Chapter 10. Criminal Justice System Personnel Intersection

Introduction of the Issue

The commission examined how the missions of law enforcement personnel, judges, prosecutors, defense attorneys, and correctional authorities intersect so that the criminal justice system can better prevent and control crime and serve victims. The federal government influences the state, local, and tribal criminal justice ecosystem in many ways. Several of these were determined to be particularly important to the commission:

The federal government, which establishes and develops national policies and initiatives that help standardize and unify the administration of justice, is responsible for ensuring that citizens' rights are never violated by criminal justice system personnel. Further, federal criminal justice legislation on criminal justice issues can help provide consistency to a patchwork of state criminal justice codes. Federal grant funding, which plays a role in shaping criminal justice practices at the state and local level, helps promote uniform tracking of key outcomes using evidence-based practices and evaluations. For some types of crimes, including those involving interstate commerce or transportation of illegal goods or services, federal statutes establish a "federal nexus" that allows, but does not require, prosecution in federal court.[1]

The commission identified issues at the intersection of criminal justice components, which include promising programs and practices that should be supported and further developed to increase efficiency. Topics, all interrelated, are arranged in sequential order based on the component most responsible for or affected by it.

10.1 Law Enforcement

Background

The major roles for law enforcement agencies include selectively enforcing the law, protecting the public, arresting violators, and preventing crime. While performing these roles requires law enforcement to interact with all components of the criminal justice system, they collaborate most often and most closely with prosecutors in the early stages of the process. When they arrest individuals for criminal and traffic offenses, police share information with prosecutors, who then decide whether to prosecute. Prosecutors must assess both the quality of that information and the conduct of police to ensure they meet constitutional standards.

Current State of the Issue

The commission focused on the following three areas for law enforcement personnel and their operations: providing training and support for law enforcement officers and investigators on Fourth, Fifth, and Sixth Amendment issues; promoting the ability of law enforcement to discretionally issue summonses; and enhancing crime awareness, data-sharing, and analytic capabilities through real-time crime centers (RTCCs).

<u>Training and Support on Fourth, Fifth, and Sixth Amendments</u>

The Fourth, Fifth, and Sixth Amendments to the U.S. Constitution are central to the criminal justice process, especially relating to law enforcement operations. Profound misunderstanding and confusion among the public, media, and law enforcement regarding the stopping, questioning, searching, and temporary detention of a possible criminal suspect has led some members of the public to believe that "stop, question, and frisk" is illegal or unconstitutional; it is not. It has also led to trepidation among law enforcement who do not fully understand what is permissible. While such activities are handled daily, there are often unique circumstances that are beyond the capacity for law enforcement officers and investigators to routinely address.

10.1.1 The Department of Justice should develop and consistently update a comprehensive, standardized, and immersive training program for law enforcement on stops, questioning, searches, and

[1] Phyllis J. Newton, Candace M. Johnson, and Timothy M. Mulcahy, *Investigation and Prosecution of Homicide Cases in the U.S.: The Process for Federal Involvement* (Chicago: NORC at the University of Chicago, 2006), https://www.ncjrs.gov/pdffiles1/nij/grants/214753.pdf.

seizures.

Law enforcement training academies require recruits to take training for stops, questioning, searches, and seizures, and officers may receive updated in-service training based on changes in departmental policies, new laws, or new legal precedents.[2] For clearer and more actionable training, the Department of Justice (DOJ) should develop a standardized immersive program. This training, using role play to depict a real-life situation in the field that allows officers to comment on various critical decision points, should be taught from the perspective of the law enforcement officer, stressing how to apply the appropriate laws using scenario-based training. Scenario-based simulation can also provide an effective learning environment for officers to go through realistic experiences, review their actions, and learn from them.

The Huntsville, Alabama, police department has adopted a cutting-edge immersive simulator for training on both routine and difficult situations. Captain Dewayne McCarver, the department's director of training, explains, "This simulator is designed to integrate all the different aspects of our training into real simulations. The company actually hired real actors to create those scenarios because the realism of those scenarios is really important. If you don't feel like it's real life, it doesn't have the same impact."[3] This particular training scenario uses 300-degree surround screens, recording in high-definition resolution, to provide realistic experiences for a for a variety of events, ranging from routine traffic stops to encounters with armed suspect.

10.1.2 Local prosecutor's offices, where practical, should develop resources for 24/7 access by law enforcement officers to prosecutors who can provide real-time assistance to address issues relating to search and seizure and serving warrants.

Sometimes an officer will need access to real-time information when making urgent time sensitive decisions on whether it is legally and constitutionally permissible to execute a search, seizure, warrant, or arrest. Often these situations occur outside of normal business hours. While some prosecutors' offices assign prosecutors to be on-call for these circumstances, most do not.[4] This is particularly true in smaller and rural jurisdictions.

[CROSS REFERENCE RURAL AND TRIBAL]

On-call prosecutor services, especially during evenings, weekends, and holidays, would offer guidance and reassurance for officers to perform their duties; help confirm that police actions are meaningful, lawful, and constitutional, decreasing the likelihood that police actions are challenged later in the criminal justice process; and provide much needed and timely general assistance for investigators addressing complex cases.

Neighboring jurisdictions with limited resources should consider forming regional partnerships. State prosecutor or district attorney associations may help coordinate the development of regional on-call services.

<u>Discretionary Issuance of Summonses</u>

Law enforcement officers have considerable discretion when deciding whether to make an arrest if a person has committed a misdemeanor or other low-level offense. In many jurisdictions, however, the officer either has to arrest the person or let the person go. Historically, the authority to issue a summons—ordering the subject to appear in court at a certain date or upon subsequent notice—has been limited to judges. Now, in a growing number of states, officers can now use their discretion when issuing a summons in lieu of arrest. This process is similar to issuing a traffic summons but applies to low-level offenses, typically misdemeanors.

The officer, the police agency, the suspect, and the criminal justice system all benefit when an officer can issue a summons; it provides a course of action other than doing nothing or making an arrest. The issuance of a summons helps the officer prioritize more urgent matters, reduces crowding issues in jails, and relieves

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[2] Douglas R. Mitchell and Gregory J. Connor, *Stop and Frisk: Legal Perspectives, Strategic Thinking, and Tactical Procedures* (New York: Routledge, 2017).

[3] Lindsey Connell, "HPD Using Top-Notch, Immersive Training Simulator," *WAFF*, August 8, 2019, https://www.waff.com/2019/08/09/hpd-using-top-notch-immersive-training-simulator/.

[4] Adam M. Gershowitz, "Justice on the Line: Prosecutorial Screening Before Arrest," *University of Illinois Law Review*, (2019), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2965&context=facpubs.

potential burdens on the court. Further, suspects avoid the inconvenience of arrest and possible detention, including a decrease in costs and time, while also maintaining their work and home life.

When properly implemented, an officer's ability to issue a discretionary summons for misdemeanors and low-level offenses does not weaken the police. Moreover, the ability to avoid weakening the protective police posture of any jurisdiction to make an arrest for a low-level offense is in the best interests of the rule of law. The choice between enforcing all laws and weakening policing posture should not be binary.

10.1.3 States should consider revising their statutes to permit the use of discretionary summonses by law enforcement officers if they do not already permit it.

In Virginia, officers may exercise discretion in issuing a summons. However, Virginia Code § 46.2-940 requires an officer to make an arrest when the person is believed to have committed a felony. In addition, an officer should make an arrest for a misdemeanor if the officer believes the suspect is "likely to disregard a summons or refuses to give a written promise to appear under the provisions."[5]

While the use of discretionary summonses can have strategic benefits at any time, the practice has been shown to be useful in response to the COVID-19 pandemic, particularly when applied in a narrow deliberate and measured manner. In response to COVID-19, individual law enforcement agencies across the country have changed their practices to limit arrests, either by taking fuller advantage of current laws allowing discretionary summons or by issuing new administrative edicts. Law enforcement agencies in Nevada County, California, increased the frequency of officers issuing summonses.[6] The Chicago Police Department directed officers that certain low-level and non-violent crimes can be handled via citation and misdemeanor summons.[7] Law enforcement officers in Tucson, Arizona, were ordered to use cite and release as frequently as possible and only serve misdemeanor warrants that were necessary for public safety reasons (e.g., domestic abuse). [8]

<u>Real-Time Crime Centers</u>

Most individual law enforcement agencies are currently set up as individual agencies and do not share information from department to department. Instead of putting money into only one agency or area, regional centers use money more efficiently, and smaller agencies are then better equipped to fight violent crime. A real-time crime center (RTCC) is a centralized location where dedicated personnel are housed and equipped with a range of technology tools, access to data, and analytic capabilities. In the past 15 years, RTCCs have grown in number and evolved in sophistication to provide a broad range of assistance to law enforcement agencies, such as surveilling public spaces via video-feed, identifying suspicious behavior in real time, and disrupting criminal networks. Commonly, RTCC technology includes video screens that display feeds from surveillance cameras throughout the jurisdiction, gunfire detection systems, and automated license plate readers (ALPR). Video surveillance and continual monitoring are core features of virtually all RTCCs.

In recent years, RTCCs started to appear in smaller cities. The *San Diego Union Tribune* reported on the opening of an RTCC in Harford, Connecticut, and mentioned other smaller jurisdictions with established RTCCS at that time, including Wilmington, Delaware; Springfield, Massachusetts; Bridgeport, Connecticut;

[5] Va. Cod. Ann. § 46.2-940 (2020), https://law.lis.virginia.gov/vacode/title46.2/chapter8/section46.2-940/.
[6] Liz Keller, "Cite and Release, Not Jail, for Some over COVID-19 Concerns" *The Union News for Nevada County, California*, March 18, 2020, https://www.theunion.com/news/cite-and-release-not-jail-for-some-over-covid-19-concerns/.
[7] Alexander Mallin and Luke Barr, "Police Implement Sweeping Policy Changes to Prepare for Coronavirus Spread," *ABC News*, March 18, 2020, https://abcnews.go.com/US/police-implement-sweeping-policy-prepare-coronavirus-spread/story?id=69672368.
[8] "Police Responses to Covid-19," The Brennan Center for Justice, last modified May 30, 2020, https://www.brennancenter.org/our-work/research-reports/police-responses-covid-19.

Modesto, California; and Wilmington, North Carolina.[9]

In Alabama, the average size of the law enforcement agency is 10 officers or fewer, and these smaller departments do not have access to the type of technology that enables them to fight crime. The East Metro Area Crime Center (EMACC) in Oxford, Alabama, uses and shares advanced technology with its 28 regional partners throughout north-central Alabama, including pole cameras, camera trailers, ALPR, crime-tracing software, phone and computer forensics, and facial recognition software. The center uses a large video wall to monitor cameras which are placed throughout the region on poles and camera trailers. On-site gunshot detection and shell casing analysis help to further reduce gun crimes in the region. Child crimes are also investigated through the cybercrimes unit.[10]

Chief Bill Partridge of the Oxford, Alabama, spoke to the commission about the East Metro Area Crime Center (EMACC), a regional RTCC launched in May 2019. He shared details about the RTCC, including that EMACC provides data access and analytic services for 28 federal, state, and local public safety agencies in the northeast portion of Alabama, relying on state-of-the-art technology to provide real-time intelligence. [11]

PULL QUOTE: "[By bringing] these smaller departments together . . . we've seen dramatic decreases in crime, especially violent crime, across the region."[12] - Chief Bill Partridge, Oxford, Alabama, police department

[CROSS REFERENCE CRIME REDUCTION]

While much of the attention paid to RTCCs focuses on data and advanced analytical tools, trained crime and intelligence analysts add important human intelligence. They use their skills to leverage core technologies, including geographic information system technology for mapping crime and assessing hotspots, software to perform link analysis or social network analysis, and statistical algorithms for assessing offender dangerousness and likelihood to offend based on past criminal history.

