

A NEW ERA IN JUVENILE SENTENCING:
WHY *MONTGOMERY*, ADOLESCENT NEUROSCIENCE, AND A
SHIFT IN THE NATIONAL CONVERSATION POINT TOWARD A
NEED FOR MEASURE 11 REFORM

by
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In 1994, Oregon voters passed Ballot Measure 11, a mandatory minimum sentencing scheme that imposes long inflexible sentences for a plethora of serious crimes. In addition to establishing mandatory minimum sentences, Measure 11 dramatically re-shaped the landscape of the juvenile justice system by mandating transfer to adult court for youth between 15 and 17 years old, charged with any Measure 11 offense, even if they are eventually convicted of a lesser offense. In recent years, there has been a push to rethink the way that we evaluate and treat juvenile offenders. Evolving Supreme Court jurisprudence, along with new research into adolescent neuroscience have called into question the appropriateness of treating juvenile and adult offenders equally when dealing with lengthy criminal sentences. This Note examines the history and justifications behind Measure 11's treatment of juvenile offenders and proposes two functional and realistic reforms that would make Measure 11 a fairer sentencing scheme for juvenile offenders. Part I outlines the history of Measure 11, the reforms it laid out for Oregon's sentencing of juvenile offenders, and the system's shortcomings. Part II examines the evaluation of the Supreme Court's jurisprudence regarding juvenile sentencing and how Measure 11's structure clashes with the Court's command that "children are different." Part III outlines recent advances in adolescent neuroscience and how they relate to juvenile criminal culpability and Oregon's juvenile sentencing practices. Part IV offers proposed reforms and how they fit within the existing provisions of Measure 11.

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INTRODUCTION

In 1994, Oregon voters approved Ballot Measure 11, an expansive initiative that rewrote much of Oregon's sentencing practices for violent crimes and dramatically altered Oregon's juvenile justice system. Spurred on in part by a belief that Oregon's juvenile justice system was too lenient toward young offenders, Measure 11 stripped away much of the flexibility and discretion that previously existed. Under Measure 11, all 15, 16, and 17-year-olds charged with any of twenty-one different crimes are automatically transferred into the adult criminal court, even if they are eventually convicted of a lesser offense.¹ At the same time, Measure 11 did away with Oregon's previous sentencing guidelines, ensuring that anyone found guilty of one of those twenty-one crimes would receive a guaranteed minimum sentence with no possibility of parole or sentence reductions, regardless of the existence of any mitigating factors.

In the twenty-two years since Oregon voters first implemented Measure 11, aside from a handful of small revisions, all of the underlying provisions of the law have remained unchanged. At the same time, nationally, there has been a push to rethink the way that we evaluate and sentence juvenile offenders. Four recent Supreme Court decisions regarding juvenile sentencing have all questioned the practice of treating juvenile offenders as adults. The Supreme Court—as well as a number of states that have begun to scale back harsh juvenile sentencing laws—has been spurred on by the emergence of pioneering research into adolescent neurosci-

¹ OR. REV. STAT. § 137.707 (2013).

ence that has shed light on the substantial differences in the ways adolescents and adults engage in decision-making and process emotional stimuli.

This Note argues that because Measure 11 lacks any provisions allowing for the consideration of youth as a mitigating factor in either sentencing or the transfer to adult court, Measure 11 no longer fits with evolving Supreme Court juvenile sentencing jurisprudence or current adolescent neuroscience, and, as a result, the time has come for meaningful change. This Note proposes two functional and realistic reforms that would be an important first step toward making Measure 11 a fairer sentencing scheme for juvenile offenders. First, in line with Oregon's existing "exceptions" statute to Measure 11,² for juveniles convicted of certain second-degree crimes the sentencing judge should be allowed to make a downward departure from the Measure 11 minimums if the judge finds that the nature of the juvenile's age stands as a mitigating factor for the offense. This change would be significant as 32% of all juveniles sentenced to Measure 11 crimes in Oregon are for the offenses of assault II and robbery II.³ The second reform would be the creation of a youth offender parole board that will evaluate the progress and reform that juvenile offenders with long sentences undertake while incarcerated to determine if a reduction in the length of their sentence is warranted. Research has shown that juveniles have substantial differences in mental functioning from adults, differences that diminish their relative culpability. A youth offender parole board could be staffed with experts who would be better able to evaluate the degree to which the nature of an offender's young age factored into his or her criminal culpability. California (among other states) has already implemented this type of system for juvenile offenders sentenced to lengthy sentences.⁴

This Note proceeds in four parts. The first Section outlines the history of Measure 11, the reforms it laid out for Oregon's sentencing of juvenile offenders, and the system's shortcomings. The second Section examines the evolution of the

² OR. REV. STAT. § 137.712 (2013) (allowing a judge, with discretion, to sentence an offender under the more lenient sentencing guidelines for the crimes of: manslaughter II, assault II, kidnapping II, rape II, sodomy II, unlawful sexual penetration II, sexual abuse I and robbery II, under very specific and limited criteria, for situations in which the gravity of the offense was at the lower edge of what falls under the statutory definition of the crime). The statute provides no leniency based on a lowered culpability of the defendant.

³ OR. DEP'T. OF CORR., OFFENDERS WITH MEASURE 11 CONVICTIONS AS OF MAY 1, 2016 (2016), <https://digital.osl.state.or.us/islandora/object/osl:73359>.

⁴ S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013). The youth offender parole hearings allow offenders sentenced to more than 15 years in prison to have a special parole hearing after 15 years in which the board shall give "great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner" *Id.*

Supreme Court's jurisprudence regarding juvenile sentencing and how Measure 11's structure clashes with the Court's command that "children are different."⁵ The third Section outlines recent advances in adolescent neuroscience and the lessons they provide with regard to juvenile criminal culpability and Oregon's juvenile sentencing practices. The fourth Section delves into this Note's proposed reforms and how they fit within the existing provisions of Measure 11.

I. MEASURE 11

In 1994, via statewide referendum, Oregon voters approved Ballot Measure 11, a sweeping piece of legislation that fundamentally and permanently altered Oregon's criminal sentencing scheme.⁶ In addition to creating strict mandatory minimum sentences for a variety of felony crimes, it ushered in a new era for juvenile sentencing in Oregon by automatically transferring juveniles aged 15 and older into the adult criminal system if they were charged with any of the twenty-one qualifying crimes. This Section outlines the history of Measure 11's enactment, its key provisions, and its shortcomings with regard to Oregon's juvenile justice system.

A. History

During the late 1980s and early 1990s, a rise in violent crime rates, coupled with intensified media attention, spurred a nationwide push for criminal sentencing reform.⁷ A voting public, tired of what it viewed as a system rife with discretion, pushed state legislatures for tougher "mandatory minimum" laws: harsh sentencing schemes that took away much of the sentencing discretion traditionally reserved for judges.⁸ By 1994, the year of Measure 11's passing, all fifty states had at least some form of mandatory minimum sentencing.⁹ Even before Oregon voters passed Measure 11, the state legislature had already created a new, tougher system of sentencing guidelines in 1989 that eliminated the prior parole-based system, leaving only an "earned time discount" for up to 20% of the total sentence.¹⁰

⁵ *Miller v. Alabama*, 567 U.S. 460, 480 (2012).

⁶ *Ballot Measures at a Glance*, THE OREGONIAN (Nov. 9, 1994), at B5.

⁷ See Michael Tonry, *Sentencing in America, 1975–2025*, in 42 CRIME AND JUSTICE: CRIME AND JUSTICE IN AMERICA: 1975–2025, 141, 159–60 (Michael Tonry ed., 2013).

⁸ Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 940–41 (2001).

⁹ MICHAEL TONRY, SENTENCING MATTERS 146 (1996).

¹⁰ Nancy Merritt et al., *Oregon's Get Tough Sentencing Reform: A Lesson in Justice System Adaptation*, 5 CRIMINOLOGY & PUB. POL. 5, 7 (2006).

In addition to encouraging the general trend toward heavier adult criminal sentencing, a number of notable criminology experts incited a rising fear that a new generation of incorrigible “super-predator” youths was emerging who would bring with them an unprecedented wave of exceptionally violent crime.¹¹ Responding to a nationwide spike in juvenile crime, Princeton academic John DiLulio, Jr., who first coined the term, predicted that: “On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators. . . . perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons . . . [who] fear neither the stigma or arrest nor the pain of imprisonment.”¹² Other academics adopted and spread the theory,¹³ capturing the headlines of major media outlets.¹⁴ Major U.S. political figures chimed in as well. Senator (later Attorney General) John Ashcroft and President Bill Clinton both spoke out regarding this impending onslaught of brutal juvenile crime.¹⁵ The public perception of the state of juvenile delinquency spurred reforms nationwide that pushed increasing numbers of young offenders out of the juvenile court system and into adult criminal court.¹⁶

¹¹ Robin Walker Sterling, “*Children Are Different*”: *Implicit Bias, Rehabilitation, and the “New” Juvenile Jurisprudence*, 46 LOYOLA L. REV. 1019, 1057 (2013).

¹² John DiLulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), <http://www.weeklystandard.com/article/8160>.

¹³ See, e.g., *The Superpredator Myth, 20 Years Later*, EQUAL JUSTICE INITIATIVE (Apr. 7, 2014), <https://eji.org/news/superpredator-myth-20-years-later> (criminologist James Fox stated in the 1990s that: “Unless we act today, we’re going to have a bloodbath when these kids grow up.”).

¹⁴ See *Superpredators Arrive*, NEWSWEEK (Jan. 21, 1996), <http://www.newsweek.com/superpredators-arrive-176848> (“Criminal-justice experts have predicted the arrival of the superpredators—a generation of teens so numerous and savage that they’ll take violence to a new level.”).

¹⁵ Ashcroft stated before the Senate Subcommittee on Youth Violence that: “In America today, violent juvenile predators prowl our businesses, schools, neighborhoods, homes, and parking lots, leaving in their wake maimed bodies, human carnage and desecrated communities.” *The Violent and Hard-Core Juvenile Offender Reform Act: Hearing on S. 1245 Before the Subcomm. on Youth Violence of the S. Comm. on the Judiciary*, 104th Cong. 7 (1996) (statement of John Ashcroft, Sen.). President Bill Clinton, at a public event in 1997, stated that youth crime “has got to become our top law-enforcement priority” and that “we’ve got about six years to turn this juvenile crime thing around or our country is going to be living with chaos” *Clinton Urges Campaign Against Youth Crime*, N.Y. TIMES (Feb. 20, 1997), <https://www.nytimes.com/1997/02/20/us/clinton-urges-campaign-against-youth-crime.html>.

