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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellee,

v.

ANDREW MICHAEL CZARNECKI **No. 166654**
Defendant-Appellant.

Wayne CC: 16-010813-01-FC
Court of Appeals No. 348732

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellee,

v.

ADONTE MARQUIS BOUIE **No. 166232**
Defendant-Appellant.

Oakland CC: 18-267977 FC
Court of Appeals No. 351911

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Does a mandatory sentence of nonparolable life in prison for 1st-degree murder and for conspiracy to commit 1st-degree murder for a person who was 19 or 20 years of age at the time of his or her crime violate Mich. Const. 1963, art. 1, § 16?

Defendant answers: YES

Amicus answers: NO

Statement of Facts

Amicus joins the statements of facts of the People of the State of Michigan.

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Argument

I.

A mandatory sentence of nonparolable life in prison for 1st-degree murder and for conspiracy to commit 1st-degree murder for a person who was 19 or 20 years of age at the time of his or her crime does not violate Mich. Const. 1963, art. 1, § 16.

> *[A judge] knows well enough that one entrusted with decision, traditionally above base prejudices, must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must severely discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception.*[1]

A. Introduction

In the case of Andrew Czarnecki, this Court has ordered that the question to be briefed is whether this Court's holding in *People v. Parks*[2] that it constitutes cruel or unusual punishment under the Michigan Constitution[3] to sentence those who commit 1st-degree murder when 18 years of age to a sentence of life in prison that has no possibility of parole without a hearing considering the "mitigating factors of youth" should be extended to defendants who are 19 years of age at the time they commit 1st-degree murder, and, if it is necessary to reach an affirmative result to overrule the almost 50-year-old decision of *People v. Hall*,[4] whether that should be done.[5]

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[1] Roger J. Traynor, "Reasoning in a Circle of Law," 56 Va. L. Rev. 739, 750-751 (1970).

[2] *People v. Parks*, 510 Mich. 225 (2022).

[3] Mich. Cons.t Art. 1, § 16.

[4] *People v. Hall*, 396 Mich. 650 (1976).

[5] *People v. Czarnecki*, 2024 WL 3086656 (No. 166654, Mich. June 21, 2024).

Defendant was convicted for the premeditated murder of Gavino Hernandez Rodriguez, whose body was set on fire after he was murdered.

The same briefing is directed in the Bouie case, but the crime is conspiracy to commit 1st-degree murder and the age involved is 20 years of age.[6] Aniya Edwards, a 19-year-old visiting family on summer break from college, was killed; defendant was acquitted of the murder charge but convicted of the conspiracy charge.

Amicus answers that the decision regarding the appropriate level of development, on a categorical basis, of persons so as to render them as responsible for their crimes as are all other persons is one belonging to the legislature, limited by the decision of the United States Supreme Court in *Miller v. Alabama*[7] that before those under the age of 18 years may be held equally responsible as older persons for crimes carrying a mandatory penalty of life in prison that is not subject to parole, an individual assessment must be made, and this Court's decision "extending"[8] that decision in *Parks* under the Michigan Constitution to those 18 years old. To sentence those over the age of 18 to life in prison, not subject to parole, the same as older persons, does not violate the Michigan Constitution.[9]

B. Article I, § 16 of the Michigan Constitution does not render unconstitutional a mandatory sentence of life in prison not subject to

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[6] *People v. Bouie*, 2024 WL 3086658 (No. 166232, Mich. June 21, 2024).

[7] *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

[8] It is a misnomer to say this Court "extended" *Miller*, as *Miller* is an Eighth Amendment decision, and this Court did not extend its federal constitutional holding there to 18-year-olds—something no federal court has done, see *Cruz v. United States*, 826 F. App'x 49, 52 (CA 2, 2020) ("Every Circuit to consider this issue has refused to extend *Miller* to defendants who were eighteen or older at the time of their offenses")—but instead held that the Michigan Constitution compelled that result.

[9] "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." 1963 Mich. Const Art. 1, § 16.

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parole for 1st-degree murderers and those who conspire to commit 1st-degree murder as to any class or subset of adults; the authority to set the sentence for the offense belongs to the legislature

"The bottom line is this: the people ratified [Mich. Cons.t Art. 1, § 16], not any of our personal views.[10]

1. Interpreting the Michigan Constitution: the task is to examine the text, history, and structure of a provision to determine the durable expression made there of the will of the People

"[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment"[11]

Our state constitution, no less than our federal constitution, is a durable expression of the will of the people, both authorizing and limiting government, and standing outside of and superior to all agencies of government, including the judiciary. Its source of authority is the people of the State: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."[12] The judicial branch is as much an agent or servant of the sovereign people as are the legislative and executive branches; it does not stand outside of government but is a part of it. The judge, as servant of the people, must search for the public meaning of a

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[10] *Erlinger v. United States*, –U.S.–, 144 S. Ct. 1840, 1852 (2024) (cleaned up; bracketed material added).

[11] *United States v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37, 5 Wheat. 76 (1820).

[12] See Mich. Const. 1963, Art. I, § 1. The same provision appears in Mich. Const. 1908, Art. II, § 1. In our first State Constitution, this language is divided between Article I, § 1 and § 2, § 1 providing that "First. All political power is inherent in the people" and Art. § 2 providing that "Government is instituted for the protection, security, and benefit of the people; and they have the right at all times to alter or reform the same, and to abolish one form of government and establish another, whenever the public good requires it."

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constitutional text as understood by the lawgiver.[13] As Madison said, concerning our federal constitution:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers.[14]

It has been established since the early days of our State that our state constitution is law through the act of ratification by the people, and that the task of the judge is to determine what the provisions of the constitution meant to the ordinary people who made it law. State precedent—which is to be followed unless overruled—establishes that a court interpreting a constitutional text should endeavor to place itself

> in the position of the Framers of the Constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. *It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change.*[15]

Certainly new circumstances to which a provision must be applied may arise, but as Justice Campbell said long ago, "[t]hat the constitution means nothing now that it did

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[13] "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *County of Wayne v. Hathcock*, 471 Mich. 445, 468 (2004).