As technology has advanced, RTCCs have become more proficient in using unstructured data for intelligence and analysis purposes, including advanced digital media tools. Some RTCCs use sophisticated artificial intelligence solutions that automatically detect patterns of suspicious activity on video feeds, freeing the analyst from having to watch a wall full of video screens.

10.1.4 The Department of Justice should provide funding to expand and refine real-time crime centers throughout the nation and develop technology tools that provide real-time crime centers with the ability to identify and disseminate crime intelligence, analyze crime patterns, and develop strategies for reducing crime.

As documented by the Rand Corporation, adding RTCCs helps law enforcement agencies improve awareness of their communities and decision making, and helps them carry out more effective, efficient operations that lead to crime reduction.[13] DOJ funding may accelerate the spread of RTCCs and increase the ability of local and state law enforcement agencies to leverage analytic and data-sharing benefits. It may also help ensure that current RTCCs are sustainable and able to evolve as technologies and data analysis approaches evolve.

DOJ should develop tools to support RTCCs including hardware, analytics software, and intelligence platforms. Since established under the Justice System Improvement Act of 1979, DOJ has developed

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[9] "Smaller Cities Across US Opening High-Tech Crime Centers," *The Yeshiva World*, May 24, 2016, https://www.theyeshivaworld.com/news/headlines-breaking-stories/421151/smaller-cities-across-us-opening-high-tech-crime-centers.html.

[10] *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reduction of Crime* (April 16, 2020) (written statement of Bill Partridge, Chief of Police, Oxford Police Department, AL), https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings.

[11] *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Domestic Violence and Sexual Assault, Technology Issues Encountered by Law Enforcement, Leveraging Technology to Reduce Crime* (April 16, 2020) (statement of Chief Bill Partridge, Oxford police department, Oxford, AL), https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings.

[12] Partridge, *President's Commission on Law*, April 16, 2020.

[13] John S. Hollywood et al., *Real-Time Crime Centers in Chicago: Evaluation of the Chicago Police Department's Strategic Decision Support Centers* (Santa Monica, CA: RAND Corporation, 2019), https://www.rand.org/pubs/research_reports/RR3242.html.

standards for such technologies and helped ensure that law enforcement agencies have access to them. DOJ also administers grant programs to help bring new equipment to market by funding research and development of innovative technologies and should provide direct support for local and regional efforts to build and improve local and regional RTCCs and for their procurement of equipment that meets minimal standards. Standards for criminal justice and intelligence data and intelligence systems may be set by such authorities as the Criminal Justice Information Services (CJIS) Division of the Federal Bureau of Investigation (FBI), and the National Institute of Standards and Technology Law Enforcement Information Technology.

10.2 Prosecution and Defense

Background

Under the adversarial criminal justice system, a prosecutor's primary responsibility is charging and formally prosecuting a suspect. More broadly, according the American Bar Association (ABA) standards, the prosecutor should

> [S]eek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.[14]

In contrast, the role of the criminal defense lawyer is to investigate the case on behalf of the defendant, provide guidance to the defendant on how to plead, and, if necessary, represent the defendant at trial. Like prosecutors, they also have a broader role. According to ABA standards, this includes, "a duty to be open to possible negotiated dispositions of the matter, including the possible benefits and disadvantages of cooperating with the prosecution"[15]

While these formal roles depict how opposing counsel are perceived to operate, prosecutors and defense attorneys often find themselves in situations where they will cooperate rather that act as strict adversaries. Common examples requiring some level of cooperation involve plea bargaining (i.e., the most predominant manner of resolving criminal cases in both federal and state courts) and deciding when to process defendants through treatment courts rather than traditional criminal courts.

Current State of the Issue

Regarding the intersection of criminal justice agencies, the commission focuses on four concerns: the need for increased transparency in the plea bargaining process; the use of adoptive case mechanisms to deal with serious, violent, and habitual offenders; the need for adjustments to felony theft thresholds; and the role of prosecutor in addressing officer use of force incidents that result in death or serious bodily injury.

Plea Bargaining

The Fifth and Sixth Amendments guarantee the rights of criminal defendants, including the rights to due process, a public trial without unnecessary delay, a lawyer, an impartial jury, know the nature of the charges and evidence against them, and confront adverse witnesses. These ideals are seldom represented in real life, as more than 90 percent of all criminal cases in both federal and state courts are resolved though plea

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[14] American Bar Association, *Criminal Justice Standards for the Prosecution Function*, 4th Edition, 2017, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.
[15] American Bar Association, *Criminal Justice Standards for the Defense Function*, 4th Edition, 2017, https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

bargains.[16] Plea bargaining is often viewed as a secret deal arranged between a prosecutor and defense attorney,[17] and has been described as a necessary evil.[18] In many criminal court jurisdictions, dockets are crowded and prosecutors, defense counsel, and judges all feel pressured to quickly move cases through the system. In addition, the outcome of a trial is always in question, whereas the plea bargain provides both the prosecutor and defense some control over the result and a measure of certainty.

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Criticisms of Plea Bargaining

- May result in innocent people pleading guilty instead of taking their chances with a trial
- Diminishes respect for the law, particularly when the charges pled to are not clearly related to the crimes for which defendants are charged
- Victims are often not notified of the plea, nor are they provided an adequate opportunity to be heard
- Potentially leads to decreasing perceptions of legitimacy of the legal process

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Benefits of Plea Bargaining

- A lesser charge, a more lenient sanction, or a sense of certainty for the defendant
- A certainty of conviction and lower costs for the prosecution and state
- Speeds up the processes of the justice system and frees up investigatory and prosecutorial resources for more serious offenders.
- Give victims of crime of a guaranteed result in conviction

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Most criminal justice practitioners and scholars acknowledge that plea bargaining is vital to the efficient operations of the criminal justice system; without it, the justice system would grind to a halt.[19] However, the lack of transparency and accountability with the practice causes problems in many jurisdictions. When defendants are charged with crimes of far lesser seriousness than indicated by the arrests and are soon out on the street, law enforcement officers may conclude that their efforts at securing a lawful arrest do not matter, they may become demoralized, and they may lose the incentive to make future arrests.[20]

Some scholars have argued that police officers are not as motivated to conduct thorough investigations if they believe the original charges will be bargained down.[21] In serious cases, learning that a prosecutor settled a case for some fraction of what the defendant could have received at trial is troubling to officers who invested time and effort in investigations, arrests, and booking of habitual, violent, and serious offenders.

[16] Aditi Juneja, "A Holistic Framework to Aid Responsible Plea-Bargaining by Prosecutors," *New York University Journal of Law & Liberty* 11 (2017): 600, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991160.
[17] Thea Johnson, "Public Perceptions of Plea Bargaining," *American Journal of Criminal Law* 46 (2019), https://heinonline.org/HOL/P?h=hein.journals/ajcl46&i=137.
[18] Nancy McDonough, "Plea Bargaining: A Necessary Evil," *University of Arkansas Little Rock Law Journal* 2, no. 2 (1979), https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1398&context=lawreview.
[19] Douglass B. Wright, "Plea Bargaining–A Necessary Tool," *Connecticut Law Review* 16, no. 4 (Summer 1984).
[20] Jonathan Abel, "Cops and Pleas: Police Officers' Influence on Plea Bargaining," *Yale Law Journal* 126, no. 6 (2016), https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining.
[21] George B. Palermo et al., "Plea Bargaining: Injustice for All?," *International Journal of Offender Therapy and Comparative Criminology* 42, no. 2 (1998).

10.2.1 States should establish laws or criminal procedures that increase transparency, accountability, and openness of the plea negotiation processes. Negotiated pleas, and the basis for those pleas, should be established on the record.

Despite the prevalence and necessity of plea bargaining, the secrecy and the steep reduction in charges and sanctions often associated with plea bargaining have raised grave concerns among law enforcement officers who investigate and arrest serious and violent offenders who are released on far lesser charges. To address some of these concerns, the federal government and several states established rules or enacted legislation intended to introduce a level of openness, transparency, and accountability in plea bargains.

Federal Rules of Criminal Procedure Rule 11 requires that "the court must address the defendant personally in open court" and stipulates procedural requirements, including a determination that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).[22] In Illinois, the state supreme court's rules on waivers, and pleas specify numerous conditions intended to increase the openness of the plea process, including specifying the conditions in which a judge may participate in plea negotiation, exercise oversight, and approve of the plea bargain.[23]

Taking steps to increase transparency, accountability, and openness can infuse some checks and balances back into the equation. Putting key elements of plea bargaining on the record not only increases those levels, but also allows attorneys to review them.[24]

10.2.2 Prosecutors should apprise law enforcement, and victims of serious crimes and felonies, of all plea negotiations and case resolutions.

When law enforcement officers arrest suspects, particularly for violent crimes and serious felonies, they are understandably frustrated when they learn that the offender is released on probation or has served a shorter sentence as a result of plea bargaining. Providing notification before the final resolution of the plea gives officers fair notice and offers them an opportunity for input.

Legislation from the state of Maine stipulates, "Whenever practicable, before submitting a negotiated plea to the court, the attorney for the State shall make a good faith effort to inform the relevant law enforcement officers of the details of the plea agreement reached in any prosecution where the defendant was originally charged with murder, a Class A, B or C crime [as well as certain classes of gun crimes]."[25]

<u>Serious Violent and Habitual Offenders</u>

Some crimes violate both state and federal law, empowering either or both governments to bring criminal charges. Once a federal nexus is established for a local crime, the state's attorney and the U.S. attorney representing the office with jurisdiction of that locality can discuss the optimal prosecution strategies. These partnerships are sometimes called adoptive case mechanisms.

As a practical matter, the decision on where to prosecute boils down to where the case would best be prosecuted. Often, a deciding factor is the severity of sentencing in the respective courts. Other factors may include the resources available in respective courts or policies of the local state attorney's office. For serious

[22] Fed. R. Crim. P. 11(b)(1) (2014), https://www.uscourts.gov/sites/default/files/federal_rules/FRCrP12.1.2014.pdf; Legal Information Institute, "Federal Rules of Criminal Procedure, Rule 11. Pleas," Cornell Law School, accessed June 5, 2020, https://www.law.cornell.edu/rules/frcrmp/rule_11.

[23] Illinois Supreme Court Rule 401(3)(b) (1984), http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_IV/ArtIV.htm.

[24] Joel Mallord, "Putting Plea Bargaining on the Record," *University of Pennsylvania Law Review* 162, no. 3 (2014), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4582&context=penn_law_review; Robert C. Underwood, "Let's Put Plea Discussions-and Agreements-on Record," *Loyola University Chicago Law Journal* 1, no. 1 (1970): 1, https://pdfs.semanticscholar.org/7e52/1097fefdc0500bebcd2fec6584549b8f14a3.pdf.

