

IN BRIEF

**Jails:
Intergovernmental
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Of A
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FOREWORD

The Advisory Commission on Intergovernmental Relations from time to time singles out for study and recommendation particular problems the amelioration of which, in the Commission's view, would enhance cooperation among the different levels of government and thereby improve the effectiveness of the federal system. The Commission has identified the field of local jails and correctional responsibilities as such an issue.

This *In Brief* summarizes the Commission's research and resulting recommendations on local jails contained in the volume, *Jails: Intergovernmental Dimensions of a Local Problem (A-94)*, which will be issued later this year. That volume includes the following five chapters:

- Jails: An Introduction, Overview, and Issues;
- Noninstitutional Strategies: Alternative Programs and Procedures;
- State-Local and Interlocal Relations and Local Jails;
- The Federal Role In Local Jails: From Law Assistance to Law Suits; and
- Commission Findings and Recommendations.

This document briefly summarizes each of those subjects.

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Chairman

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INTRODUCTION

The nation's jails are now widely believed to be in a state of crisis. Hardly a novel claim, reformers have been decrying the conditions found in jails for decades. Yet, the fact that those reformers have recently been joined by the courts, armed with the force of the Constitution, imbues the age-old "crisis" with a renewed urgency.

Numbering approximately 3,493, local jails have become veritable "dumping grounds" for many of the nation's misfits—"social service agencies of last resort" for public inebriates, the mentally ill, the mentally retarded, and troubled children. Moreover, of the estimated 7 million people who pass through American jails each year, about 60% are there awaiting trial, while the remaining 40%, having been adjudged guilty, are serving time as punishment. This unwieldy combination of humanity is only one part of an administrative imbroglio which includes, in addition, poorly trained and compensated personnel, servicing deficiencies, space limitations, and financial uncertainties.

A loosely though frequently employed term, "jail" is here used to describe local (usually county) institutions* that primarily confine: individuals awaiting trial or other legal disposition, adults serving short sentences (generally one year or less), or some combination of both.

Unlike the population of state prisons, the local jail population remained *numerically* stable throughout most of the 1970s. However, between 1978 and 1982, the number of inmates in American jails rose precipitously—a 34% increase in just four years. Moreover, the problem of numerical instability is exacerbated by the inherent instability of the incarcerated populations themselves: because jails hold individuals for relatively short periods of time, turnover is frequent.

*Only six states assume full administrative responsibility over jails.

Where jails and the jailed are concerned, disparities are the order of the day. Although the typical facility is small and located in a rural or suburban setting, the typical inmate resides in a large urban facility. These disparities appear even more acute when framed in percentage terms: 45% of jail prisoners are confined in fewer than 4% of local institutions; 44% of the facilities hold a mere 4% of the inmates. And while jails and their attendant problems are a nationwide phenomenon, jail populations are highly regionalized, with close to half (43%) of all such inmates held in southern institutions and an additional one-quarter (24%) held in the west.

The typical jail inmate is a single, young adult, male, and has an average annual income of \$3,700. Moreover, most jail inmates have not completed high school and blacks are disproportionately represented.



The above synopsis suggests something of the complexity of the jail as an institutional form. It also suggests the variability of jails as individual institutions, reflecting the priorities and problems of the local communities of which they generally are the least regarded and understood parts.

Throughout its study of local jails, the Advisory Commission on Intergovernmental Relations has recognized that no two jails are exactly alike, that no two bear exactly the same burdens and that, therefore, no single solution will alleviate the jail "crisis." Indeed, to speak of a jail crisis is to ignore the variances. Clearly, there are many jails grappling with severe crises, many more are struggling with serious problems, and a few are even enjoying "success" within the perverse policy milieu that jails, by the nature of their clientele, must occupy.

The remainder of this *In Brief* will summarize: (1) the major issues and problems intrinsic to the jail as an institutional form as well as to many or most jails as individual institutions; (2) the major alternatives currently available to using jails; (3) the crucial state-local relationships that shape the operation of the local jail; (4) the federal judicial role in local jails; and (5) the Commission's proposals for local adult correctional reform.

JAILS: CURRENT PROBLEMS AND ISSUES

It's worse here than at [prison]. Here, there is no room to move, nothing to do, no work. I can't see my wife and kids. I'd ten times rather be in a state place. Here, you are a dead person.¹

In 1931, the National Commission on Law Observance and Enforcement conferred on the American jail the unsavory epithet: "most notorious correctional institution in the world."² Nearly half a century later, that same institution—if no longer considered the world's most heinous penal establishment—was still being characterized as: "the worst blight in American corrections;"³ "a major 'disaster area;'"⁴ the "yardstick of the inadequacies and breakdowns in a community's health and human service system;"⁵ and a place where "[a]nyone not a criminal when he goes in, will be when he comes out."⁶ In recent years, federal and state courts have branded conditions in many such institutions "unconstitutional."

¹ Jail inmate quoted in Phillip B. Taft, Jr., "Backed Up In Jail," *Corrections Magazine*, June 1979, pp. 32-39.

² National Commission on Law Observance and Enforcement, *Report on Penal Institutions, Probation, and Parole*, Report of the Advisory Committee on Penal Institutions, Probation, and Parole (Washington, DC: U.S. Government Printing Office, 1931), p. 273.

³ Daniel Fogel quoted in "The Scandalous U.S. Jails," *Newsweek*, August 18, 1980, p. 74.

⁴ Barry Krisberg, *Changing the Jails*, Manual prepared pursuant to the Changing the Jails Conference, University of San Francisco, April 1975, p.1.

⁵ National Assembly on the Jail Crisis, *New Partnerships for Reform: Proceedings of the National Assembly on the Jail Crisis* (Kansas City, MO, May 22-25, 1977), p. vii.

⁶ Norman Carlson quoted in *The New York Times*, January 5, 1982, p. B10.

Many of the nation's jails are indeed in trouble. That "trouble," however, is not just a generalized malaise but rather the result of specific and complex problems—problems which are common (in varying degrees of severity) to many or most jails. Some of the more cogent and universal of those problems include: personnel, disparate inmate populations, service provision, facility utilization, and costs.

Personnel

In 1971, this Commission noted that "the average jail is still characterized by . . . untrained and apathetic personnel."⁷ Unfortunately, more than a decade later, a survey of the nation's sheriffs revealed:

Today, many non-jail experts have suggested that overcrowding is the biggest problem. The survey makes it abundantly clear that the number one problem is personnel Many of the comments penned to the questionnaire explained that personnel difficulties span a range which touches on the lack of jail training, inadequate salaries, and heavy staff turnovers due to lack of career incentive programs.⁸

Nor are sheriffs—those who should, after all, be most painfully aware of the problems besetting their own institutions—the only contemporary observers to acknowledge the dearth of adequately trained personnel in both state and local correctional facilities. Indeed, among others, the Chief Justice of the United States and the director of the U.S. Bureau of Prisons have cited the personnel issue as the chief problem to be overcome by local jails.⁹

Paid average starting salaries of just \$10,780, jail personnel suffer additionally from institutional priorities that make "training . . . the most expendable item in budgets [with] budget cuts

⁷ Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System*, A-38 (Washington, DC: U.S. Government Printing Office, 1971), p. 234.

⁸ National Sheriffs' Association, *The State of Our Nation's Jails*, 1982 (Washington, DC: National Sheriffs' Association, 1982), p. 3.

⁹ Warren E. Burger, Chief Justice of the United States, 1982 *Year-End Report on the Judiciary*, undated copy received from the Supreme Court, February 1983, p. 7 and U.S. Congress, House, Committee on the Judiciary, Subcommittee on Courts, Civil Liberties, and Administration of Justice, Statement of Norman A. Carlson concerning Bureau of Prisons Oversight, 98th Con., 1st sess., February 23, 1983, p. 6. See also, for example, Kenneth Kerle, "Jails: Construction; Personnel; Lack of Training; Etc.," paper presented to the American Correctional Association, 112th Congress, Toronto, August 18, 1982, pp. 4,7.

[frequently] given as the excuse for not conducting training.”¹⁰

The Population Puzzle

The jail, unfortunately, is the institution to whom the responsibility falls because it is the only one which cannot say no.¹¹

Thus, the jail—the “social agency of last resort”—is saddled with a mixture of one-time delinquents, small-time losers, violent criminals, and social misfits. It is an amalgam that might throw even the most capable manager of human affairs into a virtual frenzy. Specifically, at any given time the local jail may house pretrial defendants alongside convicted offenders; runaway or truant children alongside experienced and grown-up criminals; simple misdemeanants alongside state felons; the mentally ill, retarded and intoxicated alongside presumably rational malefactors.

Inmate groups and their attendant problems include:¹²

- *Pre- and Post-Trial Inmates.* Over 60% of all jail inmates are pretrial detainees, while the remainder are confined for penal purposes. Conditions in jails, if unsatisfactory, however, affect both groups—both the convicted and the presumably innocent who legally may not be punished prior to adjudication of guilt.
- *Local and State Prisoners.* In 1981, an estimated 8,576 state prisoners were being held in local jails. Such placement causes overcrowding in many jails, friction between state and local authorities over adequate reimbursement rates, and administrative problems as local officials attempt to cope with the difficulties of housing both local misdemeanants and state felons.
- *Juveniles and Adults.* Young people in jails are often victimized and prone to suicide. Though recent years have witnessed a number of state and federal judicial and legislative initiatives aimed at removing juveniles from adult institutions, their numbers remain high, the most recent estimate being 300,000 per year.

