THE SUPREME JUDICIAL COURT OF MASSACHUSETTS PROVIDES GREATER PROTECTIONS AGAINST CRUEL OR UNUSUAL PUNISHMENT FOR JUVENILES AND YOUNG ADULTS: A CONVERGENCE OF SCIENCE AND LAW

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I. INTRODUCTION

The twenty-first century has seen the rapid evolution of cruel and unusual punishment jurisprudence. In a string of landmark decisions, the U.S. Supreme Court held that the Eighth Amendment[1] prohibited the juvenile death penalty;[2] juvenile life without the possibility of parole for nonhomicide offenses;[3] and, in *Miller v. Alabama*,[4] the mandatory imposition of juvenile life without the possibility of parole even in homicide cases.[5] Shortly after *Miller*, in *Montgomery v. Louisiana*, the Court concluded that *Miller* applied retroactively,[6] leading a wave of resentencing that significantly reduced the number of inmates serving juvenile life without parole sentences.[7] Both *Miller* and *Montgomery* stated that life without the possibility of parole was an unconstitutionally disproportionate punishment "for all but 'the rare juvenile offender whose crime reflects irreparable corruption,'"[8] and strongly suggested

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

2. Roper v. Simmons, 543 U.S. 551, 570–71 (2005).

3. Graham v. Florida, 560 U.S. 48, 74 (2010). "Life without parole" sentences, also referred to as "life without the possibility of parole," LWOP sentences, "true life" sentences, or natural life sentences, are sentences of imprisonment for the duration of an offender's life which offer no mechanism for release other than executive commutation or pardon. ASHLEY NELLIS & RYAN S. KING, THE SENT'G PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 4 (2009), https://www.sentencingproject.org/app/uploads/2023/01/inc_NoExitSept2009.pdf. Juvenile life without parole, or JLWOP, refers to life without parole sentences imposed on offenders who were under eighteen at the time of the offense for which they were sentenced. PAOLO G. ANNINO ET AL., JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 3–4 (2009), https://dx.doi.org/10.2139/ssrn.1490079. As discussed further *infra*, life without parole is generally considered to be the most severe criminal penalty imposed besides the death penalty. *See infra* Part II. This Article generally uses the term "life without parole" to describe such sentences, but any of the terms listed above are used interchangeably.

4. 567 U.S. 460 (2012).

5. *Id.* at 479.

6. 577 U.S. 190, 208–09 (2016).

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

8. *Montgomery*, 577 U.S. at 208 (quoting *Miller*, 567 U.S. at 479–80).

that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[9]

Following *Montgomery*, some expected that the Court would extend Eighth Amendment protections further, or at least that it would be receptive to arguments supporting such expansion.[10] In 2021, however, a new majority on the Court decided *Jones v. Mississippi*, holding that no factual finding of permanent incorrigibility was required prior to sentencing a juvenile to life without the possibility of parole.[11] The Court further held that juveniles can constitutionally be sentenced to life without parole so long as the sentence is not mandatory and the judge has discretion to impose a lesser punishment,[12] a holding that a vehement dissent described as an "abandonment of *Miller* and *Montgomery*."[13] In doing so, however, the *Jones* Court explicitly reminded litigants that "our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under [eighteen] convicted of murder."[14]

As *Jones* demonstrates, the double protection of individual rights provided by state constitutions is particularly important in a period of uncertainty and upheaval regarding what rights are protected by the U.S. Constitution.[15] Indeed, commentators have noted that the focal

9. *Miller*, 567 U.S. at 479. Because the Supreme Court often looks to sentencing practices among the states to determine if a particular punishment is cruel and unusual under the Eighth Amendment, Chief Justice John Roberts suggested in his *Miller* dissent that the majority opinion was attempting to create a national consensus against juvenile life without parole, laying the groundwork for its future abolition. *Id.* at 500–01 (Roberts, C.J., dissenting).

10. *See, e.g.*, Brandon Buskey, *Reaction to* Montgomery v. Louisiana*: The Supreme Court Offers Hope to Juveniles Sentenced to Die in Prison, and a Little to Adults as Well*, 41 HARBINGER 175, 177–79 (2016) (suggesting potential avenues for further development of Eighth Amendment protections after *Montgomery*).

11. 593 U.S. 98, 100–01 (2021). The U.S. Supreme Court and other courts have used a variety of terms to describe juveniles or young adults who are deemed to be incapable of rehabilitation. *See, e.g.*, *id.* ("permanently incorrigible"); *Miller*, 567 U.S. at 479–80 ("the rare juvenile whose crime reflects irreparable corruption"); Diatchenko v. District Att'ny for Suffolk Dist., 1 N.E.3d 270, 284 (Mass. 2013) ("irretrievably depraved"). Accordingly, this Article uses the terms "permanently incorrigible," "irreparably corrupt," "irretrievably depraved," and similar terms synonymously in this manner.

12. *Jones*, 593 U.S. at 100. A sentence is discretionary when a sentencing court has the ability to exercise choice regarding the punishment imposed after a defendant is convicted of a crime. *See Sentencing*, BLACK'S LAW DICTIONARY (12th ed. 2024). By contrast, a mandatory sentence is one where the sentencing court is required to impose a particular punishment when an individual is convicted of a crime. *Id.*

13. *Jones*, 593 U.S. at 130 (Sotomayor, J., dissenting).

14. *Id.* at 120 (majority opinion).

15. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) ("[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens."); Scott L. Kafker,

point has already shifted to state constitutional law in the context of cruel and unusual punishments and other areas involving the rights of criminal defendants.[16] It is not difficult to discern why. As many commentators, and several members of the U.S. Supreme Court, have noted, "a state court is entirely free to read its own State's constitution more broadly than [the U.S. Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme Court] in favor of a different analysis of its corresponding constitutional guarantee."[17] State courts may also serve as examples to other states as they interpret their own constitutions, and even to the U.S. Supreme Court if it chooses to reinterpret the U.S. Constitution.[18] State courts thereby perform an important function as laboratories of constitutional law.[19]

In this Article, we discuss one state court's experimental interpretation of cruel or unusual punishment, particularly its reliance

State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval, 49 HASTINGS CONST. L.Q. 115, 135 (2022) (arguing that such double protection is particularly important in a period of federal constitutional retrenchment); Robert F. Williams, *The State of State Constitutional Law, The New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 954 (2020) (noting that historically, the rejection of asserted federal constitutional rights by the U.S. Supreme Court has prompted state courts to consider whether those asserted rights are protected under state constitutions).

16. *See* David M. Shapiro & Monet Gonnerman, *To the States: Reflections on* Jones v. Mississippi, 135 HARV. L. REV. F. 67, 69 (2021) ("[W]ith a flurry of state supreme court litigation and renewed scholarly interest in state constitutions that restrict extreme criminal punishments, the center of innovation is already beginning to shift from the federal courts to their state counterparts—both for juvenile life without parole and for criminal punishments more broadly."); *see also* Jay D. Blitzman, *The State of Juvenile Justice*, *in* THE STATE OF CRIMINAL JUSTICE 2023, at 171, 174–75 (Elizabeth Kelly ed., 2023) (discussing reforms to the juvenile justice system at the state level).

17. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) (citing Brennan, *supra* note 15); *see also* Kansas v. Carr, 577 U.S. 108, 118 (2016) ("The state courts may experiment all they want with their own constitutions, and often do in the wake of this Court's decisions." (citing Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1971–77 (2008))).

18. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 352 (2009); Kafker, *supra* note 15 at 133 ("Horizontal federalism, allowing one state court to look to the decisions of the others for guidance, has also become much easier than it was in the 1970s and 80s, given that many state supreme courts have since that time developed their own interpretations of different rights, especially in criminal procedure.").

19. *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (comparing state legislatures to laboratories, allowing for experimentation in public policy between different states). This metaphor has been applied to state constitutional law as well. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 216 (2018) (arguing that state courts should serve as "laborator[ies] of experimentation" in the field of constitutional law through the independent interpretation of state constitutions).

on empirical research in cognitive neuroscience, developmental psychology, and related fields, to justify greater protection for juveniles and young adults. In 2024, in *Commonwealth v. Mattis*, the Massachusetts Supreme Judicial Court abolished life without the possibility of parole sentences for eighteen-, nineteen-, and twenty-year-olds.[20] This decision followed *Diatchenko v. District Attorney for Suffolk District*,[21] where the court likewise prohibited life without the possibility of parole sentences for juveniles.[22] Both cases relied heavily on current scientific research about brain development and other empirical evidence regarding the behavior of young people.[23] Indeed, both cases concluded that scientific research on brain development and behavior precluded the discretionary imposition of life without the possibility of parole—for juveniles, in *Diatchenko*, and young adults, in *Mattis*—because the research demonstrated that a sentencing court could not conclude "with integrity" that a juvenile or young adult was "irretrievably depraved" or incapable of rehabilitation.[24] In this Article, we explore the distinct role that the development of science and other empirical research regarding juveniles and young adults has played in the analysis of cruel or unusual punishment under the Massachusetts State Constitution and how that approach may serve as an example to other states.[25] We also explore how scientific consensus may help courts determine societal consensus, even when other states have not ruled on a question before the court.[26] Finally, we emphasize that judges should not be required to make findings or render sentencing decisions that cannot be made with integrity consistent with the scientific evidence, and that if the Federal Constitution does not preclude such findings or sentencing decisions, state constitutions may provide greater protections to criminal defendants.[27]

20. 224 N.E.3d 410, 428 (Mass. 2024). Specifically, the court abolished life without parole sentences for criminal offenders who were eighteen, nineteen, or twenty years old at the time they committed the criminal offense for which they were being punished. *Id.*

21. 1 N.E.3d 270 (Mass. 2013).

22. *Id.* at 276. As used in this Article, the terms "juvenile" or "juvenile offender" refer to individuals who were under eighteen when they committed a criminal offense for which they are later convicted and subject to punishment.

23. *See Mattis*, 224 N.E.3d at 420–24; *Diatchenko*, 1 N.E.3d at 277.

24. *See Diatchenko*, 1 N.E.3d at 283–84; *Mattis*, 224 N.E.3d at 432 (Kafker, J., concurring).

25. *See infra* Parts III and VII.

26. *See infra* Section VIII.B.

27. *See infra* Part VIII.

II. THE ROLE OF SCIENCE IN THE U.S. SUPREME COURT'S CRUEL AND UNUSUAL PUNISHMENT ANALYSIS FROM *ROPER* TO *MILLER*

In a series of cases including *Roper v. Simmons*,[28] *Graham v. Florida*,[29] and *Miller v. Alabama*,[30] the U.S. Supreme Court consistently referenced findings from empirical research in various fields of "science and social science"[31] to support expanded protections for juveniles under the Eighth Amendment. Although this research was not front and center in all these decisions, it always played a supporting role.

In 2005, in *Roper v. Simmons*, the U.S. Supreme Court held that the juvenile death penalty constituted cruel and unusual punishment and was thus unconstitutional.[32] The Court began by looking to legislation and practice at the state level, recognizing an emerging consensus among the states rejecting the juvenile death penalty.[33] A majority of states outlawed a sentence of death for juvenile offenders in particular or banned the death penalty altogether.[34] The Court also pointed out that states which theoretically permitted the juvenile death penalty generally did not actually impose the punishment in practice; only three states had executed juvenile offenders in the decade preceding *Roper*.[35] The Court then observed that the United States was the only country in the world that still officially allowed the death penalty for juvenile offenders.[36]

Next, reinforcing its own "death is different" jurisprudence,[37] the Court emphasized that "[b]ecause the death penalty is the most severe

28. 543 U.S. 551, 569, 575 (2005).

29. 560 U.S. 48, 68–69 (2010).

30. 567 U.S. 460, 470–72 (2012).

31. *Id.* at 472 n.5 ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

32. 543 U.S. at 568.

33. *See id.* at 564–67. For a broader discussion of the practice of "state counting" and its utility in cruel and unusual punishment analysis, see *infra* notes 208–26 and accompanying text.

34. *Id.* at 564. Justice Antonin Scalia criticized the majority for its inclusion of states banning the death penalty in its discussion of state practices regarding the execution of juvenile offenders. *Id.* at 610–11 (Scalia, J., dissenting). For a broader critique of such "state counting" as a practice for determining whether a punishment violates the Eighth Amendment, see generally Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1123–49 (2006) (arguing that the Court is inconsistent regarding what types of state legislation or practices "count" for purposes of establishing a national consensus, making the practice of state counting subjective in practice).

35. *Roper*, 543 U.S. at 564–65.

36. *Id.* at 575.

37. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 411 (1986) (explaining that the Court's concern for the procedures surrounding death penalty sentences "is a natural consequence

punishment, the Eighth Amendment applies to it with special force."[38] Under the Eighth Amendment, the most severe punishments can only be imposed on those who commit the most serious crimes, are most culpable, and are thus "the most deserving of execution."[39] Then, relying on both commonsense intuition as well as corresponding "scientific and sociological studies," the Court held that "juvenile offenders cannot with reliability be classified among the worst offenders."[40] Accordingly, the Court concluded that the death penalty was unconstitutionally disproportionate for juvenile offenders in light of their decreased culpability.[41]

Citing scientific and sociological studies, the Court in *Roper* identified several characteristics of juveniles that contributed to their decreased culpability. First, the studies confirmed that juveniles show "[a] lack of maturity and an underdeveloped sense of responsibility."[42] Second, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[43] Finally, juveniles' identities are less fixed than those of adults, meaning juveniles are more capable of reform and less deserving of the most severe punishments.[44] These characteristics mean that juveniles are "less susceptible to deterrence" and more capable of change than adult offenders and are therefore less deserving of the most severe punishment in the form of the death penalty.[45]

Five years later, the Supreme Court returned to its "children are different" Eighth Amendment jurisprudence in *Graham v. Florida*, where it held that juveniles could not constitutionally receive life without

of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different").

38. *Roper*, 543 U.S. at 568.

39. *Id.* (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

40. *Id.* at 569.

41. *See id.* at 570–71.

42. *Id.* at 569 (alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)); *see* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992).

43. *Roper*, 543 U.S. at 569. This is in part because juveniles have less control over the environment in which they grow up. *Id.* (citing Laurence Steinberg & Elizabeth C. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003)).

44. *Id.* at 570. The Court recognized that "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.*

45. *Id.* at 571. In states like Massachusetts which did not allow the death penalty, the practical impact of *Roper* was relatively minor. *See* Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 124 (Mass. 1984) (striking down a statute allowing for the death penalty as unconstitutional under the Massachusetts Constitution).

the possibility of parole sentences for nonhomicide crimes.[46] As it did in *Roper*, the Court began its Eighth Amendment analysis by looking to state laws and state sentencing practices to determine that a national consensus existed against sentencing juveniles to life without parole for nonhomicide offenses.[47] The Court then reiterated its findings from *Roper* regarding the characteristics of juveniles that led to the conclusion that the crimes of juveniles are "not as morally reprehensible as th[ose] of an adult."[48] It also noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," strengthening the conclusion that juveniles are less culpable and more capable of reform than adult offenders.[49]

The Court also emphasized that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences."[50] Namely, life without parole sentences impose an irrevocable punishment on an offender, meaning the offender will be denied freedom for the rest of their life, regardless of their efforts to rehabilitate or make amends for their crimes.[51] A sentence of life imprisonment without the possibility of parole "means denial of hope."[52] The Court noted that life without parole was a more punitive sentence applied to juveniles than to older offenders, because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."[53] Moreover, the characteristics of juveniles, in particular their capacity for change, meant that the judgment that an offender would forever present an ongoing danger to society, implicit in a sentence of life without parole, could not reliably be

46. 560 U.S. 48, 75 (2010).

47. *Id.* at 62–63. Despite the fact that thirty-seven states allowed life without parole sentences for juveniles convicted of nonhomicide offenses, the Court determined that a consensus existed against juvenile life without parole for nonhomicide offenses because only 124 individuals nationwide were serving such sentences. *Id.* at 62–64. The Court cited a study, ANNINO ET AL., *supra* note 3, at 2, which found 109 such individuals, but after conducting its own research, the Court concluded the number of juveniles serving life without parole for nonhomicide offenses to be at least 124. Of those 124 individuals, seventy-seven were serving juvenile life without parole sentences in the state of Florida, and only eleven states had any individuals serving juvenile life without parole sentences. *Id.* at 63–64; ANNINO ET AL., *supra* note 3, at 4–5.

48. *Graham*, 560 U.S. at 68 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

49. *Id.* The Court went on to explain that the rationales for punishment applied with less force to juveniles because juveniles are less deserving of harsh retribution and are less easily deterred than adult offenders by the prospect of punishment. *Id.* at 71–72.

50. *Id.* at 69.

51. *Id.* at 69–70.

52. *Id.* at 70 (quoting Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989)).

53. *Id.*

made as to juveniles because "incorrigibility is inconsistent with youth."[54] All these considerations led the Court to declare that the Eighth Amendment prohibited juvenile life without the possibility of parole for nonhomicide offenses.[55]

Next, in *Miller v. Alabama*, the Supreme Court held that mandatory sentences of juvenile life without the possibility of parole were unconstitutional for juvenile homicide offenders.[56] In a majority opinion written by Justice Elena Kagan, the Court explained that the principles laid out in *Roper* and *Graham* on the constitutional differences between adults and children, as well as the Court's jurisprudence requiring consideration of a defendant's individual characteristics in death penalty cases, led to the conclusion that the mandatory imposition of juvenile life without parole sentences was unconstitutional because it did not allow a sentencing court to consider a juvenile's "youth and attendant characteristics" before imposing a sentence of life without parole.[57] The Court emphasized that its "decisions [in *Roper* and *Graham*] rested not only on common sense—on what 'any parent knows'—but on science and social science as well."[58] It stressed that the *Roper* Court had "cited studies showing that 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior.'"[59] In recognition of these considerations, the Court reasoned that mandatory life without parole "disregards the possibility of rehabilitation even when the circumstances most suggest it."[60] Due to "children's diminished culpability and heightened capacity for change,"[61] the Court stated its belief that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[62] The Court also strongly implied that life without parole was an unconstitutionally disproportionate punishment for all but "the rare

54. *Id.* at 72–73 (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968)). The Court also noted that in many jurisdictions, inmates serving life without parole sentences are not allowed access to rehabilitative services such as work training programs that are available to other inmates. *Id.* at 74.

55. *Id.* at 77. For a broader discussion on the merits of categorical rules in the context of sentencing young people, see *infra* notes 180–200 and accompanying text.

56. 567 U.S. 460, 479 (2012).

57. *Id.* at 483.

58. *Id.* at 471.

59. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)); *see also* Steinberg & Scott, *supra* note 43, at 1014 (providing the study quoted by the *Roper* Court herein).

60. *Miller*, 567 U.S. at 478.

61. *Id.* at 479.

62. *Id.*

juvenile offender whose crime reflects irreparable corruption."[63] In *Miller*, the Court placed less reliance on societal consensus against juvenile life without parole than it had previously in *Roper* and *Graham*.[64] Instead, the Court emphasized, as it had in *Graham*, scientific research on the characteristics of juveniles and similarities between "life-without-parole sentences imposed on juveniles [and] the death penalty itself."[65]

After the Supreme Court's decision in *Miller*, there was significant diversity of opinion among state courts and federal district and circuit courts regarding whether the decision was retroactive,[66] and how robust protections for juveniles should be. Some jurisdictions, foreshadowing the Supreme Court's decision on the issue in *Jones*, construed the holding of *Miller* narrowly to bar only *mandatory* life without parole for juveniles. For example, the Supreme Court of Georgia held that, so long as juvenile life without parole was discretionary, meaning a judge could impose a lesser sentence, a sentencing court had wide latitude as to whether to impose life without parole.[67] Other jurisdictions interpreted *Miller* more broadly to prohibit juvenile life without parole without a factual finding that a particular juvenile was "irreparably corrupt," or created particular procedural safeguards which allowed juveniles more robust opportunities

63. *Id.* at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)). This was later made explicit in *Montgomery v. Louisiana*. *See* 577 U.S. 190, 209 (2016) ("*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right."). *But see* Jones v. Mississippi, 593 U.S. 98, 113 (2021) (holding that a sentencing court need not explicitly decide whether a juvenile offender is permanently incorrigible before sentencing the juvenile to life without parole).

64. *See Miller*, 567 U.S. at 482–85 (rejecting the contention that *Miller* conflicted with the consensus-seeking aspect of the Court's other Eighth Amendment cases but nevertheless pivoting away from a strict reliance on consensus).

65. *Id.* at 474. The Court considered the similarities between life without parole and death sentences key to requiring individualized sentencing for juveniles prior to the imposition of a life without parole sentence. *See id.* at 474–75.

66. *Compare* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 281 (Mass. 2013) (concluding that "the 'new' constitutional rule announced in *Miller* is substantive and, therefore, has retroactive application to cases on collateral review"), *and* State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013) (same), *with* Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013) (holding that defendant was "not entitled to the retroactive benefit of the *Miller* rule in a postconviction proceeding"), *overruled by*, Jackson v. State, 883 N.W.2d 272, 278–79 (Minn. 2016). Of course, the Supreme Court ultimately decided the issue in favor of retroactivity. *Montgomery*, 577 U.S. at 206.

67. Jones v. State, 769 S.E.2d 901, 905 (Ga. 2015).

to present evidence of the mitigating qualities of their youth.[68] In many of these jurisdictions, juvenile life without parole sentences became much less common.[69]

III. *DIATCHENKO*: THE SUPREME JUDICIAL COURT WEIGHS IN

In a unanimous 2013 opinion, the Massachusetts Supreme Judicial Court held in *Diatchenko v. District Attorney for the Suffolk District* that juvenile life without the possibility of parole sentences were unconstitutional under article 26 of the Massachusetts Declaration of Rights.[70] The court also concluded that *Miller* should be given retroactive application to those already serving sentences of life without the possibility of parole for crimes they committed as juveniles.[71] It began by

68. *See e.g.*, 18 PA. CONS. STAT. § 1102.1(d) (2012) (requiring a sentencing court to "consider and make findings on the record" regarding various factors before sentencing a juvenile to life without parole); MICH. COMP. LAWS § 769.25(d)(6)–(7) (2014) (providing that sentencing courts "shall consider the factors listed in *Miller v. Alabama*" and "shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed"). *See generally* Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles is the Only Constitutional Option*, 45 FORDHAM URB. L. REV. 149, 161–171 (2017) (providing a broad overview of changes in state laws and sentencing practices after *Miller* and *Montgomery*).

69. *See* Sentencing Children to Life Without Parole: National Numbers, CAMPAIGN FOR THE FAIR SENT'G OF YOUTH (May 6, 2024), https://cfsy.org/sentencing-children-to-life-without-parole-national-numbers [https://perma.cc/5x9h-4p2f] ("Fewer than 100 people total have been sentenced in new JLWOP cases since 2012 when *Miller* was decided. At the peak of JLWOP imposition in 1995, 219 children were sentenced to life without parole in that year alone."). For example, in Pennsylvania and Michigan, two states that imposed greater procedural protections for juvenile offenders, the majority of individuals who sought resentencing of their juvenile life without parole sentences after *Miller* and *Montgomery* were given less punitive sentences, and many were released on parole. *See* TARIKA DAFTARY-KAPUR & TINA M. ZOTTOLI, RESENTENCING OF JUVENILE LIFERS: THE PHILADELPHIA EXPERIENCE 2–4 (2020).

70. *Diatchenko*, 1 N.E.3d at 276. Article 26 of the Massachusetts Declaration of Rights reads in relevant part: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." MASS. CONST. art. XXVI. The Declaration of Rights is the first part of the Massachusetts State Constitution, written in 1780. *Massachusetts Constitution (1780)*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/massachusetts-constitution (last visited May 29, 2025). This Article uses the terms "Massachusetts Declaration of Rights" and "Massachusetts Constitution" interchangeably.

71. *Diatchenko*, 1 N.E.3d at 278. As a result of *Diatchenko*, sixty-six individuals who had been sentenced to life without parole were allowed parole eligibility after they had served fifteen years of their sentence. Brief for the Committee for Public Counsel Services as Amicus Curiae in Support of Messrs. Mattis and Robinson at 10–11, Commonwealth v.

emphasizing that the Supreme Judicial Court has "the inherent authority 'to interpret [S]tate constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'"[72] The court also noted that, in particular, the Massachusetts Declaration of Rights "often afford[s] criminal defendants greater protections" than the U.S. Constitution.[73] It then concluded, on the basis of "current scientific research on adolescent brain development," that "a conclusive showing of traits such as an 'irretrievably depraved character' can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender."[74] Because a sentencing court could not reliably determine whether a particular juvenile offender was permanently incorrigible and thus incapable of rehabilitation, a court could not subsequently determine whether the imposition of life without parole was a proportional punishment for a juvenile.[75] The court also analogized life

Mattis, 224 N.E.3d 410 (Mass. 2024) (Nos. SJC-09265, SJC-11693), 2023 WL 1452113 at *10–*11 [hereinafter CPCS Brief].

72. *Diatchenko*, 1 N.E.3d at 282 (alteration in original) (quoting Libertarian Ass'n of Mass. v. Sec'y of the Commonwealth, 969 N.E.2d 1095, 1111 (Mass. 2012)). The court has done so by examining the text, history, and prior interpretations of Massachusetts constitutional rights at issue. *See* Commonwealth v. Gonsalves, 711 N.E.2d 108, 115 (Mass. 1999) ("The Declaration of Rights was written in the historical context of the abuses of governmental power inflicted on the colonists by British officials, and art. 14 was directed at the unlawful invasion of privacy rights by those officials. That the drafters of the Fourth Amendment subsequently chose to replicate the words used in art. 14 cannot support a conclusion that we are compelled to act in lockstep with the United States Supreme Court when it interprets that amendment. Such a conclusion posits a serious misunderstanding of the authority of this court to interpret and enforce the various provisions of the Massachusetts Constitution, particularly those in the area of civil liberties."); Barron v. Kolenda, 203 N.E.3d 1125, 1134–36 (Mass. 2023) (interpreting state constitutional right to petition and assembly in consideration of the historical context in which it was drafted by John Adams). Once the court has its own state constitutional precedents in place, it may follow such precedent without turning to federal precedent for guidance. *See* Commonwealth v. Almonor, 120 N.E.3d 1183, 1191 n.9 (Mass. 2019); *see also* Kafker, *supra* note 15, at 140 n.126 ("Of course, once one state constitutional precedent is in place for a particular provision, [the] task [of state constitutional interpretation] is greatly simplified."); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996) ("[W]hen people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years."). *Diatchenko* provided such a precedent for *Mattis*. *See* Commonwealth v. Mattis, 224 N.E.3d 410, 437 (Mass. 2024) (Kafker, J., concurring).

