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Oklahoma's State Question 780: Criminal Justice Reform and Resistance



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Oklahoma's State Question 780 made possession of any controlled dangerous substance (CDS) a misdemeanor¹ and eliminated all sentencing enhancements based on prior drug possession offenses or location.² SQ 780 also raised the threshold for felony property crimes from \$500 to \$1000.³ SQ 780 is a blueprint for criminal justice reform in conservative states. It also might be a cautionary tale about implementing sweeping changes within a criminal justice system.

I. SQ 780: Reform . . .

SQ 780 was the product of a bipartisan coalition of religious, economic, and political leaders. The most high-profile advocate of the initiative was Kris Steele, a Republican and former Speaker of the Oklahoma House of Representatives. After terming out of office, Steele helped form Oklahomans for Criminal Justice Reform, a coalition of business leaders, law enforcement experts, and advocates across the state.⁴ Under his leadership, the organization led a "Yes on 780 and 781" campaign.

Coalition partners drafted SQ 780 and 781 as a response to Oklahoma's drastic incarceration rates.⁵ Oklahoma has long incarcerated women at the highest rate of any state. Although African Americans comprise only 10 percent of Oklahoma's population, they account for 25.5 percent of inmates in Oklahoma prisons.⁶ A new report released in the summer of 2018 found Oklahoma's incarceration was rate higher than any other state in the United States and any other country in the world.⁷ The campaign for SQ 780 highlighted the need reduce incarceration levels and to curb state spending on jails and prisons.

SQ 780 was strongly opposed by district attorneys and other law enforcement personnel.⁸ Several law enforcement officials claimed that the measure would restrict the pretextual prosecution of dangerous criminals for drug possession offenses,⁹ inhibit their capacity to use "compassionate leverage" to coerce addicted persons into treatment programs,¹⁰ and block their ability to "get [the] attention" of first-time offenders by charging them with felonies.¹¹

Despite law enforcement opposition, SQ 780 passed with over 58 percent of the vote in the November 2016 general election. Republican Governor Mary Fallin called the passage of SQ 780 an "historic vote [that] reflects a fundamental change in the way our state understands and

treats drug addiction, a disease that has destroyed too many of our families."¹² Governor Fallin used the occasion to offer a basic critique of the state's administration of criminal justice:

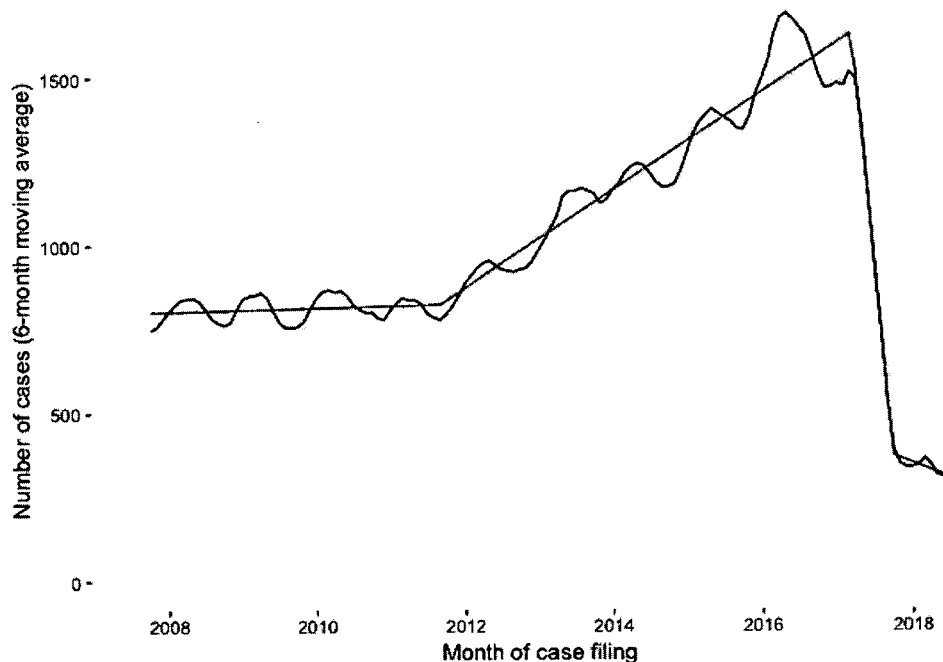
We are creating an epidemic of broken families in Oklahoma by incarcerating mothers and fathers who are struggling with addiction . . . A system that results in the break-up of the family because of addiction is not in keeping with Oklahoma values. A system that puts a young person in front of a judge under the threat of incarceration for a youthful indiscretion risks making that child a lifelong participant in the criminal justice system. And, a state that prioritizes a prison system over its education system puts its future in serious jeopardy. Oklahoma is not that state and we cannot become it. It's time we get smarter on how we confront crime.¹³

