

# Reforming Sentencing Policies and Practices in Arizona\*

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## INTRODUCTION

The early 1970s witnessed calls for reductions in state and federal prison populations and predictions that the use of incarceration would decline. For example, in 1973 the National Advisory Commission on Criminal Justice Standards and Goals, which concluded that “[t]he prison, the reformatory, and the jail have achieved only a shocking record of failure,”<sup>1</sup> recommended that “no new institutions for adults should be built and existing institutions for juveniles should be closed.”<sup>2</sup> These calls for reductions in the use of incarceration, however, fell on deaf ears.<sup>3</sup> Rather than declining, America’s imprisonment rate, which had fluctuated around a mean of 110 individuals per 100,000 population for most of the twentieth century, increased every year from 1975 to 2007.<sup>4</sup> In fact, the state and federal prison population increased from 300,000 to 1.6 million between 1975 and 2007, a fivefold increase.<sup>5</sup> Although the number of persons incarcerated declined by 6.7% from 2007 to 2017, there were still almost 1.5 million individuals serving time in state and federal prisons in 2017.<sup>6</sup>

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1. NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, TASK FORCE REPORT ON CORRECTIONS 597 (1973).

2. *Id.*

3. BUREAU OF JUST. STAT., PRISONERS 1925–81, at 2 (1982).

4. Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1226, 1228 (2010); see also CASSIA SPOHN, *HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT* 289 (2d ed. 2009).

5. Zimring, *supra* note 4, at 1228.

6. JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2017, at 3 tbl.1 (Edrienne Su & Jill Thomas eds., 2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/XD9H-B34W>].

Like the rest of the United States, Arizona experienced dramatic increases in its prison population.<sup>7</sup> In fact, the prison population grew from 3,456 in 1978 to 42,111 in 2018—a twelvefold increase<sup>8</sup>—and in 2017 Arizona had the fifth highest imprisonment rate in the United States.<sup>9</sup> Moreover, the state’s prison population has continued to increase even as its crime rate has declined.<sup>10</sup> From 2000 to 2018, the Arizona prison population increased by 60%, while the property crime rate declined by 44%, and the violent crime rate fell by 12%.<sup>11</sup> The increase in Arizona’s prison population (60%) also has outpaced growth in the state’s residential population (33%).<sup>12</sup> Skyrocketing increases in the number of persons imprisoned in Arizona, in other words, cannot be attributed to either population growth or increases in crime.<sup>13</sup>

As these figures demonstrate, for the past several decades both the United States and the state of Arizona have “been engaged in an unprecedented imprisonment binge.”<sup>14</sup> Most criminologists argue that these dramatic increases in the prison population were due, not to increases in crime, but to changes in sentencing policies and practices, including mandatory minimum sentences, three-strikes or habitual offender provisions, truth-in-sentencing statutes, life without the possibility of parole laws, and overly punitive sentencing guidelines in which the severity of the sentence is not proportionate to the seriousness of the crime.<sup>15</sup> Marc Mauer of the Sentencing Project, for example, stated that “[t]he impact of these sentencing changes on

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7. FWD.US, ARIZONA’S IMPRISONMENT CRISIS: THE HIGH PRICE OF PRISON GROWTH 2 (2018), <https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/09/The-High-Price-of-Prison-Growth.pdf> [https://perma.cc/U6TP-VHCM].

8. *Id.*

9. BRONSON & CARSON, *supra* note 6, at 11 tbl.6.

10. FWD.US, *supra* note 7, at 2, 7.

11. *Id.*

12. *Id.*

13. *Id.* at 7–8.

14. JAMES AUSTIN & JOHN IRWIN, IT’S ABOUT TIME: AMERICA’S IMPRISONMENT BINGE 1 (1994).

15. David Garland, *Introduction: The Meaning of Mass Imprisonment*, 3 PUNISHMENT & SOC’Y 5, 6 (2001); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 18–19 (2015); Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, 3 PUNISHMENT & SOC’Y 9, 11–12 (2001); NAT’L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 70 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014); U.S. Sent’g Comm’n, *Fifteen Years of Guidelines Sentencing*, 17 FED. SENT’G REP. 269, 270 (2004); Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, 3 PUNISHMENT & SOC’Y 161, 161 (2001).

prison populations has been dramatic, and far outweighs any change in crime rates as a contributing factor.”<sup>16</sup>

The role played by more punitive sentencing policies and practices was confirmed by a rigorous analysis of growth in the prison population from 1980 to 1996,<sup>17</sup> which concluded that 88% of the tripling of the prison population during this time period could be explained either by a greater likelihood of incarceration following conviction or by longer prison sentences imposed on those who were incarcerated.<sup>18</sup> Similarly, a recent comprehensive analysis by the National Research Council determined that the increase in the state prison population between 1980 and 2010 was due primarily to growth in prison admission rates, especially for drug offenses, and to increases in time served, particularly for violent crimes.<sup>19</sup>

The next section of this paper examines in more detail the sentencing reforms enacted by jurisdictions throughout the United States during the past four decades. This is followed by an analysis of sentencing policies and practices in Arizona. The paper concludes by proposing a set of sentencing reforms designed to undo the damage inflicted by Arizona’s current sentencing scheme.

## I. FOUR DECADES OF REFORM

There have been substantial changes to sentencing policies and practices over the past four decades.<sup>20</sup> Forty years ago, indeterminate sentencing was the norm, and “the word ‘sentencing’ generally signified a slightly mysterious process which . . . involved individualized decisions that judges were uniquely competent to make.”<sup>21</sup> Judges had substantial though not unfettered discretion to determine the type and length of the sentence, and parole boards decided how long incarcerated offenders would serve.<sup>22</sup> In making these decisions, judges took into consideration the seriousness of the crime, the criminal history and background characteristics of the offender, and the harm done to the victim.<sup>23</sup> With few exceptions, judges were not

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16. Mauer, *supra* note 15, at 11.

17. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17, 18–19 (1999); *see also* SPOHN, *supra* note 4, at 290.

18. Blumstein & Beck, *supra* note 17, at 43.

19. NAT’L RSCH. COUNCIL, *supra* note 15, at 56.

20. MICHAEL TONRY, SENTENCING MATTERS 3 (Michael Tonry & Norval Morris eds., 1996).

21. *Id.*

22. *Id.* at 4.

23. *Id.* at 3.

required to impose specific sentences on particular types of offenders or on offenders convicted of particular types of crimes.<sup>24</sup>

Concerns about disparity, disproportionality, and discrimination in sentencing—coupled with widespread disillusionment with rehabilitation and a belief that more punitive sentences were necessary to deter and incapacitate dangerous offenders—led to a series of incremental reforms that revolutionized the sentencing process.<sup>25</sup> Although a number of jurisdictions retained indeterminate sentencing, other jurisdictions responded by enacting determinate sentencing systems that limited judges’ options at sentencing or by promulgating voluntary or presumptive sentencing guidelines that calculated sentences based on the seriousness of the crime and the offender’s criminal history.<sup>26</sup> Jurisdictions also enacted mandatory minimum sentencing statutes targeting violent offenders, drug offenders and career criminals; “three-strikes-and-you’re-out” laws that provided sentencing enhancements for repeat offenders;<sup>27</sup> and truth-in-sentencing statutes designed to ensure that offenders served a larger portion of the sentence imposed by the judge.<sup>28</sup> Many jurisdictions expanded the categories of offenders eligible for life—or life without the possibility of parole—sentences and/or altered the number of years offenders sentenced to life would have to serve before being eligible for parole.<sup>29</sup> As a result of these changes, the sentencing process today is much more complex and fragmented, and there is no longer anything that can be described as “the American approach.”<sup>30</sup>

#### A. *Determinate Sentencing and Sentencing Guidelines*

In 1972, Marvin Frankel, U.S. District Judge for the Southern District of New York, issued an influential call for reform of the sentencing process.<sup>31</sup> Judge Frankel decried the degree of discretion given to judges under existing indeterminate sentencing systems, which he maintained led to “lawlessness” in sentencing.<sup>32</sup> To remedy this, he called for legislative reforms designed to curtail judicial discretion and eliminate arbitrariness and disparity in

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24. *Id.* at 3–4.

25. *Id.*

26. SPOHN, *supra* note 4, at 231–34.

27. *Id.* at 226–27.

28. *Id.* at 227.

29. ASHLEY NELLIS, THE SENT’G PROJECT, STILL LIFE AMERICA’S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 22–26 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf> [<https://perma.cc/B9EC-DGX2>].

30. SPOHN, *supra* note 4, at 227.

31. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 10–11 (1973).

32. *Id.* at 8.

sentencing.<sup>33</sup> More to the point, he advocated for the creation of an administrative agency called a sentencing commission that would create rules for sentencing that judges would be required to follow.<sup>34</sup>

Judge Frankel's calls for reform did not go unheeded. States and the federal government adopted a series of incremental, structured reforms designed to *control* the discretion of sentencing judges.<sup>35</sup> A number of jurisdictions experimented with voluntary or advisory sentencing guidelines based on the past sentencing practices of judges.<sup>36</sup> Advocates of this reform hoped that identifying the normal penalty or going rate for certain types of offenses would reduce intrajurisdictional disparity.<sup>37</sup> Other states (including Arizona) adopted determinate sentencing policies that curtailed judicial discretion by limiting judges' sentencing options; these statutes provided a range of imprisonment for each class of offense and allowed judges to enhance the sentence for aggravating factors such as use of a weapon, presence of a prior criminal record, or infliction of serious injury.<sup>38</sup> Still other jurisdictions established presumptive sentencing guidelines that incorporated crime seriousness and criminal history into a sentencing grid that judges were required to use in determining the appropriate sentence.<sup>39</sup> Whereas every state and the federal system used indeterminate sentencing in 1970,<sup>40</sup> by 2017 the federal government, fourteen states, and the District of Columbia were operating under sentencing guidelines promulgated by sentencing commissions; four states were operating under determinate sentencing systems; and indeterminate sentencing survived in the remaining states.<sup>41</sup>

Supporters of sentencing guidelines predicted that guidelines would reduce disproportionate and disparate sentencing by prescribing punishments based on the facts of the case, thereby limiting the extent to which judges' biases, preferences, and philosophies of punishment would influence their decision-making.<sup>42</sup> Although there are a number of methodological

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33. *Id.* at 10–11.

34. TONRY, *supra* note 20, at 9.

35. SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990*, at 122 (1993).

36. SPOHN, *supra* note 4, at 230.

37. *Id.*

38. *Id.* at 226.

39. *Id.* at 230.

40. *Id.*

41. For a discussion of variations among jurisdictions with sentencing guidelines, see Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, 81 *FED. PROB.* 28, 31 (2017).

