

Selective Enforcement and Stereotypes Drive Racial Disparities in the Arrests of Native Americans in Flagstaff Arizona

Abstract

Coconino County Arizona has the second highest arrest rate of all Arizona counties, well above the rate of arrests in the major metropolitan areas of Phoenix and Tucson. In 2021, Arizona had the eighth highest incarceration rate in the United States and the United States had the highest incarceration rate in the world. It can be inferred from these facts that Coconino County has one of highest incarceration rates in the world. And the people who are incarcerated are primarily men and women who are members of the Navajo, Hopi and other Native American tribes.

In the County seat of Flagstaff, the arrest rate of Native Americans has consistently been ten times or more than that of Whites for more than half a century. With this study the authors explore the legitimacy of the official explanations for the disparities in arrest rates and conclude that the major drivers of these disparities are policies, practices and beliefs based on ingrained racial stereotypes and the selective enforcement of minor offenses of “public disorder” against Native Americans

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I. INTRODUCTION

*"Racism is so universal in this country, so widespread, and deep-seated,
that it is invisible because it is so normal."*

-Shirley Chisholm¹-

In 1977 the Arizona Advisory Committee to the United States Civil Rights Commission prepared a report on problems encountered by Native Americans in the criminal justice system in Flagstaff, Arizona titled "*Justice in Flagstaff: Are These Rights Inalienable?*" The committee found that "the administration of criminal justice in Flagstaff is not always equal for all persons regardless of race."² Using data from the 1974 and 1975 Flagstaff Police Department annual reports, the Committee noted that 40 to 43 percent of all persons arrested in Flagstaff were Native American and that 65 percent of their offenses were for four alcohol related crimes, including DUI, liquor law violations, disorderly conduct and vagrancy.

Fifty years later, Native Americans make up over 50% percent of all arrests in Flagstaff but only 10 to 11% of the overall Flagstaff population. Explanations offered by the Flagstaff Police Department for the continued disparities are that Native American "recidivists"³ skew the numbers; that "non-resident" Native Americans come to Flagstaff to drink alcohol; and that Flagstaff is a "border town"⁴. All of these explanations express the same underlying stereotype, that Native

Racial Disparities

A disparity exists when the proportion of a racial group arrested is greater than the proportion of such group in the general population.

¹ Shirley Chisholm was the first African American woman in the United States Congress, serving from 1968 to 1983.

² "Justice in Flagstaff: Are These Rights Inalienable?" A Report Prepared by the Arizona Advisory Committee to the U.S. Commission on Civil Rights (March 1977) Available online at:

<https://babel.hathitrust.org/cgi/pt?id=mdp.39015031047577&view=1up&format=plaintext&seq=1>

³ The Flagstaff Police Department has used a myriad of terms for individuals arrested multiple times. We use the term "recidivist" as the least offensive of those terms.

⁴ "Border towns" in this context are cities and towns that are in close proximity to a Native American Reservation. Flagstaff was settled in the late 1800s next to the Navajo and Hopi Reservations. The border of the Navajo Reservation at its closest, is approximately 30 miles from Flagstaff.

Americans commit more crimes than Whites; more specifically that Native Americans abuse alcohol more than Whites because of a genetic predisposition- the “firewater myth.”⁵

In September 2020, after the murder of George Floyd and in response to community concerns of racial bias and excessive force in law enforcement, the Flagstaff City Council requested the Police Department to give them a presentation on those issues.⁶ During the presentation on racial bias, the Chief of Police asserted that officers are “*not taught to racially profile people*” but instead “*police based on criminal and driving behavior.*” He also said that officers “*must outline probable cause⁷ for the arrest to be taken to court at which point prosecutors or public defenders can dismiss cases.*”⁸

At another public meeting in December 2021, the Department presented data showing that 294 individuals, each arrested 5 or more times in either 2019 or 2020, were responsible for a combined total of 2,244 arrests during that two-year period as displayed in Table 1 below.

⁵ The firewater myth is the notion that American Indians and Alaska Natives are more susceptible to the effects of alcohol and vulnerable to alcohol problems due to biological or genetic differences. *See eg*, Vivian Gonzalez, Monica Skewes, *Association of the Firewater Myth with Drinking Behavior Among American Indian and Alaska Native College Students*, *Psychol. Addict. Behav.* 30(8): 838–849. (December 2016); doi:10.1037/adb0000226.

⁶ A recording of the presentation is available at <https://flagstaffaz.new.swagit.com/videos/75474?fp=swagit>, commencing at 1.05.04.

⁷ Pursuant to the 4th Amendment of the United States Constitution, no person may be arrested for a criminal offense without “probable cause.” “Probable cause exists if an individual has a reasonable belief that a crime has been committed and that the defendant committed that crime.” *State ex rel. Collins v. Superior Court*, 132 Ariz. 479, 647 P.2d 177 (1982).

It is the arresting officer’s responsibility to determine if probable cause exists *before* making an arrest. An arrest without probable cause is a violation of a person’s civil rights. The Chief’s statement appears to be an abdication of law enforcement’s responsibility and suggests a lack of understanding of the prosecution of minor, misdemeanor cases. In the vast majority of such offenses, the defendant is not represented by an attorney and the prosecutor doesn’t review the case materials. There is no independent legal review of the police report to ensure that probable cause existed for the arrest or prosecution. Many defendants simply plead guilty at their initial appearance, having no knowledge of the law and without the assistance of counsel.

⁸ Appendix A, Arizona Daily Sun, “*Police Explain Policies to Council*,” Sep. 12, 2020 citing the Presentation by the Flagstaff Police Department to the Flagstaff City Council on September 8, 2020. The Council presentation included a PowerPoint available online at:

https://cityweb.flagstaffaz.gov/agendaquick/docs/2020/CCWS/20200908_1081/4827_FAIR_Presentation_Police_Practices_First_Presentation_Council_Copy_%282%29.pdf.

2019	2020
Individuals with 5 or more arrests	Individuals with 5 or more arrests
140 individuals accounted for 894arrests	194 individuals accounted for 1,350arrests
77% were unsheltered (108)	73% were unsheltered (142)
59% Native Males (83)	62% Native Males (121)
17% Native females (23)	12% Native females (24)
19% White Males (27)	20% White Males (39)
2% White Females (3)	2% White Females (3)
N/A	2% Black Males (4)
2% Black Females (3)	1% Black Females (2)
1% unknown males (1)	1% unknown males (1)

Table 1-Flagstaff Police Department-Recidivist Arrest Data 2019 & 2020⁹

Based on data published in the FPD Annual Reports ¹⁰ for the same years, this represented 18% of the 12,446 arrests made. This was presented in part to defend against the concerns of racial bias, and to support the Department’s claim that “recidivists” were responsible for the high number of Native American arrests.

Our analysis of the data indicated that 78.7% of those arrested in the recidivist group were Native American. In comparison, 52% and 58% of **all** arrestees (12,446 arrests) were Native American in 2019 and 2020.¹¹ This data shows that there is an even *greater* racial disparity amongst recidivists than in the general population of arrestees.

⁹ The initial data provided by the Police Department identified 77 percent of the recidivists as Native American, 21 percent as White (Hispanic and non-Hispanic), 3 percent as Black and one person as racially “unknown”. Upon reviewing the actual police reports however we discovered that of the 266 individuals represented in those reports, four were misidentified as White when the report data identified them as Native American and that the one “unknown” race was also identified as Native American in the reports. This changed the percents by race from 77 percent to 78.7 percent Native American. The initial data also did not include ethnicity, so Whites included both Hispanic and non-Hispanic persons. Ethnicity was however documented in the police report from which we were able to differentiate between Hispanics and non-Hispanic Whites.

¹⁰ Flagstaff Police Department Reports & Statistics, <https://www.flagstaff.az.gov/1209/Statistics-Reports>.

¹¹ Flagstaff Police Department Annual Reports, 2019, p. 41 and 2020, p.51.

As demonstrated, significant statistical disparities in the arrest and prosecution of Native Americans in Flagstaff have existed for decades. The Police Department has consistently denied that racial bias plays any part in those disparities. With this study we explore the explanations given by the Flagstaff Police Department to determine if they adequately explain the disparities or if the disparities are in whole or in part the result of racial bias.¹²

Our analysis and findings are based on a review of public records including Flagstaff Police Department Annual Reports, the Departments public presentations in 2020 and 2021 and a detailed review of 763 police reports randomly selected from the 2,244 arrests identified by the Department in Table 1. The arrest data presented in this study only pertains to arrests made by the Flagstaff Police Department within the City of Flagstaff.

Other sources we referred to include the 1977 report of the Arizona Advisory Committee on Civil Rights, a 2009 report prepared by the Navajo Nation Human Rights Commission, historical news articles from the Arizona Daily Sun and its predecessors, and data from a 2008 study by the Coconino County Criminal Justice Committee on the citation-release practices of the Flagstaff Police Department. Our methodology for review of the police reports is further explained in Section IX.

II. THE POLICE DEPARTMENT EXPLANATION FOR RACIAL DISPARITIES

A. Disparities in Arrests

In 2020, Coconino County had the second highest arrest rate of all Arizona counties, well above the rate of arrests in the major metropolitan areas of Phoenix and Tucson.¹³ In 2021, Arizona had the

¹² In *United States v. Sellers*, 906 F.3d 848 (9th Cir. 2018) the Court stated that inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect.”

¹³ LeCroy & Milligan Associates, Inc., *Justice Reinvestment Data Landscape Executive Summary*, p.3 (Tucson, AZ 2022)(citing statistics published by the Arizona Department of Public Safety). Coconino County had an adult arrest rate of 4,500 to 100,000 second only to Gila County with an arrest rate of 4,553 arrests per 100,000. Both counties

eighth highest incarceration rate in the United States and the United States had the highest incarceration rate in the world.¹⁴ It can be inferred from these facts that Coconino County has one of highest incarceration rates in the world. And the people who are incarcerated are primarily men and women who are members of the Navajo, Hopi and other Native tribes.

In the County seat of Flagstaff Arizona, Native American adults are arrested at a rate that is **more than 10 times higher** than that of Whites. In 2020, the per capita arrest rate of Native Americans in Flagstaff, was **44,379** per 100,000. By comparison, the arrest rate of non-Hispanic Whites, was only **3,803** per 100,000. The estimated adult arrest rate nationwide in 2019 was 3,011 arrests per 100,000 inhabitants for all racial groups combined, while the national average arrest rate for Native Americans was 3,559 per 100,000.¹⁵

The Flagstaff Police Department has maintained for more than 50 years that it does not engage in racially biased policing or racial profiling, instead blaming the huge disparities on three factors: recidivists, non-residents, and on being a “border town.”¹⁶

had arrest rates that were more than *double* the arrest rate in Maricopa County which was 2,287 per 100,000 despite its significant population difference and urban center.

Flagstaff is the largest urban area in Coconino County, with over half the population of the County residing in the Flagstaff metropolitan area. Coconino County population numbers include tribal members living on that portion of Navajo reservation within the boundaries of the County. The arrest rates published by the Arizona Department of Public Safety however only include arrests made by State or local law enforcement agencies who provide that data to the Arizona Department of Public Safety and does not include arrests made on the reservation by tribal police. Arizona Department of Public Safety: *Crime in Arizona 2020 p.16.*

¹⁴Emily Widra and Tiana Herring, *States of Incarceration: The Global Context 2021*, Prison Policy Initiative (September 2021) <https://www.prisonpolicy.org/global/2021.html> Arizona’s incarceration rate hovers between 7th and 8th in comparison to other states from year to year.

¹⁵ FBI, Crime in the U.S. 2019, Table 43

<https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested>

¹⁶ The Chief has also said that “the public relies on the police department more than in other similarly sized cities noting that FPD gets 581 calls per 1000 residents while other “benchmark” cities get 433 calls per 1000 residents.” There has been no discussion of whether the Department’s response policies may encourage such greater reliance. An example of how this might occur is in the response to minor shoplifting offenses that are treated in much the same way as major thefts-the reports we reviewed showed full arrests being routinely made for shoplifting of goods worth as little as \$1.99 with most incidents involving less than \$20. See Section VI(A)(f) below.

Chart 1 shows the disparity in arrests of Native Americans within the 2,244 “recidivist” arrests made between January 1, 2019 and December 31, 2020.



Chart 1: Flagstaff Police Department Arrests of Recidivists by Race, 2019 & 2020

In analyzing the reasons given by the Department for the racial disparities, the first thing we noticed is that they do not explain why the arrest rate of Native Americans rose between 2002 to 2020, while the population of Native Americans remained the same and while the arrest rate of non-Hispanic Whites correspondingly declined.

Data from the 2007 Criminal Justice Coordinating Council study on the Department’s citation-release policies¹⁷ displayed in Chart 2, shows that arrests of Native Americans rose steadily from 32 percent in 2002 to 44 percent in 2005, while the arrests of non-Hispanic Whites correspondingly declined from 47 to 37 percent. The arrests of Blacks and Hispanics remained relatively flat, although there was a slight decline in the latter.

¹⁷ Wendy White, *Analysis of Flagstaff Police Department Cite and Release Policy and Practices* (August 2007) (unpublished paper- <https://swcej.org/mt-content/uploads/2021/03/fpd-citation-release-2008.pdf>) The co-author of this study was the Criminal Justice Coordinating Council researcher from 2005-2008. She authored the 2007 study on behalf of the CJCC and Police Department.

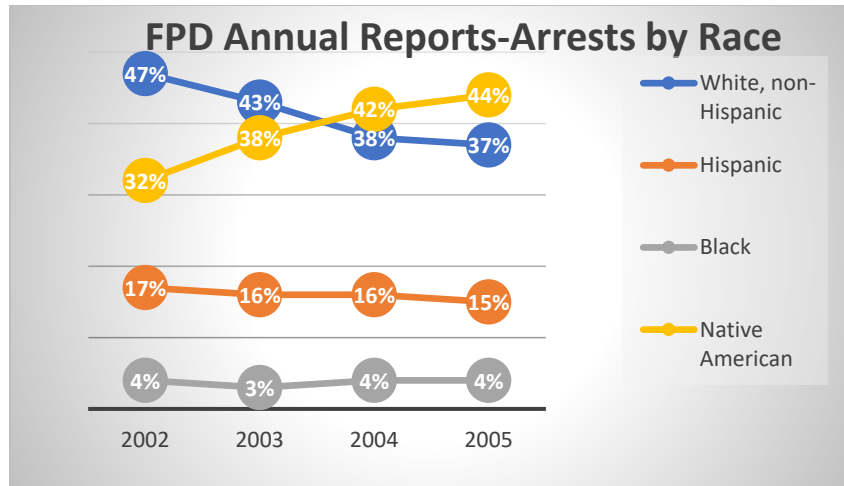


Chart 2: Percentage of Arrests by Race, Flagstaff Police Department Annual Reports 2002-2005

Coconino County Jail data, displayed in Chart 3, shows that from 2005 to 2008 the percent of local jail bookings made by Flagstaff Police Department rose for Native Americans from 46.4 percent in 2005 to 54 percent in 2008 while the percent of bookings of Whites dropped from 35.4 to 32.2 percent.

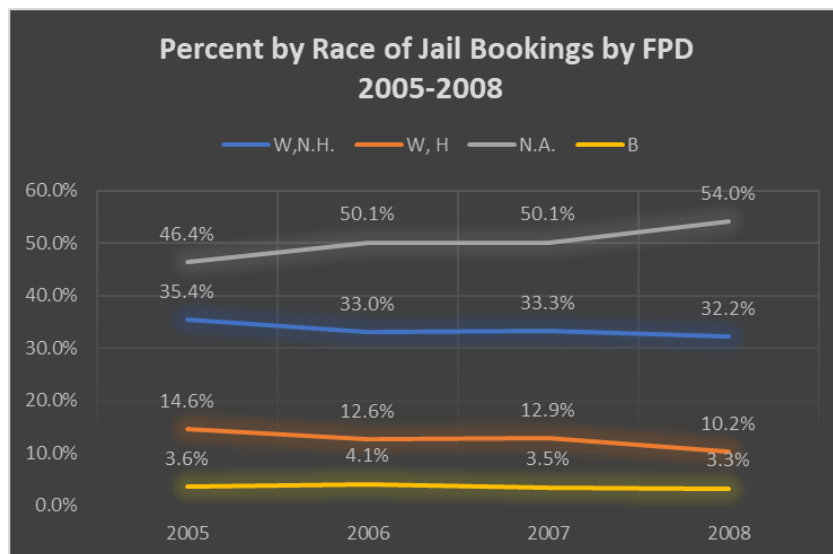


Chart 3: Jail Bookings by Flagstaff Police Officers by Race, 2005-2008

Data from the Flagstaff Police Department Annual Reports from 2014 through 2020, displayed in Chart 4, shows the continuing trend in the increase in arrests of Native Americans and corresponding decrease in the arrests of non-Hispanic Whites. The percentage of arrests of Blacks and Hispanics remained relatively constant.

