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CHAPTER 12

CHANGING PUNISHMENTS FOR PROPERTY OFFENSES, TO CHANGE THE LIVES OF WOMEN IN NEED

Amber A. Baylor

I. INTRODUCTION

In 2014 the U.S. Supreme Court denied certiorari to Cecelia Cathleen Rodriguez, a 61-year-old woman from Oklahoma sentenced to life in prison.¹ Her crime was theft of two purses from a department store. Ms. Rodriguez hoped that the Supreme Court would see fit to upend her conviction or declare her sentence excessive. Ms. Rodriguez's family reported to the state court that she has struggled with heroin addiction since the 1960s, leading to numerous arrests on petty charges. The majority of her extensive record was composed of petty thefts, drug possession, and other nonviolent offenses. The stolen bags in the case that brought her life in prison totaled less than \$700 in value.²

Ms. Rodriguez was sentenced under Oklahoma's grand larceny statute, which applies to thefts over \$500.³ Like many schemes around the country, the sentencing guidelines for the offense mandated a habitual offender enhancement. The mandatory minimum for an individual with Ms. Rodriguez's record is four years. The law allows up to life in prison for the theft offense.

In 2014, many states revisited disproportionately high sentencing schemes for low-level property offenses. Voters in states across the country rallied in favor of reductions in penalties for low-level, nonviolent property offenses, such as theft, check fraud, and larceny. Bipartisan efforts to ease the financial burden of incarceration have led to criminal justice reforms in states like California, Oregon, and Mississippi. Advocates for women in the criminal justice system have embarked on campaigns to frame reforms as not just a cost-cutting measure, but also as a moral imperative.

For many women, primarily women with little money, relatively low-value property offense convictions can lead to devastatingly disproportionate consequences, such as the trauma of incarceration and the marginalization that follows a serious criminal record. The tremendous sanctions that currently exist for low-level nonviolent property offenses have sparked a call among advocates for policy change. Women-centered campaigns argue for greater nuance in the justice system's response to women charged with property offenses.

¹ Rodriguez v. Oklahoma, 134 S. Ct. 1513 (2014).

² *Shoplifting brings life sentence for Cecilia Rodriguez*, NEWSOK, Mar. 21, 2009, available at <http://newsok.com/shoplifting-brings-life-sentence-for-cecilia-rodriguez/article/3355237>.

³ 21 OKLA. STAT. 1701.

II. THE NEED TO CHANGE DRASTIC PUNISHMENTS FOR PROPERTY OFFENSES

Today, the rate of women convicted for property crimes is on the rise. While the national crime rate is dropping, the rate of women arrested for larceny arrests has increased 31%.⁴ Women's arrests for property crime are also up 27%.⁵ For these types of offenses, the arrest rates for women are increasing at a higher pace than arrests among men. Currently, across the nation, over 10% of women are in prison for theft and fraud, in contrast to under 6% and 4% of men respectively.⁶ Felony convictions and incarceration have not quelled the rise in offenses or addressed the root causes of low-level property crime by women.

A. Smarter Responses to Low-Level Property Crime Acknowledge the Root Causes

The U.S. Justice Department's "Smart on Crime Initiative" lays out reform priorities for the country. Changes proposed by the Attorney General include: (a) protections for vulnerable populations; (b) just punishments for low-level, nonviolent convictions; and (c) efforts to bolster prevention and ease recidivism.⁷ The Justice Department's reform priorities compel change in the nation's prosecutions and sentencing for low-level property crime.

1. Women convicted and imprisoned for these offenses are often vulnerable individuals because of their social status as women, age, health, and economic need.

In general, women in the criminal justice system often have unmet needs, including dealing with histories of trauma. A recent report indicates that 85-90% of women in the criminal justice system have a history of domestic or sexual abuse.⁸ Reports also indicate that individuals in vulnerable states are likely to resort to property offenses. For instance, women with substance addictions are much more likely to depend on the proceeds of property crimes for survival than subsistence-related offenses like soliciting prostitution.⁹

Property offenses such as petty theft have correlated with the national rise on unemployment and poverty following the recession.¹⁰ According to national surveys, retail thefts in particular have increased.¹¹ These thefts often include items not covered by benefits, such as goods for personal hygiene, detergent, formula, and over-the-counter

⁴ Judge Eugene M. Hyman (ret.), *The Scarlett eLetter and Other Roadblocks to Redemption for Female Offenders*, 54 SANTA CLARA L. REV. 119, 140 (2014).

