

MEAN WOMEN AND MISPLACED PRIORITIES:  
INCARCERATED WOMEN IN OKLAHOMA

*Sarah Wynn*

INTRODUCTION.....	281
I. WOMEN AS A MINORITY IN THE CRIMINAL JUSTICE SYSTEM .....	283
II. THE FEMALE OFFENDER: THEMES AND DIFFERENCE FROM MALE OFFENDERS .....	284
III. FEMALE OFFENDERS: DIFFERENCES IN OFFENDING PATTERNS .....	287
IV. NATIONAL INCREASES IN FEMALE OFFENDER RATES: MEANER WOMEN OR TOUGHER LAW ENFORCEMENT? .....	289
V. OKLAHOMA FEMALE INCARCERATION RATE: WHY SO HIGH? .....	291
VI. SOLUTIONS .....	298
CONCLUSION .....	300

INTRODUCTION

An African-American woman was pulled over in Beckham County, Oklahoma,<sup>1</sup> and the police conducted a free air dog sniff of her car.<sup>2</sup> She had 52.7 pounds of marijuana in her car.<sup>3</sup> The jury was confused about what percentage of the sentence they imposed would actually be served by the defendant, but the judge was prohibited from clarifying.<sup>4</sup> The defendant was sentenced to fifty years without parole and will serve 100 percent of that time.<sup>5</sup> Forty-five years is the equivalent to a life term in Oklahoma.<sup>6</sup> This particular case should shed light on why Oklahoma has the highest female incarceration

---

1. Brief of Appellee at 2, *Holt v. Oklahoma*, No. F-2010-721, (Okla. Crim. App. 2010); *see also* Brief of Appellant at 2, *Holt*, No. F-2010-721; Offender Inquiry, OKLA. DEP'T OF CORR., [http://docapp065p.doc.state.ok.us/servlet/page?\\_pageid=395&\\_dad=portal30&\\_schema=PORTAL30](http://docapp065p.doc.state.ok.us/servlet/page?_pageid=395&_dad=portal30&_schema=PORTAL30) (search "First Name" and "Last Name" for "Linda" and "Holt") (last visited Oct. 29, 2012).

2. Brief of Appellee at 4, *Holt*, No. F-2010-721; *see also* Brief of Appellant at 2, *Holt*, No. F-2010-721.

3. Brief of Appellee at 5, *Holt*, No. F-2010-721; *see also* Brief of Appellant at 3, *Holt*, No. F-2010-721.

4. Brief of Appellee at 41, *Holt*, No. F-2010-721.

5. *Id.* at 42.

6. OKLA. UNIF. JURY INSTRUCTIONS 10-13B (2006) ("If a person is sentenced to life imprisonment, the calculation of eligibility for parole is based upon a term of forty-five years.").

rate in the United States.<sup>7</sup> Questions such as, “Should a non-violent offender ever be required to serve a life sentence?” are questions that Oklahoma needs to ask itself, especially with this unsavory first place in mind.

Between 1986 and 1995, the incarceration rate of women has increased at the alarming pace of over 400 percent while the male incarceration rate has increased at half that pace.<sup>8</sup> This case study of the state with the highest female incarceration rate in the country will shed some light on the relevant factors for this discrepancy. Oklahoma has a female incarceration rate of 130, which is almost twice the national average of 67<sup>9</sup> and significantly higher than Idaho, which has the second highest female incarceration rate of 104.<sup>10</sup> Why? There are two potential answers: more women are being sentenced to jail time and/or women are being given longer sentences,<sup>11</sup> such as the life sentence for marijuana trafficking as in the example case. In his study, Kelly Damphousse, a University of Oklahoma (OU) sociology professor,<sup>12</sup> concludes that the main reason for the increase in prison population is longer sentences.<sup>13</sup> This article explores the reasons why sentences have increased over time through an examination of national policies and Oklahoma’s sentencing laws. More specifically, this article concludes that the incarceration rate of women in Oklahoma is so high because non-violent crimes, the ones women commit the most, are punished as harshly as violent crimes.

This article starts in Section I by examining women as a minority in the criminal justice system. Section II considers general themes in the profile of the female offender. Section III then talks about differences in female offending patterns. Section IV addresses the national increase in female incarceration starting in the 1980s. Section V then takes this national picture and examines the particularities in Oklahoma that give it the highest incarceration rate of women in the country. In Section VI, this article concludes by proposing some solutions.

---

7. Throughout this paper, the term “incarceration rate” will be used. The incarceration rate is simply the number of people incarcerated per 100,000 population. This is a much more sensitive tool than raw numbers since every state has a different population, and the larger states do tend to have more people imprisoned. The incarceration rate corrects for this and allows for a more direct comparison.

8. Marne L. Lenox, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 281 (2011).

9. FISCAL YEAR 2011 ANNUAL REPORT: INSTITUTIONS-DIVISION I, OKLAHOMA DEPARTMENT OF CORRECTIONS: FEMALE OFFENDER OPERATIONS 4 (2011), available at <http://www.doc.state.ok.us/field/female/FY%202011%20Annual%20Report%20Final.pdf>.

10. Paul Guerino et al., *Prisoners in 2010*, BUREAU OF JUSTICE STATISTICS, app. at 22 (Dec. 2011), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2230>.

11. Kelly R. Damphousse, *Review of the Oklahoma Incarceration Rate/Crime Rate and Offenders*, prepared for the Oklahoma Alliance for Public Policy Research, Inc. and the Oklahoma Criminal Justice Resource Center, app. at C11 (Jan. 23, 2003) (on file with author).

12. Associate Dean, College of Arts & Sciences and President’s Associates Presidential Professor – Sociology at the University of Oklahoma.

13. Damphousse, *supra* note 11, at C9.

## I. WOMEN AS A MINORITY IN THE CRIMINAL JUSTICE SYSTEM

The incarceration rate of women has increased at the alarming pace of over 400 percent between 1986 and 1995.<sup>14</sup> In contrast, the male incarceration rate has increased only 200 percent.<sup>15</sup> Despite the drastic increase in female incarceration rates, it must be understood that the criminal justice system is enforced against men for the benefit of male victims, as women remain a minority of both offenders and victims.<sup>16</sup> This trend continues, as women continue to be the minority in contact with the criminal justice system today.

The criminal justice system is enforced for the benefit of male victims as women are a minority of victims coming into contact with the criminal justice system. Statistics show that of the crimes reported, women represent a minority of victims of crime.<sup>17</sup> Statistics from 1991 show that men were 123 percent more likely to report being the victim of a robbery, were 161 percent more likely to be the victim of an aggravated assault, and were 74 percent of all homicide victims.<sup>18</sup> Despite this, women traditionally are thought of as the victims of crime.<sup>19</sup> These statistics, however, only represent the number of reported crimes.

The number of actual victims and its composition of characteristics are unknown because of the vast number of unreported and unprosecuted cases.<sup>20</sup> It is unlikely that women are actually a minority of victims. This discrepancy could be due to the fact that rape is underreported<sup>21</sup> because the victim is just as much on trial as the offender. In addition, police stations have had a policy of not responding to domestic abuse calls.<sup>22</sup> Due to these policies, the perpetrators of crimes towards women are going unpunished, which creates a legal environment where men are overrepresented as victims. This seems to be confirmed partially by current statistics on victims. In 2009, 16 percent more men were victims of violent crime than women.<sup>23</sup> This may be due to the number of recent changes in policy towards domestic violence and rape victims, like mandatory arrest and, therefore, reporting. Thus, despite the stereotypical picture of women as victims, the number of reported female victims has only just begun approaching that of male victims.