¹⁶ Between 1992 and 1999, every state except Nebraska expanded its juvenile transfer provisions to usher more juveniles into the adult system. MELISSA SICKMUND, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILES IN COURT, JUVENILE OFFENDERS AND VICTIMS NATIONAL REPORT SERIES 7 (2003), <https://www.ncjrs>.

In Oregon, much of the focus on harsher treatment of juvenile offenders grew out of a strong public reaction to one particular incident of youth violence: a 1993 incident where three African-American teenagers violently beat a 22-year-old man outside of the Lloyd Center mall. The sentencing judge, declining to follow the District Attorney's recommendations, chose to keep two of the three defendants in juvenile court.¹⁷ In response to the public outcry for tougher penalties for juvenile offenders, then-Governor Barbara Roberts commissioned a task force on juvenile justice led by the then-Attorney General (later elected governor) Ted Kulongoski.¹⁸ The Commission's report stood as a strong rebuke of Oregon's juvenile justice system, calling for a major expansion of both youth detention facilities and adult facilities in order to handle the "changing and growing tide of violent juvenile crime."¹⁹ While the task force, as well as the Oregon legislature, was still debating which reforms it ultimately wanted to implement, State Representative Kevin Mannix decided to press for reforms via citizen initiative, taking juvenile justice reform out of the hands of the legislature and into the judgment of the voting public.²⁰

B. Measure 11's Reforms

What resulted from Representative Mannix's efforts was a major overhaul of Oregon's criminal justice system, with regards to violent crime, that substantially increased penalties, removed judicial discretion, and reshaped the landscape of juvenile sentencing. Measure 11, as passed in 1994, imposed mandatory minimum sentences for sixteen different crimes, well above what most offenders would have received under the existing sentencing guidelines,²¹ with terms ranging from 70 months at the low end to 300 months for the most serious offenses.²² The State

gov/pdffiles1/ojdp/195420.pdf.

¹⁷ CAMPAIGN FOR YOUTH JUSTICE & P'SHIP FOR SAFETY AND JUSTICE, MISGUIDED MEASURES: THE OUTCOMES AND IMPACTS OF MEASURE 11 ON OREGON'S YOUTH 18–19 (2011), https://safetyandjustice.org/wp-content/uploads/2016/12/Misguided_Measures.pdf.

¹⁸ THEODORE R. KULONGOSKI, GOVERNOR'S TASK FORCE ON JUVENILE JUSTICE FINAL REPORT 3 (1994), <https://www.oregon.gov/oja/reports/jtaskforce.pdf>.

¹⁹ *Id.* at 6.

²⁰ CAMPAIGN FOR YOUTH JUSTICE & P'SHIP FOR SAFETY AND JUSTICE, *supra* note 17, at 21.

²¹ NANCY MERRITT ET AL., RAND CORP., OREGON'S MEASURE 11 SENTENCING REFORM: IMPLEMENTATION AND SYSTEM IMPACT 2 (2004).

²² Act of Apr. 1, 1995, ch. 2 § 1, 1995 Or. Laws 11 (codified as amended at OR. REV. STAT. § 137.700 (2013)) (listing crimes at the time, including: murder, manslaughter I, manslaughter II, assault I, assault II, kidnapping I, kidnapping II, rape I, rape II, sodomy I, sodomy II, unlawful sexual penetration I, unlawful sexual penetration II, sexual abuse I, robbery

Legislature added two more offenses in 1995.²³ Senate Bill 1049, passed in 1997, added three additional offenses, bringing the total to twenty-one, as the law stands today.²⁴ Unlike some mandatory sentencing laws in other states where the imposition of harsh minimum sentences was predicated on some amount of prior conduct (California's "Three Strikes" policy being a notable example),²⁵ Oregon's mandatory minimums are imposed regardless of an offender's criminal history or lack thereof.²⁶ Under Measure 11, sentences can be extended for aggravating factors, however, with only a few very specific exceptions, no amount of mitigating circumstances can lower these sentences.²⁷ This limitation also includes an explicit prohibition on any "earned time" reducing the length of a sentence based on the demonstrated rehabilitation by an incarcerated offender, or any type of parole system.²⁸

In addition to reshaping the general scope of criminal sentencing in Oregon, Measure 11 radically altered Oregon's juvenile justice scheme. Prior to the passage of Measure 11, waiver into adult court was discretionary and crimes could be tried either in the adult criminal court or in juvenile court.²⁹ In 1994, the last year prior to Measure 11, only eight juveniles were tried as adults for Measure 11 crimes, but by 1998 that number had ballooned to 114 juveniles.³⁰ Under Measure 11, juveniles between the ages of fifteen and seventeen are *automatically* transferred to the jurisdiction of the adult criminal system if they are simply *charged* with a Measure 11 offense (even if they are eventually convicted only of a lower offense), removing any judicial discretion in choosing whether a juvenile defendant might be better served in the more remedial juvenile justice system.³¹ Measure 11 also severely lim-

I and robbery II).

²³ Act of June 30, 1995, ch. 421 § 1, 1995 Or. Laws 1072 (codified as amended at OR. REV. STAT. § 137.700 (2013)) (adding offenses, including attempt or conspiracy to commit aggravated murder and attempt or conspiracy to commit murder).

²⁴ Act of Oct. 4, 1997, ch. 852 § 2, 1995 Or. Laws 2477 (codified as amended at OR. REV. STAT. § 137.700 (2013)) (adding offenses, including compelling prostitution, using a child in a display of sexually explicit conduct, and arson I when the offense represented a threat of serious physical injury).

²⁵ Under California's "Three Strikes" policy, the idea was to impose harsh minimum sentences as a consequence of a demonstrated pattern of repeated criminal behavior. See FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 4–10 (2001).

²⁶ OR. REV. STAT. § 137.700 (2013).

²⁷ *Id.*

²⁸ *Id.*

²⁹ MERRITT ET AL., *supra* note 21, at 65.

³⁰ *Id.* at 66 tbl. 6.2.

³¹ OR. REV. STAT. § 137.707 (2013).

ited Oregon's "Second Look" program, a system predating Measure 11, which allows the sentencing court to evaluate a juvenile offender's progress toward rehabilitation halfway through their incarceration and determine what further commitment or disposition would be appropriate.³² Because Measure 11 requires offenders to serve the entirety of their sentences for any conviction of a Measure 11 offense, only juveniles charged with a Measure 11 crime but found guilty of a lesser offense can access the program.³³

While Measure 11 does not contain any specific provision for life sentences, it does allow for consecutive sentencing under some circumstances.³⁴ As a result, while Measure 11 narrowly escapes the Supreme Court's command against mandatory life sentences for juveniles found in *Miller v. Alabama*, a juvenile could receive a sentence that effectively keeps them in prison for their entire life, with no effective chance for release (known as *de facto* life without parole or DLWOP).³⁵

C. Measure 11's Shortcomings

Measure 11's powerful reforms, while popular with voters, ushered in a system with serious shortcomings. First, by automatically transferring large numbers of juvenile offenders into the adult criminal system, Measure 11 removed the ability of sentencing judges to opt for a more rehabilitative juvenile justice system. Second, with the fall of the "super-predator" theory and the decrease in juvenile crime nationwide that occurred in the late 1990s, the major impetus behind Measure 11—that harsh deterrence was needed to curb a new breed of superpredator juveniles—no longer justifies Measure 11's severe penalties. And, lastly, in making no distinction in sentencing between adult and juvenile offenders, Measure 11 takes away the ability of the court to evaluate the reduced culpability of juvenile offenders compared to their adult counterparts.

³² OR. REV. STAT. § 420A.203 (2013). One comprehensive study of the effects of Measure 11 found that less than 6% of youths affected by Measure 11—including youths charged with a Measure 11 crime, but who are ultimately convicted of a lesser offense—were able to benefit from the Second Look program. CAMPAIGN FOR YOUTH JUSTICE & P'SHIP FOR SAFETY AND JUSTICE, *supra* note 17, at 60. For a comprehensive argument for reforming Oregon's Second Look program, see Elizabeth Hilliard, *A Life Without: Juveniles Spending their Lives in Oregon's Prisons and the Need for Change Following Miller and Graham*, 20 LEWIS & CLARK L. REV. 333, 370–71 (2016).

³³ Hilliard, *supra* note 32, at 370 n.230.

³⁴ OR. REV. STAT. § 137.123(5)(a) (2013).

³⁵ See *Miller v. Alabama*, 567 U.S. 460, 465 (2012). See also Part III, *infra* (discussing the impending conflicts between Measure 11 and the Supreme Court's jurisprudence on juvenile sentencing).

Looking first at Measure 11's automatic transfer provisions, the consequences of sentencing a juvenile in adult court are severe. Juvenile court records can often be expunged and the range of sentencing and treatment options are often wider in juvenile court.³⁶ One of the major motivations behind passing mandatory transfer policies for juveniles, coupled with long and inflexible sentences, was the idea that harsh consequences could quell crime among young offenders. However, several government studies have found that juveniles that are transferred into the adult criminal system are more likely to re-offend after serving their sentences. One large-scale review by the U.S. Department of Justice found that in more than six different studies, spanning a variety of sampling methodologies and state jurisdictions, there was a "strong consistency" in results, and that "[a]ll of the studies found higher recidivism rates among offenders who had been transferred to criminal court" compared to those retained in the juvenile court.³⁷ This correlation even held true among offenders who merely received probation in the adult court system.³⁸ Another review, conducted by the CDC's Task Force on Community Preventive Services, found that the transfer of juveniles to the adult criminal system generally resulted in higher rates of subsequent violent crimes.³⁹ While acknowledging the diverse array of juvenile transfer laws, the task force concluded that "[t]o the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good."⁴⁰ Another large scale study followed 2,887 Florida youths and found that juveniles who were transferred to adult court had higher rates of re-arrest, more serious offenses on repeat arrests, and shorter periods between arrest compared to a matched group that remained in the juvenile court system.⁴¹ While there may certainly be situations where judges still decide that the nature of the crime or the history of a juvenile offender rightly justifies the decision to place them in adult court, Measure 11 allows no consideration of whether the community, as well as

³⁶ See CAMPAIGN FOR YOUTH JUSTICE & P'SHIP FOR SAFETY AND JUSTICE, *supra* note 17, at 26.

