

# MAKING AMENDS

## Episode Four: How Am I Going to be a Better Person After This Time?

**Herbert:** If you wanted to defend a mandatory minimum sentencing scheme, like Measure 11, what would the argument for it look like?

**Kirsten:** I would say that the argument for Measure 11 or mandatory minimums, at least in Oregon, was that what was happening for very serious crimes, including murder, was that people were getting sentenced to, you know, life sentences for murder but they were completely indeterminate sentences. Which meant that there was no minimum that necessarily, by law, had to be served before that person could be considered for parole. And what happened was that the parole board was sometimes paroling people after a very short period of time. People would serve eight years or even less for murder. And there was a huge public backlash as a result of that. They did—the public did not like that. They did not think that was fair. And so, as a result, we ended up with Measure 11.

**Herbert:** Messiah, can you imagine an argument--

**Messiah:** Can I imagine an argument for Measure 11? Uh, I can. For the people to feel safe, they were like, "Okay, if we know that these people are away for a minimum amount of time, then we feel that much more safe," versus it just being up in the air.

**Steve:** So the public is assured?

**Messiah:** Yes. I think it's reassuring the public more than it is helping the offender.

**Narration:** Kirsten and Messiah both raise good points about mandatory minimum sentences, like those mandated by Oregon's Measure 11. Kirsten suggests that the public wants some certain number of years in prison as retribution for committing a violent act. Messiah recognizes the value of reassuring the public in this way, but he also wonders about the welfare of the offender who gets locked away for a long time. Because I was also interested in what a long sentence means for the person who receives it, I asked another question of the group:

**Herbert:** So one of the arguments for sending people to prison or, or convicting them of violence is that what that can do is interrupt some sort of cycle of violence. And so, I guess that's another question. Do we think that the criminal justice process, as it's currently working, is it an effective intervention in cycles of violence?

**Josiah:** No.

**Herbert:** Why not?

**Josiah:** You may have interrupted this violence, but you're going to another whole world of pure violence. So there's no interruption at all. There's maybe a momentary lapse in

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violence, but you're going to a whole new world where you have to be violent. Yeah, it don't matter, man, you're going to a world where violence is every day.

**Herbert:** Kirsten, do you have thoughts on this question?

**Kirsten:** Well, I do think that sending someone to prison, at least in the short term, can interrupt violence, literally. I mean, there are people that are kind of out of control, that are in a bad place, they're just kind of on a rampage. And, you know, to Josiah's point, I mean, yeah, you're just taking them from one environment and putting them in another. So you're not actually changing them from being violent, but you are removing them from society.

**Narration:** People who go to prison for a lengthy and mandatory sentence for a violent crime are definitely being removed from society. And maybe this removal does reassure a public that wants some measure of retribution.

But the people that prosecutors work to convict for a violent crime do not disappear, they simply move – to the world of prison. And the United States puts a lot of people in that world.

So, what happens when you move to that world? What actually occurs after a prosecutor secures a conviction that leads to a mandatory sentence? What can the incarcerated men in this circle teach these prosecutors about what happens to them after their convictions?

This is season two of Making Amends: The Prosecutors Go to Prison. I'm Steve Herbert. In this series, we're going to follow a group of prosecutors from Portland who agreed to enter a prison there to engage in several conversations with six incarcerated men. Their goal was to consider crimes of violence – why they happen, what harms they cause, and how we should respond to them. What can they learn from each other, and what can we learn from listening in?

Episode Four: How am I going to be a better person after this time?

**Herbert:** When you came to prison did your relationship to violence change at all?

**Jacob:** We all see things on TV about how prison supposedly is.

**Narration:** This is Jacob.

**Jacob:** When I was in county jail for about a year and a half, you know, I heard all these stories about these guys who were, not romanticizing prison, but kind of trying to make prison out to be this grand thing, kind of like what you see on TV. Where if a guy steps on your toe, you gotta do this, and if a guy cuts you off in line, you gotta do this. And all these supposed rules of how things went. So my first experience with violence probably in

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prison was over a chair. And a huge thing was that once you had a chair, that was your chair. And if anybody sat in that chair, you were letting them punk you out, for want of a better word. And so, almost every fight that I saw in the first year that I was down was over a chair. And so, I remember that every night when I would come out to the day room, it would set up this anxiety that someone would be sitting in my chair. You felt like you were on the edge of violence all the time.

