

# **YOUTH AND MEASURE 11 IN OREGON**

**IMPACTS OF MANDATORY MINIMUMS**



**OREGON COUNCIL ON CIVIL RIGHTS**

**CHAIR: ROBERTA PHILLIP-ROBBINS**

**WITH BEN SCISSORS**

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--Ben Scissors

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# TABLE OF CONTENTS

Executive Summary	1-2
Policy Recommendations	3
Introduction	4-5
Interviews with Youth in Oregon Youth Authority Custody: Part One	6-7
Youth in the Context of their Development and the Criminal Justice System	8-16
Interviews with Youth in Oregon Youth Authority Custody: Part Two	17-18
Understanding Ballot Measure 11	19-21
Interviews with Youth in Oregon Youth Authority Custody: Part Three	22-23
Does Measure 11 Make Sense for Youth?	24-31
Interviews with Youth in Oregon Youth Authority Custody: Part Four	32-33
Collateral Consequences of Measure 11	34-36
Interviews with Youth in Oregon Youth Authority Custody: Part Five	37-38
Recommended Policy Changes for Measure 11 Youth	39-43
Appendix One	45
Bibliography	46-51
References	52-66

# EXECUTIVE SUMMARY

## BACKGROUND

Oregon's policy of charging youth as adults under Measure 11 is a harsh and costly practice that stands at odds with a contemporary understanding of brain science. While other states have modernized their approaches, Oregon has not. Today, Oregon incarcerates young people at a higher rate than almost every other state in the country, including Texas and Louisiana. In fact, Oregon has the second highest rate of youth transfers to adult court in the nation, with young people - especially youth of color - subjected to lifelong consequences as a result. The data underscore the racial disparities: in 2012, Oregon convicted black youth of Measure 11 offenses at 17 times the rate of their white counterparts.<sup>1</sup>

## PURPOSE

Beyond highlighting Measure 11's stark racial impact, the purpose of this report is to bring together components of the juvenile justice policy discussion typically considered only in isolation. In doing so, the report highlights how Measure 11 is an ill-conceived tool for the unique needs and responses appropriate for justice-involved youth. Children have a unique capacity for change and growth and our criminal justice policies should reflect this empirical fact.

## METHODOLOGY

This report seeks to present a more nuanced and comprehensive look at Measure 11 and justice-involved youth by drawing on various types and sources of information. In addition to academic research and media coverage, this report incorporates data on Measure 11 referrals and several in-depth interviews with young people currently serving

Measure 11 sentences at MacLaren Youth Correctional Facility.

We used Measure 11 youth data originally collected and compiled by the Oregon Department of Justice in consultation with the Oregon Youth Authority. The authors then organized and analyzed the research with the help of Dr. Mark G. Harmon, a Professor in the Department of Criminology and Criminal Justice at Portland State University. The research pointed to a clear racial disparity in both the indictment and conviction of Oregon's youth of color compared to their white peers.

This report also explores a small sampling of the human cost of Oregon's outdated approach. We conducted five in-depth, semi-structured interviews with youth currently serving Measure 11 sentences at MacLaren Youth Correctional Facility for crimes they committed when they were 15, 16, or 17 years old. The interviews provide an intimate perspective on the hopes of a few Measure 11 youth. They also reveal the trauma of their upbringings and the fear and confusion that characterized their experiences with the adult court system.

## REPORT OVERVIEW

1. Section 1 ("Introduction") provides a guide to the report as well as recommended additional reading material on juvenile justice and youth brain development.
2. Section 2 ("Youth in the Context of their Development and the Criminal Justice System") describes how youth has been characterized and defined by the U.S. Supreme Court in recognition of emerging youth cognitive development research.

Due to their still-developing brain structures, young people are particularly susceptible to risky behaviors and peer pressure, but also possess a unique capacity for change and growth. The Court has recognized their special vulnerabilities and concluded that they are inherently less culpable than adults for their actions as a result.

3. Section 3 (“Understanding Ballot Measure 11”) deconstructs Ballot Measure 11 into its constituent elements: its basic components, formation and evolution. One key insight is the heightened fear around youth crime - particularly black youth crime - that pervaded the minds of voters when Measure 11 was passed in the 1990s. Measure 11 restructured the criminal justice system to be less rehabilitative and more punitive, particularly for young people.

4. Section 4 (“Does Measure 11 Make Sense for Youth?”) tackles the question of efficacy and discusses Measure 11’s impact on Oregon. Measure 11 has had no clear benefit to public safety as measured by deterrence or recidivism. In fact, most research suggests that interactions with the adult criminal justice system at such a young age increase recidivism and reduce public safety. Measure 11 has significantly expanded the number of young people put in state custody and tried as adults. The lifelong consequences of an adult record can be devastating to young people and their families and costly for communities and taxpayers. Measure 11 is a blunt instrument that has largely stripped judges of their discretionary power to take into consideration the particular mitigating factors of a young person’s case through mandatory sentences applied to children as young as 15 as though they were adults. This one-size-fits-all policy disproportionately hurts youth of color.

a. Key statistics on race:

i. Black youth account for 15.5% of Measure 11 indictments but only 1.8% of the general population in Oregon (resulting in an over-representation of around 8.6 times.)

ii. The average *relative* rate of disparity (measure by the relative rate index or RRI<sup>2</sup>) between black and white youth for the five most common Measure 11 crimes is 15.26. The overall RRI for all crimes covered in this study was 13.6.

5. Section 5 (“Collateral Consequences of Measure 11”) discusses the drastic, and often overlooked, impact of an adult conviction that stays with a young person well after they have served their term. The impact on

them and their family is significant, as the conviction may impede their ability to obtain work, housing, and often higher education. These effects are not confined to the youth, however: Oregon taxpayers bear a significant burden for youth incarceration. Measure 11 offenders require close custody, the most expensive form of state confinement, which can result in costs of as much as \$263 per day and \$95,995 per year, per juvenile.

6. Section 6 (“Recommended Policy Changes for Measure 11 Youth”) proposes key policy recommendations designed to support the rehabilitation of young people. At the most fundamental level, Oregon should adopt policies designed for young people, instead of trying to impose on them policies designed for adults.

# POLICY RECOMMENDATIONS

## To address the impact of Measure 11 on Oregon youth

### **1. REMOVE ALL YOUTH FROM AUTOMATIC ADULT PROSECUTION UNDER MEASURE 11 AND RETURN OREGON TO A “DISCRETIONARY WAIVER” SYSTEM.**

This would put much-needed discretion back in the hands of judges, in contrast with the current system that allows prosecutors sweeping authority to decide how to prosecute Oregon youth. This modest reform would still allow judges to levy severe sentences against serious child offenders, but would restore the court’s ability to look at the mitigating circumstances particular to each case.

### **2. MORE TRANSPARENT DATA COLLECTION FROM PROSECUTORS’ OFFICES AND LAW ENFORCEMENT.**

One critical problem with prosecutors’ vast discretionary power is that: “[their] offices are mostly a black box with little transparency.”<sup>3 4</sup> Police officers similarly share a key role as gatekeepers to the criminal justice system. To facilitate smart, data-driven policymaking, counties across the state should provide demographic data on youth referrals to prosecutors’ offices. In addition, they should provide the public with more descriptive information about felony filings to adult court, updated annually.

### **3. GIVE ALL YOUNG PEOPLE THE OPTION OF A “SECOND-LOOK HEARING.” EVERY YOUNG PERSON SHOULD HAVE THE CHANCE TO PROVE TO A JUDGE THAT THEY CAN GROW AND CHANGE.**

The U.S. Supreme Court, relying on the most up-to-date cognitive science available, has said clearly that young people have a tremendous capacity for change and positive growth, regardless of the severity of their crimes. Measure 11 has stripped away the opportunity for young people to demonstrate this potential. A second-look hearing not only allows youth to prove their positive change in front of a judge, but also presents a clear incentive for good behavior and a start on the path toward rehabilitation while in custody. This commonsense approach also recognizes the reality that nearly all Measure 11 youth will, at some point, return to society.

### **4. ADDRESSING ROOT CAUSES.**

Oregon should boost investment in safety net programs that decrease involvement with the criminal justice system. In addition, Oregon should expand access to job training and programs that foster non-violent problem solving so that young people can avoid harsh sentences in the first place. Along with preventative measures, stakeholders throughout the criminal justice system – including judges, prosecutors, public defenders and law enforcement – should be trained in trauma-informed care, cultural responsiveness and brain development.

# INTRODUCTION

Juvenile justice is an under-researched issue that requires much greater attention, particularly in Oregon.<sup>5</sup> Oregon's incarcerated youth population may be smaller than that of larger states, but the relatively small numbers belie a big problem: the *rate* of juvenile custody - including youth transfer to adult court - in Oregon is greater than almost every other state in the nation, and it disproportionately impacts children of color.<sup>6</sup>

*“Minority youth [in Oregon]...have higher rates of involvement in the juvenile system than their white counterparts and receive more intensive and intrusive dispositions, including higher rates of detention, lower rates of diversion, higher rates of placement in correctional facilities, and higher rates of transfer to adult court.”<sup>7</sup> – Dr. William Feyerherm*

Juvenile justice is a broad topic encompassing many interrelated, but often disjointed, topics. To properly examine the issues surrounding justice-involved youth, one must consider not only safety, but also developmental science, political motivation, racial bias, and economic impact, among other factors. While many conversations center on one or two of these principles, this report brings all of these topics together for a more comprehensive analysis of juvenile justice reform. At the heart of the discussion is Measure 11, a mandatory minimum sentencing law that has a particularly harsh impact on Oregon youth.

This report will first discuss how youth have been defined through emerging developments in the science of cognitive development. The U.S. Supreme

Court has paid close attention to these trends and reflected their teachings in a series of landmark decisions. These cases demonstrate a basic principle obvious to many parents: youth are fundamentally different, and less culpable than, adults.<sup>8</sup> States across the country are increasingly receptive to new science about youth brain development, implementing more sensible methods of accountability that are safely reducing the number of incarcerated youth in line with the Supreme Court's shift.<sup>9</sup> A review of current research in cognitive development demonstrates that Measure 11 is out of touch with the scientific consensus, and makes little sense given what we now know about the development of the adolescent brain.

The report then examines Measure 11 closely, including the motivations for its formation, the mechanics of the policy, and the efficacy and impact of Measure 11 on Oregon youth and Oregon's youth of color, specifically. A close look illustrates that the environment in which Measure 11 was passed is starkly different than today. It also uncovers a troubling fact: that Measure 11 has not lived up to many of the promises made about it.<sup>10</sup> Measure 11 has had and continues to have a shockingly disparate impact on Oregon's youth of color.<sup>11</sup>

To highlight the troubling impact of Measure 11 on Oregon's youth, this report includes data on the racially disparate impact of Measure 11 as well as in-depth interviews with five youth currently serving mandatory minimum Measure 11 sentences at MacLaren Youth Correctional Facility. These interviews provide a unique insight into the lives and minds of the youth our state incarcerates. Their hopes and aspirations show they share many characteristics typical of young people their age; so too do their fears, pain and confusion about the criminal justice

system into which they have entered. The report then considers the vast collateral consequences of convicting a youth as an adult of a Measure 11 offense. The bottom line is that the costs of trying youth as adults under Measure 11 extend well beyond the direct expenses associated with their custody. Lastly, we provide three key policy recommendations to improve Oregon’s criminal justice system, combat racial disparity, and reflect in policy and practice a more up-to-date understanding of youth brain development.

## OTHER RESOURCES

In addition to this report, the following resources may be useful to provide greater context to and understanding of justice-involved youth, racial disparity in Oregon’s criminal justice system, and the impact of Measure 11:

1. [Gonsalves, Kate: “Disrupting Mass Incarceration at the Local Level: A Guide to Mapping Reform,” published by the Oregon Justice Resource Center.](#)
2. [Ziedenberg et al.: “Misguided Measures,”](#)

[published by the Campaign for Youth Justice and Partnership for Safety and Justice.](#)

3. [“Longitudinal Study of the Application of Measure 11 and Mandatory Minimums in Oregon,” published by the Oregon Criminal Justice Commission.](#)

4. [Ferguson, Jennifer: “Racial and Ethnic Disparities and the Relative Rate Index \(RRI\): Summary of Data in Multnomah County,” published by Multnomah County, Oregon, and the Safety and Justice Challenge.](#)

5. [Hilliard, Elizabeth: “A Life Without: Juveniles Spending Their Lives in Oregon’s Prisons and the Need for Change following \*Miller\* and \*Graham\*,” published in the \*Lewis & Clark Law Review\* Vol 20:1 pp 333-379.](#)

6. [“State-by-State Data,” published by The Sentencing Project.](#)

7. [Simpson et al.: “MIT Young Adult Development Project,” published by the Massachusetts Institute of Technology.](#)



# INTERVIEWS WITH YOUTH IN OREGON YOUTH AUTHORITY CUSTODY

Q. TELL US A LITTLE ABOUT YOURSELF AND MAYBE SOME BACKGROUND ABOUT YOUR LIFE GROWING UP.



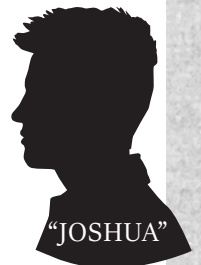
“Growing up we just grew up around violence and stuff. From where I’m from it’s just, like, normal basically. Because when I came in here, I already knew a bunch of these people.”

“...there is a lot of negativity where I was growing up and, like, a lot of violence...So, I mean, when it comes down to me and avoidance, it’s more about not really knowing how to deal with emotions because my mom wasn’t able to, like, give me the attention that was probably needed, ya know? So I was probably, like, disconnected with things growing up. Not understanding how to cope with certain things, I guess.”



“Family life was pretty pristine, pretty easy. Didn’t grow up rich or anything like that. Definitely had our moments, like my dad was in prison and my mom was on drugs. So I grew up without my mom. I grew up with my dad. He got custody of us and stuff like that, but I never saw him so I got brought up by my brothers if anything. So they’re the ones that helped me out and then when they went to prison when they were 15 and 16 due to Measure 11, armed robbery, then I just...wham! Super bad depression stage. When my brothers went in depression stage, they’re out now. They were together that night, I was like 14 when that happened and they were like 15 and 16. That was pretty devastating.”

“My mom had two kids before me that were put through foster care and when she had me she did drugs and alcohol when I was in her womb and I came out with my umbilical cord wrapped around my neck and had to be resuscitated. I was taken away from my mom and immediately put in foster care after the hospital and was put with my aunt for a year-and-a-half-to-two years. When I was there, I saw a lot of drugs and physical and sexual abuse towards my cousin and physical abuse started happening to me but I was taken away [before it could get worse]. I was put in another foster care home and received the same treatment...I was in foster care for 14 years and went to 12 different homes... Every time I got put [back] with my mom she would fill me with false hope and then she would start doing drugs over and over and over again and physical abuse would start happening and I would be taken away...I did a lot of drug use, being around my mom and the drugs and alcohol. I used marijuana, meth, and heroin. I don’t remember a day I wasn’t high. I was probably high all the time.”



# INTERVIEWS WITH YOUTH IN OREGON YOUTH AUTHORITY CUSTODY

Q. WHAT LED UP TO THE SITUATION THAT RESULTED IN YOUR MEASURE 11 CONVICTION?



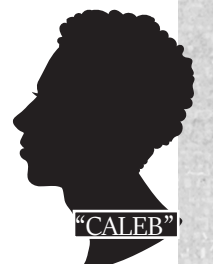
"I mean it started off at a party. I just bumped into somebody and then it all went down. I was 16 when that happened."

"Just probably in the moment dealing with a lot of anger and I just didn't give a shit about what people thought or people disrespecting me or saying something wrong. Then I just reacted quickly, probably a little too quick. Shit! I got a lot of time for it. I've been over it in my head plenty times and I have quite a few ways to, like, escape this incident, ya know? But for some reason I'm pretty sure it had to do with, like, loyalty, commitment and dedication, and probably that pride stuff too."



"I was homeless because I couldn't go back to my parents and I was looking to get into some type of transitional housing. At the time I was staying at a Janus Youth program. I was bouncing between there and the shelter and then I just got tired of that because I was trying to stay sober and it's kind of hard to do that there. People doing all sorts of stuff, ya know? So I started to just like [sleep] out on the street, ya know? [Later I got an apartment with another kid trying to get clean] ...we were getting ready to get evicted and I didn't have a job, he didn't have a job, so the first thing I thought of was, like, what can I steal, what can I take? And I had never robbed anybody before, ya know? It had never even crossed my mind, honestly. It happened all the time when I lived in Oakland and...that wasn't a lifestyle I wanted to be a part of...It was desperate times call for desperate measures, ya know?"

"[At first] you just want to blame people, like 'oh my dad wasn't there' or 'oh my mom wasn't there, my brothers wasn't there' that's where my mindset was. Now I'm just like, no, I was in a bad mindset. I wasn't ready. It's one of those things where you're just a kid and then you're having all this bad stuff happening to you...No one teaches you the fundamentals that you truly need to know to stay out of the system or to avoid certain things, especially when your dad's not there and stuff like that, and those aren't excuses those are just facts that lead up to things like that, ya know? Like, oh man if no one's there this kid is going to be uneducated, they definitely don't teach you law in school, they definitely don't. So, okay, who do I learn this stuff from? I don't know. It sucks ya know? Just knowing you could have avoided it so easily through education. Just [with] pure knowledge you could have avoided a lot of stuff."



# YOUTH

## In the context of their development and the criminal justice system

Where it makes sense to do so, the authors have used the term “youth” to describe young people in the context of criminality. This represents an intentional departure from the rigid and unscientific use of the term “juvenile.”<sup>12</sup> Merriam-Webster dictionary defines “youth” as “the period between childhood and maturity.”<sup>13</sup> This definition better reflects the broad spectrum of development that occurs during one’s teenage years and beyond.

### I. DEFINING “YOUTH”

The definition of “youth” has changed throughout history, shaped by informal norms as much as by scientific standards.<sup>14</sup> This reality provides important context to concerns that society may perceive youth culpability differently based on traits such as race or gender. Looking back in time provides a good example: scholars point to the development of a new definition of “childhood” in the nineteenth century that afforded children greater protections and ascribed to them new innate characteristics, thus formally distinguishing them from adults.<sup>15 16</sup> Previously, society tended to view children simply as the property of their parents, with few rights or protections. The shift in attitudes ushered in a new way of perceiving and treating children, whom society increasingly viewed as fragile, vulnerable and in need of protection.<sup>17</sup> However, this transition in which a new “distinct...social category that afforded political and social rights” to certain children was created represented a distinctly *white* process that intentionally and systematically left out children of color.<sup>18 19</sup>

Our modern social contract with young people still finds its roots in history. Even today, ideas about

youth culpability and criminal justice still reflect the friction between whether youth should be protected *by* society or protected *for the purposes of* society.<sup>20</sup> This ambivalence has contributed to the treatment of young people as both “innocent, vulnerable and dependent” as well as “crafty, autonomous almost-adults,” often differentiated along racial lines.<sup>21</sup>

These competing definitions have been especially susceptible to implicit bias, significantly contributing to racially stratified outcomes.<sup>22</sup> For example, the American Psychological Association notes perceptions of youth of color as “older...[and] less innocent” than their white peers by the public and criminal justice actors alike.<sup>23</sup> Similarly, the portrait of “permanently corrupted” youth was painted in distinctly racial terms.<sup>24</sup>

### II. LEGAL DEFINITIONS OF “JUVENILE”

Perceptions of culpability - particularly for older youth of color - began blurring the legal lines between “youth” and “adult” in the late twentieth century.<sup>25</sup> In the 1980s and 1990s, more states eased the transfer of youth into adult court, meaning more young people being prosecuted as adults.<sup>26</sup> Beliefs that some youth were simply ‘beyond repair’ played

a key role in the proliferation of this approach.<sup>27</sup> However, recent legal precedent has spurred policy changes across many states that embrace a more scientific understanding of youth brain development and criminal culpability.<sup>28</sup>

The American Civil Liberties Union highlights a series of important contemporary cases that, at their core, “[acknowledge] that young people grow and change.”<sup>29</sup> By establishing more clearly that “children are different” due to their “diminished culpability and heightened capacity for change,” these cases signal an important shift.<sup>30</sup>

Central to these emerging cases is the Eighth Amendment standard that the justice system not inflict “cruel and unusual punishment” on any person.<sup>31</sup> The Eighth Amendment “guarantees individuals the right not to be subjected to excessive sanctions,” thus requiring that “punishments

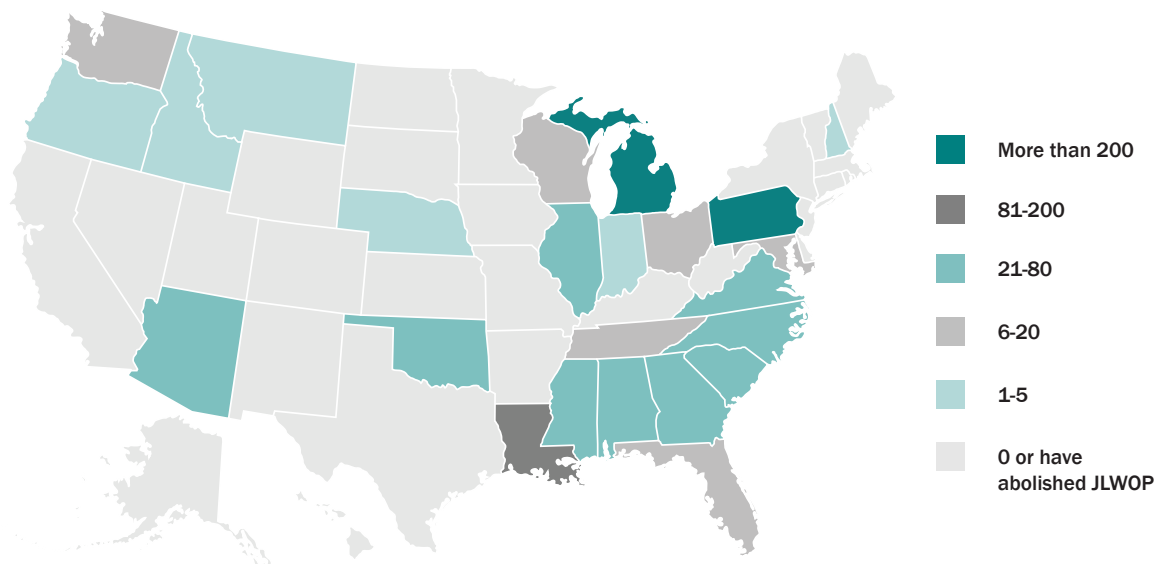
be proportionate to the crime committed.”<sup>32</sup> Applied to our growing understanding of youth brain development, this standard has significant implications for how our justice system treats young people. In other words, “as American society evolves, so too does the Court’s definition of what is cruel and unusual.”<sup>33</sup>

The Supreme Court cases on the next page explicitly targeted the very harshest sentences - the death penalty and life without parole (LWOP), deemed cruel and unusual under the Eighth Amendment for youth in most cases. However, the decisions have important implications that go beyond just the very harshest sentences, as will be discussed later on. Beginning with *Roper v. Simmons* and ending most recently with *Montgomery v. Louisiana*, this series of cases illustrates a clear progression in scientific understanding of youth brain development as well as an evolution of legal precedent.

### KEY CONCEPTUAL TAKEAWAYS FROM SUPREME COURT DECISIONS

1. Youth have a unique capacity for reform
2. Youth are fundamentally different from, and less culpable than, adults
3. All youth should have a reasonable opportunity to demonstrate their ability to change
4. Lengthy sentences that fail to take into consideration the mitigating qualities of youth are in violation of their Eighth Amendment rights.
5. Youth should have access to a “meaningful opportunity for release.”

