A LIFE WITHOUT: JUVENILES SPENDING THEIR LIVES IN OREGON'S PRISONS AND THE NEED FOR CHANGE FOLLOWING *MILLER* AND *GRAHAM*

by
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Conflict of Interests Disclaimer[**]

This Comment addresses the many problems associated with imposing life-without-parole sentences on juvenile offenders and offers suggestions for reforming Oregon's juvenile sentencing scheme to bring it in line with the rationale of United States Supreme Court's juvenile-sentencing jurisprudence. In recent years, the Supreme Court has made clear that such harsh penalties warrant special scrutiny when imposed on juvenile offenders. Although Oregon's sentencing scheme appears to prohibit life-without-parole sentences for juvenile offenders, judges may, in practice, impose sentences that result in de facto life sentences, which offer these youthful offenders no meaningful opportunity for parole. This Comment argues that the best way for Oregon's sentencing scheme to appropriately consider the age of a juvenile offender before imposing life sentences is to afford these offenders a second sentencing hearing, at the earlier of halfway through the offender's sentence or when the offender reaches age 25, at which a court could reevaluate the length of the sentence originally imposed in light of the offender's demonstrated propensity for rehabilitation and reform.

This Comment proceeds in five parts. The first Part provides an overview of the evolution of the treatment of juveniles in the criminal justice system in America and explains how the nation has arrived at the political

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climate that embraces smarter sentencing of juvenile offenders. The second Part describes the ways in which juveniles in Oregon are currently serving life sentences without meaningful opportunity for parole. The third Part discusses the evolving standards in Supreme Court precedent concerning life-without-parole sentences in prison and juveniles. The fourth Part explains how the reasoning in that Supreme Court jurisprudence applies to any sentences that effectively result in a juvenile spending the rest of his or her life in prison. Finally, the fifth Part will demonstrate that affording Second Look proceedings, both retroactively to juvenile offenders currently serving life in prison and prospectively to all future juvenile offenders, is the most effective method of bringing Oregon's sentencing scheme in line with the reasoning of Graham, Miller, Montgomery *and with current research on adolescent brain development.*

INTRODUCTION

In the United States, there are 2,500 individuals who began serving life sentences without the possibility of parole before their eighteenth birthdays.[1] Each of those individuals will spend more time behind bars than in society.[2] And every one of these people will live a life without the hope of ever becoming better than the worst thing he or she has done.

Oregon's sentencing scheme, on its face, appears to ban such life-without-parole sentences for juveniles.[3] In practice, however, judges may impose sentences that result in a juvenile offender spending the rest of his or her life in prison. For many offenders, those sentences will be carried out without any hearing to provide for a meaningful opportunity for release. For example, a judge may sentence a juvenile offender to serve five 25-year terms in prison consecutively, essentially a 125-year sentence. A sentence that long is not called "life without parole" because it does not technically exclude the possibility of parole within the offender's lifetime. In effect, however, an offender serving a sentence this long will not be granted parole before the end of his or her life. Thus, even though such sentences are prohibited, youth in Oregon continue to receive aggregate, or de facto, life-without-parole sentences.

Recent decisions by the United States Supreme Court have illustrated that such harsh penalties, when imposed upon juveniles, warrant special scrutiny due to the Eighth Amendment's prohibition on cruel and unusual punishment. Starting in 2005, with *Roper v. Simmons*, the Court held that the Eighth Amendment bars the death penalty for all juvenile offenders.[4] Five years later, in *Graham v. Florida*, the Court held that life-without-parole sentences for juvenile offenders for nonhomicide crimes also violated the Eighth Amendment.[5] In 2012, the Court went even further to hold that the Eighth Amendment prohibits a sentencing scheme

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[1] *Juvenile Life Without Parole*, AM. C.L. UNION, https://www.aclu.org/issues/juvenile-justice/youth-incarceration/juvenile-life-without-parole?redirect=blog/tag/juvenile-life-without-parole.

[2] Although it is beyond the scope of this Comment, the racial disparity in the imposition of life-without-parole sentences is notable. *See* HUMAN RIGHTS WATCH, SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 18–23 (2008), http://www.hrw.org/sites/default/files/reports/us0208_1.pdf; ASHLEY NELLIS, SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS 14–16 (2012), http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

[3] OR. REV. STAT. § 161.620 (2013).

[4] 543 U.S. 551 (2005).

[5] 560 U.S. 48 (2010).

that mandates the imposition of life without the possibility of parole on any juvenile[6] offender.[7] And, this term, in *Montgomery*, the Court decided that the holding in *Miller* imposes a substantive requirement to afford a juvenile offender an opportunity to show that he or she is not deserving of a life-without-parole sentence.[8] The evolution of these cases demonstrates that a sentencing court should rarely, if ever, impose a sentence that would result in an offender dying in prison for a crime committed before age 18.[9]

This Comment argues that the best way for Oregon's sentencing scheme to appropriately consider the age of a juvenile offender, before imposing a life sentence, is to afford these offenders a second sentencing hearing, at which a court could reevaluate the length of the sentence originally imposed in light of the offender's demonstrated propensity for rehabilitation and reform. Specifically, this Comment proposes that Oregon's Second Look hearings, which would afford a sentencing reevaluation at the earlier of halfway through the offender's sentence or when the offender reaches age 25, be provided to juvenile offenders who are sentenced to long, or de facto life, sentences.[10] Such Second Look hearings should also be retroactively afforded to offenders currently serving life, or de facto life, sentences for offenses committed before age 18. These proposals are supported by the current national trend towards less severe sentencing for juvenile offenders, the Supreme Court's reasoning in *Gra-*

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[6] Technically, "juvenile" refers to "the jurisdictional age of each state's juvenile court or family court system and includes those youth who fall under the purview of the state's delinquency code and not the criminal code." COMM. ON ASSESSING JUVENILE JUSTICE REFORM, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH, 18 n.2 (Richard J. Bonnie et al. eds., 2013) [hereinafter REFORMING JUVENILE JUSTICE]. As is common practice, however, and for the purposes of this Comment, the term "juvenile" refers to anyone under the age of 18—synonymous with "youth." *See, e.g.*, *id.* at 18.

[7] Miller v. Alabama, 132 S. Ct. 2455 (2012).

[8] Montgomery v. Louisiana, No. 14-280, slip op. at 22 (U.S. Jan. 25, 2016) ("In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.").

[9] *See id.* (explaining that a sentence to life without parole for a juvenile whose crime reflects "transient immaturity" is disproportionate, and thus unconstitutional, under the Eighth Amendment); *see also Miller*, 132 S. Ct. at 2469 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

[10] As discussed in Part V, *infra*, this Comment also suggests that, these hearings should be conducted no later than an offender's 25th birthday. Therefore, these hearings should be conducted at whichever date occurs earlier: halfway through the sentence or the offender's 25th birthday.

ham, Miller, and *Montgomery*, and recent research on adolescent brain development.

This Comment proceeds in five Parts. The first Part will provide an overview of the evolution of the treatment of juveniles in the criminal justice system in America and explain how the nation has arrived to the political climate that embraces smarter sentencing of juvenile offenders. The second Part will describe the ways in which juveniles in Oregon are currently serving life sentences without a meaningful opportunity for parole. The third Part will discuss the evolving standards in the Supreme Court precedent concerning life-without-parole sentences in general and juvenile sentencing trends. The fourth Part will explain how the reasoning in the *Graham* and *Miller* decisions applies to any sentences that effectively result in a juvenile spending the rest of his or her life in prison. Finally, the fifth Part will demonstrate that affording Second Look proceedings, both retroactively to juvenile offenders currently serving life in prison and prospectively to all future juvenile offenders, is the most effective method of bringing Oregon's sentencing scheme in line with the reasoning in *Graham*, *Miller*, and *Montgomery* and with current research on adolescent brain development.

I. THE FOUR STAGES OF JUVENILE JUSTICE

Although there may be uncanny similarities between the tempestuous toddler resisting naptime and a grandstanding politician refusing to back down on an issue, there are also undeniable differences. While a neurologist might explain the difference based on the toddler's underdeveloped prefrontal cortex, a pediatrician might focus on motor-skill development or age. A lawyer could speak to the status of one as a dependent or a minor, but a philosopher may focus on the inability of the toddler to tell from right and wrong. Regardless of the explanation, the long-standing consensus—across different professions, countries, and cultures—is that children are different from adults. The disagreement typically arises in what that difference means. And that disagreement has been especially clear in the context of children and criminal law.

Historically, the legal duty of the state to look after and care for children is deeply embedded in American and Western[11] cultures. As far back as ancient Rome, it was the province of proconsuls to ensure that children received proper treatment and education from tutors and guardi-

[11] Great Britain, Canada, Australia, and Ireland enacted legislation around the 1900s that embodied the idea that "the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian." Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

ans.[12] The King of England, as *pater patriae*—the father of the country—had the duty to ensure that courts and laws served the best interest of the youth in the kingdom.[13] The relationship between the state and juveniles in America initially reflected the duty of the government to care for children, but the scope of that duty has changed extensively as the juvenile justice system has undergone four stages of development.

The following subparts will provide an overview of those four stages of development to illustrate the importance of providing youth with unique sentencing proceedings that account for the distinction between young and adult offenders. In the first stage of juvenile-justice development, the emphasis was on the power of the State—through court systems—to supersede the power of the parent and send "delinquent"[14] children to houses of refuge as a tool to reform the child.[15] During the second stage, the rehabilitative mission of the first stage began to falter, and the Supreme Court emphasized the importance of affording procedural protections to youth as states began to sentence juveniles in the adult criminal justice system. The third stage occurred in the 1980s, when a national shift towards tough-on-crime policies and the now-dispelled accusation that America was breeding a generation of "superpredators" led to sentencing policies that diminished the distinction between youth and adults in the criminal justice system. Currently, the promulgation of new Supreme Court precedent and brain-development research has contributed to widespread dissatisfaction with the tough-on-crime policies of the past. This dissatisfaction with tough-on-crime policies set the stage for states to modify the sentencing of juveniles and once again reinforce the

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[12] GEORGE SPENCE, AN INQUIRY INTO THE ORIGIN OF THE LAWS AND POLITICAL INSTITUTIONS OF MODERN EUROPE, PARTICULARLY THOSE OF ENGLAND 189 (1826) ("The protection of persons under age, and of idiots and others of unsound mind . . . was committed to the proconsul or governor of the province, by the special appointment of the emperor as parens patriae.").

[13] *See* Neil Howard Cogan, *Juvenile Law, Before and After the Entrances of "Parens Patriae,"* 22 S.C. L. REV. 147, 166–81 (1970) (tracing the development of the *parens patriae* doctrine in England).

[14] In 1816, the term "juvenile delinquent" was first defined: Boys, not of the age of majority, who had committed capital offenses. REPORT OF THE COMMISSION FOR INVESTIGATING THE CAUSES OF THE ALARMING INCREASE OF JUVENILE DELINQUENCY IN THE METROPOLIS 1, 9–10 (J.F. Dove 1816). Now the term "juvenile delinquent" generally designates a person, not yet of the age of majority, whose behavior has violated certain codes, typically the family or juvenile code of the state. There are two broad categories into which delinquency may be grouped: "(1) behaviors that would be defined as criminal offenses if committed by adults . . . and (2) behaviors that are prohibited only for minors, which are called status offenses." PRESTON ELROD & R. SCOTT RYDER, JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE 3–4 (3d ed. 2011).

[15] Mack, *supra* note 11, at 106.

duty of the state to care for children and recognize that children are different.

A. The Duty of the State to the Essentially Good Child[16]

In the 19th century, the duty of the government to look after children and the recognition of "children as different" came to a crossroads in the American criminal justice system. Children who committed crimes were in need of protection by the government and decidedly different treatment than adults in the criminal justice system. But common law did not differentiate between adults and youth who had reached the age of criminal responsibility—seven at common law and in some American states, ten in other states, and twelve if the child lacked "mental and moral maturity."[17] The early age at which youth could be prosecuted for crimes became especially problematic as disadvantaged children were forced to beg in the streets due to the dire financial situations of their families and, thus, committed petty crimes through no fault of their own.[18]

By the early 20th century a movement to keep those youthful offenders separate from adult criminals had garnered much support.[19] The ideals of the *parens patriae* doctrine, which requires the "legal protector of citizens considered to be unable to protect themselves" to bear "the responsibility for such protection," began to surface in proceedings dealing with juvenile delinquents.[20] Reformers felt that, because the sole focus of

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[16] *In re Gault*, 387 U.S. 1, 15 (1967) ("The child—essentially good, as [the reformers] saw it—was to be made 'to feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or on trial." (second alteration in original) (quoting Mack, *supra* note 11, at 120)).

[17] *See* Mack, *supra* note 11, at 106 (explaining the juxtaposition between the consistent recognition of the State's duty to care for children and the need to punish criminals).

[18] Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1191 (1970); *see also* Herman Schwendiger & Julia R. Schwendiger, *Delinquency and the Collective Varieties of Youth*, CRIME & SOC. JUST., Spring–Summer 1976, at 7, 9, 11–12 (surmising that 18th century juvenile delinquency in America arose out of conditions that had been carried over from the "carnival of crime [that] erupted" in England "from the swirling decomposition of feudal relations and the rise of early capitalism").

[19] SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 742 (2d ed. 1997); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY xviii (2d ed. 1977).

[20] *Parens patriae*, OXFORD ENGLISH DICTIONARY (3d ed. 2005), http://www.oed.com/view/Entry/137815. "Indeed, at its founding, the juvenile court perceived its role as that of a sort of a 'superparent.'" Lois A. Weithorn, *Envisioning Second-Order Change in America's Response to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1328 (2005).

