

# Criminal Justice Reform: An Introduction

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Thank you, Professor Luna, for the kind words and for organizing this remarkable conference. It was a great day for Arizona and ASU when you joined the law faculty, and I am personally grateful for the insights on criminal law you have generously shared with me.

Thanks also to ASU for hosting this conference in this magnificent new building. What a gem not only for the students lucky enough to study here, but for the entire community, for which this law school is a pillar.

And a hearty thanks and welcome to everyone participating in this conference. Your work here, and back at home, will be extremely consequential as we weigh changes in our criminal justice system. I am as gratified as I am humbled by the charge you have undertaken, and I look forward to the fruits of your wisdom and labors.

It is ironic that I am kicking off this conference. I still consider myself a rookie justice, although as you may know we recently expanded the Arizona Supreme Court from five to seven, with the odd consequence that I am now further from the bottom yet no closer to the top. Prior to joining the Court slightly more than a year ago, I had no direct involvement in criminal law or—with the exception of peripheral involvement with civil asset forfeiture—with criminal justice reform. I probably know less about the topic than anyone in the room, and certainly I have much more to learn from you than I can possibly impart.

But since joining the Court, despite a very steep learning curve, I have taken on criminal cases and related policy issues with great enthusiasm. Because nearly all of the criminal cases that reach my Court raise issues of constitutional or statutory interpretation, they fit comfortably within my analytical wheelhouse, even if the specific questions are new to me. Likewise, my experiences with systemic policy reform in areas such as education and immigration lend themselves to confronting criminal justice reform, even though like those other issues it is essential to learn them deeply before attempting to solve them.

And solve them we must. As you all know, how our criminal justice system works or doesn't work touches intimately the lives of every American. Certainly those accused of crimes: Will they receive fair, expeditious justice? Will their experience with the criminal justice system leave them rehabilitated or ruined?

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But it impacts everyone else as well. Will our criminal justice system keep us safe or will it foster criminality? Will it deliver justice and restitution to victims? Will it provide a commensurate return on taxpayer investment? And perhaps most important, will it instill the public confidence and support necessary to sustain the rule of law?

It may be a useful starting point, and is always a worthwhile exercise, as I have in my own past endeavors in education and immigration policy, to begin the conversation with the most fundamental question: If we were designing a criminal justice system today, from scratch, with no preconceptions, to obtain its most essential goals, would it resemble the system that we have today? In the areas of K-12 education and immigration, my own answer to those questions was absolutely not. I suspect the answer is quite different for our criminal justice system, fortunately. Indeed, my own brief experience as a justice has greatly increased my confidence in our criminal justice system, in the sense that it produces just results in the vast majority of cases.

Which leaves us to concentrate on specific but very important practices that should be questioned and improved. Which in turn requires us, in my view, to resist the passions of the day—whether to lock 'em up and throw away the key, or to view the system as fundamentally flawed and criminals as its victims—and instead focus on improving the system to ensure just results in individual cases that produce a sound criminal justice system in the aggregate.

Foremost among those salient issues are our nation's incarceration practices. It will be no revelation to you that our nation's incarceration rates, and the expenses associated with those numbers, are staggering—more than 2.2 million people behind bars, an increase of 500 percent over the past 40 years.<sup>1</sup> The cost to taxpayers is immense; indeed, a recent study showed that pretrial incarceration alone, about which I will talk in more detail later, costs \$14 billion nationally every year.<sup>2</sup>

Arizona is no exception to increased incarceration and its attendant costs. When Governor Doug Ducey entered office in 2015, our state faced a huge fiscal crisis with a \$1.5 billion budget shortfall.<sup>3</sup> Indeed, we previously sold off a number of state buildings, including the House and Senate offices, and were

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1. *Criminal Justice Facts*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/criminal-justice-facts/> (last visited May 11, 2017).

2. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017).

