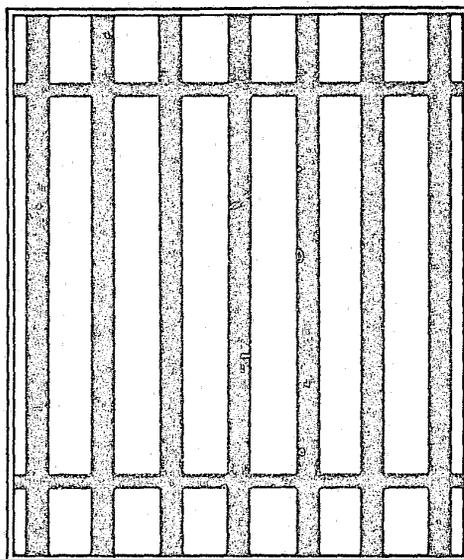


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**JAILS:
INTERGOVERNMENTAL
DIMENSIONS
OF A LOCAL PROBLEM**
A COMMISSION REPORT



ADVISORY COMMISSION ON
INTERGOVERNMENTAL RELATIONS
WASHINGTON, DC 20575
MAY 1984 A-94

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April 1984

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Foreword

The Advisory Commission on Intergovernmental Relations was established by Public Law 380, passed by the first session of the 86th Congress and approved by the President September 24, 1959. Section 2 of the act sets forth the following declaration of purpose and specific responsibilities for the Commission:

Sec. 2. Because the complexity of modern life intensifies the need in a federal form of government for the fullest cooperation and coordination of activities between the levels of government, and because population growth and scientific developments portend an increasingly complex society in future years, it is essential that an appropriate agency be established to give continuing attention to intergovernmental problems.

It is intended that the Commission, in the performance of its duties, will-

(1) bring together representatives of the federal, state, and local governments for the consideration of common problems;

(2) provide a forum for discussing the administration and coordination of federal grant and other programs requiring intergovernmental cooperation;

(3) give critical attention to the conditions and controls involved in the administration of federal grant programs;

(4) make available technical assistance to the executive and legislative branches of the federal government in the review of proposed legislation to determine its overall effect on the federal system;

(5) encourage discussion and study at an early stage of emerging public problems that are likely to require intergovernmental cooperation;

(6) recommend, within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government; and

(7) recommend methods of coordinating and simplifying tax laws and administrative practices to achieve a more orderly and less competitive fiscal relationship between the levels of government and to reduce the burden of compliance for taxpayers.

Pursuant to its statutory responsibilities, the Commission 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. One subject so identified by the Commission concerns local jails and correctional responsibilities.

In the following report, the Commission examines: (1) problems intrinsic to the nation's nearly 3,500 jails; (2) alternatives to the use of those jails; (3) state-local and interlocal relations and local corrections; and (4) the federal role in local corrections.

The report was approved at the Commission's meeting of June 16, 1983.

Robert B. Hawkins
Chairman

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The report would not have been possible without the cooperation and assistance of the above persons. Full responsibility for content and accuracy rests, of course, with the Commission and its staff.

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Executive Director

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Assistant Director

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Jails: An Introduction, Overview 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 many such institutions, "unconstitutional."

The following chapter attempts to highlight both the statistical characteristics of the American jail and the very real problems that have fueled the perception that the nation's jails are in a state of profound crisis. Though such problems are indeed genuine and widespread, it is important to note that not all jails are "major disaster areas." Nor, obviously, is every local facility the repository of every problem listed. Nonetheless, the problems are pervasive and, in certain significant cases, quite severe—pervasive enough and sometimes severe enough to warrant concern on the part of policymakers at all levels of government.

And what is this allegedly beastly entity called jail? At first blush, defining the term may seem akin to defining any simple, one-syllable, commonly used noun. It would hardly appear necessary to attach formal meaning to a word known by the average five-year old child, used frequently in everyday speech by most adults, and printed continually in newspapers across the nation. Jail, after all, is neither a "big word" nor an example of "bureaucratese." Yet, because jail is such a common word, it has come to be used as a descriptor for every institution where people are held involuntarily—from federal penitentiaries, to state prisons, to juvenile reformatories, to the most temporary police station lockups. Even as unassailable a source as *Webster's* defines jail simply as "a building for the confinement of persons held in lawful custody."⁷

While none of the above definitions is wrong in a literary sense, for the purposes of this study the term "jail" will be used to describe local (usually county) institutions used to confine: individuals awaiting trial or other legal disposition; adults serving short sentences; or some combination of both. According to the latest survey of jails, there currently are 3,493 such facilities in the United States, holding more than 212,000 people at any given time, and approximately 7 million over the course of a year⁸—nothing if not a formidable institutional array. Moreover, although they will not be included in this study, it has been estimated that an additional 13,566 temporary local detention facilities—police "lockups" and other facilities that generally detain persons for less than 48 hours—exist nationwide.⁹ (See *Table I-1*.)

Table I-1
JAILS AND LOCKUPS BY STATE, 1981

State	Jails*	Lockups**	Total
Alabama	69	284	353
Alaska	—	72	72
Arizona	38	71	109
Arkansas	76	169	245
California	127	395	522
Colorado	63	188	251
Connecticut	6	111	117
Delaware	5	35	40
District of Columbia	—	11	11
Florida	95	296	391
Georgia	199	413	612
Hawaii	4	4	8
Idaho	44	107	151
Illinois	99	807	906
Indiana	91	311	402
Iowa	100	311	411
Kansas	103	238	341
Kentucky	117	234	351
Louisiana	66	261	327
Maine	16	126	142
Maryland	36	113	149
Massachusetts	17	348	365
Michigan	87	581	668
Minnesota	87	356	443
Mississippi	89	182	271
Missouri	117	561	678
Montana	57	71	128
Nebraska	93	172	265

Yet, the above statements are merely clinical definitions and gross statistics, conveying, as they do, an efficient facelessness. In fact, jail—a repository for people—is hardly faceless nor, for that matter, always efficient. What jail is, however, is a veteran among government institutions—a millenarian albatross that has remained stubbornly immune to successive attempts toward reform.

Thus, unlike prisons and penitentiaries—relative newcomers to the penal milieu—jails are well established in the Anglo-American experience. Various traced to 10th¹⁰ or 12th¹¹ century England, the jail developed under the tutelage of the county (shire) and its sheriff.¹²

Used primarily for detention as opposed to punishment (though in reality a stay in jail could amount to rather severe punishment), the English

practice of jailing was costly for the unfortunate inmate, who was forced to pay for each of life's necessities (and, if possible, a number of less-than-wholesome luxuries), as well as for the "privilege" of entering and leaving the institution. Hence, the jail was maintained and its keeper very well compensated out of the pockets of those it held.¹³

Not surprisingly, the English jail, like other British institutions, was readily transplanted to the shores of the New World. Indeed, its relocation came complete with county responsibility, sheriff administration, and fee-type compensation. As in England, these jails were used primarily as places of detention for those awaiting state trial or some form of state punishment. In fact, the idea of jail-as-punishment was one of the first truly "American" breaks with British tradition—a Quaker innovation

Table I-1 (continued)

JAILS AND LOCKUPS BY STATE, 1981

State	Jails*	Lockups**	Total
Nevada	21	16	37
New Hampshire	14	205	219
New Jersey	27	497	524
New Mexico	32	69	101
New York	63	633	696
North Carolina	106	329	435
North Dakota	53	102	155
Ohio	93	817	910
Oklahoma	77	346	423
Oregon	39	161	200
Pennsylvania	73	1,050	1,123
Rhode Island	—	37	37
South Carolina	71	190	261
South Dakota	66	111	177
Tennessee	104	200	304
Texas	255	765	1,020
Utah	30	129	159
Vermont	16	72	88
Virginia	107	177	284
Washington	43	223	266
West Virginia	55	150	205
Wisconsin	74	388	462
Wyoming	23	71	94
U.S. Total	3,343	13,566	16,909

*County facilities holding persons awaiting legal disposition and adults serving short (usually one year or less) sentences.

**Local holding and pre-trial detention facilities which normally detain persons for less than 48 hours.

SOURCE: The National Center on Institutions and Alternatives, "National Directory of County and Local Jails," in *And Darkness Closes In: National Study of Jail Suicides* (Washington, DC: MCI, October 1981), pp. 70-71.

designed to "reform . . . these unhappy creatures . . . [through] solitary confinement . . . and a total abstinence from spiritous liquors. . . ." In time, all three varieties of prisoners—the untried, the convicted but unsentenced, and those whose punishment was jail—came to characterize the population of American jails.

If the administrative arrangements surrounding jails have remained substantially the same through vastly different periods of time, so, unfortunately, have the criticisms. Thus, for nearly two centuries

reformers have been decrying the squalid conditions of American jails—to the point that the language used by 18th century observers could easily be substituted for that of their latter 20th century counterparts. Such criticisms, in turn, have inspired countless calls for reform over the years: calls to separate certain populations; calls both to enlarge and reduce; calls to consolidate; calls to rid the jails of certain groups such as orphans, debtors, the drunk and the mentally ill; in general, calls to humanize.

Today, youths are still mixed with adults and un-

Table I-2

**LOCAL JAIL POPULATION AND INCARCERATION RATES,
BY STATE AND REGION, 1978**

Region and State	Number of Prisoners (percent of total)	Prisoners Per 100,000 Civilian Population
U.S. TOTAL	153,162 (100%)	71
NORTHEAST	23,849 (16%)	49
Maine	325	30
New Hampshire	370	43
Vermont	—	—
Massachusetts	2,207	38
Rhode Island	—	—
Connecticut	—	—
New York	10,667	60
New Jersey	3,873	53
Pennsylvania	407	54
NORTH CENTRAL	28,408 (18%)	49
Ohio	5,465	51
Indiana	2,453	45
Illinois	5,781	52
Michigan	5,685	62
Wisconsin	1,926	41
Minnesota	1,517	38
Iowa	664	23
Missouri	2,849	59
North Dakota	118	19
South Dakota	276	40
Nebraska	676	44
Kansas	998	43
SOUTH	62,635 (41%)	90
Delaware	—	—
Maryland	3,173	77
District of Columbia	1,407	212
Virginia	4,232	84
West Virginia	1,066	57

sentenced, first offenders with hardened criminals; many jails are overcrowded while others are underutilized; little in the way of interjurisdictional consolidation has occurred; and although orphans and debtors are no longer jailed as such, the mentally ill and the inebriated are still routinely locked behind steel bars. In many instances, the minimum in constitutional conditions remains doggedly unattainable.

The remainder of this chapter will present a summary overview of the major current issues, prob-

lems, and debates surrounding jails today. Its purpose is to orient the reader to the vast array of perplexing questions and subjects, many of which will be explored more fully in succeeding chapters. Indeed, the "jail problem" is not simply a problem—if it were, its solution would probably not be so hard to attain. Rather, the "jail problem" is a complex collection of problems, including jurisdictional authority and responsibility, Constitutional rights, sociological and medical opinion, basic public safety, and perhaps most difficult, the allotment of in-

Table I-2 (continued)

**LOCAL JAIL POPULATION AND INCARCERATION RATES,
BY STATE AND REGION, 1978**

Region and State	Number of Prisoners (percent of total)	Prisoners Per 100,000 Civilian Population
North Carolina	2,789	51
South Carolina	1,638	58
Georgia	8,278	165
Florida	10,246	120
Kentucky	2,149	62
Tennessee	4,439	103
Alabama	3,707	100
Mississippi	1,427	60
Arkansas	1,334	62
Louisiana	4,042	102
Oklahoma	1,704	60
Texas	10,995	85
WEST	38,270 (25%)	96
Montana	324	42
Idaho	539	61
Wyoming	268	64
Colorado	1,681	63
New Mexico	794	66
Arizona	2,501	107
Utah	676	52
Nevada	912	139
Washington	2,453	65
Oregon	1,872	76
California	26,206	119
Alaska	44	11
Hawaii	—	—

Data on jail populations refer to prisoners present on February 15, 1978, less 5,232 state prisoners housed in local jails. The affected states include Alabama (1,342), Florida (59), Louisiana (1,190), Maryland (380), Massachusetts (110), Michigan (44), Mississippi (1,000), New York (269), South Carolina (724), and Tennessee (114).

SOURCE: U.S. Department of Justice, National Institute of Justice, *Summary and Policy Implications of a National Survey*, Vol. 1 of *American Prisons and Jails* (Washington, DC: U.S. Government Printing Office, 1980), p. 17.

creasingly scarce resources for the benefit of an exceedingly unpopular constituency.

JAILS: THE COMPOSITE PICTURE

Any attempt to describe the "typical jail" deserves the following caveat: there is no "typical jail." Yet, inasmuch as the 15th century English "gaol" remains in many ways archetypal, American jails and jail inmates share a great number of statistical characteristics. Keeping in mind that the variations are almost endless, a composite picture (perhaps, more appropriately, a jigsaw puzzle) of the contemporary jail may be drawn.

Hence, today's jail, resembling its ancient counterpart, is very likely to be a local and, even more specifically, a county responsibility. Only six states assume full administrative responsibility over jails, with a seventh requiring the transfer of misdemeanants serving 90 or more days to state facilities.¹⁵ In between, there are a number of variations. Nonetheless, jails remain indisputably poor dependents of local government.

Unlike prisons and penitentiaries, the jail population remained *numerically* stable throughout the 1970s. However, between 1978 and 1982, the population of American jails rose precipitously—a 34% increase in just four years.¹⁶ 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, causing substantial disparities in prisoner-space ratios and rendering the concept of average daily population (212,000 in 1982) less useful than it is in the case of prisons.

In fact, where jails and the jailed are concerned, disparities are the order of the day. Thus, 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 less than 4% of local institutions; 44% of the facilities hold a mere 4% of the inmates. Moreover, although jails and their attendant problems are a nationwide phenomena, 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.¹⁷ (See *Table I-2*.)¹⁸

The typical jail inmate in 1978 was single, a young adult, male, and had an average annual income of \$3,700.¹⁹ According to a survey of jail inmates that year, the following sociodemographic characteristics were notable:

- About 70% of all jail inmates were under 30 years of age.
- Women continued to make up a small proportion of jail inmates, with male inmates dominating by a substantial 94%.
- Blacks were disproportionately represented among the jail population, accounting for about four out of every ten male inmates and five of ten female inmates.
- More than three-fourths of jail inmates had never been married (54% among men and 46% among women) or were separated or divorced (23% among men and 30% among women).
- Only two-fifths of all jail inmates had completed their high school education.
- Jail inmates were poor, with a median reported income of \$3,714 annually. Moreover, one in every four jail inmates either had no source of income prior to incarceration or was dependent on welfare, social security or unemployment benefits.
- About one-fourth of all *convicted* inmates consumed heavy amounts of alcohol before committing their crimes.
- About one of every five *convicted* inmates was under the influence of drugs (not alcohol) when their crimes were committed.²⁰ (See the *Statistical Appendix*.)

Physically, jails tend to be newer than prisons and penitentiaries. Almost 53% were opened between 1950 and 1978 and these "new" facilities currently house 59% of the jailed population.²¹

However, if newness may be equated with niceness, many would contend that the niceties end there. Thus, both absolutely and relatively, time spent in jail is time spent in severe physical circumscription. When measured against a number of space standards, jails, once again, are demonstrated to be the poor stepchild of corrections. For instance, at the

high end of the scale, a substantial number could not meet the 75-square-feet-of-space-per-person standard endorsed by the American Correctional Association in 1966²² and later embraced by a federal district court in New York.²³ For that matter, it is likely that many would fail to meet even the 50 square feet deemed the "minimum acceptable under the Constitution" by the Fifth Circuit Court of Appeals in 1977.²⁴ Finally, when measured against the widely-endorsed minimum of 60 square feet per inmate for single-occupancy cell,²⁵ fully 61% were found deficient—cells which, it should be noted, often house two or more inmates. Thus, among all local prisoners detained in cells, 81% endured under 60 square feet of space. And even the majority of jail prisoners contained in dormitories, though physically somewhat less likely to be cramped than their celled counterparts, live without 60 square feet of space (57%).²⁶ (See *Graphs I-1 and I-2.*)

JAILS: CURRENT PROBLEMS AND ISSUES

The Intrinsic Issues

Unfortunately, as many of the quotes proffered at the beginning of the chapter suggest, this section might just as aptly be titled, "Jails: The Same Old Problems and Issues." Thus, jails have long been disparaged for their inadequately trained personnel; for misusing, misjudging or mismanaging capacity; for lacking minimum services even while expending maximum resources; and for handling or at least mixing the wrong types of individuals. Yet, though jails seemingly have "always" been under fire by humanitarian, fiscal, and managerial reformers, it is only recently that they have come under constitutional scrutiny. That scrutiny, along with increasingly beleaguered local budgets and a new harder-line public and official attitude toward criminals and the accused, have given even the age-old issues a current urgency.