America's adult criminal justice system was "punishment as expiation for the wrong, punishment as a warning to other possible wrongdoers," adult criminal courts were not the proper place for youth.[21] Thus, a group of reformers known as the "Child Savers" helped champion the movement to achieve a uniform and specialized juvenile court.[22]

Judge Lindsey of Colorado, a prominent figure in the movement for the establishment of the juvenile courts, explained:

> [The juvenile court's] purpose is to help all it can, and to hurt as little as it can; it seeks to build character—to make good citizens rather than useless criminals. The state is thus helping itself as well as the child, for the *good of the child is the good of the state.*[23]

Additionally, in juvenile courts, "delinquency was approached as a treatable sickness, thus giving rise to the concept of individualized justice and rehabilitation."[24] Hence, a juvenile-justice system was founded as a venue for states to effectively carry out their responsibility to protect and rehabilitate youth as an alternative to incarceration.

The true genesis of the juvenile-justice system is attributed to the Juvenile Court Act of 1899, which established the first juvenile court in America in Cook County, Illinois.[25] The structure of juvenile court proceedings was quite distinct from adult criminal trials. The purpose of juvenile proceedings was to identify the cause of the youth's delinquency and propose a solution.[26] The juvenile courts were meant to evaluate and

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[21] Mack, *supra* note 11, at 106. "[T]he duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense . . . [was] to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen." *Id.* at 107; *see also* Fox, *supra* note 18, at 1193. Some scholars, however, propose less altruistic motivations behind the reform, including classist ideology and support of private industry. *See, e.g.*, PLATT, *supra* note 19, at 3–12, 69.

[22] The term "child savers" was used to characterize a group of reformers who "regarded their cause as a matter of conscience and morality," and claimed to serve no particular class or political interests. PLATT, *supra* note 19, at 3; *see also* Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1023–24 (2013).

[23] Mack, *supra* note 11, at 121–22 (emphasis added) (quoting JUVENILE IMPROVEMENT ASS'N OF DENVER, JUVENILE COURT LAWS, ETC. 23–24 (1908), http://hdl.handle.net/2027/uc2.ark:/13960/t8jd4t683).

[24] Catherine M. Sinclair, *A Radical/Marxist Interpretation of Juvenile Justice in the United States*, FED. PROB., June 1983, at 20, 21.

[25] There were, however, laws in both New York and Massachusetts by that time that provided for separate trials of minors from adults. PLATT, *supra* note 19, at 9–10; *see also* Fox, *supra* note 18, at 1207.

[26] REFORMING JUVENILE JUSTICE, *supra* note 6, at 33–34; *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., http://www.cjcj.org/education1/juvenile-justice-history.html.

rehabilitate, not adjudicate and punish. Thus, juvenile court hearings were informal, and judges had broad discretion to prescribe individualized treatments, tailored to the needs of each defender.[27] Initially, the mission to create a system that protected youth, while holding them accountable, was successful. By 1925, every state had a separate juvenile court for youth facing criminal charges,[28] and by 1932, the United States had more than 600 independent juvenile courts.[29]

States primarily chose one of two places for youth to serve the sentences imposed in juvenile court: Houses of Refuge or schools of reform. Many states adopted the House of Refuge model. The New York House of Refuge, for example, provided a place for destitute or wayward youth identified as "on the path to delinquency."[30] This House of Refuge format for reform gained popularity, and by the 1840s, more than 25 had been constructed.[31] The Houses, although rehabilitative in theory, were flawed in practice.[32] The Houses excluded any child who had committed serious crimes or had been deemed an irredeemable delinquent. It was feared that these youth were beyond reform and their incorrigible behavior would have impeded the efforts to "save" youth who had not yet succumbed to "delinquency."[33] Thus, children found guilty of "real crime" were relegated to the adult correctional institutes or back to a life of poverty in the streets.[34] Additionally, the Houses were often overcrowded and frequently imposed strict discipline on the youth.[35] Some Houses even implemented nightly solitary confinement, also popular in adult institutions, as a way of encouraging youth to focus on reform.[36] The institutional design and exclusive practices of the Houses rendered them only slightly better than the adult facilities.

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[27] REFORMING JUVENILE JUSTICE, *supra* note 6, at 34.

[28] *Id.*; *see also* CTR. ON JUV. & CRIM. JUST., *supra* note 26.

[29] PLATT, *supra* note 19, at 10.

[30] CTR. ON JUV. & CRIM. JUST., *supra* note 26; *see also* Fox, *supra* note 18, at 1192.

[31] *See* CTR. ON JUV. & CRIM. JUST., *supra* note 26.

[32] Numerous habeas corpus petitions were filed against the managers of the House, asserting that children were being unlawfully held there. Fox, *supra* note 18, at 1204–05.

[33] *Id.* at 1192–93 ("The first annual report of the Managers of the House, submitted to the Society and the public in 1825, reveal[ed] that, of the 73 children received during the first year of operation, only one had been convicted of a serious offense (grand larceny), nine had been sent for petty larceny, and the remaining 63 (88 percent) were in the House for vagrancy, stealing, and absconding from the Almshouse.").

[34] *See id.* at 1191, 1194 (explaining the occasional jury nullification that occurred for young offenders and the discretion exercised by District Attorneys to keep youth out of institutes).

[35] *Id.* at 1195; CTR. ON JUV. & CRIM. JUST., *supra* note 26.

[36] Fox, *supra* note 18, at 1198–99.

As an alternative to the Houses, states created reform schools that placed great emphasis on education.[37] The reform schools also focused on creating a family-like atmosphere in an attempt to reform youth through parental kindness.[38] Like the Houses, however, the reform schools largely focused on children who committed petty crimes.[39] The courts retained full discretion to incarcerate children who committed serious crimes with adult criminals.[40]

In effect, both the Houses and reform schools excluded some young offenders and used excessively punitive methods against others. Many young offenders either faced punishment that closely resembled adult penal institutions in the Houses or schools, or were sentenced as adults because they were deemed unfit candidates for the alternative.[41] The juvenile proceedings, however, continued to purport to have a focus on the "best interest of the child" and procedures that were meant to be favorable for youth. Although the proceedings often resulted in punishment, the juvenile courts were not seen as criminal adjudications.[42] As a result, courts avoided applying constitutional procedural safeguards, required in adult criminal courts, to the juvenile court proceedings.[43] Consequently, the juvenile court systems continued to develop outside of judicial scrutiny until the mid-20th century.

B. Children Without: Incorporation of Procedural Rights into the Juvenile-Justice System

The second period of juvenile-justice reform, in the 1960s and 1970s, arose out of the belief that juvenile courts were failing their rehabilitative mission and that juveniles were being deprived of their rights.[44] Juvenile court proceedings focused on the background and welfare of youth ra-

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[37] CTR. ON JUV. & CRIM. JUST., *supra* note 26.

[38] Fox, *supra* note 18, at 1208. The superintendent of the Chicago Reform School explained that the chief aim of the school was "to fill a father's place to these unfortunate youth." GEO. W. PERKINS, FIRST ANNUAL REPORT OF THE SUPERINTENDENT OF THE CHICAGO REFORM SCHOOL TO THE BOARD OF GUARDIANS 14–15 (1856).

[39] Fewer than 15% of the Chicago Reform School's inmates were convicted of "grave and heinous" offenses. Fox, *supra* note 18, at 1213.

[40] *See* Fox, *supra* note 18, at 1214 (explaining how some offenders were "screened out" of the Chicago Reform School because they committed "offenses of such enormity or notoriety that the courts could not avoid dealing with the offense rather than the offender").

[41] *Id.* at 1190, 1206.

[42] REFORMING JUVENILE JUSTICE, *supra* note 6, at 34.

[43] *See* Fox, *supra* note 18, at 1213–15 (explaining the refusal of courts to second-guess juvenile court proceedings).

[44] REFORMING JUVENILE JUSTICE, *supra* note 6, at 35.

ther than on the specific details of the crime.[45] Theoretically, it meant that judges were able to formulate the most beneficial plans that focused on the rehabilitation and treatment of the young offender. Practically, however, it meant the exclusion of juries, lawyers, and evidentiary protections from juvenile proceedings.[46] Juveniles were being sent to training schools that resembled prisons.[47] Reports of abusive practices in these facilities were pervasive.[48] Frequently, the time of confinement imposed on a child was unrelated to the severity of the charged offense.[49] Concern over this misuse of the juvenile courts culminated in two cases in the 1960s: *Kent v. United States*[50] and *In re Gault*.[51] Both cases were attempts by the Supreme Court to remedy injustices suffered by juvenile delinquents through the imposition of minimum constitutional procedural rights in juvenile court proceedings.

In the first case, *Kent*, the Court held that the essentials of due process and fair treatment must apply to administrative hearings in juvenile courts.[52] The juvenile-court judge in *Kent* placed an order waiving his jurisdiction over Kent, a juvenile, so that he could be tried in adult criminal court.[53] The juvenile-court judge did not hold a hearing. He did not rule on a motion submitted by Kent's attorney to keep Kent in the juvenile system to afford him treatment in a hospital for his severe psychopathology.[54] Likewise, the judge did not respond to a request by Kent's attorney for access to files to ensure effective assistance of counsel.[55] When the Supreme Court reviewed the judge's decisions, it held that those procedures were invalid because they did not comport with the essentials of due process and fair treatment.[56] Justice Fortas, writing for the Court, expressed disconcertion that "the child receives the worst of both worlds," receiving "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[57] Although the Court did not import all the constitutional requirements of adult crimi-

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[45] Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 825 (1988).

[46] *Id.*

[47] Barry Krisberg, *Reforming Juvenile Justice*, AM. PROSPECT (Sept. 2005), http://prospect.org/article/reforming-juvenile-justice.

[48] *Id.*

[49] *Id.*

[50] 383 U.S. 541 (1966).

[51] 387 U.S 1 (1967).

[52] *Kent*, 383 U.S. at 562.

[53] *Id.* at 546.

[54] *Id.* at 545–46.

[55] *Id.* at 546.

[56] *Id.* at 562–63.

[57] *Id.* at 556.

nal proceedings to juvenile courts, it did recognize that the purpose of juvenile courts had shifted from entirely rehabilitative to punitive.

A year later in *In re Gault*, Justice Fortas, again writing for the majority, called juvenile proceedings a "kangaroo court."[58] In *Gault*, a 15-year-old was committed to the Arizona State Industrial School for up to 6 years for making lewd phone calls.[59] An adult convicted of the same offense at that time would have received a maximum sentence of 12 months in jail.[60] Thus, the youth in the juvenile court proceeding, without a lawyer or notice of a charge, faced five more years' imprisonment than an adult offender, who would have received notice and adequate representation. As a result, youth were receiving neither the benefit of more favorable adjudication nor the procedural protections of an adult criminal court. Highlighting the serious loss of liberty at issue in juvenile-court proceedings, the Court held that all juvenile-court proceedings must have minimum procedural safeguards guaranteed in criminal prosecutions by the Constitution.[61]

In response to *Gault* and later opinions requiring procedural protections, juvenile courts nationwide developed more defined procedural protections.[62] With the development of more procedural safeguards came adversarial tendencies. The procedural requirements, although intended to be protective, meant that judges were no longer free to use discretion to determine what was best for the youth. Youth advocates quickly recognized the danger of these formalized proceedings. Advocates called for an imposition of standards that would enforce the once-envisioned rehabilitative sentences for youth, and not the mostly punitive sentences of traditional adult adversarial criminal proceedings.[63] Before these reforms could take place, however, a tough-on-crime ideology overpowered the "children are different" mantra of the past.

C. Different but Equal: The Trend Toward Sentencing Youth as Adults

By the late 1980s, a harsher perspective on juvenile crime had emerged, leading to a third stage of juvenile-justice "reform."[64] During this stage, which continued through the 1990s, almost every state in America expanded laws that allowed or required the prosecution of juveniles in the adult criminal justice system.[65] It was during this stage that

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[58] 387 U.S. 1, 28 (1967).

[59] *Id.* at 4–6, 29.

[60] REFORMING JUVENILE JUSTICE, *supra* note 6, at 35.

[61] *In re Gault*, 387 U.S. at 55, 57.

[62] REFORMING JUVENILE JUSTICE, *supra* note 6, at 36–37.

[63] *Id.* at 37.

[64] *Id.* at 38.

[65] OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF

Princeton Professor John DiIulio coined the term "superpredator" and predicted that the number of juveniles in custody would triple in the coming years.[66] DiIulio's predictions were bolstered by high-profile juvenile cases in the news. For example, the 1989 Central Park jogger case, in which five youth falsely confessed to gang-raping a jogger in New York City, became "emblematic of a state of rampant crime" in America.[67] All five teenagers, at the time aged 14 to 16, were demonized in the media and appeared to perfectly represent the "superpredator" persona.[68]

Spikes of violent acts by youth seemed to pervade the country.[69] "By 1993, the rate of homicides committed by juveniles had tripled from a decade earlier."[70] Nationwide, proponents of tougher sentences, especially for juveniles, relied on incidents like the Central Park Five and other sensationalized cases to justify tougher sentences.[71] The prevalent message from the public was: adult crime, adult time.[72] In a 1996 book,

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JUSTICE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 1 (2011) [hereinafter OJJDP REPORT], https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf. Some states, in addition to allowing prosecution of youth as adults, now draw the line between juveniles and adults at age 17, and a few draw it at 16. As such, any youth over the age of 16 or 17 in those states is considered an adult in the criminal system. *Id.* at 2.

