

CRIMINAL JUSTICE IN ARIZONA

2018

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INTRODUCTION

Arizona's criminal justice system (CJS) touches everyone in the state. Even those who will never see the inside of a courtroom must shoulder the tax burden of maintaining our system of courts, jails, prisons and police forces. Every Arizonan also benefits from the protections offered by this system.

Criminals are seldom sympathetic figures, and politicians of every stripe score points with the electorate by promising to "get tough on crime." The natural human reaction may be to lock away those who violate the norms of society. But this reaction should not prevent us from looking at the underlying principles of our criminal justice system and searching for the most efficient, economical and humane solutions to the problem of crime.

With more than \$1 billion spent annually in the state to maintain the CJS, it is worth asking whether that money is being spent wisely. But before that question can be addressed, there should be some thought about the purpose of the system.

Is the purpose of our criminal justice system to punish those who commit crimes, or is it to rehabilitate them so they don't offend again? Perhaps it is to protect citizens from crime?

In reality, the CJS performs each of these functions to some degree. As the attitudes and preferences of society change over time, the prominence of each of these functions gradually changes as well. In some eras rehabilitation is seen as the primary purpose of the system, while in others punishment is in favor.

Are changes in store for the criminal justice system? Is there the political will to reform a system that stirs such strong emotions? Possibly. Organizations from across the political spectrum, ranging from the Koch Brothers Foundation to the American Civil Liberties Union, have advocated for criminal justice reform.

The criminal justice system consumes a large and increasing share of our tax dollars. These dollars should be used wisely and in ways that protect public safety. We need to start asking such hard questions with the realization that asking such hard questions is not being "soft on crime." Asking hard questions and demanding evidence-based answers can protect both the public's pocket book and its safety - on our streets, in our courtrooms, in our jails and prisons and in our communities.

The following chapters trace the path that one might follow through the criminal justice system, from the initial contact with police through charging and sentencing and eventual release from the system. We also will look at how the system becomes an endless cycle for many people, with a high percentage of ex-prisoners reoffending and re-entering the system.

SIZE AND SCOPE OF ARIZONA'S CRIMINAL JUSTICE SYSTEM

*By Dan Hunting, Senior Policy Analyst,
Morrison Institute for Public Policy, Arizona State University*

Arizona's criminal justice system (CJS) is a sprawling enterprise, with courts, jails and prisons scattered across the state. In addition to incarcerating tens of thousands, it also employs thousands of Arizonans as law enforcement officers, prosecutors, judges and other court employees, and prison guards. This section describes the CJS, detailing the size and composition of both the facilities as well as the people who live and work in the system. Arizona's criminal justice system, including police officers, inmates, and crimes committed, is relatively large compared to other states. Arizona has the fifth-highest percentage of prisoners per capita.¹

Key Points:

- The number of crimes committed have been declining for years.
- At the same time, incarceration rates have gone up.
- The crime rate has decreased over one-third since 2006.
- Court cases are heard by 435 judges throughout the judicial system.
- The vast majority of cases heard by the courts are relatively minor traffic and civil cases.
- Total costs of the municipal, county, and statewide criminal justice system vary according to location, but average approximately \$525 per person every year.

Crime Rates

The impetus for having a criminal justice system in the first place is the presence of crime in our communities. So, it's worth looking at the rate of crime over time to get an idea of how big our CJS should be. A society with zero crime would simply be wasting its money if it built prisons for criminals that didn't exist. Similarly, a very-high-crime society will need to construct a large CJS infrastructure to handle the problem.

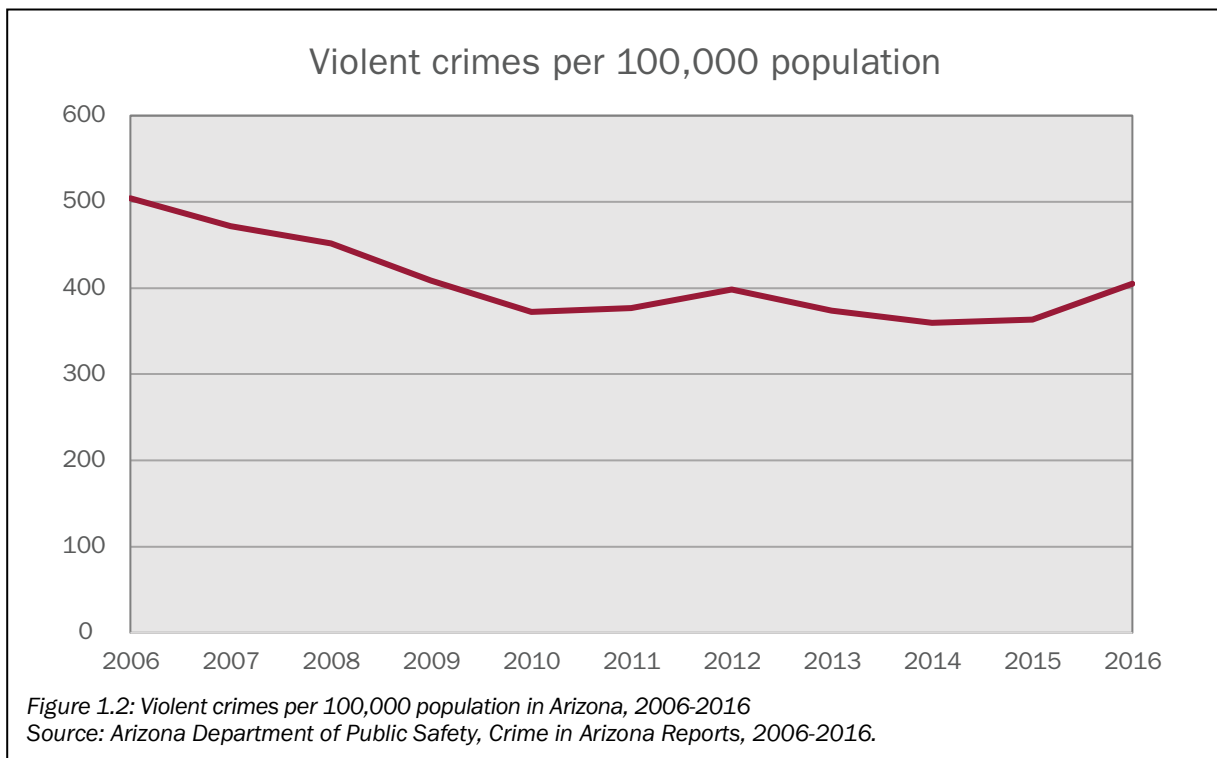
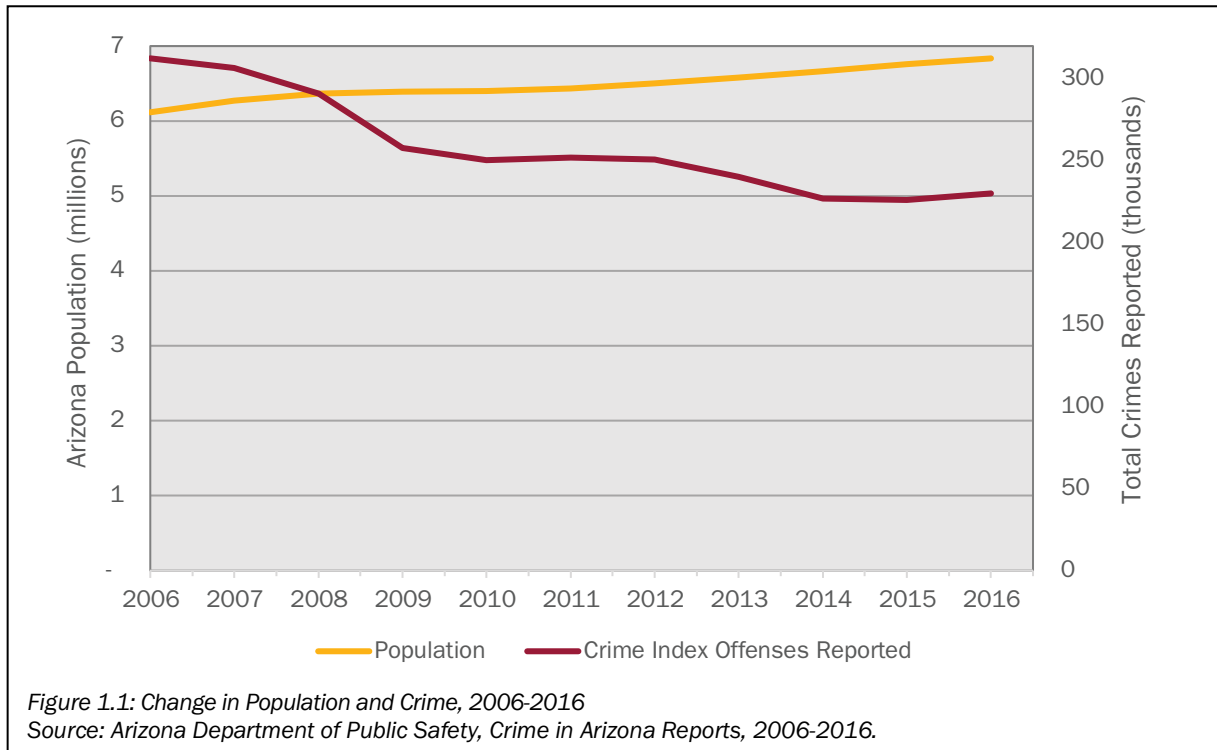
So where does Arizona stand? There are many ways to measure crime, but two of the most useful are the number of crimes committed each year and the rate of crime, usually expressed as crimes per 100,000 population.

The state's population continues to grow, so intuitively, one might think that more people moving to the state should bring more criminals, as well. But this is not the case. Although the state population increased by 12 percent – from just over 6 million to just under 7 million between 2006 and 2016 – the total number of crimes committed annually in Arizona decreased from 312,519 in 2006 to 230,129 in 2016, a drop of 26 percent (Figure 1.1).² This translates to a drop in the total crime rate from 5,110 crimes per 100,000 population in 2006, to 3,367 per 100,000 in 2016, a decline of over one-third.

¹ National Institute for Corrections, 2015, <https://nicic.gov/state-statistics/2015/arizona>

² Population numbers from the Arizona Office of Economic Opportunity, <https://population.az.gov/population-estimates>
Crime statistics from Arizona Department of Public Safety Crime in Arizona reports, 2006-2016; <https://www.azdps.gov/about/reports/crime>

Crime statistics are usually divided into two broad categories for analysis: violent crimes such as murder, rape, and assault, and property crimes including burglary and automobile theft.



Violent Crime

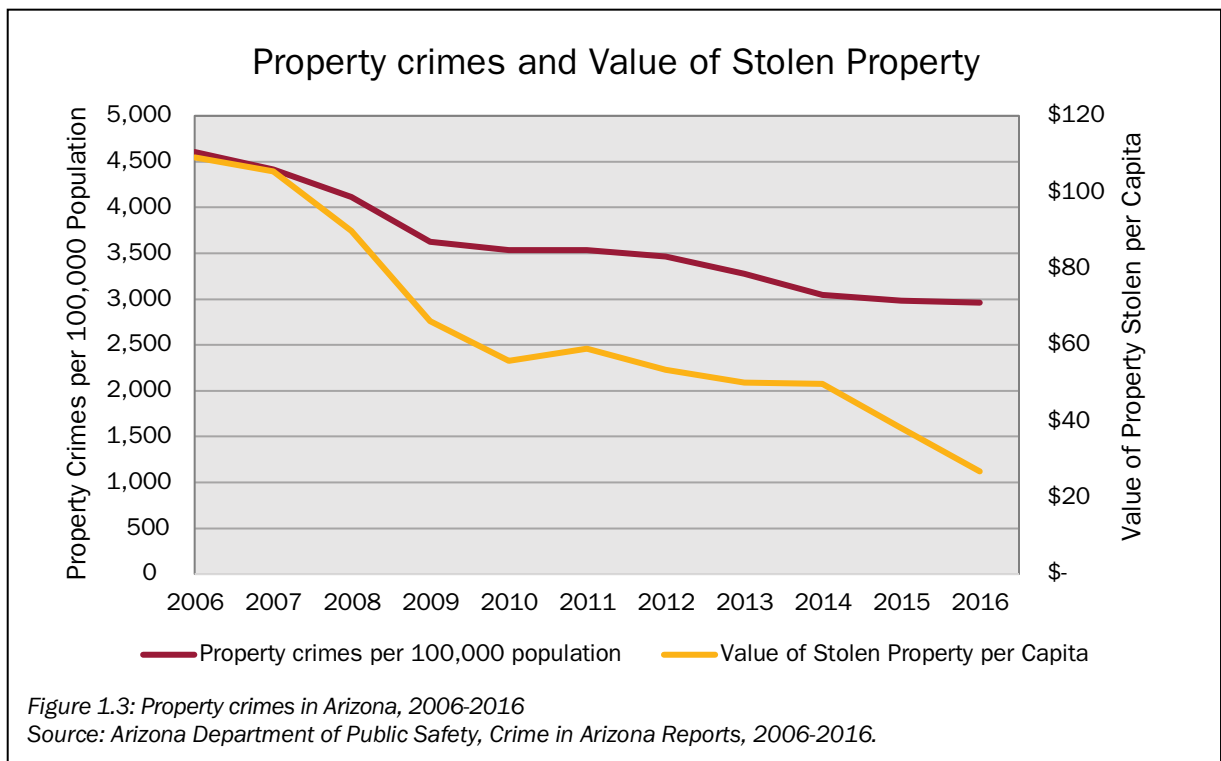
There has been a reduction in the absolute number of violent crimes committed in the state, from 30,833 in 2006 to 27,704 in 2016. This is a decrease of 3,129, or 10 percent. Especially in a growing state like Arizona, the impact of crime on society is better expressed as a rate per 100,000 population. At the same time the absolute number of violent crimes was dropping, the population was increasing, so the actual crime rate has dropped significantly, from 504 per 100,000 population to 405, a decrease of 20 percent (Figure 1.2).³

Property Crimes

Although violent crimes typically grab the headlines, the average citizen is much more likely to be a victim of property crime, ranging from petty theft to burglary and auto theft. There are about 20 property crimes committed for every violent crime in the state.

There has been an even more dramatic decrease in property crime since 2006, with the absolute number of crimes committed dropping from 281,686 to 202,425 by 2016. The total number of property crimes reported in 2016 was 79,261 less than in 2006, a decrease of 28 percent. As with violent crimes, the concurrent increase in population led to an even larger decrease in the property crime rate, from 4,605 per 100,000 population in 2006 to 2,961 in 2016, a drop of 36 percent (Figure 1.3).⁴

The Arizona Department of Public Safety crime reports also offer another way to measure the impact of property crime through estimates of the value of property stolen each year. The value of property stolen annually in Arizona dropped by 72 percent over 10 years, from \$667 million in 2006 to \$184 million in 2016. Much of this drop in value is attributed to an 82 percent decrease in the value of automobiles stolen across the time period.



³ Ibid.

⁴ Ibid.

Law Enforcement

Agencies

There are sworn police officers at every level of government; federal, state, tribal, county and municipal. There are 77 municipal police forces in the state, ranging from small towns like Kearny and Patagonia, each with three officers listed on the force, to the Phoenix Police Department, with over 2,700 officers. There are 8,672 municipal police officers in the state of Arizona,⁵ meaning there are 1.6 officers per 1,000 citizens statewide. Each of the state's 15 counties operates its own sheriff's office to handle crimes in unincorporated areas of the state. As sovereign entities, the state's Native American tribes also maintain their own police departments. State troopers working for the Department of Public Safety patrol Arizona's highways. Finally, there are federal officers serving in the United States Marshals Service, Forest Service, National Park Service and Border Patrol.

The Arizona Peace Officer Standards and Training Board is responsible for establishing standards for over 150 agencies statewide, certifying sworn officers in addition to correctional officers.⁶

Officers

There are over 12,000 sworn police officers in Arizona, not counting those working for federal agencies. In addition, there are about 10,000 civilians working in law enforcement statewide in support roles (Figure 1.4).

The average age of Arizona police officers is 40, with 81 percent of officers being male.

They are more educated than the general population, with 41 percent having a bachelor's or master's degree. An additional 49 percent have an associate degree or have attended some college.

| Law Enforcement Employee Totals - 2016 | | | |
|--|---------------|--------------|---------------|
| | Officers | Civilians | Total |
| Municipal Police | 8,672 | 3,460 | 12,132 |
| Universities and Colleges | 218 | 163 | 381 |
| County Sheriff's Departments | 2,003 | 4,988 | 6,991 |
| Arizona Department of Public Safety | 1,159 | 906 | 2,065 |
| Tribal Police | 401 | 259 | 660 |
| Other | 21 | 20 | 41 |
| Total | 12,474 | 9,796 | 22,270 |

Figure 1.4: Non-Federal Law Enforcement Employees in Arizona, 2016
Source: FBI 2016 Uniform Crime Report, Police Employee Data

Courts

Arizona's court system consists of five venues to handle criminal cases, ranging from traffic offenses to capital murder cases and appeals. The Supreme, Appeals, Superior, Justice of the Peace and Municipal courts employ a total of 435 judges. Superior Courts also employ over 100 judges pro tempore, commissioners and hearing officers.⁷ The state has an additional Tax Court to handle civil tax cases.

There were nearly 2 million cases filed in Arizona's court system in 2016, including civil and criminal cases. Municipal courts handle 57 percent of this workload, over 1 million cases. About three quarters of the cases seen in Municipal courts are civil and criminal traffic cases. Justice of the Peace courts handle another large portion of the total court system caseload, with nearly 715,000 cases. Traffic-related cases make up over half of the Justice of the Peace filings.

⁵ FBI: Uniform Crime Report 2016

⁶ Arizona Peace Officer Standards and Training Board, <https://post.az.gov/>

⁷ Arizona Judicial Branch Annual Report, 2016. <http://www.azcourts.gov/Portals/38/Annual%20Report%202016.pdf>

As the state's crime rate has decreased, the number of cases in the court system has dropped by 25 percent, from 2.5 million total in 2006, to 1.9 million in 2016.⁸ Much of this decrease is due to the drop in traffic filings over time.

Corrections

Over 42,000 people are incarcerated in the state prison system, giving the state an incarceration rate of 596 per 100,000 population, well above the national rate of 385 per 100,000 population.⁹ In addition, there are nearly 14,000 people in county jails and nearly 85,000 probationers.

Correctional Facilities in Arizona

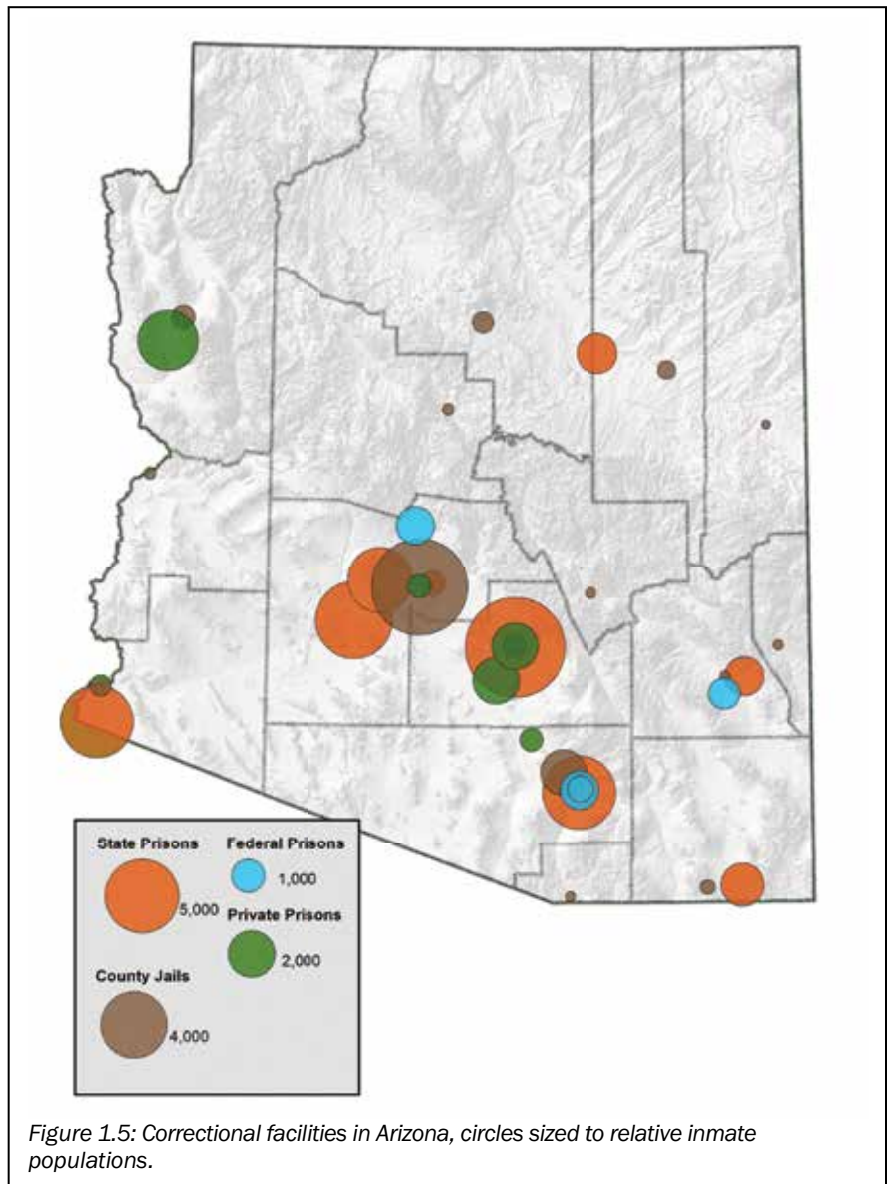
Correctional facilities of several kinds can be found across the state. Each county has its own jail to detain those awaiting trial and those incarcerated for relatively short periods.

The Arizona Department of Corrections operates 10 facilities housing over 33,000 prisoners convicted of felony offenses.

There are seven private prisons operating under contract with the state, housing about 8,300 prisoners.

The state and private prisons are concentrated around Florence and the western part of Maricopa County, as well as Mohave County (private) and Yuma County (state).

In addition, there are federal prisons in Tucson and Safford housing over 4,000 inmates in total.



⁸ Arizona Judicial Branch Annual Report, 2016. <http://www.azcourts.gov/Portals/38/pdf/2006AnnualRpt.pdf>

⁹ National Institute for Corrections, 2015.

