UPDATED MAY 2018

UNLOCKING MEASURE 57

Oregon Justice Resource Center
Advocate. Educate. Engage.

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ABOUT

OREGON JUSTICE RESOURCE CENTER

OJRC is a Portland, Oregon, 501(c)3 nonprofit founded in 2011. We work to promote civil rights and improve legal representation for communities that have often been underserved in the past: people living in poverty and people of color among them. Our clients are currently and formerly incarcerated Oregonians. We work in partnership with other, like-minded organizations to maximize our reach to serve underrepresented populations, train public interest lawyers, and educate our community on civil rights and civil liberties concerns. We are a public interest law firm that uses integrative advocacy to achieve our goals. This strategy includes focused direct legal services, public awareness campaigns, strategic partnerships, and coordinating our legal and advocacy areas to positively impact outcomes in favor of criminal justice reforms.

WOMEN'S JUSTICE PROJECT

The Women's Justice Project is a program of OJRC. We created the Project as the first and only program in Oregon to exclusively address the needs of women who are intersecting with the criminal justice system. Our goals are to ensure the criminal justice system treats women fairly, protects their health and safety, and makes it possible for them to successfully rejoin their communities when they are released. We do this through integrative advocacy: combining litigation, legislative and other reforms, communications initiatives, and partnerships with organizations such as Red Lodge Transition Services.

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“Throughout the 1990s and the first half of the 2000s, Oregon continued to have one of the highest property crime rates in the country. Oregon’s property crime rate began dropping precipitously in 2005. From 2005 to 2010, Oregon experienced the largest property crime rate drop of any state.”

Oregon Criminal Justice Commission, 2011 Briefing Paper: *Measure 57 Implementation and Impact*

INTRODUCTION

Oregon is facing the unfortunate results of having overlooked its justice-involved women for too long during the era of mass incarceration. Over the past twenty years, the incarceration rate of women in Oregon has tripled,[1] despite the state's crime rate being at 30-year lows[2] and the arrest rate for women having decreased in the last two decades by 36-40%.[3]

In 2016, Oregon's only women's prison, Coffee Creek Correctional Facility (CCCF), was struggling to operate safely under the pressure of housing more than 1300 women.[4] Its built capacity, or the number for which it is truly intended, is 1253 women, and its threshold capacity using emergency beds is 1280.[5] Legislators grappled with the decision to open a second women's prison, with estimated costs of approximately 18 million dollars for the first biennium.[6] This proposed expenditure came at a time when the state faced a 1.7 billion dollar budget shortfall.[7]

These challenging circumstances created an opportunity for state legislators to take a deep look at the incarceration of women in Oregon and pass real criminal justice reform.
During the 2017 legislative session, the overcrowding at CCCF was greatly considered by the legislature.[8] Unfortunately, the legislature focused only on reducing the number of occupied prison beds enough to avoid the cost of operating a second women's prison, instead of engaging in a critical examination of sentencing laws that disproportionately impact women and the underlying drivers of women's incarceration. The results were modest adjustments to existing programs and laws, including Ballot Measure 57 (M57).

To enact real reform, the legislature should repeal all changes that M57 made to the repeat property offender statute, ORS 137.717. M57 was first enacted on January 1, 2009, and, in part, created mandatory minimum prison sentences for nonviolent property offenses, the type of crime for which nearly half the women at CCCF have been convicted. In 2016, 47% of prison intakes at CCCF were for property crimes. Three of the four most common offenses, comprising nearly 31% of all women intakes were theft in the first degree, identity theft, and unauthorized use of a vehicle.[9]

M57 amended ORS 137.717 to increase presumptive sentences, removing nearly all judicial discretion to reduce those presumptive sentences, and widening the net for defendants who could be sentenced under ORS 137.717.

PROPERTY CRIME IN CONTEXT

Property crimes are often driven by underlying social and public health issues such as poverty, abuse, trauma, and drug addiction. The latter is a continual behavior that occurs despite problematic consequences. Some drugs are sold on the black market, an unregulated and cash-based market. Given this context, it is unsurprising that the "repeat property offender" is far more common than the one-time property offender.