**Herbert:** So how do you understand fights over chairs?

**Jacob:** I look back now, and even then I realized how ridiculous that was. And almost everything that I've seen fights happen over in prison are over these ridiculous rules that we set up. The way that I view it was that, kinda the way that we view people with other crimes than ourselves. Like so, we have this hierarchy of sex offenders and all the other crimes. But the fighting over the chair, or picking on people because of their crime, or looking at people weirdly because of their crime, I view it as a thing of saying, us and them. I'm better than they are because I am not this. I'm better than these people because no one is taking my chair. You know, all these weird rigid – they call it “politics” in here and codes and things like that. It's just ridiculous. And I think that almost everybody believes they're ridiculous, and yet we all follow them to some degree or another.

**Narration:** Even though Jacob knows that these codes of prison are ridiculous, he can also recognize the toll that they have taken on him over time.

**Jacob:** A person might come to prison, even though they've committed a crime, and not feel necessarily like they are a criminal. We can all understand that this is why I did this, and these small decisions led to this horrible crime. But because I can see each little component part, you don't always feel like a criminal. But I think that when we start following all these rules in here, be they violence or just this rigid code, it starts to make you feel almost like you are a criminal because you are a part of this society.

**Narration:** The codes of prison that Jacob references are reinforced by the role that gangs play in prison life. This helps strengthen patterns of violence rather than break them, according to Gerard.

**Herbert:** So, a prosecutor might say, if someone finds themselves in this cycle of violence, that sending them to prison is a good thing because it interrupts that cycle.

**Gerard:** No, it removes it from the community and transplants it to a prison, but the violence don't stop. It takes another form, and it raises the commitment.

**Herbert:** Can you explain that a little bit further?

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**Gerard:** Ordinarily, somebody comes to the penitentiary around 17, 18, as far as gang violence goes. And they haven't earned a rep yet, they haven't earned their own name. And part of them earning their bones, so to speak, is fighting. It's mandatory.

**Herbert:** You used the term "name," in there. So, what do you mean by that?

**Gerard:** So, accolades. Receiving accolades. It's like having honors, bravery. Basically what it boils down to is bravery. Or stupidity, however you want to look at it.

**Herbert:** Explain that to me a little bit more fully.

**Gerard:** So, one of the things that distinguishes a gang member is his propensity to violence and his willingness to engage on any level. You know, so say we from different places and I shoot at one of your homeboys, and I come to prison for it, his homeboys is gonna be required to fight me, at least.

**Herbert:** If they come to prison, then that expectation doesn't change?

**Gerard:** Nah, it's the same. We don't come to prison green. When we come to prison, our lifestyle matches the prison lifestyle on the street. From a young age, we've been trained for prison. The same rules apply on the streets as apply to the people who come to prison.

**Narration:** Josiah told a similar story. And the fact that he had a 19-year sentence under Measure 11 influenced his use of violence in prison.

**Josiah:** So, I came to prison, I instantaneously joined a gang. I joined the natives. I've known I was native my whole life and so I joined up cliqued up with the natives.

**Herbert:** Because?

**Josiah:** Because that's what you do in prison. You either run by yourself and hope to survive, or you join a gang and you survive as part of a gang life. Those are your only two options in prison.

**Herbert:** So you felt you had no choice?

**Josiah:** Yeah.

**Herbert:** So what did it then mean to join that gang?

**Josiah:** If we had a conflict, since I was new, I had to resolve it. And I stepped up to the plate instantaneously. Like I knew, this is what I have to do, and this is what I'm going to do.

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Because this is my life for 19 years, and I don't care. A lot of gang members, their homeboys that are Measure 11 will go do the dirt for them. Why not? "I got you, bro. Keep your clear conduct and get your good time. You get out faster." My day is the same. "Oh, oh, we have an issue with this dude? I got it, don't trip." And I'll just go and fight him. I won't even talk to him, I'd just go and take off on him.

**Herbert:** You were happy?

**Josiah:** Yeah, I didn't care. I got to lash out all my anger on that one person.

**Narration:** Measure 11 meant that Enoch also had a long, fixed sentence. His was for 25 years. As with Josiah, Enoc's sentence only worked to intensify his embrace of violence, not reduce it.

**Herbert:** And so coming to prison initially, it sounds like the pattern of violence did not stop.

**Enoch:** No. No and when I came to prison with this long prison sentence I was angry about it. You know, I had been sentenced to more prison time than I had been alive. And they always joke when you first arrive with a long sentence. They're like, "Oh yeah, your parole officer's going to be born tomorrow." And you think about it, and you're like, "Fuck man! That might be true!" So, when I got to prison, I had all of that baggage that I was dragging with me. You know, I had the skinhead street gang reputation. Just wanted to make sure that everybody knew, "Hey, I'm fucking here now. And I'm a force to contend with." The sentence is so long that, to you, there's no light at the end of the tunnel. Who cares? I don't even know if I'm going to live 10 years. Now you have to survive in a dog-eat-dog world for the next 25 years. You better fucking figure out how you're going to do that. Worry about changing your life so you don't come back to prison when you get closer to the gate. And that's exactly how I looked at it. I was a mean guy when I came to prison, and I was a vicious fucking asshole in prison for the first 10, 12, 13, 14 years.

