

Comments on Oregon Criminal Justice Commission "Measure 11 Analysis January 2011" Draft

Below you will find my comments, representing Crime Victims United, on the "Measure 11 Analysis", January 2011 draft, from the Oregon Criminal Justice Commission (CJC).

Because of the short time I had to review this report, I have read only the executive summary and the introduction and my comments are limited to those parts of the report.

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General Comments

One need read no further than the first page to understand that this report is a one-sided attack that takes every opportunity to amplify perceived problems with Measure 11 while glossing over minor details like the fact that Oregon's violent crime rate has decreased by an astounding 51.2 percent since Measure 11 went into effect.

(Crime Victims United does not claim and never has claimed that Measure 11 is solely responsible for the decrease in Oregon's violent crime rate, but we do believe that it made a substantial contribution to that decrease.

From 1995 to 2009, Oregon had the second largest decrease in violent crime rates of all states.

While Oregon's violent crime rate decreased by 51.2 percentage points, Washington's violent crime rate decreased by 31.6 percentage points. Using the reporting formulation found in the literature on treatment, including CJC literature, Oregon's violent crime rate decrease was 62 percent larger than Washington's.

Despite the efforts of anti-Measure 11 forces, any honest attempt to determine the contribution of Measure 11 to Oregon's astounding violent crime rate decrease would show that it has prevented many thousands of violent crimes and saved taxpayers and victims far more money than it cost. We leave it to the CJC to quantify this.

This contextual information deserves a place in the executive summary, alongside the four pages which the authors devoted to a one-sided dissection of statements from the 1994 voters' pamphlet.)

The executive summary casts doubt on the Criminal Justice Commission's commitment to its mission:

*"The Criminal Justice Commission's purpose is to improve the efficiency and effectiveness of state and local criminal justice systems by providing a centralized and **impartial** forum for statewide policy development and planning."*

The executive summary belies any pretense of impartiality on the part of the authors.

Comments on the Executive Summary

"This report seeks to move beyond the strongly held beliefs about M11, to measuring how it has changed how sentencing decisions are made in Oregon in the past 15 years."

This would be an appropriate assignment for the CJC, but it is not reflected in the executive summary which is clearly intended to be a broadside for use in an all-out attack on Measure 11.

"The chief petitioners assertion, based upon principles of justice and accountability, that the sentences he proposed were the minimum necessary cannot be measured as a true or false belief. Each individual's moral sense of what justice requires in an individual criminal case varies based upon the individual's own worldview, the facts of the case, and the individual's relation to the victim and the offender. To test whether millions of Oregonians would agree with whether the sentences in thousands of criminal cases provided justice to society and to the victim is impossible."

This is written as if two-thirds of Oregon voters did not pass Measure 11 in 1994 and as if nearly three-fourths of Oregon voters did not reaffirm it in 2000.

While it is true that *"to test whether millions of Oregonians would agree . . . is impossible"*, it is clear from these elections that the values of Oregon voters are far more faithfully-represented by Measure 11 than they are by the Oregon Criminal Justice Commission, or, for that matter, by the executive branch, by some in the legislative branch, and by many in the judicial branch of the government of Oregon.

The CJC apparently shares the view that the voters are ignorant and don't know what they are doing. An alternative explanation, to which we subscribe, is that the voters know something that all of the statistics in the world can not refute: That serious punishment for the most violent crimes is necessary for protection of society, to establish and maintain society's values, and to inculcate respect for the sanctity of an innocent person's life and limb.

"In a diverse state where consensus on a moral issue may be impossible"

Did the CJC miss the memo? **There is an overwhelming consensus, expressed through the ballot, that Measure 11 sentences are appropriate!**

"How much crime is actually avoided due to incapacitation of offenders generally, due to all Oregon's sentencing policies, has been explored in earlier reports by the Oregon Criminal Justice Commission."

The CJC can not just gloss over a 51.2 percent decrease in the violent crime rate! If the intention is to accurately portray what has happened in Oregon since the passage of Measure 11, this critical contextual information must be included in the executive summary.

"The magnitude of crime avoided due to incapacitation is dependent upon how adept Oregon's criminal justice system is at identifying those offenders who pose the highest risk of engaging in criminal behavior in the future."