### Juvenile life without parole (JLWOP) sentences in the United States<sup>34</sup>



# TIMELINE OF SELECTED RECENT US SUPREME COURT (SCOTUS) CASES RELATING TO YOUTH SENTENCING

2005

## ***ROPER V. SIMMONS***

### **JUVENILES CANNOT BE SENTENCED TO DEATH**

This case “marked the first time the Court had grounded its opinion in developmental science.” SCOTUS found the death penalty unconstitutional under the Eighth and Fourteenth Amendments when applied to juveniles.<sup>35</sup>

2010

## ***GRAHAM V. FLORIDA***

### **JUVENILE LIFE WITHOUT PAROLE IS UNCONSTITUTIONAL FOR NON-HOMICIDE JUVENILE OFFENDERS**

The Court found that juvenile LWOP is unconstitutional under the Eighth Amendment for juveniles who have committed non-homicide offenses.<sup>36</sup> The decision cited “the development of brain regions involved in behavior control” and the limited use of such sentences nationally as reasons.<sup>37</sup> The Court also found that “all juvenile non-homicide offenders should have a chance to demonstrate maturity and reform”<sup>38</sup> and recognized the proportionality problem inherent in a LWOP sentence for a sixteen-year-old and the same sentence for a seventy-five-year-old.<sup>39</sup>

2012

## ***MILLER V. ALABAMA***

### **MANDATORY JUVENILE LIFE WITHOUT PAROLE IS UNCONSTITUTIONAL FOR ALL CRIMES**

The Court found mandatory juvenile LWOP unconstitutional under the Eighth Amendment, regardless of the crime committed, and for all juveniles, relying on a growing scientific consensus about youth brain development<sup>40</sup> and requiring lower courts to consider a young person’s family and home environment<sup>41</sup> and “the mitigating qualities of youth” when making decisions.<sup>42</sup>

2016

## ***MONTGOMERY V. LOUISIANA***

### ***MILLER* RULING NOW APPLIES RETROACTIVELY**

SCOTUS found that *Miller* applies retroactively, allowing people previously sentenced to LWOP as juveniles the possibility of parole.<sup>43</sup> The ruling emphasized courts’ constitutional obligations to youth with regard to their ability to ‘grow out of’ their criminal behavior with the right opportunities.<sup>44</sup>

### III. BEYOND MONTGOMERY: IMPLICATIONS OF THE SUPREME COURT'S DECISIONS FOR OREGON

The series of Supreme Court cases ending in *Montgomery* has opened a national dialogue about how the criminal justice system should handle youth. States are taking notice. Since *Miller*, 27 states “have changed their laws for juvenile offenders convicted of homicide” to now include the possibility of parole.<sup>45</sup> Many state court decisions now reflect a growing consensus that youth deserve “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>46</sup>

However, not all states have made reforms reflecting the emerging scientific and legal landscape. Many states, including Oregon, remain behind the curve.<sup>47</sup> Some states have interpreted the Court’s findings differently, arguing a much narrower interpretation.<sup>48</sup> However, change is clearly underway; spearheaded by the Supreme Court decisions, the youth justice debate is shifting. In some states, reforms are going beyond just the most severe sentences – such as life without parole – and applying the Supreme Court’s legal standards to other lengthy sentences as well. Other state courts have seen challenges that argue against extreme sentences that do not take into consideration youth’s unique capacity for change.

*“Because research shows that we cannot know whether a youth’s criminal conduct is transient, the U.S. Supreme Court has held youth must have an opportunity for release so that those who have grown and changed are not serving extreme sentences.”<sup>49</sup> — Sarah Mehta*

Armed with mounting brain science and with the potentially unobtainable standard of “irreparable corruption” in mind, some states appear to be taking the Supreme Court decisions to their next logical step. Not limited to only the severest sentences, the following is a summary of each of the major national efforts that have come about alongside, or as a result of, the Supreme Court decisions discussed above:

#### ENDING DE FACTO LIFE WITHOUT PAROLE SENTENCES

De facto life sentences occur when a person is serving a term that is likely to equal or exceed their life expectancy, even if their sentence was not explicitly

termed “life.” For example in Oregon, Measure 11 sentences can be stacked on top of one another, resulting in de facto life sentences for youth in a limited number of cases.<sup>50</sup> In other words, several lengthy sentences – each individually shorter than a life sentence – can be combined (‘stacked’) to well over the normal life expectancy of a healthy person. Stacking can thus amount to a de facto life sentence.<sup>51</sup>

*Graham* effectively decided that the application of life without parole to non-homicide youth is unconstitutional; practically speaking, a de facto life sentence is substantively identical to a sentence explicitly labeled “life.” In light of recent Supreme Court decisions, even a sentence that is “not technically labeled ‘life without parole’” may violate a young person’s Eighth Amendment rights.<sup>52</sup> California’s Supreme Court for example, recently decided that a 110-year sentence for a youth convicted of a non-homicide crime violated his Eighth Amendment rights.<sup>53</sup>

#### RAISE THE AGE LAWS

A majority of states have passed new laws redefining legal age boundaries to increase the age at which the justice system can automatically charge youth as adults.<sup>54</sup> So far, evidence suggests that these policies result in better public safety outcomes.<sup>55</sup> Although incremental in scope, these changes reflect a better understanding of biology, culpability, maturity and thinking ability.<sup>56</sup> States such as South Carolina, for example, have raised the age that youth can stay in the juvenile justice system from 16 to 17.<sup>57</sup> New York similarly passed legislation keeping 16- and 17-year-olds in the juvenile system for certain offenses.<sup>58</sup> Currently, most efforts focus on low-level, nonviolent offenders.

While the “raise-the-age” campaign represents a promising step, developmental science may require the justice system to significantly adjust the age at which prosecutors may try a person as an adult. The Massachusetts Institute of Technology’s Young Adult Development Project sums up contemporary developmental science as follows: “As a number of researchers have put it, ‘the rental car companies have it right.’ The brain isn’t fully mature at 16, when we are allowed to drive, or at 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.”<sup>59</sup>

## PAROLE ELIGIBILITY FOR MANDATORY MINIMUM SENTENCES

**Myth:** *Graham, Miller* and *Montgomery* apply only to sentences that are labeled “life without parole.”

**Reality:** *Graham, Miller*, and *Montgomery* apply to any lengthy sentence that denies a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>60</sup>

A handful of states have interpreted the series of Supreme Court decisions more broadly to protect youth not only from mandatory life without parole sentences or de facto life, but also a range of lengthy mandatory sentences. While much of the energy of recent challenges have focused on de facto life sentences, some have gone further. These state courts have recognized that other lengthy sentences - those that do not necessarily qualify as “life” or “de facto life” in biological terms - still violate constitutional rights when applied to youth.<sup>61</sup>

Some states are using a broader application of the Supreme Court decisions, building on *Graham*’s standard that said a youth must have a “realistic [and] meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>62</sup> Most states merely comply with the Supreme Court decisions in a “hyper-technical” manner, tweaking laws only enough to satisfy the strictest definitions of the Supreme Court’s decisions.<sup>63</sup> In these states, the primary focus is on life sentences and those de facto life sentences. A handful of states recognize the underlying principle of ensuring that all youth have a chance to prove their capacity for change and growth. Indeed, “instead of assessing whether someone is more likely than not to be dead before having the chance of release, some courts have correctly focused on whether the sentence would permit the individual to have a meaningful life upon release.”<sup>64</sup>

*“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. The same is true for a sentencing scheme that mandates the imposition of long sentences, such as Measure 11.”*<sup>65</sup> – Elizabeth Hilliard

Last, it seems that there is movement in Oregon with calls from the judiciary to end mandatory

minimums. In a recent Oregon decision, *State v. Ryan*, Chief Justice Balmer (joined by Justices Kistler and Landau), discussed in his concurring opinion how Measure 11 is ill-suited to the unique qualities of individual defendants.<sup>66</sup> His opinion goes beyond the primary issue at matter in the case and deals with broader questions about culpability and sentencing implicating all youth.<sup>67</sup> The concurring opinion by Balmer helps pave the way for future reform by calling for a review of Measure 11 by the legislature.<sup>68</sup>

*“Measure 11 offenses permit only the most limited consideration of personal characteristics, degree of culpability, mitigating facts, or the impact of the Measure 11 sentence on a particular defendant.”*<sup>69</sup> – Chief Justice Balmer

For background, in *State v. Ryan*, the Oregon Supreme Court agreed with part of the defendant’s argument and found the trial court erred in its 75-month Measure 11 sentence because it failed to adequately consider the defendant’s intellectual disability. In doing so, the trial court also failed to consider his reduced culpability in considering if the mandatory minimum penalty under Measure 11 was proportional to the crime committed.<sup>70</sup> As such, the court determined that his case move to a lower court for re-sentencing.

Importantly, in addition to the specific claim about his intellectual disability, the defendant in this case also “advanced a broad theory” that various factors of “youth...mental illness or other individual factors affecting judgment and conduct... [are] always relevant in determining whether a mandatory minimum sentence is constitutionally disproportionate.”<sup>71</sup> While the court declined to offer an official opinion on this argument, Balmer felt it was “important...to respond” to this claim.

Chief Justice Balmer, in his concurring opinion,<sup>\*</sup> agreed with the defendant that “a just and nuanced sentencing policy would give a judge at least some discretion...to take into account personal characteristics.”<sup>72</sup> Regarding the defendant’s proposition that the court take into consideration these individual characteristics, Balmer lamented the inflexibility of Measure 11: “I agree that, in many circumstances, such factors probably should be considered in determining an appropriate sentence – and would be in a more rational sentencing scheme than Measure 11.”

\* A concurring opinion is a non-legally-binding opinion written in addition to the majority opinion.

It is clear that the effects of bad policymaking are being felt in the judiciary. Balmer urges legislators to revisit Measure 11 in light of the inflexibility of Measure 11 to respond to the many mitigating qualities each individual defendant may have. Balmer notes the disproportionate impact a mandatory prison sentence may have on a young person:

*“In my view, the legislature should revisit the statutes that prevent courts from considering, when imposing a Measure 11 sentence, intellectual disability, youth, immaturity, or other mental or psychological limitations that may affect behavior. Appropriate legislation would give the courts discretion to impose a sentence more tailored to a particular defendant and crime, rather than imposing the current mandatory minimum sentence...” – Chief Justice Balmer*

His opinion makes clear that, consistent with legal precedent in Oregon,<sup>73</sup> it is up to the legislature to update our laws to reflect our evolving society. It is telling that moderate voices in the judiciary are now calling on the legislature to reconsider Measure 11 – a one-size-fits-all tool – and implement better policy that accounts for the highly-varied degrees of culpability among our justice-involved youth.

#### **IV. SCIENTIFIC DEFINITIONS OF AGE: STAGES OF DEVELOPMENT**

In *Roper*, the Supreme Court identified three key features that define youth as being less culpable than adults, solidifying with behavioral and cognitive fact how “children are different.”<sup>74</sup> The court listed:

1. “...a ‘lack of maturity and an underdeveloped sense of responsibility’ that frequently leads to ‘impetuous and ill-considered actions and decisions’;
2. an increased susceptibility to ‘negative influences and outside pressures,’ including a reduced ability to control or escape their environments;
3. a ‘more transitory, less fixed’ character that is ‘not as well formed as that of an adult.’”<sup>75</sup>

*“The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern*

*impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.”<sup>76</sup> – Dr. Ruben C. Gur*

Most states have legal age categories unsupported by current scientific definitions.<sup>77</sup> The Supreme Court grounded recent decisions in a growing body of research that is still relatively novel to many institutions and policymakers today.<sup>78</sup> Most states hold that an individual becomes an “adult” for the purposes of the criminal justice system at age 18, and even younger for more serious crimes. Oregon’s laws, like most states, haven’t kept pace with behavioral science, still charging youth as young as 15 in adult court. However, the scientific consensus around brain development does not support such a rigid delineation. Research shows the brain undergoes significant changes relevant to criminal behavior and culpability well into a young person’s mid-20s.<sup>79</sup> In contrast to the static definitions found in most state laws, the best scientific research indicates that the teenage brain is still “under construction.”<sup>80</sup>

Jay Giedd, a researcher at the National Institute of Mental Health, explains that during adolescence the “part of the brain that is helping organization, planning and strategizing is not done being built yet.... It’s sort of unfair to expect [adolescents] to have adult levels of organizational skills or decision making before their brain is finished being built.”<sup>81</sup>

The National Institute of Mental Health describes how the teenage brain undergoes “striking changes” and “in key ways...doesn’t look like that of an adult until the early twenties.”<sup>82</sup> Importantly, different parts of the brain also develop at different rates. For example, research has shown that the maturation of brain structures that lead to “increases in reward-seeking and need for novelty” occur before the maturation of the prefrontal cortex (the structure of the brain “responsible for planning, judgment, and inhibition”), which does not fully develop until the mid-twenties.<sup>83</sup> In other words, at the same time that the brain’s propensity for risk-taking increases, the brain’s ability to think about future consequences lags behind in development. This temporal ‘gap’ in development provides a biological explanation for greater risk-taking behavior in teens.

The teenage brain is in constant flux. Part of what makes teenage brain development so complicated – and vulnerable to disruption – is that “genes, childhood experience, and the environment...all



shape behavior” all in “the context of a brain that is changing.”<sup>84</sup> A young person’s ability to make complex decisions and regulate behavior rely on a complicated process wherein these factors build and reconstruct layers of foundation, all while being bombarded with complex stimuli.

FrameWorks Institute provides helpful visual metaphors to understand the complex science behind youth brain development:

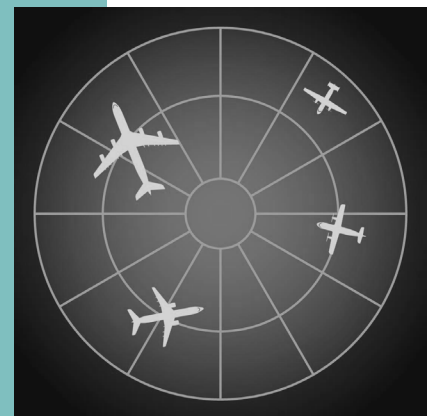


**EXPLANATORY METAPHOR #1: “BRAIN ARCHITECTURE: THE TEENAGE BRAIN IS CONSTANTLY BEING REMODELED.”<sup>85</sup>**

“Our brains get built like the structure of a house – what comes first lays down the foundation for all that follows. So, a child’s early experiences and environments are critical to the durability of the child’s later functioning. But as children grow, they encounter increasingly complex tasks and demands. Like the structure of a house, the brain needs to become functional in different ways to accommodate new expectations and requirements. It gets remodeled. Again, the experiences and environments that adolescents have available to them become the building materials that allow them to adjust to new demands, to support new skills, and to become reliable members of society.”

**EXPLANATORY METAPHOR #2: “AIR TRAFFIC CONTROL: THE TEENAGE BRAIN IS LEARNING TO RESPOND TO COMPLEX STIMULI.”<sup>86</sup>**

“The mental skills and abilities that a child develops play a huge role later in life. For example, the abilities to focus, pay attention, and ignore distractions are key. These skills begin in early childhood, where they require lots of practice and support, but aren’t fully developed and operational until the mid-twenties. These abilities are like air traffic control at a busy airport, where lots of things have to be coordinated. Some planes have to land, others have to take off, but there’s only so much room on the ground and in the air. The human brain also has a mechanism for controlling its mental airspace. It’s called executive function. This mechanism enables our brains to create mental priorities and watch over the flow of information so they can focus on tasks and make good decisions. We need to make sure that our systems recognize that these air traffic control systems are still developing in youth and make sure that communities give young people practice and support in using these skills.”



The implications in the criminal justice context are important. Not only are teens at higher risk of violating the law, they may also be ill equipped to deal with criminal justice processes designed for adults. Courtroom proceedings demand that a teenage brain think through the consequences of a plea deal in adult court. Further, because the teenage brain is “under construction” and highly susceptible to negative impacts, court proceedings that do not consider their unique vulnerabilities may have detrimental impacts on that developmental process, creating unnecessary long-term developmental damage.

**TAKEAWAYS: KEY FEATURES OF THE TEENAGE BRAIN<sup>87</sup>**

For many years, scientists believed the brain to be static. Not so. New research shows the brain,

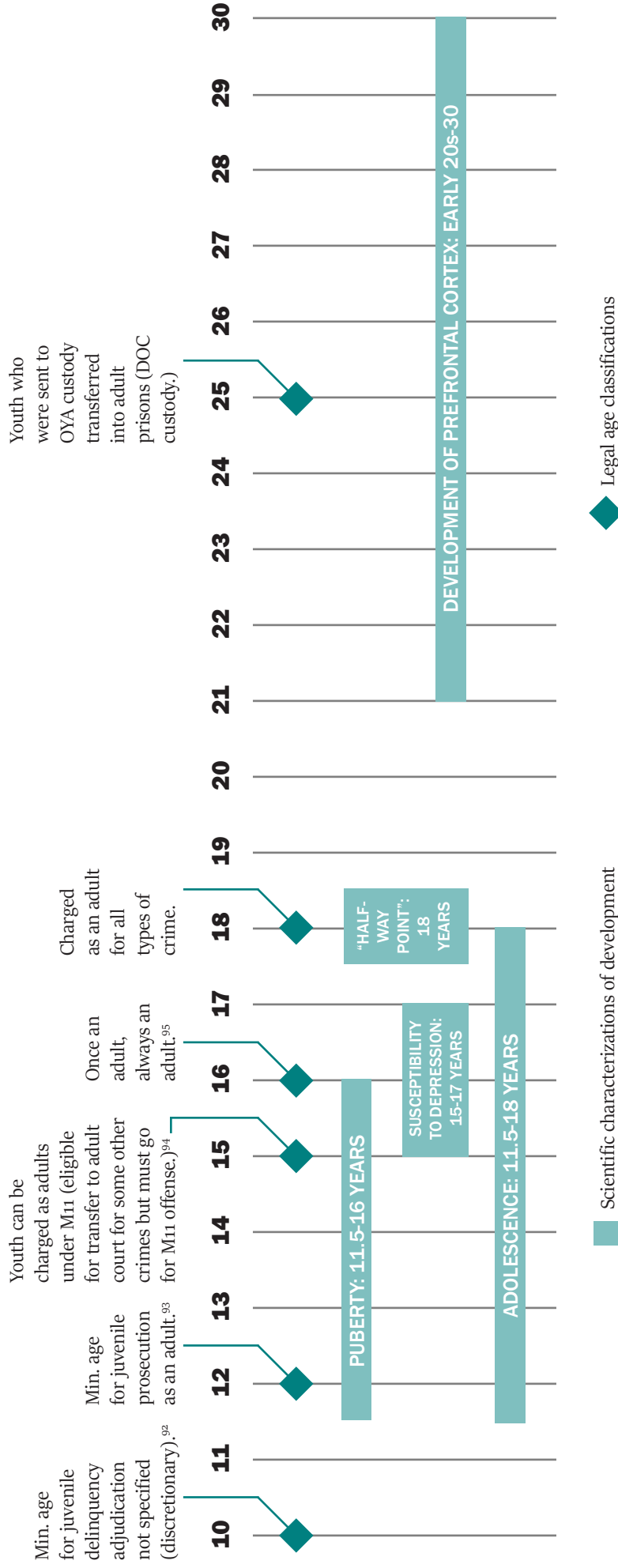
particularly for youth, to be very malleable and subject to large changes depending on stimuli and influence.<sup>88</sup> Simply put, the brain “is more plastic than we thought.”<sup>89</sup>

*“Because the brain is undergoing such rapid, fundamental changes at this stage of life, adolescents have a heightened capacity to learn and to [grow] out of risky behavior. Given an environment and supports appropriate to their developmental stage, most young offenders have the potential to become law-abiding adults.”<sup>90</sup> – The MacArthur Foundation Research Network on Law and Neuroscience*

### Features of the teenage brain and their plasticity

Teenage brain feature	Plasticity
Gray matter	Contributes to emotion, self-control, and decision-making. Changes into a person’s twenties.
Executive suite	Ability to plan ahead, regulate emotion and self-evaluate. Develops into a person’s twenties.
Reward system	Peaks at puberty then declines. May help explain risky behavior, especially in the context of trying to impress friends. <sup>91</sup>
Connectivity	The brain’s ability to operate different parts in tandem increases well into adulthood.
Emotional reactions	Brain’s circuitry regulates emotion, undergoing extensive changes over time. Teenagers show higher emotional responses than children or adults.
Hormones	Enormous hormonal changes during adolescence, including both sex and stress related hormones, affect different brain functions and social behavior.
Intellect	The sheer mental capacity of adolescents is similar to that of an adult. However, behavioral tests show teens may process information using different mental operations, including for impulse control and responses to emotional content.

# A visual timeline of youth brain development



**PUBERTY:** Girls and boys develop at different rates. The range for puberty onset and completion in males averages around age 12-16; for females, it is roughly 11.5-14.5 years of age.<sup>96</sup>

**ADOLESCENCE: Right/wrong framework:** Youth make huge changes in thinking ability during these years, most notably ability to think abstractly. This “still has limitation,” e.g. researchers term adolescents’ thinking style “dualistic”; because handling complicated situations that require weighing multiple factors to determine what is “right” and “wrong” is particularly difficult for them.<sup>99</sup> In general, youth at this age still tend to think about right and wrong differently from adults and fairly simplistically.<sup>100</sup>

**Empathy:** Youth at this stage still struggle being empathetic to the same capacity as adults, in part because they “are limited in their ability to hold more than one point of view.”<sup>101</sup> Perhaps most importantly, research shows “when their needs become pressing, the needs of others fall off” their radar.<sup>102</sup>

**Risk-taking behavior and sensation-seeking:** the “supercharged car with unskilled driver.”<sup>103</sup> Risk-taking increases as the desire of youth to feel strong emotions and sensations increases.<sup>104</sup> As sensation-seeking (and thus risky behavior) rapidly increases, however, adolescents’ ability to regulate it lags behind. As researchers put it: “there is often a gap of several years between the onset of the “accelerator” and developing effective “brakes.”<sup>105</sup>

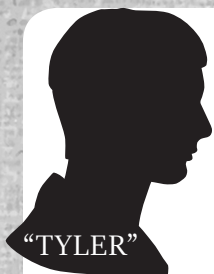
**SUSCEPTIBILITY TO DEPRESSION:** Teens at this age prone to heightened sadness/depression, “which can lead to poor grades at school, alcohol or drug use, unsafe sex, and other problems.”<sup>106</sup>

**THE “HALFWAY POINT”:** Dr. Sandra Aamodt, PhD Neuroscience: “the changes that happen between 18 and 25 are a continuation of the process that starts around puberty, and 18 year olds are about halfway through that process.”<sup>107</sup>

**DEVELOPMENT OF PREFRONTAL CORTEX:** Youth are still undergoing significant changes in their brain development well past the age of 18 and very likely beyond age 21.<sup>108</sup> The prefrontal cortex is where “executive functions” happen: things like planning, memory, and importantly, something called “response inhibition,” which is another way of saying impulse control.<sup>109</sup> Skills associated with the prefrontal cortex “allow an individual to pause long enough to take stock of a situation, assess his or her options, plan a course of action, and execute it. Poor executive functioning leads to difficulty with planning, attention, using feedback, and mental inflexibility, all of which could undermine judgment and decision-making.”<sup>110</sup>

# INTERVIEWS WITH YOUTH IN OREGON YOUTH AUTHORITY CUSTODY

Q. DO YOU THINK YOU WERE OLD ENOUGH TO THINK ABOUT THE CONSEQUENCES OF WHAT YOU WERE DOING?



"I didn't know anything about Measure 11. I didn't know that was even a thing. I knew nothing about it. I didn't even know it existed. I knew that anytime I committed a crime I thought about it to some extent, but at the time I really needed money, ya know? Because we were already pretty much squatting...I think I had just turned 16. I had no clue, I didn't know anything about Measure 11. I had heard about it, ya know? I had heard people talking about it. I knew this kid that had gotten charged with it. He beat someone with a baseball bat. And I thought it was like if you used a weapon or beat someone up. But I had never associated it with [stealing]."

