



**The Role  
of General Government  
Elected Officials**

**in Criminal Justice**

U.S. Advisory Commission on  
Intergovernmental Relations

A-125  
May 1993



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Intergovernmental Relations**

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# EXECUTIVE SUMMARY

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In this report, *The Role of General Government Elected Officials in Criminal Justice*, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) examines the intergovernmental, policy, funding, and management issues facing general government elected officials in dealing with the effects of explosive growth in the criminal justice system.

**Criminal justice is a growing fiscal problem for municipal, county, state, and federal governments, costing over \$70 billion a year.** From the mid-1970s to the early 1990s, criminal justice expenditures rose faster than any other area of state and local government spending. Between 1973 and 1990, state own-source spending on criminal justice increased 759 percent (prison growth, increased state assistance to local governments, and merger of local courts into many state systems); county, 490 percent (jails, court costs, and crime prevention); municipal, 330 percent (police and crime prevention); and federal, 345 percent (more than 3,000 crimes being tried as federal offenses and longer prison sentences).

**Spending on criminal justice has been driven more by increases in prosecution and prison sentencing than by increases in reported crime and arrests.** Between 1973 and 1989, the number of people in prison grew by 233.4 percent. Increased arrests (stemming from population growth, more reported crime, and stronger law enforcement) accounted for about one-third of the growth. The rest resulted from court-related decisions and correctional policies, as well as increased revocation of parole and probation.

**Law enforcement officers, courts, and corrections officials cannot, by themselves, reduce crime significantly.** Crime prevention programs that address economic and social needs, and policies and incentives that empower citizens to reestablish effective community institutions and civic order also are essential. Only general government elected officials have the authority to reach across public agencies and programs—such as health departments, school boards, and housing authorities—and focus them on crime prevention.

**Local, state, and federal chief executives and lawmakers play critical roles in determining the outcomes and effectiveness of the criminal justice system and crime prevention.** Legislators enact laws that define crimes and prescribe punishments. Executive officials carry out or oversee law enforcement. Chief elected officials **also** have the power of the budget, appointment powers over agency heads, authority to legislate policy, and access to the public to build citizen support for prevention.

**Criminal justice responsibilities are dispersed among many different municipal, county, state, and federal agencies and authorities that police, adjudicate charges, and administer correctional programs.** One common element is the independence of key officials, such as judges, prosecutors, sheriffs, clerks of court, and coroners. State and local governments are the primary actors. State-local criminal justice systems prosecute 94 percent of all serious crimes (felonies); county jails hold most persons detained on state or federal felony charges; state prisons hold 92 percent of the total prison population; and state and local governments spend 87.4 percent of all criminal justice funds. The federal government's influence, however, has been expanding, while its state-local criminal justice assistance dropped from 27 percent of total federal justice spending in 1973 to 7 percent in 1990.

In 1990, 36.5 percent of criminal justice expenditures were funded by the states (60 percent for state prisons and community corrections); 29.0 percent by municipalities (80 percent for policing); 20.9 percent by counties (policing, court functions, and corrections about evenly); and 13.5 percent by the federal government.

**Rapid growth in the criminal justice system has significantly affected the responsibilities, workloads, and financial demands on different parts of the system, creating more intergovernmental tensions.** Since 1973, all governments have experienced extraordinary pressure to fund criminal justice services. Tension is especially evident when sufficient intergovernmental assistance is not forthcoming or when other governments do not meet their traditional responsibilities (e.g., a local

jail backlogged with felons awaiting transfer into overcrowded state prisons).

**Three out of four convicted offenders are on probation or parole.** These services are supported by only 11 percent of state and county correctional spending. Significant variations exist among the states in the use of imprisonment and community sentences. Policy considerations vary in deciding what proportion of a state's prison inmates can be placed more cheaply and equally effectively in nonprison correctional programs and/or serve reduced sentences. For states that must relieve prison overcrowding, the experience of those using early release, shorter sentences, and community correctional supervision and programs for all but the most serious offenders indicates that a 10 to 15 percent reduction is possible without any appreciable increase in criminal activity.

**Policies seldom link government agencies to address literacy, job training, probation supervision, substance abuse, mental illness, housing, and other services needed to phase offenders back into the community.** Approximately 60 percent of prison inmates are school dropouts; over half admit they were under the influence of alcohol or drugs at the time of their crime; and in 1986, less than 40 percent earned more than \$10,000 in the year before their arrest. The responsibility for providing education, human services, employment, and criminal justice programs is dispersed among municipal, county, and state governments, and independent school districts. Inmates and juveniles who start programs in correctional institutions often cannot continue outside because agencies resist taking offenders, programs are not coordinated, and/or no room is available. Local governments resist community corrections programs if there is no state funding. Citizens also resist having offenders in their community.

**The need for coordination of criminal justice activities far outstrips efforts to promote coordination.** Diverse authority complicates coordination and obscures responsibility. Multiple types of coordination are needed to meet different needs. For example, a municipal police agency may need to coordinate with other municipalities, the county sheriff, state police, and/or federal agencies to enhance enforcement capability; with the county prosecutor, forensic laboratory, jail intake, and the court for more efficient procedures; and with the housing authority, code enforcement agents, schools, juvenile court, and the recreation department for prevention initiatives. Coordination also has been undercut by competition for limited funds. Successful efforts typically involve a forum for debate and consensus building among policymakers, as well as a mechanism for operational collaboration.

Based on the findings of the study, the Commission recommends:

- State legislatures and the Congress should reexamine their criminal justice systems to rectify imbalances among law enforcement, adjudication, and corrections capabilities. Federal or state mandates should be enacted only after thorough systemwide impact analyses have been prepared. Special attention should be given to prevention, policing, adjudication, jails, corrections, improved management, intergovernmental funding, and constitutional balance.
- The chief elected officials of general government should (1) insist on being informed about the basic characteristics, interrelationships, and current facts of the criminal justice system with which they interact; (2) hold criminal justice officials accountable for supporting improved system performance by using budget leverage; and (3) engage the other key actors in the system and the public in exploring policy options that take into account a systemwide perspective.
- Elected officials should support the development and use of decision-support and management information systems, the development of performance indicators for key activities, and the collection of the required data for (1) forecasting personnel and facilities needs; (2) analyzing the budgetary impacts of mandates; and (3) improving the efficiency and effectiveness of crime investigations, court case management, and correctional classification and supervision.
- State and local elected officials should establish and participate in criminal justice coordinating bodies and should support such bodies where they exist (e.g., criminal justice budget review committees, jail or prison planning task forces, community corrections boards, and juvenile justice coordinating councils). The councils should coordinate general government and criminal justice goals, help realize intergovernmental and interagency operating efficiencies, help balance the system, and help build community consensus on criminal justice. State and/or local criminal justice commissions are needed and should include adequate attention to community corrections. Criminal justice is and should remain largely a state and local responsibility. A federally mandated structure for state or local coordination should be avoided.



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# PREFACE

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This report is based on the premise that, even if prevention could cut crime rates in half, taxpayers still are entitled to efficient, effective, and responsive government services. Criminal justice functions are no exception. The report reflects four major elements of legislative and executive action:

- The magnitude of the criminal justice challenge;
- Determining the criminal justice response to crime;
- Holding agencies accountable and supporting program needs; and
- Governing the non-system.

The report focuses on the functioning of the criminal justice system. It emphasizes the dynamics of criminal justice decisionmaking—its sources of conflict, constitutional restraints, system impacts, and the potential for leadership. Prevention is addressed only as it is carried out by criminal justice programs. Politically intense issues—such as capital punishment—and legal procedures that affect individual cases but not the system are omitted. Instead, the report focuses on concerns that have major cost impacts across agencies, between governments, and over time.

For example, corrections has been the fastest growing area of spending. The report, therefore, focuses more on that growth than on increasing arrests without follow-through. It emphasizes ramifications on urban counties, cities, and states from the high crime rate in cities, which is more than twice the rate in suburban counties and four times that in rural counties. Finally, given that the federal government funds only 13 percent of total expenditures on criminal justice and prosecutes only 6 percent of serious crime, this report does not focus on the structure of the federal criminal justice system. However, it does give considerable attention to concerns about the influence of fed-

eral policies on state and local criminal justice systems and on initiatives to try more criminal cases in federal courts.

The report reflects the concerns and perspectives of more than 100 lawmakers, chief executives, and criminal justice officials who were interviewed for this project. It brings current research, landmark studies, and examples of successful programs together in one place. It also provides valuable original analyses that provide a good overview of the intergovernmental, interagency, and interbranch dynamics of the criminal justice system. This overview allows all officials to better understand how their initiatives and/or burdens are affected by the policies of many different officials and governments.

The assumption is that if policy decisions can be approached through a collegial process of determining the facts, agreeing on the need, and resolving accountability, general government elected officials will be in the position to use their unique access to the public and the private sector; their authority over treatment, employment, and education programs; and their contacts with other elected officials to build understanding and support for change. The goal of this report is to support the essential leadership role of general government elected officials.

Frustration with escalating costs and lack of effectiveness in the criminal justice system led the National Association of Counties, joined by the National Governors' Association, National Conference of State Legislatures, the U.S. Conference of Mayors, and the National League of Cities, to support the U.S. Advisory Commission on Intergovernmental Relations in working with the U.S. Department of Justice to fund a study designed to both inform general government elected officials about the criminal justice system and to critique their role in it.

**Robert B. Hawkins, Jr.**  
Chairman





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# ACKNOWLEDGMENTS

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This report is part of a project on the role of elected officials in the criminal justice system. The project director and author of the report is Vivian E. Watts, a former Virginia legislator and Secretary of Public Safety.

The report is accompanied by a *Guide to the Criminal Justice System for General Government Elected Officials*.

ACIR commends the dedication of the following individuals in helping launch these studies: Donald Murray of the National Association of Counties, Nolan Jones of the National Governors' Association, Jon Felde of the National Conference of State Legislatures, Patrick V. Murphy of the U.S. Conference of Mayors' Police Policy Board, and Edwin W. Zedlewski of the U.S. Justice Department's National Institute of Justice.

The Commission wishes to thank staff members and individuals who participated in interviews and focus group discussions from the following associations:

American Bar Association, Council of Chief Judges  
American Correctional Association  
International Association of Chiefs of Police  
International City/County Management Association  
Large Urban Areas Probation Chiefs  
National Association of Attorneys General  
National Association of Counties  
National Association of Criminal Justice Planners  
National Center for State Courts,  
Institute for Court Management  
National Committee on Community Corrections  
National Conference of State Legislatures  
National District Attorneys Association  
National Governors' Association  
National Institute of Municipal Law Officers  
National Juvenile Detention Association  
National League of Cities  
National Legal Aid and Defender Association  
National Sheriffs Association  
U.S. Conference of Mayors  
Virginia Network of Victims and Witnesses of Crime

Thanks go also to the following individuals who offered advice and suggestions for the project at thinkers' and/or critics' sessions:

*Julio Barreto, Jr.*, National League of Cities  
*Fred Becker*, Bureau of Justice Assistance, U.S. Department of Justice  
*James Blume*, U.S. General Accounting Office  
*Mary Brodrick*, National Legal Aid and Defenders Association  
*Warren I. Cikins*, The Brookings Institution  
*Osa Coffey*, Virginia Department of Correctional Education  
*Alvin W. Cohn*, National Institute of Corrections, U.S. Department of Justice  
*William G. Colman*, consultant, Potomac, Maryland  
*Helen Corrothers*, U.S. Sentencing Commission  
*Mark A. Cunniff*, National Association of Criminal Justice Planners  
*Roberta Dom*, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice  
*Thomas Henderson*, National Center for State Courts  
*D. Alan Henry*, Pretrial Services Resource Center  
*Sally T. Hillsman*, Vera Institute of Justice  
*Gwen Holden*, National Criminal Justice Association  
*Joan E. Jacoby*, Jefferson Institute for Justice Studies  
*Charles Kehoe*, Virginia Department of Youth Services  
*Kay Knapp*, Institute for Rational Public Policy  
*Roberta Lesh*, International City/County Management Association  
*William Lucas*, Office of Liaison Services, U.S. Department of Justice  
*Charles B. Meeks*, National Sheriffs' Association  
*Norval Morris*, University of Chicago Law School  
Pat Mysza, National Legal Aid and Defenders Association  
*Laurie Robinson*, American Bar Association  
*Thomas Rametta*, Metropolitan Washington Council of Governments  
*Daniel Rosenblatt*, International Association of Chiefs of Police  
*Mary K. Shilton*, National Association of Criminal Justice Planners  
*James Swain*, Bureau of Justice Assistance, U.S. Department of Justice

*Matthew Tansey*, Florida Advisory Council on Intergovernmental Relations  
*Anthony Trivisono*, American Correctional Association  
*Carl Trishler*, U.S. General Accounting Office  
*Laura DeKoven Waxman*, U.S. Conference of Mayors

At ACIR, Ronald D. Allen and Erica Jacoby Price provided research support for the project. Joan A. Casey edited the reports for publication.

The author wishes to particularly acknowledge the contribution of the legislative careers of Honorable **A.L. Philpott** and the Honorable Warren G. Stambaugh to preserving a balance between the concepts of justice and political accountability.

Funding for the project was assisted by the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, under NIJ's program to facilitate the exchange of information to improve state and local criminal justice administration.

The Commission and its staff retain final responsibility for the contents of this report.

**John Kincaid**  
**Executive Director**

**Bruce D. McDowell**  
**Director, Government Policy Research**

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# FINDINGS AND RECOMMENDATIONS

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## Findings

**1. Criminal justice is a growing fiscal problem for America's municipal, county, state and federal governments.**

Governments in America now spend over \$70 billion a year on criminal justice. Since the mid-1970s, criminal justice expenditures have risen faster than any other area of state and local government spending. Between 1973 and 1990, state own-source spending on criminal justice increased 759 percent; county, 490 percent; municipal, 330 percent; and federal, 345 percent.

**2. Spending on criminal justice has been driven more by increased prosecution and prison sentencing than by increases in reported crime and arrests.**

Between 1973 and 1990, the number of people in prison grew by 238.2 percent. The U.S. incarceration rate of 426 prison and jail inmates per 100,000 population compares to 97/100,000 for the United Kingdom, 81 for France, 68 for Denmark, and 45 for Japan in 1989. The extraordinary growth has resulted from actions taken by all parts of the criminal justice system; however, increased arrests (stemming from population growth, reported crime, and stronger law enforcement) account for only about one-third of the growth.

Court-related decisions and correctional policies account for the remaining two-thirds of the growth affecting most criminal justice agencies. Prosecutors are more apt to press charges following an arrest, thereby increasing court caseloads, and tougher sentencing laws combined with judicial and prosecutorial discretion have produced more imprisonments. Increased parole and probation revocations also have added to prison growth.

Despite efforts to fund this growth, the United States entered the 1990s with overloaded courts, prisons, and jails; probation and parole caseloads that are double past levels; continuing budget pressures; and rising rates of violent and juvenile crime. Furthermore, many criminals are continuing to commit crime longer: the average age at arrest is 29; nearly 60 percent of jail populations are over age

25, compared to half in 1983; and 23 percent of state prison inmates are over age 35, compared to just 14 percent in 1979.

**3. Law enforcement officers, courts, and corrections officials cannot, by themselves, reduce crime significantly. Crime prevention programs that address economic and social needs, and policies and incentives that empower citizens to reestablish effective community institutions and civic order also are essential.**

Changes in criminal justice systems alone will not significantly reduce crime. By the time police agencies, prosecutors, public defenders, judges, jailers, probation officers, and prison administrators get involved, their principal contribution is to control the cost of crime by being more efficient.

Actually reducing crime and its costs requires (1) prevention programs for infants (e.g., crack babies and abused children) through teenagers; (2) reexamination of the effects on crime of policies governing education, welfare, urban renewal, public housing, and economic development; (3) ready availability of drug treatment, literacy, and job training for adult criminals and youth; and (4) private and government efforts to support people in areas heavily hit by crime to strengthen social structures, maintain sound civic values, work with law enforcement, and assert individual responsibility. The success of any single prevention program is undercut by multiple problems of offenders and the effect of negative adult behavior on younger generations. At the same time, criminal justice costs continue to be driven by past prevention failures.

Only the elected officials of general government have the authority to reach across all the necessary public agencies and programs—such as health departments, school boards, and housing authorities—and focus them on crime prevention.

**4. Because of their unique constitutional authority and responsibilities, local, state, and federal chief executives and lawmakers play critical roles in determining the outcomes and effectiveness of the criminal justice system and crime prevention. Barriers exist to their informed involvement.**

The responsibility and the authority to address many criminal justice and crime prevention issues lie uniquely

with the chief elected officials of general government—including mayors, county chief executives, governors, state legislators, members of city councils and county boards, as well as the president and the Congress. First and foremost, legislative officials enact laws that define crimes and prescribe punishments. Executive officials carry out or oversee the enforcement of criminal laws. Chief elected officials also have the power of the budget, appointment powers over general government agency heads, authority to legislate policy, and ready access to the public to build support for prevention and foster citizen involvement.

The constitutional balance of powers also gives chief executives and lawmakers the responsibility to hold criminal justice officials accountable for efficient, effective, and responsive performance. General government officials can exercise this responsibility by using their assigned powers of approving budgets and setting personnel levels, passing sentencing laws, appointing correctional and police agency heads, enacting legislation, and adopting executive policies that set criminal justice procedures.

Informed involvement of lawmakers and chief executives sometimes is restrained because many have not had routine contact with the criminal justice system, and they are not conversant with legal procedures, terminology, and life-threatening situations. Research is limited and most data reporting is focused on one part of the criminal justice system, with definitions that are confusing or cannot be applied broadly. Finally, much of what is written is written by criminal justice officials for criminal justice officials and is difficult to use for policymaking or to determine accountability.

5. *Most crimes, and authorized punishments for them, are established by state laws.*

Historic fear of abuse of authority fostered a noncentralized structure of criminal justice in America. The U.S. Constitution specified only treason and counterfeiting (with respect to the United States) as federal criminal matters. Otherwise, criminal law was reserved to the states, with each state to reflect community standards through enactment and enforcement of its own criminal laws.

Today, state-local systems of criminal justice prosecute 94 percent of all serious crimes (felonies), county jails hold most persons detained on state or federal felony charges, state prisons hold 93 percent of the total prison population, and state and local governments expend 87.4 percent of all criminal justice funds. State and local governments, therefore, are the primary actors in criminal justice.

6. *The federal government's influence on criminal justice has been expanding faster than its financial commitment.*

Historic developments (e.g., Reconstruction and Prohibition), increased interstate travel and communication, the emergence of crime as a presidential campaign issue in 1964, and passage of five major anticrime bills in the 1980s have resulted in more than 3,000 acts being defined as federal crimes. In addition, federal court orders have mandated significant expenditures to correct conditions in prisons in 45 states and in 25 percent of all local jails holding more than 100 inmates. In contrast, federal assistance for

state and local law enforcement dropped from 27 percent of federal justice spending in 1973 to only 7 percent in 1990.

This loss of funding is criticized by state and local officials because they must produce the actual results promised under well-publicized federal anticrime initiatives. The federal government's criminal justice system, however, does not have to—and does not—accept jurisdiction over most “street crimes” even if a federal law covers the offense. Tougher federal sentences also add political pressure on state officials to enact similar increases.

7. *Criminal justice responsibilities are dispersed among municipal, county, state, and federal governments; their legislative, executive, and judicial branches; and many different agencies and authorities that police, adjudicate charges, and administer correctional programs.*

The structures of each state's and the federal government's criminal justice systems differ, as may the structures in urban and rural jurisdictions. However, one common element is the independence of key officials. Not only are most judges, prosecutors, sheriffs, and clerks of court—and sometimes other officials, such as coroners—elected independently, but agency heads usually serve at the pleasure of and are funded by different units of government. These checks and balances were created to protect persons against arbitrary persecution and punishment, but they need not bar collaboration where it could yield system improvements.

In 1990, 36.5 percent of criminal justice expenditures were funded by states; 29.0 percent by municipalities; 20.9 percent by counties; and 13.5 percent by the federal government. (When intergovernmental funding is attributed where it is spent, the municipal and county shares are slightly larger.)

- Municipalities fund over half of all policing activities, which comprise approximately 80 percent of their criminal justice budgets.
- County responsibilities are split almost evenly between policing (usually provided by county sheriffs), court-related functions, and corrections. Jails are a county responsibility; however, about half of county jail populations are awaiting trial for state and federal offenses (felonies) or local offenses (misdemeanors). Only one-third are serving sentences of less than one year for a local misdemeanor. The remainder have been convicted of a felony and are awaiting transfer into a state or federal prison.
- States spend 60 percent of their criminal justice budgets on corrections—mostly to fund state prisons. However, states also bear about half the cost of community corrections. On average, the remainder of state criminal justice spending is split evenly between policing and court-related services.
- The federal government funds all aspects of its own criminal justice system. It also provides grants to state and local governments. Comparing expenditures by the federal government with

total state and local expenditures, the proportions spent on policing are about equal, but correctional costs make up only 15.5 percent of federal criminal justice expenditures, compared to 36.3 percent of state and local expenditures; court-related expenditures by the federal government are more than twice the proportion spent by states and localities.

**8. *Rapid growth in the criminal justice system has significantly affected the responsibilities, workloads, and financial demands on different parts of the system, creating rising intergovernmental tensions.***

Since 1973, all governments have experienced extraordinary pressure to fund criminal justice services. This creates frustration when greater intergovernmental assistance is not forthcoming or when other governments do not meet their traditional responsibilities (e.g., a local jail backlogged with felons awaiting transfer into overcrowded state prisons).

- The 759 percent increase in state own-source criminal justice spending has been driven by prison growth, increased state assistance to local governments, and merger of local courts into many state systems. State taxes now fund 36.5 percent of criminal justice expenditures, compared to 24.2 percent in 1973, when municipal spending on police and federal assistance were more dominant.
- The 490 percent increase in county own-source funding has been driven mainly by jail growth, but many counties still bear significant court costs. Many urbanized counties also fund crime prevention programs.
- The 330 percent average increase in municipal funding masks significantly higher increases for police in large cities. This increase also does not include expenditures to prevent crime, such as street lights, recreation programs, and social services.
- The 345 percent increase in total federal criminal justice funding resulted from two opposite trends. The drop in federal aid to state and local governments offset increased costs incurred by the federal government itself due to more crimes being tried as federal offenses and increased prison time resulting from federal sentencing reform. From 1985 to 1990, direct criminal justice expenditures by the federal government grew almost as much as direct state criminal justice expenditures, making the federal government even less responsive to state, county, and municipal claims for restored intergovernmental funding, as in the War on Drugs.

Two areas where budget increases have not kept pace produced notable imbalances within the justice system:

1. Community corrections. In 1977, over 17 percent of correctional expenditures were for probation and pa-

role; by 1990, this had dropped to 11 percent. Specifically, from 1985 to 1988, probation and parole personnel increased at only half the rate of the number of offenders on probation or parole; hence, reduced supervision and programming have been accompanied by increased revocations and, starting in 1987, less use of probation as a sentencing option. These effects further increase the prison portion of correctional spending.

2. Court-related funding. Felony case filings in state courts increased over 8 percent annually from 1984 to 1989, while judicial and prosecutor personnel increased approximately 3 percent annually. Because speedy trial requirements apply only to criminal cases, reduced court funding has produced significant delays in hearing civil cases. In addition, where public defense funding has not kept pace, inadequate representation increases prison and jail populations.
9. ***Most crime occurs in big cities and highly urbanized counties.***

In 1989, cities with over one million population reported over 80 percent more crime and over three times more violent crime per person than the national average. Cities between 50,000 and one million people also had rates at least one-half higher than the national average. While only one in 280 rural households and one in 133 suburban households had a member who was the victim of a robbery in 1989, one in 59 households in cities over 50,000 population were victimized.

Spending for police has increased significantly faster in large cities than in small municipalities, and urban counties have experienced at least equal growth in court and jail demands. Some urban governments that do not have responsibility for funding schools spend half their budget on criminal justice.

**10. *Three out of four convicted offenders are on probation or parole. Most of those who are in prison have serious criminal histories, but prison populations can be reduced if corrections alternatives are strengthened.***

The standard statistic that three out of four persons convicted of a crime are serving their sentence in the community can be misleading because it combines misdemeanants and felons. It is more informative to note that over 90 percent of misdemeanants and two-thirds of felons are serving a sentence in the community. Therefore, community corrections already is used heavily for misdemeanors and minor felonies. Further expansion must focus on adequate staffing for programs that address more serious—but not yet career—criminal behavior. Even though over 90 percent of misdemeanants and two-thirds of felons are serving a sentence in the community, only 11 percent of state and county correctional spending supports probation and parole. About 85 percent of state and county correctional expenditures is committed to institutional care.

Confusion also has been created by studies that consider only the current offense of those being sent to prison rather than the criminal history of those in prison. Such studies can create the false impression that large numbers of prison inmates are nonviolent petty criminals. In fact,



whereas only 27 percent of the people admitted to state prisons in 1991 were sentenced for a violent offense, 60 percent of all inmates in state prisons had been convicted of a violent crime at least once. The difference stems from the fact that serious offenders serve longer sentences, and that some of those currently serving time for a nonviolent offense have violent criminal histories. Another 18 percent of all inmates were in prison on at least their fourth conviction for a nonviolent offense. The remaining 22 percent includes only 7 percent who are nonviolent first timers. (All drug offenses are categorized as nonviolent.)

Significant variations exist among the states in the use of imprisonment in relation to reported crime rates, arrests, and use of community sentences. Policy considerations vary, accordingly, in deciding what proportion of a state's prison inmates can be more cheaply and equally effectively placed in nonprison correctional programs and/or serve reduced sentences. The experience of states using early release of all but the most serious offenders to relieve prison overcrowding indicates a 10 to 15 percent reduction in prison populations is possible, without any appreciable increase in criminal activity, through shorter sentences and use of community correctional supervision and programs.

***11. Policies seldom link government agencies in order to establish a continuum to address literacy, job training, probation supervision, substance abuse, mental illness, housing, and other services needed to phase offenders back into the community.***

Approximately 60 percent of prison inmates are school dropouts; over half admit they were under the influence of alcohol or drugs at the time of their crime; and in 1986, less than 40 percent earned more than \$10,000 in the year before their arrest.

The responsibility for providing education, human services, employment, and criminal justice programs is dispersed among municipal, county, and state governments; departments within these governments; and independent school districts. Many offenders have needs that should be addressed simultaneously by the complementary actions of several agencies, such as adult education, drug treatment, public housing, and parole supervision. Inmates and juveniles who start programs in correctional institutions often cannot continue in similarly focused programs outside because general government agencies resist taking offenders, programs are not coordinated, and/or there is no room in the available programs. Finally, local governments resist policies to sentence state felons to community programs instead of prison if state funding does not finance the community programs. In turn, citizen resistance to having offenders in the community makes it difficult to focus remedial programs on first-time offenders to prevent them from becoming career criminals. Only the elected officials of general government have the political reach and authority to link agencies, programs, and funding to overcome present deficiencies in the system.

***12. The need for coordination of criminal justice activities far outstrips current efforts to promote coordination.***

Diverse authority complicates coordination. Because of the number of independently elected officials and the division of responsibilities between governments, lawmakers and chief executives must work with court officials and agency heads over whom they do not have hire/fire or budgetary authority. This lack of clear authority limits their ability to mandate coordination and obscures responsibility for coordination.

When coordinating bodies are established, principals cannot participate with equal authority. For example, a typical local coordinating body will include independent elected officials, agency heads from county and municipal governments, employees of the court, and middle managers from state bureaucracies.

Multiple types of coordination are needed to meet different needs. For example, a municipal police agency may need to coordinate with other municipalities, the county sheriff, state police, and/or federal agencies to achieve enhanced enforcement capability; with the county prosecutor, forensic laboratory, jail intake, and the court for more efficient procedures; and with the housing authority, code enforcement agents, schools, juvenile court, and the recreation department for prevention initiatives. Key officials may lose interest in participating in large coordinating bodies that do not focus on their immediate needs, and they simply may not have the time to participate in a number of special purpose bodies.

Coordination also has been undercut by competition for limited funds. Very few of the coordinating bodies mandated by the federal government in the 1970s still exist because most focused too much on obtaining federal grants.

However, some officials are using the most pressing problem in their system to draw players together. Successful efforts typically involve both a forum for debate and consensus building among policymakers, as well as a mechanism for operational collaboration. Such solution-oriented approaches have produced many different types of coordinating bodies, some of which have built on initial successes—for example, court case management to relieve jail overcrowding or criminal justice budget review—to establish ongoing comprehensive priority setting, planning, and coordination.

## **Recommendations**

### ***Recommendation 1*** **Balancing the Criminal Justice System**

The Commission finds that the criminal justice system is out of balance. Disproportionate emphasis has been placed on law enforcement and tough mandatory sentences, compared to appropriations and policies affecting the courts, prosecution, public defense, corrections, and crime prevention programs. Increasingly, federal statutes and court orders are setting the tone, while the costs are being borne overwhelmingly by the state and local governments. State laws, in some cases, also mandate criminal justice costs that are difficult for local governments to meet.

***The Commission recommends, therefore, that state legislatures and the Congress reexamine their criminal justice systems to rectify imbalances among law enforcement, adjudica-***

tion, and corrections capabilities, Any additional criminal justice mandates proposed in the Congress and state legislatures should be considered for enactment only after thorough system impact analyses have been prepared and aired with affected governments, and with affected law enforcement, prosecution, public defense, corrections, and crime prevention interests. Special attention should be given to the following issues:

#### Prevention

- A. The priorities and programs of family support, health, and education agencies are crucial in addressing the reasons why some children grow into a life of crime.
- B. Intergovernmental coordination of the delivery of welfare, housing, education, employment, drug treatment, health, and other human services is essential to the success of prevention efforts.
- C. It is particularly important that resources be directed to where crime is the highest and that citizens be empowered to reclaim their communities.

#### Policing

- D. The proactive role of police and sheriffs' deputies in crime prevention and in working with residents of high-crime communities should be promoted.
- E. Police and sheriffs' deputies should assist with the successful return to the community of persons on pretrial release, probation, and parole.
- F. To protect the integrity of selection and training, surges in the hiring of police and sheriffs' deputies should be avoided.

#### Adjudication

- G. General government officials should facilitate improvements in court case management through relevant involvement of executive branch systems-support expertise. To the maximum degree appropriate, more use should be made of summons in-lieu of arrest, deferred prosecution, pretrial release, video depositions, expedited trials, and reminders to appear for trial.
- H. Integrated state court systems, with state assumption of financing, should be considered where not in use to improve the functioning of lower courts.
- I. States should support small prosecutor offices and courts by providing access to legal research, pertinent continuing legal education, and multijurisdictional support.

#### Jails

- J. States should develop jail operating and construction standards, with particular attention to personnel requirements and training, and should provide technical or financial assistance to localities in meeting such standards. Federal and state courts should avoid prescribing detailed remedies to jail and prison overcrowding, except in extreme cases.

- K. Counties holding state prisoners should be paid at appropriate rates that are indexed to cost increases in comparable state facilities.
- L. Separate facilities and services should be provided for mentally ill, inebriated, and drug dependent detainees.
- M. Academic, job training, and substance abuse programs should be provided for inmates, in close cooperation with community agencies, to facilitate continued participation upon release.

#### Corrections

- N. Sentencing guidelines should be balanced against realistic estimates of incarceration capacities; the program capacities of probation, parole, and alternative community sanctions; and the recidivism rates of persons in these alternative programs.
- O. Community-based and institutional correctional programs, personnel, and staffing levels should be upgraded.
- P. Academic, job training, and substance abuse programs and mental health services should be provided for inmates. Prison and jail industries, using private contractors, should be authorized as one means of giving offenders marketable skills, where such contractors would not create unfair competition with private businesses.
- Q. The distinct functions of supervising probationers and gathering pre-sentence information on offenders should be separated and supported adequately.
- R. Greater use should be made of community-based alternatives to incarceration — such as community service, restitution, and enhanced supervision; community corrections acts to provide a framework for managing intermediate sanctions should be considered.

#### Improved Management

- S. Professional administrators should be used to support officials throughout the criminal justice system in implementing needed management improvements.
- T. When comparing privatization alternatives with public operations in criminal justice, full costs and liabilities should be considered, on both sides of the equation.
- U. Multigovernment (regional) correctional, training, and other criminal justice activities should be authorized and encouraged by states where they have the potential to produce cost savings and improved services.

#### Intergovernmental Funding

- V. State and federal criminal justice grant formulas should direct funds to where the money could do the most to reduce crime.
- W. State and federal grants should encourage community corrections for first-time and nonviolent offenders and emphasize cooperation between government entities.
- X. State finding assistance to localities should be indexed to increases in comparable state criminal justice programs.

- Y. *The federal variable pass through formula should be administered to ensure that federal money is apportioned according to the different degree of state and local criminal justice responsibility in each state.*
- Z. *Federal grants should avoid earmarking that prevents use in efforts that address the range of needs across the states.*
- AA. *Federal corrections research, training, technical assistance, and information-sharing programs, which are outstanding, should be continued and emulated in other fields of criminal justice. Additional research should be encouraged on identifying career criminals so they can be isolated more effectively from society.*

#### Constitutional Balance

- BB. *Shifting the prosecution of criminal cases from states to the federal government and increased federalization of individual criminal activity (not based on multistate access, against a federal agency, or a threat to national security) should be curtailed.*

### Recommendation 2 Informing and Involving Policymakers

The Commission finds that the chief elected officials of general government—including mayors and members of municipal councils, county chief executives and county boards, governors and state legislators, and the president and members of Congress—play unique and essential roles in criminal justice. These roles include (1) legislating the definitions of crime; (2) guiding the acceptable range of sentences that may be imposed on convicted persons; (3) establishing and reorganizing the law enforcement, court, and corrections agencies that administer justice; (4) funding these activities; and (5) engaging in policy oversight to ensure that criminal justice agencies function efficiently and effectively in response to the will of the people. All of these roles must be played knowledgeably in relation to each other if the system is to work well.

The Commission finds, however, that some elected policymakers are not fully informed about the complexities of the criminal justice system to make decisions that foster the intergovernmental, interbranch, and inter-agency relationships that determine the ultimate success or failure of their policies. Their lack of a broad context for decisionmaking may expose them to strong public pressure for immediate actions in response to isolated occurrences reported in the press, whether or not such actions make sense in the long run.

*The Commission recommends, therefore, that the chief elected officials of general government (1) insist on being informed about the basic characteristics, interrelationships, and current facts of the criminal justice system with which they interact; (2) hold criminal justice officials accountable for supporting improved system performance by using budget leverage; and (3) actively engage the other key actors in the system and the public in exploring policy options that take into account a systemwide perspective. Clear distinctions should be maintained between policy setting by general government*

*elected officials and detailed administration of programs by professional administrators and program officers. It is the responsibility of the general government elected officials to establish a clear, balanced, and workable framework for the criminal justice system, but not to micro-manage it so that appropriate administrative and professional discretion cannot be exercised.*

### Recommendation 3 Improving Information and Decision-Support Systems

The Commission finds that information technology is making possible much more powerful information systems and analytical processes for supporting criminal justice decisionmaking by elected officials. These systems have the potential to assist elected policymakers in forecasting future personnel and facilities needs more reliably, based on past trends and simulations of proposed sentencing changes or other policy options. They also can assist in analyzing the budgetary impacts of mandates from other governments. In addition, information systems can help improve the efficiency and effectiveness of criminal justice processes for crime investigations, court case management, and correctional classification and supervision. These tools are best used in close cooperation with active participants in the system, including close examination by the elected officials of the assumptions on which the analyses are based.

*The Commission recommends, therefore, that the chief elected officials of general government support the development and use of enhanced criminal justice decision support and management information systems, the development of performance indicators for key activities, and the collection of the required data. The Commission recommends, further, that these officials engage general government personnel from budgeting, data systems technology, and planning offices in the development and use of these information systems so that they will serve the needs of state and local decisionmakers realistically and reliably. In particular:*

- A. *Criminal justice planning capacity is needed for (1) individual criminal justice agencies, (2) criminal justice coordinating bodies, (3) the chief executives and budget offices of municipal, county, and state governments, and (4) legislative committees responsible for criminal justice policies and appropriations.*
- B. *Data collection and reporting to meet the needs of criminal justice planning should be independent of and insulated from political influence so that the data will be respected and used by all policymakers and program managers. Crime, arrest, conviction, and incarceration rates should be collected and correlated.*
- C. *Information systems should be developed to support the preparation of fiscal impact statements. Such statements should be required for proposed changes in the criminal code and proposed budgets designed to fund each part of the criminal justice system. These statements should show the financial and workload effects of proposals on the other parts of the criminal justice system. States should develop the analytic capability to determine impacts on indi-*

*vidual local jurisdictions. Localities should develop the capability to analyze the impact of state proposals on them.*

- D. Processes to estimate the need for additional prison and jail space should require involvement of all criminal justice agencies to document capacity limits, catalog alternative programs and policies that can reduce space needs, present an analysis of the specific types and numbers of offenders who can be diverted by these alternative programs, test assumptions against projected law enforcement activities and priorities, and demonstrate professional competence in making population projections.*
- E. Systems are needed that can reliably estimate the amount of general revenue relief that can be achieved from revenues (e.g., fines and program fees) produced within the criminal justice system.*
- F. Information gathered on offenders should be shared more readily between criminal justice agencies with the goal of improving the accuracy of the information used by each agency and eliminating redundant efforts.*

#### *Recommendation 4* **Establishing and Supporting Criminal Justice Coordination**

The Commission finds that the criminal justice system needs to be better coordinated. Although some coordination attempts in the past were not successful, others have been. Successful coordination brings together the diverse actors in the system to get to know each other, develop **trust**, and consider common problems. Participation by the chief elected officials of general government is important to hold the group together and to cement the essential link between the general government and the criminal justice community.

*The Commission recommends, therefore, that the chief elected officials of state and local general government take the lead in establishing and participating in criminal justice coordinating bodies. Where such bodies exist — including, for example, criminal justice budget review committees, jail or prison planning task forces, community corrections boards, and juvenile justice coordinating councils — the Commission recommends that the chief elected officials of general government do all in their power to support and enhance their development as useful problem-solving forums, including regular participation of general government officials in councils of their peers. For example, the mayor and county executive should be part of coordination efforts between the sheriff, prosecutor, chief judge, head of probation, and police chiefs, as well as between chief criminal justice officials and treatment agencies. Local general government elected officials and state legislators should be part of state planning bodies.*

*Coordinating bodies should address essential tasks and be given authority to perform them. The membership should include appropriate legislative and executive representatives of the municipal, county, state, and federal governments, plus representatives of police, sheriff, prosecutor, crime lab, public defender, judges, clerk of court, prison, parole, probation, and treatment provider offices. The membership of each coordinating body should reflect its purposes.*

*The charge to these councils should be to coordinate general government and specialized criminal justice goals, to help identify and realize intergovernmental and interagency operating efficiencies that no single group acting alone could produce, to help balance the system so that bottlenecks do not develop and choke off the effective operation of the system, and to help develop community consensus on criminal justice philosophies and implementation policies.*

*State and/or local criminal justice commissions are needed and should include adequate attention to community corrections. Criminal justice is and should remain largely a state and local responsibility, and a federally mandated structure for state or local coordination should be avoided.*





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# 7 — THE CHALLENGE

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**M**any elected officials of state and local general government are frustrated by the criminal justice system. Criminal justice budgets are perceived to be out of control; indeed, the rate of growth in criminal justice spending has outstripped even Medicaid almost every year since the mid-1970s.<sup>1</sup> Tougher sentencing laws have not reduced crime; in fact, violent crime rates have begun to climb. A quarter of the counties with jails holding at least 100 inmates and 33 state prison systems are under court orders to relieve overcrowding. The use of alternatives to prison and jail is being undercut by excessive caseloads that compromise probation supervision and indigent defense. Civil cases are not being heard because criminal cases are flooding the courts. And the fear of crime remains a perennial and potent campaign issue.

General government elected officials' who have attempted to alter these trends report that they often are brushed aside or intimidated by criminal justice officials, overwhelmed by intergovernmental actions beyond their control, and/or unable to obtain adequate information for sound decisionmaking. For many of these officials, increased efforts to assume responsibility have meant only more frustration.

This report explores the intergovernmental, policy, funding, and management issues facing general government elected officials in dealing with the effects of explosive growth in criminal justice during the last decade and a half and with the challenges of the next decade. It also is intended to serve as a source of information for general government officials who have not had extensive contact with the criminal justice system, as well as providing insight for criminal justice officials on how to work with general government officials toward more effective action.

General government elected officials carry out many criminal justice functions: setting penal policy, serving as ombudsmen for the public, overseeing management and budgets, negotiating intergovernmental arrangements, providing leadership, and defending constitutional imperatives. Therefore, meeting the criminal justice challenge will require full engagement by knowledgeable officials—on the general government side and on the criminal justice side.

To lay the groundwork for discussing this challenge, the remainder of this chapter provides an overview of the criminal justice system, tracking the extraordinary growth and prospects of future growth. This overview also shows how the criminal justice system operates, and definitions are introduced as needed. The chapter concludes with a brief review of the challenges related to our governmental framework of checks and balances and noncentralization that are intertwined with problems driven by criminal justice concerns.

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## *DIMENSIONS OF THE PROBLEM*

Criminal justice problems in the United States seem inexorable and foreboding. Although the dynamic nature of crime and society's response to it produced some signs in 1991 that the rate of growth may be lessening, even the most optimistic reading of selected trends cannot outweigh other **signs** of continued pressures on the criminal justice system. Furthermore, a decade and a half of unremitting growth has produced problems that cannot be ignored, even if all growth were to stop tomorrow.

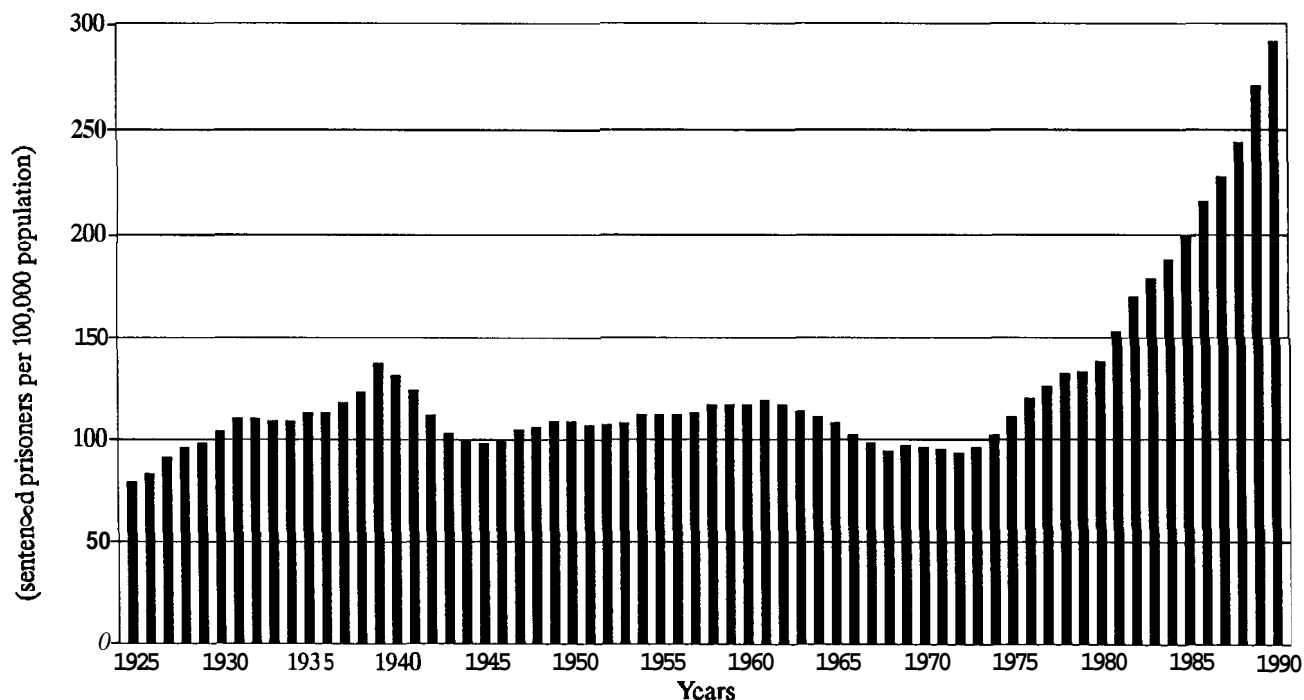
The following summary of criminal justice trends underscores another major fact about the system: it does not operate as a system. Criminal justice officials and general government elected officials typically operate independently of each other and therefore have no coordinated influence on criminal justice policy. A major theme of this report is the challenge to general government elected officials to understand the ramifications of these independent actions and to forge a system approach.

### **Historic Trends**

#### **Prison Population Growth Reflects Major Shift**

Figure 1-1 (page 10) demonstrates the dramatic change in criminal justice in the United States, as reflected by the number of persons per 100,000 population serving time in state and federal prisons.

Figure 1-1  
Sentenced Prisoners in State and Federal Institutions, 1925-1990



Source: U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics, 1990*.

For 50 years, from 1925 through 1974, the average annual increase in the proportion of the U.S. population in prison was only 0.5 percent. This suddenly increased to an average annual growth of 6.2 percent from 1974 through 1985, escalating further from 1986 through 1990 to 7.9 percent per year. For 1990, the growth dropped to 7.7 percent.<sup>3</sup> These unparalleled rates of growth have resulted in the United States having a higher percentage of its population behind bars than any other nation in the world.<sup>4</sup>

Further, because the graph is based on the number of inmates per 100,000 population, these rates understate actual growth. The total number of prison inmates has climbed even more steeply, 238.2 percent from 1973 through 1990, even though the incarceration rate increased only 186.3 percent.<sup>5</sup>

While the extraordinary rates of growth apply to both state and federal prison populations, the predominant increases have been in the state systems because criminal justice is primarily a state responsibility. State prisons hold 93 percent of all sentenced felons! Since 1973, state prison populations have grown more than 50 percent faster than federal prison populations, mostly because federal crimes are largely "white collar," in contrast to the "street crimes" handled by the states. In recent years, however, growth rates in the federal system have been similar to those in the states.<sup>6</sup>

#### Why Prison Populations Have Increased

Prison is the end of line. The factors that have led to the large number of people behind bars reflect policies and ac-

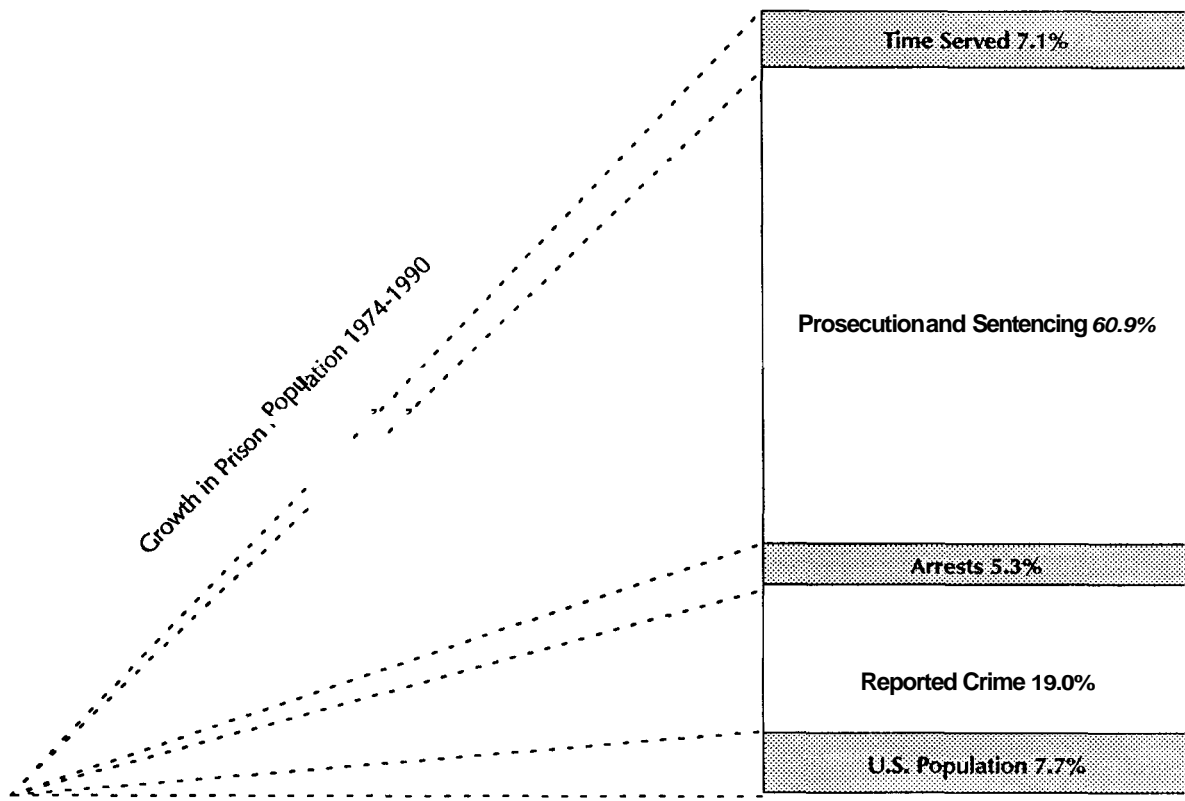
tions of the criminal justice system as a whole: the decision not to parole, the length of the sentence to be served, the decision to sentence to prison rather than probation, the determination of guilt, the decision to prosecute, the decision to arrest, the ability to arrest, and the commission of crime.

While subject to the limitations of the FBI and Bureau of Justice Statistics reports on which it is based, Figure 1-2 summarizes the relative effects of general population growth, reported serious crime, felony arrests, prosecution and sentencing, and length of stay on the total growth in U.S. prison populations.\* (Their relative weighting was based on simply taking the reported growth in the major criminal justice elements and subtracting the growth of any preceding factors.)

The heavy impact of sentencing legislation and court-related sentencing policies is evident; similar sentencing impacts have been documented within state systems and in the federal criminal justice system? This picture of criminal justice trends shifts the traditional debate from the impact of more police activity by municipalities to the impact of legislative and court-related sentencing policies. Equally important for general government elected officials, this analysis provides an important perspective on the relatively small contribution of increased crime to the criminal justice budget pressures. The following subsections briefly discuss the trends depicted in Figure 1-2.

**Level of Crime.** While the nation's population increased 18.5 percent between 1974 and 1990,<sup>10</sup> the *National Crime Victimization Survey (NCVS)* reports that the

Figure 1-2  
Factors Contributing to Criminal Justice Growth, 1974-1990



Source: ACIR.

number of crimes is about what it was in 1973, having fallen 17.0 percent from a high reached in 1981." By this measure (see Figure 1-3, page 12), increased crime is not responsible for the load on the criminal justice system.

In significant contrast, the FBI's *Uniform Crime Report* (UCR) shows a 66 percent increase in the number of serious crimes reported since 1973, as shown in Figure 1-4 (page 12).<sup>12</sup>

These conflicting indicators of crime levels are both produced by the U.S. Department of Justice. Both are widely reported. The variation between the two measures reflects the difference between how much crime touches individuals and how much of it must be dealt with by the criminal justice system. It is particularly important for elected officials to know whether or not the crime rate has increased: since 1981, it has not. It is equally important to acknowledge that because more citizens are reporting crime, the number of crimes handled by police and therefore by the criminal justice system has increased.

The discrepancy between these two measures of crime shows how differing statistical approaches and data gathering methods can confuse policymakers. General government officials must sort through four categories of crime statistics. Each gives a different and incomplete picture, in part because of the nature of criminal activity. The

Focus description of these reporting tools (page 13) is intended to provide guidance in approaching crime statistics, to explain why the FBI's UCR trend is the best measure to relate to criminal justice system growth, and to introduce standard terms used in distinguishing types of crime.

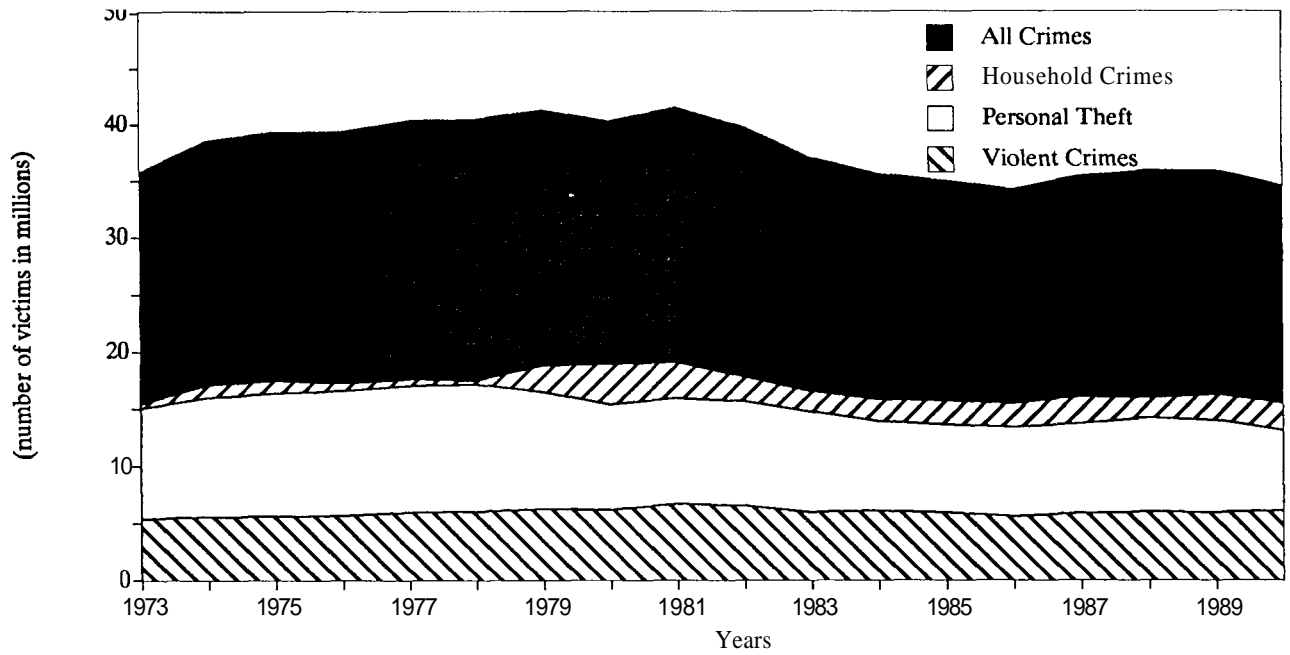
**Arrests.** So far, this analysis of factors outside the criminal justice system, that is, population growth and increases in reported serious crime, has accounted only for approximately 25 percent of the increase in the number of serious offenders. The rest of the increase is due to policy changes within the criminal justice system, some of which have been made directly by general government elected officials.

The first action of the criminal justice system is to make an arrest. The number of arrests for serious Part I crimes increased 62.7 percent between 1973 and 1989, which is almost identical to the 63.5 percent increase in the total number of Part I crimes reported (see Figure 1-5, page 13).<sup>17</sup>

Although arrests for Part II offenses increased only 57.9 percent since 1973,<sup>18</sup> policies advocated by elected officials were influential in two leading areas—(1) a 117 percent increase in drug arrests, which has had an impact on prison populations, courts, and jails, and (2) an 83 percent increase in drunk driving arrests, with an impact on courts and jails (see Table 1-1, page 14).

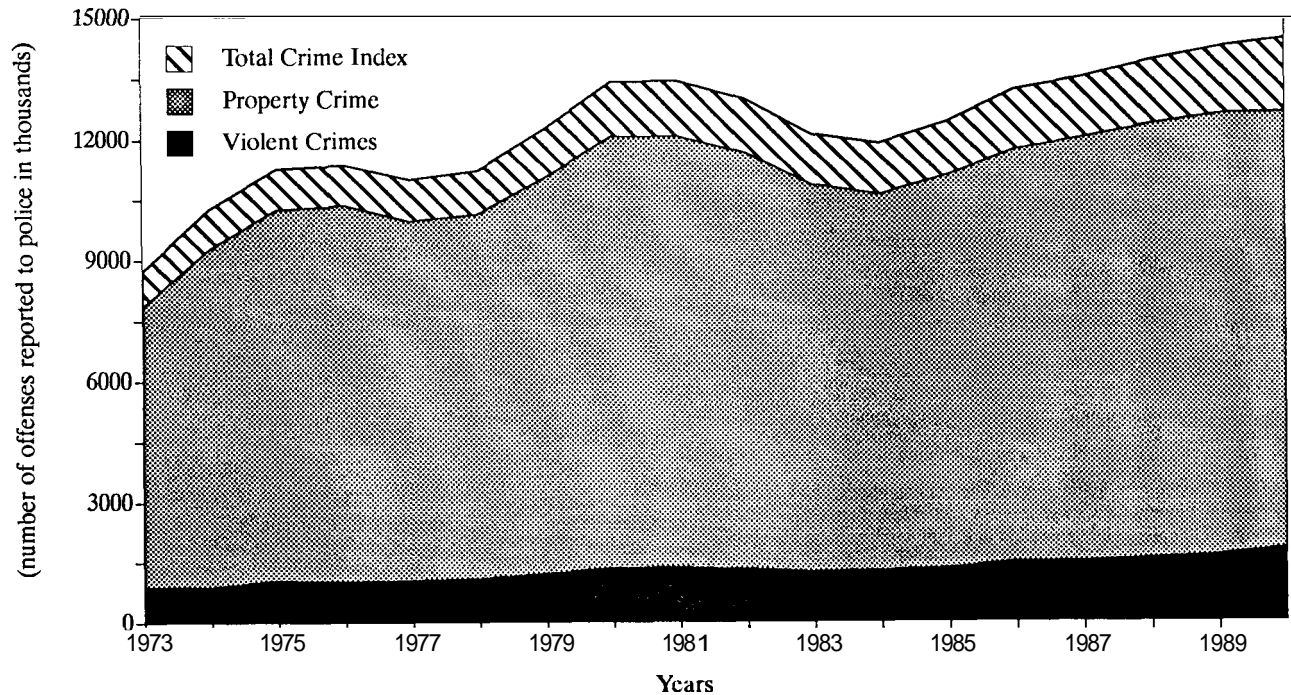
*Figure 1-3*  
**Victimization Trends, 1973-1990**

(excluding murder and crimes against businesses; including unreported crimes and some misdemeanors)



Source: "Criminal Victimization, 1990," *BJS Bulletin*, October 1991.

*Figure 1-4*  
**Number of Index Crimes Reported to Police, 1973-1990**



Source: U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics, 1990*.

*Focus*  
**Definitions of Crime**

**The first major category is serious crimes reported to the police.** This category is listed first because these crimes have the greatest impact on the criminal justice system. They are referred to as "Part I" or "index" crimes. Reports of their incidence are gathered as part of the **FBI's Uniform Crime Report**. Index crimes are divided into two categories: violent crimes (murder and non-negligent manslaughter, rape, robbery, and aggravated assault) and property crimes (burglary, larceny, motor vehicle theft, and arson). All of these crimes are "felonies," which are defined in almost all states as crimes punishable by more than one year in prison. Therefore, increases in index crimes would relate most directly to increases in prison populations.

**A second category is crimes reported in the NCVS.** The survey was instituted in the early 1970s to estimate crimes against persons, both felonies and lesser crimes, whether or not they have been reported to the police. Unreported crimes, of course, do not affect the criminal justice system, but they can have a significant bearing on public confidence and the political impact of crime. Through repeated random surveys, the NCVS estimates that over 35 million crimes against persons were committed in 1989, but only 38 percent were reported.<sup>13</sup>

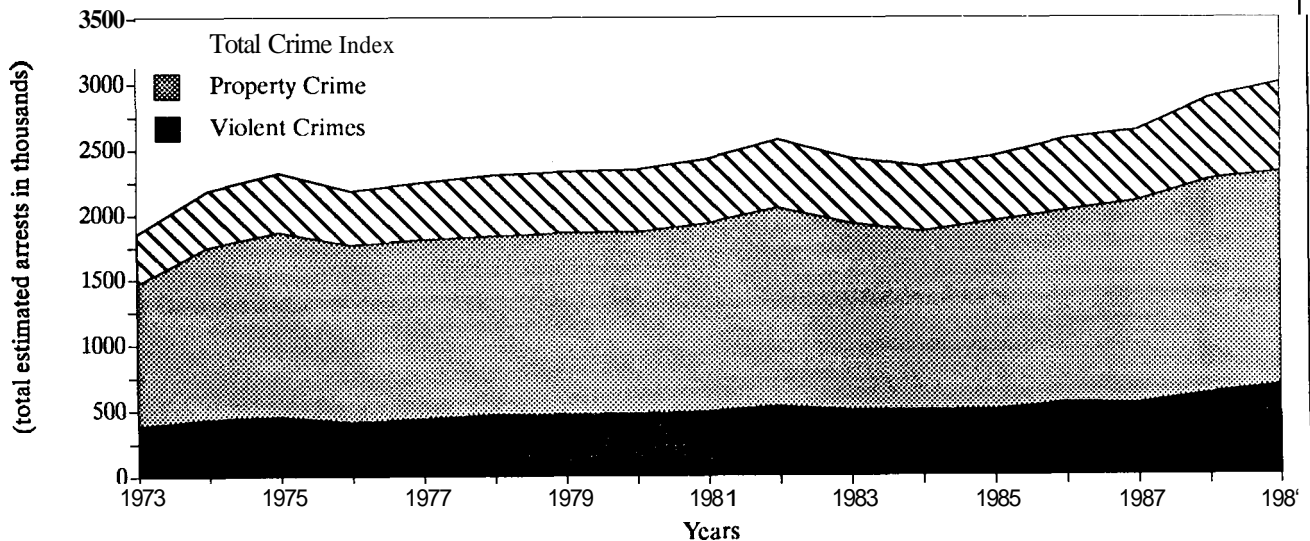
Given this estimate of the percentage of unreported crime, the fact that the UCR recorded 14.3 million serious crimes reported to the police in 1990<sup>14</sup> is not out of line with the NCVS estimate of 34.4 million victimizations—especially with sampling difficulties in households located in high-crime areas and the fact that the NCVS does not include murder or crimes against businesses. Thus, the fact that the UCR showed an increase

in crime while the NCVS did not can be explained by the NCVS's own report that since 1973 there has been an increase from 32 percent to 38 percent in the percentage of crimes reported and confirmation by both the NCVS and the UCR that violent crime has not increased, while the large number of minor crimes covered by the NCVS has decreased.<sup>16</sup>

**A third major category of crime is drug crime.** Crime statistics do not include drug offenses because they are not committed against people who would report them either to the police or in a survey. Drug crimes can be tracked only at the point of arrest. Therefore, government officials need to be aware that they see only part of the picture when they look at crime statistics—rather than arrest statistics. The UCR does track arrests separately, and this arrest report refers to drug crimes and crimes other than index crimes as "Part II" crimes.

**A fourth category of crime is minor crimes that have a heavy impact on local jails, juvenile detention, and courts.** These minor crimes are termed "misdemeanors," which are not punishable by a prison sentence. Misdemeanors include drunk driving, most domestic violence, and some types of gang activity, all of which have had a heavy impact on local government resources. However, a high percentage of these and other misdemeanors are unreported, and, as with drug crimes, this fact needs to be kept in mind when looking at most crime statistics. Part II arrest reports do include misdemeanors along with non-Part I felonies, and at least 30 percent of the victimizations reported in the NCVS concern misdemeanors.

*Figure 1-5*  
**Estimated Arrests for Index Crimes, 1973-1989**



Source: "Criminal Victimization, 1990," *BJS Bulletin*, October 1991.

*Table 1-1*  
**Arrests for Ten Most Common Part II Crimes in 1989 and Percentage Change Since 1973**

Part II Crimes	1989	Percent Change
Driving under the Influence	1,736,200	83%
Drug Abuse Violations	1,361,700	117
Simple Assaults	978,900	155
Drunkenness	822,500	-49
Disorderly Conduct	776,600	8
Liquor Laws	657,300	142
Fraud	376,600	164
Vandalism	307,800	82
Weapons	225,200	45
Stolen Property	176,800	96

Source: U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics, 1990*.

As a result of the war on drugs in the last half of the 1980s, 31 percent of 1989 prison admissions were for drug offenses.<sup>19</sup> While drug arrests include misdemeanors, the same ratio of arrests to prison admissions as for Part I felonies, all drug arrests must be included to approximate a 31 percent admissions figure.

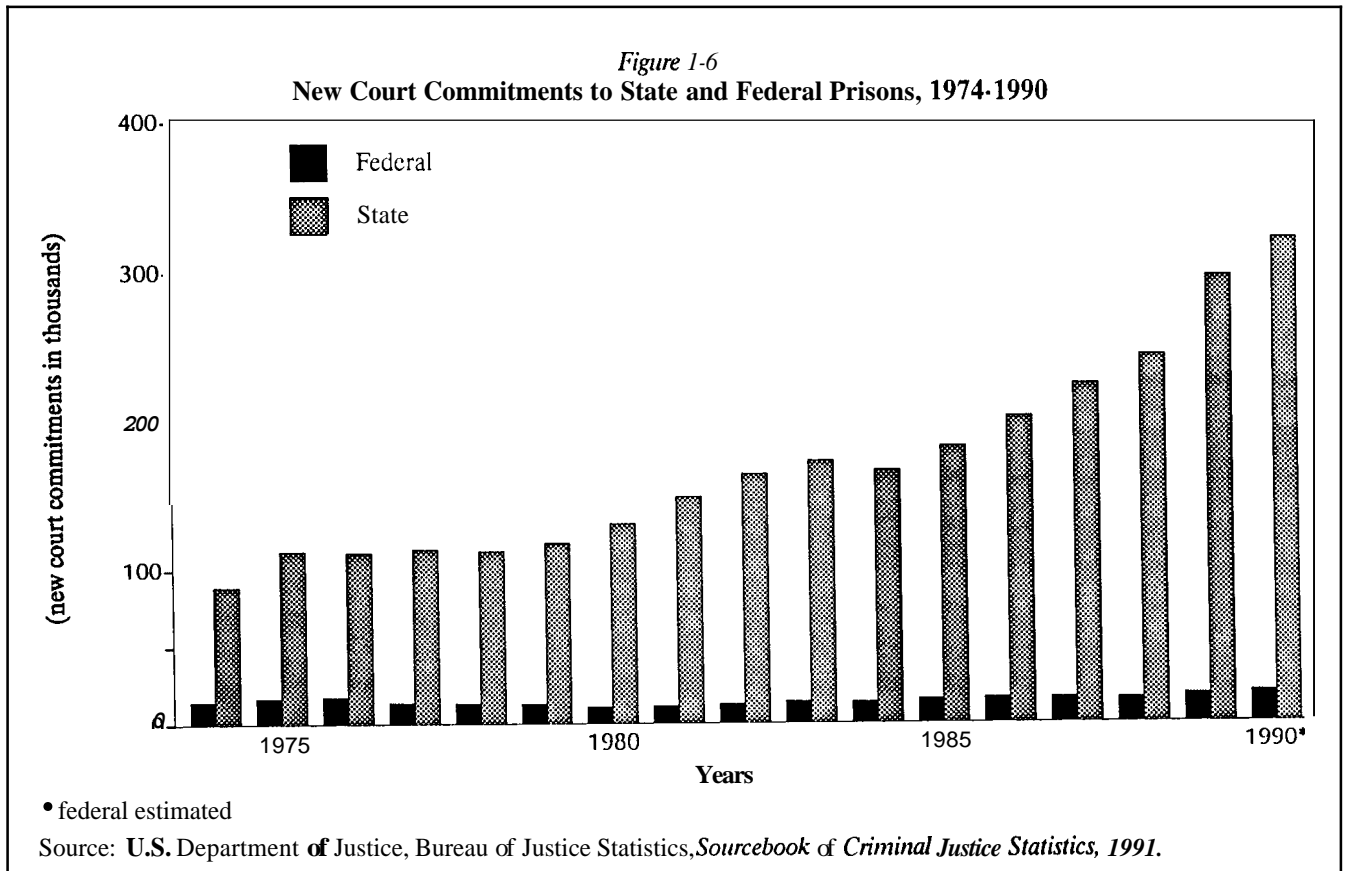
Therefore, combining Part I arrests with all drug arrests produces an estimated 76.3 percent growth in arrests

from 1973 to 1989, although the influence of drug arrests on the growth of prison populations has not been constant over the full period. The fluctuations in drug arrests is shown later in Figure 1-10 (page 18).

**Prosecution and the Decision to Imprison.** Just as the commission of a crime is not necessarily followed by a report of the crime and the report is not necessarily followed by an arrest, an arrest is not necessarily followed by a charge (prosecution), nor is prosecution necessarily followed by conviction, nor is conviction necessarily followed by a prison sentence. However, the decision to imprison has grown substantially faster than either arrests or reported crimes.

While arrests increased only 76.3 percent from 1973-1989, the ultimate decision to give a prison sentence increased 221.2 percent from 1974-1990, as shown in Figure 1-6.<sup>20</sup> This extraordinary increase in court commitments to prison reflects a significantly tougher stance toward imprisonment due to sentencing laws passed primarily by state legislatures and to the exercise of court discretion, briefly described in the paragraphs that follow.

Once a person is convicted of a felony, three factors determine whether he or she will serve time in prison. First, and increasingly important, sentencing laws enacted by the state legislature (or Congress for federal prisoners) may require imprisonment. Second, within ranges allowed by the law, the judge may exercise discretion. Third, the judge's decision may be influenced by recommendations from the prosecutor and the defense, and by a pre-sentence report from a probation officer.



**Length of Time Served.** The steep growth in prison populations also has been influenced by the length of time an individual spends in prison. This is the result of a chain reaction among the following four elements: (1) the length of the original sentence, as determined by legislators and the court; (2) good time and discretionary release policies, also prescribed by legislation; (3) mandatory emergency release policies to enforce a cap on the number of prisoners that may be held in a state's prison facilities; and (4) the number of released inmates who violate parole conditions and are brought back to serve the remainder of their original sentences.

The uneasy balance among these elements has varied in each state since the mid-1970s. The more prison space a state has built, in general, the more the balance has moved toward longer prison stays. However, on average, the increase has been less than 20 percent.

This is a modest estimated increase, given that many states and the federal government passed numerous bills prescribing longer sentences. Typically, however, such legislation resulted in a level of overcrowding that forced some type of relief. Relief measures included (1) state legislation to provide more generous good-time credit, (2) state legislation placing a cap on the prison population, (3) slower intake of state-sentenced inmates from local jails; and/or (4) a federal court-ordered cap. To the degree that these relief measures led to less discrimination in parole, they in turn have contributed to the very significant 691.3 percent increase in the number of prisoners returned for parole and probation violations, as shown in Figure 1-7.

Admittedly, the sharp increase in the number of offenders being admitted/returned to prison to serve the re-

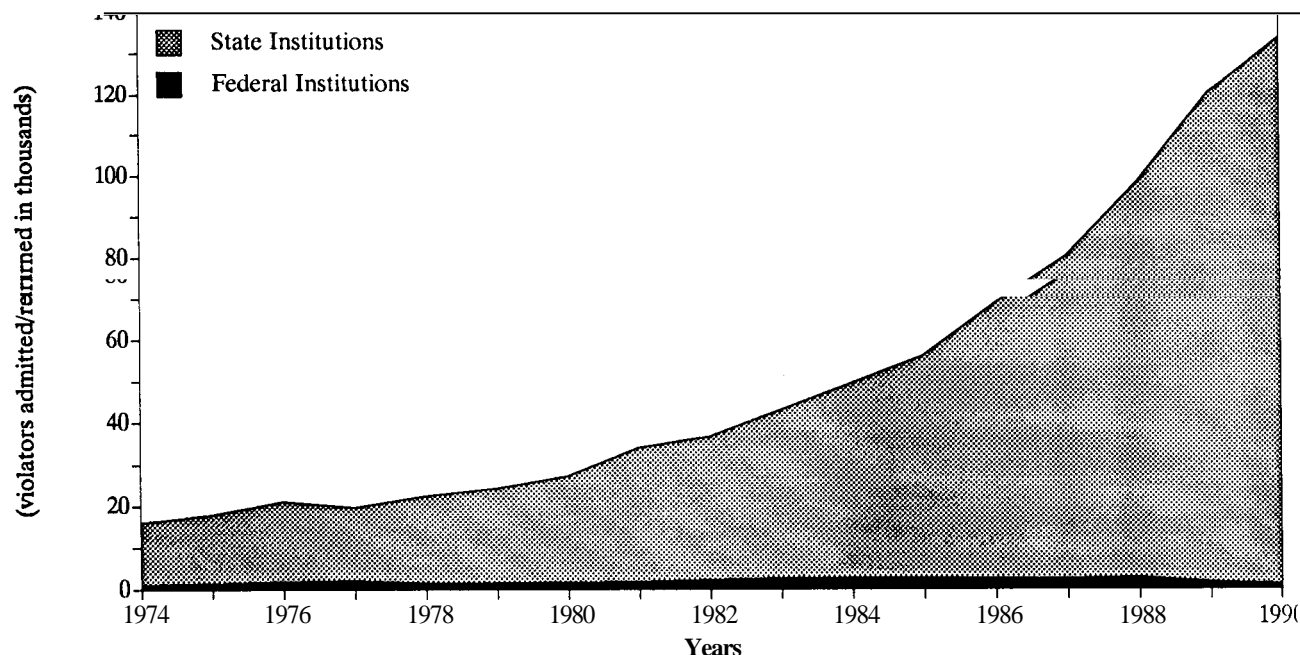
mainder of their sentences also could reflect tougher enforcement of probation or parole conditions and more serious violations being committed by people on probation or parole, as well as relatively indiscriminate emergency release measures necessitated by overcrowding. Whatever the reasons, the number of probation and parole violators admitted/returned to prison grew from less than 10 percent of the admissions in 1974 to **28.2 percent** in 1990.

### Impacts on Other Elements of the Criminal Justice System

Besides tracing reasons for the growth in the number of prison inmates, the foregoing analysis also touched on growth affecting other parts of the criminal justice system. Increased reporting of crime by citizens, along with more police and investigative tools, which led to more arrests, increased the caseloads of jails, forensic laboratories, prosecutors, public defenders, and judges. Caseloads grew even more dramatically with the increasing proportion of arrests being prosecuted. Recent increases in violent crime and drug arrests have intensified these post-arrest impacts further while also straining police and sheriff departments.

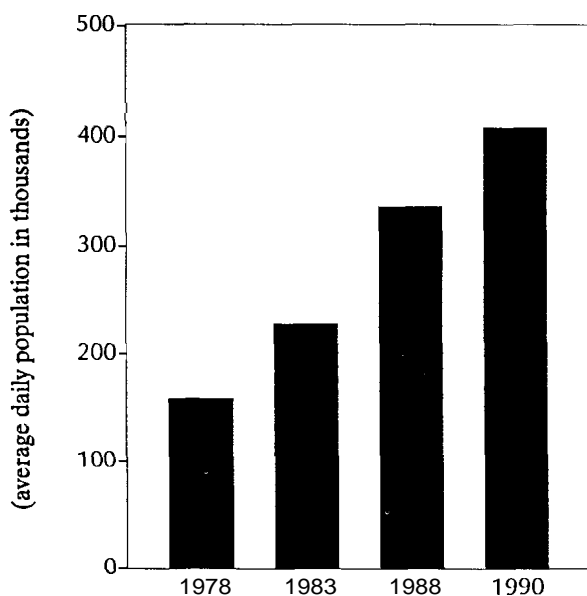
**Jails.** The growth in jail populations has been even greater in some localities than the growth in state prison populations. A discussion of local jails warrants special attention because they are affected by, rather than having much effect on, the rest of the criminal justice system. A jail (or a lock-up where this is a separate municipal facility) must receive arrested individuals. If the prosecutor decides to press charges, the county jail must continue to

Figure 1-7  
Parole, Probation, or Other Conditional Release Violators Admitted/Returned to Prison, 1974-1990



Source: U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics, 1991*.

**Figure 1-8**  
Average Daily Population of Jail Inmates, Selected Years, 1978-1990



Source: U.S. Department of Justice, Bureau of Justice Statistics, "Jail Inmates, 1990," *BJS Bulletin*, June 1991.

hold those whom the court magistrate will not release on bail until all the court-related officials are ready to act. The jail, then, keeps those who are sentenced to prison until the official court records are completed and the state accepts the prisoner. In addition, the jail holds misdemeanor offenders sentenced to jail time.

Figure 1-8 shows a 158 percent increase in the average daily jail population between 1978 and 1990. The average annual increase in jail population was the same as in prison populations during much of the 1980s, although there were greater swings from year to year. Record growth rates of over 15 percent were reported in 1988 and 1989. However, jail populations grew only 5.9 percent in 1990

due in part to the fact that there were 17 percent fewer state inmates awaiting transfer.<sup>21</sup>

Although the size of both jail and prison populations reflects increases in reported crime, general population growth, and changes in arrest policies (particularly drug arrests), jail populations in particular are affected by court backlogs and pretrial release policies. From 1983 to 1989, the percentage of those in jail awaiting trial grew from 39.9 percent to **42.6 percent**.<sup>22</sup> State prison overcrowding has increased the number of prisoners continuing to be held in local jails in at least three states by 20 to 30 percent.<sup>23</sup>

**Public Expenditures.** For many general government elected officials, the most crucial aspect of the changes in criminal justice is growth in state and local expenditures. There are three ways to view this growth: How much has criminal justice spending grown relative to other public programs? Have all areas of criminal justice spending grown equally? Have funding requirements affected some governments more than others?

Table 1-2<sup>24</sup> indicates that spending on corrections increased faster than any other area of public spending between 1970 and 1990. Although per capita expenditure on corrections is a small fraction of state and local expenditures on education or on welfare and health, many general government elected officials view corrections as eating up discretionary dollars for more constructive—or simply more politically popular—initiatives. The 20-year shift in per capita state and local spending also reveals a much greater increase in spending for corrections than for police or courts.

Figure 1-9<sup>25</sup> illustrates the significant differences in the growth of criminal justice own-source funding among states, counties, municipalities, and the federal government. The former dominance of municipal spending for police has been overtaken by state funding for criminal justice needs. Between 1973 and 1990, total state funding (own-source direct expenditures and intergovernmental assistance to localities) increased 759 percent, pushing the state share of criminal justice funding from 24.2 percent to 36.5 percent of the total. County own-source funding increased 491 percent, changing its share only slightly from 20.1 percent to 20.9 percent. In contrast, municipal own-source funding increased at half the rate of state spend-

**Table 1-2**  
Per Capita Spending by State and Local Governments on Major Programs, Selected Years, 1970-1990

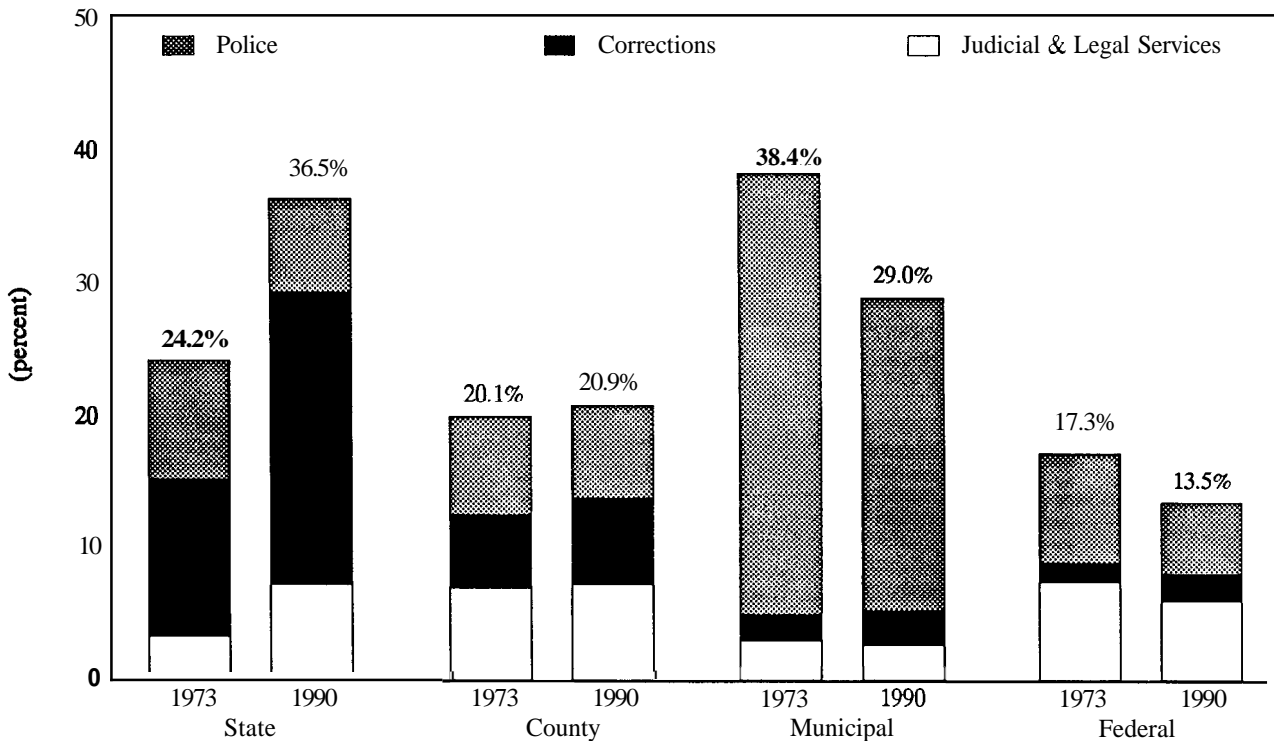
Governmental Functions	Per Capita Spending in 1985 Constant Dollars					Percent Change 1970-1990
	1970	1975	1980	1985	1990	
Education	\$710	\$807	\$824	\$807	\$934	32%
Public Welfare	209	268	292	300	374	79
Hospital and Health Care	148	182	193	208	253	71
Highways	247	204	189	189	207	-16
Police Protection	70	83	82	88	104	49
Corrections	25	32	38	54	83	232
Court Related	na	na	na	34	48	na

Source: Compiled from U.S. Department of Commerce, Bureau of the Census, *Government Finances* (various years).



Figure 1-9

Own-Source Funding, by Government, as a Percentage of Total Criminal Justice Spending, 1973 and 1990



Source: ACIR computation from U.S. Department of Justice, Bureau of Justice Statistics, *Justice Expenditure and Employment in the US., 1990*.

spending, 330 percent, causing its share to drop from 38.4 percent to 29.0 percent. The increase in federal funding (345 percent) also was only half the increase in state funding, due in large part to cuts in federal intergovernmental assistance, dropping the federal share of total criminal justice spending from 17.3 percent to 12.6 percent.

In addition to a drop in federal intergovernmental assistance from 27.0 percent of federal expenditures in 1973 to only 7.2 percent in 1990,<sup>26</sup> Figure 1-10 (page 18)<sup>27</sup> illustrates differences in the growth of criminal justice system functions, causing state, county, municipal, and federal spending shifts. Growth in prisons and jails funded by states and counties exceeded growth in police budgets. The high state funding increase also reflects merger of county and municipal courts into some state systems in the late 1970s and early 1980s. Finally, although it is not apparent in Figure 1-10 (page 18), by the mid-1980s, growth in the number of crimes being tried as federal offenses and federal sentencing reform resulted in a 1985-1990 growth in direct federal expenditures almost equal to the continued growth in direct state expenditures.

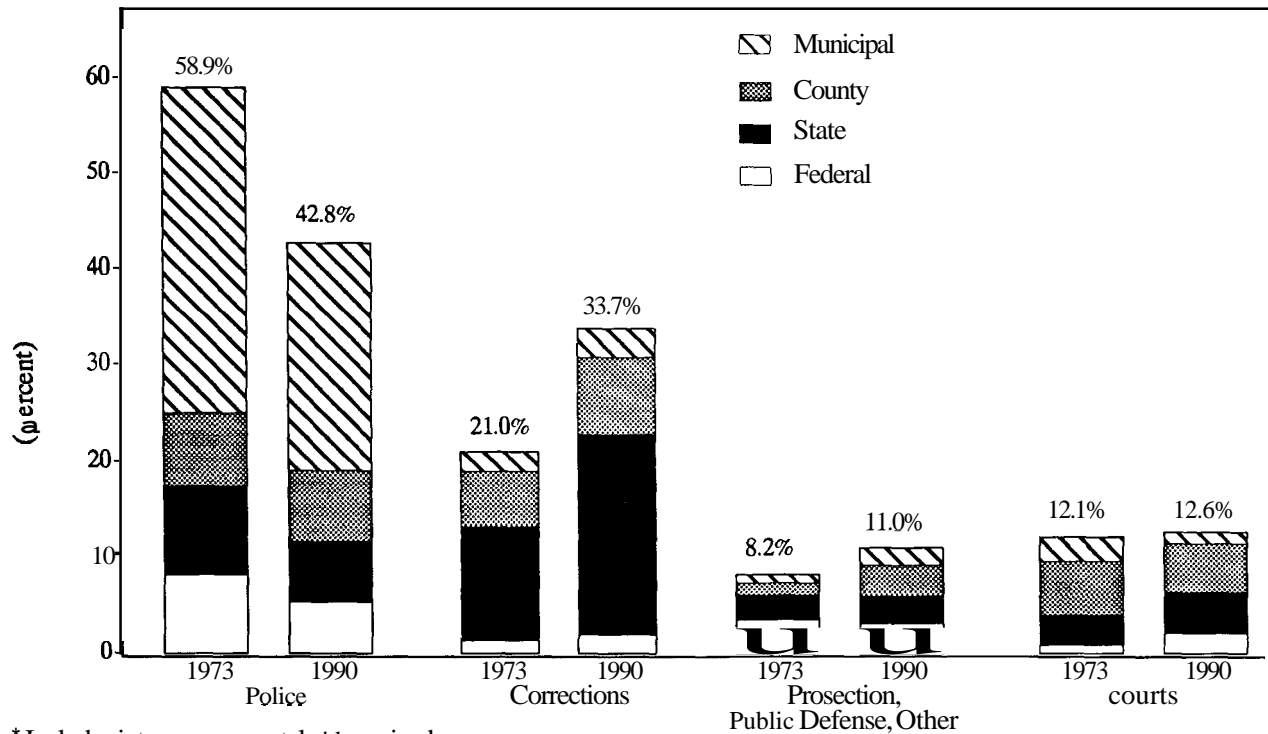
Expenditures on criminal justice agencies are only part of what is spent on fighting crime. This point can be made for all governments, but it is especially true for local governments, which bear the costs of targeted prevention measures, such as street lights and youth recreation and jobs programs, as well as for increasing the effectiveness of general education, treatment, and social welfare programs.

Furthermore, using averages to trace intergovernmental and other shifts in criminal justice spending masks two significant factors. First, spending for police in large cities increased significantly faster than in other municipalities, although this higher rate of growth is still less than growth in corrections, which is funded by states and counties.

Second, a larger proportion of county budgets than of state budgets is consumed by criminal justice costs; therefore, counties may experience greater fiscal stress from growth in their criminal justice spending. In 1985, on average, 13.1 percent of county spending was for criminal justice, compared to only 5.4 percent of state spending and 10.0 percent of municipal spending.<sup>28</sup> The drop in the proportion of county budgets needed for education as the baby boom passed through school age, and as states have played a stronger role in school finance, has been more than made up by the growth in criminal justice spending.<sup>29</sup> Furthermore, as with large cities, county averages mask the reality that criminal justice spending in urban core counties far exceeds that in other counties. Finally, the National Association of Counties points out that census data often include county spending under city spending in reporting on some of the nation's largest cities.

The foregoing discussion from the perspective of the states, counties, and large cities about who is hit hardest by increasing criminal justice costs sets the stage for looking at intergovernmental policies and funding in later sections

Figure 1-10  
Comparison of Criminal Justice Direct\* Expenditures by Function, 1973 and 1990



\* Includes intergovernmental aid received.

Source: ACIR computation from U.S. Department of Justice, Bureau of Justice Statistics, *Justice Expenditure and Employment in the U.S., 1990*.

of this report. It also invokes the adage: crime may not pay, but taxpayers sure do.

### Harbingers of Future Trends in Criminal Justice

The criminal justice trends of the last decade and a half can be expressed in one word: growth. This growth has not been the result of any one factor, but of many compounded elements: increased citizen reporting of crime, more capable and aggressive law enforcement, tougher prosecution, harsher sentencing laws and decisions, and, recently, increased crime rates. General government elected officials have alternatively championed tough policies and been appalled at the rising costs and disappointing results.

More passionate characterizations describe the growth in criminal justice in the last 15 years as being of crisis proportions (whatever adjectives are used). It is notable that such crisis-type descriptions began appearing a decade ago. The concern is that by the end of the 1990s, these characterizations may be even more applicable.

This report discusses initiatives to control the impacts of growth through coordination, management, and programming. A realistic view of how much criminal justice demands might be reduced, even if these initiatives were fully operative, however, requires an assessment of future pressures on the criminal justice system. The subsections that follow outline major harbingers of continued growth:

age demographics, the "war on drugs," increased violent crime, use of alternative sanctions, urban core demographics, and public attitudes.

### Age Demographics

An almost perennial hope has been that a large part of the growth in the criminal justice system was a result of the baby boom, and that after this generation (born between 1945 and 1964) moved through the prime crime age (15 to 35), growth would moderate or even decline. By this reasoning, 1980 should have been a peak year for crime rates. However, not only have all areas of criminal justice recorded unprecedented growth rates each year since 1980 the rates of growth also grew steeper after 1986.

The hope that the aging of the baby boom generation would relieve pressure on the criminal justice system has not materialized for several reasons. First, the baby boom never ended among residents of the most economically distressed big-city ghettos.<sup>30</sup> For criminal justice, the total size of the prime crime age population is less important than the size of the sub-populations in this age group who are most likely to commit crime and to be arrested and incarcerated.<sup>31</sup>

Second, on average, older criminals commit more serious crimes. Further, the older the criminals, the more likely that they are repeat offenders and will serve long sentences.<sup>32</sup> Half of the U.S. prison population in 1986 was over age 28, two years older than in 1979;<sup>33</sup> in 1991, 23 percent were aged 35-45, compared to only 14 percent in

1979.<sup>34</sup> Half of the federal prisoners in 1990 were over age 35.<sup>35</sup> Aging also is apparent in local jail populations. Nearly 60 percent of jail inmates were between age 25 and 44 in 1989, compared to only 51 percent in 1983.<sup>36</sup>

Third, the traditional definition of the prime crime age category, 15 to 35, may have to be extended. The common public perception is that the typical arrestee is about 20 years old. In reality, in 1989, the average arrestee was almost 29.<sup>37</sup>

Finally, even as the baby boom generation ages beyond the prime crime age, the children of early baby boomers—referred to as the baby boomlet or echo boom—are entering that age group. The beginning of baby boomlet criminal activity can be seen in the continuing increase in arrests of offenders under age 15, which began in 1987, and under age 18, which began in 1989.<sup>38</sup> Since the 1980s did not produce the lull in criminal justice system growth that would have been predicted from age demographics alone, if other factors leading to that growth are not changed, demographically we can expect new heights in criminal justice activity toward the end of the 1990s, pushed by the baby boomlet.

## The War on Drugs

No other area of criminal justice has been as volatile as the response to drug offenses. Figure 1-11 shows a de-

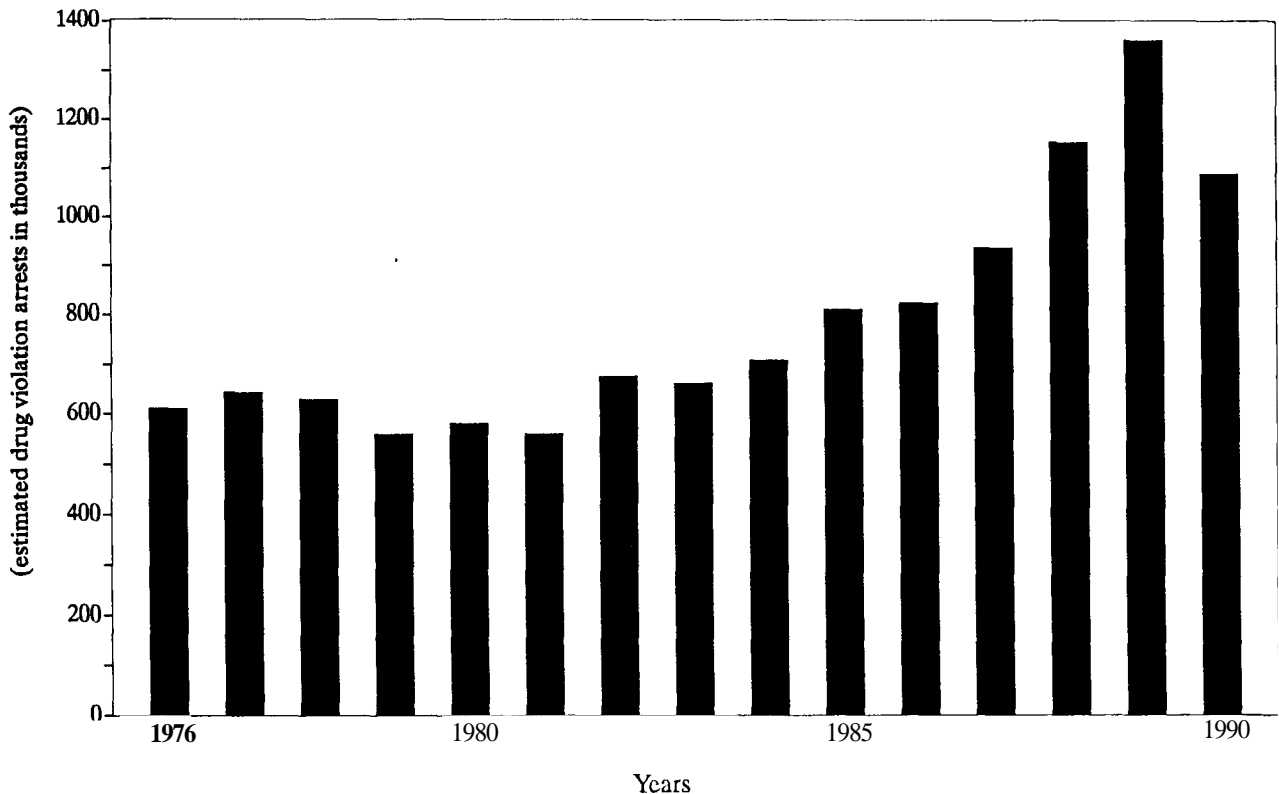
cline in drug arrests between 1976 and 1982, followed by modest increases until drug arrests exploded in 1987, 1988, and 1989.<sup>39</sup> The doubling of the number of drug arrests since 1984 was compounded by an almost three-fold increase in the likelihood of a prison sentence for a drug conviction. In 1981, 24 drug offenders were admitted to state prisons for every 1,000 arrests; in 1989, the number was 70 per 1,000 arrests.<sup>40</sup>

Given this volatility, it is too soon to judge whether the 14.0 percent decrease in drug arrests during 1990 is a harbinger of relief for the criminal justice system in the 1990s. At least for the moment, it has produced news reports that some local jail populations and court caseloads have dropped sharply because fewer drug arrestees are being held for trial.<sup>41</sup>

However, any relief to prison populations will not be seen until inmates serving sentences on drug charges are released. Whether this relief will last depends on whether past law enforcement efforts have dismantled drug rings or simply disrupted the trade temporarily. For those serving time on drug charges, future arrests also may depend on the efficacy of drug treatment efforts. In 1991, an estimated 22 percent of prison inmates were convicted of drug offenses, compared to 13.2 percent in 1985 and 6 percent in 1979.<sup>42</sup>

Optimistic projections that drugs may be less of a problem in criminal justice in the 1990s are drawn from recent surveys showing (1) a decline in hospital emergency room drug deaths and drug overdose cases, (2) the lowest

Figure 1-11  
Total Estimated Arrests for Drug Violations, 1976-1990



Source: U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports, 1976-90*.

level of drug use among high school seniors in 15 years, and (3) a 44 percent drop in self-reported monthly household drug use from 1985 to 1990.<sup>43</sup> Many observers take exception to an optimistic interpretation of these data, at least as far as criminal activity is concerned, because the surveys do not include high school dropouts, prisoners, or individuals who are not from established households.<sup>44</sup> Casual drug use may be decreasing, but hardcore drug use is seen as a major continuing problem for the criminal justice system.

If the substantial reduction in drug arrests reported in 1990 does not hold, the criminal justice system will have to continue to cope with inundated court dockets, jails, and prisons. For example, in 1989, one in every five men and one in every three women in jail was there for a drug offense, compared to only one in ten of all jail inmates in 1983.<sup>45</sup> The situation in state courts parallels that reported for the federal court system, in which criminal filings—fueled by a 280 percent growth in drug cases—outpaced civil filings in the 1980s.<sup>46</sup> In 1991, more than one in five prison inmates were serving time for a drug offense, compared to approximately one in 20 at the beginning of the 1980s. Thirty-one percent of new prison admissions in 1991 were for drug offenses.<sup>47</sup>

## Violent Crime

Whatever happens with drug arrests in the 1990s, the drug trade of the 1980s spawned other sources of long-term pressure on the criminal justice system. The 1980s drug trade was distinguished, first, by its level of violence, fostered in part by the fact that most of the current drugs of choice produce an aggressive rather than a passive physiological response, and by the increased firepower of the weapons used. Second, as never before, organized crime has used juveniles in its drug operations. Juveniles are recruited as young as age 10 and are often using high-powered weapons by their mid-teens. These guns and individuals with the inclination to use them will be on the streets for years to come.

Increased juvenile violence is documented in the number of murder arrests of suspects under age 18, which increased from 1,100 in 1982 to 2,331 in 1990. This pattern of increasing violence among the next generation of adult criminals is further demonstrated by the shift from burglary (generally defined as breaking into an unoccupied premises) to robbery (which involves the use of force or threat of force against a person). From 1982 to 1990, while juvenile burglary arrests decreased 40 percent, robbery arrests increased 30 percent. Offenders under 18 now account for one-fourth of all robbery arrests.<sup>48</sup>

In addition to the prospects of a new generation of even tougher criminals operating in the 1990s and beyond, significant increases in violent crime are occurring currently. During the 1980s, UCR property crimes increased only 4.9 percent, while the growth in violent crime was 33.7 percent. Contrary to popular perception, increased murder rates have contributed to, but have not driven, this increase in violent crime.<sup>49</sup> The growth in violent crime, therefore, is more pervasive than just the fact that higher

murder rates reflect an increasing number of deaths, as opposed to woundings, because of the firepower of the guns being used.<sup>50</sup>

Finally, most of the increase in violent crime came in the last half of the 1980s: in 1986, violent crime increased 12.1 percent; in 1987, it decreased 0.3 percent, only to rise 5.5 percent in 1988, 5.1 percent in 1989, and 10.6 percent in 1990. This pattern of increasing crime has left elected officials especially frustrated because it has come in the face of more than a decade of funding and policy decisions to fight crime through unprecedented rates of arrest, prosecution, and incarceration.

## Probation and Parole

The escalating costs of keeping persons in jail or prison and the signs that more and longer imprisonment have produced only limited results in reducing crime have caused policymakers to take renewed interest in punishment options. However, although it is as accurate in 1990 as it was in 1980 to say that three-quarters of the sentenced offenders in the United States are under supervision in the community,<sup>51</sup> a significant shift occurred during the 1980s that may portend increased criminal justice problems.

First, it is important to clarify the difference between probation and parole. Probation is ordered by a judge as a sentencing alternative to jail or prison, and, generally, is used for offenders who are not judged to be serious criminals. In contrast, parolees have an offense record serious enough to warrant at least some prison time, and parole refers to the release of an inmate before the end of the maximum prison sentence stipulated by the judge. Parole is granted by a state executive branch authority, and has been used to encourage acceptable behavior by prison inmates. (Only rarely is a parole system established for jail inmates.)

The status of the more than four million adults under the care or custody of a correctional agency on a given day in 1990 is shown in Table 1-3.<sup>52</sup> As noted, the total proportion supervised in the community changed little during the 1980s, but this is because there were more emergency prison releases, triggered by overcrowding in several state systems, rather than because of the use of probation as a sentencing option.

Not surprisingly, as the use of probation began falling off by the end of the 1980s, the use of prison and jail sentences increased (see Table 1-4).<sup>53</sup>

**Table 1-3**  
Status of Adults under Correctional Control, 1990

	1990
<b>Supervised in the Community</b>	<b>73.6%</b>
Probation	61.4
Parole	12.2
<b>Incarcerated</b>	<b>26.4%</b>
Jail	9.3
Prison	17.1

**Table 1-4**  
 Probation, Jail, Prison, and Parole,  
 Average Annual Percentage Increase,  
 1983-1978 and 1987-1990

	Average Annual Increase 1983-1987	Average Annual Increase 1987-1990
<b>Probation</b>	<b>9.2%</b>	<b>5.9%</b>
<b>Jail</b>	<b>7.4</b>	<b>11.4</b>
<b>Prison</b>	<b>7.4</b>	<b>9.8</b>
<b>Parole</b>	<b>10.1</b>	<b>14.4</b>

It is possible that heavy use of probation during most of the 1980s—especially without general government funding for commensurate increases in staffing for supervision<sup>54</sup>—led more offenders to continue their criminal activity. As the offender’s record grows, at some point the court is forced to impose a prison sentence. In fact, 93 percent of state prison inmates are either repeat offenders or convicted violent offenders.<sup>55</sup> Judges and prosecutors also may have become disillusioned with the efficacy of probation, leading to a decline in its use beginning in 1987.

Between 1977 and 1985, state governments raised the proportion of their total corrections spending for institutions from 76 to 84 percent, thereby lowering the percentage for probation. County governments raised their spending for institutions from 70 percent to 80 percent.<sup>56</sup>

If, indeed, this lagging rate of funding increases for probation created a cycle of relatively less dependence on alternatives to incarceration, state and county governments face a double funding hit to reverse this cycle in the 1990s. At the same time that more funds must be found for prisons and jails because alternatives are used less frequently, the alternatives also must be funded at levels that will produce confidence in their effectiveness before general government officials can hope to see any commensurate reductions in incarceration costs.

## The Demographics of Crime

A key to intergovernmental issues in criminal justice is recognition of the fact that crime is concentrated in core urban areas. (The phrase “core urban area” is used to underscore the fact that counties as well as cities provide criminal justice services to people in the inner cities.) Not only has this concentration of criminal activity been true historically, but crime rates are increasing more in urban cores than in the rest of the nation. This is a crucial trend. Overall criminal justice growth will not be reduced in the 1990s unless crime is reduced in the jurisdictions where it is concentrated.

There are ample statistics to document the concentration and growth of crime in core urban areas. These statistics demonstrate that the impact of crime on citizens depends on where they live and that it is the concentration of

poverty rather than of racial minorities in urban cores that produces the correlation to crime. In 1989, one in 59 urban households had a member who was the victim of a robbery, compared with one in 133 suburban households, and only one in 280 rural households. However, while black household victimization has increased sharply since 1985, led by violent crimes of robbery and aggravated assault,<sup>57</sup> poor whites have about the same homicide rate as poor blacks, and wealthy blacks about the same rate as wealthy whites.<sup>58</sup>

Figure 1-12 (page 22)<sup>59</sup> further demonstrates the significant differences in reported crime, particularly violent crime, between urban, suburban, and rural jurisdictions. The graph also indicates income differences between jurisdictions.

To appreciate the relationship of crime to urban poverty, it is important to look at the income disparity that lies behind the average income figure for major cities. This income disparity has been the focus of research on “impacted ghettos,” which are defined as census tract groupings that have high rates of male unemployment, welfare dependency, female-headed households, and school dropouts. Using this uniform definition, it was discovered that between 1970 and 1980 the number of impacted ghettos in Philadelphia, Chicago, Baltimore, Los Angeles, and other large metropolitan areas increased by 100 percent or more.<sup>60</sup>

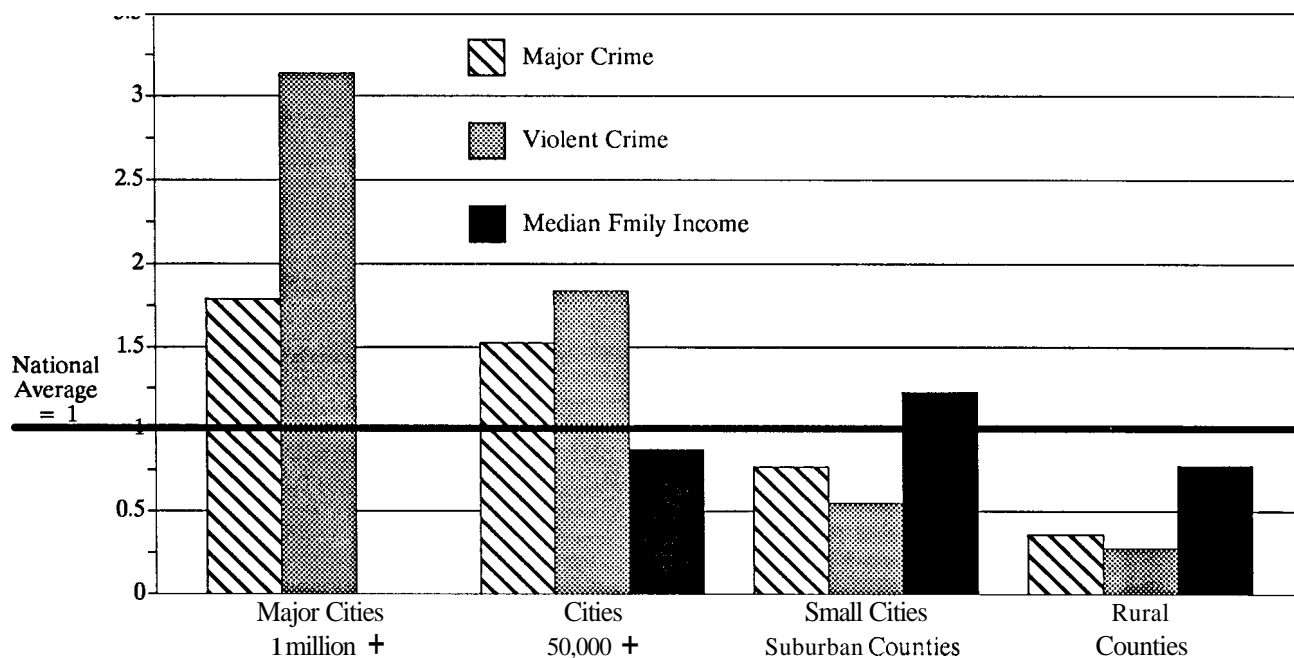
It is highly probable that an extension of this research would show that the proportion of core urban areas covered by impacted ghettos continued to grow between 1980 and 1990, since the 1990 U.S. Census showed that income disparity continued to increase. The fact that income disparity continued to widen in the 1980s may be particularly foreboding for the 1990s because the number of people in poverty should have fallen during the 1983-1989 cycle of economic recovery.<sup>61</sup>

Impacted ghettos account for an extraordinary amount of criminal justice activity and costs. For example, in 1980, an estimated 6 percent of the residents of Chicago’s impacted ghettos were under some form of correctional supervision.<sup>62</sup> In 1989, Baltimore residents made up over half the state prison population and 70 percent of its juvenile cases,<sup>63</sup> even though the city comprised only 15 percent of the state’s population. Urban cores nationwide have this same disproportional impact on state, county, city, and federal criminal justice agencies and government budgets.

The intergovernmental challenge of this disproportionate criminal activity is further underscored by the difference in the response of local governments to crime depending on their size. Comparisons of the 3,123 counties and county equivalents reveals that the 75 largest counties with populations over 600,000 accounted for 54 percent of reported crime but only 47 percent of all state felony convictions in 1988, while the 2,650 counties with less than 100,000 population accounted for just 16 percent of reported crime but 38 percent of state felony convictions.<sup>64</sup>

These differences in the response to crime between urban and non-urban areas can lead to a chicken-or-egg discussion: Has the lack of response produced increased

Figure 1-12  
 Comparisons of Reported Major (UCR) Crimes, Violent Crime Index, and Median Family Income Relative to National Averages for Major Cities, Suburban Counties and Small Cities, and Rural Counties, 1989



Source: ACIR compilation from U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports, 1976-90*; and U.S. Department of Commerce, Bureau of the Census, *Money Income of Households, 1988 and 1989*.

crime, or has criminal activity had such an impact on urban criminal justice systems and depleted their fiscal resources that they cannot respond as effectively as less impacted non-urban systems? Wherever the answer lies, the intergovernmental import is in the fact that at the end of the 1980s, the growth in crime in the 75 largest counties was twice that of the nation as a whole.<sup>65</sup>

Finally, it would be hard to overstate the governmental and societal challenge of the concentration of criminal activity in core urban areas. The fact that 5 percent of the total population of many major cities is currently under some form of correctional control under-estimates the problem. This statistic does not include those who have previously been convicted of a felony. Even more significant, if the proportion under correctional control is expressed as a percentage of males in the prime crime age rather than as a percentage of total population, a much starker picture emerges: The challenge of crime in our core urban areas in the 1990s means dealing with at least one in every three males between the ages of 15 and 35.<sup>66</sup>

### Public Opinion

Finally, public opinion influences the magnitude of the criminal justice challenge. Although education can modify public opinion, general government officials must balance their ability to lead the public with their need to represent the public.

The climate of public opinion defines the starting point for general government elected officials to influ-

ence change. There were several notable shifts in public opinion on the criminal justice system during the 1980s. Some of these shifts can be regarded as harbingers of reduced pressure on the criminal justice system:

- The view that harsher punishment is the most important way to help reduce crime was held by only 24 percent of Americans in 1989, compared to 38 percent in 1981.<sup>67</sup>
- Given two options in a 1989 survey, only 32 percent agreed that improved law enforcement is the way to lower crime, compared to 61 percent who responded that additional money and effort should go to attacking the social and economic problems that lead to crime.<sup>68</sup>
- A majority still believes that crime is increasing, although the proportion has dropped from 68 percent in 1981 to 55 percent in 1991. There also has been a drop from 48 percent to 38 percent in those who report they personally feel more uneasy on the street than they did the previous year.<sup>69</sup>

There are at least equal indications that the public still retains a strong determination that crime must be dealt with forcefully:

- Different polls from the one cited above report that 84 percent believe there is more crime than there was a year ago,<sup>70</sup> and 62 percent believe that crime will get worse in the next 10 years.<sup>71</sup>

- In a 1989 survey, only 25 percent expressed confidence in the ability of the courts to convict and properly sentence criminals.<sup>72</sup>
- Tougher criminal penalties for juveniles were favored by 79 percent in another 1989 survey, with 72 percent agreeing that lenient treatment of juvenile offenders by the courts was to blame for teenage violence. These views on the responsibility of the criminal justice system were only slightly behind views on the responsibility of the home.<sup>73</sup>
- **The** public is willing to continue spending in order to reduce crime. There was no shift from 1981 to 1990 in the belief of a large majority of the public (70 percent) that too little is being spent on halting the rising crime rate. However, the percentage who also believed too little is being spent on dealing with drug addiction did increase from 59 percent to 64 percent, and there was a significant increase from 52 percent to 71 percent in those who thought too little was being spent on improving the nation's education system.<sup>74</sup>

The age, racial, and regional differences evident in public opinion polls on crime help explain some of the variations between state Criminal justice systems and the divergence that emerges in local and national public policy debates.

People over age 55 have more confidence in the police and less confidence in the courts. Also, they are slightly more apt to favor harsher penalties, but they are not as convinced as younger respondents that crime will get worse in the next 10 years. While these trends are consistent, older citizens' opinions differ only about 5 percentage points from national averages.<sup>75</sup>

**Racial** attitudes about crime as shown in the polls are more divergent. Blacks rated reducing unemployment as approximately twice as important in reducing crime as did whites (20 percent versus 9 percent), while whites were twice as apt as blacks to cite harsher punishment (26 percent versus 13 percent).<sup>76</sup> Blacks gave significantly more weight to drugs as the most important problem facing the country and to cutting the drug supply as a way to reduce crime.<sup>77</sup> As reported in 1989, blacks' confidence in the police to protect them from crime was only slightly less than for whites.<sup>78</sup>

Regionally, the polls show citizens in the South as being (1) most concerned about crime and drugs, (2) more afraid to walk alone at night, (3) more pessimistic about crime rates in the next 10 years, and (4) more inclined to spend money on law enforcement than on attacking social problems to fight crime. In 1989 polls, more citizens in the South and West than in the Midwest or Northeast believed crime had gotten worse that year.<sup>79</sup>

Finally, public perception does not reflect the difference between crime rates in urban core areas versus suburban and rural areas. In June 1989, 57 percent of large-city respondents said there was more crime compared to the previous year; however, 52 percent of suburban residents and 48 percent of rural residents responded in the same way. This stands in contrast to the fact that, between 1986 and 1989, the percentage of urban households victim-

ized by crime of any kind rose from 28 percent to 31 percent, while that for rural households fell from 20 percent to 17 percent. All participants in the 1989 poll were sure that the growth in crime in the U.S. as a whole was greater than in their area, but rural and suburban residents have a stronger feeling of increasing crime than do large-city residents (89 percent, 82 percent, and 81 percent, respectively).<sup>80</sup>

Public perceptions can change. Attitudes about drugs are the prime example. Those citing drugs as the biggest factor in crime has grown from only 13 percent in 1981—when unemployment was cited most often by 37 percent—to 58 percent in 1989.<sup>81</sup> The danger is that if the public dialogue does not encompass broader knowledge of criminal justice issues, public support will readily turn to more popular issues, leaving a residue of reactive opinion about crime. Again, the issue of drugs provides a prime example: The number of people citing drug abuse as the most important problem facing the country rose from 2 percent in 1985 to 38 percent in 1989 only to drop rapidly to 11 percent in 1991.<sup>82</sup> The challenge to government officials is to exert leadership in maintaining informed public opinion.

