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THE STATE POLITICS OF CONGRESSIONAL AND JUDICIAL
REFORM: IMPLEMENTING CRIMINAL RECORDS POLICY

A Dissertation Presented

By

THOMAS CARLYLE DALTON

Submitted to the Graduate School of the
University of Massachusetts in partial fulfillment
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

February 1984

Department of Political Science

Thomas Carlyle Dalton



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THE STATE POLITICS OF CONGRESSIONAL AND JUDICIAL
REFORM: IMPLEMENTING CRIMINAL RECORDS POLICY

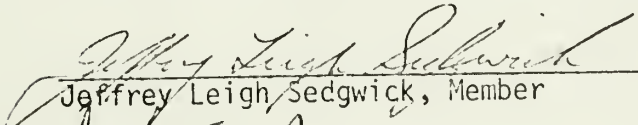
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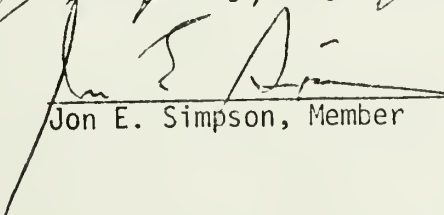
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ABSTRACT

The State Politics of Congressional and Judicial Reform: Implementing Criminal Records Policy

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This study examines Supreme Court civil liberties and Congressional criminal records policies in order to understand the politics of state implementation of federal criminal justice guidelines. Analysis of state responses to the Mapp and Miranda decisions leads to identification of salient interests and factors influencing policy outcomes. Evidence of these interests and factors is sought in the analysis of national patterns of state response to the criminal records privacy mandate established by a 1973 amendment to the Crime Control Act. The author presents an intensive case study of implementation of the mandate in Washington state, using interviews to probe factors raised by national patterns. Overall, the state implementation of the criminal records privacy guidelines parallels the response to Mapp and Miranda in that there was extensive procedural compliance but little change in performance.

Alternative conceptual frameworks are used to explain these consequences of LEAA's attempt to regulate criminal justice processes. If the apparent lack of success is explained by unclear laws involving

the delegation of too much discretion to state and local officials, then the outcomes are easily understood using existing pluralist frameworks stressing dissagregation, interest group conflict and compromise. A better explanation lies in the dynamics of power structural conflict which stresses elite indifference, under-enforcement and constitutional constraints to changing criminal justice processes. The underlying political realities uncovered in this explanation involve judicial opposition to executive encroachment and local law enforcement resistance to state regulation. Recognizing these realities provides greater purchase in understanding the common factors influencing Congressional and Court originated criminal justice reform.

Procedural policies with structural implications threaten to alter underlying patterns of power and preference, producing non-compliance and efforts by implementing organizations to restore the political status quo. This means the preservation of control by criminal justice officials over the process. Factors internal to the criminal justice system contributing to these outcomes include maintenance of organizational autonomy and stability. External factors involve the separation of powers and public sentiment for law and order compared with the relatively weak demand for minority rights.

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C H A P T E R I
REGULATING CRIMINAL JUSTICE INFORMATION SYSTEMS:
THE LIMITS TO INFORMATION TECHNOLOGICAL REFORM

Over the last fifteen years, the federal government has undertaken new, ambitious initiatives to reduce crime through experimentation and innovation, involving the creation of state and local agencies to plan and coordinate criminal justice policy. The Mapp (1961) and Miranda (1966) decisions and the Omnibus Crime Control and Safe Streets Act (1968) noted the onset of a period in which the Supreme Court, and Congress through the Law Enforcement Assistance Administration (LEAA), greatly enlarged their role in policy development and oversight of the administration of criminal justice.

Significantly, the Crime Control Act was used not only to advance a reform agenda (e.g., through appropriation of block grant money for allocation to the states), but to bring about increased innovation and coordination and limited regulatory control (through conditions of aid) of criminal justice processes. Congressional regulation of criminal justice information systems was initiated by an amendment in the early 1970's to improve the management, increase the quality, and control the exchange of criminal records. A central purpose of that policy is the enlargement of privacy protections and due process rights for subjects of criminal records.

In many respects, this intervention parallels similar efforts by the Supreme Court in the 1960's and early 1970's to enunciate national policies for defendant's due process protections in the criminal justice process. Both Court and Congressional policies were a part of a broader movement to strengthen policy making and accountability mechanisms at the state and local level. Yet, the policies were initiated in contrasting political environments, involving different underlying institutional relationships and functions. The Supreme Court decisions involving suspects' and defendants' rights in the 1960's were made in spite of widespread opposition to the increased "federalization" of state court procedure. The Supreme Court civil liberties decisions were intended to increase federal control as well as to strengthen state court authority over lower court behavior.

In contrast, the regulation of criminal records management was one of many conditions of aid which accompanied a widely supported injection of resources to state and local criminal justice agencies through state block grants. These grants were intended not only to stimulate innovation but increase state and local discretion and control of policy making processes.

A significant feature shared by the federal criminal history records policy and Supreme Court decisions protecting due process rights is that they mark the federal government's first attempt to regulate the administration of criminal justice. This has presented some novelty for intergovernmental relations in criminal justice over the last two decades. On the one hand, the Department of Justice has

assumed a de facto regulatory role through LEAA, and, on the other, the Supreme Court and lower courts have greatly enlarged their policy-making and supervisory role over the administration of criminal justice. Thus, to the extent that both LEAA (following Congressional mandate) and the courts have exercised regulatory control over the administration of justice, they have become involved in the implementation of intergovernmental policy.

In addition, these Congressional and Court initiatives are broadly rooted in the administrative reform tradition. The primary strategy of this tradition, which dates back to Woodrow Wilson and the Populist and Progressive reform movements, has been to strengthen the professional management of government agencies and make them more accountable to the public. While the focus of past reforms has been on structural change (e.g., at-large elections, council-manager form of government, executive budgeting, judicial appointment and court unification), contemporary reforms place greater reliance upon technological change (e.g., computer processing of information) as the vehicle for reform. Recent observers have suggested that, like previous reform movements, information technological reforms serve political as well as technical agendas (Kraemer and Dutton, 1979). Those who control the implementation of information technologies are thought to exert leverage over the distribution of power and impacts associated with such innovations and, thus, serve some interests as opposed to others.

It is evident from the literature on information technological reform, that although the adoption of information innovations in

criminal justice has not intended to change the intergovernmental, interjurisdictional relations, policy management and governance structures, nonetheless, the effects of information technological innovations may bring about such changes (Laudon, 1974). Moreover, a combination of political and organizational factors has influenced the level of support or resistance by criminal justice agencies to criminal justice policy innovations at the federal, state and local level and, thus, may suggest factors likely to affect the creation and regulation of national criminal justice information systems.

Study Focus: State Implementation of the Federal
Criminal Records Privacy Amendment

In 1973, the Omnibus Crime Control and Safe Streets Act of 1968 was amended to provide for privacy, security and dissemination controls and safeguards of criminal history record information. Federal guidelines promulgated by the LEAA in 1975 mandated that each state initiate a planning process and strategy to bring state and local criminal justice agencies into compliance with federal requirements. The state of Washington responded to federal law through passage of comprehensive legislation in 1977 which invested administrative authority in the State Planning Agency. Thus, the state privacy law set in motion the implementation of an inter-governmental policy.

This study undertakes a close examination of the implementation of privacy guidelines for criminal justice information systems in order to address several related issues: What are the politics of

state implementation of federal guidelines in the criminal justice area? What are the interests involved and what factors influence outcomes? And finally, what do such findings imply for a more general understanding of policy implementation?

This study bears a close relationship to and is rooted in studies about the politics of implementation and regulation of information technological reforms (e.g., automation of records systems) in criminal justice and other policy areas; studies which assess the implementation and impact of federal legislative and Supreme Court policy regulating law enforcement activities and the administration of criminal justice; and studies of policy implementation which explore the role and significance of guideline development as a variable in explanatory theories of policy implementation processes.

The policy implementation literature has identified several factors which may increase the likelihood of compliance to policies originated by legislatures and courts. The state implementation of Supreme Court civil liberties decisions in Mapp and Miranda provides the closest policy analog to understanding factors likely to affect federal regulation of criminal justice processes. Therefore, salient findings of Court impact studies are briefly summarized as they bear upon the conditions of effective implementation and their significance for understanding the politics of intergovernmental regulation.

The remainder of Chapter I consists of a discussion of the importance of the criminal record in relation to the growth of information technology in criminal justice, a description of judicial and legislative attempts to regulate that technology and efforts by LEAA

to underwrite and influence the direction of information technological reforms undertaken by criminal justice agencies to satisfy federal regulations. A variety of political factors are identified which now constrain the full development and comprehensive regulation of a national, computerized criminal history record system. Finally, at the end of this chapter, a method is specified in more detail of how state and local performance under the federal privacy mandate will be assessed and explained.

The subsequent analysis of state implementation of federal criminal history records regulation consists of four parts. First, national patterns of state response are presented in order to determine how performance in Washington compares to that of other states. Second, a case study of the processes by which the state of Washington converted federal regulations into state policy is presented in order to identify interests and factors shaping outcomes. Third, the case forms the basis for a subsequent analysis interpreting the significance of political factors which contribute to an explanation of national patterns of state response. Finally, common factors are identified which influence the politics of state implementation of Court and legislative policies designed to regulate the administration of criminal justice.

The Growth of Criminal Justice Information Systems

All criminal justice agencies have common information needs because of the interdependence involved in processing cases to conclusion. Importantly, information needs continue after cases reach

final dispositions and thus reinforce interdependence. The criminal history record, among other criminal justice case documents, is intended to serve an important short-hand function to satisfy some of these common information needs.

The criminal history record (or rap sheet, as it is commonly known) consists of a summary of an individual's contacts with the criminal justice system. As such, it contains a record of arrest charges and court disposition or sentencing information. The criminal record is used for a variety of purposes: pre-arrest investigation by police and prosecutors (the most frequent use), arrest and bail decisions (based on the severity of police charges), plea bargaining, court case preparation, witness verification, juror qualification, corrections assignment, and probation and parole decisions to estimate likelihood of escape. The criminal record is not limited to these uses. It is also used for employment purposes, licensing of particular professions and security investigations. Almost 20 percent of requests to states for criminal record information come from non-criminal justice organizations. While this constitutes the extent of legal uses, there is also a black market of uncertain proportions for such material (Laudon, 1980; OTA, 1982a).

The number of criminal records maintained in the United States is enormous and growing at an alarming rate. SEARCH Group, Inc. (1976a) estimated that there were approximately 195,000 criminal records in 1975. In a recent study by Laudon, estimates were placed at 216 million records (1980: 52). As local criminal history files are automated, the number is expected to increase by another 10 to 15 percent by 1985.

Perhaps nearly half of these files are inactive (e.g., because of age of data subject or lack of contact with the system). Yet, the Department of Labor estimates that 30 percent of the labor force has a criminal record.

Criminal history records are maintained in differential proportions between federal, state and local agencies. Of the 216 million records, 21.4 million are held by the FBI and 195 million are held by more than 64,000 state and local criminal justice agencies. Of these, 29.2 million are held by state repositories with only 4 million of that number computerized. Approximately 150 million, or three-fourths of state and local files, are held solely by local criminal justice agencies (largely police departments) and in manual files (Laudon, 1980: 52).

Although numerous opportunities have arisen as a result of the introduction of information technology in criminal justice, it is also evident that these innovations increase the potential risks to individual privacy. Such risks stem principally from the enhanced capabilities of the speed of exchange and proliferation of dissemination of data enabled by computer technology.

What makes the capability of speed damaging is the slowness of update processes compared to the rapidity and frequency of dissemination. This creates the potential for injustice in a variety of criminal justice decision-making contexts before the stale or otherwise incomplete data is updated or corrected. By introducing factual or contextual inaccuracies the criminal record may convey an erroneous impression of the data subject's past or present conduct which may result in false arrest, inappropriate sentences, and so forth.

The combination of remote terminal access and message switching capabilities (e.g., inquiries to a given location may be routed through a central switching point to another user) now make it possible to send and receive messages through multiple ports of entry. If the information is inaccurate or incomplete, exchanges between criminal justice users can create a spreading effect to perpetuate unjust decisions, lost time and inefficiency.

Federal court antecedents to Congressional action

Federal and, particularly, state courts have shown a reluctance to intrude upon police discretion in the use of criminal records. Judicial review has been largely confined to issues pertaining to identification and record maintenance. Much less attention has been focused upon exchange and dissemination practices, record reporting responsibilities and utilization of records in case-related decision making contexts. Thus, court review of criminal records management has differed from those decisions by the Supreme Court (e.g., Mapp and Miranda) which regulate the methods by which convictions are obtained. Moreover, federal and state courts have been unable to agree upon standards which should govern records handling practices, nor have they clearly enunciated where the balance should be struck between the protection of individual privacy and due process rights and effective law enforcement.

In many ways, Menard vs. Mitchell (1971), typified these difficulties. In its decision, the Federal District Court in Washington, D.C., acknowledged the problems inherent in the dissemination

of incomplete and inaccurate records in the conduct of police work. While a student at UCLA, Dale Menard was arrested for burglary, fingerprinted, detained and subsequently released without charge. The FBI subsequently received a record of the detention but failed to note his release without charge. Menard demanded that the record be expunged from both local and FBI files thereby preventing both the maintenance and dissemination of the record. The Federal District Court ruled that an arrest alone did not justify maintenance of fingerprints or records by either the state repository or the FBI and that the FBI must limit disclosure of such records to law enforcement agencies only (Marchand, 1980: 139).

What was exceptional about the Menard decision was its willingness to question the propriety of commonly accepted records management practices in a period of time when rapidly expanding computer technologies not only made these practices anachronistic but greatly magnified the potential adverse impact of the exchange and dissemination of inaccurate and incomplete information. It was precisely the recognition of the complexity of information systems in record management processes that prompted the federal court in this decision to insure adequate protections for the data subject's privacy rights.

Unlike previous court rulings addressing the issues pertaining to criminal records, the Menard decision was particularly unequivocal about enunciating the rights of the subject of a criminal record. Importantly, in drawing a firm legal distinction between a record of arrest and conviction, the federal court challenged law enforcement conventions which heretofore had drawn no such clear-cut distinction.

Not only have arrest records always been considered an important tool in police investigative work, but the private sector (e.g., banks, insurance companies, credit companies and employers) have considered access to police records essential to the security of their businesses. Yet, at least at the federal level, the court found no statute which authorized FBI dissemination of arrest records for non-criminal justice purposes (Marchand, 1980: 140).

Given the potential adverse impact upon privacy and reputation, Judge Gezell argued in Menard that the FBI must show a "compelling necessity" to disseminate a record that revealed episodes of doubtful authenticity in a person's life. The determination of "public necessity" was considered by Judge Gezell to rest not with the executive branch but with the Congress. A case by case approach was not considered acceptable and had so far not solved the problem. Rather, Judge Gezell considered that Congress was more properly responsible and uniquely capable (Marchand, 1980: 140).

Interestingly, the Menard decision did not apply to internal criminal justice use of arrest and conviction records. Thus, in contrast to Mapp and Miranda decisions, Judge Gezell did not really challenge the adequacy of procedures available to insure the integrity of records exchange practices. Rather, he concluded that any misuse of criminal records within the criminal justice system could be rectified by the courts. In subsequent regulations (1975), however, LEAA broadened the term "dissemination" to include the exchange of information between criminal justice agencies. Consequently, criminal justice agencies can now be held liable for the quality of information

exchanged between agencies for decision making purposes. As subsequent chapters indicate, the control of dissemination of criminal history record information within the criminal justice system has proven to be extraordinarily difficult to achieve.

There have been two other decisions after Menard which suggest increased intervention by federal courts in police record use in decision-making.

In Tarlton vs. Saxbe (1974) the Court of Appeals in Washington, D.C., further amplified the Menard decisions by declaring that the FBI was not just a passive recipient of records supplied by state and local agencies but had a duty to prevent the dissemination of inaccurate arrest and conviction records. In addition, the FBI was ordered to take administrative steps to insure the accuracy and completeness of criminal history record materials submitted to the National Crime Information Center by state and local justice agencies (OTA, 1982a).

A federal court in New York in Tatum vs. Rogers (1979) has shown a willingness to review the effects of the utilization of incomplete criminal record information (arrest data) in law enforcement internal decision making processes. The U.S. District Court cited violations of Constitutional rights when incomplete criminal records information was used in setting bail decisions (OTA, 1982a).

Significantly, there have been no cases which have focused on the extent of responsibility that state and local agencies have for insuring accuracy and completeness of criminal history record information. However, it is inevitable, given increased state regulation of

criminal record management practices that civil suites will be brought to test the states' commitment to implement federal regulations.

Although the Menard decision constituted an important step in the direction of defining data subject rights with respect to public dissemination and avenues available to protect these rights (i.e., access and review), it deferred to Congress for the resolution of complex administrative issues involved in the regulation of the management and utilization of criminal history records.

In short, with increasing availability of fingerprints, technological developments, and the enormous increase in population, the system is out of effective control. The Bureau needs legislative guidance and there must be a national policy developed in this area which will have built into it adequate sanctions and administrative safeguards. It is not the function of the courts to make these judgments, but the courts must call a halt until the legislature acts (Marchand, 1980: 140-141).

Yet, because of unresolved conflicts between federal bureaucracies competing for control of a national criminal history records system, and tensions regarding the distribution of federal and state responsibilities, Congress has been unable to reach a consensus on a comprehensive approach to criminal records privacy policy. Instead, a temporary measure was devised in which LEAA's responsibilities under the Crime Control Act were expanded to include implementation of a privacy mandate in which brevity of detail invited extensive administrative interpretation and conflict.

The amendment reads as follows:

All criminal history information collected, stored, or disseminated through support under this title shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to

ensure that all such information is kept current therein; the Administration shall ensure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement in criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete or maintained in violation of this title, shall, upon satisfactory verification of his identity, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction. Any person violating the provisions of this section, or any rule, regulation, or order issued thereunder, shall be fined not to exceed \$10,000 in addition to any other penalty imposed by law (Omnibus Crime Control and Safe Streets Act of 1968: Section 524B).

The passage of the amendment constituted a limited victory for LEAA and a substantial setback for the FBI in the struggle for control over standards designed to govern the management of state and local criminal records information systems. While the Bureau retained management control over the computerized criminal history program, it was now subject to LEAA regulations (Title 28). Moreover, both the Menard decision and criminal records privacy mandate have provided important levers to LEAA in its efforts to fund and influence the direction of information technological reforms undertaken in criminal justice.

Improving information technological capacity of criminal justice agencies

LEAA attempted to increase the extent of informational coordination between criminal justice agencies in order to improve the quality of criminal records exchanged and disseminated in the criminal justice process. The success of that effort depended upon LEAA's capacity to influence at least three factors: the processes by which

information innovations are diffused; the organizational structures, practices and interorganizational relations involved in the criminal justice process; and intergovernmental relationships. These efforts have had only limited results and have exacerbated problems of record quality, privacy protection and Constitutional rights.

The infusion of LEAA assistance between 1968 and 1980 appears to have greatly accelerated the diffusion of information technology in criminal justice. Marchand reports, for example, that in 1968 only ten states had automated, state-level criminal justice information systems. By 1972, forty-seven states had automated at least one component of their criminal justice systems. At that time, 46 percent of the computerized systems were state-level and 54 percent local (Marchand, 1980: 73). By 1980, there had been substantial growth in local computerized systems: 66 percent (of a survey of over 600 systems) were local and only 34 percent involved state-level applications. Importantly, 73 percent of the computerized criminal history files added since 1976 are in local rather than state systems (U.S. Department of Justice, 1980: 2-3).

In addition, LEAA encouraged state and local criminal justice systems which include joint use or participation by two or more components of the criminal justice system. In a national survey in 1972, LEAA determined that nearly 28 percent of the total systems surveyed (151) had automated information systems which served two or more organizations. In a follow-up survey in 1976, a slightly larger sample of systems surveyed showed a small decline in combined systems to 25 percent. However, a third survey completed in 1980 showed a

significant decline in the number of shared or combined systems. Of a little over 600 systems included in this survey, only sixty (10 percent) combined two or more functions (U.S. Department of Justice, 1980: 4).

Organizational effects

LEAA has attempted to influence the organizational contexts within which information technology is utilized by police, offices of prosecution and state courts through special demonstration programs designed to alter the ways in which information is collected, exchanged and utilized in decision making. These efforts had to contend with important differences in organizational structures, transactions and informational needs.

Computerization has progressed unevenly in criminal justice agencies and has had differential organizational effects (see Table 1). LEAA had a somewhat stronger influence over the use of information technology in law enforcement than in other components of the criminal justice system, but this has resulted in unintended effects. Police organizations have demonstrated a willingness to use identification and criminal history information in applications closely related to functions central to organizational purposes (e.g., investigation, apprehension, arrest). However, there is some limited evidence that such applications reinforce "legalistic" approaches to law enforcement, depersonalize patrol activity, and narrow the scope of judgment and discretion, and thus magnify problems resulting from the reliance upon incomplete and inaccurate criminal records. Significantly, automation of police arrest records has greatly outstripped the

availability of court disposition information, making law enforcement agencies the primary information intermediaries of the entire system (Colton, 1978).

Table 1. Extent of Utilization of Information Technology in Criminal Justice.

Information Systems	Police	Prosecutor	State Courts
Extent of diffusion	Extensive	Moderate	Limited
Integration	Extensive	Limited	Limited
Number of uses	Extensive	Moderate	Moderate
Extent of use in processing	Extensive	Limited	Limited
Efficacy or integrity (e.g., accuracy, completeness, privacy and dissemination safeguards)	Limited to Moderate ^a	Moderate ^b	Limited ^c

^aColton, 1978; MITRE, 1977a.

^bSEARCH Group, 1976a; Weimer, 1980.

^cHays, 1978; SEARCH Group, 1975.

LEAA also sponsored and funded information innovations in offices of prosecution. These initiatives have been advanced in order to increase the effectiveness of prosecution by increasing clearance rates, structuring discretion (i.e., plea bargaining) and focusing resources on the trial and conviction of repeat offenders. These efforts have had little success because of organizational resistance, inability to reduce complex decisional factors to data contained in

criminal records, and the strength of informal collaboration between prosecutors and police in charging and case disposal (Jacoby, 1980; Weimer, 1980).

Attempts to influence state and lower court organizational structures through information innovations have proven to be equally ineffective. Not only does the complexity of tasks and court structure constrain the possibilities of information-based organizational change, but resistance by lower courts to centralization of management, which state court information systems represent, make acceptance difficult to achieve. Moreover, state and lower courts do not appear to consider criminal record information a priority data element for case management and thus do not consider information coordination with police or the central state repository a compelling priority (Berkson, Hays and Carbon, 1977; Hays, 1978; SEARCH Group, 1975).

Enlarging state and local participation in NCIC

Along with its efforts to influence the growth and use of information technology, LEAA attempted to standardize and centralize the collection of criminal history offender data. This LEAA program consisted of a two-pronged strategy to upgrade the capabilities of central state repositories and to develop a national network capable of routing inquiries between federal and state systems which fit within the FBI's National Crime Information Center (NCIC).

First, LEAA assistance greatly improved and increased state repository record maintenance capabilities. As Table 2 indicates, in 1969 when this LEAA program commenced on a demonstration basis, none

of the states had established automated name indexes and the same number had computerized all criminal history records. By 1982, twenty-seven states had fully operational computerized criminal history records with seven having automated name indexes. There is evidence to indicate that the twenty-seven states with complete computerized records generated far more record disseminations than states with manual records (OTA, 1982a: 46). In 1979, for example, disseminations from states with automated criminal history files constituted more than half of all records maintained by state repositories, but less than one-fifth of all state records.

Table 2. Development of Central State Repository.

	Completely Automated	Automated Index	Manual File
1969	0	0	50
1975 ^a	17	17	16
1982 ^b	27	7	16

^aSEARCH Group, 1976a: 8, 25.

^bOTA, 1982a: 48.

Second, LEAA reinforced the fledgling development of the NCIC through grants to the FBI, states and localities designed to upgrade records collection and exchange capabilities. The NCIC consists principally of two major files: an Identification and Criminal History File. The Identification file consists of arrests, warrants, stolen

property and other data. It is considered a "hot" file and used to facilitate investigative and police field work. The Criminal History file consists of records of arrests and convictions submitted by central state repositories.

The number of NCIC automated Identification files and the number of users has grown extensively since its inception largely with the assistance of LEAA. For example, the NCIC data base has grown from 23,000 records in two files consisting of wanted persons and stolen property with approximately ten thousand daily inquiries in 1967, to ten files which contained over nine million records by 1981 (OTA, 1982a: 33-34). In addition, the NCIC averaged 342,000 daily inquiries and over ten million information exchanges per month.

Similarly, the number of user agencies has increased from fifteen in 1967 to an estimated 64,000 federal, state and local agencies in 1981 (see Figure 1). Although only seventy-nine state and federal agencies have a direct line to the NCIC, numerous other criminal justice agencies are entitled to the information. In a 1979 survey, OTA found that thirty-four states reported a total of 900 terminals at state and local levels with access to state records and to NCIC/CCH data (1982a: 49). Indirect access to NCIC files is facilitated primarily by a message-switching service provided by the National Law Enforcement Telecommunications Network to other state and local users. An OTA state sample shows that access is widely, although unevenly, distributed between police, prosecutors and courts. For example, court access to NCIC files ranges from as much as 47 percent in New York to 13 percent in Minnesota (OTA, 1981: 43).

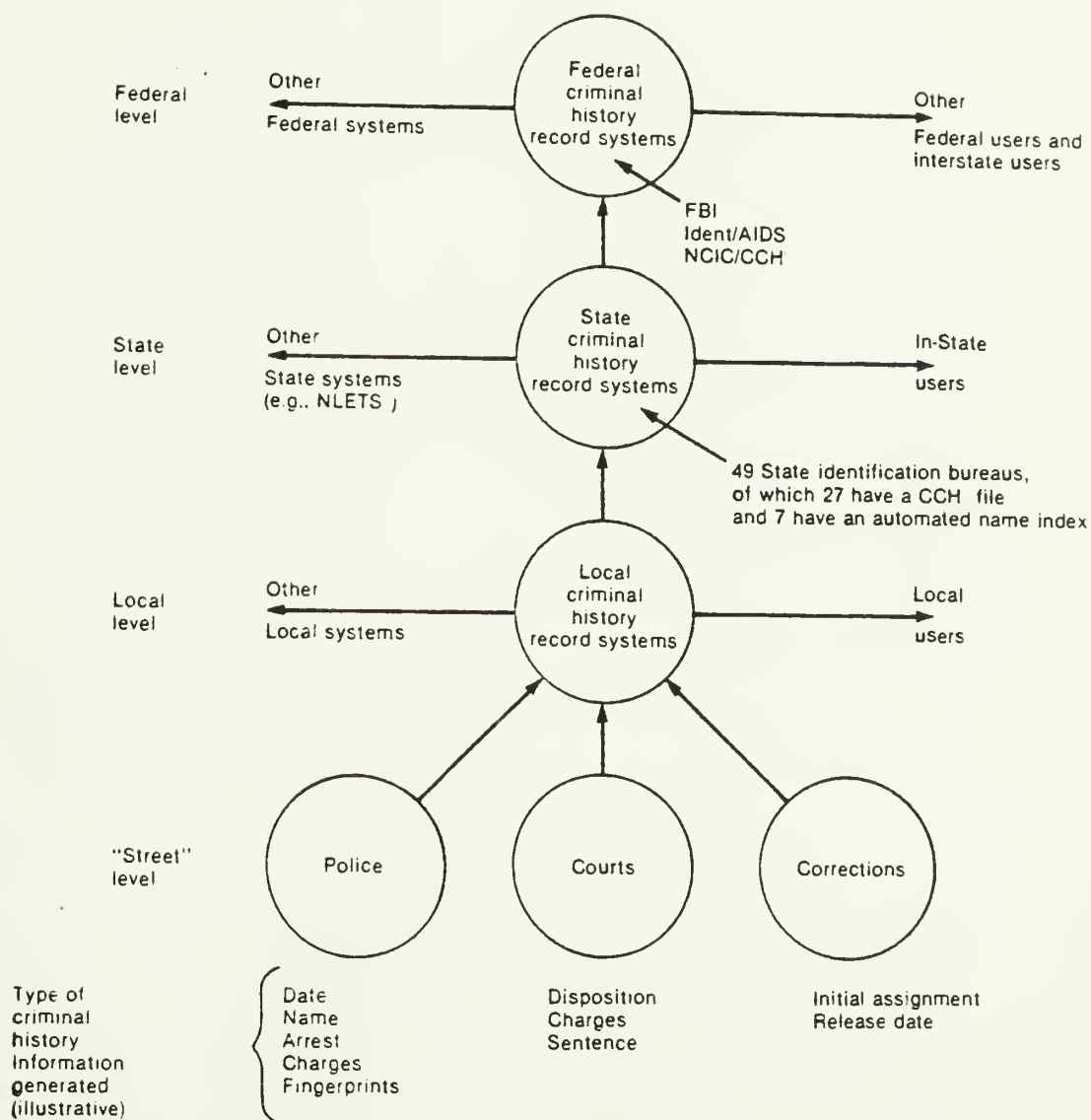


Figure 1. Overview of Criminal History Records System.

SOURCE: OTA, 1982a: 23.

In contrast to the NCIC Identification file, the computerized criminal history file component (CCH) has grown at a much slower rate. There are currently only 1.5 million computerized criminal histories in the NCIC/CCH. As of 1981, CCH message traffic accounted for 3.5 percent of the NCIC total monthly traffic while transactions for stolen property and wanted persons accounted for nearly 90 percent of the monthly NCIC totals. The maximum number of states who have chosen to participate in the NCIC/CCH has never exceeded thirteen; in 1981, only eight states were participating. Thus, in the OTA 1981 survey, the eight states fully participating in the NCIC/CCH accounted for only about 24 percent of all criminal fingerprint cards submitted to the Identification Division. Moreover, 67 percent of the message traffic from state and local agencies originated from these eight states, thus further limiting the value of the CCH file to the vast majority of states. Thus, an important reason for the limited participation by the states in the NCIC/CCH is the inability of most states to provide complete and accurate records, making utilization of the NCIC/CCH of limited usefulness to states and localities.

Competing proposals for up-
grading the national CCH

The exact network configuration, administrative and accountability mechanisms of a national computerized criminal history record system (CCH) has been the subject of a protracted policy conflict between LEAA, the FBI and Congress. That debate, discussed in detail elsewhere by Marchand (1980), has directly impinged upon the substance of criminal history regulatory policy.

Beginning in 1969, LEAA sponsored a program for the interstate collection and exchange of computerized criminal history records. Instead of funding the random development of local criminal history systems (precluded by fund limitations), LEAA decided to fund a demonstration project (called Project SEARCH) by which to test the feasibility of a computerized criminal offender file which involved the exchange of standardized data between the states. Even though the project successfully demonstrated the feasibility of the concept, conflicts arose as to what information should be maintained in the system and who should operate it. Although evaluation and debate was inconclusive, in December 1970 the Attorney General decided that the FBI should manage the system.

Although numerous hearings have been held, several legislative proposals advanced and successive studies conducted since 1970 to determine technical feasibility costs and possible safeguards, Congress has been unable to reach a consensus on a national policy and comprehensive legislation. Bureaucratic conflicts in the Justice Department between the FBI and LEAA with respect to system configuration and governance have largely accounted for this impasse.

Both the FBI and LEAA have advocated proposals for a nationwide computerized criminal history system which differ in several respects. The most salient differences pertain to record maintenance and control responsibilities; standards governing data quality and privacy; and, importantly, system governance.

First, the FBI proposal involves maintenance of records pertaining to all federal offenders and data subjects with multi-state

offenses in the NCIC central repository. Currently, the FBI maintains records of single state, multi-state and federal offenders of fully participating states. Under the single-state, multi-state plan, the states would retain possession of single-state offender records while the FBI would maintain multi-state records and utilize a "pointer" or index system and a message switching capability which would enable the NCIC to route inquiries from one state to another for single-state records. The index file would consist of only the name or equivalent identification of individuals with an arrest record. Complete criminal history records information would be provided by the state from which the record originated. Second, the Bureau proposes voluntary state and local compliance to privacy, security and other measures to ensure the integrity and quality of criminal history data. Third, the FBI suggests that its NCIC Policy Advisory Board (currently composed primarily of federal and state law enforcement officials) exercise policy and management control over CCH.

Two recent developments with respect to FBI proposals are noteworthy. First, Congress was officially advised by the FBI in 1980 of a project to test a national CCH index using the Florida central state repository as the message switching point for inquiries to the NCIC files. Congress approved the demonstration as long as the FBI/NCIC did not operate message switching during the demonstration. However, when it was discovered that the Florida computer equipment was unable to handle widely divergent request formats of participating states, the FBI subsequently utilized its NCIC/CCH in a message switching role (OTA, 1982a: 114).

The OTA has challenged the FBI's authority to operate message switching even for the purposes of a demonstration (OTA, 1982a: 115-117). Moreover, it is not entirely clear, according to a discussion in 1982 with a staff member involved in the OTA study, that the FBI has ceased using the message switching capability. Therefore, it is possible that the FBI may be retrieving criminal history record information from state repository files without the knowledge of state officials.

In addition, the FBI has also significantly increased the amount of duplication between Ident and CCH files. For example, the NCIC/CCH records also held in Ident increased from 44 to 58 percent from 1979 to 1982 (OTA, 1982a: 196). While this duplication between files reflects the FBI's need to develop an automated fingerprint capability, such duplication would also enable the development of a computerized criminal history file technically outside Congressional control.

It is evident from these two related instances of FBI discretionary decisions that there may be a variety of ways that Congressional control over a national CCH may be circumvented.

The LEAA/CCH concept differed substantially from the FBI version. One important difference resides in its concept of federalism. LEAA has insisted that the NCIC maintain only criminal records for federal offenses; central state repositories would maintain single and multi-state offense records. Second, LEAA has favored a central NCIC national index or "pointer" system maintained by the states by which inquiries are routed from the index to the originator of the record. The National Law Enforcement Telecommunications System (NLETS) currently

operates a message switching system which routes inquiries received by the NCIC index back to the appropriate state. LEAA contended that the FBI proposal to operate message switching is tantamount to giving the Bureau the capability to develop a central criminal history file because it would give the Bureau access to state and local files. The FBI has tried unsuccessfully (in 1973 and 1979) to persuade Congress to authorize implementation of a message switching capability but so far has been refused because of unresolved policy issues regarding impact on federal-state relations and surveillance potential. More recently, the FBI has been willing to reconsider its support for a single-state, multi-state plan for a national index, if the latter enables the FBI to retain control over message switching.

Next, LEAA has consistently promoted (through SEARCH Group, Inc.)¹ decentralized, state control of a CCH system. In essence, each state would establish an independent commission to develop, monitor and enforce criminal records management and privacy regulations. In addition, each participating state would be represented on a board which would formulate national policy and user standards (SEARCH Group, 1978).

¹LEAA first used the term SEARCH to label its 1969 demonstration project for the development of a national computerized criminal history system.

"The acronym 'SEARCH' originally stood for 'System for Electronic Analysis and Retrieval of Criminal Histories.' That expansion of the acronym was dropped in 1972, when it ceased to be descriptive of the consortium's range of activities, but the acronym itself was retained. In March 1974, the consortium became a non-profit California corporation called 'SEARCH Group Incorporated'" (Zenk, 1979: 3).

There have been several reasons why LEAA has proposed an essentially decentralized CCH. Its control over block grant money (now limited to state statistical programs funded by the Bureau of Criminal Justice Statistics) facilitated close contact and observation of state records system problems, needs and capabilities. LEAA has long contended that the lack of participation by the states in the FBI/CCH system stems from both political as well as technical constraints. States and localities are not eager to surrender management control to federal authorities. Moreover, a decentralized records management system has made good political sense because it has been consistent with the revenue sharing strategy of devolving decision making to the state and local governments.

Comparisons of surveys conducted over a ten year period to determine support for various technical configurations has shifted markedly from centralized approaches (single-state, multi-state) to decentralized, state-focused approaches (national index only) (see Table 3). Significantly, the emergent consensus concerns only technical configuration. Opinion is still divided on issues pertaining to management, regulation, Constitutional rights and governance processes.

All proposed alternative configurations of a national CCH (i.e., national repository; single-state, multi-state; National Index or Regional System) require the development of a policy-making and decision-making body (i.e., board or commission).

Table 3. Shifting Preferences of Federal and State Criminal Justice Officials for a National CCH System.

	System Alternative	
	Single-State Multi-State	National Index
FBI	throughout 1970's	since 1980
NCIC Advisory Policy Board	early mid 1970's	since 1978
States (DOJ Survey of 10 states)	1978	
States (OTA Survey)	1979 (11 states)	1979 (24 states)
SEARCH Group, Inc.	1970-1978	1979 to present
NLETS, Inc.		1981
U.S. Attorney General's Task Force on Violent Crime		1981

SOURCE: OTA, 1982a: 164.

Thus far, the NCIC Policy Advisory Board is composed of twenty elected and six appointed members. The twenty elected members represents state and local law enforcement: nine from state police or patrols; seven from state bureaus of identification; and four local (city or county) police. The six appointed members include two members each from judicial, prosecutorial and correctional components. Thus, about three-fourths of the representation is law enforcement. The LEAA and others have challenged the restrictiveness of representation and have suggested much broader representation within and outside the criminal justice system.

The FBI favors a slightly altered NCIC Policy Advisory Board whereas LEAA and SEARCH Group prefer an independent federal information board. Most state and local officials appeared to support the FBI proposal at that time. Since that time, surveys of state criminal justice officials (conducted by the Department of Justice) (OTA, 1978) and Office of Technology Assessment (1982a) indicate that support for two alternative governance configurations has become increasingly divided.

The Department of Justice survey found that state officials considered an agency other than the FBI to be a more viable governance entity in the long term and criticized organizational separation between IDENT and CCH components of the NCIC (OTA, 1982a: 171). An OTA survey in 1979 indicated that while twenty-two state repository officials favored FBI management control, there was extensive variation in support for governance configurations. Respondents urged that states be given increased policy control and that some other entity such as NLETS, SEARCH Group or board be given policy and enforcement powers. Table 4 on the following page presents the results of the OTA 1979 survey, showing the relationship between system structure and policy control.

Table 4. 1979 Preferences of State Repository Personnel for CCH System Structure and Policy Control.

System Structure	Policy Control						Totals
	FBI	FBI with revised board	Independent board	No preference	FBI or NLETS	SEARCH or NLETS	
National repository	1						1
Single-state/ multi-state	8	1	1				11
National index	6	6	6		1	1	24
Regional systems							1
Total decentralization							1
No preference				4			4
Totals	15	7	7	4	1	1	42

SOURCE: OTA, 1982a: 1972.

NOTE: Forty-two states responding by telephone and/or mail to an OTA survey conducted in mid-1979.

Political Constraints to Regulating Criminal
Justice Information Systems

The foregoing discussion has shown that it is now technically possible to create a national, computerized criminal history record system. In fact, the United States already has a national criminal history network, partly manual and partly computerized, which includes

(1) criminal records; (2) fingerprints and repository maintained by the NCIC/IDENT and forty-nine state identification bureaus; (3) twenty-seven state CCH files; and (4) an interstate exchange system utilizing the U.S. mail, the NCIC and the NLETS communication networks. Thus, many of the necessary elements of the computerized criminal history system are already operational.

Nonetheless, there are several political factors which have prevented the complete development of that system thus far. These factors are important to examine in that they reflect larger political issues and interests involved in the regulation of criminal justice information systems:

1. Constitutional rights and discrimination--surveillance potential;
2. Law enforcement practices--the conduct of investigations versus individual access to records;
3. Privacy versus the public right to know;
4. Separation of powers--executive regulation of the courts;
5. Federalism--the balance of authority between federal, state and local government;
6. System governance--system accountability and representation processes; and
7. Record content, management and oversight.

Constitutional rights and discrimination

There has been a longstanding concern by civil rights interests that the creation of a national CCH might be used by law enforcement

agencies--particularly the FBI, for monitoring or surveillance of lawful activities of individuals and organizations. This concern was reinforced by revelations of FBI conduct of domestic political, intelligence and surveillance activities against anti-Vietnam war leaders and groups. In fact, the NCIC had been used for intelligence purposes for which it had no Congressional authorization. Although the FBI has assured critics that these practices were anomolous and have ceased, the Justice Department and FBI have most recently (in September 1982) approved but not yet implemented use of the NCIC/CCH for intelligence and surveillance of persons judged by the U.S. Secret Service to represent a potential threat to the President (OTA, 1982b: 25). The American Civil Liberties Union, National Lawyers Guild, other civil liberties groups, and those advocating a variety of political views critical of the status quo who often use public demonstrations as a method of dramatizing their views, are strongly opposed to police collection of intelligence on such activities and have steadfastly opposed the expansion of the NCIC for this reason.

The investigation and intelligence applications of criminal records also tend to have a discriminatory effect on minority populations, especially blacks. Studies in Philadelphia by Miller (1979) and in California by the Bureau of Criminal Statistics (1981) show that blacks are more likely than whites to be arrested and account for a disproportionate number of releases without charges. Moreover, NCIC records indicate that in 1980 blacks accounted for nearly 29 percent of all records in this CCH file, almost triple the percentage of blacks in the population (OTA, 1982a: 141-142).

Private sector use of criminal history records in a wide variety of employment and licensing decisions is of uncertain but evidently extensive proportions. An American Bar Association survey in 1974 identified 1,948 separate federal and state statutes governing the licensing of persons with arrests or convictions (OTA, 1982a: 193). Also, it has been estimated that between 40 and 80 percent of private sector employers request criminal history information in job applications (Miller, 1979: 20-23). Federal Title 28 regulations now permit dissemination of federal criminal history records if permitted by state and local law. As Chapter III indicates, there are extensive variations in state and local laws covering access to such information. Yet, a SEARCH Group study (1981) suggests that access to such information held by local police is rarely denied.

Limiting job opportunities on the basis of a criminal record (especially a simple arrest without conviction) involves added punishment for conduct for which the subject may have been vindicated. Thus, in response to such issues of potential discrimination from the pre-employment use of arrest records, state Human Rights Commissions, under pressure from national black organizations such as the NAACP, Urban League and local affiliates, have adopted state policies limiting the use of such information.

Law enforcement practices

The implementation of criminal justice policy necessarily involves reconciling conflicting values. For example, implementation of Supreme Court civil liberties decisions has had to strike the

balance between the individual's right to fairness, due process and effective law enforcement. Similarly, while the national CCH concept greatly enhances records collection and exchange capabilities essential to investigative activity, it also presents special problems of record access, dissemination and confidentiality. While the national CCH would facilitate an extensive exchange of criminal records between state and local jurisdictions, the data subject must have access to that data for the purposes of review and/or challenge and correction of inaccurate information.

Law enforcement officials contend that data subject access to criminal records should be limited to "rap" sheet information only. This is so because access to a variety of intelligence information would tend to undermine the efficacy of the investigative process. Importantly, criminal history information retrieved from other jurisdictions in the process of an investigation is considered privileged and confidential (American Friends Service Committee, 1979; and O'Toole, 1978). The effect of this operating presumption is to deny access to records pertaining to the data subject other than those originated by the agency. Consequently, the data subject is unable to challenge or correct erroneous information exchanged between criminal justice agencies used as a basis for decision making. Civil liberties groups oppose these limitations on an individual's access to his own record in part because of their concern that information from inappropriate police surveillance might be included in such files without the subject being aware of it.