73. *Diatchenko*, 1 N.E.3d at 283.

74. *Id.* at 283–84 (footnote and citations omitted).

75. *Id.* at 284; *see also* Hoesterey, *supra* note 68, at 181 (recognizing that "the science of adolescent brain development, on which the [Supreme] Court based its conclusion that 'children are different,' plainly states that making an accurate determination about a juvenile's permanent character is impossible." (footnotes omitted)). *Cf.* Miller v. Alabama,

without the possibility of parole for a juvenile to the death penalty, reasoning that the similarities between the sentences supported the conclusion that life without parole was a disproportionate punishment for young offenders.[76]

As discussed in more detail *infra*, the *Diatchenko* court put more emphasis than the U.S. Supreme Court on developing brain science to bar juvenile life without the possibility of parole sentences under article 26.[77] Whereas *Miller* only required that such sentences be discretionary to allow a sentencing court to consider the defendant's "youth and attendant characteristics" in determining whether the juvenile defendant was permanently incorrigible,[78] the Massachusetts Supreme Judicial Court imposed a categorical rule holding *all* juvenile life without parole sentences unconstitutional.[79] The Massachusetts Supreme Judicial Court concluded that the same science that informed the *Miller* Court provided compelling evidence that the determination of whether a juvenile was incorrigible and thus "deserving" of life without parole could not be made with integrity by a sentencing court.[80]

Diatchenko also did not engage in the "state counting" review of state legislation and sentencing practices that characterized the Supreme Court's Eighth Amendment analysis in *Roper* and *Graham*, and to a lesser extent in *Miller*.[81] Instead, the *Diatchenko* Court noted that the practice of sentencing juveniles to life without parole was condemned by the international community,[82] and quoted an observation by John Adams, the primary author of the Massachusetts constitution,[83] that "we

567 U.S. 460, 479–80 (2012) (recognizing the "great difficulty . . . of distinguishing . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption'" (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005))); Graham v. Florida, 560 U.S. 48, 72–73 (2010) ("To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles makes that judgment questionable.").

76. *Diatchenko*, 1 N.E.3d at 284.

77. *See infra* Section VIII.B.

78. *Miller,* 567 U.S. at 483.

79. *See Diatchenko*, 1 N.E.3d at 284.

80. *See id*.

81. *See* Commonwealth v. Mattis, 224 N.E.3d 410, 437 (Mass. 2024) (Kafker, J., concurring) (In *Diatchenko*, the court "did not even compare [Massachusetts] to other States or express concern that [the court was] providing greater protection than those other States. Again, this is a critical and distinctive aspect of *Diatchenko I*."). *Compare Diatchenko*, 1 N.E.3d at 285, *with Roper*, 543 U.S. 551, 564–65 (discussing "evidence of national consensus" against the juvenile death penalty).

82. *Diatchenko*, 1 N.E.3d at 285 n.16.

83. Edward F. Hennessey, *The Extraordinary Massachusetts Constitution of 1780*, 14 SUFFOLK U. L. REV. 873, 880 (1980).

belong to an international community that tinkers toward a more perfect government by learning from the successes and failures of our own structures and those of other nations."[84] The court thus grounded its holding not in the sentencing practices of other states, but in the principles embodied in the Massachusetts Declaration of Rights, and it used the most up-to-date scientific evidence regarding the legislatively recognized category of juvenile offenders to ensure its holding had an objective basis.[85]

IV. *MONTGOMERY* AND *JONES*

In 2016, the Supreme Court upheld and clarified the core holding of *Miller* in *Montgomery v. Louisiana*.[86] In *Montgomery*, the majority opinion, written by Justice Anthony Kennedy, held that *Miller* created a new substantive rule of constitutional jurisprudence and therefore applied retroactively to juvenile offenders whose convictions were final at the time *Miller* was decided.[87] The Court emphasized that *Miller* was based on the premise that "children are constitutionally different from adults for purposes of sentencing,"[88] and that the distinctive aspects of children identified in *Roper*, *Graham*, and *Miller* diminished the penological justifications for subjecting juvenile offenders to life without the possibility of parole.[89] It also clarified that *Miller* declared that life without parole is unconstitutionally disproportionate for most juveniles, observing that "[e]ven if a court considers a child's age before sentencing

84. *Diatchenko*, 1 N.E.3d at 285 n.16 (quoting JOHN ADAMS, PREFACE, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1797)).

85. *Id.* at 276, 283–84; *see also Mattis*, 224 N.E.3d at 437 (Kafker, J., concurring) (discussing the reasoning of the *Diatchenko* Court).

86. 577 U.S. 190 (2016). In *Montgomery*, the Supreme Court held that *Miller*'s prohibition of mandatory juvenile life without parole was retroactive, allowing for the roughly 2,500 individuals serving mandatory juvenile life without parole sentences to seek resentencing. *Id.* at 206*; see also A Chance for Hope: U.S. Supreme Court Ends Mandatory Juvenile Life Without Parole Sentences*, JUVENILE L. CTR. (June 26, 2012), https://jlc.org/news/chance-hope-us-supreme-court-ends-mandatory-juvenile-life-without-parole-sentences (outlining the challenges that come with applying the *Miller* decision for the approximately 2,500 individuals nationwide serving LWOP sentences for homicides they committed when they were under the age of eighteen).

87. *Montgomery*, 577 U.S. at 206. Upon Justice Kennedy's retirement in 2018, commentators identified the Court's jurisprudence on the sentencing of juveniles as a part of his legacy on the Court. *See, e.g.*, 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, 750 (2019) (observing that Kennedy "changed the landscape" of Eighth Amendment law).

88. *Montgomery*, 577 U.S. at 206 (quoting Miller v. Alabama, 567 U.S. 460, 471 (2012)).

89. *Id.* at 206–07.

him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"[90] Rather, life without parole is only justified for "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible."[91] The Court also made clear that juvenile life without parole sentences should be rare, given the risk of imposing disproportionate punishment on a child who was not irreparably corrupt.[92]

In *Jones v. Mississippi*, however, a new majority on the Supreme Court appeared to reverse a critical aspect of *Miller* and *Montgomery* in holding that a sentencing court could impose a life without parole sentence on a juvenile offender so long as the punishment was not mandatory.[93] Whereas *Montgomery* held that a sentence of life without parole was only proportionate punishment for a juvenile whose crime demonstrated that they were "permanently incorrigible,"[94] the *Jones* Court declined to require a sentencing court to actually make a separate factual finding that a juvenile was irreparably corrupt before sentencing them to life without parole.[95] In practice, this means that a sentencing court need not determine whether a child is among "those rare children" for whom life without parole was deemed permissible in *Miller* and *Montgomery*.[96] Although Justice Kavanaugh's majority opinion was at pains to explain that the Court was not reversing *Montgomery*, both Justice Thomas's concurrence and Justice Sotomayor's dissent stated that *Jones* essentially overturned *Montgomery* and severely limited the holding of *Miller*.[97] As Justice Sotomayor opined in her dissent, which was joined by Justice Kagan (who authored *Miller*): "A sentencer must actually 'make the judgment' that the juvenile in question is one of those rare children for whom [life without parole] is a constitutionally permissible sentence. The Court has thus expressly rejected the notion

90. *Id.* at 208 (quoting *Miller*, 567 U.S. at 479).

91. *Id.*

92. *See id.* at 209 ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.").

93. Jones v. Mississippi, 593 U.S. 98, 118 (2021).

94. *Id.* at 110.

95. *Id.* at 113.

96. *Id.* at 129 (Sotomayor, J., dissenting).

97. *See id.* at 121 (Thomas, J., concurring) (arguing that the Court should have concluded "that *Montgomery* was a 'demonstrably erroneous' decision worthy of outright rejection" (quoting Gamble v. United States, 587 U.S. 678, 711 (2019) (Thomas, J., concurring))); *id.* at 130 (Sotomayor, J., dissenting) ("[T]he Court attempts to circumvent *stare decisis* principles by claiming that '[t]he Court's decision today carefully follows both *Miller* and *Montgomery*.' The Court is fooling no one. Because I cannot countenance the Court's abandonment of *Miller* and *Montgomery*, I dissent.").

that sentencing discretion, alone, suffices."[98] The *Jones* Court, however, did not adopt this interpretation of its precedent. Thus, although the Eighth Amendment still prohibits the *mandatory* imposition of juvenile life without parole, after *Jones*, the imposition of discretionary life without parole sentences for juveniles faces fewer procedural hurdles.

Jones suggested, however, that greater protections for juveniles regarding sentencing could be provided by the states, including, at least implicitly, by state courts interpreting state constitutions in addition to state legislatures.[99] The Court observed:

> [O]ur holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under [eighteen] convicted of murder. States may categorically prohibit life without parole for all offenders under [eighteen]. Or States may require sentencers to make extra factual findings before sentencing an offender under [eighteen] to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All of those options, and others, remain available to the states.[100]

Jones thus appeared to leave further development of statutory and constitutional protections for young offenders to occur at the state level.

V. STATE COURT RESPONSE TO *JONES*

In the wake of *Jones*, defendants in some states whose courts had relied on *Montgomery* and the Eighth Amendment to expand procedural protections for juveniles saw those protections disappear.[101] For example,

98. *Id.* at 130 (Sotomayor, J., dissenting) (citing Miller v. Alabama, 567 U.S. 460, 480 (2012).

99. *See id.* at 119–20 (majority opinion).

100. *Id.* at 120.

101. *See, e.g.*, Commonwealth v. Felder, 269 A.3d 1232, 1234–35 (Pa. 2022) (recognizing that *Jones* "largely . . . abrogated" a previous Pennsylvania Supreme Court case which had expanded procedural protections for juveniles after *Montgomery*); Holmes v. State, 859 S.E.2d 475, 481 (Ga. 2021) (deciding, after *Jones*, that a "distinct determination" that a juvenile was irreparably corrupt was no longer required under the Eighth Amendment). The Pennsylvania Supreme Court limited protections of juveniles it had previously created under the Eighth Amendment after *Montgomery*, but arguably left open the possibility that the Pennsylvania State Constitution could be interpreted to be more protective of juveniles. *See Felder*, 269 A.3d at 1247–48 (Donohue, J. concurring) ("It remains an open question

following *Montgomery*, the Georgia Supreme Court held that a juvenile could only be sentenced to life without the possibility of parole following a "distinct determination on the record that [the juvenile] is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery*."[102] After the U.S. Supreme Court decided *Jones*, however, the Georgia Supreme Court followed *Jones*'s change of reasoning and did away with the "distinct determination" requirement.[103] The court did not address whether the Georgia Constitution's prohibition on cruel and unusual punishments[104] required more protections or process for juvenile offenders convicted of homicide than did the U.S. Constitution, but held that the distinct determination requirement in sentencing "was explicitly a holding of federal constitutional law based on [the Georgia Supreme Court's] understanding of the decisions of the United States Supreme Court in *Miller* and *Montgomery*."[105] It appears that the litigants before the Georgia Supreme Court did not raise the issue of protections under the state constitution.[106]

VI. THE ROAD TO *MATTIS*

The Supreme Court's decision in *Jones* had no impact on juvenile offenders in Massachusetts who, pursuant to *Diatchenko*, were already protected from life without parole sentences by the state constitution.[107] Indeed, the decade following *Diatchenko* provided evidence that juvenile offenders' capacity for rehabilitation, which had been central to the holdings of *Miller* and *Diatchenko*, was not merely theoretical. Of the juvenile offenders who became eligible for parole following *Diatchenko*, seventy-four percent of the individuals who received parole hearings

whether any or all components of [the relevant case applying *Miller*] remain in place with respect to the Pennsylvania Constitution's prohibition of 'cruel punishments.'").

102. Veal v. State, 784 S.E.2d 403, 412 (Ga. 2016). Under the rule promulgated in *Veal*, juveniles were afforded more protection than prior to *Montgomery*, when sentencing courts had "fairly broad" discretion, "so long as the trial court considered the defendant's youth." *Id.* at 410.

103. *Holmes*, 859 S.E.2d at 481.

104. GA. CONST. art. 1, § 1, ¶ XVII.

105. *Holmes*, 859 S.E.2d at 480.

106. *See* Brief of Appellant at 11–16, Holmes v. State, 859 S.E.2d 475 (Ga. 2021) (No. S21A0377), 2020 WL 7063795, at *11–16.

107. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 284–85 (Mass. 2013).

were granted parole.[108] Once released, only three of the thirty-seven individuals granted parole were subject to subsequent parole violation or revocation proceedings,[109] a rate markedly lower than the recidivism rate for homicide offenders nationally,[110] but mirroring the low re-offense rate of former "juvenile lifers" granted parole in Pennsylvania after *Miller*.[111]

Following *Diatchenko*, the Supreme Judicial Court also consistently left open the possibility that the continued development of scientific research on brain development and related issues in young people could be constitutionally relevant for the purposes of considering whether constitutional protections under article 26 would be extended to those eighteen and over.[112] In 2020, the Massachusetts Supreme Judicial Court decided in *Commonwealth v. Watt* that "it likely [was] time . . . to revisit the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it."[113]

108. Commonwealth v. Mattis, 224 N.E.3d 410, 439 (Mass. 2024) (Kafker, J., concurring); *see also* CPCS Brief, *supra* note 71, at 13–14 (discussing in more detail the results of parole hearings for the cohort of juvenile offenders whose mandatory sentences of life without parole were reduced after *Diatchenko*). This finding mirrors other studies of juvenile homicide defendants whose sentences were reduced after conviction and were ultimately released from prison. *See, e.g.*, DAFTARY-KAPUR & ZOTTOLI, *supra* note 69, at 3–4 (finding that Pennsylvania is a national leader in releasing juveniles with a life sentence without the possibility of parole since the *Montgomery* decision).

109. CPCS Brief, *supra* note 71, at 14.

110. Nationally, around thirty percent of individuals convicted of homicide are rearrested in the two years following their release from incarceration. DAFTARY-KAPUR & ZOTTOLI, *supra* note 69, at 2.

111. After *Miller*, Philadelphia provided resentencing for offenders who had been sentenced to life without the possibility of parole as juveniles. Of 174 members of the former "juvenile lifer" cohort who were released from prison after resentencing, only six were rearrested and only two were convicted of crimes after their release. *See* DAFTARY-KAPUR, *supra* note 69, at 10. Despite *Jones*, juvenile life without parole sentences have become markedly rarer after *Miller*. In fact, thirty-one states have now either abolished juvenile life without parole or have no one serving such a sentence. CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *MONTGOMERY V. LOUISIANA* SIX YEARS LATER: PROGRESS AND OUTLIERS 5 (2022), https://cfsy.org/wp-content/uploads/Montgomery-v.-Louisiana-Six-Years-Later-Progress-and-Outliers.pdf. And of the roughly 2,800 individuals who were serving juvenile life without parole sentences at the time of *Miller*, only three percent have been resentenced to juvenile life without parole, suggesting that sentencing courts take seriously the greater prospect for reform of juveniles. *Id.*

112. *See, e.g.*, Commonwealth v. Okoro, 26 N.E.3d 1092, 1099–1100 (Mass. 2015) (declining to extend the holding of *Diatchenko* but recognizing the possibility that continued research on "adolescent brain development and related issues" could "inform our understanding of constitutional sentencing as applied to youth").

113. Commonwealth v. Watt, 146 N.E.3d 414, 428 (Mass. 2020).

Watt was an appeal by defendants Nyasani Watt and Sheldon Mattis, who were tried jointly and convicted of murder in the first degree on a theory of deliberate premeditation for their roles in the shooting death of sixteen-year-old Jaivon Blake.[114] Watt, who was ten days away from turning eighteen years old at the time of the shooting,[115] was sentenced to life imprisonment with the possibility of parole after fifteen years, whereas Mattis, who was eighteen when the shooting occurred, was sentenced to life without the possibility of parole.[116] On appeal, Mattis argued that because developments in scientific research demonstrated that individuals between the ages of eighteen and twenty shared many of the same developmental traits with juveniles that are constitutionally relevant for sentencing, the court should extend the holding of *Diatchenko* to young adults and hold that his sentence of life without the possibility of parole was unconstitutionally cruel or unusual.[117] Recognizing that the record was insufficient to make such a determination, the court remanded the case to the superior court for evidentiary hearings "on adolescent brain development and its impact on behavior."[118]

VII. *COMMONWEALTH V. MATTIS*

On remand, several prominent experts in the fields of neuroscience, forensic psychology, and developmental psychology provided testimony on "adolescent neurological and psychological development after the age

114. *Id.* at 419.

115. Jeremy Siegel, *Should 18-Year-Olds Be Imprisoned for Life?*, GBH NEWS (Aug. 7, 2023), https://www.wgbh.org/news/local/2023-02-14/should-18-year-olds-be-imprisoned-for-life. Watt was later granted a new trial on the basis that he was denied effective assistance of counsel because his trial counsel reportedly slept through significant portions of the trial. Commonwealth v. Watt, 224 N.E.3d 377, 380 (Mass. 2024).

116. *Watt*, 146 N.E.3d at 420.

117. *Id.* at 427–28. After *Diatchenko*, the court heard many appeals where defendants argued for the extension of its holding to older defendants, and although it had declined to do so, the court consistently recognized that:

> "[R]esearchers continue to study the age range at which most individuals reach adult neurobiological maturity, with evidence that . . . [certain] brain functions are not likely to be fully matured until around age twenty-two," and that *such "research may relate to the constitutionality of sentences of life without parole for individuals other than juveniles*."

Id. at 428 (emphasis added) (quoting Commonwealth v. Garcia, 123 N.E.3d 766, 771 (Mass. 2019)).

118. *Id.* at 428.

of seventeen."[119] The record was transmitted to the Massachusetts Supreme Judicial Court, but the court remanded the case a second time for specific factual findings on the basis of the record, particularly "whether the imposition of a mandatory sentence of life without the possibility of parole for . . . those convicted of murder in the first degree who were eighteen to twenty-one at the time of the crime, violates [article 26 of the Massachusetts Declaration of Rights]."[120] Based on the factual record, another superior court judge issued findings outlining relevant ways in which eighteen- to twenty-year-olds were similar to juveniles and different from older adults, and concluded that the mandatory imposition of a sentence of life without parole for offenders aged eighteen to twenty violated article 26.[121] Importantly, the judge's findings "confirm[ed] that the brains of emerging adults are similar to those of juveniles."[122] The judge's factual findings and the record of the case were sent to the Massachusetts Supreme Judicial Court and became the basis for the *Mattis* decision.[123]

In a 4-3 decision, the *Mattis* court concluded that life sentences without the possibility of parole were unconstitutional for eighteen- to twenty-year-olds.[124] Like in *Diatchenko*, the court imposed a categorical ban on such sentences, rather than adopting a discretionary sentencing scheme as the Supreme Court did in *Miller*.[125] Massachusetts thus became the first state to abolish life without parole sentences for those between eighteen and twenty years old,[126] and roughly two hundred individuals gained parole eligibility.[127]

119. Commonwealth v. Mattis, 224 N.E.3d 410, 416–17 (Mass. 2024). The experts who testified were all "recognized as leaders in their respective professional fields," and their testimony was supplemented by numerous scientific studies entered into evidence. *Id.* at 417, 417 n.8. Among those whose testimony was introduced was Dr. Laurence Steinberg, an expert in the field of developmental psychology whose research was cited in *Roper* and *Miller*. *See id.* at 417, 417 n.9.

120. *Id.* at 417.

121. *Id.* at 417–18.

122. *Id.* at 420.

123. *Id.* at 418.

124. *See id.* at 410, 414–15.

125. *Id* at 415, 420. The Commonwealth had agreed that mandatory sentences of life without parole were unconstitutional under article 26 but had argued that discretionary sentences of life without parole were constitutional if certain sentencing procedures were followed. *See* Commonwealth's Brief at 27, Commonwealth v. Mattis, 224 N.E.3d 410 (Mass. 2024) (No. SJC-11693), 2022 WL 18046973, at *27.

126. *Massachusetts First State to Ban Life Without Parole for People Under 21*, THE SENT'G PROJECT (Jan. 18, 2024), https://www.sentencingproject.org/newsletter/massachusetts-first-state-to-ban-life-without-parole-for-people-under-21/.

127. Afton M. Templin & Mara Voukydis, *Youth Matters: Resentencing and Parole After* Commonwealth v. Mattis, BOS. BAR J., Spring 2024, at 11, 11.

The majority consisted of three different opinions, one written by Chief Justice Kimberly Budd, one written by Justice Scott Kafker, and one written by Justice Dalila Argaez Wendlandt and joined by Justice Frank Gaziano.[128] There were also two dissenting opinions written by Justices David Lowy and Elspeth Cypher.[129] None of the opinions disagreed with the factual findings, only the legal conclusions that should be drawn from such findings. We therefore begin with the court's summary of the relevant scientific findings based on the expert testimony and research in the trial court record. Specifically, the superior court judge "made four core findings of fact" on brain development in eighteen- to twenty-year-olds, finding that they:

> (1) have a lack of impulse control similar to sixteen and seventeen year olds in emotionally arousing situations,[130]
>
> (2) are more prone to risk taking in pursuit of rewards than those under eighteen years and those over twenty-one years,
>
> (3) are more susceptible to peer influence than individuals over twenty-one years,[131] and
>
> (4) have a greater capacity for change than older individuals due to the plasticity[132] of their brains.[133]

128. *Mattis*, 224 N.E.3d at 411.

129. *Id.*

130. This is in part due to the fact that the prefrontal cortex, a part of the brain associated with long-term planning and controlling impulses, is not fully developed until an individual's early to mid-twenties. *Mattis*, 224 N.E.3d at 422 (citing Grace Icenogle et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*, 43 L. & HUM. BEHAV. 69, 70 (2019)).

131. *See Mattis,* 224 N.E.3d at 423 ("All four experts agreed that current research supports this conclusion."). For additional information, see generally Adriana Galván, *Adolescent Brain Development and Contextual Influences: A Decade in Review*, 31 J. RES. ON ADOLESCENCE 843, 852-853 (2021); Karol Silva et al., *Peers Increase Late Adolescents' Exploratory Behavior and Sensitivity to Positive and Negative Feedback*, 26 J. RES. ON ADOLESCENCE 696, 696-705 (2015).

132. Brain plasticity or neuroplasticity refers to the brain's ability to change in response to its environment. *Mattis*, 224 N.E.3d at 423.

133. *Id.* at 421. Similarly, it was uncontested that "most [eighteen- through twenty-year-olds,] even those who commit serious crimes will age out of offending and will not become career criminals." *Id.* at 424. The experts who testified all discussed the "age-crime curve," a well-documented phenomenon where the incidence of criminal behavior peaks in the late teen years and then declines as an individual ages, which would also seem to support this conclusion. *See id.* at 422.

In sum, "the scientific record strongly supports the contention that [eighteen- to twenty-year-olds] have the same core neurological characteristics as juveniles have."[134]

For each of the justices in the majority, these findings mirrored the scientific findings on the brains of juveniles deemed constitutionally relevant in *Miller* and *Diatchenko*.[135] They showed that "the brains of [eighteen- to twenty-year-olds] are not fully developed and are more similar to those of juveniles than older adults."[136] For all of the justices in the majority, these findings, particularly the scientific consensus they described, were important. As the chief justice wrote, "[W]here modern scientific consensus regarding a particular class exists, it can be useful in determining the contemporary standards of decency as they relate to that class."[137] The Kafker concurrence went further, emphasizing, as the court had in *Diatchenko*, that such a scientific consensus may itself preclude life sentences without the possibility of parole for juveniles and young adults because it demonstrated that a finding of "irretrievabl[e] deprav[ity]" cannot be made with integrity for juveniles or young adults.[138]

134. *Id*. at 421; *see* Jay D. Blitzman, *The State of Juvenile Justice*, *in* THE STATE OF CRIMINAL JUSTICE 2024, at 190–91 (Elizabeth Kelly ed. 2024) (describing *Mattis* as "perhaps the most robust application of science and research to law to date," and noting that "[t]he decision was based on the enormous body of scientific evidence about neurodevelopment").

135. *See, e.g.*, *Mattis*, 224 N.E.3d. at 432 (Kafker, J., concurring) ("[B]ased on the fact findings here, we cannot distinguish in any way this case from *Diatchenko I* on scientific grounds."); *see also* Francis X. Shen et al., *Justice for Emerging Adults After* Jones*: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment* Miller *Protections to Defendants Ages 18 and Older*, 97 N.Y.U. L. REV. 101, 106 (2022) ("Current neuroscientific consensus is that age [eighteen] is not a magic number in the development of legally-relevant brain circuitry.").

136. *Mattis*, 224 N.E.3d at 428.

137. *Id*. at 420 (first citing Miller v. Alabama, 567 U.S. 460, 471–72 (2012); and then citing Commonwealth v. Okoro, 26 N.E.2d 1092, 1099–1110 (2015)).

138. *Id*. at 432 (Kafker, J., concurring). *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 283–84; CATHERINE INSEL ET. AL, CTR. FOR L. BRAIN & BEHAV., WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE: A GUIDE FOR JUDGES, ATTORNEYS, AND POLICY MAKERS 6–7 (2022), https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/ ("While there is no scientifically reliable basis to predict that a youthful offender is 'permanently incorrigible,' there is a robust scientific basis, as described in this Guide, to identify the 'transient immaturity' of youth and emerging adults and the normal process of self-desistence from criminal misconduct that occurs with maturation."). *Cf.* Mary Marshall, Note, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1657 (2019) ("There is substantial evidence to suggest" that making reliable predictions about whether juveniles are capable of rehabilitation is "impossible."). The Center for Law, Brain and Behavior at Massachusetts General Hospital has emphasized that "recent scientific research establish[es] that these same 'signature qualities of youth' extend into the period of *late adolescence* (ages 18–21))." INSEL ET. AL, *supra*, at 7.