PERSONNEL

In 1971, this Commission noted that "the average jail is still characterized by . . . untrained and apathetic personnel."²⁷ More than a decade later, a survey of the nation's sheriffs revealed:

Today, many non-jail experts have suggested that over crowding 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.²⁸

Nor are sheriffs—those who should, after all, be most painfully aware of 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, the Chief Justice of the United States has said:

One of the gravest weaknesses of our prisons²⁹ has been the lack of training of guards and attendants who have hourly eyeball-to-eyeball contact with prisoners. If they are not able to cope with inmates—who by definition are abnormal people—prison disturbances, costly riots and often loss of life will result.³⁰

And the Director of the U.S. Bureau of Prisons recently averred:

Improved training for correctional officers and administrators is, in the short run, the single most important action that the federal government can contribute to assisting state and local governments.³¹

Finally, jail consultant Ken Kerle has asserted:

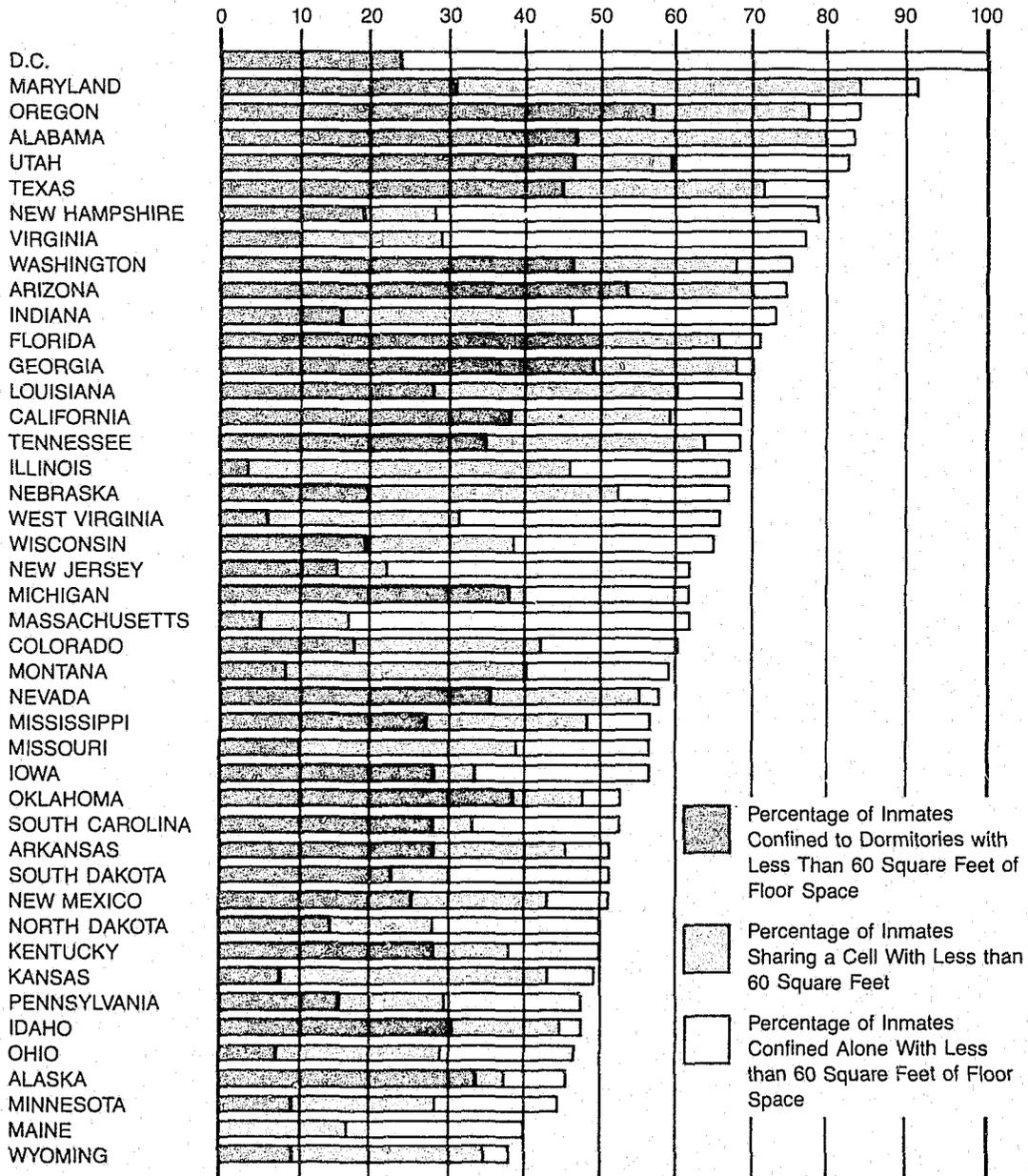
Personnel is still the number one problem of jails. . . . Start paying decent salaries and developing decent training and you can start to attract bright young people to jobs in jails. If you don't do this, you'll continue to see the issue of personnel as the number one problem of jails for the next 100 years.³²

The problem of jail personnel, then, is twofold: deficient training and generally substandard salaries. The result, according to one survey, is a third significant factor: an extremely low prestige career, unlikely to attract individuals of high caliber or constructive ambition.³³ As one author has put it:

Rare indeed is the household in which little

Graph I-1

PERCENTAGE OF JAIL INMATES LIVING IN HIGH DENSITY CELLS OR DORMITORIES
(less than 60 square feet of floor space per inmate)

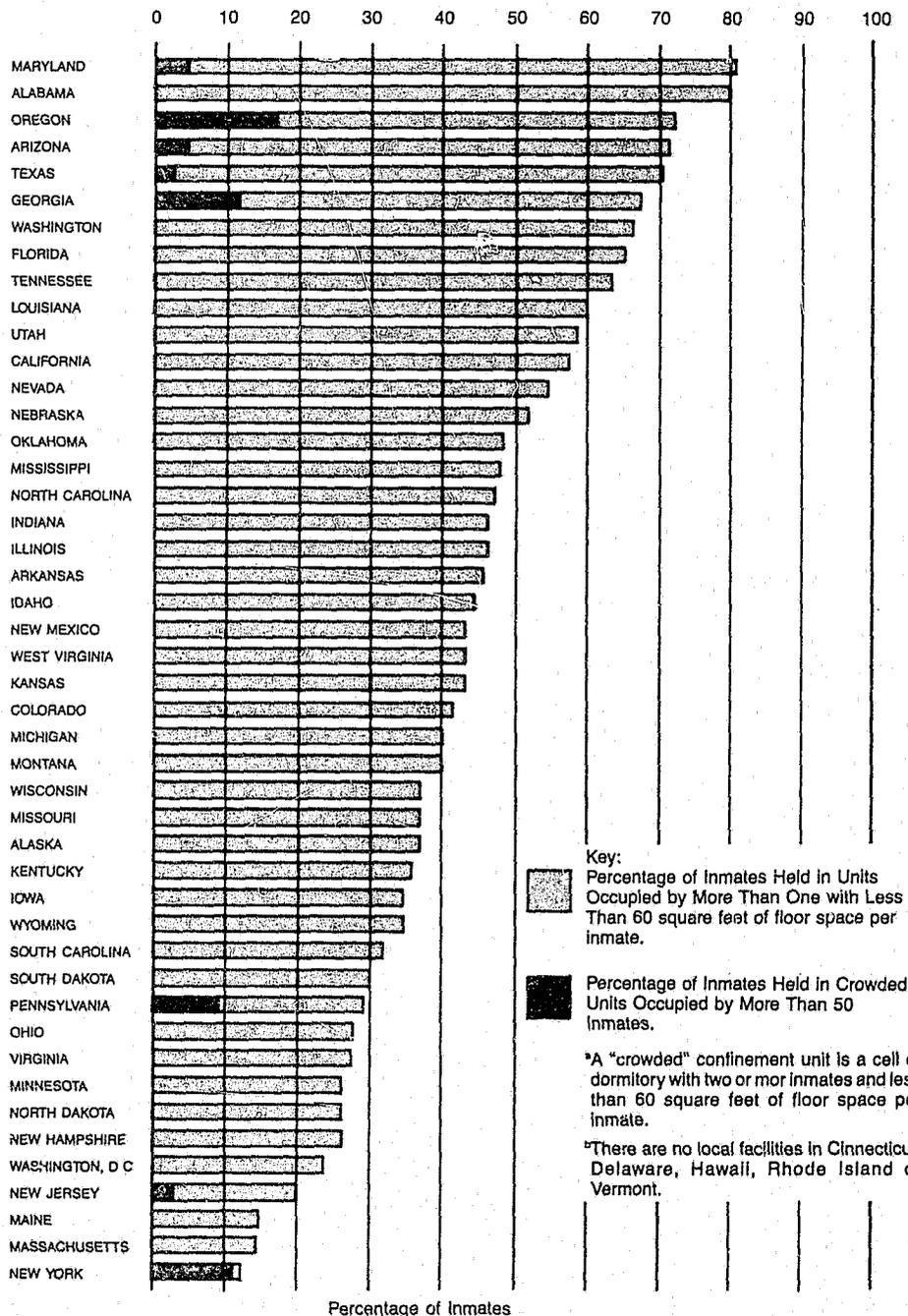


Percentages of Inmates

Source: U.S. Department of Justice, National Institute of Justice, *Summary and Policy Implications of a National Survey, Vol. I of American Prisons and Jails* (Washington, DC: U.S. Government Printing Office, 1980), p. 162.

Graph I-2

PERCENTAGE OF INMATES HELD IN CROWDED^a CONFINEMENT UNITS IN LOCAL CORRECTIONAL FACILITIES, BY STATE, February 15, 1978



SOURCE: National Jail Census (CJ-3, CJ-4), 1978, reproduced in U.S. Department of Justice, National Institute of Justice, *Summary and Policy Implications of a National Survey, Vol. 1 of American Prisons and Jails* (Washington, DC: U.S. Government Printing Office, 1980), p. 78.

Johnny enthusiastically announces, "When I grow up, I want to be a warden." If he did, a hurried visit to the school psychologist would probably ensure.³⁴

Indeed, if little Johnny or Joanie were considering a career in criminal justice, he or she would be better advised financially to pursue the path of a police officer rather than that of a jailer. Of 1,688 sheriffs responding to a particular question in the NSA 1982 survey, 70% said that rookie patrol officers in their jurisdictions were paid more than newly hired jail officers—on average, \$1,764 more. Among all respondents, jail personnel were reported to be earning average starting salaries of just \$10,780. And while union employees are compensated at a considerably higher level (\$12,928), their police counterparts are also paid correspondingly higher salaries (\$14,574).³⁵

Again, according to the National Sheriffs' Association, "[j]ail training today is where police training was 20 years ago."³⁶ For most recruits (47.9%), that means in-house, on-the-job training rather than academy training. Moreover, "[t]raining seems to be the most expendable item in budgets and frequently budget cuts are given as the excuse for not conducting training."³⁷

An alternative to local in-house training is academy training at either the state or local level. However, NSA analysts have observed that local out-of-house training often means police academy instruction which in turn often means that police personnel function as teachers:

[I]f [local academy training] means police personnel are involved in the jail training, then it is not acceptable. . . . Police officers usually are not trained correctional officers unless they work in departments where correctional and police work is rotated. Jail officers and administrators should be principally involved with the training of jail officers.³⁸

On the other hand, although state correctional academy training may be preferable from a vocational standpoint,

it is also wrong, we feel, to have state correctional staff training local jail personnel. Jails are not prisons, nor are prisons jails. The local jails process 6.3 million persons a year and the innumerable problems of

short-term confinement simply don't exist in penitentiaries. Jail officers need special skills. . . . [J]ail staffs are another distinct category needing specialized training.³⁹

THE POPULATION PUZZLE

The jail, unfortunately, is the institution to whom the responsibility falls because it is the only one which cannot say *no*.⁴⁰

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 amalgamation that would 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.

Pre- and Post-Trial Inmates

According to the National Sheriffs' Association (NSA) and the Bureau of Justice Statistics (BJS), the majority—over 60% or almost 119,000 on a given day and over 4 million annually—of all jail inmates are pretrial detainees.⁴¹ That is, they are individuals who have been charged with crimes but who have not been convicted and, therefore, are presumably innocent. Statistics vary quite widely as to how long the typical unconvicted person remains within jail walls. BJS estimates the average length of stay for all jail inmates to be about 11 days⁴² while the NSA survey indicated a jail incarceration period of over three months for pretrial detainees alone.⁴³ However, whether individual pretrial jail stays are long or short—an issue of separate significance—the problem of the institution's basic function remains. Is its function to assure appearance at trial or to punish? The answer is both: nearly 40% of all jailed people (the convicted population) are so confined for penal purposes.

The Supreme Court has clearly articulated the principle that "a detainee may not be punished prior to an adjudication of guilt."⁴⁴ Pretrial detention, in other words, is supposed to be an insurance mechanism,⁴⁵ in some cases a public safety device, or both.⁴⁶ Yet, in jail, when conditions of overcrowding, deficient servicing, poorly trained personnel, and violence do occur they affect not only the minority of

Table I-3

**STATE PRISONERS HELD IN LOCAL JAILS
BECAUSE OF PRISON OVERCROWDING**

	1981	1980
U.S. TOTAL	8,576	7,130
Alabama	1,485	1,410
Florida	288	285
Georgia	1,729	770
Kentucky	104	94
Louisiana	793	1,267
Maine	23	6
Maryland	71	277
Massachusetts	—	125
Michigan	162	75
Mississippi	1,172	1,243
Montana	1	1
New Hampshire	19	—
New Jersey	945*	200*
New Mexico	18	13
New York	39	—
Oklahoma	72	124
South Carolina	544	609
Tennessee	212	178
Utah	29	—
Virginia	846**	368
Washington	24	85*

*Not included in this state's official prison count

**Includes some persons held for reasons other than overcrowding.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, "Prisoners in 1981," Bulletin, NCJ-82262, May 1982, p. 3.

convicted offenders but the majority of pretrial detainees as well. That such conditions exist is untenable in and of itself. That they exist for the pretrial defendant may be patently illegal. According to a U.S. District Court:

It is abundantly clear that extreme overcrowding in a local jail is of greater practical effect and constitutional consequence than in a larger institution or a common road camp. Simply stated, all overcrowding is not equal. Perhaps more importantly, the local jail houses a high percentage of pretrial detainees. . . . As a matter of common sense and fundamental fairness, the criminal justice system must insure that pretrial detainees are not housed in more deprived circumstances than those accorded to convicted persons. . . . Overcrowding in a local jail cannot be

qualitatively equated with overcrowding in a state penal institution.⁴⁷

Local and State Prisoners

Indeed, for a variety of fiscal, political, and practical reasons, the majority of the nation's jails may be in worse shape than the majority of the nation's prisons. A fairly recent cause of this disparity is the overflow or back up of state prisoners in local institutions.

Just as many jails have suffered from severe overcrowding over the past few years, so have many prisons. Moreover, just as jails have been the recipients of federal court orders, so have their state counterparts.⁴⁸ The combined result of overcrowding at the state level and judicial orders to relieve crowding and other deficiencies was, in 1981, an estimated 8,576 state prisoners being held in local facilities.⁴⁹ (See Table I-3.) Although this is primarily a question of utilization, it also may produce serious problems of

human intermingling—the problem of pretrial detainees mixing with convicted offenders is compounded by introducing serious grade felony criminals.

Juveniles and Adults

A population dilemma of long-term duration that continues to plague local jails is the commingling of adults and juveniles. The problem is twofold. First, and most obvious, is the effect of the commingling itself. When in direct contact with adult offenders and defendants, young people risk being prime targets for physical, sexual, and mental abuse. Moreover, the special stress that incarceration places on the immature has resulted in “the rate of suicide among children held in adult jails and lockups [being] significantly higher than that among children in juvenile detention centers and children in the general population of the United States.”⁵⁰

A second and equally disturbing problem lies in the nature of the alleged crimes for which juveniles are detained in jails. Thus, based on a 1976 site visit and study, the Children’s Defense Fund (CDF) found that “17.9% of jailed children . . . had committed ‘status offenses,’ i.e., actions which would not be crimes if done by adults, such as running away or

truancy.”⁵¹ In addition to status offenders, CDF identified 4.3% of jailed youths as having committed no crime at all. Rather, these were children who literally had no place else to go or were being held in jail for their own protection. Indeed, only 11.7% of youths in jail were found to have committed serious crimes.⁵² (See *Table I-4*.)

Diverse correctional groups, spanning the political spectrum, have called either for the removal of juveniles from jails or, at the very least, for the separation of adults and children when complete removal is impossible:

- The National Advisory Commission on Criminal Justice Standards and Goals states that “Jails should not be used for the detention of juveniles.”
- The American Bar Association and the Institute For Judicial Administration stated that “the interim detention of accused juveniles in any facility or part thereof also used to detain adults [should be] prohibited.”
- The National Sheriffs’ Association stated that “in the case of juveniles when jail detention cannot possibly be avoid-

Table I-4

OFFENSES OF JUVENILES FOUND IN JAIL ON DAY OF SITE VISIT		
Charge	Number	Percent of Known
Serious Crimes Against the Person*	19	11.7
Property Crimes**	45	27.8
Minor Assaults	6	3.7
Minor Property Crimes	11	6.8
Behavior Crimes***	20	12.3
Children’s Status Offenses (Noncriminal)	29	17.9
Runaway	17	
Delinquent	8	
Truant	4	
Protective Custody	7	4.3
Hold for Transfer	25	15.5
Total Known Offenses	162	100.00

*FBI Index of Violent Crimes: Murder, Rape, Robbery
**FBI Index of Property Crimes: Burglary, Larceny, Auto Theft
***Prostitution, Drugs, Drunkenness, Vagrancy

SOURCE: Children’s Defense Fund, *Children in Adult Jails* (Washington, DC: Children’s Defense Fund, 1976), p. 20.

Table I-5

JUVENILES IN LOCAL JAILS, JUNE 30, 1982

	All inmates	White*	Black*	Hispanic	Other**
Total	1,729	956	662	62	49
Male	1,577	859	635	47	36
Female	152	97	27	15	13

*Excludes person of Hispanic origin

**American Indians, Native Alaskans, Asians, and Pacific Islanders

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, "Jail Inmates, 1982," Bulletin, NCJ-87161, February 1983, p. 1.

ed, it is the responsibility of the jail to provide full segregation from adult inmates, constant supervision, a well-balanced diet, and a constructive program of wholesome activities. The detention period should be kept to a minimum, and every effort [made] to expedite the disposition of the juvenile's case."

- The American Correctional Association stipulates that "juveniles in custody [should be] provided living quarters separate from adult inmates, although these may be in the same structure."⁵³

Moreover, the National Coalition for Jail Reform, an umbrella organization that speaks to jail problems for a large and varied set of associations,⁵⁴ is categorically opposed to "the placing of juveniles in adult jails and lockups."⁵⁵

Recent years have witnessed a number of state and federal judicial and legislative initiatives aimed at removing juveniles from adult institutions.⁵⁶ Nonetheless, their numbers remain high. Estimated by various sources at between 100,000 and 1 million annually,⁵⁷ one report put the number of juveniles in adult jails at 1,729 on June 30, 1982 or an estimated 300,000 per year.⁵⁸ (See Table I-5.)

