REVIVING REHABILITATION AS A DECARCERAL TOOL

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ABSTRACT

After advocates argued that circumstances attendant to late adolescent offenders make them less culpable for their offenses and better disposed to rehabilitation, the Massachusetts Supreme Judicial Court (SJC) held in January 2024 that it is unconstitutional to sentence eighteen-to-twenty-year-olds to life without parole.[1] *Last summer, Connecticut passed legislation providing a "second look" opportunity for parole to those incarcerated for lengthy prison sentences for crimes that they committed before they were twenty-one years old.*[2] *In 2021, Rhode Island decreased the amount of time that youthful offenders must serve before they become eligible for parole, but its highest court is currently interpreting disputed provisions.*[3] *Efforts to reduce lengthy sentences for late adolescents are grounded in scientific literature showing that "emerging adults" have great propensity for rehabilitation, rendering extraordinarily long prison sentences inappropriate.*[4]

Recently, national conversation has focused on reducing the front-end of incarceration, by shrinking police presence and decriminalizing drug and other nonviolent crimes. Back-end decarceral efforts—so called "second look" sentencing and clemency initiatives—are either underappreciated or derided as reforms that legitimate a fundamentally unjust system. While I embrace the need to significantly shrink the quantity of people in prison, sentencing reforms for emerging adults can meaningfully reduce our

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1. Commonwealth v. Mattis, 224 N.E.3d 410 (Mass. 2024).

2. *Testimony in Support of Connecticut Bill to Extend Parole Eligibility to People Who Committed Crimes Before Age 25*, SENT'G PROJECT (Mar. 20, 2023), https://www.sentencingproject.org/testimony/testimony-in-support-of-connecticut-bill-to-extend-parole-eligibility-to-people-who-committed-crimes-before-age-25/ [https://perma.cc/B3VG-C8DA] ("SB952 would ensure young people have a second chance to prove they can be productive members of society."); *see* 2023 Conn. Acts 23-169 (Reg. Sess.) (codified at CONN. GEN. STAT. §§ 54-125a, -142a(e) (2023)).

3. 13 R.I. GEN. LAWS § 13-8-13 (2023) (effective July 6, 2021).

4. *See, e.g.*, *Mattis*, 224 N.E.3d at 423–24 (discussing evidence in the record that emerging adults have a "greater capacity to change than older individuals").

carceral footprint. Also, disproportionality by race in extreme sentencing suggests that late adolescents are particularly likely to be sentenced based on systemic racism and implicit biases in policing, prosecution, and sentencing, rather than unique characteristics or facts of their crimes. Thus, effective "second look" efforts have the potential to address racial inequities.

This essay explores three state efforts to reduce the carceral terms of late adolescents, evaluating the advocacy strategies and compromises made to achieve meaningful reform. The Supreme Court recognizes that minors are less culpable, less deterrable, and more capable of rehabilitation than adults. Significant research supports extending these findings to "emerging adults"—individuals under the age of twenty-five years old. Should this rehabilitative lens, grounded in science, be effectively harnessed to the "back-end" reforms focused on those who commit crimes prior to the age of twenty-five, the potential decarceral effects can be widespread. In the area of emerging adults and serious crime, criminal law minimalism means coupling the science about late adolescents with effective advocacy strategies to reduce our carceral population.

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INTRODUCTION

> [B]y the age of nine both my parents were deceased. Over the next seven years, at the hands of my legal guardian, I endured many forms of physical and emotional abuse. By the age of [twelve], it was common for my stepmother to involve me in her criminal lifestyle of drug use, packaging drugs, and making deliveries. Refusing her demands ended in beatings. Finally, at the age of [sixteen], I took control and decided to escape this life, which was devoid of any love, support, or guidance. I foolishly turned to the streets and eventually a gang, believing it was a solution to []the toxic environment that was my home. I was blinded by impulsiveness and an inability to comprehend the lifelong consequences that this choice would have. Without ever having been in trouble before, I managed, in the span of one year, to throw my life away and take away the life [of] Mr[.] Rom Poev. I understand the reality that no number of apologies or good deeds will atone for my actions. I also have thought about the amount of pain and heartache that I have caused[,] along with the lasting effects that it has on his family, the community, and my own family. I will live with this for the rest of my life and forever be sorry

> and remorseful. I have spent the last [twenty] years, because of incarceration, facing up to this tragedy, believing in what is the central point of this legislation before you: [y]outh are not beyond change and they have redemptive qualities, which allow them to be capable of becoming mature adults who are productive contributors to society. During my time incarcerated, I have continuously pursued a path that would allow me the opportunity to one day prove that change is possible and that I do possess the ability to realize my full potential."[5]

Following Mario Monteiro's testimony, Rhode Island's General Assembly voted to decrease the amount of time that youthful offenders serving any sentence other than life without parole (LWOP) must spend in prison before they are eligible for parole, passing what was colloquially known as "Mario's Law."[6] This expressly retroactive legislation included significant compromises and is currently being challenged in the state's supreme court.[7]

Beginning in 2005 with its decision to ban the death penalty for juveniles,[8] the U.S. Supreme Court has repeatedly acknowledged that children are less blameworthy than adults and have a greater capacity for rehabilitation. The Court held in *Graham v. Florida* that imposition of LWOP on juveniles for crimes other than homicide is unconstitutional, holding that children are entitled to a "meaningful opportunity to obtain release."[9] In *Miller v. Alabama*, the Court emphasized that immaturity, vulnerability, and capacity for change of youth require judges to conduct individualized sentencing before imposing life without parole sentences.[10]

There are varying approaches and critiques of the back-end decarceral efforts that have followed these cases. For example, some insist that the Roberts Court's juvenile LWOP cases rest on an extremely narrow interpretation of the Eighth Amendment, and ultimately preserve the status

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5. Steve Ahlquist, *The Juvenile Offender Parole Act Would Allow a Second Chance at Life*, UPRISE RI (Mar. 4, 2021, 4:46 PM), https://upriseri.com/juvenile-offender-parole-act/ [https://perma.cc/2GHK-TAN9] (quoting the written testimony of Mario Monterio, an incarcerated supporter of R.I. House Bill 5144, read in committee by Rep. Julie Casimiro).

6. § 13-8-13(e); *National Groups File Court Briefs in Support of "Mario's Law," Allowing for Early Release of Juvenile Offenders; Briefs Challenge Attorney General Position*, ACLU R.I. (Feb. 20, 2024, 11:15 AM), https://www.riaclu.org/en/news/national-groups-file-court-briefs-support-marios-law-allowing-early-release-juvenile-0 [https://perma.cc/TB6J-JTLQ].

7. *See infra* Section II.C.

8. Roper v. Simmons, 543 U.S. 551, 569, 578 (2005) (finding that the execution of juveniles violated the Eighth Amendment because they are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure").

9. 560 U.S. 48, 75 (2010).

10. 567 U.S. 460, 471 (2012) ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."). In *Montgomery v. Louisiana*, the Court applied *Miller* retroactively. 557 U.S. 190 (2016).

quo of mass incarceration.[11] Nevertheless, in the aftermath of the Court's repeated findings that children are different and less culpable,[12] many states initiated dramatic sentencing reforms and several have had a significant reduction of youth incarceration.[13] For example, the District of Columbia enacted the Incarceration Reduction Amendment Act (IRAA), which permitted anyone who committed a crime as a juvenile to petition for resentencing after twenty years of their sentence.[14]

When none of the released individuals reoffended, proponents sought to extend IRAA to all individuals who committed crimes before they turned twenty-five.[15] Neuroscience findings show that brain development continues in young people until the age of twenty-five, with these "emerging adults" exhibiting the same immaturity, vulnerability, and rehabilitative potential that the Court found significant in *Miller* and *Montgomery*.[16] Despite vigorous protest,[17] the D.C. Council passed an amendment to the IRAA, extending resentencing to individuals whose crimes occurred before they turned twenty-five and who had served at least fifteen years incarcerated.[18] Meanwhile, in response to extraordinarily long sentences nationwide, the drafters of the Model Penal Code proposed an unprecedented reform—permitting any defendant to petition for resentencing based on changed circumstances following fifteen years of imprisonment.[19]

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11. *See* Sarah Mayeux, *Youth and Punishment at the Roberts Court*, 21 U. PA. J. CONST. L. 543 (2018); John F. Stinneford, *The Illusory Eighth Amendment*, 63 AM. U. L. REV. 437, 490 (2013) (noting that the cases where the Court invalidated LWOP punishments affect "only one one-thousandth of one percent of all felony convictions").

12. Jody Kent Lavy, *Notion that "Kids Are Different" Takes Hold in Youth Justice Policy Reform*, JUV. JUST. INFO. EXCH. (Dec. 31, 2012), https://jjie.org/2012/12/31/over-years-notion-that-kids-different-takes-hold-youth-justice-policy-reform/ [https://perma.cc/T76D-6CMA]; *Montgomery*, 577 U.S. at 206–07.

13. Emily Buss, *Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 U. CHI. L. REV. 843, 846 (2022).

14. D.C. CODE § 24-403.03 (2021); *see* Madison Howard, *Second Chances: A Look at D.C.'s Second Look Act*, CRIM. L. PRAC. (Mar. 21, 2021), https://www.crimlawpractitioner.org/post/second-chances-a-look-at-d-c-s-second-look-act [https://perma.cc/YS8E-2ZXS].

15. Michael Serota, *Taking a Second Look at (In)Justice*, U. CHI. L. REV. ONLINE (Jan. 23, 2020), https://lawreviewblog.uchicago.edu/2020/01/23/taking-a-second-look-at-injustice-by-michael-serota/ [https://perma.cc/VJ2C-XY9N].

16. *See* CATHERINE INSEL, STEPHANIE TABASHNECK, FRANCIS X. SHEN, JUDITH G. EDERSHEIM & ROBERT T. KINSCHERFF, WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE 2–3 (Arielle Baskin-Sommers et al. eds., 2022), https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf [https://perma.cc/HSW9-YHP9].

17. Professor Kathryn Miller details the "fierce" criticism of extending this bill. Kathryn E. Miller, *A Second Look for Children Sentenced to Die in Prison*, 75 OKLA. L. REV. 141, 142–43 (2022).

18. § 24-403.03.

19. MODEL PENAL CODE: SENTENCING § 305.6 cmt. a (AM. L. INST., Tentative Draft No. 2 2011); *see* Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G REP. 194, 196–97 (2009); Kevin R. Reitz, *Discussion of Model Penal Code: Sentencing*,

Like D.C.'s IRAA, traditional "second looks" include judicial, legislative, and executive efforts that provide an opportunity for reconsideration of lengthy prison sentences. Such initiatives include laws conferring new parole eligibility after shorter terms, requiring parole boards to consider new factors for release, and permitting courts to resentence individuals to shorter periods of incarceration.[20]

This essay explores three sentencing reform efforts for emerging adults, examining their critiques and questioning whether a revived belief in rehabilitation undergirds these reforms. For emerging adults, carceral minimalism includes judicial challenges to the constitutionality of mandatory long sentences,[21] and campaigns seeking to raise the age of juvenile court jurisdiction.[22] These reforms illustrate the strength of leaning into rehabilitation, tracking the newest developments in brain science, and emphasizing public safety in the conversation of decarceral reform. Developments in science mirror the popular appetite for belief in hope and personal change. These developments also offer a practical hook for addressing the moral problem of mass incarceration and its associated costs for governments.

In a reality where we have long and racially disproportionate carceral sentences,[23] "second look" reforms for emerging adults are subject to macro and micro critiques. First, over the past decade, scholars and activists emphasize the need for "non-reformist reforms"—changes that undermine the existing political, social, and economic order, rather than those that invest in marginal improvements.[24] Abolitionists dedicated to ending mass

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87 A.L.I. PROC. 27 (2010) ("The second-look provision, which would go back to a judicial decisionmaker of some kind in the current draft, is something that is new, that is not based on close examples in existing legislation anywhere in the United States.").

20. *Issues by State*, FAMM, https://famm.org/our-work/issues-by-state/ [https://perma.cc/D3HF-ERRK] (reporting pending second look legislation in the states). Although compassionate release, which permits incarcerated persons to obtain early release due to a significant medical condition, is not technically a resentencing procedure, scholars consider it in the "second look" category. *See* Renagh O'Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. 621, 637–40 (2022).

21. *See infra* Section II.A.

22. *Frequently Asked Questions*, RAISE THE AGE MA, https://www.raisetheagema.org/faqs/#top [https://perma.cc/4G8Y-6AS8]. Unlike traditional sentencing reforms, this latter effort is about identifying those navigating an adolescent transition and preventing them from the harms and collateral consequences of the adult criminal legal system.

23. *See infra* Section I (discussing racial disproportionality of extremely long sentences).

24. *See* Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 97 (2020) (categorizing "non-reformist reforms" as those that "facilitate transformational change"); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 791, 791 n. 41 (2021) (highlighting that "power-shifting" is integral to the broader movement of abolition and, ergo, should be part of "non-reformist reforms" (citing Akbar, *supra*, at 98–106)); MARIAME KABA, *So You're Thinking About Becoming an Abolitionist*, *in* WE DO THIS 'TIL WE FREE US 2, 3 (Tamara K. Nopper ed., 2021) ("Even if the criminal punishment system were free of racism, classism, sexism, and other isms, it would

incarceration and dismantling the prison industrial complex, for example, are likely to oppose efforts to improve safety conditions of prisons.[25] Reforms to make policing or prisons more humane are critiqued as "reformist reforms."[26] They could serve to make these problematic institutions marginally more acceptable but thereby legitimatize and prolong their existence.