[14] Letter from Madison to Henry Lee (June 25, 1824), reprinted in 9 *The Writings of James Madison* 191-192 (G. Hunt ed., 1910).

[15] *Pfieffer v Board of Education of Detroit*, 118 Mich 560, 564 (1898) (emphasis supplied). See also *Holland v Clerk of Garden City*, 299 Mich 465, 470-471 (1941)("It is a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the People adopting it") and *Burdick v Secretary of State*, 373 Mich 578, 584 (1964)("Courts on numerous occasions have gone to the constitutional convention debates and addresses to the people to decide the meaning of the Constitution").

not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances."[16]

As tools to aid in the interpretation of our state constitution, this Court has consistently held that the Address to the People and the constitutional convention debates may be highly relevant in determining the public meaning to the *ratifiers* of particular constitutional provisions.[17] The Address is particularly important in this regard because it represents what the ratifiers—the people—were told about the proposed constitution *before* they voted to adopt it.[18] This Court has emphasized that "the proper objective in consulting constitutional convention debates is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision," and so "the primary focus ... should not [be] on the intentions of the delegates . . . but, rather, on any statements they may have made that would have shed light on why they chose to employ the particular terms they used in drafting the provision to aid in discerning what the common understanding

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[16] *People v Blodgett*, 13 Mich 127, 140 (1865)(Campbell, J.).

[17] See e.g., *Studier v. Mich. Pub. Sch. Employees' Retirement Bd.,* 472 Mich. 642, 655–656 (2005).

The Address to the People of Article 1, § 16 was that no change was being made from the 1908 constitution, and the convention comment to the 1908 provision was that no change was made from the 1850 constitution. The 1835 constitution provided that "and cruel and unjust punishments shall not be inflicted." 1835 Mich. Const. Art. I, § 18.

[18] See *People v. Nutt,* 469 Mich. 565, 590 n. 26 (2004) ("The Address to the People, widely distributed to the public prior to the ratification vote in order to explain the import of the ... proposals, 'is a valuable tool....' "). And see *Mich. United Conservation Clubs v. Secretary of State (After Remand),* 464 Mich. 359, 378 (2001) (Young, J., concurring), noting that the Address was "officially approved by the members of the constitutional convention."

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of those terms would have been when the provision was ratified by the *People.*"[19] As Justice Cooley, perhaps our greatest justice, put the matter:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.[20]

The task of the judge when confronting the meaning of a state constitutional text is, then, as a matter of long-established Michigan precedent, to ascertain what the ratifiers "understood themselves to be enacting." As one commentator has said, the text "must be taken to be what the public of that time would have understood the words to mean. . . . In other words, the objective or publicly-accessible meaning of the terms is sought."[21] And "statutes are presumed to be constitutional, and [courts] have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' "[22]

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[19] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 490 Mich. 295, 309-310 (2011).

[20] Cooley, *A Treatise on the Constitutional Limitations* (1886), p. 81. And see *People v. Smith,* 478 Mich. 292, 298-299 (2007); *Attorney General v. Renihan*, 184 Mich. 272, 281 (1915).

[21] See Randy Barnett, "An Originalism for Nonoriginalists," 45 Loy L Rev 611, 636 (1999).

[22] *In re Certified Questions From United States Dist. Ct. , W. Dist. of Michigan, S. Div*., 506 Mich. 332, 340 (2020), quoting *People v. Skinner*, 502 Mich 89, 100 (2018), quoting *In re Sanders*, 495 Mich. 394, 404 (2014), in turn citing *Taylor v. Gate Pharm*., 468 Mich. 1, 6 (2003).

To determine the will of the People expressed in any particular provision, the Court considers the text and history of the provision within the structure of the Constitution.[23] As Justice Gorsuch very recently so eloquently put it:

> Discerning what the original meaning of the Constitution requires in this or that case may sometimes be difficult. Asking that question, however, at least keeps judges in their proper lane, seeking to honor the supreme law the people have ordained rather than substituting our will for theirs. And whatever indeterminacy may be associated with seeking to honor the Constitution's original meaning in modern disputes, that path offers surer footing than any other this Court has attempted from time to time. *Come to this Court with arguments from text and history, and we are bound to reason through them as best we can. . . . Allow judges to reign unbounded by those materials, or permit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule. (Except the judges themselves.)* Faithful adherence to the Constitution's original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow.[24]

This Court has noted the textual difference between the Eighth Amendment of the United States Constitution and Mich. Const. Article 1, § 16, but has never considered what, in light of history, that difference means. And there *is* history; it is time the Court considered it

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[23] After closely examining the text, structure, and history of the Constitution . . . ." *Citizens Protecting Michigan's Const. v. Sec'' of State*, 503 Mich. 42, 54 (2018)

[24] *United States v. Rahimi*, 144 S. Ct. 1889, 1909 (2024) (Gorsuch, J., concurring) (emphasis supplied).

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2. The law the People have made—that Article 1, § 16 of the Michigan Constitution employs the phrase "cruel or unusual" rather than "cruel and unusual"—provides no basis to find mandatory life without parole for the offenses here unconstitutional as applied to 19 and 20 year olds

A page of history is worth a volume of logic.[25]

a. "The law the people have made": article 1, § 16, and the "and" and the "or" of it

There *is* a textual difference between the Eighth Amendment and Article 1, § 16—the former uses the phrase "cruel and unusual punishment," while the latter refers to cruel "*or"* unusual punishment. This Court in *People v. Bullock*[26] said that the "difference does not appear to be accidental or inadvertent,"[27] but other than the textual difference itself, nothing was offered then or since in support of this assertion.[28] Is there anything in the history of the language used that suggests that the use of "or" rather than "and" was designed to accomplish some purpose? And if so, to what end was the choice

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[25] *New York Tr. Co. v. Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963 (1921).

