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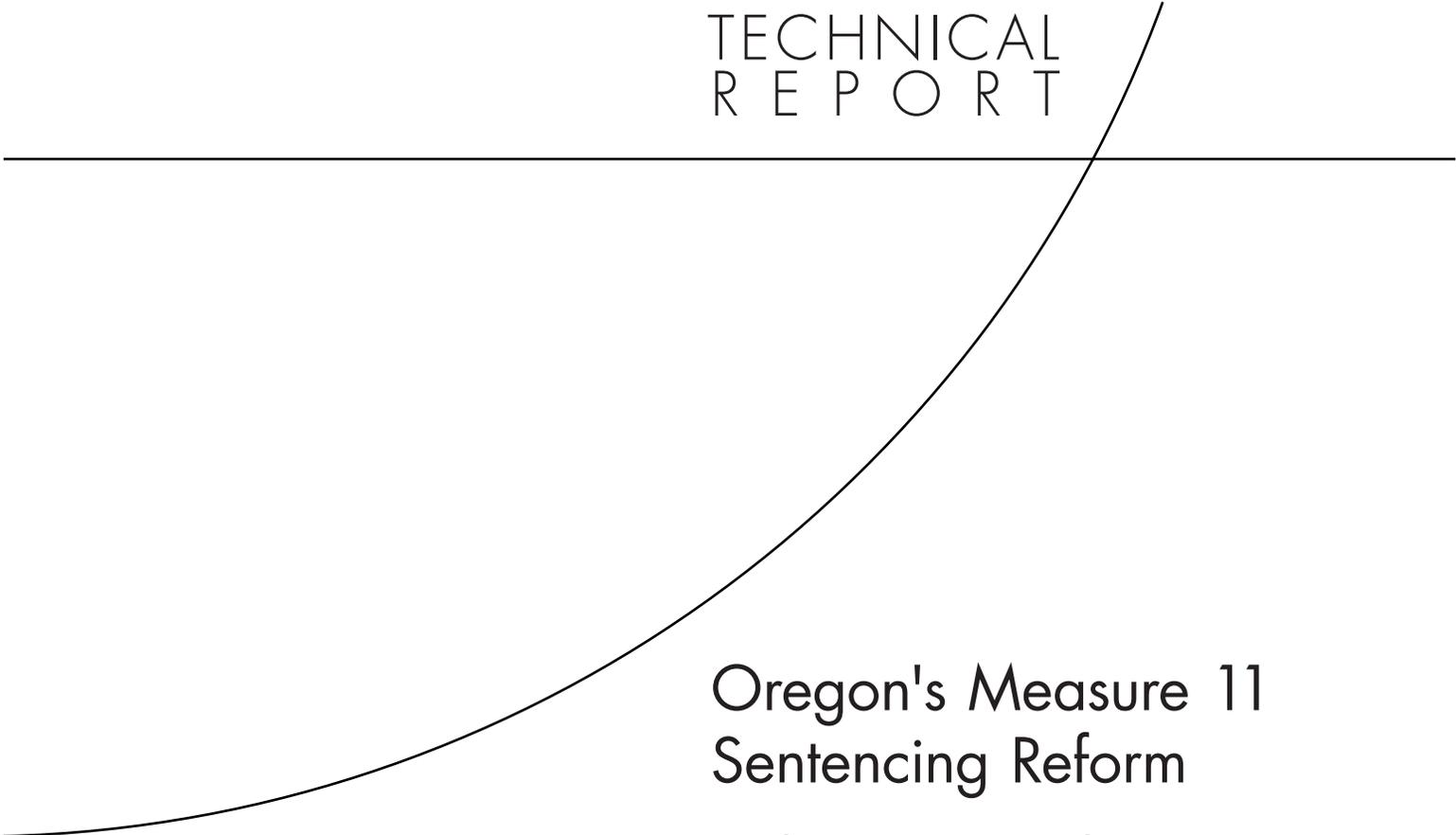
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TECHNICAL
R E P O R T



Oregon's Measure 11 Sentencing Reform

Implementation and System Impact

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Prepared for the National Institute of Justice



PUBLIC SAFETY AND JUSTICE

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Summary

Background

In 1994, Oregon voters passed Measure 11, which imposed long mandatory prison terms for 16 designated violent and sex-related offenses, prohibited “earned time,”¹ and provided for mandatory waiver of youthful offenders to adult court. This measure stood in sharp contrast to sentencing practices at the time, overlaying the state’s existing sentencing guidelines system for selected offenses, increasing the length of prison terms imposed, and reducing judicial discretion at the sentencing phase.