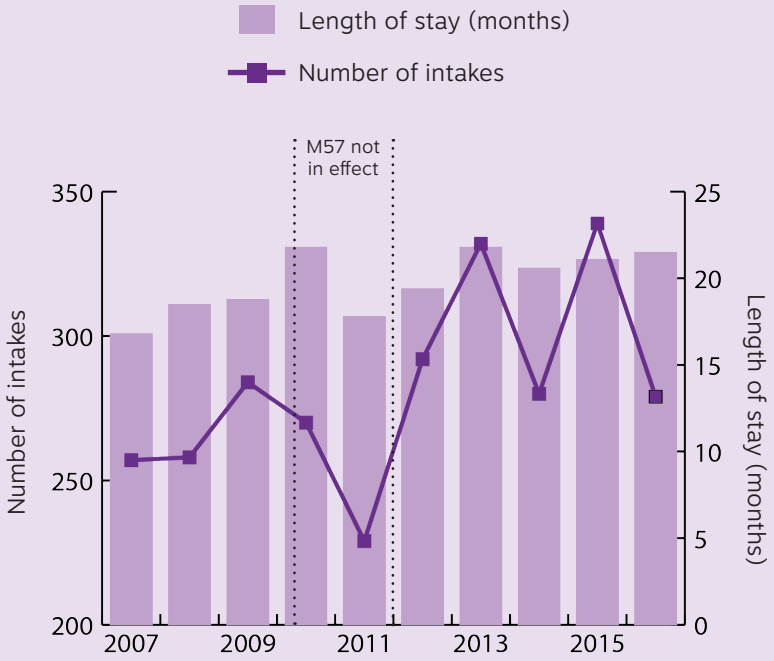
Mandatory minimum sentences and more aggressive charging practices have greatly contributed to increasing incarceration rates across the country.[10] Such sentences remove judicial discretion and shift more power to prosecutors, who already hold significant sway in the criminal justice system. Prosecutors have nearly unrestricted and opaque discretion to charge crimes in ways that trigger overly punitive and disproportionate sentences. Mandatory minimum sentences do not allow for consideration of the specific circumstances in which the crimes are committed and therefore do not allow for sentences tailored to those circumstances which will justly hold a defendant accountable and further public safety.

According to the Oregon Criminal Justice Commission, prison intakes for women were significantly fewer during the years prior to the enactment of M57 and during the brief window of time when the measure was not in effect (February 15, 2010 to January 1, 2012) than when M57 has been in effect.[11]

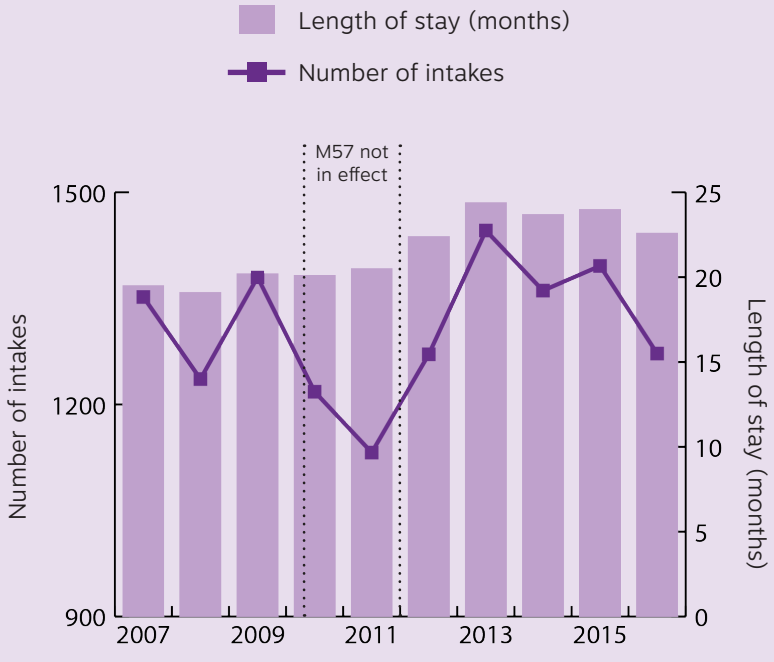
In 2017, the Commission estimated that if M57, as related to ORS 137.717, was no longer in effect on July 1, 2017, 70 prison beds for women would be saved by July 2019 and 130 beds by July 2021.[12]

Despite the significant impact of ORS 137.717 under M57, how the measure operates and its criminal law context are not well understood by most Oregonians. This report "unlocks" M57 by first briefly providing the social context in which property crimes are often committed. It then explains the patchwork legal context to shed light on why M57's changes to ORS 137.717 have such an adverse and unjust effect. Finally, this report reveals reforms needed to correct the confusing criminal policies, more fairly address property crimes, and reverse the state's reliance on incarceration.