Also, criminal law is mainly enforced against men as they represent a greater percentage of the offenders and the prison population. In 1983, men

---

14. Lenox, *supra* note 8, at 281.

15. *Id.*

16. See Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2154-56 (1995).

17. *Id.* at 2155.

18. *Id.* at 2155-56.

19. *Id.* at 2155.

20. See *id.* at 2156.

21. *Id.*

22. See *id.* at 2159.

23. See Jennifer Truman & Michael Rand, *Criminal Victimization, 2009*, BUREAU OF JUSTICE STATISTICS, 5 (Oct. 2010), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2217>.

and boys represented 78 percent of all property offenders and 89 percent of all violent offenders.<sup>24</sup> This overwhelming majority of male offenders translates into a nearly 90 percent majority of the incarcerated population that has remained consistent for the past decade.<sup>25</sup> While the national raw number of incarcerated women went up an alarming amount from 2000 (93,234) to 2010 (112,822), it pales in comparison to the number of men in the system from 2000 (1,298,027) to 2010 (1,499,573).<sup>26</sup> Thus, women are still a minority of those against which the criminal laws are enforced.

This trend holds true in Oklahoma as well. While Oklahoma still has the highest incarceration rate of women (135 in 2010), the incarceration rate of men (1,192 in 2010) is almost ten times higher.<sup>27</sup> It is safe to say that women are a minority of the incarcerated population in the United States and Oklahoma, and, therefore, criminal law has just started to recognize their particular needs as offenders that are also victims, mothers, addicts, and mentally ill.

## II. THE FEMALE OFFENDER: THEMES AND DIFFERENCE FROM MALE OFFENDERS

Criminology tends to focus on male offenders due to their being 90 percent of incarcerated persons.<sup>28</sup> This necessitates the study of feminist criminology in conjunction with criminology because when women are simply made a part of criminology research they are studied through the lens of their male counterparts.<sup>29</sup> This male lens can cause criminology research to overlook the themes and issues in female offending due to their status as a minority in the system. Some of these themes include the female offender's role as a mother, her experiences as a victim, her socioeconomic status, her mental health needs, her substance abuse, and her offending patterns, which will be discussed in turn.

Female offenders are commonly custodial mothers of minor children. Over 55 percent of incarcerated women reported having lived with their minor children in the month before incarceration (41.7 percent single households), while only 35.5 percent of men reported doing so (17.2 percent single parent households).<sup>30</sup> Eighty percent of all incarcerated mothers' children live with

---

24. Schulhofer, *supra* note 16, at 2154-55.

25. See Guerino et al., *supra* note 10, app at 15-16.

26. *Id.*

27. *Id.* app. at 22.

28. See Susan F. Sharp, *It's not Just Men, Anymore: The Criminal Justice System and Women in the 21<sup>st</sup> Century*, THE CRIMINOLOGIST: THE OFFICIAL NEWSLETTER OF THE AM. SOC'Y OF CRIMINOLOGY, Vol. 31, Issue 2, 2006 at 1, 1.

29. *Id.* at 1, 4.

30. Lauren E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children*, BUREAU OF JUSTICE STATISTICS, 4 (revised Mar. 30, 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>.

their grandparents.<sup>31</sup> Due to the difficulties of maintaining a relationship with their children while incarcerated, some women face the additional challenge of having their parental rights contested.<sup>32</sup> The National Prison Project found that many of the “women [in D.C.] were not being advised of court dates when their parental rights were being decided.”<sup>33</sup> Furthermore, when the women’s lawyers were informed of this lapse, the lawyers “became angry. . .because they felt the project was trying to make them look bad.”<sup>34</sup>

Incarcerated women are disproportionately minorities and of low socioeconomic status. The incarceration rate of all males is 943, male Caucasian is 459, male Black 3,074, and male Hispanics 1,258.<sup>35</sup> The incarceration rate of females is 67, female Caucasian is 47, female Black 133, and female Hispanic 77.<sup>36</sup> These statistics mean that minorities are consistently over represented in the incarcerated population as compared to the population at large. This trend holds true in Oklahoma for African-Americans and Native Americans as well.<sup>37</sup> In addition, incarcerated women are likely to have lower socioeconomic statuses. In Oklahoma, 89.4 percent of 1,171 female offenders received into custody were unemployed (76.5 percent frequently unemployed) and 62.3 percent reported reliance on social assistance.<sup>38</sup> Thus, incarcerated women are more likely to have a commonality in their socioeconomic status than their racial minority status.<sup>39</sup>

Another commonality among incarcerated women is that they are more likely to require mental health treatment. It is estimated that one in four adults has a mental illness or mood disorder,<sup>40</sup> but the rate of mental illness of those incarcerated is twice as much.<sup>41</sup> This discrepancy is partially explained by the

31. Dona Playton, *Incarceration and the Sentences for the Children Left Behind*, WYO. STATE BAR (Feb. 2009), [http://wyoingbar.org/bar\\_journal/article.html?id=221](http://wyoingbar.org/bar_journal/article.html?id=221).

32. See Michelle S. Jacobs, *Piercing the Prison Uniform of Invisibility for Black Female Inmates*, 94 J. CRIM. L. & CRIMINOLOGY 795, 816 (2004) (book review).

33. *Id.*

34. *Id.* at 816-17.

35. Guerino et al., *supra* note 10, app at 15-16.

36. *Id.*

37. See FISCAL YEAR 2011 ANNUAL REPORT, *supra* 9, at 23; see also Damphousse, *supra* note 11, at C13-C14, and C24.

38. FISCAL YEAR 2011 ANNUAL REPORT, *supra* note 9, at 16.

39. This paper does not attempt to even partially address the complex issues surrounding minority status, socio-economic status, and education as it applies to prisoner populations.

40. *The Numbers Count: Mental Disorders in America*, NAT’L INST. OF MENTAL HEALTH. <http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml#Anxiety> (last visited Sept. 30, 2012).

41. See e.g., Lauren E. Glaze & Doris J. James, *Mental Health Problems of Prison and Jail Inmates*, BUREAU OF JUSTICE STATISTICS, 4 (Sept. 2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>; *Facts: Mentally Ill Offenders*, OKLA. DEP’T OF CORRECTIONS (Jan. 1, 2012) <http://www.doc.state.ok.us/newsroom/publications/Mentally%20Ill%20Offenders%20FACT%20S.pdf> (“Approximately 13,000 (50%) out of 25,600 incarcerated offenders have a history of, or are currently exhibiting some form of mental illness. Of the 2,650 female offenders, 1,840

fact that mental illness becomes more likely with traumatic life events. The Adverse Childhood Experiences (ACE) Study showed that as the number of adverse experiences<sup>42</sup> in childhood increases, so does the likelihood of substance abuse or having a mental illness.<sup>43</sup> The maximum ACE score is eight with each event counting as one.<sup>44</sup> Only 7 percent of those in the middle class had a score of four or higher,<sup>45</sup> while 49.5 percent of a sample of incarcerated women had a four or higher.<sup>46</sup> With each point increase in the ACE score, the likelihood of having a diagnosis of bipolar disorder or PTSD prior to incarceration increased 26 and 37.9 percent respectively.<sup>47</sup> Thus, given that most incarcerated women have been victims, their high risk of having a mental illness is explained.