Thus, the "back-end reforms" described here may be critiqued as "reformist reforms." Indeed, these efforts seem to accept a profoundly flawed criminal legal system and chip away at it instead of abolishing its present form. Professor Jamelia Morgan recently named this challenge, discerning when to pursue so called "reformist reforms" alongside "non-reformist reforms," as "abolition in the interstices," by which she means grappling with the reality that a radically reimagined world is not one that we have now.[27]

In addition, there are critiques specific to reforms attendant to emerging adults. While neurological and psychosocial research clarify that the attributes of children relevant for rehabilitation continue to exist significantly past the age of eighteen, Professor Emily Buss argues that the Court's "kids are different" approach is problematic.[28] Recent developmental science largely drives the calls to extend the ages of juvenile exceptionalism to emerging adults. Buss warns, though, that extending this youth exceptionalism framework to emerging adults could obscure the "central role that immaturity plays in most offenders' full criminal careers and preserves a destructive fiction that youthful offenders are a distinctive, more sympathetic, and less corrupt minority among the millions charged with committing crimes."[29] In other words, given most people age out of criminal behavior,[30] emphasizing the neurological or developmental

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not be capable of effectively addressing harm."); MARIAME KABA, *Police "Reforms" You Should Always Oppose*, *in* WE DO THIS 'TIL WE FREE US, *supra*, at 70, 71 (highlighting how, for example, "'reforms[] that focus on strengthening the police or 'morphing' policing into something more invisible but still as deadly should be opposed"); Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1200 (2022) (identifying articulations of abolition throughout scholarship and reiterating why reformist reforms will not be successful).

25. See CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS TO END IMPRISONMENT (2021), https://criticalresistance.org/wp-content/uploads/2021/08/CR_abolitionisteps_antiexpansion_2021_eng.pdf [https://perma.cc/4QUC-G336], for examples of how abolitionists categorize reformist reforms.

26. *Id.*

27. Jamelia Morgan, *Abolition in the Interstices*, LPE PROJECT (Dec. 14, 2023), https://lpeproject.org/blog/abolition-in-the-interstices/ [https://perma.cc/9ZQE-APNN]; *see also* Cynthia Godsoe, *A Perfect Storm: Young People, False Confessions & Prosecutorial Involvement*, 58 NEW ENG. L. REV. 1 (2023).

28. Buss, *supra* note 13, at 840–46.

29. *Id.* at 845. Buss suggests a "life-course developmental approach [that] would eliminate incarceration for all offenders still in the process of growing up." *Id.*

30. INSEL ET AL., *supra* note 16, at 37–38.

immaturity of "emerging adults" risks artificially making the individuals who commit crimes who are biologically older than that line appear more mature, culpable, or less capable of rehabilitation than they truly are.[31] As Professor Cynthia Godsoe explains, the essential problem of any "line-drawing [in the criminal legal sphere] is that the system itself is so overly punitive and racially disproportionate that granting certain groups more opportunities for diversion, rehabilitation, or other relief, inevitably leaves the system largely intact in its harms."[32]

Professor Josh Gupta-Kagan was among the first to connect surging academic arguments for treating young adults less severely than their adult counterparts with general pleas for reducing mass incarceration.[33] Gupta-Kagan cites academic proposals to cap nearly "all violent crime sentences at [twenty] years,"[34] repeal mandatory minimum sentences,[35] expand reentry efforts,[36] or reduce the power of prosecutors to leverage punitive plea bargains.[37] He urges linking advances in neuroscience and young adult development with the parallel proposals to halt mass incarceration.[38]

Five years later, despite focus aimed at reducing our carceral footprint and addressing systemic racial disparities, this critical question remains. Can a revived interest in rehabilitation, whether it is spurred by neuroscience about late adolescence, public responsiveness to the shame of mass incarceration, or even the reality of increased state prison costs, spur meaningful reduction in the incarceration of young adults?

These three recent criminal reform efforts do not resolve the debate between abolition and other frameworks for reform. Yet, I argue that

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31. This mirrors the risk of "innocentrism" masking the many wrongs of the system to people who are factually guilty, including excessive punishment and racism. *See* Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 325 (2010) (arguing that convictions are "wrongful" also when they come from demonstrable unfairness, disproportionate punishment, and other punishment, even if the person is not factually innocent). For emerging adults, focusing on "second chances" may wrongly presume individuals had a "first chance" that was even remotely equitable.

32. Godsoe, *supra* note 27, at 5.

33. Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV. 669, 670–71.

34. *Id.* at 709 (citing Marc Mauer, *A 20-Year Maximum for Prison Sentences*, DEMOCRACY (2016), http://democracyjournal.org/magazine/39/a-20-year-maximum-for-prison-sentences/ [https://perma.cc/U9HC-88WA]); *see also* Mauer, *supra* (noting the harm to families from lifelong incarceration, how life sentences deprive all prisoners "of the chance to turn his or her life around," and the high cost of incarcerating individuals for life, especially given high health costs of older prisoners).

35. Gupta-Kagan, *supra* note 33, at 709–10 (citing TODD R. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA 163–80 (2014)).

36. *Id.*

37. *Id.* at 710 (citing Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE RELIGION GENDER & CLASS 191 (2015)).

38. *Id.* at 670–71.

reforms "in the interstices,"[39] could substantially limit the reach of our carceral system and, thus, be consistent with criminal law minimalism.[40] Specifically, this essay aims to understand how stakeholders grappled and compromised with the world that we have now. In each, rehabilitation was harnessed alongside public safety as justifications for reform. Exploring these efforts suggests practical lessons for other states engaged in reforms targeting emerging adults with the aim of reducing the general carceral footprint.

I. A COMPLICATED COMMITMENT TO ADOLESCENT REHABILITATION

Modern punishment is grounded in various theories, including retribution,[41] deterrence,[42] incapacitation,[43] and rehabilitation—the concept of using punishment to "treat" criminals and stop their criminality.[44] Rehabilitation can be inconsistent with other goals. Thinking of punishment as a means of *helping people stop* committing criminal acts requires a different posture than incarcerating to deter criminal behavior or punish people for wrongdoings.[45] This section focuses on the history, abandonment, and resurgence of rehabilitation as it relates to punishment of juveniles and emerging adults.

A. Retribution Replaces Rehabilitation in Juvenile Sentencing

Rehabilitation was a popular justification of criminal punishment until the 1970s, when it became disfavored for a few reasons. To begin with, critics suggested that punishment and prisons were not reducing recidivism: in other words, individuals were not being rehabilitated during long

39. Morgan, *supra* note 27.

40. *See* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 44 (2020) ("For criminal law minimalism, the penal system still has a role to play in society, but a radically reduced, reimagined, and redesigned role relative to the one it has played in the United States.").

41. *See generally* MATTHEW C. ALTMAN, A THEORY OF LEGAL PUNISHMENT: DETERRENCE, RETRIBUTION, AND THE AIMS OF THE STATE (2021).

42. *Id.* Deterrence assumes that people are rational actors and will avoid criminal activity if the potential pain of incarceration outweighs pleasure from the crime.

43. The theory of incapacitation assumes that a small number of offenders commit a disproportionate amount of criminal acts and seeks to isolate such individuals. FRANCIS T. CULLEN & CHERYL LERO JONSON, CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES 99, 111–12 (2012).

44. Rehabilitation assumes the decision to commit a crime is determined by various biological, sociological, and psychological factors. Traditionally, rehabilitation justifies punishment when it improves the offender, reduces recidivism, and thereby improves public safety. CULLEN & JONSON, *supra* note 43, at 147–70.

45. *See* JOSEPH L. HOFFMAN & WILLIAM J. STUNTZ, DEFINING CRIMES 33–35 (4th ed. 2021) (discussing the traditional justifications for punishment at common law).

sentences of imprisonment.[46] To the contrary, prisons were notably criminogenic. Second, the premise of rehabilitation is to prevent future crime by *altering the character of the offender*, a theory presuming that people commit crimes because of their character.[47] This theory ignores the social, economic, and societal causes of crime. Finally, the goal of "fixing" individuals who have committed crimes definitionally gives judges, correctional officers, and parole boards tremendous discretion with individuals' lives, making the process deeply susceptible to explicit prejudices or implicit bias. Scholars increasingly question the premise that incarceration can be rehabilitative.[48] Others emphasize its "criminogenic" effect.[49]

Traditionally, the Court's juvenile jurisprudence has been motivated by a combination of paternalism and rehabilitation.[50] In the 1960s, courts developed the doctrine *parens patriae*, believing that adults should make decisions in the best interests of minor children.[51] As the volume of juvenile criminal cases grew, courts abandoned hope for individualized treatment and the system began to resemble adult criminal court. In *Kent v. United States*, the Court solidified the provision of systemic constitutional protections for juveniles, including the notice of charges and rights to confront and cross examine witnesses.[52] Then, in the Court's seminal case justifying different treatment for juveniles, concurring Justice Black cautioned against justifying the denial of constitutional protections based on

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46. *See generally* Esther K. Hong, *The Federal Juvenile System*, 102 B.U. L. REV. 2025 (2022); Sarah French Russell, *A "Second Look" at Lifetime Incarceration: Narratives of Rehabilitation and Juvenile Offenders*, 31 QUINNIPIAC L. REV. 489, 514 (2013) (explaining decline of rehabilitation and then describing how evidence of one's rehabilitation in prison could provide persuasive support at a future hearing for one's release); Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 93–99 (2019).

47. *See* HOFFMAN & STUNTZ, *supra* note 45, at 34–35 (explaining why the rehabilitation justification can be misplaced and it is hard to imagine the behavior prompting arrest would not reoccur).

48. *See, e.g.*, Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 560 (2021) ("Though the precise date that the theory died is difficult to pin down, conventional wisdom holds that by the end of the 1970s the prison was no longer understood as a form of treatment.").

49. *See, e.g.*, Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 60S (2011) ("On balance, the evidence tilts in the direction of those proposing that the social experiences of imprisonment are likely crime generating.").

50. *See, e.g.*, Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 558 (1998) (explaining that the majority in *In re Gault* aimed to "find a jurisprudential basis for affording the essential protections of the adult criminal process while preserving the rehabilitative goals, confidentiality, and other benevolent features of the juvenile court process" (citing *In re* Gault, 387 U.S. 1, 27–28 (1967))).

51. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 695 (1991).

52. 383 U.S. 541 (1966).

age with the premise of rehabilitation.[53] The Court stressed that unbridled discretion, "however benevolently motivated" was problematic if juveniles get neither the "protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[54]

Juvenile courts were structured to have a broad jurisdiction and employ vast discretion.[55] They are infused with paternalism[56] and lack the openness and the procedural protections of adult courts.[57] Cynthia Godsoe clarifies that significant racial disproportionalities occur at every stage of the juvenile process, from arrest to sentencing.[58]

During the 1980s and 1990s, states' juvenile courts shifted their focus from rehabilitation to punishment. Their vast and paternalistic scope was coupled with increasingly harsh sanctions, leading one observer to call the system the "worst of both worlds."[59] In the late 1990s, John Dilulio predicted that there would be "a wave of young, violent, remorseless juvenile delinquents known as super-predators [who] would plague the country and increase crime rates."[60] Dilulio's warnings were explicitly racialized.[61] They also coincided with a few highly publicized crimes committed by young adults.[62] State legislatures used the myth and popular images of heinous crime to pass laws that increasingly treated juveniles as

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53. *Gault*, 387 U.S. at 61 (Black, J., concurring) ("Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment.").

54. *Id.* at 18, 18 n.23 (majority opinion) (quoting *Kent*, 383 U.S. at 556).

55. Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 179 (2017); *see also* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 139 (expanded 40th anniversary ed. 2009); Michael Willrich, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO xxviii (2003) (stating that American courts "aimed not merely to punish offenders but to assist and discipline entire urban populations").

56. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 110 (1909) (noting that a state acts for "the welfare of its children" (quoting Commonwealth v. Fisher, 62 A. 198 (Pa. 1905))).

57. Schall v. Martin, 467 U.S. 253, 263 (1984) (denying juveniles the right to a jury trial and noting that the Constitution does not require the elimination of all difference in treatments of juveniles).

58. Godsoe, *supra* note 55, at 196; *see* Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 541–42 (2009) (noting racial disproportionality was true "in all relevant offense types and all age categories").

59. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 110 (1999).

60. Matt DeLisi, Brendan D. Dooley & Kevin M. Beaver, *Super-Predators Revisited*, *in* CRIMINOLOGY RESEARCH FOCUS 21, 21 (Karen T. Froeling, ed., 2007); *see* FELD, *supra* note 59, at 189–210 (addressing the rising rates of crime committed by juveniles during this period); *The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014) [hereinafter *The Superpredator Myth*], https://eji.org/news/superpredator-myth-20-years-later/ [https://perma.cc/JK5Z-8GRU].

61. Dilulio warned that the trouble will be greatest in Black, inner city neighborhoods and that "not only is the number of young [B]lack criminals likely to surge, but also the [B]lack crime rate, both [B]lack-on-[B]lack and [B]lack-on-white, is increasing." John J. Dilulio, Jr., *My Black Crime Problem, and Ours*, CITY J. (1996), https://www.city-journal.org/article/my-black-crime-problem-and-ours [https://perma.cc/2JWD-EMSG].

62. *The Superpredator Myth*, *supra* note 60.

adults for sentencing purposes.[63] Such depictions helped convince the public that youth were a threat to everyone.[64] This prediction was false, as was the touted idea of victimization.[65] In fact, media portrayal that "juvenile crime was rising [in the 1990s] when . . . it was dropping by unprecedented amounts is perhaps the most egregious distortion perpetrated by the media."[66] In an amicus brief for *Miller*, John Dilulio himself wrote that their predictions proved wrong.[67]

Responding to this false perception of a rise in teen violence, many state legislatures expanded the circumstances pursuant to which youths could be processed in adult criminal court.[68] Professor Kate Weisburd explains that this shift away from rehabilitation coincided with a dramatic rise in juvenile incarceration rates,[69] and the amendment of stated purposes of juvenile courts to incorporate "the goals of public safety, youth accountability, and victims' rights" more heavily.[70]

This increasingly punitive juvenile criminal system disproportionately affects Black youth. That racial disparities emerge at the entry point of our criminal legal system and discretionary policing need not be reiterated here.[71] Yet, there is evidence that implicit racial bias contributes

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63. *Id.*; Terrance T. Allen & Ahmed Whitt, *An Examination of the Relationship Between Media Exposure and Fear of Victimization: Implications of the Superpredator Narrative on Juvenile Justice Policies*, 71 JUV. & FAM. CT. J. 23, 24 (2020).