⁵ *Id.*

⁶ Women's Foundation of California, *Bias Behind Bars: Decreasing Disproportionate Rates of Incarcerated Women in California and Nationwide for Low-Level Offenses* (2014), available at <http://www.womensfoundca.org/sites/default/files/Bias-Behind-Bars.pdf>.

⁷ U.S. DEPT. OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (2013).

⁸ *Bias Behind Bars*, *supra* note 6.

⁹ Lisa Kanti Sangoi and Lorie Smith Goshin, *Women and Girls' Experiences Before, During, and After Incarceration: A Narrative of Gender-Based Violence, and an Analysis of the Criminal Justice Policies that Perpetuate this Narrative*, 20 UCLA WOMEN'S L.J. 137, 150-51 (2013).

¹⁰ Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 330 (2013).

¹¹ *See id.*

medicines.¹² A recent article also indicates that non-gender conforming young women living independently as minors may resort to property offenses for their needs.¹³ Many young women, exiled from homes because of gender identity, enter the criminal justice system due to low-level property crimes, such as petty theft.¹⁴

Young women are also often used by more sophisticated parties to engage in fraud transactions. For instance, in a recent crime trend in New York, teenage girls and young women were approached by individuals organizing fraud schemes and asked to cash fraudulent checks.¹⁵ The young women were not involved in arranging the scam, but similar to drug couriers, the girls were making the physical transactions.¹⁶ In this case, the young women made very little of the proceeds, but assumed all of the risk of arrest.¹⁷

Advocates for women have supported efforts to understand the factors driving low-level offenses from the perspective of women in the criminal justice system. This empathetic perspective is embraced on a global level. The United Nation's Rules for Treatment of Female Prisoners encourages alternatives to incarceration and sentencing that takes into account "the history of victimization of many women offenders and their caretaking responsibilities."¹⁸

Despite our desire to protect vulnerable parties, existing mechanisms do not work. Legislative provisions designed to "protect" vulnerable communities from prosecution for offenses like theft often fail. For instance, in New York, a special provision in the criminal law allows courts to vacate a conviction related to trafficking if the defendant is a victim of sex trafficking.¹⁹ In reality, women charged with property crimes are rarely able to rely on these provisions because the statute is aimed at vacating old priors.²⁰ Specialized courts for people affected by drug addiction often exclude women like Cecilia Cathleen Rodriguez because of restrictions or practices that exclude individuals with significant prior convictions.²¹ In addition, a recent report from The Sentencing Project indicates that people of color are disproportionately excluded from diversionary programs or protection for vulnerable individuals.²² Ironically, people struggling with addiction, trauma, and mental health are often those incarcerated for low-level property offenses.

¹² *Id.*

¹³ Julia C. Oparah, *Feminism and The (Trans)gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN'S L.J. 239, 257-58 (2012).

¹⁴ *Id.*

¹⁵ Sonia Sharp, *Central Brooklyn Gangs Target Teen Girls in Popular Bank Scam, Cops Say*, DNAinfo.com, Oct. 1, 2013, available at <http://www.dnainfo.com/new-york/20131001/crown-heights/central-brooklyn-gangs-target-teen-girls-popular-bank-scam-cops-say>

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ U.N. Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), U.N. Doc. A/C.3/65/L.5, at 21 (Oct. 6, 2010), available at <http://www.ihra.net/files/2010/11/04/english.pdf>.

¹⁹ N.Y. CPL 440.10(1)(i).

²⁰ Alyssa M. Barnard, *The Second Chance They Deserve': Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1498 (2014).

²¹ Eric Sevigny, Harold Pollack, and Peter Reuter, *Can Drug Courts Help Reduce Prison and Jail Populations?*, ANNALS OF AMERICAN ACADEMY OF POLITICAL SOCIAL SCIENCE 194 (2013).

²² Marc Mauer and Nazgol Ghandnoosh, *Incorporating Racial Equity into Criminal Justice Reform*, The Sentencing Project 12 (2014).

2. In recent years the public has seen disproportionately punitive sentences that destroy the lives of women and their families.