**Narration:** So, for many people who first enter prison, their embrace of violence does not change, and might even become more intense. The codes of prison and the ties that many people feel to their social group can make change very difficult. And a long and mandatory sentence might even make it easier to continue to engage in violence once you're incarcerated. Thoughts about accountability may not be ringing in your head.

Another common critique of mandatory minimums is that they give prosecutors too much power. Everyone, including the defendant, knows the sentence for each violent crime. So, if a prosecutor charges you with a crime with a long sentence, you may be scared into taking any plea deal that offers you something less. With the power it gives them, you

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might think the prosecutors in the circle would love Measure 11. Well, if you thought that, you'd be wrong.

**Herbert:** Clayton?

**Clayton:** My critique for mandatory minimums, at least in the state of Oregon, is that those were created by voters. I understand democracy, but we have a lot of specialization in our society. Plumbers, carpenters, doctors, lawyers. Across the board, we all specialize in something. And giving the voters the power to make retribution the main goal of our sentencing schemes takes the people who specialize in the criminal justice system out of it.

**Herbert:** And why is that a problem?

**Clayton:** Because voters are not experts in the criminal justice system. I kinda see it as the equivalent of saying, "We're gonna force all doctors to perform a very specific type of treatment for people with this problem." The voters aren't doctors. They're not lawyers. They're not judges. They're not people who rehabilitate people. They don't know what's going to protect society.

**Herbert:** Adrienne.

**Adrienne:** There's no room for the person in mandatory minimums. There's no room to look at that person and, you know, figure out what their background is, what their history is, why they committed this crime, you know, kinda what happened to them that got them to this place. There's zero room for that. And so, it just removes the actual person who committed the harm.

**Narration:** Kirsten doesn't completely agree with Adrienne on this point. But to understand her position, you need to see an important distinction between two decisions that she makes. One of those decisions is when she charges someone; the other is when she's ready to negotiate a plea bargain.

**Kirsten:** For me personally, I would not really consider Measure 11 in my charging decision, because I have an obligation to bring the charges that I think the person has committed. We have a charge, which is to prosecute crimes. And I don't think it's our role to say, "We're going to just pretend like this crime didn't happen, because we know that there's a mandatory minimum." And so, you know, if somebody commits a robbery with a knife at a convenience store and steals five dollars from a tip jar, right, that might not be as serious as somebody who commits a robbery with a gun and points it at the person's head and tells them they're gonna blow them away, right, in terms of the impact on the victim and all of those. But they're both first degree robbery charges. But I wouldn't look at that, you know, the situation where maybe the victim wasn't scared and the person used a knife and say, "Well I'm not gonna charge robbery in the first degree," because that is, by law, the crime that they committed. But the outcome would be dramatically different in our plea bargain process.

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**Narration:** Leslie concurs with Kirsten on this point, in part because she wants to be fair to every defendant who she thinks is guilty of a Measure 11 offense.

**Leslie:** I don't feel very comfortable looking at a case and saying, "Well, I'm gonna elect not to pursue these charges because of the person's background." Because I do worry that, like, minority people are policed more than non-minority people. And so, if you're doing that -- I don't know, I am constantly afraid that I'm going to use my discretion in a way that is unjust. And so, the more -- sometimes, I'm like the more I can have less discretion, the more comfortable I feel.

**Narration:** But prosecutors do have a lot of discretion. Even if they don't exercise that discretion at the moment of charging, they will certainly exercise it during the plea negotiations.

**Kirsten:** What we do a lot in our discussions when we talk about the case—is, you know, we'll frequently talk about, "Okay, if this person wasn't charged with a Measure 11 or, you know, the next lowest crime, what would the presumptive sentence for this person be if Measure 11 weren't there?" So, we're trying to really look at how serious was the conduct. We used to take the position that anytime that you committed a robbery with a firearm that you had to serve the 90-month mandatory minimum sentence. And we certainly do not do that anymore.

**Narration:** After hearing all of this, Jacob had a question for the prosecutors. You may recall that he was convicted for a crime in Pendleton, Oregon, not Portland. That means he was charged by a prosecutor in Umatilla County, not Multnomah County.

**Jacob:** So like, your office's approach to, you know, the way you're trying cases and charging cases, and all that, for want of a better word, is really progressive. And so I wonder, like, I'm sure that the DA's from all the other counties meet up, or you have a lot of conversations with them. So how do, I guess, how did they view your approach?