[25] Me. Rev. Stat. Ann. tit. 15. § 812 (2019), https://codes.findlaw.com/me/title-15-court-procedure-criminal/me-rev-st-tit-15-sect-812.html.

crime—particularly gang crimes, gun crime, crimes associated with criminal drug or human trafficking, or crimes involving habitual violent offenders—the attorneys consider public safety and maximum sanctions.

Sentences are typically longer in the federal system than those set by state courts, and cases are most often pursued through federal courts to maximize the sanction. Securing conviction in federal court also provides the opportunity to incarcerate an offender far from his home residence, which may remove the possibility that those involved in gangs or criminal enterprises continue contact with criminal associates. Many DOJ-supported strategies have integrated ways to encourage U.S. and local attorneys to collaborate and exercise adoptive mechanisms, such as the Bureau of Alcohol Tobacco, Firearms and Explosives' (ATF) Crime Gun Intelligence Centers (CGIC), Project Guardian, and Project Safe Neighborhoods (PSN).[26] The Prosecutor-to-Prosecutor Program (P3), which DOJ has identified as a best practice under the PSN, is an example that institutionalizes the practice in one jurisdiction.[27] Jay E. Town, the U.S. attorney for the Northern District of Alabama, instituted P3 as standard practice in all state attorneys' offices operating in the U.S. Attorney District for Northern Alabama.

10.2.3 U.S. attorneys' offices should engage in systemic communications with state prosecutors about all serious and threatening criminal activities eligible for prosecution in either the state or federal jurisdiction.

Offenses that involve the most serious threat to a community—particularly those that involve gang crimes, gun crime, drug or human trafficking crimes, and habitual violent offenders—deserve the fullest attention of local, state, and federal law enforcement and prosecutors. By keeping abreast of ongoing investigations being conducted by federal and local law enforcement, U.S. attorneys' offices and local prosecutors' offices can provide input into the investigation process to ensure procedures and evidence-gathering practices receive priority attention and support optimal prosecution strategies.

10.2.4 State prosecutors should collaborate fully with U.S. attorneys' offices to develop systemic processes that identify and determine cases that have a potential to be prosecuted in the federal court system. These cases should be charged in the jurisdiction where the greatest amount of sanction is possible.

State prosecutors should be attentive for cases with a possible nexus to federal law and reach out to USAOs to discuss the possibility of federal prosecutions whenever possible. When moving forward with prosecutions, state prosecutors should assess which prosecution will result in the severest sentence. To provide for optimal coordination, state prosecutors should adopt strategies of vertical prosecution (i.e., the same prosecutor stays with the case from the investigative stages through to final prosecution) rather than horizontal prosecution (i.e., different prosecutors are assigned to lead each stage). USAOs follow vertical prosecution strategies. Mirroring that structure in the local prosecutor's office should enhance partnerships and continuity throughout the prosecution process.

Criminal Statutory Reforms

Felony thresholds refer to the classification of crime that differentiates felonies and misdemeanors and often appear arbitrary when compared across states. Every state classifies theft as either misdemeanors or felonies based on the monetary value of the item(s) stolen. According to the Pew Charitable Trust, felony theft thresholds in 2018 ranged from a low of $200 in Massachusetts to a high of $2,550 in Texas and Wisconsin. The report noted that several states have not updated their felony thresholds since 2000 or earlier.[28]

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[26] Bureau of Alcohol, Tobacco, Firearms and Explosives, "Fact Sheet - Crime Gun Intelligence Centers (CGIC)," May 2018, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-crime-gun-intelligence-centers-cgic; U.S. Department of Justice, "Project Guardian," December 13, 2019, https://www.justice.gov/projectguardian; U.S. Department of Justice, "Project Safe Neighborhoods," accessed June 5, 2020, https://www.justice.gov/psn.

[27] U.S. Department Justice, *U.S. Attorney Presents Program to Streamline Decision on State or Federal Prosecution*, 2018, https://www.justice.gov/usao-ndal/pr/us-attorney-presents-program-streamline-decision-state-or-federal-prosecution.

[28] Jake Horowitz and Monica Fuhrmann, "States Can Safely Raise Their Felony Theft Thresholds: Research Shows Outdated Statutes Lead to Serious Charges for Lower-Level Offenses," Pew Charitable Trusts, May 22, 2018, https://www.pewtrusts.org/en/research-and-analysis/articles/2018/05/22/states-can-safely-raise-their-felony-theft-thresholds-research-shows.

From the perspective of the defendant, a misdemeanor conviction will result in a fine, probation, and possible jail term of no more than one year. In contrast, a felony conviction has potentially much steeper sanctions, including years in prison. Depending on the state, being convicted of a felony can also have wide-ranging and long-term consequences, including limiting job opportunities and prohibiting access to public housing. In some states, being convicted of a felony may mean the offender loses voting privileges.

For prosecutors, statutes with outdated felony theft thresholds present the dilemma of either applying the rule of law or exercising discretion and pursuing lesser charges for minor theft offenses that are felonies on the books. Given the volume of property crime cases, an upward adjustment of the felony theft threshold can significantly affect case processing. Keeping that threshold low strains prosecutorial, judicial, and correctional resources. Overall, principles of equity, consistent with the Eighth Amendment (i.e., the punishment must be reasonable and proportionate to the amount of harm done), suggest that states update their felony thresholds regularly to adjust for inflation and the market price of goods.

10.2.5 States should review and update their felony property crime statutes regularly to ensure that the felony threshold is adjusted for inflation and the Consumer Price Index.

Many states do not regularly update felony threshold level for property crimes, which results in unintendedly large pools of defendants subject to felony charges. Undertaking efforts to ensure the felony thresholds are up to date can enhance notions of fairness, improve perceptions of these laws as being legitimate, and allow for more efficient use of scarce resources. Failing to adjust felony thresholds may contribute to jail or prison overcrowding. Maintaining felony thresholds adjusted for inflation and the Consumer Price Index ensures that theft classes and sanctions are commensurate with the real value of the property stolen.

In 2016 the state of Alaska, through Senate Bill 91, became the first in the nation to require that the threshold value for felony theft be adjusted every five years to account for inflation.[29] The Virginia Department of Criminal Justice Services report, *2015 Blueprints for Change: Criminal Justice Policy Issues in Virginia: Virginia Felony Larceny Threshold 35 Years Later*, is an in-depth assessment of the commonwealths plans to adjust its felony threshold.[30] The report's assessment projected increases in jails and prison population if the commonwealth did not adjust its felony threshold.

<u>The Prosecutor's Role in Use of Force Cases</u>

Officer-involved shooting incidents and any other type of use-of-force incident that results in death or serious bodily injury raise grave concerns within the community, by the press, and by advocacy organizations. Although incidents involving use of force are rare,[31] the heightened public attention to these events underscores the need to address them with defined standards and full transparency. This assures the public that investigative processes are not above reproach, which helps build public trust and confidence in the integrity of the process. Officers should conduct prosecutorial investigations in a manner that ensures the utmost clarity, fairness, and objectivity for all involved parties, including those bringing the allegations, the involved officers, their agencies, and the general public.

For any officer-involved use-of-force case that involves death or serious bodily injury, law enforcement agencies should transfer investigation to an independent law enforcement body (**see recommendation X.X.X**). Prosecutor's offices should take similar actions for the same reason. At a minimum, transfers to independent prosecutorial bodies should occur for any use-of-force incident that involves death or serious

[29] SHORT FORM: Jake Horowitz and Monica Fuhrmann, "States Can Safely Raise Their Felony Theft Thresholds: Research Shows Outdated Statutes Lead to Serious Charges for Lower-Level Offenses," Pew Charitable Trusts, May 22, 2018, https://www.pewtrusts.org/en/research-and-analysis/articles/2018/05/22/states-can-safely-raise-their-felony-theft-thresholds-research-shows.

[30] *Virginia Felony Larceny Threshold: 35 Years Later*, (Richmond, VA: Virginia Department of Criminal Justice Services, 2015)

[31] Shelley Hyland, Lynn Langton, and Elizabeth Davis , *Police Use of Nonfatal Force, 2002–11* (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, November, 2015, https://www.bjs.gov/content/pub/pdf/punf0211.pdf.

bodily injury.[32] For other cases that involve use of force, state and local prosecutors may also elect to refer them for independent criminal investigation when appropriate. Prosecutors should consider using similar transfers to independent bodies when they observe a real or perceived conflict of interest between the prosecutor's office and an individual officer or agency that is the subject of an investigation.

[CROSS REFERENCE RESPECT FOR LAW ENFORCEMENT]

[BEGIN TEXT BOX]

States may play an important role in establishing independent prosecutorial options. Connecticut enacted a law in 2012 that requires the Division of Criminal Justice (DCJ) to investigate all police-involved deaths. It also allows the state's chief attorney to appoint a special independent prosecutor when deemed necessary.[33] The Connecticut statute empowers the state's chief attorney to "exercise all powers and duties with respect to the investigation and prosecution" for relevant cases.[34] That independent prosecutor is empowered to act in lieu of the county state's attorney.

While this example is restricted to investigations of officer-involved deaths, it may be adapted by a state and applied to any use-of-force incident involving death, serious bodily injury, or a conflict of interest.

[END TEXT BOX]

When a conflict with law enforcement arises, an independent prosecutorial body is better situated to achieve transparency, accountability, and fairness. With careful and deliberate planning, these independent prosecutorial bodies can optimize trust and integrity by establishing meaningful and standardized approaches to ensure that all investigations are thorough and transparent.

[BEGIN TEXT BOX]

"Independent counsel" refers to attorneys or prosecutorial bodies who investigate and prosecute criminal activity in government. They are intended to hold accountable those government officials who make, implement, and enforce laws. State prosecutors have the duty to uphold the laws; however, they also have a duty of loyalty to superiors and colleagues. Because independent counsels do not answer to government officials, their independence in investigation and prosecutorial action can help alleviate inherent conflicts of interest.[35]

[END TEXT BOX]

Once states develop protocols for independent investigation, local prosecutors' offices should act proactively and transparently to transfer cases to state prosecutorial bodies. As recommended in the "Respect for Law Enforcement and the Rule of Law" chapter, local prosecutors should contribute to the public education process undertaken by law enforcement agencies (see **recommendation X.X.X**). Local prosecutors should help set realistic public expectations by informing their constituents about their prosecutorial processes for investigating use of force, the unique legal standards underpinning these processes, and the circumstances and mechanisms that trigger independent prosecutions.

10.2.6 States should develop protocols to identify the most appropriate prosecutorial agency responsible for investigating cases that involve any use-of-force incident resulting in death or serious bodily injury. This

[32] For this report, serious bodily injury is bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.
[33] Connecticut General Statutes, § 51-277(a) (2012). https://law.justia.com/codes/connecticut/2012/title-51/chapter-886/section-51-277/
[34] Ibid.
[35] Adapted from the Free Legal Dictionary by FarLex, https://legal-dictionary.thefreedictionary.com/Independent+Counsel, retrieved July 20, 2020

prosecutorial agency should be responsible for determining further actions.