42. Paula Kautt & Cassia Spohn, *Crack-ing Down on Black Drug Offenders? Testing for Interactions Among Offenders' Race, Drug Type, and Sentencing Strategy in Federal Drug*

challenges to determining whether sentencing guidelines have reduced disparity,<sup>43</sup> most studies of sentences imposed in jurisdictions with presumptive guidelines conclude that sentencing across judges is more uniform<sup>44</sup> and that sentences are more tightly coupled to the seriousness of the offense and the offender's criminal record.<sup>45</sup> Critics, however, contend that guidelines led to substantially more punitive punishment<sup>46</sup> and facilitated the rise in mass incarceration that disproportionately impacted low-income and minority communities.<sup>47</sup> Thus, the objective of more uniformity and consistency in sentencing may have been purchased "at the price of undue severity in sentences, undue uniformity of those sentenced, and unwarranted complexity."<sup>48</sup>

Those who lobbied for adoption of presumptive sentencing guidelines also claimed that guidelines would reduce unwarranted disparity and discrimination.<sup>49</sup> Assessing whether this has occurred is difficult, given that there has been almost no research comparing the effects of legally irrelevant offender characteristics on sentence outcomes before and after the

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*Sentences*, 19 JUST. Q. 1, 4 (2002); see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988).

43. SPOHN, *supra* note 4, at 252–53.

44. Kay A. Knapp, *What Sentencing Reform in Minnesota Has and Has Not Accomplished*, 68 JUDICATURE 181, 184 (1984); TERANCE D. MIETHE & CHARLES A. MOORE, NAT'L INST. OF JUST., SENTENCING GUIDELINES: THEIR EFFECT IN MINNESOTA 5 (1989); Lisa Stolzenberg & Steward J. D'Alessio, *Sentencing and Unwarranted Disparity: An Empirical Assessment of the Long-Term Impact of Sentencing Guidelines in Minnesota*, 32 CRIMINOLOGY 301, 301 (1994); U.S. SENT'G COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 31–52 (1991).

45. John H. Kramer, Robin L. Lubitz & Cynthia A. Kempinen, *Sentencing Guidelines: A Quantitative Comparison of Sentencing Policies in Minnesota, Pennsylvania, and Washington*, 6 JUST. Q. 565, 569 (1989).

46. SPOHN, *supra* note 4, at 290; TONRY, *supra* note 20, at 13–15.

47. See Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System that Have a Racially Disparate Impact. A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215, 231 (1994).

48. See James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Inter-Judge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 303 (1999) (footnote omitted); John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?* 30 ECON. INQUIRY 583, 584 (1992); Jonathan M. Karpoff & John R. Lott, Jr., *Why the Commission's Corporate Guidelines May Create Disparity*, 3 FED. SENT'G REP. 140 (1990); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 916 (1991); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 834 (1992); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1704 (1992).

49. See TONRY, *supra* note 20, at 3–5.

implementation of guidelines. However, most research conducted during the post-guidelines era revealed the persistence of disparate sentencing, especially in the decision to sentence the offender to prison or not.<sup>50</sup> Although researchers initially found a reduction in disparities attributed to the offender's race, ethnicity, and sex in some of the first states to adopt sentencing guidelines,<sup>51</sup> later studies demonstrated that these legally irrelevant factors continued to play a role, challenging beliefs that guidelines would eliminate bias in the courtroom.<sup>52</sup>

The fact that disparities remain in jurisdictions with determinate sentencing and sentencing guidelines suggests that judges and prosecutors are reluctant to determine sentences based solely on crime seriousness and prior criminal record.<sup>53</sup> It implies that statutorily irrelevant factors such as race, gender, age, employment status, and social class may be factually relevant to prosecutors' and judges' assessments of the degree to which offenders are dangerous, pose a threat to the safety of the community, and are amendable to rehabilitation. It also attests to Tonry's assertion that "[t]here is, unfortunately, no way around the dilemma that sentencing is inherently discretionary and that discretion leads to disparities."<sup>54</sup>

### B. Mandatory Minimum Sentencing Statutes

Concerns about increases in violent crime, coupled with a moral panic about the use and abuse of illegal drugs, prompted most jurisdictions to enact mandatory minimum sentencing statutes during the 1970s, 1980s, and early

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50. See generally Ojmarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 J. QUANTITATIVE CRIMINOLOGY 439, 451 (2005); Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 2000 427, 432–33 (2000).

51. Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL'Y 279, 303–306 (1993); Knapp, *supra* note 44, at 186–87; Kramer et al., *supra* note 45, at 569; Charles A. Moore & Terance D. Miethe, *Regulated and Unregulated Sentencing Decisions: An Analysis of First-Year Practices Under Minnesota's Felony Sentencing Guidelines*, 20 LAW & SOC'Y REV. 253, 267–69 (1986).

52. See generally Ronald S. Everett & Roger A. Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 189 (2002); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001); Stephen Demuth & Darrell Steffensmeier, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who Is Punished More Harshly?*, 65 AM. SOC. REV. 705 (2000); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998).

53. See Kramer et al., *supra* note 45, at 585.

54. See TONRY, *supra* note 20, at 180.

1990s.<sup>55</sup> Commentators from both sides of the political spectrum criticized overly lenient sentences imposed on offenders convicted of violent crimes and drug offenses<sup>56</sup> and called for the enactment of mandatory minimum sentencing statutes that would require the judge to impose specified sentences on offenders convicted of certain types of crimes, such as violent offenses, firearms offenses, drug offenses, or drunk driving offenses, and on habitual or repeat offenders.<sup>57</sup> By the mid-1990s mandatory penalties had been adopted in every state, and Congress had enacted more than sixty mandatory sentencing laws covering more than 100 federal offenses.<sup>58</sup>

As already noted, changes in sentencing policies and practices enacted during the sentencing reform movement were intended to reduce disparities in sentencing by precluding legal actors from considering statutorily irrelevant factors.<sup>59</sup> Mandatory minimum sentencing policies, which apply to *all* offenders convicted of certain crimes or with certain types of criminal histories, were designed to achieve this goal.<sup>60</sup> If an offender is convicted of an offense that triggers a mandatory minimum, the judge is required to impose the mandatory penalty.<sup>61</sup> The judge is not permitted to consider potentially mitigating factors such as the defendant's role in the offense, family situation, history of drug or alcohol abuse, or other background characteristics.<sup>62</sup> Mandatory minimum sentencing policies also reflect the justice system's attempt to regulate criminal behavior.<sup>63</sup> Rooted in deterrence and rational choice theory, mandatory minimums were a response to the nation's growing concerns over rising crime rates.<sup>64</sup> Public officials claimed that mandatory minimums would prevent future crime by deterring potential offenders and incapacitating those who were not deterred.<sup>65</sup>

Critics of mandatory minimum sentencing statutes—especially those applicable to non-violent offenses—cite their excessive severity and their

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55. See Spohn, *supra* note 50, at 429–31.

56. See TONRY, *supra* note 20, at 3, 9–13, 146.

57. *Id.* at 10, 13.

58. *Id.* at 146; see also SPOHN, *supra* note 4, at 253.

59. See *supra* notes 35–37 and accompanying text.

60. Stephen Breyer, Assoc. Just., U.S. Sup. Ct., Federal Sentencing Guidelines Revisited, An Address Before the University of Nebraska College of Law (Nov. 18, 1998), in 11 FED. SENTENCING REP. 180, 180 (1999).

61. See TONRY, *supra* note 20, at 11.

62. *Id.*

63. *Id.* at 3.

64. DALE PARENT, TERENCE DUNWORTH, DOUGLAS McDONALD & WILLIAM RHODES, NAT'L INST. OF JUST., KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: MANDATORY SENTENCING 1–2 (1997), <https://www.ncjrs.gov/pdffiles/161839.pdf> [<https://perma.cc/E47S-B3EH>].

65. Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 947–48 (2001).

inflexibility.<sup>66</sup> Opponents also charge that these statutes, like presumptive sentencing guidelines, do not eliminate discretion in sentencing; rather, they transfer discretion from the sentencing judge to the prosecutor.<sup>67</sup> The imposition of a mandatory minimum sentence is contingent upon conviction for an offense requiring a mandatory minimum sentence.<sup>68</sup> Because the prosecutor decides whether to file a charge triggering a mandatory minimum sentence and, if so, whether to reduce the charge to one not carrying a mandatory penalty during plea negotiation, critics charge that prosecutors, not judges, determine what the ultimate sentence will be.<sup>69</sup>

There also is evidence that mandatory minimum sentencing statutes, and especially those applicable to drug offenses, disproportionately target people of color and those living in low-income communities.<sup>70</sup> Some scholars suggest that this is because people of color and the poor are more likely to commit crimes that trigger mandatory penalties,<sup>71</sup> but others argue that disparities result from the application of mandatory minimum statutes.<sup>72</sup> For example, one study examined imposition of mandatory sentences in Pennsylvania, where the application of mandatory penalties is determined by the prosecutor's decision to file a charge that triggers a mandatory penalty and then to file a motion to apply the mandatory penalty.<sup>73</sup> An important conclusion of this study was that "prosecutors choose to apply the mandatory to eligible offenses in relatively few cases."<sup>74</sup> The authors also found that among offenders who were eligible for a mandatory minimum sentence, Hispanics were substantially more likely than Whites and males were more likely than females to receive the mandatory penalty.<sup>75</sup> These results challenge both the notion that mandatory penalties are, in fact, mandatory, and the assumption that they are applied without reference to legally irrelevant factors.

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66. Anderson et al., *supra* note 48, at 303.

67. Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427, 427–28 (2007).

68. *Id.*

69. *Id.*

70. See generally KATHERINE A. BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* (2d ed. 2003); Ulmer et al., *supra* note 67, at 440.

71. See PARENT ET AL., *supra* note 64, at 3–4; David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995).

72. Ulmer et al., *supra* note 67, at 440.

73. *Id.* at 436–40.

74. *Id.* at 440.

75. *Id.* at 442. For similar findings, see U.S. SENT'G COMM'N, *supra* note 44, at 126.

Mandatory minimum sentencing statutes, which arguably were designed to deter potential offenders and ensure the incapacitation of serious and dangerous offenders, came under increasing criticism as prison populations skyrocketed, correctional budgets ballooned, and racial and ethnic disparities in imprisonment worsened.<sup>76</sup> Beginning in the late 1990s, many jurisdictions began to revise their mandatory minimum sentencing statutes,<sup>77</sup> either by limiting the crimes to which they applied or by reducing their punitiveness.

### C. *Three-Strikes-and-You're-Out Laws*

Three-strikes laws were developed with the goal of increasing sentences and enhancing punishment for repeat offenders by imprisoning offenders for an extended time upon conviction for a third (or, sometimes, a second) qualifying offense.<sup>78</sup> They aim to reduce crime by capitalizing on incapacitation, or the philosophy that incarcerated offenders can no longer commit crimes once imprisoned.<sup>79</sup> By focusing on offenders with qualifying, repeat criminal histories, three-strikes laws specifically seek to incapacitate those who pose the greatest risk to public safety.<sup>80</sup> Additionally, three-strikes laws aim to reduce crime through deterrence, with the expectation that each additional strike an offender receives will increase an offender's perception of the costs of crime.<sup>81</sup>

Currently, thirty states, the District of Columbia, and the federal system have implemented some form of a three-strikes law.<sup>82</sup> However, these laws are written and applied differently depending on jurisdiction.<sup>83</sup> Although many jurisdictions give offenders with their third felony conviction life sentences without the chance of parole, other jurisdictions impose less

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76. Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89, 89–90 (2001).