¹⁰ National Sheriffs' Association, *The State of Our Nation's Jails*, p. 125.

¹¹ Capital District Regional Planning Commission, “The Need for a Capital District Regional Forensic Unit,” A Criminal Justice Position Paper (New York: Capital District Regional Planning Commission, 1981), p. 2.

¹² For complete discussion of these groups, their problems, and the problems they cause local jails, see Chapter 1 of ACIR, *Jails: Intergovernmental Dimensions of a Local Problem*.

- *The Mentally Ill, Retarded, and Substance Abusers.* Recent studies indicate that from 20% to 60% of all individuals confined in jails are mentally ill or disordered. Moreover, over 1 million persons each year are arrested for public drunkenness and many of those are later jailed. Obviously, the large numbers of such individuals strain jails' limited resources—resources ill-equipped to deal with troubled people who require social and psychiatric services.
- *Female Inmates.* Because women constitute only about 6.5% of the jail population, jails themselves tend to be male-oriented institutions. Consequently, as a general rule, female inmates receive even fewer services than those meagerly afforded men.

Service Provision in a Short-Term Environment

Jails historically have been recognized as deficient in providing services to their inmates. High costs relative to perceived benefits, disparate and very volatile populations, and a lack of supervision adequate to maintain security where service provision requires some mobility on the part of prisoners are oft-cited explanations for insufficient services. Such basic services, then, as recreation, work opportunities, education, and counseling are inadequately provided or not provided at all to many inmates of the nation's jails.

More importantly, medical services are still wanting. As of 1980, only 67 jails had been accredited by the American Medical Association for meeting its minimum health care standards. As late as 1981, only 16.6% of responding sheriffs reported having in-jail infirmaries, only 35.2% provided dental services, and only a little over 40% took initial medical screenings of inmates or took prisoners' medical histories.¹³ Not surprisingly, those percentages decrease with the size of the facility.¹⁴

Utilizing the Local Jail

If any aspect of jails has brought them into the national limelight over the past few years, it is the degree to which so many are now thought to be overcrowded. Indeed, the evidence on overcrowding is compelling, suggesting, for the first time, that it is no longer limited to urban and southern jails—even wealthy suburban counties are now reporting major bed shortages. Given the fact that official non-standardized ratings tend to overestimate available space, it is prob-

¹³ National Sheriffs' Association, *The State of Our Nation's Jails*, p. 207.

¹⁴ *Ibid.*, pp. 208-12. For more complete information on service provision generally and particular services see Chapter 1 of ACIR, *Jails: Intergovernmental Dimensions of a Local Problem*.

ably safe to assume that overcrowding has reached crisis proportions in many of the nation's jails—an assumption corroborated by the fact that in mid-1982 “[b]y whatever measure used, the inmate population in [the 100] large[st] jails exceeded capacity.”¹⁵

Although indicating a severe institutional crush and drastically limited space, the fact that the overall operational capacity of the nation's jails has very nearly been reached does not necessarily mean that all or even most jails are overcrowded. On the contrary, recently released figures revealed that on June 30, 1982, the 100 largest jails in the United States held 82,189 prisoners (approximately 40% of the national total), while the remaining 3,393 local institutions retained 127,811 inmates (about 60% of the total).¹⁶ That means “that most unoccupied beds in the jail system are in smaller facilities.”¹⁷ Nonetheless, individual sheriffs responsible for the operation of smaller jails may perceive an overcrowding problem if, “due to staff shortages, the inmate counts, bed checks, and cell searches are overlooked and inmate programs such as outdoor recreation are postponed.”¹⁸

Of Pricetags and Politics

The Pricetag

One long-espoused answer to at least some of the problems besetting local jails lies in buildings—in constructing new facilities, renovating existing buildings, or acquiring other ones. It is a strategy considered by some to be of absolute necessity if a crisis is to be averted in the nation's correctional systems. By others, it is considered shortsighted and a foolhardy use of precious correctional dollars. Most experts, however, agree on one thing: the costs of correctional facilities—capital and operational—are indeed overwhelming.

The bulk of correctional capital outlays in the United States go for new construction and renovation. In 1977, such expenditures amounted to \$415 million at all levels of government, with local governments spending about \$167 million.¹⁹

Among capital outlays, new construction consumed the majority of the dollars spent, with average estimated jail construction costs per bed running as high as \$41,600 in the west, \$37,200 in the

¹⁵ U.S. Department of Justice, Bureau of Justice Statistics, “Jail Inmates, 1982,” Bulletin, NCJ-87161, Washington, DC, February, 1983, p. 3.

¹⁶ *Ibid.*, pp. 2-3.

¹⁷ *Ibid.*, p. 4.

¹⁸ National Sheriffs Association, *The State of Our Nation's Jails*, p. 231.

¹⁹ U.S. Department of Justice and U.S. Bureau of the Census, *Expenditure and Employment Data for the Criminal Justice System: 1977* (Washington, DC: U.S. Government Printing Office, 1979), Tables 4, 48, and 52.

northeast, \$35,200 in the north central part of the country, and \$20,500 in the south.²⁰

Although new construction appears to be the preferred method for upgrading correctional systems (or at least the largest consumer of resources), three additional facility-based options may be employed by local governments: adding to an existing building, renovating an old facility, or acquiring and remodeling some non-correctional facility, such as a school, mental hospital, or motel. Although each of these options is less expensive than new construction, they are still quite costly.

Capital outlays for prisons and jails represent "big ticket" expenditures, but they pale in comparison to operating costs. Hence, in 1977, federal, state, and local governments spent 5.78 times more—\$2.4 billion—operating their correctional facilities than they did upgrading or expanding them. At the local level operational expenditures amounted to \$832 million or \$5,253 per inmate²¹—a sum that *excludes* such budgetary items as central office administration, employer contributions to employee benefits, and services provided to inmates.

The Politics

In the race for local budgetary eminence, jails have long been political, losers. Providing services for lawbreakers (even accused transgressors) has always been difficult to justify when pitted against the needs of school children, motorists, and the ailing. Pothole repair is far more likely to garner public support than is correctional alleviation. Yet, despite the rather dismal politics of the jail, 1982 may have been a watershed year.

In that year, a surprising number of jail construction bonds won approval from state and local voters. In fact, nationwide, only three counties with bond issues on their fall ballots failed to convince voters of a compelling need to fund correctional building projects.²²

Whether or not such results imply more than short-term deviation from the public's usual unwillingness to spend government dollars on jail facilities is unclear. Nonetheless, with so many bond

²⁰ U.S. Department of Justice, *National Jail Census* (CJ-3 and CJ-4), 1978. Beyond basic building costs, the National Moratorium on Prison Construction estimates that per bed furnishings and equipment may run as high as \$5,000. Moreover, architectural fees may add 10% to total costs, and site acquisition and preparation an additional 20% to construction costs. National Moratorium on Prison Construction, *Jail and Prison Costs* (Washington, DC: National Moratorium on Prison Construction, 1975).

²¹ U.S. Department of Justice and U.S. Bureau of Census, *Expenditure and Employment Data for the Criminal Justice System: 1977*.

²² "Election Results: Most Construction bonds Win," *Jericho* 30 (Winter 1982-83):

Building More Jails: Is it Helping or Hurting?

In 1980, the National Institute of Justice released a major report on *American Prisons and Jails* by Abt Associates, Inc. That study appeared to substantiate what many in the field of corrections had long suspected: that jails and prisons are “capacity-driven” institutions. That is, more free bed space creates an institutional and systemic “need” to fill that space. Thus, the report tentatively concluded:

We can say that there appears to be new evidence that decisions to build more prisons may carry with them hidden decisions to increase the number of persons under custodial supervision. Under these circumstances even a massive construction program might fail to keep pace with the potential demand for prisoner housing.¹

Researchers at Carnegie-Mellon University, however, have now challenged that report's conclusion. Citing technical and methodological errors and omissions, the Carnegie-Mellon team has criticized the “capacity-driven” model as being “oversimplistic” in its failure to acknowledge and incorporate such variables as “the demographic structure of the general population, economic conditions and increased demands for greater punitiveness.”² Simply, they assert, the model has not been proven.

In the face of such criticisms, *American Prisons and Jails* researchers have corrected some of the discovered technical errors. Those changes, they maintain, do not obviate their original proposition. Meanwhile, the debate over the efficacy of further construction rages on, with perhaps the most perceptive observation coming from Michael Sherman and Gordon Hawkins:

[T]he debates have as much to do with political symbols as with empirical data. The outcome of these debates will not be determined primarily by empirical data on . . . recidivism rates or incarcerated population growth rates. Each side may manipulate such data to its own advantage, but the important warning to observers is not to decry and dismiss those manipulations. They should be seen as what they are—expressions of deep and legitimate political ideas and aspirations.³

¹ U.S. Department of Justice, National Institute of Justice, Office of Research Programs, *American Prisons and Jails*, vol I: *Summary and Policy Implications of a National Survey* (Washington, DC: U.S. Government Printing Office, 1980), p. 120.