PRISON INTAKES FOR PROPERTY CRIMES IN OREGON, 2007-2016[11]



FEMALE PRISON INTAKES FOR PROPERTY CRIME IN OREGON



MALE PRISON INTAKES FOR PROPERTY CRIME IN OREGON

THE ROLE OF SUBSTANCE USE IN PROPERTY CRIME DEMANDS A DIFFERENT APPROACH TO PUNISHMENT

SARAH BIERI

CHALLENGING THE PUNITIVE APPROACH TO ADDICTION

Americans increasingly regard drug addiction as a public health problem requiring compassion, treatment, and support, rather than as a moral failing requiring punishment.[13] Moreover, punishment does not work because addiction, by its very nature, is persistent in the face of negative consequences.[14] The enduring preference for punishment seen in the criminal justice system has been influenced, in part,[15] by parallel ideas from the drug treatment realm.[16] Since the early twentieth century, the dominant approach to treatment has relied on the idea that "hitting rock bottom" is a precedent for recovery.[17] This premise assumes that an addicted person will only stop if she suffers devastating consequences.[18] In this context, it is "not surprising that the criminal justice system is seen as an appropriate tool to fight addiction."[19] The problem is that the "rock bottom" concept is not supported by scientific evidence.[20] Indeed, the punitive approach to addiction is a proven failure.[21] Newer theories of addiction argue instead for an approach emphasizing compassion and respect, harm-reduction, and retaining ties to one's community.[22]

"Since the early twentieth century, the dominant approach to treatment has relied on the idea that 'hitting rock bottom' is a precedent for recovery. This premise assumes that an addicted person will only stop if she suffers devastating consequences. The problem is that the 'rock bottom' concept is not supported by scientific evidence."

ADDICTION AND PROPERTY CRIME

Substance use and addiction are strongly correlated with crime in general.[23] Property crime has a particularly close connection to drug use,[24] because addiction fuels the need for cash to purchase drugs.[25] This fact is important to understanding why a "repeat property offender" is more common than a one-time property offender,[26] and why property offenders have higher recidivism rates than other crime types.[27] In a 2013 federal study of drug use among arrestees, individuals arrested for property crime were more likely to test positive for drugs than those arrested for violent or other non-drug crimes.[28] In 2010, a data analysis by Columbia University found that 83% of inmates convicted of property crimes had involvement with substance abuse.[29]

ADDICTION IMPAIRS DECISION-MAKING ABILITY

It is generally accepted that a person who is under the direct influence of drugs or alcohol has a reduced ability to evaluate the risks of her actions.[30] Intoxication

is therefore one sense in which crime can be drug-related. But neuroscientific research shows that long-term drug use can also affect decision-making by causing changes in brain function that "undermine voluntary control."[31] These changes make it very difficult to resist continued drug use and addiction-driven behaviors,[32] and cause negative consequences to have less influence over behavior.[33] When a person is substance-dependent, the brain's reward-seeking and habit-forming structures have learned to overvalue the addictive substance and undervalue alternative actions.[34] The cerebral cortex, which facilitates rational decision-making by inhibiting impulsiveness, becomes "hobbled."[35] Over time, drug abuse can further damage the cerebral cortex.[36] These changes in brain function can result in a "nearly automatic" maladaptive behavior pattern despite negative consequences.[37] This is not to say that addicted people have no free will; but rather have a "skew[ed] ability to choose well."[38] This is important to understanding why the threat of punishment has little effect on addiction-driven behaviors like property crime.

WHY MANDATORY MINIMUM SENTENCING IS MISGUIDED

The overwhelming consensus among experts is that the harsh policies of the War on Drugs have failed, and a shift to a public-health framework is needed.[39] Research suggests that, as a general matter, the deterrent effect of mandatory minimum sentencing is "modest at best."[40] The deterrent effect of punishment on drug crime is even more dubious.[41] Given this context, it follows that long sentences of incarceration for addiction-driven behaviors such as property crime are not an effective solution.

Moreover, long terms of incarceration can cause a rift between the individual and the community that can contribute to recidivism.[42] By contrast, a greater emphasis on treatment, education, and aftercare services can reduce recidivism by breaking the cycle of addiction and re-arrest.[43] Our collective goal should be to create policies that promote health and safety. A holistic, compassionate approach incorporating evidence-based treatment, harm-reduction programs, and emphasis on maintaining ties to the community would better serve public safety and public health than punishment, which fails to address the underlying problem.

“If I represent a person with no previous criminal history who is accused of stealing $10,000 from his employer, a prosecutor might charge that defendant with a single, serious felony (and thus guarantee a sentence of probation). A different prosecutor might decide to charge that defendant with ten less serious felonies, and then stack those felonies at sentencing to impose a lengthy prison sentence.”

Brook Reinhard, Executive Director of Lane County Public Defender Services, writing for the *Register-Guard* on January 25th, 2017.

TIMELINE

PRE-1989

INDETERMINATE SENTENCING

Before 1989, Oregon used what is called an "indeterminate" sentencing system in which the sentencing court ordered both minimum and maximum prison terms for a defendant and the parole board later decided the release date.

1989

OREGON ADOPTS SENTENCING GUIDELINES

In 1989, Oregon introduced sentencing guidelines, a major policy shift that mirrored a national trend toward determinate sentencing. Under this new system, the sentencing court would use the 99-block Sentencing Guidelines Grid to order a single prison term. This term can only be reduced as provided by statute, through e.g. credit for time served, "good" time, etc.