## Summary

There is not one chain reaction in the criminal justice system, but multiple chain reactions. Law enforcement is affected by citizen willingness to report crime as well as by the incidence of crime; the court system and local jails are affected by prosecution rates, as well as by arrest and crime rates; and prisons and jails are affected by conviction rates, length of sentences, and use of probation and parole, as well as by the crime, arrest, and prosecution rates. The execution of policies within each component of the system can be affected by the weight of public opinion. Finally, decisions made by general government elected officials regarding funding, program direction, and sentencing both spur and are driven by these multiple responses.

Since the mid-1970s, these multiple reactions have resulted in unprecedented rates of growth, perhaps to crisis proportions. In the 1990s, the issue is: Will there be any downturn? The most hopeful sign is that in 1991 the United States experienced the lowest annual percentage increase in prison population since 1984. Nevertheless, this growth still represented a 6.2 percent annual increase, and in 20 states growth was equal to or higher than in 1990. The budget impact of this growth alone translated into the need for 900 new prison beds every week nationwide, in addition to costs generated by commensurate growth in jail, probation, parole, court, and police activities.<sup>83</sup>

Therefore, we cannot ignore recent harbingers of even greater pressure on the criminal justice system in the 1990s. The passage of the baby boom through the prime crime age has not provided relief. Increasing numbers of juveniles are committing serious crimes. Violent crime has risen significantly in all offense categories, not just homicides. The use of probation as a sentencing option is no longer keeping pace with the growth in incarceration. The criminal justice challenge of America's core urban areas continues to expand its demands on city, county, and state budgets. And the public's willingness to consider using non-criminal justice means to fight crime is heavily

tempered by strong expectations that the criminal justice system also will be adequately financed and perform effectively to deter criminal activity.

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## **FUNDAMENTAL INTERGOVERNMENTAL ISSUES**

The criminal justice system occupies a unique position compared to functions that are within the usual day-to-day purview of general government elected officials. First, it rests on the constitutional separation of powers between the judicial, legislative, and executive branches, each with its separate authority to establish and carry out criminal sanctions. Second, in determining individual guilt, criminal justice is grounded on the checks of an independently selected judge, prosecutor, sheriff, and clerk of court. Third, in most jurisdictions, these criminal justice officials interact with police departments, the public defender, forensic services, pre-trial services, a parole board, probation department, and prison system, which are separately authorized by municipal, county, state, or federal governments or by the judiciary. Finally, criminal sanctions and prevention efforts need to involve education, substance abuse, employment, and other general government agencies.

Therefore, intergovernmental considerations go beyond simple analysis of the roles and responsibilities of state, county, municipal, and federal governments. Inter-branch and interagency relations are equally important to achieve the coordination and interaction required for a more productive criminal justice system.

### **Bridging Disparate Sources of Authority**

**As** repeatedly affirmed by the more than 100 criminal justice and general government officials who participated in interviews and focus group discussions for this report, the traditional isolation of the criminal justice system and of officials within the system is a major obstacle. The following admonition to a conference of legislators and judges bluntly states the need to challenge that isolation:

I don't lie awake at night worrying about the separation of powers. . . . I do worry about government that can't **cope**, about government that wastes time and energy and basic human intelligence when its various agencies operate more as competitors than **as** colleagues. I don't worry about a judge giving a legislator the benefit of his judicial experience in suggesting refinements in a law—or amendments to a pending one. That may bother the legislator, but it doesn't bother me. After all, the executive branch in most states isn't at all shy about telling the legislature how things should be done.<sup>84</sup>

While the preceding quote uses an example of how criminal justice officials should work to bridge the gap, it is equally critical for general government officials take the ini-

tiative. A particularly cogent expression of the role that must be played by chief executives was made on behalf of the National Governors' Association **by** the governor of Nevada who also had the perspective of a criminal justice official:

**As** a former eight-year district attorney and now as a sitting Governor, I can tell you that the criminal justice system remains relatively autonomous. They operate much like an island, separate from normal governmental controls. Someone has to ensure that the major elements of state government work together. . . even the criminal justice system. Governors are in the best position to **assume** the initiative. But we need [local] help and cooperation. Strong leadership at all levels of government is a must. . . . [T]he only way to go is one of an overall well-balanced intergovernmental effort.<sup>85</sup>

State legislators, county commissioners, city council members, and members of Congress do not have the same personal command of resources as their government's chief executive. However, they often have the advantage in long-term service. Particularly, if they specialize in one area of criminal justice, lawmakers can initiate comprehensive efforts and can hold agencies responsible in future years for explaining how they are carrying out their goals of legislative policy.

The focus study summarizes additional factors that influence the relationship among criminal justice and general government officials. It tends to confirm that constitutional concerns about separation of powers are less of a problem than each player's source and use of authority and power. Differences in authority, responsibility, personal autonomy, and the personalities that these differences sometimes foster can be overcome. The key is for government leaders to recognize the roots of the resistance, make necessary accommodations, and not be deterred by traditional reasons for isolation.

### **State-Local Relations: Defining Responsibility**

The division of state and local criminal justice responsibility varies widely, and in many states, budget pressures have created controversy over how it is determined. The state legislature, often backed by the governor, defines criminal acts punishable by a prison sentence. These same elected officials raise the taxes to fund the prison system, but often they play only a minor role in funding the costs of trying the case, supervising those awaiting trial, or making arrests.

County and city officials have used the constitutional basis that criminal cases are brought in the name of the State *v.* (Defendant) to challenge their state to play a greater role in supporting criminal justice functions. State elected officials, in turn, may not only feel constrained by a lack of funds, but point to the effectiveness of community-based programs for many classes of offenders. It also must be pointed out that the level of law enforcement reflects individual community standards and that local taxpayers should fund increased police presence and prosecutor



*Focus*  
**Empowerment of Officials to Address Criminal Justice Problems**

**Efforts** to shape criminal justice policy and deal with system impacts should take into account that not all participants are able to participate in policy discussions on an equal footing and that their incentives for change will differ. The following brief sketches stress how differently each official in the typical state-local criminal justice system came to the respective position, the degree of independence, and the source of power.

*General government elected officials* must be conscious of the will of 51 percent of the voters. Chief executives represent a singular focus to command media attention and develop public understanding. In contrast, state legislators, county commissioners, members of city councils, and members of Congress may be constrained by the need to translate the benefits of the time they spend on wide-ranging criminal justice problems to the voters in their relatively small districts. While all general government elected officials have more opportunities to change public opinion than criminal justice officials, if they go too far beyond the electorate and are unable to exert the leadership to bring the electorate along, not only will they be defeated, but more importantly, the controversial program will be reversed along with their defeat. Of great significance, general government officials have the ultimate power of the budget to use in leveraging criminal justice players to act, along with hire/fire power over some. Criminal justice options also may be defined by sentencing legislation.

*Judges* typically are shielded from many of the political forces faced by general government officials. Their terms are longer. In many states, their continuance in office depends on an uncontested retention vote; in others, they are appointed. (In six states—Alabama, Arkansas, Indiana, Mississippi, Missouri, and Texas—some or all judges are elected for four to six years in partisan elections.) Their independence in carrying out their professional responsibilities is checked only on rare occasions by higher court review, but they do operate as part of an extensive court system, which is equally concerned about a noncriminal docket. In criminal cases, judges are significantly restrained by being able to act only on what the prosecutor brings before them. Court budgets may be subjected to the same budget review as executive agencies, although typically they are not singled out and in some states the judicial budget is sent to the legislature without executive revision.

The *prosecutor* usually is elected on a partisan ballot; however, the term typically is longer than for general government officials. While operating in an arena of constant negotiation with defense lawyers and ultimately with judges, this official substantially controls what will be prosecuted and can influence the degree of punishment through plea and charge bargaining. The prosecutor,

who has sole authority for the office and is not constrained by impartiality or by being part of a larger system, is more apt to be publicly visible than are judges. Typically, prosecutor's offices have lagged behind court reforms that led to employing administrative expertise for budget development.

The *sheriff* shares many of the advantages of the prosecutor as far as length of term, independence, and the political advantage of carrying out duties that punish criminals. However, having little control over the size of the jail population and limited administrative choices, budget battles with general government officials are far more significant for the sheriff. They also are significant to general government officials because jail budgets involve very large dollar amounts.

A *clerk of court*, elected in almost all judicial systems, shares the advantage of administrative autonomy with the other criminal justice players and frequently has the added advantage of significant budgetary independence derived from fees collected. The clerk of court may not be focused on the needs of the criminal justice system because the office handles at least an equal amount of noncriminal work, such as maintaining real estate records, issuing marriage licenses, etc.

In addition to all of these officials, the criminal justice system depends equally on the participation of *the chief of police, the public defender, the chief probation/parole officer, the court administrator, the head of pretrial services, the director of the department of corrections, and/or the administrator(s) of juvenile programs*. The difference is that these players typically serve at the pleasure of an elected official(s). Therefore, they may not be able to sit with equal authority or freedom to commit to policy changes. Cooperative efforts are complicated further by the fact that each of these administrators typically is appointed by a different unit of government: city police, state or county public defender, state or court probation officer, state corrections officer, and county or court juvenile authorities. Further, these administrators sometimes operate one step removed from the budget authority. For example, one official may be limited in the pursuit of local initiatives by being part of a division of a state bureaucracy, while another's advocacy to the general government budget authority is limited by being part of a total court budget.

Finally, if prevention and alternative sanctions are pursued, *non-criminal justice agency heads* need to be involved in collaborative efforts. School district superintendents, city drug treatment program heads, state employment agency heads, and county welfare department administrators need to be directed and supported by general government officials, to whom they are accountable, to address the problems of the criminal justice system.

Counties, in particular, feel caught in the middle. Municipal funding responsibility usually stops when the arrestee is brought into the county jail/detention center and, typically, state funding responsibilities do not start until the sentenced offender is transferred into the prison system. Many county commissioners and chief executives are left frustrated over the costs they must absorb that result from state political decisions and municipal arrest priorities.

State-municipal conflicts focus more on need than on constitutional responsibility. As discussed in the section on the demographics of crime, cities feel the greatest impact of criminal activity. Mayors and council members argue that police are the first line of defense, that if efforts to fight crime are not focused where crime is the heaviest, the state's as well as the city's economic tax base will be undercut while criminal justice and human service costs will increase.

Because each state has a unique criminal justice structure, there are almost as many different responses to state-local conflicts as there are states. This report includes discussion of a number of ways in which state-local responsibility is being redefined through intergovernmental funding, court reorganization, indigent defense, Community Corrections Acts, state-run community facilities, jail construction, shared costs, redefinition of state felonies, sentencing guidelines, and court suits. These concerns raise basic questions about where supervision and treatment programs are located, how funding formulas are developed, the ability of criminal justice agencies to respond to increased prosecutions, improving police effectiveness, preserving local and agency autonomy, and controlling system impacts.

### Controlling System Impacts

Not long ago, when many criminal justice officials heard a phrase such as "controlling system impacts," they would have rejected it as another esoteric planning exercise. This attitude appears to be changing rapidly, as judges, sheriffs, prison administrators, prosecutors, public defenders, forensic laboratories, and probation and parole administrators have become overwhelmed by caseloads they can neither manage nor control. Their frustration in seeing their efforts wasted by lack of carry-through also is shared by the police. Even general government officials, who find their discretionary spending siphoned off into criminal justice agencies, are recognizing that "identifying and controlling system impacts" is not an academic exercise.

The number of comprehensive studies released recently demonstrates a growing recognition that answers to the challenges in criminal justice are multifaceted. For example, this report has drawn on system-wide analyses released in 1989 and 1990 by several states, including California, Colorado, Florida, Michigan, New Jersey, Ohio, Tennessee, and Virginia, and on local studies from Maryland, Minnesota, and Texas. Whether initiated by the governor, legislature, local general government body, or in one instance by the Bar Association, all of these studies were broad-based looks at the impact of the disparate processes of criminal justice decisionmaking, even though most were initiated because of prison and jail overcrowding.

Corrections system overloads have not been the only trigger to spur officials. Court system overload also has launched comprehensive systems studies, including the 1990 *Report of the Federal Courts Study Committee*, self-described as the "most comprehensive examination of the federal court system in the last half century"; the 1989 report of the first national conference on legislative-judicial relations; and the American Bar Association's 1988 report *Criminal Justice in Crisis*, updated in 1990.

Police concerns about systems impacts resulted in congressional support of a study of law enforcement in the 1991 anticrime legislation. Subsequently, the National Governors' Association, National Association of Counties, and National Conference of State Legislatures joined in calling for a more broadly focused national crime commission "to give the people of this country a comprehensive agenda that will provide this nation with a systematic approach to combatting crime."<sup>86</sup>

### The Federalist Concept of Noncentralized Criminal Justice

While it is important to recognize intergovernmental system impacts, the 1991 debate over the breadth of a federal study might well have started with the basic issue of why there needs to be a federal study at all. Virtually without exception, the state and local studies cited do not reference any federal role. At least in part, this reflects the fact that 87 percent of criminal justice funding is state and local. Therefore, what does creating a comprehensive federal agenda connote?

The U.S. Constitution is quite limited with respect to criminal jurisdiction. Treason is defined and the Congress is authorized to provide for the punishment of counterfeiting. Otherwise, criminal jurisdiction is left to the states. State delegation of police protection to local governments and independent selection of local judges, prosecutors, and sheriffs further reflected a fear of centralized law enforcement. This noncentralized structure also encompassed acceptance that community standards should define criminal behavior.

However, beginning with Reconstruction and accelerating with Prohibition, the federal government began to play a larger role in criminal justice. Today, more than 3,000 acts are defined as federal crimes. Whether it is tracking a violent criminal across state lines, interdicting sophisticated international and/or interstate drug operations, enforcing child support orders, or unraveling intricate financial fraud, the emphasis increasingly has been on attempting to develop more effective law enforcement rather than on checking centralized power.

Furthermore, it appears that our federalist system of criminal justice may be entering another phase: a shift from community-based, noncentralized law enforcement to an emphasis on a greater federal role in setting the standard for criminal sanctions. During the 1980s, the Congress enacted five major anticrime bills, with another major bill being hotly debated by the 102nd Congress. This activity, in part, reflects the fact that crime became a pre-idential campaign issue beginning in 1964. Such federal

Legislation has pressured many state and local elected officials to be equally tough on crime.

The fact that this degree of federal government activity runs counter to the constitutional concept of a noncentralized criminal justice system has been little debated until recently. Because of a proposal to extend the death penalty into the 14 states that now prohibit it, congressional debate on the 1991 anticrime bill brought forth some strongly felt statements about making more than 50 federal crimes capital offenses. In addition, there has been a growing reaction from federal judges about having to handle types of cases, particularly minor drug offenses, that they have not handled in the past.<sup>87</sup>

Previously, most intergovernmental tension was created by the publicity surrounding federal anticrime legislation compared with the very small federal role in prosecuting only 6 percent of all felony cases. Local officials point out that members of Congress and the president get political credit for being tough on crime, even if the new laws seldom are enforced through the federal criminal justice system and little impact is felt on the federal budget. Instead, it is the states and localities that have to increase their criminal justice expenditures to meet federally heightened public expectations.

The results of the federal war on drugs may be changing the intergovernmental debate, however. Tough federal penalties enacted by the Congress always have been a potentially attractive alternative to local police and prosecutors, who can petition for an arrest to be prosecuted as a federal crime if they feel that the state law is too weak or local judges too lenient. However, federal prosecutors have to be willing to accept the case. With the federal war on drugs, U.S. attorneys began pursuing more cases, which had been prosecuted in the state courts, in response to an aggressive executive branch agenda as articulated by the president and the attorney general. This resulted in a heavy impact on federal court caseloads and a 119 percent growth in the number of federal prisoners from 1985-1991, compared to a 68 percent growth in state prison populations.<sup>88</sup>

The combined results of the active anticrime stances of the federal executive and legislative branches is drawing increasing comment from the federal judiciary. Speaking out against the "federalization of crimes . . . for essentially political reasons,"<sup>89</sup> Chief Justice William H. Rehnquist echoed positions taken by The Judicial Conference, the Conference of Chief Justices, The Federal Judicial Council, The Federal Courts Study Committee, and the American Bar Association.

Although the major concern of the federal judiciary is the overload created by large numbers of drug offenses and the resulting impact on the often complex civil and criminal cases that are traditionally handled by federal courts, their arguments raise other basic concerns about federal decisions compromising state action, shifting prosecution from elected to executive-appointed prosecutors, and having criminal cases decided by judges who are appointed for life. In addition, concerns are expressed about whether federal involvement will cause state and local governments to pull back their efforts and whether federal law enforcement is able to handle the criminal

cases that have traditionally been their responsibility, such as social security fraud, civil rights, and tax evasion.

As members of the state and federal judiciary grapple with these questions, many of their concerns will not be able to be addressed without change within the legislative and executive branches, among both criminal justice and general government elected officials. All three branches will need to join in a response to the chief justice's call in his 1991 year-end report to reexamine the growing role of the federal government in criminal justice:

The time has come to reexamine the role of the federal courts. In conducting that reexamination, as Chief Justice Earl Warren stated, "It is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism." In attaining a balance, we cannot overlook the constitution's intent to have state and federal systems share the administration of justice, with the federal court's limited role reserved for issues where important national interests predominate.<sup>90</sup>

Throughout this report, basic considerations about the proper role of the federal government in all aspects of criminal justice will surface, whether it is federal court overload, joint law enforcement efforts, national research, establishing uniform data bases, the effect of federal sentencing legislation, bill of rights protections, or funding crime-impacted jurisdictions. The challenge is to forge a partnership for greater effectiveness—which, if it is to be achieved, must be accompanied by intergovernmental political accountability—while still honoring both the concepts of noncentralized authority and of equal justice under the law.

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## SUMMARY

Criminal justice spending has been the fastest growing area of state and local expenditures since the mid-1970s. This significant commitment of resources has not produced a downturn in crime, however, and juvenile crime trends, violence spawned in part by the conduct of the drug trade, and a falloff in the use of probation all indicate that the pressure to devote even more resources to criminal justice will be unabated.

State and local lawmakers, chief executives, and criminal justice officials are showing heightened recognition of the need to control system impacts through collaboration and opening lines of communication. In contrast, federal efforts continue to carve out an increased federal policy role with little debate on the ramifications of shifting away from our traditional noncentralized criminal justice system.

General government elected officials play a crucial role in every aspect of these criminal justice concerns: from shaping philosophic direction under the Constitution to holding an administrator accountable for the cost of a new building; from listening to a grieving relative

plead for tougher sentencing laws to sorting out the statistical claims of program performance; and from using political leverage to force a collaborative systems approach to making hard budget decisions. The key issue is whether the role played by lawmakers and chief executives will be based on conscious, informed decisions or whether their actions produce policy by default.

Too often, general government elected officials have felt intimidated by the criminal justice system. The intent of this report is to provide a base of knowledge and a context for decisionmaking to dispel this sense of intimidation. As comprehensive as it is, in order to cover the breadth of roles just outlined, the report is limited in its depth.

First, the report is limited to information necessary so that general government elected officials will know what questions to ask of program managers. It is assumed that these elected officials do not have to know how to set-up or run programs; their responsibility is to hold program managers accountable and to operate from a base of knowledge adequate to judge the need for support or change.

Second, the report is limited to those legal procedures that have an impact on criminal justice system growth and costs, and does not contain details about determining an individual's guilt or innocence.

Third, while this report raises many criminal justice issues, the intent is not to resolve philosophical debates about such matters as punishment versus rehabilitation or any of the related concepts of deterrence, selective incapacitation, treatment, restitution, just desserts, and risk control. The intent is to help guide the resolution of the balance of philosophies within each criminal justice community and the political structure of which it is a part, so that resources can be marshalled to achieve the best results possible from the approaches used.

However, it is hoped that the report will help general government elected officials, as representatives of the full range of public interests, assume their rightful role as a constructive force, enabling criminal justice authorities to carry out their disparate missions within a smoothly functioning system. It also is hoped that criminal justice officials will respond readily, out of recognition that it will be the general government elected officials who take on the intergovernmental funding battles, who are at the front line in answering citizen concerns, and who must balance the resources of the community against total needs.

## NOTES

<sup>1</sup> U.S. Department of Commerce, Bureau of the Census (Census), *Government Finances: 1989-90* (Washington, DC, 1991).

<sup>2</sup> The term "general government elected officials" is used throughout to refer to the chief executives and lawmakers in state and local government: governors and state legislators, county executives and commissioners, and mayors and members of city councils. "General government officials" also is used and includes both appointed and elected officials, while "elected officials" includes both criminal justice and general government officials who are elected. The broad term "government officials" includes all general government and criminal justice officials, both appointed and elected.

<sup>3</sup> ACIR computation from U.S. Department of Justice, Bureau of Justice Statistics (BJS), *Sourcebook of Criminal Justice Statistics*, 1991 (Washington, DC, 1992), p. 637.

<sup>4</sup> Marc Mauer, *Americans Behind Bars: A Comparison of International Rates of Incarceration* (Washington, DC The Sentencing Project, 1991).

<sup>5</sup> *Sourcebook of Criminal Justice Statistics*, 1991, p. 636.

<sup>6</sup> ACIR computation from *Sourcebook of Criminal Justice Statistics*, 1991, p. 637.

<sup>7</sup> Ibid.

<sup>8</sup> The percentages were derived by (1) determining the ratio of the percentage increase in state and federal prison populations from 1974 through 1990 to the percentage growth in population, reported UCR Index crime, the sum of drug arrests and ams & for UCR Index crimes for 1973 through 1989, and the percentage growth in new court commitments to state and federal prisons from 1974 through 1990, and (2) subtracting each percentage ratio from the preceding ratio. The relative contribution on increase in time served to the growth in prison populations was assumed to be the proportion not accounted for by the other factors.

<sup>9</sup> See BJS, *BJS Data Report*, 1989 (Washington, DC, December 1990); Commission on the Future of Virginia's Judicial System, *Courts in Transition* (Richmond, December 1989); Ohio Governor's Committee on Prison and Jail Crowding, *Final Report*, by David Diroll, Candace Peters, and Steven Van Dine (Columbus: Governor's Office of Criminal Justice Services, 1990); (California) Blue Ribbon Commission on Inmate Population Management, *Final Report* (Sacramento, January 1990); Warren C. Gregory, *The Crisis in the Michigan Criminal Justice System: Causes, Consequences, and Options* (Lansing: Michigan House of Representatives, Fiscal Agency, 1989); State of New Jersey County and Municipal Government Study Commission, *Corrections Policy for the 90s*, (Trenton, 1989); Colorado Legislative Council, Committee on Criminal Justice, *Legislative Council Report to the Colorado General Assembly* (Denver, 1989).

<sup>10</sup> *Sourcebook of Criminal Justice Statistics*, 1991, p. 372.

<sup>11</sup> "Criminal Victimization, 1990," *BJS Bulletin*, October 1991.

<sup>12</sup> ACIR computation from *Sourcebook of Criminal Justice Statistics*, 1991, p. 312.

<sup>13</sup> "Criminal Victimization, 1990."

<sup>14</sup> U.S. Department of Justice, Federal Bureau of Investigation (FBI), *Uniform Crime Reports, 1989* (Washington, DC, 1990), p. 48.

<sup>15</sup> "Criminal Victimization, 1990."

<sup>16</sup> Ibid.

<sup>17</sup> ACIR computation from *Sourcebook of Criminal Justice Statistics*, 1991, p. 372.

<sup>18</sup> ACIR computation from FBI, *Uniform Crime Reports*, 1990, 1991.

<sup>19</sup> Interview with Lawrence Greenfeld, associate director, Bureau of Justice Statistics, May 5, 1992.

<sup>20</sup> ACIR computation from *Sourcebook of Criminal Justice Statistics*, 1976, p. 698, and *Sourcebook of Criminal Justice Statistics*, 1991, p. 638.

<sup>21</sup> "Jail Inmates, 1990," *BJS Bulletin*, June 1991.

<sup>22</sup> BJS, "Profile of Jail Inmates, 1989," *BJS Special Report* (Washington, DC, April 1991).

<sup>23</sup> BJS, *Census of Local Jails* (Washington, DC, May 1990); and *Sourcebook of Criminal Justice Statistics*, 1989.

<sup>24</sup> BJS, *Report to the Nation on Crime and Justice* (Washington, DC, 1988), p. 120; and Census, *Government Finances: 1989-90*.

<sup>25</sup> ACIR computation from BJS, *Justice Expenditure and Employment in the U.S., 1971-1979* (Washington, DC, 1984), and *Justice Expenditure and Employment*, 1990 (Washington, DC, 1992). Intergovernmental expenditures were apportioned as follows: all federal intergovernmental expenditures and net local intergov-

- ernmental expenditures (those not between municipalities and counties) were subtracted from state total expenditures; state intergovernmental expenditures were subtracted from county and municipal expenditures in proportion to the total expenditures of counties and municipalities for each criminal justice activity; and county and municipal intergovernmental expenditures (minus proportionate shares of total local intergovernmental expenditure) treated as payment for services and added back to respective municipal and county expenditures.
- <sup>26</sup> ACIR computation from BJS, *Justice Expenditure and Employment, 1971-1979* and *Justice Expenditure and Employment, 1990*.
- <sup>27</sup> *Ibid.*
- <sup>28</sup> *Report to the Nation on Crime and Justice*, p. 115.
- <sup>29</sup> *Intergovernmental Perspective 17* (Winter 1991).
- <sup>30</sup> Census, *Changes in American Family Life* (Washington, DC, August 1989); and John J. Dilulio, Jr., "Punishing Smarter: Penal Reforms for the 1990's," *The Brookings Review* 7 (Summer 1989): 3-12
- <sup>31</sup> Hennepin County Board of Commissioners, Hennepin County Sheriff, Hennepin County Attorney, Fourth Judicial District Court, and Minneapolis Police Department, *Hennepin's Criminal Justice System and the New Public Safety Facility* (Minneapolis, January 1990), p. 35.
- <sup>32</sup> *Report to the Nation on Crime and Justice*, p. 42.
- <sup>33</sup> *Sourcebook of Criminal Justice Statistics, 1987*, p. 495.
- <sup>34</sup> BJS, *Prisons and Prisoners in the United States* (Washington, DC, April 1992).
- <sup>35</sup> *Sourcebook of Criminal Justice Statistics, 1990*, p. 645.
- <sup>36</sup> "Profile of Jail Inmates, 1989."
- <sup>37</sup> U.S. Department of Justice, National Institute of Justice (NIJ), "Drugs and Crime, 1989," *Drug Use Forecasting Annual Report, 1989* (Washington, DC, June 1990).
- <sup>38</sup> *Uniform Crime Reports, 1987-1990*.
- <sup>39</sup> ACIR computation from *Uniform Crime Reports, 1976-1990*.
- <sup>40</sup> "Prisoners in 1991," *BJS Bulletin*, May 1992.
- <sup>41</sup> Pierre Thomas, "Population of Area Jails Drops Sharply," *Washington Post*, February 11, 1991.
- <sup>42</sup> *Prisons and Prisoners in the United States*.
- <sup>43</sup> W. John Moore, "Rethinking Drugs," *National Journal*, February 2, 1991, pp. 267-271.
- <sup>44</sup> News conference held by Sen. Joseph Biden of the Senate Judiciary Committee, December 19, 1990.
- <sup>45</sup> "Profile of Jail Inmates, 1989."
- <sup>46</sup> Federal Courts Study Committee, *Report* (Philadelphia, 1990).
- <sup>47</sup> "Prisoners in 1991," *BJS Bulletin*, May 1992.
- <sup>48</sup> *Uniform Crime Reports, 1990*, p. 178.
- <sup>49</sup> *Uniform Crime Reports, 1986 and 1990*.
- <sup>50</sup> Michael DeCourcy Hinds, "Number of Killings Soars in Big Cities across U.S.," *New York Times*, July 18, 1990.
- <sup>51</sup> "Probation and Parole, 1989," *BJS Bulletin*, November 1990.
- <sup>52</sup> "Probation and Parole, 1990," *BJS Bulletin*, November 1991.
- <sup>53</sup> ACIR computation from *ibid.*
- <sup>54</sup> ACIR computation from *Justice Expenditure and Employment in the U.S., 1985 and 1988*; and "Probation and Parole 1989."
- <sup>55</sup> *Prisons and Prisoners in the United States*.
- <sup>56</sup> BJS, *Bureau of Justice Statistics Annual Report: Fiscal 1988* (Washington, DC, 1989).
- <sup>57</sup> "Crime and the Nation's Households, 1989," *BJS Bulletin*, September 1990.
- <sup>58</sup> "Homicide among Young Black Males—United States, 1978-1987," *Morbidity and Mortality Weekly Report*, December 7, 1990.
- <sup>59</sup> ACIR computation from *Uniform Crime Reports, 1990*, and Census, *Money Income of Households, Families, and Persons in the United States: 1990* (Washington, DC, August 1991).
- <sup>60</sup> Mark Alan Hughes, *Poverty in Cities* (Washington, DC National League of Cities, 1989).
- <sup>61</sup> Interview with David Greenstein, director, Center on Budget and Policy Priorities, 1990.
- <sup>62</sup> DiIulio, "Punishing Smarter: Penal Reforms for the 1990s."
- <sup>63</sup> Russell Committee, Bar Association of Baltimore City, *The Drug Crisis and Underfunding of the Justice System in Baltimore City* (Baltimore, December 1990).
- <sup>64</sup> *BJS Data Report, 1989*.
- <sup>65</sup> "Felony Defendants in Large Urban Counties, 1988," *BJS Bulletin*, April 1990.
- <sup>66</sup> ACIR computation from Census, *Projections of the Population of the United States, by Age, Sex, and Race: 1955 to 2050* (Washington, DC, February 1989).
- <sup>67</sup> *The Gallup Report* 285 (June 1989): 26
- <sup>68</sup> *Ibid.*, p. 190.
- <sup>69</sup> *Ibid.*, p. 184.
- <sup>70</sup> *Ibid.*, p. 172.
- <sup>71</sup> *Sourcebook of Criminal Justice Statistics, 1990*, p. 173.
- <sup>72</sup> *Ibid.*, p. 161.
- <sup>73</sup> *Ibid.*, p. 157.
- <sup>74</sup> *Ibid.*, p. 181.
- <sup>75</sup> *Ibid.*, pp. 159, 161, 173, and 191.
- <sup>76</sup> *The Gallup Report*, pp. 25-21.
- <sup>77</sup> *Ibid.*, p. 24.
- <sup>78</sup> *Ibid.*
- <sup>79</sup> *Sourcebook of Criminal Justice Statistics, 1990*, p. 269; and 1957, p. 249.
- <sup>80</sup> *The Gallup Report*, p. 25.
- <sup>81</sup> *Sourcebook of Criminal Justice Statistics, 1990*, p. 152.
- <sup>82</sup> *Ibid.*
- <sup>83</sup> "Prisoners in 1991," *BJS Bulletin*, May 1992.
- <sup>84</sup> Elder Witt, in Nancy C. Maron, Linda K. Ridge, John Martin, and Carol Friesen, *Legislative-Judicial Relations: Seeking A New Partnership* (Williamsburg, Virginia: National Center for State Courts, 1989), p. 100.
- <sup>85</sup> Governor Bob Miller of Nevada, before the National Association of Counties Conference, January 11, 1991.
- <sup>86</sup> National Association of Counties, "Resolution on the Formation of a National Crime Commission," *The American County Platform and Resolutions, 1991-1992* (Washington, DC, 1991), p. 154.
- <sup>87</sup> Federal Courts Study Committee, *Report*.
- <sup>88</sup> ACIR computation from *Sourcebook of Criminal Justice Statistics, 1987*, p. 187; and "Prisoners in 1991."
- <sup>89</sup> Welcoming remarks of Chief Justice William H. Rehnquist, Conference on State-Federal Judicial Relationships, Orlando, Florida, April 8, 1992.
- <sup>90</sup> "Chief Justice's 1991 Year-End Report on the Federal Judiciary, *The Third Branch* 24 (January 1992).



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## 2—THE DYNAMICS OF SENTENCING

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**G**eneral government elected officials can influence the criminal justice system in many ways. They can induce greater efficiency by funding full computerization of records, as they have when constituents complained about slow service from departments of motor vehicles. They can push for more effective program delivery by reducing probation and parole caseloads, as they have for public school class sizes. They can break down bureaucratic barriers by insisting that public agencies serve offenders, as they have in attempting to mainstream persons with disabilities.

In the real world of politics, however, without constituent pressure, elected officials can let these types of issues languish. A more visible effort, like changing sentencing laws, often is regarded as the way to “fix what’s wrong.”

The wide range of possible policy roles and oversight responsibilities of general government officials will be addressed throughout this report. The next three chapters focus on the role of lawmakers and chief executives in setting criminal justice policy and establishing a continuum of response. The last four chapters focus on officials’ responsibility for management oversight of the results of these policies, particularly in funding and controlling system impacts.

By starting with a discussion of the influence that elected officials have on determining what is a criminal act and how it should be punished, a context for responsibility can be established. What the legislature defines as a crime, how it to be punished, and for what period of time drives all other aspects of the criminal justice system. By understanding how the criminal justice system may respond and why, state, federal, and local lawmakers and chief executives can better weigh the effects of sentencing legislation on the efficacy of the system, the administrative oversight required, and the budget support necessary.

Specifically, this chapter examines:

- How public attitudes affect the response of elected officials;
- How lack of familiarity with the constitutional basis and functioning of the criminal justice system leads many lawmakers and chief executives to focus solely on sentencing changes; and
- How legislative sentencing changes affect the criminal justice system.

While an attempt is made to bring forth concerns and frustrations, it is with the intent to portray reality rather than to assess blame. Voter pressures, constitutional restraints, and the separation of powers are all real and equally valid in our system of government.

But the effect of sentencing changes in increasing workloads throughout the system and creating extraordinary budget pressures also is very real. Furthermore, focusing first on interbranch and internal criminal justice dynamics also provides a sharper focus as to why legislative changes in the criminal code, which have had such significant effects on the criminal justice system and on general government budgets, have had so little effect on the incidence of crime.

Joint action of general government and criminal justice officials is required, but it must come from mutual understanding. Only by clearly identifying the components of the problem can general government elected officials begin to use their powers and influence to shape constructive governmental approaches and, at the same time, convince the public that responsible action is being taken to fight crime. Since the core of representative government is to apply such collective wisdom, it is well to keep in mind the fundamental tenet expressed by the Florida Supreme Court in *Ryan v. Ryan* (1973):

These matters of individual right, social mores, and state policy are to be settled in the cauldron of the people’s representative government, the legislatures. By such representatives the people choose to elect, upon whatever standards they represented to the people. If the electorate finds that it has been misled in such standards, or chooses to change them, the polls will open again.<sup>1</sup>

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## THE POLITICAL CONTEXT

### Crime Is Whatever Elected Officials Legislate as Crime

No act is a crime unless elected officials have voted to make it one. Additionally, legislatures have an “inherent power” to prescribe punishment for acts it has defined as **criminal**.<sup>2</sup> Therefore, instead of saying, “State law requires,” it might be more revealing if we always said, “Our state legislature requires.” Within constitutional limits, there is nothing sacrosanct about a criminal statute. What one legislative session has passed, another can change.

Since the **mid-1970s**, state legislatures, county boards, city councils, and the Congress have been active in exercising their authority to toughen criminal penalties. These elected representatives did not act out of the blue. Contemporary social concerns fostered vocal constituencies advocating tougher sentences. Drugs and gun control received the most attention in the 1980s; however, a number of new criminal penalties also resulted from rape and domestic violence counseling, which stemmed from the women’s movement in the late 1970s, as well as grass roots efforts to fight drunk driving in the 1980s.

Of equal significance with the legislative changes championed by these movements is the change in focus they produced. The women’s movement and the drunk driving movement directed more attention to the victim and to the personal and economic impacts of criminal acts. Between 1974 and 1988, 48 states passed legislation allowing input by crime victims at sentencing. This focus on the victim has influenced legislators to pass tougher laws and the justice system to mete out tougher sentences within the ranges defined by the legislature.

A sampling of the crime legislation passed by general government elected officials includes:

- State legislatures **passed** statutes giving additional mandatory prison time for conviction on a second felony offense, over and above the sentence for the **actual** crime committed. Three-time offenders **can** now draw a true life term in some states. In 1983, California law provided that all residential burglaries be punished **by** a prison sentence.
- During the 1980s, opponents and supporters of gun control joined together in many states to pass mandatory sentences for the possession and/or use of a gun in the commission of a felony.
- Child **abuse**, domestic violence, and rape laws have been expanded and clarified in many states, leading to more arrests, convictions, and longer sentences.
- Longer sentences for drug offenses and new categories of offenses have been added to criminal statutes. For example, drug free school zones have defined several new categories of offense. Legislation that makes possession of cocaine in

any amount a felony has moved these cases into the state correctional system. Michigan made cocaine possession the equivalent of murder, carrying a mandatory sentence of life without parole. Congress made possession with intent to distribute 5 grams of crack cocaine punishable by a five-year mandatory minimum sentence in 1986, only to follow this in 1988 by legislating the same penalty for mere possession.

- Influenced by direct citizen lobbying and by the fact that these same lobbying efforts had convinced Congress to threaten states with loss of highway funds if they did not tighten their drunk driving laws, the Pennsylvania legislature passed a mandatory sentencing statute for Driving under the Influence (DUI) in 1983. In 1980, there were 635 DUI offenders in the county jails and prisons of Pennsylvania. By 1987, the number had increased to 9,287, and the average length of stay had steadily **increased**.<sup>3</sup>
- Between 1984 and 1988, the number of “gross” misdemeanor charges by the Minneapolis city attorney increased from 784 to 1,579 as a result of state legislation on DUI and domestic violence. By 1989, the net effect on the local county jail was about 20 to 30 beds a day. In addition, state legislation toughening some felony sentences resulted in higher bail amounts and more people being held awaiting **trial**.<sup>4</sup>
- Even for petty offenses, there has been a tendency to enact criminal rather than civil penalties. During an interview, a local county board member noted that the board had just passed legislation giving **30** days in jail for illegal camping and **30** days for a loose dog.
- Expansion of federal RICO (*Racketeer Influenced and Corrupt Organization Act*) provisions to cover the drug trade and passage of the *Sentencing Reform Act* were among the federal initiatives to increase criminal penalties.

The effect of these and many other criminal code changes has put considerable pressure on the criminal justice system. The responsibility of elected officials is to ensure that the whole system can and will respond appropriately.

### Swings of Philosophy

The merits presented by advocates of any criminal code change have been less important at times than the climate of the debate. Perhaps because few policymakers have had an ongoing involvement with criminal justice, ideological extremes seem to have more than normal influence. Everyone has gone to school, needed health care, and driven a car, for example, and debate on these issues is often tempered by direct experience. This is rarely true for criminal justice.

The 1960s have been referred to as the “Rehabilitation Era” in criminal justice. At the beginning of the



1970s, a noted scholar in the field could even observe, "Except for . . . some political, law enforcement, judicial, *and* correctional officials, almost no responsible person is advocating a very austere or retributive stance in dealing with offenders. . . ."<sup>5</sup>

By the 1970s, opponents were able to point to the fact that crime rates had risen during the 1960s as proof that rehabilitation did not work. Political campaigns emphasizing law and order began moving criminal issues to the forefront of the political arena. Increasingly, public attention was focused on the dangers of street crime and on stronger law enforcement and more imprisonment as primary crime-control strategies. Less was said about the causes of criminal behavior? This shift in philosophy was underscored by the national attention given to a controversial 1987 study concluding that, while costly, incarceration saves the public money because a criminal behind bars is not committing new crimes.<sup>7</sup>

The 1980s swing in philosophy *also* was influenced by the same drive present in medical care and national defense, two other areas of rapid increases—you can't be safe enough.

Politically, . . . a program that fails to get x percent of poor citizens off the welfare rolls by a given time is one thing, and a program that fails to keep even one convicted criminal under correctional supervision from harming even one innocent citizen is quite another?

No matter how strong the merits behind a criminal justice policy decision, the fear factor is typically brought forth to *try to assure Victory*. For example, in 1990, Hennepin County (Minneapolis) produced a comprehensive, well-documented report to the Minnesota legislature on the need for a new local detention center. Nevertheless, its next-to-last sentence sounded the warning: "If the wrong person is released to relieve ADC [Adult Detention Center] crowding, the costs might be measured in human lives."<sup>9</sup>

The elected officials interviewed for this project were generally active in the field of criminal justice and more aware than most of the nature of the system's problems. Nevertheless, they readily pointed out that they were constantly aware that they must not be labeled "soft on crime" or they would be extremely vulnerable in the next election. Any leadership role they might play was constrained by this reality. This dilemma was appreciated, although regretfully, by at least one state prison system administrator:

We have what I consider very enlightened legislative committees. Chairs of our judiciary committees are smart guys. *So* it has been a nice environment, but it is changing. The Willy Horton syndrome has been seared into peoples' memories. They know they can push a button. They know fear is a big thing with the public and there is nothing like exploited fear."

### Diffused Responsibility

"'Fragmented,' 'divided,' 'splintered,' and 'decentralized' are the adjectives most commonly used to describe the American system of criminal justice. . . . Words

such as fragmented and divided, however, refer not only to demarcations in authority, but to differences in states of mind, and not only to physical distances, but to distances in philosophy and outlook."<sup>10</sup> These words were contained in *A National Strategy to Reduce Crime*, the 1971 landmark report on the National Advisory Commission on Criminal Justice's standards and goals. *They* remain an apt description today.

Our constitutional system contains many legal safeguards to ensure substantial independence of each component in carrying out its mission. The goal is to ensure impartial justice as well as to check abuse. Those who shaped our governmental institutions were wary of a strong government with broad police powers. They apportioned narrowly defined criminal justice responsibilities among separate authorities. Each authority was further checked by having to stand for election and depend on separately elected general government officials for funding. Almost all states have maintained an independently selected **judiciary, parole board, and public defender and a** separately elected prosecutor, sheriff, and clerk of court. Law enforcement, probation and parole supervision, and prisons are generally executive branch functions.

*As* noted, the power to define criminal acts and prescribe punishment was reserved to the legislative branch. Increasingly, however, this power *is* being exercised as if it should be absolute, rather than balanced by the actions of judges, prosecutors, or correctional authorities. Enacting mandated sentences and narrowly defined sentencing guidelines has become an outlet for legislative frustration with what is seen as an unresponsive criminal justice system. For some legislators, however, such mandatory legislation *is* simply an expedient reaction to perceived public dissatisfaction and legal processes that are little understood or appreciated.

The chief judge of the Maryland Court of Appeals expressed his frustration over the effect of tough sentencing legislation on the court system in testimony before a Baltimore Bar Association committee:

The legislature for reasons that we have heard over and over again is unwilling to reduce these crimes, and I am thinking of DUI first offense, theft, first time possession of narcotics, unwilling to put them under the six-month or three-month limit to keep them in the District Court. . . . [T]hey say it sends the wrong message to the public, we are being soft on criminals. . . .

The Bar's report concluded:

While it might well serve individual political ambition to give lip service to being tough on crime, the result is merely to allow an already overburdened Circuit Court to be deluged further with cases never intended for it. *An* elected representative being thus tough on crime simply forces the Circuit Court to deal with petty offenses when dangerous felonies could and should be its **focus**.<sup>12</sup>

Intergovernmentally, "distances in philosophy and outlook" are also driven as much by money as by mission. With the cost of criminal justice continuing its 15-year climb, tension has mounted. A major **source** of this tension

stems from the fact that the general government body that must pay the bills has not necessarily set the tougher policy.

Some of the fragmentation of criminal justice funding between units of general government has its roots in the historic desire to establish checks on the criminal justice system. For example, the tradition of municipal funding of police links program accountability with the constituency receiving the service. In contrast, state funding of local court systems grew out of a need to address underfunding in some localities that limited equal access to justice. However, such separation of responsibilities creates significant intergovernmental tensions.

County officials point out that it is relatively easy for municipalities to get tough on crime because they have only law enforcement. They do not have to support the costs of the jail, prosecutor, public defender, court, or probation/parole borne by the county. While the state usually pays a portion of these court and correctional expenses, criminal justice costs represent a much smaller portion of the state budget than of a county budget. Increases in county responsibility, therefore, are more difficult to absorb. A city council passing an ordinance mandating the maximum sentence (30 days in jail) allowed under state law for a drug-related offense, obviously, creates an impact for the county jail. Even a speeding crackdown *can* overwhelm the county clerk's office and strain available courtroom space.

Furthermore, in a focus group discussion for this project, county elected officials stated their belief that state legislators have no concept of what it costs when "they legislate tough sanctions to support their reelection" and that few have an appreciation of the effect on the total system of the rate at which people are arrested. Even when a fiscal impact process on proposed changes in the criminal code or operational mandates exists, these county officials believe that many legislatures do not adhere to the policy or do not take fiscal statements seriously.

The federal legislative process is equally criticized. Some counties and state officials fault the federal war on drugs for concentrating funds on law enforcement and ignoring the impact on the courts and correctional systems or the need for treatment services. Many city officials are equally vocal in their criticism that federal drug money is being diverted in the state allocation processes and is not reaching the cities whose law enforcement efforts are the first line of defense.

The first report on the administration's drug strategy called for a balanced approach to include punishment, education, and treatment. But in a February 1990 appearance before the Senate Judiciary Committee, Office of National Drug Control Director William J. Bennett observed, "Should we have drug education programs or should we have tough policy? If I have the choice of only one, I will take policy every time."<sup>13</sup> Limited funding almost always makes choice necessary.

In the most positive light, the concerns of our founding fathers are well served by such intergovernmental funding debates. Programmatic extremes will be avoided as each unit of government advocates that greater attention be given to the responsibilities it carries. Whether this is a constructive debate depends on whether the respec-

tive government officials are attempting to better shoulder or to shed program responsibility.

## Difficulties in Understanding the Criminal Justice System

As noted, few elected officials have had direct contact with the criminal justice system. Only 16 percent of the more than 7,000 state legislators are attorneys, and not all of them have practiced criminal law.<sup>14</sup> A 1976 U.S. General Accounting Office (GAO) report, *System in Crisis*, picked up on an Oregon planner's comment, "Perhaps the most important thing that the criminal justice planner has to say about the [trial-sentencing] sector is that we know very little about it."<sup>15</sup> Such lack of knowledge, at least on the part of general government officials, has not changed.

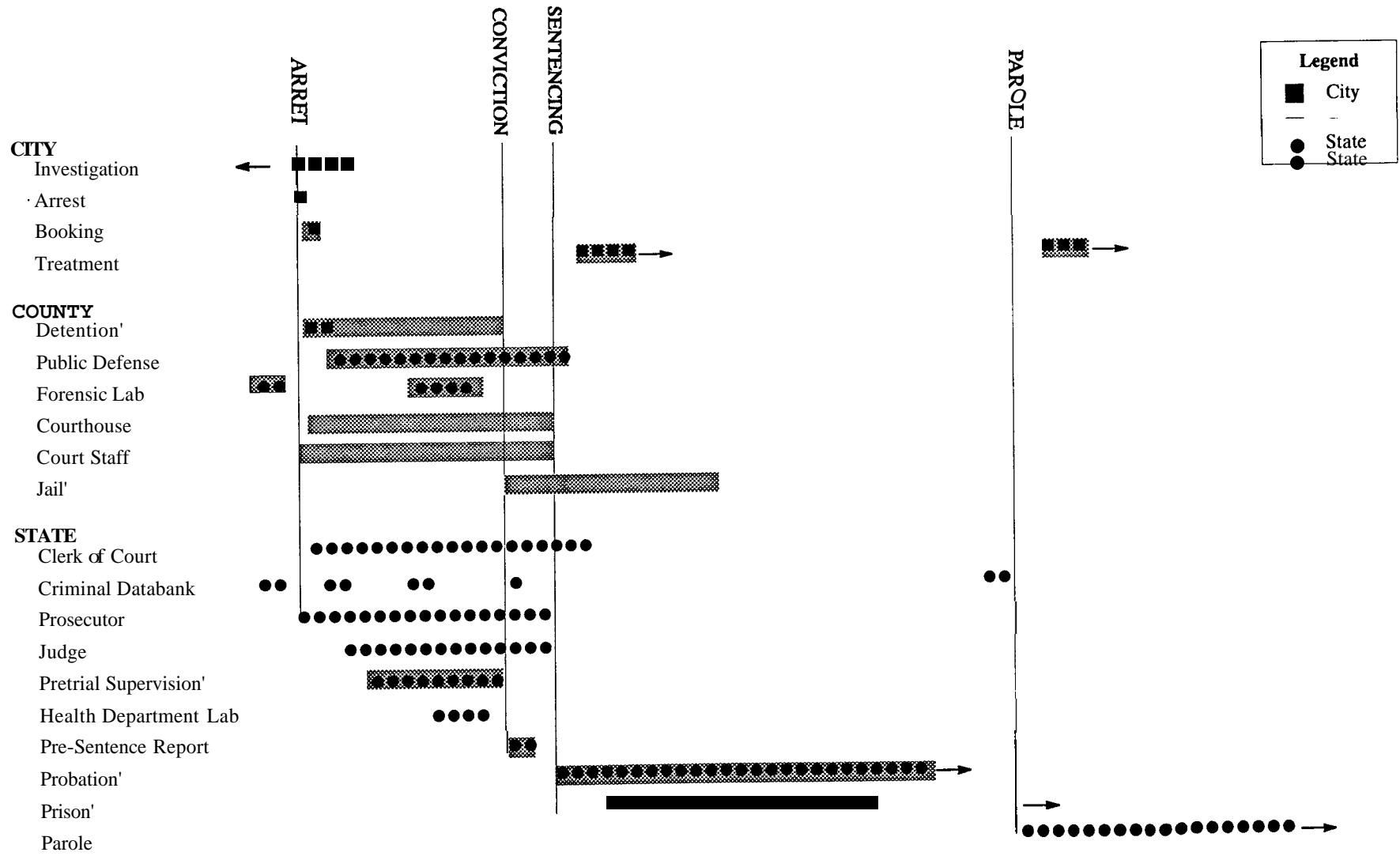
One problem is system complexity. The constitutional checks discussed previously contribute to this complexity. An elected official must sort through the impacts of many separate professional responsibilities and procedures in trying to decide what he or she actually needs to know. In addition, while an offender may proceed in a precisely prescribed way through legal steps that define the "system," trying to trace governmental administrative accountability for where the offender may be at any given point is daunting.

This complexity will be addressed throughout this study. One administrative example, as illustrated in Figure 2-1, will suffice at this point: The offender is arrested by a city-funded police department and booked at a county-funded jail. Throughout, the official records will be the responsibility of a state-funded clerk's office. The offender is tried by a state-paid judge in a county-funded building by a city-funded prosecutor's office who may depend on a state-funded laboratory for analysis of evidence. If indigent, the offender will be defended by a state-funded public defender's office. The offender may be placed under the supervision of a county-funded probation officer with the directive to participate in a city-funded education program. If the offender fails probation, the county-funded probation department will try to get the state-funded court to rule that he or she be placed in the county-funded jail or the state-funded prison system.

Differences from one system to another, even within the same state, further complicate efforts by general government officials to understand the concurrent and fragmented responsibilities depicted in Figure 2-1. Basic sources of information—including this report—cannot speak to the specifics of each jurisdiction because the combinations are almost endless. For example, one locality may have court-appointed probation officers, another state employed, and in still another probation may be a local responsibility. Criminal courts will be referred to by different names, as are prosecutors. Indigent defense may be provided by the county, state, private bar, or some combination of these sources. The county sheriff may be the chief policing authority and jail administrator, and provide court security, or may serve only in the last capacity.

Another problem is political avoidance. When asked whether his governor, whom he had described as supportive, had any background in criminal justice, a prison administrator replied, "He is too smart for that. . . too clever. . .

Figure 2-1  
 Overlapping Governmental Responsibility for a Case in a Representative Criminal Justice System



<sup>1</sup>Individual either detained or under pretrial supervision in community.

<sup>2</sup>Not used simultaneously, but an offender may serve part of a sentence in more than one facility (i.e., most felons are held in jail until transferred to a state prison).

He knows enough governors to know that corrections is something that can only hurt you.” A senior state legislator doubted that even half his fellow legislators have ever spoken with a judge about criminal justice. County elected officials indicated that they talk to other elected officials about criminal justice only at budget time or when there is an inescapable crisis. State legislators who might regularly show up at a local day-care or education discussion “don’t want to be associated with negative issues like alternatives to incarceration.”<sup>16</sup>

A final problem is the tendency of criminal justice officials to isolate themselves. Most state and local correctional officials would agree with a recent comment by the director of the federal Bureau of Prisons, “My greatest disappointment—which is probably one my predecessors would share—is the total misunderstanding by the public of what we do.”<sup>17</sup> The roots of such a lack of understanding were well articulated in the following observation made two decades ago: “Correctional managers generally fail to make their values explicit either because they are not sure what the goals of correction should be or because they fear that if these values are enunciated, they may be rejected by superiors, colleagues, or subordinates. Since he is neither elected nor appointed as political leaders are, he tends to act more as a functional bureaucrat. . . . [H]e avoids setting goals or enunciating values that might create such controversy.”<sup>18</sup>

From an entirely different perspective, of institutional strength rather than weakness, some court officials believe they need to isolate themselves to preserve separation of powers. A judge who has testified against a particular law in a legislative hearing may be perceived as having prejudged the issue. Furthermore, distrust may be operative. For example, although the report of the 1989 “landmark” conference on the legislative-judicial relationships noted that increased communication was desirable, the report also noted that “a lack of respect for the separation of powers” could give judicial-legislative councils “the potential disadvantage of increasing legislative dominance over the judicial branch.”<sup>19</sup>

Prosecutors, sheriffs, and judges may try to isolate themselves rather than deal with general government budget scrutiny. They feel protected by their constitutional authority and mission. In addition, the fact that they do not serve at the pleasure of the budget authority, as do other agency heads, further reduces their need to compromise. In fact, under the separation of powers in 20 states, judicial budget requests must be sent to the legislature without any executive branch revision.<sup>20</sup>

Finally, in criminal justice, the fear factor can be summed by almost all criminal justice officials in an attempt to close out unwelcome inquiry. Local elected officials interviewed said that they did not have a problem with criminal justice technical language. The “jargon” that does get in the way of open debate is the language of fear that is sometimes used strategically against them: “How can you not arm law enforcement officers as well as the criminals are?” “You just don’t understand the life and death world we’re dealing with.”

## Summary

America’s criminal justice system is complex and not well understood. It is based, first, on a balance of powers that reserves to the legislative branch the power to define what acts are crimes and the degree to which they are to be sanctioned. In the last few decades, the public, legislators, chief executives, members of the judiciary, and criminal justice officials have embraced a range of preferred sanctions. Rehabilitation and reduced rates of incarceration in the 1960s were followed by more active arrest, prosecution, and sentencing legislation beginning in the mid-1970s. This swing was spurred by shortcomings in rehabilitation and by victim rights movements that magnified the debate about whether the criminal justice system was dealing adequately with criminals. By the mid-1980s, incapacitation became the dominant response to the public’s personal fear of crime, with state, local, and federal general government elected officials in the forefront of legislative change to toughen criminal penalties.

America’s criminal justice system is grounded, further, on administrative checks and balances. Disparate authority between independently elected officials and units of government was established to prevent dictatorial abuse of “police power” and to assure impartiality in determining the guilt and sanctioning of individuals. However, the fragmentation of the criminal justice system contributes to lack of knowledge and/or lack of acceptance of responsibility among elected officials and criminal justice authorities.

Finally, much of the general public, as well as the majority of general government elected officials, has had minimal contact with the criminal justice system. This isolation, combined with elements of fear, leads to pressure for expedient solutions. However, the complexity of the criminal justice structure creates the potential for expedient solutions to have exponential effects, both within the criminal justice system and on other units of government.

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## THE CRIMINAL JUSTICE SENTENCING SYSTEM

A number of components go into deciding if an offender is to be punished, how, and for how long. General government elected officials need to understand the basic dynamics of these decision processes in their pursuit of the most effective responses to crime. Such an understanding will help distinguish when their responsibility is best carried out through sentencing laws, which is the focus of this chapter, or through allocation of budget resources, oversight of services, policy coordination, or increased public awareness and involvement, which will be explored in the following chapters.

This section describes those criminal justice procedures that carry out the finding of guilt and the time served. It will look at bill of rights protections and court

management, as well as the role of the prosecutor, public defender, judge, and parole board. While this overview provides basic information for those not familiar with criminal justice processes, more importantly, it presents all readers with a discussion of issues that need to be addressed by those who would dictate that turnstile justice must stop through sentencing law changes, rather than through focusing on what contributes to the perception of turnstile justice.

## Is The Criminal Justice System Sound?

The perceived unresponsiveness of the criminal justice system is expressed in numerous public pronouncements: Criminals are being let off too easy. They're back on the street before the cops are. Arrests aren't prosecuted. Offenders are given no or minimal time. If they are locked up, they serve only a small fraction of their sentences.

Gallup Poll results in 1989, 1985, and 1981 have been consistent. Half the people surveyed have confidence in the police to protect them from violent crime. But, only slightly more than 25 percent have confidence in the ability of the courts to convict and sentence criminals properly." Elected officials have reacted to this dissatisfaction. "Do something about crime" has been translated as "counter weak judicial processes by legislating tougher sentences."

This lack of confidence in the courts stems from both a lack of understanding of the sentencing system and the extraordinary growth in incarceration discussed in Chapter 1. Before looking at the sentencing process and its constitutional framework, it is important also to have an idea of how a decade of continual growth has affected the functioning of the court system.

When the *Los Angeles Times* asked more than 2,000 criminal justice officials, "Is Los Angeles' criminal justice system basically sound?" 71-81 percent of the judges and prosecutors said it was. However, only 50-55 percent of police, probation officers, and public defenders agreed. "The further removed from the street, it would seem, the more optimistic the view." While only one-third of the judges saw deterioration, 45-55 percent of the police, prosecutors, and probation officers and 70 percent of the public defenders believed that the quality of justice had deteriorated over the decade of the 1980s.<sup>22</sup>

This type of response is not limited to one city. In 1988, the American Bar Association (ABA) produced a major report entitled *Criminal Justice in Crisis*. The original purpose of the report was to "examine the extent, if any, to which constitutionally guaranteed protections were creating problems in the criminal justice system as some critics contended. [Instead, the] Committee found a system struggling to survive. The crisis resulted from a lack of resources rather than from the preservation of constitutional protections as alleged."<sup>23</sup>

The ABA committee conducted hearings in three cities and surveyed more than 1,000 persons involved in the justice system—judges, prosecutors, defense attorneys and law enforcement professionals—throughout the nation. They "found a systems suffering from not one, but two crises. Furthermore, they found that these crises extended

to every part of the justice system, from investigation to the courts and through the corrections system. The first crisis is that the entire system is starved for resources. The second crisis is the drug crisis." A follow-up report, released in August 1990, observed that "[i]n the months since the report was made public, this situation has dramatically deteriorated."<sup>24</sup>

The drug crisis and increasing rates of reported crime began in the mid-1980s. As noted in Chapter 1, total arrests began increasing during the 1970s, even though the crime rate was not increasing, due to better police training, sophisticated technology, adjustments to restrictive Supreme Court rulings, and increased willingness of citizens to report crime.

The staffing of most heavily impacted judicial systems was not increased to reflect the increased arrest activity within the court's jurisdiction. For example, between 1980 and 1989, there was a 149 percent increase in the number of criminal cases in Los Angeles Superior Court, but only a 21 percent increase in the number of judges and a 40 percent increase in the number of public defenders.<sup>25</sup> Therefore, the ability of judicial systems to absorb the increases caused by increased drug arrests and crime rates since 1985 has been severely strained by low staffing.

The pressure on the judicial system from the increased criminal caseloads also affects civil cases. According to a local bar association study, while Baltimore City's backlog of criminal cases has increased from 1,400 to 2,300, the time to trial for civil jury cases has slipped from 13 months to two years since 1988. The association concludes that "even if funding to maintain the current level of expenditures is found, since criminal cases must take priority, the Circuit Court may be unable to try civil cases altogether in three to five years."<sup>26</sup>

In fact, the civil docket is an endangered species in many jurisdictions. Chief Justice Malcolm Lucas of the California Supreme Court accurately described the situation when he said that "drug cases are swamping the courts. The system has begun to take on so much water we are close to foundering. Too often, civil cases get drowned." . . . Vermont recently declared a six-month moratorium of civil jury trials because it lacked sufficient resources to support both criminal and civil trials. In the Federal District Court for the Northern District of Florida, criminal filings have inundated the courts, and now outpace civil filings by a four to one margin, exactly the reverse of the ratio just five years ago.<sup>27</sup>

The ABA report emphasized that, "These are not isolated examples. The gradual 'shutdown' of the civil justice system is spreading throughout the nation. . . . The closing of the civil docket threatens to disenfranchise all citizens."<sup>28</sup>

The backlog in state courts was echoed by the Federal Courts Study Committee: "The deterioration in the indices of federal judicial performance has been gradual, but the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials."<sup>29</sup>

Court backlog also has a direct effect on county jails and other detention facilities. The Minnesota legislature ordered Hennepin County to reexamine further changes in court procedures before the legislature would approve funding a new detention facility. The Hennepin report summarized the effect of increased arrests and court backlog on jails well:

[T]he number of people in [jail] on any given day is the result of two primary influences. The first is . . . police agencies, which decide who among the people arrested will be brought to the [jail]. The second is the court, prosecuting attorneys, and defense attorneys, whose actions determine how long people are detained. . . . As a processing facility between the police and the courts, the [jail] functions much like a pipeline for the criminal justice system. . . . The people and systems adjust as much as possible to the added load until it becomes too much. At that point, the pipeline clogs and cases start backing up on the court's calendar and, more visibly, in the [jail].<sup>30</sup>

As will be discussed more fully in Chapter 5, numerous county jails are under court-ordered population caps in part because of court backlog, as well as new legislative criminal sanctions, increased arrests, and prison backlog.

The extraordinary growth, which has affected timely response of the courts to civil as well as criminal cases and has overloaded jails, also has reduced the amount of professional time spent on each case. This has diluted the meting out of justice. The California Senate Judiciary Committee's vice chairman was highly critical of the Los Angeles district attorney on learning that three-quarters of the

"special allegations," intended by legislators to prevent repeat offenders from being granted probation or to increase their sentences, were dropped under plea agreements:

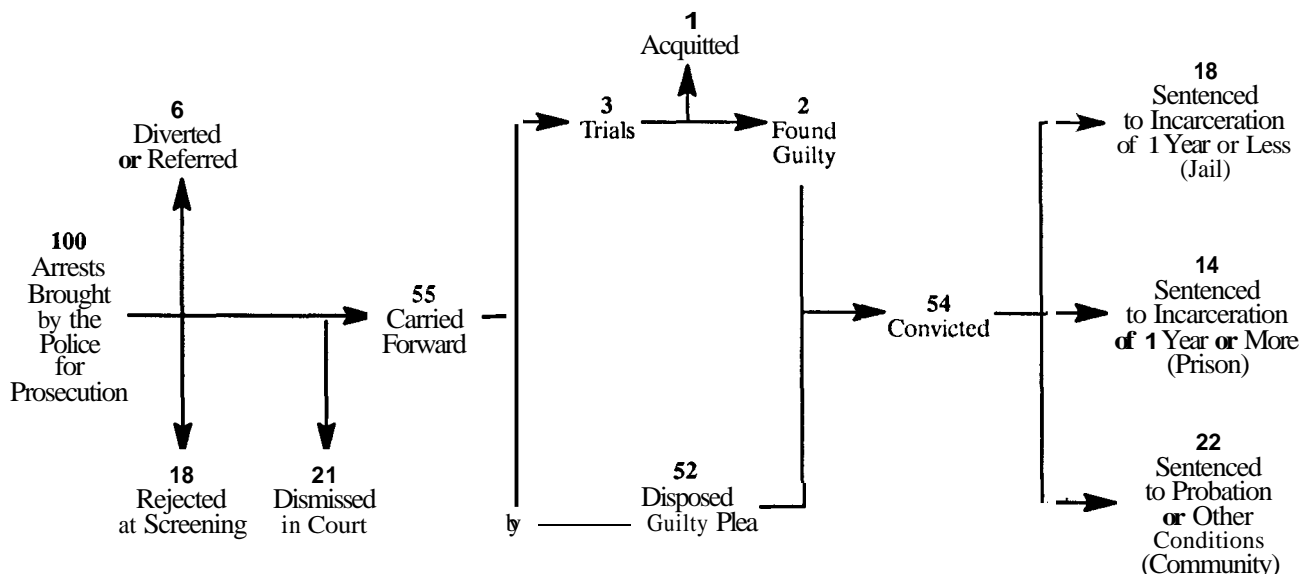
If he really did what the law told him to do, these guys wouldn't be circulating out on the street and back through the courts all the time, the state senator charged. That's exactly what we should be doing, District Attorney Ira Riener agreed, but, if roughly more than 5% [of cases] go to trial, everything shuts down. The system is functioning—and I suppose you could put quotes around 'functioning'—because only 5% of the cases are going to trial.<sup>31</sup>

### Why Do "Criminals" Go Free?

Although we are taught that a person is innocent until proven guilty, the fact that 45 percent of arrests are not prosecuted is a source of public frustration and, at times, anger that "criminals have gotten off on a technicality." Figure 2-2 outlines the principal decision points that may result in an "arrestee" not being prosecuted.

Prosecutors control the case outcome at more decision points than any other official.<sup>32</sup> Indeed, the prosecutor may be the most powerful criminal justice actor in the system. In almost all states, cases will not be initiated without the prosecutor's decision or concurrence to press charges against the defendant. Typically, the prosecutor controls how serious a charge will be brought. At any point, the prosecutor has the sole power to decide that the charge(s) will be dropped (nolle prosequi). The prosecutor also may move to enhance or to reduce the charge, which frequently affects the defendant's decision to plead guilty." The judge or jury can act only on the charges brought.

Figure 2-2  
Typical Outcome of 100 Felony Arrests Brought by the Police for Prosecution, 1988



Source: U.S. Department of Justice, Bureau of Justice Statistics, *The Prosecution of Felony Arrests, 1988*.

The mission of the prosecutor is not just to prosecute, but to successfully prosecute guilty parties. “I don’t believe in filing a case just because the cop thinks that the guy’s going to plead guilty. If we can’t make the case, I don’t file it. It means I’m doing my job, that I’m not a rubber stamp for the cops.”<sup>34</sup> The prosecutor is looking for evidence that there is probable cause that the person is guilty. For example, if everyone present in a household during a drug bust is arrested, the prosecutor may have to refuse to file charges against several who may have been bystanders, or else file a lesser charge, diverting the case to **misdemeanor** court.

Although the judiciary makes the ultimate decision on constitutional issues, the prosecutor’s office is a key place where constitutional protections must be recognized if prosecution is to be successful. In criminal cases, the most crucial court rulings are interpretations of the federal Bill of Rights, cited below (emphasis added), or parallel provisions of state constitutions:

**The Fourth Amendment**—The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable searches and seizures**, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**The Fifth Amendment**—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; **nor** shall any person be subject for the same offence to **be twice put in jeopardy** of life or limb; **nor** shall be compelled in any criminal case to **be a witness against himself, nor be deprived of life, liberty, or property, without due process** of law; nor shall private property be taken for public use, without just compensation.

**The Sixth Amendment**—In all criminal prosecutions, the accused shall enjoy the right to a **speedy and public trial, by an impartial jury** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to **be informed** of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for **obtaining** witnesses in his favor, and to **have the Assistance of Counsel** for his defence.

**The Eighth Amendment**—**Excessive bail shall not be required**, nor excessive fines imposed, **nor cruel and unusual punishments** inflicted.

**The Fourteenth Amendment**—(in part) . . . **No State** shall make or enforce any law which **shall abridge the privileges or immunities of citizens of the United States**; nor shall any **State** deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

In this review of intergovernmental relations, there is no need to examine the many specific court rulings that have applied these provisions to check the police power of the state. It is necessary only to emphasize that this is the proper role of the judicial branch. Individuals elected to the executive branch and to the legislative branch may feel that they cannot carry out what they perceive to be the popular will of the people because of these court rulings. However, this same struggle was at the heart of the original constitutional debates. Those who insisted on adoption of the first ten amendments as a condition of their support for the constitution prevailed in enshrining the principle that the will of the majority will be constrained to protect the rights of the individual.

In a discussion of the politics of criminal justice, however, it is relevant to note that there is a strong movement to limit the challenges (habeas corpus petitions) that a prisoner can make to state conviction in the federal courts based on federal constitutional grounds. (Habeas corpus is literally translated “*produce the body*” and is a **petition** to a court to review the legality of a person being detained.)

A major element of the 1991 presidential crime package was to severely limit federal court review of state criminal convictions. In calling for a limit on federal habeas corpus petitions, the 1990 report of the Federal Courts Study Committee pointed out that the 537 habeas corpus petitions filed in federal court **in 1945 had grown to 10,521 in 1989**.<sup>35</sup> While this 20-fold increase is far in excess of the four-fold growth in the prisoner population since 1945, it should be noted that in the last 15 years habeas petitions have increased only at half the rate of prisoner population increases. The fact that an offender is only half as likely to appeal as 15 years ago may be attributable to changes in the makeup of the federal bench, making a successful appeal less likely, or it may reflect the accommodation throughout **the** criminal justice system to earlier constitutional decisions, making such suits less necessary.

Retired Associate Justice Lewis Powell headed an Ad Hoc Committee on Federal Habeas Corpus in Capital Cases. Its 1989 report concluded that capital cases “should be subject to one fair and complete course of collateral review in the state and federal system, free from time pressure of impending execution and with the assistance of competent counsel.” Chief Justice William H. Rehnquist, in reaffirming his endorsement of the Powell committee’s report in 1992, observed that:

[C]apital **habeas** presents essentially a question of federalism—striking the proper balance between the lawful authority of the states and the role of the federal courts in protecting the capital defendant. The present system accomplishes neither purpose very well . . . [collateral review] will go a long way towards removing one major source of friction between the state and federal **systems**.<sup>36</sup>

The collateral review proposal would compensate for differences in state laws governing capital cases. Some states do not provide counsel for indigents during the appeal process, some do not fund the cost of investigations or expert witnesses, and some do not permit new evidence to be entered on appeal even for someone facing a death sen-

tence. In contrast, proposals to achieve finality in death sentence decisions by enacting shorter time limits or otherwise limiting federal habeas appeals are based on the assumption that all defendants have had the same chance to make their case.

Sharp restrictions on federal writs of habeas corpus from state court convictions would place greater importance on state laws. In some states, this could lead to greater protection of defendants' rights, as noted in the 1989 ACIR study *State Constitutions in the Federal System*.<sup>37</sup> Many state constitutions have spelled out greater restrictions in such areas as obtaining evidence and determining probable cause. These greater protections can prevail even now. If a state court has included a "plain statement" that it is basing its decision on "independent and adequate" state grounds, the U.S. Supreme Court held in *Michigan v. Long*<sup>38</sup> that it should not hear an appeal of such a state ruling. However, recent rulings by the New Jersey Supreme Court—*State v. Mollica*<sup>39</sup> (1989) and *State v. Minter*<sup>40</sup> (1989)—held that evidence obtained by FBI agents under less restrictive federal requirements can be used in a state criminal proceeding as long as it cannot be proven that state/local officials and federal agents had acted in concert to circumvent more exacting state laws regarding wire taps, search warrants, and the like.

Even when state laws prevail, defense advocates worry that while some states may choose to move further than the federal government, there needs to be a floor to pressure law enforcement systems in other states to observe the basic protections of the federal Constitution. Given the heavy reliance on the U.S. Constitution in this century to assert defendant rights, it also will take considerable time for states to build a body of case law interpreting state constitutional provisions that are adequate to guide law enforcement activities. Finally, the opportunity to have a state conviction reviewed in a federal court after the appeal of the original finding of guilt has been exhausted is particularly important to the poor. If an offender was not well represented originally and relevant constitutional challenges were not raised, they may not be raised in appeal—they may only be raised under a writ of habeas corpus.

In the daily functioning of the criminal justice system, the prosecutor's office is the critical focus for constitutional rights decisions. Was the evidence obtained properly? Is it sufficient to indicate probable cause? The degree of case screening done by the prosecutor's office before the charges are filed varies. Jurisdictions with high rejection rates of arrests through screening by the prosecutor's office prior to court filing have lower rates of court dismissals. Those with low arrest rejection rates have higher dismissal rates.<sup>41</sup>

Case screening has a major impact on the entire local criminal justice system. Jail or other detention facilities may hold people needlessly. Staff and professional time throughout the system is wasted just in processing the required paperwork. The earlier the case can be knowledgeably screened, the less waste there will be of system resources. Nevertheless, the number of prosecutor's offices that review cases before a preliminary court hearing has dropped to only half. Early screening was most prevalent in the West and Midwest, and used least in the South.<sup>42</sup>

The first and most productive way to improve case screening is at the point of arrest. Some prosecutor's offices have set up regular communication and training with law enforcement agencies to heighten the officers' awareness of where arrests are weak. This is particularly important in fast-growing or high turnover departments because younger officers tend to make arrests at a higher rate than older officers.<sup>43</sup>

It is not always possible to train all officers on the beat adequately, however. Faced with severe overcrowding the Hennepin County sheriff requested the Minneapolis police department to require that a watch command supervisor approve all "probable cause" arrests. (Although not referred to as "probable cause" arrests in other jurisdictions, these are the type of arrests in the earlier example, where everyone in the room is arrested in a drug bust. These types of bookings in Hennepin County resulted in people being held in the detention center 25 percent longer before they were released or charged than persons who were formally charged.<sup>44</sup>

Even with improved communication and training the philosophic push behind increased arrests simply may be transferred to produce an impact on another part of the system. "Police officers have become so familiar with what felonies the district attorney will and will not accept, that they routinely bypass the D.A.'s office submitting to the city attorney hundreds of cases each week that are then prosecuted as misdemeanors in Municipal Court."<sup>45</sup>

Shorter time limits between arrest and filing charges is another way to reduce the number of people held in jail who may not be charged. This actually may also improve investigative work, according to the National Center for State Courts:

In most criminal cases, the evidence that police have at the time of arrest is the evidence that the prosecution will have to rely on at trial. Cases rarely get stronger with the passage of time. Forcing the police department to focus its energies and its investigative resources within that 36 hours after arrest may, in fact, result in better cases being presented for prosecution. The luxury of having 50 or 60 hours after booking to present a case can result in an indifferent "let the detectives handle it tomorrow attitude" which does not enhance the resolution of criminal investigations.<sup>46</sup>

Such examples of improved communication and coordination between elements of the criminal justice system may create greater efficiency, but they will not necessarily reduce all sources of tension between the prosecutor, who is independently elected in all but five states, and the multiple law enforcement agencies within his or her jurisdiction. Different philosophies may be represented. In addition, if the staffing of the prosecutor's office has not kept pace with increased arrests, the priorities of the prosecutor may grow even more distant from the activities of law enforcement officers. According to a 1989 seven-part series in the *Los Angeles Times*,



[only] four in every ten adult suspects arrested by the Los Angeles Police Department for the most serious crimes had either felony or misdemeanor charges filed against them. A decade ago, the filing rate was double that. . . . In 1970, 30% of all adult suspects arrested in Los Angeles for Part I crimes—homicide, rape, robbery, aggravated assault, burglary, larceny and vehicle theft—had felony charges filed against them. By 1980, the rate dropped to 21%. By 1989, it was 17%.<sup>47</sup>

The drop between 1980 and 1989 is explained in part by a 1986 law requiring officers to make arrests in domestic violence situations, even when prosecution is unlikely. Nevertheless, high increases in arrests have not been translated into equally high increases in prosecutions, even though—and in part because—the caseload of the prosecutor’s office doubled during the decade of the 1980s.

The series went on to report that, “Like their counterparts in local law enforcement, federal authorities say many crimes that once were vigorously investigated are now tossed aside, largely because prosecutors are too busy with more serious offenses.” FBI spokesman Fred Reagan said that:

[I]n the spirit of accommodation, the FBI and the U.S. attorney’s office agreed upon filing standards so neither agency would waste time or effort pursuing insignificant or probably unprovable cases. We found in recent years that our people were running around and spreading themselves too thin on cases that didn’t have a lot of ‘quality’ to them.<sup>48</sup>

Quality seemed to be a fighting word in this look at police/prosecutor relations. Local prosecutors were quoted as saying that “with arrests increasing, the quality of many Police Department investigations has declined, leaving them little choice but to reject outright or try to settle by pleabargain a growing number of cases that cannot be won in court.” A police detective was reported to have “snapped,” “Prosecutorial discretion is the biggest problem in the system today. . . . They will only file cases that my 10-year-old son could successfully prosecute.”<sup>49</sup>

Thus, unrelenting growth can exacerbate the tension inherent in the checks and balances of the criminal justice system. When increased law enforcement resources are not matched by an increased capability to process these arrests and a case is dropped, law enforcement officials feel ill-served, whether the case was dropped for valid constitutional concerns or not. With significantly greater public trust in the police than in the “court,” police complaints about the criminal justice system carry political weight.

General government elected officials find themselves caught in the middle in trying to address the public’s concern: “Why do ‘criminals’ go free?” An important starting point for the discussion that must be fostered is that it is not as simple as saying “the court” is too lenient.

### Right to Counsel

For those who believe that the judicial system is letting criminals off too easy, the fact that tax dollars may be

paying for their defense is, at the least, politically unpopular. This attitude was exemplified in administrative interpretations that federal war on drugs money would not be used to fund the “enemy,” which made it necessary for Congress to insert specific support for public defenders in intergovernmental grant legislation.

A constitutional right to be represented by a lawyer has been established through U.S. Supreme Court rulings over the last 60 years. Initially, the Sixth Amendment “right to counsel” was applied only to federal prosecutions and, usually, was interpreted to mean that the accused only had the right to retain an attorney, not to have one provided. In 1932, *Powell v. Alabama* extended this protection to the states through the due process clause of the Fourteenth Amendment. “The volume of indigent representation remained relatively modest, largely subject to judicial discretion and highly varied between jurisdictions until 1963. That year, in the landmark case of *Gideon v. Wainwright*, the Supreme Court ruled that a lawyer must be provided for a person without funds who is tried for a felony offense.”<sup>50</sup>

The Bureau of Justice Statistics (BJS) estimates that over 40 percent of felony defendants are classified as indigent. However, in many large cities where poverty is most prevalent, the number is far higher. For example, according to the local Bar Association, most defendants in Baltimore City are represented by the Office of Public Defender. Therefore, it is important that only 10 states rely solely on local funding for public defender offices, while 20 states have state-supported systems, and in eight other states more than half of public defender funding is provided by the state.<sup>51</sup> The remaining states use systems of private counsel.

In 60 percent of all counties, predominantly in the South, judges assign counsel from a list of available private attorneys. This is down from 72 percent of the counties in 1973, as more public defender offices have been established. In fact, 43 of the 50 largest counties, with over two-thirds of the nation’s population, use public defender offices.<sup>52</sup>

Assignment of counsel can be made at initial booking, but it is often made at the first appearance before a judge. One-third of all counties responding to a national survey reported that they provide a lawyer within 24 hours of arrest. In 42 percent of the counties, however, it took longer than 48 hours, increasing the need for jail beds. Early representation is more likely to occur in counties with public defender offices.<sup>53</sup>

Early and adequate representation has become not simply a constitutional question. Just like early case screening by the prosecutor, it can also reduce system overload. Indigent persons who are not represented—or who are represented by a lawyer who is not prepared—may have more serious charges brought against them. They will be more apt to remain in jail because of higher bail, reflecting the more serious charge, or because no alternatives to bail are negotiated. More serious charges also will reduce the defendants’ negotiating position in plea bargaining, making them more apt to receive longer sentences and to actually serve time than nonindigent persons committing the same criminal act. Each of these outcomes of inadequate counsel increases public expenditures.

In March 1990, St. Louis City sued the state of Missouri in federal court to fund more public defender positions. This followed the federal court having found the city in contempt for exceeding the court-imposed cap on its jail and workhouse populations. Ninety percent of the inmates in the workhouse were awaiting trial. According to the city's director of human services:

Crowding at the workhouse and understaffing of public defenders are directly related. When the inmate population became a problem early this year, . . . she talked to a dozen officials whose agencies influence inmate population. "When I went around and said, 'What went wrong? What is it?', one thing everyone said was: 'We need more public defenders.' Adding public defenders is a sensible and cost-effective way to eliminate overcrowding. The alternative, which is to construct additional prison space, would be much more costly and would do nothing to improve the inmates' rights to a speedy trial."<sup>54</sup>

Each attorney in the felony section of the state Public Defender's Office in Baltimore City handles more than 400 felony cases a year. This is more than two and a half times the ABA standard of 150 felony cases. "Without Public Defender or other adequate representation for indigents, the cases cannot be prosecuted no matter how much funding is available to the Police Department, the jail, or other components of the criminal justice system." The office has ceased to employ experts because of budget cuts. The head of the Maryland Public Defender Office "suggested that the situation may not improve unless someone at the State level understands the significance of the Sixth Amendment right to counsel."<sup>55</sup>

The challenge to general government elected officials is to balance the political unpopularity of funding public defenders with pragmatic considerations of avoiding costly system impacts. For many, finding the balance will carry out their oath "to uphold the constitution" by assuring that individual rights are not overwhelmed in dealing with growth.

### Speedy Trial

Because the criminal justice system is essentially closed, it reacts like a giant water balloon. If one area is restrained, it will pressure another. As was noted on the civil side, the more cases that come in and are not heard, the longer it will take for any given case. On the criminal side, the Constitution provides for a speedy trial for each case. Because of this restraint, the system cannot "respond" by taking longer. For the elected official who is concerned about the cost of supervising offenders awaiting trial, this is a welcome restraint. For the elected official concerned about criminals receiving proper punishment and/or justice, it may not be.

Most states and the federal government have adopted specific time standards, although 15 states and the District of Columbia either simply prohibit "unreasonable delay" or have no statutory requirement.<sup>56</sup> There are many variations of these speedy trial acts. But, no matter what the

specified time limit for each stage or for the process as a whole, most speedy trial acts set shorter time limits if the person is detained. Continuances requested by the defense are not included. If any time limit is exceeded, the case may be dismissed.

According to a 1987 Bureau of Justice Assistance (BJA) survey, courts processed 1 percent of all cases immediately following arrest. It took less than 3.5 months to process half the cases. Within six months of arrest, courts had disposed of 73 percent of the misdemeanor cases and 68 percent of the felony cases. For felonies, the average time from arrest to sentencing was seven months in 1988. This is two weeks longer than in 1986, which has exacerbated jail overcrowding in many jurisdictions. Although it takes slightly longer in large urban courts (75 largest counties), the delay between arrest and sentencing has not increased since 1986.<sup>57</sup>

Speedy trial acts set maximum trial limits. There is the further consideration, however, that most cases should not take that long. Such concern may stem from:

- Practical attempts to cut system costs;
- The penology tenet that swift and sure punishment is more effective than lengthy punishment; and/or
- The philosophic belief that "Justice delayed is justice denied."

In an attempt to reduce delay for most cases, while allowing for extraordinary circumstances, some state legislatures or court systems have set overall standards. For example, the Minnesota legislature has required that judicial districts meet the following standards by July 1 1994: 90 percent of criminal cases to be disposed within 127 days, 97 percent within 180 days, and 99 percent within 36 days.<sup>58</sup> These requirements reflect the ABA's recommended standards.

Moving more criminal cases within speedy trial constitutional restraints has been achieved in most systems by compressed decision processes and, secondarily, by increased administrative efficiency. For reasons discussed in Chapter 7, it seldom has been achieved by proportional across-the-board personnel increases.

### Case Management

"Compressed decision processes" can mean changing procedural requirements for more effective case management. Too often, however, it is simply a euphemism for being forced to spend less time on each case in order to handle more cases. Forced "compression" has sentencing ramifications. However, before considering these effects, a brief review of improved case management as a constructive alternative will shed some light on how far stretched to accommodate growth without resorting to "compression."

During the year ending June 30, 1989, there were an estimated 19 million admissions and releases from local jails.<sup>59</sup> In the 75 largest counties that handle two-thirds of all felony prosecutions, this translates into hundreds of

thousands of offenders on any given day who should move from one step to another in the criminal justice process. Each day of delay imposes an average of over \$50 per person in jail costs alone. A minor loss of efficiency—5 percent of the people awaiting trial in a 300-person jail being delayed just four days—will equal over \$500,000 a year.

The Federal Courts Study Committee asserted, “Case management and the better utilization of modern science and technology are areas in which the burden of reform falls squarely on the judges themselves.”<sup>60</sup> This statement underestimates the general government budget problems of funding improved technology at the same time that costs resulting from lack of such improvements still have to be met. Nevertheless, it is true, first, that judicial officers must be willing to change time-honored ways of doing business. Depositions can be videotaped; oral arguments can be made over a speakerphone; pleadings, court orders, and other court papers can be filed electronically; and closed-circuit television can reduce the need to transport prisoners to and from the jail.

While police and courts aren’t anywhere near taking full advantage of the technology that’s out there, some jurisdictions are putting these tools to dazzling uses, [including] optical scanning and digital storage of court briefs for rapid cross-town or cross-state transmission. . . . *New Jersey’s* suspects become bytes the second they’re booked, and are then electronically tracked throughout their time in the legal system, from arrest through probation. . . . In the most advanced circuit courts in Florida, sheriff’s department staffers punch in (or optically scan) all such information, and the county court has instant access to it, . . . the sheriff’s department has access to the whole court proceeding, including final disposition of the case. The state attorney’s and public defender’s offices are tied into the system, too. . . . *New Jersey* is actually close to the paperless criminal justice system.<sup>61</sup>

Case management not only involves technology, it also involves procedural changes. Minnesota’s Fourth Judicial District revised its Judicial Assignment Plan to provide for “single judge” continuity in criminal cases. In 1987, felony trial continuances averaged 6.8 per day. That figure dropped to 4.5 in 1988 and to only 1.1 per day during the first half of 1989, at least in part because continuances could no longer be used to shop for a judge.<sup>62</sup> This kind of success underscores the position of the National Center for State Courts that case management rests on the willingness of judges to take control of the calendar away from the prosecutor.<sup>63</sup>

The American University Adjudication Technical Assistance Project’s “Differentiated Case Management-Expedited Drug Case Management Program” represents an even larger procedural change. It is based on early evaluation of each case by the defense and prosecutor that puts the case on one of three tracks: expedited, standard, or complex. “The main point of this approach is that what-ever

the outcome of a case is going to be, determine it and have it occur sooner.”<sup>64</sup> Preliminary findings from the nine major projects currently being funded showed an increase from only 11 percent of drug cases being disposed of in 90 days to 88 percent. For example, Philadelphia’s use of differential case management in 1990 reduced its average case processing time by 70 days and freed 400 jail beds per day. Philadelphia’s approach allows no plea bargaining for cases placed on the expedited track, and the court administration keeps close track of these cases to assure that they are not delayed.<sup>65</sup>

Moving cases more expeditiously also requires looking at the supporting network, for example, forensic laboratory capacity. “It seems to take forever to get murder weapons and fingerprints tested by the police lab,” according to one 26-year police veteran in Los Angeles.<sup>66</sup> In Virginia, the backlog in the state forensic lab serving local prosecutors typically resulted in a two-month wait for analyses of crime scene evidence for the presence of drugs. The time was reduced to 10 working days for 90 percent of the cases through staffing increases and local cooperation in paring down the tendency to request analysis of every potential item at a crime scene, rather than what was needed to make the case.<sup>67</sup>

Reality also points to concerns about whether justice is compromised. In Baltimore City, a cooperative effort to move selected cases to expedited trial was launched between the state’s attorney’s office, the public defender’s office, the district court, and the city jail. However, in the view of the public defender,

[It] threatens certain constitutional rights. In drug cases, the analysis of the substance found is often not available and there is no time for independent defense investigation. [T]he State’s Attorney picks the people who are eligible, hands us the police report and tells us it is true. The client is told if he pleads guilty he will be released from jail immediately, if not, the average wait in jail is 47.3 days.<sup>68</sup>

Nonetheless, the public defender—who has a strong interest in reducing his office’s caseload—provides three attorneys and support staff and admits that the program works 85 percent of the time.

Concerns about the balance between efficiency and justice come from advocates of widely differing criminal justice positions. “They’re not dispensing justice in Los Angeles,” said a retired California Highway Patrol officer, “they’re redispensing cases.”<sup>69</sup> Similarly, the ABA, speaking for prosecutors, judges, and defense attorneys, warned: “Surely our nation—and the ABA as the national voice of the legal profession—recognizes that ‘quantity’ justice must not displace ‘quality’ justice.”<sup>70</sup>

There are other case management considerations, which will be discussed under budgeting. For purposes of understanding the procedures and pressures surrounding the sentencing decision, it is adequate to underscore that in order to keep individual case decisions from being swamped by numbers, it takes proactive comprehensive analysis, cooperation with all players accepting account-

ability for reducing delay, professionalism in court administration, and funds.

## Plea Bargaining

A decidedly negative view of what reactive case management has come to represent was found in an otherwise straightforward glossary of criminal justice terms appearing in the *Los Angeles Times*. It defined case management as, "A euphemism by judges and attorneys to describe plea bargaining."<sup>71</sup>

Plea bargaining does not have a good reputation. It is conducted out of the public eye and, assuming the offender could have been found guilty, its most visible result is a reduced sentence. Prohibitions against plea bargaining have been adopted by Alaska and six of its local jurisdictions.<sup>72</sup>

While courtroom drama is a staple on television and in the movies, actually, less than 10 percent of cases go to trial nationwide. In high-crime cities, even fewer do, with the number decreasing since 1986 in every offense category except rape. Nevertheless, even in these cities, the more serious the offense, the more likely the case will go to trial. Forty-four percent of murder cases go to trial, 23 percent of rape cases, 15 percent of aggravated assault, 13 percent of robbery, 8 percent of drug trafficking, 7 percent of burglary, 5 percent of larceny, and 6 percent of all other felonies.<sup>73</sup>

Criminal cases do not go to trial for two reasons: the offender pleads guilty (1) as charged initially or (2) to a lesser charge through a process of plea bargaining. Approximately two-thirds of all felony defendants in the 75 largest urban counties who plead guilty do so within 24 hours of being arrested.<sup>74</sup> For the remaining one-third of the defendants who plead guilty, plea bargaining achieves some degree of individual justice while saving the expense of a full trial.

Because over 90 percent of criminal cases are settled without going to trial, any shift has the potential to produce little relative impact on the 90 percent side but a very significant impact on the 10 percent side. For example, requiring "settlement conferences" in pretrial calendars was one of a number of changes made in Hennepin County (Minneapolis) to relieve jail overcrowding. "Settlement rates have been very high, and since the hearings are held in advance of the trial date, lengths of stay in the jail are reduced."<sup>75</sup> However, because this measure is dealing with an already high percentage of cases that are plea bargained (the 90 percent side), there is only a reduction of two or three a day in the need for jail beds.

On the other hand, legislative changes to try to block the possibility of a person receiving a reduced sentence can have great impact. As the Federal Courts Study Committee observed, "Traditionally, 85 to 90 percent of federal convictions are the result of guilty pleas, generally as part of a plea bargain. Hence, even a 5 percent reduction in guilty pleas means a 33 to 50 percent increase in trials."<sup>76</sup> In addition, a reduction in plea bargaining will increase the need for jail beds for those awaiting trial. Nationally, for 1988, a guilty plea case took an average of nearly seven months to complete, compared to 10 months for a jury or bench trial.

Heavy caseloads also can have a perverse effect on the number of cases settled pretrial, thus creating a spiral of

even more backlog to both the jail and courts. The Baltimore Bar Association study noted that, historically, up to 20 percent of cases were settled very early in the process, at arraignment (the point when the specific charges that will be filed against an offender are determined). The number of guilty pleas at arraignment has declined to less than 5 percent. Lack of early familiarity with the case by both the defense and prosecutor because of heavy caseloads was cited as a major

On the other hand, the use of plea bargaining in some jurisdictions may have little relation to crowding. It may be a matter of prosecuting style. The prosecutor's office may in fact have overcharged in some cases to improve its negotiating position. If more serious charges or multiple charges are filed just to use as bargaining chips, an outsider will have a skewed picture of the incidence of various types of criminal activity and the effectiveness of the court system in dealing with such crimes.

Another style is represented by the district attorney of Ventura County, California, who has declared a "no plea bargain" policy. This does not mean that all criminal cases in Ventura County are settled by juries.

It means that prosecutors are more selective in choosing the charges they file in each case. Once a charge is filed, a defendant is told that he must plead guilty to that charge or go to trial. Ventura County prosecutors then leave it up to the judge to decide the appropriate sentence, rather than agreeing upon a sentence and having the judge, in effect, rubber stamp the agreement — the way virtually all Superior Court cases are settled in Los Angeles. . . . The median prison sentence imposed in Ventura County for all crimes is 48 months, compared to 28 months in Los Angeles.<sup>78</sup>

This discussion would seem to indicate that the process is totally in control of the prosecutor. The off-setting leverage for the defense is the constitutional protection of a speedy trial and the right to a trial. If the offender refuses to plead guilty to the charges presented by the prosecutor, the case must go to trial within the legal time limits or be dismissed. A prosecutor may not feel that the case warrants that much staff time, that there is only a reasonable chance of winning on the charge filed, or that the judge will not accept a tougher recommended sentence. Therefore, the prosecutor is willing to negotiate a lesser charge and/or sentence.

## Judicial Discretion

During a recent speech on judicial-legislative relations, a veteran legislator and lawyer pointedly quoted Aristotle: "It would be most admirably adapted to the purposes of justice, if laws properly enacted were to abandon as fed [cases] as possible to the discretion of the judge."<sup>79</sup> In contrast, a quote more frequently heard during legislative debates cautions that "bad cases make bad laws." The desirable judicial/legislative balance in sentencing may lie somewhere between these two perspectives.

As the Gallup Poll reported, three-quarters of the public do not trust the "court" to protect them from crime

Too often in this shorthand reference, “court” comes to mean “judge.” The focus of public frustration should not be on the “court” but on everything that happens after the police make an arrest. It is the system, with its constitutional protections, its procedural traditions, and, increasingly, its accommodation to overload, that should be the concern of officials elected to represent the public.<sup>80</sup>

Nevertheless, one reaction of general government elected officials has been to legislatively mandate sentences. If someone has gotten off too easy, or someone might, there is a legislative desire to make sure it never happens again. These laws take away the discretion of the judge in all similar cases. One hundred offenders are automatically incarcerated for a longer time, because it is appropriate punishment for the flagrant case. This is in the tradition of “bad cases make bad laws.”

On the other hand, wide-ranging judicial discretion can undercut equal justice. Certain judges may consistently give tougher or lighter sentences than other judges. Studies of the sentencing patterns of judges in Virginia found, for example, that for identical charges and criminal histories, six out of 34 judges always gave straight prison terms with no probation while seven judges always gave only probation. In another set of matched cases, the average length of the prison sentences imposed by different judges ranged between one and 14 years.<sup>81</sup> Such wide-ranging discrepancies are not superficial statistical happenstance. In a recent discussion among judges from jurisdictions surrounding Washington, DC, each judge had distinctly different priorities in dealing with the drug problem: treatment of the drug-dependent offender, punishment for the crime committed, or public safety. Not surprisingly, “No consensus was reached.”<sup>82</sup>

The public’s perception of “soft-hearted” judges has been confirmed in recent studies. In a national survey of 79,000 persons placed on probation in 1986, 21 percent had not been recommended for supervision in the community in the pre-sentence report.<sup>83</sup> In a one-year survey of serious cases in an Iowa judicial district, while probation officers and judges tended to agree on the sentencing of the first-time offenders, probation officers recommended incarceration for repeat offenders almost twice as often as judges imposed it.<sup>84</sup> In a *Los Angeles Times* survey of 1,800 superior court cases, probation officers recommended that defendants be denied probation and sent to state prison 52 percent of the time. Yet in 25 percent of those instances, judges granted defendants probation on condition that they first go to county jail, where inmates serve far less time than in prison.<sup>85</sup>

Nevertheless, because of judicial independence, “tough” judges have frustrated general government officials trying to reduce the time served in overcrowded prisons and jails as much, or more, than “soft hearted” judges have frustrated officials championing tougher penalties. For example, both of the Oregon legislature’s initial efforts to establish capacity-restrained sentencing guidelines and the Virginia legislature’s 1982 increase of “good time” applied only to felonies. Each resulted in major unforeseen impacts on jail populations. Judges and prosecutors countered the legislative intent by changing felony

charges—which carry the reduced time to be served as a state prisoner—to misdemeanor charges because more time would actually be served, even though it was “only” in the local jail.

Following an unfavorable ruling by a state district court that the state owed \$40 a day for state felons backed up in local jails because of prison overcrowding, Texas officials placed the blame for overcrowding “squarely on the shoulders of the judiciary. . . . You can’t lock everyone up.” Of course, to the degree that sentencing decisions have added to overcrowding, the prosecutors also are responsible. Judges typically rubber stamp 90 percent of the sentences that are plea bargained. However, the 10 percent of the cases that the judge will hear are generally more serious, as noted earlier, and have the potential of significantly longer sentences and, therefore, proportionately greater system impact.

In fact, some judges want to be tougher yet, by eliminating parole. “[T]he public’s proper concern with sentencing disparity is primarily a result of the disparity between the sentence imposed and the sentence actually served.”<sup>86</sup> The 1990 conference of judges from Maryland, Virginia, and the District of Columbia, previously referred to, produced this exchange:

A judge wanted to know if judges were sentencing solely for punishment or whether they were sentencing for punishment and rehabilitation goals. His question was related to “whether release on parole sooner than the judge had intended meant that the judge was not carrying out the punishment objective effectively. [Another] judge shared his concern that the sentencing power of the judge was being undermined in the eyes of the public who may believe that the judge is responsible for the short period of time that an offender may serve in prison?”

Before looking at the role played by parole in sentencing, however, a summary comment on the judicial role is in order. There is no single focus for the effect that judges have on the criminal justice system. Judicial discretion raises conflicting reasons for concern, admonition, and frustration.

Concern is growing because judges are playing a reduced role in crowded court systems, as more and more cases are being decided through plea bargaining. In its best light, plea bargaining allows judges and juries to focus on serious cases and difficult factual situations. In its worst light, plea bargaining is inappropriately taking the place of impartial judicial review.

Concern also has surfaced that mandatory sentences remove the possibility of dealing with individuals, even in an overloaded system. Removing judicial discretion also removes an important avenue to reduce the number of offenders who should not be clogging the correctional system.

But these concerns about the reduced role of judges in sentencing are balanced by the admonition of many elected officials that “judges are the most difficult to get involved.” A county official, who doubted that judges even know that jails are overcrowded, observed, “They have tunnel vision or ‘black robe disease.’” They believe that under the separation

of powers they should not be involved in operational issues. Therefore, judges do not know, or refuse to realize, the impact of their actions on the system.<sup>88</sup>

Finally, frustration is the direct result of a conflict between perception and reality. A public perception that judges are responsible for arrestees being dealt with ineffectively may lead to legislative "solutions" that create greater problems.

## Parole and Determinate Sentencing

In a 1990 gubernatorial campaign, the successful candidate vowed no parole for violent criminals or major drug dealers. *State Legislatures* carried an estimate that this no-parole plan would require more than \$1 billion in prison space over the next 10 years for the state in question.<sup>89</sup> In most cases, cost alone is enough to end serious consideration of abolishing parole. Only Maine has abolished parole, but nine other states have abolished parole board discretion by adopting determinate sentencing.<sup>90</sup>

The dissatisfaction remains, however. Undoubtedly, some legislators voting on mandatory sentencing bills believe that they are denying parole because the legislative language may state that the sentence is "to be served without probation." Such a reference only prohibits a judge from suspending the sentence; the offender must serve time behind bars. However, as the chief patron of a mandatory two-year weapons bill fumed on finding out that offenders sentenced under his bill were out on parole, "Probation. Parole. I didn't know there was a difference."<sup>91</sup>

By the turn of the century, almost all state legislatures and the Congress had adopted systems of parole based on indeterminate sentencing. This movement was an outgrowth of a "medical model" of corrections, which assumes that the purpose of incarceration is to change the offender's behavior rather than simply to punish. Sentences are not indeterminate in that there is no limit to the length of time an inmate may serve. The court sets the limit when it pronounces sentence (e.g., three to five years). What is indeterminate is how much of that time the offender will actually serve.

### Determining Eligibility for Parole

The role of the parole board is to review an inmate's record at intervals specified in the state code and to decide whether he or she should be released. This decision is based on several considerations, such as the nature of the crime, previous criminal behavior, the inmate's record while incarcerated, victim statements, statements on the inmate's behalf, and the inmate's parole plan for employment and living arrangements on release.

Parole is not automatic, and how readily it is granted varies considerably from state to state. Prior to 1976, when Maine became the first state to abolish parole, 77 percent of that state's eligible inmates were paroled? Whereas, in Virginia, throughout the 1980s, only 35 percent of the inmates typically were released on their first eligibility date. That first eligibility date has been determined by the legislature to be no sooner than one-quarter of the sentence for first offenders, one-third for second offenders, and

half for those convicted for a third time or more. Annual parole board reviews are conducted for those not released. On their second eligibility date, 45 percent of the inmates in Virginia are granted parole; 35 percent on their third; 29 percent on their fourth; and only 17 percent on their fifth eligibility date or more.<sup>93</sup>

As in most states, the computation of eligibility dates is not based on the sentence given by the court but on the sentence as reduced by legislatively determined rates of good time. Good time may be automatic if there are no infractions. Additional good time may be earned by participation in rehabilitation or extraordinary service, such as fighting forest fires. While good time may have been adopted originally to encourage constructive prisoner behavior, in reality, legislatures have increased good time allowances recently almost exclusively as a way to reduce prison population growth. It is common for good time credits to reduce the sentence originally imposed by one-third to one-half.

The combination of parole and good time means that most offenders serve considerably less than half of their imposed sentences. As distressing as this may be to some, it must be balanced with America's already high rate of imprisonment and the costs if the rate is substantially changed.

Nevertheless, the federal government may have started a trend in the opposite direction. The 1984 *Sentencing Reform Act* not only abolished parole for federal crimes committed after October 1987, it also sharply curtailed any good time reductions. Federal prisoners will receive good time credit for no more than 15 percent of the original sentence, whereas in the past, they served an average of 33 percent of their original sentences.<sup>94</sup>

### Goals of Parole

As part of a system of checks and balances, two goals can be served by parole. First, sentencing disparities from one judge to another may be tempered. The parole board sees many more cases than any given judge and, potentially, can play a significant role in achieving equal justice. For example, someone receiving 10 years on a marijuana distribution charge may be paroled on first eligibility, whereas someone given only five years may not.

Secondly, parole can serve to individualize justice. Too often, the focus of public discussion is on how early an inmate can be released, as if all were. Parole not only allows for early release of individuals who seem to have responded constructively to having been incarcerated, it also allows for holding other individuals for the maximum time.

Just as judicial discretion means sentencing according to the individual and the circumstances of the crime, parole is based on looking at how each individual has responded to a period of incarceration. Eliminating parole would make the judge's decision at a given time absolute, by eliminating discretion at a subsequent point in the system based on the facts at that later date. Some judges have even argued that granting parole (an action taken by the executive branch of government) is a violation of the separation of powers in that it is the legislative role to make the law and the judicial role to carry it out. It is ironic when judges who want to abolish the discretion of parole are among the advocates of judicial discretion when legislators discuss mandatory sentencing laws.

Most judicial advocates for abolishing parole are not simply speaking to truth-in-sentencing, under which the bench conveys to the public information on legislative statutes governing good time and parole eligibility. Rather, this view—which was also reflected in the Federal Sentencing Commission that abolished parole—is that the public wants everyone to serve the full 10 years. This is the “just desserts” model that punishes the crime rather than the criminal. The “just desserts” model grew out of the belief that the “medical model” was, indeed, an apt reference to describe the rehabilitative philosophy of corrections because curing an individual’s criminal behavior through criminal sanctions was no more certain than curing the common cold.

Two opposite reactions to the failure of the medical/rehabilitative model have converged toward the same end: abolish parole. The push for harsher penalties, which could be achieved by abolishing parole, has already been discussed. Opposition to parole also has been based on the argument that, as practiced, parole does not serve equal justice. “Some were spending years behind bars for minor offenses because they failed to make a satisfactory showing of a cure, while others were able to con parole boards with shows of sincerity, then go out and commit new crimes.”<sup>95</sup> In fact, it was prisoners’ advocates in California who lobbied to make it the first of nine states to drop indeterminate sentencing.

By the beginning of the 1980s, the National Academy of Sciences noted that the replacement of the indetermi-

nate sentence and the rehabilitation ideology with a “just desserts” philosophy and fixed sentences has been widely hailed by persons of diverse political ideology, either:

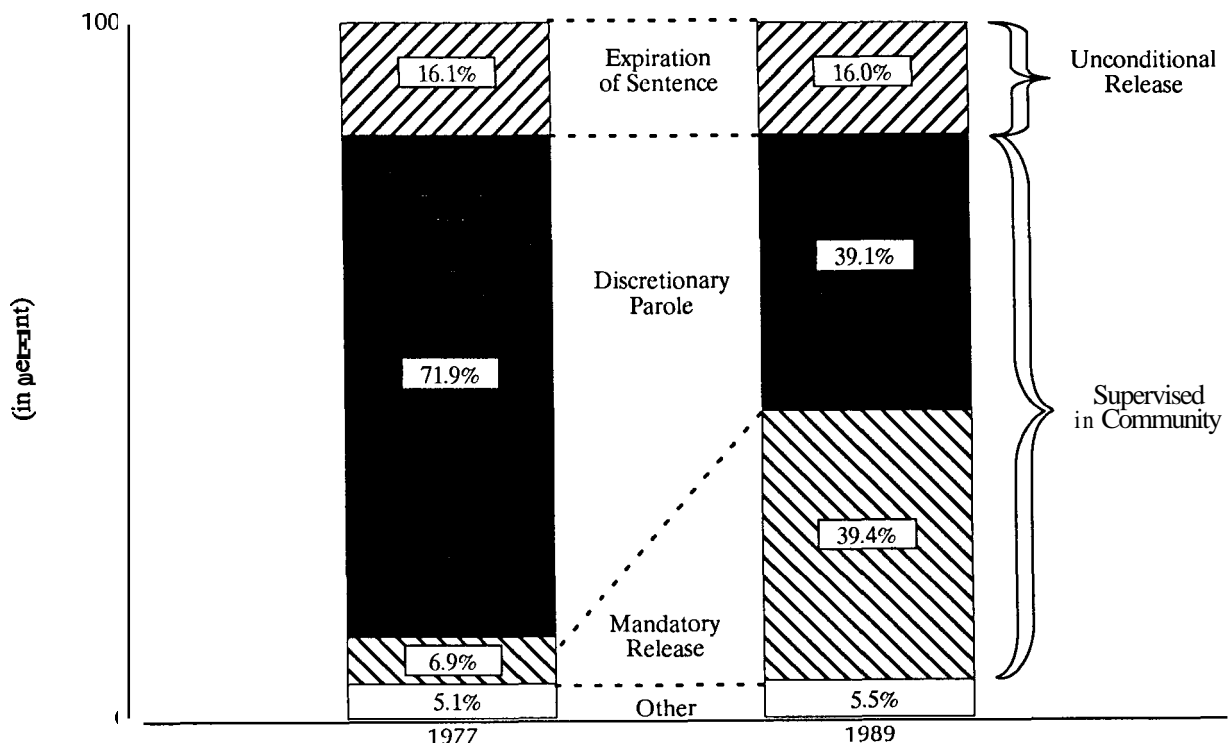
- To end coerced treatment and protect offenders rights,
- As justification for more severe punishments, or
- As a “utilitarian stance” emphasizing social defense and incapacitation as the primary goal.<sup>96</sup>

Such legislation has resulted in a decline in discretionary release of state prisoners on parole from almost 72 percent of all releases in 1977 to 39 percent in 1989. It must be noted, however, that the proportion of inmates serving their full sentences has not increased (Figure 2-3) due in part to mandatory releases forced by population caps that have been triggered by overcrowding?<sup>97</sup>

### Summary

Guaranteeing basic rights to all individuals was a major issue in the adoption of the U.S. Constitution, and fear of unbridled police power in the Crown gave particular importance to the rights of those accused of crime. As a result, state and federal bills of rights and the noncentralized structure of America’s criminal justice system were shaped to check the dictates of any one official and to preserve the rights of the accused, even against the will of the

Figure 2-3  
Change in Type of Release from State Prisons, 1977-1989



Source: Derived from U.S. Department of Justice, Bureau of Justice Statistics, *Probation and Parole 1989*.

majority as represented by elected officials in the legislative and executive branches.

The arresting officer, prosecutor, defense attorney, the court officer charged with determining the criminal and personal history of the accused, the sentencing judge, probation or institutional corrections officials, and parole authorities are all charged with independently weighing the actions of an individual brought into the criminal justice system. Restraints on anyone element of review affect the power of the others.

The extraordinary growth in the number of people being handled by all aspects of the criminal justice system has strained these checks and balances and the functioning of the system. When increased law enforcement resources are not matched by an increased ability to process these arrests, police and/or sheriffs' deputies feel ill-served. When large caseloads reduce the time to consider evidence and relevant sentencing factors, typically, the role of the prosecutor is strengthened and longer periods of incarceration may result. When court management does not keep pace with growth, detention facilities become overcrowded and plea bargaining becomes more of a necessity than an option. Finally, when correctional space is not increased commensurate with increased arrests, prosecutions, and sentences to prison, then the ability to review each offender's response to the correctional sanction before making a decision to release is lost.

These and other consequences within the criminal justice system affect the ability of elected legislators and chief executives to change criminal justice outcomes through sentencing laws. Legislative removal of discretion from one may increase the discretionary power of another. Almost two decades of unrelenting growth may mean the intent of enhanced sentencing laws can be realized in many systems only through budget support of administrative improvements, manageable caseloads, and/or expanded capacity. Finally, pressures for new sentencing legislation may need to be tempered by an increased appreciation for the constitutionally based reasons that persons are diverted through arrest screening, plea bargaining, sentencing, parole review, and bill of rights protections.

The issues that are involved in legislative sentencing reform can be more clearly appreciated within the context of these dynamics in the criminal justice system. Concerns raised by ongoing efforts of general government elected officials to change the sentencing outcomes will in turn shed further light on the interaction of legislative change with the constraints of the criminal justice system and the potential for system impacts.

when it became the first state in recent history to abolish indeterminate sentencing and parole. Although establishing determinate sentencing was a legislative initiative, the legislature left the judges with a wide range of penalties from which to choose (e.g., 0-5 years or 0-20 years). Recently, Virginia took another hybrid approach that could still be classified as a judicial model. Rather than allowing empirical guidelines developed by the judiciary to be vol-

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## ***SENTENCING REFORM***

### **Sentencing Reform Commissions**

There are as many reasons for a state to establish a sentencing reform commission as there are commissions. While hardliners push for longer sentences, social atti-



corporated sentencing alternatives and mandated correctional impact statements for sentencing proposals.

The approach taken in Oregon, at least in its inception, was an attempt to balance all elements: judicial, legislative, and commission.

