Brought Back to Life: Massachusetts Supreme Judicial Court Resuscitates Parole Eligibility for Juveniles Convicted of First-Degree Murder

"We have never decided whether the phrase 'inflict cruel or unusual punishments' in art. 26 has the same prohibitive sweep as the phrase 'nor cruel and unusual punishments inflicted' in the Eighth Amendment."[1]

I. INTRODUCTION

The cornerstones of the American juvenile justice system are rehabilitation and guidance.[2] From the very beginning a paternalistic approach, instead of stern discipline, has governed the correction of delinquent behavior.[3] Our society does not consider juveniles to be fully developed adults, and instead believes that juveniles have the time and opportunity to adjust their behavior to meet societal standards.[4] As a result, Congress implemented the juvenile court system to help delinquent minors become the adults our nation expects them to be.[5]

The justice system is no stranger to the axiom that legislators both make the law and set the statutory guidelines for sentencing criminal perpetrators.[6] In sentencing offenders after a criminal trial, judges look to these statutes and regulations, as well as to relevant common law, to determine the appropriate punishment or rehabilitative programs for each offender convicted.[7] To some, it may not always be clear why judges choose a given sentence; there may be many considerations involving more than just the offense charged, especially in

1. Michaud v. Sheriff of Essex Cty., 458 N.E.2d 702, 708 (Mass. 1983).

2. *See In re* Gault, 387 U.S. 1, 25-26 (1967) (explaining foundation of American juvenile court system).

3. *See id.* at 14-16, 25-26 (describing purpose behind antiquated American juvenile justice system).

4. *See id.* at 26 (explaining juvenile judges evaluating "demeanor and conduct of [] emotional and psychological attitude" of juveniles).

5. *See id.* at 14-16 (citing goals for juvenile justice reform).

6. *See* JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 4 (6th ed. 2012) (discussing states' legislative power to define criminal conduct and responsibility); *see also* Weems v. United States, 217 U.S. 349, 379 (1910) (acknowledging legislative function and right to enact laws); Commonwealth v. Brown, 1 N.E.3d 259, 270 n.11 (Mass. 2013) (delegating power of sentencing schemes to Legislature for juvenile homicide offenses).

7. *See* DRESSLER & GARVEY, *supra* note 6, at 4-5 (discussing judiciary powers in light of legislative enactments); *see generally* Hon. Robert A. Mulligan, *Sentencing Guide: Massachusetts Sentencing Guidelines*, MASS. SENT'G COMMISSION (Feb. 1998), http://www.mass.gov/courts/docs/admin/sentcomm/guide.pdf [http://perma.cc/973W-LQZG] (establishing sentencing practice guidelines for Massachusetts).

the juvenile system.[8]

In abiding by legislated law, judges must often implement mandatory sentences for some crimes, negating the ability of that judge to consider the inherently distinct characteristics of a minor offender.[9] The United States Supreme Court in *Miller v. Alabama*[10] held the sentencing term of mandatory life without the possibility of parole (LWOP) unconstitutional for juvenile homicide offenders, classifying LWOP as "cruel and unusual punishment" when applied to juveniles under the Eighth Amendment.[11] In turn, the Supreme Judicial Court of Massachusetts (SJC) took the position that mandatory *and* discretionary sentences of LWOP under Massachusetts General Laws chapter 265, Section 2 shall no longer apply to juveniles and violate Article 26 of the Massachusetts Declaration of Rights.[12] As a result, individuals currently serving LWOP sentences following a homicide conviction as a juvenile are now eligible for parole if they have served a term of at least fifteen years.[13] In issuing this historic relief, the SJC noted the broader protections afforded to citizens under Article 26, yet discussing its similarity to the Cruel and Unusual Punishment clause of the Eighth Amendment.[14] The SJC, however, failed to parse why Article 26 offers these heightened protections, and in failing to do so the court erred in proscription of discretionary LWOP sentences for the most heinous of juvenile offenses.[15]

This Note will examine the relationship between the Legislature and state courts in sentencing criminally convicted juveniles.[16] This Note will also seek to clarify perceptions as to the current state of the law behind the mandatory sentencing of minors; the concept of individualized assessment; and the

8. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 283-84 (Mass. 2013) (noting brain development stages of juvenile offenders and necessary assessment before sentencing).

9. *See id.* at 287 (Lenk, J., concurring) (analyzing individual considerations weighed in juvenile sentencing). There are certain characteristics that render youth different from their adult counterparts: "[I]mmaturity, impetuosity, and failure to appreciate risks and consequences" are among them. Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012).

10. 132 S. Ct. 2455 (2012).

11. *Id.* at 2475 (holding mandatory sentencing schemes do not allow judges to consider mitigating circumstances for juveniles); *see* U.S. CONST. amend. VIII (delineating certain punishments as cruel and unusual).

12. *See Diatchenko*, 1 N.E.3d at 286-87 (explaining Diatchenko's life sentence as still in effect, but now eligible for parole consideration); *see also* Commonwealth v. Brown, 1 N.E.3d 259, 265-70 (Mass. 2013) (remanding Brown's case for sentencing in accordance with *Diatchenko*).

13. *See Diatchenko*, 1 N.E.3d at 286 (establishing Diatchenko's thirty-one years served makes him eligible for parole immediately); *see also* Commonwealth v. Brown, 1 N.E.3d 259, 260, 269 (Mass. 2013) (recognizing inconsistency in sentencing both classes of juvenile murderers with new fifteen year parole eligibility).

14. *See Diatchenko*, 1 N.E.3d at 282-84 (explaining court's ability to interpret state constitutional protections more broadly than federal counterparts).

15. *See id.* at 283-84 (holding LWOP unconstitutional under Article 26).

16. *See infra* Part II.A.1.b (explaining legislative enactments in juvenile justice system); *infra* Part II.B.1 (describing legislative lawmaking in criminal sector); *infra* Part II.B.2 (elucidating court system's role in juvenile lawmaking); *infra* Part II.B.3 (outlining interaction of Legislature and court in lawmaking).

disparities between trying an adult and, alternatively, a child under the age of eighteen.[17] Finally, this Note will analyze the extended protections created under Article 26 and the SJC's scrutiny of the Massachusetts General Court's (MGC) sentencing schemes.[18]

II. HISTORY

A. A Brief History of the Juvenile Justice System

In the United States, Illinois first introduced the concept of the juvenile court in 1899.[19] Since then, the implementation of a juvenile court system has spread across the country.[20] Legislatures based the inception of juvenile courts on the premise that society owed a child offender more than just a verdict; society owed the child offender guidance toward a better life outcome through rehabilitation and clinical perspective.[21] In recent years, these original motives have blurred due to media hype and political crackdowns, often resulting in sentences for juveniles that are not unlike those imposed on adults.[22]

1. Juvenile Courts and Sentencing

a. Standards for Separation of Juvenile and Adult Courts

Before the creation of juvenile courts in 1899, children were often severely

17. *See infra* Part II.C (noting mandatory imposition of juvenile sentences and dissolution thereof).

18. *See infra* Part II.D (explaining Article 26 of Massachusetts Declaration of Rights and analysis); *infra* Part III (analyzing SJC's application of Article 26 and decision of unconstitutionality).

19. *See In re* Gault, 387 U.S. 1, 14 (1967) (observing juvenile courts established in 1899); Akin Adepoju, Note, *Juvenile Death Sentence Lives On . . . Even After* Roper v. Simmons, 2 S. NEW ENG. ROUNDTABLE SYMP. L.J. 259, 263 (2007) (describing timeline of adoption of juvenile court); Sara E. Fiorillo, Note, *Mitigating After* Miller*: Legislative Considerations and Remedies for the Future of Juvenile Sentencing*, 93 B.U. L. REV. 2095, 2099 (2013) (articulating implementation of juvenile court system).

20. *See In re Gault*, 387 U.S. at 14 (explaining rise and development of American juvenile justice system); FREDERIC L. FAUST & PAUL J. BRANTINGHAM, JUVENILE JUSTICE PHILOSOPHY 1 (1974) (analyzing development of juvenile system philosophy); Adepoju, *supra* note 19, at 263-64 (explaining juvenile court's structure as different than "'regular' criminal court"). Juvenile courts consisted of practice solely in matters involving criminal juveniles. *See also* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 3 (2d ed. 2003) (detailing terms "infant" and "modern terms 'minor,' 'juvenile,' or 'child'" as under majority age). The federal court system followed thereafter in 1906. *See* Fiorillo, *supra* note 19, at 2099 (addressing federal adoption of juvenile justice system).

21. *See* Adepoju, *supra* note 19, at 262-65 (discussing age distinctions for certain activities because of juvenile "capacity"); *see also* MARY CLEMENT, THE JUVENILE JUSTICE SYSTEM: LAW AND PROCESS 19 (1997) (noting characteristics of juvenile system include "informal procedures," "court of no record" and private proceedings); Fiorillo, *supra* note 19, at 2098 (explaining reformation of juveniles dates back to English common law).

