

FIXING ARIZONA’S MASS INCARCERATION DILEMMA
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*Sometimes I think this whole world is one big prison yard.
Some of us are prisoners, some of us are guards.¹*
– Bob Dylan

PART I: OVERVIEW OF OVER-INCARCERATION

There are those who believe that all inmates in Arizona prisons and jails belong there. Contrary to this view is the growing national consensus that we should not be incarcerating nonviolent drug offenders, even those with prior drug convictions, who have not committed property crimes.² In fact, there are a number of other less serious crimes whose sentences could be reduced as well without any deleterious impact on public safety. Moreover, even when offenders deserve incarceration, they may not have deserved the amount of time imposed - the punishment did not fit the crime.

Referring to a nonviolent drug offender who received a mandatory life sentence without parole in federal prison, former U.S. Attorney General Eric Holder noted, “There are thousands like him serving sentences in our federal and state systems that are disproportionate to their crimes. The financial cost of our current incarceration policy is straining government budgets; the human and community costs are incalculable.”³ He pointed to federal and state statutes requiring fixed minimum prison terms as being largely responsible for this, and considered them costly and cruel. He despaired the rate and length of incarceration in this country as “unprecedented and unsustainable.” He concluded that over-reliance on mandatory minimum sentences must come to an end. Even while the present Executive Branch is reviving “tough on crime” sentencing, Congress continues to float bills that would curb excessive prison time.⁴

Paul Ryan, the Republican Speaker of the U.S. House of Representatives, acknowledged in 2016 that he was “a late convert to criminal-justice reform.” He recognized that tough-on-crime laws imposing mandatory minimum sentences and three-strike penalties “ended up putting people [in] for long prison terms, which ends up ruining their life and hurting their communities where we could have had alternative means of incarceration, better means of actually dealing with the problem than basically destroying a person’s life.”⁵ Indeed, the statistics have been disturbingly large:

One in thirty-one adults, or seven million, are under some form of correctional control ... in federal prison, 51% are serving long, hard time for drug offenses – only 4 percent are in for robbery and a mere 1 percent for homicide – and in the

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state system, 20 percent [are in on drug convictions], larger than any other category of offense. Some 3,700 Americans who have never committed a violent crime are serving twenty-five years to life in California alone.”⁶

Some of these high numbers can also be attributed to the de-institutionalization of the mentally ill. Starting in the 1970’s, there was a popular movement to shut down psychiatric facilities in favor of community placements and outpatient treatment. This was a failed experiment, and the mentally ill who were not adequately medicated or supervised soon ran afoul of the law. Without sufficient residential placements and outpatient treatment, they began to be absorbed instead by the criminal justice system. Today, prisons house many of the persons who, in earlier times, would have been placed in mental health facilities.⁷ In fact in 2005, over half the state and federal prison inmates were mentally ill.⁸ The abysmal failure of state and federal governments to provide adequate treatment of our mentally ill citizens will continue to feed a disproportionate incarceration of this population.

Because 86 percent of the individuals incarcerated in the U.S. are in state custody, states bear the lion’s share of the burden to resolve this problem.⁹ The Vera Institute of Justice produced an exhaustive study, *New Trends*, analyzing sentencing and corrections laws enacted by the states in 2014 and 2015 to fix the over-incarceration problem. States have taken heed of the evidence such as what is presented in *New Trends* in trying to find ways to reduce their mass incarceration dilemmas.¹⁰

Despite a national environment of stark ideological division on many issues, there is a significant bipartisan agreement emerging on crime and punishment. It’s manifest in the states, where ideologically driven criminal justice policies rooted in punitive views of justice system-involved people are giving way to an evidence-based approach rooted in what works to make society safer and stronger.¹¹

In 2014 and 2015, 46 states enacted at least 201 bills, executive orders and ballot initiatives to reform at least one aspect of their sentencing and corrections systems. Most of the policy changes focused on three areas: creating or expanding opportunities to divert people away from the criminal justice system; reducing prison populations by enacting sentencing reform, expanding opportunities for early release from prison, and reducing the number of people admitted to prison for violating the terms of their community supervision; and supporting re-entry into the community from prison.¹² By providing concise summaries of representative reforms in each of these areas, *New Trends* serves as a practical guide for policymakers looking to effect similar changes in criminal justice policy.

Arizona is, however, decidedly behind the curve in addressing its mass incarceration problem. The importance of ignoring the direction the country is going cannot be understated for Arizona, a state with one of the highest incarceration rates. It is even more unjustified in light of research indicating that shorter sentences do not jeopardize public safety – safety being the mainstay basis for Arizona’s heavy sentencing regime.

A. Over-incarceration – the National Problem

The United States has the highest incarceration rate in the world.¹³ State and federal prisons' populations total over 1.5 million – and more than 2 million when local jails are included.¹⁴ Former Attorney General Holder illustrated the scope of the problem:

From the late 1970s, America's incarceration rate more than quadrupled to over 700 per 100,000 people from about 130; compare that with Russia, for example, which imprisons about 150 people per 100,000. Between 1970 and 2005, America's prison and jail population increased sevenfold to approximately 2.2 million from about 300,000. The United States has about 5 percent of the world's population, yet about 22 percent of its known prisoner population. In 2010, it cost about \$80 billion per year to house these people in our prisons and jails.¹⁵

Further, federal prosecutors had charged mandatory minimum penalties for drug trafficking in two-thirds of cases. During AG Holder's administration however, policy changed to disfavor charging mandatory minimums for low-level, nonviolent drug offenders.¹⁶ Consequently, federal prosecutors charged this harsh penalty in less than half of the drug cases – the lowest rate on record.¹⁷ Note, of course, that this positive development may be reversed given Attorney General Sessions' policy change requiring that charging should be based upon securing the highest possible sentence.¹⁸

Our nation also has some of the harshest sentencing in the world. Just 20 percent of countries have life without parole sentences at all; yet the United States resorts to it even for single, nonviolent offenses. There are about 160,000 people serving life in the United States, as compared to 59 in Australia, 41 in England, and 37 in the Netherlands. In 2005, Human Rights Watch counted more than two thousand Americans serving life without parole for crimes committed as juveniles;¹⁹ all other countries combined had only locked up twelve children without possibility of release. We are one of just nine countries that punish via both life sentences and the death penalty.²⁰

America also incarcerates women at an alarming rate. Nearly 30 percent of the world's imprisoned women are in America. Note that that is twice the rate of China and four times the rate of Russia. Nonetheless, two-thirds of the women in state prisons are there for nonviolent offenses.²¹ And our female incarceration problem is of relatively recent origin; we imprison eight times as many women now as in 1980.²² The social impact of incarcerating women (who usually bear critical child-rearing responsibilities) is considerable. Sixty percent of American women in state prisons have children under the age of 18. An estimated 2.6 million American children have a parent in prison. These children are often put in chaotic homes, and are more likely to be sexually abused and imprisoned themselves.²³

America further has an astoundingly high juvenile incarceration rate. We far out-distance other countries with 336/100,000 juveniles imprisoned; the next highest countries are South Africa at 69, New Zealand at 68, Netherlands at 51, and England at 46.²⁴ In 2007, there were over 60,000 juveniles imprisoned in this country.²⁵ America was among only a handful of nations that had in the past few decades imposed death penalty and life without parole sentences on juveniles, keeping company with such places as China, the Congo, Iran, Pakistan, Yemen, Saudi Arabia, and Nigeria.²⁶ Fortunately, the Supreme Court held both death penalty and life

without parole for juvenile offenders to violate the Eighth Amendment recently.²⁷ But that had negligible impact on the number of juveniles remaining imprisoned.

America's Death Rows had been famously criticized for being overpopulated. They were problematic due to inhumane isolative treatment on death row, the length of time spent on them, and the cost of death row incarceration. Fortunately, throughout our country, death row populations have been decreasing steadily in the past fifteen years due to abolition in some jurisdictions, prosecutors' reductions in capital charging, an anti-capital punishment shift in popular opinion, unavailability of means of execute, and the costs of capital litigation. Around the turn of the century, there were approximately 3,500 on America's death rows, but that number shrank to 2,881 in 2015.²⁸ Nevertheless, it remains too high.

Also significantly, most individuals in local and county custody are there for minor violations such as driving with suspended licenses, shoplifting, or evading subway fares. Compounding the issue is the sad fact that many of those include veterans²⁹ as well as juveniles.³⁰ That number could increase, as there are nearly eight million outstanding warrants throughout the country, almost all for minor offenses.³¹ Ironically, it is those incarcerated on such minor infractions who are often least able to bond out, and they have been jailed for longer periods of time due to their inability to pay court-imposed fees.³² This has effectively created in some areas "an unconstitutional modern-day debtors' prison," keeping impoverished people behind bars.³³

Furthermore, having a criminal record is a serious bar to much employment. "One in three U.S. adults has a criminal record that will show up on a background check meaning that nearly 70 million people – disproportionately people of color – could be summarily excluded from the work force, regardless of their educational background or relevant skill set."³⁴ An Indiana study revealed that unemployed and underemployed parolees are far more likely to reoffend than those who are fully employed.³⁵ Because unemployment correlates strongly with recidivism, it correspondingly contributes to the over-incarceration problem.

B. Over-incarceration – the Arizona Problem

Arizona's incarceration statistics are alarming. Although we have 6.8 million residents, and are the 14th largest state by population,³⁶ as of fall 2014, approximately 42,000 Arizonans were in prison (38,078 male and 3,934 female).³⁷ "Since 1992, the population in the Arizona prison system, both privately and publicly run, has increased by 171%. This far exceeds the state's population growth of 75% over that time, and reflects an increase in the incarceration rate from 393/100,000 to 624/100,000."³⁸ At this rate, Arizona imprisons "nearly 50 percent higher than the average for all states," placing Arizona as the sixth highest in incarceration rates in the nation in 2013.³⁹

Some may comfort themselves that Arizona's substantial imprisonment rate is justified by it making the community safer from dangerous and violent criminals. However, driven by mandatory sentencing, especially in drug cases, and prosecution policies per the War on Drugs, Arizona prisons are in fact stuffed primarily with non-violent, low level offenders. How DOC defines repeat and violent offenders needs to be reviewed.

Current laws and policies crowd Arizona's prisons with people convicted of low-level, nonviolent crimes whose offenses are driven by addiction to alcohol and illegal drugs. ... The large number of low-level and nonviolent offenders behind bars is a product of Arizona's mandatory sentencing laws, which force judges to lock up individuals who commit repeat but petty offenses. Most of these individuals are substance abusers whose crimes are related to addiction and many should be in mandatory treatment and other community-based programs rather than prison. ... Under the repetitive enhancement, an addict with one prior conviction for drug possession caught selling a gram of cocaine faces a sentence that is almost double that of a dealer caught with a kilo of cocaine for the first time. Such an outcome flies in the face of common sense and the will of voters, who clearly intended that convictions for drug possession should not result in long prison terms. Yet if the enhancement is invoked and the prosecutor can prove the facts, the judge must impose an enhanced sentence.⁴⁰

The cost of our high prison incarceration rate is equally staggering. The Arizona Department of Corrections has a budget of about \$1 billion annually. That represents 11% of Arizona's \$9.2 billion budget for fiscal year 2016.⁴¹ For 2016, DOC Director Charles Ryan recently requested another 2,500 prison beds (in addition to 1,000 new private prison beds funded in 2015), with another 1,000 to be funded in 2016. In his budget request, Director Ryan noted that "DOC has been adding an average of 911 inmates a year in recent years with no end in sight."⁴²

Arizona's county jails are similarly overburdened. Maricopa County has had an average daily jail population of 8,314,⁴³ and over 100,000 cycle through Maricopa County jails each year.⁴⁴ The total incarceration budget of Maricopa County increased from \$43.8 million in 2004 to \$102.5 million in 2015.⁴⁵ This represents "an unsustainable 87% increase ... [and] a doubling in per-inmate expense from \$6,325 in 2004, to \$12,864 in 2015."⁴⁶ A lopsided 52% of the Maricopa County budget is spent on criminal justice and public safety.⁴⁷

Private prisons, first authorized in 2005, now account for 15% of Arizona's prison population, housing mainly a "population that is inherently less expensive to house: inmates requiring lower security levels and those without major health issues."⁴⁸ Because of the difference in populations housed publicly and privately in Arizona, it is difficult to judge whether the State in fact nets any savings from reliance on private prisons.⁴⁹ DOJ flip-flopped its position regarding private prisons – banning them in the Obama Administration then promptly reinstating them in the Trump Administration – so the federal system may not offer much constructive guidance.⁵⁰

An additional problem is the graying of Arizona's inmates. Almost 10% of the prison population is 55 years of age or older, nearly doubling since 2007, presumably due to lengthy sentences passed in recent years.⁵¹ This results in severe increased healthcare costs for DOC. Given that advanced age statistically correlates with substantially reduced recidivism,⁵² lengthy prison terms that result in elder incarceration make little sense. Consequently, though it does not increase the prison population, it substantially increases the costs to taxpayers.

Prioritizing prosecution and incarceration under the present Arizona sentencing structure has dire funding effects on other community needs such as schools. As *Arizona Republic* columnist Laurie Roberts recently wrote:

Meanwhile, K-12 schools have been shorted by \$1.3 billion in recent years, according to a Maricopa County Superior Court Judge. This state now kicks in less to public schools than any other state, according to the U.S. Census Bureau. And the honors don't stop there. Arizona also has made the nation's deepest cuts to higher education since the Great Recession, according to the Center on Budget and Policy Priorities. The non-partisan group recently reported that Arizona is spending 47 percent less per college student than it did in 2008. And that was before this year's \$99 million cut to community colleges.⁵³

This is doubly troubling, given research confirming that education is one of the surest ways to prevent youth from turning to crime in the first place!⁵⁴

C. The Push To Punish

This admitted focus on incarceration goes back to the 1960s, according to Harvard historian Elizabeth Hinton.⁵⁵ At the time, the war on crime had enjoyed the bipartisan embrace of punishment by both liberals and conservatives.⁵⁶ Although liberal President Lyndon Johnson is better known for his "War on Poverty," it was his "War on Crime" that evolved into incarceration as the major means of reducing crime. Nixon's "War on Drugs," Regan's escalation of it, and Clinton's 1994 Crime Bill all contributed to the incarceration boom and the concomitant cost boom.⁵⁷ The push to incarcerate in turn led to the construction of more prisons.

Of course underlying the push to imprison is a belief that harsher sentencing will make Arizona safer. Nevertheless, the incarceration of nonviolent offenders, especially drug offenders for possessing small amounts of marijuana, exceeded those for all violent crimes in 2015. This is true even though social attitudes toward the drug have changed with some states legalizing its use or decriminalizing small quantities and, as noted above, this despite a steep decline in crime rates over the last two decades, including a 36% drop in violent crime.⁵⁸ Is nonviolent drug possession justifiably Arizona's No. 1 safety concern?

Further, even if safety is the prime objective of the War on Crime, we live in a time of reduced violent crime. By 2016,

The country's violent crime is about half of what it was in 1991. Cities, in particular, have become markedly less dangerous. Less than half as many police officers are killed in the line of duty today as in the mid 1970's. In 1968, Americans rated "crime and lawlessness" as the single most important domestic problem facing the nation. Today, according to Gallup, they rank "crime/violence" below issues like economy, unemployment, racism and race relations, and dissatisfaction with government.⁵⁹

Aside from long sentences, defendants also face a host of serious collateral consequences. For example, in *United States v. Nesbeth*,⁶⁰ U.S. District Judge Frederic Block urged judges to realize how felony convictions affect peoples' lives. Ms. Nesbeth had faced a sentencing range of 33-41 months for bringing 0.6 kilos of cocaine into the country at the behest of her boyfriend (though she was not paid for this favor). She was 20, lived with her mother, had been enrolled in college, worked with children as a counselor in lower-income areas, and was a first-time offender. Employed as a nail technician, she did not use illegal drugs. She had fully complied with her conditions of release and efforts made at rehabilitation. Judge Block varied substantially from the Guidelines, sentencing her to one year of probation, six months' of home confinement, and 100 hours of community service.⁶¹ Judge Block had declined to put her in prison because of the number of collateral consequences she will face, some for the rest of her life as a convicted felon:

Today a criminal freed from prison has scarcely more rights, and arguably less respect, than a freed slave or a black person living "free" in Mississippi at the height of Jim Crow. Those released from prison on parole can be stopped and searched by the police for any reason... and returned to prison for the most minor of infractions, such as failing to attend a meeting with a parole officer.... The "whites only" signs may be gone, but new signs have gone up – notices placed in job applications, rental agreements, loan applications, forms for welfare benefits, school applications, and petitions for licenses, informing the general public that "felons" are not wanted here. A criminal record today authorizes precisely the forms of discrimination we supposedly left behind – discrimination in employment, housing, education, public benefits, and jury service. Those labeled criminals can even be denied the right to vote.⁶²

He called for all criminal practice stakeholders to pay greater attention to these consequences,⁶³ advising that 50,000 federal and state statutes and regulations impose a variety of penalties, disabilities, or disadvantages on convicted felons.⁶⁴ Often, moreover, "the inability to obtain housing and procure employment results in further disastrous consequences such as losing child custody or going homeless. In this way, the statutory and regulatory scheme contributes heavily to many ex-convicts becoming recidivists and restarting the criminal cycle."⁶⁵

PART II: ADDRESSING OVER-INCARCERATION: LESSONS FROM FEDERAL INITIATIVES

Arizona taxpayers have been bearing the burden of an expensive prosecution and incarceration program that has itself done little to reduce crime, yet has commandeered resources that could be used to correct other serious problems plaguing our people as well as intervene to prevent crime. As fiscal responsibility demands increase, finding ways to reduce sentences of non-dangerous offenders has become imperative. There are a number of options to accomplish this. One place to start looking for ideas is with the federal government.