In its present form, Measure 11 sentences supersede any lesser existing guideline sentences for 21 violent and sex offenses – the original 16, plus 5 more added later (see Table S.1). Sentences range from 70 months for second-degree assault, kidnapping, robbery, and certain sex offenses, to 300 months for murder. Penalties may not be reduced because of the offender’s prior record – regardless of whether an offender has a criminal record, or the length of such record, minimum sentences are the same for all offenders. Thus, some penalties are actually higher under sentencing guidelines in instances where an offender has an extensive criminal record. In general, however, Measure 11 penalties are longer than those imposed under sentencing guidelines. Juveniles aged 15 years or older are also subject to the measure.

Proponents of the measure believed that these enhanced penalties would improve public safety by deterring future criminal behavior and increasing the length of time that felons who commit serious crimes spend in prison. Opponents, on the other hand, believed that the measure would adversely affect criminal justice system operations and reduce system integrity. In terms of system operation, opponents expected the measure to lead to an increase in jury trials and prison populations, over-burdening both the courts and the correctional system. At the same time, they anticipated an increase in jail

¹ “Earned time” refers to a reduction in prison time due to good behavior, resulting in a discrepancy between the original sentence and the time actually served. Earned time is also referred to as “good time” or “gain time.”

populations as M11-eligible offenders² were held more frequently and for longer periods of time pre-trial, due both to their increased flight risk and to the fact that a rising number of defendants would choose to await trial rather than accept a plea bargain. There was also concern that those already convicted of felonies

Table S.1
Offenses Requiring Imposition of Mandatory Minimum Sentences Under Oregon’s
Ballot Measure 11

<i>Offense</i>	<i>ORS Code</i> <i>Section</i>	<i>Minimum</i> <i>Term</i> <i>(Months)</i>
Murder	163.115	300
Attempt or conspiracy to commit aggravated murder	163.095	120
Attempt or conspiracy to commit murder	163.115	90
Manslaughter in the first degree	163.118	120
Manslaughter in the second degree	163.125	75
Assault in the first degree	163.185	90
Assault in the second degree	163.175	70
Kidnapping in the first degree	163.235	90
Kidnapping in the second degree	163.225	70
Rape in the first degree	163.375	100
Rape in the second degree	163.365	75
Sodomy in the first degree	163.405	100
Sodomy in the second degree	163.395	75
Unlawful sexual penetration in the first degree	163.411	100
Unlawful sexual penetration in the second degree	163.408	75
Sexual abuse in the first degree	163.427	75
Robbery in the first degree	164.415	90
Robbery in the second degree	164.405	70
Arson in the first degree	164.325	90
Using child in display of sexually explicit conduct	163.670	70
Compelling prostitution	167.017	70

Note: When a person is convicted of the offenses listed in this table and the offense was committed on or after April 1, 1995 (or after October 4, 1997, for the Measure 11 offenses added later), the court must impose, and the person must serve, at least the entire term of imprisonment. The person is not, during the service of the term of imprisonment, eligible for release on post-prison supervision or any form of temporary leave from custody. The person is not eligible for any reduction in the sentence for any reason whatsoever under ORS 421.121 or any other statute. The court may impose a greater sentence if otherwise permitted by law, but may not impose a lower sentence than the sentence specified in this section (ORS 137.700).

