

DEFENDING THE INDIGENT DURING A WAR ON CRIME

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INTRODUCTION

For nearly a decade, Americans have engaged in a war on crime of unprecedented proportion. Shrill political rhetoric, massive government spending, and intensive media exposure fuel the war effort. For example, to gain political advantage, President Bush and his advisors labeled a \$3 billion, Democrat-initiated crime bill "pro-criminal," even though the bill includes more than fifty new capital offenses and relaxed search and seizure standards.¹ A near doubling of tax dollars dedicated to police, courts, and corrections mirrors an almost 30% increase in the number of law enforcement personnel in the United States during the past decade.² Gang violence, crackhouse busts, victimization of the elderly, and seemingly random "drive-by" murders are familiar news stories reported throughout the nation.³

Drug law offenders in general, and illicit drug users in urban areas in particular, provide the raw material for staggering "enemy" body counts. Drug arrests per year nationwide increased nearly 43% between 1977 and 1987; from about 569,000 cases in 1977 to over 811,000 cases in 1987. In 1988, drug arrests increased 43% to 1,555,000 and in 1989 rose by another 19% over the count for 1988.⁴

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¹ Clifford Krauss, *After Senate Backs Bush and Blocks Defeats Anti-Crime Bill, Congress Goes Home*, N.Y. TIMES, Nov. 28, 1991, at D22.

² 1991 U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 186-87 (1991).

³ See, e.g., James N. Baker and Regina Elam, *Programs That Can Make a Difference*, NEWSWEEK, Sept. 11, 1989, at 28; George J. Church, *Fighting Back; Bush Declares Another War on Drugs but It May Not Help Much*, TIME, Sept. 11, 1989, at 12; Gustavo A. Goriti, *How to Fight the Drug War*, ATLANTIC MONTHLY, July 1989, at 70.

⁴ John A. Martin, *Drugs, Crime, and Urban Trial Court Management: The Unintended Consequences of the War on Drugs*, 8 YALE L. & POL'Y REV. 117,

Surprisingly, the nation launched the war on crime and has sustained it in what is shaping-up to be an increasingly peaceful era. A typical American's chance of being a crime victim is considerably less than in the late 1970s.⁵ Crime victimization against the elderly (a powerful force in local, state, and national politics) has dropped so rapidly that by the early 1990s, the elderly, who account for nearly 12% of the nation's population, are the victims in only 2% of all crimes committed and 0.3% of violent crimes.⁶ Moreover, the chances of a police officer being killed in the line of duty have fallen to less than one-half of the chances two decades ago,⁷ and the size of the historically most crime-prone age-segment of the U.S. population, those aged sixteen to twenty-five, has declined rapidly.⁸

Still, even if the rhetoric and reality of crime and crime control soon become synchronized, it seems likely that the legacy of the war on crime will be substantial. The lingering consequences will haunt — perhaps most of all — our courts and those charged with providing adequate defense for the nation's numerous indigent criminal defendants. Felony caseloads nearly doubled in the typical U.S. trial court over the past decade, with courts in urban areas experiencing even more dramatic increases. Drug arrests are a rapidly increasing proportion of total arrests and now constitute one-half of all criminal cases in many urban trial courts.⁹

The increasing number of defendants in many jurisdictions reveals only a small part of the impact of the war on crime. In

118 (1990). See also INFO. PLEASE ALMANAC 825 (1991) (Estimated Arrests 1989).

⁵ 1989 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BJS DATA REPORT, 1989 18 (1990) [hereinafter 1989 BJS DATA REPORT].

⁶ 1989 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 234 & 250 (Timothy J. Flanagan & Kathleen Maguire, eds., 1990) [hereinafter 1989 SOURCEBOOK].

⁷ 1989 SOURCEBOOK, *supra* note 6, at 401.

⁸ See, e.g., Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC., 552 (1983); D. Wayne Osgood, et al., *Time Trends and Age Trends in Arrests and Self-Reported Illegal Behavior*, 27 CRIMINOLOGY 389 (1989); Yossi Shavit & Arye Rattner, *Age, Crime, and the Early Life Course*, 93 AM. J. SOC., 1457 (1988); Darrell Steffensmeier, et al., *Relative Cohort Size and Youth Crime in the U.S., 1953-1984*, 52 AM. SOC., REV. 702 (1987).

⁹ Martin, *supra* note 4, at 119. See also *Courts and the "War on Drugs,"* 73 JUDICATURE 236 (1990).

this article we will show that the war on crime also creates a hostile climate for providing indigent defense in the nation's state and federal courts. An increasing number of "policy-sensitive" drug cases, an alteration of plea policies, mandatory sentencing and de jure limitations on judicial discretion, increased prosecutorial power, and jail and prison overcrowding all characterize this hostile climate.

This article begins with a detailed description of the characteristics and trends of the current war on crime. Section II examines the implications for courts and indigent defense.

I. CHARACTERISTICS AND TRENDS OF THE WAR ON CRIME

A. CHARACTERISTICS AND TRENDS

Paradoxical trends define the terrain on which the crime war is now being waged. Crime, as measured by victimization against individuals and households, declined steadily over the last twenty years, but arrests for some crimes increased dramatically. Despite a period of declining drug use among many segments of the U.S. population, especially young people, the national mobilization against illicit drugs persists. Although American streets are becoming safer, public fear of crime is increasing. Even though incarceration rates are at record levels and prison sentences are longer in duration, the perception is one of leniency in the judicial system.

This section examines the nature of crime, trends in crime control, and the sources of those trends to provide a detailed description of an increasingly hostile indigent defense environment. That hostility results as much from political rhetoric and its effect on public opinion as from violence and theft.

1. *Victimization Declines, but Law Enforcement Activity Increases*

Victimization rates for crimes against persons and households have declined during the last twenty years.¹⁰ Every type of crime examined in the annual National Crime Survey declined between 6% and 33% during the period from 1975 to

¹⁰ See GEORGETTE BENNETT, *CRIME WARPS: THE FUTURE OF CRIME IN AMERICA* 1-16 (2d rev. ed. 1989).

1988, the most recent dates for which complete data is available.¹¹ The proportion of American households affected by theft or violent crime has not increased in the last fifteen years. Despite the media attention directed at violent crime, the rate of murder and non-negligent manslaughter decreased by just over 13%, from 9.7 to 8.4 persons per 100,000, from the late 1970s to the late 1980s.¹² Moreover, theft against individuals and households still constitutes 84% of all crime in America. (See Table 1).

Crime against the elderly has declined rapidly beginning in the mid-1970s and elderly victims now account for a smaller fraction of all U.S. crime victims than in the 1970s. At 4.1 victims per 1000 in the population, the victimization rate for violent crime against the elderly is 47% less today than in 1975, and is only one-seventh of the rate for the general population. In addition, personal theft from elderly victims has declined 25% to a rate of 18.3 victims per 1000. The elderly's household property victimization has fallen 35% to 77.7 victims per 1000.¹³

The changing demographic composition of the nation suggests similar declines in victimization rates over the next few decades. As the percentage of elderly in the population continues to grow, victimization should continue to decline.¹⁴ Historically, rates of arrest for property crime have peaked at age sixteen, dropped in half by age twenty-two, and dropped in half again by age thirty. Violent-crime arrests rates have peaked at about age eighteen and dropped in half by age thirty.¹⁵ The number of persons in what is by far the most crime-prone age group, ages sixteen to twenty-five years, will decline during the next few decades. The number of younger Americans will not begin to approach the number of young baby-boomers alive

¹¹ 1989 BJS DATA REPORT, *supra* note 5, at 18.

¹² Debra C. Moss, *Drug Cases Clog the Courts*, 76 A.B.A. J. 34, 36 (1990).

¹³ 1989 SOURCEBOOK, *supra* note 6, at 234, 250.

¹⁴ See BENNETT, *supra* note 10, at 2.

¹⁵ See *supra* note 8.

