

## Chapter 1

### INCENTIVES IN POLICY REFORM

Spurred by the laissez-faire economic philosophy currently entrenched in Washington, monetary incentives are increasingly popular alternatives to regulatory approaches in achieving policy objectives, particularly those objectives that require change in complex organizations. An emerging "paradigm" holds incentive-based policies to be more effective than regulatory alternatives.<sup>1</sup> Because incentive schemes are not overtly grounded in the compulsion that underlies regulation, they are often viewed as morally superior as well. This book examines an attempt to use monetary incentives to reform the criminal courts, a policy arena where the conscious importation of pecuniary motivations raises especially interesting problems. It focuses on the Speedy Disposition Program (SDP), a novel New York City initiative designed to reduce pressure on the city's pretrial detention facilities by using budgetary incentives to encourage the district attorneys for the city's five boroughs to dispose of their oldest pending cases.

Toward the end of 1983, New York City officials faced a federal court order mandating an immediate decrease in the number of detainees housed in its overcrowded jails. The order resulted in release

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of hundreds of incarcerated defendants awaiting trial in the city's backlogged courts—a serious political embarrassment to a mayor whose administration was grounded in toughness on criminal justice matters. Statistics indicated that even a marginal decrease in the then-current six-month wait from arrest to disposition would have resulted in a marked lessening of pressure on jail facilities. With no authority whatever over the courts,<sup>2</sup> and with only a limited power of the purse over the city's six<sup>3</sup> district attorneys, the New York City Office of Management and Budget sought to provoke what it could not compel through use of financial incentives directed at the district attorneys' offices.<sup>4</sup>

Approximately \$1.5 million in seed money was divided among New York's six DAs at the beginning of 1984. In accepting these funds, the district attorneys agreed to try to reduce both the number of older felony cases from their borough pending in supreme court<sup>5</sup> and the number of their office's "long-term detainees" housed in pretrial detention facilities. This aspect of SDP resembled the typical attempt of a funding authority to "purchase" reform with money earmarked for a specific purpose. The novelty of the New York program came after the seed money was allocated. By agreeing to participate, the district attorneys placed their offices into a competition in which those showing the greatest success in reducing the number of targeted cases would be allocated the largest share of an additional incentive pool consisting of several million dollars.<sup>6</sup> The specific delay-reduction programs established with the seed money, and the use of monies subsequently awarded from the incentive pool, were entirely in the hands of the individual DAs. The city attached no strings to the use of the funds distributed and did not mandate any particular approach to the problem of pretrial delay. It simply promised a substantial monetary reward to the offices that were successful in achieving the desired results: reduction in the inventory of old felony cases and long-term pretrial detainees.

The incentive element of SDP resonated with a broad trend toward market mechanisms in public policy generally. It also fit nicely with an emerging conventional wisdom among judicial administration researchers. The program's designers accepted the counterintuitive conclusion of recent empirical research that court delay is not necessarily caused by, or even related to, inadequate court system resources.<sup>7</sup> SDP was grounded in the view that the "legal culture" of a local court strongly affects its pace of litigation, and that meaningful

improvement in that pace can be achieved only by altering the norms and values that pervade a court system. Rather than relying on mandates, unrestricted budgetary increases, or structural reorganization—tools not well suited to effect the requisite change in attitudes—the New York program provided a financial motivation to encourage DAs to shake up the system and overcome the institutional inertia grounded, at least in part, in the culture of the local court community.

This book does not attempt a comprehensive evaluation of the Speedy Disposition Program.<sup>8</sup> Rather, we use this intriguing policy initiative to illuminate broader issues raised by using monetary incentives to achieve organizational change in the criminal justice system, and to suggest considerations to guide both future research and subsequent attempts to use incentives in other areas. SDP is part of a long, not especially successful, tradition of efforts to reform the criminal courts in New York City and elsewhere. It also stands as one of a growing number of initiatives designed to replace more traditional implements of public policy—regulation, exhortation, appropriation—with the market-based tools of monetary incentives. Before launching into a detailed account of the program in subsequent chapters, we place the program in the context of previous research on criminal justice reform and on the use of incentive mechanisms as policy tools.