Privacy versus the public
right to know

Another contested issue which constrains efforts to limit access to federal, state and local criminal history records is the conflict between individual privacy and the public right to know. Policies for the protection of privacy rights with respect to information systems and other areas have been preceded by at least a decade of federal policies designed to greatly enlarge the accessibility of governmental records. It is therefore not surprising that efforts to limit certain information made accessible to the public by prior policy would be controversial. Given policies with cross-cutting objectives such as these, the conditions of compliance are uncertain and policy success is problematic (O'Brien, 1980).

The Menard decision (1971) and other similar cases involving the adverse effects of the publication of inaccurate record information underscored the need to control the dissemination of information utilized in the administration of criminal justice. Federal and state courts are divided, however, as to an appropriate policy response to the problem. Moreover, the Supreme Court in Paul vs. Davis (1976) held that police have a right to publicize a record of an official act, such as an arrest, without exposing state or federal officials to law suits for civil rights invasions. Accordingly, the fact that the record may be incomplete does not constitute a prohibition to its dissemination in accord with normal procedures. In its decision, therefore, the Supreme Court clearly had to balance competing rights and chose to weigh the public right to know more heavily in the balance.

The press has been one interest which has consistently pressed for the presumption in favor of disclosure of public records, especially records of criminal proceedings. The press contends that exercise of its first amendment rights is necessarily curtailed by any regulations limiting access to public records. Consequently, they have been strongly opposed to any form of regulations which both limit access and/or expose them to liable suits. As we see in Chapter III, the press' interest in maintaining open access to and publication of criminal records has undermined LEAA's attempt to implement a uniform national policy limiting dissemination of criminal records.

Separation of powers

One of the persistent tensions in our constitutional form of government is the maintenance of an independent judiciary, free from interference from executive or Congressional regulation. The development of a national CCH presents tensions in this doctrine.

The effectiveness of the national CCH necessarily requires substantial participation by courts in the timely submission of final disposition information of state and federal repositories. However, the separation of powers doctrine has made attempts to legislate court participation in a national CCH and observance of records management regulations unsuccessful. While local trial courts are dependent upon information generated by police and prosecutors for a variety of decisions, state and local courts have proceeded with caution with respect to enlarging participation in state and local criminal justice information systems which entail executive erosion of judicial

independence. Thus far, although state court interests (e.g., the National Center for State Courts) have not opposed the development of a national CCH, they have not been supportive of federal policies which involve regulation of courts using the NCIC or other criminal justice information systems. Moreover, efforts by state courts to develop integrated information systems for trial courts have not been particularly successful in mandating participation in such information technological reforms.

Federalism

The formulation and implementation of federal policy typically invites conflict over the acceptable balance of authority between federal, state and local governments. The attempt to develop a national policy for the collection, exchange and dissemination of criminal history records is no exception.

First, tradition dictates that the criminal justice system is highly decentralized both in political and functional terms. Like education, law enforcement and the administration of criminal justice is considered a matter of local control; leadership of most of the major elements of local criminal justice (e.g., police, prosecutors and courts) is selected through general elections. Thus, criminal justice officials represent diverse and overlapping constituencies. The relative political independence of each component sustains and reinforces differences in perspective on appropriate policy responses to crime, and thus limits the efficacy of federal policy intervention. Efforts to create a national CCH imply a centralization of regulatory

authority over state and local law enforcement and other criminal justice agencies which heretofore has not existed. Moreover, law enforcement interests do not constitute a monolithic or unitary political force. Federal, state and local law enforcement interests are often divided on policy issues which require consensus on governance and management because of strong differences over functional responsibilities, roles, jurisdiction, and so forth.

Second, the development of a national criminal information exchange system necessitates increased state authority and/or enforcement of policy which presents some novelty for most states. Only four states now exercise any regulatory control over criminal justice activities including information system processes (Skoler, 1977). It is not entirely clear what role state and local elected officials should assume under a national CCH and what agency or agencies should assume an enforcement or oversight role. Moreover, it is not self evident how uniform policy might take shape under conditions of state decentralization in criminal justice leadership. For unlike the relationship between federal and state courts, criminal justice agencies are not clearly linked in either a formal or informal hierarchical structure. Thus, the configuration of the criminal justice system and power conflicts pose important constraints to the implementation and enforcement of a national CCH.

System governance

Not only does the national CCH pose problems for federalism, but it raises issues central to democratic governance processes. One of the difficulties involved in the regulation of criminal justice

information systems is to find an appropriate regulatory authority. Since its participation in the development of a national CCH, SEARCH Group, (a major contractor and consultant to LEAA) has promoted a two-tier governance system. The first tier would consist of representatives from each of the fifty states to constitute a governance body with authority to make policy decisions and enforce compliance with national standards. The representatives would be appointed by state governors and would not necessarily have law enforcement backgrounds.

The second tier would consist of independent state commissions with responsibility for state policy development, regulation and enforcement of national and state criminal justice information system standards, including privacy. Other functions of state boards might include audit responsibility, appellate review of disputed record challenges, and coordination of standards with other state information systems. The state board or commission would be broadly representative of public and private sector interests including law enforcement.

LEAA (along with liberal academics and civil liberties groups) has generally favored the SEARCH Group proposals and has consequently strongly advocated that states consider an independent commission as the preferred alternative to other approaches such as state law enforcement agencies. This approach, however, has not gained much support from either state executives and legislatures nor from state and local law enforcement officials. In an era of deregulation and greatly reduced public intervention, with few exceptions (e.g., California, Massachusetts) governors have been reluctant to create

new commissions, especially when conflict with law enforcement interests is a likely consequence.

State law enforcement is not eager to surrender even partial jurisdiction over state standards to non-criminal justice interests. Likewise, local criminal justice officials are not eager to see the enlargement of state regulation, regardless of its source or composition.

Finally, the FBI considers the two-tier concept to be inimical to its interests as a national investigative agency whose responsibilities include policy leadership in criminal justice and maintenance of a strong moral authority in the eyes of state and local law enforcement.

Record content, management and oversight

Any national CCH system must necessarily include guidelines for record management processes by users, establish limits to file size and content, establish standards for record quality and oversight for audit mechanisms. Such guidelines are essential to ensure the integrity, security and privacy of criminal history record information.

Record management procedures include file structure, data collection and maintenance practices, exchange and dissemination procedures, monitoring and transaction logs and so forth. There is little uniformity across criminal justice agencies in jurisdictions with respect to record management practice. Consequently, the interstate transmission of criminal record information involves potentially wide variations in the care and restrictiveness with which it is maintained and utilized. LEAA grants have been used to support greater standardization but with only limited success, in part because standardization

was considered equivalent to centralization of policy control (Folan and Lettre, 1981).

Also, agreement must be reached among federal, state and local law enforcement groups and national civil liberties groups as to the size and content of a national criminal history record file. Numerous alternatives have been identified and assessed by OTA (1982a), but there is little agreement on these proposals. File size would be dictated by the system configuration or structure (i.e., national repository versus index). For example, if a national CCH is limited to violent and serious offenders, file size would be approximately 8.6 million records, whereas a national index consisting of federal and single-state, multi-state offenders would be 20.5 million. Generally, the larger the size of the national files, the greater the likelihood of problems of record quality (i.e., inaccuracy and incompleteness). Consequently, technical issues such as these necessarily involve unresolved political issues. For this reason, and given the greater potential for surveillance that a larger file size entails, civil liberties and minority group interests have generally opposed enlarging the NCIC along the lines of a national repository or utilization of an FBI-controlled message switching service between the states.

System audit mechanisms are also necessary but again, political factors limit consideration of approaches which ensure adequate control. The GAO has most recently been proposed by OTA for nationwide audit responsibility, but criminal justice interests contend that outside auditors lack expertise, necessitate security clearances and are unable to guarantee confidentiality of findings.

Structure of Analysis

According to the policy implementation literature there are a number of variables which strongly influence the likelihood of compliance to policies originated by legislatures or courts. Chapter II consists of a review of that literature and alternative conceptual frameworks with which to understand the relative significance of factors influencing state and local implementation processes.

In Chapter III, national data is presented to identify patterns of state policy response to the criminal records privacy regulations (Title 28) and effects on records quality and management processes. Chapters IV through VI consist of a case study of state guideline development and implementation processes in Washington state. The case study identifies interests involved and other factors influencing state performance which contribute to an explanation of national patterns of state response.

Finally, Chapter VII develops and assesses alternative explanations of the Washington case and identifies common factors influencing the politics of state implementation of court and legislative policy.

Introduction to the Washington case

Chapters IV through VI consist of a case study which documents how the federal criminal records privacy mandate was converted into state policy; how guidelines were subsequently developed; how implementation occurred and how state and local criminal justice agency practice was affected. Chapter IV focuses principally on the role of

state officials, the state planning agency and other interests involved in the passage of comprehensive state legislation. Chapter V examines the guideline development process in some detail, focusing particularly on interests and factors involved in a committee review process by which federal policy was translated into state guidelines. Then, Chapter VI examines the impact upon state and local criminal justice organizations and interests and their response. The case documents factors precipitating subsequent efforts to bring about legislative amendments and regulatory revisions.

The case study covers the time period from late 1976, when a state security and privacy plan was developed along with draft legislation, to the summer of 1981, over a year after the State Patrol assumed regulatory authority for administering the law. The significance of this interval resides in the fact that during this time two different state agencies (the State Planning Agency and State Patrol) exercised administrative authority and thus two different processes and versions of state guidelines resulted. The period under investigation involves events covering two different presidential and gubernatorial administrations (in Washington) and two different implementing agencies (the SPA exercised administrative authority from 1977-1979, at which time the State Patrol assumed administrative control).

The reconstruction of the legislative, guideline development and implementation processes is based, in part, upon this author's personal observations and recollections as a participant in these processes from 1976 through 1978. From 1976 to 1977, I served as a staff member to the Governor's Committee on Law and Justice, through

the State Planning Agency (SPA), and developed long range plans and standards for information systems. In 1977, I was involved in the legislative process which then passed state legislation implementing the Title 28 privacy regulations. Subsequently, I was appointed by the Governor's Committee as administrator of the Security and Privacy Program with responsibility for guideline development and implementation. Thus, I have drawn upon personal experience, official documents, correspondence and other state records for documentation and corroboration of events.

During 1980 and 1981, I conducted a series of twenty-two intensive interviews with criminal justice and other officials and individuals not only to help reconstruct processes involved in state implementation and their effects but to probe factors of particular interest to this study. Those factors included perceptions of federal and state policy objectives, attitudes towards regulatory requirements, expectations about and actual effects of the law and regulations on existing practice, and consequences for inter-agency and state-local relationships. The following criteria were utilized in the selection of interview respondents: (1) participation in and familiarity with state guideline development processes; (2) position and influence in state and local criminal justice agencies and professional associations; (3) institutional and geographic representativeness; and (4) non-criminal justice interests familiar with and involved in the development and implementation of the policy. When I report information from these interviews in Chapters IV through VI, publicly known officials are identified by name and title, otherwise I refer to individuals only

by their general region, position, role or relationship to the Security and Privacy program in order to protect their anonymity.

There are some potential sources of bias in utilizing this approach. My participation in both legislative and implementation processes may inhibit the candidness and truthfulness of the responses. However, this difficulty was circumvented in part for the following reasons: my involvement in the program terminated in 1978; the State Patrol has subsequently assumed administrative control (February 1979); the controversy surrounding passage of the law has grown dormant; and federal enforcement action has slackened considerably with substantial reduction in LEAA funded activity. In addition, this study sought an explanation, not an evaluation, of performance (a potentially less threatening focus) with potential technical assistance benefits to the criminal justice community. Also, the interviews did not require, in most instances, departmental approval and confidentiality of the responses was maintained where requested.

The case approach

The case study approach is a useful strategy when complex phenomena must be examined in real world contexts. The state implementation of a federal mandate presents such a context for there are numerous factors and interests at work which shape responses, ultimate outcomes and impacts of federal policy. A study limited solely to available data on patterns of national compliance would not provide a sufficient basis by which to explain why things happen the way they did. The processes by which policy gets implemented are perhaps best

understood through a case study approach because it is extremely difficult to separate or distinguish between the factors influencing implementation and the context in which they operate or interact. Although it may be difficult to precisely assign causal relations between factors, case analysis facilitates construction and testing of alternative explanations (Yin, 1981).

To be sure, there are inherent weaknesses to a case approach. First, the number of variables involved in implementation processes can be extremely large, thus limiting analytical precision. This aspect requires selectivity and qualitative judgment in assigning significance to variables affecting outcomes. Such problems can be dealt with by utilizing retrospective interviews to reconstruct key events in ways which identify factors suggesting a common explanation.

Second, an analysis of one state's response, although suggestive of similar factors producing national patterns of state response, does not provide an exclusive explanation of such patterns. There may be factors idiosyncratic to the Washington case which limit applicability to an explanation of national performance. Thus, the findings of the case are limited to other states whose experience is most comparable with respect to statutory approach, technological capacity, and other features. However, in conjunction with nationwide data, the case approach provides depth to enrich our understanding of the political significance of national patterns.

C H A P T E R I I
ACHIEVING COMPLIANCE WITH FEDERAL POLICY:
STATE IMPLEMENTATION OF LEGISLATIVE
AND JUDICIAL MANDATES

The conventional wisdom of the policy implementation literature holds that there are several conditions conducive to effective (successful) implementation and compliance. Such conditions are generally held to be invariable regardless of the policy characteristics, nature of the policy system, organizational structure and implementing environment. Therefore, this chapter begins with a brief review and assessment of these factors which include: minimal threat of change, clarity of mandate, support of state and local elites, and possibility of enforcement.

Next, the comparison of state responses to legislative and court policy to regulate the administration of criminal justice may help to determine the potential relevance of these factors to the criminal justice system. Supreme Court policies regulating law enforcement (specifically the Mapp and Miranda decisions) provide this study with the closest policy analogs with which to understand the politics of implementation of criminal records privacy policy.

A study of the effects of Supreme Court criminal procedures policy on lower courts, especially state courts, contributes to our understanding of the significance of guideline development as a factor

which influences implementation processes and subsequent outcomes. The fact that state courts and administrative agencies both exercise similar supplementary rule-making functions suggests a potentially fruitful avenue of exploration of the relative capacities of courts and legislatures to influence implementation. Studies of the Mapp and Miranda decisions, for example, have focused upon the supplementary policy making functions that state courts employ to translate Supreme Court policy into state practice (Canon, 1973; 1977; Manwaring, 1972; Romans, 1974; Tarr, 1977).

This comparative analysis necessarily focuses upon state courts and legislative-bureaucratic policy makers/implementers because state courts and, in most cases, state legislatures and administrative agencies are the intermediate recipients of intergovernmental policy. The factors which shape state officials' responses to policy enunciated by their federal superiors in the intergovernmental system may have important consequences for the way that policy is understood and interpreted as well as transmitted and communicated to lower level implementers.

Legislatures and courts do differ fundamentally with respect to processes by which policies are made. Also, courts and legislatures exhibit other differences as well, such as organizational structure, and implementing environment. However, an exhaustive review of similarities and differences between the institutions originating these civil liberties decisions and the criminal records privacy mandate is neither necessary nor desirable. Such a comparison is unnecessary because what we wish to learn from the civil liberties

policies, which happen to be Court-initiated, is what they suggest are the salient factors and interests involved in the implementation of policies designed to regulate the administration of criminal justice. In addition, the desirability of such an approach is questionable because of the likelihood that the inquiry would become preoccupied with invidious comparisons of strengths and weaknesses of institutional policy-making capacities. While efforts of this kind are illuminating about potential policy boundaries between courts and legislatures (see Baum, 1981; Horowitz, 1977; Youngblood and Folsie, 1981), they tell us little about political factors shaping the responses of criminal justice officials to federal policies. Moreover, as Baum asserts:

The difficulties involved in the implementation of judicial policies are far from unique. If problems of implementation are common in the judiciary, these problems are chiefly the result not of special conditions in the judicial system but of the universal weaknesses of organizational superiors (Baum, 1976a: 108-109). [Emphasis added.]

Therefore, a review of state responses to and effects of these two important civil liberties decisions may be suggestive of the likely results of the state implementation of a Congressional mandate advancing similar objectives.

What the ensuing analysis of state responses to the Supreme Court civil liberties policy suggests is that elite support and willingness to enforce compliance are significant factors involved in the implementation of a national policy designed to regulate the administration of criminal justice. These factors appear to account for significant variations in compliance between states. This is not to say that the other factors are unimportant. The extent of change appears to have a secondary, but nonetheless important relationship

to elite support and local compliance while policy clarity and specificity have, if anything, precisely an inverse relationship to compliance and change.

Finally, the chapter concludes with a review of recent conceptual frameworks advanced to show the relationships among the factors identified above and other variables influencing the implementation of policy in the federal system. Such frameworks seek to provide the basis for explanatory theories of policy implementation processes. As such, they attempt to specify causal relationships between factors likely to increase compliance regardless of differences in characteristics of policy systems, organizational structure and process and implementing environments.

Common Conditions of Effective Implementation

Minimal threat of change

Most of the implementation literature holds that judicial and legislative policies which involve extensive change are less likely to be effectively implemented than those in which change is minimal. Significantly, while courts may be less constrained than legislatures by political-environmental factors in making rulings involving profound social change, they are no less affected by problems in implementation.

Policies which involve extensive change but low goal consensus are more likely to encounter difficulties in implementation than policies with little change and high goal consensus (Van Meter and Van Horn, 1975). This is so because policy is largely a product of incremental decisions; current policies build on past ones deviating

only slightly from prior goals and practices. Legislative policies involving extensive institutional change require an enormous amount of initial public support and continuous special interest support over time to ensure they are faithfully and effectively executed. This support is especially vulnerable to dissipation over time and subsequent erosion of initial statutory success is a likely byproduct (Mazmanian and Sabatier, 1981).

Unlike legislative policy, court decisions can involve extensive change with little public support. Therefore, implementation processes depend less on interest group support over time than on other factors internal to the judicial process and organizational context into which the decisions are injected (Baum, 1981).

Regardless of these important institutional differences, the amount of change does have a bearing on the extent of compliance. There are at least three factors which reinforce the importance of change in influencing policy outcomes. These factors include: complexity of organizational process involved, stability of the policy system, and the values, attitudes and expectations of implementers.

First, policies which entail extensive organizational change and interorganizational coordination are likely to be perceived by implementers as involving more extensive change than those minimizing such effects (Pressman and Wildavsky, 1973). Even policies involving high goal consensus are likely to be ineffective if they also require organizational change.

Next, policies involving policy systems characterized by instability and fluctuation will generally be less capable of

effectively implementing policy involving extensive change than systems which are stable and tightly coupled (Rabinovitz, Pressman and Rein, 1976). This is so because consensus and decision making processes are more likely to be weak in "loosely-coupled" systems than in those which are not. Extensive bargaining and compromise is necessary before policies can reach execution stage with the predictable result that as the policy nears the execution stage, ambiguity replaces clarity and specificity.

Finally, the values, attitudes and expectations of implementers can be important factors influencing the extent of policy change. If implementers do not share values underlying a decision or statute, perceived changes are likely to be greater than if policy values are compatible with implementers' beliefs. Moreover, policies involving extensive change of values may affect the intensity with which the policy is supported or opposed by target groups. Policies involving extensive change which produce intense opposition are less likely to be effectively implemented than those involving neutrality or more weak opposition (Van Meter and Van Horn, 1975). Expectations also affect the way the magnitude of change is characterized. For example, court decisions which are not anticipated by target groups may produce greater expectations of change than decisions and trends which build slowly over time (Wasby, 1970). Importantly, regardless of the actual amount of change, policies can produce expectations about policy outcomes which differ markedly from actual effects.

Unambiguous mandate

Another tenet of successful implementation is that the policy objectives should be stated clearly, intended behavior identified and performance specified (Van Meter and Van Horn, 1975; Mazmanian and Sabatier, 1981).

Clarity of policy is important for three reasons. It tells implementers what is expected of them and provides a way to deter deliberate distortion or misrepresentation by those seeking to evade compliance. In addition, an unambiguous policy provides a resource to supporters of the policy (i.e., clients and special interests) to influence implementation processes (Mazmanian and Sabatier, 1981).

Judicial opinions are somewhat more limited than statutes in the potential for clarity. While statutes provide general rules for action, judicial decisions typically justify certain acts and therefore are deliberately narrow in scope. Little is said about alternative behavior.

However, the complexity of legislative processes and necessity for compromise make intentional vagueness and delegated discretion inevitable elements of statutes (Van Horn, 1979). To the extent that both courts and legislatures face similar problems of complexity, intermediate and lower level implementers are given responsibility for the development of more detailed guidelines to provide the clarity lacking in original policy (Baum, 1981).

Further, clarity of policy affects the processes by which policy is transmitted from superiors to subordinates. In this respect, courts are less able than legislatures to control the way decisions are

transmitted. Courts are more dependent upon communication processes controlled by numerous participants in the judicial process (Wasby, 1970; 1973). Consequently, clarity is essential to limit vulnerability to distortion by lower level implementers. In contrast, the special difficulties legislatures face concern loss of control over guideline development processes to federal and state agency implementers. Thus, the exercise of oversight powers is essential to obtain feedback as to bureaucratic fidelity to legislative intent.

Supportive state and local elites

Next, initial and continuous support by state and local elites is crucial to effective implementation of federal policy. There are two sources from which elite support may emerge to influence compliance processes: (1) governors, legislators, judges and local elected officials; and (2) state and local agency administrators.

State and local elite support is especially important to the success of a federal intergovernmental policy because such officials exercise more direct control over agency resources and activities. Conflicting policy objectives from federal and state sources are most likely to undermine compliance with federal policy (Mazmanian and Sabatier, 1981). While support for federal programs over time is determined largely by national political forces, strong initial support for state adoption and compliance is especially crucial to short term success. A "fixer" (a legislator or executive official who controls resources important to the program) should be readily available to intervene on a continuous basis in order to protect the program from destruction (Bardach, 1977a). In this regard, in recent years the

devolution of decision making to state and local elected officials has been urged as a strategy to increase elite support by strengthening accountability and representation processes at state and local levels.

Another way in which state executives and legislators can influence policy implementation processes is through their power to interpret policy intent and objectives to lower level implementers. Such interpretations can decisively influence attitudes of subordinates in the policy system. As Dolbeare and Hammond (1971) found, elite predispositions toward a policy can reinforce misinterpretations of policy in which the lack of positive action is rationalized away.

In addition to state executives and other state officials, state and local agency administrators with direct responsibility for implementation can influence the degree of compliance. Federal policies which create new agencies and organizational processes by which policy is implemented are more likely to achieve initial policy objectives because implementers may be chosen who are supportive of the aims and statutory purposes. In addition, agency administrators must be skillful in the use of resources and mobilization of interest group support to persuade sovereigns to continue to support efforts towards compliance. If these skills are lacking little success can be expected in securing compliance (Rourke, 1976).

One final factor significant in determining whether support of agency administrators will occur is the extent to which statutory goals are consistent or compatible with their utilities or preference rankings (Brown and Stover, 1977). Policies which impose costs with little payoff for administrators with respect to continued interest

group support and long term agency survival will find little support, so non-compliance becomes an acceptable alternative.

Enforcement possible

As Richard Neustadt declares, decisions are not "self-executing" and policies adopted by legislatures and courts are no exception (1960). Any policy will encounter some indifference or resistance which must be overcome to achieve goals and objectives. Therefore, effective policy implementation requires that some means be available to ensure that intended policy objectives get implemented. Here, the implementation of legislative and court-originated policy differs in a fundamental respect. Legislative policy objectives are primarily enforced through an inducement system in which conditions are attached to grants of aid. In contrast, courts must rely primarily upon sanctions to enforce compliance to its decisions.

Inducement and sanction systems differ in important respects. The allocation of resources is intended to make compliance to policy more attractive; the benefits of compliance are meant to outweigh the costs. Factors likely to affect the efficacy of policy inducements to increase compliance include policy salience and support, relative deprivation of loss of funds and likelihood of actually suffering the loss of funds.

Sanctions, on the other hand, are meant to make a negative response less attractive. Sanctions increase the cost of non-compliance without altering the benefits of compliance (Baum, 1976a; Brown and Stover, 1977). To be effective, sanctions must entail the threat of substantial loss and credibility of use; that is, the recipient must

value the object forfeited and must perceive that the sanction is likely to be inflicted for non-compliance. Factors likely to affect the credibility of the sanction and likelihood of compliance therefore, include zone of acceptance, intensity of enforcers' demand (Krislov, 1971); number of target groups affected (Brown and Stover, 1977); and number and intensity of groups willing to challenge officials for non-compliance (Brown and Stover, 1977; Scheingold, 1982).

There are several means available to legislatures to enforce compliance with policy decisions. Obviously, one of the most important is the control over and potential withdrawal of federal funds for non-compliance. Another is the direct intervention by superiors in the activities of subordinates. Yet, such direct means are rarely employed and in fact, need not be because there are a variety of other indirect but effective approaches to achieving compliance (Van Meter and Van Horn, 1975).

The statute itself constitutes an important source of leverage to legislators and bureaucrats to enable enforcement. New agencies may be created or existing ones designated for policy execution that are sympathetic to the policy objectives, likely to build professional and client alliances and pursue aggressive agendas. Decision rules of implementing agencies (e.g., grant allocation formulas and regulatory procedures) can also be structured to minimize veto points and ensure organizational consistency with intended objectives (Mazmanian and Sabatier, 1981).

In addition, grant-in-aid programs secure advance compliance by requiring detailed plans for the administration and allocation of

funds. Along with plans, detailed guidelines may be promulgated to carefully specify eligible expenditures, intergovernmental and inter-agency responsibilities and relationships, reporting requirements and other areas (Van Horn, 1979). Regulatory intrusiveness may therefore be an important surrogate for the direct hierarchical control lacking in a federal system involving decentralization of power and state and local autonomy (Nieman and Lovell, 1981).

Finally, exchange strategies which try to maximize shared values between superiors and subordinates can also be an important substitute for approaches based upon power-dependence (Gray and Williams, 1980). Funding can be used to foster policy innovation and demonstration projects designed to cultivate mutual support for change. Moreover, to the extent that state and local officials can be encouraged to address common problems through federal initiatives, the need for active enforcement is diminished. Thus, recent federal policies have emphasized the strengthening of state and local relations under revenue sharing in order to devolve accountability and thus, enforcement to lower levels of power.

Recent studies of state court policy making in the aftermath of the Warren Court suggest that states have assumed increased leadership in extending Supreme Court-originated rights protections into other areas. Therefore, it is contended, decentralization of policy making to state courts is likely to increase the prospects of further alignment and enforcement of state policy with constitutional requisites. In this respect, the devolution of decision making to state courts is considered a key factor in increasing the possibility of enforcement (Porter and Tarr, 1982).

Implementing Mapp and Miranda

In its decisions on Mapp vs. Ohio in 1961 and Miranda vs. Arizona in 1966, the Supreme Court enunciated national guidelines for police observance of suspects' and defendants' due process rights which have had far reaching political implications. Civil liberties groups hailed the rulings as a significant step towards curbing police power and abuses while criminal justice interests and other sympathetic public officials decried them for undermining effective law enforcement. The decisions also precipitated controversy between states-rights proponents and interests advocating a thoroughgoing federalization of civil rights policy. Therefore, a brief review of the decisions is necessary in order to understand the political environment surrounding the implementation of these Supreme Court policies.

The Miranda ruling involves an attempt to specify the conditions under which a suspect's statements may be considered voluntary. Unless certain designated warnings have been given to a suspect by police (e.g., the right to remain silent, have an attorney present during interrogation) the statements cannot be considered voluntary and thus cannot be introduced as evidence by the prosecutor.

In addition, Miranda requires that officers take positive actions to acknowledge suspects' rights. The warnings are to be incorporated as an integral part of the formal process by which an offender is taken from arrest to final adjudication. In most circumstances, suspects must be given an opportunity to exercise or waive Miranda rights at the point at which they are taken into custody. Thus,

the Miranda ruling does not alter police roles or functional activities; rather, it establishes limits on how far the fact-finding process may proceed before an individual is given an opportunity to withdraw from further involvement in that process.

The Miranda decision is a model of clarity and specificity, providing little leverage for alternative state court interpretations. Police use of confessions as investigative tools is clearly discouraged. Moreover, the warnings are not to be employed in a perfunctory or ritualistic way but given in "unequivocal terms" (Milner, 1971a: 40).

The Mapp decision applied the so-called exclusionary rule for searches and seizures to law enforcement officials in states, holding that illegally seized evidence could not be used in state criminal proceedings. In contrast to Miranda, the Mapp decision involves not a positive but a negative injunction; police are not to collect evidence through methods contrary to the right to privacy, and courts are not to admit evidence which involves use of unreasonable searches and seizures.

Some observers see the Mapp decision primarily as an attempt to deter police abuse of investigative powers. In contrast, others advise a broader reading of Mapp as a rule to guide judicial decisions regarding admissibility of evidence and the adjudication of guilt or innocence of the accused (Horowitz, 1977). But it is not altogether clear why Mapp must be considered either a regulation of police or lower court conduct but not both. Moreover, understanding both Mapp and Miranda decisions as an extension of the supervisory responsibility state courts have over trial court procedure suggests the importance of their leadership in securing police compliance.

What is common therefore, to both decisions is that the Court determined that the credibility and fairness of trial outcomes was seriously undermined by admitting evidence or testimony secured by police in fact finding processes which involved unreasonable invasions of individual privacy or coercive custodial environments. The Court clearly attempted to advance at least two objectives by this decision.

First, the Supreme Court intended that the police not only discontinue certain practices associated with investigation such as warrantless searches and custodial interrogation but expected police to devise other methods by which evidence could be collected.

Second, the lower courts were expected to utilize these policies as standards governing decisions on admissibility of evidence and, significantly, with Mapp judges were expected to directly participate in decisions regarding the need and appropriateness of the issuance of search warrants. Thus, the policies involved structural implications; courts are directly implicated in a supervisory function which expands their responsibilities in the criminal justice process.

The methodologies employed to determine the impact of the Supreme Court civil liberties decisions vary in significant ways. Scholarly opinion is consequently strongly divided about the results and efficacy of the decisions, especially in the case of Mapp. No attempt is made here to participate in this debate. Rather, I have tried to draw broadly from representative studies in the literature in order to determine what it tells us about factors affecting state and local responses.

The expectations and realities of change

What is striking about initial responses of criminal justice officials to the Mapp and Miranda decisions is the common expectation that if implemented, they would result in extensive, adverse change in the conduct and outcomes of the criminal justice process. The observance of defendant's rights was expected to constrain law enforcement investigative functions, impede effective prosecution and produce judicial outcomes contrary to findings of factual guilt. Subsequent studies suggest, however, that these beliefs or perceptions were greatly exaggerated; the actual effects of the policies have varied substantially from initial expectations.

Although the response by the criminal justice community was largely negative and consistent with public opinion, neither decision was unexpected by criminal justice officials. Twenty-two state courts had already adopted some form of the exclusionary rule prior to Mapp. Moreover, federal courts had been operating under the rule since Weeks in 1914. Yet, interestingly, police in states operating under the exclusionary rule prior to Mapp perceived greater disruption of existing practice (Murphy, 1966). Pre-Mapp rule states also showed a greater likelihood towards non-compliance than non-rule states, although compliance would be unlikely to involve much policy change for pre-Mapp rule states.

The Miranda decision also was preceded by several prior Supreme Court decisions involving a gradual but unmistakable enlargement of defendants' due process protections. Miranda simply consolidated the

several incremental steps the Court had already taken to ensure adequate and uniform due process protections in the states. In fact, the decision seems to have been better anticipated by police than Escopedo (Wasby, 1970: 155). Yet once the complete panoply of defendants' rights was fully specified and embodied in a concrete procedure, the perceived extent of change was greatly magnified.

Studies of the impact of Mapp and Miranda generally suggest that expected effects were greatly overdrawn. Changes have occurred but not necessarily in either intended or anticipated directions. Formal compliance does not carry the onerous consequences expected by police and prosecutors, nor do the decisions appear to close avenues available to bypass or evade compliance (Baum, 1979; Wasby, 1970). The issuance of Miranda warnings, for example, has not endangered the likelihood of conviction (see Seeburger and Wettick, 1967; Wald et al., 1967). And both decisions have generally revealed the resilience, adaptiveness and pervasiveness of informal practices (e.g., plea bargaining) which limit policies designed to formalize procedures and structure discretion (Horowitz, 1977). In this regard, the Miranda decision, more so than Mapp, lends itself to literal compliance.

These findings underscore the limited behavioral change required to achieve compliance, yet the general lack of efficacy in achieving desired objectives. The importance of the decisions for our understanding of the relationship between extent of change and compliance therefore suggests that policies may impose cognitive costs for role bearers who must comply with policies for which they have no underlying

belief or support. The actual extent of behavioral change necessitated to achieve policy compliance may be far less important in determining policy efficacy than the extent of dissonance resulting from compliance to mandates which create inconsistencies in perceived role bearing functions.

Procedural clarity and perfunctory response

One of the novel attributes of the Supreme Court civil liberties decisions, contributing no doubt to the general image of profound policy change, was the attempt to specify police and trial court behavior in detailed terms. In this regard, the Miranda decision constituted a model of clarity and precision, atypical of most court decisions as well as legislative policy. In addition, both policies were clearly intended to minimize the variations in state court criminal defendant guidelines and limit the leverage lower level implementers might have to either evade, avoid or fail to comply with the policies.

Studies of the impact of these Court-originated policies suggest however that there may be an inverse relationship between the extent of policy concreteness and compliance. The attempt to limit the leverage of lower level implementers by making procedural adoption unavoidable may make change in informal processes especially likely to sustain non-compliance. Policies limited to procedural objectives may increase the probability of perfunctory responses and thus limit the probability of change in actual performance.

The Mapp and Miranda policies offer contrasting profiles of compliance which strongly suggest that Miranda has resulted in patterns

of literal and perfunctory compliance while the less precise Mapp ruling has produced differential responses (Baum, 1979). While the majority of police may now be using the Miranda warnings, they have developed a variety of subtle, informal methods by which to adapt to Miranda and avoid its consequences. The tight focus of the decision on a discrete point in the investigative process has evidently invited exploitation of marginal situations in which custody is ambiguous. In contrast, the exclusionary rule, given the absence of procedural prescription has produced far more uncertainty among police and others about the likelihood that non-compliance will go unnoticed or unchallenged. Compliance to Mapp is therefore dictated largely by the nature of the case and the importance of obtaining a conviction (Canon, 1974a).

When response to the civil liberties decisions is enlarged to include the prosecutorial stage, compliance is more problematic. The informal practice of plea bargaining is pervasive in the criminal justice process. Consequently, the overwhelming majority of cases are disposed of through guilty pleas. There are in fact, a variety of ways in which prosecutors may deal with problems of evidence; compared to these alternatives, the likelihood that a case will go to trial, involve a successful motion to suppress evidence and lead to sanctions of police practices is rather slim (Horowitz, 1977).

In addition to these problems, unambiguous Court-originated policy mandates have not produced uniform state court rulings. There are, in fact, a number of ways in which state courts may respond to Supreme Court policy. Many such responses are not clearly categorized as either compliant or non-compliant. State courts in some instances

have chosen to qualify, limit or even expand Supreme Court civil liberties policies (Kramer and Riga, 1982). The specificity of the Miranda decision has, for example, produced state court responses which clearly divide along ideological lines (Romans, 1974) and show wide variations in the scope of permissible behavior defined to fall inside or outside interrogation policy guidelines (Cimino, 1973). Moreover, occasions of state court non-compliance appear related less to clarity and substance of policy than to the importance of state practices they seek to invalidate. State courts are less likely to comply when long standing state practices are threatened (Tarr, 1977).

Finally, the communication of Court-originated policies undergoes distortion in their transmission from superiors to subordinates. It is not evident, however, that policy clarity contributes to more effective transmission processes. Clear policies are just as vulnerable to distortion as unclear ones, particularly if they are controversial as was the case with Miranda. Press reports of the Miranda rules greatly oversimplified the policy and often failed to report how it affected the interrogation process (Wasby, 1973). Moreover, how Miranda was understood by police depended primarily upon the source interpreting it. Milner (1971a) reported significant variations in police understanding of Miranda in terms of source. Significantly, he discovered that departmental sources were more likely to involve greater distortion than those outside the department.

Differential support by elites

State court justices are potentially important intermediaries in determining the way Supreme Court decisions are implemented at the state and local level. Most state courts now have authority to supervise trial court behavior through adoption of rules and through enunciation of guidelines resulting from review of trial court cases. Therefore, state court review of trial court decisions provides two important vehicles by which state courts may influence state and local implementation of Supreme Court decisions. State court opinions may be used to express support or opposition to policies implied by Court decisions and such decisions may help commence a process by which additional state court policies emerge. While it is clear that state courts have undertaken a more activist posture over the last two decades (Porter and Tarr, 1982), few studies are available which carefully document precisely how much influence state court rulings interpreting Supreme Court policy have in determining lower level responses and ultimate policy outcomes. The few studies that do focus on this issue, although unable so far to establish a direct causal relationship between state court decisions and directions of local response, do provide evidence of the importance of state and trial courts' support for a Supreme Court policy.

As noted before, Mapp, and later Miranda, provoked widespread controversy among national, state and local elected officials. State courts were no exception. Canon (1974b) discovered that "organizational contumacy" was widespread. Canon defined instances of contumacy to consist of attempts to express defiance, disobedience or resistance

to Court policy through tactics which include adoption of strained interpretations, expressions of confusion and other means of delaying implementation.

Significantly, the most frequently expressed criticism of both decisions pertained to their adverse implications for effective law enforcement. State courts showed considerable sympathy for police and strongly sided with law enforcement values. As Canon observes:

Those taking this approach seem to identify less with values ascribed to the courts in determining constitutional policy than with values held by those outside the judiciary (1974b: 61).

Thus, state court contumacy may provide an important source of political symbolism injected into the arena of state politics. Given the widespread negative public reaction to Mapp and Miranda, perhaps state courts found it necessary to shield themselves from the inevitable political repercussions likely to ensue from the necessity of complying with decisions of judicial superiors. Such cues create expectations among prosecutors and police that Supreme Court policy is being implemented under protest and that actual enforcement may be unlikely.

We also know a great deal about prosecutor attitudes toward the Mapp and Miranda rulings and they are overwhelmingly negative. In his survey in one state Katz (1966) found the following prosecutor attitudes toward Mapp. For example, most prosecutors are more likely than other criminal justice officials to hold that reliable evidence should be admitted in court regardless of the legality of seizure, that state courts should not apply the same standards as federal courts,

that police should not be subjected to civil or criminal prosecution for violations of the exclusionary rule and that the Mapp rule should be relaxed.

Yet once the federal standards had been adopted by state courts it appears to have been difficult to persuade them to relax or withdraw the standard in face of Supreme Court invitations to do so. Studies by Wilkes (1974; 1976) and Gruhl and Spohn (1981) show that efforts by the Burger Court since 1971 to relax the Miranda standards have neither resulted in similar decisions by state courts nor produced increased attempts by local prosecutors to evade the ruling. Interestingly, however, prosecutors continue to be critical of the policy yet uphold the doctrine in their day to day decisions.

In addition, there is some evidence that police also look primarily for direction from local trial courts. While local trial courts sometimes demonstrate little familiarity with state court decisions, where local courts do comply with instructions from state courts, police practices are likely to be more consistent with state court policy (LaFave, 1968).

What this analysis suggests is that where police and prosecutors' attitudes and styles are similar; where hostility by trial judges to the policies is widespread; where judicial willingness to supervise police investigative activity is minimal and where prosecutorial case screening is unsystematic, then police non-compliance is likely to flourish. Where such conditions prevail, the unintended consequence of the civil liberties decisions may have been, as Horowitz (1977) contends, to reinforce rather than weaken an informal and, at times, arbitrary structure of practices.

The underenforcement of
Supreme Court decisions

If most state courts have complied with the Supreme Court civil liberties decisions in Mapp and Miranda, in spite of initial criticisms (see Baum, 1979 and Tarr, 1977) and trial courts and local prosecutors are generally willing to comply with state policies, then it would be reasonable to expect increased police observance of defendants' due process rights and substantial reform of police investigative practices. Yet the available evidence fails to support these expectations. Instead they suggest that police conduct continues to be governed primarily by local custom and practice. Moreover, there appear to be extensive variations between police departments within states governed by clear and consistent policies expressing unequivocal protection of defendant's due process rights (Canon, 1973; Manwaring, 1972; Porter and Tarr, 1982).

There are two lines of argument to explain the gap between federal and state policy and local performance: (1) state courts are incapable of direct intervention in police conduct and therefore are unable to enforce decisions; (2) there are important political, intergovernmental and organizational constraints which limit the aggressiveness with which enforcement of Supreme Court mandates is pursued.

First, while it is true that there are important institutional constraints to state court intervention and supervision of police behavior, state courts do have the power to supervise lower court behavior and, thus, may impose sanctions on both trial courts and police for non-compliance. Yet studies of state court implementation of Mapp,

for example, indicate that while state courts have been more willing to overturn police methods conflicting with the exclusionary rule, they have also been unwilling to impose actual sanctions on offending departments and individual officers. What evidence of this kind suggests is that trial court judges frequently fail to supervise police investigations when there is a need to do so.

Second, while enforcement is possible, political and organizational considerations make enforcement unlikely. State court organizational relations to lower courts and police were put under pressure by Supreme Court rulings involving increased state enforcement efforts. Briefly put, state courts adopting their own exclusionary rule before Mapp were less likely to comply with that decision because adoption of the federal rule preempted state-based mechanisms for enforcement. Clearly, criticism of federal preemption of state court supervisory, policy making and enforcement power was widespread. One important recurring complaint, as Canon's review of state court contumacy indicates (1974b), was that Mapp and Miranda put state and lower courts in an awkward and unwanted position of supervising police behavior. Therefore, adoption of a Supreme Court policy would not only preempt state policy making and thus, a body of ancillary decisions, but give federal courts a larger role in enforcement of federal law. Therefore, potential federal preemption of state enforcement mechanisms constitutes a threat to the decentralized power and local discretion which typifies the administration of criminal justice.

State court judges are unlikely to treat Supreme Court policy with a sense of urgency unless organizational interests are either

threatened or advanced by compliance. The Supreme Court civil liberties decisions created new opportunities for state courts to increase their organizational strength and policy making authority through administrative reforms. Efforts to increase the power of state courts to supervise trial courts through policy making may also further administrative centralization and vice versa. However, there is little evidence to be found which suggests a significant relationship between policy and administrative control and the ability of state courts to influence lower court compliance to policies and decisions through administrative reforms. It is evident that progress towards state court unification has been slow; where substantial administrative reforms had been adopted, it is not evident that their implementation has been successful nor increased lower court compliance to state court and Supreme Court policy (Baar, 1980; Glick, 1982; Glick and Vines, 1973).

Conceptual Frameworks for Understanding State and Local Implementation of Federal Policy

Studies of the policy implementation process have progressed through several stages involving closely related focal points of inquiry. The traditional disciplines of administrative theory and organizational behavior supplied the initial impetus to systematically investigate why policies fail to get translated into neutral rules of program execution (Hargrove, 1975; Rabinovitz, Pressman and Rein, 1976).

Studies of the impact of Supreme Court decisions, demonstrating a gap between intent and actual performance invited closer inspection of how a legislative policy gets translated into behavior (Dolbeare

and Hammond, 1971; Wasby, 1970). As the field of policy implementation developed, the focus has broadened from a preoccupation with organizational dynamics of policy execution to recent attempts to advance integrated explanatory frameworks capable of specifying common factors affecting outcomes.