77. BUREAU OF JUST. ASSISTANCE, DEP'T OF JUST., NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 24–26 (1996), <https://www.ncjrs.gov/pdffiles/strsent.pdf> [<https://perma.cc/LKS3-FEBK>].

78. Susan Turner, Peter W. Greenwood, Elsa Chen & Terry Fain, *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75, 76 (1999).

79. Jonathan Simon, *Criminology and the Recidivist*, in THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY 24, 25–27 (David Shichor & Dale K. Sechrest eds., 1996).

80. Turner et al., *supra* note 78, at 75.

81. Marvell & Moody, *supra* note 76, at 90.

82. See Mitchell, *supra* note 41, at 28.

83. JAMES AUSTIN, JOHN CLARK, PATRICIA HARDYMAN & D. ALAN HENRY, THREE STRIKES AND YOU'RE OUT: THE IMPLEMENTATION AND IMPACT OF STRIKE LAWS 5 (2000), <https://permanent.access.gpo.gov/gpo41273/181297.pdf> [<https://perma.cc/RJZ9-LGT7>]; Turner et al., *supra* note 78, at 76.

punitive sentences for a third strike.<sup>84</sup> Similarly, while commonly referred to as three-strikes laws, jurisdictions impose the harshest sentencing penalties after offenders accumulate differing numbers of strikes, from two in South Carolina to four in Maryland.<sup>85</sup> Different jurisdictions also allow different crimes to count towards an offender's strikes.<sup>86</sup> Although all jurisdictions with three-strikes laws include violent felonies as strikes, some jurisdictions also count non-violent felonies, drug crimes, street crimes, and even criminal attempts as strikes.<sup>87</sup> Given these differences, it is difficult to compare the effects of three-strikes laws across jurisdictions in the United States.

Although the intention of three-strikes laws is to incapacitate violent offenders and deter criminal behavior, early research found that instrumental crimes were generally unaffected by the implementation of these laws, and that violent crime may have increased rather than decreased.<sup>88</sup> Some studies concluded that jurisdictions with three-strikes laws experienced slight decreases in robberies, burglaries, larcenies, and motor vehicle thefts.<sup>89</sup> However, researchers were reluctant to attribute these declines to the laws themselves, given the potential influence of other changes in sentencing policies and practices and a general decline in national crime rates.<sup>90</sup> Moreover, some research found that homicides increased<sup>91</sup> or declined at slower rates<sup>92</sup> in jurisdictions with three-strikes laws compared to those without these laws. Overall, it appears that three-strikes laws were less effective than intended at achieving incapacitation and deterrence.

Critics of three-strikes-laws also contend that these laws have increased racial disparities in prison populations.<sup>93</sup> Research has shown that three-strikes laws are applied more often to Black defendants than to White

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84. AUSTIN ET AL., *supra* note 83, at 5.

85. *Id.* at 9–11 tbl.1.

86. *Id.*

87. *See id.*

88. Elsa Y. Chen, *Impacts of 'Three Strikes and You're Out' on Crime Trends in California and Throughout the United States*, 24 J. CONTEMP. CRIM. JUST. 345, 363 (2008); Tomislav V. Kovandzic, John J. Sloan, III & Lynne M. Vieraitis, *Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of "Three Strikes" in U.S. Cities (1980–1999)*, 1 CRIMINOLOGY & PUB. POL'Y 399, 408 (2002); *see* Marvell & Moody, *supra* note 76, at 96.

89. Chen, *supra* note 88, at 357; *see* Kovandzic et al., *supra* note 88, at 402; Tomislav V. Kovandzic, John J. Sloan, III & Lynne M. Vieraitis, "Striking Out" as Crime Reduction Policy: *The Impact of "Three Strikes" Laws on Crime Rates in U.S. Cities*, 21 JUST. Q. 207, 225 (2004).

90. *See* Chen, *supra* note 88, at 360–61.

91. Kovandzic et al., *supra* note 88, at 408; *see* Kovandzic et al., *supra* note 89, at 226; Marvell & Moody, *supra* note 76, at 96.

92. Chen, *supra* note 88, at 360.

93. John R. Sutton, *Symbol and Substance: Effects of California's Three Strikes Law on Felony Sentencing*, 47 LAW & SOC'Y REV. 37, 38 (2013).

defendants, resulting in Black defendants receiving longer prison terms even after controlling for other legally relevant variables.<sup>94</sup> This racial disparity is most prominent in “wobbler” cases, or those where prosecutors have discretion to file the case as either a felony or a misdemeanor.<sup>95</sup> In these instances, Black defendants are more likely than similarly situated White defendants to be charged with felonies and thus to have the conviction count as a second or third strike.<sup>96</sup>

Although those who championed three-strikes laws viewed them as an important element of the sentencing reform movement, in reality these laws are simply more punitive versions of habitual offender statutes that date back to the late eighteenth century.<sup>97</sup> The results of evaluation research are somewhat mixed, but most studies reveal that three-strikes laws did not reduce or deter crime but did increase unwarranted disparity in sentencing and contribute to the disproportionate number of Black men affected by mass incarceration in the United States.

#### D. Truth-in-Sentencing Laws

Widespread concerns about offenders who were paroled from prison after serving only a small portion of their sentences led to a number of related reforms.<sup>98</sup> Many states abolished parole<sup>99</sup> and reduced the amount of time subtracted from offenders’ sentences for good behavior in prison or for participation in prison-based educational and vocational programs.<sup>100</sup> Many states also adopted truth-in-sentencing laws that require offenders to serve a substantial percentage of the prison sentence imposed before being eligible for release.<sup>101</sup> Enactment of these laws was encouraged by passage of the Sentencing Reform Act of 1984, which required convicted federal offenders to serve 85% of the sentence imposed, and the Violent Crime Control and Law Enforcement Act of 1994, which authorized grants to states that required

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94. Elsa Y. Chen, *The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California’s Three Strikes Law*, 6 J. ETHNICITY CRIM. JUST. 83, 99 (2008); Sutton, *supra* note 93, at 64.

95. Chen, *supra* note 94, at 98.

96. *Id.*

97. SPOHN, *supra* note 4, at 264.

98. William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1060 (2015).

99. *Id.*

100. PETER B. HOFFMAN, HISTORY OF THE FEDERAL PAROLE SYSTEM 28–29 (2003) <http://www.fedcure.org/information/TheHistoryOfTheFederalParoleSystem-2003.pdf> [<https://perma.cc/EG4V-3XP9>].

101. See Berry, *supra* note 98, at 1060.

people convicted of violent crimes to serve at least 85% of the sentence imposed by the judge.<sup>102</sup>

The goal of truth-in-sentencing laws is to ensure that offenders, particularly violent offenders, serve a substantial portion of their sentences.<sup>103</sup> The goal, in other words, is to increase the length of the prison sentence. Data from states that enacted an 85% rule showed that the average time served by violent offenders did, in fact, increase.<sup>104</sup> It went from thirty-two months to eighty-two months in Vermont, from twenty-eight months to fifty months in Florida, and from thirty-one months to forty-seven months in North Dakota.<sup>105</sup>

Like three-strikes laws and mandatory minimum sentencing statutes, truth-in-sentencing laws are premised on assertions that offenders who commit violent crimes or repeat their crimes are responsible for a disproportionate amount of crime and that locking them up for long periods of time will therefore reduce the crime rate.<sup>106</sup> Research addressing the effects of truth-in-sentencing laws on sentencing outcomes and crime rates is fairly minimal, and the results are inconsistent.<sup>107</sup> Turner, Greenwood, Chen, and Fain's research suggested that truth-in-sentencing laws increased prison populations and correctional spending without decreasing violent crime rates,<sup>108</sup> but Long's research found that truth-in-sentencing laws lead to a reduction in violent crime.<sup>109</sup> There is also some preliminary work suggesting that truth-in-sentencing laws increased disparities in sentence lengths between Black and Hispanic offenders compared to White offenders.<sup>110</sup> However, much more research is needed before definitive conclusions regarding the effects of truth-in-sentencing laws can be reached.

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102. *Id.* at 1059–60.

103. *Id.* at 1060.

104. PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUST. STAT., TRUTH IN SENTENCING IN STATE PRISONS 9 (1999), <https://bjs.gov/content/pub/pdf/tssp.pdf> [<https://perma.cc/TZK4-5MX4>].

105. *Id.*

106. *See* Berry, *supra* note 98, at 1060.

107. *See* Turner et al., *supra* note 78, at 77–79; Wei Long, *Does Longer Incarceration Deter or Incapacitate Crime? Evidence from Truth-in-Sentencing Reform*, 50 APPLIED ECON. 2664, 2676 (2018).

108. *See* Turner et al., *supra* note 78, at 77–79.

109. *See* Long, *supra* note 107, at 2676.

110. Mark G. Harmon, *The Imprisonment Race: Unintended Consequences of “Fixed” Sentencing on People of Color over Time*, 9 J. ETHNICITY CRIM. JUST. 79, 99 (2011); Lynn Adelman, *The Adverse Impact of Truth-in-Sentencing on Wisconsin’s Efforts To Deal with Low-Level Drug Offenders*, 47 VAL. U. L. REV. 689, 705 (2013).

*E. Life and Life Without the Possibility of Parole Sentences*

The proliferation of three-strike laws, mandatory minimums, and the elimination of parole boards or discretionary release on parole as part of truth-in-sentencing reforms,<sup>111</sup> coupled with reductions in the number of individuals sentenced to death, led to dramatic increases in the number of offenders incarcerated for life or for life without the possibility of parole (LWOP).<sup>112</sup> The number of offenders serving life sentences increased by roughly 500% (from 34,000 to 160,000) over the past three and a half decades, significantly outpacing “even the sharp expansion of the overall prison population during this period.”<sup>113</sup> This is especially true for sentences to life without the possibility of parole, which increased from 12,453 in 1992 to 53,290 in 2016.<sup>114</sup> Moreover, thousands more offenders are serving “virtual” life terms, or sentences that are so long they exceed a person’s natural life expectancy.<sup>115</sup>

In addition to the increasing prevalence of life sentences, the growing population of “lifers” in prison also reflects the fact that “the meaning of life”<sup>116</sup> has changed. For most of the twentieth century, a “life” sentence meant that the offender would serve ten or fifteen years in prison.<sup>117</sup> As Gottschalk noted, “Until the early 1970s, even in a hard-line state such as Louisiana . . . a life sentence typically meant ten years and six months.”<sup>118</sup> The situation is very different today. Several jurisdictions, including Florida, Illinois, Iowa, Louisiana, Maine, Pennsylvania, South Dakota and the federal system, have abolished parole, which means that any sentence to life is “the functional equivalent of LWOP.”<sup>119</sup> Even in jurisdictions that retain discretionary parole release, offenders are often required to serve a greater

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111. Berry, *supra* note 98, at 1059.

112. Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 U. MIA. L. REV. 439, 440 (2013); Jessica Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, in 1 LIFE WITHOUT PAROLE 66, 66 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

113. MARC MAUER & ASHLEY NELLIS, THE SENT’G PROJECT, THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES 9 (2018).

114. NELLIS, *supra* note 29, at 24.

115. *Id.* at 5.