[26] *People v. Bullock*, 440 Mich. 15 (1992).

[27] *People v. Bullock,* 440 Mich. at 30-31.

[28] "While the historical record is not sufficiently complete to inform us of the precise rationale behind the original adoption of the present language by the Constitutional Convention of 1850, it seems self-evident that any adjectival phrase in the form A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.' The set of punishments which are *either* 'cruel' *or* 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' *and* 'unusual.'" *People v. Bullock,* 440 Mich. at 31 (emphasis in the original).

The Court continues to rely on this ipse dixit. See *People v. Lymon*, —Mich.—, 2024 WL 3573528, at 4 (No. 164685, Mich. July 29, 2024) ("The parallel provision in the federal Constitution provides that the government shall not inflict 'cruel *and* unusual punishments." U.S. Const., Am. VIII (emphasis added). This Court has previously recognized that the Michigan Constitution's use of 'or"'rather than 'and' provides additional protection beyond its federal counterpart, as it prohibits punishments that are cruel, even if they are not unusual, and prohibits punishments that are unusual, even if they are not cruel. See *People v Bullock*."

made? Does the Michigan Constitution actually ban innovative punishments that are not cruel? *Bullock* says it does.

The Northwest Ordinance was passed on July 13, 1787, by the Confederation Congress, establishing the Northwest Territory, which included the territory that later became the State of Michigan, as well as principles for its governance. Included was a provision in Article 2 that "no cruel or unusual punishments shall be inflicted." On August 6, 1789, the Northwest Ordinance of 1789, which essentially continued the 1787 Ordinance, was signed into law under the new Constitution, and it too provided that "no cruel or unusual punishments shall be inflicted." On September 25, 1789, by joint resolution, Congress proposed the Bill of Rights Amendments to the States, the tenth of which was what came to be the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It would be far more than passing strange if Congress proposed to the States an amendment to the Constitution concerning punishments that it intended to be *different* from that it had enacted governing the Northwest Territory only six weeks earlier. And there is no evidence that it so intended.

Indeed, founding-era evidence establishes that no difference was intended when the disjunctive was used rather than the conjunctive in a particular constitution of the era.

- As evidenced by the state constitutions they wrote, the Founders used the phrases "cruel and unusual," "cruel or unusual," and "cruel" interchangeably as referring to a unitary concept.

  *****

  The state constitutions enacted during and shortly after the Bill of Rights' ratification also counsel against a literal interpretation. Pennsylvania and South Carolina each enacted constitutions during 1790, while ratification of the Bill of Rights was still pending. In addition, Delaware and Kentucky enacted constitutions in 1792 during the year following the Bill of Rights' ratification. All of these constitutions prohibited "cruel punishments," omitting entirely any reference to the term

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“unusual.” Numerous state constitutions enacted after the Founding period used this same language. There is no evidence that this formulation was understood to mean anything different from either the Eighth Amendment’s proscription of “cruel and unusual punishments” or the ban of the many state constitutions enacted during the Revolutionary and post-Revolutionary periods against “cruel or unusual” punishments.[29]

- [T]he phrases “cruel and unusual” and “cruel or unusual” were often used interchangeably, with early American state constitutions often employing “cruel or unusual” instead of the “cruel and unusual” verbiage.[30]

- [N]either the Framers nor their English predecessors attributed much difference between the phrases cruel *and* unusual and cruel *or* unusual. . . . “the available evidence indicates that the Founders understood [both formulations] to capture the same meaning.”[31]

And in the debate on ratification of the Constitution, where much concern was expressed regarding the absence of a Bill of Rights, the disjunctive and conjunctive were used interchangeably, with “cruel” and “unusual,” however expressed, referring to a unitary concept. At the Massachusetts Ratifying Convention, Abraham Holmes complained that in the absence of a Bill of Rights Congress was not “restrained from inventing the most cruel *and unheard of* punishments . . . RACKS and GIBBETS, may

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[29] Stacy, Tom, “Cleaning Up the Eighth Amendment Mess,” 14 Wm. & Mary Bill Rts. J. 475, 503-504 (December, 2005) (footnotes omitted).

[30] Bessler, John, “The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century,” 2 Brit. J. Am. Legal Stud. 297, 313 (2013) (footnotes omitted).

[31] Casale, Robert, and Katz, Johanna, “Would Executing Death-sentenced Prisoners after the Repeal of the Death Penalty Be Unusually Cruel under the Eighth Amendment?,” 86 Conn. B.J. 329, 336 (2012) (footnote omitted).

See *State v. Conner*, 873 S.E.2d 339, 355 (N.C., 2022), citing *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L. Ed. 2d 630 (1958).

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be amongst the most mild instruments of their discipline."[32] The minority dissent of the Pennsylvania Ratifying Convention offered a series of suggested amendments to the proposed Constitution, including that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel *nor* unusual punishments inflicted."[33] The New York ratifying convention proposed amendments to the proposed Constitution constituting a Bill of Rights, including that "excessive bail ought not to be required, nor excessive fines imposed; nor cruel *or* unusual punishments inflicted."[34] The North Carolina ratifying convention resolved that there should be a Declaration of Rights added to the proposed Constitution to include a provision that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted."[35] The phrases were used interchangeably, and nothing suggests any difference in meaning was intended.

Michigan achieved Statehood in 1837, and its first constitution, that of 1835, provided in Article 1, § 18 that "Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unjust punishments shall not be inflicted." There is no historical evidence that the textual change from the Northwest Ordinance—from "cruel or unusual" to "cruel and unjust"—was meant to accomplish some change from the prohibition in the Northwest Ordinance. In the Constitution of 1850, Article 6, § 31, our constitution returned essentially to the language used in the Northwest Ordinance: "cruel or unusual punishment shall not be inflicted." And the 1908 Constitution, in Article 2, § 15, continued that language, which also appears in our current constitution: "cruel or unusual punishment shall not be inflicted." Amicus can

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[32] Bernard Bailyn, 1 *The Debate on the Constitution*, p. 912 (emphasis supplied, capitalization in the original).