The 1987 Oregon legislature found that the decision to imprison offenders, and decisions as to the period of imprisonment, must be made on a systematic basis that maintains institutional population within a level that the legislature and the citizens of the state are prepared to provide. The legislature also found that we must allow for the judicial discretion necessary for appropriate sentencing in individual cases.<sup>99</sup>

Inadequate prison space prevented Florida's guidelines, enacted in 1983, from taking full effect. In 1985, guideline proposals were rejected by the legislatures in New York and *South Carolina*. Louisiana, New Mexico, and the District of Columbia have proposals under development.<sup>100</sup>

Perhaps the most significant influence on the future course of state sentencing reform may be federal reform efforts. Congressional legislation providing for federal sentencing guidelines was first passed by the Senate in 1978. The federal sentencing commission ultimately was authorized by Congress as a provision of the *Comprehensive Crime Control Act of 1984*. Congress acceded to the commission's recommendations in 1987, and all federal judges have been sentencing under these guidelines since November 1989.

In the discussion that follows of the issues involved in comprehensive sentencing reform, the federal approach is amply represented for two reasons. First, many of these concerns will arise in any comprehensive effort; there is no difference in state or federal dynamics in the points discussed. State officials, therefore, can learn from the federal experience as to whether they want to initiate a sentencing commission approach and how it should be structured. Second, the U.S. Justice Department, believing that replication of federal sentencing guidelines by the states "will directly benefit states," transferred \$300,000 from state and local anti-drug grant funds to the U.S. Sentencing Commission during 1990 for this purpose.<sup>101</sup> State criminal justice officials and general government officials need to be aware of what their state may be encouraged to undertake under this federal initiative.

### Who Will Be in Charge of Reform?

By late 1988, 140 federal district judges had ruled that the U.S. Sentencing Guidelines were unconstitutional and 104 had found them to be constitutional. Ultimately, in January 1989, the U.S. Supreme Court upheld the constitutionality of the guidelines in an 8-to-1 opinion.<sup>102</sup> Guideline development by a commission appointed by the executive that included members of the judiciary, and ratification by the legislative branch were held not to be in violation of the separation of powers.

Nevertheless, a new round of challenges to the federal sentencing guidelines—which are indicative of the reac-

tion to state sentencing guidelines, as well—has been filed. The new challenges stem from the fact that the sentencing outcome has been put in the prosecutor's hands based on the charges filed. These and the original challenges would appear to be driven as much by judicial reactions to having their power constrained, as by differences in constitutional interpretation. At least one U.S. district judge quit, citing the stress from handling scores of drug cases and the lack of discretion he had in sentencing.<sup>103</sup>

Sentencing commissions are usually comprised of members of more than one branch of government. The legislature usually has initiated the commission. Members of the judiciary have been asked to participate to provide knowledgeable guidance on sentencing practices; for example, the Ohio commission is chaired by the state's chief justice. Executive agency representatives often are included to provide the most direct assessment of capacity restraints. Some state commissions have had their members appointed by the governor. The U.S. Sentencing Commission has seven voting members and two nonvoting members appointed by the president and confirmed by the Senate. It was created as an ongoing, independent judicial body in the federal criminal justice system.<sup>104</sup>

In contrast to Congress, states have avoided a major element of a separation-of-powers challenge by having the legislature enact the guidelines into law. Congress took the stance of simply not objecting to the guidelines becoming effective. In fact, the Senate Judiciary Committee held only one day of hearings. The principal focus of the House Criminal Justice Subcommittee's action was not on the substance of the guidelines but simply on whether there should be a nine-month delay to permit field testing.<sup>105</sup>

The Ohio Governor's Committee on Prison and Jail Crowding sounded the typical, all-encompassing call in its 1990 recommendations:

Goals of the Sentencing Commission would include "frugal use of correctional resources," as well as just punishment proportionate to the seriousness of the crime; similar punishment of similar offenses; offer the offender an opportunity to improve him or her self; tie each sentencing decision more directly to the crime, offender, and victim; and protection of the public.<sup>106</sup>

However, the Ohio governor's committee also acknowledged that taking popular politics out of sentencing was an important goal. "A sentencing commission could provide the General Assembly with a response to public pressure for changing sentences."<sup>107</sup> Therefore, as a shield against legislators reacting to the possibility of being labeled soft on crime if they reduce any sentences, sentencing recommendations would be considered as a total package by the legislature, with opportunity for the commission to respond to any legislative changes before the package is enacted. Political input was recognized as an important ingredient, nevertheless, and the committee recommended that commission members be selected from among elected officials for the most part. Thereby, political sensitivity would be part of the development of whatever was brought before the legislature.<sup>108</sup>

This Ohio attempt amply demonstrates one major pitfall of sentencing commissions: the political vulnerability of dealing with the reality of sentencing. As briefly outlined in the discussion of parole and good time, prisoners typically serve only a small portion of their sentences. Yet, almost all prisons and large jails still are overcrowded. If the goal of a sentencing commission is truth-in-sentencing, then the sentences given will have to be reduced—significantly.

Sentencing commission recommendations are, therefore, typically developed as a package. This is basic to viewing parity across criminal offenses. More importantly, it is essential to the legislature adopting change without further impact on the need for prisons and jails. The package can be sold as reducing the sentences for “less serious” offenders so that “serious” offenders are fully punished. Unfortunately, the public may accept this in theory until it gets applied to the reality that an estimated 95 percent of state prison inmates have either been convicted of a violent offense or have a history of prior convictions.<sup>109</sup> At that point, distinguishing between “serious” and “less serious” becomes politically volatile. Legislators are not going to like being asked to reduce the statutory sentence of 5 to 10 years for a third burglary conviction to a flat 18 months.

Minnesota and Oregon have had the most success in dealing with this challenge by tying it clearly to the issue that the public cannot afford to build more prisons. Other state legislatures and the Congress have chosen instead to include building more prison space, at the onset, as part of the package to achieve sure, equitable, and appropriate sentencing.

### Projecting the Effects of Sentencing Changes

But, how does the legislature know what effect the sentencing guidelines will have on prison and jail populations? The difficulties of criminal justice forecasting will be discussed at length in Chapter 8. It should suffice for the moment to equate its difficulty with economic forecasting, with the added observation that “Economists state their GNP growth projections to the nearest tenth of a percentage point to prove that they have a sense of humor.”

No matter what the legislative intent, projections of the effect of sentencing changes are not possible with the same degree of certainty that legislators are accustomed to in other fields, such as education or even Medicaid. All 5-year-olds will enter kindergarten, but not all 18-year-olds will enter prison.

Not only is it difficult to make prison and jail projections, but any projection has added potential for being disregarded in a politicized debate because, unlike most social legislation, changes in the criminal justice code apply only to new offenders. If aid-to-dependent children eligibility is extended through high school graduation rather than terminated at age 18, the additional cost will occur in the first year. Adding two years to a 5-year term will only be felt after five years. The expense will be the problem of another legislature.

To the degree that it is openly recognized that any objective projections are based on multiple subjective assumptions, legislative action may be duly tempered. Unfortunately, tacit political agreement to accept optimistic projections, rather than to consider worst-case scenarios,

is not uncommon. If future costs are not debated and/or multifarious data not even developed, the short-term political gain from passing truth-in-sentencing reforms will result in longer net sentences.

Thus, how the impact of sentencing changes is determined and conveyed can make a major difference in legislative action. Therefore, while this discussion started with the controversy over whether the judicial branch, the legislative branch, or the executive branch should wield the greatest power in sentencing reform, there is reason to question whether it is, in fact, the appointed individuals who control the data, rather than the legislature, who are determining sentencing policy.

### Problems with Sentencing Commissions

While a commission may shield a comprehensive revision from political pressures to increase sentences, a commission also may develop its own agenda, penal philosophy, and/or pride in seeing its product adopted. This may be especially true if the executive makes the appointments and has adopted truth-in-sentencing as part of a tough-on-crime platform. Several state legislatures, alert to this problem, have stipulated that the bulk of sentencing commission members will serve by virtue of their position (such as chief justice, Senate judiciary chair, or state attorney general) or will be designees of criminal justice interest groups (such as local prosecuting attorneys, defense attorneys, or sheriffs' association), rather than be appointed by the governor.

Even if it has the desire, a commission may not have been given the technical resources or the charge necessary to fully address impact projections. For example, in 1991, the U.S. Sentencing Commission still was answering inquiries as to the effect of the sentencing guidelines on prison populations by citing figures speculatively generated in 1986. Further, the Congress did not call for a GAO evaluation of the impact of the guidelines until four years after they were in effect. Finally, even though the commission was to have surveyed prison capacity and projected whether implementation would result in exceeding such capacity, there has been no systematic or ongoing survey.<sup>110</sup>

Most state sentencing commissions have been given the role of monitoring the effects of the policy once it has been enacted. Such outside oversight can be very important for the federal prison system or any state system presenting its budgetary needs to the executive and hence to the legislature. Prison (or jail) administrators may not be taken seriously, at least by some general government officials, without direct validation from the commission staff who, in the process of adopting the sentencing guidelines, will have assumed the stature of experts.

As noted, this credibility may or may not be well placed, depending on how the commission is selected and staffed. The Federal Courts Study Committee surfaced this concern by calling for continued analysis

not confined to the Commission or to a few groups or government agencies. Rather, bar association, prosecution and defense groups, public policy organizations, public and private research institutes, foundations and other funding sources and, of course, individual scholars, should all join

in this research effort that, heretofore, has been largely the sole province of the Sentencing Commission.”

### Substantive Complexity

Simple justice was a goal of Camelot. In modern times, as populations grew and became increasingly mobile, judges came to know less and less about the offender, the crime, or the victim. With population growth, individual judges also came to represent an ever smaller part of the totality of decisions that define justice. Sentencing guidelines are a mechanical means to try to cope with this evolution. They are an attempt to comprehensively define justice and the facts that should be known before sentencing.

Elected officials are used to having big numbers thrown at them. But even they would be daunted by being asked to rank 500—or is it a thousand? or two? or three?—separate criminal offenses, multiplied by six—or should it be 12?—levels of past criminal history, multiplied by how many degrees of victim impact, multiplied by what relevant facts about the offender and the severity of his or her actions. Such a task is rightly delegated to staff. However, tough policy decisions, such as equating a barroom brawl with child abuse, eventually come back to the elected representatives.

The task is complicated further by the disarray in some criminal codes. This is particularly true of the federal code, as described by the Federal Courts Study Committee:

There are more than 3,000 separate federal statutory offenses. Important offenses such as murder and kidnapping are co-mingled (sic) with trivial offenses like reproducing the image of “Smokey the Bear” without permission and taking false teeth into a state without the approval of a local dentist. The current statutes use 78 different terms to describe the *mens rea* that must accompany the various offenses. Many offenses overlap. For example, 446 statutory offenses deal with just four offense areas— theft, fraud, forgery, and counterfeiting. The resulting confusion and inefficiency seriously impede the operation of an effective criminal justice system.<sup>112</sup>

The Federal Courts Study Committee commented that “a number of criticisms of the U.S. Sentencing Guidelines may actually be criticisms of the arbitrary structure of federal criminal laws, a structure made transparent by the guidelines. There are thousands of separate federal criminal prohibitions, enacted at different times, reflecting different penal attitudes and full of gaps and overlaps.”<sup>113</sup>

Most states are a step ahead of the Congress. Beginning more than 25 years ago, states began revising their criminal codes in line with the Model Penal Code, which was published by the American Law Institute in 1962. By 1985, three-fourths of the states had done so.<sup>114</sup> The Federal Courts Study Committee urged the Congress to “resume the task, formidable as it is, of recodifying federal criminal law in order to bring about a simplified, rationalized, and coherent system of prohibitions.”<sup>115</sup>

However, even though states that have recodified their criminal law based on the Model Penal Code have a more structured base, this structure does not translate well into a uniform sentencing matrix. The Model Penal Code classifies offenses based on the worst case, not the usual case. It is based on the assumption that the legislature sets the maximum for the worst case but—importantly—with enough of a range below it to allow the court to set sentences appropriate for the usual case.<sup>116</sup>

This focus on the worst case may translate satisfactorily into sentencing guidelines in the case of aggravated sexual assault because the type of behavior in such crimes is relatively narrow. The usual case and the worst case are within the same range. However, possession of even a large quantity of drugs may result from a wide range of involvements in the drug trade. “Intent” would be very important, as would individual factors, such as age, income, and family status, to distinguish between a mainline lawyer engaged in a lucrative drug trade “on the side” and a poor Mexican father enticed to take a drug run over the border.

As noted, criminal assault can include a barroom brawl or child abuse, and each can encompass a wide range of severity. It is true that an offense category can be subdivided repeatedly into other categories to encompass meaningful distinctions. However, the Federal Sentencing Guidelines, based on only 43 offense categories and six levels of criminal history, results in a 258-cell matrix. Even at this simple level, one assistant U.S. attorney observed, “The guidelines are not fun to deal with. Most people who become attorneys didn’t do so to perform calculations.”<sup>117</sup>

Most state commissions have made distinctions, such as monetary amounts, frequency of behavior or harm, age of victim, and extent of injury, in setting sentencing guideline ranges and reasons for departure.<sup>118</sup> The federal guidelines also make allowances for each of the 258 cells to be adjusted upward for factors such as degree of bodily injury, weapon use, or the vulnerability of the victim. Downward adjustments are indicated primarily for a guilty plea (“defendant’s acceptance of responsibility for the offense”).

Critics note that the United States Sentencing Commission Guidelines manual states, “Congress sought uniformity in sentencing by narrowing the wide disparity on sentences imposed by different federal courts for similar criminal conduct by similar offenders.” However, these critics point out that “[G]uideline sentencing actually does a disservice to these notions of uniformity, as key factors about the ‘offender’ are eliminated.”<sup>119</sup> The guidelines do not indicate that downward adjustments also may be made for the offender’s age, employment history, or family status and whether the defendant was an instigator and leader or a follower. The Federal Courts Study Committee has urged that the *Sentencing Reform Act* be amended to permit consideration of an offender’s age and personal history.

However, some civil rights advocates do not support mitigating sentences by trying to individualize justice. They prefer to equalize justice through the “just desserts” approach, which seeks to punish all convicted offenders in direct relation to the seriousness of the offense or harm done, because guidelines that specify sentencing reductions for offenders who are employed and/or married will

let white middle-class offenders off easy compared to inner-city blacks.<sup>120</sup> Interestingly, Congress' charge to the commission, to ensure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders, serves both hardliners and those who believe that being poor should not be a reason to lock someone up.

### Who Will Ultimately Decide Actual Time Served?

A simple law of physics, "For every action there is an equal and opposite reaction," may be at work in trying to set uniform sentencing standards. The more the sentencing options are limited, the more the description of individual circumstances may be massaged to meet the guidelines. This will mask the reality that human behavior is not easily pigeonholed, and the legislative goal of uniformity may be served more in appearance than in fact.

Sentencing commissions attempt to spell out "how much each of the relevant factors is worth in a simple calculation whereby one arrives at 'the' appropriate sentence." Should the amount taken in a robbery be weighted the same as that taken in an embezzlement or larceny? What should be the penalty enhancement for "brandishing" a weapon as opposed to simply "possessing" it? Should the weight given to threatening the victim be able to be canceled out by pleading guilty?<sup>121</sup> Each distinction made by a sentencing commission creates additional incentive for the defense or the prosecution to argue that the facts of the case fall on one side or the other of a cut-off.

By statute, judges can depart from the federal guidelines for "aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission."<sup>122</sup> Of the U.S. district court judges surveyed, 72 percent felt that the guidelines did not offer sufficient flexibility to permit them to give an appropriate sentence in each case. Nevertheless, the U.S. Sentencing Commission found that, in 1989, judges did administer sentences within the guidelines in 82 percent of the cases before them. The courts departed downward in 5.8 percent of the cases because the defendant rendered substantial assistance in the investigation or prosecution of others. In 8.7 percent of the cases, courts adjusted downward for such reasons as the defendant's age, family ties, and physical condition. In 3.5 percent of the cases, courts departed upward and sentenced above the guideline range. Reasons given included the defendant's criminal history and the amount of drugs involved.<sup>123</sup>

Such judicial departures can be appealed by the prosecution or the defense. Even without such formal appeals, defense/prosecution bargaining has additional fodder under sentencing guidelines: Plea bargaining and charge bargaining have been joined by fact bargaining.

In gathering the "facts" of a case, the Federal Courts Study Committee observed that the role of the probation officer who is writing the pre-sentence report has been changed significantly. "The probation officer, in developing recommendations for the judge about proposed findings, is thus thrust into the middle of a highly contentious

situation. . . . They may be required to make significant decisions regarding enhancement, credits, and perhaps reasons for departures."<sup>124</sup> "Challenges to the officers' factual findings and the evidentiary hearings held to resolve them reportedly have prompted some judges to advise probation officers to secure counsel."<sup>125</sup>

The traditional role of the pre-sentence report has varied greatly according to the circumstances of the individual court. In theory, the report is to provide the sentencing judge with a view of the facts that is independent of either the case presented by the prosecutor or the case presented by the defense. At a minimum, the report is the judge's source of information about prior criminal activity that could not be brought forth in assessing guilt. The probation officer serves as a fact-finding extension of the judge. In 13 states and the federal system, probation officers are employees of the court.

In reality, the heavier the court caseload, the lower the importance given to pre-sentence reports. They take time to prepare. The judge may prefer to move directly into sentencing if the defense and prosecutor present a plea-bargain agreement. If the probation officers' caseloads have grown with court overload, the reports may seldom provide any information not already before the judge. Although all but five states require pre-sentence reports by state law, nevertheless, some judges have stopped asking for them for the 90 percent of the cases that are plea bargained: "So, who's going to sue?"

This same reality may prevail under sentencing guidelines. As long as defense, prosecutor, and judge are all overloaded, no one may challenge whether the sentencing guidelines were administered properly. However, for court systems still able to exert the traditional checks and balances, there is concern that sentencing guidelines may produce an undesirable shift in who ultimately will decide the punishment. If the judge is constrained in sentencing to a narrow range of 5 to 10 percent difference between the minimum and maximum sentence, how much will this increase the power of the prosecutor in deciding the charge? If the criminal history or the value of the stolen property can move the punishment to a different level who will control this finding of facts?

The impending dilemma was described in a paper by a senior U.S. probation officer:

Some probation officers expressed the feeling that defense attorneys, prosecutors, and judges would "tear them apart" in court over minor mistakes made in PSI report preparations or other challenges of their authenticity and accuracy. One very capable defense attorney confronted me one afternoon in mid-1987 on an elevator in the federal courthouse. "How do you like the new guidelines?" he asked. I replied that I wasn't "thrilled" by them and expressed the concern that the U.S. Probation Officer role would become considerably more visible than at present. He remarked, "Don't worry about that, because over the years, defense lawyers, judges, and prosecutors have been unable to determine what justice is. And so now it's your turn. You can't do any worse than we have done."<sup>126</sup>

At least initially, U.S. probation officers, who are “relatively low status members of the courtroom work group,” have nonetheless been regarded as experts in the federal guidelines because they have received the most training. **As** prosecutors, defense lawyers, and judges become more familiar with the guidelines, their traditional bargaining positions may be resumed.

In addition, there is concern that sentencing guidelines may further overload the courts. “Because the results of any particular finding allowed under the guidelines significantly impact the sentence imposed, judges are spending an enormous amount of time making findings at sentencing hearings before a sentence can be imposed.”<sup>127</sup> Three-fourths of the 365 U.S. district court judges surveyed by the Federal Courts Study Committee said sentencing hearings have become more time consuming. Fifty-six judges said that the time required had increased 25 to 100 percent. However, over one-third agreed that, “Given the goals of eliminating disparity between defendants and making sentencing more rational, the additional procedures associated with the Sentencing Guidelines are not more burdensome than needed.”<sup>128</sup>

Another source of overload, predicted by critics, is an increase in the number of defendants who will choose to go to trial because mandatory minimum sentences give defendants no incentive to plea bargain. “We’re trying more cases than we used to,” said Chief Federal Judge Francis J. Boyle in Rhode Island. “You get more defendants who want to just take a shot at it and hope the jury makes a mistake.”<sup>129</sup> Notwithstanding such isolated reports, a 1989 survey by the U.S. Sentencing Commission found that the rate at which defendants plead guilty has remained constant since nationwide implementation of the guidelines. Just over 88 percent of all defendants sentenced under the federal guidelines in 1989 entered pleas of guilty or nolo contendere. This is approximately the same rate of guilty pleas entered in the federal courts before sentencing guidelines.<sup>130</sup>

Perhaps this is because, as other critics have warned, sentencing guidelines have further strengthened the role of the prosecutor in negotiating guilty pleas. The prosecutor is as constrained as the judge under sentencing guidelines in the range of sentence that can be offered to induce a guilty plea. However, the prosecutor does have another avenue of discretion, while the judge does not, and defendants know this: the prosecutor can change the charge.

Effectively transferring sentencing discretion from judges and parole authorities to prosecutors (and at the same time increasing the sentence disparity between guilty-plea and trial defendants) would not be progress; to the contrary, it would be a perverse and regrettable development . . . the guidelines are merely bargaining weapons—armaments that enable prosecutors, not the Sentencing Commission, to determine sentences in the overwhelming majority of cases. . . . Typically, the prosecutor *can* offer a sentence about one-third as severe **as** the sentence that the defendant would have received if convicted of the greater charge at trial.<sup>131</sup>

The Federal Courts Study Committee felt it was too early to take a position on the federal sentencing guidelines, but they did outline similar concerns. “Despite the Attorney General’s instructions to federal prosecutors, which state that departures from the guidelines ‘should be openly identified rather than hidden between the lines of a plea agreement,’ it is felt that discretion has been passed from the judge’s hands to the **prosecutor’s**.”<sup>132</sup>

In fact, the commission’s initial assumptions acknowledge that the federal guidelines will not significantly limit plea bargaining.

The Commission has assumed that only a small minority of future offenders—the 15 percent convicted at trial—will be sentenced as severely as the guidelines appear to mandate. . . . [T]he Commission’s predictions assume that defendants who plead guilty will receive discounts of 30 or 40 percent from their probable post-trial sentences (the same ‘percentage reduction’ that guilty-plea defendants currently receive).<sup>133</sup>

In addition to other concerns about prosecutors manipulating the charge to achieve a guilty plea, it has also been noted that “[T]he long tradition of record-keeping and appellate review make judicial decisions accountable in a way that prosecutorial decisions are not.”<sup>134</sup> If fact bargaining comes to carry greater weight, the lack of written records will make it even more difficult for legislative or executive oversight to determine whether the goal of similar sentences for similar criminal acts has been achieved, or whether it is simply the charges—the labels that expediently are given to the criminal acts—that have been changed.

While this discussion has focused principally on concerns raised about the federal sentencing guidelines, the dynamics of the judge, prosecutor, defense, and probation officer are the same in state courts. The legislative search for sentencing uniformity may have a very significant effect on altering this balance of power. In that shift, sentencing uniformity related to the actual criminal act committed still may remain elusive.

## The Impact on Prisons and Jails

“A rose by any other name would smell as sweet.” This is not so for sentencing commissions and determinate sentences. Legislators must carefully define the goals and parameters to be served by such initiatives, or they are as apt to end up with crabgrass as with orchids.

Of the nine states having the longest experience with determinate sentencing, five (California, Illinois, Maine, New Mexico, and Washington) had prison population increases during the 1980s that exceeded the average increase for all states. The growth in the other states has been artificially restrained by population caps that have reduced sentences or advanced parole eligibility despite—or because of—determinate sentences. Florida’s cap came as the result of a federal court order, while North Carolina’s cap was enacted by the legislature in 1987. Only Minnesota has not experienced extraordinary growth following the adoption of determinate sentencing.

From the beginning, Minnesota resolved that sentencing guidelines would be constrained by prison capacity. It can be argued that this is simply a cap before the fact. There are two important differences, however. First, initial legislative agreement on capacity restraints assured that the guidelines would control the proportionality of the sentencing, not the vagaries of how prisoners are released under a cap (i.e., reducing all sentences by 30 days has a different effect than reducing all sentences by 5 percent). Second, legislating tough sentencing guidelines without the capacity to carry them through does not advance truth-in-sentencing. The following description of the 1980s in Florida provides an excellent example of the spin-offs when sentencing reform does not adequately consider capacity:

Starting in the early 1980s, lawmakers in [Florida] launched one of the most aggressive anti-crime and drug crackdowns in the nation, passing tough laws that abolished parole, stiffened sentences and mandated prison time for possession of even small amounts of cocaine and other illegal substances. "Four years ago, inmates sentenced to Florida prisons served an average of 52 percent of their sentences. Today, the figure is 33 percent and dropping fast." As a result of a 1972 suit, there is "a court-imposed limit on the number of prisoners in state institutions and the appointment of a special federal 'master' to ensure enforcement. . ."

[B]y the time [Governor] Martinez took office in 1987, new inmates from a crack-induced explosion in drug offenses were being herded into makeshift tent prisons. Facing a new federal court ruling that could lead to mass releases all at once, [Governor] Martinez called a special session of the state legislature and was granted authority to grant inmates "administrative gain time"—essentially time off—whenever the state's prisons were full.

When the program began, a state computer automatically granted most inmates five days off their sentences whenever state correctional officers learned the prisons were at 99 percent of capacity. "Then we went to 10 days, but it wouldn't generate enough bodies out the door," [Secretary of Corrections] Dugger explained in a recent interview. "So finally, we went to 30 days." By last year, the computers were taking one month off sentences every two weeks.

[This occurred despite the fact that a \$350 million, four-year effort more than doubled the prison capacity.] While states dump violent criminals back into the communities, county jails are swelling with rearrested "releasers." . . . [T]he sheriffs' association has filed a suit against the state government to stop the early releases. . . .

Over the past year, [Governor] Martinez and state lawmakers repeatedly have tinkered with

the program in response to public criticism. The list of violent offenders ineligible for gain time has been expanded. Instead of automatically granting time off to inmates through computers, the state parole commission has been asked to review each case individually—a process that some state officials concede may be impossible.<sup>135</sup>

Relatively recently, Oregon launched a comprehensive determinate sentencing reform. As previously noted, the 1987 Oregon legislature found that "the decision to imprison offenders, and decisions as to the period of imprisonment, must be made on a systematic basis that maintains institutional population within a level that the legislature and the citizens of the state are prepared to provide."<sup>136</sup> The result has been that, even for crimes against persons, Oregon guidelines sentence very few inmates to terms of five years or longer. The penalties for a few serious crimes were increased, but penalties for most lesser crimes were decreased.

These reductions were not adequate to constrain prison population growth in part because, when the sentencing reform package was presented, the legislative politics led to tougher penalties being added. Therefore, subsequent action had to be taken that tied Oregon's parole guidelines to prison capacity. Parole became openly acknowledged as an instrument of prison population control.

Parenthetically, although Oregon has retained parole even under determinate sentencing, it is now approached on a "presumptive" basis by notifying the inmate shortly after admission what the presumed parole date will be. A greater burden of proof thus is required to deny parole, removing much of the potential for inequitable treatment alleged under indeterminate systems.

Not surprisingly, such sentencing reductions were not universally embraced in Oregon. As noted earlier, local jail populations were impacted heavily because felony guidelines were developed before misdemeanor sentencing guidelines. Prosecutors and judges took the opportunity to convict on a reduced charge so that the offender would serve more time in jail on a misdemeanor conviction than the prison time that could be given under the new felony guidelines. The Oregon Criminal Justice Council was directed to develop guidelines for misdemeanors by 1991, two years after the deadline for the felony guidelines.<sup>137</sup>

Minnesota's guidelines have been in effect for 10 years and apparently did not have to face the same judicial reaction of felonies being reduced to misdemeanors to circumvent the lowered felony sentencing caps. Nevertheless, several key state policymakers have recently proposed the development of local sentencing guidelines, similar to the state sentencing guidelines. Even for misdemeanor sentences of less than a year, jail crowding has made it necessary to ensure that sentences are handed out equitably, according to the Anoka County community corrections director.

Local jail populations can also sustain a heavy impact if state sentencing guidelines do not adequately provide for sanctions other than imprisonment. R testimony before the U.S. Advisory Commission on Intergovernmental Relations in 1983 singled out this problem with Minnesota's initial effort

forts. When short sentences are given instead of community-based sanctions, they are usually served in a local jail.

The greatest concern about the effect of guidelines on the use of alternative sanctions may stem from the new federal guidelines because the federal guidelines may become a benchmark to judge the severity of state guidelines. Congress specified in the *Sentencing Reform Act of 1984* that, "The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."<sup>138</sup> Nevertheless, the guidelines that emerged authorized fines, home detention, community service, and other community-based sanctions only as a supplement to a period of incarceration and not as an alternative to it. Probation alone is limited to offenders who fall within the lowest 21 cells of the 258-cell matrix.<sup>139</sup> As of 1990, 74 percent of the offenders sentenced under the guidelines were sent to prison, compared to only 52 percent of offenders in 1986.<sup>140</sup> If any state uses the federal guidelines as a model, the sharp reduction in the use of probation in the federal justice system, from 50 percent of cases to 10 percent, would portend a heavy impact on localities.

### The Political Climate

Elected officials are pressured by the public's fear of crime, by competing political philosophies, and by their own fear of the 30-second campaign spot. But, because most elected officials and citizens know little about criminal justice, they also are under extraordinary pressure by actions of the body politic. According to the First Law of Political Campaigns: "If there are twelve clowns in a ring, you can jump in the middle and start reciting Shakespeare, but to the audience, you'll just be the thirteenth clown."<sup>141</sup>

Officeholder concerns about going against common wisdom in criminal justice are true whether it is actions of their own predecessors or contemporary initiatives by other elected officials. The dynamics can involve classic confrontation between the executive and the legislature or may simply reflect similar perceptions of the public will or needed action.

The reluctance during the last two decades to weaken any criminal penalty currently on the books was described well by a seasoned state senator:

Once you have increased the sentences you are not going to be able to bring them back down. It won't happen. We are locked in. . . . A new monster has been created by all this toughness. It is the monster of prison overcrowding and all the cost it is bringing about. . . . We as legislators created the problem, but now you cannot go back to the public and say we made a mistake. Judges and D.A.s are locked into this cycle as are elected officials and they can't go back.<sup>142</sup>

The reluctance to rescind past sentencing legislation had a major effect on federal sentencing reform. While it authorized a Sentencing Commission for a comprehensive

review, Congress made it clear that guideline ranges should not violate the maximum and minimum sentences that they had already prescribed for any crime. Consequently, according to the commission's projections made in 1986, 85 percent of the impact of the sentencing guidelines are assumed to be from the mandatory minimum sentences that the Congress had previously enacted, rather than from the guidelines themselves. To the degree that this is true, it underscores the problem with a piecemeal approach. Eliminating parole without any compensating changes in the previously enacted mandatory sentences will have the effect of significantly increasing the time served. Federal prisoners had been serving an average of 33 percent of their sentences. Without parole, federal inmates will serve 156 percent longer sentences at a minimum.<sup>143</sup> In fact, although less than half the federal prisoners released in 1990 had been sentenced under the guidelines, the average time served for all those released already was 29 percent higher than in 1986."

The Federal Courts Study Committee's report asserted that retention of previously enacted mandatory sentences also thwarted an original goal of the 1984 act, which was to sentence according to the nature of the offender, as well as the nature of the offense.

The recent mandatory minimum sentence provisions ignore these offender and offense variables and in the process inhibit the efforts of the Sentencing Commission to fashion a comprehensive and rational sentencing system. . . . Repeal of these mandatory minimum sentences would allow the Sentencing Commission to revise its guidelines applicable to the relevant offenses—a compelling need in light of the huge projected increase in the federal prison population. . . . [V]irtually all commentators on our draft proposal on this subject, including present and past members of the Sentencing Commission, support repeal of mandatory minimum sentences.<sup>145</sup>

In addition to the legislator's reluctance to weaken any criminal laws already on the books, the influence of the body politic is even more powerful. As amply demonstrated in the examples of recent legislation cited at the beginning of this chapter, state legislatures have been active in passing tougher criminal laws. This prevailing trend has been multiplied further by the actions of other states and the Congress.

There are numerous national clearinghouse columns and news articles about other state initiatives, which are picked up by elected officials in shaping their obligatory "crime package." This borrowing from other states may be for political reasons, or it may be necessary to counter the fact that criminal activity has become increasingly mobile. If a state's laws and their enforcement are weak relative to other states, organized crime involved in activities such as drugs, vehicle theft, or fraud may move to take advantage of the weakness.

Federal action has had even greater influence on state actions. First, it receives more attention in the popular media and is therefore more apt to be echoed by the local official's constituency. In an area where there are few if

any standards of reasonable policy, local elected officials are more apt to be measured by federal action. Second, if a state's laws are deemed to be too weak, criminal cases may be taken to federal court. Such court shopping has significantly increased.

Traditionally and constitutionally, the federal government played a very minor role in criminal justice. **As** noted, out of fear of a strong central government with broad police authority, the founding fathers reserved general police powers to the states. However, as federal domestic activity increased generally, the Congress criminalized more actions under federal law. Thirty-seven federal agencies now have law enforcement authority.

Second, Prohibition initiated a significant growth in federal involvement in general law enforcement. Once the precedent was set and the federal capability established, expanded federal law enforcement did not disappear with Prohibition's repeal. Using the interstate commerce clause as the constitutional authority, the *Travel Act*, the *Hobbs Act*, wire and mail fraud, and the RICO statutes added significantly to the federal government's authority to prosecute crime. "[T]here is virtually no crime, including convenience store stickups or juvenile purse-snatchings which, because of their respective effects on interstate commerce, do not have some federal criminal statute covering them."<sup>146</sup>

Today, even though less than 6 percent of felons have been convicted of a federal offense, fighting crime is as apt to be part of a congressman's or president's agenda as it is a state legislator's or a mayor's. In a 1989 letter, the U.S. assistant attorney general for the criminal division applauded this federal influence on the body politic: "[T]he state legislatures are following the federal government's lead in enacting stiffer laws. To this extent, the federal government has played an entirely appropriate role in providing an example for legislation and enforcement to the states."<sup>147</sup> However, significant concerns have been raised about the impact of such federal legislation as RICO statutes on the balance of power in the federal system and the rights of individuals.<sup>148</sup>

Many states have enacted legislation parallel to those federal laws that strengthen criminal prosecution. **As** of 1986, 23 states had enacted RICO laws very similar to the federal statutes, which were first enacted in 1970 and most recently amended in 1986. Unlike other statutes that address individual criminal acts, the RICO statute was specifically designed to target the overall and continuing operations of organized crime organizations. Racketeering activities are defined to include any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotic or dangerous drugs, fraud, and other crimes. These laws cover wiretap procedures, immunity provisions, multijurisdictional investigations, and forfeiture of property used in or purchased by illegal activity. Because these provisions are technical and not well understood by the public, enactment by states often has been spearheaded by officials within the criminal justice field.

The pressure to increase state criminal penalties to match federal penalties, at times, has been even more direct. Where states have not enacted sentences that are as

tough as federal provisions, local prosecutors—often at the urging of law enforcement officers—may refer the charge to a U.S. attorney.

[A] first offender caught carrying 50 grams of crack now faces 10 years in prison without parole in federal court—at least seven years more than he might serve under state law in Florida, Texas, New York, California or the District. . . . In some places, especially the District, prosecutors and drug task forces are steering *cases* out of local courts into federal courts to take advantage of the tougher federal penalties, say judges and prosecutors. Traditionally, federal drug cases were complex prosecutions of large narcotics rings. Now, judges say, they are processing scores of small-time offenders, all of whom face heavy prison terms.<sup>149</sup>

Since 1980, the number of drug cases filed in federal district courts has increased 229 percent, whereas the total number of criminal cases filed is up only 56 percent. Drug cases average more than two defendants each—and many have ten or more—and drug trials now represent more than 44 percent of all criminal trials, up from 26 percent in 1980.<sup>150</sup> In FY 1990, only civil filings did not increase, while criminal case filings increase 6 percent, twice that for 1989.

The U.S. assistant attorney general maintained, in a November 27, 1989, letter to the Federal Courts Study Committee, that the increase in the caseload of minor drug offenses was due to increased drug enforcement on lands and facilities where the federal government has exclusive jurisdiction, such as Indian reservations, the high seas, and the Pentagon; airport and seaport seizures; and border smuggling cases in states such as Florida, Texas, and California. In addition to such specific increases, the "relationships between the investigators, prosecutors and witnesses require a coherent prosecution strategy that may counsel invoking federal jurisdiction on a dominant number of the cases being investigated."

The Federal Courts Study Committee noted that minor drug cases also find their way into federal court because the Congress has provided funds for federal prosecution whereas state prosecutor's offices are not as well staffed and able to take on the flood of drug arrests.<sup>151</sup>

However, in high-crime areas, federal prosecutors appear to be no more able to handle the increased caseload than local prosecutors. For example, 15 years ago, the U.S. attorney's office in Los Angeles would file criminal charges against suspects who had used the mail to defraud victims of \$50,000 or more. Today, they usually will not accept the case unless the loss to the victim exceeds \$250,000. Federal law allows the FBI to step in when the value of stolen goods from interstate shipments exceeds \$5,000, but the U.S. attorney usually will not prosecute the case unless the value exceeds \$25,000. The U.S. attorney usually will not accept a case involving interstate car theft or copyright violations unless organized crime is involved or the suspects are operating in at least three states.<sup>152</sup>

The following recommendation was central to the Federal Courts Study Committee's findings:



Where the offense arises out of trafficking on a local basis rather than out of the activities of large multistate or even multinational rings, the proper jurisdiction to prosecute and try the offense is the state, not the federal government. Unless this division of responsibilities is respected, the federal courts will be swamped as they almost were during Prohibition. . . . We recommend that the Department of Justice formulate policies of demarcation of federal from state responsibilities in the drug area that will conform to the principles of federalism. And to assist the states in shouldering the burdens entailed by our proposal, we urge Congress to appropriate to the states some of the funds that would otherwise have to be spent to expand the federal role in drug enforcement. . . . Both the principles of federalism and the long-term health of the federal judicial system require returning the federal courts to their proper, limited role in dealing with **crime**.<sup>153</sup>

However, the views expressed in dissent by the U.S. Justice Department representative is equally significant:

The role of the federal courts is crucial to drug law enforcement, for without their authority federal law enforcement loses its nationwide subpoena power, its electronic surveillance authority, its contempt and immunity powers, and its forfeiture authority to name a few. . . . [U]ntil the vast majority of the states enact new and more effective laws to combat drug trafficking (e.g., forfeiture provisions, pretrial detention, harsher sentences) and create adequate prison capacity to house those convicted, the federal government will have a responsibility to step into the **breach**.<sup>154</sup>

Which view will prevail? The second view represents the reality of politics. **As** long as politicians remain convinced that the public believes tougher sentences are the answer to their fear of crime, constitutional issues regarding proper venue under our republican structure will *carry* little weight.

**This** last observation refers to another effect of the body politic: competing perceptions of being responsive representatives of the public's interests. In an example of legislative/executive dynamics, the House Judiciary Committee was willing to consider delaying full implementation of the federal sentencing guidelines to allow for a trial period, as urged by groups such as the American Bar Association and the Judicial Conference. However, the administration, in a letter from Attorney General Edwin Meese, opposed delay as "inconsistent with effective law enforcement," and the subcommittee's recommendation for field testing was defeated on the floor of the House.

Finally, the philosophic climate not only affects the specific laws that are passed, it also influences decisions within the criminal justice system. If more drug dealers are serving prison sentences, is it because the guidelines call for longer sentences and prosecutors find it more attractive to prosecute drug dealers, or is it because a new attorney general, who is reacting to the same perception of

public priorities, calls for more drug dealer prosecutions and devotes more resources to proving the full extent of their crimes in sentencing hearings?

Concern about sentencing reform is widespread. As one critic observed:

Someday, even if observers look back upon discretionary pre-guidelines sentencing with astonishment, they may view the first federal sentencing guidelines as a symbol of some disturbing trends in American penology—a mark of an increasing dehumanization of offenders; of more incessant political appeals to our fear of crime; of a more impatient search for simple, mechanistic solutions to difficult human problems; and of a deepening failure of leadership in an ever less republican system of **government**.<sup>155</sup>

This frustration is matched—at least—by advocates of reform. More than 15 years ago, another author reflected:

[A]ctual prison stays are far less than the sentences imposed in virtually all states—perhaps a necessary accommodation, in light of the excessive length of American sentences, but one that has fostered disparity and unrest, and offended our sense of equal **justice**.<sup>156</sup>

Since this observation was made, the basis for the concern expressed has gotten worse.

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## **SUMMARY**

Equitable sentencing of individuals, which also reflects public values and constitutes an effective response to criminal behavior, is extremely complex. Reform efforts in many states and in the federal criminal justice system have been spurred, at least in part, by the desire to manage this complexity. Those general government elected officials who have supported a sentencing commission and/or sentencing guidelines have felt that systematization is essential if their attempts to set policy are to be effective.

The history of sentencing reform, thus far, seems to indicate that the innate complexity of sentencing may be beyond the degree of control envisioned by many of these legislative and executive policymakers. The number of different types of crime within broad categories, the constraints of using definitions that do not create legal loopholes, and the wide variety of circumstances surrounding individual criminal acts and range of criminal histories, all have necessitated that development of sentencing reform plans be delegated to nonelected experts.

Legislators and chief executives find that they have not gained control of sentencing by enacting complex mandatory guidelines. Each category within a sentencing matrix puts increased importance on the charges brought before the judge rather than on a constrained sentencing decision, and the public process of judicial sentencing may

be replaced by informal bargaining between the prosecutor and defense. In other instances, the response has been to try traditionally state offenses as federal offenses or as local misdemeanors. Finally, in states that adopted sentencing guidelines without tying them to prison capacity, general government elected officials have experienced a loss of control over escalating prison budgets and/or over release discretion, often negating the intent of the sentencing legislation.

Nevertheless, general government elected officials do have the responsibility to define criminal acts and set sentencing policy, and many feel that as elected representatives they must respond to the public's fear of crime and its belief that the courts are not dealing with crime effectively. If comprehensive sentencing reform or mandatory penalties are not found to produce greater equity or deter crime, what other means can general government elected officials use to shape an effective criminal justice system? There is no simple answer to this question.

The remainder of this report will discuss how general government officials can exercise their oversight responsibilities, use their power of the budget, leverage their access to the public, and draw on their positions of authority to encourage criminal justice and other elected officials to reason with them to develop the most productive means to sanction and deter criminal activity. By examining what is required to support sentencing decisions, general government elected officials will be better equipped to judge the efficacy of the sentencing laws they advocate or enact.

## NOTES

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<sup>4</sup> Hennepin County Board of Commissioners, Hennepin County Sheriff, Hennepin County Attorney, Fourth Judicial District Court, and Minneapolis Police Department, *Hennepin's Criminal Justice System and the New Public Safety Facility* (Minneapolis, January 1990).

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<sup>6</sup> James G. Fox, "Critical Perspectives on Selective Incapacitation and the Prediction of Dangerousness," in Dean C. Champion, ed., *The U.S. Sentencing Guidelines: Implications for Criminal Justice* (New York: Praeger Publishers, 1990), p. 137.

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<sup>19</sup> Nancy C. Maron, Linda K. Ridge, John Martin, and Carol Friesen, *Legislative-Judicial Relations: Seeking a New Partnership* (Williamsburg, Virginia: National Center for State Courts, 1989), p. vi.

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<sup>23</sup> American Bar Association, *Report on the Crisis in the Criminal Justice System*, p. 1.

<sup>24</sup> Ibid.

<sup>25</sup> David Freed, "Plea Bargaining Becomes the Currency of the Courts," *Los Angeles Times*, December 20, 1990.

<sup>26</sup> Russell Committee, *The Drug Crisis and Underfunding of the Justice System in Baltimore City*, p. 4.

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<sup>28</sup> Ibid., p. 8.

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## 3 —CRIMINAL JUSTICE OPTIONS TO MORE PRISONS AND JAILS

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**T**ypically, criminal justice policy discussions are based on the assumption of incarceration for those convicted of a crime. Other means of dealing with criminal behavior are regarded as the alternative, requiring proof of why someone should be freed rather than why he or she should be held. The Supreme Court rejected this view regarding pretrial detention in *United States v. Salerno* (1987): “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

Some advocates of alternatives also believe that incarceration of sentenced offenders should be used only after all other options have been rejected. They argue that, given the large number of persons who serve their sentences in the community without jeopardizing public safety, prison and jail space should be viewed as a valuable public investment to be used only if it produces the best results, and not as a requirement for punishment.

This chapter is a review of the use of options other than secure detention. While it starts with a brief discussion of the concerns that are creating new interest in reducing incarceration and ends with an analysis of the differences between the states in the use of community sanctions, the heart of the chapter is a catalog of specific programs:

- Options to reduce pretrial detention;
- Community-based programs to provide a range of sentencing options for probation;
- Programs to strengthen the use and credibility of parole; and
- Programming in prisons and jails to reduce the length of stay.

This listing is designed to familiarize general government officials with the large number of program options before taking up the governmental challenges involved in making these programs more effective or expanding their use in Chapter 4.

First, it is important to clarify the frequently cited statistic that three out of four adults serving a sentence for a criminal offense are living in the community. This is a much higher proportion than the general public might assume, and some would object immediately to seeing this ratio go any higher. However, this standard statistic is somewhat misleading because it lumps serious and minor offenders together.

Although it is not uncommon for the general public to use the terms jail and prison interchangeably, public policy consideration of how the growth in the number of incarcerated persons might be brought under control should not mix the reasons for holding persons in a local jail with the reasons for holding others in a state prison. This is as inappropriate as a school policy debate that mixes arguments about whether attendance should start at age four with whether students can drop out at age 16.

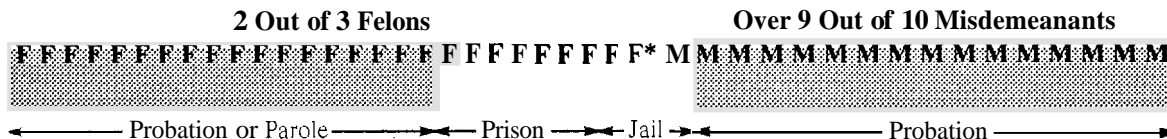
Therefore, rather than the muddled picture that three out of four offenders serve their sentences in the community, a clearer context for considering options is provided by noting, as shown in Figure 3-1 (page 62), that almost two out of three people (64.1%) who could be imprisoned because of a serious crime (felony) are living in the community, while more than nine out of ten people (93.0%) who could be held in jail because of a misdemeanor are living in the community.

Figure 3-1 depicts the residual potential to relieve the need for prison and jail space only for offenders sentenced to correctional control. In most jurisdictions, there are approximately three times more misdemeanor arrestees (excluding non-DUI traffic offenses)<sup>4</sup> who are not placed under correctional control.

By presenting criminal justice options in terms of all arrests, Figure 3-2 depicts a more complete perspective on the importance of the full range of programs discussed in this chapter in reducing the need for jail and prison beds. In addition, Figure 3-2 shows the total demands on the criminal justice system from policing, intake, court, and record-keeping agencies even when individuals are not placed under correctional control.

Figure 3-1

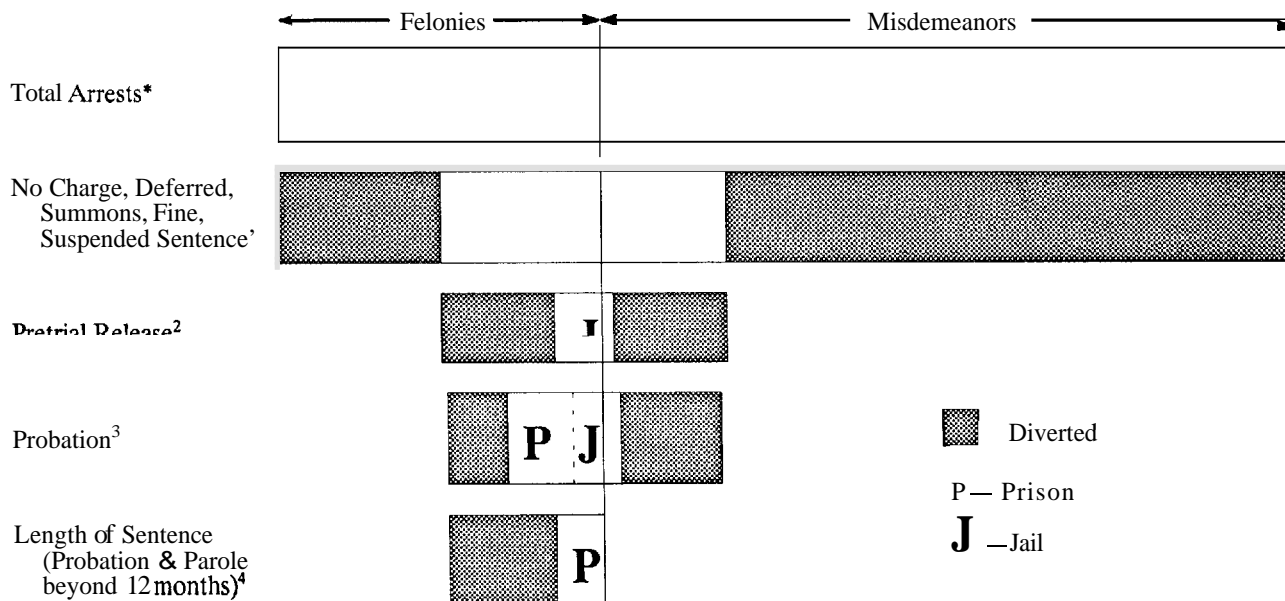
**Proportion of Convicted Felons and Misdemeanants under Correctional Control in the Community**  
 (Estimates based on reports that about half of the 2.7 million on probation had been convicted of misdemeanors: and about three-quarters of the people in local jails are being held because of a felony offense.<sup>3</sup>)



\*In addition to those charged with a felony who are being held pretrial.

Figure 3-2

**Proportion of Arrestees Diverted from Jail or Prison through Criminal Justice Options**



\*Excluding non-DUI traffic offenses.

Source: ACIR computations from: <sup>1</sup>FBI 1990 UCR arrest estimate; "The Prosecution of Felony Arrests, 1988," *BJS Bulletin*, February 1992; "Recidivism of Felons on Probation, 1986-89"; "Probation and Parole 1990." <sup>2</sup>BJS, "Profile of Jail Inmates, 1989," *BJS Special Report* (Washington, DC, April 1991), and "Pretrial Release of Felony Defendants, 1988," *BJS Bulletin*, February 1991. <sup>3</sup>"Felony Sentences in State Courts, 1988," *BJS Bulletin*, December 1990, and "Profile of Jail Inmates, 1989." <sup>4</sup>U.S. Department of Justice, *Correctional Populations in the United States, 1990* (Washington, DC, July 1992).

**INTEREST IN INCREASED USE OF SENTENCING OPTIONS**  
**Shifts in Public Policy**

General government officials are giving increased consideration to alternatives to incarceration. For many,

the only reason for doing so is a search for cost savings. Correctional budgets have been the fastest growing area of state and county spending for almost all of the last 15 years. This fiscal impact has been due in large part to the constant pressure to house more and more inmates at an average cost that continues to match the cost of an Ivy League education. Alternatives are viewed as a way to save at least the cost of housing, while perhaps improving the behavior of certain offenders.

Additionally, many criminal justice officials believe that alternatives must be developed to allow them to respond to criminal behavior more appropriately. The limited sentencing options available in most states have been described as “the choice between an aspirin or a lobotomy.”<sup>5</sup> The need to expand sentencing alternatives as a public safety issue was stressed by the attorney general of the United States in his opening remarks to the 1990 National Drug Conference:

To echo again the President’s strategy, “If state and local officials wish to expand their capacity to prosecute and sentence drug offenders, they must broaden their notion of what constitutes punishment.” Some refer to this as alternatives to incarceration. Better, I believe, to refer to this as alternatives to non-incarceration. . . . We also know that there are many for whom incarceration is not appropriate. But is simple probation sufficient? Turning them back into the general population? Particularly when probation officers are carrying caseloads far beyond what is manageable? We need to fill the gap between simple probation, on the one hand, and prison. We need intermediate steps—intermediate punishments.<sup>6</sup>

The growing consensus at the end of the 1980s seemed to be, then, that expanding the range of choices for penal control is an opportunity to increase public safety while cutting costs in the long term. Now, this consensus is being openly joined by those who believe that alternatives also should be pursued as a means to stop criminal behavior more effectively.

During most of the 1980s, the notion that alternative programs could stop criminal behavior through rehabilitation seldom was espoused publicly as the principal reason for establishing a program. However, the lack of success in reducing overall crime rates, the growth in violent crimes, publicity about America’s high rate of incarceration, and budget pressures all have combined to give rehabilitation efforts more credence. The trend for the 1990s, however, is to use rehabilitation selectively, by attempting to identify “career criminals” and concentrating limited rehabilitation resources on the remainder, who are not apt to fall into a pattern of repeated crime—unless their experience in the criminal justice system reinforces such behavior.

### Public Acceptance

Although it may not be responsible to advocate policies based solely on their acceptability to the public, it would also be foolhardy to ignore the public’s sentiments. Part of effective policymaking depends on an understanding of what the public already knows and believes.<sup>7</sup>

As noted in the discussion in Chapter 2 of who is sentenced for what acts, elected officials have the burden of representing the public’s priorities. This goes far beyond getting reelected. It ensures that government operations do not become self-serving. Knowing what is driving pub-

lic sentiment, as well as public priorities, becomes even more important when elected officials feel that they must try to lead public opinion in support of policy change.

Apparently, the public does not accept that sentencing policies over the last 15 years have played a major role in prison and jail growth. Consequently, citizens are reluctant to agree that these policies should be changed toward greater use of alternatives. For example, during the summer of 1986, the Edna McConnell Clark Foundation involved 125 people in focus groups at ten locations: New York City; Little Rock; Minneapolis; Chicago; Boston; Atlanta; Westchester County, New York; San Diego; St. Louis; and Houston. They found that citizens were quite well informed on prison and jail crowding, but that:

Americans believe that prison overcrowding is caused by an increase in crime. They simply do not believe that the crime rate has leveled off or that mandatory and stiffer sentencing are a cause of the problem. . . . These measures and especially mandatory sentencing were popular with the focus groups. Respondents felt that they made sentences more uniform and punishment more predictable—both of which, they said, had a deterrent effect. Most tended to disregard the connection between such laws and overcrowding. . . . They did not want to see that what they consider a positive step has had an undesirable effect—overcrowded prisons that warehouse idle inmates.<sup>8</sup>

In fact, reducing idleness became the main factor these citizens would accept as a reason to reduce prison and jail crowding.

The public’s distaste for having inmates idle can be harnessed by political leaders in support of more prison and jail space, programs, personnel, and/or in support of community alternatives. When it is tied directly to the public’s desire for punishment, it can become a means of creating even greater support. In a 1982 Gallup Poll, 59 percent thought it was more important to rehabilitate in prison than to punish. Just seven years later, support for rehabilitation had dropped to 48 percent and support for punishment had grown from 30 to 38 percent. Nevertheless, Wayne Huggins, director of the U.S. National Institute of Corrections and a former sheriff, regularly sells audiences on how the middle class idea of punishment misses the mark for most offenders:

Legislators, governors, people such as myself set punishment based on what frightens us, what deters us, what things you could do to us that would be the worst thing in our lives. And certainly one of the worst things you could do to us is take our freedom and incarcerate us. . . . But if you stop and define the punishment from the offender’s eyes, what you might end up with is an interesting contradiction. We are afraid that we would be embarrassed and would lose our reputations or our credibility. In fact, in many cases, the inmate’s stature is actually raised. The harder the parole officer was, the tighter the prison, their status is that much higher in the criminal commu-

nity. Most of these people never had a job. Ultimately we would be afraid of losing our freedom, our friends and family. In all too many cases, they are not getting away from friends and family, they are going to friends and family.

So many have been captive in a few small city blocks, they don't know freedom as you and I do. They are going to get clean clothes at least three times a week, they are going to get free dental care, free medical care, recreation and a roof over their heads, three square meals a day. That is why I think that we have to look at punishment in terms of the way they define, rather than the way we define it.<sup>9</sup>

The more that officials tell the public how little there is to do in most institutions, besides watch television, the more public support can be raised for putting criminals to work. The head of New York City's probation services had previously spent many years working with victims of crime. Her new position might have been regarded as antithetical. Instead, she found that, if time is spent explaining the goals of various alternative sanction programs, especially community restitution, victims of crime can become effective lobbyists for probation department budget needs.

Although drug, alcohol, and sex offender programs do add to per prisoner costs, the increase is very small compared to the basic costs of security personnel, food, and facility operations. The problem is that these programs represent add-ons in most systems and are in direct competition for budget dollars with day care, environmental clean-up, or any number of initiatives with popular constituencies. For example, the cost of incarceration at the Baltimore jail is \$35 a day per inmate; this is \$23 more per day than the daily cost per student in the city school system.<sup>10</sup>

Furthermore, education, work training, and medical services can add to public resentment if prisoners are seen as receiving these advantages free while the public at large must pay. Elected officials at the focus-group discussions spoke of having to deal with the public's sense of fairness, reporting deep resentment when the citizens perceive that criminals are given unfair advantages. Officials find it hard to add to correctional budgets when it costs more to house a prisoner than the average person spends to support a family. Because offenders are not viewed with sympathy, this level of spending is especially galling. As the National Academy of Science observed in 1981, "While much of the general populace accepts rehabilitation in principle, they almost certainly would object to providing more extensive social benefits to wrong doers while 'good citizens' are denied similar services and opportunities."<sup>11</sup>

ACIR's finding of two decades ago still rings true:

Citizens and their elected representatives have been reluctant to grapple with or support improvements in corrections for reasons that can be understood:

- This issue, after all, involves some of the most troublesome members of society;

- Investment in rehabilitative resources strikes at the traditional "eye-for-an-eye" belief that incarceration and punishment are the proper ways to treat offenders;
- Reform involves obtaining new money as well as redirecting funds now being used to support the present, mostly ineffective system; and
- Programs for institutional modernization, effective probation and parole, and adequate personnel compensation and training do not command as much public support as health and hospitals, education, highways, and other programs benefiting groups or constituencies of law-abiding members of our society.<sup>12</sup>

Nevertheless, Alabama authorities conveyed encouragement to officials gathered at a recent annual meeting of the National Governors' Association that the public's desire for fairness can be refocused in support of alternative sanctions. When 400 Alabama residents were given a choice of prison or probation for 23 offenders, whose crimes ranged from petty theft and joyriding to rape and armed robbery, the group initially chose prison for 18 of the 23. After an explanation of costs and alternative sanctions, some of which were related to the offense, such as restitution or community service, the public's preference for prison sentences declined significantly. They chose prison for only four of the 23. In citing this study, California officials observed that "given Alabama's historical conservatism on criminal justice, it is reasonable to expect similar results in other parts of the country."<sup>13</sup> In fact, a 1989 study of California residents showed similar results. Participants were given 25 different crime scenarios and asked to select the preferable punishment option. Incarceration was selected initially by 63 percent of the respondents, but by only 27 percent after the briefings.<sup>14</sup> Studies such as these demonstrate the value of informing the public, with emphasis on the issues that concern them.

## Summary

There are signs that there may be broader use of correctional options in the 1990s. Constructing and operating significantly more prison and jail space is straining state and county budgets. There is growing recognition that public safety concerns cannot be met for a significant portion of probationers and parolees under standard programs. Many are seeing a need for a more effective criminal justice response to reducing future criminal activity, given the apparent ineffectiveness of high incarceration rates. Finally, the public's sense of justice is apparently not driven by a desire to punish. If programs can be shown to be less costly, provide restitution, and address the unfairness of inmates simply being idle, they can garner public support.

General government elected officials need to become conversant with what is being done in other states and localities to get a realistic perspective on what is possible in their communities. Their confidence level is important in addressing public concerns, in holding program managers



accountable for realistic performance, and in supporting criminal justice officials' initiatives to develop a more effective system.

## AN OVERVIEW OF OPTIONS TO INCARCERATION

Often when general government officials look for information about alternatives to keeping a person in jail or prison, they find only a collection of operational details aimed at criminal justice administrators. Such a plethora of information may make it difficult to focus on the public policy issues and system support needed for any program's success. The next sections focus on such governmental factors in pretrial release, probation, and parole, followed by a summary of programs offered within jails and prisons to reduce the need for further incarceration.

This catalog of programs will reveal little that is new to most localities, but it will arm general government officials to meet the challenge of expanding and effectively supporting what is in place. Although these governmental issues are the focus of the next chapter, several themes bear mentioning, now:

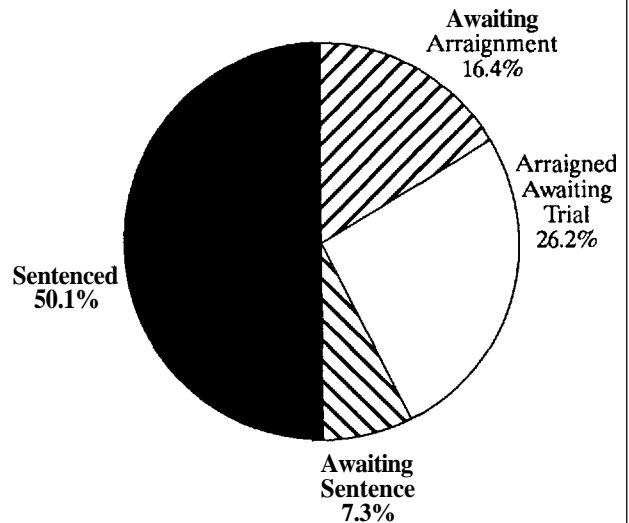
- Alternatives are not no-cost.
- Public safety means that the same degree of attention needs to be given to staffing for community supervision as traditionally has been given to police.
- Modifying criminal behavior means professional involvement at or above levels that were not effective earlier in the individual's life.
- In the absence of the resources to address either or both of these needs, alternatives become simply a sifting-out process, giving the offender another chance. On the positive side, if the offender does not commit another crime, then the system is free of further dealings at little cost.

### Pretrial Options

Pretrial release programs are extremely important in relieving jail overcrowding because, typically, half of the people in most jails are awaiting trial or arraignment (Figure 3-3). Demand for jail space is affected not only by whether the accused is or is not released before trial, but how many days or even hours it takes to make and carry out the decision to release. How pretrial release is administered also will affect case management in the court if the accused is not available when the case is ready to be heard.

In 1988, in the 75 largest counties, approximately two-thirds of the persons charged with felonies were released prior to trial. When releases of misdemeanants and felons are combined, the proportion exceeds 80 percent.<sup>15</sup> By felony offense, the likelihood of release varied from 86 percent of those charged with driving under the influence or

Figure 3-3  
Population Profile of Local Jails, 1989



Source: U.S. Department of Justice, Bureau of Justice Statistics, "Profile of Jail Inmates, 1989," *BJS Bulletin*, April 1991.

other felony driving charges to 72 percent of those charged with drug offenses to 59 percent of those charged with a violent offense. The more serious the criminal record, the less the likelihood of release: three-quarters of those with no prior conviction, half of those with a prior felony conviction, and only one-quarter of those on parole were released.<sup>16</sup>

Traditionally, the decision to release and the conditions imposed are based on the likelihood that the defendant will appear at trial. In the 1988 large-county survey, approximately 25 percent of those released failed to appear, and at the end of one year, one-third of them were still fugitives. The greatest likelihood not to appear was among those with five or more convictions, while the greatest likelihood of not being found was among those who had paid a full cash bond.<sup>17</sup>

More recently, legislatures have enacted laws to require that public safety also be considered. The *Federal Bail Reform Act of 1966* created a presumption in favor of release. At least 18 states enacted similar legislation, and, as early as 1970, an amendment for the District of Columbia directed judges to consider community safety in addition to the risk of flight. The concept of "preventative detention" also was introduced, defining certain types of offenses that would preclude bail.<sup>18</sup> Over 60 percent of the states now have one or more provisions regarding community safety in considering pretrial release.<sup>19</sup> Some include provisions regarding specific types of cases, such as a law in Minnesota that mandates at least a \$1,200 bond in domestic violence cases. Success in protecting community safety is measured by the fact that less than one-fifth of those on pretrial release are rearrested for a felony offense committed while on release. Defendants under age 21 are 50 percent more likely to be rearrested than those over 35. Again, the more prior felony convictions, the greater the likelihood of rearrest.<sup>20</sup>

The following brief summaries describe the basic components of balancing the presumption of the right to be free pending trial, public safety, and court functioning. While the pretrial release decision usually is made by a judge or magistrate, other officials across the country have taken the initiative to establish release options and to enhance the court's decision through better offender information. In addition, this subsection discusses initiatives to sanction minor criminal acts while minimizing the use of court or jail resources.

### Types of Program Initiatives

**Risk Assessment Models.** In the early 1960s, the Manhattan Bail Project was the first notable attempt to analyze the factors related to the likelihood to appear for trial and to develop a risk-assessment model. Subsequent models, which are objective scoring systems, have allowed non-court personnel to make substantially more of the decisions regarding release. This is particularly important at night and over the weekends, because it reduces the need for additional jail beds if defendants have to be held in jail until the next workday. Some jurisdictions use interns or other low-wage employees to conduct screening and verification. The better the information network that can be accessed, the more risk-assessment models can be used with confidence, either to establish expedited review of routine cases or to supplement the subjective judgment of the court.

**Release on Recognizance (ROR).** The Manhattan Bail Project also was the first to document that a defendant with roots in the community was not likely to flee, irrespective of ability to pay a bondsman. Because of this finding, about 70 percent of those released today are freed nonfinancially, compared to less than one percent of cases in the 1960s.<sup>21</sup>

**Enhanced Notification.** Some defendants do not appear for trial simply because they forget. The average time between arrest and adjudication is 122 days for released defendants, compared to only 37 days for detained defendants.<sup>22</sup> Although priority for scheduling trials for detainees is important in relieving jail overcrowding, an average of four months' wait often has meant that defendants lose track of their court dates. When defendants fail to appear, bench warrants are issued. Thus, a minor offense, such as a neighbor complaining of disorderly conduct, can multiply into wasting resources to rearrest, book, and detain the defendant. Some jurisdictions, therefore, have found it cost-beneficial to hire personnel to remind those on release of their court dates, and/or provide immediate follow-up to bring the defendant back into the court system.

**Pretrial Services Programs.** Pretrial screening units have been established in at least 500 jurisdictions. Forty percent of these programs have the power to release a defendant on their own authority, although this power may be limited regarding felons. Most units provide supervision of releases, if ordered, and maintain a list of referral agencies for defendants in need of social services, drug treatment, or mental health services. In 38 percent of the jurisdictions, these units are administered by the court; 38 percent by probation; and 10 percent by the sheriff.<sup>23</sup>

**Pretrial Custody Screening.** This initiative is a direct review of the cases of defendants who have not been released by the judge or magistrate. These cases may involve transfer or the need for additional procedures that can expedite the removal of the defendant from the local jail.<sup>24</sup> The *National Prosecution Standards*, developed by the National District Attorneys Association (NDAA), recommends that prosecutors report to the court monthly on the status of cases for defendants who have not been released.<sup>25</sup>

**Summons in Lieu of Arrest.** If a police officer issues a summons or citation, the accused does not have to be taken to jail and booked. The use of citation release for misdemeanor charges and regulatory violations has been common for many years. Some jurisdictions with overcrowded jails, however, are now expanding the use of citations for drug possession, some property offenses, assault, and domestic violence cases. In most jurisdictions, the prosecutor's office has worked with the municipal police departments to develop guidelines on the proper use of citation arrests. Because most of these cases would have been booked and released after only a short period in jail, however, citation arrests produce only minor savings of jail beds.

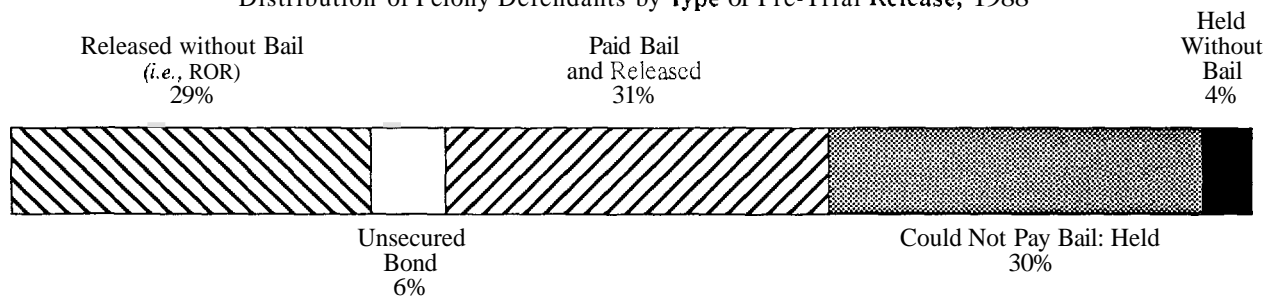
As with ROR, follow-up notification of the defendant just prior to the court date also is very important. Given that these represent the most minor offenses, some courts have set a special schedule to try people released on citation quickly as another way of reducing the waste of resources produced by failures to appear in court. In fact, some even argue that it is better to establish a court capacity to try misdemeanors immediately, even if it means holding defendants overnight, rather than using citations, because of the high rate of failure to appear in certain misdemeanor categories.

**Bail.** While states may mandate that localities have non-monetary, prerelease programs in place as a condition of funding under the state's Community Corrections Act, actual use will vary. According to officials at one overcrowded urban jail in New Jersey, there were no nonviolent, first-time arrestees being held pretrial. In a suburban county, however, a woman had been held for four months on a shoplifting charge because she could not post \$100 bail.<sup>26</sup>

Figure 3-4 shows the results of a 1988 survey of the 75 largest county jail systems. In this survey, 4 percent were held without bail, 29 percent were released without any form of bail under one of the programs mentioned above, and another 6 percent were released on an unsecured bond (meaning they did not have to pay any money unless they failed to appear). The remaining 61 percent of the defendants had to pay before they could be released. Half of these did not make bail and were held in jail until trial.<sup>27</sup>

Of the approximately 30 percent who did pay money to be released, more than half used a third party, typically a bail bondsman. The usual 10 percent fee charged by bail bondsmen is not returned. With a deposit bond, the 10 percent that the defendant deposits with the court is returned (less an administration fee) when the case is complete. Deposit bonds are a relatively recent innovation, developed in part to move the release process along faster and to produce court revenue. Deposit bonds also were instituted by some systems because they believed that more

Figure 3-4  
Distribution of Felony Defendants by Type of Pre-Trial Release, 1988



Source: U.S. Department of Justice, Bureau of Justice Statistics, "Pretrial Release of Felony Defendants, 1988," *BJS Bulletin*, 1991.

defendants would appear for trial if they knew they would get their money back. However, the 1988 survey did not bear this out. The failure to appear was 27 percent for those whose deposit would be returned by the court, while only 20 percent of those who had paid a bail bondsmen failed to appear. The final category of bail, full cash bond, was associated with a 26 percent failure to appear and, as noted earlier, resulted in the highest percentage still fugitive after one year.<sup>28</sup>

The critical time period to be examined for the effect of bail policies and procedures on jail overcrowding is the first days of detention. For example, if the averages for the 75 largest counties in Table 3-1<sup>29</sup> were a profile of one jail, local officials should expect answers as to why those making a deposit with the court cannot be handled as fast as

those using a bail bondsman and why the decision for ROR cannot be made as quickly as an unsecured bond decision. Such oversight questions are in addition to the perennial question: Why should anyone's release depend on ability to pay money?

For example, a 1988 study indicated that almost half of the Baltimore City jail population had a bail of \$1,000 or less, meaning that paying \$100 would effect release. When the Offender Aid and Restoration Program put up the money out of private and government funding for the release of approximately 1,500 inmates in FY 1990, this resulted in a net saving of over \$2 million in jail costs. However, it still cost the jail \$367,500 for the seven days the offenders were held before their release could be arranged, leading the Bar to observe that:

Table 3-1  
Time from Arrest to Release for Felony Defendants Released before Case Disposition,  
by Type of Release and the Most Serious Arrest Charge, 1988

Type of Release and Most Serious Arrest Charge	Number of Defendants	Percentage of Felony Defendants in the 75 Largest Counties Who Were Released before Case Disposition within:						
		Same Day	1 Day	2 Days	1 Week	1 Month	6 Months	1 Year
All Release Defendants	28,346	22.5%	45.5%	58.7%	78.2%	91.5%	99.4%	100%
<b>Type of Release</b>								
Surety Bond	6,783	23.1	50.3	59.0	75.5	91.7	99.3	100
Full Cash Bond	3,213	7.5	20.5	32.0	67.1	85.2	99.4	100
Deposit Bond	2,540	27.2	38.1	49.5	72.3	91.0	99.1	100
Unsecured Bond	2,571	52.7	72.0	78.5	86.8	92.9	99.4	100
Recognizance/ Citation Release	12,765	18.7	45.3	63.2	82.4	93.4	99.6	100
<b>Most Serious Arrest Charge</b>								
Violent Offense	5,374	15.6	33.1	47.3	70.2	86.3	98.7	100
Property Offense	9,659	28.8	53.1	64.1	80.0	93.0	99.8	100
Drug Offense	10,852	20.0	43.6	58.5	80.6	93.5	99.5	100
Public Order Offense	2,461	24.0	50.8	62.7	77.8	88.3	99.1	100

Source: U.S. Department of Justice, Bureau of Justice Statistics, "Pretrial Release of Felony Defendants, 1988," *BJS Bulletin*, 1991, Table 9.

It seems clear that those inmates who would ultimately qualify for OAR should be screened out before even entering the jail. . .by application of realistic bail release standards by the District Court Commissioners. . . .At the initial Commissioner threshold level, important decisions are regularly made as to bail release. Great care and careful consideration must be applied in the setting of a bail which will not be met. . . .The Court has now set guidelines.<sup>30</sup>

Finally, the role of bail bondsmen has been controversial. Both NDAA and ABA standards advocate nonfinancial release or forms of bail that penalize the defendant for failure to appear. It has been noted that in some systems, bondsmen do not bear sufficient risk of forfeiture and/or responsibility for returning absconders. A 1986 study estimated that forfeitures only amounted to 1 to 2 percent,<sup>31</sup> despite the fact that the national average for those on surety bonds who fail to appear after one year is over 5 percent.<sup>32</sup> Frequently, the offenders are returned when they are arrested on another charge rather than due to expenditures by a bondsman in a search.

Supervised Pretrial Release. This is a relatively new approach that grew out of both the concern for public safety and trying to avoid wasting criminal justice resources on minor offenders because they fail to appear. Its use has expanded rapidly according to a 1991 survey, which found that 80 percent of pretrial service programs provide supervision for released defendants.<sup>33</sup> Two New Jersey counties run a program for arrestees who have been held in jail for at least 30 days. Curfews are established, substance abuse counseling or other mental health services may be ordered, and the participant is closely supervised by a probation officer. Hays County (Houston), Texas, uses a weekly telephone check-in for all ROR defendants.

Deferred Prosecution. The *Federal Bail Reform Act of 1966* and of 1984 established the rationale that conditions could be placed on pretrial release if they were reasonably related to the individual being able to await trial in the least restrictive setting. A series of these types of court-related programs were organized beginning in 1972 under the Treatment Alternatives to Street Crime (TASC) program. If the prosecutor and court agreed, defendants could accept referral to a community-based treatment program, and the pending case would be suspended or a summary probation issued. If the individual completed the program successfully, the pending charges were dismissed.

The federal funding base for 130 TASC programs in 39 states was withdrawn in 1981, but there has been renewed use of such programs under the federal war on drugs. Local prosecutors have targeted drug users, who are charged for treatment at rates just below the relatively stiff fines they could be charged if they were tried and found guilty of possession. The history of success under TASC treatment programs has been good, due in part to the fact that many participants are first offenders and because two-thirds of all persons illegally using drugs have jobs.<sup>34</sup>

Figure 3-5 shows the growth in use of deferred prosecution (conditional dismissal) in West Germany. Although conditional dismissal is now being used for “fairly serious, especially economic, offenses” without trial, as well as for “petty cases,” the simultaneous reduction in sentences to prison was not a direct result; instead, it was due to a ripple effect from using the other options shown. Legislative initiative was responsible for this increased use of options, through a 1970 law prohibiting sentences to prison for short periods except under extraordinary circumstances.<sup>35</sup>

Mediation. Mediation is used most in civil cases, and courts are beginning to try mediation to satisfy victims of minor crimes. For example, the Columbus, Ohio, City Attorney’s Night Prosecutor Program mediates about 45,000 cases per year, with a settlement rate of 93 percent when both parties appear. In 1988, the program mediated more than 35,000 bad check cases, with over a half-million dollars recovered and only 1,100 formal charges filed. The program also hears domestic violence, simple assault, menacing, criminal damaging, and other cases.<sup>36</sup>

## Probation and Parole

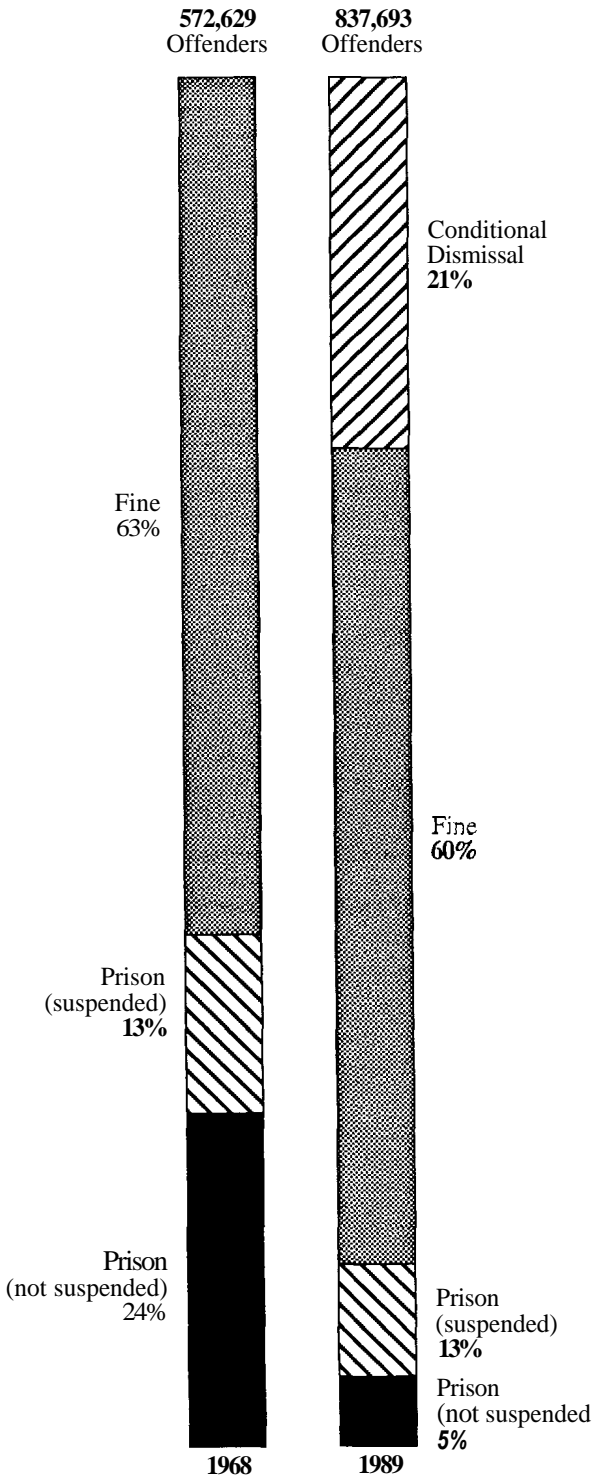
As noted in Chapter 1, there is a significant difference between probation and parole in terms of (1) the seriousness of parolees’ criminal records compared to probationers’, (2) the fact that parolees have served time, and (3) whether a judge or an executive agency determines who will participate. However, probation and parole will be taken up together in this subsection because the types of programs used and their administration are basically the same whether the program is for probationers or for parolees.

In 1988, state courts sentenced 44 percent of convicted felons to state prison, 25 percent to jail, 30 percent to straight probation (in addition to those who received probation along with a jail or prison sentence), and 1 percent to an alternative sentence.<sup>37</sup> The average probation sentence of 43 months is considerably longer than the average jail sentence of seven months. Because of good-time credits and parole, the average prison sentence of 76 months also means that the average prisoner will be in prison only 24 months before being placed under parole supervision. Therefore, theoretically, probation represents a comparably significant sanction.

### Probation and Parole Caseloads

However, although a number of strong programs will be described in the paragraphs that follow, in reality, most probationers and parolees are under minimal supervision. For example, in Texas, at the end of August 1989, the governor’s office reported that 95.4 percent of probationers were on regular probation, which meant they were seen once every three months. Only 3.7 percent were under intensive supervision and seen four times a month. Less than 1 percent—which included some substance abusers and those who had histories of sexual or family violence or a mental disability—were seen three times a month by probation officers with specialized training and caseloads of 40:1. Finally, 0.1 percent were termed high-risk felons and were seen five times a week by officers with caseloads of 25:1.<sup>38</sup>

**Figure 3-5**  
West German Criminal Sanctions, 1968 and 1989



Source: Statistisches Bundesamt, Fachserie A, Reihe 9: Rechtspflege 1968, p. 120; Statistisches Bundesamt, Fachserie 10, Reihe 3: Strafverfolgung 1989, p. 42; Statistisches Bundesamt, Staatsanwaltschaften 1989, p. 14

It is because of system profiles such as this that, when general government officials fund strengthened probation and/or parole options, they may not see much, if any, direct effect on prison and jail populations. Judges, prosecutors, parole boards, and probation officers often use new or expanded options to give greater supervision to the vast majority already under regular supervision. Only to the degree that this increased supervision prevents further criminal activity will prison and jail population growth ultimately be affected.

#### Classification of Potential Probationers and Parolees

As with risk-assessment models in pretrial release, the use and refinement of objective classification models can make a significant difference in the use of probation. One of the most highly regarded offender classification and caseload management systems was developed starting in 1975 by researchers working with the Wisconsin Department of Corrections and assisted by the National Institute of Corrections.<sup>39</sup> Under this system, a risk/needs assessment instrument is completed on each probationer at regular intervals, and the level of supervision may be increased or reduced.

The vast majority of probation agencies now have some form of classification system." In 1984, the president of the American Probation and Parole Association noted the importance of classification instruments for community corrections agencies:

The classification instruments that researchers developed over the past decade have really revolutionized parole and probation in the United States. . . . This development has made communities safer, in that clients with the highest risk of recidivism are placed in maximum supervision caseloads and watched more closely. It has also helped probation and parole administrators allocate their budgets in a more reasoned fashion.<sup>41</sup>

A significant budget question for general government officials is whether such a classification system is part of a comprehensive, coordinated information system and not a redundant effort.

#### Types of Probation and Parole Programs

**Civil Penalties.** A civil rather than a criminal penalty can be used in three distinct areas. First, an offender can be punished without the act being classified as criminal. Civil penalties have long been used for most driving offenses, for example, and for regulatory offenses, such as noise ordinances, alcoholic beverage control laws, or environmental laws. Second, in a search for meaningful sanctions other than incarceration, communities have given new application to the reasoning that someone who has broken society's laws is not entitled to society's privileges. This has led to the suspension of drivers' and other licenses and to withholding public housing or unemployment benefits. Third, with increased experience in using forfeiture to confiscate property used in connection with a drug transaction without having to find anyone **guilty**, some localities are using the same techniques or applying the same logic

to other areas. For example, the car of someone soliciting a prostitute might be confiscated.

In passing such laws, general government elected officials need to weigh these different approaches case by case. Civil penalties can keep petty cases from clogging the court dockets and, in serious regulatory infractions, they **can** lead to better fact-finding without information being shielded under the Fifth Amendment. However, withholding benefits may be counterproductive to getting an offender back into mainstream, law-abiding activity.

**Monetary Sanctions.** Fines and restitution, already among the most common penalties, are growing in popularity. They usually are in addition to a prison or jail sentence or to probation. For example, the **U.S.** Sentencing Commission authorized fines only as a supplement to other punishments and not as an alternative to them. In **1983**, two-thirds of felony probationers were ordered to make one or more types of financial payment: probation supervision costs (**34%**), court fees (**32%**), restitution to the victim (**28%**), victim compensation fund (**13%**), fines (**7%**), and other (**9%**).<sup>42</sup> **Issues** regarding the rate of collection of these fines are explored in Chapter 7.

In addition to the rate of collection, policy concerns should consider the severity of punishment related to the ability to pay. Day fines address this concern. They are relatively new in the United States, but have been used extensively in western Europe. Day fines are determined by multiplying a number of units that reflect the seriousness of the crime by the average daily disposable income of the offender. A pilot project, sponsored by NIJ in Staten Island, New York, resulted in an **18** percent increase in the dollar amount ordered by the court. If the statutory caps on what could be charged in 25 percent of the cases were removed, the dollar increase would have been **79** percent. The increase in the number of sentences given fines under the pilot indicates that the system is not hard to administer. Adoption of such a system, however, raises the basic public policy question of whether uniform sentencing should be uniform to the offense or to the offender.

**Restitution.** Restitution has gained strong favor with the public<sup>43</sup> and is especially appropriate if the offender is employed. Therefore, it often is combined with incarceration by using weekend jail sentences or nonsecure residential centers. Under such programs, the offender's entire paycheck may be surrendered for board and room and distributed to meet obligations. Elected officials must meet the challenge of physically locating such centers in the community to avoid further use of costly and possibly overcrowded jail space.

The continuum of sanctions also should include similar centers to provide pre-employment classes and placement assistance for probationers or parolees who are not employed. In FY **1989**, offenders in such a center in Harris County were able to contribute over **\$47,000** toward room and board, over **\$11,000** toward court-ordered fees, and **\$4,500** for their families. The center also requires community service and progress toward a GED (graduate equivalency diploma or high school diploma).<sup>44</sup>

**Community Service.** In cases where the offender is not employed or when restitution is not appropriate or is too easily paid, community service programs can be used to impress on the offender responsibility to society, provide a sense of accomplishment, and fill needs that would otherwise go unmet. Community service assignments may be carried out by offenders individually, but many offenders require greater supervision. Usually, a crew of ten or more is supervised by a probation officer. Work assignments should last 250 to 300 hours to allow the host agency to invest in orientation and training and still get some productive work to meet agency needs, as well as to promote some degree of commitment in the offender. Probation officials must aggressively seek out work opportunities and have the time to work closely with the sponsors, which can be private groups, such as the Salvation Army, as well as government agencies. The more that these offenders represent true diversions from a jail or prison term, the more budget resources must be committed to security screening and supervision.

**Day Reporting Centers.** These are highly structured programs run by public or private agencies. The first program was established in this country in **1986**, but they have been used in England since **1974**. Cook County (Chicago) and New York City have programs for probationers, and Boston has a program for parolees. The programs focus the offenders on structured activities, including community service, education, drug treatment, and employment counseling. By using the community-based services of other agencies, ties can be established for continuing participation after the court-ordered sentence is completed. Such centers offer much the same programming as that offered in residential facilities, at much less cost. However, to realize this saving, public officials need to ensure that the centers are located where they can be reached by offenders living in the community.

**Home Confinement.** This may be simply a curfew, or it may limit outside activities to job, school, and/or treatment, or it may be strict home incarceration at all times with very limited exceptions. Jail overcrowding makes home confinement preferable to weekend sentences, which affect the jail when the number of new arrestees coming in are the greatest. A stable home and good prospects of a job usually are required. Home confinement began as an alternative for first-time property offenders and serious traffic violators. The nature of the increase in drug arrests in many communities, however, has made this an increasingly logical approach because of the higher numbers of jail inmates who are employed (about two-thirds in **1989**, compared to only slightly more than half in **1983**). Los Angeles County established a pilot project for jail inmates with severe medical problems. It is also being tried for target groups, such as drug pushers or gang members suspected of violent activity, to try to deter such activity as well as to expedite their removal from the community by detecting renewed criminal activity early. The more it is used for offenders without community stability, the more it requires effective monitoring and budget support for low supervisory caseloads.

Electronic Monitoring. At end of the 1980s, electronic monitoring was still new enough that it was more talked about than used. An NIJ survey found that 6,490 offenders were being monitored electronically on any given day in 1989, compared to 2,277 in 1988 and 95 in 1986. The annual number of persons placed under monitoring supervision is estimated to be four or five times these figures. In 1987, the typical person on electronic monitoring was a male convicted of driving under the influence of alcohol. By 1989, the typical offender was a burglar. Drug offenders were more common (22%) in 1989 than major traffic offenders (18.9%).<sup>45</sup> Not all systems are free of technological problems, such as electrical interference from household appliances, but it is now possible to benefit from the operational experience of the pioneering departments.

Electronic monitoring is an extension of home confinement. Both programs provide a continuum between the normal levels of minimal probation supervision and incarceration. Rather than being incarcerated, a probationer or parolee who has violated the conditions under normal supervision would be placed under these added restrictions and increased surveillance. Electronic monitoring is usually used for a relatively brief period of transition, to indicate the offender's suitability for less closely monitored release or the need for incarceration.

Intensive Supervision Programs (ISP). There were more than 25,000 felons under intensive supervision nationwide, or about 2.7 percent of all probationers. ISPs began in the early 1980s and were instituted in 40 states by 1987.<sup>46</sup> Caseloads range from nine per officer in Connecticut to 40 in Texas and Washington State.<sup>47</sup> ISPs are typically designed as an alternative to prison, not just a reordering of probation case management. For example, New Jersey prohibits judges from sentencing offenders directly to ISP; instead, sentenced felons who have been imprisoned for 30 but not more than 60 days are screened by correctional authorities for participation. Officials believe that during this period the offender will have experienced whatever deterrence effect prison might have.<sup>48</sup>

Despite reduced caseloads requiring over five times as many probation officers on the average, Georgia estimates a savings of nearly \$7,000 for each case diverted from prison, an Illinois evaluation showed a 58 percent savings over imprisonment, and New Jersey estimates a savings of nearly \$17,000.<sup>49</sup> Programs may require offenders to have a community sponsor, obey a curfew, be tested for drug use, attend substance abuse treatment, be employed, pay all restitution and fines, perform community service, and not have a violent criminal history. Officer contacts range from at least twice a week to daily, particularly under a team approach that uses lower paid personnel to do surveillance.

Nonviolent offenders who are employed would have a low tendency to recidivate under any sanction. Nevertheless, an evaluation of the New Jersey ISP program showed that recidivism was cut in half over a matched group, with approximately 8 percent rearrested for new crimes and 19 percent recommitted for technical violations? Comparison studies in Cook County, however, showed no difference in rearrest, but the offenses were less serious. Evalu-

ation of the Georgia program reported an 80-90 percent success rate, but an earlier analysis had shown that 40 percent of the offenders sentenced by judges to the program probably would not have been incarcerated.<sup>51</sup>

General government officials need to be alert in evaluating ISP programs. Because of their wide range, there needs to be clear articulation of what a particular ISP is structured to do and how its participants are selected before its success can be measured. If an ISP's main focus is on surveillance rather than treatment, then it should not be surprising if participants are found to be in violation of their conditions of probation or parole more often than offenders who are not watched so closely. In that case, officials should expect a clear definition of what class of offenders represent the greatest justification for higher levels of detection.

Cooperative Surveillance. As discussed in Chapter 4 under differing missions, some officials feel that the criminal justice system is not responsive in handling probation or parole violations. Police officers seldom are involved in enforcement. The ASAP program in Los Angeles County is a new intensive probation approach for high-risk felons with histories of drug involvement. It includes close cooperation between law enforcement, prosecutor, courts, and probation officials to expedite notification and handling of probation violations. A case list identifying program participants is distributed monthly to law enforcement and criminal justice agencies throughout the county, and a central telephone number is provided for their use. Probation officer caseloads will be only 35:1.<sup>52</sup>

Halfway Houses. These 24-hour residential facilities are somewhat less costly than a jail because they are not based on maintaining a secure perimeter. They may be used for a variety of programs, none of which would typically be mixed in the same facility. Unfortunately, there are numerous examples of elected officials becoming embroiled in siting battles no matter what type of offender is to be housed in the facility.

At one end of the scale, the heavy impact of mandatory sentences for drunk driving has led to separate facilities being established for DUI offenders to relieve jail overcrowding. Work release programs also may be run out of a separate facility to keep returning prisoners from being pressured to bring in contraband. Many sheriffs and jail administrators also would include residential community mental health facilities that are needed for the mentally ill who have gotten caught up in the criminal justice system.

At the other end of the scale, state prisoners who are about to be paroled may be both tested and guided in a halfway house for their readiness to reenter their home community. Of the 33 state correctional agencies that report housing inmates in such prerelease centers, 13 operated centers themselves and 29 had contracts with private agencies.<sup>53</sup> Another notable model is Delancey Street, which started in San Francisco and has launched programs in three other states. This program is a voluntary, self-help group living arrangement of ex-prison inmates that receives no public funds. Inmates must make a written request to enter the program.<sup>54</sup>

**Drug and Alcohol Treatment.** Participation in treatment for substance abuse may be a condition of probation or parole imposed in conjunction with any of the programs discussed. Typically, it means weekly therapy sessions, but also may include detoxification and a lengthy residential stay. Less than 25 percent of the probationers participate in substance abuse programs, according to the National Association of Criminal Justice Planners, although almost all probation agencies include treatment programs.<sup>55</sup>

Many of the governmental concerns about drug treatment will be discussed in the next chapter. Therefore, for an overview of different criminal justice approaches, this summary simply will use a list of demonstration projects funded under the federal Office of Treatment Improvement of the Alcohol, Drug Abuse and Mental Health Administration (ADAMHA). Renewed federal funding in this area is a recent development. ADAMHA began by budgeting \$8 million for criminal justice programs in FY 1990, and \$16 million was budgeted for FY 1991.<sup>56</sup> Therefore, this listing is not meant to highlight the federal role in encouraging these efforts, any more than it is intended to highlight the efforts that states and localities have been making.

Ten projects were funded by ADAMHA in FY 1990 for nonincarcerated populations.<sup>57</sup>

#### Diversion programs included:

- A three-agency team approach to divert 300 non-violent youthful offenders in Orange County, Florida, that includes health and human service needs, vocational counseling, and a job bank;
- A five-county joint project in the Tucson area to expand multi-modality treatment and aftercare for 275 persons, including short-term residential, outpatient day center, and aftercare;
- Compulsory pretrial treatment for 1,125 TASC offenders in Birmingham under the Alabama Mandatory Treatment Act of 1990, with a six-month to one-year range of treatment options, including methadone maintenance; and
- A behavior modification model in Rock County (Beloit), Wisconsin, for 90-100 youthful offenders.

#### High-risk probation and parole programs included:

- A one-year aftercare and follow-up program for 300 District of Columbia felons, managed jointly by probation, treatment, and social services agencies;
- An Oregon Department of Corrections program of six to nine months for 210 parolees;
- The South Carolina Department of Corrections Stay'n Straight 90-day treatment cycle that includes interagency case management for a variety of services including employment; and
- A Sonoma County, California, cooperative effort of the court, probation, prosecutor, and TASC to expand a drug alternatives center, incorporating expedited case management and mandatory

treatment, and multimodal treatment options, including prenatal services.

#### Juvenile programs included:

- The New Jersey Youth Services expansion of community-based services (medical, mental health, and family support) at four juvenile centers, 83 residential and 23 outpatient slots, and a six-month phased, guided group interaction (*psychotherapy*); and
- The Colorado Division of Youth Services expansion of treatment options by coordinating screening and assessment through joint training of personnel from juvenile court, juvenile corrections services, and eight community treatment agencies.

This list represents a sampling of the growing number of initiatives in community-based substance abuse treatment for offenders. Most share the governmental challenges that will be discussed in Chapter 4 to establish a multi-needs approach, a long-term phased program, and interagency cooperation.

### Programming to Reduce Jail and Prison Stays

The following overview of jail and prison programming is included with alternatives to incarceration under the assumption that if the time is used more productively, inmates are ready to come out sooner and stay out longer, and the public is more satisfied to see them released. If participation in these programs does not lead to shortened sentences and lower recidivism, then the public budget impact will be harder to justify.

#### Jail Programs

The two greatest challenges in running jail programs are the extreme mix of individuals housed in a jail at any given time and the short stay of most of them. With the exception of drug arrests making the average population slightly older, more educated, more apt to be employed, and more apt to be a female, the typical jail population can still be described in terms used in ACIR's 1984 report:

The jail—the “social agency” of last resort—is saddled with a mixture of one-time delinquents, small-time losers, violent criminals, and social misfits. It is an amalgamation that would throw even the most capable manager of human affairs into a virtual frenzy. Specifically, at any given time the local jail may house pretrial defendants alongside convicted offenders; . . . simple misdemeanants alongside state felons; the mentally ill, retarded, and intoxicated alongside presumably rational malefactors.<sup>58</sup>

The contemporary reaction of many sheriffs and jail administrators to this description would be, “Only more so.” In addition to the demographic changes resulting from drug arrests, during the 1980s, jails saw more mentally ill arrestees because of changes in the treatment and confinement policies of mental institutions, more sex of-



fenders because of increased awareness and reporting,<sup>59</sup> and a greater proportion of the population charged with serious crimes because efforts to deal with overcrowding have diverted minor offenders.<sup>60</sup>

**Classification.** Once again, accurate information on the offenders is crucial. The earlier it is obtained, the more readily subgroups of offenders can be separated out and be allowed into programs without extraordinary security provisions.

**Space.** As a jail becomes more and more overcrowded, lack of space may make use of classification information moot because there is no space available to separate out groups of prisoners. Space often becomes the first requirement for any program.

**Separate Jail and Detention Facilities.** Some communities have separate facilities for those inmates awaiting trial and those who have been sentenced to serve time in jail. This allows the jail staff to work more effectively with the sentenced inmates in structured programs over a longer period of time. As a result of jail overcrowding, more communities may have to wait to establish such a separation until new space is constructed.

Unfortunately, the detention facility for those awaiting trial is typically established in the old facility because it is next to the courthouse. It is also in the heart of community services that should be part of treatment. Too often, neighborhood opposition to siting new facilities means that they will be removed as far as possible from work-release job accessibility and community-based adult education or substance abuse treatment. Thus, the least serious among incarcerated offenders, for whom there is the greatest chance of benefit from treatment programs, often may be the farthest removed from the community resources.

**Education.** More than half of the jail population in a 1989 BJS survey had failed to complete high school. According to another survey, approximately 90 percent of the large jails offer basic education programs, 64 percent conduct educational diagnostics, and 61 percent use literacy volunteers.<sup>61</sup> There is a crucial interagency need to establish a strong collaborative effort between the jail and the public school adult education program, so that offenders who start to make progress during the short time they are in jail will be guided directly into the most accessible adult education program on release.

**Substance Abuse Treatment.** Approximately 87 percent of the jails with populations of over 200 report that they offer drug treatment referral services; 81 percent offer drug education; 76 percent, drug counseling; and 57 percent, detoxification.<sup>62</sup> Most of these programs are able to focus only on addiction recognition; they are not treatment programs. It is encouraging, therefore, that the demonstration projects funded under the federal Office of Treatment Improvement of ADAMHA in FY 1990 have a strong treatment component.<sup>63</sup> They include:

- King County (Seattle) jail's 21-day intensive treatment program for misdemeanants and fel-

ons at two sites, a less intensive five-week program, and a ten-week aftercare program at the work-release site;

- Cook County (Chicago) jail's comprehensive medical, psychiatric, and addiction services for 420 inmates per year, through a consortium of the sheriff, health services, the treatment agency and TASC; and
- Montgomery County, Maryland, jail's institutional treatment of 24 inmates every five weeks with six months of aftercare.

As with education programs, collaboration with community-based programs is crucial. As will be discussed in the next chapter, participation in drug treatment for less than three months is ineffective. Long-term positive results require at least six months. Compatibility of treatment approaches may also be important.

**Employment.** Providing meaningful work for jail inmates is complicated by two sets of governmental restrictions. The first restriction stems from federal and state protective laws that limit the sale of goods produced by inmates. This intergovernmental issue will be taken up under the section on prison industries. The second restriction affects only some jails. In these communities, the sheriff must get court approval to assign inmates to work release. This places great constraints on the ability of correctional administrators to respond to inmate behavior and move offenders in and out of programs as warranted.

Different approaches are taken in communities where correctional authorities are not constrained by the court in administering work programs. For example, probation officers may be used for workplace oversight, while the sheriff maintains custody. Los Angeles County has contracted out a 200-bed work release program to a private firm. In Minnehaha County (Sioux Falls), half the population in the over 100-person jail is on work release because the sheriff works with employers to keep inmates in their existing jobs.<sup>64</sup>

Because a jail is located in the community, the potential for getting offenders into permanent jobs is far higher than employment placement for inmates housed in a state prison system. Nevertheless, only 56 percent of the large jails surveyed assist inmates with job placement.<sup>65</sup> During the building boom that occurred in many communities in the late 1980s, private sector interest began to develop in establishing apprentice programs. Some employers came to realize that their difficulty in finding workers for basic construction and food service jobs was exacerbated by the numbers incarcerated. Regional economic downturns may put such public-private partnerships on hold.

Elected officials in and out of the criminal justice system can play a significant role in fostering the private sector's interest. General government officials often have wider and deeper ties with business, while criminal justice officials may be able to speak with greater credibility about getting offenders into jobs. The ultimate success of any initiative will depend on criminal justice personnel being committed to carrying out the expectations of the employer.

## Prison Programs

The challenge of providing programming for prison inmates was underscored recently by the director of the federal Bureau of Prisons:

We have a significant portion of inmates who are aggressive or assaultive, who have never held a steady job, who dropped out of school and got into trouble in their neighborhoods, who were abused or abusive in their families, who developed at an early age an orientation toward immediate gratification—with no appreciation of the benefits of family and community. The frustration is that society expects us to rehabilitate them, without any understanding of the dilemmas and complexity and the difficulty of doing so. While we clearly provide prisoners with opportunities for bettering themselves, their own self-motivation is the keystone of “rehabilitation.”<sup>66</sup>

**Classification.** As at all other points in the criminal justice system, accurate information on the inmate is crucial. Ideally, collaborative efforts should give prison officials confidence in the criminal, community, and family history information gathered for pretrial release, jail classification, and sentencing, so that prison intake can concentrate on educational, medical, and various types of psychological testing.

Limited resources also make classification more important in order to concentrate programs on inmates for whom they can do the most good. Citizens participating in the national focus groups sponsored by the Edna McConnell Clarke Foundation felt that efforts should be concentrated on those who are likely to be released, are intelligent enough to benefit from job training or education, and, most important, are sufficiently motivated to do the hard work necessary for rehabilitation. If resources are scarce, the young and first offenders should be targeted first.<sup>67</sup> These priorities parallel the priorities of most prison administrators, although they must be applied differently in different programs.

**Consequences.** Regular reclassification can help many prison systems move inmates through a range of sanctions and privileges, depending on their response. Unfortunately, lack of physical capacity due to overcrowding and personnel constraints make carrying out this goal within the prison system problematic. However, where moving inmates through a continuum has been carried out, the results are reported as cost-beneficial.

For example, Delaware’s Sentencing Accountability Commission was established by legislative act with the “expressed purpose of devising a workable program to gain control of prison population problems.”<sup>68</sup> The five-level continuum of restrictiveness and cost control that was established allows “offenders to earn their way out of prison by good behavior and conformity with the rules, or to work their way further into the system by repeated non-conformity or additional offenses.”<sup>69</sup> Officials believe this emphasis has resulted in Delaware exhibiting a consistent slowing in prison growth over the last five

years. In fact, in 1988 and 1989, the prison population in Delaware increased by 5.8 percent, in comparison to increases within its region of 15.8 percent in Maryland, 22.4 percent in Virginia, 22.3 percent in New Jersey, and 31.6 percent in Pennsylvania.<sup>70</sup>

The Bureau of Prisons also operates on a continuum of punishment and was described recently as “generally a fairly decent system” by Al Bronstein, director of the American Civil Liberties Union National Prison Project, which has brought or backed most of the major state prison litigation.” Nevertheless, the federal continuum includes Marion, the “super-maximum security” facility and successor to Alcatraz, as the ultimate punishment. Marion operates on permanent “lockdown” and, in 1987, became the first U.S. prison to be criticized by Amnesty International. Its per-inmate costs are more than twice the average for all other federal inmates. Nonetheless, prison officials believe that gang violence and assaults in federal institutions are down in large part because inmates fear they will be shipped to Marion.<sup>72</sup> Some states are adopting the federal model as a means to provide structure and a safer environment for those inmates who will exert the effort to benefit from programs.

**Work Programs.** Less than 10 percent of prison inmates are not involved in a work assignment.<sup>73</sup> The vast majority of these, however, are involved in basic duties, such as cleaning and food service, in addition to special duties, such as clerical. The goal of this type of work is much more maintaining security than it is job training. “When you get inmate idleness, you get discontent, and that breeds rebelliousness,”<sup>74</sup> according to Patrick Whalen, chief warden at the 1,100-man Petersburg Federal Correctional Institution. This is an even greater concern in managing the high percentage of state prison inmates who have violent criminal histories. However, basic tasks can instill discipline and carry-through that can be used as a basis for moving selected inmates to more meaningful work activities.

There are four types of programs for teaching inmates more advanced job skills: prison services, vocational training, prison industries, and work release. Prison services, such as farming and construction, can represent significant fiscal savings. General government officials often make budget decisions based on this goal.

Unfortunately, budgetary goals are not always compatible with imparting relevant job skills. General government officials may have to set priorities as to the desired outcome of inmate labor: relevant training or cost savings. For example, the prison system in Virginia raises and processes the bulk of the meat and dairy products used by the system, but there are few job opportunities on release. Even the decision to use inmates for prison construction projects, which involve job skills for which there is a job market in that rapidly urbanizing state, required that general government elected officials understand the need to balance conflicting goals. A budgetary goal that included getting a facility on-line as rapidly as possible would mean that the use of inmates who already have construction experience would take precedence over teaching unskilled inmates. Looking for expediency in inmate construction

projects also would conflict with the goal of concentrating training on those who will be released in the near term. Carrying out this goal means that when the inmate is skilled enough to be of real value on a prison construction site, he should be ready for release (see Figure 3-6).

The second type of prison work program, *vocational training*, uses skilled instructors and frequently involves structured classroom discipline in a wide variety of fields, such as electronics, mechanical engineering, sewerage plant operation, or cosmetology. Instruction is conducted in the way same as it would be for civilians because prisoners ultimately will sit for the same licensure exams. Most systems are able to provide only a small number of slots in such classes. For example, the two-year master technician's course at the federal prison in Lewisburg, Pennsylvania, teaches 30 students at a time and always has a waiting list in the 1,450-man prison.<sup>75</sup> Setting priorities for who will participate again involves conflicting goals. Inmates serving time on major drug distribution charges, murder, or armed robbery tend to be better educated than those doing time for burglary. This means some of the most motivated inmates will be furthest from release.

The third type of work program is *prison industries*. Most state prison systems have only 10 to 15 percent of their inmates involved in prison industries,<sup>76</sup> whereas the federal program, Unicor, reports a participation rate of 25 to 30 percent.<sup>77</sup> Almost all of these programs are limited to providing products used by governmental agencies. Typical examples include license plates, printed material, furniture, and uniforms. Some systems have expanded into such areas as Air Force jet-fighter wiring, reservations, and horticulture. However, the more aggressive the prison system is in developing products or services that are relevant to the needs of government agencies and can compete in the award of a competitive bid, the more traditional arguments against unfair competition have resurfaced from labor and small businesses.

For example, in the last half of the 1980s, in meeting the need to provide jobs for the rising federal prison popu-

lation, Unicor diversified and increased its sales from \$240 million to \$360 million. This led to proposed legislation in the 1990 session of Congress to sharply restrict Unicor's sales of furniture, textiles, apparel, and footwear. Union lobbyists were quoted as saying, "Enough is enough. . . . There's no reason [Unicor] should be taking over all of the federal office [furniture] market or all of the federal drapery market."<sup>78</sup> It took the active involvement of former Chief Justice Warren Burger to kill restrictive language in conference committee and establish a study to serve as the basis of negotiations and future compromise.

At the Same time, a California proposition allowing inmates to be employed by private businesses passed in November 1990 by more than 53 percent of the vote. As in most states, California's constitution had prohibited contracting with a private agency for the use of state prison or local jail inmate labor. In addition, if inmates produce a product, the product could be sold only to state and local governments. The ballot measure removed these restrictions. The ballot question stipulated inmate wages comparable to non-inmate wages for similar work, up to 80 percent of which may be deducted for federal, state, and local taxes; room and board; restitution; and support of the inmate's family. Employers would be provided a 10 percent tax credit for wages paid inmates, but they are prohibited from using inmates during strikes or lockouts.

Although organized labor opposed the referendum, California's initiative answered the main concern of small businesses about jail and prison industries. Business would no longer be competing with prisons and jails for government work; instead, they could bid competitively to run the inmate shop as another branch of their own factory or business services, such as the processing of airline reservations. This would bring current expertise into the prisons to set up more efficient operations and give inmates a more relevant job experience. In addition, if the restriction that limits sales to government agencies is ended, competitive bidding to handle the marketing of inmate-produced goods for a percentage of the profit could greatly expand the sales of these goods and increase prison and jail operating revenues as well as the number of inmates who work. Even without removing the current restrictions on sales, local governments and state universities represent a potential for greatly expanded sales that could be tapped by using private marketing experience.

In 1984, ACIR recommended that state legislatures, after consultation with labor, business, and the communities involved, enact statutes authorizing contracts between private companies and correctional institutions, including jails, under which convicted inmates can produce, for sale in the open market, certain goods and services that do not compete unfairly with the private sector. The Commission further recommended that states enact legislation authorizing the sale of such goods and services within their own borders.<sup>79</sup> Progress under this recommendation has been slow. The federal restriction on interstate sales of inmate goods is a major stumbling block, not only because it limits markets but because most businesses sell their products freely across state borders. Keeping inmate-produced goods out of this stream is a burden that few if any businesses are willing to undertake.

Figure 3-6

### Conflicting Missions of Work Programs

Keeping all inmates busy working at anything for security and as punishment

**VERSUS**

Concentrating resources to develop job skills and meet the education and substance abuse therapy needs of those near release;

Running farm, construction, and industry activities to maximize output

**VERSUS**

Training unskilled inmates;

Eliminating all potential security risks while the inmate is legally under penal control

**VERSUS**

Staged release through less costly reduced custody and community based work programs and halfway houses

Organized labor's main concern about the expansion of prison and jail industries is loss of jobs. Even worse, this is seen as an unfair loss of jobs to the degree it is driven by low labor costs. Currently, inmate wages range from about 20 cents per day to \$2.00. This opens up an interesting dichotomy with much of the public, which might question paying inmates at all. Elected officials need to be informed if they are to arbitrate this debate. To avoid escalating conflict, the following factors need to be clearly communicated: (1) the number of hours per day an inmate actually works because of time out for security procedures; (2) how turnover affects the productivity of new inmates; and (3) what the inmate receives after deductions for board and room and all legal obligations.

The Private Sector/Prison Industry Enhancement (PIE) program, created by the Congress in 1984, addresses some of these issues in its regulations, which include requirements that:

- A portion of any inmate earnings must go toward supporting programs that provide aid to crime victims.
- Representatives of organized labor and private industry must be consulted when inmate work programs are established.
- Inmate workers must be paid wages commensurate with those in the private sector.
- State labor officials must certify that private-sector workers will not be displaced, or existing labor contracts infringed on.
- Inmates must participate voluntarily and must receive standard benefits (including workers' compensation).
- Each program must incorporate a substantial role for the private sector."

In exchange for these restrictions, some of the federal restrictions on interstate commerce are removed. As of 1989, prison programs in 18 states and jail programs in two New Hampshire counties were certified under the PIE program.

**Work release** is the fourth category of prison work programs. It represents the greatest level of security concerns. Although community service programs are a new wave for alternative sanctions, widespread use of prisoner crews creates the same security issues that led to the demise of most of the old prisoner road gangs. Taking a crew of 10-12 inmates off the prison grounds requires a full-time guard and transportation. The same guard within the prison would provide security for four or five times that number of prisoners.

Individual work release programs usually operate out of halfway houses because of the need to separate the returning inmates from the general prison population to control contraband and because prisons usually are located far from job opportunities. The Salvation Army is the largest private provider of work-release space in Florida.<sup>81</sup> To get other employers to use prison labor, public officials must be willing to precisely spell out security proce-

dures and liability for the actions of an individual who has not been released from state custody.

**Education.** Only about 25 percent of state prison inmates are involved in full-time or part-time academic or vocational education programs.<sup>82</sup> Several states recently enacted legislation to increase this participation. In 1986, Virginia enacted a program—dubbed “No Read–No Release” by the press—targeted at basic literacy. While it was acknowledged that parole could not be denied to someone who is unable to read, it also was made clear that an inmate who was identified as reading below the 8th grade level and who physically could but refused to participate in the prison's literacy program would not be regarded as having made a satisfactory adjustment necessary for parole. The Colorado program awards good time to encourage inmates to participate. The federal system consigns inmates to the lowest paying prison jobs and/or disciplinary action if they refuse to participate. Effective in 1991, federal prisons raised their requirements to a 12th grade reading level and attainment of GED.