"So I think the biggest thing that would have kept me out of it: knowing how real everything was, ya know? Because when I saw my brothers go and stuff like that I was like they're only going to be gone for like a year, two years, but I didn't know the circumstances of everything... It's like when you hear about something on the TV and they're like 'oh my god this place has got shot up' ...but then you don't actually know unless you are in that position knowing what it actually feels like. And that's how it is when you're getting faced with a Measure 11 then you have like a public defender coming at you like 'hey man you're facing like 100 years' even though you are like 17 you're facing 100 years and you're like 'what are you talking about? It wasn't even that serious'...That Measure 11 stuff, wooh, I just did not see that coming. Cause I had no clue about it. So that just sucks... My stuff happened when I was like 14... It was one of those experimental stages like I said where if we're playing house or something where is this gonna pop up, ya know? And then it's like three years later and all of a sudden it just comes out... And it's just one of those things where I had no clue about it - I was like 'Is everything cool? 'Is it OK to experiment with this female?' And it's like we're good, but no, because you have like a ... whatever a three-year difference [in age], whatever that shit is, or just underage... you can get in trouble."



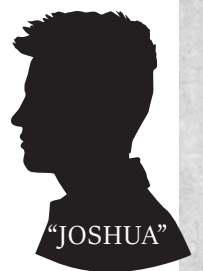
# INTERVIEWS WITH YOUTH IN OREGON YOUTH AUTHORITY CUSTODY

Q. DID YOU KNOW WHAT MEASURE 11 WAS?



“Well, uh, no. I mean I never knew anything about the system. I never heard about Measure 11. I never heard about the charge of murder, not really. Maybe like, I probably seen it on TV and stuff but I never really looked it up...now I’m totally against Measure 11 because I’ve been over it myself plenty of times in my head how I’ve grown from certain things and, ya know Measure 11 is affecting us in like, ya know, the wrong ways. Ya know if you’re getting locked up at such a young age, like I already know I was not even capable of processing probably like right from wrong in that moment, I don’t think. And it seems like I’ve been over it and I’ve not seen anything yet. Back then [I was] angry - whatever, now totally different person. I play with my little dogs I smile a lot more now, back then there was nothing like that... But then you got this whole sentence like a life sentence or 25 to life or something smaller or bigger or something outrageous, ya know, at such a young age you feel like, ya know, your life’s going to be like, well, obviously locked up forever. So no matter how much you grow, it’s just going to be in that cell, ya know, and that’s it. Nobody can know that. Nobody sees it.”

“No, I didn’t. I had no clue. I had no clue what was going on in the courts. Nothing. I had no idea. None. I was a 14-year-old kid, 15-year-old kid and they’re telling me that I was going to get outpatient treatment. And I was like ‘I don’t know what that is’ and they said, ‘You can go to a treatment program’ and I was like ‘Okay, something like my mom went to. Like a drug rehab.’ And um they uh said I’d be released on a Monday, the following Monday and I went back to the detention and there was somebody that wanted to talk to me there. And my attorney told me never to talk to anybody without an investigator or without him especially...and it slipped my mind I guess because this investigator was there and...he was a smooth talker. I’ll tell you what, they know how to uh, they know how to really get past your walls. I mean they really just, they get you. I was like ‘uhh I think I’m going to need my attorney’ and he was like ‘no you won’t need your attorney for this.’ He was like ‘you can do this, you’re a grown, you’re a grown man’ you know... And I was like okay, I can do this because he pumped my head up and I was like I can do this and I admitted everything to him. And uh I went to court that Monday and they said that they could not release me and that I was being charged with 75 months Measure 11.”



# UNDERSTANDING BALLOT MEASURE 11

## I. MEASURE 11: ITS ROOTS AND IMPACT

Ballot Measure 11, enacted in Oregon in 1994, created lengthier, mandatory minimum prison sentences for many person-on-person crimes, for which youth 15 years or older are tried in adult court and subject to the same penalties as adults.<sup>\*111</sup> Measure 11 covers serious person crimes that range from relatively lesser “second-degree” offenses, all the way up to some of the most serious offenses such as murder. The measure’s “statutory exclusion,” means that youth charged with a Measure 11 offense will automatically be processed by an adult court. Notably, the measure passed at a time of elevated fears about violent juvenile crime in Oregon and nationally.<sup>112</sup>

### PUBLIC OPINION AT THE TIME OF BALLOT MEASURE 11

In the period leading up to the adoption of Measure 11, national ‘tough on crime’ policies were rejecting more rehabilitative forms of criminal justice in state after state. On a national scale, mandatory minimums gained currency in both major political parties, based on the presumption that they could curb crime and create more standardized punishments.<sup>113</sup> At the time, public trust in the criminal justice system was low.<sup>114</sup> Despite being disproven once already as public safety tools,<sup>115</sup> they nonetheless became widespread in the 1980s and 90s at the peak of outsized fears over rising crime rates. Some criminologists further added to the climate with predictions of the impending rise of the so-called “superpredator.” Although predictions about rampant juvenile crime perpetrated by a generation of “remorseless” youngsters never came to fruition, laws forcing youth into the adult criminal justice system rose alongside mandatory minimums.<sup>116</sup>

In Oregon, similar fears about rising crime rates drove much of the public debate. Concern around violent crimes involving youth of color was exacerbated after a particularly high-profile case involving a serious assault on a white man by three black teens at Lloyd Center Mall in Portland.<sup>117 118</sup> During the same time, then Attorney General Ted Kulongoski’s Task Force on Juvenile Justice sought to address public concerns over crime rates.<sup>119</sup> However, in a bid in part helped by the Lloyd Center case, Representative Kevin Mannix was “able to pre-empt the discussions of the Task Force on Juvenile Justice by getting Ballot Measure 11 on the November 1994 ballot.”<sup>120</sup>

The high-profile Mannix effort harnessed rising fears over violent juvenile crime to build support for a significantly more punitive approach.<sup>121</sup> The 1994 voter’s pamphlet read in part, “[t]he mandatory minimum sentences for the violent crimes listed in [Measure 11] are the minimum required for justice to society and the victim.”<sup>122</sup> Backers pitched the measure as a means to deter crime, create fairer and more uniform sentences, and incapacitate violent offenders.<sup>123</sup> One of the central promises was greater “truth-in-sentencing.”<sup>124</sup> Without significant organized opposition, the measure passed easily.

## II. WHAT DID MEASURE 11 CHANGE?

Prior to Measure 11, Oregon already had a system of determinate sentencing - meaning that the length of prison stay was fixed for a particular crime, with relatively little discretion from a judge to change it.<sup>125</sup> The guidelines also eliminated parole - another hallmark of ‘truth-in-sentencing.’ Both features went hand-in-hand with the calls for “greater accountability” in the lead up to Measure 11, though

\* See Appendix One for a chart of minimum sentences required under Measure 11 for 15, 16, and 17-year-olds.

the public still feared that the state was too lenient.<sup>126</sup>

Measure 11 made punishments more severe, eliminated all opportunities for early release, and created mandatory waiver for youth into adult court. Under the previous guidelines, youth would not face in adult court unless waived in by a judge. Measure 11 took away this judicial discretion. In doing so, the shift made prosecutors the primary gatekeepers to determine whether to charge a youth with a Measure 11 offense.

Measure 11 affected youth in several important ways:

➤ Removal of judicial discretion: statutory exclusion

Prior to Measure 11, judges had greater discretion to consider “mitigating factors” – such as past trauma, abusive households, or developmental immaturity – before deciding to send a youth to adult court. Measure 11 created mandatory prison sentences uniform for all offenders of a particular crime, regardless of the unique facts of the case or the offender’s history.<sup>127</sup> First-time offenders and long-term criminals ostensibly face the same repercussions, though criminal history does appear to affect Measure 11 conviction rates.<sup>128</sup>

The U.S. Supreme Court and now states such as Washington and Connecticut have made clear that the Eighth Amendment compels courts to consider the mitigating qualities of youth. Judges do, in fact, have discretion to sentence youth outside of a mandatory adult sentence.<sup>129</sup> However, the status quo mostly takes Oregon judges out of this process.<sup>130</sup>

➤ Longer sentences

Under Measure 11, judges only have discretion to add time to a mandatory minimum sentence, not lessen it.<sup>131</sup> All defendants charged under Measure 11 face longer sentences, in some cases, much longer.<sup>132</sup> Importantly, youth offenders may also be required to “serve any sentence imposed under Measure 11 consecutively,” so that multiple sentences can be ‘stacked’ on top of one another. In effect, “one evening of mistakes may mean a lifetime of penance for a young offender.”<sup>133 134</sup> Currently, several youth who committed a crime before the age of 18 are serving de facto life sentences.

➤ No possibility of earned time or judicial review

Measure 11 took away the possibility for “earned time,” that prisoners could secure by demonstrating positive behavior after serving a significant portion of their sentence.<sup>135</sup> Further, Measure 11 eliminated “second look” hearings, which allow a judge to review a young offender’s sentence after serving half their time. By eliminating these incentives, Measure 11 took away important motivation for youth to use their time in custody proactively.

Under Measure 11, young people do not have any way of shortening their sentence “based on demonstrated maturity and rehabilitation” – a key condition that must be afforded all youth, according to the Supreme Court’s *Graham v. Florida* decision.<sup>136</sup>

➤ A less rehabilitative, more punitive justice system

Measure 11 created new priorities and dynamics of power within the justice system that impact youth in important ways. The emphasis on rehabilitative services declined. Oregon’s Task Force on Juvenile Justice moved away from front-end, preventive services and “instead focused on the back end of the system” (i.e. custody) after Measure 11.<sup>137</sup> Impartial judges saw their power stripped away. As a corollary to the removal of discretion from judges – and possibly the most important change of all<sup>138</sup> – Measure 11 redirected discretionary power into the hands of prosecutors, acting as advocates for the state. The shift placed even greater pressure on prosecutors to be ‘tough’ on crime.<sup>139</sup>

Prosecutors’ oversized role resulting from Measure 11 can be explained in a couple of ways. The criminal justice system charges a defendant based on their initial arrest by a law enforcement official, who decides what charges their alleged behavior warrants. From there, the District Attorney’s (DA) office makes the initial determination of whether the actions of the defendant, based on the facts provided by police, constitutes a Measure 11 offense. In this way, prosecutors act as ‘gatekeepers’ to the courts, a critical role determining whether youth will face charges as adults.<sup>140</sup> In other words, prosecutors, as advocates for the state, have the primary authority to determine if a youth will move to an adult court.<sup>141</sup>

As Measure 11 was largely regarded as a mechanism of ‘accountability’ in the public eye, prosecutors – unlike the spectrum of actors that reviews juvenile cases – have little incentive to look after the protection and interest of the youth compared to their clear incentive to pursue ‘victories’ in an adversarial court system. This is troubling given that, in Oregon, prosecutors are given such a wide breadth of authority with relatively little oversight or accountability.<sup>142</sup>

### **III. CHANGES TO MEASURE 11 SINCE ITS IMPLEMENTATION**

Since implementation, Oregon has modified Measure 11 in several important ways, with mixed impacts for youth. First, between its implementation and 1997, the legislature added six crimes to Measure 11’s original 16. In addition, it increased sentence length for certain crimes.<sup>143</sup> Legislators also amended Measure 11 to make some “second degree” – less serious – Measure 11 offenses eligible under certain circumstances for a lesser sentence than the mandatory minimum normally required.<sup>144</sup> However, this latter change had a negligible impact on the overall prison population, in part due to prosecutorial practices shifting in response to the change of law.<sup>145</sup>



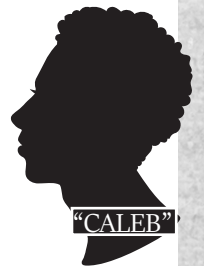
# INTERVIEWS WITH YOUTH IN OREGON YOUTH AUTHORITY CUSTODY

Q. DID YOU HAVE A TRIAL OR TAKE A PLEA DEAL?



“[The court process] was just super slow, super dumb, and they were like ‘Yea man. This is a major offense. Like I said you can get 100 years for this’. And I was like: ‘No. Now I know that you’re lying,’ and I called my dad and I was like: ‘Dad. What do I do?’ and he told me to take it to trial and ‘everything is going to be ok. Trust me...’ So then day of my trial, [my public defender], he was like: ‘I’m just going to be honest with you... I don’t know if you want to go to trial.’ And I was like: ‘no I’m pretty sure [I] want to go to trial, my family is here. I’m ready to go.’ He was like: ‘You could go to trial, but if you lose, you’re going to at least do, like, 20 years.’ I was like: ‘20 years? What the fuck?’. And I’m only like 18 at the time so 20 years that would make me almost 39 or 38, 20 damn near. That’s a whole bunch of my life and I wasn’t sure if he was, like, being serious. I don’t fucking know. And I can’t talk to my dad and usually I talk to my dad about everything. So I was just lost... This is like day of the trial. And I’m like, this isn’t making any sense to me, so I was like what should I do and [my attorney] was like: ‘This is what I can do for you. I can go over and tell the DA that you want to agree to just settle,’ ya know what I’m saying? ... So I was like ‘what are you guys talking about’ and he was like ‘I talked to the DA, 75 months, we can do this right now. We’ll turn this into a sentencing and we can just get you going.’ And I was like all right, lets go. I got scared man. I got scared. Day of the trial and they got me. So I’m just hoping when I get out I can get this stuff expunged. We have no idea if it will.”

Q. ARE THERE ANY PARTS OF THE LEGAL PROCESS, FROM YOUR INITIAL ARREST TO COMING HERE TO MACLAREN, THAT STAND OUT?



“Yeah. So right when I got sentenced they took me to Coffee Creek [Intake Center]. My mindset is thinking that I’m going to go up state [to an adult prison] so I’m gonna just have to start taking off on people as much as I can, ya know what I mean. It’s bad. I should say that I’ve never even been in an actual prison before that’s just what I’ve heard... So I’m talking to some inmates and they’re just like ‘bro now that you’ve got your sentence you’re going to have to prepare for going up state’ so how do I prepare? And he was just like ‘you’re gonna have to fight.’ So I started fighting, got charged with an assault that still might come back and hit me when I get out, but I doubt it... when I went to Coffee Creek they were like we are just gonna hold you here for 30 days and then you are gonna go up state. But then by the 5th or 6th day I got picked up by OYA and I was like, what the hell is this, and it was just super confusing.”

# INTERVIEWS WITH YOUTH IN OREGON YOUTH AUTHORITY CUSTODY

Q. WHAT WAS GOING TO ADULT COURT LIKE?



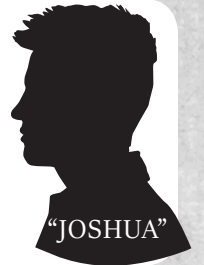
“Scary. We [defendants] don’t really say much, they just do everything. We just sit there. They just tell us what’s going to happen what you’re going to do and everything. Basically, like it was just them deciding what was going to happen. Yeah, I would have liked to play a bigger part in that process. Just like, fight harder.”

Q. WHAT ARE SOME OF YOUR INTERESTS?



“I love to do photography, video editing, coding...I’m gonna learn Java Script, Python [coding languages] - I know a little bit, just the basics, but I want to go super in depth. C++ [another coding language] is the number one thing I think everyone should learn. I’m a learner. I love to learn. I love to learn psychological things, ya know?”

“In here I’m a metal fabricator, wood worker, mechanic, welder, and I’m certified in all of these areas. Anything you want me to build, I can fix or build it for you. One of my interests is to create a program around foster kids. It’s already starting. A nonprofit from another state is coming here. I think they may be here in Portland already, and they work on building a community around the kids.”



Q. DO YOU FEEL LIKE YOU ARE REHABILITATED OR ON THE PATH TO IT?



“Yeah. It takes a long time for people to actually get it. Like I said, it goes back to accountability. This is what I did. Move on. I see it for what it was, now move on. You have to take advantage of the system because they took advantage of you. That’s the way I see it.”

# DOES MEASURE 11 MAKE SENSE FOR YOUTH?

*“A developmental model of juvenile justice rejects many of the punitive law reforms of the late twentieth century as often excessively harsh and therefore unfair to young offenders and as likely to increase rather than decrease the threat to public safety.... Indeed, the evidence suggests incarceration likely increased the risk of recidivism for many youth.”<sup>146</sup> — Richard J. Bonnie et al*

## I. IMPACT AND EFFECTIVENESS OF MEASURE 11

Measure 11 has had a significant impact on Oregon’s youth. It has increased the number of incarcerated youth, lengthened sentences, and unnecessarily moved many justice-involved youth into adult court, all of which has disproportionately affected youth of color.<sup>147</sup> It is unclear that Measure 11 is a cost-effective strategy for ensuring public safety in as applied to youth. Although some tout Measure 11’s effects on violent youth crime rates, Oregon’s declining juvenile crime rate merely mirrors national trends. As the *Misguided Measures* report makes clear, “while serious crime by adults and by young people has declined in Oregon since the passage of Measure 11, increased imprisonment and adult convictions of youth have not driven down the crime rate.”<sup>148</sup> Indeed, consistent with national studies on the relationship between incarceration and crime rate, research on Oregon shows “no discernible pattern between the number of young people charged with a Measure 11 offense and the juvenile crime rate.”<sup>149</sup>

decline closely mirrored national trends. Research cited by the Brennan Center for Justice and others points to the minimal role incarceration has played. Incarceration is only a fraction of a much larger and complex web of factors, including demographic shifts, economic trends, and rates of alcohol consumption.<sup>150</sup> Further, growing evidence points to the “diminishing returns” of incarceration in today’s society.<sup>151</sup> While scholars acknowledge the modest role incarceration played in helping to reduce high crime rates in the early 1990s, as incarceration has increased since, its relative impact on public safety has become negligible or even counterproductive.<sup>152</sup>

Proportionality is central to recent Supreme Court rulings on juvenile sentencing and the Eighth Amendment. However, it is not clear that Measure 11 is achieving this standard or effectively targeting the most serious offenders. Rather, “most youth charged with a Measure 11 offense are ultimately convicted of a non-Measure 11 crime.”<sup>153</sup> In other words, the majority of youth originally charged with a Measure 11 crime actually plead down to a non-Measure 11 offense. Many are also first-time offenders, who end up with probation, avoiding an adult prison sentence but stuck with an adult conviction on their record.<sup>154</sup>

The lifelong consequences of an adult conviction include significant barriers to employment, housing, and higher education assistance. Oregon should critically examine the purpose of mandatory sentencing under Measure 11, given this dynamic. Sponsors promoted Measure 11 and its lengthy mandatory sentences as the “minimum” required to ensure justice, but the reality in practice looks much different. In the majority of cases, prosecutors do *not* find that the youth charged with a Measure 11 offense are so dangerous that a lesser sentence cannot

Over the past few decades, Oregon’s steep crime

better serve justice.<sup>155</sup> Instead, in practice, outcomes suggest that prosecutors primarily use Measure 11 as a bargaining tool to increase the penalties a young person faces through plea negotiations.<sup>156</sup> Such wide prosecutorial discretion contradicts the principle of a Measure 11 sentence as a predictable, uniformly-applied “minimum” required to ensure justice.<sup>157</sup>

## II. UNDERSTANDING THE DIFFERENCE BETWEEN JUVENILE AND ADULT COURT

Measure 11 statutorily excludes youth from juvenile court, denying them considerable protections in the juvenile system. Unlike adult court, the juvenile justice system is intentionally designed to be collaborative in its approach.<sup>158</sup> This more compassionate approach rests “on the concept of rehabilitation through individualized justice.”<sup>159</sup> The distinction rests in part on the idea that youth are inherently less culpable than fully-formed adults.<sup>160</sup> Given young people’s rehabilitative capacity, the juvenile system focuses on “diagnosis and treatment” to protect their potential for a productive future.<sup>161</sup> While some protections distinguishing youth from adult courts were slowly dismantled over time, other protections and distinguishing processes remain.<sup>162</sup>

In the Oregon juvenile court system, youth enjoy greater access to resources for rehabilitation,<sup>163</sup> greater civil protections,<sup>164</sup> and far less punitive consequences.<sup>165</sup> The approach assumes a ‘parental’ role designed for accountability and rehabilitation, rather than strictly punishment.

Youth move through the juvenile system while interacting with a cadre of actors working together to find solutions for the young person in question. The dynamic starkly contrasts with the inherently adversarial adult system. Youth in the juvenile justice system take needs assessment tests to determine if they have adequate support systems. In these cases, a juvenile court counselor will be involved early to potentially guide them toward therapy, domestic violence groups, or another intervention. In contrast, youth indicted under Measure 11 go straight into detention, eliminating the chance to identify and address the issues that may contributed to them being in the justice system in the first place.<sup>166</sup>

In juvenile court, many more avenues are available to youth for diversion away from prison, also known as “alternative disposition.” Unlike adult court, judges may take into account circumstances such as school records, employment prospects, and rehabilitation

progress before determining the best course of action for a young defendant.<sup>167</sup> A juvenile court record can be expunged or suppressed for lower-level convictions, whereas an adult felony conviction often stays on one’s record for life.<sup>168</sup> For example, a youth convicted of a Class A felony sex offense in juvenile court can potentially be eligible for relief from the sex registry after two years. The same youth tried in adult court under Measure 11 must register for at minimum 10 years after completing their sentence and post-prison supervision.<sup>169</sup> In Oregon, “cases involving sex crimes make up over one in three [youth] Measure 11 indictments.”<sup>170</sup>

## III. EXAMINING THE MECHANISMS AND STRATEGIES OF MEASURE 11

*“No convincing evidence exists that confinement of juvenile offenders beyond the time needed to deliver intensive services reduces the likelihood of re-offending.”<sup>171</sup> — Richard J. Bonnie et al*

Some stakeholders, including the Oregon District Attorneys Association and Oregon law enforcement agencies, contend Measure 11 works “exactly as intended” by focusing scarce resources and holding the most serious offenders accountable.<sup>172</sup> No doubt, Measure 11 has significantly increased incarceration, satisfying the promise to “increase incapacitation.”<sup>173</sup> However, the most comprehensive studies of Measure 11 do not support the conclusion that the measure has successfully deterred future crime.<sup>174</sup> As explained, developmental research suggests youth are more prone to impulsive behavior and lack the ability to think about consequences, casting doubt on Measure 11’s ability to deter illicit behavior.

Further, the application and outcomes of the law appear to be different depending on somewhat arbitrary characteristics, such as age, gender, race, and ability to hire a private attorney.<sup>175</sup> Removal of judicial discretion does not guarantee ‘truth in sentencing.’ Rather, the lack of judicial discretion has resulted in aggressive plea practices, an explosion of young people tried in adult court, and punishments out of proportion to both the youth and offense.<sup>176</sup>

As it relates to youth, a discussion of the strategies and outcomes of Measure 11 requires an examination of two primary mechanisms: the transfer of youth to adult court and the imposition of adult mandatory minimum sentences.

## A. JUVENILE TRANSFER TO ADULT COURT

*“In Oregon, Black youth under age 18 are more likely than White youth to be charged as an adult for the same offenses. Adult conviction records follow them around for the rest of their lives—creating barriers to education, housing and employment.”<sup>177</sup> — Dr. Yvette M. Alex-Assensoh et al*

Oregon has the second highest rate of juvenile transfers to adult court in the nation. As of 2014, black youth were three times more likely to move to adult court than white youth.<sup>178</sup> Oregon’s high rate of juvenile transfer into adult court through Measure 11 has not had the positive impact on public safety outcomes some might suggest. Available data show counties with the fewest transfers have comparable crime rate reductions to other, incarceration-heavy counties.<sup>179</sup> A review of national research on juvenile transfers helps to explain the trend.