22. *See* Adepoju, *supra* note 19, at 264-66 (analyzing "get tough on juvenile crime" approach). It is well-known juveniles are capable of, and indeed do, commit heinous crimes, but implementation of mandatory minimum sentences may still be considered "harsh." *Id.*; *see also* Commonwealth v. Dale D., 730 N.E.2d 278, 280-81 (Mass. 2000) (describing reduction or elimination of previously afforded protections for delinquent children).

punished for crimes commonly considered inconsequential.[23] By progressively recognizing the developing maturity of juveniles, courts began to appreciate that a juvenile's decreased culpability, coupled with their greater ability to change, required an analysis of the inherent differences between juvenile and adult offenders.[24] From this analysis, courts concluded that they should withhold from juveniles many procedural rights commonly afforded to adults, such as bail, indictment by grand jury, public trial, and trial by jury; instead the court was to act in the best interests of the child, determining procedural outcomes on his behalf.[25] Courts contended that their duty was to govern the child and not overlook his indiscretion, to guide him back onto the path of appropriate behavior by acting in the interest of a parent and yet not violating the child's rights, for a child does not have a true right to liberty, but does have one to custody.[26] Such an approach was not without criticism, however, as Justice Fortas announced in *Kent v. United States*[27] his concern that removing a child's procedural rights veritably affords the child offender fewer protections than an adult offender, and strips the child of essential attention and rehabilitative care.[28]

The Supreme Court's decision in *In re Gault*[29] now guides the modern juvenile justice system.[30] This landmark decision, along with precedent guidance from *Kent*, gave new light to a more formal criminal procedure for juveniles, but still allowed for a waiver to the adult system.[31] The Court in

23. *See* FAUST & BRANTINGHAM, *supra* note 20, at 42-43 (telling adage of young boy executed in London).

24. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (indicating underdeveloped maturity and sense of responsibility of juveniles); *see also* CLEMENT, *supra* note 21, at 19 (explaining concept of "personalized justice" for juveniles).

25. *See In re Gault*, 387 U.S. at 15-16 (detailing burden of parens patriae placed on state in criminal proceeding). The state will often act as a "parent" in the absence of such a figure or during a lack of stability in a juvenile's life. *See* GARDNER, *supra* note 20, at 12 (outlining state's responsibilities as parens patriae); *see also* DEAN J. CHAMPION, THE JUVENILE JUSTICE SYSTEM: DELINQUENCY, PROCESSING, AND THE LAW 25-27 (Kim Davies et al. eds., 3d ed. 2001) (highlighting original and modern adaptations of parens patriae). The goal of the juvenile justice system is to guide the child's development. *See* Adepoju, *supra* note 19, at 263.

26. *In re Gault*, 387 U.S. at 17-18 (analyzing substitutes for procedure). The Supreme Court reasoned that children did not always receive carefully considered and individualized treatment, but rather arbitrary procedures. *See id*. at 18-19. These proceedings were often considered civil rather than criminal, seemingly negating the need for the procedural protections of a criminal trial. *See id.* at 17.

27. 383 U.S. 541 (1966).

28. *Id.* at 556; *see also* CLEMENT, *supra* note 21, at 20 (quoting Justice Fortas's warning in *Kent*).

29. 387 U.S. 1 (1967).

30. *See id.* at 26-27 (analyzing juvenile justice system's ideals and actualities); *see also* FRANK W. MILLER ET AL., THE JUVENILE JUSTICE PROCESS: CASES AND MATERIALS 1 (4th ed. 2000) (recognizing *In re Gault* as modern standard for juvenile adjudication). Congress enacted the Juvenile Justice and Delinquency Prevention Act of 1974, leading to the implementation of the Office of Juvenile Justice and Delinquency Prevention with the intent to foster judicial protections for minors. *See* Fiorillo, *supra* note 19, at 2100 (explaining governmental installments intended to help facilitate juvenile adjudication).

31. *See* CLEMENT, *supra* note 21, at 20 (noting landmark cases for juvenile system procedure); *see also Kent*, 383 U.S. at 556-57 (assessing statutory rights of juveniles). Waiver provisions for serious juvenile

Gault held that the "reasonable doubt" standard afforded to adults must also be applied to juveniles because delinquency adjudication is a true criminal proceeding and loss of liberty is still at stake.[32]

There are three types of dispositions available to the judge in a juvenile proceeding.[33] The first, nominal dispositions, are verbal warnings or reprimands, and are the least punitive of the three dispositions.[34] The next category, conditional dispositions, include probationary plans in which the youth is directed to complete specified conditions during an allotted time period, ranging from months to several years.[35] Finally, judges may also impose custodial dispositions.[36] There are two types of custodial dispositions: nonsecure custody or secure custody.[37] Nonsecure custody dispositions place juveniles in group homes, foster care, or other rehabilitation settings until the court can make more permanent, superior arrangements for the child.[38] Secure custody is considered a last resort for sentencing, as it results in youth offenders living in secure facilities, which correlates closely with incarceration.[39]

b. Sentencing of Juvenile Offenders

The sentencing of a juvenile offender focuses on rehabilitation and individualized determinations relating to the specific characteristics of the minor delinquent.[40] As the Supreme Court has noted, "[j]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a

crimes are available and applicable in almost every state. *See* Cassandra S. Shaffer, Comment, *Inequality Within the United States Sentencing Guidelines: The Use of Sentences Given to Juveniles by Adult Criminal Court as Predicate Offenses for the Career Offender Provision*, 8 ROGER WILLIAMS U. L. REV. 163, 179 (2002). In transferring youth into the adult system, a judge must make written findings of his or her decision to make the transfer dependent upon the child's rehabilitation proclivities. *See* Commonwealth v. Harold H., 682 N.E.2d 1369, 1371 (Mass. App. Ct. 1997) (explaining judicial waiver of juvenile to adult court).

32. *In re* Gault, 387 U.S. 1, 36 (1967) (holding delinquency subjects juveniles to loss of liberty comparable to felony prosecution); *see also In re* Winship, 397 U.S. 358, 365-67 (1970) (assessing juvenile due process rights as similar to those afforded adults). After *Winship*, juvenile courts must hold the prosecution to the highest standard of proof—beyond a reasonable doubt—against a defendant, just as in the adult criminal courts. *See id.* at 368; *see also* CLEMENT, *supra* note 21, at 56 (commenting on *Winship* decision's impact on juvenile adjudication system).

33. *See* CHAMPION, *supra* note 25, at 112-14 (analyzing available punishments for guilty juvenile offenders).

34. *See id.* at 112 (defining punishments under nominal disposition category).

35. *See id.* at 113 (outlining conditional dispositions and potential requirements under this category).

36. *See* CHAMPION, *supra* note 25, at 114 (describing types of custodial dispositions).

37. *See id.* (analyzing nonsecure and secure custody differences).

38. *See id.* (discussing purpose of preliminary group settings for juvenile delinquents).

39. *See id.* (explaining severity of secure custody option); *see also* GARDNER, *supra* note 20, at 302 (emphasizing secure confinement disposition for juveniles as most restrictive).

40. *See* FAUST & BRANTINGHAM, *supra* note 20, at 231 (noting individualized determinations essential in juvenile sentencing); *see also* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 378 (2014) (analyzing vulnerability and susceptibility of juveniles).

youthful defendant be duly considered" in analyzing culpability.[41] The purpose of an individualized determination turns on the notion that a juvenile's character has yet to fully develop.[42] A court, therefore, must weigh individual factors of character to determine if the juvenile's lack of maturity contributed to the offense or if he or she suffers from "irreparable corruption."[43] Juveniles are deemed to possess a greater propensity for change than adults, and thus rehabilitation is often a more appropriate solution.[44]

Due to high violent-crime rates in the early 1990s, legislatures enacted "tough-on-crime" measures throughout the country.[45] These initiatives prompted courts to employ a more punitive approach to juvenile sentencing, resulting in the concept of "'adultified' juvenile offenders."[46] In the wake of the "tough-on-crime" approach, mandatory minimum sentences, including LWOP punishments, started to appear in courtrooms across the United States; there was also an increase in waivers to adult court, which sent juveniles into the realm of the adult system of punishment.[47] The recent trend in fewer harsh LWOP sentences is reflective of decisions to relax the previously tough sentencing schemes.[48] In leaning toward accountability, instead of strict punishment, courts are returning to schemes centered on rehabilitation, and

41. Eddings v. Oklahoma, 455 U.S. 104, 116 (1982). The Court described the purpose behind its holdings preceding *Miller* as establishing the ability of a court to evaluate youthful qualities that may mitigate imposing harsh punishments. *See* Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012). The Court continued to elaborate on its reasoning in stating, "[Y]outh is more than a chronological fact." *Eddings*, 455 U.S. at 115. Youth is comprised of immaturity and irresponsibility, "impetuousness and recklessness." Johnson v. Texas, 509 U.S. 350, 368 (1993). Emotional and mental development of minors is "'particularly relevant'—more so than it would have been in the case of an adult offender." *Id.*

42. *See Miller*, 132 S. Ct. at 2467 (stating mandatory sentences do not defer to underdeveloped characteristics of young people).

43. Russell, *supra* note 40, at 378 (discussing Supreme Court holdings in *Roper v. Simmons* and *Graham v. Florida*); *see also Miller*, 132 S. Ct. at 2469 (delineating between immature juveniles and those deemed "irreparabl[y] corrupt[]").

44. *See* Graham v. Florida, 560 U.S. 48, 68 (2010) (comparing fundamental differences between juvenile and adult minds); *see also* Commonwealth v. Clint C., 715 N.E.2d 1032, 1038 (Mass. 1999) (describing purpose behind enactment of Youthful Offender Act).

45. *See* Fiorillo, *supra* note 19, at 2100 (describing "tough on crime" legislation for juvenile offenses).

46. *See id.* at 2100-01 (noting enactment of severe penalties and LWOP sentences for juveniles); *see also* FAUST & BRANTINGHAM, *supra* note 20, at 231 (analyzing goals and failures of juvenile courts).