A. Charging Priorities

The federal government took seriously its over-incarceration problem. While it approached the issue in a number of ways, a key starting point was the recognition that America

had prosecuted and sentenced low-level, nonviolent drug offenders far too harshly. Though there had been much laudatory interdiction in the large-scale production and trafficking in illegal substances in the “War on Drugs,” getting to the kingpins was costly and difficult. The “War on Drugs” also was waged too often against the little fish, targeting users and local street dealers under the theory that stopping the buying market would dry up the production and distribution networks. Many years later, we know that that did not work, but for decades the federal government divided its drug enforcement resources between attacking the source and the local small fry. The latter were far easier to catch, and so (like the states) the feds started to incarcerate a vast number of low level, nonviolent drug offenders.

It is a matter of priorities. For several decades, Congress and the U.S. Sentencing Commission had made putting away drug traffickers of any level their priority. Under the flag of the War on Drugs, Congress ramped up its statutory sentencing ranges, creating mandatory sentencing for even small quantities of drugs. The Sentencing Commission followed suit and crafted sentencing guidelines that would produce severe sentences for drug offenders. Attorney Generals demanded maximum prosecution in charging directives such as the Ashcroft Memo.⁶⁶ Long after policy makers had turned their attention to illegal aliens, child pornography, or whatever the current “crime of the month” was that captured media and politician attention, the harsh drug sentencing regime remained. It continued to feed a substantial number of minor drug players into decades-long sentences in federal prisons. Though priorities changed, the government neglected to undo the mass incarceration crisis that it had placed in motion.

Thankfully, the tide started to turn with the Obama Administration. Attorney General Holder changed priorities with his “2010 Holder Memo.” Although the “Ashcroft Memo” had instructed prosecutors to charge so as to achieve the greatest sentence possible, this first Holder memo called for “reasoned exercise” of prosecutorial discretion. “Charging decisions should be informed by reason” as well as the four grounds for sentencing (deterrence, public safety, rehabilitation, and punishment) – no longer guided by punishment alone.⁶⁷

Three years later, he unveiled his “Smart on Crime” initiative. The second of its five purposes was to “reduce overburdened prisons.”⁶⁸ The Initiative explained why low-level, nonviolent drug offenders would be getting different treatment:

Our prisons are over-capacity and the rising cost of maintaining them imposes a heavy burden on taxpayers and communities ... [with] the Bureau of Prisons comprising one-third of the Justice Department’s budget. This means a top to bottom look at our system of incarceration. For many nonviolent, low-level offenses, prison may not be the most sensible method of punishment.⁶⁹

Calling for “meaningful justice reform,” Attorney General Holder announced charging policy changes, many directed at reducing drug sentences.⁷⁰ He issued his 2013 charging memo “refining” mandatory sentence charging in drug crimes. Federal drug sentencing had had two basic means of drastically increasing mandatory time: (1) alleging prior drug trafficking or crimes of violence convictions; and (2) charging a certain quantity of drugs (since drug sentencing was largely determined by the amount of contraband). The “2013 Holder Memo” directed prosecutors to *not* charge either of those enhancements when the defendant was a low

level, nonviolent drug dealer without a significant criminal record or ties to organized crime.⁷¹ The spirit of this policy change has additionally led to a noticeable reduction in charging other mandatory drug sentencing offenses such as possessing a weapon when committing a drug crime, conducting a Continuing Criminal Enterprise, or dealing drugs near a school. Federal practitioners confirm that these policy changes have substantially cut back filing mandatory drug enhancements.

At the same time, there was a shift away from pursuing truly low-level drug offenders in federal courts. After 9/11, combatting terrorism became the highest priority, and the government decided to divert its prosecutorial resources toward that end. Attorney General Holder stated when starting his “Smart on Crime Initiative:” “We must always endeavor to ensure we use our limited resources in a manner that is consistent with our responsibility to effectively enforce the criminal law, ... maximiz[ing] efforts to prosecute the right criminal cases consistent with our mission.”⁷² Hence, he made explicit that DOJ’s “Priority Goals” were:

- National security;
- Violent crime;
- Financial and healthcare fraud; and
- Vulnerable victims.⁷³

Though dismantling *major* drug trafficking remained a “goal,”⁷⁴ prosecuting drug offenses is no longer a “priority.” Indeed, line prosecutors were advised to consider alternatives (such as state drug prosecutions) when the crime is not among the stated priorities.⁷⁵ Thus in 2015, Deputy Attorney General Yates issued a charging memo reminding prosecutors that corporate wrongdoing was a priority⁷⁶ – the broad approach to the “War on Drugs” ostensibly relegated to ancient history for the time.

Overall, the BOP inmate population (which had steadily increased to a total population of 220,000 in 2013), has been steadily decreasing since then. By the end of 2016, the population was down to 192,000.⁷⁷ Changes in addressing drug offenders had a significant positive impact on this progress. As a result of A.G. Holder’s policy decisions regarding charging, future BOP overcrowding will be substantially diminished. The number of drug case filings had already been steadily declining in federal courts by the close of 2016:

FY12	25,712 cases
FY13	23,179 cases
FY14	22,193 cases
FY15	20,790 cases ⁷⁸

By limiting drug prosecutions to the more major offenders, the Justice Department significantly reduced its future prison population.

Admittedly, DOJ’s charging policies have reverted at the outset of the Trump Administration. In May of 2017, Attorney General Sessions issued a memorandum to the U.S. Attorneys’ Offices and DOJ, rescinding A.G. Holder’s charging policies.⁷⁹ This was not an unexpected pendulum swing after the progressive changes the Obama Administration made, and

it is hopefully temporary. The “Sessions Memo” first stated that prosecutors should once again charge the harshest offenses (with presumably the harshest sentencing enhancements). However, the memo immediately allowed for exceptions under prosecutorial discretion, and with supervisor approval, in accordance with the policy that had long been in effect in DOJ. The second issue in the “Sessions Memo” was the requirement that prosecutors disclose all relevant facts to probation and the sentencing judge. This, though, has been the norm.

On the other hand, at the outset of the memo, A.G. Sessions said the goal was to achieve “just and consistent results in federal cases.” That implies that charging and sentencing thereafter should be consistent with charging and sentencing that occurred during the 8 years of the Obama Administration. Prosecutors who felt that 5 years sufficed for a drug offense in December of 2016 would be hard-pressed to contend in a similar case in February of 2017 that life without parole provided “consistent” prosecutorial treatment. As of this publication, it remains uncertain how this policy will be applied and interpreted, especially given states’ and Congressional trends that continue to try to reduce sentences.

Additionally, a central concern of the Trump Administration is reducing federal spending, and bipartisan Congressional support to decrease prison overcrowding remains in force. As discussed above, the federal Bureau of Prisons demands a lion’s share (in FY 2016 25%) of all funding going to DOJ, exceeding the budgets of prosecutions and all other agencies but the FBI.⁸⁰ Moreover in his proposed FY 2018 budget, President Trump slashed the BOP prison construction budget by \$1 billion.⁸¹ It is therefore quite likely that fiscal priorities generated by housing a potential burgeoning federal inmate population will continue to curb excessive sentencing despite initial pronouncements of A.G. Sessions.

Concurrently, states are determined to continue their efforts to unpack their prisons in their own state systems – and A.G. Sessions’ mandates only apply to federal prosecutions.⁸² At least 30 states, Arizona *not* included, have passed reforms such as reducing penalties for minor possession, giving judges more power to sentence to probation, limiting how many theft crimes qualify as felonies, and reducing mandatory minimum sentences for a number of crimes.⁸³ “So far, state-level criminal justice overhauls have helped reverse what had been an inexorable rise in the total United States prison population: After peaking in 2009, total state prison rolls had fallen about 5% by 2015 to 1.48 million, according to the Sentencing Project.”⁸⁴ The additional benefit is that “states that have most reduced their prison population have also seen the biggest drop in their crime and recidivism rates.”⁸⁵

B. Sentence Reductions

For those prosecuted for drug crimes, a number of inroads in the past decade have reduced lengthy sentences. Some background: federal sentencing is formulated by (a) broad sentence ranges *mandated* by Congress in statutes; (b) much more precise sentence ranges *advised* by the Sentencing Commission in its guidelines; (c) *interpretation* of those statutes and guidelines by case law; and for any play that remains, (d) judicial *discretion* to formulate a fair and just sentence per 18 U.S.C. § 3553(a) (the four policy grounds underlying sentencing). Sentence reductions in any of these steps lower prison overcrowding.

Reducing Statutory Ranges – A number of bills have been introduced in Congress to reduce mandatory sentence ranges, and they continue to be revived.⁸⁶ Starting in 2001, a series of bills addressed the inequities between heavy sentencing for crack cocaine and moderate sentencing for powder cocaine. These were in response to the criticism that crack’s grossly excessive punishment was due to it being a drug of choice in the African-American communities while powder was the drug of choice in Anglo-American communities.⁸⁷ Senator Durbin, a leader in drug sentencing reform, warned that “The sentencing disparity between crack and powder cocaine has contributed to the imprisonment of African Americans at six times the rate of whites and to the United States’ position as the world’s leader in incarceration.”⁸⁸ In 2007, seven such bills were proposed including the Fairness in Drug Sentencing Act of 2007, but none prevailed.⁸⁹ Finally in 2010, Senators Durbin, Leahy, and Sessions succeeded with the Fair Sentencing Act.⁹⁰

The Fair Sentencing Act provides two ways to lower sentences. First, it increased the drug quantities necessary to trigger higher sentence ranges. For example, a defendant faced the highest statutory range of 10 years to life if he had 50+ grams of crack before the Act, but could not get that range afterward unless he had 280+ grams.⁹¹ It increased those drug quantity thresholds for almost every type of drug. Second, it eliminated the mandatory minimum 5-year penalty for simple possession of crack.

Congress to this day continues to introduce sentencing reform bills, and it appears likely that one will be passed in some form soon. These include reductions of mandatory minimum sentencing, expansion of Safety Valve applicability, provisions for early release, and increases in “good time” earned release credits. Nonetheless much depends on changes in Congress after the election, because a small but vocal minority has opposed it, and supporters have been divided by the extent of statutory reform that they would propose and Attorney General Sessions remains a wild card with respect to statutory sentencing changes.⁹²

Breaking Through Charged Mandatory Minimums – The federal system has developed two principal means to avoid the statutory mandatory minimum sentencing that can lead to unduly lengthy sentences (hence prison overcrowding). The first is “Substantial Assistance” where defendants provide evidence and often assistance or testimony to aid the government in prosecuting others (such as making a confrontation call or setting up a drug bust). When a defendant cooperates this way, the government can file a motion confirming his assistance and recommending a lower guidelines sentence. There are two mechanisms to do this – U.S.S.G. § 5K1.1 allows for a sentence reduction motion *before* sentencing,⁹³ and Fed. R. Crim. P. 35 allows for a reduction at any time *after* sentencing.⁹⁴ Significantly, Substantial Assistance allows a judge to sentence below a statutory mandatory minimum sentence. The post-sentencing option differs markedly from the Arizona sentencing scheme, and allows prisoners to reduce their sentences even years later by providing critical prosecution assistance and information. For instance, if a defendant had a 151-month sentence for cocaine distribution (where there was a 10-year mandatory minimum), and she cooperated in prosecuting her co-defendants, the government could move for a 4-level reduction in her guidelines. That would result in a guidelines sentence of 100 months – which is below her mandatory minimum of 10 years (or 120 months). The government’s motion authorizes the judge to sentence below the statutory minimum. The government recommends how much of a sentence reduction to grant in

its motion, though judges may disagree (especially when they feel it is inadequate) and have granted greater and lesser sentence reductions than what the government had recommended.

The second means to avoid mandatory minimum sentencing is the federal Safety Valve provision.⁹⁵ It allows persons with no (or almost no) recent criminal record to drop below their high statutory ranges when they plead guilty and provide full information to the authorities. This is different from Substantial Assistance in that the defendant does not have to play any role in testifying or assisting in building a case, but is simply obligated to tell everything he or she knows. The reduction allows the judge to disregard the statutory mandatory minimum to drop the allotted number of Guidelines levels. Hence when a defendant with no record is arrested with 281 grams of crack cocaine, his guidelines sentence range is 97-121 months, though normally, he could get no less than his 10-year statutory minimum; however, if he qualifies for Safety Valve, he would drop below the mandatory sentence by two offense levels to a range of 78-97 months.

Reducing Sentencing Guidelines Ranges – The greatest changes have come about in the Sentencing Guidelines. There have been three major changes in the drug sentence guidelines. In 2008, the Commission announced its Amendment 706 (“Crack Retro”) which reduced the sentencing disparity between crack and powder cocaine from its previous 100:1 ratio. It dropped crack guidelines by 2 offense levels, yielding for instance a 168-month sentence in place of a 210-month one. It further was applied retroactively so that those already serving time on crack sentences could get relief.⁹⁶ Two years later, Amendment 750 (“Crack Retro II”) imposed the more substantial 18:1 ratio between crack and powder cocaine, again applied retroactively.⁹⁷ By 2015, the Commission recognized that all drug sentences were unproductively excessive. It thus promulgated Amendment 782 (“Drugs Retro”) which reduced guidelines retroactively for virtually all drugs by 2 offense levels.⁹⁸ The benefit of retroactivity, incidentally, is that it lowers *existing* as well as future prison populations.

While President Obama’s commutations are the most high-profile examples of people getting out of prison early, their numbers (total of 1,715 grantees) pale in comparison with those who have been freed under changes made by the Sentencing Commission with Crack and Drugs Retro amendments. The 2014 Amendment 782 made thousands of people eligible for early release. Pursuant to Amendment 782, judges throughout the country have freed more than 13,000 people, according to the Justice Department, and 29,000 other people have been resentenced to reduced time.⁹⁹

Other guidelines amendments were especially helpful to drug defendants. Most notable is the “Minor Role” adjustment.¹⁰⁰ Before 2015, sentence reduction for minor role was disfavored, and so was seldom employed. A person peripherally involved in transporting a single load of drugs could receive the same crushing sentence as the distributors. More troubling, if he had a limited and local role in a sizeable multi-state conspiracy, he could be sentenced based on the drug quantity of the whole conspiracy. The Minor Role amendment has since greatly reduced sentences of peripheral participants in large drug operations. By way of example, an individual who would have been sentenced to 324 months could face only 135 months with a Minor Role adjustment. Another favorable 2015 Guidelines change restricted the scope of “Relevant Conduct.”¹⁰¹ Federal sentences are based on charged conduct plus other

related (“relevant”) criminal conduct, so defendants were liable for whatever credible (often utter hearsay) evidence there was of other related drug dealing; in conspiracy cases, they could be held accountable for all acts of co-conspirators as well. With the limitation that went into effect on Relevant Conduct, defendants could only be sentenced based on the conduct they were actually aware of and consented to. For conspiracy cases especially, this can result in a considerable reduction.

The Commission has recommended productive changes to a recidivist provision, Career Offender, which can enormously increase the sentence of a drug offender who has only 2 prior drug trafficking or violent offenses.¹⁰² For example, where 50 grams of heroin would get 37 months, as a Career Offender it would be 210 months; the average Career Offender sentence is 147 months.¹⁰³ Due to addicts common lengthy criminal records, this guideline has come into play extensively, and Career Offenders now comprise 11% of the prison population.¹⁰⁴ The recommended changes would limit application of Career Offender, sparing many low-level, nonviolent drug offenders from this excessive enhancement.¹⁰⁵

Limiting Application of Statutes and Guidelines – Appellate courts have interpreted statutes and guidelines to restrict the impact of aggravating sentence terms. Though this generally is decided under traditional statutory language interpretation principles, there is occasional reference to the Rule of Lenity policy that resolves ties in favor of the defendant.¹⁰⁶ Some states, such as Texas, have reversed their positions and enacted lenity statutes.¹⁰⁷ The past decade has seen a rash of cases limiting what crimes constitute “crimes of violence” for recidivist treatment. For instance, some simple assaults, burglary, being a felon in possession of a firearm, and even robbery may no longer qualify as “crimes of violence” priors.¹⁰⁸ After years of voicing its frustration with Congress’s vague “crime of violence” standard, the Supreme Court finally declared that phrase unconstitutional.¹⁰⁹ This meant that the harsh sentencing enhancements for many prior “crimes of violence” may no longer ratchet up an individual’s sentence.