The Mentally Ill, Retarded and Substance Abusers

If any group of inmates has given rise to the characterization of the jail as the "social agency" of last resort, it is that afflicted with some mental or behavioral disorder. Unfortunately, they are a pervasive group, a fact which has led the American Medical Association's correctional program head to assert that "[t]he jail is turning into a second-rate mental hospital."⁵⁹

Fairly recent studies indicate that anywhere from 20 to 60% of all individuals confined in jails are mentally ill or disordered.⁶⁰ Specific site studies underscore those findings:

- A study of the Denver County Jail showed that 22% of 545 inmates were diagnosed as psychotic, and 23% had a history of long term or multiple hospitalization for mental illness.⁶¹
- Research conducted in March and April of 1979 at the Milwaukee House of Corrections showed 17% of the total jail population had been diagnosed by the facility's consulting psychiatrist as mentally ill.⁶²
- A survey of 150 inmates in the [Fairfax County, VA] jail on a typical weekday [in December of 1980 revealed that more than a third of the inmates whose records were checked . . . had had serious alcohol, drug, or mental problems.⁶³
- At any given time, 10% of the roughly 380 inmates at the Montgomery County [MD] Detention Center are mentally ill, emotionally disturbed, or mentally retarded, a situation that frequently plays havoc with the corrections system.⁶⁴

Moreover, the problem has worsened in recent years due to state policy decisions:

One of the most serious problems in the L.A. County Jail is a backlog of mental health cases waiting for transfer to state mental health facilities. In California, as in most other states, the closing of state mental hospitals, together with a general tight-

ening of the civil commitment laws, has meant that increasing numbers of mentally ill people are on the streets. According to the AMA's Rowan, that has meant that growing numbers of former mental patients, as well as people whose bizarre behavior might have landed them in a hospital bed a few years ago, are now being arrested and are ending up in jail.⁶⁵

Federal policies have exacerbated the problem:

Federal mental-health planners envisioned the flowering of a network of support services to care for deinstitutionalized patients at the community level through the stimulus of Federal seed money. But 1,300 of the 2,000 community mental-health centers projected for 1980 have failed to materialize and many that did have failed to service this chronically ill population. Deinstitutionalization, and ostensibly humane treatment programs, has degenerated into a tragic crisis. . . . Planners, without real consultation, assumed strong communities would accept the chronically ill. When few welcomed large numbers of these troubled people, patients were steered to transitional neighborhoods that would not put up a fuss, but the strong community support factor essential for successful aftercare was absent. The result was city streets became wards of mental hospitals, and it was out of the snakepits and into the gutter for victims of the deinstitutionalization policy.⁶⁶

And denizens of the gutter stand a high probability of becoming inhabitants of the local jail.

Although they overlap with the mentally ill to a considerable extent,⁶⁷ substance abusers comprise a discrete and significant group of jailed individuals. The Bureau of Justice Statistics' *Profile of Jail Inmates* revealed that about 46% of convicted inmates had consumed alcohol before committing their crimes, with an additional 25% consuming heavy amounts.⁶⁸ (See *Statistical Appendix Table H.*) Twenty-one percent were under the influence of some drug other than alcohol.⁶⁹

Although 33 states, the District of Columbia, Puerto Rico, and the Virgin Islands have passed the Uniform Alcoholism and Intoxication Treatment Act or similar legislation barring prosecution because of

the consumption of alcohol (See *Figure I-1.*), over one million persons each year are arrested for public drunkenness⁷⁰ and many of those are later jailed.⁷¹

In addition to the serious side effects that large amounts of alcoholic consumption may produce and with which most jails are ill-equipped to deal, the young public inebriate may be a prime candidate for suicide:

An inmate committing suicide in jail was most likely to be a 22-year old white, single male. *He would have been arrested for public intoxication, the only offense leading to his arrest, and would thereby be under the influence of alcohol upon incarceration.* Further, the victim would not have had a significant history of prior arrests. He would have been taken to an urban county jail and immediately placed in isolation for his own protection and/or surveillance. However, less than three hours after incarceration, the victim would be dead. He would have hanged himself with material from his bed (i.e., sheet or pillowcase). The incident would have taken place on a Saturday night in September, between the hours of midnight and 1:00 a.m. Jail staff would have found the victim, they say, within 15 minutes of the hanging. Later, jail records would indicate that the victim did not have a history of mental illness or previous suicide attempts.⁷²

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 (see section following). According to the General Accounting Office:

At local jurisdictions, men and women are usually housed in the same facility but separated. Differences in these systems relate more to unequal access to available opportunities rather than differences between facilities. Women are frequently denied access to the cafeteria and recreational facilities and confined to a specific floor, wing, or cell for the duration of their confinement.⁷³

A number of courts have ruled against such ineq-

Figure I-1

STATES THAT HAVE PASSED THE UNIFORM ALCOHOLISM AND INTOXICATION ACT OR SIMILAR LEGISLATION

The model act states:

Section 1. It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages, but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society.

State	Effective Date	State	Effective Date
1. Alaska	10/9/72	19. Missouri	7/1/78
2. Arizona	8/13/72	20. Montana	7/1/75
3. Colorado	7/1/74	21. Nebraska	1/1/79
4. Connecticut	6/1/76	22. Nevada	7/1/75
5. Delaware	7/16/79	23. New Hampshire	6/23/79
6. District of Columbia	8/3/67	24. New Jersey	5/9/77
7. Florida	7/1/73	25. New Mexico	7/1/78
8. Georgia	7/1/81	26. New York	11/1/76
9. Hawaii	5/20/76	27. North Carolina	10/1/78
10. Idaho	1/1/77	28. North Dakota	7/7/71
11. Illinois	7/1/76	29. Oregon	7/1/72
12. Kansas	7/1/77	30. Rhode Island	5/2/72
13. Kentucky	7/1/81	31. South Dakota	7/1/74
14. Maine	7/1/74	32. Vermont	7/1/78
15. Maryland	7/1/68	33. Washington	1/1/75
16. Massachusetts	7/1/73	34. Wisconsin	8/1/74
17. Michigan	11/15/78	35. Puerto Rico	7/22/74
18. Minnesota	7/1/71	36. Virgin Islands	7/1/79

SOURCE: First National Conference on the Public Inebriate, *The Public Inebriate: Overview and Alternatives to Jail* (Madison, WI: Wisconsin Clearinghouse, 1980), p. 8.

unities on 14th Amendment grounds,⁷⁴ but they continue to exist.

In addition to inequitable recreation and program provision, women prisoners face other forms of discrimination:

- [M]any jails do not provide staff to deal with women inmates and may send them to neighboring facilities to save costs. Thus a woman may be separated by great distances from her family and community while she is awaiting trial or serving a short sentence for a minor offense.
- [O]n average, women are sentenced to jail for less serious offenses than men are, and when sentenced for crimes not associated with sex role expectation, are

sentenced more harshly than men. . . . [A]1972 survey of jails showed that 77.1% of women were jailed for minor crimes while only 55.5% of the men were jailed for such offenses.

- [B]y far the most common medical problems of incarcerated women are gynecological or obstetric. . . . [Y]et medical services of jails, when provided, are usually [by] physicians accustomed to and primarily concerned with men.⁷⁵

SERVICE PROVISION IN A SHORT-TERM ENVIRONMENT

Any institution charged with housing individuals for any length of time is, of course, expected to provide certain essential services to its residents—

at the very least, food, shelter, and clothing. Yet, institutionalized individuals, no less than the rest of us, may require a number of additional services—either in a very immediate physical sense or for longer-term benefit. Thus, medication, recreation, familial visitation, continuing education, and various forms of counseling have long—if not always adequately—been provided in the nation's prisons. Such services, it is argued, are absolute necessities (and in some instances, constitutional rights) where people are confined involuntarily for long periods of time.

But what about relatively short-term incarceration? The argument, ideally, would run the same—"short-term" jail confinement after all may last several months or even several years. Jails, however, have historically been recognized as deficient in providing such services. High costs relative to 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.

Health Care

Of the services listed above, health care is the least likely to be considered a luxury item. Indeed, in 1976, the Supreme Court ruled that

[the] principles [behind the guarantee against cruel and unusual punishment] establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if authorities fail to do so, those needs will not be met.⁷⁶

Generally, lower courts have relied on one or more of three fairly vague and pliable tests for determining whether an inmate's physical health needs have been met in a way that meets Constitutional standards: (1) does failure to provide adequate care result in a condition that "shocks the conscience" of the court;⁷⁷ (2) do an inmate's physician or prison authorities exhibit "gross misconduct" or gross negligence in dealing with his/her medical condition;⁷⁸ or (3) does "deprivation of medical treatment . . . seriously endanger [a] prisoner's well-being."⁷⁹ In addition, the courts have tended to defer to professional medical opinion with regard to what constitutes "adequate" medical care⁸⁰—in other words, adequate

medical care is a medical determination.⁸¹ Although such standards appear to guarantee only minimal health treatment or emergency medical attention to prisoners, a number of rulings over the past decade have ordered fairly substantial changes in the delivery of medical services in state prisons, including orders to hire *full-time* doctors, dentists, physician assistants and nurses.⁸²

If prison inmates (all of whom are convicted offenders and most of whom are the more serious offenders, i.e., felons) are Constitutionally entitled to "adequate" medical care, logic as well as the Constitution itself would lead one to believe that the majority of jail inmates, being *unconvicted*, are entitled to health services of at least equal quality. And, in fact, the First Circuit Court of Appeals has averred that "distinctions [in medical care], if any are conceivable, should be the other way."⁸³—that is, in favor of the pretrial defendant.

Yet, jails, relative to prisons, have been notoriously poor medical providers. One recent observer has asserted that "[i]n the vast majority of the jails across the land the medical conditions would shock the bravest soul."⁸⁴ Indeed, a 1972 American Medical Association (AMA) survey found: "65.5% of the responding jails had *only* first aid facilities, while 16.7% had *no* internal medical facilities. [I]n only 38% of responding jails were physicians available on a regularly scheduled basis, and in only 50.6% . . . were physicians available on an on call basis. In 31.1% no physicians were available. . . . [And] only 37.8% claimed availability of a dentist. . . ."⁸⁵ Six years later, the National Institute of Justice (NIJ) reported that 77% of American jails still had no medical facilities; that a full 70% did not give inmates medical exams upon admission; and that an additional 15% only offered medical examinations to those who were manifestly ill at the time of incarceration.⁸⁶ As of 1980, only 67 jails nationwide had been accredited by the AMA for meeting its minimum health care standards. Finally, as late as 1981, the NSA's survey revealed that among all responding sheriffs only 16.6% had an in-jail infirmary, only 35.2% provided dental services, and only a little over 40% undertook initial medical screenings of inmates or took prisoners' medical histories.⁸⁷ Not surprisingly, those percentages decreased along with the size of the facility.⁸⁸

Increasingly, it is recognized that the health problems faced by local jail inmates are not limited to physical maladies. In fact, as the previous section has illustrated, anywhere from 20 to 60% of the jail

population nationwide is suffering from some form of mental disorder. Still, according to the General Accounting Office,

although some improvements have been made in recent years, extensive shortfalls still exist in the mental health services provided for jail inmates. Jails were not adequately screening inmates to identify their mental health care needs or providing them with adequate care.⁸⁹

Other commentators agree with GAO. For example, Matthew Meyers of the American Civil Liberties Union's National Prison Project alleges that

[t]he amount of psychiatric treatment going on in jails is way below that in prison, and it is grossly inadequate to deal with the problems that exist. In all but a few major metropolitan areas, very few jails provide any psychiatric care at all.⁹⁰

John Petrich, director of the AMA's psychiatric task force asserts:

County health departments have not wanted to get into jail services for the most part. And most private practitioners in the community don't want to deal with it either. They may talk about it, think it's important, but when push comes to shove, they don't want to put up the bodies and the dollars.⁹¹

The deficiencies obviously are not to be taken lightly. A few courts have ordered extensive improvements in mental health care for jail inmates, averring that "deliberate indifference to a prisoner's serious physical or *mental illness*. . . [and] failure to provide adequate treatment violates the Eighth Amendment's ban against cruel and unusual punishment and due process guarantees."⁹² Yet, as GAO points out, "[b]ecause of such factors as the size of jails and the time that inmates spend in them, not all elements of inmate health services can or should be provided by jails themselves. It would not be economically feasible for many jails, small ones in particular, to maintain a full range of mental health care services."⁹³ Rather, a sensible approach to treating the mentally ill (as well as chronic substance abusers)⁹⁴ may lie in coordinating county services. Counties, after all, not only run jails but are major

health and social service providers. Thus, for example, the American Correctional Association recommends screening incoming jail inmates for the purposes of determining mental health problems and thereafter referring psychiatric cases to appropriate community agencies.⁹⁵

Recreation

Lack of recreational opportunity, even if it is only the availability of a radio or television set, in combination with the pervasive idleness found in most jails leads to an escalation of tension and increased incidents of violence in addition to the mental and physical deterioration of people confined.⁹⁶

According to the 1981 survey of the National Sheriffs' Association, indoor recreation for jail inmates averages 14.5 hours per week while the time spent at outdoor recreation averages only 6.3 hours.⁹⁷ In other words, the typical jail inmate spends 12% of his or her week engaged in recreational activities. Moreover, as of 1978, 1,495 jails made no recreation or entertainment available to inmates.⁹⁸

Work

The surfeit of idle jail hours brought on by minimal recreational opportunities is compounded by the lack of work available to inmates. According to the American Institute of Criminal Justice:

The denial of the opportunity to take part in an activity on which society obviously places a high value is clearly a significant feature of a jail sentence today. In light of the socioeconomic strata of society from which the bulk of jail inmates come, it assumes ever greater importance. It is a truism that jail inmates, like prison inmates, as a group are relatively unskilled with little significant work history. Whether this is a fundamental cause of criminal behavior or whether both develop from even more basic problems in the individual and/or society can and has been debated endlessly with little consensus. It can be assumed however that an enforced absence from even the possibility of work can provide little except to exacerbate an already serious problem.⁹⁹

Three types of jail work programs are currently used to varying degrees:

- **Work Release** has long been espoused as a means of alleviating inmates' idle hours and, in instances where releasees pay room and board, of offsetting some of the costs of residential care. One recent study indicates that 42% of the nation's jails offer work release.¹⁰⁰ However, it is unclear how many prisoners are affected¹⁰¹ and probably safe to assume very few.
- **Institutional Support** relates to the maintenance of the jail itself.¹⁰²
- **Public Works** employ inmate crews to provide various public services.¹⁰³

Unfortunately,

Except for the institution support jobs these programs are available to a minority of the inmate population, those classified as minimum security. Except for work release, they tend to be unrealistic work experiences requiring performance at levels not relevant to work in the community. Also again except for work release these jobs do not permit inmates to earn any money.¹⁰⁴

The introduction of meaningful work programs into the nation's jails has been hampered by a number of factors:

1. *Lack of space.* Most jails including those built recently have very limited space available for any type of program activity including work.
2. *Lack of staff.* Any type of work program requires staff supervision even if only for security purposes and most jail budgets just do not include such positions.
3. *Limitations of inmate population.* The reasons work programs are so desirable for inmates are the very reasons it is difficult to design the programs—low levels of skill and motivation.
4. *Lack of funds.* Most jail budgets do not provide for even adequate security, health and personal comfort needs of

inmates, much less provide for program activities including work.

5. *Lack of legal authorization.* Especially in the area of industrial operations most state statutes are silent on the subject of productive work which raises the question of whether the activities are legal if they are not specifically authorized as they are for state prisoners.¹⁰⁵

Training, Education and Library Services

As opposed to the general population aged 18-54, three-fourths of whom have completed high school, only two-fifths of the jailed population have done so. Moreover, one-fifth of all jail inmates in 1978 had completed only eight or fewer years of schooling.¹⁰⁶ (See *Statistical Appendix Table A.*) That low educational achievement level, in turn, has been a major factor in the high degree of economic uncertainty faced by those who eventually find their ways behind bars. Such dim statistics have caused the Chief Justice of the United States to assert that "every correctional institution must be made a[n] . . . educational institution . . . or we will continue the melancholy business of releasing inmates less fit to resume private life than before conviction."¹⁰⁷

Although larger jails are more likely than smaller ones to offer some education or training, the overall response to an NSA question on the availability of such programs and services was relatively low. (See *Table I-6.*) Moreover, among responding jails, only 26.1% claimed to offer educational release.¹⁰⁸

In addition to schooling and training, model standards emphasize the educational and therapeutic effects of libraries, whether in-house or through local or regional loan services.¹⁰⁹ Yet, according to the American Library Association,

As of 1977, 88% of the largest jails (but only 23% of the smallest) had some reading materials available to residents. Only 515 public libraries serve 721 jails, or approximately 20% of the total. So someone other than the public library is providing reading materials to inmates. . . .¹¹⁰

Social Services and Counseling

Another area emphasized by model standards has been the provision of social services and counseling to jail inmates.¹¹¹ Not surprisingly, larger jails—those with 63 and more beds—are more likely than

Table I-6

NUMBER AND PERCENT OF RESPONDING JAILS OFFERING THE FOLLOWING SERVICES*

	Number	Percent
GED (General Equivalency Diploma)	774	29.1
Adult Basic Education	383	14.4
Vocational Training	214	8.0
Job Placement	417	15.7
Life Skills	114	4.3

*In response to the directive, "Please check the programs and services provided for inmates."
 SOURCE: National Sheriffs' Association, *The State of Our Nation's Jails, 1982* (Washington, DC: National Sheriffs' Association, 1982), p. 193.

smaller jails to offer some sort of personal, group, or alcohol and drug counseling. Overall, according to the NSA survey, 38.1% of responding jails claimed to offer substance abuse counseling, 49.6% offered personal counseling, and 27.1% offered group counseling.¹¹²

Providing social services and counseling to jail inmates is an area which appears particularly ripe for employing and coordinating community resources. Counties, aside from being the chief operators of jails, are major providers of social services. Moreover, community volunteer groups such as Alcoholics Anonymous may be quite successful in aiding substance abusers. While applauding the use of volunteers, however, those knowledgeable about the day-to-day operating procedures of jails caution that

[j]ails which use volunteers must always remember to delegate a staff person with the responsibility for screening the volunteers and seeing that they get a thorough orientation about the jail operation. Well meaning but unsophisticated volunteers may be persuaded by inmates to violate jail policies and procedures, such as smuggling in contraband which can pose a threat to jail security. Volunteers can make the job of the jail officer easier, but without the proper amount of attention by jail staff devoted to selection of suitable volunteers, the jail would be better off without volunteer counseling programs.¹¹³

UTILIZING THE LOCAL JAIL

The Crowding Conundrum

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, in answer to the National Sheriffs' Association survey, 795 respondents listed overcrowding as the most serious problem in their jails. Although it has been difficult for analysts to arrive at more than anecdotal evidence about the extent of overcrowding, that evidence is compelling, suggesting, for the first time, that overcrowding is no longer limited to large urban and southern jails.

