What Justice Requires: Equal Protection Clause Issues with the Massachusetts Supreme Judicial Court’s 33E Powers

"Upon deeper inspection, the gender line . . . is revealed as a manifestation of traditional attitudes about the expected behavior of males and females, part of the myriad signals and messages that daily underscore the notion of men as society’s active members, women as men’s quiescent companions."  

I. INTRODUCTION

A central tenet of the United States Constitution is equal protection under the law for every American citizen. The Supreme Court safeguards this right by mandating that differential treatment and classifications of quasi-suspect groups based on gender be subjected to intermediate judicial scrutiny. In Massachusetts, however, gender-based classifications must satisfy strict scrutiny standards to be constitutional under state law.
The Supreme Court has invalidated several laws seemingly benefiting women disproportionately to men. The Court’s justification has been that the laws violated the Equal Protection Clause of the Fourteenth Amendment. In fact, many of such laws that appear to accord women a liberty at men’s expense, are actually driven by discriminatory stereotypes against women.7

The Massachusetts Supreme Judicial Court (SJC) has extraordinary powers, including the power to reduce verdicts under chapter 28, section 33E of the Massachusetts General Laws (33E).8 Pursuant to its 33E powers, the SJC has broad discretion in deciding when to reduce verdicts.9 The SJC’s ability to reduce verdicts any time it determines that justice requires a reduction opens the door for implicit biases to sneak their way into the court’s deliberation process and impacts decisions in ways that ultimately violate defendants’ Equal Protection rights.10

Notably, in cases involving child victims, there is a pattern of inconsistent judgments regarding verdict reduction for defendants belonging as transgender, and to advance the notion that the Fourteenth Amendment to the United States Constitution ought to grant transgender individuals equal protection under the law. Cf. Federal Case Law on Transgender People and Discrimination, NAT’L CTR. FOR TRANSGENDER EQUALITY, https://transequality.org/federal-case-law-on-transgender-people-and-discrimination [https://perma.cc/9X58-F7V6] (providing list of federal cases offering protection to transgender defendants under Fourteenth Amendment).


6. See Orr, 440 U.S. at 282-83 (stating gendered statute violates Equal Protection Clause); Boren, 429 U.S. at 210 (holding statute establishing different drinking ages violates Equal Protection Clause).

7. See supra note 7 and accompanying text (detailing trends in judicial system’s treatment of female defendants).
to different genders.\textsuperscript{11} Specifically, the SJC upheld a verdict reduction for a female defendant charged with shaking a baby too hard, yet reversed a verdict reduction for a male defendant whose case had very similar facts.\textsuperscript{12} Additionally, the SJC chose to reduce a verdict for a male defendant who beat a child to death, yet refused to reduce a verdict for a female defendant whose actions bore many similarities.\textsuperscript{13} In other child-victim cases, the court refused to use its 33E power to reduce verdicts.\textsuperscript{14}

This Note begins with an overview of the Fourteenth Amendment’s Equal Protection Clause, and the Supreme Court’s treatment of Equal Protection cases involving gender-based discrimination.\textsuperscript{15} Next, this Note explores the history of the SJC’s extraordinary 33E powers, specifically focusing on its use of verdict reductions with child victims.\textsuperscript{16} This Note then argues that the SJC’s broad authority to reduce verdicts “when justice requires” has led to potentially discriminatory treatment of defendants charged with killing children depending on gendered circumstances.\textsuperscript{17} Accordingly, this Note advocates for several legislative restrictions on the SJC’s 33E powers to limit the potential for implicit biases to affect the justices’ decisions.\textsuperscript{18}
II. HISTORY

A. Fourteenth Amendment Equal Protection Rights

1. Federal Fourteenth Amendment Protection for Gender-Based Classifications

Three years after the Civil War ended, Congress ratified the Fourteenth Amendment.19 The Amendment’s purpose is to protect citizens’ Due Process and Equal Protection Clause rights from infringement by the states.20 The Supreme Court assesses alleged Equal Protection Clause violations differently depending on several key factors.21 In order to trigger an equal protection analysis, there must be some government action.22 Additionally, the government action must single out a group of people and that group must be considered a “suspect class.”23

19. See U.S. CONST. amend. XIV, § 1 (establishing Equal Protection Clause); 14th Amendment Adopted, HISTORY, http://www.history.com/this-day-in-history/14th-amendment-adopted [https://perma.cc/A64L-G8Y6] (outlining circumstances surrounding Fourteenth Amendment’s ratification). The Fourteenth Amendment was originally ratified to grant African Americans the full rights and protections associated with citizenship, and was used to challenge racially-motivated distinctions. See 14th Amendment Adopted, supra. Nevertheless, despite the Fourteenth Amendment’s race-based origins, plaintiffs also use the amendment to challenge gender-based classifications and discrimination. See LENORA M. LAPIDUS ET AL., THE RIGHTS OF WOMEN: THE AUTHORITATIVE ACLU GUIDE TO WOMEN’S RIGHTS 1 (Eve Carey ed., 4th ed. 2009).


21. See R. Randall Kelso, Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice, 4 U. PA. J. CONST. L. 225, 227-28 (2002) (enumerating Supreme Court’s consideration in Equal Protection Clause cases). In analyzing such cases, the Supreme Court must address three distinct considerations. See id. The Court considers the government’s interests, the means of attaining those interests, and the burden resulting from the means used. Id.


23. See id. (outlining classification requirement). The Supreme Court has defined members of a suspect class as individuals belonging to “discrete and insular minorities” and thus potentially deserving “more searching judicial inquiry.” See United States v. Carolene Products Co., 304 U.S. 144, 155 n.4 (1938). The government’s use of a classification may either be explicit on its face or look neutral but be discriminatory in both effect and purpose. See Russell W. Galloway Jr., Basic Equal Protection Analysis, 29 SANTA CLARA L. REV. 121, 131 (1989) (explaining different ways government may create classifications). Proof of discriminatory purpose requires a showing that the government engaged in the behavior or created the classification specifically because of the effect it would have on a particular group. See id. It is not enough to prove that the government created the classification “in spite of” the discriminatory effect on the group of people belonging to the classification. See id. Additional findings determinative of discriminatory purpose include:
Assuming there is a classification, the Court must then decide which level of scrutiny to apply to the government action. The Court’s analysis—and likely its decision—will be driven by which level of scrutiny it applies to the challenged action. The Court applies either the strict scrutiny, intermediate scrutiny, or rational basis test, depending on a variety of factors.

Assuming the Court in question has jurisdiction to hear the case and the case is justiciable, a plaintiff hoping to bring a successful Equal Protection Clause suit must satisfy several requirements. A plaintiff alleging an Equal Protection Clause violation must prove the action in question is government action. If the plaintiff can show government action is at issue, the court can subsequently decide the case on its merits. Then, the plaintiff must prove that the government action creates either an explicit classification; or if the government action is neutral on its face, has both discriminatory intent and purpose.