² Alfred Blumstein, Jacqueline Cohen, and William Gooding, “The Influence of Capacity on Prison Population: A Critical Review of Some Recent Evidence,” unpublished paper cited in “Abt Study Challenged,” *Jericho* 29 (Summer/Fall 1982): 9.

³ Michael Sherman and Gordon Hawkins, *Imprisonment In America* (Chicago: University of Chicago Press, 1981), p. 130.

issues surviving, more than the usual amount of jail construction will occur in the future.

At the same time, obstacles to jail construction are still quite potent. In a time of dwindling resources, spending funds for jails runs the risk of being perceived as an attempt to "bring the country club life to society's least deserving." An equally potent obstacle may be described as the "not in my neighborhood you don't" syndrome. The availability of funds and a public favorably disposed toward their expenditure do not necessarily assure ease of construction; it is a rare individual who wants a jail built next door to his or her home. Finally, there exists strong sentiment that building more jails does little or nothing to alleviate overcrowding but, rather, ultimately leads to incarcerating more individuals and a larger, though just as overcrowded, correctional system. (See boxed discussion.)

NONINSTITUTIONAL STRATEGIES: ALTERNATIVE PROGRAMS AND PROCEDURES

If jails have demonstrated themselves to be costly, often ineffective, and sometimes unconstitutional institutions warehousing a wide spectrum of humanity—both the presumed innocent and the proven guilty—do alternatives exist? The answer, of course, is “yes” as attested to by such long-utilized practices as pretrial release on bail, probation in lieu of incarceration, and parole after some period of detainment. These time-honored (many would say, time-worn) techniques continue to be widely used in each of their respective categories: pretrial, post-trial, and mid-incarceration.

Beginning in the 1960s and continuing through the 1970s, however, the phrase “alternatives to incarceration” began taking on far broader meaning as innovations of every stripe joined the more customary options. Thus, traditional private bail practices were supplemented by percentage bail, release on recognizance, and conditional release. Regular probation was joined by community service programs, work release, and furloughs. Parole was ostensibly enhanced by halfway houses.

Types of Alternatives²³

Described in the most elementary of terms, and choosing only the most obvious of benchmarks, the traditional criminal justice process involves:

- 1) arrest;
- 2) prosecution;
- 3) awaiting trial
 - a) in jail or
 - b) in the community after release on bail;

²³ For an in-depth discussion of alternatives to incarceration see Chapter 2 of ACIR, *Jails: Intergovernmental Dimensions of a Local Problem*.

- 4) trial;
- 5) sentencing (if found guilty)
 - a) to jail or prison or
 - b) to time on probation;
- 6) release
 - a) after completing time in a correctional facility or
 - b) on parole.

It is, at every point, a costly, time consuming process. Yet, it is also, at almost every point, a process that can be broken or interrupted through the use of alternative procedures.

Thus, for example, an individual agreeing to certain conditions may be *diverted from the criminal justice system entirely* at some point prior to prosecution. Where prosecution is warranted, the accused may be *released pending trial* through such means as release on recognizance, signed citation, or some form of percentage bail which bypasses the private bail bondsman, usually at considerably less expense to the defendant. Conviction and sentencing may involve *release or partial release* to a community service program, some type of victim restitution program, remunerated work release, or counseling and therapy. Finally, a person, having served or partially served a sentence, may be assigned to a *halfway house* or similar facility to ease his or her transition back to society.

Effectiveness of Alternatives

Obviously, different alternatives, occurring at different points in the criminal justice process (or even at the same point), will have vastly different effects. Nonetheless, a number of generalizations, each carrying with it appropriate caveats, can be made regarding the "universe" of alternatives to incarceration.²⁴

Alternatives and Jail Overcrowding

Because release is the antithesis of incarceration, logic might lead one to conclude that the more individuals set free, the fewer locked up. Yet, as a general rule, the use of alternatives to incarceration has done little to alleviate the population pressures now facing many local jails. Indeed, as the previous section has shown, over the past few years, the number of inmates in the nation's jails has mushroomed.

Although there is no simple explanation for the failure of alternatives to decrease jail populations, a number of interpretations have been advanced:

²⁴ The brevity of this document necessitates the general approach. For discussions and assessments of individual and generic alternatives see Chapter 2 of *ibid.*

1. *Alternatives to incarceration merely widen the criminal justice net.* Persons advancing this point of view contend that the existence of viable alternatives simply allows the criminal justice system to process more individuals formally. Thus, alternatives are seen as additional available sanctions rather than as true alternatives to jail. Moreover, in the case of pretrial diversion, at least one observer alleges that that "option provides the prosecutor with an opportunity to retain control over [certain] cases (and defendants) that would not be prosecutable."²⁵

2. *Other parts of the criminal justice system have become more "efficient."* For example, between 1970 and 1979 arrests for nonviolent property crimes increased 55.8%, with arrests for simple vandalism increasing 104%. In addition, certain non-violent, nonproperty offenders were arrested more frequently—drunken drivers leading the pack with a 62.3% hike.²⁶

3. *In individual cases, judges may choose to use alternative procedures in addition to jail sentences.* A not uncommon practice is to sentence an offender to some sort of community service, restitution, education program, or counseling during the day while demanding his or her presence in jail at night.

4. *Jails are capacity-driven institutions.* As mentioned in the previous section, a currently controversial theory holds that the availability of additional jail space inevitably causes an increase in the number of persons confined.

Alternatives and Rehabilitation

Today we smile in amusement at the naivete of those early prison reformers who imagined that religious instruction while in solitary confinement would lead to moral regeneration. How they would now smile at us at your presumption that conversations with a psychiatrist or a return to the community could achieve the same end.²⁷

Although not everyone views the rehabilitative capacity of non-incarcerative programs with the same amount of skepticism as the

²⁵ Madeleine Crohn, "Diversion Programs: Issues and Practices," *Pretrial Services Annual Journal*, III (1980), p. 34.

²⁶ Timothy J. Flanagan, David J. van Alstyne, and Michael R. Gottredson, eds., *Sourcebook of Criminal Justice Statistics, 1981*, (Washington, DC: U.S. Government Printing Office, 1982) p. 341.

²⁷ James Q. Wilson, *Thinking About Crime* (New York: Basic Books, 1975; Vintage Books, 1977), p. 190.

author quoted above, the evidence suggests that, on the whole, the recidivism rates of persons exposed to alternatives are no less nor any greater than those of persons confined. In fact, despite notable exceptions, the bulk of alternative programs appear to result in reduced clientele recidivism in their infancy. In maturity, however, rates tend to climb, becoming comparable to those of individuals exposed to the more traditional criminal justice approaches—suggesting little more than a criminal justice “Hawthorne Effect.”²⁸

Alternatives and Attaining Justice

For those who break the law, society’s accepted mode of achieving justice is through punishment. But does the punishment fit the crime? More than a few would argue that the current overcrowded, understaffed state of many American jails constitutes cruelty rather than just desserts. It would be, after all, an abhorrent notion to imagine a 20th century judge sentencing a shoplifter to 30 days of sexual violence and physical brutality. Yet such atrocities, if not the norm, do occur in jails where as many as 61.1% of the population are pretrial defendants. Discounting those few for whom release by any means would constitute a grave threat to society, pretrial detention in many jails may go beyond reasonably assuring appearance at trial to inflicting punishment before a determination of guilt.

On the other hand, the perception does exist that some, if not most, community-based alternatives for those found guilty of crimes accomplish little in the way of punishment. Social programs, job training, psychotherapy, and straight probation, the perception holds, are if anything, expensive “inconveniences”—expensive for taxpayers, inconvenient for criminals. According to Michael Sherman and Gordon Hawkins:

community [-based alternatives to] corrections fail to [satisfy the collective conscience] It concentrates so much on the interest of the inmates, and in reducing the incarcerated population, that it has become suspect from the perspective of the right and even the center of the political spectrum²⁹

Yet such observers do not discount the justice-achieving qualities of the more punitive alternatives, citing community service, restitution, heavy fines, and limitations on leisure short of traditional “full-time jailing” as appropriate sentences for nonviolent offenders.³⁰

²⁸ Although some programs claim it as a goal, it is not here suggested that pretrial diversion or release procedures, being limited to unconvicted individuals, should aim to rehabilitate.

²⁹ Sherman and Hawkins, *Imprisonment in America*, p. 102.

³⁰ *Ibid.*, pp. 108-109 and Wilson, *Thinking About Crime*, p. 202.

Alternatives and Public Safety

The incarceration of a convicted individual means—escape notwithstanding—that society is perfectly protected from that individual during the period of time that he or she is detained. The same, of course, may not be said when offenders are released to the community. However, considering the high costs of incarceration, in the cases of most nonviolent petty offenders society may be willing to tolerate some small additional property risks.