The grid is used to find the "presumptive" sentence that must be imposed on a defendant unless "substantial and compelling" reasons exist to do otherwise. The presumptive sentence is defined by combining two rankings, the defendant's "criminal history score" and "crime seriousness."

The criminal history score is "based upon the number of adult felony and Class A misdemeanor convictions and juvenile adjudications[44] in the offender's criminal history at the time the current crime or crimes of conviction is sentenced."[45] To determine the crime seriousness, a ranking is assigned from one to eleven according to the crime of conviction. (There are some crimes that have sub-classifications that depend upon specific facts.)

Unless otherwise specified by law, courts have discretion to depart from the presumptive sentence, but must find "substantial and compelling reasons justifying a deviation."[46] That determination is made on the basis of "aggravating or mitigating factors."[47] A departure that increases the presumptive sentence is known as an upward departure. A departure that reduces the presumptive sentence is known as a downward departure.

Crime Seriousness	A
11	225-269
10	121-130
9	66-72
8	41-45
7	31-36
6	25-30
5	15-16
4	10-11
3	120 60
2	90 30
1	90 30

Oregon's Sentencing Guidelines Grid is used to determine how much time a person must serve.

1989

THE LEGISLATURE AMENDS THE CRIMINAL HISTORY RULE

Determining which convictions are considered part of a defendant's criminal history in order to define where they fall on the grid is an important part of sentencing. OAR 213-004-0006(2) is the administrative rule for making this determination. In 1989, the legislature amended this rule to read as follows (the deleted language is ~~struck-through~~ and the added language is underlined):

"(2) An offender's criminal history is based upon the number of adult felony and Class A misdemeanor convictions and juvenile adjudications in the offender's criminal history at the time the current crime or crimes of conviction ~~was committed~~ is sentenced."[48]

This amendment creates a different reference point for determining which convictions are considered part of a defendant's prior criminal history.

By Shaundd (Own work) [CC BY-SA 3.0 (http://creativecommons.org/licenses/by-sa/3.0)], via Wikimedia Commons

In 1989, the Oregon Legislature made two changes with lasting consequences to the charging and sentencing of defendants. The reference point for deciding which convictions are considered part of someone's criminal history was changed and "offenses [from] separate criminal episodes are allowed to be joined in the same indictment" if they are similar or based on "a common scheme."

THE LEGISLATURE EXPANDS JOINDER OF OFFENSES

In 1989, the legislature amended ORS 132.560 to "permit offenses that [arise] out of separate criminal episodes to be joined in the same indictment"[49] if the offenses are of the same or similar character, based on the same act or transaction, or based on a common scheme or plan. Consequently, "offenses sentenced in a single criminal proceeding [can] arise out of separate criminal episodes."[50]

1993

STATE V. BUCHOLZ

In the case of *State v. Bucholz*, 317 Or 309, 855 P. 2d 1100 (1993), the Oregon Supreme Court interpreted the criminal history rule, OAR 213-004-0006(2). In *Bucholz*, the defendant committed the crime of theft in the first degree, a Class C felony, and a month later committed unlawful delivery of methamphetamine to a minor, a Class A felony.[51] The defendant was sentenced for both crimes in the same sentencing proceeding.

"The sentencing judge imposed a sentence of probation, including 90 'custody units', on the theft charge. The judge then imposed a period of 23 months on the charge

of delivering drugs to a minor and also imposed 36 months of post-prison supervision. The theft conviction was treated as a prior conviction for the purpose of establishing the criminal history score for the defendant on the delivery of drugs charge."[52]

The Supreme Court stated that the criminal history rule "permits" the sentencing court to use the conviction of the theft in the first degree as a prior conviction to increase the criminal history score in sentencing the defendant for the unlawful delivery of methamphetamine to a minor.[53] The use of prior convictions from different criminal episodes, but sentenced in the same proceding, to increase the criminal history score for the sentencing of subsequent convictions is known as "reconstituting" criminal history.[54]

The permissive language used by the Oregon Supreme Court in *Bucholz* gave the sentencing court discretion in determining whether to reconstitute criminal history.

1996

THE REPEAT PROPERTY OFFENDER STATUTE, ORS 137.717

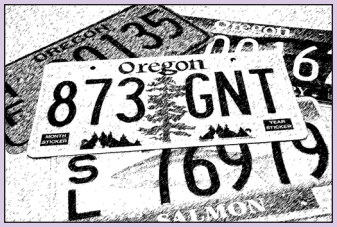
Oregon enacted ORS 137.717, also known as the "repeat property offender" statute.[55] It created higher presumptive sentences for certain property crimes when the defendant had prior property crime convictions.

Under this statute, as enacted in 1996, people who were convicted of burglary in the first degree faced a presumptive sentence of 19 months if they had:

- A previous conviction for burglary in the first degree, robbery in the second degree, or robbery in the first degree; or
- Four previous convictions for property crimes listed in subsection 2 of the statute.