The totality of the circumstances to discern whether a purpose to harm a protected group was present. Proof of adverse impact is a good starting point, but only if the discriminatory effect is substantial and not readily explainable on other grounds. The court should then examine the general history of the government entity to determine whether it has engaged in any other illegal discrimination. Next, the court should evaluate the historical background of the specific decision, looking for direct or circumstantial evidence of discriminatory purpose.

See United States Constitution: Justiciability, Const. L. Rep., https://constitutionallawreporter.com/article-03-section-02/justiciability/ [https://perma.cc/HL9U-LVKC] (discussing standing requirements). Furthermore, the plaintiff’s issue must be ripe, meaning it must be ready for judicial consideration. See id. Similarly, a plaintiff may not bring a case that is not fit for judicial consideration because the original case or controversy is no longer consequential, thus making plaintiff’s case moot. See id. Finally, the issue must not be a political question. See id. A case constitutes a political question if that case’s decision is better left to another branch of government to decide, there is no judicially-available means to solve the issue, the court would need a preliminary policy determination, or the court’s ruling would embarrass or disrespect another branch of government. See id.

Action by private parties alone is not enough to satisfy this preliminary Equal Protection Clause requirement unless such private action is sufficiently intertwined with government action such that the government either facilitates or profits from the private action. See id. at 127-28.

See id. at 128 (noting courts decide Equal Protection Clause cases on merits absent any jurisdiction or justiciability problem).
the Court determines an express or implied government classification has been created, the court will determine which level of scrutiny to apply to the classification.31

Generally, the Supreme Court will apply strict scrutiny in three instances.32 The Court will apply the highest level of scrutiny if the government classification is based on a suspect class such as race, national origin, or religion.33 Additionally, the Court will apply strict scrutiny if the classification infringes on a fundamental right.34 Finally, the Court may apply strict scrutiny when the classification is “somewhat suspect and the interest is somewhat fundamental.”35 If the Court applies strict scrutiny, the burden of proof shifts from the plaintiff to the government to prove that the classification “furthers a compelling government interest” and that the government used the least restrictive means to achieve that interest.36

For government classifications based on gender, the Court applies intermediate scrutiny.37 If the Court determines intermediate scrutiny is applicable, the burden of proof shifts to the government to prove that the classification in question is substantially related to an important government purpose.38 The Court assesses government action that does not create a classification based on a suspect class, and that does not infringe on a fundamental right using the rational basis test, which is highly deferential to the


31. See Galloway, supra note 23, at 129 (stating once Court determines government classifications created, level of scrutiny determined).

32. See id. at 130 (detailing instances where court applies highest level of scrutiny).

33. See id. at 132-33 (discussing strict scrutiny application to suspect classifications). The Supreme Court evaluates government classifications based on race, national origin, and ethnicity under strict scrutiny because the Equal Protection Clause’s enactment history stems from a need to protect newly-freed slaves from “government discrimination.” See id.

34. See id. at 148-49 (specifying fundamental right infringement determination). The government’s actions affect a fundamental right when the right is “explicitly or implicitly guaranteed by the Constitution.” See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (offering test for determining whether right to education constitutes fundamental right). Additionally, the effect of government action can properly be treated as infringement when “the government’s action substantially interferes with the claimant’s exercise of the [fundamental] right.” See Galloway, supra note 23, at 149. When deciding whether the action constitutes a substantial interference, the Court not only looks at whether the government bans the exercise of the right through “threat of legal sanctions,” but also considers whether the action “substantially deters the exercise of the right or makes the exercise of the right materially more difficult.” See id.

35. See Galloway, supra note 23, at 130 (providing third instance where Court may use strict scrutiny).

36. See id. at 134 (elucidating compelling government interest and necessary means requirements). A compelling government interest must still be constitutional, and the government must specifically intend for the classification to serve that interest. See id.

37. See id. at 142 (discussing Court’s application of intermediate scrutiny).

government.39 Under rational basis, the burden of proof rests on the plaintiff, and the government action is presumed constitutional unless it is irrational, arbitrary, or capricious.40

Before the Supreme Court’s establishment of intermediate scrutiny in 1976, the Court analyzed gender-based classifications under the rational basis test.41 Even while the Court purportedly applied the rational basis test, decisions eventually began incorporating language resembling intermediate scrutiny analysis.42 Finally, in 1976, the Court established intermediate scrutiny in Craig v. Boren.43

The Supreme Court applies the intermediate scrutiny test when it is determining the constitutionality of gender-based classifications.44 Interestingly,
many of the gender-based classification cases decided by the Court involve laws affording women more freedoms than men. While cases involving male defendants appear to afford women a benefit—such as the ability to buy alcohol at a younger age, certain tax exemptions, or other financial benefits—the supposed advantages stem from underlying sexism towards women.

2. Massachusetts Fourteenth Amendment Protection for Gender-Based Classifications

In Massachusetts, unlike under federal law, gender-based classifications and race-based classifications are evaluated under the same level of scrutiny. Under Massachusetts law, gender-based classifications are evaluated under a

interest). The Court’s intermediate scrutiny analysis requires a showing of discriminatory intent. See Pers. Adm’r v. Feeney, 442 U.S. 256, 279 (1979) (holding Massachusetts’s veterans’ hiring preference statute did not have discriminatory intent). The Court has refined its intermediate scrutiny analysis to exclude government action that has a discriminatory impact without having a discriminatory intent. See id. In Feeney, the Court held that the statute contained gender-neutral language and a gender-neutral purpose, and thus did not violate the Equal Protection Clause. See id. But see United States v. Virginia, 518 U.S. 515, 519 (1996) (holding Virginia Military Institute’s discriminatory admission policy invalid). Intermediate scrutiny requires the government to meet a higher burden of proof to justify gender-based classifications. Lapidus et al., supra note 19, at 6-7 explaining intermediate scrutiny test. When comparing intermediate scrutiny to the other tests, authors have stated that it is “more demanding than the rational basis test and is more forgiving than strict scrutiny.” Id. at 6. Under intermediate scrutiny, “[a] law will not pass . . . if the law could be written to achieve the same purpose without referring to sex.” See id. Further, to be constitutionally valid, classifications based on gender must both “serve important government objectives and . . . [must be] closely and substantially related to the achievement of those objectives.” See id.


46. See ACLU Amicus Brief, supra note 1, at 10 (arguing despite affording women benefits, drinking age statute arises from sexist beliefs regarding women). In the Amicus Brief, Ginsburg argued that Oklahoma’s underage drinking law only facially afforded women a benefit at the expense of men. See id. The disparity in drinking age, according to Ginsburg, was a byproduct of society treating men as agents who act and women as passive. See id.; see also Campbell, supra note 42, at 187 (explaining tax exemption favoring women stems from women’s perceived fragility and weakness); Wendy W. Williams, Ruth Bader Ginsburg’s Equal Protection Clause: 1970-80, 25 Colum. J. Gender & L. (25th Anniversary Issue) 41, 46 (2013) (explaining biases against women harm both men and women).