64. Allen & Whitt, *supra* note 63, at 24.

65. *The Superpredator Myth*, *supra* note 60. By the mid-1990s, the violent crimes committed by young adults fell. *Id.* In 2000, the homicide rate by juveniles stabilized and returned to that of 1985. *Id.*

66. Allen & Whitt, *supra* note 63, at 24 (citations omitted).

67. *The Superpredator Myth*, *supra* note 60; Brief of Jeffrey Fagan et al. as Amici Curiae Supporting Petitioners at 8, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).

68. Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 315 (2015); Allen & Whitt, *supra* note 63, at 24 (highlighting how crime rates actually fell, rather than rose, during this time).

69. Weisburd, *supra* note 68, at 315; THE ANNIE E. CASEY FOUND., REDUCING YOUTH INCARCERATION IN THE UNITED STATES 1 (2013), http://www.aecf.org/m/resourcedoc/AECF-Data SnapshotYouthIncarceration-2013.pdf [https://perma.cc/Q2YX-LFQF] (explaining that "youth confinement peaked in 1995," with 107,637 youth confined on a single day). The number of confined youths has since declined. *Id.*

70. Kristin Henning, *Juvenile Justice After* Graham v. Florida*: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 22 (2012).

71. Abundant research confirms systemic racism in policing and the entrenched false association between Blackness and criminality profoundly affect the policing of Black men in particular. *See, e.g.*, Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621 (1993); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010). Scholars detail the doctrinal contributors to this reality. *See* Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925 (2021); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

significantly to sentencing disparities amongst emerging adults.[72] People unconsciously and inaccurately associate Blackness with criminality and violence.[73] Differential treatment of Black and white youth reflects research regarding implicit bias, including a "powerful racial stereotype" that Black men are "violence prone."[74] People unconsciously perceive Black youths as older[75] and more criminally threatening[76] than similarly aged white youth. These pernicious associations, even if unconscious, likely influence prosecutorial or judicial decisions regarding sentencing of older adolescents.

Once arrested, prosecutors are more likely to charge Black juveniles as adults,[77] and to charge Black defendants with felony murder,[78] two factors which contribute to racial sentencing disparities. In addition to this disparate treatment by police and prosecutors, there is evidence that Black adolescents receive harsher sentences due to implicit biases of juries and judges. In a study regarding LWOP sentences for youth, when presented

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72. *See* Aliza Hochman Bloom, *Policing Bias Without Intent*, 2025 U. ILL. L. REV. (forthcoming 2025).

73. *See* Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 57, 64–65 (Angela J. Davis ed., 2017) (describing how Black parents specially educate their children on how to interact with police); Gupta-Kagan, *supra* note 33 at 723 (noting that commentators attribute extreme racial disparities in the criminal legal system at least in part to social views of "young [B]lack males as the 'dangerous class.'" (quoting Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 765 (1998))); Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 SOC. & PERSONALITY PSYCH. COMPASS 50, 55 (2016); Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 878, 889–91 (2004).

74. Buck v. Davis, 580 U.S. 100, 121 (2017) (citing Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion)); *see* Commonwealth v. Sweeting-Bailey, 178 N.E.3d 356, 380–81, 380 n.9 (Mass. 2021) (Budd, C.J., dissenting).

75. INSEL ET AL., *supra* note 16, at 22 (citing Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526 (2014)).

76. *Id.* at 23; Shannon Glasgow, Gabriella Imbriano, Jingwen Jin & Aprajita Mohanty, *Is Threat Detection Black and White? Race Effects in Threat-Related Perceptual Decision-Making*, EMOTION, May 2020; Amy G. Halberstadt et al., *Racialized Emotion Recognition Accuracy and Anger Bias of Children's Faces*, 22 EMOTION 403, 404 (2022); Andrew R. Todd, Kelsey C. Thiem & Rebecca Neel, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCH. SCI. 384 (2016); Naomi Priest et al., *Stereotyping Across Intersections of Race and Age: Racial Stereotyping Among White Adults Working with Children*, PLOS ONE, Sept. 2018, at 3.

77. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 811–12 (2012).

78. "Felony murder" is the homicide charge typically brought when another person dies or is killed during the commission of a felony. Depending on the jurisdiction, all members of a conspiracy can be charged with felony murder for a series of predicate felonies. *See* Kat Albrecht, *Data Transparency & The Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. (Aug. 11, 2020), https://firearmslaw.duke.edu/2020/08/data-transparenty-the-disparate-impact-of-the-felony-murder-rule [https://perma.cc/3GB4-YW7A] (finding that seventy-five percent of defendants charged with felony murder in Cook County, Illinois were Black).

with the same serious crime, participants were more likely to find a defendant as culpable as an adult, and therefore to support LWOP punishment, when they were primed to believe that the defendant was Black as opposed to white.[79]

B. The Court's Juvenile Quartet Revives Rehabilitation

Meanwhile, in a recent quartet of cases addressing juveniles in the criminal legal system, the Court returned to the rehabilitative premise of juvenile courts. In *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, the Court relied upon substantial scientific evidence about developmental differences between adults and youths to hold that capital punishment and LWOP are unconstitutionally cruel and unusual punishments.[80] The Court reasoned that, because youth are particularly capable of rehabilitation, the difference in punishment between youth and adults is justifiable.[81]

As some scholars argue, though, the Court's reaffirmation of the rehabilitative promise of youth was not wholly positive. Professor Weisburd explains that it justified a paternalism in juvenile courts that has enabled problematic practices, ostensibly permitting rehabilitation without incarceration while carrying various downstream negative effects.[82]

C. Science Supports Rehabilitative Justifications for Emerging Adults

The reemergence of rehabilitative justifications to separate youths from adults when imposing criminal punishment is further complicated. Because in the almost twenty years since *Roper*, research has indicated that most of the developmental reasons leading the Court to conclude that children were insufficiently culpable to warrant the death penalty and LWOP sentences remain present in "emerging adults."[83] In other words, much of the science

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79. Aneeta Rattan, Cynthia S. Levine, Carol S. Dweck & Jennifer L. Eberhardt, *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, PLOS ONE, May 2012, at 4.

80. Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the death penalty as applied to individuals under eighteen violates the Eighth Amendment); Graham v. Florida, 560 U.S. 48, 75, 82 (2010) (invalidating juvenile LWOP for nonhomicide crimes and requiring a meaningful opportunity for release based on demonstrated maturity and rehabilitation); Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (holding that mandatory juvenile LWOP is disproportionate for the vast majority of youth whose crimes reflect "transient immaturity" (quoting *Roper*, 543 U.S. at 573)).

81. *See Graham*, 560 U.S. at 74 (explaining why juvenile offenders are most in need of rehabilitation, and why therefore life punishments are often disproportionate); *Miller*, 567 U.S. at 473.

82. Weisburd, *supra* note 68, at 315–16.

83. *See* Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 647–48 (2016). The phrase "emerging adulthood" is attributed to Jeffrey Jensen Arnett, used in place of

the Court used to decide youth cannot receive the death penalty or LWOP sentences also supports the existence of these characteristics well past the age of eighteen. First, emerging adults are also immature and possess an "underdeveloped sense of responsibility" leading them to engage in risky behaviors including crime.[84] This immaturity leads older teenagers to exhibit poor self-control, prioritize short-term rewards, and under appreciate the long-term costs to themselves and others of criminal choices.[85] Portions of the brain that contribute to decision-making capability continue to develop until age twenty-five.[86] Psychological and neurological research show that "[b]iological changes in the prefrontal cortex during adolescence and the early [twenties] lead to improvements in executive functioning, including reasoning, abstract thinking, planning, anticipating consequences, and impulse control."[87] In *Miller*, the Court had heard from experts arguing that brains are not "fully mature until an individual reaches his or her twenties," and that portions of the brain which improve decision-making and control impulses do not fully develop until then.[88]

Second, the Court reasoned that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[89] This is partially because children lack the ability to extricate themselves from their home environment,[90] but for poor teenagers, this practical difficulty does not end at the age of eighteen.

Third, the Court emphasized that adolescent character traits are often transitory, and "not as well formed as that of an adult."[91] Significant

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young adulthood to avoid any implication that "young adults" had become adults. JEFFREY JENSEN ARNETT, EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES (2d ed. 2015).

84. Kelsey B. Shust, Note, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. CRIM. L. & CRIMINOLOGY 667, 669, 684–89 (2014); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1012 (2003).

85. *See* Steinberg & Scott, *supra* note 84, at 1012–13.

86. *See, e.g.*, Shust, *supra* note 84, at 684–89 (summarizing developmental data suggesting young adults over eighteen are similar to teenagers under eighteen).

87. David P. Farrington, Rolf Loeber & James C. Howell, *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 CRIMINOLOGY & PUB. POL'Y 729, 733 (2012).

88. Brief of Amici Curiae J. Lawrence Aber et al. in Support of Petitioners at 15–16, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647); *Miller*, 567 U.S. at 472 n.5; Brief for the American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 5, 9, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647).

89. Roper v. Simmons, 543 U.S. 551, 569 (2005).

90. *Id.* (citing Steinberg & Scott, *supra* note 84, at 1014).

91. *Id.* at 570; *see also* ARNETT; *supra* note 83, at vii–viii. Developmental psychologist Jeffrey Jensen Arnett established "emerging adulthood" to describe the developmental stage during which individuals transition from dependence on parents and others for supervision, financial support, and guidance, into mature adults who engage independently in work, community, and the development and maintenance of new family relationships. *Id.*

psychological literature describing 18- and 25-year-olds asserts that "identity development continues through the late teens and the twenties."[92] However, some caution that research is more ambiguous about how transitory identity is during young adulthood.[93] In addition to rapidly changing identities, data shows that crimes committed by young adults are "a transitory state that they age out of."[94] The "age-crime curve" illustrates that crime rates peak in the late teens and remain high in the early twenties before dropping precipitously in the mid-twenties.[95] The National Institute of Justice found that while just over half of juvenile offenders continue offending "up to age [twenty-five]," this figure plummets by two-thirds in the following five years.[96] Of course, because young adults commit a disproportionate number of crimes, they also constitute a lopsided number of prison admissions.[97]

Having drawn conclusions from the neuropsychological and developmental research, the Court reasoned that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders."[98] Youth are less culpable, so justifying carceral punishment with retribution is less appropriate. Adolescents are less likely to consider the consequences of their actions, including incarceration, and therefore deterrence is less effective.[99] Meanwhile, the circumstances attendant to youth render complete incapacitation questionable and "most suggest" the value of rehabilitation.[100]

Since then, developments in neuroscience and psychology undermine the propriety of drawing a line between childhood and adulthood at age eighteen.[101] Research shows that, as compared to other brain regions, the

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92. Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCH. 469, 473 (2000).

93. Scott et al., *supra* note 83, at 649–50.

94. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 190–91 (2017).

95. The age-crime curve is well-established and "is universal in Western populations." *From Youth Justice Involvement to Young Adult Offending*, NAT'L INST. JUSTICE (Mar. 10, 2014), https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx [https://perma.cc/J5XV-59RW].

96. *Id.*; *see also* PFAFF, *supra* note 94, at 191; Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 817 (2013). As Gupta-Kagan pointed out, this is particularly true for violent crime which draws the lengthiest sentences. Gupta-Kagan, *supra* note 33, at 717–18.

97. In California, twenty-six percent of new felony admissions to the state prison system in 2013 were eighteen- to twenty-four-year-olds. *See* DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., CHARACTERISTICS OF FELON NEW ADMISSIONS AND PAROLE VIOLATORS RETURNED WITH A NEW TERM: CALENDAR YEAR 2013, at 17 (2014), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/ACHAR1/ACHAR1d2013.pdf [https://perma.cc/U887-5RDP].

98. Miller v. Alabama, 567 U.S. 460, 472 (2012).

99. *See id.* at 478.

100. *Id.* at 472, 478.

101. *See* Brief of Amici Curiae Juvenile Law Center et al. in Support of Respondent Lee Boyd Malvo at 8A–9A, Mathena v. Malvo, 140 S. Ct. 919 (2020) (No. 18-217).

prefrontal cortex, which controls the brain's executive functions like impulse control and appreciation of consequences, matures more slowly.[102] This is now understood as an "[i]mmaturity [g]ap."[103] Imaging demonstrates that this gap persists well into a person's twenties.[104] As a result, experts have testified in capital cases that "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*."[105]

Given these advances, scholars, states and other countries have developed diverse proposals for emphasizing the rehabilitative possibility of emerging adults. For example, Professor Buss posits that the logical end point of the developmental analysis and related policy reforms set in motion by *Roper*, *Graham*, and *Miller* would be to abandon juvenile exceptionalism.[106] Instead, Buss argues that courts should adopt a unitary criminal legal system that recognizes the science of immaturity and its critical role in criminal offending.[107] Barry Feld proposes a "[y]outh [d]iscount" when sentencing young adult offenders, grounded on the basis that young adults are less culpable and more open to rehabilitation.[108] Others propose a "developmental approach to young offenders" which focuses on consideration of individuals' relative youth at sentencing and opportunities to seek parole on an expedited basis.[109]

II. CURRENT DECARCERAL EFFORTS FOR EMERGING ADULTS

Sentencing reforms focused on emerging adults are not anomalous. Several states have passed "young offender statutes," which strive to mitigate sentences for certain crimes committed by individuals up to age twenty-five, shield young adults from some of the most severe collateral consequences of convictions, or provide them with rehabilitative services

102. Commonwealth v. Mattis, 224 N.E.3d 410, 421–23 (Mass. 2024).

103. *See* MACARTHUR FOUND. RSCH. NETWORK ON ADOLESCENT DEV. & JUV. JUST., ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE 2 (2006), http://www.adjj.org/downloads/6093issue_brief_3.pdf [https://perma.cc/XHB9-2VUD].