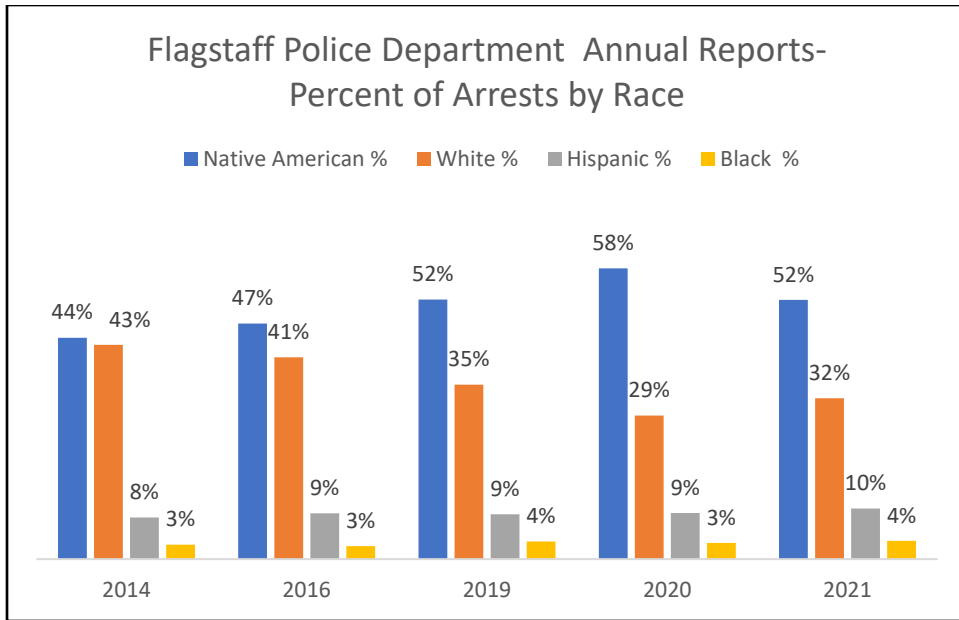


Chart 4: *Percentage of Arrests by Race, Flagstaff Police Department Annual Reports 2014-2021*

Overall, the arrests of Native Americans rose from 32 percent in 2002 to 58 percent in 2020, while the arrests of Whites declined correspondingly from 47 percent in 2002 to 29 percent in 2020. The arrests of Hispanics and Blacks remained constant.

During the same period, the population of Native Americans in the City remained consistently at approximately 10 percent. Just as it was in 2002, Flagstaff was still a border town in 2020. There is no evidence of any significant changes in the visitation habits of reservation residents. The Department's three explanation for the disparity in arrests rates do not explain the 81 percent increase in the arrests of Native Americans in that eighteen-year period.

Another lens for examining the disparities is even more illuminating. Using the data provided in the Department's Annual Reports along with population data from the United States Census Bureau, we calculated Flagstaff arrest rates by race on a per capita basis. Per capita rates provide a better method of comparing differences between discrete populations than does comparing simple percentages. Chart 5 compares arrest rates from 2014 through 2021 by race.

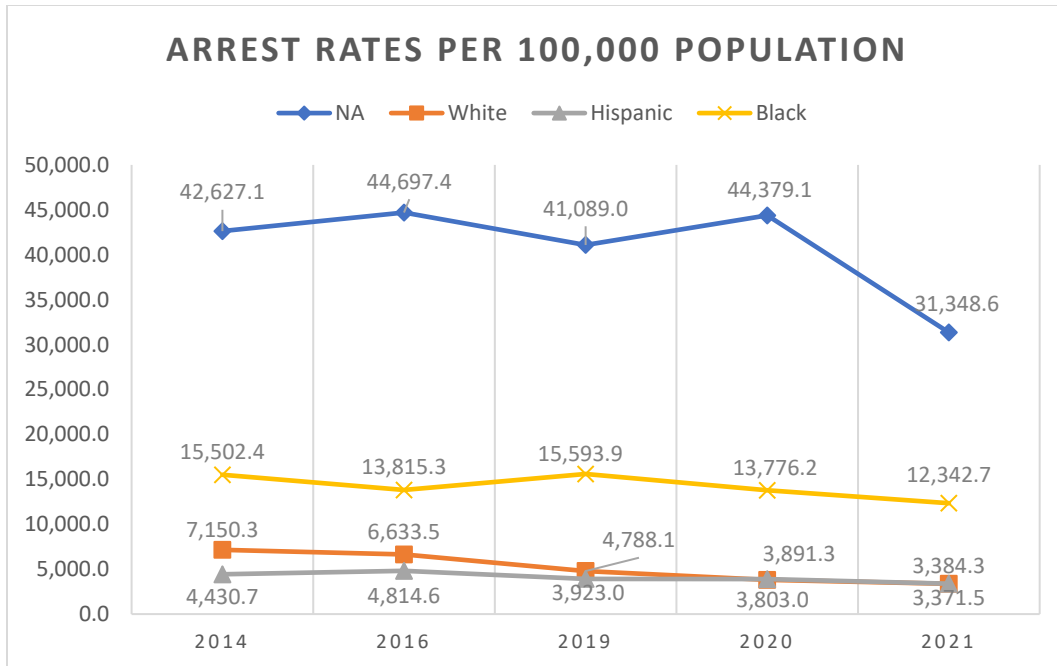


Chart 5: Flagstaff Arizona Arrest Rates Per 10,000 by Race, 2014-2021

In 2020, the year in which the police department made the presentation to the Flagstaff City Council, the arrest rate of Native Americans was **44,379** per 100,000¹⁸, almost twelve times the arrest rate of non-Hispanic Whites which was only 3,803 per 100,000.¹⁹ In the following sections we take a closer look at the three explanations for the continued excessive disparities given by the Flagstaff Police Department for the last fifty years.

¹⁸ Crime rate statistics are typically calculated on a per capita basis using a multiplier of 100,000. The formula used here was to divide the total number of arrests per racial group by the total population of each racial group then to multiply by 100,000. Per capita rates can be displayed using any standard multiplier and the comparison remains the same—in 2020 the arrest rate of Native Americans was 11.66 times the rate of arrests of non-Hispanic Whites.

¹⁹ There were so few arrests of Asians (11 in 2020) and other subgroups that we did not include them in the chart. The racial data in FPD Annual Reports for 2015, 2017 and 2018 were internally inconsistent and we did not include them in this report. The 2018 Report appeared to have erroneously reversed Native American and White arrest numbers.

B. Arrests of Native Americans is so High Because “Flagstaff is a Border Town”

“It is a historical reality that racism toward indigenous peoples exists throughout the United States especially where indigenous lands are contiguous with what are commonly referred to as —border towns.”²⁰

When making its presentation to the City Council in 2020, the Flagstaff Police Department noted that Flagstaff is a “border town” in support of its claim that racial bias does not play a role in the disparate arrest rates. The Department did not explain how being a “border town” justifies the excessive rate of arrests of Native Americans. Being a “border town” does not counter the appearance of racial bias in policing. On the contrary, racial bias against Native Americans in border towns is an issue that has been regularly raised with the United States Commission on Civil Rights, Native American Nations and Native American peoples for decades. Racism, particularly in the policing of Native Americans, is a well-known fact of life in border towns around the country.²¹

Border town justice was raised and explored extensively in the 1977 report of the Arizona Advisory Committee to the U.S. Commission on Civil Rights. The Committee *“focused its report on Flagstaff because [it] found that this city best illustrated the problems that confront American Indians from arrest through sentencing.”*²² In a 2009 Briefing, the United States Commission on Civil Rights noted that

²⁰ Navajo Nation Human Rights Commission, *Assessing Race Relations Between Navajos and Non-Navajos*, p.1 (July 2, 2010)

²¹ Stecklow, S., *The Tension between Border Town Police and Navajo is Real*, PBS Frontline & The Salt Lake Tribune, March 1, 2021, <https://www.pbs.org/wgbh/frontline/article/tension-between-police-navajos>; *Bordertown Discrimination in Montana*, A Brief from the Montana Advisory Committee for the United States Commission on Civil Rights Held in Washington, D.C. (May 2019), <https://www.usccr.gov/files/pubs/2019/05-29-Bordertown-Discrimination-Montana.pdf>; *Discrimination Against Native Americans in Border Towns*, A Briefing Before the United States Commission on Civil Rights Held in Washington, D.C. (2011), https://www.usccr.gov/files/pubs/docs/BorderTowns_03-22-11.pdf

²² *“Justice in Flagstaff: Are These Rights Inalienable?”* A Report Prepared by the Arizona Advisory Committee to the U.S. Commission on Civil Rights, p.2 (March 1977).

*“tensions remain within the [border town] community, particularly with respect to Native Americans’ interaction with law enforcement.”*²³

In 2010, the Navajo Nation Human Rights Commission published a study sub-titled *“A Review of Border Town Race Relations.”* in which the Commission stated: *“It is a historical reality that racism toward Native peoples exists throughout the United States, especially where Native lands are contiguous with what are commonly referred to as border towns.”*²⁴ Ironically, in its 2020 presentation to the Council, the Flagstaff Police Department cited a single statement from the Navajo Nation report concerning the amount of reservation money spent in border towns in support of its argument that reservation residents are the reason for the racial disparities in arrests while ignoring the Navajo Nation’s findings of racial bias in border towns.

The fact that Flagstaff is a border town has not changed from 2002 to 2020. The City’s population of Native Americans has remained consistently between 10 and 11 percent over that period.²⁵ The Police Department presented no evidence that Native Americans from bordering reservations are spending more time in Flagstaff now than they were in 2002. The 81 percent increase in the arrest rate of Native Americans from 2002 to 2020²⁶ is not explained by the fact that Flagstaff is a “border town” nor is the huge difference between the arrest rates of Native Americans and non-Native peoples. The “border town” explanation is speculation, as there is no analysis to support it as a basis for the disparity.

C. “Non-Resident” Native Americans are the Reason for Arrest Disparities

Another explanation given by the Department for the disparity in arrests of Native Americans was that the majority of Native Americans arrested in Flagstaff are “non-residents.” The Department claimed

²³ *“Discrimination Against Indigenous Americans in Border Towns”* A Briefing Before the United States Commission on Civil Rights Held in Washington, D.C. (2009)

²⁴ Navajo Nation Human Rights Commission, *Assessing Race Relations Between Navajos and Non-Navajos* (July 2, 2010).

²⁵ US Census Bureau Data 2020, 2010 and 2000 Decennials

²⁶ See Charts 2, 3 and 4 in Section II(A), above.

in the 2020 Council presentation that only 36 percent of the arrested Native Americans were City residents.²⁷ This is simply another way of saying that Flagstaff is a border town.

Even assuming that the numbers given by the Department are correct,²⁸ this does not explain the racial disparities in arrests of Native Americans. It is possible that the Department was suggesting that the resident population of Native Americans is not the appropriate benchmark for assessing whether its arrests of Native Americans is disproportionate or not. The reference to residency suggests that the Department believes that arrests should be measured against the combined number of residents and non-residents in Flagstaff throughout the year.

However, the Department has not provided any evidence or analysis of the racial distribution of visitors to Flagstaff from which it could draw such a conclusion. The only support that the Department cited was the 2010

OTHERING

“‘Othering’ is a process whereby individuals and groups are treated and marked as different and inferior from the dominant social group. Disenfranchised groups such as women, people of divergent ethnic backgrounds, working-class people, homosexuals, or migrants may all be “othered” and, in consequence, suffer discrimination.”
<https://www.oxfordreference.com>
 (“Othering”)

By labeling Indigenous Americans as “non-residents” the Flagstaff Police Department is perpetuating the belief that Native Americans are “others” that do not belong in Flagstaff. By “othering” Native Americans, particularly those who are unsheltered, FPD garners community support for racially biased policies and practices that target Native Americans for surveillance and arrest. This fosters the continuation of the community sentiment that Native Americans should be “load[ed] up and take[n] back to the reservation.” See Report cited in footnote 9 at page 62.

²⁷ See <https://flagstaffaz.new.swagit.com/videos/75474?fp=swagit> commencing at 1.05.04, Slide 9; and Appendix A.

²⁸ The Department did not explain how residency of arrestees was determined. The data provided regarding “recidivists” suggests that at least in part, the Department conflates homelessness with “non-residency.” Of the 294 individuals arrested more than 5 times in 2019 or 2020, the Department identified 73% to 77% as “non-residents” in the tables provided to us but used the term “unsheltered” for the same number of individuals when converting the underlying data to present to the social service providers in 2021. The manipulation of the terminology depending on the audience is troubling. It is unclear whether the 64% of arrestees that the Department claimed were non-residents during its Council presentation were actually non-residents or whether they were homeless persons or whether the residency determination by the arresting officers was even correct. In the 763 police reports provided to us for review the Department redacted all of the arrestee address information, including city of residence so we were unable to analyze the claims made regarding residency. The redaction was not required by law to protect privacy.

Navajo Nation Human Rights Commission study claiming that 75 percent of every Navajo dollar is spent in border towns.²⁹ The amount of reservation money spent in border towns provides no explanation for why the arrest rate of Native Americans in Flagstaff is ten to twelve times the rate of arrests of non-Hispanic Whites.

Flagstaff is the seat for Coconino County. The population for the county in 2020 was 145,101.³⁰ The County has a higher percentage of Native Americans overall than does Flagstaff. In 2020, Native Americans made up an estimated 27.5 percent of the population.³¹ In raw numbers, there were approximately 39,927 Native Americans residing in Coconino County including the estimated 8,600 living in Flagstaff. One explanation given by the Department for the excessive arrest rates of Native Americans is that non-resident Native Americans from nearby reservations travel to Flagstaff and are subsequently arrested. This does not stand up to analysis.

According to the Flagstaff Tourism Commission, Flagstaff has *six million* visitors per year.³² Fifty-seven percent of those visitors are from out of state and thirteen percent are international. Thirty percent are Arizona residents, meaning 1,800,000 visitors to Flagstaff every year are residents of the state which would include visiting Native Americans who reside on reservation lands outside the City. This far out shadows the total population of 27,610 Native Americans who reside in Coconino County outside the City limits.³³ Native Americans visiting the City from nearby reservations make up merely 1.5 percent of the

²⁹ Navajo Nation Human Rights Commission, *Assessing Race Relations Between Navajos and Non-Navajos* (2010). See Appendix A in which the Department cited to the report. At page 62 of the report it is stated that 70% of every Navajo dollar is spent in border towns. The reference in the report was not made to support the excessive arrest rates of Navajo people off reservation but rather to point out the economic importance of the people residing thereon to those border towns.

³⁰ U.S. Census Bureau (2020). State Profiles: Arizona, <https://www.census.gov/library/stories/state-by-state/arizona-population-change-between-census-decade.html>

³¹ *Id.*

³² Flagstaff Visitor Study, 2017-2018, p. 2

https://tourism.az.gov/wp-content/uploads/2019/06/3.4_CommunityStudiesAndAssessments_Flagstaff-Tourism-Study-2017-2018-Final.pdf

³³ The County population of Native Americans (39,927) minus the Flagstaff population (8,615) equals 27,610 non-Flagstaff residents living within the County, primarily on the Navajo reservation.

total in-state visitors to Flagstaff and less than one-half of one percent (.004%) of the six million non-residents that come to Flagstaff every year. Using visitor numbers rather than the resident population of the City of Flagstaff, the arrest disparities between non-Native Americans and Native Americans is even greater.

Furthermore, the fact that “non-resident” Native American visitors are being arrested at such great numbers in comparison to non-Native American, non-resident visitors, as stated by the Police Department ,does not counter the likelihood of racial bias. On the contrary, it supports the findings of racial bias against Native Americans in border towns as discussed in numerous Civil Rights Committee studies and reports. Native Americans are the subject of racial profiling based upon unfounded, but ingrained, negative stereotypes.

Blaming non-resident Native Americans also does not explain the disparity in the arrests of Native American juveniles in Flagstaff who are presumably neither visitors nor recidivists. Chart 6 shows the racial disparities in juvenile arrests as presented in the Department’s 2020 Annual Report. Native American children are arrested at three times the rate of non-Hispanic White, children.

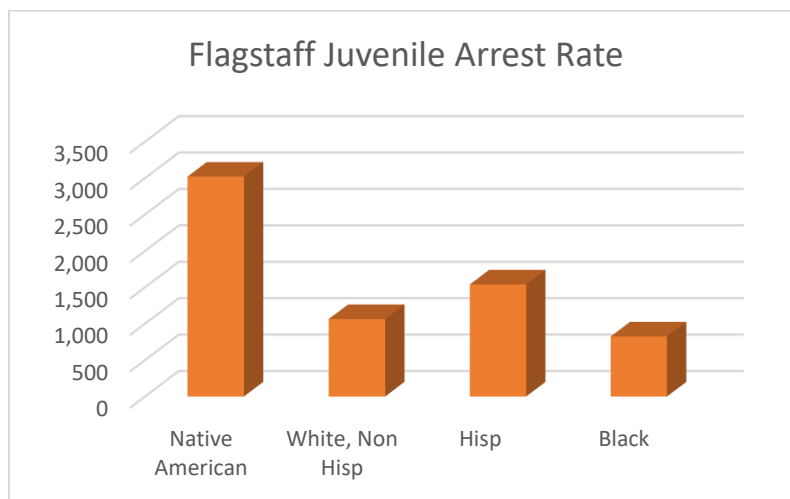


Chart 6: Flagstaff Police Department Juvenile Arrest Rate by Race, 2020

Blaming the disparity in arrest rates on “criminal behavior” of visiting reservation residents is simply a perpetuation of the racial stereotypes and prejudice against Native Americans that has existed in Flagstaff since its settlement in “Indian Country” as discussed in Section IV.