The second stage of policy implementation analysis has been characterized by a plethora of case studies identifying a number of factors hindering program implementation processes. Studies by Bailey and Mosher (1968), Derthick (1975), Lowi (1969), Murphy (1972), and Pressman and Wildavsky (1973) document how statutory ambiguity, guideline development processes and organizational complexity, including variations of state and local official support may contribute to the failure to achieve intended goals. With the exception of Lowi, studies by these authors and others of a similar kind have exercised caution in developing broader implications of what their findings imply about the nature of the political system.

This restraint has been justified in part because we lack the explanatory theories necessary to identify causal relationships between significant factors shaping outcomes. In addition, there has been no common agreement on what should constitute the outputs of public policy. Some studies have been content to measure procedural compliance while others seek to trace the relationship between output, impact and ultimate change processes (Dolbeare, 1974).

Recently, efforts to model the implementation process have been launched to fill in this important stage of theory building. The models developed cover a wide range of policy areas and arenas and draw upon

several areas of knowledge such as organizational behavior, public law, community power studies, and technology innovation and diffusion. These efforts have resulted in identifying several factors likely to influence policy effectiveness. There are however, variations in the rigor and specificity with which the models are constructed. Some schemes constitute interesting conceptual frameworks (e.g., Bardach, 1977a; Berman, 1980; Edwards, 1980) while others specify causal relationships between factors, elaborate the significance of key variables and in some instances, prescribe ways to achieve effective policy implementation (Mazmanian and Sabatier, 1983; Ripley and Franklin, 1982; Van Meter and Van Horn, 1975).

There have also been attempts to examine the utility of more rigorous models in applied settings, most notably by Van Horn (1979) Mazmanian and Sabatier (1983), and Rabinovitz, Pressman and Rein (1976). But, little effort has been directed at testing the strength of these and other models in accounting for the variation in the effects of public policies. Studies which apply conceptual frameworks and specific policy contexts do suggest, however, that the relative significance of particular factors likely to affect policy implementation processes may vary between policy systems. For example, given the strength of dispositional elements and controversy likely to confront criminal justice policies, the extent of change and clarity of policy goals may be more important to policy success than elite support or availability of enforcement mechanisms (Morash, 1982; Wasby, 1970).

Although theory testing is only in a rudimentary stage at this point, efforts have been made nonetheless to develop conceptual or

explanatory frameworks capable of integrating our knowledge across policy settings and institutions. Such efforts seek to identify common factors influencing the implementation of policies originated by courts as well as legislatures. Although the attempt to develop an integrated explanatory framework presupposes further progress in applied studies, it is not precluded by these developments.

Moreover, conceptual frameworks construed in the broadest institutional terms are a necessary corrective to study conclusions dictated largely by policy areas in which particular frameworks are applied. Examples of limited attempts in this regard include works by Baum (1977; 1981); Mazmanian and Sabatier (1983); Nakamura and Smallwood (1980); Shapiro (1968) and Shapiro and Hobbs (1974). Baum, in particular, urges caution in generalizing about judicial implementation processes from legislative policy studies because of important differences in institutional characteristics and the secondary importance of environmental influences such as interest group and public support. He also suggests, along with Brown and Stover (1977), that the literature in organizational behavior provides the best source of guidance in understanding court systems in which policy implementation processes are determined principally by the preferences and utility structure of subordinates.

In the remainder of this chapter, I discuss some of the issues and terms used by the authors of different conceptual models to describe policy outcomes. Then, I review and contrast in more detail the contours of three models which advance contrasting explanations of state and local implementation of federal policy. The models have been selected for their purported general applicability to the implementation

of federal grant-in-aid programs involving intergovernmental regulation. Since the models selected also generate conclusions about the nature of the American political system and institutions from applied settings, these themes will be carefully drawn out in the ensuing discussion.

Following the analysis of the state implementation of the federal criminal records privacy mandate presented in the next few chapters, alternative explanations are developed in Chapter VII which draw upon the frameworks sketched here. Subsequently, I assess the relative significance of factors contributing to compliance to public policy, suggest connections to the findings of studies of state implementation of Supreme Court due process policies and sketch a conceptual framework with which to understand common factors influencing the state implementation of federal mandates.

Measuring response and policy outcomes

An important concern of conceptual models regarding policy implementation processes is how to define the outputs of public policy. There is little agreement or consistency in the literature on policy implementation regarding ways to best characterize outcomes of public policy. The terms compliance, response and impact for example, are used in inconsistent and often overlapping ways, each suggesting different implications regarding scope and measurement. Thus, there is a need to employ a common terminology in order to compare the implementation of policies originated by two different institutions involving different capacities and approaches to implementation and enforcement.

As Wasby (1970) has argued, compliance involves a narrower focus than impact. Assessments of compliance turn upon judgments about the policy originators' intentions as well as the implementers' awareness, and understanding of what is expected. Importantly, the term compliance differentiates between correct and incorrect behavioral responses, thus strongly weighting interpretations by policy superiors. However, the consequences of policy may not be intended and often involve second or third order consequences (Dolbeare, 1974) which complicate judgments about causal relationships between policy, behavior and attitude. For example, the implementers' perceptions or expectations about a policy's effects may influence their willingness to comply with a policy directive.

In addition, the usage of the term compliance involves normative assumptions regarding hierarchy, obedience and acceptable and unacceptable response to policy. Policy is often implemented in contexts where lines of authority are uncertain, where intergovernmental and inter-organizational relations are better characterized in non-hierarchical terms. Although the implementation of judicial policy may involve formal hierarchical relations between the Supreme Court and state courts, states and localities do not always bear a subordinate relation to Congress with respect to policy development. In addition, implementers may exercise substantial discretion in the way they choose to respond to policy requirements. Consequentially, they may satisfy policy objectives in varying degrees through behavior neither required nor intended by the policy originator.

Four terms may be employed to characterize policy results, which help bypass some of the more vexing problems associated with the measurement of compliance. These terms are response, effects, performance and change. Each term may be distinguished in several ways.

First, the term response appears to capture two dimensions of behavior: the consistency of direction of behavior with intended goals and the intensity of the implementers' attitudes toward the policy. Both the direction and intensity of response may be influenced in turn by how the policy is interpreted and by perceptions of expected effects of that policy. Direction of response pertains to the avenues the implementer chooses to "satisfy" policy demands. Thus, response to the policy demands is not necessarily the same thing as compliance.

Policy effects or impacts, on the other hand, refer to the direct consequences of the policy including organizational structure and patterns of intergovernmental and interorganizational relations characteristic of a particular policy system. Policies may produce both intended and unintended effects. When intended results are achieved, this usually implies that at least some of the policy goals or objectives have been achieved. However, unintended consequences do not necessarily imply policy failure for such effects may sometimes contribute to the realization of policy goals.

A third term to distinguish from the other terms characterizing implementation processes is that of performance. Compliant behavior may not result in changes in performance. Thus, we are interested not only in knowing what happened as a result of the adoption of public policy but whether there has been some improvement in the nature or

conduct of decision processes and outcomes. Issues of efficiency as well as effectiveness, including fairness and due process, must figure into the appraisal of performance.

In addition to these notions, attempts to alter performance involve the idea of change. Policy induced changes are, for reasons we have already noted, difficult to measure, for change can occur on many different levels. Change or the lack of it may be manifested in beliefs, behavior, attitudes, procedure and organizational structure. It is unlikely that policies will produce simultaneous changes in all these dimensions; rather, such changes that do occur as a result of the implementation of policy will be limited to one or two dimensions.

The local consequences of federal aid

Van Meter and Van Horn (1975) advance a systems model of policy implementation. Their model proposes that where implementation involves a federal, intergovernmental policy, it embodies a unidirectional relationship between the policy, intervening variables and performance. Performance is defined narrowly to consist of the "degree to which anticipated services are actually delivered" (144). As such, the definition neglects an important feature of policy implementation processes--it's impact and whether ultimate outcomes were achieved. It is conceivable, therefore, by this measure, that policies could be effectively implemented but not result in any change.

Key variables posited by this model include: policy standards and resources, a set of intervening variables which include federal communication and enforcement mechanisms, characteristics of implementing

agencies, and economic, social, political and other environmental conditions. In addition to these factors the authors suggest that within the local policy environment, the disposition of local implementers is an important variable standing between federal control mechanisms and ultimate performance. The importance and utility of their work lies in its stress on local elites and the political environment.

Van Horn (1979) has applied an amended version of their original construct to explain the outcomes of the implementation of several recent revenue sharing programs. In this analysis, Van Horn reviews the legislative history and implementation of General Revenue Sharing, the Comprehensive Employment and Training Act (ETA) and the Community Development Block Grant program (CDBG) in order to determine what the resulting performance of these programs implies about how the funds were used, who benefits and who governs.

The findings about the latter two issues provide an interesting explanation of implementation processes and politics. In essence, although federal revenue sharing policies deviated only marginally from intended goals, they also exerted little impact on decisions made by local implementers.

First, Van Horn contends that the "worst fears" of liberal opponents to decentralization of redistributive policies in employment and training (CETA) and housing (CDBG) were not realized. Decentralizing power to state and local governments did not produce benefit patterns which substantially departed from targeted disadvantaged groups. One important reason for this outcome is due to the relative

strength of national and local interest groups (whose political clout was increased by war on poverty programs) in protecting the interests of the poor and disadvantaged.

Secondly, however, Van Horn contends that unclear national policies and vague goals, combined with the autonomy of local officials, minimized the impact of federal agency control over intergovernmental implementation processes. There were two sources for these variable results.

The inability or incapacity, as Van Horn suggests, of Congress to specify clear national policies helped account for variations from intended outcomes. Given multiple and ambiguous objectives, local implementers unsurprisingly developed a variety of interpretations as to how best to allocate funds. When Congress grew disappointed with limited initial progress, they responded during reauthorization by imposing heavier regulatory burdens on local government. Yet increased federal regulation had counter-productive effects which withdrew flexibility, thereby inviting increased variations in response.

Van Horn's reading of several revenue sharing programs leads him to reason that effective policy implementation is most likely to occur when the ends of policy are clear but means are left unspecified or flexible, incentives are targeted and enforcement is selective. Federal enforcement has been the subject of particular abuse, Van Horn observes, because a heavy handed approach is used regardless of the vast differences with respect to faithfulness to statutory intent and performance records among state and local governments. Thus, enforcement tactics must be geared towards actual performance and be stronger

where local interest groups representing target groups are relatively weak in their influence in local politics.

Moreover, Van Horn disputes Lowi's (1979) assertion that ambiguous law results in delegated power and policy failure because of the very unambitious policy agenda that ambiguous laws support. Van Horn argues that flexibility and the lack of legislative clarity are essential ingredients to intergovernmental feasibility and local innovation given the forces of rapid social economic change.

Adjusting policy to the system

Rein and Rabinovitz (1977) offer a contrasting conception of the policy implementation process. They argue that we conceive of the politics of implementation as a circular process which progresses from policy enactment to guideline development, resource distribution, oversight and legislative revision. At each stage contending imperatives of legal intent, bureaucratic feasibility and external consensus must be resolved before policies can be fully implemented and objectives achieved. These three imperatives may operate in isolation or (more likely) in conjunction at each stage of the process.

Respect for legal intent requires that implementers acknowledge legislative objectives. The requirement that policy be bureaucratically feasible necessitates that implementers make concessions to various interest groups in order to minimize opposition from target groups. Such concessions may be required in order to assure effective implementation. The consensual imperative is operative when interests external to the implementing process dominate implementation through control over priorities and definitions of standards constituting

effective performance. This influence typically results in control over the allocation of resources to beneficiaries.

Thus, the politics of implementation of federal mandates is portrayed as the process by which conflicts among contending imperatives are resolved at each stage of the implementation process. Importantly, Rein and Rabinovitz hypothesize that the way in which conflicts are resolved is a function of statutory purposes (i.e., clarity, salience, and consistency), resources (i.e., kind, level and timing), complexity and "settledness" of the administrative arena in which policies are implemented. In previous work (see Rabinovitz, Pressman and Rein, 1976) the authors have attempted to examine their theory with respect to the guideline stage of implementation. These studies have sought, in particular, to determine how guideline processes vary across policy arenas (e.g., health, social services, housing and internal revenue) and how guidelines relate to the larger political system.

An arena in which policy is implemented is defined to consist of a political and administrative context in which policy is both formulated and implemented. It includes a "web" of individual and institutional interrelationships which would develop over time among congressman, administrators, interest groups and academic experts, and other interested parties (1976: 405). Arenas vary in terms of level and complexity of the intergovernmental hierarchy of working relationships, centralization of decision making and settled patterns of interaction. The patterns of relationships between policy and arena which unfold from these studies suggest that clear policies are likely

to result in compliance in settled arenas but require accommodation (i.e., bureaucratic imperative) in open systems. Ambiguous policies, on the other hand, require clarification in settled systems and both central control combined with delegation over time, in open arenas. Guideline development processes involved in implementing Internal Revenue Service tax regulations is offered as an example of the first cell shown below in Figure 2.

<u>Substantive Issues</u>	<u>Policy Arenas</u>	
	<u>Settled</u>	<u>Open</u>
<u>Clear</u>	Compliance 1	Accommodation 2
<u>Ambiguous</u>	Clarification 3	Control/Delegation 4

Figure 2. Issues, Arenas and the Process of Guideline Development.

SOURCE: Rabinovitz, Pressman and Rein, 1976: 406.

While the social service guidelines documented by Derthick (1976) depict the polar extreme in cell 4, the Health Maintenance Organization guideline development processes are considered an example of 2 as documented by Altman and Sapolsky (1976)

An example of an instance in which an ambiguous issue is implemented in a settled arena would be Steiner's (1971) analysis of

public relief policy. This presents an interesting case according to the authors because it suggests that an ambiguous issue could work to unsettle an arena thus implying that structural changes may occur depending on the match between policies and arenas. The possibility that ambiguous policies may become more clear, and vice versa over time, may be due to changes in the patterns of interactions in an arena, induced in part by reactions to policy by institutional actors in that arena.

The fact that this last point is left undeveloped by the authors suggests the need for additional cases which fit these circumstances. But what is not entirely clear are the criteria for deciding how to characterize a policy arena or system in order to measure changes it may undergo over time. Moreover, a policy system may involve a mixture of settled and unsettled elements which include relatively unchanging functional routines and transactions, yet decentralized power and conflictual policy making processes. Such features could very well complicate judgments about conditions conducive to compliance and policy effectiveness.

There are several implications of Rein and Rabinovitz's (1977) examination of intergovernmental regulation and the American political system. First, if policy effectiveness, more than simple compliance, is the major objective of implementing public policy then the price paid for the consensus that is required is reinterpretation and minimal change in institutional structures. This is so because we are confronted with a paradox: clear policies have their best chance of success in systems which have remained unaltered over time. When we

fall away from this optimal situation there is greater conflict and less consistency with statutory intent. By this reckoning, it would seem that ambiguous policies implemented in open systems must closely approximate pluralist political processes, yet are least likely to involve consistency with statutory intent.

In fact, the authors are moved to conclude that since most policy arenas fail to approximate the characteristics of a settled arena, federal and state guideline development processes set in motion the forces of dissipation and disaggregation at each successive stage of implementation. Therefore, policy which ultimately gets implemented is likely to be the product of complex bargaining, negotiation and interest group compromise. Policy implementation processes thus reflect the broad dispersion of power and access to decision making characteristic of a pluralist political system.

What makes this view contrast most sharply with Van Horn's analytical framework is the evident absence of a meaningful role of state and local elected officials in the implementation of federal policies. Guideline development processes appear to occur in self contained bureaucratic worlds answerable only to the most powerful external interests. Therefore, by this account, state and local elected officials appear to have very little significance in the equation in which policies ultimately get executed.

A unified framework for explaining judicial and legislative policies

Mazmanian and Sabatier (1983) have developed and applied a comprehensive conceptual framework by which to explain policy

implementation processes involving federal policies which include either distributive and regulatory purposes or both and are originated by either courts or legislatures. Thus, they have developed an integrative framework by which to explain implementation processes of courts as well as legislatures. They construe policy to include broad societal agendas involving complementary statutes and court decisions over time.

Moreover, the authors contend that their framework includes other strengths as well compared to those frameworks already described, and greatly enlarge upon the conditions identified in the literature as conducive towards compliance. They also acknowledge the importance of tractability of the problem and validity of theory as important variables affecting performance. In addition, the diversity of target group behavior is also considered an important determinant of extensiveness of change.

Finally, they are careful to draw distinctions in the stages of policy outputs. Policy outputs (e.g., adopting agency policies, delivering services) constitute one of several types of dependent variables in the implementation process which include compliance by target groups, actual impacts, perceived impacts, and major statutory revisions. This distinction is important, for as Dolbeare (1974) has cogently argued, policies produce radiating second and third order consequences which may confound assessments of causal relationships among factors and influence assessments of the extent of change.

Compared to Van Horn, Rein and Rabinovitz and others, Mazmanian and Sabatier are far more impressed with the extent to which a statute

can be structured to satisfy the twin goals of policy effectiveness and democratic accountability; neither goal has to be necessarily sacrificed in the implementation process. The authors strongly reject the findings of Rein and Rabinovitz and Berman (1980) that the distinction between formulation and implementation dissolves when policies are implemented. They offer three reasons why the distinction must be maintained.

First, instances in which the distinction dissolves are the exception rather than the rule. Second, if policies evolve continuously over time (or involve circular processes) the evaluation of goal attainment becomes problematic, if not impossible. Last, viewing policy processes as a "seemless web" obscures the division of authority between elected public officials and administrative officials.

The application of the framework to different policy fields culminates in several findings. The most salient finding is that the processes by which federal mandates traverse through state and local implementation processes to become public policy do not appear to undergo any pattern of "routine or natural progression" towards ultimate outcomes. Policy implementation processes may start slowly, quickly gain or lose momentum or pass through several cycles. The exact course which the policy will take will primarily depend upon the extent to which the statute effectively structures the implementation process, and long term environmental conditions which include support by sovereigns and interest groups. Policies do not necessarily degenerate over time nor permanently derail; policies may be rejuvenated with renewed vigor after long periods of a semi-stalemate.

The authors cite Brown vs. the Board of Education (1954) as an example of a policy fitting a cumulative incrementalism scenario in which change in the political environment was a precipitating factor in achieving substantial gains in compliance. The Brown decision, although largely ignored by an indifferent Eisenhower administration, was given renewed vigor by a combination of national legislation (Civil Rights Act of 1964), bureaucratic enforcement by HEW and supportive appellate court decisions. Interestingly, differences in the politics of discrimination between the North and South have also accounted for emergent differences in efforts to end school segregation. Southern segregation, manifested largely in de jure terms, has been easy to rout out compared to de facto forms in the North. Consequently, as a result of differences in environmental contexts in which discrimination is manifested, there are now two policies instead of one. However, some observers of the judicial process, such as Baum, argue that "the balance of political forces is less important" to Court decisions, citing Mapp and Miranda as having been "made in a seemingly unfavorable climate of public opinion" (1981: 42).

Mazmanian and Sabatier contend that if the statute or decision carefully structures the implementation process so that sovereigns are given continuous oversight and intervention responsibilities, the distinction between authority, power and accountability of elected officials versus bureaucrats can be more carefully maintained. Yet, given the proclivities of Congress to produce ambiguous, unstructured statutes and judicial reluctance to interfere with bureaucratic

discretion, the authors' prescriptions for policy success would necessarily require changes in the institutions of Congress and the judiciary which are unlikely to occur in the foreseeable future. In addition, continuous interest group support and periodic intervention by sovereigns is no guarantee against either statutory revisions inconsistent with initial purposes nor long term preservation of the status quo. The identities and policy priorities of interest groups and sovereigns are themselves subject to change over time, which in tandem, may produce new consensual underpinnings of a policy in dramatic contrast to initial basis of support.

Although intent on accentuating differences between their framework and others, Mazmanian and Sabatier characterize successful policies as undergoing cumulative incrementalism in which enacted policies develop gradual support over time moving closer rather than farther away from original purposes. This may be a distinction without a difference. For regardless of whether policies undergo disaggregation and revision or cumulative support and progress toward ultimate objectives, the processes by which either result occurs involves an assumption of the politics of interest group bargaining, negotiation and compromise. Therefore, from opposing perspectives, the politics of legislative formulation and implementation appear to involve essentially the same processes.

CHAPTER III

IMPLEMENTING THE FEDERAL PRIVACY MANDATE: THE NATIONAL CONTEXT FOR THE WASHINGTON CASE

The 1973 amendment to the Crime Control Act provided LEAA the opportunity to impose a national policy on the states for the protection of privacy and due process rights of data subjects through regulation of criminal justice information systems. LEAA officials expected the regulations to result in substantial change in state record management practices, the integrity and quality of criminal records, and, importantly, uniform state policies limiting the dissemination of criminal history record information (Marchand, 1980: 204-205; Zenk, 1979).

However, as Chapter II suggests, the processes by which national policies are converted into state policies and local practice are complex and the measurement of compliance is problematic. The recent history of revenue sharing programs advancing regulatory agendas suggests that consistency and uniformity is likely to give way to variable approaches with differential results.

This chapter attempts to determine how the states have performed with respect to the federal criminal records privacy mandate and political factors shaping responses. There are several reasons why it is important to examine the national context first and then to turn to the Washington case and interpret its significance. First,

the criminal records privacy amendment simply conferred on LEAA the authority to adopt regulations providing the states with more detailed guidelines and to set in motion a state planning process by which state policies could emerge. The guideline development process was prolonged primarily because of the access it gave to contending political interests to further influence the shape of national policy. State plans were initiated during this period of unsettled policy and therefore provide important bases by which to understand the subsequent state policy-making processes.

Washington was not unlike the majority of states in undertaking a planning process which eventually led to the adoption of state policy. However, in some important respects, Washington state's initial policy was idiosyncratic and thus unrepresentative of other states. Yet, as the ensuing analysis indicates, the novelty of this state's policy quickly dissipated, resulting in a rather desultory and unexceptional performance record compared with other states, and little evidence of actual change. What this analysis provides, then, is a way to determine just how the responses of officials in Washington to the federal mandate and the state's resulting performance contribute to understanding national patterns.

Next, wide variations in the methods used by sponsors of studies of state performance under the federal mandate dictate that caution be exercised in drawing inferences about policy induced change based solely on evidence of behavioral compliance. While national surveys tell us a great deal about procedural compliance, they reveal little

about micro political forces at work in a given state with which to explain outcomes and assess change processes.

Moreover, as Marchand's comprehensive documentation (1980) of the conflict over a national CCH indicates, the assessment of the results and efficacy of the criminal records privacy mandate vary according to the interests sponsoring the particular study. In this regard, even the most recent studies by the Office of Technology Assessment have not been immune from political forces intent upon interpreting the facts to suit particular interests. Therefore, a case analysis drawn from one state's experience provides a useful way in which to put documentation of the national context in perspective.

Finally, notwithstanding these deficiencies in studies documenting state performance, a national context for Congressional regulatory policy provides a means by which to probe similarities with and differences from state performance under Supreme Court civil liberties policies. Since both policies constitute forms of inter-governmental regulation of criminal justice, albeit from different institutional sources, an analysis of one state's experience within this dual context may uncover, in more depth, common political factors which confront and shape outcomes of attempts to regulate the administration of criminal justice.

Issues Involved in the Development of Federal Guidelines (1974-1976)

Although spare in detail, the addition of Section 524B, the privacy amendment, to the Crime Control Act of 1973 provided not just another condition of aid, but presented LEAA an opportunity to develop

detailed guidelines to advance its own interpretation of criminal records privacy policy. The amendment invited extensive administrative interpretation and contributed to a prolonged guideline development process. Although LEAA wasted little time proposing draft regulations (Title 28) for public review and comment in February 1974, substantial controversy and criticism delayed their final publication until May 1975. Continued dissatisfaction with several of the guidelines forced a subsequent substantial revision in 1976. The regulations underwent yet another modest revision in December 1977, in which, among other things, LEAA suspended the deadline for final compliance to some sections of the regulations for up to another eighteen months to two years.

Defining criminal history record information

LEAA's 1974 draft regulations drew heaviest fire from criminal justice interests with respect to the definition of criminal history record information, internal dissemination controls, and applicability to the courts. In addition, non-criminal justice interests, particularly the press and private employers, along with police, expressed strong opposition to LEAA's restrictions on public dissemination of criminal history information. In fact, the dissemination provisions were by far the most controversial of all of the proposed regulations. While strong opposition to these and other provisions may be attributed in part to LEAA's failure to develop guidelines sufficiently grounded in prior legislative intent, criticism of LEAA's proposed regulations also stemmed from more fundamental philosophical differences over the

role that the exchange and dissemination of criminal records plays in effective law enforcement.

In its 1974 draft regulations, LEAA defined criminal offender record information to include that information collected for the purpose of identifying individual criminal offenders and alleged offenders. The definition represented a novel interpretation because it was more inclusive of data considered to constitute criminal history information than either stated in the Menard decision or intended by Congress. Unlike the Menard ruling or Congressional proposals, LEAA drew no distinction between files maintained on subjects with formal contacts with criminal justice and those without such documented contacts. Thus, the inclusion of information on alleged offenders implied that dissemination of intelligence and investigative information collected on suspects would be subject to regulation. The director of the Michigan State Police expressed incredulity at this prospect by commenting:

You include within the definitions section all types of records that I would have in my department. This rule would provide controls on the access to current departmental internal investigative memorandum, intelligence files, modis operandi files and any other files I would have as they relate to current criminal investigations within my agency. I cannot believe that you truly wish to provide the criminal or organized crime individuals with access to information regarding them that involves ongoing investigation into their criminal activities (U.S. Department of Justice, 1974a: 33).

In remarks submitted by a staff member of the New York Department of Justice, the LEAA staff is referred to a section of the Senate Draft Legislation (the Criminal Justice Systems Act of 1974--the Hruska Bill) where a more careful distinction is drawn between intelligence and other

criminal record data. Part of the problem with LEAA's overly broad definition of criminal offender record information was that it wasn't entirely clear whether it was intended to occur or was a definitional oversight. There is some evidence that LEAA officials were concerned about the fact that intelligence and investigative information was not always carefully separated from arrest and conviction information and thus had to include it in the definition of criminal offender information. It is possible that LEAA expected that such a definition (anticipated to be objectionable to law enforcement) would enable the separation of intelligence materials from other files, thus accomplishing the same overall purpose of securing a higher quality and verifiability of criminal record data. In any event, as the Washington case illustrates in Chapter V, clarifying the types of material covered by the regulations has not dispelled problems of interpretation.

Law enforcement agencies were particularly concerned about the effects that dissemination controls, such as transaction logs, would have on effective law enforcement. One comment submitted by the Phoenix Police Department is illustrative of these widely shared concerns:

Our investigators work on a daily basis with other criminal justice agencies in our normal duties and are constantly discussing criminal history information on suspects, prisoners, etc., and the logging of this dissemination would be ludicrous and impossible to control. The dissemination of criminal history information is inherent within the criminal justice system, it cannot be contained or curtailed without a corresponding decline in effective law enforcement (U.S. Department of Justice, 1976a: 10).

In addition to the press and law enforcement agencies, state and local governments also expressed criticism of restrictions on access to

criminal history information by non-criminal justice agencies. Many state and local governments which permit access to criminal records through either custom or through ordinance for a variety of employment, credit and other purposes were pressed to continue existing practice.

Court records and the separation of powers doctrine

In addition to dissemination policy, LEAA's attempts to make its 1974 draft regulations apply to the records of court proceedings proved equally unpopular. While custom holds judicial proceedings and resulting records of disposition to be accessible to the public, LEAA's initial broad definition of criminal history records material committed it to the inclusion of information which pertained to court proceedings. This was proposed not only for policy reasons but because LEAA recognized that court participation was essential to achieving the goals of completeness and accuracy.

The National Center for State Courts submitted a strongly worded challenge of provisions to include the courts under the LEAA regulations. These statements not only questioned LEAA's authority to promulgate regulations regarding state court activities, but challenged the constitutionality of executive regulation of the judiciary. The National Center contended that LEAA's actions "marked a clear departure from its often stated policy of not imposing federal regulation on states, and, more particularly state courts, that utilize LEAA funds" (National Center for State Courts, 1974: 4). What was found particularly objectionable by the courts was that LEAA had exceeded its administrative authority. The National Center pointed out that all the original privacy amendment

required was that information stored in criminal justice information systems be accurate and complete. This did not imply some additional state regulatory authority. The National Center argued that in proposing this regulation, LEAA was attempting to anticipate Congressional activities to regulate information privacy.

In addition to these broad concerns, the Center found LEAA's regulations unclear as to which state agencies would prepare a privacy plan and unspecific as to whether the state courts would participate in development of that plan. Moreover, the regulations did not make clear which areas of the judiciary were covered (e.g., whether it included only state courts, appellate courts and/or trial courts). Clearly the National Center was troubled by these ambiguities and the lingering implication it left for further encroachment of executive control over the courts:

Thus, the regulations appear to give LEAA wide discretion determining the extent to which the judiciary will be bound by the regulations and what must be done by a state judicial system to comply with the regulations. Such discretion in a federal agency over actions of a state judicial branch of government poses serious problems from both the standpoint of the limits of federal authority and juridical independence (National Center for State Courts, 1974: 4).

As a result of widespread dissatisfaction with the attempt to include the courts under Title 28, an intense lobbying campaign was mounted by state court judges and administrators to get the courts exempted from coverage. That effort was ultimately successful for the 1976 version specifically exempted court records.

Privacy and the press

The extensive conflict which the 1974 draft version of the Title 28 regulations incurred was indicative of the conflict inherent in attempts to translate general statutes into detailed regulations. Significantly, conflict focused not only upon issues internal to criminal justice administration but also upon public access to the information regarding the proceedings involved in the criminal justice process. The right to privacy collided with the public right to know. Importantly, the press considered itself to have a special responsibility and freedom to convey information about the process without restriction. That right and responsibility was asserted to be predicated on public attitudes toward crime control and punishment. For example, comments submitted by the American Newspaper Association best expressed these concerns:

The American Newspaper Association's position on the proposed rules of law is one of outright opposition. We applaud the intent of these rules to afford greater protection of privacy to individuals. However, insofar as these proposed rules would infringe upon the right of the press to gather and disseminate information relating to criminal justice we do seriously object. The danger it seems to us, is that LEAA's effort to protect one right, i.e., the right of privacy, it is proposing to make that right supercede the public's right to know (U.S. Department of Justice, 1974a: 31).

The Allied Daily News Association (an association of the Pacific Northwest) argued that legal restrictions on dissemination of criminal records material would also encourage suppression of information about the working of the criminal justice process:

That the ordinary policeman, jailer, assistant prosecuting attorney feels morally and legally free to reveal this information is more important to our criminal-judicial process than any statutory language mandating such openness--

more important too, than is generally appreciated. This lack of compunction about "passing the word" renders difficult, impossible, any long term cover-up of failure or corruption in the system (U.S. Department of Justice, 1974a: 35).

With the publication of the 1975 regulations, the Allied Daily News Association took yet another opportunity to elaborate on what was seen as a widespread philosophy regarding legitimate access to criminal records:

Finally, we would observe that a lawful purpose of criminal history information has been the deterrence of crime. The knowledge that a person's criminal history will probably adversely affect that person's future has been an important though unevaluated deterrent to the commission of crime throughout history. Granted the criminal record may actually contribute to recidivism among criminals, they are numerically in the minority. The deterrence resulting from public availability of criminal records works on all the rest of us--the great majority--who have no criminal history are motivated to keep it that way (U.S. Department of Justice, 1976a: 5).

Moreover, the press contended that voluntary guidelines governing news reporting had already been established in numerous states. By 1974 twenty-four states had adopted such guidelines which recommended restriction of the publication of some criminal justice information considered an evasion of individual privacy.

Limits on dissemination

As stated earlier, LEAA's attempts to establish limits for the dissemination of criminal history record information were fraught with substantial controversy. Part of the difficulty stemmed from LEAA's overly broad definition of criminal offender information. LEAA found itself in an awkward position of restricting dissemination of criminal record information which heretofore had been freely disseminated between

criminal justice agencies and widely shared with a variety of non-criminal justice users.

Revisions made in the 1975 version of the privacy regulations showed both a softening of LEAA's position with respect to dissemination and greater clarity about which records would fall under dissemination restrictions. An extremely important oversight by LEAA regulation writers in both the 1974 and 1975 version of the rules was a failure to define the term "dissemination." Perhaps this explains, in part, why a survey conducted by MITRE of Title 28 compliance activities turned up as many definitions of dissemination of criminal history records as agencies involved in the survey (1977a: 7). In its 1976 planning instructions, LEAA acknowledged this omission and attempted to correct the mistake with the following definition:

Although dissemination is a key concept in the regulations, regulations do not define the term. However, it can be interpreted to apply to the release or transmission of criminal history records information by an agency to another agency or other individual (U.S. Department of Justice, 1976c: 14).

Clearly, the term "dissemination" included exchange of information from one criminal justice agency to another. However, not every transfer of information constituted a dissemination. For example, exchange of information for the purposes of reporting data to the central state repository and information exchanged between police, prosecutors and courts with respect to cases currently in process were excluded. Thus, LEAA made it clear that factual information regarding criminal justice processes (e.g., status of investigations, apprehension, arrest, release, prosecution, correctional status) "which is reasonably contemporaneous with the events to which the information

relates" could be disseminated without restriction (U.S. Department of Justice, 1975b: Sec. 20.33(c)).

While this definition provided a bit more clarity as to when criminal records information could be legally disseminated, it was not sufficient to satisfy representatives of the press. For example, the Dallas Chapter of the Society of Professional Journalists argued that numerous departments were unwilling to risk faulty interpretations of what information was "contemporaneous" and thus refused to answer any and all requests for information. Similarly, the Allied Daily Newspaper Association observed that most law enforcement officers would be reluctant to advance their interpretation of when release of criminal records information was contemporaneous with criminal justice processes (U.S. Department of Justice, 1974a: 35).

LEAA responded to these criticisms by loosening the dissemination requirements in the 1975 regulations. Criminal justice agencies were now permitted to release criminal records information if state statute or executive order made the absence of a criminal records a pre-condition for employment or licensing.

Evidently this revision did not concede sufficient ground to private sector employers who, by 1975, through their contacts with police departments, had become sufficiently apprised of the effect of the regulations limiting access to criminal history records. For example, while responses to the 1974 regulations largely consisted of comments submitted by criminal justice (fifteen) or other public agencies (nine), only two comments were received from private firms. By comparison, when the 1975 regulations were published, thirty-three

of the seventy-four comments submitted to LEAA came from private sector firms and associations. Most of these comments expressed strong opposition to provisions for limitation on dissemination to non-criminal justice agencies (U.S. Department of Justice, 1974a; 1976a).

Consequently, under pressure to further relax what had initially been a very restrictive policy, LEAA made two important concessions. First, it defined a new category of criminal history information to consist of "non-conviction data." Non-conviction data is defined to consist of information pertaining to an arrest which has not resulted in a disposition either favorable or unfavorable to the data subject at least one year after the arrest. In turn, the limitations on dissemination apply only to non-conviction data. Thus, LEAA made a substantial departure from its initial policy which prevented access to nearly all criminal history record data.

LEAA made two more revisions in dissemination requirements which all but capitulated to the pressure of state and local public and private interests in 1976 and 1977. The 1976 revisions permitted state and local officials discretion in the interpretation of statistics permitting access to non-conviction data while the 1977 revisions no longer required express statutory authority for access to such data (U.S. Department of Justice, 1976d; 1977: Sec. 20.21(b) (2)).

The states' role in record management processes

LEAA's draft regulations also proposed guidelines to secure completeness, accuracy and currency of criminal history records. Completeness was defined to mean that criminal offender records should

contain the "fact, date and result of every transaction which occurred in processing a case from arrest to final disposition" (U.S. Department of Justice, 1974b: Sec. 20.21(a)(1)). Completeness and accuracy would be obtained by requiring that all transactions appear in the state record file within thirty days of the date of the end of the transaction. This section was not entirely clear for it alluded to a central state repository for the storage of complete records but did not specify what role the central repository would perform in the management of criminal history records. Presumably, the central state repository would constitute the only point of dissemination of criminal history records to non-criminal justice agencies.

With the publication of the 1975 regulations, LEAA finally clarified this point. Prior to the dissemination of arrest and conviction information, each criminal justice agency would be required to contact the central state repository to insure that the most complete and current information was disseminated. Recognizing that many states could not satisfy this requirement because of the absence of a central state repository, LEAA made exceptions to the predissemination query rule. Inquiries would not have to be made if, for example, time was of the essence and the state repository was technically incapable of responding to the request. As noted in Chapter I, by 1975, only seventeen states had automated files of complete criminal history records and virtually none of these states provided on-line inquiry capabilities to the localities they serviced. Thus, in many states a predissemination query by local law enforcement and other criminal justice agencies still

has to be conducted largely through more cumbersome and time consuming manual processes.

In its planning instructions, LEAA intended these exceptions to be only temporary:

Although exceptions are permitted in recognition of the reality that present manual repositories cannot respond quickly enough in every instance, these exceptions should be understood to apply only until central state repositories will employ sufficient automated data processing equipment to be able to serve all of the information needs of criminal justice agencies throughout the state (U.S. Department of Justice, 1976c: 27).

Given the optimistic expectation that most states would solve these technical issues, LEAA established a deadline of December 31, 1977, for compliance to the central state repository predissemination query requirement. Many of the comments received by LEAA criticized this time frame as unreasonable. Nevertheless, LEAA acknowledged that "although the regulations do not strictly mandate this approach," the states were urged to do so in very solemn tones: "The states should adopt this approach in their plans unless there are compelling reasons not to do so" (U.S. Department of Justice, 1975: 26). Moreover, the states were urged to seek legislation to vest a central repository with legal authority to collect and maintain criminal history record information.

LEAA's final regulations (1976) were thus the product of conflicting pressures in which criminal justice agencies pressed for more specificity and detail as to what was expected while non-criminal justice interests pressed for greater flexibility and state discretion. Moreover, given conflict over executive regulation of the courts and

subsequent exemption of them from the Title 28 regulations, an important element in a mandate predicated on effective coordination between criminal justice agencies was withdrawn. Clearly, the interests formative in the development of dissemination guidelines had succeeded in preserving state discretion on a central issue. It also gave the press and others the opportunity to influence state policy processes consistent with their preferences.

Patterns of State Policy and Performance:
The Politics of Measuring Compliance

The Title 28 security and privacy regulations divided state implementation processes into three successive stages. The first stage consisted of the submission of a state plan by the State Planning Agency (SPA) which identified steps the state would take to adopt state policy and implement procedures to comply with the federal mandate. The second stage consisted of the adoption of state policy (e.g., by executive order, legislation, court order or rule) and selection of an agency or commission to administer the regulations. The third stage included the actual implementation and utilization of state and local procedures. The results of each of these stages have been documented by LEAA-sponsored studies in varying levels of detail and methodological rigor.

LEAA did not require the states to provide evidence of the extent to which procedures were followed or to document changes in record quality. The states were, however, expected to certify that the central state repository had been audited, including a random sample of state and local agencies, within eighteen months following

the 1977 state legislative session. State plans were reviewed and assessed through an in-house evaluation process. In its Summary of State Plans (1976) LEAA staff presented the findings of that review process, including a description of similarities and differences in proposed policies and procedures, examples of typical problems states faced or expected to encounter in implementation and recurrent difficulties in interpreting the federal regulations. Since the Summary was partly intended to be a technical assistance document it made only selective references to specific state problems and approaches, and thus does not constitute a comprehensive state survey (U.S. Department of Justice, 1976b).

There are other problems with the Summary of State Plans that should also be noted. As with any survey relying upon self-reporting and assessment, accuracy and objectivity are problematic. Interpretations vary among respondents as to precisely which information is sought and/or what documentation is appropriate, and there is a tendency to tell LEAA, as the grantor, exactly what it wants to hear. For example, some state plans failed to provide important information regarding dissemination and audit approaches while others (for example, California in 1976) provided elaborate and detailed plans covering federal requirements and state variations.

In addition, while LEAA required that state plans reflect the views of diverse groups in the state through a deliberate, phased process of review and comment, states varied in the rigor with which the public was engaged. For example, the state of Washington provided full-time staffing to an Attorney General's Advisory Committee,

representative of diverse interests, which met for over a year in careful deliberations to formulate a consensus ultimately embodied in draft legislation. In contrast, many other states appear to have relied upon SPA staff to draft a policy, subsequently given pro forma review and approval for forwarding to LEAA (U.S. Department of Justice, 1976b).

Finally, the significance of the state plans, in most cases, lies largely in what they promise in terms of policy responses, not what was actually delivered. With few exceptions, state SPA's indicated that they expected to adopt comprehensive state policies by the December 1977 deadline. Yet, as of 1981, eighteen states had yet to enact state policies while six states had elected to simply amend public disclosure laws to reflect the need to observe criminal records privacy considerations.

LEAA contracted with SEARCH Group, beginning in 1974, to conduct a series of surveys to document policy approaches and progress which states have made to implement procedures which bring them into compliance with federal and/or state guidelines. The SEARCH Group methodology involves the compilation and analysis of state statutes, regulations, executive orders, or other formal policies in terms of Title 28 and other policy categories addressed by the states but not required by federal regulations. The resulting Compendium of State Legislation Supplement (U.S. Department of Justice, 1978b; 1979) and subsequent update published by OTA in 1981 provide an overview of state progress and a useful source for more detailed comparisons between the states. Such a comparison has been drawn between state dissemination policies in a subsequent section of this chapter.

There are, however, three important limitations to the SEARCH material. First, ambiguity and lack of specificity of state policies may support different interpretations and judgements as to the extent of compliance. Second, the compendium and thus, the survey data upon which it is based, only describes how states have adopted policy and procedures required by LEAA; it does not indicate the extent to which they have been implemented (operationalized) and what that implies about state performance.

Finally, the SEARCH Group--having initiated the LEAA supported effort to demonstrate the feasibility of a national CCH, long-time proponent of state-originated standards, and eager to justify it's continued consultative and technical assistance role with the states--has been hardly in a position to objectively document state compliance. The analysis of state compliance to Title 28 regulations does not appear to be based on a close reading of state statutes nor a careful distinction of the actual administrative functions state agencies performed with respect to security and privacy. For example, the number of "independent" commissions classified as having administrative authority for criminal records privacy regulations is greatly exaggerated because state criminal justice commissions with policy advisory roles (formerly SPA's) are included even though they have no operational function in privacy regulation.

A study LEAA commissioned in 1977 by the MITRE corporation was intended to provide a more intensive examination of state implementation activities which included both a quantitative survey (from an eighteen state sample) of the extent to which procedures were implemented by

state and local criminal justice agencies and a qualitative assessment (based on interviews) of common factors which facilitated or limited progress toward substantial compliance (MITRE, 1977a; 1977b).

Although site selection criteria were not entirely clear, MITRE appears to have selected a cross-section of states representing varying levels of technological capacity, policy development and implementation stages. The state of Washington was included in the survey. The survey involved on-site administration of lengthy questionnaires to state and local officials most closely involved in criminal justice information systems with responsibility for compliance to Title 28 and state laws. An important limitation of this format was reliance upon self-assessment and crude estimates of record quality which could not be verified. The survey questions, geared as they were towards probing technical or legal barriers to implementation, tell us little about political factors while, unsurprisingly, uncovering a whole raft of technical constraints.

Moreover, no clear criteria or standards are provided by the study authors with which to justify classifying states in terms of minimum, medium, and substantial compliance. These classifications are particularly problematic because they fail to distinguish between state and local policy adoption and actual implementation and/or utilization of procedures. In addition, given the absence of base line data, there is no way of determining whether any meaningful change in state and local practice has occurred as a result of procedural responses to the regulations.