[66] *The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), http://www.eji.org/node/893.

[67] Ray Sanchez, *Judge Approves $41M Settlement in Central Park Jogger Case*, CNN (Sept. 7, 2014), http://www.cnn.com/2014/09/05/justice/new-york-central-park-five/; s*ee also* CAMPAIGN FOR YOUTH JUSTICE & P'SHIP FOR SAFETY & JUSTICE, MISGUIDED MEASURES: THE OUTCOMES AND IMPACTS OF MEASURE 11 ON OREGON'S YOUTH 18 (2011) [hereinafter MISGUIDED MEASURES], http://www.safetyandjustice.org/files/Misguided_Measures.pdf.

[68] *See* MISGUIDED MEASURES, *supra* note 67, at 18; Chris Smith, *Central Park Revisited*, N.Y. MAG. (Oct. 21, 2002), http://nymag.com/nymetro/news/crimelaw/features/n_7836/; *Yusef Salaam*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/yusef-salaam.

[69] Between 1965 and 1998 the number of 12-year-olds arrested for violent crimes doubled and the number of 13- and 14-year-olds tripled. Linda J. Collier, *Adult Crime, Adult Time*, WASH. POST, Mar. 29, 1998, at C1; *see* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 1 (1996) (noting that the arrest rate for juvenile violent crimes "soared" between 1988 and 1994); *see also* Richard Lacayo, *When Kids Go Bad*, TIME, Sept. 19, 1994, at 60, 61 ("[I]t's in the inner cities where an interlocking universe of guns, gangs and the drug trade has made mayhem a career path for kids and equipped them with the means to do maximum damage along the way.").

[70] NELLIS, *supra* note 2, at 5.

[71] For a chilling account of wrongful conviction of the five youth accused of this crime and the devastating impact, of both the crime and the convictions, see THE CENTRAL PARK FIVE (Florentine Films 2012).

[72] In a 1993 poll, 73% of people interviewed favored trying violent juveniles as adults rather than in the "more lenient" juvenile courts. Sam Vincent Meddis, *Poll:*

DiIulio and his two coauthors asserted that, "America is now home to thickening ranks of juvenile 'superpredators'—radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders."[73] Across the country, juvenile-crime policy shifted to focus on the adjudication of youth as adults and increasing the length of confinement for youth who remained in the juvenile system.[74]

Currently, states have multiple mechanisms for transferring a youth from juvenile courts to adult criminal courts. Such mechanisms fall into three general categories: (1) judicial waiver laws, (2) statutory exclusion laws, and (3) prosecutorial discretion.[75] Judicial waiver laws allow juvenile-court judges to waive their jurisdiction over juveniles, consequently permitting prosecutors to subsequently file charges in criminal court.[76] Statutory exclusion laws grant adult criminal courts exclusive jurisdiction over juvenile defendants charged with committing a certain class of crimes, thus removing the initial discretion regarding where to prosecute a youth.[77] Prosecutorial discretion laws define a class of cases that may be brought in either juvenile or criminal court, and the decision as to where the case shall be adjudicated is left entirely to the prosecutor.[78]

Most states now employ one, or all, of those methods to allow children to be adjudicated as adults in the criminal justice system.[79] There are still states where children as young as ten years old can be tried as adults for various crimes.[80] In fact, a report released in 2009 found that

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Treat Juveniles the Same as Adult Offenders, USA TODAY, Oct. 29, 1993, at 1A.

[73] WILLIAM JOHN BENNETT, JOHN J. DIIULIO, JR. & JOHN P. WALTERS, BODY COUNT: MORAL POVERTY—AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 27 (1996).

[74] DAVID L. MYERS, BOYS AMONG MEN: TRYING AND SENTENCING JUVENILES AS ADULTS 2 (2005).

[75] OJJDP REPORT, *supra* note 65, at 2.

[76] MICHELE DIETCH ET AL., FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 19 (2009). "A total of 45 states have laws designating some category of cases in which waiver of jurisdiction may be considered, generally on the prosecutor's motion, and granted on a discretionary basis." OJJDP REPORT, *supra* note 65, at 2. Dietch's report notes that "[t]he total numbers of young children in adult criminal court are actually much higher than this because the data cannot capture the numbers of children sent to the adult system via automatic transfer laws or laws allowing the prosecutor to file cases directly in adult court." DIETCH ET AL., *supra* at xiii.

[77] OJJDP REPORT, *supra* note 65, at 2. As discussed below, Oregon's Measure 11 sentencing scheme fits into this category. *See infra* Part II.

[78] OJJDP REPORT, *supra* note 65, at 2.

[79] *Id.*

[80] *Id.* at 4.

"[b]etween 1985 and 2004, 703 children aged 12 and under, and 961 children aged 13 were judicially transferred to adult court."[81] In some states, there are laws in place that provide that once a child is tried as an adult, he or she must be tried as an adult in any subsequent proceedings.[82] Accordingly, this period ushered in an era where states were equipped with multiple mechanisms to adjudicate youth as adults, and children were permanently taken out of the realm of protections originally intended by the juvenile-justice system.

The juvenile-justice system that welcomed the new millennium also seemed completely void of the rehabilitative, protective, and corrective principles upon which the system was founded.[83] At the same time, in 2000, the juvenile homicide rate stabilized below the 1985 level.[84] And soon, the entire "superpredator" theory was undermined by a decrease in all juvenile crime rates.[85] By 2001, John DiIulio himself had changed his tune, touting the values of religion over retribution.[86] DiIulio did not simply accept that his theory had been wrong. Instead, DiIulio, the mastermind behind locking youth up and throwing away the key, explained that crime "[p]revention is the only reasonable way to approach these problems."[87] DiIulio is right, and recognition that these tough-on-crime responses might have been an overreaction has brought the nation to a fourth, and critical, stage in reforming the treatment of juvenile delinquents.

D. Bending the Arc Back: A Trend Toward Protective Treatment for Juveniles

Over the past two decades, this country has begun a trend toward a fourth stage of juvenile-justice reform. This fourth stage of reform demonstrates that policy makers are more willing than ever to consider

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[81] DIETCH ET AL., *supra* note 76, at xiii.

[82] OJJDP REPORT, *supra* note 65, at 7.

[83] *See generally* Feld, *supra* note 45, at 824–25.

[84] EQUAL JUST. INITIATIVE, *supra* note 66.

[85] *Id.* The juvenile crime rates dropped by nearly half, a drastically different situation than the predicted rise. *Id.*

[86] Elizabeth Becker, *An Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html. Notably, DiIulio and James Fox—another criminologist who endorsed the "superpredator" rhetoric in the 1990s—both signed onto an amicus brief in *Miller v. Alabama*, explaining that the fear of an "impending generation of superpredators" proved to be unfounded and that life-without-parole sentences are both ineffective and unnecessary to prevent an increase in violent juvenile crime. Brief of Jeffery Fagan et al. as Amici Curiae Supporting Petitioner at 8, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9647, 10-9646), 2012 WL 174240.

[87] Becker, *supra* note 86.

the effectiveness of treating juvenile offenders, not merely punishing them. This trend came about from the recognition of the ineffectiveness of tough-on-crime policies mentioned above, lower crime rates, and adolescent brain development research.

First, the reduction in the juvenile crime rates have served to reduce some of the pressure on policy makers to keep communities safe by incarcerating juvenile offenders for long periods of time. By 2004, youth crime rates had reached a two-decade low.[88] Those lower crime rates created an opportunity for policy makers to focus on alternatives to long prison sentences for youth. Additionally, while juvenile crime rates began to decline, there were significant improvements in the research regarding adolescent behavior and brain development. [89] As this Comment discusses in detail in Part V, that research on adolescent brain development indicates that juvenile offenders are more amenable to treatment and reform than their adult counterparts. The combination of the decline in juvenile crime rates and the suggestion that communities could be kept safe from juvenile offenders without sentencing them to spend the rest of their lives in prison set the stage for a discussion focused on helping and treating juvenile delinquents instead of merely sending them to prison. Additionally, the expense of incarcerating youth at adult facilities and challenges to the racial disparities in juvenile-justice systems have encouraged states to reconsider the way youth are sentenced.[90] Consequently, now in this fourth stage of juvenile-justice reform, policy makers have started to reevaluate the harsh sentencing practices of the past and to take steps toward smarter sentencing for juveniles.

II. Life Behind Bars in Oregon

Although the nation has begun to recognize the importance of returning to smarter sentencing of youth, transfers and waivers of youth into adult court remain a staple in the juvenile-justice system. As of October 2013, the Equal Justice Institute estimated that "[a]pproximately 250,000 youth under age 18 are prosecuted, sentenced, and incarcerated in the adult criminal justice system each year, and nearly 100,000 youth are placed in adult jails and prisons annually in America."[91] That is a staggering number considering the recent trends away from adjudicating youth as adults.

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[88] Reforming Juvenile Justice, *supra* note 6, at 41.

[89] *Id.* at 43.

[90] Although it is beyond the scope of this Comment, some writers suggest that the only motivating factor in juvenile-justice reform has been the cost of incarcerating youth as adults.

[91] *Teen Facing Sex Offender Prosecution for Streaking Prank Kills Himself*, Equal Just. Initiative (Oct. 17, 2003), http://www.eji.org/node/821.

Even more staggering are the numbers for juveniles serving long sentences in adult facilities. An estimated 2,500 juvenile offenders are serving life-without-parole sentences nationwide.[92] Additionally, there are an estimated 7,800 juvenile offenders serving life sentences with the eventual possibility of parole.[93] These sentences are largely a result of the tough-on-crime legislation enacted in states before the trend away from sentencing youth as adults. Oregon, along with most of the nation, still has this tough-on-crime legislation in place that allows for juvenile offenders to be sentenced to several decades, and sometimes a lifetime, in prison.

A. Oregon's Current Sentencing Scheme

In 1994, while the country was in the midst of its tough-on-crime juvenile sentencing era, Oregon voters approved Ballot Measure 11 in an effort to increase public safety by ensuring strict enforcement of mandatory minimums for violent, sexual, or person-to-person offenses.[94] This ballot measure came one year after a highly publicized incident of youth violence.[95] During that incident, three young black teenagers violently beat a 22-year-old man, Tim Hawley, while his fiancée, Tanea Whittaker, ran for help at the Lloyd Center Mall.[96] The sentencing judge decided, against the district attorney's recommendation, to try two of the three defendants as juveniles.[97] Because of the judge's decision to adjudicate the two defendants as juveniles, the offenders had the opportunity to serve time in juvenile facilities instead of in the adult Department of Corrections.

The community was outraged at the seemingly "soft" decision to forgo trying the youth as adults.[98] Capitalizing on that public outrage, the *Oregonian* published an article urging legislators to enact laws that would prevent such a result in the future. The article advocated for stricter sentencing guidelines that would "met[e] out punishment that pays more than lip service to the lives of their victims."[99] In response to the growing

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[92] *Juvenile Life Without Parole*, *supra* note 1.

[93] ASHLEY NELLIS, SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCING IN AMERICA 12 (2013), http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf.

[94] The mandatory waiver of youth into adult court and application of these statutory minimum sentences to youth 15 and older was codified in OR. REV. STAT. § 137.707 (2013).

[95] MISGUIDED MEASURES, *supra* note 67, at 18–19.

[96] Editorial, *Fix Juvenile Justice*, OREGONIAN, December 3, 1993, at D12.

[97] MISGUIDED MEASURES, *supra* note 67, at 18–19.

[98] OREGONIAN, *supra* note 96, at D12.

[99] *Id.*

distrust of the effectiveness of the juvenile-justice system, then-Governor Roberts issued an executive order establishing the Governor's Task Force on Juvenile Justice.[100] Ted Kulongoski, the Attorney General at the time, wrote a scathing critique of Oregon's juvenile-justice system. Highlighting a few particularly violent offenses, including the one at the Lloyd Center Mall, Kulongoski warned that the current sentencing scheme for juveniles lacked "consequences for unlawful actions," lacked "certainty of punishment," and failed to hold juvenile offenders accountable.[101] The Oregon public heeded those warnings and passed Ballot Measure 11 in an attempt to improve the way that the state held offenders, including young offenders, accountable. Although, as mentioned above, the trend nationwide has now shifted away from harsh sentencing schemes, Measure 11—largely unchanged from the way it was written in 1994—still dictates tough-on-crime sentences for many young offenders in Oregon.

One of the ways that Measure 11 forces tough-on-crime sentences is by preventing sentencing judges from considering an offender's mitigating circumstances. It does so by requiring judges to impose mandatory-minimum sentences on juvenile offenders who commit 1 of 21 crimes specified in section 137.707 of the Oregon Revised Statutes. Section 137.707 allows the sentencing judge to impose more prison time if aggravating factors exist, but not less—even if there are mitigating circumstances that the judge would, or should, consider. Additionally, Measure 11 includes a specific prohibition on "earned time," which would allow offenders to serve shorter sentences based on demonstrated rehabilitation or reform.[102] Measure 11 also precludes youth from receiving Second Look hearings, which allow sentencing courts to reevaluate the sentence of a young offender after half of the sentence has been served.[103] Thus, currently, a sentence imposed under Measure 11 cannot be altered or shortened based on a young offender's maturation or rehabilitation, regardless of any mitigating circumstances or the desire of a sentencing judge to afford a youthful offender leniency in his or her sentence.