47. *See* Fiorillo, *supra* note 19, at 2100-02 (describing changing views on juvenile sentencing in 1990s and attempts to return to rehabilitation); *see also* Shaffer, *supra* note 31, at 179-87 (explaining judicial waiver provisions and differences between jurisdictions). Until the 1980s, LWOP sentences for juvenile offenders were few and far between, until higher rates of crime and reactive politics incited more transfers from juvenile to adult courts. *See* Morgan S. Mcginnis, Note, *Sentenced To Die in Prison: Life Without Parole as an Eighth Amendment Violation for All Juveniles and Especially Those Who Have Not Killed*, 11 HASTINGS RACE & POVERTY L.J. 201, 204 (2014). From 1962 to 1981 an average of two juveniles received LWOP sentences annually. *See id.* In 1996, that number increased to 152. *See id.* The rate has continued to increase since 1996. *See id.*

48. *See* Fiorillo, *supra* note 19, at 2100-02 (analyzing post-1990 reformation of juvenile sentencing structures).

alternatives to punitive incarceration.[49]

B. State Powers for Sentencing

1. The Legislature

Around the late nineteenth century, state legislatures utilized their power to enact criminal laws.[50] Subsequently, courts commonly recognized that it was the Legislature's prerogative to define crimes and set penalties.[51] The Legislature is afforded primacy in creating and enacting criminal laws—a responsibility that is not to be impeded unless extenuating circumstances demand otherwise.[52] The legislative lawmaking power, however, must yield to federal and state constitutional law, despite the fact that federalism provides for state's individual authority to create and regulate its criminal laws.[53]

2. The Courts

While the Legislature creates and enacts laws, it is ultimately the role of the Judiciary to enforce those laws during the adjudication process and, in turn, decide upon appropriate punishment.[54] During the adjudication process, courts

49. *See id.* (explaining relaxed stricture on juvenile adjudicates in sentencing).

50. *See* DRESSLER & GARVEY, *supra* note 6, at 4 (discussing legislative power of states to define criminal conduct and responsibility).

51. *See* Commonwealth v. Brown, 1 N.E.3d 259, 266 (Mass. 2013) (outlining role of Legislature in establishing punishments for criminal acts); *see also* Commonwealth v. Pyles, 672 N.E.2d 96, 99 (Mass. 1996) (analyzing legislative role and right to create statutory law); Commonwealth v. Marcus, 454 N.E.2d 1277, 1278 (Mass. App. Ct. 1983) (explaining Legislature enacts criminal laws and sets corresponding punishments); *see generally* Coker v. Georgia, 433 U.S. 584, 593-94 (1977) (discussing capital punishment laws enacted in states following federal invalidation of many death penalty statutes).

52. *See* Weems v. United States, 217 U.S. 349, 379 (1910) (demonstrating scope and importance of state legislative power). "The function of the legislature . . . is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety." *Id.* When there is a question of constitutionality, the judicial branch may step in and enact or rewrite law. *See id.* at 376. A court, however, may not disturb provisions of state statutes that do not fall within the questioned rule of law. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 285-86 (Mass. 2013) (noting constitutional parts of legislation remain effective and rest parsed out); Bos. Gas Co. v. Dep't of Pub. Utils., 441 N.E.2d 746, 752 (Mass. 1982). It is the role of the Legislature to determine criminal acts and set penalties to ensure compliance and retribution to society. *See Diatchenko*, 1 N.E.3d at 285; *see also* DRESSLER & GARVEY, *supra* note 6, at 4-5 (analyzing role of state legislatures to enact criminal laws).

53. *See* DRESSLER & GARVEY, *supra* note 6, at 4 (recognizing Legislature articulates definition of crimes before their commission and judges impose punishments following). Inherent tension will always exist between the Legislature's lawmaking authority and courts' power to affect law; however, federalism reinforces the state's legislative powers in lawmaking. *See id.* Both federal and state courts, however, still retain considerable authority in making criminal law. *See id.*; *see also Weems*, 217 U.S. at 378-79 (discussing constitutional limits to legislative power); RICHARD NEELY, HOW COURTS GOVERN AMERICA 5 (1981) (discussing Legislature's power to change all law aside from constitutional law).

54. *See* MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2014) (discussing legislative intent toward severability in construing statutes); *Weems*, 217 U.S. at 378-79 (explaining Judiciary's duty in constitutional limitation situations); DRESSLER & GARVEY, *supra* note 6, at 4-5 (explaining courts powers in light of legislative enactments).

interpret criminal statutes passed by the Legislature and create "presumptions" when resolving crucial statutory ambiguities during trial.[55] State courts have the freedom, and are often encouraged, to expand the scope of rights given to their citizens through state constitutional constructions; this includes rights relating to criminal defendants.[56]

Many view the American judicial system as the guiding force enabling our country to thrive; all questions of law and punishment are decided exclusively on the evidence presented at trial and following relevant rules.[57] The court also has a responsibility to use the law and its processes to determine sentences when legislative enactment has not yet created them.[58] State courts may give "broader effect to new rules of criminal procedure" when such rules are handed down.[59] Courts, therefore, possess significant discretion where the Legislature is silent.[60]

3. Interaction of the Legislature and the Court's Law and Sentencing Powers

The American judicial system is keenly aware of legislative authority, especially when the law concerns individual conduct.[61] At times, however, courts overstep into the territory of the legislative branch and impede on its authority to draft laws and corresponding punishments.[62] Over time, courts

55. DRESSLER & GARVEY, *supra* note 6, at 5 (recognizing courts resolve disputes in sentencing phase).

56. *See* MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 5 (1999) (discussing "'new judicial federalism'" and focus on state courts after Justice Brennan); *see also* Commonwealth v. Upton, 476 N.E.2d 548, 556-57 (1985) (establishing two-pronged analysis for probable cause in Massachusetts); Commonwealth v. Upton, 458 N.E.2d 717, 720 (1983) (rejecting Supreme Court analysis for probably cause). The Supreme Court, however, does not always take kindly to explicit rejection of their analyses and opinions. *See* Massachusetts v. Upton, 466 U.S. 727, 732 (1984) (explaining Massachusetts SJC's misunderstanding of *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)).

57. *See* CARROL D. KILGORE, JUDICIAL TYRANNY: AN INQUIRY INTO THE INTEGRITY OF THE FEDERAL JUDICIARY 12 (1977) (explaining significance of Judiciary in matters of law and scope of trial court powers). "Indeed, one could describe the American judiciary as the priesthood of the American civilization." *Id.* The Judiciary is viewed in a light of truthfulness and respect, a higher authority in which we entrust our most valuable possession: our freedom. *See id.*

58. *See* Commonwealth v. Brown, 1 N.E.3d 259, 266 (Mass. 2013) (explaining court's authority to make sentencing law in absence of legislative action); *see also* Teague v. Lane, 489 U.S. 288, 315-16 (1989) (discussing retroactivity of new law and when it may apply).

59. Danforth v. Minnesota, 552 U.S. 264, 266 (2008) (outlining court authority under *Teague* for retroactive application of new laws).

60. *See generally supra* note 54 and accompanying text (noting judicial authority in absence of legislative enactment).

61. Commonwealth v. Dunn, 680 N.E.2d 1178, 1182 (Mass. App. Ct. 1997) (describing great deference courts give to legislative intent and structuring). America's courts are careful in second-guessing the decisions of the Legislature in what conduct it determines should be criminalized and sanctioned. *See id.* The Legislature is directly responsible for preserving and protecting orderly society's community ideals. *See id.*

62. *See* Michael Walton, Note, *Like Taking Candy from a Baby: The Effects of Removing Juvenile Sentencing Authority from the Legislature*, 45 U. TOL. L. REV. 675, 676-77 (2014) (analyzing Supreme Court's tendency to intervene with law enactment defiant of separation of powers); *see also* KILGORE, *supra* note 57, at 13 (describing how courts often change social policy absent legislative action).

have increasingly decided to edit or override the laws of elected officials and seemingly have taken on the role of lawmakers.[63]

As society advances change is inevitable, and judicial decisionmaking cannot ignore social influences reflective of such changing attitudes and community norms; this often results in judgments that do not coincide with an application of law as originally enacted.[64] In the view of many scholars, therefore, the Supreme Court, and not the Legislature, has the final say on what any piece of legislation signifies because the Court is the true "guardian[] of individual freedom."[65]

C. Dissolving Mandatory Sentencing for Juvenile Offenders

1. Miller *and the Supreme Court Decision*

Before *Miller*, in 2005, the Supreme Court took on the juvenile death penalty in its landmark decision of *Roper v. Simmons*.[66] *Atkins v. Virginia*,[67] had previously abolished the death penalty for those deemed mentally disabled and the Court in *Roper* rendered a similar ruling that juveniles also lack the requisite mental capacity to justify the use of the death penalty.[68] The decision in *Roper* set a standard regarding sentencing that juveniles must be treated differently from their adult counterparts.[69] Five years later, in *Graham v.*

63. *See* NEELY, *supra* note 53, at 7 (indicating phenomenon of appointed officials performing elected officials' duties). It is important to note the implications of a domineering judicial branch, as it ultimately leaves no one accountable; elected officials receive the societal vote, but judges with tenure make the rules. *See id.*

64. *See* KILGORE, *supra* note 57, at 13 (expounding upon court's reliance on social influence in judgment rendering); *see also* Walton, *supra* note 62, at 679 (analyzing juvenile case judgment relating to future legislative authority).

65. WILLIAM J. QUIRK, COURTS & CONGRESS: AMERICA'S UNWRITTEN CONSTITUTION 28 (2008) (internal citations omitted) (analyzing how Supreme Court has constructive final say in legislative enactments); *see also* Walton, *supra* note 62, at 679 (noting Supreme Court abandons deference to legislative adoption of law in some instances).

66. 543 U.S. 551, 567-68 (2005) (analyzing constitutionality of juvenile death penalty punishment); *see* Fiorillo, *supra* note 19, at 2102-03 (discussing capital punishment for juveniles unconstitutional).

67. 536 U.S. 304 (2002).