Another common theme among female offenders is that women are more likely to commit nonviolent crimes. Of offenders incarcerated for more than a year, 53.8 percent of men are serving for violent crime while only 33.9 percent of women are.<sup>48</sup> This holds true in Oklahoma as well.<sup>49</sup> In Oklahoma, in 2011, the top five controlling offense categories for which women were convicted were obtaining or possessing controlled substances (20.5 percent), distributing controlled substances (21.8 percent), larceny (7.3 percent), forgery (7.0 percent), and assault (6.2 percent).<sup>50</sup> In contrast, men were much more likely to commit assault, burglary, and murder.<sup>51</sup> Of the total imprisoned female population in Oklahoma, 65.9 percent are incarcerated for nonviolent crimes

---

(69%) and of the 22,950 male offenders, 11,070 (48%) fall in that category. Approximately 6,500 (26%) of the total population, 1400 (52%) females and 5,175 (23%) males, currently exhibit symptoms of a serious mental illness, given the most conservative definition.”)

42. See Vincent J. Felitti, *The Origins of Addiction: Evidence From the Adverse Childhood Experiences Study*, KAISER PERMANENTE MED. CARE PROGRAM, 4 (Feb. 2004), <http://www.acestudy.org/files/OriginsofAddiction.pdf> (defining an adverse experience as emotional abuse, sexual abuse, physical abuse, growing up in a household with someone with a drug or alcohol problem, growing up in a household with someone with a mental illness, growing up in a household with someone being incarcerated, growing up without one of the biological parents in the household or growing up with the mother being treated violently).

43. See Susan Sharp & Emily Pain, *Study of Incarcerated Women and Their Children*, OKLA. COMM’N ON CHILDREN AND YOUTH, 7 (Jan. 22, 2010), available at <http://nicic.gov/Library/025605> (follow “Download View” hyperlink).

44. Felitti, *supra* note 42, at 4.

45. *See id.*

46. Sharp & Pain, *supra* note 43, at 7.

47. *Id.*

48. See Guerino et al., *supra* note 10, app at 29 (estimating that 52.4% of all prisoners were serving for violent crimes).

49. Damphousse, *supra* note 11, at C11.

50. FISCAL YEAR 2011 ANNUAL REPORT, *supra* note 9, at 25.

51. See *Facts at a Glance*, OKLA. DEPARTMENT OF CORRECTIONS (June 2012), available at [http://www.doc.state.ok.us/newsroom/facts/DOC\\_Facts\\_At\\_A\\_Glance\\_June\\_2012.pdf](http://www.doc.state.ok.us/newsroom/facts/DOC_Facts_At_A_Glance_June_2012.pdf) (stating that the top five controlling offenses for all inmates: Distribution 18.2%; Possession 9.7%; Assault 10.9%; Robbery 8.7%; Rape 7.4%); see also Damphousse, *supra* note 11, at C11

and 34.1 percent for violent crimes.<sup>52</sup> In contrast, about 50 percent of men are incarcerated for violent crimes.<sup>53</sup> Thus, women in Oklahoma, like women nationally, commit violent crimes at a lower rate than men.<sup>54</sup>

Drug abuse is a theme among incarcerated women, but drug distribution or possession as a controlling offense is not. Drug abuse is a common theme, as 67 percent of the women in Oklahoma prisons need substance abuse treatment.<sup>55</sup> It is not a common theme in terms of the controlling offense, however, since distribution or possession is only about 40 percent of the controlling offenses.<sup>56</sup> This percentage would expand though, if all of the offenses of incarcerated women were taken into account.<sup>57</sup> Thus, while women have varied experiences before coming in contact with the criminal system and commit crime in different ways, the general themes of nonviolent crime, victimization (which goes hand in hand with mental health), substance abuse, and motherhood hold true.

### III. FEMALE OFFENDERS: DIFFERENCES IN OFFENDING PATTERNS

Incarcerated women are typically both offenders and victims,<sup>58</sup> but the typical theory of why women commit crimes is extremely reliant on gender stereotypes. The logic of these theories usually flow like this: because she is a woman, she is a victim, and because she is a victim, she uses drugs to cope, which leads to addiction, which leads to more crime, especially prostitution.<sup>59</sup> Thus, women are forced to commit crimes because they are addicts and victims, and there are limited criminal roles available to them because of their gender. To some extent this is true. Oklahoma University sociology Professor Susan Sharp's studies have shown that over 90 percent of the women in Oklahoma prisons have themselves been victims of domestic violence in the past.<sup>60</sup> But to classify all incarcerated women as only victims is dismissive of some of their autonomous life choices as well as their survival techniques.

To commit crime is an autonomous choice for a good proportion of female offenders. In *Women Street Hustlers*, Barbara Rockell studied a sample of sixty incarcerated women in New York and found six distinct reasons why

---

52. FISCAL YEAR 2011 ANNUAL REPORT, *supra* note 9, at 24.

53. *See id.*; ANNUAL REPORT 2011, OKLA. DEP'T OF CORRECTIONS 15 (2011), available at <http://www.doc.state.ok.us/newsroom/annuals/2011/AR20114WEB.pdf>.

54. Note that prostitution was not one of the top five controlling offenses. *See Facts at a Glance, supra* note 51.

55. FISCAL YEAR 2011 ANNUAL REPORT, *supra* note 9, at 15.

56. *See id.* at 25.

57. *Id.* at 24.

58. *Facts: Female Offenders*, OKLA. DEP'T OF CORRECTIONS (Mar. 01, 2012), <http://www.doc.state.ok.us/newsroom/publications/Female%20Offenders.pdf>.

59. *See* BARBARA ROCKELL, *WOMEN STREET HUSTLERS: WHO THEY ARE AND HOW THEY SURVIVE* 30-31 (2008).

60. *WOMEN BEHIND BARS: THE VOICES OF OKLAHOMA INCARCERATED MOTHERS AND THEIR CHILDREN*, [http://www.ou.edu/cls/wbbtf/Women\\_Behind\\_Bars/HOME.html](http://www.ou.edu/cls/wbbtf/Women_Behind_Bars/HOME.html) (last visited Sept. 30, 2012) [hereinafter "WOMEN BEHIND BARS"].

women commit crime, which she called: “show me the money”, “all in the family”, “just another addiction”, “partiers by trade”, “challenged”, and “lives of loss and trauma.”<sup>61</sup> Of these groups, only the ones in the last group were so victimized in their childhoods that they turned to drugs to forget.<sup>62</sup> The rest of the women committed crime because the women wanted fast money, it was the “family business,” it gave them a high just like being on drugs, they just wanted to party, or they wanted to feel normal because of mental illness.<sup>63</sup> Some of the women were well-educated and had good work histories.<sup>64</sup> Some of them chose crime over a respectable career, however, because they saw it as a quick way to get the expensive things they wanted.<sup>65</sup>

In addition, the women Rockell studied did not just have one crime that they all first committed, nor did they all offend in the same patterns.<sup>66</sup> The “show me the money” group of women usually used credit card fraud. Also, they often used their places of employment to gain access to credit cards or bluffed to their male coworkers to get money or transportation.<sup>67</sup> The “all in the family” group usually committed their first crime, shoplifting, with other family members and then sold the item over to other family members.<sup>68</sup> The “just another addiction” group usually shoplifted because the successful commission of a crime gave them a high like being on drugs.<sup>69</sup> “Partiers by trade” used prostitution to get money for drugs but bought the drugs from dealers themselves, often getting something extra for bringing the dealer the business or taking some of the drugs before turning them over to the “date.”<sup>70</sup> In contrast, those in the “challenged” group let their “dates” get the drugs and, therefore, sometimes ended up with nothing.<sup>71</sup> Those in the “lives of loss and trauma” group usually carried out crimes in association with significant others.<sup>72</sup> The only common theme was that all of the women claimed to have dealt drugs at some point in their criminal careers whether they were caught or not.<sup>73</sup> Thus, female offenders are best studied through their individual stories when looking at what crimes they commit and why they commit them, even though some common themes affect a majority of female offenders.<sup>74</sup>

---

61. ROCKELL, *supra* note 59, at 105.

62. *See id.* at 124-25.