47. See Mass. Const. pt. 1, art. 1 (codifying equal protection for citizens regardless of gender); Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977) (extending strict scrutiny test to gender-based classifications), superseded by statute, Mass. Gen. Laws ch. 272, §53 (2018); Lapidus et al., supra note 19, at 11 (discussing various states’ treatment of gender-based classifications under strict scrutiny). A court employing this standard of review will uphold a state legislature’s gender-based classification only when the state’s ‘compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose.”’ Lapidus et al., supra note 19, at 11.
strict scrutiny standard rather than an intermediate scrutiny standard.\textsuperscript{48} This means that to survive a constitutional attack, a gender-based classification must be supported by a compelling interest and the classification must be “limited as narrowly as possible consistent with its proper purpose.”\textsuperscript{49} This standard imposes a higher burden of proof on the party seeking to uphold the gender-based classifications because rather than serving an important purpose, the classification must serve a compelling interest, and rather than being substantially related to that interest, the classification must be as “narrowly tailored as possible.”\textsuperscript{50}

B. Implicit Bias and Its Effects on Judicial Outcomes

In her amicus brief on behalf of Craig, in \textit{Craig v. Boren}, then-ACLU attorney Ruth Bader Ginsburg argued that the difference in Oklahoma’s drinking age statute was the byproduct of unfavorable societal views of women as passive members of society.\textsuperscript{51} At its core, Ginsburg’s argument rested on the psychological and sociological concept underlying implicit bias theory, which first rose to prominence nineteen years after her amicus brief.\textsuperscript{52} The theory behind implicit bias is that human beings innately have subconscious beliefs and associations; those beliefs and associations are reinforced throughout our lives.

\textsuperscript{48} See Attorney Gen. v. Mass. Interscholastic Athletic Ass’n., 393 N.E.2d 284, 291 (Mass. 1979) (applying strict scrutiny to gender-based classifications and defining strict scrutiny). The SJC explicitly stated that gender-based classifications are to be evaluated in the same way as race-based classifications under strict scrutiny. \textit{See id.} The court struck down an interscholastic athletic association’s prohibition on boys playing on girls’ teams, holding that the policy did not pass the strict scrutiny test. \textit{See id.} at 296. States may grant their citizens more rights because the “[f]ederal constitutional rights can be understood as a floor rather than a ceiling . . . . [S]tates are free to offer more protection to individual rights than the federal government does as long as state rights do not conflict with federal provisions.” \textit{Lapidus et al., supra} note 19, at 9-10 (discussing why states may grant their citizens stronger state constitutional rights than federal constitution).


\textsuperscript{50} See \textit{id.} at 139 (setting forth strict scrutiny requirements); \textit{see also} \textit{Kelso, supra} note 21, at 228 (enumerating strict scrutiny and intermediate scrutiny requirements).

\textsuperscript{51} See ACLU Amicus Brief, \textit{supra} note 1, at 10 (arguing Oklahoma Statute affords women benefit due to sexist beliefs regarding women). In fact, Ginsburg’s Equal Protection Clause arguments consider the fact that society and the legal system reward men and women “for their compliance with sex-appropriate role behavior or penalize[s] them for deviation from it.” \textit{See Williams, supra} note 46, at 46-47 (explaining Ginsberg’s issue with societal imposition of gender norms and stereotypes).

\textsuperscript{52} See ACLU Amicus Brief, \textit{supra} note 1, at 10 (claiming Oklahoma statute’s gender-based differential treatment constitutes expression of societal expectations of passive women). In her amicus brief, Ginsburg wrote that the statute’s differential drinking age was the result of the “myriad signals and messages that daily underscore” the notion of male activity and female passivity. \textit{See id.} Ginsburg’s explanation of the statute’s harmful effects as contributing to the societal treatment of women as passive and men as active shares a conceptual framework with implicit bias theory, which states that subconscious associations are conditioned throughout a person’s entire life and are further reinforced by societal tools. \textit{See Kirwan Inst. for Study of Race and Ethnicity, Understanding Implicit Bias, Otto St. Univ., http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/ [https://perma.cc/2Q6H-K3EU]} (defining implicit bias and outlining key factors common to all implicit biases).
and affect our perception and treatment of certain groups of people. Implicit biases toward women often include beliefs regarding women’s passivity, lack of agency, and fragility. Furthermore, subconscious beliefs regarding female passivity and delicateness often result in paternalistic treatment of women as requiring assistance and protection.

Because human beings all possess implicit biases, the judiciary is not impervious to their effects, which influence judicial processes at every stage of development. Gendered implicit biases impact courts’ treatment of female defendants and subconsciously guide trial outcomes by influencing judges’ deliberation when faced with female defendants. The notion that women are passive and delicate results in female defendants receiving more lenient treatment from the criminal justice system as a whole.

Female defendants on average receive lower bond amounts, are less likely to be held before trial, and convicted female defendants are less likely than male defendants to be sent to prison. Such gendered differences exist even when...
socioeconomic status and race are factored into the analysis. Courts’ difference in treatment of female defendants is often explained by the term judicial “paternalism,” which is the idea that courts, as arbiters of justice, make decisions affecting female defendants out of a desire “to ‘protect’ women (who are assumed to be weak, defenseless, and in need of guidance) either from themselves or from some identifiable evil (specifically prison).” Female defendants perceived as conforming to stereotypical gender norms and acting in 02 [https://perma.cc/YBN3-9AUD] (stating men receive longer prison sentences than women). In fact, a study conducted by Sonja Starr found that “men receive[d] 63% longer sentences on average than women [d(id)]. Women were also significantly likelier to avoid charges and convictions, and twice as likely to avoid incarceration if convicted.” Starr, supra, at 18. Another potential explanation for why women generally receive lenient judicial treatment is that courts are more likely to consider mitigating factors for female defendants than they would for male defendants. See id. For example, although “[m]ost defendants of both genders have suffered serious hardship, have mental health or addiction issues, have minor children, and/or have ‘followed’ others onto a criminal path,” judges are more likely to take these mitigating factors into account for female defendants due to their perceived passivity and dependence. See id.; see also Prof. Starr’s Research Shows Large Unexplained Gender Disparities in Federal Criminal Cases, U. MICH. L. SCH. (Nov. 16, 2012), [https://www.law.umich.edu/newsandinfo/features/Pages/starr_gender_disparities.aspx [https://perma.cc/4YU8-NFPU] (stating women less likely to face incarceration even when convicted). It is crucial to note, however, that women of color, on average, are not beneficiaries of courts’ leniency and receive longer sentences than white women. See Mustard, supra note 58, at 312 (suggesting black defendants receive tougher sentences); Kelsh, supra note 7 (explaining black female defendants receive harsher sentences than white female defendants). The difference in treatment is attributable to different implicit biases that exist in relation to white women versus black women. See id. at 1249 (stating “intersectional subordination need not be intentionally produced” to negatively influence perceptions and treatment). 61. See Moulds, supra note 54, at 429 (describing broader favorable treatment towards female defendants); see also Goulette et al., supra note 7, at 407 (explaining harsher treatment of minority women). Black women face unique challenges due to the intersection of their race and gender. See Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1242 (1991) (arguing intersectionality creates unique circumstances and specific prejudices). Black female defendants are differently situated from white female defendants because the intersection of their race and gender creates a wholly different basis for further implicit biases to influence their treatment. See id. at 1249 (stating “intersectional subordination need not be intentionally produced” to negatively influence perceptions and treatment).