The justices in the majority also looked to Massachusetts legislation demonstrating that eighteen- to twenty-year-olds were treated as a distinct category requiring special consideration.[139] As explained in the Kafker concurrence, they are permitted certain rights and denied others, "reflect[ing] a legislative concern about the very characteristics that are at issue in [*Mattis*]: 'a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk taking' and a greater 'vulnerab[ility] to negative influences and outside pressures.'"[140] Recognizing these distinctive characteristics, juveniles sentenced as youthful offenders can remain in custody of the Massachusetts Department of Youth Services until they turn twenty-one years old.[141] In a comprehensive criminal justice reform bill, the legislature also provided for the creation of young adult correctional units with targeted interventions appropriate to young offenders' greater prospects for rehabilitation and reform.[142]

Outside of the criminal justice sphere, adults under twenty-one are likewise subject to numerous restrictions in Massachusetts that indicate an understanding by the legislature that eighteen- to twenty-year-olds are less responsible and more susceptible to negative influences than older adults.[143] Adults under twenty-one years old in Massachusetts are not allowed to purchase or drink alcohol, purchase tobacco products, or use marijuana.[144] They are not allowed to gamble in casinos, a policy

139. *Mattis*, 224 N.E.3d at 424–25; *id.* at 434–36 (Kafker, J., concurring).

140. *Id.* at 435 (quoting *Diatchenko*, 1 N.E.3d at 277).

141. MASS. GEN. LAWS ch. 119, § 58 (2022); s*ee Mattis*, 224 N.E.3d at 436 (Kafker, J., concurring) ("Likewise, the Massachusetts Sentencing Guidelines have instructed judges to consider the developmental characteristics of eighteen- through twenty-year-olds even when they have been tried as adults.").

142. MASS. GEN. LAWS ch. 127, § 48B(a) (2022).

143. *Mattis*, 224 N.E.3d at 435 (Kafker, J., concurring) (emphasizing that the characteristics which the legislature seemed to ascribe to eighteen- to twenty-year-olds were precisely the characteristics which made them less culpable and less deserving of the harshest punishments). For much of U.S. history, the demarcation between childhood and legal adulthood was twenty-one. Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 57 (2016) (noting that "[t]he U.S. age of majority was lowered from twenty-one to eighteen . . . for reasons quite unrelated to capacity"). The age of majority was gradually lowered to eighteen after the age of conscription was lowered in 1942 to meet the military demands of the Second World War, and the voting age was lowered to eighteen by constitutional amendment in 1971. *Id.* at 64–65. The continuing relevance of age twenty-one for certain rights, therefore, suggests a continued understanding that eighteen- through twenty-year-olds are distinct from adults twenty-one and older.

144. *See* MASS. GEN. LAWS ch. 138, § 34 (2022) (alcohol); MASS. GEN. LAWS ch. 270, § 6(b) (2022) (tobacco); MASS. GEN. LAWS ch. 94G, § 7(a) (2022) (marijuana). The legislature's decision to increase the minimum purchasing age for tobacco products appears to have been motivated by the recognition that "the minds and bodies [of eighteen- to twenty-year-olds] are still developing." *Mattis*, 224 N.E.3d at 435–36 (Kafker, J., concurring) (quoting Press

choice made after legislators explicitly acknowledged that the brains of eighteen- to twenty-year-olds were not yet fully developed.[145] They are also prohibited from purchasing lottery tickets over the internet,[146] serving as state police officers,[147] or supervising teen drivers with learner's permits,[148] similarly demonstrating an understanding that the relevant characteristics of juveniles identified in *Diatchenko* and *Miller* were also present in eighteen- to twenty-year-olds.[149] All these legislative

Release, Jason Lewis, Mass. State Senate, Senate Passes Jason Lewis Bill to Protect Youth from the Health Risks of Tobacco and Nicotine Addiction (June 30, 2018), https://senatorjasonlewis.com/2018/06/30/tobacco-21); *id.* at 426 (majority opinion) ("These statutes reflect the commonly held view that [eighteen- to twenty-year-olds] generally are not equipped to assume all the responsibilities of adulthood, especially with respect to high-risk activities.").

145. *See Mattis*, 224 N.E.3d at 435 (Kafker, J., concurring) ("[C]asinos may not allow people under the age of [twenty-one] .... Current Massachusetts law says you can't buy alcohol if you're under [twenty-one]. I think that these are consistent that people's brains have not matured by the time that they're [eighteen]." (quoting *Senate Session – Tuesday, October 11, 2011*, State House News Serv. (Oct. 11, 2011), https://www.statehousenews.com/news/senate_sessions/senate-session---tuesday-oct-11-2011/article_62b63798-b792-56d2-b0f0-df979317fa2d.html)).

146. Fiscal Year 2025 Budget Conference Report H. 4800 (Mass. 2023–2024). The Massachusetts Legislature recently approved an online lottery service. Although adults over the age of eighteen may purchase lottery tickets at participating retailers, the purchase of lottery tickets over the internet or through the use of mobile applications is restricted to those over the age of twenty-one. *See* MASS. GEN. LAWS ch. 23K, § 43 (2022).

147. MASS. GEN. LAWS ch. 22C, § 10 (2022).

148. MASS. GEN. LAWS ch. 90 § 8B (2022).

149. *Compare* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 277 (Mass. 2013) (discussing the "significant characteristics differentiating juveniles from adult offenders for purposes of Eighth Amendment analysis") *with Mattis*, 224 N.E.3d at 420–28 (discussing similar characteristics of eighteen through twenty-year-olds). In her concurring opinion, Justice Dalila Wendlandt observed that private organizations also recognized the salient differences between young adults and their older peers. *See Mattis*, 224 N.E.3d at 440 n.3 (Wendlandt, J., concurring) (noting that young adults sometimes face barriers to renting cars and pay much higher car insurance premiums). More recently, the Massachusetts Senate passed a bill which would expand juvenile court jurisdiction to include criminal offenses committed by eighteen-year-olds, indicating legislative understanding of and support for treating certain young adults more like juveniles in the area of criminal law. Press Release, Commonwealth of Mass., Massachusetts Senate Votes to Raise the Age of Juvenile Jurisdiction to Include 18-Year-Olds (July 11, 2024), https://malegislature.gov/PressRoom/Detail?pressReleaseId=112; Matt Stout et al., *Mass. Senate Tacks Measure to Try 18-Year-Olds as Juveniles, Not Adults, Onto Economic Development Bill*, BOSTON GLOBE (July 12, 2024), https://www.bostonglobe.com/2024/07/12/metro/massachusetts-senate-economic-development-juvenile-system-18-year-olds/. Similar legislation that would expand juvenile court jurisdiction to eighteen- through twenty-year-olds has been supported by Massachusetts Attorney General Andrea Campbell, who applauded the Supreme Judicial Court's decision in *Mattis*. Press Statement, Office of the Attorney General, Attorney General Andrea Campbell Issues Statement on Today's SJC Ruling that Mandatory Life Without Parole is Unconstitutional for Adults Under 21 (Jan. 11, 2024), https://www.mass.gov/news/attorney-general-andrea-campbell-issues-statement-on-

determinations identified eighteen- to twenty-year-olds as a distinct category defined by a lack of full maturity and a resulting diminished culpability,[150] but the legislature did not recognize this distinction in the context of first-degree murder. An eighteen-year-old convicted of murder in the first degree was subject to a mandatory sentence of life without the possibility of parole, the Commonwealth's most severe criminal penalty.[151]

All the members of the court's majority were thus focused on the science and its application to a legislatively-defined category–that is, eighteen- to twenty-year-olds. They also identified a "convergence of science and law" regarding this category of individuals.[152] The science identified particular characteristics of these individuals, and the laws passed by the legislature (except in the context of punishment for murder in the first degree) appeared to take those particular characteristics into account. Most importantly, the science regarding eighteen- to twenty-year-olds showed that they were essentially similar to juveniles, who

todays-sjc-ruling-that-mandatory-life-without-parole-is-unconstitutional-for-adults-under-21 ("The science emphatically demonstrates that young people have an extraordinary capacity to change and mature, and our justice system should provide them the invaluable opportunity to turn their lives around and fulfil their potential.").

150. *See Mattis*, 224 N.E.3d at 436 ("In sum, the Legislature has recognized that eighteen through twenty-year-olds are a distinct category requiring special consideration, at least regarding legal rights that implicate risky, impulsive, and potentially dangerous behavior and peer pressure—the very characteristics at issue in this case."). Both dissenting opinions in *Mattis* noted that there is some scientific evidence to suggest that brain development continues until an individual's mid-twenties, and accused the majority of drawing a line between eighteen- to twenty-year-olds and older adults that was inconsistent with this science. *See id.* at 444 (Lowy, J., dissenting) ("Perhaps nothing speaks louder to the flaws in the court's holding that this mandatory sentence violates art. 26 than the court having crafted a line that ends at age twenty-one, thereby engaging in legislative line drawing inconsistent with the science upon which it relies."); *id.* at 463–64 (Cypher, J., dissenting) ("[T]he court follows the neuroscience only as far as to extend juvenile sentencing privileges to one class of adult offenders, i.e., those from age eighteen to twenty at the time of the offense, while omitting another tranche of adults that the developmental science says also is deserving of protection."). The distinction between eighteen- to twenty-year-olds and older adults, however, lies not in the science of brain development alone, but rather in the legislative recognition of eighteen- to twenty-year-olds as a distinct population subject to certain restriction based on their reduced maturity in addition to that science. *See id.* at 437 n.8 (Kafker, J., concurring) ("It is the convergence of law and science, not just science alone, that governs the art. 26 analysis here."). Unlike younger adults, individuals who have attained the age of twenty-one have the full rights and responsibilities of adulthood, signifying the Legislature's view that twenty-one-year-olds are mature and responsible in a way eighteen- to twenty-year-olds are not.

151. MASS. GEN. LAWS ch. 265, § 2 (2022) (providing that individuals who are "found guilty of murder in the first degree" after their eighteenth birthday "shall be punished by imprisonment in the state prison for life and shall not be eligible for parole").

152. *Mattis*, 224 N.E.3d at 430–31 (Kafker, J., concurring).

were already protected against life without the possibility of parole sentences.

In other respects, however, the decisions constituting the majority differed to varying degrees. The chief justice's opinion, for example, looked to legislation and judicial decisions in other states to identify a "trend" toward treating eighteen- to twenty-year-olds as a distinct category deserving of greater protections.[153] It highlighted statutes from four states and the District of Columbia which provided for differential treatment of young adults in the area of criminal justice,[154] as well as state supreme court decisions in Washington[155] and Michigan[156] which did not allow life without parole sentences for young adults without individualized hearings.[157] The chief justice's opinion also surveyed state laws and noted that "[t]wenty-two states and the District of Columbia do not mandate life without parole in any circumstance."[158] She identified Massachusetts as "one of only ten States that currently *require* eighteen through twenty year old individuals who are convicted of murder in the first degree to be sentenced to life without parole."[159] The chief justice concluded that these laws and court decisions from other jurisdictions supported the court's conclusion that "'evolving standards of decency that mark the progress of a maturing society' . . . trend away from life without parole for [eighteen- to twenty-year-olds]."[160]

The Kafker concurrence did not engage in any "state counting," concluding it was unnecessary.[161] The concurrence noted that *Diatchenko* had departed from the traditional tripartite proportionality test used in

153. *See id.* at 424–25 (majority opinion); *see also* Commonwealth v. Okoro, 26 N.E.3d 1092, 1100–01 (2015) ("[D]evelopments in the area of juvenile justice in judicial opinions and legislative actions at the State, Federal, and international levels help to inform our understanding of what art. 26 protects.").

154. *Mattis*, 224 N.E.3d at 425; *see also* Blitzman, *supra* note 16, at 191–92 (discussing state-level reforms expanding juvenile court jurisprudence to include young adults).

155. *Mattis*, 224 N.E.3d at 426, 426 n.24 (citing *In re* Personal Restraint of Monschke, 482 P.3d 276, 287–88 (Wash. 2021) (requiring individualized sentencing hearings before offenders aged eighteen through twenty could be sentenced to life without parole)).

156. *Id.* at 426 (quoting People v. Parks, 987 N.W.2d 161, 168–69 (Mich. 2022) (requiring individualized sentencing hearings for young adults aged eighteen before the imposition of a life without parole sentence)).

157. *Id.* ("We are not the first State highest court to appreciate the distinct ways in which our laws bear on emerging adults."). The court did survey state practices regarding mandatory life without parole sentences and concluded that Massachusetts law as it then existed was among the more punitive states in imposing life without parole sentences. *See id.* at 426–27.

158. *Id.* at 426.

159. *Id.* at 427.

160. *Id.* at 428 (quoting Miller v. Alabama, 567 U.S. 460, 469 (2012)).