Incarcerated Population

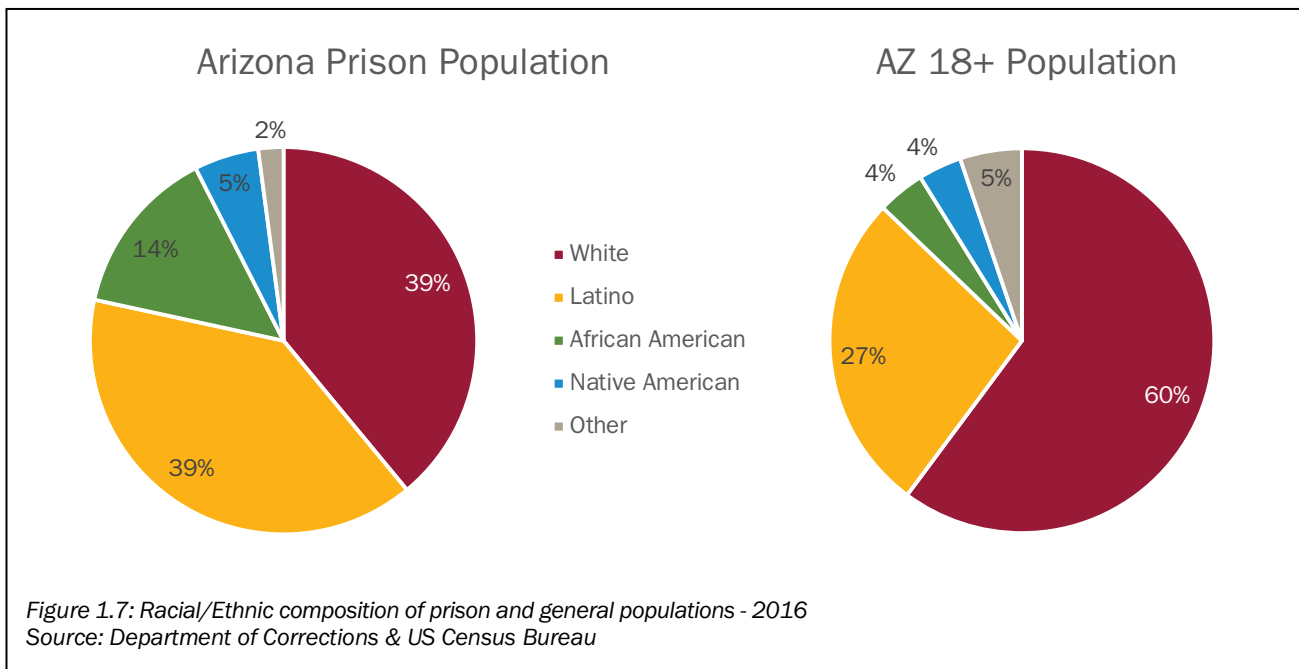
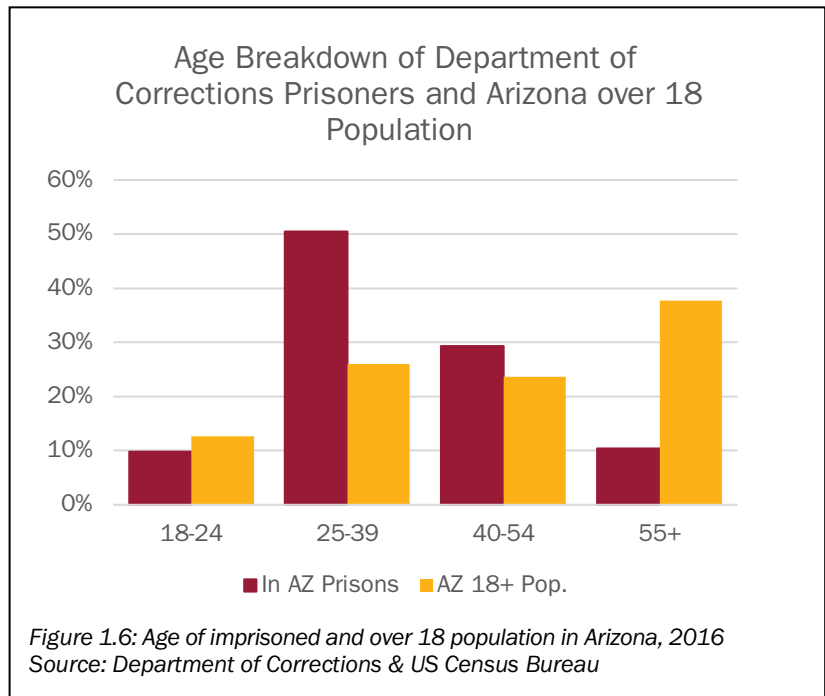
State Prison System

There were 42,073 prisoners in the state prison system as of November 2017, including both state-run and private prisons.¹⁰ These inmates have been confined for relatively long sentences for felony offenses. Of this total, 33,763 are housed in 10 facilities owned and operated by the state of Arizona, with 8,310 incarcerated in private prisons operating under state contract.

Inmates sentenced for drug-related offenses, including possession, sales and trafficking, account for 22 percent of the state prison population.

Slightly over half (52 percent) of the prison population is currently serving time for a violent crime, but an additional 22 percent have a violent offense in their past record.

The demographics of those in prison are markedly different from those of the state as a whole. Over half of those in the Arizona prison system are between the ages of 25 and 39. In the statewide over-18 population, just 26 percent fall within that range (Figure 1.6).



¹⁰ Arizona Department of Corrections, Corrections at a glance, November 2017.
<https://corrections.az.gov/sites/default/files/REPORTS/CAG/2017/cagnov17.pdf>

Additionally, the racial and ethnic background of the prison population diverges from that of the state as a whole. While 60 percent of the state's population over age 18 is White, 39 percent of those in state prisons are White. Conversely, 39 percent of Arizona's prison population is Latino even though the state's overall adult Latino population is at 27 percent. African Americans also have a disproportionate number of adults in Arizona prisons. (Figure 1.7).

County Jails

Most of the inmate population in the state's 15 county jails await trial and thus have not been convicted of a crime. The remainder of the jail population has been incarcerated on short term sentences for misdemeanors.

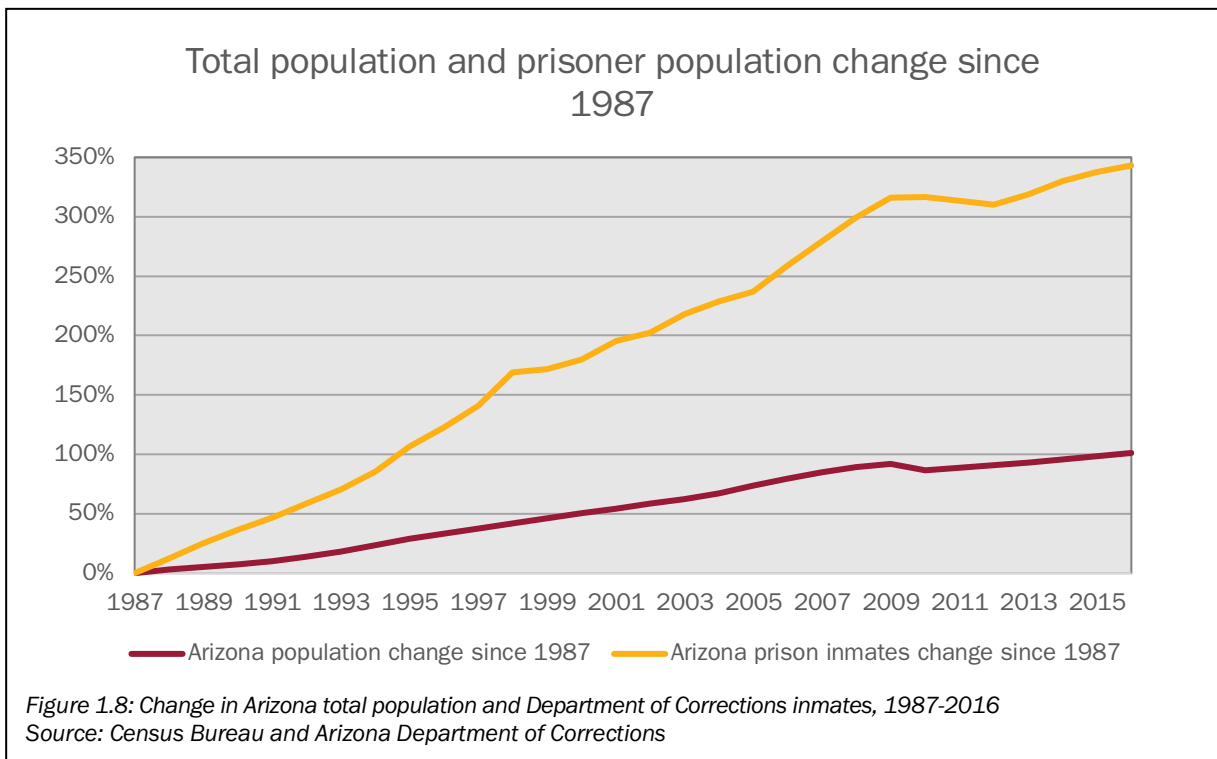
The jail population changes daily, depending upon the flows in and out of the court system, so a precise count is difficult to establish, but somewhere around 13,000 individuals are likely to be in one of the state's 15 county jails at any one time. Jails in the highly populated Maricopa and Pima counties naturally account for the bulk of this number.

Federal Prisons

The state is home to four federal prisons: two in Tucson and one each in Safford and Phoenix. These facilities house over 3,000 inmates in total.

Incarceration Rate

The number of prisoners incarcerated by the Arizona Department of Corrections has increased considerably over the years. This growth has exceeded the population growth of the state. Since 1987, Arizona has doubled its overall population, from 3.5 million to about 7 million today. Over that same period, the prison population has increased fourfold (Figure 1.8).



Since 2006, the population in state prisons has increased by 24 percent, from 34,864 to 43,061.

On Probation

Some convictions result in probation rather than jail or prison time. Probation is a type of criminal sentence where the defendant agrees to adhere to specific conditions rather than be incarcerated. While on probation, a defendant may be required to report to a probation officer, pay fees or fines or complete community service.¹¹

As with incarcerations, the number of people on probation in Arizona has increased over the years. In 2006 there were 72,661 adults on probation in the state. By 2016, that number had increased by 13 percent to 82,204.

| County | Population | Sherrif's Office Budget | Sherrif's Budget Per Capita |
|-----------------------------|------------------|-------------------------|-----------------------------|
| Apache | 73,112 | \$7,791,662 | \$107 |
| Cochise | 125,770 | \$20,043,132 | \$159 |
| Coconino | 140,908 | \$12,193,131 | \$87 |
| Gila | 53,556 | \$13,427,579 | \$251 |
| Graham | 37,599 | \$9,639,043 | \$256 |
| Greenlee | 9,613 | \$4,278,479 | \$445 |
| La Paz | 20,317 | \$5,065,792 | \$249 |
| Maricopa | 4,242,997 | \$374,050,627 | \$88 |
| Mohave | 205,249 | \$27,950,091 | \$136 |
| Navajo | 110,026 | \$7,827,200 | \$71 |
| Pima | 1,016,206 | \$163,297,184 | \$161 |
| Pinal | 418,540 | \$51,553,290 | \$123 |
| Santa Cruz | 45,985 | \$11,640,275 | \$253 |
| Yavapai | 225,562 | \$41,673,038 | \$185 |
| Yuma | 205,631 | \$12,597,116 | \$61 |
| Total – All Counties | 6,931,071 | \$763,027,639 | \$110 |

Figure 1.9: Sheriff's Department expenditures by county
Source: Census Bureau and county budget documents

Cost of the System

Maintaining the criminal justice system is an expensive undertaking. Police officers, judges, prosecutors and prison guards must be paid and corrections facilities built and maintained. The Department of Corrections alone accounts for approximately 10 percent of the state's General Fund expenditures. These are expenses that are not easy to trim when budgets get tight. If a defendant is sentenced to a 20-year term in prison, the state assumes a 20-year obligation to house and feed that prisoner, regardless of whether tax revenues are plentiful or scarce.

With law enforcement agencies and court systems spreading across local, county, tribal and federal jurisdictions, accounting for the many expenditures made to support the criminal justice system is a daunting task. However, a rough estimate of what our CJS costs the average citizen can be determined:

- At the state level, the Department of Corrections expenditures are appropriated about \$1 billion each year from the General Fund. The court system, Juvenile Corrections and the Department of Public Safety all combine for another \$300 million. Divide that by the state's population of 6.9 million and it comes down to every man, woman and child in Arizona paying about \$189 annually to maintain the state portion of the CJS.

¹¹ Arizona Court, Adult Probation Report, 2016.
http://www.azcourts.gov/Portals/25/AnnRepPop/FY2016_%20REPORT.pdf

- The primary CJS expenditure at the county level is to fund the sheriffs' office. Statewide, about \$763 million is spent annually for sheriffs' services, or \$110 per capita. This amount varies considerably from county-to-county, however, as shown in Figure 1.9. Rural counties, generally have higher per capita expenditures on their sheriffs' departments. Sheriffs deputies in these counties must often cover vast areas, although tribal law enforcement assumes many of the duties of a sheriff's department on reservation land in Apache, Coconino and Navajo counties.
- Most cities and towns, regardless of size, operate their own police departments and municipal courts. Police services statewide average around \$310 and municipal courts \$19 per capita. Again, there is wide variation in these amounts depending upon both geography and population.

Total costs for the municipal, county and statewide criminal justice systems are difficult to determine due to the many jurisdictions, agencies and budgets involved. However, a rough estimate is that such expenses are around \$525 per person per year in Arizona.

ABOUT THE AUTHOR

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ARIZONA'S CRIMINAL JUSTICE PROCESS

Adapted from azcourts.gov

Adapted from <http://www.azcourts.gov/guidetoazcourts/How-a-Case-Moves-Through-the-Court-System>

This summary concerns felony (serious) crimes. Lesser crimes (misdemeanors) follow much the same process.

Arrest / Citation

Individuals are most likely to enter the criminal justice system by being arrested by a police officer, who must be convinced there is “probable cause” to believe that a crime has been committed and that individual is the likely perpetrator. In less-serious cases, an individual may be issued a citation. If the individual is arrested and “booked” into jail, he/she will remain there until the initial appearance before a judge within 24 hours of the arrest. If cited, the individual will be summoned to appear before a judge on a certain date.

Initial Appearance

At the initial appearance, the defendant will appear before a judge. He/she will be informed of the allegations and the right to an attorney or to have one appointed. Conditions for release will be established, based on such factors as the severity of the crime, an individual’s criminal record and his/her stability in the community. The defendant may be released solely on his/her “own recognizance” – a simple promise to return to court. Or, he/she may be released only after posting bond, which is money secured by the court beforehand to help ensure the defendant’s return. Or, he/she may be released on condition of wearing a monitoring device or supervised by a court officer.

Filing Charges

A felony charge is initiated by a complaint or an indictment, with the options being the prosecutor’s choice. If done by complaint, the defendant will attend a “status conference” where he/she will meet with an attorney, go over the case and discuss a plea bargain offer if the prosecutor makes one. The prosecutor may offer a plea agreement that provides a lighter sentence than if the defendant went to trial and lost. If the defendant accepts the offer, he/she gives up the right to a preliminary hearing and a trial. If the plea offer is declined, the defendant will have a preliminary hearing before a justice of the peace or a court commissioner, usually that day or a few days later.

If the commissioner finds that there is not sufficient evidence to believe that the crime occurred or that the defendant probably committed it, the case will be dismissed. If the commissioner believes otherwise, the defendant will be “arraigned” and the case set for an Initial Pretrial Conference.

Grand Jury (Felonies Charged by Indictment)

If the defendant received an “indictment” on a felony offense, he/she will not have a preliminary hearing because at least nine members of the 16-member grand jury already found probable cause for charges. The decision to send an individual’s case to trial will be decided by this panel rather than a single judge. These proceedings, unlike the public preliminary hearing, are held in private.

Arraignment

The judge reads the charges against the defendant, enters a “not guilty” plea on his/her behalf and ensures that the defendant will have an attorney. The case is assigned to a judge and court dates are set.

Victims' Rights in Arizona

Arizona's criminal justice system performs a number of important tasks, but none more vital than serving victims of crime and their families. In the early 1990s, state residents underlined the gravity of this duty by enshrining it in the Arizona Constitution (Article II Section 2.1) as the Victims' Bill of Rights. Its 12 provisions include a victim's right to be treated with respect; to be kept informed of the status of the case; to confer with prosecutors; to be heard at court hearings concerning bail release, charging and sentencing; and to obtain a speedy resolution of the case and prompt restitution when appropriate.

A "victim" means a person against whom a criminal offense has been committed, or their survivors or lawful representatives. The responsibility for providing services is lodged in the Office of Victims' Services in the Arizona Attorney General's Office. The office - among other duties -- ensures compliance with victims' rights law, refers victims and their families to appropriate resources, conducts presentations and training sessions statewide, provides technical assistance to relevant agencies and monitors court-ordered restitution.

Adapted from the Office of the Attorney General, <https://www.azag.gov/victim-services>

Plea Agreements

The vast majority of criminal cases don't go to trial but instead end in a plea bargain. This is an agreement between the defendant, the defense attorney and the prosecutor – and accepted by a judge – that usually offers the defendant a lighter sentence than if he/she went to trial and lost. If the defendant pleads guilty, he/she formally acknowledges guilt to the judge and no trial is held.

Pretrial Hearings

If a defendant's case goes to trial, the judge will schedule several pre-trial conferences where attorneys can file various motions and where the prosecution and defense can continue to discuss possible plea bargains. If a plea agreement is reached, no trial will be held.

Trial

In a criminal trial, the prosecutor must prove "beyond a reasonable doubt" that the defendant committed the crime charged. Felony trials are heard by a jury unless the defendant, the defense attorney and the prosecutor agree to have the case presented to a judge alone. In a jury trial, eight or 12 members of the public will hear testimony and review evidence to determine if the defendant is guilty or not guilty. If the jurors decide the defendant is not guilty, the acquitted individual is released and cannot be retried for the same crime. If there is a "hung jury," which happens when a jury cannot reach a unanimous decision, the state can amend the plea agreement, retry the defendant with a different jury or move to dismiss charges.

Sentencing

If the individual enters into a plea agreement or is found guilty at trial, he/she will be scheduled for sentencing approximately one month later. The defense may try to convince the court to give a lenient sentence. However, the judge must follow sentencing laws that consider any prior convictions and other characteristics of the crime.

Appeal

If an individual is convicted after a trial, he/she has the right to appeal the case. The defense attorney will file a notice of appeal within 20 days after sentencing. There is no guarantee an appeal will be granted.

POLICE

By Cody W. Telep, Ph.D.
School of Criminology and Criminal Justice, Arizona State University

Key Points:

- The public has shown increased interest in policing practices in recent years.
- Arizona has over 140 different police agencies at all levels of government, employing about 15,000 sworn officers.
- The number of officers per 1,000 residents in Phoenix has gone down since 2008, but crime rates also have declined. The connection, if any, between these statistics is unclear.
- When citizens view police actions as legitimate and procedurally just, they are more likely to obey the law and cooperate with police.
- Use of body-worn cameras by police may lead to a reduced number of complaints from citizens.



Policing in Arizona and elsewhere has received widespread attention in recent years, due in part to a series of high-profile events involving officers' use of deadly force. While the public has always closely followed the work of the police, the 2014 killing of Michael Brown by a Ferguson (Mo.) Police Department officer has spurred even greater interest from policymakers and the public about police-related issues, particularly those related to fairness, transparency and race relations.

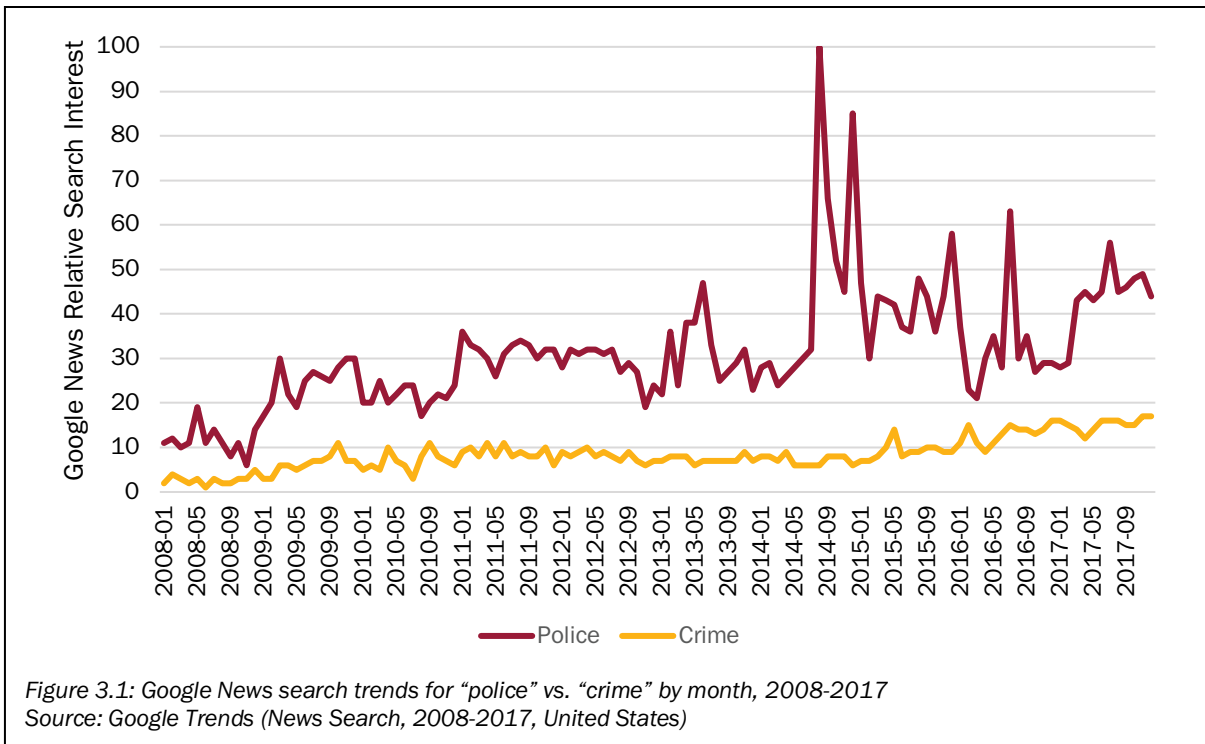
One example of this increased attention can be seen in Figure 3.1, which displays data from Google News on the relative interest of Americans in the topics of "police" and "crime" from 2008 to 2017. Two things stand out. First, the relative interest in policing has increased substantially in recent years, surrounding instances of deadly force. Second, this increasing interest is not simply a proxy for increasing concerns about crime. While national crime data showed increases in violence, particularly homicide, in 2016, crime levels remain far below rates seen in the 1980s and early 1990s.¹

This report focuses on a number of areas where the policing landscape is changing. These include crime, police funding levels, legitimacy and police fairness, immigration enforcement, interactions with individuals with mental or behavioral health problems, the role of body cameras, and the impact of militarization.

Many of these issues were addressed in President Barack Obama's Task Force on 21st Century Policing report released in 2015.² This report also draws from a report from George Mason University's Center for Evidence-Based Crime Policy and the International Association of Chiefs of Police review of the research

¹ FBI's Uniform Crime Report data at <https://ucr.fbi.gov/crime-in-the-u.s>

² https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf



evidence for these recommendations.³ But change continues to happen quickly. For example, in 2017 the Justice Department under President Donald Trump announced changes in the federal role in local law enforcement. These include a de-emphasis on the use of federal oversight through consent decrees and a return of the program allowing police agencies to acquire surplus military equipment (see below). Further changes in local policing and the federal role in local law enforcement are likely in 2018.

Policing in the U.S. and Arizona is highly localized. Nationally, there are more than 12,000 local police departments, employing approximately 477,000 sworn officers. Adding in sheriff’s offices and state police agencies increases this number to approximately 18,000 police departments and more than 765,000 sworn officers.⁴ As a result, it is challenging to draw national or even state-level conclusions about the state of policing.

In total, Arizona has approximately 141 police agencies. Ninety-six of these can be categorized as local police departments, which generally provide police services to a city or town. Arizona has 15 elected sheriffs and sheriff’s offices. The remainder agencies are state agencies (e.g., the Department of Public Safety) or agencies with special jurisdiction (e.g., the Arizona State University Police Department). Across all agencies, there are approximately 15,000 sworn officers. The bulk of these officers, however, serve in a small number of large-city police departments. The Phoenix Police Department, for example, employs about 18 percent of the officers in the state.