## THE PROBLEM OF REFORM IN CRIMINAL JUSTICE

The difficulties of inducing constructive change in the criminal justice systems of America have been amply documented over the past decades by scholars and practitioners alike. Despite the succession of U.S. Presidents who have placed improvement in criminal justice at or near the top of their domestic agendas, despite a succession of blue ribbon commissions that have investigated problems and made extensive recommendations, despite considerable lawmaking activity by Congress and state legislatures in sentencing and plea bargaining reform, and despite substantial increases in public expenditures for criminal justice, the problems remain unabated, with solutions indiscernible.

A substantial body of research on criminal courts conducted in the 1980s suggests some of the reasons for the frequent failure of

court reform efforts. The central conclusions of this research can be summarized by reference to three factors found to exert substantial influence on the conduct of business in criminal courts: (1) *informal practices* through which lawyers, judges, and other court personnel interact to dispose of cases in ways not described or controlled by laws or formal court rules and procedures; (2) *attitudes and norms* of criminal court actors that militate against change and support existing dispositional practices and patterns; and (3) *practitioner incentives* of both a personal and organizational nature that tend to support the status quo. These factors overlap to some degree, yet they emphasize distinct elements. Ironically, despite the fact that the third leg of the stool—incentives—is almost always given primacy in explaining the failure of various reform efforts, it has been subjected to the least systematic analysis.

The importance of *informal practices* in the disposition of criminal cases was first suggested, at least in the most recent wave of research, by Abraham Blumberg.<sup>9</sup> Studies of the pace of litigation have uncovered the existence of “professional courtesy” among lawyers requesting continuances and other scheduling concessions.<sup>10</sup> A judicial practice of granting postponements when privately retained defense lawyers have not been paid (a continuance awaiting the appearance of “Mr. Green, a key witness”) has been described by others.<sup>11</sup> Similarly, we have descriptions of the growth of sub-rosa plea negotiations after formal prohibitions of plea bargaining by statute or prosecutorial policy.<sup>12</sup> Raymond Nimmer terms the totality of these informal practices a court’s “local discretionary system.”<sup>13</sup> Using somewhat different terminology, James Eisenstein and Herbert Jacob posit the existence of “courtroom workgroups” whose stability and makeup influence the course of criminal case dispositions to a substantial degree.<sup>14</sup> Regardless of the terminology, all these studies demonstrate the inadequacy of a formal, legalistic model of ongoing criminal justice systems and instead emphasize the complexity of bringing about permanent change.

The importance of *practitioner norms and attitudes* has been illustrated in studies of sentencing, which indicate that the majority of cases in criminal courts are disposed in accordance with “going rates”<sup>15</sup> for “normal crimes.”<sup>16</sup> It has also been suggested that practitioners share locally based norms governing the mode of disposition.<sup>17</sup> Finally, of most relevance to New York’s Speedy Disposition

Program, several studies of delay in trial courts have posited the existence of localized norms governing the pace of litigation.<sup>18</sup>

“Local legal culture” has become an analytical shorthand by which these courthouse norms are summarized. In this understanding, commonly held attitudes and norms support a system of informal practices by courthouse regulars. They also support existing patterns in time to disposition, mode of disposition, and sentence.<sup>19</sup> Because these norms potentially constrain efforts to change either the procedures or the outputs of criminal courts, the notion of local legal culture adds an important caveat to reform proposals based on the assumption that deficiencies in formal structure or system resources are the key impediments to a properly operating system.