These criticisms take on added relevance when examining the Washington experience. Although MITRE classified the state as in

medium compliance, at the time the survey was conducted (September 1977), it had been only three months since passage of state legislation and the implementation process had barely begun. Interestingly, all states classified as in either substantial (two states) or medium (nine states) compliance had state legislation, while all states falling in the minimum category did not have such legislation. Therefore, the primary standard of assessment of state and local progress toward compliance appears to turn upon the presence or absence of state legislation. The primary utility of the MITRE survey for this study is that it provides one interpretation of state performance with which others may be compared.

Perhaps the most comprehensive source of quantitative data which documents both state utilization of federally-mandated procedures and attributes of state performance with respect to record quality and management practice is a study conducted by OTA (1982a). The purpose of the OTA report was to identify the current status of criminal history record systems in the United States; define alternatives for a national computerized system; identify potential impacts of such a system; and specify relevant policy issues needing Congressional attention.

The publication of the OTA report initiated in 1978 was delayed several times by lack of funding and unexpected political pressure emanating principally from Federal and state law enforcement officials. With each successive draft (one in 1979 and two in 1981) a great deal of the body of the report was trimmed because of a variety of objections including challenges to the adequacy of methodologies used to determine record quality in federal and state repositories. Interestingly, law

enforcement interests attempted to downplay divisiveness over governance, management and other issues pertinent to federalism, which emerged early in the study, preferring to present a united front for public consumption.

One element of the analysis begun by OTA in 1978 and 1979 consisted of 130 intensive interviews with a wide variety of state and local criminal justice officials and staff in over twenty states. The interviews, excerpts of which are found throughout early draft reports, probed beliefs and attitudes about the use of criminal justice information in depth and elicited candid observations about problems of federal-state relations in criminal justice as they relate to inter-agency, informational relations.

Two primary messages revealed by the interview responses are that the utility of a national CCH is questionable (compared to the magnitude of cost) and that Title 28 regulations have had limited efficacy in improving the quality of criminal information used in routine decision-making.

In addition, an effort was also made to conduct sample record quality audits of both the NCIC/Ident, CCH and several central state repositories. The FBI, extremely critical of the results of the NCIC audits, demanded that the work be repeated in two additional surveys using their own definitions of data quality (regarding accuracy, completeness, etc.). Ironically, their own 1979 audit showed considerably poorer record quality (39 percent incomplete) than that documented by OTA (27 percent) (OTA, 1982a: 91).

Finally, following a preliminary report published by OTA (1978), which included statements by state officials sharply critical of FBI domination of CCH proposals, the FBI and Department of Justice insisted that additional surveys be conducted to determine potential consensus on alternative designs for a CCH. These surveys (OTA, 1982a; U.S. Attorney General's Task Force on Violent Crime, 1981) generally indicated that a consensus had been reached on the technical configuration of the CCH system. These survey results were subsequently included in the OTA final report.

Although the study was not specifically undertaken to determine the results of Title 28 regulations, the OTA report also systematically documents (through surveys completed in 1979 and 1981) state policy responses as well as the extent of actual implementation of Title 28 requirements. Thus, the OTA provides a far more detailed profile than studies by SEARCH Group and MITRE.

The next sections begin with a discussion of the early state plans and then turn to the OTA reports to provide an overview of state and local performance. Following this, the other survey data is presented in order to identify factors which account for the record quality and management patterns which occurred. Performance in Washington will be presented in the context of national patterns and summarized in a concluding section.

State plans

Adverse responses to the 1974 draft regulations which mandated compliance to all provisions within a thirty day period persuaded LEAA to provide a more reasonable time period within which the states could

take steps to achieve compliance. Consequently, final regulations published in May 1975 gave the states until December 31, 1977, to certify that "all procedures. . . [were] fully operational and implemented" (U.S. Department of Justice, 1975: Sec. 20.23). Prior to that time, each state was required to submit a written plan which involved significant criminal and non-criminal justice interests and specify steps to be taken to comply with procedures set forth in the regulations. Thus, each plan would certify that "to the maximum extent feasible" action had been initiated to implement the plan. LEAA utilized the planning document to evaluate whether the procedures adopted would accomplish the required objectives.

Maximum extent feasible, in this subsection means actions which can be taken to comply with the procedures set forth in the plan that do not require additional legislative authority or involve unreasonable cost or do not exceed existing technical capability (Department of Justice, 1976d: Sec. 20.22(a)). [Emphasis added.]

Thus, with the exception of provisions pertaining to individual rights to access and review (already mandated by the Menard ruling, to which immediate compliance was expected, LEAA provided considerable leverage to the states to justify additional time to overcome any obstacles. State plans would be required to enumerate legislative, technical or fiscal constraints and describe steps taken to overcome these barriers. States unable to satisfactorily implement all procedures could, upon a showing of good cause, request recertification of compliance each year until full compliance was achieved. LEAA officials anticipated that a two year planning process would promote development of comprehensive state legislation designed to address

various technical constraints and provide the instrument through which LEAA guidelines could be implemented. In 1976, LEAA published its Summary of State Plans which compared procedures the states proposed to implement criminal records privacy requirements and typical barriers they faced in achieving complete compliance.

Significantly, approximately 75 percent of the state plans were developed and submitted by the State Planning Agencies, while most of the rest were prepared by agencies responsible for maintenance of the central state repository. In this regard, Washington was one of only a handful of states to conduct an exhaustive committee and public review process as recommended by LEAA. By 1982, in thirty-seven states, state police, departments of public safety or highway patrols exercised administrative authority over criminal records privacy guidelines.

In addition, state plans did not in most instances describe the method for conduct of a statewide annual audit. Plans exhibited great diversity in the sample size, frequency, and selection of criminal justice agencies to be audited. Although many state plans provided for an independent audit of the central state repository, the states generally assigned responsibility for local audits to the central state repository. In this respect, Washington again differed substantially from the norm by insisting that the audit function be conducted by a non-criminal justice entity such as the State Auditor.

In other areas state plans acknowledged few difficulties. Some reluctance, however, was expressed with respect to satisfying the intent

of provisions for individual access. There was widespread concern that states be permitted to structure guidelines on individual access in ways that minimized the potential burdens involved if inundated by such requests. State plans also displayed several variations in proposed dissemination policy. These variations were largely the product of constant changes in LEAA dissemination policy until a final version in 1976.

Finally, state plans indicated that a combination of legal and technical problems limited their capacity to respond to the federal privacy mandate. Both types of problems appeared to center upon the role of the Central State Repository (CSR). Lacking sufficient regulatory authority, the CSR was unable, in many instances, to achieve a level of arrest and disposition reporting sufficient to satisfy completeness requirements. In addition, their inability to handle local inquiries in a timely fashion limited CSR's usefulness and effectiveness.

LEAA concluded from the plan review process that prior technical capacity and the existence of comprehensive state legislation were the two most important factors contributing to the successful implementation of a state plan. The Summary clearly indicates that most states planned to introduce state legislation although specifically not required to do so:

It should be noted that while the regulations did not require the enactment of state legislation, the plan review indicated that nearly all states had enacted or were planning to enact implementing legislation (U.S. Department of Justice, 1976b: 3).

Record quality in federal and
state repository files (OTA)

The only data available regarding NCIC/CCH record quality prior to the 1979 OTA study is audit data furnished by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967). The report discovered, through a random audit of the NCIC/CCH file that over 35 percent of the records searched failed to contain complete court dispositions. In addition, although no numerical values were provided, the report estimated that NCIC records also exhibited a high degree of inaccuracy. Thus, the OTA study constitutes the first systematic effort to measure record quality in both federal and state criminal justice information systems.

A record quality audit involves the attempt to trace a record maintained in one system to its origin in another in order to determine whether the record contains the same information. While methodologies are available which involve surveys of end users or decision makers, the OTA undertook a sample of active cases recently disseminated by the NCIC. This method offers clear advantages in terms of accuracy compared to other methods in which representativeness may be compromised by a low survey return and variations in quality of computational processes utilized by respondents to a survey. Two different federal data bases were involved in the OTA surveys: the FBI Identification Division's manual criminal history file and the NCIC/CCH file.

The results of the NCIC/Identification and CCH record quality survey are presented in Table 5. The two most significant record quality problems for both files involved the lack of disposition

Table 5. Record Quality of FBI Identification and CCH File Disseminations, Based on 1979 Sample.

	Ident	CCH
Arrests in sample	400	400
Local agency responses	231	257
Arrests not verifiable because	63	92
Pending or sealed	19	3
No record locatable	37	55
No prosecution of arrest	6	9
Fugitive	1	1
No arrest data		24
Total arrest cases verified	168	165
<u>Results:</u>		
Actual disposition not recorded on record		
Disposition occurred more than 120 days prior to sample	49 (29.6%)	45 (27.2%)
Disposition occurred less than 120 days prior to sample	11	1
Disposition occurred after sample	2	
Disposition data unknown	6	2
Record otherwise incomplete when compared to local record		
Shows sentence but no conviction information	12	7
Shows conviction but not correctional information	7	2
Record inaccurate when compared to local record	5	5
Disposition information does not agree	34 (20.2%)	32 (19.4%)
Charging information does not agree	15	13
Sentencing information does not agree	11	10
Record ambiguous when compared to local record	8	9
Shows more dispositions than charges or vice versa	11	4
Other ambiguities	3	
Complete, accurate, unambiguous	8	
	43	74

SOURCE: OTA, 1982a: 92-93).

NOTE: Although many records exhibited more than one record quality problem, only one per record is counted above. Earliest date of sampling was 7/24/79 for Ident, 8/12/79 for CCH.

information followed by inaccurate disposition, sentencing or charging information, when compared with information in local records. No disposition meant that a court disposition was shown in a local record, but missing in the federal record. Inaccurate meant that the disposition, charges or sentence appearing in the federal record did not agree with the disposition, charges or sentence in the local record.

Thus, of the 168 verifiable Ident arrest events, 49 (or 29.6 percent) failed to contain dispositions and 34 (or 20.2 percent) were inaccurate. In addition, of the 165 verifiable NCIC/CCH arrest events, 45 (or 27.2 percent) contained no disposition and 32 (or 19.4 percent) were inaccurate.

Other recent studies of record quality underscore problems of record incompleteness: An FBI sample in 1979 found that 39.4 percent of arrests in the NCIC/CCH file did not contain dispositions. In addition, a 1980 study by the Jet Propulsion Laboratory found that Ident receives dispositions on only 45 percent of the reported arrests (OTA, 1982a: 91). The differences between these sample findings and OTA can be explained in part by a difference in methodology. As Table 5 indicates, OTA removed from consideration those cases which were still pending, sealed, if no prosecution had occurred or if the record was not locatable. Had these records been included, particularly records not locatable, they would have been included among "no dispositions reported." Thus, as the OTA report acknowledges, its analysis tends to understate the true level of arrests without dispositions.

To summarize, the problem of record incompleteness (no dispositions) constitutes the most serious record quality problem for federal

criminal records repositories. Somewhere between 27 and 45 percent of criminal records fail to contain complete disposition information. These findings about record quality in the NCIC/CCH file are somewhat surprising given the fact that the FBI claims that submission of record data by participating states (eight) is regulated by strict standards which necessarily limits participation to states with computerized central state repositories. Problems with record quality take on an added significance when considered in light of the fact that the eight states who fully participate account for 66.5 percent of the total criminal history records submitted by all states to the NCIC/CCH.

Record quality also appears to be the most significant problem of central state repositories where record incompleteness may vary from 15 to as much as 42 percent or more (OTA, 1982a: 93-94). Compared to other states record quality in Washington is rather poor. Significantly, although the Washington state central repository is fully automated and state law mandates state court reporting of disposition information, central state repository personnel indicated in 1981 that between 30 and 40 percent of state criminal records are incomplete. At the local level there is little quantitative data available concerning the quality of criminal records in most states although some limited was available in Washington state. However, the MITRE (1977a) survey respondents note that record completeness was "variable."

Wide variations among states regarding the level of arrest and court disposition information, lack of monitoring procedures and infrequency of audits directly contribute to problems of state record quality. Most states now require state courts to report case disposition

information (and local police arrest information) to the central state repository. However, a significant number (28 percent in 1982) still have no statewide system or depend only upon informal cooperation (see Table 6).

Table 6. Institutional Basis for Court Disposition Reporting.

	1979 Number of States	1982 Number of States
A formal system mandated by statute	26 (53.1%)	29 (59.2%)
A formal system by agreement with courts	7 (14.3%)	6 (12.2%)
An informal system	6 (12.2%)	5 (10.2%)
No system; depends on jurisdiction	10 (20.4%)	9 (18.4%)
Total	49 (100.0%)	49 (100.0%)

OTA, 1982a: 101.

There are substantial differences between the percentage of arrests versus court dispositions reported to the central state repository. Arrests are reported, on average, at a much higher rate than court dispositions (82 versus 66 percent) (OTA, 1982a: 100). This is true in Washington state where arrests are reported 95 percent of the time while court dispositions only 60 percent (MITRE, 1977a: 39). This disparity is surprising given a fully automated state court information system which has the capability of rapid retrieval of trial court dispositions for transmission to the central state repository.

There has been only marginal improvement in court disposition reporting since 1970 as shown in Table 7. Compared to a General Accounting Office study in 1973, OTA found in a follow up study in

1978-1979 and 1982, that while the number of states with 95 percent or more dispositions reported had doubled (from seven to thirteen states), twenty-two or 48.8 percent of the states continued to receive less than 65 percent of available case dispositions.

Table 7. Court Disposition Reporting: Comparison of GAO and OTA Findings.

Disposition Reporting Rate	1973 GAO Study (1970 Data) N = 49	1979 OTA Study (1978-79 Data) N = 41	1982 OTA Study N = 41	OTA Study N = 47
Less than 65%: Number of States Percent	31 63.3%	19 46.3%	17 41.5%	22 46.8%
65 to 90%: Number of States Percent	11 22.4%	10 24.4%	11 26.8%	12 25.5%
More than 90%: Number of States Percent	7 14.3%	12 29.3%	13 31.7%	13 27.7%

SOURCE: OTA, 1982a: 102.

State record management and enforcement

There are also wide variations between the states with respect to utilization of procedures to monitor and update delinquent court dispositions. For example, as Table 8 indicates, while about 60 percent of central state repositories periodically utilize procedures to monitor the availability of court dispositions, the rest of the states do so only infrequently or not at all. There also appear to be substantial differences in the rigor of procedures used to determine compliance. Some states use onsite visits while most others including Washington

rely on self-reporting (OTA, 1981). In this regard, the central state repository in Washington must still conduct a manual review of files (for reasons discussed in subsequent chapters), even though both the CSR and state court files are fully automated.

Table 8. Procedures Used by State Agencies to Monitor Court Dispositions.

	1979 Number of States	1982 Number of States
Automated review of file	17 (34.7%)	19 (38.8%)
Manual review of file	8 (16.3%)	11 (22.4%)
Sometimes inquire of courts before dissemination	5 (10.2%)	4 (8.2%)
No review of delinquent dispositions	18 (36.8%)	14 (28.6%)
Don't know	1 (2.0%)	1 (2.0%)
Total	49 (100.0%)	49 (100.0%)

SOURCE: OTA, 1982a: 104.

In addition, only a few state agencies (thirteen) have made any effort to conduct an audit of information stored in the central state repository. Significantly, only eleven states (as of 1979) have conducted systematic audits of local user agency files (see Table 9). Again, Washington does not differ in this regard from the majority of states. Washington's only audit was done when records were converted to automated files during 1974 and 1975.

Table 9. State Agencies That Have Conducted Record Quality Audits of Criminal History Information Stored in State Repositories.

	Number of States
Conducted quality audit	13 (26.5%)
Never conducted quality audit	36 (73.5%)
Total	49 (100.0%)

SOURCE: OTA, 1982a: 105.

Surveys of procedural compliance
(MITRE and SEARCH)

Significantly, LEAA's monitoring and enforcement efforts have focused almost entirely on procedural compliance. Not surprisingly, the profile which emerges shows extensive procedural adoption yet little evidence of substantial change in record management processes or improvement in record quality. Our review of the available data suggests that a great deal of progress has been made with respect to getting the states to both develop policy and adopt procedures mandated by Title 28 and to increasing the technical capacity of state and local criminal justice agencies to implement these procedures. Technical and legal constraints were cited by both LEAA (U.S. Department of Justice, 1976b) and MITRE (1977b) as constituting the most significant barriers to effective implementation and compliance. Since then there have been significant changes in both areas. There has been substantial improvement in the capacity of central state repositories to collect and store criminal history information and ability to service state and local agency needs.

Legal barriers to effective state policy control and regulations have also been largely removed. As the SEARCH Group (1981) indicates, each state has chosen a process through which state policies have been adopted to satisfy the federal mandate. Yet most states (thirty-seven) have lodged regulatory control in a state law enforcement agency and only rarely in independent commissions (eight). Also, the powers of the central state repository (CSR) to collect arrest and disposition data have been greatly expanded. Prior to 1974, only a few CSR's had statutory authority to collect arrest and disposition information; as of 1981, every CSR has the statutory authority to collect arrest information and most states (thirty-five) have either statutory or policy authority to collect disposition information from the courts (OTA, 1982a: 101).

State dissemination policy and practice

This profile of uniform procedural compliance disguises many differences in policy content (e.g., dissemination policy) and the extent to which states and localities actually utilize procedures and enforce state and local agency compliance with federal and/or state guidelines.

Although nearly half of the states have imposed a uniform dissemination policy on state and local criminal justice agencies through state statute, the rest have adopted other methods which include CSR legislation, open records laws, executive orders, or administrative procedures. While state statutes are applicable to all criminal justice agencies, eighteen other state policies govern only CSR dissemination procedures (see Table 10).

Table 10. Institutional Basis for State Criminal History Record Dissemination Policy.

Institutional Basis	Number of States (Total 49)
State statutes with specific reference to criminal history or criminal justice information	24
State repository enabling legislation	8
Public or open records law	5
State repository agency policy	7
Executive order	2
State repository administrative procedure	3
Employment practice	1

NOTE: Compiled from U.S. Department of Justice, 1978b; 1979.

LEAA's policy on dissemination permitted the states substantial discretion to develop policy for the dissemination of conviction and non-conviction information. Not surprisingly, as Table 11 reveals, from an analysis of LEAA's Compendium of State Legislation (1978 and 1979) the states exercised that discretion to produce several different policy variations. While about half of the states' dissemination policies, including Washington's, conform closely to one of three policy positions advanced by LEAA at different times, and thus do satisfy statutory intent, the policies exhibit wide variability in legal authority, applicability and local implementation.

Group IA states (seven) include states with dissemination policies which restrict access to both conviction and non-conviction information, and thus, are closest to LEAA's 1974 draft regulations.

Table 11. Variations in State Dissemination Policy and Management, by Year of Adoption.

I. States with Laws Resembling Changing LEAA Title 28 Regulations					
A. State Laws Comparable to Title 28 in 1974		B. State Laws Comparable to Title 28 in 1975		C. State Laws Comparable to Title 28 in 1976	
Alaska ^a	1972	California	1973	Washington	1977
Massachusetts ^a	1972	Iowa	1973	Hawaii	1978
Georgia ^b	1976	Alabama ^b	1975	Kansas ^b	1978
Illinois ^a	1976	Oregon	1976	Louisiana	1978
Maryland ^d	1976	Connecticut	1977	Montana	1978
Colorado	1977	Virginia	1977	Nevada	1978
Nebraska	1978	Washington	1977	North Dakota	1978
		Maine	1978	Oklahoma	1978
				Pennsylvania	1978
II. States with Dissemination Policy Which Applies Only to the Central State Repository					
A. CSR Statute Only		B. CSR Policy Only		C. CSR Administrative Procedure	
Kentucky	1974	Arkansas ^c	1975	Michigan	1975
Missouri	1975	Delaware	1975	Rhode Island	1976
New Mexico	1975	Mississippi	1975	Minnesota	1977
South Dakota	1976	New Hampshire	1976		
Vermont ^b	1976	North Carolina	1976		
Arizona	1977	South Carolina	1976		
Indiana	1977	Wisconsin	1976		
Idaho	1978				
III. States with Other Approaches					
A. State Open Records Law		B. Executive Order		C. Employment Practice	
Texas	1975	Tennessee	1975	New York	1976
Utah	1975	New Jersey	1976		
Ohio ^c	1977				
West Virginia	1977				
Wyoming	1977				
Florida ^b	1978				

NOTE: Compiled from U.S. Department of Justice, 1978b; 1979.

^aRegulatory authority in independent commission.

^bAdvisory commission with no regulatory authority, management by state law enforcement agency.

^cManagement by personal information system board.

^dManagement by state law enforcement agency in all states without superscripts.

Of these states, Alaska and Massachusetts had passed state criminal records privacy laws prior to the publication of the 1974 draft regulations. A significant characteristic of states in Group IA is that a high percentage (compared to other policy groups) of the states have created separate commissions to administer state policy and regulations.

Group IB states (eight) have adopted policies most similar to LEAA's 1975 regulations. Those regulations limit dissemination of criminal history record information to non-criminal justice use, if a state statute or executive order makes criminal conduct the basis for exclusion from licensing or employment. The state of Washington is included in this group of states because it also makes access contingent on whether criminal conduct is the basis of the exclusion. In most other respects, the Washington statute is similar to those characteristics of states typified by Group IC.

Group IC states (nine) have adopted state laws or policies most similar to LEAA's 1976 version of the Title 28 regulations. These states demonstrate the most specificity in distinguishing conviction and non-conviction information and permit dissemination of non-conviction information for any purpose (except Washington), as provided by either state statute, executive or court order or local ordinance.

Across these three categories, several states have added innovations of their own which have the effect of restricting the exchange of non-conviction information between criminal justice agencies. The states of Alabama (Group IB), Kansas and Louisiana (Group IC) require that criminal justice agencies demonstrate that they have a "need to know" such information for purposes pertaining only to the administration

of criminal justice. Presumably this regulation has been adopted in order to discourage the practice (discussed in Chapter VI) whereby criminal justice agencies are utilized as intermediaries by non-criminal justice users. In addition, Georgia (Group IA) requires non-criminal justice agencies which gain access to conviction information to record or log all secondary disseminations of that information.

Group II consists of eighteen states which have adopted policies which apply only to criminal history information collected and maintained by the central state repository. Thus, the dissemination policy adopted by these states may be classified as less restrictive than any version of the LEAA Title 28 regulations. This group is subdivided between states regulating CSR disseminations either through state statute, formal policy or informal administrative procedure. Unlike states in Group I, these states tend to be either less restrictive with respect to dissemination of non-conviction information or closely paralleling the 1976 LEAA regulations.

Group IIIA includes six states which have adopted comprehensive open records laws which specifically include the regulation of criminal history records. What distinguishes these states from other states in which open record laws have preceeded the development of criminal records privacy policy is that the open records law specifies the conditions under which criminal record information may be disseminated. Texas and Utah, for example, place no restrictions on dissemination of conviction or non-conviction information while the other states (Florida, Ohio, West Virginia and Wyoming) closely approximate the 1976 LEAA, Title 28 regulations.

Of the three remaining states, Tennessee and New Jersey regulate dissemination of state and local criminal records through executive order (and follow 1976 LEAA guidelines) while the state of New York regulates criminal history records through a statute pertaining to employment practices.

Finally, it is evident from an OTA fifty-state survey that state use of procedures to review local dissemination activity is infrequent and unsystematic. Only twelve states (24.5 percent) used such procedures frequently, while most other states either reviewed local logs only when a specific abuse was indicated (twenty-nine states or 59.2 percent) or not at all (six states or 12.2 percent (OTA, 1982a: 105).

There is also a great deal of unevenness in local implementation of dissemination policy. Some localities have elected, through local ordinance, to construe eligible reasons for access to non-conviction information very broadly to include licensing and other employment and credit-related purposes, which is often inconsistent with state policy. Thus, local custom and policy often prevail as to the availability of criminal record information (OTA, 1982a).

State and local performance:
LEAA-MITRE survey, 1977

As the December 31, 1977, deadline drew near for states to demonstrate full compliance with the Title 28 privacy regulations, LEAA commissioned a comprehensive survey in September by the MITRE Corporation to assess the extent of state compliance. As a result of the survey (published in December 1977) which documented substantial deficiencies in overall compliance efforts, LEAA permitted the states

to request an extension of up to eighteen months (for some requirements) to demonstrate satisfactory compliance. Significantly, the new deadline for compliance was tied to the conclusion of state legislative sessions. Thus, not only did LEAA create a stronger sense of urgency that state legislation was preferred (although never required by the privacy amendment to the Crime Control Act) but insisted for the first time that states submit proof that an effort had been made to determine the level of record quality that had been achieved as a result of implementation of LEAA mandated procedures.

The MITRE study determined that states were confronted with two types of difficulties in attaining satisfactory compliance: factors external to the regulations indicative of the environment of implementation and factors internal to the regulations themselves, such as lack of specificity and clarity of intent which caused difficulties in interpretation and implementation (1977b: vii).

Factors considered by MITRE to be external to the regulations include the political environment, financial capabilities and inter-agency coordination mechanisms. In addition, several other factors were enumerated which included insufficient time to achieve compliance, lack of precise state mandates, lack of appropriate legislation, lack of sufficient resources, local practices which limit change and tendencies to link compliance with automation of criminal history record systems. Not surprisingly the study authors conclude:

Because these factors are exogenous to the regulations themselves, there is little about the problems they generate which could be ameliorated by changes in the content in the regulations (MITRE, 1977b: viii).

Although MITRE devoted an entire volume of its two volume study to the significance of external factors, these factors were considered only of secondary significance in accounting for levels of compliance. Instead, the MITRE study conclusions strongly endorsed the view that the difficulties encountered in state and local implementation efforts were rooted either in the federal regulations themselves or occurred because of the absence of state legislation and/or detailed regulations.

MITRE ranked the eighteen states surveyed into three categories of compliance: substantial compliance (two states), medium compliance (nine states), and minimal compliance (seven states). MITRE presented four major findings inferred from the data utilized to rank order the states. First, the study concluded that "long term prior involvement with the privacy and security implementation is a reliable indicator of successful compliance" (MITRE, 1977b: viii). The two states in substantial compliance had comprehensive legislation and long term involvement in privacy and security implementation prior to the 1975 regulations. States considered in medium compliance, including Washington, had passed some kind of legislation to conform with the regulations, but were still in the process of implementing procedures. States falling short of medium compliance had not yet passed enabling legislation.

The second finding stressed that passage of comprehensive state legislation tended to greatly facilitate progress towards compliance. Legislation was considered comprehensive if it addressed all aspects of the regulations and specified an agency to exercise administrative authority.

Third, the MITRE survey concluded that:

States with highly specific mandates as to what their CSR (central State Repository) file should contain and who had actively pursued these mandates had shown adequate progress towards compliance. When mandates as to file content lacked specificity or were not strongly pursued, states fared less well in moving towards compliance (MITRE, 1977b: viii).

Finally, the MITRE report listed several other factors which appear to contribute to difficulties in achieving compliance. These factors included lack of resources, confusion as to interpretation of regulations, traditional practice and absence of automated systems.

Significantly, in nearly every instance in which MITRE found deficiencies in procedural compliance, a connection was established to ambiguities originating in the Title 28 regulations. Supplementary interview data suggested three overall sources of confusion originating in the regulations. First, many local agencies were uncomfortable with the wide latitude of discretion they had to interpret local dissemination policy and implement the general provisions. It is evident from the MITRE survey that state and local officials sought a "right" interpretation rather than that which best fit local conditions and policy orientations (1977b: 6).

Second, what seemed particularly unclear was the exact role intended for the state repository: some viewed it only as a passive recipient of local criminal history files; others interpreted its role to include active regulation, monitoring and enforcement of data quality requirements. Confusion regarding the state repository's role was determined to have caused delays in local implementation activities.

Finally, the MITRE study concluded that much of the ambiguity of the states' role resides in the doctrine of federalism:

Since the federal government does not consider it appropriate to prescribe lines of authority for implementation within the states, regulations leave open the question of who is to take the initiative in compliance activities. This has often resulted in a progress stalemate in many states. In some states, implementers have perceived their responsibilities as being limited principally to state level activities. Often, local jurisdictions are doing little to achieve compliance, believing they must wait upon state level implementers for guidelines and procedures. Frequently, when the state does come out with guidelines and procedures, localities have perceived them as not reflective of local needs and practices (MITRE, 1977b: 7).

The MITRE study concluded that the primary avenue to realization of greater progress in state and local compliance included three principal elements: (1) Congressional amendments which clarified the Title 28 regulations, particularly on dissemination policy, and specified a more precise role for the central state repository; (2) passage of comprehensive state legislation; and, (3) increased federal enforcement and technical assistance to help state and local agencies interpret and properly implement required procedures (MITRE, 1977a: 24-25).

Technology, Policy and Performance in Washington

To summarize, in most respects the state of Washington experienced technological development in criminal justice information systems comparable to the more advanced states. As Table 12 indicates, the state profile of technological capacity (i.e., central state repository computerization) is similar to or better than that of the majority of states. Although not a full participant in the NCIC/CCH, the state repository has been fully computerized since 1974. Not all jurisdictions

Table 12. Profile of Washington's Technology, Regulation and Performance Under Title 28.

Technology

- o Central state repository established in 1974.
- o Criminal records file fully automated.
- o Off-line access to NCIC/CCH; not full participant in NCIC/CCH program.
- o Partial on-line service to four urban jurisdictions; the rest are linked through teletype.
- o Three prosecutor case management systems.
- o Four computerized local police criminal history record repositories.
- o Two subject-in-process joint case management systems.
- o State court information system fully operational but trial court participation remains incomplete.

Regulation

- o Reporting of arrest and disposition information to central state repository mandated by state law; court disposition reporting to CSR also mandated by court rule.
- o State Planning Agency has administrative authority (1977-1979)^a.
- o State and trial courts exempted from regulations^b.
- o Comprehensive state privacy law with the following attributes; no restrictions on dissemination of conviction information; access to non-conviction information determined by state policy and local ordinance; dissemination of non-conviction information governed by pre-dissemination guidelines (i.e., clearance through the CSR and maintenance of a log).
- o Data subject has right to access, review, challenge and/or correct contents of criminal history file.
- o Criminal penalties and civil relief available in order to challenge violations of record procedures.
- o Standards must be satisfied for physical and administrative security of state and local records systems.

Performance

- o Arrest reporting estimated at 95%.
- o Disposition reporting estimated at 60-65%.
- o Record completeness: 30-40% of state CCH file incomplete.
- o Accuracy unknown.
- o Utilization of pre-dissemination controls per accuracy and completeness estimated at 50% of all disseminations.
- o State logging of disseminations: 95-100%.
- o Local agency logging: 6-% compliance.
- o Local audit: 10-20% of agencies have conducted sample audit of files.
- o State audit: sample audit conducted in 1981 to pre-test survey instrument; no systematic audits have been conducted.

^aThe Washington State Patrol assumed administrative authority in 1980.

^bAmendments in state law in 1980 mandated court disposition reporting to CSR and local agencies.

have on-line access to the CSR but regional information systems (in several counties) fill in the remaining gaps in service. In addition, Washington is one of the few states to have a fully operational state court information system, although participation by trial courts remains incomplete.

Washington has also adopted comprehensive legislation which closely conforms to policies recommended by LEAA guidelines. In addition, an independent agency (the State Planning Agency) was given administrative and regulatory authority. Finally, the legislation provides that the administrative agency may contract with the state auditor to conduct annual audits. In contrast, most other states have chosen to maintain audit authority within the control of state law enforcement.

In spite of these characteristics, the state's actual performance in terms of record quality falls at the low end of the range, management practices between localities is highly variable, and state enforcement is negligible. Court disposition reporting to the CSR lags well behind arrest information. Thus, 30 to 40 percent of state files (in June 1980) were incomplete or inaccurate. Only about one-half of criminal justice agencies conduct pre-dissemination queries to the CSR, as mandated by federal and state law, and only an estimated 60 percent of that number make any effort to log disseminations. In addition, local audits are rarely conducted and a state-wide audit has yet to be conducted.

Summary of Issues Raised by Nationwide Data

The profile of state policies, procedures and performance, including that of the state of Washington, suggests that the objectives of federal regulation of criminal justice information systems are far from being realized. There is, in fact, still a great deal of non-compliance. The information presented so far tells us how the states have reacted to the federal mandate and with what results; however, it does not explain why things happened the way they did. There are five important recurrent features of the data regarding nationwide performance which suggest factors which may explain the gap between intended goals and actual performance. Briefly, these performance features include (1) comprehensive state laws with variations in dissemination policy; (2) discontinuity between procedural compliance and the frequency of actual utilization of procedures and the lack of enforcement; (3) negligible efforts to improve record quality; (4) lack of reporting of court dispositions; and (5) the absence of evidence of change in local practice.

The first important feature of the data presented here is that although states have adopted several variations of federal dissemination policy, marked by differences in scope of applicability, nearly half the states have adopted comprehensive legislation imposing uniform dissemination policies and other procedures on state and local criminal justice agencies as recommended by LEAA. The utilization of state legislative processes to respond to and adopt a federal mandate would seem to constitute a particularly significant measure of the importance that state officials attach to state adoption of a particular federal

policy. Where states have vested regulatory authority in an independent non-criminal justice agency (as was the case in the state of Washington) an opportunity arises to closely examine the influence that the federal mandate and objectives had on the formation of state policy priorities, the importance of the role of state officials and other interests involved in the development of a legislative consensus, and the identification of interests and factors formative in subsequent guideline development processes.

Another feature of the pattern of state compliance which invites further analysis is the evident discontinuity or disparity between the extent of procedural compliance and the frequency with which such procedures are actually utilized and/or enforced by state regulatory agencies. Where policy is endorsed by a state legislative process and a state commission or agency is given sufficient authority and jurisdiction to enforce compliance, it would not be unreasonable to expect more evidence of actual use of procedures (or evidence of their use through the consequent improvement in record quality) than has been the case. What needs to be explained, then, is why the seeming perfunctory procedural compliance but absence of performance improvement and change. Is it, as the MITRE report indicates, because of ambiguity or uncertainty among state or local criminal justice officials as to their respective roles and responsibilities with respect to control over records management practices? Are state and local criminal justice officials simply ignoring the state mandate or are they refusing to comply with state guidelines? Or, alternatively, do a combination of political factors which include organizational conflicts, the relative

autonomy of the local criminal justice agencies, and differential elite support and enforcement efforts operate separately or in concert to defeat the possibility of effective regulation of the administration of criminal justice? A review of the Washington case may help determine the relative importance of these factors in that two different agencies (the State Planning Agency and the State Patrol) and approaches have been involved in guideline development, implementation and enforcement processes.

Perhaps the most conspicuous finding of all surveys reviewed here is the negligible, if not lack, of change in the quality of federal repository records since 1967. As Chapter I indicates, a combination of technical and political factors have limited the expansion of the NCIC/CCH program. Political reasons have included conflicts over bureaucratic jurisdiction, federalism, protection of constitutional rights and privacy and others. In addition, full participation in the NCIC/CCH has been negligible because few states are able to satisfy standards established by the FBI with respect to technical capacity (e.g., computerization of state files and automated linkages to local record files), accuracy and completeness, and timeliness. It is evident from the data on the quality of records in the federal repository that even those states considered to have satisfied technical standards have not solved problems of record quality. Thus, the extent of computerization alone is no guarantee that states are able to effectively control record quality and integrity. Moreover, the enlargement of state regulatory control over state and local records management practices, resulting from the passage of a federal mandate,

has not appeared to have had a measureable effect on record quality at the state and local level. Thus, what is of interest in an intensive case study of one state's experience is to identify factors which have limited local compliance to federal and state regulation.

Further, although most state repositories now have the authority to obtain or require the courts to furnish disposition information, the lack of court dispositions continues to be the most significant defect in record quality at federal, state and local levels. We have noted in Chapter I that the separation of powers doctrine has contributed to the exemption of the courts from regulation under Title 28. Nonetheless, court cooperation is essential to attaining the objectives of accuracy and completeness. What is of particular interest to an analysis of one state's experience, then, is what has been the response of state and trial court officials toward the privacy mandate; what political and organizational factors limit cooperation or coordination with other agencies; and what effects these factors have had on the amenability of other criminal justice officials to state guidelines and execution of implementation responsibilities.

Finally, the available data tells us a great deal about state responses to and performance under Title 28, but little about the reactions of local criminal justice officials and agency personnel. What have been the factors which influence responses of local law enforcement officials, for example, to state regulatory authority? What have been their perceptions of and attitudes toward the privacy mandate? What effects do local law enforcement, prosecutors and other officials expect state regulation of record management to have on

organizational functions and effective law enforcement? Therefore, how do these beliefs, attitudes and expectations contribute to our understanding of state and local responses and performance and consequent nationwide patterns of compliance? The presentation of the Washington case in the next three chapters will probe these issues in more depth.

C H A P T E R I V
EXECUTIVE AND LEGISLATIVE DECISION MAKING
IN WASHINGTON, 1975-1977

As we begin an examination of the Washington experience with the federal criminal records privacy amendment, we note that implementation passed through three distinct phases. This chapter treats the first phase, lasting from 1975 to 1977, which involved the development of a state plan and adoption of state legislation despite numerous political obstacles. Then, Chapter V is concerned with how administrative guidelines were developed in 1977 and 1978. Finally, Chapter VI deals with the abortive attempts to improve record quality and concurrent revisions in the state policy and reassignment of administrative responsibility to the State Patrol between 1979 and 1981.

State Elites: The Consensus of Indifference

In many respects, it is surprising that the State of Washington ever adopted criminal records privacy legislation. The Washington State ACLU chapter had sponsored criminal records privacy bills in 1974 and 1975, but neither made it out of committee and both were quickly forgotten. Like so many conditions which LEAA had attached to receipt of aid, Washington state officials responded to the criminal records privacy mandate with a similar air of routine and resignation. Even the completion and submission of a plan to LEAA in 1976, which promised

to introduce state privacy legislation in the 1977 legislative session, was no guarantee that a statute would actually be adopted.

There were several features of the political environment and attitudes of state criminal justice officials which made passage of criminal records privacy legislation a rather dim prospect. Primarily these involved the attitudes of a Governor who saw the Title 28 privacy regulations as yet another set of guidelines which would have to be converted into a state plan; an Attorney General who was ambivalent about security and privacy regulations; and a number of state department heads who preferred not to be given responsibility for administration of the regulations.

By 1977 Daniel Evans was nearing the end of this third term as a popular Republican governor who had decided not to run again. Then, Dixy Lee Ray, former head of the Atomic Energy Commission and political neophyte running as a Democrat, unexpectedly defeated Republican John Spellman (King County Executive) in the November 1977 election.

Prior to this, in 1975 Evans had requested that Attorney General Slade Gorton, Chairman of the Governor's Committee on Law and Justice, establish a special Advisory Committee on Security and Privacy to assist in the drafting of a state plan to satisfy LEAA regulations. The Advisory Committee, under the guidance of Assistant Attorney General James O'Connor, was able after nearly a year of deliberations and compromise to fashion a forward looking plan which commanded a solid consensus among both criminal and non-criminal justice interests.

However, Attorney General Gorton made it clear on two separate occasions that he was ambivalent if not unsupportive of the LEAA

criminal records privacy regulations in particular, and a comprehensive privacy statute in general. Gorton was invited to testify before Congress in October 1975, when a bill sponsored by Senator Hruska was introduced to provide statutory guidelines for criminal records privacy.¹ At the time that Gorton was asked to testify, the 1974 LEAA privacy regulations were still in a comment and review stage, and Hruska asked if Gorton would comment on them. Here is a segment of that exchange:

Sen. Hruska. Now then, Mr. Attorney General, the Department of Justice recently issued regulations pertaining to criminal justice records. Are you familiar in general with their issuance and the fact of their existence?

Mr. Gorton. Yes.

Sen. Hruska. Some concern has been voiced that these regulations have far reaching policy ramifications and that they convert material that has always been considered public information to restricted information. Have you encountered any reaction in that regard?

I have in mind, for example, the restriction on non-law enforcement agencies of government who have need and traditionally and historically have a statutory necessity to get at some of this information, and some complaints have reached us that they are inhibiting other activities in government.

Have you any comment on that part or on the regulations in general?

Mr. Gorton. I can, but I do not wish to testify at this point as an expert on the subject. I have just been asked, the Governor has just asked my office, to undertake precisely this kind of study for the State of Washington. I have just appointed an advisory committee to do. It has to work in this area, and of course in the general security and privacy area.

¹The attempts to develop a national CCH discussed in Chapter I have been marked by divisiveness over how to regulate record management practices and protect individual privacy. A proposal by Sen. Hruska, supported by the FBI, involved FBI-developed standards for regulation whereas Sen. Ervin's proposal, favored by LEAA, would have created an independent national board to develop and enforce more rigorous and restrictive controls (Marchand, 1980: 167-202).

I can say this. I have been the recipient of considerable amounts of objections of just exactly the type of which you state from quasi-law enforcement agencies and non-law enforcement agencies about the severity of these restrictions and about the fact that they do, in fact, harm the ability of other governmental agencies to work. But, I understand that they are being considered by the Department of Justice, and our own state intends to make its comments known on that subject. But I am not really in a position to be specific on it at the present time (U.S. Senate Judiciary Committee, 1976).

When Senator Hruska next asked Attorney General Gorton to comment on the LEAA program to deal with "career criminals," he suggested that the proposed Title 28 regulations may undermine these efforts:

Sen. Hruska. Now, the LEAA is supporting a program dealing with the so-called career program. The older language used to be that the habitual criminal, but now it is the career criminal, the man who knows nothing else except how to try to make a living by being a criminal.

Do you feel there is a need for efforts in this direction to try to deal particularly and specifically with the prosecution of career criminals as such?

What comment would you have on that?

Maybe you have a state plan that gets into that.

Mr. Gorton. Senator, I do agree that this is a particularly significant area. It becomes all the more significant as the rules about approving the commission of previous crimes, the nature of previous convictions, whether or not the defendant had proper legal advice at the time he was convicted for these previous crimes; that is to say, the proof that he is, in fact, the habitual criminal or career criminal becomes more difficult (U.S. Senate Judiciary Committee, 1976). [Emphasis added.]

Not only was it difficult to get state officials excited about criminal records privacy legislation but it was evident that a consensus was going to be difficult to achieve on which agency should undertake responsibility for administration and enforcement of criminal records privacy guidelines. One problem was that there were no agencies which

were either appropriate or willing to accept the administrative responsibility for implementation of such guidelines.

Discussions about which state agency should assume administrative responsibility came to a head at the December 19, 1976, meeting of the Security and Privacy Advisory Committee. Phil Winberry, Administrator for the State Courts and chairman of the Advisory Committee, conducted a discussion regarding administrative options. Several agencies were discussed which included: a new Department of Justice, the State Auditor, the Attorney General, the Identification section of the Washington State Patrol, the Data Processing Authority, the Department of Corrections and a new security and privacy commission-- an alternative recommended by LEAA and strongly favored by O'Connor, staff to the advisory committee (O'Connor, 1975).

The Department of Justice option was advanced because many expected passage of legislation proposed in the House to create such a department. Pending creation of this department, it was recommended that interim responsibility be assigned to the Attorney General. Nonetheless, strong objections were made to both alternatives. First, it seemed inappropriate and premature to assign responsibility to an agency not yet established, and to vest a regulatory function in the Attorney General's office would create a conflict of interest with its primary responsibility for prosecution of violations of state law. Consequently, both of these alternatives were rejected.