While laws that allow for the automatic transfer of youth to adult court threaten stricter consequences, research suggests that they have no demonstrated deterrent effect on criminal behavior among youth. The same holds true in Oregon.<sup>180</sup> Rather, overall “youth transferred to the adult system are more likely to be rearrested and to reoffend than youth who committed similar crimes but were retained in the juvenile justice system.”<sup>181</sup> Transferring youth into the adult system does not serve public safety. National research into efforts to raise the age for adult trial shows no negative impacts on recidivism outcomes.<sup>182</sup> In other words, keeping youth in the juvenile system longer does not result in reduced public safety.

In practice, prosecutors play the primary role in dictating the outcomes for youth facing a potential Measure 11 indictment.<sup>183</sup> With the passage of Measure 11, “the critical decision became whether to seek conviction for the charge in the indictment that carried the mandatory minimum sentence;” a decision that was “left...up to the individual district attorneys and their deputies in Oregon.”<sup>184</sup>

Unfortunately, prosecutors’ offices largely keep decision-making private, allowing for little transparency for tracking of racial data and other metrics. The opacity gives rise to concern about the potential for unchecked, “extralegal” practices and negative impact associated with implicit bias.<sup>185</sup>

<sup>186</sup> While many explanations exist for the racial

disparities created by Measure 11, one contributing factor may be the underrepresentation of people of color in law enforcement and courtrooms in Oregon relative to the demographic distribution of the general population.<sup>187</sup> The lack of diversity is notable when considering national research that shows officials may perceive youth of color as more culpable than their peers.<sup>188 189</sup>

## B. MANDATORY MINIMUM SENTENCING

The mandatory sentences under Measure 11 have not led to the kind of accountability and public safety impacts originally promised by backers.<sup>190</sup> Most youth charged with Measure 11 offenses do not face the penalty deemed the “minimum necessary” for justice under Measure 11, but rather lesser, non-Measure 11 offenses through plea negotiations influenced by the threat of lengthy Measure 11 penalties.<sup>191</sup> As a result of the increased threat, prosecutors enjoy greater relative discretion.

The dynamic created by Measure 11 has resulted in longer stays in custody and greater severity of sentencing, even for those youth who do not receive the full adult mandatory sentence.<sup>192</sup> Despite their proliferation, research has repeatedly disproven mandatory minimums as public safety tools.<sup>193</sup> For example, a 1993 meta-analysis report compiled from 50 different studies found mandatory minimums’ lengthier prison sentences produced higher rates of recidivism and a tendency for lower-risk offenders to experience more negative outcomes.<sup>194</sup> To understand Measure 11 in this context, several factors explain why Measure 11’s mandatory minimum sentencing structure may be ill suited for justice-involved youth:

### ➤ The age-crime curve

Lengthy mandatory sentences - and the lifelong consequences that come with them - ignore the high predictive value of the “age crime curve.”<sup>195 196</sup> Research shows that across various populations, youth tend to naturally grow out of illicit behavior as they mature.<sup>197 198</sup> As the Supreme Court has noted, only “ten percent of serious juvenile offenders become chronic adult criminals” and that “research indicates that one cannot predict whether an adolescent who has broken the law is likely to become a persistent offender on the basis of his adolescent offense alone, even if the offense is a serious one.”<sup>199</sup>

*“Over the last quarter century, psychological research has shown that much of youth crime and delinquency is the product of normal adolescent development... As most youth mature, however, they age out of delinquent behavior and rarely persist in a life of crime.”<sup>200</sup> – Kristin Henning*

➤ Measure 11 is a blunt instrument<sup>201</sup>

A mandatory minimum sentence amounts to a sentencing hammer that tends to treat every case as a nail. Research on how best to keep youth from committing further crimes suggests targeted, individualized interventions at an earlier age are most effective. Further, incarceration actually plays a very limited role in deterring crime relative to other social and environmental factors.<sup>202 203 204 205</sup> Measure 11 is a punitive, ‘late-in-the-game’ tool that removes judges’ ability to take account of individual factors that may have led to a crime, including past traumas known to affect a majority of Measure-11-indicted youth.<sup>206</sup> By disallowing the chance to consider a defendant’s unique situation when sentencing, the system saddles youth with lengthy sentences benefiting neither society nor, often, the victim themselves.<sup>207</sup>

The one-size-fits-all approach of Measure 11 may also result in punishments disproportionate to the public safety risk of the offense. The problem is twofold. First, sentences do not necessarily take into consideration the relative public safety risk of the youth. Second, the broad offense categories do not allow for discerning judgments based on the unique facts.<sup>208</sup> A prominent example is the case of the Grant High School youth who were charged under Measure 11, despite pleas from the judge, community, and family members.<sup>209</sup> The case involved four teenage boys of color who surrounded another student and asked for his money. *Street Roots* describes the interaction:

“[S]hortly after last period, Bullitt and three of his classmates, Rico Cabrera, 15, Saadiq Ducloux, 16, and Charlie Tzab, 16, surrounded a freshman and demanded he hand over his money. The targeted student thought it was a joke at first but became fearful when he saw Ducloux was pointing a pocketknife at him, according to court documents. They searched his pockets and

shoved him, then walked away, empty-handed and laughing.”<sup>210</sup>

The Multnomah County District Attorney’s Office responded by charging each of the boys “with six counts of felony armed robbery in the first and second degrees,” meaning that the youth potentially faced at the very minimum roughly six years of imprisonment.<sup>211</sup>

*“Mass incarceration...fails to solve the problem of violence because it is a response that treats violence as a matter of ‘good vs. evil.’ The reality is far more complicated. Nearly everyone who commits violence has also survived it, and few have gotten formal support to heal. Although people’s history of victimization in no way excuses the harm they cause, it does implicate our society for not having addressed their pain earlier.”<sup>212</sup> – Danielle Sered*

➤ Interactions with the criminal justice system may exacerbate unproductive behavior

Youth transferred to adult court exhibit worse public safety outcomes than those who are not. This may be explained in part by the large numbers of justice-involved youth who report exposure to trauma and who are troubled by mental health, domestic abuse, and drug addiction problems.<sup>213</sup> Interactions with the criminal justice system negatively impact youth in ways counterproductive to their development, and confinement may be a compounding factor to pre-existing mental health issues.<sup>214</sup> Measure 11 often results in lengthy – and traumatic – pre-adjudication holding, regardless of the eventual outcome of the conviction. More cautious and appropriate application of lengthy criminal charges is called for when considering that the teenage brain is “under construction.” Adolescent behavior, regardless of how serious, is not a reliable indicator of future behavior.<sup>215</sup> The justice system should consider each young person’s potential and capacity to change.

➤ The bargaining-chip mechanism

Mandatory minimum sentencing – and its threat of long sentences without the possibility of early

release - can scare youth into taking plea deals they may not otherwise take. Measure 11 has functionally shifted power in the courtrooms to prosecutors, leaving defendants with a greater uphill battle than many may realize. Mandatory minimums enable aggressive tactics that result in high numbers of plea deals and outcomes that do not reflect the promise of accountability.<sup>216</sup>

Measure 11 promised a way to ensure accountability for the most serious offenders. However, nine out of ten youth take a plea deal, most of which involve pleading down to non-Measure 11 offenses.<sup>217</sup> For example, a 2016 Oregon District Attorney Association's Measure 11 Report indicated that "more than half (57.3 percent) of charged homicide cases were reduced through plea negotiations or trial."<sup>218</sup> Importantly, the report only covered convictions not plead out of Measure 11. In other words, even of the relatively small portion of crimes not pled down to a non-Measure 11 crime, plea deals resulting in reductions in sentence were still common. In some cases - such as with homicides cited above - pleas were in fact more common the greater the severity of the crime.<sup>219</sup> Statistics like these suggest that the impact of a stiff mandatory sentence may have more to do with ensuring a conviction than with true accountability.

Given that Measure 11 youth - particularly youth of color in Oregon - often have fewer resources and little understanding of the law,<sup>220</sup> the threat of a long sentence is a powerful incentive to avoid trial, regardless of the weakness of the case.<sup>221</sup> This results in both the high number of plea deals taken and the differences in outcomes depending on the ability to afford a private attorney.<sup>222</sup>

#### **IV. RACIAL IMPACT OF MEASURE 11**

Measure 11 particularly negatively impacts youth of color, notable especially in the context of the racially disparate outcomes produced by Oregon's juvenile justice system overall.<sup>223</sup> *Misguided Measures* uncovered disturbing figures for Oregon's youth: black youth were almost three times as likely as white youth to face a Measure 11 charge and constituted a proportion of the total Measure 11 indictments nearly five times greater than their relative proportion of the general population. Latino and Native American youth were also significantly overrepresented relative to their white peers.<sup>224</sup> While black youth indictments are more likely, they are less likely to lead to a

Measure 11 conviction. Black youth are also most likely to face indictment on Robbery II - a less serious offense than many Measure 11 crimes.<sup>225</sup>

Our own updated data set, collected with the assistance of Dr. Mark Leymon of Portland State University's Department of Criminology and Criminal Justice, uncovered similarly disturbing figures. These figures are discussed below and shed light on a system that disadvantages Oregon's youth of color. The disparate charging and sentencing outcomes along racial lines call into question the fairness of Measure 11.<sup>226</sup>

*"Oregon is one of 15 states where prosecutors alone can decide whether to try a youth as an adult - and it's happening to black and Latino teens disproportionately."*<sup>227</sup> - Emily Green

#### RACE STATISTICS

##### Background of Mark G. Harmon

The information in these charts comes courtesy of Dr. Mark G. Harmon, a professor in the Department of Criminology and Criminal Justice at Portland State University in the Mark O. Hatfield School of Government. He brings a strong background in criminal justice research focusing on racial impacts of public policy. Research focus areas include sentencing, gender differences in imprisonment, racial disparities in sentencing and imprisonment, police-related killings, and statistical analysis. He supplied background information and advice to help frame and inform the literature review. Additionally, he cleaned, analyzed, and generated tables and figures for this report.

##### Scope and methodology

Dr. Harmon collected these data from the Oregon Criminal Justice Commission. The Oregon Department of Justice originally collected and compiled the data in consultation with the Oregon Youth Authority. The data cover all Measure 11 referrals from 1995 (the first year of the law) through 2012. During that time, there were 3,976 cases. The data include demographic information such as date of birth, age at the time of the crime, sex, race,

and county of offense. They also include justice-related information such as age at the time of trial, year the case started, trial or plea bargain, offense charged, offense convicted, whether the conviction was of a Measure 11 offense, length of sentence, sentence date, number of convictions, and number of sub-convictions. These data form the basis for a descriptive analysis of the characteristics, trends, and patterns in the cases.

#### Notes on the tables and figures

The data collected include both Measure 11 referrals to adult court (indictments) and Measure 11 convictions. The following figures and graphs discuss both measurements. The authors used demographic data from the year 2010 as a control against which to measure the degree of disproportionality in referrals and convictions, respectively. In 2010, black youth comprised 1.8 percent of Oregon's general youth population, whereas white youth comprised 83.5 percent of the general youth population.

#### Understanding "relative rate index" (RRI) as a measure of racial disparity

The primary measurement tool used to illustrate data on Measure 11 youth is the Relative Rate Index (RRI). For reference, we have used the RRI similarly to how the Safety and Justice Challenge collected data on Multnomah County in 2016 as part of the MacArthur Foundation research project ([you can view that report here](#)). The RRI is a more nuanced and informative measure of racial disparity than a basic measure of race-based proportionality, as will be described below.

We can use rate of referral to adult court for a Measure 11 crime (one of the measures laid-out in the data that follows) to illustrate the function of the RRI. A typical measurement of racial disparity would, in our example, look at a certain racial group's rate of referral to adult court relative to their proportion of the general population. We can call this preliminary measure a "proportionality measure," since it is measuring a racial category of youth referrals in relation to their proportion of the general population. If we use real data from Oregon, we can ascertain such a measurement:

- From 1994 – 2012, 615 black youth were charged with a Measure 11 crime and waived into adult court, out of a total of 3,976 youth waived.
- Thus, black youth account for 15.5% of all Measure 11 youth indictments.

- Using 2010 census data, we know black youth make up 1.8% of the general population.
- Therefore, black youth are roughly 8.6 times more likely ( $15.5 / 1.8 = 8.6$ ) to be indicted on a Measure 11 charge than would be expected based on relative proportion of the general population.

While this measure is informative, a RRI measurement goes a step further in its examination of disparity. In addition to comparing black youth's rate of referral to their share of the general population, an RRI measurement then compares that result to a similar result for a control group. For this report, that control group is white youth. So, in our example, we would take the measurement for black youth of 8.6 times and compare that with the same measurement for white youth.

First, we do the same calculations as before to find the rate of indictment of white youth relative to their proportion of the general population:

- Over the same period, of the 3,976 total youth indicted, white youth account for 52.8% of all Measure 11 youth indictments.
- Using the same census data, we know white youth make up 83.5% of the general population.
- Therefore, white youth are roughly 0.63 times less likely ( $52.8 / 83.5 = 0.63$ ) to be indicted on a Measure 11 charge than what would be expected based on their proportion of the general population.

Now, to find the Relative Rate Index, we compare the "proportionality measure" of each group:

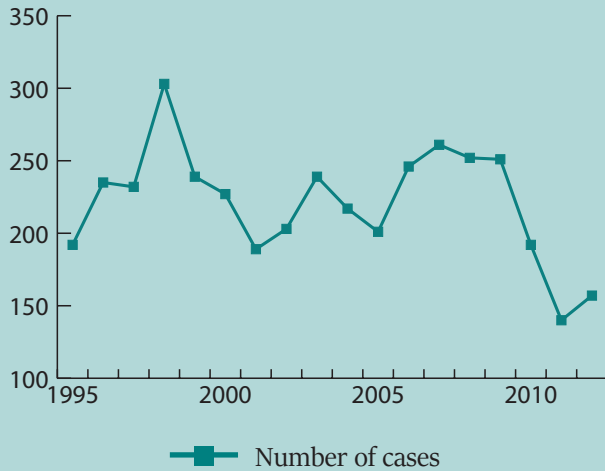
- Black youth: indicted at a rate 8.6 x more than their proportion of the general population
- White youth: indicted at a rate 0.63 x less than their proportion of the general population.
- $8.6 / 0.63 = \text{RRI of } 13.7$ .

This final result shows the relative rate of disparity between white and black youth, the RRI, is even larger than a simpler measure of proportionality. That is because, while white youth are less likely to face indictment on a Measure 11 offense than the general population, black youth are many times more likely. When you compare the two groups, the disparity becomes even more pronounced.

In summary, this RRI statistic tells us simply that black youth are 13.7 times more likely to be indicted on a Measure 11 offense than their white peers.



Figure 1. Number of Measure 11 cases over time, 1995-2012



This graph shows the number of Measure 11 youth cases has remained relatively constant over time, with a spike in the late 1990s and a sizable drop from 2009-2011. Oregon has averaged approximately 221 youth Measure 11 cases from 1995-2012.

Figure 2. Racial disparity (RRI) of Measure 11 indictments over time, including a trendline

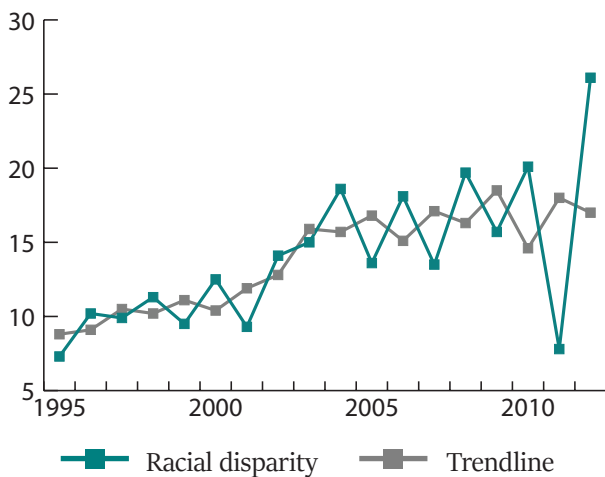


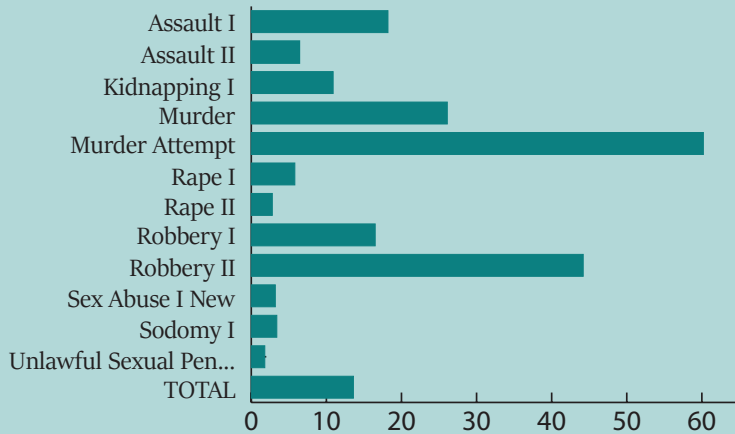
Figure 2 illustrates that Oregon has experienced significant racial disparities in Measure 11 indictments between white and black youth since the first year of Measure 11's adoption. Further, racial disparities are increasing over time, from a low of 7.3 in 1995 to a high of 26.1 in 2012. This means that in 1995, black youth were 7.3 times more likely to be indicted for a Measure 11 offense than their white peers; in 2012, that number rose to 26.1 times.

Figure 3. Outlines the percentage of the cases where the indicted youth was black or white compared to the percentage in the general population.



This graph provides a visual illustration of the difference for black and white youth respectively, of their rate of Measure 11 indictment and their relative proportion of the general population. The graph illustrates that black youth are greatly overrepresented in Measure 11 indictments relative to their percentage of the general population, whereas white youth are underrepresented.

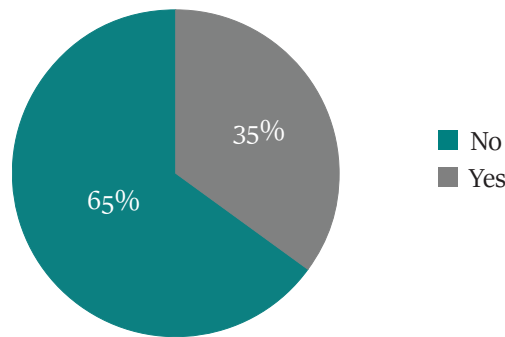
Figure 4. RRI of black to white youth for Measure 11 (covers any offense for which there are at least 50 total offenders indicted over the period of the data collection).



Racial disparity between black and white youth spans all types of charges highlighted in this study, with a total RRI of 13.6 for all crimes. Some argue the disparities between black and white youth are exaggerated due to ‘outlier’ offenses such as attempted murder that have relatively low rates of incidence. However, even if we aggregate the top five most common Measure 11 crimes for all youth, the disparities remain high. In fact, they get even larger. Relative rate of disparity between black and white youth for the five most common Measure 11 crimes:

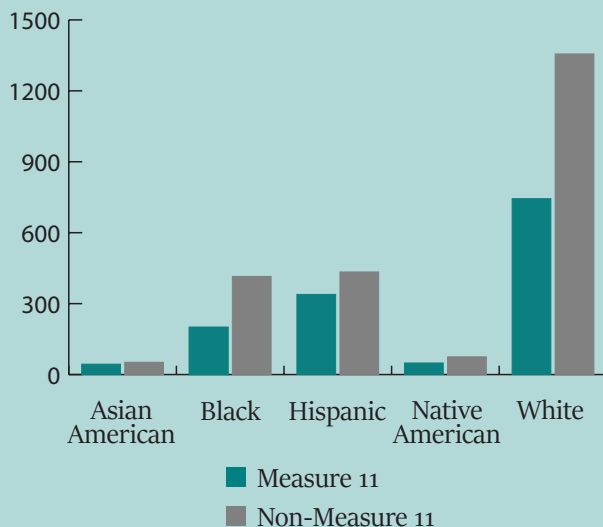
- Robbery II - 44.2
- Robbery I - 16.5
- Assault II - 6.4
- Rape I - 5.8
- Sodomy I - 3.4
- Total RRI - 15.26

Figure 5. Percentage of Cases Referred to Adult Court that Result in a Measure 11 Conviction.



The majority of Measure 11 youth brought into adult court do not end up with a Measure 11 conviction.

Figure 6. Cases referred to adult court that result in a Measure 11 conviction or non-Measure 11 conviction (by race)



Asian American - 84.6%, Black - 48.2%, Hispanic - 78.1%, Native American - 65.3%, White - 54.9%

Of youth referred to adult court, Asian Americans are the most likely to face conviction for a Measure 11 offense. Black youth are least likely. Looked at another way, Asian American youth are the least likely to have their case plead down to a non-Measure 11 conviction or dismissed entirely. Native American and Hispanic youth referred to adult court also show relatively high rates of conviction. It is important to note that although Black youth referred to adult court are slightly less likely to be convicted than white youth referred to adult court, the relative disparity is still significant. Black youth still face conviction at rates 12.5 times greater than white youth for Measure 11 offenses, only slightly less than their relative rate of referral.

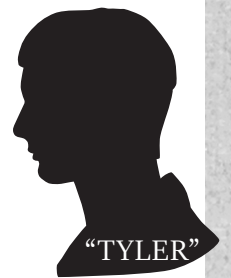
# INTERVIEWS WITH YOUTH IN OREGON YOUTH AUTHORITY CUSTODY

Q. HOW ARE THE PROGRAMS HERE AT OREGON YOUTH AUTHORITY?



“They’ve been great. You just have a lot of things to do here. There’s a lot of ways that you can better yourself, college, vocation, barbering, all types of groups. There’s just a lot of things that you can do here.”

“Honestly, it’s great here. Especially if you’re willing to take advantage of everything that is available here. They really have a lot to offer. I came in with 4 credits, high school credits, and I graduated last year. So that was a big one I didn’t think would happen, ya know? We’ve got a million-dollar machine shop over there, we’ve got Project Pooch, we do a lot of stuff with the Hope partnership. There’s something going on every day and if you’re willing to be a part of it there’s so much that you can learn from. I just feel like my time here has given me the ability to find out who I am as a person without outside distractions. So I mean I’ve...it’s hard to say. I genuinely appreciate all the time I had to spend here even though at the same I don’t, ya know?”



“The programs are super great. They’re good. It just depends on your mindset of everything. Whoever wants to excel can easily excel here. The whole thing is on you. You see people that can get the opportunity and they just do not take it. I’m the photographer. I do video editing. I do video footage. I’m doing my first documentary right now. I’m in a coding camp already, but they are trying to get me in a better one. I just got certified as a project manager two days ago so that’s my third certification that I have. So I’m also certified in web design and social media marketing. It’s dope. It’s dope. I’m a double major right now. Computer science and business. I’m scheduled to graduate next year since I’m doubling up. And then making sure I join all the mentoring programs and groups. That stuff is helpful. The communication is lacking around here sometimes so you just have to press the issue.”

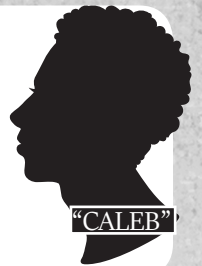
# INTERVIEWS WITH YOUTH IN OREGON YOUTH AUTHORITY CUSTODY

Q. DID YOU FEEL LIKE YOUR SENTENCE WAS FAIR?



"Not really. The only thing I would have changed is not having a second look because I believe in second chances. People can change and stuff. That was the only thing I wanted to change."