68. *See Roper*, 543 U.S. at 568-71 (holding juvenile death sentences unconstitutional under Eighth Amendment). The Court determined that, like the mentally disabled, juveniles' "diminished culpability" renders death penalty nonequivalent to the crime; a child's "youth and maturity" lessens blameworthiness. *See id.* The Court recognized the same reasoning would also apply to why deterrence may not have as much of an impact on juveniles. *See id.*; Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) (noting unlikelihood of teen offenders making "cost-benefit analysis" before committing crime). The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The *Roper* Court's interpretation of the Eighth Amendment prohibits sentencing juveniles to death, and *Roper's* application extends to the states through the Due Process Clause of the Fourteenth Amendment. *See Roper*, 543 U.S. at 578-79 (holding Eighth and Fourteenth Amendments forbid death penalty for juvenile offenders).

69. *See* Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *&* Miller v. Alabama, 82 FORDHAM L. REV. 3439, 3447 (2014) (explaining *Roper's* effect on juvenile sentencing). The Court determined three characteristics of

Florida,[70] the Court further acknowledged the disparate treatment in sentencing structures of juveniles and adults.[71] In *Graham*, the Court analyzed the LWOP penalty for juvenile nonhomicide offenses, describing the penalty as a forfeiture of the offender's life that is irreversible.[72] Thus, the *Graham* Court declared sentences of LWOP for juvenile, nonhomicide offenders unconstitutional under the Eighth Amendment.[73]

The decisions in *Roper* and *Graham* weighed heavily on the outcome of *Miller*, where the Supreme Court, once again, considered LWOP sentences for juvenile offenders.[74] In *Miller*, however, the Court narrowed its focus to exclusively homicide offenses.[75] Using *Roper* and *Graham* as guidance, the *Miller* Court declared mandatory LWOP sentences for all juvenile offenders, including homicide offenders, unconstitutional under the Eighth Amendment.[76] The Court's reasoning was grounded in the need to consider mitigating circumstances, such as age, maturity, and other factors of youth, when imposing such severe sentences on juveniles.[77]

juveniles must be taken into consideration when sentencing: "immatur[ity] and irresponsib[ility]"; their vulnerability "to negative influences and outside pressures"; and "underdeveloped character." *Id.* at 3448. In analyzing these characteristics of youth offenders, the Court reasoned juveniles have a greater ability to reform. *See id.*

70. 560 U.S. 48 (2010).

71. *See id.* at 65-70 (evaluating harsh juvenile laws throughout America).

72. *See id.* at 69-70 (describing effect of LWOP sentences). The Court deemed LWOP the harshest penalty, second only to the death penalty, which the law allows. *See id.* The Court considered justifications for sentences, including retribution, deterrence, incapacitation, and rehabilitation, ultimately determining that none provided sufficient reason to sentence a juvenile to LWOP for a nonhomicide offense. *See id.* at 71-74 (explaining typical justifications for sentences not applicable to minors). Proportionality of the punishment in relation to the crime is the focus of the Eighth Amendment. *Id.* at 59; *see also* Scavone, *supra* note 69, at 3447 (highlighting special analogy between death sentences and LWOP sentences for juveniles). Capital punishment and LWOP sentences are not so far attenuated to amount to loss of life or liberties. *See* Scavone, *supra* note 69, at 3449.

73. *See Graham*, 560 U.S. at 82 (holding juvenile nonhomicide LWOP sentences unconstitutional).

74. *See* Miller v. Alabama, 132 S. Ct. 2455, 2458-59 (2012) (explaining Court's use of precedent juvenile law decisions).

75. *See id.* at 2463-64, 2475 (discussing mandatory LWOP sentences for juvenile homicide offenders); Walton, *supra* note 62, at 676 (noting Supreme Court's decision in *Miller* to ban mandatory LWOP sentences for juveniles); *see also* Scavone, *supra* note 69, at 3447 (acknowledging reliance on *Roper* and *Graham* in *Miller* decision); Fiorillo, *supra* note 19, at 2105-13 (analyzing *Miller*).

76. *See Miller*, 132 S. Ct. at 2475 (indicating courts must engage in analysis of mitigating circumstances when sentencing juveniles); Fiorillo, *supra* note 19, at 2105 (analyzing possible implications of *Miller* decision). Mandatory sentences, such as juvenile LWOP for homicide offenses in Alabama, constrained judges to only one option and did not allow for consideration of mitigating circumstances. *See Miller*, 132 S. Ct. at 2462-63 (emphasizing difficulty stemming from Alabama's mandatory LWOP imposition).

77. *See Miller*, 132 S. Ct. at 2467 (stating considering youth mitigating factors necessary during sentencing). There are two lines of precedent analyzed when conducting proportionality review under the Eighth Amendment. *See id.* at 2458. The first line of precedent is a categorical ban of sentences that creates a "mismatch" between offender's culpability (based on class) and the harshness of the penalty. *See id.* at 2463. The second line of precedent stems from death penalty case review, and creates a prohibition of mandatory imposition of capital punishment, forcing authorities to take mitigating factors and characteristics of the individual offender into account. *See id.* By analyzing and combining the underlying purpose for these two

Unlike *Graham*, which banned all LWOP for nonhomicide offenses, the *Miller* Court did not ultimately ban LWOP for juvenile homicide offenders, but rather banned mandatory imposition of LWOP.[78] The Court's primary objective was to allow for discretion in sentencing where appropriate.[79] The Court viewed the mandatory imposition of LWOP to be at odds with the juvenile sentencing purpose and used this reasoning to establish the requirement that individual characteristics of youth be used to determine juvenile sentences.[80]

2. Diatchenko *and* Brown*: Massachusetts SJC Strikes Down LWOP for Juvenile Offenders*

In 2013, the SJC took on LWOP sentences for juvenile homicide offenders with two cases, *Diatchenko v. District Attorney for the Suffolk District*[81] and *Commonwealth v. Brown*.[82] In the wake of the Supreme Court's decision in

lines of precedent, the Court reached the decision that mandatory LWOP sentences for juvenile offenders violate the Eighth Amendment. *See id.* Justice Kagan wrote in great detail about the opportunities greatly missed when the law imposes mandatory sentences, such as the opportunity to reform and rehabilitate youth capable of leading a better life. *See id.* at 2468 (reiterating necessity of rehabilitation of youth offenders). According to Justice Kagan, without considering youth, there is greater risk for imposing disproportional punishment. *See id.* at 2469. *Accord Graham*, 560 U.S. at 77-78 (declaring importance of evaluating mitigating factors of youth); Roper v. Simmons, 543 U.S. 551, 569-74 (2005) (analyzing youth factors in determining sentences of death); Johnson v. Texas, 509 U.S. 350, 364-65 (1993) (discussing importance of considering mitigating evidence in sentencing); *see also* Scavone, *supra* note 69, at 3454 (explaining emphasis on "'mitigating factors of youth'"); Krisztina Schlessel, Note, Graham's *Applicability to Term-of-Years Sentences and Mandate To Provide a "Meaningful Opportunity" for Release*, 40 FLA. ST. U. L. REV. 1027, 1032-34 (2013) (assessing *Graham* Court's evaluative requirements of youth). By ignoring age and characteristics associated with age, mandatory imposition of LWOP sentences are directly contrary to Eighth Amendment protections. *See Miller*, 132 S. Ct. at 2475; Scavone, *supra* note 69, at 3454 (analyzing failure of Eighth Amendment proportionality test).

78. 132 S. Ct. at 2469 (banning mandatory LWOP sentences for juvenile homicide offenders). "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*; *see also* Scavone, *supra* note 69, at 3441 (discussing prohibition of mandatory LWOP sentences for juveniles). This decision, however, did not ban virtual LWOP sentences—those with terms that impose lengths of incarceration that equate to life without parole. *See* Scavone, *supra* note 69, at 3442-43 (noting possibility for term-of-years sentence to add up to life).

79. *See* Scavone, *supra* note 69, at 3453 (explaining lack of "discretionary tactics" used in mandatory sentencing practices); *see also Miller*, 132 S. Ct. at 2467-69 (discussing Court's intention to implement individualized determination hearings for juvenile sentencing).

80. *See Miller*, 132 S. Ct. at 2468 (noting mandatory sentencing schemes ignore meaningful characteristics of youthful offenders); *see also* State v. Riley, 58 A.3d 304, 313-14 (Conn. App. Ct. 2013), *cert. granted*, 61 A.3d 531 (Conn. 2013) (assessing whether mitigating factors for 100-year conviction constitutional); State v. Lockheart, 820 N.W.2d 769, at *3 (Iowa Ct. App. 2012) (reassessing mandatory imposition of LWOP for juvenile offenders); *see generally* Stephen K. Harper, *Resentencing Juveniles Convicted of Homicide Post-Miller*, NAT'L ASS'N OF CRIM. DEF. LAW. (Mar. 2014), http://www.nacdl.org/Champion.aspx?id=32657 [http://perma.cc/Q4W6-QKE2] (pointing to youthful factors to consider in sentencing proceedings).

81. 1 N.E.3d 270 (Mass. 2013).

82. 1 N.E.3d 259 (Mass. 2013).