Recent cases demonstrate how sentencing schemes can disproportionately punish. Well-publicized cases have provoked national reactions about our country's disproportionate response to property and larceny violations. For example, larceny prosecutions against mothers attempting to send their children to excellent schools has contributed to the nation's dialogue about social inequities and proportionality in punishment.

In 2012, Tanya McDowell, a homeless mother in Connecticut, was convicted of larceny and received five years in prison for providing an address that would allow her child to attend a safer, resourced school district. She was ordered to serve her sentence concurrent to a sentence on a drug offense. Ms. McDowell was charged with a larceny of \$1500 in "educational services." National newspapers that followed the story, often centered on the significant sentence and the socioeconomic underpinnings of the case.²³

In property offense, the amount of loss dictates the level of the offense. For instance, if a young woman is offered \$100 to walk up to a bank teller with a fraudulent \$2,000 check, it may result in a drastically different punishment than trying to cash a check for \$500. Though one situation results in a felony rather than a misdemeanor charge, it is difficult for society to identify substantive difference in culpability by the woman engaged in the transaction. This year, the ABA proposed a more nuanced, examination of culpability in federal economic offenses. The Committee proposed mitigating factors related to culpability.²⁴ Under suggested reforms, courts may reduce sentences for mitigating factors, such as gain, level of sophistication, and other extenuating circumstances to explain the offense.

3. Convictions create challenging barriers in the lives of women

As with all criminal convictions, a number of barriers to a healthy life follow convictions for even low-level property offenses. For women, the barriers have proven to be more extreme. For instance, a woman is more likely than a man to be sole custodian and provider for children.²⁵ Yet women have an even more difficult time finding employment after incarceration. A recent report indicates that only 37% of women have stable employment post-incarceration, in contrast to 61% of men.²⁶

III. WOMEN'S ADVOCATES CAST REFORM AS A MORAL IMPERATIVE

California, Oregon, and Mississippi are among the states that have passed reforms reducing sentences for minor theft, fraud, and other low-level property crimes. The

²³ Peter Applebome, *In a Mother's Case, Reminders of Educational Inequalities*, N.Y. TIMES, Apr. 27, 2011, available at http://www.nytimes.com/2011/04/28/nyregion/some-see-educational-inequality-at-heart-of-connecticut-case.html?_r=0.

²⁴ ABA Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes, *The Reform of Federal Sentencing for Economic Crimes* (Nov. 10, 2014), available at http://www.americanbar.org/content/dam/aba/unacategorized/criminal_justice/economic_crimes.authcheckdam.pdf.

²⁵ *Bias Behind Bars*, *supra* note 6.

²⁶ Hyman, *supra* note 4.

effectiveness of the reforms is yet to be determined, but the push for change in these states reflects popular opinions that harsh punishment for low-level offenses should be revisited.²⁷

Many voters support reform as a way to conserve community resources. For instance, Mississippi's House Bill 585, passed with great support in 2014. The bill institutes presumptive probation for first-time property offenses below \$100 and increases the threshold value of a theft necessary to upgrade the charge to a felony. The state expects that the reduction will result in fewer people in prison.²⁸

Women's organizations, while attentive to potential savings for states, have taken a different tactic in campaigns for reform by calling for empathy. In many cases, highlighting the ripple effect of prosecuting women for these offenses has sparked greater pressure for change among citizens. In California, women's organizations spearheaded a campaign to emphasize the impact of harsh sentencing in lives of women in furtherance of proposed criminal justice reforms in Proposition 47.²⁹ The campaign paid particular attention to the rise in property-related convictions among women and the need for social service support, rather than incarceration, to change the lives of women in the system, their families, and their communities.³⁰

In Oregon, women's advocates also framed proposed criminal justice reforms as women's issues. A policy advocacy organization in Portland, proponents of a sentencing reform bill, issued public reports on Oregon's need to reinvest in social service programs for women rather than prisons.³¹ The organization noted that 64% of women in the state facility had serious mental illnesses, 89% entered with substance addictions, and many had histories of trauma and abuse.³² Advocates refocused reforms as beneficial to families, noting that 75% of women in Oregon jails were mothers. Reform legislation, House Bill 3194, passed with bipartisan support in 2013.³³ The law restructures sentencing ranges, reducing punishments for property offenses including identity theft.