161. *See id.* at 437 (Kafker, J., concurring) (noting that the *Diatchenko* court did not compare Massachusetts law to the laws of other states).

some article 26 jurisprudence, which relies on the punishments imposed by other states for the same crime to determine whether the punishment imposed in Massachusetts is particularly disproportionate to a given offense or offender.[162] Instead, the concurrence discerned a different approach in *Diatchenko*, one that turned to "comprehensive fact finding grounded in science, to ensure the objectivity and integrity of our decision-making process," and was therefore prepared, with such scientific support, to provide greater protection than other states.[163] It also drew inspiration from John Adams, the primary author of the Massachusetts constitution, who was quoted in *Diatchenko* for his recognition that "we belong to an international community that tinkers toward a more perfect government by learning from the successes and failures of our own structures and those of other nations."[164] The Kafker concurrence thus emphasized that Massachusetts has a long tradition of breaking new ground in constitutional analysis, providing more robust protection of rights under the state constitution than those guaranteed by the U.S. Constitution and even in other state constitutions, with the

162. *Id.* at 437–38; *see* Cepulonis v. Commonwealth, 427 N.E.2d 17, 20 (Mass. 1981). Under the tripartite test, a court inquires as to whether a particular punishment is unconstitutionally disproportionate for a particular offender by weighing (1) "the 'nature of the offense and the offender in light of the degree of harm to society,'" (2) "a comparison between the sentence imposed . . . and punishments prescribed for the commission of more serious crimes in the Commonwealth," and (3) "the penalties prescribed for the same offense in other jurisdictions." *Cepulonis*, 427 N.E.2d at 20 (quoting Commonwealth v. Jackson, 344 N.E.2d 166, 171 (1976)). Both dissenting opinions in *Mattis* advocated for the use of the tripartite test to determine whether life without parole sentences were unconstitutional under article 26, and both concluded that article 26 did not prohibit the imposition of life without parole sentences to those over the age of eighteen. *See Mattis*, 224 N.E.3d at 456–57 (Lowy, J., dissenting); *id.* at 462–63 (Cypher, J., dissenting). The chief justice's opinion stated that while "the tripartite test incorporates elements of the approach we use today, it is of limited utility here." *Id.* at 418 n.12. As she further explained, "it is the 'categorical' framework [not the tripartite test] . . . that applies here, where the task is to assess whether a sentence is disproportionate when applied to an entire category of offenders." *Id.* While the U.S. Supreme Court has applied its Eighth Amendment categorical framework only to a very limited set of claims (involving the punishment of juveniles and death penalty cases), the Supreme Judicial Court of Massachusetts chose to apply its categorical test to another class of people, eighteen- to twenty-year-olds, identified in the *Mattis* case by a convergence of law and science.

163. *Mattis*, 224 N.E.3d at 437 (Kafker, J., concurring).

164. *Id.* at 438 (Kafker, J., concurring) (quoting Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 285 n.16 (Mass. 2013)). The chief justice's opinion also considered international law, pointing out that the United Kingdom had abolished life without parole for offenders under twenty-one and that the Supreme Court of Canada had unanimously ruled that life without parole sentences were unconstitutional for all defendants. *Id.* at 427–28 (majority opinion).

court's trailblazing decision recognizing a constitutional right to same-sex marriage being another important example.[165]

VII. THE DISTINCTIVE ASPECTS OF MASSACHUSETTS CRUEL OR UNUSUAL PUNISHMENT ANALYSIS: A POTENTIAL MODEL FOR STATE COURTS IN THE POST-*JONES* ERA

The Massachusetts Supreme Judicial Court has laid out a distinctive analytic approach to cruel or unusual punishment jurisprudence through its decisions in *Diatchenko* and *Mattis*. As it has in other areas of constitutional law, the court has interpreted the Massachusetts State Constitution to provide greater protection than the Supreme Court has provided under analogous provisions of the U.S. Constitution.[166] The Massachusetts Supreme Judicial Court has also consistently emphasized the importance of scientific research on neurobiological maturity and developmental psychology, recognizing it as a critical factor in determining whether a punishment is cruel or unusual for juveniles or young adults. The court is particularly concerned about requiring judges to make findings or impose sentences on juveniles or young adults that the scientific consensus suggests are impossible to justify with any reliability.[167] In prohibiting judges from imposing life without parole sentences on juveniles and young adults, and doing so because juveniles and young adults cannot reliably be found to be irretrievably depraved at the time of sentencing, the Massachusetts Supreme Judicial Court has clearly departed from the U.S. Supreme Court's decision in *Jones*.

The court has particularly broken new ground by declaring unconstitutional life without the possibility of parole sentences for offenders who were eighteen to twenty years old at the time of their offense.[168] Here, the court's departure from Supreme Court precedent—which has been limited to juveniles—is even greater. The Massachusetts Supreme Judicial Court did so based not only on the science, but also

165. *See id.* at 437–38 (Kafker, J., concurring); *see also Diatchenko*, 1 N.E.3d at 283 ("We often afford criminal defendants greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution."); Goodridge v. Department of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that same-sex marriage was an individual right under the Massachusetts Constitution before any other states had done so); Commonwealth v. Watson, 411 N.E.2d 1274, 1275 (Mass. 1980) (concluding that under article 26 of the Massachusetts Declaration of Rights, "the death penalty is unacceptably cruel under contemporary standards of decency, and . . . the death penalty is administered with unconstitutional arbitrariness and discrimination").

166. *See infra* Section VIII.A.

167. *See infra* Section VIII.B.

168. *See infra* Section VIII.C (discussing whether other states might consider adopting similar protections for young adults).

because of legislation and other practices in the Commonwealth defining young adults as a distinct category different from adults twenty-one and older, recognizing that they have been treated differently in a number of different areas of the law based on the same characteristics identified by the scientific research discussed *supra*.[169] Critically, the court emphasized that scientific research does not distinguish eighteen- to twenty-year-olds from juveniles on the characteristics most relevant to cruel or unusual punishment analysis. Although the court recognizes that deference is owed to the legislature in defining what conduct is criminal and what sanctions should be imposed, the court has concluded that less deference is due when the legislature itself acts inconsistently, recognizing diminished responsibility and culpability for eighteen- to twenty-year-olds in some areas of the law but disregarding those differences when imposing the most serious punishment.[170]

Finally, the justices' different approaches to "state counting" in determining contemporary standards of decency provide alternative models for other state courts to consider.[171] Although "scientific consensus" helped all the justices in the majority establish societal consensus, the chief justice's opinion and the Kafker concurrence place different emphases on the importance of other states' legislation and practices. In the following sections, we discuss why the Massachusetts Supreme Judicial Court's approach, particularly its focus on the convergence of science and law, may properly serve as a model for other state supreme courts in the post-*Jones* era.

A. Independent State Constitutional Analysis in the Federal System

As a threshold matter, the Massachusetts Supreme Judicial Court's decision to interpret article 26 of the Massachusetts Declaration of Rights differently from how the U.S. Supreme Court has interpreted the Eighth Amendment is perfectly appropriate.[172] Indeed, federalism is designed to provide a double protection of constitutional rights:[173]

169. *See supra* notes 130–151 (discussing the relevant characteristics of young adults and the laws and practices that appeared to show an understanding of those characteristics by the legislature).

170. *See infra* Section VIII.C.

171. *See infra* Section VIII.D.

172. *See* Williams, *supra* note 15, at 955–59 (discussing Supreme Court cases where the Court has emphasized the independence of state supreme courts and their ability to distinguish state constitutional protections from protections embodied in the U.S. Constitution).

173. Brennan, *supra* note 15, at 503; Kafker, *supra* note 15, at 141; *see also* Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312 (2017) ("This redundancy in interpretive authority—whereby state

> [I]f state courts do not perform [an] independent, non-deferential review of state constitutional provisions, including those that share a common origin and wording with federal constitutional provisions, state courts are not fulfilling their function in the federalist system, which is to provide the double protection of American rights and liberty the system is designed to achieve. Both the state and federal courts are responsible for guarding these American rights and preserving our liberty. If either drops its guard, and relies on the other, our rights and liberty become less protected.[174]

The U.S. Supreme Court's decision in *Jones* is a particularly apt reminder of the importance of an independent interpretation of state constitutions for a number of reasons. First, it is explicitly a federalism-promoting decision, reminding the states that their laws and their constitutions may provide greater protections for juveniles than the baseline protections of the Eighth Amendment.[175] Second, *Jones* is precisely the type of constitutional upheaval or retrenchment by the Supreme Court that should invite state courts to take a second look to determine whether the analysis of their state constitutions should depart from the U.S. Supreme Court's constitutional standard.[176] Of course:

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courts and federal courts independently construe the guarantees that their respective constitutions have in common—is one important way that our system of government channels disagreement in our diverse democracy.").

174. Kafker, *supra* note 15, at 141.

175. *See* Jones v. Mississippi, 593 U.S. 98, 120 (2021) (affirming that the Court's decision did not hinder state legislatures or state courts from providing more protections for juveniles).

176. *See* Kafker, *supra* note 15, at 139. This realignment toward state constitutional law has already been observed by practitioners and scholars. *See* Shapiro & Gonnerman, *supra* note 16, at 69. Other state courts besides the Massachusetts Supreme Judicial Court have already responded. For example, the Court of Appeals of Alaska has held that:

> [B]efore a sentencing court can impose a sentence of life without parole (or its functional equivalent) on a juvenile offender tried as an adult, the Alaska Constitution requires a sentencing court to affirmatively consider the juvenile offender's youth and its attendant characteristics and to provide an on-the-record sentencing explanation that explicitly or implicitly finds that the juvenile offender is one the "rare" juvenile offenders "whose crime reflects irreparable corruption."

Fletcher v. State, 532 P.3d 286, 308 (Alaska Ct. App. 2023). The court explained that "the federalist concerns that led to the restrained approach adopted by *Jones* are not at issue when state courts are determining the scope and meaning of their own independent state constitutions," and further noted that *Jones* had reasoned that states could adopt greater protections than were provided by the Eighth Amendment itself. *Id.* The court also stated that Alaska has a long history of requiring sentencing courts to explain the rationale behind their sentencing decisions, which also factored into the court's ruling. *Id.* at 309 ("'Without articulated findings concerning the factors that determine the range of reasonable

> A state supreme court may reasonably conclude that respect for the law and its own decision-making is promoted by the consistency and stability of state and federal constitutional interpretation of similarly worded provisions with common histories . . . . [I]t is another matter to conclude that such respect is enhanced by rapid revision or retrenchment in both state and federal constitutional law . . . .[177]

Given these fundamental principles of federalism and the reasoning of as well as the arguable retrenchment reflected in the decision in *Jones*, all state supreme courts should be focused on whether their state constitutional provisions provide greater or at least different protections against cruel and/or unusual punishment than the Eighth Amendment.[178]

We next turn to the question of whether the particular reasoning and greater protections against cruel or unusual punishment adopted in Massachusetts may serve as a model for other courts. Again, general principles of federalism provide support for such modeling. Horizontal federalism—"state courts looking for guidance to other state courts interpreting similar or identical state constitutional provisions, rather than looking vertically to United States Supreme Court decisions interpreting similar federal constitutional provisions"—is "a very common approach."[179] The question then becomes whether the distinct reasoning of the Massachusetts Supreme Judicial Court's cruel or unusual punishment jurisprudence merits consideration in other states.

B. Scientific Development and Rational Judicial Decision-Making

Perhaps the most distinctive aspect of the Massachusetts Supreme Judicial Court's decisions in *Diatchenko* and *Mattis* is the particular emphasis it placed on brain science and other empirical research involving the behavior of juveniles and young adults. The court not only required an evidentiary hearing, fact finding, and a full record in regard to this science,[180] but it relied on those findings, which essentially

sentences,' any sentence is 'arbitrary and unsupportable.'" (quoting State v. Bumpus, 820 P.2d 298, 305 (Alaska 1991))).

177. Kafker, *supra* note 15, at 139.

178. This, of course, requires litigant to raise state constitutional claims as well as federal constitutional claims. If they do not do so, as was apparently the case in the Georgia cases discussed *supra* notes 102–06, it is not for the court to raise the issue on its own.

179. WILLIAMS, *supra* note 18, at 352.

180. *See* Commonwealth v. Watt, 146 N.E.3d 414, 428 (Mass. 2020) (remanding Mattis' case to the superior court for "the development of the record with regard to research on brain development after the age of seventeen"); Commonwealth v. Mattis, 224 N.E.3d 410,

equated young adults between the ages of eighteen and twenty with juveniles, to become the first court in the country to extend the categorical prohibition against life without the possibility of parole to those eighteen to twenty years old.[181] The court also refused to require judges to make findings or sentencing decisions that could not be done with integrity, consistent with that science.[182] Brain science and other empirical research involving juveniles therefore played a critical role in the legal analysis.