If people were convicted of unauthorized use of a vehicle, possession of a stolen vehicle, or trafficking in stolen vehicles, they faced a presumptive sentence of 13 months if they had:

- A previous conviction for either unauthorized use of a vehicle, robbery in the second degree, robbery in the first degree, possession of a stolen vehicle, or trafficking in stolen vehicles; or
- Four previous convictions for property crimes listed in subsection 2 of the statute.



Crimes such as auto theft attract higher presumptive sentences for Oregon defendants who have prior property crime convictions.

If people were convicted of theft in the first degree, aggravated theft in the first degree, burglary in the second degree, or criminal mischief in the first degree, they faced a presumptive sentence of 13 months if they had:

- A previous conviction for unauthorized use of a vehicle, burglary in the first degree, robbery in the second degree, robbery in the first degree, possession of a stolen vehicle, or trafficking in stolen vehicles; or
- Four previous convictions for property crimes listed in subsection 2 of the statute.

The court could decide not to impose the presumptive sentence if it found substantial and compelling reasons justifying a downward departure.

1999

THE LEGISLATURE CREATES THE CRIME OF IDENTITY THEFT

Identity theft is the use of another person's identification with the intent to defraud.

In 1999, Oregon created the crime of identity theft, ORS 165.800, a Class C felony. A person commits the crime of identity theft "if the person, with the intent to defraud, obtains, possesses, transfers, creates, utters or converts to the person's own use the personal identification of another person."

This statute has been criticized for vagueness, which allows this felony crime to be widely charged. Not only can the victim be real or "imaginary," but the statute does not require that anyone suffer financial harm or loss. By contrast, the crime classification for theft can depend on the value of the property taken. For example, if the value of the property is less than $100, the crime may be considered theft in the third degree and a Class C misdemeanor.[56] If the value of the property is $1000 or more, the crime may be considered theft in the first degree and a Class C felony.[57]

REPEAT PROPERTY OFFENDER STATUTE/ORS 137.717

In 1999, the legislature added more property crimes to the repeat property offender statute, ORS 137.717: identity theft, fraudulent use of a credit card, computer crime, forgery in the first and second degrees, and possession of a forged instrument in the first and second degrees. This increased the number of people who could face higher presumptive sentences.

2007

THE CRIME OF AGGRAVATED IDENTITY THEFT IS CREATED

The crime of aggravated identity theft, ORS 165.803, a Class B felony, was created by the legislature in 2007. A person commits the crime of aggravated identity theft if they commit identity theft and:

- There are ten or more separate incidents within a 180-day period;
- They have a previous conviction of aggravated identity theft;
- There is a financial loss of at least $10,000 within a 180-day period; or
- They have ten or more pieces of personal identification from ten or more different people.

This added an additional felony property crime to Oregon's laws and was also added to ORS 137.717 in 2007.[58]

2008

VOTERS PASS MEASURE 57

In 2008, voters passed Ballot Measure 57 (M57). It was referred to them by legislators as an alternative to Ballot Measure 61 (M61). M61 would have, among other changes, created "36-month minimums for identity theft, first degree burglary, and Class A felony manufacture/delivery" of various controlled substances and "30-month minimums for Class B felony manufacture/delivery of same specified controlled substances."[59] M61 was projected to increase the prison population by thousands[60] and cost the state millions of dollars, increasing each year to a cost of $154-247 million in the fourth year of its implementation.[61] M57 was also projected to cost many millions of dollars and increase the prison population, but to a lesser degree, and was considered by criminal justice reform advocates to be the only way to defeat M61.[62]

In November 2008, voters faced a choice between two competing ballot measures, Measures 57 and 61. M57 was introduced in a successful attempt to prevent M61 from passing. M61 was projected to increase Oregon's prison population by thousands at a cost of hundreds of millions of dollars per year.

M57, in part, amended the repeat property offender statute ORS 137.717 to greatly broaden the definition of a repeat property offender, increase the presumptive prison sentences for repeat property offenders, and eliminate nearly all judicial discretion to downward depart from the presumptive prison sentences for substantial and compelling reasons - creating essentially another mandatory minimum sentencing scheme.[63]

More specifically, M57 broadened the definition of repeat property offender by adding to the list of

property offenses that trigger the use of ORS 137.717, including "attempt to commit" property crimes. It decreased the number of prior property convictions needed to qualify for the mandatory minimum sentence from four to two prior convictions, or to one prior conviction if the current crime was committed while the defendant was on supervision or within three years of completing supervision.