The results of Measure 11's strict sentencing requirements are long sentences and little hope for relief, or in the case of some young offenders, any hope for eventual release. The range of years in prison imposed under Measure 11 varies based on the crime, but a judge may require a juvenile offender to serve any sentence imposed under Measure 11 consecutively.[104] Accordingly, under Measure 11 sentencing guidelines, one

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[100] GOVERNOR'S TASK FORCE ON JUVENILE JUSTICE, FINAL REPORT 3 (1994), http://www.oregon.gov/oya/reports/jjtaskforce.pdf.

[101] *Id.* at 3–4.

[102] OR. REV. STAT. § 137.707 (2013).

[103] OR. REV. STAT. § 420A.203 (2013).

[104] OR. REV. STAT. § 137.123 (2013) (permitting the imposition of consecutive sentences in certain scenarios); *see also Mandatory Sentencing/Measure 11*, CLASSROOM

evening of mistakes may mean a lifetime of penance for a young offender. For example, a judge may impose two 120-month sentences for two counts of manslaughter, to be served consecutively to three 90-month sentences for three counts of kidnapping, to be served consecutively to three 90-month sentences for three counts of robbery, if she determines that one of the conditions of section 137.123(5) of the Oregon Revised Statutes has been met. These eight convictions could easily, and unfortunately, occur from a single series of events. In such a case, a juvenile would be facing 65 years in prison without an opportunity for parole. A sentence that long, however, would not be considered "a life without parole" sentence in name. Even though, in effect, that sentence would mean that a 16-year-old would be 81 years old before he or she was even eligible for release. And, eligibility for parole would not guarantee actual release. Consequently, that sentence under Measure 11, although not "life without parole" would effectively mean that a young offender would spend the rest, or very nearly the rest, of his or her life behind bars.

B. Juvenile Offenders Serving Life Sentences in Oregon

Even before the enactment of Measure 11, Oregon sentencing schemes allowed for the imposition of harsh sentences on juvenile offenders.[105] Through those sentencing schemes and Measure 11 sentencing mechanisms, Oregon's adult correctional facilities currently house nearly 50 juvenile offenders serving life sentences.[106] Forty-two of those offenders are technically serving life sentences with the possibility of parole.[107] A life sentence with the possibility of parole means that the offender *should* have at least one opportunity to present his or her case to the Parole Board to be considered for release. On the surface, therefore, it seems that those offenders will have the opportunity to demonstrate why they do not deserve to die in prison. In practice, however, limitations on the way in which those offenders may present their cases for release render the possibility for parole improbable at best.

For example, under pre-Measure 11 sentencing schemes, an offender serving an indeterminate life sentence—received as a juvenile—may present a substantive case for release only after the Parole Board per-

L. PROJECT (Oct. 25, 2015), http://www.classroomlaw.org/files/posts-pages/resources/lesson_plans/general_info.pdf.

[105] Nancy Merritt, Terry Fain & Susan Turner, *Oregon's Measure 11 Sentencing Reform* 15–19 (RAND Corp. Pub. Safety & Justice Working Paper WR-100-NIJ, 2003), https://www.ncjrs.gov/pdffiles1/nij/grants/205507.pdf.

[106] Data Spreadsheet from Jeff Duncan, Research Analyst, Or. Dep't of Corr. (Apr. 20, 2015) (on file with Lewis & Clark Law Review) (containing sentencing data for current Oregon Department of Corrections inmates convicted of crimes committed as juveniles).

[107] *Id.*

forms a two-step process to determine when that offender should have an opportunity for release. First, the Board conducts a prison term hearing as dictated by section 144.120.[108] During that first hearing, the Board is not required to consider rehabilitative efforts demonstrated by the offender while in custody or any capacity for reform demonstrated by the offender.[109] Rather, the Parole Board looks to a predetermined sentencing matrix based on the characteristics of the crime, not the offender.[110] After reviewing that matrix, the Board sets the date at which the second step—a prison term hearing—can occur, often decades down the road. That second prison term hearing is where the Board performs an exit interview and considers the individual characteristics of the offender.[111] Thus, an offender may not receive a meaningful hearing for release—one where the Parole Board considers individual characteristics, demonstrated reform, or proclivity for rehabilitation—until that offender has spent decades in prison. Even after that second meaningful Parole Board hearing, offenders often have additional term-of-years sentences that may not begin running until the first life sentence ends—i.e., even after an offender is paroled from a life sentence, he or she may have additional sentences that begin to count as being served only after the offender is "paroled" from the life sentence.[112] Thus, the effect of these life sentences can, and often do, equate to life without the possibility of parole.

In addition to the offenders serving life sentences, technically with the possibility of parole, there are five men in Oregon serving sentences for life without the possibility of parole.[113] Although the Oregon legislature barred the imposition of a life-without-parole sentence on juveniles in 1985, the legislation did not provide for a reconsideration of the life-without-parole sentences that were currently being served by juvenile offenders in Oregon.[114] Consequently, these juvenile offenders continue to serve sentences that are now categorically barred. Because these offenders were sentenced for crimes committed before the age of 18 and are facing life sentences, they fall within the purview of offenders that the Supreme Court has consistently defined as deserving of lesser punishment, and that this Comment proposes should be afforded the Second Look hearing proposed in detail in Part V.

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[108] OR. REV. STAT. § 144.120 (2013).

[109] *Id.*

[110] OR. ADMIN. R. 255-032-005 (2015).

[111] *See* OR. REV. STAT. § 144.125 (2013).

[112] *See* OR. REV. STAT. § 137.120(5)(a) (2013) (permitting the imposition of consecutive sentences).

[113] Data Spreadsheet from Jeff Duncan, *supra* note 106.

[114] 1985 Or. Laws ch. 631 § 9 (codified as amended at OR. REV. STAT. § 161.620 (2013)); *see also Engweiler v. Bd. of Parole & Post-Prison Supervision*, 175 P.3d 408, 409–11 (Or. 2007) (describing the changes in Oregon's juvenile sentencing for juveniles).

III. EVOLVING STANDARDS AND JUVENILES IN THE SUPREME COURT

In the past 10 years, the Supreme Court has authored 3 opinions that prohibit the imposition of the harshest criminal penalties on juvenile offenders.[115] In each of these opinions, the Court explained that the Eighth Amendment to the United States Constitution, which prohibits the imposition of "cruel and unusual punishments,"[116] necessitates differential treatment of young offenders from their adult counterparts.[117] The Court has reasoned that the Eighth Amendment compels courts to examine the protections of the Constitution in light of "the evolving standards of decency that mark the progress of a maturing society."[118] Thus, as American society evolves, so too does the Court's definition of what is cruel and unusual.[119]

This evolution is significant in two ways when it comes to the sentencing of juvenile offenders. First, the Supreme Court has relied on evolving standards of decency (1) to determine that courts may not impose the death penalty on any offender under the age of 18 at the time of his or her offense, and (2) to require that sentencing courts consider individual characteristics of an offender before imposing the death sentence.[120] Second, the Court's interpretation of the Eighth Amendment, as applied to juvenile offenders, has evolved to bar the imposition of a life-without-parole sentence on juvenile offenders who did not commit a homicide.[121] The Court has further held that the Eighth Amendment forbids courts from imposing mandatory life-without-parole sentences for any juvenile offender—regardless of the offense committed.[122]

The next Parts will first describe the way that the Supreme Court's death penalty jurisprudence evolved to adopt a categorical bar against

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[115] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (barring the death penalty for offenders under the age of 18 at the time of their crime); Graham v. Florida, 560 U.S. 48, 82 (2010) (prohibiting life-without-parole sentences for nonhomicide juvenile offenders); Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (precluding mandatory life-without-parole sentences for all juvenile offenders). And, most recently in *Montgomery v. Louisiana*, No. 14–280, slip op. at 21 (U.S. Jan. 25, 2016), the Court reiterated the holding of *Miller*—"that children who commit even heinous crimes are capable of change."

[116] U.S. CONST. amend. VIII.

[117] *Graham,* 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464, 2468; *Simmons*, 543 U.S. at 568–70.

[118] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[119] Megan Annitto, Graham*'s Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of* Graham *and* Miller, 80 BROOK. L. REV. 119, 123 (2014).

[120] *Simmons*, 543 U.S. at 560–64.

[121] Annitto, *supra* note 119, at 124.

[122] *Miller*, 132 S. Ct. at 2460.

sentencing juveniles to death and to require sentencing courts to account for individual characteristics of defendants. Then, the following Parts will explain how the Court has relied upon those two lines of precedents in determining that life-without-parole sentences may not be imposed on nonhomicide juvenile offenders and may not be imposed on any juvenile offender if the sentencing court cannot consider the individual characteristics of a juvenile offender.

A. Death Is Different: Death Penalty Supreme Court Jurisprudence

Two lines of death-penalty jurisprudence indicate the importance of prohibiting the imposition of harsh penalties on juvenile offenders. First, cases in which the Supreme Court has decided that a certain class of offenders should be categorically exempt from the death penalty demonstrate the Court's aversion to sentencing juvenile offenders to penalties meant to be reserved for the most incorrigible offenders. In a second line of cases, the Court has required that sentencing courts consider the individual characteristics of an offender before imposing the death penalty. The following Subparts will analyze both lines of cases in turn.

1. Evolution of Standards of Decency—Categorical Bars on the Death Penalty for Certain Types of Offenders

The Supreme Court has traditionally applied a two-step test to determine whether the imposition of the death penalty on a specific class of offenders comports with the Eighth Amendment. First, "the Court determines whether 'objective indicia of society's standards' demonstrate a national consensus against the death penalty."[123] In making this determination, the Court looks to whether state legislatures have approved or barred the imposition of the death penalty for a certain type of offense or upon a certain category of offender, and how frequently approved death sentences are actually imposed.[124] This step reflects the Court's long reliance on nationwide views for the definition of evolving standards of decency, but it is not dispositive to determining the constitutionality of the imposition death penalty.

At the second step, the Court makes a subjective and independent determination about whether capital punishment for this particular class of offenders violates the Eighth Amendment.[125] In making this determi-

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[123] Alison Siegler & 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, 334 (quoting Roper v. Simmons, 543 U.S. 551, 563 (2005)); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (discussing the importance of "objective indicia that reflect the public attitude toward a given sanction").

[124] Siegler & Sullivan, *supra* note 123, at 335.

[125] *Id.* at 335. This test has also been applied to categorical bans on the death penalty for certain offenses, but the reasoning is not applicable to the scope of this

nation, the Court balances two factors—the seriousness of the crime or class of crime at issue, and the culpability of the offender or class of offenders—against a third factor, the severity of the punishment.[126] This second step allows the Court to consider the well-established "penological justifications" for the death penalty—particularly, whether the death penalty in that case serves the goals of retribution and deterrence.[127] The justifications—retribution and deterrence—play a significant role in the evaluation of sentences for juveniles because the Court has found that the young age of an offender makes the offender more likely to take risks, which renders deterrence less effective.[128] The evolution of the Supreme Court's precedent on the matter also demonstrates that the Court has come to recognize that the diminished culpability of young offenders also decreases the applicability of the retributive justification.

Until the 1980s, juvenile defendants were subject to the death penalty. In 1988, the Court determined that imposing the death penalty on offenders 15 years old and younger violated the Eighth Amendment.[129] The Court explained that a "teenager [is] less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[130] The Court reasoned that this lesser culpability, combined with the capacity for growth and society's fiduciary obligations to children, made the retributive purpose of the death penalty inapplicable to the execution of a 15-year-old offender.[131] Additionally, the Court explained that because the death penalty was so rarely imposed on offenders 15 years old or younger, it did not serve as a deterrent.[132] Thus, the Court held neither retribution nor deterrence could be served by the application of the death penalty to offenders under the age of 16 at the time their offenses were committed. As such, the sentence becomes "nothing more than the purposeless and needless imposition of pain and suffering," and is thus unconstitutional.[133]

Comment. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419–26 (2008) (holding that the imposition of the death penalty on an offender who rapes a child is cruel and unusual punishment).

[126] Siegler & Sullivan, *supra* note 123, at 335.

[127] *Id.*

[128] Part V, *infra,* discusses the developmental differences between youth and adults in detail.

[129] Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

[130] *Id.* at 835.

[131] *Id.* at 836–37.

[132] *Id.* at 837–38. The Court also noted that the improbability that a child would conduct the cost-benefit analysis necessary for the death penalty to serve a deterrent function and the low number of executions in the last century render the deterrence even less likely. *Id.*

[133] *Id.* at 838 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

A mere year later, in *Stanford v. Kentucky*, the Supreme Court held that it did not violate contemporary standards of decency to execute juvenile offenders over the age of 15 but under the age of 18.[134] In explaining its decision, the majority relied heavily on the lack of consensus nationally on proscription of the death penalty.[135] *Stanford* was decided during the rise in the tough-on-crime attitude. Thus, the majority's determination about the imposition of the death penalty on youth mirrored the nation's trend toward crime-centric punishment instead of sentences that accounted for an offender's characteristics. The dissent in *Stanford*, however, called for a greater focus on the *personal culpability* of a juvenile offender and recognition that the use of the death penalty for young offenders was on the decline in many states.[136] These criticisms foreshadowed the evolving standards of decency that the Court would rely upon in the coming decades to overrule *Stanford*.

