

Jury of Your Peers, Not Your Parents: Abolishing Age-Based Peremptory Challenges in Massachusetts Juvenile Jury Trials

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INTRODUCTION

Both state and federal jurisprudence recognize and distinguish juveniles in the criminal justice system based on age-related characteristics.¹ However, the Massachusetts Supreme Judicial Court (“SJC” or “Court”) has refused to acknowledge age in the context of juvenile criminal jury trials, specifically with regard to the age of the jurors who decide whether to convict a juvenile defendant.²

Although both the prosecution and the defense can exercise peremptory challenges to remove potentially biased jurors, they may not do so for a discriminatory purpose.³ In *Commonwealth v. Fernandes*, Joshua Fernandes (“Joshua”), age sixteen at the time of his offense, was convicted of first-degree murder and sentenced to life in prison without parole.⁴ At trial, the prosecution used 71.8% of its peremptory challenges to remove jurors under the age of twenty-five and 81% of its peremptory challenges to remove jurors under the age of thirty.⁵ On appeal, the Court rejected Joshua’s argument that the prosecution’s use of its peremptory challenges to specifically

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¹ *Youth in the Justice System: An Overview*, JUV. L. CTR., <https://perma.cc/72ST-AT2P> (last visited Apr. 12, 2023).

² *See, e.g., Commonwealth v. Lopes*, 91 N.E.3d 1126, 1131 (Mass. 2018); *Commonwealth v. Oberle*, 69 N.E.3d 993, 999 (Mass. 2017); *Commonwealth v. Evans*, 778 N.E.2d 885, 893 (Mass. 2002); *Commonwealth v. Samuel*, 495 N.E.2d 279, 281 (Mass. 1986).

³ *Batson v. Kentucky*, 476 U.S. 79, 107–08 (1986); *Commonwealth v. Soares*, 387 N.E.2d 499, 510–11, 513 (Mass. 1979).

⁴ 170 N.E.3d 286, 295 (Mass. 2021).

⁵ Appellant’s Brief at 14–15, *Commonwealth v. Fernandes*, 170 N.E.3d 286 (Mass. 2021), (No. SJC-11586).

remove young members of the jury violated his Due Process Rights under the Sixth Amendment.⁶

This Comment will illustrate that the SJC improperly decided *Fernandes* because it failed to recognize age as a protected class when reviewing the prosecution's discriminatory use of its age-based peremptory challenges at trial. Although the SJC has rejected the argument in the past, age-based peremptory challenges violate a juvenile defendant's constitutional rights because they deny the juvenile the right to a fair trial by an impartial jury of his or her peers. Part I discusses relevant state and federal precedent surrounding jury selection, peremptory challenges, and protections against discriminatory peremptory challenges. Part II discusses the relevant facts, procedural history, and the SJC's holding in *Commonwealth v. Fernandes*. Part III argues that the SJC denied Joshua his constitutional rights because he did not receive a trial by a jury composed of a fair cross section of his community nor his peers. Finally, Part IV argues that as a matter of public policy, the SJC should recognize age as a discrete group when reviewing discriminatory peremptory challenges in juvenile trials because doing so will uphold the integrity of the juvenile justice system and maintain consistency in other aspects of the law.

I. Background

A. *The Constitutional Right to a Trial by a Jury of Your Peers*

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to a trial by an impartial jury consisting of "a fair cross section of the community."⁷ Similarly, the Massachusetts Constitution provides for the right to a trial by a jury of one's peers.⁸ During jury selection, the prosecution may exercise its peremptory challenges to remove jurors from the venire for any reason at all, as long as the reason is somehow related to the outcome of the trial.⁹ For instance, the prosecution may remove jurors based on the attorney's instinct, the juror's actions, the juror's group membership, or any other indications that may lead the prosecution to believe that the juror would favor one side.¹⁰

Across federal and state jurisdictions, including Massachusetts, peremptory challenges may not be used to remove jurors from the venire for a discriminatory purpose, as this practice violates the Equal Protection Clause.¹¹ In *Batson v. Kentucky*, the U.S. Supreme Court outlined a three-part

⁶ *Fernandes*, 170 N.E.3d at 298.

⁷ U.S. CONST. amend. VI; *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

⁸ MASS. CONST. pt. 1, art. XII.

⁹ *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

¹⁰ Maggie Elise O'Grady, *A Jury of Your Skinny Peers: Weight-Based Peremptory Challenges and the Culture of Fat Bias*, 7 STAN. J. C.R. & C.L. 47, 51 (2011).

¹¹ See *Batson*, 476 U.S. at 79–100; *Commonwealth v. Soares*, 387 N.E.2d 499, 509–11, 515–16

test for determining whether a peremptory challenge is discriminatory.¹² The defendant must first demonstrate membership of a cognizable racial group and show that the prosecution exercised its peremptory challenges to remove members of the defendant's racial group from the venire based on race.¹³ The prosecution must then present a race-neutral explanation for challenging the jurors in the defendant's racial group.¹⁴ Thereafter, the trial court will decide if the defendant established "purposeful discrimination."¹⁵

In *Commonwealth v. Soares*, the SJC narrowed restrictions on peremptory challenges, holding that the challenges may not be used to exclude members of "discrete groups" solely based on the assumption that certain biases will arise due to the juror's membership in the discrete group.¹⁶ Relying on the Equal Rights Amendment to the Massachusetts Constitution as "definitive" authority, the Court identified the discrete groups as sex, race, color, creed, or national origin.¹⁷ However, the SJC has not strictly limited challenges to these specific groups in the past.¹⁸ For instance, in *Commonwealth v. Obi*, the SJC upheld the trial court's finding that the defense's peremptory challenge against a juror wearing a headscarf was improper because it discriminated on the basis of the juror's religion, although religion is not specifically named in the Equal Rights Amendment.¹⁹ Furthermore, the Court has not "entirely foreclosed" possible reexamination of what constitutes a "discrete group" under Article 1 of the Massachusetts Constitution.²⁰ In fact, the Court recently held that sexual orientation constitutes a protected class for the purposes of a *Batson-Soares* challenge.²¹

Although the Court presumes peremptory challenges are properly made, either party may rebut the presumption of a proper peremptory challenge upon a showing of: (1) a pattern of conduct of challenging jurors that are members of a discrete group; and (2) a likelihood that the challenged jurors were excluded based on their membership in the discrete group.²²

In *Commonwealth v. Sanchez*, the SJC further defined the factors that judges should consider in determining whether jurors have been excluded for discriminatory purposes.²³ Although not exhaustive nor mandatory,

(Mass. 1979).