M57 also increased presumptive sentences, specifically from 18 to 24 months for aggravated theft in the first degree, burglary in the first degree, robbery in the third degree, identity theft, and aggravated identity theft, and from 13 to 18 months for all other felony property crimes. It then increased the presumptive sentence by two months, up to a maximum of 12 months, for each additional prior property offense not already used to increase the sentence. The sentence can then be doubled for substantial and compelling reasons but may not exceed the maximum term specified in ORS 161.605.[64] [65]

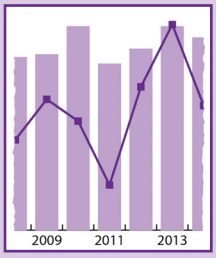
Furthermore, M57 amended ORS 137.717 to eliminate judicial discretion to downward depart from the presumptive sentence for substantial and compelling reasons. Now a judge can only order a lesser sentence if the prosecutor and the defendant agree or if all of the following criteria are met:

- The person is not on supervision for a felony property offense at the time of the new crime;
- The person has not received a downward departure before;
- Harm or loss of the crime is not greater than usual; and
- Considering the nature of the offense and the harm to the victim, a downward departure would increase public safety, enhance the likelihood that the person will be rehabilitated, and not unduly reduce the punishment.

These criteria are very restrictive and difficult to satisfy.

2009 HB 3508 CHANGES IMPLEMENTATION OF M57

Due to the economic recession and the cost of M57, the legislature passed HB 3508 by a two-thirds majority to amend ORS 137.717 to its pre-M57 form for defendants sentenced between February 15, 2010, and January 1, 2012. HB 3508 included a section returning ORS 137.717 to its M57 form for defendants sentenced after January 1, 2012.



Women's prison intakes (the purple line in this chart) dipped sharply in 2011 and rose again once the change to the implementation of M57 ended.

2009

THE OREGON COURT OF APPEALS TURNS PETTY THEFT INTO A FELONY

"Return fraud" is the act of defrauding a retailer by misusing its returns process. It often involves taking items from a store and returning them in order to receive cash or gift cards to the value of the items.

In instances of typical shoplifting, or theft by unlawfully taking items out of a store, the classification of the crime as a misdemeanor or a felony is determined by the value of the items.[66] This is not the case with so-called "return fraud." Return fraud is generally the act of taking an item from a store shelf and "returning" it to the store in order to receive cash or a gift card for the value of the returned item. In 2009, the Oregon Court of Appeals in *State v. Rocha*, 233 Or App 1 (2009), decided that return fraud is "theft by receiving." Per ORS 164.055(1)(c), theft by receiving is theft in the first degree, regardless of value, and a Class C felony.

If an individual shoplifted, by taking an item from the store, less than $100 worth of merchandise, they could face a Class C misdemeanor charge for theft in the third degree, which would not trigger ORS 137.717 or be considered a prior property offense to increase the presumptive sentence required by ORS 137.717. But if an individual committed return fraud for that same amount, they would face a Class C felony charge of theft in the first degree, which would trigger ORS 137.717 and could be used later to further increase the presumptive sentence required in ORS 137.717.

2013

HOUSE BILL 3194 MAKES INEFFECTUAL CHANGES TO ORS 137.717

The state legislature passed House Bill 3194, also known as the Justice Reinvestment Initiative, in 2013. Among a range of moderate sentencing reforms, in an attempt to flat-line prison growth in Oregon, HB 3194 amended ORS 317.717 to reduce the presumptive sentence for robbery in the third degree and identity theft from 24 to 18 months. It should be noted that this change did not reduce the average length of stay in prison for these crimes.[67]

2013

STATE V. SAVASTANO EXPANDS PROSECUTORIAL DISCRETION IN CHARGING

In *State v. Savastano*, the Oregon Supreme Court considered whether prosecutors are required to adhere to a "coherent, systematic policy in making charging decisions," in light of constitutional guarantees of equal application of the law.[68] It noted the Court of Appeal's finding that "the way in which multiple theft transactions are aggregated into a smaller number of criminal charges is of constitutional magnitude because of a defendant's possible burden to defend against 'a multitude of minor charges' and because of the range of possible penalties that could accompany different charging decisions."[69]

Despite this, the Supreme Court determined that the Oregon constitution "does not require consistent adherence to a set of standards or a coherent, systematic policy."[70] In other words, prosecutors may charge defendants as they wish, so long as they can supply "a rational explanation for the differential treatment."[71]

2015

STATE V. CUEVAS ENDS NEARLY ALL JUDICIAL DISCRETION IN REPEAT PROPERTY CASES

In *State v. Cuevas*, the Oregon Supreme Court reviewed its 1993 interpretation of the criminal history rule in *State v. Bucholz*. It determined that the criminal history rule *required* the reconstituting of criminal history - using prior convictions from different criminal episodes, even when sentenced in the same proceeding, to increase a defendant's criminal history score for subsequent convictions.[72] It did not use permissive language as it had in *Bucholz* and thereby ended judicial discretion regarding reconstituting criminal history.