"No, not at all. No. No way. No. I've seen people at OYA with the same charges I have and people get only like two and a half years. It's just a matter of circumstance and county. So depending on what county you're from. Clackamas County is no good. Man, like two years! That would have been good, that would have been nice. Yeah, there should have been one. Like I said, it caught me off guard, but I get this. That's the law. Age and stuff like that."



"At the time when I just had 75 months it felt OK. When they charged me with 60 months and a couple of years later I actually counted it up and made sense of what it would actually do to me and my life uh... it was not fair. [When I entered the facility] I didn't really have time to think about what lay ahead...eventually I realized tomorrow is going to come and there's a lot of tomorrows and I started doing the math...like figuring out what Measure 11 would do to me. It's literally a one strike law. It will forever follow you until you are put in the ground. And I realize that, so I'm just hoping that I get level 1 registration and can get off registration so I can just live my life like a normal person. Cause I'm ready. I've been away almost nine and a half years now. I've done a lot of time, had a lot to think about, done a lot of good. A couple of times I didn't do very good, but I learned my right and my wrongs. I owned up for what I did, passed a polygraph, took all the steps I needed to take in order to become the man I need to be. And I'm just really uh...here I am."

# COLLATERAL CONSEQUENCES OF MEASURE 11

*“The direct costs paid for confinement per day, or per year, are just the tip of the iceberg of what young people, their families, their communities, and all of us pay for these policy choices. Youth confinement imposes heavy burdens on family members, leaves confined youth vulnerable to assaults, exposes our communities to higher rates of recidivism, and impedes young people’s transition to adulthood.”<sup>228</sup> — Richard J. Bonnie et al*

Criminal convictions may carry with them what are known as “collateral consequences.” – legal or regulatory sanctions that are indirect results of conviction. They may include rules limiting access to employment, professional licensing, housing, education, voting, public assistance, or other opportunities. Collateral consequences can have a long-lasting impact on individuals’ abilities to successfully reintegrate into society after incarceration and provide for themselves and their families.

Even for youth not convicted of their most serious charge, the collateral consequences of an adult conviction are immense. A Measure 11 conviction, unlike most other juvenile “delinquency” convictions, often stays on a young person’s record for a major part of their productive work years if not their entire lives, creating significant barriers to housing, employment and education. Youth initially charged under Measure 11, but who take a plea deal down to a non-Measure 11 offense, they will face the same barriers to sealing their record as adults. If a young person must wait until he or she becomes 26 or 27

to seal their records (i.e. 10 years after their non-Measure 11 adult conviction), the consequences for employment and schooling opportunities hit them at the most critical time of their lives.<sup>229</sup>

These effects carry implications for society as a whole, given the costs to community and taxpayer alike.<sup>230</sup> Measure 11 overall has increased prison costs drastically since its implementation.<sup>231</sup> Some argue the high costs are necessary to ensure public safety. However, violent crime remains at 40-year lows and has continued to decline simultaneously with reduced incarceration in Oregon and across the country.<sup>232</sup>

To fully appreciate the impact of Measure 11, one cannot simply look at the promise of ‘holding offenders accountable’ through prison sentences. Rather, one must consider that an adult conviction, in many ways, is a life-long sentence that affects youth and the communities in which they live.<sup>233</sup>

The true cost of Measure 11 is difficult to measure, as it includes not only sizable trial, probation and custody expenses, but also the many long-term costs that are associated with having an adult criminal conviction on one’s record.<sup>234</sup> High costs also take scarce funding away from crime prevention. As David Rogers of the ACLU of Oregon notes, “the costs that Measure 11 has incurred has taken away from local law enforcement, drug courts, education and other services that will keep people out of prison in the first place.”<sup>235</sup> For youth, the true cost of Measure 11 is not just a one-off ‘cost of custody’ calculation; in fact, the compounding cost affects taxpayers and communities over time. Below are some of the key collateral consequences of Measure 11:

- Measure 11 results in unnecessary costs to taxpayers.

Costs of incarceration: Research from the Justice Policy Institute shows that Oregon spends as much as \$263 per day and \$95,995 per year, per juvenile, to hold Measure 11 offenders in close custody.<sup>236</sup>

Negative impacts on education: Although Oregon Youth Authority does a diligent job of requiring that youth in their facilities work toward their GED, the lengthy pretrial detention and trial processes nonetheless are significant disruptions to a young person's educational process. Further, an adult felony conviction hurts the chance to pursue higher education, and disproportionately impacts youth who rely on student aid and other financial assistance.

Costs of Recidivism: The Justice Policy Institute finds that nationally, the "victim and taxpayer costs from recidivism due to youth incarceration can reach \$7.034 billion in 2011 dollars." The Justice Policy Institute figure speaks to the unintended consequences of sentencing mechanisms that expose youth to the adult criminal justice system. The organization, notes that such policy "imposes costs 1) on those individuals directly harmed when a young person engages in behavior as a result of their previous confinement and 2) to taxpayers who pay to process a young person through the justice system again."<sup>237</sup> As discussed, several studies now show youth who interact with the adult criminal justice system are more likely to commit future crime. In Oregon, charging youth through Measure 11 has demonstrated neither a reduction in crime rates nor positive impacts to recidivism.<sup>238</sup>

Unnecessary public safety costs:<sup>239</sup> Our criminal justice system does not adequately direct scarce resources to youth who are at greatest risk of reoffending.<sup>240</sup> Oregon houses many youth in closed custody facilities at great cost even though they pose little risk of reoffending.<sup>241</sup> In addition to costs of adjudicating and housing all of the youth convicted of a Measure 11 offense, "hundreds of youth indicted under Measure 11 will never be convicted in adult court...potentially costing taxpayers millions in unnecessary funds."<sup>242</sup> The Pew Charitable Trust highlights how meta-analyses generally show that "juvenile

incarceration fails to reduce recidivism," meaning that housing youth in costly closed custody facilities is not improving public safety, "and may, in fact, increase it in some cases."<sup>243</sup> The same report found no empirical evidence for longer lengths of stay in prison.<sup>244</sup>

Unequal burden on taxpayers: Taxpayers in some counties, due to differences in how prosecutors apply the law, are harder hit than residents of other jurisdictions. For example, Malheur County uses \$108,800 in state prison resources per Measure 11 arrest – nearly three times as much as Klamath County.<sup>245</sup> The disparate application of Measure 11 therefore affects both defendant and taxpayer.

- Measure 11 has a counterproductive impact on youth development.

Most Measure 11 youth have some history of trauma, abuse or drug use. All Measure 11 youth are in just the first half of a process of cognitive, emotional and physical development that makes teen life a tumultuous and somewhat vulnerable experience.<sup>246</sup> Teens are especially susceptible to external influence that helps shape their development. Many come from homes and communities that include environmental stressors that may inhibit the development of important brain functions.<sup>247</sup> Both the adult court process and the punishing sentences mandated under Measure 11 add stress, trauma and a number of other factors counterproductive to healthy development.<sup>248</sup>

Paradoxically, Measure 11 can reduce access to some of the most promising programs for justice-involved youth, in effect acting as a roadblock to helping them become more productive citizens. Further, Measure 11 convictions do not provide many of the positive incentive structures (such as earned time for good behavior) that would motivate these youths to strive toward a better outcome and future.

- Handing down adult convictions to youth means fewer productive citizens in the workforce.

Youth charged and incarcerated through Measure 11 will serve out their sentence and return to society at some point. However, Measure 11 imposes lifelong burdens. Adult convictions make getting work, funding for education and access to

housing extremely difficult.<sup>249</sup> Both educational attainment and employment status are “strong predictors of criminal behavior,” and for a 15 or 16 year-old, a Measure 11 conviction disrupts - sometimes permanently - both processes.<sup>250</sup> Pew Center for the States finds that a prior term of incarceration “reduced subsequent wages by 11 percent, cut annual employment by nine weeks and reduced yearly earnings by 40 percent.”<sup>251</sup> Involvement with the justice system at a young age leads to worse education outcomes and a higher likelihood of reoffending, increasing “costs as individuals lose the potential to earn a living, pay taxes, and contribute to the economy.”<sup>252</sup>

Some may point to the average sentence of youth offenders in Oregon as short enough to allow them to reenter society during their working years. While that may be true in some cases, it ignores research suggesting that the adult conviction itself - rather than the actual length of stay in custody - is much more important a barrier.

- Incarceration creates intergenerational disenfranchisement, particularly among communities of color.

Research shows that for youth saddled with an adult felony conviction, their children will also likely face the same barriers to upward mobility.<sup>253</sup> Furthermore, the family of a youth convicted with a Measure 11 offense will bear a significant portion of the financial and emotional burden. The Justice for Families’ report, *Families Unlocking Futures*, highlights the significant financial, emotional and mental trauma that accompanies the family of a young person’s conviction, and how it is particularly difficult for families living below the national median income.<sup>254</sup> The report speaks to how family members feel left out of the process, even in the context of juvenile courts - *a dynamic that is likely more pronounced in adult court*, where the process is far less inclusive.<sup>255</sup>

Incarceration hampers economic mobility. Measure 11 is likely contributing to a general trend of further economic disadvantages for communities of color. According to Pew, nationally, “more young...African American men without a high school diploma or GED are currently behind bars (37 percent) than employed (26 percent).”<sup>256</sup> In Oregon, nearly

30 percent of black families live in poverty, and the median income of a black family as of 2010 sat more than \$15,000 lower than that of white families.<sup>257</sup> The economic disparity among Oregonians of color is compounded by the fact that the children in these communities are all statistically more likely to have a parent in prison.<sup>258</sup> As a result, these young people are more likely to be suspended or expelled from school and less likely to enjoy economic stability in their homes, all of which may contribute to their intersection with the criminal justice system.<sup>259</sup> This, in turn, will negatively impact their future children, who are born into the same generational cycle and subsequent barriers to upward mobility. In these important ways, incarceration affects not only the economic productivity and life outcomes of the defendant in question, but also that of their family and their children to come.

- Bail amounts are typically high for Measure 11 charges, resulting in youth who cannot afford to pay remaining in custody until their case is resolved.

Even before their cases are resolved, youth charged with Measure 11 crimes may face significant consequences. Both youth and adults charged with Measure 11 offenses will be held in custody unless they can afford to post bail. For a Measure 11 crime, bail will be set at a minimum of \$50,000 (with rare exceptions) but is often set into the hundreds of thousands.<sup>260</sup> Oregon does not allow bail bondsmen to operate, so anyone who facing pre-trial custody must pay ten percent of the total bail amount to the court as a surety against their failing to show up for future hearings. Needless to say, for many youth and their families, producing \$5,000 or more at short notice is not possible, resulting in youth facing Measure 11 charges remaining in custody until their case is resolved. Time spent in custody pre-trial can disrupt education or employment, be distressing for families, and traumatic for youth.

# INTERVIEWS WITH YOUTH IN OREGON YOUTH AUTHORITY CUSTODY

A couple of the youth interviewed are serving sentences that extend past the 25-years-of-age cap on custody under the authority of OYA, meaning they face transfer to an adult prison in the coming months or years.

Q. HOW DO YOU THINK TRANSFERRING OVER WILL AFFECT YOU?



“I think that it is counter-productive. There is a mindset that you have to have [in prison], and I don't know if you know what snitching is but that is very...you can't say anything about any situations. If you are a sex offender, you know, they are going to ask what you did. If you lie they can fact check you and find out anyway and then it's all over from there. I've always told the truth and never had a problem. I was in a couple of fights when I was in the adult facilities. Sex offenders...it doesn't matter what you did, like you're the worst of the worst. You're a horrible person, you deserve to die. I think it is a definite setback for the mind, but I think I went through too much in my childhood to be put down by something so small. I know it's like something that is a devastating change, but I can tell you I've been through worse...[Prison] really trains you to be isolated, to be aggressive, to be cruel. I mean, you have to, to survive up there. I mean, it can be as easy as someone cutting you in line. You either let them cut you in line and you get punked out and they treat you like what they call a “bitch” the rest of the time and it will follow you wherever you go, or you fight them. I mean, that's the only choices you really got...Like I said, it's going to be hard, but I think the way I carry myself and the way I'm trying to just do me, I've learned that I'm ready to move on and I'm ready to start my life. As a matter of fact, I'm way behind in my life and I'm ready to get started.”

Q. DO YOU FEEL LIKE YOU WILL FACE OBSTACLES WHEN YOU GET OUT?



“[Getting out] crosses my mind every once and a while. Probably not as much as when I first got in...I've kind of adapted to...being inside gates and being told to wake up at a certain time, stuff like that, so I don't really think about getting out too much anymore.”

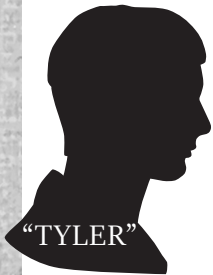
“Yes and no. Yes because those [obstacles] are real. Those are going to happen. Finding a house is going to be very hard. Finding a job could potentially be hard. But then I say no, because based on your hunger, you're gonna get whatever you want. That's just how I truly believe life is for me. I'm so hungry for whatever I want in life that whatever happens is going to come my way. And people are just going to like me. I know it. They're gonna be like: ‘this dude is dope.’ Like attracts like.”





# INTERVIEWS WITH YOUTH IN OREGON YOUTH AUTHORITY CUSTODY

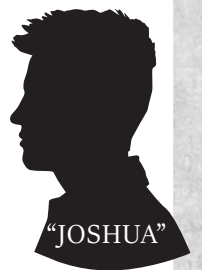
Q. WHAT IS SOMETHING YOU WOULD LIKE PEOPLE TO UNDERSTAND ABOUT MEASURE 11?



"TYLER"

"I feel like [Measure 11 education] should be a part of DARE week [drug and alcohol education for teenagers] because I know kids that, like, get into a fight and take somebody's backpack. That's normal kid stuff you know, at least I think that is. It's not really that huge of a deal, but then I know people that are here doing six years of their life because they got into a fight and stole a kid's backpack. So, when you are in the dark about that stuff and then you just get hit with that it's a real big reality check... I feel like the 'one strike you're out' kind of deal is not really all that effective. Because in a sense a lot of kids when they come into the juvenile system they're so young that they're really easily manipulated and a lot of them do fall into drugs or the gangs. They come in here for one thing and gain a whole new lifestyle that's not very positive and then they become criminal offenders and it doesn't end well."

"I think if I were to change Measure 11 - and I understand the implications of why it was made, I met the dude that made it so I understand why it was made - but I think that since they are moving everything to age 21, 21 would probably be a good age for Measure 11. Because at that point you can really grasp what it's doing to your life and think about being more aware. I think if I were to tell somebody something about Measure 11, I think that to tell them it's really a one-strike and it will forever follow you and you can't get certain jobs because of it. And that really if I was to tell the DARE officers... I think if they used [DARE] to explain [Measure 11], ... to the high schoolers and explained what it does and maybe bring someone in that was [convicted on] Measure 11 to do a speech. I would be more than happy to do that. And really explain what the consequences are behind it and give them a full grasp of it. I think they would think twice about doing something. I know they're young and dumb, but... I tell you what, if you [explain] something like 11 years in prison to where you can't do nothing but ask to go somewhere or do something. You can't get your own food, you can't get visits. However many hours in a week and you only get to spend four of it with your family. It's pretty devastating and I think that's punishment enough in [and] of itself."



"JOSHUA"

# RECOMMENDED POLICY CHANGES FOR MEASURE 11 YOUTH

## **1. REMOVE ALL YOUTH FROM AUTOMATIC ADULT PROSECUTION UNDER MEASURE 11: RETURN OREGON TO A “DISCRETIONARY WAIVER” SYSTEM.**

*“[C]ourts should have greater discretion than they do in various aspects of the sentencing process, including consideration of age, maturity, psychological condition, and other factors. The mandatory sentences required by Measure 11 should be revisited and revised to allow judges, within reasonable parameters and based on specific factors, greater flexibility to impose sentences that are more appropriate to the defendant, the victim, and the crime.” — Chief Justice Balmer*

Juvenile court should be the default option for all justice-involved youth. Oregon excludes Measure 11-charged youth from juvenile proceedings (i.e. automatically waiver into adult court), with no consideration of mitigating qualities such as age or conditions at home. Research shows even the most serious offenders can rehabilitate themselves, and that youth have a unique capacity for reform. Oregon should return to a discretionary system where an impartial judge has the chance to weigh in on what makes the most sense for the youth in question.

This recommendation appears more obvious for lower-level Measure 11 youth offenders – also known as “Tier-2” youth. Measure 11 moves many lower-level youth every year into the adult system

unnecessarily, and the high costs come without any clear benefit to public safety.<sup>261</sup> Particularly for youth charged with second-degree Measure 11 offenses, it makes little sense to burden them with an adult conviction when the majority eventually plead down to a lesser, non-Measure 11 offense.<sup>262</sup>

Second-degree Measure 11 offenses have a strong racial impact, as well. Black youth face adult court more often than their white counterparts, where a higher percentage will eventually be plead down from Measure 11.<sup>263</sup> This comes primarily from the charge of Robbery II and suggests that perhaps these cases do not need to be in adult court in the first place.

Some Oregon prosecutors recognize the illogic of adult court for lower-level Measure 11 youth, suggesting that scaling-back punishments would not jeopardize public safety.<sup>264</sup> For instance, Multnomah County has adopted a system that allows some teens between the ages of 15 and 17 charged with some Tier-2 offenses to have their cases resolved in juvenile, not adult, court.

While there are some “exceptions”<sup>265</sup> to Measure 11, they are exceedingly narrow in scope and unlikely to have a significant impact as they stand.<sup>266</sup> Further, even for the youth who qualify under one of the exceptions, the current system still involves waiving them first into adult court only to have them move back down to juvenile court.<sup>267</sup> This standard is convoluted and unnecessary and still excludes many youth from a process more tailored to their unique needs.

The same logic of allowing a judge to consider a lower-level Measure 11 youth’s mitigating qualities applies to youth convicted of a more serious offense.

That is, the justice system should provide *all* youth with legal opportunities that consider their unique cognitive and emotional development.

Allowing an impartial judge to decide whether to try a young person in juvenile or adult court would better satisfy justice for our communities. Removing statutory exclusion for youth will not mean that serious offenders avoid accountability. Instead, it will allow judges to ensure that punishments are proportional to the crime and that justice uses adult punishments sparingly and intelligently.

Today, the decision to charge youth with a Measure 11 offense and waive them into adult court rests squarely with prosecutors, who have vast discretion in the current system. Statutorily excluding youth from juvenile court strips away important discretion from judges to consider any mitigating qualities of a young defendant, leaving many Oregon judges feeling that the status quo has tied their hands.<sup>268</sup>

## **2. MORE TRANSPARENT DATA COLLECTION FROM PROSECUTORS' OFFICES AND LAW ENFORCEMENT AGENCIES.**

Oregon's prosecutors, like those in other states, operate with very little oversight and have not historically been receptive to inquiries into decision-making practices and other internal data.<sup>269</sup> In the age of data-informed policy, prosecutors should be encouraged to be more transparent and work alongside other organizations to better understand a defendant's pathway through the system.

While it is unclear the extent to which prosecutors play a role in Measure 11's racial disparity, the lack of transparency and oversight takes these key actors out of an important conversation. This lack of transparency breeds confusion and mistrust in our system. We now understand that prosecutors play a key – if not primary – role in dictating the trajectory of young justice-involved youth through the adult justice system. In order that our communities and policymakers be better informed and make more intelligent policy decisions, more data on prosecutorial practices should be publicly available.

Although Measure 11 purports to treat all defendants the same, arrest and charging practices under Measure 11 have resulted in youth of color being disproportionately waived into adult court. Black youth face adult court at a rate roughly 13 times

greater than white youth.<sup>270</sup> While this disparity may not be *created* at the prosecutorial-decision level, it is at least being maintained, and lack of data makes gaining further insight into this statistic difficult.<sup>271</sup>

Removing discretion away from judges was, at the time of Measure 11's passage, seen as a means of 'leveling the playing field' for all defendants. In addition to increasing accountability of offenders, the measure offered the promise of it was intended, in part, to controlling for certain individual judges that may have been overly punitive on one end, or overly 'soft' on the other.<sup>272</sup> However, Measure 11 has not resulted in more equitable outcomes by any measure, and youth experience severe racial disparities. So, while Measure 11 did remove discretion away from judges, it did not remove bias from our criminal justice system (see, Figures 1-6 in Section 4, Part IV).

As John Pfaff explains, prosecutorial discretion has been a primary driver of our nation's growing prison populations and is therefore, deserving of attention.<sup>273</sup> The Pew Charitable Trust's report, "The Punishment Rate," illustrated how Oregon is among a number of states that is increasingly becoming more 'punishing.' That is, our rate of incarceration is not slowing down at the same pace that our rate of crime is slowing – meaning Oregon is becoming more punitive over time.<sup>274</sup> Pfaff points to the role of prosecutors in this phenomenon. Crime rates have been steadily falling since the early 1990s in Oregon as across the nation, and arrest rates have, as would be expected, fallen with them. Even though fewer people are committing crimes and fewer people therefore face arrest, prosecutors have actually *increased* the number of felony charges they file. Pfaff also points out that data on this prosecutorial decision-making process is exceedingly difficult to find, leaving the public with only a cursory understanding of the problem.<sup>275</sup>

Currently, no easily accessible public information is available on prosecutorial intakes (such as demographic information) or their decision-making process as to which cases they accept for prosecution and for which youth cases felony charges should be filed. To remedy this, we recommend that regular updates be reported to both the Criminal Justice Commission and the public. To do this, Oregon prosecutors must:

Make prosecutorial data publicly available on the CJC dashboard. Those data should include:

1. Demographic data of youth referred to prosecutors' offices (reported every year).

2. Descriptive data about felony filings to adult court (reported every year).

### **3. EVERY YOUTH SHOULD HAVE THE CHANCE TO SHOW A JUDGE THEY CAN GROW AND CHANGE: GRANT ALL YOUTH THE OPTION OF A SECOND-LOOK HEARING.**

Second-look hearings are rigorous reviews of a young person's demonstrated progress in detention. Only after input from the District Attorney, victim, and corrections officers, can a judge decide if a young person has made significant changes to warrant placing them under community supervision in lieu of prison. Even then, the judge may decide that a closed custody facility might better serve the juvenile.

Currently, second-look hearings have a negligible impact on Measure 11 youth due to limited scope and very low approval rates.<sup>276</sup> Most Measure 11 youth are not eligible for second-look hearings and many more waive their right to a second-look hearing as part of a plea deal. The following policy recommendations seek to expand the application of second-look hearings to all youth, given their capacity to grow and change.

#### **A) SECOND LOOK TO OCCUR AT 50% OF TIME SERVED OR AFTER 20 YEARS SERVED ON LENGTHY SENTENCES, WHICHEVER COMES FIRST.**

It makes sense that a minimum threshold should be set for sentences that are eligible for second-look at fifty percent of time served. In other words, for very short sentences, a second-look hearing may not be appropriate. Instead of making our own determination, we have decided to merely highlight this component and encourage the legislature to articulate the scope of this policy.

Currently, some relatively lower-level Measure 11 youth may have the opportunity for a judge to review their case after serving at least half of their sentence, with the possibility that they serve the remainder in the community. This allows youth to rejoin their families and reenter a normal environment for socialization and rehabilitation sooner. Additionally, as the Oregon Governor's Task Force on Juvenile Justice put it, a "major advantage" of second look hearings is that they create a positive incentive for youth to demonstrate their progress and good behavior.<sup>277</sup> The current formulation leaves out too many Oregon youth from the opportunity to prove

they can change and grow.<sup>278</sup>

Second-look hearings are central to the standards laid-out by the Supreme Court, especially the position that all youth receive "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."<sup>279</sup> The Supreme Court has made clear with the use of extensive youth cognitive science that all youth – regardless of the severity of their crime – may naturally grow out of dangerous behaviors and can actively learn new, positive ways of thinking.

