

SMART
ON CRIME



A Call for Smart on Crime Solutions

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About FAMM and the Smart On Crime campaign

The Smart On Crime campaign is a project of Families Against Mandatory Minimums (FAMM). FAMM is a national nonpartisan, nonprofit organization founded in 1991 in response to inflexible and excessive penalties required by mandatory sentencing laws. FAMM promotes sentencing policies that give judges the discretion to distinguish between defendants and sentence them according to their role in the offense, seriousness of the offense and potential for rehabilitation. FAMM's 30,000 members include prisoners and their families, attorneys, judges, criminal justice experts and concerned citizens.

About the report

Arizona Prison Crisis: A Call for Smart on Crime Solutions is a comprehensive report on sentencing policy in Arizona. It contains detailed analysis and documentation of the findings of our research in Arizona, including an appendix on Arizona's criminal code.

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Preface

Incarceration rates are at an all-time high, and state budgets are more constrained than during any period since the beginning of the prison-construction boom in the late 1970s and 1980s. One of the driving forces behind these problems are mandatory minimum sentencing laws passed by the U.S. Congress and many state legislatures that force judges to give lengthy, fixed prison terms to those convicted of specific crimes without concern for mitigating factors such as the degree to which the accused may have been involved in the crime or the potential for rehabilitation. These laws contribute to the explosion in U.S. incarceration, and disproportionately impact low-income families and communities of color.

Now state-level policymakers are scrambling for information and ideas to help them better manage correctional resources. There is a great need for easily accessible, accurate information about sentencing policies and practices and cost-effective sentencing reforms. Families Against Mandatory Minimums (FAMM) is meeting that need through state-by-state briefing books and reports on state sentencing policy that provide “smart-on-crime” responses. These resources provide comprehensive sentencing and correctional policy information for public officials, policymakers, reform advocates, and members of the media.

A key component of our Smart on Crime campaign is state-by-state sentencing and correctional system profiles keyed to critical sentencing reform issues. The goals of these state sentencing and correctional system profiles are:

- To provide concise, up-to-date information about the policies and practices that drive state prison populations and correctional costs.
- To stimulate and facilitate exchange of policy-relevant information about sentencing and correctional policies across states.

- To gather and disseminate information about practical, successful reform strategies.
- To highlight progress toward gaining stronger control over correctional costs and more effective correctional outcomes.

FAMM’s Smart on Crime state-by-state profiles trace the state’s correctional policy history and describe the resulting sentencing and (where relevant) parole structures, identifying the factors and dynamics that underlay or influence prison population trends. Each state profile also characterizes the state’s level of commitment to crime prevention, alternatives to incarceration, community corrections, substance abuse treatment and re-entry programs.

These state profiles chronicle recent criminal justice policy developments that affect correctional reform efforts and analyze gains and set-backs in terms of prison population impacts and fiscal costs. Political leaders that champion positive change are recognized, and successful reform initiatives are celebrated. New proposals or initiatives for change in state sentencing policy are identified, and, wherever possible, information on draft legislation, fiscal notes, and/or legislative testimony is provided.

Despite the “tough-on-crime” environment, the cost of incarceration in a time of fiscal crisis is opening up opportunities for sensible and cost-effective sentencing and corrections reforms under the “smart-on-crime” banner.

For more information on FAMM’s Smart on Crime campaign, please visit www.famm.org.

Introduction

Twice Arizona voters approved propositions sending drug offenders to treatment rather than prison. Nonetheless, Arizona has become the incarceration capital of the western United States. Its tough sentencing laws and rapid prison expansion have done little to reduce crime. The state has the ninth-highest rate of incarceration in the nation and the highest index crime in the nation, and non-violent substance abusers crowd its prisons. Arizona policymakers have yet to adopt smarter, less expensive sentencing and correctional strategies being implemented in other states.

Families Against Mandatory Minimums (FAMM) commissioned this report to track the evolution of Arizona's sentencing laws, evaluate their effects on Arizona prison populations and state budgets, and review alternative sentencing policies that are cost-effective yet maintain the public safety.

The first section, "A costly system in need of reform," evaluates the laws that have swollen the prison budget as well as smart sentencing and correctional strategies that could safely reduce reliance on incarceration and improve Arizona's record on crime control.

The second section, "A closer look at incarceration" examines prisoner data from the Department of Corrections, and helps the reader understand why and

how people are incarcerated. It provides a wealth of information on Arizona prisoners, including data on personal characteristics, criminal record, offense of conviction and sentence and is also informed by interviews with many criminal justice professionals.

The third section, "Conclusions and recommendations," calls for a policy commission to conduct a comprehensive review of the determinate sentencing laws, to determine the causes of Arizona's prison overcrowding crisis and to recommend pragmatic reforms that can bring prison population growth under control. This section then details immediate changes that would ease Arizona's sentencing crisis until the commission completes its work and genuine reform is enacted.

The appendix, "Arizona's felony sentencing structure," compiles the complex statutory provisions that govern sentencing for felony offenses. It includes baseline sentencing ranges and probation eligibility, sentence enhancements, and the baseline and enhanced sentencing ranges for special classes of offenses.

A costly system in need of reform

Arizona today

Arizona has become the incarceration capital of the western United States. Prison overcrowding has become a crisis and correctional costs have hit an all-time high. Before more money is allocated for prison expansion, Arizona taxpayers need to examine the laws, policies, and practices that are packing Arizona prisons.

This policy report evaluates these laws that have swollen the prison budget as well as smart sentencing and correctional strategies that could safely reduce reliance on incarceration and improve Arizona's record on crime control.

Arizona laws continue to fill an increasing number of prisons. Since legislators introduced "truth in sentencing" in 1993, the number of prisoners has grown by 65 percent. Arizona's prison population growth rate in 2002 was *twice* the rate for the states in the western region of the U.S. By the end of January 2004, the state had almost 31,286 prisoners, 4,349 over capacity.¹

A review of the Arizona Department of Corrections (DOC) annual report for fiscal year 2002 provides a necessary background for evaluating why prisons are overcrowded

- Non-violent offenders fill almost three-fifths of Arizona's scarce prison beds.
- Drug offenders occupy about one in five beds. In 1986 14 percent of prison admissions were for those convicted of drug offenses. In 2002 it was 20 percent.
- Women – three quarters of whom are convicted of non-violent drug or property crimes – make up 8.5 percent of the prison population. The number is expected to grow by 16.4 percent annually over the next five years. Arizona leads its neighboring states in the incarceration rate of women.

In addition, Arizona also remains among the toughest of the "get-tough" states, standing head and shoulders above its neighbors in terms of its overall incarceration rate as well as the rates for African Americans and Latinos. Yet Arizona leads the entire nation in its overall *crime* rate – lagging far *behind* the rest of the country in terms of crime-rate reductions.

These trends indicate that Arizona's high rate of incarceration is *not* the solution to the state's high rate of crime and that pouring *more* tax dollars into prison expansion will not likely improve the state's crime-control record. Moreover, financing major prison expansions – in the face of budget deficits – siphons off tax revenues sorely needed to improve other vital public services, including those proven highly effective in preventing and reducing crime. Arizona ranks 49th among 50 states in per pupil spending for kindergarten to 12th grade education.²

Across the country, state lawmakers of both parties are working together to enact "smart" sentencing and correctional reforms. In more than half the states, legislators have taken steps to modify or repeal mandatory sentencing laws, to shorten prison sentences, to increase the rate at which low-risk prisoners are released from confinement, and/or to reduce the numbers of parolees who are returned to prison for purely technical violations of parole rules.

Yet Arizona seems mired in a policy time-warp, with harsh and inflexible laws and practices still fueling prison overcrowding and prison expansion.

While some state policymakers are saving tens of millions of tax revenue dollars by closing entire prisons, Arizona policymakers expanded the number of prison beds while at the same time cutting the budget for prison operations. As a result, during fiscal year 2002, the DOC:

- Shuttered its office of substance abuse services and cut back contracts for substance abuse treatment, increasing the likelihood that prisoners will return to abusing drugs when released.
- Reduced the total number of meals served to prisoners as well as the amount of milk provided them.
- Cut prisoners' meager wages, making it harder for them to make up for prison food cutbacks by purchasing food items from the prison commissary.
- Assigned wardens and other management staff to cover security posts because of staff reductions.

Yet as the state fiscal crisis worsened, they poured millions into costly prison construction that will eventually swell operational costs by \$60 million.

Arizona's recent prison hostage crisis has thrown a harsh spotlight on the problems of the state prison system: unacceptably high levels of inexperienced, under-trained security personnel; low wage scales that make recruitment of qualified candidates difficult and retention of well-seasoned staff problematic; and tightly packed prison housing that prevents proper assignment

1 Arizona DOC Monthly Critical Issues Report. January 2004 <http://www.adc.state.az.us/ospb/Govr%20Rpt.pdf>

2 Bustamonte, Mary. "Az. 2nd-lowest in education spending, report says." Tucson Citizen, January 27, 2003.

of prisoners according to their security classifications.

Ongoing inquiries about the recent hostage crises will presumably address many critical issues regarding prison operations. But more fundamental issues remain to be probed, and special post-session House panel hearings last fall on sentencing policy reforms show a growing realization among some Arizona policymakers that current policies need to be re-examined.

Support for change rises

Solid public support exists for correctional strategies that would reduce reliance on incarceration in Arizona. Public opinion surveys indicate strong public approval for a variety of community-based treatment and supervision programs for those convicted of non-violent and drug offenses – drug courts, drug and alcohol treatment programs, as well as carefully supervised sanctions that can hold offenders accountable for their crimes.

Public support for alternatives to incarceration for a broad range of offenders is nothing new. More than 15 years ago, at the height of the “tough-on-crime” era, ground-breaking opinion research in Alabama by Public Agenda found a preference for using non-prison options like restitution, community service and work programs in a wide array of criminal cases involving property and drug offenses. Over a decade Public Agenda’s research director, John Doble, went on to other states – Delaware, Oklahoma, Oregon, North Carolina, and Vermont – finding similar results.³

Recent national research on public preferences about crime and corrections indicates strong support – by a two to one margin – for measures that address the causes of crime over strict sentencing.⁴ Among the results,

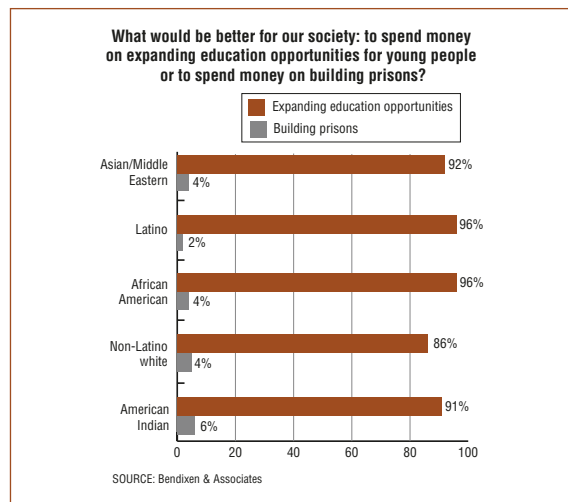
- A majority of Americans (54 percent) believe that prevention or rehabilitation should be the primary goal for dealing with crime, compared to just 39 percent who favor punishment or enforcement.
- By two-to-one, poll respondents termed drug abuse a medical problem, preferring counseling and treatment over incarceration.

- More than three-quarters favored mandatory drug treatment and community service rather than prison for those convicted of drug possession.
- Most (71 percent) also favor these options over prison for those who *sell* small amounts of drugs.
- A solid majority (56 percent) favor eliminating mandatory sentencing such as the so-called “three-strikes” law.
- More than three-quarters thought that investments in after-school programs and other crime prevention strategies would save money by reducing the need for prisons.
- Asked where legislators facing budget deficits should make cuts, they put prison budgets at the top of the list.

Similar findings are mirrored from coast to coast.⁵

In a California poll,⁶ an overwhelming majority of ethnic minority groups and non-Latino whites saw more benefit in funding education over prison construction. The poll also found overwhelming support for diverting a portion of prison expenditures to programs that provide child protective services.

Arizonans have also shown similar preferences. They resoundingly endorsed Proposition 200, showing their preference for treating drug abusers, not in-



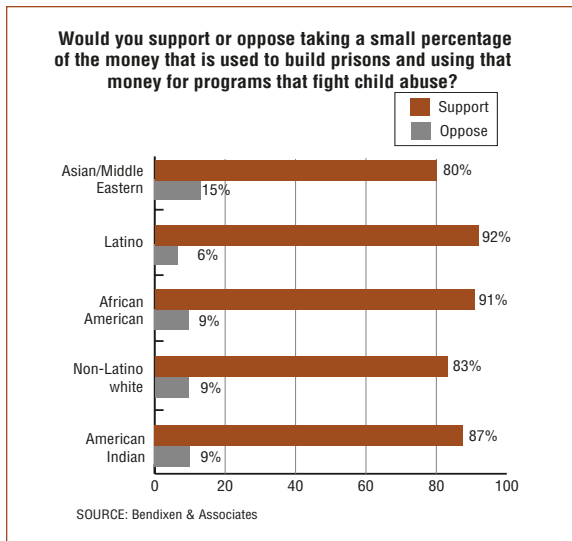
³ North Carolinians agreed in large majorities that that drug and alcohol treatment should be provided to all in need, even if this increased the cost of correctional services. They favored use of community sanctions over prison for those convicted of non-violent crimes. Eight of 10 Oklahomans strongly favored community service and close supervision, while nine out of ten favored greater use of victim restitution.

⁴ Peter D. Hart Research Associates, Inc. “Changing Public Attitudes toward the Criminal Justice System.” February 2002.

⁵ A December 2003 Potomac poll conducted in Maryland also found that 57 percent of voters in that state reject mandatory prison sentences, preferring to let judges decide who goes to prison and who does not. The Potomac poll also found prisons at the top of the “cut” list. In 2001 four times as many Californians surveyed in a Field poll reported that they supported reducing the prison budget as those who supported cutting higher education. And a February 2004 Bluegrass poll found that 73 percent of Kentuckians were willing to see funding cuts for the state’s courts and prisons to bring the budget into balance, compared to just 29 percent willing to cut funding for schools and medical care for the poor.

⁶ Bendixen & Associates. “Public Opinion Survey of California Ethnic Groups About Criminal Justice Issues.” January 2004.

carcerating them. And Arizona voters do not favor more spending on prison. In a recent KAET-TV/Channel 8 statewide poll of registered voters,⁷ those polled overwhelmingly (86 percent) supported increased spending for child protective services but did not support spending for additional prison beds to address the prison overcrowding. Some 54 percent opposed the governor’s \$700 million proposal to expand the prison system by more than 9,000 beds. Just 34 percent supported it. Even when asked about the governor’s scaled-back proposal to spend \$26 million on an increase of only 4,000 beds, only 42 percent of voters approved. Just five years ago Arizona voters had overwhelming supported prison building.⁸



The evolving structure

Pre-1978: Indeterminate sentencing

Arizona policymakers have established a tradition of harsh sentencing and correctional policies.

Arizona’s exceptionally rigid mandatory sentencing structure was created when legislators voted to restructure the criminal code in 1978. Previously Arizona’s sentencing system was purely indeterminate. Judges set a minimum and maximum term and the parole board determined when a prisoner would be released from confinement. In 1974 legislators began to rein in judicial discretion, making prison mandatory for anyone convicted of robbery using a firearm. In 1976 they extended the law to cover kidnapping, rape, various forms of aggravated assault, and resisting arrest.

⁷ The poll was designed to assess public attitudes toward two issues – prison overcrowding and child protective services – taken up by legislators in the October 2003 special session convened by the governor.

⁸ HORIZON: Public Affairs Program transcript: October 21, 2003 www.kaet.asu.edu/horizon/transcripts/2003/october/oct21_2003.htm

1978: Move to determinate sentencing

Legislators replaced indeterminate sentencing with a system of legislative determinate sentencing, believing it would reduce sentencing disparity. The new code had a limited number of penalty classes and a baseline presumptive (or expected) prison sentence for each class, with a specific range above or below the presumptive sentence for handling cases where aggravating or mitigating factors would dictate a greater or lesser sentence.

Legislators left very little discretion to judges. They mandated long prison terms for those convicted of dangerous felonies (those involving weapons or serious injuries) and made prison mandatory for those convicted of more than one criminal incident without regard to the seriousness of the other incidents.

1978-1993: More mandatory sentences

Over the next 15 years legislators stiffened their system of presumptive sentencing by adding yet more mandatory penalties and enhancements. In 1982 they added strict mandatory sentencing enhancements for those convicted of new crimes while on probation or parole. In 1985 they increased the sentencing ranges for dangerous crimes against children. Harsh new drug mandatories were enacted in 1987. By 1992, mandatory enhancements had been added that stiffened sentencing of sex offenders, repeat offenders, drug traffickers, drunk drivers, escapees from custody, as well as “dangerous” and “violent” offenders. The average Arizona prison term served had lengthened to 5.1 years, compared to the then-national average of 2.0 years.

1993: Sweeping changes

In 1993 legislators enacted a second sweeping sentencing reform to “promote truth and accountability in sentencing.” This “truth-in-sentencing” reform eliminated discretionary parole release. It also included a number of code modifications aimed at reducing the harshness of the mandatory penalties. Dollar amounts for classification of theft cases were increased. Drug thresholds carved out a range of drug offenses where a first-time defendant would be probation-eligible. Code changes set different levels of sentence enhancement for defendants with convictions for more than one criminal incident, based on whether the convictions resulted from the same trial or guilty plea hearing that produced the instant con-

viction, or from a different one. Judicial discretion to set prison terms below or above the presumptive term to account for mitigating or aggravating factors was broadened.

Early release mechanisms then in place (parole, work furlough, and home arrest) were abolished except for a narrow provision for “earned release credit” – one day off for each six served by prisoners willing to work, study, or participate in treatment. Each prison sentence would also include a term of post-release community supervision equal to approximately 15 percent of the time to be served in prison.

The old board of pardons and paroles was retooled to serve as the board of executive clemency. The change included allowing judges who find a required mandatory sentence excessive to enter a special order at sentencing permitting the prisoner to petition the board for commutation.

The presumptive sentences required in the codes were recalibrated to reflect the *actual* time then being served in prison. The Department of Corrections optimistically estimated that the result of the reforms would reduce the prison population by five percent. But after enactment of “truth in sentencing,” the number of prisoners shot up – growing by 11 percent in 1994 and eight percent in 1995.

1996-1998: The people speak against “get-tough” policies

Voters interrupted the momentum behind Arizona’s “get-tough” policy by approving Proposition 200 by a ringing majority. The ballot initiative mandates drug treatment not prison for first- and second-time non-violent drug offenders arrested for simple possession or use of an illegal drug. After legislators overturned key aspects of the initiative, a second majority vote in 1998 restored the law to its initial form. The reform saves over \$6 million a year in prison costs and effectively diverts substance abusers to probation, according to a study by the Arizona Supreme Court.

The resulting crisis: Too many prisoners, too little money

The problems of too many prisoners and too little money began to converge in the new century. In November 2002 correctional officials began to transfer part of the overflow to a private prison in Texas.

In 2003, the new Democratic governor, Janet Napolitano, termed the prison overcrowding a crisis and recommended shipping more prisoners out of

state and expanding prison capacity. She selected Dora Schriro, an innovative veteran corrections executive, to run the state prison system and pledged to give her a few months for a thorough review of the causes underlying the prison overcrowding crisis.

Many Arizona legislators also began to rethink the state’s inflexible sentencing policies. S.B. 1291, a modest reform measure, sponsored by Sen. Mark Anderson (R-Mesa), was enacted in 2003, establishing a transitional program to release non-violent drug offenders to treatment programs 90 days before their prison term ends.

After the regular 2003 legislative session adjourned, the conservative Republican House speaker, Jake Flake (R-Snowflake), appointed a special panel of lawmakers to explore ways to deal with prison overcrowding. Speaker Flake expressed concern that mandatory sentences may have taken away too much discretion from judges.

Flake appointed Rep. Bill Konopnicki (R-Safford), vice-chairman of the appropriations committee, to head the overcrowding panel. Konopnicki was interested in reforms that could preserve tax revenues while protecting public safety. Estimating that the prison population could be safely reduced by 4,000, he proposed reclassifying some low-level property felonies as misdemeanors, and diverting DUI offenders to treatment programs instead of prison. “Just putting them in jail doesn’t help the problem,” he said.

Meeting weekly, legislators considered proposals to reduce the state’s strict truth-in-sentencing requirement, modify mandatory minimum drug sentences, and divert drunk drivers from prison to community treatment and work-release programs.

In testimony before the panel, Judge Ronald Reinstein, an influential ex-prosecutor with 18 years on Arizona’s Superior Court, proposed an ambitious set of reforms. He found no magic in the state’s 85-percent truth-in-sentencing law and believed that the percentage requirement could be safely reduced. He proposed lowering mandatory minimum sentences for drug and forgery violations and making drunk-driving offenders eligible for work-release programs instead of prison. He advocated giving judges leeway to re-sentence prisoners to probation after serving a year or so and granting early prison release upon a positive recommendation from correctional authorities.

Gov. Napolitano approached the idea of sentencing reform more cautiously, telling the Arizona Republic she didn’t “believe you balance the budget by changing your criminal code.” In response to a projected 13,584-bed shortage of prison space by fiscal year 2008, Napolitano proposed a \$470 million construction program to increase the capacity of public prisons by

9,134.⁹ She argued that prison expansion could be quicker and cheaper – saving tens of millions in land acquisition and construction costs – if all new housing was on the grounds of existing public prisons.

While seeking authorization for a major prison expansion program, Gov. Napolitano also agreed that the state needs to look at alternative sentencing, such as intensive probation, as a means of slowing the growth of the inmate population. However, the Governor told Rep. Konopnicki that long-term solutions to the prison population crunch would have to wait until the regular session. Lawmakers objected, with Speaker Flake saying it made no sense to look at spending so much money without also examining why the prison population continues to balloon.

In a special session she convened in October 2003 to deal with both the prison crisis and the child protective system, the Governor asked for \$26.4 million as a stopgap to get the DOC through the current fiscal year¹⁰ and \$27.9 million more to finance construction of 1,200 permanent beds at three existing prisons.

Both houses of the legislature overwhelmingly approved a bipartisan bill (H.B.2019) that authorized up to \$42.5 million in state funding (to be matched with up to \$30 million of federal funding) for prison construction and lease of temporary prison beds. They appropriated an additional \$8 million for prison health care and recruitment, retention and benefits for the public prison workforce as well as \$250,000 for a pilot drug treatment program in one public prison. Legislators also enacted sharp increases in drunk-driving fines to offset some prison-expansion costs.

The compromise plan provided 1,000 new public prison beds and 1,000 new permanent private prison beds in Arizona – plus temporary contracts for 1,400 to 2,100 temporary beds in out-of-state prisons. Legislators agreed to waive a statute requiring selection of the lowest bid for these beds, and the administration agreed to a long-stalled contract for private construction of a 1,400-bed prison near Kingman. Temporary contracts were authorized for use of 138 jail beds in two Arizona counties. The first of the new permanent beds will be operational before 2004 ends.

Meanwhile, the prison population continues to grow.

Effects of Arizona's mandatory sentencing system

Laws dramatically increase length of sentences

U.S. Supreme Court Justice Anthony M. Kennedy, an outspoken critic of mandatory minimum sentences, charges that these laws are unnecessary and unwise and unjust. “Our resources are misspent, and punishments too severe, our sentences too long,” he said.

Arizona’s “truth-in-sentencing” law greatly increased the length of the terms for prisoners serving mandatory sentences. Mandatory sentencing provisions, even for non-violent offenders, eliminate sentencing options like probation or other alternatives to prison. Many mandatory sentencing enhancements greatly increase the length of the presumptive (or expected) prison terms. (See the appendix for details of Arizona’s schedule of mandatory sentencing enhancements.)

Prosecutors influence sentences excessively

Under Arizona’s sentencing system prosecutors determine which charges to file, whether to seek mandatory enhancements, whether to offer a plea, what concessions to offer, and whether a particular sentence will be required. Except in cases involving first-time defendants charged with low-level property or drug offenses, Arizona’s rigid felony sentencing structure places virtually all sentencing discretion in the hands of prosecutors.

When an enhancement is invoked and the prosecutor can prove the facts, the judge *must* impose the enhancement. Since the prosecutor may, through plea bargains, dismiss some or all enhancement allegations many sentences do not include all of the possible enhancements. In most cases, prosecutors effectively control defendants’ sentences by selecting the initial charges and the sentence enhancements they file and offering negotiated pleas for concessions.

Under a system of rigid sentencing presumptions like Arizona’s, decisions to charge or not charge mandatory enhancements, or to charge a preparatory offense instead of the offense itself, blurs the traditional distinction between charge bargaining and sentence bargaining. Because mandatory sentencing enhancements are not consistently applied, they produce unwarranted disparity. And because they are often used to obtain disproportionately harsh sentences in cases involving low-level crimes, they produce chronic prison overcrowding.

⁹ The actual cost of construction would swell to \$707 million with debt service payments stretched over 15 years.

¹⁰ Enough money for renting 1,600 temporary beds in local Arizona jails and out-of-state prisons, and for bonuses to increase recruitment and retention of prison staff.

Plea bargains manipulate mandatory sentencing

Too often mandatory prison sentencing enhancements are used to “hammer” defendants in plea negotiations. In a 1991 study of the effects of plea bargaining under Arizona’s mandatory sentencing enhancements, researchers concluded that, in their effort to curb judicial discretion, legislators created even more discretion in the hands of prosecutors. And they cautioned that such a system makes it extremely difficult for policymakers to anticipate or control the need for costly prison expansions.¹¹

The data established that prosecutors most often used mandatory sentencing enhancements as a plea bargaining tool. While 57 percent of Arizona’s felony offenders were eligible for mandatory sentencing enhancements, they were imposed on just eight percent. And almost 24 percent of felony convictions involved preparatory offenses such as “attempt,” “solicitation, or facilitation” – substitution charges frequently used by prosecutors to discount otherwise applicable presumptive sentences and eliminate mandatory sentencing requirements. The report also concluded that:

- Overall, the relatively infrequent imposition of mandatory enhancements indicated a wide-spread consensus that these legislated sentencing presumptions were inappropriate.
- The impact of mandatory sentence enhancements on prison population levels was substantial. The average time served by those sentenced with an imposed mandatory enhancement was 45 months longer than the average time served for a non-mandatory prison term. This translated into 4,864 prisoner years (the number of years a prisoner would occupy a bed) attributable to mandatory sentences.

Mandatory sentencing laws limit judges’ discretion

Mandatory sentencing laws diminish the ability of judges to account for individual differences among defendants. All defendants convicted for the same crime are assumed to be equally culpable, no matter their actual role in the offense. Sentences are pre-packaged with a rigid “one-size-fits-all” approach that ignores their potential for rehabilitation.

Former Arizona Court of Appeals Judge Rudolph Gerber points out how widely differing degrees of culpability can exist among defendants convicted of the same offense. “The abused wife who purposively kills her long abusive husband is guilty of the same first-degree homicide as the premeditating, torturing gang member, but the culpability seems very differ-

ent. The neophyte thief who steals for reasons of thrill or medical expense or hunger or to be admitted to a gang (or frat house) has a culpability different from that of the professional thief who makes a living at it, like a chop shop.”

Arizona’s harsh mandatory sentencing laws coerce pleas that, in turn, serve to circumvent the mandatory sentencing laws, says Judge Gerber. “The result: departure from the statutory mandate, a sophisticated form of lawbreaking.” Echoing Judge Marvin Frankel’s complaints about the rampant disorder in the old system of unbridled judicial discretion, Judge Gerber likens the exercise of prosecutorial discretion in plea bargaining as “a system of law without order” – hidden from public scrutiny, completely unregulated and unreviewable by the courts. In his view, Arizona’s mandatory sentencing laws and mandatory enhancements combine to reduce a judge’s role in sentencing from a jurist to a mechanic – oiling the squeaky wheels of a justice system that urgently needs repair.

Mandatory sentences are especially harsh for drug offenders

Except for drug offenders diverted from prison under Proposition 200, the rigid nature of the sentencing laws is especially acute for drug offenders. Arizona’s drug thresholds are relatively low. The threshold for cocaine, for example, requires even a first offender convicted of selling nine grams or more of cocaine to serve a prison term of at least three years. This sharply restricts use of probation for defendants convicted of minor drug sales – or even possession with intent to sell.

Many states are rethinking the laws that govern sentencing for drug offenses. Before leaving office in 2002, Michigan’s Republican Gov. John Engler signed a package of bills into law that repealed that state’s toughest-in-the-nation mandatory drug laws, replacing them with flexible sentencing guidelines. Both the House and Senate voted unanimously to change the laws, after two decades’ experience proved that the harsh sentences had not worked as intended, and had swept up many low-level, non-violent offenders instead of the “kingpins” that legislators’ had hoped to target.

Even *before* this sweeping reform, *probation* was mandatory for an offender such as the one mentioned above.¹² In fact, Michigan’s guidelines now require probation for a defendant convicted of selling up to 50 grams, unless the person had a very significant prior

¹¹ Institute for Rational Public Policy. “Arizona Criminal Code and Corrections Study: Final Report to the Legislative Council.” 1991.

¹² In Michigan, as in Arizona, felony probation can be imposed with a conditional term of up to one year in county jail.

history record (two or more “high severity” prior convictions) or there were serious aggravating factors involved. Even *then*, a Michigan judge is free to choose between placing defendants on probation or sending them to prison. A term of prison is the presumptive sentence only for cases involving sale of 50 grams or more. And, under Michigan’s presumptive guidelines, a judge retains authority to depart from the presumptive sentence in cases where there is a “substantial and compelling reason” for doing so.

Prosecutors typically argue that the drug weight thresholds that trigger mandatory sentencing provisions are set at the critical points where public safety needs are best served by imprisonment. However, there is no evident consensus about where drug weight thresholds should be placed to be effective. Weight thresholds vary widely from state to state. Moreover, in the majority of cases where a threshold is met or exceeded, most actual sentences are lower than required by statute because of plea negotiations.

Sentences often are disproportionate to the crime

Gary T. Lowenthal, a prominent critic of mandatory sentencing who teaches at Arizona State University Law School, recently spent his sabbatical working as a prosecutor in the Maricopa County attorney’s office. In “Down and Dirty Justice,” his book recounting those experiences, Lowenthal describes how Arizona’s rigid sentencing structure and mandatory enhancements are sometimes used to seek sentences completely disproportionate in cases involving very minor criminal acts.

Lowenthal says that the Repeat Offender Program (ROP), intended to target those with a proclivity for

high rate recidivism and punish them more harshly, uses a selection process that appears subjective and puzzling. He observed that defendants with long records were frequently handed over to the regular trial division, at the same time that some defendants with *no* prior felonies were channeled to ROP for special handling by prosecutors who seek the stiffest possible prison sentences.

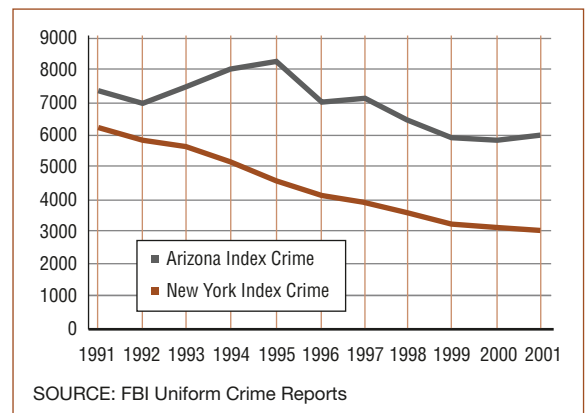
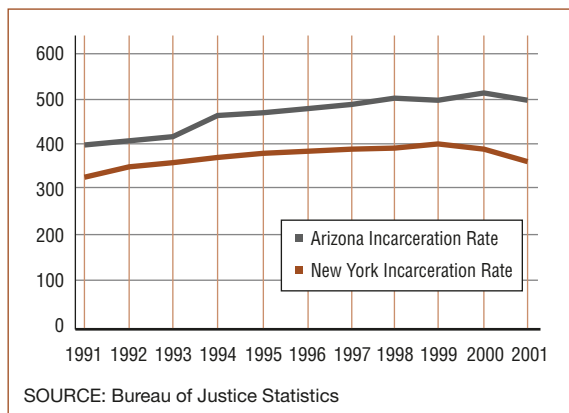
No direct relationship found between incarceration and crime rates

Empirical evidence does not offer strong support for the argument that increasing criminal penalties deters crime, according to a painstaking study by a panel of experts convened by the National Academy of Sciences.¹³ Moreover, there appears to be no direct relationship between incarceration rates and crime rates. During a decade of declining crime rates, states with *larger* increases in use of imprisonment have achieved, on average, *lower* rates of crime reduction than has been the case in states that have relied less on increased use of prison.