116. MAUER & NELLIS, *supra* note 113, at 21.

117. See MARK MAUER, RYAN S. KING & MALCOM C. YOUNG, THE SENT’G PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 4, 12 (2004), <https://www.sentencingproject.org/wp-content/uploads/2016/01/The-Meaning-of-Life-Long-Prison-Sentences-in-Context.pdf> [<https://perma.cc/HT84-RPM2>]; ASHLEY NELLIS, THE SENT’G PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 3 (2013), <https://www.sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf> [<https://perma.cc/Q779-Z3FE>].

118. GOTTSCHALK, *supra* note 15, at 202.

119. Henry, *supra* note 112, at 68.

amount of time before being eligible for release, and parole boards have increasingly denied offender release petitions.<sup>120</sup> The Sentencing Project estimates that the typical offender sentenced to life in prison with the possibility of parole will be imprisoned three decades before being released.<sup>121</sup> Many life sentences, in other words, “provide the offender with the theoretical *possibility* of release, but in practice often result in the offender’s death in prison.”<sup>122</sup>

The stark growth in life imprisonment notwithstanding, contemporary sentencing researchers “have largely ignored the issue of long termers and lifers.”<sup>123</sup> However, an important reality of life sentences is that they are served disproportionately by people of color. At both the state and federal level, two-thirds of those serving life sentences are Black or Hispanic.<sup>124</sup> According to Nellis, racial disproportionality is even more pronounced among offenders serving LWOP sentences.<sup>125</sup> On the surface, these figures certainly *suggest* that life and LWOP sentences are “riddled with racial disparity,”<sup>126</sup> but the degree to which race affects judicial decisions to sentence eligible offenders to life is largely unknown. This is because virtually no research attempts to determine whether race and ethnicity impact the imposition of life sentences, net of other relevant case characteristics.<sup>127</sup> Prior work suggests that racial disparities in federal sentencing tend to be most pronounced among those with the longest sentences, but as Mauer and Nellis observe, “there is much less direct evidence available” on “the impact of race on sentences of life imprisonment” relative to the death penalty or other sentencing outcomes.<sup>128</sup>

The advocates of sentencing reform believed that the enactment of sentencing guidelines, mandatory minimum sentences, three-strikes laws,

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120. ASHLEY NELLIS & RYAN S. KING, *THE SENT’G PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA* 4–5 (2009), <https://www.prisonpolicy.org/scans/sp/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf> [<https://perma.cc/3KKP-FF8K>].

121. *Id.* at 5.

122. Henry, *supra* note 112, at 68.

123. Lila Kazemian & Jeremy Travis, *Imperative for Inclusion of Long Termers and Lifers in Research and Policy*, 14 *CRIMINOLOGY & PUB. POL’Y* 355, 357 (2015).

124. See NELLIS, *supra* note 29, at 14; see also U.S. SENT’G COMM’N, *LIFE SENTENCES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* 7 (2015), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226\\_Life\\_Sentences.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf) [<https://perma.cc/L3AY-NSGZ>].

125. See NELLIS, *supra* note 29, at 14.

126. Charles J. Ogletree, Jr. & Austin Sarat, *Introduction: Lives on the Line: from Capital Punishment to Life Without Parole*, in *LIFE WITHOUT PAROLE*, *supra* note 112, at 7.

127. But see Melissa Hamilton, *Some Facts About Life: The Law, Theory, and Practice of Life Sentences*, 20 *LEWIS & CLARK L. REV.* 803, 852 (2016) (finding no statistically significant correlation between race and life sentences).

128. MAUER & NELLIS, *supra* note 113, at 103.

truth-in-sentencing statutes, and LWOP provisions would result in more punitive, more effective, and fairer sentence outcomes. Although the evidence is somewhat mixed, it does appear that sentences are more punitive today than they were in the past. The movement away from indeterminate sentencing and the rehabilitative ideal to determinate sentencing and an emphasis on just deserts—coupled with laws mandating life sentences or long prison terms—have resulted in harsher sentences. There also is evidence that sentences today—and particularly those imposed under state and federal sentencing guidelines—are more uniform, less disparate, and more tightly linked to the seriousness of the offense and the offender’s criminal history. These results, however, have come at a price. Research reveals that the changes in sentencing policies and practices enacted during the past four decades have resulted in dramatic increases in the U.S. prison population and that the uneven application of these policies and practices has contributed to worsening racial and ethnic disparities in punishment.

## II. SENTENCING POLICIES AND PRACTICES IN ARIZONA

Like other states in the United States, Arizona enacted a series of sentencing reforms over the past several decades. The process began in 1978, when the Arizona Legislature abandoned indeterminate sentencing and adopted a determinate sentencing system with fixed terms of imprisonment for different crime classifications and for offenders with and without prior convictions.<sup>129</sup> Since then, the Arizona Legislature has enacted mandatory minimum sentencing statutes targeting violent offenders, repeat offenders, sex offenders, drug traffickers, and impaired drivers, as well as mandatory sentencing enhancements that allow more punitive sentences if certain aggravating factors (e.g., prior felony convictions or multiple charges) are present.<sup>130</sup> In 1994 Arizona implemented a truth-in-sentencing law that eliminated parole for all offenses committed on or after January 1, 1994 and mandated that all offenders serve 85% of the imposed sentence before being eligible for release on community supervision.<sup>131</sup>

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129. See ARIZ. SENATE RSCH. STAFF, TRUTH IN SENTENCING 1 (2018) <https://www.azleg.gov/Briefs/Senate/TRUTH%20IN%20SENTENCING%202018.pdf> [<https://perma.cc/NHE3-DJFC>].

130. *Criminal Sentencing Guidelines*, AZ L. HELP, [https://www.azlawhelp.org/articles\\_info.cfm?mc=13&sc=98&articleid=393](https://www.azlawhelp.org/articles_info.cfm?mc=13&sc=98&articleid=393) [<https://perma.cc/PXX7-YH3P>]; see ARIZ. SUP. CT., 2010 CRIMINAL CODE SENTENCING PROVISIONS (2010), <https://azmemory.azlibrary.gov/digital/collection/statepubs/id/17859> [<https://perma.cc/8W32-BNGS>].

131. ARIZ. SENATE RSCH. STAFF, *supra* note 129, at 1.

*A. Capital Sentencing in Arizona*

Arizona is one of twenty-five states that retain the death penalty (and does not have a governor-imposed moratorium on executions).<sup>132</sup> Arizona's guided discretion statute specifies that the death penalty can be imposed on a defendant convicted of first-degree murder, but only if there is at least one statutorily defined aggravating circumstance and no mitigating circumstances sufficiently substantial to warrant leniency.<sup>133</sup> Until 2019 there were fourteen aggravating circumstances, including whether the defendant was convicted of a contemporaneous serious offense; whether the defendant created a grave risk of death to others; whether the defendant committed the offense as consideration for the receipt of anything of pecuniary value; and whether the defendant committed the offense in an especially heinous, cruel or depraved manner.<sup>134</sup> The statute also requires the prosecutor to file a notice of intent to seek a death sentence.<sup>135</sup>

Critics of the Arizona statute argue that the statute is so broad that virtually all defendants charged with first-degree murder are eligible for the death penalty.<sup>136</sup> In 2014, lawyers for a death row inmate, Daniel Hidalgo, filed a petition for a writ of certiorari with the U.S. Supreme Court, arguing that the Arizona death penalty statute was unconstitutional, in that it failed to sufficiently narrow the cases eligible for the death penalty and therefore resulted in unconstitutionally arbitrary and capricious decisions to seek and impose the death penalty.<sup>137</sup> In support of their motion, they introduced evidence from a study conducted by researchers at Arizona State University.<sup>138</sup> The researchers examined 866 first-degree murder cases in Maricopa County from 2002 to 2012, finding that 856 (98.8%) of these cases had at least one aggravating circumstance.<sup>139</sup> The Arizona death penalty statute, in other words, did not narrow the cases eligible for the death penalty

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132. *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [<https://perma.cc/69WR-GEN8>].

133. ARIZ. REV. STAT. ANN. § 13-751 (2020).

134. *Id.* § 13-751 (2012) (amended 2019).

135. *Id.* § 13-751(A).

136. Adam Liptak, *Supreme Court Won't Hear Challenges to Arizona's Death Penalty Law*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/us/supreme-court-death-penalty.html> [<https://perma.cc/PF8F-YKDE>].

137. Petition for Writ of Certiorari at 7, *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018) (No. 17-251), 2017 WL 3531089, at \*11.

138. *Id.* at 7–8.

139. Cassia Spohn, Ariz. State Univ., & Kimberly Kaiser, Ariz. State Univ., Presentation at the Annual Meeting of the American Society of Criminology: Applying the Death Penalty in Arizona (Nov. 2015).

and, therefore, the prosecuting attorney had almost unfettered discretion in making the decision whether to seek the death penalty or not.

In March 2018 the U.S. Supreme Court turned down Hidalgo's request for a hearing on the case.<sup>140</sup> In doing so, however, the Court wrote that Arizona's capital sentencing system may well be unconstitutional and invited Hidalgo to mount a further challenge with additional evidence.<sup>141</sup> According to Justice Breyer (who was joined in his statement by three other justices), the evidence presented by Hidalgo's lawyers, which was unrebutted by the state, "points to a possible constitutional problem. . . . Evidence of this kind warrants careful attention and evaluation."<sup>142</sup> In 2019, Arizona eliminated three of the fourteen aggravating circumstances: the defendant knowingly created a grave risk of death to another person in addition to the person murdered; the offense was committed in a cold, calculated manner without pretense of moral or legal justification; and the defendant used a "remote stun gun" during the crime.<sup>143</sup> Because these three circumstances were rarely used, their elimination is unlikely to have a significant effect.<sup>144</sup>

### B. Non-Capital Sentencing in Arizona

Judges in Arizona impose sentences using the Arizona "sentencing guidelines," which is somewhat of a misnomer in that the sentencing scheme used in Arizona is determinate sentencing with fixed terms of imprisonment, depending on the seriousness of the crime and the offender's criminal history.<sup>145</sup> Arizona's sentencing system, in other words, differs from traditional sentencing guidelines in which crime seriousness and the offender's criminal history form the two axes of a sentencing grid, and the

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140. *Hidalgo*, 138 S. Ct. at 1057 (statement of Breyer, J.).

141. *Id.*

142. *Id.*

143. Lauren Castle, *It Just Got a Bit Tougher To Get the Death Penalty in Arizona*, AZCENTRAL (Apr. 10, 2019, 5:53 PM) (quoting ARIZ. REV. STAT. ANN. § 13-751(F) (2012) (amended 2019)), <https://www.azcentral.com/story/news/politics/legislature/2019/04/10/governor-doug-ducey-signs-bill-arizona-death-penalty-law-sen-eddie-farnsworth/3365922002/> [<https://perma.cc/6TKH-ARGK>].