Miller, the SJC had to address what effect the *Miller* decision would have on juveniles sentenced to mandatory LWOP in Massachusetts.[83] In Massachusetts, the sentencing scheme for murder in the first degree provided that LWOP *must* be imposed on any defendant over the age of fourteen.[84]

a. Diatchenko v. District Attorney for the Suffolk District

In *Diatchenko*, the SJC confronted the issue of whether the mandatory sentence of LWOP in Massachusetts should apply to a juvenile convicted of first-degree murder.[85] A jury convicted Gregory Diatchenko of first-degree murder, as a juvenile, on the theories of premeditation, extreme atrocity and cruelty, and felony murder, in a murder that occurred in the course of an armed robbery.[86] The court sentenced Diatchenko to LWOP, under the mandatory imposition of the Massachusetts sentencing laws at that time; the law provided that a sentence of life in state prison applied to *anyone* guilty of first-degree murder.[87] The SJC affirmed Diatchenko's conviction and sentence on direct appeal, rejecting claims of Eighth and Fourteenth Amendment violations, as well as alleged violations of Article 26 of the Massachusetts Declaration of Rights.[88] In reexamining Diatchenko's case after *Miller*, the SJC decided that *all* LWOP sentences for juvenile offenders violated Article 26 of the Massachusetts Declaration of Rights, whether mandatory or discretionary; this decision effectively abolished the denial of parole eligibility for juvenile

83. *See Brown*, 1 N.E.3d at 261 (holding LWOP sentences for juveniles in Massachusetts impermissible after *Miller*); *Diatchenko*, 1 N.E.3d at 275-81 (analyzing *Miller* Court's decision and its impact on Massachusetts sentencing). To establish the difference between first and second-degree murder, the definition for murder in Massachusetts provides:

> Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

MASS. GEN. LAWS ANN. ch. 265, § 1 (West 2015). Penalties for murder, in both degrees, are set forth in MASS. GEN. LAWS ANN. ch. 265, § 2. *See infra* note 87 and accompanying text (explaining Massachusetts's murder penalty statute).

84. *See Brown*, 1 N.E.3d at 261 (analyzing Massachusetts's mandatory sentencing for first-degree murder).

85. *See Diatchenko*, 1 N.E.3d at 275-76 (discussing implications of *Miller* on Diatchenko's sentence).

86. *See id.* (describing Diatchenko's verdict and conviction). Seventeen-year-old Gregory Diatchenko stabbed Thomas Wharf nine times on May 9, 1981. *See id.* at 274.

87. *See id.* at 274 (outlining sentencing of offender for first-degree murder); *see also* MASS. GEN. LAWS ANN. ch. 265, § 2 (West 2014), *invalidated in part by* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270 (Mass. 2013) (explaining terms of sentencing for murder in Massachusetts).

88. *See Diatchenko*, 1 N.E.3d at 274-75 (explaining finality of Diatchenko's conviction); Commonwealth v. Diatchenko, 443 N.E.2d 397, 404 (Mass. 1982) (affirming Diatchenko's first-degree murder conviction). When Diatchenko's conviction became final, the issue of mandatory sentencing of juveniles to LWOP was not in front of either state or federal court. *See id.* at 279.

homicide offenders in Massachusetts.[89]

b. Commonwealth v. Brown

The same day the SJC decided *Diatchenko*, the court also ruled on a second case concerning a juvenile with the potential to receive an LWOP sentence.[90] A jury convicted seventeen-year-old Marquise Brown of first-degree murder for killing Tyriffe Lewis.[91] The procedural difference between *Brown* and *Diatchenko* is that Brown was awaiting trial when the *Miller* decision came down, whereas Diatchenko was sentenced years before under the Massachusetts mandatory sentencing scheme.[92] After a guilty verdict, the judge stayed Brown's sentencing until the court could better determine the implications of the *Miller* decision.[93]

c. Retroactivity of Miller

In developing case law, the Supreme Court recognized how new decisions could affect preexisting state convictions.[94] The Court laid the foundation for determining retroactivity of newly imposed laws in *Stovall v. Denno*,[95] listing three criteria that must be evaluated on a case-by-case basis: the new rule's

89. *See id.* at 287 (explaining Article 26 violation and consideration for parole for juvenile homicide offenders). The SJC explained the *Diatchenko* decision does not suggest juveniles convicted of first-degree murder should be paroled unquestionably. *Id.* at 286. Instead, the court announced it was for the Massachusetts parole board to assess the mitigating factors and circumstances of the crime, including age; offender's personality and character; and actions in the time since the crime. *See id.* at 287 (discussing discretion given to Massachusetts parole board); *see also infra* Part II.D.1 and accompanying text (analyzing SJC decision of unconstitutionality of discretionary LWOP sentences for juveniles).

90. *See* Commonwealth v. Brown, 1 N.E.3d 259, 261 (Mass. 2013) (explaining reliance on *Diatchenko* decision in holding).

91. *See id.*

92. *See id.* (discussing Brown's crime and potential trial outcomes given recent decisions).

93. *See id.* at 261 (explaining trial and sentencing of Brown). After the Commonwealth's motion to report questions of law to the Massachusetts Appeals Court, the Massachusetts Superior Court judge denied the motion and set out her sentencing approach. *See id.* at 262. Lacking legislative guidance in defining requirements for a *Miller* hearing, the judge determined that LWOP could not be imposed upon Brown. *See id.* Instead, the judge used severability principles, eliminating the sentence in question, and using the remaining sentence of life with the possibility of parole—a sentence usually reserved for murder in the second degree. *See id.*; *see also infra* Part II.C.2.d (discussing severability principles). This sentence would render Brown eligible for parole in fifteen years, according to MASS. GEN. LAWS ch. 127, § 133A, which was in effect at the time of the murder. *See Brown*, 1 N.E.3d at 261. The court granted the Commonwealth's motion to stay the sentence, while also seeking relief under MASS. GEN. LAWS ch. 211, § 3, petitioning for a hearing to review error. *See id.*; *see also* MASS. GEN. LAWS ANN. ch. 211, § 3 (West 2015). As a result, the ruling left Brown without a sentence when the SJC took on the case. *See Brown*, 1 N.E.3d at 261.

94. *See generally* Linkletter v. Walker, 381 U.S. 618 (1965) (deciding Constitution does not require retroactivity of new criminal procedure decisions); Jason Mazzone, *Rights and Remedies in State Habeas Proceedings*, 74 ALB. L. REV. 1749, 1749-50 (2011) (explaining retroactivity of Supreme Court decisions on state cases).

95. 388 U.S. 293, 297 (1967), *abrogated by* Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) (detailing retroactivity application analysis).

purpose; law enforcement's dependence on the old rule; and the retroactive effect of the new rule's application.[96] Widespread confusion as to the application of new decisions to final convictions, versus convictions at the appellate stage, required more in-depth analysis and explanation relating to retroactivity.[97]

To aid in answering this call, focus shifted toward the Court's decision in *Teague v. Lane*[98] in 1989.[99] In the opinion, Justice O'Connor explained that the emerging rules of criminal procedure that the Supreme Court handed down would not apply retroactively to cases on appellate review unless a case fit one of two exceptions.[100] The first exception is that a new rule will apply retroactively if it creates law that affects private, individualized conduct because the new rule places the according conduct outside of the legislature's power.[101] In other words, the new rule creates a novel duty on behalf of the government.[102]

The second exception is if the rule is embedded in the idea of protected rights and liberties.[103] This exception applies to so-called watershed rules, which affect the fundamental fairness of criminal proceedings; this exception, however, is seen so rarely that it is often criticized as too narrow and irrelevant.[104]

Based on a *Teague* standard of review, the SJC determined *Miller*

96. *See* Mazzone, *supra* note 94, at 1750 (discussing three factors relevant to retroactivity application review); *see also Stovall*, 388 U.S. at 297 (analyzing criteria for evaluating application of new law).

97. *See* Mazzone, *supra* note 94, at 1750 (analyzing final convictions and appellate-stage convictions for retroactive application of new law).

98. 489 U.S. 288 (1989).

99. *See id.* at 304-07 (emphasizing and clarifying nonretroactivity doctrine).

100. *See id.* at 310 (discussing nonretroactive application of new criminal procedure rules and exceptions). Justice Harlan delineated the two suggested exceptions. *See id.* at 311; *see also* Whorton v. Bockting, 549 U.S. 406, 416 (2007) (explaining *Teague* framework in collateral and direct review contexts); People v. Carp, 828 N.W.2d 685, 707-15 (Mich. Ct. App. 2012) (analyzing *Teague* exceptions after *Miller* for state application). Old rules apply to cases on both direct review and collateral review, while a new rule generally applies to only those cases on direct review. *See Whorton*, 549 U.S. at 416; Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (declaring new criminal rules retroactive on direct review).

101. *Teague*, 489 U.S. at 311 (describing first narrow exception to nonretroactivity doctrine for appellate review convictions).

102. *See id.* at 301 (defining "new rule").

103. *See id.* at 311 (discussing second exception for applying new rule to collateral review convictions); *see also* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 280-81 (Mass. 2013) (explaining second retroactivity exception).

104. *See* Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 28-31 (2009) (emphasizing limited applicability of second *Teague* exception); *see also Teague*, 489 U.S. at 311-13 (explaining "watershed" rules of criminal procedure for retroactivity). "Finally, we believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313; *see also* People v. Carp, 828 N.W.2d 685, 711-13 (Mich. Ct. App. 2012) (rejecting *Miller* as watershed rule of law).

announced a substantively new rule, permitting its retroactive application to cases on collateral review.[105] In light of this decision, Diatchenko filed a petition challenging his sentence, asking the court to apply *Miller* to his case, as it also applied to Brown's pending sentence.[106] The SJC considered the fact that the Supreme Court retroactively applied *Miller*'s new rule to a companion case before it on collateral review.[107]

d. Constitutionality of Mass. Gen. Laws ch. 265, Section 2 After Miller

Before the SJC applied *Miller* retroactively, the Massachusetts penalty statute for murder provided that *any* person who commits murder in the first degree would be sentenced to LWOP, regardless of age.[108] Since the penalty statute mandated an LWOP sentence for a juvenile offender, the SJC held the statute unconstitutional, but severable, voiding the portion of the statute concerning the LWOP for "[a]ny other person."[109] The court explained that this decision falls in line with that of the Supreme Court.[110] As such, the notion that juveniles should be afforded individualized determinations stood at the forefront of the SJC's reasoning.[111] This decision, however, failed to comply with the actual purpose of the *Miller* decision: to evaluate individual characteristics of youthful offenders during hearings.[112]

As a reaction to the SJC's decisions in *Diatchenko* and *Brown*, the MGC took action by amending the murder statute to provide specific language relating to sentencing for juvenile homicide offenders.[113] This amendment

105. *See Diatchenko*, 1 N.E.3d at 281 (assessing new rule and its retroactive application to Massachusetts juvenile sentences); *see also* Commonwealth v. Brown, 1 N.E.3d 259, 262 (Mass. 2013) (stating if new criminal law handed down before finalized conviction, new law must apply); *Griffith*, 479 U.S. at 328 (analyzing application of new criminal law on sentencing).