¹² 476 U.S. at 96.

¹³ *Id.*

¹⁴ *Id.* at 97.

¹⁵ *Id.* at 98.

¹⁶ 387 N.E.2d 499, 516 (Mass. 1979).

¹⁷ *Id.*

¹⁸ *See, e.g., Commonwealth v. Obi*, 58 N.E.3d 1014, 1023 (Mass. 2016).

¹⁹ *Id.* at 1023–24; Appellant's Brief, *supra* note 5, at 31.

²⁰ *Commonwealth v. Fernandes*, 170 N.E.3d 286, 295 (Mass. 2021).

²¹ *Commonwealth v. Carter*, 172 N.E.3d 367, 380 (Mass. 2021).

²² *Obi*, 58 N.E.3d at 1023; *Soares*, 387 N.E.2d at 517.

²³ 151 N.E.3d 404, 424 (Mass. 2020).

such factors include the following: (1) the number and percentage of jurors excluded by peremptory challenge; (2) evidence of disparate investigation of the jurors; (3) similarities and/or differences between the excluded jurors, those who have not been challenged, and those who are not members of the protected group; (4) whether the defendant or victim is a member of the same protected group; and (5) the composition of the final seated jury.²⁴ Since this list is not exhaustive, a reviewing court should still consider “all [other] relevant circumstances.”²⁵

B. Challenges to the Age-Based Peremptory Challenge

Since *Soares*, the SJC has consistently declined to recognize age as a protected discrete group in the context of peremptory challenges.²⁶ In support thereof, the Court reasons that age is not a protected group recognized by the Constitution and thus is not considered a discrete group for the purposes of exercising peremptory challenges.²⁷ The issue of age-based peremptory challenges has not yet reached the U.S. Supreme Court, but several federal appellate courts have rejected the argument that age should be a protected class for the purposes of peremptory challenges.²⁸

C. The Court’s Consideration of Age in Other Aspects of Criminal Prosecution

Although age has not yet been recognized as a protected class in the context of peremptory challenges, both state and federal tribunals have historically distinguished juvenile offenders from adult offenders due to their age and developmental differences.²⁹ More recently, courts are focusing on the science behind juvenile brain development and examining how it sets juveniles apart from adults in the criminal justice system.³⁰ For instance, courts now recognize that juvenile offenders have developmentally different maturity levels, reactions to peer influence, and the capacity for

²⁴ *Id.* at 424–25.

²⁵ *Id.* at 425 (quoting *Commonwealth v. Jones*, 77 N.E.3d 278, 293 n.24 (Mass. 2017)).

²⁶ *See, e.g., Commonwealth v. Lopes*, 91 N.E.3d 1126, 1131 (Mass. 2018); *Commonwealth v. Oberle*, 69 N.E.3d 993, 999 (Mass. 2017); *Commonwealth v. Evans*, 778 N.E.2d 885, 885 (Mass. 2002); *Commonwealth v. Samuel*, 495 N.E.2d 279, 281 (Mass. 1986).

²⁷ *Oberle*, 69 N.E.3d at 999.

²⁸ *Lopes*, 91 N.E.3d at 1131–32; *see, e.g., United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993) (holding that “young adults do not constitute a cognizable group for purposes of an equal protection challenge” to the jury composition); *United States v. Cresta*, 825 F.2d 538, 544–45 (1st Cir. 1987) (holding that the prosecution’s systematic exclusion of jurors did not violate equal protection); *United States v. Greene*, 489 F.2d 1145, 1149 (D.C. Cir. 1973) (holding that “‘young persons’ is not a cognizable class”).

²⁹ *See Youth in the Justice System: An Overview*, *supra* note 1.

³⁰ *See Youth in the Justice System: An Overview*, *supra* note 1.

rehabilitation.³¹

Notably, the U.S. Supreme Court emphasized these differences when it re-assessed the constitutionality of certain juvenile sentencing practices.³² In *Miller v. Alabama*, for instance, the Supreme Court held that mandatory life sentences without the possibility of parole for juveniles under the age of eighteen violated Eighth Amendment protections against cruel and unusual punishment.³³ The *Miller* Court noted that juveniles are constitutionally different from adults for the purposes of sentencing because they have diminished culpability and greater capacity for rehabilitation.³⁴ In Massachusetts, the SJC imposed even more enhanced protections than *Miller*, holding that both mandatory *and* discretionary juvenile life sentences without parole violate constitutional protections against cruel and unusual punishment.³⁵ Similar to the U.S. Supreme Court, the *Diatchenko* Court also cited juvenile brain development factors in support of its holding.³⁶

In addition to sentencing restrictions, courts treat juvenile offenders differently in other aspects of the criminal justice system as well.³⁷ For instance, juvenile hearings are typically closed to the public; juveniles serve their sentences in different facilities; and juveniles often face alternatives to incarceration, such as probation, rehabilitative programs, or both.³⁸

D. Age as a Protected Class in Other Areas of the Law

The law also recognizes age as a protected class in other contexts, including employment, federal financial assistance, and housing.³⁹ For instance, the Age Discrimination Act of 1975 prohibits age discrimination against applicants and employees that are forty years of age and older “in programs and activities receiving federal financial assistance.”⁴⁰ The Act prohibits age discrimination in the “hiring, promotion, discharge, compensation, [or] terms [and] conditions of employment” for such individuals.⁴¹ Similarly, Massachusetts law protects prospective tenants and

³¹ *Youth in the Justice System: An Overview*, *supra* note 1.

³² *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012).

³³ *Id.* at 479.

³⁴ *Id.* at 471.

³⁵ *Diatchenko v. D.A. for Suffolk Dist.*, 1 N.E.3d 270, 283 (Mass. 2013).

³⁶ *Id.* at 283–84.

³⁷ *What Is Juvenile Justice?*, THE ANNIE E. CASEY FOUND. (Dec. 12, 2020), <https://perma.cc/4VCQ-R472>; *Youth in the Justice System: An Overview*, *supra* note 1.

³⁸ *What Is Juvenile Justice?*, *supra* note 37; *Youth in the Justice System: An Overview*, *supra* note 1.

³⁹ Appellant’s Brief, *supra* note 5, at 30; *Age Discrimination*, U.S. DEP’T OF LAB., <https://perma.cc/M6B7-9P2L> (last visited Apr. 12, 2023).

⁴⁰ *Age Discrimination*, *supra* note 39.