IV. WHAT HAPPENS WHEN OUR SYSTEM RESPONDS TO LOW-LEVEL PROPERTY CRIMES AS A SIGNAL OF NEED

Changes have the potential to improve women's lives in a few ways: First, reforms reducing the level of the offense increase the likelihood that many women will not be sentenced to time behind bars. De-criminalizing property offenses that arise out of health or economic desperation might also make some women eligible for pre-booking

²⁷ Shannon Wight, *Vast Majority of Oregonians are Smart on Crime*, Partnership for Safety and Justice, Dec. 10, 2012, available at <http://www.safetyandjustice.org/news/vast-majority-oregonians-are-smart-crime>.

²⁸ Pew Safety Performance Project, *Pew Applauds Mississippi Leaders for Comprehensive Sentencing and Corrections Reforms*, Mar. 31, 2014, available at <http://www.pewtrusts.org/en/about/news-room/press-releases/2014/03/31/pew-applauds-mississippi-leaders-for-comprehensive-sentencing-and-corrections-reforms>. In 2012, South Carolina's reforms saved \$3 million after sentencing reforms passed. *SC's prisons benefiting from sentencing reform*, THE STATE, Feb. 21, 2013, available at http://www.thestate.com/welcome_page/?shf=/2013/02/21/2641487_editorial-scs-prisons-benefitting.html.

²⁹ Dani McClain, *How California's Prison Reform Will Fight the Overincarceration of Women*, THE NATION, Nov. 12, 2014, available at <http://m.thenation.com/blog/190441-how-california-prison-reform-law-will-fight-overincarceration-women>.

³⁰ *Bias Behind Bars*, *supra* note 6.

³¹ Jennifer Williamson, *Strong Women, Strong Families, Strong Oregon* (Aug. 7, 2014), available at <http://www.safetyandjustice.org/news/strong-women-strong-families-strong-oregon>.

³² *Bias Behind Bars*, *supra* note 6.

³³ Williamson, *supra* note 31.

diversionary programs. The inclusion of property offenses in pre-booking diversion programs can potentially re-direct women to needed social services rather than the criminal justice system.³⁴ Secondly, reducing offenses from felonies to misdemeanors -- or finding pre-booking alternatives to criminal convictions -- will give women the opportunity to move forward without the barriers created by serious criminal convictions.

Reforms also can remove reliance on the criminal justice system to address root causes of low-level property offenses among women. Criminal convictions do little to alleviate the conditions leading to the charge. A community's commitment to redirect resources away from incarceration will drive discussion about the circumstances in women's lives that lead to property offenses.

Increasingly, the country views reform in our response to property offenses as a moral imperative. Judge Charles Chapel of the Oklahoma Court of Criminal Appeals wrote in his dissent of Ms. Cecilia Cathleen Rodriguez's case about the "wholly disproportionate" sentence to life for shoplifting.³⁵ "She is a drug addict who steals to feed her addiction. Most of her convictions, like this one, were for property offenses. While she is a nuisance and a lawbreaker, she is neither violent nor an imminent danger to society. The life sentence is a miscarriage of justice."³⁶

The public response to punishments for low-level property crimes reflects a growing sentiment in the country that violations are over-criminalized and disproportionately punitive to economically vulnerable women. In the past, prosecutions for these offenses distracted the public from the gaping needs leading to violation of property laws among women.³⁷ Increasingly states are poised to address these needs and reinvest to improve the lives of women and communities.

³⁴ Chloe Cockburn, Daliah Heller, and Gabriel Sayegh, "Healthcare Not Handcuffs: Putting the Affordable Care Act to Work for Criminal Justice and Drug Policy Reform," ACLU Foundation 16 (2013) (Describing the LEAD pre-booking diversion program).

³⁵ *Rodriguez v. State*, No. C-2009-365 (Feb. 12, 2010)(Chapel, J. concurring in part and dissenting in part), *vacated* by *Rodriguez v. Oklahoma*, 132 S. Ct. 1792 (2012).

³⁶ *Rodriguez*, *supra* note 35.

³⁷ Gustafson, *supra* note 10, at 336-37 (describing prosecutions of low-level property offenses as a way of legitimizing material deprivation).