104. B.J. Casey, C. Simmons, L.H. Somerville & A. Baskin-Sommers, *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders*, 5 ANN. REV. CRIMINOLOGY 321, 329–30 (2022).

105. Commonwealth v. Bredhold, No. 14-CR-161, 2017 WL 8792559, at *1 (Ky. Cir. Ct. Aug. 1, 2017) (quoting testimony of Dr. Laurence Steinberg).

106. Buss, *supra* note 13, at 872.

107. *Id.* at 872–75.

108. Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 141–43 (2013).

109. Scott et al., *supra* note 83, at 641, 644.

such as education and job training.[110] For example, California permits earlier parole eligibility for individuals serving long prison sentences for crimes they committed before age twenty-five.[111] A growing number of jurisdictions have expanded their youthful offender statutes to include emerging adults,[112] developed "[y]oung [a]dult [c]ourt[s],"[113] or created units of probation officers and prosecutor's offices that are tasked to work with young adults on rehabilitative services.[114]

Yet these efforts are criticized from all sides of the political spectrum. Some argue that "second look" sentencing reforms undermine the finality of criminal sentencing, and suggest that finality is necessary to give punishment its deterrent effect.[115] For example, critics of proposed changes to the Model Penal Code argued that potential resentencing opportunities were antithetical to rehabilitation, insisting that finality promotes rehabilitation by "requiring defendants to accept their situation and begin to move forward, instead of distracting themselves with litigating aspects of their case."[116]

Although Massachusetts, Connecticut, and Rhode Island are not alone in reducing carceral sentences of emerging adults, there are states moving in the opposite direction. Often in response to reports of increased crime or one violent crime, some states have called for a return to the punishment levels from the "superpredator" era of the 1990s.[117] For example, Republican legislators in Minnesota and Louisiana recently advocated for more severe prison sentences for young people.[118]

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110. *See id.* at 660–61; *see, e.g.*, GA. CODE ANN. §§ 42-7-1 to -9 (2022); MICH. COMP. LAWS §§ 762.11–.13 (2022); S.C. CODE ANN. §§ 24-19-5 to -160 (2022); W. VA. CODE §§ 25-4-1 to -12 (2022).

111. A.B. 965, 2019–2020 Leg., Reg. Sess. (Cal. 2019); CAL. PENAL CODE §§ 3051, 4801(c) (West 2020).

112. *See, e.g.*, COLO. REV. STAT. § 18-1.3-407 (2023); VT. STAT. ANN. tit. 33, §§ 5280–88 (2018).

113. *See Young Adult Court*, ORANGE CNTY. SUPERIOR CT., https://www.occourts.org/system/files/youngadultcourtsummary.pdf [https://perma.cc/K9JG-F6RT].

114. CONNIE HAYEK, NAT'L INST. OF JUST., ENVIRONMENTAL SCAN OF DEVELOPMENTALLY APPROPRIATE CRIMINAL JUSTICE RESPONSES TO JUSTICE-INVOLVED YOUNG ADULTS 6 (2016), https://www.ncjrs.gov/pdffiles1/nij/249902.pdf [https://perma.cc/PUC5-8Z3E].

115. *See* Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149, 156–57 (2015). Critics of the Model Penal Code proposal emphasized the administrative burden that resentencing hearings place on courts. Frase, *supra* note 19, at 196–97; Jon S. Tigar, *Discussion of Model Penal Code: Sentencing*, 87 A.L.I. PROC. 27, 37–38 (2010).

116. Miller, *supra* note 17, at 148.

117. *Cf.* Philip Bump, *Crime is Down, Though Fox News Viewers Might Not Be Aware*, WASH. POST (Dec. 18, 2023, 3:18 PM), https://www.washingtonpost.com/politics/2023/12/18/crime-fbi-fox-news/ [https://perma.cc/G42Y-9G3R]; S. POVERTY L. CTR., ONLY YOUNG ONCE: THE URGENT NEED FOR REFORM OF LOUISIANA'S YOUTH JUSTICE SYSTEM 8–9 (2023) [hereinafter ONLY YOUNG ONCE], https://www.splcenter.org/louisiana-juvenile-justice-system-reform [https://perma.cc/N4A7-CKCJ].

118. Walker Orenstein, *New Laws, Tougher Sentences: How Legislative Republicans Want to Address Crime in Minnesota*, MINNPOST (Apr. 6, 2022), https://www.minnpost.com/state-government/2022/04/new-laws-tougher-sentences-how-legislative-republicans-want-to-address-crime-in-minnesota/ [https://perma.cc/E3LV-26YM]; ONLY YOUNG ONCE, *supra* note 117.

Meanwhile, progressives are concerned that expanding the jurisdiction of juvenile courts and establishing young adult divisions within prisons, even with rehabilitative aims, will increase incarceration. The fear is that these reforms will entrench a system that inherently punishes those who lack opportunity.[119]

A. Massachusetts—a Story of Science-Driven Advocacy

In 2013, the Supreme Judicial Court (SJC) determined, based on the scientific evidence presented, that any sentence of LWOP imposed on individuals who were under eighteen violated the Commonwealth's provision banning cruel and unusual punishment.[120] The Supreme Court had just held that mandatory LWOP sentences for offenses committed by juveniles violated the Eighth Amendment.[121] But the SJC went further in *Diatchenko*, concluding that even discretionary LWOP sentences for those who are juveniles when they commit an offense violates the state constitution.[122] The SJC found that three characteristics differentiate juveniles from adult offenders: lack of maturity, greater vulnerability to negative influences and pressures, and a greater potential for rehabilitation.[123]

Nevertheless, prior to *Commonwealth v. Mattis*, Massachusetts was tied with Louisiana in having the highest percentage of its prison population serving LWOP sentences.[124] According to the Department of Corrections, one in five of the people serving LWOP in Massachusetts were between eighteen and twenty at the time of their crimes.[125]

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119. *See* Maureen Washburn, *Young Adult Prison Movement Deepens Reliance on Incarceration, Shortchanges Reform*, JUV. JUST. INFO. EXCH. (Apr. 17, 2017), https://jjie.org/2017/04/17/young-adult-prison-movement-deepens-reliance-on-incarcerationshortchanges-reform/ [https://perma.cc/YD4M-NY8N].

120. Diatchenko v. Dist. Att'y, 1 N.E.3d 270, 275–76 (Mass. 2013), *superseded by statute*, MASS. GEN. LAWS ch. 279, § 24 (2014), *as recognized in* Commonwealth v. Watt, 146 N.E.3d 414 (Mass. 2020).

121. Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (prohibiting mandatory LWOP sentences for homicide offenders under 18).

122. *Diatchenko*, 1 N.E.3d at 276.

123. *Id.* at 276–77.

124. ASHLEY NELLIS, THE SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 16 tbl. 3 (2021), https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf#page=14 [https://perma.cc/Y2ZY-XKZS]. In 2020, more people in Massachusetts were serving life sentences than the entire state prison population in 1970. *Id.* at 14 fig. 2.

125. Brief of Amici Curiae Boston University Center for Antiracist Research et al. in Support of Defendants-Appellants and Affirmance at 15, Commonwealth v. Mattis, 224 N.E.3d 410 (Mass. 2024) (Nos. 11693, 09265) [hereinafter B.U. Amici Brief].

1. Banning Life Without Parole for Emerging Adults

Sheldon Mattis was convicted of first-degree murder stemming from a shooting that occurred when he was eighteen years old,[126] and Jason Robinson was convicted of first-degree murder for a crime that occurred when he was nineteen years old.[127] Both were sentenced to LWOP.[128] Last year, they argued that circumstances attendant to youth make late adolescent offenders less culpable for their criminal offenses and better disposed to rehabilitation. They, along with substantial amici support, urged the SJC extend *Diatchenko*, and based on the same scientific findings and carceral justifications, to categorically bar the imposition of LWOP on emerging adults.[129]

A group of racial justice centers presented and contextualized the stark racial disparity in the Commonwealth's imposition of LWOP sentences for eighteen-to-twenty-year-olds. Massachusetts is tied only with Louisiana in having the highest proportion of its prison population serving LWOP.[130] In fact, twenty percent of people serving LWOP in Massachusetts were eighteen to twenty at the time of their offense.[131] More than a quarter of Black people sentenced to LWOP are there for an offense committed as late adolescents.[132] Black people comprise 6.5 percent of the Massachusetts population and 29.9 percent of its prison population, yet they constitute 35.5 percent of the people serving LWOP.[133] Amici persuasively argued that this overrepresentation of Black people among those sentenced to LWOP for offenses committed as emerging adults illustrates systemic racism and implicit bias. For example, false associations between Blackness and criminality, even when unconscious, influence prosecutorial and judicial determinations regarding late adolescents.[134] These biases contribute to racial disparities in sentencing and counsel against a discretionary approach to LWOP for eighteen-to-twenty-year-olds.

Advocates presented additional practical arguments, arguing that sentencing so many young people to LWOP results in the confinement of a larger aging population.[135] In addition, LWOP sentences, by definition,

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126. *Mattis*, 224 N.E.3d at 416.

127. Commonwealth v. Robinson, 224 N.E.3d 391, 398–99 (Mass. 2024).

128. *Mattis*, 224 N.E.3d at 416; *Robinson*, 224 N.E.3d at 398.

129. *Mattis*, 224 N.E.3d at 415.

130. B.U. Amici Brief, *supra* note 125, at 14 (citing NELLIS, *supra* note 124, at 16).

131. *Id.* at 15.

132. *Id.*

133. *See id.* at 18–19; Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513 (2018).

134. B.U. Amici Brief, *supra* note 125, at 31–38.

135. *See id.* at 16; NELLIS, *supra* note 124, at 25 ("Lengthy prison sentences ignore the. fact that most people who commit crime . . . age out of criminal conduct.").

disproportionately affect emerging adults because "they will serve more total time in prison than older adults would on the same life sentence."[136] And most critically, advocates advanced persuasive evidence of reduced levels of recidivism among those paroled from life sentences, which could be counterintuitive. Studies have shown that of individuals paroled from LWOP sentences, those that were convicted of serious and violent crimes are the *least likely* to recidivate by incurring new arrests, convictions, or imprisonment than those sentenced for less serious offenses.[137]

Additionally, experts in adolescent brain development and behavior reasoned that the imposition of LWOP sentences for emerging adults should be unconstitutional.[138] They emphasized a "scientific consensus," reasoning that the attributes of adolescence that the SJC "found decisive in *Diatchenko*" apply with equally compelling force to emerging adults.[139] For example, they note that biological, neurological, and developmental studies show exceptional capacity for change in late adolescence.[140]

Finally, several retired Massachusetts judges asked the SJC to extend *Diatchenko* to emerging adults, warning the court that if judges retain the discretion to impose LWOP for this age group, there will continue to be disparate and arbitrary sentencing.[141] They referenced jurisdictions conducting *Miller* hearings, now constitutionally required to determine if an LWOP sentence is warranted for a juvenile, and lamented the lack of principled instruction on several factors including "circumstances of the [] offense," "family and home environment" and "potential for rehabilitation."[142] Only a ban on LWOP for emerging adults would prevent the punishment's arbitrary imposition.

Meanwhile, the Commonwealth and a few state district attorneys opposed a categorical extension of *Diatchenko*.[143] Their first argument

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136. Katy Naples-Mitchell, *Mass. Highest Court Decision Shows How Neuroscience Can Shape the Treatment of Young Offenders*, COGNOSCENTI (Jan. 25, 2024), https://www.wbur.org/cognoscenti/2024/01/25/life-sentences-without-parole-sjc-mattis-katy-naples-mitchell# [https://perma.cc/3BG4-XSCV].

137. ASHLEY NELLIS, THE SENT'G PROJECT, A NEW LEASE ON LIFE (2021), https://www.sentencingproject.org/app/uploads/2022/08/A-New-Lease-on-Life.pdf#page=14 [https://perma.cc/63EU-MV2U].

138. *See* Brief of Amici Curiae Neuroscientists, Psychologists, and Criminal Justice Scholars in Support Defendant-Appellant Sheldon Mattis and Affirmance at 5, Commonwealth v. Mattis, 224 N.E.3d 410 (Mass. 2024) (No. 11693).

139. *Id.* at 6–7.

140. *Id.* at 16–20.

141. *See* Brief of Amici Curiae Retired Massachusetts Judges et al. in Support of Appellants at 29–36, *Mattis*, 224 N.E.3d 410 (Nos. 09265, 11693).

142. *Id.* at 30 (citing Miller v. Alabama, 567 U.S. 460, 477–78 (2012)).

143. When the lower court's Judge Ullmann found application of LWOP unconstitutional for eighteen-to-twenty-year-olds, Findings of Fact on Brain Development and Social Behavior and Ruling of Law on Whether Mandatory Life-Without-Parole Sentences for Defendants Age 18 Through 20 at

resounded in separation of powers: they urged the SJC to refrain from exercising the legislative function of defining a crime and its punishment.[144] They argued that Petitioners Mattis and Robinson were seeking an inappropriate judicial evaluation of brain science, and warned that, given constantly changing scientific development, a categorical extension would set Massachusetts on an unstable path.[145] Finally, they urged the SJC to consider negative practical implications, such as the potential judicial burden of resentencing hearings.[146]

After considering the case for a year, the SJC determined, in a 4-3 split, that the Massachusetts Constitution bars the imposition of LWOP sentences for people under twenty-one.[147] Based upon contemporary standards of decency informed by an updated scientific record, the court held that LWOP sentences for emerging adults constitute "cruel or unusual punishment[]" because emerging adults have developing brains, diminished culpability, and a greater capacity for rehabilitation than older adults.[148] This historic decision accepts the lower court's core findings of fact regarding the brain science of emerging adults—they

> (1) have a lack of impulse control similar to sixteen and seventeen year olds in emotionally arousing situations, (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, and (4) have a greater capacity for change than older individuals due to the plasticity of their brains.[149]

In addition, the court reasoned that emerging adults are treated differently in other areas of law and regulation.[150] The Department of Youth Services (DYS) is statutorily authorized to maintain custody of young

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the Time of Their Crimes Violates the Massachusetts Declaration of Rights at 19, Commonwealth v. Robinson, No. 0084CR10975 (Mass. Dist. Ct., Suffolk Cnty. July 20, 2022), the Suffolk District Attorney did not appeal. In a peculiar procedural move, however, a few other District Attorneys filed an amicus brief opposing the extension of *Diatchenko*. *See* Brief of Amici Curiae for the Eastern District Attorney, *Mattis*, 224 N.E.3d 410 (No. 11693).