3. Bob Christie, *Arizona Governor Enters 2nd Year with Good Budget News*, WASH. TIMES (Jan. 10, 2016), <http://www.washingtontimes.com/news/2016/jan/10/arizona-governor-enters-2nd-year-with-good-budget-/>.

renting them back to save money.<sup>4</sup> As a result, Governor Ducey's inaugural budget was austere, eliminating the structural deficit by cutting hundreds of millions in state spending.<sup>5</sup> But with one notable exception: a proposed increase of more than \$50 million to expand prison capacity, with more to follow.<sup>6</sup> And yet even with that, we still have fewer cells than we need. We simply can't afford to keep building prisons, much less removing potentially productive people from their communities, their workplaces, or their families, if there are better alternatives.

At this early stage of my own education on the subject, I won't wade into the surrounding debate over whether too many people are being incarcerated for crimes that don't justify incarceration or the terms associated with them; or conversely, whether those high incarceration rates may be in whole or part responsible for reduced crime rates. I hope that you will develop sound data on those questions that will help drive the national debate.

But as a jurist who is oath-bound to do justice in individual cases, and as a fiscal conservative, I believe we must demand accountability and proportionality in all of our sentencing practices. If we are jailing people for whom less costly and equally effective alternatives are available, we should pursue those options.

At the same time, we should insist that the reforms protect public safety and the rights of crime victims. If we can find that sweet spot—policies that reduce crime, reduce costs, and make victims whole—we will have the ultimate win-win situation.

As we attempt to do so, I am gratified that people of good faith are reaching across traditional divides to find solutions—prosecutors and defense attorneys, liberals and conservatives. Not always agreeing, of course, but attempting to find common ground and often succeeding. I can't think of a single issue from my own policy experience in which progress was made absent a nontraditional alliance, and I think that is emphatically the case with criminal justice reform. As a conservative, I'm gratified to see groups like the American Legislative Exchange Council, the Charles Koch Foundation, and the Texas Public Policy Foundation in the forefront of reform efforts.

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4. See Ronald J. Hansen & Yvonne Wingett Sanchez, *Ducey Signs Historically Lean \$9.1B Arizona Budget*, ARIZ. REPUBLIC (Mar. 12, 2015), <http://www.azcentral.com/story/news/arizona/politics/2015/03/12/arizona-governor-ducey-signs-state-budget/70244574/>.

5. *Id.*

6. Craig Harris, *Corrections Wants to Add 2,500 More Prison Beds*, ARIZ. REPUBLIC (Sept. 3, 2015), <http://www.azcentral.com/story/news/arizona/politics/2015/09/03/arizona-corrections-wants-more-prison-beds/71622852/>.

One wonderful feature of our federalist system with dual sovereignty is our ability to pursue different directions of public policy at the state level and to compare results across the nation. That is particularly true in criminal justice policy, where the federal constitution sets the baseline and parameters but states have wide latitude to apply distinctive approaches.

When it comes to policy innovation in a wide variety of areas, Arizona is, shall we say, not a shrinking violet. That is true of criminal justice reform. To cite just one example, in 2008, Arizona enacted the Safe Communities Act,<sup>7</sup> which sought to reduce over-incarceration by focusing probation supervision on high-risk offenders and creating financial incentives to reduce crime and violations by probationers rather than to revoke offenders into state custody. The reform involved a system of earned time credits for most probationers, providing 20 days off of their probation term for every month they meet their probation obligations, including victim restitution. They lose their credits if they are rearrested. At the same time, the state re-engineered adult probation to implement evidence-based supervision techniques.

A 2011 report by the Pew Foundation found significant gains from these modest, common-sense reforms.<sup>8</sup> Within two years, despite an increase in probationers, the number of new felony convictions by probationers decreased by 31.1 percent. Likewise, there were sharp declines in probation revocations, saving the state \$36 million in incarceration costs.

Arizona is embarking on additional reforms that I would like to briefly share with you. They result from a task force initiated by my colleague, Chief Justice Scott Bales, called “Fair Justice for All.”<sup>9</sup> The reforms cohere around a number of principles, one of them paramount: that people should not be in jail solely because they lack the financial resources not to be. This principle derives from our state Constitution’s Declaration of Rights, which prohibits imprisonment for debt,<sup>10</sup> and forbids not only excessive bail but excessive fines as well.<sup>11</sup>

In the real world, it is absolutely essential that we vindicate this principle. My wife and I have been watching *Narcos*<sup>12</sup> recently—have any of you watched it? I was struck by the fact that when Pablo Escobar finally decides to give up,

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7. S.B. 1476, 48th Leg., 2nd Reg. Sess. (Ariz. 2008).