² For purposes of our analyses, a case involving one or more of the Measure 11 offenses as the most serious offense of conviction is designated an M11-eligible case. We refer to the lesser counterparts of these offenses as “M11-alternate” offenses. Second-degree assault, for example, is an M11-eligible offense, while third-degree assault is an M11-alternate offense. Any case that involves at least one M11-alternate offense—but no M11-eligible offenses—is designated an M11-alternate case. The term “M11-eligible” is used for analyses both before and after passage of Measure 11 because, had Measure 11 been in effect in the early 1990s, these offenses would have qualified for the mandatory minimum sentences imposed by Measure 11.

would be forced to remain in jail as the prisons became too full to accept new inmates. Opponents believed that mandatory minimum sentencing would provide prosecutors with undue influence over the sentencing decision. Under the new measure, there was some concern that a defendant might accept a plea offer regardless of guilt, simply to avoid the possibility of a long mandatory penalty. This was of greatest concern in juvenile cases, where defendants as young as 15 were believed to be particularly susceptible to inappropriate pressure.

In 1998, the Oregon Criminal Justice Commission (OCJC) received a grant from the National Institute of Justice to study the implementation and impact of Measure 11. RAND, under contract to the OCJC, conducted the evaluation. RAND researchers used a two-part methodology that included interviews and quantitative data analyses. Over 40 key stakeholder interviews were conducted with representatives from the district attorneys' offices, legislature, judiciary, court administration, defense bar, jails, victim's rights groups, offender aid groups, and state agencies, including the Department of Corrections, the Oregon Youth Authority, the Office of Public Defense Services (formerly the Public Defender's Office), and the Department of Justice. These interviews were designed to provide background information on the history of Oregon sentencing policy and the evolution of Measure 11, as well as to aid in the interpretation of quantitative analyses. Efforts were made to identify all policy, legal, and social changes that occurred during the Measure 11 implementation period. This information was used to rule out alternate explanations for the study findings. Historical data from the United States Census, the Federal Bureau of Investigation, the Oregon Department of Corrections, and the Oregon Criminal Justice Commission were analyzed and used to produce time trend analyses on case processing, prison admissions, sentence length, and crime rates for the decade of the 1990s.

Findings

What was the sentencing context into which Measure 11 was implemented? What other sentencing reforms and major changes had occurred in the state prior to 1994 when the measure was approved by Oregon voters?

In many respects, Oregon's experience with sentencing reform over the past quarter century serves as a microcosm of the national reform movement. During the 1970s, widespread disenchantment with indeterminate sentencing systems

led to adoption of structured sentencing systems in many states.³ The rising crime rates of the mid-1980s and increased media attention to violent crime gave rise to the “get-tough” movement of the 1990s and passage of numerous truth-in-sentencing and mandatory minimum laws. Following these trends, Oregon first adopted parole guidelines, then sentencing guidelines, and finally mandatory minimum penalties in the form of Measure 11.

Since passage of Measure 11, there have been numerous attempts to modify and overturn it. There have also been efforts to limit the potential effects of Measure 11 through subsequent legislation, most notably Senate Bill 1145. This bill was designed to shift responsibility for all offenders sentenced to prison for one year or less to the counties, thereby minimizing potential prison overcrowding caused by passage of Measure 11. Prison admission data indicate that the bill was successful in this respect, greatly reducing the number of revocations to prison for serious felony offenses.

Senate Bill 1049, enacted in 1997, added three new offenses to those covered by Measure 11, and also permitted sentencing below the Measure 11 minimum for selected cases of Robbery II, Assault II and Kidnapping II. Prior to passage of Measure 11, the vast majority of these cases were sentenced to less than 70 months incarceration. In 1996, this pattern reversed, with a majority of these three offenses drawing 70-month sentences. Following the passage of SB 1049 in 1997, the percent sentenced to less than 70 months increased for all three offenses. House Bill 2379, passed in 2001, added certain non-forcible sex offenses to ORS 137.712 (the Measure 11 departure statute created by SB 1049), and allowed up to three days early release for all offenders (to avoid weekend releases).⁴

Ballot Measure 94 was designed to overturn Measure 11. Although Measure 94 received sufficient support to be placed on the ballot in 2000, it was ultimately defeated by a margin of nearly three to one.