⁴¹ *Age Discrimination*, *supra* note 39.

homebuyers from discrimination on the basis of age.⁴²

II. The Court's Opinion

A. Factual & Procedural History

On May 10, 2010, fourteen-year-old Nathan Fomby-Davis rode around a Boston neighborhood on the back of his older brother's scooter, when his brother almost collided with a man on a bicycle, twenty-year-old Crisostomo Lopes.⁴³ The near-collision, which occurred close to an intersection, caused Lopes to ride off the sidewalk and into the street.⁴⁴ Shortly thereafter, Fomby-Davis and his brother returned home to pick up cash for food.⁴⁵ While waiting for his brother, Fomby-Davis put on his brother's helmet and decided to take the scooter for another ride around the block.⁴⁶

Meanwhile, Lopes left the area to retrieve both a gun and the defendant, sixteen-year-old Joshua Fernandes.⁴⁷ He and Joshua returned to the intersection, crouched down, and waited.⁴⁸ When Fomby-Davis rode by on the scooter, Lopes jumped into the street, grabbed him, and signaled to Joshua.⁴⁹ Joshua approached, removed a gun from his pocket, and fired three to four shots into Fomby-Davis' chest, left armpit, and right thigh.⁵⁰ Fomby-Davis stumbled into a nearby store and fell to the ground.⁵¹ Despite rescue efforts, he was pronounced deceased upon arrival at the hospital.⁵² Anthony Williams, an off-duty Boston police officer, witnessed the events from inside his personal vehicle.⁵³ After the shooting, Officer Williams pursued Joshua and placed him under arrest.⁵⁴ Lopes then appeared and was also arrested.⁵⁵

At the police station, Lopes yelled to Joshua in Creole and told him to "take the blame" several times.⁵⁶ During interrogation, Joshua denied knowing the details of the incident.⁵⁷ He claimed he was alone when the

⁴² *Overview of Fair Housing Law*, COMMONWEALTH OF MASS., <https://perma.cc/B26R-YQDJ> (last visited Apr. 12, 2023).

⁴³ Appellant's Brief, *supra* note 5, at 7–8.

⁴⁴ *Commonwealth v. Fernandes*, 170 N.E.3d 286, 295 (Mass. 2021).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Appellant's Brief, *supra* note 5, at 8.

⁴⁸ *Fernandes*, 170 N.E.3d at 295.

⁴⁹ *Id.*

⁵⁰ *Id.* at 295–96.

⁵¹ *Id.* at 296.

⁵² *Id.*

⁵³ *Id.* at 295.

⁵⁴ *Fernandes*, 170 N.E.3d at 296.

⁵⁵ *Id.*

⁵⁶ Appellant's Brief, *supra* note 5, at 8.

⁵⁷ Appellant's Brief, *supra* note 5, at 7.

scooter approached him, then he “just blacked out.”⁵⁸

At trial, the prosecution posited the theory that Lopes, a twenty-year-old Homes Ave gang member, recruited sixteen-year-old Joshua as his “assassin” and encouraged him to commit the crime.⁵⁹ During jury selection, the Commonwealth used twenty-three of its thirty-two available challenges (71.8%) to remove jurors under the age of twenty-five.⁶⁰ They used an additional three challenges on jurors under the age of thirty.⁶¹ In support of its exclusions, the Commonwealth stated:

[T]he Commonwealth has tried to exclude or to use challenges on the individuals who are less than [twenty-five] or college students. It is the Commonwealth's position, based upon experience, that individuals who are in college, not to disparage, but they often times have difficulties in deciding what classes to take, never mind whether or not somebody is guilty of first-degree murder.⁶²

Defense counsel repeatedly objected to the prosecution's use of its peremptory challenges, arguing Joshua was entitled to a jury of his peers.⁶³ However, counsel's motion for a mistrial was denied.⁶⁴ At the conclusion of voir dire, only one college student sat on the jury after the prosecution had exhausted its remaining challenges.⁶⁵

At the conclusion of the trial, the jury found Joshua guilty of firearm possession and first-degree murder on theories of premeditation and extreme atrocity or cruelty.⁶⁶ Joshua was sentenced to life imprisonment without the possibility of parole.⁶⁷ His murder conviction arrived at the SJC on direct appeal.⁶⁸

B. Court's Holding & Analysis

On appeal, defense counsel presented seven arguments for the Court's consideration: (1) that the prosecution's use of peremptory challenges to remove young people from the jury violated Joshua's Sixth Amendment Rights; (2) that trying Joshua, a juvenile, in adult court was unconstitutional; (3) that the lower court improperly excluded the defense's expert testimony regarding juvenile brain development; (4) that the jury should not have been

⁵⁸ *Fernandes*, 170 N.E.3d at 296.

⁵⁹ Appellant's Brief, *supra* note 5, at 7–11.

⁶⁰ Appellant's Brief, *supra* note 5, at 14–15.

⁶¹ Appellant's Brief, *supra* note 5, at 15.

⁶² *Fernandes*, 170 N.E.3d at 297.

⁶³ *Id.*; Appellant's Brief, *supra* note 5, at 15–16.

⁶⁴ Appellant's Brief, *supra* note 5, at 15.

⁶⁵ *Fernandes*, 170 N.E.3d at 297.

⁶⁶ *Id.* at 296.

⁶⁷ *Id.* at 295.

⁶⁸ *Id.*

instructed on the theory of extreme atrocity or cruelty; (5) that Joshua's statements to the police should have been suppressed; (6) that Joshua should have been tried separately from his co-defendant, Lopes; and (7) that the prosecution's closing argument was improper.⁶⁹ For the purposes of this Comment, the present analysis will focus on the defense's first challenge: that the prosecution's use of the majority of its peremptory challenges to remove younger members of the venire from the jury violated Joshua's constitutional right to a trial by a jury of his peers.⁷⁰

On review, the SJC declined to recognize age as a protected class for the purposes of jury empanelment.⁷¹ In support of its decision, the SJC cited *Commonwealth v. Jones*, noting that a defendant has the right to be tried by a fairly drawn jury of his or her peers.⁷² The Court also acknowledged that peremptory challenges may not be used against members of "discrete groups" on the sole basis of bias toward members of that discrete group.⁷³ However, the Court refused to expand the holding in *Obi*, which limited the protected "discrete groups" to "sex, race, color, creed, or national origin."⁷⁴ Relying on these groups as definitive authority, the Court held that age is not considered a protected class in the context of discriminatory peremptory challenges.⁷⁵

The Court also relied on federal constitutional jurisprudence in arriving at its conclusion, noting that the Equal Protection Clause requires "jury selection procedures that are free from [S]tate-sponsored group stereotypes rooted in, and reflective of, historical prejudice."⁷⁶ This protection applies not only to criminal defendants, but to the excluded jurors as well.⁷⁷

In analyzing this matter, the Court repeatedly referred to its decision in the co-defendant's appeal, *Commonwealth v. Lopes*, where it also struck down constitutional claims pertaining to the jury selection process.⁷⁸ In *Lopes*, the Court similarly held that the prosecution's use of age-based peremptory challenges did not violate the defendant's constitutional rights and that age was not considered a protected discrete group for the purposes of disputing peremptory challenges.⁷⁹ Although prior SJC opinions and courts of other jurisdictions also support this decision, the Court in *Lopes* noted that the U.S.

