

# When Justice Fails

An argument for the  
repeal of Ballot  
Measure 11

by Jo Ann Bowman

In November 1994, Oregon voters joined many states across the country by passing a new mandatory minimum law that automatically called for the trial of juveniles over 14 years old as adults for a list of crimes ranging in severity from murder to assault. This law shifted the balance of power in the courtroom from the judge, who is required to be an impartial arbiter, to the prosecutor, who is required to be adversarial.

On April 1, 1995, Ballot Measure 11 was implemented as law. Prior to that date, judges had the ability to tailor-fit sentences relative to the facts of individual cases. Improvements made to the criminal justice system in 1993, due largely to the development of sentencing guidelines, gave judges a full range of sentencing options based on the defendant's previous record, and on the facts of his or her case as presented by both prosecuting and defending attorneys. While shorter sentences could be administered appropriately in cases of dangerous and repeat offenders, judges could impose sentences even longer than those required by Measure 11.

But Ballot Measure 11 eliminated judges from the sentencing process, and placed a disproportionate amount of discretion and power into the hands of the prosecutor to determine sentences by using intimidation to leverage potentially unjust plea bargains. Prosecutors now are empowered

# Measure 94: A Surrender To Violent Criminals

by Kevin L. Mannix

Measure 94 is not just a retreat from violent criminals; it is an unconditional surrender. Calling for the retroactive elimination of Measure 11, Measure 94 requires the very costly, and in some cases, unjust re-sentencing of all persons previously sentenced under Measure 11 and its accompanying legislation. Rather than discuss modifications to Measure 11, the proponents of Measure 94 prefer to reinstate the very same inadequate sentencing guidelines in effect in March 1995.

Before Measure 11, lax sentencing guidelines allowed murderers to serve an average of less than 9 years and rapists to serve an average of less than 3 years in prison. Measure 11 took to heart the adage "let the crime define the time" by assigning specific mandatory minimum sentences for violent crimes such as murder, rape, robbery, assault, and kidnapping, and brought integrity back to the criminal justice system by ensuring sentencing commensurate with the extremity of different violent crimes. In November 1994, Oregon voters enacted Measure 11, establishing mandatory minimum sentences for violent crimes committed on or after April 1, 1995.

Adopted as ORS 137.700, Measure 11 now requires each criminal convicted of a violent crime to serve no less than the corresponding term specified for his or her crime, which means at least 25 years for a murder conviction, and over 9 years for a rape conviction.



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with significant sentencing discretion that used to belong to judges. Many defendants feel forced to plead guilty to their alleged offenses, even when innocent, rather than risk a trial and the possible imposition of a mandatory minimum sentence one which does not allow time off for good behavior, parole, or other incentives.

This article's goal is not to make you feel sorry for convicts. Pity doesn't apply here. Fairness and justice are the issues. Upon my first look at the criminal justice system, I started to think about how our tax dollars could be better invested to develop a complete criminal justice system one that includes mental health treatment, alcohol and drug treatment, anger management and job readiness training, as well as necessary punishment. After having paid their debt to society, inmates leaving a state correctional facility should be functionally literate and have a fair hope of living productive, law-abiding, and independent lives in their local communities. Their time inside prison walls is an opportunity we must seize for rehabilitation, rather than an exercise simply to sweep them under a rug for years on end.

Most people in Oregon know someone either in their family, at work or in their local community who has been charged and/or convicted of a Measure 11 crime. Yet, if you live in a large urban area, your chances of facing a Measure 11 offense increases significantly as a result of there being fewer large-county assistant district attorneys who are involved with young people in their communities. District attorneys in smaller or rural jurisdictions might coach the local little league team, or attend religious or community services and functions inviting to young people and their families. More intimately connected to their communities, these public servants tend to be less willing to charge these children with Measure 11 crimes at the expense of their own rates of conviction and career or political advancement. Instead, they are inclined to consider mitigating circumstances that affect the lives of our youth.

If you are a youth of color, your chances of being arrested and convicted of a Measure 11 offense increase dramatically. Your chances double if you are a male Latino youth and triple if you are a male African American youth. It's alarming how young people are being targeted for arrest and conviction at such an accelerated rate. At an age when they are too young to buy cigarettes legally, to vote, to enter into a contract, or to serve their country in the military, our children must decide between pleading guilty to a lesser crime than that with which they are accused, or taking their chances with a jury and a certain likelihood of serving a long mandatory minimum sentence. In other words, we won't give them adult privileges or rights, but will treat them like adults if they are accused of breaking the law. Such rigid thinking is really quite easy to conceive and implement. You simply paint each arrested person with the same broad brush of guilt and sentence, regardless of his or her alleged offense. The problem is, this mentality runs directly in the face of

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Measure 11 is designed to do several things. Importantly, this measure serves as a deterrent to crime by mandating minimum sentences for violent crime convictions, while providing notice of those sentences imposed to punish particular crimes. It also keeps our most violent criminals off the streets by increasing sentencing durations. This offers significant public protection while criminals are incarcerated, and provides convicted criminals opportunities for rehabilitation through Measure 17, passed concurrently with Measure 11. Measure 17 requires that state prisoners receive basic education and be placed in useful work activities while in prison.

Measure 11 has been a clear success. The number of person crimes (including murder, rape, and assault) has decreased for each full year after the measure was implemented in 1995. When viewed in overall terms, Oregon has seen a net reduction of 18,335 person crimes since the implementation of Measure 11. When viewed relative to Oregon's rapidly growing population, the statistics show a 23 percent decrease in violent crime over the course of five straight years, from a rate of 177.3 per 10,000 persons in 1994 to a rate of 136.1 per 10,000 persons in 1999. The 1998 rate of 144.6 person crimes per 10,000 people is the lowest rate reported since such reporting began in 1985.