144. *Id.* at 14–17.

145. *Id.* at 22–24.

146. *Id.* at 9.

147. *Mattis*, 224 N.E.3d at 415.

148. *Id.* at 418–19, 422–23. The SJC found the punishment was unconstitutional pursuant to art. 26 of the Massachusetts Declaration of Rights. "Consequently, we conclude that a sentence of life without the possibility of parole for emerging adult offenders violates art. 26." *Id.* at 428.

149. *Id.* at 421 (footnote omitted); *see also* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 82–89 (2008).

150. *Mattis*, 224 N.E.3d at 424–26.

people adjudicated as youthful offenders up to twenty-one years of age.[151] In 2018, the state legislature authorized the state Department of Correction to "establish young adult correctional units."[152] These units provide "targeted interventions, age appropriate programming and a greater degree of individual attention" to emerging adults ages eighteen to twenty-four.[153] The SJC also took notice that the state's legislature had formed a Task Force on Emerging Adults in the Criminal Justice System, whose report concluded that emerging adults "are a unique population that requires developmentally tailored programming and services."[154] The dissenting justices disagreed, noting that the legislature has drawn a line "between childhood and adulthood at eighteen, and objective indicia of contemporary standards of decency . . . demonstrate support for . . . treating individuals within this age range as adults in our criminal justice system when they commit the crime of murder in the first degree."[155]

Finally, the SJC acknowledged that the *mandatory* nature of LWOP in the Commonwealth is an outlier—merely ten states *require* eighteen through twenty-year-olds who are convicted of first-degree murder to be sentenced to LWOP.[156] The *Mattis* majority recognized that it is not entirely alone. The Supreme Court of Washington, considering evolving standards of decency, brain science, and precedent, concluded that mandatory LWOP sentences violated the state constitution when imposed on individuals under twenty-one.[157] Similarly, the Michigan Supreme Court held that mandatory life without parole for eighteen-year-olds violates its state ban on cruel or unusual punishment.[158] Like Massachusetts's article 26, Michigan's analogue has been interpreted more broadly than the Eighth Amendment and guarantees proportionate punishment. Michigan reasoned that because "the Eighth Amendment dictates that youth matters in sentencing,"[159] and because science has shown that eighteen-year-olds possess the same attributes of youth as do juveniles, mandatorily sentencing an eighteen-year-old to LWOP is "unusually excessive imprisonment and thus a

151. Commonwealth v. Terrell, 160 N.E.3d 289, 293 (Mass. 2021). The sentencing structure permits "dual" sentences for young adult offenders, requiring they remain in the DYS custody until age twenty-one before beginning their "adult" sentence. MASS. GEN. LAWS. ch. 119, § 58(b) (2024).

152. MASS. GEN. LAWS ch 127, § 48B(a) (2024) (effective Dec. 31, 2018).

153. *Id.*

154. TASK FORCE ON EMERGING ADULTS IN THE CRIM. JUST. SYS., EMERGING ADULTS IN THE MASSACHUSETTS CRIMINAL JUSTICE SYSTEM, S. 191-2840, Reg. Sess., at 11 (Mass. 2020).

155. *Mattis*, 224 N.E.3d at 443 (Lowy, J., dissenting).

156. *Id.* at 427 (majority opinion).

157. *In re* Monschke, 482 P.3d 276, 281–82, 285–87 (Wash. 2021).

158. People v. Parks, 987 N.W.2d 161, 171 (Mich. 2022).

159. *Id.* at 166.

disproportionate sentence that constitutes 'cruel or unusual punishment'" under the State's constitution.[160]

Following this decision, Mr. Mattis and Mr. Robinson, alongside approximately 200 individuals, will be eligible for parole.[161] To be sure, the SJC did not diminish the severity of their crimes or suggest the emerging adults should be paroled as soon as they have served the statutorily designated portion of their sentence. Instead, they must be granted a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" before the parole board.[162] "If [a] person's offense occurred before July 25, 2014, their sentence will now be life with the possibility of parole after [fifteen] years."[163] If their offense occurred after that date, the sentence will be "life with the possibility of parole . . . between [twenty] and [thirty] years."[164] The State's public defender agency, the Committee for Public Counsel Services (CPCS), is working with the parole board to identify prisoners newly eligible, and the Director of the Parole Advocacy Unit at CPCS indicated their intent to confirm that impacted people have a trained advocate.[165] Although advocates hope that parole will move quickly, the parole board typically has hearings planned months in advance.[166]

Mattis and Robinson, along with their advocates and allies, effectively harnessed substantial scientific and statistical evidence of rehabilitation and reduced recidivism by paroled emerging adults. They persuaded the SJC that late adolescents continue to develop in profound ways irreconcilable with the conclusion that they necessarily "pose an ongoing and lasting danger to society."[167] This advocacy was grounded in science and harnessed effective evidence that banning LWOP for emerging adults would be consistent with public safety in Massachusetts.

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160. *Id.* at 176.

161. Sarah Betancourt, *What Happens Now that Massachusetts Has Banned Life Without Parole for Emerging Adults?*, GBH NEWS (Jan. 17, 2024), https://www.wgbh.org/news/local/2024-01-17/what-happens-now-that-massachusetts-has-banned-life-without-parole-for-emerging-adults [https://perma.cc/NHZ7-AKLB].

162. Diatchenko v. Dist. Att'y, 1 N.E.3d 270, 286–87 (Mass. 2013) (citing Graham v. Florida, 560 U.S. 48, 75 (2010)).

163. Betancourt, *supra* note 161.

164. *Id.*

165. *Id.*

166. Tim McGuirk emphasized the Board's commitment to public safety and individualized determinations: "Parole is granted when the Board determines that an individual can serve the remainder of their sentence in the community without violating the law, and that their release is not incompatible with the welfare of society." *Id.*

167. *Diatchenko*, 1 N.E.3d at 284 (citing *Graham*, 560 U.S. at 71).

2. *The Ongoing "Raise the Age" Campaign*

During the year that observers anxiously awaited the outcome of *Mattis*, state legislators introduced a bill proposing raising the age of juvenile court jurisdiction to include eighteen-to-twenty-year-olds.[168] The bill proposes making this change over a five-year period to permit the pertinent state agencies to adjust their programming and staffing needed to accommodate a growing population.[169]

Unlike traditional "second look" reforms, this proposal excludes individuals convicted of first- or second-degree murder.[170] But after *Mattis*, emerging adults will not be sentenced to LWOP in Massachusetts.[171]As some youth advocates explained, the harms that result from involvement in the adult criminal legal system, including severe collateral consequences and the lack of developmentally appropriate rehabilitation programs spur high rates of recidivism for this population.[172]

Advocates argue that "Raise the Age" will result in emerging adults being held accountable in a developmentally appropriate setting that better promotes rehabilitation by addressing the root causes of criminal behavior. They emphasize two strategic points as part of their comprehensive public campaign.[173] They insist that raising the age of juvenile jurisdiction will improve public safety and decrease crime.[174] In 2013, Massachusetts raised the age of juvenile jurisdiction to include seventeen-year-olds,[175] and since that time, crimes committed by juveniles have declined by thirty-four percent in the Commonwealth.[176] Currently, the Department of Corrections states that offenders between the ages of eighteen and twenty-one in adult prisons demonstrate the highest rates of recidivism.[177] Advocates expect

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168. S.B. 942, 193d Gen. Ct., Reg. Sess. (Mass. 2023).

169. *Id.*

170. *Id.*

171. Commonwealth v. Mattis, 224 N.E.3d 410, 415 (Mass. 2024).

172. *See Frequently Asked Questions*, *supra* note 22.

173. *See, e.g.*, *Raise the Age*, CELTICS, https://www.nba.com/celtics/community/celtics-united/raise-the-age [https://perma.cc/9385-EB5S].

174. *See id.*

175. *Frequently Asked Questions*, *supra* note 22.

176. Erin Tiernan, *Massachusetts Criminal Justice System 'Failing' Young Adults, Bill Would Treat Offenders 18 to 21 as Juveniles*, MASSTERLIST (Sept. 12, 2023), HTTPS://MASSTERLIST.COM/2023/09/12/MASSACHUSETTS-CRIMINAL-JUSTICE-SYSTEM-FAILING-YOUNG-ADULTS-BILL-WOULD-TREAT-OFFENDERS-18-TO-21-AS-JUVENILES/ [https://perma.cc/9U5R-K82G].

177. KIM STEVEN HUNT & BILLY EASLEY II, U.S. SENT'G COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 23 fig. 13 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf [https://perma.cc/PVH4-JXBF].

that moving emerging adults to developmentally appropriate settings will reduce that rate.[178]

Second, the bill's proponents argue that incarcerating emerging adults in adult prisons increases toxic exposure and recidivism, whereas keeping this group away from adult prisons can foster true rehabilitation.[179] They rely on a study of individuals who have been adjudicated for serious, violent offenses.[180] It concluded that two factors most correlated to the desistence or persistence in criminal offending are: "(1) belief in the legitimacy of authority and (2) meeting adolescent developmental milestones on time."[181] Young people discharged from DYS have lower recidivism rates than young adults incarcerated in the general adult population.[182]

As Deputy Director of the Citizens for Juvenile Justice, Sana Fadel, a primary supporter of this campaign, explains, individuals aged eighteen to twenty-one serving time in adult prison are offered "little-to-no rehabilitation that sets them up for a high potential of reoffending."[183] Young adults incarcerated in Massachusetts's adult prisons have a 55 percent reconviction rate, while teens leaving the Department of Youth Services have a 22 percent rate of reconviction.[184]

Meanwhile, "Raise the Age" opponents do not dispute the science. Instead, they are concerned that the bill permits young adults to avoid necessary punishment and overwhelms juvenile facilities.[185] Because of the decline in youth crime, supporters insist that the system has the capacity to serve emerging adults. They note that the juvenile system has increased access to diversion programs, criminal record protection, and educational and rehabilitative programming—all of which will lower recidivism.[186]

The SJC's decision in *Mattis* provides a template for how advocates can rely on the science of brain development in emerging adults and evidence of rehabilitation contributing to public safety. Harnessing these two factors, Massachusetts has, at a minimum, changed the way that young adults who commit the most serious crimes are punished in the Commonwealth. The

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178. Interview with Anonymous Advocate #1 (Dec. 20, 2023) [hereinafter Interview 1]; Interview with Anonymous Advocate #2 (Dec. 19, 2023) [hereinafter Interview 2].

179. Interview 1, *supra* note 178; Interview 2, *supra* note 178.

180. CITIZENS FOR JUV. JUST., RAISING THE AGE OF JUVENILE JURISDICTION IS A PUBLIC SAFETY POLICY, https://static1.squarespace.com/static/5d6e84547e7c7d000106c704/t/6478dc3933b8d418651aafb5/1685642297771/FACT+SHEET+Pathways+to+Desistance.pdf [https://perma.cc/HP3N-F5FN].

181. *Id.*

182. 46 percent of formerly DYS-committed youth were rearraigned compared to 76 percent of eighteen-to-twenty-four-year-olds discharged from Houses of Corrections; and the re-conviction rate is 26 percent compared to 55 percent. *Frequently Asked Questions*, *supra* note 22.

183. Tiernan, *supra* note 176.

184. *Id.*

185. Interview 1, *supra* note 178; Interview 2, *supra* note 178.

186. Interview 1, *supra* note 178; Interview 2, *supra* note 178.

advocacy and record in the case suggest a blueprint for reimagining the role of rehabilitation in the decarceral conversation.

B. Connecticut—a Story of Legislative Compromise

Like many other states, Connecticut lengthened its prison terms for all individuals in the 1980s.[187] Harsher sentences meant many people who committed violent crimes as teenagers or emerging adults received extraordinarily long sentences. Presently, about 700 people in the state are serving LWOP sentences, and, even though only 13 percent of the state's population is Black, *most* of the individuals serving LWOP are Black.[188]

On October 1, 2023, Connecticut's Senate Bill 952 went into effect (becoming Public Act 23-169), expanding parole eligibility for individuals serving long sentences who committed criminal offenses between the ages of eighteen and twenty-one.[189] Pursuant to this reform, the Board of Pardons and Paroles will consider parole for those who have served most of their sentence. Specifically, an individual sentenced to ten to fifty years will be eligible for parole after serving the greater of twelve years or sixty percent of their sentence.[190] Passing this bill was a long-term effort, stewarded by Senator Gary Winfield, co-chair of the legislature's judiciary committee, who has driven prior criminal justice reforms.[191] A few advocates mentioned that S.B. 952 would not have passed without Senator Winfield's incredible persistence.[192] The law was supported by advocacy efforts by Yale Law School's Challenging Mass Incarceration and Criminal Justice Advocacy Clinics and championed by many other important state advocates.[193]

Connecticut has a Democratic supermajority, sometimes referred to as a "blue trifecta state," and has been comparatively progressive regarding criminal justice reforms.[194] According to several activists, there remains a

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187. Kelan Lyons, *Connecticut Governor Scrambles Pardons Board and Halts Clemency*, BOLTS (Apr. 28, 2023), https://boltsmag.org/connecticut-governor-scrambles-board-of-pardons-and-paroles-clemency/ [https://perma.cc/3CX6-94T3].

188. *Id.*; NELLIS, *supra* note 124, 10, 19 tbl. 5.

