U.S. Department of Justice
Office of the Attorney General

Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice

Office of the Attorney General

Washington, D.C. 20530

July 28, 1992

MEMORANDUM

TO: The President

FROM: William P. Barr
Attorney General

SUBJECT: Recommendations for State Criminal Justice Systems

The problem of violent crime in America is largely the problem of the repeat, violent offender. A small segment of our population is responsible for a large share of the violent crime. Study after study has identified a small group of hardened, chronic offenders who commit a staggering number of crimes -- well over one hundred per year for many of these violent predators.

The primary goal of the criminal justice system must be to identify and incarcerate this hard core group of chronic offenders.

Common sense tells us that incapacitating these chronic offenders will reduce the level of violence in society. While we can debate the rehabilitative and deterrent effect of imprisonment, there can be no doubt that chronic criminals are not committing crimes while they are in prison.

Moreover, the experience of the past thirty years supports the common sense notion that tough law enforcement works. The permissiveness of the 1960s and early 1970s resulted in skyrocketing crime rates. As incarceration rates fell, violent crime rates soared, nearly quadrupling from 1960 to 1980. The tougher approach of the 1980s turned this around -- dramatically slowing the increase in crime and even bringing about some decreases, notwithstanding the wave of violence associated with drug trafficking during this period. There is little doubt that there is less crime today than there would have been had we not substantially increased incarceration of criminals in the 1980s.

The challenge for the 1990s is to build upon and increase these partial successes of the 1980s. We have within our grasp the opportunity to bring about real reductions in the level of violent crime in this country. We must continue to target and incapacitate the chronic violent offender.

This will take a continued increase in resources and continued legal reform. The criminal justice system is a pipeline, ranging from investigation, to arrest, to prosecution, to punishment. Resources are needed at every stage of the system, particularly the last, where a shortage of state prison space is resulting in the premature release of violent offenders, with tragic results for society.

As you have recognized, protecting public safety is the first duty of government. Even in times of tight budgets, adequate resources must be provided for law enforcement. However, tough law enforcement is not only morally right, and right in terms of public safety; it is also a good investment. The cost of apprehending and incarcerating a career, violent offender is only a small fraction of the economic costs such an individual imposes on society through the scores of crimes he commits each year. And that is not even considering the incalculable value to the law abiding public of a safe and secure community.

In addition to adequate budgets, the law enforcement community also needs the right tools in terms of tough laws and reasonable procedures. Our law enforcement professionals put their lives on the line every day to protect the public. They deserve our full support.

We also need to be smarter in coordinating law enforcement and social spending so they reinforce each other. Neither can do the job alone; rather, they must work together in a coordinated fashion. But social programs, while essential, are not a substitute for law enforcement, and spending for such programs cannot be at the expense of law enforcement. Social rehabilitation simply is not possible in an atmosphere of crime and violence. Progress is not possible in the midst of chaos. Tough law enforcement can create the atmosphere in which real progress in our inner cities is achievable and in which education, job training and other programs can succeed and break the tragic cycle of poverty that affects too many of our citizens.

Although more remains to be done the federal government has accomplished much in law enforcement over the last decade. Our accomplishments include:

Enhanced Resources

Over the last decade, we have substantially increased resources at all stages of the federal law enforcement system. The Department of Justice has experienced nearly a 50% increase in authorized personnel from FY 1981 to FY 1992, and over a 345% increase in its budget. Since 1989 alone, the Department has added 813 FBI agents, 735 DEA agents, and 1,237 Federal

prosecutors. There has also been an increase in the number of federal judges during this period. And the budget of the Federal Bureau of Prisons has increased 470% from FY 1981 to 1992. From 1988 to date, federal prison capacity has increased 62%, on its way to a 228% increase.

Legal Reform

The Federal system also experienced significant legal reforms during the 1980s. A critical step was the ability to keep dangerous defendants in jail before trial. The 1980s also witnessed the abolition of parole in the Federal system and the adoption of sentencing guidelines. We now have "truth in sentencing" in Federal court -- by law, prisoners must serve at least 85% of the sentence they receive. Federal law also now imposes tough mandatory minimum sentences for serious firearm, drug and repeat offenders.

We have also achieved great success in stripping criminals, especially drug traffickers, of their ill-gotten gains and the instrumentalities of their trade. Since the inception of the federal asset forfeiture program in 1985, over 2.5 billion dollars in such assets have been forfeited. Of that amount, we have returned over one billion dollars to state and local law enforcement agencies to be reinvested in law enforcement programs.

Focusing the Effort on Violent Crime

We are deploying these new resources and using these new tools in innovative ways to assist our state and local colleagues in helping law abiding citizens take back their streets. Project Triggerlock is a cooperative effort among state and federal prosecutors to target the most dangerous armed offenders. In its first year of operation, Project Triggerlock has produced over 6,450 arrests. Tough federal sentencing laws are resulting in thousands of armed dangerous offenders being behind bars, preventing countless crimes. And this is just the first year of this effort.

We have taken advantage of the changed international situation to redeploy substantial investigative assets from counterintelligence work to the fight against violent crime.

And your Weed and Seed initiative represents a coordinated approach among federal, state and local law enforcement, social programs, and, most critically, the community itself, to help law abiding citizens reclaim their communities. Our demonstration projects are already showing that this approach can work. It is the wave of the future.

Protecting Victims' Rights

The 1980s also saw the emergence of a strong victims movement that assisted in bringing about much needed recognition of, and protection for, the basic rights of victims of crimes. The landmark Victims of Crime Act in 1984 created the crime victims fund, which has provided hundreds of millions of dollars to the States for victim assistance and victim compensation programs. We have also supported additional victims legislation such as the Child Abuse Act of 1990, the Victims' Rights and Restitution Act, and the Federal "Bill of Rights" for victims. The victims movement has proven to be an indispensable ally of law enforcement in the fight against violent crime, and deserves a large measure of credit for the successes of the last decade.

* * *

As a result of these efforts, in many important respects the Federal criminal justice system has been revamped and retooled to fight the battles of the 1990s. While additional investments in resources and legal reforms are still needed, fundamental change has occurred.

Violent crime is, however, still primarily a state and local problem. Although the federal role is an important one -- especially in areas of particular federal interest such as organized crime (including gangs), drugs, and firearms -- 95% of violent crime is prosecuted by state and local authorities.

Unfortunately, although many states have done much, most have, at least to some degree, lagged behind the major enhancements made at the Federal level in the 1980s. A primary challenge for the 1990s is to work with state and local law enforcement to help them identify, prosecute and incapacitate chronic violent offenders. To that end, I have consulted with a group of law enforcement experts and developed the attached set of recommendations for state criminal justice systems.

These recommendations are divided into six groups: establishing pretrial detention; providing for effective deterrence and punishment of adult offenders; providing for effective deterrence and punishment of juvenile offenders; providing efficient trial, appeal and collateral attack procedures; providing for effective prevention and detection of crime; and providing adequate protection for victims' rights.

I would like to thank the following individuals, among others, for their valuable comments and suggestions in the development of these recommendations:

- William F. Weld, Governor of Massachusetts
- Robert Miller, Governor of Nevada
- Robert J. Del Tufo, Attorney General of New Jersey
- Ernest Preate, Attorney General of Pennsylvania
- Daniel Morales, Attorney General of Texas
- Richard P. Ieyoub, Attorney General of Louisiana
- Daniel E. Lungren, Attorney General of California
- J. William Roberts, United States Attorney for the Central District of Illinois and Chairman, Attorney General's Advisory Committee of United States Attorneys
- Michael M. Baylson, United States Attorney for the Eastern District of Pennsylvania
- Jean Paul Bradshaw II, United States Attorney for the Western District of Missouri
- Marvin Collins, United States Attorney for the Northern District of Texas
- Jeffrey R. Howard, United States Attorney for the District of New Hampshire
- J. B. Sessions III, United States Attorney for the Southern District of Alabama
- Thomas J. Charron, District Attorney, Cobb County, Georgia, and President, National District Attorneys Association
- Jack O'Malley, State's Attorney, Cook County Illinois
- Johnny L. Hughes, Chairman, Legislative and Congressional Affairs, National Troopers Coalition
- William M. Rathburn, Chief of Police, Dallas, Texas
- Roland Vaughn, Chief of Police, Conyers, Georgia
- Willie Williams, Chief of Police, Los Angeles Police Department
- John Walsh, "America's Most Wanted".

The first duty of government is the protection of its citizens, and it is incumbent upon us to take the necessary steps to fulfill that responsibility. By working cooperatively with state and local law enforcement we can build on the progress of the 1980s and achieve substantial, real reductions in violent crime in the United States. We owe our citizens no less.

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5. Provide an effective death penalty for the most heinous crimes.

6. Require able-bodied prisoners to work or to engage in public service to offset the costs of their imprisonment.

7. Adopt drug testing throughout the criminal justice process.

8. Utilize asset forfeiture to fight crime and to supplement law enforcement resources.

III. Effective deterrence and punishment of youthful offenders

9. Establish a range of tough juvenile sanctions that emphasize discipline and responsibility to deter nonviolent first-time offenders from further crimes.

10. Increase the ability of the juvenile justice system to treat the small group of chronic violent juvenile offenders as adults.

11. Provide for use of juvenile offense records in adult sentencing.

IV. Efficient trial, appeal, and collateral attack procedures

12. Enact and enforce realistic speedy trial provisions.

13. Reform evidentiary rules to enhance the truth-seeking function of the criminal trial.

14. Reform State habeas corpus procedures to put an end to repetitive challenges by convicted offenders.

V. Detection and prevention of crime

15. Invest in quality law enforcement personnel and coordinate the use of social welfare resources with law enforcement resources.

16. Maintain computerized criminal history data that are reliable, accurate and timely.

17. Provide statutory authority for prosecutors to grant "use" and "transactional" immunity.

18. Provide statutory authority for electronic surveillance, pen registers, and trap and trace devices.

VI. Respecting the victim in the criminal justice process

19. Provide for hearing and considering the victims' perspective at sentencing and at any early release proceedings.

20. Provide victim-witness coordinators.

21. Provide for victim restitution and for adequate compensation and assistance for victims and witnesses.

22. Adopt evidentiary rules to protect victim-witnesses from courtroom intimidation and harassment.

23. Permit victims to require HIV testing before trial of persons charged with sex offenses.

24. Notify the victim of the status of criminal justice proceedings and of the release status of the offender.

I. Protecting the community from dangerous defendants

No failure of a criminal justice system is more tragic than the release of a demonstrably dangerous criminal defendant back into the community. A citizen who is victimized by such a defendant has a right to question society's commitment to ensuring the safety of its law-abiding members. Every State should authorize its judges to order the detention, without bail, of defendants who are a proven danger to witnesses, victims, or the community at large. States should also provide that convicted violent offenders will be detained during their appeals absent special circumstances.

Recommendation 1

Provide statutory and, if necessary, State constitutional authority for pretrial detention of dangerous defendants.

One of the most pressing problems of public safety in this country is the release of major drug traffickers and those accused of violent crimes back into our communities pending trial. Providing authority for pretrial detention of defendants charged with serious offenses is a key step States can take to improve their criminal justice systems. The Hernando Williams case in Illinois illustrates in graphic terms the tragedies that pretrial detention can avoid. Williams was released after being arrested on charges of aggravated kidnaping, rape, and armed robbery. While on release, he kidnaped another woman, raped her, and held her in the trunk of his car for several days. He actually drove to his appearance on the prior charges with his second victim locked in the trunk of his car. After his court appearance, Williams committed further sexual assaults on his second victim and then shot and killed her. *See Williams* v. *Chrans*, 945 F.2d 926, 929-30 (7th Cir. 1991).