Oklahoma law enforcement and legislators did not share the governor's sentiments. Rather, resistance from prosecutors and law enforcement continued well after November 2016. Many district attorneys contended that the voters of Oklahoma did not fully understand the changes that were wrought by SQ 780.¹⁴ Republican legislators introduced Senate Bill 512, which would have amended SQ 780 to make possession of any Schedule I and II drugs (except marijuana) a felony punishable by a fine up to imprisonment of five years and a \$5000 fine.¹⁵ House Bill 1482 would have expressly overruled 780's elimination of sentence enhancements for repeat drug possession offenders and effectively overruled SQ 780 for much of the state by reclassifying possession of CDS within 1000 feet of school, church, or public park as a felony. Both of these bills raised public outcry and died in committee,¹⁶ and at present there is no talk of resurrecting either measure.

Rather, SQ 780 has spurred further efforts at criminal justice reform in Oklahoma. In February 2017, a task force on criminal justice reform commissioned by Governor Fallin produced a report finding that 75 percent of prison admissions were due to non-violent offenses and "over half of those individuals sentenced had one or no prior felony convictions."¹⁷ The report found that Oklahoma uses incarceration more often (and release options far less often) than surrounding states.¹⁸ These findings led to a package of sentencing reforms that reduced sentences for repeat

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Figure 1
Felony Charges for Possession of CDS in Oklahoma District Courts, January–July 2008



Court data show that the number of cases filed with Possession of CDS charges were steady before 2012, then rose until the July 1, 2017 effective date of SQ 780. Source: OPEN JUSTICE OK Data (n. 23).

offenders, reduced sentence ranges for drug distribution, trafficking, and manufacturing crimes, made expungements easier for non-violent criminals, eliminated several mandatory minimums, restricted the length of supervision and revocations for technical violations of supervision, and created a mechanism of administrative parole that is projected by 2026 to reduce the growth in imprisonment by nearly 5,000 prison beds compared to status quo.¹⁹ In June 2018, Oklahoma voters passed SQ 788, a ballot initiative legalizing medical marijuana in Oklahoma.²⁰ Many observers believe that the passage of SQ 780 was crucial to driving popular support for 788.

II. . . . and Resistance

Despite these legislative and popular initiatives, law enforcement personnel continue to voice skepticism about SQ 780 and about Kris Steele, the Republican former State House speaker who has become the public face of criminal justice reform in Oklahoma. For example, during the 2018 general election, several district attorneys running for reelection criticized Steele personally, contending that SQ 780 led to an uptick in property crimes²¹ and that Steele was ultimately responsible for high-profile crimes involving youthful offenders.²²

Results since the passage of SQ 780 are both clear and counterintuitive. Felony charges for simple possession fell from 18,942 in 2017 to 4,841 in 2018 (after the July 1, 2017, effective date of SQ 780)—a 74.4 percent drop.²³ However, the overall number of new admissions to Oklahoma prisons

actually rose 10 percent in 2018.²⁴ Moreover, the number of total prison admissions for which the most serious crime was Possession of CDS in 2018 was only 10 percent lower than the total in 2017.²⁵ Among women, the number of prison admissions whose most serious crime was Possession of CDS was 7 percent *higher* in 2018 than in 2017.²⁶