TABLE 1
U.S. Crime Victimization Trends 1975 to 1988
(% All Crime in Parentheses)

OFFENSE:		1975 Victimization Rate Per 1000	1988 Victimization Rate Per 1000	% Change in Victimization 1975 to 1988
PERSONAL VICTIMIZA- TION	<i>Violent Crime</i>			
	Rape	0.9 (0.3)	0.6 (0.4)	-29.7
	Robbery	6.8 (2.9)	5.3 (2.9)	-22.2
	Assault	25.2 (10.9)	23.7 (13.2)	-5.7
	<i>Total Violent</i>	32.8 (14.2)	29.6 (16.5)	-9.7
	<i>Personal Theft</i>			
	Larceny with Contact	3.1 (1.3)	2.5 (1.4)	-20.7
Larceny with No Contact	92.9 (40.2)	68 (37.9)	-26.8	
	<i>Total Theft</i>	96 (41.5)	70.5 (39.3)	-26.6
HOUSE- HOLD VICTIMIZA- TION	Burglary	91.7 (17.2)	61.9 (16.1)	-32.5
	Larceny	125.4 (23.5)	90.2 (23.5)	-28.1
	Motor Vehicle Theft	19.5 (3.6)	17.5 (4.6)	-10.2
	<i>Total Household</i>	236.5 (44.3)	169.6 (44.2)	-28.3

during the 1970s, when crime peaked, until the middle of the next century, if ever again.¹⁶

Although victimization rates declined over the last twenty years, law enforcement activity has increased, so that today the number of people arrested in the United States is at a record level. Between 1979 and 1988, the total number of arrests in the nation increased by just under 22%. The increase in arrests, however, is not uniform across different types of crime. Arrests for burglary (-17.2%), drunkenness (-33.6%), and disorderly conduct (-8.6%) declined from 1979 to 1988, while the number of robbery arrests (+0.4%) remained nearly constant. In contrast, the number of arrests for assault increased by 40.7%, for larceny theft crimes by 22.7%, and for driving while intoxicated by 15.2%. Most startling, arrests for drug offenses increased by 89.9%, considerably more than any other type of offense during the nine year period.¹⁷

2. *Influx of Drug Cases Changes the Focus of the Judicial System*

The influx of drug cases not only resulted in more routine work for the justice system, but also created an unprecedented amount of politically sensitive work. In the present political environment, drug cases, especially those involving the sale of drugs, acquire special status. District attorneys, state attorneys, and other local, state, and federal officials are often requested to redirect their efforts from other areas to the supposed "crisis" created by drug sales and drug use.¹⁸ State statutes regularly single out drug offenders for extraordinary treatment, and the war on drugs is almost always a justification for the funding of new jails and prisons.¹⁹ Projected effect on the drug problem often determines allocation of public resour-

¹⁶ See generally KEN DYCHTWARD & JOE FLOWER, *AGE WAVE: THE CHALLENGES AND OPPORTUNITIES OF AN AGING AMERICA* (1989); LANDON Y. JONES, *GREAT EXPECTATIONS, AMERICA AND THE BABY BOOM GENERATION* 166-75 (1980); PAUL C. LIGHT, *BABY BOOMERS* (1989).

¹⁷ 1989 SOURCEBOOK, *supra* note 6, at 425.

¹⁸ See, e.g., JAMES A. INCIARDI, *THE DRUG LEGALIZATION DEBATE* 9-13 (1991).

¹⁹ See, e.g., OFFICE OF NAT. DRUG CONTROL POLICY, *NATIONAL DRUG CONTROL STRATEGY* 24-26 (1989) [hereinafter NAT'L DRUG CONTROL STRATEGY].

es.²⁰ Thus, in many ways, the intense political attention paid to drug cases is similar to the attention traditionally accorded violent crimes, such as murder and kidnapping. However, unlike murder and kidnapping, the potential number of drug cases within urban areas appears unlimited.

Federal prosecution, conviction, and incarceration trends perhaps best represent the emphasis on fighting drug related crimes in our criminal justice system. The total number of federal drug offense prosecutions increased 153% from 1980 to 1987, from 7003 prosecutions to 17,729. Prosecution rates in drug cases increased from 73% of those arrested in 1980 to 78% in 1987, and are now higher than the prosecution rates of any other type of crime.²¹ Conviction rates increased from 74% in 1980 to 85% in 1987. The number of defendants convicted in federal courts for drug possession offenses showed the most dramatic increase — just over 340%.²² Between 1980 and 1987, the number of federal drug offenders sentenced to prison for drug possession increased by 434.2%, and for those convicted of drug trafficking the number increased by 169.2%.²³ The average length of the prison sentence imposed by federal district courts increased 44% over the same period.²⁴ By the end of 1989, for the 16,834 defendants charged with drug law violations in United States district courts, the conviction rate was nearly 84% (14,139), and 77% (10,838) of those convicted received prison sentences.²⁵

3. *Police Officers Are Safer Today Than They Were in the Past*

Contrary to popular belief, American streets are significantly less hazardous for police officers today than in the past — perhaps the best indication of the inaccurate perception

²⁰ See, e.g., *id.* at 111-24; STEVEN WISOTSKY, BREAKING THE IMPASSE IN THE WAR ON DRUGS 4-5 (1986); John Haaga & Peter Reuter, *The Limits of the Czar's Ukase: Drug Policy at the Local Level*, 8 YALE L. & POL'Y REV. 36 (1990); Jerome H. Skolnick, *A Critical Look at the National Drug Control Strategy*, 8 YALE L. & POL'Y REV. 75 (1990).

²¹ 1989 BJS DATA REPORT, *supra* note 5, at 36-37.

²² *Id.*

²³ 1989 SOURCEBOOK, *supra* note 6, at 504.

²⁴ *Id.* at 494.

²⁵ *Id.* at 492-493.

of crime trends. For example, fewer officers died in the line of duty in 1990 than during any year since 1968. While over 3.5 per 10,000 police officers were killed on the job in 1971, the ratio dropped below 1.5 per 10,000 officers by 1989.²⁶ Even in the nation's five largest cities, the number of officers killed on the job declined 38% between 1980 and 1990. Not only are police officers half as likely to be killed on the job today than twenty years ago, but they are also half as likely to shoot someone else.²⁷

4. *Casual Drug Use Declines But Habitual Use Remains High*

National Institute of Drug Abuse surveys reveal that the number of Americans using illegal drugs fell dramatically between the mid and late 1980s. In 1988, 10.2 million Americans admitted to using marijuana in the past month, 8 million less than in 1985. The number of people in 1988 admitting to cocaine use in the past month was 2.9 million, half that recorded for 1985.²⁸ Most pronounced is the decline in illegal drug use among young people. In yearly surveys conducted over the past decade, high school seniors reported decreased use of nearly every type of drug. From 1979 to 1989, the percentage of seniors who reported using a particular drug in the last thirty days decreased for marijuana (36.5% to 16.7%), hallucinogens (4.0% to 2.2%), cocaine (5.7% to 2.8%), opiates other than heroin (2.4% to 1.6%), sedatives (4.4% to 1.6%), tranquilizers (3.7% to 1.3%), alcohol (71.8% to 60.0%), and cigarettes (34.4% to 28.6%).²⁹

Habitual cocaine and crack use, in contrast, has declined little, if at all, since the mid-1980s. The 1991 National Institute

²⁶ Timothy Egan, *New Faces, and New Roles, for the Police*, N.Y. TIMES, Apr. 25, 1991, at A1.

²⁷ Timothy Egan, *Less Risk for Officers, Nationwide Data Show*, N.Y. TIMES, Apr. 25, 1991, at B10. See Egan, *supra* note 26.

²⁸ Judy Treible, *A Scoreboard for the Anti-Drug Campaign*, BOULDER DAILY CAMERA, Aug. 29, 1989, at 3 (citing Drug Enforcement Administration, General Accounting Office, Office of Management and Budget, National Institute on Drug Abuse, and FBI Uniform Crime Report).

²⁹ 1989 SOURCEBOOK, *supra* note 6, at 311 (The percentage of seniors that reported using heroin in the last 30 days increased from .2% to .3%). See also Laurel Shaper Walters, *Youth Drug Use Declines*, CHRISTIAN SCI. MONITOR, Apr. 25, 1990, at 13.

of Drug Abuse annual survey reported that 855,000 Americans used cocaine frequently or about once a week, a considerable increase over the 606,000 habitual users recorded in 1990.³⁰ In addition, the prices of those illegal drugs has declined dramatically, despite tremendous increases in its purity and quality when sold on the street. Crack in particular remains cheap and plentiful.³¹

5. *Public Fear of Crime and Drug Use Continues to Increase*

Although victimization rates have decreased since the mid-1970s, the fear of crime and disapproval of drug use have increased. A series of national public opinion polls conducted in 1989 revealed that 84% of the survey participants believed that more crime existed in the United States in 1989 than in the previous year,³² induced in part by national media crime war images. Only 53% of the same survey group felt that there was actually more crime in their own area.³³ Additionally, 62% of those surveyed expected crime to increase over the next ten years.³⁴

The 1989 polls also revealed significant public fear over the leniency of the criminal justice system. Ironically, while prison incarceration rates rise to their highest levels ever in modern American history,³⁵ 83% of those respondents surveyed felt that courts were "not harsh enough" in criminal cases. Contrary to the opinion of those surveyed, judges gave longer mandatory sentences in 1989 than ever before. In 1988, 43% of those surveyed favored prohibitions on plea bargaining as a way

³⁰ See Joseph B. Treaster, *Use of Cocaine and Heroin Rises Among Urban Youth*, N.Y. TIMES, Dec. 19, 1991, at A18; John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991).