In 2005, as the tough-on-crime rhetoric began to fall into disfavor, the Supreme Court deemed appropriate a categorical ban on the imposition of the death penalty on juvenile offenders in *Roper v. Simmons*.[137] The Court recognized that juveniles are categorically different than adults, and that these differences render them less culpable for crimes committed during the tumultuous adolescent stage.[138] In doing so, the Court applied the two-step test described above. First, the Court reviewed the national trend away from imposing the juvenile death penalty.[139] The Court remarked that only three states had executed offenders for crimes committed as juveniles and that 30 states had either statutorily, or through judicial interpretation, banned the practice.[140] This trend, the Court explained, demonstrated that the indicia of consensus that supported the

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[134] 492 U.S. 361, 380–83 (1989). That same day the Court decided, in *Penry v. Lynaugh*, that the Eighth Amendment did not require a categorical exemption from the death penalty for the "mentally retarded." 492 U.S. 302, 340 (1989). *Penry* was later overruled by *Atkins v. Virginia*, which held that evolving standards of decency—indicated by nationwide legislative enactments and state practices—called for a categorical bar on the imposition of the death penalty on offenders with developmental disabilities. 536 U.S. 304, 314–15 (2002).

[135] *Stanford*, 492 U.S. at 370–72, 377 (citing Tison v. Arizona, 481 U.S. 137, 149 (1987) (vacating a death sentence for major participation in a felony with reckless indifference to human life)).

[136] *Id.* at 393–94 (Brennan, J., dissenting). The dissent further explained, "[A] majority of States decline to permit juveniles to be sentenced to death; imposition of the sentence upon minors is very unusual even in those States that permit it; and respected organizations with expertise in relevant areas regard the execution of juveniles as unacceptable, as does international opinion." *Id.* at 405.

[137] 543 U.S. 551, 578 (2005).

[138] *Id.* at 569–71.

[139] *Id.* at 564–67.

[140] *Id.* at 564–65.

decision in *Stanford* had clearly changed.[141] As such, the Court concluded that the objective prong of the test weighed in favor of banning the death penalty for juveniles.[142]

Then, turning to the subjective step of the analysis, the Court explained that the death penalty was to be reserved for the worst offenders and that differences between adult and juvenile offenders prevented juveniles from being reliably classified as "among the worst offenders."[143] First, juveniles lack maturity and a sense of responsibility, making them more reckless than adults.[144] Also, their impressionable nature makes juveniles "more vulnerable or susceptible to negative influences and outside pressures" because they have less control over their surroundings.[145] Finally, the Court relied on the "transitory" nature of juveniles in distinguishing them from adults.[146] Because of the impermanent nature of adolescence, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[147] Thus, the Court found that a system, which permitted the failings of a juvenile to be equated with the failings of an adult by imposing upon them the same death sentence, was impermissible.[148]

Finally, the Court explained that the brutality of crimes committed by some juvenile offenders necessitated the categorical ban.[149] The Court reasoned that the shocking nature of some crimes could render juries incapable of correctly accounting for the mitigating circumstance of an offender's age.[150] The Court wanted to ensure that juries would not disre-

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[141] *Id.* at 565–66, 574. The Court also noted that the United States remained the only country in the world to sanction the juvenile death penalty. The Court explained that international opinion was not controlling in the outcome, but that it did provide "respected and significant confirmation" of the Court's decision to ban the sentence. *Id.* at 575.

[142] *Id.* at 567.

[143] *Id.* at 568–69.

[144] *Id.* at 569–70; *see also* Jordon Calvert Greenlee, *Victims of Youth: Equitable Sentencing Reform for Juvenile Offenders in the Wake of* Miller v. Alabama *and* Jackson v. Hobbs, LAW & INEQ. 263, 266 (2015).

[145] *Simmons*, 543 U.S. at 569; *see also* Greenlee, *supra* note 144, at 266.

[146] *Simmons*, 543 U.S. at 570; *see also* Greenlee, *supra* note 144, at 266.

[147] *Simmons*, 543 U.S. at 570.

[148] *Id.*

[149] *Id.* at 572–73. Mr. Simmons' case was a particularly good example of a circumstance in which the jury might overlook youth due to particular depravity. The crime was a particularly heinous homicide in that it involved a home invasion, kidnapping, and drowning of the victim. *Id.* at 556–57. The state relied on age in combination with a violent killing, as an aggravating factor in its closing argument. The prosecutor said, "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit." *Id.* at 558.

[150] *Id.* at 573.

gard the flaws of an underdeveloped adolescent mind because of a sense of fear or dread evoked by the crime committed.[151] Thus, the Court took the decision out of the hands of juries altogether and banned any imposition of the death penalty on juvenile offenders.

Simmons emphasized that "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."[152] The Court determined that juveniles could never be deserving of such a severe punishment.[153] In a separate line of death penalty cases, which evolved prior to the ban on the imposition of the death penalty on juvenile offenders, the Supreme Court emphasized the importance of allowing a sentencing court to consider individual characteristics of all defendants before sentencing them to death.

2. Emphasis on Individual Characteristics of a Defendant

In addition to categorical bans on the death penalty for certain classes of offenders, the Supreme Court has determined that sentencing authorities must consider individual characteristics of a defendant before sentencing him or her to death.[154] In *Woodson*, the Court held that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment.[155] The Court reasoned that a *mandatory* sentencing scheme was flawed because it precluded the sentencing court from considering compassionate or mitigating factors.[156] Since *Woodson*, multiple Supreme Court decisions have explained that capital defendants must have an opportunity to present mitigating factors. The presentation of mitigating evidence, the Court has explained, ensures that the death penalty is reserved for only the most culpable defendants who committed the most serious offenses.[157]

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[151] *Id.*

[152] *Id.* at 568.

[153] *Id.*

[154] Woodson v. North Carolina, 428 U.S. 280, 291 (1976) (plurality opinion) (describing the adoption of discretionary sentencing by many states); Lockett v. Ohio, 438 U.S. 586, 605 (1978).

[155] 428 U.S. at 305.

[156] *Id.* at 304–05. The statute at issue in *Woodson* excluded all mitigating evidence. The Court explained that "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* at 304.

[157] Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012) (explaining *Woodson* and its progeny); Johnson v. Texas, 509 U.S. 350, 360–61 (1993) (reviewing the evolution of death penalty case law in relation to Eighth Amendment requirements for mitigation factors).

In evaluating the individual characteristics of capital defendants, the Court has placed special emphasis on the importance of age as a mitigating factor. In *Eddings v. Oklahoma*, the Court invalidated a defendant's death sentence because the judge did not consider the defendant's background and emotional disturbance.[158] The offender's background was particularly relevant—more so than it would have been with an adult offender—because of the significant impact that background, emotional development, and mental development has on the culpability of a young defendant. The majority in *Eddings* effectively adopted the rule espoused by the plurality in *Lockett v. Ohio*: that a state may not cut off the presentation of mitigating evidence, or limit the inquiry so severely as to exclude evidence from the sentencing decision.[159] Building on *Eddings* and *Locket*, the Court in *Johnson v. Texas* specifically emphasized the importance of "mitigating qualities of youth" and affirmed the constitutionality of a sentencing scheme that allowed the sentencer to consider a defendant's age.[160] This sentiment echoed what the Court had explained a decade earlier in *Eddings*, that "youth is more than a chronological fact."[161]

The assertion that age is significant beyond a mere fact helped lay the groundwork for future challenges to sentencing schemes involving young offenders. The Supreme Court made clear that a sentencing court must carefully consider mitigating factors and individual characteristics of an offender before imposing a sentence as severe as the death penalty. In the next line of cases, the Court continued that reasoning to apply to life without parole, a sentence that is the next most severe to death.

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[158] 455 U.S. 104, 113–17 (1982).

[159] 438 U.S. 586, 605 (concluding that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); *see also Johnson*, 509 U.S. at 360–61 (reviewing the progeny of the *Lockett* rule).

[160] *Johnson*, 509 U.S. at 367. The defendant in *Johnson* had been convicted of capital murder. *Id.* at 353. The Court's discussion of the defendant's youth in that case was preceded by the history of violent acts committed by the defendant. *Id.* at 355–56. The defendant had proposed a new rule to invalidate Texas's statute because an offender's youth could never be given proper mitigating force under the structure of Texas's capital procedure statute. Brief for Petitioner at *32–33, Johnson v. Texas, 509 U.S. 350 (1993) (No. 92-5653), 1993 WL 476436. The Court explained that the testimony from the defendant's father—which specifically focused on his son's youth and amenability for reform—afforded the jury the opportunity to account for the defendant's young age in imposing a death sentence. *Johnson*, 509 U.S. 350 at 368.

[161] *Eddings*, 455 U.S. at 115.

B. Life for Children Is Different

Traditionally, before *Graham* and *Miller*, the Supreme Court analyzed Eighth Amendment challenges under two distinct frameworks for capital and non-capital cases. In death penalty cases, as described above, the Court applied a two-step objective and subjective test to evaluate whether the Eighth Amendment required a categorical bar on the application of the death penalty either based on the class of offender or a type of offense. In non-capital cases, however, the Court looked only to whether a defendant's individual sentence was grossly disproportionate to his or her crime.[162]

The individual proportionality test for noncapital sentences is a two-stage balancing test.[163] The initial question focuses on proportionality of the sentence to the crime committed.[164] If the defendant can establish that his or her sentence is grossly disproportionate to the crime committed, a high threshold to cross, the Court turns to the second step. The second step is an intrajurisdictional and interjurisdictional analysis comparing the defendant's sentence to other sentences for the same crime in the same jurisdiction and other sentences for the same crime in different jurisdictions.[165] The Court has emphasized that the proportionality principle forbids only extreme sentences and the test has proved to be an exceptionally difficult hurdle for most offenders.[166]

In *Graham* and *Miller*, the Court stepped away from previously clear application of this analytical framework in noncapital cases. Instead, the Court analyzed life-without-parole sentences for juveniles under the two-step test previously used to determine only if a categorical ban on the death penalty was appropriate for certain classes of offenders or types of offenses.

1. Graham v. Florida

In *Graham*, the Supreme Court applied a categorical bar on noncapital sentence to an entire class of offenders for the first time.[167] The Court

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[162] Mark T. Freeman, Comment, *Meaningless Opportunities:* Graham v. Florida *and the Reality of De Facto LWOP Sentences*, 44 McGeorge L. Rev. 961, 964 (2013).

[163] Walker Sterling, *supra* note 22, at 1032–33.

[164] Siegler & Sullivan, *supra* note 123, at 337.

[165] Walker Sterling, *supra* note 22, at 1032.

[166] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (allowing a life-without-parole sentence for possession of a large quantity of cocaine); Rummel v. Estelle, 445 U.S. 263, 274 n.11, 284–85 (1980) (allowing a life-without-parole sentence for a defendant's third nonviolent felony); Ewing v. California, 538 U.S. 11, 23, 30–31, (2003) (upholding a 25-to-life sentence for the theft of golf clubs).

[167] Graham v. Florida, 560 U.S. 48, 102 (2010) (Thomas, J., dissenting) ("For the first time in its history, the Court declares an entire class of offenders immune from a

determined that the proportionality requirement, central to the Eighth Amendment, prohibited life-without-parole sentences for juveniles convicted of nonhomicide offenses.[168] The Court explained that applying the individual proportionality test previously used for challenges to specific noncapital sentences was inappropriate because the entire sentencing scheme of imposing life-without-parole sentences to any nonhomicide juvenile offender needed reevaluation.[169] Thus, the Court determined the appropriate inquiry would be the test for categorical bar of the death penalty previously applied in *Roper*, *Atkins*, and *Kennedy*.[170]

The Court in *Graham*, following the first step in the death penalty analysis, looked to the objective indicia of the use of life-without-parole sentences nationwide. The Court explained that although 37 states permitted the imposition of life without parole for some nonhomicide offenders, actual sentencing practices in the country demonstrated a trend away from using the sentence.[171] For example, only 123 nonhomicide juvenile offenders were serving life-without-parole sentences at the time of the decision, and of those 77 were serving sentences in Florida.[172] The trend in most states, the Court concluded, was against imposing the sentence in practice.[173]

The Court then discounted the four accepted penological justifications for life without parole as applied to juveniles: retribution, deterrence, incapacitation, and rehabilitation.[174] According to the Court, the diminished culpability of a juvenile and the lessened severity of a nonhomicide offense undermine the goal of retribution.[175] Likewise, a juvenile's lack of maturity and underdeveloped sense of responsibility render deterrence insufficient.[176] Incapacity, the Court explained, was also inad-

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noncapital sentence using the categorical approach it previously reserved for death penalty cases alone."); *see also* Siegler & Sullivan, *supra* note 123, at 338.

[168] "The concept of proportionality is central to the Eight Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham*, 560 U.S. at 59 (majority opinion) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

[169] *See id.* at 61–62.

[170] *Id.*; Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (holding that the death penalty for the rape of a child, without a result or intent of death of the victim, violated the Eighth Amendment).

[171] *Graham*, 560 U.S. at 62–67.

[172] *Id.* at 64.

[173] *Id.* at 67.

[174] *Id.* at 71; *see also* Ewing v. California, 538 U.S. 11, 25 (2003) ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.").

[175] *Graham*, 560 U.S. at 71.

[176] *Id.* at 72.

equate to justify life without parole for a nonhomicide juvenile offender.[177] And finally, because life without parole entirely forecloses the possible reentry of an offender into society, it also forswears the rehabilitative justification.[178] Therefore, the Court held the sentencing practice is cruel and unusual.[179]

The Court next explained why a categorical bar on life without parole for juvenile nonhomicide was necessary and a finding that the sentence was unconstitutional as applied only to the defendant in the case was insufficient.[180] The Court identified three problems with case-by-case decision-making when it comes to the imposition of a life-without-parole sentence on nonhomicide juveniles offenders: (1) the challenges of appropriately sentencing juveniles, (2) the difficulties faced by trial counsel in representing juveniles, and (3) the fact that life without parole completely precludes the opportunity for a juvenile offender to demonstrate maturation and reform.[181]

First, the Court explained that unique challenges in juvenile sentencing necessitate the removal of life without parole as a possible sentence for nonhomicide offenders.[182] The Court explained that because a sentencing court may not appropriately identify and protect juveniles who have a capacity for change, keeping life without parole as a sentencing option created an unacceptable likelihood "that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course."[183] The Court noted that even *the possibility* that a sentencing court would impose life without parole based on a "subjective judgment that the defendant's crimes demon-

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[177] *Id.*

[178] *Id.* at 74.

