Chapter 6. Criminal Justice System Personnel Intersection

No element of our criminal justice system, historically and currently, has been as successful at protecting the public as law enforcement. . But effective law enforcement necessarily depends on the success of all aspects of the criminal justice system. When the other elements of the system fail to provide support for the police in protecting public safety that is a problem. When prosecutors fail to pursue just punishments for criminal offenders, or when courts fail to adequately punish offenders for their crimes, the work of law enforcement then is undermined.

Law enforcement initiates the legal process through investigations and arrests, but it operates predominantly in the earliest phase of a sequential legal process that must be borne out by the rest of the criminal justice system in order to prevent crime and vindicate victims. Every part of that system—prosecutors, defense attorneys, courts, and correctional personnel—must carry out its dedicated function in order to effectuate the rule of law.

The federal government establishes and develops national policies and initiatives that help standardize and unify the administration of justice, and is responsible for ensuring that an individual's rights are not violated by criminal justice system personnel. Further, federal grant funding can play a role in shaping criminal justice practices at the state and local level, while also tracking key outcomes using evidence-based practices and evaluations.

In studying how other aspects of the criminal justice system can best work to achieve justice and assist victims, 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

While law enforcement personnel frequently interact with many other criminal justice components, peace officers collaborate rather often with prosecutors, sharing investigative information as prosecutorial decisions are assessed and cases move forward. The relationship between police and prosecutors is also valuable in assuring that law enforcement practices and procedures meet constitutional standards.

10.1.2 Local prosecutor's offices, where practical, should arrange for 24/7 access to prosecutors who can provide law enforcement officers real-time assistance to address issues relating to search and seizure and serving warrants. In rural areas, regional partnerships could be a practical solution to overcome personnel shortages and geographic limitations.

Sometimes officers 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. Quite often these situations occur outside of normal business hours. While some prosecutors' offices assign personnel to be on-call for these circumstances, many do not.[1] 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 that their investigative actions are prudent and lawful, which would decrease the likelihood that law enforcement actions will be overturned later in the criminal justice process. Such a system would also provide timely assistance and coordination for investigators working complex investigations to build evidence for a viable criminal case.

[1] 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.

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.

10.1.3 States should consider permitting discretionary summonses by law enforcement officers

Law enforcement officers have considerable discretion when deciding whether to make an arrest, based on various factors. Historically, the authority to issue a summons—ordering the subject to appear in court on a certain date or upon subsequent notice—has been limited to judges. Now, in a growing number of states, officers can 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. This process provides an option other than doing nothing or making an arrest, and it can help the officer prioritize more urgent matters, thereby relieving potential burdens on the court.

Properly implemented, a discretionary summons for misdemeanors and low-level offenses strengthens rather than diminishes the authority of law enforcement. Officers and deputies would still retain the discretion to make an arrest instead of issuing a summons. More importantly, the strict dichotomy of "arrest or nothing" has led to a disregard of low level crimes to the detriment of the rule of law. The choice between enforcing all laws and undermining the legitimacy of law enforcement should not be binary.

In Virginia, officers may exercise discretion in issuing a summons. However, Virginia Code § 46.2-940 (2020) requires an officer to make an arrest when the person is believed to have committed a felony. In addition, the law stipulates that 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."[2]

While the use of discretionary summonses can have strategic benefits generally, in response to COVID-19, some law enforcement agencies have opted to limit arrests, either by taking advantage of current laws or by issuing new administrative edicts. Law enforcement agencies in Nevada County, California., have increased the frequency of officers issuing summonses, and[3] in March 2020, law enforcement officers in Tucson, Arizona, used "cite and release" for non-violent crimes as frequently as possible to reduce the spread of COVID-19, and only serve misdemeanor warrants that were necessary for public safety reasons (e.g., domestic abuse).[4]

10.2 Prosecution and Defense

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

> seek 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.[5]

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[2] Va. Code Ann. § 46.2-940 (2020), https://law.lis.virginia.gov/vacode/title46.2/chapter8/section46.2-940/.
[3] Liz Keller, "Cite and Release, Not Jail, for Some over COVID-19 Concerns," *The Union* (Nevada County, CA), March 18, 2020, https://www.theunion.com/news/cite-and-release-not-jail-for-some-over-covid-19-concerns/.
[4] "Tucson officers citing minor offenders instead of taking them to jail to reduce coronavirus risk," Stephanie Casanova, Arizona Daily Star, March 27, 2020. https://tucson.com/news/local/tucson-officers-citing-minor-offenders-instead-of-taking-them-to-jail-to-reduce-coronavirus-risk/article_7c4ddcdf-b552-5246-8bee-ff294068d461.html.
[5] "Criminal Justice Standards for the Prosecution Function," American Bar Association, 2017, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

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."[6]

While these formal roles depict how opposing counsel are intended to operate, prosecutors and defense attorneys often find themselves in situations where they cooperate with one another, including cases where a plea bargain may be considered, and deciding when to consider defendants for treatment courts rather than traditional criminal courts.