³ Lum, C., Koper, C.S., Gill, C., Hibdon, J., Telep, C. & Robinson, L. (2016). *An Evidence-Assessment of the Recommendations of the President’s Task Force for 21st Century Policing: Implementation and Research Priorities*. Fairfax, VA: Center for Evidence-Based Crime Policy, George Mason University. Online at <http://cebcp.org/wp-content/evidence-based-policing/IACP-GMU-Evidence-Assessment-Task-Force-FINAL.pdf>

⁴ Reaves, B. A. (2011). *Census of state and local law enforcement agencies, 2008*. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice.

Funding Levels

Because police funding is generally done at the local level, it is difficult to compile data across the state or country. This section focuses on the Phoenix Police Department, in part because it is the largest department in Arizona (and the eighth largest in the U.S.), and because its funding in the past decade is representative of the situation faced by many large departments. Additionally, this section focuses on “sworn” personnel numbers, because numbers are more easily comparable year to year and because sworn personnel represent the largest share of a municipality’s policing cost. The 2017-2018 budget in Phoenix, for example, allocates a total of \$677.6 million dollars to the Phoenix Police Department. Sworn personnel wages and benefits total \$508.2 million (75 percent of the total costs for the agency).⁵

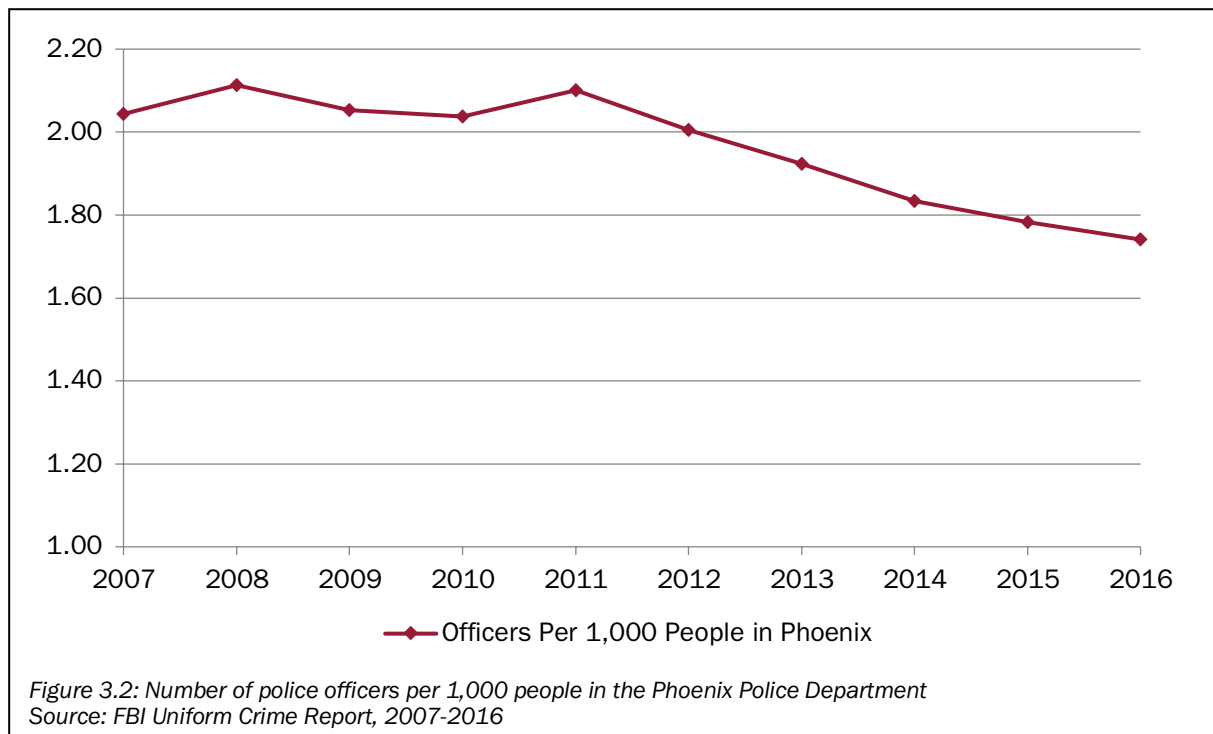


Figure 3.2 displays the number of police officers per 1,000 residents in Phoenix for the last decade (2007-2016).⁶ Phoenix, like most police departments in the western United States, has fewer officers per capita than large agencies in other parts of the country. The 2.0 officers per 1,000 Phoenix residents in 2013, for example, compares to 4.4 per 1,000 in Chicago and 4.1 per 1,000 in New York City.

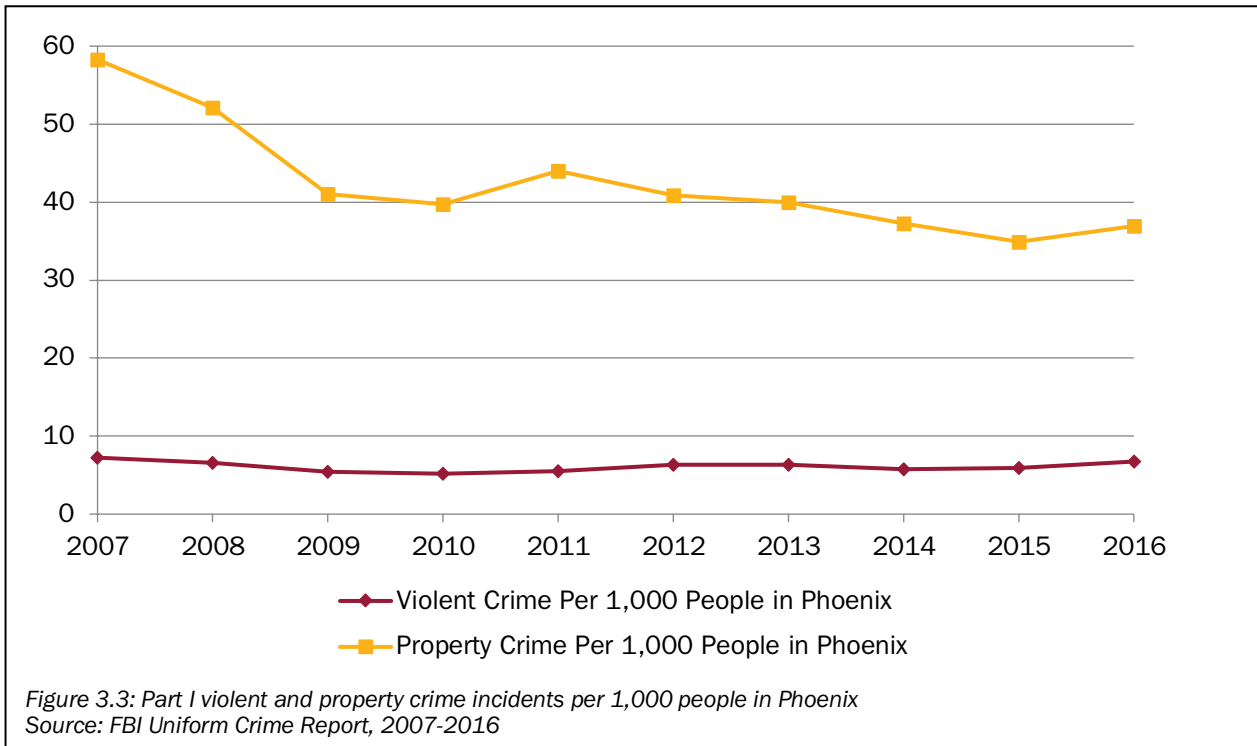
Figure 3.3 shows a decline in staffing levels per capita in recent years, after fairly stable numbers between 2007 and 2011. This largely resulted from a seven-year hiring freeze that began in conjunction with the 2008 financial crisis. During this time, the Phoenix Police Department declined in sworn officers from 3,351 in 2008 to 2,781 officers in 2015. The per capita numbers in Figure 11 account for the decline in Phoenix’s population following the housing market crash and the now increasing city population. The 2016 numbers suggest the city employed about 1.74 officers per 1,000 people, down from 2.11 in 2008. The Phoenix Police Department is currently aggressively hiring to expand to 3,125 officers by summer 2018.

⁵ <https://www.phoenix.gov/budgetsite/Budget%20Books/Detail%20Budget%202017-18.pdf>

⁶ Data drawn from the FBI’s Uniform Crime Report data on police employment.

What is the appropriate funding level for the Phoenix Police Department? This is a challenging question since there are not clear metrics for the “right” size of a department. As noted earlier, department size in large cities varies substantially. The Phoenix Police Department currently has an authorized staffing level of 4,317 sworn officers, suggesting that even with the current efforts to increase department size, officer numbers are substantially below where they could be.

There is some evidence that response times to 911 emergency calls have increased in recent years due to reducing staffing levels in patrol. As a result, Phoenix Police Chief Jeri Williams moved many detectives and special unit officers to patrol in 2017. Still, there is little evidence that response time is closely linked to crime levels or the likelihood police will identify a suspect, although response time in priority calls in which a crime is in progress is important.⁷



One useful metric to examine is crime levels. If staffing levels are “too low,” this could lead to increased levels of crime. Figure 3.3 presents the number of serious violent and property crime incidents per 1,000 people in Phoenix between 2007 and 2016.⁸ Although officer ranks declined in recent years, crime levels have generally declined or remained fairly stable, with small upticks in property and violent crime in the 2016 data. The data in Figure 3.3 do not suggest that reduced staffing levels have substantially affected crime rates, although examining this relationship is complicated by the fact that crime incident counts are impacted by the number of officers available to write incident reports.

⁷ <http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/standard-model-policing-tactics/>

⁸ Serious crime is based on FBI classifications for Part I incidents. These are homicide, robbery, aggravated assault, and rape for violent crime, and burglary, larceny/theft, and motor vehicle theft for property crime.

Officers and Undocumented Immigrants

Arizona law enforcement agencies face unique challenges due to the state's border with Mexico. As a result, Arizona has been at the center of debates regarding the role of local police agencies in immigration enforcement. Such issues were especially prominent in 2010 with the passage of Arizona Senate Bill 1070. This state measure expanded the role of local police departments in immigration-related work, which has traditionally been the role of federal law enforcement agencies.

Despite the vigorous local and national debate about SB 1070 and the role of local police in immigration enforcement, there has been limited empirical research on this topic. There are no studies of the effect of agencies' efforts to decouple immigration enforcement from local policing. Analyses of the impact of increased immigration enforcement in Prince William County, Virginia, found a limited crime control impact (only aggravated assaults declined) and a negative impact on Hispanics' perceptions of police, particularly among Hispanics whose primary language was Spanish.⁹ A study of the impacts of SB 1070 on crime found decreases in property crime. However, researchers concluded these were largely a result of decreases in the undocumented population and particularly young men, who tend to commit

Personal Insight

Brian Issitt doesn't quite say it, but his point is clear: It's not his dad's police force anymore.

A lieutenant in the Phoenix Police Department, Issitt remembers when his father was on the force in Michigan.

"When he was an officer in the 70s and 80s, police were just expected to enforce the law," he says. "Now, police officers are expected to wear a plethora of different hats." Among the most important of these tasks are forging deeper relationships with the community and "trying to do our best with the mental health issues."

In part, Issitt said, this cascade of tasks flows from the fact that police are "the most visible aspect of the criminal justice system." Another reason is that police in Arizona and elsewhere are trying to forge deeper relationships with the communities they serve. This "vitally important" mission, he says, means trying to be a jack of all trades.

It also means dealing with the community's criticism.

"There's a segment of our population that believes our use of force has become a problem," Issitt says, accusations that are "sometimes warranted and sometimes not." The keys to reducing such conflicts? Community involvement and officer training.

Another key, he says, is for people to remember that police officers are human beings who sometimes have to deal with split-second decisions, he says. "I think sometimes the public looks at situations from a black-and-white perspective, when in reality there are shades of gray in these all incidents."

⁹ Koper, C. S., Guterbock, T. M., Woods, D. J., Taylor, B., & Carter, T. J. (2013). The effects of local immigration enforcement on crime and disorder: A case study of Prince William County, Virginia. *Criminology and Public Policy*, 12, 239-276.

more crimes regardless of race or ethnicity, rather than a link between immigration and crime per se. Research focused on the Secure Communities program found no change in crime or clearance rates, potentially suggesting that immigrants did not become less cooperative with police as a result of local police becoming more involved in immigration enforcement.¹¹

Scholars also have raised concerns about potential negative consequences of local police being involved in immigration enforcement, including more unjustified stops of Latinos, and increases in unreported victimizations, particularly in Arizona.¹² These have not all been empirically examined.

As immigration policy continues to evolve, it remains an important area for continued research. In California, recent preliminary analyses of crime data suggest decreases in reporting of domestic violence among Latinos, which may be a reflection of concerns about the Trump administration's focus on immigration enforcement.¹³

Evaluating Police Performance

Evaluating police performance can employ measures related to both effectiveness in terms of crime control and fairness in terms of citizen perceptions of police legitimacy and fairness. These are primary indicators in Arizona and nationally. Indeed, the National Research Council called its 2004 review of the policing research evidence *Fairness and Effectiveness in Policing* to highlight the importance of these two, ideally mutually reinforcing goals in democratic policing.¹⁴

Crime Control Effectiveness

A growing body of rigorous research on policing interventions suggests the police can effectively reduce crime and disorder.¹⁵ Effective interventions include "hot spots" policing, problem-oriented policing and focused-deterrence strategies. Hot spots policing has officers focusing extra attention on the small percentage of street blocks or other small geographic units that experience a large share of a jurisdiction's crime problem.¹⁶ In problem-oriented policing, police craft a tailored response to a problem that addresses the factors contributing to the problem's occurrence.¹⁷ Focused-deterrence strategies involve police delivering a credible deterrent threat to gangs or other high-crime groups in a call-in meeting, and then following up with swift and severe sanctioning of group members who continue to engage in crime.¹⁸

¹⁰ http://achalfin.weebly.com/uploads/8/5/4/8/8548116/chalfindeza_lawa.pdf

¹¹ Cox, A., & Miles, T. J. (2015). Legitimacy and cooperation: Will immigrants cooperate with local police who enforce federal immigration law? *Public Law and Legal Theory Research Paper Series Working Paper No. 15-43*. Chicago: University of Chicago.; Miles, T. J., & Cox, A. B. (2014). Does immigration enforcement reduce crime? Evidence from Secure Communities. *The Journal of Law and Economics*, 57, 937-973.

¹² Provine, D. M., & Sanchez, G. (2011). Suspecting immigrants: Exploring links between racialised anxieties and expanded police powers in Arizona. *Policing & Society*, 21, 468-479.; Zatz, M. S., & Smith, H. (2012). Immigration, crime, and victimization: Rhetoric and reality. *Annual Review of Law & Social Science*, 8, 141-59.

¹³ See "Fearing deportation, many domestic violence victims are steering clear of police and courts" in the *Los Angeles Times* <http://latimes.com/local/lanow/la-me-ln-undocumented-crime-reporting-20171009-story.html>

¹⁴ <https://www.nap.edu/catalog/10419/fairness-and-effectiveness-in-policing-the-evidence>

¹⁵ <http://cebcp.org/evidence-based-policing/what-works-in-policing> and <http://www.policingmatrix.org>

¹⁶ <http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/hot-spots-policing/>

¹⁷ <http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/problem-oriented-policing/>

¹⁸ <http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/focused-deterrence/>

Some agencies in Arizona have adopted these evidence-based strategies. The Glendale Police Department implemented a problem-oriented policing project to reduce convenience store crime with funding from the Bureau of Justice Assistance.¹⁹ The project reduced crime at targeted convenience stores through a combination of situational measures, increased enforcement and an awareness campaign. The Tucson Police Department is currently implementing a hot spots policing program focused on residential locations across the city, and the Phoenix Police Department is expanding its intelligence officer program, which focuses on the gathering and sharing of information to better respond to repeat offenders and high crime locations.²⁰

Police-Community Relations in Arizona

A great deal of recent research has focused on questions of police-community relations, and in particular police legitimacy. This research has focused on survey samples from across the country, though few have focused on Arizona specifically.

“Legitimacy” here refers to the public belief that there is a responsibility and obligation to voluntarily accept and defer to the decisions made by authorities. The police need the support and cooperation of the public to effectively combat crime and maintain order. When individuals do not perceive the police as legitimate, they may be more likely to disobey police requests and to violate the law.²¹ A large body of research suggests that the way police treat people in interactions affects perceptions of legitimacy.

When police are procedurally just, citizens tend to perceive officers as more legitimate. This “procedural justice” has four components: officers allowing citizens to tell their side of the story; being neutral and transparent in decision-making; treating individuals with respect; and having trustworthy motives (i.e., showing care and concern for citizens and the community).²² These studies demonstrate that perceptions of treatment matter a great deal in how citizens view interactions with authority figures.

While research suggests that procedural justice is important across racial groups, there is also strong evidence that non-White individuals tend to view the police much less favorably than Whites.²³ A 2006 national survey of nearly 1,800 adults found that 40 percent of African American respondents said they had been treated unfairly by police because of race, compared to just 2 percent of Whites. In surveys including Latino respondents, they tend to have less favorable perceptions than Whites, but often not as negative as African-Americans.²⁴

Research suggests that individuals who see the police as more legitimate are more likely to report complying with the law and cooperating with police.²⁵ A recent study from Maricopa County suggests

¹⁹ <http://www.strategiesforpolicinginnovation.com/spi-sites/glendale-arizona-2011>

²⁰ Telep, C. W., Ready, J., & Bottema, A. J. (In press). Working towards intelligence-led policing: The Phoenix Police Department Intelligence Officer Program. *Policing: A Journal of Policy and Practice*.

²¹ Tyler, T. R. (1990). *Why people obey the law?* New Haven, CT: Yale University Press.

²² Tyler, T. R., & Huo, Y. J. (2002). *Trust in the law: Encouraging public cooperation with the police and courts.* New York: Russell Sage Foundation.

²³ Tyler, T. R. (2005). Policing in black and white: Ethnic group differences in trust and confidence in the police. *Police Quarterly*, 8(3), 322-342.

²⁴ Weitzer, R. (2014). The puzzling neglect of Hispanic Americans in research on police-citizen relations. *Ethnic and Racial Studies*, 37, 1995-2013.; Weitzer, R., & Tuch, S. A. (2006). *Race and policing in America: Conflict and reform.* New York: Cambridge University Press.

²⁵ Papachristos, A. V., Meares, T. L., & Fagan, J. (2012). Why do criminals obey the law? The influence of legitimacy and social networks on active gun offenders. *Journal of Criminal Law and Criminology*, 102, 397-440.

that procedural justice is important even for those who have been arrested. Arrestees who viewed the police as more procedurally just had more positive views of police legitimacy and were more willing to cooperate with police.²⁶ This has important implications for crime control. If increased legitimacy leads to increased compliance with the law, then using procedural justice to enhance perceptions of police legitimacy could reduce crime and reoffending in the long-term.

To date, there has been only limited research on efforts to increase procedural justice in police-citizen interactions. Evaluations of procedural justice training programs have typically been limited to assessments of officer attitudes, finding that officers are more supportive of procedural justice concepts following training.²⁷ A number of different training models currently exist, although most of these have not been rigorously evaluated.²⁸ A series of studies, all outside of the U.S., show mixed effects in using officer scripts integrating procedural justice into traffic stops.²⁹ An ongoing project in Tucson to examine the impact of procedural justice training for officers working in high-crime areas will provide new evidence on the impacts of training on officer behavior and citizen perceptions of police legitimacy.

Community policing programs also have been used extensively. Such programs vary dramatically across agencies, but emphasize some form of partnership and collaboration with residents to address community problems. Reviews of the evaluation literature suggest such programs have limited impacts on crime and fear of crime, but can be more effective in increasing satisfaction with the police and citizen perceptions of police legitimacy.³⁰

Current Issues in Policing

Space precludes a full review of all the key issues facing police today. The opioid crisis, marijuana legalization and homelessness are all major issues that law enforcement agencies have or will have to address. These issues share in common a need for police to partner with other state and local stakeholders both within and outside the criminal justice system. These issues often overlap: Many individuals facing homelessness also have unaddressed addiction or mental health problems. As one of the few 24/7 government agencies, police departments are often on the front lines of a host of community challenges.

Disabled and Mentally Ill Suspects

There is little known about protocols for dealing with individuals with mental health problems or disabilities. A small number of studies in recent years have examined officer training focused on dealing with individuals in crisis. The Crisis Intervention Team (CIT) model was developed in Memphis, Tenn., in 1988 and includes 40 hours of training delivered by mental health professionals. Providing officers with skills on using words to de-escalate crises is a key component of training. CIT-trained officers are then deployed to scenes involving an individual who may be having a mental health crisis. The research to

²⁶ White M. D., Mulvey, P., & Dario, L. M. (2016). Arrestees' perceptions of the police: Exploring procedural justice, legitimacy, and willingness to cooperate with police across offender types. *Criminal Justice and Behavior*, 43, 343-364.

²⁷ Skogan, W. G., Van Craen, M., & Hennessy, C. (2015). Training police for procedural justice. *Journal of Experimental Criminology*, 11, 319-334.

²⁸ Examples of different training models: <https://trustandjustice.org> and <http://cebcp.org/evidence-based-policing/building-trust/education-and-training>

²⁹ Nagin, D. S., & Telep, C. W. (2017). Procedural justice and legal compliance. *Annual Review of Law and Social Science*, 13, 5-28

³⁰ Gill, C., Weisburd, D., Telep, C. W., Vitter, Z., & Bennett, T. (2014). *Community-oriented policing to reduce crime, disorder and fear and increase satisfaction and legitimacy among citizens: A systematic review*. *Journal of Experimental Criminology*, 10, 399-428 and <http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/community-policing>

date on officer attitudes has been generally positive. For example, the training has been associated with increased knowledge about the causes of schizophrenia, and more favorable officer attitudes towards individuals with mental illness.³¹ A review of CIT studies suggested that “the training component of the CIT model may have a positive effect on officers’ attitudes, beliefs and knowledge relevant to interactions with such individuals, and CIT-trained officers have reported feeling better prepared in handling calls involving individuals with mental illnesses.”³²

Less is known, however, about the impact of training. A recent review of studies found no impact of CITs on the likelihood officers would make an arrest of an individual with mental illness or on whether officers used force in such interactions.³³ In contrast, a study examining actions taken by CIT-trained officers found they were more likely to refer mentally ill individuals to services or transport them to treatment, compared to non-trained officers. More research is needed, especially since CIT studies to date have relied on officers who volunteer to complete CIT training. A study that randomly assigned officers to training or a comparison group would provide further evidence on the impacts of training.

There is also no rigorous research on training programs for police on other types of disability. While most police academies provide some training on disability, this training tends to focus on mental health problems rather than learning disabilities or physical impairments, and there is no assessment of the impact of such training.³⁴ There are a number of media reports and anecdotal evidence depicting negative interactions between police and individuals with a disability, particularly those who are deaf and may have difficulty responding to police commands without an interpreter.³⁵

The Impact of Body Worn Cameras on Officers and Suspects

Perhaps no area in policing has seen more research in recent years than the effects of body-worn cameras. Many of these studies are ongoing, so this is an area where the evidence base is likely to expand substantially in the coming years. Many agencies have adopted body-worn cameras because of concerns about officer use of force and the inability to directly supervise officers in the field. Cameras are viewed as a way to provide greater accountability and transparency and ideally will improve police legitimacy. As of 2013, about one-third of agencies had adopted body-worn cameras, but that number has certainly increased in the last four years.³⁶

Research to date has not been conclusive. Still, some preliminary conclusions can be drawn about the effects of body-worn cameras. Studies of officer attitudes suggest police are generally supportive. Evaluations have been fairly consistent in showing that officers wearing body-worn cameras are less

³¹ Demir, B., Broussard, B., Goulding, S. M., & Compton, M. T. (2009). Beliefs about causes of schizophrenia among police officers before and after crisis intervention team training. *Community Mental Health Journal*, 45, 385-392.; Ellis, H. (2014). Effects of a crisis intervention team (CIT) training program upon police officers before and after crisis Intervention team training. *Archives of Psychiatric Nursing*, 28, 10-16.