Had Williams been detained before trial on the serious charges he then faced, his second victim might be alive today.

Unfortunately, cases like this are all too common. Every law enforcement official — indeed every casual reader of newspapers — knows of cases of individuals who commit crimes while awaiting trial for other crimes. A study of pretrial release in 75 of the Nation's most populous counties in 1988 found that 18% of released defendants were known to have been rearrested for the commission of a felony while on pretrial release. Two-thirds of those rearrested while on release were *again* released.[1] In many jurisdictions, arrest is little more than an inconvenience for the recidivist criminal, who is back on the streets plying his illicit trade within hours.

Moreover, this revolving-door justice has a devastating impact on the public's confidence in the criminal justice system and on the ability of the police to obtain the cooperation from the community they need to do their jobs effectively. As law enforcement officers know from experience, the best way to combat crime is for the community and the police to cooperate closely with each other. When the government fails to protect the community through pretrial detention, this essential cooperation breaks down. Communities are reluctant to provide police with information or assistance when they see that those arrested will be back on the street within days or even hours. Citizens fear that criminals will retaliate against them if they help the police. Where citizens see pretrial detention put into effect for dangerous defendants, the grip of fear is loosened and community cooperation is substantially increased.

[1] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Pretrial Release of Felony Defendants, 1988*, p. 1 (1991). *See* also Lazar Institute, *Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact*, p. 48 (1981) (reporting similar rates of pretrial rearrest).

Congress responded to this problem on the Federal level with the Bail Reform Act of 1984 [18 U.S.C. §§ 3141-56]. The Act gives Federal judges the authority to deny bail or pretrial release to defendants who pose a danger to a particular individual or to the community at large. Under the Act, criminal defendants with serious prior records that include the commission of crimes while on release and those charged with serious drug felonies are presumed to be a danger to the community and therefore unsuitable for release [18 U.S.C. § 3142(e)]. The Act also creates a strong presumption that a convicted offender will remain imprisoned during any post-conviction appeal [18 U.S.C. § 3143].

In the hands of Federal prosecutors, pretrial detention has proven an extremely effective tool for dismembering organized crime and drug enterprises. Participants in criminal enterprises are taken from the streets, and they do not return. This sends a powerful message to these groups and is highly disruptive of their operations. In addition, pretrial detention is critical to effective witness protection and to protecting both the physical and psychological security of victims.[2]

Despite the success of the Federal statute and its validity as a matter of Federal constitutional law,[3] few States have adequate provisions for detaining dangerous defendants before trial. Numerous State constitutions provide an absolute right to bail, thus making pretrial detention

[2] As one United States district judge noted in an organized crime case:

The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose to the community is self-evident. [*United States* v. *Salerno*, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986), *aff'd*, 481 U.S. 739 (1987).]

[3] The Supreme Court rejected a constitutional challenge to the pretrial detention provisions of the Bail Reform Act in *United States* v. *Salerno*, 481 U.S. 739 (1987).

impossible. States should provide trial judges with authority to detain potentially dangerous defendants before trial and should make detention pending appeal the norm, with only narrow exceptions for extraordinary cases. Where State constitutional reform is necessary, it should be undertaken. In addition, States should consider other important provisions found in the Bail Reform Act of 1984. Chief among these are serious penalties for bail jumping and enhanced penalties for crimes committed while on release. *See* 18 U.S.C. §§ 3146, 3147.

By way of example, recent experience in Philadelphia graphically demonstrates both the effectiveness of pretrial detention in reducing crime and the danger to the community if pretrial detention is not available. Philadelphia jails are subject to a court-imposed population cap that requires release of arrestees who otherwise would likely be held without bail or on very high bond. City officials report that those released as a result of the cap have committed thousands of additional crimes, including numerous murders.

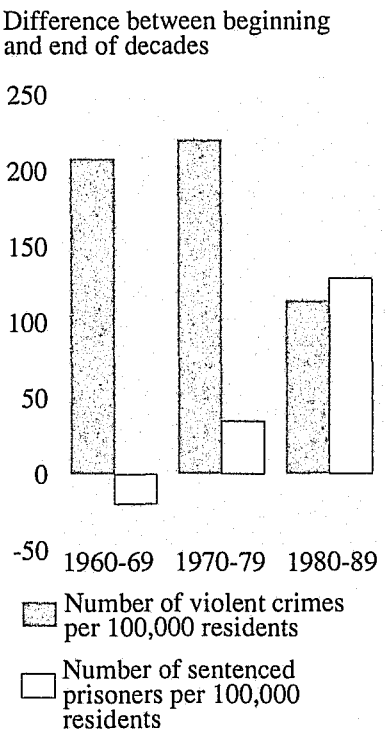
This inability to impose effective pretrial detention essentially resulted in revolving-door justice for many criminals in Philadelphia. Recognizing the danger to the community posed by this situation, the Federal Government stepped in to use Federal pretrial detention law in conjunction with a Federal-State initiative. Over 600 members of local gangs were arrested and held, the number of defendants held in pretrial detention status doubled, and the homicide rate in Philadelphia has declined.

II. Effective deterrence and punishment of adult offenders

Common sense dictates that imprisonment of chronic violent offenders will reduce the amount of violent crime. When these criminals are on the streets, they are preying on society. When they are in prison, they are not committing crimes.

The experience of the last 30 years confirms this common-sense notion. In the 1960's and early 1970's incarceration rates fell and crime rates skyrocketed. By contrast, when incarceration rates increased substantially in the 1980's, the rate of increase of crime was substantially reduced.[4]

When incarceration rates dropped in the 1960's, crime rates skyrocketed; increasing rates of incarceration have largely checked that increase

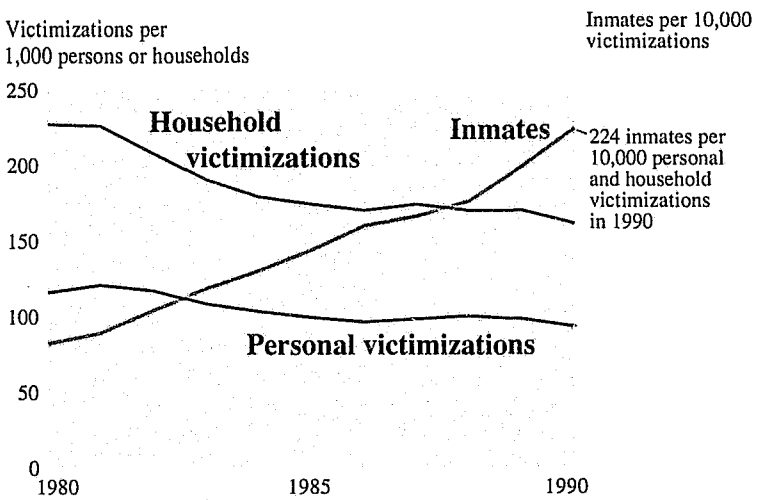


Sources: See footnote 4.

There is no question but that crime rates today are lower than they would have been if the low-incarceration policies of the 1960's and 1970's had been continued into the 1980's. If we are to make further

[4] *See* Federal Bureau of Investigation, U.S. Department of Justice, *Crime in the United States, Uniform Crime Reports* 1959-90; Bureau of Justice Statistics, U.S. Department of Justice, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86* (1988) and *Prisoners in 1989* (1990).

From 1980 to 1990, the number of criminal victimizations per 1,000 persons or households decreased as the number of inmates per 10,000 victimizations more than doubled



Sources: Bureau of Justice Statistics, U.S. Department of Justice, *Criminal Victimization 1990*, p. 4 and *Prisoners in 1990*, p. 1. Personal victimizations include rapes, robberies, assaults, and personal thefts experienced by persons 12 years old or older. Household victimizations include burglary, household theft, and motor vehicle theft. The inmates were serving sentences for all categories of crimes, including drug offenses.

progress in reducing violent crime, we need to incarcerate more of the violent offenders who prey on our society.

It is no mystery why this is the case. Again and again, studies have indicated that a relatively small portion of the population is responsible for a large part of the criminal violence in this country. One California study found that 3.8% of a group of males born in 1956 was responsible for 55.5% of all serious felonies committed by the study group.[5]

[5] These numbers are derived from Robert Tillman, *Prevalence and Incidence of Arrest among Adult Males in California* (1987). This study traced the criminal records of more than 236,000 California men born in 1956 from age 18 to age 29. The study counted all FBI Index Crimes committed by the group — murder, nonnegligent manslaughter, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft.

A Philadelphia cohort study conducted by Professor Marvin Wolfgang of the University of Pennsylvania found that about 7% of males in two birth cohorts (1945 and 1958) accounted for over two-thirds of all violent crimes committed by each group.[6]

Identification and neutralization of this hard-core criminal element is the key to reducing violent crime, and incarceration has a critical role to play in this battle. Preventing a large portion of this group from committing more crimes by putting them in prison for long periods of time after conviction for a second or third serious offense is the most effective way to reduce violent crime rates. In addition, there is evidence that certain and firm punishment early in a criminal career can reduce recidivism (and in contrast, leniency can actually encourage additional criminal behavior).[7]

Recommendation 2

Adopt truth in sentencing by restricting parole practices and increasing time actually served by violent offenders.

In many jurisdictions in this country, punishment is not swift enough, not certain enough, and not severe enough. The fact that sentences imposed by many State systems bear almost no resemblance to time actually served breeds disrespect for the criminal justice system on the part of criminals, the public, juries, and the victims of crime.

Most violent offenders who are sentenced to State prison serve only a fraction of their sentence. Research concerning release practices in 36 States and the District of Columbia in 1988 found that although violent offenders received an average sentence of 7 years and 11 months imprisonment, they actually served an average of only 2 years

[6] *See* P.E. Tracy, M.E. Wolfgang, and R.M. Figlio, *Delinquency Careers in Two Birth Cohorts*, pp. 279-80 (1990).

[7] *See* generally P.E. Tracy, *et al.*, *Delinquency Careers.*

and 11 months in prison — 37% of their imposed sentences.[8] Overall, 51% of the violent offenders in the survey were discharged from prison in 2 years or less, and 76% were back on the streets in 4 years or less.[9] In 1988, the median sentence and time served in prison for those released for the first time on a sentence[10] were:

Offense	Median sentence length	Median time served in prison
Murder	15 years	5.5 years
Rape	8	3.0
Robbery	6	2.25
Assault	4	1.25

States can increase the certainty and honesty of sentencing and both its deterrent and incapacitative effects by restricting parole practices. Parole rests on the flawed notions that the primary purpose of incarceration is rehabilitation and that success in reforming inmates can be measured by their behavior in prison. These notions overlook the fact that deterrence, incapacitation, and retribution are independent reasons for incarceration and that each deserves consideration in sentencing. All three of these important goals of sentencing are served by a clear sentence and are disserved by the uncertainty that parole creates.

Parole is also a failure in practice, and that failure has had significant costs for public safety. An 18-year-old honor student, 3 weeks away from graduation, left her home in Texas with two friends, 19 and 20 years old, on May 4, 1986. Her body was found the next day after she had been raped, beaten, and strangled. Her two companions were shot to death; their bodies were found 10 days later in a ditch. Charged

[8] *See* Bureau of Justice Statistics, U.S. Department of Justice, *National Corrections Reporting Program, 1988*, table 2-7 (1992).