D. Recidivists Are to Blame for the Disparities in Arrests

The third explanation given by the Department for the disparate rate of arrest of Native Americans is that recidivists skew the numbers because of the frequency of their arrests. In this Section we analyze the impact of multiple arrests of the same people (recidivism) on the racial disparities in arrests.

In 2020, the Flagstaff Police Department reported a total of 6,072 arrests in its Annual Report. Of those, 3,545 were described as Native American, 1,750 non-Hispanic Whites, 610 as Hispanic, 197 as Black and 17 as “Other”. In 2019 the Department reported a total of 6,374 arrests with 3,094 identified as Native Americans.³⁴

In the same year FPD attributed 1,350 arrests to recidivists as indicated in Table 1. Of those, 1,028 arrests were attributed to 145 different Native American individuals. As for other racial groups, 193 arrests were attributed to 30 non-Hispanic White individuals, 85 to 12 Hispanic individuals and 38 to 6 Black individuals.

³⁴ In 2019, the Department indicated that 438 (6%) arrests were racially “unknown” whereas in 2020 only 5 arrests were unclassified. Because of this the arrest rates by race in 2019 are less accurate than in 2020. Excluding the unknown arrests from the total results in an arrest percentage of Native Americans of 52% and an arrest rate of 41,089 per 100,000. Another way of attempting to calculate the racial breakdown is to assume that the 438 unclassified arrests have the same make up as the classified arrests. This results in an arrest rate of Native Americans that was 44,117 per 100,000-almost identical to the 2020 arrest rate.

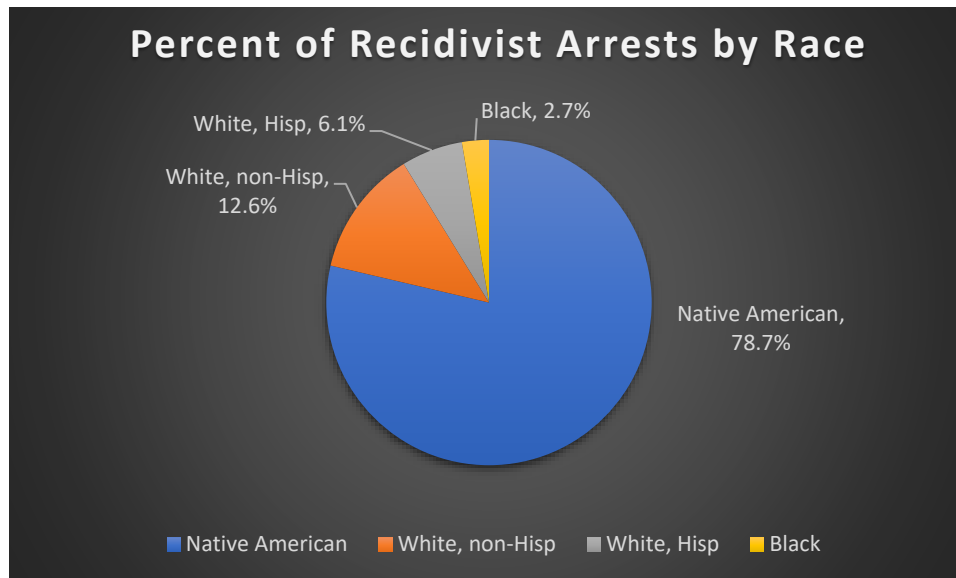


Chart 7: Percent of Recidivist Arrests by Race, 2019-2020

To calculate the impact of recidivism, we subtracted the excess arrests attributed to the recidivists from the total number of arrests. To determine excess arrests, we subtracted all but one arrest for each of the identified individuals in the recidivist group.³⁵ This reduced the total number of arrests of Native Americans from 3,545 to 2,662, the arrests of non-Hispanic Whites, to 1,587, the arrests of Hispanics³⁶ to 490 and of Blacks to 165.³⁷

Before adjusting for recidivism, in 2020 Native Americans made up 58 percent of all arrests, non-Hispanic Whites made up 29%, Hispanics made up 9% and Blacks made up 3%. After subtracting the excess arrests attributed to the recidivists, the arrest percentage of Native Americans dropped to 54%, while the arrests of non-Hispanic Whites rose to 32% and of Hispanics to 10%. The percentage of arrests of Blacks stayed at 3%.

³⁵ The number of arrests per individual within the recidivist group ranged from 5 (the minimum number used by the Department to define an individual as a recidivist) to 17.

³⁶ Although the list of names provided by FPD did not identify the ethnicity of the recidivists we were able to do so from the police reports, which do include the designation of Hispanic.

³⁷ Even amongst the recidivist population, the Native American offenders were arrested more often than the White offenders. The average number of arrests in 2019 of Native Americans was 6.5 compared to 5.8 for White, non-Hispanics, and in 2020 was 6.9 arrests of Native Americans compared to 6.4 of White, non-Hispanics.

Table 2 shows the per capita arrest rate by race in 2020 before and after adjusting for the arrests of the recidivists identified by the Department.³⁸

2020 Per Capita Arrest Rate by Race, Adjusted for Recidivism				
	<i>Native American</i>	<i>non-Hisp White,</i>	<i>Hisp</i>	<i>Black</i>
Arrest Rate <i>Before</i> Adjustment	44,379	3,803	3,891	13,776
Arrest Rate <i>After</i> Adjustment	33,325	3,449	3,419	11,637

Table 2: *Per Capita Arrest Rate by Race, Adjusted for Recidivism 2020*

While the repeated arrests of a small number of individuals does have an impact on overall arrest rates, even after adjusting for recidivism the arrest rate of Native Americans remains almost 10 times greater than the per capita arrest rate of either non-Hispanics White, or Hispanics and 3 times more than the arrest rate of Blacks. The arrest rate of Blacks is almost 4 times the arrest rate of Whites.

E. The Official Explanations Are Inadequate

The explanations offered by the Flagstaff Police Department for the disproportionate number of arrests of Native Americans are inadequate. The first two explanations are essentially the same - Flagstaff is a “border town” and Native Americans visit Flagstaff from nearby reservations. While true, they do not explain why those visitors, who make up only a small percentage of the six million or more annual visitors to Flagstaff, are also arrested at a disproportionate rate compared with White visitors and White residents. To point out that Flagstaff is a border town as the “reason” Native Americans are arrested at significantly disproportionate rates, is simply the repetition of over a century of racial bias that rests on the stereotype that Native Americans, as a race, commit more crimes than non-Native Americans, specifically those involving alcohol.

³⁸ <https://data.census.gov/table?g=160XX00US0423620&tid=DECENNIALPL2020.P4> Based on the census data, the number of Native Americans living in Flagstaff was estimated to be 7,988, or slightly more than 10% of the total population of 76,831. The number of non-Hispanic Whites living in the City was estimated to be 46,016. Population data is not exact, and the margin of error in the estimates of racial minorities is higher than that of Whites.

Blaming recidivism on the disparities also does not explain the disproportionate arrest rates of Native Americans as a whole. While repetitive arrests of a small number of Native American people does have some impact on the overall arrest disparities it is a minor contributor to the otherwise excessive arrest rates of Native Americans.

Furthermore, the disparities in the arrests of Native American recidivists themselves, begs the question. As further defined by the Flagstaff Police Department, three quarters or more of all the repeat offenders are homeless. Yet the population of homeless individuals in Flagstaff is equally White and Native American as shown in the City of Flagstaff’s 10 Year Housing Plan. Based on homeless management information systems data, Native Americans and Whites each make up about 38% of the total homeless population in the City.

Race/Ethnicity	Percent of Population	Percent of HMIS Population
White alone, non-Hispanic	59.9%	38.6%
American Indian or Alaska Native alone, non-Hispanic	10.4%	38.4%
Hispanic, any race	19.7%	12.7%
other (including multiple races, non-Hispanic)	5.3%	6.6%
Black or African-American alone, non-Hispanic	1.9%	3.1%
Asian alone, non-Hispanic	2.5%	0.4%
Pacific Islander alone, non-Hispanic	0.3%	0.2%

Table 3: City of Flagstaff – 10 Year Housing Plan (2020)-Percent of Homeless Population by Race

The recidivist arrests were 78.7% Native American. Thus even amongst the unsheltered, Native Americans are arrested at disproportionate rates. For some offenses, as described in the next section, Native American recidivists make up almost 90 percent of all the arrests. It is not credible for the police department to suggest that only Native American homeless individuals commit crimes such as third-degree trespass, drinking in public or disorderly conduct while White homeless individuals are predominantly law abiding.³⁹ National studies show that 33 to 40% of all homeless individuals suffer from

³⁹ See e.g., Neisler J, Shree S, Reitzel LR, Chen TA, Kendzor DE, Obasi EM, Wrighting Q, Businelle MS. *Characterizing Alcohol Use Behaviors among Homeless Men and Women*. Am J Health Behav. 2019 Jan 1;43(1):37-49. Forty percent of the homeless respondents in the study reported risky alcohol use and over 44% of the respondents were White;

alcohol dependency disorders or engage in risky alcohol consumption behaviors. Homeless alcoholics, regardless of their race, have only one place to drink: in public. Yet, as discussed in Section VI(A)(3), 87% of all drinking in public arrests are of Native Americans, even amongst the recidivist group.

Given that the official explanations for the disproportionate arrest rates of Native Americans are not adequate, the only other explanation is that the disparities are the result of racial bias. In the next section we explore the history of racially biased policing in Flagstaff, “zero tolerance” and “quality of life” policing policies and take an in depth look into the arrests of those identified by the Police Department as recidivists.

III. THE 14TH AMENDMENT, RACIAL PROFILING AND SELECTIVE ENFORCEMENT

A. Equal Protection

Criminal laws cannot be enforced against people solely because of the color of their skin. The 14th Amendment of the United States Constitution guarantees that all people, regardless of race, shall be treated equally by State government in the application and enforcement of all laws, including criminal laws. “[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.” *Whren v. United States*, 517 U.S. 806, 813 (1996). Police cannot investigate a person solely because of their race⁴⁰ and when “race is used as a proxy” for criminality, “a racial stereotype . . . is in operation.” Thus, Justice Scalia stated in *Whren* that selective enforcement of the law is forbidden. The Arizona Supreme Court expounded further on this fundamental Constitutional principle.

"Racially selective law enforcement violates this nation's constitutional values at the most fundamental level; indeed, unequal application of criminal law to white and black persons

Doran KM, Rahai N, McCormack RP, Milian J, Shelley D, Rotrosen J, Gelberg L. *Substance use and homelessness among emergency department patients*. Drug Alcohol Depend. 2018 Jul 1;188:328-333.; National Coalition for the Homeless, *Substance Abuse and Homelessness* (July 2009)

<https://www.nationalhomeless.org/factsheets/addiction.pdf>

⁴⁰ *United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997)

*was one of the central evils addressed by the framers of the Fourteenth Amendment." Just as a state cannot enact criminal laws applicable on their face only to African-Americans or Latinos, neither can its agents enforce facially neutral laws on the basis of race. A state can no more make "driving while Black" a crime by means of its enforcement policies than it could by express law."*⁴¹

Selective enforcement and racial profiling are similar, but not identical, ways in which the guarantee of equal protection of the 14th Amendment is violated by specific policing practices. Ultimately, an enforcement program that has a discriminatory effect and discriminatory purpose violates the Fourteenth Amendment.⁴² That is, a showing that police enforcement of "facially neutral" laws against a person due to their brown or black skin color and not against a "similarly situated" person who is white is a violation of the guarantee of equal protection.⁴³ Accordingly, selective enforcement occurs when police choose to enforce race neutral laws only against one race of people.⁴⁴

Similarly, 'racial profiling' "concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any **particular individual** of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity."⁴⁵ Racial profiling is generally raised in the context of motor vehicle stops, however it is equally applicable to the decision to approach or stop pedestrians.

From the legal standpoint, proving that any single arrest was based on improper racial bias is extremely difficult. As courts have said, "*asking a defendant [who is] claiming selective enforcement to prove who could have been targeted by an informant, but was not, or who the [officer] could have*

⁴¹ *Jones v. Sterling*, 110 P.3d 1271,1274, 210 Ariz. 308 (Ariz. 2005) citing *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1167 (10th Cir.2003).

⁴² *Wayte v. United States*, 470 U.S. 598, 608 (1985).

⁴³ *Jones* 110 P.3d at 1275, 210 Ariz. at 312.

⁴⁴ See gen., *Yick Wo v. Hopkins*, 118 U.S. 356, (1886) and *United States v. Sellers*, 906 F.3d 848 (9th Cir. 2018)

⁴⁵ U.S. Department of Justice Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003)

*investigated, but did not, is asking [the claimant] to prove a negative; there is simply no statistical record for [the person making the claim of selective enforcement] to point to.”*⁴⁶ “[B]arring some type of test operation, [a claimant would not] be able to provide the names of other similarly situated motorists who were not stopped.”⁴⁷

Although proving selective enforcement or racial profiling is difficult in the individual case, “[w]here there is evidence of a large enough number of [arrests] directed at a single race over a sufficiently long period of time, eventually there becomes a point where that evidence is sufficient to establish a colorable basis of selective prosecution.”⁴⁸ The evidence that Native Americans in Flagstaff have been and continue to be the subjects of disproportionate arrest rates 10 to 12 times that of Whites for more than 50 years is sufficient to establish a colorable claim of selective enforcement and racial profiling by law enforcement.

B. Confirmation Bias and Stereotyping Drive Selective Enforcement

Bias in the administration of justice is the same as it is in other contexts. Bias can be explicit prejudice against all members of a racial or ethnic group or it can be an implicit bias against or in favor of members of a particular group. Bias often arises from the belief in stereotypes that are not founded in fact.

Stereotypes play a key role in the racial disparities common throughout U.S. criminal justice systems. In the 2015 Department of Justice investigation of the Ferguson Missouri Police Department for example, the DOJ found that racial stereotypes and explicit bias against African-Americans as well as a

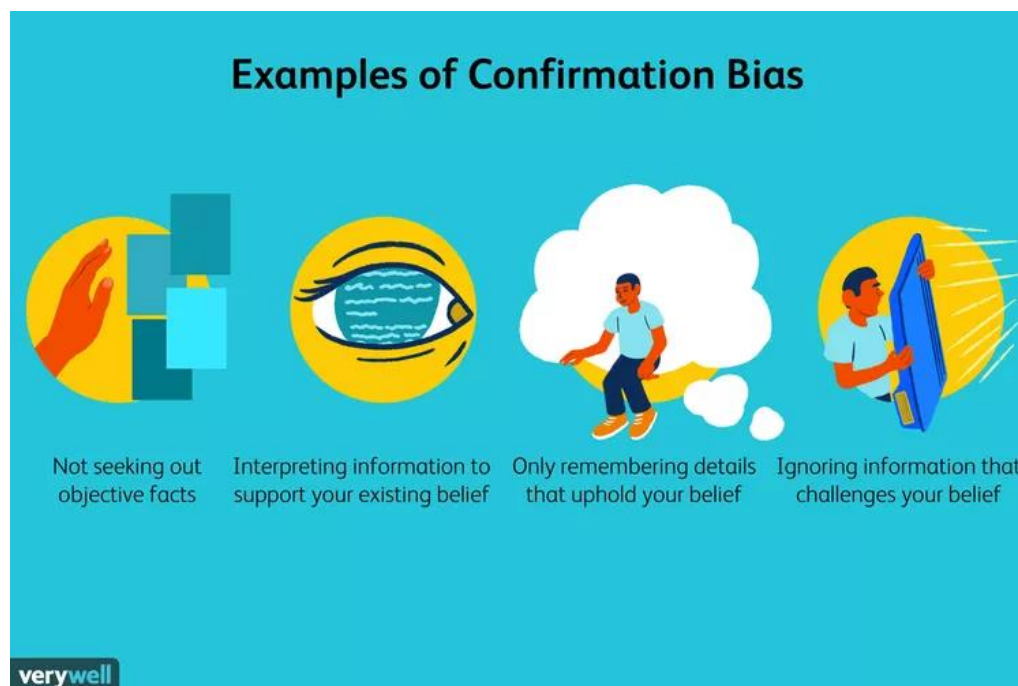
⁴⁶ *United States v. Sellers*, 906 F.3d 848, 850 (9th Cir. 2018)

⁴⁷ *Chavez v. Ill. State Police*, 251 F.3d 612, 640 (7th Cir. 2001); *Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012)

⁴⁸ *United States v. Sellers*, 906 F.3d at 864.

focus on generating revenues, created a disparate impact on African-Americans.⁴⁹ Similarly, stereotypes about Native Americans are in part to blame for the racial disparities in Flagstaff arrest rates.