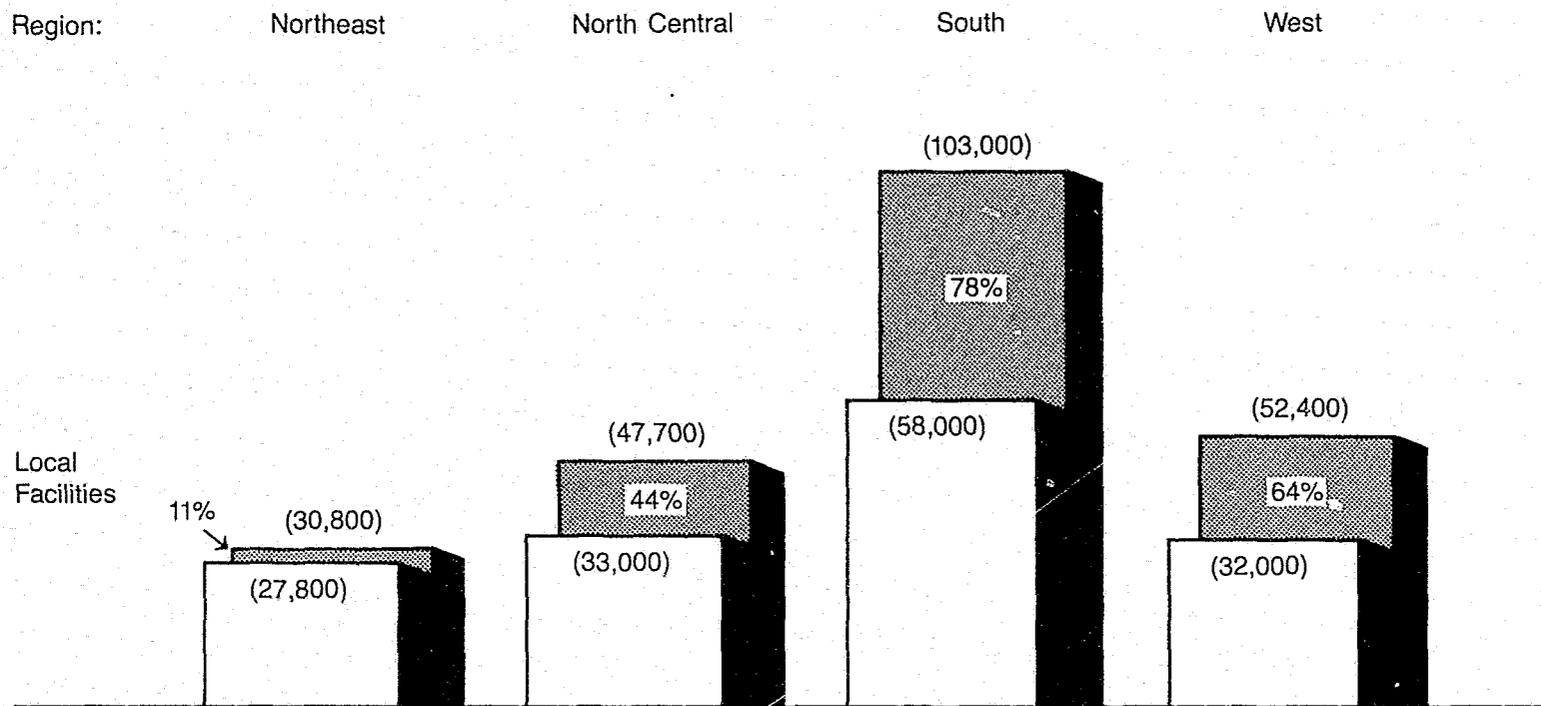
For instance, such wealthy suburban counties as Arapahoe in Colorado¹¹⁴ and Montgomery in Maryland¹¹⁵ have—in the absence of bed space—recently been forced to sleep prisoners on the floor. Meanwhile, urban and southern jails appear to be getting even more crowded.

A major problem in determining the extent of overcrowding is definitional: exactly what constitutes overcrowding in a correctional facility? A number of terms are often employed:

- *Reported Capacity*: the capacity of individual confinement units as reported by jurisdiction;
- *Measured Capacity*: defined as one inmate per cell or for dormitories as the smaller of (1) the number of square feet of floor space or (2) the jurisdictionally reported capacity;
- *Density*: the number of square feet of floor space per inmate derived by dividing the size of confinement units by the number of inmates confined;
- *Occupancy*: the number of inmates per confinement unit.¹¹⁶

Depending upon the measure used, vastly dif-

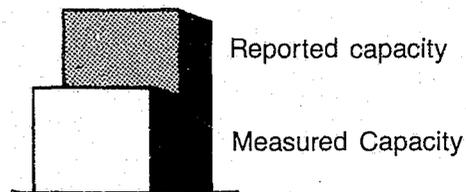
Graph I-3
PERCENTAGE OF REPORTED CAPACITY^a IN EXCESS OF MEASURED CAPACITY^b FOR LOCAL ADULT CORRECTIONAL FACILITIES, BY REGION, 1978



^aThe capacity of individual confinement units as reported by the jurisdiction.

^bMeasured capacity is defined as one inmate per cell or for dormitories as the smaller of: (1) Number of square feet of floor space/60 or (2) The jurisdictionally reported capacity.

Source: Survey of State and Federal Adult Correctional Facilities (PC-2), 1978; National Jail Census (CJ-3, CJ-4), 1978.



ferent assessments may be obtained. For instance, a National Institute of Justice (NIJ) comparison of reported capacity—a jurisdictionally arbitrary amount—and a standardized measured capacity of 60 square feet of floor space per inmate¹¹⁷ found local facilities reporting far greater capacity than the standard. (See *Graph I-3*.)

Yet another way to arrive at the extent to which local jails are overcrowded is to use measures of density and occupancy. Employing these yardsticks, the NIJ definition of a crowded inmate is

one who lives in a high density multiple occupancy confinement unit—i.e., a cell or dormitory shared with one or more inmates with less than 60 square feet of floor space per inmate.¹¹⁸

With that definition in hand, NIJ researchers concluded that “it is inappropriate to speak in terms of a national [jail] crowding problem.”¹¹⁹ Indeed, researchers found that externally imposed limits on state prison populations were the most likely determinants of crowded (high density) jails:

Several states that were among the first subject to court order to reduce crowding are also among those that had the highest percentage of jail inmates held in crowded confinement units: Alabama (80%); Florida (65%); Louisiana (60%); Mississippi (47%); Nevada (54%); and Tennessee (64%). Among the nine additional states where local facilities held more than 50% of their inmates in crowded units, are several whose state systems are pending court actions: Texas (71%); Maryland (84%); and Georgia (67%). Predictably, the two states that contained the most crowded local facilities confined the largest number of state inmates backed-up under local jurisdiction: Alabama (with 2,600 inmates under local jurisdiction) and Maryland (with 921 locally confined state inmates).¹²⁰

The problems inherent in determining whether or not “jail over crowding is now a national epidemic”¹²¹ have been exacerbated by two recent developments. First, the number of states under court order or facing pending litigation has risen dramatically since publication of the NIJ prison and jail report. Thus, as of April 1980, 30 states were involved in litigation

over prison conditions and overcrowding. In contrast, by March 1982, 38 states (plus the District of Columbia, Puerto Rico, and the Virgin Islands) were operating under existing court decrees or were involved in pending litigation affecting either the entire prison system or some major institution. (See *Figure I-2*.) Moreover, as an earlier section noted, between 1980 (the year of the NIJ report) and 1981, the number of reported state prisoners being held in local jails because of overcrowding increased by almost 1,500. (See *Table I-3*.)

Second, since 1980, statistics on the total annual number of persons in jails have been revised sharply upward. Hence, figures available during the period under study by the National Institute of Justice put the national average daily jail population at 158,000. Those numbers suggested that, unlike state prisons, local jails during the past decade had retained a fairly stable numerical population. Yet, figures released by the Bureau of Justice Statistics in 1983 revealed a dramatic upswing in the number of jail residents—an average 1982 daily jail population of 212,000. What those figures imply for the so-called overcrowding crisis, however, is really no more precise than previous population estimates:

Reporting jails were asked for their *rated* and *operational* capacities as of June 30, 1982. Both of these terms are imprecise, nonstandardized, and subject to various interpretations. *Rated capacity* carries the connotation of “official” capacity and is based on the determination of any state or local rating official; *operational capacity* is that capacity at which a jail can function from day to day. In any jail on any day there is always some space inoperative and therefore not available for use.

The rated capacity of all the Nation’s jails was estimated as 250,000. At that capacity, the June 30 jail population represented 84% occupancy. The overall operational capacity was 220,000, producing an occupancy rate of 95%.¹²²

Given the fact that official nonstandardized capacity ratings tend to overestimate the extent of available space, it is probably safe to assume that overcrowding has indeed reached crisis proportions in many of the nation’s jails—an assumption corroborated by the fact that “[b]y whatever measure used,

Figure I-2

LITIGATION INVOLVING PRISON CONDITIONS AND CROWDING, MARCH 1982

State	Affected Institution	Status
Alabama	State System	Under court order dealing with total conditions and overcrowding.
Arizona	State Penitentiary	Being operated under a series of court orders and consent decrees dealing with overcrowding, classification, and other conditions.
Arkansas	State System	Under court order dealing with total conditions.
California	State Penitentiary at San Quentin	Being challenged on overcrowding and conditions.
Colorado	Maximum Security Penitentiary	Under court order on total conditions and overcrowding.
Connecticut	Hartford Correctional Center	Under court order dealing with overcrowding and some conditions.
Delaware	State Penitentiary	Under court order dealing primarily with overcrowding and some conditions.
Florida	State System	Under court order dealing with overcrowding.
Georgia	State Penitentiary at Reidsville	Under court order on total conditions and overcrowding.
Illinois	State Penitentiary at Menard	Under court order on total conditions and overcrowding.
	State Penitentiary at Pontiac	Under court order enjoining double celling and dealing with overcrowding.
Indiana	State Prison at Pendleton	Being challenged on total conditions and overcrowding.
	State Penitentiary at Michigan City	Under court order on overcrowding and other conditions.
Iowa	State Penitentiary	Under court order on overcrowding and a variety of conditions.
Kentucky	State Penitentiary and Reformatory	Under court order by virtue of a consent decree on overcrowding and some conditions.
	Women's State Prison	Being challenged on the totality of conditions.
Louisiana	State Penitentiary	Under court order dealing with overcrowding and a variety of conditions.
Maine	State Penitentiary	Being challenged on overcrowding and a variety of conditions.
Maryland	Two State Penitentiaries	Declared unconstitutional because of overcrowding.

Figure I-2 (continued)

LITIGATION INVOLVING PRISON CONDITIONS AND CROWDING, MARCH 1982

State	Affected Institution	Status
Massachusetts	Maximum Security Unit at State Prison in Walpole	Being challenged on total conditions.
Michigan	Women's Prison	Under court order.
	Men's Prison System	Under court order on overcrowding.
	State Prison at Jackson	Being challenged on other conditions.
Mississippi	State System	Under court order dealing with overcrowding and total conditions.
Missouri	State Penitentiary	Under court order on overcrowding and some conditions.
Nevada	State Penitentiary	Under court order on overcrowding and total conditions.
	New Addition to State Penitentiary	Being challenged on total conditions.
New Hampshire	State Penitentiary	Under court order dealing with total conditions and overcrowding.
New Mexico	State Penitentiary	Under court order dealing with overcrowding and total conditions.
North Carolina	Central Prison at Raleigh	A lawsuit was filed in 1978 at Central Prison in Raleigh on overcrowding and conditions and a similar lawsuit is pending involving the women's prison.
	Women's Prison	
Ohio	State Prison at Lucasville	Under court order on overcrowding.
	State Prison at Columbus	Under court order resulting from a consent decree on total conditions and overcrowding and is required to be closed in 1983.
	State Prison at Mansfield	Being challenged on total conditions.
Oklahoma	State System	Under court order on overcrowding.
	State Penitentiary	Under court order on total conditions.
Oregon	State Penitentiary	Under court order on overcrowding.
Rhode Island	State System	Under court order on overcrowding and total conditions.
South Carolina	State Penitentiary	Being challenged on overcrowding and conditions.
Tennessee	State System	Declared unconstitutional on total conditions.

Figure I-2 (continued)

LITIGATION INVOLVING PRISON CONDITIONS AND CROWDING, MARCH 1982

State	Affected Institution	Status
Texas	State System	Declared unconstitutional on total conditions and overcrowding.
Utah	State Penitentiary	Being operated under a consent decree on overcrowding and some conditions.
Vermont	State Prison	Closed.
Virginia	State Prison at Powhatan	Being operated under a consent decree dealing with overcrowding and conditions.
	Maximum Security Prison at Mecklenburg	Being challenged on totality of conditions.
Washington	State Reformatory	Being challenged on overcrowding and conditions.
	State Penitentiary at Walla Walla	Declared unconstitutional on overcrowding and conditions and a special master has been appointed.
West Virginia	State Penitentiary at Moundsville	Being challenged on overcrowding and conditions.
Wisconsin	State Prison at Waupun	Being challenged on overcrowding.
Wyoming	State Penitentiary	Being operated under terms of a stipulation and consent decree.
District of Columbia	District Jails	Under court order on overcrowding and conditions.
Puerto Rico	Commonwealth Penitentiary	Under court order on overcrowding and conditions.
	Commonwealth System	Under court order dealing with overcrowding and conditions.
Virgin Islands	Territorial Prison	Under court order dealing with conditions and overcrowding.

SOURCE: American Civil Liberties Union Foundation, The National Prison Project, "Status Report: The Courts and Prisons," March 8, 1982.

the inmate population in [the 100] large[st] jails exceeded capacity. . . .¹²³ (See Table I-7.)

Small Jails, Small Populations

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 con-

trary, statistics cited previously disclose that while 45% of all jail inmates are confined in less than 4% of local institutions, 44% of the nation's jails hold a mere 4% of those confined. Put another way, recently released BJS figures revealed that on June 30, 1982, the 100 largest jails in the United States held fully 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).¹²⁴ That, according to BJS, means "that most unoc-

Table I-7

100 LARGEST JAILS: INMATE POPULATION JUNE 30, 1982, AND PERCENT CHANGE FROM 1978

Name/location	Inmate population 6/30/82	Percent change from 2/15/78	Name/location	Inmate population 6/30/82	Percent change from 2/15/78
Maricopa County Jail: Minimum Security	644	58%	Hillsborough County: Jail	509	38
Maximum Security	512	6	Hillsborough County: Stockade	440	22
Phoenix, AZ			Tampa, FL		
Alameda County Jail	1,563	16	Volusia County Correctional Facility	402	142
Santa Rita, CA			Daytona Beach, FL		
Contra Costa County Detention Facility	448	213	De Kalb County: Jail	624	39
Martinez, CA			Decatur, GA		
Fresno County Jail	730	27	Fulton County Jail	1,173	55
Fresno, CA			Atlanta, GA		
Kern County Jail	401	3	Cook County Jail: No. 1	603	*
Bakersfield, CA			No. 2	1,215	22
Lerdo Minimum Security Facility	450	24	No. 4	599	21
Lerdo, CA			No. 5	976	**
Los Angeles County:			No. 6	971	**
Biscailuz Center	908	58	Chicago, IL		
Central Jail	6,174	34	Marion County Jail	791	31
Sybil Brand Institute	949	43	Indianapolis, IN		
Los Angeles, CA			Fayette County Jail	407	43
Wayside Ranch: Maximum Security	1,250	41	Lexington, KY		
Wayside Ranch: Minimum Security	1,710	137	Jefferson City County Jail	851	87
Castaic, CA			Louisville, KY		
Orange County Jail	1,846	60	Caddo Parish Detention Center	433	40
Santa Ana, CA			Kelthville, LA		
Riverside County Jail	419	18	Jefferson Parish Jail	559	120
Riverside, CA			Gretna, LA		
Sacramento County Jail:			New Orleans:		
Main Jail	540	-13	House of Detention	784	155
Sacramento, California			Parish Prison	777	38
Rio Consuemes	808	65	Community Correctional Center	856	193
Elk Grove, CA			New Orleans, LA		
San Bernardino County Jail	647	17	East Baton Rouge Prison	492	-4
San Bernardino, CA			Scotlandville, LA		
San Diego County Central Detention Facility	888	16	Baltimore City Jail	1,713	10
San Diego, CA			Baltimore, MD		
Santa Clara County:			Montgomery County Detention Center	400	53
Main Jail	792	27	Rockville, MD		
San Jose, CA			Prince Georges County Detention Center	484	9
Minimum Security	885	49	Upper Marlboro, MD		
Milpitas, CA			Middlesex County Jail and House of Correction	554	42
Ventura County Jail	501	96	Billerica, MA		
Ventura, CA			Kent County Correctional Facility	634	47
San Francisco City Jail No. 3	458	25	Grand Rapids, MI		
San Francisco, CA			Oakland County Law Enforcement Center	553	1
Denver County Jail	755	37	Pontiac, MI		
Denver, CO			Wayne County Jail	723	-3
District of Columbia Detention Facility	1,860	32	Detroit House of Correction	565	-6
Washington, DC			Detroit, MI		
Dade County:			Hennepin County Corrections Facility	424	42
Training/Treatment Center	569	12	Wayzata, MN		
Jail	1,301	101	Jackson County Jail	459	-4
Miami, FL			Kansas City, MO		
Duval County: Jail	417	7			
Correctional Institute	405	5			
Jacksonville, FL					

Table I-7 (continued)

100 LARGEST JAILS: INMATE POPULATION JUNE 30, 1982,
AND PERCENT CHANGE FROM 1978

Name/location	Inmate population 6/30/82	Percent change from 2/15/78	Name/location	Inmate population 6/30/82	Percent change from 2/15/78
St. Louis Medium Security Institution St. Louis, MO	483	-1	Allegheny County Prison Pittsburgh, PA	623	49
Bergen Co. Jail—Annex Hackensack, NJ	436	116	Delaware County Prison Thornton, PA	459	21
Essex County Jail Newark, NJ	710	39	Holmesburg Prison House of Correction	1,243 976	76 54
Essex County Jail Annex Caldwell, NJ	747	41	Philadelphia Detention Center Philadelphia, PA	787	6
Hudson County Jail Jersey City, NJ	515	33	Shelby County: Correction Center Justice Center Memphis, TN	457 658	1 2
Monmouth County Correctional Institute Freehold, NJ	416	56	Bexar County Jail San Antonio, TX	929	2
Passaic County Jail Paterson, NJ	488	103	Dallas County Jail: New Old Dallas, TX	962 473	2 16
Erie County Penitentiary Aldens, NY	413	63	El Paso County Jail El Paso, TX	524	26
Nassau County Correctional Center Hicksville, NY	813	44	Harris County Detention Center Humble, TX	1,919	35
Suffolk County Correctional Facility Riverhead, NY	677	69	Harris County Jail Houston, TX	1,080	70
New York City:			Jefferson County Jail Beaumont, TX	417	128
Adolescent Reception/ Detention Center Queens, NY	1,440	58	Tarrant County Jail Fort Worth, TX	811	74
Anna M. Kross Center East Elmhurst, NY	1,765	***	Salt Lake County Jail Salt Lake City, UT	430	26
Bronx House of Detention Bronx, NY	468	-8	Fairfax County Adult Detention Center Fairfax, VA	429	121
Brooklyn House of Detention Brooklyn, NY	748	-1	Norfolk Municipal Jail Norfolk, VA	453	51
Correctional Institute for Men Queens, NY	2,176	35	Richmond City Jail Richmond, VA	746	27
Correctional Institute for Women East Elmhurst, NY	800	176	King County Jail—Main Seattle, WA	861	12
House of Detention for Men East Elmhurst, NY	1,200	-24	Milwaukee County House of Correction Milwaukee, WI	577	62
Queens House of Detention Kew Gardens, NY	482	-3			
Cuyahoga County Jail Cleveland, OH	852	34			
Franklin County Corrections Center Columbus, OH	651	70			
Hamilton County Corrections Institute Cincinnati, OH	853	159			
Oklahoma County Jail OK City, OK	441	47			

NOTE: The jails shown above were selected on the basis of size only; they do not necessarily represent all of the jails in the counties in which they are located.