Courts have also rejected prosecuting certain fact patterns under statutes defining far more serious crimes, *i.e.*, prosecutorial overreaching or over-criminalization. Two cases dealing with factually minor criminal conduct charged under extremely harsh statutes aptly illustrate “over-criminalization.” When Mrs. Bond learned that her husband had impregnated her best friend, she left arsenic on the woman’s doorknob and mailbox, a tactic that failed to do any more harm than a minor rash, and which was certainly a simple assault. Her conviction under the Chemical Weapons Treaty (intended for prosecuting governments using chemical weapons in warfare) was struck down by a sarcastically indignant Supreme Court.¹¹⁰ Similarly when Mr. Yates threw the fish overboard after being cited for catching ones that were too small, he was prosecuted under the Sarbanes Oxley Act (enacted in the wake of the Enron/Arthur Anderson debacle, to punish those destroying corporate financial documentation). The Supreme Court also reversed Yates’ conviction.¹¹¹ In both cases, the Court made clear that it would not tolerate prosecutors “pushing the envelope” by applying criminal statutes beyond their intended scope.

C. Executive Actions

In 2013, President Obama announced his Clemency Initiative, offering a truly revolutionary approach. He designed clemency criteria to correct the unduly harsh federal sentencing that had glutted federal prisons during the past several decades. Key to eligibility was that the inmate's sentence under today's laws (given all the changes discussed above) would be substantially shorter. In total, 1,715 rehabilitated federal inmates were granted sentence commutations after having served at least 10 years of their unduly lengthy sentences, many serving life without parole.¹¹² Additionally, his program for Compassionate Release (of inmates who are elderly or suffer from serious medical conditions primarily) was broadened in 2013 and 2015.¹¹³ Combined with the intention to expand these grants under compelling circumstances, both measures will reduce prison populations. Both these changes have received widespread popular support.

It is unknown whether President Trump will continue an invigorated clemency initiative of his own or not. He has not criticized the Obama initiative, so may want to fashion his own version going forward to ride the wave of support for commutation. On the other hand, his appointment of A.G. Sessions (who as a policy is seeking maximal sentencing), suggests that the President may not be inclined to use clemency much – and even if he did, his DOJ is likely to not approve much.

D. Success of a Multi-Faceted Approach

Faced with a serious BOP prison overcrowding crisis, combined with a popular and political shift away from maximal incarceration practices and toward fiscal conservation during the Obama Administration, the federal government had attacked the problem from a number of angles. Still protecting the public from dangerous felons, the Justice Department, Congress and Sentencing Commission, and U.S. Courts had taken major steps to rein in *unduly* excessive sentences, separating the wheat from the chaff. While it is too early to tell what the Trump Administration will in fact do, aside from changing charging policy, it is likely that a number of the interventions started by his predecessor are likely to continue. These interventions offer Arizona ideas about how it may address its prison overcrowding problems.

In July of 2017, the U.S. Sentencing Commission issued a report regarding the impact of mandatory minimums on the BOP population. Those sentenced under mandatory minimums decreased by 14% since 2010, though they still account for 56% of all inmates.¹¹⁴ Importantly, the Sentencing Commission attributed this achievement to: the easing of the stringent drug offense mandatorys; DOJ's prosecutorial charging policy directing prosecutors to be selective in charging mandatory sentence offenses; and Congress's passing the Fair Sentencing Act which lowered drug mandatory sentences. The report also cautioned that the recent radical change in DOJ's charging policy could impact this otherwise productive trend.¹¹⁵

PART III: ADDRESSING OVER-INCARCERATION: LESSONS FROM STATE INITIATIVES

Given that 86% of all inmates are in state custody,¹¹⁶ what other states have done to solve over-incarceration provides guidance for Arizona. The 46 states that took action to reduce their prison populations approved an impressive 201-plus separate measures to reform their sentencing and corrections systems.¹¹⁷ The movement to reduce prison overcrowding, begun in

2009,¹¹⁸ focuses on three areas: (1) creating opportunities to divert offenders from the criminal justice system; (2) enacting sentencing reform (including expanding opportunities for early release from prison, as well as using alternatives to imprisonment for community supervision violations); and (3) supporting re-entry into the community.¹¹⁹ The Vera Institute's New Trends report summarizes representative reforms in each of these areas.¹²⁰

To make this headway, states often create special committees or task forces to oversee reform. Additionally, they use data-driven research and evidence-based approaches for each undertaking. Finally, they often create oversight bodies to ensure that their reforms achieve their goals.¹²¹

A. Avoiding Prison

Many states have initiated broad categories of reform to divert offenders from prison in the first place. Innovations start with bail reform (which is one of the productive measures Arizona has implemented), for pretrial release which not only lowers jail detention numbers, but also results in shorter sentences.¹²² Next, obviously, is using deferred adjudication or deferred prosecution/judgment, conditional discharge, and eventual dismissal of charges when compliant with supervision terms.¹²³ This prevents not only imprisonment, but also criminal convictions. Furthermore, a number of states identify defendants eligible for non-custodial alternatives such as citation and release or notice-to-appear tickets rather than custodial arrest.¹²⁴

Other innovations include means of addressing specific concerns that contribute to offense behavior. At first contact, many jurisdictions try to identify individuals with underlying needs that contribute to criminal behavior (such as homelessness, mental illness, or substance abuse), and refer them to community-based treatment and service programs.¹²⁵ One of the more productive measures is expanding problem-solving courts that try to focus intervention for instance with veterans, drunk drivers, or domestic violence offenders.¹²⁶ Targeted treatment and social work, orchestrated through a problem-solving criminal court, can correct underlying problems that lead to offense conduct. An example of being more selective in charging also occurs in law enforcement; police chiefs have granted police officers more discretion to determine whether to arrest an individual or make a treatment referral.¹²⁷ Some jurisdictions have also adopted medication-assisted treatment using methadone, buprenorphine, or extended-release injectable naltrexone.¹²⁸ The effectiveness of these medical therapies, as an evidence-based practice for treating opioid dependence and other addictions, has enabled judges to have greater confidence in releasing defendants instead of detention. Finally, given that veterans comprise 10% of the incarcerated population, and they often struggle with mental illness, anger management, and substance abuse, many states are now offering targeted justice system programs to provide treatment and social services to offending veterans.¹²⁹ Incidentally, the Vera Institute applauded Arizona's HB 2457 (2014) that expanded the Homeless Court structure to include Veterans Courts.¹³⁰

The Deferral of Sentencing Pilot Program adopted in 2014 in Los Angeles County offers a good example of a highly successful structured diversion system.¹³¹ It only applies to nonviolent misdemeanors for first offenders willing to plead guilty or no contest. Judges have

discretion to defer a sentence for up to a year during which time the offender must comply with terms and conditions. Upon successful completion, the charges are dismissed.

B. Reducing Prison Populations

States have also developed a number of strategies aimed at reducing prison populations by lowering the number admitted to prison and the length of time they remain there. These innovations are led by sentence-reduction legislation, making some offenses eligible for non-prison sanctions, thereby expanding probation availability to low-level, nonviolent property and drug offenses.¹³² Relying on custodial placement in treatment and rehabilitation centers, as opposed to prisons, provides options for drug offenders to recover so as to prevent recidivism – while at the same time lowering the prison population. Note that research established that community-based treatment approaches are more effective for substance abusers than incarceration in reducing recidivism.¹³³ Enactment of medical amnesty laws protect drug users from prosecution for drug use when it is discovered as a result of their seeking medical attention for overdose or addiction. Fourteen states have adopted or expanded these reasonable medical amnesty laws.¹³⁴ Many states have also decided to reduce penalties for property offenses.¹³⁵ Another practice in many states is greater reliance on graduated sanctions for probation “technical” violations, so that prison is not the default response to violation.¹³⁶

Other advances shorten or avoid lengthy sentences. “Evidence that longer sentences have no more than a marginal effect on reducing recidivism. ... states have also begun to move away from the severe mandatory minimum sentences enacted during the past 30 years.”¹³⁷ For instance, states have enacted sentencing reform that making more crimes probation-eligible, reclassifying felony classes and penalties, shortening sentences in general, and giving judges the power to resentence people premised on good conduct in prison or jail.¹³⁸ Some have decreased the length of custodial sentences by increasing means for inmates to earn release credits, and making parole more readily available. Inmates are more motivated to program positively when they have a realistic likelihood of earning an earlier release.¹³⁹ Additionally, Safety Valve reductions from mandatory minimum sentences have allowed for shorter sentences.¹⁴⁰

The most significant reform a state could enact would be creation of a Safety Valve from mandatory minimum sentences. This allows authorities to interdict in an individual’s early foray into criminal conduct, without devastating consequences. Interestingly, though states do not generally repeal mandatory minimum sentencing statutes, they have been far more willing to create Safety Valve exceptions.¹⁴¹ For instance, Maryland allows Safety Valve for drug offenses when the case would otherwise “result in substantial injustice and is unnecessary for public safety.” North Dakota allows it for all crimes but armed offenses so as to avoid “manifest injustice” (defined as “unreasonably harsh or shocking the conscience”). Oklahoma permits Safety Valve for nonviolent offenses when the harsher mandatory sentence is “not necessary for public safety, is unjust in the particular circumstances of the case or if the defendant is eligible, absent prior convictions, for diversion or alternative sentencing.”¹⁴²

Particularly well-taken are statutes that allow judicial officers wide discretion in applying their Safety Valves. This places the judgment as to what is appropriate punishment for criminal conduct back in the hands of trained and experienced jurists selected to exercise their judgment.

North Dakota and Oklahoma have thoughtfully implemented such options, discussed above.¹⁴³ Oklahoma offers a well-considered Safety Valve bill:

Notwithstanding any other statute or law to the contrary, a judicial officer has discretion to disregard a mandatory minimum sentence in a given case, where such a mandatory sentence is unjust under the particular circumstances of the case and not necessary for public safety. This section does not apply in the case of any offense charged and proven as violent or dangerous or serious or if a weapon is used to carry out or attempt to carry out a criminal offense.¹⁴⁴

Some states have enacted laws expressly intended to reduce over-incarceration. A prime example is California's Proposition 47.¹⁴⁵ The United States Supreme Court had previously held that California's operation of its prisons at nearly 200% capacity (with high rates of mental illness, disease, malfunctioning water and electrical systems, insufficient programming and gang violence) violated the Eight Amendment's prohibition against cruel and unusual punishment.¹⁴⁶ The Court ordered the state to reduce its prison population by 63.5 % and improve health services. Consequently in 2011, California initiated a prison population reduction program called "Realignment." It reduced penalties, raised nonviolent felony thresholds that would reduce sentences, and transferred certain low-level offenders to out-of-state prisons and into county-level community supervision or local jails.¹⁴⁷ This was expanded in 2014 with Proposition 47 that scaled some nonviolent felonies down to misdemeanors, raised felony thresholds further for property crimes, and revised drug offense sentencing for "possession for recreational use of any illegal drug which was reclassified as a misdemeanor... [and] 28.5 grams or less of marijuana was reduced from a misdemeanor to a civil violation."¹⁴⁸ Importantly, it allowed those in prison for offenses covered by Proposition 47 to apply for reduced sentences retroactively as provided in the new sentencing scheme. "Successful applicants will be able to have their convictions downgraded from felonies to misdemeanors, and to receive credit for time already served."¹⁴⁹

C. Support Re-Entry into Society

Over-incarceration can also be reduced by avoiding recidivism altogether. One of the best ways to do so is to help inmates adjust to their return to the community. States have developed various re-entry programming and services, facilitating access to various benefits available to all their people. Those services help released inmates gain employment, easing the harmful impact of fees and fines. Also useful for successful re-entry is limiting public access to criminal history information. Finally, collateral consequences of criminal convictions remain a problematic barrier to re-entry into society, setting up many individuals for failure and consequently, for return to prison.¹⁵⁰

States have developed specific reforms to ease the transition from prison to the community. Adequate funding/staffing is of course a preliminary requisite. Some states have provided grants to counties implementing workforce development programs that include vocational training and post-secondary education for their parolees or probationers.¹⁵¹ State prisons in a few jurisdictions also were able to hire pre-release specialists who offer individualized case management aimed at preparing prisoners for release.¹⁵²

Because so many releasees had substance abuse or mental illness problems, working on re-entry well *before* release has been beneficial. Thus some jurisdictions have involved existing community-based mental health consultants to help ease re-entry transition of people with mental illness.¹⁵³ Others have set up substance abuse counseling, financial planning, transportation, housing assistance and aid in obtaining public benefits beginning prior to release.¹⁵⁴ Similarly, providing inmates with vocational and educational opportunities that prepare them to secure employment when they get out help them succeed. Many prisons focus vocational opportunities on fields that inmates are most likely to work in such as construction, truck driving, manufacturing, plumbing, heating, diesel technology, ventilation, and air conditioning. Those will likely offer releasees a sustainable wage as well.¹⁵⁵ Work release or day parole programs allow inmates to seek employment, attend school, secure medical treatment, and care for family or property so that they are better prepared to move back into society.¹⁵⁶

Facilitating family reunification is an important adjunct to traditional re-entry planning. Research has shown that strengthening ties between inmates and their families promotes both rehabilitation and avoiding recidivism.¹⁵⁷ Investing releasees in their community also has a productive effect on their respecting their community's laws. Therefore, many re-entry programs include encouraging civic participation as well as volunteerism.¹⁵⁸

Many trying to “go straight” after prison find that they cannot navigate the legal and social services challenges that they face. Some basic needs can be met in re-entry, such as ensuring that eligible people receive identification cards upon release from prison,¹⁵⁹ assisting them in obtaining health insurance on release,¹⁶⁰ waiving fees when applying for replacement birth certificates, ID cards, and driver's licenses, and restoring driver's licenses to people who have had them revoked after drug convictions.¹⁶¹ Some states have extended food stamps eligibility to ex-offenders,¹⁶² even changing eligibility for the federal Supplemental Nutrition Assistance Program, contrary to the existing rule.¹⁶³ A novel approach is passing laws to shield landlords from liability claims based solely on a tenant's criminal record; this enables lessors to have greater confidence in providing housing to persons with criminal records.¹⁶⁴

Having to answer the employment application question whether an applicant has ever been convicted is a major hindrance to employment. It frequently results in no interview. Ex-offenders have found that their eagerness, skills, and frank discussions of their record may get them the job if they can only get the interview. Hence the “ban the box” movement sought to prevent employers from asking the criminal convictions question at least on the job application. In response, a number of states legislated “ban the box” policies.¹⁶⁵ That movement hopes to increase employment of ex-offenders by reducing, at least on the first interview, the millstone of a criminal record. Koch Industries, as a leader in American business, adopted this practice.¹⁶⁶ Nearly half the states have banned questions about criminal backgrounds on job applications, though most policies affect government hiring and not private employers.¹⁶⁷ In fact, some jurisdictions have enacted legislation to limit public access to, dissemination of, and use of criminal information altogether.¹⁶⁸ Getting a business license can be hampered by a criminal record; some states have changed that so that, as long as the business is not related to anything in their criminal record, releasees may be eligible for business licenses.¹⁶⁹

As fines, fees, and costs may exceed their ability to make ends meet, some re-entry work has been done to prohibit imprisonment or probation of those in financial hardship for failure to pay a court-ordered fee or fine.¹⁷⁰ Likewise, some places have barred courts from contracting with collection agencies to collect money from probationers/parolees who were unable to pay fines, fees, or surcharges.¹⁷¹

D. Impact of Multi-Faceted Approaches

New York and Colorado have led the way to reduce mass incarceration through a number of approaches. From 1999 to 2012, the prison population in New York decreased by 26% and eleven prisons closed. In Colorado total prison population declined by just over 7% during the same period and four prisons closed. This was accomplished in each state by drastically reducing sentences for drug offenses, providing multiple paths for people to avoid incarceration for drug charges, the removal of mandatory minimum sentences and relaxing conditions of parole and reducing return to prison for technical violations.¹⁷²

Nebraska also provides a practical example of a broad-based, successful re-entry program. It created a varied and expansive “Vocation and Life Skills Program” that begins in prison. It features job and life skills training in prison, requires parole officers to provide transitional support in obtaining housing, job training, employment, education, healthcare coverage, and medical assistance, and also includes a “ban the box” provision with exceptions for law enforcement agencies.¹⁷³

PART IV: WHAT ARIZONA HAS DONE

Arizona has adopted few of the potential productive changes that it could implement to reduce its prison overcrowding situation. Judith Greene produced two reports in January 2011¹⁷⁴ and April 2012,¹⁷⁵ specifically addressing Arizona’s over-incarceration problem. She observed:

Arizona’s criminal justice policies have been among the harshest in the nation for many years. The Arizona Department of Corrections currently incarcerates over 40,000 inmates. Arizona’s incarceration rate has more than tripled over the past 30 years. As stated in a recent report from the Arizona Auditor General, “1 in every 749 persons in Arizona was in prison as of June 30, 1980, while 1 in every 170 Arizonans was in prison as of June 30, 2008.” Between 2000 and 2008 the average annual prison-population growth rate in Arizona was 5.1 percent, compared to just 1.5 percent for the nation as a whole. The state’s prison growth rate was third highest among all 50 states, and, again, the highest in the Western region. Yet the rate of violent crime reduction (9.5 percent) in Arizona falls far short of the reduction in violent crime enjoyed by residents of states like New York, for example, where a 21.7 percent drop in crime has occurred during the same period, while taxpayers benefited from an average prison-population reduction rate of 1.9 percent.¹⁷⁶

The state has *not* participated in the national trend to “downscale prisons.”¹⁷⁷ Current laws and policies crowd Arizona’s prisons with people convicted of low-level, nonviolent crimes

whose offenses are driven by addiction to alcohol and illegal drugs. Arizona's repeat-offender codes fail to make a rational distinction between serious crime and relatively petty offenses, driving long sentences for people who could be more effectively and economically sentenced to treatment. The oft-heard proposition that those in Arizona prisons are mostly violent offenders is simply not true.¹⁷⁸ Nonetheless, state legislators have not enacted laws that would decrease prison sentences or allow greater options for early release.