[33] Bernard Bailyn, 1 *The Debate on the Constitution*, p. 532 (emphasis supplied).

[34] Bernard Bailyn, 2 *The Debate on the Constitution*, p. 536 (emphasis supplied).

[35] Bernard Bailyn, 2 *The Debate on the Constitution*, p. 567 (emphasis supplied).

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discover nothing in any convention record or journal that indicates that the text employed in the Northwest Ordinance, the text employed in the Constitution of 1835, or the texts employed in the Constitutions of 1850, 1908, and 1963 were intended to mean anything different. Again, "the phrases 'cruel and unusual,' 'cruel or unusual,' and 'cruel'" were employed "interchangeably as referring to a unitary concept" throughout the country.

And as to text itself, this Court said in *Bullock* that "it seems self-evident that *any* adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.'"[36] But this is not necessarily so. While "and" is generally taken to be "used to join words or groups of words; added to; plus," "[o]r, on the other hand, while used as 'expressing an alternative, contrast, or opposition," is also often used "to indicate ... the synonymous, equivalent, or substitutive character of two words or phrases,' as in '[the off [or] far side], [lessen [or] abate].'"[37] In any event, here history gives context to the expression—no difference in meaning was intended by the use on occasion of "or" rather than "and" to couple "cruel" and "unusual"; indeed, no difference in meaning was intended by the occasional use of "cruel" standing alone. And as Justice Holmes once said, "a page of history is worth a volume of logic."[38]

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[36] *People v. Bullock*, 440 Mich. at 30-31 (emphasis added).

[37] Webster's Third New International Dictionary (1981).

[38] *New York Tr. Co. v. Eisner*, supra.

When the historical context is thus taken into account, the phrase is seen as unitary, a "hendiadys, in which two terms separated by a conjunction work together as a single complex expression. The two terms in a hendiadys are not synonymous, and when put together their meanings are melded." Samuel L. Bray, "'Necessary and Proper' and 'Cruel and Unusual': Hendiadys in the Constitution," 102 Va. L. Rev. 687, 688–689 (2016).

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b. "The law the people have made": that Article 1, § 16 of the Michigan Constitution employs the phrase "cruel or unusual" rather than "cruel and unusual" provides no basis to find a nonparolable life sentence imposed mandatorily for the offenses involved here unconstitutional as applied to any class of adults under the text of the Michigan provision

Though the *Bullock* opinion offered little support for its assertion that "use of the phrase 'cruel or unusual' in the Michigan constitution rather than 'cruel and unusual' does not appear to be accidental or inadvertent," assuming for the sake of argument that it is correct, does it afford any basis for finding life without parole imposed mandatorily for the offenses here unconstitutional as applied to any class of adults? It does not.

What would an "unusual" punishment be, that, according to *Bullock*, is banned by the Michigan constitution? It is inescapable that resolution of the question requires reference to the context of its use along with "cruel." Surely the constitutional provision would not ban all innovations in punishment, such as use of electronic monitoring devices. Justice Holmes pointed out over a century ago with regard to the phrase "cruel *or* unusual" in the Massachusetts constitution that "the word 'unusual' must be construed with the word 'cruel,' and cannot be taken so broadly as to prohibit every humane improvement not previously known in [the state]."[39] And Professor Stinneford[40] has thoroughly explicated the point. "Unusual" as used both the Eighth Amendment and Article I, § 16 does not mean "out of the ordinary," or any innovation in punishment would be prohibited by these provisions. Rather, as demonstrated by Professor Stinneford, in this context, and as historically understood, "unusual" means "'contrary

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[39] *In re Storti*, 60 N.E. 210, 211 (Mass., 1901).

[40] Professor of Law, University of Florida Levin College of Law.

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to long usage' or 'immemorial usage.'"[41] In the 17th and 18th centuries "[a]ctions that comported with long usage were often said to be 'usual,'" while "[a]ctions that were contrary to long usage, on the other hand, were described as 'unusual.'"[42] Indeed, "[t]hroughout the first half of the nineteenth century, American courts that were called upon to determine whether a punishment was 'cruel and unusual' almost invariably noted that a punishment could only be 'unusual' if it was contrary to the long usage of the common law."[43] And so

> the provisions in the various state constitutions and bills of rights for preserving the common law and prohibiting cruel punishments reflected a general consensus on two points: First, the government should not impose cruel punishments. Second, the common law was essentially reasonable, so that *governmental efforts to "ratchet up" punishment beyond what was permitted by the common law were presumptively contrary to reason. Given this dual consensus, the words "cruel" and "unusual" acted as synonyms when employed in the context of punishment. The word "cruel" stated the abstract moral principle, and the word "unusual" provided a concrete reference point for determining whether that principle had been violated*. Thus, it makes sense that some states outlawed "cruel punishments," some outlawed "cruel and unusual punishments," and some outlawed "cruel or unusual punishments." *Each formulation is simply a different way of saying the same thing*.[44]

Similarly, under a gross disproportionality view of cruel or unusual, "cruel" has reference to historically employed punishments; a punishment is "cruel" if "its effects are unjustly harsh in light of longstanding prior punishment."[45] The first use of the phrase "cruell and unusual punishments" appeared in the English Bill of Rights of

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[41] John F. Stinneford, "The Original Meaning of 'Unusual': The Eighth Amendment As A Bar to Cruel Innovation," 102 NW. U. L. Rev. 1739, 1745 (2008).

[42] Id., at 1770.

[43] Id., at 1771.

[44] Id., at 1799 (emphasis suppled).