⁶⁹ *Id.* at 295–310.

⁷⁰ MASS. CONST. art. XII; *Id.* at 297–98.

⁷¹ *Fernandes*, 170 N.E.3d at 298.

⁷² *Id.* at 297 (citing *Commonwealth v. Jones*, 77 N.E.3d 278, 290 (Mass. 2017)).

⁷³ *Id.* (quoting *Commonwealth v. Soares*, 387 N.E.2d 499, 516 (Mass. 1979)).

⁷⁴ *Id.* (quoting *Commonwealth v. Obi*, 58 N.E.3d 1014, 1023 (Mass. 2016)).

⁷⁵ *Id.* at 298.

⁷⁶ *Id.* (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)).

⁷⁷ *Fernandes*, 170 N.E.3d at 298.

⁷⁸ *Id.*

⁷⁹ *Commonwealth v. Lopes*, 91 N.E.3d. 1126, 1131 (Mass. 2018).

Supreme Court had not yet opined on the issue.⁸⁰ Relying on past cases, the Court concluded that age was not considered a protected group for the purposes of Joshua's constitutional challenges.⁸¹ However, the Court commented that it has not "entirely foreclosed" a re-examination of what is considered a "distinctive" group under Article 1 of the Massachusetts Declaration of Rights.⁸²

As for Joshua's remaining arguments, the Court held: Joshua's trial in Superior Court did not violate his constitutional rights; the exclusion of expert testimony was proper; the jury instruction did not disturb the verdict, as Joshua was convicted on the theory of premeditation as well; Joshua's statements to the police were properly admitted; Joshua was not prejudiced in any meaningful way by the joint trial; and the prosecution's closing argument was not extreme enough to taint the results of the trial.⁸³ The Court thus affirmed Joshua's conviction, but vacated his life sentence and remanded the matter for resentencing in accordance with *Diatchenko*.⁸⁴

ANALYSIS

III. The SJC Violated Joshua's Constitutional Rights by Permitting the Prosecution's Age-Based Peremptory Challenges at Trial

A. *The Prosecution's Peremptory Challenges Violated Joshua's Sixth Amendment Rights Because the Jury Was Not Composed of a Fair Cross Section of His Community*

By using its peremptory challenges to eliminate the majority of young jurors from the venire, the prosecution denied Joshua his constitutional right to a trial by an impartial jury composed of his peers.⁸⁵ Moreover, the resulting jury did not represent a fair cross-section of Joshua's community.⁸⁶ In *Taylor v. Louisiana*, the U.S. Supreme Court held that jury selection from a representative cross-section of the community is an "essential component" of a fair jury trial under the Sixth Amendment.⁸⁷ The purpose of seating a jury selected from a fair cross-section of the community serves as a check on governmental power; it is designed to "guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased

⁸⁰ *Id.*

⁸¹ *Fernandes*, 170 N.E.3d at 298.

⁸² *Id.*

⁸³ *Id.* at 299–310.

⁸⁴ *Id.* at 311.

⁸⁵ MASS. CONST. art. XII; Appellant's Brief, *supra* note 5, at 14–15.

⁸⁶ U.S. CONST. amend. VI; *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

⁸⁷ *Taylor*, 419 U.S. at 528.

response of a judge.”⁸⁸ Such interests cannot be served if the jury is composed of only certain portions of the population, “or if large, distinctive groups are excluded.”⁸⁹ A representative jury also creates an assurance of impartiality, thus further safeguarding an individual’s constitutional rights under the Sixth Amendment.⁹⁰

At Joshua’s trial, the prosecution used twenty-three of its thirty-two available challenges (71.8%) to remove all jurors under the age of twenty-five.⁹¹ They used an additional three challenges on all jurors under the age of thirty.⁹² At the conclusion of voir dire, only one college student sat on the jury, as the prosecution had run out of its available challenges.⁹³ Joshua was sixteen years old at the time of the offense and eighteen years old at the time of trial.⁹⁴ Based on the numbers alone, the resulting jury was not composed of Joshua’s peers, nor was it representative of his community in Boston.⁹⁵ In 2018, young Boston residents between the ages of eighteen and thirty-four comprised 39.1% of Boston’s total population.⁹⁶ This particular statistic has remained fairly steady since 1980.⁹⁷ With Joshua’s trial taking place in the city that is home to the highest concentration of millennials amongst the twenty-five largest cities in the United States, one might assume that a fairly selected jury would be representative of the same.⁹⁸ However, the prosecution attempted to remove almost all jurors under the age of thirty from Joshua’s jury, which suggests that Joshua was not tried by a jury representing a fair cross-section of his community in Boston under the holding in *Taylor*.⁹⁹ From the state level, a jury mostly composed of jurors over the age of thirty is certainly not a jury of eighteen-year-old Joshua’s “peers” within the meaning of Article XII of the Massachusetts Constitution.¹⁰⁰

Aside from numerical concerns, a jury largely composed of older adults

⁸⁸ *Id.* at 530.

⁸⁹ *Id.*

⁹⁰ U.S. CONST. amend. VI; *Id.* at 530–31.

⁹¹ Appellant’s Brief, *supra* note 5, at 14.

⁹² Appellant’s Brief, *supra* note 5, at 15.

⁹³ *Commonwealth v. Fernandes*, 170 N.E.3d 286, 297 (Mass. 2021).

⁹⁴ Appellant’s Reply Brief at 9, *Commonwealth v. Fernandes*, 170 N.E.3d 286 (Mass. 2021), (No. SJC-11586) <https://perma.cc/L2YU-P2ST>.

⁹⁵ See BOS. PLAN. & DEV. AGENCY, RSCH. DIV., BOS. BY THE NUMBERS 2020 at 20 (2020), <https://perma.cc/5AQ4-SNKM>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Appellant’s Brief, *supra* note 5, at 23; ANISE VANCE & PETER CIURCZAK, CITY OF MILLENNIALS: IMPROVING THE FUTURE PROSPECTS OF OUR REGION AND ITS YOUNG ADULTS 5 (Luc Schuster et al. eds., 2017), <https://perma.cc/5AQ4-SNKM>.