60. See Moulds, supra note 54, at 419 (accounting for lenient treatment through judicial paternalism). Often, evidence of paternalism can be located in the language of decisions themselves, which describe prison to be an evil from which female defendants need protection. See id. at 420; see also Starr, supra note 59, at 18 (describing potential reason for lenient judicial treatment of female defendants). Furthermore, judges’ concern for children becomes more of a concern when the defendant is female. See Kathleen Daly, Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing, 3 GENDER & SOC’Y, 9, 19 (1989) (stating judicial concern for children more expressed when defendant female). This related explanation for more lenient judicial treatment for female defendants is called selective sympathy. Starr, supra note 59, at 17.

[S]elective sympathy: perhaps circumstances like family hardship or “bad influence” appear more sympathetic when it is women who are in them. Psychology experiments have found that attributions of blame and credit are often filtered through expectations that males are “agentic” and active and women are “communal” and passive . . . . If so, prosecutors or judges might more readily credit societal or situational explanations for females’ crimes than for males. Id. at 16.
a stereotypically feminine manner are also more likely to receive favorable judicial treatment. However, female defendants who do not conform to traditional gender stereotypes often receive harsher judicial treatment because of their perceived nonconformance with the required mode of behavior.

C. Massachusetts 33E Powers

The Massachusetts legislature has afforded the SJC extraordinary powers under 33E. Under the statute, the SJC directly reviews all capital cases, and can elect to order a new trial or lessen a sentence. The SJC can exercise its extraordinary powers if it believes the original verdict violates the law, is too harsh given the evidence presented or does not account for new evidence, or in any other instance where the court believes “justice may require.” Such vague statutory language—where “justice may require”—allots the SJC broad judicial discretionary authority.

The Massachusetts legislature enacted 33E in 1939. The statute significantly altered the SJC’s judicial power by granting the court the ability to address matters of law and fact. Section 33E stems from the Massachusetts legislature’s desire to optimize and accelerate the process of executing defendants sentenced to death because prior to 33E’s enactment, numerous appeals prevented an efficient capital appeals process. While Massachusetts eliminated the death penalty in 1972, 33E’s definition of capital crimes now also includes first-degree murder convictions, so the statute still grants the SJC the same broad authority it did when the death penalty existed in the state.

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62. See Kelsh, supra note 7 (suggesting “judicial “chivalry” oftentimes reserved for women who conform to stereotypical gender-appropriate behavior).

63. See Goulette et al., supra note 7, at 407 (explaining women may receive harsher judicial treatment if they do not conform to stereotype). “Evil woman” theory posits that favorable judicial treatment is only reserved for specific types of women. See id.

64. See William J. Meade, The History of Capital Appeals in Massachusetts, 80 Ind. L.J. 91, 93 (2005) (describing circumstances surrounding Massachusetts legislature’s decision to enact 33E).


66. See id. (describing SJC’s 33E powers).

67. See id. (granting SJC power to reduce verdicts in interests of justice); Hartung, supra note 8, at 6 (noting SJC’s legislatively-afforded “expansive” powers under 33E).


69. See Meade, supra note 64, at 93 (detailing circumstances behind 33E enactment).

70. See Allen, supra note 68, at 988 (explaining origins behind 33E’s enactment). Back when Massachusetts had the death penalty, the six-year delay in the execution of two defendants prompted the state to create a judicial council to investigate the length behind the eventual executions. See Meade, supra note 64, at 93 (noting 33E origins). The council reported its findings to the Massachusetts legislature, which based on the council’s report, enacted 33E. See id.

71. See Allen, supra note 68, at 980-81 (explaining Massachusetts legislature defined capital case in statute). The legislature defined a capital case as a case in which the defendant was indicted for first-degree murder. See id. This definition occurred when Massachusetts still had the death penalty, but the definition has remained even after the state abolished the death penalty. See id.
For the purposes of this Note, only the SJC’s verdict-reduction power will be addressed and analyzed. Despite having the power to reduce verdicts when it determines justice so requires, the SJC actually uses its verdict-reduction power quite rarely. In fact, the SJC has only used its 33E powers to reduce a verdict twenty-five times.

By giving the SJC power to reduce verdicts “for any reason that the interest of justice requires,” 33E essentially imposes no standard of review and leaves the decision-making entirely up to the discretion of the justices on the bench. Given its expansive authority, the SJC has attempted to clarify and self-limit its 33E powers by enumerating certain factors to be used when making a 33E determination. The factors the court has enumerated include: whether the court believes a lesser verdict will be more just, whether the defendant was the aggressor, whether the defendant was confused or scared at any time of the murder, whether the defendant was suddenly attacked or provoked, whether the victim had a violent temper, and whether the defendant had a previous record and was known to be a “hard worker.” While the court has attempted to list factors it uses in determining whether to reduce a verdict, many of these factors are still broadly applicable, and still afford the court a great deal of undefined and unrestricted power.

D. The SJC’s Treatment of Cases Involving Child Homicide Victims

The SJC has heard and decided a number of cases involving homicides in which the victims were children. Out of those cases, the court outright reduced

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72. See supra Part I (outlining Note’s scope).
73. See id. (detailing number of times verdict-reduction power used).
74. See Allen, supra note 68, at 981 (describing SJC’s direct appeal process).
75. See Hartung, supra note 8, at 7 (describing certain factors SJC considers when making 33E determination).
77. See Hartung, supra note 8, at 6-7 (stating even with factors specified by SJC, court still has broad authority).
two verdicts, quasi-reduced one verdict, and upheld one trial court verdict reduction.80 Exploring the court’s treatment of the various child-victim homicides quickly illuminates noteworthy inconsistencies in the court’s treatment of defendants who commit noticeably similar crimes because the defendants receive substantially different treatment.81