144. *Id.*

145. Cassia Spohn, *Sentencing and Incarceration*, in CRIMINAL JUSTICE IN ARIZONA, 35, 38 (Bill Hart & Dan Hunting, eds., 2018) <https://www.aztownhall.org/resources/Documents/111%20Criminal%20Justice%20in%20Arizona%20Background%20Report%20web.pdf> [<https://perma.cc/3Z9C-HE8E>]; ARIZ. REV. STAT. ANN. § 13-701 (2020); *see also* ARIZ. SUP. CT., CRIMINAL CODE SENTENCING PROVISIONS 2019–2020, at 1 (2019), <http://www.azcourts.gov/Portals/34/2019Sentencing.pdf?ver=2019-07-02-103844-817> [<https://perma.cc/6FCF-V582>].

intersection of these factors produces a sentencing range that judges are required to consult when determining the appropriate sentence.<sup>146</sup> The Arizona criminal sentencing provisions base sentences on two factors: whether the offense is a dangerous felony, a non-dangerous felony, or a drug offense and whether the offender is a first or repeat offender.<sup>147</sup> Dangerous felony charges are serious, violent, or aggravated offenses, including murder, manslaughter, aggravated assault, sexual assault, sexual conduct with a child under age thirteen, dangerous crimes against children, arson of an occupied structure, armed robbery, burglary in the first degree, kidnapping, and child prostitution.<sup>148</sup> These offenses are categorized by the class of the offense (i.e., Class 2 (most serious) to Class 6 (least serious)), and separate sentencing tables are provided for first offenders, offenders with one or two historical priors,<sup>149</sup> and offenders with prior convictions for one or more dangerous offenses.<sup>150</sup> Each sentencing table includes a minimum, presumptive, and maximum sentence (or, in the case of dangerous offenders with prior convictions for dangerous offenses, a minimum, maximum, and increased maximum sentence).<sup>151</sup> For example, a first offender convicted of a dangerous Class 2 offense would face a minimum sentence of seven years, a presumptive sentence of 10.5 years, and a maximum sentence of twenty-one years.<sup>152</sup> By contrast, an offender convicted of a dangerous Class 2 offense who had previously been convicted of a dangerous offense would be facing a minimum sentence of 10.5 years, a maximum sentence of twenty-one years, and an increased maximum sentence of 26.25 years.<sup>153</sup> For these serious crimes, in other words, the sentencing range is broad; the maximum sentence is from two and a half to three times as harsh as the minimum sentence.

The sentencing procedures for offenders convicted of non-dangerous felonies are somewhat different.<sup>154</sup> Although these offenses, like dangerous

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146. ARIZ. SUP. CT., *supra* note 145, at 1–2.

147. See ARIZ. REV. STAT. ANN. §§ 13-702(D), -703(H)–(J), -704(A)–(F), -3419(A); see also ARIZ. SUP. CT., *supra* note 145, at 1–2, 7.

148. Spohn, *supra* note 145, at 39.

149. § 13-703(H)–(J). As defined by statute, a historical prior includes: (1) any felony conviction for an offense committed within five years of the current offense; (2) a Class 2 or Class 3 felony conviction for an offense committed within ten years of the current offense; or (3) any conviction for a dangerous felony or DUI regardless of when the offense occurred. *Id.* § 13-105 (22); see also ARIZ. SUP. CT., *supra* note 145, at 1; Spohn, *supra* note 145, at 38.

150. § 13-704(A)–(F); see also ARIZ. SUP. CT., *supra* note 145, at 1; Spohn, *supra* note 145, at 38.

151. §§ 13-702(D), -703(H)–(J), -704(A)–(F); see also ARIZ. SUP. CT., *supra* note 145, at 1–2; Spohn, *supra* note 145, at 38.

152. § 13-704(A); see also ARIZ. SUP. CT., *supra* note 145, at 1; Spohn, *supra* note 145, at 38.

153. § 13-704(F); see also ARIZ. SUP. CT., *supra* note 145, at 1.

154. Spohn, *supra* note 145, at 39.

felonies, are categorized by the class of the offense and by the offender's criminal history, the sentencing tables provide a mitigated and aggravated sentence in addition to the minimum, presumptive, and maximum sentences.<sup>155</sup> As an example, a first offender convicted of a non-dangerous Class 2 felony would be facing a minimum sentence of four years, a presumptive sentence of five years, and a maximum sentence of ten years.<sup>156</sup> If the judge finds that there are at least two mitigating circumstances (e.g., the defendant's age, the defendant played a minor role in the crime, the defendant's capacity to understand that what he or she did was wrong, whether the defendant was under duress at the time of the crime), the sentence can be reduced below the minimum sentence (the presumptive mitigated sentence is three years).<sup>157</sup> Similarly, if there are at least two aggravating factors (e.g., the defendant had an accomplice, the defendant used or threatened to use a deadly weapon, or the crime was committed in a heinous, cruel or depraved manner), the judge can increase the sentence above the recommended maximum sentence (the presumptive aggravated sentence is 12.5 years).<sup>158</sup> All first-time, non-dangerous felony offenders, with the exception of those convicted of drug offenses in which the quantity of drugs exceeds the statutory threshold (see below), are eligible for probation.<sup>159</sup>

Sentences for drug offenses depend on the type and quantity of drugs involved in the offense, whether the offender is a "repetitive offender" (i.e., has previously been convicted of one or more historical priors), and whether the offender is charged with multiple offenses (i.e., three or more felony drug offenses arising out of separate incidents but consolidated in the same criminal proceeding).<sup>160</sup> Sentences also vary depending upon whether the quantity of drugs is below or equal to/exceeds statutory threshold amounts, which vary by the type of drug.<sup>161</sup> For example, the threshold amount for amphetamine and methamphetamine (which are considered dangerous drugs) is nine grams, while the threshold amount for marijuana is two pounds; the threshold amount for powder cocaine is nine grams but is 750 milligrams for

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155. §§ 13-702(D), -703(H)-(J); *see also* ARIZ. SUP. CT., *supra* note 145, at 1-2; Spohn, *supra* note 145, at 39.

156. § 13-702(D); *see also* ARIZ. SUP. CT., *supra* note 145, at 1; Spohn, *supra* note 145, at 39.

157. §§ 13-701(E), -702(B), (D); *see also* ARIZ. SUP. CT., *supra* note 145, at 1; Spohn, *supra* note 145, at 39.

158. §§ 13-701(D), -702(B), (D); *see also* ARIZ. SUP. CT., *supra* note 145, at 1; Spohn, *supra* note 145, at 39.

159. §§ 13-3405(C), -3407(D)-(G), -3408(D)-(E); ARIZ. SUP. CT., *supra* note 145, at 1; Spohn, *supra* note 145, at 39.

160. §§ 13-3401 to 3421.

161. *See id.*; ARIZ. SUP. CT., *supra* note 145, at 1.

crack cocaine, representing a 12:1 disparity for powder versus crack cocaine.<sup>162</sup> As is the case for non-dangerous felonies, the drug offense sentencing tables provide mitigated, minimum, presumptive, maximum, and aggravated sentences.<sup>163</sup> Some drug offenders are eligible for probation and, as a result of Proposition 200, which was adopted by Arizona voters in 1996, those who are convicted of a first or second offense for possession or use of a controlled substance must be placed on probation unless they are also convicted of a violent offense.<sup>164</sup> However, this was modified by Proposition 301, which was enacted by voters in 2006 and allows judges to impose a prison sentence on someone for a first or second conviction for possession of a dangerous drug, including methamphetamine.<sup>165</sup>

Although Arizona does not have a “three-strikes-and-you’re-out law” similar to those enacted in Washington State and California,<sup>166</sup> Arizona law does require a mandatory sentence of life imprisonment for an offender (1) convicted of a serious offense (i.e., aggravated assault, armed robbery, arson, first-degree burglary, kidnapping, manslaughter, second-degree murder, sexual assault, but not a drug offense), first-degree murder, or a dangerous crime against children and (2) previously convicted of two or more serious offenses.<sup>167</sup> Moreover, the offender is not eligible for a pardon, probation, release, or suspension of sentence until he/she has served at least twenty-five years; the amount of time that must be served increases to thirty-five years for third-time offenses that involve aggravated or violent felonies.<sup>168</sup>

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162. ARIZ. SUP. CT., *supra* note 145, at 6.

163. *Id.* at 7.

164. STEVEN BELENKO & CASSIA SPOHN, DRUGS, CRIME, AND JUSTICE 265 (2015) (“[T]he Drug Medicalization, Prevention and Control Act (Proposition 200), was approved by Arizona voters in 1996. The Arizona law requires that nonviolent offenders convicted for the first or second time of use or possession of illegal drugs be sentenced to mandatory drug treatment, education, or community service instead of prison.”); *see also* § 13-901 (codifying Proposition 200); *Arizona Use or Possession of Controlled Substances, Proposition 200 (1996)*, BALLOTPEdia, [https://ballotpedia.org/Arizona\\_Use\\_or\\_Possession\\_of\\_Controlled\\_Substances\\_Proposition\\_200\\_\(1996\)](https://ballotpedia.org/Arizona_Use_or_Possession_of_Controlled_Substances_Proposition_200_(1996)) [<https://perma.cc/7RZU-6UWS>] (describing the election results for Proposition 200).

165. BELENKO & SPOHN, *supra* note 164, at 265 (“In 2006, Arizona voters approved Proposition 301, which excluded methamphetamine offenders from the program; as a result, offenders convicted for the first or second time of use or possession of methamphetamine are eligible for a jail or prison sentence.”); *see also* § 13-901.01 (codifying Proposition 301); *Arizona Methamphetamine Offenses, Proposition 301 (2006)*, BALLOTPEdia, [https://ballotpedia.org/Arizona\\_Methamphetamine\\_Offenses\\_Proposition\\_301\\_\(2006\)](https://ballotpedia.org/Arizona_Methamphetamine_Offenses_Proposition_301_(2006)) [<https://perma.cc/FH5P-MYR6>] (describing election results for Proposition 301).

166. PETER W. GREENWOOD ET AL., NAT’L INST. OF JUST., THREE STRIKES REVISITED: AN EARLY ASSESSMENT OF IMPLEMENTATION AND EFFECTS 2 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/194106.pdf> [<https://perma.cc/XZ4T-S8FP>].

167. § 13-706.

168. *Id.* § 13-706(A)–(B).

Like most other states, Arizona has a truth-in-sentencing statute.<sup>169</sup> The statute requires that all offenders convicted of offenses that occurred on or after January 1, 1994 serve 85% of the sentence imposed by the judge before being eligible for discretionary release.<sup>170</sup> Moreover, inmates released early are required to serve a term of community supervision following release.<sup>171</sup> Critics charge that the 85% rule serves as a disincentive for inmates to participate in educational, drug treatment, or other types of programming, which negatively affects the reentry process and enhances the likelihood of recidivism.<sup>172</sup> Critics also charge that the rule has contributed to the dramatic growth in the Arizona prison population (as noted above, the prison population grew by 60% from 2000 to 2018, despite falling crime rates).<sup>173</sup> Criticisms such as these prompted reform-minded Arizona legislators to target the 85% rule. In 2019 the legislature passed, and the Governor signed, a bill allowing inmates serving time for non-violent drug possession/use offenses to be released after serving 70% of their sentence, provided that they completed a drug rehabilitation program or some other type of self-improvement plan while incarcerated.<sup>174</sup> In early 2020, the Arizona House unanimously approved a bill that would allow offenders convicted of non-violent crimes to be released after serving 65% of the imposed sentence, contingent upon completion of a major self-improvement program.<sup>175</sup> At the time that this was written, the bill was still pending in the Arizona Senate.<sup>176</sup>

Over the past several decades, the sentencing system in Arizona has undergone several significant changes. Indeterminate sentencing was abolished and replaced with a determinate sentencing system with fixed terms of imprisonment based on crime seriousness and offender criminal history, and both mandatory minimum sentencing provisions and mandatory sentencing enhancements proliferated.<sup>177</sup> Arizona voters adopted a

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169. S.B. 1049, 1993 Ariz. Sess. Laws 1401, 1499.