³² Compton, M. T., Bahora, M., Watson, A. C., & Oliva, J. R. (2008). A comprehensive review of extant research on crisis intervention team programs. *Journal of the American Academy of Psychiatry & the Law*, 36, 47-55.

³³ Taheri, S. A. (2016). Do crisis intervention teams reduce arrests and improve officer safety? A systematic review and meta-analysis. *Criminal Justice Policy Review*, 27, 76-96.

³⁴ McAfee, J. K., & Musso, S. L. (1995). Training police officers about persons with disabilities: A 50-state policy analysis. *Remedial and Special Education*, 16, 53-63.

³⁵ “When police officers don’t know about the ADA” in The Atlantic <https://www.theatlantic.com/politics/archive/2017/09/the-steadily-problematic-interactions-between-deaf-americans-and-police/541083/>

³⁶ Reaves, B. A. (2015). Local police departments, 2013: Equipment and technology. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice.

likely to receive complaints.³⁷ It is believed that cameras may have a civilizing effect on police-citizen encounters, such that officers and citizens may be less likely to resort to behavior they know is being recorded. Additionally, cameras are likely to lead to fewer false complaints that citizens know are likely to be unfounded after a review of footage. Findings on officer use of force are less consistent. While some initial studies suggest officers wearing cameras were less likely to use force, other studies have shown no effects. It appears this relationship may vary based on agency policy. Body-worn cameras have shown more of an impact on reducing use of force in departments that do not allow officers discretion on when to use cameras (i.e., officers must keep cameras on at all times).³⁸

Arizona was the site of two of the first rigorous studies of body-worn cameras. The Phoenix Police Department³⁹ and the Mesa Police Department implemented two of the first randomized trials on the effects of cameras, and another randomized trial was just completed in the Tempe Police Department. In line with other research, the Phoenix study found that officers wearing body cameras were less likely to receive citizen complaints. The Mesa findings suggested that officers wearing body cameras were more likely to make contacts with citizens but less likely to make arrests. This suggests that cameras might create more proactivity but without greater enforcement intrusiveness.⁴⁰

Future research is needed on a number of key topics related to body-worn cameras. These include better understanding how they affect citizen perceptions of police legitimacy, as well as citizen willingness to report crime. More research is also needed on how camera footage is used for investigations and by prosecutors. There is also limited research to date on how body-worn cameras are used by supervisors for monitoring officers in the field. In addition, cameras are expensive to purchase and maintain and also require significant storage space for video files. Studies on some of these questions are currently underway.

The “Militarization” of Police

While a great deal of news media and popular attention has focused on the concept of police “militarization,” there is limited empirical research focused on its impact. The use of military terminology and tactics is not new to policing. Indeed, policing has historically emulated the military rank structure, and many police academies use a paramilitary training model. The concern with militarization is that agencies will shift from a mindset of using force only as a last resort to an armed-forces model of using force as needed to destroy an enemy.⁴¹

One current challenge is how to define whether an agency is militarized. Scholars have pointed to measures including the physical materials an agency acquires, the cultural orientation of the

³⁷ Ariel, B., Farrar, W. A., & Sutherland, A. (2015). The effect of police body worn cameras on use of force and citizens' complaints against the police: A randomized controlled trial. *Journal of Quantitative Criminology*, 31, 509-535.

³⁸ Lum, C., Koper, C. S., Merola, L. M., Scherer, A., & Reixou, A. (2015). Existing and ongoing body worn camera research: Knowledge gaps and opportunities. *Report for the Laura and John Arnold Foundation*. Fairfax, VA: Center for Evidence-Based Crime Policy, George Mason University.; Maskaly, J., Maskaly, J., Donner, C., Donner, C., Jennings, W. G., Jennings, W. G. & Sutherland, A. (2017). The effects of body-worn cameras (BWCs) on police and citizen outcomes: A state-of-the-art review. *Policing: An International Journal of Police Strategies & Management*, 40, 672-688.

³⁹ <http://www.strategiesforpolicinginnovation.com/spi-sites/phoenix-arizona-2011> and <http://www.strategiesforpolicinginnovation.com/spi-sites/phoenix-arizona-2015>

⁴⁰ Ready, J. T., & Young, J. T. (2015). The impact of on-officer video cameras on police-citizen contacts: findings from a controlled experiment in Mesa, AZ. *Journal of Experimental Criminology*, 11, 445-458.

⁴¹ Kraska, P. B. (2007). Militarization and policing-Its relevance to 21st century police. *Policing: A Journal of Policy and Practice*, 1, 501-513.

organization, the operational strategies employed, and the organizational structure and management style. Physical materials, such as riot gear, are easiest to measure, but simply measuring whether an agency has such tools does not provide information on the extent of their use. The extent an agency uses its SWAT team (and whether an agency has a SWAT team) are sometimes used as measures, as well. There is evidence that SWAT usage has increased in recent years. However, there is debate over whether this reflects that agencies are becoming more militarized or whether it reflects agencies are handling dangerous situations more professionally using sounder tactics.⁴²

Much of this debate has focused recently on the federal government's 1033 program, which began in 1997 and allows local police agencies to acquire surplus military equipment. Following concerns about police tactics in high-profile protests, President Obama significantly scaled back the program in May 2015. This executive order was rescinded and the program was fully reinstated by President Trump in May 2017. There is little research on the impacts of the 1033 program on crime, agency use of force or citizen perceptions of legitimacy. Future studies are needed to better understand how acquiring surplus military equipment affects how police agencies use force, and whether citizens perceive police agencies using such equipment more negatively.

⁴² Bieler, S., & Bieler, S. (2016). Police militarization in the USA: the state of the field. *Policing: An International Journal of Police Strategies & Management*, 39(4), 586-600; Radil, S. M., Dezzani, R. J., & McAden, L. D. (2017). Geographies of US Police Militarization and the Role of the 1033 Program. *The Professional Geographer*, 69(2), 203-213.

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BAIL, JAIL, FINES, AND FEES

By Dave Byers

Administrative Office of the Courts, Chair, Task Force on Fair Justice for All

Key Points:

- Low-income people often have difficulty paying bail, forcing them to await trial in jail.
- Research indicates that bail does little to ensure that defendants return for trial.
- Fees are imposed upon those convicted in court support programs such as domestic violence shelters, but the criminal justice system may face lower funding as the crime rate continues to drop.
- Reforms are being implemented to make the imposition of bail more equitable and to reduce the population awaiting trial in jail.



Every year in Arizona, thousands of people are arrested and jailed but cannot afford to post bail. Although defendants accused of committing a crime and arrested are presumed to be innocent, if they lack access to money, they often remain in jail while awaiting trial.

The Arizona Constitution requires that, except in limited situations, a person must be bailable. That is, defendants are generally entitled to be released (bailable) from jail on their own recognizance or other conditions, while awaiting the disposition of their offenses. Research has shown that imposing money bail does not improve the chances that low-risk offenders will return to court, nor does it protect the public because many high-risk defendants have access to money and can post bail. Instead, it serves only to treat

differently those who can and cannot access money.

Many Arizonans fall into the latter category. Arizona has the fourth-highest poverty rate in the United States. More than 21 percent, or 1.2 million of Arizonans, fall below the federal poverty line. Most of Arizona's poor are not the panhandlers on the highway off-ramps, but the "working poor"- that is, people who earn minimum wage and whose household incomes are less than 150 percent of the federal poverty level. Arizona's unemployment rates exceed the national average as well. People of all income levels, on occasion, may commit an infraction of the law. If justice in Arizona is to be administered fairly, the justice system must take into account the challenges that court-ordered sanctions pose for those living in poverty or otherwise struggling economically.

Arizona already has many statutes in place, rules and practices that enable judges to take into account economic hardship in making pretrial release determinations. This flexibility is not available in all types of cases, however, particularly with some of the more common offenses such as driving without insurance.

Several court rules have been revised to address many of the concerns surrounding bail. A revision to the right to counsel rule was made to provide indigent defendants with counsel if they are detained

pending trial after criminal charges are filed. This will allow those defendants who are unable to meet the conditions of release or afford to post a financial bond an opportunity for their case to be reviewed by an attorney who may assist in a bail review hearing.

The definitions of the various types of release have been updated and the court rule for imposing release conditions have been modified to provide a continuum of release options. The rule changes require the court to consider the least onerous type of bail conditions that are sufficient to protect the community and ensure the person returns to court.

A “deposit bond” type has been added, allowing a person to post a percentage of a financial bond with the Clerk of the Court, which would be returned to the defendant upon successful completion of the pretrial period. Currently, a person who uses the services of a commercial bondsmen is charged a non-refundable fee of about 10 percent.

For individuals arrested for certain serious offenses, such as homicide or sexual assault which are considered to pose a high risk to the community, new procedures have been added to allow the court to hold a hearing to determine if the person should be held without bail.

To assist judges in determining a person’s risk to the community at the time the court is setting release conditions, Arizona established a pretrial risk assessment tool that is completed by pretrial officers who evaluate a person’s criminal and court history. The statistically validated risk assessment tool used is the Public Safety Assessment (PSA), which was developed by the Laura and John Arnold Foundation and is considered to be the state-of-the-art for pretrial risk assessment.

This tool uses only criminal justice risk factors to determine a person’s risk of new criminal activity and likelihood of appearing for court. It is not based on any demographic factors or other factors that may have a built-in bias. This assessment is conducted on felony arrests statewide and for some misdemeanor cases. Efforts are underway to evaluate the feasibility of providing this assessment in other misdemeanor cases filed in limited jurisdiction courts.

Instructional materials have been provided to judges including “Bench Cards” to help guide judges when evaluating a person’s ability to afford a bond, or when imposing certain financial conditions at the time of sentencing, or during a hearing for persons who have fallen delinquent on court fees. Imposing incarceration is used only as a last resort and only when there has been a finding of willful non-compliance.

Following the shooting by police of an 18-year-old Black man in Ferguson, Missouri, a U.S. Department of Justice investigation found that the law enforcement practices in the city were largely shaped by the goal of raising revenue for city coffers. Ferguson has sparked a national dialogue, causing jurisdictions to examine their own practices of imposing and enforcing financial sanctions and the severe impact they can have on the poor and minority groups.

Those examining the Ferguson-type issues should note that those situations generally occur in local limited jurisdiction courts, not in courts that are under the supervision of a state supreme court. Arizona’s courts are structured differently. The Arizona Supreme Court has administrative oversight over all state courts – appellate, superior, justice and municipal courts. Oversight includes ensuring that courts perform their appropriate functions, which include educating, training and setting standards for when and on what conditions pretrial detainees are released from court.

Furthermore, the Administrative Office of the Courts (AOC) sets forth specifications for minimum accounting standards, operational reviews and training. The AOC also provides the structure for a proper relationship between municipal courts, municipal city councils and city managers.

Interference that impedes the court from carrying out the impartial administration of justice violates the distribution-of-powers provision of the Arizona Constitution and the fundamental principles of our constitutional form of government. The limited jurisdiction courts must continue to maintain independence from the executive and legislative branches so they can fairly decide cases. The vast majority of Arizona's limited jurisdiction courts operate in a high-quality manner. If a court severely fails to operate properly, administrative control of the court can be removed from the local judge and placed under the control of the county presiding judge until the problems are remedied.

These issues impact all courts in Arizona including judges, criminal justice stakeholders, victims, defendants and community members. The AOC has led this reform in Arizona with the assistance of task force members, committees, sub-committees and workgroups convened to address particular topics. These various groups included representation from all parts of the criminal justice system, victim community and other community groups. Some of these changes will require legislative remedies. Several legislative proposals are being considered.

For years now, Arizona's legislative bodies, like in many other states, have added a variety of surcharges and fees to the amount of a fine in order to fund numerous programs (e.g., DNA testing, domestic violence shelters, head injury fund). These programs depend on the stream of funding coming from those paying the costs of their citations.

However, for a variety of reasons, the overall number of citations is plummeting. For example, civil traffic citations have dropped from 1.8 million at its peak in FY 2008 to 1.2 million in FY 2015, a 34 percent decline. This downward trend is likely to continue in light of new safety-equipped cars and, eventually, driverless cars, plus law enforcement methods that use techniques to control traffic other than writing citations.

Seeing the drop in citations, the Arizona Criminal Justice Commission in July 2017 agreed to establish a task force to explore this issue further and to make recommendations for alternative funding sources. It is likely that the Legislature and city councils will need to re-examine the current dependency on revenue from citations to keep current programs funded. While the adoption of the recommendations the Task Force on Fair Justice report may result in some decreases in revenue, it could also have the opposite effect. If people who are not currently paying their sanctions at all are given sanctions based on their ability to pay, and more reasonable time payment plans, they may begin to pay, thereby increasing revenues.

A second specialized group that is brought to court involves individuals exhibiting mental health issues. A number of individuals appearing in limited jurisdiction courts have been arrested for "quality of life" crimes (i.e., shoplifting, urinating in public, trespassing and loitering) and appear to have mental health concerns. Under the current law, the process to determine the competency of a person charged with a misdemeanor or a felony is the same. The process is cumbersome and expensive.

Mesa and Glendale municipal courts have been piloting a streamlined process to handle these cases that shows promise, however, the process will not work for handling all municipal cases: It requires the superior court to appoint the limited jurisdiction court judges as superior court pro tempore judges,

as well as designating the city courthouses as satellite facilities of the superior court. Recent legislative changes modify the current mental health competency proceeding statutes for handling misdemeanor cases.

The handling of cases involving individuals with mental health issues is a challenge for all parts of the criminal justice system. Protocols for best handling these cases need to be adopted locally, since resources will vary from jurisdiction to jurisdiction. The presiding judge of each county and of each large municipal court should bring the criminal justice stakeholders in their jurisdictions together to develop protocols that will be used to better handle these cases. Such an effort is currently under way in Yavapai County.

Many of the defendants brought to jail who exhibit mental health issues have previously received services from local Regional Behavioral Health Authorities (RBHAs). In Maricopa County, the RBHA works with the pretrial services agency to identify defendants who have previously received mental health services. This allows for the coordination of necessary services while defendants, who are diagnosed as seriously mentally ill, are in custody or upon their release. Implementation of procedures like this in jurisdictions throughout Arizona is recommended.

Personal Insight

While many Arizona officials are supporting a Supreme Court initiative to make bail more affordable to suspects sitting in jail, Kathy Waters wants Arizonans to know that this is not about letting criminals off easy.

“Money bail still exists,” she says, “but we’re trying to move to a risk-based system that will increase public safety while enabling low-income suspects to get out of jail while awaiting trial. They’ll still be held accountable.”

Waters, director of Adult Probation Services for the AOC, says a more flexible bail program would also benefit the public at large, in part by reducing the burden borne by taxpayers who must pay for jails to needlessly house defendants - who meanwhile can lose their jobs and housing.

But do we really have to care that someone who’s arrested can’t make bail?

In response, Waters notes the issues of fairness and public finance and cites perhaps an even more persuasive point:

“If it happens to them or a family member,” she says, “they’ll care.”

The Phoenix Municipal Court has recently implemented a Compliance Assistance Program (CAP) that permits defendants who have had their driver’s licenses suspended to come to court, arrange a new and affordable time payment program and make down payments on their outstanding fines. In exchange, the court will provide a clearance letter for the Motor Vehicle Department so the individual’s driver’s license may be reinstated. Since its inception in January 2016, more than 21,000 individuals have taken advantage of this program. Through October 2017, the City of Phoenix recovered nearly \$12 million in outstanding fines, with a low non-compliance rate.

In May 2015, Pima County was awarded \$150,000 from the John D. and Catherine T. MacArthur Foundation for an initiative to reduce over-incarceration by changing how America thinks about and uses jails. The initiative is a competition to help jurisdictions create fairer, more effective local justice systems through bold innovation.

During Phase 1, Pima County developed a plan to reduce the jail population by 15 percent to 19 percent, and to reduce racial and ethnic disparities. Pima County was awarded an additional \$1.5 million to move forward with Phase 2, which involves creating an implementation plan for broad system change. Planning and policy teams included decision-makers from the county administration, jail, superior court, limited jurisdiction courts, law enforcement, prosecution, defense and community organizations.

Proposed court system innovations and treatment alternatives include extending evidence-based risk screening to all defendants; adding a behavioral health screen prior to initial appearance and expanding pretrial supervision capacity; training criminal justice system partners (including the judiciary) on implicit bias and the use of money bail; reducing the incidence of failure to appear by implementing reminder systems, and offering more accessibility to courts through periodic weekend warrant resolution courts; and expanding the use of home detention and electronic monitoring. If successful, these innovations are expected to reduce the jail population by 20 percent, which would potentially allow the closure of six 64-person pods at the jail, resulting in an estimated cost savings of \$2.7 million per year and improvement of pretrial justice in Arizona.

Arizona is not alone in addressing these issues. Throughout the United States, reform of bail procedures and the changes surrounding the imposition of court ordered financial obligations for indigent persons are underway. In some jurisdictions, legal challenges to the current procedures have occurred, resulting in forced change in some communities. Arizona's efforts have been proactive and not as a result of litigation.

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CHARGING

By Marc L. Miller J.D.¹

Dean, James E. Rogers College of Law, University of Arizona

Key Points:

- Prosecutors have wide discretion in deciding what charges to press against a defendant.
- The decision not to charge may be the most powerful tool of the prosecutor.
- Although the initial charges filed may not be the ones that are eventually brought to trial, they influence key decisions on bail, plea bargains, and sentencing.
- The development of charging guidelines could reduce seemingly arbitrary charges.



External Regulation of Charging

A key fact concerning charging decisions by prosecutors is that there is vanishingly little law governing them. This observation that charging is essentially unregulated is sometimes met with the response that neither police nor prosecutors can act without a legal basis for doing so. Thus, the argument goes, suggestions of lawlessness in charging (or arrest, or adjudication or sentencing) are overstated.

As a corollary, observers note that if police or prosecutors exceed their legal authority, their actions are subject to reversal by courts, and in extreme cases they can be administratively or legally sanctioned.

This response is true as far as it goes. The problem is that the criminal codes in most states, including Arizona and the federal criminal code, are so wide-ranging. There are so many overlapping offenses, crimes with broad definitions and huge authorized sentencing ranges that for many behaviors the criminal code provides few practical limits on prosecutorial decision-making.²

Equally important, antiquated criminal codes invite significant variation in how similar behavior is treated by the same (and different) prosecutors in the same jurisdiction and over time.

The second problem with looking to criminal codes to restrain police and prosecutorial behavior in charging decisions is that the applicable standard to justify arrest and charging decisions is a low one: “probable cause.” This standard – a “reasonable belief” that a crime was committed – is well short of the familiar legal standards of “preponderance of the evidence (51 percent certainty, used for civil cases)” and certainty shy of “beyond a reasonable doubt” (for determining guilt or innocence in criminal cases).

Every once in a while, high profile cases – including a few in Arizona – feature prosecutors or police

¹ Dean & Ralph W. Bilby Professor, University of Arizona James E. Rogers College of Law. Special thanks go to Ron Wright for comments on a draft of this essay.

² Barkow, 2005

officials who lose their licenses or are sanctioned for abuse of arrest and charging powers. These exceptions, however, do not change the occurrence. There are more law review articles on the topic of selective prosecution than actual cases finding selective prosecution. And the standards to prove a selective prosecution claim – or even to get evidence to assess a claim – are astronomically high.³

In other words, the fact that a legal system sometimes responds to cases of extreme abuse is not a remedy for systemic issues of misuse or inconsistent application of government powers.

Some of the most important choices in the world of criminal justice take place beyond the boundaries of traditional conceptions of law. The best examples of such lawless territory are declination decisions – decisions by a prosecuting authority not to charge an individual, even in the face of evidence that surpasses the “beyond a reasonable doubt” standard.

Scholarship suggests that declination rates in some systems can be quite high. In a famous moment in American criminal justice, federal prosecuting authorities were called to task by Congress to explain the high declination rates in charging decisions among U.S. Attorneys (federal prosecutors).⁴ That moment passed. And some good occasional scholarship notwithstanding, this enormous exercise of prosecutorial power takes place off the radar of government and private observers.⁵

The power to charge in a variety of ways -- choosing different crimes and determining the number of different counts, along with the virtually absolute power to decline to charge at all – provides enormous power to American prosecutors.

Could charging and closely connected decisions be more closely regulated by legislatures and courts? Sure. But the far more important path now, and the far more plausible path going forward, is to examine the internal regulation of power by prosecutors such as the standards and procedures they place on their own decision-making.

Internal (Executive) Regulation

For many years, scholars have had little to say about the internal (executive) regulation of executive branch agencies. The best known examples are the policies that control federal prosecutors, published in the United States Attorneys Manual. Scholarship has brought internal regulation of executive branch agencies into the scholarly light.⁶ It has also fitted it into the literature on social norms - informal rules and behaviors that operate outside the compelling force of the law. Sometimes these social norms are the sole constraint on individual behavior.⁷

Elected prosecutors, managers and police chiefs didn't need scholars to tell them that, if they wanted to control their offices, they needed to hire, train and manage with care. Mid- and large-sized offices especially needed to develop internal rules, standards procedures and guidelines. The most sophisticated prosecutors also implement internal data systems. But internal policies and procedures are only sometimes written and rarely visible to those outside the office.

³ Poulin, 1997; Miller & Wright, 2015

⁴ Miller & Wright, 2015

⁵ O'Neill, 2003

⁶ Wright & Miller, 2002; Miller & Wright, 2008

⁷ Ellickson, 1991

Some state courts have mandated the development of prosecutorial guidelines, most notably in New Jersey.⁸ Some state prosecutors have started to share their charging (and related plea and sentencing) guidelines. A good example of this is in Kitsap County in Washington State.⁹

When combined with procedures to train new prosecutors and to enforce internal standards, along with data systems to assess and report on the application of the standards, such systems have the possibility of achieving equality and justice that are at best a distant hope in traditional systems.

Charging As Part of Multi-Layered Criminal Justice Decision-Making

The charging decision is not a single decision and it does not exist at a single point in time. Initial charges can be dismissed, charges can often be re-filed, new charges can be added and charges can be modified. Modifications can occur as a result of further investigation, or for strategic reasons – such as part of a plea bargain – or in response to offers of assistance (information and/or testimony) to prosecutors in cases against other defendants.

Thus, initial charges in most systems should often be considered just that - preliminary and contingent. Yet those early charges, and decisions made later in the process, connect directly to such issues as bail and release decisions, plea bargaining, trial, sentencing and collateral consequences.