Legislation was introduced in the 1991 Congress mandating that states and local governments establish literacy programs within five years in all correctional facilities that have more than 150 inmates. Because no federal funding was included in the legislation that passed the House, the National Conference of State Legislatures (NCSL) opposed the legislation because it is a new, unfunded federal mandate.<sup>83</sup> NCSL reports that about 20 states now have prison literacy programs.

In opposing the legislation, NCSL also emphasized the difficulty in finding teachers who are adequately trained in adult literacy problems and willing to teach in a prison. Teachers also must be able to deal with a high percentage of inmates who have congenital learning difficulties or who have short attention spans because they have or have had alcohol or drug problems.<sup>84</sup> Some states, such as Texas in its Reading to Reduce Recidivism (3R) program, are using computer-assisted techniques to meet the need for adult illiterates to be guided step by step in the learning process. Prison systems also make use of other inmates and citizen volunteers as tutors.

**Substance Abuse Programs.** The Vera Institute of Justice recently described state prison substance abuse programs as “relatively unstructured, inmate- or volunteer-run programs that are ubiquitous in state prison systems.”<sup>85</sup> NJ recently confirmed that few true treatment programs exist within prisons.<sup>86</sup>

However, two of the most aggressive programs are New York State's Stay Out program and Oregon's Cornerstone program. Stay Out began in 1977. Participants are separated from other inmates, and the program is based on the assumption that addicts have deeply flawed personalities that must be challenged. More than 77 percent of the men who remained in the program for at least nine months were not rearrested in a three-year follow-up, while only 50 percent of a control group performed as well. New York's Stay Out program adds about 10 percent to the normal cost of prison and has not been expanded beyond its 200 beds, despite a 200-person waiting list.<sup>87</sup> Oregon's 32-bed Cornerstone program, be-

gun in 1976, is designed for serious offenders who are addicted to drugs. Additional beds recently have been added at a new facility, and federal grants are assisting in establishing a continuum of substance abuse care in Oregon's prison system.<sup>88</sup>

As with other alternative-sanction drug programs, ADAMHA federal demonstration grants also have been given to state prison programs such as:

- Conversion of a new Alabama prison into a 600-bed "treatment prison";
- Treatment units using cognitive learning theory in four Connecticut institutions;
- A highly structured, segregated treatment unit in the North Dakota state penitentiary; and
- A three-phase, six-month, 303-bed therapeutic community, including a mother/infant nursery unit, in the Taconic women's institution in New York.

Although most experts stress that inmates involved in substance abuse treatment must be completely separated from the rest of the prison population, it is possible to establish an intensive prison treatment program on a cost-effective basis because the cost of housing is being paid. By starting treatment in prison, the offender need only participate in outpatient treatment on release. Generally, these types of treatment slots are available in the community, whereas inpatient slots rarely are.

Determining priorities for who will receive the limited treatment slots in any correctional program is murky. It is seldom based on who may have the most serious addiction history but on the individual's willingness to participate in a program while incarcerated. The Vera Institute noted little evidence of screening of inmates and therefore of parolees for limited treatment slots. "Parole conditions mandating attendance at a drug treatment program (a very scarce resource in New York City) are given to 32 percent of the inmates who did not exhibit a severe and recent drug history, while they were not given to 44 percent of those who did have such a history."<sup>89</sup>

Even if the prison substance program is only a self-help group, continued participation on release is crucial. A no-cost volunteer program that may help encourage such continued participation is a New York State initiative to encourage members of local Alcoholics Anonymous and Narcotics Anonymous groups to contact inmates who have requested sponsors in their home community before they are released.<sup>90</sup> Finally, officials could find that using former felons who have an established record of recovery as public employees in treatment programs is actually a cost-saving approach. The savings comes in breaking the chain of recidivism that is more apt to occur when the former offender is not employed. (As in the AA model, focusing on other addicts and ex-offenders helps the person in the counselor's position with their own lifelong recovery.<sup>91</sup>)

**Boot Camps.** Prison boot camps were first initiated in Georgia and Oklahoma in 1983. By 1987, only five states were using them, but by 1990, 14 states had boot-camps

and 12 states were actively considering them. "Their use is expanding so rapidly, in part, because unlike many other intermediate sanctions, the obvious punitive features of these programs make them immediately popular with policymakers and readily acceptable to the public."<sup>92</sup>

NU research on boot camps, sometimes referred to as shock incarceration, has found no evidence that they significantly affect offender behavior or reduce recidivism. The deputy director of NU observed, "Previous shock incarceration research has provided more questions than answers."<sup>93</sup> Boot camp recidivism rates are approximately the same as those of comparison groups who serve a longer period of time in a traditional prison or who serve time on probation. Therefore, in the first instance, for those who would serve time in a traditional prison, cost savings can be realized by the shorter length of stay of those who do not recidivate.

In the second instance, however, if the recidivism rate is the same for those who serve time on probation, boot camps represent a very significant extra cost. Unfortunately, most boot-camp programs are vulnerable to such a net widening effect because state legislation often has limited participation to nonviolent first offenders, and because seven out of the first 11 programs used judge sentencing. To avoid the costs associated with net widening, NJ's initial study recommended that the decision to put offenders in a boot camp not be made by a judge but by prison officials from among the existing prison population.<sup>94</sup>

It has been observed that it is not just the discipline of military boot camps that has produced lifelong successes, but also the support of the G.I. bill in education, home ownership, and job preferences and at least two years of active military duty in an environment of constructive camaraderie. The New York State program has the heaviest emphasis on education, drug treatment, job training, and intensive parole supervision. Nevertheless, New York's DOC commissioner reported to the House Subcommittee on Criminal Justice in September 1989 that those who complete the program return to prison at the same rate as do inmates who were eligible but chose not to participate and, therefore, spent an average of 14 months in prison.<sup>95</sup>

Elected officials have been more active in establishing boot camps than any other prison program. At this point, it would appear that, if net widening can be controlled, these policymakers can declare the program a success as far as cost savings because it seems to prove that shorter sentences are as effective as longer sentences. However, most elected officials are at least equally interested in boot camps being a success in reducing recidivism, and there is no indication that they do so.

**Mental Health.** In a 1989 survey of all state prison systems, 42 reported that they had inmates in mental health programs and 39 reported that they had inmates in sex offender programs.<sup>96</sup> As with prison substance abuse programs, however, most of these programs are self-help, problem identification, group therapy sessions. They are not treatment programs.

A new focus for prison mental health programs is sex offenders. The public's focus on sex crimes has been relatively recent. For example, Vermont's sex offender popu-

lation went from 10 percent of its prison population in 1982 to triple that number four years later.<sup>97</sup> Therefore, most programs are also new. In 1990, Oregon proposed a two-component relapse prevention treatment program for 32 sex offenders and a domestic violence program providing services to 50 offenders per year in a local nonprofit center. The Oregon criminal justice system also uses a private nonprofit group—Restitution, Treatment and Training, Inc.—to provide treatment services to sex offenders convicted of incest. This company claims that less than 10 percent of those individuals who have been in the program in the past have been convicted of the same crime after treatment.<sup>98</sup> The Hennepin County (Minneapolis) Alpha Center uses 15 residential beds, as well as outpatient and day treatment for adult males convicted of felony sex offenses.<sup>99</sup>

Because many sex offenders and domestic violence offenders were abused as children, officials also need to look at the fact that over 70 percent of incarcerated adult females nationwide are mothers with dependent children. Prior to incarceration, the majority of these women had legal custody of these children.<sup>100</sup>

Prison mental health services have a long history, which seldom has been marked by professional services for the inevitable number of individuals among any group of people who will suffer depression, suicidal tendencies, or other clinical disorders. As public agencies, prison systems not only pay lower wages than mental health professionals can earn in the private sector, but the clientele is much more difficult to work with and the institutional setting is likely to be isolated. General government officials may find that they have to give firm direction in deciding whether the state mental health agency is to serve the prison population or a separate professional capability should be established within the DOC.

### Summary

There are numerous program options to reduce the use of prison and jail space. They depend, however, on policies set by general government elected officials to foster private and general government agency efforts; to accept programs in the community; and to fund the staffing and support necessary to achieve security, classification, and treatment goals.

Effective pretrial programs stress screening instruments, which can move as many arrestees who can be safely released out of jail or detention space as rapidly as possible, and nonmonetary means to assure appearance before the court for all offenders. Diversion from prosecution through participation in treatment or meeting other conditions has increased in the war on drugs.

Sentencing convicted offenders to probation rather than jail or prison can be strengthened by a range of options, such as community service; restitution; day fines commensurate with ability to pay; participation in substance abuse, job training, and GED programs; increased contact with a probation officer that may involve electronic monitoring; and day or weekend stays in reduced security facilities. Most of these options also can be used for parolees, although security concerns may be greater because

usually the fact that the court has ordered prison time connotes a more serious offender. Because they are located in the community, effective probation and parole programs need positive local general government involvement.

The length of time an offender spends in jail or prison and the likelihood of returning are addressed by programs such as prison/jail industries, education, mental health and substance abuse services, and pre-release counseling. As with all options, good classification to identify those who can benefit the most without creating unanticipated security risks is crucial to the success of the program and achieving the most cost-beneficial use of resources.

The programs cataloged in this section exemplify the energy and drive present in our federalist system of criminal justice. Within each state and its localities, there are program managers and criminal justice officials with the professional expertise and commitment to shape more productive options to overuse of imprisonment. There also are general government officials willing to encourage and support the development of more effective correctional programs and a smoother running criminal justice system, so that volume does not overwhelm correctional goals. The most successful instances of the criminal justice programs in this section have occurred through a partnership between the professional commitment and accountability of those who run the programs and the informed and realistic oversight and support of general government elected officials.

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## STATE VARIATIONS IN USE OF COMMUNITY OPTIONS

Under our federalist system, the criminal justice system in each state is unique. While this represents differences in constitutional and institutional structures, it also represents differences in philosophy. This section explores two aspects of the differences among states: Community Corrections Acts and the tendency to incarcerate. This discussion is intended to give state and local policymakers additional context for considering changes in their jurisdiction's response to crime.

### Community Corrections Acts

There has been no single model for a Community Corrections Act (CCA), although in 1992 the American Bar Association (ABA) adopted model legislation. The concept generally refers to comprehensive legislation that involves state funding designed to encourage and support localities in providing community programs that will serve as an alternative to incarceration.

At least 18 states adopted Community Corrections Acts between 1973 and 1991:

1973-74 Minnesota, Iowa, Colorado

1977-81 Oregon, New Mexico, Indiana, Ohio, Connecticut, Virginia, and Texas

1984 Tennessee

1988-91 Arizona, Michigan, Pennsylvania, Alabama, and Florida<sup>101</sup>

States that enacted legislation in the beginning of this period did so primarily to establish a more integrated and expanded system of state/local sentencing options. In contrast, several states that have enacted legislation recently have had the primary goal of reducing prison population growth. This has tended to raise local suspicions that the initiative is simply in the self-interest of state government.<sup>102</sup>

In 16 of the 18 states, local participation is voluntary (only Iowa and Kansas require local participation).<sup>103</sup> CCAs are structured on the premise that if the locality wants state funding, it must accept accountability for the programs and meet state requirements.

All CCAs require that the participating local governments prepare a community corrections plan. Typically, the plan must begin by analyzing the types of inmates who are incarcerated and how the local alternative programs in the plan will free space. The plans are approved annually by the state. In over half of the states, the review and approval are conducted by the department of corrections (DOC), although the ABA model act recommends that a separate state agency be created because “the objectives of a community corrections program are broader, and in some instances different from those of other criminal justice departments or agencies.”<sup>104</sup> The local board typically retains the power to veto any policy decision for its community, but it cannot expand programs beyond limits set by the state, for example, in regard to offense categories eligible for community sentencing, nor can it reduce requirements, for example, auditing halfway house security procedures.

The composition of local boards stipulated in CCAs usually recognizes the importance of gaining judicial and prosecutor confidence if alternative programs are to be used, as well as of having the participation of general government officials if the programs come under attack or need additional budgetary support. Citizens and law enforcement officials also are included, so that the idea of nonprison punishment can become better understood and, therefore, better accepted in the community. The jail administrator and probation and parole officials would be included to provide operational guidance. The role of these local boards in criminal justice planning is discussed further in Chapter 8.

State funding can be controlled by a formula, which usually leaves maximum discretion in the hands of local authorities as to how the funds are disbursed within the approved plan. A formula approach connotes that the state is merely encouraging and supplementing local initiative. A per diem funding approach focuses on specific programs, and puts the state in a stronger role of directing the use of certain programs in every locality. It also can carry the connotation that these programs are, indeed, state programs.

There is a variety of special funding provisions. For example, Minnesota provides that localities that do not feel they can operate a program can still participate by purchasing certain services from the state, with the cost being deducted from the formula payment due under the act. Indiana penalizes counties financially if inmates are committed to the state system who would qualify for communi-

ty corrections programs. The ABA's penalty provision addresses the criticism that county and city governments are hurt for decisions made by judges over whom they have no control by providing that “non-incarceration sanctions will be the presumptively appropriate sentence for offenders meeting the criteria.” Judges must state on the record why community options were rejected.<sup>105</sup>

There are no clear winners or losers financially in a Community Corrections Act approach—which may explain why only 18 states enacted a CCA between 1973 and 1991. Although it is true that the amount of money that the counties receive for each retained offender is less than what the state would pay to house that offender in prison, savings to the taxpayer can disappear in two ways: net widening and use of jail. Net widening refers to a more expensive community option being used for an offender who, prior to the programs becoming available, would have been put on unsupervised probation or received a suspended sentence. Virginia estimates that only 70 percent of those in its Community Diversion Incentive program are true diversions.<sup>106</sup> Furthermore, in localities that have the jail space, projected savings have been reduced when local incarceration has been the most used alternative, as it was reported to have been in Minnesota during the first seven years' experience under its Community Corrections Act.<sup>107</sup>

Strong guidance in reviewing the annual plans, which are required under Community Corrections Acts, can help reduce net widening and use of jail space. However, the National Conference of State Legislatures cautions that projected state savings may still be optimistic because “overcrowded facilities or inflated caseloads underestimate costs.” A state “would have to reduce prison populations dramatically to effect the fixed system costs,” and, in fact, if caseloads are reduced under the new initiatives, increased detection may increase costs.<sup>108</sup>

Local budgets also may not realize real savings because much of the initial financing of most acts does not represent new money. For example, in Michigan, state budget dollars that had been paid directly to community-based programs are now paid to local governments under the CCA. In discussing whether Tennessee should reorganize under a CCA, it was noted that “for community corrections act states, the services covered by the ‘state subsidies’ to local corrections are those that the state pays for in its own budget in most other states: chiefly felony probation and parole supervision services.”<sup>109</sup>

Consequently, the way CCAs are structured financially will vary significantly to reflect each state's tradition of determining state and local responsibility. Hopefully, funding battles will not overshadow the benefits of providing a greater range of correctional options in the community with accountable oversight. These are goals on which the National Association of Counties and the National Conference of State Legislatures agree. First, from the state legislative viewpoint:

In part, the recent interest in community corrections reflects a growing recognition that a state and local partnership is needed to provide innovative program leadership and to share responsi-

bility and costs. For too long, the system has fostered the temptation for local governments and states to shift the responsibility and costs of corrections from one to the other. Community corrections attempts to balance costs and responsibilities. . . . [C]ommunity-based alternatives can rightfully point to important dividends: restitution paid, community service completed, offender families kept intact and off public assistance, and training and education attained.<sup>110</sup>

From the county perspective:

What's in it for the counties? . . . The administration of the criminal justice system is a major county function. . . . Counties are the best equipped to assess local problems and resources. . . to provide better, more individualized offender services because they operate on a much smaller and less centralized level. . . . State overcrowding has caused a substantial back-up of state inmates in local jails. . . . Restitution programs are designed to force offenders to face what they have done, both to the victim and to the community [and] unemployment and substance abuse must be addressed. . . . The overwhelming majority of individuals incarcerated in state institutions eventually return to their original community.”

### State-by-State Comparisons

The states vary considerably in their use of alternatives, and the reasons why one state may have more people locked-up than another are not always the same. It is important to identify such state or local variables in approaching any policy change. Gaining institutional and public acceptance may need to be approached differently, and the same program instituted in a different setting may have different results if contributing factors are not or cannot be altered.

It has been common to compare states according to how many people are behind bars relative to state population. By this measure, usually assumed to measure “punitiveness,” the South has led the nation, followed by the West, the Midwest, and the Northeast:

Region	Penal Control/ 100,000 Population <sup>112</sup>
South	1496.4
National Average	1247.0
West	1204.0
Midwest	966.8
Northeast	957.8

Actually, this traditional measure reflects criminal activity more than it reflects the public's response to crime.

A more accurate measure was first published by the National Council on Crime and Delinquency (NCCD) in 1988 and began appearing in National Institute of Justice data in 1991. This statistic relates the number of persons incarcerated to the number of serious crimes reported. If all states were equally “punitive,” the ratio of the crime rate to the incarceration rate would be the same: the more

crimes reported, the more people behind bars. Using this measure, we see that, although the South again is substantially more “punitive” than the rest of the nation, the West is shown to be the least “punitive” because its high rate of incarceration is being driven by high rates of crime:

Region	Penal Control/ Crime Rate <sup>113</sup>
South	.285
National Average	.240
Midwest	.208
Northeast	.207
West	.188

The high number incarcerated in the West relative to the rest of the nation is directly related to the West having the highest crime rate in the nation, not to tougher sentencing decisions:

Region	UCR crime Rate/ 100,000 Population <sup>114</sup>
West	6405.1
South	5256.2
National Average	5206.5
Midwest	4657.3
Northeast	4627.3

Table 3-2 presents highlights of a 1991 report which found that the United States has the highest number of people incarcerated per 100,000 population of any country in the world. This finding has focused increased interest on trying to extend such a comparison to other countries. How much of the United States' high incarceration rate is due to increased crime? Given that what nations classify as a crime varies greatly, such an international comparison is extremely difficult. However, it has been reported that compared to western European countries, American murder rates are at least seven times as high, and there were *six* times as many robberies and three times as many rapes reported than in West Germany before reunification.<sup>115</sup>

Although factoring in the crime rate helps clarify the reason for a high incarceration rate, in order to focus on sentencing policies, it is also necessary to factor out arrest rates. Once a person is arrested, how likely is it that he or she will serve time behind bars? Using this analysis, the Midwest is now seen to have much tougher sentencing policies than were previously apparent:

Region	Penal Control/ arrests <sup>116</sup>
South	1.643
Midwest	1.448
National Average	1.401
Northeast	1.204
West	.981

These simple extensions of what had been the common measure of a state's criminal justice policies—the proportion of its population behind bars—challenges conventional notions about how each state's criminal justice system is operating. For example, Minnesota is frequently singled out because it ranks at the bottom of the states in the



**Table 3-2**  
International Comparisons

By end of 1989, the United States had the highest number of inmates per 100,000 population in the world:

United States	426
South Africa	333
Soviet Union	268

In comparison, inmates per 100,000:

United Kingdom	97
France	81
Denmark	68
Japan	45

Source: Marc Mauer, *Americans Behind Bars: A Comparison of International Rates of Incarceration* (Washington, DC: The Sentencing Project, 1991).

percentage of its population that is in prison. However, when the state's high arrest rate and its low crime rate are factored in with its use of jail, juvenile facilities, probation, and parole, Minnesota ranks 16th among the states in the number of individuals under penal control relative to the incidence of crime. The Minnesota criminal justice system has a high rate of response to crime; it is just that the response is less often prison."

The focus analysis on page 82 was developed to provide a snapshot of the range of public policy considerations faced by state and local officials. It is based on rankings contained in the 1988NCCD research, "Ranking the Nation's Most Punitive States."<sup>18</sup> While it is not a definite analysis of each state, it is valuable as an order-of-magnitude reflection of state penal policies in the mid-1980s, subject to problems in gathering accurate and comparable state-by-state data.

The analysis attempts to identify reasons why each state might consider increased use of alternative sanctions. There are states where increased use of alternative sanctions can be particularly productive because they now make little use of them and have low crime and arrest rates. Although states with high crime rates would see less reduction in their prison populations from increased use of alternative sanctions, they may wish to expand them as a means of achieving greater control over those on probation or parole.

The analysis also indicates that some states might benefit from the use of alternative sanctions to reduce the length of imprisonment, while others should concentrate on diverting offenders from the criminal justice system at the earliest possible stage. The analysis reveals that some states do appear to have a reasonable balance between the use of incarceration and alternative sanctions and, therefore, probably are more justified in dealing with prison or jail overcrowding on a facility-by-facility basis. Finally, the analysis identifies those states that do not have a high proportion of their population imprisoned because they do not have high crime rates, and notes that these states may still want to

examine their priorities rather than continue to spend public safety dollars unnecessarily.

In order to weigh policy changes responsibly, the foregoing preliminary analysis underscores the need for each local criminal justice system and each state to undertake an accurate and comprehensive analysis addressing the points raised. Are prison and jail populations high because of:

- High rates of reported crime?
- High numbers incarcerated who in other states would not be behind bars?
- Low use of alternatives? and/or
- Relatively long sentences?

## SUMMARY

Controlling costs, increasing public safety, changing criminal behavior, and providing just punishment are all reasons being put forward for a renewed emphasis on alternative correctional programs. The potential exists in all aspects of the criminal justice system:

- Police and prosecutors can increase the use of summons, improve charge screening, and employ deferred prosecution.
- Prosecutors, public defenders, judges, and other court officers can expand the use of pretrial release risk-assessment models, release on recognizance, alternative forms of bail, and pretrial release supervision.
- Jail, probation, and prison officials can work together to improve offender information and classification.
- All court and correctional officials can be involved in developing creditable programs of monetary sanctions, community service, non-secure rehabilitation centers, and intensive supervision. They can enlist police and treatment providers in developing a balance between detecting probation and parole violations and providing program support.
- Correctional administrators and general government program administrators can cooperate to expand educational, mental health, substance abuse, and employment rehabilitation efforts.
- State and local government officials can use a comprehensive change, such as a Community Corrections Act, to emphasize sentencing options.

There is no shortage of alternative programming ideas. The challenge to general government elected officials is to work with the realities of their state's system of criminal justice—as represented by its crime rate, incarceration rate, and relative use of community sanctions—to provide appropriate policy support for and public understanding of the need for change.

## Differences in the Potential for Increased Use of Alternative Sanctions in States

If there are agreed-on public policy reasons to do so, all states can reduce their prison populations by increasing the use of alternative sanctions, but for some states there is more latitude for change than for others.

*Increased use of alternatives could be particularly productive in states that rank high in the proportion of their population imprisoned and that make little use of alternatives. These states include:*

State	Rank Per Population	Prisoners Per Arrests	Total Control Per Arrests
Nevada	1	13	36
Virginia	16	17	37
Alabama	8	7	22
South Carolina	4	4	17
Oklahoma	9	14	25

Three other states also have a high proportion of their population in prison and make relatively little use of alternatives, but each of these states has a *high rate of reported crime and arrests. Therefore, increased use of alternatives will have less effect on the proportion of their population serving time in prison:*

State	Rank Per Population	Prisoners Per Arrests	Total Control Per Arrests
Florida	12	29	22
Arizona	7	30	42
California	17	35	32

Other states have a high proportion of prisoners relative to their population and make high use of alternatives. They also make high use of imprisonment, which drives up their prison populations. Only two of these states rank high in reported crime, Michigan (10) and Alaska (11). Therefore, for these states, it would be particularly *useful to look at why prisoners spend so much time in prison:*

State	Rank Per Population	Prisoners Per Arrests	Total Control Per Arrests
Alaska	2	11	3
Georgia	10	11	2
Louisiana	5	3	10
Delaware	3	5	11
Michigan	15	16	12
Mississippi	13	2	14
North Carolina	11	15	16

Only two states having a high percentage of their population in prison stand out as making substantially more use of alternatives than of imprisonment:

State	Rank Per Population	Prisoners Per Arrests	Total Control Per Arrests
Texas	14	26	7
Maryland	6	20	9

It is significant that of the 12 states that have the highest rates of reported crime (Florida, Arizona, Colorado, Oregon, Nevada, Texas, Washington, California, New Mexico, Michigan, Alaska, and New York), five of them are not listed above because, despite their high rates of reported crime, they do not have high rates of imprisonment. To the degree that these states also make relatively little use of alternatives relative to arrests, they

could be termed the least punitive in dealing with criminal activity. Development of alternative sanctions in these states may be more strongly affected by a *public safety desire to add gradients of control* than to lessen the growth of prison populations:

State	Rank Per Population	Prisoners Per Arrests	Total Control Per Arrests
Colorado	42	48	48
Oregon	27	45	38
Washington	33	40	13
New Mexico	25	34	45
New York	20	24	28

Several states, because of their low crime rates, do not appear to be punitive when measured by the proportion of their population in prison, but stand out as punitive in their high use of both imprisonment and alternatives relative to arrests. These states have relatively more latitude to approach programs that will *divert offenders from the criminal justice system at the earliest possible stage:*

State	Rank Per Population	Prisoners Per Arrests	Total Control Per Arrests
Vermont	39	9	1
Tennessee	32	10	4
Indiana	26	8	5
Illinois	30	12	6
Ohio	22	6	8

Finally, four states with low rates of reported crime make significantly higher use of alternatives than they do of imprisonment. Response to a criminal justice crisis in these states—whether it is jail or prison overcrowding or a breach of public safety—can probably be dealt with more satisfactorily by *focused changes, dealing with the problem at hand*, than the need to make major changes elsewhere in the criminal justice system:

State	Rank Per Population	Prisoners Per Arrests	Total Control Per Arrests
Massachusetts	45	28	15
Minnesota	50	50	27
Pennsylvania	38	32	18
Rhode Island	36	33	19

The remaining states also *do not have high rates of reported crime*. They can be grouped into two categories based on their use of imprisonment and alternatives. The first group ranks in the middle-range in their use of alternatives and imprisonment relative to arrests. In order of their relative use of alternatives, they are: Kentucky, Connecticut, Kansas, Nebraska, Hawaii, Missouri, New Jersey, Arkansas, Wyoming, and South Dakota.

The final group of states is in the bottom third in their use of both imprisonment and alternatives in relation to arrests. Again in order of their relative use of alternatives, they are: New Hampshire, Iowa, Montana, Wisconsin, West Virginia, Idaho, Maine, North Dakota, and Utah.

Not surprisingly, with the exception of Kansas, all of the states in the first group have more people behind bars relative to their population than the states in the second group. Of the low-crime states, the second group is the least punitive in dealing with those arrested.

## NOTES


- <sup>1</sup> U.S. v. Salerno, 481 U.S. 739 (1987).
- <sup>2</sup> U.S. Department of Justice, Bureau of Justice Statistics (BJS), "Recidivism of Felons on Probation, 1986-89," *BJS Special Report* (Washington, DC, February 1992).
- <sup>3</sup> "Probation and Parole 1990," *BJS Bulletin*, November 1991, Table 4.
- <sup>4</sup> ACIR computation of the estimated ratio of felonies to misdemeanors is based on the following assumptions about arrests as reported in the Federal Bureau of Investigation's 1990 UCR, *Crime in the United States*: Felonies include all arrests for murder, forcible rape, robbery, aggravated assault, burglary, motor vehicle theft, arson, weapons offenses, other sex offenses (excluding prostitution and ~~rape~~) and suspicion; three fourths of drug arrests; two thirds of the arrests for forgery and counterfeiting, fraud, embezzlement, possessing stolen property, and offenses against children; and one fourth of the arrests for larceny theft. Misdemeanors include the remainder, excluding non-alcohol related traffic offenses, curfew violations, and runaways.
- <sup>5</sup> Barry Krisberg in Andrew H. Malcolm, "More Cells for More Prisoners, But to What End," *New York Times*, January 18, 1991.
- <sup>6</sup> Office of the Attorney General, "Opening Remarks as Delivered by Dick Thornburgh, Attorney General of the United States, at the National Drug Conference," May 15, 1990, pp. 6-8.
- <sup>7</sup> *Crime and Punishment: The Public's View* (New York: The Edna McConnell Clark Foundation, 1987), p. 5.
- <sup>8</sup> *Ibid.*, pp. 12, 34.
- <sup>9</sup> Wayne Huggins, panelist on National Governor's Association Panel, May 22, 1991.
- <sup>10</sup> Russell Committee, Bar Association of Baltimore City, *The Drug Crisis and Underfunding of the Justice System in Baltimore City* (Baltimore, December 1990).
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# 4 – ESTABLISHING CORRECTIONAL OPTIONS

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 any successful elected officials heed the admonition not to succumb to a “why don’t we” campaign. Instead, they make sure that their campaigns focus on the material and media necessary for the crucial last weeks of the campaign. They avoid being swept along by the latest *great* idea, if it means that campaign workers and funds are diverted from that which must be delivered.

Similarly, the previous chapter was not intended to provide a “why don’t we” list. It was intended to provide an overview of what is meant by correctional options, particularly for those who are unfamiliar with the criminal justice field. It also provided further demonstrations of impacts on the system as a whole if offenders are not dealt with effectively by any given component.

This chapter focuses on the role of general government officials if correctional options are to be expanded within their systems of criminal justice. This role will not be to decide which great program should be used, but to make informed decisions on the resource commitments necessary for the effectiveness of any program, how it will interact with other programs, and how its success is to be determined. This approach to policy was well stated in a 1988 National Association of Counties newsletter:

[P]ublic officials should spend less time on consideration of the solution and more time on an improved understanding of the problem. In too many places, there is an infatuation with innovation and a “cure-all” quality assigned to programs and policy choices which have limited value for long-term restructuring of the corrections system.’

In other words, to be effective in improving the criminal justice system, general government officials need to focus on basic questions:

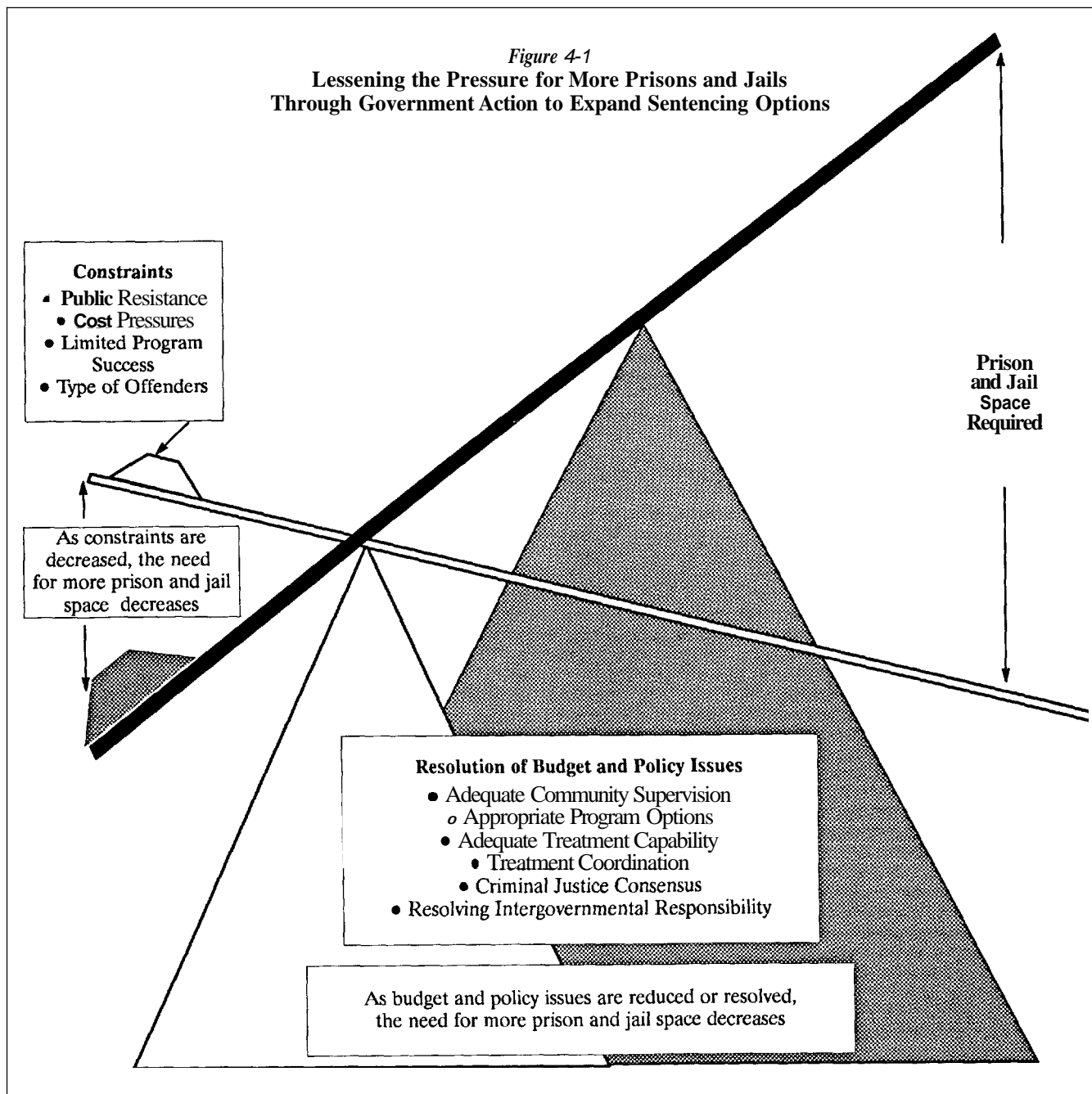
- Is the problem that correction programs have abysmal failure rates, or that we have unrealistic expectations of success?

- Is the problem that there are people locked up who shouldn’t be, or that we don’t know who we have locked up?
- Is the problem that the criminal justice system is ineffective in dealing with crime, or that crime is driven by problems that must be dealt with by government as a whole?
- Is the problem that the programs are not well-focused, or that they are not well staffed?
- Is the problem that alternatives to incarceration are not used, or that they are not effective?
- Is the problem that we need new approaches, or that we need to expand the use of the programs in place?

The fundamental approach of this chapter is to help general government officials **judge** the answers they will get to these questions from their individual systems. The key issues it discusses also are presented to help government officials deal more effectively with the concerns of criminal justice officials, potential service providers, and the public in order to marshal broad commitment to changes in policy.

The chapter begins by identifying factors that frame the context of public policy decisions: public acceptance, the push to reduce correctional costs, research results on recidivism and program effectiveness, and the makeup of the target population. The next section explores general programmatic concerns through a discussion of juvenile crime and drugs as examples. With this understanding of endemic factors and programmatic concerns, the last section discusses governmental policy issues that must be addressed to expand the use of correctional options. These policy issues include intergovernmental responsibility, availability of treatment, the need to enforce a continuum of sanctions, coordination of treatment, and the adequacy of community supervision. **As** depicted in Figure 4-1 (page 86), the more these issues mount up and/or the more constraints increase, the more need there will be for prison and jail **space**.

Figure 4-1  
 Lessening the Pressure for More Prisons and Jails  
 Through Government Action to Expand Sentencing Options



## THE CONTEXT OF POLICY DECISIONS

### Not In My Backyard

**AS** any governor, mayor or county executive can tell you, [intermediate sanctions] remains a politically and publicly sensitive issue. People expect government to protect them. They do not want government proposing programs that put unrehabilitated criminals back into **their** communities.

**And** the pressure they **can** bring to bear to prevent use of these programs is difficult to overcome. . . .

Such attitudes are understandable and that is perhaps why we have been so slow to challenge them and to abandon wishful thinking that “out-of-sight, out-of-mind” will make our world safer.<sup>2</sup>

By definition, community options take place in the community. This means that people who have been **found** guilty of a criminal act will be “at large,” outside the secure perimeter of an institution. Focus group examples of how public attitudes toward sentencing can shift with information do not deal specifically with the not-in-my-backyard (NIMBY) syndrome, which is so familiar to public officials. Therefore, elected officials still will have to struggle to move from theoretical support of nonincarceration alternatives to actually locating programs.

Although not providing guidance on how to soften the NIMBY reaction, the nationwide focus group discussions, cited in the previous chapter did surface a significant aspect of the public's reaction to crime. The report's findings emphasized that "the *fear* rather than the *fact* of crime determines the initial views many people express. . . . Most respondents had not been directly affected by crime. Rather, they saw it as a danger that *might* affect them suddenly and without *warning*."<sup>3</sup>

These deep-seated fears are difficult to ameliorate. In presenting alternatives, public officials may be able to achieve greater public support by acknowledging the fear rather than downplaying it. This would require being open about how little public protection is possible with existing probation caseloads and with population caps on prisons and jails, which severely compromise control over who is released from overcrowded facilities.

However, elected officials understandably may be reluctant to describe fully the tenuous nature of the criminal justice system's control, for the same reason that agency officials may not be sharing the information with them. There may be a desire to avoid a kill-the-messenger response: "If things are so bad, we'll find someone else who can do it better." Officials also may want to avoid further inflaming the public's fear that they are at risk, without any guarantee that citizens will accept that the alternatives presented will reduce the risk.

Nevertheless, dealing with the citizens' fear of crime is key to developing support for policy changes in any aspect of the criminal justice system. This fear is distinct from any government charts and statistics and puts the ombudsman role played by elected officials to perhaps its greatest test. **As** will be discussed, the risk of an individual criminal failing cannot be removed. Such failures will be directly and tragically demonstrable, further inflaming concern that "it could happen to me," which is not the usual public reaction to other social problems, such as school dropouts, unemployment, or environmental losses.

Given the nature of the public's fear of crime, it is especially important that policy change be an outgrowth of a coordinated strategy of key elected and criminal justice officials. Otherwise, the personal fear can be inflamed further by pronouncements from responsible authorities who can disclaim the initiative. To be successful, consensus must blend the conflicting missions of criminal justice officials, treatment providers, and those who are responsible for funding it. Perhaps the most productive goal of such a consensus **would** be to acknowledge that public safety cannot be guaranteed, but that program costs should bear some relation to the degree of additional public protection achieved.

Whether it is an education program in the prison or a work program in the community, implementation depends heavily on public acceptance. **As** in the example that follows from the 1991 Harris County (Houston) Criminal Justice Council Plan, required by the state legislature, it can be fairly said that public acceptance is half the battle:

In the implementation of a Community Justice Plan in a locality, public attitudes toward crime, sanctions and punishment will affect the develop-

ment of the plan, and Harris County is no exception. [The following factors were then cited —emphasis added]:

- **Local public views on appropriate punishment.**
- Judicial and criminal justice views concerning public safety.
- **Acceptance of potential program and facility placements by local citizens.**
- **Availability of resources and public views of the appropriate allocation of the same.**
- Evaluation of the success of programs in diverting offenders from incarceration.
- Legislative mandate and intent.
- Judicial utilization of available programs.
- Cost-effectiveness of various program elements.
- Specialized or targeted law enforcement efforts.
- **Views and concerns of other elected officials and community leaders.**
- **Public views of the operation of the criminal justice system.**
- Federal judiciary oversight and decisions?

### **Cost: The Driving Force for Change**

While persuasion and increased information may work slowly to change public attitudes, most of the officials interviewed for this project believe that cost will create a much sharper swing in penal philosophy. The challenge before general government elected officials is to make the resultant shifts in criminal justice system policies productive.

Alternative sanctions often are presented in terms of significant cost saving compared to incarceration. For example, Governor Michael Castle of Delaware reported that, even if half of the more than 700 persons in the state's Intensive Supervision Program at an annual cost of approximately **\$2,300** per offender would not have been sentenced to jail, the program saves \$5.4 million **per year**.<sup>5</sup> According to a recent study of 494 community service participants, the cost of New York City's community service program is \$920 per year per offender, compared to \$40,000 to jail someone on Riker's Island. There was no meaningful difference in the number of crimes committed after the sentence was served. However, the **cost to private individuals** of the approximately 70 crimes committed by the 494 community service participants during the time they would have been in jail is a public policy consideration?

The controversial modeling released in **1987**, which asserted that the cost to society of crimes committed by the typical offender was **17** times the cost of imprisonment, has been followed by several critiques. All of them

point out that because a relatively few offenders commit a large proportion of the crimes the analysis should not have based its computation on the assumption that all offenders would commit the average number of crimes. A more refined analysis in 1991 used the median number of crimes committed by offenders and calculated a cost ratio of 1.38, rather than over 17. In contrast to the implication of the 1987 study that the more you lock up, the more you save, the 1991 analysis concluded that if the criminal justice system diverts the least active quarter of criminals, the total cost to society of any continued criminal activity would only be two-thirds of the public cost of prison. The study also noted that savings vary by the type of crime and by the degree to which any given state already diverts offenders.’

In fact, such a model of cost savings was posited in 1981 by Peter Greenwood of the RAND Corporation. He noted that the average number of robberies that had been committed by persons in prison for armed robbery was 4.6 per year, even though half had committed no more than 1.5 robberies per year. This highly skewed pattern resulted from the fact that 1 percent committed more than 30 robberies per year. The same statistical pattern held up for every offense category: the average was three to four times higher than the midpoint. The following scenario was then developed:

Under typical arrest and conviction rates, 1,000 armed robbers would be incarcerated, and half of them would have committed one robbery and half would have averaged 10 robberies. If they all served a 3-year sentence, the annual number of armed robberies would be about half (6,667) what it would be without incarceration.

To reduce the robbery rate by another 20 percent, sentence lengths would have to be increased to 5.2 years. This would result in a 40 percent increase in the prison population. Whereas, the same 20 percent reduction in crime could be achieved without any increase in incarceration by decreasing the sentence length of all low-rate offenders to two years and increasing the sentence length of high-rate offenders to seven years.<sup>8</sup>

These types of considerations are becoming more common. There is no longer a “simple” dichotomy between rehabilitation and security. Now, controlling the burgeoning costs of incarceration also has become a driving force. When the issue is framed as “build more prisons or let dangerous people out, [w]hat sensible politician will come to a meeting to discuss those choices? The advent of corrections as a spending problem allows public officials to broaden the base of the political discussion.”<sup>9</sup>

### Recidivism: Is Batting .350 Good Enough?

The most difficult hurdle in “broadening the base of discussion” is that it is extremely difficult for public officials to deliver on the promise that less costly alternatives to incarceration will work.

Alternative sanctions may do no worse than incarceration—at much less cost. They may do better. But many

citizens hold all programs accountable to a much higher standard: Do they deter criminals from committing new crimes? As long as the felon is incapacitated behind bars, in fact, no new crimes can be committed. Felons serving their sentences in alternative programs are not thus deterred by lack of opportunity.

How many offenders will fail is usually reported with qualifications, because their success rates are influenced by who is selected to participate, how failure is defined, and/or the time period being tracked since the offender completed the program. The public commonly does not trust such “statistical excuses,” however, and simply wants to know, “How many prisoners will never commit another crime after they’re released?” The answer is about one-third. If the question, instead, is framed, “How many convicted felons will never commit another felony?” the answer is about one-half. Results in Canada have been essentially the same.<sup>10</sup>

The difference between these two answers lies in the fact that the second group includes all felons, not just those sent to prison. Felons sentenced to probation rather than prison have committed less serious crimes and/or do not have long criminal histories, and for this reason rather than the nature of the punishment, they are less apt to commit more crimes. For example, in a three-year follow-up of felony probationers, only 43 percent had been arrested for another felony.<sup>11</sup> Even among offenders whose crimes drew the more serious sanction of a prison term, the likelihood of rearrest within three years for first-time offenders is only 38 percent compared to an average of 63 percent for all persons released. In study after study, the predictive factor is the person being punished, not the punishment.<sup>12</sup>

Even among inmates released from prison, there are marked differences in recidivism among groups. A 1989 U.S. Bureau of Justice Statistics (BJS) study based on 11 states, representing over half the prisoners released nationally in 1983, reported ranges for recidivism over a three-year period of 90.4 percent to only 17.1 percent:

The *greatest* likelihood of rearrest (90.4%) occurred if the person:

- Was age 24 or younger;
- Had seven or more arrests;
- Had a record of probation or parole revocation or escape;
- Had most recently been in prison for vehicle theft, burglary, larceny, robbery, or fraud; and
- a Had been imprisoned before.

The *lowest* likelihood of rearrest (17.1%) was for a person who:

- a Was over age 35;
- Had three or fewer prior arrests;
- Had no prior record of revocations;
- Had just completed serving time for homicide, a drug offense, or rape; and
- a Had not been imprisoned before.



All factors are listed in order of their predictability, with age and prior arrest record being by far the most significant factors.<sup>13</sup>

Another difference between the two answers is the definition of recidivism. It is the difference between committing any crime and committing a felony. In 1976, the U.S. General Accounting Office (GAO) investigated the recidivism issue. Its study of four counties did confirm a 55 percent recidivism rate for probationers. GAO then went on to discuss the varying definitions of recidivism. For example, the Bureau of Prisons counted only new offenses that are serious enough to have warranted at least a 60-day sentence, while the LEAA definition included convictions of any kind, including traffic tickets. Both GAO and LEAA included probation or parole revocations for technical violations that did not involve a new crime.<sup>14</sup>

These definitions of recidivism are in contrast to some states that classify absconders with those who have successfully completed probation or parole. (As long as the state does not know the absconder has committed another crime, it generously is assumed that he or she has not done so.) Furthermore, the GAO, LEAA, and Bureau of Prisons definitions used in the 1976 study were based on convictions rather than rearrest. Because arrest does not necessarily lead to conviction, the average recidivism rate can be reported as one-quarter lower if it is based on reconviction rather than rearrest.<sup>15</sup>

Finally, the length of time offenders are tracked also affects reported recidivism rates. It is not uncommon for reported recidivism rates to be based simply on whether the felon completed probation or parole without being arrested for another crime. This is not a conscious attempt to make the "success" rate look better as much as it is a pragmatic result of the fact that no one in the criminal justice system keeps track of individuals after they have completed the official period of supervision.

Burglars and other nonviolent felons are more apt to be arrested for a new crime sooner than violent offenders. The average in a 1986 Virginia study was less than 18 months. Interestingly, this study also seemed to indicate that the more "professional" the criminal, the longer he or she may go before being rearrested. Arrests for armed robbery occurred within 16 months if the offender's previous convictions had been for less serious crimes, compared to 32 months if the person had committed armed robbery before. For murderers and rapists, the average time before a new arrest ranged from 21 months for murder, if the person had already committed a violent crime, to 58 months for a sexual offense committed against a child. Almost 75 percent of the felons had completed the period of probation or parole before they were rearrested.<sup>16</sup>

All the preceding detail signifies how easy it is to be misled, often inadvertently, in the search for more effective correctional programs. Claims of success or failure are not always what they seem. Although programs that save costs need to be explored, if they are expanded on optimistic assumptions of success, one unforeseen incident can leave the jurisdiction with no program at all.

It is crucial that elected officials have a basic understanding of recidivism and how it is reported. The general

government official must be immediately alert to the fine print of any program that reports "success." The program may be a better program or it may have only included better criminals who were tracked under the best of assumptions.

## Lack of Program Evaluation

For FY 1990, \$14 million of the federal Office of Justice Programs' budget was devoted to evaluating and providing technical assistance to model state and local programs that focus on intermediate punishments. This 245 percent increase came out of a recognition that "research and evaluation [is] necessary before well-intentioned programs are promoted to achieve results that simply don't materialize."<sup>17</sup>

Regrettably, this caution is but an echo of a National Academy of Sciences report, released a decade earlier, based on four years of research and discussion on the effectiveness of criminal rehabilitation. They concluded that:

Because programs have been poorly conceptualized and/or poorly implemented and research flawed by conceptual and methodological shortcomings, the conclusions that rehabilitation cannot be achieved may well be wrong. Instead of concluding that nothing can work, it is more accurate to state that we do not know what works. These studies are limited by methodological inadequacies including measurement problems, the use of weak programs and weak research designs, and uncertainty about the integrity of the treatments actually delivered.<sup>18</sup>

One reason for the National Academy of Sciences' focus on the effectiveness of criminal rehabilitation was to evaluate a 1975 study that was credited with "giving rehabilitation the coup de grace." The Martinson study, named after its principal author, examined all studies of treatment/evaluation published in English between 1945 and 1967 that included a control group. After reviewing 231 studies, the researchers concluded:

With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect of recidivism. These data are the best available and give us very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation."

The controversy raised by this conclusion led to the Academy's review, which essentially confirmed the validity of the Martinson assessment of previous studies.

However, the Academy raised important considerations about why study results have been so poor, citing four factors that limit meaningful evaluation, and also underscore chronic weaknesses in criminal justice programs.<sup>20</sup> If general government officials do not address these problems, tax dollars will continue to be diverted into quick fixes instead of meaningful change:

1. Programs inadequately screen participants. A program may be the best chance of success for one type of person and, yet, appear to be a waste

because of participants for whom the program offers no motivation.

2. Programs are usually single-faceted (e.g., vocational training), while many other factors may lead to continued criminal activity.
3. There often are discrepancies in what the program was supposed to be doing and what was actually done. This is often the case when trying to “sell” a model program. It is difficult to maintain “the integrity of the original program model as it is adapted by practitioners to local conditions, agency goals, and funding restrictions, . . . [and change the] routines of the practitioners.”<sup>21</sup>
4. Too often, the programs themselves are inherently weak. “Why would one expect that one hour per week of group therapy with a poorly trained leader and unwilling participants would produce a major behavior change in incarcerated felons, especially considering the powerful effect of the prison background?”<sup>22</sup>

Chronic underfunding also has undercut good program evaluation. The Vera Institute of Justice, in an ongoing evaluation of a multiagency New York drug treatment program, stated the obvious, “**How** to do both jobs at hand—tackle an intransigent problem in public policy and practice and at the same time subject the process to valid research.”<sup>23</sup> Because correctional budget submissions are cut routinely to channel funds to more politically popular expenditures, agencies almost always decide to use the remaining funds on program delivery rather than evaluation. In fact, the Vera Institute’s in-depth evaluation, which will be discussed later in this chapter, was done only because the New York assemblyman who initiated the multi-agency approach through a \$1.3 million budget amendment wrote a specific requirement for evaluation into the language of the appropriation.

Adequate evaluation also raises a specific intergovernmental challenge. Solid analysis requires a level of expertise that is not always present at the program delivery level:

Research on the recidivism of probationers in Texas until recently has been nonexistent even though Texas has more probationers than any other state. . . . The main reason for the lack of research is that probationers are supervised by local probation departments that do not usually have an incentive or funds for conducting recidivism studies. The local nature of the probation system has also made it difficult for the state probation agency to collect data on probationers, particularly those under regular probation supervision [which includes about 95% of the probationers].<sup>24</sup>

The intergovernmental dilemma is how to support needed evaluation while not undercutting the focus on program responsibility in the community.

It is particularly unfortunate that extraordinary system growth has exacerbated underfunding of evaluation.

At a time when there is heightened pressure to consider less costly alternatives, the data needed to foster confidence in these alternatives is thin. **As** the sign above the desk in one government office read:

The road to hell is paved with good intentions.  
And littered with sloppy analysis!

### Who Will Be Placed in Programs?

Two polar thrusts are receiving considerable attention today: “just desserts” and “selective incapacitation.” Just desserts focuses on the crime, while selective incapacitation focuses on the criminal.

The development of uniform sentencing, as discussed in Chapter 2, encompasses the just desserts movement. As noted, this movement grew out of dissatisfaction with leaving too much discretion with criminal justice authorities to determine who should be behind bars, based on their personal judgment as to who was or could be rehabilitated. Such latitude was seen to produce inconsistent and possibly discriminatory sentencing practices. Many also believe that such inconsistency undercuts general deterrence. Selective incapacitation, on the other hand, has gained new interest as governments have had to fund the extraordinary growth that resulted when uniform sentences were combined with longer sentences.

Selective incapacitation is based on the fact that a small percentage of criminals accounts for a vastly disproportionate share of the crimes. Thus, the assumption is that the greatest gain in crime prevention can be obtained at the least cost by concentrating on taking “career criminals” off the streets.

It could be argued that the public supports both of these seemingly opposite approaches. Participants in the 1989 focus groups cited earlier strongly favored uniform sentencing. However, not only did they specifically say they would be lenient with first-time or even second-time offenders but, in general, they indicated that the “prime criterion” in sentencing should be the “likelihood that a particular offender would run afoul of the law in the future.”<sup>25</sup>

The course of action within these (at least theoretical) contradictory public attitudes comes down to simply another expression that the public will accept alternatives to incarceration as long as those who are assigned to them do not commit more crime. Such an interpretation indicates a course of action for public policymakers that concentrates criminal justice resources on achieving safety over meting out punishment.

### Who Will Commit More Crime?

The disproportionate activity of a few criminals was first documented in a Philadelphia study that traced a group of males born in 1945 until they turned 18.<sup>26</sup> Just 6 percent of those arrested accounted for 52 percent of all offenses committed by the group. Even more significantly, they accounted for 63 percent of all serious offenses, including 82 percent of the robberies, 71 percent of the murders, 73 percent of the rapes, and 70 percent of the aggravated assaults. Later studies in Wisconsin, Ohio, California, and other long-term tracking showed the same pattern. This research also points out that the

more often a person is arrested, the greater the chance of being arrested again: 54 percent of those with one arrest had a second arrest; 65 percent of those with two arrests had three arrests; and 72 percent of those with three arrests had four arrests.<sup>27</sup>

The problem is how to apply these actuarial patterns to individual offenders. Looking at all offenders who have been arrested twice, two will be arrested again and one will not. The challenge is to determine which one. Every mistake in classification that results in a new crime being committed by a person in a probation program may jeopardize use of the program for anyone else and cause additional victim losses. However, each judgment call that assumes continued criminal activity from a person who will not do so wastes resources and may be discriminatory.

In 1986, the National Research Council, under the National Academy of Sciences, reviewed the major predictive models (the federal Salient Factor Score, RAND, and INSLAW). "Generally, for every three correct predictions, one will be incorrect. Nevertheless, the panel recommended giving greater weight to juvenile court records, evidence of serious drug use, and records of prior criminal activity in criminal justice decisions such as pretrial release, plea bargaining, sentencing, and parole."<sup>28</sup>

Use of formal predictive models is not common. However, criminal justice officials report that they do weigh factors such as juvenile record and drug use more heavily because these factors have been shown to be predictive of high rates of recidivism. As Stephen Goldsmith, the district attorney in Indianapolis, stated:

Obviously, I take other factors into account too (e.g., the strength of the evidence), but all other factors being equal, I am likely to target on offenders that empirical research has shown to be probable recidivists. Some worry about the inaccuracies in prediction. To me, using valid correlates of recidivism probably produces fewer inequities and raises fewer ethical considerations than if I based such decisions on my personal opinion.<sup>29</sup>

Bringing a more accurate information base into this informal process cannot hurt, according to the 1989 Michigan House Fiscal Agency's report on criminal justice options. It noted that, although selective incapacitation has its detractors focused on false positives in prediction, "our current criminal justice system already relies heavily on prediction. . . . More importantly, these predictions tend not to be based on scientifically derived information, but largely on subjective judgments. Selective criteria, therefore, do not introduce false positives where none existed before."<sup>30</sup>

#### What Will be the Effect on Prisons and Jails?

Assuming, then, that improved prediction of future criminal activity will allow elected officials to support increased use of community-based sanctions without unreasonably jeopardizing public safety, how much relief in prison and jail growth can be expected? The greatest potential lies in reducing jail populations, with less potential for reducing prison populations. However, as noted in the state-by-state focus analysis in Chapter 3, much depends on how much use is being made of alternatives.

Some claim that half of the people in prison could be released without jeopardizing the public's safety, while others maintain that reductions of current prison populations are possible only on the margins. As is so often the case in criminal justice, the difference appears to be as much a matter of conflicting databases as it is a difference of philosophy.

Those who believe that half the people in prison could be released frequently refer to a study done by the National Council on Crime and Delinquency (NCCD). However, the NCCD study was based on prison *admissions*, not on those in prison. In fact, it did not conclude that all—but that only "a significant number"—of the 52.6 percent of those new admissions who were convicted of petty offenses should not have been sent to prison. Petty offenses were defined as theft of less than \$1,000, only minor injury or threat of injury, no use of weapon, no use of heroin, or no selling of marijuana.

NCCD did interview their entire sample of 154 admittees about past criminal activity. They found that 43 percent were "into crime" as a way of life and noted that 59 percent of these were among those admitted for a petty offense. This would translate to about half of the 52.6 percent of admissions. NCCD described this group of repeat offenders as "highly disorganized, unskilled and undisciplined petty criminals who very seldom engaged in violence . . . [and] rarely made any significant amount of money from their Criminal acts."<sup>31</sup> This description would indicate that a high-security facility would not be required for most of these offenders, but most public policymakers still would endorse some means of addressing their high level of criminal activity.

Because the petty offenders identified in the NCCD study typically do spend less time in prison than serious offenders, a different picture about how much prison populations can be reduced emerges from looking at the criminal records of those in prison. A potential reduction in current prison populations of only 10 percent emerges from the following analysis of the BJS survey of more than 14,000 state prisoners in 1991:<sup>32</sup>

- 25% are career, violent criminals (defined as having three or more convictions with at least one for a violent offense), and
- 18% are nonviolent, career criminals who are in prison on at least their fourth conviction.

These offenders represent 43 percent of the average state prison population, and few, if any, would advocate shorter sentences for this group. An additional

- 22% are violent recidivists with two convictions, at least one of which was for a violent offense;
- 12% are violent first timers; and
- 2% are first-time drug traffickers.

The two groupings total 79 percent. There may be some offenders in the second group whose records would justify a nonprison punishment option, but if there is increased time served in the first group, no net change would result for approximately 80 percent of the total prison population. The remaining 20 percent might be reduced by one-half through using punishment options for nonviolent offenders (excluding major drug traffickers) with no previous convictions (5

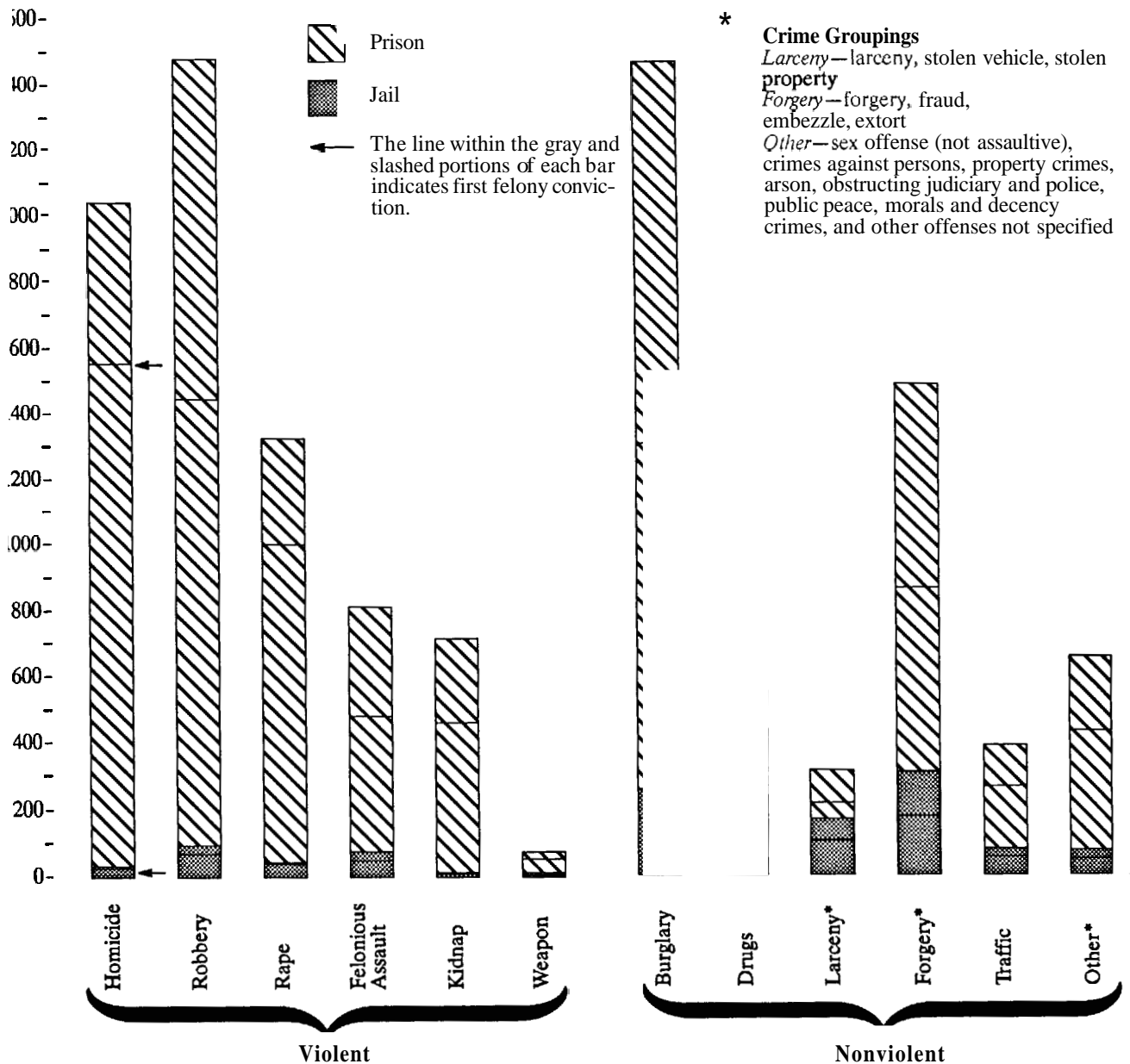
*FOCUS*  
**Who is in Prison?**

A snapshot of Virginia's prison population on November 1, 1988, shows that over 85 percent of the prison inmates were confined for either a violent offense (60 percent), a serious drug offense (7 percent), or were nonviolent offenders who had been convicted before (18.5 percent). This leaves less than 15 percent who are nonviolent, first-time offenders—the only category around which there is general public agreement that a prison sentence may not be appropriate.

It is important that each prison and jail system be able to provide elected officials, the media, and the public with at least this accurate a picture. Otherwise, false assumptions will shape policy. The most common false assumptions stem from (1) the use of the term "nonviolent," (2) the makeup of the federal system, and (3) equating the pattern of crimes committed with who is serving time.

Editorials that decry the waste of public resources be-

*Figure 4-2*  
**State Responsible Felons**



Source: Virginia Department of Corrections, Research and Evaluation Unit, OBSCIS-IRS Information System, 1988.

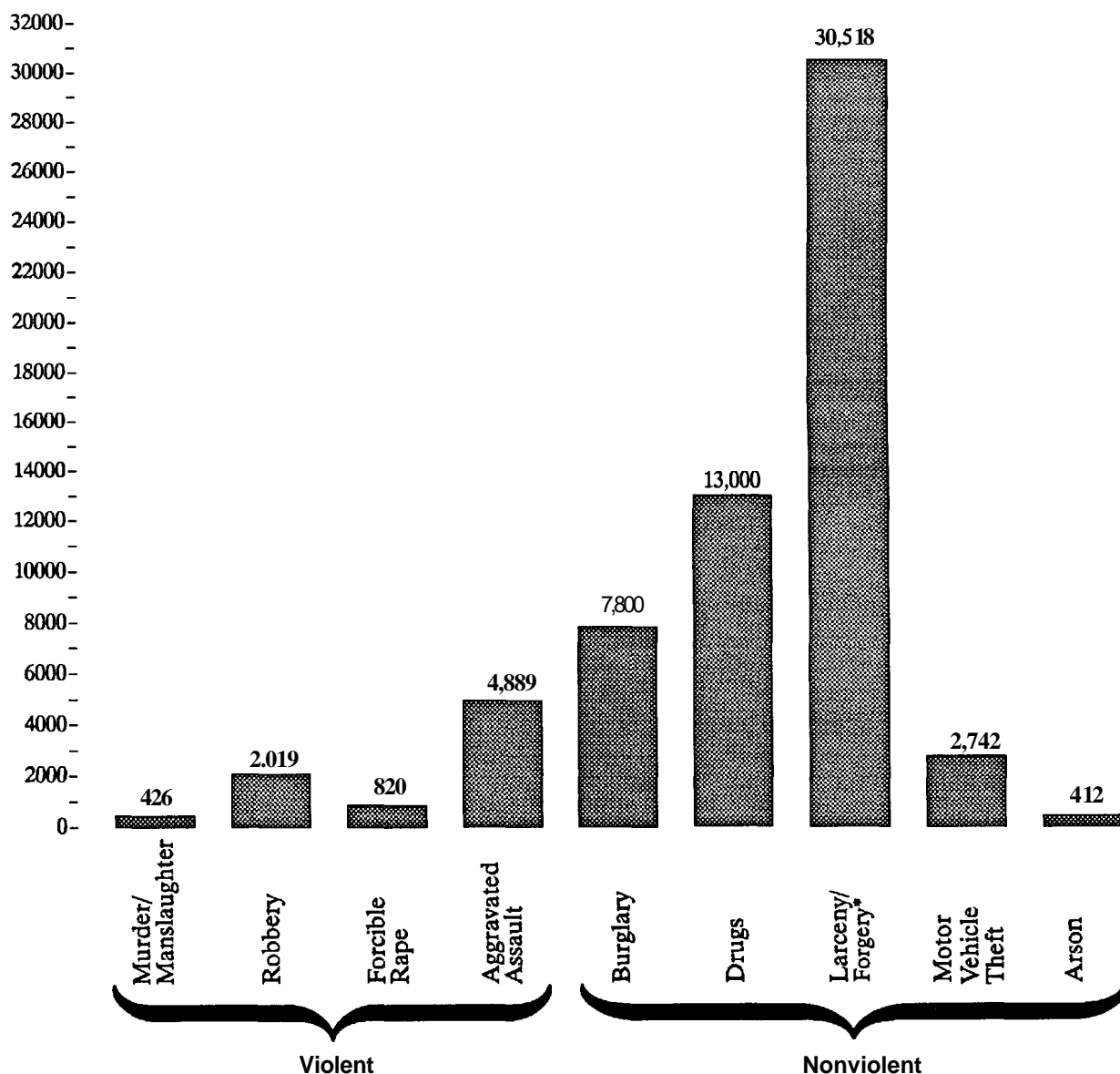
cause “half of our prison populations are nonviolent” often read as if nonviolent meant white-collar crime. In the typical groupings as found in the Virginia profile, only forgery equates to the public’s perception of a white-collar crime, and such offenders represent only a very small portion of a state prison population—3 percent in the case of Virginia.

The public’s perception of white-collar criminals wasting expensive secure prison space is drawn from the federal system. Federal prisons do contain a high percentage of white-collar criminals because tax evasion, securities violations, and interstate fraud are federal offenses, while murder and armed robbery are prosecuted predominately as state crimes. A recent analysis of the Colorado criminal justice system dubbed this the “Cookie-Bandit” issue

and observed, “This is a falsehood. Prisons are not filled with people who are guilty of relatively minor crimes like shoplifting or Writing bad checks. By the time a person gets to prison, he is most likely a veteran of the criminal justice system.”

In addition, without accurate information, it is easy to overlook how the length of time served by violent criminals and repeat offenders affects the makeup of the prison population. For example, Figure 4-3 showing arrests in Virginia presents a totally different pattern from Figure 4-2. Policy discussions, which assume that the prison makeup reflects the pattern of felony arrests, will assume that far more can be done to reduce burgeoning prison budgets by increased use of community sanctions than, in fact, can be realized.

Figure 4-3  
Arrests by Category in Virginia for Calendar Year 1987



Sources: U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Report, 1987*. Colorado Legislative Council, Committee on Criminal Justice, *Report to the Colorado General Assembly* (Denver, 1989), p. 9.

percent), one previous conviction (8 percent), and two previous convictions (7 percent). Violent and nonviolent are defined by the standard UCR offense categories described in Chapter 1. Figure 4-4 illustrates further how different conclusions about the numbers of prisoners who might be released depend on current offense versus criminal history and new admissions versus total number of prisoners.

Another approach to determining how much prison populations can be reduced is to look at reducing the sentences being served rather than at who is in prison. The experience of states using early release of all but the most serious offenders to control prison populations indicates that a 10 percent to 15 percent reduction in prison populations is possible without any appreciable increase in criminal activity.<sup>33</sup>

If the prospects for diverting state prison inmates into community sanctions in any given state are found to be marginal—although significant if thought of in terms of avoiding the cost of a medium-size prison—what types of policy changes would safely put more local jail inmates into community sanctions?

In 1989, the typical jail population was made up of about 43 percent awaiting trial and 57 percent who had been convicted, and were either awaiting sentencing (7.3 percent), transfer into the state prison system (6.0 percent), being held under contract for the federal government or other local authorities (5.1 percent), or were serving a jail term. Approximately 75 percent of the total were being held on felony charges; equally significant, approximately 75 percent had been convicted previously.<sup>34</sup>

Because it is the largest category, those awaiting trial are usually looked at first for alternative programs to reduce jail

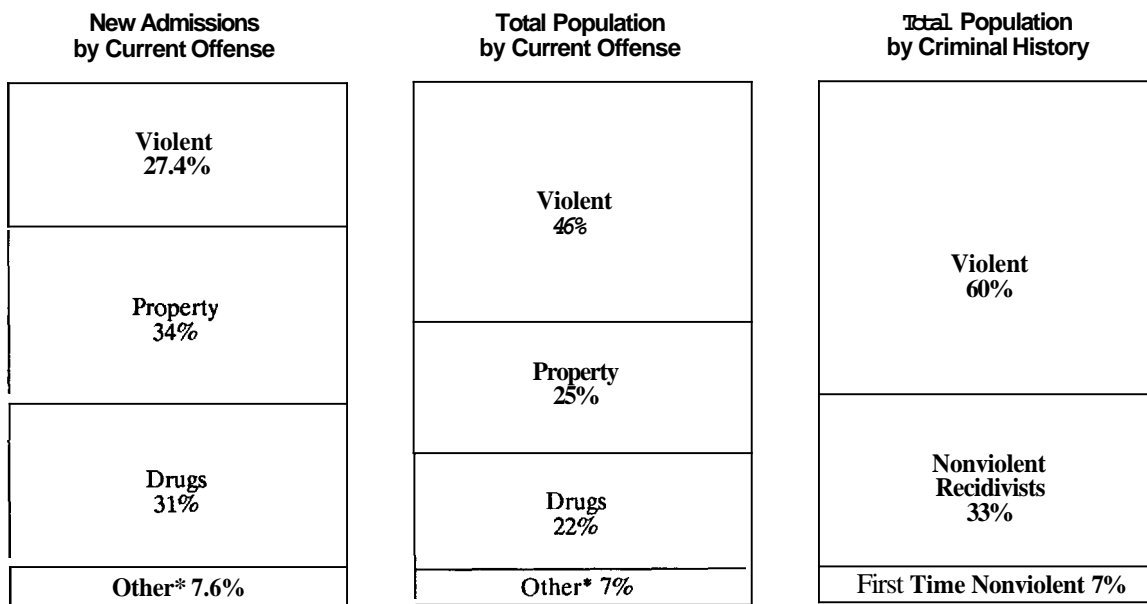
populations. Although this does include the most violent offenders, an Ohio survey showed that one in five were being held on minor misdemeanor charges. Another distinct class of detainees has been created by increased attention to domestic violence and sex offenses during the 1980s.<sup>35</sup>

The next largest category is sentenced misdemeanants. The largest subgroup in this category is serving jail sentences for driving under the influence. Nationally, sentenced DUI offenders increased by 25 percent between 1983 and 1989.<sup>36</sup> However, half of this group did have at least one previous drunk driving conviction.<sup>37</sup>

Even under the best of circumstances, community sanctions probably would not be appropriate for at least one-third of the typical jail population. These are first-timers who have committed a violent crime (6.6 percent) and recidivists who have a violent criminal record (29.9 percent).<sup>38</sup> Further, use of alternatives for those who are back behind bars for the third time or more would be limited. They might be put into Community programs, but only with well staffed supervision and not typical of the caseloads that will be discussed later in this chapter.

The focus needs to be on the estimated 16 percent of the jail inmates in 1989 who had been convicted of or charged with a nonviolent offense and had no previous sentences to probation, jail, or prison. An additional 3.5 percent were recidivists who had previous sentences for only minor public-order offenses, such as drunkenness, vagrancy, loitering, and disorderly conduct. This group includes the mentally ill, who are sometimes charged with disorderly conduct to get them off the street. More than 8 percent of the jail inmates surveyed nationally said that they had been sent by a court to a mental hospital or mental health treatment pro-

Figure 4-4  
1991 State Prison Populations



Source: ACIR computation from U.S. Department of Justice, Bureau of Justice Statistics, *Prisons and Prisoners in the United States*, April 1992

gram, and 13.3 percent said that they had taken medication prescribed for an emotional or mental problem.<sup>39</sup>

To summarize, three areas of action can reduce the number of inmates held in an expensive full-security jail. First, as raised in Chapter 2, improved court-case management could move people out of unnecessary jail detention more expeditiously. Second, general government elected officials could review policies set during the 1980s as to where drunk drivers and other substance abusers, domestic violence offenders, and the mentally ill should be held. Can these people be held in space that is less expensive than a secure jail facility?

Finally, to reduce unnecessary use of prison and jail space, the ability to identify offenders who have a low probability of committing future criminal acts, and who therefore can be creditably put in alternative pretrial or probation programs, needs to be enhanced. Elected officials may need to support each other in removing legislative restrictions on using this information for sentencing and parole.

### Summary

Concerns about cost, public safety, and finding better ways to deter criminal activity are powerful forces pushing renewed interest in alternative sanctions. To effectively shape public policy in response to these concerns, general government elected officials need to work with criminal justice officials and professionals to gain an accurate picture of what can be accomplished. A valuable by-product of this mutual exploration may be to avoid inflaming the personal fear of crime held by many people, engendered when statements are made from partial knowledge.

Conflicting pictures of potential cost savings range from negative to millions. The difference typically lies in comparisons that look at only public expenditures versus including the cost of crime to society, and in comparisons based on an overall average of the number of crimes committed by all offenders versus those that assume high-rate offenders will not be released. Because the average is typically three or four times higher than the midpoint, diverting the bottom quarter in criminal activity can produce total savings even when the cost of crime to victims is included.

The likelihood of an offender continuing to commit crime after release is also at the heart of concerns about public safety. Elected officials need to be alert when they look at recidivism claims, so that they can honestly weigh public concerns in considering policy options and hold agencies accountable for adequate evaluation of programs. Distinctions often are missed that relate to criminal histories, what constitutes failure, and the length of time offenders are tracked. Research being done to identify career criminal patterns indicates that the likelihood of a person released from prison committing new crimes can range from as low as one out of six to the virtual certainty of nine out of ten.

To avoid surprises midway through legislative change or disappointing results, general government elected officials need an accurate picture of who is in-

carcerated in their system. As the focus analysis in the last chapter indicated, there is a substantial difference among the states in incarceration practices, with resulting differences in the criminal records of those behind bars. Loosely used terms and labels are an even greater source of controversy in changing incarceration policies. In general, assertions that a large proportion of inmates can be released are based on the relative incidence of the types of crime committed or on admissions to prison rather than on the actual population of inmates serving long sentences, on the offender's current offense rather than criminal record, and/or on assuming "white collar" and "nonviolent" are interchangeable terms.

Finally, if recidivism research is to be used to determine how sentencing options can produce short- and long-term cost savings through reduced incarceration, then sentencing legislation will need to give the criminal justice system the flexibility to make offender-based decisions. Offense-based legislation that mandates incarceration and/or narrowly prescribes sentence lengths, as discussed in Chapter 2, does not provide for this potential.

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## PROGRAMMATIC CHALLENGES TO A MORE EFFECTIVE CRIMINAL JUSTICE RESPONSE

The remainder of this chapter examines the National Academy of Sciences' focus on determining the right program for the offender, the need for multifaceted approaches, caution in transplanting "model" programs, and lack of adequate program support. Although they should try to stay out of program details that should be left to the professional judgment of program administrators, elected officials do have a responsibility to hold program administrators accountable. They need to be sensitive to what is an unreasonable expectation, what legitimate differences in mission—as opposed to classic turf battles—get in the way of interagency coordination, and the range of program possibilities being used elsewhere that might help carry out the criminal justice policy direction they believe is in the public's best interest.

To prepare for a discussion of the governmental and intergovernmental policy challenges involved with establishing viable alternatives to incarceration, which will be taken up in the last section, this section focuses on two high-profile program areas—juveniles and drugs—as studies in the types of programmatic concerns that arise in all alternative sanctions. Such programmatic concerns have significant impacts on governmental policy decisions.

### The Juvenile System

Given the vast number of issues that face general government elected officials in criminal justice, juvenile justice issues are too often an afterthought. Unfortunately, lack of attention has direct impact on the problems of the adult criminal justice system. The individual criminal is

not born anew at age 18. (A few states use 16 as the age of criminal responsibility, and others use 17 or 19). The adult criminal carries all of the perceptions about the justice system gained in the juvenile system, as well as all of his or her unmet needs. Further, the increase in serious juvenile crime has left the public less satisfied with defining criminal responsibility by an arbitrary birthday. Therefore, what happens in the juvenile system is taking on greater importance.

Serious criminal activity is occurring at younger ages in many communities. In California, the homicide rate among black teenagers, already high, nearly doubled between 1984 and 1988, and in some areas it exceeds the casualty rate among soldiers in Vietnam.<sup>40</sup> According to Nevada's governor, in mid-1989, the Las Vegas Metro Police Department had identified approximately 25 separate gangs in the area, with around 2,500 gang members. A year later, those numbers doubled. The level of violence has increased—Las Vegas alone documented nearly 80 gang-related, drive-by shootings—and the overall age of the criminals charged with these violent crimes dropped.<sup>41</sup> Some drug traffickers recruit children as young as six or seven years old to be “steerers”—kids who stand on street corners and point customers to the dealer's place of business. Because of protective juvenile laws, using children has provided an easy way for a trafficker to insulate his organization from risky tasks.<sup>42</sup>

These examples of increasingly serious juvenile criminal activity are related to another major factor: the increased availability of high-powered automatic weapons in the 1980s. In considering the long-term needs of the criminal justice system, it is important to reiterate the point made in Chapter 1 that, even if the drug trade were stopped tomorrow, these weapons would continue to be used. For this and other reasons, most juveniles whom drug traffickers have used as “enforcers” to commit murders because of reduced penalties for juveniles will be in the criminal justice system for most of their adult lives.

### Trends and the Response to Juvenile Crime

The most significant trend in juvenile involvement in serious crime is documented by the FBI's Uniform Crime Reports. In 1974, because of the high number of juveniles in proportion to adults due to the baby boom, 31.2 percent of the total Part I crimes known to police and 12.5 percent of the violent crimes were cleared by the arrest of a person under age 18. These percentages decreased until in 1987 juvenile arrests represented only 18.1 percent of total arrests for serious crimes and 8.5 percent of arrests for violent crimes. In just three years, however, these percentages climbed back up to 19.2 percent of all serious crimes and 11.2 percent of violent crimes being cleared by the arrest of a person under age 18.<sup>43</sup> This level of criminal activity has caused an increase in the number of juveniles who are being tried as adults by criminal justice authorities in some jurisdictions even though the national average remained at about 5 percent of the juveniles arrested since 1979.<sup>44</sup>

This trend toward more juveniles committing serious crimes raises three program issues that may involve public policy changes. First, there will be an impact on juvenile correctional programs and facilities. Even in 1987, 39 per-

cent of the juveniles confined in long-term, state-operated correctional facilities had committed a violent crime. Overall, 58 percent had a current or prior history of violent offenses, 48 percent reported at least six prior arrests, and 24 percent reported at least three prior admissions to juvenile correctional facilities.<sup>45</sup> The traditional philosophy of the juvenile criminal justice system as rehabilitative will be tested.

Second, increased involvement of juveniles in serious crime may focus new attention on the differences in the criminal justice response among jurisdictions. The likelihood of a juvenile being arrested for serious crimes falls steadily in inverse relation to the size of the city, from 20.6 percent of total arrests for serious crimes in cities under 10,000 to only 12.1 percent in cities over one million population. This disparate response may warrant consideration of whether it is a healthy reflection of differences in community standards determining acceptable behavior, or whether it reflects an unhealthy disparity in resources leading to criminal acts not being addressed until they have become an established adult pattern.

Third, the increasing seriousness of juvenile crime rakes the public policy question of whether a central tenet of the juvenile justice system, confidentiality, should be significantly modified. Traditionally, the emphasis has been on protecting the juvenile, which has meant that court records have been sealed and courtrooms are closed to the public. However, given the growing body of research regarding career criminals, groups such as the National Research Council Panel on Research on Criminal Careers in 1986 have recommended that adult justice system agencies gain access to the juvenile record at the time of a person's first serious criminal involvement as an adult. As cited in the previous section, the two greatest predictors of continued criminal activity are how young the individual is and how many previous crimes he or she has committed. Efforts to get the public to accept the inherent risks in community alternatives call into question whether serious juvenile records can be ignored.

In addition to the role of early rehabilitation, the urban core response to crime, and effectively dealing with career criminals, the juvenile justice system has another important link to the adult system. The way the criminal justice system deals with adult offenders may have direct impact on juveniles. U.S. Sen. Daniel Patrick Moynihan has observed that while the welfare system in the 1960s created the “one-parent family,” drugs now are creating the “no-parent family.”<sup>47</sup> The number of women prisoners has grown faster than any other category, and more than one in three women in jail in 1989 was in for a drug offense. Two-thirds of these women had children under the age of 18.<sup>48</sup> This situation led a drug treatment provider to argue the case for criminal justice treatment programs as prevention in a broader sense than is usually considered:

[F]or every mother we return treated successfully, we return a functioning member of a family to children who are already seeing dysfunctional behavior and are already destined to become drug addicted themselves. I think that treatment is helped by law enforcement initiatives and that we



never see self-referral and that the best thing that can happen for most of our clients is to be on probation or parole with consequences.<sup>49</sup>

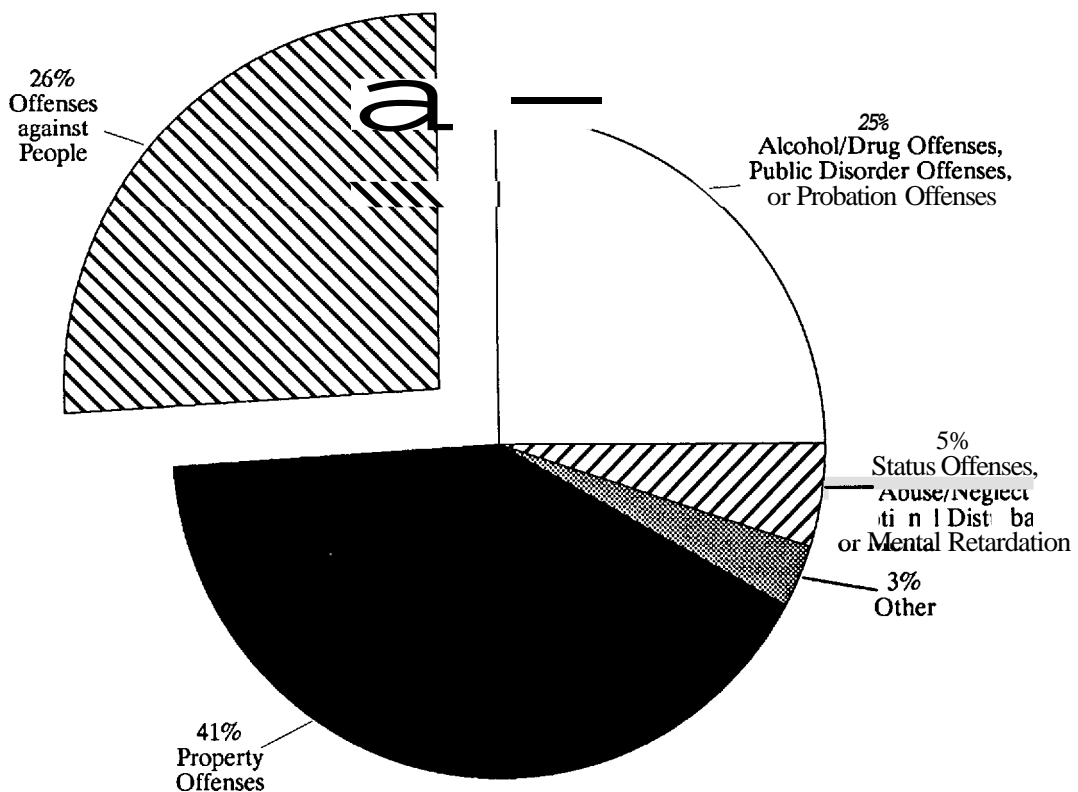
The criminal justice response to adult offenders in other areas also will have a direct bearing on the numbers brought into the juvenile justice system and the potential for successfully dealing with their criminal behavior. A BJS survey in 1989 revealed that one-third of jail inmates had another immediate family member who had served time in jail or prison, while over 30 percent of the females and 10 percent of the males had been abused by an adult before age 18.<sup>50</sup> The Ohio Legislative Commission on Afro-American Males noted that violence in the home is the primary factor in learning violent behavior and recommended that law enforcement agencies and domestic relations courts provide support for automatic referral to motivation programs (mental health, parenting, role model, and self-improvement) that are culturally competent and specific.<sup>51</sup>

Finally, problems in the juvenile justice system highlight problems faced in commanding effective community treatment for anyone in the criminal justice system. Many people who are brought into the juvenile justice system have not committed serious crimes, and some (referred to as "status offenders," "Children-in-Need-of-Services,"

CHINS, or CINAs), who are runaways or who have been declared incorrigible, may have committed no crime. As shown in Figure 4-5, significant progress has been made since Congress passed the *Juvenile Justice and Delinquency Prevention Act of 1974* in removing status offenders from institutions and removing juveniles from local jails. In 1989, \$46 million in federal funds was still being directed to local juvenile programs through formula grants enacted to support the mandates of this act. However, perhaps because of the progress in getting disturbed and disruptive youth into needed services, resistance to dealing with the remainder has become more apparent.

Most of the program gaps identified in state studies are related to juveniles who have been arrested. For example, the judge in charge of the Baltimore City juvenile court observed that waivers are often sought to try the juvenile as an adult simply because there are no available juvenile treatment programs and the adult programs, such as they are, are better.<sup>52</sup> A 1988 California survey identified over one-third of the juveniles in its Youth Authority facilities as needing serious drug treatment.<sup>53</sup> In 1989, the New Jersey County and Municipal Government Study Commission reported that the parole board is keeping some children in training schools longer because there are not enough aftercare services available in many communities.<sup>54</sup>

Figure 4-5  
Type of Offense and Other Reasons for Which Juvenile Offenders Were Held in Public Juvenile Facilities, 1989



Source: "Children in Custody, 1989," *Juvenile Justice Bulletin*, January 1991.

The goal of treating juveniles in the community is much the same as treating first-time, nonviolent adult offenders in the community. The potential for success from treatment or from sanctions can be enhanced most effectively early in a potential criminal career by maximizing any community support or pressure that can be brought to bear.

The fact that most juvenile detention centers and programs are funded by county governments,<sup>55</sup> theoretically, could aid the coordination of community education and mental health resources. However, the juvenile treatment administrators interviewed for this report maintain that local budget accountability never worked in favor of at-risk youth. Instead, the emphasis is on the needs of kids whose parents are politically active. The result is that juveniles often are committed to state residential facilities, most of which were developed out of “frustration because of the lack of services available from other agencies who should or could serve juveniles assigned to [the juvenile system].”<sup>56</sup> In addition, it is still true that some status offenders are being brought into the juvenile justice system as a first response, rather than after other public and private community agencies have been fully utilized. Formal coordinating councils working with the juvenile courts, which include the public school system, mental health and family service agencies, and the police, can reduce court use simply because of agency reluctance to deal with disruptive youth. Such councils also can establish a responsive, multi-agency approach for juveniles who are brought before the court because of the reaction of a parent or guardian. In systems where a multi-agency approach is not taken, unaddressed problems of mental illness and substance abuse are more apt to carry over into the adult criminal system.

This brief summary of the major concerns in treatment for juveniles is a precursor to any discussion of the adult criminal justice system. All of the problems in dealing with at-risk youth will be magnified in serving adult offenders: agency resistance, lack of programs funded in the community, and hardened public reaction to anyone brought into the justice system. In addition, the ominous trends for adult criminal activity reflected in the current juvenile picture give added gravity to future criminal justice problems facing governments.

### **The Criminal Justice System’s Response to Drugs**

Drugs have had a momentous effect on the criminal justice system. Political leadership has been very influential in the criminal justice system’s response to drug use and distribution, and officials need to be conversant with the effects of these policy decisions. Further, because alcohol and other drug abuse is so common among those arrested for crime, drug treatment is not only receiving increased attention as a component of correctional programs and alternatives, it also represents a microcosm of governmental issues faced in any rehabilitation effort.

#### **The Effect of Increased Enforcement Against Drug Crimes**

Starting in the mid-1980s, drug arrests increased significantly. Nationwide, drug arrests were 55 percent higher in 1989 than in 1985 and 126 percent higher than in

1980.<sup>57</sup> Although the rate of increase has slowed in some states, there is no indication that drug arrests will soon fall back to earlier levels. Many states that started the decade with prison admissions for drug offenses at less than 10 percent have projected that drug offense admissions in the 1990s will reach levels previously experienced only by states such as California or Florida—over 30 percent.

The national averages, shown in Figure 4-6 represent almost identical pictures across the 50 states. The number of drug-related charges more than tripled in Colorado in the five years between 1984 and 1989, rising from 1,299 filings to 3,956.<sup>58</sup> In California, it has been reported that fully half of all defendants sentenced in 1990 in Los Angeles’ Superior Court were convicted of violating drug laws.<sup>59</sup> In Virginia, the number of drug offenders sentenced to serve prison time increased four-fold in five years, from 356 in 1984 to 1,480 in 1989. In that state the emphasis was on possession, with the proportion of those sentenced to prison for possession going from 45 to almost 60 percent of all drug admissions.<sup>60</sup> In Illinois, the picture in 1988 was the opposite, with the 27 percent increase in drug trafficking arrests far exceeding the 8 percent increase in arrests for possession.<sup>61</sup>

The reaction of criminal justice authorities also is being reported similarly across the states. During the first State of the Judiciary address to the California legislature in 1990, Chief Justice Malcolm Lucas stressed:

... Drug-related cases are swamping the courts. In dealing with the drug crisis, courts cannot be viewed as the first resort—they must be among the last. Education, treatment, early intervention, and research into the root causes of the scourge are vital.<sup>62</sup>

In New York, Lieutenant Governor Stanley Lundine reported that:

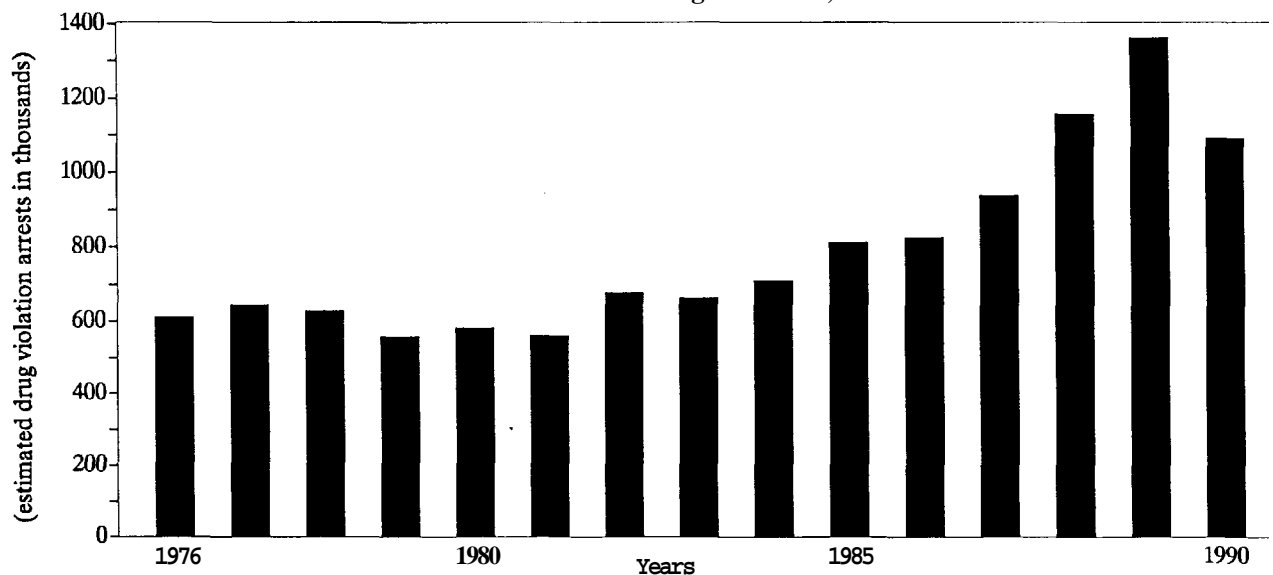
Sheriffs and police chiefs who for years assumed a “round ’em up and lock ’em up” posture are calling for more drug treatment and education—previously seen as “soft” solutions. . . . Almost one in every three persons incarcerated in New York was brought in on drug charges. . . . It costs us more than \$100,000 to build a prison cell in New York vs. \$25,000 for a drug treatment bed. . . . Treatment on demand is crucial.<sup>63</sup>

#### **Relation of Substance Abuse and Crime: Issues of Legalization**

The public policy change that has produced these large increases in drug convictions has stemmed primarily from the relationship between drug use and other types of crime. The greater the use of major drugs that inmates report, the more prior convictions there will be in their records. As a note of caution, it should not be assumed that drug use is the major cause of persons becoming criminals. More than half of state prisoners who report that they have ever used a major drug say that they began their major drug use after their first arrest.<sup>64</sup>

A drug user may commit crime (1) because of a drug-induced emotional reaction, (2) in order to buy drugs, and/

Figure 4-6  
Total Estimated Arrests for Drug Violations, 1976-1990



Source: U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports, 1976-90, 1977-91*.

or (3) to conduct the drug business.<sup>65</sup> In 1985, 21 percent of the homicides reported in the District of Columbia were identified as drug-related, increasing steadily to 34 percent in 1986, 51 percent in 1987, and to as much as 80 percent in 1988.<sup>66</sup>

However, it should be noted that alcohol abuse is far more closely linked to crime than drug abuse. According to a 1986 Department of Justice survey of state prison inmates, the violent offenses of murder, manslaughter, rape, and assault are two to three times more likely to be committed by someone using only alcohol than only drugs (see Table 4-1).

The percentages for offenders using both alcohol and drugs at the time of the violent offense fall in the mid-range, except rape, for which the percentage was 25.2. Only the crime of robbery is more apt to be committed by someone using drugs alone (20.7 percent) or both drugs and alcohol (21.2 percent) than by someone using alcohol alone (13.4 percent).<sup>68</sup> Admittedly, this information is limited by the fact that it represents the self-reports of inmates.

Table 4-1

Violent Offenses Committed by Persons  
under the Influence of Alcohol Compared to Drugs

	Offenders Using Alcohol	Offenders Using Drugs
Murder	23.6%	9.3%
Manslaughter	32.4	7.2
Rape	24.7	6.8
Assault	24.5	10.7

However, given that prison inmates have been found guilty and are serving time, they have little to lose by admitting the use of an illegal substance.

Despite the significantly higher correlation of alcohol abuse to crime, the fact that criminal justice policy decisions have focused on drug use rather than on alcohol abuse largely reflects public opinion. Similarly, the current focus on drugs is traceable to a shift in public opinion that was receptive to the relationship between drug use and crime that had always existed. According to James Burke, chairman of the Partnership for a Drug-Free America:

America's current drug problem had its beginnings in the 1960s. By 1988, the National Institute on Drug Abuse reported 68 million people between the ages of 12 and 54 had used illegal drugs once in their lifetime, almost 44% of the age group. Drug use had become so pervasive that it had become "normal" behavior. In the last five years, however, this country has gone a long way toward "de-normalizing" the use of illegal drugs—a fact that is often overlooked in all the attention given to drug-related crime.<sup>69</sup>

The current rejection by elected officials of drug use has meshed with the relationship between drug abuse and criminal behavior that has long been accepted by most criminal justice officials and treatment professionals. For drugs, as for alcohol, it is the effect of abuse in reducing effective functioning that is most responsible for criminal behavior. Drug abuse blocks the individual from taking action to establish a productive, law-abiding lifestyle. Those who work in the field also are concerned about a continuing cycle of crime being fed through the neglect of the children of drug abusers.

Therefore, despite the overwhelming impacts of increased enforcement, most criminal justice officials and treatment authorities are concerned that legalization of drugs would only bring about more use, as it did with alcohol, and create more intractable problems. However, escalating criminal justice costs and the inevitable lack of success in stopping individual drug use may affect the tone of this public policy debate in the 1990s.

### The Effect of Alternative Law Enforcement Policies

Federal drug policy and the actions of law enforcement, prosecutors, and judges in states like Virginia have placed heavy emphasis on using criminal sanctions to reduce the demand for drugs. Advocates of this approach point out that the large sums of money to be found in dealing drugs in the ghetto do not come from the ghetto. Drug dealing will be less attractive if this source of money is discouraged. This line of reasoning also notes that prosecuting only the dealers makes drugs a black man's crime.

There have also been pragmatic reasons to target drug users for arrest. New applications of forfeiture laws provide an incentive to arrest a drug buyer driving an expensive car, which can be confiscated because it was used in the commission of a illegal act. In addition, periodic political pressure to show an increase in drug arrests encourages arrests of unsophisticated buyers, who are the easiest targets.

The debate about how best to deal with drug users need not be polarized between criminalization and indifference. Using the criminal justice system to leverage treatment can be a productive compromise. For example, prosecutors in Phoenix have worked with the police to conduct aggressive arrest campaigns targeted to social drug use. The user is allowed to participate in and to pay for the cost of a drug treatment program in lieu of being tried. The cost is substantial, but it is less than the fine that could be charged if the arrestee were found guilty. Upon completion of treatment, the charge is dropped and the offender is spared from having a criminal record. The Phoenix prosecutor believes it is particularly important that arrestees spend the night in jail before being released to emphasize the threat of criminal sanctions.

The role of general government officials in this evolving policy field is, first, to provide enough flexibility within criminal statutes and ordinances to allow criminal justice officials to shape appropriate punishment options, and, second, to fund treatment options so that this flexibility does not become discriminatory against those unable to pay.

The issue of discriminatory effects of any change in criminal drug policies has become a potent concern. Between 1983 and 1989, because of almost equal increases in the arrest of black non-Hispanics and of Hispanics, there was almost a 20 percent drop in the proportion of white non-Hispanics among jail populations. This increase in the proportion of minorities is traceable directly to drug arrests, because white non-Hispanics comprised 38.6 percent of those being held in jail on all offenses in 1989, but they made up only 15.7 percent of those held for a drug offense.<sup>70</sup>

Elected officials need to be sensitive to this unequal impact on minorities and assure themselves that policies dealing with drugs are neutral. Policymakers need to set clear drug treatment goals. If the goal is reduced cost to the taxpayers through client fees, then the programs will serve casual drug users who are still gainfully employed. If the goal is to achieve a high rate of "cure" and/or reduced drug use, then programs serving voluntary, non-criminal justice clients will be able to record the greatest number of successes. However, if the goal is to reduce criminal activity, then providing adequate funding, and locating programs where criminal activity is the highest are crucial strategies.

Elected officials also must be ready to accept the possibility of inadvertent bias. For example, a judicial roundtable discussion noted that prioritizing the use of limited treatment resources through the use of objective offender profile ratings would result in a "decrease in treatment options and opportunities for the poor black offender. Drug treatment programs generally show more success with educated participants than with undereducated."<sup>71</sup> In another instance, a Minnesota state law, which was recently held unconstitutional by a county judge, provided a four-year sentence for first-time users of crack cocaine, but only probation for first-time users of cocaine in its powdered form. The judge's ruling was based on the fact that 92 percent of those arrested on charges of possession of crack in 1988 were black, while 85 percent of those arrested on charges of possessing powdered cocaine were white.<sup>72</sup>

As noted in Chapter 1, the release of statistics at the beginning of 1991 indicating that casual drug use was down but that the number of hard core cocaine users had increased opened up new debate on the focus of the nation's drug control policy. "Yuppies" may well have been reached by efforts such as the media-based Partnership for a Drug-Free America, which delivered approximately \$1 million worth of pro bono advertising per day in 1990 and was to continue for at least two more years. They also may have been intimidated by middle-class fears of being jailed. But, as noted in Chapter 3, criminal sanctions shaped by middle-class values are not necessarily intimidating to those from crime-ridden areas.

### Tracking the Severity of the Drug Problem

Controversy over the success of the war on drugs is heightened by difficulties in measuring the incidence of drug use. A much-needed tool to track actual use by offenders has recently been spurred by federal coordination efforts. Heretofore, most criminal drug-use information has been subject to the vagaries of self-reporting by arrestees and could not be compared or compiled across jurisdictions. In 1987, the National Institute of Justice began the Drug Use Forecasting (DUF) program in New York City. By 1990, 23 cities had entered the program, all using the same methodology to obtain a statistically valid sampling of voluntary and anonymous urine specimens and interviews from new arrestees. The following summary is representative of the previously unavailable information that can help officials make informed decisions:

During the first quarter of **1990**, more than half the male arrestees tested positive for a drug at the time of arrest, the range was from **57 percent** in Kansas City to **80 percent** in Philadelphia and San Diego. Among female arrestees, the range of drug use was **44 percent** in San Antonio to **88 percent** in Cleveland. Multiple drug use was highest among male arrestees in San Diego (**50%**) and Chicago (**46%**), and among females in Portland (**36%**) and San Diego (**34%**). Cocaine use among male arrestees was higher than the use of any other drug in all cities but Portland, Indianapolis, Denver, Phoenix, and San Antonio. In those cities, marijuana was the most prevalent drug. Cocaine use was the most prevalent drug among female arrestees in all DUF cities, excluding Indianapolis and San Diego.<sup>73</sup>

The availability of this type of information will help the public and policymakers sort out the unique situation in their community from national coverage and help support policy decisions on the need for and effect of expanded drug treatment services focused on the criminal justice system.

#### Using the Criminal Justice System as the Gateway to Treatment

Of course, not all drug abusers will be found in the criminal justice system. According to a **1990** report from the National Institute of Medicine,

about one-fifth of the estimated population needing treatment—and two-fifths of those who clearly need it—are under the supervision of the criminal justice system as parolees, probationers, or inmates. Overlap with the homeless estimates and expectant mothers would make the number higher. . . . Half or more of the admissions to typical community-based residential and outpatient drug treatment programs (except perhaps methadone) are on probation or parole when they enter treatment.<sup>74</sup>

However, it is true that the largest single group of serious drug users in any locality come through the criminal justice system every day. “The criminal justice system could be a gateway to treatment,” according to Eric D. Wish, director of the Center for Substance Abuse Research at the University of Maryland. “Prisoners in urban jails who are cocaine users could be ushered into treatment facilities at a fraction of the cost of imprisonment.”<sup>75</sup>

Elected officials, who want to use the opportunity presented by a person being caught up in the criminal justice system as leverage to get him or her into drug treatment and—even more importantly—to increase the odds that the person will respond to treatment, need to be aware of the crucial role they play in the following areas:

**Availability of Treatment**—General government dollars will have to be appropriated to subsidize the cost of treatment for many hard-core users, as well as to provide adequate treatment slots,

**Location of Treatment**—Unfortunately, this too often becomes a major policy decision rather than an administrative detail. Treatment programs need to be located where the offenders are: in the community, in jails, and in pre-release prison facilities. There is a high level of resistance to treatment among most substance abusers and, especially in the early stages, they will not make extraordinary efforts to get to treatment.

**Length of Treatment**—The Institute of Medicine’s review of the effectiveness of drug treatment programs identified the length of time in treatment as the highest predictor of success. Budget decisions that are based on assuming that a 60-day cure will do the job may, in fact, waste resources.

**Coordinated Treatment**—Again, because the abuser is typically resistant to treatment initially, disparate signals from “The System” are used as opportunities to slip through the cracks. Elected officials represent the ultimate authority to require interagency cooperation if it does not come from within.

**Consequences**—The claim that individuals forced into treatment by the criminal justice system will not be successful has not been borne out by research.<sup>76</sup> Very few individuals go into substance abuse treatment without pressure, such as loss of job, marital breakup, or the pleading of family or friends. If, instead, the threat is jail or prison, then the criminal justice system must be able to carry out that threat or crucial leverage will be lost. General government officials have the responsibility to provide that incarceration capacity.

Several of these areas involve significant subissues that warrant additional discussion because of their intergovernmental, interbranch, or interagency ramifications.

**Availability of Treatment.** The availability of adequate treatment is first and foremost a funding problem, whatever the source of funds. Historically, there has been significant intergovernmental involvement, both as a revenue-sharing issue to address the high need for services in low-income areas and as means to provide program oversight in a rather sophisticated field.

Less than 30 years ago, it was generally accepted that drug addiction was incurable.<sup>77</sup> Nevertheless, during the **1960s** and into the **1970s**, many programs with claims and counterclaims sprang up. To help policymakers throughout the country sort through this picture, the federal government through the National Institute on Drug Abuse (NIDA) launched the first of three national studies on the effectiveness of drug treatment programs. The first was the Drug Abuse Reporting Program (DARP), which examined outcomes for **44,000** clients entering **52** NIDA-supported drug abuse treatment agencies in the years **1969-74**, with follow-up for up to **12** years. The second was the Treatment Outcome Prospective Study (FOPS), which interviewed more than **11,000** drug users when they first entered treatment in **1979, 1980, or 1981** in **41** selected programs, with follow-up for up to five years after leaving treatment. A third national study, the Drug Abuse Treat-

ment Outcome Study (DATOS), is scheduled to assess outcomes for programs in the 1990s.<sup>78</sup>

The results of the TOPS study were published in 1989. The heart of its findings was that:

[W]hat distinguished positive outcomes was the length of time spent in treatment. A minimum of three months was necessary to produce positive changes; beyond those first three months, outcomes improved with time spent in treatment. Duration of treatment and satisfactory completion were more useful predictors than other client characteristics.<sup>79</sup>

This finding has significant implications for on the typical government cost-containment discussion to limit the time spent in any type of treatment program to 60 days. (This arbitrary number has gained usage because it is the amount of time for which the typical private insurance policy will cover in-patient treatment.) The TOPS study indicates that such limited programs may simply waste resources. The most successful treatment results involved six to 12 months.<sup>80</sup>

Equally significant as an intergovernmental issue was the report's commentary that:

[The period of time studied, 1979-81] marked the culmination of a decade of intense federal, state, and local efforts to design, implement, and sustain a comprehensive system of drug abuse treatment programs throughout the United States... [It became] a benchmark for the effectiveness of drug abuse treatment... After the *Omnibus Reconciliation Act of 1981* established block grant funding of programs through the states, this comprehensive system received less attention and support, resulting in diminishing public expenditures for treatment in the 1980s.<sup>81</sup>

The TOPS report notes that in 1979-81, the average annual cost per client for treatment in the outpatient drug-free programs was \$2,000. It was \$1,945 for outpatient methadone and \$6,135 for residential treatment. "Comparison with current data reveals that expenditures for drug abuse treatment have decreased since the time this study began. This suggests that the quality of treatment may have deteriorated since the early 1980s."<sup>82</sup>

This does not mean that the number of people being treated has declined. In fact, from 1987 to 1990, public treatment slots climbed from approximately 800,000 to 1.5 million, according to the Office of National Drug Control Policy. The resulting conflict between the constraints of public budgets and treatment research findings, such as TOPS, was bluntly stated by Peter Reuter of RAND, "Basically, what we did in the 1980s was greatly increase the number of people treated but lower the quality of the treatment. Most experts would say it is less important to cycle more and more people through treatment than to provide them with services that are worth a damn."<sup>83</sup> Congress has considered but not passed legislation that would link federal money to requirements that states be held accountable for the quality of drug treatment plans.

It would appear that the demand for more treatment slots will continue to compete with adequacy of treatment for limited budget dollars well into the 1990s. The backlog of need in the criminal justice system is a serious problem in many areas. For example, waiting lists mean a delay of three to six weeks in getting probationers into treatment in Maryland.<sup>84</sup> It sometimes takes up to six months for parolees to be admitted to a substance abuse program in New Jersey.<sup>85</sup>

In response to a provision in the *Anti-Drug Abuse Act of 1986*, a 1990 National Institute of Medicine report confirmed the lack of treatment slots and deterioration of the quality of treatment. The report's findings had a heavy criminal justice emphasis. It not only called for significant increases in the quality of drug treatment and an aggressive outreach to expectant mothers, it also recommended that the number of probationers treated be doubled and that the number of prison inmates in treatment be increased by 50,000 daily. The estimated annual cost of the recommended total package was \$2.2 billion. The 1989 cost of the corrections component was estimated at over \$800 million (\$660 million to increase the daily treatment enrollment of probationers or parolees by 132,000 at a cost of \$5,000 each and \$156.3 million to increase daily prison treatment enrollment by 50,000 at an annual cost of \$3,125 each.)<sup>86</sup>

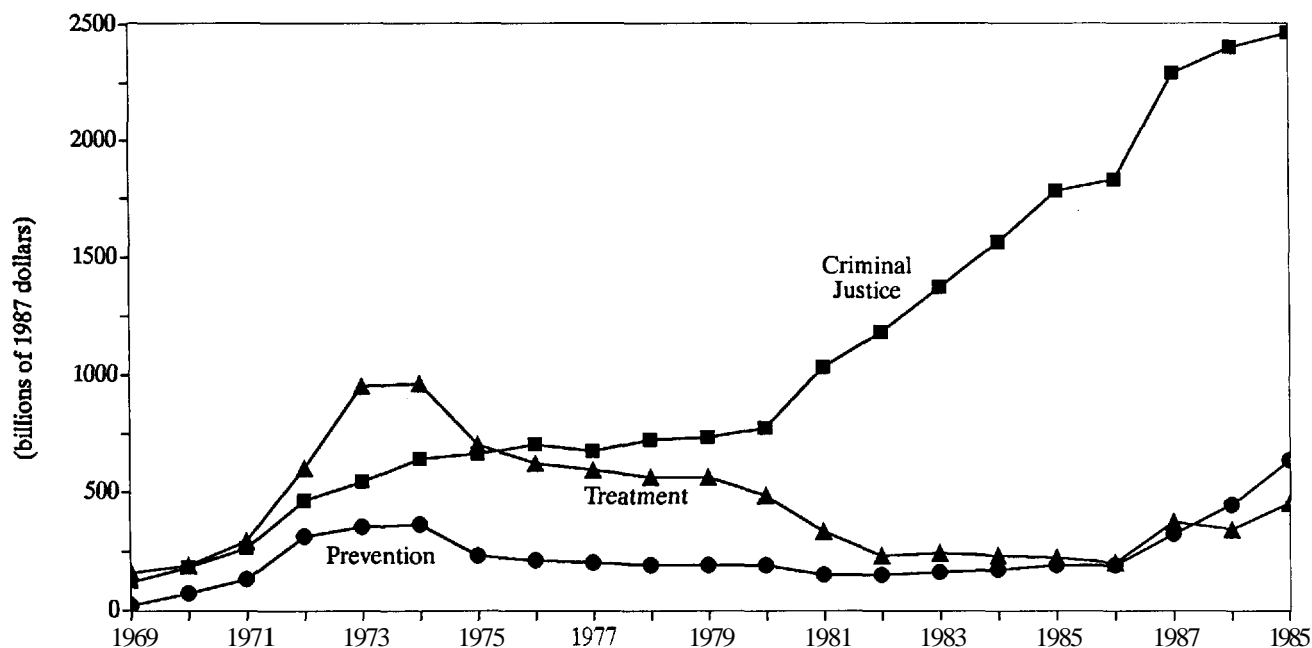
Recently, the federal government has begun again to increase funding for drug treatment through discretionary grants under the federal war on drugs. The Office of Treatment Improvement of the Alcoholism, Drug Abuse, and Mental Health Administration (ADAMHA) is implementing treatment demonstrations totaling \$8 million for FY 90 and \$16 million for FY 91. From 1987 to 1989, the Bureau of Justice Assistance provided \$10 million in discretionary funds to drug rehabilitation programs for people under penal control<sup>87</sup> (see Figure 4-7).

However, as articulated by former Attorney General Richard Thornburgh, this funding is "designed to promote innovation and foster improvement in the nation's criminal justice system. It is our federal role to try to get the thinking going, to support demonstration projects to see if we're on the right track, to evaluate what's right and what's wrong with the project, and then to get the word out to those of you in state and local government."<sup>88</sup> The federal funding is not intended to support the ongoing cost of treatment.