⁹⁹ *Commonwealth v. Fernandes*, 170 N.E.3d 286, 297 (Mass. 2021); see *Taylor v. Louisiana*, 419 U.S. 522, 526–28 (1975).

¹⁰⁰ See MASS. CONST., art. XII.

does not serve the goal of checking arbitrary governmental power that *Taylor* intended.¹⁰¹ By excluding jurors who come from one of the largest portions of society for reasons unrelated to their ability to serve as jurors, the prosecution created the possibility that the resulting jury would be arbitrarily skewed and lacking the “common sense judgment of the community.”¹⁰² Moreover, a jury that is not composed of a fair cross-section of its community affects public confidence in the criminal justice system by creating an appearance of unfairness.¹⁰³ The exclusion of young jury members creates an appearance of unfairness because the exclusion is based on a characteristic over which young people have no control: their age.¹⁰⁴ Like other traditionally excluded groups, young adults are categorized together due to their age, an attribute beyond each member’s personal control.¹⁰⁵ Because of young adults’ lack of control over their group membership, their exclusion on the basis of their age undermines “public confidence in the fairness of the criminal justice system.”¹⁰⁶

B. *The Prosecution’s Peremptory Challenges Violated Joshua’s Fourteenth Amendment Rights Because They Discriminated on the Basis of Age, a Class That Should Be Considered a Discrete Group Under Massachusetts Jurisprudence*

The SJC previously stated that “the right to use peremptory challenges . . . is not absolute.”¹⁰⁷ During jury selection, the prosecution may not use its peremptory challenges to remove jurors solely on the basis of their membership in a “particular, defined grouping[] in the community,” as this practice would violate both Article XII of the Massachusetts Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.¹⁰⁸ The issue in *Fernandes*, however, is that the SJC has consistently refused to recognize age as a “particular, defined grouping” in the context of jury selection because age is not a protected class under Article I of the Massachusetts Constitution.¹⁰⁹ As a result, the issue of

¹⁰¹ 419 U.S. at 530; Bryan D. Smith, *Young Adults: A Distinctive Group under the Sixth Amendment’s Fair Cross-Section Requirement*, 19 PAC. L.J. 1519, 1537 (1988).

¹⁰² Smith, *supra* note 101, at 1537–38.

¹⁰³ Smith, *supra* note 101, at 1538–39.

¹⁰⁴ Smith, *supra* note 101, at 1539.

¹⁰⁵ Smith, *supra* note 101, at 1539.

¹⁰⁶ *Commonwealth v. Prunty*, 968 N.E.2d 361, 373 (Mass. 2012) (quoting *Commonwealth v. Soares*, 387 N.E.2d 499, 512 (Mass. 1979)); Smith, *supra* note 101, at 1539–40.

¹⁰⁷ *Prunty*, 968 N.E.2d at 370.

¹⁰⁸ *Id.* at 370–71 (quoting *Soares*, 387 N.E.2d at 515–16).

¹⁰⁹ See, e.g., *Commonwealth v. Lopes*, 91 N.E.3d 1126, 1131 (Mass. 2018); *Commonwealth v. Oberle*, 69 N.E.3d 993, 999 (Mass. 2017); *Commonwealth v. Evans*, 778 N.E.2d 885, 893 (Mass. 2002); *Commonwealth v. Samuel*, 495 N.E.2d 279, 281 (Mass. 1986).

underrepresentation of young jurors remains unchallenged.¹¹⁰

In determining whether a peremptory challenge is discriminatory under *Batson*, the court considers whether the defendant is a member of a cognizable group and whether the prosecution exercised its peremptory challenges to remove members of the defendant's cognizable group from the jury based on their membership in that particular group.¹¹¹ The prosecution must then present a neutral explanation for challenging the jurors in the defendant's group.¹¹² Thereafter, the trial court will decide if the defendant established "purposeful discrimination."¹¹³ Similarly, the State rule under *Soares* provides that peremptory challenges may not be used "to exclude members of discrete groups" based on an assumption that bias will occur because of the juror's membership in the group.¹¹⁴

Here, the Court failed to recognize age as a discrete or cognizable group when it permitted the prosecution to use its peremptory challenges in a discriminatory manner.¹¹⁵ Had the Court considered age as a cognizable group when it reviewed the peremptory challenges used at Joshua's trial, it would have found that the prosecution engaged in purposeful discrimination under *Batson*, as the prosecution removed the young jurors solely on the basis of their membership to a particular age group.¹¹⁶ Similarly, under *Soares*, the Court would have found that the prosecution excluded young jurors solely based on the assumption that bias would result due to their membership in the young adult grouping.¹¹⁷

When the defense challenged the age-based peremptory challenges at trial, the prosecution explicitly stated that it tried to remove jurors under the age of twenty-five from the jury because they "often times have difficulties in deciding what classes to take, never mind whether or not somebody is guilty."¹¹⁸ This explanation for challenging jurors in the defendant's age group was not only non-neutral under *Batson*, it was blatantly discriminatory.¹¹⁹ The prosecution made a stereotypical assumption about the jurors in the defendant's age group, then proceeded to remove them from the jury on the basis of that assumption.¹²⁰ With this statement, the

¹¹⁰ Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045, 1047 (1978).

¹¹¹ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

¹¹² *Id.* at 97.

¹¹³ *Id.* at 96.

¹¹⁴ *Commonwealth v. Soares*, 387 N.E.2d 499, 516 (Mass. 1979).

¹¹⁵ *Commonwealth v. Fernandes*, 170 N.E.3d 286, 298 (Mass. 2021).

¹¹⁶ 476 U.S. at 96; Appellant's Brief, *supra* note 5, at 14–15.

¹¹⁷ *See* 387 N.E.2d at 516.

¹¹⁸ *Id.*; *Fernandes*, 170 N.E.3d at 297.

¹¹⁹ *See generally* 476 U.S. at 96.