[9] *See* Bureau of Justice Statistics, *National Corrections Reporting Program, 1988*, table 2-4.

[10] *See* Bureau of Justice Statistics, *National Corrections Reporting Program, 1988*, table 2-7.

and convicted for the capital murder of Suzanne Harrison was Jerry Walter McFadden, who was on parole at the time of the killing.

McFadden had been convicted of two 1973 rapes and sentenced to two 15-year sentences in the Texas Penitentiary. Paroled in December 1978, he was again sentenced to 15 years in 1981 for a three-county crime spree in which he kidnaped, raped, and sodomized a Texas woman. Released on parole again in July of 1985 even though his record now contained three sex-related convictions and two prison commitments, McFadden was convicted of a capital murder that occurred less than a year after his parole.

McFadden, who calls himself "Animal," was sentenced to death in July of 1987 for killing Ms. Harrison. That is the one sentence under Texas law that is not parolable. This example is all too common. All studies show that parolees have a high recidivism rate. A 1987 study that traced a sample of young adult parolees from prisons in 22 States found that 69% were rearrested for serious crimes within 6 years of being paroled.[11] In 1989, 10% of inmates in local jails, or about 39,000 persons, committed the crimes for which they were being held while on parole.[12] In short, conduct in prison has not proven to be an accurate predictor of behavior after prison, and the costs of indeterminate sentencing in reduced deterrence and incapacitation have not been justified.

The sole remaining justification for parole is an illegitimate one. In some States, parole is employed as a response to prison overcrowding, resulting in the premature release of dangerous offenders into the community. The proper response to insufficient prison space is to build more prisons, not to release dangerous criminals. Misusing parole or early release to deal with lack of prison space only increases crime.

[11] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Special Report, Recidivism of Young Parolees*, p. 1 (1987).

[12] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Special Report, Profile of Jail Inmates, 1989*, p. 5 (1991).

The Texas prison system, which until recently added very little new capacity, is illustrative of this problem. Under Federal court order to remain at a maximum of 95% of capacity, the Texas prison system has been releasing 150 inmates each day to make room for new convicts. The number of felons on parole increased by 430%.[13] Inmates in Texas serve an average of only 62 days for each year of their sentence.[14] As a result, reported crime rates in Texas increased 29% in the 1980's while they fell for the Nation as a whole.[15]

In Florida, early release measures have been adopted to make room for newly sentenced felons. One measure is mandatory grants of "basic gain-time" to all but a limited category of prisoners, essentially deducting a third of the sentence imposed.[16] Another measure is the discretionary award of "control release time" to some inmates, a weekly cumulative reduction of an offender's sentence. In just the first 6 months of this year, control release credits of more than 6½ years have been awarded to many prisoners.[17]

States should adopt "truth in sentencing." Parole should be limited so that the sentence served closely approximates the sentence assessed. This guide should apply to parole or any other mechanism that affects early release. While "good-time" accrual might be retained to modify or control institutional behavior, it should not exceed Federal standards that require 85% of the sentence to be served.

[13] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Probation and Parole 1981*, p. 2 (1982); *Probation and Parole 1989*, table 1 (1990).

[14] *See* Texas Department of Corrections, *1991 Fiscal Year Statistical Report*, Summary Table 4 (1992).

[15] *See* Federal Bureau of Investigation, U.S. Department of Justice, *Crime in the United States, Uniform Crime Reports, 1980*, table 3 (1981) and *1989*, table 5 (1990).

[16] Fla. Stat. Ann. §944.275(4)(a) (West 1985).

[17] See Fla. Stat. Ann. §947.146 (West Supp. 1991). The control release days are issued each Tuesday by the Control Release Authority of the Florida Parole Commission. From January 7, 1992, through June 30, 1992, the authority granted 2,350 days of control release time.

Recommendation 3

Adopt mandatory minimum penalties for gun offenders, armed career criminals, and habitual violent offenders.

In many jurisdictions, the sentences for crimes of violence are too short. In the eyes of many repeat offenders, crime offers much and the criminal justice system punishes little. For example, in 1988, of an estimated 100,000 persons convicted of murder, rape, robbery, and aggravated assault in State court, 17% — or about 17,000 violent offenders — received sentences that included no prison or jail time at all. Of all convicted rapists, 13%, or about 2,000 offenders, received a sentence involving no incarceration. In that same year, almost 30% of all those convicted of drug distribution felonies in State court received no prison or jail time.[18]

States should adopt mandatory minimum penalties for aggravated crimes of violence. In particular, imprisonment should be mandatory where a firearm is used or possessed in the commission of certain serious felonies.[19]

Every State should also have a statute similar to the Federal armed career criminal law [18 U.S.C. § 924(e)], which is designed to target and incapacitate repeat violent offenders who possess a firearm. The Federal statute provides that any person who has been convicted of three violent felonies or serious drug offenses and is in illegal possession of a firearm shall be sentenced to at least 15 years imprisonment without possibility of parole. A graduated punishment scheme

[18] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Felony Sentences in State Courts, 1988*, p. 2 (1990).

[19] *See* 18 U.S.C. § 924(c)(1).

can be utilized that imposes a mandatory minimum for a person possessing a firearm who has one prior violent conviction and increases the mandatory minimum for each additional prior violent conviction. The President has proposed such a graduated scheme for the Federal system — it would impose mandatory minimums of 5, 10, and 15 years for armed felons with one, two, or three or more prior convictions, respectively.

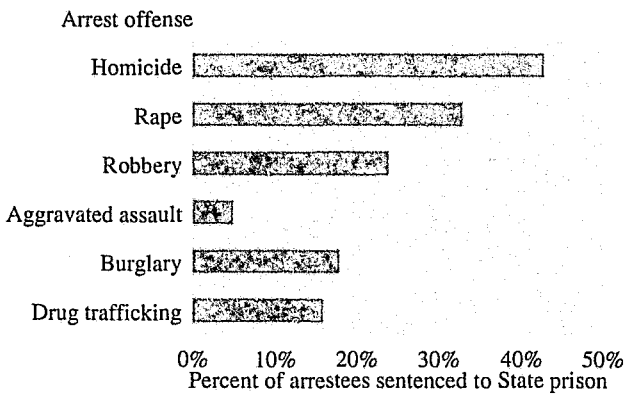
In addition to mandatory minimums tied to firearm violations, States should also adopt mandatory minimum statutes that are based on prior convictions for crimes of violence. Repeat offenders demonstrate by their own actions that rehabilitation is not an achievable goal for them. Public safety requires their incapacitation.

Recommendation 4

Provide sufficient prison and detention capacity to support the criminal justice system.

Adequate prison and detention space is critical to the effectiveness of a State criminal justice system. Jail and prison space is necessary to detain dangerous defendants before trial and to incapacitate, often through the use of mandatory minimum sentences, repeat and violent offenders. Any criminal justice system that absolves prisoners of their sentences because of a lack of space, or makes lack of space a factor in sentencing or parole, is cheating its citizens. When a violent offender is prematurely released after conviction because of lack of prison space, all the criminal justice resources used in apprehending, trying, and convicting the offender are wasted. Instead, the offender is returned to

Less than half of persons arrested for murder and a third or less of those arrested for other offenses were sentenced to prison



Source: Bureau of Justice Statistics, U.S. Department of Justice, *Felony Sentences in State Courts, 1988*, p. 4 (1990).

the community to commit further crimes. Moreover, failure to adequately punish the criminal the first time due to lack of prison space breeds lack of respect for the law and can lead to a career of crime.

The case of Texas, documented above, is illustrative. A shortage of prison space resulted in the premature release of numerous violent offenders. As a result, reported crime rates in Texas increased significantly at the same time they were declining for the Nation as a whole.

The choice is clear: More prison space or more crime. However, building more prisons is not only the morally right thing to do and the best way to protect the community from violent criminals, it is also the right thing to do in purely economic terms. Simply put, prisons are a sound investment. The premature release of violent offenders costs society far more than the expense of building and operating adequate prison space. Although incarceration is not cheap, the cost to society of *not* incarcerating criminals is far greater.

A study published in 1988 by Mark Cohen, formerly on the staff of the U.S. Sentencing Commission, estimated the 1984 aggregate cost of crime to victims — including direct losses, pain and suffering, and risk of death — at $92.6 billion in 1985 dollars.[20] This total did not include some of the larger costs to society of crime, such as lost sales, when people are afraid to go out to do their shopping; lost jobs, when businesses move out of high-crime areas; lost opportunities, when schools become the playgrounds of gangs and drug dealers, rather than places where inner-city kids can learn their way out of poverty; and lost tax revenues, when sales, businesses, and jobs evaporate.

Similarly, one study by the Bureau of Alcohol, Tobacco and Firearms (BATF) of a group of career criminals found that each had committed an average of 160 crimes per year.[21] A 1982 Rand Corporation study found that about 24% of inmates surveyed admitted to having committed more than 135 crimes a year apiece, and about 10% claimed responsibility for over 600 crimes a year apiece.[22] Mark Cohen's 1988 study looked at the costs of victimization and estimated the cost of a rape at over $51,000, the cost of a robbery at over $12,500, and the cost of an assault at over $12,000.[23] A 1987 National Institute of Justice study estimated that the *average* societal cost per crime in the Nation was slightly more than $2,300.[24] When these costs are associated with the multiple crimes committed by the habitual offenders identified above, the cost to society per criminal of not incarcerating them could exceed $300,000 per year.

[20] *See* Mark A. Cohen, "Pain, Suffering and Jury Awards: A Study of the Cost of Crime to Victims," vol. 22 *Law and Society Review*, p. 539 (1988).

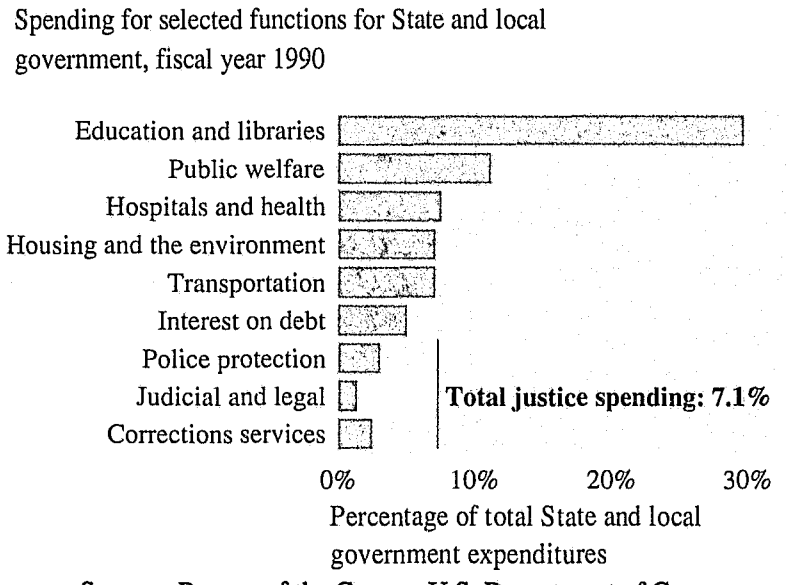
[21] *See* Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Protecting America: The Effectiveness of the Federal Armed Career Criminal Statute*, p. 29 (1992).

[22] *See* Jan M. Chaiken and Marcia R. Chaiken, *Varieties of Criminal Behavior*, p. 215 (1982).