Once again, this change would not result in a lack of accountability or a spike in crime. Quite the contrary. Allowing certain youth who have shown progress will allow them to begin re-integrating with society and begin down the path toward a productive future. Even with second look hearings, their opportunity for release may be limited. As noted in *Misguided Measures*, "less than 6 [percent] of the young people affected by Measure 11 have benefited from this law."<sup>280</sup> This policy change would allow the most serious offenders at least a reasonable chance to enjoy life outside of prison before their mandatory sentence dictates. For most Measure 11 youth, it would provide a compelling incentive to show good behavior and an earnest effort to change for the better.

*"A lot of these kids are reforming before that mandatory time, and we need to reflect that." – Joseph Hagedorn, Oregon Public Defender's Juvenile Justice Unit*

#### **B) RELIEF OPPORTUNITY FOR YOUTH TRANSFERRING INTO ADULT PRISON WITH LESS THAN A YEAR REMAINING ON THEIR SENTENCE.**

Some Measure 11 youth eventually must serve the remainder of their sentence under DOC custody in an adult prison after they "age out" of the youth system at 25. We recommend giving automatic review in front of a judge to those youth that will transfer into adult prison with 12 months or less remaining on their sentence.

Some youth face a short time remaining on their sentence and are unnecessarily transferred into adult prison to serve the remainder of their sentence because they 'age-out' of Oregon Youth Authority's juvenile facilities.<sup>281</sup> Adult prison offers few of the programs and positive stimulation available at juvenile detention facilities. Adult prison is rife with abusive and oppressive situations that may be

particularly harmful to a young person. Transfer into adult prison increases the risk of recidivism and may be counterproductive to rehabilitation. Allowing a judge the opportunity to review progress before a transfer into adult prison would help keep some young people from unnecessary exposure to the negative influences and trauma of adult prison.

#### **C) PLEA BARGAINS MAY NOT WAIVE SECOND-LOOK HEARINGS.**

Lower-level Measure 11 youth often waive their right to a second-look hearing through plea negotiations. This makes no sense, particularly for less serious young offenders who may be ready to reenter society more quickly. Prosecutors should not be able to use the significant threat of mandatory minimum penalties to pressure young people to waive their right to a critical and meaningful opportunity for a review of their case.

#### **4. ADDRESSING ROOT CAUSES.**

Measure 11 is a tool used to punish those convicted of a crime, though it fails to consider the many factors that lead a justice-involved youth to that point. At the time of Measure 11's passage, many people believed "nothing works" to prevent youth violence – an assumption that has since been disproven across the country.<sup>282</sup> More attention must be paid to 'upstream' factors to justice-involvement – that is, factors leading up to the commission of a crime or to incidents or situations that cause youth to act out or make criminal involvement more likely to happen.

Rather than spending so many taxpayer dollars on a punitive sentencing tool that doles out punishments with no record of rehabilitation, money would be better spent attacking the problem at the root.<sup>283</sup> David Rogers of the ACLU notes, "[s]ince the 1980s, the Department of Corrections has had one of the fastest-growing state agency budgets...[leaving] less money for education and social services that would more effectively build safe and healthy communities."<sup>284</sup>

Not only are non-incarceration strategies significantly more cost-effective,<sup>285</sup> but as a report from the Surgeon General made clear, rigorous empirical review has shown there are many evidence-based prevention strategies that are highly effective in their ability to reduce future crime.<sup>286</sup> Oregon should invest in youth and redirect funds to programs that keep youth from entering the criminal justice system in the

first place:

#### **A) SUPPORT AND EXPAND MANDATORY EDUCATION AROUND MEASURE 11 IN SCHOOLS.**

Many youth in Oregon have no idea what Measure 11 is, let alone the harsh punishments that come with it. For any sentencing law to have a deterrent effect, people must first understand the potential consequences of their actions. Measure 11 has no demonstrated deterrent effect. Particularly for youth, this may be an indicator that people do not fully comprehend the consequences of their actions or what constitutes a crime punishable through adult court.<sup>287</sup> Especially since we know youth brains are uniquely deficient in their ability to consider consequences, it is imperative that regular education efforts help young people understand how criminal laws work and the weight of their consequences.

We should allow youth to focus on being youth. As such, the state should ensure young people understand our criminal justice system and its impacts. Best practices would also ensure that teachers and specialists working with justice-involved youth lead these teachings, rather than law enforcement.

#### **B) SKILLS AND COMPETENCY TRAINING.**

Criminologists understand that, particularly for young men, a lack of opportunity and skills leaves them without opportunity and that disenfranchised youth are more prone to criminal behavior. The Surgeon General's report highlights successful programs to keep youth from heading down the wrong pathway, including "Life Skills Training" programs to prevent gateway drug use and programs that teach youth how to problem-solve in constructive, non-violent ways.<sup>288</sup> Oregon should promote programs focusing on non-violent skills that can help youth avoid going to prison in the first place.

*"One could make a convincing argument that the prison system contributes to further trauma, which negatively impacts brain development." – Dr. Alisha Moreland-Capua*

Other stakeholders throughout the criminal justice system – including judges, public defenders, law enforcement, prosecutors, correctional officers,

and community corrections – should be trained in trauma-informed care, culturally responsiveness and brain development so that they understand the role that trauma, unconscious bias, and brain science play in individual behavior.

### **C) SUPPORT PROMISING PROGRAMS THAT DEAL WITH ISSUES OF MINORITY YOUTH IDENTITY AND ALIENATION THROUGH POSITIVE INTERVENTION.**

In Oregon, where minority youth comprise only a small portion of the total population, youth experience implicit and overt racism on a daily basis.<sup>289</sup> *The State of Black Oregon* report discusses several effective programs, that “provide alternative pathways to more constructive Black, Latino and Asian identity.”<sup>290</sup> Many illicit teen behaviors merely reflect feelings of inadequacy or alienation. Oregon should promote programs that help vulnerable minority youth feel safe and empowered.

### **D) ELIMINATE THE SCHOOL-TO-PRISON PIPELINE.**

As *The State of Black Oregon* notes, “tough disciplinary policies can...lead to juvenile justice involvement.”<sup>291</sup> From 2012-2013, for example, black youth were expelled and suspended from school at rates more than double that of their white peers.<sup>292</sup> Not only does this make youth more susceptible to interactions with the criminal justice system, but it also reduces their likelihood of realizing academic proficiency, taking important human potential away from our society.<sup>293</sup>

Studies show that students with disabilities are much more likely to be expelled from school<sup>294</sup> and that disability-driven behavior in students of color is more likely to be attributed to willful “troublemaking” versus an underlying psychological need, which should be accommodated in the classroom.<sup>295</sup>

Schools can:

1. Remove officer presence from school campuses that is unnecessary and leads to disproportionate arrests of students of color.
2. Fulfill Oregon’s state mandate that all students of all colors enjoy equitable opportunities and access to quality education. In 2013, Oregon repealed “zero tolerance” policies in public schools (HB 2192) in a bid to improve educational

outcomes for all students, especially those of color. The Oregon Department of Education should work to ensure that local schools continue to put this reform into practice.<sup>296</sup>

3. Invest in a culturally competent response for students who exhibit behaviors related to mental health, disability, or trauma history. Prioritize services and support rather than defaulting to a disciplinary intervention.

### **E) INVEST IN MARGINALIZED OREGON COMMUNITIES.**

Impoverished households are a common feature among justice-involved youth, particularly youth of color. Lack of family and community resources can lead to crimes of desperation and frustration. As with many other factors, poverty interacts with other aspects of a youth’s life that may influence intersection with the justice system. This report demonstrates how education is a proxy to determine likelihood to interact with the criminal justice system. *The State of Black Oregon* states that “[elimination of] poverty before a student enters school is one of the best ways to improve graduation rates.”<sup>297</sup> Similarly, the Open Society Institute finds certain communities of color, disproportionately targeted by police and prosecution, suffer cyclical, intergenerational bouts of economic and social depression and cost the state huge amounts in incarceration-related expenses.<sup>298</sup> Oregon could help marginalized communities by adequately funding social service safety nets for greater family stability. Funding should be allocated through local government mechanisms to communities most affected by disparate economic and criminal justice policies.<sup>299</sup>

### **F) INCREASE REENTRY SUPPORT SYSTEMS**

Along with preventative measures, Oregon must make a stronger showing of support in embracing that nearly every single youth entering our criminal justice system will reenter society at some point. The justice system should allow youth in particular, who have a unique ability to reform, a full and realistic opportunity to succeed after serving their time. Unfortunately, due to informal stigmas and formal barriers to work, education, and housing, many young men and women continue to feel imprisoned by their offense, even after they are released from custody. Drawing on the ACLU of Oregon’s recommendations, we suggest that Oregon:<sup>300</sup>

1. Remove barriers to vocational and recreational community engagement.
2. Eliminate policies that limit public benefits and subsidized housing from people with prior criminal records and their families.

### **G) INCREASE AVAILABILITY OF CULTURALLY COMPETENT BEHAVIORAL HEALTH SERVICES**

Across the state, youth and families encounter hurdles to accessing appropriate care and services related to mental health and addiction. A recent national study ranked Oregon's youth mental health system 41<sup>st</sup> in the nation.<sup>301</sup> Adolescent patients in crisis are likely to spend prolonged periods stuck in an emergency department while a more appropriate placement is sought.<sup>302</sup> Waitlists for community-based mental health providers remain long. And, kids involved in the child welfare system face a dearth of therapeutic residential options.<sup>303</sup>

Experts in the field estimate that almost all kids who enter the justice system have been impacted by trauma related to abuse, neglect, or housing and food insecurity.<sup>304</sup> Trauma history can lead to mental health concerns and addiction; and too few services and supports are available to help kids overcome these struggles. When services are available, they may not approach service delivery through a culturally competent lens, and may not value and affirm the unique voices and identities of youth and their families.

Oregon should invest upstream in making comprehensive, culturally competent behavioral healthcare available to all kids and families.

# APPENDIX ONE

## Minimum sentences required under Measure 11 for 15, 16, and 17-year-olds<sup>305</sup>

Offense	Sentence (in months/in years)
Murder	300 months/25 years
Attempt or conspiracy to commit aggravated murder	120 months/10 years
Attempt or conspiracy to commit murder	90 months/7.5 years
Manslaughter in the first degree	120 months/10 years
Manslaughter in the second degree	75 months/6.25 years
Assault in the first degree	90 months/7.5 years
Assault in the second degree	70 months/5.8 years
Kidnapping in the first degree	90 months/7.5 years
Kidnapping in the second degree	70 months/5.8 years
Rape in the first degree	100 months/8.3 years
Rape in the second degree	75 months/6.25 years
Sodomy in the first degree	100 months/8.3 years
Sodomy in the second degree	75 months/6.25 years
Unlawful sexual penetration in the first degree	100 months/8.3 years
Unlawful sexual penetration in the second degree	75 months/6.25 years
Sexual abuse in the first degree	75 months/6.25 years
Robbery in the first degree	90 months/7.5 years
Robbery in the second degree	70 months/5.8 years
Arson in the first degree	90 months/7.5 years
Using a child in a display of sexually explicit conduct	70 months/5.8 years
Compelling prostitution	70 months/5.8 years
Aggravated vehicular homicide	240 months/20 years



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# REFERENCES

1. Data compiled from Mark Leymon (data cover convictions from 1995-2012.)
2. The Relative Rate Index (RRI) is a measure that illustrates the relative disparity between two groups. In this calculation, RRI looks not only at the rate of indictment of black youth relative to their proportion of the general population, but it then compares that figure to the same calculation made for white youth. This provides a relative rate index between a minority population and the 'control' (white youth) population. See, "Does Measure 11 make sense for youth?", "IV Racial impact of M11" for a full description of the RRI methodology and application.
3. Jeffrey Toobin, "The Milwaukee Experiment: What can one prosecutor do about the mass incarceration of African Americans?", *The New Yorker*, May 11, 2015 <http://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment>.
4. Merritt et al., 2004. The authors experienced similar roadblocks as elsewhere: "Our original proposal included an analysis of prosecutorial decisions. Though extensive efforts were made to obtain county prosecutor data during the study time frame, these data were not available." See also, Wilson and Schrag, 2017. Speaking of failed reform efforts to track racial data in Oregon, the authors note: "legislators got pushback from prosecutors who didn't want to document the perceived race of defendants. They were burning through cases so fast, they might not ever meet a defendant during the course of plea negotiations with the defense attorney. 'How the hell do we find out race? Unless the officer designates it, there's no way for us to know,'" said Clatsop County District Attorney Josh Marquis, who was critical of Peterson's 18-member committee, which included one deputy prosecutor. Police, in turn, didn't want to be forced to collect the data either, and opposed a 2001 effort to mandate stop data collection — already a "best practice recommended by national and international policing associations." See also: Rogers, 2016.
5. Griffin, 2011. Relative to the adult population, there is a paucity of information in some aspects of the juvenile justice system, in part due to reporting standards. This is particularly true about juvenile transfer to adult court and prosecutorial practices and decision-making. For example: "Currently, only 13 states publicly report the total number of their transfers, and even fewer report offense profiles, demographic characteristics, or details regarding processing and sentencing. Although nearly 14,000 transfers can be derived from available 2007 sources, data from 29 states are missing from that total. To obtain the critical information that policymakers, planners, and other concerned citizens need to assess the impact of expanded transfer laws, we must extend our knowledge of the prosecution of juveniles in criminal courts." See also: Petteruti, 2014. "The...Council of State Governments found that 20 percent of state juvenile correctional agencies do not track recidivism for youth at all, and most states do not consider the multiple ways a youth may have subsequent contact with the justice system, which range from rearrest, readjudication, or reincarceration within the juvenile justice system to offenses that involve them with the adult corrections system."
6. Sentencing Project, 2017. See also: Brown et al., 2016. It is not uncommon for relative minority segments of the criminal justice population to be discussed or researched less extensively than the general (typically male) population. As noted by Brown et al., research tends to skew toward the general population, as there is a greater abundance of data available for that population. This in turn has the effect of reproducing research on groups for which the greatest amount of data is available. Accordingly, the production of research eschews focus from minority populations, further entrenching the dynamic that less visible populations - such as juvenile offenders - stay "invisible".
7. Feyerherm, 2011.
8. *Roper v. Simmons*, 543 U.S. 551 (2005); Hilliard, 2016.
9. Nellis & Mauer, 2017. "The Bureau of Justice Statistics announced in a year-end report a two percent reduction in the number of prisoners nationally, continuing a modest decline of recent years. Overlooked by most observers, though, was the fact that the number of juveniles held in adult prisons declined to fewer than 1,000, an 82 percent

drop from the peak year in 1997.” See also, Office of Juvenile Justice and Delinquency Prevention, 2017. The large drop in youth incarceration has happened simultaneously with a drop in juvenile crime rates. Violent crime rates have continued to drop from a peak around 1994 across the nation.

10. Criminal Justice Commission, 2011 (see “Voter’s Pamphlet” at viii, 60.)

11. See: Data compiled from Mark Leymon in “Does Measure 11 make sense for youth?”, “IV. Racial impact of Measure 11.”

12. Johnson et al., 2009.

13. Merriam-Webster, 2017. This is a similar definition to “adolescence,” which is defined as: “the period of life when a child becomes an adult.”

14. Soung, 2011. “Until about 1830, social institutions regarded children primarily as property of their parents and a source of cheap labor. The notion of —childhood or —adolescence as a distinct stage of life or a social category that afforded political and social rights was nonexistent. In the early nineteenth century, however, factors including increased urbanization, a growing middle class, industrialization and Transcendentalism birthed new attitudes about children and society’s obligations to them. Childhood became associated with learning and development, as well as a kind of fragility, innocence, and vulnerability.” In other words, many of the ‘children’s rights’ as we consider them today, didn’t emerge as a topic for political discussion until mid 19th century, when “children” could be aptly defined.

15. Id. “The notion of childhood or adolescence as a distinct stage of life or a social category that afforded political and social rights was nonexistent [prior to the nineteenth century]. In the early nineteenth century, however, factors including increased urbanization, a growing middle class, industrialization

and Transcendentalism birthed new attitudes about children and society’s obligations to them. Childhood became associated with learning and development, as well as a kind of fragility, innocence, and vulnerability.”

16. Hartinger-Saunders, 2008. “...legally and socially constructed definitions of childhood and youth have, and continue to, shape the identification, treatment and research surrounding delinquent youth. Even though we age biologically along a continuum, formal social systems, most notably the courts and our system of rights, are based on specific chronological age parameters which impose a rigid element to something that is otherwise fluid. This often results in subjective decision making regarding sanctions and treatment options among family and criminal court systems as well as other professionals who work closely with delinquent youth.”

17. Soung, 2011.

18. Id. “Across the board, such tough-on-crime laws have disproportionately reined youth of color into the juvenile and criminal justice system. Professor Barry Feld argues that at the get-go, the protect-and-nurture ideology of social and legal institutions in the nineteenth century began primarily for white children. Post-slavery, black children retained their status as property and continued to lack legal rights. Their primary social function was to provide labor for the economic welfare of white people. As a consequence, there was no beginning of adolescence for African American youth.”

19. Henning, 2013. “Consistent with the historical evolution of juvenile court, Professor Kenneth Nunn discusses the differentiation and rejection of youth of color as the process of “othering.” Child and adolescent behavior that is “cute” in one’s own child becomes frightening and threatening in another person’s child. Nunn’s discussion is supported by numerous studies documenting

“people’s tendency to automatically associate positive characteristics with their ingroups more easily than outgroups . . . as well as their tendency to associate negative characteristics with outgroups more easily than ingroups.” See also: Goff, et al., 2014. See also: Soung, 2011. “... juvenile justice systems have always treated and continue to treat youth differently based on competing and ultimately racialized narratives of youth. Whether supported by social or biological evidence, conceptions of youth in the United States have often emerged unevenly for different races and ethnicities, classes, genders, and sexualities.”

20. Hartinger-Saunders, 2008. “Agnew (2001) outlines two disparate motivations for the child saving crusade; the first being that the middle class really had a desire to help poor, homeless, inner city children in need of guidance and direction and the second being more of a need for social control. The latter argues that middle and upper class members of society were concerned by the large numbers of poor families and wayward children roaming about the cities. They saw them as a disruptive force in society jeopardizing their privileged position in society (Agnew, 2001; Regoli & Hewitt, 1997; Mays & Winfree, 2001; Platt, 1974). The opposing viewpoints become important as we move through history. To no surprise, there continues to be evidence of the same competing views among the public and the various professions today.

As highlighted throughout history, the social construction of childhood and youth became the basis for justifying a separate system of justice. Therefore, the evolution of these concepts can be seen as both necessary and instrumental in the development of the current system.

21. Soung, 2011.

22. Id.

23. Goff, et al., 2014. The results of this



research applied for youth older than 10 years of age.

24. Becker, 2001. DiIulio on 'superpredators': "Based on all that we have witnessed, researched and heard from people who are close to the action," he wrote with two co-authors, "here is what we believe: 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."

25. Goff, et al., 2014.

26. Hilliard, 2016. "By the late 1980s, a harsher perspective on juvenile crime had emerged, leading to a third stage of juvenile-justice "reform." 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." See also, Loughran et al., 2010. "Nearly every state in the nation attempted to dramatically toughen laws governing criminal prosecution and sentencing of juveniles (Griffin, 2003). These statutory revisions both widened the net of eligibility and broadened the range of mechanisms by which transfer could be accomplished. Specifically, in many states, these reforms expanded the set of crimes that qualified an adolescent for transfer, lifted age restrictions, and added statutory exclusion and prosecutorial discretion as methods for achieving transfer to adult court."

27. Loughran et al., 2010.

28. Hilliard, 2016. "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 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." See also: Requarth, 2017. "... young adult courts are gaining traction. Last year, the federal National Institute of Justice tallied six such courts around the nation, in places as diverse as Idaho, Nebraska and New York. The Center for Justice Innovation, a British charity, is about to start a pilot program of five young adult courts in England and Wales."

29. Mehta, 2016. These cases include: *Roper v. Simmons*, *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Alabama*.

30. Id.

31. U.S. Const., amend. VIII.

32. National Conference of State Legislatures, 2015.

33. Hilliard, 2016. See also: Annitto, 2014.

34. Juvenile Sentencing Project at Quinnipiac University School of Law, 2017. "Juvenile Life Without Parole Sentences in the United States."

35. Krause, 2015.

36. Id.

37. Macarthur Foundation, 2017.

38. *Graham* at 79.

39. Rovner, 2017 (see *Graham* at 2028.)

40. Macarthur Foundation, 2017. "In *Miller v. Alabama*, the Court expanded its use of brain science, citing amicus briefs by a number of scientific organizations and pointing out that new findings strengthened the earlier opinions."

41. *Miller* at 2468.

42. Hilliard, 2016. "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," (see, *Miller*; 132 S. Ct at 2464.)

43. Ford, 2016.

44. Rovner, 2017. See, *Montgomery* at 17.

45. Rovner, 2017.

46. *Graham* at 24.

47. Eckholm, 2014. "In decisions widely hailed as milestones, the United States Supreme Court in 2010 and 2012 acted to curtail the use of mandatory life sentences for juveniles...But most states have taken half measures, at best, to carry out the rulings, which could affect more than 2,000 current inmates and countless more in years to come, according to many youth advocates and legal experts. "States are going through the motions of compliance," said Cara H. Drinan, an associate professor of law at the Catholic University of America, "but in an anemic or hyper-technical way that flouts the spirit of the decisions."

48. Some states, including Colorado and Minnesota, have made rulings that interprets the Supreme Court's decisions on granting youth the opportunity for release more narrowly. Recent decisions reflect their interpretation that youth sentenced to aggregated sentences resulting in a life in prison (a.k.a. 'de facto life') do not qualify for the possibility for relief, as the Supreme Court did not stipulate to sentences that aggregate multiple charges, each of which is not, on its own, a 'life' sentence (see, Cope, 2017; Berman, 2017).