Felony thresholds refer to the classification of theft crimes as either felonies or misdemeanors based on the monetary value of the stolen good(s). Felony thresholds in 2018 ranged from a low of $200 in Massachusetts to a high of $2,250 in Texas and Wisconsin; some states have not updated their felony thresholds since 2000 or earlier. [7] The failure of state legislatures to regularly update the felony theft threshold results in a large pool of offenders facing their first felony charge. The lower thresholds also put a strain on limited prosecutorial resources and contribute to a sense of unfairness and illegitimacy in the criminal justice system. Felony thresholds adjusted for inflation using the Consumer Price Index ensures that theft classifications and sanctions are commensurate with the real value of the property stolen. This approach also reduces the number of individuals who, while still being held accountable, are not confronting a felony charge and the associated collateral and myriad consequences of a felony conviction.

Regarding the intersection of criminal justice agencies, the commission focused on a few key concerns: the need for increased transparency in the plea bargaining process; the collaboration of federal and state prosecutors relevant to particularly serious/violent offenders; and the role of the prosecutor in addressing police use-of-force incidents that result in death or serious bodily injury.

10.2.1 States should establish procedures that fosters transparency, victim input, and judicial oversight over guilty plea resolutions to ensure plea agreements serve justice.

The Constitution guarantees certain rights to criminal defendants, including the rights to due process, a public trial without unnecessary delay, to counsel, an impartial jury, knowing the nature of the charges and evidence against the defendant, and confronting witnesses. In many jurisdictions, criminal court dockets are crowded, and prosecutors, defense counsel, and judges may feel pressured to move cases through the system. Subsequently, some experts estimate that approximately 90 to 95 percent of the criminal cases in state and federal court are resolved through plea agreements,[8] which have become a necessary function in our criminal justice system. However, putting key elements of plea bargain on the record not only increases transparency, but also allows for review.[9]

Additionally, more transparency and accountability with the practice of plea bargaining could boost confidence in the criminal justice system, especially among those directly involved in the case. When defendants plea to charges and receive sentences for crimes that are far less serious than represented in the

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[6] "Criminal Justice Standards for the Defense Function," American Bar Association, 2017, https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

[7] 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.[8] "Plea and Charge Bargaining," Bureau of Justice Assistance, January 2011. https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf

[8] "Plea and Charge Bargaining," Bureau of Justice Assistance, January 2011. https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf

[9] 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; and 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.

indictment, law enforcement officers and victims may become demoralized, and police may conclude that their efforts at securing a lawful arrest do not matter, eventually eroding the incentive to make future arrests.[10]

Despite the necessity to settle some cases through plea bargaining, stakeholders have expressed concerns, which has led to the federal government and several states establishing rules or enacting legislation to encourage a level of accountability with plea bargains.

Plea negotiations are akin to settlement discussions and should remain confidential. The bargaining process itself, and the respective give-and-take between prosecutor and defense attorney, should remain insulated from oversight and disclosure. However, this does not mean that prosecutors should not communicate with victims or law enforcement officers as to formal plea offers to notify or consult them regarding a potential disposition of a case. It also does not mean that judges should have no oversight over a criminal judgment simply because it is entered by way of a plea agreement.

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).[11] In Illinois, the state supreme court's rules on waivers and pleas specify numerous conditions, including articulating the conditions in which a judge may participate in plea negotiations, exercise oversight, and approve the plea bargain.[12]

Further, legislation from Maine states, "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]."[13] Likewise, over the past 30 or so years, many states have enacted victims' rights laws to assure their involvement at various phases of the criminal justice proceedings – particularly with plea bargains.[14]

10.2.2 U.S. attorneys' offices should develop regular systems of collaboration with state prosecutors for serious crimes that are eligible for prosecution in either the state or federal jurisdiction.

Some crimes violate both state and federal law, empowering either or both levels of governments to bring criminal charges. Once a federal nexus is established for a serious offense, the state prosecutor and the U.S. attorney's representative should discuss the optimal prosecution strategies. These partnerships are sometimes called "adoptive case mechanisms."