Yes, *"the magnitude of crime avoided is dependent on . . ."* But that dodges what voters are more concerned with - namely, the magnitude of death and destruction prevented by incapacitation. This depends not only on who poses the highest risk of recidivism but on the types of crimes they commit.

"in fact it contravened such an evaluation by a judge if that analysis would lead to a shorter prison sentence for low risk offenders who committed a crime that did not, in the judge's opinion, require the sentence set for all cases by M11"

Here the CJC ignores the impact of SB 1049 and HB 2379 because they would rather argue against the original Measure 11 than against Measure 11 as it now stands. Furthermore, the CJC dodges the question of consecutive versus concurrent sentences by narrowing the focus to offenders who, in the judge's opinion, do not require the Measure 11 sentence.

While we are on the subject, nearly all of Oregon's judges were appointed by governors who demonstrably do not share the values of the voters of Oregon when it comes to sentencing for violent crimes. It should be no surprise that most of those judges also do not share the voters' values.

"Also, M11 never assessed the opportunity cost of a policy of investing a greater amount of taxpayer funds in imprisonment rather than mandatory supervision, local jail sanctions to modify behavior that violated the terms of that supervision, offender education, addiction treatment, juvenile services, and police services. According to research regarding "what works" gleaned in the 16 years since its passage, this opportunity cost has meant Oregon has not invested in parts of its public safety system designed to provide the best "bang for the taxpayer's buck.""

The CJC, the governors of Oregon, and some legislators have been touting the miracle of modern social science for well over a decade now. The CJC claims the programs they tout are "proven" and proven to return far more in savings than they cost.

If that is the case, **what possible justification could the CJC, the governors they represent and their legislative allies have for not implementing these miracle programs to the fullest extent?** Measure 11 or no Measure 11, a program that returns \$3 for every \$1 spent not only has no cost to taxpayers but instead represents a funding source.

"Local jail sanctions to modify behavior that violated the terms of that supervision, offender education, addiction treatment, juvenile services, and police services" **do not stop a violent criminal who is intent on raping or murdering again.** Paroled rapist Ladon Stephens was on the **highest level of supervision** when he raped four young women and kidnapped, raped, sodomized and murdered 12-year-old Melissa Bittler in Portland in 2001. Portraying probation and treatment as a panacea is a disservice to victims and law-abiding citizens.

"Those dollars have been instead concentrated on imprisonment, with a return on investment that has been diminishing over time according to the earlier Oregon Criminal Justice Commission report cited above."

A diminishing return on investment does not mean that it is not a very rewarding investment. Remember the CJC 2007 report to the legislature? The one that the CJC has declined to recap in this report? That report suggests that, as of 2005, Oregon was still saving roughly \$4 for every \$1 spent incarcerating violent criminals. See Table 3 on page 11 at:

<http://www.ocjc.state.or.us/CJC/CJC2007Reporttolegislature.pdf>

Yes, we know those figures are for Washington State. The CJC wrote in that report:

"Due to data limitations, it was not possible to estimate a cost-benefit ratio for each type of offender for Oregon. However, there are many similarities between Oregon and Washington that make these estimates seem reasonable for Oregon."

Why is it that, 16 years after Measure 11 went into effect, the CJC has never reported on the cost/benefit ratio of Measure 11? (Or if they have and we missed it, they buried it under a rock.)

"Deterrence as a crime control policy has been debated for decades, and this examination of M11 does not seek to add to that debate."

Then why does CJC spend the next half-page trying to debunk the idea of deterrence?

Deterrence is to anti-incarceration folks as kryptonite is to Superman.

"It is important to point out that M11 sentences govern crimes committed by 15, 16, and 17 year old offenders who may be less likely to assess such a calculus and then control their impulses than adults."

For an unscientific but illuminating survey on the deterrence effect of Measure 11, see <http://www.crimevictimsunited.org/measure94/golden.htm>.

"M11 also encompasses criminal behavior where the offender acted recklessly rather than intentionally. It seems less likely that a criminal sentence will deter the actions of a person, when the person did not intend to commit the crime in the first place."