[23] *See* Mark A. Cohen, "Pain, Suffering and Jury Awards: A Study of the Cost of Crime to Victims," p. 539.

[24] *See* National Institute of Justice, U.S. Department of Justice, *Making Confinement Decisions*, p. 4 (1987).

Corrections services are only 2.5% of State and local government spending



Source: Bureau of the Census, U.S. Department of Commerce, *Government Finances, 1989-90*, p. 2 (1991).

Despite the fact that lack of adequate prison space actually costs States money, we have underinvested in this critical component of the criminal justice system. According to one estimate, more than 120,000 additional prison beds were needed across the Nation at the close of 1990.[25] While there are those who will argue that we are using prison space for people who do not belong there, the simple fact is that 93% of those in prison are repeat or violent offenders.[26] Despite the enormous need for additional prison space, spending on corrections remains a very small percentage of State and local budgets. In fiscal year 1990, only 2.5% of the $975.9 billion in total expenditures by State and local governments was for corrections (about $24.7 billion). Investment in new prison construction is only a small fraction of that figure.[27]

[25] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Prisoners in 1990*, table 9 (1991).

[26] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Prisons and Prisoners in the United States*, p. 16 (1992).

[27] *See* Bureau of the Census, U.S. Department of Commerce, *Government Finances: 1989-90*, p. 2 (1991).

States must commit adequate resources to prison construction and operation or risk presiding over the collapse of their criminal justice systems. Every State should review its incarceration needs for the next decade and seek funds through appropriation or bond initiatives to meet those needs. To do less is to fail in government's first duty — protecting its citizens.

Recommendation 5

Provide an effective death penalty for the most heinous crimes.

The death penalty has an important role to play in deterring and punishing the most heinous violent crimes. Our entire criminal justice system is shaped by the common sense notion that the more severe the penalty the greater its deterrent effect on would-be offenders. Studies indicate that this general proposition holds true in the area of capital punishment.[28] Beyond its deterrent value, the death penalty serves to permanently incapacitate extremely violent offenders who cannot be controlled even in an institutional setting. Finally, the death penalty serves the important societal goal of just retribution. It reaffirms society's moral outrage at the wanton destruction of innocent human

[28] *See* generally Stephen J. Markman and Paul G. Cassell, "Protecting the Innocent: A Response to the Bedau-Radelet Study," vol. 41 *Stan. L. Rev.*, pp. 121, 154-156 (1988) (collecting studies that demonstrate deterrent effects of the death penalty); Stephen K. Layson, "Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence," vol. 52 *Southern Economics Journal*, pp. 68, 75-80 (1985) (estimating that each execution in the United States deters approximately 18 murders).

life and assures the family and other survivors of murder victims that society takes their loss seriously.[29]

There are a number of situations when the death penalty is an appropriate sanction, and the Federal Government and a number of States have been moving to expand its use. At the very least, there are three situations where penological considerations compel the death penalty as an available sentence. At a minimum, States should make the death penalty an option for the jury to consider in these three situations.

The first is the killing of a law enforcement officer. Society owes those who put their lives on the line for public safety every measure of protection it can offer. The death penalty sends the strongest possible message that the killing of a peace officer to avoid detection or apprehension is not worth it—no matter how long a prison term the suspect faces.

Second, the death penalty should be available for those who kill in the course of serious felonies. Rapists, armed robbers, and other felons often have an incentive to eliminate witnesses to their crime to avoid detection. The death penalty raises the stakes for these criminals and thus gives the victims of these crimes an added protection. Reported cases indicate that the availability of the death penalty does influence felons' decisions to carry or use firearms while committing another felony.[30]

[29] *See*, for example, *Senate Comm. on the Judiciary, Establishing Constitutional Procedures for the Imposition of Capital Punishment*, S. Rep. No. 251, 98th Cong., 1st Sess. 13 (1983) ("Murder does not simply differ in magnitude from extortion or burglary or property destruction offenses; it differs in kind. Its punishment ought to also differ in kind. It must acknowledge the inviolability and dignity of innocent human life. It must, in short, be proportionate.").

[30] *See*, for example, *People* v. *Love*, 366 P.2d 33, 41-42 (Cal. 1961) (McComb J., dissenting) (collecting convicts' statements from police files and other sources indicating that their decisions to use toy guns during felonies, not to use firearms to resist arrest, and not to kill hostages were motivated by fear of the death penalty).

The third is killing in prison. Offenders who will spend large portions of the remainder of their lives behind bars may feel that they have little to lose by killing a correctional officer or a fellow inmate. Loss of privileges or temporary isolation is simply not an adequate punishment for taking the life of another human being.[31]

Effective procedures to implement the death penalty are equally important. In particular, State death penalty laws should bind the jury to its conclusions concerning aggravating and mitigating factors. Where the former outweigh the latter, a sentence of death should be required. *See Blystone* v. *Pennsylvania*, 110 S. Ct. 1078 (1990); *Boyde* v. *California*, 110 S. Ct. 1190 (1990). State laws should also provide for the consideration of evidence relating to the victim and the harm to the victim's family at the penalty phase of a capital trial. *See Payne* v. *Tennessee*, 111 S. Ct. 2597 (1991). In a capital sentencing hearing, the defendant is free to present any sympathetic aspect of his character or background to the jury as justification for a sentence other than death. Victim-impact evidence ensures that the jury sees the victim and the victim's family as unique individuals as well, whose loss is relevant to proper punishment.

[31] In the 5-year period from 1982 to 1987, five Federal prison officials were killed by inmates. Inmates involved in at least three of these killings were already serving life sentences for murder. *See* W. Weld and P. Cassell, *Report to the Deputy Attorney General on Capital Punishment and the Sentencing Commission* , p. 28 (Feb. 13, 1987).

Recommendation 6

Require able-bodied prisoners to work or to engage in public service to offset the costs of their imprisonment.

Law-abiding citizens have a right to expect that those who have violated the law will not lead a life of leisure in prison. Taxpayers provide for prisoners' room, board, medical care, and other expenses. In return, prisoners should perform some labor useful to the public. In addition to maintenance of the prison facility itself, inmates can perform tasks such as sorting trash for recycling, and doing nonhazardous environmental cleanup. (In identifying suitable projects for prison labor, care should be taken to avoid reducing opportunities for employment by law-abiding workers.)

Requiring prisoners to work is consistent with the punitive function of imprisonment. Prison work also teaches discipline and prepares prisoners for reintegration into the community. Prison work may also assist in reducing crime by lowering recidivism rates. The Office of Research at the Federal Bureau of Prisons recently published preliminary findings from its Post Release Employment Project (PREP). The PREP study is designed to compare Federal convicts who received training and work experience while in prison with a control group of inmates who did not. The study's preliminary findings offer strong support for prison labor programs: Inmates who worked in prison were less likely to engage in prison misconduct, less likely to commit crimes after release, and significantly more likely to be gainfully employed 1 year after release.[32]

[32] *See* Federal Bureau of Prisons, U.S. Department of Justice, *Post Release Employment Project, Preliminary Findings*, pp. 6, 10-11 (1991).

Every State should provide by statute or regulation that, as a general matter, able-bodied felony offenders incarcerated in the State must perform some labor useful to the public. States should also consider enacting laws that make a specified percentage of the cost of each prisoner's incarceration part of a mandatory fine levied as part of the sentence. While many prisoners are indigent, some can and should pay for their incarceration.[33] Proceeds from this fine should be used for correctional costs.

Recommendation 7

Adopt drug testing throughout the criminal justice process.

Elaboration of the correlation between drugs and violent crime is unnecessary. Study after study confirms what any urban dweller in America knows to be true: Violence is a way of life for those who use and distribute narcotics. More than a third of State prisoners serving time for a violent offense said they were under the influence of drugs at the time the offense occurred.[34] Data from drug testing in major urban centers indicate that between 50% and 90% of all male arrestees use drugs.[35] A 1988 survey of State prisoners incarcerated for murder indicated that over 28% were intoxicated by drugs when they committed the killing.[36]

[33] The Department of Justice is implementing such a proposal on the Federal level.

[34] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics, 1988*, p. 624 (1988).

[35] *See* Bureau of Justice Assistance, U.S. Department of Justice, *1988 Report on Drug Control*, p. 2 (1989).

[36] *See* Bureau of Justice Assistance, *1988 Report*, p. 19.

States should consider drug testing of at least certain felony arrestees to allow judges to make more informed decisions about conditions for pretrial release and sentencing after conviction. Random drug testing of those in prison would help ensure that drugs are not being smuggled into the institution. And, given the clear connection between drug use and criminal violence, periodic drug tests should generally be required of individuals on any form of supervised release after conviction for a serious felony. Use of drugs during probation or parole should result in automatic revocation of release. Where possible, the cost of drug testing of arrestees and those on supervised release should be offset by fees. However, even if small costs result, States will reap large gains in safer streets and neighborhoods.

Recommendation 8

Utilize asset forfeiture to fight crime and to supplement law enforcement resources.

Asset forfeiture is a valuable tool in removing the profit from crime and converting criminals' assets to law enforcement purposes. Asset forfeiture is a double-barreled weapon. First, it deprives criminals of their ill-gotten gains and the instrumentalities of their crimes — making sure that crime does not pay. Second, the proceeds from the sales of these assets are reinvested in law enforcement as premium funding for priority programs and to cover the costs of asset forfeiture program administration. Thus, the criminals foot the bill for both the forfeiture program and the expanded law enforcement operations it makes possible.

It is critical that the integrity of these funds, seized from drug traffickers and other criminals, be maintained for law enforcement purposes, and that they should not be viewed as a substitute for adequate law enforcement funding, but rather as augmentation to existing efforts. It is also critical that asset forfeiture laws be applied consistently with constitutional principles and that the rights of innocent parties be fully protected. The Federal forfeiture statutes have been amended to provide timely seizure and minimal procedural delays consistent with due process.

Asset forfeiture has proven to be an extremely effective law enforcement tool. In fiscal 1991 alone, the Department of Justice deposited $643.6 million into the DOJ Asset Forfeiture Fund and equitably shared $266.8 million in cash and $21.2 million in property with State and local law enforcement as a result of joint operations.[37]

States are encouraged to utilize this sanction as a complement to criminal prosecution in drug trafficking and appropriate violent crime cases. States should review their asset forfeiture laws to ensure that they do not contain loopholes such as that in the California statute, which makes forfeiture of land used to grow marijuana difficult. The Department of Justice, in conjunction with the National District Attorneys Association and the National Association of Attorneys General, has developed the Model Asset Seizure and Forfeiture Act that contains a comprehensive set of recommendations.

[37] Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, U.S. Department of Justice, *Annual Report of the Department of Justice Asset Forfeiture Fund, Fiscal Year 1991*, pp. 53, 55 (1992).

To deter and punish adult criminals:

- Adopt truth in sentencing by restricting parole practices and increasing time actually served by violent offenders.

- Adopt mandatory minimum penalties for gun offenders, armed career criminals, and habitual violent offenders.

- Provide sufficient prison and detention capacity to support the criminal justice system.

- Provide an effective death penalty for the most heinous crimes.

- Require able-bodied prisoners to work or to engage in public service to offset the costs of their imprisonment.

- Adopt drug testing throughout the criminal justice process.

- Utilize asset forfeiture to fight crime and to supplement law enforcement resources.