The belief in stereotypes results in the psychological phenomenon of “confirmation bias.” *“Confirmation bias is a cognitive bias that favors information that confirms a person’s previously existing beliefs or biases.”*⁵⁰ It is *“people’s tendency to process information by looking for, or interpreting, information that is consistent with their existing beliefs. This biased approach to decision making is largely unintentional, and it results in a person ignoring information that is inconsistent with their beliefs.”*⁵¹



Verywell / Daniel Fishel⁵²

⁴⁹ *Investigation of the Ferguson Police Department*, United States Department of Justice Civil Rights Division (March 4, 2015)

⁵⁰ American Psychological Association. *“Confirmation bias,”* APA Dictionary of Psychology.

⁵¹ Casad, Bettina J. and Luebering, J.E.. *“Confirmation Bias,”* Encyclopedia Britannica (Feb.3, 2023) <https://www.britannica.com/science/confirmation-bias>.

⁵² Cherry, K, *What Is the Confirmation Bias?* Very Well Mind (November 10, 2022) <https://www.verywellmind.com/what-is-a-confirmation-bias-2795024>

The most common racial stereotypes that drive disparities in the arrests of Native Americans in border towns such as Flagstaff are: 1) the “firewater myth”⁵³ and 2) the stereotype of the “drunken Indian.”⁵⁴ The “firewater myth” is a false belief that Native people use more alcohol than Whites and are genetically prone to alcoholism. (See Appendix C, Stereotypes Regarding Alcohol Use Among Native Americans)

*The firewater myth (FM) is the notion that American Indians and Alaska Natives (AI/ANs) are more susceptible to the effects of alcohol and more vulnerable to alcohol problems due to biological or genetic differences. Although genetics clearly play a role in the risk for an alcohol use disorder there is little evidence to support the notion that biological differences or genetics play a greater role in alcohol use disorders among AI/ANs compared to other racial groups. However, the idea that alcohol-related health disparities affecting AI/ANs are driven by biological variables remains pervasive in the general public and among AI/AN peoples.*⁵⁵

Scientific studies of alcohol use amongst Native Americans compared to Whites actually show that Native Americans are *less* likely to use alcohol than Whites and that those that do use alcohol have lower or comparable rates of alcohol use and dependence rates to those of Whites.⁵⁶ Although familial genes do play a role in *individual* addiction disorders, there is no evidence that Native Americans, as a group, are genetically more susceptible to alcohol dependence than any other racial or ethnic group or that Native Americans consume alcohol more than Whites. In fact, the majority of Native Americans, (59.9%) abstain completely from alcohol, whereas the majority of Whites consume alcohol (56.1%).⁵⁷

⁵³ Gonzalez, V. M., & Skewes, M. C. (2016). *Association of the firewater myth with drinking behavior among American Indian and Alaska Native college students*. *Psychology of Addictive Behaviors*, 30(8), 838–849.

⁵⁴ Miller, Robert and Maril Hazlett, *The “Drunken Indian”: Myth Distilled into Reality Through Federal Indian Alcohol Policy*, *Arizona State Law Journal*, 28:223 (1986)

⁵⁵ *Association of the firewater myth with drinking behavior among American Indian and Alaska Native college students*, *supra* f.n.30.

⁵⁶ James Cunningham, Solomon, T, Muramoto, M., “*Alcohol use among Native Americans compared to whites: Examining the veracity of the ‘Native American elevated alcohol consumption’ belief*” *Drug and Alcohol Dependence*, V.160, pp.66-75 (March 2016)

⁵⁷ *Id.*

Despite the lack of scientific evidence, the “firewater myth” is firmly entrenched.⁵⁸ It became solidified by the policies of the Federal Government.⁵⁹ In 1802 Congress passed a law making it illegal for Whites to use alcohol for trade with Indians or to sell alcohol to Indians. Although claimed to be for the protection of Native Americans, it was primarily for the protection of the United States in order to preserve the land rights under Indian control for the exclusive acquisition by the federal government. In 1834 Congress passed further restrictions making it illegal to bring onto or possess alcohol on any Indian reservation and banning the sale of alcohol to Indians off-reservation. Interestingly, it was not illegal for Native Americans to consume alcohol off the reservation; it was only illegal for others to sell it to them.⁶⁰

With the belief that Indians were racially incapable of using alcohol “responsibly” came the accompanying belief that Indians were therefore inferior to Whites, having a genetic weakness.⁶¹ Rather than acknowledging the havoc caused by introducing alcohol onto a peoples unfamiliar with its potency, or for the mass trauma perpetrated by colonizers through genocidal attacks, inconsistent and hostile legislation, the forced removal of Native Americans from their ancestral lands, the concerted attempt to simultaneously assimilate and abandon Native Americans, Whites have exploited the “firewater myth” for their own gain.

“[Portrayals of Indian degeneracy, evidenced particularly by alcohol abuse, symbolically enhance whites’ ostensibly more self-disciplined lifestyle and explain the impoverished conditions on Indian reservations. Moreover, Indians perceived as weak willed and recalcitrant, and thus culpable for the deviant behavior allegedly fostering the difficult conditions, remain undeserving of ameliorative intervention beyond encouragement to undergo assimilative transformation. Whites achieve great benefit

⁵⁸ See Miller, Robert and Maril Hazlett, *The “Drunken Indian”: Myth Distilled into Reality Through Federal Indian Alcohol Policy*, Arizona State Law Journal, 28:223, 235 (1986)

⁵⁹ Lee JP, Pagano A, Moore RS, Tilsen N, Henderson JA, Iron Shell A, Davids S, LeBeaux L, Gruenewald P. *Impacts of alcohol availability on Tribal lands where alcohol is prohibited: A community-partnered qualitative investigation*. Int J Drug Policy. 2018 Apr;54:77-86

⁶⁰ Id.

⁶¹ Jill E. Martin, *“The Greatest Evil:” Interpretations of Indian Prohibition Laws, 1832-1953*, Great Plains Quarterly, U of Nebraska, Lincoln, NE, 2003. (“popular stereotypes of Indians that tend to be negative, self-serving conveniences upholding whites’ supposed superiority. Alcohol abuse in particular helped form whites’ stereotypical conception of the American Indian and provides evidence of Indian degeneracy and criminality.”)

from a symbolic victory that simultaneously venerates the dominant culture and justifies the degraded conditions surrounding the subordinate one.”⁶²

Arizona, like the federal government, enacted a State law, mirroring the Federal law. In Arizona it was illegal for liquor merchants to sell alcohol to Native Americans off the reservation.⁶³ These laws were clearly racially discriminatory on their face and violated the Equal Protection guarantee of the Constitution. They were directed at one racial group and encouraged the belief in the “firewater myth” that Native Americans were racially inferior and, like children, not to be trusted with alcohol. In essence, these policies infantilized all Native Americans.

Federal and State laws prohibiting the sale of alcohol to Native Americans persisted until 1953.

“After World War II, Native American veterans and their allies pushed for the rights of Native Americans to drink alcohol outside of reservations and for reservations to allow alcohol, both of which were still prohibited into the 1950’s. The House of Representatives discussed the end of Native American alcohol prohibition, noting:

*“The Indians for many years have complained that the liquor laws are most discriminatory in nature. The Indians feel that, irrespective of the merits or demerits of prohibition, it is unfair to legislate specifically against them in this matter. Inasmuch as Indians are expected to assume the responsibilities of citizenship and serve in the Armed Forces on an equal basis with other Americans, the committee sees no reason for continuing legislation that is applicable only to Indians.”*⁶⁴

Against the backdrop of Federal and State laws prohibiting the sale of alcohol to Native Americans, the City of Flagstaff, as did many border towns, continued to treat Native Americans as incapable of using alcohol, and continued to express a community belief in the moral deficiency of Native Americans, particularly when it came to alcohol consumption.

These stereotypes have fostered the racially biased enforcement of laws in Flagstaff, specifically those laws pertaining to the possession and consumption of alcohol. When public intoxication was

⁶² Martin, Jill E., *“The Greatest Evil” Interpretations of Indian Prohibition Laws, 1832-1953* (2003). Great Plains Quarterly. 2432, p. 50. <https://digitalcommons.unl.edu/greatplainsquarterly/2432>

⁶³ See Generally, Kastenber, Joshua, *Alcohol Prohibition in the New Mexico and Arizona State Judiciaries at 100 Years: The Development of Law and Shaping of Society in the Southwest*, New Mexico Law Review (Summer 2020),

⁶⁴ Whitepaper, *Native American Nations & State Alcohol Policies: An Analysis*, NABCA, Alexandria VA (2017)

decriminalized in the 1970s⁶⁵ in favor of the provision of social and health services, Flagstaff City officials objected to the changes. Today, the “Firewater Myth” leads to the unfounded suspicion by law enforcement that *any* Native American is more likely drinking and intoxicated simply because of his or her race. This in turn leads to over surveillance, racial profiling and a greater likelihood of unwarranted stops, detentions and arrests that violate the 4th and 14th Amendment. In practice, the myth is used to justify the selective enforcement program of the Flagstaff Police Department.

IV. FLAGSTAFF’S HISTORY OF RACIAL PROFILING AND SELECTIVE ENFORCEMENT

Almost 50 years ago the Arizona Advisory Committee to the U. S. Commission on Civil Rights prepared a report⁶⁶ after hearing testimony, talking to community leaders, and observing police and court proceedings in several border town communities around the State, regarding the “the problems encountered in the criminal justice process by American Indians in Flagstaff.” The study was conducted because of the “numerous allegations” that had been made that “American Indians have been denied equal protection of the laws” in many communities around the State.

The Committee focused on Flagstaff because it “found that this city best illustrated the problems that confront American Indians from arrest through sentencing.” The committee found that the administration of criminal justice, from arrest through sentencing, was not applied equally to “all persons regardless of race.” In today’s vernacular, systemic racism in Flagstaff’s criminal justice system deprived Native Americans of equal protection of law guaranteed by the United States Constitution.

The Committee made several specific findings and several recommendations that could reduce the disparate treatment of Native Americans in the Flagstaff criminal justice system. Most of the problems

⁶⁵ Appendix B.

⁶⁶ “*Justice In Flagstaff: Are These Rights Inalienable?* A report prepared by the Arizona Advisory Committee to the U. S. Commission on Civil Rights, March 1977.”

that existed in 1977 still exist at the time of this report and recommendations made by the Committee were never implemented.⁶⁷

In 1980, just three years after the Committee's Report, Flagstaff Police Captain Gary Latham⁶⁸ responded to allegations of racial profiling in an article in the local paper.



(Arizona Daily Sun, May 7, 1980, page 8, Flagstaff, Arizona)

⁶⁷"The Arizona Advisory Committee found that the administration of criminal justice in Flagstaff is not always equal for all persons regardless of race. Although part of the problem derives from cultural conflict, the Committee found deficiencies which could be rectified with a minimum of effort by the State of Arizona, and the City of Flagstaff. Specifically, the Arizona Advisory Committee found that unnecessary arrests in violation of the law are made of persons who are simply intoxicated; that the State of Arizona and the city of Flagstaff have failed to ensure the funding of local alcoholism reception centers; that of those persons arrested for minor traffic offenses Flagstaff illegally requires bond only from American Indians; that nonlawyer magistrates fail to advise defendants fully of their constitutional rights in criminal proceedings; that a fulltime court interpreter is needed for those Indians who do not speak English; that Arizona needs to create a State wide public defender system and that courts should ensure that American Indians are not excluded from jury panels."

⁶⁸ Latham was appointed Police Chief in 1985.

A review of the archives of the Arizona Daily Sun and its predecessor shows a century long pattern of racially biased stereotypes amid allegations of biased policing by Flagstaff residents. The community attitude that Native Americans should stay on the reservation has persisted for over a century. The derogatory term “drunk Indian” was regularly used in news articles and opinion pieces until well into the 1980s.

On July 18, 1891, an article appeared in the Coconino Sun (predecessor to Arizona Daily Sun) about the false arrest of Navajo Chief Hostine for stealing a horse, for which he was released. The writer stated: *“These troubles between the Navajos and the settlers along the reservation will continue until the Government confines them to the limits of their reservation.”* Now, the police claim that “non-resident” Native Americans are to blame for the disparities in their own arrest rates; a sentiment not much different than the belief expressed in the quote from 1891.

On March 16, 1949 in an article in the Arizona Daily Sun, Flagstaff Mayor Hutchinson, in response to a suggestion that sheets be placed on jail beds to improve the sanitary conditions, stated *“anyone with experience with drunks will readily inform you that just a few drunk Indians will reduce your sheets to shreds.”*

A local resident wrote a letter to the editor on January 27, 1953 stating: *“The city police seem to be so busy picking up drunk Indians that they just have to be in too much of a hurry. It’s funny how a drunk Indian can be seen for blocks away yet the whiskey peddlers aren’t seen by the force at all.”* (Arizona Daily Sun, January 27, 1953)

In 1968, another citizen commented that *“...Cars roar up and down the alley as though it were a dragstrip. ... All the police seem to be interested in is drunk Indians and hitchhikers.”* (Arizona Daily Sun, August 23, 1968)

In 1975, the Flagstaff City Manager expressed hostility to the decriminalization of public intoxication. He suggested that *“the habitual public intoxicant”* should be *“put back into the criminal justice system”*. (Arizona Daily Sun, March 20, 1975)

And in 1977, the same year that the Arizona Advisory Commission on Civil Rights published its findings, local newspaper staff gave the following account of their foray into downtown Flagstaff during the annual all-Indian Pow Wow. *“Many people when they pass the strip of bars along Santa Fe Avenue in downtown Flagstaff say ‘that’s where all the drunken Indians hang out.’”* The journalists described their concern that upon entering the bars they would be treated *“like Custer at the “Battle of Little Bighorn”* and were surprised that no one even took notice of them. (Arizona Daily Sun, July 7, 1977, p.1)

In 1988, the City of Flagstaff was faced with the closure of its local alcohol reception center⁶⁹ (LARC) because a funder decided not to support it any longer. In an article discussing the closure, City officials stated: *“most drunks on Flagstaff streets are Indian reservation residents” “who come in off the reservation-not Flagstaff residents.”* This is the same refrain expressed by the current Police Chief in his 2020 presentation to the Council.

Another individual commenting on the closure of the LARC in 1988 said: *“As it has been explained to me, because alcohol is not legal on the reservation, Native Americans come to border towns, like Flagstaff, to drink. After a person from the reservation gets drunk, it is a long way to get home. How is he going to get back to his bed? In contrast, Flagstaff residents who get drunk usually can be driven a short*

⁶⁹ The establishment of Local Alcohol Reception Centers was codified by the Arizona Legislature when “public intoxication” was decriminalized in the mid-70s. The 1977 Advisory Committee recommended that one be established in Flagstaff. The Flagstaff LARC was in fact established shortly thereafter.

The LARC was abandoned however in 1988 when the City of Flagstaff refused to provide funding for its continuation. News articles indicate that the City leaders believed that the City should not be responsible for continuing to fund the LARC claiming that the Navajo Nation should be responsible instead. (“City Seeks Indian Help for LARC” Arizona Daily Sun, Feb. 11, 1988, p. 1)

It appears that the City decided that arrest and incarceration were better alternatives than the funding of non-punitive alternatives such as the LARC.

See *“Not ‘Just Another Drunk Indian’ Problem”* (Arizona Daily Sun, Feb. 1, 1988, p. 4)

distance to their homes by law-enforcement authorities rather than being taken to the detoxification center.” She added that most persons taken to the detoxification center are taken there from the streets by police.⁷⁰

In response to the article, and the closure of the LARC, two letters to the editor appeared on February 15, 1988 both alleging racial stereotyping by the City and police. The writers noted that most of the individuals who were going to the LARC were actually living homeless on the streets, and even if originally from a reservation, were now clearly Flagstaff residents.⁷¹

The racially biased stereotypes expressed by the police department and community in the past are identical to those that fuel the “zero tolerance” and “quality of life” policing practices that still exist today. Even though the Native Americans being arrested multiple times now are not “non-residents”, but are rather unsheltered Flagstaff residents, the belief that a resident White person can get a ride home while Native Americans must be taken to jail is highly probative that the disparate arrest rates are motivated by race, not by criminal conduct. In fact, these stereotypes are so entrenched, the police department merely needs to say Flagstaff is a “border town” and everyone in City government and the community is expected to understand what that means.⁷² Unfortunately, it is a perpetuation of systemic bias that has the continued effect of casting suspicion on every Native American as being engaged in “criminal activity.”

V. BIAS BASED POLICING POLICIES

A 2018 report from the Vera Institute expressed the impact of biased policing on Black Americans well. Bias by police officers and other criminal justice professionals against Native Americans has the

⁷⁰ Arizona Daily Sun (Flagstaff, Arizona) February 11, 1988, p. 20

⁷¹ Arizona Daily Sun (Flagstaff, Arizona) February 15 1988, p. 4

same impact as does bias against Blacks. The result is that Native Americans, as do Blacks, suffer disproportionately from the cumulative negative effects of both individual and systemic biases.