[45] John F. Stinneford, "The Original Meaning of 'Cruel'," 105 Geo. L. J. 441, 464 (2016).

1689, which was the model for the prohibition on cruel and unusual punishments in the Virginia Declaration of Rights and, ultimately, the Eighth Amendment.[46]

The likely English impetus was the case of Titus Oates, who was convicted of only perjury for falsely claiming there was a popish plot to kill the king, the claim resulting in many executions. Justice Withins sentenced Oates to be dragged across the City of London while being whipped "from Aldergate to Newgate," and two days later from Newgate to Tyburn, to pay a fine, to be pilloried four times a year for life, and to life imprisonment.[47] Oates survived scourging and petitioned Parliament after the adoption of the Bill of Rights to suspend his punishment on the ground that it was cruel and unusual, with which the members of Parliament agreed because the punishment was too harsh for the crime of conviction in "light of longstanding prior practice."[48] Justice Cooley well put the matter in his treatise, relating the provision to historical practice:

> It is somewhat difficult to determine precisely what is meant by cruel and unusual punishments. Probably a punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be made punishable to the extent permitted by the common law for similar offences. But those degrading punishments which in any State *had become obsolete before its existing constitution was adopted*, we think may well be held to be forbidden by it as cruel and unusual.[49]

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[46] Id., at 474.

[47] Id., at 477.

[48] Id.

[49] Cooley, *Constitutional Limitations*, at 329. Note the casual use of "cruel and unusual" and "cruel or unusual" as denoting the same concept.

If "unusual" punishments must be cruelly so, and include reinstitution of those punishments long obsolete, this solves the "one-way ratchet" problem. That is, if a punishment is found unconstitutional because "evolving standards of decency" have turned against it, society may never decide it has made a mistake and return to more rigorous punishment, for any such legislation is perforce unconstitutional. But if a punishment that

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Plainly, a mandatory sentence of life imprisonment, with the law not permitting parole, is not a degrading punishment for the offenses here for any class of adults that had become obsolete before the adoption of the Michigan constitutions.[50] It is not unconstitutional under the Michigan cruel or unusual punishment provision to punish 19 and 20 year olds for these offenses in the same manner as older individuals.

c. "The law the people have made," article 1, § 16, and proportionality review: how the words and phrases would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases in context at the time they were adopted: gross proportionality review should not be applied to MCL 791.234(6) and MCL § 750.316

What would the ratifiers of the Michigan Constitutions have understood themselves to be enacting in 1835 when they ratified the language "Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unjust punishments shall not be inflicted"; and in 1850 when they ratified "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be

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has been set aside only becomes "cruel and unusual" if in long disuse, society has the ability to return to a former punishment, and the ratchet turns both ways. Professor Stinneford suggests one hundred years as the relevant time period: "The relevant reference point for determining whether a punishment is cruel and unusual is not some abstract and absolute notion of unnecessary pain, but rather the range of pain (or risk of pain) caused by traditional punishment practices that have been used within the last one hundred years. States are free to experiment in order to find more humane methods of punishment without worrying that the moment they adopt a new practice, the old one becomes unconstitutional." Stinneford, "The Original Meaning of 'Cruel,'" at 504.

[50] For example, see the Revised Statutes of 1846, Chapter 153, providing the 1st-degree murder "shall be punished by solitary confinement at hard labor in the state prison for life" (the Revised States of 1838 had provided in Chapter 3 that 1st-degree murder was punishable by death, and 2nd-degree murder by life in prison, or any term of years); see also Compiled Laws of 1948, MCL 750.316, 1st-degree murder punished by "solitary confinement at hard labor in the state prison for life." And see Compiled Laws of 1948, MCL 791.32, precluding parole for those convicted of 1st-degree murder, reenacting § 4 of Ch. 3 of Act 255 of 1937) (now see MCL 791.234(6)).

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inflicted"; and in 1908 when they ratified a text almost identical to that of 1850; and finally in 1963, when that language was again continued? Because, as amicus has argued, "or" and "and" were used interchangeably at the time of the Founding, one must return to the beginning. What was the understanding at the time of the Founding, and in 1835?

Amicus will not belabor the point, but direct the Court to Justice Scalia's lead opinion in *Harmelin v Michigan*,[51] joined by Chief Justice Rehnquist as to the proportionality discussion, which amicus believes applicable to the Michigan provision.[52] Amicus agrees that:

- [T]he Clause disables the Legislature from authorizing particular forms or "modes" of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.[53]

- [T]o use the phrase "cruel and unusual punishment" [or cruel or unusual punishment] to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly. The notion of "proportionality" was not a novelty. . . . There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions, yet chose not to replicate them.[54]

- We think it enough that those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained. It is worth noting, however,

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[51] *Harmelin v. Michigan* 501 U.S. 957, 976, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

[52] And Justice Thomas has also made essentially the same points. See e.g. *Graham v Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2011)(Thomas, J., dissenting).

[53] *Harmelin*, 111 S.Ct. at 2691 - 2692.

[54] *Harmelin*, 111 S.Ct. at 2692.

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> that there was good reason for that choice . . . . While there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are "cruel and unusual," *proportionality* does not lend itself to such analysis.[55]

- The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that *the proportionality principle becomes an invitation to imposition of subjective values*.[56]

This was the understanding that informed the punishment provision of the Northwest Ordinance and the Michigan Constitution of 1835, with subsequent constitutions ratified with no understood change to that understanding.

Proportionality review should be rejected as a matter of Michigan law. It inevitably involves the court in matters that are legislative. As Justice Scalia pointed out in the *Roper*[57] case:

> the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken

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[55] *Harmelin*, 111 S.Ct. at 2692. And see Stinneford, "The Original Meaning of 'Unusual': the Eighth Amendment as a Bar to Cruel Innovation,"at 1757 (Fall 2008): "The *Roper* majority wanted to strike down the death penalty for seventeen-year-olds, despite the fact that the evidence did not demonstrate that such executions violated any societal moral consensus, at least within the United States, and so it simply pretended that the evidence supported the desired result. One may like the results of *Roper* and still find the case profoundly troubling. *If evolving standards of decency is merely window-dressing for judicial will*, then it is not merely an incorrect standard; it is not a standard at all. In the long run, a standardless standard will cause more harm than good to those criminal defendants who seek the protection of the Eighth Amendment" (emphasis supplied).