These patterns are not unlawful. In Oklahoma, sentencing is based on the applicable rule, at the time that an alleged crime was committed, rather than the time that the crime was charged or sentenced.²⁷ It is likely, then, that these new admissions were either sentenced after July 1, 2017 for conduct that occurred before that date, or else that they were revocations of deferred sentences for simple possession imposed prior to July 2017.²⁸

However lawful, these admissions are puzzling. Why are so many people being sent to Oklahoma prisons for crimes that Oklahoma voters have decided should not be subject to imprisonment?²⁹ Answering this question implicates a pattern of law enforcement resistance. As illustrated by Figure 1, in the run-up to November 2016, Oklahoma prosecutors continued to charge felony sentences for simple possession despite polls indicating significant support for SQ 780. Moreover, this pattern actually accelerated in the period between November 2016 (when SQ 780 passed) and July 2017 (when SQ 780 went into effect).

The charging discretion of prosecutors provides another opportunity for resisting SQ 780. After enactment of SQ 780, prosecutors should have replaced felony charges of

Table 1. Felony Possession of CDS, Misdemeanor Possession of CDS, and Possession With Intent to Distribute Charges Filed in Oklahoma District Courts, 2015–2018

Charge	2015	2016	2017	2018
Possession of CDS (Felony)	15556	18454	18908	4744
Possession of CDS (Misdemeanor)	4165	4286	4867	12962
Possession With Intent to Distribute	3275	3525	3176	3607

Source: OPEN JUSTICE OK Data (n. 23).

drug possession with misdemeanor charges of drug possession. However, a prosecutor resisting the reforms of SQ 780 might invoke Oklahoma’s crime of Possession With Intent to Distribute (PWID). Oklahoma’s PWID law prohibits, *inter alia*, possessing CDS “with intent to manufacture, distribute, or dispense.”³⁰ Like many other states,³¹ Oklahoma’s law does not specify a minimum quantity of controlled substance for a PWID charge.³² Oklahoma’s PWID law also carries a significant penalty: under recent reforms, PWID is punishable by a maximum of 5 years imprisonment for marijuana and 7 years for other CDS.³³

One hypothesis is that, having been blocked from charging felony possession by SQ 780, Oklahoma prosecutors charged PWID rather than misdemeanor possession in at least some cases that, prior to SQ 780, would have been charged as felony possession. In other words, Oklahoma prosecutors substituted a more serious PWID charge for a less serious misdemeanor possession charge. On this hypothesis, instead of broadly applying the “fundamental change”³⁴ implicit in SQ 780, Oklahoma prosecutors actually made *more* punitive charging decisions in at least some cases.

Results since the effective date of SQ 780 provide some support for this substitution hypothesis. Table 1 summarizes the number of felony possession, misdemeanor possession, and PWID charges in Oklahoma between 2015 and 2018. Charges for PWID were 20 percent higher the year after SQ 780 went into effect than the year before. Yet the combined number of misdemeanor and felony charges for drug possession was 25 percent lower in 2018 than in 2017. Thus, while there were far fewer charges for drug possession overall, there were far more charges of PWID, a comparatively more serious crime.

This increase in PWID charges could be explained by the charging decisions of specific prosecutors’ offices.

Overall, PWID charges increased in 41 of Oklahoma’s 77 counties.³⁵ Table 2 summarizes felony possession, misdemeanor possession, and PWID charges for Oklahoma County and Tulsa County, the two largest counties in Oklahoma, between 2015 and 2018. Oklahoma County and Tulsa County are overrepresented among the increase in PWID charges: although they account for 40.8 percent of the total PWID charges in 2018, they account for 46 percent of the increase in PWID charges.³⁶ Oklahoma County’s 2018 increase in PWID charges reversed a three-year trend that saw PWID charges reduced by more than 45 percent.³⁷ Both counties saw significant increases in PWID charges despite also seeing significant decreases in the combined number of felony and misdemeanor drug possession charges.