1. Shaken Baby Syndrome

First, there appear to be functional differences in the way the SJC treats defendants found guilty of killing a child by shaking the child too hard, and thus causing abusive head trauma.82 In Commonwealth v. Woodward,83 the SJC upheld a trial judge’s verdict reduction from second-degree murder to manslaughter of a female au pair who was found guilty of second-degree murder for killing an eight-month-old child by shaking the infant too hard and causing severe brain injuries.84 The trial court judge’s stated reason for reducing Woodward’s conviction centered around the judge’s belief that Woodward’s actions lacked the requisite degree of malice necessary for a second-degree murder conviction.85 The judge reasoned—and the SJC agreed—that Woodward
did not mean to kill the child, and that her actions stemmed from “confusion, inexperience, frustration, immaturity, and some anger” but not malice.86

In *Commonwealth v. Lyons*,87 however, the SJC reversed a trial court’s verdict reduction from second-degree murder to manslaughter for a male defendant who shook his two-week-old son too hard.88 Lyons admitted to shaking his son, but argued he did so in a panic and thus acted without the requisite legal malice.89 In reducing Lyons’s verdict to manslaughter, the trial judge reasoned that Lyons had no history of abusing his son, that the shaking lasted only a couple of seconds, that Lyons had no prior criminal history, and that he was a “steady worker.”90 The judge concluded that Lyons “succumbed to the frailty of the human condition and committed a momentary act of ‘extraordinarily poor judgment.’”91 Nevertheless, in reversing the verdict reduction, the SJC held that the trial judge abused her discretion by relying on factors not directly related to the incident at hand—such as the defendant’s lack of prior criminal history and lack of any evidence that he previously abused his children.92

The SJC reasoned a second-degree murder conviction was proper because the defendant *ought* to have known—and a reasonable person in the defendant’s place *would* have known—that shaken baby syndrome “would follow the defendant’s actions.”93 In reversing the reduction, the SJC attempted to distinguish Lyons from Woodward by stating that in Woodward the child had lived for several days after his injury, Woodward denied shaking the victim, and that the cause of injury was controverted, whereas in Lyons, death was almost immediate, and the defendant admitted shaking the victim with great force for many minutes; the court further emphasized that in Woodward the jury was not given the option to convict based on a theory of manslaughter (despite the SJC ruling the error immaterial to the outcome), while in Lyons no such error existed.94 Furthermore, in Woodward, the SJC stated “although evidence of a single blow to a child . . . may be sufficient to support a jury finding of malice,”

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86. *See id.* at 1286 (distinguishing defendant’s actions from actions considered legally malicious).
88. *See id.* at 4 (reversing verdict reduction for defendant who shook baby).
89. *See id.* (explaining defendant’s argument and defense).
90. *See id.* at 5 (outlining trial judge’s reason for reducing verdict). The trial judge relied on factors historically endorsed by the SJC as reasonable factors to consider when making a verdict-reduction determination. *See supra* note 77 and accompanying text (explaining factors considered by SJC in making 33E determinations).
91. Lyons, 828 N.E.2d at 5, 7-8 (detailing trial judge’s determination regarding defendant acting without malice).
92. *See id.* at 5-6 (expressing concern with trial judge’s findings).
93. *See Commonwealth v. Lyons*, 828 N.E.2d 1, 6 (Mass. 2005) (stating jury’s findings regarding defendant’s culpability were sound).
94. *See id.* at 6-7 (outlining two distinctions between Woodward and Lyons).
such an inference was never actually made. In Lyons, however, the court relied on that exact inference to establish malice sufficient for second-degree murder.

2. Particularly Aggressive Murder

There are also inconsistencies with the court’s treatment of murders committed by defendants who were particularly aggressive and abusive towards their child victims prior to their eventual killing. In Commonwealth v. Cadwell, a male defendant was indicted for first-degree murder for beating a four-year-old developmentally challenged boy to death. Cadwell had abused the boy for a sustained period of time before the murder. The SJC reduced Cadwell’s first-degree murder conviction, holding that his actions did not properly fit under a theory of deliberate premeditation. Furthermore, the court expressly refused to apply the theory of “extreme atrocity or cruelty” because “the previous assaults were physically distinct from the final assault [and] were not themselves an accumulative cause of death.”

In Commonwealth v. Hutchinson, however, the SJC refused to reduce a first-degree murder conviction for a nanny who beat a three-year-old child in her care to death. Hutchinson also regularly beat the children, and testified about her short temper and “inability to cope with the responsibilities of raising young children.” Hutchinson bore uncanny similarities to Cadwell, but the court did

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96. See Lyons, 828 N.E.2d at 6 (distinguishing from Woodward by holding evidence of single blow in current case establishes malice).
99. Id. at 248 (describing case facts). The court described Cadwell’s victim as a four-year-old boy who was “frail . . . weighing about twenty-five pounds, a slow learner, not yet fully toilet trained.” Id.
100. See id. (detailing child’s abuse). Cadwell physically abused the child by “slapping and punching him, striking him with a paddle, and abusing him in other ways so that he was bruised over a considerable extent of his body.” Id.
101. See id. at 252-53 (holding facts do not conform with first-degree murder theories, and verdict reduction consistent with justice). The court reasoned that Cadwell’s prolonged abuse of the child constituted “uncontrolled outbursts of frustration” and thus his fatal attack on the child was “inconsistent with a theory of deliberate . . . murder.” Id. at 252. The court also reasoned that the beatings were likely the defendant’s attempts to discipline the child. Id. at 252 (reasoning Cadwell’s motive not necessarily malicious).
102. See Cadwell, 372 N.E.2d at 252-53 (refusing to affirm Cadwell’s conviction under extreme atrocity or cruelty first-degree murder theory). The court also simply stated that there was “no indication of extended suffering” despite clear evidence of continued physical abuse prior to the child’s death. Id. at 252.
104. See id. at 194-95 (describing events surrounding child’s death and expressing SJC’s refusal to reduce Hutchinson’s first-degree verdict).
105. See id. at 194 (explaining testimony concerning Hutchinson’s state of mind during abuse).
everything in its power to distinguish the two cases by differentiating between the injuries suffered by the child victims and the jury instructions presented.\textsuperscript{106}

III. Analysis

The SJC’s verdict-reduction trends in cases involving child victims indicate a clear lack of consistency.\textsuperscript{107} This manifest irregularity in the court’s verdict reductions is a byproduct of the court’s hyper-expansive authority under 33E.\textsuperscript{108} Furthermore, such blatant outcome inconsistencies are exacerbated by the unnoticed and unchecked implicit biases that sneak their way into the justices’ decision-making processes.\textsuperscript{109} Exploring the SJC’s treatment of similarly situated defendants shows gender-based implicit biases at work behind the discrepancies in the court’s decisions.\textsuperscript{110}

A. Shaken Baby Syndrome Cases

First, the SJC’s treatment of defendants convicted of second-degree murder by shaking an infant appears to vary depending on the defendant’s gender.\textsuperscript{111} In
Woodward, the SJC’s rationale for upholding the lower court’s verdict reduction for the female au pair stemmed from the court’s belief that Woodward’s inexperience with handling the child and her lack of knowledge of potential harm eliminated the malice necessary for a second-degree murder conviction. In Lyons, however, the court rejected that very same rationale, instead holding that Lyons’s momentary lack of good judgment was not enough to absolve him of malice sufficient for second-degree murder. Furthermore, the court reasoned that Lyons ought to have known that his shaking would likely cause the infant’s death. In reversing the lower court’s verdict reduction, the SJC admonished the appeals court for using factors such as the defendant’s peaceful nature, labeling such factors irrelevant to the holding.