Therefore, the remaining 98 percent of the Institute of Medicine's annual \$750 million criminal justice price tag looms large over state and county governments. If criminal justice drug treatment was funded in the same way that the general population's drug treatment needs are funded, then only 33 percent of these funds would come from state and local governments, while 27 percent would be from third-party insurers, 23 percent from the federal government, and 17 percent from private individuals and charities.<sup>89</sup> However, the vast majority of the criminal justice need is among working-age males, who consequently are not covered by Medicaid. Of the small percentage who are employed, most are in low-wage jobs without Comprehensive health insurance.

The intergovernmental challenges of budgeting will be discussed in greater detail in Chapter 7. It is important, however, for elected officials to have this picture of the

Figure 4-7  
Federal Anti-Drug Abuse Expenditures for Treatment, Prevention, and Criminal Justice



Source: Dean R. Gerstein and Henrick J. Harwood, eds., *Treating Drug Problems* (Washington, DC National Academy Press, 1990), p. 216.

magnitude of the funding challenge in order to assess the potential for improving criminal justice drug treatment.

**Consequences for Non-Participation.** Drug testing of probationers and parolees is a hot issue in criminal justice. The heat results because most elected officials, judges, and prosecutors think it should be done, but correctional administrators don't do it. On the face of it, it appears to be a classic example of interbranch conflict. Although studies do not show that drug testing has any more effect on hard-core users than DUI laws have on alcoholics,<sup>90</sup> the lack of testing and/or lax testing by correction officials does not reflect disagreement with the policy. It more commonly reflects the inability to do anything about negative results.

President George Bush proposed that drug testing be implemented throughout the criminal justice system. The rationale behind this policy is well stated by the Office of National Drug Control Policy:

Probation and parole are excellent points at which to hold offenders accountable for staying off drugs. . . . It is a cost-efficient way to keep offenders off drugs during the critical period immediately following release from incarceration. Testing of pre-trial defendants permits early identification of those defendants who may need drug treatment?

However, such a federal policy would add still another element of controversy to drug testing, thrusting it into the forefront of the debate on intergovernmental mandates. According to the National Conference of State

Legislatures, the cost of implementing drug testing throughout the criminal justice system is estimated to be over \$10 billion. "Such a new investment at the state level would equal the total of all state expenditures for corrections for the fiscal year 1989."<sup>92</sup>

As the examples in the focus (page 104) illustrate, funding increased detection without funding the expected consequences presents the same dilemma to elected officials in drug testing as in coordinating the criminal justice system as a whole. Given limited resources, where does the balance belong: in catching more wrongdoers or in effectively dealing with those who are caught? There are numerous officials dealing with criminals—including judges, prosecutors, and corrections personnel—who believe that unless we do the latter, we are wasting resources on the former; only if there are consequences for noncompliance can the criminal justice system be an effective leverage for treatment. In a New York State study, it was reported that many offenders prefer a short jail sentence to treatment. "Abusers wish to avoid the 'hassles' associated with changing their lives."<sup>93</sup> (See focus study, page 105.) Only when the alternative is lengthy incarceration are the abusers more willing to enter drug treatment. This reaction makes a strong case for ensuring that the criminal justice system has the penal resources to give teeth to orders that probationers or parolees participate in treatment, especially combined with the TOPS findings that:

- (1) The criminal justice client stayed in treatment longer than the client with no criminal justice involvement.

*Focus*  
**System Impacts of Drug Testing**

The costs of drug testing are driven by several factors. One is the reliability of drug testing because punishment based on unconfirmed test results can be challenged. The level of monitoring affects costs because the more drugs that are to be tested for, the more costly the analysis. In addition, costs are substantially higher if testing is to detect use rather than only abuse. Finally, "the cost of testing must include the costs of follow-up and treatment, since testing without follow-up treatment or supervision would waste the resources applied to testing."

These system-wide costs are usually prohibitive. For example, the cost estimate by the Colorado Legislative Council for a bill that specified a loss of 15 days good time for anyone testing positive and revocation of probation or parole for a third positive test included 340 additional treatment beds, 100 prison beds, and more than 100 probation officers. In Pima County, Arizona, pretrial drug testing led to a 70 percent decrease in people being released on their own recognizance and a tripling of those who had to be supervised by probation officers on conditional release. In addition, if arrestees may be released at any hour, trained specimen-collection staff should be on duty 24 hours, otherwise, jail facilities may be affected.

The California Blue Ribbon Commission on Inmate Population Management reported an even more magni-

fied impact of drug testing on the rest of the criminal justice system:

[The California Department of Corrections] CDC, [the California Youth Authority] CYA, and local corrections should immediately develop and implement a state and local corrections substance abuse strategy to systematically and aggressively deal with substance abusing offenders while they are under correctional supervision, because this is perhaps the most significant contributing factor to prison and jail overcrowding. [P]arole agents and probation officers increasingly test parolees and probationers for drug use. However, there are limited options for parole agents to use other than returning a parolee to prison when drugs are detected. Once incarcerated, the problems of substance abusers are not being addressed. Although the percentage of parole violations involving drugs has remained relatively consistent over the past three fiscal years, the overwhelming increase in the number of parole violations overall drives this major factor in prison population increases. . . . Drug violators increased from 850 in 1980 to 18,700 in 1988, exceeding technical violations for the first time.

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Sources: *Testimony of Slate Senator Bill Richardson on Behalf of the National Conference of State Legislatures before the Committee on Government Operations, Subcommittees on Legislation and National Security, and Government Information, Justice and Agriculture, U.S. House of Representatives* (Washington, D C National Conference of State Legislatures, May 2, 1990), p. 2; Colorado Legislative Council, Committee on Criminal Justice, *Report to the General Assembly*; and (California) Commission on Inmate Population Management, *Final Report* (Sacramento, January 1990), p. 77.

- (2) The length of time in treatment was the greatest predictor of success.
- (3) Substantial decreases in criminal activity were found.

**Coordinated Treatment.** If for no other reason than to save resources by not funding duplicative bureaucracies, general government officials may have to serve as the catalyst for interagency cooperation. However, if they find that lack of cooperation stems from valid program concerns, it also may fall to them to arbitrate the splitting of responsibilities to achieve appropriate accountability. The challenge to policymakers is not to let administrative in-fighting divert efforts away from what should be the goal: to reduce crime by more effective treatment through whatever agency.

Whoever is responsible for drug treatment programs, the structure should recognize the following differences between criminal justice referrals and other clients:

- Clients who are involved in the criminal justice system when entering treatment are more likely to be male, young, have no prior drug abuse treat-

ment episodes, have less serious drug abuse patterns, and be more criminally active. (It should be noted here that there was no significant difference in post-treatment criminal activity between those referred by the criminal justice system and those who were not.)

- Parolees initially may appear to be particularly resistant to treatment. They have, after all, generally been "sober" for a lengthy period of time while incarcerated. Especially in overwhelmed community treatment centers, this attitude may not be effectively challenged because of the more visible problems of active users.<sup>94</sup>
- Relatively worse outcomes for criminal justice referrals were found for depression, unemployment, or other behaviors. Those free of such serious difficulties stand a much better chance of successfully completing treatment?

The last two factors were addressed in the conclusion of a study by the National Institute of Drug Abuse that,



*Focus*  
**New York Multi-Agency Collaboration**

In 1986, Assemblyman Melvin Miller proposed a \$1.3 million budget amendment to provide resources to four state agencies to address a “chronically neglected criminal justice and crime control issue—the relationship between alcohol, drug abuse and crime.” The agencies were Corrections, Parole, Substance Abuse Services (DSAS), and Alcoholism and Alcohol Abuse (DAAA). Noting a history of difficulties in collaboration, the legislation designated that there be an outside group to help facilitate the interagency approach envisioned and to evaluate the effectiveness of the program once it became operational.

The Vera Institute of Justice was selected, and the following case history draws from its interim reports in 1987, 1988, and 1989. This summary highlights resistance to interagency collaboration. This is not meant to discourage similar initiatives; instead, it is presented as assurance that resistance can be overcome. In addition to this New York program, New Jersey’s Mutual Agreement Program and Oregon’s Cornerstone program are further examples of successful interagency collaboration.

In the initial planning meetings of what came to be called ACCESS,” the division of budget and key legislative committee staff were present. Initial interagency tensions were reported high:

Budget worried that funds appropriated for the demonstration would disappear into agency operations already in place, and would thus fail to spark visible and incremental activity. The drug and alcohol agencies were unenthusiastic about finding themselves legislated into roles as subcontractors to a criminal justice agency (Parole); they also made it clear that their funding of voluntary agencies in the community did not give them unambiguous leverage over these providers’ private triage decisions. Corrections wanted more flexibility about how to spend its share of the appropriation than the budget bill appeared to permit. And differences brewed about which agency—Parole or Corrections—would employ the initiative’s coordinator.

Concerns such as these did not automatically disappear. For example, one goal of the legislation was to provide joint training so that all players would be speaking the same language and be responsive to agreed-on treatment goals. Parole officers needed to know “how to evaluate treatment options in ways likely to afford a match between parolee and provider,” and providers needed to know “how Parole operates and the special demands made on individuals under Parole supervision.” Given the combined drug and alcohol abuse problems of many offenders, training also was to “foster communication across conventional turf and to seek to develop a “team approach” for the interagency staff who are setting up the pre-release treatment program.” Nevertheless, at the end of the first year, the joint training envisioned in the legislation was structured so that parole officers would hear from one agency one day and from another the next.

Furthermore, the legislation established two new positions in both DSAS and DAAA to be contracted to Parole. DSAS recruited two counselors at grade levels higher than the funding provided, but DAAA decided to forgo the opportunity to fill its two new positions—thus relinquishing “no small advantage in a bureaucratic, civil service environment where establishing new positions for new programs is difficult indeed.” To fill the void,

Parole expanded its own staff by two individuals, whom DAAA agreed to train.

The loss of not having personnel in the DAAA chain of command was real in trying to get parolees into community services:

The active presence of DAAA within the Parole assessment and referral service was viewed by the framers of the initiative. . . as providing an important source of leverage with which to gain access to community-based alcoholism treatment providers who have not been eager to find room for offenders or parolees. These providers are largely licensed under mental hygiene law by DAAA, and almost all of them are subsidized by State dollars allocated by DAAA. That circumstance would make a DAAA employee (or an employee of the local government unit that funds alcoholism treatment agencies) much more likely to get the attention of a provider than are parole officers, no matter how well-trained.

In addition, as the program became operative, the ACCESS evaluation team made fewer referrals to alcohol treatment, perhaps because of the imbalance of experienced drug treatment professionals over the parole employees who were simply in alcoholism.

The explanation for the alcoholism agency’s reluctance to participate in the team approach, in contrast with the drug abuse agency going beyond what was required, is in part reflective of problems that arise around different treatment philosophies:

Many AA-oriented counselors view TCs (therapeutic communities) as not abstinence-based and thus believe these programs have the potential to yield disastrous effects with individuals who have had AA or NA treatment. Others suggest that the models have converged in recent years . . . [and that] these programs’ approaches to actual treatment may vary less than their stated conceptual differences. . . In any case, it is clear that AA and TC approaches have important symbolic and historical differences.

This tension between professional treatment orientations existed within Corrections as well as between agencies, leading the Vera Institute to observe in its 1987 evaluation that a greater understanding of the core program and a greater sense of “ownership” of the program by the feeder prison sites needed to be fostered.

As indicated in the beginning of this discussion of interagency challenges in the ACCESS program, these barriers can be broken down:

Giving the initiative’s central concepts a chance to become real, over the past three years, has confirmed the virtue of patience. . . . The four State agencies have forged the long-sought but previously unrealized collaboration that was properly viewed as prerequisite to the development of post-release treatment that actually reaches parolees and is responsive to their special needs.

It is important, however, to underscore the role that alert political leadership played in surmounting such interagency resistance by legislating ongoing oversight and an outside negotiator.

Sources: Vera Institute of Justice, *Alcohol, Drugs, and Crime: An Interim Report on New York State’s Interagency Initiative* (New York, 1987), pp. 1, 25-26, 65, and 67; *Alcohol, Drugs, and Crime* (1989), p. 2.

especially for criminal justice referrals, greater emphasis needs to be placed on reintegration into society once addiction is controlled, through meaningful vocational and employment services and post-treatment support groups.<sup>96</sup> As emphasized in the National Academy of Sciences' critique at the beginning of this chapter, money spent on drug treatment will have a higher return if it is part of a multifaceted approach.

There are some who advocate that program delivery must be in the hands of correctional officials if the program is not to become a "poor cousin" in agencies serving noncriminals. Others believe that making use of existing expertise is the only way to get adequately trained treatment professionals involved in meeting criminal justice needs. There does not appear to be one "right" answer. For example, Ohio's Governor's Committee on Prison and Jail Crowding recommended that the Department of Alcohol and Drug Addiction Services move aggressively to certify existing community corrections programs as drug treatment programs. This is as much to engage non-criminal justice agencies in the improvement of services provided by correctional personnel as it is to capitalize on the much higher awareness among correctional administrators of the need for treatment.<sup>97</sup>

What is important is that there be an accountable criminal justice advocate involved in any treatment program, to be a reminder that the order of the court is serious and to advocate services relevant to the offender.

Drug treatment agencies are not much geared, understandably, to relapse prevention. [Offenders] don't need detox at release, but many are desperate in their need for help in staying sober under the stress of community re-entry. . . . No one is better positioned than [a parole agent with training in substance abuse] to campaign for a treatment response that is tailored to suit parolees in such **straits**.<sup>98</sup>

In addition to lack of comprehensive program development, another factor that can undercut treatment effectiveness is conflicting messages to the offender. These mixed signals start when arrest is not followed by a commensurate court response. As the National Center for State Courts' "Large Court Capacity Increase Project" notes,

A major problem for courts handling drug cases is the lack of dispositional options available to them. A law enforcement-based strategy can produce lots of arrests but doesn't adequately address what is to be done with drug abusers once they are in the criminal justice system. . . . [L]egislated mandates, such as drug testing and incarceration, "gridlock" courts but do not necessarily get people into needed **treatment**.<sup>99</sup>

Conflicting messages also may occur when sentencing is not cognizant of professional treatment practices, as noted in the Washington Metropolitan Council of Governments' focus. Even when the offender cares, he or she ends up not knowing which "authority" to please. In addition,

as the Vera Institute noted in commenting on New York's **ACCESS** program, conflicting treatment approaches unfortunately become the "hook" an abuser can use to reject treatment. In the extreme, conflicting ideas of treatment can reach constitutional proportions, as in a Maryland Court of Appeals ruling that a judge may designate the type of facility, but not a specific facility. The court observed that:

It is difficult to perceive how the functions of DJS [Department of Juvenile Justice, an executive agency] could be properly fulfilled if it could not control the monies appropriated to it. It is DJS, not the court, that is charged with administration of the State juvenile, diagnostic, training, detention, and rehabilitation institutions. . . . Whether DJS has funds available begs the question. It may well determine that the monies would be better spent elsewhere to serve the purposes clearly announced by the **legislature**.<sup>100</sup>

The judge who presided in two of the three cases that had been appealed maintained, "I still think that this court has as a duty and obligation to do that which is in the best interest of the [child]. . . ."<sup>101</sup>

## Summary

Dealing effectively with the potential next generation of adult criminals as they pass through the juvenile justice system and treating substance abuse in all criminal offenders are not only high priority issues in themselves, but they also present microcosms of major governmental issues involved in any treatment program. For effective reintegration and long-term results, services must be provided in the local community. This is true even when treatment is initiated while the offender is incarcerated. Criminal justice policies and treatment policies must be examined to determine (1) who is being reached, and (2) if these represent priority groups. Noncriminal justice agencies need to be used as powerful allies, but they seldom readily accept the additional workload. Finally, communication between criminal justice and general government officials and program managers is essential to address differing expectations and develop realistic expectations.

Specifically, willingness to support treatment alternatives will be sustained only to the degree that it is understood by elected officials, criminal justice authorities, treatment professionals, and the public that:

1. Success is possible, but the ability of professionals to change addictive behavior or parenting voids is at least as limited for criminals as it is for noncriminals.
2. Simply by ensuring longer participation, criminal justice sanctions can improve the results of any treatment or training program. However, participation is affected directly by the opacity of the system to carry out the threat of incarceration for nonparticipation.
3. Changing dysfunctional and nonproductive behaviors while the person is under penal

## Metropolitan Washington Council of Governments Judicial Seminar

In January 1990, the Metropolitan Washington Council of Governments held a two-day **Drug Awareness Seminar for Judges**, funded by grants from the State Justice Institute and the federal Bureau of Justice Assistance. The agenda was set according to the judges' interests based on a questionnaire. High on their list was learning about what drug treatment alternatives were available in their region. Therefore, they were receptive to having a dialogue with the treatment providers and probation officers invited to attend.

The judges were most interested in effectively implementing their sentencing options. The providers were anxious to open a dialogue to foster a better understanding of addictive and recovery processes. As one provider observed, "The size of the problem, the waiting list in every jurisdiction, the uneven distribution of services, when coupled with the nature of the illness all make effective treatment much more difficult and *certainly makes communication among us, at times, less than effective.*" [emphasis added]

The comments that follow have been drawn from the evaluation report of this seminar. They demonstrate the need for greater understanding between the court and treatment agencies. They also underscore the importance of surfacing this need by direct contact between key players.

**A judge:** "My experience has been that short-term [drug and alcohol treatment] programs don't work."

**Response:** "Many short-term programs are quite effective. What often breaks down is the failure to ensure an adequate aftercare treatment component."

**A judge:** "What is the incidence or reliability of sending someone in for an evaluation and having you evaluate that person and coming up with a treatment plan that really turns out to be the right treatment plan even if that person engages in it or not? Is your evaluation reliable?"

**Response:** "It's not that good yet, judge. We are working hard on assessment. . . ."

**Judge:** "This puts us in a terrible position. You tell us to put him in a particular program and we go with it and it turns out to be the wrong program."

**Response:** "This is why I prefer that you use your sentencing authority to sentence the offender into drug treatment. The drug treatment personnel in conjunction with the court will decide what that will be. . . . That allows the offender to make it or break it. If they can make it in outpatient treatment after detox, great! If they can't, then they are still court mandated into treatment and you can try something else."

**A judge:** "I'm a judge and I'm not a treatment professional and that's the real problem. You're asking me to make a determination which is better made by a treatment professional."

**Response:** "That's right! And I would ask you not to make that determination. . . ."

**A judge:** "My experience has been that some treatment programs refuse to . . . follow what you order and want to do what they want to do instead. It really raises the big question of who should be making that final decision. Should the health care professional make that decision or should the judge make that decision after considering the recommendation of the health care professional?"

Source: Metropolitan Washington Council of Governments and Metropolitan Washington Court Administration Conference, *Drugs and the Judicial Response: Drug Awareness Seminar for Judges in the Metropolitan Washington Region: Evaluation Report*, by Ronald I. Weiner (Washington, DC Metropolitan Washington Council of Governments, January 1990), pp. 20, 23-26.

control can improve the goal of criminal sanctions to stop further criminal acts.

4. However, most criminal offenders have a variety of dysfunctional behaviors and conditions (e.g., lack of education, lack of job skills, lack of employment opportunity, lack of family or community support, in addition to substance abuse). This reduces the chance of long-term success from any program that attempts to change only one of the conditions.

It takes political courage to initiate such a dialogue on the chances of success. However, many elected officials realize that it must be done. The mayor of Macon, Georgia, is one such example. He distributes a brochure prepared by his office on coordinating community resources to fight the war on drugs with the following message:

The drug problem is so widespread that it is unrealistic, indeed futile, to expect immediately identifiable results or improvements. Short-term indicators of progress can be measured by the

number and types of tasks successfully completed. . . . Long-term indications of success such as reduced numbers of drug-related crimes or decreases in the number of drug users and dealers in the community will take longer to realize.<sup>102</sup>

The admonition of the mayor's message would be the same if all references to drugs were removed. Reducing criminal activity through educational, employment, substance abuse, mental health, or juvenile programs is possible, but it requires a long-term, comprehensive effort.

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### GOVERNMENTAL AND INTERGOVERNMENTAL POLICY CHALLENGES

Determining who can be in the community rather than in jail or prison is at the heart of creditable alternative sanctions, sentence reductions, or pretrial release. Making this policy call is seldom in the hands of any one

individual or unit of government. Therefore, even if a rational basis can be developed for a change in policy, inter-governmental communication is crucial to carry it out. Unfortunately, as the Baltimore Bar Association observed in its review of the criminal justice system:

There appears to be a lack of communication between governmental entities, executive and judicial, in almost all directions. The observation applies to relations between the Mayor and the Circuit Court, the Circuit Court and other components of the criminal justice system, the City and State, and among and between City and State agencies concerned with the war on drugs.<sup>103</sup>

Creating the public climate to try alternative sanctions is only part of the battle. It must be matched by numerous supportive internal changes. In some systems, overload has served as a catalyst for change. In others, overload has served to block change. Reducing criminal behavior can get lost in the press of processing cases, housing inmates, or stretching available dollars or, as it is sometimes more succinctly stated: "When you're up to your neck in alligators, it is difficult to keep your mind on the fact that your primary objective is to drain the swamp."

However, overload has merely exacerbated traditional reasons for reluctance to cooperate in supporting alternative sanctions. Overload is not at the core of the problem; rather, the established impediments include:

- The constitutional isolation and narrowly focused missions of judges, prosecutors, public defenders, and police;
- The tendency of treatment professionals to see their mission and clientele confined to "regular" people and lack of acknowledgment that once a person commits a crime, he or she is still their responsibility; and
- The fact that most alternative sanctions must be sited locally to be effective. Even well-versed local officeholders have resisted any shift away from sending people to prison if it is regarded as simply a shift of a state burden to their local budget. Other public officials may simply be coming to the defense of constituents who object to having "criminals in their community."

Such intergovernmental conflicts, along with budget considerations, will be taken up in the following subsections, which focus on how alternative sanctions fit within general government concerns.

### Integration of Criminal Justice and General Government

Less than 30 percent of prison populations and 40 percent of jail populations have completed high school; most were not employed full time before arrest; over three-quarters report using illegal drugs; and more than one-third drank daily during the year preceding their arrest.<sup>104</sup>

These and other factors, such as mental health problems, underscore the need to resolve the issue of the responsibilities of general government agencies versus developing rehabilitation programs within the correctional system. The most productive resolution of this conflict for each state and locality ultimately rests with general government officials.

The National Association of Counties' Public Safety Committee recognized the role to be played by general governments in its December 1990 statement that counties must focus their justice efforts on implementing three major principles to foster coordinated delivery of services in the community:

In addition to front-end investment in youth, Counties need to develop strategies and "team" approaches that deal with the whole person; and local government can be the catalyst for the delivery and coordination of comprehensive services and need to assure opportunities for health, shelter, education and employment needs.<sup>105</sup>

The need for general government services to be provided to offenders in the community also has been underscored consistently by national research. For example, in 1976, the report of the Comptroller General of the United States on probation noted a "highly significant statistical relationship between the extent to which probationers received needed services and success of probation."<sup>106</sup>

In 1981, the National Academy of Sciences reaffirmed its conviction that

rehabilitative efforts will have to be more extensive, multifaceted, and better integrated. . . . Much of what is labeled "community-based corrections" continues to be societal casework carried out in probation and parole departments. The involvement of educational, welfare, and community action organizations in devising rehabilitation programs has been limited.<sup>107</sup>

Most recently, the 1990 U.S. Sentencing Commission's discussion of intermediate sanctions concluded that:

Whenever possible, using such community resources is more desirable as it avoids duplication of services and allows the participant to be connected with a resource that will continue to serve his/her needs after legal obligations . . . are completed.<sup>108</sup>

### Reducing Turf Protection

The reluctance of general government agencies to meet criminal justice needs stems from several sources. First, criminals are often regarded as disruptive to agency efforts to work with more responsive or easier cases. Second, criminal justice goals may differ from the professional judgment of the outside treatment providers. Third, it is usually to the agency's advantage to concentrate its resources on a clientele that commands greater public support. All of these could be lumped under the familiar turf protection. Agencies have loyalty to their ongoing commitments, they do not like to have their professional judgment questioned, and they must set priorities in their budget battles.

Before elected officials can change these attitudes, they need to be sure that their policy oversight does not in fact exacerbate them. To the degree that elected officials regard criminal justice issues as separate and apart from other programs, they will be interested in other measures of treatment success only if new criminal activity also has stopped. A sober, literate criminal is still a criminal.

The alternative is for general government officials to hold treatment providers accountable only for that aspect of the criminal's behavior that they are equipped to handle and not to expect that one initiative will solve the multifaceted causes of crime. In addition, budget support may be required to address the strong feeling of most treatment providers that they should not be responsible for security. Not only are they not qualified or trained to do *so*, but many feel the negative aspects of the authority they must assume interferes with their treatment role. The budget impact of double staffing for treatment and for surveillance may have to be faced.

Further perspective on bridging the gulf between treatment providers and criminal justice policymakers is contained in the following advice to judges and treatment providers on establishing alternative sanctions:

[S]uccessful programs emphasize: integrity—remain committed to the goals, the vision, and processes agreed to . . . openness—create access and let people in authority know about the program so that they can buy into it. . . [and] political support—make sure that friends are sought from the legislative and executive branches to help fund and protect the program's integrity.<sup>109</sup>

The more that general government officials communicate that they expect a focus on program integrity and/or are receptive to providers communicating this integrity to them, the greater the chance that confidence in alternative programs will be built.

In addition, general government officials can use budget discussions to advance instruments of cooperation. For example, written agreements to formalize working relationships can reduce tension and its potential to derail programs. Such agreements can reserve a specific number of treatment slots, they can specify the type and frequency of feedback information, and they can resolve issues of confidentiality and security. If these formal agreements include interagency payment or private sector contracting for the services, the services also are likely to be used more. Treatment agencies would not be able to turn criminal justice referrals away unless the contract slots were filled, and correctional authorities would feel budget pressure to make use of prepaid services. Public agencies would benefit from a clear accounting of costs in their annual budget development.

Finally, traditional intergovernmental cooperation can play a strong role. If agencies are used to working together and if local governments take pride in their control over providing services, this will carry through into correctional programs. For example, according to Hennepin County's probation chief:

[C]ommunity-based programming for corrections services **has** been well accepted in Minnesota. **This** is true not only in the corrections arena, but in the public health, social service, and education fields as well. We have many community-based programs in these other areas that correction's staff draw on to support clients that come through our system. It is that coordinated effort that makes much of our program a **success**.<sup>110</sup>

### **Disparate Funding Responsibilities**

However, in many jurisdictions, disparate intergovernmental responsibilities for providing human services is the norm. This not only means that habits of cooperation probably will not be present, but also that the budget leverage that could be used by general government elected officials to affect agency policy will be dissipated.

If a single unit of government controls the budgets of all the players, it is much easier to force interagency cooperation. Unfortunately, this is seldom the case: Substance abuse programs usually are provided by counties, but cities also may fund treatment. Adult education usually is provided by separately funded school districts. Mental health services may be provided locally by the county, state, and/or municipality. Job training and placement is usually a state or municipal function.

**This** disparate funding focus further undercuts the push for alternatives because governing bodies may not be able to realize any net savings in their individual budgets. Counties may see immediate direct benefits in funding less costly alternatives rather than building a new jail, while cities can only anticipate a long-term pay-off from reducing crime through drug treatment. Several states fund community sanction programs only to the degree that they actually divert offenders from state prison.

The challenge to general government elected officials to supply resources to correctional needs has been long standing. The need was stated succinctly by the director of the American Correctional Association in response to the 1984 ACIR report on local jails, "Corrections is a shared responsibility and to be able to accomplish positive change we need to stop the isolation from other community agencies." However, it is one thing to utilize general government resources where they exist; it is quite another to face difficult intergovernmental policy decisions where the resources do not exist.

### **Adequacy of Community Resources**

As noted in several other areas of criminal justice concern, the provision of treatment, education, and work programs in the community is impeded by the concentration of the need in America's impacted ghettos. Whether the treatment service is county funded or city funded, both are undercut by the cycle of the local tax base being weakened by crime, the underlying causes of which cannot be addressed because of the weak tax base. The state, as a whole, then has to fund an extraordinary number of prison beds for inmates from these urban cores. This high need for state prison beds results both because the cycle of local criminal justice system contact has done little to reduce criminal activity, which has resulted in increasingly serious

criminal behavior, and because there are extremely limited alternatives in the community unless they are established by the state.

In the 1990s, this divergence in the ability of high-crime communities to provide treatment, educational, and work opportunities is being further exacerbated by drugs. The more the war on drugs has been successful in reducing casual use, the more it has become apparent that the persistence of hard-core drug use is concentrated in urban centers where it is related to the inability of the educational system, the economy, and family support systems to foster an attractive alternative to drug use and dealing. The following observation represents the view of many large-city officials:

Trading off of scarce federal resources from critical domestic programs to fund the war on drugs. . . severely limits alternatives that can be offered to those lured into the drug trade. . . . For too many young people from broken, poor families, drugs offer the only way to what we were all raised to understand was the American way—that any child born anywhere can make it to the top.<sup>112</sup>

The costs of establishing alternatives where none exist will be very significant. Nevertheless, the public policy debate needs to focus on whether the price borne by the taxpayers as a whole is any less whether public resources continue to be drawn off to fund the cost of police, courts, and state imprisonment or whether they also fund community alternatives.

### Intergovernmental Funding and Control

Even when the public can be convinced of the need to have more offenders serve their sentences in their local community, and even when a network of treatment and surveillance can be forged between criminal justice and general government agencies, another area of controversy must be addressed: Will a shift in funds and control accompany a shift in prisoners?

Intergovernmental issues concerning the presence of a state offender in the community revolve around three sets of circumstances: state-sentenced prisoners backed up in local jails, redefining state responsibility, and defining the responsibility for community corrections. In each of these areas, the decisions that are made about intergovernmental funding and control can have an important bearing on the use of alternatives to incarceration, their availability, their effectiveness, and their public safety credibility.

### State Prisoners Backed Up in Local Jails

At the end of 1990, 21 states reported that state prisoners were held in local jails because of crowding in state facilities. The number of state prisoners tends to be more of an issue of delays in constructing new prisons rather than conscious state policy decisions. Therefore, the numbers backed up will vary from year to year. However, eight states had more than 10 percent of their state-sentenced inmates backed up in local jails during at least one of the years 1988, 1989, and 1990: Louisiana (three-year annual average of 24.1 percent), Tennessee (22.2 percent), New

Jersey (14.0 percent), Mississippi (12.7 percent), Kentucky (12.6 percent), Virginia (10.6 percent), Arkansas (8.7 percent), and Idaho (8.5 percent).<sup>113</sup>

In any state, a backup of state prisoners in local jails raises the types of issues that surround a typical contract dispute: What is the service provider's obligation to provide service and at what price? In correctional terms, these issues would be phrased: Are localities legally obligated to keep state prisoners and what is a fair per diem payment?

There has been a variety of local lawsuits, either to remove the state prisoners or to have the state pay the locality a more adequate per diem. A Texas court recently ruled that the state must pay \$40 a day for state felons held in a local jail longer than seven days after sentencing.<sup>114</sup> In a 1988 Virginia court ruling, the issue was not the per diem payment but whether the state had to remove its prisoners. In this local decision, the court allowed 60 days before state prisoners had to be removed.<sup>115</sup> In Albany, New York, the sheriff hit this issue from two sides. He refused to take state parole violators back into his jail and, when he was sued by the state, he countersued for removal of the state-sentenced felons he was holding.<sup>116</sup>

### Redefining State Responsibility

In a few states, the intergovernmental conflict produced by state prisoners backed up in local jails has been settled through redefining who is a state prisoner. This has resulted in an unanticipated adjustment to tough sentencing laws, through formalizing a little-noted chain reaction. If tougher sentencing laws produce prison and jail overcrowding, where or how these sentences are served may have to be changed, with the result that a person committing the same criminal act today compared to a decade ago may still receive the same type of punishment.

For example, in 1989, the Tennessee Select Oversight Committee proposed that felons sentenced for crimes such as petit larceny, check forgery, or selling marijuana would not be sent to prison, but would serve their time in local jails. The committee further proposed that consideration be given to alternative housing and/or programming for all misdemeanants.<sup>117</sup>

There are those within the correctional field who welcome this inevitable progression. For them, the compelling reason to legislatively redefine the types of prisoners who will be the state's responsibility is not to relieve overcrowding but to recognize that most first-time, nonviolent offenders do not belong in the state prison system.

Local officials' acceptance of redefining state responsibility has been driven less by programmatic issues than by planning and budgeting concerns. In the related aftermath of the local Virginia court ruling cited above, the 1990 legislature changed the state code to stipulate that state felons sentenced to less than two years—rather than less than one year—could be left in local jails. The critical intergovernmental trade-off was that the code also was changed to end the DOC director's discretion to remove state prisoners from local jails. Local sheriffs and government officials accepted the expanded definition of whom they were responsible for because in the future they would have control over whom they took. As one local official observed, "We'd rather have to plan for more jail inmates

than not be able to plan at all because there is no control over the state's actions."<sup>118</sup>

### Responsibility for Community Corrections

State systems of justice also are being redefined over the basic question of whether alternatives to imprisonment should be a local responsibility or a state responsibility. As mentioned earlier under the discussion of costs driving the acceptance of alternatives, county officials may be relatively willing to fund an alternative to someone being held in jail when they can see a direct benefit in controlling the jail's demands on their budget.

County and municipal officials, however, may be very resistant to supporting alternatives to state prison because they see an added program responsibility with no political benefit. In fact, the suspicion may be so great that even a promise of added state funds is not well received, as in the following example from Ohio:

[T]he proposal to shift low-level felons to community facilities and programs was not popular with many county commissioners and sheriffs, despite the interrelated call for adequate State funding. Local officials expressed suspicion about the State's willingness to subsidize local corrections operations for years to come. . . .<sup>119</sup>

Proposals to fund local programs for state prisoners may be regarded as a classic "camel's nose under the tent." Localities fear that once the focus of the programs is shifted, the responsibility to fund them adequately will follow.

One way around such intergovernmental suspicion over diverting prisoners from the state system into the community is for the state system to move into the community. Again, in Ohio:

[T]he 1982 legislature proposed a system of community-based correctional facilities for felons, built by the State and subsidized by state funds, but governed and operated by local boards. While proposals to shift low-level felons to community facilities under the Community Corrections Act have been opposed by sheriffs and local officials, these new state facilities are being relatively well received and are accomplishing the same objective.<sup>120</sup>

The California New Prison Construction Act (1990) took a similar approach in establishing community correctional centers. As in the Ohio approach, technically, the allocation of responsibility in California's criminal justice system was not changed: the state is still responsible for the same classes of offenders, but these offenders are now in the locality in programs operated by the locality. The state will contract with counties that volunteer to have a facility for specific types of slots for offenders for whom the state is responsible (e.g., 50 community detention, 50 specialized probation for drug abusers, and 100 residential drug treatment). Counties may serve up to 15 percent additional local offenders at local expense. The proposed financing of these facilities is notable because it pegs local reimbursements to current state costs for comparable activities. Thus, it avoids both the pitfalls of state payments

not tracking those cost increases that localities cannot control, while holding local spending accountable to the same standards used by the government raising the funds. Specifically, it was proposed that the state pay the localities 85 percent of the average annual state operating cost of incarcerating an offender and fund local construction of a state-designed facility at a rate no more than 75 percent of the state cost to construct a minimum-security bed.<sup>121</sup>

The success of such a state-run correctional program in the community versus a locally run program depends a great deal on each state's level of responsibility for non-criminal justice support services. If, as in New York's ACCESS program, treatment centers are licensed by the state, or employment services are a state function, then a state-run community facility may be able to command better cooperation in integrating the offender into the network of community services than a local criminal justice agency can. In other localities, placing correctional programs under the same budget authority as local general government treatment programs may create the needed focus.

Basic governmental management concerns that arise whenever local autonomy is superseded by a state-run program must be considered as well. The most important need is to develop an organizational structure that will allow the centralized, distant policy approval and budget authority to be responsive to the variety of local resources and personalities that exists across any state.

Another part of rethinking the way the state system of justice is structured to achieve greater use of alternatives is to look at who should be accountable for the improvements needed to support the use of alternatives. For example, in approximately half the states, probation supervision and pre-sentence reports are a local responsibility. If better information is needed about the offender for more appropriate sentencing decisions, who will pay for more and better trained personnel to improve pre-sentence reports? Is it better for the state to subsidize targeted improvements, leaving control and accountability within a local network to maximize responsiveness and access? Or, does the state need to guarantee that minimum standards are met, so that lax management in one locality will not jeopardize the program statewide?

Another focus of intergovernmental relations in alternative sanctions revolves around state Community Corrections Acts, described in Chapter 3. CCAs represent a comprehensive approach to shifts in funding and in responsibility. They include a variety of approaches that tend to reflect the following factors:

- Whether probation and/or parole supervision was historically a local or a state function;
- Whether prison overcrowding is a major issue; and
- How large a percentage of the prison population comes from how few jurisdictions and how economically strong those jurisdictions are.

One state's CCA may simply be a vehicle for providing supplemental funding to its localities. Another state's CCA may contain substantial incentives to enact local programs, while still another's may contain financial penalties for not using community options.

As the cost of criminal justice has escalated with the rising numbers of offenders incarcerated, great pressure has been put on state and local budgets. Those communities most heavily affected by crime frequently also are so financially distressed that the issue of local control becomes secondary to the battle for financial relief. However, it is important that intergovernmental funding decisions focus first on how to heighten accountability for effective community corrections programs and maximize the delivery of services. Agreeing on this goal will establish a crucial level of trust between the state and local governments. It also will lead to a more lasting understanding of why an offender should be kept within the locality versus being put in a distant state prison. Intergovernmental funding decisions should flow from these decisions, not control them. The issue is not who pays, but that well focused programs give everyone the opportunity to save.

### Probation and Parole Officers' Accountability and Workload

The intergovernmental placement and governmental support of probation and parole officers frequently is central not only in funding discussions, but also in the other main concerns of this chapter:

- The need to establish a productive relationship between the criminal justice system and other agencies;
- The public's concern about safety over all other goals of criminal justice; and
- The acceptance of alternatives to incarceration as meaningful sanctions.

More than 15 years ago, a U.S. Government Accounting Office report on recidivism sounded this warning:

Deciding whether adequate resources are assigned to probation efforts or to other elements of the criminal justice system will ultimately be a political matter. . . . If action is not taken to correct probation systems' problems, the systems will probably deteriorate further, increasing the danger to the public and the amount of recidivism.<sup>122</sup>

This warning is even more crucial for the 1990s.

### Probation and Parole Caseloads

During much of the 1980s, it could be pointed out that as fast as prison and jail populations were growing, the use of probation was growing even faster. To many, this was a welcome indication that officials were making thoughtful sentencing decisions rather than automatically imposing incarceration. However, as noted in Chapter 1, the three-year trend from 1988-90 indicates that this balance may have run its course.

While government officials should be concerned about the impact on their budgets if the three-year shift toward growth in prison and jail sentences continues at a greater rate than the use of probation, they first need to investigate whether past budget decisions contributed to

the shift. Specifically, did increased reliance on probation without increased funding for supervision produce a short-lived, false economy?

Probation and parole caseloads increased significantly in many jurisdictions during the 1980s. For example:

- California's Blue Ribbon Commission reported that "during the last 20 years, criminal justice budget increases have been as follows: courts 196%, prosecution 179%, law enforcement 169%, and probation 98%."<sup>123</sup> "Because of underfunding and large caseloads, probation supervision following release from jail or in lieu of incarceration today is mostly monitoring for rearrest or unsupervised community release."<sup>124</sup> Sixty percent of Los Angeles probationers are tracked solely by computer and have no contact with an officer.
- The New Jersey County and Municipal Government Study Commission concluded, "Caseloads for the probation officers must be reduced. The average adult caseload is 162, it should be no more than 100. The counties would need 175 additional officers at a cost of \$3.5 million annually."<sup>125</sup>
- An Ohio Governor's Committee recommended an "increased number of probation officers to allow more interaction between offenders and those charged with surveillance. The average caseload in the seven largest counties in Ohio is 120 probationers per probation officer. This does not allow much time for the officers to monitor offenders or to complete thorough pre-sentence investigations."<sup>126</sup>
- Harris County (Houston) reported that it would need to hire 140 new probation officers to meet the 100:1 maximum standard adopted under the Texas Community Corrections Act.<sup>127</sup>
- The Hennepin County (Minneapolis) Community Corrections Advisory Board chairman observed, "The only way that a system which encompasses a wide variety of sanctions [can] be credible is if we allocate resources sufficient to make [it] credible. Up to this point community services have had to compete with institutional resources and [they] lose every time."<sup>128</sup>

In fact, concerns about probation and parole are one of the most often repeated points in any comprehensive review of a state and/or local criminal justice system. Caseloads are so large that few even bother to point out that the 1967 President's Commission on Law Enforcement and Administration of Justice recommended a caseload of 35 cases per officer.<sup>129</sup> As Table 4-2 indicates, three out of five felony probationers see a probation officer no more than once a month, at best, because actual contacts are often less than the number prescribed.<sup>130</sup>

This picture underscores the importance of government officials examining past trends and the current status of probation and parole supervisory caseloads before



**Table 4-2**  
**Prescribed\* Number of Contacts**  
**with Probation Officer, 1989**

Initial Supervision Level	Prescribed Number of Contacts	Percentage of Caseload
Intensive	9 per month	10%
Maximum	3 per month	32
Medium	1 per month	37
Minimum	1 per 3 months	12
Administrative	None required	9

\*Not necessarily actual contacts.

Source: U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Felons on Probation, 1986-89*.

considering new community programs. Has there been so little supervision or treatment guidance of probationers that they continue to commit criminal acts until the court has no choice but to incarcerate? Will a new program be any different? Once again, numerous examples have surfaced where new concepts are being undercut by existing excessive:

- In critiquing New York's ACCESS program, the Vera Institute noted that "the press of demands on Parole's ACCESS counselor, coming from the general parole population, was a nearly fatal distraction from the need to focus on Lincoln graduates."<sup>131</sup>
- The Baltimore Bar Association reports that "due to lack of funding, the frequency of monthly drug tests administered to probationers and parolees where a drug problem was indicated was cut from three times a month to once every two months. The number of agent contacts has dropped from three to two times a month in the intensive or high risk category."<sup>132</sup>
- When drug counselors in the Washington, DC, area noted that "for first-time offenders, it is important for treatment officials to communicate with probation officers and make the recommendations as to the type of treatment required based upon the evaluation process," a judge responded, "Our probation agency now has officers handling caseloads around 150 cases per officer. They can't possibly supervise that many people effectively."<sup>133</sup>
- In Hennepin County's comprehensive review of ways to reduce the need to build a new jail, the recommendation for increased pretrial release was accompanied by this warning, "As release policies are changed over time, the issue of public safety will become increasingly important. Since more defendants are likely to be released pending trial, more resources will be needed to track and supervise these releasees. At present, the Bureau of

Community Corrections does not have the resources to verify the information being used to make release decisions or to do any field supervision of the defendants released."<sup>134</sup>

### Intergovernmental Responsibility for Probation and Parole

As important as it is, achieving reasonable caseloads is not the only major issue in probation and parole administration. A key issue in 1976—responsibility for probation services—remains a problem. According to the GAO report referred to in the beginning of this section:

Decreasing caseloads in and of itself will not increase a probation system's effectiveness. A probation system must first systematically identify probationers' needs. It then must either directly satisfy these needs or arrange for them to be satisfied by other social institutions or resources.<sup>135</sup>

GAO then identified a major obstacle to achieving this goal: "Making community resource agencies more responsive to probationers' needs may be beyond the authority of probation systems."<sup>136</sup> Interestingly, this was one finding with which the Department of Justice took issue in a letter to GAO:

We believe probation agencies can strongly influence the services community resource agencies provide. Much more needs to be done by probation agencies to focus the attention of the community on the need for certain services, negotiate to have these services performed, and establish a referral system that encourages participation by community resource agencies. Realistically, if one accepts the premise of the reintegration model, the probation agencies are committed to the task of attempting to secure some modifications in the acceptance of the probationers by the community.<sup>137</sup>

This forceful articulation of the rationale for coordination of probation services in the community underscores the need to address the intergovernmental issue that was not discussed in that 1970s exchange.

This intergovernmental issue is the decision as to who will administer probation and/or parole supervision. Twenty-six states use state administration alone. Nine states use judicial administration. Thirteen states use a mix of state and local efforts. For example, the Hams County Probation Department is a mixed system. It must comply with standards established by the state Department of Criminal Justice; the local criminal court judges establish operational policy and direction; the county provides probation facilities and equipment; operational monies and salaries are derived from the state and from court-ordered supervisory fee collections. In 21 states, probation and parole supervision are combined, and that appears to be a national trend. In some states, misdemeanor probation cases are handled separately from those of felons, and juveniles may be dealt with separately from adults.<sup>138</sup>

A focus group discussion of chief probation officers brought forth the following considerations about the operational results of these various arrangements:

### *Regarding Judicial Appointment*

"I sit apart from other general government agencies. Although the county funds my budget, it works on their head that I am the only one appointed by somebody else."

"I don't find myself invited to some of the discussions other probation chiefs are."

"The power that you have in being appointed by the court is that the courts are a powerful constituency."

"Those of us under the judiciary historically have a 'don't step out in front approach.' I am always thinking in terms of the decorum of the superior court. And I can never move out in front of them, and embarrass them, and put them in tension with the constituency that they serve."

### *Regarding Local Appointment*

"Probation is now included as part of the general government cabinet; it was not when probation was under the court. I am the only criminal justice agency represented."

"The most dynamic in terms of innovation and the greatest latitude and freedom of movement are those states with strong leadership at the local level."

### *Regarding State Appointment*

"My contact with local and state legislators is self-generated and many times frowned upon by the people in [the state capital]."

"If you work for the state Department of Corrections, and you begin to step too far out in front of the institution, then you become a maverick."

"I am treated by judges as an equal, not as somebody who works for them."<sup>139</sup>

Most of these concerns underscore the desire to have probation supervision within the same governmental network as the activities in which the probationer is supposed to participate.

Given that judges, the clerk of court, the prosecutor, and the sheriff are all politically independent, probation is the only direct link between general government and the criminal justice system in most communities. The critical nature of this link was emphasized by the chief of a local probation system, as follows:

You stop trying to build your way out. You work purposefully and intensively to create intermediate sanctions based on cooperation and partnership between the incarceration side and the com-

munity corrections side of the criminal sanction continuum. There is no other way, I am convinced, to gain community support and solve the overcrowding crisis.<sup>140</sup>

Another aspect of assigning governmental authority over probation is the fact that most probation departments are responsible for two distinct functions: compiling information for the judge to use in the sentencing decision and supervising offenders who are serving alternative sentences. A 1989 New Jersey legislative commission proposed to split these pre-dispositional and post-dispositional probation services. It was recommended that the investigative work to assist judges in sentencing continue to be a part of the trial court system, but that the state should assume funding (\$22.7 million). Post-dispositional supervisory services were recognized by the commission as a major component of the correctional system. This community corrections function would continue to be funded by the counties (\$39.1 million), but with the administrative control that had previously been the court's.<sup>141</sup> The commission noted that:

With this recommendation, counties will be responsible for a continuum of services to offenders with a major emphasis on community corrections. The chief probation officer should be appointed by the respective appointing authority of the various counties to give county government both the administrative and financial responsibility to operate this program.<sup>142</sup>

The recognition of the New Jersey commission that most probation agencies carry two distinct functions not only highlights the rationale of having accountability for supervision attached to the community, it also throws needed light on the importance of accurate information about the offender for alternative sanctions to gain credibility and use. As the National Academy of Science observed, one of the principal reasons for failure is that "programs inadequately screen participants."

When criminal justice officials are brought together to assess system deficiencies, the need for accurate information is typically high on the list. From bail decision to jail classification to pre-sentence report to applying sentencing guidelines to prison classification to parole decision, the assumption is that each decisionmaker is dealing with accurate information. The decisionmaker who does not trust the information will typically respond conservatively, choosing the more costly alternative or calling for new information in a wasteful retracing of effort. General government officials who want to see more effective targeting of treatment resources and/or who believe that jail and prison space should be utilized for the more serious criminals, will have to address the need to establish information systems to support these policy goals. The New Jersey commission's recommendation for state funding of pre-dispositional probation services recognizes the cost and systemwide coordination required, which will be discussed in Chapter 8.

For purposes of identifying the governmental and inter-governmental policy decisions needed to utilize sentencing

options, it is sufficient *to* note that the budgetary impact of addressing caseload deficits in probation and parole and of establishing the technical capability for significantly improving the information base is great. These funding requirements complicate the intergovernmental decision about the placement of probation and parole where accountability can be tied most closely to the delivery of services.

### Balancing the Conflicting Missions of Public Safety, Punishment, and Rehabilitation

As emphasized at the beginning of this section, determining who can be in the community rather than in jail or prison is not in the hands of one individual, agency, or unit of government. To achieve support for alternative sanctions, therefore, the distinct missions of judges, prosecutors, public defenders, corrections managers, probation and parole supervisors, police, and treatment providers must be balanced. Further, actually establishing effective programs requires that the resulting consensus be backed by the public resources and the political will to fund it. This final subsection will discuss the potential for alternative sanctions to be given greater weight in these policy considerations.

A 1991 U.S. Supreme Court decision (*Harmelin v. Michigan*) gave significantly greater latitude to “community standards” in determining tough sentences. This decision gives renewed emphasis to the need to clearly face the question in each locality: What is to be the balance between punishment (just desserts), incapacitation (deterrence), and rehabilitation? There are strong advocates for each of these philosophies, and most of the advocates complain that the reason their approach has not shown better results is that it has not been fully carried out.

It is a challenge for political leaders not to let any single element overwhelm a comprehensive approach, through which law enforcement and correctional approaches will compliment rather than undercut each other. For example, if intermediate penalties are to work, they must be enforced; however, because overcrowded facilities will break the system, enforcement needs to be based on a set of graduated responses. The National Institute of Justice has developed an intensive retreat model for forging such compromises within local criminal justice systems. Absent an NIJ comprehensive refocusing exercise, opportunities must be found to use the characteristic concerns of individual officials to support greater emphasis on alternative sanctions.

Judges appear to be ready to back alternative sanctions, at least to the degree it gives them more options for control. Therefore, it is important that judicial concerns about control be addressed. For example, in a 1987 Michigan survey, although two-thirds of the judges expressed the desire for more community options to increase their range of sentencing alternatives, only one-third stated that they actually would use them. A Michigan legislative report concluded that: “The implications seem clear—develop community-based ‘punishments’ that are punishments in reality. By so doing, judicial perceptions that such community-based punishments are soft should change.”<sup>143</sup>

#### Focus

### NIC Intermediate Sanctions Project

In the belief that alternative rehabilitative programs cannot be imposed from the top down but have to be developed at the local level, the National Institute of Corrections and the State Justice Institute have launched a program to bring key local officials together. This “Intermediate Sanctions Project” focused on officials in 12 jurisdictions in 1990 to “encourage and support their ownership of alternative sanctions and to enhance the technical quality of their policy analysis and program development.”

Federal funds pay for three local officials to attend a retreat. Others may be included and, thus far, each locality has funded the cost of at least five to as many as ten additional people. The chief judge, prosecutor, and chief jailer must participate. The project also recommends that the police chief, local elected officials, head of the community services board, and influential citizens be considered. In all cases, the principals must attend—no deputies.

At the retreat, these local officials focus very simply on determining the locality’s philosophy of corrections and how it is to be accomplished. There is no right or wrong approach. The importance is to get agreement, so that support for governmental decisions can be marshaled to carry out that philosophy effectively.

The project has targeted only the largest jurisdiction in a state, not because criminal justice problems are usually greater there, but because a successful approach developed there will usually have the greatest influence on the other localities in the state.

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Source: U.S. Department of Justice, Office of Justice Programs, *A Survey of Intermediate Sanctions* (Washington, DC, 1990).

Although heavy fines payable over a longer period of time were mentioned, others—such as diligently enforced community service or limited freedom of movement—would have to involve “real supervision,” through significantly lower caseloads, to achieve the judges’ concept of “real punishment.”

The degree to which the courts will use alternative sanctions also depends on their level of knowledge about the programs and the details of supervision. For this reason, most CCA boards include judicial representation, or even stipulate that the chief judge chair the board. However, in at least one state, Virginia, the state supreme court advised the local courts that judicial participation in the oversight of community corrections was a breach of the separation of powers. Fortunately, such an additional barrier to increasing judicial understanding through increased participation does not exist in most other states. In fact, the Alabama focus (page 116) presents a good example of the leadership that the bench can exert and the importance of developing familiarity with the actual operation of alternative sanctions.

*Focus*  
**Alabama Judicial Leadership**

In 1987, the chief justice of the Alabama Supreme Court appointed a task force, which he charged to find ways to reach a zero rate of growth in the prison population. The Edna McConnell Clark Foundation survey of the public's willingness to support alternative sanctions, cited earlier, helped convince judges that they could avoid being labeled soft on crime when they were up for reelection if the alternative punishment is "clearly tough, fits the crime and the criminal, and is carefully monitored." As an example of the benefit of the initiative, according to *Governing Magazine*, "one judge released a seven-page sentencing order explaining why a 22-year-old man who was guilty of several burglaries, would not go to prison. . . [why] restitution, drug counseling, community service and getting a GED served everyone better than imprisonment. The man kept his job, and he's paying taxes. . . ."

The Alabama Department of Corrections backed the judiciary's efforts. "When you can't possibly afford enough prisons to house all your criminals, you have to find new and better ways to punish. That is what we are doing in Alabama now. Our judges are leading the way," according to a spokesman for the Department of Corrections. "If any such program is to succeed, it must have public acceptance. That, in turn, must be based on public understanding." The department was particularly active in an information campaign that generated favorable news stories and editorials.

The judicial leadership has enabled other public officials to embrace the need for alternatives. The mayor of Montgomery, Alabama recently stated, "Alternative sentencing is an idea whose time has come, and we are seeing it work in Montgomery" especially, he went on to assert, given the importance of maintaining prison space for violent criminals.

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Sources: John Doble and Josh Klein, *Punishing Criminals: The Public's View: An Alabama Survey* (New York: The Edna McConnell Clark Foundation, 1989); and John H. Hale, "Stone Walls Do Not a Prison Make, As Alabama Tries Alternatives," *Governing* 4 (March 1991): 9.

Judicial understanding of the totality of the system particularly important, given low public confidence in the effectiveness of courts in dealing with crime. Through their broader involvement, judges can address the system impacts of their decisions and better speak to the politics of borderline decisions. For example, in the Iowa survey cited in Chapter 2, which reported that probation officers recommended incarceration for recidivists almost twice as often as judges imposed it, it is important to note that the judge's decision was right 65 percent of the time.<sup>144</sup> In the national follow-up of 79,000 probationers, the decision not to follow the recommendation to incarcerate was right in 63 percent of the cases.<sup>145</sup> This is a significant saving of resources.

Just as the judge's mission—to give an appropriate sentence—can be focused on strengthened community sanctions, so can the mission of correctional authorities—to protect public safety while administering an overcrowded system—encompass strengthened alternatives. For example, when the Los Angeles Board of Supervisors refused to fund a follow-up probation component of a jail boot-camp program, the sheriff took the "unprecedented step" of giving the Probation Department \$1.5 million of his own funds. "The Sheriff said, simply, that without probation this program could not succeed."<sup>146</sup>

In other localities, jail administrators and sheriffs see long-term advantages in identifying an inmate's willingness to accept treatment before release, rather than waste resources on unsuccessful probation when there is less supervisory pressure. For example, the sheriff of Alexandria, Virginia, started a Sober Living Unit at the jail in 1988. The need for such a program was amply demonstrated by the fact that 80 percent of the participants had never had treatment of any kind, despite the fact that 95 percent had been incarcerated before, and by the participation of inmates who stayed beyond their release date to complete the 90-day program.

Even prosecutors, whose mission is to convict people of the crimes they have committed, may be motivated to back more effective probation and parole supervision over additional convictions. Among the prosecutor's offices that have special programs to revoke probation or parole for the commission of a new crime, rather than prosecuting the new crime itself, are Wayne County (Detroit), New York City, and Los Angeles County. These prosecutors see another "slap on the wrist" as not only wasting court resources, but being much less effective than demonstrating that the court order for the original conviction is to be taken seriously. "Probation would once again be a contract to be honored not a meaningless joke."<sup>147</sup>

Parenthetically, the independence of criminal justice officials can mean that the system may not respond just because prosecutors emphasize probation as a serious sanction. In two instances above, judges were refusing motions for revocation hearings or not scheduling them in a timely manner. In New York City, the mayor had to force the issue; in Wayne County, the prosecutor had to win a Court of Appeals decision (*People v. William*) over his right to enter into revocations.

The key to increasing the support of probation and parole officials for alternative sanctions may be to recognize the traditional multiplicity of their missions. Even though many probation and parole officers have moved away from a social work orientation (which often meant that they felt they were admitting failure if they had to move to recommit an offender) to a law enforcement orientation (which regards catching violations to be a success), most would still prefer to have a progression of sanctions. The central conclusion of the California Blue Ribbon Task Force stated it well:

The criminal justice system in California is out of balance and will remain so unless the entire state and local criminal justice system is addressed from prevention through discharge of

jurisdiction. Judges and parole authorities lack sufficient intermediate sanctions to make balanced public safety decisions. . . . Judges must balance punishment, public safety and effectiveness; and, given limited resources, have increasingly selected incarceration. . . . Parole officers given the same lack of resources in deciding whether to violate or not have dramatically increased reincarceration as their choice.<sup>148</sup>

The Governor's Commission in Ohio made a similar observation, specifically, that a return to prison should not be the only option for a parolee who tests positive for drugs. "A progressively severe range of sanctions should be developed, with prison as the ultimate penalty."<sup>149</sup>

Providing probation and parole officers with greater program choices and reasonable caseloads also may help address conflicts in mission between them and treatment providers, which center on the classic pull between treating the offender as a criminal or as a person in need of services. Some treatment providers complain that probation officers are too intrusive, as with security audits of contract residential facilities, while others complain that they do not get adequate supervisory backup. Many programs based on the Alcoholics Anonymous 12-step model maintain that even being asked whether or not the offender has attended violates their program's integrity. Others believe that being seen as "an arm of parole" hinders their effectiveness in establishing a therapeutic relationship. Who is in charge of the treatment also can be a focus of conflict over what constitutes success or what type of treatment is necessary. The more the role of the probation and parole officer is clarified, the more treatment providers can define their own needs to assure program success.

Finally, determining the balance between public safety, punishment, and rehabilitation calls forth traditional issues of state control. Because local governmental units are legal creatures of the state, many state officials feel an obligation to oversee local activities, especially where issues of public safety are concerned. As noted in the discussion of Community Corrections Acts in Chapter 3, state regulation of local programs has a heavy emphasis on public safety, including what types of offenders can participate, what security procedures should be followed, and how security audits should be conducted. These state regulations represent efforts to bolster the lowest common denominator of local correctional experience. Even though the assumption behind local advisory boards is that community representatives should be in control of who is released into their community, there is also a concern that many localities need to be shielded from inadvertent mistakes due to lack of extensive experience in dealing with criminals.

Any legislative consideration of restructuring probation or parole accountability usually finds numerous reputable voices speaking in favor of stronger public safety supervision. Judges, prosecutors, and police officials repeatedly are brought into contact with criminals who do not successfully complete probation or parole. They have little occasion to be reminded of those whose criminal activity ends. The challenge for state legislatures and executive agencies is to not allow legitimate concerns about possible career criminals,

organized gangs, and drug networks to completely overshadow getting first-time, nonviolent offenders into community services and out of a potential career-criminal track.

In the process of standing up to disparate voices from all corners of the criminal justice system and insisting on open dialogue, general government elected leaders will be able to identify the individuals who are innovators. In one locality, it was the sheriff who went out and sold the community on work release; in another, it was a judge who tailored restitution so that it can be broadly applied. One prosecutor used federal drug forfeiture funds for crack mothers, while a clerk of court was key to using summons in place of arrest and incarceration. Supporting those in the criminal justice system who are willing to stand behind a program and get others to buy-in to make it work, always has been more successful than any solution imposed from outside—not just outside the locality, but even imposed by general government officials outside the criminal justice system.

Elected officials may, in the end, take their lead from the public that, perhaps, too much is made of competing missions in criminal justice. When the Edna McConnell Clark national focus groups were asked which of four goals is the most important for the criminal justice system—punishment, incapacitation, rehabilitation, or deterrence—many found it hard to understand the basis for the question. All were important.<sup>150</sup>

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## SUMMARY

There are no inexpensive or guaranteed answers. There are no noncontroversial answers. But, improving the criminal justice system's ability to reduce criminal behavior has become a problem that cannot be ignored by general government officials. County and city government actions are particularly important because of the combined weight of the following:

1. Many offenders did not graduate from high school or are illiterate, abuse alcohol and/or drugs, and have poor employment records.
2. Most first offenders remain in the community.
3. Almost every state prisoner will return to the community.

Although local general government elected officials are key to overcoming community resistance and to developing cooperation from general government and private agencies, they may not be able or willing to fund the required services. State legislators and governors, therefore, need to resolve issues of governmental responsibility and address the problem of inadequate resources, especially in crime-impacted areas.

States have used a variety of means—increasingly under the umbrella of a Community Corrections Act—to shift responsibility for the least serious offenders back to the localities, as tougher penalties have moved more offenders into state prisons. Defining responsibility and

funding usually must be linked, however, to reduce intergovernmental resistance. This is true not only because areas most impacted by crime do not have adequate community resources but also because the intergovernmental division of responsibilities within criminal justice does not support a natural shift to nonincarceration options. Counties and cities will not see immediate benefits from relieving state prison budgets, nor will cities and most states from relieving county jails. (Intergovernmental funding considerations are discussed further in Chapter 7.)

Intergovernmental dispersion of responsibility also requires special effort to coordinate supervision and community programs. Probation officers can serve as the point of contact, but their authority may be limited by the institutional placement of the agency.

Even when a state or county has budget responsibility for both institutional and community corrections, funding alternatives still may be overwhelmed by the growth in jail and prison budgets. In this spiral, too often, alternatives to incarceration have come to stand for no action and simply may reinforce criminal behavior. Reduced growth in courts sentencing offenders to probation at the end of the 1990s, in fact, may be the result of not funding programs commensurate with the high use of probation at the beginning of the decade. Staffing new approaches at current levels may produce the same results.

Finally, as discussed in the beginning of this chapter, establishing a rationale for using a full range of correctional options is as important as resolving governmental responsibility for them. Creditable information is essential. The program's administrators need to believe in the efficacy of the approach, criminal justice authorities need to understand how their actions can enhance its potential, and treatment providers need to be helped to have a stake in it. Political leaders need to be informed and be willing to speak in terms the public can understand in order to receive the support needed to back their sentencing, policy, and budget decisions.

Perhaps more than ever, America's federal system is an asset. In an arena where there are no proven answers, each state becomes a laboratory to develop a continuum of criminal justice responses reflective of its priorities. If there is a desire to control prison growth, such a continuum will need to start with appropriate community sanctions and services that are reinforced rather than withdrawn in the face of initial criminal activity. The extraordinary cost of incarceration is justified only when other options are ineffective.

## NOTES

<sup>1</sup> Mark Corrigan, "The Politics of Sentencing Reform," *County News*, September 12, 1988, p. 13.

<sup>2</sup> Governor Michael Castle of Delaware before the National Conference on Intermediate Punishments as Sentencing Options, September 6, 1990.

<sup>3</sup> *Crime and Punishment: The Public's View* (New York: The Edna McConnell Clark Foundation, 1987), p. 15.

<sup>4</sup> Harris County Community Justice Council, *Harris County Community Justice Plan: Fiscal Year 1991* (Houston, 1990), p. 68.

<sup>5</sup> Governor Michael Castle, panelist, National Conference on Intermediate Punishments as Sentencing Options, September 4-7, 1991.

<sup>6</sup> Doug McDonald, panelist, National Conference on Intermediate Punishments as Sentencing Options, September 4-7, 1991.

<sup>7</sup> John J. DiIulio, Jr., and Anne Morrison Piehl, "Does Prison Pay? The Stormy National Debate over the Cost-Effectiveness of Imprisonment," *The Brookings Review* 9 (Fall 1991): 28.

<sup>8</sup> Peter W. Greenwood, *The Violent Offender in the Criminal Justice System* (Santa Monica: RAND Corporation, 1981).

<sup>9</sup> Corrigan, "The Politics of Sentencing Reform," p. 19.

<sup>10</sup> Alvin Cohn, "The Failure of Correctional Management," *Federal Probation* 55 (December 1987): 3-7; Daniel L. Skoler, *Organizing the Non-System* (Lexington, Massachusetts: D.C. Heath, Lexington Books, 1977); Susan E. Martin, Lee B. Sechrest, and Robin Redner, *The Rehabilitation of Criminal Offenders: New Directions for Research* (Washington, DC: National Academy Press, 1981); U.S. Department of Justice, Bureau of Justice Statistics (BJS), "Recidivism of Young Parolees," *BJS Special Report*, May 1987; "Recidivism of Felons on Probation, 1986-89," *BJS Special Report*, February 1992.

<sup>11</sup> "Recidivism of Felons on Probation, 1986-89."

<sup>12</sup> BJS, *Prisons and Prisoners in the United States* (Washington, DC, April 1992).

<sup>13</sup> "Recidivism of Prisoners Released in 1983," *BJS Special Report*, April 1989.

<sup>14</sup> Comptroller General of the United States, *State and County Probation: Systems in Crisis* (Washington, DC: U.S. Department of Justice, Law Enforcement Assistance Administration, 1976).

<sup>15</sup> "Recidivism of Prisoners Released in 1983."

<sup>16</sup> Virginia Department of Criminal Justice Services, *Felony Justice in Virginia* (Richmond, 1987).

<sup>17</sup> U.S. Department of Justice, National Institute of Justice (NIJ), *NIJ Conference on Intermediate Sanctions* (Washington, DC, 1990), p. 34.

<sup>18</sup> Martin, Sechrest, and Redner, *The Rehabilitation of Criminal Offenders*, p. 1-10 and 1-32.

<sup>19</sup> Joan Petersilia, *The Influence of Criminal Justice Research* (Washington, DC: U.S. Department of Justice, National Institute of Justice, 1987), p. 41.

<sup>20</sup> Martin, Sechrest, and Redner. *The Rehabilitation of Criminal Offenders*.

<sup>21</sup> *Ibid.*, p. 1-21.

<sup>22</sup> *Ibid.*, p. 1-11.

<sup>23</sup> Vera Institute of Justice, *Alcohol, Drugs and Crime* (New York, 1989), p. 2.

<sup>24</sup> NIJ, *NIJ Conference on Intermediate Sanctions*, p. 23.

<sup>25</sup> *Crime and Punishment: The Public's View*, p. 26.

<sup>26</sup> Marvin E. Wolfgang, Robert Figlio, and Thorstein Sellin, *Delinquency in a Birth Cohort* (Chicago: University of Chicago Press, 1973).

<sup>27</sup> "Violent Crime in the United States," *BJS Bulletin*, March 1991.

<sup>28</sup> Petersilia, *The Influence of Criminal Justice Research*, p. 47.

<sup>29</sup> *Ibid.*, p. 49.

<sup>30</sup> Warren C. Gregory, *The Crisis in the Michigan Criminal Justice System: Causes, Consequences, and Options* (Lansing: House Fiscal Agency, 1989), pp. 20-21.

<sup>31</sup> James Austin and John Irwin, *Who Goes to Prison?* (San Francisco: National Council on Crime and Delinquency, 1990), p. 12.

- <sup>32</sup> **Proportions of 1991** prison populations from *Prisons and Prisoners in the United States* (April 1992), and the estimated number of prior convictions from "Profile of State Prison Inmates, 1986," *BJS Special Report* (January 1988).
- <sup>33</sup> **National Council on Crime and Delinquency**, *Preliminary Evaluation of the Illinois Supplemental Meritorious Good Time Program* (San Francisco, May 20, 1991).
- <sup>34</sup> "Profile of Jail Inmates, 1989."
- <sup>35</sup> State of New Jersey County and Municipal Government Study Commission, *Corrections Policy for the 90's* (Trenton, 1989); David Freed, "Crime Overloads L.A. Justice System," *Los Angeles Times*, December 16, 1990; Hennepin County Board of Commissioners, Hennepin County Sheriff, Hennepin County Attorney, Fourth Judicial District Court, and Minneapolis Police Department, *Hennepin's criminal Justice System and the New Public Safety Facility* (Minneapolis, January 1990).
- <sup>36</sup> "Profile of Jail Inmates, 1989."
- <sup>37</sup> **BJS**, *BJS Data Report, 1988* (Washington, DC, 1989).
- <sup>38</sup> "Profile of Jail Inmates, 1989."
- <sup>39</sup> *Ibid.*
- <sup>40</sup> "Homicide among Young Black Males—United States, 1978-1987," *Morbidity and Mortality Weekly Report*, December 7, 1990.
- <sup>41</sup> Bob Miller, *National Association of Counties Annual Meeting*, Litchfield Park, Arizona, January 11, 1991.
- <sup>42</sup> **Executive Office of the President**, Office of National Drug Control Policy, *National Drug Control Strategy* (Washington, DC, 1990).
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- <sup>44</sup> *Sourcebook of Criminal Justice Statistics, 1990*, p. 451; *Uniform Crime Reports, 1990*, p. 235.
- <sup>45</sup> "Violent Crime in the United States."
- <sup>46</sup> *Sourcebook of Criminal Justice Statistics, 1990*, p. 448.
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## 5 — CAPITAL EXPANSION

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If present trends continue, almost every county and state chief executive, budget chief, and lawmaker will face the need to build more prison or jail space in the coming decade. The difficulties in defusing the forces that have spurred recent sentencing trends and in generating the extensive support needed for effective community alternatives make a continuation of present trends likely. Even if cost restraints and court orders temper the effects of sentencing policies and enhance the use of alternatives, the relief may be short term. It is only the rate of growth that is slowed, but growth continues.

On the positive side, the need to make a major capital expenditure can provide critical leverage for thorough system analysis, reconsideration of priorities, and establishment of sound planning procedures. Such efforts also afford an excellent opportunity to establish ongoing coordinating mechanisms for bringing independent criminal justice officials together.

This chapter highlights how states and localities have responded to these planning needs and coordinating opportunities. In addition, it discusses two other distinct areas: judicial involvement and the capital improvement process. From complex legal documents and constitutional theory to the cost of nuts and bolts, these two issues represent the extremes of general government elected officials' concerns and responsibilities. What they have in common is the potential to impede or support sound decisionmaking and program administration.

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### HOW CAN YOU BE SURE YOU NEED MORE SPACE?

Throughout this discussion, the assumption is made that elected officials want to spend only what is absolutely necessary on prisons and jails. These buildings are not points of civic pride, and no one wants to build space sooner than it is needed, only to have it filled up. Therefore, the initial line of questioning is

“Do we *really* need to build?”

The first subquestion then becomes

“Why can't more inmates be put in the existing space?”

Followed by

“Who is currently being held and for how long?”

“Are people being held in an expensive secure facility who don't need to be?”

And, finally,

“How soon must the need be met?”

“How much and what kind of space is needed?”

### Determining a Facility's Capacity

General government officials frequently become exasperated just getting an answer to the first question: How many can the current jail or prison system hold? Usually, the more inquiries and comparisons made, the more numerous and diverse the answers become.

The following list of reasons for such diverse answers may seem overly technical at this point. But it is presented because it gives a quick overview of the major issues officials must be prepared to deal with in building correctional facilities: court decisions, accreditation standards, program operation, security, environmental regulation, and site limitations.

- Supreme Court rulings in 1979 (*Bell v. Wolfish*) and 1981 (*Rhodes v. Chapman*) held that placing two inmates in a 75-square foot cell or in a 63-square foot cell was not in itself unconstitutional depending on the totality of other conditions. Prisons or jails built before this ruling usually have an original “design capacity” that does not meet this standard; consequently, their “operating or functional capacity” will be less.<sup>1</sup> In contrast, a few systems, including the federal system, are based on a design capacity of single occupancy, and by using the Supreme Court standard for double-celling could increase capacity. For example, even after facilities under construction are complete in 1995, the federal system would be rated as being 32 percent over capacity under its traditional standard of single occupancy; double-celling all cells over 70-square

feet (except high security) would result in the system being 5 percent under capacity.<sup>2</sup>

- Court rulings also have stipulated the amount and types of out-of-cell space that must be available, which have been incorporated into the American Correctional Association's (ACA) accreditation standards. These requirements, referred to as the "totality of conditions," also can reduce the operating capacity of older facilities.
- ACA standards recommend that a percentage of secure, unoccupied units be available at all times to allow separation of inmates from the general population when trouble occurs. Security concerns also include having the excess capacity to handle weekend and seasonal surges in jail populations. Although prison and jail dormitories easily lend themselves to adding more bunk beds, the greater the number of inmates in one room, the greater the security risks.
- Finally, even if compromises are achieved on all of the above factors, potential suits over state and federal *Clean Water Act* violations may cap the amount of doubling-up that can occur in some prisons because many prison facilities are not on municipal sewage treatment systems.

As this brief list demonstrates, weighing all of the factors in determining the capacity of a given jail or prison system is complex; therefore, elected officials will need to delegate review of the correctional system's response. Too often, when elected officials become the arbitrators, it is hard to balance short-term capital cost-cutting with long-term operational concerns. Nevertheless, elected officials might need to be specific in directing the capacity analysis to identify any physical constraints, such as the number of toilets or the size of the kitchen, which, if corrected, can allow more prisoners to be housed in the facility.

The next level of inquiry in determining space needs is to determine how the current space is being used. This is the golden opportunity for general government officials to bring criminal justice officials together in a joint effort to better integrate the system. This is particularly true for jails because they are the crossroad of the criminal justice system. Prison construction planning will be discussed separately.

### Reducing the Need for New Jail Space

Building a new jail should be the last step to provide for the system's needs, not the first. A coordinated examination of the best use of jail space can create support for all of the program initiatives discussed in the previous chapters. The following summary demonstrates how essential it is to get all of the independent criminal justice officials and agencies involved in analyzing how to reduce the need for new jail space.

#### Pretrial Release

The goal is to reduce the number of days of detention for persons who are typically released before trial. Police

and prosecutors need to agree on the use of summons in lieu of arrest. Judges, magistrates, and jail intake personnel need to develop guidelines delegating release decisions so that they can be made on a 24-hour basis. The prosecutor, defense counsel, judges, the clerk of court or court administrator, and the pretrial services agency need to agree on expanded pretrial release alternatives and expedited bail procedures.

#### Case Management

The goal is to analyze and expedite case flow. The prosecutor, public defender, and court administrator need to agree on hearings for minor offenses. The prosecutor and the public defender should agree on the use of deferred prosecution. The sheriff and the court administrator need to examine notification procedures that track the status of each jail inmate; the prosecutor's and public defender's offices may also need to be involved. The prosecutor and the forensic laboratory need to establish priorities. The court administrator, prosecutor, and public defender need to agree on scheduling calendars. The chief judge and the probation department need to examine the use and content of pre-sentence reports to determine their timeliness.

#### Alternative Sanctions

The goal is to build support for effective sanctions, which do not require use of a secure jail bed. The sheriff and the probation department must agree on security responsibility. The prosecutor, judges, sheriff, and/or probation department must agree on program goals. General government officials need to agree on the location of non-secure alternative facilities for those convicted of DUI, probation violators, and substance abusers. General government officials also must be involved in developing guidelines for work assignments in the community.

#### State Transfers

The goal is to reduce the number of days inmates sentenced to serve time in prison are held in the local jail. The sheriff, clerk of court, and prison intake officials should examine the procedures used to notify the state that all the legal requirements have been fulfilled and a felon is ready for transfer into the state system, as well as the procedures used to accomplish the transfer. The sheriff, prison intake officials, and parole officials need to resolve the holding of parole violators in jail. They also may need to address scheduling of parole hearings if minor felons become eligible for parole before they can be transferred into the state system.

### Using the Need for Jail Space as an Opportunity for System Analyses

It is possible that, under the leadership of a chief judge or through the efforts of the sheriff, criminal justice officials have spent months reviewing operational alternatives before the request for capital expansion was made. Such internally generated cooperation is not typical, however, given the traditional isolation of independent criminal justice officials, as will be discussed in greater length in Chapter 8. The more pronounced the isolation, the more crucial it becomes for the general government leadership to regard the building of a new jail as a prime opportunity to forge greater collaboration.

## Criminal Justice System Analysis and Cooperation Related to Expansion of Hennepin County, Minnesota, Detention Center

ney, the chief judge, a juvenile court judge, the mayor, and two city council members.

This chronology lists **six** different groups that reviewed the need for additional space. In addition, the sheriff used the services of the National Institute of Corrections (NIC), a federal agency, for three different analyses of prisoner movements and population projections. Furthermore, in 1981, the sheriff began meeting regularly with the chief judge to work on processing delay. These meetings have included the county attorney, the public defender, police officials, private attorneys, and county staff.

Although the time taken to proceed with construction has been costly in terms of leased space and system inefficiencies, the positive side includes significant long-term advances that have improved the administration of justice and have “reduced the severity of the crowding” in the jail. Specifically, improvements already implemented have freed up approximately 10 to 15 beds on weekdays and 20 to **30** beds on weekends. Planned improvements could free up another **40** to 70 beds daily. However, while this represents a reduction of more than 10 percent of the jail’s population, it is termed “inconsequential in the face of future demand.”

Therefore, equally positive is the formation of the ongoing County Justice Coordinating Committee to expedite the resolution of operational problems and foster a climate of support for innovation. It is possible that had such a recognized coordinating committee been in place from the beginning, the process of gaining county board and legislative approval might have been expedited. Their “comfort level” would have been greater than it was with simply receiving a request from the sheriff.

However, it is also important to note two admonitions in the 1990 report to the legislature on “ways and means to improve the administration of the criminal justice system.” These provisos apply to planning trade-offs that must be recognized by general government officials who are successful in establishing or being able to work with a coordinated criminal justice system:

1. The better functioning and coordinated the system, the less that can be gained by delaying the decision to build once the need is identified; and
2. The better functioning and coordinated the system, the more building with “future flexibility is of paramount importance.”

In other words, the better functioning and coordinated the system, the less fat there is to absorb shocks and the more important it is for general government officials to be responsive.

quest to the county board of commissioners.

1986-1987—An internal county task force reviews the request.

1988—The county board decides to establish a Public Safety Facility Committee to plan the new facility, chaired by a member of the county’s board of commissioners. This coordinating committee included city representatives (mayor, city council president, chief of police, and city coordinator); the county administrator; criminal justice officials (sheriff, county attorney, public defender, and the chief judge); a suburban police chiefs’ representative; and five citizen members.

1989—The Minnesota legislature authorizes the county to issue bonds for planning and site acquisition, but directs that a new study be performed before construction bonds will be authorized. The state legislation stipulates that the county board, the sheriff, the county attorney, and the judges participate in the study.

1990—The legislature receives the report. This additional analysis was conducted under the auspices of the County Justice Coordinating Committee. This ongoing committee, which meets monthly, had been created in 1988 “to respond to increasing criminal justice system pressures.” The committee includes two county board members, the sheriff, the county attorney,

Source: Hennepin County Board of Commissioners, Hennepin County Sheriff, Hennepin County Attorney, Fourth Judicial District Court, and Minneapolis Police Department, *Hennepin’s Criminal Justice System and the New Public Facility* (Minneapolis, January 1990).

This opportunity is particularly advantageous because, in building a jail, general government elected officials gain new authority to command cooperation. Most criminal justice officials will respect the general government officials' right to ask for a thorough review simply because they are asked to foot the bill. Furthermore, this political authority generally is backed by the general government's legal authority not to take action if whatever conditions they deem appropriate—including cooperative efforts—are not met.

### Determining the Nature of Future Prison and Jail Needs

The final area of inquiry in determining whether to build is future need. Budgetary oversight should look for the response in terms of what kind of space will be needed, not just how much. It is very important, however, that general government officials not interpret this to mean that they should make design decisions. This should ultimately be the purview of the sheriff or prison administrator who will be running the facility.<sup>3</sup> Instead, general government officials should be concerned about the various types of space needed and should convey early and clearly that they expect to see a level of analysis that identifies:

1. The types of inmates that are being held in the state or county correctional system as a whole;
2. Whether there will be any major shifts in these types of populations in the future;
3. The types of space and levels of security being used to hold the various classes of inmates;
4. The types of needs that will be met by the new facility; and
5. A projection of the number of beds needed and the proportion of inmates requiring more costly security.

The fifth factor—analysis of the types of prisoner populations to be housed—will be the most difficult to produce, but it is crucial. Correctional experts emphasize that this analysis is the first step in assuring that the design of the facility will minimize management problems. General government officials should regard this information as the most crucial step in controlling costs. For example, as noted in Chapter 3, jail expansion may provide the opportunity to separate the detention population from those individuals who have been found guilty and sentenced to serve time in jail. Those detained awaiting trial, such as an accused murderer or those with long criminal records, need much higher security and, therefore, a much more expensive facility than the type of person sentenced to serve time in jail, such as drunk drivers.

The same relationship between the cost of the facility and its level of security exists in prison construction and is at the heart of prison planning. This is in contrast to jail planning, for which system analysis and coordination of first importance. The greater importance of analysis of

security needs in prison planning derives from the fact that prison systems have fewer options for diverting inmates and because prison systems have large enough populations to make a separation of prisoners into different types of facilities feasible and, therefore, economical. However, as jail populations grow, the size of some subpopulations may become large enough to justify different arrangements. Finally, in addition to a security needs analysis, state prison systems should be expected to produce a separate analysis of the future needs for female, geriatric, and long-term health services for those serving mandatory sentences who cannot be released.

Projecting the need for space and analyzing the security needs of a prison system or in a jail design demands a sophistication in population projection that most jails and many prison systems cannot produce. As noted elsewhere, many factors determine how many people will be arrested, prosecuted, and sentenced to jail or prison, and how long they will stay. Because these criminal justice activities operate independently, they need to be tracked separately to determine their total effect. Unfortunately, too often, all that is available is a statistical projection of historic penal population totals, with no analysis of changes occurring in the system.

It has been traditional to address changes outside the system, which are expected to affect the total size of the inmate population, under the assumption that if there is a change, for example, in the numbers of people aged 18-30 in the general population, there will be a corresponding change in the inmate population. However, this type of modeling has been ineffective in dealing with the overriding effects of increased drug arrests, which have brought in a much higher percentage of females and blacks than traditionally have been in the general inmate population, or with the increased convictions for sexual or other abuse of females, which represent higher percentages of older white males.

Almost all systems should be able to produce an analysis of the first four factors, although the workloads and/or training of existing staff may require the use of outside consultants. The more advanced the internal planning and coordination of the criminal justice system, the less need there will be for consultants. Nevertheless, targeted use of consultants may surface alternative approaches to problems that were assumed to be endemic. They also may give support to system administrators when program suggestions from general government officials are not fruitful. For example, the Minnesota legislature suggested that Hennepin County consider a night court to shorten the time that defendants are detained in jail. An outside consultant, through the National Center for State Courts, was able to draw on national examples to identify the limits of such a proposal.<sup>4</sup>

There are models that use a different statistical approach to simulate trends within the criminal justice system. They separately track a number of different offense categories, including not only how many are convicted, but for how long they are sentenced and how long they will serve. Such systems may require historic information on more than 100 variables and a means to update the information regularly. Several projection models are summarized in

*Focus*  
**Determining Future Space Needs  
and Developing a Ten-Year Master Plan in Virginia**

In 1989, the Virginia Department of Corrections (DOC), following policy direction from the governor's office, developed a ten-year master plan for prison construction. The nature of the governor's direction was that, although the outgoing administration had increased prison capacity by 45 percent, the ongoing need for construction and its type, location, and timing needed to be documented for future administrations and for the legislature.

The ten-year plan was built on elements that had received legislative support during the just-completed 45 percent increase. First, because part of the increase had to be carried out under mid-year emergency legislation in order to provide space rapidly for unanticipated growth, there was strong legislative and executive budget support for a *sophisticated population projection model*, which the DOC had just brought on-line. Elected officials also were better able to focus on the intractable need for prison space because the model more clearly identified the limits of relief that could be provided by alternatives, such as the Community Corrections Act.

Another element of consensus was the use of *repeat design*. During the previous construction, five basic designs had emerged that could be clearly identified and understood by the legislature in terms of relative cost and size: maximum-security buildings with a corridor design of single cells, medium-security buildings with cells large enough for two inmates surrounding an open day area, medium- to minimum-security dormitory facilities varying in size and perimeter security, small intensive program facilities, and standardized program and support buildings. These components also could be combined into multiple-facility complexes.

The third component accommodated two legislative *cost-saving policies* that affected inmate housing. First, to save money on construction, elected officials believed it was reasonable to house approximately half of the inmate population in dormitories. Given this legislative direction, prison administrators were able to address security concerns by focusing on perimeter security and by planning for a small percentage of single cells to be constructed alongside dormitories to permit immediate separation of troublesome inmates.

The second cost-saving directive came from the legislature's historic reaction to federal court rulings elsewhere, which led to a stance that all medium-security cells should be built large enough to house more than one inmate, if necessary. This decision to build in excess capacity was balanced by legislative budget language that stipulated the amount of double-celling that would be used, because the more double-celling, the less need for new construction. The ten-year plan not only sized support facilities accordingly, but prison administrators strove

to get the understanding of elected officials that, while honoring the system-wide average, they needed to retain the flexibility to vary the actual amount of double-celling to reflect the mission of each prison and that inmate management dictated a lower level of doubling-up in dormitories.

A fourth area addressed in the plan was *siting and the Environmental Impact Statement (EIS) process*. The need for a comprehensive approach to deciding where prison expansions would be located was felt strongly by the governor, various cabinet members, legal counsel, prison officials, and those legislators who had been involved in recent site determinations. In the plan, DOC identified nine areas in the state as locations for new prisons, inventoried the existing facilities for expansion, and set priorities for the appropriateness of each type of prison facility for each area. This statewide assessment presumed that the more sites addressed in a single EIS review, the less the use of alternative sites could be raised as an argument against any other given site, since all possible sites would be used eventually. Furthermore, DOC administrators strove to underscore to elected officials that early site identification was crucial to timely completion of facilities without costly construction changes.

The final area of concern, particularly within DOC management, was to clearly spell out the *calendar that must be followed to open each facility in time* to meet population projections. Legislators and budget officers readily appreciated the specificity produced by this final planning step. A ten-year matrix was developed with a timeline for each of the 26 proposed facilities as to when the legislature would have to appropriate site acquisition funds, when the site would have to be approved and purchased, when the legislature would have to appropriate design funds, and when construction funds would have to be appropriated. Approximate costs, based on the use of repeat designs, were also presented for each fiscal year.

The existence of Virginia's ten-year DOC master plan depended on the willingness of an outgoing governor to announce publicly that his administration had not "solved" the prison problem, the development of a significantly more sophisticated and credible means to project prison population growth, the increased understanding of the problem within the executive department of budget and the legislative budget staff, and the sophistication that the Department of Corrections had gained in the first ad hoc round of dealing with the explosive growth in the prison population.

Like all planning documents, this master plan will be modified by the action of succeeding governors and the legislature as conditions warrant. Nevertheless, *it places cost ramifications of current penal policies, and the need for timely action, clearly in the public arena.*

Chapter 8, and the National Institute of Corrections can assist a prison or jail system in reviewing its needs.

Whatever statistical model is selected, elected officials need to be aware of two constraints in their desire for accurate inmate population projections. First, because each system is unique, ready answers will not be available unless an investment has been made in developing an accurate data base. Every state's criminal justice system reacts differently to crime and has different demographic conditions that influence crime. This is equally true for each **locality**. Therefore, a projection must be based on an accurate, individualized data base, which takes time to develop.

Second, accurate projections cannot be derived from statistical analyses alone, no matter how sophisticated. Everyone who has dealt with computers has heard the admonition, "garbage in, garbage out." All projection programs require a number of assumptions, such as how drug arrests will continue to rise, how installing a computerized fingerprint identification system will affect convictions, when revised parole guidelines will be put into effect, and what categories of inmates may experience reduced parole rates. Relevant assumptions must be developed cooperatively throughout the criminal justice system and be reviewed widely. Even when the best informed subjective judgments are brought to bear on the objective statistical model, these observations from the Hennepin County jail study still need to be kept in mind: "forecasting [is] more of **an art** than a science. . . . The fact that a difference [in forecasts] exists should be no surprise to any reader who follows such statistically popular areas such as the stock market."<sup>5</sup>

### Summary

Elected officials enter a complex world as they exercise their oversight responsibilities in the decision to build prison or jail space. Their contribution to the right decisions being made will be measured by their ability to appreciate this complexity while holding criminal justice officials accountable. Criminal justice officials must be able to document capacity limits, to catalog alternative programs and policies that can reduce space needs, to present an **analysis** of the specific types and numbers of offenders who can be diverted by these alternative programs, and to demonstrate professional competence in making population projections. The process of producing this basic information will, in and of itself, create criminal justice system improvements.

If the process **is** not working because criminal justice officials are not responding, then the general government elected official will need to marshal the leadership to insist on a collaborative approach, rather than adding to the lack of cohesion by imposing judgments from the outside. On the other hand, if thoughtful criminal justice collaboration is present, then general government officials need to join constructively in that effort.

The Chinese character for "crisis" combines the characters for "dangerous" and for "opportunity." A prison or jail overcrowding crisis is often regarded only in terms of the danger it represents to the staff, to the inmates, to maintaining the integrity of sentencing decisions, to general budget priorities, and to the possibility of federal

court intervention. The broad public interest would be well served by focusing instead on the singular potential presented by prison and jail overcrowding to forge criminal justice coordination and planning.

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## **GENERAL GOVERNMENT OFFICIALS' RESPONSIBILITY IN BUILDING PRISONS AND JAILS**

Once the decision is made to construct a prison or jail, general government elected officials are presented with a range of political issues, intergovernmental responsibilities, and nuts and bolts challenges to protect the public purse. Capital outlay authorization often must overcome broad political concerns. Facility design issues provide great potential for productive intergovernmental interaction. Considering long-term operating costs, challenging red tape, and managing construction are tests of government's ability to get the job done.

### Sources of Funding

Opposition to funding will be held to a minimum if general government officials have exercised their responsibility to hold criminal justice officials accountable for documenting current capacity, coordinated efforts for efficient system management, and analyzing the amount and nature of future need. Therefore, securing the money to build a jail or prison depends heavily on the decision processes described in the previous section. The voters—or the state funding authority in those states that assist localities—will expect answers to the same basic questions.

The actual authorization for the capital outlay depends on the source of funding. The most common sources of funding and the political dynamics of the authorization process are as follows:

- **General Tax Revenue**—Capital outlay authorization may be the final step of the decision process to approve the need for additional space. This is particularly true for prisons that are funded out of general tax revenues through the annual capital improvement budget of the state. Politics will be limited to the legislative/executive politics of setting budget priorities.
- **General Obligation Bonds**—The documentation of the need for correctional space may have to be put before the voters. If proper analysis has been done, most political questions will be resolved well enough to carry the issue at the polls.
- **State Funding of Local Jail Construction**—At least seven states (Virginia, California, Kentucky, Louisiana, Alaska, Georgia, and Ohio) provide funding for local jail construction.<sup>6</sup> In this instance, state-local relations becomes the political focus because the granting of state funds is seldom automatic and entails some degree of state

review of the local decision. Not surprisingly, the greater the state aid, the more substantive the review. In addition, most states cap the amount allocated to localities.

For example, if state funds come from a general obligation bond, the bond authorization will limit the amount of money available. Therefore, if more localities apply for funding than the money available, the amount they receive may be reduced, or there will be a limit on the number of localities receiving funds. In Ohio, for example, although state appropriations have provided for up to a 50 percent state match for county full-service jails, no facility has received more than 30 percent state funding for single-county or 42 percent for multi-jurisdictional jails.<sup>7</sup> As the California case study notes, only a limited number of localities receive funding from each state bond, although each does receive 100 percent of the cost of its jail.

In states that use general tax revenues, the total amount contributed to any one locality is capped, at least in part, to avoid localities being able to cash a blank check on the state treasury for their construction decisions. For example, in Virginia, while small projects will receive 50 percent state funds, no locality can receive more than \$1.2 million. It is notable, however, that in an effort to influence local decisions through its state funding, Virginia has removed this dollar cap for regional jail facilities, which are eligible to receive 50 percent funding no matter how costly the facility.

- **Private Financing**—Several private companies design, finance, build, as well as operate prison facilities. They have great interest in equity financing because, of all of their services, it offers the most secure opportunity for profit. The growing popularity of privatization has helped overcome concerns about the additional cost to the public of such private financing. Therefore, as inmate population growth has necessitated aggressive building programs, governments have turned to lease-backs and other private financing alternatives. For example, financing five prisons with general obligation bonds between 1985 and 1990 caused a severe drain on South Carolina's bonding capacity.<sup>8</sup> The sixth prison will use a design-build-finance private consortium that will lease the prison to the state.
- **Drug Forfeiture Funds**—The federal government has been able to use substantial funds from asset forfeitures for prison construction. In May 1990, the U.S. Attorney General reported that "drug traffickers [were] financing their own 'housing'—to the tune of \$376 million in new prison construction!"\* Recent action by many states to enact state laws parallel to federal forfeiture laws can present a similar potential to use forfeiture funds for state prison and jail construction. As the Attorney General's statement indicated, the pub-

lic politics of such financing are good, although resistance could come from other criminal justice agencies that have made use of the funds.

This summary of financing would not be complete without mention of one other element that influences the political receptivity to jail and prison construction: the major budget shock it represents. This is especially true for county jail construction. The average cost of the minimum and medium security prisons opened in 1989 was \$30,000 to \$50,000 per bed, and the average cost of additions to existing facilities was \$15,000 per bed.<sup>10</sup> Even the debt service on a 200-bed jail represents a significant budget increase, especially in counties having relatively small budgets that do not include school debt or public works projects other than those that are financed by revenue bonds. Therefore, even if the need is documented and there is reason to believe that voters will accept the need, there still may be strong political reluctance based simply on the magnitude of the cost.

### State Oversight of Local Jail Construction

Another reaction to the extraordinary local budget impact of constructing new jail space is to seek state funding. Increased state funding often recognizes the broad responsibility that the state has for criminal justice. Not only are many jail inmates accused of breaking a state law, but frequently the demands on state prison and probation services are directly affected by the lack of jail space. Arguments against the state assuming more responsibility to fund jail construction include limited state funds, traditional county responsibility, the use of jail terms for violating local ordinances, and limited state control over local construction decisions.

No matter what balance of state/local funding is decided on, state involvement in local jail construction decisions can take on an intergovernmental focus of its own. Three factors influence this focus. First, most county officials undertake a jail construction project only once in their careers, while many states are involved in almost continuous construction. Second, the design of a facility is crucial to its long-term operating costs and security. Third, the design of a penal facility should reflect the inmate management philosophy of its operator. There is general agreement that the intergovernmental resolution to balance these three factors should be: The state can and should help localities avoid costly operating errors, but the state assistance should be given with enough flexibility to accommodate local penal philosophies.

The California focus study represents an innovation in state assistance, which uses the need for new jail space to leverage increased local coordination. In contrast, many states limit their involvement to their regulatory authority. Such state regulatory requirements cover minimum standards, such as the number of square feet per inmate and the capacity of kitchen, out-of-cell, and lavatory facilities. These state standards usually reflect advisory standards developed by the American Public Health Association, the American Correctional Association, and the U.S. Department of Justice's Federal Standards for Prisons and Jails.

### Focus

## California's Role in Local Jail Planning and Finance

The California legislature worked with two successive governors to forward five statewide bond referendums between 1980 and 1988 totalling \$1.455 billion for construction of local jails. Between 1980 and 1984, state funds provided about 14,000 jail beds, while county funding paid for another 10,000. Three elements are central to the California program: local system planning, state prioritization, and 100 percent state funding.

State legislation requires that county criminal justice committees be set up to examine the role of the local jail. These committees are required to complete a thorough needs assessment and alternative analysis to support their need for new jail space. This process has fostered a better flow of information between the jail and the court. It has led to procedural changes in booking and pretrial detention. It has highlighted the need for significant technical improvements in population projections.

The state-required process also has forged support among the independent criminal justice authorities for alternative programs. For example, the Los Angeles County sheriff testified before the board of supervisors in support of the probation department's budget requests that: "These programs of the Probation Department [community work crews, intensive supervision, electronic surveillance, work furlough, and others] reflect the kind of cooperative spirit that must be shared by each and every component of our criminal justice system if we are to succeed in solving the custody crisis."

Local review frequently has led to significant changes in the proposed jail facility. Therefore, it determines over one-third of the decision for state funding under the following criteria developed by a state advisory

committee to the department of corrections, which administers the funds:

### *Degree of Need*

Crowding: 102 points

(with subtotals for present and future crowding as represented by numbers and percentages)

Facility Problems: 125 points

(including fire and life safety, 40 points; dilapidation, 50 points; and other problems)

### *County Efforts to Solve Jail Problems*

Alternatives to Incarceration: 67 points

(with subtotals for specific programs and for "system performance" measures such as incarceration rates)

Other Past Efforts: 50 points

(including past capital expenditures, compliance with minimum jail standards, quality of planning, and readiness to proceed.)

Finally, maximum state pressure for thorough local jail planning was achieved and justified by the state's decision to fund the top-ranking projects 100 percent, rather than giving something to everyone. While this decision initially created an outcry from all the unfunded counties that had applied, it produced new appreciation for the level of local analysis it would take to be funded by the state. Perhaps because state funding is neither token nor indiscriminate, four succeeding state bond referendums have had solid political backing.

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Source: U.S. Department of Justice, National Institute of Justice, "Construction Bulletin: From Arizona to South Carolina: Transfer of a Prison Design Model," *NIJ Reports*, Washington, DC, August 1990.

Additional general health, fire, and building code requirements may be enforced by other government authorities.

However, such regulatory oversight usually does not look at operating concerns, such as whether guards have unobstructed lines of sight or whether design changes can eliminate security posts for significant long-term savings. Some states and the federal government try to achieve such an operational design review by encouraging localities to use national inventories of recently constructed jail and prison facilities. For example, the Construction Information Exchange is a new National Institute of Justice (NIJ) program that has established a *National Directory of Corrections Construction*, which is a guide to over 250 jails and prisons built since 1978 with information on site adaptation, construction costs, staffing levels, and operational costs. The NIJ program also puts state prison and local jail of-

ficials in contact with colleagues who have experience with particular designs."

The federal government's altruism in assisting states and localities to use tested designs is mirrored by some states as a service to their localities. For states that contribute to local jail operating costs, however, there also is a direct self-interest in encouraging design efficiencies. If the state is not involved in the initial design, the potential for state-local funding conflicts is heightened.

For example, Virginia, which ranks highest in state funding of local jails,<sup>12</sup> pays the salaries of sheriff's deputies (guards). The number of guard positions for each local jail is determined by the state compensation board. This board looks at state needs as a whole and attempts to maintain equity across jurisdictions. On the other hand, the state DOC performs security audits as part of its jail certification program. DOC certification may require



more staff positions because of the layout of the jail than the compensation board has funded. Localities argue that the state should fund what the state requires. The state argues that the state should not have to fund staff increases dictated by inefficient local design decisions.

Whether operating costs are a significant intergovernmental concern or are funded by the same unit of government as construction, general government officials need to be aware that operating costs over the life of a jail or prison will be at least 10 times the construction costs.<sup>13</sup> Therefore, in both prison and jail construction, while the design configuration should remain in the hands of the sheriff or DOC, the government officials who will be funding the operational costs of the facility are exercising legitimate oversight to set policy for staffing ratios early in the design process (see Figure 5-1).

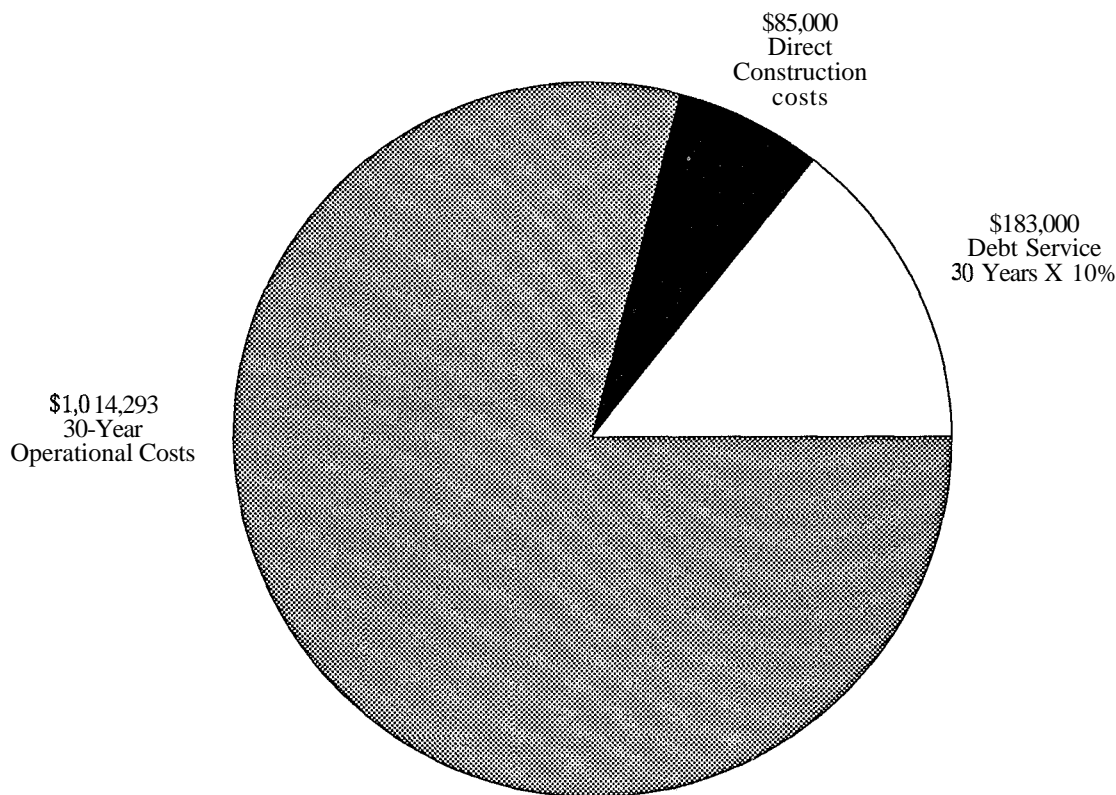
Performance-based standards are one way that a state can influence localities to make reasoned design decisions without dictating actual design. For example, the state can tie its jail construction funding to a guard/inmate staffing ratio that does not exceed a state-specified level. Such a requirement also would benefit local general government officials by surfacing staffing requirements well before the jail is opened. This can help avoid the situation that oc-

curred in a few California counties where new jails remained unopened because the counties could not afford the required staffing. One jail sat empty for over a year.<sup>14</sup>

Prototype designs, as mentioned in the focus study of Virginia's 10-year plan, is another approach being used increasingly to enhance reasoned decisions in both prison and jail construction. Repeat designs reduce surprises. This not only cuts construction costs; it allows for uniform operation, budget control, training, and security in large prison systems. Any structural or operational problems that do surface can be eliminated in the next adaptation. Standard items such as windows, fixtures, and roofing can be mass ordered. Contractors can bid on a prison with documents virtually identical to facilities that they have already built.

Use of prototype designs has taken on an expanded intergovernmental dimension with the recent increase in construction activity. The plans for a federal prison in Phoenix were adapted for use by South Carolina under NIJ's Construction Information Exchange. The South Carolina facility was opened on a "record schedule and budget." This intergovernmental cooperation also was able to resolve persistent legal questions, so that both the U.S. Bureau of Prisons and South Carolina have full rights to the plans and construction documents for future use.<sup>15</sup>

Figure 5-1  
The Million-Dollar Prison Cell: \$1,282,293



Source: National Council on Crime and Delinquency, 85 *Years of Justice Reform*, 1991

## Government Officials as Construction Managers

Along with financing and early consideration of operating costs, construction management represents another important area of general government involvement in prison and jail construction. The challenge in construction is for elected officials to strike the balance between stewardship of the public purse and government efficiency.

Many states and some localities have been under great pressure to expedite prison and jail construction. This may be due to court orders or simply the need to maintain reasonable operating conditions in the face of population surges. The need for expedited construction can involve general government officials in a number of policy decisions, for example:

- *EIS Review and Comment*—Expedited or concurrent review by environmental agencies may need to be used. This may be accomplished by executive order or it may require emergency legislation, as was enacted by Oregon in 1989.<sup>16</sup>
- *Emergency Budget Authorizations*—If population projections are suddenly exceeded, as they were in 1988 and 1989 in many jurisdictions, close cooperation may be required between the executive and the legislature to provide emergency space. Even to maintain a planned construction program, annual budget authorization procedures may need to be examined to assure that contracts can be let efficiently. Such a review of red tape may benefit capital outlay procedures in other government areas.
- *Construction Accountability*—The high level of prison construction in many states has led to an examination of who should be responsible for oversight: a general services agency with expertise gained from overseeing other government construction or the corrections department that will be directly affected if there are construction delays.
- *Policy Compromises*—Most experienced elected officials appreciate that compromise is not always bad. For example, although the use of inmate labor may have to be limited to speed construction, general government officials should expect savings from the increased use of repeat designs.

Some of these procedural decisions require action by a majority of the elected officials. Others—including the specific cost oversight considerations discussed below—involve only the top leadership, such as the governor's office, the county executive, or the budget committee.

The following factors are key to cost-control decisions and oversight by general government officials:

- *The later in the construction process that changes are made, the more costly.* The direct responsibility of general government leaders is to finalize the site decision as soon as possible. Their over-

sight responsibility is to assure that the prison or jail administrator is fully involved in the design phase before the start of construction and regards decisions as essentially final to avoid costly change orders.

- *Average cost estimates may be significantly altered* by site adaptation costs, availability of utilities, and the level of security the facility is designed to provide. Similarly, cost estimates for renovations require detailed knowledge of asbestos removal, health code requirements, and structural soundness. The direct responsibility of general government officials is to provide budget flexibility until these factors can be determined. Their oversight responsibility includes establishing a detailed long-range planning process that identifies these factors early.
- *Correctional facilities are complex.* To save short-term and long-term costs, the direct responsibility of general government leaders is the same as their oversight responsibility. They should require assurance that there is professional competence in construction management and an early, comprehensive value-engineering review. However, no single individual, especially elected officials, should be able to impose sole judgement.

## Summary

This entire overview of prison and jail construction can be summarized in the same way: no single individual should be able to impose sole judgement. The magnitude of the budget impact for construction and operating costs makes it imperative that general government officials become involved. However, productive involvement depends on respecting the balance that needs to be struck between professional experience and political reality. Correctional officials have the responsibility to present well thought-out options and consequences of construction decisions. General government officials have the responsibility to address budget and environmental concerns by using that information or calling for more.

Timely completion depends on the same information flow. Correctional administrators can present consequences and they can expedite their own decision processes. Ultimately, however, it is general government leaders who will establish the priority for timely completion by initiating the funding decision and, as necessary, conveying a sense of urgency to other agencies involved in construction.

Finally, intergovernmental assistance can be very important in making informed decisions. Information banks, performance standards, and requirements for criminal justice impact analysis need not impinge on local integrity. Instead, the earlier that general government officials are aware of these initiatives, the more they should appreciate that they represent crucial guidance in a field where most people have little experience.

## **CONSEQUENCES OF INACTION: COURT INTERVENTION**

For many governments under court order for prison or jail overcrowding, there is only one intergovernmental issue: federal court intervention. **As** in most heated disputes, truth lies on both sides. Many states and localities would not have undertaken adequate capacity expansion without court action or a threat of suit. **At** the same time, some court orders have gone beyond prevailing practices and have intruded into administrative and legislative responsibilities.

Some states and localities have been reluctant to recognize the need to expand their correctional facilities. DOC or sheriff protestations of capacity restraints are brushed aside by general government officials: "You told us that last year and the year before and the year before that. Yet, you've always found room and nothing has exploded." Unsophisticated population projection models have been inadequate and/or easily manipulated by general government officials who resist surfacing the need for construction so they can divert money to more popular programs. Even complex statistical projections have failed when there is no subjective review by and coordination with other criminal justice agency initiatives.

Beyond such conscious avoidance, as this chapter already has established, even well-intentioned states and localities will find it hard to avoid overcrowding. The complexity of prison and jail construction makes a timely response to explosive population increases extremely difficult. Even expedited prototype construction on an existing site seldom can be completed in less than two years from budget authorization to occupancy. The process for most facilities takes more than five years if it begins with a

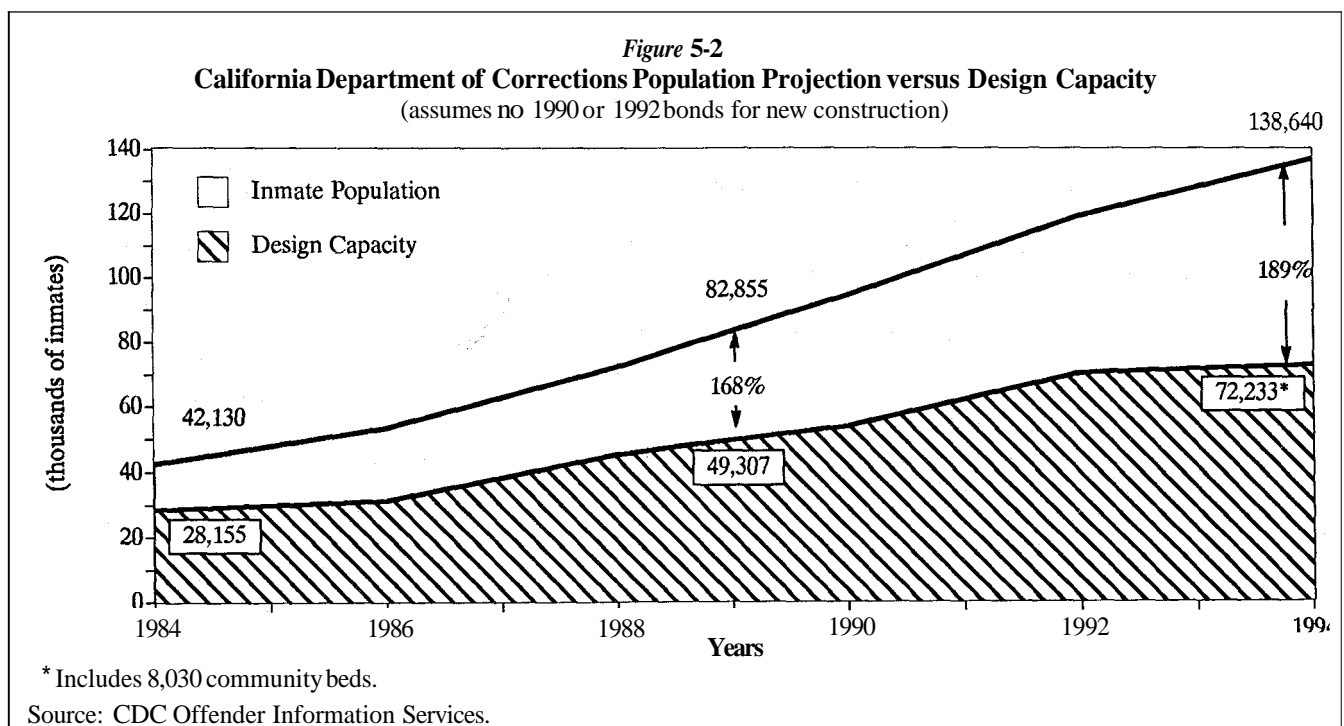
comprehensive system analysis of alternatives or it involves siting controversies (discussed in the next chapter).

Furthermore, many states and localities must overcome both long-term neglect and explosive population increases. For example, until the 1980s, no new prisons or state youth institutions had been built in California for 20 years. Despite an aggressive building program design that will increase the system's capacity from 28,155 inmates in 1984 to 72,233 in 1994, the California system will be more overcrowded in 1994 than it is today (see Figure 5-2).<sup>17</sup>

Given the lack of political reward for spending large sums on prison or jail construction and the rapid increases in the number of persons incarcerated since the mid-1970s, it is not very surprising that 33 states are under federal court order for overcrowding.<sup>18</sup> In addition, 25 percent of the 508 jurisdictions that have large jails (more than 100 inmates), and consequently hold approximately 81 percent of all jail inmates in the country, are under court order to limit population in at least one jail.<sup>19</sup>

These federal court orders have been a significant source of intergovernmental tension. The tension has its roots in the constitutional protection of the rights of the individual versus the will of the majority. Therefore, it is a balance of power issue between judicial interpretation of cruel and unusual punishment and the executive and legislative reflection of the electorate's priorities. However, given that the most far-reaching decisions have been entered in the federal courts, in practice, it also has been framed as an intergovernmental issue of federal standards of humane prison and jail operation versus state and local government penal philosophies.