Is it possible that serious punishment for a drunk driver who kills someone may deter him the next time he's in a position to drink and drive and kill? Or that it might deter someone else?

"The effect of deterrence is also minimized when the offender is intoxicated by drugs or alcohol at the time of the offense."

Is it possible that serious punishment for a drunk driver who kills someone may deter him the next time he's in a position to drink and drive and kill? Or that it might deter someone else?

"However, the predictability that is seen when someone is convicted of one of the crimes in M11 does not mean there is predictability as to the 71 percent of cases where the plea bargain process allows the offender to plead guilty to an offense that is something less than he or she actually committed, based upon the grand jury indictment."

A grand jury indictment does not mean that someone has actually committed a given crime.

"The passage of Senate Bill 1049 in 1997, and other following legislation, allowed judges to decide the sentence for certain offenses and changed this dynamic, but M11 as passed by the voters focused so greatly on establishing uniformity in sentences upon conviction that it left most of the sentencing decisions to the prosecutor in determining when he or she would actually seek a conviction for the charge that carries the mandatory sentence."

The CJC continues to argue against Measure 11 as it was passed in 1994, not Measure 11 as it has operated since 1997.

"M11 provided a definite and certain sentence for those who were convicted . . ."

Yes, and that's exactly what it set out to do.

"In the Rodriguez case, the court decided that the sentence for sex abuse in the first degree of 75 months prison proscribed by M11 was too severe when applied to a woman who had no prior felony convictions and she committed the crime of holding the back of the 12 year-old victim's head against her clothed breasts for a sexual purpose, while massaging the sides of his head."

As the CJC knows, Ms. Rodriguez' conduct was a lot more egregious than that. From the Oregon Appeals Court ruling:

"Over time, defendant's relationship with the victim became exceptionally close. Their conduct at and outside the club raised concerns among other staff members and became the subject of rumors among other children at the club, who called the victim defendant's "boyfriend." Defendant and the victim frequently hugged each other, and defendant sometimes put her arm around the victim when they walked. Defendant occasionally allowed the victim to sit on her lap in her office. He kissed her on the cheek between 10 and 20 times. She sent e-mail messages to him in which she said, "I love you" and "love you lots." The victim sent similar messages to her, including one that said, "[S]ee you later Babe I love you for ever," and another that ended, "I LOVE YOU SO MUCH." Defendant took the victim with her on several trips to Bend and Spokane, two of which were overnight trips. The two were frequently alone together in her car, at her apartment, and at his home. They were seen alone together in her office at the club with the door closed."

<http://www.publications.ojd.state.or.us/A131050.htm>

And from the Oregon Supreme Court ruling:

"Rodriguez developed a close relationship with the boy and his family, spending time at his home, helping him with his homework, and giving him rides to the club and to school. She and the boy spent time together outside the club -- often alone -- in her car, at her apartment, or at his home -- all in violation of club rules. Rodriguez told the boy not to tell anyone that they had been alone at her apartment. Rodriguez and the boy often hugged each other and put their arms around each other. The boy sat on her lap in her office and occasionally kissed her on the cheek. Rodriguez sent email messages to the boy in which she called him "babyface" and said, "I love you" and "love you lots." The boy sent Rodriguez similar messages. Rodriguez took the boy with her on several trips, including overnight trips to visit a former club member and to visit her family. Their conduct had raised concerns among staff members and became the subject of rumors among other children at the club."

<http://www.publications.ojd.state.or.us/S055720.htm>

Despite the egregious nature of Ms. Rodriguez' conduct, Crime Victims United agrees that the 6-year and 3-month sentence was too severe for her crime of conviction. Over more than a decade, Crime Victims United has advocated in the legislature for additional discretion in such cases. We received little or no support for our position from the governor, from the Criminal Justice Commission, or from other opponents of Measure 11. It seems they preferred to have a "poster case" like this one to improving the law.

"The estimated impact on the overall prison population from the passage of M11 was ???"

This is the "Measure 11 impact." It was routinely reported in the biannual prison population forecast until October of 2008 when it, along with a lot of other useful information, was dropped from the report.

"It appears that SB 1049, which allowed guidelines sentences for some M11 offenses, did not have much of an impact on the prison population."