³⁷ OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 6 (2010), <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

³⁸ *Id.*

³⁹ Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, MORBIDITY & MORTALITY WKLY. REP. (Nov. 30, 2007), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>.

⁴⁰ *Id.*

⁴¹ Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?* 42 CRIME & DELINQUENCY 171, 176 (1996).

the juvenile offender, might benefit from the more rehabilitative juvenile justice system.

The second issue with Measure 11 is that the “super-predator” theory that was a major influence in the creation of Measure 11’s inflexible juvenile transfer rules, and the rigid application of adult mandatory minimums on juveniles, never came to fruition. By the end of the 1990s, the juvenile crime rate had regressed swiftly.⁴² Commentators criticized the faulty assumptions by the leading criminologists behind the super-predator rhetoric.⁴³ By 2001, even John DiIulio, the leading criminologist who advocated for the theory and first coined the term, later expressed regret for his involvement, acknowledging that the predictions never came to pass.⁴⁴

The third major shortcoming, which is perhaps the core weakness of Measure 11, is the statute’s underlying logic that 15, 16, and 17-year-olds have the exact same degree of criminal culpability as adult offenders. Measure 11’s system of automatically transferring juveniles into adult court any time they are charged with one of twenty-one felony offenses, coupled with inflexible mandatory minimum sentences, works to place these teenagers in the identical position as adult criminals. The American Law Institute’s Model Penal Code includes, as one of three factors in decisions affecting the sentencing of individual offenders, the “blameworthiness of offenders,” alongside the gravity of an offense and the harm done to crime victims.⁴⁵ The Model Penal Code specifically endorses the notion that “when assessing an offender’s blameworthiness . . . the offender’s age shall be a

⁴² See Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 37 (2010) (outlining the numerous social and economic factors that contributed to the consistent decline in violent juvenile crime rates after the early 1990s).

⁴³ See, e.g., James C. Howell, *Superpredators and Other Myths About Juvenile Delinquency*, in PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK 4, 6 (2d ed. 2008) (“The illogical nature of DiIulio’s projection is readily apparent. He assumed that 6% of babies and children as well as juveniles would be chronic offenders. If we were to apply the 6% figure to the 1996 population under age 18, according to DiIulio’s analysis, there already were 1.9 million superpredator juvenile offenders in the United States. This number is larger than the total number of children and adolescents referred to juvenile courts each year. . . . DiIulio, Fox, and Wilson also made the mistake of assuming a direct correlation between population size and crime rates.”) (citation omitted); see also Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 361 (1999).

⁴⁴ Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19.

⁴⁵ MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (AM. LAW INST., Proposed Final Draft 2017).

mitigating factor”⁴⁶ Measure 11 ignores the personal characteristics of juvenile offenders that could affect a sentencing judge’s assessment of blameworthiness.⁴⁷ Measure 11 also ignores the family histories of juvenile offenders, a factor the Supreme Court has called out specifically, given the substantially lowered ability of a teenager to escape an abusive home environment.⁴⁸ Finally, the passage of Measure 11 predates both the notable trend of Supreme Court decisions that have called for states to re-evaluate how they sentence juvenile offenders,⁴⁹ as well as two decades of emergent neuroscientific research;⁵⁰ these two developments make up the bulk of this Note.

II. SUPREME COURT JURISPRUDENCE

Over the last 11 years, the Supreme Court has made a steady push to declare that for purposes of criminal sentencing, juvenile offenders are fundamentally different from adults. Over the course of four decisions, the Court incrementally chipped away at the rights of states to levy the harshest punishments on juvenile offenders. In 2005, the Court held in *Roper v. Simmons* that sentencing juveniles to the death penalty constitutes cruel and unusual punishment under the Eighth Amendment.⁵¹ Five years later, in *Graham v. Florida*,⁵² the Court barred states from imposing life without parole (LWOP) sentences for non-homicide offenses.⁵³ The Court then extended *Graham* in 2012, in *Miller v. Alabama*, by banning the *mandatory* imposition of LWOP sentences for juveniles even for homicide crimes.⁵⁴ While the holdings of these cases did not force Oregon to make direct changes to Measure 11, they collectively established the idea that “children are dif-

⁴⁶ MODEL PENAL CODE: SENTENCING § 6.11A(a) (AM. LAW INST., Proposed Final Draft 2017).

⁴⁷ For example, OYA reports that in 2016 77% of females and 47% of males housed in OYA custody are currently taking psychotropic medication, while 85% of females and 51% of males had a mental health disorder diagnosis within the past 12 months. OR. YOUTH AUTHORITY, OYA YOUTH BIOPSYCHOSOCIAL REPORT SUMMARY 4, 6 (2016), <https://www.oregon.gov/oya/docs/2016-YouthBiopsychosocialSummary.pdf>.

⁴⁸ *Roper v. Simmons*, 543 U.S. 551, 570 (2005). OYA reported that in 2016, 64% of the females incarcerated in OYA facilities had a documented history of physical abuse, and 51% had a documented history of emotional abuse. OR. YOUTH AUTHORITY, *supra* note 47, at 4.

⁴⁹ See *infra* Part II.

⁵⁰ See *infra* Part III.

⁵¹ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

⁵² *Graham v. Florida*, 560 U.S. 48 (2010).

⁵³ *Id.* at 79.

⁵⁴ *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

ferent” in the realm of criminal sentencing,⁵⁵ an idea that stands in direct contrast to Measure 11’s identical treatment of juvenile and adult offenders.

In 2016, the Court pushed this idea forward with its ruling in *Montgomery v. Louisiana*.⁵⁶ While *Miller* allowed the reversal of the mandatory LWOP sentence in that particular case,⁵⁷ *Montgomery* held that the rule laid down in *Miller* was not simply a prospective rule for future sentencing, but was a “substantive constitutional rule” that will apply retroactively to *all* mandatory LWOP sentences at all judicial levels, state and federal, affecting over 2,000 prior cases.⁵⁸ This Section will outline why Measure 11’s inflexible transfer and sentencing provisions clash with the Court’s existing precedent. Additionally, this Section will prove that *Montgomery* expands the precedent of the *Roper/Graham/Miller* trio, representing a turning point in the Supreme Court’s juvenile sentencing jurisprudence which may soon result in a more wide-sweeping ban on sentencing systems that completely exclude the evaluation of the diminished culpability of juvenile offenders.

A. *Roper and the Court’s Decision to Examine Neuroscience Research*

Seventeen years before the Supreme Court’s ban on the imposition of the death penalty for juveniles in *Roper*, the Court examined the question of the diminished culpability of juvenile offenders in *Thompson v. Oklahoma*,⁵⁹ a case in which the Court, by a narrow 4-member plurality, banned the imposition of the death penalty on offenders younger than 16 at the time of their defense.⁶⁰ In *Thompson*, the Court applied the traditional test for determining whether a criminal sentence violates the Eighth Amendment’s ban on cruel and unusual punishments, which focuses on whether the sentencing practices of the states demonstrates a consensus that the punishment in question violates the “evolving standards of decency that mark the progress of a maturing society.”⁶¹ In addition to finding that a sufficient national consensus existed to render applying the death

⁵⁵ *Id.* at 480.

⁵⁶ *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

⁵⁷ *Miller*, 567 U.S. at 489.

⁵⁸ *Montgomery*, 136 S. Ct. at 732, 736. While the number is hard to pin down precisely, the Court has stated that at least 2,000 cases will be affected. *Miller*, 567 U.S. at 493–94 (“The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for murders they committed before the age of 18. . . . [O]ver 2,000 of those prisoners received that sentence because it was mandated by a legislature.”) (Roberts, C.J., dissenting).

⁵⁹ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁶⁰ *Id.* at 838.

⁶¹ *Id.* at 821 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

penalty to a 15-year-old cruel and unusual, the Court went on to evaluate the imposition of the death penalty on the specific 15-year-old offender (a process known as proportionality analysis), specifically examining the diminished culpability of the offender based on age.⁶² The court concluded that a 15-year-old offender lacked the sufficient criminal culpability to justify either “social purpose” of the death penalty, namely, retribution⁶³ or deterrence.⁶⁴

One year later however, in *Stanford v. Kentucky*, the Court, by a 5-4 margin, concluded that the Eighth and Fourteenth Amendments did not forbid the execution of juvenile offenders who were 16 and 17 at the time of the offense.⁶⁵ In *Stanford*, the Court decided to focus solely on whether there was a sufficient number of States barring the practice to demonstrate a *de facto* consensus that “evolving standards of decency” render the punishment in question “cruel and unusual.”⁶⁶ Justice Scalia, author of the plurality opinion, shot down the notion that the Court should conduct its own proportionality analysis to determine whether the death penalty was excessive for the particular class of offenders in question.⁶⁷ Notably, Scalia rejected the assertion that research on adolescent behavior should factor in to the decision,⁶⁸ mocking what he called “socioscientific” evidence (perhaps

⁶² *Id.* at 835.

⁶³ *Id.* at 836–37 (“In *Gregg* we concluded that as ‘an expression of society’s moral outrage at particularly offensive conduct,’ retribution was not ‘inconsistent with our respect for the dignity of men.’ Given the lesser culpability of the juvenile offender, the teenager’s capacity for growth, and society’s fiduciary obligations to its children, this conclusion is simply inapplicable to the execution of a 15-year-old offender.”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

⁶⁴ *Id.* at 837–38 (“For such a young offender, the deterrence rationale is equally unacceptable. The Department of Justice statistics indicate that about 98% of the arrests for willful homicide involved persons who were over 16 at the time of the offense. Thus, excluding younger persons from the class that is eligible for the death penalty will not diminish the deterrent value of capital punishment for the vast majority of potential offenders. And even with respect to those under 16 years of age, it is obvious that the potential deterrent value of the death sentence is insignificant for two reasons. The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent. And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century.”).

⁶⁵ *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

⁶⁶ *Id.* at 369.

⁶⁷ *Id.* at 377.