³¹ 1987 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 289 (Timothy J. Flanagan & Katherine M. Jamieson, eds., 1988) [hereinafter 1987 SOURCEBOOK]; JAMES A. INCIARDI, *THE WAR ON DRUGS: HEROIN, COCAINE, CRIME AND PUBLIC POLICY* 82 (1986).

³² 1989 SOURCEBOOK, *supra* note 6, at 142.

³³ *Id.*

³⁴ *Id.* at 143.

³⁵ See Patrick A. Langan, *America's Soaring Prison Population*, 251 SCIENCE 1568 (1991).

to combat crime in the United States³⁶ and 79% indicated that they worried more that some criminals were "being let off too easily" than that "the constitutional rights of some people accused of committing a crime [were] not being upheld."³⁷ Only 16% were more concerned about upholding a defendant's constitutional rights.³⁸

In a 1989 national Gallup Poll, public opinion favored various anti-crime proposals. Sixty-eight percent of the sample surveyed favored the prohibition of bail for those accused of violent crimes. Eighty-two percent wanted more difficult standards for parole for those convicted of violent crimes. Sixty percent favored enacting tougher gun control laws.³⁹ However, the public did not support permitting the police to search homes without warrants; 79% opposed this option.⁴⁰

A closer look at the opinion data implies that the public may not support individual measures of crime control, initiated by the federal government, if the financial costs of those measures are too high. Even though a majority of respondents said that they favored individual tactics that involved stricter enforcement, prosecution, and sentencing, only a minority suggested that government should channel funds toward these methods. As an alternative, a majority of respondents (61%) felt that to combat crime in the United States the government should allocate additional money and effort to confront the social and economic problems that contribute to crime, such as unemployment, a weak economy, and an inadequate school system. Only 32% of those surveyed believed that the government should spend more money on crime deterrence via improved law enforcement, additional prisons, police, and judges.⁴¹ Moreover, by 1990, 40% of those surveyed indicated that the government should put the majority of money and effort toward the education of young people about the dangers of drugs, while signifi-

³⁶ 1989 SOURCEBOOK, *supra* note 6, at 156.

³⁷ *Id.* at 159.

³⁸ *Id.*

³⁹ Support for tougher gun control laws varied along both geographic and gender lines. The group that reported the most support for stricter firearm legislation consisted primarily of women (68%), and residents of large cities (66%), while approval was significantly less among men (52%), and among rural residents (48%). *Id.* at 156-157.

⁴⁰ *Id.*

⁴¹ *Id.* at 158.

cantly fewer wanted funds used for the arrest of drug sellers (19%) and drug users (4%).⁴²

The current war on crime and drugs is occurring in an era when public attitudes about illicit drug use are increasingly negative. From 1979 to 1989, the percentage of high school seniors who disapproved of "smoking marijuana occasionally" rose from 45.3% to 77.2%, and the percentage who disapproved of "trying cocaine once or twice" rose from 74.7% to 90.5%.⁴³ During the same ten year period, the percentages of high school seniors who indicated a "great risk" occurred from "trying marijuana once or twice" (9.4% to 23.6%) or "smoking marijuana regularly" (42.0% to 77.5%), or "taking cocaine regularly" (69.5% to 90.2%) also increased.⁴⁴ Despite the decline in drug use, a 1989 general population survey reported that 53% of the public expected drug abuse to worsen in the next ten years.⁴⁵ Gallup Poll results show that the number of people who describe drug abuse as the "most important problem facing our country today," increased from 2% in January 1985 to 27% by May 1989.⁴⁶

The above statistics range from criminal victimization rates to popular opinion on drug use. Taken together they illustrate some of the factors that contribute to the increasingly hostile environment in which attorneys attempt to represent indigent criminal defendants. The remaining three subsections continue to describe this environment.

6. "Get Tough" Political Rhetoric

President Bush set the tone and broad agenda of the recent crime bill debate in 1989, when the National Institute of Justice Reports outlined his program for battling crime.⁴⁷ The President's plan emphasized the importance of minimum sentencing, the enactment of the death penalty for more violent crimes involving firearms, and the expansion of the federal prison capacity. Additionally, the President stressed the enhancement of prosecution and the increase in enforcement

⁴² *Id.* at 206.

⁴³ *Id.* at 194.

⁴⁴ *Id.* at 191.

⁴⁵ *Id.* at 143.

⁴⁶ 1989 BJS DATA REPORT, *supra* note 5, at 42.

⁴⁷ *President Bush Proposes New Anti-Crime Measures*, NAT'L INST. OF JUST. REP., July-Aug. 1989, at 7.

personnel, with the simultaneous restriction of plea bargaining practices, policies that may directly affect indigent defense. He explained, "[w]e're going to take back the streets. By taking criminals off the street. It's an attack on all four fronts — new laws to punish them, new agents to arrest them, new prosecutors to convict them, and new prisons to hold them."⁴⁸

The tone set by the White House, the poor economy, the potential vulnerability of Democrats to accusations of being "soft" on crime issues, and the grim realities of life in many urban areas are all factors contributing to the hostile climate for indigent defense. These factors also stifle honest debate necessary to respond adequately to the nation's crime and other social problems.

Politically, the Democrats are in a difficult position on the crime issue. They cannot argue that the crime problem in the nation is on the decline. To do so would require Democrats to ignore the horrible conditions in many urban areas where they retain high voter support. The Democrats would also risk creating the appearance that crime conditions are improving as a result of the "get-tough" White House policy. Meanwhile, Republicans want to stay tough and play to public sentiment, regardless of the evidence about crime trends and the sources of those trends. Like the threat of communism, the threat of ever increasing crime has served as a justification for important components of Republican dogma over the past decades.

The rhetoric and maneuvering that accompanied the recent crime bill debate reveal some of the consequences of the "let's get tougher on crime" climate. One example is that stiff anti-crime proposals carrying a politically attractive tough-on-crime message make policy makers hesitant to discuss potential side effects on case backlogs, prison overcrowding, and indigent defense for fear of diluting the tough stance and thereby alienating voters. As a result, policy makers tend to ignore many important issues, thus making informed, balanced decision making impossible.

Fueling the trend toward stiff anti-crime legislation are the enormous incentives facing Democratic lawmakers to reach agreements on crime control measures. Democrats realize that the Bush Administration will use the lack of a crime agreement in the 1992 presidential election to better its position.⁴⁹ Repre-

⁴⁸ *Id.* see also NAT'L DRUG CONTROL STRATEGY, *supra* note 19, at 9.

⁴⁹ Gwen Ifill, *Senate's Rule for Its Anti-Crime Bill: The Tougher the*

sentative Charles Schumer (D-N.Y.), Democratic chair of the House Judiciary Committee's panel on Crime and Criminal Justice, said that on any stiff crime control measures, "[c]ongressmen and senators are afraid to vote no . . . [e]ven if they don't think [the measure] will accomplish anything."⁵⁰ Proposals involving stiff sentencing and incarceration are among the most politically attractive. "The Senate's rush to prove that it is doing something to curb crime is so great that some traditional arguments have been all but abandoned."⁵¹ Senator Alfonse D'Amato's (R-N.Y.) proposal for mandatory prison sentences of up to 30 years for crimes against federal authorities involving firearms is an example of this eagerness to demonstrate the Senate's toughness on sentencing and incarceration. Eighty-eight senators voted for the proposal over objections that the provision was an unacceptable expansion of federal jurisdiction into state and local prosecutions. "It's tough to vote against tough sentences for criminals,' said one Democratic senate aide. 'Who is going to vote against giving thirty years for shooting someone with a silencer on federalism grounds?'"⁵²

Although each anti-crime measure offers potential for crime reduction, a concern, voiced by Senator Bob Graham (D-Fla.), is that Congressional actions are increasingly being made "in the ignorance of what the implication would be for the totality of our Federal criminal justice system."⁵³ The recent dramatic acceleration in prison overcrowding, a topic addressed in Section II, is a concrete illustration of potential implications. Despite prison overcrowding and the cost of providing new incarceration facilities, many policy-makers find that the risk of being labeled "soft on crime" is too great to propose alternatives to incarceration and mandatory sentencing. Congress continues to establish mandatory minimum sentences for various drug-related offenses, despite protests from judicial organizations.⁵⁴ "I don't think any politician wants to be seen as soft on crime,'

Provision, the Better, N.Y. TIMES, July 8, 1991, at A6.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Michael deCoursey Hinds, *Bush Aides Push State Gun Cases Into U.S. Courts*, N.Y. TIMES, May 17, 1991, at A1; Aaron Epstein, *Judges Rail at Stiff Drug Sentences*, DENVER POST, May 11, 1991, at 4A.