*Reduced capacity of jail

**Not open in 1978

***Not fully operational in 1978

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, "Jail Inmates, 1982," Bulletin, NCJ-87161, Washington, DC: February, 1983, pp. 2-3.

cupied beds in the jail system are in smaller facilities."¹²⁵ Nonetheless, individual sheriffs responsible for the operation of smaller jails may perceive an acute overcrowding problem. According to NSA survey analysts Kenneth E. Kerle and Francis R. Ford:

Many participants cited overcrowding as an issue which at times didn't square with the figures cited as their daily inmate population. What some of these people probably mean is there aren't enough staff on the shifts to handle the workload properly. Even if a jail does have a bed space for every prisoner, jail officers think of it as

overcrowded if, due to staff shortages, the inmate counts, bed checks, and cell searches are overlooked and inmate programs such as outdoor recreation are postponed.¹²⁶

Indeed, while small jails may not be overcrowded in terms of the ratio of inmates to beds, their size tends to result in shortages of resources often more severe than those experienced by large, overcrowded urban facilities. As indicated in *Table I-8*, this appears to be particularly true in the area of service and program provision.

Table I-8

COMPARISON OF SERVICES OFFERED BY SMALLEST^a AND LARGEST^b JAILS

Service Offered	Percent of Small Jails	Percent of Large Jails
Education		
Graduate Equivalency Diploma	14.4	54.9
Adult Basic Education	4.1	35.9
Vocational Training	3.0	17.5
Job Placement	9.2	27.6
Life Skills	0.5	12.6
Educational Release	24.7	32.7
Counseling		
Substance Abuse	29.5	59.2
Personal	39.2	72.1
Group	8.4	43.3
Chaplain		
	23.9	67.3
Medical		
Infirmery	2.7	48.9
Dental Services	18.6	64.5
Initial Medical Screening	25.9	74.2
Medical History	27.5	73.9
Psychiatric Services	18.0	62.7
Secure Wards	14.1	39.5
Recreation		
Indoor	26.7	52.1
Outdoor	17.2	54.9

^aSmall jails are defined as those with 1-16 beds.

^bLarge jails are defined as those with 63 beds and up.

SOURCE: National Sheriffs' Association, *The State of Our Nation's Jails, 1982* (Washington, DC: National Sheriffs' Association, 1982), pp. 193-211.

OF PRICETAGS AND POLITICS

As much of the foregoing material suggests, whether because of overcrowding, poorly trained and remunerated personnel, incompatible combinations of inmates, or inadequate servicing, the nation's jails are in a sorry state. And the list of problems always seems to stretch much further than the list of solutions.

One long espoused answer to at least some of the problems besetting local jails lies in buildings—in constructing new buildings, renovating existing buildings, or acquiring other buildings. 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. All, however, agree on one thing: the costs of correctional facilities—capital, operational and external—are indeed overwhelming.

Reduced to the simplest terms possible, jails incur two types of tangible costs:

- *Operating Costs*—the costs of resources such as personnel, utilities, food and materials that are used up or consumed during an accounting period such as a year;
- *Capital Costs*—the costs of a correctional facility or a piece of equipment that is used over a multiyear period.¹²⁷

The Capital Costs of Jails

The bulk of correctional capital outlays in the United States are made for new construction and renovation. In 1977, such expenditures amounted to \$415 million at all levels of government. (See *Table I-9*.)

Among capital outlays, new construction consumed the majority of dollars spent—not an unexpected finding given the high per bed building costs of jails and prisons. Thus, as *Table I-10* indicates, erecting a jail—a basic act that does not include such preparatory necessities as architectural fees or site acquisition¹²⁸ and certainly does not include operational costs—may represent a substantial local fiscal drain.

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 are employed. First, a jurisdiction may opt simply to add on to an existing building, a strategy for which no jail cost

Table I-9

CAPITAL OUTLAYS FOR FEDERAL, STATE, AND LOCAL CORRECTIONAL FACILITIES, FISCAL 1977

Level of Government	Capital Outlays (in thousands)	
	Number	Percent
Total	\$415,873	100%
Federal	25,306	6
State	223,518	54
Local	167,049	40

NOTE: Capital outlays for adult correctional institutions were not presented separately from those for juvenile detention facilities for state and local governments. The federal figure for capital outlays for adult correctional institutions was \$24,337,000.

SOURCE: 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.

estimates were available. Second, it may elect to renovate an old facility. According to NIJ, "Approximately 16% of the capital funds to local jails between 1978 and 1982 is allocated for the renovation of existing facilities. The average per bed cost of these renovations is \$3,700." Finally, depending upon availability and suitability, a jurisdiction may choose to acquire and remodel some noncorrectional facility, such as a school, a mental hospital, or a motel.

Table I-10

AVERAGE ESTIMATED JAIL CONSTRUCTION COST PER BED: PROJECTED NEW CONSTRUCTION, PER REGION, 1978 to 1982

Region	Estimated Construction Costs Per Bed
Northeast	\$37,200
North Central	35,200
South	20,500
West	41,600

SOURCE: U.S. Department of Justice, *National Jail Census* (CJ-3 and CJ-4), 1978.

The Operating Costs of Jails

While capital outlays for prisons and jails represent big ticket expenditures, they pale in comparison to operating costs. Hence, in 1977, federal, state, and local governments spent 5.78 times more—or \$2.4 billion—operating their correctional facilities than they did improving them. (See *Table I-11*.)

Moreover, that \$2.4 billion figure (\$832 million for local government) is in direct current expenditures, a measure that *excludes* such budgetary items as central office administration, employer contributions to employee benefits, and services provided to inmates.

The Future Costs of Jails

Predicting the operating and capital costs that local governments will incur in the future because of their correctional responsibilities is, unfortunately, mere guesswork. Nonetheless, as *Graphs I-4 and I-5* suggest, the trend in past years has been for local capital outlays and direct current expenditures to increase. NIJ projections anticipated further annual increases until 1982 to run at between 10.6 and

14%.¹²⁹ The rate of future increases may be affected by three disparate forces: scarce governmental resources at all levels, a downward trend in the rate of inflation, and public willingness to expend funds for a most disagreeable function.

Building Jails: Political Obstacles and Instigators

Taxpayers want society to get tough on criminals, but they don't want to pay for it.¹³⁰

Expenditures for corrections programs have not historically been particularly popular.¹³¹

[P]erhaps the greatest single problem confronting jails and the entire field of corrections [is] the lack of an effective political constituency. This is in direct contradistinction to virtually every other major public service provided by government. The only people who are immediately and directly affected by jail operations are inmates, and they cannot vote while incarcerated. . . . In the ever-escalating battle for

Table I-11

DIRECT CURRENT EXPENDITURES PER INMATE FOR FEDERAL, STATE AND LOCAL CORRECTIONAL FACILITIES, FISCAL 1977

Level of government	Direct Current Expenditures for Adult Institutions FY 1977 ^a (in thousands)		Total Number of Persons Held		Direct Current Expenditures per Inmate
	Number	Percent	Number	Percent	
Total	\$2,457,298	100%	450,061	100%	\$5461
Federal	149,006	6	30,920 ^b	7	4819
State	1,476,292	60	260,747 ^b	58	5662
Local	832,000	34	158,394 ^c	35	5253

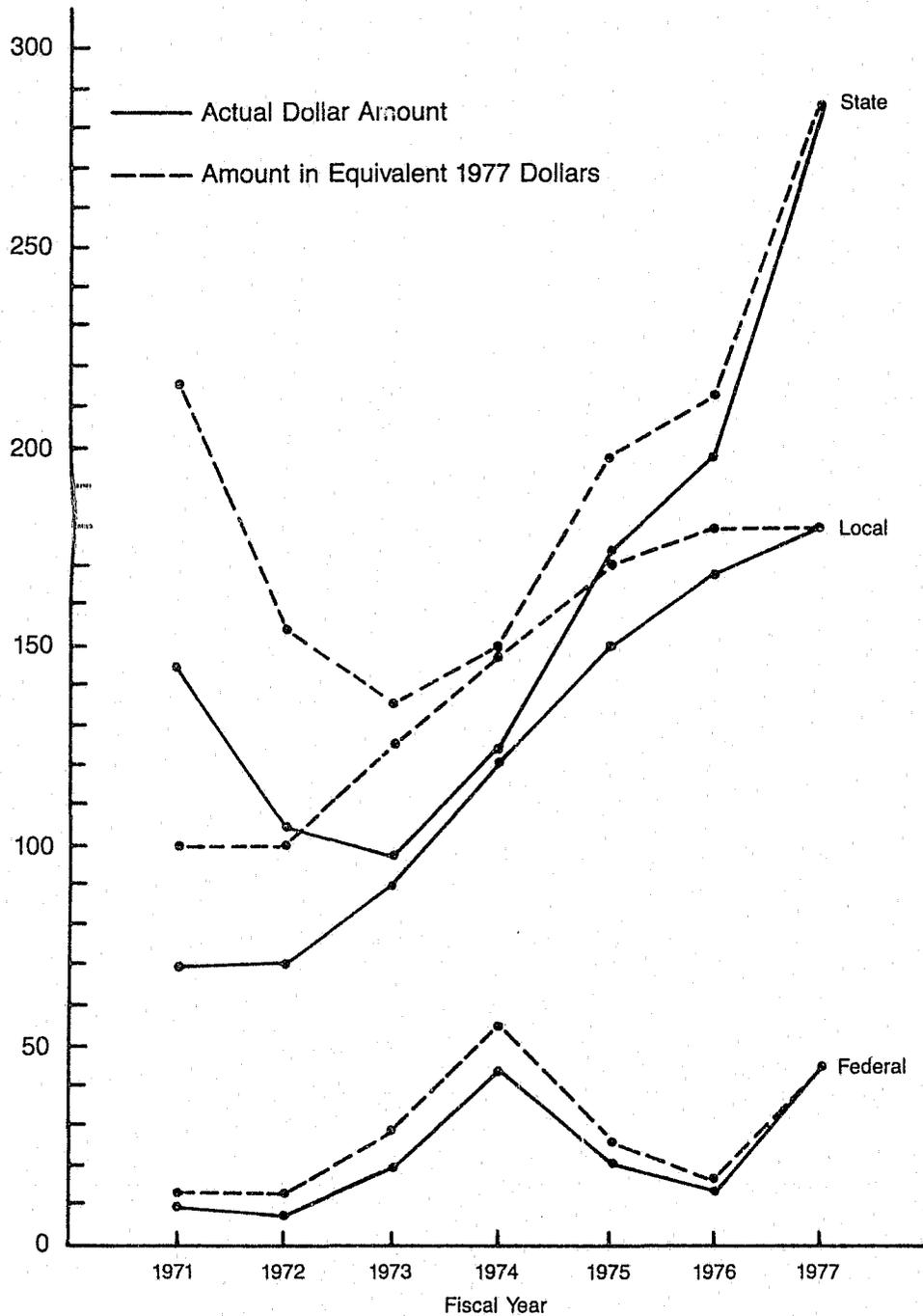
SOURCES: ^aU.S. Department of Justice and U.S. Bureau of the Census, *Expenditure and Employment Data for the Criminal Justice System: 1977* (Washington, DC: U.S. Government Printing Office, 1979), Tables 4, 47, 53, 56, and 59. Total direct current expenditures for correctional institutions minus expenditures for juvenile institutions. Local expenditures estimated by the National Institute of Justice.

^bU.S. Department of Justice, Law Enforcement Assistance Administration, *Prisoners in State and Federal Institutions on December 13, 1977* (Washington, DC: U.S. Government Printing Office, 1979), Table i.

^cU.S. Department of Justice, Law Enforcement Assistance Administration, *Census of Jails and Survey of Jail Inmates, 1978*, Bulletin, SD-NPS-J-6P (Washington, DC: February 1979). The reference date for local facilities was February 15, 1978—45 days after the December 31, 1977, reference date for federal and state facilities.

Graph I-4

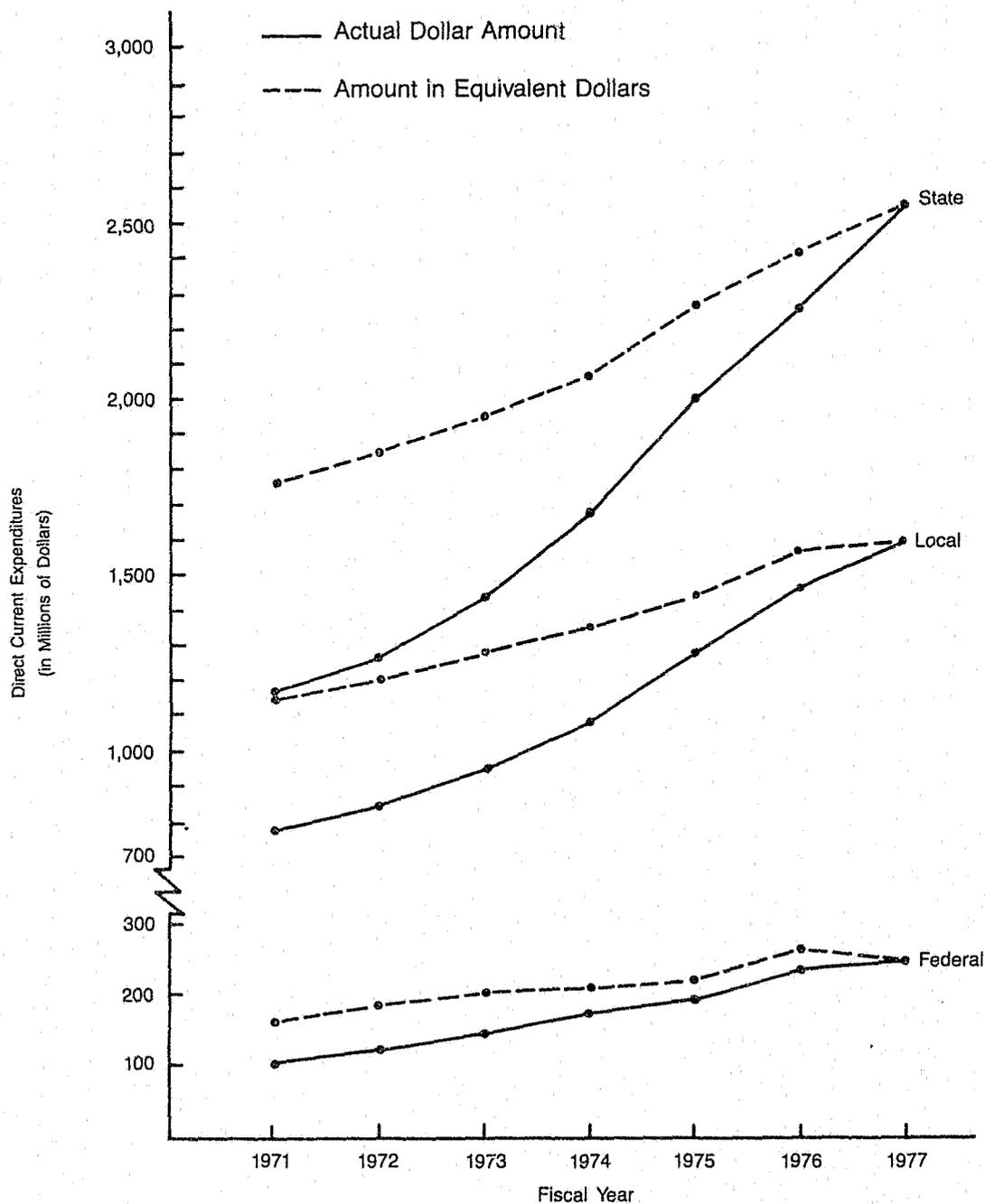
TOTAL CAPITAL OUTLAYS FOR CORRECTIONS, BY LEVEL OF GOVERNMENT, FISCAL YEARS 1971-77



Source: *Expenditure and Employment Data for the Criminal Justice System*, Washington, DC: Law Enforcement Assistance Administration, U.S. Department of Justice and U.S. Bureau of the Census, 1970-71: Tables 4 and 50. 1971-72: Tables 4 and 39. 1972-73: Tables 4 and 39. 1974: Tables 4 and 39. 1975: Tables 4 and 40. 1976: Tables 4 and 45. 1977: Tables 4 and 47, *Statistical Abstract of the United States: 1979* (10th Ed.). Washington, DC: U.S. Bureau of the Census, 1979. Table 790.