63. *Id.* at 105.

64. *Id.* at 102, 105.

65. *Id.* at 113.

66. *See id.* at 104-129.

67. *See* Rockell, *supra* note 59, at 139-40.

68. *See id.* at 134.

69. *Id.* at 120.

70. *See id.* at 137.

71. *See id.* at 143-44.

72. *Id.* at 152.

73. *See* Rockell, *supra* note 59, at 191.

74. *Id.* at 129 (summarizing some of the commonalities between the types of female offenders as categorized by Rockell).

#### IV. NATIONAL INCREASES IN FEMALE OFFENDER RATES: MEANER WOMEN OR TOUGHER LAW ENFORCEMENT?

The public has been misinformed about the character of the female offender and the challenges she faces due to the stereotype-reifying way in which women are portrayed in the media. Therefore, the public unnecessarily fears her and believes she automatically deserves to be incarcerated. One such media-portrayed notion is that the nationwide increase in female incarceration is due to women getting “meaner” and more violent.<sup>75</sup> However, the increased incarceration of women is explained best through harsher drug and zero tolerance policies nationwide that disproportionately affect women.

In general, it has been shown that the incarceration rate is tied to how much people fear violent crime.<sup>76</sup> This theory assumes that both the state and federal governments have enough money to fund rigorous incarceration programs.<sup>77</sup> When states do not have the funding they want for incarceration, they consistently turn to cheaper alternatives.<sup>78</sup> In addition, as fear of violent crime decreases, so does the incarceration rate, as again the criminal system turns to alternatives.<sup>79</sup> This, however, does not explain why the public would fear the generally nonviolent female population.

The inaccurate portrayal of incarcerated women in the media is partially responsible for generating the fear that propels the incarceration of women. In a study of ten news programs, documentaries, and talk shows depicting incarcerated women, these programs generally ignored the specific challenges facing female prisoners and focused on those women incarcerated for violent crime.<sup>80</sup> While approximately two-thirds of all incarcerated women have minor children, only one-third of the women in the programs mentioned that they had children.<sup>81</sup> In addition, mental health issues and the status of these women as victims were underrepresented. Only 3 percent of the inmates discussed being diagnosed with a mental illness, only 6 percent discussed abuse as a child, and 12 percent discussed abuse as adults.<sup>82</sup> These programs enforced the violent female offender image through the host’s description of the women as violent by nature and through the host “highlighting issues of institutional violence by women.”<sup>83</sup> Thus, the media presents a picture of incarcerated women that focuses on violence and does not discuss the extent to which these women are nonviolent offenders, victims, mothers, substance abusers, and in need of mental health treatment.

---

75. Darrell Steffensmeier et al., *Gender Gap Trends for Violent Crimes, 1980-2003: A UCR-NCVS Comparison*, 1 FEMINIST CRIMINOLOGY 72, 73-74 (2006).

76. Damphousse, *supra* note 11, at C15.

77. *Id.* at C17.

78. *Id.*

79. *See id.* at C75-C77.

80. Dawn K. Cecil, *Looking Beyond Caged Heat: Media Images of Women in Prison*, 2 FEMINIST CRIMINOLOGY 304, 309-21 (2007).

81. *Id.* at 314.

82. *Id.*, at 315-16.

83. *Id.* at 313.

Since women are disproportionately depicted as violent in the media and the female percentage of arrests has increased, citizens are more fearful of female offenders and think that women are, stereotypically, getting “meaner.”<sup>84</sup> This behavioral change in women is theorized to be a result of one of three different social changes. One change is that as society allows women more freedom, they become more “masculinized” and, therefore, more violent.<sup>85</sup> A second hypothesis cites violence as a coping mechanism for dealing with abusive homes.<sup>86</sup> A third is that women are feeling more role strain created by an overlap of new and old stresses due to greater “role strain.”<sup>87</sup> These theories fail to explain the specific offenses in which the gender gap is closing (simple and aggravated assault) and those where it remains steady (homicide).<sup>88</sup>

Instead, increased female violence is best understood in the context of increasingly strict criminal policies such as the “charging up” of less serious forms of violence, pro-arrest policies, and the more gender-neutral nature of law enforcement. Through “charging up” and zero tolerance, a greater number of minor offenses result in arrest, and charges that would have been simple are charged as aggravated assault.<sup>89</sup> Pro-arrest policies were originally set in place to encourage police to arrest the abuser in domestic violence situations.<sup>90</sup> Men have learned how to work the system, however, in order to either avoid arrest themselves by calling the police first, or making sure the victim is also arrested by telling officers that he was assaulted as well.<sup>91</sup> When the abuser alleges assault, the police must arrest the true victim as well due to their zero-tolerance policies, because any violence is cause for arrest, even if it is in self-defense.<sup>92</sup>

In addition, gender-neutral law enforcement makes the arrest of women more socially acceptable in that she is no longer viewed as needing protection.<sup>93</sup> Therefore, while the basic numbers of simple and aggravated assault arrests suggest that women are becoming more violent, the failure of the trend to reach homicide is indicative of “net widening” arrest policies being the true offender.<sup>94</sup>

In terms of nonviolent offenses, there is a consensus that the “war on drugs” is really a war on women.<sup>95</sup> The “war on drugs” introduced zero-tolerance drug policies, and harsher punishments for possession and distribution, which were shortly followed by sentencing reforms, such as the 85

---

84. Steffensmeier et al., *supra* note 75, at 74-75.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 84.

89. *Id.* at 77-79.

90. Steffensmeier et al., *supra* note 75, at 78-79.

91. *Id.* at 79.

92. *Id.* at 77-79.

93. *Id.* at 79.

94. *Id.* at 77.

95. Lenox, *supra* note 8, at 281 (2011).

percent rule.<sup>96</sup> This rule requires that offenders serve 85 percent of their sentences.<sup>97</sup> Women are more likely than men to be incarcerated for drug crimes.<sup>98</sup> With harsher drug policies, women were more likely to be arrested and because of sentencing reform, more likely to be incarcerated and serve longer sentences. Because of these new drug and sentencing policies, the rate of incarcerated women disproportionately increased.<sup>99</sup> Then, as the incarceration rate of women increases, people fear the female offender more, assume she is incarcerated for a violent crime, and push for harsher punishments. Legislators and judges respond with harsher policies because they do not want to appear soft on crime.<sup>100</sup>

These policies are indicative of a general acceptance of formal equality for female offenders. Formal equality is the feminist theory that women should be treated the same way as men by the law.<sup>101</sup> In application, the unintended consequence of formal equality is that “the same” translates to treating women like men because most laws were made with men as the standard for application.<sup>102</sup> Formal equality in the context of criminal law means that both victims and abusers have been arrested when the victim hit the abuser in self-defense because zero tolerance policies are not able to treat women differently just because she is usually the victim.<sup>103</sup> In addition, the criminal system does not recognize and accommodate offenders who are primary caregivers, since men do not usually fill this role. Thus, while formal equality is an ideal to work toward, it will not effect enough change within the criminal justice system to address the needs of women, since the standard that formal equality works toward is based on men.