The third element shown to be important in understanding change in criminal courts is *practitioner incentives*. The lack of appropriate incentives for judges, prosecutors, and defense attorneys to alter existing practice has been held determinative in the failure of reform efforts in a number of areas: delay reduction,<sup>20</sup> plea bargaining,<sup>21</sup> sentencing,<sup>22</sup> bail.<sup>23</sup> One attempt to generalize on the problems associated with reform in the criminal courts concludes:

The central obstacle to change in the courts is not the resistance to reform, but is, more fundamentally, the lack of interest in even thinking about change. This is not to suggest that there are no efforts at planned change . . . , only that there is little incentive for those engaged in day-to-day administration of the criminal courts to think about system-wide changes or, when they do, to pursue them vigorously.<sup>24</sup>

There has been little systematic analysis of the role of incentives in criminal justice reform. Furthermore, incentives seldom enter into assessments of those criminal justice reforms that do, in fact, succeed. For example, discussion of incentive structures does not appear prominently in the evaluation of the successful delay-reduction programs conducted by either the American Judicature Society<sup>25</sup> or the National Center for State Courts.<sup>26</sup> We are thus left with a puzzle: the factor put forward by commentators as the underlying explanation for the failure of many reform efforts seems to have little relevance to those that succeed. And, even with respect to the failures, we have little specific discussion of how incentives affect either organizations or individuals in a court setting.

## INCENTIVE STRATEGIES IN THREE POLICY DOMAINS

The purported centrality of incentives, as both potential tools and proven obstacles to reform in criminal justice, argues for a careful review of attempts to achieve organizational change through incentive-based strategies. Financial incentives in the private sector, always considered a primary method for motivating individual and group behavior, appear to be gaining popularity among major corporations.<sup>27</sup> Purposive use of incentives by government is similarly an increasingly fashionable alternative to regulatory approaches. As we shall see below, incentive-based policies are especially conspicuous in education and health care. In addition, we see proposals for use of incentives in such areas as nursing care for the elderly<sup>28</sup> and environmental policy.<sup>29</sup>

The subject under analysis is slippery. Viewed from the perspective of *homo economicus*, all human behavior is ultimately grounded in incentives of one sort or another. Our explicit concern with monetary incentives as policy tools confines the subject under discussion substantially, but even in this context incentive plans differ across a number of dimensions. In some the goal is to achieve a minimal standard of performance; in others the scheme is designed to move performance beyond a minimum that is mandated through regulatory techniques. Some incentive schemes aim to alter organizational behavior through a direct incentive to individuals. In others the focus is the organization itself, and individuals within it may or may not be directly rewarded for improved organizational performance.<sup>30</sup>

When one plunges into the previous work on incentives, one is struck both by the abundance of exhortations urging greater use of incentive plans and by the dearth of useful propositions about how incentives have worked in practice. Much of the current enthusiasm for incentive-based policies is grounded in two postulates: one normative, the other empirical. The normative postulate might be stated as The Moral Superiority of Voluntary Compliance. In the words of perhaps the most prominent proponent of incentives in the public sector, Charles Schultze, market-based strategies "minimize the need for coercion as a means of organizing society."<sup>31</sup> His influential *The Public Use of Private Interest* makes the case for substituting incentive systems for more traditional regulatory techniques in a number of policy areas:

For a society that traditionally has boasted about the economic and social advantages of Adam Smith's invisible hand, ours has been strangely loath to employ the same techniques for creative intervention. Instead of creating incentives so that public goals become private interests, private interests are left unchanged and obedience to the public goals is commanded.<sup>32</sup>

This normative position rests ultimately in political philosophy, and its validity is not universally accepted.<sup>33</sup> The empirical postulate—that incentives schemes are more *effective* in attaining the goals of public policy than regulation—could be examined empirically, although no rigorous test of the comparative efficacy of various policy tools has occurred to date.<sup>34</sup> We do, however, have fragmentary reports describing incentive programs in several policy contexts. What follows summarizes what we know regarding the use of incentive strategies to effectuate change in the output, procedures, and cultures of public and quasi-public organizations. A quick sojourn through three areas—criminal justice, health care, and education—illustrates the kind of incentive schemes being tried and the paucity of information both about “what works” and about the conditions under which incentives might optimally be employed.<sup>35</sup>

### *Criminal Justice*

New York's Speedy Disposition Program was a conscious attempt by government to manipulate incentives of the city's district attorneys to obtain a particular policy outcome: reduction in the number of long-term detainees. Few analogies to SDP exist in the published criminal justice literature. Beyond exhortations advocating greater use of incentives,<sup>36</sup> and cautionary discussions of the implicitly coercive or ethically suspect nature of manipulating incentives to produce particular policy outcomes,<sup>37</sup> we have uncovered only two accounts of attempts to use financial incentives in criminal justice reform, both occurring in California in the 1970s.