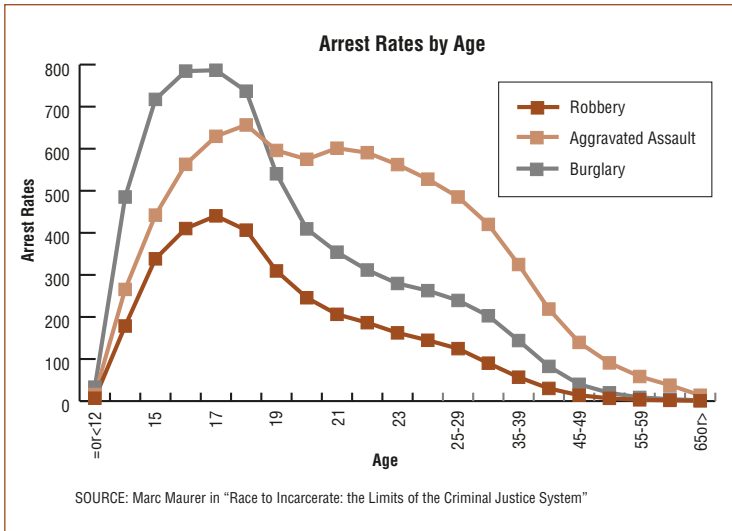
Compare Arizona with New York, for example. Bureau of Justice Statistics data indicate that Arizona’s incarceration rate increased 24 percent, from 396 to 492, between 1991 (the year that crime rates peaked, nationally) and 2001. And Arizona’s index crime rate fell by 18 percent over the same period. In New York the incarceration rate grew only 11 percent for the same period, while the crime rate fell by 53 percent.

This is not to say that sending more people to prison has *no* effect. But research indicates that incar-

Comparing incarceration rates and index crime rates in Arizona and New York



¹³ Blumstein, Alfred, Jacqueline Cohen, and Daniel Nagin. “Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates.” Washington, D.C.: National Academy Press. 1978.



ceration probably accounts for no more than about 25 percent of the decline in violent crimes. Experts see other factors – demographics, drug abuse patterns, police tactics, employment levels – as having more far-reaching effects on crime rates. While long-term incapacitation strategies have only achieved modest crime reductions, they have incurred huge financial costs for prison expansion.

Moreover, under harsh mandatory sentencing laws, the logic of incapacitation rapidly loses traction as prisoners are confined beyond their crime-prone years (between their late teens and early 30s) into the inca-

pacities of old age – when the costs of incarceration skyrocket due to their medical needs.

Arrest rates for robbery and burglary peak at age 17, and the rate peaks at 18 for aggravated assault, yet the average age of state prisoners in the U.S. is 32. Nearly two-thirds of Arizona’s prisoners are 30 or older.

The huge cost-savings claimed by the proponents of incapacitation strategies dissolve under careful scrutiny. In his 1987 monograph on this topic Edwin Zedlewski estimated that imprisonment of the typical offender costs \$25,000 per year while the social costs “saved” though incapacitation of said offender come to \$430,000.¹⁴ Franklin Zimring,

director of the Earl Warren Legal Institute at the University of California charges that Zedlewski’s estimate of the monetary cost per offense was based on “arbitrary and unjustified assumptions,” and that he had grossly inflated the number of crimes averted through imprisonment. Zimring points out that if Zedlewski’s 187-crimes-averted per-prisoner estimate were correct, “the first 12,000 to 20,000 additional prisoners in California during the 1980s would have driven California’s crime rate down to zero.”¹⁵

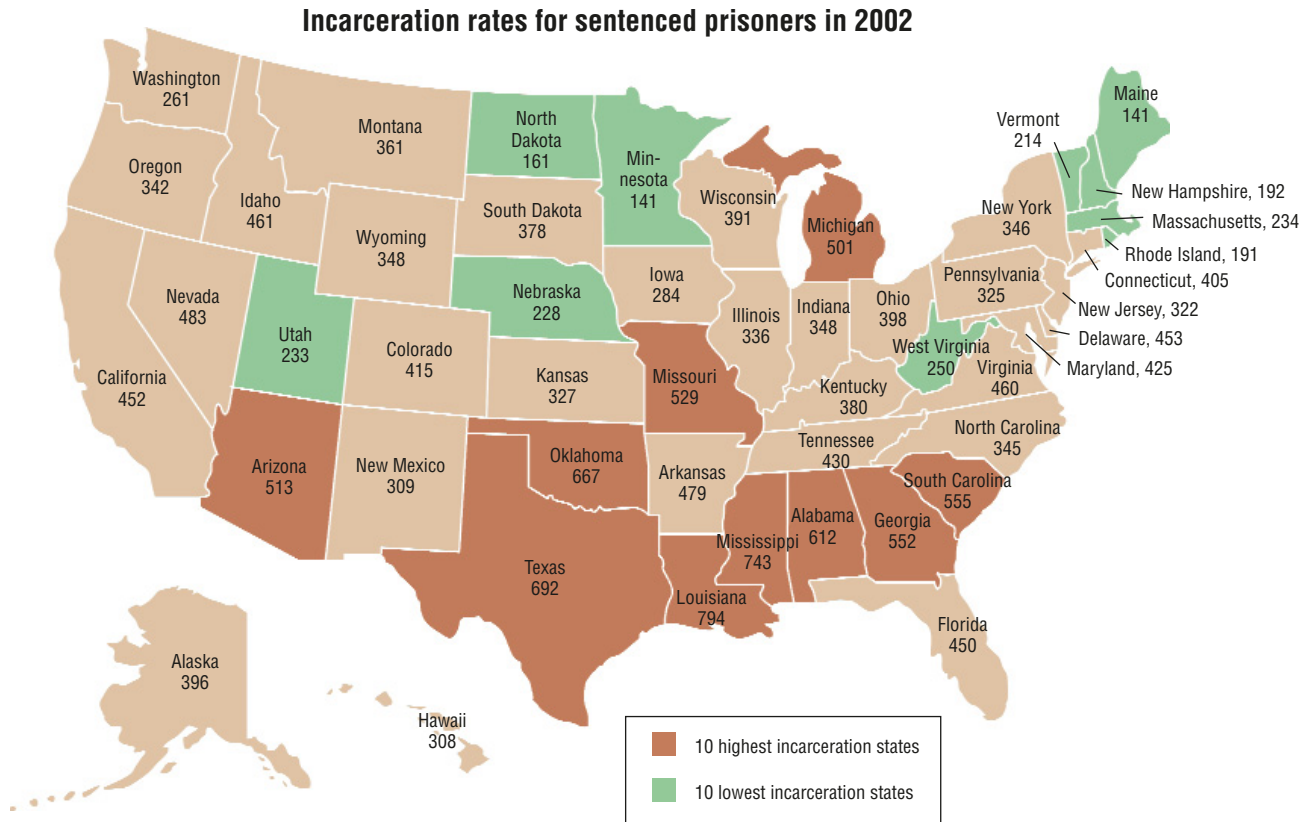
14 Zedlewski, Edwin W. “Making Confinement Decisions.” Washington, D.C.: National Institute of Justice. His calculation was based on an assumption that the typical offender commits an average of 187 crimes per year when not imprisoned, and that the average cost incurred per offense was \$2,300 – accounting for both victim losses and all expenditures entailed in preventing or responding to crime.

15 Zimring, Franklin E. and Gordon Hawkins. “Incapacitation: Penal Confinement and the Restraint of Crime.” New York: Oxford University Press. 1995.

Arizona's mandatory sentences boost prison population

Arizona's mandatory sentencing laws have led to high incarceration rates. While crime index rates have fallen in Arizona, they have fallen much less than in the nation as a whole. Arizona, with the ninth highest

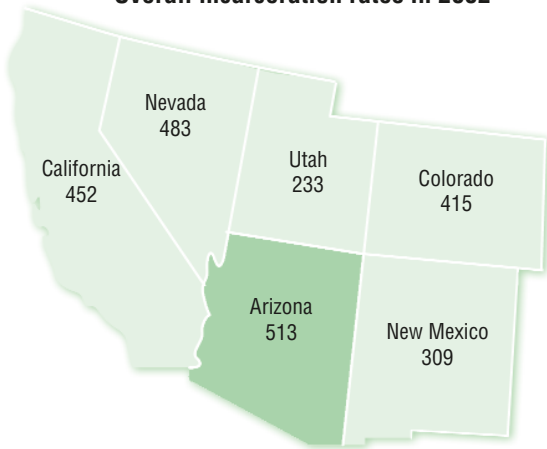
rate of incarceration in the nation, stands in stark contrast among neighboring states in the western region of the U.S. Weighed on a scale of reliance on incarceration, Arizona falls more in line with the southern states.



SOURCE: Bureau of Justice Statistics "Prisoners in 2002," July 2003 (rate per 100,000 residents)

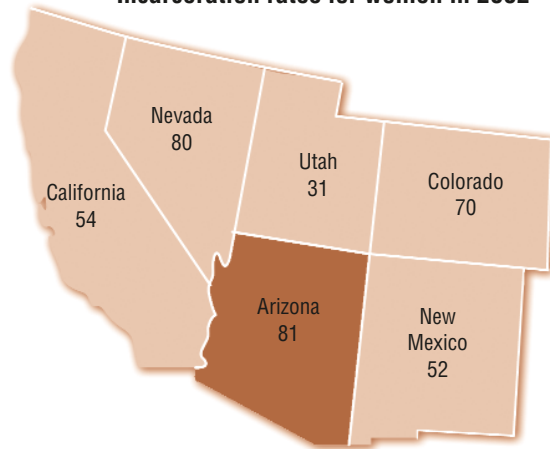
Among contiguous states, Arizona tops its neighbors on every critical measure of reliance on imprisonment:

Overall incarceration rates in 2002



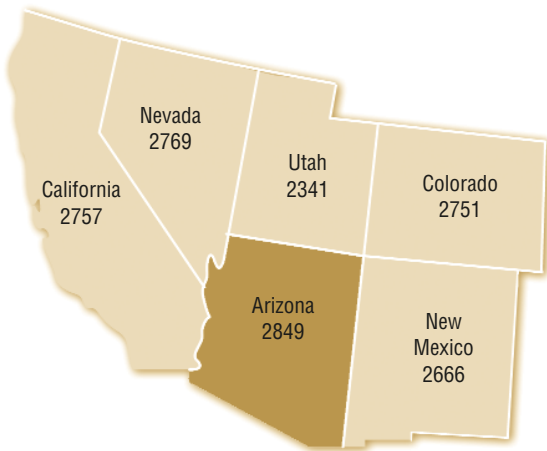
Source: Bureau of Justice Statistics "Prisoners in 2002," July 2003 (rate per 100,000 residents)

Incarceration rates for women in 2002



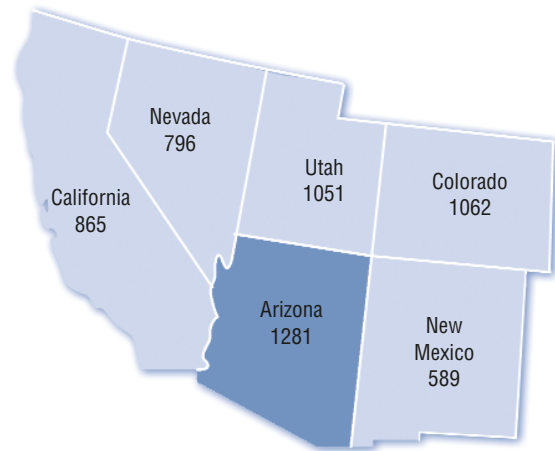
Source: Bureau of Justice Statistics "Prisoners in 2002," July 2003 (rate per 100,000 residents)

Incarceration rates for African Americans in 2001

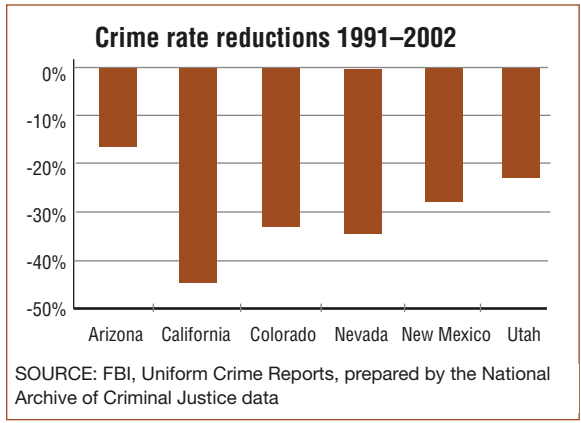
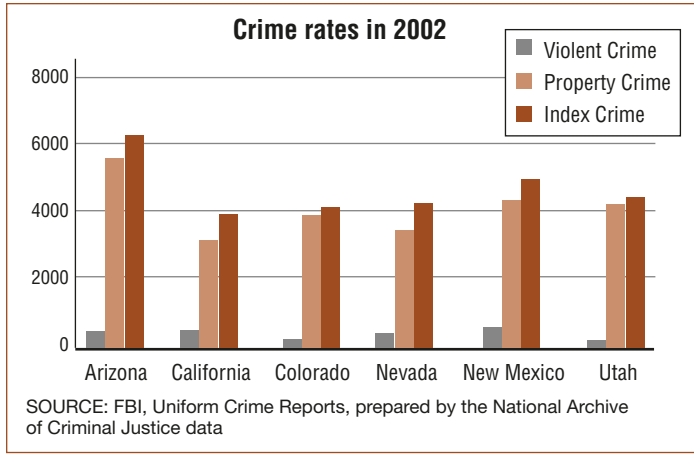


Source: Sentencing Project "State Rates of Incarceration by Race," 2004 (rate per 100,000 residents).

Incarceration rates for Latinos in 1997



Source: National Center on Institutions and Alternatives "Masking The Divide," May 2001 (rate per 100,000 adult residents)



If incarceration were the magic bullet that tough-on-crime advocates claim, Arizona’s reliance on imprisonment might be justified on crime-control grounds. Yet the state *also* tops its neighbors on index crime rates.

In fact, Arizona’s index crime rate of 6,386 in 2002 topped the nation *as a whole*. In 1991 FBI index crime rates began to decline across the U.S and Arizona’s index crime rate has since declined by 14 percent. But the state’s record pales when compared with the 30 percent decline in the national index crime rate. Arizona also lags behind on this key indicator of crime compared with its neighbor states.

More effective strategies for crime control

Establishing sentencing commissions and sentencing guidelines.

While mandatory sentencing provisions have been the major contributing factor in the burgeoning prison population levels in the U.S., structured sentencing approaches promoting greater consistency in

sentencing have been relatively successful in controlling population growth, while retaining more sentencing flexibility for judges.

Where state sentencing commissions have been charged by legislators to consider prison capacity in setting guideline standards, the result has been comparatively slower prison population growth. States with presumptive sentencing guidelines keyed to population control have significantly lower rates of incarceration and prison admissions.

Sentencing guidelines provide predictability as well as consistency. They provide a sentencing structure that can avoid

both extremes – unchecked judicial discretion on the one hand, and the inflexibility of mandatory sentencing schemes on the other. In states like Michigan and Washington, sentencing guideline systems have recently provided policymakers with a vehicle for careful crafting of prudent policy changes, and given them confidence that the reforms will produce the intended impact on prison populations.

Using drug treatment instead of prison.

In adopting Proposition 200 with its provisions of drug treatment for drug users, Arizona voters have recognized the value of drug treatment for offenders. Solid research indicates the cost-benefits of drug treatment over incarceration.

A landmark 1997 RAND Corporation study, “Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers’ Money,” compared the benefits of different law enforcement strategies to treatment for heavy users of cocaine and found that treatment is two to three times more effective than mandatory minimum prison sentences in reducing drug use. The RAND research team estimated that money spent on treatment should reduce serious crimes against both property and persons 10 to 15 times more effectively than incarceration.

A recent U.S. Department of Health and Human Services evaluation of clients in publicly funded treatment programs found that drug use dropped by 41 percent in the year after treatment – while the proportion of clients selling drugs dropped by 78 percent, and the proportion arrested on *any* charge dropped by 64 percent. The “CALDATA” study in California found that for every tax dollar invested in treatment, tax-payers saved \$7 in future crime-and health-related costs.

Staff at the Washington State Institute for Public Policy conducted extensive research on the costs and

benefits of program interventions that might be expected to reduce crime. Findings released in 2003 show that for drug offenders, a dollar invested in imprisonment produces just \$0.37 in crime reduction benefits – while Washington’s drug courts produce \$1.74 in benefits for each dollar of costs.

In the face of budget deficits and spending limits, advocates for “justice reinvestment” argue that America’s \$54 billion prison system represents a wasteful sacrifice of public safety because it drains resources from other priorities – education, housing, and health care – that are vital to sustaining safe communities and healthy families.

Eric Cadora, a program officer at the Open Society Institute, has tracked the problem in graphic detail, literally mapping the fiscal costs involved in maintaining a policy of mass incarceration. In one New Haven neighborhood – “The Hill” – for example, the state of Connecticut spent \$20 million in 2002 to incarcerate 387 people. Cadora asks whether spending that entire sum to incarcerate them is necessary or wise – especially given that most will return to The Hill at release. He suggests that targeted reinvestment of at least a portion of the funds now tied up in warehousing prisoners such as these could be used instead to prevent their incarceration.

Concentrate on programs that reduce violent crime in the long term.

The Center for the Study and Prevention of Violence at the University of Colorado published the results of painstaking evaluation of more than 400 programs that aim at reducing violent crime. Eleven specific strategies were found to be effective in preventing crime, with four found to reduce arrests or convictions by more than 50 percent. The most effective crime-control programs involved sending nurses to help improve the health of young mothers and improve the care given to infants and toddlers; targeting “at-risk” youths and their families with therapy geared to motivation and behavioral change, as well as improving their coping and problem-solving skills; and providing a structured, therapeutic foster care environment for teens with serious, chronic patterns of criminal behavior.

Other states turn to smart-on-crime agendas

While policy reform efforts seem to have largely stalled in Arizona, a new movement toward smarter, less costly sentencing and correctional strategies is taking hold elsewhere. After a quarter-century of booming prison population growth that nearly quintupled the number of state prisoners in the U.S., the “get-tough-on-crime” laws and policies of the 1980s and 1990s now haunt state officials struggling with state budget shortfalls.

The fiscal crisis is far from over. Having struggled with a cumulative \$200 billion in revenue shortfalls since the beginning of the crisis, many states are entering their fourth year of fiscal misery. Some 30 states are projecting deficits for fiscal year 2005. Arizona ranks among eight where the shortfall estimate exceeds 10 percent of the state’s general fund budget. Nationally, as state policymakers embrace a new spirit of fiscal discipline, many are embracing smarter, less costly sentencing and correctional policies and practices.

Lawmakers and executive-branch administrators are considering “smart on crime” agendas in many states involving a variety of sentencing and correctional policy reforms. Many state officials are taking strategic steps to rein in prison and jail population growth and yield significant budget savings:

- Eliminating mandatory minimum sentencing laws
- Revising sentencing laws and guidelines to return discretion to judges
- Rolling back harsh truth-in-sentencing laws and habitual offender statutes
- Diverting non-violent drug offenders to treatment instead of incarceration
- Increasing the “earned-time” credits available as positive incentives
- Revising parole standards for better-informed release decisions
- Responding more effectively to minor technical violations of probation and parole.

Three states have introduced major structural reforms to improve the effectiveness of their sentencing and correctional systems and should harvest very significant correctional cost savings as a result.

- **Michigan** legislators repealed almost all mandatory minimum drug statutes – long cited as among the toughest in the nation – replacing them with drug sentencing guidelines that give discretion back to Michigan judges. This sweeping reform of Michigan’s tough mandatory minimum drug laws was accom-

plished in 2002 with broad bipartisan support. Sentencing reform advocates from Families Against Mandatory Minimums (FAMM) worked with leaders from the Michigan Prosecuting Attorneys Association and the Michigan Association of Drug Court Professionals to assist legislators in forging a code reform package that reflects the national trend toward “smart sentencing.” It is estimated that Michigan’s reforms produced a cost savings of \$41 million in 2003 alone.

- **Ohio** policymakers used structured reforms at both the front-end and the back-end of the correctional system to stabilize the prison population and to reduce the number of prisoners by more than 5,100. In January 2002 corrections director Reginald Wilkerson shut down the Orient Correctional Institution, wringing as much as \$40 million out of the annual corrections budget. In 2004 he closed a second prison at Lima to save an additional \$25 million.

- **Washington** legislators amended sentencing guidelines to give judges more discretion to divert non-violent drug offenders from prison to treatment and to reduce prison sentences for drug trafficking. Part of the savings will increase funding for treatment by about \$8 million over the next biennium. Legislators also enacted an increase in early-release eligibility for non-violent, non-sex offenders, increasing time credits off of sentences from one-third to one-half. They hope that early releases will reduce the prison population by more than 500 prisoners to save about \$40 million over the next two years.

Since the beginning of the fiscal crisis policymakers at least 18 states have rolled back mandatory minimums or restructured other harsh penalties enacted in preceding years to “get tough” on low-level drug offenders or non-violent lawbreakers.

- **Texas** legislators, including many conservative, tough-on-crime Republicans, voted to replace prison sentences with mandatory treatment in first-offender felony drug possession cases involving less than one gram of narcotics. Texas taxpayers will be spared an estimated \$30 million over the next biennium as the prison population falls by 2,500 drug offenders.

- **Kansas** legislators amended sentencing guidelines to divert non-violent offenders convicted of drug possession offenses from prison to mandatory drug treatment and eliminated mandatory enhancements for repeat drug offenders. They allocated almost \$6 million to provide treatment for diverted offenders.

- **Colorado** legislators reduced penalties for low-level drug offenders this year. The measure should save more than \$7.8 million by fiscal year 2008 by lowering the classification for possession of less than a gram by first offenders to the lowest felony class and downgrading such offenses for repeat offenders. At least

\$2.2 million of the savings that result will be allocated to a dedicated community-based treatment fund.

- **Mississippi** legislators amended the truth-in-sentencing law to restore parole for non-violent first offenders. By April 2003, 900 prisoners had been released and the reform saved the state \$12 million in prison costs.

Officials in 15 states have eased prison population pressures with mechanisms to shorten time served in prison, increase the release rate and handle those who violate release conditions without returning them to prison.

- **Texas** policymakers introduced parole reforms in 2000. The parole board’s approval rate for non-violent offenders rose, the rate of parole revocations fell sharply, and the prison population dropped by 7,698 from September 2000 to the end of December 2001.

- **Kansas** correctional authorities are sanctioning probation and parole violators within the state’s community-corrections system rather than sending them to prison. Legislators reduced the length of community supervision for offenders convicted of low-level offenses, cutting supervision time by half in many cases. The reforms resulted in immediate discharge of 574 prisoners and are expected to save almost 800 prison beds for more serious offenders.

- **Colorado** legislators provided a community-corrections alternative to returning parolees to prison for technical violations. They also eliminated “post-parole community supervision” – a mechanism that tacked an extra one-year period of supervision on revoked parolees after they served out their mandatory parole period in prison. The reforms are projected to save \$27 million by fiscal year 2008.

- **Kentucky** policymakers adopted new risk-assessment guidelines to increase the chances of parole-eligible prisoners being granted release and approved a measure to allow non-violent prisoners to work off a portion of their sentences in community service projects.

As they strive to bring spending for vital public services in line with available public revenues, Arizona policymakers might consider whether “smart-on-crime” policies could be tailored to safely trim the prison population, thereby generating significant correctional budget savings.

A closer look at incarceration in Arizona

Methodology

To better understand the use of incarceration in Arizona, Families Against Mandatory Minimums (FAMM) requested data on both the standing prison population and prison admissions from the state Department of Corrections (DOC). Dr. Daryl Fischer, research manager at DOC, generously provided two data files: a snapshot of Arizona's standing prison population on August 31, 2003, and a file of new court commitments to DOC (including persons sentenced directly to prison or revoked from probation but not those revoked from parole) between December 2002 and November 2003.

These DOC data files contain a wealth of information on Arizona prisoners, including data on personal characteristics (age, gender, race, ethnicity, nationality, number of dependents, substance abuse and mental health needs, etc.), criminal record (number of prior felonies, number of past prison commitments, etc.), offense of conviction (offense type, statute, enhancement and/or preparatory codes applied to sentencing, involvement of injury and weapons in offense, etc.), and sentence (length, jail credit received, possible release dates, etc.).

However, the DOC data lack some information needed to assemble a complete picture of incarceration in Arizona. The data files help us understand what prisoners were convicted of, but not what they actually did or what charges and sentencing enhancements were alleged but withdrawn as part of a plea agreement. They help us understand who goes to prison but tell us little about the offenders who were never sent to prison. Finally, the files do not provide enough information about criminal record and offense of conviction to fully flesh out reform proposals or accurately project their impact on the prison population.

To strengthen their analysis, the authors also interviewed more than 30 Arizona criminal justice and other professionals, including judges, court staff, defense attorneys, former prosecutors, probation officers, treatment providers, legal scholars, academics

and researchers. Although many of those interviewed work in Maricopa County, which accounts for over half of all prison commitments, professionals who work statewide and in other counties were also included. Finally, the authors reviewed academic and other research on Arizona's criminal justice system as well as agency reports and websites.

Where possible, the authors checked quantitative findings derived from DOC data against qualitative feedback from criminal justice professionals as well as related research and reports. They also drew on the expertise of DOC's Fischer, who generously took time from his busy schedule to discuss the DOC data and proposed methods of analysis.

Who is in prison

Offense of conviction

Over half (55.2 percent) of Arizona's prison population is serving time for non-person offenses (i.e., non-violent and non-sex), and most of those incarcerated for non-person offenses (53.1 percent) were convicted of relatively low-level crimes.

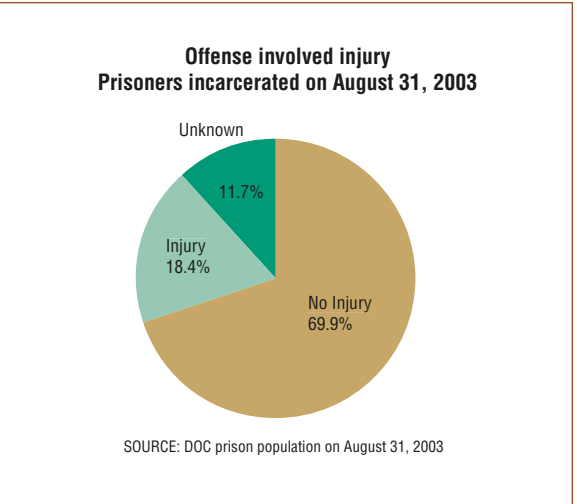
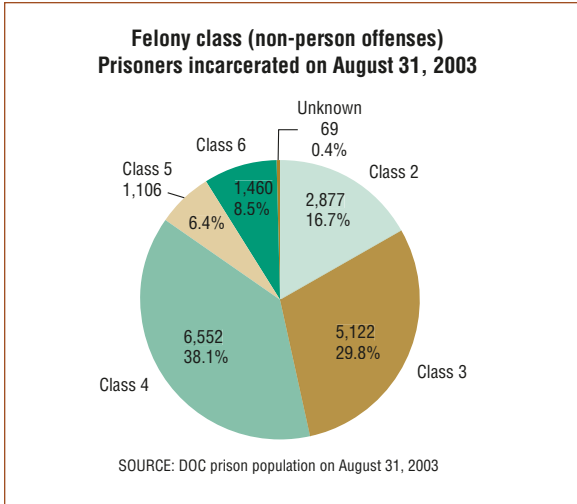
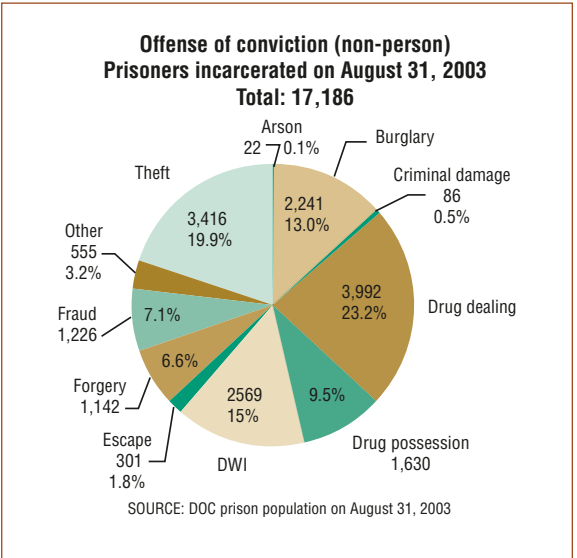
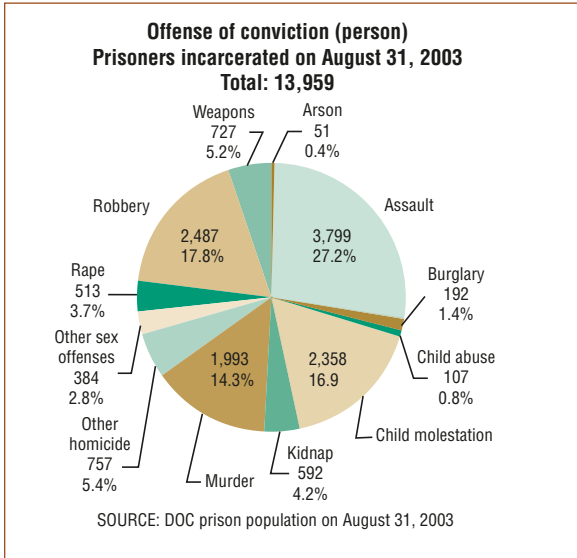
The Arizona DOC uses a number of categories to describe the offenses for which prisoners have been sentenced. "Person" offenses are divided between sex and violent offenses, and include arson (residential), assault, burglary (first-degree), child abuse, child molestation, kidnap, murder, "other homicides," "other sex offenses," rape, robbery and weapons charges.

"Non-person" offenses are divided between drug, driving under the influence (DUI), miscellaneous and property offenses, and they include arson (non-residential), burglary (not first-degree), criminal damage, drug dealing, drug possession, DUI, escape, forgery, fraud, theft and "other" charges.¹⁶ Finally, offenses can be further subdivided according to the specific statute under which a prisoner was convicted. For example, prisoners sentenced for theft include persons convicted of simple theft, unlawful use of transportation, shoplifting and theft of means of transportation.

On August 31, 2003, according to the snapshot of the standing prison population provided by DOC, the majority (55.2 percent) of the 31,145 individuals serving time in Arizona prisons were incarcerated for non-person offenses. Under half (44.8 percent) were convicted of sex or violent crimes.

Among non-person offenses, drug dealing led the

¹⁶ The category of "miscellaneous offenses" includes escape and offenses committed in other states by prisoners housed in Arizona under the interstate compact as well as "other" offenses such as engaging in prison contraband and resisting arrest.



list with 3,992 prisoners (23.2 percent of non-person offenses), more than the combined total of prisoners sentenced for rape, kidnapping and all homicides (3,855). Other top non-person offenses included theft (3,416 or 19.9 percent), DUI (2,569 or 15 percent), burglary (2,433 or 13 percent) and drug possession (1,630 or 9.5 percent).