Eager to get this important matter resolved as soon as possible, the committee proposed three alternatives and sought guidance from the Governor as to his preference on the matter. State Court Administrator

Winberry drafted a letter to Gorton requesting that he solicit the Governor's guidance on this matter. The letter listed the committee's preferred alternatives, strongly urging an independent commission as its first choice:

The Advisory Committee would like to have you discuss with the Governor what he would think of an independent commission to undertake continuing security and privacy responsibilities within the state. It is the consensus of the committee that whatever agency ultimately undertakes the long term responsibility, it should be broadly representative of the various interests which are affected by security and privacy regulations as well as by the public. An independent commission would be most desirable in the view of the members of the Advisory Committee, but we are aware of the administrative and political considerations which might make that an unacceptable recommendation and we would like to know if that is the case (Winberry, 1976).

The other two alternatives presented in the letter included attaching the Security and Privacy Advisory Committee to the Attorney General's office or assignment of administrative responsibility to the Office of Community Development. While the Governor's subsequent review of the committee proposals, as reported in a letter from Gorton to Winberry did provide some guidance, he questioned whether Title 28 regulations actually required the state to vest administrative authority in an existing state agency:

The Governor asks whether or not the State of Washington is required to have a specific agency undertake continuing security and privacy responsibilities within the state, and/or whether it is required to have an advisory committee to such an agency.

The Governor, with my concurrence, is opposed to the creation of an independent commission on the subject in any event, feeling that the state already has too many boards and commissions. For my part, I do not wish such a responsibility assigned to the Office of Attorney General. Therefore, it is the preference of both the Governor and myself, choosing among your three alternatives, that the

responsibility to the extent required, be delegated to the Office of Community Development (Gorton, 1976).

In effect, the Governor's preferred alternative affirmed the status quo, for the SPA was already housed within the Office of Community Development (OCD). Furthermore, the OCD was created by the Governor to administer all federal programs (e.g., Comprehensive Employment and Training Act, Community Development Block Grants and LEAA) and meet various planning requirements. Thus the LEAA privacy regulations seemed to logically fit into this mold.

The Attorney General also indicated that the Governor had some reservations about the appropriateness of the Office of Community Development, since it was a planning rather than an operational agency, thus leaving open the possibility that if the committee were to determine a more appropriate agency, such as the Department of Social and Health Services, he may reconsider his recommendation. Consequently, with the committee's consent, Winberry contacted several agencies to determine their interest in undertaking administrative responsibility for security and privacy.

It is obvious from a review some of the responses from agencies contacted about their interest in administering security and privacy regulations that they were not eager to undertake such an odious task. For example, the Deputy Director of the Corrections Division of the Department of Social and Health Services (a super agency created by Governor Evans) made a blunt, unambiguous reply:

Quite frankly . . . it is apparent that the department is already seen by many as an overly large and complex agency and I think planning responsibility for security and privacy matters within our agency would be seen as adding insult to injury (Burdman, 1976).

William Bachofner, the Chief of the State Highway Patrol, also rejected any additional regulatory responsibility as inconsistent with the Patrol's perceived role in the criminal justice community:

To maintain the continued rapport the Identification section coordinators have with the criminal justice agencies at present and to have the same people conducting an audit which could possibly involve criminal penalties would destroy our effectiveness (Bachofner, 1976).

The State Patrol's position on this policy matter did not soften during the 1977 legislative session, even though the Sheriffs and Chiefs Association and other law enforcement lobbies urged that the Patrol assume administrative control.

Having exhausted the possibility of engaging other state agencies in the administration of privacy regulations, and acknowledging the need to separate the privacy regulatory authority from agencies covered by the regulations, the committee gravitated toward acceptance of the Governor's stated preferences, as O'Connor's notes of the February 13 committee meeting indicate:

There was agreement that having an operating agency regulate itself as well as sister agencies would not be desirable, and that a commission which would be representative of non-criminal justice as well as criminal justice views should be established with specific authority. In light of the views expressed by the Governor to the Attorney General, attaching such a commission to the Office of Community Development for administrative purposes might be the best feasible solution (O'Connor, 1976).

It was evident as the time drew nearer to submit a final plan to LEAA that the Director of OCD did not concur with the committee's endorsement of the Governor's recommendation. The OCD director was invited to express his views at the last formal meeting of the committee (on June 25, 1976) and proceeded to douse their proposal with cold

water. In what was surely an awkward moment for the committee members and staff, the OCD director, Richard Hempstad, contended that it was inappropriate to lodge a regulatory commission in an executive branch of government because its functions were clearly quasi-judicial in nature. Moreover, Hemstad stressed (perhaps inconsistently) that housing a regulatory commission within the OCD would constitute a conflict of interest, because it already had control over the allocation of LEAA funds (Washington Attorney General's Advisory Committee on Security and Privacy, 1976).

Recognizing that the OCD director's views constituted a clear veto of the committee's plan, the recommendation was withdrawn to attach a security and privacy commission to OCD. Instead, the committee simply adopted the stance that the plan set forth the need for such a commission and carefully explained why the committee had been unable to select an appropriate agency.

The State Planning Agency

Not only was there little sense of urgency on the part of state government and criminal justice officials as to the need to comply with this latest of LEAA guidelines, but the State Planning Agency (SPA) was hardly in a strategic position to mount support from the criminal justice community necessary to gain passage of state criminal records privacy legislation.

Almost from its inception in 1970 as the Law and Justice Division of OCD, the SPA was beset with an absence of a sense of mission and policy purpose, inconsistency in leadership, staff

turnover and a lack of a coherent grant award process. During the decade of its existence (1970 through 1981) the SPA had three permanent and two acting administrators. Each successive administrator was confronted with different circumstances and demands, and had varying aspirations, management styles and policy interests. The SPA organizational structure and grant allocation process underwent numerous changes with each successive administrator. Grant award and management processes particularly exhibited distinctive changes. When the SPA first initiated its grant award activities under its first administrator, James O'Connor (1970 through 1973), that process was organized in what resembled a combination of what Feeley and Sarat (1980) term the "agency advocacy" and "cafeteria menu" approaches.

During the initial years of the LEAA program, there were intense pressures for SPA to spend money quickly in order to achieve some visible results. Under these conditions each criminal justice agency had to insure it could get a satisfactory share of the resources. Consequently, grant recipients carefully cultivated an SPA staff person who would in essence be an "advocate" for its particular project. What evolved from this practice was an agency structured in separate divisions, each serving a separate component of the criminal justice system. Thus, the annual state plan was the product of a logrolling process in which support for one project was provided in exchange for a reciprocal support for another.

However, this approach was neither successful in promoting innovation nor coordinated approaches to the problem of crime. The fact that numerous other states adopted similar planning allocation

processes perhaps prompted LEAA to promote a new campaign of crime-specific planning to get the SPA's back on track toward the intended goal of the Crime Control Act (Feeley and Sarat, 1980: 83). Crime-specific planning required that the SPA's identify projects not in terms of the needs of particular criminal justice components but rather in terms of novel strategies by which agencies might collaborate in improving the administration of criminal justice and reduction of crime.

The "cafeteria menu" approach was an adaptation to crime-specific planning employed by Washington and other SPA's. According to this strategy, projects would be funded which deal with specific crimes, such as burglary or larceny. Order and purpose was now introduced into the state planning process. Instead of listing projects according to components in which they were funded, projects were now categorized according to crime-specific problems. As an expression of its unequivocal commitment to the strategy, the LEAA launched a \$20 million demonstration project in eight cities called the Crime Impact Project to test the extent to which crime could be reduced by concentrating resources in programs targeted toward particular crimes. Subsequent negative evaluations cast serious doubt on the crime reduction potential of such approaches. Moreover, the National Conference of State Planning Agency Administrators grew more critical of being held to crime reduction performance objectives they were unable to satisfy, much less measure.

Saul Arrington, the second administrator of the Washington SPA (1973 through June 1977) was among those SPA administrators who actively lobbied LEAA to relax crime reduction performance measures and provide

greater flexibility to the states to manage planning and allocation activities. Evidently, Arrington, a vice president of the National Conference of SPA Administrators from 1974 through 1977, was more interested in the national and state politics of the LEAA program than with effective day-to-day leadership and management of his own state planning agency staff. His neglect of leadership and administrative responsibilities had two principal effects: (1) staff restiveness and demoralization precipitated inter-division conflicts and internal reorganization; and (2) subsequent close scrutiny by the Ray administration lead to his replacement in 1977.

Given both the unpopularity and ineffectiveness of crime-specific planning, LEAA placed increased emphasis from 1975 through 1977 on the standards and goals strategy. A National Advisory Commission on Criminal Justice Standards and Goals was appointed in 1971 to generate recommendations to LEAA regarding ways in which the administration of criminal justice might be improved by providing benchmarks by which progress towards goals may be judged. Seven large volumes were published by the commission in January 1973. In the following two years, the LEAA funded grant applications submitted by the states in which a standards and goals project would be established within the State Planning Agency. O'Connor, the first SPA administrator was coaxed back to the SPA in order to initiate the standards and goals project in early 1975. A few new staff were hired to conduct research and produce standards for the various criminal justice components, including information systems. After a year of work no standards have been produced. Instead, the staff had been utilized

largely in an information gathering and technical assistance capacity by state and local agencies. In many instances, their efforts were directed toward grant preparation assistance for local project applicants.

The standards staff underwent a complete turnover by early 1976 when the project finally expired. Given the absence of adoption of any standards or goals by the Governor's committee and continued pressure on the SPA's by the LEAA to produce concrete results, both the SPA administrator and Governor's Committee members considered a new standards grant application as a prudent idea. This initiative was given added impetus by Chris Bayley, a young and ambitious second term King County Prosecutor (and newly appointed Standards and Goals Subcommittee chairman), who saw a renewed standards effort as a way to influence state criminal justice policy. He was particularly interested in improving prosecutorial effectiveness and producing a tough new determinant sentencing law which would abolish the Parole Board and greatly reduce reliance upon a strategy of rehabilitation.

To insure that his policy interest would be pursued, Bayley recommended that a young and able attorney, who had served briefly as one of his deputy prosecutors, be selected as the director of the standards and goals project. Acting on the assumption that attorneys are a good source of expertise on criminal justice policies, two more attorneys (with excellent credentials but extremely limited experience) were hired over the next two months. One was appointed as an assistant director and another was assigned to produce standards for courts and prosecutors.

By April 1976, several positions were yet to be filled in the \$300,000 grant which called for an information system specialist, corrections and law enforcement specialists and an individual with social science research skills and expertise. The standards director was not particularly eager to rapidly expand the staff to its full complement. For one thing it would stretch his limited management capabilities and for another limited accomplishments of the prior standards efforts dictated that results should be forthcoming as soon as possible. Only one other staff hired was considered timely and necessary. Thus, the author was hired in mid-April to coordinate the development of standards for state and local criminal justice information systems.

The standards staff quickly discovered that the rest of the SPA staff members, particularly the planning division, were not particularly eager to reorganize a planning and grant award process in order to accommodate the latest LEAA measures of successful performance. For months, the standards director was unable to make any headway with the planning director to reach agreement on how standards and goals would be integrated with the planning and grant award process. Finally, in July 1976, a two-pronged strategy was adopted. First the Governor's Committee would identify policy priorities for which meaningful standards could be developed. Second, when standards were forthcoming they would be attached as conditions of aid to state grant awards (Brandt, 1976).

The 1977 Legislative Session: The Federal
Privacy Mandate Becomes State Law

The SPA legislative agenda

The activity of the Governor's Committee and SPA staff grew more frantic and anticipatory as the 1977 legislation session approached. The fact that the 1977 deadline for compliance to the LEAA Title 28 Privacy Regulations was imminent was all but obscured by the confluence of several criminal justice legislative proposals which preoccupied the Governor's Committee. Chris Bayley had now prepared a draft of the new sentencing law, preceeded by a thoughtful and timely article published in the University of Washington Law Review. In addition, the new chairman of the House Institutions Committee, Ron Hanna, was submitting a Juvenile Justice Reform Act (drafted with the assistance of the standards project staff). Finally, the SPA administrator had the standards staff collaborate on a draft bill which would convert the Governor's Committee on Law and Justice into a statutory commission. This would be one way to satisfy an LEAA mandate which required that the state legislature or Governor (through executive order) provide a mechanism by which comprehensive criminal justice planning could be conducted on an annual basis.

The SPA enabling legislation would require consensus among criminal justice officials as well as approval by the Governor's office. Therefore, the SPA administrator scheduled a meeting for the chairman and sub-committee chairs in mid-December 1977 in order to produce a consensus bill and discuss other legislative proposals. Attorney General Gorton and King County Prosecutor Bayley were generally

supportive (with some minor changes) of a bill to convert the SPA into a state criminal justice planning commission. However, the King County Sheriff and other law enforcement officials in attendance were generally suspicious and opposed to such a permanent commission. The King County Sheriff complained that such an agency would constitute a prelude to the creation of a department of justice--the super agency considered to be a threat to the autonomy of local law enforcement. In addition, the Governor's representative at the meeting, Hempstad (the Director of OCD) indicated that Governor Evans was not particularly in favor in creating more commissions and expressed his reluctance to preempt the views of the incoming Governor Ray on this issue. Consequently, further discussion was tabled until the new governor could be approached about how she proposed to respond to the issue.

The meeting had nearly drawn to a close (with Attorney General Gorton leaving early with other pressing business) when O'Connor walked in with a sheaf of paper. O'Connor was there to present his draft of security and privacy legislation for review, comment and approval by the meeting participants. Needless to say, the few remaining officials and staff were not eager to undertake yet another laborious discussion on an issue few understood or cared about. One member of the Governor's Committee in attendance recommended that a copy of the draft be sent to an appropriate subcommittee for subsequent review. Somewhat disheartened by the indifferent reception to over a year and a half of Advisory Committee work, O'Connor reminded the officials that he was now off contract. He would insure that the bill was handed over to the Senate Judiciary Committee, but that others would have to take responsibility for what happened to the bill after that.

Gubernatorial reorganization

Once she assumed office, Governor Ray did not waste any time appointing new agency administrators to undertake a general reorganization of state government. During the campaign, she had singled out the Office of Community Development as a glaring example of how the proliferation of federal programs had greatly enlarged the state bureaucracy. Moreover, she had contended that federal planning requirements had spawned a new class of civil servants who threatened to usurp state policy making functions with a kind of "socialistic" planning, alien to incremental political processes.

In late January 1977 Governor Ray appointed Blair Butterworth, her campaign manager, as Acting Director of OCD with the mandate to commence a reorganization of the office in which many of its functional activities would be reassigned to other agencies. There was some irony to the selection of Butterworth to execute this mandate, for he had been strongly identified and intimately associated with the administration of the federal "War on Poverty" programs a decade earlier. For example, as western Regional Administrator of the Economic Development Administration, he had helped administer the \$28 million demonstration jobs and public works program in Oakland, California, that was subsequently documented in a now classic study by Pressman and Wildavsky (1973).

The OCD division of most concern to both Governor Ray and Butterworth was the Law and Justice Planning Office, that is the SPA. Local law enforcement had repeatedly criticized the SPA for over regulation and inconsistencies in grant award processes. As a special

Deputy Assistant assigned to conduct a review of the Law and Justice Planning Office indicated in a 1980 interview, the new OCD administrator was particularly troubled by Arrington's administrative style:

Butterworth wanted to know what was going on in the Justice Division, in part because it was physically separated from the other federal programs administered by OCD. There was a general feeling that Arrington operated autonomously from the other units because Hemstad [the previous OCD Director] had given him free rein. When pressed about the details of what each of his staff were doing, he didn't seem to know or care about what they were doing. It was really a Machiavellian environment.

As the fact-finding process progressed, the new OCD leadership became more convinced that Arrington would have to be replaced. A vacancy in the position of Standards and Goals director provided the opportunity to infuse new blood into the state planning agency. Butterworth's Deputy Assistant recommended that Arrington offer the job to Donna Schram. Schram, who holds a Ph.D. in clinical psychology, was a personal friend and former colleague of the Assistant while at the Battelle Research Institute, and had established a strong reputation in criminal justice research and policy development. Ultimately she became Arrington's replacement in early June 1977.

Schram persuaded Arrington that the SPA should adopt an aggressive posture and stay on top of legislation of most concern to the Governor's Committee. Schram was particularly interested in addressing the serious issue of prison over crowding, including juvenile justice and sentencing reform. Consequently, the criminal records privacy legislation would nestle in the safety of near obscurity. In fact, for the first three months of the 1977 legislative session no one knew

(nor probably cared) what had happened to the criminal records privacy legislation after it was submitted to Senate Judiciary Committee.

Committee hearings on SB 2608:
finding an administrative home

Then, in late March, the criminal records bill surfaced. The Senate Judiciary Committee scheduled a hearing for March 22, 1977, in which Senate Bill (SB) 2608, the Washington State Criminal Records Privacy Act (WCRPA) along with several other pieces of legislation were discussed. Standards Director Schram assigned her information systems specialist to attend this and other hearings held on the bill.

Unlike its unsuccessful predecessors in 1974 and 1975, this latest privacy legislation had much better prospects of getting serious attention. An attorney and trial lawyer, the chairman of the Senate Judiciary Committee had strongly supported due process rights for criminal records data subjects. In addition, the bill reflected an impressive consensus building process through the Attorney General's Security and Privacy Advisory Committee. Most relevant interests had had an opportunity to be involved in the planning process and most had seen and commented upon the draft legislation.

What the Senate Judiciary Committee considered most important about the bill was that some form of policy response was required in order to continue to get LEAA funds and the SPA had persuaded the committee that legislation was the best method. In addition, since the publication of the Title 28 regulations the uncertainty regarding the conditions under which criminal records information could be released under the federal mandate had produced wide variations in

interpretation by state and local agencies. Some agencies had imposed a moratorium on the dissemination of any and all criminal justice information. This was less than a satisfactory state of affairs especially for news media whose life blood depended in no small way on publishing the latest local crime news. Therefore, the press was eager to get a uniform policy.

As with any law involving some form of regulation, the bill needed an aggressive sponsor or "fixer" (Bardach, 1977a) to shepherd it through the legislative process. However, no such fixer was immediately forthcoming. Both the Senate and House Judiciary Committees sought testimony and guidance on what to do with SB 2608.

Committee members were particularly opposed to the creation of a new commission (perhaps recognizing the futility of such a recommendation to Governor Ray) and suggested instead that the State Judicial Council best approximated the commission concept. While State Court Administrator Winberry was not eager to undertake added responsibilities for the Judicial Council which he staffed, he reluctantly conceded that the Judicial Council would be one of several possibilities. With this tentative, noncommittal concession extracted from the State Court Administrator, the Judicial Council quickly replaced the security and privacy commission concept in both Senate and House versions of the bill. This provision remained unchallenged until increased interest by the SPA in the status of the criminal records privacy bill provided Winberry with an opportunity to divest the Judicial Council of an unwanted role.

After the Senate Judiciary hearings on WCRPA, staff had more time to review the substance of the bill. Staff subsequently prepared a detailed analysis which identified how the proposed state law satisfied LEAA guidelines and which recommended some changes. That statement was subsequently approved by the OCD director and submitted to the legislature. The hearings held by the House Judiciary Committee on April 12 provided the first opportunity for the Office of Community Development and the State Planning Agency to go on record regarding the status of the WCRPA.

With new leadership at OCD, there was the possibility of greater receptivity to the idea (rejected by the Evans administration) that the Law and Justice Division assume administrative authority for security and privacy. The OCD director seemed favorably disposed toward the idea and lent formal agency support to it. As it turned out, the committee was eager to hear from a state agency which could speak authoritatively about the federal privacy mandate and appropriateness of a state response. Numerous questions were raised at the hearing with respect to extensiveness of coverage, fiscal impact and the capability of local agency compliance. The SPA was asked to present testimony and announced that OCD was now willing to assume administrative ownership of a state privacy law and offered multiple reasons why OCD was the best available agency:

Substitute SB 2608 locates this authority in the Judicial Council. However, this is questionable and inappropriate. The Judicial Council, by the State Court Administrator's own admission, does not have the expertise, nor is it appropriate for the courts to administer what is more properly an executive function. The Office of Community Development is, on the other hand, the proper agency to

administer the security and privacy regulations. OCD, through its Law and Justice Planning Office, administers LEAA funds which in essence cover the entire criminal justice system. Further, OCD is independent of criminal justice operating agencies and thus capable of a more disinterested and fair implementation of its requirements. Further, the Law and Justice Planning Office performs a regulatory function by virtue of its responsibility to interpret federal guidelines and allocate federal funds (Dalton, 1977a).

Winberry subsequently testified in support of the recommendation that OCD or some other executive department be assigned authority to administer the law instead of the judicial council. In addition, he noted that the recent withdrawal of the judiciary from coverage by the federal regulations obviated the direct involvement of the judiciary in security and privacy regulation and administration.

It was difficult to gauge the extent of support by the legislature and Governor for OCD administration of security and privacy. Governor Ray had made it clear that she was critical of the cost and other burdens that unnecessary federal regulation imposed on the states and localities. She was inclined in her administration to reverse the state's role in perpetuating this situation. In addition, the House Judiciary Committee had several pieces of legislation to consider including a controversial Juvenile Justice Act, which was amended sixty-seven times.

Moreover, the strong move by the Office of Community Development to assert control over administration of criminal records privacy regulation was alarming to law enforcement interests. The Sheriffs and Chiefs Association was particularly unhappy by the prospect of the SPA acquiring additional regulatory authority on top of its already

burdensome planning and grant awards guidelines. In order to avert this possibility, the Association prodded the State Patrol to take a more aggressive posture and offer to accept administrative responsibilities for the regulation. To their consternation, the Chief of the Patrol was only lukewarm to the idea and his chief of the Identification section (CSR) was positively opposed to such an idea.

What the Sheriffs and Chiefs Association failed to realize was that the Patrol had some reasons of its own to support or, at least, not hinder the SPA's efforts. The Patrol had introduced a bill early on in the session which would confer the power to investigate and prosecute persons suspected of state felony offenses. In essence, such a law would make the patrol equivalent to a state police. The impetus for the proposed legislation originated in the Organized Crime Intelligence Unit (a unit begun by an LEAA grant) because its investigative activities were continually dissipated for want of prosecution. This provided the basis for a quid pro quo between the SPA and Patrol: in exchange for SPA support for this legislation, the State Patrol would support the SPA's attempt to secure privacy regulatory authority. Arrington did in fact attempt to swing the Governor's Committee in favor of the Patrol's legislative agenda. However, the patrol surely got the worst end of the bargain for support from the Governor's Committee was not forthcoming (Schram, 1980).

The death and resurrection of criminal
records privacy: legislative and
executive staff influence

As a deadline neared for the House Judiciary Committee to report its remaining bills out for floor vote, it was clear that the criminal records privacy bill would not be one of them. The committee had been flooded with criminal justice and other kinds of legislation and compliance with Title 28 federal regulations was not an important priority.

The information systems specialist was somewhat surprised to learn by a phone call toward the end of May from William Hagens, chief counsel of the House Institutions Committee that the bill had been revived by being transferred to the Institutions Committee chaired by Ron Hanna, a young, ambitious representative of a small Puget Sound resort area whose career had catapulted as a result of rounding up the votes necessary to elect the new speaker of the House, John Bagnariol. SPA Administrator Schram was perplexed why Hanna was so interested in seeing the bill passed. As Hagens indicated in a subsequent interview in 1980, Hanna had been strongly supportive of creating a Department of Justice and was thus disappointed when the OCD leadership failed to back the SPA's attempt to submit enabling legislation to create a permanent criminal justice planning commission. Thus passage of an SPA administered security and privacy regulation provided a foundation upon which other regulatory and planning functions could be added.

Hagens invited SPA representatives over to his office to propose language in which the bill could be amended to give the SPA statutory authority to administer the law. A committee hearing was

arranged for the following Monday in which a vote could be taken to pass the bill out for a floor vote. Subsequently, the next Monday the committee held a rather perfunctory meeting and the proposed legislation glided through without dissent. However, a difficulty immediately arose the next day. Hagens notified the SPA that upon a closer reading of the bill, one of the committee members discovered an objectionable provision in the bill--a provision supported by the Allied Daily News Association which defined the limits of privacy invasion for the purposes of limiting the liability of the press in publishing information otherwise restricted by the criminal records privacy bill. This oversight nearly cost the bill the support necessary for passage.

Throughout most of the session the ACLU, the Allied Daily News Association and the originator of the state's public disclosure law, Jolene Unsoeld, had been locked in conflict over a bill proposed by the news association to limit the extent of liability for invasions of privacy. As insurance against the possibility that the attempt might not be successful, the Allied Daily News Association attached a brief section to the criminal records privacy bill which amended the public disclosure law specifying the conditions which constituted an invasion of privacy. The section was brief and concluded with the following language:

. . . a person's right to privacy has been violated where the person's personal privacy has been unreasonably invaded if facts or allegations of facts about an identifiable individual, the publicizing of which would be highly offensive to a reasonable person, are disclosed in a circumstance in which the facts or allegations are of no legitimate concern to the public (Washington Substitute Senate Bill 2608, 1977: Sec. 6).

The ACLU was upset by the definition of privacy because it was too simplistic and failed to address important issues involving public information systems. The Public Disclosure Commission was angered because the definition would confuse and obscure what constituted a public record. The intransigence of both sides threatened to give the criminal records privacy bill far more notoriety than expected and threatened to prevent the bill from reaching a floor vote.

The SPA attempted but failed to get the parties to find another forum by which they could settle their dispute. Instead, the Allied Daily News Association representative, Paul Conrad, continued to hold the bill hostage. The News Association, however, did not anticipate Representative Hanna's clout on the floor of the House. Hanna persuaded a former majority leader to propose a motion to eliminate the questionable amendment. It passed and the Washington Criminal Records Privacy Act (RCW 10.97) received unanimous support for passage. Although the bill was now on its way to the Senate floor for a vote, the Senate version still contained the controversial amendment. Even if the bill did pass with the amendment, a conference committee would have to work out the differences and the likelihood of a compromise appeared slim.

It was evident to the OCD leadership that stronger measures of influence would have to be employed to get the Senate to pass the WCRPA unencumbered by the News Association's controversial definition of privacy. The mechanism seized upon was the Juvenile Justice Act. It too had passed the House floor vote and awaited approval in the

Senate where it was expected to pass by a fairly wide margin. An OCD Deputy Assistant to Butterworth decided to capitalize on the popularity of the bill by suggesting that if the News Association's privacy amendment was not withdrawn, Governor Ray (no real fan of the Juvenile Justice law because of the political conflict with its proponents) would be asked to consider vetoing it if it reached her desk. The gesture struck a responsive chord and by a two vote margin the Senate struck the amendment and thus passed the WCRPA intact on June 10, 1977.

Senate passage of the WCRPA did not guarantee that it would become state law. Dixie Lee Ray still had to sign the bill within a ten day period which was ample time for law enforcement and other opponents to make their case for selective or complete veto. Surprisingly, evidently resigned to the inevitable prospects of SPA privacy regulations and assuming that the Governor would sign it since OCD supported it, no objections were forthcoming from law enforcement or the rest of the criminal justice community. Rather, opposition came unexpectedly from the Office of Policy Planning and Financial Management (OPPFM).

The cost of compliance: the
Governor's veto deterred

Before any bill passed by the Washington State Legislature reaches the Governor's desk, it must be reviewed by the OPPFM to assess the fiscal impact on state and local government. However, OPPFM review had rarely been confined to budget matters. For, as the title of the agency implies, it could advise the Governor as to its

perceptions of the policy implications of proposed legislation. Normally, the state budget staff will assist in the preparation of fiscal notes if required by legislative committees. In turn, fiscal impact estimates are used to evaluate appropriation requests which may accompany the legislation. Approximately six days after the WCRPA had been passed by the legislature and only four days before the deadline for Governor Ray's signature, an OPPFM budget analyst notified SPA staff that the WCRPA failed to include a fiscal note. Until one was forthcoming the bill would not be forwarded to the Governor's office. In addition, not content with the consensus reached in the legislative process, the budget analyst indicated that he questioned the appropriateness of placing administrative authority in the SPA. He argued that perhaps a better place would be the State Department of Licenses or the State Patrol.

This came as quite a surprise to SPA staff in that as early as March 25 they had discussed with OPPFM the need to broaden coverage of a fiscal note which at that time involved only one state agency, the Department of Social and Health Services. Further, the SPA urged that a state appropriation be considered to implement the bill in the absence of LEAA funding. Evidently neither of these recommendations were heeded.

The OPPFM analyst's challenge of the appropriateness of the SPA administrative authority reflected an ignorance of the political consensus underlying the decision. If the Governor were apprised of these views, it might threaten to undermine the credibility of the SPA. In the little time that remained, the SPA staff drafted a

memorandum to Butterworth for forwarding to the Governor which attempted to persuasively address both fiscal and administrative issues.

Unable to draw from any precise budget data for the State of Washington, SPA staff quickly gathered cost information from several other states which had already enacted security and privacy legislation. The annual cost of privacy administration ranged from \$60,000 in Iowa to \$350,000 in Massachusetts. State implementing agency budgets did not exceed \$100,000 in any of the states surveyed. This information was presented along with an estimate of the state agency and local government cost. In addition, the memorandum indicated the SPA could absorb initial first year administrative costs of implementation until a special appropriation request was considered in the next legislative session.

Along with this information a work plan was developed which carefully itemized implementation activities to be executed by the SPA. This was done to anticipate concerns that an unfavorable OPPFM recommendation might create about the SPA's capability to execute administrative responsibilities.

Before the SPA staff had completed the memorandum to Ray the OPPFM staff telephoned to indicate that he would recommend that the Governor veto the section of the bill which empowered the SPA to administer the law. It was evident from this response that no additional data from the SPA would be persuasive enough to overturn the OPPFM analyst's predisposition toward the dissolution of the SPA role in the state privacy regulation. Consequently, the SPA staff recommended that Butterworth take some action immediately. Perhaps there was a

chance that these negative recommendations could be stopped from reaching the Governor's desk. Butterworth's Deputy Assistant persuaded him to send the OPPFM director a letter which communicated the concerns concisely if not bluntly:

I have been informed that recommendations may be emanating from your staff to the Governor to veto Section 9 of SSB 2608 which places responsibility for implementation of the Security and Privacy Act in the State Planning Agency (currently the Law and Justice Planning Office, OCD).

The final, long-term resting place for this program has not been determined. However, I had been under the impression that there was concurrence in the Legislature that the Law and Justice Planning Office was the appropriate place to house implementation of the program--at least for the time being. . . .

I understand that [your staff is] prepared to propose that responsibility for Security and Privacy rest with the State Patrol or the Department of Motor Vehicles. Testimony and analysis to date on the bill have indicated that putting Security and Privacy in the State Patrol is equivalent to having a starved fox guard some Washington fryers. The DMV is in the transition process between data systems: certainly an additional administrative burden would be costly to that agency at this time (Butterworth, 1977).

The Butterworth memo had the desired effect, for the OPPFM recommendations were never forwarded the Governor's office. The Governor's staff did receive the memo drafted by the SPA staff, and after a phone inquiry from the Governor's office to Butterworth to clarify some obscure point, the bill was signed to bring the State of Washington into compliance with the federal regulations. The timing of the arrival of the bill at the Governor's desk was extremely favorable. The 1977 legislative session was nearing adjournment and produced a deluge of bills for the Governor's signature. The Juvenile Justice Act was among those many pieces of legislation which no doubt

deflected close scrutiny of the state law which was about set in motion state implementation of yet another federal mandate.

The Special Appropriations Request Derailed

In late September, with a full agenda of implementation activities now planned and initial draft of the guidelines underway, an OCD fiscal analyst was assigned to assist in the development of a cost estimate for submission to the Governor and state legislature in December. Subsequently, a schedule for a series of meetings with state and local criminal justice officials, city and county associations and others was developed in order to identify impacts and costs.

Both the details of this plan and a short letter to go out to state and local criminal justice agencies were presented to Eugene Wiegman, who had replaced Butterworth as OCD Director. The memo which accompanied these materials stated in part:

Although the bill did not receive an appropriation, OCD and the Law and Justice Planning Office designated by RCW 10.97 as the implementing authority, are concerned that sufficient state funding be provided to all directly impacted agencies, so that implementation and the compliance effort may proceed with maximum effectiveness.

In order to insure this effort is successful, the Law and Justice Planning Office of OCD is willing to provide assistance to your agency to develop work plans and cost analyses for the purpose of making a special appropriation request to the House Appropriations Committee in late November or early December (Dalton, 1977b).

The memo was submitted to Schram along with the explanatory materials for her review and approval. Surprisingly, she was furious about the process by which cost information would be solicited from state and local agencies. Such a strategy, she felt, would invite criminal justice agencies to submit exaggerated, unreasonable and

absurd estimates of fiscal impact. Consequently it would put the SPA and OCD in the awkward position of defending an inordinately large budget request before a legislature which sought increased fiscal austerity. In a subsequent interview conducted in 1980, Schram reflected that she expected the magnitude of the costs for compliance to security and privacy guidelines to be so large that it would have "robbed other priority areas such as prison overcrowding of sufficient funds to solve longstanding and festering problems."

Subsequent interviews with criminal justice officials revealed that while Schram's estimate of the fiscal impact was incorrect, her objection to a strategy to solicit cost estimates from criminal justice agencies reflected a realistic assessment. A records division manager from an urban police department in eastern Washington stated it this way:

A state-wide appropriation for compliance to security and privacy was not appropriate. But the incentives were there at the time to support it because it meant that additional handouts would be available. Law enforcement's criticism of the enormous costs involved in compliance with privacy regulations was just a dodge to get more money to support local information system costs. We incurred costs of around \$10,000 to enhance the fiscal security of our own information systems but we planned to do that long before the state privacy law was passed. Most smaller departments in this state could get by with an expenditure of less than \$1,000.

Other law enforcement officials expressed similar views. For example, an assistant chief of a western Washington police department indicated that a file update project was initiated to obtain complete arrest and disposition records by a temporary reassignment of field evidence personnel. He estimated that it took approximately 500 hours of time to accomplish the tasks. Significantly, throughout an interview

with the head of the records data section of the Seattle Police Department, additional costs were never mentioned as a substantial impact of WCRPA. Interestingly, while the withdrawal of a special appropriations strategy did not really have an adverse effect on other implementation activities, arguments about cost impacts have continued to be trotted out as a way to cause a retraction of proposed guidelines.

Passage of state legislation was an important step taken towards implementation of the federal mandate. State and local criminal justice information systems were no longer governed solely by federal conditions of aid, but also by a state law with criminal and civil penalties for non-compliance. While the legislation reflected a consensus among legislators as to the broad outlines of state policy, criminal justice and other interests were far from being completely satisfied with every provision and were apprehensive about how the SPA would deal with these issues during the implementation stage. In fact, the depth of conflict (and nature of the opposition) over criminal records privacy policy did not begin to surface, as the next chapter indicates, until the guideline development process commenced in late September 1977.

C H A P T E R V
THE GUIDELINE DEVELOPMENT PROCESS
IN WASHINGTON, 1977-1978

Following the adoption of the Washington Criminal Rights Privacy Act (WCRPA) in June 1977, the State Planning Agency (SPA) began to develop guidelines for implementation of the new law.

Much of the initial conflict in the guideline development process focused upon two policy issues: limitations to dissemination and rules for individual access and review. Given the protracted conflict over the LEAA draft guidelines on dissemination policy and recognizing the latitude that LEAA provided to the states to develop their own policies, difficulties could be expected to surface in the development of state and local procedures. Conflict was especially likely since the Washington law enunciated a dissemination policy whose ambiguity encouraged uncertainty and competing interpretations.

As indicated in Chapter I, LEAA gave the states discretion to determine the restrictiveness of regulations for dissemination of conviction and non-conviction information. Although the WCRPA adopted a more restrictive policy on the dissemination of non-conviction data than required by LEAA, the policy for dissemination of conviction information was stated in somewhat equivocal terms: "Conviction information may be disseminated without restriction" (RCW, 1977: 10.97.50).

It became evident shortly after passage of the WCRPA that a great deal of uncertainty prevailed as to what this phrase implied for local law enforcement. Because of that uncertainty, many agencies chose not to release any information regarding criminal justice matters for non-criminal justice use. One source of difficulty on dissemination policy stemmed from the use of the word "may" which implied that the release of conviction information could be restricted. The discretionary "may" instead of a mandatory "shall" prompted many criminal justice agencies to forbid disclosure of any criminal history record information until the SPA guidelines had clarified this and related statutory matters.

While difficulties with regard to dissemination policy were expected, the extended conflict over rules for individual access and review were not anticipated. The LEAA guidelines for individual access had attracted little attention and almost no controversy, with the exception of some comments by the FBI. Perhaps this was because of very general language used to characterize the procedures states could employ to implement these rights. Also, as Chapter III indicates, most subsequent state laws exhibited little variation in how they construed an effective and non-burdensome process to enable data subject review, access and challenge of criminal history record information. Therefore, staff were surprised at the intensity of concern by both civil liberties and law enforcement interests about this issue.

Developing and implementing guidelines for WCRPA involved two different committees. First, dissemination policy provided the only on-going policy and decision making role for the existing Governor's

Committee on Law and Justice, which was the body required by LEAA to coordinate criminal justice policy and allocation of grant funds and to which the SPA reported. The case shows that difficult and controversial decisions regarding dissemination had to be made by a Governor's Committee with little experience in or desire to regulate criminal justice processes. Second, the SPA created a special Ad Hoc Advisory Committee broadly representative of criminal justice and non-criminal justice interests to increase communication with affected agencies and to advise the SPA on drafting implementation guidelines. This latter committee was the effective working group in which controversy emerged and had to be resolved over such issues as individual access and review of files.

What follows in this chapter is a close examination of the factors and interests involved in development of guidelines with respect to dissemination and individual access in order to deepen our understanding of the political significance of state guidelines in policy implementation processes.

Gauging Responses of State and Local Criminal Justice Officials

No sooner had the SPA acquired administrative responsibility for implementation of the Washington Criminal Records Privacy Act than a wholesale turnover of leadership occurred both in the Office Community Development, Law and Justice Planning Office (SPA) and Governor's Committee.

OCD Director Blair Butterworth was replaced by Eugene Wiegman, a longtime friend of Governor Ray. Like Ray, Wiegman had had previous

experience at federal positions; he was also a former college president and had been an unsuccessful candidate for the U.S. Congress. Wiegman was eager to dismantle OCD and develop a new image of the agency. Subsequently, the CETA program quickly became a new division of the State Employment Security Department and plans were made to transfer the Law and Justice Planning Office, by executive order to the Office of Financial Management (formerly OPPFM) by January 1978. Wiegman was also assigned to replace Attorney General Gorton as chairman Pro Tem of the Governor's Committee on Law and Justice. In fact, due to the unexpected resignation of the head of Employment Security, Wiegman headed both OCD as well as Employment Security from September through December, at which time he gave up his role at OCD and chairman of the Governor's Committee to assume a permanent appointment as Commissioner of the State Employment Security Department.

Before leaving, Butterworth persuaded Wiegman to replace Arrington with Donna Schram as acting administrator of the Law and Justice Planning Office. Schram's impeccable criminal justice research credentials and demonstration of forceful policy leadership with the standards project had been impressive. However, the law enforcement community was wary because she was an unknown quantity to their ranks, and thus suspected (correctly) that the grant award process would be tightened and brought within the ambit of her special policy interests. As noted earlier, the policy areas of most interest to her were prison overcrowding and sentencing reform.

Schram recognized the special administrative responsibilities that WCRPA created for the SPA, but preferred to be spared involvement

in the intimate details of implementation because of many other pressing responsibilities competing for her immediate attention. Thus, the author was appointed Privacy Administrator and functioned as a staff liaison to a special privacy subcommittee of the Governor's Committee on Law and Justice. The subcommittee was chaired by a new appointee to the Governor's Committee, George Mattson, a district court judge and head of the State Magistrate's association. Other members of the privacy subcommittee included a state supreme court justice, the Chief of the State Patrol, the chief of a small eastern Washington police department, an assistant superintendent of public instruction and Pierce County prosecutor.

Because of the timing of the passage of the law, neither the old or new members of the subcommittee were familiar with the details of the new law when that committee was reconstituted in September 1977. Thus, it took several meetings over the next few months to come up to speed. Moreover, their intimate involvement in policy matters was probably more crucial and timely when draft regulations had been completed for their review, comment and ultimate approval.

With the selection of a judge to oversee the security and privacy implementation effort, appearances would suggest that the judiciary was willing to exercise a supervisory role in the administration of criminal records privacy. However, Judge Mattson had some reservations about the appropriateness of the Governor's Committee and the SPA assuming such a policy operational role. Mattson, now a superior court judge put it this way:

Theoretically it would have been better to have an independent agency or commission implement criminal records privacy law and regulations. The State Planning Agency was more appropriately a planning and monitoring body. The Governor's Committee was not capable of providing consistent policy direction to the SPA privacy staff. The committee was more of a political group in which different points of view emerged each time they met to consider security and privacy policy. In addition, Governor Ray didn't really put a lot of trust in the group or solicit its advice in criminal justice matters. Besides these concerns, as a member of the judiciary, I didn't really feel comfortable being involved in what was essentially an executive function (Mattson, 1981).

Mattson also noted that he doubted whether any judge could tell what the privacy guidelines required of criminal justice officials nor indicate what its impact on the courts would be.

Evidently skepticism about the SPA role was shared by the SPA administrator Schram:

The SPA was handicapped in two ways with respect to implementing criminal records privacy. First, it had no real power to bring about compliance. This probably contributed to tolerance of its authority since it had never been a real threat in the enforcement of other LEAA conditions of aid. Second, the SPA lacked credibility; it had no real expertise in the administration of criminal justice. The law enforcement community was frustrated by the SPA guideline development and compliance process. They did not think the SPA staff was knowledgeable about law enforcement functions and problems. Because of this, they weren't worried about compliance; they would simply continue to do the same things they always did (Schram, 1980).

In the meantime, the new Privacy Administrator established a series of informational meetings with other state criminal justice agencies and associations. The purpose of these meetings was to explain the law to top administrators and determine the extent to which the law would affect their record handling and administrative functions. In addition, the executive staff of various criminal

justice associations representing law enforcement, prosecutors and courts were contacted in order to enlist their cooperation in creating avenues of communication to membership regarding general statutory requirements and identifying particular implications for each component of criminal justice system. The results of these meetings suggested two things: most agency administrators had little knowledge about what WCRPA requirements entailed but they were very anxious as to the extent of the impact of the law on their record management practices. The fact that the SPA staff was unable to respond to many of their concerns with specific answers did little to relieve that anxiety. But the meetings also indicated that the SPA would have to contend with two extremes of reactions: hostility over disputed territory and indifference.

The State Patrol leadership expressed their concern that the WCPRA overlapped with their own powers established under a 1972 statute. For example, that legislation had established a Policy Advisory Committee whose function it was to advise the Chief, among other matters, on policies regarding the dissemination of criminal history information. In addition, the head of the Identification Division of the State Patrol complained that the Central State Repository would not be capable of meeting the WCRPA's January 1, 1978, deadline for pre-dissemination inquiries. The implication was that unless funding was forthcoming from the SPA or state legislature, the Patrol would disregard compliance to this aspect of the law. Several other criminal justice agencies mentioned costs as a constraint to compliance and thus had to be a factor figured into the implementation process.

In contrast to the State Patrol, the executive director of the State Prosecutor's Association indicated that his membership considered compliance to criminal record privacy one of its "least important concerns." According to him, "local prosecutors had at least two to fifteen things to react to each day and did not have the time or inclination to observe privacy requirements." Further, it was evident that criminal history records information was not considered a critical factor in prosecution. The receipt of timely and complete criminal record information is not considered essential to effective prosecution; how the police construct the crime is more important. It was also indicated that prosecutors rarely disseminate information to other criminal justice agencies or the public and thus would have little need to maintain "burdensome audit trails." In fact, in a 1980 interview the executive director of the Prosecutor's Association estimated that only three jurisdictions in the state had made any attempt to develop audit trails.