106. *See Diatchenko*, 1 N.E.3d at 275 (applying *Miller* decision to Diatchenko's case); *Brown*, 1 N.E.3d at 262 (applying *Diatchenko* decision to Brown's case); *see also* MASS. GEN. LAWS ANN. ch. 211, § 3 (West 2015).

107. *See Diatchenko*, 1 N.E.3d at 281 (explaining considerations for retroactivity of new *Miller* rule). In *Diatchenko*, the SJC announced that a new rule should be applied to any defendant "similarly situated" to that of the defendant in the establishing case. *Id.* at 282; *see also Teague*, 489 U.S. at 300 (assessing processes of determining new rule effect).

108. *See Diatchenko*, 1 N.E.3d at 282 (analyzing constitutionality of murder penalty statute).

109. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 282 (Mass. 2013) (explaining SJC decision of violation of Eighth Amendment).

110. *See id.* (commenting on *Miller* decision for finding violation of Eighth Amendment).

111. *See id.* (explaining need for individualized hearings in juvenile sentencing).

112. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (holding sentencing judgment predicated upon evaluation of individual's juvenile characteristics). The Court did not ban discretion to implement lifetime sentences, however, they did ban the mandatory imposition and the failure to discern the characteristics of the individual that may mitigate the length of a life term. *See id.*

113. *See* MASS. GEN. LAWS ANN. ch. 265, § 2 (West 2015), *invalidated in part by* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270 (Mass. 2013). The penalties included in the nonedited version of the statute, which predated the *Diatchenko* and *Brown* decisions, noted no specific provision for juveniles relating to life imprisonment; it did, however, include a specific prohibition for the death penalty. *See id.* These previous provisions provided that juveniles under the age of eighteen, at the time of the murder, could not be

provides that juveniles—persons between the ages of fourteen and eighteen at the time of committing first-degree murder—could still receive a life sentence, but would remain eligible for parole after a court-determined term.[114]

D. Article 26: Effect and Implications

Because the Fourteenth Amendment applies to the states through the Due Process Clause, it is well established that Supreme Court decisions carry weight in the realm of both federal and state law.[115] Individual states, however, have their own constitutions that may grant more rights to their citizens, but not fewer, than the U.S. Constitution.[116] Article 26 of the Massachusetts Declaration of Rights provides almost the same rights to its citizens as those afforded under the Eighth Amendment to the U.S. Constitution.[117] Although

sentenced to death. *See id*. Although the death penalty for murder in Massachusetts was found unconstitutional in 1984, the statute was found severable and valid as to the other penalties included. *See* Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 124 (Mass. 1984) (declaring provisions of Massachusetts death penalty statute unconstitutional). Currently, as of a July 2014 legislative enactment, the amended statute provides, in part, that juveniles, those aged fourteen to eighteen, that commit first-degree murder will be sentenced to life in prison with a set number of years until they are eligible for parole. *See* MASS. GEN. LAWS ANN. ch. 265, § 2 (West 2015) (amended 2014).

114. *See* MASS. GEN. LAWS ANN. ch. 265, § 2 (West 2015) (providing valid sentencing scheme for juvenile homicide offenders after *Diatchenko* via 2014 amendment); *see also* MASS. GEN. LAWS ANN. ch. 279, § 24 (West 2015) (giving sentencing guidelines for juveniles convicted of first-degree murder). This decision did not, however, *guarantee* parole for juvenile offenders sentenced to life in prison *with* the possibility of parole. *See Diatchenko*, 1 N.E.3d at 286. Rather, *Diatchenko* guaranteed juveniles the ability to become *eligible* for parole, and once the juvenile has served the statutory term-of-years determined by the court, the Massachusetts parole board will consider granting parole. *See id.*; Commonwealth v. Brown, 1 N.E.3d 259, 268-69 (Mass. 2013) (explaining juvenile parole eligibility of those serving life with parole sentences for homicide); Stephanie N. O'Banion, Comment, *Dying in Detention: Are Life Without Parole Sentences for Juvenile Non-Homicide Offenders Always Unconstitutionally Cruel and Unusual Under the Eighth Amendment?*, 38 U. DAYTON L. REV. 449, 472 (2013) (analyzing juvenile parole eligibility issues). Chapter 119 of the Massachusetts General Laws defines juveniles as persons fourteen to eighteen years old and describes how they will be punished if convicted of either first or second-degree murder. *See* MASS. GEN. LAWS ANN. ch. 119, § 72B (West 2015). These parole hearings, however, are too late to determine the individualized characteristics by which youthful offenders are evaluated during sentencing following conviction. *See* Kevin Davis, *Those Convicted as Juveniles Who Are Serving Life Without Parole Hope the Court Will Go Back in Time*, A.B.A. J. (Sept. 1, 2015, 4:50AM), http://www.abajournal.com/magazine/article/those_convicted_as_juveniles_who_are_serving_life_without_parole_hope_the_c [http://perma.cc/73XB-UUEV] (describing multitude of issues arising after decades of incarceration).

115. *See* U.S. CONST. amend. XIV (explaining Due Process application to states).

116. *See* FRANK W. MILLER ET AL., THE POLICE FUNCTION 10-12 (7th ed. 2000) (discussing state-granted individual rights); *see also* Kimberly Thomas, *Juvenile Life Without Parole: Unconstitutional in Michigan?*, 90 MICH. B. J. 34, 34 (2011) (exemplifying states' ability to afford greater rights to state citizens). States often have provisions to their constitutions that are analogous to the U.S. Constitution. *See* MILLER ET AL., *supra*, at 10. While a state cannot restrict those rights enumerated in the U.S. Constitution, they can extend them by way of individual state constitutional provisions. *See id.*; *see also Diatchenko*, 1 N.E.3d at 282 (discussing state authority in granting broader individual rights to citizens); Arizona v. Evans, 514 U.S. 1, 8-9 (1995) (describing state court ability to interpret state constitutional construction); Michigan v. Long, 463 U.S. 1032 (1983) (noting state constitutional provision ability to extend greater rights to citizens).

117. *See* MASS. CONST. art. XXVI, pt. I (referring to cruel and unusual punishment); Commonwealth v. O'Neal, 339 N.E.2d 676, 677 n.1 (Mass. 1975) (analyzing strong resemblance of Eighth Amendment and

these constructions seem to provide the same rights, the SJC has not specifically clarified that Article 26 covers the same conduct as the Eighth Amendment.[118] Given the state's power to interpret its own individual constitution, the SJC held mandatory LWOP sentences for juveniles unconstitutional under the Eighth Amendment, in addition to declaring *all* LWOP sentences unconstitutional under Massachusetts's Article 26.[119]

1. Assessment of Discretionary LWOP Sentences for Juveniles Under Article 26

The analysis for deciding if a punishment is "cruel or unusual" under Article 26 weighs:

> (i) the nature of the offense and the offender in light of the degree of harm to society; (ii) a comparison of the challenged punishment with other punishments imposed within the State; and (iii) a comparison of the challenged punishment with punishments for the same or similar crimes in other jurisdictions.[120]

In *Opinion of the Justices to H.R.*,[121] the SJC further explained that a sentence is cruel and unusual under Article 26 when the punishment is "so disproportionate to the crime that it shocks the conscience [of the court] and offends fundamental notions of human dignity."[122]

The SJC agreed with the Supreme Court in rendering mandatory LWOP sentences for juvenile homicide offenders unconstitutional.[123] The SJC took the Supreme Court's analysis further, however, and also assessed the

Article 26); *see also Diatchenko*, 1 N.E.3d at 275 n.3 (discussing similarity between Eighth Amendment and Article 26).

118. *See* Michaud v. Sheriff of Essex Cty., 458 N.E.2d 702, 708 (Mass. 1983) (noting lack of clarity relating to scope of Article 26 as compared to Eighth Amendment); *accord* Cepulonis v. Commonwealth, 427 N.E.2d 17, 19 n.2 (Mass. 1981) (emphasizing court has never determined differences between Article 26 and Eighth Amendment).

119. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 282 (Mass. 2013) (discussing unconstitutionality of LWOP for juvenile first-degree murder convictions). In *Diatchenko*, the SJC discussed its ability to afford more protections to Massachusetts's criminal defendants under the Massachusetts Declaration of Rights than the rights available under the U.S. Constitution. *See id*. at 283 (analyzing ability for state discretion in affording citizens more rights than Constitution).

120. Commonwealth v. Therriault, 515 N.E.2d 1198, 1200 (Mass. 1987) (examining concept of disproportionality under Article 26). Under the Eighth Amendment, the harshness of the offense and the gravity of the sentence are compared in order to determine if the punishment is cruel and unusual. *See* Graham v. Florida, 560 U.S. 48, 58-60 (2010) (discussing need to analyze "evolving standards of decency" marking progress of society).

121. 393 N.E.2d 313, 319 (Mass. 1979) (discussing cruel and unusual punishment and legislative intent).

122. *See id.* (analyzing court's ability to render punishments unconstitutional); *accord* Commonwealth v. Jackson, 344 N.E.2d 166, 170 (Mass. 1976) (explaining concepts of disproportionality for rendering sentences unconstitutional).