The substitution hypothesis can explain these seemingly anomalous results. The hypothesis predicts that when prosecutors no longer have the option of charging simple possession cases as felonies, they will reclassify some of those cases as misdemeanor possession and other such cases as PWID. Thus, even as the total number of drug possession cases falls, PWID would be expected to rise. To the extent that total drug possession cases are a proxy for overall drug use, this pattern would suggest that the increase in PWID charges is an artifact of prosecutorial charging decisions, rather than the product of increased drug distribution activity.

An alternative explanation is that results regarding PWID charges reflect different patterns of criminal activity post-SQ 780, rather than the discretionary decisions of prosecutors. A related hypothesis is that SQ 780’s elimination of felony drug possession might have encouraged police to pursue and prosecutors to charge more serious (albeit low-level) offenders, rather than drug addicts. The data presented here cannot rule out either of these alternative hypotheses. However, statewide the total number of charged felonies unrelated to drug possession and distribution was virtually unchanged between 2017 and 2018.³⁸ If either of these alternative hypotheses were true and policing and prosecution strategies had changed in response to the passage of SQ 780, then we would expect to see a much more significant increase in the number of charges for non-780 crimes in this period in order to account for the 20 percent increase in PWID charges.

In conclusion, the data regarding prison admissions for drug possession and charges of PWID since July 2017 are

Table 2. Felony Possession of CDS, Misdemeanor Possession of CDS, and Possession With Intent to Distribute Charges Filed in Oklahoma County and Tulsa County District Courts, 2015–2018

Charge		2015	2016	2017	2018
Possession of CDS (Felony)	Oklahoma	4574	4924	4930	1448
	Tulsa	1871	2432	2456	715
Possession of CDS (Misdemeanor)	Oklahoma	670	591	561	2064
	Tulsa	493	524	462	1321
Possession With Intent to Distribute	Oklahoma	1201	1125	658	790
	Tulsa	515	573	618	684

Source: OPEN JUSTICE OK Data (n. 23).

consistent with the notion that law enforcement officials (including prosecutors) have continued to resist the sweeping changes to Oklahoma's drug enforcement regime that were enacted in SQ 780.

III. Conclusion

SQ 780 was a landmark initiative. However, law enforcement resistance to the measure seems preliminarily to have blunted its impact. This resistance might be ameliorated by future legislative interventions (for example, by incorporating a quantity term into Oklahoma's PWID statute). In any event, Oklahoma's experience with SQ 780 suggests that even the most ambitious efforts to reverse mass incarceration for drug offenses can be undercut by the opposition of those who administer the criminal law.

Notes

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¹ Prior to SQ 780, possession of marijuana or Schedule III, IV, or IV substance was punishable by 0–5 years for a first offense and 2–10 years imprisonment if committed while a defendant was on probation or within 10 years of a first offense. Okla. Stat. Tit. 63 § 2–402 (2005). Possession of a Schedule I or II substance was a felony punishable by 2–10 years imprisonment for a first offense and 4–20 years for any subsequent offense. *Id.*

² Prior to SQ 780, possession of any CDS within 1000 feet of a school, college, university, or public park was a felony, as was possession in the presence of any child under 12 years old. Okla. Stat. Tit. 63 § 2–402 (2005). The sentence for these possession offenses was twice as long as the sentence for simple possession on a first offense and three times as long for any subsequent offense. *Id.*

³ A companion initiative, SQ 781, created a fund for community rehabilitative programs to be comprised of "calculated savings or averted costs that accrued to the state" from the reclassification of drug and property crimes under SQ 780. *Steele v. Pruitt*, 378 P.3D 47, 53 (Okla. 2016). Although this article focuses exclusively on SQ 780, the lessons of SQ 781 for criminal justice reform are likely just as consequential.

⁴ Oklahomans for Criminal Justice Reform, *About*, <https://okjusticereform.org/about/>.

⁵ Prison Policy Initiative, *Oklahoma Profile*, (June 2018), <https://www.prisonpolicy.org/profiles/OK.html>.

⁶ U.S. Bureau of the Census, Population Division, *Population Estimates of the Resident Populations of the United States and Puerto Rico: April 1, 2010 to July 1 2015* (Dec. 26, 2015); Vera Institute of Justice, *Incarceration Trends*, <http://trends.vera.org/rates/oklahoma>.