The CJC hypothesis is that Measure 11 gave prosecutors additional clout in plea agreements. No doubt that is true. But if it is true, it must also be true that SB 1049 (and HB 2379) removed some of that clout. If the additional clout led to increases in the prison population then the removal of clout must have led to decreases relative the the status quo ante.

Even if the CJC's claim about SB 1049 is true, an impartial executive summary would devote at least the same amount of space to SB 1049 (and HB 2379) as was devoted to deterrence or to the Rodriguez case. The executive summary should give an indication of the number of Measure 11 convicts sentenced below the mandatory minimum sentence and explain why.

Comments on the Introduction

"The 1970s saw a dramatic increase in violent crime in Oregon that continued through to the early 1990s."

It would be helpful to the reader to quantify the magnitude of this increase: From 1960 to 1985, Oregon's violent crime rate rose by **690 percent**. It remained at or near peak levels for the next 10 years. The decline started in 1996, the year after Measure 11 went into effect.

"Due to this increase in crime, and the lack of construction of prison beds to keep pace with it, Oregon began to experience prison overcrowding issues in the mid-1970s."

It would be helpful to the reader to quantify the magnitude of the lack of prison construction: From 1960 to 1985, Oregon built one new prison with a capacity of 400 beds.

"For frame of reference as to Oregon's prison capacity at this time, when Measure 8 failed in 1980, the prison population in Oregon was just under 2800 inmates. In May of 1986, when Measure 5 failed, the prison population had increased to just less than 3800."

It's not clear if the additional 1,000 prisoners were actually in prison.

This was a period during which novel approaches were utilized, for example, "hot bunking". Under this program, two inmates shared a single bed. While one was in the cell, the other was released. After two weeks, they switched places, except when the released inmate disappeared, which was called "an escape." There were a lot of "escapes" in those days.

To get a sense of this period, see "Prisons Under Pressure", Statesman-Journal, February 21, 1988. This comprehensive report starts:

Oregon's new corrections director is quick to admit that the state prison system has lost its credibility - with law-abiding residents and with criminals themselves.

"We don't have a deterrent to the guys on the street," Michael Francke says. "We've lost control of it."

See <http://www.crimevictimsunited.org/issues/corrections/history/1980s/statesmanjournal880221.pdf>

"To give perspective as to Oregon's prison capacity, when HB 2250 passed in July, 1989 the number of prisoners in Oregon's prisons had increased to 5300."

Some more perspective: In 1989, Oregon ranked 23rd among states in incarceration rate. In 1994, when Measure 11 passed, Oregon ranked 39th among states. We currently rank 28th. (Sources: <http://bjsdata.ojp.usdoj.gov/content/data/corpop25.csv> and <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2232>)

"The sentencing guidelines, a matrix of grid blocks, based the sanction (probation or prison) and the sentence length on the crime's severity and the offender's criminal history."

To understand some of what motivated Measure 11, readers need to know that, under sentencing guidelines, the sentence for a murderer with no prior record was 10 years. With "good time", the murderer was free in 8 years.

The CJC Executive Summary In Context

The executive summary of the CJC report amplifies a narrative that has been echoing around Oregon for a long time. The narrative says that, in 1994, Oregon took leave of its senses and went off the deep end with incarceration, turning the state into a virtual penal colony.

To put this false narrative into perspective, consider the testimony of Mr. Jake Horowitz of the Pew Center on the States. Mr. Horowitz is a national expert in state-to-state comparative criminal justice and is the point man for Pew's anti-incarceration program. Speaking at an Oregon legislative hearing on February 15th, 2010, Mr. Horowitz said:

A lot of good things going on in Oregon:

Large decreases in crime and a comparatively low violent crime rate,

Legislative endorsement of evidence-based practices,

Mandate for administrative sanctioning and community supervision including probation and parole,

Solid data and research on which to ground debates on these policies,

- and overall a modest incarceration rate [emphasis added]

...

And it is nationally viewed that Oregon has made good use of probation and parole and has largely prioritized its prison space for violent offenders as opposed to lower-level drug and property offenders [emphasis added].

Oregon criminal justice since the passage of Measure 11 has been an amazing success story but you would never know it from the CJC report.