Because there is no one solution to achieve prosecutorial independence, all local prosecutors will need to follow the laws, policies, and legal precedents of their respective states. States also will need to adjust their approaches to align with local considerations (e.g., municipal statutes or civilian oversight bodies).

Two models show how independent prosecutors handle cases that involve use of force. First, a state may establish or designate a special prosecutor's office that reviews all use-of-force cases that resulted in death or serious bodily injury. To establish a clear and consistent approach, a state should select a lead prosecutor who is qualified, objective, and independent (e.g., unaffected by political party affiliation or other biases) to build public trust. It may be challenging to establish and maintain such independence because the special prosecutor typically will serve under the supervision of the governor or state attorney general, each likely a member of a political party. States that pursue this approach should consider mitigating efforts, such as terms that do not align with gubernatorial terms. In addition, states should proactively identify a special prosecutor for cases involving use of force prior to requiring their services to avoid claims of favoritism, politicization, or partiality.

Second, a state may legislate, mandate, or otherwise promote the automatic transfer of cases to another prosecutor's office (i.e., a sister agency) within the state. This approach may take several forms. One form includes developing guidelines for transferring prosecution of defined cases to a neighboring jurisdiction or county prosecutor's office within the state. The other form involves having specialized independent bodies act on behalf of the local prosecutor. These bodies may be organized within the local jurisdiction or on a regional basis.

The prosecutor in Clark County, Washington, used the transfer to another jurisdiction approach following an officer-involved shooting.[36] Although Clark County has yet to formalize their process, Clark County Prosecuting Attorney Tony Golik proactively transferred the investigation of an officer-involved shooting in his jurisdiction to nearby Thurston County. He describes his rationale for standardizing such practices going forward:

> I think we need to work to avoid a situation where reviews are done by a local prosecutor and then there are calls from the community for a second review. . . . That situation can politicize these cases, and I think that's bad all around. So, my intent is to work to see a systemic change where these cases are regularly reviewed by a prosecutor outside the jurisdiction, a prosecutor's office that's well removed, or the attorney general's office so the community can have confidence. Families who have lost someone can have confidence and involved officers can have confidence that these situations do not become politicized.[37]

Consistent with the approach outlined in Clark County, prosecutors across the state may institutionalize this approach throughout the state by working collaboratively with state authorities or the statewide association of prosecutors.

Another form that state legislation may promote involves the transfer of cases to a local or regional body that assumes responsibility for independent investigation and prosecution. The Northern District of Alabama's U.S. attorney's office established an Independent Shooting Review Advisory Council (ISRAC) in August 2019, which is available to all county prosecutors within the district. According to U.S. Attorney Jay Town, "the

[36] Clark County prosecutor explains his decision to send officer-involved shooting investigation review to Thurston County, Clark County Today.com, June 19, 2020, https://www.clarkcountytoday.com/news/clark-county-prosecutor-explains-his-decision-to-send-officer-involved-shooting-investigation-review-to-thurston-county/.

[37] Ibid.

ISRAC is an effort between the United States Attorney's Office and active and/or retired members of law enforcement, to include prosecutors, designed to conduct an [officer-involved shooting review] at the request of a particular District Attorney (or law enforcement agency)."[38]

While ISRAC is an advisory council rather than an investigative authority, it provides a model framework and path for initiating similar bodies through state legislation. As a standing advisory council, the ISRAC can be activated only when needed to provide a review and recommendations to the prosecuting authority.[39] ISRAC consists of a cross-section of carefully selected retired law enforcement and prosecutorial personnel that provide an added measure of independence.

This approach does not require oversight by the U.S. attorney's office, and it can be used for more than just officer-involved shootings. Its framework provides a specific protocol for a county prosecuting attorney to request an independent investigation by law enforcement professionals from outside of the jurisdiction that was involved in the use-of-force incident.[40]

10.2.7 All prosecutors' offices should develop and publish well-documented, refined, and regularly updated protocols for conducting investigations and follow-up activities into all use-of-force incidents that are considered for prosecution.

Approximately 18,000 law enforcement agencies and 3,000 local prosecutors' offices are located throughout the United States, and there is no standard way to address use-of-force incidents. Depending on the jurisdiction, law enforcement agencies may coordinate with the prosecutors from the onset of an investigation; they may complete an investigation before handing it to the prosecutor's office, or a prosecutor's office may launch an investigation into use of force independent of the local agency. Because of these variances, local prosecutors and independent prosecutorial bodies should have clear protocols on how they investigate and prosecute incidents involving use of force.

The National District Attorneys Association (NDAA) has set forth guidelines, and Bill Montgomery, a prosecuting attorney from Maricopa, Arizona, laid out the rationale for such standards. Out of a growing sense of responsibility in the wake of many high-profile use-of-force incidents nationwide, Montgomery implores prosecutors to establish "an affirmative duty to assume a leadership role in the management of critical incidents."[41] He continues, "An officer-involved shooting should be responded to in a manner that conveys confidence, trust, authority, transparency, and justice to both the police department involved in the use of deadly force and the community that the law enforcement agency serves." The same commitment should hold for any use of force incident that reaches the prosecutor's office.

The following elements are considered essential:

- Every prosecution agency should have a properly trained prosecutor to serve as a law enforcement liaison to coordinate with a law enforcement agencies within the jurisdiction.
- The written protocol should establish timelines, deadlines and procedures for the delivery of a final investigation to the prosecution agency for a formal charging decision.
- Timely notice of that decision should be distributed to the involved agency, the involved

[38] U.S. DOJ Press Release: United States Attorney Jay E. Town Announces the Formation of the Independent Shooting Review Advisory Council, November 21, 2019. https://www.justice.gov/usao-ndal/pr/united-states-attorney-jay-e-town-announces-formation-independent-shooting-review
[39] Ibid.
[40] Ibid.
[41] Bill Montgomery, "The Time to Prepare for a Police Shooting Is Before It Happens," Route Fifty, September 6, 2020. https://www.routefifty.com/public-safety/2017/09/prepare-police-use-of-force-beforehand-protocol/140783/ [online article]

employee(s), the victim's representative, and the public.[42]

There is no universal protocol for independent prosecution of use of force events, but the guidelines laid out in the article provide a reasonable framework. Protocols that are established using such principles bring order and predictability to chaos. They also help hold officers accountable and create a system of checks and balances, allowing for both accountability and systematic reviews.

These protocols should detail specific events that automatically trigger the transfer of cases to independent prosecutorial bodies. At minimum, these protocols should apply to use-of-force cases that resulted in death or serious bodily injury and those that involved potential conflicts of interest between the local prosecutor's office and the police.

[CROSS REFERENCE RESPECT FOR LAW ENFORCEMENT]

10.2.8 Local prosecutor's offices should refer any use-of-force cases that both resulted in death or serious bodily injury and involved a real or potential conflict of interest between a law enforcement agency and a prosecutor's office to an independent prosecutorial agency.

Local prosecutors should identify and appropriately redirect real and potential conflicts of interest to an independent counsel to maintain objective, fair, and transparent. The independent body should be responsible for any investigation, charging decisions, and trial activities. States may consider similar options to those outlined in **recommendation x.x.x**.

10.2.9 Local prosecutors' offices should proactively engage in educational outreach to ensure that the public is informed about distinctive legal standards, investigatory processes, and charging options that apply when law enforcement officers are alleged to improperly used deadly force or force that may result in substantial bodily harm.

Prosecutors' offices should take steps to inform the public of prosecutorial standards that apply to use-of-force incidents, including cases they investigate and pursue within their offices, any use-of-force cases involving death or serious bodily injury that are automatically refer to independent prosecutorial bodies, or cases where they are referred as a result of a real or potential conflict of interest.

These standards and transfer protocols should be written in language that is easily understood and shared proactively using media and information platforms. Local prosecutors' offices may enhance this messaging by tailoring educational outreach to communities that either experience use-of-force events or that express an interest. The prosecutor should coordinate with local law enforcement agencies engaged in similar public education campaigns about their use-of-force investigation protocols.

[CROSS REFERENCE RESPECT FOR LAW ENFORCEMENT]

10.3 Courts

Background

Under the adversarial criminal justice system, the formal function of a judge presiding over a criminal court is to adjudicate legal disputes between the prosecution and defense and carry out the administration of justice in accordance with the rule of law in a fair and impartial manner. However, the formal role of the court does not adequately represent the broader real-world responsibilities that judges undertake.

In drug courts, the judge largely leads the drug court team rather than acting as a neutral arbiter presiding

[42] Ibid [or the proper format for previously cited FN that is immediately above]

over the prosecution and defense.[43] Besides the judge, the team consists of prosecutors, defense attorneys, and treatment providers who collaborate in the best interest of the defendant. In addition, the judge has direct and personal contact with the defendant and understands the effect substance use has on the lives of offenders, their families, the court system, and the community at large.

Current State of the Issue

The commission identifies three issues centered on courts that have impacts across the entire criminal justice system: expanding and refining the use of treatment courts; providing optimal indigent defense; and increasing the use videoconferencing for court proceedings.

<u>Treatment Courts</u>

Treatment courts refer to a general class of courts that emphasize use of treatment as an alternative to punishment. Drug treatment courts guide defendants who have been identified as having substance use disorders away from jail and into treatment with a goal to reduce drug dependence and offending and improve the quality of life for offenders and their families.[44] At present, there are more than 3,000 drug courts across the country spanning all 50 states. About half are for adults and half are for juveniles.[45] The popularity and success of drug courts spurred the development of other treatment courts, also referred to as specialty or problem-solving courts. The most common types of treatment courts include drug, veterans, mental health, and homelessness.

Eligibility criteria for entering a drug court program are determined by certain characteristics including offense type, criminal history, and substance use history. Typically, drug court programs do not allow violent offenders to participate. Early drug courts were designed to serve first-time offenders.[46] Over the years, they have evolved to target more serious and high-risk offenders to make more efficient use of resources.

As drug courts have progressed, screening tools have been developed to determine eligibility and appropriateness for participation. Screening is often split into criminal justice and clinical. A criminal justice screening is used to assess if the person is eligible for drug court based on the presenting offense type and criminal history. A clinical screening determines if the client has a substance use disorder and whether it can be addressed by treatment programs made available through the court. Clinical screening also determines if clients have a co-occurring mental health problem. [47]

An increasing understanding and awareness of what make drug courts successful has recently emerged, due in part to funding provided by the Bureau of Justice Assistance and the work of the National Association of Drug Court Professionals (NADCP) and the National Drug Court Institute (NDCI).[48]

Training is critical for any new treatment court; it disseminates crucial information and helps inform and improve practices. Treatment court judges should receive specific training given their pivotal role as leaders of treatment court teams and their unique position of taking a more collaborative and proactive approach to their clients' outcomes. However, some treatment court judges may not be aware of available training options. For more than two decades, NDCI has provided a week-long comprehensive training developed in collaboration with the National Center for State Courts and the National Judicial College for judges, which

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[43] Douglas B. Marlowe and William G. Meyer (eds.), *The Drug Court Judicial Benchbook* (Alexandria, VA: National Drug Court Institute, 2011), https://www.ndci.org/sites/default/files/nadcp/14146_NDCI_Benchbook_v6.pdf.