An example of the weighing of such costs and benefits is provided by the New York Community Sentencing Project which sentences repeat petty offenders to 70 hours of supervised, unpaid community service work in lieu of jail. Jail sentences for such individuals would normally be expected to run from 30 to 90 days at a cost to the city of anywhere from \$2,040 to \$6,120.³¹ In contrast, the total cost to the city per community sentencing project participant was just \$921.³²

Despite such cost savings, of those sentenced to community work, 3.6% were rearrested during the period of their two week sentences and 12% during the 30 days following community service as compared to no arrests for comparable jail inmates.³³ Although these figures raise serious public safety questions, it should be noted that most of the arrests were for petty thefts. Moreover, “[e]ighty-eight percent did not get rearrested for further crime, and these persons would have been housed in city’s jails.”³⁴ Thus, some minor risks may be offset by financial savings.

Different questions may and should arise concerning public safety vis-a-vis pretrial defendants. In theory, the decision to release a defendant has long been based on his or her likelihood of appearing at trial.³⁵ Those considered poor appearance risks could be denied bail, while the better “gambles” could be offered release with or without conditions designed to reduce any residual risk. In fact, failure to appear at trial tends to be no greater among those released through alternative procedures than among those released on traditional bail bond.

Recently, however, advocates of a new movement—preventive detention—have been seeking to add another variable to the decision to release pretrial defendants. For instance, in his 1981 address before the American Bar Association, Chief Justice Burger called for

³¹ Carl M. Loeb, Jr., *The Cost of Jailing In New York City* (Hackensak, NJ: National Council on Crime and Delinquency, 1978).

³² Vera Institute of Justice, “The New York Community Service Sentencing Project and Its Utility for the City of New York,” Staff Monograph, December 23, 1981, pp. 12-13.

³³ *Ibid.*, pp. 7-8.

³⁴ *Ibid.*, p. 10.

³⁵ *Stack v. Boyle*, 342 U.S. 1 (1981).

“return[ing] to all bail release laws the crucial element of future dangerousness.”³⁶

The Chief Justice is not alone in his concern. As of 1980, nine states and the District of Columbia had passed laws allowing judges to consider community safety when deciding whether and under what conditions to release defendants;³⁷ the ABA's Pretrial Release Standard 10-5.9 supports consideration of dangerousness as one element in judicial determinations;³⁸ the 1981 Attorney General's Task Force on Violent Crime advocated permitting “courts to deny bail to persons who are found by clear and convincing evidence to present a danger to particular persons or the community;³⁹ and the D.C. Court of Appeals recently found the judicial prediction of dangerousness not to be a “denial of a fundamental right [or] the imposition of punishment.”⁴⁰

Alternatives and Financial Savings

[R]ehabilitation is an idea that is on the decline But . . . reformist ideals may continue to be pursued because of economics. The soaring cost of incarceration has become exorbitant relative to the benefits received by society. Thus diversionary programs and alternatives to incarceration may now be supported because their cost is less, rather than for their rehabilitative value. The fact that most of these programs may be more humane, less destructive, and of some value to the offenders are secondary benefits of choices made for purely economic reasons.⁴¹

It is, of course, important to note once more that all alternatives are not alike and therefore costs incurred and costs saved may cover a vast range. Simple release on recognizance for pretrial defendants is less expensive than release conditioned upon participation in some social program. Moreover, if alternatives merely add to the sanctions available within the criminal justice system, it then becomes logical to assume that the system may be incurring additional costs over and above those of incarceration.

³⁶ Chief Justice Warren Burger, address before the annual meeting of the American Bar Association, February 8, 1981.

³⁷ Stephen Gettinger, “Has the Bail Reform Movement Stalled? *Corrections Magazine*, February 1980, p. 35.

³⁸ Cited in *Criminal Justice Newsletter*, 3 August 1981, p. 3.

³⁹ U.S. Department of Justice, *Attorney General's Task Force on Violent Crime: Final Report* (Washington, DC: U.S. Department of Justice, 1981), p. 50.

⁴⁰ *U.S. v. Edwards*, D.C. Ct. App. #80-294 (May 8, 1981).

⁴¹ Henry Weiss, Thomas Gilmore, and Trevor Williams, “Desired Futures for the American Jail,” Prepared as part of the Jail of the Future Project sponsored by the National Institute of Corrections Jail Center, June 1980.

However, in comparison to the costs of jailing, alternative sanctions and pretrial dispositions tend to be far less expensive. Thus, if employed in appropriate circumstances as genuine substitutes for jail, alternatives to incarceration may fulfill important cost saving objectives.

JAILS: THE INTERGOVERNMENTAL CONTEXT

Although the jail (and its many alternatives) may be the “quintessential local institution,”⁴² it is hardly an island—either systemically or jurisdictionally. Thus, the jail is part of a larger criminal justice system, each part of which affects the others; yet, each part of which functions separately—even disparately. Police make arrests, prosecutors make cases, and judges make sentences. Each link in the chain has an impact on the jail, though more often than not that impact is not considered.

Moreover, the locality—the traditional superintendent of the jail—is not the only level of government whose executive, legislative, and judicial decisions determine the jail’s fate. States, after all, authorize the very existence of jails, determine the bulk of what constitute criminal offenses, create sentencing structures, mandate a variety of standards, and occasionally assist jails through financial and technical means. Nor is this merely a bilateral arrangement. The federal government, too, affects the local jail. Through contracts to house its own prisoners, through various modes of aid, and most important, through judicial court orders, federal actions may shape the local correctional agenda in some subtle and not so subtle ways.

Hence, local correctional policy is continually played out in a series of complicated intersystemic and intergovernmental arenas. Those arenas will be the subjects of the remainder of this *In Brief*.

State-Local Relations and Local Jails⁴³

Sentencing and Release Policies

Control of who enters and leaves jail is out of the hands of the jail administrator. For a large portion of local inmates—those serving

⁴² E. Eugene Miller, *Jail Management: Problems, Programs, and Perspectives* (Lexington, MA: Lexington Books, 1978), p. 126.

⁴³ For a complete discussion of this subject, see Chapter 3 of ACIR, *Jails: Intergovernmental Dimensions of a Local Problem*.

sentences (constituting 40% of the inmate population nationwide)—the critical responsibility for their being in jail stems from the sentencing and release decisions of judges and parole officials. Such decisions are framed to a large extent by state legislative policy, reflecting the public's views on crime and on the purposes of incarceration. Any effort to understand and address the problems of local jails and the state's role therein must take account of these sentencing policies.

Three Basic Sentencing Structures. The state penal code and related laws establish sentencing and release policies. This legislation generally classifies crimes according to gravity, specifies the sentencing alternatives—both confinement and nonconfinement—available for offenses that fall within the classes, and indicates the amount of discretion vested in the judges and parole officers in applying the alternatives. There are 50 different sets of such state laws, but they fall into three general groupings on the basis of the amount of discretion vested in judges and parole officials: indeterminate, determinate, and mandatory minimum sentences.

1. *Indeterminate*—a type of sentence under which the judge is free to imprison, place on probation, or set varying conditions on probation. Where he or she chooses imprisonment, the commitment, instead of being for a specified single time quantity, such as three years, is for a range of time, such as two to five years, or five years maximum or zero minimum. Generally, a paroling authority determines, within limits set by the sentencing judge or by statute, the exact date of release from prison and the termination of correctional jurisdiction.
2. *Determinate*—a sentence in which a single time quantity is set and is in effect the maximum. This quantity (and/or the minimum attached by automatically applied rule) is likely to be lower than the limits automatically provided by statute, or set by the court, in the “indeterminate” method. Some degree of paroling authority discretion is typically provided. Administrative rules for reduced term because of good behavior (“good time” rules), and the like will also affect the actual release and termination dates.
3. *Mandatory Minimum*—a statutory requirement that a certain penalty shall be set and carried out in all cases upon conviction for a specific offense or series of offenses. The statute usually provides that an offender convicted of a specific very serious crime or series of crimes be confined in prison for a minimum number of years specifically estab-

lished for the particular offense, that the customary alternative of probation instead of imprisonment is not available, and that parole is not permitted or is possible only after unusually lengthy confinement.

Current Sentencing Practices. The most significant trends in state sentencing have been the increasing use of determinate and mandatory sentences. Support has been growing for reducing discretion at points in the criminal justice decision chain through determinate sentences and decisionmaking guidelines for judges and parole boards. Accordingly, emphasis has been given to fixing terms more precisely at the point of sentencing or shortly after imprisonment.

In addition, from 1977 to 1980, 15 states enacted laws to require mandatory prison sentences for certain drug offenses; 25 passed legislation imposing such sentences on persons committing certain violent offenses; and 16 specified mandatory sentences for habitual offenders.⁴⁴

Despite the swing toward determinate and mandatory sentencing, most states still follow a full or partially indeterminate sentencing scheme. Thirty-three of 51 states (including the District of Columbia) are in the "partially indeterminate" category, under which the courts are permitted to set the term that becomes the maximum with the actual release date set by the parole authority at some time before the maximum period expires. The remaining 18 states are evenly divided between the determinate and indeterminate category. This variety reflects the degree to which the indeterminate sentence once dominated state practice and its continuing staying power. The large number of "partially determinate" states also indicates that many states' determinate policies apply only to selected cases.⁴⁵

A New Twist: Sentencing Guidelines. One of the newest trends within determinate sentencing is sentencing guidelines. Such guidelines define categories of offenders and indicate a presumed sentence or range of sentences in each category. In jurisdictions where judges are mandated to use guidelines, they are required to provide a written explanation if they choose to depart from the presumed sentence. Supporters of guidelines claim that, depending upon the

⁴⁴ J.S. Miller, Marilyn McCoy Roberts, and Charlotte A. Carter, *Sentencing Reform: A Review and Annotated Bibliography* (Denver, CO: National Center for State Courts, 1981), p. 36.