170. § 101; ARIZ. SENATE RSCH. STAFF, *supra* note 129, at 1.

171. § 101.

172. Jeremy Duda, *Criminal Justice Reform Advocates Taking Aim at AZ's "Truth-in-Sentencing" Law*, AZMIRROR (Nov. 29, 2018, 10:02 AM), <https://www.azmirror.com/2018/11/20/criminal-justice-reform-advocates-taking-aim-at-azs-truth-in-sentencing-law> [<https://perma.cc/UA9G-VURH>].

173. *Id.*; FWD.US, *supra* note 7, at 2.

174. ARIZ. REV. STAT. ANN. § 41-1604.07 (2020).

175. This bill, House Bill 2808, must be approved by the State Senate and signed by the Governor. H.R. 2808, 54th Leg., 2d Reg. Sess. (Ariz. 2020).

176. *Justice Action Network Applauds Passage of Bipartisan Earned Release Credits Bill in Arizona House*, JUST. ACTION NETWORK (Feb. 28, 2020), <https://www.justiceactionnetwork.org/news/justice-action-network-applauds-passage-of-bipartisan-earned-releasenbspcredits-billnbspin-arizona-house> [<https://perma.cc/M54Q-SHXZ>].

177. *See* ARIZ. SUP. CT., *supra* note 145.

proposition requiring probation and drug treatment for a first or second conviction for drug possession or use;<sup>178</sup> several years later the voters modified this treatment-oriented policy by making those convicted of possession or use of methamphetamine ineligible for probation.<sup>179</sup> The Arizona Legislature adopted a punitive policy requiring all persons sentenced to prison to serve 85% of the sentence imposed by the judge before being eligible for release;<sup>180</sup> twenty-five years later, legislators modified this 85% rule to allow those incarcerated for non-violent possession or use of drugs to be released after serving 70% of the imposed sentence.<sup>181</sup> These policy changes reflect policymakers' and voters' concerns about both public safety and mass incarceration.

### III. SENTENCING OUTCOMES IN ARIZONA

Assessing sentencing outcomes in Arizona is difficult given that the Arizona superior courts do not have a centralized case management system and do not produce annual reports summarizing case outcomes or sentences statewide.<sup>182</sup> Although individual county superior courts produce annual reports, these typically focus on operations and expenditures rather than outcomes of criminal cases. For example, the 2019 annual report for the Maricopa County Superior Court lists the number and type of criminal cases

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178. REBECCA FEALK & CAROLINE ISAACS, DRUG SENTENCING IN ARIZONA: A PRESCRIPTION FOR FAILURE 12 (2017), <https://afscarizona.files.wordpress.com/2017/07/drug-sentencing-in-arizona-prescription-for-failure.pdf> [<https://perma.cc/6EJN-36AR>] (“In 1996, Arizona voters passed the ‘Drug Medicalization, Prevention and Control Act,’ also known as Proposition 200, which mandated that first and second-time drug possession offenses be diverted from prison into probation and treatment.”).

179. *Id.* (“In 2007, voters approved Proposition 301, ‘Probation for Methamphetamine Offenses Act,’ to exclude those charged with possession of methamphetamine from eligibility for Proposition 200 diversion. Individuals found in possession of methamphetamines can and do go to prison for a first or second drug offense.” (footnote omitted)).

180. WILLIAM J. SABOL, KATHERINE ROSICH, KAMALA MALLIK KANE, DAVID P. KIRK & GLENN DUBIN, THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS 63 (2002), <https://www.urban.org/sites/default/files/publication/60401/410470-The-Influences-of-Truth-in-Sentencing-Reforms-on-Changes-in-States-Sentencing-Practices-and-Prison-Populations.PDF> [<https://perma.cc/7C24-BGDL>].

181. FAMM, BILL SUMMARY: JUST SENTENCING ACT HB 2270 (BLACKMAN), <https://famm.org/wp-content/uploads/HB2270-Bill-Summary.pdf> [<https://perma.cc/B9XA-48EY>].

182. *See* ARIZ. SUP. CT., ARIZONA JUDICIARY ANNUAL REPORT (2019), <https://www.azcourts.gov/Portals/38/AnnualReportFY19.pdf> [<https://perma.cc/6LLY-76S4>].

filed but does not provide any data on case outcomes or sentences.<sup>183</sup> Moreover, the Arizona Department of Corrections (ADC), which produces detailed statistical reports, provides data only for offenders who are sentenced to prison.<sup>184</sup> Our ability to provide a comprehensive picture of sentencing in Arizona is constrained by these data limitations. Below I discuss data from official reports and research studies on the death penalty, life sentences, sentences for drug offenses, and sentences to imprisonment.

### A. Death Penalty Decisions

According to the most recent data provided by ADC, there are 116 inmates on death row in Arizona.<sup>185</sup> This includes 113 men and 3 women.<sup>186</sup> The racial/ethnic makeup of those on death row is shown in Table 1, which also lists the proportion of each group in Arizona's population.<sup>187</sup> As these data reveal, Blacks are overrepresented and Hispanics are underrepresented on death row. Blacks comprise only 5% of the resident population but 15.5% of those on death row; by contrast, Hispanics make up 31% of the resident population but only 20.7% of those on death row.<sup>188</sup> It is important to note that these disparities, in and of themselves, do not signal discrimination against Black offenders or in favor of Hispanic offenders, as the differences could be due to racial/ethnic differences in crime seriousness or the offender's criminal history.<sup>189</sup> Since 1910, there have been 137 executions in Arizona.<sup>190</sup>

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183. JUD. BRANCH OF ARIZ. FOR MARICOPA CNTY., ANNUAL REPORT OF OPERATIONS 49 (2019), <https://superiorcourt.maricopa.gov/media/5912/annual-report-2019.pdf> [<https://perma.cc/EJ3N-SBBZ>].

184. See, e.g., ARIZ. DEP'T OF CORR., CORRECTIONS AT A GLANCE: DECEMBER 2019 (2019), <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2019/cagdec19.pdf> [<https://perma.cc/8XYE-F4HU>].

185. *Death Row*, ARIZ. DEP'T OF CORR., <https://corrections.az.gov/public-resources/death-row> [<https://perma.cc/VXU3-XX4A>].

186. *Id.*

187. *Quick Facts: Arizona*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/AZ> [<https://perma.cc/LC7C-89R8>].

188. ARIZ. DEP'T OF CORR., *supra* note 185.

189. Spohn & Kaiser, *supra* note 139.

190. *Executions Prior to 1992 & Execution Methods*, ARIZ. DEP'T OF CORR., <https://corrections.az.gov/public-resources/death-row/executions-prior-1992-execution-methods> [<https://perma.cc/CN2N-PYA6>]; *Last Meals Request*, ARIZ. DEP'T OF CORR., <https://corrections.az.gov/public-resources/death-row/last-meals-request> [<https://perma.cc/VFG5-LNK6>].

Table 1. Race/Ethnicity of Inmates on Arizona Death Row, 2019 (N = 116)

Race/Ethnicity	N	%	% of AZ Pop.
White	64	55.2	54.1
Black	18	15.5	5.2
Hispanic	24	20.7	31.7
Other (Native American, Asian, Other)	10	8.6	9.3

Source: ARIZ. DEP'T OF CORR., *supra* note 185; U.S. CENSUS BUREAU, *supra* note 187.

As noted above, a study of capital sentencing in Arizona revealed that there was at least one aggravating circumstance that made the defendant statutorily eligible for the death penalty in all but ten of the 866 cases involving defendants charged with first-degree murder in Maricopa County from 2002 to 2012.<sup>191</sup> The authors of this study also conducted a more detailed analysis of cases (n = 299) from 2010 to 2012, finding that all but three of the cases had at least one aggravating circumstance, that the prosecutor filed a notice of intent to seek the death penalty in sixty-three (21.1%) cases, and that the death penalty was imposed in only five (1.6%) cases.<sup>192</sup> Further analysis designed to identify the predictors of the prosecutor's decision to file a notice of intent to seek death revealed that the decision was affected by the number of first-degree murder counts, whether the offender was convicted of a contemporaneous serious offense, and whether the offense was committed in an especially heinous, cruel or depraved manner.<sup>193</sup> The decision to seek the death penalty also was affected by the offender's ethnicity and the victim's race/ethnicity.<sup>194</sup> Prosecutors were more likely to pursue a death sentence if the offender was Hispanic rather than White; they were less likely to seek a death sentence if the victim was Black or Hispanic rather than White.<sup>195</sup> Application of the death penalty in Maricopa County, in other words, was affected both by legally relevant

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191. Spohn & Kaiser, *supra* note 139.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

indicators of crime seriousness and by legally irrelevant characteristics of the offender and victim.

### B. Life Sentences

According to data provided by The Sentencing Project, the population of offenders serving life sentences in Arizona in 2016 was one and a half times larger than the size of the entire Arizona prison population in 1970.<sup>196</sup> There were 2,309 persons serving life sentences in 2016, compared to a total prison population of 1,461 in 1970.<sup>197</sup> The population of “lifers,” who comprised 5.4% of the total prison population, included 1,181 serving life with parole, 504 serving life without the possibility of parole, and 624 serving virtual life sentences.<sup>198</sup> As shown in Table 2, there were racial disparities in the use of life sentences.<sup>199</sup> Among those sentenced to life in Arizona, Whites were underrepresented, and Blacks were overrepresented.<sup>200</sup> In fact, there were four times as many Blacks serving life sentences as one would predict based on the percentage of the Arizona population that is Black.<sup>201</sup>

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196. NELLIS, *supra* note 29, at 24; PATRICK A. LANGAN ET AL., U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86, at 11 (1988), <https://www.ncjrs.gov/pdffiles1/Digitization/111098NCJRS.pdf> [<https://perma.cc/6JND-55RJ>].

197. NELLIS, *supra* note 29, at 10 tbl.2; LANGHAN ET AL., *supra* note 196, at 11.

198. NELLIS, *supra* note 29, at 10.

199. *See infra* tbl.2.

200. *See infra* tbl.2.

201. *See infra* tbl.2. As noted in the discussion of capital sentencing, these differences do not necessarily signal racial discrimination. The disparities could reflect White/Black differences in crime seriousness or in criminal history.

Table 2. Race/Ethnicity of Inmates Serving Life Sentences in Arizona in 2016

Race/Ethnicity	N	%	% of AZ Pop.
White	1012	43.8	55.5
Black	448	19.4	4.9
Hispanic	714	30.9	30.9
Other (Native American, Asian, Other)	134	5.8	9.1

Source: NELLIS, *supra* note 29, at 15 tbl.4; U.S. CENSUS BUREAU, *supra* note 202.