When initial charges are fluid, the importance of the charge might not be transparent to defendants, their lawyers, judges or other observers. There are alternatives to fluid charging. For example, some prosecutors, as part of their internal processes and guidelines, frontload the investigative process, and mandate that only charges that the prosecutor believes can be proved at trial (at the higher trial standard) should be filed.¹⁰

Prosecutors committed to reinvigorating the disappearing criminal trial can commit to limit plea bargains to the most serious charge or charges. This would potentially reduce the sentencing benefit (or plea discount) obtained by entering a guilty plea. But whether prosecutors are committed to making trial (and especially jury trial) a viable option, resources invested in screening can make the charging decision a more real and substantial reflection of the prosecutor's intent and the public's needs.¹¹

Perspectives on Charging

Where different observers and actors sit can tell us a lot about what they believe about prosecutorial charging power. Legal scholars have long noted the substantial discretion in prosecutorial charging, even in settings (like offenses with mandatory minimum sentences) that appear on their face to constrain prosecutorial and judicial discretion.¹² Defense attorneys frequently make strong claims about the abuse of those highly discretionary prosecutorial powers, including undue pressure on defendants (including some innocent defendants), and inconsistency in application.¹³

Prosecutors, on the whole, reject the claim that they have vast discretion in many settings, or that they abuse their powers. Instead, prosecutors emphasize their allegiance to the law, and their commitment

⁸ Wright, 2005

⁹ <https://spf.kitsapgov.com/pros/Pages/ChargingSentencingStandards.aspx> ; Miller & Wright, 2012; Wright & Miller, 2010

¹⁰ Wright & Miller, 2002

¹¹ Pfaff, 2017

¹² Remington, 1993; Miller, 2004

¹³ Davis, 2007

to protect the citizens who typically elect the lead prosecutor in most U.S. prosecutors' offices.¹⁴ Yet prosecutors will often acknowledge that they do not have the systematic information to put their case decisions or office policies into larger policy contexts. It is hard for prosecutors to see for themselves what they are doing with their discretionary powers.¹⁵

The different perspectives of scholars, defense attorneys and prosecutors can largely be squared. Scholars flag choices prosecutors could make; defense attorneys feel the bite of actual choices with their individual clients, and (with incomplete information) may see inconsistent decisions across prosecutors. Most prosecutors believe in good faith that they are applying the law in a consistent fashion. Their subjective view considers the abstract discussions of discretion and the lack of review of decisions (such as declination) as just that – abstract, and not reflective of decisions in practice.

Without data, it is hard to resolve the different perspectives about prosecutorial decision-making, most emphatically including charging decisions. The lack of external standards (at least standards with any bite) or procedures that allow any external review of some decisions means that many U.S. jurisdictions will simply leave the issues unresolved.

But there are alternatives. Development of prosecutorial guidelines, combined with transparency about their application, is one rare but intriguing option. Especially for large offices with many line prosecutors, high turnover and high case volume, data and reports may be the only ways internally or externally to know if systematic charging and prosecutorial justice are being done.

A better political and journalistic dialogue about prosecutorial powers also could contribute to a more just system. For example, to the extent a legislature valued initial charging decisions that have a significant basis in fact and reflect the most serious provable charges, it might require prosecutors to regularly report the percentage of plea bargains that include the most serious charge. And to the extent a legislature cares about the continuing vitality of the criminal jury trial, it might require regular reports on trial rates. A relatively short amount of information could provide the basis for a more engaged and serious social and political dialogue about the fairness, consistency and efficacy of the criminal justice system and its most powerful actor – the prosecutor.

Reports with some standard elements would allow for comparisons and norming across different offices and different chief prosecutors. But the single reform most likely to bring significant transparency, consistency and discipline to prosecutorial decision-making would be the creation of an expert sentencing commission and the development of sentencing guidelines.

Many states with a wide range of political cultures have demonstrated that a good sentencing system can impose significant order and transparency, and the hope for more equality of treatment on otherwise unregulated and messy criminal justice systems.

Well-drafted, evidence-based sentencing guidelines become, in effect, a simplified and more logical and coherent criminal code, and sentences may become more predictable.¹⁶ Sentencing guidelines provide a vehicle to consider the extent to which convictions (including the charges on which they are based) fit the facts of the case and align with similar cases.

¹⁴ Miller & Caplinger 2012

¹⁵ Wright 2017

¹⁶ Berman, 2017; Tonry, 1998

The determination of what is relevant – what makes a case similar or different – is an inquiry structured by the guidelines. There are many successful variations in the structure, flexibility, values and details of different systems, and now decades of positive experience across many states.

The success of guideline systems turns on the legislative charge to the sentencing agency and the quality of its work. A good agency will have reasonably broad representation on the commission, a capable staff, resources to collect and assess data, and a mandate both to design and review the guidelines over time. The success of guideline systems also turns on the collective desire to bring more of the fundamental goals of justice, equality, due process and efficiency to the criminal justice system, which remains, in any case, a critical and expensive function of government.

Maricopa County Attorney Bill Montgomery – Personal Insight

Over time as a prosecutor, I have felt the pain of loss suffered by family members of a homicide victim in holding the murderer accountable and I have felt the joy of a recovering addict who took advantage of a second chance and is now on their way to being the person they were created to be in the first place. Because prosecutors do not get to choose who commits what type of crime against which kind of victim, some days are more filled with pain than joy.

I still vividly recall the mentally challenged mother facing a charge in a Justice Court for Truancy. It was easy to see in the first couple of minutes that her child did not want to go to school because they were being teased about their mom's difficulties that were on display whenever she dropped them off. Deferring prosecution until she could make a different educational arrangement was an easy call.

At the other end of the spectrum was the trial of a defendant whose drinking and driving not only made him a threat on the road, it made him a killer. By the time his car came to a rest in the opposite lane of traffic on its roof, four people were dead or dying, including a small child and her parents. Others were seriously hurt. The time spent with the maternal grandparents of the small child during the trial was among the most difficult, explaining criminal procedure, answering questions that sought understanding about terms and next steps, and offering encouragement during their very real walk through the valley of the shadow of death.

Regardless of the cases, as each day closes, I've always felt confident that our community has been protected and justice served.

References

Barkow, Rachel E. 2005. Federalism and the Politics of Sentencing. 105 Colum. L. Rev. 1276 (https://www.jstor.org/stable/4099434?seq=1#page_scan_tab_contents).

Berman, Douglas. 2017. Sentencing Guidelines, in Reforming Criminal Justice (Academy for Justice). (http://academyforjustice.org/wp-content/uploads/2017/10/6_Criminal_Justice_Reform_Vol_4_Sentencing-Guidelines.pdf).

Davis, Angela J. 2007. Arbitrary Justice: The Power of the American Prosecutor.

Ellickson, Robert. 1991. Order Without Law: How Neighbors Settle Disputes.

- Miller, Marc L. 2004. Domination and Dissatisfaction: Prosecutors as Sentencers. 56 Stan. L. Rev. 1211.
- Miller, Marc L. & Samantha Caplinger. 2012. Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions. 41 Crime & Justice 265 (http://www.jstor.org/stable/10.1086/665988?seq=1#page_scan_tab_contents).
- Miller, Marc L. & Ronald F. Wright. 2015. Criminal Procedures: Cases, Statutes, and Executive Materials (5th Ed.).
- Miller, Marc L. & Ronald F. Wright. 2012. Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative, in *The Prosecutor in Transnational Perspective* (Erik Luna and Marianne Wade eds.)
- Miller, Marc L. & Ronald F. Wright. 2008. The Black Box. 94 Iowa L. Rev. 125. (<https://wakespace.lib.wfu.edu/bitstream/handle/10339/16121/Wright%20Black%20Box,%20The.pdf?sequence=3>).
- O'Neill, Michael. 2003. When Prosecutors Don't: Trends in Federal Prosecutorial Declinations. 79 Notre Dame L. Rev. 221 (<http://scholarship.law.nd.edu/ndlr/vol79/iss1/5/>).
- Pfaff, John F. 2017. Prosecutorial Guidelines, in *Reforming Criminal Justice* (Academy for Justice) (http://academyforjustice.org/wp-content/uploads/2017/10/5_Reforming-Criminal-Justice_Vol_3_Prosecutorial-Guidelines.pdf).
- Poulin, Anne Bowen. 1997. Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After *United States v. Armstrong*. 34 Am. Criminal L. Rev. 1071.
- Remington, Frank J. 1993. The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices, in *Discretion in Criminal Justice: The Tension Between Individualization and Uniformity* 73 (Lloyd Ohlin & Frank Remington eds.)
- Tonry, Michael. 1998. Sentencing Matters.
- Wright, Ronald F. 2005. Prosecutorial Guidelines and the New Terrain in New Jersey. 109 Penn. St. L. Rev. 1087 (<http://papers.ssrn.com/abstract=73245>).
- Wright, Ronald F. 2017. Prosecutor Institutions and Incentives, in *Reforming Criminal Justice* (Academy for Justice) (http://academyforjustice.org/wp-content/uploads/2017/10/3_Reforming-Criminal-Justice_Vol_3_Prosecutor-Institutions-and-Incentives.pdf).
- Wright, Ronald F. & Marc L. Miller. 2002. The Screening/Bargaining Tradeoff. 55 Stanford L. Rev. 29 (<https://wakespace.lib.wfu.edu/bitstream/handle/10339/16156/Wright%20Screening%20Bargaining%20Tradeoff%2C%20The.pdf>).
- Wright, Ronald F. and Marc L. Miller. 2010. The Worldwide Accountability Deficit for Prosecutors. 67 Wash. & Lee L. Rev. 1587 (<http://scholarlycommons.law.wlu.edu/wlulr/vol67/iss4/9>).

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SENTENCING AND INCARCERATION

By Cassia Spohn, Ph.D.

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Key Points:

- Most jurisdictions now have some sort of “determinate sentencing,” including mandatory minimum sentences and “three-strikes-and-you’re-out” rules.
- This has resulted in a transfer of power from judges to prosecutors, as the charges filed by the prosecutor now largely determine the sentence.
- Sentencing guidelines are based on whether or not the conviction is for a dangerous or non-dangerous felony and the offender’s prior criminal record.
- The rate of imprisonment in the U.S. has increased from 96 per 100,000 population in 1975 to 500 per 100,000 today.
- This increase is the result of changes in sentencing policy, not changes in crime rates.
- Arizona has the fourth-highest incarceration rate in the country at 585 per 100,000 population.
- Minimum sentencing laws have modified in some states recently, indicating a shift away from determinate sentencing.



The Sentencing Reform Movement

Three decades of experimentation and reform have transformed sentencing policies and practices in the United States.

Thirty years ago, indeterminate sentencing, based on the philosophy of rehabilitation, was the norm. Judges had substantial discretion to determine the sentence range, and parole boards decided how long offenders would actually serve. Judges considered the facts and circumstances of the case and the characteristics of the offender and tried to tailor sentences that fit both. With few exceptions, judges were not required to impose specific sentences on particular types of offenders.

Times change. Concerns about disparity and discrimination in sentencing - coupled with widespread disillusionment with rehabilitation and a belief that more punitive sentences were both necessary and just - led to a series of reforms that revolutionized the sentencing process. Sentencing policies and practices today are much more complex and substantially more fragmented than they were in the past.

Some jurisdictions retained indeterminate sentencing; others replaced it with more tightly structured determinate sentencing or sentencing guidelines. Mandatory minimum sentencing statutes that eliminated judicial discretion and targeted violent offenders, drug offenders and career criminals proliferated. More than half of the states adopted “three-strikes-and-you’re-out” laws. Most jurisdictions enacted “truth-in-sentencing” laws designed to ensure that offenders served a larger portion of their ordered sentence. As a result, sentencing today is less discretionary, less individualized and more mechanical.

The situation is further complicated by a series of U.S. Supreme Court decisions¹ handed down since 2000. These decisions enhanced the role of the prosecutor and the jury in sentencing in jurisdictions with determinate sentencing or mandatory sentencing guidelines. They also made the federal sentencing guidelines advisory rather than mandatory. Although it is too early to tell whether these decisions will undo the reforms enacted of past three decades, it is clear that we have entered a new era in sentencing policies and practices.

Personal Insight

When it comes to sentencing defendants, at least some Arizona judges would like more room to judge.

As in many states, the past several decades have seen a decrease in Arizona's judges' ability to choose who goes to prison and for how long, noted retired Maricopa County Superior Court Judge Ronald Reinstein.

Laws requiring judges to follow certain sentencing guidelines means that judges today have little choice but to accept or refuse a plea bargain offered by a prosecutor, he said. Refusals are rare, Reinstein added, in part because the prosecutor can always seek approval from another judge.

Reinstein, who is a consultant to the Arizona Supreme Court, noted: "Another problem lots of judges see is not simply that people are sent to prison - (prosecutors) say 'the right people are in prison' and they're probably right. The problem is often in the length of sentences imposed, even for non-violent crimes like drug offenses."

Sentencing Reform and Mass Incarceration

In 1971, David Rothman, one of the foremost authorities on the history and development of the prison system, wrote: "We have been gradually emerging from institutional responses, and one can foresee the period when incarceration will be used still more rarely than it is today."² Two years later, the National Advisory Commission on Criminal Justice Standards and Goals concluded that "the prison, the reformatory and the jail have achieved only a shocking record of failure."³ It recommended that "no new institutions for adults should be built and existing institutions for juveniles should be closed."⁴

It is clear that Rothman's prediction did not come true, and that the commission's recommendations were not followed. Their calls for reductions in the use of incarceration, which were voiced at a time when the inmate population was just over 300,000, fell on deaf ears.

Rather than declining, America's imprisonment rate, which had fluctuated around a relatively steady mean of 110 individuals per 100,000 for most of the 20th century, increased every year from 1975

¹ *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *U.S. v. Booker*, 543 U.S. 220 (2005); *Cunningham v. California*, 549 U.S. 270 (2007); *Gall v. U.S.*, 552 U.S. 38 (2007); *Kimbrough v. U.S.*, 552 U.S. 85 (2007); *Alleyne v. U.S.*, 133 S. Ct. 2151 (2013).

² Rothman, 1971, p. 295

³ National Advisory Commission, 1973, p. 597

⁴ National Advisory Commission, 1973, p. 358

to 2010. The total state and federal prison population increased just over 1.6 million. Stated another way, the incarceration rate increased from 96 persons incarcerated for every 100,000 persons in the population to 500 per 100,000. If inmates in local jails are included, the rate is even higher: 750 per 100,000.

Although the number of prison inmates has since declined slightly to about 1.5 million, the United States still has the highest incarceration rate in the world.⁵ As these figures demonstrate, for the past 40 years, the United States “has been engaged in an unprecedented imprisonment binge.”⁶ The question, of course, is whether these dramatic increases in the prison population are due to changes in crime rates or changes in sentencing policies and practices.

If there are more crimes today – or more serious violent crimes – we would expect the prison population to increase, irrespective of any new sentencing policies. If, on the other hand, the crime rate remained relatively stable, or even declined, as the incarceration rate skyrocketed, we could conclude that at least some of the increase in the prison population is due to the crackdown on crime and criminals.

Most criminologists believe that the escalating prison population cannot be attributed to increases in crime. Franklin Zimring of the University of California Berkeley School of Law suggests that the overall upward trend actually reflects three different patterns at three different time periods.⁷ He contends that from 1973 to the mid-1980s, the imprisonment binge was fueled by “general increases in the commitment of marginal felons to prison.”⁸ During this time period, in other words, judges were generally sending more borderline offenders convicted of felonies to prison rather than giving them probation.

The yearly increases from 1985 to 1992, on the other hand, reflected a greater likelihood of incarceration and longer sentences in one category: drug offenders. Zimring argues that during the most recent time period, which he characterizes as “the period of time when imprisonment rates defy gravity and continue to grow even as crime rates are dropping,” the emphasis shifted from “‘lock ‘em up’ to ‘throw away the key.’” During this period, he said, “The lengthening of sentences has begun . . . to play a much larger role in sustaining the growth of [the] prison population.”⁹

Other scholars similarly contend that changes in sentencing policy - and not changes in crime - fueled the growing use of imprisonment in the United States. David Garland, for example, maintains that “America did not collectively decide to get into the business of mass imprisonment.”¹⁰ Instead, mass imprisonment arose as the outcome of determinate sentencing structures, the war against drugs, mandatory sentencing, “truth in sentencing,” the emergence of private corrections, and the political events and calculations that made everyone tough on crime. These developments built on one another and produced the flow of prisoners into custody.¹¹

⁵ Bureau of Justice Statistics, 2016; Garland, 2001, p. 5

⁶ Austin and Irwin, 2001 p. 1

⁷ Zimring, 2001

⁸ Zimring, 2001, p. 162

⁹ Zimring, 2001, p. 162

¹⁰ Garland, 2001, p. 6

¹¹ Garland, 2001, p. 6

¹² Mauer, 2001, p. 11

Marc Mauer of The Sentencing Project asserts that “the impact of these sentencing changes on prison populations has been dramatic, and far outweighs any change in crime rates as a contributing factor.”¹² This was confirmed by a methodologically rigorous analysis of growth in the prison population from 1980 to 1996. Al Blumstein and Allen Beck (1999) concluded that 88 percent of the tripling of the prison population could be explained by changes in the imposition of punishment: 51 percent of that increase was due to a greater likelihood of incarceration following conviction and 37 percent could be attributed to longer prison sentences. By contrast, changes in the crime rate explained only 12 percent of the growth in the prison population during this time period.

The United States Sentencing Commission reached the same conclusion regarding the growth of the federal prison population. The commission noted: “The changes in sentencing policy occurring since the mid-1980s – both the increasing proportion of offenders receiving prison time and the average length of time served – have been a dominant factor contributing to the growth in the federal prison population.”¹³

Advocates of earlier sentencing reforms had believed that sentencing guidelines, mandatory minimum sentences, “three-strikes,” and “truth-in-sentencing” laws would result in more punitive, more effective and fairer sentencing outcomes. Although the evidence is mixed, it does appear that sentences are more punitive than they were in the past.

The movement away from indeterminate sentencing and the rehabilitative ideal to determinate sentencing and an emphasis on “just deserts” – coupled with laws mandating long prison terms – have resulted in harsher sentences. Thus offenders convicted of felonies face a greater likelihood of incarceration and longer prison sentences than they did in the “pre-reform” era. These changes, in turn, have led to dramatic increases in the nation’s prison population.

Sentencing and Incarceration in Arizona

Judges in Arizona impose sentences using the Arizona sentencing guidelines, which base sentences on two factors: whether the offense is a dangerous or non-dangerous felony and whether the offender is a first or a repeat offender.

Dangerous felony charges are serious, violent or aggravated offenses including murder, manslaughter, aggravated assault, sexual assault, sexual conduct with a child under age 13, dangerous crimes against children, arson of an occupied structure, armed robbery, burglary in the first degree, kidnapping and child prostitution. Separate sentencing tables are provided for first offenders, offenders with one or two historical priors and offenders with prior convictions for one or more dangerous offenses. Each sentencing table includes a minimum, presumptive and maximum sentence (or, in the case of repeat dangerous offenders, a minimum, maximum and increased maximum sentence).

For example, a first offender convicted of a class 2 dangerous offense could face a minimum sentence of seven years, a presumptive sentence of 10.5 years, and a maximum sentence of 21 years. By contrast, an offender convicted of a class 2 dangerous offense who had previously been convicted of two or more class 2 dangerous offenses would be facing a minimum sentence of 21 years, a presumptive sentence of 28 years, and a maximum sentence of 35 years.

¹³ United States Sentencing Commission, 2004, p. 76

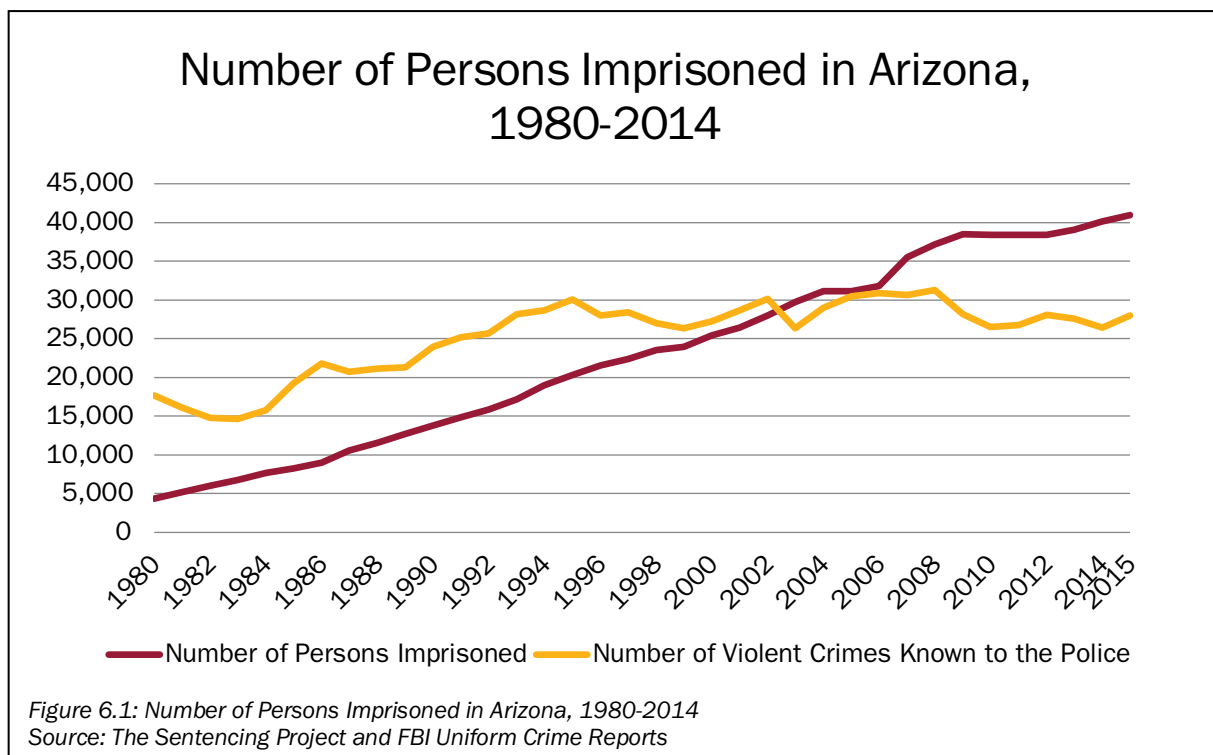
The sentencing procedures for offenders convicted of non-dangerous felonies are somewhat different. Although these offenses, like dangerous felonies, are categorized by the class of the offense and by the offender's criminal history, the sentencing tables provide a mitigated and aggravated sentence in addition to the minimum, presumptive and maximum sentences.

As an example, a first offender convicted of a non-dangerous class 2 felony would be facing a minimum sentence of four years, a presumptive sentence of five years, and a maximum sentence of 10 years. If the judge finds that there are at least two mitigating circumstances (e.g., the defendant's youth, the defendant played a minor role in the crime, the defendant's capacity to understand that what he or she did was wrong, whether the defendant was under duress at the time of the crime), the sentence can be reduced below the minimum sentence.

Similarly, if there are at least two aggravating factors (e.g., the defendant had an accomplice, the defendant took or damaged property, the defendant used or threatened to use a deadly weapon, the crime was committed in a heinous, cruel or depraved manner), the judge can increase the sentence above the recommended maximum sentence. In addition, all first-time, non-dangerous felony offenders are eligible for probation.

Arizona has a "truth-in-sentencing" statute. Passed in 1993, the statute requires that offenders serve 85 percent of the sentence imposed by the judge before being eligible for discretionary release.

According to The Sentencing Project, Arizona's incarceration rate is the fourth-highest in the United States. In 2016 it was 585 per 100,000 population, compared to a rate of 450 per 100,000 for the United States as a whole. There were 40,952 persons imprisoned in Arizona in 2015, including 1,685 (3.9 percent of the prison population) who were serving life sentences and 504 (1.2 percent of the prison population) who were serving life sentences with no possibility of parole.



The incarceration rate varied by race/ethnicity. The rate was 444 for Whites, 842 for Hispanics, and 2,126 for African Americans. The ratio of the Hispanic rate to the White rate was 1.9:1 and the ratio of the African American rate to the White rate was 4.8:1. Stated another way, the incarceration rate for Hispanics was about twice the rate for Whites and the incarceration rate for African Americans was almost five times the rate for Whites.

As shown in Figure 6.1, the number of persons imprisoned in Arizona increased dramatically in the past three and half decades; the number increased from 4,360 in 1980 to 40,952 in 2015, an increase of more than 900 percent. In 2015, there also were 76,005 persons on probation in Arizona. Figure 6.1 also displays the number of violent crimes (i.e., murder/manslaughter, rape, robbery and assault) known to the police during the relevant time period. As these data demonstrate, although the number of violent crimes has been relatively stable since 1990, the number of persons incarcerated has continued to increase.