Like many other states, Arizona’s criminal code ranks offenses by seriousness according to felony class. Class 1 is reserved for homicide, leaving Classes 2 and 3 to denote the most serious offenses in all other offense categories. In addition to carrying longer sentences, Class 2 and 3 felony convictions are treated as “historical priors” under the state’s repeat offender sentencing statute for 10 years. Classes 4, 5 and 6 denote less serious offenses, carry shorter sentences and

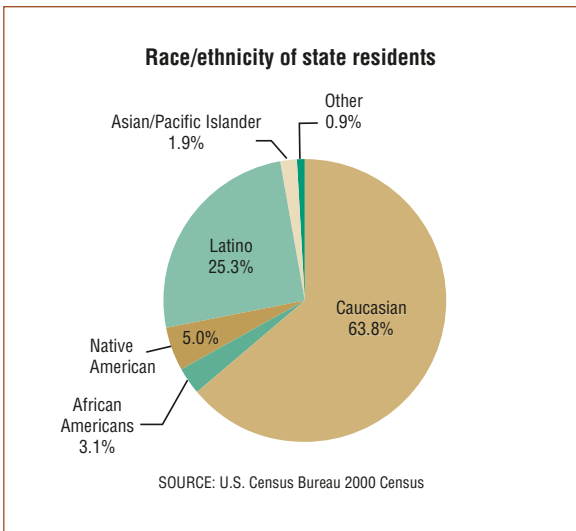
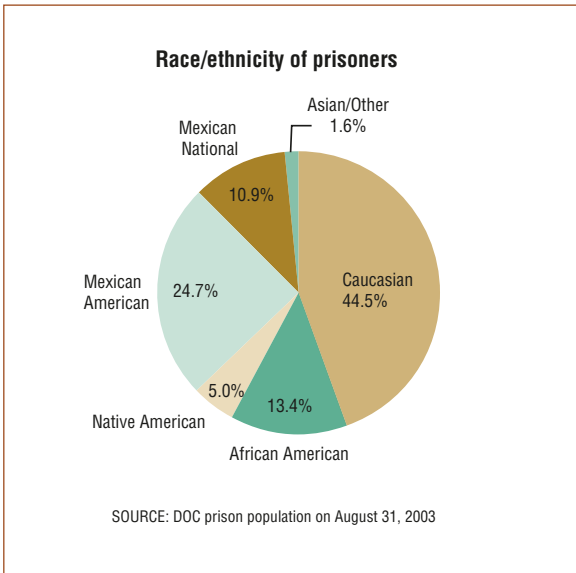
are treated as historical priors for only five years.

On August 31, 2003, the majority of Arizona prisoners were serving time for Class 1, 2 or 3 felonies. Prisoners sentenced for Class 4, 5 or 6 offenses made up more than a third of the state prison population (11,826 of 31,145) and more than half (53.1 percent) of those incarcerated for non-person offenses.

Finally, the vast majority of Arizona prisoners were sentenced for offenses that did not involve victim injury or use of firearms. Injuries were reported in 5,724 cases (18.4 percent) compared to 21,764 cases (69.9 percent) in which no injury was recorded.¹⁷ Involvement of a gun was reported in 4,387 cases (14.1 percent), while most cases (17,826 or 57.2 percent) involved no weapon of any kind.¹⁸

17 Information on injuries was unavailable in 3,656 cases (11.7 percent).

18 Information on weapon was unavailable in 3,700 cases (11.9 percent).



Race/ethnicity

African Americans and Latinos are significantly over-represented in Arizona prisons as compared to the general population, particularly among those incarcerated for drug offenses, while Native Americans are heavily overrepresented among incarcerated DUI offenders.

The August 31, 2003, data shows that whites made up just under half (44.5 percent) of all prisoners, followed by Latinos (35.6 percent divided between Mexican Americans with 24.7 percent and Mexican nationals with 10.9 percent), African Americans (13.4 percent), Native Americans (5 percent) and Asian or other (1.6 percent).¹⁹ African Americans, who make up just 3.1 percent of the state population according to 2000 census data, are heavily overrepresented in Arizona prisons, as are Latinos (25.3 percent of the general population). Native Americans make up the same proportion of state prisoners as state residents (five percent). However, the latter figure counts only Native Americans in custody of the state, while tribal and Federal authorities handle most crimes committed on reservations.

Minority overrepresentation is more pronounced in certain offense categories. For example:

- Among drug offenders, African Americans comprised 18.7 percent and Latinos 38 percent, while whites made up 39.1 percent.
- Among DUI offenders, Native Americans (17.9 percent) and Latinos (39.6 percent) were heavily overrepresented, whereas whites (36 percent) were significantly underrepresented.
- Among violent offenders, African Americans and Latinos were also overrepresented comprising 16.2 percent and 40.3 percent, respectively, compared to 36.9 percent for whites.

Prior felony record

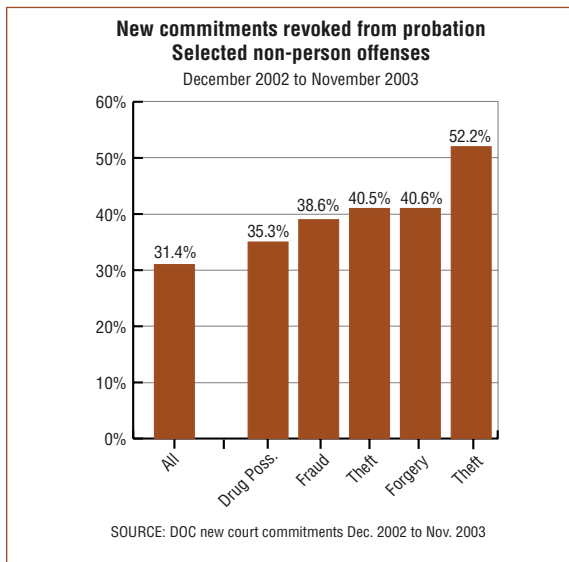
On August 31, 2003, just over three in every five Arizona prisoners had one or more prior felony convictions (62 percent).²⁰ Nearly two in five had no prior felony record. DUI and property offenders were most likely to have prior felony records, while sex and vio-

19 DOC currently classifies prisoners as Caucasian, African American, Native American, Mexican American, Mexican national or Asian/other. While most of those classified as Mexican American and Mexican national are undoubtedly of Mexican origin, other Latinos are also included in those categories.

20 The term “prior felony” refers here to a conviction obtained before the conviction for which the prisoner is currently incarcerated. At intake, DOC staff records the number (but not the type) of felony convictions for each prisoner based on information in his or her case file. In roughly a third of all cases, the number of prior felonies is listed as “unknown” – often because the individual had little or no previous contact with law enforcement, according to Dr. Daryl Fischer. In order to better distinguish first-time offenders from repeat offenders, DOC research staff used a number of data fields to create a composite yes/no variable for prior felonies. The composite variable, which is more complete and accurate than data on the number of prior felonies, is used in this report to calculate prior felonies for prisoners incarcerated as of August 31, 2003. The composite variable was unavailable for the new court commitments file, DOC between December 2002 and November 2003, so calculation of prior felonies in that dataset is based on those records for which the number of prior felonies was known.

lent offenders were least likely.

African American prisoners were somewhat more likely than whites to have prior convictions (70.8 and 63.7 percent respectively), Native Americans were slightly less likely (60.9 percent), Mexican Americans were equally likely (63 percent) and Mexican nationals were far less likely (43.4 percent). Among new court commitments between December 2002 and November 2003, African Americans also had the highest average number of prior felonies (2.2) followed by whites (1.8), Mexican Americans (1.5), Native Americans (1.2) and Mexican nationals (0.7).



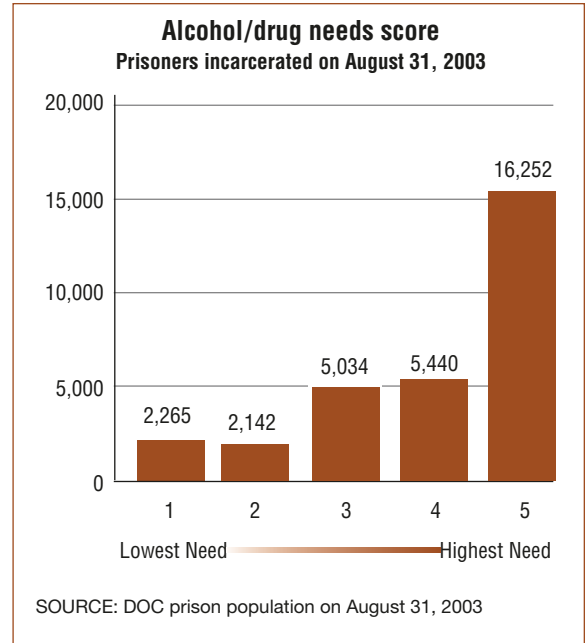
Probation revocation

Probation revocations accounted for 4,067 (31.4 percent) of 12,961 new court commitments to the DOC between December 2002 and November 2003. This figure includes two in every five new commitments for forgery (40.6 percent), theft (40.5 percent) and criminal damage (52.2 percent) and over a third of new commitments for fraud (38.6 percent) and drug possession (35.3 percent).

Substance abuse

The overwhelming majority of Arizona prisoners have serious substance abuse issues.

The high incidence of substance abuse among persons involved in the criminal justice system, particularly in prisons, is now common knowledge. For those who use controlled substances, possession of the chemicals themselves constitutes a crime; furthermore, the high cost of illegal drugs leads many addicts to either steal or participate in the drug trade to fund their habits. When Arizona voters passed the land-



mark Proposition 200 in 1996, mandating treatment rather than incarceration for individuals who possess drugs for personal consumption, they were reflecting a fundamental shift in the way most Americans think about illegal drugs.

However, because Proposition 200 applies only to first- and second-time drug possession, and not other crimes such as low-level drug sales and property crimes, Arizona continues to incarcerate a large number of chemically dependent individuals. At intake, all Arizona prisoners are assessed on their need for substance abuse treatment and assigned an alcohol and drug needs score from one to five, with five indicating the most need.

- Over half (52.2 percent) were assigned the highest possible needs score and six out of seven (85.8 percent) were assigned a score of three or higher.
- The problem is even more severe among female prisoners, three-fourths of whom (75.9 percent) were assigned a score of five.
- DUI and drug prisoners had the highest scores (76.8 percent and 62.9 percent, respectively, received a score of five), but even sex and violent offenders, who scored lowest, were overwhelmingly assigned scores of three or higher.
- Substance abuse was most prevalent among women convicted of drug offenses, with 87.5 percent receiving the highest possible alcohol and drug needs score.

In addition to assessing a prisoner's overall need for substance abuse services, DOC staff use self-reports and information drawn from case files to identify the substances used by prisoners at intake. Chemical use varies significantly by gender and race.

Among male prisoners, chemical use included:

- Narcotics (principally cocaine) – 28 percent
- Marijuana – 18.7 percent
- Stimulants – 6.9 percent
- Polydrug (more than one) – 5.3 percent
- No chemical other than alcohol – 39.9 percent

Among female prisoners, chemical use included:

- Stimulants (principally methamphetamine) – 53.3 percent
- Marijuana – 11.3 percent
- Narcotics – 9 percent
- Polydrug – 6.5 percent
- No chemical other than alcohol – 18.5 percent

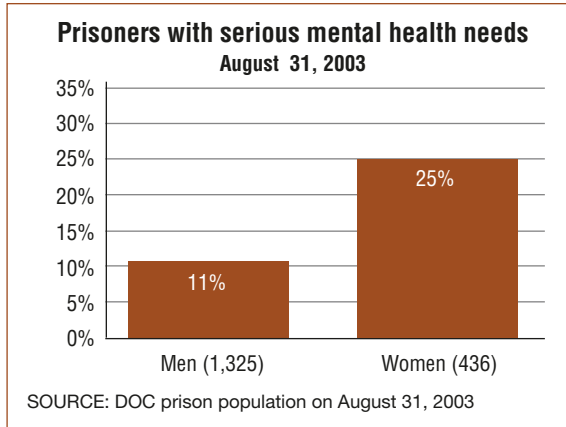
Just under a third of prisoners were heavy alcohol users (30.6 percent), with the vast majority of those using alcohol in combination with another drug. Women were less likely to be heavy alcohol users (20.7 percent).

Among women incarcerated for drug and property offenses, 1,113 or 61 percent were stimulant users.

The data also allow us to look at chemical use by race, ethnicity and nationality, finding that:

- Two-thirds of whites, African Americans and Mexican Americans used chemicals other than alcohol (65.9 percent, 64.4 percent and 63.3 percent, respectively).
- Just under a third of whites, African Americans and Mexican Americans used narcotics (28 percent, 28.7 percent and 26.4 percent, respectively).
- Whites were twice as likely to use stimulants (15.6 percent) as African Americans (6.1 percent), and significantly more likely than Mexican Americans (9.8 percent)
- African Americans and Mexican Americans were more likely to use marijuana (25.3 percent and 20.4 percent, respectively, compared to 15.2 percent for whites).
- Native Americans and Mexican nationals were much less likely to use chemicals other than alcohol (46.5 percent and 42.8 percent respectively).

- Native Americans were most likely to use marijuana (19.4 percent) and Mexican nationals most likely to use narcotics (22.6 percent).



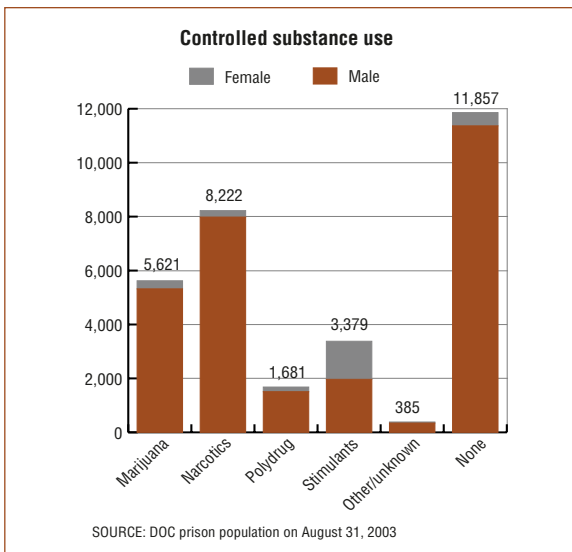
Mental illness

The relationship between mental health and incarceration has also received greater attention in recent years, as both corrections and mental health professionals have become acutely aware of a growing population of mentally ill prisoners and detainees. The incarceration of mentally ill persons can harm both the individuals and the institutions that house them. Prisons are generally ill-equipped to handle mentally ill inmates, who have trouble conforming to rules and are disproportionately likely to be confined in segregation units for disciplinary violations that are symptoms of an illness over which they have little control.

On the other hand, the harshness and isolation of prison life, combined with a lack of appropriate medical and psychiatric care, can cause the condition of mentally ill individuals to worsen. A 2003 report by Human Rights Watch and the National Alliance for the Mentally Ill found that, nationally, the incarcerated mentally ill were under-treated or not treated at all, and subject to frequent abuse.

DOC staff assesses prisoners' mental health needs at intake and assigns them a score between one and five, with scores of three and above indicating serious mental health problems. On August 31, 2003, 11.3 percent of male prisoners and 24.7 percent of female prisoners (3,875 in total) had mental health needs scores of three or higher. Among new court commitments to DOC (December 2002 to November 2003) the proportions were even greater, with 13.5 percent of men and 31 percent of women (15.7 percent overall) having serious mental health problems.

Among prisoners incarcerated as of August 31, 2003, "miscellaneous" and property offenders were most likely to score three or above (14.9 percent and



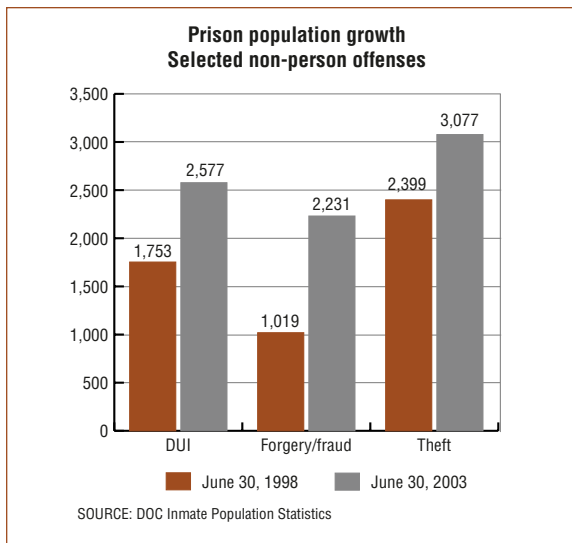
14.2 percent, respectively). One criminal justice professional who works with mental health issues suggested that these figures underestimate the extent of the problem, since DOC relies primarily on self-reports, supported by medical records only if prisoners have previously been diagnosed. Mental health problems that have not been diagnosed may not be detected unless prisoners themselves report them.

There is considerable overlap in the populations affected by substance abuse and mental health issues, since individuals with severe mental health needs tend to use drugs and alcohol to self-medicate. The National Institute of Mental Health Epidemiological Catchment Areas study, conducted in the 1980s, estimated that 90 percent of inmates in correctional facilities surveyed who had a mental disorder also had a substance use disorder. Among Arizona prisoners with mental health needs scores of three or higher, 61.5 percent had the highest alcohol and drug need score compared to 50.9 percent of those whose mental health needs score was two or below.

Individuals who are mentally ill *and* chemical addicted present a particular challenge for criminal justice and behavioral health systems: not only are their issues and behavior difficult to address, but they are also often refused access to, or served poorly by, programs that address only one aspect of the problem. For example, techniques often used in substance abuse treatment such as heavy confrontation, intense emotional jolting and discouragement of the use of medication can be detrimental for patients who are dually diagnosed according to the National Alliance for the Mentally Ill.

Prison population growth: 1998 to 2003

Arizona’s prison population is growing rapidly, a trend



driven in large part by the truth-in-sentencing statute that took effect in 1994, as well as an explosion in the number of people incarcerated for offenses such as DUI, forgery and fraud.

According to DOC statistics, between June 30, 1998, and June 30, 2003, Arizona’s prison population grew by 25.3 percent, from 24,660 to 30,898. Offenses contributing significantly to that growth include forgery/fraud, for which numbers more than doubled from 1,019 to 2,231 (an increase of 120 percent); DUI, which increased from 1,753 to 2,577 (47 percent); and theft, which grew from 2,399 to 3,077 (28.3 percent).

The Arizona Criminal Justice Commission (ACJC) reports, based on DOC data, that the average time served by persons before their release from prison grew substantially since 1994, from 25 months to 34 months (a 36 percent increase). ACJC staff attributes this growth primarily to “harsher penalties for dangerous and repetitive offenders under truth-in-sentencing.”

According to data included in an October 2003 legislative briefing by DOC director Dora Schriro, DUI and drug offenses have seen the greatest increase in time served since 1994 (from 11 to 17.6 months, or 60 percent, for DUI; from 25.8 to 33.6 months, or 30.2 percent, for drugs), while offenses against persons have seen the smallest increase (from 46.9 to 48.3 months, or 3 percent). Among the six felony class levels, Class 5 offenses saw the greatest growth in months served (from 13.3 to 19.9, or 49.6 percent).

Finally, as of June 30, 2003, individuals under 25 years of age comprised 19.1 percent of the total prison population, a small increase from the 17.8 percent reported as of June 30, 1998. The proportion of individuals aged 50 and above also increased over the last five years, from 8 percent to 9.2 percent.

Mandatory sentencing enhancements

Arizona’s determinate sentencing system and mandatory minimum sentences tie sentences to the charges brought by the prosecutor and offender’s prior record, leaving judges little room to exercise discretion, as discussed. Proponents of determinate sentencing and mandatory minimums argue that when judges have too much discretion, some punish offenders harshly whereas others let them “get off easy” for the same crime.

But determinate sentencing and mandatory minimums do not eliminate sentencing disparity, nor do they ensure that the punishment fits the crime and the individual defendant’s role in the crime. Instead, all

sentencing discretion shifts to prosecutors who decide what charges and other allegations will be made against the defendant – a decision that cannot be reviewed or appealed in any court. The system is “efficient” in terms of virtually guaranteeing that a defendant will not choose to exercise his or her right to trial and allowing prosecutors to close cases quickly.

However, effectively shifting all sentencing discretion to prosecutors eliminates the traditional checks and balances in the American system of justice. Prosecutors are one party in an adversarial system. They make their decisions without benefit of hearing the defendants’ cases or testimony of witnesses on both sides. This – coupled with narrow sentencing ranges that cannot accommodate a range of factors – creates the danger that the punishment will not fit the specific circumstances of the crime or the offender.

Plea agreements do mitigate the mandatory sentences set by statute. Yet the mandatory sentences still provide the benchmark for the plea agreements, driving up the overall length of time served by defendants and the costs to taxpayers. Plea negotiations may also be based on factors other than culpability and seriousness of the crime. For example, drug sale pleas may be based on the ability of the defendant to provide information about a drug conspiracy, which can leave those with the least involvement in the drug trade serving the longest sentences.

Broadly defined, easily manipulated

The mandatory sentencing enhancements are so broad that individuals who commit minor offenses are caught in the same net as those who pose a significant risk and are subject to the same harsh penalties.

The four sentence enhancements most commonly applied and/or used as leverage by prosecutors to secure plea agreements:²¹

1) **“Repetitive” offenders:** Those charged with a felony offense who have previously been convicted of one “historical prior” felony, if convicted, are ineligible for probation and face enhanced prison terms. Those previously convicted of two or more “historical prior” felonies are subject to even longer mandatory sentences.

As defined by statute, an historical prior includes

- a. any felony conviction for an offense committed within the last five years of the current offense;²²
- b. A Class 2 or Class 3 felony convictions for an offense committed within 10 years of the current offense; or
- c. any conviction for a “dangerous” felony or

felony DUI, regardless of when the offense occurred.

Example: A person charged with theft of property worth \$2,500 (a Class 4 felony) who was convicted of even a minor offense committed three years earlier faces mandatory prison with a presumptive sentence of 4.5 years. If convicted of two such prior offenses committed within the past five years, the defendant faces a presumptive sentence of 10 years.

The Institute for Rational Public Policy (IRPP) conducted an in-depth study of Arizona charging, plea-bargaining and sentencing practices in 1991. The IRPP report found that offenders were eligible for the repeat offender enhancement in 47 percent (7,472) of 15,720 cases examined. While the study is dated and the proportion of offenders eligible might be lower today due to the establishment of five and 10-year “washout” periods for non-dangerous, non-DUI felonies, those who work in the courts believe the proportion remains quite substantial.

2) **“Multiple” offenses:** Those charged with two or more felony offenses (other than drug offenses) arising out of separate criminal incidents but consolidated in the same criminal proceeding are ineligible for probation if convicted of more than one.

Example: A person charged with submitting two forged checks to two different banks on two different days faces mandatory prison with a presumptive term of 2.5 years for the second offense. If three checks were involved, the defendant would face mandatory prison with a presumptive term of 4.5 years for the third offense.

Those charged with three or more felony drug offenses arising out of separate criminal incidents but consolidated in the same criminal proceeding are ineligible for probation, and, if the weight of the drugs exceeds the statutory threshold, they are subject to enhanced sentences.

Example: A person charged with selling cocaine to an undercover officer on three different days faces mandatory prison with a presumptive term of five years for the third offense. If the weight of the drugs involved exceeded the statutory threshold, the defendant would face a presumptive term of seven years.²³

3) **Offenses committed on supervised release from confinement:** Defendants charged with any felony offense committed while on probation, parole or under other supervision as a result of a previous felony conviction are ineligible for probation and subject to a sentence of no less than the presumptive term if convicted. Furthermore, revocation of probation or parole is automatic upon conviction of a new felony offense, and the two sentences must be served consecutively.

²¹ More complete and detailed descriptions of these and other sentencing enhancements are available in Appendix I.

²² Time spent incarcerated, escaped from custody or on absconder status from probation is discounted from the five- and 10-year periods.

²³ Drug offenses involving amounts above the threshold are ineligible for probation on the first offense.

Example: A person charged with felony shoplifting (Class 6) while on probation for DUI faces a new prison sentence for the original DUI conviction (for which the presumptive term is 2.5 years) and a mandatory prison sentence of no less than the presumptive term (1.75 years because the defendant also has one historical prior), which must be served consecutively.

The IRPP report found that offenders were eligible for enhanced sentences because their crimes were committed while on release of confinement in 2,876 or 18 percent of cases examined.

4) **“Dangerous” offenses:** Individuals charged with dangerous offenses – offenses involving serious physical injury to a victim or the use or threat of a deadly weapon or dangerous instrument – are ineligible for probation and subject to enhanced sentences.

Example: A person charged with aggravated assault for threatening another with a gun (a Class 3 felony) faces mandatory prison with a presumptive term of 7.5 years because use of a deadly weapon makes the crime a dangerous offense.

The enhancement for dangerous offenses interacts with the other three enhancements described above. Those charged with multiple dangerous offenses or dangerous offenses committed while on supervised release for dangerous offenses, or those who have one or more dangerous historical priors, face even longer sentences.

The IRPP report found that offenders were eligible for the dangerous offense enhancement in 2,148 or 14 percent of the cases examined.

Those who repeatedly commit crimes involving dangerous weapons or serious injury to victims should face the longest sentences. But the mandatory sentencing enhancements that apply to repetitive offenders, multiple offenses and even offenses committed on release do not distinguish well between very serious and very minor criminal behaviors.

Examples: Probation is available for a defendant who embezzled \$50,000 once, but not for a defendant who forged two checks worth \$500 in the course of a week.

Stealing \$1,500 while on probation for check forgery leaves a defendant facing a minimum of 2.5 years in prison. But stealing a \$25,000 car leaves the defendant probation-eligible and facing as little as two years even if he or she is sentenced to prison.

A major drug dealer with no felony record charged with sales of a kilo of cocaine faces a presumptive sentence of five years and a minimum of three years. A drug addict previously convicted of drug possession and subsequently charged with selling half a gram of cocaine faces a presumptive sentence of 9.25 years and a minimum of 4.5 years.

A person charged with third-degree burglary of a parked car with two historical priors faces the same presumptive sentence (10 years) whether the prior convictions are for armed robbery or simple drug possession.

Not only do these sentencing enhancements fail to distinguish between very serious and relatively minor criminal behaviors, but by mandating lengthy prison sentences across the board, they also prevent judges from making those distinctions in sentencing.

Frequently alleged, rarely applied

DOC data show that the repetitive and dangerous offender enhancements were rarely applied, and that the repeat offender enhancement was most often applied to non-person offenders.

An analysis of 31,145 prisoners in DOC custody of the DOC on August 31, 2003, shows:

- While most Arizona prisoners had prior felony convictions (62 percent), the vast majority were sentenced as non-dangerous, first-time offenders (63.5 percent) or dangerous, first-time offenders (14.2 percent).
- Just one in six prisoners (16.2 percent) was sentenced as a non-dangerous offender with one historical prior (a second-time offender).
- One in 25 prisoners (3.8 percent) was sentenced as a non-dangerous offender with two historical priors (a third-time offender). Just one in 75 prisoners (1.3 percent) was sentenced as either a second- or third-time dangerous offender.
- DUI and property offenders were most likely to be sentenced as repetitive offenders (31.1 percent and 31.8 percent, respectively).

For those with prior felony convictions:

- Just over a third (34.3 percent) were sentenced under the repeat-offender provisions, while the rest were sentenced as first-time, non-dangerous (54.4 percent) or first-time, dangerous (10.2 percent) offenders.²⁴
- Property offenders with prior convictions were most likely to be sentenced under the repeat offender provisions (44.2 percent) while prisoners convicted of violent or sex offenses who had prior convictions were least likely to be sentenced as repeat offenders (26.9 percent and 16.6 percent, respectively).

These findings echo those of the IRPP report, which found that offenders were eligible for the repeat offender enhancement in 7,472 cases examined (47.5 percent of the total), charged with the enhancement in 3,975 cases (25.3 percent) and convicted with the enhancement in just 939 cases (6.0 percent).

²⁴ Since most prior felony convictions “wash out” after five or 10 years, not all prisoners with felony priors would have been eligible for enhanced sentences. One percent of prisoners were sentenced under the old criminal code.

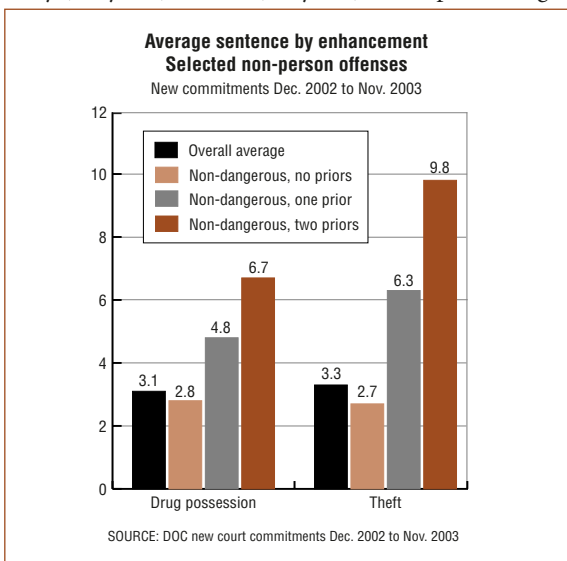
Lengthy sentences

In interviews, Arizona Superior Court judges expressed frustration with the mandatory sentencing enhancements, which they say prevent them from handing down sentences that are both proportionate to the crime and appropriate for the defendant. Many cite recent cases in which they imposed prison terms far longer than justice required on defendants who would have faced even longer sentences if the pleas were rejected and the cases taken to trial.

Individuals convicted under the repetitive offender enhancement receive lengthy sentences, even for relatively minor offenses. The average sentence for 1,602 people committed to prison by the courts between December 2002 and November 2003 with a top conviction of theft and no enhancements was 2.7 years.

However, the sentence imposed more than doubled to 6.3 years for 273 convicted of theft with one historical prior felony (non-dangerous), and tripled to 9.8 years for 21 individuals convicted of theft with two historical priors – longer than the average sentence for kidnapping (8.5 years).

In the same period, 13 people convicted of simple drug possession (i.e. not possession for sale) with two historical prior felonies received 6.7-year average sentences – longer than the average sentence for all robbery (6.5 years), assault (4.0 years) or weapons charges



(3.8 years). As expected, for those convicted of dangerous offenses, the sentences imposed were longer: 1,171 defendants convicted of assault with no enhancements received an average sentence of 2.9 years, but a finding of dangerousness bumped the average to 8.8 years for 161 prisoners sentenced for a first such offense.

Consistent application of such lengthy sentences would cost more than the state could afford. Instead, prosecutors use repetitive offender allegations as their “hammer” to win plea agreements. Given the long sentences imposed on those convicted under the enhancements, the overwhelming majority of Arizona defendants eligible for repetitive or dangerous sentence enhancements accept plea offers – often requiring substantial prison time.

In order to examine the impact of plea-bargaining on non-person offenders under Arizona’s system of mandatory sentencing enhancements, the authors examined sentences imposed on the largest group of new court commitments: those convicted of non-dangerous first offenses and sentenced directly to prison pursuant to a plea bargain between December 2002 and November 2003.²⁵

If mandatory sentencing enhancements were *not* driving up sentences in plea arrangements, the sentences would be expected to follow a bell curve, with the largest number of offenders receiving the presumptive sentence and a roughly equal number of offenders receiving sentences above or below the presumptive.²⁶ Instead, the sentence distribution skewed significantly above the presumptive. Nearly half (45.3 percent) of 4,163 offenders sentenced received terms above the presumptive, just under a third (30.3 percent) received the presumptive sentence and a quarter (24.4 percent) received sentences below the presumptive.²⁷

Erosion of the right to trial

Arizona’s system of mandatory sentencing enhancements erodes the right of defendants to trial by forcing them to accept a plea offer or risk long mandatory prison terms.

According to DOC data, offenders convicted at trial were far more likely to be sentenced as repetitive offenders than those convicted through a plea agreement. For new court commitments between Decem-

²⁵ Only new commitments sentenced directly to prison were examined because terms imposed on those revoked from probation are generally set by judges rather than plea-bargains.

²⁶ Arizona’s determinate sentencing system establishes a presumptive sentence for each offense category with the implicit assumption that the presumptive sentence will fit most cases in the applicable category. As a result, we would expect most offenders to receive the presumptive sentence.

²⁷ DOC data does not allow us to determine how many of those who received terms above the presumptive were sentenced under mandatory sentencing enhancements other than the dangerous and repetitive offender enhancements. For example, some were likely convicted of multiple offenses, which can raise the presumptive sentence. If the tendency toward sentences above the presumptive can be partly attributed to other sentencing enhancements, however, that only strengthens the case that mandatory sentencing enhancements are driving up sentences across the board.

ber 2002 and November 2003 where sentences were imposed through a plea bargain, just 11.2 percent were sentenced as repeat offenders, compared with 32.1 percent of those convicted at trial.