By continually collaborating on current investigations, federal and local law enforcement and prosecutors can offer input and ensure procedures and evidence-gathering practices receive priority attention. Further, state prosecutors should consider the benefits of adopting vertical prosecution strategies (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 for each stage). U.S. attorneys' offices typically follow vertical prosecution strategies.

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[10] 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.

[11] Pleas, Fed. R. Crim. P. 11(b)(1) (2014), https://www.uscourts.gov/sites/default/files/federal_rules/FRCrP12.1.2014.pdf; and 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.

[12] Waivers and Pleas, Illinois Supreme Court art. IV, part A (1984), http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_IV/ArtIV.htm.

[13] Negotiated Pleas, Maine 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.

[14] "Victim Input Into Plea Agreements," DOJ OVC, November 2002. https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/ncj189188.pdf

As a practical matter, the decision on where to prosecute, either in federal or state court, usually boils down to where the case would best be handled. Often, a deciding factor is the severity of sentencing in the respective courts for the applicable charge(s). Other factors may include the resources available or policies of the local state attorney's office. For serious offenses—particularly those involving gangs, habitual violent offenders, drugs, or human trafficking—the attorneys would obviously consider public safety and maximum sanctions.

Sentences in the federal system are typically longer than those set by state courts, and cases are often pursued through federal courts to maximize the sanction and while incarcerated in a federal facility, remove the ability of the offender to continue contact with criminal associates. Many DOJ-supported initiatives encourage ongoing collaboration between U.S. attorney's offices and state prosecutors, including ATF Crime Gun Intelligence Centers, Human Trafficking Task Forces, Project Guardian, and Project Safe Neighborhoods.[15] The Prosecutor-to-Prosecutor Program (P3), which DOJ has identified as a "best practice" under PSN, was launched in north Alabama by former U.S. Attorney Jay E. Town. [16] This partnership with state prosecutors offers a structured process by which these officials jointly decide the best jurisdiction for prosecution.

10.2.3 States should develop specific and special protocols for investigating and prosecuting police use-of-force incidents resulting in death or serious bodily injury.

Past and present, occasions in which law enforcement officers use force that results in death or serious bodily injury have attracted enormous notoriety, attention, and concern from communities. While rare, an unjustified and unlawful shooting by a law enforcement officer constitutes, among other offenses, an extraordinary abuse of authority and jeopardizes social trust in that authority to uphold the rule of law. Both recently and in the distant past, officer shootings—justified or not—have often spurred substantial outrage in the community and civil unrest. This civil unrest often brings a disrespect for law enforcement that all too often devolves into a disregard for the legal order itself.

Under such circumstances, an officer involved shooting and lethal use of force demand special procedures for jurisdictions to reassure the community that it is the legal system, not the public furor against it that will deliver justice. In implementing these procedures, jurisdictions should not sacrifice justice to quell social unrest, and should take care to preserve both impartiality and the due process owed to the law enforcement officer involved.

These procedures require defined standards and full transparency,[17] and jurisdictions should have a plan in place before such an event occurs.

Impartiality, both in appearance and in fact, is essential. It should not be presumed that a local prosecutor's office or law enforcement agency has a per se conflict of interest, and cannot impartially administer an investigation and prosecution of the incident. Nevertheless, in the event of any use-of-force case that involves death or serious bodily injury, law enforcement agencies may consider transferring the investigation to an independent law enforcement entity (see recommendation 7.4.4, Rule of Law Chapter). Prosecutors should also consider a similar transfer to an independent agency when a real or perceived conflict of interest exists between the prosecutor's office and an individual officer or agency that is the subject of an

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

[16] U.S Attorney's Office, Northern District of Alabama, "U.S. Attorney Presents Program to Streamline Decision on State or Federal Prosecution," U.S. Department Justice, January 18, 2018, https://www.justice.gov/usao-ndal/pr/us-attorney-presents-program-streamline-decision-state-or-federal-prosecution.

[17] Shelley S. Hyland, Lynn Langton, and Elizabeth Davis, *Police Use of Nonfatal Force, 2002–11* (Washington, DC: Bureau of Justice Statistics, 2015), https://www.bjs.gov/content/pub/pdf/punf0211.pdf.

investigation. In all of these situations, the independent body should be responsible for any investigation, charging decisions, and trial activities.

[CROSS REFERENCE RESPECT FOR LAW ENFORCEMENT/RULE OF LAW]

[BEGIN TEXT BOX]

Connecticut enacted a law in 2012 that requires the Division of Criminal Justice to investigate all police-involved deaths. It also allows the state's chief attorney to appoint a special independent prosecutor when deemed necessary.[18] That independent prosecutor is empowered to act in lieu of the state's attorney in the county where the incident occurred.