[56] *Harmelin*, 111 S.Ct. at 269 (emphasis supplied).

[57] *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 1222, 161 L.Ed.2d 1 (2005)(Scalia, J., dissenting).

precisely the opposite position before this very Court. In . . . *Hodgson v. Minnesota* . . . the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. Brief for APA as *Amicus Curiae,* . . . The APA brief, citing psychology treatises and studies too numerous to list here, asserted:

> "[B]y middle adolescence (age 14–15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems."

. . . . courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'"

Further, if the constitutional proportionality of a sentence "is an ever changing reflection of the evolving standards of decency' of our society, it makes no sense for the Justices then to *prescribe* those standards rather than *discern* them from the practices of our people. On the evolving standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the people of the [State]. By what conceivable warrant can [seven] lawyers presume to be the authoritative conscience of the [State]?"[58]

The *Morris* decision, quoting Justice Cooley's treatise, best explains the matter:

defendant claims that, as properly understood, [cruel or unusual punishment] means, when used in this connection, punishment out of proportion to the offense. If by this is meant the degree of punishment, we do not think the contention correct. . . . in England . . . . the declaration was intended to forbid the imposition of punishment of a kind not known to the law or not warranted by the law. Justice Cooley says: "Probably any punishment declared by statute for an offense which was punishable in the same way at the common law could not be

[58] Id.

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> regarded as cruel or unusual, in the constitutional sense; and probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of similar nature. But those degrading punishments, which in any state had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual.[59]

Finally, to conclude here, Justice Riley quoted the Prosecuting Attorneys Association amicus brief:

> I believe that the amicus curiae supplemental brief of the Prosecuting Attorneys Association correctly identifies the problems with an evolving standards test. . . . "if 'evolving standards of decency' as to the appropriate (proportionate) sentence for a crime are to be the measure of the constitutionality of a legislatively set penalty, how is such an inquiry to be carried out? What is the measure? What informs the judgment? What tools does a court have to make it? What enables a court to overrule society's expression of its 'standard of decency,' communicated through statute, imposing a different standard, which is also supposed to be *society's* standard and not the court's? Would not the court's role be to *discover* or *identify* society's 'standard of decency'—not what it should be, but what it *is,* and how better could society express its standard of decency than through its elected lawmakers? The alternative for the judiciary is that
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>> it is for *us* (the judiciary) to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher kings.[60]

3. Even under review for "gross disproportionality" there is no basis to find that a mandatory sentence of life in prison that is nonparolable is unconstitutional as applied to any

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[59] *People v. Morris*, 80 Mich. 634, 638–39 (1890).

[60] People v. Bullock, 440 Mich. at 63-64 (Riley, J. dissenting).

class of adults for the crimes of 1st-degree murder and conspiracy to commit 1st-degree murder

Even if *Bullock* is followed, the test there is whether the legislatively established sentence is "*grossly* disproportionate"[61]; the Court does not superintend the legislature for an abuse of discretion, nor second-guess the legislature's determination that a class of individuals is *sufficiently* mature to be responsible for the penalty imposed for particular crimes on all adults. The test is a narrow one. Michigan's test assesses proportionality by considering:

> whether a penalty may be considered cruel or unusual is to be determined by a three-pronged test that considers (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states. . . . under the Michigan Constitution, the prohibition against cruel or unusual punishment included a prohibition on grossly disproportionate sentences.[62]

As to the first factor, "first-degree murder is almost certainly the gravest and most serious offense that can be committed under the laws of Michigan—the premeditated taking of an innocent human life."[63] To paraphrase Justice Boyle in *Bullock*, "[b]ecause the absolute magnitude of the crime is grave [here, the gravest possible] and the principle of proportionality does not permit the judiciary to impose on

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[61] "{W]e conclude . . . that the penalty at issue here is so grossly disproportionate as to be 'cruel or unusual.'" *People v. Bullock*, 440 Mich. at 37.

[62] *People v. Benton*, 294 Mich. App. 191, 204 (2011).

Some cases, including *Bullock*, include "the goal of rehabilitation." But where the gravest of all crimes—1st-degree murder—has been committed, nothing in the constitution requires that the legislature consider rehabilitation as a goal, at least a goal to lead to release the defendant from prison. The legislature may certainly consider other penological goals, including punishment, as the overriding purpose of the sentence provided, at least for all adult offenders.

[63] *People v. Carp*, 496 Mich 440, 514 (2014), judgment vacated 577 U.S. 1186, 136 S.Ct. 1355,194 L.Ed.2d 339 (2016).

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the Legislature its subjective view of appropriate responses to perceived evils, the statutory scheme passes constitutional muster."[64] All "classes" of adults face the same mandatory sentence of life in prison, not subject to parole, for the gravest and most serious offense that can be committed in the state. And conspiracy to commit that offense is equally grave, as the legislature has determined.

Regarding the second factor, this Court observed in *Carp*[65] that non-homicide offenses exist in Michigan that may be viewed as less grave or serious than 1st-degree murder but for which all adult offenders will face mandatory life-without-parole sentences. "For instance, an adult who commits successive first-degree criminal sexual conduct offenses against an individual under the age of 13 faces a sentence of [mandatory] life without parole."[66] Given that the commission of a non-homicide offense by an offender over the age of 18 may result in the mandatory imposition of a life-without-parole sentence, it does not follow that sentencing an 19-year-old or 20-year-old offender for the gravest and most serious homicide offense is categorically disproportionate compared to the penalties imposed on other offenders in the state.