[179] *Id.* at 75.

[180] *Id.*

[181] *Id.* at 77–79.

[182] *Id.* To explain these challenges, the Court revisited the differences between an adult and juvenile offender first discussed in *Roper*—(1) the lack of maturity and increased recklessness of juveniles, (2) the heightened vulnerability to outside influences, and (3) the potentially transitory nature of a juvenile's personality. *Id.*; *see also* Roper v. Simmons, 543 U.S. 551, 569–70 (2005); Greenlee, *supra* note 144, at 267–68. This Comment discusses these three differences in depth in Part IV, *infra*.

[183] *Graham*, 560 U.S. at 77–78 (quoting *Roper*, 543 U.S. at 573). The petitioner in *Graham* was Terrance Jamar Graham. As the Court notes, Graham grew up in a tough environment—both parents addicted to crack cocaine—and he grew up quickly, drinking alcohol by age nine and smoking pot by age 13. Graham was involved in a robbery gone wrong, and the sentencing judge decided to impose life without parole—a sentence greater than that requested by the prosecutor. The judge did so because he concluded that Graham, at the age of 17, was incorrigible. *Id.* at 53–57; *see also* Greenlee, *supra* note 144, at 267–68.

strate[d] an 'irretrievably depraved character'" was impermissible.[184] The Court explained that a sentencing court could not be allowed to subjectively determine that a juvenile was beyond reform instead of objectively finding the juvenile was sufficiently culpable under the proper principles of punishment.[185] The only way to prevent an improper subjective determination was completely eliminating the option of life without parole.

Second, the Court noted the particular difficulties faced by counsel in the representation of juveniles.[186] "Juveniles mistrust adults, have limited understandings of the criminal justice system" and are "less likely than adults to work effectively with their lawyers to aid in their defense."[187] Thus, the Court explained that youth are more likely than adults to impede their own defenses and allow a court or jury to erroneously conclude that a particular juvenile is sufficiently culpable based on ineffective representation.[188]

Finally, the Court explained that all juvenile nonhomicide offenders should have a chance to demonstrate maturity and reform.[189] A juvenile sentenced to die in prison has "no chance for reconciliation with society, no hope."[190] That result stands in direct contradiction to the overwhelming scientific evidence demonstrating the amenability of a youth to rehabilitation.[191] Thus, the Court opined that a categorical ban on life-without-parole sentences avoids the perverse consequence of a juvenile offender becoming complicit with spending the rest of his or her life in prison and never attempting to improve beyond the person he or she was at the time of the offense.[192]

The decision in *Graham* created a platform for three revolutionary changes to juvenile and death penalty jurisprudence.[193] Primarily, *Graham* likened life without parole to the death penalty itself. In doing so, the Court acknowledged that both sentences strip an offender of his or her most basic liberties without any hope of restoration.[194] The Court's decision prompted Justice Thomas, one of the three dissenters, to remark:

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[184] *Graham*, 560 U.S. at 76.

[185] The four accepted sentencing goals are: retribution, deterrence, incapacitation, and rehabilitation. *See id.* at 71.

[186] *Id.* at 78; *see also* Mary Berkheiser, *Developmental Detour: How the Minimalism of* Miller v. Alabama *Led the Court's "Kids are Different" Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489, 506 (2013).

[187] *Graham*, 560 U.S. at 78.

[188] *Id.*

[189] *Id.* at 79.

[190] *Id.*

[191] *See* discussion in Part V, *infra.*

[192] *Graham*, 560 U.S. at 79.

[193] Walker Sterling, *supra* note 22, at 1034–35.

[194] *Graham*, 560 U.S. at 69–70.

"'Death is different' no longer."[195] Second, the Court reaffirmed the constitutional importance of brain-development research, first recognized in *Roper* and discussed in detail below.[196] Third, the Court considered and definitively denied a case-by-case sentencing approach for juvenile nonhomicide offenders facing death in prison.

2. Miller v. Alabama

Two years after the decision in *Graham*, the Supreme Court determined that a sentencing scheme that required the imposition of life without parole on any juvenile offender violated the Eighth Amendment.[197] Unlike in *Graham*, which applied to nonhomicide offenders only, the Supreme Court in *Miller* determined that no juvenile offenders—regardless of the crime they committed—should be statutorily mandated to serve life without parole.[198] But instead of adopting a categorical bar on life-without-parole sentences as it had in *Graham*, the Court in *Miller* determined that sentencing courts must consider the individual characteristics of a juvenile offender before imposing life without parole on juvenile defendants charged with homicide.[199] Thus, the reasoning in *Miller* expanded the scope of *Graham* by applying it to all juvenile offenders and clarified the importance of the age of an offender by insisting that sentencing courts consider an offender's individual characteristics.

The Court explained that the decision to ban mandatory life-without-parole sentences was the logical conclusion of two lines of reasoning apparent in recent Supreme Court cases addressing the proportionality of punishments under the Eighth Amendment.[200] First, the Court explained that under *Roper* and *Graham*, children are constitutionally different from adults for the purpose of sentencing.[201] Second, the Court noted that under *Woodson* and *Lockett*, mandatory capital sentences are unconstitutional and that the Eighth Amendment requires sentencing authorities to consider the characteristics of a defendant.[202] The Court found the latter line of cases applicable to juvenile life-without-

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[195] *Id.* at 103 (Thomas, J., dissenting).

[196] *Id.* at 68; *see also* Part V, *infra*.

[197] Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

[198] *Id.* at 2475.

[199] *Id.* at 2471; *see also* Montgomery v. Louisiana, No. 14-280, slip op. at 13–14 (U.S. Jan. 25, 2016) (explaining that although *Miller* did not impose a formal fact-finding requirement on sentencing courts before they may impose a life-without-parole sentence, it "does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole").

[200] *Miller*, 132 S. Ct. at 2464.

[201] *Id.* at 2463. The court described these cases as adopting "categorical bans on sentencing practices based on mismatches between the culpability of offenders and the severity of a penalty." *Id.*

[202] *Id.* at 2463–64.

parole sentences because of *Graham*'s recognition that life without parole for juveniles is akin to the death penalty.[203] Thus, the Court concluded that mandatory sentencing that precludes consideration of individual characteristics before sentencing a juvenile to die in prison violates the Eighth Amendment to the Constitution.[204]

The Court first relied upon the distinctions between adults and juveniles and the inapplicability of the penological justifications to young offenders explained in *Graham*, noting that *Graham*'s "reasoning implicates *any* life-without-parole sentence imposed on a juvenile, even [though] its categorical bar relates only to nonhomicide offenses."[205] The Court explained that the fundamental insistence in *Graham* is that youth matters. The mandatory sentencing scheme at issue, the Court concluded, was flawed because it did not allow a sentencer to account for the perpetrator's youth or the gravity of a life-without-parole sentence.[206] Therefore, the Court explained that the offender's youth and the equivalence of a life-without-parole sentence to the death penalty must be accounted for when evaluating the validity of a sentencing scheme.

The Court then invoked the line of cases requiring analysis of an individual's characteristics before imposing the most serious of punishments and applied it, through *Graham*, to juvenile life-without-parole sentences.[207] A judge and jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.[208] The Court further criticized the twice-removed discretion in sentencing schemes that first transfer juveniles into adult sentencing courts and then subject them to adult penalties.[209] In many sentencing schemes, like the ones from Alabama and Florida, neither step allows for judicial reevaluation of the individual characteristics of the offender. The Court explained that a cursory pretrial-stage evaluation does not remedy the issue because those proceedings do not provide full and in-depth consideration of the child or the circumstances of his or her offense.[210] Thus, the schemes impermissibly require the imposition of the harshest

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[203] *Id.* at 2466.

[204] *Id.* at 2469.

[205] *Id.* at 2465 (emphasis added).

[206] *Id.* at 2467–68.

[207] *Id.* at 2468 ("*Graham* indicates that a similar rule [invalidating mandatory death penalties for juveniles] should apply when a juvenile confronts a sentence of life (and death) in prison.").

[208] *Id.* at 2475; *see also* William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1083 (2013).

[209] *Miller*, 132 S. Ct. at 2474–75.

[210] *Id.* at 2474.

sentence with no real opportunity for consideration of the juvenile offender's unique characteristics.[211]

The Court explained that its decision does not require a state to guarantee eventual freedom.[212] A meaningful opportunity for consideration is sufficient. But the Court explicitly chose not to consider whether the Eighth Amendment requires a categorical bar on all life-without-parole sentences for juveniles.[213] The Court's logic clearly emphasizes the importance of considering a juvenile's circumstances and the great care that should be exercised when sentencing a child to die in prison.

At bottom, the reasoning in *Graham* and *Miller* has two important implications for state sentencing schemes. First, state sentencing schemes must account for the fact that "children are different." Second, states must acknowledge that life without parole, particularly for juveniles, is a uniquely harsh punishment that should be reserved for only the most incorrigible of offenders. Oregon's Measure 11 sentencing scheme continues to mandatorily impose adult sentences on juvenile offenders. Even though Oregon's sentencing scheme does not specifically allow for life-without-parole sentences, this Comment argues that *Graham* and *Miller* should extend to any sentence that results in a juvenile spending life in prison, which would require a change in the way that Oregon's juvenile sentencing scheme currently allows de facto life-without-parole sentences.

IV. BEYOND THE TEXT OF *MILLER* AND *GRAHAM*—APPLICATION TO DE FACTO LIFE SENTENCES

In *Graham*, the Court explained that the bar on imposing life without parole was not a bar on life sentences per se. Rather, the Court was requiring states to provide juvenile offenders some *meaningful opportunity to obtain release* based on demonstrated maturity and rehabilitation.[214] The Eighth Amendment, the Court clarified, forbids States from making the judgment at the outset that juvenile nonhomicide offenders would never be fit to reenter society.[215] In *Miller*, the Court explained that mandating a life-without-parole sentence for any juvenile is similarly unconstitutional. The Court in *Miller* again chose to confine its decision to the facts of the case at hand, which implicated only sentencing schemes that mandated

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[211] *Id.*

[212] *Id.* at 2469.

[213] *Id.* For a persuasive argument that, to comport with the rejection of case-by-case individualized sentences in *Graham* and *Roper*, the Court should have outright banned life-without-parole sentences for juveniles, see generally Berkheiser, *supra* note 186.

[214] *Graham*, 560 U.S. at 75.

[215] *Id.*

the imposition of life-without-parole sentences. [216] This Comment suggests that the Court's reasoning in *Graham* and *Miller* necessitates a ban on any "life sentence"—meaning any sentence that effectively requires a juvenile to spend the rest of his or her life in prison—and requires a change in Oregon's Measure 11 sentencing scheme for two reasons.

First, the three problems with the imposition of life-without-parole sentences identified in *Graham*—(1) the challenges of appropriately sentencing juveniles, (2) the difficulties faced by trial counsel in representing juveniles, and (3) the need for an opportunity for a juvenile offender to demonstrate maturation and reform—extend to any sentencing scheme that allows a court to sentence a juvenile to spend the rest of his or her life behind bars. And second, the requirement from *Miller* that sentencing courts consider individual characteristics of juvenile offenders—and only very rarely impose life sentences on juveniles—logically applies to all mandatory sentencing proceedings where a juvenile faces a life sentence.[217] This Part explains each of these arguments in turn.

A. Graham *and the Unique Challenges of Sentencing Juveniles Under Measure 11*

Graham's decision to ban life-without-parole sentences for nonhomicide juvenile offenders effectively compared a life-in-prison sentence for a juvenile to a death sentence for an adult. In doing so, the Court started

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[216] *Miller*, 132 S. Ct. at 2469 ("By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.").

[217] The Court in *Montgomery v. Louisiana*, No. 14-280, slip op. (U.S. Jan. 25, 2016), provides even stronger support for this conclusion because it not only announced that *Miller*'s ban on mandatory life-without-parole sentences is a substantive constitutional rule—retroactively applying that rule—but, it also suggested that states provide juvenile offenders facing life in prison with parole hearings. *Id.* at 13. The Court explained that "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* at 21. That opportunity to ensure that juvenile offenders do not serve disproportionate sentences is exactly what this Comment calls upon the Oregon legislature to provide. The Supreme Court of South Carolina's explanation of *Miller* is also persuasive: "*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." Aiken v. Byars, 765 S.E.2d 572, 577 (S.C. 2014).

its analysis with the proposition that sentencing a juvenile offender to die in prison can be equated to the imposition of a death penalty.[218]

After establishing that a life-without-parole sentence for a juvenile is effectively a death sentence, the Court provided three reasons for banning life-without-parole sentences for all nonhomicide juvenile offenders. The first is the possibility that a sentencing court could improperly rely on a subjective judgment about a juvenile's crimes rather than on an individual assessment of the offender's culpability.[219] This reasoning applies to any sentencing scheme that results in a life sentence, and also to extremely long sentences, like Measure 11 sentences in Oregon. Sentencing courts in Oregon are required to sentence juvenile offenders as adults for Measure 11 crimes.[220] As such, the sentencing court cannot appropriately identify juveniles who have a capacity for change and protect them from disproportionately harsh sentences. Instead, courts are allowed to impose higher sentences, but prohibited from imposing a lower sentence. This sentencing scheme forces sentencing courts to focus on the crime itself and not the offender. Consequently, sentencing courts are encouraged to subjectively determine that a juvenile is beyond reform, instead of objectively finding that the juvenile was sufficiently culpable under the proper principles of punishment.[221]

Likewise, lawyers face difficulty representing juveniles not only in life-without-parole proceedings, but in *all* juvenile proceedings. Thus, the Supreme Court's second justification for categorically banning life-without-parole sentences also applies to Measure 11 sentences.