⁶⁸ *Id.* at 375–76. Interestingly, however, Scalia did note that one factor that influenced the decision to uphold the death penalty in this case was the fact that there was “individualized consideration of the maturity and moral responsibility” of the defendants in the juvenile transfer statutes, something notably absent in Oregon’s mandatory judicial waiver system. *Id.*

reflecting what, at the time, was still a nascent field of research), stating that “on the field of the Eighth Amendment . . . socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon.”⁶⁹

The fact that the Court would hesitate to incorporate scientific research into an evaluation of juvenile culpability should not be surprising. At the time, little published research existed on adolescent brain development.⁷⁰ By the time *Roper* came before the Court 16 years later, the Court was ready for a fundamental shift in the way it would evaluate juveniles.⁷¹ Similar to *Stanford*, Justice Kennedy, writing for the majority, again undertook a “consensus” analysis.⁷² While at the time there were still 20 states that upheld the practice, Kennedy noted the infrequency with which the punishment was utilized.⁷³ Kennedy also noted that at the time, the U.S. was the last nation in the world to permit the practice.⁷⁴

Although Kennedy could have rested the Court’s holding simply on the judgment that the nation had reached a consensus against leveling the death penalty against juveniles, Kennedy, harkening back to the approach used in *Thompson*, went further in conducting an independent analysis of whether juveniles could be held similarly culpable as adult offenders for the purpose of imposing the death penalty.⁷⁵ Rather than just relying on platitudes regarding common understandings about juveniles,⁷⁶ Kennedy looked to behavioral research in order to highlight the “lesser culpability of the juvenile offender.”⁷⁷ First, Kennedy noted research

⁶⁹ *Id.* at 378.

⁷⁰ ELIZABETH SCOTT ET AL., MODELS FOR CHANGE, THE SUPREME COURT AND THE TRANSFORMATION OF JUVENILE SENTENCING 6 (2015), http://modelsforchange.net/publications/778?utm_source=%2fttransformation&utm_medium=web&utm_campaign=redirect.

⁷¹ For an overview of the Court’s increasing reliance on neuroscience, see Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescents’ Criminal Culpability*, 14 NATURE REV. NEUROSCIENCE 513, 515–17 (2013).

⁷² *Roper v. Simmons*, 543 U.S. 551, 565 (2005).

⁷³ *Id.* at 564.

⁷⁴ *Id.* at 575. It is worth noting here that the U.S. currently stands as the only nation that continues to sentence children to LWOP sentences. Brief of Amnesty Int’l, et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).

⁷⁵ *Roper*, 543 U.S. at 568. (“Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”) (citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

⁷⁶ Justice Kennedy famously began his analysis in *Roper* with the line “as any parent knows . . .” *Roper*, 543 U.S. at 569.

⁷⁷ *Id.* at 571.

demonstrating that adolescents have a much higher rate of reckless behavior,⁷⁸ stating that the research shows that juveniles have “[a] lack of maturity and an under-developed sense of responsibility.”⁷⁹ Next Kennedy cited psychological research that found that juveniles “are more vulnerable or susceptible to negative influences and outside pressures.”⁸⁰ Lastly, he noted sociological research showing that “[t]he personality traits of juveniles are more transitory, less fixed,”⁸¹ and that youth have a greater propensity for long-term change and reform.⁸² Kennedy also noted that juveniles have a “comparative lack of control over their immediate surroundings,” concluding that these factors, taken together, meant that it would be inappropriate to level the harshest criminal punishment against juvenile offenders.⁸³

Roper was a very significant case in the realm of juvenile sentencing in that the Court went out of its way to specifically delineate the psychological and behavioral differences between juveniles, in particular juveniles up to age 17, and adults.⁸⁴ However, *Roper* did not immediately usher in a wave of cases questioning the process of juvenile sentencing across the spectrum of different sentencing practices. This is because the Supreme Court had traditionally held up separate procedural rules in capital cases, as well as greatly limiting the proportionality analysis outside of the capital punishment context, often encompassed in the adage “death is different.”⁸⁵

B. *Graham v. Florida*

Five years after *Roper*, the Court took another large step forward in how it would view juvenile offenders with the case of *Graham v. Florida*, where the Court took the proportionality analysis from *Roper* and applied it to LWOP sentences for juveniles convicted of non-homicide offenses.⁸⁶ *Graham* was significant in that it

⁷⁸ *Id.* at 569 (referencing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992)).

⁷⁹ *Id.* at 569.

⁸⁰ *Id.* (referencing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

⁸¹ *Id.* at 569 (referencing ERIK E. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 27 (1968)).

⁸² *Id.* at 570 (“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”).

⁸³ *Id.*

⁸⁴ *Id.* at 569–70.

⁸⁵ See Alison Sigler & Barry Sullivan, “‘Death is Different’ No Longer”: *Graham v. Florida* and the Future of Eighth Amendment Challenges to Noncapital Sentences, 2010 SUP. CT. REV. 327, 328 (2011); Carol S. Steiker & Jordan M. Steiker, *Miller v. Alabama: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37, 37 (2013).

⁸⁶ *Graham v. Florida*, 560 U.S. 48, 68 (2010).

opened the door to questioning the fairness of treating juvenile and adult offenders as equals outside of the death penalty context.

Prior to *Graham v. Florida*, there was no Supreme Court precedent to support the notion that the Eighth Amendment could categorically preclude a non-capital sentence for an entire class of offenders.⁸⁷ Previously, evaluation of whether a specific non-capital sentence constituted cruel or unusual punishment under the Eighth Amendment was subject to a case-by-case balancing test to decide whether the particular punishment handed down in a criminal case was grossly disproportionate to the offense.⁸⁸ The next path-breaking aspect of *Graham* was the fact that, unlike in *Roper*, where the Court was able to muster a strong argument that the national consensus was moving away from applying the death penalty to juvenile offenders, in *Graham*, Justice Kennedy was only able to point to 13 states that *did not* permit LWOP sentences for non-homicides.⁸⁹ While Kennedy argued that this tally was unpersuasive, relying on the fact that in practice only a handful of states routinely sentenced juveniles to LWOP sentences for non-homicides, invalidating a sentencing practice still permitted by so many states represented a substantial break from prior Supreme Court precedent.⁹⁰ This weak “national consensus” tally forced the Court to rely more heavily on an evaluation of proportionality and juvenile culpability. In doing so, Justice Kennedy chose to borrow much of the reasoning outlined in *Roper* regarding the lessened culpability of juveniles.⁹¹

In evaluating the lower culpability of juveniles, Justice Kennedy expanded on the three reasons outlined in *Roper*, reaffirming the Court’s reliance on juvenile psychology by stating that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”⁹² Kennedy again focused on the heightened potential for reform in drawing a clear line between juvenile and adult offenders noting that “parts of the brain involved in behavior control continue to mature through late adolescence.”⁹³

While *Graham* reaffirmed many of the lessons of *Roper*, the Court largely avoided adding to the specific neurological differences between adolescents and adults, focusing more on the penological justifications for LWOP sentences as applied to youthful offenders and the uniquely harsh nature of LWOP sentences

⁸⁷ Sigler & Sullivan, *supra* note 85, at 328–29.

⁸⁸ *Id.* at 329.

⁸⁹ *Graham*, 560 U.S. at 61–62.

⁹⁰ Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 461 (2012).

⁹¹ *Graham*, 560 U.S. at 61–62.

⁹² *Id.* at 68.

⁹³ *Id.*

with regards to juveniles.⁹⁴ Because of the inherent younger age of juvenile offenders, the Court analogized LWOP sentences *to* death sentences, noting that “[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.”⁹⁵ While it might be tempting to hold *Graham* to its specific application (LWOP sentences for non-homicide offenses), Kennedy did begin to tease out the notion that *all* LWOP sentences for juvenile offenders are suspect because they require a judgment that at a young age a juvenile offender is entirely without the capability of reform, regardless of the seriousness of the crime that justifies the sentence:

Graham deserved to be separated from society for some time in order to prevent what the trial court described as an ‘escalating pattern of criminal conduct,’ but it does not follow that he would be a risk to society for the rest of his life. Even if the State’s judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the *outset*.⁹⁶

While *Graham*’s applicable holding was limited to the particular circumstances of LWOP sentences for non-homicide offenses, the Court began to lay a framework for viewing juvenile culpability as fundamentally different from adult culpability. In wide-reaching words that ring particularly true for a sentencing system like Oregon’s, Kennedy stated that “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”⁹⁷

C. *Miller v. Alabama*

Precedentially, *Graham* took the important step of unmooring proportionality from the capital sentence context,⁹⁸ setting the stage for the decision in *Miller v. Alabama*⁹⁹ that would affect the more common adjudicatory practice of mandatory LWOP sentences for *homicide* offenses, a case in which the Court greatly expand-

⁹⁴ *Id.* at 71 (“A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. With respect to life without parole for juvenile non-homicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification.”) (internal citations omitted).

⁹⁵ *Id.* at 70.

⁹⁶ *Id.* at 73 (emphasis added).

⁹⁷ *Id.* at 76.

⁹⁸ As Justice Thomas said in his passionate dissent in *Graham*, “‘Death is different’ no longer.” *Id.* at 103.

⁹⁹ *Miller v. Alabama*, 567 U.S. 460 (2012).

ed its command that states should step back from the practice of treating even serious juvenile offenders as *de facto* adults.

In *Miller*, the Court examined the question of whether a state could be permitted to level a mandatory LWOP sentence for a homicide crime without taking into account the specific characteristic of a juvenile offender's age.¹⁰⁰ Justice Kagan, writing for the majority, began by reiterating the lesson of *Roper* that juveniles are more prone to reckless and impulsive behavior, more vulnerable to negative influences and outside pressures, and have a more transient personal character.¹⁰¹ Next, Kagan connected the lessons of *Roper* with those of *Graham*: LWOP sentences are particularly problematic for juveniles due to both the unique severity of the punishment along with the higher probability of long-term reform of juveniles.¹⁰² Importantly, Kagan began to codify the broad principle that states should no longer treat juveniles as equivalent to adults, stating that this type of treatment "contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe *penalties* on juvenile offenders cannot proceed as though they were not children."¹⁰³

In some ways, the Court's holding in *Miller* that any sentencing scheme that *mandates* LWOP sentences against a juvenile offender violates the Eighth Amendment stands as a logical extension of *Roper* and *Graham*, combining *Graham's* arguments about the unique harshness of LWOP sentences and *Roper's* arguments about the diminished culpability of juvenile offenders. And in some ways, *Miller* was a demonstration of judicial restraint.¹⁰⁴ Justice Kagan noted that the Court could have chosen to ban all LWOP sentences outright, but held back because the more limited holding in the case was "sufficient to decide these cases."¹⁰⁵ Similarly, because the issue was not before the Court, there was no discussion of *de facto* LWOP sentences. But the case left many clues as to the Court's long-term desire to limit mandatory sentencing of juveniles as well as the imposition of the harshest criminal penalties generally.