In this regard, the Massachusetts Supreme Judicial Court has clearly differentiated its state constitutional analysis from the *Jones* Court's federal constitutional analysis. Although the Supreme Court consistently considered scientific evidence regarding characteristics of juveniles in its earlier Eighth Amendment jurisprudence,[183] its decision in *Jones* appears to step back from that science. By allowing the discretionary imposition of life without the possibility of parole for juveniles and young adults without requiring a finding of permanent incorrigibility,[184] the *Jones* Court seems to downplay or ignore scientific research that shows juveniles to be less culpable than adults and more capable of change, and that it is a rare case for a juvenile to be permanently incorrigible—as the Court itself has acknowledged.[185] There is a consensus among experts in the fields of neuroscience and developmental psychology that it is functionally impossible to reliably predict whether a young person under the age of twenty-one, even one who has committed a heinous crime like murder, is permanently incorrigible and incapable of reform at the time

416, 420–24 (Mass. 2024) (describing the scientific findings made by the trial court following extensive evidentiary hearings).

181. *Mattis*, 224 N.E.3d at 420–21, 428; see Stevie Leahy, *"Emerging Adults" Can No Longer Be Sentenced to Life Without Parole: The Impact of* Commonwealth v. Mattis, BOS. BAR J., Spring 2024, at 8, 8 (noting that Massachusetts is the first state to prohibit life without parole sentences for individuals under the age of twenty-one).

182. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 283–84 (Mass. 2013); *Mattis*, 224 N.E.3d at 432, 437 (Mass. 2024) (Kafker, J., concurring).

183. *See supra* Part II.

184. Jones v. Mississippi, 593 U.S. 98, 118 (2021).

185. *See, e.g.*, Montgomery v. Louisiana, 577 U.S. 190, 195 (2016) ("[A] lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'" (quoting Miller v. Alabama, 567 U.S. 460, 479–80 (2012))); *Miller*, 567 U.S. at 479 (stating that appropriate circumstances for sentencing a juvenile to life without parole should be uncommon); Graham v. Florida, 560 U.S. 48, 68 (2010) ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005))).

of sentencing.[186] A sentencing judge simply cannot reliably determine whether a murder committed by a young person is the product of youthful immaturity or is an indication that the offender will continue to pose a danger to society for the rest of their life.[187] Indeed, a large proportion of the juvenile offenders who were formerly serving life without parole sentences before *Diatchenko* have since been granted parole and have successfully reintegrated into society after serving many years in prison.[188] The same has proven true for juvenile offenders released in other jurisdictions in the wake of *Miller*.[189] These examples demonstrate that even juveniles who commit murder in the first degree, the most serious crime, may choose to take responsibility for the terrible harm they have caused and rehabilitate themselves. It further illustrates that a judgment regarding the danger to society posed by young offenders is better left to a parole board after those offenders have served many years in prison and demonstrated whether or not they have matured and turned their lives around.[190]

It was because of that science and empirical research that the Supreme Judicial Court in *Diatchenko* concluded that a "showing of traits such as an 'irretrievably depraved character' can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender."[191] These same considerations were important in the court's subsequent conclusion in *Mattis* that life without parole sentences were unconstitutional for eighteen- to twenty-year-

186. *See, e.g.*, INSEL ET AL., *supra* note 138, at 3 ("Science cannot divine which 'rare' adolescent may be 'permanently incorrigible' . . . ."). The White Paper includes adults up to age twenty-one in its definition of "adolescents." *Id.* at 5.

187. *Diatchenko*, 1 N.E.3d at 284 ("[B]ecause the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved."); *see also Mattis*, 224 N.E.3d at 428 ("[T]he brains of emerging adults are not fully developed and are more similar to those of juveniles than older adults.").

188. *Mattis*, 224 N.E.3d at 439 (Kafker, J., concurring); *see also supra* notes 109–12 and accompanying text.

189. *See, e.g.*, DAFTARY-KAPUR & ZOTTOLI, *supra* note 69, at 2.

190. *Mattis*, 224 N.E.3d at 439 (Kafker, J., concurring) ("As *Diatchenko I* and its aftermath have demonstrated, the possibility of redemption exists for the young, even those who have committed the most horrible crimes, after they have spent many years in prison maturing and taking responsibility for the terrible deaths that they caused in their youth."); *Diatchenko*, 1 N.E.3d at 287 (Lenk, J., concurring) (underscoring the importance that juvenile offenders be offered a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (quoting Graham v. Florida, 560 U.S. 48, 75 (2010))).

191. *Diatchenko*, 1 N.E.3d at 283–84 (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

olds.[192] When the imposition of life without parole on a juvenile or young adult is discretionary, and the capacity for redemption and rehabilitation cannot properly be evaluated, there remains a distinct possibility that life without the possibility of parole sentences will be imposed on young adults for improper or arbitrary reasons, thereby rendering them cruel or unusual as well.[193]

As the U.S. Supreme Court explained in *Roper*: "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[194] It expressed an identical concern regarding the imposition of juvenile life without parole sentences in *Graham*, and this concern led it to adopt a categorical rule barring the imposition of juvenile life without parole for nonhomicide offenses.[195] Empirical research supports this concern; a survey of discretionary life without parole sentencing in North Carolina found that the preferences of individual prosecutors and judges seemed to explain trends in life without parole sentences.[196] In other words, prosecutors or judges who habitually sentenced offenders to life without parole tended to continue

192. *Mattis*, 224 N.E.3d at 428 (majority opinion). Other state courts have also considered the role of science in providing constitutional protections for criminal defendants. For example, the Connecticut Supreme Court held that:

> [A] new constitutional rule of criminal procedure must be applied retroactively on collateral review if the rule was a result of developments in science that persuaded [the court] to reevaluate fundamental principles underlying judicial procedures, the rule significantly improves the accuracy of a conviction, and the petitioner advocated for the rule in the direct proceedings or in an earlier habeas petition.

Tatum v. Comm'r of Corr., 322 A.3d 299, 310 (Conn. 2024). In doing so, the court chose to apply a more protective retroactivity standard than the standard used in federal courts, noting that its "jurisprudence has benefitted from significant developments related to the cognitive science associated with eyewitness identifications," and that this science led to the conclusion that the petitioner's original postconviction appeal had been wrongly decided. *Id.* at 317.

193. *Diatchenko*, 1 N.E.3d at 284 (suggesting that unless a defendant can "with integrity" be determined to be "irretrievably depraved," a sentence of life without the possibility of parole is disproportionate for that defendant); *see also Graham*, 560 U.S. at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.").

194. Roper v. Simmons, 543 U.S. 551, 573 (2005).

195. *Graham*, 560 U.S. at 78 (quoting *Roper*, 543 U.S. at 572–73).

196. Brandon L. Garrett et al., *Life Without Parole Sentencing in North Carolina*, 99 N.C. L. REV. 279, 281 (2021) ("Our findings suggest that in the shadow of the declining death penalty, [life without parole] has emerged as a far more common, easily imposed, and pervasive form of punishment, and yet it suffers from distinct racial biases and prosecutorial incentives."). Notably, the researchers found that life without parole "sentencing is not responsive to crime rates." *Id.* at 313–15.

doing so, suggesting the imposition of life without parole sentences was connected to factors other than proportional retribution or judgments of offenders' prospects for rehabilitation.[197] Because it is impossible to predict at the time of sentencing whether a young person will forever pose a danger to society, there is an unacceptable risk that the denial of any possibility of parole will be disproportionate to the young offender in question,[198] arbitrary, or based on other inappropriate factors.[199] Such punishment would be unconstitutionally cruel.

Other states may of course adopt a similar approach to scientific evidence in the context of cruel or unusual punishment jurisprudence. Full factual records may be developed by requiring evidentiary hearings similar to those ordered prior to the decision in *Mattis*, requiring experts and the scientific research on which they rely to be tested in court to ensure their validity.[200] It is important to emphasize that the empirical

197. *See id.* at 315–16 (suggesting that the path dependence seen in life without parole sentencing rates might be attributable to local plea bargaining dynamics, prosecutorial discretion, or racial bias); *see also* NELLIS & KING, *supra* note 3, at 9–10 (comparing the prevalence of life without the possibility of parole sentences between states and concluding that the difference in life without parole sentences as a proportion of all life sentences between states "is largely a reflection of statutory law and prosecutorial practices that deemphasize LWOP and underscores the local contours of life sentencing practices"); ASHLEY NELLIS, THE SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 21 (2017) (citing fear of crime and political pressure as drivers of the increasing frequency of life sentences).

198. *See Diatchenko*, 1 N.E.3d at 284; *cf. Roper*, 543 U.S. at 573 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where [a young] offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.").

199. *See* Carrie Johnson, *Life Without Parole for 'Felony Murder': Pa. Case Targets Sentencing Law*, NPR (Feb. 4, 2021, 5:01 AM), https://www.npr.org/2021/02/04/963147433/life-without-parole-for-felony-murder-pa-case-targets-sentencing-law. For example, 70% of individuals serving life without the possibility of parole sentences for felony murder convictions are Black, whereas only 11% of the state's population is Black. *Id.* Nationally, in 2009 African Americans made up 48.3% of individuals serving life sentences, and 54.6% of individuals serving life without the possibility of parole sentences. NELLIS & KING, *supra* note 3, at 12. Similarly, before *Miller* was decided, 61% of individuals serving juvenile life without parole sentences were Black, "and the proportion of Black children sentenced to [juvenile life without the possibility of parole] has increased in new cases post-*Miller*." CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, NATIONAL TRENDS IN SENTENCING CHILDREN TO LIFE WITHOUT PAROLE (2022), https://cfsy.org/wp-content/uploads/Fact-sheet-June-2022.pdf. These examples raise the question of whether and to what extent racial bias may affect the imposition of life without the possibility of parole sentences.

200. As has been widely discussed, most judges are not experts in cognitive neuroscience or developmental psychology, able to analyze such research on their own, and it is for this reason—"to ensure the objectivity and integrity of [the court's] decision-making process"—that the court in *Watt* required extensive factfinding and expert testimony before hearing

research on which the *Mattis* court relied is, of course, not state-specific. Indeed, the exact opposite is true; experts in cognitive neuroscience and developmental psychology testified regarding the current state of research in their respective fields.[201] Although the research in those fields will continue to be retested and refined, reliance on the most up-to-date science and social science regarding the brains and behavior of juveniles and young adults is something any state court may choose to consider. Solid, peer-reviewed scientific research conducted by experts who have been subject to cross-examination in court may therefore provide a firm, objective foundation for state courts to rely on when they interpret their own constitutions. Other state supreme courts should also share the Massachusetts Supreme Judicial Court's concern that their trial judges might be forced to make sentencing decisions, including those involving judgments on an offender's potential for rehabilitation, that empirical research demonstrates are impossible.

C. The Convergence of Science and Law Justifying the Massachusetts Supreme Judicial Court's Extension of Protection Against Life Without Parole Sentences to Eighteen- to Twenty-Year-Olds

In its cruel or unusual punishment jurisprudence, the Massachusetts Supreme Judicial Court does not rely only on science, but also on legislative categorization. In *Mattis*, it required a "convergence of science and law," particularly science and law related to eighteen- to twenty-year-olds.[202] As discussed in more detail *supra*, the scientific findings presented to the court established that young adults between the ages of eighteen and twenty were similar to juveniles in a number of respects related to their immaturity, impulsivity, and capacity for change.[203] The court's review of laws and practices in the Commonwealth also established that the legislature considered eighteen- to twenty-year-olds as a distinct category of individuals, different from older adults and entitled to some statutory rights and not others because of those same

arguments in *Mattis*. *See* Commonwealth v. Mattis, 224 N.E.3d 410, 437 (Mass. 2024) (Kafker, J., concurring). Even those who support the *Roper* Court's conclusion that the juvenile death penalty was unconstitutionally cruel might reasonably express concern regarding Justice Scalia's accusation, writing in dissent, that the Court was "picking and choosing" scientific studies "that support[ed] its position" without "explain[ing] why those particular studies are methodologically sound." *Roper*, 543 U.S. at 617 (Scalia, J., dissenting). Where an evidentiary hearing and fact-finding are required, Justice Scalia's concern is at least mitigated, if not eliminated entirely.

201. *Mattis*, 224 N.E.3d at 417 n.8–9 (discussing the credentials of the experts whose testimony formed the basis for the Superior Court fact finding).

202. *See supra* notes 119–51 and accompanying text.

203. *See supra* notes 130–35 and accompanying text.

characteristics.[204] Where other state legislatures also treat eighteen- to twenty-year-olds as a distinct class entitled to some statutory rights and not others on the basis of the characteristics young adults share with juveniles, the court's analysis may be applicable to those other states as well.[205] In this way, the Massachusetts Supreme Judicial Court's approach, which made it the first court to extend protection against life without parole to eighteen- to twenty-year-olds,[206] may be of interest to other state supreme courts. Where other states have carved out eighteen- to twenty-year-olds as a distinct category based on these characteristics, but still subjected them to life sentences without the possibility of parole, those states are similarly situated.

D. The Role of Other States' Sentencing Practices in State Constitutional Cruel or Unusual Punishment Analysis

The various approaches adopted by the Massachusetts Supreme Judicial Court to state counting may also merit consideration by other state supreme courts as they consider their own state constitutions. In this regard, the different opinions that make up the *Mattis* majority provide other states with different models to consider in this difficult area of law.