The remainder of this chapter reviews specific concerns that have surfaced in trying to achieve an acceptable interbranch and intergovernmental balance. A brief history of the evolution of court interventions sets the stage.



This is followed by a discussion of the type of court oversight that has occurred and its ramifications, with particular emphasis on accreditation, the role of court masters, and the duration of court orders. The ramifications of this judicial oversight stress the involvement of elected general government officials and the effect of population caps. Finally, prospects for change are discussed, including indications of reduced federal court involvement and the role of individual state and federal judges.

### **Evolution of Court Response to Conditions of Confinement**

Application of the U.S. Bill of Rights to protect offenders is a relatively new phenomenon. Even more recent is the notion that federal courts should intercede in state correctional systems and remedy perceived constitutional violations affecting inmates. Before the 1960s, the judicial role in corrections was limited to the interpretation of statutes and review of some administrative actions. By the mid-1960s, the federal judicial posture regarding the internal management of prisons had begun to shift to active involvement.

This increased federal court activity was not limited to, nor was it exclusively spurred by, deplorable conditions in state and local corrections systems. It was part of a broad philosophical focus on federal oversight, which included mental health treatment, welfare administration, education finance, and school desegregation. All of these policy areas now have judicially determined criteria that state officials must follow in order to achieve compliance with federal court orders.

In the field of corrections, federal court decisions have been based largely on the Eighth Amendment's protection against cruel and unusual punishment, the Fourteenth Amendment's due process and equal protection guarantees, and the federal *Civil Rights Act of 1871*. These federal provisions have not been applied just to remedy overcrowding. Whereas 33 states are under court order for conditions of confinement that include overcrowding, eight more states have been successfully sued for unconstitutional administrative practices alone, some of which include violations of First Amendment rights of freedom of religion and speech. Such judicial oversight is almost without precedent among Western nations where, in lieu of constitutional litigation, the tendency has been to rely on special inspectorates and procurator offices, supervisory judges and magistrates designated for this particular purpose, and visiting commissions and committees.<sup>20</sup>

The swing toward active court intervention has been seen as necessary but sometimes excessive. The following comments of the U.S. Supreme Court in *Bell v. Wolfish* (1979) express the dichotomy well and highlight the fundamental intergovernmental balance at issue:

There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable

conditions and draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison system. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but to what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confined to officials outside of the Judicial Branch of Government.<sup>21</sup>

In 1991, the U.S. Supreme Court signaled a return to less intervention in a 5-to-4 opinion in *Wilson v. Seiter*. The majority opinion recognized that states often have limited resources to deal with tough problems and found that prisoners must prove more than the mere existence of poor prison conditions to establish cruel and unusual punishment. Justice Antonin Scalia observed that use of the word "punishment" in the Eighth Amendment implies some degree of intent. Writing for the majority, he also maintained that claims of unconstitutional prison conditions have to be analyzed one by one, rather than on the basis of whether the "overall conditions" are so bad as to violate the Constitution. The dissent noted that the standard "likely will prove impossible to apply in many cases. Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time."<sup>22</sup>

### **The Nature of Judicial Oversight**

Federal court action has been both pervasive and detailed. As of January 1990, only five states had never been involved in some type of federal litigation challenging overcrowding and/or conditions in their prisons, according to the American Civil Liberties Union's (ACLU) National Prison Project. As previously noted, 41 states (plus the District of Columbia, Puerto Rico, and the Virgin Islands) are currently under court order or consent decree to reduce population levels and/or improve the conditions of confinement in either their entire correctional system or a major facility.<sup>23</sup> As noted, approximately, 20 percent of all the nation's jail inmates are in facilities that are under court order.

For some, the pervasiveness of such federal court involvement in itself raises serious intergovernmental concern. Others may accept the need for court protection of imprisoned individuals, given their status as political pariahs, but they question the fact that individual judges can dictate administrative details. Not only is this seen as usurpation of power, but solutions are sometimes marred from too limited a focus. Judges are seen as being concerned only about the inmate rights in the case before them and not about broader issues of public safety, institutional security, system impacts, or general government budget limitations. Examples of court ordered remedies include:

- In Philadelphia, a 1988 federal court order stopped the jailing of defendants who are arrested on bench warrants because they fail to make scheduled court appearances. Since that order went into effect, bench warrants have increased from 20,000 to 34,000. According to the former staff director of a criminal justice task force appointed by Pennsylvania's chief justice, "Why on God's earth would anyone show up in court and face substantial risk of conviction and lengthy (often mandatory) prison sentences if he can remain free with impunity?"<sup>24</sup>
- In October 1985, a federal court ordered Tennessee not to accept any felons into the state system unless there was space available. That order solved overcrowding in state facilities, but the inmates did not disappear. Almost immediately, the number of felons being held in local jails began to increase.<sup>25</sup> In 1989, 25.7 percent of Tennessee's state prisoners were being held in local jails; in 1990, 18 percent were reported backed up.<sup>26</sup>
- Following the court handing down a 248-page order in the Texas case of *Ruiz v. Estelle* (1980), there were twice as many riots in the Texas prison system in *six* months as in the preceding eight years; there were 13 escape attempts, compared to only two the previous year; and four inmates were killed by other prisoners, the greatest number in nearly a decade. According to observers, inmates had heightened expectations and officers were less certain about the enforcement of some rules and how they were to *carry* out their duties."
- A study released in 1983 reported that "the costs of implementing guaranteed rights [from court orders] ranged from as little as \$5 million for some county governments to as much as \$1 billion or more for some state governments."<sup>28</sup> These costs have escalated in the ensuing decade. In a more recent example, the Georgia Association of Counties reported that over \$240 million was appropriated for some 13,000 prison and probation beds during 1989 and 1990 to extricate the state from the threat of a lawsuit that would have resulted in federal takeover of the entire Georgia DOC.<sup>29</sup>

These examples reflect the major administrative and political concerns that have arisen out of court actions: prisoner release, administrative interference, and cost.

Several steps typically precede such court directives. First, a suit is filed. Although it must be filed in the name of a prisoner or class of prisoners affected by the alleged unconstitutional conditions, virtually all major suits have been spurred by outside legal counsel, such as ACLU. There then ensues a period of negotiation. If the negotiation does not result in a consent decree, the case will go before a judge (or, possibly, a panel of judges if a state or federal law is being challenged as unconstitutional).

The period of negotiation may stretch for years. During that time, the court will become familiar with the details of the situation, and the judge will be better able to determine whether the defendants are acting in good faith. For example, after years of negotiation with various Cook County (Chicago) officials, the judge ordered designated criminal justice officials to agree on a plan to relieve jail overcrowding, including officials such as the chief probation officer and the clerk of court, who normally were not included in the past. If any of the officials refused to participate, they could be held in contempt.

Equally important, the criminal justice officials view negotiating a consent decree as a way to protect their interests. The alternative is a court order, developed as "the judge's isolated response to facts and issues sifted through the adversary process."<sup>30</sup> However, general government elected officials are as apt to be critical of consent decrees as they are of court orders based on a finding of guilt because they both represent a compromise between correctional administrators and inmate representatives. Therefore, the starting point is typically well beyond what has been supported by the legislature or the executive.

Specific court directives also may be issued from the time the court agrees to hear the case if public officials or administrators are found to be not acting to relieve the conditions. These additional requirements may include restraining orders to halt an activity or contempt of court rulings. Such judicial actions are often the focus of the most intense separation-of-powers disputes, and descriptions of such disputes have been painted in polar extremes: a conscientious judge frustrated with recalcitrant state/local officials versus resource-strapped state/local officials beleaguered by arbitrary rulings.

Three aspects fuel this conflict: the elevated role of amici litigants, determination that "the totality of conditions" is unconstitutional, and the use of special masters. Unlike typical lawsuits, amici curiae or "friends of the court" participate fully with the lawyer who represents the inmate plaintiff(s). These public interest group lawyers, therefore, will meet with the judge assigned to the case during early negotiations. This *can* result in their using their broad awareness of penal suits to expand the inmate's case to issues in which they perceive the judge has special interest.<sup>31</sup> What may start as a narrowly focused inmate complaint of inadequate medical care, as in *Newman v. Alabama* (1972), *can* become a class action for major penal reform.

Rulings and consent decrees based on the totality of conditions may encompass a long list of items, many of

which would not be found unconstitutional in another setting. Supreme Court decisions in 1991 and 1992, which will be discussed later, have called into question the practice of continuing a court order or consent decree until every condition is met.

The use of special masters also can broaden the issues under dispute, and it can significantly increase the detail of the court's intervention. Of the 41 states under court order or consent decree, 21 have special masters, monitors, or mediators appointed by the judge.<sup>32</sup> In most cases, the special master has the sole task of overseeing compliance with judicial orders. This allows the judge to be very specific in oversight and is usually the origin of complaints that the judge is running a jail or prison system.

Examples of the kinds of intrusion that have occurred include critiquing the condition of the prison library's law books, issuing pencils to inmates in solitary confinement, determining which inmates would be removed to community facilities, and having unlimited access for inmate interviews. Although Federal Rule of Civil Procedure 53 provides for the appointment of special masters only when "some exceptional condition requires it," the determination of "exceptional" is up to the judge. One judge may appoint a special master only "to observe and report their observations to the court"; another may give the special master the "authority to supervise, coordinate, and approve all steps taken by the defendants to effectuate compliance."<sup>33</sup> Whatever the initial authority given the special master, it is enhanced by (1) limited responsibilities compared to prison administrators, (2) the fact that the master may hold the position longer than individual prison officials, and (3) the expertise of the master in the eyes of the judge.

There has been a significant number of U.S. Supreme Court rulings that have urged judicial restraint to avoid overstepping the judge's proper role in the balance of powers:

In 1972—"Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons' including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations."<sup>34</sup>

In 1974—"We should not be too ready to exercise oversight and put aside the judgment of prison administrators. . . . The operation of a correctional institution is at best an extraordinarily difficult undertaking. . . . [Prison officials must have] necessary discretion without being subject to unduly crippling constitutional impediment. . . ."

In 1979—"Inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the constitution or, in the case of a federal prison, a statute"<sup>36</sup>

In 1981—"A prison's internal security is peculiarly a matter normally left to the discretion of prison administrators"<sup>37</sup>

In 1983—"Prison officials have broad administrative and discretionary authority over the institutions they manage"<sup>38</sup>

From the Court of Appeals for the Second Circuit:

In 1982—"The duty to protect inmates' constitutional rights, however, does not confer the power to manage prisons, for which courts are ill-equipped, or the capacity to second-guess prison administrators. . . . Our task is limited to enforcing constitutional standards and does not embrace superintending prison administration."<sup>39</sup>

These opinions are cited to demonstrate the length of time that the U.S. Supreme Court has been making the same point about the separation of powers. From the perspective of state and local officials interviewed for this study, little has changed.

The duration of court orders is a final indication of the nature of judicial oversight. In most cases, compliance is a long and arduous journey that requires years of combined effort by general government and criminal justice officials. For example, inmate David Ruiz first filed suit against the Texas Department of Corrections Prison Director Jim Estelle in 1972. After years of federal and state investigation and court action, the case came to trial in 1978. The trial lasted a year. In 1980, U.S. District Judge William Wayne Justice placed the entire prison system under court order for overcrowding and unconstitutional conditions. During those 10 years under federal court order, contempt orders were entered and vacated, a special master was appointed, and additional litigation was initiated because of the impact of changes in the state prison system on local jails. Judge Justice is expected to approve a final settlement between Texas officials and inmates in late 1992, 20 years after the suit was filed. It should be noted that Texas prison officials, the governor, and legislature bitterly contested federal intervention in the early stages.

Texas is not an aberrant case. Numerous other states have had all or parts of their correctional system under court order for over a decade. The length of such suits have four origins:

- 1 The detail and breadth of some court orders and consent decrees make compliance seem like the labors of Hercules.
- 1 Following precedent set in civil rights appeals, judges need assurance not only that the unconstitutional practices have been discontinued but that there is no reasonable expectation that they will recur.<sup>40</sup>
- 1 In many jurisdictions, increased law enforcement, longer sentences, and the war on drugs have overwhelmed much if not all of the progress made in the correctional system to remedy unconstitutional crowding and the program limitations such crowding may produce.

State or local officials may be slow to respond. For example, in *Rufo v. Inmates of Suffolk County Jail*,

the Suffolk County, Massachusetts, cases that were decided by the U.S. Supreme Court in 1992, the District Court suit was first filed in 1971. A new jail was supposed to have been completed by 1983, but construction was not started until 1987 and the facility was not opened until 1990.<sup>41</sup>

## Ramifications of Court Suits

Threats of court suits and court orders have had numerous consequences. Correctional space and program needs have been addressed. Elected officials have become more directly concerned. Planning has been enhanced. Coordination has been forged. Administrative changes have occurred. Many of these changes have come at substantial cost, however, including early release of inmates and serious tension over intergovernmental control.

### System Improvements at the Price of Budget Control

Overall, perhaps the greatest effect of suits over conditions of confinement is the precedent they set. Rulings—such as a minimum of 63 square feet of living space for a cell holding two people—established standards used by most jurisdictions to try to avoid a successful suit. Consequently, efforts to avoid suit, as much as court orders, have resulted in a significant growth in spending to construct prisons and jails. The proportion of correctional budgets consumed by construction grew from 7.7 percent in 1977 to 11.2 percent in 1985.<sup>42</sup> This increase is all the more notable given that operating costs also were escalating rapidly because of the growing number of prisoners.

The opportunity for program improvements presented to correctional officials by court intervention has been another avenue of change. Often, a judge has shown great sympathy to correctional needs that, routinely, have been rejected in legislative and executive budget actions. The opportunity this sympathy represents is magnified by the fact that, under Section 1983 of the *Civil Rights Act of 1971*, suits are usually filed against the DOC director or the sheriff. Suits rarely are filed against the state or the governor. Even if the correctional head wanted to go only as far as general government elected officials had supported in the past, such loyalty could come at the expense of the correctional administrator's own standing in the judge's eyes. It is the administrator who would appear insensitive, uncooperative, or incompetent, perhaps resulting in even harsher court orders to "get his attention."

Another significant avenue for correctional system improvements that has arisen out of court suits is the development of national accreditation programs. Established in the late 1970s, the American Correctional Association's Commission on Accreditation for Corrections became the first major accreditation system dealing exclusively with public agencies.<sup>43</sup> Accreditation has become the best insurance policy against suit, not only for conditions of confinement, but also for liability in cases of suicide or other injuries. Increasingly, judges are using ACA standards as their measure of compliance.

Although the judge's sympathy is driven by consideration of what a solid correctional program should be, state

and local officials have been quick to point out that the judge has no responsibility for funding. Unlike executives and the legislature, federal judges (who are not elected) need to give no consideration to cutting other programs, raising taxes, or losing their position.

Therefore, court suits frequently have resulted in general government elected officials realizing that they must become involved directly in correctional issues. Whereas in the past there simply was no political gain in being involved, a court suit can make it a loss not to be. Generally, this recognition has not come until the suit is well under way and a consent decree between the judge and the correctional administrator is entered into.

One governor, who inherited a state whose entire prison system was under court order, had previously served as speaker of the House in his state legislature. He described the typical situation around the country in this way:

There is no romance in corrections. The romance is in education and all those kinds of things. [Governors] kept pushing it back and pushing it back hoping it would go away. And, if you look at governors, for most of them it did go away, because they went out of office before they really had to deal with it. The point is that the only continuity that you have in state government is in the legislature.<sup>44</sup>

He strongly advocated state legislation requiring that the legislative leadership agree to any consent decree before it is entered into.

Legislators and executives who have become involved in trying to avoid a court suit or getting out from under a court suit often have gained new appreciation for planning and coordination, as they have seen their best efforts overwhelmed by increased law enforcement and longer sentences. Within the legislature, they become strong advocates of fiscal impact statements for sentencing legislation. Some governors have used their position to address the lack of system coordination by creating commissions that broadly represent all criminal justice interests.

### Population Caps

Too often, however, establishing an effective planning and projection capability or getting the cooperation of all criminal justice elements does not produce results fast enough. At least in the interim, until new facilities can be built or system changes made, a population cap is often imposed on the jail or prison system's population. Sometimes, local officials have exercised control over how the cap is attained; in other instances, a judge has imposed the way in which it will be accomplished.

Population caps are achieved through a variety of measures, but they are basically either a back door to release current inmates or a front-door refusal to admit new ones. The degree of overcrowding usually dictates whether the measures are programmatically sound or represent an ultimate spilling over of the correctional crisis back into the streets.

For example, prisoners have been able to earn "good time" routinely in many states and localities for years, and it is not regarded as early release but simply a tool to modify inmate behavior. However, jurisdictions that begin using "good time" credits in the midst of an overcrowding

crisis may need to answer more public safety questions. While eliminating money bail for petty offenders is a front-end means to reduce the number of jail detainees, to many people it is a desirable policy change.

Other policy changes to meet population caps have not been justified as easily. First, early release compromises the integrity of sentencing. It has been reported in Los Angeles, which released more than 300,000 jail inmates early between May 1988 and May 1990, that convicted criminals are refusing probation sentences because they know they will be free of supervision earlier by being released from jail.<sup>45</sup> The same phenomenon was reported in a 1989 Harris County study of 900 felony cases sentenced directly to prison: “[E]vidence confirmed a growing sense among local criminal justice officials that offenders were beginning to view probation as the more heavy sanction when compared with the rapid turn around presently being experienced in the Texas prison system.”<sup>46</sup>

Second, refusal to accept inmates often creates intergovernmental conflicts. A county sheriff’s refusal to accept minor arrestees may mean that the city cannot get drunks off the streets; other arrestees may crowd the municipal lockup over the weekend. Municipal law enforcement is frustrated further when waiting lists are established by some sheriffs for those convicted to serve time in jail. The Ohio Association of Counties estimated that, in November 1988, 4,000 convicted offenders in over one-third of the counties were waiting to serve their jail sentences.<sup>47</sup>

The county/state conflict over state DOC refusal to take state sentenced felons backed up in local jails was discussed in the previous chapter. As noted by the National Association of Counties, “on their list of most hated mandates, county officials have always ranked the dumping of state prisoners near the top.”<sup>48</sup> However, the number of state prisoners held by jails did drop during 1990. There were nearly 4,100 or 17 percent fewer state prisoners reported backed up in local jails than in the previous year, which had seen a record number.<sup>49</sup> This relief was due largely to aggressive prison construction programs coming on-line in selected states. It is too soon to tell whether this trend will continue, or whether new capacity will be overtaken by even more aggressive sentencing and law enforcement.

Local relief also has not occurred across the board. The impact on some jails is greater than ever from state prisoners awaiting transfer; others will see the relief they experience in one year disappear the next. The very nature of constructing facilities means that new prison beds do not come on-line in sustained increments. Often, the degree of intergovernmental tension—indeed, whether or not local suits are filed against the state—depends on whether the localities trust ongoing state efforts to increase prison capacity, rather than the actual number of state inmates backed up in local jails. Texas’ governor recently focused on that trust in indicating that she would not sign a \$1.6 billion, 28,500-bed, prison reform package financed with new taxes, unless the 13 counties pursuing lawsuits against the state dropped those suits.<sup>50</sup>

Finally, it is difficult to answer the public safety concerns raised by both early release and refusal to admit new

### Focus

## The Intergovernmental Impact of System Imbalance

By March 1989, the number of state inmates backlogged in Georgia’s county jails had reached 4,000. In response to this crisis, the governor implemented an accelerated release program for low-level, nonviolent offenders, along with additional fast-track, emergency construction of 1,600 beds. The intent was to reduce the backlog to 1,000 by the end of the year.

However, increased arrests, prosecution, and sentencing continued to outstrip the accelerated release policy. After one year, the number of state inmates backed up in local jails was reduced by only 600. This minor reduction occurred despite the fact that during the year over 3,100 beds were added to the state prison system and an average of 1,400 offenders per month were released through the accelerated release program.

offenders. For example, anyone with bail set at less than \$5,000 is automatically released in Los Angeles.<sup>51</sup> However, a similar federal court order for Philadelphia’s jail produced a strong reaction from the prosecutor, who refused to cooperate. An even more dramatic stance was taken by a Massachusetts sheriff, whose jail had been under a court-ordered population cap since the mid-1980s. When the alternative sentencing programs he had initiated and selective release still left him with 30 sentenced people on the street awaiting admission and no more inmates eligible for early release, he took over a local armory by using a 17th century provision giving the sheriff broad powers to keep the peace. This public demonstration got local government officials to approve construction of a new jail.

Some states have tried to address public safety concerns and reduce court intervention through emergency release legislation. At least 15 states have emergency release programs to relieve prison overcrowding; 13 are provided by statute.<sup>52</sup> Most of the early release provisions require a declaration of emergency by the governor, followed by across-the-board sentence reductions by enough days so that the number of inmates released brings the population below the cap. Most release programs exclude at least some categories of violent and sex crimes.

It is not uncommon to spread the burden for the decision to release inmates. Ohio enacted a law in 1987 that requires legislative review of DOC’s request, although the ultimate authority to accept or reject the legislature’s or DOC’s recommendation resides with the governor.<sup>53</sup> Borrowing on that precedent, the 1990 Ohio Governor’s Committee on Prison and Jail Crowding recommended authorizing a formal jail population committee in each county to establish an emergency admission and release plan. According to the committee, “The recommendation would allow various actors in the local criminal justice system to offer input and share political responsibility.”<sup>54</sup> In fact, it is particularly appropriate to increase local involvement be-



cause court, prosecutor, and public defender offices will be affected by how cases are scheduled.

Emergency release underscores the fact that population caps simply delay—but do not eliminate—the need for permanent policy changes and investments in the criminal justice system that support those policies. Programs may start out excluding public safety risks, such as violent offenders and sex offenders, but since the remainder are also the target of alternative sanctions, systems have run out of eligible inmates and have had no choice but to begin releasing increasingly dangerous inmates.

### Future Prospects for Conditions of Confinement Suits

Several movements have the potential to reduce the impact of federal court suits regarding conditions of confinement: Supreme Court rulings, administrative exhaustion, and changes in judicial philosophy.

In *Wilson v. Seiter* (1991), the U.S. Supreme Court ruled that prisoners must prove deliberate indifference on the part of prison officials in cruel and unusual punishment cases. This decision shifts the focus from intent to the conditions themselves and should make it easier for state and local officials to achieve compliance.

In *Rufo v. Suffolk* (1992), the Supreme Court further signaled its desire to reduce federal court involvement by overruling the position taken by a lower court that it could not modify a consent decree. The 6-to-2 opinion held that a court cannot hold local officials to every item agreed to under a consent decree simply because it was agreed to. If the local government can establish unanticipated changes in circumstances—including population growth, extraordinary compliance costs, or public safety concerns raised by population caps—then the court must justify, on constitutional grounds, why specific conditions of the original consent decree must be enforced.<sup>55</sup> In this case, the issue was single-celling of pretrial detainees, on which the Supreme Court did not rule.

These two decisions also contained significant language regarding another major source of intergovernmental conflict: the executive and legislative obligation to fund improvements. In *Rufo*, Justice Sandra Day O'Connor, concurring, observed that:

State and local governments are responsible for providing a wide range of services. Public officials often operate within difficult fiscal constraints; every dollar spent for one purpose is a dollar that cannot be spent for something else. While the lack of resources can never excuse a failure to obey constitutional requirements, it can provide a basis for concluding that continued compliance with a decree obligation is no longer “equitable,” if, for instance, the obligation turns out to be significantly more expensive than anyone anticipated.<sup>56</sup>

In past rulings, financial impediments were disregarded as irrelevant to the determination of rights, the violation of rights, or the design of relief in the event of violations. For example, in *Gates v. Collier* (1975), the Court specifically

held that “a shortage of funds is not a justification for continuing to deny citizens their constitutional rights.”

Significant recognition also was given to local government responsibility in our federal system. In *Rufo*, the Court clearly stipulated that while “no deference is involved” in local or state governments having to establish that changed conditions warrant modification of the decree:

[O]nce a court has determined that a modification is warranted, we think the principles of federalism and simple common sense require the court to give significant weight to the views of the local government officials who must implement any modification. . . . [T]he allocation of powers within our federal system. . . require that the district court defer to local government administrators, who have the “primary responsibility of elucidating, assessing, and solving” the problems of institutional reform. . . . [A] court should surely keep the public interest in mind in ruling on a request to modify based on a change in conditions making it substantially more onerous to abide by the decree?

If the court philosophy continues to shift away from *Gates*, a major separation-of-powers issue will be removed. It has been the strongly held view of general government elected officials that raising monies and allocating funds for programs and policies is inherently a legislative and executive function. Judicial edicts are seen as obstructing the expression of citizen policy preferences through their elected representatives.

Finally, the *Rufo v. Suffolk* and *Wilson v. Seiter* opinions both question the concept of “totality of conditions” in defining unconstitutionally cruel and unusual punishment. In *Wilson*, Justice Antonin Scalia observed, “Nothing so amorphous as ‘overall conditions’ can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.” The *Rufo* opinion contains the observation that “state and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation.” Therefore, if conditions change, the court must be able to justify any individual requirement as constitutionally mandated.

Another indication of a shift away from federal court involvement is found in the Federal Courts Study Committee recommendations that administrative remedies should be exhausted before a court agrees to hear a civil rights case filed by a prisoner. The committee emphasized that most claims can and should be handled internally.

The Federal Courts Study Committee noted, however, that only one-quarter of the states have obtained certification from the U.S. attorney general for their prison remedy procedures. Most states have not even tried. Therefore, the committee recommended that the certification process be substantially modified to emphasize the exhaustion of administrative remedies and reduce the 20,000 civil rights cases that are filed by prisoners in federal courts every year.<sup>58</sup> Given that only 1 percent of these cases were of the class-action type,” requiring administrative exhaustion

could have a significant effect on federal court involvement in minor state and local penal management decisions.

Finally, the experience and philosophy of individual judges also have significant bearing on court intervention. Massive conditions of confinement suits, of the kind that brought states like Texas under federal court supervision, appear to be a thing of the past.<sup>60</sup> This change is not only philosophical, it is a change from micro-managing from the bench that also was reflected in the monumental school desegregation suits of the past. Changes in judicial attitude also reflect changed circumstances. The 1970s opened with large-scale prison riots, notably at Attica in New York. Judges viewed the facts before them with the belief that riots and loss of life would be the ultimate results of unchanged conditions. Today, even though overcrowding is worse than it was at the time of Attica, the degree of upheaval is less — perhaps due in some measure to the changes that court orders have helped bring about. In fact, a study of more than 180,000 beds at 694 state prisons showed little evidence that crowding levels were directly related to increased homicide rates, assault, or major disorders. Subsequent studies have confirmed these findings.<sup>61</sup>

The nature of the judiciary is such, however, that judges always may make an exception to the trends noted. This potential is particularly significant when considering the increased use of state constitutional provisions as the basis of suits. As noted in the discussion in Chapter 2 of the congressional debate over reducing habeas corpus petitions to federal courts for review of criminal convictions, if federal judges pull back, state constitutional provisions encompass at least equal protections. State judges, therefore, can fill the void.

If current indications of a reduced federal court oversight role do materialize, the principal result will be that the intergovernmental debate will be refocused on state judicial oversight with less federal intervention. It will become more clearly a separation-of-powers debate rather than an intergovernmental issue. However, a shift in federal court philosophy does not necessarily mean that general government elected officials will not face the potential of a judge, albeit a state judge, imposing the same type of requirements discussed in this section. There will be one significant difference: most state judges are elected and, therefore, may have to defend their decisions within the public's priorities.

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## SUMMARY

Construction decisions are complex. Although the officials who will run the prison or jail need to make the final design decisions, general government officials have, at least, the financial responsibility to exercise significant oversight. This requires particular attention to the validity of population projections, a disciplined contracting process to avoid costly delays and change orders, justifications of security levels to control construction costs, and the ef-

fects of design decisions on lifetime operating costs. Significant opportunities exist for intergovernmental efforts to assist jurisdictions in benefiting from the experiences of others.

The need for additional prison and jail space is the end product of the management and philosophy of each element of the criminal justice system and of decisions made by general government elected officials regarding sentencing laws and program alternatives. Ignoring the need for space, therefore, compromises the integrity of the actions of the police, prosecutor, defender, judge, probation and parole officers, as well as of the penal system itself in carrying out its correctional mission.

However, because prison and jail overcrowding is influenced by so many factors, the capital outlay decision can operate as the focal point for comprehensive criminal justice coordination and planning. Such a review may have evolved among criminal justice officials themselves as they responded to the mounting problems. To the degree that it has not, as custodians of the public purse, general government officials have the opportunity and authority to require comprehensive involvement of all criminal justice agencies.

The least desirable alternative is for a federal judge to step in to fill a void created by state or local inaction. Thirty-three states and 25 percent of the jurisdictions with jails holding more than 100 inmates are under a federal court order for overcrowding. Many of these court orders have long histories and have created significant intergovernmental tension over accountability for funding and management in responding to the public's priorities. Some general government elected officials who have had to fund court orders entered against corrections administrators are moving to assure that their approval will be required before any future agreements are entered into.

Recent U.S. Supreme Court decisions indicate that the federal courts will reduce their level of response to overcrowding and conditions-of-confinement suits. If, consequently, such cases are taken before state court judges under state constitutional rules, what has appeared to be a federal/state (local) government conflict will become more clearly focused as the interbranch conflict it has always been. It is also possible that the state judicial response may differ from some of the past all-encompassing federal bench remedies because, unlike federal judges, state court judges are elected or have not been appointed for life.

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- <sup>22</sup>Justice Antonin Scalia, in Ruth Marcus, "Court Raises Burden in Prison Lawsuits," *Washington Post*, June 17, 1991.
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## 6 – REPRESENTING AND PROTECTING THE PUBLIC’S INTEREST

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any general government elected officials are involved only indirectly in setting criminal penalties, alternative sanctions, or building new space. However, when a constituent gets involved with the criminal justice system, an elected official’s level of involvement may intensify many times over.

This chapter discusses three elements of the criminal justice system: policing, victim/witness programs, and siting correctional facilities and programs in the community.

The common thread among them is that they are points of direct contact between the criminal justice system and law-abiding citizens. As representatives of these citizens, general government elected officials may find that they have a key role to play in assuring that the contact furthers the public’s perception, at least, of justice.

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### *OVERSIGHT OF POLICE AND SHERIFFS’ DEPARTMENTS*

There are more than 15,000 police departments and sheriff’s offices with policing responsibility in the United States. This is five times the number of prosecutor’s offices, criminal courts, or jails, and symbolizes an intent to have policing in close contact with citizens to support community values. Although some of these departments may be so small as to warrant significant intergovernmental cooperative efforts—if not merger—these concerns are budgetary and are taken up in the next chapter.

This section considers the primary programmatic concern: how general government policies can ensure that police and sheriffs’ departments, no matter what their size, are adequately focused on the goal of increasing public safety. Two broad areas are crucial to achieving this goal: personnel and the philosophy of community relations.

#### **Personnel**

It has been common to increase the number of law enforcement officers without commensurately increasing

the other elements of the criminal justice system needed to handle more arrests. This stems from the intergovernmental split of funding responsibilities and from public pressure. It also can lead to inefficiencies, lack of trust, and intergovernmental discord.

#### **The Drive to Hire More Officers**

Over half the funds spent on police protection come from municipal budgets. The remaining 45 percent is split almost equally between county, state, and federal budgets. Of equal significance is the fact that, whereas county, state, and federal budgets must absorb fairly equal impacts from the need to support court-related and correctional functions as well as police, cities have minor involvement in meeting total criminal justice needs.<sup>1</sup> Consequently, the majority of municipal government decisions to add more police are made in isolation, without considering the impact on other criminal justice needs and whether increased police efforts will be supported adequately.

In addition, all units of government are affected by the tendency to believe that hiring more police or sheriff’s deputies is the answer to fighting crime. Voters can see uniformed officers, who symbolize the criminal justice system’s immediate response. Voters also have a clear idea of what police are supposed to do. In part because people have a much greater understanding of what police do, they also have much more confidence in the police than in the courts to protect them from criminals.

This reliance on the police to fight crime is as strong within county, state, and federal constituencies as it is with the voting constituencies of cities. For example, the Congress included a major initiative for college scholarships in the 1991 federal anticrime legislation. However, these scholarships can be repaid by employment only in policing, even though the personnel needs are at least as great in corrections, probation and parole supervision, and court support functions.

#### **Assessing the Consequences of Hiring Decisions**

The first type of inefficiency created by insular decisions to hire more police is lack of consequences. There may be more arrests, but there is no commensurate in-

crease in prosecutions or convictions. In fact, what may increase is the number of criminals being freed to return to the streets. The resources spent on hiring more police are not only wasted but the lack of results feeds the public's lack of trust of the entire criminal justice system. Further, the lack of consequences may breed future costs because it reduces the deterrent effect that the threat of arrest should have on criminals. Finally, lack of carry-through can undercut police morale, decreasing performance or increasing police suspicion and isolation from the rest of the criminal justice system.

**As** an alternative, before the decision is made to add police positions, elected officials should require an analysis of whether current police efforts are as fruitful as they might be. Nationwide, less than half of all felony arrests result in convictions.<sup>2</sup> Some would interpret this statistic as indicating that half of all policing efforts to stop criminals are undercut by lack of consequences in the criminal justice system. Alternatively, general government elected officials need to assure themselves that police/sheriff practices are not contributing to the lack of efficacy. In practice, police officers and sheriff's deputies have several reasons for making arrests:

They may make arrests to quiet a situation, to assert a presence, to prevent a crime, to bring in an informant, to build a record of charges against certain suspects that may be used later to prosecute repeat arrestees, etc. Further, "sweeping the streets" may be a high priority in communities that have high crime rates. . . . [P]olice in affluent neighborhoods may also arrest . . . suspicious outsiders' to maintain community confidence. In such circumstances, the departments may have no intention of formally submitting the arrests to the prosecutor for filing. . . . In the presence of certain kinds of community pressure, a rejection from the prosecutor can be valuable: a department that is under heavy pressure from victims to "do something" may submit whatever case it has to show that the department has done its best, and it is the prosecutor who will not proceed.<sup>3</sup>

These motivations, in addition to the quality of police work, directly affect the response of the criminal justice system.

The size of Los Angeles County provides an opportunity for a comparative analysis of the effect of police activities on the carry-through of the criminal justice system. Arrests made by 25 different municipal police forces in the county resulted in conviction rates twice as high for some as for others, even though all work with the same district attorney's office. None of the purely demographic differences between communities (e.g., age, race, poverty level) appeared related to case attrition. The only statistically significant difference was the ratio of police department funding to arrests. Some departments spent \$1,500 per arrest while others spent \$5,500. Jurisdictions that spent more per arrest obtained more convictions. The study noted that resource-rich departments were able to hire evidence technicians or use computer-aided dispatch sys-

tems to place officers on the crime scene at the earliest possible time.<sup>4</sup> The number of officers was not significant.

What also was significant was that, in a close look at six municipal departments within Los Angeles County, "neither the detectives nor their supervisors knew what proportion of their cases were accepted or rejected by the prosecutor. No supervisor or chief of detectives evaluated his officers in terms of the percentage of cases presented that led to filings or convictions."<sup>5</sup> This picture is common nationwide. Police officers and sheriff's deputies are seldom rated on conviction rates—which would be an indication that a major reason for their work is, ultimately, a successful outcome for the criminal justice system. On the contrary, they frequently are rated simply on the number of arrests they make.

Based on this comparative study, elected officials who refocus accountability on convictions rather than just arrests may find that support services rather than more uniformed officers represent a more productive use of funds. They also may be able to use a focus on convictions to break down traditional barriers by making cooperative training between the police and prosecutor a budget mandate. Examples of recent prosecutor/police cooperation include Minneapolis; Garden Grove (California); Indianapolis; Newport News (Virginia); and Nashville.<sup>6</sup>

### Reducing Isolation

However, this or any other refocusing of policing activities will have to overcome several hurdles. First, local officials report that, even though the police department is an administrative agency in most localities (except for many of the less populous counties where the sheriff's department directs police functions), their influence over the police department is not significantly greater than their influence over the independently elected prosecutor.

Second, achieving policy change in police departments has been difficult for two institutional reasons. On the general government side, few city managers have police department experience. An International City Management Association survey of 7,500 city managers in the early 1980s revealed that fewer than 20 came out of an emergency services background.<sup>7</sup> On the law enforcement side, transfers from one police department or sheriff's office to another are rare. Traditionally, entire careers are spent working with the same set of assumptions about the role of each criminal justice agency and the personal cooperation to be expected. **As** a consequence of these career paths, lack of experience by policymakers in knowing the right questions to ask is compounded by the lack of experience by operating personnel in working with different approaches.

While not integrating police departments into the criminal justice system may result in a waste of tax dollars, a deeper problem, known as the "noble cause," has been described as follows:

We're the good guys, and the U.S. Constitution doesn't always apply to us. We're right, **so** anything we do is right. Sometimes, we may need to mete out punishment because the criminal justice system won't. Furthermore, the public **will** approve.\*

Policing is dangerous; its hours are irregular; and officers may be exposed to traumatic experiences. These factors lead to a strong esprit de corps. In addition, it has been noted that J. Edgar Hoover's legacy remains significant. "The model was if you had highly incorruptible young men, control their discretion, declare war on crime, train your men and keep them incorruptible, you will win. So what happens when you train soldiers in a war they cannot win? Some of them get very angry, very frustrated."\*

Adding large numbers of officers at one time can increase the potential for such personnel problems. Recruitment and training typically take more than a year for the average number of officers added to any given department annually. Local departments serving populations of 100,000 or more require an average of over 1,000 hours of pre-service training.<sup>10</sup> If the routine is compromised to get more uniformed officers on the street rapidly, there can be negative ramifications, including:

- Having to hire from an inadequate applicant pool;
- Not doing adequate aptitude and background checks; and
- Abbreviating training or providing it with inexperienced personnel.

### Community Policing

The spiral of isolation, frustration, and distrust have had serious ramifications on the effectiveness of police, especially in high-crime communities. In an attempt to deal with these problems, by the fall of 1990, more than 250 jurisdictions were considering community policing." In addition, two particularly graphic incidents in the summer of 1991 brought national attention to the issue of police/ community relations: in Los Angeles, a home video film showed brutality involving a number of officers at the scene of a traffic arrest, while in Milwaukee, official telephone recordings demonstrated unresponsiveness to citizen concerns about the need to help a boy who became the victim of a mass murderer.

Community policing is a term being used to cover programs that attempt to involve the community in policing activities by "working with the good guys, and not just against the bad guys."<sup>12</sup> It includes police officers and sheriff's deputies getting out of their cars and walking beats in the community, citizen crime-watch activities, targeting locations associated with high crime, and demonstrating to the community that government will respond to their need to regain control of their neighborhood.

At its core, community policing is not new; it is merely a new umbrella for concepts that are integral to most small-town police and sheriff's departments and have been advocated for large departments for years. The 1967 report by the President's Commission on Law Enforcement and Administration of Justice recommended decentralizing patrol and investigative duties for a more efficient field response. During the 1970s, this approach was called Team Policing.<sup>13</sup> However, as technology turned

squad cars into mobile climate-controlled offices, efficiency rather than field contact became the standard. The advent of 911 systems put further emphasis on response time, often at the expense of preventive policing.

Besides putting more officers on the street, the current formula for community policing goes beyond traditional police functions to bring officers back in contact with the public. Many programs emphasize intergovernmental cooperation. Police officers and sheriff's deputies are cast as community ombudsmen to get general government agencies involved in addressing a variety of community needs.

### Program Initiatives

The preceding descriptions of community policing contain two elements of action: government action and citizen action. Because of the authority of the police and the demoralization of many high-crime communities, typically, the community policing model has to start with government initiating change. The following subsections provide examples of four major areas of reform: increasing the police presence, physically reclaiming neighborhoods, involving citizens, and preventive outreach.

#### Police Presence

New York City introduced "Park, Walk, and Talk" in August 1990, which emphasizes identifying problems before they become crises, rather than spending over 90 percent of patrol time in a radio car responding to 911 calls. Extra personnel was provided in part by "Operation All Out," which reassigns officers from administrative positions to uniformed patrol at least one day a week.<sup>14</sup> In a number of cities, housing authorities and, recently, private management companies are providing free room and board to have a police officer as a resident. In Orlando, Florida, the housing authority provides the space for a police substation and pays for all utilities.<sup>15</sup>

#### Reclamation

Fort Lauderdale's "Code Wars" uses a team that includes a building-and-fire inspector and a narcotics officer to give the community a sense that it can reclaim its neighborhood. "When areas eliminate those qualities that are conducive to the narcotics environment (i.e., poorly lit, dilapidated, abandoned buildings), the supply as well as the demand for drugs is inhibited. Drug users must now travel farther and increase their personal risk in order to obtain narcotics. This increased time and risk effectively reduces demand among first-time users and recovering narcotic abusers." The program has reduced the amount of law enforcement service calls by 23.5 percent since 1987.<sup>16</sup>

The Minneapolis Community and Resource Exchange (CARE) uses automated information sharing between city police, inspections officials, and the county welfare agency to deny housing payments on behalf of public assistance recipients to landlords in violation of city housing standards." The benefits of such increased communication and coordination among city and county agencies and the community were heralded by CARE participants:

The government participants are impressed by their ability to work together across agency lines.

People living in the neighborhoods served by CARE believe it has given them a sense of power, hope and control over their lives. CARE has also improved their view of government.<sup>18</sup>

### Involving Citizens

Charleston, South Carolina's, police chief emphasizes the need to use the community to help enforce the law and take away the stigma of police authority acting alone. He notes, for example, that the traditional approach in stopping people who fit a description winds up alienating dozens of people every day. "We now tell people why we stopped them and more importantly we ask them for their assistance since they are not the guy we're looking for."<sup>19</sup> Repairing damage done by police searching for evidence and looking to involve specific bystanders rather than aggressively clearing a crime scene are other means to develop respect between the community and police.<sup>20</sup>

Organized citizen crime-watch activities also are crucial. The U.S. Department of Housing and Urban Development's Drug Elimination Program will provide \$8.2 million in FY 1991 and \$98 million in FY 1992 to assist in the elimination of drug-related crime in public housing projects. These grants include the support of citizen groups who will escort other tenants, patrol the development, and deter crime.<sup>21</sup>

In addition, a central element of a fully developed community policing program is grassroots determination of what needs to be done in the community and citizen participation in carrying it out. For example, Houston's Chief of Police reports meeting with Hispanic and black ministers once a month and involving them in community meetings because of their influence and prestige in the community. Their involvement led to bringing in school representatives, social service agencies, the district attorney, and city council members. In other communities, neighborhood meetings with police have turned the focus from responding to individual incidents to determining why, for example, a particular convenience store is the site of hundreds of calls a year. Community policing empowers the officers on the beat to take the initiative in responding appropriately to such a convenience store situation, rather than having case priorities controlled from a central administration.

### Preventive Outreach

Community policing also can involve positive outreach, such as the DARE (Drug Abuse Resistance Education) program started in Los Angeles in the mid-1980s and now used throughout the country. DARE uses full-time veteran police officers as instructors to reach children in their last year of elementary school.

In 1986, Prince George's County, Maryland, started the first Midnight Basketball League for 17- to 21-year-olds, an idea that has been picked up by a number of cities. At least two police officers must be on hand at all times, and the program also involves employment and education counseling.

In New York City, neighborhood "play streets" are set up each summer by blocking off traffic and using DARE officers that are not busy during school vacations. The program was funded by New York City's Drug Prosecutor, us-

ing drug forfeiture funds.<sup>22</sup> Lengthening the school year, or making public education a year-round program, as some are proposing for international competitiveness reasons, might have similar results.

### Citizen Response

The more crime has demoralized a neighborhood, the more efforts may have to be made by the police before residents will respond. In Dade County, Florida, as part of the TNT program (Tactical Narcotics Team), community relations officers go door to door to explain the program. TNT, like other programs, also has found that it is crucial to carry out visible clean-up efforts to demonstrate that public agencies will pay attention to the community before the police can expect much response from the community in helping itself.

The goal of this and other programs is to empower citizens to reclaim their communities. It is not physically possible for police personnel to be omnipresent, but they can back up a neighborhood willing to observe and report crime. During the 1980s, suburban Neighborhood Watch programs, established with police encouragement and guidance, became an effective crime prevention tool. Many high-crime neighborhoods did not have the basis for similar cooperation; therefore, groups such as the Guardian Angels were formed. Initial police reaction to these groups often reflected the degree of estrangement between the police and the community. The more estrangement, the more harshly the group organizers will criticize the police and resist police suggestions; the more estrangement, the more the police regard the vigilantes as just stirring up trouble. In contrast, community policing focuses on looking at any citizen activity as potential leverage for involving the community.

### General Government Officials' Involvement

Elected officials are in a position to play a key role in encouraging community involvement. They have budget leverage, the authority to hold government agencies accountable, and a stake in their constituents believing that government is responsive. It is in their interest to serve as mediators and initiators to bring police officers, responsible government agencies, property owners, and residents together.

The involvement of a general government elected official may start out of a necessity to establish community trust, including the need to assure that charges of police brutality are fully, impartially, and openly addressed. **This** focus on citizen needs rests on the responsibility of elected officials to assure that government agencies are responsive.

Elected officials also have the responsibility to assure that government agencies are effective. Often, this means that elected officials must challenge agencies to define their mission more broadly. Community policing initiatives have encompassed this concept by involving building inspectors, schools, and welfare agencies. However, the examples of interagency cooperation cited thus far are targeted at whatever it takes to get criminals out of a neighborhood. There has been little interest in marshaling community resources to help supervise and positively reintegrate offenders on pretrial release, probation, or parole back into their communities.



General government officials may have to take the lead in addressing these latter needs of the criminal justice system as a whole, by encouraging active police involvement in supervising juvenile offenders, probationers, parolees, or pretrial releasees. Because traditional funding patterns often isolate the police activities of the nation's core cities from the county and state-supported court and correctional systems, bridging this gulf has a significant intergovernmental focus.

Finally, elected officials have a leadership responsibility. This usually requires effort to help the public understand where solutions must be found, rather than just following public demands. Police may realize that they cannot protect a community without active community involvement, but they often need the leadership of an elected official to help convey the message to the citizenry that "government can't do it all." *As* recently stated by the chairman of ACIR:

We need to think of public services as being, not government services, but genuinely public services, in which citizen responsibility goes beyond taxpaying. The cash-for-services nexus that often defines a citizen's relationship to his or her municipality needs to be replaced by a partnership-in-service ethic.<sup>23</sup>

### Summary

Citizen trust, government responsiveness, criminal justice effectiveness, cost savings, and community involvement are all goals that elected officials can help forward by looking beyond simply hiring more police or sheriff's deputies. In many systems, police work will be better supported when general government officials exercise oversight by asking questions about reasonable hiring goals, training, investigative support, conviction rates, and how police and sheriff's deputies can better operate as government's link with the community.

Community policing is a new term for efforts, especially in large departments, to return to the concept of police and sheriff's deputies being in contact with the public and developing community support in preventing crime. Fully developed community policing also attempts to link general government services—even when they are administered by different governmental units—to help a community reclaim control of its neighborhood and, thereby, build confidence that government will respond. Among citizens in the most heavily crime-impacted communities, these government initiatives often must be undertaken before the citizens will respond by organizing their own citizen-watch activities, which have been so successful in cohesive neighborhoods.

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## VICTIM AND WITNESS PROGRAMS

Many elected officials naturally empathize with victims when presented with criminal justice issues. For others, it takes an individual constituent to bring home the

reality of the difficulties that victims have in coping with crime and the complexities of the criminal justice system. Organized efforts to help victims are a relatively recent phenomenon, pushed in large part by the women's movement, anti-drunk driving advocates, and the increasing number of elderly citizens. The newness of victim/witness programs and services creates a special challenge for general government officials and criminal justice officials to work together to assure that they are employed effectively.

Vulnerability to crime has different aspects, as Table 6-1 (page 146) demonstrates. The poor are the most vulnerable to crimes of violence, and that vulnerability increases for those living in central cities. Higher income individuals are more vulnerable to theft; in addition, the higher their income, the more vulnerable blacks are to household larceny, although higher income whites have a reduced incidence. Contrary to the perception of most elderly persons, vulnerability to violent crime, as well as theft and household larceny, decreases significantly with age. Finally, it should be noted that all of these statistics deal only with reported crime. Domestic violence and rape are significantly underreported.

No single approach is appropriate for all these types of victims; additionally, many emotions exacerbate differences and lead to demands for individual programs. This makes it particularly challenging for general government officials to insist on integrated services to avoid unnecessary duplication. At the same time, general government elected officials may find it particularly challenging in some local criminal justice systems to establish an orientation in all its components that adequately considers individual victim needs.

### Crime Prevention and Detection

Victim/witness services start with prevention and detection programs that are part of the community policing concept. If police resources are used to determine what makes communities and the people who live in them vulnerable to crime, crime can be reduced. The reduction is not only short term, an immediate result of nonresident efforts that produce better lighting, new locks, a visible police presence, and targeted arrests, but also long term, resulting from the residents instituting patrols and escort services and making themselves, in fact, less vulnerable.

Support of such initiatives benefits not only individuals but also general government interests. A community that feels victimized will be neither economically healthy nor able to build on citizen involvement with its schools, programs for the elderly, or other government services.

The underclass problem, contrary to the leading academic and journalistic understandings, is mainly a crime problem. . . . The essential difference between us and the overwhelmingly decent and law-abiding people who reside in these urban neighborhoods is that we can avoid what they cannot escape. . . . To the extent that culture-of-poverty notions apply at all, they apply only to the latter—the "underside of the underclass." In failing to make this distinction, culture-of-poverty theorists blame the victims along with the victimizers. . . .

*Table 6-1*  
**Selected Victimization Rates, by Personal or Household Characteristics and Race of Victim, 1979-1986**

Personal or Household Characteristics	Total Violent Crime		Theft		Household Larceny	
	White	Black	White	Black	White	Black
<b>Sex</b>						
Male	44.8	54.8	86.1	86.6	116.1	135.1
Female	24.9	35.6	75.3	69.1	107.8	229.8
<b>Age</b>						
12-15	57.8	63.1	132.4	106.0		
16-19	73.3	71.6	135.7	89.7	242.6	199.4
20-24	73.2	72.6	131.2	111.5	196.0	172.7
25-34	44.3	52.8	93.5	94.4	146.7	151.0
35-49	23.0	29.4	72.7	66.7	129.7	134.6
50-64	10.5	18.2	46.5	43.2	89.4	112.6
64 or older	5.3	10.8	21.6	23.8	50.6	72.3
<b>Marital Status</b>						
Never Married	63.2	65.0	129.3	92.8	135.0	126.3
Divorced or Separated	72.6	54.2	113.5	80.4	148.3	132.6
Widowed	8.6	14.5	29.5	30.2	57.6	86.5
Married	18.6	23.2	58.6	67.7	113.5	140.6
<b>Location of Residence</b>						
Metropolitan Area						
Central City	46.7	55.0	99.1	83.5	142.3	139.8
Suburb	33.9	36.3	85.3	89.4	112.4	129.9
Metropolitan Area	26.1	25.1	60.1	47.4	92.1	90.9
<b>Family Income</b>						
Less than \$7,500	53.1	56.4	76.4	63.6	115.0	109.7
\$7,500-\$14,999	38.8	43.6	75.2	78.9	122.0	138.9
\$15,000-\$24,999	31.9	36.2	80.4	85.5	121.9	141.8
\$25,000-\$49,999	29.5	32.7	87.3	100.9	111.2	152.5
\$50,000 or More	26.0	27.4	102.6	115.2	104.8	165.2

Source: U.S. Department of Justice, Bureau of Justice Statistics, "Black Victims," *BJS Special Report: Executive Summary* (Washington, DC, April 1990), p. 10, Table 6.

This victimization by criminals takes several forms. There is *direct victimization*—being mugged, raped, or murdered; being threatened and extorted; living in fear about whether you can send your children to school or let them go out and play without their being bothered by dope dealers, pressured by gang members, or even struck by a stray bullet. And there is *indirect victimization*—dampened neighborhood economic development, loss of a sizable fraction of the neighborhood's male population to prison or jail, the undue influence on young people exercised by criminal "role models" like the cash-rich drug lords who rule the streets, and so on. Badly stated, my hypothesis is that this victimization causes and perpetuates the other ills of our underclass neighborhoods.<sup>24</sup>

The high correlation between the race of the victim and of the criminal is another reflection of the community focus of most crime. Most criminals are opportunists. Isolated elderly, immobile poor, or suburban neighborhoods

essentially abandoned during working hours all present easy marks. General government officials need to examine programs and proposals to assure that they are the most effective means to counter the specific vulnerability of the target group purportedly served by the program. For example, individual social services, such as transportation for the elderly, may do more to reduce individual vulnerability than increased policing.

This discussion of policies to prevent victimization would be incomplete without noting that black-on-black homicide is the leading cause of death for black males aged 15-34.<sup>25</sup> The war on drugs has brought new concern over this fact because drug dealers increasingly have made high-powered automatic weapons available to juveniles. The presence of these weapons in the community, which are more apt to kill than simply wound, suggests that the recent increase in homicides will continue. However, the fact that homicide is the leading cause of death for young black males is not a recent phenomenon. It has persisted since about 1932.<sup>26</sup> The long-standing nature of the problem indicates that government and community efforts that

focus only on the drug trade will have little success in stemming the number of black homicide victims.

Domestic violence is another area of growing concern to elected officials. Among all female murder victims in 1989, 28 percent were killed by husbands or boyfriends, while 5 percent of male victims were killed by wives or girlfriends.<sup>27</sup> Initiatives to reduce this murder rate have focused on giving the victim options and support to escape abuse before it results in homicide. Traditionally, police do not like to respond to domestic violence calls because their safety may be threatened by the high level of emotion and also by the fact that their efforts frequently are wasted because charges are dropped after an arrest is made. To empower police, various state laws and enforcement initiatives have emphasized the police power to arrest an abuser without the victim pressing charges. Community policing programs also have trained officers to refer citizens to social service agencies when they detect domestic problems. In addition, some states have enacted laws to deny bail in order to allow the victim time to realize options without the presence of the abuser. These options can include publicly subsidized alternative living arrangements, such as the House of Ruth.

Prevention and detection must deal with aggressive group advocacy and the fear and isolation of individuals. Some communities have taken the initiative to protect themselves against crime, from suburban Neighborhood Watch programs to Guardian Angel type groups in inner cities. However, where there is little sense of community, individuals need significant reassurance that the system will respond before they will come forward. Both of these aspects also are present in individual crimes, such as rape, child abuse, and domestic violence. Women's groups have taken a strong advocacy role, but most victims need significant reassurance before they will turn to the criminal justice system for help. Elected officials need to be particularly concerned that the criminal justice system is prepared to deal with the special problems of victims who perceive that they lack status, either as individuals or because of where they live.

### Making the Criminal Justice System Accessible

Many victims and witnesses who come in contact with the criminal justice system become bewildered, if not intimidated or frustrated. In the last 15 years, programs have been developed to reduce such negative experiences. These programs come under the umbrella of a victim bill of rights, which has been adopted by 45 states and addresses such issues as:

- Notification of case status and scheduling;
- Information about available financial aid and social services;
- Translating legal terms and court jargon into lay terms;
- Protection from harassment and intimidation;
- Separate waiting areas; and
- Speedy return of property held as evidence.

In addition, most of the victim/witness programs receive some degree of funding from the government. The

federal government provides matching block grants to states under the *Victims of Crime Act (VOCA)*. These funds come from federal court fees and fines. The level of funding was capped at \$125 million in FY 1990 and \$192 million in FY 1991.<sup>28</sup> The funds are designated to support general victim/witness court services, as well as special support programs leading to more effective prosecution of such crimes as child abuse. Significant record keeping is required to receive VOCA funds, targeted at determining the populations served relative to the incidence of various types of crime.

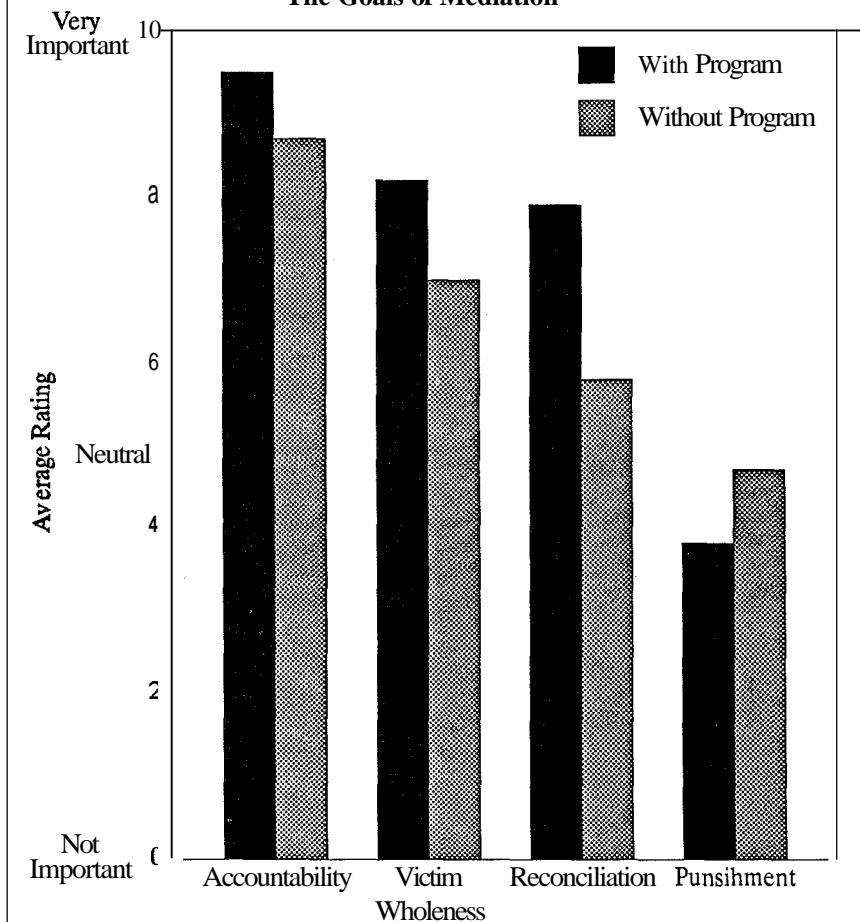
The fact that a variety of programs exists reflects the independence of the criminal justice elements, as well as the isolation felt by some classes of victims. Some prosecutors have welcomed victim/witness programs operating out of their offices because it gives them greater control over cases. Others find such direct contact disruptive. Some police and sheriff departments are sensitive to the fact that police procedures may increase victim trauma, while others believe that dispassionate fact finding is their first responsibility. Public defenders' offices, where they exist, are an appropriate focus for defense witnesses but not victims.

On the other hand, many advocacy groups are reluctant to accept even the best intentions of those within the system, or even those working with another type of victim. Each may believe that special training and sensitivity is needed to deal with victims of domestic violence, child abuse, rape, or drunk driving. Those who work with the elderly maintain that their physical needs and mental state frequently require unique support and consideration. Finally, racial minorities may perceive other barriers, such as those reported by the Ohio Governor's Commission on Socially Disadvantaged Black Males:

African Americans also under-utilize victim assistance programs, possibly as a consequence of the under-representation of African Americans on police forces. Referrals to victim assistance programs are most frequently given by law enforcement officers. . . . The most important [reason for under-utilization] seems to be *distrust of the system*. This distrust exists because of perceived police brutality, which, especially in the past, has acted as a barrier to many African Americans becoming active participants in victim assistance programs and services.<sup>29</sup>

General government officials may become involved in dealing with the desire of victim assistance groups for uniquely focused services, at least in resolving disputes for limited VOCA funds or for local supplemental funding. The policy challenge is to force the involved parties to identify a core of services needed by all victims and to ensure that those services are in place. Funding allocation also gives general government officials the opportunity to look for resolution of how victim/witness assistance should be initiated and the responsiveness of each criminal justice agency. Agreements between the program(s) and agencies that address each procedural step should be required. These agreements would resolve such issues as daily access to offense reports, the use of volunteers, and responsibility for initial referral.

**Figure 6-1**  
**The Goals of Mediation**



Source: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Victim-Offender Mediation in Juvenile Justice System* (Washington, DC, 1990), p. 3.

### Victim Involvement in Adjudication

Basic services are designed to mitigate the possible confusion, intimidation, and inconvenience associated with police and judicial procedures for victims and witnesses. In addition, adjudication programs have been established in three other areas that involve only victims: mediation, sentencing, and compensation.

### Mediation

Mediation has a long history in civil disputes. A similar approach to resolving criminal acts was not started until the mid-1970s in Canada under the title of Victim-Offender Reconciliation Program (VORP). The purpose of the original VORP project was to allow the victim and the offender an opportunity to reconcile and mutually agree on a sanction using a nonjudicial mediator.<sup>30</sup>

There is strong agreement that accountability is the most important goal of mediation, as indicated in Figure 6-1, representing a survey of all 171 organizations known to have a mediation program and 180 court systems se-

lected at random. Persons who have been involved in mediation place greater emphasis on benefits to the victim, such as "victim wholeness" and reconciliation, than those who have not been involved in mediation.

Restitution is the most frequent requirement of a mediation contract, and its use is increasing. Other requirements include community service, a behavioral requirement, and work for the victim. These elements make mediation particularly appropriate for juveniles, and the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) has established a Restitution Education, Specialized Training, and Technical Assistance (RESTTA) program.

Almost half of the mediation programs are governed by private, non-profit organizations, while 21 percent are under the direction of probation departments. Other state or county agencies administer 17.3 percent of the programs, and 7.4 percent are sponsored by courts. However, court initiatives to start programs decreased steadily during the 1980s.<sup>31</sup>

Not only has significant resistance from criminal justice officials been reported, but many victims will not participate. The reasons for conflict, as identified by program leaders, included difficulties in resolving basic issues surrounding whether:

- The process or the amount is more important;
- The state or the injured party is the victim; and
- Fairness to both victim and offender is possible.<sup>32</sup>

These conflicts lead to lack of awareness or cooperation from the court, probation departments, and community. According to one mediation program administrator, "Certain ones view VORP as an intrusion on their turf. Solving this by quiet diplomacy and persistence hasn't always worked."<sup>33</sup> Another commented, "We invited the director, the juvenile judge, and the members of the executive committee to attend mediation; none ever did."<sup>34</sup> The challenge was succinctly stated by one respondent as "convincing the district judges to try a new program and still make it seem as if it was their idea."<sup>35</sup>

However, other VORP programs have been able to overcome initial resistance. One respondent stated that the key to the program's acceptance was "clearly outlining our philosophy and intent (consistent with court counselor intent for intervention), providing regular reports on success cases, and making the program visible." Another

achieved success by “placing more ‘system’ people on the Board of Directors.”<sup>36</sup>

### Victim Sentencing Input

This option is used far more widely than mediation. Between 1974 and 1988, 48 states passed legislation allowing input by crime victims at sentencing. Its greater acceptance relates to the fact that, unlike mediation, it supplements criminal justice procedures rather than replacing them. Judges and prosecutors stay in control of determining an appropriate sentence. Further, many victims need to have the court in charge because they are emotionally not able to confront their malefactors much less reach resolution.

The victim’s input is usually in writing because most judges feel the statement will be more complete and accurate, and they can get pertinent information faster than through a potentially emotional outpouring. Many state and local jurisdictions have found that having impact statements prepared by the victims themselves achieves a middle ground between the court’s restraint and the victim’s emotion and may help promote the victim’s psychological recovery.<sup>37</sup> It also will save time for the probation officer, who is usually the one in charge of getting the victim’s input. However, forms also need to represent a compromise between the use of court terminology—such as restitution, deposition, preliminary hearing, and crime compensation—and lay understanding. Victims who do not understand their rights do not have rights.

In some states, victims also are involved in how long the offender will remain incarcerated. At least 10 states have a notification program to inform victims when the offender is up for parole consideration and to invite victim input regarding the nature of the criminal act perpetrated by the offender.

### Victim Compensation

Victim compensation programs were established by almost all states during the 1980s. They provide compensation for medical bills, lost wages, and funeral expenses. The compensation is limited, however. As of 1987, most states had a recovery limit between \$10,000 and \$25,000, while eight states had a limit between \$30,000 and \$50,000. Two states provided unlimited coverage of medical expenses. In all but six states, victims are not eligible if they have not reported the crime to the police within one to seven days, but an arrest or conviction need not take place.<sup>38</sup>

Especially in the early years of state victim-compensation programs, general government elected officials frequently needed to ensure that victims were informed that compensation was available. Fund balances generated by court fees were not being drawn down, and the number of awards per reported crime varied significantly between jurisdictions in the same state. Remedies—such as clearly designating responsibility within the criminal justice processes and directing that information be prepared in lay language to publicize the program—have resolved the initial problems in many instances.

However, as noted throughout this chapter, lack of system outreach and trust in the system leave many low-

income victims unlikely to participate in compensation programs. One victim-services director described the unfortunate chain of events that often occurs: “Victims in a lower income strata are less likely to have jobs held after a disabling assault, savings to pay for stolen rent money, food to feed the children, etc. A victimization has a snowball effect and can be a cause of homelessness and instability.”<sup>39</sup>

The compensation any victim may receive for property losses, as opposed to personal injury, depends on the judge ordering restitution as part of the sentence and assuring that it is paid. The public strongly supports restitution based on two premises: victims are compensated and offenders are forced to confront the effects of what they have done. Elected officials, both within and outside the criminal justice system, also support these goals, but may have to resolve two other policy issues: offender rehabilitation and collection.

As noted in the discussion of day fines in Chapter 3, if fines do not have some relation to ability to pay, they may interfere with other goals of rehabilitation. Some probation officers have noted that fee payments too often become the first topic of discussion with probationers and that judges may order restitution payments that reflect the impact on the victim without adequate information on the offender’s total obligations and ability to pay.<sup>40</sup> Concerns about imposing realistic financial obligations is particularly strong in the juvenile system, where restitution is being used increasingly.

Collection of restitution for the victim often is secondary to other obligations, particularly supervisory fees. In a 1988 survey, 41.8 percent of money collected from felony offenders was for correctional fees, compared to 28.6 percent for restitution payments, 20.8 percent for court fines, and 6.2 percent for court costs. The emphasis on correctional fees reflects that in many states these fees are a direct source of probation agency funding. It also may reflect adoption of an official judicial or legislative policy over how each dollar collected from an offender is to be apportioned. In some cases, top priority is given to fines or restitution, but, generally, collection of supervision fees ranks as a first or second priority.<sup>41</sup>

### Summary

The status of restitution chronicles the victims’ movement. The 1980s brought significant legislative recognition of the impact of crime on victims—just as restitution recognizes that a person, not just the state, has been violated. However, the degree of consideration the victim actually will receive is often compromised by the ongoing operation of the criminal justice system—just as collecting fees may outweigh the importance given to restitution.

Although laws have been enacted to consider victims, many general government elected officials may still need to encourage criminal justice officials to work with victim assistance programs if the spirit of these laws is to prevail. They also may have to fund the criminal justice system so that the rights they espouse for victims are not subjugated to operating needs.

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## LOCATING CORRECTIONAL FACILITIES IN THE COMMUNITY

The crux of community policing and victim-assistance concerns involves establishing citizen trust in the criminal justice system. Officials may have to deal with bitter accusations but, from the beginning of the government's outreach efforts, the theme can be struck that the goal is to better serve the individual law-abiding citizens. In contrast, when trying to place a correctional program in the community—except in the most job-hungry locality—the discussion can focus only on assuring the affected citizens that they will not be worse off.

This section examines the role of elected officials in making siting decisions. This role can be crucial because these officials often have the political leverage, if not the legal authority, to block the decision to locate a correctional facility or program if they choose. While they may be aware of the wider importance of the decision, they also must reflect the concerns of their constituents. Many correctional administrators have been frustrated by lack of support from elected officials in locating a community program, but the way in which they approach the decision process can make a significant difference in the way elected officials will respond.

### Importance of the Decision Process

In general, the more structured the decision process, the better. Citizens often start with the feeling that an arbitrary decision is about to victimize them. If this feeling is confirmed in the information presented to them about the site decision, both as to the analysis that has led to their community being selected and the final decision process, their worst fears about the operation of the facility will be inflamed. If government and the criminal justice system are perceived to be cavalier in making the correctional program location decision, citizens may fear that officials will be equally insensitive in assuring that the actual operation will not endanger their neighborhood.

Elected officials also are well served by a structured decision process. Even if they do not involve themselves in meetings called to discuss the correctional proposal, they must be prepared to answer questions during their routine community contacts and speeches. If they are unable to describe a deliberative, controlled process, many constituents will conclude that it is the responsibility of their elected representative to bring it under control. On the other hand, to the extent that the official can describe a process that clearly defines a decisionmaking procedure with multiple levels of input and fairness, the more the individual official will be shielded from blame for not having been able to stop the decision.

A structured decision process also will provide the information to build trust, not just keep distrust from growing. Citizens must be given enough information to understand that there is a documented need for this facility in this location. For prisons and jails, this means the type of

comprehensive long-range plans described in Chapter 5. Correctional officials must be able to indicate the types of offenders who will be housed in the facility. They also must be able to produce an analysis that demonstrates that there is a sufficient number of inmates of these types in the system to justify the facility; otherwise community suspicions may become inflamed that the building is a ruse to house more serious offenders.

Even if citizens come to accept that there is a need for additional space to serve a given type of inmate, the question still remains, "Why in this community?" Again, the comprehensive plan is essential. By categorizing the projected population growth for the next ten years, correctional officials should be able to use the analysis of program and security needs, combined with cost considerations, to defend their choice. Cost considerations include economies in expanding at an existing site, availability of sewer and water, availability of personnel, and site costs.

In the case of state prison facilities, the program and security analysis should be able to present the need for a range of facilities and locations, such as:

- High-security facilities for inmates who will not be released within the next year and who pose a security risk. In theory, these facilities can be very large; in reality, their size is limited by the work force available in the region. Size also may be limited by sewerage disposal restraints under the *Clean Water Act*.
- Secure treatment-oriented facilities for inmates who may pose a security risk but who will benefit from programming. The location of these facilities must first consider the ability to attract and retain treatment professionals. Effective programming usually is not compatible with a mega-sized facility.
- Low-risk residential facilities for inmates who do not pose a security risk and who will return to the community in the near future. The facilities should be as accessible as possible to urban areas. For a jail program or a prison halfway house, they should be accessible to public transportation.

Each system will have its own configurations and variations. The point is that correctional officials should be able to lay out to the affected community, and to the elected officials who represent it, that there is a need for and there are plans for different types of facilities in all regions of the state. To the greatest degree feasible, all will share the burden.

In the case of local jails or probation and parole facilities and nonresidential programs, the same type of jurisdiction-wide picture should be developed, emphasizing the need to work with offenders in the communities from which they come and to which they will be returning with or without support services. Data also might be developed that would document the lower rates of recidivism among former inmates who have been able to participate in treatment and have received supervision within their home community, compared to those who have not.<sup>42</sup>

*Focus*  
**Local Zoning and Correctional Siting**

In rural areas, federal or state EIS requirements are the main tool used by local citizens to block prison facilities. In urban areas, the main tool is local zoning codes and ordinances. Officials who are responsible for locating correctional facilities and programs have taken a number of approaches to deal with the intergovernmental conflicts surrounding control over land use in a community.

**State Law.** It is possible to override local authority through state legislation. Former Missouri Governor John D. Ashcroft pushed legislation requiring that treatment facilities be permitted in any areas zoned commercial or industrial unless community leaders can find an alternative site. Under emergency legislation, the Oregon legislature suspended EIS requirements for the siting of the first two prisons in its expansion program. The act stipulated that state agencies, counties, cities and political subdivisions could not refuse to issue the permits, licenses, and certificates that were necessary for constructing and operating facilities. However, enforcement authority was not suspended under the Oregon Law of 1987, section 7, chapter 321.

**Court Suit.** In some instances, the right of a locality to deny a correctional facility under its zoning powers has been challenged in court. The U.S. Department of Justice has brought suits in federal court, using antidiscrimination provisions in the fair housing statutes. The Office of National Drug Control Policy is reviewing further the extent to which the federal government can or should get involved in local siting decisions.

**Existing Facilities.** It is sometimes possible to step around the intergovernmental issue by using existing government facilities. Local master plans typically designate major government-owned parcels in a special category, making their use for a correctional program or facility less vulnerable to legal challenge. For this reason, New York is exploring locating one or more "drug treatment campuses" on government-owned land. The treatment campuses are designed to serve 2,000 persons in

outpatient programs, which would include a crack clinic, separate treatment programs for women, and services for children, linked by core services, such as health care, education, job training, and employment services. In 1990, under the National Drug Control Strategy, federal departments were directed to canvass their property holdings for land that could be reported excess and suitable for prison construction.

**Mandated Share.** While existing state facilities can be converted or expanded, this advantage does not exist with new land acquisitions. Local governments typically have seen no need to place opportunities for "locally unwanted land uses" (LULUs) on their master plans. Therefore, a more coercive intergovernmental approach was recommended by the California Blue Ribbon Commission on Inmate Population Management: "Local governments in major urban areas should be mandated to provide sites within the community for community correctional facilities, parole offices, prisons and jails in numbers proportionate to the number of offenders from that area in the correctional system. The Legislature should require that county jail bond funds administered by the Board of Corrections be provided to only those counties which have approved a prison site if one is required in the county."

Although these examples represent controversial intergovernmental approaches, the level of controversy reflects the high level of citizen resistance that often accompanies a correctional facility. The alternative is extraordinary delay, which is usually the case when a sheriff or jail administrator—who does not have any of the extraordinary powers of the state within his locality—tries to locate a facility. In 1981, voters in Fairfax County, Virginia, outside the nation's capital, approved a bond for a 100-bed DUI facility. A site was not settled on until 1988. "People thought we were locating another Lorton [a 6,000-bed District of Columbia prison] in the county," according to the sheriff. "Who are drunk drivers? They're Redskins and congressmen's children. I was beat about the head by politicians."

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Sources: W. John Moore, "Rethinking Drugs," *National Journal*, February 2, 1991, p. 270; Stanley Lundine, "Treatment Key to Fighting Drugs," *Journal of State Government* 63 (Spring 1990): 35-36; (California) Blue Ribbon Commission on Inmate Population Management, *Final Report* (Sacramento, 1990), p. 126; and Patricia Conley, "Counties Review Sentencing Standards," *County News* November 5, 1990.

### **Recognizing Community Interests**

The next step in developing citizen acceptance of a correctional facility is to mitigate its effect on the community as much as possible. This can include aesthetic modifications, such as building colors, the height of security lighting, setbacks, and entrance landscaping. For prisons, it also can involve agreements of direct benefit to the community, such as shared development of municipal sewer or water upgrades; agreements to buy commissary items

from local merchants for resale to the inmates; and improvements to court facilities affected by inmate-related suits. A small community also may realize indirect benefits from adding the inmate population to its census count used in state funding formulas for such purposes as schools, road funds, and revenue sharing.

Some local governments have actively sought state and federal prisons for their communities. "This is just a cold business decision," according to a local chamber of commerce president in Texas, "The city needs economic

diversity, especially new businesses unfazed by roller-coaster interest rates, slumping commodity prices and plunging oil revenues. We see a prison as a well-managed, non-polluting, long-term industry.”<sup>43</sup> Core cities that have lost industrial jobs also have begun to compete, but the most interest usually comes from rural areas. In Idaho, 25 communities applied for a new state prison, “including one that a decade ago, an Idaho official said, packed the local high school auditorium to rally against a plan to use a former sanitarium as a women’s prison. ‘We almost got lynched,’ joked an Idaho official, ‘but with the sawmill closed and the farm economy hurting, the town had a change of heart.’”<sup>44</sup> Even if the community has sought a prison and state officials have determined that correctional management considerations can be accommodated in that location, the earlier experience of the Idaho community underscores the fact that citizens still need to have their concerns addressed or “official” support will evaporate rapidly.

Efforts to gain community understanding of a proposed corrections program to be located in a community will be the same no matter what the initial indication of support has been. After this point, citizen reaction typically takes one of two divergent paths: willingness to work with corrections officials or uncompromising resistance.

General government officials can play a key and ongoing role if the community accepts or does not find a way to block the facility. They often are the ultimate ombudsmen. While a community liaison committee should be formed with clearly defined commitments from correctional administrators to work with it, if elected officials also keep themselves informed, concerns can be addressed before they become disruptive. Through this process, correctional officials may find they also gain welcome political support for their broader budget needs and a voice within general government that will speak to the impact of new law enforcement initiatives on the total justice system.

### Legal Strategies

Filing a lawsuit is the ultimate tool of citizens determined to prevent a correctional facility from being located in their community. (Of course, they also will have organized an effort to defeat every elected official who is not carrying their banner.) Nothing can guarantee that a lawsuit will not be filed or that a given judge will not respond, at least by delaying the facility for many months while fully considering each motion. However, the chances of the court ruling that the facility cannot be located where proposed is directly related to the soundness of actions by all government officials leading up to the proposal being made.

Comprehensive planning is crucial to avoid a successful lawsuit, just as it is to sound correctional management not being compromised by construction decisions, to saving money in construction, to getting funding approved, and to addressing community fears and distrust. The initial planning process must be carried out with a full understanding of the state’s EIS requirements, such as timely notification; procedures for notification; what, if any, capital outlay steps can be taken without prejudicing the decision; and the adequacy of the EIS submission. Attention

also needs to be given to local zoning restrictions and federal *Clean Water Act* and historic preservation requirements and restrictions. As time consuming as some of these processes are—particularly in the face of an overcrowding crisis or the effects of inflation—the delay is inconsequential compared to a protracted lawsuit because prescribed regulations were not followed.

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### SUMMARY

Law-abiding citizens have a right to expect that in protecting the public’s safety, the criminal justice system will not inadvertently harm individuals. This applies to policing activities, court procedures, and the establishment of correctional programs and facilities in a community. To defend this right, general government elected officials may need to assume the role of ombudsman, reacting to constituent concerns. However, citizen concerns often can be addressed even more effectively by ongoing support of sound governmental planning and management.

In policing, the challenge is to foster greater coordination between governments and between criminal justice agencies through the way police and sheriff’s deputies are hired and trained and in the definition of policing functions. In particular, decisions to add officers should be coordinated with the ability of the total criminal justice system to carry out public expectations of what should follow increased arrests. Community policing places particular importance on being able to reach across agency and government lines to focus resources on crime prevention and build confidence in residents that they can regain their communities.

The most effective use of total tax dollars also points to greater attention to the relation of policing activities with effective prosecution and the integration of police departments in surveillance of offenders on pretrial release, probation, and parole, even though these functions are funded by different units of government. Other initiatives and sound management practices, such as avoiding problems related to hiring surges, will help reduce the isolation and frustration often felt by police officers and sheriff’s deputies.

The most important aspect of efforts by general government elected officials to assist crime victims is the use of oversight opportunities and reporting mechanisms to assure that the legislative recognition given to victims’ rights during the 1980s is not compromised or ignored. Realistic restitution needs to be determined and then collected. There needs to be impartial outreach in victim-compensation programs, particularly in crime-impacted communities. Court related victim/witness programs must be sensitive to the special needs of different types of individuals victimized by crime, while providing assistance to any citizen faced with needing to understand the processes of justice.

Finally, even though placing a correctional program in a community is often extremely controversial and potentially threatening, solid, long-range planning—as discussed in Chapter 5 to save money and improve correctional management—is the best ally in reducing controversy and ensuring that the right decision is sustained.



## NOTES

- <sup>1</sup> ACIR computation from U.S. Department of Justice, Bureau of Justice Statistics (BJS), *Justice Expenditures and Employment, 1988* (Washington, DC, 1990).
- <sup>2</sup> Joan Petersilia, Allan Abrahamse, and James Q. Wilson, *Police Performance and Case Attrition* (Santa Monica: RAND, 1987).
- <sup>3</sup> *Ibid.*, p. 35.
- <sup>4</sup> *Ibid.*
- <sup>5</sup> *Ibid.*, p. 34.
- <sup>6</sup> *Ibid.*
- <sup>7</sup> Leonard Matarese, International City/County Management Association Panel, June 17, 1991.
- <sup>8</sup> Edwin Delattre, *Character and Cops: Ethics in Policing* (Washington, DC: American Enterprise Institute, 1989).
- <sup>9</sup> Jim Fyfe, U.S. Conference of Mayors Panel, May 20, 1991.
- <sup>10</sup> "State and Local Police Departments," *BJS Bulletin*, February 1992.
- <sup>11</sup> Darryl Stephens, International City/County Management Association Panel, June 17, 1991.
- <sup>12</sup> Carl F. Horowitz, "An Empowerment Strategy for Eliminating Neighborhood Crime," *Heritage Foundation Backgrounder*, March 5, 1991.
- <sup>13</sup> Daniel L. Skoler, *Organizing the Non-System* (Lexington, Massachusetts: D.C. Heath, Lexington Books, 1977).
- <sup>14</sup> "Dinkins, Brown announce the 'Park, Walk and Talk police initiative,'" *U.S. Mayor* 57 (November 1990).
- <sup>15</sup> U.S. Department of Housing and Urban Development, Office for Drug-Free Neighborhoods, *Home Front* (Washington, DC, Fall-Winter 1990).
- <sup>16</sup> "Code Wars: Fort Lauderdale Fights Back," *Safe HAVEN Newsletter* (National Coalition for Drug-Free School Zones), (First Quarter 1991): 3.
- <sup>17</sup> Steve Cramer, "City Ideas that Work," *Nation's Cities Weekly*, July 29, 1991.
- <sup>18</sup> *Ibid.*
- <sup>19</sup> Taken from International City/County Management Association Panel, June 17, 1991.
- <sup>20</sup> Reuben Greenberg, International City/County Management Association Panel, June 17, 1991.
- <sup>21</sup> Daniel Kagan, "Apartment Security Is Heaven-Sent," *Insight* 6 (June 4, 1990).
- <sup>22</sup> Confidential interview, 1990.
- <sup>23</sup> Robert B. Hawkins, Jr., "Futures Forum: Diversity and Municipal Openness," *Nation's Cities Weekly*, April 1, 1991, p. 3.
- <sup>24</sup> John J. DiIulio, Jr., "The Impact of Inner-City Crime," *The Public Interest* 96 (Summer 1989): 32-36.
- <sup>25</sup> Ohio Governor's Commission on Socially Disadvantaged Black Males, *Ohio's African-American Males: A Call to Action*, Volume One (Columbus, 1990).
- <sup>26</sup> *Ibid.*, Volume Two.
- <sup>27</sup> "Women in Prison," *BJS Special Report*, by Lawrence Greenfield and Stephanie Minor-Harper (Washington, DC, March 1991).
- <sup>28</sup> Roy Sudipta, "Offender-Oriented Restitution Bills: Bringing Total Justice for Victims," *Federal Probation* 54 (1990): 30-36.
- <sup>29</sup> *Ohio's African-American Males: A Call to Action*, Volume Two, pp. 14, 98.
- <sup>30</sup> Mark S. Umbreit, "Violent Offenders and their Victims," in Martin Wright and Burt Galaway, eds., *Mediation and Criminal Justice* (London: Sage Publications, 1989), pp. 99-112.
- <sup>31</sup> Hughes and Schneider, *Victim-Offender Mediation in the Juvenile Justice System*.
- <sup>32</sup> *Ibid.*, p. 1.
- <sup>33</sup> *Ibid.*, p. 14.
- <sup>34</sup> *Ibid.*
- <sup>35</sup> *Ibid.*
- <sup>36</sup> *Ibid.*, p. 14.
- <sup>37</sup> Robert C. Wells, "Considering Victim Impact—The Role of Probation," *Federal Probation* 54 (1990): 26-29.
- <sup>38</sup> BJS, *Report to the Nation on Crime and Justice*.
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- <sup>40</sup> Dale Parent, *Recovering Correctional Costs through Offender Fees* (Washington, DC U.S. Department of Justice, National Institute of Justice, 1990).
- <sup>41</sup> *Ibid.*
- <sup>42</sup> Harris County Community Justice Council, *Harris County Community Justice Plan: Fiscal Year 1991* (Houston, 1990).
- <sup>43</sup> W. John Moore, "Paying for Punishment," *National Journal*, March 14, 1987, p. 613.
- <sup>44</sup> *Ibid.*, p. 614.



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## 7—CRIMINAL JUSTICE FUNDING AND COST SAVINGS

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**C**riminal justice has been the fastest growing area of state and local expenditures almost every year since 1975. Only occasionally has it been surpassed by human service budgets, driven by the cost of Medicaid.<sup>7</sup> The factors driving this growth do not show any indication of major change in the near future, and most elected officials interviewed during this study do not see that pressures for increased criminal justice expenditures will abate.

Indeed, the trends toward even greater use of imprisonment, discussed in Chapter 2, appear to be continuing, as evidenced in anticrime legislation before Congress, which pressures state lawmakers to be equally tough on crime. Increased use of sentencing options will not relieve budgetary pressures either, at least in the short term, because if they are to reduce costs in the long term by effectively reducing recidivism, they must be adequately staffed, as discussed in Chapter 4. In fact, increased community supervision will detect more violations that may result in incarceration. Finally, even the most optimistic proponents of community policing as a crime deterrent, discussed in Chapter 6, caution that successful programs have not meant decreased police and sheriff's department staffing.

Therefore, this chapter must assume that lawmakers and chief executives will continue to be challenged to fund significant criminal justice budget increases. As in other areas of public budgeting, funding needs can be addressed in four ways:

- Making users (offenders) pay more;
- Cutting costs;
- Increasing intergovernmental support; and/or
- Appropriating more general fund tax revenue.

Especially in criminal justice, appropriating more tax revenues is a last resort. Appropriations will be less controversial, however, to the degree that policymakers and the public perceive that the other three avenues have been pursued fully.

Making offenders pay more has great appeal because it combines the broadly applicable logic of user fees with a popular concept of criminal punishment. Therefore, this chapter begins with an analysis of the potential of fees, fines, charges, and recouping criminal gains for meeting criminal justice budgets. Establishing a realistic assessment of the limited amount of revenue that can be raised through these particularly appealing approaches, first, brings the magnitude of the budget challenge that remains into sharper focus.

The next section takes up cost savings, which is another publicly appealing answer to meeting budget demands. Elected officials are held politically accountable for efficient, cost-effective expenditure of public tax revenues. They, in turn, must hold program managers accountable. Budget approval provides the ultimate focus for this accountability. This section discusses three principal areas for cost saving frequently raised in general government budgeting:

- Management improvements, as mentioned throughout this report;
- The potential and the risks of privatization; and
- Intergovernmental initiatives to save costs through sharing resources.

The final section focuses on intergovernmental funding alternatives. Debates on intergovernmental funding responsibility reflect aspects of the criminal justice system's unique structure of checks and balances, as well as more general concerns, such as state or federal mandates. The analysis of various formulas used to allocate intergovernmental criminal justice funding raises the concern that the constitutional principle of community standards may become a reflection of local ability to pay rather than philosophy.

Ideally, before discussing any of these issues, these introductory paragraphs would conclude with a summary of current sources of criminal justice funding: What are they? How much do they contribute? What is their ratio to costs? Unfortunately, such a perspective is not possible

because (1) state-local funding responsibilities vary so greatly, (2) most government budgets do not provide a cohesive picture of criminal justice revenues, and (3) criminal justice functions are not narrowly focused. Specific problems include:

- Criminal court charges and fines are shown only under general revenues and/or grouped with marriage licenses, recordation fees, parking fines, or even recreational fees.
- State and local dual responsibilities result in locally collected revenues going to the state, or state support not being fully shown (for example, county complaints that the state per diem payment for state inmates backed up in local jails is too small may ignore separate state assistance for deputies' salaries and personnel benefits).
- Specific revenues are earmarked, for example, to capital financing, indigent defense, or probation supervision.
- It is difficult in cost and revenue summaries compiled by federal and state agencies to separate civil and criminal justice court expenditures, categorize crime prevention programs (e.g., street lighting and code enforcement), and allocate treatment costs.

Factors such as these place particular importance on general government officials calling for a compilation of all intergovernmental sources of funding, revenues raised, and a definition of criminal justice activities for their particular unit of government.

This chapter underscores such initiatives that public officials can take while acknowledging the limited prospects of significant budget relief. Just as there are no easy answers to stopping criminal activity, there is no easy way of funding criminal justice costs. No matter how effective lawmakers and chief executives are in holding offenders, program managers, and other governments accountable, in the end, it is the public that also must be accountable for matching the demand for criminal justice and public safety with the taxes to pay for it.

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### ***REVENUES GENERATED WITHIN THE CRIMINAL JUSTICE SYSTEM***

Out of necessity, many governments have turned to user fees to replace intergovernmental spending cutbacks or reduced tax collections from regional economic downturns. Philosophically, user fees also are embraced as a means to shift unwarranted burdens from taxpayers who do not use or directly benefit from certain government services to those who do.

Faced with rising criminal justice costs, many general government officials find it particularly appropriate to shift costs from law-abiding citizens to offenders because

monetary payments also can be used as a sanction for criminal behavior. Indeed, there is a tradition of fines as criminal penalties. The difference today is that many jurisdictions are looking first at criminal justice costs and then setting the fees, rather than setting a monetary fine that reflects the seriousness of the crime. The nexus between costs and criminal charges is emphasized further in localities that earmark fees for the use of the agency collecting them, in part to increase the level of collection.

Sound budgeting dictates that elected officials have realistic expectations about the amount of relief to general tax revenues that can be achieved from criminal justice system revenues. In significant areas, the amount of revenue that can be raised is very limited. Accordingly, the following list and the discussion that follows are ordered by the likelihood of collection and how much these criminal justice revenues can be expected to bear full program costs:

- Prison and jail industry sales,
- DUI fines and counseling fees,
- Drug treatment fees,
- Supervisory fees,
- court costs,
- Fines,
- Restitution, and
- Asset seizures and forfeitures.

#### **Prison and Jail Industry Sales**

Not only can the price of goods made by inmates be set to cover the total cost of the program—including wages, repayment of equipment start-up costs, and distribution—but it should be. Eliminating subsidies helps answer concerns that correctional programs may present unfair competition to the private sector and its workers. Setting inmate wages to fairly reflect productivity not only further reduces complaints of unfair competition, it also provides funds for inmates to pay restitution, fines, and court costs that often go unpaid. Collection is not a problem because the courts have ruled “that inmates’ labor belongs to the state and that inmates’ compensation is solely by the grace of the state and governed by rules promulgated by legislative direction.”<sup>2</sup>

#### **DUI Fines and Counseling Fees**

Because almost all drunk drivers are employed, it has been common for most court-ordered drunk driving programs to be supported solely from fees. When states subsequently enacted mandatory jail terms for repeat drunk driving offenses, some counties picked up on the fact that even offenders with a serious drinking history are still apt to be employed. These counties began charging drunk drivers for their jail stays.

For example, in Montgomery County, Maryland, drunk drivers and other minor offenders are charged \$80 for each weekend sentence, with waivers for inmates who are too poor to pay.<sup>3</sup> The Pennsylvania State Association of County Commissioners’ Jail Overcrowding Project rec-

ommended charging DUI offenders a daily fee and using the fees to establish less secure housing sites for DUI and other low-risk offenders. The alternative sites would allow those employed to keep their jobs, pay off court costs and fines, room and board, and support their families. The Pennsylvania report noted that 60 percent of DUI offenders who receive mandatory jail sentences are employed.<sup>4</sup>

### Drug Treatment Fees

It has been estimated that two-thirds of all persons illegally using drugs have jobs.<sup>5</sup> Therefore, in many jurisdictions where drug use is not related to high poverty rates, the same user fee approach can be taken for drug users as for DUI offenders. However, for budgeting purposes, while all participants in drunk driving programs represent a specific offense category and DUI fees can be set to cover total program costs, the caseloads of drug and alcohol abuse treatment programs are driven by the need for treatment of individuals found guilty of many types of crimes. Therefore, general government budgeting must expect to subsidize the budgets of substance abuse programs, although certain offense categories may be self-supporting.

For example, parolees are seldom in a position to be able to pay for drug treatment; even if they are employed, it will be in low-wage jobs. Collection rates also vary by the category of offender. It will be harder to collect from parolees, even if fees are set according to ability to pay, because they are apt to be reluctant participants whose expectations have been set by free prison programs. In contrast, a first-time arrestee in a deferred prosecution program has a high incentive to pay for and participate in treatment rather than be found guilty on a felony drug charge.

### Supervisory Fees

In the last two decades, many states passed legislation to authorize charging offenders for the supervision they require (see Table 7-1).

Table 7-1

#### Number of State Correctional Fee Enabling Statutes Passed Before and After 1970

Years	Prison Inmates	Jail Inmates	Parolees	Probationers
Before 1970	21	17	3	8
1975-1987	15	9	12	20
Total	36	26	15	28

Source: U.S. Department of Justice, *Recovering Correctional Costs through Offender Fees*.

As the table indicates, the concept of supervisory fees first was applied to confined offenders and then extended to probationers and parolees? The lack of emphasis on collecting fees from parolees, again, reflects the fruitlessness of trying to raise revenues from people who do not have an

adequate source of income. In contrast, although prison and jail inmates have only minor sources of income, their personal expenses are being covered by the government, for which fees may be collected when the inmate becomes involved in a work-release or prison industries program.

Four factors affect the amount of revenue general government elected officials can anticipate from using supervisory fees for probation and parole. In the order of how much they limit revenues, the factors are: ability to pay, collection rate, the amount of the fee, and judicial discretion.

### Ability to Pay

Ability to pay often is related to the type of crime committed. Typically, the less serious the offense category covered by the program, the greater the proportion of that program's budget will be able to be covered by fees. This is the same principle that was mentioned in paying for alcohol versus drug-related programs. Texas officials estimate that about 85 percent of the misdemeanor probationers pay all their assigned supervision fees, compared to 60-65 percent for felony probationers.<sup>7</sup>

### Rate of Collection

The second most important determinant of the proportion of program costs that can be borne by supervisory fees is whether the agency charged with collecting the fees believes its program will benefit from the fees collected. In a 1988 survey, 13 of the 17 states that responded reported that revenues from fees averaged only 9.1 percent of their probation and parole operating budgets. However, in four states, the percentage of the operating budget was much higher: Texas (50.4%), Florida (34.5%), Indiana (30.3%), and Arkansas (29.1%).<sup>8</sup>

Texas probation agencies keep the fees collected; in Florida, all fees are deposited in the state's general fund. Nevertheless, both agencies believe the revenue is appropriated to benefit their programs directly, demonstrated in part by the fact that because of increased fee revenue neither state has cut general fund appropriations?

The examples of Texas and Florida seem to indicate that it does not matter if the agency retains the supervisory fees it collects. However, Oregon's experience indicates that it does. Under the Oregon Community Corrections Act, counties have a range of options. In counties that have opted to keep the fees collected, fees make up 13.7 percent of their field supervision budgets, while in counties that return the fees to the state, fees equal only 6 percent of their operating budgets.<sup>10</sup>

Collection rates also depend on the willingness of the court to overlook nonpayment if probation or parole officers report violations. Prosecutors and judges may believe that limited jail space needs to be used for more serious offenses than for nonpayment, and they may feel that by rejecting all but the most blatant violations, they will discourage probation or parole officers from clogging their docket. Recognizing these factors, the Jefferson County, Texas, Adult Probation Department recommends ten days of community service rather than jail time for willful nonpayment of supervision fees. "Faced with the prospect of two weeks of hard work, probationers reportedly often catch up on delinquent payments."<sup>11</sup>

## The Amount of the Fee

The third factor that affects the percentage of the budget that can be covered by fees is the amount of the fee. If fees are set too high, collection may be reduced by an inability to pay. If fees are set too low, probation and parole officers may see little reason to hassle the offender over payment and will concentrate on other supervisory and counseling concerns. Probation managers are likely to accept the officers' priorities if they note that it takes more agency resources to collect the fees than the amount collected.

In contrast, Texas policies permit fee revenues to exceed the cost of collection substantially. In part for this reason, fee revenue as a percentage of total funds for basic probation in Texas grew from 37.4 percent to 56.0 percent between 1980 and 1987.<sup>12</sup> Finally, higher fees—especially those perceived as flowing back to benefit the program—may serve as an incentive to getting the parolee or probationer into gainful employment.

## Judicial Discretion

The last determinant controlling the proportion of operating costs that can be borne by supervisory fees is court priorities. Unless their discretion is narrowly defined by law, judges may consider total legal obligations, such as child support, debts, and other criminal penalties, in setting the amount of the supervisory fee or in waiving it completely. Judges also may set priorities for how any money collected from an offender shall be allocated. For example, restitution or even court costs may be given precedence over fees for drug testing or electronic surveillance equipment rental.<sup>13</sup>

In many jurisdictions, the court seems to favor supervisory fees. As cited in Chapter 6, in a survey of 53 state and local agencies, 41.8 percent of the funds collected were for correctional fees, 28.6 percent for restitution, 20.8 percent for court-imposed fines, and 6.2 percent for court costs.<sup>14</sup> However, within these averages, individual judges can effect significant differences. For example, among the Oregon counties that retain the supervisory fees collected, there was a range from 6.2 percent to 24.7 percent in the proportion of probation agency budgets covered by fee collections. This range was influenced significantly by judicial decisions to emphasize restitution over supervisory fees.<sup>15</sup>

The foregoing discussion of factors affecting the amount of revenue general government officials can expect to budget from probation and parole supervisory fees also applies to fines, court costs, and restitution. Amounts must be a realistic reflection of ability to pay, as well as of the cost to collect. If the agents collecting the fees see a benefit, collection rates will be increased. Also, while budgetary pressures to raise revenue may result in more meaningful penalties for scofflaws who are otherwise productive members of society, increased monetary penalties will be counterproductive if they place unattainable economic burdens on offenders who cannot meet their other basic obligations.

## Court Costs

Depending on the type of court, substantial revenues can be collected through charging court costs. Lower

courts that process numerous minor misdemeanor and local felony charges will realize a much higher proportion of their budget than will trial courts of record that hear serious state felony charges. It is not uncommon, in fact, for counties, cities, towns, and townships to pass identical ordinances to gain jurisdiction over minor offenders, in part because the combination of court costs and fines for minor offenses is a significant source of funds to support their total local court activity. Collection from otherwise law-abiding citizens is handled relatively routinely by the court clerk's office.

In contrast, charges for court costs for state felonies are not commensurate with the actual cost of the complex due process requirements to adjudicate charges that can result in imprisonment. In addition, many arrests do not lead to convictions; therefore, no court costs are assessed, even though court resources have been used.

As previously noted, the importance attached to collecting these fees, as well as to pursuing nonpayment, varies among jurisdictions. Although over 80 percent of the probation agencies that are part of the judiciary collect court fees, only half of the probation agencies under general government do.<sup>16</sup> In fact, it is possible for an inmate to become aware of owing court costs and fines only on being released from prison. Virginia found it necessary to pass legislation in 1988 to require that clerk of court offices, courts, and DOC establish a system to inform inmates. The goal of the legislation was to improve collections and to create one less obstacle to the inmate's successful reintegration into society.<sup>17</sup>

## Fines

The purpose of a fine is to inflict punishment. Fines traditionally have been deposited in the general fund. In contrast, treatment and supervision fees are a rather recent innovation to meet budget pressures; they are intended to fund services rather than to punish and are often earmarked. The distinction can be seen in the Maricopa County (Phoenix) deferred drug prosecution program, in which offenders pay the same amount of money, whether it is a "fee" used to pay for participation in drug treatment or a "fine," if they refuse treatment and are found guilty of drug possession.

Another distinction between fees, fines, and court costs is instructive for general government officials:

- Fees are set to reflect program costs.
- fines generally reflect the relative seriousness of crimes that do not involve imprisonment.
- Court costs are set as a uniform charge for a given level of court, no matter how serious the offense or the services received.

As an example of what these differences can mean, in 1989, the Georgia General Assembly passed a 10 percent fine add-on for the construction of county jails. This resulted in a severe impact on certain offenders rather than a modest one on all offenders because ability to pay would be reflected only to the degree that judges considered it when they set fines. In contrast, a similar need in Mississippi to raise funds for 1,000 new prison beds was met by

1987 legislation to charge each person convicted of a misdemeanor \$25 and those convicted of a felony \$50, while professional bail bondsmen are charged \$20 or 2 percent of the bond, whichever is greater.<sup>18</sup> The Mississippi approach, although broad-based and therefore more modest than raising the Same amount from fewer payees, has no relation to ability to pay, seriousness of the offense, or court time.

Ability to pay is a significant issue in criminal justice budgeting because it affects the ability to collect. It also relates to the fact that a \$1,000 fine does not represent the same degree of punishment to a white-collar professional as it does to fast-food employee. As noted in Chapter 3, day fines (units of punishment multiplied by a computation of the offender's daily salary), which have been successfully used in Europe and piloted in New York City using a NIJ grant, offer a way to make punishment commensurate with the ability to pay. The New York pilot also indicated that day fines offer justification for increasing statutory limits on fines and, thus, the amount collected.

Finally, although a fine is used as a form of punishment for the individual offender who is paying it, there is no reason that fine revenues cannot be earmarked for treatment, prevention, or rehabilitation of others. New Jersey enacted a mandatory "Drug Enforcement and Demand Reduction" fine for anyone convicted of a drug offense. The penalties start at \$500 for simple possession and range up to \$3,000, and the proceeds are earmarked for demand-reduction programs. New Jersey has raised an average of \$9 million per year for prevention, education, and public awareness initiatives through these fines.<sup>19</sup> The Arizona legislature has earmarked numerous fines and fine add-ons for specific programs, such as animal ordinance violations or \$30 additional on DUI convictions for emergency medical services. One-third of the fines of the Tucson city court are earmarked for other agencies, causing its chief court administrative officer to express concern that other court considerations were being consumed by a "cash register climate." A sentencing enforcement division was formed with the dual purpose of assuring collection plus maintaining community respect for court orders.<sup>20</sup>

## Restitution

Requiring criminals to pay their victims has strong public support.<sup>21</sup> Therefore, it is important to note that restitution has been placed next to last in this discussion of criminal justice revenues not because of extraordinary collection problems or because of low total revenue potential, but because it is not a direct source of government revenue. Restitution typically is paid to an individual.

Restitution can result in significant indirect government cost savings, however. Especially for low-income victims of crime, restitution—received from either the person who victimized them or a central pool—can keep them from needing increased welfare assistance or even becoming homeless because they could not replace stolen money or missed work due to injuries. In a 1986 survey of 79,000 probationers, 24 percent of the violent offenders and 50 percent of the property offenders were ordered to pay restitution. While the average amount ordered was \$3,368, only half of the offenders were ordered to pay more than \$500.<sup>22</sup>

In other instances where the effect on a particular victim is not direct, the court may order community service as a form of restitution. The degree to which government budgets benefit from such community service restitution depends directly on the degree of cooperation between the probation department or the jail and other general government agencies, which was emphasized in Chapter 4. When supervision, well defined job assignments, and training are worked out, many needed government services can be provided at significant cost savings.

For parolees or probationers without funds, the Los Angeles County Department of Probation proposal to establish a Residential Restitution Center provides a productive alternative. The government bears the cost of board and room, but these costs are low because the facility is low security. In trade, the offender is employed and avoids the possibility of jail for not meeting the court's order. One-third of the money earned by the probationer goes to the restitution center for its operation, one-third for restitution, and one-third for family obligations or for payment to the probationer on successful completion of the program.<sup>23</sup>

## Drug Assets

Since Revolutionary times, states have provided for the forfeiture of property derived from or used to commit crime, and nearly every state has an asset forfeiture statute.<sup>24</sup> Although asset seizures can be used with other types of criminal activity, the large sums of money involved in the drug trade have resulted in increasingly aggressive use of civil forfeiture proceedings.

However, forfeiture proceedings are highly technical. They depend on sophisticated, well-coordinated investigative work, on how the assets are handled and marketed, and on how the proceeds are allocated in joint operations. Further, asset forfeiture funds can vary considerably from year to year, even for states and large local jurisdictions. In contrast, fines for drug convictions and fees for drug treatment and testing will reflect a more stable relation between drug activity and the need to fund prevention and treatment programs. Therefore, although general government officials may want to encourage the use of asset seizures and remove any statutory impediments, the revenue is seldom a stable source of support for operating budgets.

In brief, under drug asset seizures, any asset can be seized that:

- Was used or intended for use to facilitate the sale of a controlled substance (e.g., cars, boats, planes) *or*
- Is found traceable to an exchange for a controlled substance (e.g., houses, jewelry, real estate, art, financial instruments) *or*
- Has been received in exchange for controlled substances (e.g., cash, bank accounts).

The property is taken through a civil action, which is significantly different from a criminal trial. In a civil trial, the state need only prove by a preponderance of evidence—not beyond a reasonable doubt—that the property was related to drug dealing. The property need not be related to

a specific drug deal or to its owner or purchaser being found guilty of drug dealing. In a civil trial, the owner of the property must testify or forfeit the property.

Given the less favorable rules from a defendant's point of view in a civil proceeding, it is not unusual for a drug dealer not to contest a seizure that is readily traceable to drugs. Knowing that forfeiture can be used, it also is not unusual for a major dealer to shield assets in out-of-state holdings. Therefore, police, sheriff's deputies, and prosecutors must be well trained and well informed regarding what property is to be seized and how it is to be taken. Nevertheless, a 1990 survey of law enforcement agencies revealed that most did not have a formal asset forfeiture program and much was done on an ad hoc basis. Of the training that was conducted, law enforcement administered 57 percent of the programs and prosecution 42 percent; 22 percent of all programs were administered on a multijurisdictional basis.<sup>25</sup>

In part because of the complexity of successful drug forfeiture, the federal government has handled most of the activity. However, two significant intergovernmental concerns could be served by states and localities gaining the competence to handle forfeiture proceedings. First, although the federal government has taken the lead with major drug dealers—and will probably continue to do so—many believe that the federal courts should not be bogged down with lesser cases.

The second intergovernmental concern is that multi-agency involvement can raise disputes over the allocation of the proceeds. Under the U.S. attorney general's guidelines, distribution does not depend directly on where the case is tried but on the time and effort expended by each agency; whether the involvement was fortuitous or the result of effective investigation; whether the agency identified the assets for seizure; and whether the agency could have proceeded on its own.<sup>26</sup> It is obvious that, while these guidelines attempt to give fair consideration to a number of relevant factors, their very multiplicity presents ample opportunity for disagreement and delay in revenue distribution.

Increasing the competence of state and local authorities to expand their use of asset seizure, with or without the involvement of federal agents in joint investigations, does not mean that there will not be a major need for intergovernmental cooperation. Regional cooperation is particularly important to retrieve as many assets as possible, not just for the potential revenue but, more importantly, for seriously disrupting the drug dealing operations. In addition, states may be ready to assume a stronger role in training local prosecutors, police, and sheriff's deputies than they were in the initial years of asset seizures. As of 1990, approximately 38 percent of training has been provided by the federal government and 32 percent provided by private sources, which were principally professional associations, such as the National Association of Attorneys General and the National District Attorneys' Association. Only 21 percent of the training has been provided by states and 9 percent has been conducted by localities?

There are other potential sources of revenue related to drug arrests, specifically, back income taxes and tax stamps. Under the civil asset seizure process described

above, if the owner contests the seizure by claiming that the property was purchased with cash obtained from legal transactions, IRS and the state income tax department should be informed immediately. Not only is it another means to convict the individual on a criminal charge—Al Capone was imprisoned for income tax evasion—but taxes can be collected on assets that the state is not able to prove are drug related.<sup>28</sup>

In addition, as of January 1991, 22 states required tax stamps on illegal drugs.<sup>29</sup> These states do not actually expect the dealers to pay the tax. Their focus is on being able to exact heavy fines for the tax not having been paid on whomever is caught possessing or selling the drugs. As with any other felonious tax avoidance, assets of any kind may be seized to pay the fines and taxes due, without having to determine they were purchased with drug trade profits. This approach was greeted initially with some skepticism, but the U.S. Supreme Court has upheld the taxation of illegal gains, most notably in *James v. United States*, a 1961 case involving embezzled funds. To answer the charge that it is unconstitutional to compel persons to testify against themselves by registering an illegal activity, most states provide for anonymity if a person should apply for tax stamps.

Collection of these fines and taxes may lag if local police and sheriff's deputies do not see value in a drug tax stamp law as an additional means to weaken drug syndicates. As with fees and fines, however, distribution of revenue can then become a way to increase collections. For example, the Kansas drug tax stamp law was largely unused until a change was made in March 1990 to send half the proceeds to the county where the arrest was made rather than all of it going into state's general fund. Collections went up by a factor of 14.<sup>30</sup>

## Summary

For sound budgeting, general government elected officials need a realistic picture of the money-raising potential of each source of criminal justice revenue. In general, the less serious the class of crime involved, the more stable the source of revenue and, therefore, the more the revenue can be used to defray program costs. Revenues also can be increased by legislation that gives the court the flexibility to relate fines, fees, and charges to ability to pay.

The amount of revenue raised is increased further if criminal justice personnel believe that collecting the money enhances their mission. The benefit can be as narrow as the funds simply being budgeted to the agency collecting them.

Fortunately, it is also common for the revenue collection itself to augment the effect of other aspects of criminal justice programs. Establishing sound work programs for real wages can provide the means for real pay-back by the offender for criminal acts. Fees can expand treatment opportunities. Fines can be earmarked for prevention programs. Multifaceted approaches to capturing drug profits sometimes can do as much to break up a drug ring as convicting individuals involved in its operation. These examples underscore the potential available for general government officials working with criminal justice program



managers to ensure that budget decisions that attempt to increase criminal justice revenues will augment—not overwhelm—program effectiveness.

Most elected officials are aware that the public's sense of justice is satisfied when revenues are acquired from offenders and from criminal activity. The public regards this as holding lawbreakers accountable for the effects of their crimes. Therefore, it is important, politically, for general government elected officials to be given information that will allow them to report revenues in relation to the costs of associated criminal justice programs. They can, thus, be responsive to the public's sense of justice. Equally important, they will be in a position to explain the limits of such revenue generation and justify the need for tax support.

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## ***COST SAVINGS***

Before turning to the public to meet budget needs, however, most general government elected officials want to satisfy themselves that cost savings are being fully utilized to meet escalating criminal justice demands. This section examines various avenues of assumed and potential savings applicable to criminal justice budgets: operational improvements, privatization, intergovernmental resource sharing, and intergovernmental cooperation.

### **Operational Improvements**

Operational improvements that lead to program improvements have been mentioned throughout the previous chapters. Unfortunately, examples of operational improvements that lead to immediate cost savings are rare. General government officials trying to find operational savings to deal with a current year budget shortfall will find little to go on. It usually costs money to save money. For example, to increase a prison's holding capacity, structural changes must be funded; to speed parole reviews and free bedspace, more personnel or enhanced computerization may be needed; or to move cases and reduce jail time, forensic laboratory staffing and equipment increases may be essential.

Conversely, there are many examples of cost cuts that cost money. For example, in the face of a 10 percent local budget shortfall, one county decided that it could not afford \$30,000 to hire a program administrator for a supervised release program for misdemeanants, even though the program would save about \$20,000 annually in joint state and county funds on each released inmate's board and room.<sup>31</sup>

Although general government elected officials are apt to hear the same lament from all government programs, negative results from criminal justice cuts often are amplified because sustained growth has removed excess operating capacity and because of security dictates. Consequently, refusing to fund additional positions or space

can lead to a disturbance or an incident that will require the unavoidable expenditure of overtime or a liability settlement.

Just the threat of danger often makes it difficult for general government officials to carry out normal budget oversight. Elected officials report that they frequently feel intimidated when they question expenditures.<sup>32</sup> For example, Illinois state elected officials must deal with a public employee union's claim that the death of ~~six~~ correctional officers in the last seven years was the direct result of personnel funding failing to keep pace with population increases at medium security prisons. "The reality of short-staffing and overcrowding is death. It's as simple as that," according to employee representatives.<sup>33</sup>

It is important, therefore, that formal procedures be established to determine acceptable staffing levels. Such a review not only would include physical analysis of prisons, jails, and juvenile facilities, it also would include analysis of how personnel spend their time: How much of a probation officer's time is spent on paperwork rather than offender contact? How much of a police officer's/sheriff deputy's time is spent on **VIP** assignments or waiting in court for cases to be heard?

An analysis of turnover and staff vacancies is also important. Although high turnover produces short-term cost savings during the months positions remain vacant and from lower entering salaries for less experienced replacement employees, responsible budgeting dictates that elected general government officials be informed fully of the results of turnover or the failure to maintain staffing levels.