In one, the state of California designed a program to encourage localities to place more convicted defendants on probation (and thus not in state-funded prisons) through a subsidy that involved payments to localities for each convicted defendant placed on probation.

The program appeared to succeed in reducing commitments to prison, though the price paid (an increase in local jail population and an increase in the recidivism rate, which arguably resulted from the decreased incarceration in state institutions) cast some doubt on its attractiveness for other jurisdictions.<sup>38</sup>

In the other example, the city of Orange, California, experimented with linking increases in police salaries with reductions in the city's crime rates in selected crime categories. Contrary to the skepticism of many outsiders who assumed the police would simply manipulate reported crime figures, one evaluation found a real reduction in crime rates, at least in the short run.<sup>39</sup>

The implications of these innovations in the criminal justice area are ambiguous. The two aforementioned studies do report limited success with the use of incentives for the police, district attorneys, and the courts. The authors of the studies appear to agonize, however, in reaching this conclusion. In the Orange experiment, real crime rates may have differed from those reported by the police. In the California Probation Subsidy Program experiment, as previously noted, negative consequences may have offset the gains made by diverting defendants from the state system.

It is unclear whether the incentive route was the most efficacious for achieving the desired goals in these experiments. And neither the Orange police study nor the California Probation Subsidy studies delve systematically into the general considerations that militate in favor of selecting an incentive strategy or into the conditions under which incentive strategies best operate.

### *Health Care*

The most prominent use of policy incentives in health care is found in the federal Medicare program, in efforts to reduce the length of governmentally subsidized hospital stays. Before 1983, Medicare reimbursed hospitals on a cost-based retrospective basis. Hospitals received payments (constrained somewhat by a set of cost limits) for the services they provided. In an effort to stem annual increases in outlays of over 15 percent, Congress established in 1983 the Prospective Payment System (PPS) of reimbursement for hospitals for specific medical procedures. Prices for 468 Diagnosis Related Groups (DRGs) were set. Hospitals would be reimbursed the preset fee associated with each of these DRGs, regardless of costs actually incurred. The expectation was that this system would create an incentive for hospi-



tals to be more efficient. If hospitals could treat patients for less than the fee specified for the DRG, the extra funds were theirs; conversely, if they exceeded the DRG allowance, they absorbed the extra costs.<sup>40</sup>

Observations of this plan in operation illustrate both the potential efficacy and the risks of incentive-based strategies. Preliminary analysis by the Senate Special Committee on Aging suggests that the PPS system succeeded in reducing hospital stays. The average length of stay in American hospitals for Medicare patients was reduced from 9.5 days in 1983 to 7.7 days in 1985.<sup>41</sup> Contrary to fears that patients would be readmitted more frequently to hospitals (to collect multiple DRG allotments), admissions in fact declined nearly 5 percent in 1984.<sup>42</sup> Moreover, PPS appears to have significantly slowed the growth in covered Medicare expenditures. Available estimates place these annual savings as high as 20 percent, or roughly \$18 billion lower than the aggregate Medicare expenditures projected for 1990 under pre-PPS guidelines.<sup>43</sup>

These cost savings are especially impressive when compared to the growth of Medicare expenses for *outpatient* hospital expenses. Hospital outpatient charges were not included in the PPS plan, and since 1983 they have increased at roughly triple the inpatient rate. The difference, not surprisingly, led the Department of Health and Human Services in June 1991 to propose extending PPS-like reimbursement regulations to hospital outpatient charges.<sup>44</sup>