Individuals in the sample who chose to go to trial were more likely to have prior felony convictions than those who pled guilty, making the former more likely to be eligible for the repetitive-offender enhancement. However, among offenders who had one or more prior felony convictions, there were still sharp differences: 83.2 percent of those who pled guilty were sentenced as first-offenders compared to 50 percent of those convicted at trial. Furthermore, just 0.9 percent of those with one or more priors sentenced under plea agreements were sentenced as third-time, non-dangerous offenders, compared to 22.6 percent of those convicted at trial.

While DOC data does not account for all of the variables that might explain differences between prisoners sentenced under plea bargains and those sentenced after trials, research published by Arizona State University law professor Gary Lowenthal in 1993 further supports the argument that mandatory sentencing enhancements encroach on the right to trial. Lowenthal found that mandatory sentencing enhancements enacted in 1978 and 1982 significantly impacted disposition of cases in Maricopa County, helping to drive the trial rate down from 10.40 percent in 1976 to a low of 3.77 percent in 1984.

Lowenthal further demonstrated that the change could not be attributed to growth in the court's caseload, since judicial, prosecutorial and public defender resources grew at an even faster pace over the period. The trial rate has dipped even lower in Maricopa County since Lowenthal published his original findings in 1993, reaching 2.9 percent in fiscal year 2001 and 2.4 percent in fiscal year 2002.

Defense attorneys say that, while mandatory sentencing enhancements are the principal factor, pressure from prosecutors and the courts to dispose of cases quickly also undermines the right to trial. Defendants are routinely given little time to evaluate a plea offer from the county attorney's office, and the offer is immediately withdrawn if, for example, the defense attorney files a motion to challenge the legality of a search by police. Furthermore, in an effort to increase efficiency and prevent backlogs, the courts discourage delays of any kind, making careful evaluation of cases more difficult for either defenders or prosecutors.

Racial disparity

African American prisoners were significantly more likely to be sentenced with the repeat-offender enhancement than prisoners of other races.

African American prisoners were more likely to have been sentenced as repeat offenders than any other racial/ethnic group incarcerated as of August 31, 2003. Among those sentenced for non-dangerous offenses, African Americans were more likely to have been sentenced with one historical prior (24.8 percent vs. 18.6 percent for non-African Americans) than the population as a whole, and more than twice as likely to be have been sentenced with two historical priors (8.5 percent vs. four percent).

As noted, African Americans were more likely to have prior felony convictions than other racial and ethnic groups, a fact that could explain part of the disparity in use of the repeat-offender enhancement. Indeed, after controlling for whether or not prisoners had any prior felony convictions, African Americans convicted of non-dangerous offenses were only slightly more likely than non-African Americans to have been sentenced with one historical prior (33.9 percent vs. 29.5 percent).

However, African Americans with prior felonies were still far more likely to have been convicted with two historical priors (11.5 percent vs. 6.3 percent) than non-African Americans. Finally, among prisoners with three or more prior felony convictions, African Americans were slightly more likely than non-African Americans to be convicted with one historical

Sentencing enhancement							
Criminal History	Prior felonies	No historical priors		One historical prior		Two historical priors	
		African American	Non-African American	African American	Non-African American	African American	Non-African American
All		66.7%	77.4%	24.8%	18.6%	8.5%	4.0%
One or more		54.6%	64.2%	33.9%	29.5%	11.5%	6.3%
Three or more		46.2%	52.8%	37.9%	36.0%	15.9%	10.6%

SOURCE: DOC prison population on August 31, 2003

prior (37.9 percent vs. 36 percent) and much more likely to be sentenced with two historical priors (15.9 percent vs. 10.6 percent).

The decision to charge a defendant with two historical priors is entirely discretionary for prosecutors. As is evident from the table above, even among defendants with three or more felony convictions, just over one in 10 was convicted with two historical priors. The number of prior felonies alone cannot explain why African Americans are more likely to receive the

maximum repetitive offender enhancement. Further research is needed to determine whether this outcome is a result of unwarranted disparity or other factors not included in this analysis.

Drug offenses

On August 31, 2003, one out of every six Arizona prisoners (18 percent) was serving time for a drug offense. The majority (54.9 percent) of incarcerated drug offenders were convicted of selling dangerous or narcotic drugs and nearly a quarter (23.2 percent) were convicted of possessing dangerous or narcotic drugs for personal use.

Nearly two-thirds (64.6 percent) of incarcerated drug offenders were convicted of Class 2 or Class 3 felonies. However, this does not mean that most are major drug dealers. In fact, nearly all activities related to the sale of dangerous or narcotic drugs – including possession for sale, transport and even conspiracy to sell – are Class 2 felonies.

As discussed, African Americans and Latinos make up over half (56.7 percent) of incarcerated drug offenders but less than a third (28.4 percent) of all state residents. Women made up a much higher proportion of those serving time for drug possession (17.4 percent) and drug sales (13.7 percent) than prisoners as a whole (8.5 percent).

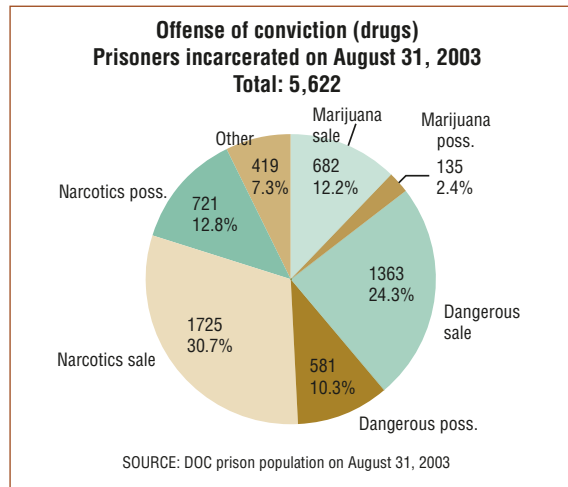
Drug possession

Arizonans endorsing Prop 200 (not once, but twice) signaled their clear belief that treatment, not incarceration, should be the preferred response to drug use and addiction. However, while Prop 200 has successfully reduced the proportion of the prison population serving time for personal drug possession, substance abusers can still end up serving substantial prison terms that do little to address their problem.

Unless one or both prior Prop 200 offenses were designated as misdemeanors upon successful completion of probation (an unlikely circumstance for a defendant who has used up both Prop 200 “strikes”), an addict facing a third drug possession charge will likely have one or two historical priors, making him or her eligible for mandatory prison with an enhanced sentence.

This circumstance is reflected in the sentences imposed on 1,161 offenders committed to prison by the courts between December 2002 and November 2003. The average for all new possession commitments was 3.1 years, with those convicted of possessing marijuana, dangerous drugs and narcotics receiving average sentences of 2.3 years, 3.3 years and 3.9 years respectively.

Many judges interviewed consider the sentences



imposed on third- or fourth-time possession offenses excessive. While they believe that continued drug use requires a firm intervention, possibly including residential treatment, jail or even a brief prison sentence, they believe that long prison terms serve neither the addict nor the public.

Further, because the courts have ruled that Prop. 200 felony convictions count as historical priors under the dangerous and repetitive offender statute, these convictions can lengthen sentences for current and former drug users convicted of subsequent unrelated offenses. In effect, current and former drug addicts can receive longer sentences solely because of their addictions.

Since prisoners convicted of non-person offenses are more likely to have major substance abuse problems, they are presumably also more likely to be convicted of drug possession. DOC data contains the number, but not the type, of prior felony convictions, making it impossible to measure the impact of prior Prop 200 convictions on sentence length. Among persons committed for non-person offenses, however, each prior felony (up to six) correlated with an increase in average sentence length of 8.1 months.

Drug sales

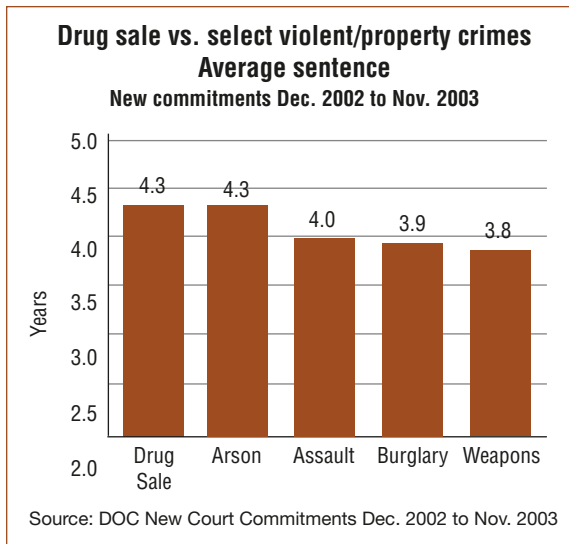
Low-level addict-dealers, who are not eligible for diversion through Prop 200 or drug court programs, face relatively stiff prison terms, despite the fact that their involvement in the drug trade can be both extremely minor and the result of their drug addiction.

- *The classification of virtually all sale offenses involving dangerous or narcotics drugs at the highest felony level (aside from murder) inflates both the seriousness of, and the prison terms imposed upon, low-level dealers.*

Nearly all activities involved in the sale of dangerous or narcotic drugs – including possession for sale,

sale, manufacture and transport – are Class 2 felonies, the highest class assigned to any felony other than murder. The defendant need not have a significant role in the transaction to be charged with a Class 2 drug sale. Nor does the quantity of drugs have to be significant: sale of any amount of dangerous or narcotic drugs is a Class 2 felony.

Of 1,337 people committed to prison by the courts for drug sales between December 2002 and November 2003, 522 (39 percent) were convicted of Class 2 felonies. An additional 404 (30.2 percent) were convicted of attempted drug sales, a preparatory offense designation that reduced the conviction from Class 2



to Class 3. And 34 were convicted of soliciting or facilitating drug sales, preparatory designations that reduced the felonies from Class 2 to Class 4 and Class 6, respectively. In other words, 69 percent of those committed to prison for drug sales either were convicted of Class 2 felonies, or would have been convicted of Class 2 felonies if prosecutors (who have sole discretion over preparatory designations) had not agreed to a conviction on reduced charges.

As a consequence of the fact that plea bargaining starts for the overwhelming majority of drug sale offenders at the top of the sentencing chart, sentences for drug sale are long compared to other non-violent and even many violent offenses. For new court commitments between December 2002 and November 2003, the average sentence imposed for drug sales was 4.3 years, the same as the average sentence imposed for arson (4.3 years) and more than for the average sentence for assault (4 years), burglary (3.9 years) or weapons (3.8 years). The sentences were significantly longer for those convicted of selling narcotic or dangerous drugs as a Class 2 offense (i.e., without the

benefit of a preparatory offense category, such as an attempt, which lowers the offense class): 5.6 years and 5.9 years, respectively.

- *The practice of offering probation in exchange for pleas to Class 2 and Class 3 felonies can set low-level dealers with substance abuse problems up for failure, including revocation to long prison terms.*

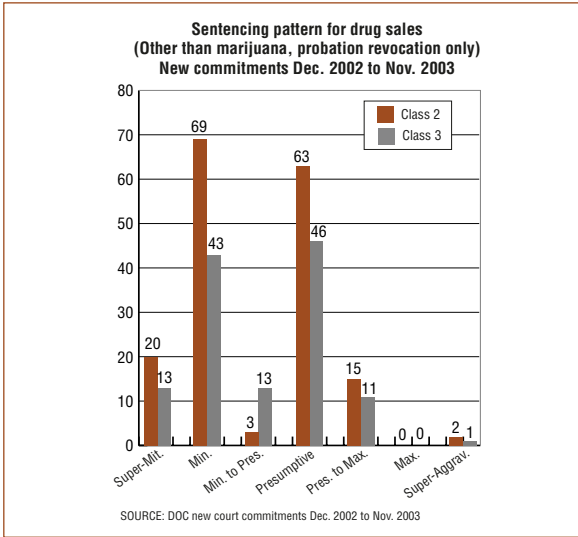
While most drug sales are serious felonies (i.e. Class 2 or Class 3) that carry long average prison terms, nearly a third (30.3 percent) of new court commitments for drug sales between December 2002 and November 2003 were offenders revoked from probation. Low-level offenders charged with sale for the first or second time are frequently offered probation (or an agreement that does not require prison, allowing the judge to award probation) in exchange for a plea to a Class 2 or a Class 3 drug sale.

Public defenders report that their clients, especially those awaiting trial in a county jail, find pleas to probation hard to turn down, even when both attorney and defendant know that a chemical dependency makes him or her unlikely to be able to comply with the conditions of supervision. Yet when these individuals are revoked from probation, as often happens, they find themselves facing presumptive five-year prison terms.

If the violation is due to a new drug conviction, the offender faces automatic revocation on the previous offense and a mandatory prison sentence of no less than the presumptive term for the new offense, to be served consecutively. Thus, an addict caught twice for steering undercover officers to a dealer in exchange for a small amount of drugs to feed his or her habit could be looking at an absolute minimum of eight years (three for the first offense and five for the second) unless the prosecutor offers a better deal in exchange for another guilty plea.

- *Analysis of sentences imposed on individuals revoked from probation for drug sales shows that judges, who have more control over sentencing of persons revoked from probation than those sentenced directly to prison, considered the presumptive sentences too long for Class 2 and Class 3 offenses.*

Judges have little role in the sentencing of defendants who accept plea agreements requiring a prison sentence in order to avoid an enhanced mandatory term. As a consequence, sentencing patterns in Arizona tend to reflect the mandatory sentencing enhancements more than the considered opinion of judges.



The major exception is the sentencing of persons revoked from probation. While judges are constrained by the sentence range for the felony class in question, they are not constrained by plea agreements. As a consequence, sentences imposed on offenders revoked from probation provide a useful window onto what sentences judges believe fit the crimes and individuals offenders they see before them.

If judges believed that the sentence range for a given felony class fit the crime, we would expect the sentences to take the shape of a bell curve, with the largest number of offenders receiving the presumptive sentence, a roughly equal number of offenders receiving sentences above or below the presumptive, and just a handful of offenders receiving sentences at or below the minimum and maximum sentences.

But an analysis of sentences imposed on defendants convicted of selling dangerous or narcotic drugs who were subsequently revoked from probation between December 2002 and November 2003 bears no resemblance to the expected bell curve. For 172 individuals convicted of Class 2 drug sales, judges imposed sentences at or below the minimum (four years) more than half of the time. Further, more individuals received super-mitigated sentences *below* the minimum than sentences *above* the presumptive (five years).

A similar pattern is evident for Class 3 sales of dangerous or narcotic drugs. Of 127 individuals sentenced after being revoked from probation, 44.1 percent received sentences at or below the minimum (2.5 years), compared to 44.9 percent who received sentences at or

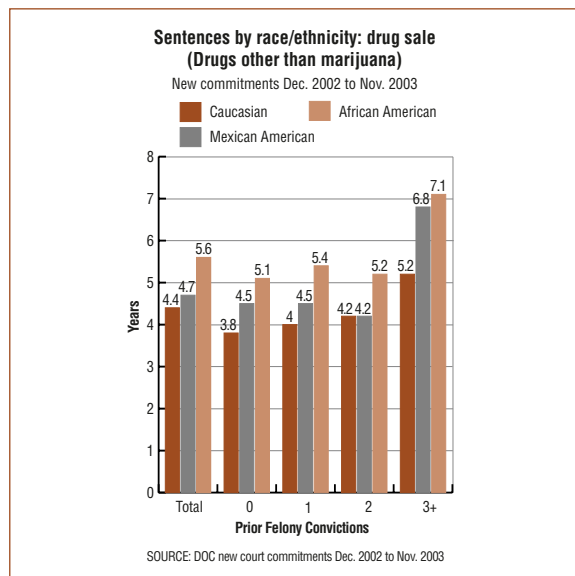
above the presumptive (3.5 years). Again, more individuals received super-mitigated sentences below the minimum than sentences above the presumptive. In both cases, the high proportion of super-mitigated sentences is significant, since imposing them requires a judge to file notice and find substantial mitigating factors.

It could be argued that the tendency of judges to sentence below the presumptive term simply shows that those granted probation were less serious offenders. But the sentencing pattern is very different for offenders convicted of assault, to use one example. Among 133 committed for Class 2 or Class 3 assaults after being revoked from probation, just 28.5 percent were sentenced at or below the minimum compared to the majority of dangerous and narcotic drug sales.

Racial and ethnic disparity in drug sentencing

*Mexican Americans and African Americans received significantly longer sentences for both possession and sale of dangerous and narcotic drugs than whites with a similar number of prior felony convictions.*²⁸

Mexican Americans and African Americans sentenced to prison for drug sales between December 2002 and November 2003 received significantly longer terms of incarceration than their white counterparts. Mexican Americans received longer average sentences than whites (4.7 years and 4.4 years, respectively), despite the fact that Mexican Americans had, on average, fewer prior felonies (1.6 and two, respectively).



28 Native Americans and Mexican nationals are not included in the analysis of sentencing disparity because those populations have unique characteristics that make it difficult to make valid comparisons. As noted, many crimes committed by Native Americans are handled through the tribal and federal justice systems, so no assurance can be provided that those incarcerated in state prisons make up a representative sample, or that information on prior felonies is complete and accurate. Similarly, people who work in the criminal justice system say there are differences in how Mexican nationals are handled by the justice system, and the fact that many may be recent arrivals may make information less complete and accurate.

African Americans, who received the longest sentences (5.6 years, on average), also had the greatest number of prior felonies (2.6, on average) – a fact that, at first glance, might seem to explain the disparity.

After controlling for prior felonies, however, it becomes clear that both Mexican Americans and African Americans received longer sentences than whites with the same number of priors, as shown in the table below. Mexican Americans receiving six to 19 more months in three of four categories, while African Americans received between 12 and 23 more months in every category.

Further analysis is required to determine the degree to which the disparity is attributable to factors other than race and ethnicity that have not been examined here. At a minimum, however, these data sug-

gest that both Mexican Americans and African Americans received more prison time than whites with the same number of priors. Again, further research is needed to determine whether or not disparities shown here are attributable to factors other than race and ethnicity.

Drug courts

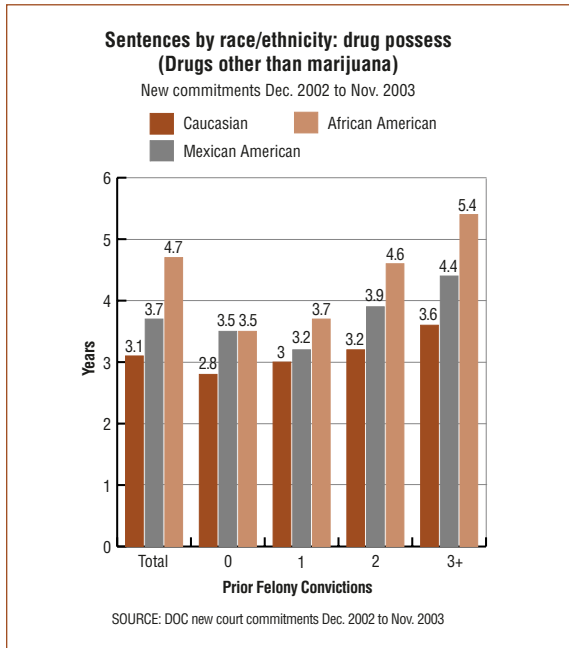
Drug courts are special courts to help offenders address underlying substance abuse problems by using the tools of the justice system to encourage participation in drug treatment. Most drug courts are local responses to the problem of low-level, chemically dependent offenders who clog prisons, jails and courtrooms where their addiction issues are rarely, if ever, addressed effectively. Because drug courts are driven by the priorities, philosophy and resources of local jurisdictions that create them, there is no single drug court process, program or population.

Some characteristics, however, distinguish drug courts from traditional courtrooms and criminal procedures.

- **Collaboration among key justice system players** is the key to achieving the desired outcome for the participant. In drug courts, defendants, prosecutors, probation officers and judges set aside narrowly defined and often adversarial roles to focus on how they can work together to keep participants in treatment and out of prison.
- **A wide range of incentives and sanctions** encourage compliance with probation conditions, especially the requirement that probationers participate in treatment. Rather than relying solely on the threat of a lengthy prison term, drug courts employ a sanctions “ladder” which can involve tools such as increasing or decreasing the frequency of drug tests and court appearances, or raising and lowering community service requirements. Participants who consistently fail to follow the rules are sometimes jailed for a weekend or more, while small rewards are used by some jurisdictions to reinforce positive behaviors.

- **Intensive supervision**, including frequent court appearances, makes it easier for problem behaviors to be identified and addressed before they escalate. In addition to traditional supervision by probation officers, many drug courts require participants to appear before the judge monthly. During these appearances, judges can assess progress and respond to both positive and negative reports with rewards and sanctions.

Arizona’s drug court experiment began in 1992 and continues today, with more than a dozen adult, juvenile and family drug court programs, as well as two DUI court programs (one in English, one in Spanish). Currently, adult drug court programs operate in Coconino,



gest that a closer look should be taken at the disproportionate impact of drug sentences on communities of color in Arizona.

African Americans and Mexican Americans sentenced to prison for personal possession of dangerous or narcotic drugs also received significantly longer terms of incarceration than their white counterparts. Mexican Americans received significantly longer average sentences than whites (3.7 years and 3.1 years, respectively) despite the fact that Mexican Americans had roughly the same average number of prior felonies (2.5 and 2.4, respectively).

African Americans, who again received the longest prison terms (4.7 years, on average), also had the greatest average number of prior felonies (3.3). But after controlling for prior felonies, it becomes clear

Gila, Maricopa, Pima, Yavapai and Yuma counties. As of July 31, 2003, the Administrative Office of the Courts reports that the state’s adult courts had produced 1,504 graduates and had an additional 746 participants currently enrolled, over half in Maricopa County.²⁹

When drug courts began in Arizona, with the help of federal grants, they primarily served offenders convicted of simple drug possession;

however, the profile of drug court participants has changed over time. While drug courts exclude participation of offenders with prior convictions for violent or sex offenses, most have expanded beyond drug possession to handle some low-level property offenders and occasionally those convicted of drug sales, as long as their criminal behavior is rooted in substance abuse.

A major incentive for many participants is the opportunity to avoid a felony conviction. Coconino, Pima, Yavapai and Yuma counties offer pre-conviction programs that allow eligible participants to have their charges, in most cases, dismissed upon completion of the program and/or term of probation.³⁰ Although Gila, Maricopa and Yuma operate post-conviction programs, successful completion of the program can still result in the reduction of a felony designation to a misdemeanor for those convicted of open-ended (Class 6) offenses. In addition, many participants are released from probation early upon successful completion of the program, and some are also released from a jail term that would otherwise have been imposed as a condition of probation.

Drug court proponents say the program can reduce recidivism and also create savings for the state by keeping persons in the community who would otherwise have been revoked from probation or sentenced directly to prison in the community. According to Judge Patricia Escher, the presiding judge of Pima County’s drug court, a recent study found that just 24 percent of program graduates had been re-arrested since 1999 compared to 61 percent of those who failed

Cost of drug sentencing					
Offense	Drug	Commitments	Average sentence (years)	Average cost of incarceration	Total cost of incarceration
Sale	Marijuana	325	3.3	\$51,583	\$16,764,598
Sale	Dangerous drugs	473	4.5	\$71,785	\$33,954,409
Sale	Narcotic drugs	477	4.8	\$75,543	\$36,034,008
Possession	Marijuana	185	2.3	\$35,917	\$6,644,691
Possession	Dangerous drugs	399	3.3	\$52,062	\$20,772,937
Possession	Narcotic drugs	364	3.9	\$61,471	\$22,375,350
Other		275	2.8	\$44,237	\$12,165,269
Total		2498			\$148,711,262

SOURCE: DOC New Court Commitments Dec. 2002 to Nov. 2003

the program, and 65 percent of those who were never placed in the program. Judge Escher also observes that the average cost of drug court is \$4,200 – less than a quarter of what Arizona spends to incarcerate a prisoner for a single year.

Judges and other criminal justice professionals who staff drug courts believe that, if expanded, drug courts could help ease the burden of overcrowding and reduce costs while delivering better outcomes for participants and the public. However, most jurisdictions using drug courts report that their current funding, a patchwork of small state and federal grants and county funds, is barely adequate to the number of participants currently enrolled.

Driving under the influence

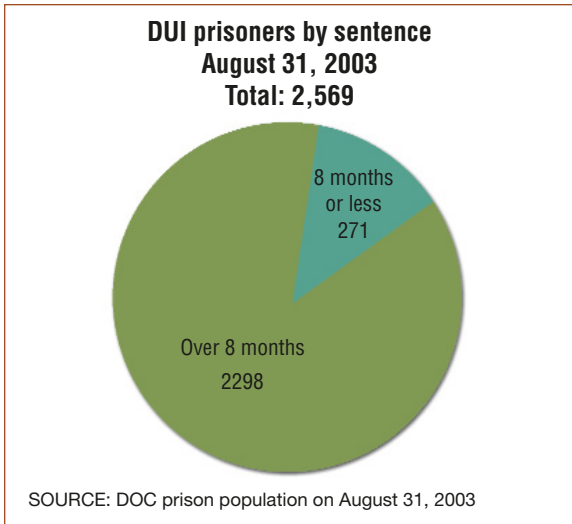
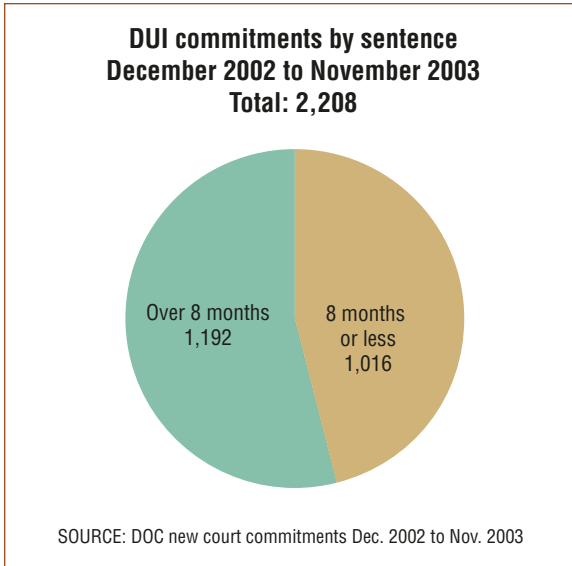
Drunk driving convictions are the leading source of new court commitments to Arizona prisons and a significant driver of prison population growth.

On June 30, 1998, Arizona prisons housed 1,753 DUI offenders. Over the following five years, however, the number of incarcerated DUI offenders grew by 47 percent to 2,577 – nearly twice the growth rate for the prison population as a whole. As of August 31, 2003, DUI offenders accounted for one in 12 prisoners and ranked fourth among the 21 DOC offense categories (behind drug sale, assault and theft).

DUI convictions were also the leading source of court commitments to prison between December 2002 and November 2003, accounting for 2,208, or

²⁹ The total number of graduates does not include the first three years of Maricopa County’s drug court (1992-1995), for which there are no reliable data.

³⁰ Coconino operates a post-plea, pre-adjudication program, in which the status of conviction varies depending the offense in question (which can include drug, DUI and property offense), although most graduates are able to avoid a felony conviction. Yavapai’s program incorporates both post and pre-adjudication, with most pre-adjudication offenders sustaining a misdemeanor conviction for possession of drug paraphernalia upon successful completion. On the other hand, the previously sustained convictions of post-adjudication offenders are unchanged by successful completion of drug court.



one out of every six, new commitments. That figure, however, includes two very different populations that need to be distinguished for purposes of analysis.

Unlike any other offense, persons convicted of felony DUI and placed on probation are required to serve four or eight months in prison as a condition of probation. While judges are *permitted* to impose a county jail term of up to one year as a condition of probation for any other felony offense (except first-time personal possession under Prop 200), the four- or eight-month term is *mandatory* for DUI and must be served in prison rather than a county jail.³¹

When new DUI court commitments are divided between individuals serving terms of eight months or less

and those serving over eight months, it is possible to see that just under half (46 percent) were committed to prison as a condition of probation, while just over half (54 percent) were sentenced to prison in lieu of probation – 17.2 percent after being revoked from probation and 36.8 percent sentenced directly to prison.

Although persons serving eight months or less comprised nearly half of new court commitments, they made up a small fraction (10.5 percent) of incarcerated DUI offenders. This indicates that, while four- and eight-month terms imposed as a condition of probation are a major driver of DUI admissions, individuals sentenced to prison instead of probation are responsible for growth in the number of incarcerated DUI offenders.

Long prison terms for drunk driving

Unlike all other offenders, individuals convicted of felony DUI are required to spend time in prison as a condition of probation, while those sentenced to prison serve longer terms than many property or even violent offenders.

The fact that nearly half of those committed for felony DUI spend just four or eight months in prison could suggest that DUI offenders receive lighter sentences than other offenders. However, the truth is just the opposite. Felony DUI is the only offense for which the imposition a term of incarceration is a mandatory condition of probation.

Felony DUI is also the only offense for which a term of incarceration imposed as a condition of probation must be served in prison rather than county jail. While other offenders can more easily maintain family ties and even their jobs, if allowed to participate in work furlough, people convicted of DUI may be incarcerated hours from home, depending on where beds are available.

Further, a felony DUI sentence does not end when the four or eight-month prison term has been served. Like other offenders on felony probation, DUI offenders are subject to revocation for failing to comply with the conditions of their release. And, like other offenders, DUI offenders revoked from probation are sentenced to substantial prison terms. Data on new court commitments between December 2002 and November 2003 show that DUI offenders revoked from probation serve prison sentences averaging 2.5 years – longer than the sentences of offenders revoked for forgery (1.8 years),

31 Those convicted of felony DUI who have been convicted of DUI three or more times in the past five years are required to spend eight months in prison as a condition of probation. Those convicted of felony DUI who have been convicted twice in the last five years and/or whose driving privileges were suspended or revoked at the time of the incident are required to spend four months in prison as a condition of probation.

theft (2.0 years), assault (2.1 years), weapons charges (2.2 years) or burglary (2.4 years).

While individuals convicted of a first felony DUI are generally placed on probation after serving four months in prison, those who have allegable historical priors (which can include *any* felony offense committed within the last five years) face *mandatory* prison with a presumptive term of 4.5 years (one historical prior) or 10 years (two historical priors).

Two-thirds of DUI offenders committed for prison terms over eight months were sentenced directly to prison without the option of probation. DUI defendants sentenced directly to prison received even longer prison terms than those revoked from probation, averaging 3.7 years – lower than the average sentence for assault (5.2 years) and burglary (4.7 years), but slightly higher than forgery (3.6 years) and drug possession (3.6 years).

Finally, unless a non-DUI felony conviction is for a dangerous offense, it can only be used to enhance a sentence under the dangerous-and-repetitive offenders statute for five or 10 years, depending on the seriousness of the offense. But felony DUI convictions, like “dangerous” felony convictions, are “forever” priors that can trigger a mandatory sentence enhancement 15, 30 or even 50 years later.

Persons convicted of felony DUI are not necessarily habitual drunk drivers.

Felony DUI offenders are not all habitual drunk drivers who have been given many previous opportunities by the criminal justice system to correct their behavior. A third drunk driving incident within five years can trigger a felony DUI charge but so can any drunk driving incident that occurs while the defendant’s license or privilege to drive is suspended, canceled or revoked. This means that

- A person whose license was suspended for failure to pay a speeding ticket or other fine related to a moving violation is guilty of felony DUI the *first* time he or she drives drunk.
- A person previously convicted of one misdemeanor DUI whose immigration status (i.e. undocumented) prevents him or her from having driving privileges restored can be charged with felony DUI on the *second* offense.
- A person driving under the influence with one or more children under 15 can be charged with a Class 6 felony DUI on the *first* offense.