“Beyond laws and policies that disparately impact black people, the bias of individual actors in the criminal justice system—police, prosecutors, judges, and juries—can further disproportionately involve black people, leading to more frequent stops, searches, and arrests, as well as higher rates of pretrial detention, harsher plea bargaining outcomes, and more severe sentences than similarly situated white people. Some of this bias may be the result of overt racism but, more often, it manifests as implicit bias. Implicit bias is the “automatic positive or negative preference for a group, based on one’s subconscious thoughts,” which can produce discriminatory behavior even if individuals are unaware that such biases form the bases of their decisions. Implicit bias affects everyone, but is of particular import when it results in unequal treatment by criminal justice actors. Such biases impact individual stages of the process, like policing, and also accumulate over multiple stages, through case processing, prosecution, and disposition. The cumulative effect of such individual biases contributes to disproportionately negative outcomes for black Americans.”⁷³

In 2001 the United States Department of Justice released guidelines for Federal Law Enforcement Agencies regarding the use of race in policing decisions. The guidelines include the following:

- “In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.”⁷⁴
- “In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful.”⁷⁵

The DOJ set the tone for the importance of these guidelines in its introduction, stating that “[r]acial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in

⁷³ Hinton, Elizabeth, Henderson, LaShae and Reed, Cindy; *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute for Justice, NY, NY, May 2018.

⁷⁴ U.S. Department of Justice Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, p. 3-4 (June 2003).

⁷⁵ *Id.* at p. 5.

law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society.”⁷⁶

In 2006 the Flagstaff Police Department policy on Racially Biased Policing was that:

“racially biased policing, including racial profiling, is unethical and unacceptable. The Department will not tolerate the racial or ethnic profiling of any group and prohibits any policy, procedure or practice that constitutes profiling any person based on race, skin color, and/or ethnicity of the purpose of traffic stops or investigation.”

‘Racial profiling’ was defined as *“the reliance on race, skin color, and/or ethnicity as an indication of criminality, reasonable suspicion, or probable cause, except when part of a description of a suspect, and said description is timely, reliable and geographically relevant.”*

‘Racially biased policing’ was defined as *“Applying or incorporating personal, societal, or organizational biases and/or stereotypes as the basis, or factors considered, in decision-making, police actions, or the administration of justice.”⁷⁷*

The current policy on bias-based policing appears to be a step backward. It is much less restrictive and can be interpreted to allow officers to use stereotypes in making policing decisions. It states:

402.3 BIAS-BASED POLICING PROHIBITED

Bias-based policing is strictly prohibited.

However, nothing in this policy is intended to prohibit an officer from considering protected characteristics (race, ethnicity, national origin, religion, sex, sexual orientation, gender identity or expression, economic status, age, cultural group, disability, or affiliation with any non-criminal group (protected characteristics) in combination with credible, timely and distinct information connecting a person or people of a specific characteristic to a specific unlawful incident, or to specific unlawful incidents, specific criminal patterns or specific schemes.”⁷⁸

This policy seems to allow officers who believe in the “firewater myth” and other stereotypes about Native Americans to base policing decisions on those stereotypes; that is, that Native Americans,

⁷⁶ Id. at p. 1.

⁷⁷ FPD General Order 4.2.30, September 1, 2006.

⁷⁸ Flagstaff Police Department Policy Manual, Chapter 4, Section 402, p. 336 (2020)

engage in “specific criminal patterns” such as drinking in public, engaging in disorderly conduct, trespassing, assaultive behavior or shoplifting crimes more than Whites.

Our review of 763 arrest reports of the identified “recidivists” supports the conclusion that bias and racial profiling based on stereotypes, coupled with an aggressive policy of “quality of life” and “zero tolerance” policing drive the racial disparities in the arrest of Native Americans in Flagstaff.

VI. THE “RECIDIVISTS”

The Department blames recidivists for the excessive arrest rates of Native Americans. As demonstrated in Section II (D), while recidivism has some impact on arrest rates, the impact is relatively minor. After adjusting for recidivism, the percentage of arrests of Native Americans dropped from 58 to 54 percent in 2020 and the arrest rate dropped from 44,379 to 33,325 per 100,000. This rate was still almost 10 times the arrest rate of non-Hispanics Whites as shown in Table 2, Section II(D).

Furthermore, the assertion that “recidivists” are to blame for the disparities in arrest rates begs the question, because it assumes that racial bias plays no role in *their* arrests. It assumes that the arrests themselves are lawful and supported by legally sufficient, race neutral facts to establish the basis for the initial contact and subsequent arrest. If, however, the surveillance, contact and arrests of the so-called recidivists themselves are motivated by racial profiling or selective enforcement, then the Department’s theory is based on a false premise.

In our review of the 763 arrest reports of the people identified by the Department as recidivists we found that with respect to certain crimes, notably those that fall into the category of “nuisance” or “quality of life” offenses, stereotypes, racial profiling and an active targeting of Native Americans for increased surveillance, resulted in a troubling number of contacts without reasonable suspicion and arrests without probable cause.

A. “Quality of Life” Crimes

According to the Annual Reports, the mission of the Flagstaff Police Department is “...to protect and preserve life, property, public order and the rights of the individual, by providing exemplary service through the establishment of a partnership of shared responsibility, support and trust with law abiding members of the community.” The Department states:

“We value life - preserving life is our highest priority. We value the Constitution - it provides equal and enforceable standards for all. We value integrity –We recognize integrity as the basis for mutual respect and trust. We value service - by providing exemplary service we enhance our credibility and establish trust with the community. We value quality of life - We value our role in promoting an environment that enables people to preserve or enhance their quality of life through a partnership of shared responsibility and trust.” Flagstaff Police Department Annual Report, 2020.

The Department touts its zero tolerance policing practices as a model of police practices. The Department places an emphasis on order maintenance policing and the apprehension of “quality of life” offenders. These policing practices are the successors to what is known as “broken windows” policing. The theory behind broken windows policing is that enforcement of minor offenses will prevent more serious offenses. Policing strategies based on this theory contribute to mass incarceration of people of color as well as the violation of their civil rights through unlawful stop and frisk practices.

The “broken windows” theory has largely been discredited by subsequent studies.⁷⁹ The City of Flagstaff, however, continues to follow these practices despite the complete lack of evidence that order maintenance policing reduces serious crime. Our research confirms that the persons who are most often arrested, particularly those who are Indigenous, are not the individuals who commit serious crime.

1) Most Serious Offense

⁷⁹ The “broken windows” theory formed the basis of policing in New York City and elsewhere contributing to the mass incarceration of people of color over the past 30 years. See generally, Daniel T. O’Brien, Chelsea Farrell, and Brandon C. Welsh, *Looking Through Broken Windows: The Impact of Neighborhood Disorder on Aggression and Fear of Crime Is an Artifact of Research Design*, Annual Review of Criminology, 2:53–71, 2019.

We were able to categorize all 2,244 arrests of the recidivists as either traffic, misdemeanor or felony offenses by reference to publicly available Court information using just the name and birth date of each named arrestee. Initially we found that of the 2,244 reported arrests, only 2,110 were followed up with formal criminal complaints. One hundred thirty-four arrests (6%) did not result in formal charging. Of the cases filed, 89 percent were filed as misdemeanors, 2 percent as traffic offenses and 8 percent⁸⁰ as felonies. This was lower than the overall percentage of felony arrests reported by FPD. In 2019, the percentage of adult arrests for felonies was 19.4 percent and in 2020 it was 18 percent.⁸¹

With the 763 arrests for which we obtained reports, we were able to go beyond the simple misdemeanor versus felony classification. In reviewing each report, we first determined the most serious offense listed in connection with the arrest. Felonies are always more serious than misdemeanors and a first degree misdemeanor is more serious than a second or third degree misdemeanor.⁸²

In 51 percent of the cases, only one offense was listed in the arrest report. In the others, more than one offense was charged. To determine which of the offenses was the most serious in the arrests involving more than one charge, we first considered the statutory classification of the offenses, then whether one offense was against a person (such as assault) and the other against property (such as theft or criminal damage). Where the statutory classification was the same, we determined that offenses against persons were more serious than those against property.

The top 6 most serious offenses were:

⁸⁰ There was a difference in the felony arrests of recidivists between 2019 and 2020. Although the number of recidivist arrests increased overall by 51%, from 894 to 1350, the percentage of felony arrests dropped from 10% in 2019 to 7% in 2020.

⁸¹ This simple analysis shows the issues with “Broken Windows Theory” and why it is discredited. Native Americans had a higher rate of arrests for misdemeanor offenses, while white individuals had a higher rate of arrests for felonies.

⁸² The severity of an offense is defined by statute. A.R.S. §13-601. In Arizona there are 6 felony classifications with a Class 1 being the most serious and a Class 6 being least serious, and 3 misdemeanor classifications with a Class 1 being most serious and a Class 3 being least serious. All criminal offenses carry the possibility of incarceration, a fine, or both.

- Consuming Alcohol in Public (Misdemeanor) 17.4%
- Trespass (Misdemeanor) 15.2%
- Disorderly Conduct- Fighting or seriously disruptive behavior (Misdemeanor) 15.1%
- Shoplifting (Misdemeanors & Felonies) 12.6%
- Assault-(Misdemeanors & Felonies) 10.0%
- Possession of Dangerous Drugs or Drug Paraphernalia (Felonies) 7.7%

Chart 9 shows there were significant differences between the most serious offenses charged against Native Americans and those charged against non-Native Americans. While the number one offense for Native Americans was Consuming Alcohol in Public, a misdemeanor, accounting for 22.5 percent of all arrests, the top offense for Whites, both Hispanic and non-Hispanic, was possession of dangerous drugs or drug paraphernalia (methamphetamine), both felonies, making up 24.4 percent and 17.3 percent of their arrests respectively.

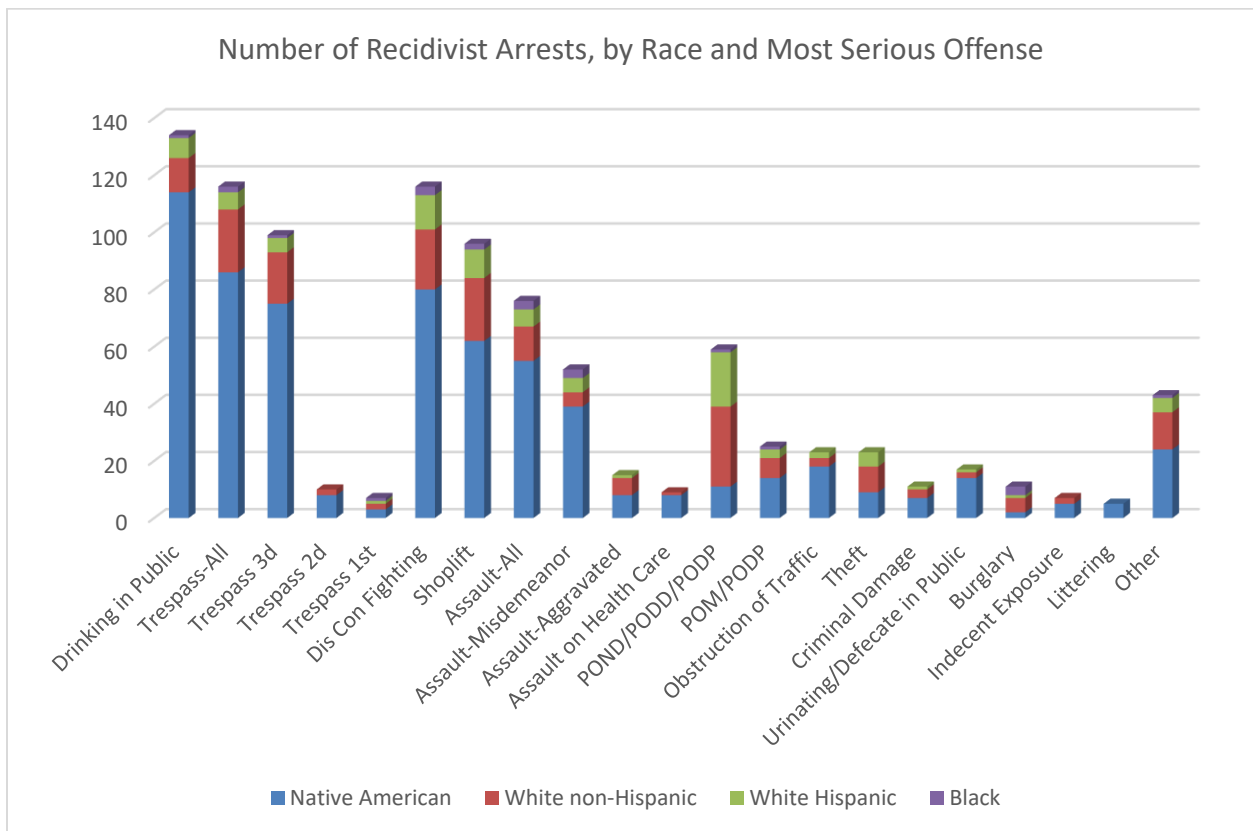


Chart 8: Most Serious Offense by Race, Recidivists 2019-2020

Another difference between the Native American recidivists and the non-Natives was in the percentage of arrests for felony versus misdemeanor offenses is shown in Chart 9. Only 8.7 percent of all arrests of Native Americans were for alleged felony offenses, while the percentage of felony arrests of White, Hispanics was 39.7 percent and of White, non-Hispanics was 32.1 percent.

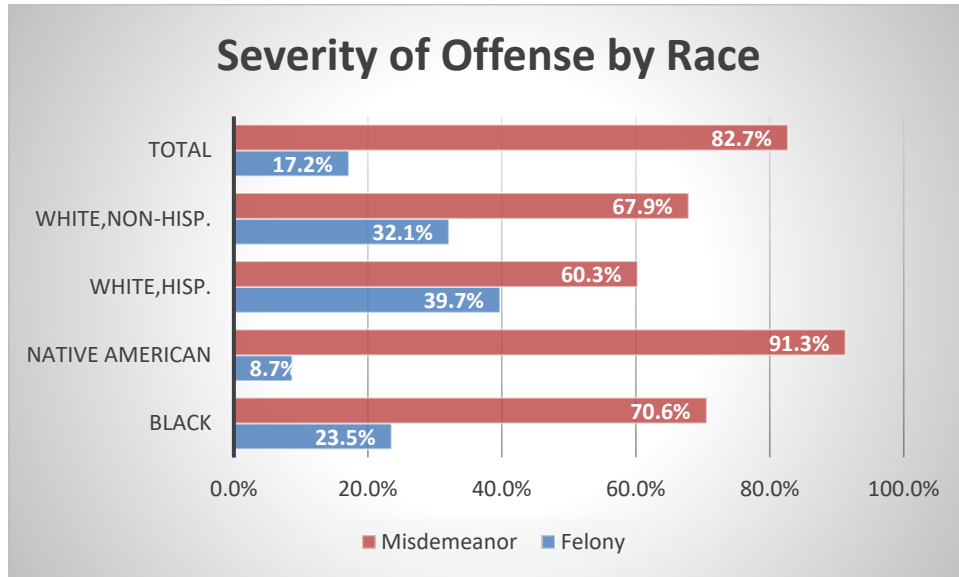


Chart 9: Severity of Offense by Race, Recidivists 2019-2020

Drilling down even further, even the felonies Native American recidivists were charged with tended to be less serious than those the non-Native Americans were arrested for. Although felonies are more serious than misdemeanors by statute, within the recidivist group, 16.8 percent of the alleged felonies were simply enhanced misdemeanors.⁸³ For Native Americans, 38 percent of the felony offenses for which they were arrested were either “assault on a health care worker” or third time shoplifting, which

⁸³ Under Arizona law, an act that is considered a misdemeanor, such as minor shoplifting, can be charged as a felony if the offender has committed similar acts within the previous 5 years. A.R.S. §13-1805(I). So, for example, if a person were to shoplift a \$2.50 bag of potato chips and within the previous 5 years had twice shoplifted other \$2.50 bags of potato chips, the current offense would be converted from a Class 1 misdemeanor to a Class 4 felony, carrying a presumptive prison term of 2.5 years. Other offenses, such as assault against a health care worker, firefighter, or police officer are statutorily categorized as felonies under Arizona law by virtue of the victim’s status, not by virtue of the severity of the act itself. A.R.S. §13-1204(A)(8). One of the felonies charged within the reports reviewed was felony assault on a peace officer, after the arrestee allegedly spit in the direction of the arresting officer while being taken into the jail.

are both enhanced misdemeanors. All the arrests of Native Americans for the felony offense of “assault on a health care worker” occurred at the local hospital after the alleged offender was brought involuntarily to the emergency room for alcohol intoxication. One of the arrests for assault was based on the fact that while waiting for care in the ER reception area, the defendant stood up and threw his cloth beanie at the receptionist hitting him in the face with it. This was charged as a felony assault.