Laudably, Arizona's Prosecutor's Advisory Council started some efforts to consider reform. It undertook a survey to identify 3,000 prisoners who could be viable candidates for early release. They applied a risk assessment tool identifying nonviolent first offenders serving one year or less, and low-risk, nonviolent Class 4-6 felons serving two years or less.¹⁷⁹ This was a productive exploration of opportunities for reform, but no steps have been taken in Arizona to have such individuals released from prison.

A. Establishing Problem-Solving or Specialty Courts

There are also some constructive attempts to prevent potential DOC inmates from going to prison. A number of Arizona county and municipal court systems have put into place specialized or problem-solving courts to try to address behaviors that contribute to offense rather than to simply "warehouse" mentally ill, veterans, or addicted individuals in jail or prison. Thus Veteran's Courts,¹⁸⁰ Mental Health Courts,¹⁸¹ Homeless Courts,¹⁸² Drug and DUI Courts,¹⁸³ and Domestic Violence Courts – either as courts or as diversionary programs – have sprung into use in counties with sufficient populations to use them. As of this writing, Arizona is operating 9 Drug Courts (in Cochise, Coconino, Gila, Maricopa, Navajo, Pima, Pinal, Yavapai, and Yuma Counties, with plans in the making for one in Mohave County) and 3 DUI Courts.¹⁸⁴ Mental Health Courts are active in Maricopa and Pima Counties.¹⁸⁵ Municipalities are often even more involved, given that they have less serious crimes under their jurisdiction and can afford to treat more than incarcerate. For instance, Phoenix has Homeless, Veterans, and Mental Health Courts.¹⁸⁶ Flagstaff offers Mental Health, Veterans, and Family Courts, while Tempe has its own Mental Health Court.¹⁸⁷ These courts work with the defendants to correct underlying problems that led to the offense behavior, rewarding success often with alternatives to incarceration.

B. Implementing Evidence-Based Supervision Practices

Though sentencing laws have not materially improved, there have been some efforts to decrease prison populations from the post-release violation end as well. As mentioned, community corrections and supervision practices implemented evidence-based practices to identify what offenders are most at risk of failure on supervision, as well as which ones would need little supervision. Research has shown that increased services to the high-risk offenders and decreased services to the low-risk offenders produce less recidivism and violations. Furthermore, it has established that a number of interventions offered in supervision in fact work.¹⁸⁸

Arizona's probation and community supervision organizations, especially in Maricopa County,¹⁸⁹ have implemented evidence-based practices to reduce returns to prison¹⁹⁰ without

jeopardizing public safety.¹⁹¹ Essentially, this initiative (known as Smart Justice) identifies individuals in the justice system who are moderate- to high-risk to commit new offenses and targets them for treatment and interventions. Because research suggests that minimizing incarceration for those who are low-risk to reoffend in fact reduces their recidivism, these individuals are managed with minimal incarceration. This limits their future contact with the justice system and attempts to preserve the pro-social factors helping them succeed (*e.g.*, employment, school, or family ties). The Smart Justice goal is to incarcerate the right defendants: violent and repeat offenders.¹⁹² As a result, Maricopa County has reduced the overall violent and property crime rates to historic lows.¹⁹³ While 40% of national jail populations are moderate- to high-risk of re-offense, 68% of the Maricopa County jail population is identified as moderate- to high-risk of re-offense!¹⁹⁴

C. Avoiding Remanding to Prison upon “Technical” Violations

Efforts have been made to use community-based sanctions to address “technical” (or non-re-offense) violations of supervision. In Arizona, the number of technical violations that result in revocation has consequently dropped dramatically.¹⁹⁵ The Council of State Governments Justice Center recently released a study outlining the incredible reduction in probation revocations in Arizona state-wide as compared to other states. Between FY 2008 and FY 2016, there was a 28% decrease in probation revocations which meant a 29% decrease in revocations to prison.¹⁹⁶ Based on that, DOC also backed off of the need for additional beds for prison and DOC Re-Entry Centers aiding offenders on emerging from prison. The state-wide probation department has developed a highly commendable and significant policy of not revoking probationers for technical violations or minor offenses. It is estimated that this has resulted in an almost 40% reduction of probation revocations.¹⁹⁷ This has contributed to a reduction not only of prisoners who violate, but also avoids later recidivism.

D. Rejecting “Debtors’ Prisons” for Fines/Fees

Additional programs have helped reduce the number of individuals in Arizona’s jails. Arizona courts impose costs on defendants to cover expenses such as day-to-day courtroom operations, drug and mental health tests, even public defenders (who represent people who cannot afford a lawyer)! These charges, which mount quickly, are sufficiently disruptive for lower-income adults who are simply trying to make ends meet. They can be an even heavier burden on juveniles, one million of whom find themselves in court each year. When these young people or their families fail to pay the fees, they may end up behind bars, be forced to return to court over and over again, or have their drivers’ license suspended, making it harder for them to go to school or work. Families that are already struggling to get by may have to decide between paying the courts or buying food and clothing. Arizona courts already use a risk-based release system for juveniles so there is no “money for freedom” system in the juvenile court.¹⁹⁸

In 2016, the Arizona Supreme Court, through Chief Justice Scott Bales, initiated a meritorious program called the Task Force on Fair Justice for All,¹⁹⁹ affecting both civil and criminal cases. The Court created the Access to Justice Commission in August 2014. Its mission was to recommend innovative ways to promote access to justice for individuals who cannot afford legal counsel or are otherwise representing themselves in civil cases.²⁰⁰ Chaired by

Judge Lawrence F. Winthrop, the Commission was also tasked with developing an informational campaign to promote the availability of a state income tax credit for contributions to agencies that serve the working poor, including legal aid agencies in Arizona.²⁰¹ Importantly the program also addressed fines, penalties, fees and pretrial release policies that seek to avoid “an unconstitutional modern-day debtor’s prison.”²⁰² The Task Force’s priority is to authorize judges to mitigate mandatory minimum fines, fees, surcharges, and penalties if the amount otherwise imposes an unfair economic hardship.²⁰³ Its goals are clearly stated:

People should not be jailed pending the disposition of charges merely because they are poor. Release decisions and conditions should protect public safety and ensure the defendant’s appearance at future proceedings. Consistent with the Arizona Constitution, people should not be jailed for failing to pay fines or other court-assessed financial sanctions for reasons beyond their control. Court practices should help people comply with their court-imposed obligations. Sanctions such as fees and fines should be imposed in a manner that promotes rather than impedes, compliance with the law, economic opportunity, and family stability.²⁰⁴

Moving Arizona’s justice system away from a “debtor’s prison” effect is a positive reform that will reduce the incarceration rate.

E. Reducing Pre-Trial Detention

Another important goal of Justice Bales’s Task Force was to reduce unnecessary pre-sentence incarceration. This again arose from evidence-based research verifying that pre-trial detention correlates with recidivism, which in turn increases the prison population. Even short pretrial stays of 72 hours have been shown in national as well as an Arizona study to increase the likelihood of recidivism.²⁰⁵ Pretrial incarceration can cause loss of employment, economic hardship, interruption of education or training, and impairment of health or injury because of neglected medical issues. All those burdens contribute to recidivism.

Requiring a defendant to post money to get out of jail does not ensure that the person will be more likely to return to court, nor does it protect public safety. Indeed, in analyzing more than 750,000 cases, a study financed by the Laura and John Arnold Foundation found that in two large jurisdictions, “nearly half of the highest-risk individuals are likely to have access to money to post a case surety. Communities are better served by assessing the risk defendants pose and their likelihood of appearing for their future court hearings.”²⁰⁶

To eliminate “money for freedom” (that had been a key component of Arizona’s bail system) the Task Force made 65 recommendations.²⁰⁷ The previous system had too often been based on the individual charge or charges rather than the risk the defendant posed.²⁰⁸ The Task Force replaced this “with a risk-based release decision system ... to keep the high risk people in jail and release low- and medium- risk individuals, regardless of their access to money.”²⁰⁹ A risk-based approach maintains public safety while maximizing release of those who are not threats.

Toward that end, all Arizona superior courts adopted the “Arnold Grid” or “Public-Safety Assessment (PSA)” to better assess risk, hence increase pre-trial release. Arizona was a pilot state for the Arnold Foundation which developed the instrument.²¹⁰ The Arnold Grid is used for initial appearances to objectively determine risk, limiting the number of cases where an individual is jailed with a bond. It provides an evidence-based release system – fulfilling one of the recommendations of the Task Force. The Grid produces a failure to appear score as well as a new criminal activity score. Both are based on the PSA, comprised of nine factors such as age at arrest, whether the current charge is violent, prior convictions, prior violent convictions, and prior failures to appear. For the second six months of implementation, the application of the PSA resulted in 44% more own recognizant releases and 23% more supervised releases.²¹¹

Arizona additionally already uses a risk-based system for juveniles, so there is no “money for freedom” system in juvenile courts. A juvenile may only be held in detention if he or she will not “be not be present at any hearing or the juvenile is likely to commit an offense injurious to self or others.”²¹²

The Maricopa County Justice Court Video Appearance Center further significantly reduced “the amount of time defendants are held in custody on misdemeanor charges pending appearance in the justice courts.”²¹³ Not only does it eliminate transporting prisoners to and from the 26 justice courts, but it also reduces pretrial confinement time in such cases by 50% with an additional 30% anticipated when a proposed Intake and Release Facility becomes operational.²¹⁴ The Center complements the Arizona Supreme Court’s Fair Justice Task Force initiative as well as Maricopa County’s Smart Justice program.

F. Assisting Defendants to Comply with Court Appearances

Another Arizona innovation is the Compliance Assistance Program recently implemented by the Phoenix Municipal Court. It “notifies defendants who have had their driver’s licenses suspended that they can come to court, arrange a new and affordable time payment program, and make a down payment on their outstanding fine.”²¹⁵ When this is done with respect to traffic fines, fees, and parking charges (that prevent reinstatement of an Arizona driver’s license), the Court will, without the individual seeing a judge, notify Motor Vehicle Department (“MVD”) that the individual is in compliance. The individual is then advised to contact MVD to find out what steps are needed to reinstate driving privileges. More than 5,000 people have used this program in its first four months.²¹⁶ The added bonus is that all collection costs previously added to any balance owed are waived. Justice courts in Maricopa County have for quite a while been recalling suspensions of licenses for people who appear in court ready to make payments.

To reduce unnecessary jail time, an Interactive Voice Response System adopted in Pima County Consolidated Justice Courts and the Glendale and Mesa Municipal Courts notifies defendants of upcoming court dates, missed payments, and the issuance of warrants.²¹⁷ Fewer failures to appear mean less pre-sentence detention time. Both Glendale and Mesa report a reduction of the number of people failing to appear of up to 24%.²¹⁸ Justice courts in Maricopa County are looking to adopt similar practices.

G. Intervening Timely in Mental Competency

Pre-sentence detention is being reduced as well for persons going through competency proceedings. Previously, superior court judges conducted competency litigation for municipal as well as county cases. However, a Limited Jurisdiction Mental Competency Proceedings Pilot, coordinated through Maricopa County Superior Court, presently authorizes Mesa and Glendale municipal court judges to conduct mental health competency hearings rather than transfer them to superior court. This intervention has been remarkably successful, reducing the time to determine and restore competency from 6 months to 60 days.²¹⁹

Another important innovation is the Criminal Justice Engagement Team which began in February 2016 at the Maricopa County Jail. The Team meets with seriously mentally ill offenders within 24 hours of arrest to place them into voluntary mental health programs for up to 90 days. This stabilizes them on medication and can result in much more favorable sentence and supervision options, even diversion. The Team also works with minor crime cases (such as public intoxication or urination, and petty theft offenders) to get them out of custody expeditiously. Thus the team diverts a significant percentage of the detainee population out of jail and back into community placements and supervision.²²⁰

H. Offering Re-Entry from DOC Programming

In April of 2016, a significant reorganization of DOC, reflecting a productive paradigm shift, included opening a Division of Inmate Programs and Re-Entry. Director Charles Ryan noted that, “This new structure reflects an increased emphasis on preparing state inmates for successful return to our communities.” The Division will use assessment tools and evidence-based programming to provide the optimal targeted services to better assure successful re-entry.²²¹ This will result in a reduction in recidivism, lowering our prison population over the long term.

I. Implementing a Broad, Multi-Faceted Approach

Finally, the Supreme Court’s Task Force applauded the Pima County-MacArthur Safety & Justice Challenge.²²² Pima County was initially awarded sizeable grants from the John D. and Catherine T. MacArthur Foundation to change how Arizonans think about and use jails. This project set goals of: reducing the jail population by 15-19%; reducing racial and ethnic disparities of our jailed population; adding a behavioral health screen prior to initial appearance; training justice system partners (including judges) on implicit bias; encouraging less resort to money bail; reducing failures to appear by implementing reminder systems; and expanding use of home detention and electronic monitoring including work release options for those sentenced to jail on felonies. Importantly, “the innovations are expected to reduce the jail population by twenty percent (20%) which would potentially allow the closure of six 64-person pods at the jail, resulting in estimated cost savings of \$2.7 million per year and improvement of pretrial justice in Arizona.”²²³

There is much more Arizona could undertake to create a broad-impact, multi-faceted approach to correcting its mass incarceration crisis. As evidence of the national consensus that this state should go further in reform, the national bipartisan Coalition for Public Safety commented that among its priorities was improving over-incarceration specifically in Arizona.²²⁴

The core problem of reducing the population of those presently in prison has not been addressed, especially because of mandatory minimum sentences requiring long prison terms and prohibiting probation, and prosecutorial charging and plea policies that create lengthy prison terms. But there have been some thoughtful and beneficial inroads to prison overcrowding reform in other areas that Arizona has successfully implemented.

There are a number of think tanks and task forces that have come up with recommendations for prison overcrowding reform. One of the better was developed by the Brennan Center for Justice at the New York University School of Law. Its recommendations called on states to mandate alternative sentences like drug treatment, probation or community service for low-level crimes like drug possession, minor drug trafficking, minor fraud, forgery and theft (accounting for 25% of the nation's prison population). Judges would have the flexibility to hand down reduced prison sentences in exceptional circumstances even in the case of serious, repeat offenders. The report also recommends a reduction in sentences for major crimes that account for a majority of the prison population – aggravated assault, murder, nonviolent weapons offences, robbery, serious burglary and serious drug trafficking. If these reforms were retroactively applied, the authors estimate, more than 200,000 people serving time nationally for these crimes would be eligible for release. Under a saner system, the report says, nearly 40% of the country's inmate population could be released from prison without jeopardizing public safety. This would save states \$200 billion over the first 10 years – enough to hire 270,000 new police officers, 360,000 probation officers or 327,000 teachers. The report concludes that preliminary reforms that many states already have enacted reflect a growing realization that mass incarceration is economically unsustainable and socially disastrous. But to reverse four decades of bad policy, state law-makers will have to adopt a more decisive and systematic approach to sentencing reform.²²⁵

PART V: WHAT MORE ARIZONA COULD DO

The opportunities for addressing over-incarceration in Arizona seem almost endless. No one looking at the examples afforded by changes taking place at the federal level and in our sister states can doubt that successful approaches are there if Arizona's decision-makers are ready to consider them. The recent extremely productive work of Chief Justice Bales' Task Force on Fair Justice for All suggests that Arizona's people are eager to address seriously Arizona's incarceration challenges.²²⁶ It is not the province of this article to tell our leaders what they should do; rather the goals of this article are best achieved by identifying some of the most pressing challenges and the best available possible remedies.