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]

In sensitive, high-profile cases, an independent prosecutor is often better situated to achieve transparency and accountability. This independent prosecutor can optimize trust and integrity by establishing standardized approaches to ensure investigations are thorough and fair.

There are multiple solutions to achieve prosecutorial independence while investigating these complex, high-profile incidents. All local prosecutors should follow the laws, policies, and legal precedents of their respective states. States should also adjust their approaches to align with local considerations (e.g., municipal statutes or civilian oversight bodies). In general, reassigning the case to an independent prosecutorial entity should be discretionary rather than mandatory, and should also consider that a reassignment may validate an inference of a conflict of interest where none existed.

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 in office 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.

As an example, the prosecutor in Clark County, Washington, used a "transfer to another jurisdiction" approach following an officer-involved shooting.[19] Clark County Prosecuting Attorney Tony Golik transferred the investigation to nearby Thurston County. He describes his rationale:

[18] Representation of the State by Chief State's Attorney, Connecticut Gen. Stat. § 51-277 (2012), https://law.justia.com/codes/connecticut/2012/title-51/chapter-886/section-51-277/

[19] Ken Vance, "Clark County Prosecutor Explains His Decision to Send Officer-Involved Shooting Investigation Review to Thurston County," June 19, 2020, https://www.clarkcountytoday.com/news/clark-county-prosecutor-explains-his-decision-to-send-officer-involved-shooting-investigation-review-to-thurston-county/.

> 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.[20]

Another possible solution involves the transfer of cases to a local or regional body that assumes responsibility for independent investigation and prosecution. In August 2019, *t*he 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 district attorneys in the area. Former U.S. Attorney Jay Town described ISRAC as "an effort between the U.S. 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)."[21]

While ISRAC is an advisory council, rather than an investigative authority, it provides a model framework. As a standing advisory council, the ISRAC can be activated only when needed to provide a review and recommendations to the prosecuting authority.[22] Because of many variables, local prosecutors should have clear protocols on how they will investigate and prosecute incidents involving use of force.

The National District Attorneys Association has developed guidelines, which are explained by Maricopa County (Ariz.) County Attorney Bill Montgomery: Out of a growing sense of responsibility following 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."[23] 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."[24]

The following elements are considered essential:

- Every prosecution agency should have a properly trained attorney to serve as a law enforcement liaison to coordinate with 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 employee(s), the victim's representative, and the public.[25]

Having established protocols in place can bring order and predictability to chaotic and volatile situations and create a system of checks and balances.

[CROSS REFERENCE RESPECT FOR LAW ENFORCEMENT]

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[20] Vance, "Clark County Prosecutor Explains."
[21] U.S. Attorney's Office, Northern District of Alabama, "United States Attorney Jay E. Town Announces the Formation of the Independent Shooting Review Advisory Council," U.S. Department of Justice, November 21, 2019. https://www.justice.gov/usao-ndal/pr/united-states-attorney-jay-e-town-announces-formation-independent-shooting-review.
[22] U.S. Attorney's Office, Northern District of Alabama, "United States Attorney Jay E. Town."
[23] Bill Montgomery, "The Time to Prepare for a Police Shooting Is Before It Happens," Route Fifty, September 6, 2017. https://www.routefifty.com/public-safety/2017/09/prepare-police-use-of-force-beforehand-protocol/140783/.
[24] Montgomery, "The Time to Prepare."
[25] Montgomery, "The Time to Prepare."

Subsequently, prosecutors' offices should take steps to inform the public of prosecutorial standards and protocols that apply to use-of-force incidents. These standards and transfer protocols should be written in language that is easily understood and shared proactively using media and other information platforms. The National District Attorney's Association provides general guidance, applicable to the rules of ethical conduct, regarding prosecutors' interaction with the news media, which indicates that "information may be released by the prosecution if such release will aid the law enforcement process, promote public safety, dispel widespread concern or unrest, or promote confidence in the criminal justice system. The prosecutor should refrain from making extrajudicial comments before or during trial that promote no legitimate law enforcement purpose…"[26]

[CROSS REFERENCE RESPECT FOR LAW ENFORCEMENT]

10.3 Courts

Under our 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 often undertake.

For example, in drug courts, the judge largely leads the "drug court team," rather than acting as a neutral arbiter.[27] Besides the judge, the team consists of prosecutors, defense attorneys, and treatment providers who all 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.