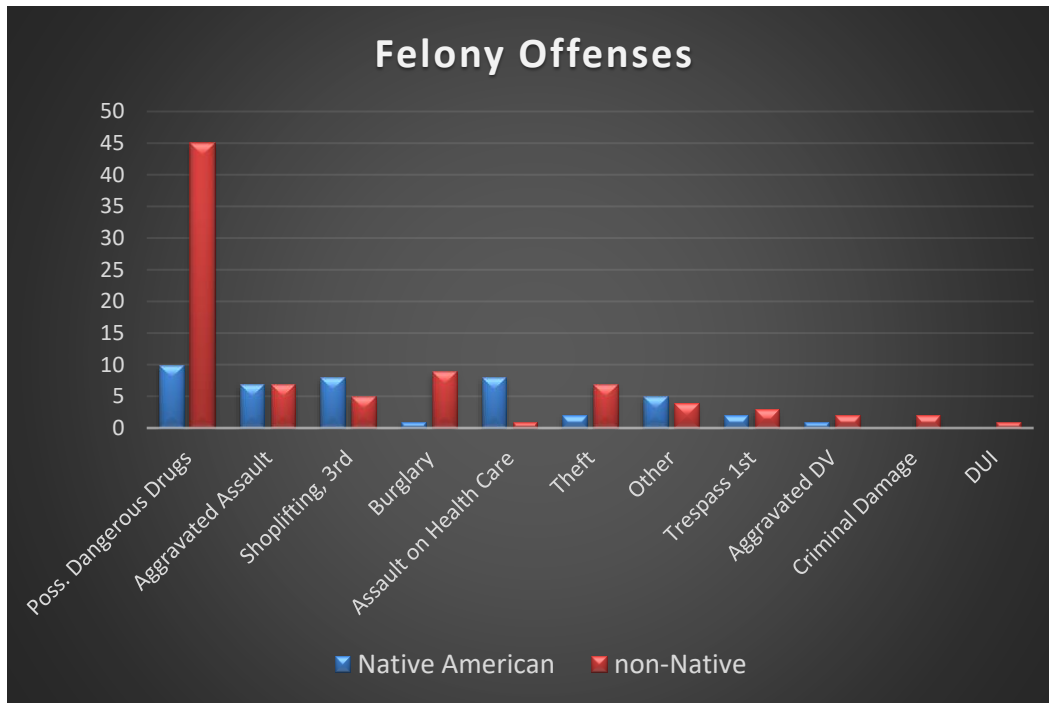


Chart 10: Felony Offenses by Type and Race, Recidivists 2019-2020

Aggravated assaults, other than on a health care worker, made up only 1.4 percent of all the arrests of Native Americans, but it made up 3 percent of the arrests of Whites. Possession of dangerous drugs and paraphernalia made up 2 percent of all arrests, both misdemeanor and felony, of Native Americans, but 19 percent of the arrests of Whites.

The Native Americans arrested multiple times by Flagstaff police are not the criminals that commit murder, rape, robbery, burglary, or serious property crimes. Our study confirms that the premise of the broken windows theory of policing, that targeting minor offenses of disorder will decrease serious crime, is faulty. What it does do is increase racial disparities in arrests and exacerbate racial tensions.

2) *Police Initiated versus Citizen Complaint Contacts*

The Flagstaff Police Department often argues in defense of its high arrest rates that it is only responding to citizen complaints of crime. It has noted that there are more reports of crime in Flagstaff than in similar cities. In its presentation to the City Council, the Department noted that it receives 581 calls per 1,000 citizens compared to 30 other similar cities that receive only 433 calls per 1,000. This does explain, in part, why the arrest rates in Flagstaff are so high.

With the recidivist population however, only 65 percent of all the arrests were initiated by citizen complaint. Thirty-five percent of all arrests of this group were initiated solely by an officer, after purposeful surveillance or general observation.

Police initiated contacts have the greatest potential for being racially motivated, either implicitly or explicitly, because such contacts are largely discretionary. Discretion lies in the decision of the geographic areas to surveil as well as the determination of the people to surveil and contact.⁸⁴ With the recidivist arrests, there were significant racial disparities between the self-initiated contacts compared with those initiated by citizen complaints.

Thirty-nine-point-seven percent (39.7%) of the arrests of Native Americans were initiated through police surveillance and observation alone. In comparison, only 21% of the arrests of non-Hispanic Whites, were self-initiated. This is suggestive of discretionary police surveillance and observation focused on Native Americans. The circumstances surrounding many of the contacts with Native Americans confirm this conclusion.

⁸⁴ See gen., Fagan, Jeffery, Braga, Anthony A., Brunson, Rod K., and Pattavina, April, *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 *Fordham Urb. L.J.* 539 (2016); Alpert, G.P., Macdonald, J.M. and Dunham, R.G., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, *Criminology*, 43: 407-434(2005).

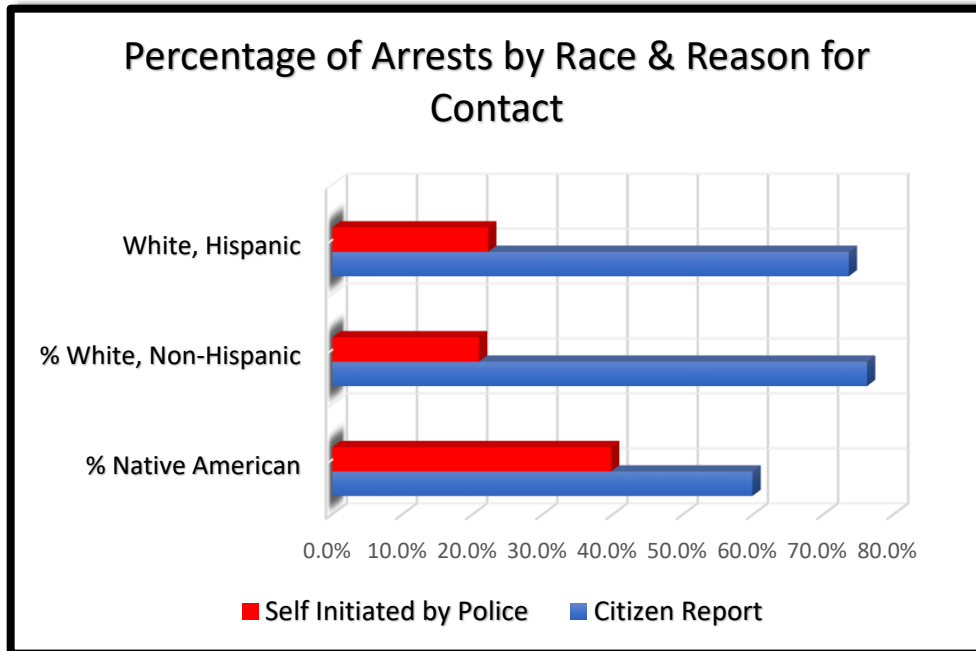


Chart 11: *Percentage of Arrests by Race & Reason for Contact, Recidivists 2019-2020*

Many of the self-initiated arrests in the recidivist group were conducted by the Flagstaff Police Department’s “Selective Enforcement Squad.”

3) *The Selective Enforcement Squad and Drinking in Public*

The Flagstaff Police Department has a special unit called the “Selective Enforcement Squad.” As described in its Annual Reports, the Squad *“is designed to increase departmental flexibility by assigning officers to special events, incidents, or targeted criminal activity. Squad members provide walking patrols in the downtown area, bicycle patrols and foot patrols in high crime areas.”* The practice of selective enforcement, if based on racial characteristics, violates the Constitutional guarantee of Equal Protection. The name of the Squad itself is problematic, it’s enforcement activities even more so.

The Selective Enforcement Squad was responsible for 17 percent of the arrests of the recidivists. Eighty-five percent (85%) of those recidivists arrested by the Selective Enforcement Squad were Native American. In comparison, only 62.4% of arrests by other officers were Native American.

Non-Hispanic Whites, made up only 9.8 percent of the Selective Enforcement Squad arrests while 24.6 percent of their arrests were by officers not assigned to that Squad. Additional analysis showed that the Selective Enforcement Squad was responsible for 22 percent of *all* arrests of Native Americans of the recidivist group, but only 8% of arrests of Whites within the group.

The primary offense that the Selective Enforcement Squad enforced was “Consuming Alcohol in Public.”⁸⁵ Seventy-seven percent of all the arrests made by members of this Squad was for drinking in public.⁸⁶ All of those arrests were self-initiated by the arresting officer.⁸⁷ None of the arrests were the result of a citizen complaint.

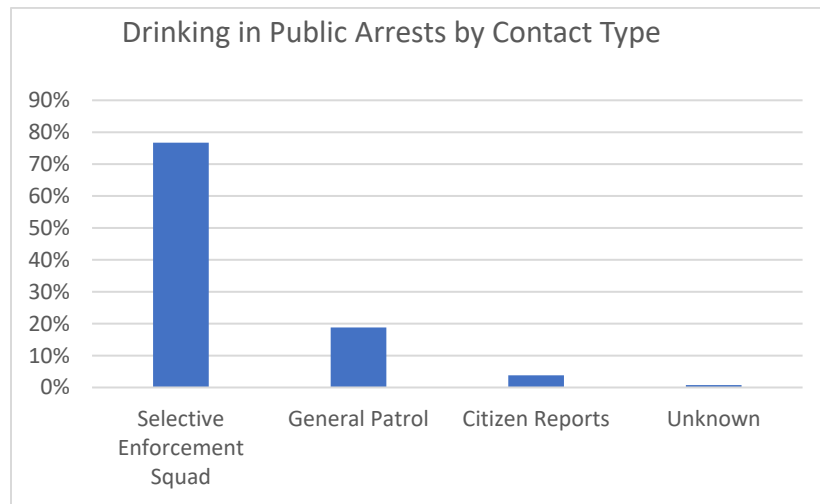


Chart 11: *Drinking in Public Arrests by Reason for Contact*

Drinking in public is considered a “quality of life” offense, as are trespass and disorderly conduct. The apparent focus of the Selective Enforcement Squad is on the arrest of Native Americans for “quality of life” offenses.

⁸⁵ While it is not unlawful to be intoxicated in public in Arizona, it is unlawful to consume alcohol in public. A.R.S. §4-244(20).

⁸⁶ The Selective Enforcement Squad made 133 arrests out of the total number of the 763 arrests sampled. Coincidentally, the total number of arrests by all officers for Drinking in Public was also 133. Out of that number the Selective Enforcement Squad made 102 arrests.

⁸⁷ Of note, one officer with the Selective Enforcement Squad was responsible for 34 percent of *all* Drinking in Public arrests within the recidivist group.

In its 2020 Annual Report, the Department stated that it made 636 arrests for Public Consumption, 85 percent of which were of Native Americans. In 2019, the number of arrests for Public Consumption was significantly lower, but the percentage of Native Americans arrested for the offense was higher (87%). The Annual Reports do not disclose what percentage of drinking in public arrests are made by the Selective Enforcement Squad. As discussed in Section II(E), it is not credible that Native Americans are the only race that drinks alcohol in public.

4) *Trespass*

There are three degrees of Trespass in Arizona's penal code. The least serious is third-degree Trespass, classified as a class three misdemeanor. Like drinking in public, third degree trespass is a "quality of life" offense that results in a significant number of the arrests of Native Americans in Flagstaff. Trespassing made up 13 percent of all arrests in the recidivist group. Eighty five percent of the trespassing arrests were for third degree trespass.

The arrest reports for third degree trespass suggest that the Flagstaff police use the statutory offense as a surrogate for "loitering" and "vagrancy."⁸⁸ Loitering and vagrancy, as commonly understood, are not illegal.⁸⁹ The United States Supreme Court has found common "vagrancy" statutes unconstitutional, because they are vague and raise the specter of arbitrary police enforcement. Arbitrary police enforcement violates the Due Process clause of the 14th Amendment.

The prior Arizona trespass statute made it a crime to "trespass by loitering."⁹⁰ "Loitering" however was later removed from the statutory language. Arizona now defines third degree trespass as follows:

⁸⁸ The United States Supreme Court has held that common vagrancy ordinances or statutes are unconstitutionally vague. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)

⁸⁹ A.R.S. §13-2905 prohibits "loitering" in very limited circumstances, none of which were present in the cases reviewed.

⁹⁰ A.R.S. §13-712(9)(1970)

“A person commits criminal trespass in the third degree by knowingly entering or remaining unlawfully on any real property after a reasonable request to leave by a law enforcement officer, the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry.”⁹¹

The trespass arrests within the recidivist group, raise a number of troubling issues. First, all of the arrests for third degree trespass occurred on the exterior grounds of a business or publicly owned area in area, presumptively open to the public. Businesses and government give implied consent to enter their property to all members of the public, unless expressly stated otherwise.⁹²

Second, it was unclear from many of the reports whether the person arrested had been given “reasonable notice prohibiting entry” as required by the statute. For example, there were several arrests for trespass where police claimed that an individual had been “trespassed” from all of the grocery stores of a single chain of stores in different locations around the City. There was no evidence in the reports indicating whether that person had the authority to make such a broad ban against an individual. Does a cashier at one grocery store have the legal authority to trespass someone from that store let alone from all other stores of the same chain in the City? In one instance, an 18 year old assistant manager called police to ask for help ejecting an unwanted customer. Before any officer arrived the owner of the store convinced the man to leave. When officers responded, the owner was gone, as was the alleged trespasser. Nonetheless, the officer convinced the young manager to press charges and then went in search of the trespasser. Under those circumstances, it would seem clear that the assistant manager did not have the authority to initiate any criminal complaint for trespass when the owner would not.

Third, several of the trespass arrests were allegedly based on the presence of a “No Trespassing” sign. The location of the sign, however, did not seem to pertain to the area where the individual was

⁹¹ A.R.S. §§13-1502.

⁹² The trespass statutes have been held to apply to publicly owned property because the State "has power to preserve the property under its control for the use to which it is lawfully dedicated." *State v. Barr*, 183 Ariz. 434, 438 (App. 1995).

found. This was particularly true on one street where individuals were arrested for being in front of the no trespassing sign while the sign clearly only applied to the fenced area behind it.

Other trespass arrests indicated that the person was “trespassed” from a business location months or years earlier. On questioning, the individual either did not remember being given notice or believed it applied to different property. It is questionable whether notice provided to someone months or years in the past would constitute “reasonable notice” for the purpose of the criminal trespass statute.

Several arrests were made while the individual was simply walking through a parking lot that served multiple businesses. Arizona courts have stated that “the inadvertent setting of foot upon the property of another or the innocent crossing of another’s property” is not criminal.⁹³ It appears that an arrest under these circumstances would not be supported by probable cause.

The most serious issue raised by the reports was the clear focus on surveilling Native Americans without any reasonable suspicion of any criminal conduct. For example, in one case, an officer observed four Native American men standing and talking next to an outdoor water machine in a large grocery store parking lot. They were doing nothing illegal or suspicious, but the officer describes them as “loitering.” He approached and requested identification from all of them, and they complied. Upon running their names through the police database, the officer found that one of them had been previously “trespassed” from “all” of the same grocery stores 10 months earlier. Upon questioning, the individual stated that he thought he was “trespassed” from a different location. The officer found nothing on the other three people. He arrested the one man and let the others go calling them “field contacts” in his report. This was clearly a case of racial profiling. The officer had no legal basis for detaining them let alone asking for identification. Whether there was probable cause to arrest one out of the four would require additional evidence to determine.

⁹³ *State ex rel Purcell v. Maricopa County Superior Court*, 535 P.2d 1299, 1301 (1975)

Another issue raised is that police appear to be encouraging businesses to “trespass” individuals permanently rather than allowing the businesses to make the decision for themselves. Based on statements made by officers in the reports, the Department apparently has a policy that they will not arrest someone for trespassing if the business only wants the person to leave for a period of time. Under these circumstances, officers encourage the business owner to “permanently trespass” the individual, so that the next time the individual comes onto the property he or she can in fact be arrested and taken to jail.

Again, because the majority of the alleged offenders are Native Americans, the active participation in the “trespass” decision by law enforcement raises Fourteenth Amendment concerns. If law enforcement is utilizing a facially neutral statute in a manner that is unequal in treatment, the Fourteenth Amendment is implicated. Even if the individuals are *not* Native American, the practice of encouraging business owners to “permanently” ban people from their premises solely for the benefit of law enforcement, is highly dubious and may run afoul of the Constitutional protections for freedom of association.

Another issue concerns the alleged trespass on public property, such as parks, bus stops, public buildings and elsewhere. Public property is traditionally open to members of the public absent an important reason for limiting or closing its use.

In one case, a young Native American man, was walking through a City Park after 10pm when an officer spotted him. The officer claimed that he “approached the male subject in an attempt *to advise him* of the park hours.” Based on the report the officer did not indicate that he had reasonable suspicion to detain him. Nonetheless, he did detain him and demanded identification. Because the officer had no right to detain him, he also had no right to request identification or to arrest him. This was one of several cases in which officers unlawfully detained people solely for the purpose of giving them notice that they

were “trespassed.” This was also one of the cases in which the officer did not file any formal charges after the arrest.