In addressing this topic, it is helpful to divide the analysis into two general perspectives: (1) looking forward at changes in our State's sentencing laws that may reduce our imprisonment rates; and (2) looking at strategies that may help reduce our existing population of incarcerated individuals. From all that has been reported in this review, it is apparent that at its core, Arizona's high rate of incarceration is a drug sentencing problem. Other reforms may be achieved, but the state will accomplish little without a forthright recognition that Arizona must revisit the imprisonment practices for nonviolent drug offenders. Lawmakers--in state after state and at the federal level--have come to agree that the War on Drugs is not won by the long-term incarceration of drug- addicted men and women.

A. Reforming Sentencing Practices

In 1994, Arizona joined a wave of states across America that were reacting to what then seemed to be a national epidemic of drug use and drug-related property crimes. At the same time, many Arizonans held the belief that victims of crime deserved greater protection under our laws. Quite commonly, those who advocated on behalf of victims focused on what they thought were lenient judges who could not be counted on to impose stiff sentences. These are complex phenomena, and there were good reasons to support the views of those who advocated for the rights of crime victims and those who feared the drug epidemic – but the public policy ramifications of those concerns have left us today with an incarceration remedy that is not either necessary or sustainable. What resulted was known as “truth-in-sentencing.”

Truth-in-sentencing was designed to assure skeptical advocates on behalf of victims and the public that those who break the law would serve sentences that had been prescribed by the legislature. Parole was abolished. All sentenced individuals would serve at least 85% of their stated sentence without regard to their compliance with prison regulations or their obvious need, in many cases, for mental health services. Nowhere was this approach to mandatory sentencing more powerfully felt than it was with drug-related offenses. Indeed, it seemed perfectly logical to visit the most severe sentences on those found guilty of multiple offenses – even though the vast majority of multiple offenders were drug violators whose addiction drove their repeat offending – despite the repeat offending occurring most often in minor offenses (such as simple possession or distribution, or low-level property crimes) in support of their addictions.

As a consequence, our prison population more than doubled, far outstripping our population growth and moving us into the leadership among states with prison rates far exceeding population growth.²²⁷ And of course, incarceration costs money, and it crowds out other governmental budgetary priorities. Given this recent history, it is not difficult to identify the causes of exploding incarceration. More challenging is the task of identifying and implementing the changes that might serve to reform that system.

Here are some starting points. First, our policymakers should acknowledge that the vast bulk of drug-related offenses do not have individually identifiable victims. Certainly, we are all victims of drug abuse, but very few of us are actually physically affected. Our property is not taken or invaded; our personal safety is not affected. When we understand this, we can begin to appreciate that the best protection for victims is a system that treats and helps drug users escape from addiction. Whatever we as a society may think of drug treatment programs, we all must now accept that incarceration without assistance is certain to fail. Denying that our Arizona prisons are populated primarily by nonviolent drug offenders will not cause the problem to go away. We must begin with the premise that has now been accepted by other states and the federal government: we will accomplish nothing until we squarely address the substance abuse issue.

Starting from this premise, there are numerous available strategies that have been tried and proven to succeed elsewhere in this country and around the world. Possibly the best place to start is with a re-examination of the idea that judicial discretion should be eliminated (as it largely was under the Truth-in-Sentencing regime). Arizona has become one of the leaders in

developing and maintaining a system for the selection of judges on merit. The election of judges is a quaint notion of the past in Arizona's most populous counties and in all of its appellate courts. We should justly be proud of the merit selection process that Arizona created. We should also put our faith in the periodic performance review of those we appoint to the bench. If we understand that we have good judicial officers, and that they are sincere in their determination to follow the law, we can then comfortably give them discretion to evaluate the offenders as well as punish the offenses. We have emphasized elsewhere in this article that "Safety Valve" laws have succeeded in other jurisdictions – laws allowing judges to modify sentences that, in their considered judgment, do not fit the crime.²²⁸ Further, mandatory minimum sentences are being rescinded in state after state, and that most certainly deserves to be reconsidered in Arizona. The process of reassessment of our sentencing laws may, and probably should, take time. But, in the meantime, the immediate expedient of providing our judges with the ability to address the most obviously excessive sentences should not be ignored. Simply enacting the well-proven Safety Valve legislation would go a long way at the start.

These steps are necessary for the future, and they will almost certainly reduce the rate at which our prison population has grown. It cannot succeed unless Arizona, like other states, embraces the growing body of evidence-based solutions for drug treatment. Virtually every well-developed study concludes that expenditures for treatment and counselling are a far more effective intervention than simple incarceration.²²⁹ Arizona can reduce entry and re-entry at the same time. Imprisonment need not be the sole remedy for a nonviolent drug offense, and it need not be the preferred remedy for drug offenders who fail in their first efforts at rehabilitation. It would be unwise and presumptuous for us to opine on which programs and which strategies will be most successful. Instead, we have tried to identify those successful innovations that other states and the federal government have successfully accomplished. We can, however, look to what this state and others have done when they have decided that the problem of mass-incarceration needs to be addressed. Look at what a multidisciplinary task force was able to accomplish in Arizona when it was presented with the opportunity to address pretrial incarceration. In just six months, a diverse group of justice system professionals was able to arrive at unanimous recommendations for change – change that will almost immediately reduce the populations of our county jails.²³⁰ There is no reason to think that a similar approach will not yield significant reform for our prison system.

Inevitably, any task force will find it necessary to examine what has happened in other jurisdictions. Arizona's population is not unique. We have many of the same challenges our neighboring states have encountered. We need sensible diversion programs, just as so many other states have needed them. We found mandatory minimum sentencing to fail, just as it has failed elsewhere. In one more six-month undertaking, we have no doubt that Arizona could identify sentencing and treatment approaches that would embrace the best practices from around the country. Indeed, there is every reason to believe that we will build and improve on these advancements in other jurisdictions.

B. What Can We Do about the 42,000 Present Arizona Prison Inhabitants?

Arizona will have accomplished much if it succeeds in reducing the rate at which individuals are brought into, or are returned to, our prisons. There is also, however, much that

we can do to reduce our reliance on long-term incarceration for those presently serving sentences. The program of federal intervention initiated under the Obama Administration (discussed in Part II of this article) offers a substantial starting platform. We, like the Department of Justice, can make explicit our priorities. One of those priorities is certain to be the reduction of recidivism. Those released from Arizona's prisons should have tools that will allow them to succeed. If we focus on rehabilitation as our overarching priority to reduce recidivism, we will quickly realize that today we devote almost no attention to this topic. We will also as quickly see that other jurisdictions are finding better approaches. Education, skills development, and employment have proven far better methods to avoid reoffending than long-term removal from society.²³¹

Certainly for some inmates in our state prisons, there is no alternative to long-term incarceration. Public safety remains a first priority, so removal of violent offenders who cannot control themselves from society will continue as it has in other states. What will change, however, is the lengthy incarceration of those who pose little risk. As we have seen elsewhere – including in our neighboring state of California – success arises from some reduction of existing sentences combined with more attention to preparing inmates to return to Arizona's communities.²³² At the end of the day, we will surely have a smaller percentage of our people in prison and fewer families with incarcerated loved ones. The focus of our legislature can finally cease being the appropriation of money for more prison beds. Our reliance on private, for-profit prisons will become unnecessary.

We do not expect that the overall cost of our prison system will be immediately reduced. Rather, the funds we save by reduced prison populations must be appropriated in the short term to help fund increased treatment and training as well as re-entry support services. The range of options suggested by the recent Vera Institute's New Trends report provides a palate of programs, many of which are well-suited to Arizona.²³³ Again, it would be unwise to prejudge which programs are best for this state, but one cannot look at the long list of sensible suggestions that are taking root elsewhere without concluding that many of them would be applicable to Arizona's population.

For those who require incarceration, one goal must be to improve correctional education programs. An article authored by then-President Obama and published in the most recent issue of the Harvard Law Review makes clear the reasons why education has to become a greater priority for Arizona.²³⁴ As our former President concluded, "every dollar spent on prison education saves four or five dollars on the cost of re-incarceration."²³⁵

Reentry must be a priority in Arizona. Until recently, we could hardly find any successful examples of reentry programs. Now, however, good programs have emerged across the country and state. A task force created for this purpose should begin by evaluating the work now underway.²³⁶ We should also accept as a given that some who reenter our communities will fail. Some may fail more than once. The answer for those who do fall short of their release obligations need not, however, always be a return to prison. An increasing number of well-devised programs in other states are providing discretion to counselors and to law enforcement officers to divert nonviolent individuals to programs where they might have a chance of success.

We are not alone in recommending sensible approaches – approaches that begin with identifying and utilizing evidence-based formulas for the often complex process of dealing with the populations of inmates returning to our communities. The work has started and has succeeded elsewhere. We can profit from that work and build on it.

As we move forward, there should be focused consideration of women incarcerated in Arizona. Our female prison population is composed primarily of nonviolent offenders. Nationally, two-thirds of incarcerated women are in prison for nonviolent offenses.²³⁷ There is no evidence to suggest that Arizona is different. Many of those women have children who are still minors, and whose likelihood of becoming productive citizens will be significantly increased if their mothers were home raising them. Those who evaluate Arizona’s prisons and our sentencing laws must look with care at the stories of these women and children.

Finally, we would invite those who address these issues to consider the roles and responsibilities of Arizona’s Board of Executive Clemency. Before 1994, that Board served as a parole board. Because of the dramatic change in philosophy accompanying the truth-in-sentence regimes, parole has ceased to exist for all but a few individuals sentenced for crimes that occurred more than 23 years ago.²³⁸ Clemency, as noted in Part II,²³⁹ has been exercised extensively at the federal level not only to target worthy individuals, but to correct misguided sentencing schemes relevant to drug cases. Sentence reconsideration in this state could help alleviate the often extremely lengthy sentences served by aging members of our prison population – individuals who a well-trained Board could evaluate for earlier release on a case-by-case basis. Legislation would be required to expand the Board’s powers, and that Board would need resources it now lacks, but the cost-saving ultimately to Arizona taxpayers would almost certainly justify any additional expenditures.

C. Conclusion

A recent report pertaining exclusively to Arizona’s criminal sentencing and incarceration costs makes very helpful recommendations, narrowing our own.

While the majority of the states have retooled their criminal sentencing laws in an effort to reduce prison populations, Arizona remains mired in an outdated, punishment-heavy mentality. The current system is extremely costly and is not producing a commensurate reduction in recidivism....²⁴⁰ Despite a wealth of research on the effectiveness of cost-effective alternative approaches, the state legislature has been extremely slow to embrace large-scale sentencing reform.²⁴¹

The rate of growth in our prisons, the report recites, “has far outpaced Arizona’s population growth,” the expanding prison system is “not the product of increased crime, which is at historic lows nationwide and in Arizona and the growth “has been extremely expensive (with DOC’s \$1 billion budget being 11% of the general fund or an increase of 40% in seven years.)”²⁴²

In FY 2016, the Arizona state prison population was 42,902 – the highest it has ever been. The average length of a prison stay in Arizona is 8.4 years. Nationally states sentence felony offenders to an average of 4.11 years....²⁴³ Yet recidivism

in Arizona remains extremely high. Currently, about 49.3 percent of prisoners in Arizona have served time in the past – that is essentially a 50 percent failure rate....²⁴⁴

Again underscoring conclusions that are now too evident to ignore, the Report identifies the key drivers of Arizona’s high incarceration rate as “truth-in-sentencing, requiring all prisoners to serve 85% of their sentence, mandatory sentences that require extremely harsh penalties, particularly for those with prior offenses,” and “extreme harsh drug sentences.”²⁴⁵

With Arizona being one of the leading states, “(m)ore U.S. cities and states are reducing their reliance on cash bail, rejecting the longstanding notion that money should determine whether arrested individuals are locked up until trial.”²⁴⁶ Unfortunately, as argued throughout this article, Arizona has not joined the complementary trend toward decarceration.

While 38 states and the federal government have at least modestly reduced their prison populations in recent years, our comparative analysis of U.S. Prison Population Trends 1999-2015 reveals that a growing number of jurisdictions have made dramatic progress. The total number of people held in state and federal prisons has declined by a modest 4.9% since reaching its peak in 2009. Yet 16 states have achieved double-digit rates of decline and the federal system has downsized at almost twice the national rate....

Given that nationwide violent and property crime rates have fallen by half since 1991, the pace of decarceration has been very modest in most states and a quarter of the states continue to increase their prison population....

These findings reinforce the conclusion that just as mass incarceration has developed primarily as a result of changes in policy, not crime rates, it will require ongoing changes in both policy and practice to produce substantial population reductions.²⁴⁷

The authors hope that the collection of resources identified and marshalled in the endnotes to this article will prove helpful to others in determining the best paths forward. We have been impressed by the very great sense of agreement among individuals and groups who have addressed the problems of mass incarceration. Disagreements seem to exist as to the best tactics, but we have repeatedly seen that most points of the criminal justice compass agree that these are problems well worth addressing. Prosecutors, defenders, judges, probation and parole officers, and those in the academic communities have come together to recognize problems that certainly exist and can be profitably addressed. We are grateful to have had the opportunity to add our efforts to those who have already begun to chart the best paths.

¹ BOB DYLAN, *George Jackson* (1971). George Jackson was a prisoner at San Quentin who was killed by prison guards that year.

² For instance, *The Odd Couple: Left, Right Join to Promote Justice Reform*, ARIZONA REPUBLIC, Mar. 2, 2015, at A12 (hereinafter, “The Odd Couple”). The article mentioned that the Koch brothers, ACLU, Freedom Works, the Center for American Progress, and Americans Friends Service have come together to form the Coalition for Public Safety because they are “so frustrated” with the state of criminal justice in America and want to “work together to fix it.” Available at <http://www.azcentral.com/story/opinion/editorial/2015/03-01/od-co>.

³ See Eric Holder, *Sentences Full of Errors*, NEW YORK TIMES, Aug. 14, 2016, at 6. There is room for divergent opinions of course. Cf. Barry Latzer, *The Myth of Mass Incarceration*, WALL STREET JOURNAL, Feb. 23, 2016, at A17.

⁴ For example, in mid-July of 2017, Senators Rand Paul (R-KY), Patrick Leahy (D-VT), and Jeff Merkley (D-OR), and Representatives Bobby Scott (D-VA) and Thomas Massie (R-KY) reintroduced the Justice Safety Valve Act.

⁵ REBECCA SILBER, RAM SUBRAMANIAN, AND MAIA SPOTTS, JUSTICE IN REVIEW: NEW TRENDS IN STATE SENTENCING AND CORRECTIONS 2014-2015 (hereinafter, “New Trends”), Vera Institute of Justice, at 6 (2016), available at www.vera.org/pubs/state-sentencing-and-corrections-trends-2014-2015.

⁶ BAZ DREISINGER, INCARCERATION NATIONS: A JOURNEY TO JUSTICE IN PRISONS AROUND THE WORLD, at 8 (2016) (hereinafter, “Incarcerating Nations”).

⁷ E.F. Torrey, *Documenting the Failure of Deinstitutionalization*, 73 PSYCHIATRY 122 (summer 2010).

⁸ DORIS JAMES AND LOREN BLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, Bureau of Justice Statistics Special Report, at 1 (Sept. 2006).

⁹ *Id.*

¹⁰ New Trends, *supra* note 5, at 2.

¹¹ *Id.* According to New Trends, research indicating that shorter sentences do not have an adverse impact on public safety. See, e.g., UNITED STATES SENTENCING COMMISSION, RECIDIVISM AMONG OFFENDERS WITH SENTENCE MODIFICATIONS MADE PURSUANT TO RETROACTIVE APPLICATION OF 2007 CRACK COCAINE AMENDMENT (2011).

¹² New Trends, *supra* note 5, at 2.

¹³ DREISINGER, INCARCERATING NATIONS, *supra* note 6, at 8.

¹⁴ *Id.* “In 2015, the number of American prisoners declined more than 2 percent, the largest decrease since 1978. By 2014, the incarceration rate for black men, while still stratospheric, had declined 23 percent from its peak in 2001.” James Forman, Jr., *Justice Springs Eternal*, NEW YORK TIMES, March 26, 2017, at 1 and 5; and see text *infra*, at notes 83 & 38.