Finally, as noted in Chapter 4, one of the most perplexing issues general government officials face in funding policing and corrections is determining program effectiveness. It is unrealistic to assume that all programs are successful and cost effective but, as noted, lack of funding for creditable evaluation has been endemic. Both program managers and general government budget officials have a vested interest in determining whether the target populations have been appropriately selected for the program, whether comparable control groups are being used to determine success, whether a valid baseline can be established for comparison, and how success is defined.

However, even when good research provides answers to these questions, general government officials seldom realize excess revenue. Slowing the rate of increased spending seems to be the best that can be expected, as the Florida focus study (page 162) demonstrates. Although this focus could have been presented in the chapters discussing alternatives, it is presented under this discussion of budgeting because it represents one of the most extensive analyses to date of cost-benefits.

Operational cost savings are possible in the criminal justice system, but many savings are related to creating a system approach to needs and impacts. Budget session decrees can be used to get the attention of the independent criminal justice officials that general government officials have a responsibility to enforce fiscal accountability. However, responsible budgeting to maximize cost savings and program effectiveness require planning and coordination, which are the subject of the next chapter.

## Evaluation of Florida's Intensive Community Supervision Program

Florida's ongoing Community Control Program (FCCP) provided intensive supervision (ISP) for more than 60,000 offenders between late 1983 and 1988, making it the largest ISP program in the nation. The program included a minimum of 28 contacts a month, drug and alcohol screening, and sometimes involved house arrest or electronic surveillance. Probation officer caseloads were from 20 to 25 offenders. Because of the size of the program, a better than normal analysis of its success was conducted.

**Target Population.** The original target was to divert offenders from prison sentences to relieve overcrowding. However, only 12 percent of a 1987 FCCP participant sample were downgrades from a recommendation for imprisonment, while 31 percent were upgrades from sentencing guideline recommendations for regular probation. Thus, the policy goal of controlling prison costs was overridden by increased probation costs due to net widening.

**Control Group Success Comparisons.** Approximately 20 percent of FCCP participants were arrested for new offenses compared to 24 percent of a matched group who had served time in prison. However, there was no significant difference for the rearrest rates of a different set of FCCP offenders who were matched with offenders who received a minor jail sentence along with probation or with offenders who had been sentenced only to regular probation.

Thus, while the increased cost of prison is not justified as a deterrent *for offenders with similar backgrounds*, neither is the increased cost of intensive probation control. In all three comparisons, offenders with similar backgrounds did as well or better in the less costly, less restrictive alternative. For those who could have been placed on regular probation, the more costly alternative of intensive probation did not increase success by reduc-

ing the rate of recidivism. For those who could have been placed in prison, the less costly alternative of intensive supervision was, in fact, more successful in reducing the rate of recidivism.

**Valid Baseline Cost Comparisons.** After FCCP was established, numerous criminal justice system changes took place: sentencing guidelines were implemented, the crime rate increased considerably, regular probation caseloads grew from 80 to more than 110, and emergency releases of state prisoners became necessary to meet court-imposed population caps. Furthermore, FCCP itself altered the conditions of probation so that valid violation comparisons were not possible. Because offenders were supervised much more closely, they were charged with technical violations of their probation conditions twice as often as regular probationers. Thus, it is impossible to compare baseline revocation rates or sentencing reductions, or realize actual cost savings versus simply documenting cost avoidance.

**Conclusion.** Although the target population was compromised through net widening and it was not possible to meet rigorous research standards by freezing baseline conditions, the evaluation was able to document FCCP's cost effectiveness. Using \$14,250 as the annual cost of prison, the net cost avoidance was estimated to average almost \$3,000 per case even with the high number of participants who could have been handled successfully in regular probation.

This degree of cost saving is certainly not bad news for general government officials struggling with increasing correctional budgets. FCCP, even though compromised by significant net widening, saved costs without increasing crime. However, a program like FCCP will not actually reduce budgets—unless government also can control the other factors leading to increased crime, arrests, and tougher sentences.

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Source: National Council on Crime and Delinquency, *Evaluation of the Florida Community Control Program* (San Francisco, MA, 1990).

## Privatization

During the 1980s, the rapidly increasing costs of criminal justice, the need for expanded capacity, and the positive climate for turning a wide range of government services over to the private sector led many states and counties to consider the privatization of correctional facilities. Budget debates focused on speed and potential cost savings, while operational concerns focused on liability and product delivery. However, at times, some citizens seemed to assume, "If business will take care of all these criminals, we won't have to pay."

In fact, as noted in discussing criminal justice revenues, there are only a few programs where cost to the public can be eliminated. For the vast majority of potential programs, it appears to be more a philosophical decision than a cost-cutting decision as to whether most services will be provided by private or public employees.

Criminal justice services that are provided routinely by the private sector, without any use of public funds, include private security personnel—who outnumber publicly employed police officers—and substance abuse treatment for offenders with the ability to pay and the desire to use a private provider. Some states, such as Oregon, have

begun contracting with private agencies to collect fines, restitution, and court costs for a percentage of the revenue collected.<sup>34</sup> In addition, much of the function of a bail bondsman is carried out as a private sector activity; however, some localities find that bail bondsmen's lack of effort to bring in those who fail to appear shifts costs back to public law enforcement.

In all other instances, private profit depends on payment of public tax dollars. The issue, then, is: Can the private sector do the job cheaper, faster, and/or better than the public sector? The last goal has been the easiest to determine. Several functions are contracted out routinely because the private sector can do the job better than trying to develop or employ the expertise within the criminal justice sector, for example, prison and jail construction, health and psychological services, drug testing laboratory analysis, and administrative systems development, including off-the-shelf programs for computer-assisted dispatch, legal research, and inmate records.

In contracting, one concern that is more important in criminal justice than in other areas of public budgeting is whether there are liability issues that should override awarding contracts to the lowest bidder. For example, the cheapest drug testing system may be a more costly decision in the long run if the test results are not accepted as reliable in court.

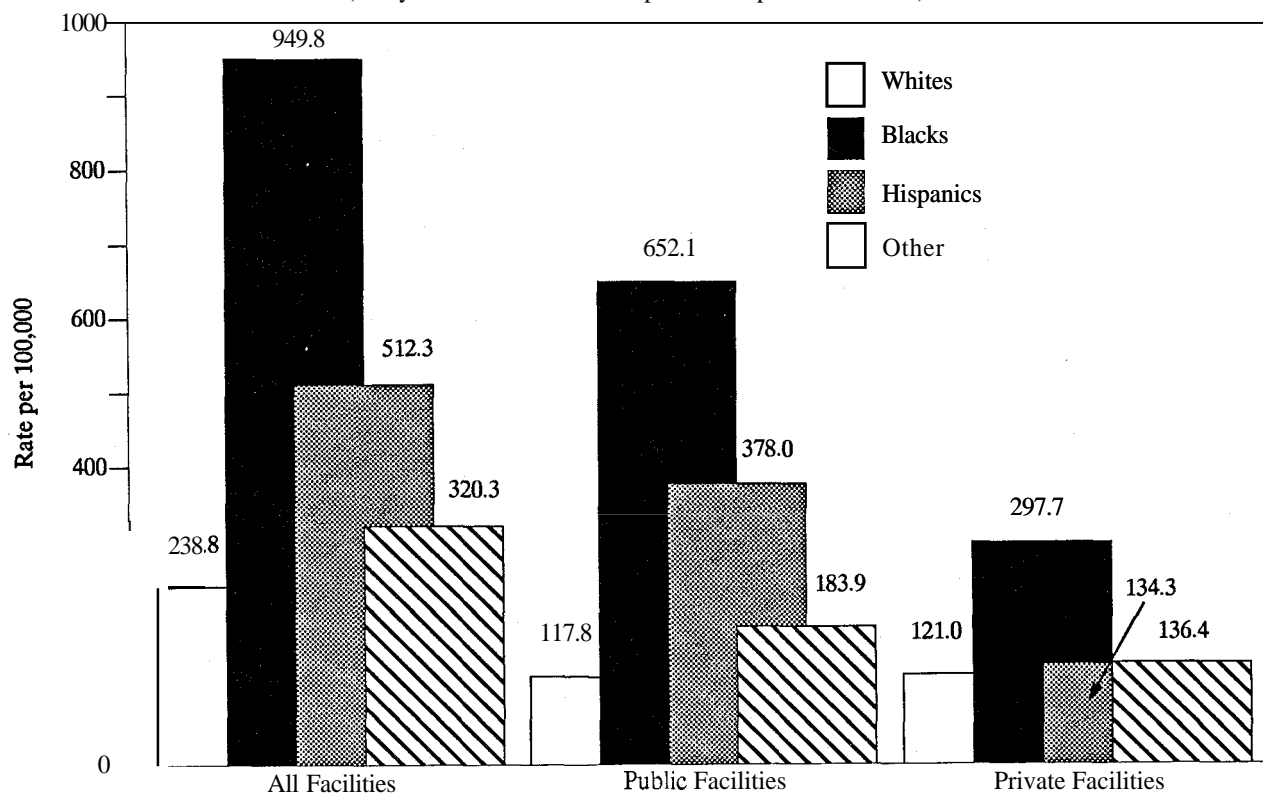
Many observers consider that the needed expertise in the development of prison and jail industries also lies in the private sector. This expertise can be tapped by hiring managers from the outside or by soliciting firms, through competitive bidding, to open branch operations inside a penal institution, or to provide marketing services. Competitive bidding is an effective means to answer business concerns about unfair competition.

In addition, adult and juvenile correctional agencies have a long tradition of contracting with private agencies, both nonprofit and for-profit, to provide community treatment services. These contracts are based largely on the belief that the programs will be better because they provide the opportunity for offenders to reintegrate into the community while still under penal control. They also may provide sophisticated treatment for individual needs, which are not being met in the general penal populations. However, use of private facilities to provide enhanced treatment tends to reflect the jurisdiction's ability to pay, as indicated by the relatively high proportion of white juveniles in private facilities shown in Figure 7-1.

It is this traditional use of private providers for special populations that represents an apt description of the status of private sector operation of jails and prisons at the

**Figure 7-1**  
**Juveniles in Custody by Race, 1989**

(1-day count rates/100,000 in public and private facilities)



Source: U.S. Department of Commerce, Bureau of the Census, "1989 Census of Public and Private Juvenile Detention, Correctional and Shelter Facilities," unpublished.

beginning of the 1990s. During the 1980s, several private for-profit corporations were formed to build and run prisons and jails. However, most privatized operations have not gone beyond special populations, and most of the financial success of these private firms has come from financing construction.

Texas has taken the greatest initiative in privatization. Of the ten new prisons coming on-line at the end of the 1980s, four were built and are to be run by the private sector. These 500-bed facilities were opened in late 1989 and were rated in the first year of operation as being "just fair" in meeting the terms of the contract.<sup>35</sup>

### Major Issues

The major issues involved in whether cost or time savings can be achieved through privatization of correctional facilities are:

- **Liability**—Can government contract away its liability or is it ultimately responsible for injuries?
- **Standards**—Are private operators prepared to conform to court-ordered standards and to the security concerns of the community?
- **Personnel**—With a large portion of correctional budgets being driven by personnel costs, can adequate savings be realized solely through more efficiently designed facilities, or will lower wages cause greater turnover and less screening of personnel?
- **Competition**—Is there an adequate competitive bidding climate to keep cost low when the contract is rebid? Will the contracts of current employees allow them to work for a competitor?
- **Financing**—Does the government have financing alternatives for constructing the facility? What is the current dollar cost of any financing alternative?
- **Efficiency**—Can the private sector respond more readily to program needs and construction time-tables because they are unhampered by legislative budget procedures or bidding requirements?
- **Full Cost Accounting**—In making cost comparisons, have all government costs been fully accounted for, including personnel benefits, retirement fund obligations, administrative support services if the service is provided by public employees, and the governmental cost of security oversight and contract administration if it is contracted out?

The import of these questions is that public officials who are considering privatization must be prepared to enter sophisticated cost analyses and complex negotiations. A detailed request for proposal (RFP) must be prepared and experienced advice sought in developing the terms of the contract. Negotiations should include spelling out what standards are to be achieved (for example, some companies agree to achieve ACA accreditation), how ongoing

security audits are to be conducted, and the obligations of the provider to respond without expensive change orders.

The heavy emphasis on security concerns helps explain why, thus far, most privatization initiatives have been with specialized populations, such as those about to be released, federal detainees being held for trial, and low-security offenders. Furthermore, it has been reported that no private prison operation has shown a profit to date<sup>36</sup> and that the profit margins of private correctional corporations are beginning to fall because they were initially driven by fees for financing<sup>37</sup>. Finally, localities willing to pay high fees to house their prisoners because they are under court order often regard this as a short-term emergency option. Many have found it cheaper in the long run to build and operate their own facilities.<sup>38</sup>

These issues of security and long-term profitability seem to indicate that the role of the private sector in operating penal facilities will not grow to cover a very significant proportion of jail and prison system operations. The privatization movement of the 1980s, however, has introduced a wider range of options for general government officials, especially in providing a safety valve to comply with court-ordered population ceilings. Most importantly, it also has provided a focus to demand that public penal administrators justify expenditures and to examine inefficient requirements in general government administration.

### Intergovernmental Operational Cooperation and Resource Sharing

Another way to reduce budget demands while meeting criminal justice needs is to share resources. Some of the benefits from intergovernmental cooperative arrangements between agencies with parallel criminal justice functions include:

- General government budgets benefit when expensive law enforcement equipment and experienced investigative personnel are shared.
- Public safety is enhanced as integrated data banks are established to respond to the mobility of some of the most serious criminals and criminal activity.
- Through cooperation, regional jails can expand correctional program options while minimizing siting controversies.
- Even prosecutors and judges are realizing the need for greater communication as federal criminal code changes create the potential for greater selectivity in determining jurisdiction.

The following subsections give a brief summary of the types of law enforcement and correctional cooperation existing between local, state, and federal agencies.

However, in considering the potential for increased intergovernmental cooperation, general government officials need to be aware of two areas of potential controversy. First, operational controversies over how priorities are determined and who is in charge can undercut program initiatives. Although general government officials seldom will have a pivotal role in resolving these operational dis-

putes, they do play a key role in the second arena of concern: federalism. The United States constitutional structure provides that criminal justice is largely a state function; most states have extended this concept of non-centralization to enshrine law enforcement as a local function. "Cooperative" arrangements that turn into dictates by the better financed, equipped, or simply larger unit of government can undermine this constitutional concept. It is general government elected officials who must be the ultimate arbitrators of the balance between preserving federalism and seeking efficiency and cost savings.

### **Law Enforcement Intergovernmental Cooperation**

The large number of law enforcement agencies ensures community responsiveness; it also creates significant potential for greater effectiveness through increased coordination. In 1986, there were

- 11,743 municipal police departments;
- 79 county police departments;
- 1,819 township police departments;
- 3,080 sheriff departments, most of which have police functions;
- 965 special police agencies, including park police, harbor patrols, transit police, and campus security units;
- 51 state police departments; and
- more than 50 federal law enforcement agencies.<sup>39</sup>

More than half of the local agencies had fewer than 10 sworn officers.

Although the potential has always existed, several factors have been operating to bring about more cooperation in the 1990s. Organized crime is highly mobile and sophisticated, especially the drug trade and syndicates involving vehicle theft and financial fraud. Computerization has made greater cooperation between federal, state, local, and international law enforcement communities possible. Drug forfeiture funds have provided an attractive incentive for joint investigations. Budget pressures also have meant that agencies have had to pursue shared use of highly sophisticated investigative equipment or go without.

### **Municipal-County Law Enforcement Cooperation.**

Municipal-county cooperation focuses on shared equipment and investigative backup. For example, Allegheny County, Pennsylvania, operates a crime lab that is used by municipal departments. The county police supply backup investigative services to most of the municipalities in the county on request. St. Louis County, Missouri, has technical joint ventures between its municipal departments and the county police for the development of a 911 system, on-line access for police dispatchers to state and FBI data bases, and a "Code 1000" system that provides rapid deployment of officers from multiple jurisdictions when needed.<sup>40</sup>

Traditional cooperation, which is an outgrowth of shared jurisdiction, also should be noted. It is common for a sheriff to deputize municipal police departments, giving

them authority throughout the county. The power of a local law enforcement officer to make an arrest in another jurisdiction also can be provided for by state legislation, extending the authority of law enforcement officers to any part of the county in which the officer is employed. In contrast, it is not typical for state police or county police and sheriff's deputies to operate in big cities, except for interstate highway patrols or on a special cooperative investigation. Of course, arrests always may be made across jurisdictional lines in hot pursuit or under the power of citizen arrest, which does not include the power to search.

**State-Local Law Enforcement Cooperation.** State-local cooperation typically is based on collaborative efforts and on support technology. Emphasis on illicit drug enforcement in the late 1980s increased collaboration significantly. Of the more than 11,000 local police and sheriff's departments having primary responsibility for drug enforcement, 55 percent were participating in multiagency drug enforcement task forces in 1990.<sup>41</sup> Many states have included experienced prosecutors in these multijurisdictional task forces to help ensure that the police procedures used and evidence gained will stand up in court.

Although the proportion of large agencies involved in multiagency task forces is over 80 percent, half of all the local police officers assigned to task forces nationwide are employed by small departments serving populations of less than 25,000.<sup>42</sup> The high number of small departments involved reflects the fact that efforts to clamp down on the drug trade in urban areas served to displace some criminal activity to rural areas. It is possible, however, that the emergence of drug task forces may serve as a catalyst for permanent cooperative arrangements, perhaps leading to consolidation of small police and sheriff's forces. For example, based on targeted drug enforcement experience, Michigan formed 23 multijurisdictional cooperative general law enforcement teams made up of state troopers, county sheriffs, and municipal police officers.

In addition to collaboration to fight the drug trade and other syndicated crime activities, computerization also has led to increased coordination between state and local law enforcement agencies. This has been particularly true in the development of Automated Fingerprint Identification Systems (AFIS). AFIS enables a computer to search through hundreds of thousands of fingerprints in less than ten minutes and provide a selected number that are the closest match for conclusive identification by the technician. It represents a major revolution in criminal investigative work because manual searches are not feasible without the name of a suspect. Since the mid-1980s, 35 states have, or are in the process of establishing an AFIS system and many provide statewide access. For example, the Virginia system has 20 regional terminals that can receive fingerprints from local law enforcement agencies for virtually instantaneous identification. The state system also is adding prints from local files to expand the data bank.

**State-State Law Enforcement Cooperation.** Law enforcement coordination also takes place between states. For example, the Northwest Tri-State Narcotics Law Enforcement Council was initiated by the governors of Oregon, Washington, and Idaho in 1988. It consists of the state

police superintendents and coordinates efforts to investigate and shut down drug labs, stop drug shipments, and reduce marijuana cultivation.<sup>43</sup> Other multistate efforts have conducted simultaneous drug searches on interstate routes or border crossings.

#### **Federal-State-Local Law Enforcement Cooperation.**

Federal law enforcement resource sharing is of the same nature as state/local initiatives. Since 1924, the FBI has been authorized by the Congress to collect and disseminate fingerprint cards and arrest record information. At this time, however, it does not have AFIS capability, so that its response to the requests it receives from over 62,000 agencies may not be able to penetrate aliases, and the turnaround time is commonly two months. Nevertheless, it still remains the principal source of information for offenders who have multistate records. In addition, the National Crime Information Center (NCIC) maintains a computerized filing system of 12 separate data bases that include stolen and recovered guns, stolen license plates, stolen securities, wanted persons, and missing persons.

The FBI also maintains one of the world's most comprehensive crime laboratories and shares its services with states and localities, in the same way that states and counties provided forensic services to police forces within their boundaries. However, the FBI screens requests from state and local agencies carefully and returns any it determines could be performed satisfactorily by the contributing laboratory or jurisdiction.

INTERPOL is a law enforcement function within the U.S. attorney general's office that brings together police in all units of government with police in other countries. Operations were decentralized to state liaison offices in the 1980s, largely in response to increased activity of state and local police and sheriffs' departments with international crime and foreign nationals. Decentralization has tapped the growing capabilities of state information systems to assist international investigative agencies, while providing states the opportunity to obtain information on international crime and its impact on their state.

Beginning in 1981, Law Enforcement Coordinating Committees (LECC) have been established in each federal judicial district to serve as a focus for improved "cooperation and coordination between and among federal, state, and local agencies." LECCs are often cochaired by the state's attorney general or other state official and the U.S. attorney, and now exist in each of the 93 federal judicial districts. Many use subcommittees to deal with issues such as white-collar crime, toxic waste, Indian affairs, drug offenses, child pornography, asset forfeiture, violent crime, and victim/witness issues.<sup>44</sup>

Paralleling state initiatives, the U.S. Department of Justice also has established task forces of federal, state, and local prosecutors and investigators to coordinate the investigation and prosecution of highly sophisticated and diversified drug-related and money-laundering enterprises. These task forces coordinate efforts with and among the following federal agencies and state and local law enforcement agencies: DEA (Drug Enforcement Administration), Customs, BATF (Bureau of Alcohol, Tobacco, and Firearms), INS (Immigration and Naturaliza-

tion Service), FBI, IRS, Coast Guard, U.S. Marshals Service, Tax Division and Criminal Division of the Department of Justice, and U.S. attorneys. By 1988, more than 700 multijurisdictional task forces and drug units had been established in nearly every state.<sup>45</sup>

In addition, under the supremacy clause of the federal Constitution, it has been held that state officers have not only the power but also the duty to enforce federal Criminal law. Consequently, informal coordination between federal and state law enforcement officials to try arrests made by local police and sheriffs' departments in federal court has grown, as the Congress has passed tougher Criminal penalties than those that exist in many states for similar offenses.

Finally, there is a long history of federal/state/local agreements for law enforcement on federal lands and enclaves. There are areas, such as military bases and Indian reservations, where the federal government has required that the state cede exclusive jurisdiction to them, which means that the state cannot enforce its laws on these lands. However, in most of these instances, the federal government itself enforces the state's laws under the *Assimilative Crimes Act of 1948*, which incorporates by reference the state criminal law of the surrounding state in force at the time of the offense. On the other hand, for parks and other public lands, the federal government typically has entered into agreements with state officials for concurrent jurisdiction, which gives local, state, and federal officers full enforcement powers. There also are a few instances in which the state has retained its proprietary enforcement rights and the federal government has no power to enforce state laws, and some instances of partial jurisdiction in which the federal government has only the right to enforce certain state laws, such as violent crimes, while the local authorities enforce lesser offenses, such as traffic laws.

Although the jurisdictional status of each federal enclave has its own history, typically, budget considerations cause local officials to try to cede law enforcement authority rather than retain it. If a case is tried as a local offense, all the associated jail and court costs will be borne by the locality. If federal officers make arrests under federal charges, the locality is spared these costs.

#### **Intergovernmental Cooperation among Correctional Agencies**

Administrative cooperation between penal authorities focuses principally on prisoner exchanges and joint facilities, although initiatives to facilitate educational exchanges will be discussed later. In general, relations between federal authorities and county jail or state prison administrators are better than between the states and their counties. This is due to the fact that per diem payments are defined by contract and frequently are higher than any state payment. Also, federal prisoners are less apt to be violent.

**County-County Correctional Cooperation.** County-county cooperation has increased with jail overcrowding. Siting any correctional facility is never easy, but state or federal authorities, at least, usually have choices generated by depressed communities competing for employment. Local governments are essentially landlocked with-

in the confines of their community. Therefore, some local governments have joined together to build and operate jails and detention facilities and to avoid siting the facility in the most densely populated jurisdictions. Other small units of government have joined together as a way to achieve economies of scale and professionalism or to separate female and juvenile populations from incarcerated adult males (often in response to federal and/or state mandates or a court decision).

Formal agreements are necessary *to* define the basis of cost sharing, priority allocation of beds, and the responsibility of each local sheriff. In addition, establishing a regional jail for rural counties to replace existing antiquated facilities—rather than in addition to local jails as would be the case in an urban setting—may meet great resistance from rural sheriffs who fear losing too large a chunk of their responsibilities.

**County-State Correctional Cooperation.** County-state cooperation exists, but it often is overshadowed by disputes over timely removal of state-sentenced prisoners from overcrowded local jails. However, even in overcrowded systems, states have established protocols to remove prisoners in the order requested by local sheriffs and jail administrators. These agreements provide relief to jails in handling disruptive prisoners or those in need of medical care, which save jails the cost of trying to provide for special populations.

**State-State Correctional Cooperation.** Interstate cooperative agreements have existed for several decades to cover both the transfer of prisoners and the supervision of probationers and parolees. The Compact for the Supervision of Parolees and Probationers, to which all states, Puerto Rico, and the Virgin Islands are signatories, was initiated in 1934. However, in 1987 at the urging of several associations representing probation and parole administrators and officers, the National Institute of Corrections (NIC) funded joint action to tighten control over the movement and supervision of offenders. A compact also exists between 47 states and the District of Columbia to exchange inmates, often one-for-one. In 1989, 36 agencies received 712 inmates, and 37 agencies sent 1,534 inmates.<sup>46</sup>

**Federal-Local Correctional Cooperation.** Federal/local cooperation has been strong, historically, because federal prison facilities are widely dispersed and are not convenient for holding people awaiting federal trial. Therefore, local jails hold approximately 75 percent of the federal detainees for the U.S. Marshals Service under negotiated intergovernmental agreements in each of the 50 states. The average per diem payment for FY 1989 was \$41.45, with rural jails receiving less than large metropolitan jails.

In the past, this was welcomed income; however, crowding has made housing federal prisoners a low priority. In response, the Marshals Service has initiated a Cooperative Agreement Program to help state and local governments expand and/or construct new facilities in exchange for a contract for a designated number of beds. In 1983, only \$26 million in federal funds went to constructing local jails; by 1990, over \$94 million was provided

to 141 local detention facilities. In addition, excess federal equipment is funneled to local jails, although it remains the property of the Marshals Service. In general, this type of personal assistance, the high rate of per diem payment, the frequently nonviolent nature of the offenders, and the relatively small number of inmates involved have led to better relations between U.S. marshals and local jails than between the state and local jails.

**Federal-State Correctional Cooperation.** Federal/state administrative cooperation has allowed states to transfer inmates into federal facilities and allowed the federal Bureau of Prisons to use state facilities to protect selected federal inmates. Prisoners may be transferred from state to federal facilities as the result of a riot or a serious disciplinary problem, or because a convicted state offender cooperated with federal authorities and may be in danger if left in the state system. The bureau has statutory authority to board state prisoners in federal institutions on a contract basis. For example, states such as Vermont, which have no maximum security prison, send all their security risks to federal facilities. On August 1, 1990, 1,131 state prisoners, which represented 2 percent of the total federal sentenced population, were detained in various federal institutions through intergovernmental contracts.<sup>47</sup>

There are two other areas in which the federal government cooperates directly with the states. In cases of an emergency, there is a 24-hour National Institute of Corrections response to identify sources of emergency supplies or provide professional help for hostage families. For example, temporary jail cells were transferred from Texas to a flooded Alabama locality and mattresses were transferred from New York to Pennsylvania.<sup>48</sup>

In addition, under the National Drug Control Strategy, in 1990, federal departments were directed to canvass their property holdings for land that could be reported excess and suitable for prison construction. If appropriate and consistent with the provisions of the *McKinney Act*, amendments to the *Federal Property Administration Services Act* will then be proposed so that state and local governments needing a prison site receive special consideration.<sup>49</sup> Thus far, sites have been few in number and often located a good distance from areas of greatest need.

## Overcoming Barriers to Sharing Resources

### Establishing Priorities

All of the cooperative agreements cited above look good on paper, but most face the problem of differing priorities. Often, the agency that needs assistance places a far higher priority on action than does the other agency. The drain on limited resources also can play a role.

For example, many state program managers see AFIS technology primarily as an efficient central depository and retrieval system. Local police-sheriff investigators, however, quickly realized that they could save days wasted in tracking down false leads by requesting an AFIS check of latent crime scene prints as their first step. Furthermore, use of AFIS at jail intake is an effective means to penetrate aliases.

The issue becomes how to set priorities for the use of a state resource for local resource-savings and increased effectiveness: Should all drug distribution arrests have priority? all sex crimes? all reported thefts above a certain dollar value? or should each local law enforcement agency be allocated a certain number of inquiries? The alternative to such priorities is for the state to fund increases in AFIS capacity and personnel to realize local law enforcement agency savings.

Prisoner transfers also raise concerns that the receiving agency's resources will be used to relieve the sending agency's budget. This is why most prisoner transfers are reciprocal. In addition, the receiving agency takes on the public safety responsibility for the transferred offender. Security concerns, for example, contribute to the fact that it reportedly takes six months to transfer a probationer who is a resident of the District of Columbia, Virginia, or Maryland from the court where he or she is being sentenced to the control of the probation department where he or she is a resident. A complete investigation is done by the receiving probation department, which is then forwarded to the state, where it is acted on by the Interstate Compact Office.<sup>50</sup>

### Determining Who Is in Charge

Lack of response caused by conflicting priorities is relatively easy to identify and measure. Solutions are, therefore, easy to define, even if lack of funds may make them difficult to carry out. Lack of effective coordination due to turf battles can be far more subtle and difficult to overcome.

Specific concerns behind these turf battles include confidentiality of operations, establishing the chain of command over operational decisions, and methods of operation, in addition to concern about who gets public credit. Traditionally, local law enforcement has been given deference. State law may give local officials arrest powers outside their jurisdiction, but inside their jurisdiction, they oversaw law enforcement activities. However, starting with Prohibition, through the enactment of RICO statutes, and now in the war on drugs, federal and state authorities have become increasingly aggressive about pursuing criminal investigations without respect to jurisdictional borders.

Even though joint efforts are carried out through formal agreements, local law enforcement officials still may chafe during the actual conduct of the operation. A local or state police department may have spent months or years investigating a case. Their work may be the reason the FBI became interested. However, when the FBI comes in, they usually make the actual arrests, in part because of the large sums they can use for drug buys, which they can command from federal forfeiture funds. Local officials may feel that they have been cut out because of security precautions surrounding the arrest or because they do not receive credit for their preliminary work. These feelings can be further intensified in the apportionment of drug assets—which are controlled by the federal arresting agents—based on the contribution of each law enforcement agency's work leading to the arrests. Finally, throughout the joint operation, there may be an undercurrent that federal or state authorities represent a "higher" level of law enforcement and, therefore, "higher" individual competence.

At least half of the states have moved to reduce some of the specific elements of controversy by enacting their own RICO statutes. Most of these state laws are similar to the federal statute and they allow states, operating on their own or in concert with local officials, to seize illegally obtained profits and property and to target continuing operations rather than individual criminal acts. As noted under the discussion of forfeiture funds as a source of revenue, increased state and local law enforcement training in civil forfeiture procedures is needed. If it is provided, it should result in state and local officials being able to maintain more control in federal-state-local operations.

### Federalism and Intergovernmental Cooperation

Historically, our system of criminal justice was based on fear of a centralized police power. The policing function was established as the most local function. The challenge today is to preserve that noncentralized concept while responding to budget pressures for greater efficiency and to the challenge of highly mobile criminal activity.

As noted, in the last 60 years, the Congress has greatly expanded the number of acts that can be prosecuted in federal courts. Legislation that passed both houses in 1991 not only would add to this list but it would further enlarge the federal role through tougher sentencing, extension of the death penalty, creation of "drug emergency areas" and rural drug task forces, and federal operation of ten regional drug-treatment prisons and ten first-offender boot camps to be used for state offenders.

These federal initiatives are being raised in this discussion of funding criminal justice rather than in a separate constitutional discussion because the driving force in the acceptance of an increased federal role in law enforcement by state and local authorities has been the opportunity to expand program capability while relieving budget pressures. Nevertheless, state and local elected officials may wish to consider whether the shift away from local control is worth the degree of funding relief provided.

Little attention has been paid to this shift outside the federal court system. Not surprisingly, the federal judiciary's concern is driven by increased caseloads, but it gives expression to issues that should be of concern to state and local officials. For example, the Federal Courts Study Committee Report contained the pointed observation that:

One facet of the expansion of federal presence in the criminal area is the concomitant loss by the states of control over cases and investigations that historically would have been their own. . . . [I]n many cases, federal efforts are predicated on the supposed inability of state officials to investigate violations with interstate implications.<sup>51</sup>

Out of this concern, the Federal Courts Study Committee recommended legislation that would strengthen the ability of the states to prosecute rather than to turn all multistate criminal activity over to the federal government. Specifically, the committee recommended that federal legislation allow state courts to apply to federal courts for assistance in gaining nationwide service of subpoenas and other processes.<sup>52</sup>



The Federal Courts Study Committee further urged that, “Federal prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts.”<sup>53</sup> This admonition echoes the U.S. attorney general’s guidelines urging U.S. attorneys not to supplant local prosecution. Justice Sandra Day O’Connor focused her address before the 1991 Presidential Violent Crime Summit on the same theme of “appropriate respect and regard.”<sup>54</sup> Congress also echoed this in its 1991 bill by declaring it “the intent of Congress that [provisions] shall be used to supplement but not supplant the efforts of State and local prosecutors.”

However, despite this official unanimity among all branches of the federal government against the prosecution of crime under federal laws, in practice, the trend toward greater involvement of federal authorities in law enforcement continues to be driven by tougher penalties enacted by Congress, by aggressive executive agency policies, and, in some jurisdictions, by the difference in judicial philosophy and/or caseloads. Parallel federal and state laws do provide options. In fact, to eliminate any potential legal loophole being used by the defense that an arrestee could not be prosecuted in federal court, the statement of congressional intent cited above is followed by the qualification that it does not “place any limitations on otherwise lawful prerogatives of the Department of Justice.”

The difference between intent and practice is exemplified further by legislative authorization of targeted programs for “drug emergency areas” and for rural drug prevention in the 1991 federal anticrime proposals and by executive department initiatives, such as “Weed and Seed.” Rural drug enforcement task forces would have heavy representation of federal law enforcement authorities and cross-designation of federal law enforcement officers to enable them to enforce state laws. The “drug emergency areas” provision would authorize the president to “direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law” in support of state and local efforts. Although still entitled “cooperative” support, the provisions represent a significant extension of federal initiative. A Department of Justice description of Weed and Seed is less subtle in acclaiming that:

The Weed and Seed program will complement the Department’s law enforcement initiatives under Project Triggerlock, which targets violent offenders for prosecution in Federal court to take advantage of tough Federal firearms laws. Between April 1991 and January 1992, Project Triggerlock resulted in 4,500 cases charged and had a 91% conviction rate.<sup>55</sup>

General government officials and citizens in the localities receiving the assistance probably will welcome the federal presence. In high-crime areas, there undoubtedly is great sympathy for the following dissent of the assistant attorney general for the criminal division of the U.S. Department of Justice to the Federal Courts Study Committee’s call for restraint:

Federal policy is to coordinate with local prosecutions not to “federalize” them. . . . [U]ntil the vast

majority of the states enact new and more effective laws to combat drug trafficking and create adequate prison capacity to house those convicted, the federal government will have a responsibility to step into the breach. . . . In fact, an important reason why federal prosecutors sometimes take cases that apparently could be handled in state courts is that they have been asked to do so by state investigators or prosecutors who believe, for one reason or another, that society will not be as adequately protected by a prosecution at the state level.<sup>56</sup>

Finally, it is not just concern about combatting crime that is leading to change. The desire for efficiency and increased professionalism, which is a laudable goal of budgeting, has also shifted traditional intergovernmental balances. These forces, as well as concern for equal justice, led to state unification of small local courts in the early 1970s. The experience gained through specific multijurisdictional drug task forces similarly appears to be leading to comprehensive unification of many small police forces. For example, based on its experience with regional drug task forces, Michigan observed that through statewide coverage, even in rural areas, “Much more can be accomplished with fewer dollars than with a strategy of separate funding for each of the more than 600 organized police/sheriff departments in the state.”<sup>57</sup>

It would appear that the U.S. Senate was operating from a similar motivation when it passed a 1991 provision for the federal government to begin running drug treatment prisons and boot camps for state prisoners. The Senate approach appears to be based on a belief that the 50 states would not be able to administer effective treatment programs if they were to be given the federal treatment funds directly, as under the House version.

The key policy question, then, is whether our federalist structure creates a meaningful difference in facilitating intergovernmental cooperative cost savings.

- Should operational initiatives be opposed if they involve federal efforts while being encouraged if they do not?
- Or should the goals of increased efficiency and the modern irrelevancy of historic jurisdictional boundaries to organized crime compel government policy toward increased joint efforts by whatever means they can be achieved?

## Summary

Controlling the cost of government services is a widely recognized responsibility of general government elected officials. In criminal justice, cost savings may come through improved system management—as discussed throughout this report—to remove bottlenecks that affect the operational costs of other agencies. Savings may be realized by making lower cost alternatives available. However, due to start-up costs, many of these initiatives save money only in the long term.

Long-term cost savings also can be realized by augmenting the professional capacity of an agency, either by

using the private sector or through intergovernmental cooperation among similar agencies. General government officials will need to ensure that full-cost accounting comparisons and liability issues are addressed in decisions to expand use of the private sector.

Increased intergovernmental cooperation between parallel criminal justice agencies, spurred in the 1980s by the drug trade, will likely continue to develop, in part because controlling the unrelenting growth of criminal justice expenditures will demand it. In other cases, intergovernmental cooperation will increase simply because the comfort level of practitioners and their willingness to cooperate increase with each successful operation. In addition, new computer technology increases the capability to support improved communication, coordination, and criminal investigation.

However, constitutional concerns about the resulting centralization should be part of the public policy debate. To the degree that this debate ensures that cooperative efforts are participated in freely at the working level to meet actual needs, rather than imposed from the top down, the concept of community standards of law enforcement can remain sound. Indeed, the philosophical goal for all criminal justice agencies—to preserve their autonomy while pursuing productive cooperation—was well stated in referring to prosecutors a decade and a half ago: “largely independent, they have accepted the collegial model of state [-federal] help but not state [-federal] supervision.”<sup>58</sup>

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## INTERGOVERNMENTAL FUNDING

The first two sections of this chapter dealt with sources of revenue and cost savings that could be realized from a government’s decisions to help itself. The second section included the concept of governments sharing their resources to achieve mutual benefits. This final section focuses on the responsibility of state and federal governments to fund criminal justice system needs after all locally generated resources have been tapped.

This section begins with the types of state and federal programs and project grants targeted to achieve specific policy goals determined by the government providing the funding. It then turns to intergovernmental formula support for criminal justice, typically through block grants, where the major impetus is to establish a more even funding base.

Because there is a significant difference between federal and state criminal justice responsibility, it is difficult to compare the amount of intergovernmental assistance each provides. The federal system is constitutionally separate from state-local criminal justice systems, and any assistance is traceable directly even if it passes through a state allocation process. However, the amount of federal assistance is small. Although 7.2 percent of 1990 federal criminal justice expenditures went to state and local governments, federal intergovernmental funds made up only 1.1 percent of state/local expenditures. Even in 1973, when over 25 percent of federal spending was intergov-

ernmental assistance, federal funding was only 5 percent of state and local expenditures.<sup>59</sup>

Although states did appropriate at least 3 state dollars in direct assistance to localities for every federal dollar in 1990,<sup>60</sup> significant state funding also may take the form of a state assuming responsibility for a criminal justice function that localities provide in other states. The longer the division of authority has been in place, the less local governments are apt to regard the direct state expenditure as state assistance. Combining direct expenditures and intergovernmental assistance, state governments funded 40 percent of total state-local criminal justice expenditures on average in 1988, and six states funded over 60 percent (Alaska, Delaware, Kentucky, North Carolina, Vermont, Virginia).<sup>61</sup>

## State and Federal Program Support and Project Funding

State and federal discretionary project grants and technical assistance represent one avenue for meeting criminal justice needs. Project grants are not an ongoing source of revenue. Ideally, the successful improvements they help develop will be funded by the government with the program responsibility. In addition, the policy goals of experimental project grants are served most fully when information is shared with other criminal justice agencies to spread use of proven program improvements.

At times, information sharing has been collegial, and ongoing funding has been provided willingly by the host government. At other times, changes fostered by discretionary grants have become controversial mandates. The same potential for intergovernmental controversy exists in training. Training programs may be a welcome state assumption of a need that would have had to be funded locally or go unmet; in other instances, training initiatives are regarded as irrelevant, costly, and/or intrusive. As in the previous section, often, the difference is whether practitioners perceive that the programs support their priorities or are controlled and imposed from “above.”

### State Program Assistance

Policing. State provision of training for local police and sheriff’s departments was initiated in many states with federal LEAA (Law Enforcement Assistance Administration) funds in the 1970s. The impetus for LEAA funding, as well as the continuing importance of the state role, reflects the fact that the vast majority of local law enforcement agencies are too small to establish and support their own training. Eighty-nine percent of the police agencies serve jurisdictions with populations under 25,000. Only 34 of the almost 12,000 local police departments and only 12 of the 3,000 sheriff’s departments have more than 1,000 sworn officers.<sup>62</sup>

The major issue in state-provided training is whether it is relevant to local circumstances. States attempt to address this concern by providing the training regionally, drawing from experienced local officers as trainers, and by working with local advisory boards. This enables them to weight the curriculum appropriately. For example, one region may need to emphasize procedures to be followed in a convenience store hold-up off an interstate while another

er might need training in dealing with domestic violence in a small-town setting.

**Courts.** State services to prosecutors and judges also expanded in the climate of **LEAA**, although the origins of steps to increase court professionalism began with the appointment of the first court administrator in New Jersey in 1948. With local court reform and unification came a structure, usually administered by the state supreme court, to convey administrative improvements, personnel management strategies, and continuing legal education to judges sitting locally. This climate of increased professionalism, as well as the need to understand the ramifications of numerous **U.S.** Supreme Court evidentiary rulings, also led states to support specially targeted continuing legal education for prosecutors. More recently, the development of computer networks for time-consuming legal research has led states to fund access to this research capability for small prosecutor offices.

Similar state-supported in-service training for public defenders is not common, in large part because their mission is the same as members of the private bar. Therefore, their continuing legal education needs can be met by non-government programs.

Indeed, private, nonprofit professional associations play a major role in continuing education, information sharing, and the development of standards in every field of criminal justice. For example, the American Bar Association, the National Center for State Courts, and the Institute for Court Management play key roles in training court officials, along with the National Association of Attorneys General, the National District Attorney's Association, and the National Association of Legal Defense Attorneys. The American Correctional Association, as an umbrella organization for a number of penal functions, took the lead in establishing prison and jail standards, while the nonprofit Commission on Accreditation for Law Enforcement Agencies (CALEA) began accrediting police and sheriff departments in the mid-1980s. Trial Court Performance Standards were published in 1990 by the National Center for State Courts under a Bureau of Justice Assistance grant.

**Local Corrections.** State project grants and technical assistance for correctional programs vary much more from state to state than does state assistance provided for policing or court-related functions. The differences, in large measure, reflect differing degrees of state responsibility. In *six* states (Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont) the state is responsible for virtually all correctional spending; there are no state grants to localities because there is little or no local responsibility. In eight states (California, Florida, Minnesota, Nevada, New York, Oregon, Pennsylvania, and Texas), less than 60 percent of all correctional spending in 1987 was funded by the state.<sup>63</sup> Table 7-2 lists the states that provided more than \$1 per capita in state correctional aid to localities in 1987. Those states account for 97 percent of total state corrections aid.

States that have enacted Community Corrections Acts have acknowledged that alternatives to incarceration

*Table 7-2*  
**States Spending at Least \$1 Per Capita  
for Corrections Aid to Localities, 1987**

State	Amount Per Capita
1. Virginia	\$27.37
2. California	9.57
3. Tennessee	8.29
4. New York	7.62
5. Kentucky	7.48
6. Iowa	6.58
7. Louisiana	5.80
8. Oregon	5.06
9. Alaska	5.00
10. New Jersey	4.49
11. Minnesota	3.70
12. Arizona	3.52
13. Maryland	3.33
14. Texas	3.06
15. Ohio	2.76
16. Georgia	2.25
17. Illinois	2.17
18. Mississippi	1.68
19. Kansas	1.51
20. North Carolina	1.51

Source: Martha A. Fabricius and Steven D. Gold, *State Aid to Local Governments for Corrections Programs* (Denver: National Conference of State Legislatures, April 1989).

are important to the functioning of the state's total criminal justice system. These states are likely to fund local pilot projects for pretrial release, electronic incarceration, community service/restitution, and juvenile treatment. **As** noted in Chapter 3, recent Community Corrections Acts are more apt to be based on mandates for local participation, which target funds to reduce the use of incarceration, than are those passed a decade ago, which were oriented more toward equalizing resources.

**As** noted in Chapter 5, states also are increasing their support of local jail construction costs. This policy decision can be based on any number of factors. The state may want to influence jail design because it assists in paying jailer salaries. State policymakers may be concerned that if jail expansion is not addressed along with prison capacity expansion, sentencing may be slanted increasingly toward a prison term. State construction grants may be used to encourage regional facilities to replace antiquated, inefficient, small rural jails. Finally, states may simply be responding to intergovernmental pressure to help fund what is a significant one-time local expenditure. Such pressure is often related to the fact that a large number of individuals being held in local jails have been arrested for violation of state laws. Local cries for state help became particularly strong in the late 1980s due to the impact of state legislation requiring mandatory jail terms for drunk driving.

Differences in mission between prisons and jails, as well as in local receptivity, explain why states have been slow to develop training programs for jail deputies. Train-

ing that could be provided by prison officials would be related to handling experienced violent offenders and to the type of organized activity that can develop with long periods of incarceration. There is no parallel in prison operations to many of the duties of jailers who handle large turnovers of disruptive individuals.

Finally, some states provide an oversight function in certifying private in-state and out-of-state facilities that may be used by juvenile and adult treatment programs. Given that programs used for juveniles may also be used for special education placements by local school systems, a single review authority is particularly efficient.

**Criminal Justice Planning.** There was a 294 percent increase in the total amount of state correctional aid provided to local governments from 1980 to 1987. This not only outstripped the increase in total state aid to localities (67.9%), but the growth in state correctional aid to localities also was more than double that of state correctional spending (117.9%).<sup>64</sup> Despite such extraordinary increases in state assistance, local claims that they are unable to meet the rising costs of criminal justice are more prevalent than ever. This lack of relief has begun to underscore the fact that traditional approaches are not adequate and that proactive planning, rather than just reactive spending, is needed. However, many localities do not have the resources to undertake sophisticated planning.

For example, noting that, "State and local criminal justice agencies have very limited research and evaluation resources, often fragmented within agencies," Oregon's 1990 Drug Control Package proposes to use federal drug funds to create state and local matching grants "to identify needs and to determine which programs work and which do not."<sup>65</sup> Recognizing that planning depends on accurate forecasting, Virginia is attempting to work with localities to improve their jail population forecasting capabilities. However, demographic and law enforcement differences between localities seem to make it infeasible to provide the assistance through one state model, and given ongoing budget pressures, the cost of setting up adequately sophisticated models in each major locality has not been a priority expenditure.

Another area in which states are providing assistance to localities has been dictated by lack of computer compatibility, which, despite technical progress, still presents problems. As noted, data sharing is an important element of effective police work and correctional program efficiency, but coordination may be blocked rather than assisted by technology if incompatible decisions are made initially. In New Jersey, potential incompatibility was avoided by the state purchasing the equipment to be used locally as part of its integrated court system support. In Florida, the state simply tried to reduce compatibility problems by offering regular technology seminars to suggest systems compatible with others statewide, as well as with the state's own system.<sup>66</sup>

### **Federal Program Assistance**

The federal government has been more active than the states in providing project grants to foster innovations, perhaps because it is not under the same pressure to fund

ongoing operational costs within a balanced budget. The level of federal activity also reflects the breadth of research-sharing opportunities that federal efforts can facilitate among the 50 states. Table 7-3 provides a listing of federal criminal justice project grants funded in FY 1991. Formula grants, which will be discussed later, also are shown. While the value of these grants-in-aid (in 1982 dollars) has increased from \$572 million in FY 1978 to an estimated \$928 million in FY 1991, criminal justice assistance represents only **0.6** percent of all federal assistance to states and localities.<sup>67</sup>

Most grants are funded through the Office of Justice Programs (OJP) of the U.S. Department of Justice. OJP is comprised of five program divisions: the Office of Juvenile Justice and Delinquency Prevention (OJJDP), Office for Victims of Crime (OVC), the Bureau of Justice Statistics (BJS), the Bureau of Justice Assistance (BJA), and the National Institute of Justice (NIJ). While each program division has independent authority to award funds to programs under its purview, the combined components constitute a single agency whose goal is the development and implementation of innovative programs. Grants and assistance also are awarded through the National Institute of Corrections which is under the federal Bureau of Prisons.

**Criminal Justice Planning.** In addition to grant assistance to improve criminal justice functioning, the federal government has established standards in several areas of crime statistics that are useful for planning. A uniform nationwide approach to data reporting enables local and state agencies to assess their needs and program effectiveness and puts elected officials in a better position to make policy decisions on the impact of crime. Uniform Crime Reports (UCR) is the most widely used of these federal data bases. The FBI receives incident and arrest data on eight major crimes, either directly or through state-run UCR programs, from the more than 15,000 state and local law enforcement agencies. These data are compiled in an annual publication called *Crime in the United States*, which was first published in 1930.

In 1969, following the recommendation of the Katzenbach Commission, a small federal administrative statistical effort was formed with LEAA funds to meet the need for a wider range of criminal justice information than that provided by the FBI. In 1979, the Bureau of Justice Statistics (BJS) was established as a separate Justice Department agency. Its statutory responsibilities include: (1) collection, analysis, and dissemination of statistics on crime and justice for all units of government; (2) provision of technical assistance and financial aid to state statistical-operating agencies; (3) analysis of privacy, confidentiality, and security of criminal records and data; and (4) dissemination of information on the state of crime and justice to all branches of federal and state governments. BJS reports are used widely by state and local officials.

Drug Use Forecasting (DUF) is another recent uniform reporting system for criminal justice planning instituted by the federal government. NIJ began the DUF program in New York City in 1987. By 1990, 23 cities had entered the program. DUF is designed to provide each city with estimates of drug use among arrestees and informa-

*Table 7-3<sup>69</sup>*  
**Federal Categorical Criminal Justice Grants, FY 1991**

Title	U.S. Code	Recipients:		
		States	States and Localities	Governments and Non-Profit Organizations
<b>Project Grants</b>				
1. Juvenile Justice and Delinquency Prevention: Special Emphasis and Technical Assistance	42 USC 5634			X
2. National Institute for Juvenile Justice and Delinquency Prevention	42 USC 5651			X
3. Missing Children's Assistance : Public Information	42 USC 5773(b)			X
4. Missing Children's Assistance: Research, Demonstration	42 USC 5775			X
5. Criminal Justice Statistics Development	42 USC 3732	X		
6. Justice Research and Development	42 USC 3772			X
7. Mariel Cubans	101 Stat 1329-14	X		
8. Criminal Justice Discretionary Grants	42 USC 3761			X
9. Emergency Federal Law Enforcement Assistance	42 USC 10501	X		
10. Narcotics Control Discretionary Program	42 USC 3796p			X
11. Drug Law Enforcement Program—Prison Capacity	42 USC 3796i(4)			X
12. Crime Victim Assistance/Discretionary Grants	42 USC 10603			X
13. Corrections:	18 USC 4351-53			X
(a) Training and Staff Development,				
(b) Research and Evaluation,				
(c) Technical Assistance,				
(d) Policy Formulation, and				
(e) Clearinghouse				
<b>Formula Grants</b>				
1. Children's Justice Grants to States	42 USC 5103	X		
2. Juvenile Justice and Delinquency Prevention: Allocation to States	42 USC 5631		X	
3. Crime Victim Assistance	42 USC 10603	X		
4. Crime Victim Compensation	42 USC 10602	X		
<b>Formula/Project Grants</b>				
1. State and Local Narcotics Control Assistance	42 USC 3712 et seq.		X	

Source: U.S. Advisory Commission of Intergovernmental Relations, *Characteristics of Federal Grant-in-Aid Programs to State and Local Governments: Grants Funded FY 1991* (Washington, DC, March 1992).

tion for detecting changes in drug use trends. Through anonymous random urine sampling, the DUF program provides the first objective measure of recent drug use among people who are involved in crime, rather than relying on self-reporting. This information can be used to plan the allocation of law enforcement, treatment, and prevention resources, as well as to provide comparisons on the effectiveness of local drug use reduction efforts.<sup>68</sup>

**Policing.** The FBI has a long history of initiating innovative policing techniques and new technologies, testing them for effectiveness, and then channeling them to state and local law enforcement through training programs. As an integral component of the FBI's effort to upgrade state and local law enforcement capabilities, seminars and courses are offered at the FBI Academy and in regional, state, and local facilities to improve the management of crime-solving programs and operations. Specialized schools address a broad array of technical and investigative topics, such as hostage negotiation, computer crime, criminal psychology, and interpersonal violence. The FBI

also provides training on state-of-the-art investigative tools for state and local crime lab personnel to enhance their forensic capabilities. For example, the FBI instituted a training course in 1988 for state lab technicians in DNA chromosome matching protocols and procedures.

**Courts.** The federal war on drugs has produced renewed interest in discretionary grants to enhance effective prosecution. This federal assistance is being directed in a number of areas: legal support, management assistance, and alternative sentencing. For example, federal agencies are providing training to help state and local authorities pursue large intrastate drug enterprises and, in some jurisdictions, to help formulate legislative proposals creating the necessary statutory tools to ensure that violators are adequately punished and their assets forfeited.<sup>69</sup> BJA is funding development of a model case-management program for jurisdictions with populations over 750,000 to prosecute large numbers of drug cases more effectively or efficiently. In the development of this model, the actual practices of a minimum of 30 metropolitan prosecutors'

offices will be surveyed. Finally, federal funding, which had been withdrawn in 1981, is again available for TASC programs, which are designed to encourage participation in treatment in lieu of prosecution.

The caseload impact on federal courts of the war on drugs also has spurred ongoing efforts to coordinate state and federal court activities. In 1970, Chief Justice Warren E. Burger initiated the concept of local state-federal judicial councils. Although at least 40 councils were formed, by 1980 only nine were still active. However, that number grew to 19 in 1990, and by joint action of the Conference of Chief Justices (state) and the Judicial Conference (federal), a National Judicial Council of State and Federal Courts was formed in 1990 to serve as "a national coordinator to encourage the establishment of local state-federal judicial councils and strengthen existing councils."<sup>70</sup> In addition to calendar coordination, coordinated discovery, and joint settlement efforts stemming from multiple cases relating to one event, efforts in some state and federal courts include unified jury pools, coordinating appointment of indigent counsel, and taking a joint approach to management issues such as court reporting, training, and data management.<sup>71</sup>

In another area that received significant attention in the 1980s, the federal government established a separate agency, the Office for Victims of Crime (OVC), to provide states and localities with grants and awards to improve the treatment of crime victims. Although OVC grants are primarily federal formula block grants to compensate and aid victims of crime, rather than demonstration grants, they are included in this section because they are controlled by federal requirements that are designed to influence state and local priorities as to the classes of victims served and the services provided. OVC also operates the National Victims Resource Center, a clearinghouse for victim-oriented information.

**Corrections.** The National Institute of Corrections is the primary vehicle of federal assistance to state and local correctional agencies. It was created in 1974 to serve and strengthen correctional programs through five program areas: (1) training, (2) technical assistance, (3) research and evaluation, (4) policy and standards formulation and implementation, and (5) clearinghouse information. Through its four program divisions (jails, prisons, community corrections, and the National Academy of Corrections), NIC responds to requests from state and local officials that address both institutional and community correction concerns.

NIC's philosophy is to be a facilitator. When called in, it will analyze the nature of the problem, but it does not recommend how to solve it. Instead, NIC recommends experts or contacts with other systems that have addressed similar situations. It is up to the locality to pursue the specific assistance. According to its director, only half of NIC's staff is permanent; the other half is on a two-year rotation from the states and localities through intergovernmental agreements. This gives NIC's recommendations great credibility in the field, creates a dynamic information clearinghouse, and provides in-service training for local and state officials.

In keeping with the facilitator concept, NIC grants are small. For example, in 1990, NIC designated four sites as "Jail Resource Centers." Each designation was accompanied by a \$35,000 grant for travel to allow other correctional officials to observe how the respective programs work and how to implement them in their jurisdictions. These resource centers included an objective jail security classification system, new institutional planning, a direct supervision program, and a jail industries program. NIC also has established satellite TV training programs that can be set up to meet specific needs, such as use of a new classification system. Night service is offered to accommodate correctional down time.

In addition to NIC assistance, the Office of Justice Programs (OJP) is placing strong emphasis on intermediate punishments. In FY 1990, \$14 million of OJP's budget was devoted to intermediate punishments—a 245 percent increase from 1989. All of OJP's agencies are studying, evaluating, implementing, and providing training and technical assistance to model programs, such as shock incarceration, drug testing, denial of federal benefits, and electronic monitoring.<sup>77</sup>

While grants are given to improve rehabilitation and treatment programs for juveniles, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) has had to maintain a specific interest in removing juveniles from or separating them within adult jails and correctional facilities and in removing status offenders from institutions. In FY 1989, OJJDP distributed close to \$46 million in formula grants and almost \$1 million for on-site technical assistance, workshops, and educational initiatives to bring states into compliance with the 1974 federal act that mandated separation. In addition, \$4 million in discretionary funds was allocated to aid states for jail removal initiatives.

The Bureau of Justice Assistance (BJA) administers discretionary project and formula grant funds and programs to assist state and local criminal justice agencies. The Drug Control and System Improvement program established by the *Anti-Drug Abuse Act* of 1988 is the primary federal grant administered by BJA. These grants focus on anti-drug initiatives in state and local law enforcement systems. Appropriations for this program in 1990 totaled \$447 million, triple the allotment in 1989.<sup>73</sup> In addition, BJA administers a smaller program of discretionary state and local project grants to test state-of-the-art criminal justice practices and transfer model programs to other jurisdictions through expert on-site assistance.

The National Institute of Justice (NIJ) is the principal research and evaluation arm of the U.S. Department of Justice. Its goal is to develop research about the control of crime and promulgate the results to criminal justice policymakers and practitioners through training, fellowships, and conferences. In 1972, NIJ established the National Criminal Justice Reference Service (NCJRS) to serve as an information clearinghouse. With over 100,000 books, articles, reports, and other library aids in the archives, NIJ responded to more than 40,000 information requests in 1989.<sup>74</sup> New publications and innovative programs from the four other OJP divisions also are distributed through NCJRS, which can be and is used as a resource by general government officials.

## Will Discretionary Assistance Lead to a Mandate?

Discretionary project grants are used for one or for a combination of the following reasons:

- A government desires to influence the policy decisions of the recipient governments.
- There are insufficient funds to support the same level of funding for all recipient governments.
- There is insufficient evidence or political support to mandate the policy change.
- The broadly based government wants to support innovation and information sharing among the recipient governments.
- The broadly based government's program responsibilities cannot be addressed without operational changes within its recipient governments.

All of these reasons involve trying to effect change in state or local government policies without full funding support. Therein lies the intergovernmental controversy: Will benign support for change become an unfunded mandate?

The least controversial project grants and assistance programs are those that represent a unique function that cannot be performed by the participating units of government. The broad nature of these services also removes them from the influence of current political philosophies. These types of programs include state and federal UCR data development, FBI advanced training programs, and the clearinghouse functions provided by NIC and NCJRS. Although there is always the possibility that the service might be cut back or eliminated through budget cuts, other units of government could not be productively mandated to perform such a broad-based or highly specialized function.

In other assistance programs, if mandates evolve, their acceptance can be enhanced by the NIC practitioner-based approach, which many of the state basic training programs also try to incorporate. Acceptance is not just a matter of collegial respect; it also reflects the fact that the program substance is, in fact, relevant to the problems and priorities at the working level. If a collegial approach has been used and if mandated training requirements are expanded, the need for the upgrade will be accepted by the practitioners and thus, in most instances, by the general government officials who will have to fund incremental budget increases caused by the additional hours spent in training and not in the performance of duties.

Suspicion that discretionary assistance will lead to an oppressive mandate increases with the degree to which the grant relates to the program responsibilities of the grant provider. For this reason, federal project grants to foster alternative sanctions raise fewer concerns among local governments than does state funding of similar initiatives. For example, a pilot program for pretrial release might be regarded with suspicion that the state will use the results of successful programs to make state jail per diem funding conditional on all localities establishing similar programs.

The establishment of a coordinating function likewise raises concerns that coordination will lead to costly regulations and retrofitting to achieve compatibility. The Senate version of the 1991 federal anticrime legislation authorized \$100 million annually to help states meet the mandate that they must computerize their records to allow for instant background checks of prospective weapon purchasers or lose half their federal law enforcement funds. This attempt to fund the mandate may be severely undercut, however, by the legislation's direction to the Department of Justice to develop regulations to ensure nationwide compatibility and accessibility. The cost of meeting these regulations may far exceed the assistance.

Even greater controversy can occur when conditions are attached to discretionary grants or assistance programs during the legislative process. The controversy is fanned because such a legislative history usually means that the requirement has some popular support, and officials in the recipient governments probably would have already instituted it, if funding was not prohibitive or other priorities were not more pressing. Local or state officials, therefore, feel that both their management prerogatives and their political credit have been usurped.

For example, a 1991 House of Representatives proposal would make drug testing an integral condition of grants for pretrial drug testing and prison drug treatment. This concept has wide public support, but it is very costly. Because all prisoners released from any drug treatment program would have to be tested, including those not covered by the grant, the cost of meeting this condition would be more than the grant funds received.

Not surprisingly, the greatest intergovernmental controversies are attached to mandates that are not accompanied by any funding. The view from the targeted governments is that if state or federal legislators feel that it is their duty to speak out on an issue, then they should accept at least some responsibility for solving it. For example, as noted earlier, both houses of Congress passed legislation in 1991 mandating that state and local governments establish literacy programs in correctional facilities that have more than 150 inmates. No federal funding was authorized to help pay for the additional costs to states and localities. Therefore, although about 20 states have prison literacy programs, the National Conference of State Legislatures (NCSL) opposed the legislation as another unfunded federal mandate.<sup>75</sup>

Finally, even if mandates are accompanied by funding, a major source of controversy occurs when the initial level of intergovernmental support is not maintained. For example, although the Georgia legislature declared in the 1979 Indigent Defense Act "that the state be responsible for funding the indigent defense system," by fiscal 1990, the level of state funding had fallen to 6.5 percent. State budget cuts and caseload growth, which pushed costs from \$18 million to \$26 million, further reduced state support to just 4 percent in 1992. One way to deal with the erosion of intergovernmental funding of mandates is to change the funding base to the actual cost of a specific element of the mandate (e.g., funding public defender salaries in the same way as the state finances prosecutor salaries, as suggested in this instance by a Georgia Supreme Court justice).<sup>76</sup>

However, even designating that the state has specific responsibilities may not guarantee payment. In California, a 1977 legislative concession to those opposing the death penalty established a provision in the Penal Code that the state had the responsibility to reimburse counties for investigative costs for indigent defendants facing a death penalty. However, in balancing the FY 1991 budget, state funds used for this purpose were cut. Los Angeles County filed an administrative class action before the state's Commission on State Mandates attempting to force the state to pay and was reported ready to take the case to court if the Commission did not rule in favor of the county's claim.<sup>77</sup>

### Is Intergovernmental Assistance Relevant?

Questions are sometimes raised as to whether intergovernmental pilot funding and direct assistance administered by state or federal agencies are truly helpful to recipient governments or to the programs they administer. Several approaches can help answer such questions in the affirmative, including:

- Recognizing that most programs cannot be transferred wholesale;
- Respecting professionally developed standards; and
- Examining the need for a centralized bureaucracy.

It has been observed that there are no model programs, only model administrators. Even taking this view, state and national research data and networking information on what works is still very valuable, but as a spur to creative thinking, not as a recipe book. Although using research results to prescribe a specific approach can be too confining, demonstrating that success is possible can be very supportive of change. By simply having the data available, the innovators within each local and state criminal justice network can use it to justify an approach adapted to the unique structural components, demographics, and personalities with which they must deal.

However, whether intergovernmentally supported research is regarded as setting the climate for change or actually being the instrument of change, the issues surrounding valid criminal justice research raised by the National Academy of Science, discussed in Chapter 4, still must be addressed:

Because programs have been poorly conceptualized and/or poorly implemented and research flawed by conceptual and methodological shortcomings, . . . instead of concluding that nothing can work, it is more accurate to state that we do not know what works.<sup>78</sup> These studies are limited by methodological inadequacies including measurement problems, the use of weak programs and weak research designs, and uncertainty about the integrity of the treatments actually delivered?

Some of the measurement problems and weak research designs that hamper intergovernmental transfers of research include skewed selection of participants, lack of

system-specific baseline data, and lack of defined follow-up periods.

There is an important intergovernmental role in addressing such shortcomings because most local governments are not staffed to provide sophisticated research analysis. In addition, the first concern at the operating level is often program delivery rather than evaluation, creating an even greater need to validate programs at locations other than those at which they have been developed. False expectations based on inflated reports of success can undercut otherwise sound programs, which are in fact capable of limited progress.

Professional organizations represent another important element in shaping relevant intergovernmental policies. As noted throughout this report, the American criminal justice system is based on the checks and balances of independent components. Furthermore, practitioners must have specialized skills, such as legal training and/or training to avoid death or injury. Professional pride, therefore, is both required and fostered by the structure of the system. General government officials need to find ways to avoid threatening that pride while exercising their oversight responsibility and desire to set policy.

Professional associations are one means to bridge that gap. The contribution of these associations has grown since the days of LEAA, with its emphasis on criminal justice reform and the need for standards. Professional organizations began to realize that they had a responsibility to provide guidance for general government officials, or they would have regulations imposed arbitrarily.

As the professionalism of these organizations has increased, most general government officials can be convinced to use their standards in setting policy. Although often more expensive than the alternatives that policymakers would adopt on their own, one advantage in using national standards is the protection offered against successful court suits. For example, accreditation has been used as a benchmark to end court orders stemming from cruel and unusual punishment and overcrowding suits. Furthermore, as the National Institute of Municipal Law Officers advocates, achieving police and jail accreditation is the best defense against expensive personal injury suits. Even charges growing out of an incident as serious as a jail suicide may be dismissed if procedures recommended under professional accreditation standards have been followed. Of course, more importantly, the procedures can prevent such serious incidents.

While relevant to practitioner concerns, intergovernmentally mandating professional standards still may be highly controversial because of cost. In addition, professional organizations sometimes end-run the government that must fund and administer the program by getting state or federal officials to mandate standards for which they need take no further responsibility. For example, in 1991, the U.S. Senate passed the "Police Officers' Bill of Rights Act," which sets standards for internal investigations of police activity that explicitly preempt state laws and collective bargaining agreements. The legislation even preempted state and local sovereign immunity from suits related to violation of the personnel rights mandated



by the legislation. Not surprisingly, the U.S. Conference of Mayors, the National League of Cities, and the National Association of Counties strongly opposed the measure.

In addition, when looking to the recommended standards of professional associations for guidance, general government officials need to be aware that the weight of the total membership of professional associations does not reflect large urban departments where crime is so heavily concentrated. Therefore, a separate review of relevance to any cities to be covered by intergovernmentally imposed standards and requirements is important.

The special needs and problems of large, heavily impacted urban criminal justice systems represents another challenge to developing relevant statewide services. If the counties and municipalities that comprise a state's principal urban area have the resources, it can become the tail that wags the dog. Whatever is put in place in the state's major city tends to dictate the nature of state-supported assistance elsewhere. In other states, the core urban area has neither its own resources to set the standard nor sufficient voting power in the state legislature to command state resources relevant to its needs.

Finally, whenever state or federal agencies provide services directly, rather than support the local or state administration of programs, those officials are likely to question whether the additional bureaucracy is relevant to their needs. For example, as much as half of the \$50 million appropriated for 1990 BJA project grants was used to fund federal programs, such as the FBI's upgrade of the National Crime Information Computer system (\$17 million), the National Crime Prevention Council (\$4 million), and the DARE program (\$1.2). Federal officials maintain that the purpose of these programs is to help state and local governments. Local officials argue that they would rather have a share of the limited funding to help themselves.

### Intergovernmental Formula Funding

Project grants represent targeted assistance. They reflect a political judgment by state or federal authorities that certain criminal justice approaches are more critical than others, often because they are expected to spur change. Project grants typically fund activities that are supplemental rather than basic, for example:

- Paying for most of the cost to transfer a prototype design as a means to reduce construction costs, rather than paying a share of the cost of actual construction;
- Supporting the purchase of electronic monitoring devices, rather than probation and parole officer salaries; or
- Funding targeted enforcement of drug laws, rather than a share of all law enforcement.

In contrast, formula funding involves broad-based revenue sharing, equalization, or-even program assumption. It acknowledges that there is a responsibility on the part of the funding government to see that its constituent governments are able to meet basic program obligations. Equalization is much harder to achieve than revenue shar-

ing, technically and politically, although usually the rationale for equalization is more easily defended.

The principal reason why equalization is harder to achieve is that it attempts to reflect a measure of need in its distribution, and need is difficult to measure. In addition, measures of need change according to the issue being addressed, which can introduce significant confusion in political debate and sometimes can lead to the legislation, as adopted, not carrying out its assumed intent.

### Variations in Governmental Responsibility for Criminal Justice Functions

In determining the need for funds, the first step is to answer the intergovernmental question: Who provides the service? Because of the diversity among state criminal justice structures, the question is not as easily answered as for most public programs.

The federal variable passthrough (VPT) formula developed in 1972 for LEAA block grant funding was a comprehensive attempt to establish a rational basis for determining who provides criminal justice in each state. It has been used for the distribution of most federal block grant monies between the states and localities since 1972, including the anti-drug abuse block grant. The focus study (page 178) describes the VPT, and provides a picture of the variation among the states and some types of criminal justice funding.

The basic problem with technical approaches, such as the federal VPT, is that while they may be excellent for the program they were designed to serve, they may be regarded as so good that they automatically are adopted for programs whose thrust is different. For example, since VPT includes all criminal justice expenditures, it would not be appropriate for allocating only correctional or only police funds. Furthermore, if the VPT approach is used to allocate money proportionally to places where it is currently being spent (e.g., to allocate funds among the 50 states or for reallocations to local governments), it will simply give more money to those spending the most even if their criminal justice problems are not as great.

### Allocation on the Basis of Need Versus Funding Support

After determining which units of government have what degree of criminal justice responsibility, the next consideration is whether intergovernmental funding is to be targeted according to need or be used to improve the level of criminal justice services across all states or localities. The following list presents the most frequently used distribution approaches with the degree to which they tend to reflect relative criminal justice system needs:

- **Population Distribution**—Distribution by total population creates a general revenue sharing approach designed to improve criminal justice services in all recipient jurisdictions without regard to the degree of need. It is common for federal law enforcement block grant funds to be allocated among the 50 states on the basis of population, although the state-local split within the state reflects the VPT proportion.

*Focus*  
**Federal Variable Passthrough Formula**

The **1968 Omnibus Crime Control and Safe Streets Act** (often referred to as the **LEAA** block grant program) originally required that state governments distribute **75** percent of the federal block grant funds to local governments. This reflected the finding that, on average, localities financed threequarters of the cost of criminal justice. There were, however, significant differences in the state-local split from state to state, ranging from over **75** percent local funding to less than **50** percent.

In **1972**, the LEAA block grant program was changed so that the percentage passed through to the localities in any given state would correspond with the actual percentage of criminal justice costs borne locally. This distribution is still used for federal criminal justice block grant funding and is referred to as a variable passthrough (VPT). The VPT for each state is computed annually by the Census Bureau, but there is a two-year lag in the figures used because the computations are based on actual expenditures. The state-by-state computations include police protection, the judiciary, prosecution and legal services, public defense, corrections, and a residual "other."

The percentage of federal block grant funds to be passed through to localities in a given state can shift significantly from year to year because the VPT reflects capital outlay and state intergovernmental expenditures, as well as own-program operating costs, while it includes only own-source revenue. Individual state shifts between **1987** and **1988** ranged from plus to minus **11** percentage points.

For example, Tennessee's increased payments to local governments for housing state prisoners caused the state's VPT share to rise **7.2** points. In Washington, it was the localities' VPT share that rose **6.5** points when a large state payment for jail construction in **1985** was not matched in **1988**. In contrast, large outlays of own-source revenue for prison construction increased the state's VPT share in several states.

VPT is intended to leave maximum discretion with the states in order to encourage comprehensive planning and a systems approach, while providing a safeguard that state bureaucracies will not siphon off monies needed to support local programs. However, cities have been very critical of this approach. Almost **25** percent of the **30** cities responding to a **1990** U.S. Conference of Mayors survey said that they had yet to receive any funding through the Drug Control and System Improvement Grant Program in its first three years. Three out of four said that federal anti drug funds should be given directly to the cities or that a substate entitlement mechanism should be established by the federal government.

This debate between the states and counties versus the cities in the distribution of federal criminal justice funds is more than a debate about the technical merits of VPT. It involves a number of system planning and intergovernmental issues that will be discussed in Chapter **8**, such as perceptions of the importance of police and sheriff's deputies in fighting crime, state and federal comprehensive drug strategies, and criminal justice system capacities.

*Table 7-4*  
**Variable Passthrough Percentages, by State, FY 1988, with Percentage Changes for Local Share Since 1985**

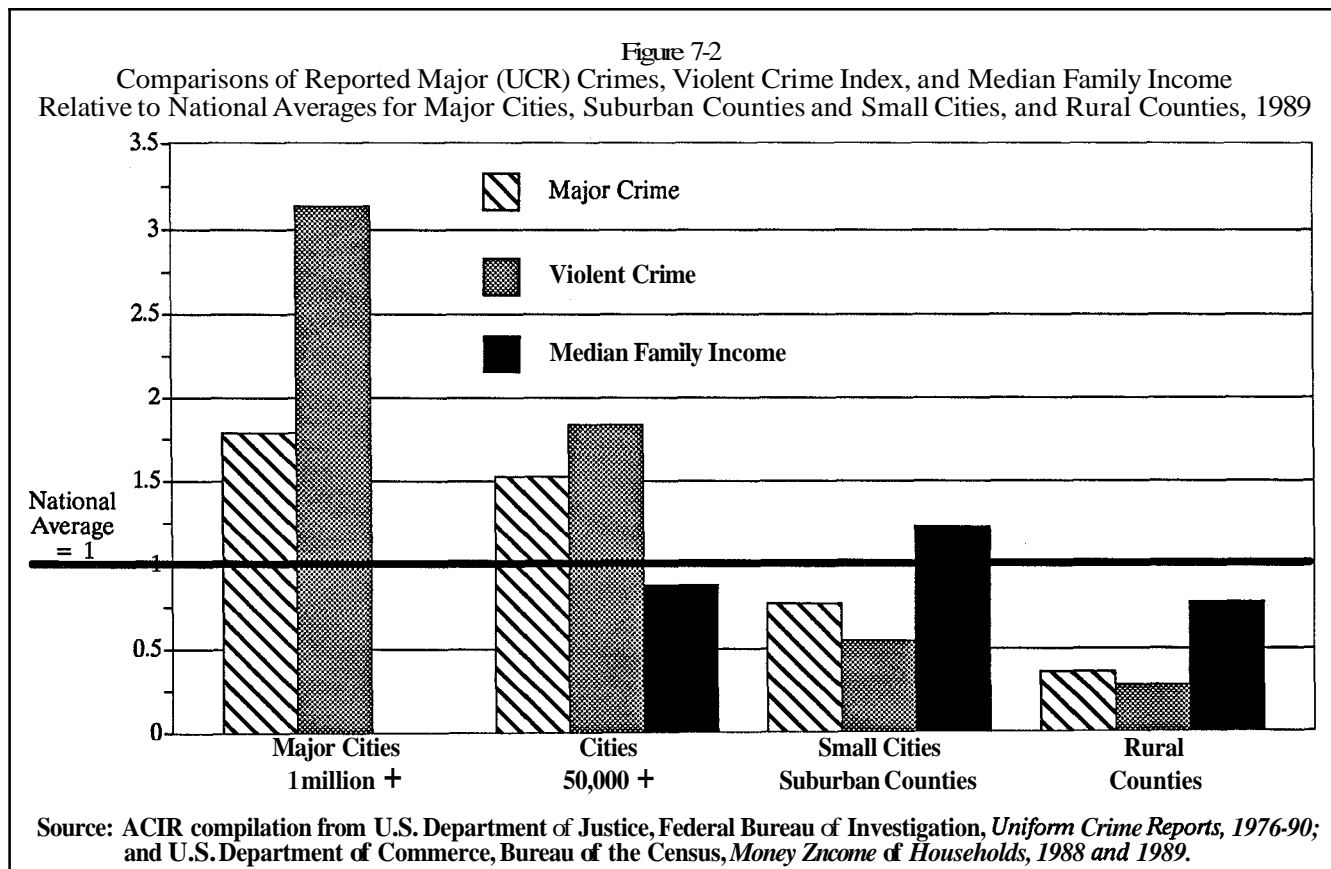
State	Percent of Total Spending by Localities	Percent Impact	State	Percent of Total Spending by Localities	Percent Impact
<b>U.S. Total</b>	<b>59.39%</b>	<b>-0.3%</b>	Missouri	<b>58.08%</b>	<b>-9.2%</b>
Alabama	<b>51.26</b>	<b>5.3</b>	Montana	<b>58.56</b>	<b>5.8</b>
Alaska	<b>24.63</b>	<b>69.7</b>	Nebraska	<b>60.13</b>	<b>2.4</b>
Arizona	<b>61.23</b>	<b>-4.4</b>	Nevada	<b>61.93</b>	<b>-14.5</b>
Arkansas	<b>57.78</b>	<b>8.0</b>	New Hampshire	<b>54.90</b>	<b>7.4</b>
California	<b>64.37</b>	<b>-3.7</b>	New Jersey	<b>58.55</b>	<b>-3.5</b>
Colorado	<b>64.03</b>	<b>-1.2</b>	New Mexico	<b>44.84</b>	<b>8.5</b>
Connecticut	<b>44.76</b>	<b>-0.7</b>	New York	<b>64.53</b>	<b>4.5</b>
Delaware	<b>28.47</b>	<b>10.9</b>	North Carolina	<b>39.31</b>	<b>-7.5</b>
District of Columbia	<b>100.00</b>	<b>0.0</b>	North Dakota	<b>60.24</b>	<b>-7.1</b>
Florida	<b>65.18</b>	<b>3.8</b>	Ohio	<b>61.89</b>	<b>-11.9</b>
Georgia	<b>58.16</b>	<b>2.3</b>	Oklahoma	<b>46.28</b>	<b>-1.3</b>
Hawaii	<b>47.09</b>	<b>-2.9</b>	Oregon	<b>49.38</b>	<b>-2.9</b>
Idaho	<b>62.82</b>	<b>1.9</b>	Pennsylvania	<b>67.76</b>	<b>-2.3</b>
Illinois	<b>66.51</b>	<b>1.8</b>	Rhode Island	<b>44.75</b>	<b>-0.2</b>
Indiana	<b>58.91</b>	<b>0.7</b>	South Carolina	<b>40.96</b>	<b>-2.1</b>
Iowa	<b>46.27</b>	<b>-15.5</b>	South Dakota	<b>49.36</b>	<b>-2.4</b>
Kansas	<b>54.58</b>	<b>-0.2</b>	Tennessee	<b>52.21</b>	<b>-12.1</b>
Kentucky	<b>30.33</b>	<b>-4.7</b>	Texas	<b>67.52</b>	<b>-0.6</b>
Louisiana	<b>55.09</b>	<b>3.0</b>	Utah	<b>50.90</b>	<b>1.6</b>
Maine	<b>45.98</b>	<b>0.4</b>	Vermont	<b>28.20</b>	<b>22.1</b>
Maryland	<b>43.14</b>	<b>4.6</b>	Virginia	<b>31.59</b>	<b>-1.3</b>
Massachusetts	<b>44.28</b>	<b>2.1</b>	Washington	<b>62.91</b>	<b>11.5</b>
Michigan	<b>57.43</b>	<b>-5.4</b>	West Virginia	<b>49.86</b>	<b>1.4</b>
Minnesota	<b>70.93</b>	<b>5.3</b>	Wisconsin	<b>67.39</b>	<b>3.9</b>
Mississippi	<b>57.17</b>	<b>12.4</b>	Wyoming	<b>55.41</b>	<b>-4.0</b>

Source: U.S. Department of Justice, Bureau of Justice Statistics, BJS, "Anti-Drug Abuse Formula Grants: Justice Variable Passthrough Data, 1988," *BJS Technical Report* (Washington, DC, February 1990).

- **Criminal Justice Expenditures**—Distribution reflects some measure of criminal justice activity, but it makes no distinction between localities that have ample resources to apply to modest crime problems and those that have limited resources to apply to overwhelming crime problems. As a basis of federal funding, it also does not distinguish between states that incarcerate high numbers per capita even though they have low crime rates.
- **Crime-Prone Population**—Distribution based on the population percentage in the prime crime age (generally defined as 15 to 35) reflects some measure of need, but it makes no distinction between the tendency to commit crime reflected in the different crime rates of rural, suburban, and inner-city populations. The age range selected is crucial, depending on the program thrust of the funding. For example, the U.S. General Accounting Office found that an anti-drug distribution formula based on the number of 18- to 24-year-olds was a better reflection of the incidence of drug use in urban areas than total urban population. Distributions for juvenile programs, policing, or prison literacy are necessarily different.
- **Per Capita Income**—Distribution inversely related to income is a good reflection of incidence of crime between suburban and core city populations, without the degree of reporting errors encountered in using the crime rate. However, it

does not provide a good surrogate for the incidence of crime occurring in rural areas compared to suburban and urban populations because crime rates are low in rural areas but so is reported income. For example, in 1989, the median household income for cities over 50,000 population was almost one-third lower than for suburban households and households in smaller cities, and it was almost 15 percent higher than for rural households.<sup>81</sup> However, the violent crime rate of 1,208.3 per 100,000 population in cities over 50,000 was more than three times higher than in smaller cities and suburban counties and six-and-a-half times higher than in rural counties. (The comparative differences for total major crimes reported were 8,653.7, 4,358.1, and 2,030.8 respectively.) Even more dramatic comparisons could be made by breaking out just those cities with populations over one million, which had crime rates of 2,057.9 for violent crime and 10,149.6 for all major crimes reported in 1989,<sup>82</sup> as shown in Figure 7-2.

- **Crime Rate**—Distribution based on crime rates is a potentially good reflection of relative need, except that it is prone to reporting errors. Crime rates reflect reported crime, and residents in high-crime areas are less apt to report minor crimes because of lack of police response. Further, the FBI's Uniform Crime Report, which is the standard for reporting crime rates nationally,



does not include drug arrests, which are having a heavy impact on most criminal justice agencies. Finally, reported crime rates may be inflated by recording multiple charges rather than the most serious charge.

- **Violent Crime Rate—Distribution** based on reported violent crime provides a better reflection of major prison, jail, court, prosecutor, and public defender resource demands than do total UCR statistics, as well as neutralizing the tendency not to report less serious crimes in low-crime localities. This measure is still susceptible to system reporting errors, and it does not include the impact of drug arrests.

There are numerous variations in the way in which these factors have been combined in formula grants. Good staff analysis can assist in providing the right formula to carry out clearly articulated policy. Frequently, however, intergovernmental disputes reflect philosophical disagreements as much as they do technical problems because legislators and chief executives often try to achieve other goals besides supporting criminal justice expenditures.

For example, Minnesota's Community Corrections Act subsidy formula, last changed in 1975, gives equal weight to county per capita income, taxable value, expenditures for correctional purposes, and county population aged 6 through 30 (State Code 401.10). This formula is as much a tool for equalization under general revenue sharing as it is for funding criminal justice needs. Therefore, it is criticized by criminal justice officials in those counties where the percentage of funding falls below the county's percentage of serious crimes reported. They particularly criticize its generosity to high-growth suburban developments, which have many children and a low real estate tax base but little crime.<sup>83</sup>

### **Does Funding Recognize Criminal Justice Responsibility?**

At the heart of the Minnesota formula dispute is the local claim, which has been heard increasingly as budgets have gotten tighter, that the state is ultimately responsible for the quality of criminal justice within its borders. Under this reasoning, the only goal of a state formula should be to determine criminal justice needs and help fund them. This contention has as many intergovernmental implications for the basic structure of the American form of criminal justice as the concern over the growing federal involvement in law enforcement, which was discussed at the end of the previous section.

The problem is that, while federal law enforcement expansion is clearly a reversal of federalism and can be defended only as an expedient response to current problems, the division of criminal justice responsibility between the state and its localities was not clearly addressed in the Constitution. On one hand, all responsibility can be argued to lie with the state, because localities are creatures of the state, and localities arrest, detain, try, and sentence criminals under state law. On the other hand, it can be ar-

gued that the American system was established in the tradition of local law enforcement, with county responsibility for operating and financing local jails dating back to 13th century England.

Pragmatic considerations are no more definitive. A state system of criminal justice administered locally can be argued as convincingly to require full state funding of the local administration as to require local funding in order to preserve autonomy and local priorities in administration. In the absence of compelling intergovernmental theory, the level of state support for local criminal justice activities has been left to the politics of the 50 states.

Over the last two decades, the trend has been to increase state funding. The first reason for increased state criminal justice funding was the success of court reform advocates in the 1970s in pushing for increased professionalism and equal standards of justice. Local courts were replaced with unified state court systems in well over half of the states. Even in those states where local concerns about diversity and community values have prevented state court unification, local fiscal stress has led to more state funding. In these states, state aid takes the form of cost reimbursements to avoid significant state control of court administration.<sup>84</sup> The principle that the state should take responsibility for court services also led many states to begin paying the salaries of prosecuting attorneys and to support indigent defense services.

The second factor leading to increased state criminal justice funding stemmed from court orders and federal mandates relating to conditions of confinement, including separation of juvenile populations, square footage standards for jail cells, out-of-cell requirements, and employee qualifications. Although localities have had to fund the majority of these improvements, most states have accompanied state requirements with technical assistance and some degree of state funding.

Finally, in the 1980s, the third factor that has led to a substantial increase in state criminal justice funds going to localities has been the inability of state prison systems to house all of their sentenced inmates. Prison overcrowding has resulted in three types of state formula-based funding for localities—per diem payments, community sanctions, and construction assistance—and has made corrections aid to local governments the fastest-growing area of state aid. In fact, the previously noted 294 percent increase in state correctional aid to localities was substantially more than the 164.9 percent increase in local correctional costs between 1980 and 1987.<sup>85</sup>

Nevertheless, state aid still averages less than 20 percent of the local cost of corrections.<sup>86</sup> Therefore, significant tension exists in most states for the state to do more. In particular, it seems that the more a state has taken funding responsibility for court services, the more pressure there is to increase state support for jail costs and juvenile detention. From the state's point of view, this pressure becomes a matter of tough choices between competing claims on limited funds. The following news account of one state's dilemma is indicative:

[Legislators] said it is unlikely that the financially strapped state will take over the circuit courts in

the near future. “This year, I don’t see how it can be—we’re already being pressed to take over the \$40 million a year job of running the [Baltimore] city jail, a bailout [the governor] linked to his proposal to end the \$38 million in aid the state provides annually for the city police force.”<sup>87</sup>

Looming within this climate of greater pressure for state funding of all local criminal justice programs is the fact that state correctional spending has increased even faster than any other element of the system. Given that prisons are the potential end result of all other criminal justice spending, state officials are beginning to see the need for a more thorough consideration of the total impact on the criminal justice system of responding to county and city demands for assistance. This change in philosophy will be explored in the final chapter of this report.

### The Politics of Funding and the Demographics of Crime

The first rule of legislative success is counting to 51 percent. Even though the power of legislative seniority or the influence of executive leadership can cause votes to line up more readily, the basic question is still: Will a majority of the legislators support the proposal? The larger the common interest, the easier it is to achieve a majority. Two aspects of criminal justice, unfortunately, combine to make it politically difficult to achieve majority agreement to allocate monies to where the need is greatest. One is the balkanization of criminal justice activities; the other is the urbanization of crime.

What were seen as necessary checks and balances during the founding the American criminal justice system can inhibit its ability to achieve comprehensive budget attention today. Municipal governments account for 29 percent of the funds spent on criminal justice, but over 80 percent of this is spent on police. States spend 36.5 percent of the criminal justice dollar, but over half is spent on corrections. County governments account for 20.9 percent of expenditures, and it is split almost evenly between policing, jails, and court-related activities. Finally, in the typical local government structure, the more urbanized the county, the less it is apt to have commensurate responsibility for policing as its constituent cities take on greater policing responsibility.

This structure means that intergovernmental funding battles seldom occur along simple urban versus rural lines. First, the states and the counties are more apt to be allies in lobbying the Congress for general criminal justice spending, while the core cities focus almost exclusively, both in Congress and in state legislatures, on more support for police functions.

Second, in dividing up the state or federal budget pie, the priority given to winning these funding battles versus meeting other program needs is based on still another grouping of interests. Governmental units of any type that have large urban core populations are apt to be allied in looking for increased intergovernmental anticrime funding against governments dominated by suburban and rural interests that may see intergovernmental funding of schools or transportation as more pressing. This second

grouping of allies is particularly significant because the priority given an issue is often more important than the merits of the issue itself, particularly within state legislatures that must operate within balanced budgets.

Therefore, while census counts show that urban voters outnumber rural voters, this seldom impacts the politics of criminal justice funding because core-city dwellers constitute a minority of the urban count.<sup>88</sup> This makes those who are directly affected by the criminal justice needs of the inner cities a distinct minority in state legislatures or in the Congress. Adequate funding must depend on other legislators being convinced that shifting tax revenue from their constituents into inner-city criminal justice programs is in their interest.

The more pragmatic arguments advanced for providing increased state funding to help inner cities provide criminal justice services include:

- **Cost Savings**—The less crime deterrence there is in the core cities, the more state taxpayers will have to pay in prison costs. For example, Baltimore City is the sentencing jurisdiction for over half of Maryland’s prison inmates, and it generates 70 percent of its juvenile cases,<sup>89</sup> even though the city comprises only 15 percent of the state’s population. Comparable ratios would be true for many cities, particularly those with even higher violent crime rates, such as Atlanta, Newark, St. Louis, Detroit, Chicago, New York, Los Angeles, Boston, Dallas, and **Charlotte**.<sup>90</sup>
- **Safety**—If criminals and crime syndicates are allowed to go unchecked, they will expand their activities into neighboring jurisdictions. The more clogged jails and court services become, the less deterrence police activity will have.
- **State Economic Development**—Most large cities represent a flagship for tourist interest and for international investment in the state. The perception that the most well known city in the state is unsafe may color outside perceptions of the rest of the state.

Philosophical and humanitarian arguments that the state government should help fund the criminal justice needs of urban core areas are harder to encapsulate. Essentially, they rest on principles of equal access to justice and on breaking the cycle—at least for a new generation—of joblessness, poverty, family dysfunction, and crime.

Indeed, poverty combined with the heightened opportunity for crime in a densely populated setting most clearly delineates the intergovernmental funding challenge. Crime is concentrated in urban cores, and the cities and counties that absorb the heaviest impact of crime typically have lower local tax revenues, because of unemployment and business flight, to apply to a significantly higher need for criminal justice services. Specifically, in 1989, the average per capita expenditure for police in cities with more than one million people was over 50 percent greater than the average for all cities, or **\$122.82** compared to **\$81.63**.<sup>91</sup> In addition, with over one-third more arrests in cities than in suburban areas and over 80 percent more than in rural

areas, the burden of urban counties in bearing jail and court costs is also significantly greater than for other counties.

Whether major cities and urban core counties will receive extraordinary intergovernmental assistance to offset the unequal impact of crime on their budgets is becoming a more critical question. **As** noted in Chapter 1, the number of impacted ghettos (as measured by rates of male unemployment, welfare dependency, female-headed households, and school dropouts) in Philadelphia, Chicago, Baltimore, and other large metropolitan areas has increased significantly.<sup>92</sup> This is creating even greater disparities between governments in their ability to fund and in their need to fund criminal justice services.

With only slight rewording, most of the considerations just outlined for providing additional state assistance to major cities and urban core counties could be applied to providing federal assistance. However, the political considerations differ significantly. Most important is the fundamental difference in America's constitutional system of the state and the federal role in criminal justice. Government theory can be used to support state assumption of responsibility; constitutional theory argues against an ever-expanding federal role.

**As** noted, since Prohibition, federal involvement in criminal justice has increased substantially from the extremely limited role envisioned in the Constitution. National political campaigns, however, did not begin to focus on "fighting crime in the streets" until the 1964 presidential campaign.<sup>93</sup> Presidential and congressional attention to crime accelerated in the 1980s, with the enactment of five anticrime bills between 1982 and 1990. These bills were notable for increases in federal criminal penalties, many of them mandatory, and for the absorption of numerous state criminal acts as potential federal crimes. This federal action placed considerable political pressure on state officials to enact similarly tough sanctions.

In return, state and local officials alike have exerted their own pressure on federal officials to fund local and state criminal justice programs, at least in part out of frustration that federal officials can gain political credit for being tough on crime and then escape the budgetary consequences. They point to the fact that federal expenditures for criminal justice can be funded by deficit spending or they can be limited by not accepting federal jurisdiction for crimes that can be prosecuted under either state or federal laws. State and local officials do not have these options. Whatever the public expects from any federal anticrime legislation will be paid, for the most part, from state and local budgets because the federal criminal justice system handles only about 6 percent of all felony cases.<sup>94</sup>

Within this attempt to link political credit and consequences, there are two camps. Governors, state legislators, and county officials usually are allied in support of a federal funding approach that can be directed to meet the needs of the total criminal justice system as it differs from state to state, while mayors and city officials argue that substantial funding should go directly to cities. The cities' line of reasoning combines the predominance of crime as a city problem and the assertion that police are the first line of defense with the political appeal of the higher public

trust in the effectiveness of police than courts or corrections to deal with crime.

Some cities also have claimed that one reason they have not received an appropriate share of the federal block grants funneled through the state is that they cannot meet the 25 percent match requirement due to the depleted tax base associated with their high crime rates. Whether this is any more true of the major cities than of their urban counties may be debatable, but the argument does raise another basic issue in intergovernmental funding: grantsmanship. The more that federal or state governments believe there is a need to control state or local government programming and budgeting decisions, the more intergovernmental funding becomes vulnerable to providing assistance to those who are already closest to the goals set and who are, therefore, ready to respond.

If conditions are not kept to a minimum, then formula funding begins to serve the same purpose as project grants: to promote change rather than intergovernmental burden sharing. There is a role for both in America's federalist system, but if the goal of each funding initiative is not clearly delineated, it may not be achieved.

Finally, even in a debate that is cleanly focused on the need for intergovernmental burden sharing, which burdens end up being shared also establishes a policy direction. The disagreement between the states and counties versus the cities regarding funding the total criminal justice system versus the police is not just a fiscal decision as to which units of government receive more funds. It can produce major system impacts, which will be taken up in the next chapter.

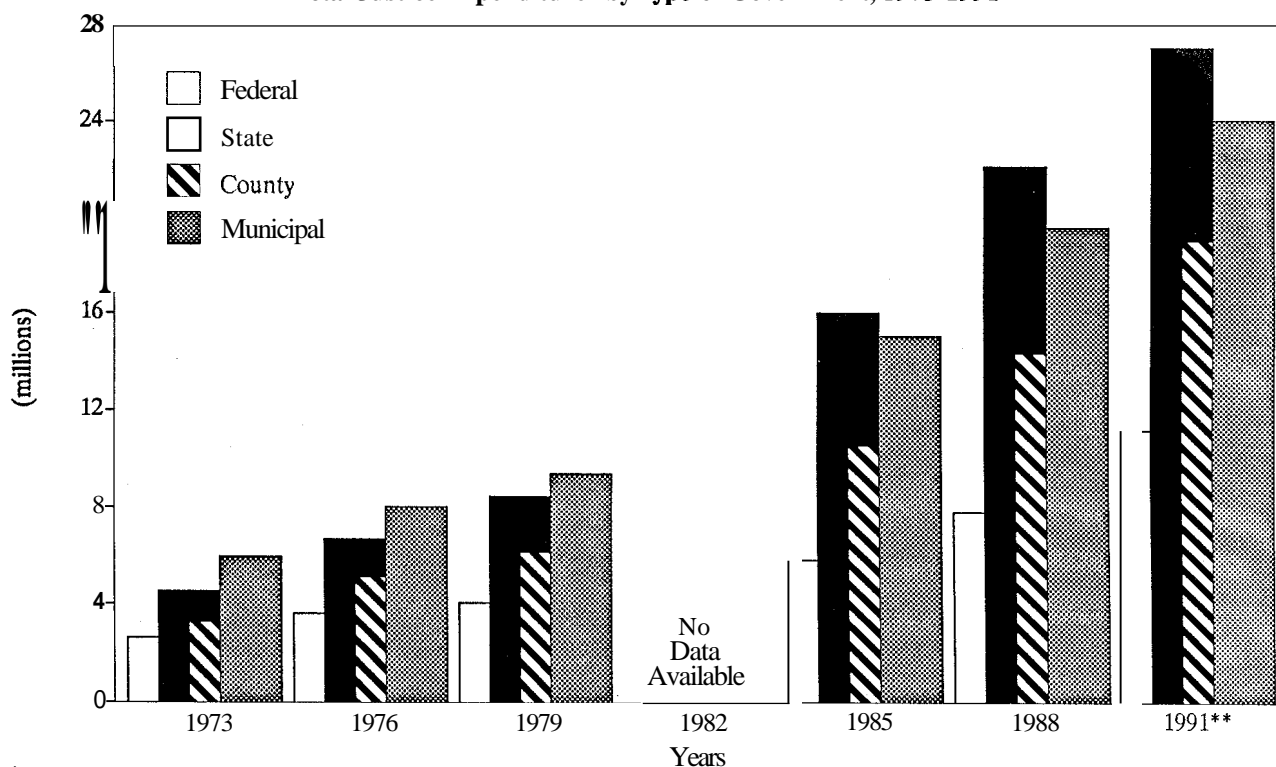
Similarly, broader debates between prevention and law enforcement underlie almost every state or federal criminal justice funding decision. For example, the federal war on drugs has been criticized for its emphasis on law enforcement (\$7.8 billion of the \$9.5 billion appropriated in 1990),<sup>95</sup> even though, of the \$2.2 billion in formula grants to state and local governments, \$1.7 billion was for treatment and prevention.<sup>96</sup>

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## SUMMARY

Figure 7-3 presents another picture of data, first presented in Chapter 1, on how the upward spiral of criminal justice spending has affected state, county, federal, and municipal governments. It underscores the pressure to find additional sources of revenue. Working with program managers, it is possible for general government officials to realize increased revenues from many offenders in ways that augment the goals of criminal justice sanctions and that gain additional public support to meet unfunded needs. Privatization, efficiencies, and shared resources also are avenues by which to gain public acceptance of the remaining tax burden that must be borne. However, each of these four avenues has more potential to produce program improvements than to provide budget relief.

Figure 7-3  
Total Justice Expenditure\* by Type of Government, 1973-1991



\* Includes direct and intergovernmental.

\*\* Based on straight line projection of growth from 1988 to 1990.

Source: U.S. Department of Justice, Bureau of Justice Statistics, *Justice Expenditures and Employment in the U.S., 1984-1992*.

Without significant own-source revenue relief forthcoming, intergovernmental funding of criminal justice expenditures becomes a fertile field for debate. County officials can cite state mandates—from jail standards to sentencing legislation—as justification for increased state funding. States may reply that they have shouldered their burden by pointing to sustained increases in state funding of local court and jail programs, which have surpassed the rate of local increases. Both states and counties can turn to the federal government to back up tough federal anti-crime legislation by helping defray the resulting correctional and court system impacts borne by state and local governments. Major cities and counties, on the other hand, make the case that increased law enforcement funding is needed predominately in core urban areas, where crime is highest.

Shaping funding legislation to carry out any of these claims of intergovernmental financial responsibility is difficult. The first question that needs to be openly debated is whether the funding goal is to assist all units of government to fight crime more effectively or to direct the funds to localities where the impact of crime is greatest. Because the incidence of crime is related to a combination of factors—such as age demographics, unemployment, number of individuals in poverty, and population densities—block grant funding formulas that reflect only one or two factors may direct funds to localities that are less affected by

crime. Using categorical grants, on the other hand, raises concerns about whether the targeted program has an impact on other criminal justice functions that are not funded, whether the program will evolve into a mandate, and whether the program requirements are relevant to local conditions.

In the heated debate produced by funding pressures, there has been little discussion of how the checks and balances of America's criminal justice system might be compromised by increased central funding and control. During the 1960s and 1970s, the drive behind expanded state and federal services, funding, and mandates was to achieve increased professionalism and thereby enhance equal justice. With escalating costs, caseloads, and overcrowding, the drive has shifted to an emphasis on increased efficiency.

Because intergovernmental concerns increasingly are budgetary, general government officials are driving policy change to a much greater degree than when moves to achieve equal access to justice came more from within the law enforcement and justice communities. As discussed in the next chapter, open dialogue, which includes both general government and criminal justice officials, is important to ensure that community standards, responsiveness, and priorities—as established by local units of government from town councils to each state capital—are not overwhelmed in the drive for increased funding and efficiency.

## NOTES

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- <sup>7</sup> *Ibid.*
- <sup>8</sup> *Ibid.*
- <sup>9</sup> *Ibid.*
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- <sup>12</sup> *Ibid.*
- <sup>13</sup> *Ibid.*
- <sup>14</sup> *Ibid.*
- <sup>15</sup> *Ibid.*
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- <sup>27</sup> Jacoby, Gramckow, and Price, *Survey of Asset Forfeiture Programs in 1990*.
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- <sup>31</sup> Robert O'Harrow, "Plan to Ease Loudoun Jail Crowding Is Crowded Out," *Washington Post*, January 5, 1991.
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- <sup>42</sup> *Ibid.*
- <sup>43</sup> "Oregon's Fight against Drugs."
- <sup>44</sup> "Draft Submission on LECC and Victim-Witness Activities," Executive Office of U.S. Attorneys LECC/Victim-Witness Staff, April 5, 1991.
- <sup>45</sup> National Governor's Association, letter to Speaker Thomas Foley, July 26, 1991.
- <sup>46</sup> George Camp and Camille Camp, *The Corrections Yearbook: Adult Prisons and Jails* (South Salem, New York: Criminal Justice Institute, 1990).
- <sup>47</sup> Michael J. Quinlan, "Meeting the Challenges of the Federal Bureau of Prisons," *The Third Branch* 22 (December 1990): 10-11.
- <sup>48</sup> Interview with Wayne Huggins, director, National Institute of Corrections, U.S. Department of Justice.
- <sup>49</sup> Office of National Drug Control Policy, *National Drug Control Strategy*.
- <sup>50</sup> Metropolitan Washington Council of Governments (COG) and Metropolitan Washington Court Administration Conference, *Drugs and the Judicial Response: Drug Awareness Seminar for Judges in the Metropolitan Washington Region: Evaluation Report*, by Ronald I. Weiner (Washington, D C Metropolitan Washington Council of Governments, January 1990).
- <sup>51</sup> Federal Courts Study Committee, *Report*, Volume 11, "Report of the Special Committee, Federal Court Section, Allegheny Bar Association (Philadelphia, 1990), Item B, p. 7.
- <sup>52</sup> Federal Courts Study Committee, *Report*.
- <sup>53</sup> *Ibid.*, p. 35.
- <sup>54</sup> U.S. Department of Justice, Office of the Attorney General, Attorney General's Summit on Law Enforcement Responses to Violent Crime: Public Safety in the Nineties, March 3-5, 1991, p. 36.
- <sup>55</sup> "BJS National Update," April 1992, p. 2.
- <sup>56</sup> Federal Courts Study Committee, *Report*, p. 141.
- <sup>57</sup> Donald L. Reisig and Richard J. Liles, "States Must Lead Local Efforts," *Journal of State Government* 63 (Spring 1990): 52-53.
- <sup>58</sup> Daniel L. Skoler, *Organizing the Non-System* (Lexington, Massachusetts: D.C. Heath, Lexington Books, 1977), p. 161.
- <sup>59</sup> ACIR computation from BJS, *Justice Expenditure and Employment in the U.S., 1971-79* (August 1984), and *Justice Expenditure and Employment, 1990* (September 1992).



- <sup>60</sup> ACIR computation from BJS, *Justice Expenditure and Employment, 1990*.
- <sup>61</sup> BJS, *Justice Expenditure and Employment in the U.S., 1988* (August 1991).
- <sup>62</sup> U.S. Department of Justice, "National Survey of Law Enforcement Agencies, 1987," *National Archive of Criminal Justice Data Bulletin*, Winter 1989.
- <sup>63</sup> Martha A. Fabricius and Steven D. Gold, *State Aid to Local Governments for Corrections Programs* (Denver: National Conference of State Legislatures, April 1989).
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- <sup>67</sup> U.S. Office of Management and Budget, *Budget of the United States Government Fiscal Year 1992* (Washington, DC, 1991), Part Seven, Table 12.3.
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- <sup>70</sup> Report, National State-Federal Judicial Council to the Conference of Chief Justices (January 1991) and the Judicial Conference of the United States (March 1991).
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- <sup>73</sup> Executive Office of the President, Office of National Drug Control Policy, *White Paper Federal Drug Grants to States* (Washington, DC, December 1990).
- <sup>74</sup> NIJ, *Research Plan: 1991* (Washington, DC, May 1991).
- <sup>75</sup> National Conference of State Legislatures, *Federal Update*, April 26, 1991.
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- <sup>77</sup> "State Pushed on Death Penalty Funding," *California County*, May/June 1992.
- <sup>78</sup> Susan E. Martin, Lee B. Sechrest, and Robin Redner, *The Rehabilitation of Criminal Offenders: New Directions for Research* (Washington, DC: National Academy Press, 1981), pp. 1-32.
- <sup>79</sup> *Ibid.*, pp. 1-10.
- <sup>80</sup> U.S. General Accounting Office (GAO), *Drug Treatment: Targeting Aid to States Using Urban Population as Indicator of Drug Use* (Washington, DC, November 1990).
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- <sup>82</sup> ACIR computation from U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports, 1990* (Washington, DC, August 11, 1991), pp. 150-151.
- <sup>83</sup> Memorandum from Michael Cunniff, Hennepin Bureau of Community Corrections, to Vivian Watts, December 21, 1990.
- <sup>84</sup> *Intergovernmental Penpective* 17 (Winter 1991).
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- <sup>87</sup> Fern Shen, "Maryland Chief Judge Wants Consolidation," *Washington Post*, January 22, 1991.
- <sup>88</sup> Census, *Money Income of Households, Families, and Persons in the United States: 1988 and 1989*, p. 3.
- <sup>89</sup> Russell Committee, Bar Association of Baltimore City, *The Drug Crisis and Underfunding of the Justice System in Baltimore City* (Baltimore, December 1990).
- <sup>90</sup> BJS, *Sourcebook of Criminal Justice Statistics, 1990* (Washington, DC, 1990), p. 368.
- <sup>91</sup> *Ibid.*, p. 41.
- <sup>92</sup> Mark Alan Hughes, *Poverty in Cities* (Washington, DC: National League of Cities, 1989).
- <sup>93</sup> Skoler, *Organizing the Non-System*, p. 22.
- <sup>94</sup> ACIR computation from *Sourcebook of Criminal Justice Statistics, 1990*, pp. 479 and 516.
- <sup>95</sup> Office of National Drug Control Policy, *National Drug Control Strategy*.
- <sup>96</sup> Federal Funds Information for States, *Estimated Anti-Drug Abuse Allocations for 1990: Issue Brief 89-18* (Washington, DC, December 23, 1989), p. 3.



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## 8 – PLANNING AND COORDINATION

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**I**f an elephant is a horse designed by a committee, then the criminal justice system could be described as a herd of elephants. Criminal justice officials, each dedicated to a discrete mission of arrest, prosecution, defense, adjudication, or corrections, are not only isolated but often feel that they must not bias their judgment by looking at the whole. Thus, the race horse is given a trunk, sturdy legs, and tusks. State, county, municipal, and federal general government elected officials in turn have each tried to create and recreate an improved model that has sharper tusks to better protect the public, or sturdier legs to support more effective sanctions, or a more piercing trumpet to serve as real deterrence. Thus, the creature became a herd.

No group of officials intended that the creature grow so big or consume so much. General government officials are alarmed at the increasing budget impact of this growth, and criminal justice officials are frustrated with bloated workloads and the resulting compromises to their missions. This final chapter discusses how officials are coping with these impacts and the measures they can institute to anticipate and control rather than simply react to change.

Three main goals are addressed:

- Integrating planning into the mainstream of administration;
- Focusing individual frustrations into system coordination; and
- Fostering the political will and public understanding to achieve the policy changes that emerge from the planning and coordination efforts.

Within each of these arenas there are numerous pragmatic concerns, which must be addressed to carry out the overall goal.

In planning and budgeting, determining who is responsible becomes key, followed by the need to deal with personnel, forecasting, and fiscal demands. Managing these budget issues inevitably underscores the need for coordination to develop relevant and accessible data, manage work flows, control system impacts, and establish coordinating bodies with the requisite credibility, authority, and commitment. Finally, using the results of planning and coordination initiatives to establish an informed dia-

logue and to shift public opinion brings the discussion full circle to encompass the underlying elements of isolation and fear that have been noted throughout this report.

One common theme emerges as essential to achieving any of these goals: the need to determine whether the system is to be a race horse, a work horse, a charging rhino, or an imposing elephant. Each has its merit, but they are not interchangeable, nor are their support needs the same. Clear articulation of goals is essential to focus staff effort, engage non-criminal justice agencies, establish budget priorities, and influence intergovernmental support.

General government elected officials and criminal justice officials in each local and state system need to reason together to reach consensus about the balance to be achieved between deterrence, arrest, incapacitation, punishment, and rehabilitation. There is no right answer; there are only unproductive approaches to different goals.

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### *PLANNING AND BUDGETING*

#### **Responsibility for Planning**

The relationship between setting policy, planning, and budgeting varies significantly among criminal justice functions. Budget decisions control most planning and policy decisions in the case of police, courts, most juvenile programs, and probation/parole. If budget requests are not funded, internal policy adjustments must be made. In contrast, because basic prisoner costs must be met, policy drives a major portion of prison and jail budgets. However, the policies are not set by prison or jail administrators; they are the sentencing and arrest policies set by the legislature, police, prosecutors, and judges.

In addition, all officials—general government elected officials, budget administrators, and every criminal justice administrator—share the planning challenge of determining when the mission of each agency will be significantly compromised if additional funding is not provided. Each of these groups of officials has a different prime interest, however:

- Elected officials must focus on ultimately public priorities;
- Budget administrators focus on sound financial management; and
- Criminal justice administrators focus on effective programming.

No one planning approach or mechanism can accommodate all of the factors noted above. There is a need for criminal agencies to engage in long-term program and administrative planning. There is a need for the chief executive to be able to prepare a budget using coordinated data to forecast and track growth. There is a need to be able to inform all elected officials and other policy leaders of system impacts and demographic trends. There also may be a need for the legislature to be able to confirm the budget and growth assumptions of the executive budget and/or agency submissions.

The need for criminal justice planning, with its policy coordination and budget oversight, was recognized increasingly during the 1980s. Such calls for planning grew out of the desire to control, or at least predict, extraordinary growth, rather than being in a constant state of reaction.

In part, because this recognition of the need for proactive planning tools came from within and, in part, because of the weakness of LEAA-fostered planning efforts in the 1970s, a common proviso from the 1980s has been that planning must be close to the source of policy control. For example, in a National Governors' Association (NGA) handbook, the first questions new governors are advised to ask in criminal justice is, "Who in the state is responsible for developing the criminal justice policy information base? Does this individual or agency have direct access to the governor?"<sup>2</sup> The Federal Courts Study Committee focused on the same basic issue in its observation that long-range planning "must be a part of the mainstream of the judiciary's governing process, rather than an isolated, abstract function."<sup>2</sup>

One reason why planning is not integrated with program and budget administration stems from the nature of government budget cycles. Agencies must begin preparing requests for the next year before they know the current year's funding levels. In this climate, it is easy for planning efforts to become detached from the actual situation of the agency. The less relation planning exercises have to gaining budget resources to carry out the agency's program, the less importance top managers and other key players will give to it, resulting in the planning effort becoming even more detached. Under these circumstances, the planning effort becomes an obscure operation that only occasionally provides meaningful options or guidance for the agency.