What is not fully known is the price paid to achieve the savings on inpatient medical care. We do not know, for example, if "prospective payment has evoked desirable behavioral responses such as increased efficiency or the acquisition of resources at lower factor prices, or whether it has motivated less desirable behavioral responses such as cost-shifting or reducing the quality of care."<sup>45</sup> Nor do we know what, if any, are the consequences for patient care of the earlier hospital discharges.<sup>46</sup> Some observers suggest that patients are being released "quicker and sicker," while others speculate that shorter stays in hospitals may yield a net reduction in illness since there is less overall exposure to the diseases inherent in a hospital environment.<sup>47</sup> One research project (conducted by the American Medical Association) found that 60 percent of the doctors surveyed *believed* quality had decreased with the advent of PPS,<sup>48</sup> but for the most part, speculation on effects is just that: speculation.<sup>49</sup>

What is plain, we think, from the PPS experience is that the creative use of financial incentives stimulated change in hospital and

physician practices, an observation analogous to that made in the criminal justice experiments reviewed earlier. It is possible, however, that these changes resulted simply from a general atmosphere of increased attention to the length of hospital stays or from the creation of regulatory bodies to monitor Medicare reimbursement, and not from the incentive plan *per se*.<sup>50</sup> The information necessary to analyze these competing hypotheses, to assess more thoroughly the policies hospitals have adopted, and to examine the consequences of these policies for patient care, is simply not available at present.

### *Education*

Incentive schemes have recently been urged or adopted with respect to several aspects of the educational enterprise.<sup>51</sup> In an early stage of formulation,<sup>52</sup> these reforms include programs focused on teachers, students, and schools.<sup>53</sup> Some are as simple as career ladders for teachers based on performance and ability rather than the more traditional promotion steps based on longevity and educational level.<sup>54</sup> Others, such as paying schools for successfully getting children out of compensatory education classes, publicizing the schools that are most successful, or creating a "market" in which parents select schools through a system of vouchers, are intriguing possibilities.<sup>55</sup>

Whereas the animating principle behind reform in the Medicare reimbursement program seemed to be that hospitals could do the same for less, and thus save the federal government money, the principle behind incentive schemes in education is driven less by finances than by quality. Today's efforts at educational reform follow a long period sometimes characterized by "throwing money at problems" with little effect. In a metaphor reminiscent of the criminal justice reform literature, the attempt to achieve real change in the schools was likened by a former dean of the Harvard School of Education to "trying to push a large square of jello across a plate with the sharpened point of a pencil."<sup>56</sup> Neither school expenditures nor classroom size were found to be related to student performance. As a result, policymakers now appear to be more open to "bottom up" incentive plans in lieu of uniform schemes imposed from the top.<sup>57</sup> The education literature has embraced a notion of the centrality of "school climate"<sup>58</sup> in sorting schools on an effectiveness continuum.

Two dimensions of this bottom-up approach to conceptualizing innovation strategies for schools are worth noting. First is the belief that imposing a uniform blueprint fails to deal with the very real

possibility of a bad fit for some schools.<sup>59</sup> Teachers can simply “nullify any effort they are not committed to.”<sup>60</sup> Second is the flip side of this argument: if innovations must be compatible with local tastes, if local school climate is as important as some suggest, and if simply throwing resources at school problems does not work in any event, then why not allow innovations to arise at the bottom?<sup>61</sup> This argument contains an almost irrational component in that it concedes that some of what might work through bottom-up incentive plans may not be easily captured by evaluators. Innovation might work because of local chemistry, effort, or attitudes—factors neither easily summarized nor readily transferable.

Eric Hanushek, in a thoughtful review of the education literature, makes many of these points nicely:

An alternative approach [to “top-down” strategies], which seems more productive given our current state of knowledge, is to begin with the presumption that the teaching process is idiosyncratic and that the ingredients of successful teaching are indefinable. This view suggests that it would be more profitable to encourage individual teachers and administrators to innovate, and then to reward good performance where it appears. Such an approach could conceivably pay off even if one never identified the ingredients of success; improved performance would simply depend on teachers and administrators finding their own way to a promised reward. . . . Incentive schemes of various sorts might be a fertile area for experimentation. The essential questions involve alternative type of incentive schemes and the behavioral responses of teachers and administrators. . . . It seems much more profitable [than searching for “the” blueprint for successful schools] to change our basic perspective, to think in terms of altering incentives and basing policies on performance, while admitting that we do not understand exactly what goes on in the classroom.<sup>62</sup>

The skepticism that runs through the conjecture about what PPS will produce in hospitals seems in the educational area to be replaced by an optimism and faith in encouraging “a hundred flowers to bloom” at the local level. Manipulating the reward structures of teachers, schools, and students<sup>63</sup> is held out as a promising alternative to mandating specific policies.