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

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

Treatment courts refer to a general class of courts that emphasize 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 the goals of reducing drug dependence and criminal behavior, and improving the quality of life for offenders and their families.[28] 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.[29]

The popularity and success of drug courts spurred the development of other treatment courts, also referred to as specialty or problem-solving courts, with the most common additional types being, veterans, mental health, and homelessness courts.

Eligibility criteria for entering a drug court program are determined by certain factors including offense type, criminal history, and substance use history. Typically, drug court programs do not allow violent offenders to

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[26] National Prosecution Standards, 3rd Edition, National District Attorneys Association, Pg 48. https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf.

[27] 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.

[28] 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.

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

participate. Early drug courts were designed to serve first-time offenders,[30] but over the years, they have evolved to also target serious and high-risk offenders to make more efficient use of resources.

[CROSS REFERENCE SOCIAL PROBLEMS]

Training is critical for any new treatment court, to disseminate crucial information and help 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 creating a more collaborative and proactive approach to the participants' outcomes. However, some treatment court judges may not be accessing available training options that include the role of the judge, what works, key components of drug courts, and how to manage co-occurring disorders.[31]

Several states, including Illinois, Massachusetts, New Mexico, and Utah, require drug court certification.[32] According to the Administrative Office of Illinois Courts, under the auspices of the Illinois Supreme Court, "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."[33]

Developing a certification procedure or track that treatment court judges could pursue stresses the importance role treatment courts play.

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 on problem-solving courts 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 their goals. For instance, graduates have lower rates of recidivism and substance use, and treatment is more cost effective than incarceration.[34]

Conversely, far less research has been conducted on other types of treatment courts; therefore, it would be ideal to identify the impacts of these other problem-solving courts, determine what elements of their treatment programs leads to success, and develop best practices and evidence-based standards.[35]

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 some treatment court standards and guidance

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[30] W. Clinton Terry III, ed., *The Early Drug Courts: Case Studies in Judicial Innovation* (Thousand Oaks, CA: Sage Publications, 1999).
[31] Carolyn Hardin, Chief of Training and Research, National Association of Drug Court Professionals, Alexandria, VA, email communication with John Markovic, Federal Program Manager, Criminal Justice System Personnel Intersection Working Group, April 21, 2020.
[32] Michael J. Tardy, *Problem-Solving Courts Certification Process and Application* (Springfield, IL: Administrative Office of the Illinois Courts, updated 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; "Problem Solving Courts," New Mexico Courts, accessed June 5, 2020, https://pscourts.nmcourts.gov/nm-drug-court-certification.aspx; and "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.
[33] Tardy, *Problem-Solving Courts Certification*.
[34] "Adult Drug Court Research to Practice (R2P) Initiative," National Institute of Justice, April 1, 2019, https://nij.ojp.gov/topics/articles/adult-drug-court-research-practice-r2p-initiative.
[35] "The Efficacy of Drug Courts," Evidence-based Professionals Society, accessed June 15, 2020, https://www.ebpsociety.org/blog/education/271-efficacy-drug-courts.

address this reality, additional protocols, best practices, and research addressing co-occurring disorders would benefit the treatment court community, its practitioners, and its participants.

The underlying problems addressed within different treatment courts are often co-occurring.[36] A veteran arrested and eligible for diversion 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 referred to the treatment court that best suits their needs.

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 consider factors that vary at the local level, such as population density or volume of criminal caseload.

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, 372 U.S. 335 (1968), the right to counsel has been extended to all criminal prosecutions that carry a sentence of imprisonment.[37]

Under the federal system, there are three basic forms of indigent defense:

- public defender organizations, which are federal entities whose staff are federal employees.
- community defender organizations, which are nonprofit defense counsel organizations incorporated under state laws; these attorneys operate in federal districts through federal grants.[38]
- panel attorneys, who are private lawyers paid at an hourly rate to serve as indigent defense for federal defendants.[39]

Within 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.[40]

A 2016 report by the Bureau of Justice Statistics found that approximately 66 percent of felony defendants in federal court, and 82 percent of felony defendants in large state courts were represented by indigent defense.[41] The different forms of indigent defense systems could be strengthened and adapted to local needs with appropriate research.

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

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[36] 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; James 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; Jane Topolovec-Vranic et al., “The High Burden of Traumatic Brain Injury and Comorbidities Amongst Homeless Adults With Mental Illness,” *Journal of Psychiatric Research* 87 (2017), https://doi.org/10.1016/j.jpsychires.2016.12.004; and 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, Marjorie Rock, and Lawrence K.W. Berg (New York: Springer Publishing, 2002).