Graph I-5

TOTAL DIRECT CURRENT EXPENDITURES FOR CORRECTIONS, BY LEVEL OF GOVERNMENT, FISCAL YEARS 1971-77



Source: *Expenditure and Employment Data for the Criminal Justice System*. Washington, DC: Law Enforcement Assistance Administration, U.S. Department of Justice and U.S. Bureau of the Census. 1970-71: Tables 4 and 50. 1971-72: Tables 4 and 39. 1972-73: Tables 4 and 39. 1974: Tables 4 and 39. 1975: Tables 4 and 40. 1976: Tables 4 and 45, 1977: Tables 4 and 47. *Statistical Abstract of the United States: 1979* (10th Ed.). Washington, DC: U.S. Bureau of the Census, 1979. Table 790.

a share of limited or dwindling public revenues, it is easy to understand how jails are relegated to last place at the appropriations table.¹³²

In the race for local budgetary eminence, jails have long been functional losers. Providing services for lawbreakers (even accused transgressors) has always been politically difficult to justify when pitted against the needs of school children, motorists, and the ailing. In other words, 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 the approval of state and local voters. In a statewide election, Californians gave the go-ahead to a \$285 million bond issue for jail construction and renovation. Dade County, FL, voters were persuaded to pass a \$200 million jail bond for the purpose of constructing 2,200 new cells. And bond issues exceeding \$30 million in each instance were approved in Arapahoe County, CO; Prince George's County, MD; Bexar County, TX; and Palm Beach County, FL. Indeed, nationwide, only three counties with bond issues on their fall ballots—Worth in Iowa, Elko in Nevada, and Raines in Texas—failed to convince voters of a compelling need to fund correctional building projects.¹³³

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, the fact that so many bond issues did pass does assure more than the usual amount of jail construction 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." That perception, for example, was vividly expressed by the *Toledo Blade* when Lucas County Commissioners unveiled plans in 1974 for a new jail, the construction of which was necessitated by a U.S. District Court decision finding the old jail unconstitutional. Thus, the *Blade* accused commissioners of being

[u]ndaunted, unhearing, and unswayed by common sense . . . and moving into a position to cram down the public's craw an extravagant, over blown jail that will cost at least 11.4 million dollars. And that amount,

of course, does not include the small fortune that will be spent on equipment and accessories to decorate the jail *in the style and comfort its 300 or so short-term inmates can be expected to enjoy*¹³⁴

Equally as potent an obstacle is the "Not in my neighborhood you don't!" syndrome. The availability of funds and a public favorably disposed toward their expenditure do not alone assure ease of construction. For instance, plans by the City of New York to build a new jail on the outskirts of Chinatown and Little Italy provoked 12,000 neighborhood demonstrators to protest outside City Hall in the chill of November.¹³⁵

The fact that bond issues have begun to win approval suggests that factors abetting jail financing may have outweighed the obstacles—at least temporarily and in some localities. While each jurisdiction may be expected to have its own peculiar reasons for agreeing to build or upgrade its jails (in Prince George's County, MD, a series of *Washington Post* articles detailing rapes and other violence in the jail apparently decided the question), two developments may have been of particular importance.

First, public support for stringent criminal sanctions may be translating itself into support for the physical manifestations of those sanctions, jails and prisons. Second, voters may have realized or been convinced that court orders to improve jail conditions and alleviate overcrowding are not matters that can easily be dismissed by responsible public officials. Unconstitutional situations must be remedied and if those remedies require the expenditures of funds, then funds must be expended.

Building More Jails: Is It Helping or Hurting?

The 1980 release of NIJ's *American Prisons and Jails*¹³⁶ appeared to substantiate what many in the field of corrections had long suspected: that jails are "capacity-driven" institutions. That is, more free bed space creates an institutional and systemic "need" to fill the space. Thus, the report tentatively concluded:

[O]ur search for leading indicators of prison population has cast substantial doubt on the logic of custodial expansion as a means of reducing population pressures. Six years ago, William Nagel, with other opponents of prison construction, called for a moratorium on facility expansion, suggesting that the availability of additional space was

responsible for increasing the number of persons confined with no clear evidence of any deterrent or rehabilitative effect. If the capacity theorists are right, responding to crowding by increased capital expenditures for new institutional space can provide at best a temporary alleviation of the crowding problem, and will ultimately result in a new equilibrium of more prisons, more prisoners, and the same crowded conditions as before. Whether this new equilibrium is desirable is a value question beyond the scope of our research. 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.¹³⁷

Researchers at Carnegie-Mellon University, however, have now challenged this 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."¹³⁸ 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 corrections, 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.¹³⁹

CONCLUSION AND VOLUME OVERVIEW

To return to a statement proffered at the beginning of this chapter, the jail is a complex of complex problems—to name but a few, spatial, managerial, legal, and financial. Nor are solutions and reforms easily achieved. Each of the nation's nearly 4,000 jails is different from the others and each, accordingly, is beset with different problems and combinations of problems. Moreover, as the remainder of this volume will make clear, though the jail may be the "quintessential local institution,"¹⁴⁰ it is hardly an island—either jurisdictionally or institutionally.

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 separately. (For previous ACIR recommendations on the role of the courts, see *Appendix A* of this volume.) 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.

Even within the correctional subsystem the jail is only one option. As *Chapter II* illustrates, pretrial defendants may be released pending trial through a variety of means—from simple release on recognizance to the more traditional surety bail. Convicted misdemeanants may serve out sentences on simple probation or through some sort of service or recompense to the offended community or individual victim.

Finally, as *Chapters III and IV* make clear, 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 or technical means. 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, Washington may shape the local correctional agenda in some subtle and not so subtle ways.

Hence, jail policy is continually played out in a series of complicated intersystemic, interprogrammatic, and intergovernmental arenas. These arenas often contribute to the problems that beset jails. They may also be the key to their solutions.

FOOTNOTES

- 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*, 5 January 1982, p. B10.
- 7 *Webster's New Collegiate Dictionary* (8th ed.; Springfield, MA: G&C Merriam Company, 1976), p. 618.
- 8 U.S. Department of Justice, Bureau of Justice Statistics, "Jail Inmates, 1982," Bulletin, NCJ-87161, Washington, DC, February, 1983, pp. 1-2.
- 9 The National Center on Institutions and Alternatives, "National Directory of County and Local Jails," in *And Darkness Closes In: National Study of Jail Suicides* (Washington, DC: NCIA, 1981), pp. 70-71. A number of organizations are now attempting to get a better grasp of the extent of local lockups. Note especially, William S. Edmunds, *Improving the Operation of Local Temporary Detention Facilities*, draft volume for the Police Executive Research Forum, 1982; also note work being done by the International Association of Chiefs of Police and the National Commission on the Accreditation of Law Enforcement Agencies.
- 10 Henry Burns, Jr., *Origin and Development of Jails In America* (Carbondale, IL: Center for the Study of Crime, Delinquency, and Corrections, University of Southern Illinois, n.d.), p. 1.
- 11 Billy L. Wayson, et al, *Local Jails* (Lexington, MA: D.C. Health and Company, 1977), p. 3.
- 12 Burns, *Origins and Development of Jails In America*, p. 1.
- 13 *Ibid.*, pp. 4-6.
- 14 Cited by Michael Sherman and Gordon Hawkins, *Imprisonment In America* (Chicago: University of Chicago Press, 1981), p. 50.
- 15 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. 73.
- 16 U.S. Department of Justice, Bureau of Justice Statistics, "Jail Inmates, 1982," p. 1.
- 17 U.S. Department of Justice, *American Prisons and Jails*, vol. I, pp. 73-74.
- 18 Percentage discrepancies between table and text result from using average daily population statistics in the text and single day population in the table.
- 19 U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates: Sociodemographic Findings From the 1978 Survey of Inmates of Local Jails* (Washington, DC: U.S. Government Printing Office, 1980), p. 1.
- 20 *Ibid.*, pp. 1-9.
- 21 U.S. Department of Justice, *American Prisons and Jails*, Vol. I, p. 73.
- 22 *American Correctional Association Manual of Correctional Standards* 49 (1966) cited in National Clearinghouse for Criminal Justice Planning and Architecture, *The High Cost of Building Unconstitutional Jails* (Champaign, IL: University of Illinois, 1977), p. 7.
- 23 *Ambrose v. Malcolm*, 414 F. Supp. 485, 487 (S.D.N.Y. 1976).
- 24 *Gates v. Collier*, 423 F. Supp. 732, 734 (N.D. Miss 1976) *aff'd* 548 F. 2d 241 (5th Cir. 1977).
- 25 See for example: Commission on Accreditation for Corrections, *Manual of Standards for Adult Local Detention Facilities* (Rockville, MD: Commission on Accreditation for Corrections, 1978); U.S. Department of Justice, *Federal Standards for Prisons and Jails* (Washington, DC: U.S. Government Printing Office, December 16, 1980), recommending from 60 to 70 sq. ft. depending on length of stay; and *Pugh v. Locke*, 406 F. Sup. 318, 332 (M.D. Ala. 1976), *aff'd in part, sub. nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977).
- 26 Department of Justice, *American Prisons and Jails*, Vol. I, pp. 74-75.
- 27 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.
- 28 National Sheriffs' Association, *The State of Our Nation's Jails, 1982* (Washington, DC: National Sheriffs' Association, 1982), p. 3.
- 29 By implication from his speech's preceding paragraph, the Chief Justice was also referring to jail personnel.
- 30 Warren E. Burger, Chief Justice of the United States, *1982 Year-End Report on the Judiciary*, undated copy received from the Supreme Court, February 1982, p. 7.
- 31 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 Cong., 1st sess., February 23, 1983, p. 6.
- 32 Ken Kerle, "Jails: Construction; Personnel; Lack of Training; Etc.," paper presented to the American Correctional Association, 112th Congress, Toronto, August 18, 1982, pp. 4, 7.
- 33 According to a Louis Harris poll commissioned by the Joint Commission on Correctional Manpower and Training in 1968, a sample of high school students chose corrections as the least desirable among a range of vocational occupations. Joint Commission on Correctional Manpower and Training, *The Public Looks at Crime and Correction*, Washington, DC, February 1968, cited in E. Eugene Miller, *Jail Management: Problems, Programs, and Perspectives* (Lexington, MA: Lexington Books, 1978), p. 23.
- 34 E. Eugene Miller, *Jail Management*, p. 28.
- 35 National Sheriffs' Association, *The State of Our Nation's Jails*, pp. 149-51. Only 18% of all jail staffs are represented by unions. *Ibid.*, p. 121.
- 36 *Ibid.*, p. 125.
- 37 *Ibid.*
- 38 *Ibid.*, p. 126.
- 39 *Ibid.*
- 40 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.
- 41 NSA, *The State of Our Nation's Jails*, p. 157 and Bureau of Justice Statistics, "Jail Inmates, 1982," p. 1. On June 30, 1982, 118,189 jail inmates were awaiting arraignment or trial.
- 42 BJS, "Jail Inmates, 1982," p. 2.
- 43 NSA, *The State of Our Nation's Jails*, p. 157.
- 44 *Bell v. Wolfish*, 441 U.S. 520 (1979).
- 45 *Stack v. Boyle*, 342 U.S. 1 (1951).
- 46 Increasingly, the use of preventive detention of possibly dangerous individuals is coming into vogue as a legitimate reason for pretrial detention. See for example, *U.S. v. Edwards*,

- D.C. Ct. App. #80-294 (May 8, 1981); Chief Justice Warren Burger, address before the annual meeting of the American Bar Association, February 8, 1981; and 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. See also *Chapter II* of this report.
- 47 *Gross v. Tazewell County Jail*, 31 CrL 2061 (W.D. VA. March 2, 1982).
- 48 See *Chapter IV* of this report.
- 49 U.S. Department of Justice, Bureau of Justice Statistics, "Prisoners in 1981," *Bulletin*, NCJ-82262, May, 1982, p. 3.
- 50 M. Flaherty, *An Assessment of the National Incidence of Juveniles in Adult Jails, Lockups, and Juvenile Detention Centers* (Washington, DC: U.S. Government Printing Office, 1980) cited in the National Center on Institutions and Alternatives, *And Darkness Closes In: National Study of Jail Suicides* (Washington, DC: The National Center on Institutions and Alternatives, 1981), p. 5.
- 51 Children's Defense Fund, *Children in Adult Jails* (Washington, DC: Children's Defense Fund, 1976), pp. 3-4.
- 52 *Ibid.*
- 53 James Brown and Doyle Wood, "National Priority: Removing Juveniles From Adult Jails and Lockups," in *Forum on Deinstitutionalization: Selected Readings on Children in Adult Jails and Lockups*, ed. Community Research Forum, University of Illinois at Champaign-Urbana prepared for U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (Washington, DC: U.S. Government Printing Office, 1980), p. 3.
- 54 Members of the coalition include the American Civil Liberties Union, the American Correctional Association, the American Public Health Association, the Benedict Center for Criminal Justice, the Committee for Public Justice, the Institute for Economic and Policy Studies, Inc., the John Howard Association, the National Association of Blacks in Criminal Justice, the National Association of Counties, the National Association of Criminal Justice Planners, the National Center for State Courts, the National Clearinghouse for Criminal Justice Planning and Architecture, the National Council on Crime and Delinquency, the National Criminal Justice Association, the National Institute of Corrections, the National Interreligious Task Force on Criminal Justice, the National Jail Association, Inc., the National Jail Managers' Association, the National League of Cities, the National Legal Aid and Defenders Association, the National Moratorium on Prison Construction, the National Sheriffs' Association, the National Street Law Institute, the National Urban League, Offender Aid and Restoration of the United States, Inc., Pretrial Services Resource Center, the Southern Coalition on Jails and Prisons, and the Unitarian Universalist Service Committee.
- 55 National Coalition for Jail Reform, *Juveniles in Jail: Fact and Fiction* (Kansas City, MO: Correctional Services Group, n.d.), p. 1.
- 56 For a discussion of the federal initiatives see *Chapter IV* of this study.
- 57 National Coalition for Jail Reform, *Juveniles in Jail*, p. 1.
- 58 Bureau of Justice Statistics, "Jail Inmates, 1982," pp. 1-2.
- 59 Joseph Rowen quoted in Rob Wilson, "Who Will Care For the 'Mad and Bad'," *Corrections Magazine*, February 1980, p. 14.
- 60 U.S. General Accounting Office, *Jail Inmates' Mental Health Care Neglected; State and Federal Attention Needed* (Washington, DC: U.S. Government Printing Office, 1980), p. 1. GAO cited studies by the National Coalition for Jail Reform estimating that 20 to 35% of the jail inmate population was mentally ill and the National Institute of Corrections estimating that 60% of those so confined suffered from mental disorders.
- 61 GAO, *Jail Inmates' Health Care Neglected*, p. 2.
- 62 *Ibid.*
- 63 Thomas Grubisich, "Fairfax Jail: Alcohol, Drug, Mental Problems Stored Here," *The Washington Post*, 27 December 1980, p. C3.
- 64 Ronald D. White, "Mentally Ill, Retarded Suffer In Crowded Jails," *The Washington Post*, 19 November 1981, p. MD1.
- 65 Wilson, "Who Will Care for the 'Mad and Bad'," p. 14.
- 66 Arthur J. Naparstek and David Biegel cited in Daniel J. Elazar, "Can the Federal System Be Saved?" (Philadelphia: Temple University, Center for the Study of Federalism, July 1982), p. 7.
- 67 First National Conference on the Public Inebriate, *The Public Inebriate: Overview and Alternatives to Jail* (Madison, WI: Wisconsin Clearinghouse, 1980), p. 4.
- 68 Heavy amounts are defined as 4 ounces or more of ethanol or absolute alcohol. BJS, *Profile of Jail Inmates*, p. 17. One ounce of ethanol is equal to two cans of beer, 1.5 glasses of wine, or two ounces of 80 proof liquor. U.S. Department of Justice, Bureau of Justice Statistics, "Prisoners and Alcohol," *Bulletin*, NCJ-86223, January, 1983, p. 1.
- 69 BJS, *Profile of Jail Inmates*, p. 17.
- 70 Conference on the Public Inebriate, *The Public Inebriate*, p. 5.
- 71 Donald Murray, "The Public Inebriate," *County News*, 18 August 1980, p. 6.
- 72 National Center on Institutions and Alternatives, *And Darkness Closes In*, p. ii. (emphasis added)
- 73 U.S. General Accounting Office, *Women in Prison: Inequitable Treatment Requires Action* (Washington, DC: U.S. Government Printing Office, 1980), p. ii.
- 74 See for example: *Glover v. Johnson*, 77-1229 (E.D. Michigan, October 16, 1979); *Barefield v. Leach*, No. 10282 (D.N.M. 1974); *Grosso v. Lally*, no. 4-74-447 (D. Md. 1977); and *Molar v. Gates*, 159 Cal. Rptr. 239 (4th Dist., 1979).
- 75 Dorothy Wood, Benedict Center for Criminal Justice, "Women In Jail," paper prepared for the National Coalition for Jail Reform, Milwaukee, WI, January, 1982.
- 76 *Estelle v. Gamble*, 428 U.S. 97 (1976).
- 77 *Church v. Hegstrom*, 416 F.2d 449 at 451 (CA2, 1969).
- 78 *Martinez v. Mancusi*, 443 F.2d 921 at 924-925 (CA2, 1970).
- 79 *Stokes v. Hurdle*, 393 F. Supp. 757 at 761 (D.MD., 1975).
- 80 *Coppinger v. Townsend*, 398 F.2d 392 at 394 (CA10, 1968).
- 81 William Paul Isele, *Constitutional Issues of the Prisoner's Right to Health Care* (Chicago: American Medical Association, n.d.), p. 10. Moreover, in 1982, the Supreme Court reaffirmed the judiciary's wide-ranging deference toward professional judgment (in the extant case, a mental health professional) in *Youngberg v. Romeo*, 50 LW 4681 (1982).
- 82 See for example, *Newman v. Alabama*, 349 F. Supp. (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 928 (1975); *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972); *Finnney v. Arkansas Board of Corrections*, 505 F. 2d 194 (8th Cir. 1974); *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974); *Williams v. Edwards*, 457 F.2d 1206 (5th Cir. 1977); *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977); *Palmigiano v. Garrahy*, 443 F. Supp. 269 (D.R.I. 1977); and *Todaro v. Ward*, 431 F. Supp. 1129 (S.D.N.Y. 1977), *aff'd* 565 F. 2d 48 (2d Cir. 1977).
- 83 *Rozecki v. Gaughan*, 459 F.2d (1st Cir. 1972).
- 84 Robert F. Diegelman, Address before the American Medical Association's Fourth National Conference on Medical Care and Health Services in Correctional Institutions, Chicago, IL, October 24, 1980, p. 3.
- 85 American Medical Association, *Medical Care In U.S. Jails: Report of the 1972 AMA Medical Survey of the U.S. Jail System* (Chicago: American Medical Association, 1973), p. ii.
- 86 U.S. Department of Justice, National Institute of Justice, *American Prisons and Jails*, Vol. III: *Conditions and Costs of Confinement* (Washington, DC: U.S. Government Printing