189. Act effective Oct. 1, 2023, 2023 Conn. Acts 23-169 (Reg. Sess.) (codified as amended CONN. GEN. STAT. § 54-125a (2024)).

190. *Id.* And if their sentence exceeds fifty years, they are eligible for parole after thirty years. *Id.*

191. Senator Winfield's state criminal law reform efforts are widely acknowledged. *See, e.g.*, Lisa Backus, *Going Back for Those Left Behind: Sen. Gary Winfield*, CT NEWS JUNKIE (Nov. 29, 2021), https://ctnewsjunkie.com/2021/11/29/going-back-for-the-left-behind-sen-gary-winfield/ [https://perma.cc/ZZ43-6PEV].

192. Interview 1, *supra* note 178; Interview 2, *supra* note 178; Interview with Miriam Gohara, Clinical Professor of L. & Dir. of Jerome N. Frank Legal Servs. Org., Yale Law School (Jan. 8, 2024).

193. Interview 1, *supra* note 178; Interview 2, *supra* note 178.

194. Interview 1, *supra* note 178; *see, e.g.*, Act effective Oct. 1, 2015, 2015 Conn. Acts 15-84 (Reg. Sess.) (codified as amended CONN. GEN. STAT. §§ 53a-46a, 53a-54a, 53a-54b, 53a-54d, 54-91g, 54-125a (2024)).

strong tradition of bipartisan cooperation.[195] The State's legislative culture is collegial and solicitous of bipartisan support on the sessions' agenda of proposed bills, despite the Democratic supermajority.[196] This culture explains, at least partially, why criminal justice reforms are successful.

In 2015, Connecticut passed Public Act 15-84, which retroactively eliminated LWOP sentences for individuals who committed crimes prior to eighteen, required courts to consider the mitigating aspects of youth when sentencing juveniles to serious felonies, and established automatic parole eligibility for anyone who committed a crime prior to turning eighteen.[197] In pushing for S.B. 952, advocates, including Yale Law School's students, repeatedly presented research to state legislators showing that adolescent brain development continues through the age of twenty-five and lengthy incarceration stifles the capacity for growth and maturation.[198] Thus, by the time that S.B. 952 was introduced, advocates found that even the more reluctant state representatives were acclimated to years of hearing about scientific advancements regarding emerging adults and the increased opportunities for rehabilitation.[199]

In fact, Connecticut had already recognized these implications of emerging-adult brain science in areas of the criminal legal system. In 2022, the Board of Pardons and Paroles commuted the sentences of eleven individuals who committed crimes before they were twenty-five.[200] In their commutation decisions, the Board referenced adolescent brain development studies illustrating that human brains are not fully developed until an individual's late twenties.[201] But by the time state legislators were debating

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195. Interview 1, *supra* note 178; Interview 2, *supra* note 178; Interview with Miriam Gohara, *supra* note 192.

196. *See* Interview 2, *supra* note 178.

197. 2015 Conn. Acts 15-84.

198. *See, e.g.*, *Testimony in Support of S.B. 952 Before the Joint Comm. on Judiciary*, 2023 Reg. Sess. (Conn. 2023) [hereinafter *Judiciary Committee Testimony*], https://ct-n.com/ctnplayer.asp?odID=21617 [https://perma.cc/RR7B-LGK3] (testimony of Joette Katz, former Associate Justice of Connecticut Supreme Court and former Commissioner of Connecticut's Department of Children and Families); *From Youth Justice Involvement to Young Adult Offending*, *supra* note 95; *Clinics Celebrate the Expansion of Parole Eligibility for Young People*, YALE L. SCH. (June 12, 2023), https://law.yale.edu/yls-today/news/clinics-celebrate-expansion-parole-eligibility-young-people [https://perma.cc/5MN9-HBRR].

199. *See* Interview 2, *supra* note 178; *Clinics Celebrate the Expansion of Parole Eligibility for Young People*, *supra* note 198.

200. Lyons, *supra* note 187; Kelan Lyons, *Parole Board Shortens Sentences of 11 Men Who Committed Crimes when They Were Young*, CT MIRROR (Jan. 21, 2022, 5:00 AM), https://ctmirror.org/2022/01/21/parole-board-shortens-sentences-of-11-men-who-committed-crimes-when-they-were-young/#:~:text=Acknowledging%20an%20increased%20understanding%20in,felony%20murder%20or%20attempted%20murder. [https://perma.cc/J2AH-SA92].

201. Lyons, *supra* note 187.

S.B. 952, the recent rise in commutations was under attack.[202] In Connecticut, the power to commute a prison sentence is vested in the Board of Pardons and Paroles; there is no direct role for the Governor.[203] The state GOP staged a large protest in response to the increased use of clemency by the state's Board.[204] Accompanied by families of victims of violent crimes, Republican state legislators publicly asked Governor Lamont to stop the commutations. Lamont removed Carleton Giles, a former police officer, as chairman of the Board.[205] The Board subsequently ceased all commutations.[206]

For the State's many criminal justice advocates seeking to reduce Connecticut's carceral population, Governor Lamont's and the Board's decisions were discouraging. The recent rise in clemency had "overwhelmingly benefited people of color."[207] The Board identified that nearly two-thirds of the individuals who received commutations in 2022 were Black, and one quarter were Latinx.[208] The Board, under Giles's leadership, attempted to dampen criticism by announcing that it would no longer hear commutations from people serving life without release sentences.[209] Statistics showed that, even in 2022, more than three-quarters of applicants were denied commutation.[210] Critically, the bulk of state prisoners who were granted commutations in 2022 were sentenced as juveniles or young adults to extremely long prison terms.[211] Thus, the Parole Board seemed to remain receptive to the legislative advocacy occurring on the science on developing brains in young adults.[212] Representative Steven Stafstrom, the Democratic co-chair of the Judiciary Committee, noted that the 2022 commutations applied to emerging adults were often for sentences from the late 1990s that would not be given today.[213] Further, commutation

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202. *See* Alex Putterman, *Commutations of Long Prison Sentences in CT Put on Hold as Board Reviews Policy*, CT INSIDER (Apr. 20, 2023, 4:45 PM), https://www.ctinsider.com/news/article/commutations-ct-put-hold-board-reviews-policy-17908933.php [https://perma.cc/S3WA-CXXU]; Jamiles Lartey, *Connecticut Normalized Clemency. Not Anymore.*, MARSHALL PROJECT (May 6, 2023, 12:00 PM), https://www.themarshallproject.org/2023/05/06/connecticut-incarceration-clemency-commutation-pardon-justice-reform [https://perma.cc/PRT8-X4RX].

203. *See* Emilia Otte, *A New Law on Prison Commutations Draws Ire of Both Victims and Inmate Advocates*, CT EXAMINER (May 31, 2023), https://ctexaminer.com/2023/05/31/a-new-law-on-prison-commutations-draws-ire-of-both-victims-and-inmate-advocates/ [https://perma.cc/KP8B-44UM].

204. Lyons, *supra* note 187.

205. Giles, a Black man, was "painted . . . as the architect" of the Board of Parole's decision to release more prisoners than it previously had. This was unfounded. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *See id.*

210. *Id.*

211. *Id.*

212. *See id.* (recognizing that the Board appeared to "heed" arguments surrounding young adult brain development).

213. *Id.*

only corrected extremely long sentences based upon today's understanding of appropriate punishment.[214]

Advocates intimated that the attack on commutations ultimately helped pass the parole eligibility bill because even the legislators who disapproved of executive commutation wanted to provide an avenue for young adults to obtain relief from extreme sentences.

Connecticut had also recently established a mentorship program in its prisons, whereby individuals serving long sentences who had effectively changed and improved themselves mentored those with shorter sentences.[215] Those mentors illustrated their impact in disrupting cycles of crime and how they could be doing similar work outside of prison.[216] Advocates highlighted this reform during the floor debates on S.B. 952.[217] This served to humanize rehabilitation for members of the legislative chambers.[218]

1. Two Critical Compromises

Despite Connecticut's history of reform in juvenile sentencing and its eventual passage, S.B. 952 was controversial when introduced.[219] The Yale Law School clinic was motivated by obtaining relief for their clients who had committed their offenses between the ages of eighteen and twenty-five and were serving lengthy sentences.[220] During the floor debate about S.B. 952, though, several Republican senators raised concern about young adult crime. They cited rising car thefts since the start of the COVID-19 pandemic, and a perception that youth crime was rising in Connecticut.[221] Given the proposal affected emerging adults with the most severe sentences, for crimes other than car theft, this pushback was irrational. However, it demonstrated a real fear for public safety.

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214. *See id.* (further quoting statements by Representative Stafstrom).

215. *See* Maurice Chammah, *The Connecticut Experiment*, MARSHALL PROJECT (May 8, 2018, 5:00 AM), https://www.themarshallproject.org/2018/05/08/the-connecticut-experiment [https://perma.cc/6PUZ-HAKV] (reporting on "TRUE," a pilot program at Cheshire Correctional Institution).

216. Interview 2, *supra* note 178.

217. *See Judiciary Committee Testimony*, *supra* note 198 (testimony of Ray Boyd, co-founder of Next Level Empowerment Reentry Program in New Haven, Connecticut).

218. *See* Interview 2, *supra* note 178.

219. Jaden Edison, *CT Senate Votes to Expand Parole Eligibility for Young Adults*, CT MIRROR (May 9, 2023, 9:45 PM), https://ctmirror.org/2023/05/09/ct-parole-eligibility-young-adult-prison-sentence/ [https://perma.cc/FBW9-V6JF].

220. Interview 2, *supra* note 178.

221. Interview 1, *supra* note 178; Interview 2, *supra* note 178; *see also* Christopher Keating, *Connecticut Lawmakers Seeking to Stop Rash of Juvenile Car Thefts*, HARTFORD COURANT (Mar. 25, 2019, 6:03 PM), https://www.courant.com/2019/03/25/connecticut-lawmakers-seeking-to-stop-rash-of-juvenile-car-thefts/ [https://perma.cc/SD3B-LLB7]; Julia Bergman, *CT Lawmakers Pledge to Tackle Juvenile Crime*, CTPOST (July 8, 2021, 9:52 AM), https://www.ctpost.com/news/article/CT-lawmakers-pledge-to-tackle-juvenile-crime-16299645.php [https://perma.cc/C924-HEHB].

Additionally, a decade prior to these discussions, a tragic crime befell one state representative.[222] Although this history was not related to expanding parole eligibility, advocates noted that several state legislators were opposed to extending parole opportunities for young adults because of the trauma and pain from that tragedy.[223]

In any session, legislative members are fighting to address bills presented by every committee, budgets, and other state priorities needing to be addressed within the session. The House Democratic co-chair typically wants to negotiate a deal with the ranking member of the other side; all committees have bipartisan chairs.[224] The Senate debated S.B. 952 first and urged to get it raised in the House within the limits of the session.[225] Even after the Senate passed the bill, House Republicans tried to kill it and the State Attorney opposed the measure.[226]

The law ultimately represented significant compromise for its sponsors and primary advocates. As written and initially proposed, the bill would have expanded the possibility for parole to individuals who committed serious crimes between the ages of eighteen and twenty-five.[227] Advocates pushed for the bill to include individuals who had committed their crimes up until the age of twenty-five, soliciting testimony from experts on that age range.[228] Professor Miriam Gohara explained that, even when they believed it was unlikely to be passed as applicable for individuals up to twenty-five years old, advocates continued to try to expand the age range.[229] This was both to establish a record about the related science for emerging adults and to represent impacted persons and their families.[230] Advocates persisted in seeking applicability to individuals up to twenty-five-years-old among allies, some of whom were concerned about the scarcity of resources and practical challenges of a reform that would make so many incarcerated people eligible for a second-chance sentencing.[231]

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222. *Connecticut Town Finds Hope, Healing 10 Years After Gruesome Petit Family Murders*, ABC NEWS (July 21, 2017, 9:59 AM), https://abcnews.go.com/US/connecticut-town-finds-hope-healing-10-years-gruesome/story?id=48708022 [https://perma.cc/9V6U-XE4Y] (reporting that a former state legislator, and town manager, Bill Petit, suffered a horrific home invasion during which his family members tragically died). Several advocates noted that this heinous crime contributed to other legislators' critique of S.B. 952. Interview 1, *supra* note 178; Interview 2, *supra* note 178.

223. Interview 1, *supra* note 178; Interview 2, *supra* note 178.

224. *See, e.g.*, *Legislative Regulation Review Committee*, CONN. GEN. ASSEMBLY, https://www.cga.ct.gov/rr/# [https://perma.cc/4G9E-9Q7P].

225. Interview 1, *supra* note 178.

226. *Id.*

227. *Id.*

228. *See, e.g.*, *Judiciary Committee Testimony*, *supra* note 198 (testimony of Robin Walker Sterling, Darnell Epps, and Dr. Kathryn Thomas).

229. Interview with Miriam Gohara, *supra* note 192.

230. *Id.*

231. *Id.*

By the time of the floor debate, S.B. 952 was restricted in scope, though. First, it was amended to cover individuals who committed their offenses between the ages of eighteen and twenty-one.[232] Second, eligibility dates for when the crimes had to have been committed for the expanded parole eligibility to apply were adjusted. Originally, the triggering crime had to occur before October 1, 2015.[233] Upon being abruptly amended, it had to occur before October 1, 2005.[234] This meant that for emerging adults serving incredibly long sentences for crimes they committed between 2005 and 2015, there was no longer recourse.

This concession was highly controversial, and some advocates viewed it as an irrational limit to the bill's relief.[235] Others justified the bill's change by explaining that, because Connecticut had undergone substantial criminal legal reform around 2005, its criminal laws became fairer at that time.[236] Professor Gohara feared this amendment would cause the reform to fail for lack of continued consensus amongst its many advocates.[237] Yale pushed the revised bill, despite its compromised scope, because it provided relief for various impacted people.[238] Their continued support illustrates a rejection of what Carol Steiker calls "an insistence on transformation or nothing"[239] and persevering as a decision to focus on reducing existing suffering.