III. Effective deterrence and punishment of youthful offenders

To a large extent, the success or failure of the criminal justice system will depend upon its effectiveness in handling youthful offenders — ensuring that for the vast majority of juvenile offenders their first brush with the law is the last, and ensuring that the small group of chronic hardened youthful offenders are incapacitated for extended periods.

Juvenile crime, especially violent juvenile crime, is on the increase. Between 1965 and 1989 the arrest rate for juveniles for murder almost tripled, the arrest rate for aggravated assault tripled, and the arrest rate for weapons violations by juveniles increased 2½ times.[38] Indeed, the increase in crimes by juveniles is responsible for a large share of the increase in violent crime.

The long-term solution to the problem of juvenile crime falls largely outside of the law enforcement system. It requires strengthening those basic institutions — the family, schools, religious institutions, and community groups — that are responsible for instilling values and creating law-abiding citizens.

From the law enforcement standpoint, however, we must deal better with two groups of juveniles. The larger group have only one or two brushes with the law and then straighten out as they mature, and the smaller group, the hardened chronic offenders, commit the majority of all violent juvenile crime.[39]

[38] *See* Federal Bureau of Investigation, U.S. Department of Justice, *Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses, 1965-1989*, pp. 31, 73, 213 (1990).

[39] *See* generally P.E. Tracy, *et al.*, *Delinquency Careers in Two Birth Cohorts* (1990).

With respect to the first, larger group of juvenile offenders, the juvenile justice system must be better designed to deter them from committing additional crimes. The goal is to prevent juveniles in this group from becoming chronic offenders. Indeed, the success of the criminal justice system in preventing these juvenile offenders from becoming career criminals is perhaps the single greatest determinant of future levels of criminality. The best way to accomplish this is by imposing tough, smart sanctions that are carefully tailored for the first-time juvenile offender and are designed to instill the values of discipline and responsibility that are necessary to prevent further criminality. Such punishment actually benefits the juvenile more than lenient sanctions, or no sanctions at all. Excessive leniency can result in additional transgressions, culminating in a life of crime. The juvenile does not get the message that crime does not pay because he is not made to pay for his crime. A juvenile justice system that is too lenient can become, in effect, a conveyor belt for career criminals. In contrast, tough but fair sanctions can turn the juvenile around and stop the all too common pipeline from juvenile offender to adult offender.[40]

States need a range of such sanctions that are designed to instill discipline and responsibility and ensure that the juvenile does not commit further offenses. These should include structured institutional settings such as boot camps.

[40] *See* P.E. Tracy, *et al.*, *Delinquency Careers in Two Birth Cohorts*, p. 295 (1990). ("We know that the chronic offender is detached from the schools and other community-based socialization and control agents. Failure to impose sanctions at all, or failure to impose necessary controls early on, can encourage further delinquency.")

The challenge for the juvenile justice system is different with respect to that small segment of the juvenile population that commits most of the violent juvenile crime and progresses to become hardened career criminals. The task for a successful juvenile justice system is to identify this group of chronic offenders and incapacitate them through extended periods of incarceration.

The juvenile justice system needs to become tougher and smarter in its handling of both groups. With respect to the larger group of juveniles, excessive leniency wastes the opportunity to salvage the youth and instead encourages them to become career criminals. As to the group of chronic offenders, excessive leniency fails to adequately protect society from these violent criminals. Tough, smart sanctions tailored to the particular offender will both reduce the number of juveniles who become chronic offenders and better protect society from those who do.

Recommendation 9

Establish a range of tough juvenile sanctions that emphasize discipline and responsibility to deter nonviolent first-time offenders from further crimes.

One of the key challenges for a State juvenile justice system is to deter the youthful offender from further transgressions. For the vast majority of juveniles, this should be possible if we are smart in imposing sanctions. To this end, States should develop a range of tough but fair sanctions for nonviolent first-time juvenile offenders, where the emphasis is on instilling values of discipline and responsibility. These sanctions should include the option of institutional settings.

One promising possibility is boot camps. Another is mandatory, highly structured community service or public works programs. A

sentence to a boot camp or a public works program, rather than probation, could change a first-time offender's attitude toward himself and society, thereby preventing the commission of further crimes.

It must be remembered, however, that boot camps and similar sanctions involve attempts to change behaviors that have often been learned over a period of years. This cannot be accomplished overnight. Rather, commitment must be for a sufficiently long period to affect behavior patterns. The discipline of the boot camp, or similar sanction, may also need to be followed by a period of regimented work to underscore the behavior modification and commitment.

By imposing tough but carefully tailored sanctions on juvenile offenders, the justice system can deter the vast majority from further crime. Excessive leniency, on the other hand, is a misguided attempt at kindness that all too often will simply result in additional crime and hardened criminals.

Recommendation 10

Increase the ability of the juvenile justice system to treat the small group of chronic violent juvenile offenders as adults.

Unfortunately, there is a small group of juvenile offenders who are as hardened as any adult criminal. One of the most troubling statistics of the 1980's is the sharp increase in juvenile arrests for murder. The number of juveniles arrested for murder increased by 60% between 1981 and 1990. The corresponding adult increase was 5.2%. In 1990, more than a third of all murders in this country were committed by individuals under the age of 21.[41]

[41] *See* Federal Bureau of Investigation, U.S. Department of Justice, *Crime in the United States, FBI Uniform Crime Reports, 1990*, tables 27 and 36 (1991). The data also suggest an increased percentage of forcible rapes by offenders under 18 in the 1980's.

Anecdotal evidence suggests that the emergence of new violent youth gangs and the tendency of criminal drug enterprises to use young teens as drug couriers, enforcers and even hired killers have contributed to this trend. The notorious leniency of many juvenile justice systems has led to an attitude of "Let the kid do it" among criminals on the street.[42]

The criminal justice system must recognize that some youthful offenders are simply criminals who happen to be young. Every experienced law enforcement officer has encountered 15- or 16-year-olds who are as mature and as criminally hardened as any adult offender. Although this group represents only a small fraction of our youth, they commit a large percentage of all violent crimes. As painful as this fact may be, public safety demands that law enforcement recognize and respond to this criminal element. The challenge for a State's juvenile justice system is to identify this group of hard-core offenders and to treat them as adults.

This may require some reform of existing juvenile justice systems. Discretionary waiver or certification of juveniles into adult court is often a cumbersome process, filled with delays. The uncertainty of waiver reduces any deterrent effect that the threat of adult punishments might have on juveniles. States should ensure that their systems permit treatment of juveniles as adults in appropriate circumstances. One approach is to create a legislative presumption that any juvenile age 14 or older who commits an enumerated crime of violence (for example, murder, rape, kidnaping, or armed robbery) will be tried as an adult. The presumption could be rebutted by showing mitigating factors that justify juvenile treatment of the offense. Where the juvenile has a

[42] Last year a 14-year-old drug runner in the District of Columbia shot and killed three people on the same day. The drug dealer for whom the juvenile worked was convicted of felony murder, but the juvenile served a total of only 26 months in juvenile detention for the three killings. He was back out on the streets taunting local police before his 17th birthday. *See Washington Post*, July 31, 1991, p. A20, col. 1.

previous adjudication for an enumerated offense, then the certification would be automatic. Where violence is involved, a firearm is used, or multiple offenses have occurred, the juvenile has through volitional criminal conduct moved outside the intended focus of the juvenile system.

Recommendation 11

Provide for use of juvenile offense records in adult sentencing.

A major problem in dealing with young offenders is lack of information about, and accountability for, serious crimes committed before the age of 18. Many apparent first-time offenders in this country have in fact committed numerous serious crimes as juveniles, yet evidence of these crimes may not be available or, by law, may be considered legally irrelevant to sentencing for adult offenses. While the desire to forgive a youthful indiscretion and not saddle an otherwise law-abiding adult with a criminal record is commendable, that rationale simply does not apply to a juvenile offender who continues a life of crime in adulthood.

This lack of adequate juvenile criminal histories creates a void with respect to the criminal conduct of certain offenders. For example, the Bureau of Justice Statistics estimates that 38% of inmates incarcerated for murder in State prison in 1986 had a prior juvenile conviction. Thirteen percent of those inmates had no adult record and thus only prior juvenile convictions.[43] To address this problem, the Department of Justice has authorized the FBI to accept juvenile records from the States for inclusion in the national criminal records system.

[43] The figures are similar for other violent crimes. For example, 54% of State prisoners convicted of robbery as adults had a juvenile record — 15% had only prior juvenile convictions. (These figures are based on the raw data underlying the BJS Special Report, *Profile of State Prison Inmates, 1986* (1988).)

States are urged to forward juvenile criminal history information for serious offenses to the FBI. States should review their expungement and confidentiality statutes concerning juvenile offenses to ensure that they are able to provide such information. States should also ensure that State law allows for the fingerprinting of juveniles convicted of serious offenses. Records are useless without a reliable means of identification. Finally, States should amend their career criminal statutes to provide that juvenile convictions for serious drug and violent crimes are relevant factors for sentence enhancement.

To deter and punish young criminals:

- Establish a range of tough juvenile sanctions that emphasize discipline and responsibility to deter nonviolent first-time offenders from further crimes.

- Increase the ability of the juvenile justice system to treat the small group of chronic violent juvenile offenders as adults.

- Provide for use of juvenile offense records in adult sentencing.

IV. Efficient trial, appeal, and collateral attack procedures

The primary purposes of a criminal trial are to ascertain the truth and to impose just punishment on the wrongdoer. Society's ability to identify and punish wrongdoers is at the very heart of the social compact with its citizens. A criminal justice system that loses sight of its primary goal will quickly — and deservedly — lose the confidence of its citizens.

Other sections of this report have discussed methods for increasing the certainty and severity of punishment. Whatever its content, punishment must occur within a reasonable time after the crime to be effective. This means that the criminal justice system must move as swiftly as possible in adjudicating guilt or innocence. The system must also speak with reasonable finality. Endless reopening and reexamination of a determination of guilt and sentence serves only to undermine the effectiveness of punishment. The changes suggested in this section would substantially enhance the efficiency of State criminal justice systems and the deterrent effect of the punishments they dispense.

Recommendation 12

Enact and enforce realistic speedy trial provisions.

Justice delayed may be justice denied — for society, for the victims of crime, and for the accused. All three have substantial interests in bringing criminal cases to trial as quickly as possible. Society has an interest in maximizing the deterrent effect of its punishments and in quickly identifying and removing offenders from society. The victims of crime have a strong interest in seeing justice done and in bringing emotional closure to a terrifying experience. The defendant has an

interest in clearing his name if innocent, or in knowing his punishment and beginning to serve his sentence if guilty. Finally, all three have an interest in determining the facts while physical evidence and the memories of witnesses are still fresh.

Despite the shared interest in speedy trials, and despite the existence of some form of speedy trial provision in 45 States,[44] delays in prosecution in many State systems are too long. Many State laws set extremely lax standards for a speedy trial—up to 1 year from the date of arrest. As a result, a 1988 study of felony convictions in 300 counties across the country found that the average time between arrest and sentencing was 208 days. Delays were even higher in violent felony and drug trafficking cases. For example, the average delay from apprehension to trial for murder is 347 days, the delay for rape is 253 days, and the delay for drug distribution offenses is 211 days. All these figures include cases disposed of by pleas as well as those that go to trial.[45]

Delays in bringing criminals to trial benefit no one except the guilty, and they particularly hurt victims, who suffer prolonged anguish while awaiting the trial. States should take all necessary steps to ensure the trial of criminal charges at the earliest possible date. Many docket-management techniques are available to help States meet this important goal.