Strangely, the leadership in the law enforcement community did not openly express its attitude toward the WCRPA until after several months of participation in the rule making process. Initial meetings with the Executive Director of the Washington Sheriffs and Chiefs Association were cordial and cooperative. Plans were discussed to address regional meetings of law enforcement personnel and to organize a state wide training effort.

There were several reasons for this reticence and seeming cooperation among the leadership and ranks of state and local law enforcement. Although "law enforcement had to dislike the law because

it was a mandate by the Feds," as a Spokane police sergeant noted, few were willing to risk jeopardizing continuation of LEAA money from the SPA by exhibiting open resistance. In addition, prior exposure to the Federal Title 28 Regulations had prepared many departments for a state law which did not appear to differ much from its federal predecessor.

Those who had participated in preparation of a state privacy plan felt secure in their understanding of the new law and its effects. But, there was also wide spread uncertainty, particularly among smaller rural departments, about what was required by the law and this made it difficult to develop firm opinions about what to expect. This uncertainty lead many departments to impose a moratorium on the dissemination of any information until they got a firmer grip on what was legally permissible. Importantly, the law enforcement leadership saw participation in guideline development as an opportunity to get what they wanted in terms of regulations. For all of these reasons, a consensus, at least among the rank and file, emerged which involved a presumption in favor of getting something done through participation in guideline development and implementation activities.

The Governor's Committee in a Policy Role:
Dissemination Policy

As noted before, LEAA had initially advanced a restrictive policy regulating access to non-conviction information. That policy limited dissemination of arrest records for "the purposes expressly and specifically required by statute, federal statute or federal executive order" (U.S. Department of Justice, 1975: Sec. 20.2.(b)(2)). LEAA subsequently amended this policy, under considerable protest from

non-criminal justice interests, to permit non-conviction data to be disseminated "for any purpose authorized by statute, ordinance, executive order, court order or court rule as construed by appropriate state or local officials" (U.S. Department of Justice, 1976d: Sec. 20.21(b)(2)).

The WCRPA established dissemination policy comparable in restrictiveness to LEAA's initial 1974 regulations. That policy involved the following language:

Criminal history record information, which includes non-conviction data may be disseminated by a criminal justice agency to implement a statute, ordinance, executive order, or a court rule, decision or order which expressly refers to records of arrest, charges or allegations of criminal conduct or other non-conviction data and directs that it be available or accessible for a specific purpose (RCW, 1977: 10.97.80).

There were two problematic aspects of this policy which required additional regulations. First, there are a wide variety of public and private agencies which conduct investigative activities but such agencies may not necessarily fit the definition of criminal justice agencies. Secondly, in many instances, the legal authority which authorizes non-criminal justice access is vague as to purpose and fails to make reference to non-conviction data.

The SPA adopted a way to deal with the first issue which had been suggested by LEAA in its planning instructions. A criminal justice agency was defined to include agencies which allocated a substantial portion of their annual budget to, and had as its primary function, the administration of criminal justice. But this definition was unhelpful, SPA staff thought, because it failed to distinguish subunits of larger

agencies which did execute criminal justice functions. For example, although the Liquor Control Board's principal function was licensing, the enforcement division did have the power to prosecute violators. Because of these problems, the SPA staff proposed that a subunit which conducts functions associated with the administration of criminal justice could gain access to non-conviction information. However, when an opinion was requested from the Attorney General he rejected this approach as improper since it would leave the legislatively imposed condition of the budget test "superfluous."

Nevertheless, there were two alternative paths an agency could propose to resolve the issue. The agency subunit could either establish a contract of services with a criminal justice agency in order to secure access (a potentially cumbersome approach given the number of criminal justice agencies involved), or the agency could apply for certification by showing that a statute, ordinance or other legal mechanisms specifically enabled access to non-conviction information. Most applications for access to non-conviction information were handled in the latter way.

These problems posed difficult matters of judgment which the SPA staff did not feel secure making on their own. Further, the SPA was being pressed by requests from a whole variety of federal, state and local agencies to make quick decisions about matters on which there was little in the way of formal policy. In addition, many local law enforcement agencies experienced dramatic increases in requests for criminal record information. The Seattle Police Department indicated, for example, a 200 percent increase in requests. Consequently the Privacy Administrator decided to enlist the Governor's Committee in the

development of a systematic policy which would involve them in a decision making role.

Two regulations were subsequently drafted to establish a framework within which the Governor's Committee could make decisions as to access to criminal history data which included non-conviction information. One regulation set up a process by which an agency could apply for certification as a criminal justice agency. The other regulation established a method by which the SPA could determine those non-criminal justice agencies which had legitimate access to non-conviction data. The agency would be required to identify the purpose for which the information was sought, the legal authority, and how the need to know this information related to performance of official duties. Approved agencies would be identified and a listing published by the State Planning Agency.

Surprisingly, the Governor's Committee members, particularly the Chief of the State Patrol and other law enforcement officials, showed a much stronger interest in decisions regarding certification of criminal justice agencies. Such decisions were not taken lightly because acknowledgement of an agency as a criminal justice agency, even if it was only for the purpose of obtaining criminal record information, was considered tantamount to recognition and acceptance in the law enforcement community. For example, entities which performed investigative activity for a social service agency such as Child Protective Services or the Welfare Fraud Division of the Department of Social and Health Services were rejected by law enforcement committee members because of "do good" philosophies alien to the law

enforcement mentality. On the other hand, investigative offices of the Armed Forces were certified with little discussion.

Policy decisions regarding non-criminal justice agency access raised controversial issues with potentially volatile political results. Consequently, the Governor's Committee largely deferred such issues to the SPA staff. Given the restrictiveness of the state law, it was not surprising that few applicants for certification to receive arrest information were approved. One federal applicant particularly rankled by rejection was the U.S. Civil Service Commission. They argued that this was the first time that they had been refused access to non-conviction information. But a close reading of the executive order showed that arrest for non-conviction information was not listed as material for which they were authorized access. This was also the case with many other federal and state agencies.

LEAA policy makers had expected that a tightening of access to non-conviction information would prompt federal and state agencies to seek legislation to revise outdated statutes in order to secure information now denied them. These actions were expected to subsequently render criminal records privacy a more visible public issue and generate increased public scrutiny of the way criminal records were used. However, in spite of these expectations, there has been no great sense of urgency (by non-criminal justice agencies) to secure adequate statutory authority because not only are multiple avenues available to circumvent the regulations, but policy custom continues to dictate who gains access of such records.

Interviews with several local criminal justice records managers confirmed what the Privacy Administrator had long suspected, that each police department has a different notion about which organizations are entitled to access to such information. Access to criminal record information by banks, insurance companies and a variety of employers depend upon the strength of relations cultivated with law enforcement agencies.

Moreover, after the State Patrol undertook administration of the law in 1980, certification guidelines have been relaxed to allow substantial discretionary departures from the rules. One local law enforcement official who was interviewed in 1980 about how dissemination policy has been handled by the Patrol observed:

I'd say that the role of the State Patrol, based on law enforcement attitudes, is almost nonexistent. They aren't cops so they can't tell us to do anything, which includes how we use information in our own files.

The Ad Hoc Advisory Committee: The Expansion
of Policy Conflict

It was evident from initial reactions of many criminal justice officials that implementation of the WCRPA was not going to be easy. SPA staff suspected that ignorance of the requirements of the law exaggerated its actual effects. If some mechanism could be employed to enhance communication processes between the SPA, Governor's Committee and affected agencies, perhaps the pockets of opposition and more widespread grudging acceptance could be gradually replaced by dutiful compliance. The mechanism chosen was the appointment of an advisory committee, broadly representative of both criminal justice agencies

and non-criminal justice interests. The primary role of the Ad Hoc Advisory Committee was to provide a forum for review and comment on regulations drafted by the SPA staff to implement the WCRPA.

The committee was expected to provide the SPA with multiple perspectives from which a consensus interpretation of the intent of the law could emerge, to anticipate the impacts of proposed rules and regulations and to provide a means by which the costs of agency compliance could be more carefully calculated. The explicit attention to costs would satisfy a two-fold need. First, it would provide data with which a special appropriation request could be presented to the Governor for submission to the upcoming special legislative session. This would help remove what many viewed as the central obstacle to compliance--the lack of sufficient resources. In addition, such an effort would help the SPA to acquire the resources necessary to conduct a state wide audit. Only an audit would provide the SPA with specific baseline information necessary to make judgements about progress toward compliance. Moreover, the audit authority would lend credibility to the seriousness with which the SPA took its enforcement responsibility.

The absence of a formal appointment process of committee members by the Director of OCD appears to have contributed to ambiguity in the line of authority for administration in guideline development. While persons designated for appointment were recruited in a variety of ways, a letter authorizing appointment originated neither from Wiegman nor Schram but from the Privacy Administrator. Evidently the Deputy Director of OCD and Wiegman were reluctant to give the Ad Hoc Advisory Committee a status that would associate them too closely with the

Governor's Committee and did not think it advisable to create the impression that they had more than just an advisory role.

Nevertheless, several key Ad Hoc Advisory Committee members expressed confusion and doubt as to who had final authority to formally adopt rules and regulations. One committee member was moved to remark in a 1981 interview:

We knew someone upstairs was telling the SPA to develop the rules but we just didn't know exactly who was in charge.

In fact, there were multiple "authorities." Schram was one authority as administrator of the SPA. The Governor's Committee had formal supervisory and final decision making power so they were another authority. In fact, the WCRPA only mentions the SPA as the administrative authority for the law; no mention is made of either the Governor's Committee nor the OCD director but the fact that the OCD director was both head of the agency and chairman pro tem of the Governor's Committee spared conflict on this point. Perhaps because of a careful avoidance of an association with something potentially controversial as the WCRPA guidelines, Wiegman ultimately delegated the job to Deputy Director James Frits whose signature appears on the final version of the regulations.

As indicated in the list of participants in Table 13, the membership of the Ad Hoc Advisory Committee consisted of representatives from a wide spectrum of state agencies, criminal justice organizations, a variety of state associations and an assortment of non-criminal justices interests including the ACLU, Public Disclosure and Human Rights commissions, city, county and business associations. Selection

Table 13. Ad Hoc Advisory Committee for Implementation of the Washington Criminal Records Privacy Act.

Participant Name	Agency Represented
Bill Absher	Institute of Public Service, Seattle University
Doug Alexander	Public Records, Liquor Control Board
Bob Blum	Parole Board
Jim Beaty	Washington Association of Counties
Janet Bridgman	KING Broadcasting
Craig Cole	State Human Rights Commission
Larry Collar	House Ways and Means Committee
Chuck Dalrymple	Licensing Liquor Control Board
Cam Dightman	DSHS, Research
Bill Gales	Senate
Walt Gearhart	Board of Prison Terms
Gary Gilbert	Liquor Control Board
Bill Hagens	House Institutions Committee
Steve Harrington	Washington Association of Cities
John Hayden	Washington State Patrol, Organized Crime Intelligence Unit
Judge James P. Healy	Superior Court, Pierce County
Ron Hendry	Prosecutors Association
Graham Johnson	Public Disclosure Commission
June Lloyd	Snohomish County Criminal Justice Agency and State Association of Law and Justice Planners
Dennis J. Loeb	City of Seattle, Law and Justice
Dan Lynch	King County System Service
James R. McMahon	Bothell Police Department
Doug Marshall	Association of Washington Businesses
Suzanne Matsen	Seattle Department of Licenses and Consumer Affairs
Art Mickey	Liquor Control Board
Allen Mitchell	DSHS, Budget Services

Table 13 (Continued)

Participant Name	Agency Represented
Michele Pailthorpe	ACLU
Mike Pepe	Senate Constitution and Election Committee
Bill Peters	DSHS, Adult Correction
John M. Reed	FBI, Special Agent in charge
Doug Russell	King County Sheriff
Ed Ryan	DSHS, Data Support
Kevin Ryan	Assistant Attorney General for WSP
Capt. Paul M. Schultz	Washington State Patrol (WSP)
Jim Shofner	Administrator for the Courts
Richard Six	State Gambling Commission
Merle Steffenson	Department of Licensing
Jeff Sullivan	Prosecuting Attorney, Yakima County
Lester Sydney	Job Therapy
Sgt. Walt Trefry	Spokane County Sheriffs Department
Jolene Unsoeld	Independent Citizen - Public records interest
Bill Webb	Washington Association of Sheriffs and Police Chiefs
Rick Wickman	OCD

SOURCE: Washington, Law and Justice Planning Office, 1977a.

processes for committee membership varied; many representatives were identified by the Privacy Administrator; others were recommended by respective agencies or associations while a few requested membership. Although there were no formal selection criteria, the Privacy Administrator insured that all major components of criminal justice were represented and that the selection process maintained a continuity with those involved in the legislative process and included participants involved in the development of the 1976 state privacy plan.

Several subcommittees were created in order to address each of the major areas shown in Table 14 as requiring further clarification through adoption of administrative regulations. In addition to the subcommittees, the Privacy Administrator created five work groups whose assignment was to produce a work plan which would identify specific steps agencies would take to achieve compliance. Needless to say, while there wasn't much enthusiasm for the development of work plans, several agencies submitted such plans with the expectation that the appropriation would be forthcoming in the near future.

The Privacy Administrator had not anticipated that the Ad Hoc Advisory Committee would be as large or potentially unwieldy as it had gotten to be. The WCRPA had become more than a curiosity and interest spread far beyond law enforcement to include many other non-criminal justice agencies and associations. Each interest had different motivations for participation: the ACLU sought guidelines which provided extensive leverage to the data subject to inspect and challenge the contents of his file; the Human Rights Commission was concerned that the guidelines on dissemination were consistent with "fair preemployment

Table 14. Provisions of the Washington Criminal Rights Privacy Act Requiring Clarification through Implementation Guidelines.

Provisions	Time Frame
<u>I. REVIEW AND CHALLENGE</u>	
A. Each criminal justice agency must permit individual who believes he/she is subject of record held by that agency to appear and request to see record. SPA to adopt rules for challenge of records alleged to be incomplete or inaccurate, for resolution of disputes, and for correction and dissemination of corrected information.	This portion of law goes into effect on 09/21/77; rules needed by then.
B. DEFINITIONS: Criminal justice agency; nonconviction data; criminal history record information.	
C. See Section 8.	
D. See Section 6, providing for deletion of nonconviction data after two or three years under certain circumstances.	
<u>II. SECURITY OF RECORDS</u>	
A. SPA to establish standards for physical security (i.e., protection from fire, theft, loss, destruction) and for protection from unauthorized access.	Goes into effect 09/21/77; development of standards can continue after that date.
B. SPA to establish standard for personnel, employed by state and local criminal justice agencies, who are responsible for maintenance and dissemination of criminal history record information (e.g., levels of security clearance).	
C. See Section 9 (1) and (2).	
<u>III. DISSEMINATION</u>	
A. Effective 01/01/78, no criminal justice agency to disseminate arrest information unless record also states disposition; agency must check with identification section of WSP if record pertains to felony or gross misdemeanor. (Section 4)	Section 4 goes into effect on 01/01/78; but Section 5 goes into effect on 09/21/77; rules for dissemination thus needed by 09/21/77.
B. Conviction records, and information pertaining to matter currently in process, may be disseminated without restriction. (Section 5 (1) and (2))	

Table 14 (Continued)

Provisions	Time Frame
<p>C. Nonconviction data may be disseminated:</p> <ol style="list-style-type: none"> 1. By criminal justice agency to another for any purpose associated with administration of criminal justice. (Section 5 (3)) 2. To implement statute, ordinance, court order, expressly referring to arrest records and authorizing or directing that such records be available. (Section 5 (4)) 3. To individuals and agencies pursuant to contract to provide services (Section 5 (5)) and for research (Section 5 (6)). 	
<p>D. Records must be kept of each dissemination. (Section 5 (7))</p>	
<p>E. DEFINITIONS: Criminal history record information; nonconviction data; conviction data; criminal justice agency; disposition; dissemination.</p>	
<p>IV. <u>COMPLETENESS AND ACCURACY</u></p>	
<p>A. Dispositions not covered by SSB 2608 (see Ch. 43.43 RCW), but are crucial to implementation of law. Records are not "complete" without dispositions. Need is to assess existing problems in reporting of dispositions and desirability of changes in laws or rules regarding such reporting.</p>	<p>Disposition reporting part of existing law; discussions can continue after 09/21/77 effective date.</p>
<p>B. SPA has duty to provide for audits of criminal history record information systems (section 9 (3)); such audits will help assess accuracy of information.</p>	
<p>C. DEFINITION: disposition.</p>	

SOURCE: Washington, Law and Justice Planning Office, 1977b.

practices." Representatives of the Public Disclosure Commission wanted to insure that the WCRPA was interpreted within the preexisting framework of the open records law. Needless to say, these and other agendas made a collision with law enforcement inevitable.

One of the most consistent complaints expressed by law enforcement representatives interviewed subsequent to the guideline development process was that law enforcement agencies were underrepresented on the Ad Hoc Advisory Committee.¹

Regardless of whether the concern was well founded or not the perception of being outnumbered had two principal effects: it drove law enforcement participants into a highly defensive posture favoring a "narrow" interpretation and substantially weakened law enforcement support for the final version of the guidelines. Comments by a sergeant from an eastern county sheriff's department best captures the reasons for law enforcement's defensive posture:

Where [the Ad Hoc Advisory Committee] got out of hand was that it was taken over by vested interests. Instead of being a hearing board it became an arbitration board. We should have been a hearing board. Where the committee got into trouble was the development of multiple vested interests. Consequently, we had to develop our own group because the numbers were overwhelmingly against us. If we hadn't become very dedicated cops, protecting the interest of cops with the votes we had, we would have never gotten what we wanted.

¹This seemed a surprising criticism for law enforcement had by far the most representation in proportion to other groups. There were nine members in all: two from the state patrol, two from the Seattle Police Department (added later to the list in Table 13), three others from police departments around the state, the executive director of the Washington Sheriffs and Chiefs Association and an FBI agent. The courts had two representatives, as did prosecution.

The guidelines eventually adopted by the SPA were considered the product of non-law enforcement interests and failed to reflect the realities of law enforcement. Most law enforcement personnel felt that the rules went substantially beyond the intent of both Title 28 and the WCRPA. As a consequence, as a records manager from a large western Washington Police Department observed: "When the rules were published we basically ignored them."

The Ad Hoc Advisory Committee met six times from August 6, 1977, through January 20, 1978. The interest level and thus attendance was high during the first three months. During this time the regulations underwent substantial revisions. However, the November through January period was marked by a substantial decline in attendance, especially by non-criminal justice interests. Public hearings held in Yakima and Seattle drew attendance from mostly law enforcement and other criminal justice personnel. The months of December and January were spent focusing on legal issues which necessitated several opinions from the Assistant Attorney General. In fact, advisory opinions had to be requested several times in order to resolve disputes over interpretations which threatened to postpone final adoption of the regulations.

Defining Rules for Record Access and Inspection

The debate over the guidelines for regulating individual access and inspection of criminal history records was symptomatic of the level of conflict between different interests which emerged in the Ad Hoc Advisory Committee's deliberations. This discussion consumed an inordinate amount of meeting time, compared with issues pertaining to record quality which probably should have received more attention.

Interpreting statutory meaning
and anticipating impacts

Bardach contends that unlike coalition building (or "massing of assent") involved in the legislative process, policy implementation is characterized primarily by "defensive politics." Participants are concerned more with what they might lose than what they might gain as a result of implementation. What distinguishes the two processes is that "conflict over the terms on which assent is given or withheld," is what "is crucial to the implementation process" (Bardach, 1977a: 43). From this perspective, Bardach advances two reasons why implementation is best characterized as defensive politics:

The primary reason for this sort of defensive politics in the post-adoption period is that all, or at least many, of the important participants act within a context of expectations that something will happen that bears at least a passing resemblance to whatever was mandated by the initial policy decision. A second, if related, reason is that participants who favor the policy goals of the mandate use the existence of the mandate as a moral and sometimes legal weapon in the emerging struggle over the terms in which policy is effected (Bardach, 1977a: 43).

Bardach's notion of policy implementation is indeed serviceable to those who seek to understand the forces that shape the execution of the policy. But, it needs to be qualified in two important respects: agreement on what constitutes the policy mandate is frequently problematic and expectations about what will happen turn in part, upon how the mandate is understood in relation to legislative intent. Expectations about potential effects of the law can have a reverse influence: anticipated impacts may produce interpretations of statutory requirements and objectives which, although consistent with predispositions of implementors are inconsistent with legislative intent. Stated in

another way, the meaning of words and thus the stated objectives of a statute are understood within the context with their use. Regulatory policy rarely specifies with clarity and precision all the contexts in which it might apply. Consequently, variations in context may easily support alternative interpretations of a legislative intent.

Responses of participants in guideline development processes are dictated, in part, by different and competing contextual considerations. These contexts support different and, frequently, contested interpretations of statutory intent. Each contestant advances interpretations which not only originate from their perceptions of the context, but are intended to bring about certain expected or desired effects which determine the extent to which features of the context may be altered. The fact that neither adverse consequences feared by opponents of an interpretation nor the desired effects of an alternative interpretation actually occur as a result of implementation of guidelines may have relatively little influence over the duration of support by proponents of favored positions.

Just such a juxtaposition of belief, attitude and policy consequence was involved in the development of procedures designed to implement WCPRA provisions for individual access and limitations and dissemination of criminal record information. Both policies were the focus of intense conflict between criminal and non-criminal justice interests to advance favored interpretations of statutory intent, to achieve expected performance and to realize ultimate effects. In particular, regulations to implement procedures to enable inspection and challenge of criminal history record information became the

lightening rod of conflict between non-criminal justice interests seeking to advance liberal constructions and law enforcement organizations seeking to contain such attempts.

The efforts by non-criminal interests to secure the most permissive rules on access were animated by the assumption that these procedures constituted the most effective way to alter the way that criminal records were managed and disseminated. The threat of inundation by requests for access to criminal history record files and stiff criminal and civil penalties for refusal to follow guidelines for access and other due process requirements would constitute a sufficient deterrent to unlawful police dissemination and an incentive to secure other important statutory objectives. In contrast, law enforcement interests were equally assertive that such permissive procedures not only substantially exceeded the intent of the WCRPA but would constitute an intolerable administrative burden and would adversely affect investigative activities.

Although neither position has been borne out by the actual events, a moderately permissive policy of access, promulgated by the SPA in 1978, has now been replaced by guidelines originated by the State Patrol which have significantly modified the thrust of these earlier rules.

Interlocking laws with conflicting definitions

One area in which LEAA guidelines reflected some confidence from prior policy was that of provisions for individual access, review and challenge of the contents of a data subject's file. The Menard

decision was conspicuous in enunciating an unambiguous doctrine that subjects of arrest and conviction records may inspect records which pertain to them and challenge information considered inaccurate or incomplete. LEAA subsequently converted these principles into administrative procedures intended to facilitate the exercise of these rights. The language used in the federal regulations marks the attempt to balance the concerns of administrative efficiency against due process:

Any individual, upon satisfactory verification of his identity may be entitled to review without undue burden to either the criminal justice agency or to the individual any criminal justice information maintained about the individual and maintain a copy thereof when necessary for the purposes of challenge or correction (U.S. Department of Justice, 1975: Sec. 20.21(g)(1)).

The apparent even-handedness of the LEAA regulations provoked little controversy in the criminal justice community. These provisions created little controversy because they lacked the degree of concreteness and specificity necessary to energize alternative interpretations and expectations. Instead, the states were delegated responsibility to develop detailed procedures to implement individual access and dissemination provisions. Importantly, the way the states have chosen to develop these procedures depends to some extent upon how they define key concepts associated with criminal history record information.

Instead of parroting back the LEAA guidelines (as so many states have chosen to do) the WCRPA framed access policy with the following language:

All criminal justice agencies shall permit an individual who is, or who believes that he may be, the subject of a criminal record maintained by that agency to appear in person during normal business hours of that criminal

justice agency and request to see the criminal history record information held by that agency pertaining to the individual (RCW, 1977: 10.97.70).

Two divergent positions emerged about how this policy should be interpreted and translated into subsequent guidelines. Representatives of the law enforcement argued that the provision should be given as literal an interpretation as possible. A literal interpretation held that a criminal justice agency was only obligated to permit inspection of records originated by that agency. Any other criminal history material pertaining to the data subject which originated from another agency, including information from central repository files, the FBI and other criminal justice agencies which may be in agency's possession, was exempted from access. Therefore, for example, if the individual wanted to inspect a criminal history file maintained by the central state repository then he would have to secure that file in person at the central office. Significantly, this position was not based upon an interpretation of statutory intent but rather on predictions of the organizational consequences which would ensue if the policy was not adopted. As an assistant chief and former Governor's Committee member acknowledged in a subsequent interview:

We fully expected to be inundated by requests from individuals to see their records. We were concerned that the rules not be developed in a fashion that would worsen an already difficult situation.

This approach troubled the ACLU legislative coordinator for it failed to treat disclosure of a record to a data subject as a dissemination. Under the law the dissemination of criminal record information required that a pre-dissemination query be made to the State Patrol to obtain the most current and complete disposition information. In

essence, such a narrow reading would perpetuate the exchange of material between criminal justice agencies which was potentially inaccurate and incomplete. Thus, a second position, advanced principally by the Director of the Public Disclosure Commission (PDC), but strongly supported by the ACLU and others, contended that a much boarder interpretation was warranted by reading of the state public disclosure law. The efforts to convince the SPA and others of the superiority of this interpretation exhibited cleverness and legal shrewdness.

In essence the PDC director contended that the word "record," left undefined in the WCRPA, had a technical meaning already well established by the public disclosure law--a law which preceeded the WCRPA by several years. Public records were defined by that law to include:

Any writing containing information relating to the conduct of government or performance of governmental proprietary functions prepared, owned, used or retained by any state or local agency regardless of the physical form or characteristics (RCW, 1974: 42.17.020(26)).

A definition of records included in the proposed rules was indeed consistent with this definition. Criminal records were defined to include that information "collected" and "maintained" by a criminal justice agency to include:

(1) Records or information directly generated or collected by that agency in the performance of its official functions; and (2) records or information properly obtained from another agency but retained by a criminal justice agency in the normal course of its business, and includes federal, state, or local rap sheets from wherever obtained if they are in the possession of the agency (Washington, OCD, 1977).

The SPA staff had framed the definition of records in this way in recognition of the fact that interagency exchange of records enabled

multiple agency ownership of criminal records which pertained to a particular data subject. Accordingly, the thinking was that if a data subject was given access to all records maintained by an agency which pertained to himself, he would be provided a better opportunity to correct errors or inaccuracies which appeared on records originating from other criminal justice agencies.

Given these conditions the integrity of the information released by the agency would depend largely upon the quality of the file organization and conscientiousness of records personnel. The SPA guideline writers considered it important not only to carefully enumerate material approved for dissemination under the law but wanted to insure that the information the agency disseminated was the same information about a particular data subject each time that information was released.

The SPA initial approach to this issue was to propose a rule which listed the types of files searched for the purpose of identifying criminal history record material. Law enforcement representatives were opposed to this approach because it appeared to make other criminal history information available to data subjects for inspection. The SPA consequently gave up this strategy and fashioned an approach which both acceded to the concerns of law enforcement and showed greater promise of increasing the accuracy and completeness of criminal history records. This approach permitted the agency to separate criminal history record information from other files when responding to a request to review the files or for other disseminations.

The Attorney General's advisory
opinion: the balance is struck

An opinion was solicited by the Public Disclosure Commission from an Assistant Attorney General on the subject and furnished to the SPA. The opinion presented the following findings:

Criminal history record information as defined in the WCRPA appears to fall within this definition. Since the definition includes writings used by a local agency, as well as those which are prepared or retained by that agency, criminal history records information maintained by the Washington State Patrol, Identification Section is a public record of any criminal justice agency which uses such information. The Public Disclosure Law requires agencies, upon request for identifiable public records, to make them promptly available to any person. The law also requires agencies to adopt and enforce rules consistent with the chapter's purpose of insuring full public access to the public records, which provide for the fullest assistance to inquirers. . . . The Public Disclosure Law states that its provisions are to be liberally construed and that in the event of conflict between the provision of this act or any other act, provision of this act shall govern. . . . Certainly it would appear that each local State Patrol office, as a part of the agency maintaining the criminal history records must under terms of Section 8 accept and process requests to see such records (Tuttle, 1977).

The Attorney General's opinion had two principal effects; it robbed law enforcement of the support necessary to defend a more restrictive position and greatly enlarged considerations involved in proposing rules which adequately facilitated the exercise of the right to inspect and challenge the accuracy and completeness of criminal history information. For example, the ACLU representative proposed that since police precincts and branch offices of the state patrol were criminal justice agencies, such offices could handle or facilitate request for records inspections.

The subsequent draft administrative rules reflected the need to balance individual rights and convenience against administrative necessity. Law enforcement continued to be steadfast in its insistence that any expansion of responsibility for provisions for inspection of records exceeded statutory intent and created an excessive administrative burden. Nevertheless, non-criminal justice interests were not persuaded. It was evident that computerization had created the conditions, in at least some jurisdictions in the state, in which criminal history records stored in a regional repository could be readily obtained through a remote terminal. Under these conditions, it was not considered burdensome to utilize these capabilities to facilitate such a request. The resulting regulations strove for a middle ground:

A criminal justice agency has the meaning set forth in WAC 365-50-020 (5) (8) and shall include regional or branch offices of the state or local criminal justice agency including the Washington State Patrol. If such a agencies or their regional or branch offices do not have the facilities or capabilities to process such a request, the individual shall be referred to the nearest criminal justice agency having such facility or capabilities, which agency shall process the individual's request (WAC, 1978: 365.50.070).

In addition, another administrative rule specified a procedure by which the agency responding to the request would obtain and furnish the requestor with "a copy of any criminal history information in the files of the Identification Section of the Washington State Patrol relating to the requestor" (WAC, 1978: 365.50.070).

An Ad Hoc Advisory Committee spokesman for the law enforcement position, Jim McMahon (a small town police chief and a respected and dominant voice in the state law enforcement leadership), clearly unhappy

with the ruling, increased the intensity of his attack upon the draft rules. In a letter to the Executive Director of the Sheriffs and Chiefs Association (subsequently published and circulated around the state), McMahon urged attendance of association members and others at public hearings on the proposed rules scheduled for late November or early December. The letter exhibited a tone of urgency:

I consider it imperative that all chiefs and sheriffs thoroughly familiarize themselves with the WCRPA and be prepared to attend the public hearings with their input. The impact of this law is going to be tremendous on every L.E. agency in the state down to the very smallest (McMahon, 1977).

Among the issues specified in the letter as critical was that pertaining to inspection guidelines:

The statute (WCRPA) requires an individual who desires to see his record to appear in person during normal business hours at the agency holding the records. There is an organized effort to draft the administrative rule in such a way as to allow that individual to come to any law enforcement agency with such a demand and require that the agency obtain the records from whatever other agency the subject designated (Washington Association of Sheriffs and Police Chiefs Newsletter, 1977: 1).

This characterization had clearly misinterpreted the thrust of the procedure proposed. The agency which responded to the request for inspection was only required to reveal criminal record information (other than those records maintained by the Central State Repository) which originated from another criminal justice agency if it was currently in the possession of such records. Whether intended or not, this misinterpretation helped reinforce perceptions of greatly exaggerated impacts.

When a public hearing was held in Seattle by the SPA staff, a great deal of time was spent dispelling the rumors created about the

extent of a criminal justice agency's responsibility to assist records requests. The attack on this and other provisions achieved a limited victory for it caused postponement of the adoption of the guidelines and thus provided another opportunity for law enforcement interests to push for revisions. However, the contending sides of the issue would not budge in either direction. Consequently, the SPA staff offered to obtain an opinion from the Attorney General's office about this issue. Both sides agreed to "live" with the decision and let the adoption procedures go forward.

The resulting opinion appeared to vindicate the non-law enforcement point of view by reinforcing an earlier Attorney General's opinion provided to the Public Disclosure Commission. The opinion included the following observations and guidance:

As we understand it, there has been a good deal of discussion about the relationship between the WCRPA and the Public Disclosure Law. Of course, the WCRPA specifically amends one section of that law thus indicating rather clearly that the legislature was aware of the prior statute at the time it enacted this subsequent one. . . . Indeed we questioned whether they substantially amended it all. Thus, the Public Disclosure Act remains intact. It is remedial legislation which provides that it be liberally construed. As a general principal then in dealing with those public records specifically identified in WCRPA, the provisions of the Public Disclosure Law continue to hold sway, consequently disclosure should always be favored. . . .

We recommend that the words "conviction record" and "record" wherever used in the statutes or rules be interpreted in accordance with the definition of records in the Public Disclosure Law. To the extent that any such record is physically maintained by a criminal justice agency it should be provided in its entirety, regardless of the origin of the information actually contained therein. . . .

In order to realize the disclosure policy and objectives of the Public Disclosure Law relating to records generally, the WCRPA provision for individual inspection can only be interpreted to mean that any individual is entitled to appear at any office of a particular criminal justice agency

to request information on himself. This places the actual burden of discovery and producing the information on the entity upon which Section 8 places the obligation for disclosure (Carr, 1978).

The opinion represented a substantial defeat for law enforcement interests. The law enforcement leadership considered the SPA administrative rules to have overreached the law, especially as they pertain to the rules on individual inspection. A sheriff from an urban eastern Washington department characterized the response this way in a 1980 interview: "Nine-nine percent of law enforcement in this state did not consider the SPA administrative regulations legitimate. Most of us thought they went far beyond legislative intent."

The impact of inspection provisions

In interviews conducted in 1980 and 1981, I sought to determine what effects the SPA inspection provisions had upon police departments. Respondents interviewed included officials from both small and large urban departments. Contrary to expectations, none reported a deluge of inquiries. Small departments have processed ten to fifteen requests a year while requests to large urban departments have numbered between fifty and three hundred a year.

The most frequent source of requests was from inmates in prison, particularly persons convicted of serious offenses who sought appellate review of their cases. Another probable reason for this source of request would be that the criminal history record is utilized in decisions pertaining to parole. It is obviously in the interests of inmates to insure that their records portray an accurate and complete profile of arrest, charges and dispositions.

Another common but significant observation was that applications for inspection of records were frequently submitted under the Public Disclosure Law instead of the WCRPA. Not only did requestors exhibit confusion but records center personnel were unsure as to how to handle record requests filed under a different statute. Such confusion contributed to delays in receipt of requested information. This occurrence seems to imply that there has been little awareness and understanding about data subjects rights under the WCRPA.

In contrast to these observations, which suggest negligible visibility and utilization of the law by individual data subjects, defense attorneys and public defenders (at least in two of the largest court jurisdictions in the state of Washington) have demonstrated an increased willingness to use the procedures available in the WCRPA as a tool in plea negotiations, trial defense and as a means to influence sentencing decisions.

In light of the turmoil surrounding the development of inspection provisions, it would not have been surprising to find a great deal of non-compliance. To the contrary however, there has been far more acceptance than anticipated. What the WCRPA did, similarly to Mapp and Miranda, was to structure the discretion involved in the administration of criminal justice. Structuring discretion does not necessarily entail adverse consequences for existing practices and routines. This fact was not entirely lost upon those with responsibility for compliance. For example, an eastern Washington records manager put it this way:

Needless to say we didn't want this type of regulation. We didn't know why, but it was a regulation and therefore we didn't want it. We hadn't really thought hard enough about our records handling processes and unfortunately we had to address it by mandate rather than desire. However, the most beneficial part of the mandate was that it helped us reorganize our records processes. Consequently, it made records more important in the entire criminal justice process.

A records chief from a large, urban Puget Sound police department remarked that:

One of the most important effects of the rule making process was it suggested to us that we reexamine what we were doing with our records. It made us take a hard look at how we were managing and using our records; ultimately we ended up streamlining our procedures.

Some interviews with law enforcement personnel suggest that expected negative consequences have been overdrawn. In this regard, two respondents interviewed for this study provide some interesting insights as to how experience with implementation increases the willingness to acknowledge distinctions between expected and actual results. A western Washington records manager for example, welcomed the WCRPA in these terms:

Law enforcement agencies should be eager to adopt these guidelines since they provide structure and certainty as to the circumstances under which discretion may be used in the release of criminal records. The law gives us an answer to queries. In fact, the WCRPA provides guidelines which could serve as department-wide procedure for the use of any information pertaining to law enforcement matters.

An eastern Washington records manager chose to draw interesting parallels to Miranda when asked to evaluate his experience with the WCRPA in light of original expectations:

We all cried wolf when we got the Miranda decision because this was going to impact us to the point where we couldn't do a damn thing. And this was the attitude we were taking on the WCRPA. I was the first one to say

that the Miranda decision made better cops out of us and that consequently, the WCRPA would make better cops out of us if it was done rationally. I fought for that approach and to some degree it was accepted.

It was a necessary evil that we found ourselves cleaning up the loose-lipped attitude that prevailed within criminal justice which was that, by saying all this data is mine and no one can tell me what to do with it. I think we have needed some discipline in this regard.

When asked to state more specifically how the two policies compared in terms of effects on law enforcement practice, the respondent provided this elaboration:

It [the WCRPA] compares only to the extent that it was expected to impact us so we couldn't do our job. Miranda required us to warn a person of his rights before taking him in for questioning. Similarly, we could have been impacted by the WCRPA to the point that we were supposed to be handcuffed like we were supposed to be by Miranda.

What Miranda made us do was clean up to make sure we had the right guy and we had to go through these procedures so we didn't lose the right guy before going any further. Privacy and security gave us the same type of obligation. We had to make sure the record was clear and make sure the record was available. Prior to the WCRPA, criminal justice record keeping was an almost ran. Until 1970, the Spokane sheriff's office never had a person assigned to a record keeping function.

If the WCRPA had preceded the Miranda decision, we probably wouldn't have had that decision. Miranda came about in part because an officer acted on the basis of prior knowledge that the suspect was a known criminal in the community. Because of that knowledge, the arresting officer acted in a totally disrespectful manner, failing to acknowledge his rights. If there had been an environment conducive to accuracy and completeness, abuses of this kind may have been less likely to occur.

Communicating the Rules: Law Enforcement Training

In a review of studies of the effects of the Miranda decision, Wasby (1974-1975 and 1978) found that in-house training can be an effective source of communication and thus likely to increase the level of

understanding of Supreme Court decisions. In turn, increased understanding may have a positive effect on acceptance and thereby increase the likelihood of compliance. For example, Milner's study of the efforts of law enforcement jurisdictions in Wisconsin to transmit the Miranda decision indicated that all four police departments surveyed rated conference and training as the best source of information (1971a: 224). While the professionalization of the department did not increase police contact with non-law enforcement sources of information, it did increase utilization of intradepartmental lines of communications. However, while Milner's study also determined that professionalization can have positive effects on the way court decisions are communicated and received, he acknowledges, "there was no real hierarchy through which binding directives regarding the implementation of the Miranda decision could flow" (1971a: 52). The upshot of this important fact, Milner concludes later, is: "that Miranda did not basically change the decentralized and often unsystematic communication processes used to inform police departments about innovations" (1971a: 226).

In this regard, what makes the communication process noteworthy in the case of criminal records privacy regulations is that extensive and well coordinated training sessions were conducted by law enforcement leadership immediately after the SPA rules were adopted. Nearly one thousand law enforcement and other criminal justice personnel attended sessions conducted in four different locations in the state. It was indeed surprising and salutary to see such a strong interest taken by law enforcement to increase awareness of a law and somewhat unusual that the staff and resources of the Washington State Criminal

Justice Training Commission were not utilized to conduct the training. But evidently law enforcement had some strong incentives to control this process because it afforded an opportunity to advance their interpretation of what the regulations required and how they would be implemented.

Each of the principal instructors for the sessions had been active participants in the rule making process. They included the chairman of the Sheriffs and Chiefs Association, the chief of the Identification Section of the State Patrol, the chief of the Records Division of the Seattle Police Department, and her deputy assistant. It was obvious that they had taken the task seriously for the sessions reflected organization and effective use of training aids and graphics. In addition, a short test was included at the end of each session to certify that the trainees had received credit for professional development.

The chairman of the Sheriffs and Chiefs Association (perhaps the most outspoken opponent of the SPA ruling making process) began each session with a brief overview of the law and explanation of key definitions. He also used this as an opportunity to editorialize about the law, injecting his opinions about sections of the law and regulations he considered questionable if not illegitimate. One issue he chose to dwell on at some length was the necessity to log dissemination between criminal justice agencies. He promised that the law enforcement community would be only temporarily limited by this and possibly other provisions. He promised that the Sheriffs and Chiefs Association would introduce several amendments to the WCRPA

during the 1979 legislative session. While he didn't urge open defiance of this and other provisions, the implication was unmistakable that evasions or non-compliance were sanctioned by the law enforcement leadership.

The other instructors relied less upon overt criticism and invective and more on emphasis to advance their interpretation of the law. For example, dissemination requirements were considered to apply only to written exchanges of criminal record material, thus exempting the frequent oral exchanges of such data between detectives or the routine phone exchanges which often involve reference to records of criminal conduct. In another instance, provisions pertaining to data subject access and review were construed to mean that the right to access applied only to conviction information. Access to non-conviction information would be permitted only if the data subject would demonstrate that his record was in some way inaccurate or incomplete.

In addition to these examples, the State Identification Division director encouraged the utilization of exceptions in the law which pertained to dissemination of criminal records. He indicated that the central state repository did not have the capability to provide timely responses to a flood of inquiries. Moreover, he suggested that it would be erroneous to assume that the central state repository files were current and accurate.

To be sure, the training sessions were an effective device to greatly enlarge awareness of the operational aspects of the regulations. Systematic exposure to the law made it far more difficult for isolated records clerks to invoke ignorance as a defense of a

continuation of the status quo. There were two factors which contributed to a fairly rapid transmission of information about what the law required. First, complexity and ambiguity reinforced one another to create a sense of uncertainty and caution about advancing "incorrect" interpretations of the law. The typical records clerk, unlike the seasoned detective or the self-assured cop, often lack the self-confidence necessary to exercise discretion. Most records clerks work best in an operational environment structured by clear guidelines and procedures. This temperament was demonstrated in training and frequently was exhibited in the efforts by a wide variety of criminal justice personnel to determine what the "SPA" interpretation was prior to the implementation of procedures.

Second, unlike court-originated decisions regulating administrative procedure, in which the remoteness of the policy source insulates police personnel from receiving information about the decision outside the law enforcement community, the SPA had close and continuous linkages with the recipients of the policy. Whether they liked it or not, the law enforcement community had grown accustomed to having to respond and comply to the numerous LEAA-originated and SPA-interpreted conditions of aid. The SPA rule-making process simply brought law enforcement personnel into yet a closer interaction with the SPA and thus dependence for guidance. This fact may explain why the law enforcement leadership made such persistent efforts to gain "ownership" and control over training and other avenues of transmission (e.g., association meetings, panel discussions) because of the effect it might have of legitimizing the source of the regulations. Respondents in

subsequent interviews indicated that the SPA credibility had been greatly enhanced as a result of assuming regulatory authority. For it demonstrated an unexpected knowledgeability of law enforcement practice and a commitment to get something done regardless of the magnitude of resistance.

C H A P T E R V I
LEGISLATIVE REVISION: THE IMPLEMENTATION AND
ENFORCEMENT OF RECORD QUALITY PROVISIONS
IN WASHINGTON, 1979-1981

An examination of the factors involved in the development of SPA guidelines to insure the quality and integrity of criminal records is instructive about political constraints which limit attempts to regulate the administration of criminal justice. As was the case with inspection and dissemination provisions, interpretation of key terms such as audit, purge, delete, query, and transaction logs dictated, in part, the substance of the resulting guidelines. It was evident that law enforcement interests had technical applications of these key terms which ran counter to those definitions considered pertinent to criminal records privacy policy. In addition, policies involving controls on the exchange of data between criminal justice agencies were expected to have burdensome and unjustified impacts upon investigative functions.