123. *See Diatchenko*, 1 N.E.3d at 282 (finding *Miller* holding exemplifies violation of Eighth Amendment).

discretionary imposition of LWOP sentences for this class of offenders under Article 26 of the Massachusetts Declaration of Rights.[124] Although the SJC did not find the sentence disproportionate to the crime of first-degree murder, it found the sentence unconstitutional for this class of offenders.[125]

2. Implications of Article 26 Ban on LWOP Sentences for Juvenile Homicide Offenders

As a result of the SJC's decision declaring all LWOP sentences unconstitutional under Article 26, Gregory Diatchenko became eligible for parole.[126] Similarly, the *Diatchenko* decision spared Marquise Brown from a discretionary LWOP sentence, requiring instead that he receive a life sentence *with* the possibility of parole.[127] Now, juvenile offenders who commit murder will not be subject to mandatory, or even discretionary, sentences of LWOP in Massachusetts.[128]

III. ANALYSIS

The SJC exceeded its authority in determining that all possible LWOP sentences for juvenile offenders are unconstitutional under Article 26, because this type of lawmaking power is granted to the MGC.[129] Although the SJC followed Supreme Court precedent in declaring mandatory imposition of LWOP for juvenile offenders in Massachusetts unconstitutional, it unnecessarily overstepped its bounds in also holding discretionary LWOP sentences for juveniles convicted of homicide unconstitutional under Article 26.[130] It is the role of the Legislature—not the courts—to establish statutory

124. *See id.* at 282-83 (analyzing discretionary LWOP sentences under Article 26 for juveniles).

125. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 283 (Mass. 2013) (determining discretionary LWOP unconstitutional for juveniles as class). The SJC explained the analogy between LWOP sentences on juveniles and the death penalty, as both ending in a loss of liberty and, figuratively, life. *See id.* at 284; Commonwealth v. Brown, 1 N.E.3d 259, 261 (Mass. 2013) (discussing finding of all LWOP sentences for juveniles unconstitutional under Article 26); *see also* Dist. Att'y for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1281-85 (Mass. 1980) (declaring death penalty unconstitutional under Massachusetts Article 26).

126. *See Diatchenko*, 1 N.E.3d at 286-87 (finding Diatchenko's sentence proper and denial of parole improper).

127. *See Brown*, 1 N.E.3d at 261-63 (analyzing Brown's sentencing requirements after *Diatchenko* decision). Brown's parole eligibility term was determined based on the parole eligibility statute in effect when he committed the crime; thus, fifteen years would pass until he would become eligible for parole. *See id.*; *see also* MASS. GEN. LAWS ANN. ch. 127, § 133A (West 2015).

128. *See Diatchenko*, 1 N.E.3d at 284-85 (declaring discretionary LWOP sentences unconstitutional under Article 26).

129. *See* Commonwealth v. Dunn, 680 N.E.2d 1178, 1182 (Mass. App. Ct. 1997) (explaining court deference to legislative intent).

130. *See Diatchenko*, 1 N.E.3d at 284-85 (holding any LWOP sentence for juvenile offenders violates Article 26). The *Miller* court did not categorically ban all LWOP sentences for juvenile offenders; it left discretionary LWOP sentences as a viable option. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (rejecting argument for categorical ban of discretionary LWOP for juveniles).

sentencing terms for its citizens.[131] Prior to the SJC's decisions in *Diatchenko* and *Brown*, sentences were based on proportionality to the crime committed.[132] The MGC intended to treat and sentence juveniles convicted of first-degree murder in the same manner as adult offenders, and thus the SJC should have deferred to this legislative intent.[133] Following these SJC decisions, Massachusetts now subjects juvenile offenders convicted of second-degree murder and premeditated first-degree murder with extreme atrocity and cruelty to the same sentencing scheme.[134]

It is well within the authority of the state to broaden the scope of rights afforded to its citizens.[135] The verbiage of Article 26, however, does not stray far from that of the U.S. Constitution's Eighth Amendment.[136] Given the

131. *See* Weems v. United States, 217 U.S. 349, 379 (1910) (discussing legislative intent stands unless violation of constitutional provision); Commonwealth v. Marcus, 454 N.E.2d 1277, 1278 (Mass. App. Ct. 1983) (describing legislative role in punishment for crimes). Courts know to tread with caution when reviewing both the Eighth Amendment and Article 26 of the Declaration of Rights. *See Marcus*, 454 N.E.2d at 1278 (analyzing court and legislative authority).

132. *See Brown*, 1 N.E.3d at 261-63 (analyzing implications of *Diatchenko* decision); Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 284-85 (Mass. 2013) (emphasizing discretionary LWOP sentence for juveniles impermissible under Article 26). This sentencing hierarchy was particularly important to the fundamental principle that a punishment should fit the crime. *See Weems*, 217 U.S. at 367 (discussing graduated and proportioned punishments to their crimes). The SJC affirmed Diatchenko's conviction on direct appeal in 1982, rejecting his argument that mandatory imposition of LWOP was disproportional to his crime, violating the Eighth and Fourteenth amendments as well as Article 26. *See Diatchenko*, 1 N.E.3d at 280 (observing original affirmation of Diatchenko's conviction); *see also* Commonwealth v. Diatchenko, 443 N.E.2d 397, 404 (Mass. 1982) (affirming Diatchenko's LWOP sentence).

133. *See* Commonwealth v. Clint C., 715 N.E.2d 1032, 1038 (Mass. 1999) (describing Youthful Offender Act imposition and intent). The MGC enacted the Youthful Offender Act to address the rise in violent juvenile-committed crimes. *See id.* In accordance with the purpose of this act, the MGC removed offenders aged fourteen to seventeen to the adult system. *See* MASS. GEN. LAWS ANN. ch. 119, § 54 (West 2015) (describing removal of youth to adult court system); Commonwealth v. Dale D., 730 N.E.2d 278, 280-81 (Mass. 2000) (discussing removal of juvenile offenders to adult system). The Youthful Offender Act circumvented the transfer hearing, allowing for a Juvenile Court judge to use adult sentences for juvenile offenders. *See Dale D.*, 730 N.E.2d at 281. In sentencing the child, the court may use punishments provided by law for the crime committed while conducting sentencing hearings to evaluate:

> the nature, circumstances and seriousness of the offense; victim impact statement; a report by a probation officer concerning the history of the youthful offender; the youthful offender's court and delinquency records; the success or lack of success of any past treatment or delinquency dispositions regarding the youthful offender; the nature of services available through the juvenile justice system; the youthful offender's age and maturity; and the likelihood of avoiding future criminal conduct.

MASS. GEN. LAWS ANN. ch. 119, § 58 (West 2015) (explaining process for sentencing youthful offenders).

134. *See* Commonwealth v. Brown, 1 N.E.3d 259, 269 (Mass. 2013) (emphasizing problems remaining, including terms for parole eligibility).

135. *See* MILLER ET AL., *supra* note 116 and accompanying text (discussing state constitutional affordance of greater rights to citizens).

136. *Compare* MASS. CONST. art. XXVI, pt. I, *with* U.S. CONST. amend. VIII. Article 26 provides in 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, pt. I. In turn, the Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.

acutely similar language in Article 26 to that of the Eighth Amendment, it is surprising that the SJC has never explained exactly why the interpretation of Article 26 affords more rights to Massachusetts's citizens.[137] Instead, the SJC should have utilized these extended protections to implement the individualized hearings discussed in *Miller* for juvenile homicide offenders.[138]

The SJC's decision to entirely proscribe LWOP sentences for juvenile offenders exceeds the judiciary power granted to the court.[139] By usurping legislative authority and abolishing longstanding criminal sentences, the SJC has interfered with an area of the law in which the people of Massachusetts, through their elected officials, have already voiced their approval.[140] The SJC should have implemented the Supreme Court's individualized *Miller* hearings; this solution would have accommodated the nuances of juvenile sentencing, but also maintained the societal purpose of punishment.[141]

Although every juvenile is different, in terms of maturity and mental

CONST. amend. VIII.

137. *See* Michaud v. Sheriff of Essex Cnty., 458 N.E.2d 702, 708 (Mass. 1983) (commenting on lack of court analysis into differences between Article 26 and Eighth Amendment). The SJC further discussed this lack of analysis in *Commonwealth v. O'Neal*, stating, "[A]nalysis under our State Constitution may parallel analysis under the Federal Constitution . . . ." 339 N.E.2d 676, 690 (Mass. 1975) (concluding Eighth Amendment and Article 26 have similar meanings). *See* Thomas, *supra* note 116, at 34 (explaining greater protections afforded to Michigan citizens due to "or" language and relevant case law). The *Evans* Court, however, explains that while state courts are bound to interpret the rights afforded in the U.S. Constitution, Supreme Court decisions of similar instance are nonetheless binding. *See* Arizona v. Evans, 514 U.S. 1, 8-9 (1995). The SJC has previously qualified its decisions to provide greater protections than the U.S. Constitution—via the Massachusetts Declaration of Rights—through implementing examples and guidelines to assess applicable conduct. *See* Commonwealth v. Upton, 476 N.E.2d 548, 556 (1985). For example, in *Commonwealth v. Upton (Upton II)*, the court decided that Article 14, the Massachusetts equivalent to the U.S. Constitution's Fourth Amendment regulating search and seizure, provided more extensive protections for criminal defendant's when determining probable cause. *See id.*; *see also* MASS. CONST. art. XIV, pt. I (outlawing unreasonable searches and seizures). This was in response to the Supreme Court's shame as to the SJC's decision in a previous Upton case, *Commonwealth v. Upton (Upton I)*. *See* 476 N.E.2d at 556 (solidifying two-pronged analysis for probable cause under Article 14); Massachusetts v. Upton, 466 U.S. 727, 732 (1984) (declaring Massachusetts SJC interpretation of *Illinois v. Gates* incorrect); *see also* Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (rejecting two-pronged analysis for determining probable cause); Commonwealth v. Upton, 458 N.E.2d 717, 720 (1983) (snubbing Supreme Court's holding in *Illinois v. Gates* as to rejection of two-pronged test). In making this decision, the SJC articulated the test for probable cause as required by Massachusetts Article 14, mandating the two-part analysis now known as the "*Aguilar-Spinelli* standard." *See Upton*, 476 N.E.2d at 556. In Diatchenko's case, the SJC should have similarly provided a standard by which greater protections under Article 26 are evaluated. *See infra* Part III.