said Robert Dickover, chief of the research branch of the California's Department of Corrections. "The politicians have painted themselves into a corner. They . . . have promised more from the policy of incarceration than they can deliver."⁵⁵

Finally, as the scope and momentum of the nation's war on crime and the distortion of reality accompanying it increases, accurate information about unintended consequences, including possible affects on the quality of indigent defense, is more difficult for policy-makers to obtain and address. The fear of voter reprisal if one appears soft on crime, by questioning the impact of the crime war and by supporting rights for criminals, stifles honest debate. Describing the overall trend of the Senate's biannual crime debates, Senator Howard M. Metzenbaum (D-Ohio) said that "[t]he truth is, we're engaged in a crass political contest about which of us — Democrats or Republicans — hate crime more."⁵⁶

7. *Supreme Court Decisions Force Constitutional Law Interpretation Toward the Right*

Recent United States Supreme Court decisions will likely affect the daily operation of justice more profoundly than much of the judicial activity in the past several decades. In 1991, the Court overruled four major precedents. Each of these new decisions narrowed the scope of procedural and evidentiary criminal protections. Enforcement tactics developed and implemented in the nation's war on crime were a factor initiating these recent cases. Easing procedural restrictions for admitting prosecutorial evidence into trials and limiting challenges by defendants to their treatment while in the criminal justice process create new impediments to providing adequate indigent defense.

a. *Easing Evidentiary Restrictions on Prosecutions*

The Court ruled 6-3 in *Florida v. Bostick*⁵⁷ that police do not necessarily violate Constitutional protections against unfair

⁵⁵ Peter Kerr, *Crowded Prisons Pose Tough Choice for Florio*, N.Y. TIMES, May 19, 1991, at A28.

⁵⁶ Gwen Ifill, *Bush Drops Plan for a Court for Aliens*, N.Y. TIMES, June 21, 1991, at A14.

⁵⁷ 111 S. Ct. 2382 (1991).

searches and seizures by boarding buses and obtaining passengers' permission to search their luggage. *Bostick* arose over one of the latest drug interdiction innovations, namely "working the buses."⁵⁸ The sheriff's deputies in Broward County, Florida routinely boarded public buses and, "without articulable suspicion," asked passengers if they could search the passengers' luggage.⁵⁹ After advising passenger Terrance Bostick of his right to refuse a search, Bostick consented to the search and officers found cocaine in his luggage. Prosecutors used the cocaine as evidence against him on a drug trafficking charge. The Florida Supreme Court accepted Bostick's motion to suppress the evidence based on violations of the Fourth Amendment of the United States Constitution.

The United States Supreme Court invalidated the state court's per se rule that classified every bus encounter as a seizure. The Court instead ruled that, "in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."⁶⁰ Although the officers lacked the reasonable suspicion required to justify a seizure, the decision made suspicion unnecessary by ruling that such bus raids do not, by themselves, constitute a seizure. The majority held that, "[t]he encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature."⁶¹ "[T]he mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him."⁶²

Bostick represents the judicial trend towards easing evidentiary restrictions in criminal prosecutions. The decision follows a string of rulings beginning in the early 1980s which enables law enforcement officials to stop and question passengers in airport terminals⁶³ and other public locations,⁶⁴ to ask

⁵⁸ *Id.* at 2389.

⁵⁹ *Id.* at 2384-2385.

⁶⁰ *Id.* at 2389.

⁶¹ *Id.* at 2386.

⁶² *Id.* at 2387.

⁶³ *Florida v. Rodriguez*, 469 U.S. 1, 5-7 (1984) (per curiam).

⁶⁴ *INS v. Delgado*, 466 U.S. 210, 218 (1984); *Florida v. Royer*, 460 U.S. 491, 497-498 (1983) (plurality opinion) (dictum).

to examine an individual's identification,⁶⁵ and to request consent to search luggage,⁶⁶ without the level of suspicion ordinarily required by the Fourth Amendment. However, as we describe later in this section, even though individuals may refuse the request of law enforcement officers, the likelihood of an individual fully understanding their opportunity to do so seems remote.

The Supreme Court overruled precedent from the past twenty-five years in a number of other telling cases in 1991. In *California v. Acevedo*,⁶⁷ the Court limited *Arkansas v. Sanders*,⁶⁸ which had restricted police authority to search automobiles lawfully stopped without search warrants. *Acevedo* allows the police to search a container within an automobile without a warrant whenever probable cause exists to believe that the container holds contraband or evidence.⁶⁹ *Arizona v. Fulminante*⁷⁰ limited *Chapman v. California*⁷¹ which, *inter alia*, had barred the use of any coerced confession in a criminal trial. *Fulminante* held that using a coerced confession at trial could be "harmless error" if other evidence was adequate to support a guilty verdict.⁷² Finally, in *Payne v. Tennessee*,⁷³ the Court overturned two recent 5-4 Supreme Court decisions, *Booth v. Maryland*⁷⁴ and *South Carolina v. Gathers*.⁷⁵ *Payne* held that the Constitution permits introducing, during the sentencing phase of capital murder trials, evidence concerning

⁶⁵ *Delgado*, 466 U.S. at 216; *Royer*, 460 U.S. at 501; *United States v. Mendenhall*, 446 U.S. 544, 555 (1980).

⁶⁶ *Royer*, 460 U.S. at 501.

⁶⁷ 111 S. Ct. 1982 (1991).

⁶⁸ 442 U.S. 753.

⁶⁹ *Acevedo*, 111 S. Ct. at 1983.

⁷⁰ 111 S. Ct. 1246 (1991).

⁷¹ 386 U.S. 18 (1967).

⁷² *Fulminante*, 111 S. Ct. at 1253; *See also* Linda Greenhouse, *High Court Widens Evidence Allowed in Capital Cases*, N.Y. TIMES, June 28, 1991, at A1.

⁷³ 111 S. Ct. 2597 (1991).

⁷⁴ 482 U.S. 496 (1987).

⁷⁵ 490 U.S. 805 (1989).

the victim and the impact of the victim's death.⁷⁶ Both *Booth* and *Gathers* had barred this evidence.⁷⁷

These recent Supreme Court decisions limit the procedural and evidentiary protections available in criminal cases. The gradual narrowing of evidentiary restrictions and broadening of allowable search practices promote the Bush Administration's policies on crime and drugs. However, despite visible and desirable gains, the policies have had less visible and less desirable effects on the quality of indigent defense. In particular, the courts have eliminated some tools once available to defense attorneys to challenge the legality of a search and seizure, often the single most important issue in a drug case. In addition, by allowing what were once considered unlawful, as well as distasteful, law enforcement practices, recent decisions have contributed to the hostile climate surrounding indigent defense in urban trial courts.

As an illustration, both the majority and the dissent in *Bostick* acknowledged the difficulties of determining the constitutionality of innovative crime enforcement practices in the current political climate. The majority noted that the Court was "not empowered to suspend constitutional guarantees so that the Government may more effectively wage a 'War on Drugs.'"⁷⁸ However, as Justice O'Connor explained, "this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful."⁷⁹ Speaking in dissent, now-retired Justice Marshall remarked, "[o]ur Nation, we are told, is engaged in a 'war on drugs.' No one disputes that it is the job of law-enforcement officials to devise effective weapons for fighting this war. But the effectiveness of a law-enforcement technique is not proof of its constitutionality."⁸⁰ Justice Marshall also noted that "a passenger unadvised of his rights and otherwise unversed in constitutional law *has no reason to know* that the police cannot hold his refusal to cooperate against him."⁸¹ "Rather than requiring the police to justify the coercive tactics employed here, the majority blames respondent for

⁷⁶ *Payne*, 111 S. Ct. at 2606-2607. See also *Excerpts From Opinion on Evidence About Murder Victims*, N.Y. TIMES, June 28, 1991, at A14.

⁷⁷ *Booth*, 482 U.S. at 501-502; *Gathers*, 490 U.S. at 810.

⁷⁸ *Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1991).

⁷⁹ *Id.*

⁸⁰ *Id.* (Marshall, J., dissenting).

⁸¹ *Id.* at 2393.

his own sensation of constraint."⁸² Immersed in an environment fueled by the rhetoric of "war," criminal defendants are increasingly likely to feel constrained to abide by the orders of law enforcement officers. The historically powerless population of the indigent, who tend to be uninformed of their constitutional rights, is likely to be adversely affected by these decisions.

As a result of *Bostick*, public transportation searches are a more appealing tactic for police because they allow access to usable evidence without the level of suspicion required for other types of searches. Public defenders, already overburdened by the increase in drug arrests, will likely face an increase in the number of indigent defendants. The Court's ruling does protect potential defendants by requiring luggage searches to remain "consensual." However, determining whether a defendant felt free to decline the officers' requests, "or otherwise terminate the encounter," is likely to exacerbate the logistical difficulties involved in determining the validity of this new tactic.