21st Century Backlash?

In 1996, Michael Tonry, a law professor at the University of Minnesota and a staunch critic of mandatory penalties, predicted that “sooner or later, the combination of chronic prison overcrowding, budgetary crises and a changed professional climate will make more public officials willing to pay attention to what we have long known about mandatory penalties.”¹⁴ By the late 1990s, it appeared that Tonry was correct.

Prison populations continued to grow even as the crime rate declined, and mandatory minimum sentencing statutes came under increasing criticism. In July 1998, Michigan Governor John Engler signed a law reforming Michigan’s “650 Lifer Law.” Under the old law, anyone convicted of possessing, delivering or intending to deliver more than 650 grams of cocaine or heroin received a mandatory life sentence without the possibility of parole. The new law requires a sentence of “life or any term of years, not less than 20” for future offenders. A companion bill made the change applicable to offenders sentenced under the old law.

In February 1999, DeJonna Young became the first person released from prison as a result of the legal changes. She had been sentenced to life in prison without parole in 1979 after she and her boyfriend were stopped by the police, who found 3 pounds of heroin in her car. Young, who was 24 at the time of her arrest, maintained that she didn’t know the drugs were in her car.

New York’s draconian Rockefeller Drug Laws also came under attack. In early 2001, New York Governor George Pataki recommended shorter mandatory terms, treatment instead of incarceration in some cases, and enhanced sentencing discretion for judges. Although state legislators were generally supportive of the governor’s recommendations, the New York State District Attorneys Association came out against the changes. The president of the association stated, “We can’t live with a system that takes out of prosecutors’ hands the right to send predatory drug dealers to prison.”¹⁵

Notwithstanding such opposition, in 2004 Governor Pataki signed the Drug Law Reform Act, which replaced the indeterminate sentences required by the Rockefeller Drug Laws with determinate sentences, reduced mandatory minimum sentences for non-violent drug offenders and for first-time offenders convicted of the most serious drug charges. The statute also allowed offenders serving life sentences to apply for re-sentencing.

¹⁴ Tonry, 1996, p.135

¹⁵ Who’s Defending Rockefeller Drug Laws, 2001

These attacks on mandatory minimums, coupled with the spread of drug courts and the increasing emphasis on drug treatment rather than incarceration, suggest that state and federal officials are willing to rethink mandatory minimum sentencing statutes, particularly for nonviolent, low-level drug offenders. Although it is unlikely that mandatory penalties and truth-in-sentencing laws will be repealed, there appears to be growing consensus that reform is needed.

References

- Austin, James and John Irwin. 2001. *It's About Time: America's Imprisonment Binge*. 3rd ed. Belmont, CA: Wadsworth.
- Blumstein, Alfred and Allen J. Beck. 1999. Population growth in U.S. prisons, 1980-1996. In *Prisons*, vol 26, *Crime and Justice: A Review of Research*, edited by M. Tonry and J. Petersilia. Chicago, IL: University of Chicago Press.
- Bureau of Justice Statistics. 2016. Prisoners in 2015. Washington, DC: U.S. Department of Justice.
- Garland, David. 2001. Introduction: The meaning of mass imprisonment. *Punishment & Society* 3: 5-7.
- Mauer, Marc. 2001. The causes and consequences of prison growth in the USA. *Punishment & Society* 3: 9-20.
- National Advisory Commission on Criminal Justice Standards and Goals. 1973. *Task Force Report on Corrections*. Washington, DC: U.S. Government Printing Office.
- Rothman, David J. 1971. *The Discovery of the Asylum: Social Order and Disorder in the New Republic*. Boston, MA: Little, Brown.
- Tonry, Michael. 1996. *Sentencing Matters*. New York: Oxford University Press.
- United States Sentencing Commission. 2004. *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*. Washington, DC: Author.
- Who's Defending Rockefeller Drug Law? Prosecutors. 2001. *New York Times*, February 6, 2001.
- Zimring, Franklin E. 2001. Imprisonment rates and the new politics of criminal punishment. *Punishment & Society* 3: 161-166.

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VULNERABLE POPULATIONS

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Key Points:

- 1 in 10 prisoners in Arizona is considered elderly.
- Inmates begin to face the problems of the elderly at an earlier age than the general population.
- More than a quarter of inmates suffer from mental illness.
- Many mentally ill inmates do not receive treatment while in prison.
- Evidence suggest that LGBT people are much more likely to be incarcerated than the general population.
- LGBT inmates are more likely to be victimized while in prison.
- Ninety percent of female inmates experienced physical or sexual violence prior to prison.
- Offenders with developmental disabilities, chronic illnesses, and substance abuse issues present special difficulties both while in prison and when making the transition back to society upon release.

Most Arizonans are unlikely to feel much sympathy for prison inmates. At the same time, few would deny that prison is an unhealthy, oppressive and often dangerous place for virtually all inmates. But what may be less apparent to outsiders is that certain groups within general prison population face even greater challenges. These include a greater risk of assault, theft, extortion and neglect of serious medical needs. Any of these factors can severely damage – or further damage – an inmate’s mental, emotional or physical well-being. This can have a long-lasting impact on all of society since some 95 percent of all prison inmates eventually return to the community – currently 1,000 a month in Arizona – after serving an average of only two years behind bars.

Elderly Offenders

In Arizona, 1 in 10 prisoners are elderly.¹ Among non-incarcerated populations, 65 and older is considered elderly. However, among incarcerated populations, 55 and older is considered elderly, due to prisoners’ higher incidence of poor health because of various socioeconomic and risk factors.² Elderly prisoners are more expensive to house, are more likely to be victimized by other prisoners, and tend to struggle with daily activities in prison due to physical or cognitive limitations, making them vulnerable to increased punishment by prison staff.

When prisons and jails across the United States were designed, the potential needs of elderly prisoners were not taken into consideration. Since prisons also were not designed to accommodate inmates with mobility issues, elderly prisoners may struggle with daily activities like climbing to a top bunk or going up and down stairs that lack handrails – making them prone to falls and injury.^{3,4}

¹ Arizona Department of Corrections. (August 2017). *Corrections at a Glance*. Retrieved from: <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2017/cagaug17.pdf>

² Ollove, M. (2016, March 17). Elderly Inmates Burden State Prisons. *The Pew Charitable Trusts*. Retrieved from: <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/17/elderly-inmates-burden-state-prisons>

Many elderly prisoners also have cognitive disorders. A study of Texas prisoners found that 40 percent of prisoners over 55 suffered from a cognitive disorder.⁵ When an inmate suffers from a cognitive disorder or has mobility issues, they often have difficulty in “prison activities of daily living,” which include being able to drop to the floor for alarms or stand for headcounts by prison staff.⁶ When an inmate fails to obey a prison procedure due to a physical or cognitive ailment, it can be misunderstood by prison staff as insubordination. Few prison staff receive training on how to recognize and deal with conditions such as cognitive disorders.⁷ Without training, prison staff can view those with a cognitive disorders or physical ailments as breaking prison rules, leaving prisoners vulnerable to additional punishment.⁸

Elderly prisoners and those with dementia are also vulnerable to being assaulted by other inmates.⁹ As a result, they will sometimes end up segregated from the rest of the population,¹⁰ which itself can cause further stress for a prisoner with a cognitive disorder.

Some states have created facilities within prisons to accommodate their elderly prisoners. For example, the Texas Department of Criminal Justice has designated geriatric units within some of their prisons, giving inmates additional time to dress, eat, and shower.¹¹ The Missouri Department of Corrections has a unit for elderly prisoners, with no top bunks and special assistance with meals.¹² But such units within prisons are rare. Some states have instead contracted with private nursing homes to care for elderly inmates, who are housed outside the walls but remain in state custody.¹³ Such arrangements, however, can drive up the costs of housing the elderly, chiefly due to the need for additional staff to meet elderly prisoners’ needs.¹⁴ A 2012 ACLU report found that it cost \$34,135 per year to house an average prisoner, but \$68,270 per year to house a prisoner aged 50 and older.¹⁵

Mentally Ill Offenders

Mental disorders are common in most prisons. In Arizona, 27 percent of prisoners have a moderate

³ Human Rights Watch. (2012, January 27). *Old Behind Bars: The Aging Prison Population in the United States*. Retrieved from: <https://www.hrw.org/report/2012/01/27/old-behind-bars/aging-prison-population-united-states>

⁴ Williams, B. A., Goodwin, J. S., Baillargeon, J., Ahalt, C., & Walter, L. C. (2012). Addressing the Aging Crisis in U.S. Criminal Justice Healthcare. *Journal of the American Geriatrics Society*, 60(6), 1150-1156. <http://doi.org/10.1111/j.1532-5415.2012.03962.x>

⁵ Williams, B. A., Baillargeon, J. G., Lindquist, K., Walter, L. C., Covinsky, K. E., Whitson, H. E., & Steinman, M. A. (2010). Medication Prescribing Practices for Older Prisoners in the Texas Prison System. *American Journal of Public Health*, 100(4), 756-761. <http://doi.org/10.2105/AJPH.2008.154591>

⁶ Williams, B., Lindquist, K., Sudore, R., Strupp, H., Willmott, D., & Walter, L. (2006). Being Old and Doing Time: Functional Impairment and Adverse Experiences of Geriatric Female Prisoners. *Journal of the American Geriatrics Society*, 54(4), 702-707.

⁷ American Civil Liberties Union. (June 2012). At America’s Expense: The Mass Incarceration of the Elderly. Retrieved from: https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf

⁸ Maschi, T., Kwak, J., Ko, E., & Morrissey, M. (2012). Forget Me Not: Dementia in Prison. *The Gerontologist*, 52(4), 441-451.

⁹ Williams, B., Lindquist, K., Sudore, R., Strupp, H., Willmott, D., & Walter, L. (2006). Being Old and Doing Time: Functional Impairment and Adverse Experiences of Geriatric Female Prisoners. *Journal of the American Geriatrics Society*, 54(4), 702-707.

¹⁰ Human Rights Watch. (2012, January 27). *Old Behind Bars: The Aging Prison Population in the United States*. Retrieved from: <https://www.hrw.org/report/2012/01/27/old-behind-bars/aging-prison-population-united-states>

¹¹ *Id.*

¹² *Id.*

¹³ Ollove, M. (2016, March 17). Elderly Inmates Burden State Prisons. *The Pew Charitable Trusts*. Retrieved from:

<http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/17/elderly-inmates-burden-state-prisons>

¹⁴ American Civil Liberties Union. (June 2012). At America’s Expense: The Mass Incarceration of the Elderly. Retrieved from: https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf

¹⁵ *Id.*

to high level of mental illness.¹⁶ In a 2009 study in Texas, the state with the largest prison population, 15 percent of incarcerated men and 31 percent of women were found to be mentally ill.¹⁷ Like elderly populations, mentally ill inmates also have a higher risk of victimization in prison, and display behaviors that can make them more susceptible to punishment by prison staff.

The downsizing or closure of regular psychiatric hospitals has shrunk the overall number of available psychiatric beds, which can pressure remaining hospitals to discharge patients who have not received sufficient treatment. If a mentally ill individual is released but continues to display bizarre or aggressive behavior, he or she may be arrested. This can compound the problem by sending such individuals to jail or prison instead of to treatment.¹⁸ While incarcerated, a substantial portion of prison inmates who need mental health treatment will not receive it.¹⁹

While imprisoned, mentally ill individuals, especially those not receiving adequate treatment, may continue to exhibit behavior perceived as disruptive or aggressive. This often leads to conflict with staff, resulting in the prisoner's punishment for rule violations.²⁰ This results in mentally ill prisoners being disproportionately represented among prisoners in segregation or solitary confinement for rule infractions. In some prisons, mentally ill prisoners can still be found guilty of a rule infraction, even if their offense is attributed to their mental illness.²¹ Punishment can also include denial of therapy or other prison activities.^{22,23}

LGBT Offenders

Research on lesbian, gay, bisexual and transgender (LGBT) populations in the criminal justice system is relatively limited. However, there is evidence that an LGBT adult is three times more likely to be incarcerated than the general US adult population.²⁴ A national survey of inmates in 2012 found that 9 percent of men in prison and 6 percent of men in jail identified as LGBT, while 42 percent of women in prison and 36 percent of women in jail did so.²⁵

Like elderly and mentally ill prisoners, LGBT populations are more likely to be victimized in prison. When compared with heterosexual inmates, LGBT adult inmates are twice as likely to be sexually victimized by other inmates.²⁶ As a result, safety concerns may cause them to forego useful activities, such as therapy. Even LGBT inmates who want to access resources like therapy and education face prison managers who are often reluctant to let them go due to safety concerns.²⁷

¹⁶ Arizona Department of Corrections. (August 2017). *Corrections at a Glance*. Retrieved from:

<https://corrections.az.gov/sites/default/files/REPORTS/CAG/2017/cagaug17.pdf>

¹⁷ Steadman, H. J., Osher, F. C., Robbins, P. C., Case, B., & Samuels, S. (2009). Prevalence of serious mental illness among jail inmates. *Psychiatric services*, 60(6), 761-765.

¹⁸ Lamb, H. R., & Weinberger, L. E. (2005). The shift of psychiatric inpatient care from hospitals to jails and prisons. *Journal of the American Academy of Psychiatry and the Law Online*, 33(4), 529-534.

¹⁹ Adams, K., & Ferrandino, J. (2008). Managing mentally ill inmates in prisons. *Criminal Justice and Behavior*, 35(8), 913-927.

²⁰ Houser, K. A., Belenko, S., & Brennan, P. K. (2012). The effects of mental health and substance abuse disorders on institutional misconduct among female inmates. *Justice Quarterly*, 29(6), 799-828.

²¹ Fellner, J. (2006). corrections quandary: Mental illness and prison rules. *Harvard Civil Rights-Civil Liberties Law Review*, 41(2), 391-412.

²² *Id.*

²³ Metzner, J. L., & Fellner, J. (2010). Solitary confinement and mental illness in US prisons: A challenge for medical ethics.

²⁴ Meyer, Ilan H. (2017). Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012. *American Journal of Public Health*, 107(2), 267-274.

²⁵ *Id.*

²⁶ *Id.*

Like their adult counterparts, LGBT youth are more likely to be incarcerated than heterosexual or “straight” youth.²⁸ A study published in the *Journal of Adolescent Research* demonstrated the mechanism for how this can happen. LGBT youths are at a higher risk than straight youths for being victimized at school.²⁹ If LGBT youths defend themselves, it can lead to punishment that results in arrest or incarceration, suggesting LGBT youth are particularly vulnerable to the so-called “school to prison pipeline.”³⁰

Youth Offenders

Arizonans become legal adults at age 18; prisoners aged 18 to 24 make up 11 percent of the prison population.³¹ These young prisoners in adult prisons can be seen as “easy” targets for victimization by other inmates.

In Arizona, offenders under 18 are dealt with by a separate system of courts, prisons and probation officers. Contrary to the trend among adult offenders, the number of incarcerated juveniles has steadily declined, decreasing from 446 in 2012 to 159 in 2016.³² In Arizona and other states, there has been a shift from incarcerating juveniles to treating them in their communities. This shift has grown out of research showing how incarceration has a negative effect on young people’s development,³³ and increases their likelihood of being incarcerated as adults.³⁴

Some advocates have suggested moving the “adult” incarceration age to 21, based on research demonstrating that young adult brains more closely resemble those of teenagers than adults.³⁵ Still, those incarcerated in juvenile facilities are more vulnerable to sexual victimization than adult inmates in adult prisons. In a national study conducted from 2011 to 2012, 9.5 percent of those incarcerated in juvenile facilities reported sexual victimization, while only 4 percent of adults in prisons and 3.2 percent in jail, did so.³⁶

Youth who are also people of color are more likely than White youth to interact with the juvenile justice system. Students of color are more likely to be suspended, expelled and experience school-based arrests.³⁷ African American and Hispanic students make up 42 percent of students nationwide, but

²⁷ Maschi, T., Rees, J., & Klein, E. (2016). ‘Coming Out’ of Prison: An Exploratory Study of LGBT Elders in the Criminal Justice System. *Journal of Homosexuality*, *Journal of Homosexuality*, 28 May 2016.

²⁸ Wilson, B., Jordan, S., Meyer, I., Flores, A., Stemple, L., & Herman, J. (2017). Disproportionality and Disparities among Sexual Minority Youth in Custody. *Journal of Youth and Adolescence*, *46*(7), 1547-1561.

²⁹ Snapp, Shannon D., Hoenig, Jennifer M., Fields, Amanda, & Russell, Stephen T. (2015). Messy, Butch, and Queer: LGBTQ Youth and the School-to-Prison Pipeline. *Journal of Adolescent Research*, *30*(1), 57-82.

³⁰ *Id.*

³¹ Arizona Department of Corrections. (August 2017). *Corrections at a Glance*. Retrieved from: <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2017/cagaug17.pdf>

³² <https://adjc.az.gov/sites/default/files/media/annualreport16.pdf>

³³ Fazel, S., Doll, H., & Långström, N. (2008). Mental disorders among adolescents in juvenile detention and correctional facilities: a systematic review and meta-regression analysis of 25 surveys. *Journal of the American Academy of Child & Adolescent Psychiatry*, *47*(9), 1010-1019.

³⁴ Aizer, A., & Doyle Jr, J. J. (2015). Juvenile incarceration, human capital, and future crime: Evidence from randomly assigned judges. *The Quarterly Journal of Economics*, *130*(2), 759-803.

³⁵ Somerville, L. (2016). Searching for Signatures of Brain Maturity: What Are We Searching For? *Neuron*, *92*(6), 1164-1167.

³⁶ United States Department of Justice. (June 2017). *PREA Data Collection Activities*. Retrieved from: <https://www.bjs.gov/content/pub/pdf/pdca17.pdf>

³⁷ Mallett, Christopher A. “The school-to-prison pipeline: disproportionate impact on vulnerable children and adolescents.” *Education and urban society* *49.6* (2017): 563-592.

account for 72 percent of youth arrested for school-related offenses.³⁸ A study done in Arizona shows that that Black, Latino and American Indian youth are more likely to be detained than White youth.³⁹

Female Offenders

Women make up 10 percent of Arizona's prison population.⁴⁰ Nationally, women entering prison have higher rates of trauma, mental illness, domestic violence victimization, and sexual abuse than non-inmates. A 2012 study found that 90 percent of female inmates had experienced physical or sexual violence prior to entering prison.⁴¹ Another study reported that 50 percent of incarcerated women reported being sexually or physically abused as children.⁴² Due to this pathology, commonplace prison procedures like pat downs and searches can lead to women being re-traumatized.⁴³

Due to such trauma – and to the fact that prisons are typically built to house men – women's needs are often overlooked. For example, women's reproductive and gynecological care often do not exist within the current prison model.⁴⁴ A 2017 study found that nearly a third (31 percent) of prisons do not have onsite OBGYN care.⁴⁵ This means many prisons must incur additional costs to send women offsite for care.⁴⁶

Nor is treatment for women prisoners' mental health always available – even though they are twice as likely as male inmates to be mentally ill. Nearly a third of women prisoners (31 percent) are seriously mentally ill.⁴⁷

Offenders with Serious and Chronic Illness

Twelve percent of prisoners in Arizona have a serious or chronic illness.⁴⁸ Generally, chronically medical conditions are more prevalent among inmates than among non-incarcerated individuals.⁴⁹ For example, a 2010 study of Texas prisoners found that nearly a quarter of inmates had a chronic condition.⁵⁰

³⁸ Losen, D. L., Hewitt, D., & Toldson, I. (2014). Eliminating excessive and unfair discipline in schools: Policy recommendations for reducing disparities-Discipline disparities: A research-to-practice collaborative. Bloomington, IN: Center for Evaluation and Education Policy, The Equity Project at Indiana University

³⁹ Rodriguez, N. (2010). The Cumulative Effect of Race and Ethnicity in Juvenile Court Outcomes and Why Preadjudication Detention Matters. *The Journal of Research in Crime and Delinquency*, 47(3), 391-413.

⁴⁰ Arizona Department of Corrections. (August 2017). *Corrections at a Glance*. Retrieved from: <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2017/cagaug17.pdf>

⁴¹ Lynch, S. M., Fritch, A., & Heath, N. M. (2012). Looking beneath the surface: The nature of incarcerated women's experiences of interpersonal violence, treatment needs, and mental health. *Feminist Criminology*, 7(4), 381-400.

⁴² McDaniels-Wilson, C., & Belknap, J. (2008). The Extensive Sexual Violation and Sexual Abuse Histories of Incarcerated Women. *Violence Against Women*, 14(10), 1090-1127.

⁴³ Moloney, Van Den Bergh, & Moller. (2009). Women in prison: The central issues of gender characteristics and trauma history. *Public Health*, 123(6), 426-430.

⁴⁴ *id.*

⁴⁵ Kelsey, C., Medel, M., Mullins, N., Dallaire, C., & Forestell, D. (2017). An Examination of Care Practices of Pregnant Women Incarcerated in Jail Facilities in the United States. *Maternal and Child Health Journal*, 21(6), 1260-1266.

⁴⁶ *id.*

⁴⁷ Steadman, H., Osher, F., Robbins, P., Case, B., & Samuels, S. (2009). Prevalence of serious mental illness among jail inmates. *Psychiatric Services (Washington, D.C.)*, 60(6), 761-5.

⁴⁸ Arizona Department of Corrections. (August 2017). *Corrections at a Glance*. Retrieved from: <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2017/cagaug17.pdf>

⁴⁹ Binswanger, I., Krueger, P., & Steiner, J. (2009). Prevalence of chronic medical conditions among jail and prison inmates in the USA compared with the general population. *Journal of Epidemiology and Community Health*, 63(11), 912.

⁵⁰ Harzke, A., Baillargeon, J., Pruitt, J., Pulvino, G., Paar, S., & Kelley, L. (2010). Prevalence of Chronic Medical Conditions among Inmates in the Texas Prison System. *Journal of Urban Health*, 87(3), 486-503.

Those with serious and chronic illnesses are additionally vulnerable because many inmates do not receive a medical exam after intake. A national study done by the American Journal of Public Health reported that 68 percent of local jail inmates, and 20 percent of state prison inmates do not receive a medical exam while incarcerated.⁵¹ Another barrier to medical care is the cost to inmates. In 35 states, including Arizona, state prisoners can be charged for each medical visit they make.⁵² Payment can prove challenging for inmates who rely only on the small amount of money they make from their prison job.

Offenders with Substance Abuse Issues

In Arizona, 78 percent of state prisoners have a moderate to intense need for substance abuse treatment.⁵³ Nationally, prisoners are 12 times more likely than adults in the general population to abuse substances or have a drug dependency.⁵⁴

Once detained, such individuals may reveal their vulnerability even before they are charged with a crime. For example, someone addicted to opiates such as heroin can begin withdrawal symptoms within 6 to 8 hours and can experience the physical and mental pain of withdrawal while in jail, only to be released without charge.⁵⁵ Research shows that half of jails fail to use the recommended detoxification protocols like methadone or clonidine.⁵⁶

Once incarcerated, prisoners with a history of substance abuse have limited options to get help. The most common form of treatment offered is drug and alcohol education, which is available in 74 percent of prisons. Fifty-five percent of prisons offer group counseling for substance abuse, but only up to 4 hours a week. Forty-six percent of prisons offer prisoners counseling for more than 5 hours a week.⁵⁷ Of the prisons that offered drug treatment services, 85 percent of services lasted less than 90 days.⁵⁸

Offenders with Developmental Disability

Developmental disabilities are defined by the Centers for Disease Control and Prevention as “a group of conditions due to an impairment in physical, learning, language, or behavior areas. These conditions which begin during the developmental period, may impact day-to-day functioning and usually last throughout a person’s lifetime.”