One key to countering the tendency for planning to slip out of the mainstream is clear recognition of the distinction between setting policy and providing policy research. The planning staff needs to focus on producing and/or compiling relevant data—criminal profiles, crime statistics, case load trends, sentencing trends, demographic trends, etc.—that directly affect budget requirements or

criminal justice agency operations. They need to identify budget or program decisions made by contributory systems, such as hiring new police, instituting drug testing, extending court hours, installing an AFIS capability, or complying with a court order. They should have the responsibility for studying national data. The crucial step, then, is that the judgment that this information leads to a specific course of action must be made by the agency's chief program administrators or the chief budget policymakers, not by the head of planning.

A danger in creating a separate planning agency or department has been that its hierarchy begins to operate as if they were policymakers. Planners assume the role of recommending specific policies rather than facilitating policy decisions by those who have program responsibility. When this happens, significant operational issues may not be considered properly, and more importantly, the program operators who have not been involved in the considerations will have no ownership of the recommendation. Planning agency recommendations consequently are reduced to carrying only academic weight.

While academically rigorous recommendations have value—as acknowledged in the discussion in Chapter 7 of the research sharing fostered by the U.S. Department of Justice—much more is needed to institute sound policy. For example, agency administrators must determine how internal management problems shape the way an emerging problem can be addressed. At the same time, the chief executive or the budget administrator may care little *how* a problem is addressed; they must be given compelling reasons *why* it must be addressed. Typically, they have been bombarded through the political process for changes in other program areas, while, except for police, there is seldom any citizen advocacy for the needs of the criminal justice system. The planning process needs to give them a perspective to weigh the seriousness of emerging criminal justice problems against needs in other program areas.

Therefore, in order to keep criminal justice planning in the mainstream, it is necessary to establish a multifocused planning capability that has four elements: data development, agency planning, executive/budget planning, and multi-agency coordination. Although this may necessitate multiple planning staffs to keep planning close to decision-makers, it does not need to result in duplication of effort.

For example, the data-gathering function should be established as a source of primary information that has multiagency impact. Budget planners and agency planners then may disagree, for example, over the validity of using a ten-year trend analysis of all felony convictions versus a five-year trend of violent crime convictions, but there would be no duplication of effort in developing the primary data base. There would simply be healthy debate and oversight as to how to apply the numbers.

Surfacing such healthy debate can be regarded as an advantage of the multiple-focused planning necessary to keep planning close to decisionmakers. Agency planning can fall into a position of serving only the purposes of that agency and becoming bogged down in operational minutiae. Budget agency planning can become resource driven. Planning in an independent planning agency can become

so theoretically exacting as to be impractical or irrelevant. Yet, good planning should be driven by each of those goals, being applicable, achievable within resource restraints, and able to be documented.

In addition, a danger in having all planning focused in the executive—or in the “key arbiter of Executive authority, the Division of Budget”<sup>3</sup> is that planning can become controlled to justify a pre-set political agenda rather than providing an unbiased basis for setting policy. Yet, as noted by Mark D. Corrigan, director of the National Institute for Sentencing Alternatives, adaptability and relevancy must be part of the planning process:

The master planning concept is flawed for several reasons. None is more significant than the notion of a changing political dynamic. Much has been written about the instability of the political process. Issues of importance change. Decision makers and stakeholders change. Economic and social conditions change. Such **flux** does not imply that a government cannot plan for the long-term, but rather that its approach must be more adaptive to shifting conditions and multiple forces.<sup>4</sup>

One way of blending adaptability with sound planning is to establish an executive and/or a legislative budgetary planning capacity but maintain the independence of data collection as a safeguard against distortion to reflect a political agenda. Solid information can serve to justify policy shifts advocated by elected officials, but it also can provide the basis for scrutiny of such policies. To serve the latter role, the legislature may find it necessary, either by statute or budget language, to guarantee the continued production of key documents, primary data bases, forecast models, and random sampling techniques, such as the Drug Use Forecasting (DUF) system.

To summarize, the responsibility for long-range planning is not single focused. Long-range planning needs professional planning staff support, but this support needs to feed into, not be allowed to evolve independently of, policymakers and program managers. With relevant data, the chief elected executive, the legislature, the budget office(s), and chief criminal justice officials and managers can engage in healthy debate about policy choices that will best balance public safety, budget resources, effective administration, and program results.

### **Planning and Budgeting in Times of Explosive Growth**

Ongoing growth in the criminal justice system has given new importance to five elements of budgeting: (1) program evaluation, (2) personnel, (3) forecasting, (4) intergovernmental entitlements, and (5) facility master planning. Program evaluation has been discussed in other chapters, where it was noted that rigorous evaluation in criminal justice often has been limited by who is selected to participate in the program, lack of control over other behavioral influences, and underfunded efforts. Master planning for facility expansion also was discussed, and it was noted that facility master-planning requires three to

five years lead time before the facility can be brought on line, depends on good analysis of the populations to be housed, and must have broadly based input from all elements of the criminal justice system. Therefore, the following discussion will focus on the remaining three elements of budgeting in times of rapid system expansion: personnel, forecasting, and entitlements.

### **Personnel**

The starting point for dealing with personnel issues stemming from rapid growth is to determine whether staff increases have kept pace with the number of offenders that each element of the criminal justice system is charged with handling. The focus study (page 190) provides specific comparisons of trends in criminal justice personnel growth. In brief, personnel growth has been highest in prisons and jails, where, over time, it has kept pace with the mushrooming numbers incarcerated. Probation and parole personnel increases have been only at about half the rate of prison and jail personnel, despite the fact that the number of offenders on probation and parole has increased along with those in prison or jail. While judicial and police personnel increases have been one-third the annual increases in prisoners or in jail personnel, these increases have been in line with the slower growth rate in arrests, which is the driving caseload indicator.

After a jurisdiction determines the magnitude of personnel needs due to past budgeting decisions, the next logical step is to project what will be required due to future growth. However, for purposes of this discussion, forecasting will be taken up later, because it will have more significance if it is placed in the context of what has to be planned for, put in place, and funded to deal with personnel requirements, regardless of whether it is a backlog of needs or future needs that must be met.

**Personnel Recruiting.** The first issue in personnel is obvious from the focus study: sheer numbers. This is especially true in corrections because corrections not only has the highest annual growth rate, it also has the highest personnel turnover. The 1990 turnover rate for prison officers was reported to be 14.46 percent.<sup>5</sup> For probation officers, 60 percent of the states reported turnover rates of at least 10 percent.<sup>6</sup> In contrast, the municipal police turnover rate is reportedly less than 5 percent.<sup>7</sup> Therefore, general government officials should consider the need to support a continuous recruitment strategy and fund a year-around training capability.

In addition, standard general government budgeting strategies may need to be examined. It is common to make use of “salary vacancy factors.” This justifies funds being cut from each agency’s budget based on the assumption that, because of turnover, an agency-specific percentage of authorized positions will be empty at any point in the year. Carrying out this assumption for prison and jail staffing, however, usually drives up overtime because few if any security posts can be left vacant. Therefore, if authorized personnel levels are not funded and filled through continuous recruitment, actual savings seldom are gained.

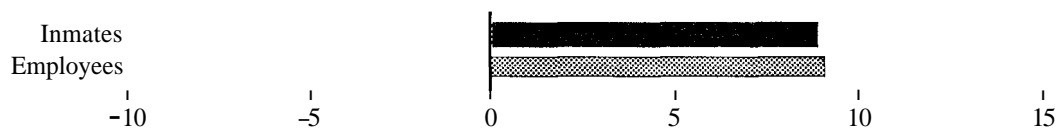
In fact, budget policymakers and agency managers should look at strategies to keep prison and jail officer va-

*Focus*

**Criminal Justice System Personnel Growth Comparisons**

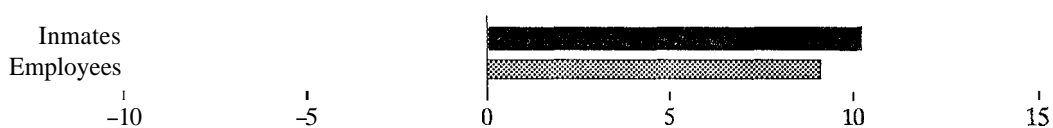
Jails— In the five years between 1983 and 1988, the 52.9 percent increase in jail inmates was matched by a 54.3 percent increase in jail personnel.

**Average Annual Percentage Increases for Jails, 1983-1988**



State Prisons— The growth in state prison personnel has also been increasing at over 10 percent per year, as have prison populations.

**Average Annual Percentage Increases for State Prisons, 1987-1989**

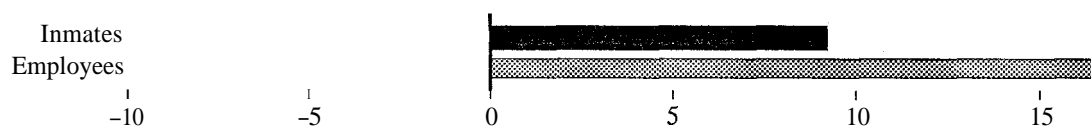


The growth rate between 1987 and 1989 for state prison inmates was 21.6 percent, while the number of state prison employees increased 18.9 percent.

Federal Prisons — However, the growth in federal prison personnel has been significantly greater than the growth in inmates.

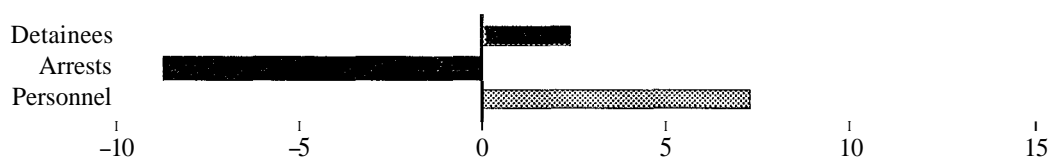
The growth rate between 1987 and 1989 in federal inmates was 19.3 percent, and in federal prison employees, 35.7 percent.

**Average Annual Percentage Increases for Federal Prisons, 1987-1989**



Juvenile System— Likewise, the number of juvenile system personnel increased significantly more than the increase in juveniles in public facilities or in the number of juvenile arrests, which has been decreasing.

**Average Annual Percentage Increases for Juveniles, 1987-1989**



The growth in juvenile system correctional personnel was 15.1 percent between 1988 and 1990, while the number of juveniles in public facilities increased 4.9 percent between 1987 and 1989 and the number of juveniles arrested dropped 16.7 percent between 1987 and 1989.

Probation and Parole— In contrast, the number of personnel for probation, pardon, and parole has increased at only half the rate of the increased number of offenders placed on probation or parole.

**Average Annual Percentage Increases for State and Local Probation and Parole, 1985-1988**

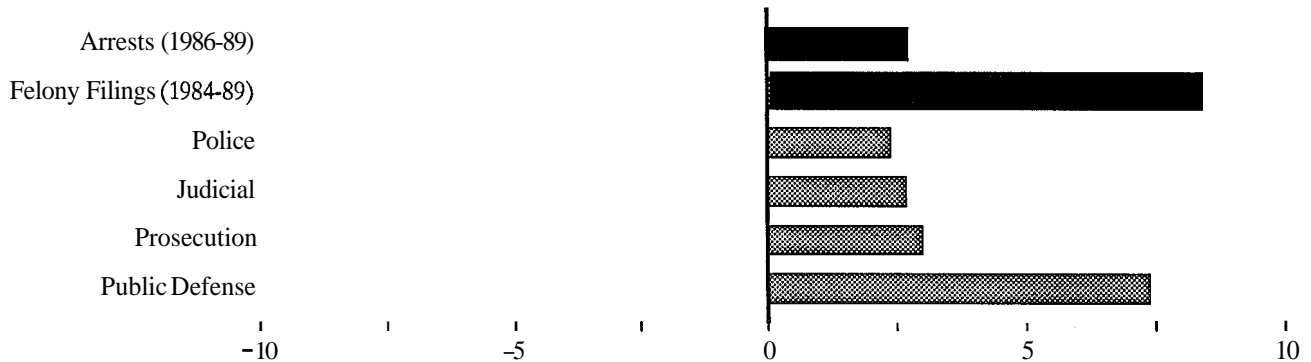


The growth in total state-local probation, pardon, and parole personnel during the three years between 1985 and 1988 was 11.5 percent, whereas the number of individuals on probation or parole increased 21.9 percent.

*Focus (cont.)*  
**Criminal Justice System Personnel Growth Comparisons**

**Police and Courts**—Police and court-related personnel growth has been significantly less than corrections personnel growth. While these personnel increases have kept pace recently with the growth in the number of arrests, they have fallen significantly behind the number of felonies prosecuted.

**Average Annual Percentage Increases for Police and Court Personnel, 1985-1988**

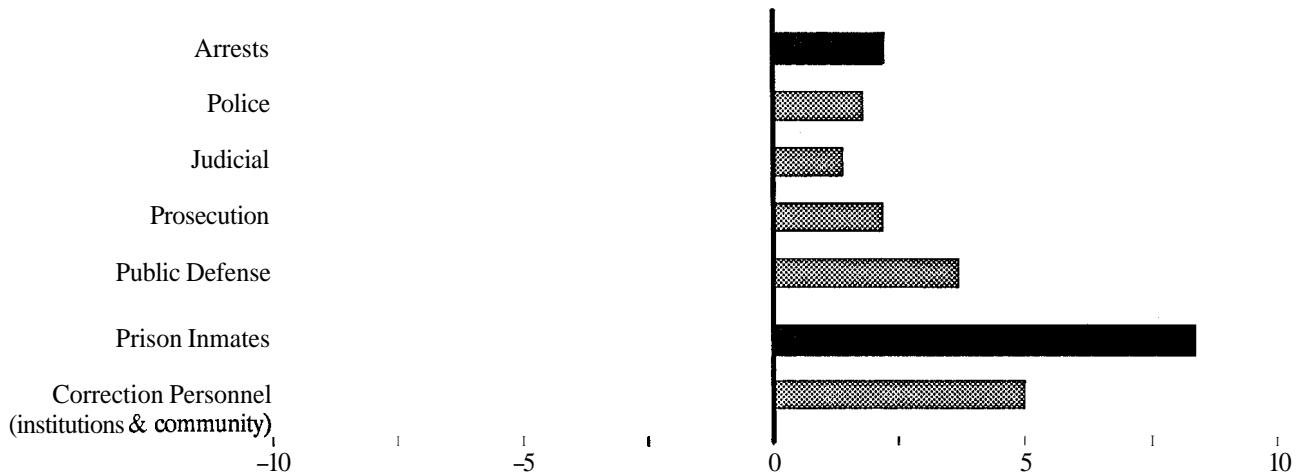


The three-year increase from 1985 to 1988 in police was 7.4 percent; judicial personnel, 8.3 percent; prosecution and investigative services, 9.3 percent; and public defense, 24.0 percent. The three-year increase between 1986 and 1989 in the number of arrests was 8.3 percent, but the increase in the number of felony case filings was over 25 percent.

**Ten-Year Comparisons**

Whether or not current staffing levels are adequate may be determined as much by whether there is an historic backlog of need as by whether recent staff increases have kept up with workload. Earlier comparisons for subcategories of correctional staffing used above are not available; nevertheless, comparing the broad categories of criminal justice activities is still informative.

**Average Annual Percentage Increase, Ten-Year Comparisons, 1979-1988**



From 1979 to 1988, there was a 21.9 percent increase in arrests, while personnel increases were: police, 17.1 percent; judicial, 13.7 percent; prosecution and investigative services, 21.8 percent; and public defenders, 38.5 percent. There was a 100.3 percent increase in state and federal prison inmates, while prison, jail, probation, and parole personnel increased 56.9 percent.

Sources: U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics: 1989*, pp. 82, 83, 91, 584 1990, pp. 91-93, 569, 604, 607; *Justice Expenditure and Employment in the U.S.: 1985*, p. 118; 1988, pp. xxii, 118; "Probation and Parole, 1989," *BJS Bulletin*, November 1990, p. 4. U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports: 1986*, p. 165; 1987, p. 169; 1988, p. 172; 1989, p. 173. Court Statistics Project, *State Court Caseload Statistics: Annual Report 1989* (Williamsburg, Virginia: National Center for State Courts, 1991).

cancies to a minimum. **As** a first step, the chief executive or the budget chairman might call for an analysis of overtime. If it is excessive and if continuous recruitment strategies are not being used, then the agency should be directed to change recruitment strategies and develop other appropriate means to bring overtime under control.

**Personnel Staffing Analyses.** On an opposite tack, because the staffing of designated security posts is a major factor in prison and jail budgets, budget officials need to assure themselves that all of the authorized positions are necessary. Budget staff and prison/jail officials need to engage in a mutually satisfactory procedure for analyzing the necessity for each security post. Once this security audit is complete, it should stand as the basis for planning and funding for future budgets. **As** noted under capital planning, such an analysis also is valuable in modifying the design of new facilities to save staffing costs.

The fact that institutional staffing is driven by post-specific security is a major reason why prison and jail staffing recently has kept pace with the growth in sentenced felons while noninstitutional corrections staffing for probation and parole has fallen significantly behind. Although, initially, the inmate explosion could be handled by putting more offenders in the same space with little or no increase in staff, when space had to be physically expanded, so did staffing. Furthermore, it can be demonstrated physically that if a prison or jail post is not staffed, a security problem will be created.

In contrast, the potential for increased criminal activity growing out of incremental increases in noninstitutional corrections caseloads is not so easily demonstrated nor is there a physical trigger—enforceable in court—for when expansion must take place. The importance of adequate staffing to the success of alternative probation and parole sanctions, however, is a major policy issue, as noted in Chapter 4.

Staffing ratios for police agencies, courts, prosecutors, and public defender offices also are subject to incremental increases. However, various types of politics may override this tendency. The politics of police personnel increases centers on the public's belief that police are more important than any other element of the criminal justice system in fighting crime. General government elected officials are the key to how big a role this type of political influence plays in budgeting decisions.

In contrast, it is rare for general government elected officials to take the initiative in court-related staffing decisions. In fact, because many judges and prosecutors also are elected, they may be reluctant to advocate staffing increases, so that they can go before the electorate with a record of having controlled costs and growth in government. Another influence on court staffing is the politics of creating new judgeships and filling vacancies. These political strategies have been played out to both create and deny judgeships. Suffice it to say that court functioning can suffer, as exemplified by the fact that between 1988 and 1991 it took an average of 502 days from the time a federal judgeship became vacant to when it was filled?

Politics of whatever nature often result in reactive budgeting, carried out one year at a time. To establish a basis for proactive budget planning, general government officials can use the same approach taken in security-post audits of prison or jail staffing. For example, they can require documentation of how current staff spend their time:

- How much time do probation and parole officers or police spend on paperwork? Would up-dated data management equipment or lower paid staff for support functions be cost beneficial?
- How much time do police, prosecutors, and public defenders spend waiting for cases to be heard? Do court scheduling procedures need to be examined? Would on-line access to the status of each courtroom's docket be justified?
- What should be the balance between adding professionals—a new judgeship, assistant prosecutor, uniformed officer, etc.—and hiring paraprofessionals and other support staff?

General government budget officials and the chief administrator of each criminal justice agency must then agree on appropriate measures to justify new positions and how those measures will be tracked. Measures of the need for staff increases could include many factors, such as growth in the general population, a given age cohort, reported crime, violent crime, total arrests, arrests for drugs and violent crimes, convictions, caseloads, or any combination of these.

Although many astute administrators present their budget requests with this type of documentation, the important issue is to establish confidence between general government officials and criminal justice officials as to whether the appropriate information is being provided. **As** noted in Chapter 1, criminal justice data bases can be very confusing. Further, it is not uncommon for budget policymakers to have much less familiarity with these measure than they do, for example, with leading economic indicators. Finally, there is a climate of distrust that must be overcome. This distrust is born out of the feeling expressed by many officials that scare-stories are used to intimidate them? This distrust is matched, especially in corrections, by criminal justice officials who are convinced that their needs often will be ignored in order to fund more politically popular programs.<sup>10</sup>

Shared intergovernmental funding responsibility constitutes an additional reason to pursue preagreement on how staffing needs are to be measured. For example, it is common to have judges' salaries paid by the state, with support staff, equipment, and office facilities funded by localities. Therefore, lack of coordination for budget planning can be disruptive. For example, the additional judge approved by the state for the Baltimore City Circuit Court in 1989 received no funding from the city for necessary support staff, which amounted to \$78,000. In addition, according to the Baltimore Bar Association, the new judge requires an additional prosecutor from the state's attorney's office, which also must be funded by the city.<sup>11</sup> In



Chatham County, Georgia, the circuit court judges sued to force the county to fund programs related to the effective functioning of the judiciary.

**Personnel Training.** Training new staff is often as important as the level of staffing, and sound budgeting based on planning can play a significant role. Especially in high-growth departments, the more that budgeting decisions support a relatively stable stream of new hires, the better. As noted in Chapter 6, precipitous, often politically motivated, decisions to hire a large number of police at one time can be the source of long-term morale problems, if the available applicant pool is inadequate, new employees are not properly screened, or training is compromised because of the extraordinary numbers that must be handled.

Even in major prison systems where large numbers of new officers are routine, budget officials need to ensure that the training program is budgeted commensurate with current growth. This is especially important given that the quality of the applicant pool, typically, will not increase. Consequently, in times of high growth, training becomes even more critical, as exemplified by the following anecdote: When a large group of prisoners at a major prison in Virginia became disruptive on Thanksgiving weekend in 1989, 80 percent of the officers on duty had worked for the prison system for less than one year. Because proper procedures were followed, the disruption was contained and ended without incident.<sup>12</sup>

Finally, intergovernmental coordination may need to focus on the capacity of training programs administered by the state for local criminal justice personnel. This is especially true if the training is provided by the state as a means to enforce standards. If the standards do not require training by the state, then the state, government associations, or large jurisdictions may be able to contract for extraordinary surges in training needs. Such an approach was taken by the Missouri Chiefs of Police Association, which contracted with a private provider to give police supervisory personnel management training relevant to law enforcement.<sup>13</sup>

**Personnel Turnover.** General government policymakers must consider the availability of personnel in the discussion of any proposed program expansion. As noted in Chapter 5, many prison systems place this consideration first when reviewing potential sites. The consideration is equally valid in most criminal justice activities, because they are personnel intensive. In the war on drugs, the 1990 White House Drug Control Strategy noted that “before we can make treatment more widely available, we need to . . . secure properly trained staff to run them.”<sup>14</sup> Parenthetically, although the report proposed federal funding for in-service treatment training programs and pre-service training fellowships and grants,<sup>15</sup> the 1991 anticrime bill targeted its training and scholarship funding only to police.

Turnover rates are often the most telling sign that total budget planning for personnel increases has not been addressed properly. Turnover may result from job dissatisfaction that is traceable to recruiting approaches, inadequate training, or salary. High turnover also may reflect a more generous benefits package offered by other governments or more attractive private sector management poli-

cies. There are many examples of the private sector using personnel who received their law enforcement training and experience with government agencies. Because high rates of turnover can represent a waste of training resources in criminal justice, general government officials should expect that agency managers have conducted exit interviews and used other survey techniques to isolate the most significant causes for turnover and its waste of public resources.

To summarize, the effectiveness of most criminal justice programs depends on the persons operating them; therefore, general government budget officials must be cognizant of the factors that influence the availability of appropriately trained personnel. In most instances, it will be the responsibility of the agency head to anticipate personnel needs and develop a plan for establishing the resources needed to recruit, train, and retain the staff needed. This agency planning must address both entry-level recruitment and management-level development for rapidly expanding programs. In addition, all programs need to focus on a comprehensive analysis of how professionally trained staff can be used more effectively by hiring lower paid staff support or instituting technological improvements.

General government elected officials have a right to expect that this level of agency planning stands behind any agency budget brought before them. They should be prepared to question the agency accordingly. However, they then should recognize that the documented needs for personnel recruitment, training, development, and support must be funded.

#### Forecasting

The need for sound forecasting has been mentioned several times. It can play a decisive role in the passage of sentencing legislation. It is crucial for capital expansion decisions. It also is central to moving from reactive to proactive budgeting.

This subsection provides relevant details on the complexities and limitations of forecasting. Such an understanding should put policymakers in a better position to determine the validity of the forecasting data they are receiving, who should be charged with the forecasting responsibility, and whether elected officials should be part of subjective forecasting input.

Most effects in the criminal justice system are not straightline but are compounded. Projections of caseloads or of incarcerated populations must take into account a wide range of factors, such as types of crimes committed, reporting rates, arrest rates per type of crime, trends in the average length of sentence being given per type of crime, and trends in the proportion of repeat offenders in each crime category (since this would affect length of sentence or use of probation or parole). As an example, a few of the specific issues identified in the Hennepin County (Minneapolis) jail expansion analysis included:

**Enforcement Levels**—In recent years, family violence has received increasing public attention. One result was a 184 percent increase in reports of family violence between 1986 and 1988.

**Legislative Changes**—One example is a recent initiative to make being a passenger in a stolen car a gross

misdeemeanor, which could mean four or five people being detained instead of one.

**Law Enforcement Resources**— Without the availability of the breathalyzer, DWI arrest rates would very likely be much lower.<sup>16</sup>

**Forecasting Models.** States and some large localities are making major investments in sophisticated computerized modeling. Such systems may require historic information on over 100 variables and a means to update the information throughout the year. Most of these models can be programmed to simulate the effect of program options, such as use of boot camps or a new mandatory sentence provision for a specific crime. NIC is asked frequently to assist a prison or jail system in reviewing the options available.

A quick look at the state of the art was provided in a 1990 review<sup>17</sup> of forecasting models that might be appropriate for use by the federal government to project the impact of drug control strategies:

- *JUSSIM* was first developed in the early 1970s and uses a microcomputer. It can be programmed locally to show the effects on the entire criminal justice system, such as the need for judges and prosecutors, as well as the need for correctional space produced, for example, by a 25 percent increase in arrests. However, it does not track the cumulative total size of the inmate population. The Institute for Law and Justice has recently updated its application.
- *IMPACT* uses microcomputers and was developed by the Center for Decision Support of the Criminal Justice Statistics Association. *IMPACT* can be operated by a nonprogrammer and is focused on prison and jail populations.
- *CCPS* was developed by Abt Associates for the National Institute of Corrections. It can be run on a personal computer using Lotus 1-2-3 or other standard spreadsheet program. It is limited to community corrections, especially probation and parole supervision.
- The *National Council for Crime and Delinquency* (NCCD) developed a mainframe simulation model that is used in over a dozen states. The system is focused on prison populations and is customized for each state. Florida and Virginia recently brought the system on-line. The system in Virginia requires data entry for 130 variables. A new microcomputer version requires less data. The NCCD model can be very responsive in projecting the impact of policy changes.
- The *Structured Sentencing Simulation (SSS) Model*, developed by the Institute for Rational Public Policy, is an extension of a simulation used by the Minnesota Sentencing Guidelines Commission. It can be used to project impacts on local jails and community corrections as well as prisons, but

relevant probabilities must be available. It can be run on a microcomputer.

- *JUSTICE* is a simulation of the Texas correctional system developed for a microcomputer by the Texas Criminal Justice Policy Council. It can be updated constantly by integrating the data base within the program, which can save on one of the largest costs of projection models: the collecting of data.
- *FEDSZM* has been developed jointly by the U.S. Sentencing Commission and the federal Bureau of Prisons. It simulates plea bargaining practices, sentencing practices, time spent in prison, time spent in community corrections, and the effect of probation and parole.

The growing sophistication of such objective computer tracking and projection capabilities is significant, but they have three major limitations: subjective influences, availability of data, and trust.

**Availability of Forecasting Data.** Even controversial, subjective assumptions must be applied to a valid data base. As with so many other management challenges, the fragmented nature of the criminal justice system complicates good data collection. Projections of the growth in prison populations based on admission statistics, such as NCCD's model, may be slower to recognize change than a model that uses arrest or reported crimes, but it will be easier to administer because all of the input comes from a single source.

Projecting jail population and court-related caseloads is particularly hard because they must be jurisdiction specific, and the factors that predict growth in crime, arrests, and criminal charges in a close-in suburban jurisdiction may be as different from those in its core city as from its fast-growing exurban neighbors. Predicting these unique factors is complicated further by the fact that sophisticated modeling may be too expensive for all but the largest jurisdictions. Finally, to increase the validity of the forecast, the data may need to take into account very narrowly focused considerations. For example, Hennepin County noted that young police officers make more arrests on the average than older police officers; therefore, increasing the number of police will result in a larger number of arrests than would be accounted for by simply multiplying the current arrest rates per officer times the number of officers.<sup>18</sup>

**Subjective Forecasting Input.** Even the most timely data and the most sophisticated statistical models will be inadequate because they can not project public attitudes and other subjective factors. Computer programs can weigh trends and project any combination of factors, but the end result will depend on the initial assumptions. Subjective review—such as many governors or chief administrators regularly seek for revenue projections from a council of advisors—can help determine how long trends will continue and whether they will intensify.

Subjective review is the third step, after numerical data is compiled to establish historic trends and permanent changes to the system have been identified, such as new sentencing laws, higher police staffing levels, or new

law enforcement technologies. This review is necessary because simply projecting, for example, that a new longer sentencing law will increase the time that the percentage of inmates currently serving time for that offense will serve in the future may significantly understate the law's effect. Potentially, a multiplier effect, relating to the same public influences that led the legislature to get tough on that type of offense in the first place, may be present in other elements of the criminal justice system. For example, prosecutors may find it more worthwhile to prosecute under the new law and start devoting more resources to these types of cases, and the number of arrests the police make may increase for the same reason.

The managers of the projection model, therefore, need to be able to communicate their assumptions to a cross section of criminal justice practitioners and major policymakers. Ideally, the subjective review group, at least, should include representatives of police agencies, prosecutors, judiciary, parole, legislature, and the executive. Broad participation of general government policymakers in the subjective review not only will significantly improve the validity of technical staff assumptions, but also will provide these chief policymakers with valuable exposure to the factors that have the most impact on criminal justice needs. As a representative of the Criminal Justice Statistics Association, working with state and local jurisdictions in the criminal justice forecasting, observed:

[Participating in the subjective review process provides insights] that can be readily understood by decision makers who may not be well-versed in criminal justice problems. This increases the likelihood that the projections will be used and enables decision makers to take control of the future. . . .<sup>19</sup>

Establishing Trust in Forecasts. Not only have general government officials in the past tended not to be well versed in criminal justice issues, but when they attempt to seek information they are asked to appreciate the importance of confusing data bases, which must be appropriately applied for valid statistical projections (such as UCR crime rates, arrest rates, reporting rates, white-collar crime, and state felons).

Thus, the desire to not want to believe forecasting predictions, because it means more money will have to be spent on programs that are not politically popular, heightened by lack of knowledge and confusing answers, can lead to significant distrust from general government elected officials. The focus of this distrust may be the agency responsible for forecasting, in other words, "Kill the messenger."

One reaction has been to recast responsibility for maintaining the forecasting model. As of 1990, legislative fiscal offices in 10 states were preparing prison population forecasts.<sup>20</sup> This growing practice raises questions of cost, access, and validity. The preceding brief descriptions of the major projection models give a small indication of the complexity of forecasting. If this complexity is duplicated in the executive and legislative branches, questions of cost must be raised. Alternatively, if the legislature takes on sole responsibility for detailed sophisticated projections, questions of timely exchange of information between the

operating agencies, the executive budget office, and the legislative forecasting technicians must be resolved. Finally, if the legislative forecasting is only a simple projection of total prison populations or caseloads, elected officials who do not have sophisticated statistical training may need help to weigh why these results may differ from a more detailed executive agency analysis.

Similar issues must be resolved if the executive has sole responsibility for forecasting. The nature of the concerns varies with the three main possibilities for the location of the forecasting responsibility within the executive:

- Department of Corrections—To assure that management decisions can be adjusted as rapidly as possible if the forecast model begins showing unanticipated results, it can be argued that the model should be maintained by DOC. DOC also may have direct access to the greatest amount of data. Finally, because its budget is far greater than any other agency's, predicting DOC requirements also is of far greater importance to fiscal management.
- Executive Office of the Budget—Nevertheless, if the model is developed within the executive's office of the budget, what the state's prison system may lose in immediacy may be made up in assuring that the forecasts are applied to other operating and budgeting concerns. Executive office of the budget projections could encompass the range of criminal justice agencies' needs, including the state's judicial system, parole system, probation caseloads, intergovernmental financing obligations, personnel benefits, as well as the prison system.
- Criminal Justice Planning Agency—Placing forecasting responsibility in a separate criminal justice planning agency also would encompass a wider analysis of impact. In addition, it might overcome distrust that figures emanating out of DOC or the office of the budget might be self-serving. However, removing this essential planning information from operational responsibility and budget authority raises the concerns mentioned earlier about lack of relevancy when planning is not close to policy control. Procedures would need to be institutionalized to ensure that the executive budgeting processes fully utilize the data and that the agencies have immediate access to the data for their management adjustments.

Wherever the tracking and projection capability is established, a crucial element for establishing trust is an inclusive review process that involves the legislative and the executive branch with practitioners. For example, a 1988 Ohio law requires DOC to work with an advisory committee of the General Assembly to assure accuracy and objectivity of the prison population simulation model.<sup>21</sup> An inclusive review process not only will provide essential subjective input but also will establish familiarity and confidence in the integrity of the projection model. If chief budget officers, legislators and/or their financial analysts,

and chief executive senior policy advisors are not involved in ensuring the integrity of the projections, they will not be stakeholders. Lack of trust will continue.

### Entitlements

The fifth budgeting element affected by explosive growth is projecting the funding requirements to meet entitlements and per unit fixed costs. Often, intergovernmental funding is involved, and at times the outspoken criticism from other elected officials fostered by shortfalls may make entitlements more vexing to general government elected officials than the other internal management problems of program evaluation, capital expansion, personnel, or forecasting.

The most important means to reduce budgetary stress produced by per unit fixed costs is to establish a good base for short-term tracking. The budget staff of the individual agencies, the executive, and the legislature should be able to account for seasonal fluctuations in caseloads and space demands. The ability to detect any departures from these seasonal norms will enable them to determine at the earliest moment whether adjustments are needed to complete the budget year.

The complexity of the short-term tracking base needs to reflect the demographics of crime encompassed by the governmental unit. Growth will not be equally distributed throughout a state or even within a large jurisdiction. The more that key elements of growth are tracked, the more intergovernmental conflicts and bottlenecks can be reduced. For example, DUF (Drug Use Forecasting) tracking will be able to detect regional trends that may lead to increased arrests, prosecutions, and convictions in one major city of a state as opposed to the other urban areas. The earlier that the need for increased defense and prosecution staffing is recognized, the less back up there will be in the local jail.

However, even though good short-term tracking will help reduce problems in meeting current-year obligations, high growth will produce significant intergovernmental funding controversy because each government is trying to find new sources of revenue and/or reduce the growth in its funding obligations. Controversy is no less whether intergovernmental funding is based on shared costs or on formulas. Intergovernmental controversy initially may seem to be less in states that pay localities a per diem for various classes of jail inmates because the state has no choice but to respond to growth. However, the controversy is often just delayed because, in ensuing years, per diem payments may not be increased commensurate with actual costs so that a given state appropriation covers more inmates.

Even if the total amount of intergovernmental funding has increased at a faster rate than the costs borne by local governments—as it has in many states<sup>22</sup>—the pressure on local budgets from the growing share of their own-source revenues that must go to criminal justice needs have caused them to question traditional intergovernmental funding responsibilities. These challenges, in turn, have fueled long-standing disagreements over how localities report their criminal justice statistics to qualify for state aid. For example, should the state begin paying for

inmates awaiting transfer into the state prison system on the finding of guilt, on sentencing, or after the time for filing an appeal has lapsed? How many hours constitute a day for per diem payments? Local budget directors' claims for broader interpretations frequently are countered by state budget analysts' attempts to tighten administration.

Another area of intergovernmental funding controversy involves state-shared personnel costs. Caseload and facility-specific agreements discussed under personnel staffing become key to reducing such controversies. However, most of these agreements represent a target that, during periods of high growth, the state will lag behind by at least a year. For example, the approved state budget may project a total of 835 probation officers to maintain current caseloads but, if the number of probationers increases beyond projections during the year, there is no adjustment.

The same funding lag occurs in state-funded services. For example, forensic lab services are funded under a fixed budget amount, most public defender offices receive a fixed total to fund the payment of expert witnesses, and juvenile contract appropriations assume a maximum number of private treatment slots at a maximum fee. The more the number of cases increases, the less able the program is to absorb the shortfall. Furthermore, the more that sustained growth produces repeated annual budgeting shortfalls, the more breakdown there will be in the program's mission, frequently producing a bottleneck that has an impact on the rest of the criminal justice system.

### Summary

The breadth of detail incorporated in this and the following section should underscore the need for comprehensive coordinated planning. At the same time, a recurrent theme in recommendations for how planning should be structured is that planning needs to be close to the source of policy control. This may necessitate multifaceted planning efforts, but it does not have to entail duplication of effort. For example, independent data-gathering responsibility can support both legislative and executive resource planning while assuring integrity in the policy assumptions. Likewise, the data routinely collected by operating agencies can be fed into a planning agency's data base, while the operating agency maintains control of the information to meet its immediate needs.

In addition to program evaluation and capital planning, discussed in other chapters, three other elements of budget planning take on increased importance in times of explosive growth: personnel, forecasting, and entitlements. Because most criminal justice programs are personnel intensive, planning needs to address personnel issues, such as whether past hiring deficits have affected performance, staffing justifications, recruitment, training, and reasons for turnover.

The goal of forecasting is to enable policymakers to be proactive; however, forecasting criminal justice growth is extremely complex. Although several increasingly sophisticated computer models have been developed, because of the volatility of criminal justice decisions, statistically objective projections tell only half the story and must be mo-

dified by subjective input from criminal justice officials and policymakers.

Finally, the wide variety of state/local funding of criminal justice funding arrangements, some of which are regarded as entitlements, underscores the need to track total system impacts. Otherwise, states may underbudget their obligations, with any combination of negative results: a state budget shortfall, local budgeting impacts resulting in intergovernmental tension, program decreases, and/or bottlenecks with resulting system impacts.

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## SYSTEM IMPACTS

Forecasting and planning for budget growth, for personnel recruitment and training, and for capital expansion require a relevant data base. Weighing the cost and potential effectiveness of sentencing legislation, community treatment sanctions, and staffing increases requires an integrated data base. Removing bottlenecks, assuring consequences, and developing more effective means to reduce criminal activity require the willingness of policymakers and managers to coordinate their activities. The challenge is to bring together these elements—relevancy, integration, and coordination—within the disparate structure of the criminal justice system.

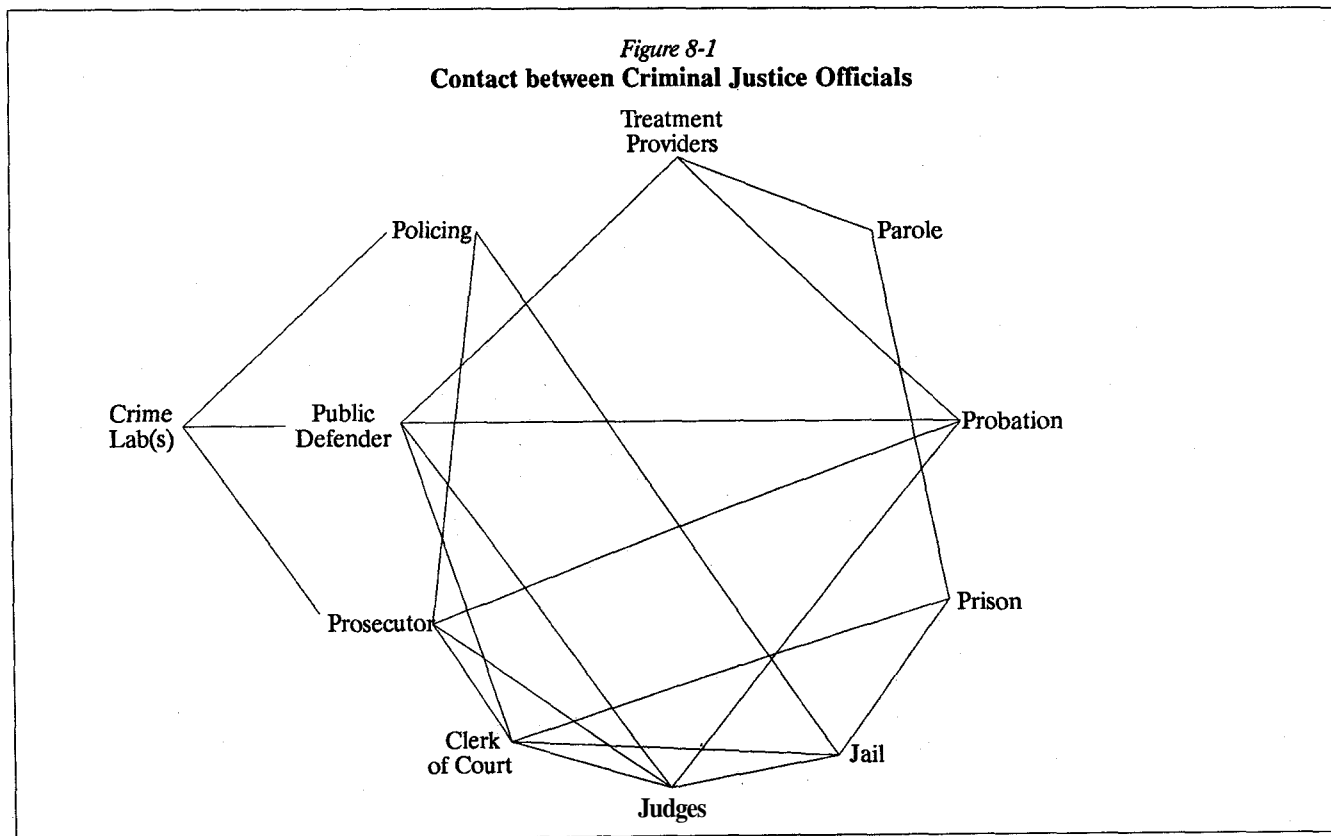
There are at least ten players within the typical criminal justice system, plus general government treatment

providers. They are funded by and must *carry out* the laws passed by at least three separate governmental units—state, county, and municipal. Some localities also face a variety of federal jurisdictional factors. By demonstrating the basic points of contact, Figure 8-1 underscores the need for various combinations of ongoing coordination. In addition, separate forums are required for program managers to address operational details, on the one hand, and general government elected officials and agency heads to discuss broad policy considerations, on the other.

This section discusses challenges in developing operational coordination and policy collaboration among and between criminal justice and general government officials. Previous chapters have raised numerous specific needs, including case management, legislative impact analysis, offender classification, establishment of community alternatives, capital improvement master planning, and the integration of police with community and criminal justice system responses. Such needs are revisited through a discussion of the integrated approaches needed to achieve them.

## Data Base Development

In the 1970s, the driving force for coordination frequently was simply a desire to qualify for federal funding. **As** the funding disappeared, so did most of the coordinating bodies that were formed under the federal mandate. During the 1980s, coordination efforts began to reappear, spurred by a desire to control escalating budget demands or the need for additional space. To the degree that the participants in these coordinating efforts find that they



meet real needs, there is ample indication that many are evolving into ongoing coordinating bodies.

One of the most frequently recognized needs for ongoing cooperation is data base development. Although the initial stimulus bringing officials together may be escalating costs, general government and criminal justice officials usually realize that the information needed in order to control, reduce, and/or forecast cost impacts cannot be generated within any one agency. In addition, integrated **database** development is driven by distinct needs related to:

- Individual offender classification, used as the offender progresses through the system to determine eligibility for pretrial release, probation, or prison/jail security;
- System management, used to move cases from arrest through trial; and
- Aggregate analyses, used for computerized forecasting models, fiscal impact projections, and planning by the local, state, and federal governments.

### Individual Offender Information

Developing a unified data base is not just a planning tool; it provides direct operating efficiencies and improved performance. However, as logical as it is to coordinate the information, logic alone often will not overcome individual agency budget priorities and the personal preferences of managers, as underscored in the following excerpt from a letter written by a state highway patrol lieutenant colonel on learning of this project:

While there are many justifications for the designed fragmentation of the criminal justice process from a constitution basis, the opposite is true on an operational level. The processing of a criminal offender from the time of arrest to final release provides significant opportunities for improvements in the efficiency of the criminal justice system *if data were standardized and shared*. Throughout the country there are situations developing which will culminate in the automation of a police system, a prosecutor system, and a judicial system on separate floors of the same building on different hardware/software platforms connected to separate networks.<sup>23</sup>

General government officials should be prepared to use their power of budget approval to leverage the participation of multiple agencies. The cost of computerization means that any decisions must pass through them, and the increased ability of computers to handle total system integration means there are no innate barriers to requiring that every criminal justice official participate. In addition, it is important for general government officials to be actively involved in bringing about the coordinated effort.

For example, one of the largest local government computer applications in the world, LAJIS, was initiated in 1987 to serve the criminal justice needs of Los Angeles County. It has been reported that the most important element in its successful implementation was the recognition

of the need for LAJIS by the board of supervisors, as well as the sheriff, district attorney, chief administrative officer, and principal members of the criminal justice community. This general government recognition of the need led to the establishment of the Information Systems Advisory Board in 1982, comprised of executive staff from 12 criminal justice agencies and professional associations. Not only does the chairman of the board of supervisors head the advisory board, but the development of LAJIS received "key support" from county general government experts in systems design and computerization.<sup>24</sup>

LAJIS was initiated as a comprehensive change, but incremental change can be equally cost beneficial. General government officials can leverage their current system and should not be deterred by an assumption that an entire system must be planned at one time. In the case of the Harris County (Houston) Criminal Justice Planning Task Force, the means to "eliminate the current redundancy of employees from different agencies collecting the same information concerning an offender"<sup>25</sup> grew out of efforts that had begun earlier for full automation of defendant-based information in the Pre-Trial Services Agency. Recognizing that "[t]he effectiveness of the entire criminal justice system relies on a systematic approach to the gathering and verification of information concerning the offender as the initial step,"<sup>26</sup> the Pre-Trial Services system was seen as a catalyst for meeting the information needs for the sheriff, district attorney, district clerk, the community supervision and corrections department, and the courts.

Bringing chief program managers together becomes the vehicle to uncover overlapping problems, develop consensus, and achieve commitment to the solution. Once the policy commitment is established, formation of a technical task force is essential. Often, such task forces are greeted with much more optimism at the working level than may have been the case, at least initially among the "B.C. (before computers) agency heads."<sup>27</sup> Involving general government computer experts in developing the system specifications can help ensure that automation is not just an add-on to the way things have always been done in the criminal justice system.

In addition, the less sophisticated the computer system that can be justified on a cost-benefit basis, the more important it is for an interagency task force to address physical details. If ready access to the information is not established, the respective agencies will develop duplicative material for convenience and internal efficiency. Where files cannot be physically or electronically shared, compatible data entries need to be developed to allow information to be merged for system analysis or, as in the case of criminal data banks, expanded access.

It is important for the policy group and the operational task force to communicate regularly. In particular, the respective agency heads and/or the chief general government officials will need to reiterate their commitment to change to overburdened employees in the disparate criminal justice system, who may not see the importance of recording accurate information that is not directly relevant to their needs. For example, according to a recent audit, despite improvements since periodic audits began in 1983,

nearly 85 percent of the arrest records maintained by the Illinois State Police for the Computerized Criminal History system were missing one or both of the prosecutor's or court dispositions; 60 percent were missing both. As the Cook County sheriff lamented, "I know it's resources, it's money, but it's something that we have to have in law enforcement because so many people depend on this data." An ad hoc working committee was formed to address the problem with representatives from the state police, the administrative office of the Illinois Courts, state and local reporting agencies, and the audit authority.<sup>29</sup>

As the decision to cooperate in providing individual offender information matures, the original group of chief policymakers may need to be expanded. In many jurisdictions, the first and most crucial need will be to include the municipal police with the county court and jail officials. This may represent a significant intergovernmental challenge because it will involve city-county funding issues. For example, New Jersey is reported to be the closest to complete coordination of its offender information from the moment of arrest through sentencing and imprisonment. This is due in large part to state funding." In contrast, cities in Florida are using drug bust proceeds to fund police computer systems, and state coordination is limited to giving advice.

State legislators may want to consider legislation to direct a portion of drug forfeiture funds to integrate the police with the rest of the criminal justice system. Such a policy directive takes on added immediacy because police forces were often the first criminal justice agencies to computerize, and these early systems need upgrades. This produces a fertile climate to establish integrated systems that can bridge governmental structures. As long as the police have an independent source of funding, there may be little inclination to cooperate.

Once the commitment is made to coordinate offender information, other policy issues may emerge, including access to juvenile records, access for private treatment providers, and whether eliminating redundancy in the collection of information affects the preparation of presentence reports in systems where they have been dropped due to overload. For example, the Ohio Commission on Prison and Jail Overcrowding found that rather than eliminating pre-sentence information reports, standardizing PSIs statewide by training local officers would not only improve equity under the law but could also save state prison manpower if the information was not generated anew for classification purposes.<sup>31</sup> Each of these second-round considerations may call for expanding the initial policy coordinating group.

#### Information to Enhance System Flow

The goals for developing an integrated offender data base are cost savings through eliminating redundancy and increased effectiveness through better data. The goals for developing a systems management data base—cost avoidance and increased efficiency—are related, but meaningfully different.

Most criminal justice personnel recognize immediately that better data will make them more effective. In

contrast, it may take more to convince some of these same players that greater efficiency also will make them more effective. The rationale that needs to be appreciated lies in the observation of Francis Bacon, when he ascended to the bench in England in 1614, that "Fresh justice is the sweetest."<sup>32</sup> Cost avoidance seldom means that redundant expenditures can be eliminated, but it frequently means that current resources can be employed more effectively. It depends on each step in the criminal justice system producing meaningful and timely data to trigger the actions required of personnel involved in the next step. Cost avoidance derives from public employees not being kept waiting and offenders not being held under more expensive security than necessary.

There have been numerous examples of the need for coordinated systems throughout this report. A brief recap of the types of problems that must be addressed through system management include:

- 8 Legal Requirements—Individuals cannot be moved from one element of the criminal justice system to another without legal authorization. Often, state inmates reported as backed up in local jails actually are waiting for court paperwork to be completed.
- 8 Jail Overcrowding—The expense of building a new jail or the threat of a lawsuit may be avoided if bottlenecks are eliminated elsewhere in the system. For example, the percentage of unconvicted inmates being held in local jails nationally increased from 39.9 percent in 1983 to 42.6 percent in 1989. This increase was due entirely to the number not yet arraigned, which grew from 11.5 percent in 1983 to 16.4 percent in 1989. The percentage arraigned and awaiting trial actually decreased.<sup>33</sup>
- Poor Case Preparation—The development of the facts of the case by the police, prosecution, and the public defense can be compromised if scheduling meets the needs of only one element of the criminal justice system. Verifying offender information also may be compromised.
- 8 Delay—Usually, the longer a case sits before it is tried, the more justice may be compromised because memories fade and conflicting testimony is harder to rectify. Although it is rare for a case to be dismissed because it was not heard within statutory limits, it is possible. With the increase in drug cases, adequate resources for forensic laboratory analyses has become particularly critical in combatting delay.
- 8 Physical Restraints—Just as chains will break at their weakest link, standard procedures frequently will fail due to physical restraints, such as the size of the intake room, the number of courtrooms, or even, as in the case of the New York court, something so specific as the limited number of sally ports to receive busloads of offenders being transported from the distant jail.

This summary of problems created in the criminal justice system is due only partially to overloaded facilities. Its root cause is that each element has little authority over the procedures of the others: Police control arrest practices; prosecutors control charging; the legislature usually constrains pretrial release and sentencing policies; the clerk of court controls the preparation of legal documents; probation departments may be charged with the timely appearance of defendants on pretrial release; court administrators exercise significant control in scheduling cases, while judges may control the progress of cases. Sheriffs or jail administrators typically have the least control of all and are the first to feel the effects of lack of action by other criminal justice officials because jail backlog is in terms of people, not stacks of paper.

It is obvious that workable systems to improve the flow of people, authorized by the requisite paper trail, must involve all agencies. While the sheriff or chief judge may initiate change, the most comprehensive solutions usually emanate from general government elected officials. The sheriff may be an early catalyst for change by taking steps, such as establishing a daily reporting system as in Hennepin County.<sup>34</sup> Chief judges and court administrators also may use their authority to carry out initiatives fostered by the training they have received from such organizations as the Center for State Courts, the American Bar Association, and the American Judicial Conference.

Nevertheless, because they control the funding, general government officials are in the best position to force all of the players to reason together. Local general government officials frequently have taken advantage of the request for new jail or courtroom space. State legislatures are in an even better position to take a proactive stance. California developed state standards that require management improvements before additional judicial operating requests are met.<sup>35</sup> The 1987 Oregon legislature tackled both court operating and jail space demands by setting time limits for arraignments, probation violation hearings, sentencing, judgment orders, and completion of pre-sentencing reports.<sup>36</sup>

However, improvements, such as video bail review, computer remotes, or space modifications, may still not eliminate the need for increased staffing and space. Therefore, good-faith efforts to coordinate for system management efficiencies must include general government personnel. As was noted in the LAJIS example, they have broad technical expertise and, if this expertise is not engaged, those who have the ultimate control over funding the improvements may not be convinced that all that can be done is being done.

### Aggregate Information to Support Analysis and Planning

The need for aggregate data is a reflection of both the independence and the multiplier effect in the criminal justice system. Even though the system was conceived to maximize the independence of each official in determining guilt or innocence, in fact, this independence is often influenced by the same forces. This creates a snowball effect.

As a hypothetical example, a 2 percent increase in violent crime might be met by a 3 percent increase in municipal police, which might result in a 5 percent increase in total felony arrests. The increased public concern created by the increased violent crime might cause the prosecutor's office to increase the percentage of all arrests where the decision is made to prosecute, and it might cause the prosecutor, judge, or jury to be less inclined to consider lighter sentences. The result is that the original 2 percent violent crime increase becomes a double-digit increase in the number of people behind bars.

General government officials must be able to judge this multiplier effect to make rational policy decisions. The Oregon Jail Overcrowding Project's commentary on the result of not gathering aggregate data speaks to this need:

There did not exist reliable information concerning historical and current crime rate and arrest, prosecution, charging, sentencing or disposition practices. Without that information, those who make or influence public policy on criminal justice must guess about the nature and scope of the problems they are called upon to solve.<sup>37</sup>

Aggregate data also is critical for evaluating intergovernmental programs. Michigan's Community Corrections Act requires evaluation of the extent to which each community actually diverts offenders from prison through CCA-funded programs. However, neither the state nor most localities traditionally tracked the makeup of jail populations. Using a federal NIC grant, the state established both a Jail Population Information System (JPIS) and a Community Corrections Information System (CCIS).<sup>38</sup>

The Harris County Criminal Justice Council provides another example of how frequently the importance of automation and consolidation of information is being recognized. In fact, the need for a sound, integrated data base was given the top priority by the council, which was made up of judges, the district attorney, the sheriff, the clerk's office, the district courts administrator, and the chief probation officer, as well as a member of the city council, a member of the state legislature, the county attorney, and the city school board president:

The development of a baseline offender profile is recognized as a necessary and integral aspect of the process of making appropriate allocation of resources and monitoring the effectiveness and utility of various program elements of the community justice system.<sup>39</sup>

This top-priority recognition underscores the importance of bringing criminal justice and general government officials together. It boosts the chances that resources will be identified within all of the agencies that must participate in order to establish a valid data base. Equally important, the wide participation of criminal justice interests provides a focus for resolving reporting formats and protocols.

Ideally, aggregate data will grow out of the data required for operational purposes. The more that it does not, the less likely it is to be recorded accurately or transmitted in a timely manner. As with individual offender information and with management systems data bases, it is



critical that each element of the system recognizes the importance of the information it is gathering and that there is consistency in the terms used. Recording new data, at least initially, represents a new burden to line personnel. Because they frequently have little experience with the advantages of planning, as opposed to what information about an offender can trigger, they are more apt to regard it as simply more paperwork.

Those who will be using the aggregate data for planning should focus on using existing data to the greatest degree possible, with modifications only if necessary to achieve conformance with significant state and federal data systems for valid comparisons of local trends and needs. In some systems, even standard state and federal categorizations must be approached with caution. They may create the same operational problems as any distinction borrowed from another system: If it is irrelevant to the operational needs and options within system using it, the information recorded will be “fudged” by employees to make the “right” distinction as they see it.<sup>40</sup> Wrong data bases not only waste operational resources, they also provide wrong aggregate information for policy evaluation and development. Finally, it must be noted that many officials have criticized the FBI’s Uniform Crime Report, which should set the standard for valid jurisdictional comparisons, but which is seen as highly vulnerable to reporting errors because (1) it is voluntary, (2) there is little quality control or training, and (3) its crime definitions are inflexible.<sup>41</sup>

General government officials often become the strongest advocates for establishing aggregate data bases. They may have begun their push for criminal justice coordination because of immediate budget pressures, but they soon realize that gathering aggregate data moves the reason for coordination from coping with overload to the potential for controlling it.

### Fiscal Impact Statements

Another basic tool for controlling system overload is to estimate the fiscal impact of crime legislation or a budget initiative before it is passed. Some states have fiscal impact statement requirements, but the value of any statement depends on the data used, the breadth of the projection, and when the information becomes available to elected officials.

#### Validity of Data

The validity of the data used depends not only on what data are available, but whether the right data are used. Data will be difficult to generate if a forecasting model has not been established; however, even a manual count and a future-year projection will take the discussion beyond just a “guesstimate.”

One critical error—which has been made when large computer data bases are available as often as when there is only manual data—has been to base projections on the total number of inmates imprisoned for the offense category covered by the legislation, rather than focusing on current admissions. Legislation tends to deal with crimes of current concern. Using an historic conviction base may draستي

cally understate the fiscal impact of the legislation when it is applied to current community standards for arrest, prosecution, and sentencing.

#### Breadth

The breadth of the projection refers not just to the number of years projected, but whether the impact on all components of the criminal justice system are considered. Most forecasting models focus on prison bed needs. Because this is the largest budget, even such a limited impact assessment provides an order of magnitude assessment of the state budget impact. However, it does not red-flag the impact on court-related offices that may be funded locally. In Minnesota, therefore, public defender offices have recently taken the initiative to submit their own impact statements on new criminal law bills.<sup>42</sup>

Of equal concern is the fact that few states have an adequate means of analyzing the local impact of bills regarding misdemeanors. Legislation on drug testing, domestic violence, drunk driving, or other misdemeanors will have significantly greater impact on probation, parole, jail, and court services than on the state prison system. Furthermore, simply projecting statewide total or average increases is not relevant for programs funded locally. Legislators need to be provided with local information, at a minimum, showing the magnitude of difference between urban, suburban, and rural jurisdictions.

The breadth of projecting fiscal impacts also includes extending fiscal impact statements to cover criminal justice appropriations, not just sentencing legislation. For example, funding new investigative tools, such as a computerized fingerprint identification system, which would have an impact on conviction rates for property crimes, or DNA analysis of body tissues, which has become a powerful new tool in violent crimes, should be accompanied by projections for their impacts on costs throughout the criminal justice system.

#### Timeliness

Legislators, the governor’s office, affected agencies, judges, prosecutors, the defense bar, and local governments need to receive the information as early as possible in considering legislation. This is less of a problem in large states with full-time legislative sessions than in states with short legislative sessions, which, if they are small, also may not have as much projection capability.

#### Improving the Fiscal Impact Process

Even when fiscal impact statements are required, many officials interviewed expressed the belief that legislators do not know the ramifications of votes and that the process needs to be strengthened. In addition to increasing the sophistication of the analysis, its breadth, and its timeliness, some states have taken steps to put teeth in impact statements. For example, Tennessee adopted a “pay as you go” fiscal assessment bill in 1985, which requires that appropriations be passed before a sentencing enhancement bill becomes law.<sup>43</sup> A prison population cap goes even further in strengthening the fiscal impact statement. Sentencing guidelines and parole reform in Minnesota, Washington, and Oregon are the best examples of

forcing the legislative process to link the adoption of new priorities and goals to finite resources.

Just as states need to be cognizant of projecting the cost of crime legislation on local governments before it is passed, the National Conference of State Legislatures has pointed out that the Congress and the president should adopt the same discipline:

In order for states to [be more effective] partners with the federal government, the Office of National Drug Control Policy should give more careful attention to the fiscal implications of its policies during its formulation of the National Strategy. We believe that not only are states entitled to information regarding the impact of federal proposals, but also, each Congressman and Senator deserves to know how the various proposals will affect the budgets and tax situations in their own states.<sup>44</sup>

The NCSL testimony went on to point out that the \$6 million included in the *Crime Control Act of 1989* for states that adopt mandatory sentencing for certain firearm offenses would allow for the construction of only 2.2 beds per state, without considering annual prison operating cost per inmate.

The Federal Courts Study Committee recommendations for judicial impact assessments contained a checklist of “housekeeping” points to be considered when passing legislation, including, for example, indication of whether the statute should be broadly or narrowly interpreted and a listing of which statutes are intended to be repealed, modified, or preserved intact by the new statute. The Federal Courts Study Committee’s commentary also echoed a lament heard in state legislatures—as it is in the halls of Congress—that it is impossible for interested parties to recognize, much less monitor, every bill. Fiscal impact statements are seen as an essential “red flag.”<sup>45</sup>

The agreement of many general government and criminal justice leaders about the need for fiscal impact statements is well expressed in a particularly strong declaration of the American Bar Association—which also is developing a model impact statement—that was picked up by the National Governors’ Association in its policy position:

Legislation that increases the number of crimes and length of prison sentences without also providing for additional police, prosecution, and defense services, as well as correctional services, must be seen as a futile, counterproductive gesture.<sup>46</sup>

### Coordination to Deal with System Impacts

As important as fiscal impact statements are in and of themselves, their preparation serves to raise another red flag—the need for system-wide coordination that goes beyond the operational concerns discussed thus far. For example, the difficulty in determining intergovernmental impacts may underscore the need for differential funding that reflects crime-related demographics. Or sentencing impacts may be regarded as highly speculative in the absence of judges, prosecutors, treatment providers, or other officials

being fully informed of or in accord with the legislative intent or the import of the new technology being funded. Finally, the fiscal impact process considers only the effect of state action on localities; there is no comparable review of pending local decisions on the rest of the system.

There are abundant examples of the problems endemic to the criminal justice system because of the lack of system coordination and agreement on priorities:

- **Inadequate Correctional Programs—A 1971 Advisory Commission on Intergovernmental Relations finding rings as true today as it did then:**

In the Commission’s view, pouring large amounts of funds into police programs in the final analysis will have an insignificant effect upon reducing recidivism unless correctional agencies also are treated as “first class citizens.” Indeed, increasing law enforcement capabilities alone will only contribute further to the already overcrowded conditions in corrections facilities, without improving the effectiveness of rehabilitation efforts. Therefore, the Commission rejects the argument of some observers that fighting crime in the streets always should receive top fiscal priority.<sup>47</sup>

Because they are the end of the line, correctional programs also can take a heavy impact from efforts to solve problems elsewhere in the system. Cook County began five evening courtrooms in October 1989 to handle its backlog of drug cases. The backlog had decreased by 4,000 as of mid-1991, but an unintended side effect is that more offenders are being sentenced to prison terms because of insufficient personnel and time to seek alternative sentences. “Illinois had the largest increase in inmate population in the country last year, and I think that’s probably directly attributable to the increased efficiency of our courts here in Cook County,” said Presiding Criminal Court Judge Thomas Fitzgerald.<sup>48</sup>

- **Inadequate Court Resources—As the Federal Courts Study Committee observed:**

At some point, the war on drugs will be a casualty of itself. Overload causes backlog. Backlog threatens timely prosecution and, under the *Speedy Trial Act*, can lead to dismissals. The Chief Justice has warned against “an hour-glass-shaped law enforcement system.” It will have increased prosecutorial and correctional resources, “but without the judge-power to handle the added workload there will be a bottleneck in the middle of the system substantially lessening our ability to win the war on drugs.”<sup>49</sup>

Indeed, the President’s 1990 National Drug Control Strategy recommended more clerks, admin-

istrators, defense services for indigents, probation and pretrial officers, security and support staff, additional judgeships in federal courts, and state expansion of court resources to “respond to the flood of drug cases that can be found in virtually every jurisdiction.”<sup>50</sup>

- Inadequate Detention Space—As noted in the Hennepin County jail study:

As a processing facility between the police and the courts, the [jail] functions much like a pipeline for the criminal justice system. . . . As crime increases, forcing more arrests, the flow into the pipeline increases. The people and systems adjust as much as possible to the added load until it becomes too much. At that point, the pipeline clogs and cases start backing up on the court’s calendar and, more visibly, in the [jail].<sup>51</sup>

- Overutilization of Resources—The Florida ACIR found that a **95.0** percent increase in jail capacity between **1985** and **1989** led to a **72.1** percent increase in incarceration, even though there was only a **10.6** percent increase in crime. The seven-fold growth was caused by a growth in arrests (**18.3** percent) that was almost twice the increase in crime and by increased prosecutions (**47.9** percent) that more than doubled the effect of the increased arrests.<sup>52</sup>

By the end of the **1980s**, more and more states began trying to address the problem of establishing priorities in the criminal justice system, so that problems such as those listed above do not frustrate criminal justice officials and waste resources directed toward fighting crime. Because these efforts at a systems approach have grown out of necessity—usually involving system overload or budget crisis—there are many variations in the types of coordinating bodies that have been formed. The challenge for the **1990s** is to turn these ad hoc reactive efforts into ongoing proactive tools. The subsection that follows briefly outline some of the coordination approaches being used, while the next section on the politics of change addresses the basic issues that must be tackled by these coordinating bodies.

#### LEAA State Planning Agencies and Criminal Justice Coordinating Councils

A focal point of the *Omnibus Crime Control and Safe Streets Act of 1968* was its mandate for comprehensive criminal justice planning. It contained block grants to permit states to identify needs and plan programs. This federal planning push was further strengthened because much of the federal money for operational initiatives was not narrowly defined for specific functions and was funneled through the 55 State Planning Agencies (SPAs) created under the act. Thereby, these SPAs could significantly influence state and local criminal justice agencies to include a planning element in all operational grant applications. The **1970** amendments to the *Safe Streets Act* specifically

encouraged local and regional planning by federal funding of Criminal Justice Coordinating Councils (CCJCs).<sup>53</sup>

The extent and duration of LEAA activity is reflected by its funding history. Expenditures for criminal justice planning, information, and communication systems that served more than one criminal justice function and general training programs tripled between **1971** and **1976**, before leveling off in **1977**, and then falling close to the **1971** level, adjusted for inflation, in **1985**. This pattern demonstrates the impact of the rapidly increasing LEAA block grant program in the early **1970s** and its termination in **1979-80**.<sup>54</sup>

There are fewer than **70** city-county criminal justice coordinating councils in the country.<sup>55</sup> Of **24** coordinating councils identified for a **1991** survey, **18** had their origin during the LEAA era. The annual funding of these coordinating councils varied from over **\$3** million to nothing. The most active organization typically had data-gathering and projection responsibility, such as in Dade County (Miami) and in Los Angeles County, or were responsible for criminal justice training, as in Lucas County (Toledo).<sup>56</sup>

The demise of CJCCs and SPAs is typically ascribed to two factors: they were seldom more than grant administrators and their representation was skewed. The view that they were seldom more than grant administrators is in part a reflection of the top-down origin of the LEAA mandate. In jurisdictions where the funding expired before an ongoing agenda reflecting the benefits of coordination emerged from the participants, the planning function died with the funding. The development of a meaningful planning role also was stifled by the requirement for annual plan submissions. This required planning on “short-term goals and immediate funding concerns, producing artificial work burdens, and demanding an inordinate amount of time.”<sup>57</sup>

Even as grant administrators, most of the grant funds were passively directed to meet the existing needs of agencies capable of “good grantsmanship” rather than to identify and initiate systemic improvements. According to a U.S. Government Accounting Office (GAO) assessment,

The problem is that LEAA and the SPAs generally provided technical assistance only on request, rather than actively seeking out program officials, asking them about their problems, and suggesting solutions [LEAA] should complete its consideration and study of the issues so action, not merely planning, can be taken.”

The problems of skewed representation also had several origins. The first was police agency domination. A **1970** LEAA survey showed that **34** percent of the members were police; only **6** percent were corrections, **8** percent prosecution, and **8** percent judicial. This police dominance was due in part to problems of jurisdictional representation, because, as noted earlier, almost every jurisdiction has its own police force. On average, there are five-times more police agencies to be represented in any region than there are court or correctional officials. At times, moreover, regional efforts to include all units of government numerically overwhelmed the importance of the core city’s criminal justice problems. Finally, it was rare to have representation of state or federal officials,

even though in a given region they may play a significant role in probation, immigration, or drug trafficking.

### **Councils of Governments and Metropolitan Planning Organizations**

The movement to establish regional councils of governments (COGs) or metropolitan planning organizations (MPOs) predated CJCCs. Although they, too, were required for distribution of certain federal grants, COGs and MPOs were involved in enough different program areas that most were able to achieve legitimacy among their member governments despite changes in their federally mandated *raison d'être*.

However, although COGs and MPOs frequently will have a criminal justice committee, their governing boards are composed of general government officials who concentrate on issues for which they have the prime responsibility, such as transportation, air quality, land use, and sewage treatment. The role of COGs and MPOs in bringing criminal justice officials together has tended to be more in getting similar officials together, such as all the region's police chiefs, rather than playing an ongoing role of system coordination and planning.

General government officials can spur criminal justice coordination, nevertheless, by using a COG or MPO to sponsor a special program or workshop related to criminal justice. However, it is very important that the development of program content and focus include criminal justice officials so that they will feel ownership of the outcome. By bringing criminal justice officials together on a specific topic, a COG or MPO can become the catalyst for the formation of a separately constituted body, as criminal justice officials realize the potential for ongoing cooperation.

Another problem with a COG or MPO serving as the forum for criminal justice coordination and planning is their jurisdictional representation. As in the LEAA critique, many criminal justice officials in large cities are reluctant to spend much time with an organization in which all governmental units are given the same weight. For example, it was observed during interviews that the city of Phoenix would be just one among over two dozen governments if it tried to use its COG as a criminal justice planning forum.

Although LEAA and other regional planning efforts of the 1970s established very few enduring criminal justice coordinating bodies in the 1990s, there may be more planning efforts than ever existed under the federal mandate, as the following subsections indicate. There is reason for optimism that these forums may last because they have avoided some of the basic weaknesses inherent in the earlier approach. They tend to be self-generated rather than imposed from without. They are more inclusive of all agencies related to criminal justice. They involve an action agenda.

### **Budget Coordinating Bodies**

To reiterate one of the main tenets of the drive for improved coordination: The more the forum involves people in the mainstream of decisionmaking, the more it will avoid the failings of earlier LEAA efforts.

ACIR made the point that planning must be in the mainstream in its 1976 assessment of the *Crime Control*

*Act*: "The SPAs have been largely unable to change their image as Federal planners and grant dispensers in connection with the operations of other State agencies. While some exceptions do exist, most are involved and do not relate closely to other executive branch agencies as a funding conduit or information resource."<sup>59</sup> The Council of State Government's finding was equally action oriented: "[E]ffective planning must be related to authority to implement and thus made sense only, or at least primarily, as an endeavor of operational agencies."<sup>60</sup>

Budget development is in the mainstream of decision-making. In Olmstead, Minnesota, following successive reversals of county board budget decisions due to the strong objections of certain criminal justice officials, a review group was formed consisting of a member of the county council, the county administrator, county attorney, the sheriff, the district attorney, the presiding court judge, a district court judge, community corrections director, and juvenile corrections director. Even though each budget still goes through the standard process, any outstanding issue has to go through the criminal justice review group for resolution before going to the council's budget committee. The review group has been so successful in spotting the effect of any action on the entire system that some discretionary money is now designated to the group to apply to needs of the system as a whole.<sup>61</sup>

Localities that have initiated efforts to set budget priorities among criminal justice agencies are finding that the results are, in fact, avoiding the LEAA criticism of too much emphasis on police resources. For example, at a 1990 retreat, Charlotte City Council members identified drugs and the criminal justice system as one of five areas they wanted to concentrate on. During ensuing planning forums to identify how the council's priorities could be carried out, all of the ten criminal justice areas—except law enforcement—identified needs within their own agencies as their top concerns. In contrast, both the Charlotte Police Department and the Mecklenburg County Police Department identified the need for more jail and prison space, more judges, and more prosecutors because of their concerns that too many arrested persons do not come to trial and too many convicted people are released before serving their time.

### **Secretariats, Coordinating Councils, and Crime Commissions**

Attempts to take a comprehensive approach in establishing criminal justice priorities have led to various institutional structures for continued coordination. The philosophy behind most of these efforts is to create ongoing oversight of system impacts rather than rely on the more narrowly focused, relatively closed budget process.

One alternative for executive oversight is to group agencies under broad functional areas. These groupings may each be under a cabinet level official, comparable to the structure of the U.S. Department of Justice. Over the years, there have been numerous state reorganizations in response to various trends in public administration. In the 1960s, at least 20 states placed correctional agencies under human services super-agencies with welfare, mental health, and employment services. State police or highway patrols

were placed under a public safety secretariat, most commonly, or **transportation**.<sup>62</sup> By the end of the 1970s, concerns about **security** and the demands of administering two rapidly expanding areas—social entitlements and prisoner growth—led many states to recast corrections as a public safety rather than a rehabilitation agency. Under this reorganization, some states have brought adult corrections, state **police**, probation, parole, public defense, prosecutors, and juvenile court treatment functions under the same umbrella for gubernatorial policy purposes and administration.

Local jurisdictions are not apt to have executive oversight structures that include criminal justice because many of the local agencies are independent, under a different local government, or divisions of a state agency. However, Hennepin County recently included probation in its weekly general government cabinet meetings.

Mechanisms for legislative oversight include organizing the budget staff to assure that the staff handling the judiciary's budget, for example, also is reviewing all the executive criminal justice agencies. In some states, this is producing an increasingly proactive committee structure, combining a greater awareness of proposed criminal code changes with correctional budget considerations.<sup>63</sup> Another model is found in the Virginia Crime Commission, which includes legislators, local prosecutors, and laymen to review criminal justice issues throughout the year and develop a legislative agenda.

A prime example of bureaucratic coordination that is not necessarily dependent on the direction of an elected official is the California Executive Corrections Council. By working on operational issues, it can institute solutions directly. Recommendations to elected officials for policy change come only after management alternatives have been tried. The council also crosses state-local divisions and brings together state corrections, sheriffs, and local probation officers.

### Task Forces

It is common for general government elected officials to form a task force whenever a particularly controversial and/or expensive issue is brought before them. This strategy should be regarded as a potential catalyst to establish an ongoing forum to surface problems and develop solutions. It should not be overused, as in Hennepin County where the coordinating council threatened to disband because the mayor of Minneapolis formed special task forces for every issue, usually consisting of same players, namely, the police chief, court administrator, chief jailer, *etc.*<sup>64</sup>

Nevertheless, there are times when a task force formed around a specific problem may bring different players to the table, whose respective roles are not traditionally appreciated. For example, Cook County (Chicago) has one of many large jail systems under a consent decree to reduce overcrowding. It is readily acknowledged that one of the most positive elements of a 1982 court decree was the formation of a Criminal Justice Coordinating Council and, particularly, its composition.

If we would have set this group up at any other time or for any other reason, I guarantee you, three of the people would not have been on it: the Chief Probation Officer, the Public Defender,

and the Clerk of Court. They are three absolutely critical people who traditionally would have been

### Coordinating Bodies under Community Corrections Acts

Community Corrections Acts (CCA) have the potential to serve the clearinghouse function LEAA envisioned for CJCCs. A major difference is that a CCA is oriented toward corrections, while LEAA tended to be oriented toward law enforcement. CCA coordination also focuses on state-local relations rather than county-city relations because they are funded by the state in a desire to relieve prison and jail overcrowding and to control costs.

CCAs require a local plan before a county or group of counties, typically within a single court's jurisdiction, can receive state funds. It is the development of this plan, rather than the formation of a CCA board to oversee the use of community sanctions, that offers the real potential for system coordination. Because the local plan represents the trigger for receiving state funds, the state can exert significant influence in assuring that the plan is comprehensive in its consideration of alternatives and in the cooperation needed to make them effective.

Most of the 17 states classified by the National Association of Criminal Justice Planners as having a CCA require that the plan be initiated by and/or submitted through the county government. The exceptions are **Arizona**, which designates the superior court, and **Connecticut**, **Iowa**, **Missouri**, and **Texas**, which designate the local corrections **agency**.<sup>66</sup> Designating general government officials to initiate and submit the plan recognizes the role that often only they can play in bringing treatment providers, the schools, general government elected officials, and all of the independent criminal justice officials together to support alternatives to incarceration.

### Federal Drug Enforcement Allocations

Despite strong objections from cities, federal drug funds are given to the states for allocation among their local jurisdictions rather than directly to city and county governments. This has led at least one state, Tennessee, to take an approach that is reminiscent of LEAA funding in the 1970s. Tennessee has designated 29 regional task forces, eight of which are based on SMAs, to submit "mini-strategies" each year for "cooperative, coordinated programs with multi-agency involvement." Each task force is formed with every police and sheriff's department sitting on the board of directors. Federal grant money is awarded to the task force, not to one jurisdiction. Thus far, however, Tennessee's experience is mirroring LEAA in another way, with **70** percent of the regional grants going directly for law enforcement, such as improved forensic **services**.<sup>67</sup>

### Blue Ribbon Commissions

Some governors, elected county executives, mayors, legislative leaders, chief judges, and presidents have used their positions to focus on the comprehensive challenge of the criminal justice system. Findings and recommendations from these types of commissions have been used abundantly throughout this report.

To be meaningful, blue ribbon commissions need to be given priority by the convener in staffing, public relations, and the quality of appointments. Given the interrelated nature of the criminal justice system, they usually have the greatest value as a planning and coordinating tool if they have not been convened with too narrow a focus. For example, a proposed "National Commission to Support Law Enforcement" in the 1991 federal anticrime bill had no judicial, correctional, or local and state officials in its makeup, even though the International Association of Chiefs of Police call for a National Commission on Crime and Violence suggested that a judge, prosecutor, corrections or probation official, welfare agency, children's advocate, and victims' advocate be included.<sup>68</sup> In contrast, the 1967 President's Commission on Law Enforcement and Administration of Justice included local and state officials from courts, corrections, and general government.<sup>69</sup>

Whatever its title, the difference between a blue ribbon commission and a task force is in its public visibility, as well as the breadth of its considerations and the experience of its members. Its success does not depend on the officials who are accountable for change being brought together; it depends on credible individuals developing a compelling agenda for change that can bring pressure for public officials to come together.

### Summary

Most outside observers looking at any enterprise that has escalating costs, public distrust, and a structure of disparate roles would conclude that it needs to establish priorities and coordinate its efforts. The challenge in the criminal justice system has been to get all its independent authorities to come to this same conclusion.

With hundreds of thousands, if not millions, of cases moving in and out of any state's criminal justice system every year, data management represents a major operational focus of coordination for decisions about individuals, system management, and planning. For example:

- Public safety and/or treatment decisions require ready access to sources of accurate information.
- Moving individuals through the system can be no more efficient than the official forms that trigger or record action.
- Foreseeing impacts and resource needs for disparate elements requires a foundation of timely, relevant data.

General government officials can assure that data systems established to meet these needs are inclusive, benefit from the technical experience gained in developing other data management networks, and are given budget priority commensurate with their potential to improve effectiveness and save system costs.

Given that criminal justice components span state, county, and municipal responsibilities, general government officials also must be prepared to support cooperation with criminal justice agencies. Throughout the country, many general government and criminal justice

officials exercise leadership to show that "cooperation and coordination are both required and possible."<sup>70</sup> Coordinating mechanisms include: fiscal impact statements, LEAA criminal justice coordinating councils, MPO inter-jurisdictional committees, cooperative budget development and review by criminal justice agencies, councils and secretariat overview structures, and special task forces and commissions.

Many innovative officials use the most pressing problem in their system to draw players together. Successful efforts typically involve a forum for debate and resolution among policymakers, as well as a mechanism for operational collaboration. Such solution-oriented approaches have produced many different types of forums and proven the viability of local flexibility under a federal system. Concrete results in addressing each problem have built trust and opened the thinking of the system to more comprehensive approaches to priority setting, planning, and coordination—concepts that, when imposed from without, have been staunchly resisted in the past.

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## *THE DYNAMICS OF CRIMINAL JUSTICE CHANGE*

The preceding sections have laid out sound reasons for what, on occasion, are regarded as luxuries: planning and coordination. Without system coordination, the prime goal of each element of the criminal justice system will continue to be compromised:

- General government officials will not be able to control costs.
- Police resources will be wasted.
- Prosecutors will find that offenders are not punished equitably.
- Public defenders will find due process reduced to a production line rubber stamp.
- Judges will be frustrated with lack of appropriate sentencing options.
- Sheriffs, jailers, and prison administrators will continue to face daunting liability and management challenges.
- Probation-parole officers and treatment providers will find it difficult to achieve results because of lack of punishment options to carry through with negative sanctions, on the one hand, and lack of resources to carry out positive rehabilitation, on the other.
- The public's safety will not be enhanced. Public confidence will not grow.

This final section attempts to identify the institutional and political barriers that must be overcome to develop an effective criminal justice system. Institutional barriers in-

clude clarifying intergovernmental responsibilities, integrating the components of the criminal justice system into the mainstream of public services, and accommodating lines of authority. Addressing these issues should go far in developing the political leadership necessary to reduce the barriers to public acceptance of policy changes that must be instituted to achieve the most productive balance.

### Clarifying Intergovernmental Responsibility

Determining intergovernmental responsibility for criminal justice usually ends up balancing three facets: legal requirements and restraints, managerial efficiencies, and need. As each state and its localities grapple with the questions raised and as they, in turn, engage in debate with the federal government, proposed solutions also should be measured by the constitutional question: Is there a way to achieve an effective criminal justice system without sacrificing local autonomy to determine and enforce community standards?

#### Legal Requirements and Restraints

Looking at state-local relations in criminal justice, there are several sources of tension. First, counties feel caught in the middle. Although state legislatures have granted city, town, and county councils the power to enact criminal ordinances not punishable by time in prison (misdemeanors), they also retain this power for themselves. Therefore, while a county council must be willing, for example, to pay for the full cost of passing a law that drunk driving shall be punishable by incarceration in the county jail, the state legislature can pass the same law to apply to all counties and never face paying for the additional jail space. Likewise, if a city or town passes a drunk-driving ordinance punishable by jail time or their police forces conduct a drunk-driving crackdown, again, the county must absorb the extra jail costs.

This tension increased with the budget deficit experienced by many localities in the early 1990s. For example, as of January 1991, approximately 45 of California's 58 counties opted to charge cities for booking suspects arrested by city police. Santa Clara County estimated that the city of Mountain View may have to pay \$300,000 per year based on past booking practices. Although this may seem to be an example of increased intergovernmental tension, it actually can result in cities recognizing the total criminal justice system impacts of their political decisions and reducing the numbers of minor offenders sent to jail."

Second, counties feel caught in the middle because state responsibility has not been defined clearly. Most counties, as creatures of the state, are responsible for holding state prisoners until they are transferred into the state system. Counties historically have felt they have been pawns under this system. One advantage of overcrowding is that it has forced clearer resolutions of state-county responsibility through a number of different means. For example, the courts decided in a 1990 Texas decision that full state funding must follow state prisoners. The Mississippi legislature decided in 1991 that state responsibility meant the state must house the prisoners and

they could not be left in county jails. A blue ribbon commission in Virginia decided in 1989 that state responsibility should be redefined to match reasonable penal policy as to whether petty felons belong in prison or jail.

Each of these resolutions achieved a closer nexus between state control and state responsibility and, thus, represents a step toward reducing criminal justice system fragmentation. The resolutions force a rethinking of the conventional wisdom that state funding follows state interests for supporting those elements of the criminal justice system for which they are accountable rather than local interests or, ideally, a unified system.

The intergovernmental balance between the federal government and the states and localities is in a state of flux because of a perception that the federal government can fight crime better than states or localities. This began with Prohibition, gained credence with white-collar financial crimes, and has been spurred by sophisticated drug operations. Of at least equal significance, the perception has been fostered politically, starting with the 1964 presidential campaign. The perception is responsible, in part, for more than 3,000 acts now being defined as federal crimes although as previously noted the federal criminal justice system actually handles only 6 percent of felonies.

The fact that increased federal law enforcement runs counter to the constitutional concept of a noncentralized criminal justice system is little debated. In fact, for most state and local elected officials, the major source of tension is the political pressure created by federal legislation for them to be equally tough on crime. There is relatively little concern about law enforcement activities that are carried out and paid for by the federal government.

Against this backdrop, clarifying intergovernmental responsibilities becomes a muddled debate of issues raised throughout this report:

- The need for effective measures against highly mobile organized crime;
- The value of the federal government as a clearinghouse and stimulant for state and local initiatives;
- Unfunded federal mandates;
- The drop in intergovernmental funding from 27 percent to 7 percent of federal criminal justice expenditures;
- Distribution of federal funds directly to local governments versus through each state based on its total criminal justice needs;
- Concerns that the distinct purview of the federal courts is being overwhelmed by cases that could be handled by state courts;
- Accusations of political one-upmanship; and
- Constitutional structure.

Despite the fact that five major drug and crime bills were passed in the 1980s, the 1990s started with another high-profile federal anticrime bill. Therefore, it would seem that, at least for the foreseeable future, state and local

criminal justice system planning will need to continue to adapt to major shifts in policy direction from the federal government.

### Managerial Efficiencies

Chapter 7 included numerous examples of intergovernmental provision of services, which in many instances have served as a vanguard for establishing a system's approach to criminal justice. Such intergovernmental initiatives—fostered by budget savings, technological advances, and increased effectiveness—have been instrumental in overcoming the traditional tendency of some criminal justice officials to protect their turf and methods of operation.

In these instances, the most serious barrier to an increasingly comprehensive system approach becomes who will take responsibility for funding. States that have a strong tradition of regarding localities as divisions of state government, with the prosecutor, judges, clerk of court, and sheriff operating as state constitutional officers, may be more likely to pay for system improvements than states that regard their localities as having more autonomy and, therefore, more responsibility.

Local government contract arrangements or regional agreements—such as that provided for under Iowa law to finance local law enforcement through the formation of a special district—generally have not been embraced for criminal justice. Given that localities still have to pay for the service, any saving from consolidation has not outweighed the loss of direct control over the politically potent issue of law and order. Therefore, intergovernmental initiatives have tended to be limited to interagency agreements for specific services, such as laboratory analyses.

### Need

Cities argue that need is the compelling factor that should define governmental responsibility. The argument that there is an intergovernmental responsibility to assist in proportion to the relative need of urban cores is further augmented, as noted in Chapter 7, by the view that the largest cities are regarded by many as symbols of the nation's or a state's health.

In addition to the societal impact of high crime rates in our largest cities, all cities see themselves as the first defense against crime. "When there is a drug problem in the city of Knoxville, it is city police that go to that street corner or make that raid or whatever it is. It is not a highway patrolman from the state, and it's not the deputy or the sheriff."<sup>72</sup>

County and state officials counter that arrests are only the beginning of criminal justice costs. "Intergovernmental issues, such as the need for new jails, more courtrooms, judges, etc., are easily overlooked as we respond to the need for more law enforcement on the street."<sup>73</sup> In determining need, the system must be viewed as a whole—increased arrests are neutralized if cases cannot be adequately prosecuted or prison space is unavailable.

The debate may then shift to prevention.

The U.S. Conference of Mayors have acknowledged that our nation is fighting the war on drugs

today because it lost the war on poverty. Top city police officials have acknowledged that in the face of unprecedented levels of crime and incarceration—four prisoners for every 1,000 citizens, the highest level in the world—their traditional criminal justice system simply does not work.<sup>74</sup>

Shifting the debate to prevention at least acknowledges that all governments have program responsibilities.

### Integrating Criminal Justice into the Mainstream of Public Services

These intergovernmental political battles are overlaid on the endemic politics of isolation within criminal justice. Therefore, most successful coordination efforts have set the stage for the broadest possible ownership of policy changes by identifying a reason why it is in the best interest of each official's mission to collaborate with and support other elements of the system. As underscored by the ABA:

[T]here is a seeming desire to displace attention from the behavior of judicial professionals to alleged artificial barriers and constraints. The first step is the general acceptance by the bench and bar of the proposition not merely that delay exists, but that the delay that exists is a problem that must be solved.<sup>75</sup>

The same statement could be made about the broad responsibility that must be assumed for effective correctional programs or use of police resources.

The following subsections briefly outline the potential for leadership from each major official to forge a system of criminal justice out of its disparate pieces. The points made are equally valid whether the individual is the actual leader in bringing the players to the table or simply needs to be convinced of the importance of meaningful participation by someone else who has assumed a leadership position. However, within each autonomous arena of criminal justice responsibility and in convincing the public of the need for productive change, each player at some point will need to play a leadership role to forward long-term solutions.

#### Executive Leadership

Governors, county executives, mayors, and the president can use the focus of their offices to create a climate of public understanding of the need for change that can both enable and pressure other officials to act. For example, the National Governors' Association has called on all governors to create multidisciplinary, intergovernmental blue ribbon commissions to study the corrections crisis, to examine the contributing factors, to develop quality data, and to recommend approaches to handle the problem.<sup>76</sup>

As head of the executive branch, most chief executives also command:

- The power of budget formation to leverage agency attention;
- The power to fire and hire agency heads;



- The authority to approve operating policies; and
- **An** oversight structure to monitor day-to-day agency operations.

While these powers may be constrained in relation to independently elected criminal justice officials, if they are used to encourage criminal justice and treatment agency collaboration, initiatives, and planning, the resulting changes will lead other criminal justice officials to participate.

### Legislative Leadership

Although they do not have the same personal command of resources as a governor or the president, most state legislators and members of Congress have the advantage of long-time service. Not only can they initiate comprehensive efforts, they also can hold the agencies responsible in future years for explaining how their activities are carrying out the system planning and cooperation called for. Examples of legislative initiatives cited in this report include a California study of inmate population management,<sup>77</sup> an Ohio study of African-American male and New York State's interagency initiatives on alcohol, drugs and crime.<sup>79</sup>

The leadership of county commissioners or city council members is often dependent on their willingness to specialize. If they are willing to spend the time to work directly with criminal justice and treatment officials, they can become effective facilitators of change. However, their long-term success may be constrained by their ability to translate the benefits of solving wide-ranging criminal justice problems to the voters of their relatively small districts.

### Judicial Leadership

California's Chief Justice Malcolm M. Lucas, as chairman of the State Justice Institute's board of directors, sounded the following challenge to a conference of state and federal judges:

I'd like to turn . . . to a topic that is a leading cause of glazed eyes in judges: the need for better planning by the courts. Like many of you, I'm sure, I did not originally come to the bench with a design for the future of my court. If I thought about it at all, I assumed our court's direction was set largely by the executive and legislative branches, and initiative on my part would be futile, even if I was inclined to exercise it.

However, my views changed after serving on the bench, most strikingly since becoming Chief Justice. It became abundantly clear to me that unless judges themselves took an active leadership role in planning for the long term, the future of the courts—as an institution—was in grave peril.<sup>80</sup>

Before judicial leadership can come forth, there may first be a need to break the "macho isolationism" of judges through the simple process of increased contact. This was the underlying theme to emerge from a unique conference of state legislators and judges, sponsored by

the National Center for State Courts and the National Conference of State Legislatures:

Familiarization with the roles, procedures, and organization of the other branch allows people involved in one branch to anticipate the import of their actions on the other. Personal contact is important, because people are more apt to talk and listen to people they **know**.<sup>82</sup>

It was acknowledged that "the two branches have limited knowledge of each other's institutional roles and procedures" and that "the judiciary tends to be overcautious in approaching the legislature."<sup>83</sup> The conference recommended specific steps to improve legislator-judicial working relationships, such as judicial impact statements, state of the judiciary addresses, interbranch coordination on drug treatment and education, and the inclusion of judges on study groups throughout the entire legislative process. Significantly, a survey of 40 legislators from 24 states and 62 chief justices and court administrators from 40 states concluded that, "More communication between the legislative and judicial branches of state government would *not* undermine the separation of powers doctrine."<sup>84</sup>

The structure of the judiciary sometimes has resulted in hesitancy about who should speak for the court: trial court administrators, state court administrators, presiding judges, or chief justices. The local prosecutor, sheriff, or general government elected officials do not operate within a comparable hierarchy. In fact, because the judicial hierarchy does not control retention or compensation, judges who take the initiative can be effective. For example, in Kentucky, legislators hear about judicial operations and needs directly from circuit judges serving in their districts. The state's judicial structure endorses this disparate approach as a reflection of the "significant variety of legal cultures" throughout Kentucky's 120 counties.<sup>85</sup>

### Leadership from the Prosecutor and from the Sheriff

**As** stated at the beginning of this section: "Without system coordination, the prime goal of each element of the criminal justice system will continue to be compromised." Just as the self-interest of general government elected officials is to control costs so that they do not have to take the responsibility for raising taxes, independently elected criminal justice officials must come to see that their prime mission will be compromised without system management, coordination, and planning.

The sheriff is often the first to experience the impact of the lack of system control. Ideally, the sheriff can serve as the catalyst for other criminal justice and general government officials to realize the need for change by devoting resources to identifying the types of prisoners being held in jail, administrative reasons for how long they are held, the cost, and the alternatives. In reality, cooperation typically has not occurred unless a crisis—usually in the form of a court order—is imminent.<sup>86</sup>

In contrast, while the prosecutors less often take a leadership role, in part because their office is not the first to be seriously affected by system dysfunctioning, their leadership can be pivotal. Their advocacy for system im-

provements is less apt to be seen as self-serving. Their prosecutorial mission makes them particularly creditable and effective in advocating alternative sanctions.

### Correctional Agency Leadership

The average length of service for a director of an adult correctional agency is less than three and a half years. As of July 1990, only four had served longer than ten years.<sup>87</sup> The political and managerial pressures represented by this extremely high rate of turnover make leadership difficult.

However, this turnover also may stem in part from lack of leadership, as demonstrated in the following comparison of the themes of 1990 budget workshops held for various criminal justice officials by their national professional associations. The theme of a budget workshop for chiefs of police was to “go out and marshal the support of the community, particularly among the volunteers and service clubs with whom you’ve worked.”<sup>88</sup> The theme of a budget workshop for judges was “sit down one to one with legislative leaders.”<sup>89</sup> In contrast, the dominant theme of a budget workshop for prison, jail, probation, parole, and juvenile administrators was “you can’t get support unless you define your mission.”<sup>90</sup>

The problem most correctional managers have with the admonition that they must define their mission is that others routinely define it for them. Nevertheless, “If they lead instead of merely administer their agencies, we can expect more responsible participation in the correctional process not only by subordinates, but by legislators, elected officials, laymen, volunteers, clients, witnesses, and victims as well.”<sup>91</sup>

The very fact that setting the correctional agenda is highly politicized represents a strong argument for why it is in the interest of criminal justice agencies to participate in informal forums. The more that other officials become exposed to the realities of following through on the actions of the rest of the criminal justice system and on legislative mandates, the more potential allies will emerge. For example, one DOC administrator observed that he had to remain silent on many recommendations of a blue ribbon commission on which he served and with which he strongly agreed, because of the position of his governor. However, he added, “experienced legislators understand my position.”<sup>92</sup> As noted, in jurisdictions as diverse as Charlotte, North Carolina,<sup>93</sup> and Los Angeles,<sup>94</sup> when asked to look at the entire criminal justice system, all criminal justice officials put more correctional resources and more courts ahead of more police.

### Leadership from General Government Agencies

Many administrators in agencies outside of criminal justice have realized that clients who are in the criminal justice system are no less their clients. However, when the initiative comes from outside the criminal justice system, it is important to establish a means to continuously involve criminal justice officials to ensure full utilization of outside efforts.

Education: The Dade County (Miami) school board, at the urging of the Chamber of Commerce, worked with probation and parole services and the Private Industry Council to dedicate staff to evaluate the academic and vo-

ational potential of felons aged 16 to 22 and to identify the appropriate training programs. However, the school board lost a \$120,000 grant to conduct the program because of lack of court referrals, despite the fact that the chief judge had initiated the original planning meeting? A chief judge from another state candidly acknowledged the same type of problem in his jurisdiction. When he initiated and chaired a local commission on education and the penal system, he was surprised at how “excited” the education community was at the prospect of providing services; the judge found, instead, that “the problem is the system.”<sup>96</sup>

Employment. Competition for jobs and private profit usually has meant that people in the criminal justice system are not included in employment training initiatives. Therefore, it becomes particularly important for the criminal justice system to take the initiative. For example, the Policy Advisory Board, established by statute under the 1990 California prison industries referendum, consists of the director of corrections, the director of the employment development department, and five members appointed by the governor, who must include one labor and one industry representative. In another state, simply including a labor representative on a blue ribbon commission resulted in his becoming one of the most outspoken advocates for prison industries after seeing inmate idleness first hand while participating in the commission’s prison and jail tours.<sup>97</sup>

Social Services. The initiative for the Minneapolis Community and Resource Exchange (CARE) program, which was discussed in Chapter 6, also came from the justice system through a CJCC, but it resulted in government participants becoming “impressed by their ability to work together across agency and city/county lines” to attack neighborhood drug, crime, and deterioration problems.<sup>98</sup>

Substance Abuse. Substance abuse involves more general government agencies, by far, than any other criminal justice concern. A survey of Michigan state agencies revealed that only four of the 19 principal state departments and agencies reported no direct expenditures related to substance abuse, with a total dollar expenditure in 1989 exceeding \$250 million.<sup>99</sup> Furthermore, “Most anti-drug abuse operations are carried out not by the states directly, but by local governments and nonprofit organizations,”<sup>100</sup> as noted in the announcement of a cooperative agreement between BJA and Harvard’s Kennedy School of Government to establish a Working Group of State Drug Control Executives. The announcement underscored the fact that “[it] is difficult to develop and implement strategies when so many people with indirect influence are involved.”<sup>101</sup>

The recommendations that will come from the Harvard grant may include some that have emerged from efforts for increased coordination initially targeted simply to save costs and increase coverage. For example, in Athens County, Ohio, a case worker assigned to a welfare recipient’s case also serves as a court monitor when a condition of probation is also a condition of receiving public assistance. The court has the benefit of more probation supervision and the social services agency may experience great-

er cooperation from welfare recipients because of the court order.<sup>102</sup>

To summarize, leadership in forging a more effective system of criminal justice requires a blend of knowledge, position, self-interest, and desire to press for productive change rather than be consumed by crisis management. The preceding brief discussions can be criticized for not identifying the need for all these leadership attributes from each official. Nevertheless, if the means can be found to get the players to the table, most will rise to the occasion and the sum of all their reasons for being there will be the measure of ultimate success.

### Achieving Change in the Criminal Justice System

Frequently, it is a specific crisis that compels criminal justice and general government officials to come together. Whether ongoing coordination and system planning will develop out of the initial thrust depends on four ingredients: involvement of the right officials, establishing an ongoing agenda, avoiding theatrics, and gaining public understanding and support.

#### Involvement of the Right Officials

Much has been said throughout this chapter about the need for policy coordination to be close to the officials who will be held accountable. Successful collaboration efforts stress that a “no substitute rule” must be established for the participation of whatever players are to reason together. It is as inhibiting to progress for a deputy district attorney to try to substitute for his or her elected boss in a meeting with the county executive, mayor, sheriff, chief judge, et al., as it is to substitute an agency statistician in a meeting of budget managers.

A “no substitute” rule not only helps move decisions by providing that those in charge are present when decisions need to be made, it also is crucial for the consensus-building process leading up to any decision. The conclusion of a study of state and federal litigation coordination is appropriate for all officials:

Perhaps most important to successful coordination is the strength of the personal and working relationship developed between the judges. Most judges agree that coordination is more about personalities than procedures. Successful coordination requires flexibility, innovation, and a willingness to compromise in order to develop arrangements acceptable to both courts. One judge observed that coordination requires “diplomacy, consideration, courtesy, and some degree of informality.”<sup>103</sup>

The study went on to discuss a wide range of contacts, which emphasized the informal open door that must stand behind and/or grow out of a formal coordination structure.

The need to submerge individual egos also was emphasized in the judicial relations study, as it often is in discussing criminal justice-general government cooperation. Many anecdotal examples were gathered in the course of

this report, and the following candid admonitions could be broadly applied:

“There is no reason in this God’s green earth why [the relationship between sheriffs and county governments] shouldn’t work. . . . You’ve got to learn how to sit down and talk around your egos,” [the president of the Maryland Sheriffs’ Association said]. . . . [The assistant state attorney general who handles sheriffs’ problems observed], “Most of the problems I’ve heard could be handled just as well by a marriage counselor.”<sup>104</sup>

Ensuring that key officials are in contact is the beginning of developing the mutual understanding and respect required to assuage personal concerns.

#### Need for an Ongoing Agenda

As noted, one of the reasons for the lack success in establishing state and local system coordination through the federal LEAA planning initiative was that most of the Criminal Justice Coordinating Councils were established for the purpose of receiving federal funds. The federal funding disappeared before these councils had identified their own agenda.

The ability of successful coordinating groups to define an ongoing agenda seems to depend on two factors. The first is simply doing it. At least one member must be able to focus the group beyond the initial reason they were brought together. Alternatively, the group simply may be forced to stay together by the number of years it takes to move from initial overcrowding to constructing a new local jail or the number of years it has taken to satisfy a court order. The complexity and the longevity of the task acts to establish the viability of the group. The Hudson County (Jersey City) jail population committee, formed as part of a consent decree, exemplifies the value of a format that keeps key players meeting regularly. The county administrator reports, “I now have the criminal assignment judge and the prosecutor fighting over who has the best ideas for alternatives to incarceration, whereas before the prosecutor took a strict law enforcement approach . . . because, officially, that’s what he felt he had to say.”<sup>105</sup>

The second element of success in establishing an ongoing agenda is a reduced level of competition. As previously cited, in Los Angeles, the sheriff became such a staunch supporter of the needs of the chief probation officer that he transferred funds from his budget. In Olmstead, Minnesota, the success of the criminal justice budget coordinating council in prioritizing agency requests toward system improvements led to the elected general government officials giving the council a discretionary pot of money.<sup>106</sup>

One main source of competition, however, is limited dollars. As the ABA observed:

[T]he justice system has been viewed as merely another piece in the budget pie—a piece without a strong advocate. . . . [V]arious constituent parts of the justice system for some years have battled over the same small share of overall government resources. . . . at the expense of some other part of

the justice system, or without regard to the impact that increased efficiency in one part will have on another.<sup>107</sup>

Even though it was intended to foster comprehensive planning, the phenomenon of grantsmanship under the LEAA approach to intergovernmental funding has been critiqued as exacerbating rather than relieving competition.

**An** alternative view is that budget battles are often only another name for turf protection in interagency disputes, as expressed in the following lament of a career criminal justice manager:

Unfortunately the present stress on the budgetary aspects of the system may drive us further apart as we all compete for the available dollars. Perhaps it is the fact that we do have to compete, on an agency-by-agency basis, that keeps the system from working as a whole . . . programs have met with little success. The basis for this lack of success is the absence of a coordinated effort due to lack of a common goal. Control of crime, or reducing crime is a very moral sounding intention that is tastefully consumed by the public. However, each agency has its own interests to promote, and these interests become overriding in the terms of pursuit of available dollars, "turf," and jurisdiction protection.<sup>108</sup>

### Combating Theatrics through Consensus Building

The logic that coordination depends on reducing competition which, in turn, depends on agreeing on common goals, is at the heart of the National Institute of Corrections' Intermediate Sanctions Projects discussed in Chapter 4. The federal government subsidized the cost of retreats for key criminal justice officials from major localities. The focus of these retreats is to foster agreement on the mission of their local criminal justice system. Is it deterrence, prevention, punishment, or something else? How is this mission further defined by the way in which it is carried out and measured? Does it involve increased arrests, fewer violent crimes, higher clearance rates, longer sentences, or lower recidivism? By uncovering the differing perspectives on such questions, key officials begin to realize the magnitude of the resources required to realize their missions most effectively once the case leaves their agency's control.

The alternative is to fall into what a focus group of elected county officials described as "theatrics," when they were asked to cite their number-one frustration in dealing with the criminal justice system. These officials provided examples of perceived theatrics, but an interview with a prosecutor provided cogent confirmation of the phenomenon when he stated with conviction that, "The best way to handle the general elected officials is to 'intimidate' them."<sup>109</sup> It must be noted that problems with theatrics came across from all sides: "The legislature uses the judiciary as a whipping boy." "Judge bashing has increased." "Elected officials are driven by the crime of the month."

Some systems will be stymied by the criminal justice system's combination of disparate authority, specialized bodies of knowledge, and fear-invoking issues, because these factors make it easy to use theatrics to shift blame or force the currently popular "solution" rather than focus on system ramifications. These systems may never reach the level of agreement on goals necessary for a comprehensive approach. Nevertheless, any level of coordination and collaboration on specific programs still represents progress, as even the most pessimistic view must concede:

Since planning requires not only a systems perspective, but consensually agreed upon goals, . . . [i]t is highly unlikely that a true system will ever evolve in criminal justice administration in the United States in the immediate future . . . because there are too many vested interests, differing philosophies on how best to control crime and criminals, petty jealousies among top-level administrators, an overall lack of commitment for the creation of such a system, and a genuine lack of leadership in the field. Although such a system may never come to fruition, . . . benefits would accrue if there at least were some efforts at systematization. [T]he coordination of services and programs is achievable—provided there is leadership.<sup>110</sup>

### Developing Public Support

Achieving public support and understanding is related directly to involving the key players, defining an ongoing agenda of relevant problems, and finding consensus on the mission of the criminal justice system. It is futile to try to develop public support without these internal efforts. The public will not understand the need for policy changes to provide carry through on crime-fighting efforts if authorities are not in agreement. Further, the media will not assume the responsibility to fathom and convey the importance of resource requirements or program successes, if officials are not able to relate them to a well-conceptualized mission.

Public support will be enhanced further through an open approach. One element of openness is outside involvement. Numerous means of increased involvement have been cited throughout this report, including establishing neighborhood watch, victim support, and community policing initiatives; encouraging churches, service clubs, and teachers to work with prisoners and to sponsor projects for youth and adult offenders ordered to perform community service; establishing community advisory committees for each state prison facility, juvenile residential program, and jail; and providing opportunities for student interns and retirees to assist with data gathering and other courthouse and jail duties. As noted by a former victim/witness advocate who became New York City's chief probation officer, "Instead of dealing with groups like MADD as a kind of enemy, we need to recognize that we both have the same agenda: keeping offenders from repeating. Mutual support is possible."<sup>111</sup>

Another element of opening the system is shedding the defensive posture that was expressed frequently in interviews: "A reporter once told me, 'We like you guys be-

cause bad news is our good news’.” “The story is always written to sell newspapers and not to educate the people on what is going on.”<sup>112</sup> In light of such concerns about bad press, the experience of a long-time judge, Ohio’s Chief Justice C. William O’Neil, offers a sage perspective:

Thirty-eight years of elective public office has taught me that you can run for public office, but you can’t run for editor. You are entitled to have the news media tell the truth about you and your work. Nothing more. If you promptly open your court and its work to the media in every way properly possible—and when you can’t comment or speak on a matter, explain why—you will be most gratified with the **results**.<sup>113</sup>

Finally, opening the criminal justice system to public understanding and support demands that all officials—but especially general government elected officials who have the greatest contact with the public and the media—are informed and then communicate candidly about the nature of the criminal justice challenge. Most general government officials will not find their role in communicating the realities of the criminal justice challenge in the 1990s to the public to be an **easy** assignment, however. Most will be frustrated that there is not a clear focus to be communicated.

On the one hand, it can be documented that imprisonment does not deter crime and that we must control the escalating cost of criminal justice through the use of alternative sanctions. This argument can be countered, at least in part, by pointing out that 80 percent of those in most state prison systems are incarcerated because they have committed violent crimes, they have long criminal histories, or they are drug dealers. Although alternatives may be appropriate for the others, they will provide little relief to state and local budgets, especially if these alternatives are funded at levels adequate to be effective.

More impassioned views also are supported by the realities of crime. Those who are enraged by the total cost of crime to victims and to society because criminals are not locked up will focus on one set of facts, while those who plead for the dollars to fund social programs to prevent new generations of criminals are supported by a different set of trends.

**As** the following synopsis of major findings incorporated throughout this report illustrates, general government elected officials must deal with the realities that support all of these conflicting views:

**Cost.** The most compelling argument to control cost is that:

- State and local criminal justice expenditures have increased 232 percent since 1970. This far exceeded the percentage increase in the cost of public health. The average cost of imprisonment has paralleled the cost of an ivy league education.

This is countered by the fact there is little room to cut costs appreciably because:

- Even though surveys indicate that the majority of the public would favor alternative programs for nonviolent offenders, 2/3 of all felons are already on probation or parole. Only **5 percent**<sup>114</sup> of a typical state prison system’s population are nonviolent first-time offenders, if inmates who have been convicted of drug crimes are not included.

Others would argue that it **is** cost effective to spend even more to fight crime because:

- Losses suffered by victims of crime include property losses and loss of income due to injury or death. Indirect costs to the public include welfare and medical costs for victims and their families and possible loss of economic tax base and jobs in heavily impacted communities.

**Efficacy of Imprisonment.** There is evidence that prison is not **working** because:

- America has the highest rate of incarceration in the world, and yet crime has not decreased; and
- The **likelihood** of the offender continuing to commit crime is much more dependent on characteristics of the offender than the length of the sentence served.”

Nevertheless, we will need to plan on continuing to incarcerate large numbers because:

- America’s crime rate is also higher than that reported in most other countries; and
- On average, two-thirds of felony offenders will be arrested again.

**Crime Prevention.** Addressing the needs of at-risk populations by strengthening basic services **is** needed given that:

- Approximately **57** percent of prison inmates reported being under the influence of alcohol and/or drugs at the time of their **offense**;<sup>116</sup> many had an annual income of less than \$10,000, and had not completed high school at the time of their **crime**.<sup>117</sup> Approximately half of all jail inmates have been **raised** in a single-parent household and one-third have a family member who served time.”

However, we need to continue to fund both criminal justice sanctions and prevention because the next generation **of** criminals already is moving into the criminal justice system, given that:

- The percentage of persons arrested for a violent crime who were under **18** increased more between **1987** and **1990** than in any three-year period in recent **history**.<sup>119</sup>

**Responsibility.** Establishing a more effective criminal justice system is predominantly a state and local government responsibility, because:

- Federal courts account for only **6** percent of all felony convictions.

The most critical intergovernmental challenge in program delivery is driven by the fact that:

- The crime rate in cities of over 250,000 residents is twice as high as in the rest of the country.” However, fighting crime is not just a city problem, because many of the criminal justice service demands created by these city residents are provided by county and state governments.<sup>121</sup>

Finally, the checks and balances established to protect persons accused of a crime should not be interpreted to stand in the way of creating a criminal justice system. Neither does the separation of powers remove general government elected officials from responsibility for the effective operation of the criminal justice system. Rather, the authority to raise and appropriate funds gives general government elected officials the responsibility to call for resolution of conflicts that stand in the way of improvements.

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## SUMMARY

The strength of constitutional safeguards and institutional checks established early in our nation’s history have admirably protected individuals from arbitrary persecution. However, traditionally, many officials have operated as if the adversarial strictures controlling the determination of individual guilt and punishment also bar cooperation in achieving an effective criminal justice system.

With overloaded courts, prisons, and jails; impossibly high probation and parole caseloads; extreme budget pressures; and rising crime rates, there is growing recognition that the habitual isolation of the criminal justice system must be challenged. Credibility and cost savings dictate that development of case-management efficiencies, a relevant flow of information, and valid projection instruments require the input and support of all users. The inherent complexity of criminal justice procedures and the time required to respond to physical and hardware needs require comprehensive long-term planning. The effectiveness of passing tough anticrime legislation and/or of increasing arrests depends on intergovernmental commitment to funding and developing the programs, personnel, and space for the courts and correctional system to carry through.

These changes demand the active participation of general government elected officials. Through using their responsibility for criminal justice oversight, which is inherent in their appropriation power, they can bring key players together. They can foster priority-setting procedures among criminal justice officials. They can insist that general government agencies serve clients in the criminal justice system. Such initiatives will move the system toward open dialogue. By empowering all officials to speak, general government elected officials can counter the strident advocacy of any one official. By insisting on an inclu-

sive process, they can keep planning, prioritization, and operational design close to the working level and ensure the relevancy and efficacy of system changes.

Finally, by recognizing that the criminal justice system is not a world apart, general government officials will increase their own understanding and that of the public. Only through such increased understanding will the states and their localities supported by the federal government be able to move toward realistic criminal justice goals that reflect the priorities and needs of all of society.

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