¹²⁰ *See generally* Kendra Cherry, *What Is Ageism?*, VERYWELL MIND (May 2, 2022), <https://perma.cc/7QHM-W2YR>.

prosecution carelessly admitted that it engaged in a systemic pattern of excluding jurors solely based on their membership in a particular group.¹²¹ The prosecution's statement ultimately rebutted any presumption of properly used challenges under *Soares*.¹²² Regardless, the Court still permitted the prosecution to use those challenges because the Court definitively relies on the Equal Rights Amendment to define discrete groups when reviewing peremptory challenges.¹²³ As a result, the Court once again limited itself to the following protected groups: sex, race, color, creed, and national origin.¹²⁴ Despite the Court's overall decision in *Fernandes*, it still acknowledged the possibility of expanding upon this definition of protected groups, and has actually done so recently.¹²⁵

In a 2021 appeal, *Carter*, the SJC expanded the scope of constitutionally protected classes by holding that a juror's sexual orientation is a protected status for the purposes of *Batson-Soares* challenges.¹²⁶ The court considered three factors in arriving at this conclusion: (1) that gay individuals have historically suffered discrimination on the basis of their sexual orientation; (2) that sexual orientation is inherently intertwined with an individual's sex, which is already considered a protected class; and (3) that one's sexual orientation is not relevant to their ability to serve as an impartial juror.¹²⁷ Although young adults have not nearly suffered the same type nor severity of discrimination as gay individuals, they are subjected to age-based stereotypes in matters of everyday life, most prominently in the workplace.¹²⁸ Even at Joshua's trial, the prosecution purposefully ejected young jurors on the basis of the stereotypical assumption that college-aged students are incapable of making important decisions.¹²⁹ Further, like sexual orientation, a juror's young age has no relevance to the juror's ability to serve impartially.¹³⁰ If anything, a juror's old age may have more of an influence on the juror's impartiality toward a juvenile defendant.¹³¹ Under the analysis set forth in *Carter*, the SJC thus should further expand its consideration of constitutionally protected groups to include young adults.¹³²

Even if the prosecution had not admitted to engaging in a specific pattern of juror exclusion, the Court still should have found a pattern of

¹²¹ See *Fernandes*, 170 N.E.3d at 297.

¹²² *Id.*; 387 N.E.2d at 516.

¹²³ *Soares*, 387 N.E.2d at 516.

¹²⁴ *Id.*

¹²⁵ Commonwealth v. Carter, 172 N.E.3d 367, 380 (Mass. 2021); *Fernandes*, 170 N.E.3d at 295.

¹²⁶ 172 N.E.3d at 380.

¹²⁷ *Id.* at 379–80.

¹²⁸ See *infra* Part IV(B).

¹²⁹ *Fernandes*, 170 N.E.3d at 297.

¹³⁰ Cf. *Carter*, 172 N.E.3d at 380.

¹³¹ See *infra* Part IV(A).

¹³² See 172 N.E.3d at 379–80.

improper exclusion under the *Sanchez* factors.¹³³ Such factors, though non-exhaustive, include:

(1) the number and percentage of [jurors] who have been excluded from jury service due to the exercise of a peremptory challenge; (2) any evidence of disparate questioning or investigation of prospective jurors; (3) any similarities and differences between excluded jurors and those, not members of the protected group, who have not been challenged (for example, age, educational level, occupation, or previous interactions with the criminal justice system); (4) whether the defendant or the victim are members of the same protected group; and (5) the composition of the seated jury.¹³⁴

At Joshua's trial, the prosecution used twenty-three of its thirty-two available challenges (71.8%) to remove jurors under the age of twenty-five, and three challenges against jurors under the age of thirty.¹³⁵ In total, the Commonwealth used 81% of its total peremptory challenges to remove jurors under the age of thirty.¹³⁶ These numbers undoubtedly represent the vast majority of the exclusions made by the prosecution's peremptory challenges.¹³⁷ It is likely that these figures alone would create a presumption of improper exclusion under *Sanchez*.¹³⁸ Further, Joshua, an eighteen-year-old at the time of trial, was a member of the same age group as the excluded jurors, and the excluded jurors were removed solely on the basis of their young age.¹³⁹ At the conclusion of voir dire, only one college student sat on the jury, likely to the dissatisfaction of the prosecution, who admittedly removed college-aged students on the assumption that they were incapable of making decisions.¹⁴⁰ By intentionally removing almost all jurors of the same age group as Joshua, the prosecution unquestionably surpassed the aforementioned *Sanchez* factors.¹⁴¹ As a result, the Court should have found that the prosecution engaged in discriminatory exclusion of young jurors, and thus violated Joshua's constitutional rights.¹⁴²

¹³³ See 151 N.E.3d 404, 424–25 (Mass. 2020).

¹³⁴ *Id.*

¹³⁵ Appellant's Brief, *supra* note 5, at 14–15.

¹³⁶ Appellant's Reply Brief, *supra* note 94, at 9.

¹³⁷ See Appellant's Reply Brief, *supra* note 94, at 9.

¹³⁸ See 151 N.E.3d at 424–25.

¹³⁹ Appellant's Reply Brief, *supra* note 94, at 9.

¹⁴⁰ See *Commonwealth v. Fernandes*, 170 N.E.3d 286, 297 (Mass. 2021).

¹⁴¹ See 151 N.E.3d at 424–25.

¹⁴² See MASS. CONST., art. XII; *Fernandes*, 170 N.E.3d at 297–98; *Sanchez*, 151 N.E.3d at 424–25.

IV. The SJC Should Recognize Young Adults as a Discrete Group for the Purposes of Peremptory Challenges in Juvenile Jury Trials as a Matter of Public Policy

Although the SJC has declined to do so in the past, it should reconsider the impact of discriminatory age-based peremptory challenges in juvenile trials, if not for constitutional concerns then as a matter of public policy.¹⁴³ Prosecutors are systematically more likely to exclude younger members of the jury.¹⁴⁴ Current jurisprudence allows them to do so without explanation.¹⁴⁵ In a juvenile jury trial, this practice automatically eliminates the defendant's peers from the jury, and thus violates the defendant's constitutional rights.¹⁴⁶ In addition to constitutional concerns, this practice may have actual influence on a criminal defendant's chances of conviction.¹⁴⁷ Further, both the Court and the legislature recognize age in other aspects of the law, as well as in other aspects of juvenile adjudication.¹⁴⁸ In order to uphold the integrity of the juvenile criminal justice system and to maintain consistency with other areas of the law, the Court should recognize age as a discrete group in the context of peremptory challenges in juvenile jury trials.¹⁴⁹

A. *The Age of the Jury Has an Impact on Deliberation and Trial Outcomes*

Attitudes of young adults are "so different from those of the rest of the population that the quality of a jury's deliberation would be significantly affected by the absence of the young."¹⁵⁰ Older adults and younger adults commonly differ in their views, opinions, and feelings related to major areas of life including health, personal issues, and death.¹⁵¹ Moreover, older adults tend to be "more politically conservative, more resistant to change, and less tolerant of political and social nonconformists than the young."¹⁵² Thus, each age group has its own "distinctive subculture" that is essential to an effective jury deliberation.¹⁵³

¹⁴³ See *infra* Part IV(A)–(C).