⁴⁵ Caroline S. Cooper, Debra Kelley, Sharon Larson, *Judicial and Executive Discretion in the Sentencing Process: Analysis of State Felony Code Provisions* (Washington, DC: The American University, 1981). Also see Richard S. Morelli, Craig Edleman, and Roy Willoughby, *A Survey of Mandatory Sentencing in the U.S.*, Pennsylvania Commission on Crime and Delinquency, September 1981.

way they are constructed, they may reduce sentencing disparities, control inmate populations, encourage alternatives to incarceration, or achieve all three objectives. About a dozen states have guidelines that are currently in use or will soon be put into effect.

Sentencing Structures and Jails. Although felons, those who make up the inmate population of state prisons, are the principal focus of interest in sentencing practices, state sentencing and release policies also have a profound impact on jails. They directly affect the framework within which courts and parole officials determine who will be sentenced to jail and for how long. Further, they have an indirect effect because they apply to the total array of crimes—stretching across a continuum from the most serious felony to the least serious misdemeanor—and prisons and jails together constitute a continuum of resources for dealing with sentenced offenders. Thus, sentencing and release practices affecting prisons inevitably have a “spillover” affect on jails.

Minnesota’s sentencing guidelines provide an example of how state felony sentencing structures may affect local jails. In almost half of the sentences meted out to convicted felons, the judge stays a prison sentence and instead gives the felon time in jail or a workhouse as a condition of probation. Moreover, the state’s Sentencing Guidelines Commission did not provide judges with non-imprisonment guidelines, so determining a “split” probation-jail sentence is done without the benefit of guidelines and has resulted in inconsistent sentencing of these offenders to jail. Minnesota found that the sentences being served by jail inmates already were substantially nonuniform before split-sentencing, and the latter has not made overall jail sentencing more uniform. The Minnesota guidelines, limited as they are to imprisonment sentences for felony offenders, clearly have added to the crowding problems in Minnesota’s jails and workhouses and, at best, have not helped achieve greater uniformity in sentencing among those serving jail terms.

Jail Standards and Inspections

Until well into the 20th century, counties and cities were generally left to their own devices in running local jails. State legislatures had the constitutional power to impose statutory requirements on jails but they used it rarely, and then only in an *ad hoc*, episodic fashion. As conditions in local jails came under mounting criticism, however—from reform groups, study committees, the media, an evolving corrections profession, and, in the last few decades, the courts—states were increasingly pressed to take corrective action. Their principal response has been to develop and, in many cases, mandate performance standards and to establish jail inspection programs.

out of the 44 states with locally administered jails, 33 had state standards in 1982 and one inaugurated them in 1983. In addition, two states had voluntary standards developed and implemented by the state association of counties in cooperation with the state sheriff's association (Idaho) or by the county association alone (New Hampshire).⁴⁶

Although the above figures suggest steady progress in the field of state standards development, several factors mitigate against their effectiveness. First, a substantial number of states either have not established standards or have made them merely voluntary. Second, many states do not have inspection programs, and even in those that do, enforcement is frequently lax or nonexistent, as attested to by the continuing resort to court orders to compel compliance with constitutional and statutory standards. Finally, where standards do exist, localities frequently lack the financial means required to provide mandated improvements.

State Subsidies

The number of states granting subsidies for local adult corrections and the number and dollar amount of subsidy programs increased markedly in the six-year period 1976-82, from 12 in nine states to 24 in 17 states. There was also a notable shift in the kinds of subsidy programs: the number of subsidies for physical plant trebled, and although the number of "alternative to incarceration" subsidies increased only slightly, more of them were comprehensive, community-based type programs.

State Technical Assistance and Training

Technical assistance and training in the field of local corrections are carried on in varying degrees by all but a few states. In most cases, these activities are conducted principally to aid local governments' efforts in meeting state-prescribed minimum jail standards. ACIR-NACo survey results indicate that state governments often respond with technical assistance when local jails are placed under court order to remedy deficiencies or to close their doors.

A Closer State-Local Partnership: Community Corrections Act States

In an effort to improve their state-local corrections activities, several states have adopted statewide community corrections programs, funded by the state but administered by local governments. Although eight states may be defined as community corrections act

⁴⁶ 1982 ACIR-NACo survey of state corrections officials and the Third National Assembly on the Jail Crisis, Washington, DC, November 12, 1982.

(CCA) states, only six have programs that are fully active. Those six are Minnesota, Oregon, Kansas, Virginia, Iowa and California. Of the two remaining state programs, Ohio's has been underfunded and confined to six rural counties on a pilot basis and Indiana's has been limited to three counties, two of which are small.⁴⁷

State CCA programs generally include the provision of state funds to stimulate community corrections, supplemented by significant state use of standards, guidelines, plan approval, technical assistance and monitoring. The two evaluations that have been completed (in Minnesota and Oregon) indicated that these programs have an impact on local jails. The evidence clearly indicates increased jail sentencing of felons in both states, and in one state at least an improvement of jail programs. Moreover, one state evaluation also suggests that the CCA has produced a significant reduction in the number of misdemeanants jailed, although the evaluation report itself stops short of drawing this conclusion.

Developments in CCA states thus far, however, do not yield clear conclusions about the long-run influence of these programs on jails. Most important is the issue of whether the community corrections approach, in light of its emphasis on deinstitutionalization, should include local incarceration as one of its components. To date, the state programs do include it; hence, jails are directly affected. But the continuing debate on the issue suggests that the matter is not resolved for all states and for all time.

Weighing against inclusion of local incarceration, and certainly against heavy inclusion, is the hard fact that it costs considerably more than most non-incarcerative alternatives. The near universally bleak fiscal outlook at all levels of government suggests that cost factors may be very significant in restricting the use of jails as elements of community corrections. Finally, what will have as much influence on the relationship of community corrections and jails as any factor will be the attitude of judges as reflected in their sentencing decisions. State legislatures can influence those decisions by the way they construct state community correction programs and structure sentencing policies and procedures.

State Administration of Jail Functions

Once widely espoused as a major means of reforming jails, a final—indeed, the ultimate—means of state involvement in local corrections is state assumption and administration of the jail func-

⁴⁷ ACIR staff phone interview with Nick Gatz, Administrator, Bureau of Community Services, Ohio Department of Rehabilitation and Correction, November 1982, and Dean Duval, Director of Community Services, Indiana Department of Correction, December 1982.

tion as part of an integrated state-local corrections system. To date, however, only six states—Alaska, Connecticut, Delaware, Hawaii, Rhode Island and Vermont—have taken this approach and no state has done so since 1973.

Federal-Local Relations and Local Jails⁴⁸

Just as changes have occurred in state-local correctional relations over the past decade, so have changes occurred in the relationship between the federal government and the local jail. Having traditionally played a very minor role in state and local criminal justice generally and corrections in particular, the national government, through its court system, has recently begun to shape state and local correctional policies in a most profound manner. Though an aggressive judicial corrections stance is among the newest of federal interventions into the subnational criminal justice system, it is almost without question the most important. For that reason, the remainder of this *In Brief* will concentrate on the rise of the “managerial judge” to the exclusion of the federal financial, contractual and regulatory approaches to local corrections.⁴⁹

The Emergence of the Managerial Judge

If nothing else, what have come to be known as the lower court “institution cases,” ruling upon and ordering changes in state prisons, mental institutions, and, increasingly, local jails, are notable for their volume. Yet the quantity of such cases is not their most distinguishing characteristic—in the United States, the phrase, “burgeoning field of case law,” is a redundancy if ever there was one. Rather, they are differentiated by an unusual degree of judicial intrusion:

Federal district judges are increasingly acting as day-to-day managers and implementors, reaching into the details of civic life: how prisons are run, medication is administered to the mentally ill, custody is arranged for severely deranged persons, private and public employers recruit and promote. Though judicial authority and democracy have always existed in tension, as federal judges assume a more active managerial role, politicians and citizens chafe for quite pragmatic reasons.⁵⁰

⁴⁸ For a complete discussion of this subject, see Chapter 4 of ACIR, *Jails: Inter-governmental Dimensions of a Local Problem*.

⁴⁹ For a discussion of those approaches, as well as a much more thorough discussion of the federal constitutional approach, see *ibid*.

⁵⁰ Charles Fried, “Curbing the Judiciary,” *The New York Times*, November 10, 1981, p. A23.