The preoccupation with the effects of dissemination and access policy discussed in Chapter V obscured a primary objective of criminal records privacy which is to increase the accuracy and completeness of criminal history records utilized in the administration of criminal justice. There is some evidence to suggest that neither law enforcement or other criminal justice officials considered improvements in the integrity or quality of criminal records an important policy goal in

general, nor were there incentives to undertake organizational changes and interagency exchange processes necessary to realize these objectives. Moreover, burdens of compliance were nearly exclusively focused on law enforcement. This uneven distribution of burdens tended to produce political conflict between police and the courts.

The difficulties encountered by the SPA in securing cooperation from the courts and prosecutors originated, in part, from the federal mandate which had exempted the judiciary and failed to prescribe a positive role for prosecutors. Although the courts originate records regarding the outcomes or dispositions of cases, they are not required to cooperate in furnishing that information to law enforcement. Although prosecutors could assume a role of information intermediary for disposition information, LEAA did not write regulations which would accomplish this end. With the state law tailored closely to Title 28, specifications to the SPA had to develop creative solutions to these challenging and politically volatile problems.

The Investigative Function: The Limits To Police Reform

One of the factors which contributed to SPA staff difficulties in getting law enforcement and other criminal justice officials to modify record keeping practices was that almost no one recognized accuracy and completeness as an important and central objective of both Title 28 and state law. Almost everyone interviewed by this author as a part of the documentation of this study considered limitations on dissemination of criminal history record information to be the primary

or single policy objective. This perception was also shared by non-criminal justice interests (e.g., ACLU, the press, the Human Rights Commission).

The political environment and circumstances which prevailed at the time that Title 28 was passed probably contributed to this perception. The anti-Vietnam War protests, revelations of domestic surveillance and the Watergate scandal had become permanent fixtures of public consciousness and the police were no exception. A couple of respondents made occasional references to public concern about surreptitious FBI investigatory practices as a factor which precipitated regulation of police records management and exchange activities. These observations were generally framed in the context of seeing privacy regulation as a form of retaliation against the cops for excesses of a federal agency.

The SPA and its Privacy Administrator were mindful of the controversy and divisiveness which surrounded criminal records regulations, and thus, they consciously avoided discussions focused upon the desirability of the mandate. Such discussions might invite an endless debate, sidetracking the Ad Hoc Advisory Committee from the more important and critical tasks of guideline development. The absence of a clarification of the intent and description of objectives, especially by state elites and other criminal justice officials in positions of recognized authority, may have forfeited an important source of cue-giving to the criminal justice community.

In some respects, this failure to acknowledge positive features of a policy was comparable to the police responses to the Mapp and

Miranda decisions; both these decisions were characterized by law enforcement in terms of negative (e.g., forbidden behavior or practices) rather than positive objectives. Both Mapp and Miranda introduced a new set of considerations and conditions which had the perceived effect of compromising tools considered essential to effective law enforcement. What has made the protection of due process rights so repugnant to law enforcement is that they are considered inconsistent if not contradictory to the ideology of crime control which views the criminal justice process as a means of establishing the guilt of the accused (Packer, 1968). In addition, crime control emphasizes efficiency, routine, timeliness and finality. The presumption of guilt is the operational expression of confidence that police have in the integrity, effectiveness and finality of fact finding and charging processes. Thus, the Mapp and Miranda decisions were perceived to introduce considerations about individual rights and due process which limit the likelihood of effective prosecution and conviction.

Demand for utilization of accurate and complete criminal records in criminal justice decision making, like civil liberties due process guarantees, puts pressure on the police to exercise care in the utilization of information in the fact finding process. For example, utilization of prior records of arrest is not sufficient to establish guilt nor does it justify taking shortcuts in the investigation of crime.

In this respect, then, there are some close parallels to the Mapp decision. The Mapp ruling places a special responsibility on law enforcement officers to justify an invasion of individual privacy to

obtain evidence considered likely to establish a linkage between a suspect and a criminal act. Similarly, criminal history records are frequently utilized by the police as an important source of informants who may be aware of those involved in criminal activity. In addition, criminal records may also be utilized as a means of identifying suspects potentially involved in the commission of a crime. Although generally unacknowledged by police, the reliance upon past records as a means to round up potential suspects can play a significant role in the police investigative process. A Seattle detective remarked to the author at one time that approximately three hundred individuals in the City of Seattle were responsible for 60 percent of all crime. His estimate was based upon the fact that these individuals all had prior criminal records. He assured me that the crime rate would decline substantially if the habitual offender statute were used to imprison even a third of these persons.

The WCRPA, like the Mapp and Miranda rulings, regulates the conditions under which criminal records may be acquired for utilization in investigative, pre-trial, charging and other proceedings. Significantly, however, the attempts to place restrictions on the flow of criminal information exchanged for the purpose of investigative and other uses has proven exceedingly difficult to achieve. What has made regulations in this area problematic is that law enforcement considers investigation exempt from any outside regulatory control. (In this regard see Milner, 1971b; Skolnick, 1974; Wilson, 1968 for representative views.)

The WCRPA and subsequent administrative rules place two important conditions on the exchange of criminal record information between criminal agencies, including the interagency exchange of data for the purposes of intelligence work or investigation. Both these conditions were consistent with the Title 28 mandate. First, all exchanges require a pre-dissemination query to the central state repository to obtain the most current disposition information. Second, a log must be kept on each dissemination which includes the following information: (1) identification of the agency or person to whom the information is disseminated; (2) the date the information was disseminated; (3) the individual to whom the information relates; and (4) a brief description of the information disseminated.

While law enforcement interests are willing to acknowledge that the provisions generally apply to routine exchanges of criminal record data, they feel that the exchange of such information in the conduct of intelligence and investigative activities should be exempted from such controls. Such regulations are considered onerous because information shared in an investigative context does not lend itself to audit or predissemination control. For example, concerns were expressed that these requirements would impede investigations and infringe upon the freedom needed to exchange information on known offenders. The timeliness of the exchange of intelligence information could be jeopardized, it was argued, if detectives were prohibited from exchanging information on records of arrest, without first attempting to gain the most current information prior to the exchange.

The only reference in the WCRPA to intelligence and investigative information is found in the section which specified that the data subject had a right to inspect his file. The section contains the following wording:

The individual's right to access and review of criminal history record information shall not extend to data contained in intelligence, investigative or other related files and shall not be construed to include any information other than that defined as criminal history record information by this chapter (RCW, 1977: 10.97.80).

The language found here was not sufficient to allay the concerns expressed by law enforcement that investigative activities not be regulated. Therefore, it was recommended that an additional sentence be added to the list of definitions which stated: "Criminal history record information does not include information contained in intelligence and investigative files." Subsequently, this phrase was modified some more to state: "Criminal history record information does not include intelligence and investigative information."

This rewording seemed innocuous to the SPA staff for all it appeared to mean was that intelligence and investigative information would not have to be divulged if it also contained criminal history record information. Nothing in this phrase implied that criminal history information was not accessible just because it was contained in such files or that the information exchanged in the course of investigation was exempted from regulations on dissemination. Evidently, law enforcement interests did not understand it in the same terms.

What prompted the attempt to specifically distinguish the two kinds of information was that it had strategic value as a tool to

thwart a class-action suit by several community activists, the success of which depended upon gaining access to the contents of the Seattle Police Department's intelligence and investigative files. The plaintiffs contended that information collected and maintained in these files pertained to political beliefs, community organizational affiliations, sexual preferences and other personal information which was both irrelevant to effective law enforcement and unrelated to the commission of any crime. The plaintiffs also argued that such practices violated their first amendment and other Constitutional rights. In response to their claims, the Seattle Police Department argued that the WCRPA specifically denied access to the contents of investigative intelligence files. This tactic however was ultimately unsuccessful.

The Seattle Police Department's argument was unpersuasive principally because the state public disclosure law (RCW 42.17) generally made intelligence and investigative information accessible to data subjects unless it could be demonstrated that disclosure would undermine effective law enforcement. The plaintiffs contended that the WCRPA did not amend 42.17 nor was intended to regulate the conditions of release of intelligence information, because that was not the intent of the privacy law:

The entire chapter is concerned with the accuracy of information maintained by a law enforcement agency which flows from the fact of an arrest, whether or not convictions result. This fact is clear from the definitions of criminal history record information and non-conviction information. The act is not about investigative and intelligence information. . . . The act in general does not apply to the type of information requested by the plaintiffs in this case. This act creates no right of access to this type of information and it need not do so, since such right is created by RCW 42.17 (Gibbs and Douglas, 1977).

The King County Superior Court ruled in favor of the plaintiffs and the Seattle Police Department subsequently appealed the decision to the State Supreme Court. That court upheld the lower court decision and thus enabled subsequent passage of a Seattle ordinance which marked the first attempt by a local municipality to regulate the information collected and maintained in police intelligence and investigative files.

Although the outcome of this important court ruling denied police a means to categorically prevent public access to intelligence information, it had little effect on their predispositions to exempt material collected in the conduct of investigative activities. That predisposition, born out of custom and ideology of effective law enforcement, holds that any information utilized or exchanged as a part of the conduct of an investigation is beyond the reach of regulation. Consequently, as interviews with those responsible for compliance bear out the exemption of investigative activity becomes an exception which swallows the rule. One records sergeant, an experienced consultant with over a hundred police departments in the state described in a 1981 interview a widespread method of evading the logging and predissemination requirement this way:

There are great loopholes in the law. I can tell you how violations occur. They are happening every day. The cops are violating it by making disseminations without logging them. Hundreds of them happen on telephones and elsewhere. But we cover ourselves by saying they are investigative in nature and under investigative work we don't have to record it as a dissemination.

Aside from the obvious aversion to regulations which entail documentation for the purpose of an audit, many law enforcement agencies have unnecessarily compounded administrative burdens. For example, it

was estimated by a records sergeant in a western Washington police department that 60 to 70 percent of law enforcement agencies have established separate ledgers by which disseminations of criminal history record information are recorded. Instead, a far less cumbersome and less expensive approach could be employed by which disseminations are recorded directly on a particular criminal history record. When asked to account for this widespread phenomenon, a perceptive records manager of an eastern Washington sheriffs office gave the following explanation:

The language of the users is just not recognized by the legislature and every user has its own language. In the criminal justice area the word "log" has a special meaning. It means a minute-by-minute record of transactions involved in the dispatching process. That's where the biggest problem is--its semantics. Now you take something totally different in the WCRPA and use a term in it which is not defined or explored in the body of the act. Consequently, law enforcement personnel use log in this sense and this means maintaining a record separate from the main criminal record files. The WCRPA doesn't say that log should be a part of the record. I made an effort to explain this to the Ad Hoc Committee that this was the meaning commonly understood by law enforcement. However, the ACLU clouded the matter by suggesting that we were trying to avoid establishing a logging process and consequently I dropped further efforts to clarify this problem.

In addition to the difficulties posed by custom and predisposition for effective regulation of record dissemination practices, the status of files collected by regional information centers also presented some inconsistencies in the interpretation of dissemination guidelines. The WCRPA specifically exempted exchanges of information between criminal justice agencies which "jointly participated in the maintenance of a single record keeping department as an alternative to maintaining separate records" (RCW, 1977: 10.97.030(8)(a)). The idea involved in a joint records center is that all transactions involving

arrest, charges and convictions would be maintained in the central records center, obviating the need for files in user departments. But joint participation does not necessarily imply that the central record center serves as a repository for criminal history records.

The Eastern County Information System is one example of a system which assumed the role of an ad hoc records repository. Offenders from five surrounding counties are booked into a central county jail. Since jail records are maintained within the Eastern County Information System, it necessarily contains arrest record information on individuals whose arrests originate from surrounding jurisdictions. Importantly, cases from surrounding jurisdictions are still adjudicated by the court found within the originating jurisdiction. Thus, the local law enforcement agency still has responsibility to maintain the record of arrest and ultimate disposition. Yet the Eastern Washington Information System freely disseminates non-conviction information to user jurisdictions with little observance of pre- and post-dissemination rules.

In a 1980 interview, an eastern county records manager characterized the practice in these terms:

One area we are probably abusing is that of the rules pertaining to record keeping centers. Under the law, all participants in a joint records keeping center do not have to log disseminations between members of the center. My interpretation of a member of center is if you keep data which is relevant to the WCRPA. We house criminal offender information for eighty-four agencies because they all use the jail in Spokane. And since we're only talking about arrest histories as the record regulated by security and privacy then my interpretation is that under the law--which I know we are twisting to beat hell--

I am a central record keeping agency for anybody who uses the jail. I'm going to go to court some day with it, but I don't think they will do a thing to me because I think it's right.

Improving Record Quality: The Case
of Judicial Non-Cooperation

As indicated before, close cooperation between courts and law enforcement agencies is necessary in order to insure that criminal history record information contains current, accurate and complete disposition information prior to dissemination. Yet studies by OTA (1982a), MITRE (1977a) and others noted in Chapter III, indicate that the lack of complete disposition information continues to be the most significant deficiency of records maintained by federal and state records system. In addition, MITRE (1977a) discovered wide variations in the quality of criminal records maintained by local jurisdictions. Unlike the use of state records by the central state repository, the availability of local disposition information tends to be uneven. Compliance appears to be primarily dependent upon local tradition, priorities and commitments; the adequacy of resources; and the quality of interagency relationships among local components of the criminal justice system (MITRE, 1977a: 4). There are numerous instances in the state of Washington in which effective cooperation between local law enforcement and trial courts can and has occurred with respect to furnishing disposition information. However, the chief source of opposition to the development of more effective mechanisms for disposition reporting in Washington has stemmed principally from the State Court Administrators office.

It should be recalled from Chapter III that state court administrators, through the National Center for State Courts, were successful in their efforts to exempt the courts from coverage by the LEAA regulations. The imagery of an unconstitutional violation of a separation of powers and executive invasion of judicial administration was sufficient to thwart any efforts by LEAA to require judicial compliance with the security and privacy regulations. But more than principles were at stake in the attempt to maintain independence from executive or legislative regulations: executive regulation constituted a potential source of interference in the efforts by state courts to implement a unified information system.

The significance of this factor became quite evident almost from the start of the SPA rule-making process. Phil Winberry, State Court Administrator (and as noted in Chapter IV, the chairman of the Attorney General's Advisory Committee on Security and Privacy which helped to draft WCRPA) was aggressive, ambitious and politically astute. He was a strong advocate of state judicial reform and had distinguished himself with involvement in national conferences aimed at advancing the cause of court modernization and unification. During his tenure as State Court Administrator, Winberry undertook two related initiatives to advance state court unification. One initiative was the development (through state LEAA assistance) and implementation of a state court management information system (SCMIS). The other was the passage of legislation amending the state constitution to enable restructuring and administrative unification of trial and appellate state courts.

The attempt to secure a constitutional amendment was begun with the creation of a Judicial Article Task Force (funded with a \$60,000 grant from the SPA). Winberry utilized the group skillfully to produce a consensus bill, which was, as he subsequently characterized it: "the most comprehensive piece of judicial reform ever introduced in the state" (Winberry, 1980: 152). The proposal involved a substantial consolidation of existing trial courts; standardization of judicial selection, tenure, compensation and retirement; a procedure for discipline and removal of justices; and, importantly, the consolidation of all administrative authority and rule-making in the state supreme court. While the proposal garnered substantial support from the legal community, it was most strongly opposed by superior court justices who stood to lose substantial administrative and fiscal autonomy. The bill was ultimately defeated by an extremely narrow margin in the 1977 legislative session. Since that time, there have been no new initiatives to undertake state judicial reform on the scale contemplated by the 1977 legislation.

Although this defeat constituted a major setback for judicial reform it did not however adversely affect efforts to develop and implement a state wide judicial information system. A substantial LEAA grant awarded by the SPA of \$500,000 made it possible to test the feasibility and mount the necessary political support required to fund and implement SCMIS. While it has taken several years for many technical problems to be ironed out (especially those defining the court clerks' data collection role), support has gradually increased for an enlargement of the number of court jurisdictions participating in the system.

Although the state court was the recipient of one of the largest state grant awards, the SPA was largely unsuccessful in its attempt to both insure if the system was compatible with the comprehensive law enforcement data system and capable of providing the central state repository with the disposition information necessary to satisfy the LEAA mandate for accurate and complete information. Moreover, the development and gradual expansion of the state court system has helped increase centralization of state administration without formal unification between trial courts and local police, while undermining effective cooperation between trial courts and local police.

The passage of the state Criminal Records Privacy act in 1977 provided the SPA with a stronger set of tools with which to influence court involvement in the implementation of record quality objectives. Although it was clear that both the Title 28 and the WCRPA legislation exempted court records, at least as they pertained to limitations on dissemination, it was, nonetheless, necessary to require trial and appellate courts to furnish disposition data to the central state repository. The method chosen seemed eminently suitable: define the courts as criminal justice agencies. The following wording was included in the first draft of the regulations circulated for Ad Hoc Advisory Committee review and comment:

The following agencies shall be considered criminal justice agencies for the purposes RCW 10.97 and these regulations: Courts at any level, if they exercise criminal jurisdiction (for the purpose of reporting and receiving criminal history record information (Washington, OCD, 1977)).

While law enforcement interests were obviously extremely supportive of this provision, the State Court Administrator was firmly opposed and anxious to remind the Privacy Administrator that federal exemption of the courts precluded such a rule. Nevertheless, law enforcement interests did not consider it unreasonable to expect the courts to comply with the provision. Subsequently, the State Court Administrator mobilized support of the judicial community to get the proposed rule withdrawn. He selected a rather dramatic way to impress upon the Privacy Administrator that the courts could not be regulated in any way by SPA regulations. The Privacy Administrator was invited to a meeting attended by a state supreme court justice, a superior court judge, an assistant Attorney General and a clerk of a large superior court district. After a brief lecture by State Court Administrator Winberry, punctuated several times by reference to the judiciary as a separate branch of government, each participant in the meeting expressed concurrence with a recommendation by the State Court Administrator that the regulation be withdrawn.

Needless to say, their collective recommendation was reflected in a subsequent draft of the regulations. Nevertheless, the problem of the courts' need to gain access to criminal record information had to be stated in a way that did not also imply that they were subject to regulation. This problem was handled with new language under the general applicability section of the regulations:

The courts and court record keeping agencies have the right to require and receive criminal history record information from criminal justice agencies (WAC, 1978: 365.50.010).

Thus, judicial interests had not only successfully eliminated a regulation (which admittedly had little legal purchase anyway) but maintained the burdens of compliance on law enforcement. The effect of this action created a sense of defeat and resentment within the law enforcement community. Subsequent interviews with law enforcement officials indicated that many police departments have simply refused to furnish the courts with either routine or criminal record information until satisfied that the courts are making a substantial effort to furnish disposition information. In other instances, police are simply refusing to disseminate information (especially for individual records requests because of the added burden to secure complete dispositions. An eastern Washington record manager's remarks are illustrative of the resentment of regulations considered to be less than even handed:

There are more and more of us saying now we can't give out arrest or conviction information because it isn't accurate even though we know the source of accurate records. Again, that may be challenged in the courts, especially where it involves data subject requests. But right now, apparently it is a good enough reason because the courts aren't arguing with us. The smallest amount of everything the courts do--criminal cases--is the information they won't give us--not without some damn good working relationships. If they were mandated by law, they would do it. That's what probably made the thing so ridiculous when they [LEAA] excluded them. In our county, it is less than 1600 dispositions a year that they would have to give to us. We're only looking at three to four transactions a day that they would have to give us.

The courts won more than we ever expected. The development of regulations was going to be the one place where we could get the information we needed. But throughout the whole process, we were the bastards that had legislation placed on us. We were the bastards who had criminal liability placed on us because of infractions, but yet we had no control over court records, so how could we be wrong? So we felt utter frustration when the committee exempted the courts.

What's even sadder is that the trial courts in [my] county wanted to participate--they were willing to assist in getting disposition information. What is unfortunate is that we let a State Court Administrator make the decision for the courts of the state of Washington.

In 1981, (in the wake of approval of a state appropriation) the State Supreme Court issued a court rule which mandated participation of state trial courts in the state court management information system. The rule has further reduced opportunities for informal cooperation between the lower courts and police. In fact, one superior court judge indicated that he is not even certain that such information would be collected by an information system designed primarily to satisfy internal court calendar, case control and other management information needs. "Getting disposition information to the state identification section is", the judge noted, "just not an issue for superior court justices." In counties in which there are multiple court districts cooperation from the courts is uneven and sporadic. For example, a King County records manager characterized the difficulties this way:

We have a verbal agreement with the district court administrator in which they send a disposition to use and we update our records and send them to the central state repository. Unfortunately, for reasons we don't know, only some of the courts do it, and then not all in this case. We are presently working this out with the [new] Court Administrator in order to make these records more complete.

In other instances police have been able to cultivate cooperative relationships with offices of prosecution. In Pierce County, a large jurisdiction south of Seattle, the sheriffs department and county prosecutor have established an effective working relationship in which the prosecutor takes responsibility for return of court disposition

information to the police. In this instance, inter-agency coordination has been successful because the prosecutor has had a strong interest in tracking the outcomes of cases in order to monitor and evaluate charging patterns. But such cooperation is the exception rather than the rule.

Although law enforcement interests have been generally opposed to federal and state privacy regulation, the exemption of the courts from the regulations provided the key impetus to pursue legislative amendments in the 1979 legislative session. That effort resulted as we shall see, in an amendment designed to mandate court involvement in criminal record privacy at the local level.

Law Enforcement Interests Prevail: Redistributing the Burdens of Liability and Compliance

The adoption of the privacy rules and regulations in late February 1978; the conduct of well-attended state-wide training sessions; the development of draft security and audit provisions; and increased policy involvement of the Governor's Committee contributed to a sense of growing momentum towards substantial compliance. The Privacy Administrator now looked for ways to strengthen the law during the next legislative session; to secure carryover funds from the Governor's Committee to support administrative staffing; and, perhaps to explore potential strategies for finding a more secure administrative home for the WCRPA. Neither the future of the LEAA program nor the SPA appeared very secure. Yet the WCRPA assured that some type of administrative mechanism would have to be fashioned to insure continued efforts to bring about compliance. However, several factors

converged to dissipate the SPA momentum, ultimately paving the way for the assumption of administrative authority over the WCRPA by the State Patrol.

Perhaps one of the most important factors to seriously weaken the Privacy Administrator's control over rule-making and implementation activities was the unexpected departure of Donna Schram as the Law and Justice Planning Office Administrator in late March. Schram's resignation was prompted in part by her disappointment over her inability to utilize the SPA to influence state criminal justice policy. Specific recommendations by the Governor's Committee to resolve prison overcrowding and develop new sentencing policies were not given much attention by the Governor. In addition, substantial reductions in LEAA assistance made the allocation of that money a more painful and contentious process. As a consequence, the SPA was increasingly locked into support and continuation of existing projects rather than initiation of promising new innovations.

The replacement of Schram by the deputy administrator was not particularly encouraging for the health of the privacy and security program. Deputy Administrator Keith Weaver had never really been supportive of SPA control over privacy regulation. It put the SPA in the awkward position of having to say "no" to criminal justice agencies who had grown accustomed to getting whatever they wanted. Although they did not have a great deal of confidence in Weaver's ability, the law enforcement leadership finally found an individual sympathetic to their concerns about the burdens of the WCRPA. Furthermore, given his tenuous position as acting administrator, Weaver was eager to please a

constituency which had a great deal of clout on the Governor's Committee. Thus, one of Weaver's major tasks was to somehow contain the aggressiveness with which the Privacy Administrator was pursuing the implementation of the WCRPA.

Indeed, the rule-making process had not been completed; draft regulations were being prepared for administrative and physical security and audit process. The security guidelines involved numerous special considerations because of the diversity of agency contexts in which criminal record data was collected and maintained. For example, the adult corrections division of DSHS stores its criminal record information in a computer which serves the data needs of all the divisions of the DSHS. Thus, regulations had to be devised to somehow limit access of non-criminal justice personnel to criminal record files. Procedures were devised which ultimately created overlapping management control between criminal justice and non-criminal justice personnel. Further, the State Data Processing Authority contended that its authority to control standards for operation of computer systems had been preempted if not usurped by the SPA regulations. Needless to say, these and many other issues involving security in non-dedicated joint computer operations complicated and slowed the development of rules in this area. Yet, surprisingly, most problems of this kind resulted in compromises which appeared to satisfy competing interests.

However, there was one area of regulations governing administrative security which produced much opposition from law enforcement. Title 28 regulations proposed that criminal records only be directly accessible to employees responsible for control of the information

system. The SPA staff interpreted this to mean that not all personnel within a criminal justice agency were intended to have direct access to criminal record information. Consequently, the SPA staff proposed that criminal justice agencies establish a system of security clearances which would limit access to those individuals who have a "need" and a "right" to know the information. The SPA reasoned that restricting access in this way would increase the likelihood that an effort would be made to determine the accuracy and completeness of the material prior to release to agency personnel (such as patrolmen or detectives) and limit the avenues of secondary dissemination of dated or otherwise incomplete criminal record material.

Law enforcement members of the Ad Hoc Advisory Committee expressed strong opposition to this proposal. They argued that it would be impossible and inappropriate to control internal access to criminal record materials. They reasoned that while it made some sense to restrict individuals authorized to maintain and modify such data, it would constitute an unreasonable burden to centralize access for utilization of criminal records in an environment in which remote terminals had been designed specifically to decentralize and, thus, facilitate access to central files.

Evidently, the law enforcement leadership decided that they had had enough of the SPA's regulatory efforts. Consequently, the Sheriffs and Chiefs Association decided to use the obligatory pre-adoption review and comment period as a strategic time to express their dissatisfaction with the overall thrust of the SPA rule-making effort. On May 18, 1978, the Privacy Administrator received a mimeographed

letter (evidently widely distributed around the state with copies also sent to the Office of Financial Management (OFM) director to whom the SPA now reported and the SPA administrator) which strongly criticized the latest proposed rules and urged postponement of adoption.

The letter requested that the SPA postpone, for at least sixty days, adoption of what the Association termed "amendments to the WCRPA." The letter declared that "the people representing the Sheriffs and Chiefs Association on your Ad Hoc Committee view these actions as a steamroller attempt to rush through amendments further handcuffing the criminal justice agencies who must live with this act from hereon." The letter went on to express their attitudes more bluntly:

The Sheriffs and Chiefs Association ask that you spend a few days with representatives of the law enforcement community making an indepth study of the monster you are creating for criminal justice agencies to live with. The only way to effectively implement this security and privacy act of 1977 is through mutual understanding and agreements by all agencies involved; this has not been accomplished by the 45 plus member Ad Hoc Committee (Cotton and Webb, 1978).

The letter provided the OFM director with his first exposure to how politically volatile the implementation of the WCRPA had become. It was evident to the Privacy Administrator that the OFM director was hesitant to assume responsibility for signing off on regulations which did not command solid support. In addition, the OFM office had investigated the fiscal impact of an annual audit and discovered that by state law, local government had to reimburse the state auditor for 25 percent of the total cost. Thus, the OFM director did not want to put

regulations into effect which ran counter to a Governor's attempts to lift federal and state regulatory burdens from local government.

It was also evident to the SPA acting administrator Weaver that the Privacy Administrator was becoming a political liability for himself in the agency. Yet, Weaver was unable to effectively control the privacy activity because the Privacy Administrator had carefully cultivated a policy-making role for the Governor's Committee which was not easily overridden. Nevertheless, the SPA administrator did have management control over SPA staffing and over matters. Consequently, a timely lapse in the funding for the Standards and Goals project, which ended the Privacy Administrator's position, provided the avenue by which his involvement in security and privacy regulation could be terminated. Thus, on July 1, 1978, the Privacy Administrator was released from the SPA, along with several other employees as a part of a general reduction in force necessitated by the loss of LEAA funds.

Although more direct control by the SPA administrator was encouraging to law enforcement, the SPA and Governor's Committee continued to be drawn into a regulatory process they could not avoid. The Governor's Committee was responsible for decisions regarding the certification of agencies permitted access to criminal justice records. As indicated before, this was an area in which controversy abounded. Requests for Governor's Committee certification continued to pour into the SPA office during the remainder of 1978, posing some difficult and potentially unpopular decisions.

One such controversial decision by the Governor's Committee to recognize an eastern Washington Indian tribe (and thus other Indian

reservations) as a criminal justice agency for the purposes of the use of non-conviction information severely alienated the State Patrol, who was strongly opposed to the decision. Decisions like this may have prompted the State Patrol leadership to reconsider opposition to their administration of security and privacy. What was particularly galling about the certification process was that the judiciary was over-represented and, thus, able to dominate the decision-making process. This only exacerbated the resentment the police felt towards the courts. It was simply another manifestation of the judiciary exercising supervision of regulations they had successfully eluded.

As the 1979 legislative session approached, the Sheriffs and Chiefs Association decided to take action. The State Patrol leadership was persuaded to give up its resistance to the administration of the privacy regulations. In addition, the House Judiciary Committee had some new members and was chaired by a conservative Republican sympathetic to the law enforcement community.

The Association undertook a two pronged attack to include the courts within the regulations and to transfer administrative authority to the State Patrol. That strategy was stated succinctly in the House Judiciary Committee report:

Issue: Current law requires a criminal justice agency to obtain the disposition of a case from the court (or State Patrol) before it can give out any information about the case to anyone. This places a burden on police because the courts are not required to give the disposition data to the agency which initiated the criminal proceeding; thus the agency must spend time and money to obtain such dispositions.

The current law places too great a burden on law enforcement agencies to obtain dispositions, especially when the information is required by another criminal justice agency who has no real need for the disposition data.

Dispositions are often hard to obtain and very time consuming. The State Patrol should administer the law because it is more knowledgeable and efficient (Washington, House Judiciary Committee, 1979).

The Sheriffs and Chiefs Association proposed two important amendments to deal with the difficulties involved in obtaining court dispositions. First, a new section was added to the law that required that whenever a court reached a disposition, that information would have to be furnished by the agency "which initiated the criminal history record for the charge" (i.e., police) as well as to the Identification Section of the Washington State Patrol.

But, in addition to this section, the Association proposed another amendment which exempted criminal justice agencies from satisfying requirements for completeness (e.g., pre-dissemination query to the State Patrol) if the court failed to provide disposition information in a timely way:

Provided further that when the full information requested to be disseminated relates to specific facts or incidents which are otherwise within the direct knowledge of the disseminating agency, the completeness requirements of this section shall apply only to the extent that the agency has previously received the disposition data from the court or other criminal justice agency required to furnish disposition data (Washington, House Bill 571, 1979: Sec. 4).

If a quick witted staff counsel to the House Judiciary Committee had not recognized the implications this amendment would have of virtually gutting the WCRPA of its central objectives, it would have probably sailed through the February 5th hearing of the House Judiciary Committee with unanimous approval. The implications of the amendment were that it would permit dissemination of conviction and non-conviction data to any criminal or non-criminal justice agency, without initiating

a predissemination query to the State Patrol. The chairman of the committee quickly intervened and suggested that the Association propose "refinements" in the language to sidestep these implications. However, the changes submitted to the committee by the assistant Attorney General on behalf of the Association were still unacceptable to the committee staff.

Evidently, the chairman of the House Judiciary Committee did not share the staff concerns about the proposed amendments. At a subsequent hearing two weeks later (February 22nd), Chairman Irv Newhouse scolded the staff and committee for taking so long to come up with a solution. Newhouse advised the committee that the "staff had dragged their feet on this bill; that the sponsors hadn't had a fair shake in getting it heard and that he wanted it through the Rules and on the floor for passage tonight" (Cheal, 1979).

Although the language finally adopted specified that the exception applied only to the exchange of information between criminal justice agencies, it still involved the implication that the courts must take the initiative to supply disposition information to law enforcement. The new section reads in part:

Whenever a court or other criminal justice agency reaches a disposition of a criminal proceeding, the court or other criminal justice agency shall furnish the disposition data to the agency initiating the criminal history record for that charge and to the identification section of the Washington State Patrol as required under RCW 43.43.745 (RCW, 1980: 10.97.50).

Presumably this provision would now make the court subject to penalty and civil liability if it failed to provide disposition information to law enforcement agencies. However, such an issue would

necessitate a court decision and that decision would surely void an amendment which requires their active participation. A superior court judge was asked (in a 1981 interview) how the courts felt about this new provision of the WCRPA.

We have basically ignored it. The only legitimate form of regulation of court activities is through rules adopted by the State Supreme Court. In fact, we already have a rule which covers this type of information.

The State Patrol Takes Over: Regu- latory Revision and Effects

In contrast to the controversy generated around the reporting of disposition information, the legislature found no opposition to transfer of administrative authority from the SPA to the State Patrol. Thus the most important element of law enforcements' success resided not so much in the few strategic amendments secured in the law but the opportunity that administrative ownership provided to make wholesale changes in the SPA regulations. Reference has already been made to SPA regulations which were strongly opposed by the law enforcement leadership in community. Briefly, they tended to focus upon rollback and tightening of provisions pertaining to individual access and review; rules which required cooperation from the prosecutor and requirements that local agencies adopt written policies to implement the law and regulations. Therefore this section focuses upon the reaction of criminal justice officials and others to legislative and regulatory changes and their aftermath.

Unsurprisingly, one of the most striking differences between the SPA and the State Patrol rule-making processes was the number and

background of participants involved. The Chief of the State Patrol appointed a special advisory committee which consisted of five law enforcement officials, all of whom had served on the SPA Ad Hoc Advisory Committee. A draft version of the administrative rules was not circulated widely for review and comment and a public hearing held on June 12, 1980, was attended by about ten people--all representatives of law enforcement agencies. Both the Patrol and the law enforcement community were anxious to avoid the controversy which surrounded the development of the SPA guidelines which had proceeded them. In fact, as one eastern Washington sheriff, who had participated in the SPA process (although excluded from this latest effort), remarked in a 1981 interview:

Although I looked upon the guideline revisions as a beneficial thing to clean them up, what I objected to was the fact that they were done without any formal input from major users. I never knew the WCRPA had been amended and rules revised until they were published. As a result, I have great trouble, even today, deciding which version of the WCRPA and administrative rules prevail.

Another record manager from an urban western Washington police department expressed her disappointment that the law enforcement community did not use the opportunity it had to clarify and/or revise key definitions in the law such as non-conviction data, criminal history record information, and dissemination. She contended that much of the difficulty that criminal justice agencies had with understanding the restrictions on dissemination stem from a lack of a clear distinction between arrest and conviction records. As a participant in the State Patrol rule-revision process, she had urged consideration of these issues but was preempted by an overriding concern about the impact of the SPA regulations:

The 1979 rule-making group wanted to eliminate regulations they thought constituted a reinterpretation of the state privacy law. The group was primarily impact-oriented; they wanted to eliminate provisions such as obtaining the status of arrests more than one year old from the prosecutor or provisions requiring that law enforcement agencies assist data subjects by forwarding record challenges to agencies of origin. Procedures like this would be too time consuming and prosecutors and other agencies wouldn't cooperate anyway.

This respondent however, questioned the real value of taking an impact orientation towards the revision of the regulations. According to her, the WCRPA has not really created substantial change in record management practices because law enforcement agencies continue to be considered and used as "information intermediaries in the criminal justice process." She also acknowledged that a routine practice, mostly untouched by the WCRPA, has been the utilization of police agencies as intermediaries to obtain data from other police departments to satisfy requests by private users. She observed that it may have been a big mistake for the State Patrol to strike a "need to know" criterion from the SPA rules, for the department which unwittingly serves as an intermediary may be making itself liable for unlawful disseminations. She continued by saying: "The law is thus having a chilling affect on interagency exchange practices precisely because someone ultimately is responsible for a dissemination log."

In addition to this appraisal most respondents interviewed concurred that the WCRPA had a negligible effect upon the ability of police officers to detect, apprehend and convict offenders. Thus, unlike Mapp and Miranda where mistakes or violations in evidence gathering or post-arrest warnings may result in unsuccessful prosecutions, failure to insure the utilization of accurate and complete

records has no comparable potential result. Rather, failure to observe criminal records privacy guidelines can result in both criminal and civil penalties. Thus, violations of criminal records privacy have both a more direct and insidious effect. The consequences are more direct in that an agency and its employees can be held liable for civil damage suits. The effects are also delayed in that discovery and challenge of violations may not occur until long after the infraction is committed. As a result, both police and prosecutors have become more circumspect about the exchange of criminal record data and extremely cautious in the kind of information disseminated to the press.

Although the amendment of the WCRPA to require court reporting of dispositions was expected to increase court involvement in satisfying accuracy and completeness requirements, court cooperation, especially in larger urban jurisdictions has not measurably increased. Both the State Patrol Identification Section as well as police in large urban jurisdictions have retaliated for continued failure of the courts to furnish disposition information. For example, if a court requests non-conviction information on a subject whose file fails to contain disposition information, it will not be provided to the requesting court. The hope is that by withholding records, courts will be more likely to discipline each other for impeding the sentencing process, but there is little evidence to warrant this expectation.

When the State Patrol acquired administrative authority for the WCRPA in 1979, LEAA still had authority to monitor state implementation activities and enforce compliance. LEAA control was exercised primarily through its power to require periodic reports identifying

progress made towards compliance. The state of Washington had satisfied requirements mandated by federal or state law except one very important element: a plan to execute a systematic statewide audit. The adoption of security and audit rules in 1980 now cleared the way for the Patrol to implement what LEAA considered to be the one remaining deficiency in Washington compliance activities.

The SPA Privacy Administrator had contacted the State Auditor nearly two and a half years earlier to develop an audit process but was stymied by both lack of funds and organizational politics. Nevertheless, the State Auditor's office undertook followup efforts with the Patrol to see if a new effort could be undertaken. Eager to get the LEAA off its back, the Patrol reluctantly accepted the auditors' recommendation that an audit plan be developed and pretested. If the State Auditor were successful in getting the Patrol to accept the plan, it would, of course, constitute a new source of revenue which could justify an increase in its budget. The Auditor estimated that it would cost approximately \$260,000 to conduct an audit which involved one third of 310 agencies each year for three years. A total of thirty staff would be assigned to twelve regions across the state to conduct the audit.

The plan submitted was thorough with respect to verification of procedures, documentation of record quality and inclusiveness of public agencies involved in the criminal justice process. The plan was not submitted for approval by the Patrol until a sample audit had been conducted to pretest the audit instrument. Four county jurisdictions were selected for on-site visits including the State Identification

Section, and the sheriffs' offices in King County (a large urban jurisdiction), Snohomish County (a medium size jurisdiction), and Mason County (a small, rural jurisdiction).

There was no attempt to conduct a systematic audit nor to trace a statistically representative sample of arrests to determine accuracy and completeness largely because the main objective was to test the feasibility of conducting an audit. Nevertheless, numerous deficiencies were uncovered in records management procedures in all three jurisdictions surveyed. One recurrent deficiency common to all jurisdictions pertained to the quality and accessibility of dissemination logs. Dissemination forms frequently failed to specify exactly which charges and related dispositions were disseminated, they were often inaccessible and, in some instances, did not employ standardized elements of information.

The Snohomish County Sheriffs Office had the highest rejection rate for incomplete, inaccurate or misleading criminal history records. This is a surprising finding in that the county has a sophisticated offender-based information system linking police, prosecutor and county record files. In contrast, Mason County had more complete and accurate documentation of criminal record information. The difference appeared to stem largely from the extent of cooperation by the courts and jurisdictional complexity--the greater the number of courts and larger the prosecutors' office, the greater the use of inconsistent event and case numbers and thus the greater likelihood of incomplete and inaccurate records.

In September 1979 the State Auditors Office submitted its plan and results from the sample audit to the Chief of the State Patrol. By this time, the Chief had gotten feedback from agencies involved in the sample as well as from other local criminal justice officials. It was evident from the response that the proposed audit involved a far more rigorous review of records quality and management practices than local law enforcement officials expected. The principal objection was that the audit focused too heavily upon record quality (accuracy and completeness) and dissemination controls. One eastern county sheriff expressed the concerns this way:

The auditor placed way too much emphasis upon what he did with our records, how we recorded it and the accuracy and completeness of our files. We felt this emphasis was inappropriate. What would have been appropriate was a survey to generally assure that each agency had adopted procedures to carry out the objectives of the law.

Not surprisingly, the Patrol rejected the audit plan and since that time, no new plan has been developed or approved. A records manager from a large, western Washington urban jurisdiction observed that if an audit were to be conducted it would definitely renew the "visibility that the WCRPA once had when the SPA had administrative authority."

CHAPTER VII

EXPLAINING STATE AND LOCAL IMPLEMENTATION OF LEGISLATIVE AND JUDICIAL POLICY

This study has sought to identify interests and factors which determine the politics of state implementation of federal guidelines in criminal justice and what that implies for an understanding of policy implementation processes. Chapter I presented a number of political factors to be examined in the development of state guidelines to provide a potentially useful focal point by which to explain state performance and thereby contribute to our understanding of political factors which limit the regulation of criminal justice.

In this chapter we return to the conceptual frameworks for explaining policy implementation processes outlined at the end of Chapter II as potential sources of an explanation of what happened in Washington and nationwide, and why. Although proponents of these conceptual frameworks present their explanations differently, they generally agree with respect to the significance of statutory clarity and minimal change as conditions of effective implementation. Thus, we follow the logic implied by these factors to develop an overall explanation of the lack of compliance and limited change resulting from the federal criminal history records mandate, using the nationwide data from Chapter III and additional elaboration from the Washington case (Chapters IV through VI).

However, these existing frameworks and the political conclusions they sustain are to a large extent underdetermined by the available data. The data from which these authors draw to support their analyses and conclusions involve complex and interdependent factors which are neither easily operationalized nor reduceable to simple formulas for success. Therefore, accepting the explanation resulting from these frameworks requires concurrence with conceptual underpinnings and assumptions incompletely formulated and perhaps incapable of being tested with any degree of scientific rigor.

When performance may result from the confluence of a number of political factors, an alternative explanation is needed which gives more attention to the support of state and local elites. Thus, this chapter next draws together the data and findings from the Washington case to form a more complete explanation. Since case material presented in Chapters IV through VI is based upon only one state's response, which may be unrepresentative of other states, the explanation advanced must be considered limited. However, the evident uniformity in state performance described in Chapter III may support some limited inferences as to factors which may account for similarities in state performance. Thus, while this study cannot generate a conclusive explanation, it does suggest a plausible interpretation.

Finally, this chapter broadens the explanation to suggest how the factors which affect the state implementation of federal regulations compare with those which shape responses to two important court-originated decisions (i.e., Mapp and Miranda) which regulate the administration of criminal justice, also. In particular, this investigation

examines common factors pertinent to understanding state implementation of national mandates and determines what this tells us about the efficacy of efforts to implement intergovernmental regulatory policies in criminal justice. The analysis concludes with a discussion of what these common factors imply for a more general understanding of policy implementation, intergovernmental regulation and the American political system.

Explaining the Lack of Policy Success:
Ambiguous Statutes with Uncertain
Consequences

Of the factors considered conducive to effective policy implementation discussed in Chapter II, policies with clear goals involving little institutional change are considered by some to be key factors in explaining policy outcomes. First, policies which are clear in purpose and provide specific guidelines minimize distortion and evasion, and therefore make enforcement possible. Second, policies which minimize the amount of change which institutions, organizations and individuals must undergo in order for implementation to be effectuated are unlikely to generate opposition from elites having authority and influence with respect to the compliance of subordinates.