In another case, a Native American man entered into a publicly owned recreation center, sat on a chair in the hallway and fell asleep. Although he was doing nothing wrong, the staff called police. An officer arrived, woke him and told him to leave. He immediately complied without incident. Having been unable to make an arrest, the officer followed him out the door and then continued to follow him down an alley, unnoticed by the man. The man stopped behind some bushes and urinated. There were no other people present, and he could not have been seen by anyone. Nonetheless, the officer arrested him for urinating in public.

These are but a small sample of the circumstances where third degree trespass was used as a pretext to contact Native American people. There was no evidence in the reports that the Department or its officers enforce the trespassing statute against non-Native American people with the same zealousness that they are enforced against Native Americans.

5) Disorderly Conduct-Fighting or Seriously Disruptive Behavior

Another statute that is aggressively enforced against Native Americans is “disorderly conduct” by fighting or engaging in “seriously disruptive behavior.”⁹⁴ The enforcement of disorderly conduct laws is susceptible to abusive law enforcement practices because of the potential for violating the right of free speech protected by the First Amendment of the United States Constitution. In order to avoid the Constitutional problems associated with older versions of its disorderly conduct laws, the Arizona statute now specifically proscribes three different types of conduct.

A. A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:

⁹⁴ A.R.S. §13-2904.

1. Engages in fighting, violent or seriously disruptive behavior; or
2. Makes unreasonable noise; or
3. Uses abusive or offensive language or gestures to any person present *in a manner likely to provoke immediate physical retaliation* by such person; or...

Disorderly conduct is a misdemeanor. Amongst the recidivist group “disorderly conduct” by “fighting, violence or seriously disruptive behavior” accounted for 15.1 percent of all arrests, the third highest category of offenses charged.

When people are actually engaged in a physical fight, and either intend or know (or should know) that it is bothering other people, then it is apparent that they are committing a violation of the disorderly conduct statute. But problems arise when the only conduct that a person engages in is verbal, such as yelling, swearing or just being loud, because the First Amendment protects our speech even if it is offensive to other people. The Arizona Supreme Court, in accordance with United States Supreme Court decisions, recognizes that “[t]here is a difference between merely rude or offensive behavior and criminal conduct.”⁹⁵

To protect against the enforcement of the disorderly conduct statute against merely offensive speech, the Arizona Supreme Court defines “seriously disruptive behavior” as behavior that is of the same nature as “fighting” and “violence.”⁹⁶ It “is of the same general nature as fighting or violence or conduct liable to provoke that response in others and thus to threaten the continuation of some event, function, or activity.” “To 'disrupt' means 'to throw into disorder or turmoil, ... to interrupt to the extent of stopping.'...”⁹⁷

⁹⁵ *In re Julio L.*, 197 Ariz. 1 (2000); *Prosize v. Kottke*, 249 Ariz. 75 (App. 2020)

⁹⁶ *In re Julio L.*, 197 Ariz. 1, (Ariz. 2000)

⁹⁷ *In re Julio L.*, 197 Ariz. 1, (Ariz. 2000)

Based on the definition of “seriously disruptive behavior,” our review of the recidivist arrests for “disorderly conduct” found that 53 percent were not supported by probable cause because they involved only swearing or loud language that was not seriously disruptive

Sixteen and a half percent of the disorderly conduct arrests were made at the Emergency Room after an inebriated individual was involuntarily taken there by police or ambulance.⁹⁸ From our review, over half of the arrests at the hospital lacked probable cause. Seventy four percent of the arrests at the hospital for disorderly conduct were of Native Americans.

6) *Shoplifting*

Another focus of Flagstaff policing is on “shoplifting.” Unlike “drinking in public,” “trespassing” and “disorderly conduct,” shoplifting is not typically considered a “quality of life” offense because it involves an actual victim. Amongst the recidivist group, shoplifting made up the fourth highest percentage of arrests. All of the shoplifting arrests appeared to be supported by reasonable suspicion and probable cause.⁹⁹

In Arizona the seriousness of a shoplifting offense is first defined by the value of the merchandise stolen. Where the merchandise stolen is less than \$1,000 the offense is a misdemeanor.¹⁰⁰ Only one of the cases we reviewed involved the shoplifting of items worth more than \$1,000. In that case a White suspect concealed forty CDs on his person in a department store before being noticed by security.

As to the items taken, 44 percent involved only the theft of alcohol and another 8 percent involved the theft of alcohol along with another item. Eight percent of the total involved only the theft of

⁹⁸ Six percent of *all* the arrests of this group occurred at the local hospital.

⁹⁹ The quality of the report writing for the shoplifting arrests was problematic. In very few cases did the arresting officer preserve the evidence, either physically or by photograph, and in a quarter of the cases, the value of the item stolen was not noted in the report. We were able to estimate the value in most of those cases by using an internet search for the item or by referring to another report in which the same or similar item was stolen. In most of the shoplifting cases the items were simply returned, unopened, to the merchant and no actual loss occurred.

¹⁰⁰ A third misdemeanor shoplifting offense within 5 years is a class 4 felony offense, regardless of the value of the item stolen. A.R.S. §13-1805(I).

food or non-alcohol beverages. Twenty percent involved the theft of clothing and 24 percent involved the theft of miscellaneous items. Five arrests were of the same person who shoplifted canned air which he was using to get high. Two arrests involved the theft of a bandana only, during the middle of the Covid epidemic. Both of the bandana thieves were booked into jail.

Eighty-seven percent of all items taken were valued at less than \$100. Table 4 is the breakdown of incidents by value of merchandise taken.¹⁰¹

Value of Merchandise	Percent of Total
<=\$5	16.3%
<=\$10	38.8%
<=\$20	59.2%
<=\$100	86.7%

Table 4: Shoplifting Incidents by Value of Merchandise

The least valuable item stolen was a single can of beer with a stated retail value of \$1.99 while the most expensive theft was of the forty CDs which had aggregate value of \$1,846.42.

The stolen items resulting in arrest and booking into the County Jail included a bag of chips in one case and a bottle of coca cola in another. Other thefts included a can of bean dip, a can of Vienna sausages, a pair of blue jeans, as well as beer and alcohol.

As to custody status upon arrest for shoplifting, 16 percent of Native American shoplifters were cited and released, while white, non-Hispanics were cited and released in 29 percent of the cases.¹⁰² Based on value alone all but one shoplifting offense was a misdemeanor. However, 16 percent of the arrests

¹⁰¹ Value of items is based on retail value. The replacement or wholesale value is less than the retail value. The wholesale value of some of the items taken was likely only a few cents.

¹⁰² The total number of shoplifts in the reviewed cases was only 98. The total number of suspects who were cited and released was only 15. Native Americans were arrested in 61 cases, white, non-Hispanics in 21 cases. Citations were issued in lieu of arrest in 9 of the Native American arrests and 6 of the white, non-Hispanic arrests. The number of cases from this study is too small to determine if current citation release versus full booking arrests differs based on the race of the suspect. However, in the 2007 study of the Cite and Release practices of the Flagstaff Police Department, the data showed that Native Americans arrested for misdemeanor offenses were given a citation in lieu of arrest in only 28 percent of all cases while non-Hispanic Whites were cited and released in 41 percent of all cases. White, *Analysis of Flagstaff Police Department Cite and Release Policy and Practices*, (Flagstaff, Ariz. 2007) p. 10.

were charged as felony shoplifts by the arresting officer based on an allegation that the individual had committed two or more other shoplifting offenses within the previous five years.

B. Troubling Pattern of Surveillance of Native Americans

It is a fundamental requirement of policing that no person shall be detained absent reasonable suspicion to believe that the person was, is or is about to commit a crime¹⁰³ and that no person shall be arrested except on probable cause to believe that the person has committed a crime.¹⁰⁴ These protections are guaranteed by the 4th Amendment of the United States Constitution.

After making an arrest without a warrant, the suspect must be taken to a magistrate for an initial appearance within twenty-four hours and a formal complaint must be filed within 48 hours after the initial appearance. If no complaint is filed the case will be dismissed and the defendant released.¹⁰⁵ Out of the 2,244 arrests we discovered that 6 percent (134 cases) did not result in the filing of a formal complaint within the required time period or at any time thereafter. While there are other reasons for not filing a formal complaint, one reason is that the arrest itself was not supported by probable cause.

The review of the police reports of the recidivist group included an analysis of the case facts and whether they met basic constitutional requirements.¹⁰⁶ We examined whether the initial contacts were supported by objectively reasonable suspicion of criminal activity; whether the arrests were supported by probable cause to believe that a crime was committed and the person arrested probably committed it; whether the evidence was sufficient for the State to prove the case beyond a reasonable doubt and whether the police followed the constitutional requirements regarding the search and seizure of property.

¹⁰³ *Terry v. State of Ohio*, 392 U.S. 1 (1968).

¹⁰⁴ *Ker v. State of California*, 374 U.S. 23, 35 (1963).

¹⁰⁵ Arizona Rules of Criminal Procedure, Rule 4.1(a) and (b).

¹⁰⁶ The authors are experienced criminal attorneys, with over 60 years of experience between them.

Our review of the cases uncovered a pattern of surveillance of Native Americans based solely on and officer's "hunch" that the person was going to commit a crime. Basing policing activity on hunches gives rise to the possibility that racial bias, including racial profiling, is the motivating factor, not objectively reasonable suspicion of criminal activity. While additional evidence such as body cam footage and interviews of officers as well as suspects would be needed in most cases to determine if the contacts and arrests complied with the requirements of the Constitution, several cases stood out as most likely based on racial profiling. The following are the facts taken from several police reports demonstrating this problematic pattern of aggressive surveillance of Native Americans without reasonable suspicion of criminal activity.

CASE SUMMARIES

Case One: On a mid-morning summer day, an officer observed a Native American man and woman lying together on the grass at a local city park. He observed a clear plastic water bottle next to them with a clear liquid in it. The man picked up the water bottle and took a drink, then handed it to the woman who also took a drink. The officer, who was watching them from a distance, described the man as appearing very intoxicated. Upon seeing them share the water bottle, the officer approached, picked up the bottle and opened it without permission. He claimed it had a strong odor of an alcoholic beverage and arrested both of them for drinking in public. He dumped the contents out on the ground.

There was no legal basis for approaching the couple. Other than the fact that they were Native American, and one allegedly appeared intoxicated, there was nothing suspicious about a man and a woman sharing a water bottle. The water bottle was still in their possession when the officer approached and he had no legal basis for seizing it. The two people made no statements indicating they were drinking alcohol and the officer poured the liquid out at the scene, thereby destroying the only evidence of the alleged crime.

Case Two: On a summer evening, an officer was patrolling the parking lot of a large grocery store. He saw three people standing near a shopping cart, a Native American man and woman and a white man. They were doing nothing suspicious when he first observed them. Nonetheless, he pulled out his binoculars to watch them. He indicated that with his binoculars he was able to see the Native American man take a drink from a pink can. He then saw the Native American female take a drink from the can. He indicated that he recognized the can as a Steel Reserve (alcoholic beverage) can. He approached them and arrested the two Native Americans. He stated that he did not see the white male drink from the can and didn't arrest him.

This appears to be a clear case of racial profiling. While it is not technically illegal for an officer to use binoculars to surveil people, even if they are not engaged in suspicious activity, the choice by this officer to watch three people, two of whom were Native American, who were doing nothing other than standing next to a shopping cart, is highly suggestive of racially biased policing. While in this instance, two of the individuals did in fact commit the crime of drinking in public, the Flagstaff Police Department does not maintain or collect data about the number of times officers surveil Native Americans who are *not* doing anything illegal.

Case 3: On a late spring afternoon, an officer was parked in the parking lot of a strip mall. He observed a Native American male carrying a plastic bag that the officer said "appeared to have a bottle in it." The man approached two other Native American men and handed them the plastic bag. He observed them take the plastic bag out of the parking lot and meet up with another two other Native Americans. He saw them sit down together near a culvert. He parked his car out of sight of them and then reported crawling on his hands and knees through the tall grass so he could get a good vantage point to watch them through his binoculars. He observed them drink from a bottle with a brown liquid in it. He did not identify

the bottle as an alcohol bottle. He then approached them, saw a bottle between them, picked it up and identified it as a whiskey bottle.

Again, as to the surveillance it is not a technical violation of the Constitution. However, for the officer to speculate that an opaque plastic bag has a bottle in it is not reasonable suspicion. The mere fact that three Native American men meet together and one hands the others a plastic bag is not an objectively reasonable basis for believing a “crime is afoot.” The officer was unable to identify the bottle as an alcoholic beverage from a distance. He only identified it as an alcoholic beverage after he picked it up. Based on his report, he did not have a legal right to seize the bottle.

Case 4: Midday on a winter morning, on a large, well-travelled public street, an officer saw a Native American man carrying a black plastic bag that the officer claimed had “one item inside” although he could not see inside the bag. He reported that it appeared to contain “a can or bottle of some kind.” He stated that it was his “belief at the time that the subject was carrying an alcohol container.” Based on this “belief” the officer followed the man on foot for half a mile on the sidewalk. He then positioned himself behind some bushes at a neighboring building and watched him take a drink from a bottle that was wrapped in the plastic bag. He approached him and arrested him.¹⁰⁷

As with two of the other incidents, there was nothing technically illegal about the officer following the defendant. However, the officer’s observations that led him to follow the man for half a mile were not objectively reasonable suspicion of criminal activity: it is not unlawful or suspicious for a Native American (or anyone else) to carry a plastic bag, the officer had only a hunch that it contained alcohol, and even if it did, it is not unlawful for a Native American to possess alcohol or carry a bag containing it.

¹⁰⁷ There were two individuals arrested at this time. The one described was not one of the “recidivists” and in fact had only one prior arrest in Flagstaff in 2009. He was not “homeless” and was not a known offender. The second individual was arrested separately and had nothing to do with the first other than that they spoke to each other briefly at the location where the first was arrested. There was even less evidence supporting the arrest of the second man, who was on the recidivist list, than there was for the first.

Case 5: An officer on patrol parked his vehicle near a local park. He observed two Native American men sitting together on a bench. One had on a cowboy hat. He saw the second man take the hat off the head of the first man and put it on his own head. The second man then got up and walked away. The officer immediately went after the second man telling him to stop. The suspect said: “it’s my hat” and continued to walk away. The officer pushed him against the fence and arrested him for theft.

He stated in the report that the basis for his arrest was that the hat didn’t “appear to fit” the suspect very well. He did not speak with the first man to determine if it was his hat, until after arresting the second man; the first man did not call for his assistance or claim that the hat had been stolen from him. There was neither reasonable suspicion for the detention nor probable cause for the arrest.

These cases are but a few that contained facts suggestive of racial profiling and selective enforcement. The troubling issues presented by them include the fact that in this type of misdemeanor case, the defendants are not entitled to the appointment of counsel¹⁰⁸ and the defendants often plead guilty without any legal review of the facts and circumstances of the alleged offense, simply to get out of jail quickly.¹⁰⁹

VII. QUALITY OF LIFE CRIMES AND COSTS OF ENFORCEMENT

¹⁰⁸ In *Scott v. Illinois*, 440 U.S. 367 (1979) the Supreme Court decided that the right to the appointment of counsel does not extend to misdemeanor cases when incarceration is not actually imposed.

¹⁰⁹ The authors intended to complete an analysis of the cases reviewed by obtaining the court records of prosecution for the offenses. We made a public records request to the Arizona Office of the Courts, which is the administrative arm of the Arizona Supreme Court. Although the AOC acknowledged that we were entitled to review the records, the AOC would not provide us with access to them claiming that it did not have a sufficient number of “licenses” to give us electronic access and that it would cost the Court \$40,000 to obtain another license. It appears that all of the electronic access licenses had already been allocated to for-profit businesses to mine court records for profit making endeavors. Thus our request as a non-profit organization, for Court transparency, could not be accommodated. Southwest Center for Equal Justice intends to continue the investigation into the disparate treatment of Native Americans in the Flagstaff criminal justice system and to follow this report with a second study of the prosecution of Native Americans for minor misdemeanor offenses.

Based on its Annual Reports, the Flagstaff Police Department appears to be proud of its aggressive enforcement of “quality of life” crimes and other misdemeanor offenses. Police departments of course have discretion on how to spend their budgets. However the Department also expresses frustration over its own enforcement policies, suggesting that more social services need to be provided to people who suffer alcohol and drug disorders and mental illness.

From the late 1970s through the late 1980s, in response to the 1977 report of the Arizona Advisory Committee to the United States Civil Rights Commission, Flagstaff had a Local Alcohol Reception Center (LARC) that was a drop off point for persons who were inebriated. As previously discussed the LARC was abandoned when City officials decided that the problem of public inebriation should be funded by, and was solely the responsibility of, the Navajo Nation, effectively “othering” Native Americans.