The SJC’s difference in outcome in Woodward and in Lyons can be explained by the court’s broad discretionary power under 33E combined with inherent implicit biases towards male agency and female passivity. The SJC was much more willing to attribute a lack of understanding and confusion to Woodward’s actions than Lyons’s actions even though what killed the infants in both cases was the defendants’ shaking. In fact, Woodward and Lyons contained numerous factual and legal similarities. These similarities included the lower courts’ emphasis on no abusive history and the trial judges’ determination that the defendants’ action did not cross the line to form the requisite malice for second-degree murder convictions. In Woodward, the SJC used the evidence suggesting no history of prior abuse and Woodward only shaking the child once as reasons to affirm her verdict reduction, while in Lyons, the court dismissed Lyons’s lack of previous abuse as irrelevant and held that the one instance of shaking the child satisfied the malice requirement.

The SJC essentially treated Woodward as confused, naïve, and unaware of the potential consequences of her actions, yet treated Lyons as a responsible-enough

112. See supra notes 85-86 and accompanying text (explaining court’s belief about Woodward’s level of culpability).
113. See Commonwealth v. Lyons, 828 N.E.2d 1, 5 (Mass. 2005) (providing reasons for Lyons’s verdict reduction); supra notes 91-92 and accompanying text (detailing difference between trial judge’s and SJC’s treatment of Lyons’s malice).
114. See supra note 93 and accompanying text (discussing SJC’s determination Lyons “ought to have known” his actions would likely be fatal).
115. See supra note 91 and accompanying text (stating SJC determined trial judge’s reasoning regarding defendant’s peaceful nature irrelevant).
116. See supra Section II.B (exploring how implicit bias influences judicial outcomes specifically with female defendants).
117. See supra notes 94-96 and accompanying text (describing SJC’s justification for treating Woodward and Lyons differently).
118. See supra notes 94-96 and accompanying text (outlining similarities between trial courts’ findings in both cases).
119. See supra notes 94-96 and accompanying text (describing trial courts’ findings of law in both cases).
120. See supra notes 95-96 and accompanying text (detailing SJC’s various justifications for affording Lyons and Woodward different judicial treatment).
agent who *ought to have been aware* of the consequences of his actions. Nevertheless, factual discrepancies alone are not enough to explain the stark divergence in the judicial treatment of the two cases. Instead, Woodward received more favorable judicial treatment than Lyons because the justices’ implicit biases impacted their decisions. As discussed previously in this Note, implicit biases directed towards women often include beliefs that women are passive and lack agency power, while implicit biases directed at men include beliefs that men are active and possess adequate agency power. These biases explain the SJC’s willingness to attribute Woodward’s actions to a mistake not rising to the level of legal malice required for a second-degree murder conviction, and the subsequent refusal to absolve Lyons of that very same malice.

**B. Particularly Aggressive Murder**

Additionally, the inconsistency in the SJC’s treatment of defendants who brutally murder children are best explained if gendered implicit bias is taken into consideration. As discussed previously, female defendants are more likely to receive favorable judicial treatment only if they conform to traditional gendered notions of how women ought to behave. However, because such favorable and paternalistic treatment is exclusively reserved for women who act according to gendered stereotypes, women who deviate from traditional female behavior by committing violent and excessively aggressive crimes are actually more likely to receive harsher judicial treatment. Therefore, it is hardly surprising the SJC was willing to reduce a male defendant’s verdict and not a female defendant’s verdict for murders that were violent and where the defendants’ actions were

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121. See supra note 94 and accompanying text (describing SJC’s conclusion regarding Woodward’s confusion); supra note 96 and accompanying text (identifying SJC’s conclusion holding Lyons to higher standard of forethought).

122. See supra notes 94-96 and accompanying text (outlining SJC’s attempt at distinguishing Lyons and Woodward with little justification).

123. See Goulette et al., supra note 7, at 414 (concluding certain female defendants receive more lenient judicial treatment); Moulds, supra note 54, at 417 (noting existence of “chivalry factor”); see also Kelsh, supra note 7 (explaining lenient judicial treatment reserved for female defendants who conform to gendered roles). Woodward likely received favorable judicial treatment from the SJC in large part because she fulfilled a gendered role as the victim’s au pair. See Commonwealth v. Woodward, 694 N.E.2d 1277, 1281 (Mass. 1998) (stating Woodward was child’s au pair); Rohde, supra note 84, at 4 (stating au pairs generally young women).

124. See Greenwald & Banaji, supra note 53, at 15-17 (discussing implicit bias linking maleness with aggression and achievement, and femaleness with dependence).

125. See supra notes 94-96 and accompanying text (providing SJC’s different analysis of malice for Woodward and Lyons).

126. See supra notes 97-106 and accompanying text (outlining differences between SCJ’s judicial treatment of Cadwell and Hutchinson).


128. See Goulette et al., supra note 7, at 414 (concluding only certain women receive lenient judicial treatment and explaining why); Kelsh, supra note 7 (explaining “evil woman” phenomenon).
demonstrably more aggressive in nature. In *Cadwell*, the SJC distinguished the male defendant’s prior abuse of the victim from the act that ultimately killed the child (justifying such separation because the act that killed the child was meant to discipline him), while in *Hutchinson*, the court simply refused to make that same separation.

The SJC’s tendency to reduce a first-degree murder conviction for a violent male defendant and refusal to reduce a first-degree murder conviction for a similarly situated female defendant points to the court’s inadvertent susceptibility to the “evil woman theory.” Because aggression and violence are typically treated as male characteristics, a female defendant committing an especially violent and aggressive crime is less likely to be afforded lenient judicial treatment because of her perceived nonconformance with traditionally accepted gender behavior. The SJC’s willingness to reduce *Cadwell*’s verdict and simultaneous refusal to reduce *Hutchinson*’s verdict is evidence of the court’s implicit bias against the perceived “evil woman” and its broad authority under 33E simply allows it to administer justice against her.

### C. Equal Protection Concerns

The SJC’s inconsistent treatment of similarly situated defendants raises serious Equal Protection Clause concerns. Defendants and their attorneys ought to reasonably understand how the SJC will apply precedent to their particular situations, but at least in the case of child homicide victims, such consistency is lacking. A significant concern is that the Massachusetts

129. See supra notes 104-106 and accompanying text (outlining SJC’s different treatment of Hutchinson and Cadwell despite factual similarities between cases).