Under the third factor, at least 19 states[67] and the federal government impose, at a minimum, mandatory sentences of life without parole for 1st-degree murder; Michigan's legislature is, then, not an outlier in penological choice.[68]

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[64] See Bullock, at 72-73 (Boyle, J.,concurring and dissenting).

[65] *Carp*, at 516.

[66] *Id.*, citing MCL 750.520b(2)(c).

[67] Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Pennsylvania, South Dakota, Wyoming.

[68] Compare *People v Benton*, supra, 206-207 (the third factor supported the constitutionality of a sentence when 18 other states imposed the same mandatory-minimum sentence as Michigan for the offense), with *Lorentzen*, 387 Mich at 179 (the third factor supported that a sentence was unconstitutional when "[o]nly one state, Ohio, has as severe a minimum sentence for the sale of marijuana as Michigan") and *Bullock*, 440 Mich at 37

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But the real issue here is that the defense argues that certain scientific evidence shows that, as a general matter, human brains are not *fully* mature at 19 and 20 years of age, so that what the defense opts to denominate "young adults" are not as mature in their decision-making as those who are 25 years of age and older. The policy question, however, is not whether those 19 and 20 years old are *as* mature as those 25 years of age and older, but whether they are *sufficiently* mature so that, if they take another human life under circumstances constituting 1st-degree murder, or conspire to do so, they should suffer the gravest penalty. Defendant thinks not. The legislature thinks so. Those who think not are free to present their scientific evidence to the legislature and call for a change, a call to which the legislature may respond favorably or to which the legislature may determine that those 19 years of age or older are sufficiently mature to suffer the penalty of life without parole for committing a 1st-degree murder or conspiring to do so. It was, after all, understood in *Roper* that full maturity may not arrive at the age of 18. But the Court said that while "[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules" as "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," it is also true that "[b]y the same token, some under 18 have already attained a level of maturity some adults will never reach." And thus a line must be drawn, and "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood."[69] The Court has repeatedly drawn that line, drawing it at 18 years of age in *Miller*, in a case involving 14-year-old defendants, where the Court could have drawn the line at a different, higher, age. This Court, having overridden the legislative will as to 18-year olds, should go no further, and should leave the matter to the legislature.

(adopting Justice White's dissenting analysis from *Harmelin v Michigan*, 501 US 957, 1026; 111 S Ct 2680; 115 L Ed 2d 836 (1991) ("No other jurisdiction imposes a punishment nearly as severe as Michigan's for possession of the amount of drugs at issue here.").

[69] *Roper v. Simmons*, 125 S. Ct. at 1197–1198.

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C. Conclusion

Defendant Czarnecik committed a premeditated murder, ending Gavino Hernandez Rodriguez's life.[70] Mr. Rodriguez's future was ended that day,[71] and those who loved him and cherished his life and his company are without him forever. To paraphrase Justice Boyle as she so well put the matter in discussing a proportionality argument under *Milbourn*,[72] "elaborate rationalizations for lowering sentences distance the appellate judiciary from meaningful connection with reality." As the tragedy of the murder victim here and his survivors is "mediated through the processes of proportionality," "the focus of the reviewing court shifts from the horror" of the assassination of the victim, "to the image of . . . sympathetic defendant, incarcerated at great cost to the state."[73]

This Court should not permit itself to be used as a legislative committee; "[t]he Founding Fathers did not establish the United States as a democratic republic so that elected [political] officials would decide trivia, while all great questions would be decided by the judiciary."[74] The United States Supreme Court has decided that life without parole cannot be imposed on juvenile 1st-degree murderers without a case-specific consideration of the "mitigating factors of youth," and this Court has

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[70] And defendant Bouie conspired to end a life.

[71] "Hell of a thing, killin' a man. Take away all he's got and all he's ever gonna have." William Munny (Clint Eastwood), *Unforgiven* (Malpaso Productions/Warner Brothers 1992).

[72] Where "defendant himself described how he terrorized, tortured, burned, and sodomized eighty-four-year-old Marie Green; then left her for dead" *People v. Merriweather*, 447 Mich. 799, 802 (1994).

[73] Id., at 805.

[74] *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 858 (CA9, 1996)(en banc)(Kleinfeld, J., dissenting), rev'd sub nom. *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

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"extended" that principle under the Michigan Constitution to those who are 18 years old. So be it (though the Court should retreat from *Parks*[75]). But if parole consideration is to be granted to other classes of adult 1st-degree murderers or those conspiring to commit that offense, that is a decision for the legislature to make, and the families of the victims of these murders should be able to rest easy in the justice promised them by the

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[75] Amicus, of course, continues to believe that *Parks* was wrongly decided, and that in its consideration of "brain science" the Court considered the wrong question—whether a person's brain is "fully developed" at 18—rather than the appropriate question—whether a person's brain is *sufficiently developed* at 18 to comprehend that the taking of another life under circumstances constituting 1st-degree murder is a terrible thing, so that the slayer, or one conspiring to slay, may suffer the most severe state punishment, and *that* question is for the legislature, which has made a number of such decisions. See e.g. MCL § 722.52 (except as otherwise provided in the state constitution and notwithstanding any other provision of law to the contrary, "a person who is at least 18 years of age on or after January 1, 1972, is an adult of legal age for all purposes whatsoever, and shall have the same duties, *liabilities*, *responsibilities*, rights, and legal capacity as persons heretofore acquired at 21 years of age"); MCL § 750.234f (a person who is 18 years of age or older may possess a firearm in public); MCL § 333.1053 (an individual who is 18 years of age or older and of sound mind may execute a do-not-resuscitate order on his or her own behalf, and a patient advocate of an individual who is 18 years of age or older may execute a do-not-resuscitate order on behalf of that individual); MCL § 551.103 (a person who is 18 years of age or older may contract marriage without the consent of his or her parents, and thus raise children); MCL § 700.2504 (a person who is 18 years or older may make a will); MCL § 330.1716 (a person who is 18 may consent to surgery); MCL § 722.52 (a person who is 18 may enter into valid and binding contracts). And see the dissent of Chief Justice Clement in *Parks* ("Even if 18-year-olds are not so well-developed neurologically as 27-year-olds, they are *sufficiently neurologically developed* to make major decisions about their lives. Moreover, first-degree murder, in particular, is an obviously serious offense, the gravity of which I believe 18-year-olds are generally more than able to comprehend"). *People v. Parks*, 510 Mich. 225, 283–284 (2022) (Clement, C.J., dissenting) (emphasis supplied). And, of course, at 18 (thus including 19 and 20 year olds) a person is deemed sufficiently mature to exercise the franchise, a solemn and critical personal obligation and right that is constitutionally protected by the 26th Amendment. "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI.