[44] Emily F. Wood, Monica K. Miller, and Tatyana Kaplan, "Specialty Courts: Time for a Thorough Assessment," *Mississippi College Law Review* 36, no. 2 (2018), https://heinonline.org/HOL/P?h=hein.journals/miscollr36&i=254.

[45] *Drug Courts* (Washington, DC: U.S. Department of Justice, Office Justice Programs, January 2020), https://www.ncjrs.gov/pdffiles1/nij/238527.pdf.

[46] W. Clinton Terry III, ed., *The Early Drug Courts: Case Studies in Judicial Innovation*, vol. 7 (Thousand Oaks, CA: Sage Publications, 1999).

[47] Roger H. Peters and Elizabeth Peyton, *Guideline for Drug Courts on Screening and Assessment* (Tampa: University of South Florida Department of Mental Health Law and Policy, 1998), https://www.ncjrs.gov/pdffiles1/bja/171143.pdf.

[48] National Association of Drug Court Professionals, *Adult Drug Court Best Practice Standards, Volume 1* (Alexandria, VA: National Association of Drug Court Professionals, 2013). https://www.nadcp.org/.

delivers the most sophisticated and up-to-date scientific information and skills related to treatment courts. Topics include the role of the judge, what works, key components of drug courts, and how to manage co-occurring disorders.[49]

Drug court certification is standard in several states, including Illinois, Massachusetts, New Mexico, and Utah.[50] The Administrative Office of Illinois Courts, under the auspices of the Illinois Supreme Court, provided the following edict regarding its requirements: "In order for a court to secure PSC [problem-solving court] certification, the court shall demonstrate compliance with the PSC Standards and a commitment to adopting evidence-based practices. Each new and existing adult PSC shall complete and submit an application for certification through the AOIC [Administrative Office of Illinois Courts]. The PSC certification process entails a review of the application detailing the court's policies, procedures, operations and on-site review."[51]

The underlying problems addressed across the different treatment courts are often co-occurring.[52] A veteran arrested for an eligible offense may have a substance use disorder, experience mental health issues, and be homeless. Assuming there are multiple treatment court options in the jurisdiction, the defendant should be processed through the treatment court that best suits their needs.

10.3.1 The Department of Justice should examine the feasibility to establish voluntary certification programs for treatment court judges. If found feasible, the Department of Justice should support the development of judicial certification standards.

Developing a certification procedure or track that treatment court judges could pursue on a voluntary basis stresses the importance of treatment courts and elevates their role to that of tradition criminal court judges.

10.3.2 The Department of Justice should evaluate the effectiveness of all types of treatment courts, including mental health, veterans', and homelessness courts.

The majority of research has focused on drug courts, rather than mental health, veterans', and homelessness courts. According to the National Institute of Justice (NIJ), drug courts are often successful in accomplishing most their goals. Graduates have lower rates of recidivism and substance use, treatment is more cost effective than incarceration, and communities generally support them. [53]

Far less research has been conducted on other types of treatment courts. More research would help identify the impacts of these courts, determine what elements of their treatment programs contribute to their success, and develop best practices and evidence-based standards.[54]

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[49] Hardin, email communication with Criminal Justice System Personnel Intersection, April 21, 2020.
[50] Michael J. Tardy, *Problem-Solving Courts Certification Process and Application Supreme Court of Illinois: Administrative Office of the Illinois Courts* (Supreme Court of Illinois, Administrative Office of the Illinois Courts, November 2019), https://courts.illinois.gov/Probation/Problem-Solving_Courts/PSC_Certification.pdf; *Adult Drug Court Manual 2015 A Guide to Starting and Operating Adult Drug Courts in Massachusetts* (Boston: Executive Office of the Trial Court, 2015), https://www.macoe.org/sites/macoe.org/files/files/Adult%20Drug%20Court%20Manual.pdf; New Mexico Courts, "Problem Solving Courts," accessed June 5, 2020, https://pscourts.nmcourts.gov/nm-drug-court-certification.aspx; "Utah Judicial Council Adult Drug Court Certification Checklist Revised," Utah Judicial Council, last modified December 16, 2019, https://www.utcourts.gov/psc/docs/Utah_Adult_Drug_Court_Certification_Checklist.pdf.
[51] Michael J. Tardy, *Problem-Solving Courts Certification Process*.
[52] Gerald Goldstein et al., "Comorbidity between Psychiatric and General Medical Disorders in Homeless Veterans," *Psychiatric Quarterly* 80, no. 4 (2009): 199, https://dx.doi.org/10.1007%2Fs11126-009-9106-6; J.P. LePage et al., "The Effects of Homelessness on Veterans' Health Care Service Use: An Evaluation of Independence from Comorbidities," *Public Health* 128, no. 11 (2014), https://doi.org/10.1016/j.puhe.2014.07.004; Topolovec-Vranic J et al., "The High Burden of Traumatic Brain Injury and Comorbidities Amongst Homeless Adults With Mental Illness," *Journal of Psychiatric Research* 87 (April 2017), https://doi.org/10.1016/j.jpsychires.2016.12.004; Nahama Broner, Randy Borum, and Kristen Gawley, "Criminal Justice Diversion of Individuals with Co-Occurring Mental Illness and Substance Abuse Disorders: An Overview," in *Serving Mentally Ill Offenders: Challenges & Opportunities for Mental Health Professionals*, eds. Gerald Landsberg, DSW, Marjorie Rock, Dr.PH, Lawrence K.W. Berg, PhD, Esq. (New York: Springer Publishing, 2002).
[53] National Institute of Justice, "Adult Drug Court Research to Practice (R2P) Initiative," April 1, 2019, nij.ojp.gov: https://nij.ojp.gov/topics/articles/adult-drug-court-research-practice-r2p-initiative
[54] "The Efficacy of Drug Courts," Evidence-based Professionals Society, accessed June 15, 2020, https://www.ebpsociety.org/blog/education/271-efficacy-drug-courts.

10.3.3 The Department of Justice should support the development of treatment court models or protocols for populations with co-occurring problems.

Defendants who appear in treatment courts often experience multiple types of problems (e.g., substance use disorders, mental health disorders, and homelessness). While the treatment court standards and guidance promoted by the NADCP address this reality, additional protocols, best practices, and research addressing co-occurring disorders would greatly benefit the treatment court community, its practitioners, and the clients.

Indigent Defense

The Sixth Amendment establishes the right to counsel in federal criminal prosecution. Through a series of landmark decisions by the U.S. Supreme Court, notably Gideon v. Wainwright, the right to counsel has been extended to all criminal prosecutions that carry a sentence of imprisonment.[55]

Under the federal system, there are three basic forms of indigent defense: public defender organizations, community defender organizations, and panel attorneys. Federal public defender organizations are federal entities whose staff are federal employees. Community defender organizations are nonprofit defense counsel organizations incorporated under state laws. Under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A (1986), they operate in federal districts though federal grants.[56] Panel attorneys are private attorneys paid at an hourly rate to serve as indigent defense for federal defendants.[57]

Under state and local courts, three general forms of indigent defense parallel the operations at the federal level: public defender programs, assigned counsel, and contract attorneys. Public defender programs are public defenders that are organized and paid by the state. Assigned counsel (i.e., court-appointed attorneys) are private attorneys who may work for a set fee per case or at an hourly rate. Contract attorneys provide indigent defense through contracts with one or more private attorneys or law firms that operate for profit.[58]

A 2016 report by BJS found that approximately 66 percent of felony federal defendants and 82 percent of felony defendants in large state courts were represented by indigent defense.[59]

Indigent defense systems have been widely criticized, with a common theme being that public defenders are overworked and underpaid.[60] Critics have described the failings of indigent defense as a denial of justice to the poor and unnecessarily costly as a result of increased jail times, retrials, and resulting lawsuits.[61]

Generally, research suggests that assigned counsel are less prepared, less communicative, and more isolated, particularly when paid low or flat fees; less experienced and worse performing when paid below market rates; and less likely to go to trial when paid more for pleas.[62] Conversely, public defender programs are often associated with lower caseloads, more investigators, more client contact, more training, and faster case

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[55] Other landmark decisions include *Argersinger v. Hamlin,* in which the Supreme Court extended Gideon to include lesser offenses that carried a possible sentence of incarceration, and *In re* Gault, which extended the right to counsel to include all juveniles involved in delinquency proceedings that face possible incarceration.

[57] "Chapter 2: Appointment and Payment of Counsel," in *Guide to Judiciary Policy, Vol. 7: Defender Services, Part A: Guidelines for Administering the CJA and Related Statutes*, (Washington, DC: United States Courts, January 2020), 2, https://www.uscourts.gov/sites/default/files/vol07a-ch02.pdf.

[57] "Chapter 2: Appointment and Payment of Counsel," in *Guide to Judiciary Policy, Vol. 7: Defender Services, Part A: Guidelines for Administering the CJA and Related Statutes*, (Washington, DC: United States Courts, January 2020), 2, https://www.uscourts.gov/sites/default/files/vol07a-ch02.pdf.

[59] Suzanne M. Strong, *State-Administered Indigent Defense Systems, 2013* (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, last modified May 2017), https://www.bjs.gov/content/pub/pdf/saids13.pdf.

[59] Suzanne M. Strong, *State-Administered Indigent Defense Systems, 2013* (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, last modified May 2017), https://www.bjs.gov/content/pub/pdf/saids13.pdf.

[60] Theodore Schoneman, "Overworked and Underpaid: America's Public Defender Crisis," *Fordham Political Review* (September 19, 2018), http://fordhampoliticalreview.org/overworked-and-underpaid-americas-public-defender-crisis/.

[61] Christine S. Scott-Hayward and Henry F. Fradella, *Punishing Poverty: How Bail and Pretrial Detention Fuel Inequalities in the Criminal Justice System*, (Los Angeles: University of California Press, 2019).

[62] Alexa Van Brunt, "Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them," *The Guardian (US edition)*, June 17, 2015, https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked.

assignment. [63] Other benefits of public defender programs compared to other forms of indigent defense include better justice system coordination, supervision of attorneys, and client satisfaction.

Tony Fabelo, Senior Fellow for Justice Policy at the Meadows Mental Health Policy Institute of Texas, suggests, "A significant problem facing policymakers is the lack of comprehensive research to guide public defense policy and reform. Advocates for improving public defense services debate issues regarding the best way to deliver quality public defense services, with a strong bias in favor of enhancing public defender offices. As expected, advocates favor spending more money rather than less on these services. For policymakers, however, a basic obstacle to promoting reform is the lack of systematic research to guide policy development."[64]

Given the lack of research and the challenges many states and localities face while attempting to improve their indigent defense services, the commission believes that additional research is needed nationally and that states and localities should be supported in their assessments of what works.

Many states allow localities within a state (e.g., counties) to determine the type of indigent defense they deliver.[65] Travis County, Texas, considered revising its system while the commission was researching this topic. Travis County's current form of indigent defense is a hybrid program that uses an assigned counsel approach for most felony cases, but maintains public defenders for misdemeanors involving persons with mental health issues and juveniles. At the request of the county, the Texas Indigent Defense Commission conducted an assessment and suggested that the county transition to a full public defender program.