130. See supra note 106 and accompanying text (detailing further similarities between *Hutchinson* and *Cadwell* and SJC’s refusal to acknowledge said similarities).

131. See supra note 97 and accompanying text; see also Kelsh, supra note 7 (explaining “evil woman” theory).

132. See Goulette et al., supra note 7, at 407 (describing existence of “evil woman” phenomenon and its effects on judicial outcomes).

133. See Goulette et al., supra note 7, at 407 (explaining women who commit violent crimes receive worse judicial treatment than men committing violent crimes). *Compare Commonwealth v. Hutchinson*, 481 N.E.2d 188, 192 (Mass. 1985) (noting similarities between facts of case and *Cadwell* facts yet refusing to reduce verdict), *with Commonwealth v. Cadwell*, 372 N.E.2d 246, 253 (Mass. 1978) (allowing verdict reduction from first-degree murder conviction). Gender conflict theory suggests that men use systems of power—whether implicitly or explicitly—to exert control over women who act outside the boundaries of accepted gender performance. See Goulette, supra note 7, at 407. Because of this inherent power structure and struggle, “gender conflict theory predicts that female defendants, especially those charged with violent crimes, will be treated more harshly than other groups of females.” *Id.*

134. See *JAILHOUSE LAWYER’S HANDBOOK*, supra note 20, at 106 (discussing importance of precedent and stare decisis); supra notes 19-20 (exploring circumstances surrounding and rationale behind Equal Protection Clause).

135. See *JAILHOUSE LAWYER’S HANDBOOK*, supra note 20, at 106 (advising attorneys to consider binding precedent when crafting legal arguments); supra note 133 and accompanying text (indicating inconsistency in SJC’s application of precedent).
legislature affords the SJC incredibly broad discretionary power under 33E. Such power allows the court to justify any difference in treatment by simply stating that justice requires a certain judicial outcome even if said outcome noticeably deviates from the court’s precedent.

The SJC’s inconsistent treatment of child homicide cases is particularly problematic because the court’s actions technically do not violate the Equal Protection Clause. While an individual defendant challenging the court’s decision could probably prove a functional gendered classification, it would be incredibly difficult (likely impossible) to successfully prove that the court’s actions were purposefully discriminatory. To prove discriminatory purpose, a defendant challenging the SJC’s actions would have to show that the court “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”

No defendant challenging the SJC’s differential treatment will be able to satisfy this crucial Equal Protection Clause requirement. In enacting 33E, the legislature did not advance any classification-related purpose, as the statute’s enactment was meant to optimize sentencing defendants to death. Additionally, the SJC’s actions can hardly be seen as purposefully creating a classification because the factors the court considers are incredibly broad. Absent a purposeful or even inadvertent

136. See supra notes 64-67 and accompanying text (elucidating 33E’s origins and powers afforded to SJC through statute).
137. See supra notes 66-67 (explaining SJC’s broad authority under 33E).
138. See supra note 23 and accompanying text (explaining Equal Protection Clause classification must either discriminate on its face or in effect). 33E does not create classifications and is not discriminatory on its face. See MASS. GEN. LAWS ch. 278, § 33E (2018) (granting SJC powers and not creating any classifications). Furthermore, 33E does not have a discriminatory purpose because it was created to help reform death penalty appeals. See Meade, supra note 64, at 93 (explaining reason for 33E’s enactment).
139. See supra note 23 (discussing discriminatory purpose proof requirements).
140. See Galloway, supra note 23, at 131 (describing what plaintiff alleging Equal Protection Clause violation must prove); Henson, supra note 30, at 121 (outlining burdens of proving discriminatory purpose when statute neutral). To succeed on an Equal Protection Clause claim, a plaintiff must “affirmatively demonstrate[] that his particular minority group has been affected adversely.” See Henson, supra note 30, at 121. However, because 33E affords the SJC incredibly broad authority to reduce verdicts, plaintiffs will have difficulty demonstrating deliberate discrimination. See supra notes 8-9 and accompanying text (describing SJC’s broad discretionary power regarding verdict reduction and listing verdict reduction factors). Because the SJC can ubiquitously justify a verdict-reduction decision so long as justice could have required that particular decision, plaintiffs will be unable to refute the court’s rationale while attempting to challenge a given verdict-reduction. See Henson, supra note 30, at 121-22 (noting “[o]bvious disproportionate impact to . . . plaintiff” not necessarily “apparent to a fact-finder”).
141. See Galloway, supra note 23, at 131 n.40 (explaining additional factors courts consider when determining whether government action has discriminatory purpose).
142. See § 33E (granting SJC broad discretionary powers but creating no specific classifications).
143. See supra note 70 and accompanying text (exploring Massachusetts legislature’s justification for enacting 33E).
144. See supra note 77 and accompanying text (explaining factors SJC uses when making 33E determinations). The SJC does not create classifications when using its 33E power, but rather justifies its decision
classification within the statute, defendants will be unsuccessful in bringing an Equal Protection Clause claim.145

The fact that an individual wanting to challenge the SJC’s differential treatment based on gender and implicit bias will not be able to bring an Equal Protection Clause claim is highly problematic considering the court’s actions appear to, at the very least, violate the essence or spirit of the Equal Protection Clause, which at its core is meant to protect people from unfair, discriminatory, and inconsistent government treatment.146 This issue is even more significant in a state such as Massachusetts, where gender-based classifications are afforded a higher level of review through strict scrutiny rather than intermediate scrutiny.147 In Massachusetts, however, defendants and their attorneys have no way of understanding the court’s decision-making process, and defendants are subsequently left with no remedy to challenge the court’s decisions.148

D. Possible Solutions and Next Steps

It will likely be difficult for the SJC to regulate its own conduct because of 33E’s direct conference of broad authority to the court.149 The court’s previous attempts to self-regulate its 33E powers have not yielded clear standards.150 A functional solution must limit the possibility for justices’ implicit biases to dictate the court’s decisions regarding whether to reduce or affirm verdicts.151 The main area where the SJC is susceptible to implicit bias’s influence is in its analysis of the premeditation and deliberation requirements.152 Individual justice’s implicit biases regarding female passivity, male agency, and “evil woman” outliers guide the court’s assessment of the extent to which a given defendant formed the requisite thought or decision to commit murder.153

145 See supra notes 59-62 (detailing expansive justifications SJC may give to justify granting or not granting verdict reduction).

146 See LAPIEDUS ET AL., supra note 19, at 2 (describing purpose and use of Equal Protection Clause). The Fourteenth Amendment’s “Equal Protection Clause requires states to treat their citizens equally, and advocates have used it to combat discriminatory laws, policies, and government actions.” Id.

147 See supra notes 47-48 and accompanying text (outlining Massachusetts’s strict scrutiny standard for evaluating gender classifications).