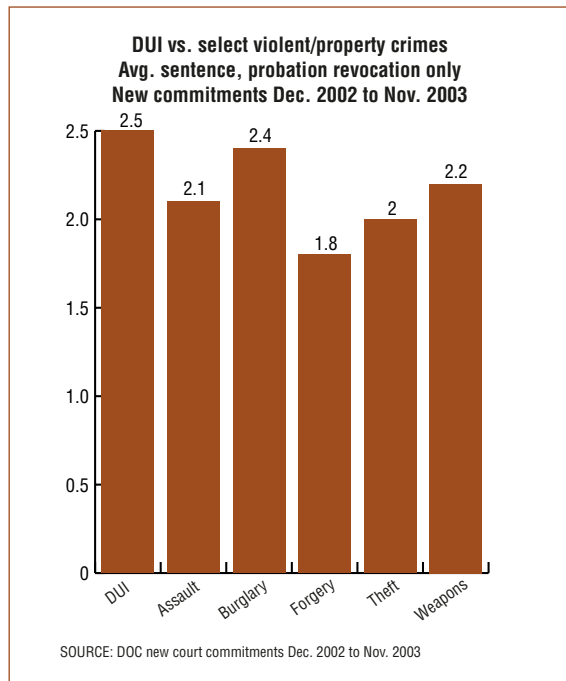
Finally, a felony DUI charge can be triggered by any drunk driving incident that occurs while the de-

fendant’s license or privilege to drive is restricted due to a previous DUI violation. This can be the case even with expired restrictions if the defendant failed to file the correct paperwork or take other steps to remove the restriction from his or her license.

Racial and ethnic disparity

African Americans and Mexican Americans serve longer average prison terms for DUI, even though they generally have fewer prior felony convictions than their white counterparts.

African Americans and Mexican Americans sentenced to over eight months in prison for Class 4 DUI had fewer prior felonies on average (1.6 and 1.4, respectively) than their white counterparts (1.8). Yet African Americans and Mexican Americans received *longer* sentences, averaging 3.6 years



and 3.8 years, respectively, than whites, whose sentences averaged 3.4 years.

In addition, when average sentences are broken down by the number of prior felonies, both African Americans and Mexican Americans received more prison time than whites in three of four categories.³²

As with disparity found in drug sentencing, more research is needed to determine whether factors other than race and ethnicity that have not been considered here might account for the disparity.

32 The figures for African Americans should be treated with caution since they are generated from a small number of cases.

DUI courts

Research shows that Arizona’s mandatory minimum sentences for DUI offenders have been ineffective at reducing drunk driving.³³ Maricopa County has been experimenting with two strategies that show more promise. The first of these is a five-year-old DUI court modeled on the state’s drug courts. Judge Eddward Ballinger, the presiding criminal judge of Maricopa County Superior Court, considers the DUI court a success and says the results for participants whose native language is Spanish have improved significantly since the court began holding Spanish-language hearings. Rebecca Potter, who heads the Maricopa County Public Defender’s vehicular crimes unit, agrees with Judge Ballinger’s assessment and expects it to be confirmed by data that has been collected by the adult probation department.

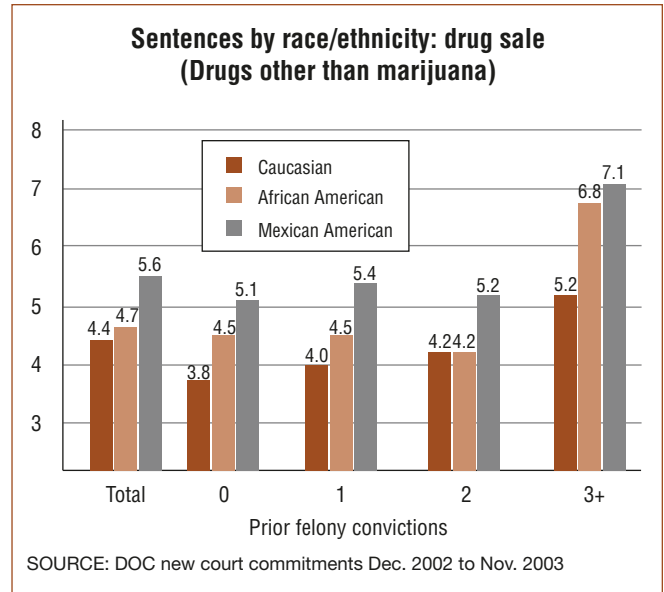
According to Potter, Maricopa’s is the only DUI court in the country that used a random sample of DUI felony offenders sentenced to probation to allow a valid comparison of recidivism rates between DUI court participants and standard probationers. Offenders eligible for the study were taken at random from those who were sentenced to probation for felony DUI and who lived in a 21-ZIP code area of the county. Those selected for the study were then randomly assigned to either standard probation or to probation with requirement of participation in DUI court in the order.

Potter expects the research results, which will be released soon, to show that DUI courts are reducing recidivism and that participants in Spanish-language DUI court have a higher success rate than DUI court participants as a whole – an important issue since Mexican Americans and Mexican nationals made up a disproportionate 38.2 percent of new DUI court commitments and 39.6 percent of DUI prisoners.

Another strategy piloted in DUI court is the use of “Secure Continuous Remote Alcohol Monitors” (SCRAM) bracelets, which can detect alcohol use by the person wearing them. Using the bracelets on DUI court participants during their first 30 days in the program helped reduce alcohol use, according to attorneys and probation officers who staff the court.

Property offenses

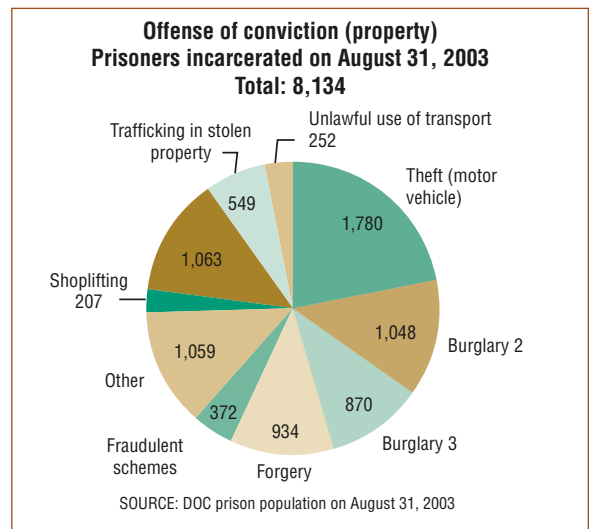
On August 31, 2003, nearly half (47.3 percent) of all incarcerated non-person offenders were serving time for property offenses. The vast majority of prop-



erty offenders were convicted under one of nine statutes shown on the pie chart at right.

Theft

Theft (including simple theft, motor vehicle theft and a handful of other offenses such as shoplifting) accounted for more than two in five property offenders incarcerated as of August 31, 2003 (42 percent). Nearly three-fourths (73.3 percent) of those serving time for theft were convicted in Maricopa County, which had the highest incarceration rate for theft in the state (73.7 per 100,000 population, compared to a



³³ A study by Professor Henry Fradella of the College of New Jersey, published in the June 2000 issue of Criminal Justice Policy Review, found that, between 1975 and 1995, statistically significant decreases in DUI occurred as a result of informal social controls, but increasing criminal sanctions – including mandatory minimums for first-time offenders – had little or no effect.

state average of 60.7 per 100,000). While the majority was sentenced directly to prison, 40.5 percent of new court commitments for theft between December 2002 and November 2003 were sentenced to prison after being revoked from probation.

Persons convicted of simple theft are serving substantial prison sentences for crimes that often involve relatively small amounts of money.

Of 3,416 persons incarcerated as of August 31, 2003, for theft, 1,063 (31.1 percent) were convicted of simple theft, an offense for which the felony class is determined by the monetary value of the property or services stolen. Nearly half (44.8 percent) of those incarcerated for simple theft were convicted of low-level (Class 4-6) offenses defined by statute as theft of services or property valued less than \$3,000. Half (49.4 percent) were convicted of Class 3 theft, which can involve amounts up to \$25,000 or as low as \$3,000; and just 5.8 percent were convicted of Class 2 thefts involving amounts of \$25,000 or more.

Relative to the monetary values attached, average sentences for low-level theft were substantial. Among persons sentenced to DOC between December 2002 and November 2003 for simple theft, average sentences were 1.3 years for Class 6, 2.5 years for Class 5 and 3.3 years for Class 4. Based on the \$19,505 per capita annual cost of

incarceration and prisoners serving an average 81 percent of their sentences, the state spends over \$20,000 to incarcerate people convicted of a crime defined as the theft of \$250 to \$1,000 worth of property or services; nearly \$40,000 for crimes of \$1,000 to \$2,000 in value; and over \$50,000 for crimes of \$2,000 to \$3,000 in value.³⁴

A proposal that originated in the state's sentencing commission would reduce the use of costly prison beds for thefts involving small amounts of money. The proposal, which was introduced as a bill in the House of Representatives during the 2003 special session and reintroduced in the 2004 regular session, would adjust the dollar amounts used to classify simple theft upward as shown in the chart below. The impact of the proposal would be to move all Class 4, 5 and 6 simple thefts down one felony level (with what is now a Class 6 theft becoming a misdemeanor), and to reclassify the very bottom end of Class 3 (\$3,000 to \$4,000) as a Class 4 offense.

Although simple theft is just one of many low-level property and miscellaneous offenses that would be reclassified under the proposal, it is the statute under which the largest number of those who could have been affected by the proposal have been incarcerated. Four other crimes reclassified by the proposal are also the top counts of conviction for persons committed to Arizona prisons by the courts between December 2002 and November 2003, as shown in the table below.

Simple theft: New court commitments, average sentence and cost of incarceration

Felony class	Value of property or stolen service	Commitments (12/02-11/03)	Average sentence	Average cost of incarceration	Total cost of incarceration	New proposed values
Class 2	\$25,000 or more	8	4.8	\$75,835	\$606,680	\$25,000 or more
Class 3	\$3,000 up to \$25,000	110	4.3	\$67,936	\$7,472,960	\$4,000 up to \$25,000
Class 4	\$2,000 up to \$3,000	61	3.2	\$50,557	\$3,083,977	\$3,000 up to \$4,000
Class 5	\$1,000 up to \$2,000	79	2.5	\$39,498	\$3,120,342	\$2,000 up to \$3,000
Class 6	\$250 up to \$1,000	422	1.3	\$20,539	\$8,667,458	\$1,000 up to \$2,000
Total		680	2.1	\$33,752	\$22,951,417	

SOURCE: Arizona DOC new court commitments December 2002 to November 2003

Current new court commitments for offenses categories reclassified by proposed reform

Offense	Felony class	Value of property or service stolen	Commitments	Average sentence	Average cost of incarceration	Total cost of incarceration	New proposed values
Criminal damage	Class 6	\$250 up to \$2,000	76	1.7	\$26,858	\$2,041,208	\$1,000 up to \$2,000
Shoplifting	Class 6	\$250 up to \$2,000	39	1.6	\$25,278	\$985,842	\$1,000 up to \$2,000
Credit card fraud	Class 5	\$1,000 and up	2	1.5	\$23,699	\$47,398	\$2,000 and up
Credit card fraud	Class 6	\$250 up to \$1,000	5	1.6	\$25,278	\$126,390	\$1,000 up to \$2,000
Food stamp fraud	Class 6	\$100 and up	3	1.0	\$15,799	\$47,397	\$1,000 up to \$2,000

SOURCE: Arizona DOC new court commitments December 2002 to November 2003

³⁴ The most recent per capita spending figures from DOC, available in the Fiscal Year 2002 Annual Report Workbook, show the annual cost of incarceration was \$19,505 per prisoner. Dr. Daryl Fischer reports that prisoners serve 81 percent of their sentences, on average, before they are released.

While some cases were undoubtedly pled down from more serious theft charges, the figures show that the state is spending millions of dollars to lock up individuals convicted of low-level property crimes. For most of these offenders, substance abuse treatment might provide a more effective (and less costly) way to prevent continued offending, and restitution or community service a better way to hold them accountable.

DOC data regarding the criminal history and personal characteristics for prisoners incarcerated for the offenses listed in the two tables (excluding Class 2 theft) as of August 31, 2003 show:

- More than a third had *no* prior felony convictions.
- Over 12 percent were women, compared to 8.5 percent of the general prison population.
- The majority had dependents, including over two-thirds of the women.
- One in 10 of the men (11.9 percent) and a quarter of the women (26.1 percent) had serious mental health problems.

Forgery and fraud

Statutes prohibiting forgery, fraud and trafficking in stolen property have contributed to significant growth in the number of incarcerated property offenders, in part because they allow serious charges to be brought against petty offenders.

While theft offenses significantly contributed to growth in the state prison population over the last five years, the number of persons incarcerated for forgery and fraud more than doubled during that time. As of August 31, 2003, forgery and fraud offenses accounted for more than a quarter (2,368 or 29.1 percent) of all incarcerated property offenders.

Forgery: As of August 31, 2003, 1,142 property offenders were serving time for forgery offenses, including 934 convicted under the forgery statute, 82 convicted of possessing forgery tools and 82 convicted of identity theft. The average sentence imposed on new court commitments for all forgery offenses between December 2002 and November 2003 was 2.9 years. The average sentence for those convicted under the

forgery statute was 3.3 years.

Among those incarcerated for forgery offenses:

- Most new commitments were sentenced directly to prison but two in five (40.6 percent) were incarcerated after being revoked from probation.
- Women, who comprised just 8.5 percent of the prison population, made up 27.4 percent of those incarcerated for forgery on August 31, 2003.
- More than four in five (929 or 81.3 percent) incarcerated for forgery were convicted in Maricopa County, which had the third-highest rate of incarceration for forgery among the 15 counties (27.3 per 100,000 population, compared to a state average of 20.3 per 100,000).

When people hear the word forgery, many think of an elaborate counterfeiting ring. However, attorneys and others who work in Arizona's criminal justice system say that people convicted of forgery are more likely to be petty offenders who use forged checks to steal small sums of money. Because forgery is a Class 4 felony regardless of the amount of money involved, forgery charges can be brought against offenders who could otherwise be charged with nothing more serious than Class 5 or 6 thefts.

Fraud: On August 31, 2003, Arizona had 1,226 individuals incarcerated for fraud offenses; of these, 866 (70.6 percent) were convicted under statutes prohibiting fraudulent schemes and artifices (372 prisoners) and trafficking in stolen property (549 prisoners). Persons revoked from probation made up a large proportion (38.6 percent) of new court commitments for fraud offenses between December 2002 and November 2003. As with forgery, women were overrepresented among those incarcerated for fraud offenses, making up 19 percent of the total as compared to 8.5 percent of all prisoners incarcerated as of August 31, 2003.

The statute prohibiting the use of fraudulent schemes and artifices is broadly defined and can be applied to a wide range of criminal behaviors in which deception is used to secure goods or services. As with forgery, no monetary values are attached to the offense. Unlike forgery, however, fraudulent schemes and

New court commitments for forgery and fraud – selected offenses

Offense	Commitments	Average sentence (years)	Average cost of incarceration	Total cost of incarceration
Forgery	536	3.3	\$52,137	\$27,945,360
Fraudulent schemes and artifices	82	5.8	\$91,634	\$7,514,028
Trafficking in stolen property	173	5.4	\$85,315	\$14,759,473
Total	791			\$50,218,860

SOURCE: Arizona DOC new court commitments December 2002 to November 2003

35 During any six-month period.

36 During any six-month period.

artifices is a Class 2 felony – the *highest* level of felony aside from murder. The offense carried an average sentence of 5.8 years for those committed to prison by the court between December 2002 and November 2003.

While it may have been intended for the Enrons of the world, those who work in the criminal justice system say the charge of fraudulent schemes and artifices is frequently used as leverage against low-level property offenders. As a consequence, the impact of the statute on the state’s prison population extends beyond 372 prisoners convicted and sentenced under it to include other property offenders whose sentences under plea agreements were driven up by the threat of fraud charges.

The statute prohibiting trafficking in stolen property is also broadly defined, and the role it plays in plea-bargaining is similar to that of fraudulent schemes and artifices. In the first degree, trafficking in stolen property applies to persons who initiate, organize, finance or supervise thefts and trafficking. In the second degree, the offense applies to anyone who “recklessly” trafficks in stolen property. Trafficking in stolen property in the first degree is a Class 2 felony, and in the second degree a Class 3 felony.

While the first definition applies to “fences” – those who create a market for stolen goods – trafficking in the second degree can easily be used as an add-on to offenses such as theft and burglary, or as a substitute charge in cases where the evidence is not sufficient to prove that the defendant actually stole the goods.

Among those incarcerated for trafficking in stolen property on August 31, 2003, the overwhelming majority (416) were convicted of second-degree trafficking.

As with fraudulent schemes and artifices, there are no monetary values attached to the definition of trafficking in stolen property. The seriousness of the charge not only ensures long sentences for those convicted under it (terms averaging 5.4 years for those sentenced between December 2002 and November 2003), but also allows the statute to lengthen sentences for other low-level property offenses.

Women

Rapid population growth

Arizona’s female prison population has skyrocketed over the last five years – driven largely by the incarceration of non-violent offenders – and growth is projected to continue at the current rapid pace.

On June 30, 1998, Arizona prisons housed 1,653 women. Five years later, the number had grown to 2,620, an increase of 967 or 58 percent. According to DOC projections presented to the House Sentencing Alternatives Group, the number will grow by another 60 percent, reaching 4,194, by June 30, 2008.

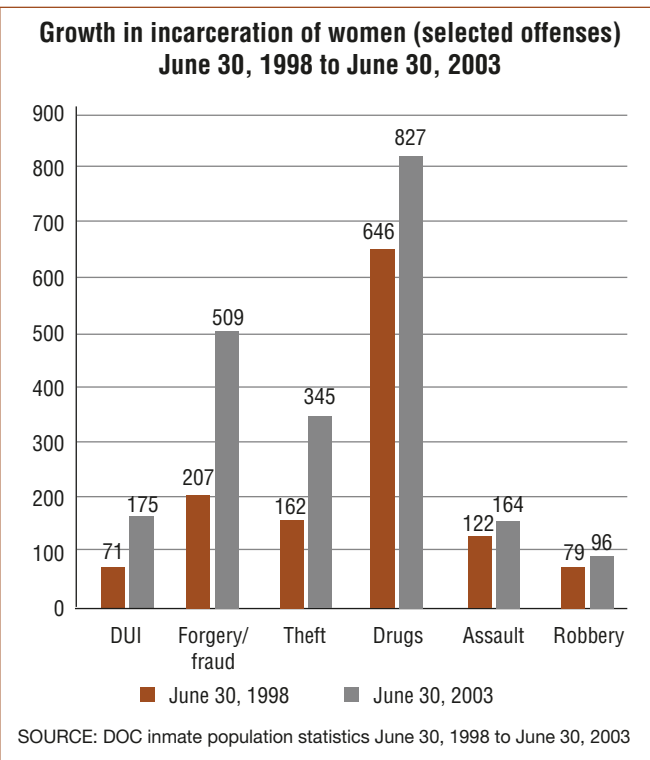
Just three non-violent offense categories accounted for two-thirds of the growth in the number of women behind bars between 1998 and 2003: forgery and fraud numbers grew by 145 percent and accounted for nearly a *third* of all growth; theft numbers grew by 113 percent; and DUI numbers rose by 146 percent.

The number incarcerated for drug offenses rose at a slower pace (28 percent), but still accounted for 19 percent of all growth. The number of women imprisoned for assault and robbery also grew at a slower pace, increasing by 34 percent and 37 percent, respectively.

Offense characteristics

The crimes for which women are incarcerated are far more likely to be non-violent and non-serious by a number of measures, than those of male prisoners.

Of 2,651 women incarcerated in Arizona as of August 31, 2003, over three-fourths were convicted of non-person offenses. Property offenders made up over a third (37.5 percent) of women prisoners, followed closely by drug offenses (31.4 percent). One in five women prisoners (20.7 percent) were sentenced for a violent offense, and



just 33 (1.2 percent) for a sex offense.

Women were significantly less likely incarcerated for Class 1, 2 or 3 felonies than men (51.2 percent and 62.3 percent, respectively). Among incarcerated drug offenders, women were more likely than men to be serving time for personal possession (34.1 percent vs. 28.1 percent) and less likely to be convicted of drug dealing.

Women prisoners were also much less likely than men to have committed crimes with guns or caused injuries. Just over one in 10 (275) women prisoners was convicted of an offense involving victim injury, compared to under one in five (5,449) men.³⁷ Fewer than one in 25 (98) female prisoners was sentenced for an offense involving a gun, compared to just over one in seven (4,289) male prisoners.³⁸

Finally, 27.6 percent of women prisoners were initially placed on probation by a judge, indicating that their original crimes were not viewed as a threat to public safety, compared to 15.5 percent of men. Nearly half of women prisoners were either first offenders (with no prior felony convictions) or revoked from probation or both.

Special needs: substance abuse, mental health

Women offenders are significantly more likely than men to have serious substance abuse and mental health problems that contribute to their criminal behavior, as well as other unique needs that are currently not addressed by the criminal justice system.

Three-fourths (75.9 percent) of women prisoners were classified with the highest possible alcohol and drug needs score by DOC staff, and nine in 10 had a score of three or higher. Among women incarcerated for drug and DUI offenses, the problem was even more severe, with 87.5 percent and 86.9 percent, respectively, receiving the highest need score.

While the substances used by male prisoners varied substantially, stimulants (methamphetamine) were the drug of choice for over half of all incarcerated women. Methamphetamine users accounted for 63.3 percent of all women incarcerated for drug offenses and 59 percent of those incarcerated for property offenses, indicating that addiction to methamphetamines has driven hundreds of these women into low-level drug and property crimes.

As discussed previously, women prisoners were more than twice as likely as men to have serious mental health problems: 24.7 percent of female prisoners received mental health scores of three or higher, compared to 11.3 percent of males.

According to Barbara Broderick, who heads the Adult Probation Department in Maricopa County, women’s distinct problems and needs, if not addressed,

make them more likely to be revoked from probation. In the late 1990s, Broderick’s department ran a women’s treatment network that combined a gender-specific approach to probation – a team of probation officers who had training and experience working with women offenders – with substance abuse treatment services. Although considered highly effective, the program was dismantled when grant funding lapsed.

Broderick says plans are underway to re-start gender-specific probation services, with the hope of reducing the number of women revoked from probation to prison – an important goal since 40.1 percent of women committed to prison from Maricopa County between December 2002 and November 2003 were revoked from probation.

Mothers behind bars

According to DOC data two-thirds of women prisoners (1,748 or 65.9 percent) reported having one or more dependents as compared with 57.7 percent of men (16,436). Furthermore, women are more likely to have been the primary caretakers of their dependent children. Criminal justice and human service professionals who work with women offenders say the damage caused by separating mothers from their children can be severe for both parties.

Research by the Pima Prevention Partnership and the Arizona Juvenile Department of Corrections (JDOC) shows, respectively, that children of prisoners are seven times more likely to be incarcerated than their peers and that three-fourths of girls and over half of boys in the custody of JDOC had a parent or sibling in the correctional system in the past decade.

The state is also beginning to look more closely at the services provided women on probation, in prison and after release to see what could help more women succeed. The Governor’s Task Force on Improving Outcomes for Incarcerated Women With Children, chaired by DOC director Schriro, is examining the issues over the next several months.

Probation, parole and community supervision

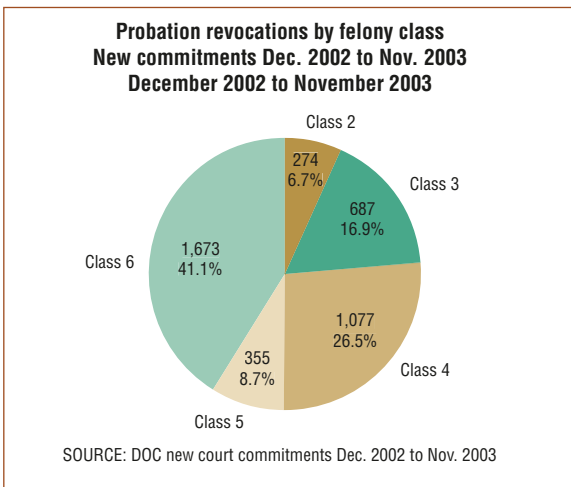
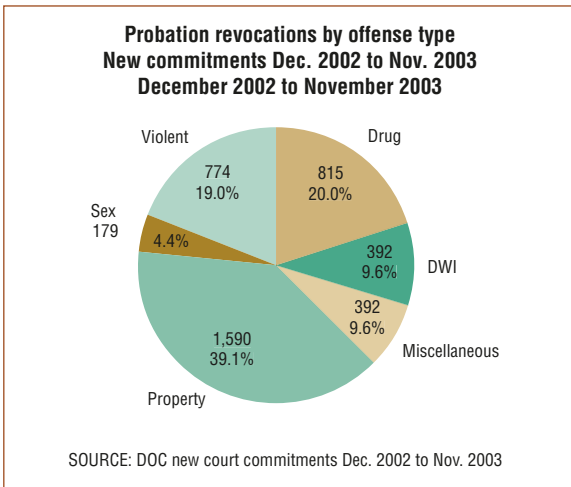
Half of prison admissions are persons revoked from probation or parole, principally as a result of technical violations rather than new convictions.³⁹

Data presented by DOC officials during the 2003 special legislative session show that persons revoked

37 In 3,656 cases, involvement of injury was listed as unknown.

38 In 3,700 cases, involvement of a weapon was listed as unknown.

39 Offenders sentenced after the abolition of parole in 1993 are technically released onto community supervision rather than parole; however the term “parole” continues to be used as a catch-all term for supervised release from prison.



from probation and parole made up just over half of prison admissions in fiscal year 2003 (9,195 of 17,373 total admissions).

The overwhelming majority of those admitted to prison from probation or parole were revoked because they were unwilling or unable – often as a result of substance abuse or mental health problems – to comply with the conditions of supervision, *not* because they had been convicted of new crimes. Four in five probationers (81 percent) and nine in 10 parolees (91.4 percent) were revoked for technical violations rather than for new convictions.

According to probation officers and others who work with offenders in the community, substance abuse and mental illness are major contributing factors to revocation. Data on prisoners incarcerated on August 31, 2003, show that those revoked from probation were even more likely to have received the top alcohol and drug need score (58.7 percent) than those sentenced directly to prison (50.9 percent). Prisoners revoked from probation were also slightly more likely than those sentenced directly to prison to have a men-

tal health needs score of three or higher (14.5 percent and 12 percent, respectively).

Probation: tough, effective... and not available for thousands of offenders

While probation supervision is lax or non-existent in many states as a result of high caseloads, Arizona mandates no more than a 60:1 ratio between adult probationers and probation officers, allowing probation departments to provide much more effective supervision than in most other states. Probation officers enforce probationer compliance with a strict regimen, including abiding by 15 uniform conditions (reporting, submission to any drug and alcohol testing as directed, participation in programming as directed, seeking and maintaining employment, paying fines and fees, etc.) as well as any special conditions imposed by the judge.

Probationers who require additional supervision – whether by the nature of the offense or the offender’s prior history or failure to comply with the conditions of standard probation – can be placed on Intensive Probation Supervision (IPS). IPS can involve as many as four contacts per week with probation officers who are given a lower caseload (one per 15, two per 25 or three per 40 probationers) to facilitate close supervision. According to ACJC, the number of individuals on IPS has grown significantly, from 5,963 in 1996 to 9,477 in 2001.

IPS probationers must work; complete 40 hours of community service a month; pay fines, restitution and fees; and attend drug treatment and education if so instructed. One probation officer described the IPS regimen as follows:

You go out at seven in the morning and he’s doing his community service hours washing windows at the county bus depot. The following afternoon, you make a random check at his job, where he’s earning money to support himself, pay fines and pay restitution. On Monday, you drive by his house at nine in the evening and he’s at home sleeping because he has to be up at six to do community service again. We’re doing more to hold offenders accountable here than in DOC, where they have no bills or restitution to pay, no job, no family responsibilities.

Finally, if a judge determines that incarceration is necessary, he or she has the power to impose up to a year in county jail as a condition of probation. Statistics published by Maricopa County’s criminal justice system show that, in fiscal year 2002, more than a third (37.2 percent) of all felony cases resulting in a

disposition of probation also included a jail term, while an additional 6.8 percent included a prison term.⁴⁰

Although many believe probation does a better job of holding offenders accountable than the prison system, it is only available for offenders with no historical prior felonies under Arizona’s mandatory sentencing laws. Prosecutors may, at their discretion, make probation available to offenders with felony records by withdrawing the allegation that the individual in question is a repetitive offender. But they require thousands of non-violent and non-sex offenders to accept plea agreements requiring prison in order to avoid facing long mandatory sentences – denying judges the opportunity to determine which are appropriate candidates for probation.

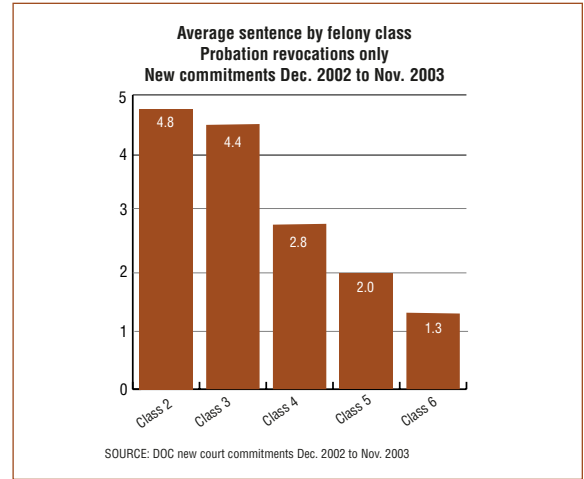
Individuals revoked from probation were sentenced to substantial prison terms, even though the vast majority were revoked for technical violations rather than new convictions.

Arizona law does not make a sentence to probation mandatory, or even presumptive, for any felony offense except first- and second-time drug possession under Proposition 200. In order for an offender to receive probation, a judge must determine that the public is best served by allowing him or her to remain in the community. In making that determination, the judge has the help of pre-sentence investigators who review the case, assess the offender and solicit input from interested parties (including the prosecutor, law enforcement and any victims) before recommending a term of probation or prison.

Additionally, in cases that are plea bargained (the vast majority), the county attorney’s office must authorize a plea agreement that does not require prison and withdraw any allegations (repeat offender, dangerousness, crime committed on post-conviction release, etc.) that would mandate a prison term. In short, offenders are sentenced to probation based on a judge’s careful consideration, often at the recommendation of pre-sentence investigators and often with the consent of prosecutors, because they are not believed to pose a significant threat to the public.

DOC data show that those revoked from probation are overwhelmingly low-level offenders convicted of non-violent and non-sex offenses. Among 4,067 offenders sentenced to prison after being revoked from probation between December 2002 and November 2003:

- Three-fourths (3,113 or 76.5 percent) were on probation for non-person offenses (i.e. not violent or



sex offenses).

- Three-fourths (3,105 or 76.3 percent) were on probation for low-level offenses (Class 4, 5 or 6).
- Two in five (41.1 percent) were sentenced for Class 6 offenses, compared to one in five (21.2 percent) of all new court commitments.

As shown, the overwhelming majority of those revoked from supervision have not been convicted of new and more serious offenses, or indeed any new offenses at all. While sanctions need to be imposed on technical violators to maintain the integrity of the system and prevent crime, in many jurisdictions around the country technical violations do not necessarily lead to long prison sentences. In Arizona, however, technical violators receive substantial prison terms.

For new court commitments revoked from probation between December 2002 and November 2003, average sentences ranged from 1.3 years for Class 6 felonies (over 40 percent of the total) to 4.8 years for Class 2 felonies. Among non-person offenders, those convicted of drug dealing, fraud and DWI received the longest average sentences (3.5 years, 2.6 years and 2.5 years, respectively).

Parole

The structure of the DOC information management system makes it difficult to distinguish between individuals returned to DOC custody because they were revoked from parole and those who never left DOC custody. Such a distinction was impossible to make using the population and new court commitment data DOC provided FAMM, preventing a more thorough analysis of the parole revocation population.

DOC statistics show that, because prisoners sentenced since the 1993 adoption of “truth-in-sentenc-

⁴⁰ As discussed previously, defendants convicted of felony DUI are required to serve a four- or eight-month term of incarceration in prison, rather than county jail, as a condition of probation.

ing” are required to serve 85 percent of their sentences behind bars, terms of post-release community supervision can be extremely brief. The DOC Annual Report for FY 2002 indicates that nearly three times as many released offenders were under supervision for some part of the year (9,736) as on supervision at any one time (a high of 3,550 in June 2002), which means that most were on supervision for just a few months.