One of the first examples comes in a footnote in which Justice Kagan, citing to several amicus briefs, notes that the neuroscience research had continued to strengthen the underlying tenet of *Roper* and *Graham* that treating juveniles as

¹⁰⁰ *Id.* at 479.

¹⁰¹ *Id.* at 471–72. Additionally, Kagan again reaffirmed the Court's reliance on emerging brain science stating that: "Our decisions rested not only on common sense—on what 'any parent knows'—but on what science and social science as well." *Id.* at 471.

¹⁰² *Id.*

¹⁰³ *Id.* at 474 (emphasis added).

¹⁰⁴ SCOTT ET AL., *supra* note 70, at 25.

¹⁰⁵ *Miller*, 567 U.S. at 479.

adults is scientifically unsound.¹⁰⁶ Kagan suggested that this precept should be extended beyond the circumstances of *Graham*, in which the Court relied on the lesser severity of non-homicide offenses, stating that “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.”¹⁰⁷ Kagan also addressed the fact that juveniles have a lessened capability to interact capably with police officers and prosecutors or participate meaningfully in the complicated process of a criminal trial by aiding their attorneys.¹⁰⁸ Kagan argued that mandatory sentencing that treats juvenile and adult offenders identically “ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.”¹⁰⁹ Building off these cautionary examples of the dangers of sentencing juveniles *like* adults, Kagan implied in several places in her opinion that there should be a *de facto* presumption against imposing LWOP sentences against juveniles.¹¹⁰

One area of *Miller*’s majority opinion that strikes directly at Measure 11’s broad system of mandatory transfers of juveniles into adult court was a detailed admonition of both mandatory transfer systems and discretionary transfer systems that lodge discretion in the sole hands of a judge or prosecutor.¹¹¹ One of the important holdings of *Miller* was that the discretion required by the Court in choosing whether to sentence a juvenile to a LWOP sentence cannot simply be the discretion present in deciding whether to transfer a juvenile; instead it has to be decided independently at a sentencing hearing.¹¹²

One potential reason why the Court in *Miller* was hesitant in limiting its ruling simply to the situation of mandatory LWOP sentences, rather than attacking

¹⁰⁶ *Id.* at 472 n.5 (“The evidence presented to us in these cases indicates that the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger.”).

¹⁰⁷ *Id.* at 473.

¹⁰⁸ *Id.* at 477–78.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 479 (“[G]iven all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*.”) (emphasis added); *see also id.* at 480 (“Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”).

¹¹¹ *Id.* at 488 (“Even when States give transfer-stage discretion to judges, it has limited utility . . . [and] the decisionmaker typically will have only partial information at this early, pre-trial stage about either the child or the circumstances of his offense.”).

¹¹² *Id.* at 489.

discretionless juvenile sentencing generally, lies in just how wide-sweeping *Miller*'s ruling was. In *Roper* the Court dealt with a practice (the death penalty) that historically held special rules.¹¹³ Additionally, *Roper* addressed a relatively small number of cases; by 2005, very few jurisdictions still sentenced juvenile offenders to the death penalty.¹¹⁴ Similarly, *Graham*, while breaking from the Court's traditional notion that "death is different," again dealt with a fairly rare practice.¹¹⁵ *Miller* was significant in that the Court addressed a fairly common criminal sentencing practice, implicating over 2,000 outstanding sentences,¹¹⁶ also, *Miller* addressed a sentencing *practice*, rather than just focusing on the severity of the punishment (death penalty) or the lessened severity of the crime in question (non-homicide offenses). In the years following *Miller*, numerous legal commentators speculated on the ramifications of *Miller*, suggesting that *Miller* will open up a future of Supreme Court rulings that expand the notion that "children are different" beyond *Miller*'s facts.¹¹⁷ Chief Justice Roberts, in dissent, speculated that one end consequence of

¹¹³ *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

¹¹⁴ *Id.* at 564–65 (2005) ("[E]ven in the 20 states without a formal prohibition on executing juveniles, the practice is infrequent. . . . In the past 10 years, only three have done so.").

¹¹⁵ *Miller*, 567 U.S. at 495–96 ("*Graham* went to considerable lengths to show that although theoretically allowed in many States, the sentence at issue in that case was 'exceedingly rare' in practice. The Court explained that only 123 prisoners in the entire Nation were serving life without parole for nonhomicide crimes committed as juveniles, with more than half in a single State. . . . Here the number of mandatory life without parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, is over 5,000 times higher than the corresponding number in *Graham*." (Roberts, C.J., dissenting).

¹¹⁶ *Id.* at 493–94 ("The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for murders they committed before the age of 18. . . . [O]ver 2,000 of those prisoners received that sentence because it was mandated by a legislature.") (Roberts, C.J., dissenting).

¹¹⁷ See Jennifer S. Breen & John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes After Miller v. Alabama*, 52 AM. CRIM. L. REV. 293, 294 (2015) (arguing that the reasoning of *Miller* implies that all mandatory sentencing schemes are constitutionally suspect under the Eighth Amendment: "In *Miller*, the Court established a special right for children, namely, individualized consideration of their age in crafting a sentence. . . . [T]he defendants in *Miller* [received] special treatment from the Court, for the simple yet profound reason that they are children, a distinction that now has new and broad significance for applications of the Eighth Amendment."); Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 L. & INEQ. 263, 329–30 (arguing that the *Roper/Graham/Miller* cases call for a blanket "discount" on all sentences imposed on juveniles in adult court); Adam Saper, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration*, 38 N.Y.U. REV. L. & SOC. CHANGE 99, 111–12 (2014) ("*Miller* breaks ground as the first Supreme Court opinion to assess juvenile sentencing procedure, rather than the nature of a sentence itself. The Court specifically held that *Graham*'s

Miller would be an end to all mandatory sentencing schemes for juveniles, or perhaps a ruling that even imposing any identical adult sentence on a juvenile would be unconstitutional.¹¹⁸

D. *Montgomery and the Future Juvenile Sentencing Jurisprudence*

One of the largest and most pressing questions left unanswered in *Miller* was whether the ruling in *Miller* would apply retroactively to the thousands of prisoners serving LWOP sentences for crimes committed before the age of 18. In the years following *Miller*, numerous states were forced to alter their sentencing rules to comply with *Miller*'s mandate. In doing so, some states ruled that *Miller* applied retroactively,¹¹⁹ while others did not.¹²⁰ In 2016, the Supreme Court answered this question in *Montgomery v. Louisiana*,¹²¹ ruling that *Miller*'s command was not simply a procedural rule, but a new substantive rule that applies retroactively.¹²² While some of the immediate ramifications of *Montgomery* are somewhat straightforward (huge numbers of cases will now be challenged on whether the mandatory imposition of an LWOP sentence was appropriate based on the cir-

and *Roper*'s recognition of juvenile characteristics is not crime specific, and thus applies in all cases of juvenile sentencing.”).

¹¹⁸ *Miller*, 567 U.S. at 501 (“The principle behind today’s decision seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive.”) (internal citation omitted).

¹¹⁹ See, e.g., *Falcon v. State*, 162 So.3d 954, 956 (Fla. 2015); *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014); *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2014).

¹²⁰ See, e.g., *People v. Carp*, 852 N.W.2d 801, 832 (Mich. 2014); *State v. Tate*, 130 So.3d 829, 841 (La. 2013).

¹²¹ *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

¹²² *Id.* at 734. When the Supreme Court lays down a new constitutional rule affecting criminal sentences, the question of whether old sentences can be challenged on collateral review (review that follows direct appeals, such as *habeas corpus*) rests on the case of *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, if a new constitutional rule is considered “procedural” in nature, meaning that it simply regulates “only the manner of determining the defendant’s culpability” then it does not apply retroactively. *Montgomery*, 136 S. Ct. at 734–35. (quoting *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004)). If the new rule is “substantive” in nature, then it affects all settled cases, essentially re-opening them to challenge. This generally occurs where the rule prevents the state or federal government from imposing a certain penalty outright, or if the creation of the new rule “necessarily carr[ies] a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him.” Brandon Buskey & Daniel Korobkin, *Elevating Substance Over Procedure: The Retroactivity of Miller v. Alabama Under Teague v. Lane*, 18 CUNY L. REV. 21, 27 (2014) (quoting *Summerlin*, 542 U.S. at 352) (quotations and citations omitted). For a more thorough overview of retroactivity, see *id.* at 26–32 (2014).

cumstances), this Section will show that the larger ramification of *Montgomery* is that the Court is sending a message to the states that continuing the status quo of treating juveniles like de-facto adults is no longer constitutionally tenable, and that Oregon's Measure 11 system is particularly vulnerable moving forward.

In his majority opinion in *Montgomery*, Justice Kennedy began by reaffirming some of the broad conclusions drawn from the *Roper/Graham/Miller* line of cases. While the direct holding of the case itself, much like the holding in *Miller*, was limited to the situation of mandatory LWOP sentences for juveniles, Kennedy reiterated what could be called the Court's new outlook on juvenile sentencing. Kennedy stated that "*Miller* took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.'" ¹²³ Notably, Kennedy did not attach this broad pronouncement to the LWOP sentencing context. Next, Kennedy proceeded to explain how, for the purposes of LWOP sentencing, all four of the traditional penological justifications for criminal punishment fall short in light of the "distinctive attributes of youth." ¹²⁴ The case for retribution is not as strong for juveniles as it is for adults, due to their lowered "blameworthiness." ¹²⁵ Deterrence also applies less for juveniles because the "characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." ¹²⁶ Further, there is a lessened need for incapacitation, because, as Kennedy explains, "ordinary adolescent development diminishes the likelihood that a juvenile offender 'forever will be a danger to society.'" ¹²⁷ Finally, for LWOP sentences, rehabilitation cannot justify juvenile LWOP sentences because the nature of those sentences is to foreclose the possibility of a release into society. ¹²⁸ While Kennedy framed these penological arguments within the context of LWOP sentencing, with the exception of rehabilitation, the broad phrasing the Court adopts for the first three justifications (retribution, deterrence, and incapacitation) would seem to apply to all extended term-of-years sentences, not simply LWOP.

Throughout the majority opinion, Kennedy repeatedly suggested that *Miller's* ruling, that a Court must take into account what might be termed "*Miller* factors" before sentencing a juvenile to LWOP, was not simply a procedural hurdle that

¹²³ *Montgomery*, 136 S. Ct. at 733 (quoting *Miller v. Alabama*, 567 U.S. 460, 461 (2012)).

¹²⁴ *Id.* (quoting *Miller v. Alabama*, 567 U.S. 460, 461 (2012)).