Payne was also not without dissenters. Justice Stevens dissented based on the influence of the war on crime rhetoric. "Today's majority has obviously been moved by an argument that has strong political appeal."⁸³ "Given . . . the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime . . . today's decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens."⁸⁴ Justice Marshall, again in dissent, discussed his concerns that the court had overlooked the possible adverse effects of the war on crime on sentencing practices, including the imposition of long prison terms and the death penalty. "Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women or the indigent."⁸⁵

b. *Narrowing Scope of Defense Mechanisms*

The Court's 5-4 decision in *Wilson v. Seiter*⁸⁶ represents the narrowing scope of mechanisms that defendants may use to

⁸² *Id.* at 2394.

⁸³ *Payne v. Tennessee*, 111 S. Ct. 2597, 2627 (1991) (Stevens, J., dissenting).

⁸⁴ *Id.* at 2631.

⁸⁵ *Id.* at 2625 (Marshall, J., dissenting).

⁸⁶ 111 S. Ct. 2321 (1991).

challenge their treatment throughout the criminal justice process. Pearly L. Wilson, an inmate of Ohio's Hocking Correctional Facility, sued prison officials after they ignored his written complaints about prison overcrowding, inadequate heating and cooling, unsanitary conditions, and the failure to segregate physically and mentally ill inmates. The Court ruled that inmates challenging confinement conditions must show not only that the conditions are inhumane, but also that they resulted from the "deliberate indifference" of prison officials.⁸⁷ This ruling requires judges to inquire into the intentions of prison officials.⁸⁸ In addition, challenging overall prison conditions under the Eighth Amendment's ban on cruel and unusual punishment is now more difficult.

Wilson v. Seiter comes at a time when thirty-seven states and the District of Columbia operate all or part of their correctional departments under federal court orders resulting from suits initiated by prisoners, the American Civil Liberties Union, and human rights groups.⁸⁹ These court orders deal with prison overcrowding, inadequacies in prison staffing levels, health care provisions, and overall confinement conditions.⁹⁰ The "deliberate indifference" requirement articulated in *Wilson* shifts the focus from objective prison conditions to the state of mind of prison officials. The Justice Department and the American Civil Liberties Union jointly urged the Court to continue interpreting the Eighth Amendment as establishing an objective and mandatory standard of minimal prison conditions.⁹¹ However, the Court held it could not address problems of prison overcrowding without inquiries into officials' intentions, because the intent requirement implicit in the Eighth Amendment's term "punishment" could not be "ignored as policy considerations might dictate."⁹²

⁸⁷ *Id.* at 2326.

⁸⁸ See Linda Greenhouse, *Justices Restrict Suits Challenging Prison Conditions*, N.Y. TIMES, June 18, 1991, at A1 [hereinafter *Justices Restrict Suits*].

⁸⁹ 1989 SOURCEBOOK, *supra* note 6, at 109.

⁹⁰ Kerr, *supra* note 55, at A28 (New Jersey prisons are operating at 140% capacity and California prisons are at twice their capacity). See also Langan, *supra* note 35.

⁹¹ See *Justices Restrict Suits*, *supra* note 88, at A1.

⁹² *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991).

The dissent was primarily concerned that inmates could not prevail on constitutional challenges to prison conditions if the cause was a state legislature's unwillingness to pay for prison improvements. Elizabeth Alexander, who argued for Pearly L. Wilson, believes that the ruling is not necessarily destructive to inmates' rights because she anticipates inmates will be able to persuade judges that long-term prison inadequacies are the result of deliberate indifference.⁹³ However, the actual impact of *Wilson* will remain unclear until the courts determine the standard for deliberate indifference.

The *Wilson* decision may delay decision-makers determinations of the effect that anti-crime policies have on the prison system. As court dockets expand to include a rapidly increasing number of drug cases, and as prison overcrowding worsens, future Supreme Court decisions may make ignoring the side effects of the war on crime even easier for policy-makers. Indigent defendants entering the system amidst the current political climate will find few ways to challenge court procedures and prison conditions.

Cases restricting the use of writs of habeas corpus to challenge the constitutionality of convictions and sentences in federal courts provide further evidence of the narrowing definition of prisoners' rights. Both *McCleskey v. Zant*⁹⁴ and *Coleman v. Thompson*⁹⁵ superseded *Fay v. Noia*⁹⁶ which had extended to most state prisoners the right to file habeas corpus petitions in federal courts. As a result of these two decisions, the burden in a second or subsequent petition for habeas corpus often shifts to the prisoner to disprove abuse of the writ. A petitioner can disprove abuse in two ways: by showing cause for an earlier default and actual prejudice as a result of an alleged violation of federal law or by demonstrating that failure to consider claims will result in a fundamental miscarriage of justice.⁹⁷

Moving in a similar direction are rulings on the constitutionality of mandatory sentencing. In *Harmelin v. Michigan*, the Supreme Court held that the Constitution permits mandatory sentencing to life in prison without parole for nonviolent first

⁹³ *Justices Restrict Suits*, *supra* note 89, at A1.

⁹⁴ 111 S. Ct. 1454 (1991).

⁹⁵ 111 S. Ct. 2546 (1991).

⁹⁶ 372 U.S. 391 (1963).

⁹⁷ *McCleskey*, 111 S. Ct. at 1470; *Coleman*, 111 S. Ct. at 2565.

offenses, including possession of 1.5 pounds of cocaine.⁹⁸ That ruling sharply limited *Solem v. Helm*⁹⁹ in which the Court had previously invalidated an identical sentence imposed on a man convicted of passing a bad check. *Harmelin* suggests that mandatory sentences initiated as part of the war on drugs will be difficult to challenge under the Eighth Amendment.¹⁰⁰

Current trends also create barriers to defendants' release from the system. The Supreme Court has diminished incentives to negotiate alternatives to incarceration by upholding mandatory sentencing and making prison overcrowding less vulnerable to lawsuits. Offenders who are potentially successful in a rehabilitative program, including indigent defendants and certain classes of drug offenders, will get swept more easily into an increasingly crowded system.¹⁰¹

8. *Increasing Concentration of Crime and Crime Control*

Although the federal government is largely responsible for the anti-crime and drug emphasis, crime and law enforcement activity concentrates disproportionately on non-white residents of urban areas. "Although the fight rages everywhere 'from sea to shining sea,' the battle zones are primarily the inner cities," according to Ann Bailey, Committee member of the National Legal Aid and Defender Association.¹⁰² Both victimization rates and arrest statistics illustrate the extent to which crime, especially violent and drug-related offenses, is focused increasingly in urban locations among non-white racial and ethnic groups, especially African Americans.

Although the national household victimization rate was 24.6% in 1988, 30% of all urban households, and 29% of all African American households, were touched by crime.¹⁰³ In 1988, the victimization rate for violent crimes was 40 per 1000

⁹⁸ *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991).

⁹⁹ 463 U.S. 277 (1983).

¹⁰⁰ See Linda Greenhouse, *Mandatory Life Term is Upheld in Drug Cases*, N.Y. TIMES, June 28, 1991, at A15.

¹⁰¹ See also Jane Gross, *Probation and Therapy Help Some Drug Users*, N.Y. TIMES, June 21, 1991, at B6.

¹⁰² Ann Bailey, *Legal Services, Poor Clients, and the "War on Drugs,"* 24 CLEARINGHOUSE REV. 504 (1990).

¹⁰³ 1989 BJS DATA REPORT, *supra* note 5, at 18.

persons for African Americans, but only 28 per 1000 for whites.¹⁰⁴ In that same year, 66% of all arrests and 70% of drug arrests occurred in cities even though cities accounted for only 55% of the total population.¹⁰⁵

Arrest trends underscore the disparate effects of the recent crime-fighting tactics on urban and non-urban areas and on whites and African Americans. In 1988, 65.3% of all arrests made in cities were of whites, while 32.8% were of African Americans. However, arrest rates varied widely by race for different types of crime. Of those arrested for property crimes, 63.3% were white and 34.6% were African American, while 51% of those arrested for violent crimes were African American and 47.5% were white. Of the total arrests made for drug abuse violations in cities, 55.5% were of whites and 43.8% were of African Americans.¹⁰⁶ In addition, while whites made up 65.3% of those arrested in cities, they comprised 80.3% in suburban areas and 81.5% in rural counties. The percentage of arrests of African Americans was highest in cities, at 32.8%, while African Americans made up 18.9% of arrests in suburban areas and 15.0% of arrests in rural counties.¹⁰⁷

Jail and prison population figures also reveal the uneven impact of law enforcement priorities on America's black and white populations. Even though African Americans accounted for just over 12% of the United States population by the end of the 1980s, on December 31, 1988, they accounted for 46% of the entire prison population, and on June 30, 1989 they accounted for 47% of that population.¹⁰⁸

By the end of 1990, approximately 455 of every 100,000 U.S. residents were in prison, giving the United States the highest incarceration rate in the world.¹⁰⁹ Incarceration rates among African Americans, however, best reveal the effect of the war on crime. "Black men are now four times more likely to be incarcerated in the United States than they are in South Africa."¹¹⁰ The incarceration rate for African American men by

¹⁰⁴ *Id.* at 21.