8. PEW CTR. ON STATES, THE IMPACT OF ARIZONA’S PROBATION REFORMS (2011).

9. ARIZ. SUPREME CT., JUSTICE FOR ALL: REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON FAIR JUSTICE FOR ALL (2016), <https://www.azcourts.gov/Portals/0/FairJusticeArizonaReport2016.pdf> [hereinafter JUSTICE FOR ALL].

10. ARIZ. CONST. art. II, § 18.

11. *Id.* § 15.

12. *Narcos* (Netflix).

he builds his own jail for himself—that’s a whole new take on private prisons, right?—and from there he continues to direct his drug empire. Now, there are not very many people who can do this—not even the part about building the jail, but being able to conduct business and even get richer while in jail.

For ordinary people, by contrast, even a brief stay in jail is devastating. It disrupts work and family. Each passing day fuels recidivism and greater criminality. I have absolutely no hesitation about harsh penalties for people who have committed serious crimes. But we should all be concerned about people being incarcerated solely because they cannot pay fines or meet bail.

There is great debate, which many of you may be involved in, over how many people are in jail or prison for minor drug offenses. But there can be no debate over the fact that a large number of people are in jail solely because their financial circumstances dictate that they cannot get out. If we can cure that problem, we will make a significant dent in our jail population. Even more, that solution may well have a trickle-up effect, in that it will reduce recidivism and greater criminality that increases our prison population.

From our task force’s core principle that people should not be incarcerated solely because they cannot afford to get out flow 11 others, which I will recite because each is an important premise for the overall reform effort:

1. Judges need discretion to set reasonable penalties.
2. Convenient payment options and reasonable time payment plans should be based on a defendant’s ability to pay.
3. There should be alternatives to paying a fine.
4. Courts should employ practices that promote a defendant’s voluntary appearance in court.
5. Suspension of a driver’s license should be a last resort.
6. Non-jail enforcement alternatives should be available.
7. Special-needs offenders should be addressed appropriately.
8. Detaining low- to moderate-risk defendants causes harm and higher rates of new criminal activity.
9. Only defendants who present a high risk to the community or individuals who repeatedly fail to be held in court should be held in custody.

10. Money bond is not required to secure appearance of defendants.
11. Release decisions must be individualized and based on a defendant's level of risk.<sup>13</sup>

These premises in turn lead to two primary reform thrusts, reducing fines and fees, and largely eliminating cash bail.

Fines and fees may represent the lowest-hanging fruit on the criminal justice reform tree. They sound relatively innocuous but often lead to a debilitating cycle. Fines for relatively minor driving and related infractions typically start off in the hundreds of dollars. To that are added court fees. Driving without insurance in Arizona, for instance, carries a mandatory minimum assessment of at least \$500 including court fees and surcharges.<sup>14</sup> Judges have little to no discretion regarding such assessments. Failure to pay the assessments leads to automatic driver's license revocation.<sup>15</sup> Each year in our state, 100,000 driver's licenses are suspended for failure to pay fines and fees.<sup>16</sup>

Just think about what that means. A person who can't afford insurance probably also can't afford to pay an assessment of \$500 or more. For that reason, many offenders will avoid their court hearings. Which means their driver's license will be suspended. Over half of those will then be cited for driving without a valid license.<sup>17</sup> Before long, the offender may wind up in jail, if employed he'll lose his job, and the fines are still unpaid.

Already, our courts have developed procedures to partly ameliorate these problems, through payment plans and telephonic reminders of court appearances.<sup>18</sup> Those efforts have reduced failures to appear. But judges need far more flexibility, to reduce or eliminate fines and fees on a case-specific basis, substitute community service where appropriate, and restrict rather than suspend driver's licenses. Our Legislature is considering such reforms.