¹⁴⁴ Shamena Anwar et al., *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & ECON. 1001, 1003 (2014).

¹⁴⁵ See, e.g., *Commonwealth v. Lopes*, 91 N.E.3d 1126, 1131 (Mass. 2018); *Commonwealth v. Oberle*, 69 N.E.3d 993, 999–1000 (Mass. 2017); *Commonwealth v. Evans*, 778 N.E.2d 885, 893 (Mass. 2002); *Commonwealth v. Samuel*, 495 N.E.2d 279, 281 (Mass. 1986).

¹⁴⁶ See Appellant's Brief, *supra* note 5, at 16.

¹⁴⁷ See *infra* Part IV(A).

¹⁴⁸ See *infra* Part IV(B)–(C).

¹⁴⁹ See *infra* Part IV(A)–(C).

¹⁵⁰ Zeigler, *supra* note 110, at 1076–77.

¹⁵¹ Zeigler, *supra* note 110, at 1075.

¹⁵² Zeigler, *supra* note 110, at 1075.

¹⁵³ See Zeigler, *supra* note 110, at 1075–76.

Both the prosecution and the defense use age as a tactical advantage during jury selection.¹⁵⁴ Specifically, the prosecution is more likely to use its peremptory challenges against younger jurors, while the defense is more likely to use its peremptory challenges against older jurors.¹⁵⁵ This pattern occurs due to potential selection bias: the prosecution is more likely to assume that younger jurors will not convict, while the defense is more likely to assume that older jurors will convict.¹⁵⁶ As a result, the jury typically consists of jurors from the middle-aged distribution.¹⁵⁷ The average age of the jury pool has a striking effect on conviction rates: when the average age of the jury pool is around fifty years old, defendants are convicted about 79% of the time.¹⁵⁸ This pattern occurs in about 50% of criminal trials.¹⁵⁹ Conversely, jury pools that are under the age of fifty only convict about 68% of the time.¹⁶⁰ For comparison, the 2009 criminal conviction rate in Suffolk County and Middlesex County, regardless of jury age, was 62%.¹⁶¹ A possible explanation for higher conviction rates amongst older jurors is that older jurors are generally more conservative than younger jurors, either because they were born into a more conservative generation or because they become more conservative as they age.¹⁶²

By systemically removing younger jurors from the jury, especially in juvenile trials, the prosecution invites the risk of diminished viewpoints, higher conviction rates, and underrepresentation of the young.¹⁶³ As stated above, the disproportionate treatment of younger jurors also increases the chances of unchecked governmental power, lack of impartiality, and an assumption of unfairness.¹⁶⁴ Moreover, young jurors bring perspectives and opinions to deliberations that older jurors cannot adequately represent.¹⁶⁵ In other words, “‘a flavor, a distinct quality is lost’ if young adults are seriously underrepresented on jury rolls.”¹⁶⁶ In order to maintain the integrity and fairness of juvenile jury trials, the SJC should reconsider its classification of young adults as a discrete group for the purposes of preventing

¹⁵⁴ See Anwar et al., *supra* note 144, at 1003.

¹⁵⁵ Anwar et al., *supra* note 144, at 1003.

¹⁵⁶ See Anwar et al., *supra* note 144, at 1013.

¹⁵⁷ Anwar et al., *supra* note 144, at 1003.

¹⁵⁸ Anwar et al., *supra* note 144, at 1004.

¹⁵⁹ Anwar et al., *supra* note 144, at 1004.

¹⁶⁰ Anwar et al., *supra* note 144, at 1004.

¹⁶¹ Lefteris K. Travayiakis, *Massachusetts Criminal Conviction Rates in Suffolk, Middlesex, Norfolk & Worcester Counties Released*, BOS. CRIM. LAWS. BLOG (Mar. 16, 2010), <https://perma.cc/AJK4-Z4FB>.

¹⁶² Anwar et al., *supra* note 144, at 1022–23.

¹⁶³ See Anwar et al., *supra* note 144, at 1004; Zeigler, *supra* note 110, at 1076.

¹⁶⁴ See Smith, *supra* note 101, at 1537.

¹⁶⁵ See Zeigler, *supra* note 110, at 1076.

¹⁶⁶ Zeigler, *supra* note 110, at 1076 (quoting *Ballard v. United States*, 329 U.S. 187, 194 (1946)).

discriminatory peremptory challenges.¹⁶⁷

B. Age is Recognized as a Distinct Group in Other Aspects of Life

Ageism occurs in various realms of daily life, including education, employment, and residency.¹⁶⁸ Both the courts and the legislature recognize age as protected class in these areas.¹⁶⁹ For instance, Massachusetts' fair housing law prohibits discrimination by housing providers in the sale and rental of housing against current or prospective tenants on the basis of age.¹⁷⁰ Notably, Massachusetts specifically refers to age as a "protected characteristic" for the purposes of regulating housing discrimination practices.¹⁷¹ As a result, landlords may not refuse to rent to tenants based on age nor increase rental prices based on age nor steer tenants away from potential rental properties based on age.¹⁷²

State and federal legislative enactments also protect adults from age discrimination in hiring, promotion, discharge, compensation, and terms of employment.¹⁷³ With regard to age discrimination in the workplace, young adults are actually more likely than their older peers to experience or witness some form of discrimination at work, a phenomenon dubbed "reverse ageism."¹⁷⁴ However, the federal protections for age discrimination typically apply to older workers above the age of forty.¹⁷⁵ Interestingly, younger people tend to have greater exposure to all forms of discrimination than their older counterparts, including racism, sexism, and ageism.¹⁷⁶ In the workplace specifically, younger employees are targeted with stereotypical age-related assumptions.¹⁷⁷ For example, older colleagues may assume their younger colleagues cannot handle important tasks or may overlook

¹⁶⁷ See Anwar et al., *supra* note 144, at 1004; Zeigler, *supra* note 110, at 1076.

¹⁶⁸ Zeigler, *supra* note 110, at 1076.

¹⁶⁹ See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 134–36 (2000) (finding sufficient evidence of age discrimination against the employee under the Age Discrimination in Employment Act); *Bloom v. City of Worcester*, 293 N.E.2d 268, 285 (Mass. 1973) (upholding a city ordinance that guaranteed equal access to employment, housing, education, recreation, and public accommodations regardless of race, color, religious creed, national origin, sex, age, or ancestry); see *Age Discrimination*, *supra* note 39; *Overview of Fair Housing Law*, *supra* note 42.