#### V. OKLAHOMA FEMALE INCARCERATION RATE: WHY SO HIGH?

Politicians and judges in Oklahoma do not want to have a reputation for being soft on crime.<sup>104</sup> That Oklahoma has the highest incarceration rate of any state is testimony to the fact that politicians respond to their constituents’ fears.

---

96. See also Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 626 (Supp. 2002) (“Figures published by the Bureau of Justice Statistics show that the percent of maximum sentence served in state prison was 31.8% in 1993. This percentage had increased to 43.8% in 1999.”).

97. Sharon R. Neumann, *Solving Prison Overcrowding Circa 1995*, THE OKLA. ACAD. 103, 109 (2008), <http://www.okacademy.org/PDFs/2008-research.pdf>.

98. Guerino et al., *supra* note 10, app at 29.

99. Lenox, *supra* note 8, at 281 (stating that while there was a 487% increase in the incarceration of female drug offenders between 1986 and 1995, incarceration rates rose only 203% for male drug offenders).

100. Damphousse, *supra* note 11, at C12.

101. CYNTHIA GRANT BOWMAN ET AL., *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 115 (4th ed. 2011).

102. See Sharp, *supra* note 28, at 3.

103. BOWMAN ET AL., *supra* note 101, at 268.

104. David B. Braddock and Ron Peters, *Oklahoma House of Representatives*, THE OKLA. ACAD., 12, 12 (2008), <http://www.okacademy.org/PDFs/2008-research.pdf>.

Oklahoma's incarceration rate of 130 women is almost twice the national average of 67.<sup>105</sup> Possible explanations for this high incarceration rate include public fear, treating non-violent crimes as harshly as violent crimes, and the underfunding of social programs for both men and women.

The attitude of the people in Oklahoma toward incarcerated women is exemplified by this statement of the former head of the sociology department at the OU: "Oklahoma just has mean women."<sup>106</sup> This statement by a head of the sociology department at Oklahoma University expresses the problematic opinion that the kind of women in Oklahoma has more to do with Oklahoma's high incarceration rate than Oklahoma's crime policies, poverty levels, and drug problems. This is simply not true, however, as this paper has previously dispelled with the "meaner women" theory.<sup>107</sup> A more plausible explanation is that, as University of Oklahoma Professor Susan Sharp said, Oklahoma incarcerates people for things that other states would not.<sup>108</sup> Indeed, it has also been observed that more simple assaults are being charged as felonies.<sup>109</sup> Thus, Oklahoma needs to change its attitude toward incarcerated women in order to effect change in the system.

Oklahoma's attitude toward female offenders is not the only attitude that needs to change though. Oklahoma's million-dollar audit<sup>110</sup> of its State Department of Corrections was premised on the assumption that "no systematic change is likely or practical in Oklahoma."<sup>111</sup> Based on this premise, the audit called for more maximum-security beds even through more than 50 percent of the crimes that result in incarceration in Oklahoma are nonviolent.<sup>112</sup> Therefore, while an attitude change is needed toward female offenders in particular, a change in attitude toward the Department of Corrections as a whole is also necessary.

As a state, Oklahoma seems to have overreacted to its fear of violent crime. The crime rate increased 14 percent from 1974 to 2001, while the

---

105. Guerino et al., *supra* note 10, app at 22.

106. Barbara Palmer, *Justice System Examined in Oklahoma's Top-Rank For Female Incarcerations*, TULSA WORLD, Jan. 30, 2011, [http://www.tulsaworld.com/news/article.aspx?subjectid=487&articleid=20110130\\_11\\_AI\\_CUTLIN578670&allcom=1](http://www.tulsaworld.com/news/article.aspx?subjectid=487&articleid=20110130_11_AI_CUTLIN578670&allcom=1) ("In 1996, when [Susan] Sharp was interviewing at the University of Oklahoma, a department head - since retired - picked her up at the airport. . . He very proudly told me that Oklahoma had the highest female incarceration rate in the nation," Sharp recalled. "And when I asked him why, he said, 'Oklahoma has mean women.'").

107. *See supra* pp. 12-15.

108. WOMEN BEHIND BARS, *supra* note 60.

109. Robert Ravitz, *A Rational Punishment Policy? It's a Distant Memory*, THE OKLA. ACAD., 60, 61 (2008), <http://www.okacademy.org/PDFs/2008-research.pdf>.

110. Jennifer Kirkpatrick, *Reviewing the ODOC Performance Audit*, THE OKLA. ACAD. 71, 71 (2008), <http://www.okacademy.org/PDFs/2008-research.pdf>; *see* PERFORMANCE AUDIT OF THE DEPARTMENT OF CORRECTIONS FOR THE LEGISLATIVE SERVICE BUREAU OF THE OKLAHOMA LEGISLATURE: FINAL REPORT, MGT OF AM. (2007), <http://www.okhouse.gov/Documents/OKRVSDFinalReport080103.pdf>.

111. Kirkpatrick, *supra* note 110, at 76.

112. *Facts at a Glance*, *supra* note 51.

incarceration rate went up 440 percent during the same time period.<sup>113</sup> As Public Defender Robert Ravitz said, “[w]hen we react to the aberrational crime, all sentences go up, even for those whose criminal act is considered a routine crime, not aggravated or mitigated.”<sup>114</sup> Thus, politicians caught wind of the public’s fear and created an extremely harsh criminal system in Oklahoma.

One way to measure exactly how harsh Oklahoma’s criminal system has become is to look at the number of people on death row in the state. Oklahoma is number one with 3.2 people executed per one million population as opposed to the national average of 0.24 per one million population.<sup>115</sup> This harshness is especially relevant to women because, as explored previously, “harsh on crime” includes harshness on the property and drug offenses that women are more likely to commit than men.

The harshness of the criminal system in Oklahoma is a main reason for Oklahoma’s high incarceration rate of women. One point of interest about Oklahoma incarceration rates is that while Oklahoma has the highest incarceration rate of women, it has the fifth highest incarceration rate of men.<sup>116</sup> If men and women were committing the same crimes, it would seem logical that Oklahoma would be first for both. So, what are the differences in men and women’s experiences with Oklahoma government and criminal justice system that creates this discrepancy?

The answer to this question is that Oklahoma sentencing laws do not differentiate between the amounts of drugs possessed or sold. In 2009, 85 percent of all incarcerated women were incarcerated for property (burglary, larceny, forgery and fraud) or drug crimes (i.e., non-violent crimes), as compared to 73 percent of men.<sup>117</sup> However, there is only a 3 percent difference between men and women incarcerated for property crimes.<sup>118</sup> In contrast, 56 percent of women are incarcerated for drug crimes as compared to 47 percent of men.<sup>119</sup> Thus, a difference in the way Oklahoma treats drug crimes would give rise to a discrepancy in incarceration rates sufficient to create the divide in placement in the national incarceration rates and should be exposed in part by comparing Oklahoma’s drug statutes with other states.