This was a 4-3 decision by the court. The dissent, made up of Justices Walters, Landau, and Brewer, argued for overruling *Bucholz*. Walters, writing for the dissent, argued that the criminal history rule "*permit[s]* a sentencing court to include, as part of a defendant's criminal history, only those convictions that preceded the hearing at which a defendant's 'current crime or crimes' are sentenced."[73]

2017 OREGON LEGISLATURE PASSES HOUSE BILL 3078

In 2017, with the goal of reducing the number of prison beds needed in Oregon, specifically recognizing the overcrowding at CCCF, the Oregon legislature passed House Bill 3078, also called the Safety and Savings Act. As well as other provisions expanding various programs, HB 3078 amended ORS 137.717.

The amendments focused on theft in the first degree and identity theft, the top two crimes for women's prison intakes.[74] Specific to these two convictions in ORS 137.717, HB 3078:

- Reduced the presumptive sentence from 18 months to 13 months;
- Removed robbery in the third degree as a prior property offense that would trigger the presumptive sentence;
- Increased the number of prior property convictions that would trigger the presumptive sentence from two to four;
- Removed the requirement to increase the presumptive sentence by two months for each prior conviction under certain circumstances; and
- Allowed more opportunity to downward depart from the presumptive sentence with the showing of substantial and compelling reasons.

In short, HB 3078 "remove[s]" theft in the first degree and identity theft from M57.[75]

The Oregon Criminal Justice Commission projected this change would save 31 beds in the women's prison and 82 beds in the men's prisons by July 2019.[76]

HB 3078 passed by a simple majority. The provisions amending ORS 137.717 went into effect January 1, 2018.

2017 CHALLENGING HB 3078

On November 15, 2017, Clackamas County D.A. John Foote, joined by Oregon voters Mary Elledge and Debbie Mapes-Stice, filed a civil lawsuit[77] asking the court to declare HB 3078 invalid and unenforceable, or to declare the provisions of HB 3078 relating to ORS 137.717 invalid and unenforceable. The plaintiffs argue that HB 3078 did not comply with Article IV, section 33, of the Oregon Constitution, which states: "Reduction of criminal sentences approved by initiative or referendum

process. Notwithstanding the provisions of section 25 of this Article, a two-thirds vote of all the members elected to each house shall be necessary to pass a bill that reduces a criminal sentence approved by the people under section 1 of this Article."[78]

The plaintiffs argue HB 3078 reduced criminal sentences passed by the people in M57, codified in ORS 137.717, and did not pass by a two-thirds majority vote of the legislature, therefore it is unconstitutional.

In response, the Oregon Department of Justice (ODOJ), among other points, argued that "the sentences modified by HB 3078 were not 'adopted by the people,' and Article IV, section 33 is inapplicable."[79] ODOJ explained that the sentences for repeat property crimes approved by the people in M57 were modified and reduced in 2009 with HB 3508 and passed by a two-thirds majority vote of the legislature. Therefore, "in 2017, when HB 3078 reduced sentences [in ORS 137.717], it was modifying the laws on the books, which was adopted by the legislature, not the people."[80]

2018 JUDGES RULE ON HB 3078

After HB 3078 went into effect on January 1, 2018, Clackamas County D.A. John Foote filed a memorandum in many criminal cases in his county arguing HB 3078 was unconstitutional and that defendants should be sentenced under M57 and not ORS 137.717 as amended by HB 3078.

On February 5, a panel of Clackamas County Circuit Court judges heard oral arguments in the civil and criminal cases on the constitutionality issue. On February 14, they ruled HB 3078 was unconstitutional and defendants should be sentenced under M57.

As of publication, circuit court judges in individual criminal cases in Washington[81], Umatilla[82], and Linn[83] Counties have ruled HB 3078 unconstitutional. While these rulings are limited to the specific criminal cases, they add to the confusion and statewide inconsistency of sentencing under ORS 137.717.

In the 2018 legislative session, to address inconsistency in sentencing defendants under ORS 137.717, the legislature passed a law to fast-track the question of the constitutionality of HB 3078 and its amendments to ORS 137.717 to the Oregon Supreme Court.[84]

SENTENCING PROPERTY CRIMES IN OREGON

WHERE DO WE STAND TODAY?

Oregon has a joinder statute, ORS 132.560, which allows the prosecution of multiple allegations, spanning multiple criminal episodes, in one indictment. This allows for the sentencing of multiple criminal episodes or property crimes in the same proceeding.

Oregon has a criminal history rule that requires considering convictions stemming from separate criminal episodes as prior convictions when sentencing subsequent convictions in the same proceeding. This allows defendants, who are being sentenced for the first time for property crimes, to be sentenced under ORS 137.717 as repeat property offenders.

Oregon has a vague identity theft statute that applies equally to those who cause financial harm and to those who cause no financial harm.