How was Measure 11 implemented? Were all Measure 11 eligible offenses sentenced according to the new measure? Do we see changes in the manner in which offenses are prosecuted by the district attorney?

³ Under indeterminate sentencing schemes, judges work within broad penalty ranges set by the legislature to determine appropriate sentences, setting minimum and maximum terms for each defendant on an individual basis. Structured sentencing includes the use of determinate sentencing, sentencing guidelines, and mandatory minimums penalties – which provide more standardized sentences for offenses.

⁴ Because our data did not go beyond 1999, we were unable to assess the potential impact of House Bill 2379.

In order to answer these questions, we analyzed case processing practices for both M11-eligible and M11-alternate cases and conducted interviews with key system stakeholders. Our findings were in keeping with previous research (USGAO 1993; Vincent and Hofer 1994; Wicharaya 1995) and indicated that case processing and prosecution patterns had shifted following implementation of the measure, minimizing the anticipated impact upon court and correctional resources.

Like similar “get-tough” legislation adopted nationwide, original impact projections for Measure 11 were based on the assumption of full implementation, meaning that every case determined to meet the legal criteria of the measure would be so prosecuted. Analyses of both sentencing and interview data, however, indicate that this did not occur under Measure 11. Instead, prosecutors used their discretion to determine which cases would be fully prosecuted under the law.

Without exception, prosecutors interviewed for the study acknowledged that the measure should *not* be applied in every eligible case, and that the measure, as written, provides overly long mandatory minimum sentences for many of the cases falling under its purview. These statements support prior research (USGAO 1993; Vincent and Hofer 1994; Wicharaya 1995) which shows that mandatory minimum laws are seldom fully implemented and thus do not produce the system impacts that would be expected under full implementation. Instead, through selective charging practices and plea negotiation, the prosecutor determines the extent and manner in which the law will be applied. While the discretion afforded prosecutors under mandatory minimum laws is tempered by the norms of the courtroom community and local legal culture, these laws generally provide prosecutors with greater authority over criminal case processing than any other court practitioner.

What impact did Measure 11 have on trial rates? Did the measure inundate the courts with requests for trials as critics feared?

The frequency of trials for both M11-eligible and M11-alternate offenses increased for only a short period following passage of the measure.⁵ Though this does not support practitioner predictions or the findings of some previous studies that showed a long-standing increase in trial rates, it does support the theory that these rates increase only for the brief period during which “going-

⁵ The substantial difference in mandatory minimum sentence length for an M11-eligible offense and a presumptive guidelines sentence for an M11-alternate offense creates a substantial disincentive to go to trial.

rates” are established under the new law. Previous research (USGAO 1993; Vincent and Hofer 1994; Wicharaya 1995) has shown that although passage of mandatory minimum legislation has a lasting impact on “going rates” for both affected offenses and related offenses⁶ – generally increasing sentence length for both – the increase in trial rates is short-lived (Merritt, et al. 1999). As a result, any increased burden on court resources caused by the new laws is also temporary.

What our analysis did show, however, was a lasting shift in plea patterns. While the majority of M11-eligible offenses were resolved through plea both before and after passage of the new measure, there has been a change in the frequency with which certain plea types are utilized. Specifically, the frequency with which “plea to original charge” and “plea with charges dropped” are used has decreased, while the frequency of “plea to a lesser included offense” has increased, indicating an increased tendency to reduce M11-eligible charges to M11-alternate charges.

What are the characteristics of offenders sentenced under Measure 11? Does the measure appear to differentially affect minorities and youths?

Interviews with key stakeholders suggested that there was some degree of public concern that Measure 11 would improperly target minority populations for prosecution under the measure. Our analysis has not shown this to be the case. While non-white offenders make up a disproportionate percentage of the M11-eligible population, this trend is also reflected in the M11-alternate and other felony categories. Thus, while non-whites are in fact disproportionately represented within Oregon’s offender population, there is no evidence that Measure 11 has exacerbated this disparity.