⁷ Prison Policy Initiative, *States of Incarceration: The Global Context 2018* (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

⁸ See, e.g., Rick Green, *Law Enforcement Criticize Criminal Justice Reform Measures*, Daily Oklahoman (Nov. 2, 2016) ("All district attorneys in the state of Oklahoma are opposed to State Questions 780 and 781.") (quoting Greg Mashburn, District Attorney for Cleveland County).

⁹ *Id.* ("Edmond Police Chief Bob Ricks said the Oklahoma Association of Chiefs of Police also opposes the two measures.

'One of the great levers we have against those who commit violent crime is that in almost every instance we find they are engaged in drug distribution or drug possession,' he said. 'Often time, we know who the rapists are. We know who the burglars are. We know who the people who commit violent assaults are, but in order to remove those people from the streets we have to use the leverage of possession. What we are doing is removing that tool from our arsenal.'").

¹⁰ Tim Harris, *The Case Against State Questions 780 and 781*, Tulsa World (Oct. 29, 2016) ("If a maximum punishment for drug possession is never higher than a misdemeanor level, the 'compassionate leverage' created by the threat of a felony prosecution will vanish from the prosecutor's toolbox of plea negotiation options.").

¹¹ Jaclyn Cosgrove, *Seven Things to Know About SQ 780, 781*, Daily Oklahoman (Feb. 26, 2017) ("Boring is concerned that if someone at or near a school has meth, for example, he could end up only charging that person with a misdemeanor, unable to prove a more serious crime was being committed. Also, 17- and 18-year-old students caught with drugs at school need to know they're facing serious charges, and many of them will laugh off a misdemeanor, Boring said. 'Understand, we're not putting those kids in prison on the first offense,' Boring said. 'The deal is to get their attention.'").

¹² Press Release, Oklahoma Governor's Office, Gov. Fallin Looks Forward to Offering Comprehensive Justice Reform Policies After Passage of SQ 780 (Nov. 11, 2016), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=223&article_id=26784.

¹³ *Id.*

¹⁴ KFOR-TV & K. Query, *Oklahoma Senator Files Bill to Change Voters' Criminal Justice Reform Decision* (Feb. 1, 2017, 3:10 PM), <https://kfor.com/2017/02/01/oklahoma-senator-files-bill-to-change-voters-criminal-justice-reform-decision/> ("After hearing from my constituents after the election, I believe there is a large group of voters that didn't understand that this state question would essentially decriminalize drugs in schools, parks and playgrounds," said [Scott] Biggs, R-Chickasha. 'I'm all for cleaning up our books to have a more efficient justice system but not at the expense of our children.'").

¹⁵ S.B. 512, 56th Leg., 1st Sess. (Ok. 2017) (full text), http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20INT/SB/SB512%20INT.PDF.

¹⁶ Ralph Shortey, the author of Senate Bill 512, was subsequently arrested for solicitation of a minor child and sentenced to 15 years in federal prison, with a consecutive 10 years of supervised release. Associated Press, *Ex-Senator Ralph Shortey sentenced to 15 years in prison in child sex trafficking case*, KjrH Tulsa (Sep. 18, 2018, 11:55 AM), <https://www.kjrh.com/news/local-news/ex-senator-ralph-shortey-may-get-life-in-prison-for-child-sex-trafficking>.

¹⁷ Oklahoma Justice Reform Task Force, Final Report, 3 (Feb. 2017), [https://s3.amazonaws.com/content.newsok.com/documents/OJRTFFinalReport%20\(1\).pdf](https://s3.amazonaws.com/content.newsok.com/documents/OJRTFFinalReport%20(1).pdf).

¹⁸ Less than 10 percent of prisoners released from prison were paroled. *Id.* at 3.

¹⁹ Quinton Chandler, *Fallin Signs Seven Criminal Justice Reform Bills To Combat Prison Growth*, State Impact – Oklahoma, Npr, (Apr. 27, 2018, 1:25 PM), <https://stateimpact.npr.org/oklahoma/2018/04/27/fallin-signs-seven-criminal-justice-reform-bills-to-combat-prison-growth/>.