49. Mehta, 2016.
50. Chart on file with the Oregon Justice Resource Center. Oregon currently has six individuals serving life without parole sentences for convictions stemming from a youth crime. Many more youth are serving long sentences with no possibility of parole for several decades. Many of these youth likely fall into the category of 'de-facto' lifers.
51. Hilliard, 2016.
52. Prof. Sarah Russel (Juvenile Justice Project) via email to Oregon Justice Resource Center, March 2017.
53. See, *People of California v. Caballero*.
54. Hager, 2016. As of 2016, 43 states had changed their laws; since then, New York and others have also joined the list.
55. Ashton et al., 2017.
56. Barr, 2016.
57. South Carolina S.B. 916. 121st Session. (2015-2016).
58. McKinley, 2017.
59. Simpson, 2008.
60. Prof. Sarah Russel (Juvenile Justice Project) in email to Oregon Justice Resource Center, March 2017.
61. Id.
62. Graham at 75, 82.
63. Eckholm, 2014. Cara Drinan, associate professor of law, said in an interview with The New York Times that "States are going through the motions of compliance...but in an anemic or hyper-technical way that flouts the spirit of the decisions."
64. Prof. Sarah Russel (Juvenile Justice Project) in email to Oregon Justice Resource Center, March 2017.
65. Hilliard, 2016.
66. *State of Oregon v. Steven Levi Ryan* (2017).
67. Id. See: Balmer, concurring, at 627-8.
68. Id. Article I, section 16 of Oregon's Constitution includes a prohibition similar to that of the U.S. Constitution's Eighth Amendment against sentences that are "disproportionate to the offense for which they are imposed." It reads, in part: "Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."
69. Id.
70. Id. The court informed its decision on Supreme Court precedence as well as a prior decision of its own, *Rodriguez/Buck*.
71. Id.
72. Id.
73. Id. Balmer cites: "In *State v. Wheeler*, 343 Or 652, 175 P3d 438 (2007), we reviewed in detail Blackstone's influential support for the concept of proportionality, noting his view that because of the "difficulty of ensuring that punishments are proportional...deference should be granted to the legislature's choices." Id. At 659.
74. *Roper v. Simmons*, 543 US 551 (2005).
75. Id. at 569-70.
76. Juvenile Justice Center, 2004. Cites: Declaration of Ruben C. Gur., PhD in *Patterson v. Texas*. Petition for Writ of Certiorari to US Supreme Court, J. Gary Hart, Counsel.
77. Requarth, 2017. Speaking to the unreliability of biological age markers, Ms. Cohen and her collaborators published a study in *Developmental Cognitive Science*, discussing how they used an "impulse-control test to predict the 'emotional brain age' of individual participants. Later, they assessed each person's preference for taking risks. People with a younger 'emotional brain age,' regardless of chronological age, tended to prefer riskier behavior. But the variability was highest among young adults." As Cohen put it, "If you pick a random 18- to 21-year-old, you have no idea what level of maturity you're going to get...So in this period with the most variation, why would the law draw a bright line right there?"
78. Macarthur Foundation, 2017. "At least since the early 1900s, the justice system in the United States has recognized that juvenile offenders are not the same as adults, and has tried to incorporate those differences into law and policy. But only in recent decades have behavioral scientists and neuroscientists, along with policymakers, looked rigorously at developmental differences."
79. Zimmer, 2017. See also: Cohen et al., 2016. One study, for example, showed that even 18-20 year olds responded differently under duress than did individuals 21 years of age and older: "The current study used an emotional go/no-go paradigm and functional neuroimaging to assess cognitive control under sustained states of negative and positive arousal in a community sample of one hundred ten 13- to 25-year-olds from New York City and Los Angeles. The results showed diminished cognitive performance under brief and prolonged negative emotional arousal in 18- to 21-year-olds relative to adults over 21."
80. National Institute of Mental Health, 2017.
81. Juvenile Justice Center, 2004.
82. National Institute of Mental Health, 2017.

83. Willoughby, 2013.
84. National Institute of Mental Health, 2017.
85. Bales et al., 2015.
86. Id.
87. National Institute of Mental Health, 2017. See also: Simpson, 2008.
88. Mackey, 2012.
89. Id.
90. Macarthur Foundation, 2017.
91. Candy, 2011. From the interview, Dr. Aamodt: "...the other part of the brain that is different in adolescence is that the brain's reward system becomes highly active right around the time of puberty and then gradually goes back to an adult level, which it reaches around age 25 and that makes adolescents and young adults more interested in entering uncertain situations to seek out and try to find whether there might be a possibility of gaining something from those situations."
92. National Conference of State Legislatures, 2010.
93. Id.
94. 1997 ORS Tit. 34, Sec. 419C.340 (waiver); 1997 ORS Tit. 14, Sec. 137.707 (statutory exclusion).
95. See, 1997 ORS Tit. 34, Sec. 419C.364 states, "Once the juvenile court has waived a child of at least 16 to an adult court, it may also 'enter a subsequent order providing that in all future cases involving the same youth, the youth shall be waived to the appropriate court without further proceedings.'" In essence, the default is that this youth will be automatically treated as an adult for any offenses that follow an incident resulting in adjudication in an adult court.
96. Lee, 1980. Averages of puberty onset and completion respectively, for males, were 11.9 and 15.8 years of age; for females they were 11.45 and 14.6 years of age. Averages were rounded up to the nearest full year. These data show the range of individual age variation of normal pubertal events. Puberty may begin from age 8.0 to 14.9 years for females and from age 9.7 to 14.1 years for males and is complete by age 12.4 to 16.8 years for females and by age 13.7 to 17.9 years for males.
97. Simpson, 2008.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id. Citing Pittsburgh researcher Ronald Dahl.
104. Id.
105. Id.
106. Center for Disease Control and Prevention, 2017.
107. NPR - Brain Maturity Extends Well Beyond Teen Years
108. Johnson et al., 2009. "Evidence suggests that, in the prefrontal cortex, ['myelination'] does not occur until the early 20s or later. The prefrontal cortex coordinates higher-order cognitive processes and executive functioning. Executive functions are a set of supervisory cognitive skills needed for goal-directed behavior, including planning, response inhibition, working memory, and attention. These skills allow an individual to pause long enough to take stock of a situation, assess his or her options, plan a course of action, and execute it. Poor executive functioning leads to difficulty with planning, attention, using feedback, and mental inflexibility [19], all of which could undermine judgment and decision making.
109. Id. NPR - Brain Maturity Extends Well Beyond Teen Years: "The prefrontal cortex is not yet fully developed. That's the part of the brain that helps you to inhibit impulses and to plan and organize your behavior to reach a goal."
110. Johnson et al., 2009.
111. ORS 137.700
112. Scott & Steinberg, 2008. "Reform initiatives often have been triggered by a high-profile crime that stirs public fears. In Arkansas, for example, legislative reforms lowering the minimum age of criminal adjudication for juveniles followed the Jonesboro school shootings in which two youths, aged eleven and thirteen, killed four schoolmates and a teacher. In some states, racial biases and fears appear to have played a role in reform initiatives. In California, for example, enthusiasm for Proposition 21, a sweeping referendum expanding criminal court jurisdiction over juveniles, was generated by sensational television ads in which African American gang members killed innocent bystanders in drive-by shootings.<sup>10</sup> But by the time that California voters approved Proposition 21, juvenile crime had been on the decline for several years."
113. Mascharka, 2001. "Mandatory minimum sentences, once rare in the criminal law system, have experienced a dramatic increase in popularity. This political phenomenon has enjoyed wide bipartisan support: since the mid-1980s, Congress has routinely passed new crime measures containing mandatory minimum sentences (see, See, e.g., Alcohol and Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended

in scattered sections of 18 U.S.C., 21 U.S.C., 31 U.S.C.); Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(a), 102 Stat. 4377 (codified as amended at 21 U.S.C. §§ 846, 963 (2000)).”

114. *Id.* “A primary motive for this change was to confirm waning public confidence in the criminal justice system by thwarting ‘soft’ judges who sentenced culpable criminals too lightly; proponents believed they could accomplish this through a compulsory system where ‘similar offenders, committing similar offenses, would be sentenced in a similar fashion.’”

115. *Id.* “In 1970, Congress responded to the concerns of prosecutors, wardens, and families of those convicted, repealing virtually all provisions imposing mandatory minimum sentences for drug violations. Congress commented that lengthening prison sentences “had not shown the expected overall reduction in drug law violations.” Among those rallying against these mandatory minimums was a freshman Congressman from Texas—who would later become a “tough on crime” President—one George Bush, who spoke out for “better justice, and more appropriate sentences.”

116. In fact, youth violence has been on the steady decline since the mid-1990s. See, Fair Punishment Project, 2016; Drum, 2014.

117. Wight, 2011. Fear of a juvenile crime wave hit Oregon with a highly publicized incident of youth violence. After a group of young black teenagers were turned away from a Benson High school dance, they made their way to the nearby Lloyd Center mall. Three youth, Nathaniel Wilson (age 15), Nathaniel Martin (age 16), and Michael Chiles (age 15), violently beat a 22-year-old man, Tim Hawley, while his fiancée Tanea Whittaker ran for help. Hawley was beaten so severely that he suffered

serious brain damage in the attack. According to Tanea, one of the boys yelled, “Get that white boy,”<sup>15</sup> just prior to the attack. The idea that black youth were committing crimes against white victims inflamed the media and the public. An Oregonian article about the attack quoted a woman saying, “there is a certain type of black man I find frightening, and that’s usually between the ages of 15 and 25, especially if they are in a group,” and another woman suggesting that “[t]he blacks seem to be the ones with the attitudes. I can’t help it if I’m white and they’re black and I feel like a target.”<sup>15</sup>;

118. Scott, Elizabeth & Steinberg, Laurence, 2008.

119. Hilliard, 2016.

120. Wight, 2011.

121. *Id.* The Task Force had been evaluating a considerably more robust platform for holding youth accountable, but it was still significantly less punitive than what was eventually passed through Measure 11. The Task Force’s recommendations included juvenile transfer for 12 first-degree offenses and also included the possibility for a “Second-Look” hearing, where youth would be granted the opportunity to be seen by a judge for the possibility of parole after serving half of their sentence. Measure 11 drastically increased the scope of the transfer law and got rid of the possibility for a second-look hearing.

122. Criminal Justice Commission, 2011.

123. *Id.*

124. *Id.*

125. *Id.* Sentencing guidelines limited this discretion and required the judge to impose the “presumptive sentence” unless there were substantial and compelling reasons to depart upward or downward. Sentencing guidelines also

eliminated parole, thus offenders served their entire sentences, less earned time of up to 20 percent.

126. Wight, 2011.

127. Criminal Justice Commission, 2011. The M11 sentences range from 70 months to 300 months and “trumped” the sentencing guidelines. For example, under the guidelines an offender convicted of Robbery II with a criminal history of C5 would face a presumptive prison sentence between 56-606 months with a potential 20 percent reduction in sentence for good behavior. M11 created a mandatory minimum prison sentence of 70 months for Robbery II convictions for all offenders, regardless of the facts of the individual case or the offender’s criminal history.

128. Criminal Justice Commission, 2011. “A M11 indicted offender’s criminal history is important in determining whether they are convicted of a M11. A M11 indicted offender with three or more prior person felonies is nearly twice as likely to be convicted of a M11.”

129. See, *Washington State v. Zyion Houston Sconiers*. The court found that, “because ‘children are different,’ . . . sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges [Washington’s determinate sentencing scheme] and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there.” Further, it was clear that the duty to consideration of a youth’s unique mitigating circumstances could not be shirked at the time of sentencing because a youth may be released on parole down-the-line. The court stated that youth’s mitigating circumstances must be considered “at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line.”

130. Criminal Justice Commission,

2011. “Judges still have discretion as to whether to accept the agreement proffered by the parties, and under ORS 137.712 have some discretion as to the sentence on certain M11 crimes. Yet, this analysis makes clear that the prosecutor’s case by case disposition involving indictments returned by grand juries is where the bulk of the sentencing decision is made on M11 offenses.”

131. Hilliard, 2016.

132. Criminal Justice Commission, 2011.

133. Hilliard, 2016.

134. Zaits, 2012. As noted in the Oregonian, DA’s point out that “prosecutors note that 58 percent of those convicted of Measure 11 crimes get consecutive sentences for multiple crimes.”

135. Hilliard, 2016.

136. *Graham*, at 75, 82.

137. Wight, 2011.

138. Pfaff, 2017.

139. Merritt et al., 2004. “The overwhelming finding of these studies was that the new laws, though mandatory, could not ensure either certainty or severity in sentencing. Instead, through the circumvention of police and prosecutors, it was quite possible that they would result in a reduction of convictions and an increase in sentencing disparity. In other words, it was now the police and prosecutors who had assumed primary decision-making responsibility for the sentencing decision, in that they now determined who would be subjected to the mandatory penalty. Importantly, because these decisions were not being made in open court, it was unclear what the criteria for selecting an “appropriate” case was, or how offenders who were fully prosecuted

under the law differed from those who were not.”

140. Henning, 2013. “Despite the significant role that probation officers, police, and schools play in contributing to racial disparities in the juvenile justice system, prosecutors are arguably the system’s most powerful decision makers. As the gatekeepers of juvenile court jurisdiction, prosecutors wield enormous power to decline prosecution, divert youth from the system, and identify creative alternatives to adjudication.”

141. Merritt et al., 2004.

142. Merritt et al., 2004. See also: Pfaff, 2017.

143. Criminal Justice Commission, 2011.

144. *Id.* However, most youth will still be convicted through the adult court.

145. *Id.* See, discussion of SB 1049: “If one uses indictments as the starting point it is not clear that the passage of SB 1049 had an impact on the prison population. Prior to the passage of M11, offenders indicted for Robbery II, Assault II and Kidnapping II were convicted of their most serious offense 31 percent of the time and went to prison about a quarter of the time. When M11 passed fewer indicted offenders were convicted of their most serious charge but a much higher percentage went to prison. When SB 1049 passed, a higher percentage of offenders were convicted of their most serious offense. Throughout the 2000s the percentage convicted of their most serious offense increased. As this increased, the number of “opt outs” also increased, causing the overall impact on the average offender to change very little. It appears that SB 1049 did have an effect on how offenders were prosecuted, with many more receiving a conviction for their most serious charge.”

146. Bonnie et al., 2013.

147. Criminal Justice Commission, 2011. “Since M11 applies to juvenile offenders age 15 and older, it does impact juvenile incarceration. Since 2000, OYA has had between 250 and 350 people incarcerated, ranging in age from 15 to 24, who were convicted in adult court of a M11-listed offense. Of those, the majority are either serving on a M11 sentence, or are serving on a sentence which was likely influenced by M11 (e.g., a plea to an attempt of a M11-listed ORS). Given the seriousness of the offenses, most of them would have faced OYA incarceration regardless of M11, but M11 acted to lengthen the time they served in OYA. Estimates suggest that in each month since 2000, OYA has had between 100 and 200 additional people incarcerated as a result of M11.”

148. Wight, 2011.

149. *Id.*; See also: Roeder et al., 2015.

150. Roeder et al., 2015.

151. *Id.*

152. *Id.*

153. Wight, 2011.

154. *Id.* One in three youth convicted of an adult offense via the Measure 11 charging process do not receive adult prison sentences. From 2006 to 2008, 36% of all the youth convicted of an adult offense via the Measure 11 charging process were eventually placed on adult probation. If these youth were truly the worst of the worst, it is hard to understand why a district attorney would agree to pleas allowing a third of youth to return directly to the community.

155. Criminal Justice Commission, 2011.

156. *Id.*

157. Wight, 2011. “Most youth do

not have the benefit of an impartial judge evaluating their case. Instead, prosecutors make the final decision in 92% of the cases. Voters were promised predictability when they passed Measure 11. However, considerable variation exists in how Measure 11 is implemented by prosecutors' offices across Oregon. This report shows that nine out of 10 young people indicted for a Measure 11 offense do not go to trial." See also: Merritt et al., 2004. "Prior to the passage of M11, offenders indicted for Robbery II, Assault II and Kidnapping II were convicted of their most serious offense 31 percent of the time and went to prison about a quarter of the time. When M11 passed fewer indicted offenders were convicted of their most serious charge but a much higher percentage went to prison." In other words, while Measure 11 may have increased incarceration for certain crimes, it may have also reduced 'truth-in-sentencing.'

158. Soung, 2011. "The juvenile court also developed amidst Transcendentalism and positive criminology, schools of thought that spawned scientific and medical strategies to addressing crime. Progressive reformers challenged the attribution of criminal behavior to choice and free will, qualified individual responsibility for crime, and shifted the analysis of crime towards external and deterministic influences. These reformers relied on a philosophy of diagnosis and treatment in emphasizing rehabilitation and reform, rather than punishment and retribution. They also conceived juvenile courts as an alternative to criminal prosecution, and thus separated youth from adults in the criminal justice system. Guided by a mission to rehabilitate, the juvenile court adopted at least two guiding principles. First, it considered youth to be reason for reduced culpability... [and] [s]econd, the court declared itself *parens patriae*, or father of the people, to intervene as a parental figure to determine what it deemed to be in the

best interests of the child, as opposed to the expressed interests of a client in the criminal justice system."

159. NCJRS, 1999.

160. Soung, 2011. Speaking of juvenile courts, Soung notes: "[f]irst, it considered youth to be reason for reduced culpability, though the court also avoided abdicating youth of total responsibility, recognizing that older youth, in particular, possess sufficient moral reasoning, cognitive capacity, and volitional control to hold them partially responsible for their behavior, albeit not to the same degree as adults."

161. Id. "Second, the court declared itself *parens patriae*, or father of the people, to intervene as a parental figure to determine what it deemed to be in the best interests of the child..."

162. Butts and Mitchell, 2000. "Changes in juvenile law and juvenile court procedure are slowly dismantling the jurisdictional border between juvenile and criminal justice system."

163. Green, 2016. Mark McKechnie of Youth, Rights & Justice said this of youth taking plea deals in the adult criminal justice system: "[e]ven when youth plead to lesser offenses, they are still stuck in the adult system, and they are served by probation officers and other people who are really experienced and have a better understanding of adult offenders than they do of youth offenders...Roughly half, now, of the youth that are committed to the Oregon Youth Authority are there on an adult sentence." Green notes, "[t]hese youth can't participate in work release and other community-based programs available to youths serving time on juvenile sentences, even though they are held at the same facility." Says McKechnie, "[y]ou could have two youth who are very similar, in terms of their risk and their behavior, but if you have one under a juvenile sentence, OYA has a lot more options, including

releasing them, that they don't have for a youth under Department of Corrections supervision."

164. For example, delinquent youth remain anonymous while their charges are being adjudicated. Measure 11, however, allows for the public release of their information.

165. NCJRS, 1999.

166. Elizabeth Wakefield (Attorney at Metropolitan Public Defenders) in conversation with author, March 2017.

167. Id.

168. Pittman and Nguyen, 2011. For example, a juvenile can petition to be removed from the sex offender registry "2-5 years after juvenile court's jurisdiction ends." See also, Scholl, 2016.

169. Id.

170. Wight, 2011.

171. Bonnie et al., 2013.

172. Oregon State Legislature, HB 3194 A Public Testimony (see, MeyersJ Testimony 04/05/2013). See also, Foote, 2012. District Attorney John Foote's report suggested in 2012 that "Measure 11 has proven to be one of the most successful policy initiatives in the recent history of our state."

173. Criminal Justice Commission, 2011. See, "Voter's Pamphlet."

174. Id.

175. Id. "Juvenile offenders are 21 percent less likely to be convicted of their most serious offense. The greatest difference is from male to female where females are 40 percent less likely to be convicted of their most serious offense. M11 is applied differently across demographics. Juveniles and females indicted for a M11 are both less likely to receive a M11 conviction. These

differences are statistically significant with juveniles and females both being about 20 percent less likely to be convicted of a M11. M11 conviction rates also differ by ethnicity. Blacks who are indicted for a M11 are about 15 percent less likely to be sentenced to prison than whites” (though they are much more likely to be indicted) “and Hispanics are about 40 percent more likely to be sentenced to prison than whites.”

176. Oregon District Attorneys Association, 2016. In some cases, the more serious the charged offense, the more likely it appears to have been plead-down (for agg murder, murder, manslaughter). At the very least, it appears that in some cases ‘accountability’ is not necessarily proportional to the severity of the crime.

177. Alex-Assensoh et al., 2015 (citing David Rogers of ACLU Oregon). Note: according to the data collected by Dr. Harmon on behalf of OJRC, this dynamic was true across all crimes overall, but not all individual crimes. See Section IV for a more complete discussion.

178. Hager, 2015. “Florida transferred an average of 164.7 juveniles per 100,000; the next highest rate was Oregon’s, which transferred an average of 95.6.”

179. Wight, 2011. “Along with research showing that youth tried in the adult court are more likely to reoffend more often and more seriously than youth processed in the juvenile justice system, the data from Oregon do not show that trying youth as adults is necessarily driving down the juvenile crime rate. Counties that sent the fewest youth to the adult court were as likely to see bigger drops in juvenile crime, and no clear relationship was found between increased use of Measure 11 and falling juvenile crime rates.”

180. Singer and McDowall, 1988.

181. Redding, 2008. The Office of Juvenile Justice and Delinquency Prevention found that laws that make it easier to transfer youth to the adult court system have little or no general deterrent effect on young people, meaning that they do not prevent youth from engaging in criminal behavior. The report also found that youth transferred to the adult system are more likely to be rearrested and to reoffend than are youth who committed similar crimes but were retained in the juvenile justice system. See also: Hahn et al., 2007. The Centers for Disease Control and Prevention Task Force on Community Preventive Services found in its systematic review on the transfer of young people to the adult system that, 1) transferring juveniles to the adult justice system is counterproductive as a strategy for deterring subsequent violence and 2) there is insufficient evidence that transferring youth to the adult criminal system prevents youth crime.

“[T]he weight of evidence shows greater rates of violence among transferred than among retained juveniles; transferred juveniles were approximately 33.7 percent more likely to be re-arrested for a violent or other crime than were juveniles retained in the juvenile justice system.”

182. Loeffler, 2015. “...longitudinal research conducted by myself and others suggests that the specific age of majority has little to no impact on juvenile crime.”

183. Criminal Justice Commission, 2011. Referring to Oregon’s shift in discretion to prosecutors, the author notes: “In only 28 percent of the cases indicted did M11 accomplish the goal of assuring the judge imposed the sentence the chief petitioner claimed was the minimum necessary for justice to society and the victim. M11 altered how the other 72 percent of cases were handled: it shifted control of the sentencing process from the judge to the prosecutor, but gave no guidance as to what sentence

was appropriate. The critical decision became whether to seek conviction for the charge in the indictment that carried the mandatory minimum sentence. M11 left the decision about what sentence to seek in thousands of the most serious cases up to the individual district attorneys and their deputies, in Oregon’s 36 counties.”

184. Id.

185. Merritt et al., 2004. Referring to the shift that took place with the passage of Measure 11, the authors note, “...it was now the police and prosecutors who had assumed primary decisionmaking responsibility for the sentencing decision, in that they now determined who would be subjected to the mandatory penalty. Importantly, because these decisions were not being made in open court, it was unclear what the criteria for selecting an “appropriate” case was, or how offenders who were fully prosecuted under the law differed from those who were not. This shift in decisionmaking authority is significant in that, unlike the judge, the prosecutor is not a neutral party, but rather serves as an advocate of the state. Moreover, prosecutorial decisionmaking, unlike that of other courtroom actors, is rarely subject to review and does not occur in open court. This less public process potentially allows for the development of charging practices which rely on extralegal, as well as legal, case characteristics.”

186. Wilson and Schrag, 2017. Speaking of failed efforts to reform criminal justice practices in the past, specifically relating to better tracking of racial data, the authors note, “Gordly and other legislators got pushback from prosecutors who didn’t want to document the perceived race of defendants. They were burning through cases so fast, they might not ever meet a defendant during the course of plea negotiations with the defense attorney. “How the hell do we find out

race? Unless the officer designates it, there's no way for us to know," said Clatsop County District Attorney Josh Marquis, who was critical of Peterson's 18-member committee, which included one deputy prosecutor. Police, in turn, didn't want to be forced to collect the data either, and opposed a 2001 effort to mandate stop data collection – already a “best practice recommended by national and international policing associations.””

187. Parks, 2015. The Oregon State Bar has recognized this problem and made plans in 2015 to improve the lack of diversity among legal professionals: ““Most days, when you call a lawyer, it's not your best day,” said Kateri Walsh, a spokeswoman for the state agency that regulates lawyers and judges. “The importance of having someone you can relate to and trust is critically important.” As the Oregonian notes, “Nearly 7 percent of Oregon bar members now identify as a racial or ethnic minority. That's about 1,000 people. But it's still not representative of the state's general population. Nearly a quarter of Oregon residents identify as a race other than white alone.” This problem is even more significant when one considers that minorities are drastically over-represented in prison and juvenile facilities relative to the general population. See also: Lam, 2015. Nationally, 8 out of 10 lawyers are white. See also: Wilson and Schrag, 2017. “De Muniz recalls one proposal from the 1995 package that drew sharp opposition: standard training of judges and lawyers to discover their own implicit bias. “Quite frankly it got a lot of pushback,” De Muniz said. “Because their own perception, like all of us, is that ‘I'm not biased when it comes to these things.’ There was some reluctance to say we might all be in need of some training. There was a perception that that wasn't necessary.”... David Fidanque, the former director of the Oregon ACLU, says that a mindset of denial persists today. “I think we delude ourselves, people in power

delude ourselves, into thinking there must be higher rates for crime in these groups. If nothing else, it must be based on something about class, not race or ethnicity,” said Fidanque, who spent more than three decades advocating for legislation to force lawmakers and law enforcement to examine why disparities persists.” Fidanque, who is white, said, “If it were happening to our children, we would be demanding change.”