Our interviews also revealed concerns on the part of some as to the handling of juveniles under Measure 11. Our analyses indicate that the case processing and incarceration trends for juveniles closely mirror those of adults. Youthful offenders make up less than 6% of the M11-eligible and M11-alternate offense categories, since the vast majority of juveniles are tried in juvenile court. And while the total number of juveniles sentenced as adults has increased

⁶ “Going rates” are the standard sentences offered to offenders in exchange for a guilty plea and vary according to offense and case circumstances. “Related offenses” are lesser counterparts of sentences affected by mandatory minimum legislation. For example, if first- and second-degree assault were affected offenses, third-degree assault would be a related offense.

dramatically since passage of Measure 11,⁷ the proportion sentenced to prison for M11-eligible vs. M11-alternate offenses has remained relatively stable.

What impact did the measure have on prison admissions and sentence lengths?

Our analyses support the statements of Oregon prosecutors, as well as earlier research findings, showing that the proportion of offenders convicted of, and admitted to prison for, M11-eligible offenses *decreased* while the proportion of M11-alternate sentences and admissions *increased* following implementation of the measure. At the same time, sentence lengths rose within both offense categories, providing further evidence that M11-eligible cases deemed inappropriate for Measure 11 sanctions were being pled down to M11-alternates. This increase in M11-alternate sentence lengths also suggests that offenders technically eligible for prosecution under Measure 11, and facing the threat of long mandatory minimum penalties, increasingly chose to plead to lesser (M11-alternate) charges. While higher than the norm imposed prior to Measure 11, these sentences were less than would have been imposed for an M11-eligible offense. Thus the findings suggest that passage of Measure 11 affected the “going rate” for both M11-eligible and M11-alternate offenses. The “going rate” is also affected by the more serious nature of offenders charged with alternate offenses. Before mandatory minimums, an offender would have been charged with the higher offense, and in many cases would have received a sentence similar to the higher sanction for the alternate offense. Information derived from our interviews suggests that practitioners believed the Measure 11 penalties to be too lengthy for many of these cases.

What were the trends in Oregon’s crime rate before and after passage of Measure 11?

Although our original research design did not propose a comprehensive analysis of crime rates, we were asked to address the impact of Measure 11 on crime rates in Oregon. Crime rates, particularly for violent crime, declined in Oregon after 1995. While our findings are consistent with the possibility that Measure 11 may have been at least partly responsible for this decline, such findings do not provide clear evidence of a causal link. An examination of other factors, which is beyond the scope of the present study, would need to be made before definite conclusions can be drawn.

⁷ The total number refers to juveniles sentenced to M11-eligible, M11-alternate, and other felonies. M11-eligible cases accounted for roughly one-third to one-half of the total juvenile cases sentenced as adults.

Concluding Remarks

Findings from this study indicate that passage of Measure 11 has altered sentencing and case processing practices for those charged with serious person offenses in the state of Oregon. While some of these were planned system changes, others were unplanned and are not fully understood.

The measure can be considered a success in that it has accomplished its intended goal of increasing the length of prison sentences for offenders convicted of M11-eligible offenses. However, since passage of the measure, fewer offenders have been sentenced for these offenses, and a greater proportion have been sentenced for M11-alternate offenses. Analyses suggest that this shift resulted from the use of prosecutorial discretion and the downgrading of cases which, though technically M11-eligible, were not deemed appropriate for the associated mandatory minimum penalty.

Although the selective use of Measure 11, along with Oregon's prison construction program and reduced crime rates, has enabled the state to avoid the negative consequences of prison overcrowding, the process by which cases are being chosen for either full or partial prosecution is unclear. Prosecutors interviewed were confident in their ability to apply the measure appropriately; however, it is not clear what criteria were used in making their decisions, or whether these criteria were consistently and equitably applied. Further research should address how discretion is exercised and charging decisions made under Measure 11.

Oregon's Measure 11 introduced bold changes into the sentencing structure of the state. Our analyses addressed the implementation and impact of the measure on prosecution, sentencing, and convictions, both statewide and in three separate counties. As with many policy changes, some of the observed consequences were expected, others were not. Further research and experience with the measure will provide more definitive answers to the questions we have posed.