Criminal justice professionals say that extremely high turnover rates and limited program resources make it difficult for parole officers to help returning prisoners successfully readjust to life on the outside. The data show that 2,365 of 9,736 offenders supervised at some point during fiscal year 2002 were revoked from parole; many were presumably released a few months later with no supervision at all.

Use of incarceration by jurisdiction

Arizona counties may “overuse” prison because they incur no direct costs for their use.

In the mid-1990s, sociologists Michael Polakowski and Michael Gottfredson examined the use of prison beds by Arizona counties. After analyzing incarceration and crime rates along with other county characteristics, such as spending on criminal justice and per capita income, they found that crime rates could not explain the significant variation in the use of incarceration. The authors observed that, “these findings coincide with expectations that jurisdictions will overuse a common resource like the prison system when they incur little direct cost for those decisions.”

A county-by-county analysis of prisoners incarcerated on August 31, 2003, suggests that some counties continue to overuse prison beds and that incarceration rates do not seem to correlate (either positively or negatively) to index crime rates, as shown in the table below.⁴¹

Overuse of incarceration for non-person offenders

Variation in incarceration rates among counties did not fall clearly along urban-rural lines, and was driven, in large part, by incarceration rates for drug, DUI, property and miscellaneous offenses, rather than violent and sex offenses.

Many people assume that because urban areas tend to have higher crime rates they will also have higher rates of incarceration. Yet the incarceration rate in Maricopa County (which includes Phoenix and its suburbs) ranks fifth among the 15 counties, and Pima County (which includes Tucson) has the eighth-highest incarceration rate. Conversely, among the counties with the highest incarceration rates (Mohave, Graham, La Paz and Gila), none has a city with over 50,000 residents.⁴²

Further, variation in overall county incarceration rates is largely a product of variation in the rate at which counties incarcerate non-violent drug, property and public order (DUI and miscellaneous) offenders. Excluding Apache County and Santa Cruz County, which had incarceration rates far below the state average (118.9 and 188.3 per 100,000 population, respectively), incarceration rates for violent and sex offenders were relatively consistent across counties.⁴³ The top rate (Pima County at 282.3 per 100,000) was 63 percent higher than the bottom (Cochise County at 173.6).

In contrast, incarceration rates for non-violent offenses (drug, property and public order crimes) varied widely across counties, with the top rate (Mohave County at 415.7 per 100,000) 123 percent higher than the bottom (Pinal County at 186.5). Among counties with above-average incarceration rates, all six locked up drug, property and public order offenders at higher than average rates, whereas just two (Mohave and Maricopa) did the same for violent and sex offenders. Among counties with below-average incarceration rates, one (Pima) incarcerated violent and sex offenders at rates above the state average, whereas all nine incarcerated drug, property and public order offenders at below-average rates.

41 Without attempting to duplicate Polakowski’s and Gottfredson’s findings, this report has calculated incarceration rates by county and offense type, using August 31, 2003, prison population data provided by DOC and July 1, 2003, population estimates generated by Arizona’s Department of Economic Security.

42 The northwest corner of Mohave County falls within the Las Vegas Metropolitan Statistical Area, as defined by the U.S. Census Bureau, which may partially account for the county’s high rate of incarceration.

43 Since over half of Apache County is located on Navajo and Apache reservations, and 76.9 percent of the county’s population is Native American, the county’s apparently low crime and incarceration rates may be due to the handling of crime by tribal and federal agencies, which do not commit prisoners to Arizona state facilities or report data (in the case of tribal agencies) included in the Uniform Crime Report. Santa Cruz County is located on the U.S.-Mexico border with over half of its population living in a border city (Nogales); its apparently low rate of crime and incarceration may be attributable to the heavy involvement of federal law enforcement (Border Patrol and the U.S. Marshal Service) in the region.

Variations in incarceration rates do not appear to correlate with variations in index crime rates.

A county-by-county examination of index crime rates and incarceration rates shows very little apparent correlation between the two.⁴⁴ For example,

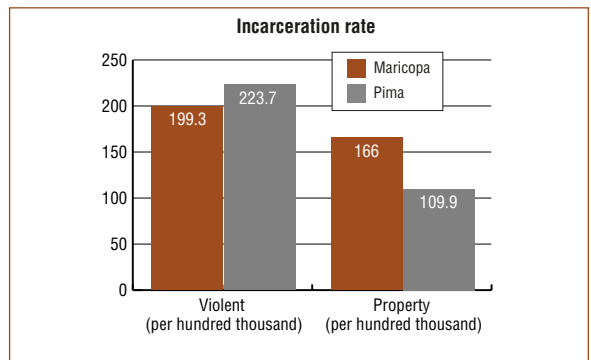
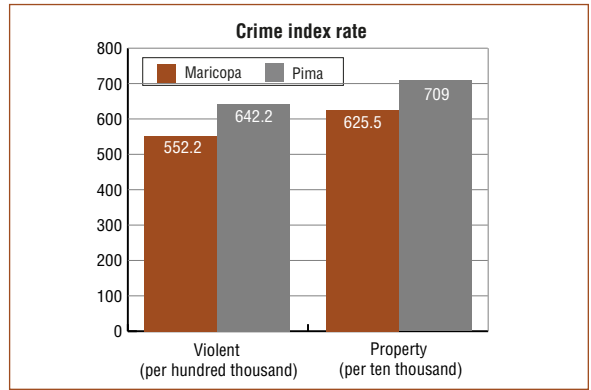
- Mohave County has the fourth-highest rate of index crime (493.7 per 10,000), while ranking number one in the state for its incarceration rate (689.1 per 100,000).⁴⁵ But Graham County, which has the third-lowest crime rate, maintains the second-highest incarceration rate (658.2).

- Maricopa, the most populous county, has the state's second-highest rate of index crime (680.7 per 10,000), and an *above-average* incarceration rate (595.3 per 100,000) while Pima, the second most populous county, has the highest rate of index crime (773.2) and a *below-average* incarceration rate (511.9).

- Yuma, the fifth-most populous county and home to the second-largest city located outside of the Phoenix metro area (the city of Yuma), has a both a lower crime rate (340.8 per 10,000) *and* a lower incarceration rate (463.3 per 100,000) than either La Paz or Gila, both small rural counties.

According to the DOC's Fischer, incarceration and index crime rates have moved further apart over the years, as offenses not included in Part I of the Uniform Crime Reports – including drugs, DUI, forgery, fraud and sex offenses other than rape – make up a larger proportion of the prison population. While this limits the usefulness of comparing index crimes and incarceration rates, index crime rates are still considered by many policymakers to be a measure of criminal justice effectiveness, and index crimes (murder, rape, robbery, burglary, assault, etc.) are considered by members of the public as the most serious threats to public safety, making the comparisons relevant for purposes of this discussion.

The presence of Native American reservations, which handle crime through separate justice systems, will tend to distort crime and incarceration rates in counties where the number of crimes taking place on reservations is large. However, Apache County has the only majority Native American population in the state, and just two other counties have populations of which Native Americans make up more than 15 percent (Coconino at 28.5 percent and Navajo at 47.7



percent). Aside from Apache County, which has the highest proportion of Native Americans and lowest rates of crime and incarceration, neither crime nor incarceration rates seem to correlate with Native American population.

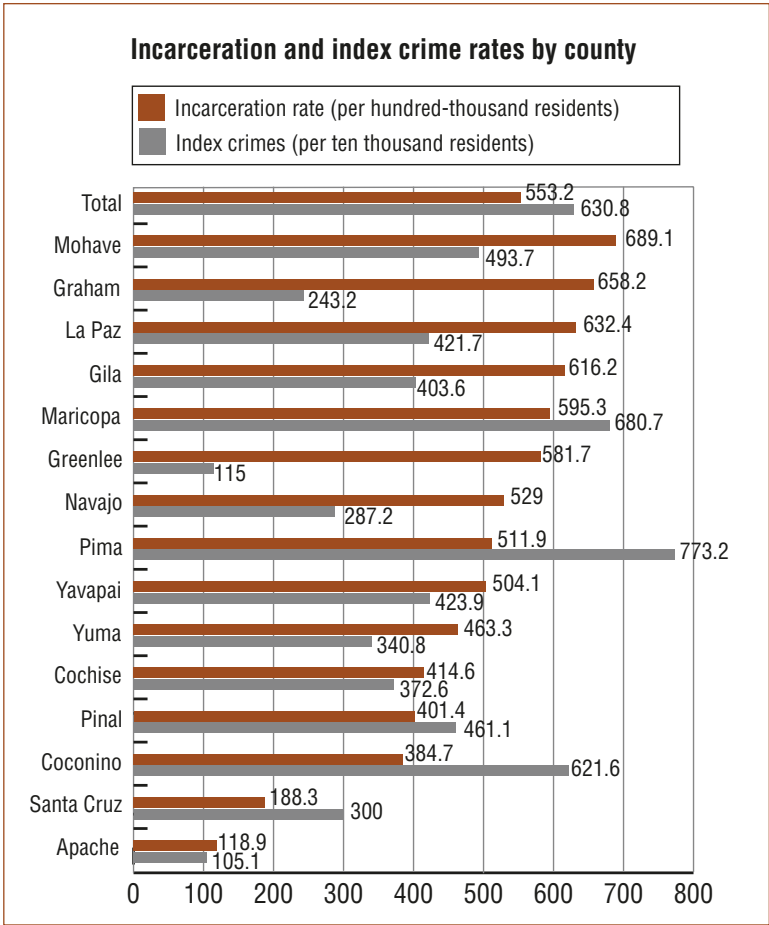
Crime rates alone do not appear to explain the significant differences in both overall all incarceration rate and use of prison beds for Arizona's two major urban counties.

A comparison of Maricopa County and Pima County yields interesting results for both the relationship between crime and incarceration, and the use of prison beds for violent and non-violent offenders. Since the violent crime rate is 16.3 percent higher in Pima County (642.2 per 100,000 population) than in Maricopa County (552.2), it might seem logical that Pima incarcerates violent offenders at a higher rate (223.7 vs. 199.3, or 12.2 percent higher).

However, Pima County's property crime rate is slightly higher than Maricopa County's (709 vs. 625.5 per 10,000 population, or 13.3 percent higher), yet

44 The Crime Index is based on the Uniform Crime Reporting program, which tracks reports to law enforcement agencies of selected violent crimes (murder and non-negligent manslaughter, forcible rape, robbery and aggravated assault) and property crimes (burglary, larceny-theft, motor vehicle theft and arson). Index crime rates represent the number of index crimes reported for each 100,000 people who live in the reporting area.

45 Index crime rates and property crime rates are presented here per 10,000 population, rather than per 100,000 population, to facilitate comparison with rates of incarceration and violent crime.

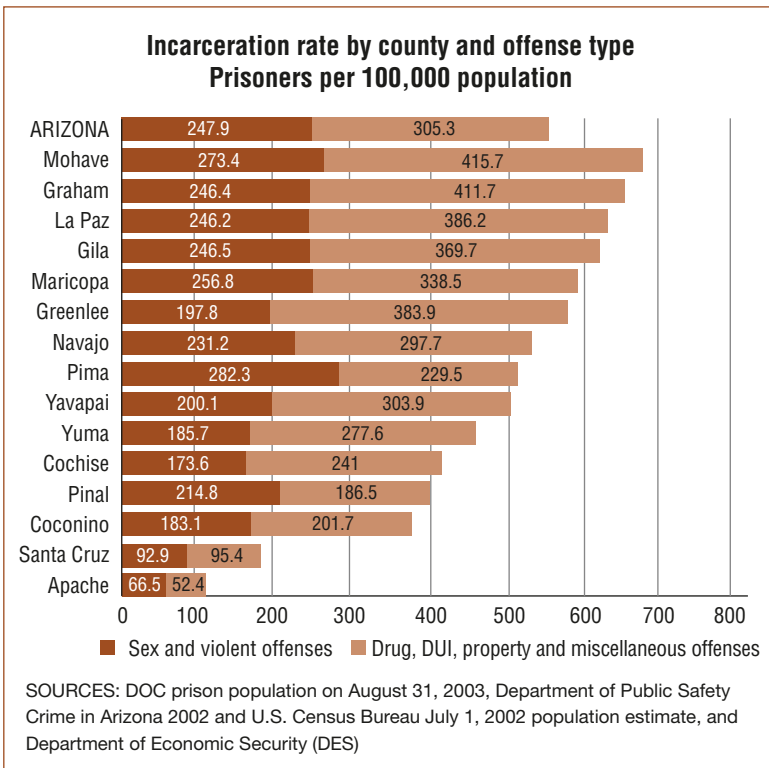


Maricopa incarcerates property offenders at one-and-a-half times the rate of its neighbor to the south (166 and 109.9 per 100,000, respectively).

These comparisons fly in the face of two simplistic (and contradictory) stories often told about the relationship between crime and incarceration: first, that high incarceration rates are a necessary consequence of high crime rates; and, second, that high incarceration rates produce lower crime rates. If higher crime rates were the primary cause of higher incarceration rates, Pima County should lock up many more property offenders. If higher crime rates were a consequence of lower incarceration rates, Pima's violent crime rate should be lower and its property crime rate far higher than Maricopa's rates.

Instead, the comparison demonstrates, first, that there is no simple relationship (negative or positive) between crime and incarceration rates in the two counties. Second, it shows that whereas Pima County concentrates limited state criminal justice resources (i.e. prison beds) on violent offenders, whom the county incarcerates at more than twice the rate of property offenders, Maricopa fills state prison beds with nearly as many property offenders as violent offenders. The latter observation conforms to Polakowski's and Gottfredson's 1996 finding that Maricopa incarcerated more non-violent offenders than expected based on the county's crime rate.

These observations are consistent with those of noted criminologist Frank Zimring, who used comparisons between major cities in and outside the U.S. to demonstrate that there was almost no correlation between rates of property crime and rates of violence. Zimring argues that the conflation of violence with crime in the U.S. has encouraged policies that incarcerate more and more non-violent offenders while doing less and less to address the problem of violence.



Although the lack of program resources may contribute to higher rates of incarceration in rural counties the high rate of incarceration in Maricopa County, which has many more program resources, may suggest that law enforcement strategies should also be reviewed.

It is impossible with such limited data to pinpoint the causes of county-by-county variance in the incarceration of non-violent offenders. Administrative Office of the Courts staff and drug treatment providers point out that rural counties lack program resources many offenders need to succeed under community supervision, including substance abuse treatment, mental health services, job training and job referral.

A report on drug court programs, published in 2001 by the Adult Probation Services Division of the Arizona Supreme Court, noted that Gila County’s drug court did not have a certified drug counselor for treatment services. The county was forced to rely on the best efforts of a probation officer then studying for a master’s degree in counseling.

But in Maricopa County where many such services are available, non-person offenders are also incarcerated at high rates. Possible explanations include the Repeat Offender Program (ROP) run by county law enforcement, which targets repeat but often low-level drug and property offenders, and strict charging and plea-bargaining policies to which assistant county attorneys must adhere unless they receive authorization from a superior to deviate.

Cost of incarceration

The DOC projects that the state’s prison population will continue to grow at a breakneck pace, reaching 40,512 by June 30, 2008. On June 30, 2003, the DOC reported a “bed deficit” of 3,970, which is projected to reach 13,584 by the end of FY 2008. Construction of a private DUI prison in Kingman will increase the state’s prison capacity by 1,400 beds, and measures taken during the special session will add an additional 2,000 beds to private and public in-state prisons. In the meantime, legislators authorized the DOC to contract for 138 beds in county jails and 1,400 to 2,100 temporary beds outside of the state.

While DOC gives no estimate of operating cost of new beds at Kingman, a rough estimate is possible using available data. Under recently negotiated contracts with Correctional Services Corporation, Arizona now pays an average per diem rate of \$46.65 to house DUI offenders. In 2002 DOC spent an additional \$4.73 per diem for overhead associated with the contract (prisoners’ wages, oversight and administration), according to the DOC’s Fiscal Year 2002 Report Workbook. Using no increase in DOC per diem overhead expenditures and the current contract per diem rate for DUI offenders, the estimated annual cost of operations at Kingman would be \$18,754 per prisoner, or \$26.2 million at full occupancy.

A rough estimate for the 1,000 new private in-state beds can be generated based on the current average per diem contract cost for all existing private beds of \$44.82, plus DOC overhead expenditures of \$4.73 per diem, for an estimated annual cost of \$18,115 per prisoner, or \$18.1 million at full occupancy. The 1,000 public beds will be evenly split between male and female minimum-security prisoners. The operating cost for the men’s beds can be roughly estimated using the fiscal year 2002 average per diem cost of male minimum security (level 2) units of \$45.52, for an estimated annual cost of \$16,614 per prisoner or a total of \$8.3 million with 500 beds.⁴⁶ The operating cost for the women’s beds can be estimated using the fiscal year 2002 average per diem cost for female minimum-security (level 2) units of \$60.20, for an estimated annual cost of \$21,971 or a total of \$10.9 million with 500 beds.

Added together, the total annual cost of operating the new beds in Kingman and those authorized in the special session may exceed \$60 million a year. Furthermore, the 3,400 new beds cover just a *quarter* of the 13,584-bed deficit projected for fiscal year 2008.

In October 2003, responding to the overcrowding crisis just prior to convening the special legislative ses-

Population	Operation	Beds	Cost of operation (per prisoner per year)	Total cost of operation (at full occupancy)
Male DUI	Private	1,400	\$18,754	\$26,255,180
Male	Private	1,000	\$18,115	\$18,114,950
Male Level One	Public	500	\$16,614	\$8,306,980
Female Level One	Public	500	\$21,971	\$10,985,500
Total		3,400		\$63,662,610

⁴⁶ The DOC has indicated that the new public beds will be designated as “level one.” However, there are currently no level- one beds in Arizona’s prisons, so cost estimates are based on level-two beds, currently the lowest-security beds in the system.

sion, Gov. Janet Napolitano proposed the construction of 9,134 new public prison beds over the next four years, at a cost of \$700 million. Legislators balked at the figure. Polling by Arizona State University and KAET showed that the public rejected the plan by 54 percent to 32 percent.

But even the governor's estimate of \$700 million understates the fiscal impact of prison growth, since it covers only the cost of borrowing for and building 9,134 new beds. Based on most recent information on per diem costs of Arizona's prison operations (from fiscal year 2002), the cost of operating the proposed 9,134 beds would be an estimated \$170 million per year. Over 15 years the total cost of operations would be \$2.6 billion, pushing the full price tag for prison expansion from \$700 million to over \$3 billion in that period.

Proponents of private prisons have argued that privatization is the answer to the high cost of corrections. But DOC figures indicate that, after accounting for overhead costs borne by the state, private prison beds cost the state more than public ones. Yet even if all of the needed new beds were privatized at a savings estimated by proponents to be 12 percent over public beds, the annual cost of expanding the prison system by more than 9,000 new beds would only be reduced from \$170 million to \$150 million. Furthermore, these estimates are conservative, since they do not account for costs that could be expected to escalate substantially over 15 years. Wages for prison staff (whether public or private) would almost certainly have to be increased to attract thousands of new workers to institutions that are already understaffed.

Arizona can barely afford to operate its current chronically overcrowded and understaffed prison system, much less one that is a third larger. According to many analysts, Arizona's fiscal problems will extend well beyond the recent economic downturn. Even when revenues recover from the recession, it is not clear that they will keep pace with rapid growth in the expected costs for education and health care.

Further, the state has other pressing needs such as improvements in child abuse prevention, pre-school programs and the compensation of state workers, all of which are on the agenda for the current legislative session. Since it seems increasingly unlikely that tax reform will be enacted any time soon (at least not a reform that *increases* state revenues), it is likely that Arizona will have to choose between meeting those needs and continuing with current sentencing policies.

Prior to any prison expansions, corrections spending was already crowding out spending on other state

priorities. In an April 2003 report, "Borrowing Against the Future: The Impact of Prison Expansion on Arizona Families, Schools and Communities," the Arizona Advocacy Network (AzAN) tracked the growth in corrections spending (which doubled between 1988 and 2003 after adjusting for inflation) and correlated that growth to reduced funding for higher education and social programs.

According to the AzAN report:

- Inflation-adjusted per capita spending on prisons grew from \$39.81 to \$113.68 (an increase of 185.5 percent) between 1979 and 2003, while per capita university spending fell from \$177.35 to \$131.82 (a reduction of 25.7 percent) over the period.

- Students and their parents were effectively forced to make up for a \$1,288 decline in per-student funding over the last 15 years with tuition increases totaling \$1,043.

Michael Crow, Arizona State University president, has said that he may have to seek a cap on enrollments if the Legislature fails to approve another \$58 million in funding this year. Such a move could deny 5,000 qualified students access to the university. In addition, all three of Arizona's state universities are planning further tuition hikes this year.

By proposing a 9,134-bed expansion of the prison system, Gov. Napolitano did what politicians rarely do: she put a visible price tag on the costs of maintaining criminal justice policies that are tough, but not necessarily smart, on crime. Whether the decision to expand the prison system is taken all at once, or voted in incremental steps, the cost will be the same, and is clearly far more than the state can afford. Faced with similar crises, many other states have adopted smart reforms that reduce the burden of incarceration on residents without compromising public safety.

Conclusions and recommendations

In many respects Arizona is a national leader in correctional policy and practice. When Arizona voters showed their strong preference for treatment over incarceration for low-level drug offenders, criminal justice policymakers across the nation were jolted to realize that new attitudes about solutions to the drug abuse problem had taken hold. Proposition 200 sparked similar reforms in many other states through ballot initiatives and legislation.

Arizona’s probation system has long been regarded as one of the best in the nation, a pioneer in the development of well-managed community-supervision programs that serve as models for other jurisdictions.

Yet Arizona’s rigid sentencing structure has a lock on an increasing share of the state budget, and taxpayers are paying the price of spiraling correctional costs. The criminal code itself, more than a quarter-century old, is due for a complete overhaul.

The myriad problems detailed in this policy report point to the urgent need to restore sentencing discretion to Arizona’s judges. In actual practice the imposition of Arizona’s statutory mandatory sentencing enhancements is the exception, not the rule. The role these laws play in plea negotiations hinders judges from using appropriate discretion to weigh the many important factors that should assure that punishment fits the crime and the role of individual defendants.

It has been many years since Arizona’s policymakers thoroughly reviewed the overall workings of the sentencing and correctional system. Policy experts have not closely examined sentencing issues since the 1991 report by the Institute for Rational Public Policy. No thorough evaluation has been made of the impact and effectiveness of Arizona’s 1993 “truth-in-sentencing” reforms. A sentencing commission established in 2002 was short-lived and did not produce a report.

Despite declining crime rates, Arizona has one of the fastest-growing prison populations in the U.S. The working group convened by Rep. Bill Konopnicki (R-Safford) to examine possible alternatives to the rising prison population growth signaled a new and encouraging direction. The process has produced some sensible proposals, but much more is required.

Establish a permanent top-level policy commission to study and recommend revisions to Arizona’s mandatory sentencing system.

Arizona needs a top-level policy commission,

staffed and supported by criminal justice experts, to conduct a comprehensive review of the determinate sentencing laws, to determine the causes of Arizona’s prison overcrowding crisis, and to recommend pragmatic reforms that can bring prison population growth under control.

A policy commission should include a mix of government officials and public members, tapped for their experience and expertise in criminal law, corrections, judicial administration, substance abuse treatment and community programs, as well as members from the community and legislature. The process should entail detailed analysis of criminal case processing as well as sentencing policies and practices. With adequate data drawn from the courts and correctional systems, modeling tools can aid development of concrete policy proposals and can also give policymakers accurate predictions of the fiscal impact of any proposed legislation or policy innovations.

Until the needed policy commission and staff are put in place to assure more effective and efficient use of Arizona’s limited correctional resources, the state’s policymakers should abstain from planning further prison bed expansion. In the meantime, many concrete steps could be taken now to reduce prison population pressures and improve the correctional system.

Mandatory sentencing enhancements.

Establish a procedure through which judges can set aside mandatory minimum sentences in the interest of justice.

Under Arizona’s system of mandatory sentencing enhancements, a judge cannot set aside a mandatory prison sentence, even when that sentence is excessive relative to the facts of the offense. Judges should have the same power prosecutors already enjoy – to determine that the interests of justice are best served by setting aside a mandatory minimum sentence if that sentence is disproportionate or unjust.

Two states that employ mandatory minimum sentences have adopted similar reforms. Maine’s legislators have authorized judges to suspend mandatory prison sentences for offenses other than murder if they are found to create “substantial injustice” and if doing so would neither diminish the gravity of the offense nor endanger public safety. Connecticut legislators have also given judges some leeway to relax mandatory minimum sentencing laws for sale or possession of drugs for “good cause.”

Judges should be allowed to depart from mandatory minimums when the sentence would create a substantial injustice or when sentencing an individual

to substance or mental health treatment would best achieve public safety. A majority of Arizona's incarcerated offenders are chemically dependent and there is ample evidence that treatment is a more effective crime-control strategy than mandatory prison sentences.

Lower minimum sentences for non-dangerous repeat offenses.

Current statutory sentencing ranges force judge to impose lengthy sentences on certain offenders, especially those convicted as repetitive offenders. For example, a defendant with one historical prior conviction charged with stealing \$2,000 faces at least a 2.25-year prison sentence, regardless of circumstances. With two historical prior convictions, the minimum possible sentence is six years.

Minimum (and super-mitigated) sentences should be reduced for non-dangerous repeat offenses. This would still escalate punishment of repeat offenders and allow long sentences to be imposed on serious offenders, without wasting scarce corrections resources on locking up petty offenders for long terms.

A bill introduced in 2004 by Rep. Bill Konopnicki (R-Safford) would take a small but positive step toward restoring judicial discretion in the sentencing of non-dangerous offenders by making it easier for judges to impose sentences at the very top or bottom of the current ranges. H.B. 2243 would eliminate the requirement that judges find two substantial aggravating or mitigating factors in order to impose sentences that are now considered super-mitigated or super-aggravated.

The reform could be taken further by lowering the proposed minimum sentences for offenders convicted with one or two historical priors. Replacing the minimums for repetitive offenders with the current minimums for multiple offenses is the simplest way to accomplish this.

A defendant with one historical prior conviction would face an absolute minimum sentence of one year for a \$2,000 theft and 2.25 years with two historical prior convictions. The presumptive sentences would remain 4.5 years and 10 years respectively, while the maximum possible sentences would be 7.5 years and 15 years, respectively.

Because plea bargaining, not judicial discretion, currently drives sentencing, it is impossible to estimate the impact of either H.B. 2243 or the above proposals on the prison population. However, most judges interviewed could cite a recent case in which mandatory minimums forced them to impose a sentence they considered excessively punitive.

The state will spend nearly \$100,000 on average to incarcerate each individual convicted of theft with one historical prior, and over \$150,000 on one convicted with two historical priors, compared to under \$50,000 for a prisoner convicted with no historical priors. Given the high cost of long prison terms, the reduction of even a handful of sentences for non-violent offenders could yield considerable savings, still giving judges discretion to impose long sentences, where warranted.

Limit the use of mandatory enhanced sentences for repeat offenders to those whose prior convictions include serious or dangerous felonies.

Arizona's one-size-fits-all enhancement for repetitive, non-dangerous offenses makes no distinction between offenders whose criminal records include very serious (even violent) felonies, and those whose records include only petty offenses. This policy fills scarce prison beds with low-level drug, DUI and property offenders.

Low-level (Class 4, 5 and 6), non-dangerous offenses should no longer be counted as historical prior convictions that can trigger the repetitive-offender sentencing enhancement. Such a reform would still permit offenders who have serious criminal histories and are charged with minor crimes – such as a serial rapist caught trespassing – to receive enhanced sentences. And it would still permit judges to impose substantial sentences on those who deserve them, since even a person convicted of the lowest-level felony (Class 6) can get a sentence of up to two years for a first offense.

Instead, the reform would allow defendants with only minor criminal records to have their day in court without fear of being hammered with a harsh mandatory sentence if they lose. And it would allow judges to impose appropriate sentences on offenders who are more of a nuisance than a danger to the public.

Department of Corrections (DOC) data does not distinguish prior felonies by class or type, so it is impossible to know how many of those currently incarcerated would have been affected by the proposed reform, much less what sentences judges would have imposed absent the mandatory enhancements. However, we do know from court officials that many defendants face repetitive offender allegations as a consequence of prior low-level convictions. We also know that the vast majority of court commitments to prison were for low-level felonies, and the proportion is presumably higher among those who remain on probation.

Finally, as discussed, sentences for repetitive of-

fenders were far longer than sentences for first offenders. This is true not only for those sentenced with the repeat-offender enhancement, but also for those with prior felony convictions sentenced as first offenders under plea agreements. Among new court commitments for non-person offenses between December 2002 and November 2003, the average sentence increased by 8.4 months, on average, for each prior felony conviction.⁴⁷

Even if judges had complete discretion in sentencing, offenders with longer records would receive, on average, somewhat longer prison terms. However, the FAMM research indicates that the mandatory sentencing enhancement for repeat offenders drives up sentences further than is justified or necessary for public safety. Reducing the number of low-level offenders eligible for the enhancement would decrease the sentences of even those offenders who are not convicted with the enhancement by mitigating the power of prosecutors in plea negotiations. Even if the reform cut sentences for just one in five non-person offenders by an average of 8.4 months, the eventual consequence would be a projected savings of over 1,000 prison beds or \$20 million a year in correctional costs.⁴⁸

Limit an historical prior to a conviction obtained before the commission of the current offense.

Because of an anomaly in Arizona’s criminal code, defendants charged with multiple offenses who seek to have those charges separated and handled in different criminal proceedings risk being sentenced as repeat offenders. Most people would assume that a repetitive offender is a person convicted of one felony who goes out and commits another. Under Arizona law, however, if a person is convicted in separate criminal proceeding of drug possession on Monday and an unrelated theft on Tuesday, the theft conviction is a repetitive offense subject to a mandatory enhanced prison sentence.

In practice, this makes it difficult for defendants to contest multiple allegations. For example, a defendant charged with two burglaries who is only responsible

for one will have difficulty convincing a jury of innocence in the second case when there is strong evidence of guilt in the first. However, if the defense attorney moves to have the cases separated to ensure a fair trial, the defendant risks an enhanced mandatory sentence if ultimately convicted of both offenses.

Limiting historical priors to convictions obtained before the commission of the current offense would not change sentencing of true repetitive offenders but would prevent individuals charged with one or more offenses from defending themselves without fear of exposure to repetitive-offender allegations and would reduce prison costs.

Drug offenses

On August 31, 2003, Arizona had 3,982 incarcerated individuals for drug sales, for an estimated annual cost of \$78 million, and another 1,630 individuals for drug possession, at an annual cost of \$32 million. Furthermore, an unknown number were incarcerated for other non-person offenses as a result of prior convictions for drug sale or possession. The following proposed reforms could help reduce the human and social cost of incarcerating drug offenders.

Make sale of dangerous or narcotic drugs involving amounts below statutory thresholds a Class 4 felony.

Arizona’s laws prohibiting sale of dangerous and narcotic drugs draw little distinction between a drug-addicted individual convicted of street sales and an individual at the top of the drug trade, since both are guilty of the same Class 2 felony. As a consequence, the state is filling prison beds with low-level dealers, often substance abusers themselves who serve longer average sentences than many violent offenders.⁴⁹ Imposing long prison terms on low-level drug offenders who sell to fund a habit is not only disproportionate punishment but also a waste of criminal justice resources, since those incarcerated are likely to be quickly replaced by other drug addicts.

⁴⁷ The average increase in sentence length was calculated for new commitments who had between zero and six prior felonies – 97 percent of all new commitments for whom the information was available – and includes felonies that could be alleged as historical priors under the repetitive-offender enhancement as well as those that are too old to be alleged.

⁴⁸ Estimated savings are calculated based on fiscal year 2002 DOC per-prisoner expenditures. The savings that can be achieved by removing one prisoner from a public prison are limited to the “marginal costs” directly associated with that prisoner (i.e. food and medications). However, Arizona currently contracts with out-of-state private prison companies on a per diem basis, which means that the full cost of each bed saved can be recovered by bringing prisoners back home. Further, rapid growth in the state prison population has led to the authorization of new public and private beds within the state. Bed-savings achieved through reform reduce the number of beds that must be built, saving not only the full cost of operations but also the cost of construction and financing. Finally, savings that approach the full cost of operations can be achieved by removing enough prisoners from existing facilities to close entire housing units or even prisons.