188. Green, 2016. “Borg said the question of implicit bias should be raised during questioning. He said another key “is getting the prosecutor and victim to be comfortable that the intervention will solve the problem – that the kid won't do it again. When there is a racial difference, it's harder to identify with the defendant.””

189. Henning, 2013. “This article contends that decision makers, such as police, probation officers, and prosecutors, treat youth of color more harshly than white youth in part because of an implicit bias to ignore developmental immaturity in youth of color. While few empirical studies explicitly consider the impact of implicit racial bias on perception of impulsivity, lack of control, and culpability, two studies conducted by Sandra Graham and Brian Lowery provide early support for this position and lay the foundation for additional research... More recently, in a 2012 Stanford University study on the effects of race on the perception of juvenile culpability, psychologists found that race had a significant effect on white Americans' support for severe sentences, such as life without the possibility of parole for youth and perceptions of juveniles' blameworthiness relative to adults... As the researchers at Stanford point out, the findings on implicit bias demonstrate the “fragility of protections for juveniles when race is in play,” which may significantly influence public policy regarding adolescent sentencing and transfer to adult court.”

190. Criminal Justice Commission, 2011.

191. *Id.*

192. Wight, 2011. For example, “second look” hearings – a hearing reserved for juveniles to have their case reviewed by a judge at ½ and ¾ of their term of incarceration (and may potentially be released to community supervision if they have shown good participation and rehabilitation while in custody) – is potentially being used as a plea-bargaining tool by prosecutors even for some non-Measure 11 offenders. Second look hearings are typically only restricted from Measure 11 offenders, but because prosecutors have such great discretion to define the terms of punishment, they may require that a youth waive their right to a second look hearing in order to plead-down to a non-Measure 11 offense. As stated by the author, “Second Look is not available to all young people who received a non-Measure 11 adult conviction as a result of a plea. Some interviewees suggested that in some of the plea agreements reached with juveniles who had a Measure 11 charge hanging over them, these agreements may have included that the juvenile will waive his or her right to a Second Look hearing in exchange for a non-Measure 11 adult conviction.”

193. Merritt et al., 2004. “This form of sentencing has survived indeterminate and structured sentencing and exists as part of the current “get-tough” movement. However, while most states maintained mandatory penalties for selected crimes, these laws have not been found effective in achieving stated goals of reducing crime through deterrence and incapacitation, and have led to disparate application of the law.”

194. Gendreau and Goggins.

195. *Montgomery v. Louisiana*, 577 U. S. \_\_\_\_ (2016). “The need for incapacitation is lessened, too, because ordinary adolescent development



diminishes the likelihood that a juvenile offender “forever will be a danger to society.”

196. Mulvey et al., 2004. “There is little doubt that something important happens that leads serious adolescent offenders to change their behavior during the transition to early adulthood. One of the most consistently documented, although only partially understood, findings in criminology is the existence of an age-crime curve, showing that the likelihood of official and self-reported criminal activity within a cohort decreases during late adolescence and early adulthood (Blumstein, Cohen, Roth, & Visher, 1986; Piquero, Farrington, & Blumstein, 2003). More interesting, similar age curves are seen for alcohol and drug use as well as substance abuse diagnoses (Chen & Kandel, 1995; Schulenberg, Maggs, & Hurrelman, 1997)...there must exist one or more processes during late adolescence and early adulthood that cause some individuals who engaged in crime when they were younger—even very serious offenders—to stop offending altogether or to slow down their rate of offending if they remain criminally active (Piquero et al., 2001).”

197. National Institute of Justice, 2014.

198. Petteruti, 2014. Research also now shows that confining youth interrupts normal adolescent development and can contribute to recidivism when a young person might have naturally aged out of delinquency.

199. Mehta, 2016. “Laurence Steinberg, who has been working on adolescent development and legal decisions for almost two decades and is the author of many of the studies relied upon by the Supreme Court, notes that only around “10 percent of serious juvenile offenders become chronic adult criminals” and that “research indicates that one cannot predict whether an adolescent who has broken the law is likely to become a

persistent offender on the basis of his adolescent offense alone, even if the offense is a serious one.”

200. Henning, 2013.

201. Mulvey et al., 2004. The author notes that effective desistance strategies (strategies that reduce intersection with the criminal justice system) rely on an understanding for subgroups’ unique factors: “Numerous analyses of longitudinal data indicate that this pattern of change appears to occur differentially within subgroups of any cohort, with some individuals more likely to continue at a high rate of antisocial behavior and others more likely to drop off at different rates of decline (Nagin, Farrington, & Moffitt, 1995). Understanding the processes behind these turning points (Abbott, 1997) in offending among different groups of offenders is essential for designing sanctioning and intervention policies (LeBlanc & Loeber, 1998). If we can identify those factors that contribute to the naturally occurring pattern of desistance from crime that takes place during individuals’ early 20s, we may be able to structure policies and practices that promote this process.” Unfortunately, laws like Measure 11 treat all youth the same, regardless of their background or relative level of development.

202. National Institute of Justice, 2014. “There is good evidence that early interventions in childhood, such as home visits by nurses, preschool intellectual enrichment programs and parent management training, are effective in preventing delinquency. For example, an evaluation of the Elmira (N.Y.) Nurse-Family Partnership program found that at age 15, children of the higher-risk mothers who received home visits had significantly fewer arrests than controls. Another follow-up when the children were 19 showed that the daughters (but not the sons) of mothers who received home visits had significantly fewer arrests and

convictions.”

203. Mascharka, 2001. “After it was well established that raising the costs to the offender reduces crime, it was still an open question as to how great a factor increasing the severity of punishment actually was in deterring crime. In the past decade, several studies have established that certainty of punishment (likelihood of apprehension and conviction) is a far more significant factor.” See also: Roeder et al., 2015.

204. Merritt et al., 2004. “...it is widely acknowledged that punishment under the current criminal justice system comes neither quickly nor assuredly—prerequisites for effective deterrence.”

205. De Muniz et al., 2012. “The best measurement for whether deterrence works is whether similar offenders, when subjected to different terms of incarceration, recidivate at different levels. The most methodologically sophisticated research studies (those matching offenders to minimize the effect of pre-existing differences) find no significant effect, positive or negative, of longer prison terms on recidivism rates.”

206. Silvis, 2010. Speaking of Multnomah County Juvenile Detention Center, the author notes: “Almost every teen in the center stands accused of a Measure 11 felony...Youth corrections staff—who monitor these girls and boys round the clock – understand that many teens who are taken into custody are driven by extreme emotions that stem from trauma, abuse, neglect or addiction. And studies suggest that with the right treatment most teens can and do change their behavior. The majority of these young inmates are taking prescription psychiatric medications for depression, anxiety and other mental health problems...They’ve missed a lot of school and need intensive educational help. Some are completely abandoned by their families and get no visits.

207. Public testimony on HB 3194, a criminal justice bill that attempted to modify Measure 11, included widespread support for removing some of the charges from the list of offenses requiring mandatory minimum sentences. Several citizens gave public testimony about how the mandatory sentence given under Measure 11 was not in the best interest of the victim or the victim's family. Their testimony illustrated how in some cases it is only the prosecutor who is seeking the full mandatory sentence, often against the wishes of the victim's family and the community. See, HB 3194 A, Hearings before the Commission on Public Safety, April 3, 5, 2013. 2013 Leg., statement of LaDonna Pollard. See also: HB 3194 A, Hearings before the Commission on Public Safety, April 3, 5, 2013. 2013 Leg., statement of Hon. Daniel Murphy.

208. De Muniz et al., 2012. See also: *State v. Steven Levi Ryan* at 613, referring to the *Rodriguez/Buck* case, in which the trial court considered a case involving a 13-year-old boy who "by bringing the back of his head against her [a 13-year-old girl] clothed breasts for a minute," was facing a Measure 11 crime of Sex Abuse I. The Supreme Court of Oregon noted that, given the broad categories under Measure 11, departures from the mandatory minimum in some cases were warranted when considerations of certain "case-specific factors" necessarily "[shocked] the moral sense of...reasonable people," as in this case: "[While] some...criminalized conduct is especially harmful....a mandatory prison term of 75 months' imprisonment for first-degree sexual abuse does not, on the face of the statute, violate Article I, section 16...But because the statute also encompasses conduct that reasonable people would consider far less harmful, [the] defendant...[was] entitled to argue that the mandatory minimum sentence, as applied to the particular facts of [his case], was unconstitutionally disproportionate."

209. Green, 2016.

210. Green, 2016.

211. Id.

212. Sered, 2017.

213. Dierkhising et al., 2013. "Up to 90% of justice-involved youth report exposure to some type of traumatic event. On average, 70% of youth meet criteria for a mental health disorder with approximately 30% of youth meeting criteria for post-traumatic stress disorder (PTSD). Justice-involved youth are also at risk for substance use and academic problems, and child welfare involvement."

214. McCartin. "Detention is an additional traumatic experience. Removal of a child from the home, even for a brief period is in itself a traumatic event. Institutional placement removes a youth from his or her supports and exposes them to a negative peer culture. Confinement has been shown to exacerbate symptoms of PTSD."

215. Mehta, 2016.

216. Criminal Justice Commission, 2011.

217. Wight, 2011.

218. Oregon District Attorneys Association, 2016.

219. Id.

220. Nellis and Mauer, 2017. "Moreover, youth are frequently unaware of the consequences of their actions within the court system; a guilty plea, for instance, may be offered to expedite the process but may be accompanied by an assortment of problems in later years." See also, Kamerling-Brown, 2016. Charlie Tzab, speaking on his Measure 11 charge in which he and a group of friends stopped another student on campus at knife-point and asked for his money, then walked away

when he didn't have any: "Charlie Tzab, 16, was one of the four boys charged in the crime. In an interview, he says he wasn't aware of Measure 11's sentencing provisions prior to getting arrested. "I didn't really know anything about it before," says Tzab, who was one of two from the four who agreed to talk to *Grant Magazine*. "At Donald E. Long, they just explained it to us...It was really stressful and surprising and confusing at the same time.""

221. Wight, 2011. See also: Rakoff, 2014. It may even be the case that young offenders are more prone to false confessions: "Research indicates that young, unintelligent, or risk-averse defendants will often provide false confessions just because they cannot "take the heat" of an interrogation. Although research into false guilty pleas is far less developed, it may be hypothesized that similar pressures, less immediate but more prolonged, may be in effect when a defendant is told, often by his own lawyer, that there is a strong case against him, that his likelihood of acquittal is low, and that he faces a mandatory minimum of five or ten years in prison if convicted and a guidelines range of considerably more—but that, if he acts swiftly, he can get a plea bargain to a lesser offense that will reduce his prison time by many years."

222. Criminal Justice Commission, 2011. "M11 indicted offenders who have a private attorney are about 25 percent less likely to be convicted of a M11."

223. Sentencing Project, 2017.

224. Wight, 2011.

225. Id. (See, figure 2 at pg. 43).

226. Id.

227. Green, 2016.

228. Petteruti, 2014.

229. Wight, 2011. "...[w]hile young

people in the juvenile justice system can petition to have their records closed through “expunction” at age 18, youth convicted of Measure 11 offenses may not have their records expunged...For young people who carry a non-Measure 11 adult charge as the result of a plea agreement, the same expunction policies apply as would apply to an adult. To have their records sealed, youth: 1. Must have completed all of the requirements imposed upon them by the court and completed their term of probation; 2. Cannot have had a conviction set aside in the past 10 years; and 3. Must wait 10 years if they had been convicted of any other offense except a motor vehicle violation within the 10-year period immediately before the filing of the motion. In effect, youth ages 16 or 17 who accept a non-Measure 11 adult conviction may well have to wait until age 26 or 27 to seal their records. During all that time, a young person will encounter barriers to employment and housing that will likely have lifelong repercussions and encourage reoffending.”

230. Id. “Many youth who have an adult conviction have been assessed by the Oregon Youth Authority to have a lower risk of reoffending than other youth within their custody and control. In other words, we may be sending some youth to prison for long mandatory sentences and using system resources on them when they are less likely than others to commit another crime. Hundreds of youth transferred to the adult court via Measure 11 are sentenced to adult probation – an indicator that they are not necessarily the worst-of-the-worst.”

231. Criminal Justice Commission, 2011. “...prison is a cost to the state’s general fund, composed primarily of income tax revenues, that is shared by all Oregonians. It is also a cost that has increased by more than 163 percent in nominal dollars and 54 percent in inflation and population adjusted dollars since the passage of M11.”

232. Renauer, 2011.

233. A. Green, 2016. “The change also serves as acknowledgement that an adult conviction is public information and can stay on a defendant’s record for life. Adult-court convictions also can hamper getting into college, getting a job and find housing.” [http://www.oregonlive.com/portland/index.ssf/2016/06/some\\_young\\_robbers\\_kidnappers.html](http://www.oregonlive.com/portland/index.ssf/2016/06/some_young_robbers_kidnappers.html)

234. Sered, 2017. “Not only does incarceration fail to interrupt these drivers, it intensifies them – interrupting people’s education, rendering many homeless upon return from prison, limiting their prospects for employment and a living wage, and disrupting the social fabric that is the strongest protection against harm, even in the face of poverty. On the individual level, violence is driven by shame, isolation, exposure to violence, and an inability to meet one’s economic needs – factors that are also the core features of imprisonment.”

235. Conrad, 2013.

236. Oregon Youth Authority Issue Brief, January 2015. [http://www.oregon.gov/oya/docs/issue\\_briefs/IB\\_managing\\_costs\\_2013-15.pdf](http://www.oregon.gov/oya/docs/issue_briefs/IB_managing_costs_2013-15.pdf)

237. Petteruti, 2014.

238. Wight, 2011. “Along with research showing that youth tried in the adult court are more likely to reoffend more often and more seriously than youth processed in the juvenile justice system, the data from Oregon do not show that trying youth as adults is necessarily driving down the juvenile crime rate.”

239. Krisberg et al., 1994. “Juvenile incarceration has proved enormously expensive, often approaching (and in some cases exceeding) \$50,000 per case per year. Even the most expensive community-based programs are less costly.”

240. Wight, 2011.

241. Id.

242. Id.

243. Pew Charitable Trusts, 2015.

244. Id.

245. Criminal Justice Commission, 2011. See, “Map 2.” As an example, “[T]he highest county...uses 2.8 times as much state prison resources as the lowest county. Klamath County is the lowest, using an estimated \$38,600 of prison resources per arrest, and Malheur County is the highest, using just under \$108,800 per M11 arrest.”

246. Nellis, 2011. “Juvéniles and young adults who become delinquent are handled by the system during a key developmental phase of adolescence. Often lacking the necessary skills to cope with adult responsibilities when they are released, many youth face unemployment, school reenrollment challenges, and homelessness.”

247. Mackey et al., 2012. “A variety of studies have provided evidence that this prolonged period of development makes the PFC [pre-frontal cortex] particularly sensitive to environmental influences – not only during the prenatal period and infancy, but also during childhood and adolescence.” See also, Arnsten, 2009. “The prefrontal cortex (PFC)—the most evolved brain region—subserves our highest-order cognitive abilities. However, it is also the brain region that is most sensitive to the detrimental effects of stress exposure. Even quite mild acute uncontrollable stress can cause a rapid and dramatic loss of prefrontal cognitive abilities, and more prolonged stress exposure causes architectural changes in prefrontal dendrites.”

248. Mackey et al., 2012. “[C]hildren who experience detrimental or simply insufficient environments will thereby

encounter obstacles to reaching their full potential... A 'stressor' can be defined as a real or perceived threat to homeostasis, and 'stress' can be defined as the state of experiencing such stressors. Stressors can take many forms, including exposure to predators, physical restraint, and maternal separation."

249. Nellis, 2011.

250. Id.

251. The Pew Charitable Trusts, 2010.

252. Petteruti, 2014.

253. The Pew Charitable Trusts, 2010.

254. Justice for Families, 2012.

255. Elizabeth Wakefield (Attorney at Metropolitan Public Defenders) in conversation with the author, March 2017.

256. The Pew Charitable Trusts, 2010.

257. Alex-Assensoh et al., 2015.

258. With the exception of Asian/Pacific Islander.

259. The Pew Charitable Trust, 2010. "Children with fathers who have been incarcerated are significantly more likely than other children to be expelled or suspended from school (23 percent compared with 4 percent). Family income averaged over the years a father is incarcerated is 22 percent lower than family income was the year before a father is incarcerated. Even in the year after the father is released, family income remains 15 percent lower than it was the year before incarceration."

260. ORS 135.240

261. Id.

262. Id.

263. Id. "Black youth are 4% of the population but constitute 19% of Measure 11 indictments. The majority (70%) of Measure 11 indictments against black youth were for robbery or assault charges. Black youth are three times as likely as white youth to face a Measure 11 indictment. Further, the overwhelming majority (74%) of black youth ultimately are not convicted of a Measure 11 crime."

264. A. Green, 2016.

265. Including, for example, an alternative sentencing program for a limited number of lower-level youth offenders, promoted and supported by Rod Underhill. See: Green, 2016.

266. Id. See also: Criminal Justice Commission, 2011. See, discussion of SB 1049.

267. This process is known in Oregon as "reverse waiver."

268. *State v. Ryan*. See Also: HB 3194 A, Hearings before the Commission on Public Safety. April 3, 5, 2013. 2013 Leg., statement of Hon. Daniel Murphy.

269. Merritt et al., 2004. The authors experienced similar roadblocks as elsewhere: "Our original proposal included an analysis of prosecutorial decisions. Though extensive efforts were made to obtain county prosecutor data during the study time frame, these data were not available." See also, Wilson and Schrag, 2017. Speaking of failed reform efforts to track racial data in Oregon, the authors note: "legislators got pushback from prosecutors who didn't want to document the perceived race of defendants. They were burning through cases so fast, they might not ever meet a defendant during the course of plea negotiations with the defense attorney. "How the hell do we find out race? Unless the officer designates it, there's no way for us to know," said Clatsop County District Attorney Josh Marquis, who

was critical of Peterson's 18-member committee, which included one deputy prosecutor. Police, in turn, didn't want to be forced to collect the data either, and opposed a 2001 effort to mandate stop data collection — already a "best practice recommended by national and international policing associations." See also: Rogers, 2016.

270. See: Data compiled from Mark Leymon in Section 4, part IV.

271. Multnomah County Health Department, 2014.

272. Criminal Justice Commission, 2011. See, "Voter's Pamphlet."

273. Pfaff, 2017

274. Pew Charitable Trusts, 2016. Between 1983 and 2013, Oregon's rate of punishment has increased significantly relative to most other states (though, Oregon's imprisonment rate remains below the national average). During that time, Oregon's rate of punishment increased 214%.

275. Pfaff, 2017

276. Wight, 2011.

277. Kulongoski.

278. Bernstein, 2014.

279. *Graham* at 24. See also: Caldwell, 2016. Caldwell demonstrates how some states have correctly interpreted the spirit of the Supreme Court trilogy discussed previously by applying the principle that youth be granted "a meaningful opportunity to obtain release..." to all juvenile offenders facing serious penalties, regardless of their crime. Caldwell notes: "West Virginia's legislation, like California's, embraces the spirit of *Graham* and *Miller*. In addition to abolishing LWOP for juveniles, it establishes parole eligibility for all juveniles after they have served fifteen years of incarceration."

280. Wight, 2011.
281. See, ORS 420A.200.
282. Office of the Surgeon General, 2001.
283. Id. Speaking of the need to focus on prevention, the Surgeon General's report notes, "[u]nfortunately, the news about effective programs has been slow to bring about change in school, community, and juvenile justice system prevention efforts, where precious resources continue to be spent on ineffective programs. Some experts believe that youth crime and violence rates could be "substantially" reduced simply by reallocating the money now spent on ineffective policies and programs to those that do work."
284. Alex-Assensoh et al., 2015.
285. Washington State Institute of Public Policy, 2017.
286. Office of the Surgeon General, 2001.
287. Criminal Justice Commission, 2011.
288. Office of the Surgeon General (US);
289. Alex-Assensoh, 2015.
290. Id.
291. Id.
292. Id. This is true except for Middle School expulsions, in which black youth were expelled at a rate slightly less than twice that of their white peers.
293. Id.
294. Justice Center: The Council of State Governments and PPRI (Public Policy Research Institute ) "Breaking Schools' Rules: A Statewide Study of how School Discipline Relates to Students' Success and Juvenile Justice Involvement," 2011. [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf)
295. Parker, Clifton B., 2015. "Teachers more likely to label black students as troublemakers, Stanford research shows." <https://news.stanford.edu/2015/04/15/discipline-black-students-041515/>
- NAACP Legal Defense and Educational Fund, 2017. "Locked out of the classroom: how implicit bias contributes to disparities in school discipline." [http://www.naacpldf.org/files/about-us/Bias\\_Reportv2017\\_30\\_11\\_FINAL.pdf](http://www.naacpldf.org/files/about-us/Bias_Reportv2017_30_11_FINAL.pdf)
- National Council on Disability, 2015. "Breaking the school-to-prison pipeline for students with disabilities." See p. 79: Nationally, 36 percent of all African American male secondary students with disabilities were suspended at least once in 2009–2010 compared to 17 percent of white male secondary students with disabilities.
- Losen, Daniel J., and Tia Elena Martinez, 2013. "Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools." Civil Rights Project/Proyecto Derechos Civiles, accessed April 30, 2015, [http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rightsremedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-theoveruse-of-suspensions-in-american-middle-and-high-schools/OutOfSchoolOffTrack\\_UCLA\\_4-8.pdf](http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rightsremedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-theoveruse-of-suspensions-in-american-middle-and-high-schools/OutOfSchoolOffTrack_UCLA_4-8.pdf). <https://www.ncd.gov/publications/2015/06182015>
296. Id.
297. Id.
298. Cadora and Tucker, 2003.
299. Id. For example, the Justice Reinvestment concept, in its original form, sought to divert people from prison and reinvest the money saved from reduced prison costs into communities of color with high rates of poverty and incarceration. As implemented today, the original Justice Reinvestment concept has been operationalized at the "Justice Reinvestment Initiative" (JRI), a program of which Oregon is an active part. However, in its current form, money is reinvested not primarily into low-income and high-incarceration communities, but rather back into programs within the criminal justice system. While JRI has some beneficial aspects, it does not tackle head-on the sort of upstream forces that lead to cyclical incarceration and disenfranchisement as envisioned by the conceptual founders of the Justice Reinvestment concept. Oregon should work to bring back a more community-centered approach to local funding.
300. Alex-Assensoh, 2015.
301. Mental Health America, 2017. "Ranking the States." <http://www.mentalhealthamerica.net/issues/ranking-states>
302. Oregon Health Authority Public Health Division, 2017. "Emergency Department Boarding of Psychiatric Patients in Oregon."
303. Oregon State Court Juvenile Justice Mental Health Task Force, 2016. "Report and Recommendations."
304. Disability Rights Oregon, 2017. "Don't Look Around: A Window into Inhumane Conditions for Youth at NORCOR."
305. ORS 137.700. Remember that sentences can be 'stacked' on top of one another, meaning a defendant charged and convicted of multiple sentences may serve each sentence individually for a cumulative sentence that is much longer than any of the charges individually.