---

113. Zohre Salehezadeh, Kenneth Kickham, & Robert Bently, *Women in Prison: A Cross-Sectional Analysis of Female Incarceration* at the Oklahoma Department of Human Services National Association for Welfare Research and Statistics Conference Tuesday, slide 6 (Aug. 24, 2004), available at <http://www.docstoc.com/docs/28612974/Women-in-Prison-Women-in-Prison-A-Cross-Sectional-Analysis-of-Female>.

114. Ravitz, *supra* note 109, at 60.

115. Salehezadeh et al., *supra* note 113, at slide 17.

116. Guerino et al., *supra* note 10, app at 22.

117. FISCAL YEAR 2009 ANNUAL REPORT, OKLAHOMA DEPARTMENT OF CORRECTIONS: FEMALE OFFENDER OPERATIONS 37 (2009), available at <http://www.doc.state.ok.us/field/female/FY%202009%20Female%20Offender%20Operations%20Annual%20Report.pdf>.

118. *Id.*

119. *Id.*

It is interesting to note that about equal percentages of women were incarcerated for distribution (21.8 percent) as possession (20.5 percent).<sup>120</sup> That means 20 percent of the incarcerated female population is subject to the five-year minimum associated with distribution of cocaine.<sup>121</sup> Approximately the same percentage of male offenders has distribution as their controlling offense as well.<sup>122</sup> Women involved in the distribution of drugs, however, are usually at the bottom of the distribution train<sup>123</sup> and, therefore, do not have valuable information to exchange for reduced sentences. So, revisiting the example in the introduction, Holt probably did not even have enough information to give police to try to reduce her sentence from life to a lesser number of years. She probably would still be sentenced to more than the statutory minimum, but her case is not typical due to the quantity of drugs involved. For most other cases, the statutory minimum does have a huge impact on women if they are not dealing the same quantities as their male counterparts and yet subject to the same minimum sentence.

The real difference between the drug crimes of men and women is the percentage that has possession as a controlling offense. For incarcerated women, possession is over 20 percent of the controlling offenses.<sup>124</sup> In contrast, possession is the controlling offense for under 10 percent of men.<sup>125</sup> This means that if there is a statutory difference that contributes to Oklahoma's female incarceration rate, it will be found in differences in the harshness of drug possession penalties.

The largest drug abuse problems for incarcerated women in Oklahoma are by far marijuana and alcohol use. Of these women, 41.2 percent reported using THC several times a week or daily, 35.5 percent of women reported using alcohol daily or several times a week, 34.5 percent reported using Methamphetamine daily or several times a week, and 18.9 percent reported using crack several times a week or daily.<sup>126</sup> Simple possession of any amount of marijuana gives an offender exposure up to one year,<sup>127</sup> which is on the higher end of the sample states, since some impose just a fine for possession.<sup>128</sup> Where Oklahoma differs from other states, however, is that a second offense involving any amount of marijuana is automatically a two-year minimum and a ten-year maximum.<sup>129</sup>

---

120. FISCAL YEAR 2011 ANNUAL REPORT, *supra* note 9, at 25.

121. OKLA. STAT. ANN. tit. 63, § 2-401 (West. 2012).

122. *Facts at a Glance*, *supra* note 50.

123. See MEDA CHESNEY-LIND & LISA PASKO, *THE FEMALE OFFENDER: GIRLS, WOMEN AND CRIME* 105 (2nd ed. 2004).

124. FISCAL YEAR 2011 ANNUAL REPORT, *supra* note 9, at 12.

125. Compare *id.* (showing the percentage of women), with *Facts at a Glance*, *supra* note 51 (showing the percentage of the entire prison population).

126. Sharp & Pain, *supra* note 43, at 7.

127. OKLA. STAT. ANN. tit. 63 § 2-402(B)(2)II (West 2012).

128. See App. 1.

129. Uniform Controlled Dangerous Substances Act of 1971 §63, 63 OKLA. STAT. §2-402 (2012).

Unlike other states, Oklahoma does not break down punishments for distribution or possession by the quantity of drugs found by police.<sup>130</sup> If Oklahoma made its system more flexible by decreasing the minimum sentence for small amounts of drugs, Oklahoma should see a drop in its incarceration rate for both men and women. Since women still possess and deal lower quantities of drugs, however, the rate of incarcerated women should drop more sharply than the men.

The Oklahoma Academy suggested such a solution in their 2008 recommendations for Oklahoma's criminal justice system.<sup>131</sup> In 1998, Oklahoma considered putting a sentencing matrix<sup>132</sup> into place along with an 85 percent rule,<sup>133</sup> but ended up adopting the 85 percent rule without the sentencing matrix.<sup>134</sup> According to the Oklahoma Academy, this is like "nitro without glycerine; peanut butter without jelly, and ham without eggs. It just doesn't work as well."<sup>135</sup>

Another reason for the drastic increase of women as compared to men in the prison system could be due to the way that violent crimes (murder, robbery, and aggravated assault) that men are more likely to commit are treated as compared to nonviolent drug crimes. When looking at the Oklahoma statute, it is striking that Oklahoma gives similar exposure to those accused of first-degree rape (five years to death penalty)<sup>136</sup> as to those caught distributing cocaine for the first time (five years to life).<sup>137</sup> The harshest minimum punishment that sexual assault crimes carry is half as much as the second time caught distributing drugs (i.e. a minimum of ten years).<sup>138</sup> Thus, the second nonviolent offense carries twice as heavy a minimum sentence as the most violent of sexual assaults. Since women are more likely to commit drug crimes than violent crimes, they receive as harsh or harsher incarceration sentences than men who commit violent crimes. This may contribute to Oklahoma's first place ranking in the incarceration rate of women while being fifth for men.

In order to collect a sample to see if Oklahoma is odd in its treatment of drug crimes versus sexual assault, five states' statutes with the highest incarceration rates of women were compared against the five states' statutes with the lowest rate of incarcerated women.<sup>139</sup> Wisconsin was also included as

---

130. See App. 1.

131. *Findings & Recommendations on Oklahoma Criminal Justice*, THE OKLA. ACAD. 5 (2009), [http://www.okacademy.org/PDFs/08Final\\_Findings.pdf](http://www.okacademy.org/PDFs/08Final_Findings.pdf).

132. Breaking down punishments by the amount of drugs involved in the offense is referred to as a sentencing matrix.

133. OKLA. STAT. ANN. tit. 21 § 12.1, n. 1 (West 2012).

134. *Findings & Recommendations on Oklahoma Criminal Justice*, *supra* note 130, at 5.

135. *Id.*

136. tit. 21, § 1115. However, the U.S. Supreme Court has ruled that the death penalty was unconstitutional as a penalty for rape. *Coker v. Georgia*, 433 U.S. 584 (1977).

137. tit. 63, § 2-401.

138. tit. 21, §§ 51.1, 1115.

139. See App. 2 (demonstrating that all of the states with the highest incarceration rates are located in the south while those with the lowest are located in the northeast).

a state with an incarceration rate (40) slightly lower than the average of 67.<sup>140</sup> The sale of cocaine was chosen as the drug crime to which sexual assault is compared to, because its national status as a drug of choice, and because it is considered “worse” than marijuana, but “better” than heroin. In the states with sentencing matrixes, the punishment associated with the highest amount of drugs was chosen to compare to the others. The results are shown in table form in Appendix 2 and graphically in Appendix 3.