In 2019 alone, 140 individuals were arrested 894 times. Approximately 88 percent of the arrests resulted in a full custody booking. In 2020, 194 individuals listed as recidivists, were arrested 1,350 times. Approximately 82 percent were taken to jail. Based on the 2007 Cite and Release Study the average jail stay for a minor misdemeanor offense after arrest is approximately 3.4 days.¹¹⁰ Each arrest also takes officers off the street and unavailable to attend to serious crime. If the matter is prosecuted, the prosecutor, court, staff, and occasionally defense counsel must spend resources to process the case.

While we did not attempt to analyze the cost of taking police off the street to book a misdemeanor or the costs of prosecution, the cost of incarceration for 3.4 days in the County Jail is capable of calculation. Nationally, it is reported that local governments spend billions on jails. According to one 2017 study:

- Jail and other local corrections costs had risen sixfold between 1977 and 2017, with jail costs reaching \$25 billion.

¹¹⁰ White, *Cite and Release Study for Flagstaff Police Department*, (2007), p.5.

- Almost 2 in 5 dollars spent on state and local correctional institutions went to local jails.
- About 1 in 17 county dollars was spent on local jails.
- The average annual cost of holding a person in jail was about \$34,000.¹¹¹

Assuming the national figures of the costs of holding someone in jail are consistent with the cost of incarceration in the Coconino County Jail, the per night cost is about \$93. Estimating an average of 3.4 days in jail for each of the identified recidivist arrests in 2019 and 2020, the incarceration costs for these offenses was almost \$600,000.¹¹²

While the purpose of this study was to analyze the racial disparities in the policing of Native Americans in Flagstaff, the economic impact on taxpayers of the policing practices discussed cannot be ignored.

¹¹¹ **Local Spending on Jails Tops \$25 Billion in Latest Nationwide Data.** Costs increased despite falling crime and fewer people being admitted to jail, Pew Trust Issue Brief, January 29, 2021
[https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-\\$25-billion-in-latest-nationwide-data](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-$25-billion-in-latest-nationwide-data)

¹¹² Based on the number of persons released with a citation, 88% of the arrests in 2019 and 82% of the arrests in 2020 resulted in a full booking. Thus, out of the total number of 2,244 arrests, 1,894 were booked into jail for an average of 3.4 nights in custody.

VIII. CONCLUSION AND FINDINGS

- There has been little change in the impact of the criminal justice system on Native Americans in Flagstaff since the publication of the 1977 Report of the Arizona Advisory Committee to the United States Civil Rights Commission. Discrimination against Native Americans remains prevalent in Flagstaff. The “firewater myth” and disparaging stereotype of the “drunk Indian” continue to fuel the disparate arrest and prosecution rates of Native Americans.
- The arrest rate of Native Americans has increased over the past two decades despite no change in population figures. In 2020, the rate of Native American arrests was 44,379 per 100,000 compared with the arrest rate of non-Hispanic Whites, of only 3,803 per 100,000.
- The reasons given by the Department for the disparate arrest rates of Native Americans have not changed in 50 years and do not provide a valid basis for the immense racial differences in arrests. Flagstaff is, and always has been a border town. Native Americans are a vital part of the community and bring millions of dollars in economic benefit to Flagstaff.
- Reservation visitors make up a miniscule percentage of the 6 million visitors to Flagstaff year most of whom are not from the neighboring reservations While blaming reservation residents for the excessive arrests of Native Americans, the Department has offered no data on the arrest rates of non-resident Whites.
- The Department also conflates homelessness with non-residency. By calling Native Americans who live unsheltered in Flagstaff “non-residents,” the Department perpetuates the “othering” of Native Americans and those living unhoused.
- Although the recidivist population accounts for a significant proportion of all arrests, when controlling for recidivism, the arrest rate of Native Americans was still 10 times higher than that of non-Hispanics Whites in 2020, with similar arrest rates in 2019.

- Drinking in public, third degree trespass and disorderly conduct are selectively enforced almost exclusively against Native Americans. Undercover officers assigned to the Selective Enforcement Squad go to extraordinary lengths to surveil Native Americans across the City.
- The Native American recidivist population rarely commit serious offenses. The felony offenses they are arrested for are typically enhanced misdemeanors. There is no evidence that the aggressive enforcement of minor nuisance offenses has led to a reduction in serious crime.
- The White recidivists account for the majority of the more serious felony offenses. The most common felony offense amongst them involves use of dangerous drugs, specifically methamphetamine.
- The failure of medical health services and government agencies to provide alternative, non-law enforcement options gives law enforcement no tools other than arrest for minor nuisance offenses, such as drinking in public.
- The reasons given for the disparate arrest rate of Native Americans in Flagstaff are based on racially biased stereotypes and disproven myths. The disparate arrest rates of Native Americans is largely driven by selective enforcement and racial profiling.

IX. METHODOLOGY

We used a multi-source methodology to analyze arrests rates and the explanations for racial disparities. We reviewed Flagstaff Police Department Annual Reports, reports from the Navajo Nation and United States Commissions on Civil Rights; historical news clippings; Arizona Department of Public Safety Crime Reports; Arizona Supreme Court Public Access to Court Information; and data from previous studies of Coconino County arrest and incarceration rates.

In addition to those sources, we made two public records requests to the Flagstaff Police Department. The first request was for the data used by the police department to create the aggregate data displayed in Table 1. We were provided with two lists, one for each year, that identified the individuals arrested by name, race, and gender. Date of birth was redacted by the Police Department. The list also categorized each person as either a “resident” or “non-resident” and listed the number of times he or she had been arrested during the year.

We made a second public records request after receiving the lists of recidivists. Initially we requested all 2,244 police reports documenting the arrests of the identified individuals. The Department indicated that it would be too onerous to provide all of the reports, because of redaction requirements relating to personal identifying information. Although all reports are electronically entered, the Department apparently has no automated system for redacting confidential data.

We offered to enter into a confidentiality agreement with the Department however the Department declined. We reached an agreement to obtain a random sample of the reports in the total number of 770. However, because the lists provided to us did not include the Departmental Report Number for each arrest (DR numbers), we had to develop a different method for identifying which reports we sought. The records clerks with the police department indicated that if we were to provide the name

of the offender and annual arrest sequence, (ie: first arrest, second arrest, third arrest and so in), in the given year they would be able to produce the report for that arrest.

Our first issue was whether to randomize the sample based on offender name or on arrests. We decided that because our interest was in circumstances surrounding arrests rather than characteristics of the offender (except race) we would focus on arrests, not names.

The total number of arrests of Native Americans was 1,716 while that of Whites was only 456 and of Blacks was 60. Based on the much smaller number of arrests of Whites than Native Americans we decided to create two randomized lists, one for White offenders and one for Native American offenders. We ran a simple sample size calculator for the 1,716 Native American arrests and derived a number of 480 reports to review. The sample calculator for the 456 White arrests returned 271 arrests to review. The number of Black and Unknown were too small for a statistically valid sample size however we decided to review 18 reports from those arrests.

To create the random sample using this method, we first divided the names of offender by race, creating three lists. We then expanded each named offender by the number of arrests they had during the two-year period, assigning a number (1,2,3,4...) to each row to signify which arrest chronologically would be the DR requested. We generated a random numbers list for each racial category based on the total number of rows per category and matched the random number to the corresponding row. We then provided the police department with a list of 769 arrests (identified by name and chronological arrest sequence by year). We requested that the Department provide the initial arrest report, including the narrative, and a copy of any misdemeanor citation issued.

The Department provided us with approximately 75 reports per week for ten weeks. The reports were divided between us to review and record data points. We designed a simple Microsoft Access database to enter the data. The list of data points that we recorded is attached as Appendix D.

Some data points, such as the presence of reasonable suspicion or probable cause, required legal analysis to reach a decision. In those cases, if the first reviewer decided that the facts did not support reasonable suspicion/probable cause, a “no” or “maybe” would be entered. After all the reports were reviewed a second reviewer read all cases in which “no” or “maybe” was entered. Where two of us disagreed as to the existence of sufficient facts, the decision was to give the arresting officer the benefit of the doubt and enter the record as a “yes.”

We referred to US Census Bureau data for population statistics.

Police explain policies to Council

SCOTT BUFFON
Sun Staff Reporter

The Flagstaff Police Department was invited to explain its policies, procedures and operations to the Flagstaff City Council during Tuesday night's meeting.

The meeting was the first of three the council plans to have with the department to learn about current policies and procedures. The next meeting will look at what other cities are doing to respond to mental health and public intoxication, and the third meeting will discuss the possibility of a new system for responding to mental health and public intoxicant calls as well as information on a Public Safety Commission.

Councilmember Jim McCarthy invited police for the discussion after local protests against high-profile police killings of people of color nationwide.

Many local protesters called for the defunding of police budgets after months of Council's work for the 2020-21 fiscal year budget in June. Despite the flood of comments both supporting and asking to defund the police, Council decided to push the controversial question to the next budget cycle.

Dan Musselman, interim

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department has 93 white, one Middle Eastern, three Native American, 14 Hispanic, and two Asian officers. Women account for 5% of their sworn officers.

Despite the scrutiny placed on applying officers, Musselman said one to two officers still leave their agency every year because of policy violations.

"We take appropriate discipline measures when officers are not abiding by our values, mission or policies," Musselman said. "We do see one or two officers leave our agency every year for policy violations or during the disciplinary process."

He asserted that officers are not taught to racially profile people, and instead police based on criminal and driving behavior. Additionally, officers must outline probable cause for charges to be taken to court, at which point prosecutors or public defenders can dismiss cases.

Officer performance is not judged by the amount of arrests, and complaints are investigated relying upon body camera footage.

The administration also sits down with officers who have five or more complaints, are involved in more vehicle pursuits, internal affairs or excessive use of force reports turned in to figure out the problem.

A college and border town

Part of what makes Flagstaff's crime problem unique is because it is a border town and a college town, Musselman said.

Musselman brought up the department's arrest records that were cited by many protesters during allegations of racial bias.

The information shows 52% of the department's arrests being Native American, despite the ethnic group making up 12% of the public's overall population, according to the 2010 census.

Additionally, they broke the statistics down by local residents ver-

sus non-local residents, showing 36% of Native American arrests were local residents while the rest were from out of the city.

Musselman pointed out a substantial part of Flagstaff's street population includes Native American people. This is true for many parts of Flagstaff's social services, including homeless shelters and school districts.

He then cited an article from Assessing Race Relations that said an estimated 75% of every Navajo dollar is spent in border towns.

"We know we're seeing more people in and out of our community. Unfortunately those involved in homeless, poverty, substance abuse and mental health are most susceptible to the criminal justice system," Musselman said.

These factors are often discussed at the county's Criminal Justice Coordinating Council, a collection of local criminal justice leaders.

Flagstaff Mayor Coral Evans asked if there was anyone on Council to solely represent the interests of Native American people during the council's discussions. While people who are Native American have served on the council, Musselman explained, no agency is appointed to advocate for Native American people.

Along those lines, people within the city also rely upon the department more than citizens in other similar-sized cities. Flagstaff gets 581 calls per 1,000 people, compared to 30 other benchmark cities that have 433 calls per 1,000 population.

When Evans asked Musselman why the city has more calls, the interim chief couldn't say exactly, but gave some thoughts.

"I would venture to guess it's because we're a college town and we have a very large transient population. We have a lot of liquor establishments compared to others," Musselman said. "Those 30 benchmark cities we compare ourselves

Appendix B- Decriminalization of Public Intoxication

DECRIMINALIZATION OF PUBLIC INTOXICATION

In the 1970s, most states decriminalized the offense of public intoxication. Society came to recognize that alcoholism is a disease and that laws punishing people for merely being intoxicated were ineffective and inhumane. See Friday, P C, *Issues in the Decriminalization of Public Intoxication*, Fed. Prob., V 42, 3, 33-39 (Sept 1978)

The Arizona Legislature followed suit, decriminalizing public intoxication and banning local government from enacting any law in contravention of the state statute or from enforcing laws of general applicability in a manner that would circumvent the intent of the new statute. A.R.S. §36-2031. Unfortunately, the second prong of decriminalization, which was to increase funding for social and medical interventions for the treatment of alcoholism was not as forthcoming.

Many law enforcement agencies, including the Flagstaff Police Department and the City of Flagstaff, objected to decriminalization of public inebriation (Arizona Daily Sun, 20 Mar 1975, p 16). Public intoxication continues to be seen as a police problem resulting in costly criminal justice intervention and futile punitive processes.

“As with increased criminal penalties, any police response that is predicated solely on a deterrence model typically has little lasting value in addressing chronic inebriation. Crackdowns on chronic inebriates often focus on “hot spots” like parks, transit stations, and near shelters and liquor stores where inebriates tend to cluster and cause problems.

An increase in crackdowns and “zero tolerance” policing of uncivil behavior (drunkenness, loitering, and so on) gained favor as police agencies moved away from traditional-style policing and embraced “broken windows” approaches. While crackdowns and similar approaches can produce change that is sudden, obvious and drastic, as a stand-alone response, they hold little promise of engendering a lasting impact on chronic inebriation.” Pate, Matthew, *Chronic Public Inebriation*, Problem-Oriented Guides for Police; Problem-Specific Guides Series No. 68 (Center for Problem Oriented Policing, 9/2012)

Many of the Native American recidivist group in our study exhibited signs of intoxication. In 35 percent of the arrests of Native Americans, the subject was described as intoxicated or exhibiting symptoms of intoxication. The non-Native American subjects were less likely to be described as intoxicated but more likely to exhibit signs of methamphetamine use. Intoxication, while a factor in the arrests of the Native American recidivists, does not explain the disparity in arrest rates between Native Americans and non-Natives.

Appendix C-Stereotypes Regarding Alcohol Use Amongst American Indians

Excerpt from Philip A. May, *Overview of Alcohol Abuse Epidemiology for American Indian Populations*, National Research Council (US) Committee on Population; Sandefur G.D., Rindfuss R.R., Cohen B., editors. Washington (DC): National Academies Press (US); 1996. (Citations in excerpt have been omitted but can be found in the original)

“There are a number of commonly held stereotypes with regard to alcohol use and abuse among American Indians. One of the most pervasive of these is that Indians metabolize alcohol more slowly or differently than other ethnic groups. Approximately a dozen studies have now been published on the biophysiology of alcohol processing among American Indians. In general, the findings have shown that American Indians metabolize alcohol in a manner and at a speed similar to those of other ethnic groups in the United States; that there is a great deal of variation in alcohol processing within American Indian and Alaska Native ethnic groups; that prior drinking experience and body weight are very influential in the metabolism process ; and that overall liver structures among American Indians are not unique, and their liver phenotypes are similar to those of other, particularly European, ethnic groups. Thus, the findings of these studies are in keeping with those of studies conducted among ethnic groups throughout the world.

It is also said that American Indian drinking patterns and problems are uniquely Indian. However, review of the epidemiologic statistics of American Indians shows that high rates of alcohol problems among American Indians are influenced by many of the same factors or traits that influence drinking among other groups. Of particular importance are variables such as age, geography, social norms, and political and legal policies. Special combinations of these influences have created particular patterns of drinking and alcohol-involved injury, death, and arrest that are high to very high, and therefore perceived to be uniquely Indian when in fact they may not be. Furthermore, the literature describes variation in alcohol consumption from one tribal culture to the next. There are some high-risk/rate groups, and there are also many low-risk/rate groups. Studies show that the style of drinking also varies among American Indians, spanning the four commonly mentioned styles of abstinence, moderated social drinking, heavy recreational drinking, and anxiety or chronic alcohol-dependent drinking.

Many studies support the commonly held belief that alcoholism and alcohol abuse are epidemic among some tribal populations. Yet the arrest and morbidity data used for these studies are frequently not descriptive of individual behavior; rather, they are aggregate data that reflect duplicate counts of arrests and problems generated by a select number of individuals. Thus, the impression is given that many more individuals are involved in the deviant behavior than is actually the case.”

See also, Cunningham, J.K., Solomon, T.A., Muramoto, M.L., *Alcohol Use Among Native Americans Compared to Whites: Examining the Veracity of the Native American Elevated Alcohol Consumption Belief*, Drug and Alcohol Dep., 2016; 160(3): 65-75; Feldstein SW, Venner KL, May PA. *American Indian/Alaska Native alcohol-related Incarceration and Treatment*, Am Indian Alaska Native Ment. Health Res., 2006; 13(3):1–22; Spicer P., Beals J., Croy C.D., et al. *The Prevalence of DSM-III-R Alcohol Dependence in Two American Indian Populations*, Alcohol: Clinical & Exp. Res. 2003; 27(11): 1785 – 1797.

Appendix D-Field Names for Incident Table

Field Names for Incident Data Points Recorded in Access from Police Reports

Def ID
Co-Defendants
Race
Ethnicity
DR Number
Date of Incident
Time of Incident
Location of Incident
Primary Officer
Special Enforcement
Reason For Contact
Reasonable Susp Facts
Reasonable Susp
PC Factors
PC
Legal Issues
Most Serious Offense
Offense 2
Offense 3
Offense 4
Offense Level
Intoxication
Alcohol Related
Drugs
Mental Health
Homeless
Custody
Suspect Known
Notes