- Office, 1980), p. 209.
- 87 NSA, *The State of Our Nation's Jails*, 1982, p. 207.
- 88 *Ibid.*, pp. 208-12.
- 89 GAO, *Jail Inmates' Health Care Neglected*, p. 5.
- 90 Quoted in Wilson, "Who Will Care for the 'Mad and Bad'," p. 14.
- 91 Quoted in *Ibid.*
- 92 U.S. District Court for the Western District of Pennsylvania paraphrased in GAO, *Jail Inmates' Health Care Neglected*, p. 10.
- 93 *Ibid.*, p. 2.
- 94 For a discussion of alternatives to jail for alcoholics and public inebriates see *Chapter II* of this study.
- 95 American Correctional Association in cooperation with the Commission on Accreditation for Corrections, *Standards for Adult Local Detention Facilities*, 2d ed. (Rockville, MD: American Correctional Association, 1981), p. 73.
- 96 Miller, *Jail Management*, p. 12.
- 97 NSA, *The State of Our Nation's Jails*, p. 213.
- 98 Miller, *Jail Management*, p. 12.
- 99 American Institute of Criminal Justice, "Jail Work Programs: A Concept Paper," March 1981, p. 2.
- 100 Miller, *Jail Management*, pp. 13-14.
- 101 For a further discussion of work release, see *Chapter II* of this report.
- 102 American Institute of Criminal Justice, "Jail Work Programs," pp. 3-4.
- 103 *Ibid.*, p. 4.
- 104 *Ibid.*
- 105 *Ibid.*, p. 5.
- 106 Bureau of Justice Statistics, *Profile of Jail Inmates*, p. 4.
- 107 Burger, *Year-End Report*, p. 8.
- 108 NSA, *The State of Our Nation's Jails*, p. 193.
- 109 See for example, U.S. Department of Justice, *Federal Standards for Prisons and Jails* (Washington, DC: U.S. Government Printing Office, 1981), standard 18 and ACA, *Standards for Adult Local Detention Facilities*, pp. 98-99.
- 110 Rhea Joyce Rubin and Connie House, "Library Service in U.S. Jails: Issues, Questions, Trends," *Library Journal* (February 1, 1983): 174.
- 111 See U.S. Department of Justice, *Federal Standards for Prisons and Jails*, standard 19 and ACA, *Standards for Adult Local Detention Facilities*, p. 97.
- 112 National Sheriffs' Association, *The State of Our Nation's Jails*, p. 199.
- 113 *Ibid.*, pp. 200-01.
- 114 Richard Allison, "Crisis in the Jails: Overcrowding is Now A National Epidemic," *Corrections Magazine*, April 1982, p. 28.
- 115 Ronald D. White, "Montgomery Moves to Ease Jail Overcrowding," *The Washington Post*, 19 February 1982, p. B5.
- 116 U.S. Department of Justice, National Institute of Justice, *American Prisons and Jails*, Vol. III, pp. 39-85.
- 117 The NJL definition of measured capacity provides at least 60 square feet per unit of capacity for any room or cell. Because cells are defined as units less than 120 square feet, the measured capacity figures do not necessarily represent units of capacity that would consistently meet proposed minimum standards of 60 square feet per space. *Ibid.*, p. 49.
- 118 *Ibid.*, p. 70.
- 119 *Ibid.*, p. 76.
- 120 *Ibid.*, p. 78.
- 121 Allinson, "Crisis In the Jails," Subtitle, pp. 18-19.
- 122 Bureau of Justice Statistics, "Jail Inmates 1982," p. 2.
- 123 *Ibid.*, p. 3.
- 124 *Ibid.*, pp. 2-3.
- 125 *Ibid.*, p. 4.
- 126 NSA, *The State of Our Nation's Jails*, p. 231.
- 127 Unless otherwise noted, the discussion of costs is based on National Institute of Justice, *American Prisons and Jails*, vol. III, 113-40.
- 128 The National Moratorium on Prison Construction estimates that per bed furnishings and equipment may run as high as \$5,000, 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).
- 129 The National Institute of Justice used three methods to project rates of change between 1977 and 1982. The first was simply to extend fiscal year 1977 totals to 1982. That method yielded an average annual change of 14.5%. A second approach utilized recently observed trends in operating costs per inmate and yielded a low estimate of 11.5% and a high estimate of 14.5%. A third approach employed a regression equation estimated from expenditure and inmate data for the 50 states for 1972 to 1976, as well as from data on the change in total personal income in each state over that period. It produced a low estimate of 10.6% and a high of 11.6%. National Institute of Justice, *Conditions and Costs of Confinement*, pp. 131-33.
- 130 Alan Breed, Director of the National Institute of Corrections quoted in "Don't Blame the Sheriff for Crowded Jails," *County News*, 8 November 1982, p. 1.
- 131 Mark Pogrebin and Dail A. Neugarten, "Jails and Resources Scarcity," *Policy Perspectives*, 1 (1982): 436.
- 132 Miller, *Jail Management*, p. 19.
- 133 "Election Results: Most Construction Bonds Win," *Jericho 30* (Winter 1982-83): 4, 8.
- 134 *Toledo Blade* editorial, June 26 1974, cited in James M. Holzemer, "Federal Court Intervention Into Lucas County Corrections Center," *County News*, September-October 1982, p. 14. (emphasis added)
- 135 Maurice Carroll, "As Board Meets, Thousands Protest Jail Plan," *The New York Times*, 8 November 1982, p. A1.
- 136 The National Institute of Justice study was completed under a contract awarded to Abt Associates, Inc.
- 137 National Institute of Justice, *American Prisons and Jails*, vol. I, pp. 119-20.
- 138 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.
- 139 Sherman and Hawkins, *Imprisonment In America*, p. 130.
- 140 Miller, *Jail Management*, p. 126.

STATISTICAL APPENDIX

Table A
**INMATES OF LOCAL JAILS,
 BY SELECTED SOCIODEMOGRAPHIC
 CHARACTERISTICS**

Characteristic	All Races			White			Black			All Other Races		
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
Total	158,394	148,839	9,555	89,418	34,752	4,666	65,104	60,474	4,630	3,873	3,614	259
Age												
Under 30	110,166	103,204	6,962	60,581	57,322	3,259	46,788	43,291	3,497	2,796	2,591	205
Under 20	24,860	23,491	1,369	14,742	13,995	747	9,533	8,954	579	585	542	43
20-24	52,277	49,087	3,190	29,934	28,429	1,505	21,040	19,479	1,561	1,303	1,180	123
25-29	33,029	30,626	2,403	15,906	14,899	1,007	16,215	14,858	1,357	908	869	39
30 and over	48,228	45,635	2,593	28,836	27,430	1,407	18,316	17,183	1,133	1,076	1,023	54
30-34	18,827	17,665	1,162	10,503	9,934	569	7,814	7,259	555	510	472	38
35-54	25,941	24,636	1,305	15,856	15,098	758	9,518	8,987	532	566	551	16
55 and over	3,460	3,334	126	2,477	2,397	80	984	937	46	0	0	0
Median age	25.31	25.30	25.45	25.01	24.99	25.40	25.61	25.61	25.64	25.26	25.49	23.49
Marital Status												
Married	33,648	31,802	1,846	20,751	19,568	1,183	11,867	11,267	599	1,030	966	63
Separated or divorced	36,913	34,065	2,848	24,405	22,805	1,600	11,385	10,201	1,184	1,124	1,059	65
Widowed	2,647	2,245	403	1,073	867	207	1,563	1,378	185	11	0	11
Never married	85,128	80,686	4,442	43,178	41,512	1,666	40,242	37,585	2,657	1,708	1,589	119
Not reported	58	42	16	10	0	10	48	42	6	0	0	0
Dependents at time of admission												
With dependents	68,602	64,099	4,503	36,644	34,941	1,703	30,194	27,516	2,678	1,764	1,642	122
Median number	2.5	2.6	2.2	2.5	2.5	2.0	2.6	2.7	2.3	2.4	2.4	2.4
Mean number	2.4	2.5	2.1	2.4	2.4	1.9	2.5	2.6	2.2	2.1	2.1	2.1
Without dependents	88,441	83,522	4,918	52,094	49,189	2,904	34,290	32,403	1,887	2,057	1,930	127
Not reported	1,351	1,218	133	680	621	58	619	555	65	52	42	10
Highest grade of school completed												
0-8	29,987	28,782	1,205	19,375	18,719	656	9,878	9,366	511	734	696	38
9-11	66,278	61,926	4,352	33,709	31,793	1,917	31,045	28,722	2,323	1,524	1,412	113
12	46,738	43,925	2,813	27,531	26,012	1,519	17,887	16,653	1,234	1,320	1,260	60
13 or more	15,205	14,047	1,158	8,632	8,069	563	6,278	5,732	546	295	246	48
Not reported	187	159	27	170	159	11	16	0	16	0	0	0
Median grade	10.2	10.2	10.5	10.2	10.2	10.6	10.2	10.2	10.3	10.4	10.4	10.4
Military service												
No service	113,486	109,044	9,442	62,716	58,136	4,580	52,942	48,339	4,603	2,828	2,569	259
Service	39,861	39,753	108	26,696	26,616	80	12,120	12,092	27	1,045	1,045	0
Not reported	48	42	5	5	0	5	42	42	0	0	0	0

NOTE: Detail may not add to total shown because of rounding that takes place in the estimation procedure. Estimates of less than 300 on all inmates (and male inmates) and of less than 100 on female inmates are based on too few sample cases to be statistically reliable.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates: Sociodemographic Findings From the 1978 Survey of Inmates of Local Jails* (Washington, DC: U.S. Government Printing Office, October 1980), p. 12.

Table B

INMATES OF LOCAL JAILS, BY DETENTION STATUS, RACE AND SEX

Detention Status	All Races			White			Black			All Other Races		
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
Total	158,394	148,839	9,555	89,418	84,752	4,666	65,104	60,474	4,630	3,873	3,614	259
Unconvicted	66,936	62,863	4,074	36,677	34,642	2,035	28,799	26,865	1,934	1,460	1,355	105
Not yet arraigned	16,750	15,412	1,338	10,441	9,721	720	5,943	5,380	563	366	311	55
Arraigned and awaiting or on trial	50,103	47,367	2,736	26,236	24,921	1,315	22,773	21,401	1,371	1,094	1,045	50
Arraignment status not reported	83	83	0	0	0	0	83	83	0	0	0	0
Convicted	91,411	85,935	5,476	52,698	50,068	2,631	36,300	33,609	2,691	2,412	2,259	154
Awaiting sentence	12,359	11,560	798	6,998	6,618	380	5,057	4,653	403	304	289	15
Sentenced	79,052	74,374	4,678	45,701	43,449	2,251	31,243	28,955	2,288	2,108	1,970	139
To local facility	57,306	53,647	3,659	34,321	32,547	1,774	21,264	19,508	1,756	1,721	1,593	128
To nonlocal facility	11,542	10,874	668	6,020	5,726	293	5,389	5,024	365	134	123	10
Facility not reported	10,204	9,854	351	5,360	5,176	184	4,591	4,424	167	254	254	0
Not reported	47	42	5	42	42	0	5	0	5	0	0	0

NOTE: Detail may not add to total shown because of rounding that takes place in the estimation procedure. Estimates of less than 300 on all inmates (and male inmates) and of less than 100 on female inmates are based on too few sample cases to be statistically reliable.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates: Sociodemographic Findings From the 1978 Survey of Inmates of Local Jails* (Washington, DC: U.S. Government Printing Office, October 1980), p. 13.

Table C
INMATES OF LOCAL JAILS, BY DETENTION STATUS, SEX AND HISPANIC ORIGIN

Detention status	Both sexes			Male			Female		
	Total	Hispanic	Non-Hispanic	Total	Hispanic	Non-Hispanic	Total	Hispanic	Non-Hispanic
Total	158,394	16,349	142,045	148,839	15,667	133,172	9,555	682	8,873
Unconvicted	66,936	7,042	59,895	62,863	6,767	56,095	4,074	275	3,799
Not yet arraigned	16,750	1,616	15,133	15,412	1,565	13,847	1,338	51	1,286
Arraigned and awaiting or on trial	50,103	5,425	44,678	47,367	5,202	42,165	2,736	223	2,513
Arrest status not reported	83	0	83	83	0	83	0	0	0
Convicted	91,411	9,266	82,145	85,935	8,858	77,077	5,476	407	5,069
Awaiting sentence	12,359	1,158	11,201	11,560	1,097	10,464	798	61	737
Sentenced	79,052	8,108	70,944	74,374	7,762	66,613	4,678	346	4,331
To local facility	57,306	6,110	51,196	53,647	5,845	47,802	3,659	265	3,394
To nonlocal facility	11,542	1,099	10,443	10,874	1,032	9,842	668	67	602
Facility not reported	10,204	900	9,304	9,854	885	8,969	351	15	336
Not reported	47	42	5	42	42	0	5	0	5

NOTE: Detail may not add to total shown because of rounding that takes place in the estimation procedure. Estimates of less than 300 on all inmates (and male inmates) and of less than 100 on female inmates are based on too few sample cases to be statistically reliable.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates: Sociodemographic Findings From the 1978 Survey of Inmates of Local Jails* (Washington, DC: U.S. Government Printing Office, October 1980), p. 13.

Table D

INMATES OF LOCAL JAILS, BY SELECTED PREARREST EMPLOYMENT AND INCOME CHARACTERISTICS, RACE AND SEX

Characteristic	All Races			White			Black			All Other Races		
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
Total	158,394	148,839	9,555	89,418	84,752	4,666	65,104	60,474	4,630	3,873	3,614	259
Employment status												
Working	89,526	86,409	3,117	51,193	49,467	1,726	36,195	34,893	1,303	2,138	2,050	88
Full-time	70,574	68,075	2,499	42,022	40,546	1,476	26,920	25,951	969	1,632	1,578	54
Part-time	18,953	18,335	618	9,171	8,921	250	9,275	8,941	334	506	472	33
Not working	68,101	61,770	6,331	37,858	34,961	2,897	28,555	25,287	3,268	1,688	1,522	166
Looking for work	42,426	39,468	2,957	22,379	21,152	1,227	19,123	17,479	1,644	924	837	87
Not looking for work	25,461	22,093	3,368	15,394	13,725	1,670	9,303	7,684	1,619	764	684	80
Not reported	214	209	5	84	84	0	129	124	5	0	0	0
Not reported	767	660	107	366	324	43	354	294	60	47	42	5
Annual income												
With income	139,789	131,689	8,099	80,004	76,040	3,964	56,495	52,566	3,931	3,290	3,084	206
Less than \$3,000	61,594	56,869	4,725	32,216	30,018	2,198	27,994	25,578	2,417	1,384	1,273	110
Less than \$1,000	29,153	26,682	2,471	15,688	14,458	1,230	12,927	11,737	1,191	538	487	51
\$1,000-\$1,999	15,306	14,207	1,099	7,651	7,215	436	7,249	6,629	620	406	363	42
\$2,000-\$2,999	17,135	15,980	1,155	8,877	8,345	532	7,818	7,212	606	440	423	17
\$3,000-\$9,999	56,802	54,076	2,725	33,412	32,010	1,402	22,137	20,898	1,239	1,253	1,169	85
\$3,000-\$5,999	34,870	32,804	2,065	19,726	18,636	1,090	14,319	13,408	911	825	761	65
\$6,000-\$9,999	21,932	21,272	660	13,686	13,374	311	7,818	7,489	328	428	408	20
\$10,000 or more	21,393	20,744	649	14,376	14,012	364	6,364	6,090	275	653	642	11
Without income	10,659	9,807	852	5,796	5,357	439	4,512	4,125	387	351	325	26
Not reported	7,947	7,343	604	3,618	3,355	263	4,097	3,784	313	232	204	27
Median income	\$3,714	\$3,821	\$2,416	\$4,184	\$4,288	\$2,594	\$2,986	\$3,158	\$2,254	\$3,944	\$4,004	\$2,588
Main source of income												
Wages and salaries	107,845	104,448	3,397	63,851	61,976	1,875	41,589	40,157	1,432	2,404	2,315	89
Transfer payments¹	18,966	16,100	2,866	9,198	8,203	995	9,356	7,571	1,785	412	326	86
No independent income²	22,380	20,030	2,350	11,285	9,954	1,332	10,336	9,382	954	759	695	64
Illegal income	5,814	5,229	585	3,352	3,061	292	2,342	2,054	288	119	114	5
Other	1,826	1,660	167	917	814	103	783	724	59	127	122	5
Not reported	1,564	1,373	191	814	746	69	697	585	112	52	42	10

NOTE: Detail may not add to total shown because of rounding that takes place in the estimation procedure. Estimates of less than 300 on all inmates (and male inmates) and of less than 100 on female inmates are based on too few sample cases to be statistically reliable.

¹Social security, unemployment benefits, education grants and welfare.

²Includes borrowing from, and support by family or friends.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates: Sociodemographic Findings From the 1978 Survey of Inmates of Local Jails* (Washington, DC: U.S. Government Printing Office, October 1980), p. 14.