Few would dispute the findings in most such court decisions that conditions in the institutions under order are deplorable. And, with findings of unconstitutional conditions in hand, it would be extremely difficult for even a moderately compassionate jurist not to order changes. Indeed, whether in the hands of a merciful or heartless judge, findings of Constitutional violations demand changes designed to bring the offending institution into compliance with the Constitution. However, in contrast to court actions of only a decade or two ago which tended to lean toward locally designed compliance plans and implementation with "all deliberate speed," the newer court orders are often marked by demands for immediate conformance with court-designed plans—the only alternative being that the offending jurisdiction shut down all or part of its prison system, mental institution(s), jail(s), etc.:

Let there be no mistake in the matter: the obligation of the respondents to eliminate existing unconstitutionality does not depend upon what the legislature may do, or upon what the governor may do, or indeed upon what respondents may actually be able to accomplish. If Arkansas is going to operate a penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States.⁵¹

Thus, the judge of the 1970s and 1980s—the judge overseeing the era of jail litigation—has taken on the additional functions of local legislator and executive. This trend has been noted with some degree of alarm by a number of prominent legal scholars:

Rather than preventing the government from acting in an unconstitutional way, these orders mandate affirmative action by the legislative and executive branches to correct constitutional violation. Moreover, the court orders involve a subject matter that is the very foundation of the discretion that is lodged in the other branches [as well as autonomous state governments]: the raising, allocation, and spending of government funds.⁵²

Sweeping use of federal equity power has obvious implications for federalism. When a judge undertakes systemic relief, he displaces the elected and appointed officials who normally supervise the state or local function that is the object of that litigation. . . . There is a genuine danger of

⁵¹ *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark., 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971).

⁵² Gerald E. Frug, "The Judicial Power of the Purse," 126 *University of Pennsylvania Law Review* 715 (1978), pp. 735-36.

a judge's "tunnel vision". . . . This is not intended to insinuate that a judge does not act out of felt necessity and on the basis of demonstrated need, but it does call attention to the extent to which systemic reforms, undertaken through the federal courts' equity powers, displace the normal democratic and political process.⁵³

But are federal courts all over the country to decide the questions, levy the taxes, and distribute the revenues? Not to act would be to acknowledge judicial futility. To act would be to adopt a tax and fiscal policy for the state. It might even become necessary to set up the machinery to make the policy effective. In addition to questions of competency, those of legitimacy would surely arise. Even in the case of legislative default, does a federal court—usually a single judge—have legitimate power to levy taxes on people without their consent, and to decide where and how public money shall be spent?⁵⁴

The Effects of Judicial Intervention

From small beginnings only a decade or so ago, prison and jail litigation has blossomed to the point that "one out of every five cases filed in federal courts today is on behalf of prisoners."⁵⁵ "The increase in civil rights petitions filed by state prisoners in federal courts has been remarkable—from 218 petitions in 1966 to 2,030 in 1970, to 12,397 in 1980"⁵⁶ to 16,741 in 1981.⁵⁷ Moreover, between 10 and 13% of all jails are presently under court order; between 16 and 22% have been involved in court actions; and between 17 and 20% are now party in a pending lawsuit.⁵⁸ The majority of such actions were brought or are being brought in federal court. (See boxed discussion.) Most observers would agree that no recent initiative in the field of corrections—federal, state, or local—has had the

⁵³ A.E. Dick Howard, "The States and the Supreme Court," 31 *Catholic University Law Review* 375, 426 (Spring 1982).

⁵⁴ Archibald Cox, *The Role of the Supreme Court in American Government* (London: Oxford University Press, 1976), pp. 95-96.

⁵⁵ Linda Moore, "Prison Litigation and the States: A Case Law Review," *State Legislative Report* 8 (November 1981), p. 1.

⁵⁶ Howard, 31 *Catholic University Law Review*, 375, 379 (Spring 1982).

⁵⁷ Joseph Enders, "Federal Inmates In Jails," presentation before a workshop on *Federal and State Inmates in Jails: What Are the Options?* The Third National Assembly on the Jail Crisis, Washington, DC, November 10-13, 1982.

⁵⁸ See: National Sheriffs' Association, *The State of Our Nation's Jails*, 1982 (Washington, DC: National Sheriffs' Association, 1982), pp. 43-57 and Mark A. Cunniff, "Report on County Jails," Report on a Survey by the National Association of Criminal Justice Planners prepared for the National Association of Counties, April 21, 1982, pp. 11-13.

The Jail and Section 1983

Like biblical lineage, the *Civil Rights Act of 1866* begat the Fourteenth Amendment, the Fourteenth Amendment begat the *Civil Rights Act of 1871*, the Act of 1871 begat an amendment in 1875, and the amendment begat Section 1983, a seemingly simple sentence, which, in its old age, has been doing a lot of begatting itself—begatting some condemnation, some commendation, and a great deal of consternation¹

The above quotation might well have added: “The begatting of jail litigation,” for the flood of suits against jails has been greatly abetted by recent judicial developments concerning Section 1983 of the *Civil Rights Act of 1871*.²

Following almost a century of underutilization, between 1961 and 1980 the Supreme Court took several steps to broaden the law’s applicability to local governments and their officials, holding (1) that local governments themselves could be characterized as “persons” under Section 1983; (2) that not only were they liable for Constitutional violations resulting from officially adopted ordinances, regulations and decisions but also for custom and usage and official conduct not formally adopted but pervasive enough to have the force of law; (3) that localities were liable for money damages; and (4) that local jurisdictions could not employ a “good faith” defense to avoid such damages.³ Although the pertinent cases did not involve jails, the implications were clear.

Hence, “[s]heriffs, jail administrators and managers, and jail supervisors need not be personally present or have personally violated pretrial detainees’ or inmates’ rights to be held liable under Section 1983.”⁴ Instead, inmates may be able to demonstrate that such officials were tied to the Constitutional violations by proving any number of official deficiencies such as negligent hiring, training or supervision.⁵ Moreover, failure to correct such inadequacies as overcrowding, insufficient medical care, and repeated violence can place counties and municipalities under the cloud of Section 1983 where “[t]he lack of funds to take corrective action is no defense.”⁶

In 1983, a bitterly divided Court considered whether punitive damages⁷ are available under Section 1983 and, if so, what underlying threshold of conduct will trigger awarding such damages.⁸ The case in question involved an inmate of a Missouri reformatory who was beaten and sexually assaulted by his cellmates. The inmate, Wade, had been the subject of previous assaults and one of his cellmates had a history of assaulting other prisoners. Wade brought suit under Section 1983 against a number of reformatory guards and other officials alleging that his Eighth Amendment rights had been violated. Thereafter, a district court jury awarded Wade both compensatory and punitive damages, an appeals court affirmed that award, and the Supreme Court upheld the appellate decision—sanctioning, for the first time, the availability of punitive damages under Section 1983.

The Court then considered what sort of behavior would leave an official open to punitive damages. That is, must the official in question have acted with malicious intent to cause injury or is “reckless or callous indifference to . . . federally protected rights” sufficient motivation? The Court here held that indifference was an adequate standard for allowing juries to assess punitive damages. The decision is likely to stimulate even more extensive prison and jail-related litigation.

¹ Cynthia Cates Colella, “The Mandate, the Mayor, and the Menace of Liability,” *Intergovernmental Perspective*, Fall 1981, p. 15.

² In relevant part, Section 1983 reads: “Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

³ *Monroe v. Pape*, 365 U.S. 167 (1961); *Monell v. Department of Social Services*, 436 U.S. 658 (1978); and *Owen v. City of Independence*, 445 U.S. 622 (1980).

⁴ Charles Swanson, “Is Your Jail a Liability Trap?” *Georgia County Government Magazine*, December 1981, p. 56.

⁵ *Ibid.*, pp. 56-57.

⁶ James A. Rowenhorst, “Legal Actions Against Law Enforcement and Jails,” *South Dakota Municipalities*, May 1982, p. 8.

⁷ Compensatory damages are awarded to individuals to compensate for some injury actually suffered. They have long been available under Section 1983. Punitive damages are assessed to penalize the individual who has inflicted the injury and to deter that individual from violating rights in the future.

⁸ *Smith v. Wade*, 51 LW 4407 (1983).

sort of profound impact that federal judicial intervention into state and local institutional and administrative arrangements has had.

The role of the federal judge in the local jail is obviously a troublesome one. On the one hand, many would argue that a high degree of judicial intervention has been necessitated by state legislatures and county boards that refuse to remedy Constitutional violations. Indeed, more than a few local sheriffs secretly welcome such "intrusions" as the only way to attain money for improvements, badly needed and long requested. According to one expert:

The number of collusive lawsuits is staggering. I don't know how many jail administrators have told me, "I know my jail is a pigpen, but I can't get cooperation from my county commissioners. So go ahead and sue me."⁵⁹

Jail, the often forgotten community burden, may have found salvation in the black robes of the federal district judge.

Yet, there is reason to be less than sanguine over the emergence of the "managerial judge." The raising, allocation, and spending of funds are legislative and executive functions—in these cases, *state and local* legislative and executive functions. Disturbing questions are raised not only regarding separation of powers but of federalism as well. Thus, the new judicial mandates are like the proverbial two-edged sword—cutting for jail improvement, but against local discretion.