As shown in Appendix 3, other states have different discrepancies between how they punish drug versus violent crimes.<sup>141</sup> While not having as much exposure for sexual assault (only up to 60 years instead of the death penalty), the Wisconsin statute has a lower exposure (up to 40 years) for the first distribution of drugs, even at the highest amount level.<sup>142</sup> The states with the five lowest female incarceration rates, in order of lowest to highest incarceration rate, punish rape as follows: in Massachusetts up to a life sentence<sup>143</sup> (bringing 28 grams into the state,<sup>144</sup> up to 25 years<sup>145</sup>), in Rhode Island 10 years to life<sup>146</sup> (selling more than one kilogram,<sup>147</sup> 20 years to life<sup>148</sup>), in Maine up to 30 years<sup>149</sup> (selling any amount, up to 10 years<sup>150</sup>), in New York up to 25 years<sup>151</sup> (selling more than 57 grams, 15 to 25 years<sup>152</sup>), and in New Hampshire 10 to 20 years<sup>153</sup> (selling more than 142 grams, up to 30 years<sup>154</sup>). The other four states with the highest female incarceration rates, in order of lowest to highest incarceration rate, punish rape as follows: in Idaho one year to life,<sup>155</sup> in Arizona five and a quarter to fourteen years,<sup>156</sup> in Louisiana up to twenty-five years.<sup>157</sup>

---

Incarceration rates for the 11 states listed in Appendix 2 are based on data gathered by the U.S. Department of Justice’s Bureau of Justice Statistics. *See* Guerino et al., *supra* note 10, app at 22.

140. *See supra* note 10, app at 24.

141. *See* App. 3.

142. WIS. STAT. §§ 940.225, 961.41 (2009-10). In Wisconsin, the maximum penalty for a person found guilty of first-time distribution of drugs at the highest amount level is a Class C felony. WIS. STAT. § 961.40 (2009-10). Under Wisconsin law, a person convicted of a Class C felony may be imprisoned for up to 40 years. WIS. STAT. § 939.50(3)(c) (2009-10).

143. MD. CODE ANN. § 3-303(d) (LexisNexis 2012).

144. *Id.* § 5-614(a)(1)(ii).

145. *Id.* § 5-614(a)(2).

146. R.I. GEN. LAWS § 11-37-3 (2011).

147. *Id.* § 21-28-4.01.2(a)(2)(ii).

148. *Id.* § 21-28-4.01.

149. ME. REV. STAT. ANN. tit. 17-A, §§ 253, 1252 (2005).

150. *Id.* §§ 1103, 1252.

151. N.Y. PENAL LAW §§ 70.00(2)(b), 130.35 (McKinney 2009).

152. *Id.* §§ 70.00(2)(a)(i); *see* § 220.43.

153. N.H. REV. STAT. ANN. § 632-A:10-a (2007).

154. *See id.* § 318-B:26(I)(a)(1)(B)

155. IDAHO CODE ANN. § 18-6104 (2004).

156. ARIZ. REV. STAT. ANN. § 13-1406 (2009).

157. LA. REV. STAT. ANN. § 14:43 (2012).

Unfortunately, there does not seem to be any correlation between the female incarceration rate and the way the state punishes rape as opposed to distribution of cocaine. State handling of these crimes was a proxy of how a state treats violent versus non-violent crime. What can be taken from Appendix 3 is that the states with the highest female incarceration rates all give a great deal of discretion to the sentencing entity with the exception of Arizona. None of the states with the highest female incarceration rates have any statutory controls based on how much cocaine is sold, while most of the lower states do. Three of the five states with the highest incarceration rates can sentence a person up to life in prison for a first conviction of cocaine distribution. In addition, distribution does not only mean the sale of cocaine, but includes all exchanges and sharing.<sup>158</sup> The only state with a low incarceration rate of women that allows a possible life sentence is Rhode Island, but this state reserves the punishment for those caught distributing more than a kilogram of cocaine.<sup>159</sup> The fact that Rhode Island's female incarceration rate remains low is consistent with the observation that while women are caught selling drugs at an equal rate as men, they usually deal lower quantities.

Besides having a state government that may be hypersensitive to public fears about crime and harsh on nonviolent crimes, Oklahoma has a long history of underfunding alternatives to incarceration as well as services like welfare programs that would decrease the need for incarceration. Oklahoman women have a greater need for these services too, as 62.3 percent reported reliance on social assistance at the time of their arrest, 67 percent of incarcerated women have a moderate to high need for substance abuse treatment, and 69 percent (69 percent previously treated or currently exhibiting as opposed to 48 percent of men<sup>160</sup>) have been previously treated for mental health issues.<sup>161</sup> Oklahoma's 1996 expenditures on social services (\$16.04 per capita) ranked it thirty-eighth in the nation with the national average being \$23.52 per capita.<sup>162</sup> If Oklahoma brought its expenditures up to the national average, the study would expect that the female incarceration rate would decrease by 4 per 100,000.<sup>163</sup> Oklahoma ranked twenty-seventh in 1997 for expenditures for mental health and substance abuse services (\$4.89 per capita).<sup>164</sup> If it brought its expenditures up to \$6.39 per capita (California's rate of expenditure), the female incarceration rate could be expected to drop by 12.5 per 100,000.<sup>165</sup> Thus, much of the money that Oklahoma puts into the prison systems could be better used by funding programs to prevent the need for incarceration.<sup>166</sup>

---

158. *United States v. Washington*, 41 F.3d 917, 919 (4th Cir. 1994).

159. R.I. GEN. LAWS § 21-28-4.01.2(b).

160. *Facts: Mentally Ill Offenders*, *supra* note 41.

161. FISCAL YEAR 2011 ANNUAL REPORT, *supra* 9, at 15-17.

162. Salehezadeh et al., *supra* note 113, at slide 19.

163. *Id.*

164. *Id.* at slide 21.

165. *Id.*

166. *Id.* at 19, 21

Giving more money to programs, however, is arguably not enough. Lowering the incarceration rate by a total of 16.5 would still leave Oklahoma with the highest incarceration rate, as Idaho is second with an incarceration rate of 104.<sup>167</sup> Also, a change in public policy would arguably do more. If Oklahomans stopped thinking of incarcerated women as just “mean women” and responded to reason instead of fear and emotion, not only would money then be spent on alternatives to incarceration and prevention, but the reform needed within the programs would be easier to achieve as well.

Oklahoma must also learn to recognize the very real economic and human consequences of incarceration. Whenever the state talks about how much the state is spending, the public always hears about education and healthcare, but the fact is that the Department of Corrections is the second largest budgetary expense in Oklahoma,<sup>168</sup> despite the fact that Oklahoma spends the least amount per person incarcerated of any state in the United States.<sup>169</sup> Yet, providing treatment to the individuals who need it would cost less than incarceration and significantly reduce the human cost not just to the female offender, but to her children as well.<sup>170</sup> Children have more problems with mental health, substance abuse, and school after their mothers are incarcerated.<sup>171</sup> This continues the cycle of trouble with the law, which really hit home for one judge when he started sentencing the third generation of the same families.<sup>172</sup> Oklahoma needs to re-weigh the need to punish offenders against the economic and human costs of punishment.