2. *Advocacy by Directly Impacted Families*

While it is true that science on emerging adults had been introduced to the state legislature annually since the 2015 reform,[240] several advocates

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232. Senate Amendment to An Act Concerning Parole Eligibility for an Individual Serving a Lengthy Sentence for a Crime Committed Before the Individual Reached the Age of Twenty-Five, S.B. 952, Jan. Sess. 2023 (Conn. 2023), https://www.cga.ct.gov/2023/amd/S/pdf/2023SB-00952-R00SA-AMD.pdf [https://perma.cc/USX9-G98G]; House Amendment to An Act Concerning Parole Eligibility for an Individual Serving a Lengthy Sentence for a Crime Committed Before the Individual Reached the Age of Twenty-Five, S.B. 952, Jan. Sess. 2023 (Conn. 2023) [hereinafter House Amendment], https://www.cga.ct.gov/2023/amd/S/pdf/2023SB-00952-R00HA-AMD.pdf [https://perma.cc/P5CZ-UVWG].

233. House Amendment, *supra* note 232.

234. Interview with Miriam Gohara, *supra* note 192.

235. Interview 1, *supra* note 178; Interview with Miriam Gohara, *supra* note 192.

236. Interview 1, *supra* note 178; Interview 2, *supra* note 178.

237. Interview with Miriam Gohara, *supra* note 192.

238. *Id.*

239. Carol S. Steiker, *Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment*, 71 FLA. L. REV. 1363, 1394 (2019) ("[A]n insistence on transformation or nothing seems to me unrealistic and even cruel in its willingness to decline to support real reductions in human misery. After all, first steps . . . are often the only way to get to a second step.").

240. Interview with Miriam Gohara, *supra* note 192; *see also Clinics Celebrate the Expansion of Parole Eligibility for Young People*, *supra* note 198 (Yale Law Student Darnell Epps notes that "[f]or the past six years, I've spent countless hours speaking to at-risk youth about making better choices, and it is my deep conviction that *everyone* has the capacity for change, *regardless* of their crime").

believe that the persistent testimony and advocacy from individuals directly impacted by S.B. 952 was the most effective strategy for convincing state legislators and for its ultimate passage.

Powerful narratives came from those who were impacted by the potential reform, particularly family members of young adults who are incarcerated, and formerly incarcerated individuals themselves.[241] Deb Martinez, a sister of one of the impacted individuals, was among the strongest personal advocates for the passage of S.B. 952. She repeatedly met with legislators, urging them to pass the bill, and attended every day of the legislative session.[242]

Aside from making difficult compromises, S.B. 952 supporters used strategic messaging to persuade legislators. They presented the reform as providing hope and opportunity for rehabilitation to a population that could rehabilitate.[243] Various impacted people provided powerful testimony. Ray Boyd, a formerly incarcerated person who leads a reentry program in New Haven, emphasized the importance this bill would have and that it would motivate inmates looking for a second chance at life.[244] Donald Freitag discussed the rehabilitation of his son who had completed ten years of a thirty-year sentence, emphasizing that this bill would provide young offenders with hope and an impetus to keep improving themselves and rehabilitating.[245]

In addition, the bill's supporters presented the reform as providing hope and opportunity to a population that could rehabilitate.[246] Advocates reinforced that this reform was not automatic; it represented a process where parole has discretion to make individual determinations.[247] Connecticut's S.B. 952 passed and was signed by the Governor on June 28, 2023.[248]

Connecticut's expansion of parole opportunities for individuals sentenced for crimes they committed as late adolescents exemplifies the success of a rehabilitation narrative, coupled with repeated exposure of

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241. *Judiciary Committee Testimony*, *supra* note 198 (statements of Ray Boyd, Deborah Martinez, and Donald Freitag).

242. *Id.* at 2:11:00–2:14:32 (statement of Deborah Martinez).

243. *Id.* (statements of Ray Boyd, Deborah Martinez, and Donald Freitag).

244. *Id.* at 2:00:55–2:05:59 (statement of Ray Boyd).

245. *Id.* at 2:48:12–2:52:15 (statement of Donald Freitag).

246. *See, e.g.*, Molly Gill, *Written Statement of Molly Gill*, FAMM (Mar. 17, 2023), https://www.cga.ct.gov/2023/juddata/TMY/2023SB-00952-R000322-Gill,%20Molly-FAMM -Supports-TMY.PDF [https://perma.cc/M6RS-HWGH] (statement of FAMM's Vice President of Policy in support of Connecticut S.B. 952).

247. *See* Letter from Dr. Eric Frazer, Licensed Clinical Psychologist (Mar. 15, 2023), https://www.cga.ct.gov/2023/juddata/TMY/2023SB-00952-R000322-Frazer,%20Dr.%20Eric, %20Assistant%20Clinical%20Professor-Yale%20Sch.%20of%20Medicine-Supports-TMY.PDF [https://perma.cc/T6LY-JVUX] (supporting Connecticut S.B. 952).

248. *See* Act effective Oct. 1, 2023, 2023 Conn. Acts 23-169 (Reg. Sess.) (codified as amended CONN. GEN. STAT. § 54-125a (2024)) (approved on June 28, 2023).

directly impacted persons to state legislators. Advocates' persistence with S.B. 952/Law 23-169, even when confronted with significant legislative opposition and compromise, illustrates a decision to focus on easing the suffering of many presently incarcerated for extraordinarily long periods.[249]

C. Rhode Island—a Story of Reform and Backlash

In 2021, the Rhode Island legislature amended its Youthful Offender Act with the intent to permit parole consideration for individuals serving extremely long sentences who had committed their crimes before the age of twenty-two.[250] The amendment applies to all youthful offenders who committed their offenses at any time on or after January 1, 1991.[251] It permits parole eligibility after a person serves twenty years of incarceration.[252] It thus reduces the years that individuals need to spend in prison before having the *opportunity* to convince the parole board that they have been rehabilitated and can meaningfully contribute to society pursuant to set terms and conditions.

Understanding this legislation requires acknowledging the state's peculiar history with juvenile crime and options for reform.

Rhode Island is a small state where pain from gruesome murders in the late 1980s left much of the community especially fearful of violent youth criminality. In 1989, Craig Price was convicted of murdering a family in Warwick and a young woman two years prior.[253] At the time of Price's conviction, a juvenile offender could only receive juvenile detention until their twenty-first birthday.[254] Public outcry from these events triggered the State to amend its sentencing scheme, permitting juvenile offenders of any age to be waived into adult court and subject to adult sentencing, including LWOP.[255]

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249. *Cf.* Daniel S. Harawa, *In the Shadows of Suffering*, 101 WASH. U. L. REV. 1847 (2024); *see also* Steiker, *supra* note 239, at 1394.

250. After considering enaction of legislation providing an earlier chance for parole to individuals who committed their crimes while they were juveniles or emerging adults, the General Assembly added a provision governing time when parole may be issued for "[l]ife prisoners and prisoners with lengthy sentences." 13 R.I. GEN. LAWS § 13-8-13(e) (2024) (effective July 6, 2021).

251. *Id.* The eligibility date is purposely after the murders committed by Craig Price. Interview with Anonymous Advocate #3 (Jan. 30, 2024) [hereinafter Interview 3].

252. § 13-8-13(e).

253. Mark Arsenault, *'Into Another World' – Craig Price's Story*, PROVIDENCE J., Mar. 7, 2004, at A-01.

254. Mackenzie McBurney, Comment, *Paying the* Price*: Eliminating Life Without Parole Sentences for Juveniles in Rhode Island*, 23 ROGER WILLIAMS U. L. REV. 553, 555 (2018).

255. John J. Cloherty III, *The Serious Juvenile Offender in the Adult Criminal System: The Jurisprudence of Rhode Island's Waiver and Certification Procedures*, 26 SUFFOLK U. L. REV. 407, 407–08 (1992). The legislature passed the "Craig Price legislation" in 1990. *Id.* at 408 nn.5–6.

In *Miller*, the Supreme Court left open the possibility for states to have discretionary LWOP for juvenile offenders, but "took pains to make clear that all such sentences are now suspect."[256] In 2017, the Rhode Island Attorney General, Peter Kilmartin, publicly opposed enacting legislation that would eliminate juvenile LWOP.[257] He believed doing so would prevent LWOP for the "as-yet unknown juvenile criminal who commits an unimaginably horrific crime."[258] Since, advocates have sought an amendment to Rhode Island's code to codify *Miller* and prohibit LWOP for juveniles, as Massachusetts had.[259] They insisted that, while Craig Price remained imprisoned, "the constitutionally protected right of juvenile offenders to be free from cruel and unusual punishment has been circumvented for fear of having to face another gruesome juvenile killer and the desire to have the option to keep that juvenile in prison for life."[260]

Advocates argued that given the trauma from the Price murders, and the reality that LWOP was rarely imposed for juveniles,[261] their juvenile sentencing reform efforts should focus elsewhere. Indeed, *Miller* also recognized that "young minds are different" applies with equal force outside of the LWOP context. The Court specifically noted that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific."[262]

1. The Road to Mario's Law

Rhode Island's 2021 expansion of parole consideration reflects the State's history and characteristics. It also reveals compromises that went

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256. Perry L Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 J. CONST. L. 929, 956 (2015).

257. *See* Jacqueline Tempera & Patrick Anderson, *R.I. Senate Passes Bill Ending Life-Without-Parole Sentences for Juveniles*, PROVIDENCE J. (June 15, 2017, 5:59 PM), https://www.providencejournal.com/story/news/crime/2017/06/15/ri-senate-passes-bill-ending-life-without-parole-sentences-for-juveniles/20559386007/ [https://perma.cc/SF5M-R2C7].

258. *See* Katie Mulvaney, *Bill Would End Life-Without-Parole Sentences for Minors in R.I.*, PROVIDENCE J. (June 12, 2017, 3:37 PM), https://www.providencejournal.com/story/news/courts/2017/06/12/bill-would-end-life-without-parole-sentences-for-minors-in-ri/20607624007/ [https://perma.cc/KY7Q-4QKD] (quoting a letter from Peter Kilmartin, the State Attorney General, to the Senate).

259. *See* McBurney, *supra* note 254 (arguing that in light of Supreme Court precedent, the state should ban JLWOP); *see* Diatchenko v. Dist. Att'y, 1 N.E.3d 270 (Mass. 2013).

260. McBurney, *supra* note 254, at 578–79.

261. As one advocate noted, the Supreme Court's approval of the juvenile sentencing scheme in *Kentucky v. Jones*, 140 S. Ct. 123 (2019) (mem.), made it likely that Rhode Island's juvenile LWOP scheme would pass constitutional review. Interview 3, *supra* note 251; *see also* Interview with Anonymous Advocate #4 (Jan. 9, 2024).

262. Miller v. Alabama, 567 U.S. 460, 473 (2012).

into its passage. The amendment was colloquially named "Mario's Law," after Mario Monteiro.[263]

When he was seventeen years old, Mario Monteiro caused a death while using a firearm, and was convicted for murder in the first degree and discharge of a firearm during the commission of a crime of violence.[264] He was tried as an adult.[265] The sentencing judge was statutorily required to impose a consecutive life sentence.[266] When Mr. Monteiro began serving his sentence, it was the longstanding practice of the Parole Board and Rhode Island Department of Corrections to determine an initial parole eligibility date for those serving consecutive sentences, including consecutive life sentences, by aggregating the statutory minimum term for a consecutive life sentence. For Mr. Monteiro, this meant adding the fifteen years for each of his consecutive life sentences, and providing for initial parole eligibility after thirty years of incarceration.[267]

While serving his sentence, Mr. Monteiro engaged in significant rehabilitative efforts, including earning a high school diploma, working toward his associate degree, and becoming an anti-gang advocate and mentor to prisoners.[268] In 2016, Mr. Monteiro learned about a pending version of this reform, which would allow individuals incarcerated for crimes committed before they turned eighteen to argue for parole eligibility after fifteen years of incarceration.[269] Mr. Monteiro along with his friend, Marvin Rubio, contacted family, legislators, and advocacy organizations.[270] They argued that juveniles sentenced as adults merited parole review after fifteen years.[271] Eager to garner support for the reform, they cited similar laws in other states, scientific researching showing teenagers do not

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263. *See* Christopher Shea, *'Mario's Law' Namesake Given Chance for Parole*, R.I. CURRENT (May 17, 2023, 3:10 PM), https://rhodeislandcurrent.com/briefs/marios-law-namesake-given-chance-for-parole/ [https://perma.cc/G7RX-8M2H]; *see also* Sofie Rudin, *From Inside Prison, Activist Mario Monteiro Is Pushing to Change Juvenile Sentencing Laws*, PUB.'S RADIO (Aug. 7, 2020), https://thepublicsradio.org/article/from-inside-prison-activist-mario-monteiro-is-pushing-to-change-juvenile-sentencing-laws-/ [https://perma.cc/Z372-GE47] (describing Mario Monteiro's efforts in advocating for others incarcerated for crimes they committed as young people).

264. State v. Monteiro, 924 A.2d 784, 787–89 (R.I. 2007).

265. *Id.* at 795 (recognizing that Mr. Monteiro's conviction was his "introduction into the adult criminal justice system").

266. 11 R.I. GEN. LAWS § 11-47-3.2(c) (providing also that a person "sentenced to life under subdivision (b)(3) or (b)(4) of this section may be granted parole"). Mr. Monteiro's conviction was affirmed on appeal. *Monteiro*, 924 A.2d at 794.

267. *See* Brief for Amicus Curiae Rhode Island Public Defender at 15–17, Neves v. State, No. SU-2022-0092-MP (R.I. Feb. 19, 2024).

268. Katie Mulvaney, *After Serving 20 Years, Mario of 'Mario's Law' Could Get Parole Under Law Bearing His Name*, PROVIDENCE J. (May 19, 2023, 6:40 AM), https://www.providencejournal.com/story/news/politics/courts/2023/05/19/judge-rules-in-favor-of-mario-monteiro-in-youthful-offender-parole-case-marios-law/70231913007/ [https://perma.cc/B462-EDYR].