⁵⁹ Elizabeth Gaynes quoted in Richard Allison, "Crisis in Jails: Overcrowding is Now A National Epidemic," *Corrections Magazine*, April 1982, p. 22.

CONCLUSION

To return to an idea proffered at the outset, the jail is a complex of complex problems—managerial, spatial, legal and financial, to cite only the most obvious. Nor are solutions and reforms easily achieved. Each of the nation's nearly 4,000 local jails is different from the others and each, accordingly, is beset with different problems and combinations of problems. Moreover, although the operation of jails is primarily a local function, state and federal actions can and do profoundly affect that operation.

At its June 16, 1983, meeting, the Advisory Commission on Intergovernmental Relations proposed a series of 16 recommendations aimed at alleviating some of the problems of local jails. Those recommendations address all three levels of government and speak, in varying degrees, to all three branches—stressing especially a strong state-local partnership.

The problems facing local jails will not disappear over night. Many, after all, have plagued jails for centuries. Nonetheless, if policymakers begin to follow the ACIR agenda for reform, some measure of improvement will follow. The Commission's recommendations for reform may be found at the end of this *In Brief*.

RECOMMENDATIONS

(Adopted June 16, 1983)

Part A

PRISONERS AND SENTENCING POLICIES

Recommendation A.1

EXPANDING THE USE OF PRETRIAL RELEASE TO ENSURE FAIRNESS AND TO HELP REDUCE BURDENS ON LOCAL JAIL FACILITIES

Approximately 60% of all jail inmates are pretrial detainees—persons charged with, but not convicted of, criminal offenses. Although pretrial detainees and convicted inmates must sometimes be housed in the same facilities, the Commission finds that jailing many pretrial detainees results in an inefficient use of jails' resources and may be harmful to the pretrial detainees. Furthermore, the Commission is convinced that jailing most nonviolent alleged petty offenders prior to trial is both unnecessary from the perspective of assuring their appearance in court and is relatively expensive in comparison to various forms of court-based and police-station release. At the same time, the Commission believes that community safety deserves at least some consideration in determining who should be released. Therefore,

The Commission recommends that to ease the financial burden of bail on poor defendants, all states enact defendant-based percentage bail laws. The Commission also recommends that states and localities make greater use of such nonfinancial pretrial release options as citation release and release on recognizance where there is a reasonable expectation that public safety will not be threatened. Further, the Commission recommends, where not already incorporated in state statutes, enacting legislation (a) permitting pretrial detention of repeat violent crime offenders and (b) recognizing community safety as one consideration to be taken into account in judicial determinations of bail or other pretrial options.

Recommendation A.2

KEEPING INAPPROPRIATE POPULATIONS OUT OF JAILS

The Commission finds that in recent years local jails have been used to house persons charged with no crime or simply petty violations. The results for both the jails and such people have generally been adverse. Juveniles, detained mainly for minor and, at times, even non-violations of the law, are often subject to physical, sexual, and mental abuse. Moreover, youth in jails have been found to have a high susceptibility to suicide. Many mentally ill and retarded persons once under the purview of traditional social service providers and institutions, thanks to "deinstitutionalization" reforms, are now found in great numbers in the nation's jails; yet most jails quite understandably have no expertise in dealing with this group's problems. Public inebriates also make up a significant portion of the population of jails. But the problems of these individuals are poorly served by jails. Indeed, these detainees often pose real risks to themselves in such a setting.

Various state and federal judicial and legislative initiatives have attempted to keep some or all of these groups out of jails, but the frequent absence of real alternatives undermines these efforts. The Commission is convinced that, in general, jail is the wrong place for juveniles, the mentally ill and retarded, and public inebriates and that relevant state and local social service agencies have a basic role in reducing the extent of this practice. Therefore,

The Commission recommends that all states, after consultation with affected local governments, adopt guidelines (1) for removing, where practicable, juvenile, mentally ill and retarded, and publicly inebriated detainees from jails and (2) for ensuring in the future that people within these categories are not detained in jails. The Commission further recommends that the states, in conjunction with their localities, develop better coordination among their social service and related agencies for dealing with such actual or potential detainees. Where resource constraints render these proposals impracticable, the Commission recommends that people within these categories who are detained in jails be housed separately from other detainees and be given particularly close attention throughout their stays.

Recommendation A.3

STRENGTHENING COMMUNITY-BASED CORRECTIONS AND ALTERNATIVES TO INCARCERATION

convicted offenders, although sometimes necessary to protect society, is costly in comparison to other modes of punishment. Particularly for many less serious felony and misdemeanor offenders, community-based alternatives such as community service and restitution may provide not only a tangible relationship between crime and punishment but may result in some financial or in-kind benefit to the community and to the victim. Therefore,

The Commission recommends that in punishing less serious felony and misdemeanor offenders, state governments encourage local governments to make increased use of community-based alternatives to incarceration such as community service and restitution.

Recommendation A.4

SENTENCING GUIDELINES: REDUCING SENTENCING DISPARITIES, CONTROLLING INMATE POPULATION, ENCOURAGING ALTERNATIVES TO INCARCERATION

The Commission finds that properly developed and administered sentencing guidelines can help (1) reduce disparities in sentencing practices, (2) control the population of prisons and jails, and (3) encourage using alternatives to incarceration. The Commission further finds, however, that although guidelines have been proposed and tested since the mid-1970s, they are currently in use in only a few states. In these states, moreover, the guidelines seldom deal effectively with the problems of jails. In no instance do guidelines cover all offenders sentenced to jails; they usually are limited to felony offenders and rarely require judges in their sentencing decisions to consider prescribing alternatives to incarceration. Therefore,

The Commission recommends that all states adopt sentencing guidelines that apply to both felony and serious misdemeanor offenders and provide alternatives to incarceration for non-violent offenders. Such guidelines should be based on legislatively predetermined population maximums at both the state and local levels.

Recommendation A.5

REIMBURSING LOCAL GOVERNMENTS FOR THE HOUSING OF STATE PRISONERS

The Commission finds that overcrowding in local jail facilities

has been greatly exacerbated by legislative, executive, and judicial limits imposed on state prison populations. These limits have produced a spillover of state prisoners into local jails. Imposing state felony offenders on local facilities that were designed to house pre-trial defendants and convicted misdemeanants obviously places an undue burden on jail administrators and regular jail inmates. Hence,

The Commission recommends that whenever states must house prisoners in local facilities, they enter into mutually agreeable contracts with affected local governments to provide fair and appropriate reimbursements to such governments for housing and caring for these prisoners.

Part B

INTERLOCAL AGREEMENTS

Recommendation B.1

INTERLOCAL COOPERATIVE ARRANGEMENTS

Interlocal contracts and joint agreements for delivering jail services hold considerable appeal for economy and efficiency-minded localities, particularly small jurisdictions. Yet, they have not been used as extensively as they might, as evidenced by the profusion of small jails and the feeling among many state corrections officials that greater use of interlocal arrangements is among the best alternatives for dealing with local jail problems. One factor inhibiting greater use of interlocal agreements is the lack of authorizing legislation in some states. Therefore,

The Commission reaffirms its 1971 recommendation that states authorize and, by means of financial incentives and technical assistance, encourage local governments to contract with each other to keep inmates, or to enter into agreements for jointly establishing and operating multigovernment correctional systems.

Part C

STANDARDS AND STATE ASSISTANCE

Recommendation C.1

JAIL STANDARDS: LOCAL AND STATE ROLES

The Commission recognizes that jails are a local function and that the responsibility for setting basic operating standards for jails should lie first with local governments, taking into account community values. The Commission also recognizes, however, that local

jails must respect the basic constitutional rights of inmates and that states have some responsibility to assure that those basic rights are protected. Thus,

The Commission recommends that where state operating standards for jails do not already exist, states, either through governmental commissions or through private professional organizations, in consultation with local governments, develop standards to assist local governments in protecting the basic constitutional rights of jail inmates. The Commission further recommends that state legislatures enact legislation permitting relevant state agencies to furnish technical or financial assistance to localities in meeting such standards.

Recommendation C.2

UPGRADING JAIL PERSONNEL

Many informed observers believe that personnel is one of the greatest problems facing jails, traceable mainly to the low prestige attached to jail service as a career. This negative image of jail employment stems to a large degree from deficient training and generally substandard compensation and related benefits for jail personnel. Therefore,

The Commission recommends that local government take steps to improve their recruitment, compensation, training, and promotion practices applicable to jail personnel. To this end, the Commission further recommends that states conduct or help provide training programs for jail personnel and that they pay particular attention to personnel and training in mandating standards for local jails.*

Recommendation C.3

UPGRADING JAIL MANAGEMENT

Although establishing and enforcing minimum personnel and training standards will go a long way toward upgrading jail services, it will not come to grips with a fundamental need in jail management: direction by a full-time administrator trained in corrections. Therefore,

The Commission recommends that state and local governments take steps to assure that each jail is administered by a well

*The following Commission members dissented: Governor Lamar Alexander, Mr. James S. Dwight, and Representative Robert S. Walker.

trained correctional administrator, appointed as appropriate by the sheriff, county board, or county executive, whose primary responsibility is to manage the jail. If limited budgetary resources and a low inmate population make a full-time administrator inappropriate, the Commission recommends that (as proposed in Recommendation B.1), the localities concerned enter into cooperative agreements with other jurisdictions to create a jail facility and program with sufficient scope to warrant such an administrator.