Technically, all life sentences imposed in Arizona for crimes committed on or after January 1, 1994 are life without the possibility of parole sentences, due to the fact that parole was eliminated for these offenses.<sup>203</sup> The 1993 truth-in-sentencing legislation also replaced the phrase “life with a chance of parole after 25 . . . years” with “life with chance of release after 25 years.”<sup>204</sup> However, until 2016 judges continued to (mistakenly) impose life sentences with the possibility of parole after a specified number of years.<sup>205</sup> In fact, from January 1994 to January 2016, 248 of the 690 life sentences imposed by Arizona superior court judges included the possibility of parole after serving either twenty-five or thirty-five years.<sup>206</sup> This is problematic for a number of reasons, not the least of which is the fact that under the old law, those serving life sentences were guaranteed a parole hearing after twenty-five years, but under the new law, there is no parole so there can be no parole hearing.<sup>207</sup> Rather, the prisoner must file a petition with the Board of Executive

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202. The 2016 population statistics are based on *Quick Facts: Arizona*, U.S. CENSUS BUREAU, [https://webadmin.azmag.gov/Portals/0/Documents/MagContent/Complete-Count-Committee\\_2017-12-12\\_Arizona-Quick-Facts.pdf](https://webadmin.azmag.gov/Portals/0/Documents/MagContent/Complete-Count-Committee_2017-12-12_Arizona-Quick-Facts.pdf) [<https://perma.cc/N8H5-3FJZ>].

203. Michael Kiefer, *Hundreds of People Were Sentenced to Life with Chance of Parole. Just One Problem: It Doesn't Exist*, AZCENTRAL (Mar. 19, 2017, 6:02 AM), <https://www.azcentral.com/story/news/local/arizona-investigations/2017/03/19/myth-life-sentence-with-parole-arizona-clemency/99316310/> [<https://perma.cc/XMV2-HGYU>].

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

Clemency.<sup>208</sup> In March 2020, the Arizona Supreme Court ruled that Abelardo Chaparro, who was sentenced to “life without the possibility of parole for 25 years” for first-degree murder was eligible for a parole hearing.<sup>209</sup> According to the Court, “Chaparro is eligible for parole after serving 25 years pursuant to his sentence, and his *illegally lenient sentence* is final under Arizona law.”<sup>210</sup>

### C. Sentences for Drug Offenders

The Arizona superior courts do not provide statewide data on sentence outcomes, but limited data on drug sentencing in Arizona is available as a result of a study by the American Friends Service Committee.<sup>211</sup> This study examined sentences imposed on 1,261 individuals sentenced to prison for drug crimes in three Arizona counties (i.e., Maricopa, Pima, Yavapai) in 2015.<sup>212</sup>

With respect to sentences for drug offenses, the report stated that “Arizona has a strangely contradictory approach to drug crimes.”<sup>213</sup> One contradiction lies in the fact that although Proposition 200, which was implemented in 1998, requires that first- and second-time non-violent offenders convicted of drug possession/use be diverted from prison into probation and treatment, a third conviction for drug possession/use results in very harsh sentences.<sup>214</sup> Another is that, despite evidence that the implementation of Proposition 200 saved Arizona \$2.5 million in its first year and \$6.7 million after its second,<sup>215</sup> voters in 2007 approved Proposition 301, which excluded those convicted of possession/use of methamphetamines from eligibility for Proposition 200 diversion.<sup>216</sup> Thus, individuals convicted of simple possession or use of methamphetamine can be incarcerated for a first or second offense.<sup>217</sup> Moreover, even though Arizona law establishes drug amount thresholds that must be met before someone can be charged with drug sales, individuals with prior criminal convictions can be charged with selling drugs even if the

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208. *Id.* See Katherine Puzauskas & Kevin Morrow, *No Indeterminate Sentencing Without Parole*, 44 OHIO N.U. L. REV. 263 (2017) for a discussion of the legal issues surrounding this situation.

209. *Chaparro v. Shinn*, 459 P.3d 50, 52 (Ariz. 2020).

210. *Id.* at 55 (emphasis added).

211. FEALK & ISAACS, *supra* note 178.

212. *Id.* at 23.

213. *Id.* at 12.

214. *Id.*

215. Nancy Rodriguez & Vincent J. Webb, *Probation Violations, Revocations, and Imprisonment*, 18 CRIM. JUST. POL’Y REV. 3 (2007).

216. FEALK & ISAACS, *supra* note 178, at 12.

217. *Id.*

quantity of drugs does not exceed the statutory threshold.<sup>218</sup> As Fealk and Isaacs noted, “If the person does have prior convictions, they can be charged with sales of a drug for selling or attempting to sell any amount of drugs.”<sup>219</sup>

The Fealk and Isaac study did not include a multivariate analysis of drug sentencing (which would be required in order to reach conclusions regarding disparity and/or discrimination in sentencing) but did provide bivariate data on a number of outcomes, including the following:

- In Maricopa County (Arizona’s largest county, which includes the Phoenix metropolitan area), two thirds of charges filed in the Maricopa Superior Court were charges for drug offenses: possession/use of drug paraphernalia (16.5%); possession/use of a dangerous drug (11.5%); possession/use of marijuana (10.9%); marijuana violation (7.6%); drug paraphernalia violation (6.9%); possession/use of a narcotic drug (6.4%); dangerous drug violation (5.8%).<sup>220</sup>
- Nearly all (95.8%) of the mandatory sentencing enhancements filed by prosecutors in the three counties included in the study were for prior convictions.<sup>221</sup>
- Only 2.9% of the felony drug cases included in the study were cases in which defendants went to trial; the mean sentence was 96% greater for offenders convicted at trial than for offenders convicted as a result of a guilty plea; offenders who pled guilty and were sentenced to prison were convicted, on average, of only one of every three crimes with which they were initially charged.<sup>222</sup>
- There were geographic disparities in the number of charges filed in drug cases, with a mean of 6.1 charges in Yavapai County (the most rural county), 3.04 in Pima (Tucson) County, and 2.54 in Maricopa County. The mean prison sentence was also longer in Yavapai County (4.22 years) than in Pima (2.57 years) or Maricopa (2.46 years) Counties.<sup>223</sup>
- There were relatively few racial/ethnic differences in average prison sentences for individuals with prior convictions who were convicted of possession of methamphetamine, but Blacks with no prior

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218. *Id.* at 13.

219. *Id.*

220. *Id.* at 9.

221. *Id.*

222. *Id.* at 10.

223. *Id.* at 11.

convictions faced substantially longer sentences than Whites with no prior convictions for selling marijuana.<sup>224</sup>

Fealk and Isaacs concluded their report, which they characterized as “only a snapshot of drug sentencing in Arizona,” by noting that “[i]t is critically important for state agencies and sentencing courts at all levels to collect consistent data” so that government officials and the public will “have an accurate picture of the effectiveness, cost, and outcomes of our criminal justice system.”<sup>225</sup>

#### *D. Imprisonment in Arizona*

Data on imprisonment trends in Arizona come from reports prepared by the Bureau of Justice Statistics and the ADC and from research conducted by FWD.us,<sup>226</sup> a bipartisan political organization, and the Texas Public Policy Foundation, a conservative thinktank based in Austin, Texas.<sup>227</sup> According to the Bureau of Justice Statistics, in 2017 Arizona had the *fifth highest* incarceration rate (569 per 100,000 population) in the United States; only Louisiana (719), Oklahoma (704), Mississippi (619), and Arkansas (598) had higher rates.<sup>228</sup> At the end of fiscal year 2019, there were 42,312 persons confined in Arizona prisons; of these, 37,986 (89.8%) were males, and 4,236 (10.2%) were females.<sup>229</sup> There were 8,931 (21.1% of all offenders) individuals serving time for drug offenses; this included 4,081 (45.7%) incarcerated for drug possession (primarily methamphetamine and narcotic drugs) and 4,850 (54.3%) incarcerated for drug sales, manufacture, or distribution.<sup>230</sup> Of the 18,159 persons *admitted to prison* in FY2019, 31.9% were admitted for drug offenses, 25.2% were admitted for violent crimes, and 5% were admitted for weapons offenses; the remainder (37.9%) were admitted for DUI and property offenses.<sup>231</sup> Among those admitted to prison for drug offenses, 70.3% were convicted of possession or use of drugs (again, primarily methamphetamine and narcotic drugs), and 29.8% were convicted

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224. *Id.* at 14.

225. *Id.* at 16.

226. FWD.US, *supra* note 7.

227. GREG GLOD, TEX. PUB. POL’Y FOUND., ALL TALK AND NO ACTION: ARIZONA’S MANDATORY DRUG SENTENCING (2019), <https://www.texaspolicy.com/arizonas-mandatory-drug-sentencing/> [<https://perma.cc/4899-U4RV>].

228. BRONSON & CARSON, *supra* note 6, at tbl.6.

229. ARIZ. DEP’T OF CORR., ADMISSIONS, RELEASES, CONFINED POPULATION FACT SHEET 4, [https://corrections.az.gov/sites/default/files/REPORTS/Inmate\\_Population/inmate\\_popfacts\\_sheet\\_2019.pdf](https://corrections.az.gov/sites/default/files/REPORTS/Inmate_Population/inmate_popfacts_sheet_2019.pdf) [<https://perma.cc/X62G-NY3E>].

230. *Id.*

231. *Id.*

of manufacture, sale, or distribution of drugs.<sup>232</sup> Considering both the confined population at the end of FY2019 and those admitted to prison during FY2019, in other words, a substantial proportion were offenders convicted of drug offenses, and from 46% (those confined) to 70% (admissions) of these offenders were convicted of possession or use of drugs.

Although prison populations throughout the United States skyrocketed during the past four decades—increasing fourfold from 1980 to 2017—the prison population in Arizona grew by a shocking multiple of twelve; it increased from 3,456 in 1980 to 42,320 in 2016.<sup>233</sup> In fact, Arizona’s prison population increased by 60% from 2000 to 2018, despite declining violent and property crime rates and an increase in the Arizona population of only 33%.<sup>234</sup> According to FWD.us, this recent increase in Arizona’s prison population “was the result of policy and practitioner choices that both dramatically increased the number of people sent to prison for lower-level offenses and also extended prison terms far beyond the national average.”<sup>235</sup> The report attributed these changes to the fact that Arizona has increasingly used prison sentences for non-violent and first-time felony offenders; it noted that since 2000, the number of people sentenced to prison for non-violent crimes grew by nearly 80%,<sup>236</sup> the number sentenced to prison for drug offenses almost doubled,<sup>237</sup> and the number sent to prison for a first felony conviction tripled.<sup>238</sup> The report also provided data showing that “Arizona is out of step in how long it holds people in prison.”<sup>239</sup> Compared to the national average for length of stay in prison, individuals incarcerated in Arizona for property crimes serve sentences that are twice as long, those incarcerated for drug offenses serve 40% longer, and those incarcerated for violent offenses serve 25% longer.<sup>240</sup>

It also is clear that there are racial and ethnic disparities in the use of incarceration in Arizona.<sup>241</sup> As Part 2 of the FWD.us report pointed out, “In Arizona, communities of color are both disproportionately sentenced to

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232. *Id.*

233. FWD.us, *supra* note 7, at 2.

234. *Id.*

235. *Id.* at 9.