Nationally, nearly a third of the prison population in 2012 (32 percent) had at least one disability, compared to 11 percent of the general population.⁵⁹ Intellectual disabilities are also prevalent within prisons, comprising an estimated 4 percent to 10 percent of the national prison population, while

⁵¹ Wilper, A., Woolhandler, S., Boyd, J., Lasser, K., McCormick, D., Bor, D., & Himmelstein, D. (2009). The health and health care of US prisoners: Results of a nationwide survey. *American Journal of Public Health, 99*(4), 666-72.

⁵² <https://www.brennancenter.org/states-pay-stay-charges>

⁵³ Arizona Department of Corrections. (2016). *Admissions, Releases, Confined Population Fact Sheet*. Retrieved from: https://corrections.az.gov/sites/default/files/REPORTS/Inmate_Population/inmatepopfactsheet2016_063016-formatted.pdf

⁵⁴ United States Department of Justice. (June 2017). *Drug Use, Dependence, and Abuse Among State Prisoners, and Jail Inmates, 2007-2009*. Retrieved from <https://www.bjs.gov/content/pub/pdf/dudaspji0709.pdf>

⁵⁵ Fiscella, K., Moore, A., Engerman, J., & Meldrum, S. (2005). Management of Opiate Detoxification in Jails. *Journal of Addictive Diseases, 24*(1), 61-71.

⁵⁶ *Id.*

⁵⁷ Taxman, F. S., Perdoni, M. L., & Harrison, L. D. (2007). Drug treatment services for adult offenders: The state of the state. *Journal of substance abuse treatment, 32*(3), 239-254.

⁵⁸ *Id.*

⁵⁹ Bureau of Justice Statistics. (2015). *Disabilities Among Prison and Jail Inmates, 2011-12*.

<https://www.bjs.gov/content/pub/pdf/dpji1112.pdf>

making up 2 percent to 3 percent of the non-prison population.⁶⁰

Individuals with developmental disabilities can suffer from enhanced vulnerability from their first contact with the system. Many police officers, prosecutors, judges and other figures lack training in recognizing disabilities, rendering the disabled vulnerable to incarceration without officials considering their disability.⁶¹

For example, a person with an intellectual disability may be easily manipulated to commit a crime at the suggestion of others. They may also be more willing to give in to pressure during interrogation and confess to something they didn't do. The behavior of an individual with an intellectual disability also can make them vulnerable during their own prosecution, where they often have memory problems, are prone to suggestibility and have trouble understanding court procedures and legal consequences.⁶²

Once incarcerated, inmates with developmental disabilities – similarly to those with mental illness – tend to have trouble with daily prison activities and following directions, which makes them vulnerable to punishment. Prisoners with intellectual disabilities also are vulnerable to losing life skills like the ability to communicate and maintain emotional stability.⁶³

Sex Offenders

Sex offenders, especially those convicted of offenses against children, form one of the most abhorred populations behind bars. They are thus vulnerable to manipulation by corrections officers, as well as other prisoners. They may use an inmate's sex offender status to pressure him into breaking rules or, conversely, to follow prison rules. Sex offenders may also be subject to extortion in exchange for others' silence about their status.⁶⁴ In some cases, officers have threatened to broadcast that an inmate was a sex offender – even if untrue – to get the prisoner to comply with their demands.⁶⁵

Sex offenders themselves are well aware of their vulnerabilities. It has been noted that sex offenders will try to “cover” their criminal history, including changing their appearance to not appear like the “typical sex offender.” One researcher reported on a prisoner who attempted to look like a biker, instead of a middle aged man, to avert suspicion about why he was incarcerated.⁶⁶ Scheming to “pass” as a non-sex offender hangs over the heads of these prisoners throughout their sentence.

There are nine federal facilities across the nation, including one in Arizona, with designated sex offender-specific facilities. The Federal Bureau of Prisons recognizes sex offenders as a vulnerable

⁶⁰ Petersilia, J (2000) Doing Justice? Criminal offenders with Developmental Disabilities. CPRC Brief. California Policy Research Center, University of California. Retrieved from: <https://files.eric.ed.gov/fulltext/ED465905.pdf>

⁶¹ Close, D., & Walker, H. (2010). Navigating the Criminal Justice System for Youth and Adults with Developmental Disabilities: Role of the Forensic Special Educator. *The Journal of Behavior Analysis of Offender and Victim Treatment and Prevention*, 2(2), 74-103.

⁶² Parton, Felicity, Day, Andrew, & White, Jack. (2004). An empirical study on the relationship between intellectual ability and an understanding of the legal process in male remand prisoners. *Psychiatry, Psychology and Law*, 11(1), 96-109.

⁶³ Reingle Gonzalez, J., Cannell, M., Jetelina, K., & Froehlich-Grobe, K. (2016). Disproportionate Prevalence Rate of Prisoners With Disabilities. *Journal of Disability Policy Studies*, 27(2), 106-115.

⁶⁴ Schwaebe, C. (2005). Learning to pass: Sex offenders' strategies for establishing a viable identity in the prison general population. *International Journal of Offender Therapy and Comparative Criminology*, 49(6), 614-625.

⁶⁵ Ricciardelli, R., & Spencer, D. (2014). Exposing 'Sex' Offenders. *British Journal Of Criminology*, 54(3), 428-448.

⁶⁶ *Id.*

population, and provides them specialized treatment.⁶⁷

People of Color

As of 2017, 59 percent of Arizona's incarcerated population consisted of people of color. Forty percent of Arizona's prison population is Hispanic, 14 percent is African American, 5 percent is Native American, and 39 percent is White.⁶⁸

Nationally, the prison population over-represents African American men.⁶⁹ In fact, one in every eight African American men between the ages of 25 and 34 are in prison.⁷⁰ Data from 2015 Justice Department data reports that 745 of every 100,000 Black adults are imprisoned.⁷¹ Nationally, Hispanic men are also overrepresented within incarcerated populations⁷² – 820 out of every 100,000 Hispanics are incarcerated, while 312 of every 100,000 Whites are behind bars.⁷³

While incarcerated, people of color are more susceptible to victimization and assault by staff.⁷⁴ Prisoners of color, especially African Americans and Hispanics, are likely to have poorer health than their White counterparts. A national study of inmates found that African American inmates had higher rates of chronic health conditions than White inmates.⁷⁵ Black and Latino male inmates were twice as likely to have HIV, compared to White inmates. Incarcerated women of color were six times more likely to be HIV positive when compared to their White peers.⁷⁶

⁶⁷ Federal Bureau of Prisons. *Sex Offenders*. Retrieved from

https://www.bop.gov/inmates/custody_and_care/sex_offenders.jsp

⁶⁸ Arizona Department of Corrections. (August 2017). *Corrections at a Glance*. Retrieved from:

<https://corrections.az.gov/sites/default/files/REPORTS/CAG/2017/cagaug17.pdf>

⁶⁹ Alexander, M. 2010. *The New Jim Crow*, New York, NY: The New Press.

⁷⁰ Brewer, R., & Heitzeg, N. (2008). The Racialization of Crime and Punishment. *The American Behavioral Scientist*, 51(5), 625-644.

⁷¹ Bureau of Justice Statistics. (2015.) *Prisoners in 2015*. Retrieved from: <https://www.bjs.gov/content/pub/pdf/p15.pdf>

⁷² Shepherd, Jennifer L., Fandel, Johnna, Esposito, Rashaun, Pace, Elizabeth, Banks, Mekka, & Denious, Jean E. (2012). Multidimensionality Matters: An Effective HIV, Hepatitis C, and Substance-Use Prevention Program for Minority Parolees. *Journal of Offender Rehabilitation*, 51(4), 199-221.

⁷³ Bureau of Justice Statistics. (2015.) *Prisoners in 2015*. Retrieved from: <https://www.bjs.gov/content/pub/pdf/p15.pdf>

⁷⁴ Wolff, Nancy. (2009). Understanding Physical Victimization Inside Prisons: Factors that Predict Risk. *JQ: Justice Quarterly*, 26(3), 445-476.

⁷⁵ Harzke, A. J., Baillargeon, J. G., Pruitt, S. L., Pulvino, J. S., Paar, D. P., & Kelley, M. F. (2010). Prevalence of Chronic Medical Conditions among Inmates in the Texas Prison System. *Journal of Urban Health : Bulletin of the New York Academy of Medicine*, 87(3), 486-503. <http://doi.org/10.1007/s11524-010-9448-2>

⁷⁶ Maruschak, L. M. (2006). HIV in prisons, 2004 (NCJ 213897). Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.

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RE-ENTRY AND RECIDIVISM

By Kevin Wright, Ph.D.

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Key Points:

- Eighteen percent of those released returned to prison within six months.
- Arizona's three-year recidivism rate of 39 percent is lower than the national average of 50 percent.
- Those returning to society after prison often lack the resources to establish themselves in the outside world.
- Access to transportation, employment and health care may help reduce recidivism.



Nearly everyone sent to prison will one day return to the community. This means that understanding recidivism is of critical importance to members of that community. At the most basic level, recidivism can be defined as “the reversion of an individual to criminal behavior after he or she has been convicted of a prior offense, sentenced, and (presumably) corrected”.¹ Recidivism therefore requires that some sort of involvement with the criminal justice system has taken place, and that then the individual again comes into contact with the system after additional transgressions. Recidivism, in other words, is officially detected, repeat unlawful behavior.

Multiple measures of this behavior exist, including re-arrest, reconviction, and reimprisonment. Recidivism can include technical violations – acts that are otherwise not viewed as criminal, such as entering an establishment that serves alcohol – that can constitute breaches of contract for individuals on probation or parole release. Other factors can also drive the frequency of recidivism. More intensive supervision of released individuals could mean more opportunities for violations and the detection of violation. A longer time spent within the community could also mean more opportunities to recidivate. (It is often said that at least three years since release provides a good understanding of recidivism).

Recidivism is complicated, featuring different definitions, the combination of unlawful behavior with technical violations, varying levels of supervision and different follow-up periods. Recidivism becomes “a complex measure of criminal behavior combined with formal and informal policy and procedure mechanisms.”²

These complexities of recidivism are not trivial. For example, in a national study of over 400,000 formerly incarcerated individuals released across multiple states in 2005, it was determined that 18 percent of those released had returned to prison within 6 months. In the same study, it was determined that 77

¹ Maltz, 1984: 1

² Wilson, 2005: 494

percent of those released had been rearrested within 5 years.³ Both numbers are correct and both are valid indicators. But it is critically important to know exactly what is being measured (and what is not) to fully comprehend recidivism.⁴

What is the extent of recidivism in the United States? The national study cited above by the U.S. Bureau of Justice Statistics (BJS) documented 404,638 formerly incarcerated individuals from 30 states for a period of five years, from 2005-2010. Within that five years, over three-quarters (77 percent) of the released individuals had been rearrested and over half (55 percent) had a parole or probation violation or a new offense that resulted in reimprisonment.⁵

The United States Sentencing Commission (2016) produced a report on 25,431 incarcerated individuals released from the federal prison system in 2005 with a follow-up period of eight years. Nearly half were rearrested, nearly one-third were re-convicted, and nearly one-quarter were re-imprisoned during that period.

A critical difference between this study and the BJS study is that the former also included individuals who were previously sentenced to only probation. These individuals had a re-arrest rate of 35 percent, while individuals sentenced to prison had a re-arrest rate of 53 percent. Further data are contained in a 2011 Pew Center on the States report entitled "State of Recidivism: The Revolving Door of America's Prisons." This provided aggregate recidivism rates between 2004 and 2007 for 33 states. The overall three-year recidivism rate, measured as return-to-prison, was 43 percent. This rate masked wide variation among states, with six states reporting recidivism rates above 50 percent (led by Minnesota's 61 percent) and five states reporting recidivism rates under 30 percent (led by Oregon's 23 percent).

Criminologists have long focused on identifying and targeting risk factors that might increase an individual's likelihood of recidivism. These individual-level risks are classified into two categories: static and dynamic.⁶

Static risk factors are features of the person that cannot be changed, such as age, race or criminal record. Research has consistently found that younger individuals, males, minorities and those with a criminal history have a higher risk for recidivism.⁷

Dynamic risk factors, on the other hand, are characteristics that can be changed and therefore make appropriate targets for treatment. These include antisocial values, beliefs and behaviors, which sometimes are referred to as "criminogenic needs".⁸ Consideration of static and dynamic risk factors can begin to suggest what programs are most appropriate for certain individuals in order to reduce recidivism. But to truly understand recidivism - and how to potentially reduce it - it must be learned why people recidivate.

³ Durose, Cooper, and Snyder, 2014

⁴ See Wright and Khade, 2018 for more detailed discussion

⁵ Durose et al., 2014

⁶ Bonta and Andrews, 2017

⁷ Benedict, Huff-Corzine, and Corzine 1998; Gainey, Payne, and O'Toole 2000; Gendreau, Little, and Goggin 1996; Hepburn and Albonetti, 1994; Listwan et al., 2003

⁸ Andrews et al. 1990

Why Do People Recidivate?

The reasons that people continue to engage in crime are as varied as the reasons people commit crimes in the first place. A criminology textbook may include everything from biological theories of crime to psychological theories to sociological theories; from individual theories of crime to neighborhood theories to nation-state theories; and from social bond theories to social disorganization theories to social learning, to social support theories. Then there are factors such as strain, labeling, poverty, genes, masculinity, self-control, inequality, personality - the list goes on. For the general public, the reason is usually simpler and perhaps a bit obvious: Criminals choose to engage in crime.

Most criminologists tend to be wary of any explanation that whittles criminal behavior down to a simple choice - a rational, cost/benefit analysis of whether to forge that check, inject that heroin, or beat up that former associate. Part of this reluctance is that rational-choice explanations of criminal behavior by themselves can lead to punitive policy prescriptions: All we need to do, this approach says, is make the costs of crime outweigh the benefits. Thus, increasing the likelihood of going to prison and for a longer time should dissuade most people from engaging in crime.

Personal Insight

Ryan Nightenhelser has some firm opinions about the challenges facing inmates returning from Arizona prisons, and counts himself among the lucky ones.

"[Housing] support plays a major role in [a released inmate's] success," he said. "It's a huge thing if you have a friend or family member who will allow you to live with them for a while. Lucky for me, I did."

Nightenhelser noted that released inmates are given \$100 when they get out, "which pays for little more than your bus ticket." An ex-inmate who comes out with little or no money desperately needs housing. "At least if [released inmates] knew they had someplace to go when they first got out, they could focus on getting housing and a job."

Nightenhelser has both, and says he's determined to keep them. But the task is further complicated, he says, by the negative stereotypes of inmates held by the public. There certainly are people who deserve to be locked up, he says, but "what people don't know] is how small a percentage [of inmates] are violent or dangerous." Many, he says, are in on drug offenses . . . "People think prisons are full of hard, tough guys just waiting to come out and commit more crimes," Nightenhelser says. "First-hand, I can tell you this isn't true."

But this line of thinking shows the limited value of the "crime as a choice" explanation. First, people who engage in crime do not always have the same set of legal, prosocial options available to them from which to choose. They often come from disadvantaged backgrounds marked by abuse and victimization, drug and alcohol addictions, and family instability. They have fewer opportunities for quality education, gainful employment or positive recreational outlets. They find themselves surrounded by crime and incarceration. Engaging in criminal behavior may be the easiest, most comfortable or only choice available to them.

The counter argument is that many people grow up in difficult situations yet refrain from criminal behavior. This is true, but leads to a second shortcoming of the "crime as choice" explanation: people

who engage in crime do not always approach the decision-making process with a rational mindset. A number of different factors can impact rationality, including mental illness, past victimization, and drug and alcohol addiction. More importantly, however, what is perceived as rational may be different for people who engage in crime as compared to those who do not. It may sound like a cliché, and perhaps a bit of a copout, but there is some truth to the idea that “crime is all they know.” If you surround yourself with family and friends who engage in criminal behavior, then you are likely to develop attitudes that support that behavior and “thinking errors” that prohibit you from considering the impact of your actions on yourself and others, as well as the potential legal ramifications of those actions.

Considering these two shortcomings together helps explain why prison is not much of a deterrent to people who engage in criminal behavior, and especially those who engage in repeat criminal behavior. It does not matter how long the prison sentence is or how vile the prison conditions may be, offenders give little consideration to the punishment aspects of a criminal act. To some, incarceration is a natural part of life, and to others it may even represent a badge of honor or rite of passage. Broadly speaking, people recidivate because 1) they have limited opportunities to obtain and sustain quality education, gainful employment, stable housing, as well as supportive professional and personal networks and relationships and, 2) they are rewarded for antisocial thinking and behavior instead of prosocial thinking and behavior, which may be influenced by prior victimization, mental illness or substance abuse.

A more direct approach to answering why people recidivate is to simply pose the question to people who are currently incarcerated. The challenge in doing this is that it may be difficult to establish the necessary rapport with incarcerated individuals that would allow for truthful responses to questions that pry at the most difficult aspects of their lives. To counter that obstacle, in the summer of 2017, researchers from Arizona State University (ASU) worked with incarcerated men to develop and implement a study that could overcome this critical obstacle. ASU faculty, graduate students and incarcerated men are part of a think tank called The Arizona Transformation Project (ATP),⁹ which evolved out of the first Inside-Out Prison Exchange Program in Arizona in spring 2016.

The ATP developed interview questions in collaboration with the Governor’s Office Recidivism Reduction Project Team. Incarcerated members were trained in proper interviewing techniques and consent protocol, as required by ASU’s Institutional Review Board (IRB). The five incarcerated researchers completed 409 interviews in two months at the medium-security East Unit of the Arizona State Prison Complex at Florence. The report was shared with the Governor’s Office.¹⁰ It is believed to be one of the first studies in the United States in which incarcerated men served as interviewers of other incarcerated men.

Early in the interview, the incarcerated men were asked: Why do you think most people come back to prison? Several themes emerged. The most prominent theme that emerged (44 percent of respondents) was that a lack of resources or programming contributed to recidivism. For example, one respondent said: *“Because they are not adequately prepared for reentry into society, because they have not made successful and dedicated transformation from their old lifestyle to one that would keep them out of prison.”*

A second theme was drug and alcohol use (27 percent of respondents), captured by the respondent who said: *“A lot of felons have serious drug addiction problems. ... When addicts get out, there aren’t any affordable quality treatment options.”*

⁹ See www.aztransform.org

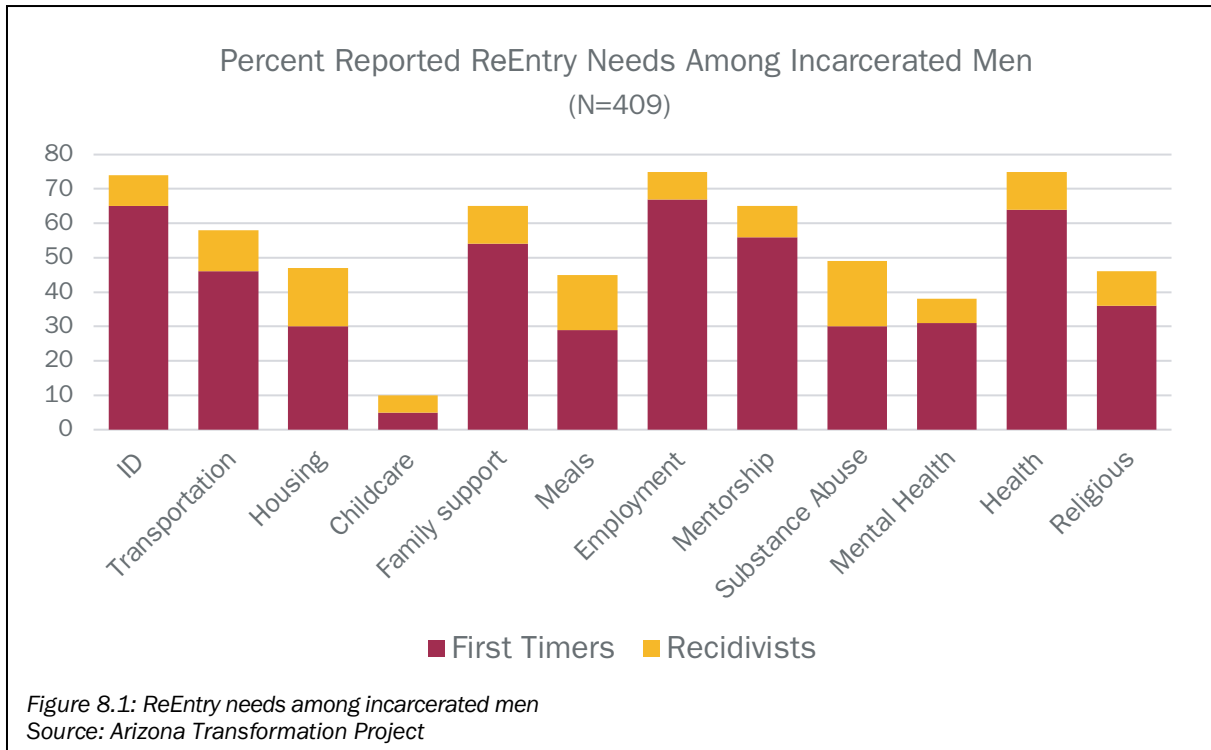
¹⁰ Wright et al., 2017

The third most prominent theme among respondents was an inability to change thinking and behavior, or resorting to comfort. This was best captured by the respondent who said: *“Lack of education, skills, and a desire to succeed. They stay in here for a long time, get complacent and [there isn’t] any real type of job training to teach them how to be successful. So, they revert back to crime (what they know) because they’re unprepared for society. ... Prison isn’t much of a deterrent anymore when someone isn’t taught how to live.”*

Other themes that emerged included lack of a support system/mentor (16 percent), lack of education (15 percent), money issues (14 percent), stigma (14 percent), and peers, neighborhood or family environment (12 percent).

Of the 409 men interviewed, 62 percent had been to prison before (recidivists). The men who had recidivated were different in important ways from those who had not. They were older (42 years versus 39 years), had more kids (2.5 versus 1.5), more minor kids (1.4 versus 0.8), fewer months served in prison (77 versus 123), fewer years still to serve in prison (4.8 versus 7.4), and had been employed on the outside for a shorter period of time (52 months versus 72 months). They also were more likely to have less than a GED (21 percent versus 17 percent) and to have been unemployed at time of arrest (48 percent versus 35 percent).

Importantly, they were also more likely to believe that they had a substance abuse problem (52 percent versus 35 percent) and were more likely to not know where they would live upon release (31 percent versus 17 percent). But most telling are their responses to questions that were asked regarding their perceived needs upon release. Recidivists were statistically significantly more likely to report needing assistance with obtaining identification, transportation, housing, childcare, family and friend support, meals, employment, mentorship, substance abuse, healthcare and religious services (see Figure 8.1).



Despite having served much longer sentences, and with much longer sentences still to serve, first-timers perceive their reentry needs to be less than that of recidivists. There are many plausible explanations for these differences. Given their experience, recidivists' perceptions of needs may be more rooted in reality. Should this be the case, prison first timers may be woefully underprepared for the challenges that lie ahead. It is also plausible that recidivists have been particularly negatively impacted by the experience of churning in and out of prison: Bridges have been burned, stigmas have been added and failures have accumulated.