²⁰ Secretary of the State of Oklahoma, *Full Text Ballot Initiative State Question 788*, <https://www.sos.ok.gov/documents/questions/788.pdf>.

²¹ Lauren Partain, *Police say passing of State Questions 780, 781 are linked to spike in theft*, Ktul Tulsa Channel 8 (Sep. 25,

2018), <https://ktul.com/news/local/police-say-passing-of-state-questions-780-781-are-linked-to-spike-in-theft>.

²² Pat Campbell Podcast, *DA Steve Kunzweiler on Keplar [sic] Verdict and Deonte Green*, Talk Radio 1170 (Oct. 20, 2017), <https://www.1170kfaq.com/story/39333829/da-steve-kunzweiler-on-keplar-verdict-deonte-green> at 18:46–19:08 (Campbell: “So Kris Steele’s the bad guy?” Kunzweiler: “... Kris Steele ought to be wearing this. He’s the poster child for somebody who’s saying that we’re putting too many non-violent offenders in prison.”).

²³ Ryan Gentzler, *Assessing the First Year of SQ 780*, Open Justice Oklahoma <https://openjustice.okpolicy.org/blog/assessing-the-first-year-of-sq-780/> (hereinafter Open Justice Ok Data).

²⁴ Fwd.Us & Oklahomans for Criminal Justice Reform, *Oklahoma’s Ongoing Imprisonment Crisis: Despite Reforms, Oklahoma’s Prison Population Projected to Keep Climbing 1* (2018), https://www.fwd.us/wp-content/uploads/2018/11/oklahoma_data_update_2018.pdf. This report is reproduced in Appendix 1. See the online journal for more information.

²⁵ *Id.* at 3.

²⁶ *Id.* at 2.

²⁷ See, e.g., *Williams v. State*, 59 P.3d 518, 519 (Okla. Cr. 2002) (under Oklahoma law, a defendant is “entitled only to an application of the law which was in effect at the time he committed the crime.”). In this respect, Oklahoma does not follow the rule, operative in the majority of U.S. jurisdictions, that “procedural changes in the law, which do not prejudice or operate to the detriment of the defendant, apply to all trials occurring after the enactment of” the change. *Id.* at 520 (dissenting opinion of Chapel, J.) (citing authorities).

²⁸ We would expect to see fewer felony charges for simple possession in FY 2019, as more people are charged for post-July 2017 conduct.

²⁹ Indeed, the number of charges for possession of CDS actually increased during the period between the passage of SQ 780 and its effective date in comparison to the equivalent period in the previous year. Open Justice Ok Data, *supra* note 23.

³⁰ Okla. Stat. Tit. 63, § 2–401(A)(1) (2018).

³¹ See *Moncrieffe v. Holder*, 569 U.S. 184, 204 (2013) (“[A]bout half the States criminalize marijuana distribution through statutes that do not require remuneration or any minimum quantity of marijuana.”) (citations omitted).

³² Oklahoma Court of Criminal Appeals Uniform Jury Instructions, OUIJI-CR 6–2 comments. PWID liability can attach even when the quantity of the drug is insufficient to produce any effect on the nervous system. *Id.* (citing *Whitehorn v. State*, 561 P.2d 539 (Okla. Crim. App. 1977); *Cox v. State*, 551 P.2d 1125 (Okla. Crim. App. 1976); *Spriggs v. State*, 511 P.2d 1139 (Okla. Crim. App. 1973); *Doyle v. State*, 511 P.2d 1133 (Okla. Crim. App. 1973)).

³³ Okla. Stat. Tit. 63, § 2–401 (2018).

³⁴ Press Release, Gov. Fallin, *supra* note 12.

³⁵ Open Justice Ok Data, *supra* note 23.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Felony charges not affected by SQ 780 totaled 24,797 in 2017 and 24,871 in 2018. Open Justice Ok Data, *supra* note 23. Non-780 charges in Tulsa County rose by 53 (from 3967 to 4071) and in Oklahoma County by 166 (from 4661 to 4828) between 2017 and 2018. *Id.*