Recommendation C.4

EXPANDING ACADEMIC TRAINING

Only two-fifths of those serving jail sentences have completed high school, and one-fifth have completed eight or fewer years of schooling. This low educational achievement level is a major factor in the high degree of economic uncertainty faced by jail offenders. Yet, less than one-third of jails currently offer schooling leading to a general equivalency diploma, and only 14% offer adult basic education. Therefore,

The Commission recommends that local governments initiate or upgrade their academic training programs for the inmates of their jails. The Commission further recommends that in those jurisdictions where limited budgetary resources, low inmate population, or both, do not warrant in-house academic and training programs, the localities concerned make use of such local institutions as the public library, the public school system, the community college, and other adult education programs.

Recommendation C.5

CORRECTIONS INSTITUTIONS: WORK PLACES, NOT WAREHOUSES

The Commission notes that conventional rehabilitation programs for convicted inmates of jails and prisons have not significantly modified recidivism rates. Some officials blame this result on the lack of adequate basic education and vocational training. Others go further and argue that neither of these educational efforts will amount to much unless they are directly linked to acquiring a marketable skill. Still others, including the Chief Justice of the United States, contend that correctional institutions themselves should provide the opportunity for their inmates to gain job-related skills for an easier and more productive return to society. These ends would be achieved by establishing correctional institution-private sector partnerships whereby inmates would provide goods for the contracting firms and be paid reasonable compensation. Hence,

The Commission recommends that state legislatures, after consultation with labor, business and the communities involved, enact statutes, where lacking, authorizing contracts between private companies and correctional institutions, including jails, under which convicted inmates can produce certain goods and services that are not in unfair competition with the private sector for sale in the open market. The Commission further recommends that states enact legislation authorizing the sale of such goods and services within their own borders.

Part D

A FEDERAL ROLE?

Recommendation D.1

FEDERAL RESEARCH, TRAINING, AND TECHNICAL ASSISTANCE FOR LOCAL CORRECTIONS

The Commission finds that the magnitude of correctional problems nationwide demands a concerted effort on the parts of all levels of government—federal as well as state and local. Moreover, the Commission believes that even in an era of tight budgetary constraints, and taking into consideration the propriety of federal involvement in functions that are traditionally state and local, the federal government may still perform extremely valuable services through its research and development, training, and technical assistance activities. Hence,

The Commission recommends that the federal government continue its efforts in the areas of correctional research and development; in training local correctional personnel; and in providing technical assistance and information to local correctional agencies.

Recommendation D.2

AMENDING THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT

The Commission believes that one of the most salutary ways that the national government could help jails is by amending the *Federal Property and Administrative Services Act* to permit disposing surplus federal property to states and localities for correctional and related purposes. Such authority already exists for schools, hospitals, parks and recreation, public airports, historic monuments and fish and wildlife. Given the overcrowding of many state prisons and local jails, the need for additional facilities in various of the community-based corrections programs, and the

equally pressing need for facilities in community-based mental health, detoxification and substance abuse programs, the Commission is convinced that such authority should be extended to cover state and local corrections. Eligibility should include community-based alternatives and other nonincarceration programs, as well as public and nonprofit institutions providing services designed to assist juvenile status offenders, the mentally ill and retarded, and substance abusers. By such action, Congress would provide an excellent demonstration of "cooperative federalism" at a time when coercion and cooption are still far too prevalent in the system. For these reasons . . .

The Commission recommends that Congress amend Section 203 of the Federal Property and Administrative Services Act of 1963 (40 U.S.C. 484) to authorize the Administrator of the General Services Administration, on the recommendation of the Attorney General, to donate surplus federal property to any state, county, municipality, or nonprofit organization for constructing and modernizing facilities used for:

- a) probation or parole, pre-adjudication and post-adjudication of offenders, or supervision of parolees;**
- b) juveniles who are adjudicated delinquent, are neglected and awaiting trial, or are adjudged status offenders;**
- c) the treatment, prevention, control or reduction of narcotic addiction or alcoholism;**
- d) the treatment and care of the mentally ill and retarded in a community setting;**
- e) community-based corrections programs; and**
- f) other correctional facilities and programs, including jails as well as prisons.**

Recommendation D.3

CREATING STATE COMMISSIONS ON CORRECTIONS PRACTICES

Because jails in particular and corrections generally are traditionally state and local functions, the Commission opposes creating a National Commission on Corrections Practices. The Commission urges that states, where lacking, seriously consider establishing state correctional commissions with local as well as state members to develop comprehensive state and local correctional policies.

Recommendation D.4
**NO FEDERAL FINANCIAL ASSISTANCE FOR
LOCAL CORRECTIONAL SYSTEMS**

The funding, operation, and management of jails are traditionally state and local concerns, and an expanded federal role in such areas should be based on a clear and convincing demonstration of national purpose. Lacking such a demonstration, the Commission recommends no new program of direct federal financial assistance to jails or local correctional agencies.*

Part E
CONSTITUTIONAL CONSIDERATIONS

Recommendation E.1
**TOWARD A MORE BALANCED APPROACH TO
JUDICIAL INTERVENTION**

In recent years, federal and state courts have vigorously examined the conditions that exist in both state prisons and local jails. As a result, many such institutions have been found unconstitutional due to overcrowding and other conditions.

The Commission applauds the judicial intent to alleviate long-neglected, substandard conditions in jails and prisons and believes that remedies required to bring such facilities into compliance with the Constitution should be carried out expeditiously.

At the same time, the Commission believes that certain functions are distinctly legislative and executive—specifically, raising, allocating, and spending government funds. Recent judicial impositions of extremely specific court-designed plans demanding immediate compliance circumvent the regular legislative and executive processes. Moreover, the fact that *federal* judges have so often undertaken these functions with regard to subnational institutions implies serious circumvention of *state and local* legislative and executive processes by the federal government. Therefore,

The Commission believes that federal and state courts should confine their role to insuring that appropriate legislative and executive officers produce reasonable plans for bringing unconstitutional institutions into compliance with the Constitution and that such plans are appropriately implemented. Further, the Commission urges both federal and state courts to avoid, except in the most extreme circumstances, using judicial decrees to prescribe detailed remedies.

* Commission member County Board Chairman Gilbert Barrett dissented.

Advisory Commission on Intergovernmental Relations

June 14, 1983

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Robert B. Hawkins, Jr., **Chairman**, Sacramento, CA
Vacancy

Members of the United States Senate

David Durenberger, Minnesota
William V. Roth, Delaware
James R. Sasser, Tennessee

Members of the U.S. House of Representatives

Barney Frank, Massachusetts
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William F. Passannante, Speaker Pro Tem, New York State Assembly

Elected County Officials

Gilbert Barrett, Chairman of the Board, Dougherty County, Georgia
William J. Murphy, County Executive, Rensselaer County, New York
Peter Schabarum, Board of Supervisors, Los Angeles County, California

What is ACIR?

The Advisory Commission on Intergovernmental Relations (ACIR) was created by the Congress in 1959 to monitor the operation of the American federal system and to recommend improvements. ACIR is a permanent national bipartisan body representing the executive and legislative branches of Federal, state, and local government and the public.

The Commission is composed of 26 members—nine representing the Federal government, 14 representing state and local government, and three representing the public. The President appoints 20—three private citizens and three Federal executive officials directly and four governors, three state legislators, four mayors, and three elected county officials from states nominated by the National Governors' Association, the National Conference of State Legislatures, the National League of Cities/U.S. Conference of Mayors, and the National Association of Counties. The three Senators are chosen by the President of the Senate and the three Congressmen by the Speaker of the House.

Each Commission member serves a two year term and may be reappointed.

As a continuing body, the Commission approaches its work by addressing itself to specific issues and problems, the resolution of which would produce improved cooperation among the levels of government and more effective functioning of the federal system. In addition to dealing with the all important functional and structural relationships among the various governments, the Commission has also extensively studied critical stresses currently being placed on traditional governmental taxing practices. One of the long range efforts of the Commission has been to seek ways to improve Federal, state, and local governmental taxing practices and policies to achieve equitable allocation of resources, increased efficiency in collection and administration, and reduced compliance burdens upon the taxpayers.

Studies undertaken by the Commission have dealt with subjects as diverse as transportation and as specific as state taxation of out-of-state depositories; as wide ranging as substate regionalism to the more specialized issue of local revenue diversification. In selecting items for the work program, the Commission considers the relative importance and urgency of the problem, its manageability from the point of view of finances and staff available to ACIR and the extent to which the Commission can make a fruitful contribution toward the solution of the problem.

After selecting specific intergovernmental issues for investigation, ACIR follows a multistep procedure that assures review and comment by representatives of all points of view, all affected levels of government, technical experts, and interested groups. The Commission then debates each issue and formulates its policy position. Commission findings and recommendations are published and draft bills and executive orders developed to assist in implementing ACIR policies.