¹²⁵ *Id.*

¹²⁶ *Id.* (quoting *Miller*, 567 U.S. at 472).

¹²⁷ *Id.* (quoting *Miller*, 567 U.S. at 472).

¹²⁸ *Id.*

states must clear.¹²⁹ Instead these factors implicate a substantive constitutional right possessed by juvenile offenders in LWOP sentencing.¹³⁰ In recognizing the sheer scale of *Montgomery*'s consequences, Justice Kennedy made the interesting suggestion that instead of resentencing mandatory LWOP sentences, Courts could simply open the doors to parole for juvenile offenders, arguing that: "[e]xtending parole eligibility to juvenile offenders does not impose an onerous burden on the States . . . [t]he opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change."¹³¹

Some additional evidence regarding the potential consequences of *Montgomery* beyond the immediate holding of the case can be found in the dissent. Justice Scalia points out the fact that *Montgomery* can be seen as a substantial extension of the (arguably) limited holding of *Miller*.¹³² Scalia also points out the difficulty in deciding *at the time of the offense*, whether an offender meets this "incurability" bar.¹³³ Scalia suggests that the difficulty in making this evaluation, coupled with the majority's explicit endorsement of opening up LWOP sentences to parole suggests that the Court has essentially outlawed juvenile LWOP sentences, despite the fact that LWOP sentences themselves do not meet any of the Court's traditional tests for rendering a sentence unconstitutional under the Eighth Amendment.¹³⁴

¹²⁹ *Id.* at 734 ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" (quoting *Miller*, 567 U.S. at 479)).

¹³⁰ *Id.* ("*Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it 'necessarily carr[ies] a significant risk that a defendant'—here, the vast majority of juvenile offenders—'faces a punishment that the law cannot impose upon him.'" (quoting *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004)).

¹³¹ *Id.* at 736.

¹³² *Id.* at 743 ("Having distorted *Teague*, the majority simply proceeds to rewrite *Miller*. The majority asserts that *Miller* 'rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.' It insists that *Miller* barred life-without-parole sentences 'for all but the rarest of juvenile offenders, those whose crimes reflect permanent incurability. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*.' The problem is that *Miller* stated, quite clearly, precisely the opposite . . .").

¹³³ *Id.* at 744 ("How wonderful. Federal and (like it or not) state judges are henceforth to resolve the knotty 'legal' question: whether a 17-year-old who murdered an innocent sheriff's deputy half a century ago was at the time of his trial 'incurable.'").

¹³⁴ *Id.* ("This whole exercise, this whole distortion of *Miller*, is just a devious way of eliminating life without parole for juvenile offenders. The Court might have done that expressly . . . but that would have been something of an embarrassment. After all, one of the justifications the Court gave for decreeing an end to the death penalty for murders (no matter how many) committed by a juvenile was that life without parole was a severe enough

Montgomery represents a number of important lessons with regards to the Supreme Court's views on juvenile sentencing. First, it represents another step forward in making the case that juveniles are *fundamentally* different from adults, in terms of culpability and potential for reform; *and* that this now core concept is *not* specific to the types of heinous crimes that result in LWOP (or de-facto LWOP) sentences.¹³⁵ Second, in casting *Miller*'s "incurability" consideration as a substantive constitutional command rather than a procedural one, the Court calls into question the entire notion of judging a long-term development of a juvenile long before his or her mental development is completed. Lastly, the Court throughout these four cases demonstrated that it will take seriously the continued research into understanding the neurological development of juveniles, and that these discoveries can inform and shape the entire justification of juvenile criminal sentencing. Both of this Note's proposed reforms fall in line with the Court's evolving juvenile sentencing jurisprudence. Allowing a sentencing Court to at least consider imposing a lesser sentence than Measure 11's long mandatory minimums for second-degree felonies falls in line with the Court's statement that juvenile offenders have fundamentally lowered culpability for crimes. At the same time, allowing for youth offender parole hearings for those juvenile offenders sentenced to decades-long or life sentences follows the Court's concerns about levelling the harshest possible punishments upon juvenile offenders, particularly in schemes where no weight was given to the mitigating factor of youth.

III. ADOLESCENT NEUROLOGICAL DEVELOPMENT

One of the important lessons from the four Supreme Court cases addressing the proportionality of juvenile sentencing under the Eighth Amendment was the Court's newfound willingness to rely on the emergent science regarding adolescent¹³⁶ neurological development.¹³⁷ In *Roper*, the Court drew from social science

punishment.”).

¹³⁵ *Miller*, 567 U.S. at 473 (“[N]one of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific.”).

¹³⁶ There is no consensus among the community of neuroscience researchers as to the precise age definition of an adolescent. The research in this section generally refers to individuals between the ages of 14 and 22. Given that brain development continues into the mid-20s, most researchers place the end of adolescence somewhere between 20 and 25, with none using the term to describe a period ending before the age of 18.

¹³⁷ See, e.g., Steinberg, *supra* note 71, at 513 (“References to neuroscience in the Supreme Court's thinking about adolescent culpability have become more frequent, just as neuroscience has become more influential in legal policy and practice more generally. Before *Roper*, neuroscience had not played any part in decisions about developmental differences between adolescents and adults.”).

and psychological research that demonstrated that adolescents have a higher rate of reckless behavior and a lowered level of developmental maturity compared to adults,¹³⁸ are more susceptible to peer pressure,¹³⁹ and have a more transitory character.¹⁴⁰ The Court also established that, in evaluating the appropriateness of imposing the death penalty against juveniles, the “lesser culpability of the juvenile offender” directly implicated the proportionality element of the Eighth Amendment’s ban on cruel and unusual punishment.¹⁴¹ The Court expanded on these ideas in the cases that followed, repeatedly alluding to the emerging research on adolescent development.¹⁴² While the direct holdings of these cases do not *yet* force Oregon to alter Measure 11’s sentencing scheme for juveniles (Oregon does not technically impose mandatory LWOP sentences, though de facto LWOP sentences remain an open question for the Court), we should not ignore the Court’s suggestion to use this research to inform the way we treat juveniles within the criminal justice system. California presents a telling example, where, having already created a standalone youth offender parole process for prisoners whose crimes were committed before the age of 18,¹⁴³ the state decided to extend the system to prisoners whose crimes were committed before the age of 23, reflecting the conclusions of neuroscientific research finding that the brain is still developing in the mid-20s.¹⁴⁴

At the time of Measure 11’s passage in 1994, while the nation was clamoring for harsher punishments to stave off the coming of an illusory new breed of “superpredators,” there was little research into the broad developmental trajectories of adolescents. Much of the focus around neurological development centered on the first few years of life, reflecting a now discredited view that neuroplasticity (the ability of the brain to change throughout one’s life) drops off after the critical first years of childhood.¹⁴⁵ Instead, new techniques in brain imaging have shown that regions of the brain that help guide higher-level decision-making¹⁴⁶ as well as emo-

¹³⁸ *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 570.

¹⁴¹ *Id.* at 571.

¹⁴² *See Miller v. Alabama*, 567 U.S. 460, 471 (2012); *Graham v. Florida*, 560 U.S. 48, 68 (2010).

¹⁴³ S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013).

¹⁴⁴ S.B. 261, 2015 Leg., Reg. Sess. (Cal. 2015).

¹⁴⁵ LAURENCE STEINBERG, *THE AGE OF OPPORTUNITY, LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* 22 (2014).

¹⁴⁶ Beatriz Luna et al., *What Has fMRI Told Us About the Development of Cognitive Control Though Adolescence?*, 72 *BRAIN & COGNITION* 101, 111–12 (2010) (discussing the protracted development of the prefrontal cortex, the area of the brain that is engaged in inhibition and the

tional regulation¹⁴⁷ are not fully developed until the early to mid-20s.¹⁴⁸ The boon in research on this important maturation period has yielded many important lessons that apply directly to important questions of criminal culpability. While few would argue that a teenager who commits a serious crime should be held blameless, this Section will prove that factors such as: a lesser degree of impulse control and a higher propensity for risk-taking, lowered ability to respond properly to stressful or highly emotional situations (particularly in the presence of peers), and an underdeveloped ability to assess consequences all point to a lessened culpability for juvenile crimes. At the same time, the still-developing adolescent brain gives teenage offenders a better chance at growth and reform. Adolescents have a much higher rate of delinquency and criminal behavior, yet, for the large majority of them, this does not evolve into a life-long pattern of criminal behavior, a criminological phenomenon often referred to as the “age-crime” curve.¹⁴⁹ This Note’s reforms will begin to bring Measure 11 more in line with these important advancements in understanding the cognitive and developmental differences between adolescents and adults.

One of the common mysteries that underlies much of the question of why adolescents have higher rates of delinquent behaviors than adults lies in the fact that by the age of about 16, adolescents’ level of intelligence and their ability to reason are generally the same as adults,¹⁵⁰ yet the ability to make sound decisions

calculation of the social and practical consequences of one’s behavior).

¹⁴⁷ Sharona M. Atkins et al., *Training the Adolescent Brain: Neural Plasticity and the Acquisition of Cognitive Abilities*, in *THE ADOLESCENT BRAIN: LEARNING, REASONING, AND DECISION MAKING* 218, 219 (Valerie F. Reyna et al. eds., 2012) (discussing the difficulties of adolescents in evaluating positive and negative emotional impulses: “The regulatory rule of the prefrontal cortex over the limbic structures that produce the surges of neurochemicals such as dopamine and norepinephrine, which lead to arousal and reward, is limited by the slowly developing myelin fibers and the remodeling of the dopaminergic system during adolescence.”).

¹⁴⁸ Charles A. Nelson III & Margaret A. Sheridan, *Lessons from Neuroscience Research for Understanding Causal Links Between Family and Neighborhood Characteristics and Educational Outcomes*, in *WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES* 27, 29 (Greg J. Duncan & Richard J. Murnane eds., 2011) (“[R]ecent research suggests that the process of myelination [the process of strengthening neural connections in the brain] is likely incomplete until the early to mid-twenties.”).

¹⁴⁹ See Alex R. Piquero, *Taking Stock of Developmental Trajectories of Criminal Activity over the Life Course*, in *THE LONG VIEW OF CRIME: A SYNTHESIS OF LONGITUDINAL RESEARCH* 23, 23–27 (Akiva M. Liberman ed., 2008); Lisa Stolzenberg & Stewart J. D’Alessio, *Co-Offending and the Age-Crime Curve*, 45 *J. CRIME & DELINQ.* 65, 66–70 (2008).