[37] Gideon v. Wainwright, 372 U.S. 335 (1968). Other landmark decisions include Argersinger v. Hamlin, 407 U.S. 25 (1972), in which the Supreme Court extended Gideon v. Wainwright to include lesser offenses that carried a possible sentence of incarceration, and In re Gault, 387 U.S. 1 (1967), which extended the right to counsel to include all juveniles involved in delinquency proceedings that face possible incarceration.

[38] Criminal Justice Act, 18 U.S.C. § 3006A (1986), https://www.govinfo.gov/app/details/USCODE-2011-title18/USCODE-2011-title18-partII-chap201-sec3006A.

[39] “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: U.S. Courts, 2020), 2, https://www.uscourts.gov/sites/default/files/vol07a-ch02.pdf.

[40] Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (Washington, DC: Bureau of Justice Statistics, 2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf.

[41] Suzanne M. Strong, *State-Administered Indigent Defense Systems, 2013* (Washington, DC: Bureau of Justice Statistics, revised 2017), https://www.bjs.gov/content/pub/pdf/saids13.pdf.

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."[42]

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

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 jurisdictions that have adopted a holistic defense approach have realized improved outcomes and efficiencies.

One innovation in indigent defense that emerged in the 1990s is the adoption of a holistic model, which stresses extending services beyond only providing representation for criminal charges.[43] A core feature of the model is that public defenders collaborate with social workers to provide referrals and address underlying factors such as poverty, mental illness, unemployment, homelessness, and substance use disorder that may contribute to the client's criminal behavior and may keep them cycling though the criminal justice system. This approach, described as client-centered, differs fundamentally from the traditional model of public defense.[44]

The Knox County Public Defender's Community Law Office in Tennessee is an example of a client-centered, holistic defense approach that began in 2013. 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, [who] 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. However, most don't know what to do or how to bring about change. And that's where the public defender can come in.[45]

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 different indigent defense providers: 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

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[42] Burkhart, email communication with Criminal Justice System, March 27, 2020.

[43] Robin Steinberg, "Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm," *Washington and Lee Law Review* 70, no. 2 (2013), https://heinonline.org/HOL/Page?handle=hein.journals/waslee70&div=24&g_sent=1&casa_token=&collection=journals.

[44] 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.

[45] *President's Commission on Law Enforcement and the Administration of Justice: Hearing on the Role of Public Defender* (June 2, 2020) (statement of Mark Stephens, Public Defender (former), Knox County, TN), https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings.

million criminal court cases, several encouraging findings resulted. Based on 10 years of data, researchers found the holistic defense approach reduced the likelihood of a custodial sentence by 16 percent and sentence length by 24 percent without affecting conviction rates."[46]

10.3.6 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.

The COVID-19 pandemic hastened the adoption of videoconferencing in many federal, state, and local courts, resulting in questions about how a jurisdiction can best leverage videoconferencing. 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 $4million in emergency grant funding across the state to allow courts to purchase videoconferencing technology for arraignments and other needs.[47] On March 30, 2020, the U.S. Courts website approved the use of video and teleconferencing for certain criminal proceedings.[48]

In November 2018, the National Institute of Justice convened a panel of subject matter experts for a Court Appearances through Telepresence Advisory Workshop. The final report identified numerous advantages of videoconferencing in criminal proceedings, including increased safety for court personnel, reductions in costs, and enhanced court efficiency.[49] 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 assert that teleconferencing could increase access to expert witnesses and other witnesses who might be 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]

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. Teleconferencing could also adversely affect the attorney-client relationship and ability to have private communications.[50]

While conducting courtroom proceedings by videoconferencing has existed since at least 1998, the COVID-19 crisis has accelerated the adoption of this technology and expanded it greatly. Increasing the capacity to effectively carry out videoconferencing and advancing virtual courts could prove useful to jurisdictions of all sizes – whether during a crisis or not.

10.3.7 State and local jurisdictions should amend laws or administrative rules to allow videoconferencing.

As noted, teleconferencing or videoconferencing in court proceedings has substantially increased during the COVID-19 pandemic. Any state or local rules originally written limiting its use should be revised to ensure

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[46] James M. Anderson, Maya Buenaventura, and Paul Heaton, "The Effects of Holistic Defense on Criminal Justice Outcomes," *Harvard Law Review* 132 (2018).
[47] 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.
[48] "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.
[49] 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.
[50] Gourdet et al., *Court Appearances in Criminal.*

improved access to courts. If statutory limits exist, lawmakers may wish to consider eliminating those barriers.

10.4 Detention and Corrections

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.