[44] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Prosecution of Felony Arrests, 1981*, table 30 (1986).

[45] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Felony Sentences in State Courts, 1988*, p. 7 (1990).

Recommendation 13

Reform evidentiary rules to enhance the truth-seeking function of the criminal trial.

States should undertake a complete review of their evidence codes and rules to ensure that they operate to promote the search for truth. The cost of keeping probative evidence from juries in criminal cases is extremely high, and can include the release of guilty offenders to victimize innocent citizens. As Justice O'Connor has written:

While Federal courts must and do vindicate constitutional values outside the truth seeking function of a criminal trial, where those values are unlikely to be served by the suppression remedy, the result is positively perverse. Exclusion in such a situation teaches not respect for the law, but casts the criminal system as a game and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns. [*Duckworth* v. *Eagan*, 492 U.S. 195, 211-12 (1989) (O'Connor, J., concurring)].

In recent years, the Supreme Court has identified a number of situations where it has declined to apply the exclusionary rule to enforce the Fourth Amendment. Primary among these is *United States* v. *Leon*, 468 U.S. 897 (1984), which held that where police act in reasonable, good faith reliance on a warrant issued by a neutral magistrate, evidence will not be suppressed even where it later turns out that probable cause was lacking or that the warrant suffered from some other defect. Two Federal courts of appeals have extended the "good faith" principle to warrantless searches. *See*, for example, *United States* v. *Williams*, 622 F.2d 830, 840 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981); *United States* v. *Beck*, 729 F.2d 1329, 1331 (11th Cir.), *cert. denied*, 469 U.S. 981 (1984).

States should ensure that their own law allows for admission of evidence seized by officers acting with an objectively reasonable belief that they are obeying the law. This rule should apply in both warrant and warrantless situations. One approach is to provide by statute that whenever police officers act in good faith, but commit a technical error of law or fact, evidence should nevertheless be admitted in court. *See*, for example, Colo. Rev. Stat. 16-3-308 (1986) (codifying good faith exception for both warrant and warrantless cases). In several States, this may require constitutional change.[46]

States should also review evidence rules concerning the use of prior convictions or acts in two settings. The first is the impeachment of a defendant who takes the stand. Under the traditional approach to impeachment, any past conviction for either a felony or a crime involving dishonesty was admissible to impeach the credibility of a witness.[47] At present, Federal Rule of Evidence 609 imposes a general 10-year time limit on admissible convictions and requires a special determination by the judge that the probative value of a defendant's felony convictions outweighs any prejudicial effect.

Several States have adopted impeachment rules that are even more restrictive than the Federal rule. Alaska and Iowa limit the general category of admissible offenses to those involving dishonesty. Montana completely prohibits the admission of prior offenses for impeachment purposes.

[46] Six States appear to suppress evidence as a matter of State constitutional law even where the police have reasonably relied upon a facially valid warrant. *See State* v. *Oakes*, 598 A.2d 119 (Vt. 1991); *Commonwealth* v. *Edmunds*, 586 A.2d 887 (Pa. 1991); *State* v. *Marsala*, 579 A.2d 58 (Conn. 1990); *State* v. *Carter*, 370 S.E.2d 553 (N.C. 1988); *State* v. *Novembrino*, 519 A.2d 820 (N.J. 1987); *People* v. *Bigelow*, 488 N.E.2d 451 (N.Y. 1985). Two additional States have statutory exclusionary rule provisions that have been interpreted to preclude application of the *Leon* "good faith" exception in the State. *See Mason* v. *State*, 534 A.2d 242 (Del. 1987); *Commonwealth* v. *Upton*, 476 N.E.2d 548 (Mass. 1985).

[47] At common law, felons were not allowed to testify at all. As this prohibition eased, the rule arose that felons could testify, but the jury was to be made aware of their criminal record.

States are urged to adopt the traditional impeachment rule by providing for the admission of all felony convictions and convictions of crimes involving dishonesty against all witnesses, including a defendant. At a minimum, State evidence codes should be no more restrictive than Federal Rule 609.

Second, many State evidence codes are also unduly restrictive and unnecessarily frustrate the search for truth through limitations on the use of past criminal conduct of the defendant as evidence of guilt. Evidence that the defendant has committed offenses of the same type on other occasions is particularly probative and critical in the area of sex crimes such as rape and child molestation. Studies suggest that a substantial percentage of sex offenders have a strong disposition to recidivism.[48] In addition, because the victim is often the only eyewitness in these cases, evidence that the defendant has committed other sexual offenses can be critical to informed evaluation of the relative credibility of the complaining witness' allegations and the defendant's denial.

Judicial decisions in many jurisdictions have recognized the utility of past crimes evidence in sex offense cases despite the absence of explicit statutory authority for its admission. *See* generally 1A *Wigmore's Evidence* § 62.2 (Tillers ed. 1983). However, this view is not unanimous, and cases have been lost because of the exclusion of such evidence under State law.[49] States should provide clear statutory

[48] *See*, for example, Bureau of Justice Statistics, U.S. Department of Justice, *Special Report, Recidivism of Prisoners Released in 1983*, table 10 (1989).

[49] The examples of convictions reversed because of the admission of relevant past crimes evidence are striking. *See*, for example, *People* v. *Ogunmola*, 701 P.2d 1173 (Cal. 1985) (conviction of gynecologist for raping patients during medical examinations reversed due to admission of evidence of same conduct toward other patients); *People* v. *McMillan*, 407 N.E.2d 207 (Ill. App. 1980) (conviction of defendant for molesting his 13-year-old daughter reversed because evidence was admitted at trial of similar abuse of his 15-year-old daughter).

authority for the admission of evidence of past sex offenses whenever a crime of sexual assault or child molestation is charged.[50]

Recommendation 14

Reform State habeas corpus procedures to put an end to repetitive challenges by convicted offenders.

Abuse of both State and Federal habeas corpus laws has reached crisis proportions. Traditionally, habeas corpus was a remedy for detention without trial, an important protection against government overreaching. In recent years, the writ of habeas corpus has been converted from a bulwark of individual liberty into a device employed by prisoners to endlessly reexamine issues decided at trial and on appeal. The constant relitigation of criminal convictions saps judicial and prosecutorial resources, while diminishing the deterrent and retributive effect of punishment. Repetitive habeas corpus proceedings also needlessly reopen the wounds of victims and survivors.[51] The abuse is particularly troubling in the death penalty area, where it is not

[50]The President's proposed Comprehensive Violent Crime Control Act of 1991 (S.635 and H.R.1400) in § 801 calls for a general rule of admissibility in sexual assault and child molestation cases for evidence that the defendant has committed offenses of a similar nature on other occasions.

[51] More than 20 years ago, Justice Harlan expressed his concern over the negative effects that repetitive habeas corpus filings have on the administration of justice:

At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definite answer to the questions litigants present or else it never provides an answer at all. . . . No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved. [*Mackey* v. *United States*, 401 U.S. 667, 690-91 (1971) (Harlan, J., dissenting)].

unusual for condemned prisoners to file two or three applications for habeas corpus relief in both State and Federal court.

States should undertake a thorough review of their habeas corpus systems to guard against needless relitigation and to close loopholes that can be abused. Four specific reforms are strongly recommended:

1. States should allow only truly collateral claims (such as ineffective assistance of counsel) to be raised on State habeas corpus. Any claim that was or could have been brought forward in a prisoner's direct appeals should be explicitly barred in habeas corpus proceedings.

2. States should adopt explicit time limits for the filing of State habeas corpus petitions, running from the time the petitioner has concluded his direct appeals. Every cause of action, from tort suits to contract claims, has a statute of limitations. In most States, there is no time limit on the filing of a habeas corpus petition challenging a final criminal judgment entered years, and sometimes decades, ago.

3. States should bar successive habeas corpus petitions except where sufficient cause is shown for the previous failure to raise the claim and the claim, if proved, would undermine the court's confidence in the prisoner's factual guilt.

4. States should adopt the retroactivity approach of *Teague* v. *Lane*, 489 U.S. 288 (1989), and subsequent cases in State habeas proceedings. *Teague* provides that changes in the law after trial and appeal will not apply retroactively unless they prohibit a particular crime or sentence entirely or significantly enhance the truth seeking function of the trial.

In addition, States may wish to consider the adoption of "unitary review" procedures in capital cases, like those in effect in California, which allow direct review and the adjudication of collateral claims to take place concurrently. This approach potentially provides additional economies of time by avoiding successive direct review and collateral proceedings.

To enable courts to find the truth and to punish wrongdoers:

- Enact and enforce realistic speedy trial provisions.
- Reform evidentiary rules to enhance the truth-seeking function of the criminal trial.
- Reform State habeas corpus procedures to put an end to repetitive challenges by convicted offenders.

V. Detection and prevention of crime

State and local governments must give police and prosecutors the tools they need to apprehend and convict violent offenders. These tools include proper equipment, proper training and appropriate legal authority to get the job done. For many States this may require an increased budgetary commitment to the fight against violent crime. On the Federal level, the Department of Justice has increased its full-time personnel by nearly 50% from 1981 to 1992. In the last 3 years, the Department's budget has increased by almost 60%. Increases of similar magnitude are necessary in all critical areas of the criminal justice system in many States and localities.

In 1989, State and local direct spending for law enforcement and criminal justice was only 6.9% of all State and local spending. Recognizing that conditions in the States vary greatly and that efficient use of resources is more important than measures of absolute expenditures, it nonetheless appears that some States and jurisdictions are underinvesting in public safety. Creating an environment where law-abiding citizens are free from fear and violence is the primary duty of government, and this should be reflected in budgetary priorities.

There are those who will say that rather than increase funding for law enforcement, it is better to invest in programs that address the so-called "root causes" of crime. This view mistakenly sees social programs as an alternative to law enforcement. While it is true that law enforcement cannot do the job of community revitalization alone, it is even more certain that social programs cannot succeed without effective law enforcement. The best schools and the finest housing programs will have little positive impact if they are overrun by violent crime. The challenge of the 1990's is to coordinate our social programs with tough law enforcement to help law-abiding citizens reclaim their communities.

Recommendation 15

Invest in quality law enforcement personnel and coordinate the use of social welfare resources with law enforcement resources.

Law enforcement personnel deserve the full support of the public in their work. A high quality police force is central to the safety of any community. Moreover, police work itself involves substantial risk, long hours and much personal sacrifice. Prosecutors make substantial economic sacrifices by foregoing often lucrative private practices for government service. Judges work long hours and often risk retaliation from criminal defendants. Correctional officers put their lives on the line in a hostile environment every day. The public has a substantial interest in retaining the services of seasoned professionals in each of these critical areas, and compensation for law enforcement personnel at all levels should be sufficient to recruit and retain such professionals. Adequate training and equipment are also essential.

Police deserve top quality equipment. This includes adequate firepower to defend themselves and body armor to protect themselves from armed criminals. As of 1990, 73% of local police departments and 80% of State police departments authorized officers to carry semiautomatic sidearms.[52] Only a quarter of all local police departments required personnel to wear body armor on the job and only 12% of State police forces had such a requirement.[53] States should make sure their officers have adequate firepower and should make body armor available to every officer. Use of body armor should be mandatory for execution of arrest and search warrants.

[52] *See* Bureau of Justice Statistics, U.S. Department of Justice, *State and Local Police Departments, 1990*, p. 1 (1992).