138. *See* Miller v. Alabama, 132 S. Ct. 2455, 2467-75 (2012) (setting forth need for individualized determinations on mitigating factors of youth in sentencing offenders).

139. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 282-84 (Mass. 2013) (analyzing Supreme Court's decision and Article 26 implications along with individualized sentencing requirements); *see also Miller*, 132 S. Ct. at 2467-75 (asserting need for individualized determinations of youthful offenders). "[W]e do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . . ." *Miller*, 132 S. Ct. at 2469.

140. *See* NEELY, *supra* note 53, at 7 (reaffirming elected legislators purpose to make public approved law).

141. *See Miller*, 132 S. Ct. at 2468 (recognizing aspects of juvenile's life ignored during mandatory sentencing imposition); *see also* Graham v. Florida, 560 U.S. 48, 69 (2010) (contending offenders who kill deserve harshest punishments).

capacity, discretionary LWOP for juvenile murderers does not violate Article 26 as a disproportionate punishment.[142] A procedure to conduct *Miller* hearings would afford due deference to mitigating circumstances in juvenile sentencing, while simultaneously complying with the MGC's sentencing guidelines for juvenile citizens.[143]

In *Miller*, the Supreme Court declared its intention behind its holding that courts must be afforded opportunities to analyze mitigating factors of the juvenile's life before declaring life imprisonment without the ability for possible freedom.[144] The Court attempted to inform lower courts, including state courts, that the decision was not just about the unconstitutionality of mandatory LWOP sentences for juvenile offenders, but was also about the need for individualized determinations in sentencing.[145] The Court stated sentencing should be based on the mitigating characteristics of those juveniles because such a consideration is inherent to the juvenile system's original purpose.[146]

Multiple states have followed *Miller* in affording juvenile offenders individualized hearings, but multiple states have not gone so far as to find discretionary LWOP sentences cruel and unusual.[147] If the SJC followed suit and only afforded individual hearings, the SJC would have conformed to the legislative intent of rendering harsh sentences for juveniles in Massachusetts who are deserving of harsh punishment.[148] Individualized analyses, established through *Miller* hearings, would best weigh mitigating factors and still provide for the possibility of societal retribution, or punishment, through longstanding legislative enactment.[149] The SJC's abolishment of both mandatory and discretionary LWOP sentences, instead, creates an urgent need for MGC action.[150] Today, as a result of the SJC ruling, juveniles convicted of second-

142. *See* Commonwealth v. Jackson, 344 N.E.2d 166, 173 (Mass. 1976) (declaring legislative authority in state criminal law).

143. *See Miller*, 132 S. Ct. at 2469 (holding juveniles require more in-depth analysis in sentencing). By ignoring the characteristics intrinsic of youth in sentencing, disproportionate punishments may result. *See id.*

144. *Id.* at 2475 (explaining reasoning underlying Supreme Court's *Miller* decision).

145. *See id.* at 2467-69 (analyzing evaluation of individual characteristics of juveniles necessary for proper sentencing).

146. *See id.*

147. *See, e.g.*, State v. Riley, 58 A.3d 304, 304, 313-17 (Conn. App. Ct. 2013), *cert. granted*, 61 A.3d 531 (Conn. 2013) (holding use of mitigating factors rendered defendant's 100-year sentence constitutional); State v. Lockheart, 820 N.W.2d 769, at *4 (Iowa Ct. App. 2012) (remanding juvenile's mandatory LWOP sentence for individualized evaluation of mitigating characteristics); People v. Carp, 828 N.W.2d 685, 715-23 (Mich. Ct. App. 2012) (declaring *Miller* procedural and therefore not retroactive or applicable to cases on collateral review).

148. *See* Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012) (describing jurisdictions at time of decision with mandatory LWOP for juvenile murderers in adult court). At the time of the *Miller* decision, twenty-nine states still sentenced juvenile homicide offenders to mandatory LWOP. *See id.*

149. *See id.* at 2471-75 (discussing individualized determinations and legislative intent); *see also* Commonwealth v. Dunn, 680 N.E.2d 1178, 1182 (Mass. App. Ct. 1997) (noting court deference to legislative intent criminalizing conduct and establishing punishments).

150. *See* Commonwealth v. Brown, 1 N.E.3d 259, 269 (Mass. 2013) (addressing discrepancy in SJC declaration and existing state law).

degree murder, a lesser crime, may receive longer periods for establishing parole eligibility than those convicted of first-degree murder, and such an unfair outcome warrants immediate attention.[151]

To establish a determinative *Miller* hearing, which would satisfy the Supreme Court's enumerated concerns, the SJC could have looked at a number of factors of youth.[152] While the list could become quite extensive, the Supreme Court touched on a few overall qualities, which it considered of indeterminable importance.[153] The SJC could expand upon these characteristics through establishment of their state *Miller* hearings.[154] For example, a lawyer representing a juvenile client accused or convicted of first-degree murder could ask questions relating to the juvenile's familial, substance abuse, and educational histories.[155] The lawyer may even touch upon developmental and mental history, or even past social interactions.[156] These topics are ripe for judicial review, allowing judges to evaluate carefully every individual on the overarching concepts validated by the Supreme Court.[157]

The Supreme Court stated that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."[158] Those that kill are

151. *See id.* (assessing consequences of court's decision).

152. *See Miller*, 132 S. Ct. at 2467 (attributing mitigating factors to juvenile offender's behavior before sentencing).

153. *See id.* (noting youth as relevant factor for it indicates "more than a chronological fact"). Mandatory LWOP sentences preclude evaluation of a juvenile's age, immaturity, impetuosity, and lack of foundation for reasoning. *See id.* at 2468. A judge cannot account for the youth's family environment, no matter the situation at home. *See id.* While the circumstances and nature of the crime are also key analytical factors, these need not be addressed in the *Miller* hearing since the hearing is due to the crime charged, first-degree murder. *See id.* at 2471-75.

154. *See* Harper, *supra* note 80 (explaining state court judges' discretionary implementation of LWOP using mitigating factors of youth).

> While a judge can still sentence a juvenile who commits first degree murder to life without the possibility of parole, there must first be a full-blown sentencing hearing in which the juvenile can present and the court can consider the many reasons why this child is different and should not be sentenced to life without any chance of release.

Id.

155. *See id.* (listing aspects of offender's life to evaluate before *Miller* hearing).

156. *See id.* (suggesting questions lawyers should ask juvenile clients).

157. *See id.* (presenting questions useful in evaluation of youthful homicide offenders). Some of the questions that the National Association of Criminal Defense Lawyers promulgate for attorney use in preparing for newly established *Miller* hearings include: criminal history; sentencing history; law at the time of the offense (useful for those cases on collateral review); defendant's role in the crime; defendant's testimony (if used or to be used); and plan for after prison, along with other mitigating factors, such as why he committed the crime, what the state of his life was at the time of the crime, and since committing the crime, how the youth has changed. *See id.* Even interviews of those close to the juvenile, coupled with the logical inference of age, maturity level, home life, mental status, and behavioral history, can be easily evaluated at a *Miller* hearing. *See id.*

158. *See* Graham v. Florida, 560 U.S. 48, 69 (2010) (analyzing severity of murder). "[L]ife is over for the

deserving of the harshest punishments, especially in cases involving premeditation with extreme atrocity or cruelty.[159] The SJC erred in declaring all LWOP sentences for juveniles unconstitutional under Article 26, as the court failed to sufficiently account for the legislative intent behind the established sentencing hierarchy; thus, the court's decision in *Diatchenko* undercut the sentence's original purpose, mistaking it instead as cruel and unusual punishment.[160]

IV. CONCLUSION

There is little doubt juvenile offenders often lack the maturity and cognitive development of their adult counterparts. There is likely even less doubt that murder—especially first-degree murder—is a vicious crime that warrants severe punishment. The MGC prioritized the delicate circumstances surrounding juvenile sentencing and implemented a scheme that reflected this perspective accordingly. The SJC then undermined this prudent scheme in the *Diatchenko* and *Brown* cases, leaving the Commonwealth to fall victim to a misguided new system.

The SJC's decisions in *Diatchenko* and *Brown* created inconsistencies between court-established law and legislative intent. It is disappointing that the SJC failed to see merit in a juvenile sentencing scheme that allows for individualized hearings; a scheme of this kind serves as a balanced solution because it yields to legislative intent, but also recognizes the need for careful assessment in context. Furthermore, a line of Supreme Court cases, establishing the mitigating characteristics of youth necessary for evaluation, stand ready to be implemented. The SJC's decision has placed substantial pressure on the MGC to create a new sentencing scheme, void of LWOP punishments, which decipher between youth convicted of first and second-degree murder. This current lack of uniformity will only lead to copious appeals by juveniles with second-degree murder convictions and parole eligibilities which exceed the lengths of those with first-degree murder convictions. Unfortunately, it is now up to the MGC to resolve this disconnect, which has recently been created in Massachusetts juvenile sentencing schemes.

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victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair." Coker v. Georgia, 433 U.S. 584, 598 (1977).

159. *See Graham*, 560 U.S. at 69 (emphasizing gravity of offender's impact on society when committing murder).

160. *See id.* at 75 (declaring states not required grant of parole). If the Supreme Court decides a state is not obligated to guarantee freedom at some point in a nonhomicide juvenile offender's life, then the states should not be forced to ensure the possibility for that same freedom of a juvenile convicted of first-degree murder. *See id.*