The primary justification for pretrial 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 when certain public safety factors exist[51] the perception of the danger a defendant poses to victims, witnesses, or the general public; likelihood of flight risk; or probability to engage in criminal behavior while on release.

The commission identified the following recommendations related to detention and corrections, which will have an impact on the wider criminal justice system: responding to bail reform initiatives, and addressing the existence of contraband cell phones in prison.

10.4.1 Any jurisdiction planning to eliminate its system of cash bail should first establish a comprehensive pretrial release program that addresses public safety concerns – particularly for victims and witnesses – and potential flight risk. Such programs should use a validated risk assessment tool that sets realistic conditions of release reflecting the seriousness of the charged offense(s) and should ensure that meaningful and effective sanctions for violations of pre-trial release are defined and enforced.

Bail refers to pretrial restrictions imposed on a person charged with a criminal offense 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 court appearance. Under this system, defendants who post 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.[52] Many bail reform advocates have criticized the use of cash bail as discriminatory. A growing number of states – including California, Illinois, New Jersey and New York – have taken steps to eliminate cash bail for most misdemeanors and some felonies. Reform advocates believe this trend will save money as fewer individuals will be detained awaiting trial.

However, one argument against the bail reform movement is that removing judicial discretion and eliminating the practice of preventive detention could lead to increased crime rates.[53] In fact, after New York State's bail reform took effect on January 1, 2020, crime in New York City increased noticeably; since then, the state has been revisiting the issue in response to these crime spikes.[54]

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[51] 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.
[52] Todd Minton and Zhen Zeng, *Jail Inmates at Midyear 2014* (Washington, DC: Bureau of Justice Statistics, 2015), https://www.bjs.gov/content/pub/pdf/jim14.pdf.
[53] 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 (2020), http://dx.doi.org/10.2139/ssrn.3541091.
[54] 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; and 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.

Prior to making decisions regarding bail (pretrial), prosecutors and court officials should address the following:

- the collection and analysis of defendant information to determine risk,
- recommendations to the court concerning conditions of release, and
- plans to supervise the defendant who is released from custody during the pretrial phase.

Eliminating cash bail without these points addressed disregards the important roles of incentives and accountability that help assure suspects appear in court, while also deterring additional criminal behavior and/or violations of pretrial conditions.

In January 2017, New Jersey shifted away from a cash bail system, as an element of criminal justice reform. In lieu of using money to determine who is released or detained, New Jersey began relying on a "public safety assessment tool," which 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.[55]

When properly validated and implemented, these tools can assist in the decision-making to minimize dangers to the community.

Eliminating cash bail removes a major incentive for defendants to appear in court, comply with conditions of release, and refrain from criminal behavior while on pretrial release. This is particularly true of habitual offenders with extensive criminal histories. Subsequently, judges may want to amend release decisions, conditions, and/or enforce revocation more often than before bail reforms occurred.

One option for providing meaningful accountability for defendants released pretrial, absent cash bail, is the use of sanctions that are "swift, certain, and fair," following the tenets of the Project HOPE probation program.[56] Like probation, pretrial release can be viewed as a form of community supervision, which should include sanctions for violations.[57]

10.4.2 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.

Until recently, nearly every jurisdiction in the United States relied upon cash bail as a condition of pretrial release. Currently, the parameters for issuing bail vary by state, locality, and judicial preference. DOJ guidance on the minimal constitutional standards would allow states, localities, and their elected officials to better maintain a lawful system of bail. This guidance could also address the primary concern of public safety in ensuring that habitual offenders and dangerous suspects are not released.

10.4.3 The Department of Justice should commit funding to research the nature and length of detention of defendants who are held in jails to accurately assess the seriousness of their charges, how much danger they pose to the community, and to determine how often new offenses are committed by defendants who are out on bail.

Advocates of bail reform often assert that the majority of defendants held in jail on cash bonds are held for low-level charges and that many of them are first-time arrestees. Determining the true nature of this population can help criminal justice practitioners more accurately determine the severity of the situation at

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

[56] 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.

[57] Mark A.R. Kleiman, Beau Kilmer, and Daniel T. Fisher, "Response to Stephanie A. Duriez, Francis T. Cullen, and Sarah M. Manchak: Theory and Evidence on the Swift-Certain-Fair Approach to Enforcing Conditions of Community Supervision," *Federal Probation* 78, no. 2 (2014): 71 https://www.uscourts.gov/sites/default/files/78_2_8_0.pdf.

the local level. To maintain objectivity, funding should be prioritized for local jail jurisdictions that commit to working in partnership with an independent research organization.