[53] *See* Bureau of Justice Statistics, U.S. Department of Justice, *State and Local Police Departments, 1990*, p. 1 (1992).

Prosecutors deserve and require adequate training. This includes basic clinical training as well as specialized training in particularly difficult or complex areas such as capital punishment or the law of search and seizure. State and local prosecutors are overextended in many jurisdictions, and continue to face increasingly complex cases involving money laundering, racketeering, and intricate drug distribution schemes. Adequate training is essential if they are to continue to meet these challenges.

Judges require adequate support staff and equipment. This includes law clerks and computer equipment for case management. It also includes the use of magistrates and judicial adjuncts within constitutional strictures.

While prison space appears to be the most pressing need in many State criminal justice systems, States should assure that other aspects of their criminal justice systems are adequately funded.

States should also ensure that use of their law enforcement resources is coordinated with other public health and welfare expenditures. Investment in law enforcement and investment in social programs should not be viewed as alternative or competing strategies. Both are needed and, to be effective, they must be coordinated. If the streets are not safe, if they are controlled by a criminal element, neighborhood rehabilitation programs are doomed to failure. By the same token, sporadic "sweeps" by law enforcement, without a sustained commitment to neighborhood redevelopment, result in little, if any, permanent improvement in a community's security or quality of life. Enterprise zones, rehabilitation of public housing, and strengthening of community groups must be combined with tough law enforcement to successfully reduce violence and enhance the quality of urban life.

The "weed and seed" concept, adopted as a model program by the Department of Justice, involves a coordinated approach to reclaiming our communities. Federal, State, and local law enforcement officials

pool their resources to take out street gangs and drug dealers. Once this is accomplished, social programs have a fighting chance. Law enforcement remains on the scene, assisting in the rehabilitation effort and building a new relationship with community leaders.

An essential component of Weed and Seed is an effective community policing program. Under community policing, law enforcement works closely with residents of the community to develop solutions to the problems of violent and drug-related crime. Rather than simply responding after the fact to crime, the police build a productive relationship with the community to prevent crime from occurring. As such, community policing serves as the bridge between the "weed" and the "seed" side of the program. However, because it relies upon a more established police presence in the community, community policing takes adequate resources. States and localities should invest sufficient amounts in their police departments to permit community policing.

In addition to its model program, the Department of Justice will assist State and local leaders in establishing their own "weed and seed" sites in urban areas.

Recommendation 16

Maintain computerized criminal history data that are reliable, accurate and timely.

Ready access to reliable criminal history records is essential to an efficient criminal justice system. First, criminal history records are necessary to the effective use of pretrial detention. A history of violence or failures to appear is often the key to convincing a judge to detain a defendant before trial. The inability to provide detailed criminal histories at a first appearance can result in the release of a dangerous defendant.

In addition, accurate criminal history records are critical to effective use of career criminal statutes and for general sentencing purposes. A criminal history data base can also form the basis for a point of sale check prior to the purchase of a firearm. This type of system, which has been adopted in Virginia, Delaware and several other States, can make a contribution to public safety by preventing those with criminal records from purchasing firearms through legitimate channels. Reliable criminal history data is also essential for long-term planning for criminal justice resource needs from police to prisons.

Although many States have made substantial progress in improving and automating criminal history records in recent years, there is much yet to do. Disposition reporting continues to be a serious problem. Only eight States in the Nation have final dispositions recorded for as many as 80% of all their arrest records. There also is a serious problem with delays and backlogs. Ten States reported in 1989 that there was a delay of three months or longer between a trial court disposition and the entry of that information into the State data base. In a recent survey representing over 2,300 chief prosecutors, two-thirds said that incomplete criminal history information was a major problem for them.[54]

States should invest in updating and computerizing their criminal history records. States should also consider adopting point of sale systems for firearms purchase checks. In this regard, the Department of Justice recently has set aside $27 million to be made available to the States over 3 fiscal years to upgrade the quality of their criminal history systems. In addition, beginning in late 1992, all States must dedicate at least 5% of Federal formula grants from the Department of Justice to improve their criminal justice records. At present funding levels, this would total more than 21 million additional Federal dollars per year dedicated to improvement of State criminal justice records.

[54] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Prosecutors in State Courts, 1990*, p. 1 (1992).

Recommendation 17

Provide statutory authority for prosecutors to grant "use" and "transactional" immunity.

Selective grants of immunity are the prosecutor's method of lifting the veil of secrecy from drug enterprises, violent gangs, and organized crime associations.[55] Accomplices are often the only witnesses to suspected criminal acts. The testimony of lower-echelon members of criminal organizations is critical to establishing the guilt of leaders and organizers, and thus to putting the whole organization out of business for good.

At present, State laws are a patchwork on the subject of immunity. Despite the fact that the Supreme Court has held that use immunity is constitutionally sufficient,[56] several State statutes still provide for only transactional immunity.[57] This reduces the effectiveness of immunity as an investigatory tool and can result in a windfall for the clever witness.

In addition, several States provide for automatic immunity, thus taking the immunity decision and the substantial leverage that goes with it out of the hands of the prosecutor. For example, New York provides for automatic transactional immunity for all witnesses

[55] Grants of immunity to compel the testimony of witnesses are made necessary by the Fifth Amendment, which provides: "No person shall . . . be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V.

[56] *Kastigar* v. *United States*, 406 U.S. 441 (1972).

[57] "Use" immunity prohibits the government from using the compelled testimony, either directly or indirectly, to build a case against a witness. Prosecution remains possible based on other evidence. "Transactional" immunity protects an immunized witness from prosecution for *any* criminal transaction mentioned in the compelled testimony. Prosecution is barred by transactional immunity even where independent evidence of criminality is uncovered.

appearing before its grand juries. A 1988 report by the New York State District Attorneys Association documents at least six occasions in recent years where the New York rule has literally allowed a witness to "get away with murder" by testifying about it under mandatory transactional immunity.[58] Alabama courts will not grant immunity without the consent of the witness, thus eliminating the effectiveness of immunity as an investigatory tool.[59]

State immunity statutes should be comparable to 18 U.S.C. § 6002. They should vest authority to request immunity in the prosecutor and give him or her the choice between use or transactional immunity.

Recommendation 18

Provide statutory authority for electronic surveillance, pen registers, and trap and trace devices.

Electronic surveillance of suspects is an essential tool for the investigation and prosecution of large-scale drug trafficking and organized crime cases. The leaders of these organizations are often able to avoid direct involvement in criminal acts while planning and coordinating criminal activity over the telephone. Use of electronic surveillance can build an extremely effective case based on the wrong-doers' own words, while avoiding the risks of using undercover agents or informants.

Congress provided Federal wiretap authority in the Omnibus Crime Control and Safe Streets Act of 1968. *See* 18 U.S.C. §§ 2510-21. The statute provides for the granting of applications for wire surveillance upon specific findings of probable cause and necessity, and places

[58] *See* New York State District Attorneys Association, "The Case for a New Immunity Law in New York," p. 6 (1988).

[59] *See* Ala. R. Crim. P. 12.7(b) (only transactional immunity available and only with consent of the witness).

careful limits on the scope and duration of electronic surveillance. The statute also explicitly authorizes the consensual monitoring of electronic communications where a law enforcement officer is a party to a conversation.

Another important tool in the investigation of sophisticated criminal networks is the pen register. A pen register records the numbers dialed from a telephone by monitoring the electrical impulses caused by dialing. In *Smith* v. *Maryland*, 442 U.S. 735 (1979), the Supreme Court held that the use of a pen register is not a search within the meaning of the Fourth Amendment, and thus neither probable cause nor a warrant is necessary to employ such a device.

Congress has provided a detailed statutory scheme for the use of pen registers and "trap and trace" devices[60] by Federal investigators. 18 U.S.C. §§ 3121-27. The statute requires application to a court and a demonstration that "the information likely to be obtained is relevant to an ongoing criminal investigation" [*Id.* at § 3123(a)]. The statute also creates a legal obligation on the part of telephone companies, landlords and other third parties to assist law enforcement personnel in the installation of authorized pen registers. Finally, the statute insulates both the providers of communications services and law enforcement officers from civil and criminal liability for actions undertaken pursuant to the statute.

State law on the subject of electronic surveillance, pen registers and trap and trace devices is presently a hodgepodge. At present, 15 States make no provision for court-ordered electronic surveillance. Other States, such as California, have weak electronic surveillance laws. And in several States, the courts have held that the use of a pen register is a search under the State constitution for which a warrant supported by probable cause is required. *See*, for example, *People* v. *Sporleder*, 666 P.2d 135 (Colo. 1983); *State* v. *Hunt*, 450 A.2d 952 (N.J. 1982). At

[60] A "trap and trace" device reveals the telephone number of the source of all incoming calls to a particular number.

least one State supreme court has held that a pen register should be treated as if it were a wiretap for purposes of the State's electronic surveillance law, thus requiring a warrant as a statutory matter. *See Ellis* v. *State*, 353 S.E.2d 19 (Ga. 1987). States should thoroughly review their laws in this area to ensure that statutory authority exists for electronic surveillance and for the effective use of pen registers and "trap and trace" devices. Statutory and constitutional change should be sought where necessary.

To detect and prevent crime:

- Invest in quality law enforcement personnel and coordinate the use of social welfare resources with law enforcement resources.
- Maintain computerized criminal history data that are reliable, accurate, and timely.
- Provide statutory authority for prosecutors to grant "use" and "transactional" immunity.
- Provide statutory authority for electronic surveillance, pen registers, and trap and trace devices.

VI. Respecting the victim in the criminal justice process

To be both effective and humane, a criminal justice system must respond to the needs of victims of crime at all stages of the criminal justice process. From the time law enforcement officers arrive at the scene of a crime, through apprehension of a suspect, the trial, sentencing, appeals and punishment, victims are profoundly affected, and their perspective deserves consideration. It is incumbent upon all criminal justice professionals to think of the victim and to evaluate how their decisions affect the victim and the victim's family.

One way to ensure appropriate consideration of victims' rights is to codify and enforce a "Victims' Bill of Rights." Congress took this step in the Victims' Rights and Restitution Act of 1990 ("Victims' Rights Act"), Pub. L. No. 101-647, 104 Stat. 4820, and at the same time urged the States to follow suit.

Victims should not have to wait until they are attacked to have effective recourse. States should enact "stalking" laws that would make it a crime to repeatedly harass or follow a person if it places the victim in reasonable fear of death or serious bodily injury. If, in addition, a restraining order or similar order is in effect at the time of an offense, an enhancement of the penalty should be considered.

Victims' needs can include protection from further violence or retribution, restitution to cover economic loss, and information about and participation in the criminal justice process. Victims should have the right to place their story before sentencing authorities and parole boards. Victims' views should be given consideration in both sentencing and release decisions. Finally, the criminal justice system should do all it can to minimize the pain of victims and victim-witnesses. This includes the provision of adequate compensation and the protection of victim-witnesses from further emotional trauma.

Recommendation 19

Provide for hearing and considering the victims' perspective at sentencing and at any early release proceedings.

In most States, the defendant has the right to address the tribunal after conviction and before sentencing. At this point, the defendant is allowed to tell his or her story, to offer any facts in mitigation of his crime, and to ask for mercy. States should provide the victim with a similar right of allocution, that is, a right to inform the sentencing authority about the impact of the crime on his or her life.[61] States that retain a system of parole or early release should afford victims a right of allocution at parole hearings. Parole statutes should provide that the impact of early release on the victim and the victim's family or survivors should be a consideration bearing on early release.