148 See supra note 81 and accompanying text (providing examples of inconsistent SJC verdict reductions for child homicide cases); see also JAILHOUSE LAWYER’S HANDBOOK, supra note 20, at 106 (explaining necessity of relying on precedent).

149 See supra notes 66-67 and accompanying text (describing SJC’s broad authority under 33E).

150 See supra note 78 and accompanying text (describing SJC’s difficulty in self-limiting its 33E powers).

151 See Moulds, supra note 54, at 423 (explaining judges more likely to allow implicit biases to affect decisions when discretion allowed).

152 See Moulds, supra note 54, at 423 (presenting findings suggesting judicial discretion susceptible to implicit bias); Taylor, supra note 81, at 787 (noting courts’ trouble applying “concepts of premeditation and deliberation”).

153 See Goulette et al., supra note 7, at 406 (describing judges’ feeling like they want to protect certain women from evils of jail). Because 33E allows the court to reduce verdicts if it believes justice will be better
One potential solution could exclusively address child murders—specifically through legislative means—by adding another category of first-degree murders similar to the way in which Arkansas dealt with an analogous issue.\textsuperscript{154} The advantages of such a solution would be its highly-specified limitation on the court’s powers.\textsuperscript{155} It would not infringe on the court’s overall 33E powers, but would limit what factors affect the court’s consideration in making a 33E verdict-reduction determination specifically as it applies to a child homicide case.\textsuperscript{156}

The problem with the above approach may be that it only treats a single symptom of the underlying problem with the SJC’s overall 33E powers.\textsuperscript{157} Cases dealing with child murder victims are only a small group of cases where the SJC has decided to use its 33E powers.\textsuperscript{158} If it turns out, after further research is done regarding the court’s general 33E verdict powers, that implicit bias affects other categories of cases, a legislative fix only addressing child homicides will not treat the root problem of 33E, which will effectively allow implicit bias to generally affect all other judicial deliberations.\textsuperscript{159}

Due to the possibility of a greater underlying issue, the legislature would likely have to address the legislative requirements for first-degree murder that do not rely as heavily on premeditation and deliberation.\textsuperscript{160} A similarly plausible solution may be for the legislature to amend 33E to remove the “or for any other served, the judges—wanting to protect certain groups of defendants—will determine that protection in the form of a verdict reduction is required. \textit{See MASS. GEN. LAWS ch. 278, § 33E (2018) (granting court authority to reduce verdicts when justice requires); see also Moulds, supra note 54, at 418 (arguing judicial paternalism problematic).}\textsuperscript{154} See Taylor, supra note 81, at 785-87 (describing Arkansas’s legislative solution to courts’ inconsistent treatment of child homicide). An example of such a legislative action could be similar to the language in an Arkansas statute, which states that “[a] person commits murder in the first-degree if . . . the person knowingly causes the death of a person fourteen years of age or younger at the time the murder was committed.” \textit{ARK. CODE. ANN. § 5-10-102(a)(3) (2018) (codifying additional behavior making defendant eligible for first-degree murder conviction).}\textsuperscript{155} See Taylor, supra note 81, at 785-87 (outlining Arkansas’s legislative action in response to \textit{Midgett v. State} decision).\textsuperscript{156} See § 5-10-102(a)(3) (enacting additional first-degree murder options for child homicides). Legislative action similar to Arkansas’s, would not limit the SJC’s 33E discretionary powers because the changes would impact only the definitional part of 33E, not the discretionary aspect. \textit{See id.}\textsuperscript{157} See § 33E (granting SJC broad discretionary powers). Statutes such as Arkansas’s would only impact the first-degree murder definition under 33E, but would not actually impact that court’s discretion because the court would still have the power to reduce verdicts when it deems justice so requires. \textit{See § 5-10-102(a)(3) (adding to definition of first-degree murder yet not imposing discretionary boundaries).}\textsuperscript{158} See supra note 74 and accompanying text (listing number of times SJC has chosen to reduce verdict).\textsuperscript{159} See § 33E (granting SJC broad discretionary authority); see also Moulds, supra note 54, at 423 (stating judicial discretion leads to implicit bias problems); supra note 74 and accompanying text (listing number of times SJC has chosen to reduce verdict). The SJC has not exclusively reduced verdicts for child-homicide cases. \textit{See supra note 74 and accompanying text (stating SJC has reduced twenty-five verdicts); supra note 80 and accompanying text (noting SJC’s verdict reductions for child homicides). If the broader issue concerns the SJC’s discretionary powers, a definitional addition to 33E will do nothing to solve the underlying problem.}\textsuperscript{160} See Taylor, supra note 81, at 787 (stating some states do not use premeditation and deliberation in “distinguish[ing] . . . more culpable murder offense”).
reason that justice may require” provision from the statute. The court would still have discretionary power to decide whether to reduce a verdict if it believes “the verdict was against the law or the weight of the evidence, or because of newly discovered evidence,” but the court would no longer be able to substitute its own notions of what justice may require for a given defendant in any given case.

IV. CONCLUSION

Implicit bias is an inescapable extension of the human condition. It is no surprise then, that implicit bias affects the judiciary as well, despite its perceived and admired objectivity. While it cannot be eliminated, its effects can certainly be recognized and mitigated. Fully understanding and accounting for the fact that implicit bias will necessarily and inevitably exist within judicial deliberations requires a concerted effort by the court and perhaps the legislature to lessen the degree to which such biases can impact judicial outcomes.

33E affords the SJC incredibly broad authority and imposes virtually no limitation on the court’s discretionary power on appeal. To allow the court to reduce verdicts any time the it thinks justice requires opens the door for implicit biases to substantially impact the judicial deliberations. Individual justices may implicitly believe that justice requires different kinds of treatment for defendants based on theoretically irrelevant factors such as gender or race, and the court as a whole will have the ability to justify those implicit beliefs using its broad discretionary 33E powers. Furthermore, while the court does attempt to provide justifications for its decisions to either reduce or affirm verdicts, when looked at in its totality, the court’s reasoning seems to lack a coherent pattern.

This Note only explores the SJC’s verdict reduction powers in relation to a specific category of cases, and certainly more research needs to be done about trends in the court’s overall usage of its 33E reduction powers. Nevertheless, even in such a small sample of cases, worrisome inconsistencies in the court’s decisions are present, and while defendants may have an extremely difficult time challenging those decisions on Equal Protection Clause grounds, this fact is unsettling. Especially in a state that prides itself on affording all its citizens equal protection under the state constitution, and which even provides its citizens more protections than are federally afforded to them, there is a need to understand and mitigate the existence of implicit bias in the judiciary so Massachusetts citizens are afforded both formal and substantive equality under Massachusetts law.

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161. See § 33E (granting SJC authority to reduce verdicts if court believes justice better served through reduction).
162. See id.