236. *Id.* at 9–10.

237. *Id.* at 11.

238. *Id.* at 13.

239. *Id.* at 14.

240. *Id.*

241. FWD.US, ARIZONA’S IMPRISONMENT CRISIS: THE COST TO COMMUNITIES 10 (2018), <https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/PART-2-The-cost-to-communities-1.pdf> [https://perma.cc/5UY8-MLNX].

prison, and, in some circumstances, spend longer periods behind bars.”<sup>242</sup> Table 3 summarizes these differences, both for all offenders admitted to prison and for offenders admitted to prison for various types of offenses (data on length of sentence provided only for all offenders admitted to prison).<sup>243</sup> Considering all individuals admitted to prison in FY2017, Whites, who made up 55% of the Arizona population, comprised only 40% of prison admissions; by contrast, Blacks, who made up 5% of the population, were 13% of prison admissions; Hispanics, who made up 31% of the population, were 37% of admissions; and Native Americans, who made up 5% of the population, were 7% of admissions.<sup>244</sup> The average sentence imposed on Black offenders was also longer than the mean sentence imposed on White and Hispanic offenders.<sup>245</sup> There were disparities for each of the three types of crimes.<sup>246</sup> Among offenders admitted to prison for violent crimes, the disparities between Blacks (who made up 5% of the population but 17% of prison admissions) and Whites (who made up 55% of the population but 35% of prison admissions) were even more pronounced than they were for all offenders.<sup>247</sup> Although disparities of this magnitude suggest the possibility of racial discrimination at sentencing, the disparities could be due to racial and ethnic differences in the offender’s criminal history, pretrial detention status, and other legally relevant factors that judges take into account when tailoring sentences to fit offenders and their crimes.<sup>248</sup>

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242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 13.

246. *Id.* at 11.

247. *Id.*

248. *See* SPOHN, *supra* note 4, at 132.

Table 3. Racial and Ethnic Disparities in Prison Admissions and Sentences in Arizona, 2017.

	<b>% of Admissions</b>	<b>Length of Prison Sentence</b>
<b>All Offenders*</b>		
White	40	54.3
Black	13	61.5
Hispanic	37	51.3
Native American	7	41.7
<b>Violent Offenders</b>		
White	35	
Black	17	
Hispanic	37	
Native American	10	
<b>Drug Offenders</b>		
White	41	
Black	11	
Hispanic	42	
Native American	3	
<b>Property Offenders</b>		
White	50	
Black	10	
Hispanic	32	
Native American	6	

\*Whites comprise 55% of the Arizona population, Blacks comprise 5%, Hispanics comprise 31%, and Native Americans comprise 5%.<sup>249</sup>

Source: FWD.US, *supra* note 241, at 10–13.

Policies that contributed to the imprisonment binge in Arizona include Proposition 301 (2006), which allows judges to impose prison sentences on

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249. FWD.US, *supra* note 241, at 10–11, 13.

individuals for a first or second conviction for possession of a dangerous drug, including methamphetamine; prior to 2006, the law required that all non-violent offenders convicted of drug use/possession for the first or second time be sentenced to probation with mandatory drug treatment.<sup>250</sup> Other punitive policies include: the state's "repetitive offender" sentencing enhancement provisions, which allow judges to increase sentences substantially for those convicted of multiple offenses or with prior felony convictions;<sup>251</sup> Arizona's habitual offender provisions, which require a life sentence without parole for offenders convicted of a serious offense who have two or more prior convictions for serious offenses;<sup>252</sup> and Arizona's truth-in-sentencing rule, which requires most offenders to serve 85% of the sentence imposed by the judge before being eligible for release.<sup>253</sup> Together, these policy choices help explain why "Arizona is falling behind the rest of the nation."<sup>254</sup>

It is important to point out that Arizona's overreliance on incarceration for punishing non-violent offenders and drug offenders comes at a high price.<sup>255</sup> In 2019, the budget for the ADC was \$1.1 billion, an increase of more than \$280 million since 2000.<sup>256</sup> This was substantially more than Arizona's investments in higher education, economic security, and child safety.<sup>257</sup> Overreliance on incarceration also has collateral consequences for offenders, their families, and their communities. For example, research reveals that drug offenders sentenced to prison have higher recidivism rates than those who receive probation sentences<sup>258</sup> and that the families and children of incarcerated parents experience financial hardship, increased levels of emotional stress, and weakened interpersonal relationships.<sup>259</sup> There also is a substantial body of research documenting the deleterious effects of high incarceration rates on the stability and safety of communities.<sup>260</sup>

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250. Proposition 301, S. Con. Res. 1033, 47th Leg. (2006), [https://apps.azsos.gov/election/2006/info/PubPamphlet/Sun\\_Sounds/english/Prop301.htm](https://apps.azsos.gov/election/2006/info/PubPamphlet/Sun_Sounds/english/Prop301.htm) [<https://perma.cc/YF6X-J4ZT>].

251. ARIZ. REV. STAT. ANN. § 13-703 (2020).

252. *Id.* § 13-706(A).

253. S.B. 1049, 1993 Ariz. Sess. Laws 1401, 1499.

254. FWD.US, *supra* note 7, at 20.

255. *Id.* at 4.

256. *Id.*

257. *Id.*

258. Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders*, 40 CRIMINOLOGY 329, 329 (2002).

259. Jillian J. Turanovic, Nancy Rodriguez & Travis C. Pratt, *The Collateral Consequences of Incarceration Revisited: A Qualitative Analysis of the Effects on Caregivers of Children of Incarcerated Parents*, 50 CRIMINOLOGY 913, 943 (2012).

260. See Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 100 (2008).

## IV. A TWENTY-FIRST CENTURY REFORM AGENDA FOR ARIZONA

There is growing evidence that the time is right to pursue substantial and meaningful sentencing reform.<sup>261</sup> In fact, evidence that Americans' appetite for punishment may be shrinking and that the United States must chart a different course on sentencing comes from a variety of sources.<sup>262</sup> At the federal level, Congress enacted three sentencing reform bills with broad bipartisan support: The Second Chance Act (2008), which authorized grants to government agencies and non-profits to provide employment assistance, substance abuse treatment, and other services designed to reduce recidivism;<sup>263</sup> The Fair Sentencing Act (2010), which reduced the 100:1 sentencing disparity for crack and powder cocaine to 18:1 and eliminated the five-year mandatory minimum sentence for possession of crack cocaine;<sup>264</sup> and The First Step Act (2018), which shortened mandatory minimum sentences for non-violent drug offenses, reduced the sentence for conviction under the federal three-strikes rule from life to twenty-five years, expanded the drug safety valve that allows judges to deviate from mandatory minimums when sentencing drug offenders, and made the provisions of The Fair Sentencing Act retroactive.<sup>265</sup> A number of states also are re-assessing their policies regarding sentencing of non-violent offenders and drug offenders; these states have enacted laws designed to eliminate overly harsh mandatory minimum sentences for these types of offenders.<sup>266</sup> States have also enacted legislation that downgrades felony drug offenses to misdemeanors (and certain misdemeanors to infractions) and that makes certain types of offenders ineligible for a prison sentence (see, for example, AB109 in California).<sup>267</sup> Critics contend that these reforms do not go far enough and represent little more than "nibbl[ing] at the edges" of the problem.<sup>268</sup> However, the fact that they are supported by both conservative and liberal politicians and by large majorities of American citizens suggests that major change in sentencing policies and practices may be on the horizon.

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261. Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, 26 FED. SENT'G REP. 198, 198 (2014).

262. *See id.*

263. Second Chance Act of 2007, 34 U.S.C. § 60511.

264. Fair Sentencing Act, 21 U.S.C. § 801.

265. First Step Act, 18 U.S.C. §§ 3631–4130.

266. Subramanian & Delaney, *supra* note 261, at 199.

267. *See* Katharine Tellis & Cassia Spohn, *AB109 in California: Realignment, Decarceration and Crime in Los Angeles County*, in 4 HANDBOOK ON SENTENCING POLICIES AND PRACTICES IN THE 21ST CENTURY 312, 313 (Cassia Spohn & Pauline Brennan eds., 2019).

268. Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 526 (2014).

*A. Reforming Sentencing in Arizona*

Recommendations for meaningful sentencing reform in Arizona include the following:

- Repeal the death penalty or, at a minimum, significantly reduce the number of aggravating circumstances that make an offender eligible for a death sentence;
- Make sentencing in Arizona less punitive by reducing mandatory sentencing enhancements for repeat offenders and multiple offenses, raising weight and monetary thresholds for drug and property offenses, providing judges with enhanced discretion to depart from the guidelines when appropriate, and ensuring that statutory maximum sentences are proportionate to the seriousness of the crime;
- Enact legislation (e.g., AB109 in California) that makes non-violent, non-serious, and non-sex offenders ineligible for a prison sentence;
- Repeal or drastically scale back *all* mandatory minimum sentences;
- Repeal Proposition 301, which allows judges to impose a prison sentence on persons convicted of a first or second offense of possession or use of methamphetamine—sentence these offenders to probation with mandatory substance abuse treatment;
- Reduce the percentage of time offenders must serve before being released from prison under Arizona’s truth-in-sentencing statute from 85% to 60% for all offenders incarcerated for non-violent crimes and drug offenses;
- Revise the habitual offender law that requires a life sentence in certain circumstances to reduce the amount of time that must be served before the offender is eligible for release;
- Reduce felony drug use/possession offenses to misdemeanors;
- Eliminate the 12:1 disparity in sentencing for powder and crack cocaine and reduce sentences retroactively for offenders sentenced for crack offenses when the disparity was in effect;
- Reinvest cost savings from reducing incarceration in community-based programs that provide treatment, prevent crime, and protect public safety;
- Require standardized data collection protocols across counties and courts and make the data publicly available to researchers.

Critics of the sentencing policies and practices pursued during the past several decades are increasingly calling on state and federal governments to “chart a different course” in sentencing policy.<sup>269</sup> This seems particularly urgent in Arizona, which has the fifth highest incarceration rate in the United States, a ballooning corrections budget, and prison beds filled with non-violent drug offenders who do not receive the substance abuse treatment they need to successfully re-enter society.<sup>270</sup> Scholars and practitioners concerned about skyrocketing imprisonment rates and the collateral consequences of incarceration for offenders, their families, and their communities are championing sentencing reforms designed to slow the flow of people into prison, reduce both the number of persons now incarcerated and the lengths of sentences they are serving, and ameliorate unwarranted disparities in imprisonment.<sup>271</sup> The recommendations outlined above are designed to do just that. They are designed to end Arizona’s imprisonment crisis and to ensure that sentences in Arizona are fair, equitable, and proportional.

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269. Cassia Spohn, *Twentieth-Century Sentencing Reform Movement: Looking Backward, Moving Forward*, 13 CRIMINOLOGY & PUB. POL’Y 535, 541 (2014).

270. See BRONSON & CARSON, *supra* note 6, at 11; FWD.US, *supra* note 241, at 1–4.

271. Tonry, *supra* note 268, at 526–27; Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 37 (2008).