What the criminal justice, medical care, and education areas have in common is that none has generated a body of systematic research in evaluating specific incentive plans. Nor, until recently, was there any but the most cursory theory about the general conditions under which incentives are preferable to other policy tools.<sup>64</sup> We cannot, of course, remedy these deficiencies in an examination of one incentive program, however intriguing. But our final chapters do relate the SDP experience to what has been observed in other policy contexts, and posit some general considerations of design and context to inform future incentive programs. We detail the SDP story in the next three chapters, and then return to these broad concerns about the implementation and efficacy of incentives in chapters 5 and 6. First, we set out a brief description of the methods we used to learn about the Speedy Disposition Program.

## A NOTE ON METHODOLOGY

The primary data for this book come from a set of unusually rich interviews with individuals working within and outside the criminal courts of New York City. In each borough we spoke with district attorneys and their staffs, judges and court staff, and defense attorneys. Outside the courts, we interviewed present and former officials in the New York City Office of Management and Budget, the Criminal Justice Coordinator's Office, the city council, and the Vera Institute of Justice. A total of 81 formal interviews were conducted, supplemented by numerous telephone, or brief in-person, follow-up conversations. Nearly all interviews were conducted by both of the authors.<sup>65</sup>

Our interviews took place both during the life of the Speedy Disposition Program and in the months immediately after the experiment was completed. Thus we were present for all the major conflicts which arose in the program's history, and we managed to keep abreast of these conflicts, while staying just far enough away from them not to be asked to offer our assessments of the particular matter under dispute.<sup>66</sup> Also, by sampling opinion at many junctures during the program's two-year history, we were able to guard against the natural tendency of respondents to impose an interpretation of history consistent only with the experiment's final outcome.

The problem of anonymity loomed particularly large in this project. Our goal was not to evaluate the individual district attorneys'

offices and assess their overall quality or competence. Indeed, we had neither the time, the inclination, nor the expertise to evaluate the most essential work of the offices: the prosecution of alleged criminals. We were interested instead in the broad question of the effectiveness of monetary incentives in inducing organizational change. Were it possible, we would have preferred to use fictional names for the various offices, since it is the general pattern of the responses and not the borough-specific findings that inform the analysis of incentive strategies with which we conclude. Yet given the distinctive attributes of each district attorney's office, and the Vera Institute's published evaluation of their performance, any attempt at disguising their identity would be both futile and disingenuous.

The difficulties of protecting the anonymity of our respondents, promised at the commencement of each interview, becomes more serious when the study sites are identified. To protect this critical anonymity we have taken some liberties with inconsequential attributes when we identify the source of a quotation. Also, we often either leave the respondent's formal position unclear, or assign respondents a position held by more than one individual. Finally, many of the themes we advance have multiple sources. Indeed, by the third year of interviews, we found that many of our tentative observations and conclusions began to resonate in the responses of those we were interviewing. Along with giving us more confidence in the assessments we reach, this tendency toward agreement among our respondents also protects the source of particular interpretations or arguments.

Although our interviews and observations over more than two years constitute the most important source of our data, we also rely on data collected as part of the Vera effort. The quantitative data collection effort that accompanied the Vera Institute's evaluation of SDP is one of the most extensive and difficult of which we are aware in the criminal justice literature. We were the direct beneficiaries of the competence with which those data were collected and analyzed, and the collegiality with which they were shared. With the exception of the odd bit of statistical information that we obtained directly from New York City agencies or officials, all the statistical information reported here originated in the Vera evaluation.<sup>67</sup>