⁴⁹ On August 31, 2003, 3,084 prisoners were serving time for sale of dangerous or narcotic drugs, at an annual cost to the state of over \$60 million. The majority (60.1 percent) had the highest possible alcohol and drug needs score, indicating serious substance abuse problems.

Arizona can better distinguish between major and minor players in the drug trade by making sale of dangerous or narcotic drugs involving amounts below statutory thresholds a Class 4 felony. Under the proposed reform, judges could still impose substantial sentences on more serious offenders convicted for sales under the threshold when warranted (up to 3.75 years for a first offense). Yet, low-level addict-dealers would no longer face presumptive prison terms of five, 10 or 15 years depending on their historical priors.

There is ample precedent in other states for reforms that lessen penalties on low-level drug dealers. The Michigan reforms have been discussed earlier. Delaware legislators have reduced the mandatory minimum prison terms for trafficking cocaine from three years to two. Indiana legislators have given judges the authority to sentence drug offenders who sell drugs to support their habit to treatment instead of prison. And, as discussed, Connecticut legislators relaxed mandatory minimums for drug sales.

DOC data do not contain information on drug amounts related to convictions. However, at least a third of all commitments for Class 2 sale of dangerous or narcotic drugs between December 2002 and November 2003 were sentenced for weights below the threshold and the proportion was probably much greater.⁵⁰

Based on current sentencing patterns for all drug sales, the proposed reform could reduce average sentences for many low-level offenders from 5.7 years (Class 2) to 3.5 years (Class 4).⁵¹ While still substantial, a 3.5-year average term saves the state nearly \$35,000 per offender. Similarly, there would be a reduction in the average sentence for low-level offenders convicted of attempted sales from 3.8 years (Class 3) to two years (Class 5).

If just a third of those committed for sales (468) or attempted sales (323) of dangerous or narcotic drugs had been sentenced as Class 4 or Class 5 felons under the proposed reform, the projected result would be an eventual 400-bed reduction in prison population and an \$8 million savings to taxpayers. If more than a third were incarcerated for amounts below the threshold, the savings would be even greater.

Raise statutory threshold amounts for sales of dangerous or narcotic drugs and equalize threshold amounts for cocaine in crack and powder form.

Prison is mandatory for first offenders convicted of drug sales involving amounts above Arizona's very low statutory thresholds – as little as 750 milligrams of crack cocaine, one gram of heroin or nine grams of methamphetamine or cocaine in powder form. In contrast, under Michigan's new sentencing guidelines, probation is presumptive for first-time offenders convicted of selling up to 50 grams of a controlled substance.

Arizona should follow Michigan's example by raising threshold amounts for drugs other than marijuana.⁵² Such a reform would not prevent judges from imposing prison sentences on individuals convicted of sales under the threshold who deserve prison time. It would, however, make probation an option for offenders convicted of low-level drug sales, thus making them eligible for cost-effective drug courts and treatment options.

Arizona should also eliminate the disparity between threshold amounts for crack and powder cocaine. Under current law, it takes 12 times more powder than crack cocaine to trigger a mandatory prison term, even though the drug in question is the same. Nationally, disparity in treatment of those who use and sell powder and crack cocaine has contributed to a disparate number of African Americans serving sentences for drug offenses since African Americans are more likely to face charges involving crack. Arizona's crack/powder disparity could also be a contributing factor to disproportionate numbers of African Americans sentenced to prison for drug offenses.

Restore discretion to judges in sentencing individuals convicted of a third or subsequent charge of drug possession for personal use by exempting drug possession from the repetitive-offender enhancement.

Despite the passage of Prop 200, nearly as many prisoners are serving time for personal drug possession as murder.⁵³ Although Prop 200 diverts hundreds of first- and second-time drug possession cases into treatment, those who fail treatment face long prison

50 Among 449 new court commitments for completed Class 2 narcotic or dangerous drug sales between December 2002 and November 2003, 160 were revoked from probation. Since probation is only available for completed sales under the statutory thresholds, at least that number were below the thresholds.

51 These figures include marijuana sales as well as narcotic and dangerous drug sales, since too few narcotic and dangerous sales were convicted as Class 4 felonies to generate a valid average sentence. Since sentencing is based primarily on felony class and applicable enhancements, rather than chemical sold, the inclusion of all drug sales provides a reasonable basis for estimating the impact on sentencing.

52 The reform would apply to substances for which thresholds are determined by weights. Lawmakers might consider similar changes to thresholds for LSD (currently – milliliter or 50 dosage units) and PCP (4 grams or 50 milliliters).

53 On August 31, 2003, 1,630 prisoners were incarcerated for drug possession, compared to 1,993 for murder.

terms – 3.1 years on average – for the third or subsequent offense.⁵⁴ In fact those convicted of Class 4 drug possession (the vast majority of those incarcerated for drug possession) received longer average sentences than those convicted of Class 4 assault (3.6 years and 3.2 years, respectively).

While probation is mandatory for first- and second-time drug possession, a chemically dependent individual who racks up three felony convictions for drug possession in five years faces mandatory prison with a presumptive term of 10 years and an absolute minimum of six years.

Policy makers should restore the ability of judges to impose an appropriate sentence on drug offenders who are ineligible for Prop 200, within the range provided for non-dangerous first offenders. The reform would make it possible for an individual who has been unable to overcome a dependency to get one more chance – possibly in a more structured setting such as a drug court or residential treatment. Or a judge could decide to impose reasonable prison terms on offenders they believe are not amenable to treatment.

In addition to the other drug law reforms mentioned previously, Kansas's sentencing commission changed guidelines for second, third and subsequent drug possession convictions so a third conviction only triggers a 20-month prison term – roughly half the average sentence for drug possession in Arizona.

There is no way to quantify the impact such a proposal would have on sentencing using the available data. However, if the removal of the upward pressure created by the repetitive offender enhancement caused average sentences to fall to the presumptive for non-dangerous first offenses, the eventual result could be a 1,000-bed reduction in the need for prison space.⁵⁵

Exempt past Prop 200 felony convictions from being counted as historical priors that can trigger mandatory prison for a subsequent offense.

Although Prop 200 prevents individuals convicted of first- and second-time possession from being sentenced directly to prison, Prop 200 convictions are still putting many of them in prison through the back door. Under Arizona's rigid system of mandatory sentencing enhancements, even a minor conviction that

would otherwise lead to probation can become a repetitive offense subject to a mandatory enhanced prison term because of one prior Prop 200 conviction.

The proposed reform would leave judges the option of imposing significant prison terms on those who deserve them, and persons convicted of drug possession would still have many incentives to successfully complete probation or drug court. But low-level offenders would no longer face substantially enhanced sentences as a sole consequence of a past or current drug problem.

As with other proposals discussed, there is precedent in other states for reforms that reduce the impact of prior drug convictions on sentencing. Washington has lowered the scoring of prior drug convictions within its system of sentencing guidelines, while New Mexico repealed a mandatory sentencing enhancement that had been required if a prosecutor charged a defendant with a previous drug conviction as an habitual offender.

More information on prisoners' prior felony records is needed to estimate the impact of the reform. However, the number of drug possession cases is significant, as is the average impact of prior felony convictions on sentence length. If the average increase in the sentence length of persons incarcerated for non-person offenses (8.4 months per prior felony conviction) holds true for prior Prop 200 convictions, the state may be spending an extra \$10,000 or \$20,000 on each prisoner with Prop 200 priors.

Make drug courts available to any non-violent offender who has an underlying substance abuse problem and who would benefit from the treatment-oriented approach and structured supervision drug courts provide.

The majority of incarcerated non-person offenders have serious substance abuse issues, but only a handful get an opportunity to participate in drug court programs. On August 31, 2003, there were 10,330 non-person offenders with severe substance abuse problems in Arizona prisons.⁵⁶ By contrast, on July 31, 2003, there were just 764 participants from six counties enrolled in drug courts.

54 Based on new court commitments between December 2002 and November 2003.

55 Among new court commitments for drug possession between December 2002 and November 2003, there were 744 Class 4 convictions with sentences averaging 3.6 years, 44 Class 5 convictions with sentences averaging 3.6 years and 370 Class 6 convictions with sentences averaging 2.1 years. If the average sentences fell to the presumptive sentence for non-dangerous first offenses (2.5 years, 1.5 years and one year, respectively), the eventual result would be a projected savings of 662 beds for Class 4 offenders, 75 beds for Class 5 offenders and 330 beds for Class 6 offenders.

56 As indicated by an alcohol and drug needs score of five.

Criminal justice professionals who work with drug courts overwhelmingly believe that they can hold many chemically dependent offenders accountable more effectively and at lower cost than the prison system. They also say that many more cases could be successfully diverted if funds were available for additional treatment slots and the court personnel needed to accommodate the more time-intensive drug court process.

Drug courts should be made available as a sentencing option for any non-person offender who has an underlying substance abuse problem, is amenable to treatment and has no serious violent criminal history. This would require increasing the number of slots in existing drug court programs, establishing drug courts in the nine counties that currently have none and working with drug court administrators to develop strategies for expanding the scope of the programs to include more chemically dependent individuals whose convictions are for property or drug sale offenses.

Lack of adequate funding has been a major barrier to drug courts reaching their full capacity in Arizona and elsewhere, even though savings in prison operations would more than offset dollars spent on drug courts. The state of Washington recently found an effective solution to this problem. Washington legislators passed a package of reforms that reduced prison terms for non-violent drug offenders and diverted a portion of the savings to drug courts (with the remainder being used to close a budget gap). Arizona could implement a similar strategy by adopting the reforms outlined above in conjunction with drug court expansion.

For drug courts to reach their full potential as a tool for addressing (rather than just warehousing) the problem of drug-related crime, resources should help expand the scope of drug courts to include the range of non-violent offenders whose behavior is driven by substance abuse. DOC data show that over half (53.3 percent) of property offenders incarcerated as of August 31, 2003, had the highest alcohol and drug needs score. The figures are even higher for those convicted of dangerous or narcotic drug sales, with 60.1 percent receiving the highest score.

Chemically dependent individuals convicted of drug sales and/or low-level property offenses could benefit from participating in treatment within the structured and carefully supervised drug court context. Currently, however, drug courts enroll few property offenders (a tiny fraction of property offenders with substance abuse problems) and most exclude in-

dividuals convicted of drug sales, regardless of the amount of drugs involved or the individual's role in the transaction.

Finally, the state would benefit from the establishment of drug courts in the nine counties that lack them, and both funding and technical assistance should be provided to make that possible. Where rural counties have trouble identifying qualified treatment professionals to work with drug court participants, the state should work with them to find solutions, providing small grants if necessary.

By diverting just one in five non-person offenders with severe chemical dependencies, the state could save 2,000 beds and \$40 million in correctional costs – enough to fund more than 4,000 drug court slots and still net over \$20 million for deficit reduction.

Driving under the influence (DUI)

Expand the use of DUI courts and other structured alternatives to incarceration for non-violent DUI offenders.

As discussed previously, criminal justice professionals who work with Maricopa County's DUI courts consider them a success, particularly since the implementation of a Spanish-language DUI court. Maricopa County's DUI court could be expanded within the county and replicated elsewhere, as could the use of SCRAM devices.⁵⁷

Montana legislators enacted a measure that provides residential treatment as an alternative to prison for drunk drivers and expect to save the state \$3 million a year. A similar measure might save far more in Arizona, which has more than eight times as many total prisoners as Montana.

While there has been a vigorous grassroots movement to “get tough” on Arizona drunk drivers, Jan Blaser-Upchurch, who chairs the state chapter of Mothers Against Drunk Driving, has indicated that she is open to options other than prison.⁵⁸

Limit use of repetitive offender sentencing enhancement for DUI offenders to those with prior felony DUI convictions and bar the use of prior DUI convictions to enhance sentences for non-DUI offenders.

Currently, defendants charged with felony DUI can

57 “Secure Continuous Remote Alcohol Monitors” (SCRAM) bracelets detect alcohol use by the person wearing them.

58 Arizona Daily Star, October 1, 2003

receive mandatory enhanced prison terms because of prior convictions that have nothing to do with drunk driving. There is no evidence, however, that a person once convicted of theft, for example, presents a greater danger to the driving public than a person with nothing but DUI convictions. Conversely, defendants charged with non-DUI offenses can receive mandatory enhanced prison terms as a result of past DUI convictions, although there is no evidence that a person who steals and drives drunk is more likely to be a career criminal than one who simply steals.

Felony DUI convictions should be separated from other criminal convictions for the purpose of sentencing under the dangerous-and-repetitive-offender statute. Thus only those who persist in driving under the influence would be eligible for enhanced DUI sentences. It would also mean that a person convicted of a first low-level property or drug offense could not be sentenced as a repeat offender on the basis of an old felony DUI conviction.

Without more complete data on the prior records of Arizona prisoners, Famm cannot estimate the impact of such a reform on the prison population. However, the courts sentenced 812 DUI offenders directly to prison for sentences averaging 3.7 years between December 2002 and November 2003, some number of whom were denied probation as a result of a prior non-DUI felony. We also know that at least 1,816 individuals were convicted of felony DUI during that period, all of whom are now eligible for mandatory enhanced prison terms for any subsequent convictions.

Property offenses

Reduce penalties for low-level property offenses and reclassify minor property offenses as misdemeanors.

As discussed, Arizona currently spends millions of dollars to incarcerate persons convicted of petty theft, shoplifting and other minor property offenses. The majority of property offenders have severe substance abuse problems, for which treatment in the community might be a more appropriate response than lengthy prison terms.

A proposal that originated in the short-lived Sen-

tencing Commission and was introduced in the 2004 regular session of the legislature by Rep. Carole Hubbs (R-Sun City West) would take an important step in the right direction. As described in the earlier discussion of property offenses, H.B. 2146 would reclassify a long list of Class 6 felonies as misdemeanors and update the monetary values used to define the felony class of crimes such as theft, shoplifting and credit card fraud – effectively reducing penalties for low-level property offenders.

The principal direct impact of the reform on the prison population would be reduction of penalties for low-level simple theft. Under H.B. 2146, 418 individuals convicted of Class 6 felonies and sentenced to an average 1.3 years in prison between December 2002 and November 2003 would have been convicted of misdemeanors, avoiding prison altogether.⁵⁹ Another 78 sentenced to an average 2.5 years for Class 5 felonies would instead have received Class 6 felonies, potentially reducing their sentences by over 14 months.⁶⁰ Finally, 50 sentenced to an average 3.2 years for Class 4 felonies would have instead been convicted of Class 5 felonies, potentially reducing their sentences by over eight months.⁶¹

The projected result of the reclassification of what are currently Class 4, 5 and 6 thefts is 672 sentence-years, which could translate into an eventual savings of 544 beds based on the estimated 81 percent of sentence that prisoners serve before they are released. The proposed reform would presumably also have affected some of the 110 offenders sentenced to an average 4.3 years for Class 3 thefts. However, because the proposal only reclassifies the very bottom end of the current dollar range, it is impossible to project the potential impact without information on the monetary values involved in each offense.

The same data limitations also make it impossible to estimate how many individuals committed for other offense categories affected by the proposal would have been affected, including 126 offenders sentenced to prison terms of between one and two years for criminal damage (Class 6), shoplifting (Class 6), credit card fraud (Class 5) and food stamp fraud (Class 6). The exception is Class 6 credit card fraud, for which there were five new commitments for sentences averaging 1.6 years – all of whom would have received misdemeanors under the proposed reform.

⁵⁹ This figure includes 22 convicted of attempted Class 5 thefts and two convicted of facilitating Class 4 thefts, all of whom would presumably have been classified downward along with all other Class 4, 5 and 6 thefts.

⁶⁰ This figure includes nine convicted of attempted Class 4 thefts, which presumably would have been classified downward, but not one convicted of facilitating a Class 2 theft who would have been unaffected by the reform.

⁶¹ This figure does not include 11 convicted of attempted Class 3 thefts, since there is no way to know whether they would have been affected by the reform.

While it, too, is impossible to measure with the available data, the long-term impact of the reform proposal could go far beyond prisoners incarcerated for the offenses discussed above. The overwhelming majority of offense categories reclassified by the bill do not result in prison sentences but in felony convictions that can trigger enhanced mandatory prison sentences for subsequent charges. Thus, there could be many prisoners who received enhanced prison sentences, or accepted plea offers requiring prison, based on prior felony convictions that would have been misdemeanors under the proposed reform. However, more detailed information on the prior felony records of those incarcerated is needed to quantify the impact.

Reducing penalties for low-level theft and related offenses and designating Class 6 property offenses as misdemeanors would not only decrease use of costly prison beds for petty crimes. It would also make it easier for those convicted of the lowest-level (Class 6) offenses to get their lives back on track without the burden of a felony record, which can restrict access to jobs, education and housing.

The proposal currently under consideration could be strengthened, however, by reclassifying Class 6 property offenses not included in H.B. 2146. For example, of new court commitments for Class 6 property offenses between December 2002 and November 2003, 124 were for first-degree criminal trespass, 102 were for unlawful use of transport (i.e., joyriding) and 136 were for possession of forgery tools.⁶² The average sentences imposed for these offenses were 1.8 years for criminal trespass, 1.5 years for joyriding and 1.2 years for possession of forgery tools. The projected result of designating Class 6 criminal trespass, joyriding and possession of forgery tools is a reduction of 555 sentence-years, which could translate into an eventual savings of 449 prison beds.

None of the three offenses described above involves criminal behavior for which a prison term or felony record is required to protect public safety. Class 6 criminal trespass applies to a person who has unlawfully entered a residential structure, but unlike second-degree burglary, criminal trespass does not entail intent to commit burglary or any other felony. Class 6 joyriding applies to passengers in a vehicle that is being used unlawfully, rather than the person in control of the vehicle, who is guilty of Class 5 joyriding. Class 6 possession of forgery tools applies to the possession of any device that *could* be used or adapted for forgery, but does not require that the owner intended to use it for forgery, which would make the offense a

Class 5 felony.

Re-classify charges of forgery, fraudulent schemes and artifices and trafficking in stolen property by the monetary values involved, along the lines of other property offenses such as simple theft.

Forgery and fraud are leading contributors to growth in Arizona's prison population, especially the number of women prisoners. While this growth is related to a rise in the incidence of identity theft, it is also a consequence of the way statutes prohibiting forgery and fraud are written. Unlike theft, there are no monetary values attached to the definition of forgery (Class 4), trafficking in stolen property (Class 2 or 3) or fraudulent schemes and artifices (Class 2), which allow prosecutors to bring charges carrying very lengthy prison terms against very low-level offenders.

Forgery, fraud and trafficking in stolen property should be reclassified based on monetary values involved, using the updated values proposed for simple theft under H.B. 2146. Forgery not involving monetary values would remain a Class 4 felony, except for signing a false name at a police precinct, which would become a Class 1 misdemeanor.

Without information on the monetary values involved, there is no way to estimate the impact of the proposal on number of people incarcerated for forgery and fraud. Further, without additional data on charging practices, it is impossible to estimate the proposal's effect on the sentences of defendants initially charged with forgery and fraud who ultimately plead guilty to lesser offenses. We do know, however, that the total cost of incarcerating individuals sentenced to prison for those three offenses between December 2002 and November 2003 will be nearly \$50 million before all 774 are released.

Women

Review sentencing policies and law enforcement practices that disproportionately impact women.

This report has identified many policies that contribute to rapid growth in the number of women behind bars, including imposition of long sentences on individuals convicted of drug possession and sale, and use of forgery and fraud statutes to prosecute low-level offenders. However, there may be other explanations for why so many women – particularly those

⁶² The figures include completed offenses only.

struggling with methamphetamine addiction and mental health problems – are being incarcerated.

The Governor’s Task Force on Improving Outcomes for Women With Incarcerated Children should examine not only the resources needed for female probationers and prisoners, but also the policies that encourage incarceration overwhelmingly low-level and non-violent women offenders.

Support the re-establishment of Maricopa County’s Women’s Treatment Network as well as replication of the program in other jurisdictions.

In 1995, Maricopa County Adult Probation Department, Maricopa County Sheriff’s Office, Pretrial Service Agency, Arizona Department of Health Services and Treatment Assessment Screening Center joined forces to develop an integrated treatment system for female probationers with substance abuse problems with funding from the Center for Substance Abuse and Treatment Services. Besides their substance abuse problems, 75 percent of the women reported experiencing multiple abuse (mental, physical and sexual). The Women’s Treatment Network (WTN) combined a gender-specific approach to probation – a team of probation officers who had training and experience working with women offenders – with substance abuse treatment services.

A brief by former director Robin Hoskins reported that among WTN participants

- 70 percent were employed and 62 percent were enrolled in educational or vocational programs;
- 78 percent tested negative for drugs between January and November of 1999;
- The average length of time to successful completion of the program was 234 days.

Although considered highly effective, the program was dismantled when grant funding lapsed.

Funds should be provided to re-establish WTN in Maricopa County and replicate the program in other jurisdictions. If the program succeeded in reducing the number of women revoked from probation by just 25 percent, the result would be over 150 fewer prison commitments. Since the average sentence for women revoked from probation was two years, the eventual result would save more than 100 prison beds or over \$2 million in corrections costs.⁶³

Allow women convicted of non-violent, drug-re-

lated offenses to be released early to a re-entry drug court program.

In 2001, New Mexico’s legislature authorized women convicted of non-violent, drug-related offenses within 18 months of eligibility for release to apply for early re-entry to a drug court program. Such a program could be replicated in Arizona, where drug offenders make up a third of all incarcerated women and nearly 90 percent of women incarcerated for drug offenses have severe substance abuse problems.

On August 31, 2003, 475 women serving time for drug offenses were within 18 months of their projected release date. If half were released to a drug court program, the state would have saved over 200 beds and \$5 million in correctional costs.

Probation and parole

Increase availability of drug treatment and mental health services to probationers and parolees.

The majority of those revoked to prison have severe substance abuse problems and a significant number have serious mental health issues. Criminal justice professionals interviewed say there is a shortage of drug treatment slots and an even larger gap in mental health treatment, especially in rural jurisdictions.

Expansion of programs and services designed to help probationers and parolees overcome barriers to successful reintegration into society, including substance abuse treatment, mental health and employment services, is cost-effective and increases public safety by reducing recidivism.

Expand use of community-based programs as alternatives to revocation for both probation and parole.

Much attention has been given in the press, the Legislature and the DOC to the need to reduce the impact of technical revocations on the state’s prison population. A number of proposals have been introduced, ranging from improvement of services designed to help probationers and parolees succeed in the community, to the establishment of a short-term “shock incarceration” program.

Policymakers should pursue community-based sanctions for probation and parole violators as an alternative to revocation, where appropriate. Not only

⁶³ The average annual cost of incarceration for a female prisoner was \$22,036 in fiscal year 2002. Savings could be achieved by reducing the number of beds that would otherwise be built and operated for the growing population of women prisoners.

are community-based programs far less expensive than prisons and jails to operate, but they also facilitate the maintenance of critical family ties and provide a more realistic environment for evaluating an offender's progress toward rehabilitation. Programs might include day-reporting centers, where probationers and parolees would be required to check in daily and be employed and/or participate in treatment and counseling.

H.B. 2646, introduced by Rep. Bill Konopnicki (R-Safford) during the 2004 regular legislative session, would authorize DOC to contract with a private or non-profit entity to place probation and parole violators in a community accountability program that provides treatment and supervision services. The program would be phased in over two years, serving 1,000 eligible prisoners in the first year and 2,000 in the second. The Joint Legislative Budget Committee estimates savings of \$1.2 million in the first year and \$2.5 million in the second year, along with savings of \$8.5 million to \$21.8 million that would be generated by deferring prison expansion.

Another alternative to revocation is placement of probation and parole violators in community-based residential facilities. Most criminal justice professionals say there is a pressing need for more residential drug treatment beds. Many probationers would also benefit from a less expensive alternative that provides basic counseling, education and employment referral services in a structured setting. Such a facility would allow probation and parole officers to remove supervisees from unhealthy home environments and provide services that address their needs without removing them from the community entirely.

A number of states have recently taken steps to reduce revocations through the use of community sanctions. Colorado legislators have approved a community-corrections alternative to parole revocation for technical violations, and Kansas legislators mandated the same for both parole and probation violators. Hawaii's legislators have mandated diversion to treatment not only for first-time drug possession but also for first-time probation and parole violators whose violations are drug-related. Finally, Arkansas legislators relaxed restrictions on admissions to community corrections facilities so that parolees who are convicted of misdemeanors can avoid being sent back to prison. In Arizona, some legislators are thinking along similar lines. S.B. 1261, introduced by Sen. Jorge Luis Garcia (D-Tucson), would promote the use of alternative sanctions for probation and parole violators who have

not committed new felonies.

The impact of the proposed reform on the prison population would depend on the number successfully diverted. However, if a quarter of those revoked from probation between December 2002 and November 2003 had been diverted to community-based alternatives, the result would have been over 1,000 fewer commitments to prison, eventually reducing demand for prison beds by 2,000.⁶⁴

Give the sentencing judge the discretion to count time served on probation against the sentence an individual receives upon revocation and to take one day off the prison sentence for every two days served successfully on probation.

Currently, a chemically dependent person who successfully serves one year of a two-year probation term before relapsing and being revoked for technical violations is no different in the eyes of the law than a person who is revoked before completing a month on supervision. Middle Ground Prison Reform has proposed to address this problem by authorizing judges to provide sentencing credit for up to half of time served on probation.

In practice, judges already have the power to impose shorter sentences, within the statutory range, on individuals who made greater efforts to comply with the terms of probation. However, the proposed reform would give them the flexibility to impose an effective sentence below the statutory minimum without a finding of super-mitigation, or even a sentence below the super-mitigated range where appropriate. Further, the reform would encourage formal recognition of time served on probation by judges, and it would give individuals struggling on probation incentive to keep trying.

Release and re-entry

Fully fund the new early-release-to-transition program for drug offenders, then increase the period of release and extend eligibility to all non-person offenders whose crimes are driven by substance abuse.

In 2003 the legislature approved the early-release-to-transition program by enacting S.B. 1291, introduced by Sen. Mark Anderson (R-Mesa). The program permits 90-day early release into a transition network for all drug offenders not convicted of violent crimes, sexual abuse or

64 Based on 1,000 persons revoked from probation who would have served 81 percent of an average 2.5-year sentence.

arson. While legislative summaries indicated that 4,800 prisoners could qualify for release, the program's first-year funding created room for only 200 prisoners this year, and, according to the Arizona Republic, DOC had not begun to implement the program when 2003 ended. If implemented and expanded to include all who are eligible, however, the program could have a significant impact on the state's prison population.

Ultimately, the transition program should be expanded to include chemically dependent prisoners convicted of DUI, property and other non-person offenses. Public safety would be better assured if all chemically dependent prisoners – those incarcerated for both drug charges and non-person offenses – received treatment.

In addition, the early-release provision should be extended to six months, as proposed in the bill's original version. Some 4,221 non-person offenders were within six months of their projected release date on August 31, 2003, and 2,425 of them had the highest possible alcohol and drug needs score. If just half of the 2,425 were released early, over 1,000 beds, or \$20 million, would be saved annually. Those savings could be diverted to drug treatment, mental health and job training services to prevent recidivism – a more cost-effective trade-off for both the public and offenders.

Finally, the transition-to-treatment program should be combined with the “shock-incarceration” program proposed by the DOC director. The resulting program should replace the four-month intensive prison program for probation violators, who are better served by community-based programs. Missouri legislators have established a presumption that low-level offenders who complete a 120-day prison treatment program will be released on probation or parole.

Use of incarceration by jurisdiction

Allow counties that find effective strategies for reducing their use of incarceration to share in the savings generated for the state.

The current system of criminal justice funding encourages local jurisdictions to sentence offenders to

prison and let the state pick up the tab, rather than spend limited county funds on effective alternatives to protect public safety and keep offenders in the community. In January 2003 Gov. Napolitano's chief legislative lobbyist indicated that her office was considering making counties that suddenly boost the number of people they send to prison pay the added cost.⁶⁵

A way should be found to share the benefits of adopting “smart-on-crime” policies. At a minimum, the state should fully support county efforts to invest in community-based alternatives since they will ultimately reduce state corrections costs. The state should give also local jurisdictions a financial incentive for reducing use of incarceration for offenders who do not pose a major risk to the community.

For example, the state would save 188 prison beds – \$3.5 million annually – if Mohave County brought its incarceration rate for non-person offenders (415.7 per 100,000 population) in line with the state average (305.3). If the savings were split between the state and Mohave County, the county could afford to enroll 300 offenders in drug court (at roughly \$4,200 per person including drug testing and treatment) and still net nearly half a million dollars, while the state would save nearly \$2 million.

Maricopa County could save 1,127 beds or \$22 million annually by reducing its incarceration rate for non-person offenders by 10 percent – from 338.5 per 100,000 population down to the state average.⁶⁶ While Maricopa already has drug courts and other community programs, doubling the number of drug court and Intensive Supervised Probation slots at a cost of less than \$10 million could divert 1,127 from prison.⁶⁷ To work, however, such an approach needs to be coupled with reform of mandatory sentencing laws.

Further research

Finally, there are several issues that should be investigated within the larger review of Arizona's sentencing policies, such as:

- Overrepresentation of people of color in the state's prison population, particularly among those convicted of drug and DUI offenses. This report found sentencing disparities that could not be explained by the number of prior felony convictions alone.

⁶⁵ Arizona Daily Sun, January 9, 2003

⁶⁶ Even if Maricopa's rate of incarceration for non-person offenders reached the current state average, it would continue to be significantly higher than the average for all other counties (254.7 per 100,000 population) and for Pima County (229.5), since Maricopa's high rate of incarceration drives the state average.

⁶⁷ As of July 31, 2003, 638 persons were enrolled in Maricopa drug and courts according to the Administrative Office of the Courts. As of August 2003, 888 adults were on ISP, according to the Maricopa County Criminal Justice System Monthly Report. The average cost of ISP is \$5,700 per person, according to Barbara Broderick, the chief probation officer in Maricopa County.

- Rapid growth in the number of incarcerated women, especially those serving time for low-level drug and property offenses.
- Finding effective alternatives to mandatory minimum sentences that have been used by other states.

A trend toward “smart-on-crime” reforms is sweeping the nation, providing more effective, less costly policies that hold offenders accountable and protect public safety by emphasizing prevention and rehabilitation. Public support for easing mandatory sentencing laws and restoring judicial discretion is growing, as is support for addressing substance abuse and underlying mental health issues with treatment and rehabilitation.

Arizona remains one of the top ten “tough-on-crime” states in terms of its incarceration rate, yet it ranks number one in the nation for its crime rate. The laws and policies that have packed Arizona’s prisons have not served to curb the state’s crime problem. The Governor’s Advisory Blue Ribbon Panel on the recent hostage crisis at the Lewis Correctional Facility found prison overcrowding a cause for concern and called for a comprehensive review of Arizona’s sentencing statutes.

As outlined in this report, there are many modest steps available to improve the cost-effectiveness of Arizona’s criminal justice system, better protect public safety, and relieve prison population pressures. In the face of the severe fiscal crisis most Arizonans are not willing to see more money spent on expanding the prison system at the expense of funding for the vital public services needed to ensure healthy, safe communities.

Arizona’s felony sentencing structure

By Howard Wine, Esq.

Arizona has complex statutory provisions that govern sentencing of defendants convicted of felony offenses.

Arizona’s criminal code grades all felony offenses into six designated sentencing classifications, in descending order of seriousness, from Class 1 through Class 6.

Class 1

Class 1 is reserved for first- and second-degree murder. First-degree murder requires a sentence of death, natural life in prison (no parole or commutation), or life in prison with a mandatory minimum of 25 years

if the victim is 15 years or older, or 35 years if the victim is under 15 years old.

The presumptive term for second-degree murder is normally 16 years, except it is 20 years if (a) the victim is under 15 years of age, or (b) the defendant was previously convicted of second-degree murder or a “dangerous” (see definition below) Class 2 or 3 felony. If the victim is under 12 years of age, the defendant can be sentenced to life with a 35-year mandatory minimum or to a flat term of 20 years.