Finally, the Court in *Graham* explained that "all juvenile nonhomicide offenders should have a chance to demonstrate maturity and reform."[222] This is true for juvenile offenders subject to Measure 11 sentencing schemes as well. Long sentences imposed under Measure 11 prohibit a juvenile from demonstrating that he or she has reformed and matured beyond the person who committed the original offense.

Notably, the Ninth Circuit recently decided that a 254-year-and-four month sentence—with the earliest possible date of parole at 127 years—is "materially indistinguishable" from the sentence in *Graham*.[223] The court reasoned, "Because Moore would have to live to be 144 years old to be eligible for parole, his chance for parole is zero."[224] The result of this and

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[218] *Graham*, 560 U.S. at 69–70.

[219] *Id.* at 77.

[220] MISGUIDED MEASURES, *supra* note 67, at 28.

[221] As noted above, the four accepted principles are: retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 71.

[222] *Id.* at 79.

[223] Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013).

[224] *Id.* In *Goins v. Smith*, 556 F. App'x 434, 438–39 (6th Cir. 2014), however, the Sixth Circuit held that *Graham* does not clearly apply to de facto life sentences and

other effective life sentences is that a juvenile must live the remainder of his or her life in prison, "knowing that he is guaranteed to die in prison regardless of his remorse, reflection, or growth."[225] These sentences are therefore counter to the idea proposed by the Supreme Court in *Graham* that juvenile offenders should have the opportunity to improve and mature.

The Supreme Court's three justifications for finding life-without-parole sentences to be unconstitutional, articulated in *Graham*, demonstrate the flaws of life, or extremely long, sentences imposed on juvenile offenders. The same flaws occur in de facto life sentences imposed on juvenile offenders in Oregon. *Graham* applied only to nonhomicide juvenile offenders; thus, one could argue that its protections should not be afforded to juveniles sentenced for homicide offenses. Applying the reasoning of *Graham* to de facto life sentences imposed under Measure 11 would thus not excuse homicide offenders. In *Miller*, however, the Court explained that *mandatory* life-without-parole sentencing was impermissible for *any* juvenile offender. Measure 11 sentences, like the life-without-parole sentences at issue in *Miller*, are *mandatory*. Thus, *Graham* calls the length of Measure 11 sentences into question; similarly, *Miller* calls the mandatory structure of the sentencing into question.

B. Miller *and Adequate Consideration of an Offender's Characteristics*

In *Miller*, the Court explained that mandatory life-without-parole sentences are problematic because the sentencing court cannot account for a juvenile's unique opportunity for reform.[226] The same is true for a sentencing scheme that mandates the imposition of long sentences, such as Measure 11.

The Court in *Miller* indicated that a sentencing scheme should allow sentences that mean a life behind bars only as a very last resort for the most incorrigible youth.[227] The Court also explained that mandatory sen-

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noted that courts are split over the application of *Graham* as to term-of-years sentences.

[225] *Moore*, 725 F.3d at 1192. Other state courts have also held that de facto life sentences are subject to the ban imposed by *Graham*. *See, e.g.*, Henry v. State, 175 So. 3d 675, 680 (Fla. 2015), *reh'g denied* (Sept. 24, 2015); People v. Caballero, 282 P.3d 291, 293 (Cal. 2012) (holding that *Graham* applies to de facto life sentences); People v. J.I.A., 127 Cal. Rptr. 3d 141, 149 (Ct. App. 2011); People v. De Jesus Nunez, 125 Cal. Rptr. 3d 616, 624 (Ct. App. 2011); *see also* Annitto, *supra* note 119, at 125.

[226] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

[227] *Id.* That sentiment has now also been reemphasized by the Supreme Court, in Montgomery v. Louisiana, No. 14-280, slip op. (U.S. Jan. 25, 2016). In *Montgomery*, the Court explains that after *Miller* "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is *necessary* to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at

tencing schemes are unconstitutionally unfair because the sentencer is not presented with a real choice to evaluate mitigating evidence.[228] Similarly, in Oregon, Measure 11 currently forces a judge to impose mandatory sentences without considering the juvenile offender's mitigating characteristics. This requirement runs completely contrary to the idea in *Miller* that a sentencing court should have the opportunity to evaluate the individual circumstances of a young offender before imposing a severe sentence.

This Comment, thus, contends that the appropriate solution to the problems with Measure 11 is to afford juvenile offenders with Second Look hearings. A sentencing judge cannot appropriately account for mitigating evidence during the first sentencing proceedings for a juvenile offender because that offender is still in the throes of adolescence and has not yet developed into the person he or she will become. Thus, the Second Look hearing should occur after the juvenile's brain has had time to develop out of adolescence.

V. POLICY RECOMMENDATION—A CALL FOR LEGISLATIVE ACTION[229]

Oregon's current sentencing scheme regularly subjects young offenders to mandatory penalties under Measure 11.[230] This Comment argues that Oregon should amend its Second Look statute to apply to all juvenile offenders—most importantly to those sentenced to life, de facto life, or aggregate life sentences. These Second Look hearings should occur after the juvenile's brain has developed—in the mid-twenties—and before juvenile offenders are transferred to the custody of the Department of Corrections. As the Court has most recently explained in *Montgomery*, hearings such as these will afford an opportunity for release to those who "demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change."[231]

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12. (citing *Miller*, 132 S. Ct. at 2465 (2012)) (emphasis added).

[228] *Miller*, 132 S. Ct. at 2475.

[229] This suggestion is not meant to preclude the idea of an overall improvement of the parole-release system or to discount the importance of affording Second Look hearings to offenders who were technically over the age of 18 when they committed their crimes but were still in adolescent development at the time. A change to Oregon's sentencing scheme would be a heavy political lift, involving a total overhaul of the scheme, and is thus beyond the scope of this Comment.

[230] The only youth who may benefit from Second Look hearings are those who were originally charged with Measure 11 offenses but later pled or were convicted of a lesser offense. OR. REV. STAT. § 137.707 (2013); *see also* Part II, *supra*.

[231] Montgomery v. Louisiana, No. 14-280, slip op. at 21 (U.S. Jan. 25, 2016).

Oregon's Second Look statute provides certain juvenile offenders with a hearing at exactly halfway through their sentence.[232] This hearing is conducted by a sentencing court that evaluates the offender's rehabilitative progress and future potential for reform; the court then determines whether further commitment or release is appropriate.[233] Initially, the statute was "conceived as an opportunity to help provide young people in custody with an incentive to change their behavior; however, less than 6% of the young people affected by Measure 11 have benefited from this law."[234] The task-force report that became the basis for Measure 11 suggested a Second Look procedure for all juveniles subject to Measure 11 sentences,[235] but this suggestion was not adopted due to the tough-on-crime environment in which Measure 11 was passed. Now, however, following the trend away from tough-on-crime procedures and in the wake of the Supreme Court's reasoning in *Miller* and *Graham*, Oregon's political climate is ripe to revisit the suggestion to expand Second Look hearings to all juvenile offenders—or at the very least, to those who face life sentences.[236]

These Second Look hearings should take place before an offender is transferred from the custody of the Oregon Youth Authority into the custody of Department of Corrections or before the offender is 24-years and 11-months old, whichever is sooner.[237] The timing of the hearing is important for two reasons.

First, any time spent exposed to an adult facility increases a juvenile's likelihood of experiencing physical and sexual abuse in the facility[238] and suicide.[239] The dangers for youth in an adult correctional facility are

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[232] OR. REV. STAT. § 420A.203(1) (2013).

[233] If the sentencing court determines that further commitment is not appropriate, it may provide for a reduction in the term of incarceration pursuant to OR. REV. STAT. § 421.121 (2013).

[234] MISGUIDED MEASURES, *supra* note 67, at 6.

[235] *Id.* at 21.

[236] Although this Comment is specifically focused on juveniles serving life sentences in Oregon, the simplest legislative change would be to afford Second Look hearings to all juvenile offenders.

[237] Holding these hearings before an offender reaches the age of 24 years and 11 months is necessary because offenders must be transferred from Oregon Youth Authority custody to Oregon Department of Corrections custody before their 25th birthday. OR. REV. STAT. § 420A.200 (2013).

[238] "In 2005 and 2006, 21% and 13%, respectively, of all victims of substantiated incidents of inmate-on-inmate sexual violence in jails were juveniles under the age of 18—an extremely high proportion of victims given their relatively low numbers in jail populations (typically only 1% of all inmates are juveniles)." NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA, 13 (2007).

[239] Youth housed in adult facilities are *36 times* more likely to commit suicide than

traumatic and create an environment where a young offender would feel less comfortable asking for help or treatment. In contrast, Oregon Youth Authority facilities are focused on treating and improving the skills, education, and emotional development of offenders. Therefore, a Second Look hearing prior to transfer to adult facilities would allow courts to evaluate the way that youth have responded to the treatment in youth facilities before the dangerous environment of adult facilities could negatively affect a juvenile offender's ability to demonstrate his or her capacity for reform and rehabilitation.

Second, the most accurate evaluation of a juvenile's potential for rehabilitation would occur after the juvenile has matured out of adolescence, which for most persons is in the mid-twenties. Waiting to evaluate the rehabilitation and potential for future reform until after an offender is no longer an adolescent is necessary because of three significant distinctions between the brain development of adolescents and adults. First, adolescents have a "'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking."[240] Second, youth "are more vulnerable . . . to negative influences and outside pressures," and have limited "control[l] over their own environment."[241] Finally, the character of a juvenile is more malleable than that of an adult; a youth's traits are "less fixed" than an adult's, and his or her "actions are less likely to be 'evidence of irretrievabl[e] deprav[ity].'"[242] "The combination of these three cognitive patterns accounts for the tendency of adolescents to prefer and engage in risky behaviors that have a high probability of immediate reward but can have harmful consequences."[243] Therefore, an adequate Second Look hearing would occur after an offender has had an opportunity to mature beyond any negative transitory characteristics of adolescence.

A. Impulsivity, Risk-Taking, and a Lack of Maturity

Adolescence is the transitional period between childhood and adulthood.[244] During this stage, the juvenile is less capable of exercising self-control than an adult, but more prone to risk-taking than a child.[245] The prefrontal cortex area of the brain, which is responsible for controlling

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in a youth facility. *Id.* at 10.

[240] Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

[241] *Id.* (alterations in original) (quoting *Simmons*, 543 U.S. at 569).

[242] *Id.* (alterations in original) (quoting *Simmons*, 543 U.S. at 570).

[243] REFORMING JUVENILE JUSTICE, *supra* note 6, at 2.

[244] Anne-Marie R. Iselin et al., *Maturity in Adolescent and Young Adult Offenders: The Role of Cognitive Control*, 33 LAW & HUM. BEHAV. 455, 455 (2009).

[245] B.J. Casey et. al., *The Adolescent Brain*, 28 DEV. REV. 62, 62–66 (2008).

impulses and weighing consequences before taking action, has not fully developed in an adolescent.[246] Typically, this part of the brain does not develop until a person reaches his or her mid-twenties; until that age an adolescent has less self-control than he or she will have as an adult.[247] During that same period of low impulse control, a person's risk-taking and reward-seeking behavior is at its peak.[248] Reward-seeking behavior is indicated by exaggerated accumbens activity in the brain.[249] Studies have shown that accumbens activity does not start increasing until a person reaches the adolescent stage of brain development.[250] Thus, the adolescent brain, more so than the same person's brain as a child or as an adult, encourages risk-taking behavior with little or no regard for the consequences.[251] In other words, an adolescent's brain is simultaneously experiencing the highest proclivity for risk-taking behavior and lowest levels of impulse control that a person will experience in his or her lifetime.[252]

In light of this unique developmental stage, evaluating adolescent behavior as being predictive of adult behavior during the sentencing of juveniles is inadequate for two reasons. First, the potential rehabilitation of a juvenile offender cannot be evaluated by comparing how the offender behaved as a child to how he or she behaved as an adolescent. During sentencing proceedings, courts may look to the behavior of an offender as a child and try to compare it to the behavior that triggered the conviction during adolescence. For example, a sentencing court may determine that a well-behaved child who then makes "bad decisions" as an adoles-

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[246] *Id.* at 63–64.

[247] OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 172 (2012) [hereinafter CHILDREN EXPOSED TO VIOLENCE], http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf.

[248] Casey et al., *supra* note 245, at 63–65.

[249] *Id.* at 65.

[250] *Id.* at 69.

[251] *Id.* at 69–70. Evolutionarily, this stage of adolescent development was essential because it provided an adolescent with the confidence—increased risk-taking and fearlessness decreased the ability to accurately weigh consequences—necessary to leave the protection of his or her family. Adolescents needed this time to establish independence and acquire skills to increase success upon the separation from the protection of the family. *See id.* at 62–77.