¹⁵⁰ Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 *PSYCHOL., PUB. POL’Y, & L.* 115, 119 (2007) (“[A]dolescents’ level of intelligence and ability to reason are generally indistinguishable from adults by the age of 16, at least under ideal conditions. However, as numerous psychosocial studies have demonstrated, adolescents are

lags behind that of adults. One of the important factors in explaining why this phenomenon occurs is found in the brain's limbic system, the part of the brain tasked with regulating emotional responses to inputs from a person's surrounding environment (referred to as the "socioemotional" regions).¹⁵¹ During early adolescence, there is a rapid increase in dopaminergic activity (the brain's production of dopamine, our primary "reward" chemical) in these socioemotional regions of the brain, which leads teenagers to seek out novel, exciting or even dangerous experiences in a process known as "reward-seeking."¹⁵² This chemical reward-seeking impulse explains why rates of substance use, delinquent behavior, and reckless driving all spike in the early teenage years.¹⁵³ At the same time, this increase in reward-seeking behavior occurs before the structural maturation of what's known as the "cognitive control system," parts of the brain such as the prefrontal cortex that guide aspects of executive function such as "response inhibition, planning ahead, weighing risks and rewards, and the simultaneous consideration of multiple sources of information."¹⁵⁴ This divide between an increased desire for dramatic spikes in dopamine and the inability of the brain to properly manage those impulses helps to explain why adolescents tend to seek out much more risky and dangerous forms of stimulation than adults.¹⁵⁵

The underdeveloped capacity for self-regulation helps to explain why adolescents often seem to make risky choices "in the heat of the moment," choices that are at odds with what they might be able to reason is the best decision if they were

much less capable of making sound decisions when under stressful conditions or when peer pressure is strong.").

¹⁵¹ STEINBERG, *supra* note 145, at 72.

¹⁵² Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 216–17 (2010).

¹⁵³ Adriana Galván, *The Teenage Brain: Sensitivity to Rewards*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 88, 88 (2013) ("[H]eighted reward sensitivity in adolescents is linked to changes in dopamine-rich neurocircuitry." "Adolescence is characterized by heightened reward sensitivity and risk-taking behaviors and often linked to high rates of drug use, reckless driving, and sexual promiscuity.").

¹⁵⁴ Steinberg, *supra* note 152, at 216–17.

¹⁵⁵ Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 83 (2008) ("[R]isk-taking increases between childhood and adolescence as a result of changes around the time of puberty in . . . the brain's *socio-emotional system* that lead to increased reward-seeking, especially in the presence of peers. Risk-taking declines between adolescence and adulthood because of changes in . . . the brain's *cognitive control system*—changes which occur gradually and over the course of adolescence and young adulthood. The differing timetables of these changes . . . makes mid-adolescence a time of heightened vulnerability to risky and reckless behavior.").

asked what the best choice might be in a hypothetical situation.¹⁵⁶ Studies have found that while objective evaluations about probability and relative value are fairly mature during adolescence, the gap in judgment shown in “hot” contexts, such as periods of high emotion, are worse in adolescents than in adults.¹⁵⁷ Anecdotally, this might explain why a high school student might perform just as well as a 30-year-old adult on a standardized test (perhaps even better), but the teenager might be much more prone toward reacting violently in the face of a threatening peer than an adult might.¹⁵⁸

Another important factor in explaining adolescents’ tendency toward risky and impulsive decisions that can often lead to criminal consequences is the heightened tendency to submit to peer influences. In *Roper*, Kennedy addressed susceptibility to peer influence as one of the three factors the Court identified as lowering the relative culpability of juveniles.¹⁵⁹ Juveniles are more likely to commit crimes in groups than adults,¹⁶⁰ and similarly, are more likely to be arrested and charged with accomplice/accessory charges or felony murder charges.¹⁶¹ One recent study found, for example, that in playing a driving simulation game *alone* adolescents and adults took around the same number of driving risks, but when adolescents were in the presence of other peers they knew, the rate of risky decisions was sub-

¹⁵⁶ Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 1184, 1184 (2012) (“The heightened risk-taking and impulsivity observed in adolescence has been partly attributed to the slow development of the brain regions necessary for cognitive control, subsuming response selection, top-down control and inhibitory process.”).

¹⁵⁷ *Id.* at 1186.

¹⁵⁸ B.J. Casey et al., *The Adolescent Brain*, 1124 ANNALS N.Y. A.C.A. SCI. 111, 116–17 (2008) (as one group of researchers put it: “[I]n emotionally salient situations, the more mature limbic system will win over the prefrontal control system. In other words, when a poor decision is made in an emotional context, the adolescent may know better, but the salience of the emotional context biases his or her behavior in the opposite direction.”).

¹⁵⁹ *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

¹⁶⁰ Franklin E. Zimring, *American Youth Violence: A Cautionary Tale*, in 42 CRIME & JUSTICE IN AMERICA, 1975–2025, at 265, 270 (Michael Tonry ed., 2013) (“The third specific marker of youth violence is the very high prevalence of group involvement. The official statistics on almost all forms of adolescent criminality show high levels of group involvement.”); Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIME L. & CRIMINOLOGY 867, 870 (1981) (finding that for individuals under 21, 64% of robberies were committed in groups, while for individuals over 21, only 39% were committed in groups).

¹⁶¹ FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 152 (1998) (“[A]nalysis of Federal Bureau of Investigation homicide data shows that just over half of all persons arrested for homicide under the age of 18 were involved in an offense for which at least one other homicide arrest was made. That is more than twice the proportion of multiple arrest defendants in over-18 homicide arrests, or 51 percent versus 23 percent.”) (citations omitted).

stantially higher, whereas for the adult participants, the presence of friends had almost no effect on their decisions.¹⁶² Building off this research, a later study using an updated version of the driving simulation test found that adolescents favored riskier choices even if they were merely told that a peer was watching their performance from another room.¹⁶³ Adolescents are also more likely to engage in risky activity linked with an increase in social status; experimentation with drugs and alcohol generally occurs in the presence of friends rather than alone.¹⁶⁴ The rapid changes in the balances of hormones in the adolescent brain makes teens hypersensitive to rejection and their status. As one neuroscientist put it, adolescence is the “perfect neurobiological storm.”¹⁶⁵

Another important aspect of the adolescent brain that explains adolescents’ poor decision-making, particularly in the realm of criminal or delinquent behavior, is the fact that, on the whole, adolescents have a neurologically altered sense of risk and reward compared to that of adults.¹⁶⁶ Adults generally have a stronger sense of “loss aversion,” a desire to avoid the potential of loss in a risky scenario, whereas adolescents are more motivated by what they perceive as potential reward than potential loss.¹⁶⁷ This difference stems in part from the aforementioned dif-

¹⁶² Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 630 (2005).

¹⁶³ Alexander Weigard et al., *Effects of Anonymous Peer Observation on Adolescents’ Preference for Immediate Rewards*, 17 DEVELOPMENTAL SCI. 71, 71 (2014) (“Adolescent participants (ages 14–18) in the scanner took more risks in a simulated driving game when they believed that two close friends were observing their behavior from an adjacent room.”).

¹⁶⁴ STEINBERG, *supra* note 145, at 93.

¹⁶⁵ *Id.* at 95–96 (“The social brain is still changing in adolescence, and these changes help explain why young peoples’ concerns about what their peers think increase during this time. It’s the perfect neurobiological storm, at least if you’d like to make someone painfully self-conscious: improvements in brain functioning in areas important for figuring out what other people are thinking, the heightened arousal of regions that are sensitive to social acceptance and social rejection, and the greater responsiveness to other people’s emotional cues, like facial expressions. Given all of this, it is easy to see why changes in these parts of the brain increase adolescents’ sensitivity to their status within their peer group, make them more susceptible to peer pressure. . . . [N]o matter what gender they are, adolescents’ fixation on others’ emotions can dull their perception of potentially important information elsewhere in their environment.”).

¹⁶⁶ Emily E. Barkley-Levenson et al., *Behavioral and Neural Correlates of Loss Aversion and Risk Avoidance in Adolescents and Adults*, 3 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 72, 72 (2013) (“Many psychological theories of adolescence pose that a sense of invulnerability is normative in this developmental phase, and suggest that this causes adolescents to underweight possible negative consequences when they make risky decisions.”).

¹⁶⁷ Blakemore & Robbins, *supra* note 156, at 1185; STEINBERG, *supra* note 145, at 74. (“Although adolescents are relatively more attentive and responsive to rewards than adults,

ferences in the way that the adolescent brain processes emotional input through the reward-sensitive dopamine system,¹⁶⁸ but it is also connected to the rapid hormonal changes that also occur through puberty.¹⁶⁹ This helps to explain why adolescents often seem to make risky choices while driving, or seek an adrenaline rush doing dangerous stunts; their ability to predict a potential loss is weaker than adults. In the criminal sentencing context, this difficulty in predicting loss underlies the weakness of the deterrence rationale for adolescents, a concept echoed by the Court in *Roper*.¹⁷⁰

All of these underlying factors that affect decision making: the delayed development of the brain's "cognitive control system," the increased difficulty in making decisions in "hot" emotional contexts, the lessened ability to resist peer influence along with the increased desire to appease peers, and the lowered ability to consider "loss," all link up with the underlying issue that the brain's development is experience-dependent.¹⁷¹ It might seem self-evident, but the brain grows stronger and more efficient over time as an adolescent moves through these developmental years. Neuroscientists now know that the brain does not complete myelination (the process by which neurons in the brain become more efficient at communicating with one another, improving decision-making) until an individual's mid-20s.¹⁷² Adolescents have less life experience to help shape their judgment and decision-making. Again, while this does not absolve adolescents of criminal responsibility, it suggests a lowered culpability that lawmakers should consider.

In the same vein, this lack of experience is linked to another social development factor that Justice Kennedy alluded to: the relative inability of teenagers to escape a criminogenic environment in which they may have been raised.¹⁷³ A teen-

they're actually *less* sensitive to losses.").

¹⁶⁸ Adriana Galván, *Adolescent Development of the Reward System*, 4 FRONTIERS HUM. NEUROSCIENCE, 1 (2010) ("The field has generally assumed and agreed upon the notion that these behavioral changes are largely driven by rewards, including monetary, novel and social rewards, and by extension, the reward-sensitive dopamine system.").

¹⁶⁹ Galván, *supra* note 153, at 90 ("[I]t is important to touch on the equally influential role that pubertal hormones play in reward sensitivity.").