¹⁵ Holder, *Sentences Full of Errors*, *supra* note 3. He also decried the “racial bias in the criminal justice system” where “more than twice as many African-Americans as whites were in state prisons for drug offenses” by the early 2000’s. In this connection black neighborhoods across the country have been disproportionately affected by the number of African-Americans serving long, mandatory minimum sentences for drug offenses, so that some states require lawmakers to consider a “racial impact statement” before approving any criminal justice system legislation. States with such a statute, as of July 2017, are Iowa, Connecticut and Oregon. Minnesota also uses a racial impact statement, but it is not mandatory. New Jersey is the latest to pass such a statute. On average, African-Americans are incarcerated in state prisons at five times the rate of whites across the country. WALL STREET JOURNAL, July 16, 2017, at A4.

¹⁶ Memorandum from Eric Holder, Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division, Re: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013).

¹⁷ Holder, *Sentences Full of Errors*, *supra* note 3.

¹⁸ Memorandum from Jefferson Sessions, Attorney General, to All Federal Prosecutors, Re: Department Charging and Sentencing Policies (May 10, 2017).

¹⁹ In 2010, the U.S. Supreme Court handed down *Graham v. Florida*, holding that life without parole sentences for persons who committed the crimes as juveniles was unconstitutional, in violation of the 8th Amendment’s prohibition of cruel and unusual punishment. *Graham v. Florida*, 560 U.S. 48 (2010).

²⁰ DREISINGER, INCARCERATING NATIONS, *supra* note 6, at 8.

²¹ Nicholas Kristoff, *Mothers in Prison*, NEW YORK TIMES, Nov. 27, 2016, at 1 & 6.

²² Aleks Kajstura and Russ Immarigeon, *States of Women’s Incarceration: The Global Context* (2016), available at <https://www.prisonpolicy.org/global/women/>.

²³ *Id.*

²⁴ Richard Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, The Annie E. Casey Foundation, at 3 (2011).

²⁵ *Id.* at 2.

²⁶ Human Rights Watch, *Iran, Saudi Arabia, Sudan: End Juvenile Death Penalty* (Oct. 8, 2010), available at <https://www.hrw.org/news/2010/10/08/iran-saudi-arabia-sudan-end-juvenile-death-penalty>.

²⁷ See *Roper v. Simmons*, 125 S.Ct. 1183 (2005) (death penalty); and *Graham v. Florida*, 130 S.Ct. 2011 (2010) (life without parole).

²⁸ Mark Berman, *The Steady Decline of America's Death Rows*, THE WASHINGTON POST (May 6, 2017).

²⁹ *Id.*

³⁰ The Juvenile Law Center issued a new report, *Debtors' Prisons for Kids*, that illustrates the destructive results of charging court fees and fines to juveniles, many of whom come from impoverished families and are not able to enter the work force due to their age. See Jessica Feierman *et al.*, *Debtors' Prisons for Kids* (2016), available at http://www.jlc.org/sites/default/files/publication_pdfs/JLC_debtorsPrison_9-6v2.pdf; and see Erik Eckholm, *Court Costs*, NEW YORK TIMES, Sept. 1, 2016, at A1.

³¹ Jo Craven McGinty, *This Column is on Your Permanent Record*, WALL STREET JOURNAL, Aug. 8, 2015, at A2. Researchers used the National Longitudinal Survey of Youth, Survey of State Criminal History Information Systems, and the work of the National Consortium for Justice Information and Statistics for this information. See *How to Get Around a Criminal Conviction*, NEW YORK TIMES, Oct. 19, 2015, at A22 (“Some 70 million to 100 million people in the United States – more than a quarter of all adults – have a criminal record, and as a result they are subject to tens of thousands of federal and state laws and rules that restrict or prohibit their access to the most basic rights and privileges – from voting, employment and housing to business licensing and parental rights.”).

³² Timothy Williams, *Jails Have Become Warehouses for the Poor, Ill and Addicted a Report Says*, NEW YORK TIMES, Feb. 11, 2015, at A10. See also RAM SUBRAMANIAN, CHRISTIAN HENDRICKSON, AND JACOB KANG-BROWN, IN OUR OWN BACKYARD: CONFRONTING GROWTH AND DISPARITIES IN AMERICAN JAILS, Vera Institute of Justice (2015), available at www.vera.org/pubs/incarceration-trends-in-our-own-backyard; RAM SUBRAMANIAN *et al.*, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAIL IN AMERICA, Vera Institute of Justice (2015); Campbell Robertson, *Missouri City to pay \$4.7 million etc.*, NEW YORK TIMES, July 16, 2015, at A12 & 13 (discussing the sums paid “to compensate nearly 2000 people who spent time in the city’s jail for not paying fines and fees related to traffic and other relatively petty violations”).

³³ *Id.*

³⁴ McGinty, *This Column*, *supra* note 31. “Arrest record or criminal record” is usually defined to include anyone who has been arrested or taken into police custody, whether or not charges are ever filed or ultimately dropped. Thus those never convicted of a crime may have a criminal history or record.

³⁵ John Nally, Susan Lockwood, Taiping Ho, and Katie Knutson, *The Post-Release Employment and Recidivism among Different Types of Offenders with a Different Level of Education: A Five-Year Follow-up Study in Indiana*, 9 JUSTICE POLICY JOURNAL (Spring 2012).

³⁶ Available at www.census.gov.

³⁷ Robert Gottsfield and Larry Hammond, *Out of Sight, Out of Mind: Solitary Confinement in Need of Review*, 52 ARIZONA ATTORNEY, 36, 36-38 (April 2016). For discussion of solitary confinement nationally, see The Liman Program, Yale Law School Association of State Correctional Administrators, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison*, at ii, 3, 6-9, & 14 (Aug. 2015), available at www.asca.net (showing Arizona is the third in the nation with respect to prisoners in administrative segregation, and Arkansas and Kentucky were first and second).

³⁸ Dan Hunting, *Arizona's Incarcerated Population*, Morrison Institute for Public Policy (Nov. 2015), available at <https://morrisoninstitute/asu.edu/sites/default/files/content/products/The%20Incarcerated%20Population.pdf>. Unlike the state prison increase, “the average number of jail inmates ... declined by 16 percent from 2004 to 2014 in five Arizona counties including Maricopa.” *Id.* at 3.

³⁹ *Id.*

⁴⁰ Judith Greene, *Justice Strategies, Turning the Corner: Opportunities for Effective Sentencing and Correctional Practices in Arizona*, THE DEFENDER, Arizona Attorneys for Criminal Justice, at 9-10 (January 2011) (hereinafter, “Turning the Corner”). In Arizona, only a low level of drugs is needed to get above the statutory threshold requiring a harsher sentence. Under Proposition 200, A.R.S. 13-901.01, a first time drug offender who is not selling gets probation with some exceptions.

⁴¹ *Id.*

⁴² Laurie Roberts, *If Only Arizona Were as Interested in Schools as Prisons*, ARIZONA REPUBLIC, Sept. 7, 2015, at 3A. Ms. Roberts remarked that, “It seems we are awash in criminals.”

⁴³ *Id.*; and see Denny Barney, *Bringing Prison Practices into Focus: Maricopa County Initiative Looks for Solutions*, ARIZONA REPUBLIC, Sept. 12, 2015, at 4F.

⁴⁴ Barney, *supra* note 42, at 5F. The Vera Institute of Justice also provides a tool, Incarceration Trends, allowing each county in the country to examine the size of their jails and their history of growth, how it compares with similarly situated counties, and to plan for the future and evaluate reform efforts. Maricopa County’s tool is available at trends.vera.org/#/incarceration-rates.

⁴⁵ *Id.*; and see ARIZONA REPUBLIC, Sept. 3, 2015, at 10A.

⁴⁶ *Id.* Note that these statistics are adjusted for inflation.

⁴⁷ *Id.* The cost per day of housing an inmate in an Arizona state prison is \$65 per day or \$23,826 per inmate annually. See <http://corrections.az.gov>; see also <http://arizonaindicators.org/Criminal-Justice>.

⁴⁸ See Hunting, *supra* note 38.

⁴⁹ *Id.*

⁵⁰ Sally Yates, Deputy Attorney General, issued the ban on private prisons, citing that “[t]hey simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs, and ... they do not maintain the same level of safety and security.” Memorandum from Sally Yates, Deputy Attorney General, to the Acting Director, Federal Bureau of Prisons, Re: Reducing our Use of Private Prisons (August 18, 2016); and see Hunting, *supra* note 38; Devlin Barrett and Austin Hufford, *U.S. to Stop Using Private Prisons*, WALL STREET JOURNAL, Aug. 19, 2016, at A-2. Immigration’s use of private for-profit detention centers holding immigrants may have followed suit. ARIZONA REPUBLIC, Aug. 30, 2016, at 1A. However, the Trump Administration was quick to dismantle this progressive reform. Matt Zapotosky, *Justice Department Will Again Use Private Prisons*, THE WASHINGTON POST (Feb. 23, 2017).

⁵¹ See Hunting, *supra* note 38.

⁵² Numerous studies have confirmed that recidivism drops off markedly with age even as young as age 40. *E.g.*, Alfred Blumstein and Jacqueline Cohen, *Characterizing Criminal Careers*, SCIENCE 985, 991 (1987); Alex Piquero *et al.*, *Assessing the Impact of Exposure Time and Incapacitation on Longitudinal Trajectories of Criminal Offending*, 16 JOURNAL OF ADOLESCENT RESEARCH 54 (2001).

⁵³ Laurie Roberts, *Despite Federal Report, Arizona Still in Love with Private Prisons*, ARIZONA REPUBLIC, Aug. 19, 2016, at 3A. See also *infra* note 193.

⁵⁴ Kathryn Hanson and Deborah Stipek, *Schools v. Prisons: Education’s the Way to Cut Prison Populations*, THE MERCURY NEWS (May 15, 2014).

⁵⁵ Katherine Hinton, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016). Others attribute the start of this pernicious movement to the 1980’s. See NEW YORK TIMES, June 2, 2015, at A19. John F. Pfaff argues the major contributor to America’s mass incarceration problem is ambitious politicians passing draconian laws, and over-zealous prosecutors who operate with wide discretion and little oversight. He noted that, “Prosecutors threaten long sentences and plea-bargain down which means that pretty much nobody has his day in court.” John F. Pfaff, LOCKED IN (2017).

⁵⁶ Hinton, *supra* note 55, at 10.

⁵⁷ *Id.* For example, the Sentencing Reform Act of 1984 emphasized deterrence and incapacitation. Pub. L. 98-473, Title II, §218 (a) (8), Oct. 12, 1984, 98 Stat. 2027. Contrast this with the more recent Sentencing Act supported by President Obama (and that had received bipartisan support in the Senate) See S.2123 – Sentencing Reform and Corrections Act of 2015, Congress Gov., available at <https://www.congress.gov/bill/114th-congress/senate-bill/2123> (listing bipartisan cosponsors).

⁵⁸ Timothy Williams, *Study Finds Disparities in Arrests for Marijuana*, NEW YORK TIMES, Oct. 13, 2016, at A19 (highlighting a report by Tess Borden, a fellow at Human Rights Watch, and the ACLU). A disproportionate number of those arrested, according to the study, “are African-Americans who smoke marijuana at rates similar to whites but are arrested and prosecuted far more often for having small amounts of the drug for personal use.”

⁵⁹ Beverly Gage, *Riot Act*, NEW YORK TIMES MAGAZINE, Sept. 4, 2016, at 11. Though homicides are up in a number of cities nationally, “homicide rates are still much lower than they were in the 1990s.” While murder rates were up in 25 of the nation’s 100 largest cities, such rates “remained largely unchanged in 70 cities and decreased significantly in five.” NEW YORK TIMES, Sept. 1, 2016, at 14. Chicago’s homicides are mainly attributed to gang violence. NEW YORK TIMES, Sept. 3, 2016, at B11.

⁶⁰ *United States v. Nesbeth*, No. 15-CR-18, 2016 WL 3022073 (E.D.N.Y. May 24, 2016).

⁶¹ *Id.*

⁶² Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 141 (2012).

⁶³ Judge Block cited a number of sources such as the ABA Collateral Consequences database at: abacollateralconsequences.org. See also the Vera Institute of Justice’s study, RAM SUBRAMANIAN, REBEKA

MORENO, AND SOPHIE GEBRESELASSIE, RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION 2009-2014 (2014).

⁶⁴ Judge Block cited the Collateral Consequences of Conviction Act, available at

<http://www.uniformlaws.org/LegislativeMap.aspx?title=Collateral%20Consequences%20of%20Convictions%20Act>

. *And see generally*, American Bar Association, Collateral Consequences, *supra* note 63.

⁶⁵ *Nesbeth*.

⁶⁶ “It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case. . . . The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.” Memorandum of John Ashcroft, Attorney General, to All Federal Prosecutors, Re: Policy on Charging of Criminal Defendants (Sept. 22, 2003).

⁶⁷ Memorandum of Eric Holder, Attorney General, to All Prosecutors, Re: Department Policy re Charging and Sentencing (May 19, 2010).

⁶⁸ DEPARTMENT OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 2 (2013).

⁶⁹ *Id.* at 2-3.

⁷⁰ *Id.* at 3.

⁷¹ Holder, Memorandum Re: Charging Mandatory Minimum Sentences, *supra* note 16.

⁷² *Id.* at 1.

⁷³ DEPARTMENT OF JUSTICE MANUAL, vol. 1, at 2 (2016).

⁷⁴ *Id.*, at 8 (Goal 2, subpart 2.3).

⁷⁵ Holder, Memorandum Re: Charging Mandatory Minimum Sentences, *supra* note 16, at 2-3.

⁷⁶ Memorandum of Sally Yates, Deputy Attorney General, to the Assistant Attorney General *et al.*, Re: Individual Accountability for Corporate Wrongdoing (2015).

⁷⁷ U.S. Department of Justice, FY 2016 Agency Financial Report at III-13 (2017).

⁷⁸ U.S. SENTENCING COMMISSION, SOURCE BOOK (2013); U.S. SENTENCING COMMISSION, SOURCE BOOK (2014); U.S. SENTENCING COMMISSION, SOURCE BOOK (2015); U.S. SENTENCING COMMISSION, SOURCE BOOK (2016).

⁷⁹ Sessions, Memorandum Re: Charging and Sentencing Policy, *supra* note 18.

⁸⁰ U.S. Department of Justice, FY 2016 Agency Financial Report (2017) shows the greatest number of personnel of any DOJ agency was in BOP. *Id.* at I-6. The report also features a section entitled, “Containing the Cost of the Federal Prison System,” that reports that BOP has the largest portion of the budget aside from the FBI, accounting for more than 25% of DOJ’s entire funding in FY 2016. *Id.* at III-12-13. Further, the report notes that inmate medical costs (as the population grays) skyrocketed from \$263 million in FY 2010 to \$326 million in FY 2014.

⁸¹ Kim Soffen and Denise Lu, *What Trump Cut in his Agency Budgets*, THE WASHINGTON POST, May 23, 2017.

⁸² NEW YORK TIMES, May 19, 2017, at A1 & A12.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ For instance, in mid-July of 2017, a bipartisan group reintroduced the Justice Safety Valve Act in Congress.

⁸⁶ New Trends, *supra* note 5.

⁸⁷ *E.g.*, Laura Wytsma, *Punishment for Just Us – a Constitutional Analysis of the Crack Cocaine Sentencing Statutes*, GEORGE MASON INDEPENDENT LAW REVIEW 473 (1994-95).

⁸⁸ Carrie Johnson, *Bill Targets Sentencing Rules for Crack and Powder Cocaine*, THE WASHINGTON POST, Oct. 16, 2009.

⁸⁹ U.S. Senate Bill 1685 (2007).

⁹⁰ U.S. Pub. Law 111-220 (2010).

⁹¹ Compare the 2009 version of 21 U.S.C. § 841(a) (2009) with its successors.

⁹² New Trends, *supra* note 5, at 52; *and see* Bill Keller, *Will 2017 Be the Year of Criminal Justice Reform?* NEW YORK TIMES, Dec. 16, 2016.

⁹³ U.S.S.G. § 5K1.1 provides “Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.” It is the Court that decides what reduction to give, but typically, judges rely heavily on the government’s recommendation since it was the government who knew how productive the cooperation was.

U.S.S.G. § 5K1.1 (a).

⁹⁴ Fed. R. Crim. P. 35 (b) provides, “Upon the government’s motion made more than one year after sentencing, the court may reduce a sentence if the defendant’s substantial assistance” essentially was not known (or relevant) by sentencing so it had not been offered as a § 5K1.1 motion.

⁹⁵ U.S.S.G. § 5C1.2 provides, “the court shall impose a sentence in accordance with the applicable guidelines without regard to the statutory mandatory minimum sentence, if the court finds that the defendant ... does not have more than 1 criminal history point, ... did not use violence or credible threat of violence or possess a firearm, ... the defendant was not an organizer, leader, manager, ... and truthfully provided the Government all information and evidence the defendant has concerning the offense.” Congress authorized avoiding its mandatory minimum sentences by statute, 18 U.S.C. § 3553(f).