Still other reasons could include the nature of the crime and the circumstances that led to their incarceration (whereas first timers may be in for longer sentences for violence that is not tied to deficits, need or addiction), substance abuse and mental illness, or challenges associated with criminal justice supervision. Whatever the reasons, recidivists seem to differ from non-recidivists. One recidivist summed his experience this way: *"Having a negative thought pattern from prison. Frustration and lack of opportunities. Not having the tools to deal with frustration of denials and roadblocks. So, all the negative thinking from prison kicked back in. And I go back to old ways. I started with [a] positive mind-set and that quickly faded away, leading to substance abuse. Substance abuse changes people so quickly, so you must avoid those frustrations and barriers."*

Re-Entry and Recidivism in Arizona

How is Arizona doing when it comes to reentry and recidivism? The challenges here are similar to the challenges elsewhere, and significant strides have been made in the last few years to reduce recidivism in the state. As of November 2017, approximately 42,000 people were incarcerated in state prisons in Arizona.¹¹ At yearend 2015, Arizona had the fifth-highest incarceration rate in the nation (781 per 100,000 adults), behind only Louisiana, Oklahoma, Mississippi and Alabama. Approximately 14,000 people were released from Arizona prisons in 2015.¹²

Arizona's three year return-to-prison rate is 39.1 percent. This figure puts the state below the national average for the BJS cohort study reported above, 49.7 percent within 3 years,¹³ and below the figure for the Pew state study reported above 43.3 percent within 3 years.¹⁴ Although comparisons across states should always be done with caution, Arizona is decidedly average when it comes to recidivism – the Pew study puts Arizona between states like Minnesota (61.2 percent) and California (57.8 percent) and states like Wyoming (24.8 percent) and Oregon (22.8 percent). Importantly, however, approximately half of all of the people currently incarcerated in Arizona have served a prior term in prison (21,157).¹⁵

The reduction of recidivism has been a primary goal for Governor Doug Ducey's administration as represented by the Recidivism Reduction Project Breakthrough Team.¹⁶ This project has the Arizona Department of Corrections (ADC) as the lead agency and includes additional agencies such as the Department of Economic Security, the Department of Housing, and the Department of Health Services. ADC has made a number of changes over the last few years with recidivism reduction in mind, including modifying conditions of confinement to make prisons less restrictive, training correctional officers

¹¹ Ryan, 2017

¹² Carson and Anderson, 2016

¹³ Durose et al., 2014

¹⁴ Pew Center on the States, 2011

¹⁵ Ryan, 2017

¹⁶ See <https://ams.az.gov/protecting-our-communities>

on motivational interviewing techniques, and supplying cognitive behavioral therapy for high-risk individuals.

ADC also has collaborated with some of the above agencies to introduce innovative approaches to recidivism reduction – most notably with the implementation of employment centers in three prisons. Prior to their release, eligible inmates can transfer to these units and receive assistance in employment searches from Department of Economic Security staff. Potential employers are invited to the centers for job fairs with the goal of having individuals released from prison with a job in hand.

Additional approaches to reducing recidivism include reentry centers to provide alternatives to re-incarceration, a partnership with Uber to provide transportation to released individuals, enrollment of incarcerated individuals within the Arizona Health Care Cost Containment System (AHCCCS), reentry coalitions designed to mobilize support for formerly incarcerated individuals within the community, and the development of new standards for halfway house quality. Each of these approaches will require evaluation to determine how well they reduce recidivism, but they are all steps in the right direction.

How to Reduce Recidivism

Based on the above information, which is informed by scholars, currently incarcerated individuals, formerly incarcerated individuals, correctional administrators and staff, and other key stakeholders associated with recidivism reduction, the following elements could help to reduce recidivism.

1. Replace the reward structure of incarcerated individuals

Focus on rewarding good behavior rather than punishing bad behavior. Incentivize prosocial behavior on the inside that is expected on the outside: reward sobriety (e.g., clean UAs), and education, job, and programming performance (not only attendance or completion). Create bank accounts that allow people to save money toward their release and to visually see the savings.

2. Create prosocial opportunities for formerly incarcerated individuals

Time spent in legal activities means less time to spend in illegal activities. Work to increase education, employment, housing, and productive leisure opportunities. Do not just remove barriers (e.g., “Ban the Box”) – create pathways for formerly incarcerated individuals to be successful. Begin these processes while the individual is still incarcerated, and give special attention to the immediate transition period between prison and community re-entry.

3. Distribute re-entry and recidivism efforts across multiple agencies and organizations

Recidivism is not simply a problem for the Department of Corrections. Employment needs, health needs, mental health needs, substance abuse needs and housing needs all point to assistance required from other agencies and organizations.

4. Recognize that people recidivate for a variety of reasons

There never will be a magic-bullet program that works for everyone and reduces recidivism to a significant degree. Even the very best, gold standard cognitive behavioral therapy programs are difficult to scale up to reach a large population. Recidivism-reduction efforts should be multifaceted and address the many factors related to criminal behavior.

5. Start re-entry on the first day of incarceration

Re-entry programming often begins just a few months before re-entry and has to overcome the effects of years of incarceration. Instead, re-entry preparation should begin early, with individualized case plans from counselors and in-prison mentoring from those who have gone through the system.

6. Foster ties to the outside world within prison

Nearly all prisoners are returning to society. Re-entry into society is a shock, and the unfamiliarity of interacting with people and institutions can promote recidivism. Opportunities for keeping prisoners connected to society, while still retaining the incapacitation effects of incarceration, include the Inside-Out Prison Exchange Program, parenting programs that allow family members into the institution so that skills can be practiced, work release, visitation with a focus on family reunification, mentorship programs, and job training.

7. Acknowledge victimization among people who are incarcerated

The well-documented “victim/offender overlap” in criminology means that a significant portion of people who are incarcerated are also victims. They also often were children of incarcerated parents themselves. Women in prison in particular often have significant histories of abuse and victimization. Addressing these harms and traumas is critical toward successful re-entry.

8. Develop alternatives to re-incarceration

Prison should be reserved for violent individuals who are a continued danger to themselves or society. Prison is more costly than community alternatives. It costs approximately \$24,300 to incarcerate one person per year in Arizona – \$66 a day. It costs approximately \$3,400 to supervise one person per year in the community in Arizona, or \$9 a day. Incarcerating older people is even more costly and their likelihood of reoffending declines significantly with age. Good quality transitional housing and reentry centers or increased supervision conditions may be better responses to recidivism.

9. Empower and reward correctional staff

Correctional staff are often underpaid and overworked and, quite simply, undervalued. They are often expected to act as change agents to alter antisocial thinking and behaviors while simultaneously ensuring safety and security. Staff should be trained and provided the best resources available to accomplish these goals, and they should be incentivized to do their job well.

10. Anticipate setbacks

Resist the urge to hold up individual examples as failures of the larger program or approach. High-profile negative instances can result in an otherwise successful program or policy being discarded.

The above list is certainly not exhaustive, and it generally avoids recommendations that would require significant legislative changes. It also does not explicitly address the especially pronounced impact of incarceration on the future prospects of youth, women, and racial and ethnic minorities. Arizona is making significant advancements in several of these areas, but it will take continued and additional support from community members to achieve sustained progress.

Nearly everyone in prison is coming back. It is time to acknowledge this fact and to give appropriate attention and resources to recidivism reduction in order to achieve public safety at a lower social and economic cost.

References

- Andrews, Don A., Zinger, Ivan, Hoge, Robert D., Bonta, James, Gendreau, Paul, and Cullen, Francis T. 1990. "Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis." *Criminology*, 28, 369-404.
- Benedict, W. Reed, Lin Huff-Corzine, and Corzine, Jay. 1998. "Clean Up and Go Straight: Effects of Drug Treatment on Recidivism among Felony Probationers." *American Journal of Criminal Justice*, 22, 169-187
- Bonta, James, and Andrews, Don A. 2017. *The Psychology of Criminal Conduct*. 6th ed. New York, NY: Routledge.
- Carson, E.A., and Elizabeth Anderson. 2016. *Prisoners in 2015*. Washington, DC: U.S. Department of Justice.
- Durose, Matthew R., Cooper, Alexia D., and Snyder, Howard N. 2014. *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*. Washington, DC: Bureau of Justice Statistics.
- Gainey, Randy R., Payne, Brian K., and O'Toole, Mike. 2000. "The Relationships Between Time in Jail, Time on Electronic Monitoring, and Recidivism: An Event History Analysis of a Jail-Based Program." *Justice Quarterly*, 17, 733-752.
- Gendreau, Paul, Little, Tracy, and Goggin, Claire. 1996. "A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!" *Criminology*, 34, 575-607.
- Hepburn, John R., and Albonetti, Celesta A. 1994. "Recidivism Among Drug Offenders: A Survival Analysis of the Effects of Offender Characteristics, Type of Offense, and Two Types of Intervention." *Journal of Quantitative Criminology*, 10, 159-179.
- Listwan, Shelley J., Sundt, Jody L., Holsinger, Alexander M., and Latessa, Edward J. 2003. "The Effect of Drug Court Programming on Recidivism: The Cincinnati Experience." *Crime & Delinquency*, 49, 389-411.
- Maltz, Michael D. 1984. *Recidivism*. Orlando, FL: Academic Press.
- Pew Center on the States (2011). *State of Recidivism: The Revolving Door of America's Prisons*. Washington, DC: The Pew Charitable Trusts.
- Ryan, Charles L. 2017. *Corrections at a Glance*, November 2017. Available at <https://corrections.az.gov/reports-documents/reports/corrections-glance>
- United States Sentencing Commission. 2016. *Recidivism Among Federal Offenders: A Comprehensive Overview*. Available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf
- Wilson, James A. 2005. "Bad Behavior or Bad Policy? An Examination of Tennessee Release Cohorts, 1993-2001." *Criminology & Public Policy*, 4, 485-518.

Wright, Kevin A., Danielle L. Haverkate, Travis J. Meyers, Caitlin Matekel, Cody W. Telep, Erik Maloney, Justin Thrasher, Johnny House, Varrone White, and Timm Wroe. 2017. Recidivism Reduction in Arizona. Report submitted to the Governor's Office Recidivism Reduction Project Team.

Wright, Kevin A., and Natasha Khade. 2018. Offender Recidivism. In *Routledge Handbook of Corrections in the United States*, edited by O.H. Griffin and V.H. Woodward, pp. 494-502. New York, NY: Routledge.

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NATIVE AMERICAN CJS ISSUES

By Alexander Mallory
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Key Points:

- Crime on tribal lands involves a complex web of overlapping jurisdictions that changes with the severity of the crime and the nature of both victim and offender.
- In recent years, the Tribal Law and Order Act (TLOA) and the Violence Against Women Act (VAWA) have given tribes increased sentencing and jurisdiction over domestic violence.

Background

Criminal matters arising in tribal lands can be especially complex and challenging. Three sovereigns (federal, state and tribal) share authority.¹ To determine jurisdiction, for example, a court must look to federal and tribal laws, treaties and U.S. Supreme Court cases.²

These jurisdictional challenges hinder effective law enforcement, which takes on added significance because Native Americans are victims of violent crime at least twice as often as other racial groups.³ Seventy percent of these crimes are interracial, involving either a non-Indian perpetrator and an Indian victim or an Indian perpetrator and a non-Indian victim.⁴ The current framework of criminal law in Indian Country developed as a result of several events in the late 1800s. In 1885, Congress enacted the Major Crimes Act (MCA) (18 U.S.C. 1153). This legislation authorized federal prosecutors to prosecute crimes committed by Indians that occurred on Indian lands. Since the enactment of the MCA, the federal government has been the primary law enforcement actor in Indian Country.

Congress enacted the MCA because of the Supreme Court's decision in *Ex Parte Crow Dog*. In *Crow Dog*, the Court held that the federal courts lacked jurisdiction over intra-Indian crimes. This outraged the non-Indians in the Dakota Territory. Although the dispute was resolved in a traditional Sioux fashion, the non-Indians viewed the resolution as a miscarriage of justice. Consequently, Congress enacted the MCA and conferred federal criminal jurisdiction to crimes committed by Indians on Indian lands. Specifically, the act mandated federal jurisdiction over seven crimes: murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny. The act has been amended numerous times and now covers more than 40 major crimes.

Although several laws confer federal jurisdiction over crimes on tribal lands, the most important ones are the Indian Country Crimes Act, extending federal law to interracial crimes in Indian country; the aforementioned Major Crimes Act, punishing Indian offenders for commission of several felonies in Indian Country; and the Assimilative Crimes Act, allowing federal prosecutions for state law violations.⁵

¹ Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 ARIZ. L. REV. 503 (1976).

² Robert N. Clinton, Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective, 17 ARIZ. L. REV. 951 (1975).

³ Cohen's Handbook of Federal Indian Law 9.01, at 736 (Nell Jessup Newton ed., 2012).

⁴ Id. at 736.

⁵ Getches, D., Wilkinson, C., Williams, R., Fletcher, M. and Carpenter, K. (2017). Cases and materials on federal Indian law. 7th ed. St. Paul: West Academic Publishing, p.585.

Four additional laws are relevant to criminal jurisdiction in Indian country. First, the Indian Civil Rights Act of 1968 (ICRA) limits the punishment a tribal court can impose to no more than a \$5,000 fine and a year in jail.⁶ The U.S. Constitution and Bill of Rights do not apply in tribal court. Therefore, ICRA also conferred individual rights to tribal members that are enforceable against actions of tribal governments.

Second, the Tribal Law and Order Act of 2010 amends ICRA to allow Indian tribes to sentence convicted criminals (all Indians) to up to three years in jail per offense, with the total punishment no greater than nine years and a fine limited to \$15,000.

Third, the 2013 Amendments to the Violence Against Women Act (VAWA) restore tribal jurisdiction over non-Indians who commit crimes of domestic violence against Indians while in Indian country. Finally, the *Duro Fix*, reaffirms the “inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians.”

Institutions and Players

Criminal jurisdiction in Indian country involves federal, state, and tribal jurisdictions. Jurisdiction differs based on the offender and the crime.

| Offender | Victim | Crime | Jurisdiction |
|------------|------------|-----------------------------------|----------------|
| Indian | Indian | Major Crime | Federal/Tribal |
| Indian | Indian | Non-Major Crime | Tribal |
| Indian | Non-Indian | Major Crime | Federal/Tribal |
| Indian | Non-Indian | Non-Major Crimes | Tribal |
| Indian | Victimless | | Tribal |
| Non-Indian | Indian | General Crime Assimilative Crimes | Federal |
| Non-Indian | Non-Indian | Any crimes | State |
| Non-Indian | Victimless | | State |

Tribes have inherent jurisdiction over any Indian who commits an offense in Indian Country. If an Indian commits an offense not listed as a major crime, the tribe will have exclusive jurisdiction. If an Indian commits a major crime, the tribal and federal courts have concurrent jurisdiction. In *Wheeler*, the U.S. Supreme Court held that prosecuting an individual in tribal and federal court is not a violation of double jeopardy, because tribal sovereignty is inherent and not delegated from the federal government.

The federal government has exclusive jurisdiction to prosecute any general federal crime anywhere in the country, including Indian Country. If a non-Indian commits an offense against an Indian, then the federal government has exclusive jurisdiction. If the offense involves a non-Indian perpetrator and a non-Indian victim, the state will have exclusive jurisdiction. If a non-Indian commits a victimless crime, the state will have exclusive jurisdiction. Finally, in *Oliphant v. Suquamish Indian Tribe*, the court held that tribes lack inherent sovereign authority over non-Indian offenders except in a manner acceptable to Congress.

⁶ Double Jeopardy and Nonmember Indians in Indian Country, 82 NEB. L. REV. (2003).

Progress Achieved

In recent years, Congress enacted the Tribal Law and Order Act (TLOA)⁷ and the reauthorization of the Violence Against Women Act (VAWA). These two pieces of legislation provided tribes with enhanced sentencing and criminal jurisdiction over crimes of domestic violence.

The TLOA authorized Indian tribes to sentence convicted criminals (all Indians) to up to three years in jail. However, the tribal conviction must meet certain procedural requirements. The statute requires that the tribe must guarantee the following rights:

- 1) effective assistance of counsel;
- 2) for indigent defendants, a defense attorney licensed to practice law by any jurisdiction in the United States;
- 3) a judge who
 - a) has sufficient legal training to preside over criminal proceedings; and
 - b) is licensed to practice law by any jurisdiction in the United States;
- 4) publicly available criminal laws, rules of evidence, and rules of criminal procedure of the tribal government; and
- 5) a record of the criminal proceeding.
- 6) Several tribes in Arizona have opted into TLOA, including the Gila River Indian Community, Salt River Pima-Maricopa Indian Tribe, and the Hopi Tribe

The 2013 reauthorization of VAWA was the most significant recent achievement in Indian County criminal matters. The reauthorization acknowledged the inherent authority of Indian tribes to prosecute non-Indian lawbreakers. The statute acknowledges tribal authority to prosecute “dating violence” and “domestic violence” perpetrated by non-Indians. But the statute does not affect all non-Indians. It authorizes tribes to prosecute non-Indians with “ties” to the tribal community, including residence, employment, or an intimate relationship with a tribal member or resident non-member Indian.

VAWA also requires participating tribes to guarantee all the protections of the original Indian Bill of Rights, the newer procedural requirements contained in TLOA, and new requirements on the composition of juries. Tribes prosecuting non-Indians are required to empanel juries that “reflect a fair cross section of the community, and do not systematically exclude any distinctive group in the community, including non-Indians.” The Pascua Yaqui Tribe is the first Arizona tribe to implement VAWA.

Although VAWA was a win for tribal communities, the statute has not escaped criticism. Tribal prosecutors for the original five pilot tribes⁸ express frustration that their jurisdiction is limited.⁹ Specifically, the prosecutors are not able to charge defendants for crimes related to abuse or endangerment of a child. Alfred Urbina, the former Attorney General for the Pascua Yaqui Tribe, reported that all 18 of the cases that have been prosecuted under VAWA included children as victims.¹⁰ The

⁷ Getches, D., Wilkinson, C., Williams, R., Fletcher, M. and Carpenter, K. (2017). Cases and materials on federal Indian law. 7th ed. St. Paul: West Academic Publishing, p.585.

⁸ The Pilot Project comprised of five tribes: the Confederated Tribes of the Umatilla Indian Reservation, Pascua Yaqui Tribe, Tulalip Tribes of Washington, Assiniboine and Sioux Tribes of Fort Peck, and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation in North Dakota.

⁹ Justice.gov. (2017). Violence Against Women Act (VAWA) Reauthorization 2013 | TRIBAL | Department of Justice.

¹⁰ See Tribal VAWA: Much Remains Undone <https://www.youtube.com/watch?v=xydojLiNoTU>

reauthorization was a step toward greater sovereignty. Nevertheless, effective VAWA implementation will require additional Congressional action.

Conclusion

TLOA and VAWA were two significant pieces of legislation that helped restore and reaffirm tribal sovereignty. To date, no defendant has raised a constitutional challenge to his conviction under VAWA. A non-Indian will challenge his conviction; the only question that remains is when.

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NOTES



2018 | Morrison Institute for Public Policy, Arizona's premier think tank, was established in 1982. An Arizona State University resource, Morrison Institute utilizes nonpartisan research, analysis, polling and public dialogue to examine critical state and regional issues. Morrison Institute provides data- and evidence-based review to help improve the state and region's quality of life. Morrison Institute is part of the ASU College of Public Service and Community Solutions.

MorrisonInstitute.asu.edu

Further Reading on Criminal Justice

POLICE

Doleac, J.L. (2017). *Do body-worn cameras improve police behavior?* Retrieved from Brookings Institute: <https://www.brookings.edu/blog/up-front/2017/10/25/do-body-worn-cameras-improve-police-behavior/>

Gaub, J., Choate, D., Todak, N., Katz, C., & White, M. (2016). Officer Perceptions of Body-Worn Cameras Before and After Deployment. *Police Quarterly*, 19(3), 275-302.

McClure, D., La Vigne, N., Lynch, M., Golian, L., Lawrence, D., & Malm, A. (2017). How Body Cameras Affect Community Members' Perceptions of Police Results from a Randomized Controlled Trial of One Agency's Pilot. Retrieved from Urban Institute: https://www.urban.org/sites/default/files/publication/91331/2001307-how-body-cameras-affect-community-members-perceptions-of-police_5.pdf

Provine, D., & Sanchez, G. (2011). Suspecting immigrants: Exploring links between racialised anxieties and expanded police powers in Arizona. *Policing and Society*, 21(4), 468-479.

BAIL, JAIL, FINES AND FEES

Cassidy, M. (2017, June 22). Bond companies 'extremely worried' as Arizona moves away from cash bail bonds. *The Arizona Republic*. Retrieved from: <https://www.azcentral.com/story/news/local/arizona/2017/06/21/arizona-courts-back-away-cash-bail-system-bond-companies-worried/400209001/>

Fellner, J., Raphling, J., Root, B. (2017). *"Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*. Human Rights Watch. Retrieved from: <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly>

Hart, B. (2016). *Bail or Jail? Most Arizonans support changes in the bail system*. Retrieve from Morrison Institute for Public Policy. Retrieved from: https://morrisoninstitute.asu.edu/sites/default/files/content/products/Bail%20Poll_0.pdf

CHARGING

Berman, Douglas (2017) *Sentencing Guidelines*, in *Reforming Criminal Justice*. Academy for Justice. Retrieved from http://academyforjustice.org/wp-content/uploads/2017/10/6_Criminal_Justice_Reform_Vol_4_Sentencing-Guidelines.pdf

Boylan, R. T. (2012). The effect of punishment severity on plea bargaining. *The Journal of Law and Economics*, 55(3), 565-591

Miller, M., & Caplinger, S. (2012). Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions. *Crime and Justice*, 41(1), 265-310.

SENTENCING AND INCARCERATION

- Bureau of Justice Statistics (2016). *Prisoners in 2015*. Retrieved from: <https://www.bjs.gov/content/pub/pdf/p15.pdf>
- Gottschalk, M. (2011). The past, present, and future of mass incarceration in the United States. *Criminology & Public Policy*, 10(3), 483-504.
- National Research Council. 2014. The Growth of Incarceration in the United States: Exploring Causes and Consequences. Washington, DC: *The National Academies Press*. <https://doi.org/10.17226/18613>
- United States Sentencing Commission. (2012). Report to Congress: Mandatory minimum penalties in the federal criminal justice system. *Federal Sentencing Reporter*, 24(3), 185- 192.
- Zimring, F. E. (2010). The scale of imprisonment in the United States: Twentieth century patterns and twenty-first century prospects. *The Journal of Criminal Law and Criminology (1973-)*, 100(3), 1225-1246.

VULNERABLE POPULATIONS

- Hart, B. (2016). *Juvenile Justice in Arizona: The Fiscal Foundations of Effective Policy*. Retrieved from Morrison Institute for Public Policy: https://morrisoninstitute.asu.edu/sites/default/files/content/products/JUVENILE%20JUSTICE%20IN%20AZ_final.pdf
- Olove, M. (2016, March 17). Elderly Inmates Burden State Prisons. *The Pew Charitable Trusts*. Retrieved from: <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/17/elderly-inmates-burden-state-prisons>
- Wilper, A., Woolhandler, S., Boyd, J., Lasser, K., McCormick, D., Bor, D., & Himmelstein, D. (2009). The health and health care of US prisoners: Results of a nationwide survey. *American Journal of Public Health*, 99(4), 666-72.

RE-ENTRY AND RECIDIVISM

- Na, S., & Harris, C. (2017 August 14). Will helping inmates hone skills, find jobs keep them out of prison? *The Arizona Republic*. Retrieved from: <https://www.azcentral.com/story/news/local/southwest-valley/2017/08/14/arizona-tries-lower-crime-recidivism-finding-inmates-jobs/513641001/>
- Durose, M.R., Cooper, A.C., & Snyder, H.N. (2014). *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*. Bureau of Justice Statistics. Retrieved from <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>
- Makarios, M., Steiner, B., & Travis III, L. F. (2010). Examining the predictors of recidivism among men and women released from prison in Ohio. *Criminal Justice and Behavior*, 37(12), 1377-1391.



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