One innovation in indigent defense is the adoption of a holistic model that emerged in the 1990s,[66] which stresses extending services beyond only providing representation for criminal charges. A core feature of the model is that public defenders collaborate with social workers to address underlying factors such as poverty, mental illness, unemployment, homelessness, and substance use disorder that may have contributed to the client's offending behavior and keep them cycling though the criminal justice system. Social workers play an integral role, both in terms of identifying client needs and providing referral and access to services. This approach is described as client-centered that differs fundamentally from the traditional model of public defense.[67]

The Knox County Public Defender's Community Law Office (CLO) in Tennessee is an example of a client-centered, holistic defense approach that began in 2013. The motivation for the program lies in its unique approach to understanding the conditions and reality in which indigent defendants often live. Mark Stephens, the former elected public defender for Knox County, notes,

> Those folks generally don't wake up one morning and decide to go commit a crime. It's people living in chaos and dysfunction, however, can get themselves in a place where engaging in criminal activity seems . . . a viable alternative to their circumstances. Living in chaos and dysfunction is exhausting. I've also learned that a client's first arrest is an opportunity. When people are arrested for the first time they often experience that moment where they recognize they really need to make a change in their life. Their behavior has landed them in jail. And most are ashamed and embarrassed as to what has happened. At that moment many clients are contemplating behavior modification in their life.

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[63] "Research on Public Defenders," research report brief shared by Geoffrey Burkhart, Executive Director, Texas Indigent Defense Commission, with Criminal Justice System Personnel Intersection Working Group, March 27, 2020.
[64] Texas Indigent Defense Commission, "Research on Public Defenders," 3.
[65] Suzanne M. Strong, "State-Administered Indigent Defense Systems."
[66] Robin Steinberg, "Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm," 70 Wash. and Lee L. Rev. 961, (2013), https://heinonline.org/HOL/Page?handle=hein.journals/waslee70&div=24&g_sent=1&casa_token=&collection=journals.
[67] Sarah Buchanan and Roger M. Nooe, "Defining Social Work Within Holistic Public Defense: Challenges and Implications for Practice," *Social Work* 62, no. 4 (2017), https://doi.org/10.1093/sw/swx032.

> However, most don't know what to do or how to bring about change. And that's where the public defender can come in.[68]

Limited research regarding the effectiveness and efficiency of the approach includes a rigorous empirical evaluation undertaken at the Bronx Criminal Court. The study involved comparing the outcomes between two indigent defense providers that had operated side-by-side: the Bronx Defenders (a holistic defense provider) and the Legal Aid Society (a traditional approach). Using administrative data and analyzing court outcomes for more than half a million criminal court cases, several encouraging findings resulted. Based on 10 years of data, they found the holistic defense approach reduced the likelihood of a custodial sentence by 16 percent and sentence length by 24 percent but did not affect conviction rates. The researchers concluded that "this promising model deserves future research—beyond the criminal justice system and in other jurisdictions—and a more prominent place in conversations about how to address mass incarceration."[69]

10.3.4 The Department of Justice should provide funding to examine the cost, efficiency, and effectiveness of various forms of indigent defense. This research should determine the relative costs and benefits of different approaches and determine whether these factors vary by contextual factors at the local level, such as population density or volumes of criminal caseload.

Research should be conducted to fully understand the types of indigent defense services, policy, and practice. The best delivery methods may differ in rural and urban jurisdictions depending on the volumes and types of criminal cases. Because the demands and needs vary greatly, research should be conducted to identify factors that affect the cost, efficiency, and effectiveness of indigent defense delivery at the local level.

10.3.5 The Department of Justice should provide funding to states and localities to determine if public defender programs are more effective and more viable than other indigent defense delivery options.

Following the example of the study in Travis County, Texas, states and localities may benefit from assessing their current methods of delivering indigent defense. These studies may point to ways to improve delivery of services to indigent defendants and identify the cost-benefit implications of proposed changes. Funding should be allocated to states or localities that partner with independent and qualified researchers from universities or research associations to evaluate and compare different methods to deliver indigent defense.

10.3.6 The Department of Justice should provide funding to states and localities to determine if jurisdictions that have adopted a holistic defense approach have realized improved outcomes and efficiencies.

Based on research conducted on the implementation of the holistic defender model in the public defenders' offices' in the Bronx, New York, and in Knox County, Tennessee, further research would provide more insight into the viability of this model. Such research would note if the holistic defender model is an evidence-based practice and it would provide guidance to public defender offices considering whether to adopt this model.

10.3.7 Local jurisdictions should ensure that defense attorneys are fully integrated into all criminal justice collaborations, including participation on criminal justice coordination councils, when possible.

Local public defender offices are often not fully integrated into the collaboration that exists among police, prosecutors, and the courts. According to Geoffrey Burkhart, Executive Director of the Texas Indigent Defense Commission, "Historically, public defenders have not always been at the table."[70]

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[68] *President's Commission on Law Enforcement and the Administration of Justice: The Role of Public Defenders* (June 3, 2020) (statement of Mark Stephens, former Elected Public Defender in Knox County, TN), https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings.

[69] James M. Anderson, Maya Buenaventura, and Paul Heaton, "The Effects of Holistic Defense on Criminal Justice Outcomes," Harvard Law Review 132 (2018).

[70] *President's Commission on Law Enforcement and the Administration of Justice: The Role of Public Defenders* (June 3, 2020) (statement of Geoffrey Burkhart, Executive Director of the Texas Indigent Defense Council), https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings.

Involving the public defender may be accomplished formally or informally. Formal examples include participating in local or regional criminal justice coordinating councils that meet regularly. Carlos Martinez, Miami-Dade Public Defender, provided an informal example of public defenders working with law enforcement. His office provides instruction at the Miami-Dade Police Department training academy regarding the serious consequences of an arrest and involvement with the criminal and juvenile justice systems, as well as a manual on the consequences of arrest. Similar training was provided to the Miami-Dade School Police, which helped reduce arrests. Public Defender Martinez asserts,

> I can tell you from the time that we started having the discussion to the time that we had the training, in a matter of two years the arrest rate in the school system went from 2,200 a year to 800 a year. The 800 may seem like a lot, but to us that was tangible evidence that the officers were taking into consideration what the consequences were, and more importantly it's really having an extra tool of recognizing what discretion the officers have."[71]

<u>Videoconferencing for Criminal Justice Proceedings</u>

The COVID-19 pandemic hastened the adoption of videoconferencing in federal, state, and local courts, resulting in questions about how a jurisdiction can best leverage videoconferencing quickly. As stay-at-home and social distancing orders became common, videoconferencing in courts escalated.

On March 19, 2020, Ohio Supreme Court Chief Justice Maureen O'Connor announced plans to release $4,000,000 in emergency grant funding across the state to allow courts to purchase videoconferencing technology for arraignments and other needs.[72] On March 30, 2020, the U.S. Courts website approved the use of video and teleconferencing for certain criminal proceedings.[73]

On behalf of NIJ, RTI International and the RAND Corporation convened a panel of subject matter experts for a Court Appearances through Telepresence Advisory Workshop in November 2018. The final report identified numerous advantages of videoconferencing in criminal proceedings, including increased safety for court personnel, reductions in costs, and enhanced court efficiency.[74] Further, subject matter experts noted that teleconferencing reduced the need to secure and transport defendants to court and time spent in jail awaiting a hearing. These experts believed that teleconferencing could increase access to expert witnesses and other witnesses fearful about testifying in person. Workshop participants also said that videoconferences allow non-English speakers and individuals with disabilities to access the criminal justice system more easily.

[CROSS-REFERENCE VICTIM SERVICES]

The Rand workshop participants also identified some potential disadvantages of videoconferencing in criminal court, which included concerns that the judgment and behavior of criminal justice personnel who appear in court remotely might be different than at an in-person proceeding. In addition, defendants and witnesses who are not physically present might not fully appreciate the gravity of the proceedings, thereby increasing the risk that they engage in impulsive behavior or that they become disengaged from the legal process. Teleconferencing could also adversely affect the attorney-client relationship by hindering their ability to carry out private communications.[75]

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[71] *President's Commission on Law Enforcement and the Administration of Justice: The Role of Public Defenders* (June 3, 2020) (statement of Carlos Martinez, Public Defender for Miami-Dade, FL), https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings.
[72] Jacob Fisher, "Ohio Supreme Court to Release $4M in Emergency Grants amid Coronavirus Pandemic," *Dayton Business Journal*, May 19, 2020, https://www.bizjournals.com/columbus/news/2020/03/19/ohio-supreme-court-to-release-4m-in-emergency.html.
[73] "Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic," U.S. Courts, March 31, 2020, https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic.
[74] Camille Gourdet et al., *Court Appearances in Criminal Proceedings through Telepresence* (Santa Monica, CA: RAND Corporation, 2020), https://www.rand.org/pubs/research_reports/RR3222.html.
[75] Short form of preceding footnote

10.3.8 Criminal justice agencies should develop the capacity to engage in videoconferencing for selected court proceedings, including arraignments. Criminal justice agencies should purchase video technology and update the infrastructure necessary to support virtual courtrooms.

Conducting courtroom proceedings by videoconferencing has existed since at least 1998; however, the COVID-19 crisis accelerated the adoption of this technology, which demonstrates how developing local capacities to effectively carry out videoconferencing and advancing virtual courts would be useful in the event of a local natural disaster, such as flood.

10.3.9 State and local jurisdictions should amend laws or administrative rules that prohibit or limit videoconferencing.

As noted, teleconferencing or videoconferencing in court proceedings has increased in response to the COVID-19 pandemic. Any rules originally written should be revised to ensure improved access to courts.

10.3.10 The Department of Justice should sponsor an after-action panel comprising a statistically diverse cross-section of jurisdictions to discuss the innovations, challenges, and best practices in the adoption and use of videoconferencing that stemmed from the COVID-19 pandemic.

DOJ should convene a panel or a series of panels to identify lessons learned, promising practices, challenges, and practical needs that were discovered about videoconferencing in the wake of the COVID-19 pandemic. This cross-sectional panel should include representation individuals with urban, rural, and tribal experiences and perspectives as well as representation from the federal court system. The Department of Justice should publish proceedings from the after-action panel on the use of teleconferencing in courts to share lessons learned and emerging standards with the jurisdictions across the country. The discussions and feedback produced by the after-action panel should result in a published report. Topics should include general recommendations for video technology capacity building, strategies for clearing legal hurdles, guidelines about the types of hearings suitable for videoconferencing, and areas of further research.

10.4 Detention and Corrections

Background

For this chapter, "corrections" refers to all agencies in the criminal justice system that deal with individuals who have been convicted of a crime. The correctional system ensures that an offender's sentence is carried out in jail, in prison, on probation, or in court-ordered community service under the supervision of the state. "Detention" refers to the use of jails as pretrial detention where defendants are held without bail or are being detained because they cannot post bail to secure their release before trial. Well beyond their custodial role, both correctional and detention staff work closely with other criminal justice agencies to provide treatment and services to clients.

Current State of the Issue

Generally, a person convicted of a crime is detained to protect the public against their actions and to deter future offending. Another rationale for detaining a convicted offender is retribution, or the belief that confinement and the deprivation of liberty is a punishment that fits the gravity of the offense committed. Not all of these justifications of punishment hold when the offender is detained during the pre-trial period, because the individual has not at that point been convicted. The primary justification for pre-trial detention is to ensure that a criminal defendant appears in court, but the federal government and the majority of states allow judges to preventively detain defendants for public safety considerations.[76] Preventive detention may be based on the dangerousness of a defendant to victims, witnesses, or the general public. It may also be based on the defendant's general likelihood to engage in criminal behavior while on release.