If we accept this conventional wisdom of effective policy implementation, then nationwide patterns of compliance with the federal criminal records privacy mandate could be explained without recourse to the details of the Washington case. In fact, at a superficial level, the Washington case might be used to further corroborate the importance of these factors for explaining the limited support by state elites,

underenforcement of record quality and dissemination provisions and other responses producing actions falling short of statutory objectives. An explanation of patterns of national compliance based upon extent of change and statutory clarity is described in the next two sections.

Organizational resistance to technological change

Mazmanian and Sabatier (1981; 1983) contend that the effectiveness of regulatory policy will depend upon whether that policy is predicated on valid causal theory about the relation between strategies and desired performance. They observe that the efficacy of regulatory programs will frequently depend upon the availability of technology to target groups or organizations who must comply with statutory mandates. Difficulties with implementation and, thus, successful performance may be compounded if policy involves "technology forcing provisions" involving extensive change as the means to achieve desired objectives.

As Chapter I indicates, the attempt to develop a national CCH involving regulatory reform has been dependent upon the efficacy of parallel efforts to influence the implementation of information technological reforms. In order to reduce these technological limitations, LEAA advanced a strategy by which it could achieve its regulatory objectives. That strategy involved the attempt to promote information innovations in criminal justice in order to change organizational structures, and interorganizational patterns of coordination in directions which make them more amenable to uniform regulation.

However, LEAA simply misjudged the extent to which system constraints constitute formidable barriers to attempts to use regulation

as a means to control the direction of information technological reform. There are two reasons for this. First, as Chapter III shows, the effects of the diffusion of the information innovations have been differential. Law enforcement information technology has greatly increased the exchange of and reliance upon criminal records in the conduct of police patrol, inquiry and investigative functions. Yet the application of information technology by offices of prosecution and the courts has not had a similar emphasis on the utilization of criminal records. Information systems have been primarily employed to satisfy day-to-day case management information needs rather than those pertaining to charging or sentencing processes. Unlike police organizations, the functions of prosecution and adjudication do not lend themselves to information innovations designed to increase the utilization of criminal records as an additional aid or substitute for highly idiosyncratic and discretionary decision-making processes. Moreover, while state repositories have been substantially upgraded, many still lack technological sophistication.

Second, because of the dynamics of decentralization, LEAA surrendered direct regulatory control over State Planning Agencies--a medium through which it could influence and exert leverage over state policy making processes. The fact that less than half the states have adopted dissemination policies, which vary from LEAA's recommended dissemination policy is indicative of LEAA's limited capacity to influence state policy through the SPA.

By this account, LEAA's theory about the connection between the development of a uniform method of record keeping, organizational

coordination and a national CCH was faulty. Moreover, the SPA infrastructure has not proven to be either a reliable or an effective means of facilitating information technological or other policy innovations (Feeley and Sarat, 1980). Thus, criminal records privacy safeguards could not possibly be effectively implemented if the organizational preconditions to regulation have not been effectuated.

The twin evils of ambiguity
and delegated discretion

It is also contended that statutes which carefully structure the implementation process increase the likelihood of successful performance. Factors or variables considered to have strategic significance as leverage points over implementation processes include maximizing hierarchical integration among agencies responsible for compliance; minimizing veto-clearance points involved in achieving objectives; biasing decision-rules in favor of statutory mandates; and maximizing participation by interests supportive of the mandate, who are external to the implementing agencies (Mazmanian and Sabatier, 1981). In addition, guideline development must bring about congruence between goals, terms and procedures and problems they are designed to address. Given the complexity of problems associated with improving record quality, a period of "administrative learning" must occur prior to final adoption of any rules and regulations (Rabinovitz, Pressman and Rein, 1976: 401).

There has never been a sufficient Congressional consensus to adopt comprehensive criminal records privacy policy. In the absence of comprehensive legislation, LEAA had the slenderest of mandates from a substitute amendment both vague in wording and intent, and spare in

detail with which to establish guidelines for state compliance. Given these conditions, LEAA could expect conflict over guidelines which attempted to infer legislative intent. Yet LEAA squandered the opportunity to achieve policy uniformity and to advance its own policy preferences by yielding to interests which sought state flexibility and discretion, especially with respect to dissemination policy. The fact that states have adopted several different dissemination policies, each paralleling one of three versions of the federal guidelines is indicative of the problems inherent in the ambiguity of LEAA's regulations and delegation of policy interpretation and adoption to the states. Thus, it would be reasonable to argue that the LEAA's Title 28 regulations lack the clarity of intent, unity of purpose and finality to insure uniformity in state compliance.

But clearly, political feasibility was a central consideration in LEAA's guidelines on limits to dissemination. In the absence of a Congressional consensus on dissemination policy LEAA clearly had to fashion a policy acceptable to diverse and competing interest groups, including the press, employers, civil rights groups and local governments. The guideline development process therefore served as a surrogate legislative process in which the attempt at a uniform and precise statutory interpretation gave way to the ambiguity inherent in the politics of negotiation and compromise. Although this result is not inconsistent with the philosophy of the "new federalism," the devolution of policy making to state and local governments accentuates the power and influence of bureaucrats and special interests closest to policy implementation processes (Van Horn, 1979). By this account then, issues pertaining to

constitutional rights and the conflict between the privacy and the public right to know constituted significant political factors in explaining the patterns of state compliance.

Next, characteristics of the criminal justice system of decision making, policy development processes and distribution of power make policy consensus and voluntary coordination between components unlikely and conflict inevitable. In conjunction, these factors may account for why the attempt to increase the clarity, specificity and uniformity of objectives through guideline development proves ineffective, as Berman observes, in a policy system "where the autonomy of local organizations is well established" (1980: 219).

Moreover, because of these reasons, LEAA has been able to exercise only negligible enforcement of performance standards. The fact that most SPA privacy plans have given way to administrative control by state law enforcement suggests that in the absence of precise specification of a state administrative authority to implement criminal records privacy, LEAA has been unable to enforce compliance.

The Washington SPA guideline development process, and perhaps those processes employed by other states, merely constituted a replay of the federal rule-making process because state law continued to reflect the ambiguity of the mandate and language of its federal precursor. The SPA overspecified procedures for compliance because of the need to compensate for two important deficiencies: the lack of a precise mandate including clearly ranked objectives and the need to anticipate and minimize the impact of a statute involving substantial change.

The guideline development process also provided the Washington SPA an avenue to not only clarify lines of authority but structure implementation in a direction consistent with its interpretation of the statutory mandate. A wide spectrum of interests were given the opportunity to participate in guideline development and as the case reveals, a presumption prevailed in favor of a liberal interpretation of procedures to protect the rights of individual data subjects. In spite of these advantages, however, experience in Washington state differed little from national patterns.

Thus, this explanation would suggest that implementation of the federal criminal history records policy was limited because guideline development only exacerbated problems of ambiguity in the original legislation at both the national and state levels. Also, the delegation of discretion to the state and local level inhibited the development of a uniform criminal history information system and contributed to state underperformance in terms of record accuracy and quality.

Explaining the Absence of Significant Change:
The Politics of Structural Conflict

Our preliminary explanation has stressed the ambiguity of the federal statute, uncontrolled administrative rule-making, lack of goal consensus and insufficient technological capacity as significant factors in explaining state responses to the federal criminal records privacy mandate. While taken together the factors help account for some of the differences and similarities in state adoption of federally mandated procedures, important features of state responses and performance attributes remain unexplained.

Regardless of the problems of ambiguity in the federal regulations, the uniformity of state plans and extensive procedural compliance suggests that state officials have responded in ways required by the federal regulations. In another respect, if state officials (e.g., the governor, legislature and state criminal justice officials) utilized the discretion inherent in LEAA regulations to develop state dissemination policies consistent with state priorities and preferences, then we should expect effective enforcement to originate from state rather than federal officials. Moreover, in those areas of federal regulation in which there has been substantial state procedural compliance (e.g., the development of central state repositories, individual access and controls for accuracy and completeness), why has there been relatively little change in record quality or management practices?

If deficiencies in technological capability have largely accounted for the failure of some states to improve the accuracy and completeness of criminal records, then why is there so little variation between all states, as the OTA survey indicates, between the frequency and consistency with which records management procedures (e.g., monitoring, delinquent disposition reporting and record quality audits) are conducted and the overall integrity of criminal records utilized in administration of criminal justice?

In another respect, a comparison of the LEAA regulatory development process with state guideline development (albeit in one state) suggests that they involve different policy focuses. The focal point of conflict over the Title 28 regulations gravitated around the extent of limitations placed on access to criminal records by the press and private

employers. In contrast, as the Washington case study shows, the attempt to regulate the conditions of the internal use and exchange of criminal records in the administration of criminal justice engendered the most controversy. That this policy area was controversial is due primarily to the fact that state guidelines specified, in some detail, the extent of responsibility law enforcement and other criminal justice officials had to ensure the integrity (e.g., accuracy and completeness) of records utilized in the administration of criminal justice. Finally, although the commitment of state officials is important to the development and implementation of policy and enforcement given the indifference of state officials in the Washington case, why was the SPA able to adopt guidelines which attracted considerable conflict and still make progress in subsequent implementation activities?

The explanation of implementation processes as solely a function of the clarity of the policy purposes and amount of change involved may produce a profound misreading of the importance of the expectations and attitudes of implementers, elite support and enforcement as factors involved in the state implementation of federal mandates. As the ensuing analysis suggests, such a focus fails in crucial respects to penetrate appearances to uncover the political realities which limit change in due process protections, management practices, and the use and exchange of criminal records.

The extent to which state and local elites support federal policies involving regulation of criminal justice processes may have an important bearing on whether such policies result in institutional change. The interests and priorities of state executives, legislators,

and state court judges determine, in significant ways, their response to federal policies. Policies enunciating clear and precise procedural guidelines which fail to involve credible costs or sanctions for evasion or substantial benefits for compliance, may produce reactions of indifference or a kind of formal, perfunctory and mechanical policy adoption, resulting in little or no structural change. Moreover, as state policy responses to the Supreme Court civil liberties decisions show, there are likely to be few costs to formal ratification of policies necessitating procedural change and, perhaps, substantial political benefits for compliance, especially if these are the only types of changes upon which federal and state enforcement is based.

State elite responses to federal policies are also conditioned in important ways by their perceptions and attitudes about the scope of their supervisory role and extent to which policies addressing this role might disrupt the political status quo between state judicial and law enforcement officials and local criminal justice officials. Federal and state policies which seek to strengthen enforcement powers of state organizations which lack elite commitment and local political support will probably be unsuccessful regardless of the extent to which additional powers are spelled out.

State elite indifference and problematic enforcement

It is not evident that having the jurisdiction to enforce law will guarantee that aggressive enforcement will occur. Effective implementation requires that policy originators and officials responsible for implementation demonstrate a strong commitment to statutory goals.

It was noted earlier that Washington state officials (e.g., the Governor, the Attorney General, and other criminal justice officials and department heads) reacted to the federal privacy mandate with indifference. But indifference does not necessarily imply opposition. For, unlike initial reactions to Mapp and especially Miranda, there was no visible outcry of criticism, condemnation or rejection of the mandate in Washington, nor for that matter, in any other state. Criminal justice officials did not publicly argue, as they did in decisions designed to regulate evidence gathering and post-arrest interrogations, that criminal records privacy would undermine effective law enforcement. Perhaps the fact that the regulation was treated as a routine condition of aid may have contributed to this reaction, but there is also some evidence that criminal records privacy has not constituted an issue of major concern to state and local elected officials.

LEAA structured the state implementation process in a way that reinforced the perception by state officials that criminal records privacy was just another condition which had to be satisfied in order to get federal aid. The linkage of compliance to preparation of a state plan enabled the Washington Governor for example, to delegate the task to the SPA and the Governor's Committee and, thus, avoid having to enunciate a policy response. Since the Governor's Committee was dominated by state and local criminal justice officials, there was little concern and every reason to expect that criminal records privacy would be given the same perfunctory response as other guidelines. The state planning process had to result in some form of concrete action and draft legislation would be a persuasive response to the LEAA guidelines. The

fact that the Attorney General's Advisory Committee was unable to persuade the Governor to support the independent commission concept, and the unwillingness of existing state agencies to assume administrative responsibility for the regulations made the prospect of passage of legislation extremely unlikely.

Thus, the WCRPA became state law not because it was a significant priority of state officials but because it was instrumental to the achievement of other agendas. In some respects, it was a classic case of log rolling. The State Patrol supported passage of the WCRPA in exchange for Governor's Committee support for expansion of its law enforcement powers. The State Court Administrator was willing to support passage if that would help free the Judicial Council from an unwanted administrative role. The House Institutions Committee chairman supported it because it was linked to the creation of a Department of Justice. Finally, a majority of legislators voted in favor of the bill because the SPA staff had persuaded them that LEAA mandated a state law and that the Governor (through OCD) supported this avenue of compliance.

What is most conspicuous in this enumeration of reasons for eventual adoption is the relative absence of focus on the substantive aspects of policy. Other than the News Association's aborted attempt to hold the WCRPA hostage for its own privacy amendment, there was no real controversy regarding the purpose of the law's dissemination policy or any other aspects of the legislation. What is surprising is that the WCRPA became so controversial long after passage.

In most instances, states have insured that criminal records privacy regulation is housed in an agency with state-wide policy

jurisdiction and enforcement authority. That the states have not aggressively pursued implementation and compliance or enforcement activity (as our subsequent discussion will indicate) does not necessarily stem from an inadequate authority or jurisdiction.

Unlike most other states, Washington initially chose to lodge administrative authority in the State Planning Agency. While several legislative agendas intersected to make this possible, the reasoning which prevailed ever since the Attorney General's Advisory Committee proposed an independent security and privacy commission had been accepted by the legislature that regulatory authority for criminal records privacy should not be lodged in an operational criminal justice agency. In fact, its initial accomplishments were indeed impressive. State guideline development resulted in regulations more forward looking than most states in areas such as inspection provisions, record quality, dissemination controls and audit. Also noteworthy in Washington was the conduct of extensive, state-wide training sessions involving law enforcement leadership and participation of nearly one-thousand criminal justice personnel. Regardless of leadership attitudes towards the law, its legal requirements were being disseminated widely in the criminal justice community.

There was, however, slippage in leadership support and political environment conducive towards SPA implementation. OCD reorganization and transfer of the SPA program to the state budget agency combined with a gradual dismantling of the LEAA program, a turnover of Law and Justice Planning office administrators, and increased non-cooperation of the

judicial leadership served to encourage efforts by state and local law enforcement to derail further regulatory actions and destabilize SPA control. All of these pressures converged at a time when the SPA had just completed a protracted rule-making process and was about to acquire added enforcement power through the conduct of state-wide audit.

The gradual dissipation and erosion of leadership commitment and support is said to constitute a significant reason for ineffective regulation (Bardach, 1977a; Mazmanian and Sabatier, 1981). Perhaps this factor alone explains what happened in the case of the SPA's attempt in Washington to implement the WCRPA. Perhaps--but there was no overriding commitment to see the regulatory process through--state officials had typically been indifferent to most federal conditions of aid; but what they were not indifferent to were regulations which involved controversy. Criticism and pressure from law enforcement could not be ignored for they were a significant block on the Governor's Committee and had captured a substantial percentage of LEAA allocated funds.

It is to the source and role of this criticism that we now turn to establish the importance of the linkage between elite support and the beliefs, expectations and attitudes of implementers closest to policy execution.

The political realities of anticipated change

An important recurring preoccupation in the history of social and political thought is to somehow penetrate the appearances of social structure to reveal the reality to observers as well as participants.

Such an endeavor continues to be a difficult task because, as Connolly observes, "bound up with this distinction are those between theory and ideology, thought and action, the actual and the possible, and consciousness and self-consciousness" (1981: 63).

Since the discrepancies between appearance and reality may assume a variety of forms, the distinction between necessary and merely contingent features of social life is seldom unproblematic. A newly gained understanding may require theorists and agents to reconcile or alter their beliefs and revise their interpretations and expectations to conform with newly discovered social necessities; or, alternatively, transform social structures in ways which will satisfy real interests. The images of institutional structure, capacities of role-bearers within them and perceived possibilities of change are sustained by political interpretations. These interpretations, although both plausible in terms of the moral ideals and/or fears they underpin, are typically undersupported by available evidence. Nonetheless, as Connolly suggests, they seek

to crystallize our self-understanding in a particular way in the hope, vain as it usually is, that this articulation will help to solidify the reality portrayed or to obstruct the outcome feared or to promote the achievement pursued (1981: 89).

Appearances play an important strategic role in political conflict involving policies and their consequences. An essential purpose of politics is to strike an acceptable relationship between the distribution of power and affected interests. Importantly, the results of political conflict may both redistribute power among the participants and result in a differential distribution of burdens and benefits, responsibilities and opportunities.

Parties to a political dispute therefore have important incentives to trade upon purported discrepancies between appearance and reality in ways calculated to advance their favored policy positions. Contending interests involved in a policy issue are unlikely to reveal their real interests or power positions in order to gain leverage over consequences of policies they favor.

A recurring theme in the literature on law enforcement and criminal justice reform, replayed in significant ways in the attempt to implement policies in Washington to regulate criminal justice information systems, is that attempts at reform fly in the face of reality. Wilson's analysis of the futility of prospects for change is asserted unequivocally:

The patrolman is neither a bureaucrat nor a professional, but a member of a craft. As with most crafts, his has no body of generalized, written knowledge nor a set of detailed prescriptions as to how to behave--it has, in short, neither theory nor rules. . . .

An attempt to change a craft into a bureaucracy will be perceived by the members as a failure of confidence and a withdrawal of support and thus strongly resisted; efforts to change it into a profession will be seen as irrelevant and thus largely ignored (Wilson, 1968: 283).

Yet Milner, acknowledging serious attitudinal and structural constraints, suggests a pivot upon which change may turn:

Changes that are necessary to make the exclusionary rule unnecessary may be so basic as to require adoption of a new paradigm of criminal justice administration, a paradigm emphasizing the values and norms necessary to gain police restraint. . . . At the very minimum this would seem to require that groups outside the police organization more actively encourage police restraints. Existing reference groups might advocate this goal more explicitly, or new groups might become a more integral part of the process. In any case such exchanges in police behavior are unlikely unless other changes in the criminal justice system take place.

The importance of the Court's attempts at police restraint may pale in this context, but it might still play some role. Though the Court's power to develop a conscious and explicit program seems effectively limited, this institution might still influence attitudes and behavior in other ways. It may act as a catalyst for change by lending its prestige to certain values and thus encouraging interest and support from others in a better position to develop programs necessary to implement these values (Milner, 1971b: 486-487).

The case study of one state's efforts at implementing a federal mandate highlights the political significance of police opposition to regulation of information utilized in the conduct of police investigations and the significance of state court support of and involvement in implementation of such regulations. What is significant about law enforcement's reaction to criminal records privacy regulation, even though it differed in important respects from prior Supreme Court civil liberties decisions, is that the policies were considered equivalent. This is surprising because there are two important objective differences between the Mapp and Miranda decisions and criminal records privacy. First, improvements in record quality resulting from accuracy and completeness guidelines are designed to enhance police identification of repeat offenders and therefore to increase their influence over decisions made at subsequent stages of the criminal justice process, including bail, charging and sentencing. This would appear to constitute an important incentive for compliance.

Second, unlike its civil liberties predecessors, sanctions for failure to comply with criminal records regulations do not affect case outcomes. The effects of inaccurate or incomplete records are not equivalent to illegally seized evidence or improperly administered warnings. Cases are not dismissed or reversed if problems surface at

trial in the integrity of criminal records used in fact finding processes. While judges vary widely in the weight given such material, prosecutors' charging decisions and success in plea bargaining are greatly influenced by the number of prior arrests and convictions (Jacoby, 1980; Weimer, 1980). Given these differences it is not obvious why police anticipated criminal records privacy regulations to have an adverse effect compatible to that expected with Mapp and Miranda, nor why state prosecutors cared so little about the implementation of state guidelines.

However, law enforcement interests were not alone in mischaracterizing the point and exaggerating the consequences of the federal mandate and state regulations. The ACLU, representatives of the Washington Public Disclosure Commission and other liberal interests accentuated and exploited the due process dimensions of the regulations because they believed that the inspection provision constituted the strongest mechanism to secure enforcement and compliance. No doubt similar perceptions by police reinforced their views. On the one hand, proponents of strengthened due process rights fully expected liberally construed procedures for records access to instigate needed reforms in the records management practices. On the other hand, expecting such procedures to inundate law enforcement agencies with records requests and time consuming challenges and appeals, law enforcement interests steadfastly, although initially unsuccessfully, resisted these attempts.

The paradigm popular among students of criminal justice policy which explains outcomes of policy regulating criminal justice in terms of the conflict between crime control and due process values misses the

extent to which justifying ideologies may deceive their proponents and mislead their opponents. Operating in tandem, these opposing ideologies justify beliefs and expectations about the possibilities and realities of change. The simplistic dichotomy of efficiency vs. fairness locks participants in the comfort of appearances by establishing the boundaries of how the path towards reform is conceived and repudiated. Thereby, the process of reform becomes a caricature of itself in which the proponents and opponents of change act out their beliefs in self-fulfilling ways.

Cast in these terms, the conflict between opposing interests over state guidelines has paradoxical results. Although attempting to thwart efforts to create burdensome guidelines imposing due process protections, law enforcement interests found themselves drawn into an ever widening spiral of interpretative regulations as a defense against having alternative interpretations of due process rights imposed upon them and as an offense to contain efforts to enlarge regulatory access to intelligence files. Also, the single-mindedness with which due process proponents carried their efforts all but obscured the path toward real reforms which lay in the improvement of the quality of records used in the entire criminal justice process. Unfortunately, record quality provisions are not self-enforcing but necessitate elite support, permanent administrative mechanisms, enforcement and long term oversight.

Law enforcement's political agenda was revealed in another way as well. Under court sanctions resulting from community activists' pressure to end the collection and maintenance of information resulting

from political surveillance, law enforcement interests were intent upon preserving discretion perceived to be inherent in the investigative function. Criminal records privacy regulation could be used as a tool to deny access to material accessible through other state law. When success in this effort was thwarted by an unfavorable Supreme Court opinion, police resorted to the one weapon that really mattered--non-compliance to provisions which regulated interdepartmental dissemination of investigative material which included reference to criminal records.

Finally, therefore, what the Supreme Court civil liberties decisions and Washington implementation of the federal criminal records mandate suggest is that expectations about policy consequences, regardless of whether they are well founded, can be an important political factor in explaining responses to external regulation. Perhaps it is not surprising then that when appearances have been successfully severed from political purposes that police are willing to acknowledge, as an eastern Washington records manager did in 1981, that expectations were not only greatly overdrawn but that had the WCRPA preceeded Miranda it would have obviated the necessity for that decision. The WCRPA made clear to at least some law enforcement personnel what Miranda had clearly failed to do, that the integrity and accuracy of information used in investigation of suspects of crimes is as important as securing an actual arrest and possible conviction. In this way, reforms in record management processes have been viewed by some as an asset rather than a liability.

These insights underscore the importance of law enforcement investigative practices as a political factor limiting effective

regulation of criminal justice information systems and its import for understanding the interests formative in the ultimate outcome of such reform efforts. Additional political realities, which unfold when examining issues of federalism and the separation of powers doctrine, provide the space in which to further understand the gap between procedural compliance and actual change.

Judicial independence, underen-
forcement and the differential
burdens of compliance

Almost immediately after LEAA published its initial draft regulations in 1974 the National Center for State Courts challenged the Justice Department and LEAA's authority to regulate the judiciary. While strenuously arguing that the separation of powers doctrine prohibited such an effort, state court interests chose to case their objections in broader terms. The National Center contended that LEAA's actions "indicate a clear departure of LEAA from its traditional and often stated policy of not imposing federal regulations on the states. . . (1974: 2). Moreover, the LEAA draft proposal was criticized for exceeding its statutory authority by requiring state plans.

This criticism is somewhat surprising and inconsistent for judicial recipients of generous LEAA grants have complied with all other conditions of aid before and after the Title 28 regulations. Why this mandate should be any more onerous than other forms of executive regulation is not obvious.

The National Center also challenged the desirability of the creation of new state organizations to implement plans.

It is unclear from the proposed regulations whether each state would be expected to create a new and separate planning entity to carry out the provisions of these regulations or whether an existing state agency would be used such as the State Planning Agencies (National Center for State Courts, 1974: 6).

What evidence of this kind suggests therefore is that state judicial interests challenged the attempt to create new sources of state policy-making authority which invited jurisdictional conflict.

While these efforts were underway to force LEAA retraction of these onerous aspects of the regulations (between February 1974 and March 19, 1976, when LEAA's revised regulations were published), the Washington State Court Administrator assumed a leadership role in producing a state privacy plan. In fact, as minutes of the Attorney General's Advisory Committee indicate, a motion was passed which made the Clerk of the Courts (an elected official in Washington) subject to the management and control of the Superior Court for the purposes of the state plan (Washington Attorney General's Advisory Committee on Security and Privacy, 1975: 2). The idea was that if state and trial courts were included under the regulations, then they should assume a supervisory responsibility over court record keeping functions. Thus, whatever the outcome of the final regulations, the courts stood to advance their organizational interests.

Even after LEAA regulation of the courts was withdrawn in 1976 the State Court Administrator continued to be heavily involved as a sponsor of state legislation. The State Judicial Council was proposed in initial legislation, and seriously considered until replaced by the Office of Community Development, as administrative authority for WCRPA. While it is not altogether clear why the state court leadership should

continue to pursue an administrative role over regulations originated by executive agencies, state court organizational interests could conceivably be furthered by adding additional regulatory responsibilities. The fact that the Judicial Council was staffed by the State Court Administrator's office would have made it possible to use the state Criminal Records Privacy law as a way to advance state court administrative consolidation denied previously through other means. The attempt to implement a state court information system was proving difficult and a federal mandate requiring coordination of records processes between criminal justice agencies could help remove some organizational barriers. Moreover, acquisition of state regulatory authority was consistent with existing state court policy authority and may have offered an attractive way by which to at least limit further executive encroachment on judicial organizational interests while increasing administrative control over trial court activities.

We have already noted the commonality of police perceptions of the Supreme Court civil liberties and criminal records privacy as policies imposing due process considerations on the conduct of law enforcement officers. Interestingly, unlike the police, the courts have not interpreted criminal records privacy in due process terms. Remarks made by Judge George Mattson help explain this interpretation while providing additional insights about police reactions.

The WCRPA was not received by either courts or police with the same concern as Mapp or Miranda. While the civil liberties decisions were important to our attempt to secure convictions, the WCRPA poses more of a civil liability concern; neither its impacts nor purpose are of much significance to either us or law enforcement.

The essential purpose of the WCRPA is the protection of police agencies from having to divulge a lot of data they

don't want to share. Basically, they want to avoid civil liability for the use of their information for criminal justice purposes.

The biggest problem the WCRPA faces is getting the courts interested in the issue of privacy. I did try to influence the development of the state court information system because it now creates access to some court documents that are either uninformative or should be confidential, but we have been unable to reach agreement on how to control access to court records without undermining policies which have always made them publicly accessible (Mattson, 1981).

These remarks suggest, then, that what really separated courts and police was not so much objective differences in the impact of the law on functions and routines (although there are some important differences in this regard), but the impact on organizational interests resulting from differential burdens of compliance.

As the Washington case documents, therefore, the problems of enforcement of record quality provisions and compliance largely reflected political-organizational conflict between police and courts. Thus, the eventual efforts by law enforcement interests to redistribute the burdens of compliance (by lifting civil liability sanctions imposed on police for failure to furnish complete dispositions) unmasked institutional and organizational conflicts underpinning a policy involving overlapping jurisdictions with uneven responsibilities for compliance.

There was widespread resentment by law enforcement officials about the inequity of Title 28 and, thus the WCRPA, in exempting the courts. Moreover, reactions of state elites reinforced the view that since police were the primary custodians and intermediaries for the documentation of all transactions related to the compilation of criminal records, their compliance was what was necessary. Perhaps these factors, combined with the SPA regulatory authority, provided law enforcement

interests an opportunity to challenge the legitimacy and authority of the regulations and, thereby, to undermine an important purpose of Title 28 and state law which was to regulate the quality of information used and exchanged in the administration of criminal justice.

Ever since the Menard decision implementation of criminal records privacy involved a collective responsibility for record quality--a responsibility that implies interagency and interjurisdictional coordination among all components of the criminal justice process. The exclusion of the courts from that mandate and ambiguous role for prosecutors has reinforced, as we see in the Washington case, a sense of inequity of burdens--an unequal shouldering of responsibility by law enforcement. That the courts eluded the mandate and continue to fail to provide complete disposition information has been an important factor in justifying non-compliance. If the state court has not considered its participation critical to satisfying the criminal records privacy mandate, then it can hardly be expected that police would take their own responsibilities seriously. It may, by this account, then be unsurprising that the most serious problem with the quality of criminal history records continues to be the lack of complete dispositions.

Thus, the politics of regulation of criminal justice is bound up in a system in which differences in organizational capacity, power and intergovernmental and interorganizational relations work to inhibit rather than support the accommodation necessary to facilitate change in the management of criminal history records.

Interpreting National Patterns Through
the Washington Case

The foregoing analysis of state and local efforts to implement a national policy intended to regulate criminal justice information systems provides contrasting explanations of national outcomes. Our first explanation focused upon the primacy of the technological change, statutory ambiguity and delegated discretion as key factors accounting for the limited success in achieving performance objectives. The difficulty with this explanation is that it is both misleading and inconsistent: what is misleading about it is its overemphasis on technical factors such as statutory intent and content which underplays the role of politics in dictating outcomes. Explanatory inconsistency is the ultimate result for we are unable to reconcile wide variations in state policies (particularly between states with comprehensive policies vs. states lacking such policies) with the nearly universally poor performance and lack of change among all states.

The importance of each of the factors accentuated in the second explanation (i.e., elite indifference, anticipated change and differential enforcement) help remove these inconsistencies in interpreting the national data. There are several state responses which suggest substantial indifference of state executives (and substantial opposition by local elected officials) as a significant explanatory factor.

First, with the exception of the Governor of Arkansas (U.S. Department of Justice, 1974a: 4) who expressed mild criticism of the regulations, neither other governors nor their national association took the opportunity to comment on LEAA's initial regulations in 1974 or 1976.

In contrast, local elected officials, through national lobbying organizations which included the National League of Cities and National Association of Counties exercised strong criticism of dissemination provisions and cost implications for municipal information systems.

Second, few state executives demonstrated a willingness to assign administrative authority to an independent agency (only four states). Clearly, most state executives (and/or legislatures) showed deference to state and local law enforcement interests as to the appropriate administrative entity. With few exceptions, state law enforcement agencies have assumed administrative responsibility. A significant number of these also have statutory powers sufficient to impose a uniform policy for dissemination of records on local law enforcement agencies.

Finally, given the small number of statewide audits conducted by 1982, it is evident that state enforcement and executive and legislative oversight have lacked aggressiveness.

The Washington case also reinforces the importance of law enforcement practice and federalism together in contributing toward an understanding of national patterns. First, police demands for the independence of investigative activity stems not only from a common ideology of crime control but from opposition to federal and state regulation. Intelligence activities, as the Washington case indicates, often include surveillance of political activity currently unregulated by most states and localities. Thus, there are strong incentives for individual departments to resist controls in this area because of the potential intrusion by elected officials and citizens, such as in the

ordinance that was passed by the Seattle City Council. Police risk the possibility of being dropped from participation in national intelligence networks such as the Law Enforcement Intelligence Unit (O'Toole, 1978) when confidentiality is breeched by regulatory intrusions.

Second, not only is credulity of the likelihood of aggressive enforcement stretched by state law enforcement administration of federal and state mandates, but it is evident from the Washington case that acceptance of jurisdictional authority is woefully lacking. State level law enforcement is just not recognized as a legitimate source of regulatory authority by local law enforcement, and state police or highway patrols are probably not eager to risk the political conflict of aggressive enforcement.

Moreover, conflict over state jurisdiction contributes to the relevance of judicial independence in explaining evident problems in state enforcement of federal mandates and state policy. What was conspicuous about state court opposition to LEAA guidelines was the usurpation of existing lines of state policy-making exercised by state courts. As the Washington case clearly suggests, state court justices clearly supported the principle of privacy while trial court judges were largely indifferent to what was perceived to be a police administration issue. State courts clearly have their own administrative problems to work out with respect to exercising policy and administrative jurisdiction over lower courts. Federal and state regulations involving administrative reform have evidently overlooked the importance of judicial power in determining the viability of record management reforms. As the Supreme Court civil liberties policies indicate, if

state courts have not been eager to intervene in police conduct, given unquestioned authority to do so, it is hardly surprising that state courts would resist legislative policies which impose on courts administrative responsibilities for compliance with criminal history record regulations.

Understanding the Consequences of Judicial and Congressional Policy

So far we have begun to construct an explanation of certain recurring performance features of the state implementation of the Congressional privacy mandate. Importantly, state response patterns to Title 28 exhibit a contrasting portrait of extensive procedural adoption yet underutilization of procedures; and expansion of the regulatory jurisdiction of state law enforcement but limited evidence of actual enforcement. There are similarities between these state responses and performance attributes and the consequences of the Mapp and Miranda decisions. There has been extensive procedural compliance and newly emergent organizational practices but little evidence of actual change. The Washington case provides insights into why this has occurred. In so doing, it contributes towards our understanding of policy implementation processes and the political factors which impede as well as facilitate policy innovation and regulatory reform in criminal justice.

There is an important dimension of policy emerging from this study which has a bearing on explanatory frameworks seeking to identify relationships between factors shaping implementation processes and outcomes.

Federal policy intervention may occur in three ways. First, federal policy may define the substantive mandate and goals of the implementing organization by specifying the policy or program approach, treatment philosophy or rights and the specific kinds of services to be delivered or regulations to be administered. Second, federal policy may influence the structure of an organization, for example, by prescribing or attempting to change its location with respect to state or local government, its governance or decision making structure, the actual functions it performs, or its position within the policy system. Finally, federal policy may attempt to dictate or alter the procedural aspects of how an organization performs, particularly how employees conduct routine tasks and exercise discretion in applying procedures to individual situations or clients.

Most studies seeking to explain the politics involved in implementation processes treat the substance of the policy as a given or unalterable feature of the context. However, there are to important reasons why policy should not be treated as an independent variable. First, as this study suggests, the policy which actually gets implemented is largely the product of the actions of state and local rather than federally mandating institutions. Second, we have found a problematic relationship between policy objectives enunciated by policy originators and the expectations of implementers. It is probably misleading to assume that implementers' responses are governed largely by their understanding of the policy intent. Implementers may respond instead according to expected political consequences of compliance. Thus, adaptive behavior resulting from such anticipatory reactions may not be

the effect of policy but the product of on-going political relationships between organizations within a policy system.

Over the last two decades, federal criminal justice policy has been increasingly concerned to specify both structural and procedural characteristics of implementing organizations as well as with the substantive approach. Thus, federal policy-makers have expanded their intervention through mandates and conditions of aid which prescribe the structural and procedural means by which they expect policy to be implemented as well as the ends they desire to achieve.

So, the policies we have compared involve dual objectives. Procedural policy provides guidelines for decisions and actions, and standards by which to appraise their appropriateness (Davis, 1975); structural policies are designed to alter organizational roles and functions or intergovernmental relations. These types of policies are not always carefully distinguished nor acknowledged by either policy originators or implementers. Nevertheless, they have important implications for the efficacy of policies designed to structure the discretion criminal justice officials have in executing their functions.

What our analysis of criminal records privacy and Supreme Court civil liberties policies suggests is that attempts to reform the criminal justice system necessarily entail both aspects of policy. The structural aspect of policy consists of formal relations between components constituted by differences in organizational structure, authority and power, mission and function in the criminal justice process. At another level there is a layer of procedural relations (both formal and informal) involving policy interdependence, common value systems (e.g., the

ideology of crime control), goals and incentives for compliance. These underlying procedural bases account for what Rabinovitz, Pressman and Rein (1976) might describe as the "settled" character of criminal justice and its capability to absorb policy reforms and limit the possibility of change. Thus, policies advancing reform based on procedural change alone are likely to be derailed by the informal aspects of the system. In contrast, policies which promote structural change are more likely to sharpen conflict between criminal justice components than procedural ones by triggering a dialectic process by which compliance burdens may be absorbed, deflected or redistributed and power shifts avoided, reconciled or redirected towards a new political equilibrium.

Given this dimension of policy then, the connection between the Washington case and Mapp and Miranda now becomes clearer. First, state officials are unlikely to treat federal regulatory policy with a sense of urgency unless organizational interests are either threatened or advanced by compliance. Federal policies which seek to alter inter-governmental relationships create the conditions in which organizational and jurisdictional conflicts are likely to emerge. Therefore, state official responses and actions are conditioned by the opportunities created and limits imposed by such alterations for existing organizational strength, responsibility and interorganizational relations. Federal policy may provide opportunities for expansion of state power while imposing new responsibilities and constraints which make that expansion politically unrealistic and unfeasible.

Second, state officials do not act unilaterally on the basis of self interest nor exclusively in terms of organizational power. Their sense of priorities is influenced in important ways by the attitudes and behavior of those with the most immediate and direct responsibility for compliance. State officials, whether state justices, administrators or legislators search for evidence of the ways the policy will affect existing custom and practice. The responses and the guidelines which eventually emerge will necessarily reflect the compromise which must ultimately be struck between satisfying policy objectives and maintaining organizational prerogatives while limiting their disruption of existing practice.

Third, it is more difficult for state and local criminal justice officials to evade policies predicated on structural reform because they are likely to produce contradictions in interorganizational relations which put one or more of its elements in a bind. Structural policies are likely to create such effects partly because of functional interdependence of the components of the criminal justice system and its sensitivity to disruptions in power relations. As Dolbeare and Hammond (1971) have noted elsewhere in their study of state implementation of the Supreme Court prayer decisions, "style issues" provide greater leverage to state elites and lower level implementers to dictate responses largely because they do nothing to alter existing structures of power and preference.

As we have shown, procedural policies with structural implications have a different character: they seek to alter underlying patterns of power and preference making non-decisions (or non-responses) more

transparent and some limited compliance nearly unavoidable. Where policies impose unequal burdens and disrupt power relations between organizations who must implement them and comply it is likely that the organizations affected will attempt to redress the imbalance and restore the political equilibrium.

Others (Bynum, 1982; Zalman, 1982) have noted in studies of sentencing policies the significance of anticipatory reactions to laws specifically designed "to be broken." What they discovered is that laws predicated on some expected degree of non-compliance may be better able to achieve desired goals than those requiring universal compliance. Their studies show, for example, that determinate sentencing legislation designed to limit judicial discretion may actually increase prosecutorial discretion. Thus, leverage over case outcomes is simply shifted from one set of officials to another rather than eliminating it altogether. As Zalman hypothesizes in his study of sentencing reform in Michigan, the legislature perceived this to be a desirable state of affairs because it feared that imposing a law with no options would exacerbate prison overcrowding. Thus, the legislature may have expected that the law would be "mandatory" only when the prosecutor intended it to be mandatory.

Implications for the American Political System

These findings also raise important issues regarding the structure of accountability involved in state implementation of federal guidelines. It is at the state level where the connection between executives, legislatures and bureaucrats appears most tenuous and problematic. Given a complex intergovernmental policy involving criminal

justice information systems, state executives and legislatures have shown a surprising lack of interest in the organizational, social and administrative consequences of the growth and utilization of information technology in criminal justice.

Moreover, the ever-expanding and deepening complexity of the national network of criminal justice systems may actually outstrip the present capacities of federal, state and local officials to either control its growth or insure its accountability. This is evidenced by the fact that there is no uniform national policy, but rather fifty state policies which are underenforced. Federal regulatory policy as implemented by LEAA, according to the profile of national performance presented here, has had regressive effects on representation processes. More specifically, the combination of grant-supported proliferation of information technology and state-based regulatory policies has reinforced local control over informational relations in criminal justice. These relations continue to be dictated by law enforcement custom and practice and local public values. Similarly, as the analysis in Chapter II indicates, the Supreme Court civil liberties decisions in Mapp and Miranda, while increasing political visibility and policy-making by state courts, have nonetheless produced wide variations in policy and enforcement while at the same time reinforcing local police practice.

From this perspective, then, in contrast to Van Horn's (1979) contention, federal block grant programs do not necessarily increase the involvement of state and local elected officials nor increase accountability to the public with respect to these issues. Nor is it clear that the aftermath of the Supreme Court civil liberties decisions

has resulted in increased state court enforcement of Constitutional protections (Porter and Tarr, 1982). What these examples of federal involvement do indicate is that federal and state officials are unable to determine the way in which federal and state policies are actually implemented. Instead, a very powerful coalition of federal, state and local law enforcement interests, combined with institutional power conflicts, have dominated both policy-making and implementation, thus dissolving the distinction between the powers and roles of state officials and bureaucratic implementers suggested by Mazmanian and Sabatier (1983).

Tarr concludes his study of state court responses to Supreme Court establishment cases with the comment that a major benefit of non-compliance is that it avoids the disruption of long-standing and widespread state practices that compliance would entail. Tarr sees an important implication of this for understanding the governance role of state courts:

Such programs could not exist, of course, without broad popular support. These findings, in turn, compel one to acknowledge the vital importance of the democratic components of judicial role: state court judges have consistently decided cases in such a way as to preserve policy expressive of majority sentiment in the state (Tarr, 1977: 133).

Of course, the risks of reversal tend to make non-compliance ineffective, as Tarr points out, so that the advantages must lie elsewhere. Instead, the advantages of non-compliance consist in enabling judges to avoid the criticism they face by invalidating programs, especially those strongly supported by public opinion. Such a response

allows state court judges, as Tarr reasons, to reaffirm allegiance with predominant political forces and policy values in the state.

As Glick and Vines (1973: 140) noted in their investigation of the state judiciary in state politics, state court judges generally do not associate the "interests" involved in litigation with interest groups as a political lobby. Moreover, interest group involvement construed as a source of informal pressure brought to bear on the formal judicial process is strongly condemned by most state court judges. Yet, as this analysis suggests, state courts as well as state executives exercise an important influence over how legislative policies get implemented.

Policies intended to reform the administration of criminal justice must be sufficiently important to state executives and legislators that they would accept the political risks and conflict with state judicial and law enforcement interests which would be necessary to achieve policy change. That this intervention may therefore require compromise between branches of government over policies which involve overlapping jurisdictions between executive, legislative and state court functions may be an unavoidable but necessary consequence. The separation of powers doctrine, enunciated long ago by James Madison was not intended to prevent but to encourage a vigorous interaction between branches of government so that the public interest might be better served.

Surely there is overwhelming public support for crime control through law and order. Courts and legislatures draw upon this public sentiment to justify an aggressive posture toward law enforcement.

The balance that gets struck between defendants' due process rights and effective law enforcement is more likely to preserve the control that police and prosecutors have over the processes by which cases are handled and resulting outcomes. The factors internal to the criminal justice system contributing to these outcomes involve maintenance of organizational autonomy, and stability of political power. The factors external to that system involve the separation of powers and preponderance of public sentiment for law and order compared to the relatively weak intensity of demand for the protection of minority rights.

What is problematic therefore about legislative and judicial intervention in the criminal justice policy system to protect individual rights is that the state and local implementation of a federal mandate necessarily reflects primarily the interests and priorities, beliefs and attitudes of state and local criminal justice officials, and other interests secondarily. In this instance, the interests in the maintenance of the organizational status quo in criminal justice merges with majority preference. There is nothing rationally inconsistent with this posture, only that the neglect of minority rights may often be the concession extracted for this consistency.

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