¹⁷⁰ *Roper v. Simmons*, 543 U.S. 551, 571 (2005) ("[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.").

¹⁷¹ Blakemore & Robbins, *supra* note 156, at 1186 ("[T]he complex cognitive requirements of the IGT [(a type of gambling-based game experiment)] emphasizes the importance of past experience (and hence learning) for decision-making, in particular the mismatch between expected and obtained outcomes.").

¹⁷² See Nelson & Sheridan, *supra* note 148, at 29.

¹⁷³ *Roper*, 543 U.S. at 570 ("Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for

ager raised in a neighborhood with heavy gang activity, or with parents who commit criminal acts, lacks the ability to simply leave that environment. When this is coupled with an adolescent's heightened desire for social acceptance, lowered ability to assess risk, and greater susceptibility to peer pressure, it greatly increases the motivation to fall into a pattern of criminal behavior. It is telling that, in all four of the Court's recent cases on juvenile criminal sentencing, the juveniles in question acted alongside other adolescents.¹⁷⁴ The background of Terrance Graham, the defendant in *Graham*, is particularly telling. Graham's parents were addicted to crack cocaine, and Graham himself began drinking at the age of 9 and smoking marijuana at 13.¹⁷⁵ In the commission of the robbery that ended up sending Graham to a life behind bars, he committed the crime with two 20-year-old adults.¹⁷⁶ Due to the mandatory nature of Florida's LWOP sentencing, the Court decided that at the age of 17, Graham had proven that his life had no remaining value to society, that any future development of his mind or his abilities, or even demonstrated reform during incarceration, should not grant him the opportunity for release. The prevailing neuroscience cautions against rendering these sweeping and permanent judgments against an adolescent whose brain is far from reaching its developmental potential.

With regards to the prevailing neuroscience on adolescent development, Measure 11 represents the worst of two worlds. The mandatory transfer of 15, 16 and 17-year-olds to adult court simply on the charge of one of the measure's 21 listed crimes makes the implicit judgment that these adolescents share the same criminal culpability as their adult counterparts, which 20 years of recent adolescent neuroscience research refutes. At the same time, Measure 11's inflexible sentences wrest from the criminal justice system any ability to evaluate and reward an adolescent's growth or eventual demonstrated maturity.

A. *Proposed Reforms*

As the preceding Sections have demonstrated, Measure 11 suffers from significant shortcomings. Measure 11 was passed in a time in which Oregon and the nation was gripped in fear of a wave of juvenile crime that never came to pass, the Measure stripped away the ability of judges to carefully analyze whether a juvenile deserved to be tried in the more rehabilitative juvenile system, or whether in sentencing a juvenile in adult court if the mitigating factors of youth justify a reduced punishment for their crimes. Measure 11 stands in stark contrast to the last 12

failing to escape negative influences in their whole environment.”).

¹⁷⁴ Feld, *supra* note 117, at 291.

¹⁷⁵ *Graham v. Florida*, 560 U.S. 48, 53 (2010).

¹⁷⁶ *Id.* at 54.

years of Supreme Court jurisprudence, which, while taking relatively small steps, has sent a clear message that juveniles are fundamentally different from adults for purposes of criminal culpability and sentencing. Measure 11 also stands in contrast to the last 20 years of pioneering research in the emergent field of adolescent neuroscience that supports the Court's conclusions that juveniles have a fundamentally lowered criminal culpability.

This Note's proposed reforms would start easing some of Measure 11's shortcomings. While the argument can certainly be made that a serious overhaul of Measure 11's provisions relating to juvenile offenders is warranted,¹⁷⁷ reforms to Measure 11 have been exceedingly rare over the last 22 years. Much of the difficulty in changing the provisions of Measure 11 stems from the passage of Measure 10, a constitutional amendment put before the voters in the same 1994 election that mandated that any reduction in sanctions under Measure 11 had to be approved by a two-thirds majority of the legislature.¹⁷⁸ While advocacy groups have had some success in reforming attendant aspects of the law, such as the decision to house juveniles either in adult or juvenile facilities prior to trial,¹⁷⁹ in the two decades since Measure 11's passage, there has yet to be a single substantive revision of Measure 11's juvenile sentencing or transfer provisions.

This Note proposes two reforms that are both realistic, yet fit pressing needs. The first reform would allow juveniles, subject to the discretion of the courts, to be sentenced to sentences shorter than the Measure 11 minimums when they are convicted of certain second-degree offenses. This change is realistic as it falls in line with the limited history of Measure 11 reforms. One of the first (and only) revisions that lessened the harsh nature of Measure 11 sentencing was the passage of S.B. 1049 in 1997. While the bill added some offenses to the list of Measure 11 crimes, it also allowed for the sentencing judge to use the more lenient sentencing guidelines in sentencing individuals convicted of second-degree assault, second-degree robbery and second-degree kidnapping.¹⁸⁰ A similar piece of legislation was

¹⁷⁷ Two wide-reaching reforms that would go a long way toward improving the juvenile justice scheme in Oregon would be the removal of Measure 11's mandatory transfer provisions for juvenile offenders, or simply removing the mandatory nature of the sentencing minimums for all juvenile offenders.

¹⁷⁸ Merritt et al., *supra* note 10, at 20.

¹⁷⁹ See CAMPAIGN FOR YOUTH JUSTICE & P'SHIP FOR SAFETY AND JUSTICE, MISGUIDED MEASURES REVISITED: PROGRESS AND PROMISE IN OREGON'S YOUTH JUSTICE SYSTEM 6–7 (2016), <http://www.safetyandjustice.org/wp-content/uploads/2017/09/Misguided-Measures-Revisited-Keeping-Youth-Out-of-Jails.pdf> (outlining three recent successful bills in the Oregon Legislature that remove the ability of State and local law enforcement to process or hold juveniles in adult facilities).

¹⁸⁰ S.B. 1049, 69th Leg. Assemb., Reg. Sess. (Or. 1997).

passed four years later in the form of H.B. 2379, which allowed for the same departure from Measure 11's mandatory minimums for the crimes of second-degree rape, first-degree sexual abuse, second-degree sexual penetration and second-degree sodomy.¹⁸¹ Both amendments focused purely on the facts and circumstances of the criminal act itself, for situations where the severity of the crime fell on the lesser end of the statutory definition of the crime,¹⁸² presumably reflecting a lessened severity of the offense. As this Note has outlined, both the Supreme Court and prevailing neuroscientific research have established that the nature of juvenile development creates a "lesser culpability of the juvenile offender."¹⁸³ For some of these second-degree Measure 11 crimes, the status of the offender *as* a juvenile could be added to these other existing circumstances as reason to depart from the mandatory minimum sentence. Given that the legislature has already acknowledged that these second-degree offenses represent the lower end of crimes that deserve the harsh, inflexible treatment of Measure 11's sentencing scheme, opening up similar sentencing departures for juveniles would be a natural extension of those prior reforms.

The second reform would be the creation of a youth offender parole board to allow the review of the longest juvenile sentences. This Note proposes a model along the lines of that adopted by California, which created a dedicated system of youth offender parole hearings apart from their prior parole hearing system.¹⁸⁴ California's system allows parole hearings to begin after a juvenile offender has served 15, 20 or 25 years of their sentence depending on the severity of the sentence imposed.¹⁸⁵ The hearings are specifically oriented to give "great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth" as well as growth and increased maturity demonstrated during their time incarcerated.¹⁸⁶

Currently, because Measure 11 does not impose any *mandatory* life without parole sentences, it does not run afoul of the Supreme Court's recent commands in *Graham* and *Miller* regarding juvenile LWOP sentences. However, Oregon does allow for consecutive sentencing that results in de facto LWOP sentences.¹⁸⁷

¹⁸¹ H.B. 2379, 71st Leg. Assemb., Reg. Sess. (Or. 2001).

¹⁸² For example, an assault II offense where the victim was not "physically injured by means of a deadly weapon" and "the victim did not suffer a significant physical injury." See § 137.712.

¹⁸³ *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

¹⁸⁴ Cal S.B. 260.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ OR. REV. STAT. § 137.123(5)(a) (2013); see also Hilliard, *supra* note 32, at 20–21 (finding that Oregon currently has 42 offenders serving de facto LWOP sentences for crimes

The Supreme Court may find that these de facto LWOP sentences are in fact LWOP sentences.¹⁸⁸ The Supreme Court has already made strong statements about the imposition of life sentences on juveniles, stating that the practice should be “uncommon,” and that the unique developmental aspects of juveniles caution against a determination of permanent incorrigibility at a young age.¹⁸⁹ The Court may decide in the near future to abolish all LWOP sentences for juveniles, something the dissenting justices in *Miller* have argued may be the next logical step in the Court’s juvenile sentencing jurisprudence.¹⁹⁰ The creation of a youth offender parole board would allow the State to circumvent these potential constitutional issues by allowing juvenile offenders a chance to have the mitigating aspects of their age taken into account, even if it would be decades after the fact. The creation of a such a board would not upset existing sentences, nor would it guarantee the eventual freedom of the rare juvenile who does represent a persistent and permanent danger to the community; however, it would allow those juvenile offenders who have demonstrated decades of reform and growth while incarcerated a chance to show that they deserve a chance at freedom.

CONCLUSION

In conclusion, the recent Supreme Court jurisprudence, as well as emergent adolescent neuroscience research both point to the reality that Measure 11 is overdue for meaningful reform. The reforms this Note proposes offer a first step at implementing elements of discretion into a system that currently provides no room for a juvenile offender to argue for judicial lenience on the basis of the inherently diminished capacity and culpability of youth. Allowing juveniles charged with Measure 11’s lesser crimes to receive shorter sentences lowers the chance that these offenders will need to see the inside of an adult prison and allows sentencing judges the chance to consider the developmental gap between juveniles and adults. Creating youth offender parole hearings similarly allows juveniles who might otherwise serve out a life behind bars for reckless decisions made as a teenager to have a second chance. It would allow the courts to consider the greater potential for

committed before the age of 18).

¹⁸⁸ Oregon’s consecutive sentencing statute contains no express provisions considering the mitigating factors of the age of a juvenile offender in deciding whether to impose consecutive sentences that in effect impose de facto LWOP. § 137.123.

¹⁸⁹ *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

¹⁹⁰ *Id.* at 501 (“The principle behind today’s decision seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles.”) (Roberts, C.J., dissenting).

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growth and reform present in adolescents and evaluate and consider a juvenile offender's demonstrated reform and maturation.