¹⁰⁵ 1989 SOURCEBOOK, *supra* note 6, at 434, 438, 441.

¹⁰⁶ *Id.* at 434.

¹⁰⁷ *Id.* at 434, 438, 442. *See also* powell and Hershenov, *supra* note 30.

¹⁰⁸ 1989 SOURCEBOOK, *supra* note 6, at 573, 587.

¹⁰⁹ *U.S. World's Foremost Incarcerator*, DENVER POST, Feb. 11, 1992, at 3A.

¹¹⁰ powell and Hershenov, *supra* note 30, at 569-70.

the end of the 1980s was 3109 per 100,000.¹¹¹ This figure is nearly 5.5 times larger than the 567 per 100,000 rate recorded for all African Americans in 1980.¹¹²

B. CRIME WARS, COURTS, AND INDIGENT DEFENSE: A SUMMARY

Collectively, the six salient characteristics of the current law and order mentality examined in this section contribute to an increasingly hostile climate for indigent defense within the American justice system. Moreover, myth and reality of crime and crime control are now nearly indivisible. Confronting this hostile climate has become extremely difficult. Ann Bailey perceptively summarized our current situation when she noted that: "When we use a 'war' analogy, we accept that we cannot actually do battle against an inanimate thing; we declare war against people. We accept that 'we' cannot win this war unless there are people who are enemies, and somebody or many somebodies must lose."¹¹³ "The War on Drugs presents an opportunity to be liked and admired . . . The arguments to employ adversarial tactics can be convincing."¹¹⁴

Declining victimization rates and stable or declining arrest rates for most crimes over the past dozen years indicate that the average American is less likely to be a crime victim now than in the mid-1970s. The "aging" of the nation's population indicates that these trends will continue throughout and beyond the 1990s. In addition, declining drug consumption rates among casual users and less tolerant public attitudes towards drug use (especially among younger people) suggest that both the crime and drug epidemics have already peaked among the general population.

Yet despite these gains, improvement in the climate for indigent defense in the American justice system is unlikely in the near future. The continuing widespread use of cocaine among habitual users, the increasing concentration of law enforcement activity and drug arrests in inner cities, the disintegration of urban areas, public fear of crime, and the populari-

¹¹¹ Tom Wicker, *The Iron Medal*, N.Y. TIMES, Jan. 9, 1991, at A21.

¹¹² BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1980 at 21 (1982).

¹¹³ Bailey, *supra* note 102, at 504.

¹¹⁴ *Id.*

ty of "get tough" political rhetoric and legislation create unrelenting pressure on the justice system to solve this highly visible, politically charged, multifaceted, and partially mythical crime problem. Moreover, the relief from overcrowded case dockets expected as a result of declining non-drug crime has not appeared. The recent emphasis on combating drugs negated many crime control gains of the past dozen years. Routine crimes now take second place in the justice system to more "serious" drug cases.

Finally, the disparate impact of crime and drug policies on African Americans and whites contributes to heightened racial tensions in the nation.¹¹⁵ For example, aggressive law enforcement under the war on crime and drugs, coupled with widespread crime and drug use in urban areas, leads many African Americans to perceive white disdain for "their" problems. The disproportionate size of the African American population incarcerated in U.S. jails and prisons plays upon stereotypes of African American men. Injecting the bitterness and hostility that frequently accompany polarized views about race can only increase hostility towards indigent defense.

II. IMPLICATIONS OF THE WAR ON CRIME AND RESPONSES OF THE JUSTICE SYSTEM

A. IMPLICATIONS FOR COURTS AND INDIGENT DEFENSE

"Pessimistic" and "frantic" describe the mood of many criminal practitioners across the nation. Judges, administrators, public defenders and even prosecutors wonder aloud about the long-term consequences the war on crime will have on criminal justice systems.¹¹⁶ "America's urban trial courts could soon become the first casualty in the war on drugs,"¹¹⁷ noted one court administrator during a seminar held in 1989. In this section we will examine the consequences of the war on crime

¹¹⁵ See generally E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* (1991) (choices offered by liberals and conservatives fail to reflect Americans' true values and concerns).

¹¹⁶ See Robert D. Lipscher, *The Judicial Response to the Drug Crisis: A Report of an Executive Symposium Involving Judicial Leaders of the Nation's Nine Most Populous States*, STATE CT. J., Fall 1989, at 13.

¹¹⁷ John Clarke, Trial Court Administrator, Jersey City, New Jersey, Remarks at a National Center For State Courts sponsored Seminar on Drug Case Processing in Urban Trial Courts, Denver, Colorado (July 17-18, 1989).

on criminal justice, including: (1) understaffed, under-funded systems processing too many defendants and the escalating levels of jail overcrowding; (2) increased prosecutorial power throughout the system and increased resource disparity between the defense and prosecution; and (3) declining judicial discretion. We will also examine some of the responses being developed: (1) increased plea bargaining, often according to untraditional policies; and (2) comprehensive caseflow management programs.

1. *Overburdened Justice Systems*

Case backlogs and case processing times are growing in federal and state jurisdictions throughout the nation. The current war on crime and drugs accounts for much of the expanding workload. Responses to the workload are primarily to add resources, undertake management innovations, and move resources from one part of a system to another. However, none of the strategies employed has proved successful.

In the last decade, the number of federal drug cases increased more than fivefold, from approximately 3100 in 1980, to 16,400 in 1990.¹¹⁸ During the same period, the number of district judges increased by about 10%, from 516 to 575.¹¹⁹ The result is an enormous increase in backlogged cases. In 1990, the backlog of drug cases in federal courts reached over 7400, a sixfold increase from 1200 in the year before.¹²⁰ Moreover, drug cases strain the court system in ways other than by the impact of their shear numbers:

Drug cases are not only rising in raw numbers. At least in some courts, they impose heavier burdens than do other criminal cases. This may stem in part from related factors, such as mandatory minimum sentences for possessing even small amounts of narcotics. Faced with such sentenc-

¹¹⁸ Hinds, *supra* note 54.

¹¹⁹ *Id.*; see generally Moss, *supra* note 12 (increased criminal prosecutions have led to backlogs in many federal and state courts as well as prison overcrowding).

¹²⁰ As *U.S. Spends More on Courts, Backlog Grows, Study Finds*, N.Y. Times, May 28, 1991, at A17.

es, even guilty defendants will seek trial more often than they would otherwise.¹²¹

The increase in the number of federal drug prosecutions also burdens the already overcrowded federal prison system. The number of defendants sentenced to prison for drug offenses in district courts rose 177.4% between 1980 and 1987.¹²² During the same period, the length of the average federal prison sentence for drug convictions rose 44%, whereas the average increase for all other crimes was 25%.¹²³ The number of federal prisoners convicted of drug-related offenses doubled in the past two years to almost 33,000.¹²⁴ Federal prison system officials report the system is currently operating at 160% of the designed capacity,¹²⁵ with over half of the 61,000 federal prison inmates serving mandatory prison sentences from drug-related charges.¹²⁶

Recent policy decisions increase the burden on federal courts. Prior to 1986, primarily state courts tried drug offenses, unless the case involved exceptional circumstances such as the crossing of state lines.¹²⁷ However, since 1986, Congress has passed a number of laws requiring federal courts to try an increasing number of criminal cases.¹²⁸

The Bush Administration is fueling this attempt to increase the caseload at the federal level, by trying to establish a system that prosecutes as many criminal cases involving firearms as possible in federal rather than state courts. One recent proposal, "Operation Triggerlock," incorporates several politically attractive features for advancing the war on crime including sentencing at the federal level, which generally results in tougher prison sentences.¹²⁹

¹²¹ *Courts and the "War on Drugs"*, *supra* note 9, at 236.

¹²² 1989 SOURCEBOOK, *supra* note 6, at 494.

¹²³ 1989 BJS DATA REPORT, *supra* note 5, at 37.

¹²⁴ Epstein, *supra* note 54, at 4A.

¹²⁵ Hinds, *supra* note 54, at A1.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *See, e.g.*, Anti-Drug Abuse Act of 1988, 21 U.S.C. § 1501-1509 (1988); Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 (1988); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 1837.

¹²⁹ Hinds, *supra* note 54, at A1.