States should also provide for the use of victim-impact evidence in capital cases. In the penalty phase of a capital case, the defendant is allowed to present any evidence of his character or background in mitigation. Where survivors desire it, the State should compile and present evidence from survivors detailing the loss suffered by the victim's family and friends. The jury should know the victim as well as the defendant as a unique human being, worthy of its consideration in passing sentence.

Finally, the victim should have a right to be present at all public court proceedings related to the offense, including pretrial motions, voir dire and trial, appeals, and collateral litigation. For most victims, the

[61] In just over half the States, the victim now has the right of allocution. The President's violent crime bill would establish a right of allocution for the victim in Federal criminal proceedings.

crimes committed against them or their loved ones are the most traumatic events of their lives. They deserve the right to watch the criminal justice system as it addresses the wrong committed against them.

Recommendation 20

Provide victim-witness coordinators.

One of the greatest innovations in victims' rights in Federal cases was the establishment of a victim-witness coordinator in each United States Attorney's Office. These officials can provide an important liaison between victims and the criminal justice system. They can keep victims and survivors apprised of the status of proceedings, as well as whether or not the defendant has been released on bail before trial. They can also make victims aware of restitution or other remedies available to them. Victim-witness coordinators should be aware of the State programs funded through the Victims of Crime Act and administered by the Office for Victims of Crime in the Department of Justice. These programs offer such services as victim compensation and assistance, counseling, and housing for battered women.

Recommendation 21

Provide for victim restitution and for adequate compensation and assistance for victims and witnesses.

While all 50 States have some form of victim restitution law, in many cases these laws are not adequately enforced. Mechanisms must exist for monetary fines and restitution payments to be collected during imprisonment and after release. These mechanisms should be structured so as to relieve victims of the burden of pursuing the offender for restitution.

States should also ensure that profits a criminal derives directly or indirectly from his criminal activity are made available to the victim for restitution. This includes profits from literary or other depictions of the crime. Crime victims should not have to watch criminals reap fame and fortune from their victimization. The Department of Justice has prepared new Federal "Son of Sam" legislation that addresses the constitutional concerns expressed by the Supreme Court in *Simon & Schuster, Inc.* v. *N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991). The Department will assist States in reviewing and, if necessary, revising their forfeiture and victim compensation statutes in light of the Court's decision in *Simon & Schuster.*

States should also provide for adequate compensation for victim-witnesses. This should include payment for travel, loss of work time, and assistance with day care and other needs. The victim should not suffer an additional economic and emotional blow dealt by the criminal justice system itself. States should consider placing victim-witnesses in a category separate from other witnesses, allowing the former more services and compensation for costs incurred as a result of cooperation in the prosecution.

Recommendation 22

Adopt evidentiary rules to protect victim-witnesses from courtroom intimidation and harassment.

Every State should have two evidentiary protections for complaining witnesses. The first is a rape-shield law. Federal Rule of Evidence 412 provides a model. It makes reputation or opinion evidence concerning the past sexual behavior of the alleged victim inadmissible in the trial for a sexual offense. It also makes evidence of the past sexual behavior of the complaining witness generally inadmissible, unless that behavior occurred with the defendant or the defendant seeks to show

that another individual was responsible for the sexual contact or the victim's injuries.

Evidence of reputation and past sexual conduct of the victim generally has no place in the trial for a sexual offense. Past consensual activity of the victim has little or no relevance to whether the defendant sexually assaulted the complainant. Its admission violates the victim's privacy, increases the trauma of trial, and discourages victims from cooperating in prosecution. Too often this kind of evidence is used by the defense to embarrass and intimidate the victim.

Every State should also protect child witnesses, where necessary, from traumatic confrontations with their alleged abusers. As the Supreme Court has noted, placing a child witness in close proximity to an alleged abuser or molester may do serious psychological damage. In addition, it may actually disserve the truth-seeking function of the trial by so overwhelming the child as to prevent him or her from accurately remembering and testifying to painful events. *See Craig* v. *Maryland*, 110 S. Ct. 3157, 3168-70 (1990). The Maryland statute, upheld by the Supreme Court in *Craig*, provides a good model. If the trial judge finds that courtroom testimony will result in serious emotional trauma to a child witness, such that the child will not reasonably communicate the facts by direct testimony, the testimony is taken by closed-circuit television with only the attorneys and, if necessary, a guardian present [Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989)].

Recommendation 23

Permit victims to require HIV testing before trial of persons charged with sex offenses.

With the advent of the deadly HIV infection, sex offenses have become even more painful and traumatic for victims. Now victims must confront the possibility that they have contracted an incurable disease. The uncertainty alone is terrifying. The criminal justice system must respond to this added trauma for victims of sexual offenses.

States should provide, at the request of the victim, for the mandatory HIV testing of defendants in sexual offense cases *before* trial.[62] The latest medical evidence indicates that early testing and treatment can delay the onset of AIDS in those who test HIV-positive and prolong survival of those with AIDS.[63] Moreover, the victim is entitled to end the dread and uncertainty that surrounds this question. Test results should be provided to the victim and to the court. States should also require that, at the request of the victim, the defendant be tested again periodically, for example, after 6 months and 12 months given the latency period of the virus. Finally, States should provide enhanced penalties for offenders infected with HIV who commit sexual offenses that may transmit the virus to the victim.

All such testing, and the use of test results, should be done in a manner that safeguards the victim's confidentiality.

[62] At least 11 States now provide for HIV testing of *accused* sex offenders, in addition to those States providing for testing of convicted offenders. The Administration has proposed similar legislation to the Congress for Federal sex crimes. In 1990, Congress provided a funding incentive to encourage States to adopt HIV testing for convicted sex offenders and to reveal the results to victims.

[63] *See* Massachusetts Medical Society, vol. 326 *The New England Journal of Medicine*, "The Effects on Survival of Early Treatment of Human Immunodeficiency Virus Infection," p. 1037 (1992).

Recommendation 24

Notify the victim of the status of criminal justice proceedings and of the release status of the offender.

As the party directly harmed by the crime, the victim has a keen interest in understanding the criminal justice process and knowing its results. Victims and survivors of victims need to bring their traumatic experience to closure. The criminal justice system has an important role to play in this process.

Victims of crime should also be apprised of any change in a convicted offender's status, such as entrance into work release, weekend furlough or community incarceration. Many victims of crime live with the fear (often justified) that they may be victimized by the same offender again after release. States should also ensure that adequate protective measures are taken before release, where objective facts create a legitimate fear of further victimization.

To respect the victim's needs in the criminal justice process:

- Provide for hearing and considering the victim's perspective at sentencing and any early release proceedings.

- Provide victim-witness coordinators.

- Provide for victim restitution and for adequate compensation and assistance for victims and witnesses.

- Adopt evidentiary rules to protect victim-witnesses from courtroom intimidation and harassment.

- Permit victims to require HIV testing *before* trial of persons charged with sex offenses.

- Notify the victim of the status of criminal justice proceedings and of the release status of the offender.

Citizen's checklist: Questions about criminal justice to ask your State and local leaders

How well does your State and local government stack up against the Federal Government and other States in the area of public safety? Do your police and prosecutors have the tools they need to combat violent street gangs, drug dealers and gun-toting criminals? Does your State invest enough in prisons to keep violent repeat offenders in prison instead of in your neighborhood?

Ask those responsible for law enforcement and public safety in your State and local community these questions:

☐ Do our courts have authority to detain dangerous defendants without bail or are these defendants released back into the community before trial?

☐ How much of the sentences they are given in court do violent offenders in our State actually serve in prison on average? Does our State still have parole? Why?

☐ Are there mandatory minimum penalties in our State for the use of a firearm in the commission of a felony for repeat offenders who are caught in illegal possession of a firearm and for repeat violent offenders?

☐ What percentage of the State budget is devoted to prisons? Can profits from the seizure of criminals' property be used for prison construction in our State?

☐ Does State law provide the death penalty for those who kill law enforcement personnel, for those who kill while committing another felony such as rape or robbery, and for those who kill in prison?

☐ Are prisoners convicted of felonies required to perform some labor in our prisons?

☐ Are persons arrested for serious crimes in our State drug-tested? Are probationers and parolees in our State drug-tested? Is drug use while on probation or parole grounds for mandatory revocation of release?

☐ Do our State and local law enforcement agencies use asset forfeiture against drug traffickers and other violent criminals? Are assets seized used to supplement law enforcement funding?

☐ Does our State provide a range of criminal sanctions that emphasize discipline and responsibility for the nonviolent first-time juvenile offender?

☐ Are juveniles over the age of 14 who commit serious crimes, like murder and rape, prosecuted in adult court unless special circumstances are shown by the defense?

☐ Does our State keep detailed records of juvenile offenses and share them with the FBI? Does our State provide that an offender's serious juvenile crimes should be considered at sentencing? Can juvenile offenders be fingerprinted for law enforcement records in our State?

☐ What is the average delay from time of arrest to time of trial for violent felonies in our State? Do we have a speedy trial law with specific limits on delay?

☐ Do our courts exclude evidence from trial even where the police act in a good faith attempt to follow the law? Do our

courts exclude more evidence than is required by the Federal Constitution?

☐ If a defendant testifies in his defense, can our prosecutors let the jury know that the defendant has a prior criminal record?

☐ Are prior rape and child molestation offenses admissible in our courts to show that a defendant has a disposition to commit those crimes?

☐ Is there a time limit on filing a petition for habeas corpus in our State courts to prevent months and even years of delay? Are prisoners limited to one habeas corpus challenge to their convictions in State court?

☐ Are our police and sheriffs provided with protective body armor and adequate weaponry to defend themselves against well-armed criminals? Are our law enforcement personnel adequately compensated?

☐ What percentage of State and local budgets are spent on law enforcement and criminal justice? Is it less than 6.9% (the national average)?

☐ Does our State maintain complete, accurate, and up-to-date computerized criminal history records?

☐ Do our prosecutors have authority to grant "use" and "transactional" immunity?

☐ Can police in our State obtain court orders for wiretaps or use pen registers and trap and trace devices on phone lines to investigate large-scale drug rings and organized crime networks?

☐ Do victims have the right to address the court at sentencing in our State, or may only the defendant do so? Do victims have the right to attend all court proceedings in our State? Is the victim's perspective considered before early release is granted to a convicted felon?

☐ In a death penalty case where the defendant puts on evidence of his background and family life to evoke sympathy, can our prosecutors present evidence about the victim and the victim's family to give the jury a sense of their loss?

☐ Does our State have victim-witness coordinators?

☐ Does our State provide for victim restitution and assistance for victims and witnesses?

☐ If a criminal profits from his crime by writing a book or giving a paid interview, does our law require that some of that money go to the victim?

☐ Does our State provide professional assistance or counselors to assist victims and witnesses in the criminal process? Are adequate witness fees paid to cover food, travel, and lost work time?

☐ Do our evidence laws protect rape victims against courtroom attacks on their reputations and revelation of irrelevant details of their private sex lives? Does our State provide for protection of child witnesses by allowing closed-circuit televised testimony where testifying in the presence of the defendant would cause the child serious emotional trauma?

☐ Can victims of sex offenses in our State require HIV testing of the accused before trial?

☐ Are victims in our State notified of the status of criminal justice proceedings and the release status of the offender?

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