[76] Rafael A. Mangual, *Reforming New York's Bail Reform: A Public Safety-Minded Proposal* (New York: Manhattan Institute, 2020), https://media4.manhattan-institute.org/sites/default/files/reforming-ny-bail-reformRM.pdf.

The commission identified two issues centered on detention and corrections that have an impact on the wider criminal justice system: the bail reform movement and the adverse effect of contraband cell phones in prison.

Bail Reform

Bail refers to pre-trial restrictions imposed on a person charged to ensure compliance with the judicial process. In the United States, bail commonly implies a money or property bond that the suspect deposits to the court to ensure the court appearance. Under this system, defendants posting bail are released; they will forfeit that bail if they fail to appear or if they violate the conditions of release.

Nationally, more than 60 percent of persons held in jail are pretrial detainees.[77] Many bail reform advocates have criticized the use of cash bail as inherently discriminatory against the poor.[78] Bail has also been described by bail reform advocates as inherently discriminatory against people of color.[79] A growing number of states, including California, Illinois, New Jersey, and New York, have taken steps to eliminate cash bail for most misdemeanors and a subset of nonviolent felonies.[80] Critics also argue cash bail results in defendants losing their jobs or their ability to provide care for children or family members.[81] Holding people in jail who do not pose a risk for flight or who do not pose significant threat to the public exacerbates jail overcrowding, thereby contributing to unsafe conditions.[82] In addition, criminogenic effects of spending time in detention has been cited as an argument against holding pretrial detainees for misdemeanor offenses.[83] Curtailing cash bail saves money because fewer individuals will be detained.[84]

Many sound arguments have been made against the bail reform movement, with some stating that removing judicial discretion and eliminating the practice of preventive detention will lead to increased crime rates.[85] Others believe that any reform will place offenders back on the streets, which will endanger the community, leave victims vulnerable, and allow offenders to recidivate.

Concerns about the effect of bail reform on crime rates have been raised in the media. After the New York State bail reform took effect on January 1, 2020, crime in New York City spiked for the first two months of the

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[77] Todd Minton and Zhen Zeng, *Jail Inmates at Midyear 2014* (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, June 2015), 1−3, 8. http://www.bjs.gov/content/pub/pdf/jim14.pdf.

[78] Salma S. Safiedine and K. Jeannie Chung, "The Price for Justice: The Economic Barriers That Contribute to an Unfair and Unjust Criminal Justice System," *Criminal Justice* 32, no. 4 (Winter 2018), https://search.proquest.com/openview/024d8a72f85ddd1c39d09cf8bb87a052/1/advanced; Muhammad B. Sardar, "Give Me Liberty or Give Me…Alternatives?: Ending Cash Bail and Its Impact on Pretrial Incarceration," *Brooklyn Law Review* 84 (2018), https://brooklynworks.brooklaw.edu/blr/vol84/iss4/9/.

[79] Lydette S. Assefa, "Assessing Dangerousness amidst Racial Stereotypes: An Analysis of the Role of Racial Bias in Bond Decisions and Ideas for Reform," *Journal Criminal Law & Criminology* 108 (2018): 653, https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/1/; Paul Heaton, "The Expansive Reach of Pretrial Detention," *Faculty Scholarship at Penn Law*, (February 3, 2020), https://scholarship.law.upenn.edu/faculty_scholarship/2142.

[80] James C. McKinley Jr., "Cuomo in Bid to Help Poor Proposes Ending Cash Bail for Minor Crimes," *New York Times* (New York, NY) January 2, 2018, https://www.nytimes.com/2018/01/02/nyregion/cuomo-ending-cash-bail-state-of-the-state.html; Human Rights Watch, "128 Rights Groups Urge New York Legislature to Implement Pretrial Reforms," November 7, 2019, https://www.hrw.org/news/2019/11/07/128-rights-groups-urge-new-york-legislature-implement-pretrial-reforms.

[81] Will Dobbie, Jacob Goldin, and Crystal S. Yang, "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," *American Economic Review* 108, no. 2 (2018), https://pubs.aeaweb.org/doi/pdf/10.1257/aer.20161503.

[82] Rachel Smith, "Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed," *Georgetown. Journal on Poverty Law & Policy* 25 (2017): 451, https://www.law.georgetown.edu/poverty-journal/wp-content/uploads/sites/25/2019/02/25-3-Condemned-to-Repeat-History.pdf.

[83] Paul Heaton, Sandra Mayson, and Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," *Stanford Law Review* 69, no. 3 (2017), https://www.stanfordlawreview.org/print/article/the-downstream-consequences-of-misdemeanor-pretrial-detention/.

[84] *Bail Reform Is an Opportunity for Savings in New York* (Brooklyn, NY: Vera Institute of Justice, March 2020), https://www.vera.org/downloads/publications/bail-reform-is-an-opportunity-for-savings-new-york.pdf.

[85] Paul G. Cassell and Richard Fowles, "Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois," *University of Utah College of Law Research Paper No. 349* (February 19, 2020), http://dx.doi.org/10.2139/ssrn.3541091.

year; the state is now revisiting this issue in response to these crime spikes.[86]

One solution to assist in determining the need for pretrial detention is to adopt and validate risk assessment instruments to support bail decisions. These instruments can be used to determine the likelihood that a defendant will show up for court or commit another crime if released. If validated bail risk assessment tools are effectively implemented, they can incorporate objectively the level of danger and likelihood to offend into the bail decision. These tools can also provide the judicial officer with a meaningful review of the risk of flight or clear and present dangers posed by a given defendant.

New Jersey effectively eliminated cash bail. In place of using money to determine who is released or detained, it relies on a risk assessment instrument called the public safety assessment (PSA) tool that considers nine factors from an individual's criminal history to predict their likelihood of returning to court for future hearings and remaining crime-free while on pretrial release.[87]

In the context of bail reform, where a greater number of defendants will be released without cash bail, criminal justice agencies must carefully consider violations of bail, realistic sanctions for such behaviors, the use of revocation, and other sanctions that may be effective. With more defendant's being released, there will be more opportunities for persons to reoffend. In addition, the likelihood of forfeiting bail increases when no surety is provided by the defendant. Because of these factors, judges and prosecutors should be allowed to amend release decisions, conditions, or enforce revocation.

One option for providing meaningful accountability for defendants released pre-trial absent cash bail is the use of sanctions that are "swift, certain, and fair" (SCF), following the tenets underlying Project Hope probation.[88] Like probation, pretrial release is a form of community supervision. Recognizing every form of community supervision must have sanctions for violation, *Federal Probation* argues that "swift-certain-fair (SCF) sanctioning improves on conventional practice in enforcing the conditions of community corrections both by substituting swiftness and certainty for severity and by increasing the predictability, and thus the perceived fairness, of the process from the offender's viewpoint."[89] The principles of SCF that show promise in probation programs may also be beneficial if applied to conditions of pretrial release.

10.4.1 The Department of Justice should define the minimum constitutional standards for cash bail systems based on U.S. Supreme Court and federal circuit court precedent. This definition should specify the due process and equal protection requirements.

Nearly every jurisdiction in the United States relies upon cash bail as a condition of pretrial release. Currently, the forms of issuing bail vary by state, locality, and judicial preference. DOJ guidance on minimal constitutional standards would allow states, localities, and their elected officials to better maintain a lawful system of bail and avoid costly, frivolous lawsuits. This guidance would also help address the primary concern of public safety in ensuring that habitual repeat offenders and dangerous individuals are not released.

10.4.2 Any jurisdiction that eliminates its system of cash bail should first establish an alternative protocol for thorough pre-trial processes that fully addresses public safety concerns and potential flight risks.

When making decisions regarding bail, the pretrial process completed by prosecutors and the court should

[86] Ashley Southall and Jesse McKinley, "Spike in Crime Inflames Debate over Bail Law in New York," *New York Times,* February 4, 2020, https://www.nytimes.com/2020/02/04/nyregion/crime-stats-nyc-bail-reform.html; Jamiles Larty, "New York Tried to Get Rid of Bail. Then the Backlash Came," *Politico*, April 23, 2020, https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299; Dan Frosch and Ben Chapman, "New Bail Laws Leading to Release of Dangerous Criminals, Some Prosecutors Say," *Wall Street Journal* February 10, 2020, https://www.wsj.com/articles/bail-reform-needs-reform-growing-group-of-opponents-claim-11581348077.

[87] Chloe Anderson, Cindy Redcross, and Erin Jacobs Valentine, *Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment* (Washington, DC: MDRC Center for Criminal Justice Research, November 12, 2019), 2, https://www.mdrc.org/publication/evaluation-pretrial-justice-system-reforms-use-public-safety-assessment-0.

[88] Mark A.R. Kleiman, "Swift-Certain-Fair: What Do We Know Now, and What Do We Need to Know?," *Criminology & Public Policy* 15 (2016), https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9133.12258.

[89] Mark A.R. Kleiman, Beau Kilmer, and Daniel T. Fisher, "Theory and Evidence on the Swift-Certain-Fair Approach to Enforcing Conditions of Community Supervision," *Federal. Probation* 78, no. 2 (2014), https://www.uscourts.gov/sites/default/files/78_2_8_0.pdf.

address three primary functions: the collection and analysis of defendant information for use in determining risk, recommendations to the court concerning conditions of release, and plans to supervise defendants who are released from custody during the pretrial phase. Eliminating cash bail without these mechanisms in place disregards the import roles of incentives and accountability that help make certain that the suspect appears in court while also deterring additional offending and violations of pre-trail conditions.

10.4.3 Courts and prosecutors in local jurisdictions should adopt validated pre-trial risk assessment and needs tools that determine realistic conditions of release and reflect the seriousness of offense charges.

Bail risk assessment tools predict the likelihood of a defendant appearing for court or committing additional offenses while on release. When properly validated and implemented, these tools can result in decisions that ensure due process protections while minimizing the likelihood that defendants will fail to appear. These actions should reserve the fundamental rights of defendants while serving the interest of public safety.

10.4.4 Judges, prosecutors, and pre-trial release officers should ensure that meaningful and effective sanctions for violations of pre-trial release are defined and deployed when no-cash bail laws or policies are implemented.

Eliminating cash bail removes a major incentive for defendants to appear in court, comply with conditions of release, and refrain from criminal offenses while on release. This is particularly true of habitual offenders with extensive criminal histories. Absent this incentive, a defendant who has violated bail should still be subject to a variety of sanctions, including revocation of release and orders of detention and prosecution for contempt of court. Enforcing commensurate sanctions for violation of no-cash bail can help ensure that defendants appear in court, comply with conditions, and do not engage in criminal offenses while on release.

10.4.5 The Department of Justice should provide funding to research the nature and length of time of defendants who are held in jails to accurately determine the seriousness of their charge and how much of a danger they pose to the community and to determine how often new offenses are committed by offenders who are out on bail.