Classes 2-6: Baseline sentencing ranges and probation eligibility

Arizona has a schedule of baseline sentencing ranges that apply to all Class 2 to 6 offenses (except a few categories of special offenses discussed below), unless a mandatory sentence enhancement requires the court to use a different sentencing schedule. That baseline schedule is as follows:

Normally, a defendant sentenced to prison would draw the middle, presumptive term. Based on aggravating or mitigating factors, a judge may increase or decrease the term within maximum or minimum ranges. The factors relied upon must be specified in the record at sentencing. When at least two substantial aggravating or mitigating factors are present, the judge may impose a “supermaximum” or “superminimum” term of up to 25 percent above or below the normal maximum or minimum otherwise authorized for the offense (as indicated by the numbers in parentheses on the chart). Prior to sentencing the judge must give notice of the intention to impose such a term.

Preparatory offenses. The felony class level of certain preparatory offenses (an attempt, a solicitation, or a facilitation) is determined by subtracting a specified number of felony levels from the level of the base offense. As a result, conviction of a mere preparatory offense rather than a “completed” reduces the sentencing range. An attempted offense reduces the charge by one class level and thus lowers the sentencing range. A solicitation (commanding, encouraging, requesting, or soliciting another person) reduces the charge by two class levels. A facilitation (knowingly providing

Class	First conviction		
	Min.	Presumptive	Max. years
2	(3) 4 years	5.0 years	10.5 (12.5) years
3	(2) 2.5 years	3.5 years	7 (8.75) years
4	(1) 1.5 years	2.5 years	3 (3.75) years
5	(.5) .75 year	1.5 years	2 (2.5) years
6	(.33) .5 year	1.0 year	1.5 (2) years

another with means or opportunity to commit offense) reduces the charge by two to four class levels, depending on the original class level of the facilitated offense. With facilitation, a Class 1 felony becomes a Class 5 felony, a Class 2 or 3 felony becomes a Class 6 felony, and a Class 4, 5, or 6 felony a misdemeanor.

As a plea-bargaining tool, prosecutors often focus on offense preparations and disregard the completion of the offense, thus reducing the felony-class level. The defendant then pleads to a preparatory offense rather than the completed offense with which he or she is charged.

Probation. Unless imposition of a sentence enhancement (discussed below) or a stipulation in a plea bargain eliminates probation eligibility, defendants convicted of Class 2 to 6 felonies are eligible for probation. The exceptions are for the prison-only offenses – sexual assault, certain dangerous crimes against children and certain drug offenses involving manufacture, minors and schools. When sentencing a defendant to probation, a judge may also impose a county jail sentence of up to one year as a condition of probation.

Consecutive sentencing. A term of probation may be imposed consecutively to a term of imprisonment, but not consecutively to another term of probation. A term of imprisonment may not be imposed consecutively to a term of probation. A judge who imposes a term of probation consecutively must waive any period of community supervision that follows the prison sentence. There are constitutional and statutory limitations on the imposition of consecutive sentences where the offenses underlying separate convictions are too closely related.

Class 6 felonies that may be treated as misdemeanors. If a defendant is convicted of a Class 6 felony that does not involve a serious injury or use of a deadly weapon or dangerous instrument, however, the judge may enter a judgment of conviction for a Class 1 misdemeanor or place the defendant on probation and leave the conviction type (felony or misdemeanor) undesignated until after completion of probation. This provision makes such treatment an option even if the prosecutor has alleged and proved that the defendant has one historical prior conviction (see definition below) but not two or more historical priors.

Special categories of offenses to which the standard baseline schedule does not apply. The standard baseline chart does not apply to the following offenses or categories of offenses:

- Sexual assault
- Dangerous crimes against children
- Drug offenses within a drug-free school zone

Arizona’s menu of sentence enhancements

Arizona statutes provide a large menu of sentence enhancements that require judges to treat defendants more harshly than the baseline sentencing schedule stipulates. But the mandatory enhancements are triggered only if the prosecutor alleges an intention to seek the enhancement and proves the necessary facts. Where the prosecutor alleges an enhancement and proves the facts, the judge *must* impose the enhancement. In practice, because plea bargains offered at the discretion of the prosecutor cause the dismissal of some or all enhancement allegations, many defendants receive sentences that do not reflect all of the possible enhancements applicable to the facts of their cases.

Some shorthand “terms of art” used throughout the sentencing statutes and/or in this survey include the following:

- “Dangerous offense” means an offense that involves serious physical injury to a victim or use/threatened use of a deadly weapon or dangerous instrument, including a motor vehicle.
- “Serious offense” means (a) first-degree murder, (b) second-degree murder, (c) manslaughter, (d) aggravated assault resulting in serious physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, (e) sexual assault, (f) any dangerous crime against children (as defined in Arizona law), (g) arson of an occupied structure, (h) armed robbery, (i) burglary in the first degree, (j) kidnapping, and/or (k) sexual conduct with a minor under 15 years of age.
- “Instant offense” means the offense of conviction on which sentence is being pronounced. “Instant conviction” means the conviction on which sentence is being pronounced.

Enhancement for the dangerousness of the offense

The prosecutor has the sole discretion to invoke a sentence enhancement by proving that that the instant offense was dangerous. The enhancement eliminates any probation eligibility and requires imposition of a longer prison term than the baseline schedule provides, as shown in the following enhanced sentencing schedule:

Class	First conviction		
	Min.	Presumptive	Max.
	7 years	10.5 years	21 years
3	5 years	7.5 years	15 years
4	4 years	6 years	8 years
5	2 years	3 years	4 years
6	1.5 years	2.25 years	3 years

Enhancement for offenses committed in furtherance of street gang activity

The prosecutor has the sole discretion to invoke a sentence enhancement by proving that the instant offense was committed to further or assist criminal conduct by a street gang. The enhancement eliminates the defendant’s eligibility for probation or pardon and requires that the defendant serve a prison term three years longer than would otherwise be imposed.

Enhancement for offenses committed in school safety zone

If a defendant is convicted of a felony offense committed in a school safety zone, a judge may impose a sentence enhancement one year longer than the minimum, maximum and presumptive sentence. (This is the only non-mandatory enhancement in the criminal code.)

Enhancements based on the defendant’s criminal history

Enhancements for one/two or more historical priors

The prosecutor has the sole discretion to invoke a sentence enhancement by proving that that the defen-

dant has one or more historical prior felony convictions. To qualify as a historical prior felony conviction, the conviction must pertain to a separate criminal episode and be entered before a trial or plea of guilt on the instant offense. (Unlike similar enhancements in most other states, Arizona law does not require proof that the enhancing conviction was entered or finalized before the defendant committed the instant offense.) The enhancement eliminates the defendant’s probation eligibility and imposes a longer prison term than in the baseline schedule, as shown in the following enhanced sentencing schedules:

Special enhancement when historical priors are “dangerous” offenses

Arizona has a sub-menu of alternative and more stringent enhancements for historical priors when the prosecutor pleads and proves that the offense underlying an historical prior was dangerous, but a defendant is subject to these enhancements only if his/her instant offense is also a “dangerous” one.

When the instant offense is a dangerous Class 4/5/6 instant offense

When a defendant’s instant conviction is for a

dangerous Class 4, 5 or 6 offense, the prosecutor has the sole discretion to invoke a sentence enhancement by proving that the defendant received one or more historical prior felony convictions for dangerous offenses. The enhancement eliminates any probation eligibility and mandates sentencing. (See chart at left.)

Class	One historical prior			Two historical priors		
	Min.	Pres.	Max.	Min.	Pres.	Max.
2	(4.5) 6 yrs.	9.25 yrs.	18.5 (23.25) yrs.	(10.5) 14 yrs.	15.75 yrs.	28 (35) yrs.
3	(3.5) 4.5 yrs.	6.5 yrs.	13 (16.25) yrs.	(7.5) 10 yrs.	11.25 yrs.	20 (25) yrs.
4	(2.25) 3 yrs.	4.5 yrs.	6 (7.5) yrs.	(6) 8 yrs.	10 yrs.	12 (15) yrs.
5	(1) 1.5 yrs.	2.25 yrs.	3 (3.75) yrs.	(3) 4 yrs.	5 yrs.	6 (7.5) yrs.
6	(.75) 6 yrs.	1.75 yrs.	2.25 (2.75) yrs.	(.25) 3 yrs.	3.75 yrs.	4.5 (5.75) yrs.

Note: The numbers in parentheses approximate the super-minimum and super-maximum sentences available.

Class	One dangerous historical prior			Two dangerous historical priors		
	Min.	Pres.	Max.	Min.	Pres.	Max.
4	8 years	10 years	12 years	12 years	14 years	16 years
5	4 years	5 years	6 years	6 years	7 years	8 years
6	3 years	3.75 years	4.5 years	4.5 years	5.25 years	6 years

When the instant offense is a dangerous Class 2 or 3 instant offense

When a defendant’s instant conviction is for a dangerous Class 2 or 3 offense, the prosecutor has the sole discretion to invoke a sentence enhancement by proving that the defendant has one or more historical prior felony convictions for Class 1, 2 or 3 dangerous offenses. The enhancement eliminates any probation eligibility and mandates sentencing. (See chart at left.)

Class	One dangerous historical prior			Two dangerous historical priors		
	Min.	Pres.	Max.	Min.	Pres.	Max.
2	14 years	15.75 years	28 years	21 years	28 years	35 years
3	10 years	11.25 years	20 years	15 years	20 years	25 years

Note: These enhancements are available only if the historical prior in question is for a Class 1, 2 or 3 felony offense.

Expiration periods for historical priors

Arizona statutes, like those of many other states, bar sentence enhancements when recorded events in a defendant’s criminal history occurred too remotely in time. Often referred to as wash-out or expiration provisions, they cause old convictions to wash out of the defendant’s criminal history after the passage of a specified amount of time for purposes of sentence enhancement.

There is an important practical difference between a washout provision and a statute of limitations, which bars the prosecution of unfiled civil or criminal court claims when too much time has passed since the occurrence of the claimed offense. Traditional statutes of limitations protect defendants from having to oppose stale claims where plaintiffs have waited too long to assert their rights and defense evidence may have been lost or defense witnesses’ memories faded.

By contrast, when a years-old conviction would trigger a sentence enhancement for an instant conviction, the age of the old conviction is generally not a function of prosecutorial delay. In addition, there is little concern over the loss of defense evidence and staleness of memories since fingerprint identification and incontrovertible documentary evidence are used to prove that the conviction occurred. Washout provisions therefore respond solely to the notion that remote events in the defendant’s criminal history are less indicative of character at the time of sentencing than are recent events, and at some point events become too remote to justify a sentence enhancement.

Arizona law divides convictions into three categories – based on the offenses underlying them – in determining whether and when they wash out as potential sentence enhancement triggers:

- (1) convictions that never wash out,
- (2) convictions that wash out based on a 10 year measure, and
- (3) convictions that wash out based on a five year measure.

Convictions that never wash out. Convictions for the following felony offenses, or categories of felony offenses, never wash out:

- (1) offenses for which a sentence of imprisonment is mandated, except those for drug offenses involving amounts under the threshold. These offenses presently are
 - (A) a dangerous or deadly assault by a prisoner;
 - (B) a prisoner assault related to riot;
 - (C) a sexual assault;
 - (D) an offense involving a minor in participation in or illegal control of a criminal syndicate;

- (E) manufacture of a dangerous drug in an amount over the threshold;
 - (F) manufacture of a narcotic drug in an amount over the threshold;
 - (G) an offense involving or using a minor in a drug offense involving a substance in an amount over the threshold;
 - (H) commission of a drug offenses in a drug-free school zone; and
 - (I) first-degree murder.
- (2) dangerous offenses;
 - (3) offenses involving the illegal control of a criminal enterprise;
 - (4) DUI offenses;
 - (5) offenses defined as dangerous crimes against children.

Convictions that wash out on a 10-year basis.

With one exception* a conviction for any Class 2 or 3 felony, other than those that never wash out (see above), is considered washed out when the offense underlying that conviction occurred more than 10 years before the instant offense, discounting for any time the defendant spent incarcerated, escaped from custody, or on absconder status from a probation.

Convictions that wash out on a five-year basis.

With one exception* convictions for any Class 4, 5, or 6 felony, other than those that never wash out (see above), are treated as washed out whenever the offense underlying that conviction occurred more than five years before the instant offense, discounting for any time the defendant spent incarcerated or on absconder status from a probation.

***Exception:** No more than two felony convictions on a defendant’s record can be washed out. Thus, any otherwise washed out conviction in excess of two loses its status as a washed out conviction and may be used to trigger sentence enhancement.

Enhancements for multi-episode convictions arising from a “consolidated” trial or plea hearing

The prosecutor has the sole discretion to invoke a sentence enhancement by proving that a single consolidated trial or plea hearing produced two or more convictions for felony offenses, none of which was committed during the same criminal episode (referred to below as “convictions for separate offenses”). The level of enhancement depends upon

- (a) the number of convictions for separate offenses and
- (b) the dangerousness of the separate offenses.

Two convictions for separate offenses. Where the prosecutor proves that a consolidated trial or plea hearing produced both the instant conviction and a conviction for an earlier and separate offense, the en-

enhancement eliminates any probation eligibility (baseline sentencing schedule applies).

Three or more convictions for separate offenses.

Where the prosecutor proves that a consolidated trial or plea hearing produced both the instant conviction and two or more convictions for earlier and separate offenses, the enhancement eliminates any probation eligibility and the sentencing schedule below applies:

Class	Min.	Presumptive	Max.
2	(4.5) 6 years	9.25 years	18.5 (23.25) years
3	(3.5) 4.5 years	6.5 years	13 (16.25) years
4	(2.25) 3 years	4.5 years	6 (7.5) years
5	(1) 1.5 years	2.25 years	3 (3.75) years
6	(.75) 1 year	1.75 years	2.25 (2.75) years

Note: The numbers in parentheses approximate the super-minimum and super-maximum sentences available.

Two convictions for separate dangerous offenses.

Where the prosecutor proves that a consolidated trial or plea hearing produced both the instant conviction for a dangerous offense and a conviction for an earlier and separate dangerous offense, the enhancement eliminates any probation eligibility and the sentencing schedule below applies:

Class	Min./Presumptive	Max.
2	10.5 years	21 (26.25) years
3	7.5 years	15 (18.75) years
4	6 years	8 (10) years
5	3 years	4 (5) years
6	2.25 years	3 (3.75) years

Note: The numbers in parentheses approximate the super-maximum sentences available.

Three or more convictions for separate dangerous offenses. Where the prosecutor proves that a consolidated trial or plea hearing produced both the instant conviction for a dangerous offense and two or more conviction for earlier and separate dangerous offenses, the enhancement eliminates any probation eligibility and the sentencing schedule below applies:

Class	Min./Presumptive	Max.
2	15.75 years	28 (35) years
3	11.25 years	20 (25) years
4	10 years	12 (15) years
5	5 years	6 (7.5) years
6	3.75 years	4.5 (5.75) years

Note: The numbers in parentheses approximate the super-maximum sentences available.

Three-strikes enhancement for two historical priors for “serious” offenses

Under Arizona’s version of a “three-strikes” statute, the prosecutor has the sole discretion to invoke a sentence enhancement by proving that:

- (1) the instant offense is a serious offense (except a drug offense, dangerous crime against children, or first-degree murder), and
- (2) the defendant has two or more historical priors for serious offenses not committed on the same occasion.

The enhancement eliminates any probation eligibility and requires the defendant to serve life in prison without the possibility of release before 25 years.

Enhancement for felony offenses committed while on felony probation, etc.

The prosecutor has the sole discretion to invoke a sentence enhancement by proving that commission of the instant offense occurred while the defendant was on felony probation, parole, work furlough, community supervision, or any other release or on escape status. The enhancement has two elements:

- (1) elimination of both probation eligibility and eligibility for any prison term less than the presumptive term (designated in the applicable sentencing schedule), and
- (2) revocation of probation/parole release and consecutive completion of the remaining related sentence if the defendant’s pre-existing probation, parole, or other release was granted by an Arizona jurisdiction.

Enhancement for dangerous felony offenses committed while on felony probation

The prosecutor has the sole discretion to invoke a sentence enhancement by proving that:

- (1) the instant offense was dangerous, and
- (2) the defendant committed the instant offense while on felony probation, parole, work furlough,

community supervision, or any other release or on escape status.

The enhancement has four elements:

(1) elimination of probation eligibility and eligibility for any prison term less than the presumptive term, and

(2) revocation of any probation/parole/release granted by an Arizona jurisdiction and imposition of the instant-offense sentence to run consecutively to any sentence remaining after the revocation, and

(3) service of the instant offense sentence day-for-day with no possibility of early release on any basis, and

(4) judicial discretion for judges to impose a “super-maximum” prison sentence of up to 25 percent above the maximum if otherwise unavailable.

Enhancement for dangerous felony offenses committed while on felony probation, etc., for dangerous or serious offenses

The prosecutor has the sole discretion to invoke a sentence enhancement by proving that:

(1) the instant offense was dangerous, and

(2) the defendant committed the instant offense while on felony probation, parole, work furlough, community supervision, or any other release or on escape status, and

(3) the offense for which the defendant was on release or escape was dangerous or serious.

The enhancement has four elements:

(1) elimination of both probation eligibility and eligibility for any prison term less than the maximum term (designated in the “max.” column), and

(2) revocation of any probation/parole/release granted by an Arizona jurisdiction and imposition of the instant-offense sentence to run consecutively to any sentence remaining after the revocation, and

(3) service of the instant offense sentence day-for-day with no possibility of early release on any basis, and

(4) judicial discretion for judges to impose a “super-maximum” prison sentence of up to 25 percent above the maximum if otherwise unavailable.

Enhancement for offenses committed while a charge is pending

The prosecutor has the sole discretion to invoke a sentence enhancement by proving that an instant offense was committed while an un-adjudicated felony charge was pending. The enhancement requires the defendant to serve two years in prison, before any probation, or in addition to the service of any other prison term pronounced.

Baseline and enhanced sentencing ranges for special classes of offenses

Dangerous crimes against children

Sentencing for dangerous crimes against children is governed by a schedule of baseline and enhanced sentences, as follows:

Dangerous crimes against children									
Category	First conviction			One predicate prior*			Two predicate priors*		
	Min.	Pres.	Max.	Min.	Pres.	Max.	Min.	Pres.	Max.
A	13 yrs.	20 yrs.	27 yrs.	23 yrs.	30 yrs.	37 yrs.	Life		
B	10 yrs.	17 yrs.	24 yrs.	21 yrs.	28 yrs.	35 yrs.	Life		
C	2.5 yrs.	5 yrs.	7.5 yrs.	8 yrs.	15 yrs.	22 yrs.	N/A		
D	5 yrs.	10 yrs.	15 yrs.	5 yrs.	10 yrs.	15 yrs.	N/A		

* A predicate prior means a conviction, not entered at the same trial or plea hearing that produced the instant conviction, of any of the following felonies: child abuse done intentionally or knowingly under circumstances likely to produce death or serious injury, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

Category A offenses include second-degree murder, sexual assault, taking a child for the purpose of prostitution, child prostitution, sexual conduct with a minor or continuous sexual abuse of a child, involving or using minors in drug offenses, or attempted first-degree murder. This category addresses offenses involving a victim who is 12, 13, or 14 years of age. Unless the sentence is commuted, the defendant is not eligible for suspension, probation, pardon or release from confinement on any basis until the complete sentence is served.

Category B offenses include aggravated assault, molestation of a child, commercial sexual exploitation of a minor, child abuse or kidnapping. Unless commuted, the defendant is not eligible for suspension, probation, pardon or release from confinement on any basis until the complete sentence is served.

Category C involves sexual abuse. A defendant may earn release credits of one day for every six days served.

Category D involves preparatory offenses. A defendant may earn release credits of one day for every six days served.

In convictions involving Category C or D, a defendant is probation-eligible provided it is their first offense.

Drug offenses

Two facts heavily influence sentencing in most drug cases. First, many drug offenses, regardless of the quantity or circumstances involved, are Class 2 felonies, just one felony class level below first-degree murder. Second, many drug offenders have other pending charges or have been convicted before because, due to the very nature of drug abuse, repeat users, addicts, and/or persons with other low-level criminal involvement commit such offenses. Thus, drug offenses are often charged as Class 2 offenses and accompanied by allegations supporting multiple and lengthy sentence enhancements. Even when prosecutors offer plea bargains that dismiss enhancement allegations and/or reduce the felony class, the actual sentences remain relatively long because of where the bargaining began.

Felony class levels. The kind of prohibited activity involved determines the felony level of most drug offenses. For example, possessing a drug for sale, manufacturing a drug, administering a drug to another person, or selling, transporting for sale or importing a drug is a Class 2 felony possession. Possessing equipment or chemicals for purposes of manufacturing a drug, or obtaining a drug by fraud, deceit, misrepresentation or subterfuge is a Class 3 felony; possession (not intending sale) of either a dangerous or a narcotic drug is a Class 4 felony.

For marijuana offenses, the felony class level depends on the weight of the marijuana as well as on the kind of prohibited activity. (See chart below.)

Crimes involving prescription only drugs or drug paraphernalia are Class 6 offenses.

Automatic probation ineligibility and unique sentences. For four drug offenses, a prison sentence is mandatory, probation is unavailable, and

sentence must be served on a flat-time, or day-for-day, basis, irrespective of the absence of any sentence enhancement:

- (A) manufacture of a dangerous drug;
- (B) manufacture of a narcotic drug;
- (C) involving or using a minor in a drug offense; and
- (D) committing a drug offense in a drug-free school zone.

For the last offense, a unique sentencing provision mandates a prison term one year longer than the offense’s class level, irrespective of any sentence enhancement.

Additional sentence enhancements exclusively for drug offenses

All of the sentence enhancements discussed above are impossible at sentencing for drug offenses. But Arizona law adds two sentence enhancements exclusively for drug offenses involving possessing a drug for sale, manufacturing a drug, administering a drug to another person, or selling, transporting for sale or importing a drug.

Enhancement if the amount of the drug involved is equal to or exceeds the “threshold”

The prosecutor has the sole discretion to invoke a sentence enhancement by proving that the aggregate quantity of drugs involved in offenses involving possession/control of drugs,⁶⁸ or in all offenses consolidated for trial, is equal to or exceeds a threshold amount. The enhancement eliminates any probation eligibility.

Drug:	Threshold amount:
Amphetamine and methamphetamine	9 grams (including in liquid suspension)
Cocaine	9 grams (powder); 750 milligrams (rock form)
Heroin	1 gram
LSD	1/2 milliliter (liquid form) – 50 dosage units (blotter form)
Marijuana	2 pounds
PCP	4 grams or 50 milliliters

	Possession	Possession for sale	Production	Sale
Less than 2 lbs.	Class 6	Class 4	Class 5	Class 3
2 lbs. but less than 4 lbs.	Class 5	Class 3	Class 4	Class 2
4 lbs. or more	Class 4	Class 2	Class 3	Class 2

Enhancement if the drug offense was committed in a drug-free school zone

Possession, use, sale or transfer of marijuana, peyote, prescription drugs, dangerous drugs or narcotic drugs in a drug-free school zone (the

68 As opposed to drug offenses involving the possession of manufacturing equipment or products and the like.

area within 300 feet of school grounds, or any public property within 1,000 feet of a school, a school bus or a school bus stop) requires mandatory prison, with an extra year tacked on to the normal term. The defendant is not eligible to accrue earned-time credits.

Enhancement for serious drug offenses committed under kingpin-type circumstances

A serious drug offense is defined (with the exception of drug-free school zone offenses), as every felony drug offense involving an amount of marijuana, dangerous drugs or narcotic drugs at or over the threshold, every “prescription-only” drug offense, and every drug offense involving minors. The prosecutor has the sole discretion to invoke a sentence enhancement by proving that either (a) the instant offense was part of a pattern of at least three related drug offenses producing income to the defendant of more than \$25,000 per calendar year, or (b) the instant offense was committed as part of the defendant’s leadership role in the conduct of a drug dealing legal entity (corporation, etc.) or group of persons with the intent to promote its criminal objectives. The enhancement imposes a life sentence without the possibility of release before service of 25 years.

Enhancement for the instant offense of involving minors in drug offenses when the minor is under age 15

When the instant offense is an offense involving a minor in a drug offense, the prosecutor has the sole discretion to invoke a sentence enhancement by proving that the minor was under age 15. The enhancement eliminates any probation eligibility and mandates a sentence in the following range: 13 years minimum, 20 years presumptive and 27 years maximum.

Enhancements for multi-occasion drug offense convictions arising from a consolidated case

The prosecutor has the sole discretion to invoke a sentence enhancement by proving that a single consolidated trial or plea hearing produced two or more convictions for drug offenses (other than for simple possession of marijuana, dangerous drugs or narcotic drugs), none of which was committed during the same criminal episode (referred to below as “convictions for separate drug offenses”). The level of enhancement depends upon whether the prosecutor also proved that the combined amount of the drug involved in the offenses was over the threshold.

Three or more convictions for separate drug of-

fenses involving a combined amount under the threshold. Where the prosecutor proves that a consolidated trial or plea hearing produced both the instant conviction and two or more convictions for earlier and separate drug offenses, the enhancement eliminates probation eligibility.

Class	Min.	Presumptive	Max.
2	4 years	7 years	12 (15) years†
3	2.5 years	5 years	9 (11.25) years†
4	1.5 years	3 years	5 (6.25) years†
5	.75 year	2.5 years	4 (5) years†

†Approximately 25 percent increase allowed for two or more substantial aggravating factors.

Two convictions for separate drug offenses involving a combined amount over the threshold. Where the prosecutor proves that a consolidated trial or plea hearing produced both the instant conviction and a conviction for an earlier and separate drug offense, the enhancement eliminates probation eligibility.

Three or more convictions for separate drug offenses involving a combined amount over the threshold. Where the prosecutor proves that a consolidated trial or plea hearing produced both the instant conviction and two or more convictions for earlier and separate drug offenses, the enhancement eliminates probation eligibility and the sentencing schedule in chart on right applies.

Provisions for non-incarceration/drug treatment for certain drug offenders

Arizona’s landmark Proposition 200, first enacted by voters in 1996, provides significant relief from Arizona’s strict drug sentencing laws by carving an exception for those convicted for the first- or second-time of possession of drugs for personal use, mandating diversion of these defendants. Unless previously convicted or indicted for a violent offense, a defendant convicted of possession for the first time must be placed on probation and participate in a drug treatment or education program. As originally enacted, a first offender violating probation could be subjected to stricter probation (including home arrest) but not be jailed. A second offender could receive a jail term as a condition of probation and also be jailed for a violation of probation.

After passage of the proposition, Arizona legislators amended the law, passing a bill in 1997 that permitted jail time on a first offense, as well as use of jail if the probationer violated probation. The following year voters repealed the legislative amendment, approving by a resounding margin the return of the law

they enacted in 1996.

In 2002, however, voters enacted Proposition 302 – which amended the law to allow a jail term for first offenders, but only if they violated probation by committing another drug offense or violated their treatment requirement, failed treatment, or refused to participate in treatment. Defendants refusing the treatment option or rejecting a sentence of probation are sentenced under the normal requirements of Arizona’s drug laws.

While defendants convicted in first- and second-time drug possession cases are sentenced differently than those convicted of other drug offenses, felony convictions sentenced under the provisions of Proposition 200 serve as allegeable historical prior felonies for subsequent convictions.

Driving under the influence (DUI)

Aggravated driving under the influence of intoxicating liquor or drugs (DUI) is defined as driving under the influence if:

- 1) the defendant’s driving license or privilege to drive is suspended, canceled, revoked or refused for any reason, or if it is restricted due to a previous DUI violation, or
- 2) the defendant commits a third or subsequent violation within five years, or
- 3) the defendant commits the offense with a person under 15 years old in the vehicle.

Aggravated DUI under the first two circumstances is a Class 4 felony, while the third circumstance is a Class 6 felony.

A defendant convicted of aggravated DUI under the first two circumstances faces a mandatory prison term of at least four months as a condition of probation. A defendant whose convictions for *three or more* other DUI offenses and the instant offense all occurred within the same five-year period must serve at least eight months in prison as a condition of probation. A person sentenced under the third circumstance that has convictions for two other DUI offenses and the instant offense all occurring within the same five-year period must serve at least four months in prison.

An aggravated DUI defendant with one or more “historical prior” felony convictions for DUI is not eligible for the probation-with-prison sentence. He or she faces a mandatory prison sentence just like other class 4 or 6 felony defendants, and a mandatory prison sentence is also required when an aggravated DUI defendant is revoked from probation.

Common property crimes

The normal baseline sentencing ranges described earlier apply to property offenses. For some, but not

all, property offenses the offense is spread across two or more felony class levels, gauged by the monetary amount involved. The felony level for theft of property or services is classified by monetary value:

\$25,000 or more	Class 2
\$3,000 but less than \$25,000	Class 3
\$2,000 but less than \$3,000	Class 4
\$1,000 but less than \$2,000	Class 5
\$250 but less than \$1,000	Class 6

Theft of property worth less than \$250 is a misdemeanor.

The monetary value classifications for criminal damage to property felonies are lower than for theft offenses:

\$10,000 or more	Class 4
\$2,000 but less than \$10,000	Class 5
\$250 but less than \$2,000	Class 6

Monetary value classifications for shoplifting also fall at the low end of the felony scale:

More than \$2,000	Class 5
\$250 but less than \$2,000	Class 6

Theft of “means of transportation” with intent to permanently deprive the owner is a Class 3 felony, but “unlawful use” (without such intent) is a Class 5 felony.

Theft of a credit card or obtaining a card by fraudulent means is a Class 5 felony.

Forgery is Class 4, while possession of a forgery device can be Class 5 or 6, depending on whether the defendant intended use of it for purposes of forgery.

Trafficking in stolen property is either a Class 2 felony (the person “knowingly initiates, plans, finances, directs, manages or supervises the theft and trafficking”) or a Class 3 felony (the person “recklessly traffics”).

Obtaining any benefit through “fraudulent schemes and artifices” (by means of false or fraudulent pretenses, representations, promises or material omissions) is a Class 2 felony.

Felony classification of burglary varies by the degree of seriousness, as well as the circumstances involved:

- Third-degree burglary is a Class 4 felony defined as entering or remaining unlawfully in a nonresidential structure, or a fenced commercial or residential yard, or making entry into any part of a motor vehicle, with intent to commit theft or any felony.
- Second-degree burglary involves entry of a resi-

dential structure, and is a Class 3 felony.

- First-degree burglary is classified as a violent felony because it involves entry with intent while possessing weapons or explosives. It is a Class 2 violent felony if committed in a residential structure; otherwise it is a Class 3 violent felony.

Mandatory sentencing enhancements for property offenses

Mandatory sentencing enhancements (if alleged by the prosecutor) apply in sentencing property offenses where a defendant has historical priors, or “multi-occasion” convictions, and/ or is sentenced for a crime committed while on post-conviction supervision, or while a charge is pending.

In addition, certain mandatory sentencing enhancements pertain specifically to property offenses. Theft of property valued at \$100,000 or more – “super-theft” – requires a mandatory prison sentence. Similarly, if a benefit obtained through fraudulent schemes and artifices has a value of \$100,000 or more, prison is mandatory.

If a defendant convicted for shoplifting has committed two or more prior offenses involving burglary, shoplifting, robbery or theft in the past five years, the offense is enhanced to a Class 4 felony.



About FAMM and the Smart on Crime campaign

The Smart on Crime campaign is a project of Families Against Mandatory Minimums (FAMM). FAMM is a national non-partisan, non-profit organization founded in 1991 in response to inflexible and excessive penalties required by mandatory sentencing laws. FAMM promotes sentencing policies that give judges the discretion to distinguish between defendants and sentence them according to their role in the offense, seriousness of the offense and potential for rehabilitation. FAMM's 35,000 members include prisoners and their families, attorneys, judges, criminal justice experts and concerned citizens.

FAMM works with legislators, law enforcement, criminal justice experts, the media and citizens to provide public education and implement cost-effective criminal justice policies that increase judicial discretion while protecting public safety. FAMM provides support to policy makers concerned about the high fiscal and human costs of mandatory minimums sentencing and related policies.

**For more information on the Smart On Crime
campaign, please visit www.famm.org.**

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