Oregon has an interpretation of a theft statute by the Oregon Court of Appeals which converts petty thefts in the form of "return fraud" into felony thefts.

Oregon has a broad and punitive mandatory minimum sentencing scheme, Measure 57, for defendants who commit non-violent property crimes.

Oregon has an interpretation of the state constitution by the Oregon Supreme Court that allows prosecutors great discretion to charge defendants as they wish, without a "consistent adherence to a set of standards or coherent systematic policy," as long as they can offer "a rational explanation for differential treatment."

Oregon is inconsistently sentencing defendants under ORS 137.717 for property crimes while the constitutionality of amendments made to ORS 137.717 during the 2017 legislative session remains to be decided by the Oregon Supreme Court.

Oregon's criminal laws, used with broad discretion by prosecutors to aggressively charge, result in mandatory minimum sentencing for nonviolent property crimes that applies too widely and is overly punitive. This does little to address root causes of property crimes and, therefore, does little to deter future crimes.

CONCLUSION

The current state of ORS 137.717, the repeat property offender statute, as amended by Ballot Measure 57 (M57) will likely be clarified by the Oregon Supreme Court later this year (2018). A finding by the court of the constitutionality of HB 3078, which "remove[s]" theft in the first degree and identity theft from M57 is projected to help reduce the number of prison beds needed. This is a step in the right direction. However, in light of the existing statutes and case law, and the context in which property crimes are committed as described in this report, HB 3078's amendments to the repeat property offender statute are an incremental change to the system.

Oregon needs real criminal justice reform. We are living in a time when we have more information about the drivers of crime;[85] increasingly available data analysis about crime rates, whom we are arresting, and how we are punishing;[86] more research showing that incarceration is not an effective strategy for reducing crime;[87] and when other states are closing prisons as their crime rates continue to decline.[88] We need to reject the politics of fear and anger, so often pushed by proponents of mandatory minimums, and engage in a complex and thoughtful discussion that embraces research and science about the incarceration of women. We should not simply be asking what minor changes we can make to affect the prison bed projections. Rather, we need to be asking deeper values-based questions about our criminal justice system. What are the circumstances out of which people are committing crimes and how can we create the societal infrastructure to effectively prevent crime? Do our punishments for crime truly advance public safety and social welfare? What are we trying to achieve with our criminal justice system and is it working?

The need to address overcrowding at CCCF and the long-ignored rising incarceration rates of women in Oregon should be embraced as an opportunity for real change. We have learned throughout this era of mass incarceration that simply locking people up is not an effective response to addiction, poverty, and other social and public health problems that frequently drive criminal activity.

For legislators who are serious about reversing the state's incarceration trends and reforming the system to advance the public safety and welfare of Oregon, the solutions are clear:

Lawmakers must act to repeal Measure 57 as applied to ORS 137.717 and directly tackle mandatory minimum sentencing, which is overly broad and overly punitive.

The decision by the Oregon Supreme Court about the constitutionality of HB 3078 will inform the number of votes needed to repeal M57's amendments to ORS 137.717, whether a simple majority or a two-thirds majority is needed. If the legislature is committed to policies based in research and science that further the health and safety of our communities, there

should be overwhelming support for repeal.

In unlocking the impact of M57, this report reviewed the patchwork developments of criminal policies and laws, which result in disjointed, outdated, and unfair sentencing of property crimes.

Review the need for the repeat property offender statute.

In light of current research and science about drivers of property crimes, the legislature should review the repeat property offender statute, ORS 137.717, and consider its repeal.

Fix *State v. Rocha* and return petty theft to a misdemeanor crime.

The legislature should amend ORS 164.055, theft in the first degree, as was proposed in HB 2615 during the 2017 session, so that theft by return fraud is more fairly classified as a felony or misdemeanor by the value of the property.

Amend the identity theft statute, ORS 165.800, to include more clarity.

The legislature should amend the identity theft statute to treat cases differently depending upon the value of harm or loss. It should create degrees for the crime, similar to the crime of theft, that are dependent on the value of the harm or loss and classify them as misdemeanors or felonies accordingly.

Return the criminal history rule to its original draft form.

The current criminal history rule unfairly punishes individuals who are being sentenced and being held accountable for the first time. The legislature should amend the rule to its original draft form so that a defendant's criminal history includes the convictions at the time of the crimes rather than at the time of sentencing of each of the crimes.

Address *State v. Savastano*.

The legislature should mandate that prosecutors create and make public consistent charging practice standards to ensure the fair and consistent treatment of individuals.

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1. For a Class A felony, 20 years
2. For a Class B felony, 10 years
3. For a Class C felony, 5 years
4. For an unclassified felony as provided in the statute defining the crime. [1971 c.743 §74].

Note: prison terms can be sentenced consecutively.

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