And the legislature, or the People through the Constitution, may choose to reserve some things for those who are older, such as the purchase of alcohol, or the holding of certain elective offices, which are limited to those 21 or older. See e.g. MCL § 436.1109(6); MCL § 436.1109(6); 1963 Mich. Const. Art IV, § 7; 1963 Mich. Const. Art V, § 20 (governor or lieutenant governor must be at least 30).

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sentence imposed on conviction. There is no federal constitutional rule requiring upsetting these sentences, and this Court should not require it under the state constitution; the matter is for the legislature.

Coda

In *People v Hall* defendant and another person robbed and beat to death Albert Hoffman. Defendant argued that a mandatory sentence of life without the possibility of parole for the taking of Mr. Hoffman's life was cruel or unusual punishment. This Court held:

> As for the cruel and unusual punishment claim, under *People v. Lorentzen* . . .the punishment exacted is proportionate to the crime. Defendant has not contended that Michigan's punishment for felony murder is widely divergent from any sister jurisdiction. The third Lorentzen factor, rehabilitation, was not the only allowable consideration for the legislature to consider in setting punishment.
>
> "(S)ociety's need to deter similar proscribed behavior in others, and the need to prevent the individual offender from causing further injury to society * * *'were also recognized. , , , In any event rehabilitation and release are still possible, since defendant still has available to him commutation of sentence by the Governor to a parolable offense or outright pardon. . . . A mandatory life sentence without possibility of parole for this crime does not shock the conscience.[76]

This Court has asked whether it is necessary in order to exclude 19 and 20-year-olds from the mandatory imposition of a nonparolable life sentence to overrule this almost 50-year-old decision,[77] and if so, whether that should be done. It is necessary to do

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[76] *Hall*, at 657-658,

Interestingly, in its order for a MOAA in *People v. Langston*, 6 N.W.3d 404, 405 (Mich. 2024) the Court has also asked whether *Hall* should be overruled.

[77] It is ironic that then Chief Justice McCormack's took to task Justice Zahra for rejecting an approach of that "pedigree": "When the Court has for 50 years approached new iterations of a question governed by broad constitutional text with a specific analysis, it is immodest indeed to pitch that away." *People v. Stovall*, 510 Mich. 301, 331 (2022) (McCormack, C.J., concurring with her own opinion).

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so—other than having been narrowed by *Miller* and *Parks*, it remains the law—and for the reasons stated, as well as principles of stare decisis, the Court should not do so. Mandatory life in prison without parole for these offenses for 19 and 20-year-olds is not contrary to long usage and thus not "cruel or unusual," given the crimes committed, as grossly disproportionate for the taking of another human life.

Massachusetts has "extended" *Miller* under the state's "cruel or unusual" provision to 19 and 20 year olds, but did so by acting as a super-legislature, which this Court should not do----Michigan *does* have a legislature and a Governor, which can hold hearings on proposed legislation and make the policy decision as to appropriate punishment differently—or the same—as currently exists. The Massachusetts decision, *Commonwealth v. Mattis*,[78] over the dissent of three justices, holds that "contemporary standards of decency"—meaning the standards of decency of the four members of the majority—compelled the result that the brains of 19 and 20-year-olds are not sufficiently mature beyond those of 18-year-olds—considering the matter as though it were a legislative committee holding a hearing—so as to allow the same punishment provided for a 21-year-old convicted of an offense carrying the mandatory penalty of life without parole (relying in part on this Court's decision in *Parks*).

The dissenters have the better of the argument, in language fully applicable here. As put by one justice, "A significant amount of time and energy has been expended to prove through science what the Legislature knew when it promulgated its first statute concerning juveniles: young males take more risks and are more impulsive than older males." Further,

> [w]hether this court should eliminate the imposition of mandatory sentences of life imprisonment without the possibility of parole for those convicted of murder in the first degree who were from age eighteen to twenty at the time of the crime implicates many important considerations. . . . although much is made of neuroscience, and the fact

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[78] *Commonwealth v. Mattis*, 224 N.E.3d 410 (Mass., 2024).

> that this group of 'emerging adults' lacks maturity and responsibility, such that they are prone to risk taking and negative influence from their peers, the science alone, accompanied with the Justices' personal and moral beliefs, is not enough to take this decision away from the Legislature. Novel discoveries about how certain areas of the brain may function does not explain "why" and "how" we make the decisions we make. The human exercise of free will is the foundation of our criminal law; it is not reducible to magnetic resonance imaging (MRI) scans. *But, if it is so reducible, then that is something over which the citizens and their representatives should engage in vigorous debate.*[79]

The majority asks the wrong question—are the brains of 19 and 20-year-olds fully mature?—rather than the appropriate question—are their brains *sufficiently* mature so as to be sentenced in the same manner as older offenders of these grave crimes? That is a legislative decision..

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[79] Id., at 466-467. (Cypher, J., dissenting) (emphasis supplied).

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Relief

WHEREFORE, amicus requests that this Honorable Court affirm the defendants' sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains _9732________ countable words.

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