269. *See* Rudin, *supra* note 263.

270. *Id.*

271. *Id.*

appreciate the consequences of their actions, and the Supreme Court's caselaw requiring juveniles be treated differently than adults.[272]

At that time, someone like Mr. Monteiro serving two consecutive life sentences would become eligible for parole only after serving thirty years. With Section 13-8-13(e), those who committed crimes before the age of twenty-one would be eligible for an initial consideration for release on parole to the community after twenty years and upon terms set by the state's parole board.[273]

Notably, Rhode Island is one of seven states that does not have a "single-subject rule," and can pass bills encapsulating various topics.[274] After workshopping versions of the bill, including in the judiciary committee, Rhode Island's House Speaker put "Mario's Law" in a state budget article.[275] During the final hearing, legislators had only a few questions.[276] By putting it in a state budget article, it also was not subject to amendments, only an up or down vote.[277]

This did not protect the bill from compromise. First, the law contained a counterintuitive carve out for LWOP. The broadened parole eligibility does not apply to individuals who are sentenced to LWOP.[278] Price's well-known and troubling crimes made it politically untenable to include LWOP sentences in this bill.[279] This compromise made sense, given the dearth of LWOP sentences in the state as compared to Massachusetts, where it was mandatory for first degree murder.[280] This exception illustrates how, much like in Connecticut, particularly gruesome or remarkable crimes committed by emerging adults impact the memory, reputation, and psychology of a community.

2. *Resistance to Reform's Implementation*

When Mr. Monteiro was brought before the Parole Board in December 2021, he had served twenty years, and the new Subsection (e) had taken

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272. *Id.*

273. *See* 13 R.I. GEN. LAWS § 13-8-13(e) (2024).

274. Interview 3, *supra* note 251. A "single-subject rule" is "the requirement that each act of the legislature be limited to a single subject." Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1629 (2019) (recognizing that only forty-three state constitutions include such a rule).

275. Interview 3, *supra* note 251.

276. *Id.*

277. *Id.*

278. 13 R.I. GEN. LAWS § 13-8-13(e) (2024).

279. Interview 3, *supra* note 251.

280. There are currently no juveniles serving LWOP in Rhode Island. Interview 3, *supra* note 251; Brief for Amicus Curiae Rhode Island Public Defender, *supra* note 267, at 14.

effect.[281] Recognizing Mr. Monteiro's rehabilitative efforts, the Board unanimously granted him parole in December 2021.[282]

The Board, however, provided alternative dispositions: immediate parole on paper to his consecutive life sentence, or deferred parole to the community in December 2022 based on "the existing legal debate" as to whether Subsection (e) meant he was eligible for parole to the community.[283] The Board ultimately acceded to the RIDOC's contrary interpretation, and Mr. Monteiro was paroled to his consecutive life sentence.[284]

Mr. Monteiro challenged this position, arguing the interpretation was "absurd and illogical" and contrary to the reform's express terms.[285] The reform "extends parole review to 'any offense' committed by a youthful offender after that person has served [twenty] years."[286] The state insisted that the new "youthful-offender provision didn't apply to Mr. Monteiro's second consecutive life sentence" and that it represented an "impermissible [legislative] encroachment" into an area for judicial discretion.[287]

The trial court disagreed, finding Mr. Monteiro met the standards of parole to the community under Subsection (e). Judge Nugent concluded that if the legislature had intended to separate multiple sentences, it would have specified that the reform applied to "any single offense."[288] Also, parole was not modifying a sentence because the individual remains subject to that underlying sentence, and the reform simply affords discretion to the parole board (part of the executive branch) to determine whether parole is appropriate in any given case.[289] Judge Nugent cited the Supreme Court's recent cases that recognize juveniles lack full culpability and have rehabilitative potential.[290]

Nevertheless, the State Attorney is currently challenging the legality of Section 13-8-13(e) in the Rhode Island Supreme Court as applied to Mario Monteiro and three other petitioners.[291] In opposing this reform's

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281. Indeed, the Board acknowledged that Mr. Monteiro "became eligible to see the Parole Board this year due to new legislation in Article 13 [of the Budget Act adding Subsection (e)] impacting youthful offenders." *See* Brief of Respondents at 13, Neves v. State, No. SU-2022-0092-MP (R.I. Feb. 16, 2024).

282. *Id.*

283. *Id.* at 13–14.

284. *See* Mulvaney, *supra* note 268.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *See id.*

290. Monteiro v. State, No. PM-2023-00921, 2023 WL 3641496, at *9 (R.I. Super. Ct. May 17, 2023).

291. *See* Brief of Petitioner-Appellant State of Rhode Island at 1, Neves v. State, No. SU-2022-0092-MP (R.I. Jan. 8, 2024).

application to Mr. Monteiro and three other criminal defendants serving multiple sentences,[292] the State Attorney General makes two arguments: one grounded in statutory interpretation, and one grounded in separation of powers.

The State first argues that the reform does not apply to anyone serving more than one sentence.[293] The State argues that the plain language of Section 13-8-13(e) applies to individuals convicted of *a single offense* and, thus, should not apply to individuals serving multiple sentences.[294] The plain and ordinary meaning of "offense" suggests that the Rhode Island General Assembly intended the subsection to apply to individuals serving a single sentence, and, had they intended otherwise, they would have used "offense or offenses."[295] In addition to clear meaning, the State also argues that its interpretation is clear contextually.[296] It insists that its interpretation of Section 13-8-13(e), as applying only to people serving a single sentence, is consistent with parole statutes as a whole in that it would require people serving two sentences to be paroled from one to the next.[297] Interpreting this provision to apply to individuals serving consecutive life sentences would, according to the State, conflict with other provisions of the statute that specifically address consecutive sentences.[298]

Second, the State argues that this reform violates the State's "separation of powers" doctrine by interfering with the judiciary's sentencing function.[299] Citing their state constitution, the State argues "[i]t is well settled that the General Assembly cannot rightfully exercise judicial power."[300] Applying Section 13-8-13(e) to individuals serving life and a consecutive sentence would be an "impermissible exercise of judicial power by the legislature."[301] In short, the argument is that only the judiciary has the power to reduce a sentence.

Advocates for the reform to parole eligibility, and those who represent Mr. Monteiro and others affected by the law, are enraged by the State's

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292. *See id.* (also challenging the application of Section 13-8-13(e) to Keith Nunes, Pablo Ortega, and Joao Neves).

293. *Id.* at 22; *see* Brief for Amicus Curiae Rhode Island Public Defender, *supra* note 267, at 13.

294. Brief of Petitioner-Appellant State of Rhode Island, *supra* note 291, at 22.

295. *Id.* at 24–25.

296. *See id.* at 27–30 ("[E]ven when confronted with a clear and unambiguous statutory provision, 'it is entirely proper for [this Court] to look to the sense and meaning deducible from the context.'" (quoting State v. Hazard, 68 A.3d 479, 485 (R.I. 2013))).

297. *Id.* at 27.

298. *Id.* at 30–31.

299. Monteiro v. State, No. PM-2023-00921, 2023 WL 3641496, at *9 (R.I. Super. Ct. May 17, 2023).

300. Brief of Petitioner-Appellant State of Rhode Island, *supra* note 291, at 32–33.

301. *See id.* at 33 (citing R.I. CONST. art. V).

current legal challenge.[302] They insist that the law was passed in recognition of the fact that, as the Supreme Court has repeatedly emphasized, "even when they commit terrible crimes," juveniles lack the culpability of adults and should be given a second chance.[303]

Advocates argue that the State Attorney General's (and Department of Corrections's) position is illogical.[304] Interpreting Rhode Island's reform to require parole to consecutive sentences risks circumventing the statutory intent to provide meaningful opportunities for release and makes it likely that many individuals will continue to serve unconstitutionally disproportionate sentences. If a person like Mr. Monteiro, who was sentenced to life and a consecutive sentence before the reform passed, were eligible for parole after serving twenty years but not before they began serving the consecutive sentence, it would "effectively operate to nullify" the statute's terms and "defeat its purposes," given most people serving a single life sentence were already eligible for parole after twenty years of incarceration prior to the Amendment.[305]

Advocates and impacted persons await the Rhode Island Supreme Court's decision on the applicability of this law to those who have been sentenced with consecutive sentences. The state's position illustrates potential pushback for advocates seeking to center rehabilitation of young adults in their decarceral aims.

III. EMBRACING REHABILITATION TO MINIMIZE CARCERAL FOOTPRINT

Dwayne Betts cautions against framing *Roper*, *Graham*, *Miller*, and *Montgomery* as "watershed" cases, and urges recognizing them as one step toward more sensible sentencing for juveniles.[306] Indeed, this quartet has "not resulted in a significant reduction in the length of juvenile prison sentences,"[307] and cabining judicial analysis to death sentences or LWOP

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302. *See ACLU Challenges State's "Absurd" Position that "Mario's Law," Allowing for Early Release of Juvenile Offenders, Doesn't Apply to Mario*, ACLU R.I. (Feb. 24, 2023, 12:00 PM) [hereinafter *ACLU Challenges State's "Absurd" Position*], https://www.riaclu.org/en/news/aclu-challenges-states-absurd-position-marios-law-allowing-early-release-juvenile-offenders [https://perma.cc/AEG4-5XP4].

303. Miller v. Alabama, 567 U.S. 460, 472–73 (2012); *see ACLU Challenges State's "Absurd" Position*, *supra* note 302.

304. Brief of Respondents, *supra* note 281; *ACLU Challenges State's "Absurd" Position*, *supra* note 302.

305. *ACLU Challenges State's "Absurd" Position*, *supra* note 302.

306. Reginald Dwayne Betts, *What Break Do Children Deserve? Juveniles, Crime, and Justice Kennedy's Influence on the Supreme Court's Eighth Amendment Jurisprudence*, 128 YALE L.J.F. 743, 751 (2019).

307. *Id.* at 751. Twenty-one states and D.C. have banned LWOP sentences for children—and this figure has quadrupled in the last five years. *Which States Ban Life Without Parole for Children?*, CAMPAIGN FOR FAIR SENT'G YOUTH, https://cfsy.org/states-that-ban-life-without-parole-lwop-sentences-for-children/ [https://perma.cc/3T7E-RLQX].

ignores "what other prison term for a juvenile might be unjust."[308]

Nevertheless, these cases, and the scientific research since, have moved us toward asking critical questions about how much time in prison is sufficient. Just, as Betts argues, cabining reform in juvenile sentencing to LWOP sentences drastically underachieves meaningful decarceral impact, so too does drawing a line at eighteen. Instead, there are a few reasons to think that second look reforms aimed at emerging adults between the ages of eighteen and twenty-five will be successful in generating major decarceral reform.

First, despite the critiques, the Court's repeated findings that children are less culpable and have a greater capacity for change do provide support for states seeking to alter the default extremely long sentences for young adults. In the reforms described, the significant advances in neuroscience and adolescent development were effective.[309] To be sure, there is debate about the extent to which developmental brain science should be the foundation for decarceral change. Some, recognizing the possibility of science to evolve, emphasize the tenuousness of relying primarily on the development of brains in emerging adults.[310] Nevertheless, the science since the Court's juvenile quartet strongly supports the view that emerging adults are less culpable and more capable of rehabilitation.

Moreover, evidence showing reduced recidivism among those paroled from life sentences as emerging adults, combined with research showing criminal behavior declines after late teenage years,[311] powerfully support the argument that releasing emerging adults is compatible with public safety.

Third, these reforms embody public opinion, and a widespread belief in self-improvement, second chances, and hope. This narrative, coupled with science and evidence of reduced recidivism, was operative in all three states' reforms.

These reforms reveal massive compromise and illustrate the power of unique state histories in criminal sentencing reform. But even in the manner that they were limited, these efforts could encourage the generation of more decarceral efforts.

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308. Betts, *supra* note 306, at 752.

309. *See supra* Section II.A.

310. *See, e.g.*, Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 (2009). *But see* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 29 (2008) (arguing that scientific knowledge about adolescent development "should be the foundation of the legal regulation of juvenile crime").

311. *See* Caitlin V.M. Cornelius, Christopher J. Lynch & Ross Gore, *Aging Out of Crime: Exploring the Relationship Between Age and Crime with Agent Based Modeling*, 2017 SOC'Y FOR MODELING & SIMULATION INT'L 25.

CONCLUSION

Benjamin Levin persuasively explains that the question with criminal minimalism is not *whether* we should minimize, but how and what principles should guide that minimizing.[312] At its best, Levin argues, a minimalist view merely begins conversations, pushing scholars and policymakers to ask critical questions of what we should minimize and how.[313] Excavating these three recent efforts forces us to confront why we sentence emerging adults to long sentences, what science and crime data justifies doing so, and whether we are compelled by the theory of rehabilitation. It also illustrates practical political strategies that have worked to reform sentencing and will help other actors seeking to minimize the breadth of their carceral states.

Scholars argue that the role that the criminal penal system must be radically reduced, reimagined and redesigned.[314] We must destabilize the perception that transformative change in the criminal legal system is incompatible with reforms that relieve present suffering of impacted persons and their families.

312. Benjamin Levin, *Criminal Law Minimalisms*, 101 WASH. U. L. REV. 1771 (2024).

313. *Id.*

314. In this symposium issue, scholars have put forward excellent frameworks for promoting criminal law minimalism. *See* Yoav Sapir & Guy Rubinstein, *Minimalist Criminal Courts*, 101 WASH. U. L. REV. 1955 (2024); Daniel S. Harawa, *In the Shadows of Suffering*, 101 WASH. U. L. REV. 1847 (2024); Symposium, *Criminal Justice Minimalism*, 101 WASH. U. L. REV. 1771 (2024); Christopher Slobogin and Kate Weisburd, *Illegitimate Choices: A Minimalist(?) Approach to Consent and Waiver in Criminal Cases*, 101 WASH. U. L. REV. 1913 (2024).