Despite the Bush Administration's assurances that Operation Triggerlock would be "a major step in the Government's priority campaign against street crime and violent offenders,"¹³⁰ federal judges are resisting the initiative. Judicial organizations, including The Judicial Conference of the United States, which administers the federal court system, oppose diverting more drug cases to the federal level because of the effect on the federal court caseload.¹³¹ Drug cases now account for about one third of all federal criminal cases and judges complain that as drug and gun cases fill the federal dockets, "important constitutional issues . . . await hearings for months or years."¹³² Federal courts must meet stricter deadlines for criminal cases, forcing civil cases to face increasingly lengthy delays. The Southern District Court of California, for example, tries fewer than 50 of the 1000 civil cases filed there each year, because it must now spend more than 70% of its time on routine drug and gun cases.¹³³

The Supreme Court has expressed great concern over the federalization of crimes. In Chief Justice Rehnquist's end of the year statement he "chastised Congress for unnecessary legislation overloading the courts."¹³⁴ According to Rehnquist, "the writers of the Constitution intended the federal judicial system to have only a 'limited role reserved for issues where important national interests predominate.'"¹³⁵ Justices Sandra Day O'Connor and Antonin Scalia also urged Congress to halt increasing federal jurisdiction over criminal acts. "Murder is not a federal crime; murder of the president is,' Justice Scalia told members of the House Appropriations subcommittee that controls the court's budget. 'What has happened in recent years is people have come to think if its a big problem, then it's a federal problem.'"¹³⁶

State courts throughout the nation mirror the pattern of increasing caseloads in the federal court system. However, the

¹³⁰ *Id.* at B16. See also Nancy E. Roman, *Justices Hammer Needless Laws*, WASH. TIMES, Feb. 19, 1992, at A4.

¹³¹ Hinds, *supra* note 54, at A1.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Roman, *supra* note 130, at A4.

¹³⁵ Linda Greenhouse, *Ease Load on Courts, Rehnquist Urges*, N.Y. TIMES, Jan. 1, 1992, at A8 (quoting Chief Justice Rehnquist).

¹³⁶ Roman, *supra* note 130, at A4 (quoting Justice Scalia).

magnitude of the demand on state court systems dwarfs that on the federal system. In 1989, the total number of cases filed in state courts reached nearly 100 million.¹³⁷ The enormous increase in the federal drug caseload (from 1200 cases in 1989 to 7400 cases in 1990) is still less than the drug caseloads of the state courts in many of the nation's large cities.¹³⁸

The increased caseload also effects the length of time required to dispose of cases. A recent comprehensive study of twenty-six urban trial courts reported that the median time from filing to disposition for civil cases ranged from about six months in fast courts, to nearly two years in slower courts.¹³⁹ The study revealed that the median time from arrest to disposition of felony cases was 119 days, yet felony case processing times of more than six months to more than one year were common in many courts.¹⁴⁰ None of the courts met the American Bar Association Standards that stipulate that only 2% of a court's felony caseload should take more than 180 days to process. These figures are especially disturbing given that 95% of cases were either plea bargained, settled, dismissed, or disposed of by arbitration.¹⁴¹

Furthermore, state prison facilities have not kept pace with inmate population growth. The nation's state prisons held a record 610,000 inmates at the end of 1989, an increase of 63,000 from the previous year.¹⁴² To respond adequately to the inmate population growth would require building a 1000-bed prison every six days.¹⁴³ The inmate population of state and

¹³⁷ David B. Rottman & Brian J. Ostrom, *Caseloads in the State Courts, Volume, Composition, and Growth*, STATE CT. J., Spring 1991, at 4.

¹³⁸ See generally JOHN GOERDT, EXAMINING COURT DELAY: THE PACE OF LITIGATION IN TWENTY-SIX URBAN TRIAL COURTS, 1987, at 72, 98 (1989) (felony and drug-related case processing times) [hereinafter COURT DELAY]; John Goerd, *Explaining The Pace of Civil Litigation: The Latest Evidence From 37 Large Urban Trial Courts*, 14 JUST. SYS. J. 289 (1991) (discussing long case processing time in state general jurisdiction courts) [hereinafter *Civil Litigation*].

¹³⁹ *Civil Litigation*, *supra* note 138, at 294-296. See also COURT DELAY, *supra* note 138, at 13.

¹⁴⁰ COURT DELAY, *supra* note 138, at 53-55.

¹⁴¹ John A. Martin & Nancy C. Maron, *Courts, Delay, and Interorganizational Networks: Managing an Essential Tension*, 15 JUST. SYS. J. 268, 269 (1991).

¹⁴² Langan, *supra* note 35, at 1568.

¹⁴³ *Id.*^e

federal prisons increased by 7.3% during the first six months of 1989, a rate that exceeded any annual increase previously recorded.¹⁴⁴ The result of the incarceration binge is that by the end of 1990, 771,000 people were in state and federal prisons, and more than 396,000 were in local jails.¹⁴⁵

Certain states have especially pronounced increases in incarceration. In California, for example, the prison population more than quadrupled in the last decade, rising from 22,000 inmates in 1982 to well over 100,000 today.¹⁴⁶ In New Jersey, the prison population also quadrupled, from 5800 in 1980 to its current level of more than 23,000. This places New Jersey prisons at 140% of their intended capacity.¹⁴⁷ About half of those prisoners are in jail for violations of New Jersey drug laws and are serving recently instituted mandatory prison terms.¹⁴⁸

2. *Increasing Power Disparity Between Defense and Prosecution*

The increased caseload created by the tough anti-crime stance affects both prosecutors and defenders. However, the two sides do not feel the effects equally. The variety and amount of resources available to defense counsels lag far behind those available to prosecutors. The recent increases in the formal and informal power of prosecutors work to the disadvantage of defendants, especially indigent defendants.¹⁴⁹

Public defenders are unable to keep up with their expanding caseloads. For example, fifteen public defenders in Nashville, Tennessee, handled 12,500 cases in 1987. Sixteen public defenders in Baton Rouge, Louisiana, currently receive 4,500 appointments per year.¹⁵⁰ Costs for indigent defense services rise along with the number of cases. In state courts, the cost of providing indigent defense more than tripled between

¹⁴⁴ See Moss, *supra* note 12, at 34.

¹⁴⁵ Kerr, *supra* note 55, at A28.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See Timothy R. Murphy, *Indigent Defense and the U.S. War on Drugs: The Public Defender's Losing Battle*, CRIM. JUST., Fall 1991, at 14.

¹⁵⁰ Stacey Colino, *When Justice Goes Begging, The Crisis in Indigent Defense*, STUDENT LAW., Oct. 1988, at 14.

1976 and 1982.¹⁵¹ From 1982 to 1986, costs increased further by a national average of 60%.¹⁵² Prosecutors, in comparison, work under much better conditions. By the late 1980s, prosecutors in many state jurisdictions had at least three times the budget of public defenders for pursuing cases.¹⁵³ In addition, largely in response to the federal government's increased focus on drug prosecution, the number of federal prosecutors doubled from 1980 to 1990, while federal public defense expenditures lagged far behind.¹⁵⁴

Current federal policy . . . is grounded on the premise that indigent defense is solely the responsibility of state and local government . . . While at least 70% of defendants arrested for drug or drug-related offenses qualify for and are appointed defense counsel because of indigency, there is no acknowledgment of the need for more resources for indigent defense services in the entire *National Drug Control Strategy* promulgated by the White House in September 1989.¹⁵⁵

In addition to increased manpower, prosecutors today possess better bargaining tools and more power to negotiate with defendants than they previously enjoyed. These tools include longer sentences, mandatory sentences, and worsening jail and prison conditions. Prosecutors armed with mandatory sentences effectively determine an offender's punishment when they choose a specific charge. This altering of traditional plea-bargaining policies has led to fears that prosecutors have too much control over the pace and outcome of litigation.

¹⁵¹ Robert L. Spangenberg, *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures*, NAT'L INST. JUST., 1986, at 1.

¹⁵² John B. Arango, *Defense Services for the Poor*, CRIM. JUST., Summer 1989, at 29. See also Murphy, *supra* note 149, at 16, 18.

¹⁵³ Colino, *supra* note 150, at 14.

¹⁵⁴ Hinds, *supra* note 54, at A1. Colino, *supra* note 150, at 14.

¹⁵⁵ Murphy, *supra* note 149, at 18. But see Timothy R. Murphy, *Indigent Update*, CRIM. JUST., Fall 1991, at 17 (Some recent congressional action, most notably The Comprehensive Crime Control Act of 1990, indicates there may be an increase in federal assistance for state indigent defender programs.).