The hallmark of the U.S. Supreme Court's Eighth Amendment jurisprudence, particularly in *Roper* and *Graham*, is the practice of

204. *See supra* notes 139–51 and accompanying text.

205. For example, in most states, individuals under twenty-one years old are not allowed to gamble. *See Gambling Age by State 2025*, WORLD POP. REV. (2024), https://worldpopulationreview.com/state-rankings/gambling-age-by-state. In many jurisdictions the minimum age to become a police officer is twenty-one as well. *See* Int'l Ass'n of Chiefs of Police, *Basic Requirements*, DISCOVER POLICING, https://www.discoverpolicing.org/about-policing/basic-requirements/ (last visited May 29, 2025). Nationally, the age for purchasing tobacco and alcohol is twenty-one years old, and in many of the states that have legalized recreational marijuana, eighteen- to twenty-year-olds are barred from purchasing or using marijuana as well. *See* 23 U.S.C. § 158(a)(1) (providing that states must keep their minimum age for alcohol consumption at twenty-one years old in order to retain access to federal highway funds); *Tobacco 21*, FOOD & DRUG ADMIN. (Sept. 30, 2024), https://www.fda.gov/tobacco-products/retail-sales-tobacco-products/tobacco-21 (noting that under federal law the age to purchase tobacco products was raised to twenty-one in 2019); *STATE System Minimum Legal Sales Age (MLSA) Laws for Tobacco Products Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Dec. 30, 2024) https://www.cdc.gov/statesystem/factsheets/mlsa/Minimum-Legal-Sales-Age.html (showing that forty-two states, three territories, and the District of Columbia have raised their minimum legal sales age for tobacco to twenty-one to match the federal minimum sales age); *see, e.g.*, CAL. BUS. & PROF. CODE § 26000(b) (West 2017) (restricting adult-use cannabis sales and consumption to adults twenty-one and over); N.Y. CANNABIS § 3 (McKinney 2022) (same); 410 ILL. COMP. STAT. ANN. 705/1-10 (2024) (same).

206. Leahy, *supra* note 182, at 6.

reviewing state law and state sentencing practices to determine whether a national consensus exists for or against a particular punishment.[207] As a preliminary matter, the Supreme Court's search for national consensus may reflect what professors Lawrence Gene Sager and Robert Williams, as well as Sixth Circuit Court of Appeals Chief Judge Jeffrey Sutton, have called the underenforcement thesis[208] or the "federalism discount."[209] This reflects "[f]ederalism considerations [that] may lead the U.S. Supreme Court to underenforce (or at least not to overenforce) constitutional guarantees in view of the number of people affected and the range of jurisdictions implicated."[210] Because the Eighth Amendment sets a national baseline for constitutional protections from cruel and unusual punishments, the Court considers a wider variety of views than a state supreme court might in interpreting its own state constitution's Eighth Amendment analogue. As this Article explains, this difference may justify greater protections at the state level, because a state court does not issue a ruling for the entire country, but only for its own state.[211]

Separate and apart from whether the "federalism discount" exists or should itself be discounted, there is considerable inconsistency between decisions and disagreement between members of the Supreme Court regarding what factors indicate a national consensus. For example, should the Court consider only the text of state statutes and the punishments those statutes theoretically allow, or should actual sentencing practices inform the analysis of whether a consensus exists against a punishment?[212] If the imposition of a particularly harsh

207. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 62–63 (2010) (discussing the prevalence of juvenile life without parole sentences for nonhomicide offenses, both in state statutes and in state sentencing practices).

208. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–28 (1978); *see also* Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMPLE L. REV. 1123, 1137–38 (1992) (discussing "the reluctance of Supreme Court justices to apply a 'uniform national mandate to a diverse group of state governments,' resulting in narrower constructions of federal constitutional rights" (quoting Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 389 (1984))).

209. SUTTON, *supra* note 19, at 175.

210. *Id.*

211. *See id.* ("No state supreme court by contrast has any reason to apply a 'federalism discount' to its decisions, making it odd for state courts to lean so heavily on the meaning of the Federal Constitution in construing their own.").

212. *Compare Graham*, 560 U.S. at 62 (reasoning, despite the fact that thirty-seven states allowed juvenile life without parole for nonhomicide offenses, that "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus"), *with id.* at 111 (Thomas, J., dissenting) ("That a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed. It is not proof that the punishment is one the Nation abhors."). Similarly, the Court has been

punishment for a particular offender only results from the interplay of several distinct state statutes, should the theoretical availability of such a punishment be considered indicative of legislative intent?[213] How much, if at all, should international law or sentencing practices in other countries inform "contemporary standards of decency" relevant to Eighth Amendment analysis?[214] The inconsistency with which the Court has analyzed the legal landscape of the nation has led to criticism from dissenting justices and commentators suggesting that such "state counting" is essentially a subjective exercise.[215] Commentators have also

inconsistent with regard to the issue of whether states that ban the death penalty altogether should be considered in analyzing whether the Eighth Amendment bans the execution of particular classes of offenders. *Compare* Roper v. Simmons, 543 U.S. 551, 564, 574 (2005) (counting the twelve states that "rejected the death penalty altogether" among the thirty states that banned the juvenile death penalty, because "a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles"), *with* Stanford v. Kentucky, 492 U.S. 361, 370–71 (1989) (rejecting the notion that a consensus existed against the juvenile death penalty because a majority of the then-thirty-seven states that allowed the death penalty allowed for the execution of juveniles over the age of sixteen), *and Roper*, 543 U.S. at 610 (Scalia, J., dissenting) (arguing that only those states that allow death penalties should have been considered when determining whether a consensus existed regarding the acceptability of the juvenile death penalty).

213. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court seemed to step away from a strict approach to state counting in Eighth Amendment jurisprudence. *Id.* at 485 n.11. It further reasoned that the availability of mandatory juvenile life without parole in twenty-nine jurisdictions was not indicative of a consensus in favor of the punishment because its availability was only due to the existence of laws allowing juveniles to be tried as adults for certain crimes, coupled with laws mandating life without parole for adult offenders convicted of homicide. *Id.* at 486–87. Because these statutes were passed at separate times, the existence of these laws did not necessarily demonstrate that state legislatures affirmatively intended to mandate juvenile offenders convicted of homicide offenses be sentenced to life without parole. *Id.* For example, some state statutes considered by the Court would in theory allow a child between the ages of six and ten years old be sentenced to mandatory life without parole, a result the Court believed was not likely the result of deliberate choices by the state legislature. *Id.*

214. *Compare Graham*, 560 U.S. at 80 (quoting Enmund v. Florida, 458 U.S. 782, 796 n.21 (1982)) (noting that although comparative and international law are not controlling in Eighth Amendment analysis, "[t]he climate of international opinion concerning the acceptability of a particular punishment" is nonetheless relevant), *and Roper*, 543 U.S. at 575 ("Our determination that the death penalty is disproportionate punishment for offenders under [eighteen] finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."), *with id.* at 624 (Scalia, J., dissenting) ("[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.").

215. *See, e.g.*, *Miller*, 567 U.S. at 494–95 (Roberts, C.J., dissenting) (reasoning that because "the parties agree[d] that most States ha[d] changed their laws relatively recently to expose teenage murders to mandatory life without parole," the imposition of mandatory juvenile life without parole should not violate the Eighth Amendment); Jacobi, *supra* note

criticized the practice of state counting as inconsistent with other important principles of federalism,[216] and as overly deferential to state legislatures.[217] One commentator has also suggested that legislation tends to lag behind public sentiment regarding punishment, because very punitive sentences are sometimes not repealed even after they cease to be imposed, so considering only the text of state laws can lead to the conclusion that contemporary standards of decency allow harsher punishments than those that are actually imposed in practice.[218]

Against this backdrop, it is notable that the Massachusetts Supreme Judicial Court did not engage in any state counting when it decided *Diatchenko*.[219] In *Mattis*, the different justices likewise did not require a national consensus. That being said, the Chief Justice did survey other jurisdictions and identified what she described as "an emerging trend" away from sentencing eighteen- to twenty-year-olds to life without the possibility of parole,[220] while the Kafker concurrence argued that even identifying a trend in other jurisdictions was unnecessary given the reasoning in *Diatchenko*.[221] In both opinions, a scientific consensus either contributed to, or substituted for, a societal consensus reflected in other states' practices.[222]

35, at 1092 ("[A]n examination of the cases makes it abundantly clear that counting state legislation is no more objective than the terms of traditional death penalty jurisprudence.").

216. *See* Jacobi, *supra* note 34, at 1092 (arguing that state counting is effectively "[o]ne arm of the federal government, the judiciary, . . . using the actions of some states to prevent others from undertaking precisely the sort of social experimentation that the federal system was intended to allow. The states, as 'laboratories,' were intended to be free to pursue policies, regardless of whether they are nationally popular.").

217. *See* Daniel Loehr, *The Extravagance of Eighth Amendment Deference*, 61 AM. CRIM. L. REV. 1, 17 (2024) ("[T]he Court could use this type of deference to affirm a practice that appears cruel and unusual simply because other states use it.").

218. *See* Robert J. Smith et al., *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537, 579 (2023) (arguing that statutes are not always indicative of popular opinion because "needlessly harsh punishments stay frozen into laws long after societal views change, with legislation a lagging indicator of contemporary standards of decency").

219. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 284–85 (Mass. 2013); *see also* Commonwealth v. Mattis, 224 N.E.3d 410, 437–38 (Mass. 2024) (Kafker, J., concurring) (noting that the Supreme Judicial Court in *Diatchenko* did not compare constitutional protections under the Massachusetts Declaration of Rights to protections in other states, but instead cited international law and foundational principles on which the Massachusetts Constitution was written).

220. *See Mattis*, 224 N.E.3d at 426, 428 (reviewing statutes from five jurisdictions and decisions from two state supreme courts to conclude "that the 'evolving standards of decency that mark the progress of a maturing society' . . . trend away from life without parole for emerging adults" (quoting *Miller*, 567 U.S. at 469)).

221. *Id.* at 437 (Kafker, J., concurring).

222. *Id.* at 420 (majority opinion); *id.* at 432 (Kafker, J., concurring).

The Massachusetts Supreme Judicial Court's reliance on scientific consensus to bolster or substitute for inconclusive state counting is another distinctive aspect of the court's reasoning that may be applicable to and helpful for other states. It helps address the myriad problems identified with state counting as a practice of constitutional interpretation.[223] It also reflects the commonsense reality that some states must lead for others to be able to follow. Advances in scientific research and scientific consensus may therefore provide an alternative means of ensuring that our "evolving standards of decency"[224] actually *do* evolve. Importantly, "comprehensive fact finding grounded in science" may, as the Kafker concurrence emphasized, help "ensure the objectivity and integrity" of this evolution.[225]

IX. CONCLUSION: SCIENCE IN A STATE CONSTITUTIONAL LABORATORY

If a state may serve as a laboratory of democracy, and a state supreme court serve as laboratory of state constitutional law, then it is only fitting that empirical science should play a leading role in such a laboratory. For the Supreme Judicial Court of Massachusetts, cognitive neuroscience and developmental psychology, as well as other empirical research on the behavior of juveniles and young adults, has moved the court's cruel or unusual punishment jurisprudence forward. The court has concluded that the state constitution precludes judges from making findings and imposing sentences on juveniles and young adults that are contradicted by that science. More particularly, where the scientific findings conclusively demonstrate that it is not possible to decide whether a juvenile or young adult is irretrievably depraved at the time of sentencing, the court has rejected the discretionary imposition of life sentences without the possibility of parole for juveniles and young adults, as allowed by the Supreme Court in *Jones v. Mississippi*. For the Massachusetts Supreme Judicial Court, scientific consensus has also helped substantiate a societal consensus, even when the science is moving faster than state legislatures around the country and "state counting" alone is not enough to establish a clear national consensus. Where scientific findings have substantiated a legislative judgment that juveniles and eighteen- to twenty-year-olds are distinct classes, identified

223. *See supra* notes 212–18 and accompanying text.

224. *See, e.g.*, *Miller*, 567 U.S. at 469 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)) (affirming that "evolving standards of decency that mark the progress of a maturing society" are relevant to the constitutional inquiry into what punishments are cruel and unusual).

225. *Mattis*, 224 N.E.3d at 437 (Kafker, J., concurring).

by their immaturity, impulsivity, and capacity for change, the court has held that sentences for murder in the first degree should also reflect this judgment. This convergence of law and science is critical to the court's analysis.

Whether other state supreme courts will find the Massachusetts Supreme Judicial Court's analysis on the convergence of law and science in its cruel or unusual punishment jurisprudence persuasive remains to be seen. Reliance on the most up to date science, as it continues to advance, should, we conclude, provide an acceptable, even desirable model. The concern about judges having to make sentencing decisions inconsistent with that science should also cross state borders. As for whether a scientific consensus may substitute for more traditional state counting, there is reasonable room for disagreement, as evidenced by the divisions within the Massachusetts Supreme Judicial Court itself. The different state supreme courts will surely be presented with different statutory schemes regarding punishment of juveniles and young offenders, which will also affect their analysis. In sum, the laboratories of democracy and state constitutional law will continue to experiment and learn from each other, and thereby provide greater protections against cruel or unusual punishments.