But not without a fight. Fines and fees are enormously popular revenue sources. All sorts of government programs, including the courts themselves, depend on them. Given that there is rarely if ever organized opposition to new fines and fees—indeed, people assessed with civil or criminal penalties are surely the world's least-powerful special-interest group—such penalties are simply too

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13. JUSTICE FOR ALL, *supra* note 9, at 14–37 (discussing all 11 principles of the Justice for All Task Force).

14. ARIZ. REV. STAT. § 28-4135(E)(1).

15. *Id.* § 28-1601(A).

16. JUSTICE FOR ALL, *supra* note 9, at 20.

17. *Id.*

18. *See id.* at 16, 18, 20–21.

tempting as a revenue source. Indeed, here in Arizona, we even subsidize political campaigns through a 10% surcharge on civil and criminal penalties.<sup>19</sup>

But we simply must give judges greater flexibility over such fines and fees. Surely we end up paying far more in terms of incarceration, lost productivity, and secondary crime than the amount of the initial fines. We want people to come to their court hearings, to receive consequences commensurate with their circumstances, to clear their records, and to remain productive members of society. Our current system imposes perverse disincentives to all of those goals and should be reformed.

A more controversial reform is the elimination of most cash bail, which accounts for most of those who are incarcerated for financial inability to pay. Whether you would end it or mend it, cash bail clearly leads to perverse consequences. Many people arrested for relatively minor offenses cannot secure even minimal amounts of cash bail. The longer they languish in jail for inability to pay, the more likely they are to lose their jobs, have their family lives disrupted, and recidivate. A May 2016 report by the Maricopa County Justice System found that low-risk defendants detained for only two to three days were 39% more likely to recidivate before trial than those detained only one day.<sup>20</sup> The numbers go up from there, with defendants detained four to seven days 50% more likely to recidivate, and 74% more likely if detained more than a month. Similar trends were found in post-disposition recidivism based on the amount of pretrial detention. For low-risk defendants, pretrial detention seems more likely to breed crime than prevent it.

By contrast, many seriously dangerous criminals can bail their way out of jail. Returning to Pablo Escobar, would there be *any* amount of cash bail he couldn't meet? Having bail be the norm—and one's liberty depend primarily not on the severity of the crime, the risk of harm to others, or the risk of flight, but rather ability to pay—is fundamentally unfair and is not calibrated to the goals of the criminal justice system.

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19. ARIZ. REV. STAT. § 16-954 (“[Pursuant to the Citizen Clean Elections Act,] an additional surcharge of ten per cent shall be imposed on all civil and criminal fines and penalties collected pursuant to § 12-116.01 and shall be deposited into the fund.”).

20. See DAWN NOGGLE ET AL., TRANSITION FROM JAIL TO COMMUNITY AND THE INTERSECTION BETWEEN HOMELESSNESS, SMI, AND INVOLVEMENT IN THE CRIMINAL-JUSTICE SYSTEM 24 (2016), <http://www.azceh.org/resources/Pictures/23rd%20Annual%20Conference/2016%20Session%20Documents/Session%205%20-%20Transition%20for%20Jail%20to%20Community%20PPT.pdf> (presenting statistics).

Last winter, our Court approved major changes to our bail rules that will take effect on April 3. The heart of the changes is as follows: “Any person charged with an offense bailable as a matter of right must be released pending or during trial on the person’s own recognizance with only the conditions of release” specified elsewhere in the rules, “unless the court determines, in its discretion, that such a release will not reasonably assure the person’s appearance ... or protect other persons or the community from risk posed by the person. If such a determination is made, the court may impose the least onerous condition or conditions ... that are reasonable and necessary to protect other persons or the community from risk posed by the person or to secure the appearance of the person in court.”<sup>21</sup>

The new rules authorize monetary conditions only on an individualized determination of the defendant’s risk of non-appearance, risk of harm, and financial circumstances, rather than a bond schedule. The rules specify that the court “must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond.”<sup>22</sup> And the court must impose the least-onerous type of bond in the lowest amount necessary to protect the public and secure appearance, with preferences for unsecured appearance bonds or deposit bonds over cash bonds.