¹⁷⁰ *Overview of Fair Housing Law*, *supra* note 42.

¹⁷¹ *Overview of Fair Housing Law*, *supra* note 42.

¹⁷² *Overview of Fair Housing Law*, *supra* note 42.

¹⁷³ *Age Discrimination*, *supra* note 39; Mass. Comm'n Against Discrimination, *Age Discrimination in the Workplace*, MASS.GOV, <https://perma.cc/B4Q2-BNXX> (last visited Apr. 12, 2023).

¹⁷⁴ Emma Waldman, *Am I Old Enough to Be Taken Seriously?*, HARV. BUS. REV. (Nov. 25, 2020), <https://perma.cc/6PVM-TXGX>.

¹⁷⁵ See *Age Discrimination*, *supra* note 39; Waldman, *supra* note 174.

¹⁷⁶ Waldman, *supra* note 174.

¹⁷⁷ Waldman, *supra* note 174.

feedback from their younger counterparts on projects.¹⁷⁸

Here, the prosecution specifically targeted all young jurors by using the majority of its peremptory challenges to eliminate them from the jury.¹⁷⁹ When challenged on the systematic removal of the jurors, the prosecution blatantly indicated that it wanted to remove jurors under the age of twenty-five due to the assumption that college-aged students are unable to make important decisions.¹⁸⁰ If employers and housing providers cannot deny individuals certain experiences and responsibilities on the basis of age, then the government—here, the prosecution—should not be able to either.¹⁸¹ Notably, population statistics for the City of Boston, the area from which Joshua’s jury pool was drawn, show that 70.6% of young adults ages twenty-five to thirty-four have a bachelor’s degree or higher, compared to 41.8% of adults over the age of thirty-five.¹⁸² In order to prevent arbitrary peremptory challenges that discriminate on the basis of age-related stereotypes, the SJC needs to recognize age as a discrete group when reviewing peremptory challenges in juvenile trials.¹⁸³

C. *The Court Recognizes Age-Related Factors in Other Aspects of Juvenile Adjudication*

Massachusetts laws regarding juvenile adjudication specifically require that juvenile delinquents “shall be treated, not as criminals, but as children in need of aid, encouragement and guidance.”¹⁸⁴ In both state and federal courts, juveniles receive specialized treatment throughout the adjudication process as well as in sentencing consideration due to their youthful age and ongoing brain development.¹⁸⁵ For instance, the Court previously validated youth offender statutes that require the government to prove certain elements and the judge to provide certain jury instructions in juvenile cases.¹⁸⁶ In addition, the general public is excluded from various juvenile proceedings except where the prosecution is proceeding with indictment.¹⁸⁷ With regard to juvenile sentencing, the SJC considered juvenile brain

¹⁷⁸ Waldman, *supra* note 174.

¹⁷⁹ Appellant’s Brief, *supra* note 5, at 14–15.

¹⁸⁰ Commonwealth v. Fernandes, 170 N.E.3d 286, 297 (Mass. 2021).

¹⁸¹ See *Age Discrimination*, *supra* note 39; *Overview of Fair Housing Law*, *supra* note 42.

¹⁸² BOS. PLAN. & DEV. AGENCY, RSCH. DIV., *supra* note 95, at 21.

¹⁸³ See *Fernandes*, 170 N.E.3d at 297; Waldman, *supra* note 174.

¹⁸⁴ MASS. GEN. LAWS ANN. ch. 119, § 53 (West 2021).

¹⁸⁵ See, e.g., *Diatchenko v. D.A. for Suffolk Dist.*, 1 N.E.3d 270, 283–84 (Mass. 2013); see *What Is Juvenile Justice?*, *supra* note 37; *Youth in the Justice System: An Overview*, *supra* note 1.

¹⁸⁶ See, e.g., *Commonwealth v. Quincy Q.*, 753 N.E.2d 781, 789–90 (Mass. 2001) (explaining that in a juvenile criminal proceeding, the prosecution must prove: (1) the elements of the criminal offense; and (2) the elements of Mass. Gen. Laws. ch.119 § 54, which are specific to youthful offenders, and the judge must instruct the jury of the same).

¹⁸⁷ MASS. GEN. LAWS ANN. ch. 119, § 65 (West 2021).

development in its decision to protect juvenile offenders from both mandatory and discretionary life sentences without parole.¹⁸⁸ Currently, the Court is considering whether to extend this holding to “emerging adults” who are ages eighteen to twenty and have been convicted of first-degree murder.¹⁸⁹ Since the Court has historically considered a juvenile’s age in other aspects of the juvenile trial process, it should do so here by preventing the government from exercising peremptory challenges against young adults on the jury in a discriminatory manner, thus guaranteeing a juvenile defendant the right to a trial by a jury of their peers.¹⁹⁰

CONCLUSION

The Massachusetts Supreme Judicial Court denied Joshua Fernandes his constitutional right to a fair and impartial jury of his peers when it refused to recognize age as a discrete group when reviewing the prosecution’s peremptory challenges at trial. Instead, the Court permitted the prosecution to use the bulk of its peremptory challenges to remove young jurors from the jury panel even though the prosecution admitted to removing young jurors on the assumption that the jurors had a diminished ability to make important decisions because of their age. The discriminatory manner in which the prosecution exercised its challenges would be barred by state and federal precedent but for the SJC’s refusal to identify age as a discrete group in the Commonwealth of Massachusetts.

As argued above, the SJC should reconsider its classification of young adults as a discrete group, because young adults bring unique opinions to the deliberation room that may influence conviction rates. Moreover, the Court has already begun expanding the “definitive” list of protected groups under Article I of the Constitution, so it should continue to do so here. In addition, Massachusetts jurisprudence recognizes and protects age in other aspects of everyday life, including housing and employment. The trend should continue into criminal adjudication of juveniles as well. Finally, both state and federal courts consider age-related characteristics when reviewing juvenile criminal procedure and sentencing. By including age as a protected group for the purposes of peremptory challenges in juvenile jury trials, the Court will guarantee that a juvenile defendant receives a fair trial by an impartial jury composed of his peers, not his parents.

¹⁸⁸ *Diatchenko*, 1 N.E.3d at 283–84.

¹⁸⁹ See Ella Fassler, *Massachusetts Could Loosen Life Without Parole Restrictions for Young People*, THE APPEAL (Jun. 30, 2021), <https://perma.cc/6W4W-FGFR>.

¹⁹⁰ See *supra* Part IV(C).

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