**Kirsten:** We're mocked.

**Adrienne:** I can't say we're the best loved county in this state.

**Kirsten:** I mean, the prosecutors are a reflection, and how they're handling the cases, should be a reflection of the community that they serve, and what that community wants to see. So we have an obligation to follow the law, we have an obligation to charge people with the crimes that they have committed. But then we have a lot of leeway and discretion in that plea bargain process. And so, yes, I think that somebody in Multnomah County is very likely to get a lesser sentence and somebody in Umatilla County.

**Herbert:** How does that make you feel hearing that?

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**Jacob:** Oh, I mean, I definitely think she's right. But, um, not great, I guess. I mean, I don't plan on ever living in Umatilla County against or commit crimes, hopefully. But yeah, I mean, I definitely think there's a disparity, like you're saying. Go Multnomah County.

**Narration:** So, these prosecutors, at least, are quite careful with Measure 11. Although they recognize that they are legally obligated to charge whatever crimes they believe have occurred, they understand the consequences of actually getting a conviction for a Measure 11 offense. They don't always want to give someone a long prison sentence if they don't think it's warranted.

Perhaps unsurprisingly, Enoch wanted to turn everyone's attention back to what Measure 11 means for those who are incarcerated.

**Enoch:** I think Measure 11 just doesn't serve the public interest very well. I think that there's no release valve for a period of time. So, you don't have a parole board saying, "Hey, this guy is rehabilitatable or has been rehabilitated," and can release you at some point in the middle. Where, you know, you're just not drowning in the warehouse. So I think the lengthy sentences cost a shit ton of money, they had to build a bunch of prisons to accommodate it, at the expense of programs that they could have instituted in the prisons, including education. We used to have a bunch of college courses, and once the budget started shrinking, all of that went away and they started just building more prisons to stuff people into. I just—Measure 11 is just a boondoggle.

**Narration:** The loss of programs that Enoch mentions was something the incarcerated men wanted to highlight. From their perspective, all a mandatory minimum sentence does is give you many years in prison. It does not mean that you are provided much by way of assistance in trying to build a better life.

**Herbert:** Jacob.

**Jacob:** So I mean I think, first we gotta decide what is it exactly that we're trying to achieve. The first thing, of course, is to get the violent perpetrator off the streets and away from the victim, so there's not more victims created. So if that's the end goal, just to remove them from the situation and keep the public safe for that duration of their prison sentence, if that's just the goal, then it's successful. But if our goal is to be like, "Okay, we're gonna take this person out of the situation and make sure it doesn't happen again, and that they don't get out and victimize more people," then we are not succeeding very well. So in my case, the courts mandated that I take anger management, and alcohol and drug treatment, because I was drunk when I committed my crime and obviously murder is a violent thing. So when I got to prison, I was 18 by this point, and the first time I saw my counselor, I told him, "Hey, I'm supposed to do alcohol and drug treatment, and anger management." And he said, "Don't worry about that. We'll work on that the last three years that you're incarcerated. Just keep a job." Now at 18, I'm like, "Great!" I don't want to do that stuff



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anyway. I just wanted to be in the yard and have fun and whatever, right? So I was excited about that. But I look back now and I think, "That is so ridiculous!"

**Narration:** Like Jacob, Messiah got a mandatory sentence under Measure 11. As he was being sentenced to seven and a half years, he asked for some direction forward. He did not get much by way of an answer.

**Messiah:** Well the DA doesn't really have -- well, I don't know, you guys tell me if I'm wrong -- but it's like, okay, I commit this violent crime. And it's like, okay, I'll give you this time. But there's no program set in place like, Okay, you're going to prison. Like he said, anger management, stuff like that. Like when I caught my case, and I was like, okay, and I did my settlement conference, and the judge is sitting in front of me, off the podium, whatever. And he's sitting there and I'm like, "I'm not worried about the time that you're offering. I'm just worried about what I'm going to do so that I won't come back, you know." And that was like the number one thing that they couldn't answer. How am I going to be a better person after this time? What am I going to do? What are the steps that you're going to put in place for me to do better? You know, I had to find that role for my own.

**Narration:** So, if our hope was that mandatory minimums would make accountability easier for people convicted of violent crimes, the men in the circle suggest otherwise. While their case was in court, they had incentives to avoid telling the truth. And when they came to prison, they had reasons to continue to act violently, and they lacked programs that might help point them in a new direction.

But might it be different? Could we build prisons that make personal change more common? Can we provide incentives to people who are incarcerated to actually try to embrace accountability, and to transform themselves in the process?

**Kirsten:** What I am hearing over and over again, and I agree with, is that the current mandatory minimum downfall is it's all stick with no carrot, right? There is no ability to make meaningful change and have that benefit you. There's no incentive and that's a serious flaw.

**Narration:** How to make prisoner change more possible. That's next time on Making Amends: The Prosecutors Go to Prison.