Although we are far from pioneers in this area, I believe these rules are a bold move. There are two aspects of the changes that I particularly like. Previously, the bail and release assessment focused exclusively on securing the defendant’s appearance. For the first time, public safety is placed on an equal footing with risk of flight. Hence, while the imposition of cash bail will unquestionably be reduced, I hope that going forward, release conditions will be carefully tailored to public safety. And indeed, we may have to be prepared for the possibility that by taking by these factors into account, we will see fewer defendants released at all because they are deemed to present danger to others, a phenomenon that has happened in the federal system and the District of Columbia.<sup>23</sup>

A second aspect I am pleased to see is release conditions based on individualized risk assessments rather than bond schedules that treat all defendants the same. The risk-assessment tools currently available are far from flawless, but they are an improvement upon a one-size-fits-all approach.

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21. ARIZ. R. CRIM. P. 7.2(a).

22. ARIZ. R. CRIM. P. 7.3(b)(2).

23. See, e.g., *Performance Measures*, PRETRIAL SERVS. AGENCY FOR D.C., [https://www.psa.gov/?q=data/performance\\_measures](https://www.psa.gov/?q=data/performance_measures) (last visited May 11, 2017).



I cannot, however, yet fully subscribe to the task force's 10th principle—"Money bond is not required to secure appearance of defendants,"<sup>24</sup> or for that matter public safety—as more than an aspiration rather than as a proven fact. Of course, that issue is hotly contested across the nation. Just this Tuesday, the *New York Times* profiled New Jersey's system that by constitutional amendment has largely eliminated cash bail.<sup>25</sup> The article was fairly positive. Before the changes, 39% of the state's inmates were bail-eligible but could not post bond, leaving many accused of low-level crimes incarcerated for long periods. Now, only a handful of defendants are held before trial—but those few include defendants charged with serious crimes who previously would have been bail-eligible.

But some studies show that defendants released on their own recognizance are substantially less likely to appear at court hearings than those who post cash bail,<sup>26</sup> although others show that low- to medium-risk defendants released without bonds or on non-secured bonds return at higher rates.<sup>27</sup> Because the direct and indirect costs of failure to appear are high, additional data would be useful. By definition, with fewer defendants in jail, the risk of additional crimes increases. Perhaps most significantly, the disappearance of bail bondsmen removes from the law-enforcement arsenal a privately funded mechanism with a strong financial incentive to assure that defendants appear in court. That absence may be most acutely felt in smaller and rural communities that lack adequate resources to monitor defendants. Indeed, the appreciable savings from reduced pretrial incarceration may largely be offset by increased resources needed to monitor defendants and secure their appearance.

Certainly we should not be shaken by episodic instances where the new systems fail. They are inevitable, just as are examples of people on bail committing crimes and defendants who can't bail themselves out becoming hardened criminals in prison. But we must also carefully measure the progress of new systems and not allow ourselves to be wedded to our own inventions any more than we are to the status quo. While I believe our new rules here in Arizona are an improvement over the status quo, ultimately we may find

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24. JUSTICE FOR ALL, *supra* note 9, at i.

25. Lisa W. Foderaro, *New Jersey Alters its Bail System and Opens Legal Landscape*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html>.

26. See, e.g., THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007) ("Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances.").

27. See, e.g., PRETRIAL JUSTICE INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 3 (2013) ("For defendants who were lower, moderate, or higher risk: Unsecured bonds are as effective at achieving public safety as are secured bonds.").

that we have to give our courts greater discretion to order cash bail, in truly appropriate circumstances, not only as a last resort but as one discretionary tool among many. But I would love to discover that this proves unnecessary.

We really have to get this right. We are in what I would describe as the Goldilocks phase of criminal justice reform—testing out what is too hot, too cold, and just about right. I am glad to see a great amount of experimentation, cooperation, study, and debate.

Your role in this is central. Like many others, I am only a student of your work, but am poised to do what I can to put it to good use. There is an incredible amount of intellectual wattage in this room. Please, illuminate us.

Thank you so much.