3. *Declining Judicial Discretion*

Judges fear that the war rhetoric limits their discretion at a time when discretion is needed most. Many judges believe that to appropriately respond to the needs of a diverse group of offenders requires a wide range of justice and social service options including treatment, counseling, and supervision programs, as well as jail and prison terms. However, the comparatively costly construction of incarceration facilities is by far the preferred option of policy-makers.¹⁵⁶

Mandatory sentencing, especially minimum mandatory sentencing, is a popular tactic in state, as well as federal, justice systems, but eliminates what was one way for local justices to balance offender and community needs.¹⁵⁷ At one time, judges could balance these needs, as well as community resources such as treatment, training, and counseling programs, when determining the sanctions that should be imposed on an offender. But today, mandatory sentencing and the distribution of resources within a particular system limit sentencing. Even where sentencing standards allow local justice officials to tailor responses to a specific offender and community, the lack of supervisory mechanisms, treatment programs, and jail and prison facilities can render such authority meaningless. Finally, judges are beginning to complain publicly that mandatory minimum sentences are often too harsh, particularly for minor, first-time drug offenders. "The bottom line," said United States District Judge Robert McNichols of Washington, "is we're putting people in prison who don't belong there — and the prisons are bulging at the seams."¹⁵⁸

Since the Comprehensive Crime Control Act became law in 1984, Congress has continued to establish hundreds of mandatory minimum sentences, primarily for drug-related offenses.¹⁵⁹ The results have been dramatic. In 1990, the average prison sentence for manufacturing, distributing, or possessing 1 kilogram of heroin was 10 years without parole, while the

¹⁵⁶ See Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 *SCIENCE* 939, 941 (1989).

¹⁵⁷ See, e.g., DAVID W. NEUBAUER, *CRIMINAL JUSTICE IN MIDDLE AMERICA* 6-17 (1974).

¹⁵⁸ Epstein, *supra*, note 54, at 4A.

¹⁵⁹ See Comprehensive Crime Control Act of Oct. 12, 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 3182.

average for homicide was 6.6 years and for sex offenses the average was 5.1 years.¹⁶⁰ In U.S. district courts the average prison sentence imposed for drug offenses increased 43.9% between 1980 and 1987,¹⁶¹ and as noted previously, more than half of federal prison inmates are serving mandatory prison sentences for drug-related charges.

B. JUSTICE SYSTEM RESPONSES

1. *Plea Bargaining*

It is hard to know whether President Bush was optimistic, naive, or disingenuous when he included the restrictions on plea bargaining in his plan for taking "back the streets by taking criminals off the street."¹⁶² Despite President Bush's rhetoric, nearly 90% of all criminal case dispositions in state and federal courts are now, and will likely continue to result from plea bargains.¹⁶³ Creating a justice system with an expedient method for plea bargaining continues to be the primary concern of the most recent reforms.

Defense attorneys increasingly focus on determining what defendants actually did, knowing the market value of pleading particular acts within the system, and negotiating for a dismissal, or a charge or charges that will result in the least amount of punishment. This approach might offend those with visions of a judicial process dominated by extensive pretrial work, trials, thorough sentencing reports, and careful, flexible sentencing options and policies. However, expedient plea bargaining systems are perhaps the best method for reducing backlog, given the scarcity of defense resources and the massive demands placed on courts by the crime war.

2. *Caseflow Management Programs*

The administrative crises that expanding caseloads create in many jurisdictions force trial courts to adopt more effective and expeditious case processing procedures.¹⁶⁴ Court manage-

¹⁶⁰ Epstein, *supra*, note 54, at 4A.

¹⁶¹ 1989 SOURCEBOOK, *supra* note 6, at 494.

¹⁶² *President Bush Proposes New Anti-Crime Measures*, *supra* note 47, at 7.

¹⁶³ 1989 SOURCEBOOK, *supra* note 6, at 492, 500, 510.

¹⁶⁴ See COURT DELAY, *supra* note 138, at 30-36, 75-83; *Civil Litigation*,

ment organizations and state court administrative offices have urged trial courts to design and implement comprehensive caseload management programs. These programs encourage attorneys to meet with their clients soon after arrest, to provide prosecutors the information and authority needed to fashion reasonable plea offers quickly, to enable courts to monitor case progress, to limit "courtesy" continuances, and to provide accurate and timely sentencing reports.¹⁶⁵

Today's conventional wisdom about judicial system management urges courts to play a coordinating role in caseload management. There is an expectation that every justice system component, including defense attorneys and especially public defense attorneys, are to function as part of an administrative team. Each member must pay as much attention as possible to the effective and expeditious processing of the caseload as it pays to its specialized role within the system. Court-led inter-agency working groups — composed of judges, private attorneys, court managers, public defenders, and prosecutors — focus on administrative procedures. These groups are an effective tool for increasing justice system efficiency.¹⁶⁶ The active cooperation of nonjudicial agencies such as police departments and corrections departments, prosecutors, and public defenders is also crucial for courts to develop successfully a more efficient case processing system.¹⁶⁷

Recent justice system reform has focused heavily on developing mechanisms for assembling vital information early in the case.¹⁶⁸ To respond to the rapidly increasing caseloads triggered by recent anti-crime tactics, the system needs information at the outset about the incident, the accused, and the realistic availability of sentencing alternatives. The space for incarceration, the resources for treatment or probation, the chances for conviction and the case's broader legal merits all influence the process. Case studies in a variety of jurisdictions reveal that through reorganization of the procedures, information needed to dispose of cases earlier in the judicial process can

supra note 138.

¹⁶⁵ See, e.g., BARRY MAHONEY, CHANGING TIMES IN TRIAL COURTS 81-90 (1988); Martin & Maron, *supra* note 141, at 269.

¹⁶⁶ See *supra* note 165.

¹⁶⁷ See *supra* note 165.

¹⁶⁸ See MAHONEY, *supra* note 165, at 79-80.

be obtained.¹⁶⁹ The modification of police, probation, and pre-trial release agency procedures can help insure more rapid assemblage of crucial information. In addition, the development of procedures for assigning defense counsel that insure early client contact would expedite the judicial process. Furthermore, prosecutors can assign staff with the skill and authority needed to put together realistic plea offers early in the process. Finally, courts can encourage, through rule changes, more pre-arraignment conferences, scheduling conferences, pretrial conferences, and motion hearings that facilitate earlier meetings between attorney and client, quicker case preparation, and expedited pleas and sentencing.¹⁷⁰

Caseflow management will not enable the justice system to overcome all of the numerous detrimental effects accompanying the war on crime. No system can overcome poorly conceived, poorly implemented, and ultimately unworkable public policy, simply by altering administrative procedures. Instead, improving indigent defense requires a direct confrontation with the sources of the hostile climate toward the accused now present throughout the nation.

CONCLUSION

To serve today's indigent adequately, defense counsel must move far beyond negotiating on behalf of the accused, case-by-case, plea bargain by plea bargain. Defenders need to move beyond simply asking for more resources in an attempt to match the increasing resources of prosecutors. Serving the indigent requires systematically and relentlessly confronting the sources of a climate that is hostile to indigent defense. In particular, the advocates of indigent defense must confront the lack of realistic direction, the deception and misinformation, the callousness, and the political opportunism that characterize the nation's anti-crime efforts. Moreover, if they are to confront the war on crime successfully, the advocates of indigent defense must ally themselves with judges, prosecutors, court administrators, and other justice system actors.

Supporters need to promote detailed planning efforts that anticipate the changes in statutes and enforcement policies.

¹⁶⁹ *Id.*

¹⁷⁰ *See Id.*; Martin & Maron, *supra* note 141; COURT DELAY, *supra* note 138; *Civil Litigation*, *supra* note 138.

They need to work with courts and other justice system agencies to develop their assessments of what effect policy changes will have on the justice system and the provision of indigent defense. They must express their views directly to policy-makers during the formulation of plans for implementing legislation and policy.

Champions of improved indigent defense should sponsor and facilitate examinations of the effects of new tactics on both their local justice systems and their communities. Despite the billions of dollars spent each year in the on-going war on crime, we know remarkably little about victimization trends in local communities or what happens when local resources are redirected to the justice system from other priorities. We need to know the intricacies of the relationships between crime, crime control, and broader social forces, such as a poor economy. Most importantly, we need to know whether or not increases in justice system activity improve the quality of life within a community.

Proponents need to stand up to politicians who manipulate public fear of crime by perpetuating a myth of increasing violence in every corner of the nation. They especially need to stand up to politicians who bash justice systems and transform them into scape-goats for broader policy failures.

Finally, spokespersons for improved indigent defense must convey to the American public a more complete and realistic image of crime, crime control, and the effects policies have on the nation's communities. The message must include the pain and suffering that have accompanied the war on crime. Frustrated practitioners, desolate crime victims, and often equally desolate crime perpetrators, fill the criminal justice system today. Americans need to see the human casualties of the war on crime.