Considering the current trend toward bail reform, more defendants are likely to be released pretrial than would have been in years past, which increases the potential to release defendants with a high risk of reoffending. Additional research would allow local officials 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 defendant poses to the community.

10.4.4 Congress should enact federal legislation that would permit state prison systems to use cell phone jamming equipment in correctional facilities.

Cell phones are considered contraband in federal and state prisons, for the many dangers they present and the criminal behavior that is often initiated because of mobile phones. Therefore, in most jurisdictions (possibly all), it is illegal for an inmate to possess a cell phone or use cell phone signals. However, 10,988 contraband cell phones were confiscated in Alabama's prisons between 2017 and 2019, according to Alabama DOC Commissioner Jeff Dunn.[58] These cell phones are typically smuggled into prisons by corrupt staff or visitors, dropped in prison yards, or thrown over fences.

Inmates use phones to commit fraud on businesses and individuals; engage in drug trafficking and other criminal enterprises; organize retribution on victims, prison staff, government officials, or other inmates; harass individuals; and/or instigate and coordinate inmate disturbances.

[**CROSS REFERENCE TO REDUCTION OF CRIME]**

Most egregiously, contraband cell phones have been used to coordinate and order homicides and attempted murders, 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 a prison, 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."[59] Director Stirling said, "Inmates are physically taken out of society by going to prison; however, they are virtually out there amongst us still committing crimes."[60] Fortunately, Captain Johnson survived the shooting.

[CROSS REFERENCE TO TECHNOLOGY]

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

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.

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[58] Jefferson Dunn, Commissioner, Alabama Department of Corrections, email communication with John Markovic, Federal Program Manager, Criminal Justice System Personnel Intersection Working Group, March 24, 2020.

[59] *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reduction of Crime* (April 15, 2020) (statement of Bryan Stirling, Director, South Carolina Department of Corrections), https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings.

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

Federal Communications Commission's Role With Contraband Cell Phones

While micro-jamming is a viable technology solution, only federal prison facilities can use it. The prohibition against state prison use of micro-jamming stems from the Federal Communications Act of 1934, 47 U.S.C. § 333 (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."[61]

The Federal Communications Commission convened a diverse group of stakeholders, who released the *Contraband Phone Task Force Status Report* in April 2019.[62] 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 in Maryland conducted a pilot test of cell phone jamming technology and, "Data from the test show that the micro-jammer's signal disrupted commercial wireless signals inside the prison cell, which meant that if 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."[63]

In a similar test, the Federal Bureau of Prisons collaborated with the Broad River Correctional Institution in Columbia, S.C., to test jamming 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."[64]

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10.5 Criminal Justice Coordinating Councils

Despite significant advances in information sharing, some criminal justice agencies still operate in silos, making communication and collaboration difficult to initiate and maintain. This often leads to inefficient systems that are not meeting the needs and expectations of the people. To counter this, some jurisdictions have created Criminal Justice Coordinating Councils (CJCC) to support strategic planning and information sharing, and to foster ongoing communications. Most CJCCs include personnel from law enforcement, prosecution, defense, courts, and corrections agencies.

10.5.1 Local and/or state governments should develop or contribute to statewide or regional criminal justice coordinating councils.

CJCCs typically use a data-guided, structured process to identify, analyze, and solve (or manage) issues that have a system-wide impact, such as with resource reductions, improving case outcomes and efficiencies, streamlining the local criminal justice system generally, and developing strategies for challenging client populations (e.g., those with substance use disorders, mental illness disorders, or who are homeless).

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[61] Willful or Malicious Interference, 47 U.S.C. § 333 (1934), https://www.govinfo.gov/content/pkg/USCODE-2011-title47/pdf/USCODE-2011-title47-chap5-subchapIII-partI-sec333.pdf.

[62] Cellular Telecommunications Industry Association and Association of State Correctional Administrators, *Contraband Phone Task Force Status Report*, (Iona, ID: Association of State Correctional Administrators, 2019), https://api.ctia.org/wp-content/uploads/2019/04/Contraband-Phone-Task-Force-Status-Report-Combined.pdf.

[63] 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.

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

Currently, NNCJCC supports 30 network member councils that represent a diverse cross-section of the country. A recent report by the District of Columbia's CJCC illustrates the scope and reach of this council 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.[65]

[65] Aimee Wickman and Nastassia Walsh, "Staffing a Criminal Justice Coordinating Council." *National Association of Counties* (blog), October 7, 2015, https://www.naco.org/blog/staffing-criminal-justice-coordinating-council-cjcc.