[252] Adolescents lack a developed ability to self-regulation because the limbic system, which influences pleasure-seeking and emotional reactivity, develops more rapidly than the control system, which supports self-control. Casey et al., *supra* note 245, at 69–70. These findings suggest that during adolescence, some individuals may be more prone to engage in risky behaviors due to developmental changes in concert with variability in a given individual's predisposition to engage in risky behavior, rather than to simple changes in impulsivity. B.J. Casey et. al., *Risk-Taking and the Adolescent Brain: Who Is at Risk?*, DEV. SCIENCE, F13 (2007).

cent is likely to continue the later developed pattern of bad decision-making into adulthood. However, the studies on brain development indicate that this is not always the case.[253] Rather, an adolescent's poor decision-making skills often stem from the increased risk-taking behavior encouraged by increased accumbens productivity. This accumbens productivity subsequently decreases in many people as their prefrontal cortex develops.[254] Accordingly, a person that engaged in more risky behavior as an adolescent than he or she did as a child may not continue that high-risk behavior into adulthood. As such, evaluations of adolescents at sentencing may not be adequate predictors of that person's capacity for rehabilitation.

Second, an adolescent has not yet developed the capacity for self-control that he or she may have as an adult. A person during his or her adolescent years has the lowest capacity for self-regulation and highest capacity for engaging in activity that appears immediately rewarding.[255] As an adolescent's brain develops his or her ability to avoid bad decision-making increases.[256] Essentially, the adolescent version of a person could be experiencing "bad" transient characteristics that will not continue into adulthood. Therefore, it is not effective to evaluate an adolescent offender's potential for rehabilitation until he or she has a fully developed prefrontal cortex and is not experiencing the heightened levels of reward-seeking behavior encouraged by increased accumbens in adolescence.

The impermanence of adolescent qualities must inform the way the sentences of juvenile offenders are evaluated. To account for the transient characteristics of adolescents, an effective evaluation of a juvenile should not occur only at sentencing, when the offender is still experiencing heightened impulsivity and decreased self-control, but should be revisited after the offender's brain has taken on the permanent characteristics of adulthood. Thus, an appropriate evaluation as to the suitable length of a sentence for an adolescent offender would occur after a juvenile has served a portion of his or her sentence and has reached mid-twenties, when his or her brain has developed more fully. The benefits of providing juveniles with Second Look hearings after they have spent time in juvenile correctional facilities are further supported by research that shows adolescents are particularly susceptible to negative environmental factors.

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[253] Casey et al., *supra* note 245, at 69–71.

[254] *Id.* at 69.

[255] *Id.* at 70–71. Sometimes the inability of youth to process the implications of their offenses can lead to tragic results before sentences. For example, a 15-year-old in Alabama hanged himself after a streaking prank resulted in the threat of adult prosecution and a possible life-long requirement to be listed on Alabama's sex offender registry. *See* EQUAL JUST. INITIATIVE, *supra* note 91.

[256] *See* Casey et al., *supra* note 245, at 70–71.

B. Susceptibility to the Negative Impacts of Violence and Other Environmental Factors

Adolescents have a heightened sensitivity to environmental influences, such as peer pressure and immediate incentives, relative to children and adults.[257] Two out of three children in the United States will witness violence in their home or neighborhood.[258] When children are exposed to violence, even if the child only witnesses the violence and is not personally victimized by it, the development of that child's brain is fundamentally altered if effective services and treatment are not provided.[259]

Essentially, the brain of a child exposed to violence and psychological trauma becomes solely focused on the struggle to survive.[260] For victimized children, living in survival mode typically alters their psychological, physical, and social–emotional development.[261] A singular focus on survival means that the child's awareness of primal needs, such as food and self-preservation, is heightened.[262] The heightened focus on these primal needs means that the brain is incapable of focusing on other development that typically occurs during childhood.[263] Therefore, even after the immediate violence has ended, the child's brain is focused on survival and cannot afford attention to other skills necessary to developing healthy relationships and measured responses to tense situations.[264] Studies indicate that youth will use violence due to this exaggerated focus on the primal need for self-preservation.[265] Thus, exposure to violence and the brain's heightened focus on survival will cause youth to act violently themselves. A child might also be quicker to aggressively protect him or herself after witnessing the trauma that can be caused by violence. In-

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[257] Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012); Roper v. Simmons, 543 U.S. 551, 569 (2005); *see also* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1013 (2003).

[258] CHILDREN EXPOSED TO VIOLENCE, *supra* note 247, at 28 ("Exposure to violence is a national crisis that affects almost two in every three of our children.").

[259] J.D. Ford, *Neurobiological and Developmental Research: Clinical Implications*, *in* TREATING COMPLEX TRAUMATIC STRESS DISORDERS: AN EVIDENCE-BASED GUIDE 31, 47–52 (Christine Courtois & Julian D. Ford eds., 2009).

[260] *Id.* at 31–32; CHILDREN EXPOSED TO VIOLENCE, *supra* note 247, at 30.

[261] *See* Ford, *supra* note 259, at 32 (explaining the impacts the stress-response system associated childhood trauma can have on a child's physical and mental wellbeing); CHILDREN EXPOSED TO VIOLENCE, *supra* note 247, at 30–31.

[262] *See* CHILDREN EXPOSED TO VIOLENCE, *supra* note 247, at 30, 171.

[263] *Id.* at 30.

[264] *Id.*; *see* R.F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE 3, 180–82 (2006).

[265] CHILDREN EXPOSED TO VIOLENCE, *supra* note 247, at 30–32.

deed, "[m]any youth involved in juvenile justice are not maliciously aggressive but in fact are reacting defensively because of their exposure to violence."[266]

Additionally, studies speculate that victimized children misconstrue violence as a source of power or prestige.[267] This can occur because the child has seen how violence hurts a victim but appears to empower the aggressor.[268] After witnessing a violent exchange, a child may think that there is a causal link between power and violence, and if the child subsequently wishes to exercise power in his or her own life, he or she may think the best way to do so is through violence. Therefore, acts of violence committed by a person in adolescent years are largely shaped by the atmosphere in which a juvenile has grown up.

In the context of juvenile offenders serving long sentences, the correlation between a violent childhood environment and the commission of more severe crimes is evident in the composition of current juveniles serving life without parole. In one survey, 79% of juveniles serving life without parole reported witnessing violence in their homes, and more than half reported witnessing violence in their communities.[269] Overall, one in five had experienced sexual abuse, and that statistic was much higher for the girls serving life-without-parole sentences, who suffered sexual abuse at a rate of 77%.[270]

Other environmental factors, including parental incarceration and poverty can contribute to a youth's propensity for bad behavior. Many juvenile offenders serving life-without-parole sentences have a parent or close relative in prison.[271] "Parental incarceration is often associated with emotional and behavioral problems among their children, including elevated aggression, violence, defiance, cognitive and developmental delays, and extreme antisocial behavior."[272] Children with parents in prison are also at higher risk for becoming delinquent, dropping out of school, and ultimately being incarcerated themselves.[273] Likewise, one in three juvenile lifers surveyed in 2010 were living in public housing just prior to

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[266] *Id.* at 176; *see also* Miller v. Alabama, 132 S. Ct. 2455, 2464 n.5 (2012) (quoting Brief of J. Lawrence Aber et. al. as Amici Curae in Support of Petitioners at 26–27, Miller v. Alabama, 132 S. Ct. 2455 (2007) (No. 10-946 & No. 10-9647), 2012 WL 195300) ("Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency.").

[267] CHILDREN EXPOSED TO VIOLENCE, *supra* note 247, at 141.

[268] *See id.*

[269] NELLIS, *supra* note 2, at 10–11.

[270] *Id.* at 10.

[271] *Id.* at 12.

[272] *Id.*

[273] *Id.*

their arrest, which is indicative of the impoverished and transient environments from which these children frequently come.[274] These environments are detrimental to development, and they foster delinquent behavior. It is not until a juvenile is removed from volatile environments and afforded rehabilitative treatment that his or her amenability to reform can really be evaluated.

Once these youths are removed from their violent environments and exposed to the treatment and psychological resources provided during their incarceration, they might be able to move beyond survival mode. Treatment and psychological help can provide a child with "resilience" factors, which in turn allow the child to move out of survival mode and into a mode where he or she can develop emotionally and psychologically.[275] The Oregon Youth Authority is better equipped than the Department of Corrections to provide young offenders with treatment to improve these resilience factors.[276] Without treatment, however, it is difficult to predict when—or even if—a child can move beyond survival mode. Thus, if an offender's past is wrought with violence and victimization, a court should have the opportunity to evaluate a young offender after he or she has been removed from violent environments and been provided with rehabilitative services through the Oregon Youth Authority.[277]

C. Greater Chance for Reform than Adults

Finally, the actions of adolescents are less likely to be "evidence of irretrievabl[e] deprav[ity]" than those of adults.[278] Much adolescent involvement in illegal activity is an extension of the kind of risk-taking that is part of the developmental process identified above. In fact, for most adolescents, behaviors that could be qualified as risky or antisocial are impermanent and cease as the person matures and settles into his or her individual identity.[279] Because this behavior tends to be transitory, "[o]nly a relatively small proportion of adolescents who experiment in . . . illegal activities [actually] develop entrenched patterns of problem behavior that persist into adulthood."[280]

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[274] *Id.* at 9.

[275] CHILDREN EXPOSED TO VIOLENCE, *supra* note 247, at 145.

[276] *See Treatment Services*, OR. YOUTH AUTHORITY, http://www.oregon.gov/oya/Pages/tx_services.aspx (listing the Oregon Youth Authorities intervention principals and treatment services).

[277] *See id.*

[278] Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (alteration in original).

[279] Roper v. Simmons, 543 U.S. 551, 570 (2005) (citing Steinberg & Scott, *supra* note 257, at 1014).

[280] *Id.* (quoting Steinberg & Scott, *supra* note 257, at 1014).

Furthermore, recent reports on juveniles serving life without parole indicate that young offenders have often experienced educational and general cognitive difficulties in addition to adolescent and environmental challenges. For example, two in five respondents in a 2012 survey had been enrolled in special education classes prior to being incarcerated.[281] "Fewer than half (46.6%) of the survey respondents were attending school at the time of the crime, and nearly all (84.4 %) had been suspended or expelled at some point in their academic career."[282] A lack of traditional education can inhibit a child from developing the analytical skills to make measured and thought-out decisions.[283] Unlike adult offenders, who may also have experienced educational difficulties in their childhood, young offenders are still forming their reasoning skills.[284] As such, it is possible that adolescents can mature out of the tendency toward delinquent behavior if they are provided the right educational—and in the case of youth exposed to violence, psychological—tools.[285]

Overall, the high risk-taking and low impulse-control behavior of adolescents, the susceptibility to negative environmental factors, and the greater possibility for reform of youth demonstrate clear distinctions between young offenders and adult offenders. These distinctions indicate that a meaningful opportunity for review should be afforded to an offender after he or she matures out of the adolescent stage of development. They also demonstrate that the initial evaluation of an adolescent, which occurs while he or she is still in a transient stage of development, is insufficient to truly evaluate the culpability of the offender. For a court to truly evaluate the culpability of a juvenile offender, the evaluation must occur once that juvenile is no longer in the impermanent adolescent developmental stage. The evaluation must occur after a juvenile's brain has developed and after a juvenile has been removed from dangerous or detrimental environmental influences. And most importantly, the evaluation must occur after the juvenile has been afforded some chance at reform.

These three characteristics of adolescence not only distinguish adolescents from adults in terms of culpability—*why* a meaningful opportunity for review is necessary—but also in terms of *when* a meaningful opportunity for review is necessary. In the case of adolescents, an evaluation of proclivity for rehabilitation should occur when the offender is in his or her mid-twenties. Consequently, this Comment argues that in Oregon, a post-adolescent opportunity for review should be statutorily mandated to

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[281] NELLIS, *supra* note 2, at 13.

[282] *Id.*

[283] *See* REFORMING JUVENILE JUSTICE, *supra* note 6, at 3 (identifying the potential cognitive benefits of formal education).

[284] Steinberg & Scott, *supra* note 257, at 1011.

[285] *See* REFORMING JUVENILE JUSTICE, *supra* note 6, at 3, 124–25.

occur before a youth is transferred to the Department of Corrections and after the adolescent's brain has had time to develop.

Finally, this Comment suggests that the Second Look hearings should be afforded retroactively to all juvenile offenders serving life sentences. The juvenile offenders currently serving life sentences in Oregon prisons suffered from the same sentencing challenges and adolescent shortcomings as the youth who should be afforded Second Look hearings in the future. This Comment contends that the ever-growing body of science on adolescent brain development, and the reasoning embraced by the Court in both *Miller* and *Graham*, calls for a retroactive provision of Second Look hearings to all the juvenile offenders serving life, and de facto life, sentences.[286]

CONCLUSION

In conclusion, the best way for Oregon's sentencing scheme to appropriately align with the trend toward smarter sentencing of juveniles, the Supreme Court's decisions in *Graham* and *Miller*, and recent brain development research, is for Oregon to extend its Second Look hearings to all juvenile offenders who are sentenced to long, or de facto life, prison sentences. These hearings would provide juvenile offenders with the critical opportunity to be reevaluated after having spent time in custody and after having time to mature beyond adolescence into adulthood. Allowing a juvenile to demonstrate capacity for maturation and amenability to rehabilitation were once integral components of our juvenile-justice system. Affording Second Look hearings to juvenile offenders would ensure that the future of juvenile sentencing would once again strive to improve the lives of juveniles instead of forcing them to spend the rest of their lives behind bars.

[286] This call for retroactivity is well-supported by the recent Supreme Court decision in *Montgomery v. Louisiana*, which held that *Miller*'s prohibition on mandatory life without parole for juvenile offenders announced a new substantive rule that, under the Constitution, is retroactive in cases on state collateral review. No. 14–280, slip op. at 22 (U.S. Jan. 25, 2016).