## VI. SOLUTIONS

Possible workable solutions are well researched. The difficulty lies in finding what combination of solutions will work best in decreasing the incarceration rate of women in the most cost effective way, such that it is palatable to legislatures in conservative states that are economically strained. Some solutions include funding more social welfare and substance abuse programs as well as being more proactive with drug crimes in prevention measures instead of contributing to the very high incarceration rate in the state.

Drug courts are one way of addressing the female incarceration rate. From 2002 to 2005, while women only represented about 10 percent of the incarcerated population, they represented almost 32 percent of all those

---

167. See Guerino et al., *supra* note 10, app at 22.

168. James Drummond, *Dreaming of Solutions I Hope to Live to See*, THE OKLA. ACAD. 31, 32 (2008), <http://www.okacademy.org/PDFs/2008-research.pdf>.

169. Oklahoma Academy Research Committee, *This Research Says: “Let’s Stay Tough But Get Smarter”*, THE OKLA. ACAD. 11, 11 (2008), <http://www.okacademy.org/PDFs/2008-research.pdf>.

170. See Sharp & Pain, *supra* note 43, at 8.

171. *Id.* at 10.

172. Lou Kohlman, *A Conversation With the Judge: Edward Cunningham, District Judge, Canadian County*, THE OKLA. ACAD. 28, 29 (2008), <http://www.okacademy.org/PDFs/2008-research.pdf>.

admitted to drug court.<sup>173</sup> Because graduates of drug court were 63 percent less likely than successful standard probation offenders, the savings over four years to the Oklahoma Department of Corrections were estimated to be in excess of \$87,123,275.<sup>174</sup> Oklahoma saved an additional \$3.25 million because thirteen infants were born drug free.<sup>175</sup>

If these savings were not enough, drug court also had an extremely positive impact on the ability of graduates to become more self-sufficient. The average monthly income of women entering drug court is only \$488.<sup>176</sup> The average monthly income of the women at graduation doubles, while the income of men increases by half.<sup>177</sup> However, women graduates of drug court make the same amount as men when they enter drug court, which is around \$1000 a month.<sup>178</sup> This highlights just how much lower a woman's earning potential is than her male counterpart's.

Expanding the reach of the drug court would do much for the incarceration rate of women, taking into account the needs of the whole person. Expansion is needed because of the women released during 2011, 915 had a need for substance abuse treatment, but only 31 percent of them completed treatment prior to release.<sup>179</sup> Treatment is key to lower rates of recidivism because only 23.5 percent of drug court graduates reoffend as compared to 38.2 percent of successful standard probation offenders and 54.3 percent of released inmates.<sup>180</sup> Thus, the infrastructure already in place with the Drug Court program should be expanded.

Despite all of the good that drug courts have done for Oklahoma, district attorneys (DAs) in some counties will not refer offenders to drug court because they do not want to appear "soft on crime."<sup>181</sup> Therefore, a necessary step to expand use of drug courts would be to take discretion of whether or not to refer to drug court away from the DAs. Instead, perhaps giving the discretion to the defendant's lawyer or making referral mandatory would be a better option, as long as the defendant meets certain criteria. Thus, taking discretion away from the DAs about whether to refer to Drug Court would create an influx of possible Drug Court participants.

Another step that Oklahoma needs to take includes revisiting how it treats violent versus nonviolent crime. Six percent of all men and women serving life

---

173. PERFORMANCE AND OUTCOME REPORT ON DRUG COURTS FOR FY'02 – FY'05, OKLA. DEP'T OF MENTAL HEALTH AND SUBSTANCE ABUSE SERV. iv (2006), available at <http://www.odmhsas.org/eda/drugcourt/Drug%20Court%20Report/Final%20Drug%20Court%20Report%20FY2005%20.pdf>.

174. *Id.* at v.

175. *Id.*

176. *Id.* at 15.

177. *Id.*

178. *Id.*

179. FISCAL YEAR 2011 ANNUAL REPORT, *supra* 9, at 26.

180. See PERFORMANCE AND OUTCOME REPORT ON DRUG COURTS FOR FY'02 – FY'05, *supra* note 173, at 20.

181. See Kohlman, *supra* note 172, at 29.

without parole sentences are serving for nonviolent crimes.<sup>182</sup> Unless Oklahoma really has forty-three<sup>183</sup> big time pimps and drug dealers, this number seems far too large. That both a person's first offense for selling cocaine and first-degree sexual assault carry five-year minimum sentences speaks loudly of Oklahoma's mislaid priorities. This could be modified by introducing a sentencing matrix into Oklahoma's statute so that people possessing or selling small amounts of drugs are not disproportionately punished.

In addition, introducing a sentencing matrix would prevent jury confusion as to how much a person would actually serve of their sentence. As we saw in the example in the introduction, the jury in that case sentenced the defendant to fifty years because they thought she was going to serve a fraction of that time, probably with a lot of time on parole. Instead of giving juries (and judges) such a huge expansion of time with which to work, a sentencing matrix would give them a more coherent structure with which to work. This would lead to more consistent sentencing for offenses involving different amounts of controlled substances. Also, Oklahoma breaks down most violent crimes by how bad the crime is (i.e. first, second, and third degree sexual assault) and gives different punishments accordingly. Why not for drug crimes? Thus, introducing matrix sentencing into the Oklahoma statute would have extremely positive effects, including reducing jury confusion and consistent sentencing.

Therefore, there are many workable solutions that Oklahoma can implement with ease. First, Oklahoma can make the decision to send an offender directly to drug court without waiting for DA referrals in order to ensure expansion of the program. Second, the state can then build off of existing infrastructure that not only provides much needed treatment, but also provides education, and a respective increase in earning power and independence. Third, the state can implement a sentencing matrix into the Oklahoma statutes in order to clarify sentencing, which in turn leads to consistent sentencing that does not disproportionately punish nonviolent offenders.

#### CONCLUSION

The Oklahoma Department of Corrections annual report states:

The 33 states that provided specific spending data reported spending as much as 22 times more per day to manage offenders in prisons than to supervise offenders in the community. The reported average offender in prison cost was \$79 per day (\$29,000 annual). Whereas, the average cost of managing an offender in the community ranged

---

182. ANNUAL REPORT 2011, *supra* note 53, at 22.

183. Forty-Three is about 6% of those serving life without parole sentences in Oklahoma.

2012]

*INCARCERATED WOMEN IN OKLAHOMA*

301

from \$3.42 per day for probationers to \$7.47 per day for parolees (about \$1,250 to \$2,750 annually).<sup>184</sup>

In a state with as many financial troubles as Oklahoma, it is hard to comprehend why the Oklahoma legislature does not understand, or perhaps does not believe, that they can get elected on the platform that the cost of prevention and alternatives to incarceration are far less taxing on Oklahoma's economy both fiscally and societally. Thus, solutions like increasing funding to mental health programs and statutorily treating nonviolent crimes less harshly could have a positive impact on both incarceration and the economy. Oklahoma should not allow the old façade of being tough on crime stand in the way of necessary change. If solutions fall on deaf ears in the legislature, change will be hard and Oklahoma will continue to be number one in this unsavory category and pay an ever-increasing economic and human cost.

---

184. ANNUAL REPORT 2010, OKLA. DEP'T OF CORRECTIONS 33 (2010), *available at* <http://www.doc.state.ok.us/newsroom/annuals/2010/annualreport2010.pdf>.