⁹⁶ U.S.S.G., Am. 706.

⁹⁷ U.S.S.G., Am. 750.

⁹⁸ U.S.S.G., Am. 782.

⁹⁹ NEW YORK TIMES, Nov. 23, 2016, at A1 & A17. President Obama has no authority to commute sentences of state offenders.

¹⁰⁰ U.S.S.G. § 3B1.2.

¹⁰¹ U.S.S.G. § 1B1.3.

¹⁰² U.S.S.G. § 4B1.2.

¹⁰³ U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS, 1 (2016).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2-3.

¹⁰⁶ The Rule of Lenity is a seldom-invoked statutory interpretation principle applied when a term is ambiguous. *See Skilling v. United States*, 562 U.S. 358, 410-11 (2010) (theft of “honest serves”); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (whether DUI involving serious bodily injury is a “crime of violence”).

¹⁰⁷ Texas House Bill 1396 (2015). *See* Paul Larkin & John-Michael Seibler, *Turning the Rule of Lenity into a Rule of Lenity*, The Heritage Foundation Legal Memorandum no. 163 (Nov. 17, 2015).

¹⁰⁸ *E.g.*, *Curtis Johnson v. United States*, 559 U.S. 133 (2010) (simple assault); *United States v. Wenner*, 351 F.3d 969 (9th Cir. 2003) (burglary); *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008) (felon in possession of a firearm); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015) (robbery).

¹⁰⁹ *Samuel Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551 (2015).

¹¹⁰ *Bond v. United States*, 572 U.S. ___, 134 S.Ct. 2077 (2014).

¹¹¹ *Yates v. United States*, 574 U.S. ___, 135 S.Ct. 1074 (2015).

¹¹² The Office of the Pardon Attorney’s website reflects that 1,715 inmates had been granted commutations during President Obama’s term, available at <https://www.justice.gov/pardon/clemency-initiative>. President Obama’s last White House Counsel, Neil Eggleston, has called the Clemency Project “the largest pro bono project in American history” which he advises “led to 1700 commutations a third of which individuals were serving life sentences.” Neil Eggleston, Address at the American College of Trial Lawyers Conference, Boca Raton (March 3, 2017).

¹¹³ Federal Bureau of Prisons, Change Notice: Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 (c)(1)(A) and 4205(g) (March 25, 2015).

¹¹⁴ U.S. SENTENCING COMMISSION, 2017 OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (July 2017).

¹¹⁵ *Id.* at 21-23.

¹¹⁶ New Trends, *supra* note 5, at 2.

¹¹⁷ *Id.* at 2 & 3.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 3.

¹²⁰ *Id.* at 8. The report advises that it does not provide an exhaustive listing or analysis of every state criminal justice-related bill. Its Exhibit A (at 53-59) sets forth a state-by-state listing of all reforms covered in the report. For Arizona the new reforms are listed at p.53 as HB 2457 (Veteran-related reforms); HB 2593 (increases opportunities for early release for those committing crimes before age 18); and SB 1116 (waivers of fines and fees).

¹²¹ *Id.* at 5; *and see, e.g.*, Nebraska LB 907 (2014).

¹²² New Trends, *supra* note 5, at 10-19.

¹²³ New Trends, *supra* note 5, at 15; *and see* California AB 2309 (2014). Diversion programs were created nationally to spare first-time or low-risk defendants the harsh consequences of a criminal record and allow prosecutors more time to go after dangerous offenders. The wrong way to do it is exemplified by Shalia Dewan and

Andrew W. Lehren, *An Alabama Prosecutor Sets the Penalties and Fills the Coffers*, NEW YORK TIMES, Dec. 13, 2016, at A1 & A16 (the diversion system in this Alabama county “resembles a dismissal-for-sale scheme, available only to those with money, and in some cases, favor ... generating more than \$1 million for his office in the last five years”).

¹²⁴ New Trends, *supra* note 5, at 11; *and see* Idaho SB 1352 (2014). Another example is New York which used to have thousands of arrests each year for possessing trivial amounts of marijuana (in 2011, 50,000 people were arrested on charges of public possession has been decreased to about 16,600 arrests in 2015); a policy was introduced under which those with tiny amounts of marijuana were issued the equivalent of a traffic summons instead of having to go through the legal system. But despite research showing that whites and minority citizens use marijuana at similar rates, Black and Latino New Yorkers “are still far and away more likely to be singled out for low-level arrests that have little public safety value, but seriously damage their lives.” NEW YORK TIMES, Nov. 25, 2016, at A24.

¹²⁵ New Trends, *supra* note 5, at 11; *and see* Montana HB 33 (2015).

¹²⁶ New Trends, *supra* note 5, at 12; Arkansas SB 472 (2015), and Arizona’s problem-solving courts; *and see infra* notes 178-185.

¹²⁷ New Trends, *supra* note 5, at 11; *and see* Washington SB 2627 (2014).

¹²⁸ New Trends, *supra* note 5, at 13. The report advises that sentencing alternatives such as drug courts often prohibit these medications in treatment. *But see* Indiana HB 1304 and SB 464 (2015) (authorizing use of drugs for inmates for medication-assisted treatment of opioid or alcohol dependence).

¹²⁹ New Trends, *supra* note 5, at 16. Returning veterans often struggle with known criminal risk factors at higher rates than others such as mental illness, substance abuse, unemployment, homelessness, and PTSD. *And see* <https://www.washingtonpost.com/posteverything/wp/2016/07/08/one-reason-homeless-they-cant-afford-lawyers/>.

¹³⁰ New Trends, *supra* note 5, at 16; *and see* discussion under What Arizona Has Done of our Specialty or Problem-Solving Courts, *infra* notes. 178-185.

¹³¹ New Trends, *supra* note 5, at 15; *and see* California AB 2124 (2014).

¹³² New Trends, *supra* note 5, at 19-20; *and see* Wyoming SB 38 (2015) and Alaska SB 64 (2014).

¹³³ New Trends, *supra* note 5, at 10, 13, 18 and 19; *and see* Indiana HB 1304 (2015). For instance, in Vermont, an addict may call the Vermont Attorney General’s office and get enrolled in a program that steers low-level lawbreakers with drug addictions into treatment and other services, bypassing incarceration and if they live up to their agreement to stay clean, the reward is a clean record and no jail, probation or work crew. The program also covers low-risk offenders with mental health problems. WALL STREET JOURNAL, Dec, 24-25, 2016, at A1 and A10. *And see* the Phoenix Police Department program, *infra* note 218. Hopefully, a plus in the battle to elevate mental health care is President Trump’s proposed nominee, psychiatrist Elinore F. McCance-Katz for the new position of assistant secretary for mental health and substance abuse. NEW YORK TIMES, May 25, 2017, at A17.

¹³⁴ New Trends, *supra* note 5, at 26; *and see* North Carolina SB 154 (2015).

¹³⁵ New Trends, *supra* note 5, at 20; *and see* Texas HB 1396 (2015) (raising felony threshold for various property crimes to \$2,500).

¹³⁶ New Trends, *supra* note 5, at 19.

¹³⁷ *Id.* at 27.

¹³⁸ *Id.* at 27-28, 34-37; *and see* California AB 1156 (2015) and Alabama SB67 (2015), for a comprehensive program of criminal justice reforms.

¹³⁹ New Trends, *supra* note 5, at 28-30; *and see* Arizona HB 2593 (2014) (modifying parole eligibility standards for persons who committed crimes before the age of 18). Under this law, those imprisoned for life without parole are eligible for parole after serving a minimum term. Anyone released under this condition will remain on life-long parole. *See also infra* note 119.

¹⁴⁰ New Trends, *supra* note 5, at 27. California’s Three Strikes law is a perfect example of a disastrous mandatory minimum policy. For a discussion of Arizona’s more benign two three strikes laws, *see* R.L. Gottsfield and Michael Rice, *Arizona’s Criminal Three Strikes Laws*, GREATER PHOENIX ATTORNEY AT LAW MAGAZINE 8 (July 2011).

¹⁴¹ New Trends, *supra* note 5, at 27.

¹⁴² *See generally id.*; *and see* Maryland HB 121 (2015); North Dakota HB 1030 (2015); Oklahoma HB 1518 (2015).

¹⁴³ New Trends, *supra* note 5, at 27.

¹⁴⁴ Oklahoma HB 1518 (2015). A.R.S. 13-603L permits a sentencing judge to advise in writing at the time of sentence that what the law requires “is clearly excessive” and allows the defendant to petition the board of executive clemency for a commutation of sentence, a sort of Safety Valve statute that has been ineffective in materially reducing Arizona prison population. In Arizona, judicial officers are advised: “The intentional failure by the court

to impose the mandatory sentences or probation conditions in this title is malfeasance.” A.R.S. Section 13-701(I). This provision will have to be modified or deleted altogether should Arizona adopt a Safety Valve measure.

¹⁴⁵ New Trends, *supra* note 5, at 31.

¹⁴⁶ The U.S. Supreme Court upheld the finding of a three-person appeals court panel on two prior class-action cases against the state of California. The first case, *Coleman v. Brown*, concerned incarcerated people with serious mental disorders. The second case, *Plata v. Brown*, concerned incarcerated people with serious medical conditions. Both cases stemmed from inhumane conditions and insufficient treatment programs associated with California prison overcrowding. *Brown v. Plata*, 563 U.S. 493 (2011).

¹⁴⁷ New Trends, *supra* note 5, at 31.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 37-51 (with Arizona discussion at 47).

¹⁵¹ *Id.* at 39; *and see* California AB 2060 (2014).

¹⁵² New Trends, *supra* note 5, at 39; *and see* Colorado HB 14-1355 (2014).

¹⁵³ New Trends, *supra* note 5, at 39.

¹⁵⁴ *Id.*; *and see* Indiana HB 1268 (2014).

¹⁵⁵ New Trends, *supra* note 5, at 39; *and see* Indiana SB 173 (2015).

¹⁵⁶ New Trends, *supra* note 5, at 40; *and see* Michigan SB 581 (2014).

¹⁵⁷ New Trends, *supra* note 5, at 41; *and see* Hawaii SB 2308 (2014). Some prisons indeed have nurseries. *See* Jessica Pishk, *The Rise of Prison Nurseries: Even a Prison Cannot Ignore Biology*, PACIFIC STANDARD (Feb. 18, 2015).

¹⁵⁸ New Trends, *supra* note 5, at 41.

¹⁵⁹ *Id.* at 42; *and see* California AB 2308 (2014); U.S. DEPARTMENT OF JUSTICE, PRISON REFORM: REDUCING RECIDIVISM BY STRENGTHENING THE FEDERAL BUREAU OF PRISONS (2016) (helping inmates obtain government-issued ID prior to their release is noted as a significant BOP reform). Some states favor restoration of voting rights as well. New Trends, *supra* note 5, at 42; *and see* California AB2243 (2014).

¹⁶⁰ New Trends, *supra* note 5, at 42; *and see* California AB 2570 (2014).

¹⁶¹ New Trends, *supra* note 5, at 42 & 44; *and see* Florida HB 53 (2014) and Delaware SB 217 (2014).

¹⁶² New Trends, *supra* note 5, at 42 & 44; *and see* Missouri SB 680 (2014).

¹⁶³ New Trends, *supra* note 5, at 43; *and see* Texas SB 200 (2015).

¹⁶⁴ New Trends, *supra* note 5, at 43 & 49-50; *and see* Texas HB 1510 (2015) and Texas SB 1902 (2015).

¹⁶⁵ New Trends, *supra* note 5, at 43-47. “Ban the box” refers to a movement advocating that employment applications remove the question whether the applicant has a criminal record so an individual can at least make the first cut based on his or her education or employment record and proceed to an interview where a criminal record question may then be asked.

¹⁶⁶ Mark V. Holden, General Counsel and Senior Vice President of Koch Industries, as reported in WALL STREET JOURNAL, Aug. 16, 2016, at A13.

¹⁶⁷ New Trends, *supra* note 5, at 44; *but cf.*, Ben Leubsdorf, *Ban-The-Box Laws May Backfire*, WALL STREET JOURNAL, Oct. 4, 2016, at 3 (may create a wider racial gap when it comes to which applicants are interviewed and hired).

¹⁶⁸ New Trends, *supra* note 5, at 49-51; *and see* Illinois HB 3149 (2015). Limiting public access to, dissemination of, and use of criminal history information is accomplished by expanding eligibility for remedies that shield criminal records from public view searches as expungement or sealing mechanisms and also by mandating the removal of print and electronic publication of booking photographs and arrest records.

¹⁶⁹ New Trends, *supra* note 5, at 45; *and see* New Hampshire HB 1368 (2014).

¹⁷⁰ New Trends, *supra* note 5, at 47; *and see* Colorado HB 14-1061 (2014). In Arizona, the AJCA adopted the policy of not revoking probation solely for nonpayment of fees, fines or restitution.

¹⁷¹ New Trends, *supra* note 5, at 48; *and see* Georgia HB 328 (2015).

¹⁷² JAMES KILGORE, UNDERSTANDING MASS INCARCERATION: A PEOPLE’S GUIDE TO THE KEY CIVIL RIGHTS STRUGGLE OF OUR TIME 232-33 (2015).

¹⁷³ New Trends, *supra* note 5, at 40; *and see* Nebraska LB 907 (2014).

¹⁷⁴ Turning the Corner, *supra* note 40. Miss Greene is a former Soros Justice Fellow, a Research Associate at Rand Corporation, a Director of Court Programs at Vera Institute of Justice and a Program Consultant, Prosecuting Attorneys Research Council. She was Director of Justice Strategies when the reports were written.

¹⁷⁵ Judith Greene, *Justice Strategies, Bucking the Trend and Paying the Price; Why Arizona Needs Smart on Crime Policies*, THE DEFENDER, Arizona Attorneys for Criminal Justice (April 2012) (hereinafter, “Bucking the Trend”).

¹⁷⁶ Greene, *Turning the Corner*, *supra* note 40, at 1. The conclusions derived from the research supporting the two reports are: (1) Under Truth-in-Sentencing, the recidivism rate for many moderate- and low-risk offenders has increased “giving credence to the long-held notion that our prisons serve as ‘schools for crime.’” In fact, Truth-in-Sentencing was designed to target violent offenders as well as ensure the certainty of a prison term. The 85% was a requirement to receive federal funds and it required states to designate the violent offenders and insure those served 85% and Arizona is only one of two states (Florida is the other) who have 85% for all offenders. *Meta-Analytic Synthesis of the Research*, 3 Journal of Experimental Criminology no. 4, at 353 (2007); D.A. ANDREWS AND JAMES BONTA, THE PSYCHOLOGY OF CRIMINAL CONDUCT 279 (2007); M. Nrdecka *et al.*, *A Meta-Analysis on the Effectiveness of Juvenile Cognitive Behavioral Programs*, in COGNITIVE BEHAVIORAL INTERVENTIONS FOR AT RISK YOUTH 14-1 (B. Glick ed., 2008). (2) Moderating sentencing options for low risk offenders does not increase the risk to public safety. Greene, *Turning the Corner*, *supra* note 40, at 1. (3) Research, program innovations, and cost/benefit analysis offer a high degree of confidence that there are many models for effective alternatives (reducing costs and improving public safety) to incarceration. *Id.* at 1-2. (4) Arizona’s incarceration rate is primarily driven by Truth-in-Sentencing. *Id.* at 4. (5) There is no evidence to support the hypothesis that harsher sentences reduce levels of crime. *Id.* (6) “Truth-in-Sentencing” laws have not reduced the rate of violent crime. *Id.* And (7) The oft-heard proposition that those in Arizona prisons are mostly violent offenders is simply not true. *Id.*; Daryl Fisher, *Prisoners in Arizona: Truth in Sentencing, Time Served and Recidivism*, Arizona Prosecutor’s Advisory Council (2012).

¹⁷⁷ Greene, *Turning the Corner*, *supra* note 40, at 3-4.

¹⁷⁸ Fisher, *Prisoners in Arizona*, *supra* note 174, at 9-10.

¹⁷⁹ Greene, *Turning the Corner*, *supra* note 40, at 3-4.

¹⁸⁰ Information is available at:

www.superiorcourt.maricopa.gov/superiorcourt/probateandmentalhealth/guardianreviewprogram/veterancourt.asp.

There are two misdemeanor criminal courts serving area veterans in Pima County, being The Pima County Justice Court and Tucson City Court, the first ever in Arizona. THE WRIT, October 2016, at 5, available at www.pimacountybar.org. The specialized Transferred Youth Unit provides the youthful probationer with an officer who possesses expertise in managing juveniles in the adult system and can coordinate the specialized services needed by this unique population. Juveniles on standard adult probation are required to participate in the Juvenile Transferred Offenders Program, a specialized court.