The Federal Bureau of Investigation (FBI) Violent Crime Index also reflects a reduction of violent crimes in Oregon. Including data on crimes covered under Measure 11, such as willful murder, forcible rape, robbery and aggravated assault, this data suggests that since 1974, the absolute number of such crimes in Oregon trended upward until shortly after the implementation of Measure 11. Yet to date, this historical increase in crime incidence over time has reversed itself, resulting in Oregon's lowest rates of violent crimes since 1984.

Still, while this reduction in Oregon violent crimes since 1994 has contributed to the overall reduction in the Oregon crime rate, property crimes and status offenses have fluctuated in frequency. This phenomenon points simultaneously to the effectiveness of Measure 11 and to the need to reinterpret and expand its reach over non-person crimes—a thought not lost on Salem policymakers. This is why Measure 11 was written preemptively as a statutory measure, not as a constitutional measure, to allow the Oregon Legislature to address needed modifications in sentencing requirements. After property crimes increased significantly in 1997, the Oregon Legislature toughened sentencing for repeat burglars and repeat auto thieves in its 1997 session by allowing greater flexibility in sentencing criminals convicted of second degree robbery and assault. This action came in recognition that there had been no clearly defined, systematic approach to tougher sentences for these crimes.

The loss of Measure 11 by approval of Measure 94 will materialize in decreased public protection from convicted criminals, huge costs to taxpayers, and in the appearance of a giant bureaucratic burden laid at the feet of police, prosecutors, courts, victims and their



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one of the cornerstones of democracy: each person deserves a fair hearing and an even shake in a criminal proceeding.

This fall, voters in Oregon will have an opportunity to rebuild our criminal justice system by repealing Ballot Measure 11. Oregonians have shown they want a justice system that provides for a range of sentencing options based on individual defendants, victims and circumstances surrounding criminal acts. Oregonians also are tired of the state using prisons as a last stop facility. A one size fits all justice system serves no one's best interests. It does not serve juveniles, who when incarcerated are taught how better to be prisoners than how to reenter society as productive citizens with the tools of literacy. It certainly doesn't serve those communities that must receive ex-offenders after they have completed their sentence.

Reasonable people agree that criminals have a debt to pay to

society and must go to prison for their offenses. Although no one disputes this fact, opponents to this repeal effort think any criticism of Measure 11 equates to a proposition of anarchy. This pattern of thought belies a central aspect of totalitarianism: a sharp distinction between good and bad with no temperance whatsoever. I challenge the use of fear to motivate bad legislation or to effect change by promoting paranoia. Fear cannot be the driving force behind developing a criminal justice system that must impose appropriate sanctions for breaking the law. This is why we elect judges. We trust them to weigh facts, avoid emotional decisions and provide sentences that hold defendants accountable, protect the community, and ensure the proper treatment of convicts so they may return to local communities as focused, productive, and contributing individuals.

I am hopeful that Oregonians will engage in dialogue about building a criminal justice system that serves all

our children's needs. This discourse must come from a balanced approach to criminal justice, not 15 second sound bites. We must evaluate the true cost of incarcerating so many of our youth. As a community we have to recognize our high incarceration rate as what it is our failure to build a comprehensive criminal justice system that addresses the core causes of criminal behavior, including conditions of poverty, mental illness, and drug and alcohol dependency. Our push to criminalize juvenile behavior comes at a high social and community cost. Until one can obtain mental health treatment as easily as obtaining a gun, we will continue to use our jails as warehousing facilities. We can do better and we must.

Remember, 98 percent of people in jail and prison today ultimately will be released. They will return to our local communities devastated and embittered by their experiences. Do we want them dropped in our laps with poor job skills, few housing or employment opportunities, and



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families. At present, over 3,200 violent criminals are incarcerated as a result of Measure 11. Measure 94 would require that each of these violent criminals be re-sentenced within 90 days of its enactment. Because they are incarcerated, virtually all of these violent criminals meet standards for indigent legal representation, requiring that each be represented at their re-sentencing hearings by taxpayer paid, court appointed attorneys. And with a return to the sentencing standards of March 1995, nearly 1000 violent criminals could be eligible for immediate release from prison as the criminal courts system becomes overwhelmed, losing its ability to meet the 90 day re-sentencing guideline.

There exist similar repercussions in re-sentencing violent juveniles.

Measure 11 requires that juveniles 15, 16 and 17 years old charged with violent crimes be tried in adult court, while still allowing those convicted to serve their sentences at the Oregon Youth Authority (OYA). As a result, over 95 percent of Measure 11 convicted juveniles serve their time in OYA. Measure 94 retroactively repeals this provision, and would require these juveniles to be re-sentenced in juvenile court where they could seek to avoid the adult sanctions mandated under Measure 11. Many of these juveniles would be eligible for immediate release without consideration of their crimes simply because 1995 sentencing guidelines provided that juvenile court jurisdiction ended when a defendant reached age 21.

In short, Measure 94 strips away

the protections established by Measure 11, would likely release countless violent criminals back to the streets within only 90 days, and sends a simple message to violent criminals: society surrenders and is unwilling to carry on its effective fight against violent crime. The retroactive repeal of Measure 11 by Measure 94 is bad public policy and should be rejected firmly by voters.

As a State Representative, Kevin Mannix has chaired the Judiciary Committee on Criminal Law, and served on the Ways and Means, and Labor and Rules Committees, as well as the Emergency Board. He is currently a candidate for Oregon State Attorney General.