Advocates of bail reform often assert that the majority of offenders being held in jail on cash bonds are being held for low-level offenses and that many of them are first-time arrestees.[90] Determining the true nature of pretrial jail detainee populations can help the criminal justice system more accurately determine the severity of the problem at the local level. Such research can also help determine whether it is a systematic nationwide problem or isolated to certain jurisdictions. To maintain objectivity, funding should be made available to local jail jurisdictions that commit to working in partnership with an independent research organization.

In the current climate of bail reform, more offenders are likely to be released than would have been in years past. This situation carries the potential to release defendants with a high risk of re-offending. Additional research would allow local jurisdictions to assess the potential tradeoffs of bail reform and make any necessary legal and policy adjustments. This research should include an assessment of the types and severity of criminal conduct, unlawful contacts with victims or witnesses, and how much of a danger the offender poses to the community and funding should be made available to local jail jurisdictions that commit to working in partnership with an independent research organization.

<u>Contraband Cell Phone Use in Prison</u>

Cell phones are considered contraband in federal and state prisons. It is illegal for an inmate to possess a cell phone or use cell phone signals. According to Commissioner Frederick Dunn of the Alabama Department of Corrections, 10,988 contraband cell phones were confiscated in Alabama's prisons between 2017 and 2019.[91]

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[90] John Mathews II and Felipe Curiel, "Criminal Justice Debt Problems." American Bar Association, November 2019 (Vol. 44, No. 3: Economic Justice), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/

[91] Arnaldo Mercado, "Contraband Cellphones and Related Investigations," *Memorandum from Alabama Department of Corrections*, January 17, 2020.

Contraband cell phones are smuggled into prison by such means as brought in by corrupt staff, smuggled in by visitors, dropped in prison yards, and thrown over fences.

Inmates use phones to commit fraud on businesses and individuals; engage in drug trafficking and other criminal enterprises; organize retribution on prison staff, government officials, victims, or other inmates; and instigate and coordinate inmate disturbances. Cell phones play a central role in contributing to staff corruption, as staff may participate in smuggling or directly communicate and transfer funds with inmates.

Most egregiously, contraband cell phones have been used to carryout completed and attempted homicides, both inside and outside prisons. Bryan Stirling, Director of the South Carolina Department of Corrections, relayed the story of Captain Robert Johnson who, after having confiscated a cell phone at Lee Correctional, was "targeted and shot in his house five or six times point blank because he was doing his job at Lee Correctional to find contraband cell phones."[92] Director Stirling said, "It was such a sophisticated plot to kill him that they used a .38, so there would be no shell casings left. What folks need to know on this call and in public is that inmates are physically taken out of society by going to prison; however, they are virtually out there amongst us still committing crimes."[93] Captain Johnson survived the shooting.

Federal prisons have implemented a series of technologies and interdiction strategies to address the problem of contraband phones, including whole-body imaging devices, sophisticated walk-through metal detectors, thermal fencing, K-9 units, and fixed sensor and handheld radio frequency detection that can identify cell signals. Technical solutions designed to disable contraband cell phones in prison and jails show promise, including managed access systems (MAS) and micro-jamming. MAS allows calls from approved phone numbers but blocks unapproved numbers. Micro-jamming disrupts phone signals within a precise area.

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Federal Trade Commission Action on Contraband Cell Phones

While micro-jamming is a viable technology solution, only federal prison facilities permit it. The prohibition against state prison use of micro-jamming stems from the Federal Communications Act of 1934, which states, "No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this Act or operated by the United States Government."[94]

The Federal Communications Commission convened a diverse group of stakeholders, who released the *Contraband Phone Task Force Status Report* in April 2019.[95] Both MAS and cell phone jamming were addressed, but no conclusions were made about technical viability or their legal status.

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Positive Cell Phone Jamming Tests in Federal and State Prisons

With the assistance of a grant from NIJ, the Cumberland Federal Correction Institute (FCI) in Maryland conducted a pilot test of cell phone jamming. A DOJ press release reported, "Data from the test show that the micro-jammer's signal disrupted commercial wireless signals inside the prison cell, which meant that if

[92] *President's Commission on Law Enforcement and the Administration of Justice: Reduction of Crime, Domestic Violence and Sexual Assault, Technology Issues Encountered by Law Enforcement, Leveraging Technology to Reduce Crime* (April 15, 2020) (statement of Bryan Stirling, Director of the South Carolina Department of Corrections), https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings.
[93] Partridge, *President's Commission on Law*, April 16, 2020.
[94] 47 U.S. Code § 333. Willful or Malicious Interference, (1934), https://www.govinfo.gov/content/pkg/USCODE-2011-title47/pdf/USCODE-2011-title47-chap5-subchapIII-partI-sec333.pdf.
[95] Cellular Telecommunications Industry Association (CTIA) and Association of State Correctional Administrators (ASCA), *Contraband Phone Task Force Status Report*, (Iona, ID: ASCA, April 26, 2019), https://api.ctia.org/wp-content/uploads/2019/04/Contraband-Phone-Task-Force-Status-Report-Combined.pdf.

cellphones were operating inside the cell, they would have been rendered inoperable. At 20 ft. and 100 ft. outside the cell, however, the micro-jammer signals did not disrupt the commercial wireless signals."[96]

In collaboration with the Federal Bureau of Prisons, the Broad River Correctional Institution in Columbia, South Carolina, tested jammer technology. Director Stirling states, "We did observe cell signals inside the housing unit were blocked, text messages, data connections, everything, but calls outside the one-foot perimeter of the exterior of the inmate housing unit could be made. So these are promising test results."[97]

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10.4.6 The Department of Justice should determine the feasibility of enacting federal legislation or an executive order that would allow state prison systems to use cell phone jamming equipment in facilities.

Current regulations under the Federal Communications Act of 1934 have been interpreted as prohibiting state prisons from deploying cell phone jamming equipment in their facilities, but the legal interpretation is open to question regarding jamming in federal prisons compared to state prisons.

10.4.7 The Department of Justice should fund appropriate data collection and research efforts to better clarify how contraband cell phones are being brought to prison, what types of sanctions are being deployed, and the impacts that contraband cell phone usage has on prison security and public safety.

Many states have provided accounts of how cell phones are smuggled into prison, the sanctions the states use, and the effects cell phones have on the safety of the institution, inmates, staff, and the public at large. However, the scope of the problem is difficult to quantify because confiscation data only tell a partial story.[98] Funding a thorough, standardized, and nationally representative collection of data would help inform policy and guide realistic and effective interventions. Funding should also support training and technical assistance to prison and jail staff to help them better understand, document, and respond to the ongoing problem.

10.5 Overarching Issue

Background

Collaboration involves criminal justice components working together toward a common purpose through sharing a vision, preparing a plan, and implementing the plan to achieve coordinated and common outcomes.[99] Cross-agency collaboration may take many forms, including human collaboration through criminal justice coordination councils or through data-sharing efforts centered on information technology integration. Many of these efforts are underway that affect and rely on all components of the criminal justice system, including law enforcement, prosecution, defense, courts, and corrections agencies and personnel.

Current State of the Issue

Justice information sharing initiatives are common across the thousands of law enforcement, prosecutorial, defense, court, and correctional agencies that comprise the criminal justice system. Data-sharing initiatives streamline processes for agencies and promote efficient processing and operation within local jurisdictions.

The commission identified three overarching issues that will enhance communication and information sharing across the criminal justice system: encouraging the formation of criminal justice coordinating councils (CJCCs), enhancing the effective sharing and management of digital media evidence from body-worn cameras

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[96] Office of Public Affairs, "Prison Test Shows Micro-Jamming May Counter Criminal Threat of Contraband Cell Phones," U.S. Department of Justice, July 15, 2018, https://www.justice.gov/opa/pr/prison-test-shows-micro-jamming-may-counter-criminal-threat-contraband-cell-phones.

[97] Stirling, *President's Commission on Law*, April 15, 2020.

[98] Eric Grommon, Jeremy Carter, and Charles Scheer, "Quantifying the Size of the Contraband Cell Phone Problem: Insights from a Large Rural State Penitentiary," *The Prison Journal* 98, no. 5 (2018).

[99] M. Elaine Borakove et al., *From Silo to Co-System: What Makes a Criminal Justice System Operate Like a System?* (Arlington, VA: The Justice Management Institute, April 30, 2015), 3, http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/07/From-Silo-to-System-30-APR-2015_FINAL.pdf.

and other sources, and promoting ongoing efforts to achieve true criminal justice data integration.

Criminal Justice Coordinating Councils

In many jurisdictions, criminal justice agencies operate in silos, making communication and collaboration difficult to initiate and maintain. One method to address this is creating a CJCC to support regular collaborative and strategic planning and information sharing. According to the National Network of Criminal Justice Coordinating Councils (NNCJCC), CJCCs emerged in the 1970s, and are "[bodies] of elected and senior justice system leaders that convene on a regular basis to coordinate systemic responses to justice problems".[100]

CJCCs often use a data-guided and structured planning processes to identify, analyze, and either solve or manage issues that have a system-wide impact. CJCCs focus on criminal justice intersection issues designed to coordinate the delivery of services among agencies and maximize the effective deployment of resources. Particular projects or priorities CJCCs have addressed include dealing with resource reductions, improving case processing inefficiencies, improving case outcomes, and developing strategies for challenging client populations (e.g., those with substance use disorders, mental illness disorders, or who are homeless).

Each CJCC has its own unique structure, focuses on different projects and challenges, and may operate with different levels of formality. Common elements include committing to improve the local criminal justice system, maintaining regular committed membership, and meeting regularly. NCJCC promotes development of CJCCs and supports both general and network membership. Higher-level network membership is criteria-based to ensure CJCCs receiving support have well-defined missions, a commitment to these missions, and devoted personnel and other resources to maintain them. Currently, NNCJCC supports 30 network member councils that represent a diverse cross-section of the country.

CJCCs can coordinate and improve the operation of local law enforcement. The recent report by the District of Columbia's CJCC illustrates the scope and reach of the CJCC in the nation's capital:

> CJCC provides a forum for effective collaboration and problem-solving among the District's criminal and juvenile justice system agencies including, but not limited to, combating violent crime, juvenile justice, substance abuse and mental health, and reentry. CJCC operates and maintains the Justice Information System (JUSTIS) to enable local and federal criminal justice agencies in the District to share information efficiently and in a timely manner. CJCC also conducts research and analysis to inform agencies about the level of activity at each stage of the District's criminal justice system, monitors and evaluates the impact of collaborative solutions, and identifies promising practices in criminal and juvenile justice.[101]

10.5.1 Local governments should develop or contribute to county or regional criminal justice coordinating councils.

CCJCs can provide an effective means of coordination among criminal justice agencies, elected officials, and public safety agencies operating locally and regionally. When carefully planned, implemented, staffed, and funded, CCJCs can be a solution to criminal justice agency silos that continue to exist in many jurisdictions.

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[100] Aimee Wickman and Nastassia Walsh, "Staffing a Criminal Justice Coordinating Council (CJCC)," last modified October 7, 2015. https://www.naco.org/blog/staffing-criminal-justice-coordinating-council-cjcc

[101] Aimee Wickman and Nastassia Walsh, "Staffing a Criminal Justice Coordinating Council (CJCC)," last modified October 7, 2015. https://www.naco.org/blog/staffing-criminal-justice-coordinating-council-cjcc