¹⁸¹ Information is available at

www.superiorcourt.maricopa.gov/superiorcourt/Probateandmentalhealth/comprehensive-mental-health-department.

¹⁸² Information is available at www.superiorcourt.maricopa.gov/superiorcourt/homelesscourt/index.asp. A homeless individual who accrues \$200 in fines might as well be \$2 million – and that is where the Homeless Court helps people clear up old court fines in exchange for community service hours and a promise to reform. ARIZONA REPUBLIC, Aug. 24, 2015, at 1A.

¹⁸³ Information is available at

www.superiorcourt.maricopa.gov/adultprobationinformation/substanceabuse/drugcourtprogram.

¹⁸⁴ Arizona Judicial Branch website, available at <https://www.azcourts.gov/apsd/Drug-Courts>.

¹⁸⁵ Information is available on-line at <https://www.maricopa.gov/882/Mental-Health-Court>; <http://www.sc.pima.gov/?tabid=94>. In fact, the Supreme Court came out with a manual on the state’s mental health court standards, available at: <http://nacmconference.org/wp-content/uploads/2014/01/MHC.Standards.final-March-17-2015.pdf>.

¹⁸⁶ Information available online at <https://www.phoenix.gov/law/specialty-courts>.

¹⁸⁷ Information available online at <http://www.tempe.gov/city-hall/city-court/mental-health-court>.

¹⁸⁸ The research is wide-spread and well-documented. As a mere sampling, see D.A. Andrews *et al.*, *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY, no. 3, 369 (1990); P. Gendreau *et al.*, *Does “Punishing Smarter” Work? An Assessment of the New Generation of Alternative Sanctions in Probation*, 5 FORUM ON CORRECTIONS RESEARCH, no. 3, 31 (1993); M.W. Lipsey, *What Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents* (1995), in WHAT WORKS? REDUCING REOFFENDING – GUIDELINES FROM RESEARCH AND PRACTICE 63-78 (James McGuire ed., 1995); P. Gendreau *et al.*, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 CRIMINOLOGY, no. 4, 48 (1996); M.W. Lipsey and D.B. Wilson, *Effective Intervention for Serious*

Juvenile Offenders: A Synthesis of Research, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 313-345 (R. Loeber & D.R. Farrington, eds., 1998); S. Redondo *et al.*, *The Influence of Treatment Programmes on the Recidivism of Juvenile and Adult Offenders: A European Meta-Analytic Review*, 5 PSYCHOLOGY, CRIME AND LAW 251 (1999); Frank S. Pearson and Douglas S. Lipton, *A Meta-Analytic Review of the Effectiveness of Corrections-Based Treatment for Drug Abuse*, 79 THE PRISON JOURNAL, no. 4, 384 (1999); P. Gendreau *et al.*, *The Effects of Community Sanctions and Incarceration on Recidivism*, 12 FORUM ON CORRECTIONS RESEARCH, no. 2, 10 (2000); M.W. Lipsey *et al.*, *Cognitive Behavioral Programs for Offenders*, 578 THE ANNALS FOR THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 144 (2001); F.S. Pearson *et al.*, *The Effects of Behavioral/Cognitive Behavioral Programs on Recidivism*, 48 CRIME AND DELINQUENCY, no. 3, 476 (2002); C. Dowden *et al.*, *The Effectiveness of Relapse Prevention with Offenders: A Meta-Analysis*, 47 INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY, no. 5, 516 (2003); D.B. Wilson *et al.*, *Quantitative Review of Structured, Group-Oriented, Cognitive-Behavior Programs for Offenders*, 32 CRIMINAL JUSTICE AND BEHAVIOR, no. 2, 172 (2005); C.T. Lowenkamp *et al.*, *The Risk Principle in Action: What Have We Learned From 13,676 Offenders and 97 Correctional Programs?*, 51 CRIME AND DELINQUENCY, no. 2, 1 (2006); D. Wilson *et al.*, *A Systematic Review of Drug Court Effects on Recidivism*, 2 JOURNAL OF EXPERIMENTAL CRIMINOLOGY, no. 4, 459 (2006).

¹⁸⁹ Green, *Turning the Corner*, *supra* note 40, at 1, 3-4.

¹⁹⁰ The Arizona Supreme Court, under the leadership of former Maricopa County Judge Ron Reinstein, has championed use of evidence-based supervision practices for years. See, e.g., the Arizona Judicial Branch's website on this focus, available at <https://www.azcourts.gov/apspd/Evidence-Based-Practice>.

¹⁹¹ *Smart Justice in Maricopa County, ASU State of our State Conference*, at 1 (Nov. 20, 2015) (hereinafter, "Smart Justice Report"). Maricopa County uses assessment tools, as explained in the report, at various stages of an individual's involvement in the criminal justice system to determine risk, criminogenic and/or social needs. Two of these risk assessments used during the booking process include the Public Safety Assessment ("Arnold Grid") completed prior to the initial appearance and the Risk Recidivism Score is completed at classification (called the "proxy" or "RRS" score). *Id.* at 2.

¹⁹² Greene, *Turning the Corner*, *supra* note 40, at 1 & 3.

¹⁹³ *Id.* at 3.

¹⁹⁴ *Id.* The average daily jail population in Maricopa County as of 2014 was 7,997, with 82% on felony charges. The average length of stay was 27.59 days, 42% of people booked were released within 24 hours, 75% of inmates were pretrial and 14.6% were women. As of July 1, 2015, the per diem cost per inmate was \$85.49 a day; the cost to book was \$285.94 for each offender, with municipalities bearing the costs for those held on city charges with the remainder of costs covered by Maricopa County. Smart Justice Report, *supra* note 189, at 1.

¹⁹⁵ Greene, *Bucking the Trend*, *supra* note 175, at 1-4, 12-13.

¹⁹⁶ Adult Probation Safer Communities Report (2008-2016), available at www.scgjusticecenter.org.

¹⁹⁷ Information is available at www.superiorcourt.maricopa.gov/superiorcourt/criminaldepartment/innocation.asp.

There is also in Maricopa County the highly regarded and long-standing MCSO Alpha substance abuse program offered to offenders with substance abuse histories and moderate-to-high re-offending (proxy) scores.

¹⁹⁸ Smart Justice Report, *supra* note 191, at 1 & 3.

¹⁹⁹ *Justice for All: Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies*, available at: <http://www.azcourts.gov/csccommittees/Task-Force-on-Fair-Justice-for-All> (hereinafter, "Task Force"). The Task Force is chaired by David Byers. Significantly the Arizona Town Hall has voted to make criminal justice and sentencing reform its major topic for 2018.

²⁰⁰ The history and mission statement are available at <http://www.azcourts.gov/scccommittees/Arizona-Commission-on-access-to-Justice>. A successful volunteer effort in Superior Court, Maricopa County, is the AmeriCorps grant program where from June 2016-May 2017 AmeriCorps members have assisted 102,873 customers, in the following areas: Information Desk 83,429 individuals aided; 2,918 at the Protective Orders Center; and 16,526 at the Self-Service Center. Available at haughts@superiorcourt.maricopa.gov, and also <http://AZCourtHelp.org>.

²⁰¹ Task Force, *supra* note 199.

²⁰² *Id.* at 27. Additionally, a Houston federal judge overturned the county's bail system for people charged with low-level crimes after finding that it disproportionately affected indigent residents and violated the constitution. See NEW YORK TIMES, Apr. 30, 2017, at A13.

²⁰³ See Task Force, *supra* note 199, at 2. And see *Money or Justice? How Fees and Fines Have Contributed to Deep Distrust of the Courts - and What Chief Judges Are Doing about It*, JUDICATURE 44 (Winter 2016).

²⁰⁴ Administrative Order No. 2016-16 on 3/3/16. See Task Force, *supra* note 199, at 11-12.

²⁰⁵ Task Force, *supra* note 199, at 27.

²⁰⁶ *Id.* Arizona has the fourth-highest poverty rate in the United States. More than 1.2 million Arizonians struggle economically every day. “Most of Arizona’s poor are not the panhandlers on the highway off-ramps, but the working poor.” So reducing fines and fees and performing community service instead is a life saver for the working poor who face choices of paying the rent or buying food at the end of every month. THE ARIZONA REPUBLIC, Apr. 20, 2017, at 12A.

²⁰⁷ See Task Force, *supra* note 199, at 27.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 27 & 35; and see www.ArnoldFoundation.org. According to a recent (November/December 2016) Morrison Institute for Public Policy poll, most Arizonans strongly support the changes in the bail system. Bill Hart, *Bail or Jail?*, available at <https://morrisoninstitute.asu.edu/category/publication/topics/criminaljustice>. The recent Arizona Judicial Conference (6/21-6/23/2017) also featured pretrial release innovations and the abolishment of money for justice in Arizona. And see *infra* note 226.

²¹¹ Judicial Branch News, Jan. 2017, at 7, available at

<http://www.superiorcourt.maricopa.gov/MediaRelationsDepartment/Publications/newsletters.asp>. The PSA pretrial assessment has been implemented in all 15 Superior Courts and is being administered in some counties for the municipal courts. The assessment individually predicts FTA (Failure to Appear), NCA (New Criminal Activity) and for the first time has a prediction of violence which is flagged in the report. This is what makes PSA unique. For the differences between the prior COMPAS tool and the PSA used in Arizona with respect to bail risk assessment tools, see

http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

²¹² Task Force, *supra* note 199, at 27. With the use of an evidence-based risk assessment tool, Detention Screening Instrument, the juvenile court is doing a better job of keeping children in the community even though our population is expanding. “There is a reduction in detention and a lowering of referrals to juvenile corrections and to an adult criminal division. Over five years, the incarceration declined 35% (detention) and 40% (juvenile corrections).” JPD Trends and Implications (March 2017), internal working paper prepared by the Research and Planning Services Division, Juvenile Probation Department of the Judicial Branch of Maricopa County; and see BILL HART, JUVENILE JUSTICE IN ARIZONA: THE FISCAL FOUNDATIONS OF EFFECTIVE POLICY, Morrison Institute for Public Policy, at 12 (Jan. 2016).

²¹³ Task Force, *supra* note 199, at Appendix B at 42.

²¹⁴ *Id.*

²¹⁵ *Id.* at 41.

²¹⁶ *Id.* Those wanting to resolve a warrant need to see a judge, but may still qualify for the CAP benefits to resolve civil traffic, civil, and parking charges.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ The goal is to provide services immediately for low to moderate-risk defendants previously diagnosed as seriously mentally ill. See lrathur@adp.maricopa.gov. Other programs in Maricopa County are the Healthcare Enrollment Initiative which has fostered a dramatic rise in the number of probationers enrolled in healthcare and receiving health benefits. This not only solves a human need but also decreases, in the case of those with mental health and addiction issues, the likelihood of relapses and thus reduces recidivism. This matches the dramatic change in inmate healthcare in Maricopa County which has been deemed the best-run jail-based healthcare program in the country. ARIZONA REPUBLIC, Sept. 20, 2015, at 5F; and see Treatment Advocacy Center, Office of Research & Public Affairs, *Psychiatric Beds Spending Linked to Jail Population Reduction* (2016), available at <https://mail.google.com/mail/ca/u/O/#inbox/159d11117b31e31d>. A very exciting program of the Phoenix Police Department in the Avondale area, which has the highest rate in the Phoenix metropolitan area of children taken from families due to drug abuse, is the “angels program” where individuals can report a drug problem to the police who get them in touch with an “angel” who then gets the services and treatment they need without arrest or incarceration. Hopefully this pilot program will spread locally and throughout the state. See *supra* note 132.

²²¹ Press release, Arizona Department of Corrections, ADC Announces Creation of Division of Inmate Programs and Reentry (April 12, 2016), available at <https://corrections.az.gov/article/adc-announces-creation-division-inmate-programs-and-reentry>.

²²² Task Force, *supra* note 199, Appendix B at 42.

²²³ *Id.*

²²⁴ The Odd Couple, *supra* note 2. There is a movement to limit civil forfeiture of homes, boats, vehicles and other property seized especially from drug arrests by requiring a criminal conviction before forfeiture proceeds can be sent to state law enforcement. WALL STREET JOURNAL, Oct. 3, 2016, at A1 (California's new statute limiting civil forfeiture). The California statute stops the disturbing trend among law enforcers to seize assets from people who have never been found guilty.

²²⁵ NEW YORK TIMES, Dec. 25, 2016, at 18.

²²⁶ See *supra* note 197.

²²⁷ See text accompanying *supra* notes 36-39.

²²⁸ See text accompanying *supra* notes 139-141.

²²⁹ E.g., Lipsey, *400 Research Studies*, *supra* note 186, at 63-78; Pearson and Lipton, *Corrections-Based Treatment for Drug Abuse*, *supra* note 189; Wilson, *Drug Court Recidivism*, *supra* note 189.

²³⁰ *Supra* note 197, see especially 27 *et seq.*

²³¹ See text accompanying *supra* notes 121-143.

²³² See text accompanying *supra* notes 144-148.

²³³ See *supra* note 5.

²³⁴ Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV.L.R. 811 (2017).

²³⁵ *Id.* at 831-32. And see PETER WAGNER AND BERNADETTE RABUY, FOLLOWING THE MONEY OF MASS INCARCERATION, Prison Policy Initiatives (2017), available at <https://www.prisonpolicy.org/reports/money.html>; COURTNEY MCMINN, HIGHER EDUCATION IN PRISON AS A MEANS TO REDUCE RECIDIVISM, to be published by ASU Law Journal for Social Justice, May 2018.

²³⁶ Most impressive have been programs initiated to assist women returning from our State's prison. ADOC offers a 9-month, in-patient Women's Recovery Academy at its women's facility in Perryville, followed by aftercare and reentry assistance. Information available at <https://corrections.az.gov/location/19/perryville>. Additional re-entry services and counseling has been made available to women through Sage Counseling. Aside from re-entry services, Sage also provides family reunification, parenting, domestic violence, and substance abuse treatment. Information available at <http://www.sagecounseling.net/programs.html>. As to drug rehabilitation, see Craig Harris, *A Real Second Chance*, ARIZONA REPUBLIC, Feb. 5, 2017, at 1A & 20A (addressing the substance abuse counseling available at the Maricopa Reentry Center in North Phoenix: "If Gov. Doug Ducey has his way, the nascent re-entry program will expand with a \$518,000 infusion from the state budget" and the addition of "six more substance-abuse counselors and a re-entry planner which would allow more people to enroll" and "which marks a shift in the state's philosophy on incarceration and how to pay for it.").

²³⁷ See text accompanying *supra* note 21.

²³⁸ The Arizona Republic, in a three-part series on parole notes that while parole was abolished in Arizona in 1993 and converted to community supervision and probation, it is still being used presently in sentencing, March 19, 2017 at 1A and 20-21A; March 20, 2017 at 1A and 11A; and March 22, 2017 at 1A and 6A. See Laws 1993, Ch. 255, Section 99 as amended by Laws 1994, Ch. 236, Section 17, effective July 17, 1994 and retroactively effective to January 1, 1994. And see A.R.S. §41-1604.09 (in Section I, limits parole to felonies committed before January 1, 1994).

²³⁹ See text accompanying *supra* note 111-112; Norman L. Reimer, *Reflections on Clemency 2014 - the Legal Profession's Response to a Call for Help, The Commutation Legacy of President Barack Obama*. THE CHAMPION 16 (Dec. 2016), available at www.NACDL.org.

²⁴⁰ CAROLINE ISAACS, A NEW PUBLIC SAFETY FRAMEWORK FOR ARIZONA: CHARTING A PATH FORWARD (Dec. 2016), available at <https://afscarizona.files.wordpress.com/2014/03/a-new-public-safety-framework-for-arizona-december-2016.pdf>.

²⁴¹ *Id.* at section entitled "The Current Picture."

²⁴² See *supra* note 237.

²⁴³ See *supra* note 238.

²⁴⁴ See *supra* note 239.

²⁴⁵ See *supra* note 238. It also mentions "Technical violations of community supervision" which we believe Arizona is addressing (see text *supra* notes 193-195).

²⁴⁶ Nicole Hong and Shibani Mahtani, *Cash Bail, Staple of Courts, Is Fading*, WALL STREET JOURNAL, May 23, 2017, at A1 7 A12.

²⁴⁷ The Sentencing Project, available at sentencingproject.org@mail.solsalabs.net (May 24, 2017). Six states have reduced their prison populations by over 20% since reaching their peak levels: New Jersey, New York, Alaska, California, Vermont, and Connecticut. Several southern states that have exceptionally high rates of incarceration – including Mississippi, South Carolina, and Louisiana – have also begun to significantly downsize their prison populations. Twelve states have continued to expand their prison populations, with four producing double-digit increases since 2010: North Dakota, Wyoming, Oklahoma, and Minnesota.