Table E

**INMATES OF LOCAL JAILS, BY PREARREST AND ANNUAL INCOME,
MAIN SOURCE OF INCOME AND SEX**

Prearrest annual income	Total	Wages and Salaries	Transfer Payments ¹	No Independent Income ²	Illegal Income	Other	Not Reported
Total	158,394	107,845	18,966	22,380	5,814	1,826	1,565
With income	139,789	103,810	18,261	10,349	5,497	1,658	214
Less than \$3,000	61,594	37,087	12,157	9,100	2,305	791	153
Less than \$1,000	29,153	15,433	5,606	6,122	1,301	587	105
\$1,000-\$1,999	15,306	10,077	2,809	1,755	649	17	0
\$2,000-\$2,999	17,135	11,577	3,742	1,224	356	188	48
\$3,000-\$9,999	56,802	48,135	5,731	1,028	1,496	395	16
\$3,000-\$5,999	34,870	28,322	4,641	729	819	349	10
\$6,000-\$9,999	21,932	19,813	1,091	299	677	47	5
\$10,000 or more	21,393	18,587	372	221	1,696	471	46
Without income	10,659	0	0	10,659	0	0	0
Not reported	7,947	4,035	705	1,372	317	168	1,350
Median income	\$3,714	\$4,569	\$2,190	\$844	\$4,623	\$3,324	\$2,043
Male	148,839	104,448	16,100	20,030	5,229	1,660	1,373
With income	131,689	100,556	15,522	8,954	4,966	1,524	166
Less than \$3,000	56,869	35,646	10,340	7,884	2,144	730	126
Less than \$1,000	26,682	14,804	4,837	5,205	1,189	565	84
\$1,000-\$1,999	14,207	9,624	2,354	1,602	627	0	0
\$2,000-\$2,999	15,980	11,219	3,149	1,078	328	165	42
\$3,000-\$9,999	54,076	46,643	4,844	861	1,366	361	0
\$3,000-\$5,999	32,804	27,320	3,819	585	760	321	0
\$6,000-\$9,999	21,272	19,324	1,025	276	606	41	0
\$10,000 or more	20,744	18,267	338	209	1,456	433	41
Without income	9,807	0	0	9,807	0	0	0
Not reported	7,343	3,892	578	1,269	263	136	1,207
Median income	\$3,821	\$4,606	\$2,180	\$859	\$4,339	\$3,300	\$993
Female	9,555	3,397	2,866	2,350	585	167	191
With income	8,099	3,254	2,739	1,395	530	135	48
Less than \$3,000	4,725	1,441	1,818	1,216	161	62	27
Less than \$1,000	2,471	629	769	917	112	22	21
\$1,000-\$1,999	1,099	454	455	152	21	17	0
\$2,000-\$2,999	1,155	359	594	146	28	23	6
\$3,000-\$9,999	2,725	1,492	887	167	130	34	16
\$3,000-\$5,999	2,065	1,002	822	144	59	28	10
\$6,000-\$9,999	660	490	66	22	71	6	5
\$10,000 or more	649	320	34	12	239	39	5
Without income	852	0	0	852	0	0	0
Not reported	604	143	127	103	55	32	143
Median income	\$2,416	\$3,554	\$2,244	\$760	\$3,530	\$3,607	\$2,452

NOTE: Detail may not add to total shown because of rounding that takes place in the estimation procedure. Estimates of less than 300 on all inmates (and male inmates) and of less than 100 on female inmates are based on too few sample cases to be statistically reliable.

¹Social Security, unemployment benefits, education grants and welfare.

²Includes borrowing from, and support by family or friends.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates: Sociodemographic Findings From the 1978 Survey of Inmates of Local Jails* (Washington, DC: U.S. Government Printing Office, October 1980), p. 15.

INMATES OF LOCAL JAILS, BY LIFETIME DRUG EXPERIENCE, RACE AND SEX

Type and frequency of drug	All Races			White			Black			All Other Races		
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
Total	158,394	148,839	9,555	89,418	84,752	4,666	65,104	60,474	4,630	3,873	3,614	259
Never used	48,486	45,274	3,213	26,186	24,690	1,496	21,330	19,684	1,646	970	899	71
Used drugs	108,124	101,992	6,132	62,442	59,362	3,080	42,831	39,957	2,875	2,850	2,673	178
Daily	63,174	59,013	4,161	38,953	36,797	2,155	22,826	20,909	1,917	1,397	1,307	90
Weekly	12,256	11,851	405	6,086	5,941	146	5,987	5,744	243	178	161	17
Less than weekly ¹	32,694	31,128	1,566	17,403	16,624	779	14,018	13,304	715	1,275	1,205	71
Heroin	41,260	37,905	3,355	22,888	21,372	1,516	17,640	15,889	1,751	732	644	88
Daily	23,223	20,805	2,418	12,276	11,231	1,045	10,576	9,255	1,321	371	320	51
Weekly	2,592	2,446	146	1,364	1,318	46	1,222	1,127	95	6	0	5
Less than weekly ¹	15,445	14,654	791	9,248	8,823	425	5,842	5,507	335	355	324	32
Methadone	11,369	10,547	822	7,471	6,951	520	3,583	3,307	276	315	289	26
Daily	1,172	1,034	138	588	503	85	568	520	48	16	11	5
Weekly	1,607	1,512	95	1,174	1,112	62	433	400	33	0	0	0
Less than weekly ¹	8,590	8,001	589	5,709	5,336	373	2,582	2,387	195	299	278	21
Cocaine	45,970	43,164	2,805	28,656	27,188	1,468	16,172	14,908	1,263	1,142	1,067	74
Daily	8,847	8,348	499	4,939	4,679	261	3,699	3,460	238	209	209	0
Weekly	4,542	4,300	242	2,955	2,849	105	1,449	1,329	120	139	121	17
Less than weekly ¹	32,581	30,516	2,064	20,762	19,660	1,102	11,024	10,119	905	794	737	57
Marijuana	104,405	98,809	5,596	60,964	58,034	2,930	40,722	38,224	2,498	2,719	2,552	167
Daily	50,576	48,296	2,280	31,940	30,663	1,277	17,457	16,498	959	1,179	1,135	44
Weekly	13,333	12,689	645	6,741	6,446	294	6,379	6,040	339	213	202	11
Less than weekly ¹	40,496	37,824	2,671	22,283	20,925	1,359	16,886	15,686	1,200	1,327	1,215	112
Amphetamines	48,698	46,086	2,612	35,626	33,891	1,735	11,551	10,769	782	1,521	1,425	96
Daily	16,021	14,915	1,106	12,919	12,108	811	2,731	2,472	258	372	336	37
Weekly	3,650	3,492	159	2,491	2,397	95	936	878	59	222	217	5
Less than weekly ¹	29,027	27,679	1,347	20,216	19,386	829	7,884	7,419	465	927	872	54
Barbiturates	46,917	44,246	2,671	33,259	31,534	1,725	12,042	11,187	855	1,615	1,524	90
Daily	12,385	11,454	931	9,635	8,981	654	2,405	2,160	245	345	314	31
Weekly	3,601	3,408	193	2,724	2,558	166	825	797	28	52	52	0
Less than weekly ¹	30,931	29,384	1,547	20,900	19,995	905	8,812	8,230	582	1,218	1,158	59
LSD ²	33,298	31,635	1,664	26,921	25,602	1,319	5,233	4,969	265	1,143	1,064	80
Daily	5,681	5,394	287	4,808	4,581	227	681	643	39	191	170	21
Weekly	3,039	2,970	69	2,701	2,642	59	292	286	5	47	42	5
Less than weekly	24,578	23,271	1,308	19,412	18,379	1,033	4,260	4,040	221	905	852	54
PCP ²	25,557	24,377	1,181	19,770	18,874	897	4,815	4,585	229	973	918	54
Daily	4,285	4,104	181	3,241	3,128	113	945	887	57	100	89	11
Weekly	1,290	1,253	36	1,135	1,099	36	154	155	0	0	0	0
Less than weekly	19,982	19,020	964	15,394	14,647	748	3,716	3,543	172	873	829	43
Other drugs ²	6,424	6,154	270	5,172	4,977	195	1,163	1,093	70	89	84	5
Daily	2,607	2,448	159	1,954	1,853	101	606	554	53	47	42	5
Weekly	450	419	30	365	334	31	85	84	0	0	0	0
Less than weekly	3,367	3,287	81	2,853	2,790	63	472	455	17	42	42	0
Not reported	1,784	1,574	210	789	699	90	942	833	110	52	42	10

NOTE: Detail may not add to total shown because of rounding that takes place in the estimation procedure. Estimates of less than 300 on all inmates (and male inmates) and of less than 100 on female inmates are based on too few sample cases to be statistically reliable.

¹Includes insignificant numbers of cases for which frequency of use was not reported.

²Total may include an unspecified number of cases for which frequency of use was not reported.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates: Sociodemographic Findings From the 1978 Survey of Inmates of Local Jails* (Washington, DC: U.S. Government Printing Office, October 1990), p. 16.

Table G
**CONVICTED INMATES OF LOCAL JAILS, BY WHETHER UNDER DRUG INFLUENCE
 AT TIME OF OFFENSE, TYPE OF DRUG, RACE AND SEX**

Drug influence and type	All Races			White			Black			All Other Races		
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
Total	91,411	85,935	5,476	52,698	50,068	2,631	36,300	33,609	2,691	2,412	2,259	154
Under influence	19,122	17,960	1,163	12,108	11,463	645	6,515	6,043	472	500	454	46
Heroin only	3,659	3,219	440	2,423	2,174	249	1,210	1,045	165	25	0	25
Marijuana only	5,963	5,855	109	3,374	3,310	63	2,334	2,294	39	256	250	6
Other drugs only	4,415	4,171	244	3,141	3,000	141	1,150	1,051	97	124	119	5
Multiple drugs	5,084	4,714	370	3,168	2,977	191	1,821	1,652	169	95	84	10
Heroin and other	2,081	1,844	237	841	722	119	1,230	1,122	108	10	0	10
All other combinations	3,002	2,870	133	2,327	2,255	72	591	531	61	84	84	0
Not under influence	68,979	65,030	3,949	38,749	36,988	1,761	28,406	26,320	2,086	1,824	1,721	102
Not reported	3,309	2,945	364	1,841	1,616	225	1,379	1,246	133	89	84	5

NOTE: Detail may not add to total shown because of rounding that takes place in the estimation procedure. Estimates of less than 300 on all inmates (and male inmates) and of less than 100 on female inmates are based on too few sample cases to be statistically reliable.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates: Sociodemographic Findings From the 1978 Survey of Inmates of Local Jails* (Washington, DC: U.S. Government Printing Office, October 1980), p. 17.

Table H

**CONVICTED INMATES OF LOCAL JAILS, BY WHETHER ALCOHOLIC BEVERAGE
CONSUMED JUST PRIOR TO OFFENSE, RACE AND SEX**

Alcohol consumed and amount	All Races			White			Black			All Other Races		
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
Total	91,411	85,935	5,476	52,698	50,068	2,631	36,300	33,609	2,691	2,412	2,259	154
Consumed¹												
Less than 4 ounces	42,224	41,023	1,201	28,124	27,459	665	12,440	11,973	467	1,660	1,591	69
4 ounces or more	14,793	14,247	544	7,989	7,791	197	6,412	6,086	326	392	371	21
Amount unknown	25,415	24,890	527	18,674	18,303	373	5,473	5,366	106	1,268	1,220	48
Not consumed	2,016	1,886	130	1,461	1,365	96	555	521	35	0	0	0
Not reported	46,775	42,664	4,111	23,148	21,263	1,886	22,923	20,777	2,146	704	624	79
	2,412	2,248	164	1,426	1,346	80	937	858	78	49	44	5

NOTE: Detail may not add to total shown because of rounding that takes place in the estimation procedure. Estimates of less than 300 on all inmates (and male inmates) and of less than 100 on female inmates are based on too few sample cases to be statistically reliable.

¹In ounces of ethanol (absolute alcohol).

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates: Sociodemographic Findings From the 1978 Survey of Inmates of Local Jails* (Washington, DC: U.S. Government Printing Office, October 1980), p. 17.

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 presumed innocent and 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. And, increasingly the term “community-based corrections” was employed as the catch-phrase describing them all.

COMMUNITY-BASED CORRECTIONS: DEFINITION AND CONCEPT

It is probably only a slight exaggeration to suggest that the term community-based corrections carries as many different meanings as there are people

defining it. Hence, in its narrowest dimension, community corrections is often used exclusively to define that handful of states discussed in the following chapter and known generically as "Community Corrections Act" states—those that have instituted devolutionary partnership plans with their local governments. On the other hand, using the broadest delineation possible, community-based corrections may be said to describe every possible mechanism in the local correctional milieu from drug rehabilitation to the jail cell. Yet, in order for community corrections to be a viable alternative to traditional jailing the use of the jail itself should be limited. And while statewide plans may have certain distinct advantages, singular community plans should not be dismissed. Community corrections, in other words, must be conceptually discrete.

For our purposes, a key distinction arises between the closed institution and the open community. Jails, prisons, and penitentiaries are institutionally based correctional modes while more social service oriented, less constricted programs located in the community constitute community corrections. A useful definition has been provided by Stephen E. Doeren and Mary J. Hageman:

[C]ommunity-based corrections may be defined as: any correctional-related activity aimed at directly assisting and supporting the efforts of offenders to establish meaningful ties to relationships with the community for the specific purpose of becoming reestablished and functional in legitimate roles in the community. Clearly and unmistakably, then, the goal of community-based corrections is the successful reintegration of the offender into the community.¹

Along the same lines, though positing a model that includes a more integrated community approach, E.K. Nelson, Robert Cushman, and Nora Harlow of the American Justice Institute contend that:

Community-based corrections implies not only that offenders are retained in their communities, but that other community agencies, citizens, elected officials and corrections staff all have some stake in the operation. . . . Some measures of the degree to which a corrections system is community-based include: the number and proportion of state institution commitments;

the extent to which the corrections organization relies on other community services; and the degree to which local groups and individuals are involved in the corrections process.²

In their study of *Imprisonment In America*, Michael Sherman and Gordon Hawkins set forth three paradigms of the criminal justice system: "crime control," "legalist," and "social service."³ Community-based corrections (of which the authors are quite critical) falls, for the most part, within the third model, social services:

Here the criminal justice system and the correctional subsystem are seen as providing services to people whose criminal behavior stems from some unmet personal need. In different historical periods, these needs have included the opportunity for religious reflection, psychological counseling, job training, education, and so on. But the basic notion is that social order can be enhanced by the provision of social services through the criminal justice system. The modern instruments range from police shelters to court employment projects to the assistance provided by officers of probation and parole. . . .⁴

A community-based corrections program, then, is distinct from traditional forms of local corrections in:

- being less reliant (though not necessarily unreliable) on incarceration;
- placing greater emphasis on support than on punishment;
- attempting to reintegrate offenders and arrestees into their own communities;
- stressing decentralization over centralization; and
- varying considerably in scope from community to community.

Before turning to a discussion of the discrete alternatives, it is worthwhile to consider briefly the latter two characteristics.

Decentralization and the Widening of Community Responsibility

According to E. Eugene Miller:

One of the few advantages that the jail has in the correctional milieu is that it is the quintessential local institution. . . . Therefore, jail managers have a tremendous potential asset that is denied virtually all other correctional administrators by virtue of location alone, i.e., the possibility of attaining significant credibility with the public and thereby maximizing the use of local resources.⁵

Thus, some penal reformers reason that if community identification is a highly prized value, decentralization of correctional programs should be no less desirable than decentralization of other, less "disagreeable" policies. Arrestees and returnees aside, community-based corrections ideally work to devolve responsibility from state (and occasionally federal) governments to local governments by keeping certain offenders on home turf who otherwise would be shipped off to (or retained longer in) state and federal facilities. Decentralization, then, increases the responsibility and workload of the local community.

In the case of corrections, the decentralization argument is often premised less on local responsibility per se than on longer-range local safety objectives. As one observer points out, 99% of the people who are sent away [to state and federal prisons] are going to come back. It's to the community's advantage to see to it that something positive comes out of the experience.⁶ Hence, the argument asserts that offenders generally have ties to given communities—communities apt to contain friends and family members—and are very likely to return to those communities after periods of institutionalization. An individual subject to the aberrant and sometimes unsavory atmosphere of jail or prison has a far higher probability than the average person of exhibiting irregular or even malevolent behavior on the outside. The community, therefore, has a self-preservationist interest in offering its own offenders humane services.

The Scope of Community-Based Corrections: From Single Programs To Integrated Systems

To the most impassioned advocate of community-based corrections, the concept, to maintain viability, must be all-inclusive. In other words, a single pre-

trial release program, in and of itself, is insufficient. Rather, such supporters contend that workable community-based corrections, at a minimum, must integrate the whole local criminal justice system; at a maximum, must marry criminal justice agencies to other local services agencies through a process of comprehensive planning.

Unfortunately, reality in this case seldom comports with the vision, for only an estimated 80 to 100 counties nationwide have "full-service," professional corrections agencies and only a few of those offer a complete network of correctional, social and training programs.⁷ Thus, practically speaking, and taking into account imposing fiscal and political constraints, community-based corrections may be viewed as constituting a wide and diverse continuum, encompassing those communities employing one or two alternatives to traditional incarceration and those that offer arrestees and convicted offenders alike a diverse yet coordinated set of programs and services.

PRETRIAL ALTERNATIVES TO PROSECUTION AND INCARCERATION

Pretrial Diversion

The Pretrial Services Resources Center defines pretrial diversion programs as those

in which defendant participation is voluntary, the diversion occurs prior to adjudication, various services are available to the defendant, and charges are dismissed (or the equivalent) if the defendant successfully completes the diversion process.⁸

More simply, the National Advisory Commission on Criminal Justice Standards and Goals defines diversion as the "halting or suspending before conviction of formal criminal proceedings against a person on condition or assumption that he will do something in return."⁹ Diversion, then, may be said to function as an *alternative to prosecution* rather than an *alternative to incarceration*. Nonetheless, it is relevant to this discussion because, in diverting individuals from the criminal justice system, it may in turn have an important residual effect—diverting some fraction of those individuals from a component of the system, jail.

As of 1981, 139 formal adult diversion programs had been identified nationwide. However, because diversionary procedures are often employed outside

Table II-1

**DESCRIPTIVE PROFILE OF PRETRIAL DIVERSION PROGRAMS
(1980 figures)**

**PERCENT OF PROGRAMS OPERATING UNDER STATUTORY AUTHORITY,
PROSECUTORIAL DISCRETION OR
OTHER LOCAL GOVERNMENT ADMINISTRATIVE DECISION:**

State statute	44.9%
State statute and court rule	2.4
Prosecutorial discretion	23.6
State statute and prosecutorial discretion	2.4
Local government administrative decision	9.4
TOTAL	82.7%

ORGANIZATIONAL PLACEMENT OF DIVERSION PROGRAMS

<u>Type of Organization</u>	<u>Percent of Program</u>
Prosecutor	33.8
Probation	14.2
Probation under courts	12.6
Courts	16.5
Other public agency	8.7
Private nonprofit	13.4
Other	.8
TOTAL	100.00

PERCENT OF PROGRAMS RECEIVING MAJORITY FUNDING FROM:

County government	37.9%
Municipal government	5.6
State government	14.5
LEAA	18.5
CETA	5.6

SELECTED SOURCES OF PRIMARY PROGRAM FUNDING: CURRENT VS. ORIGINAL

<u>Funding Source</u>	<u>Current</u>	<u>Original</u>	<u>Percent Change</u>
LEAA	18.5	64.9	-46.4%
CETA	5.6	5.4	+0.2
State government	14.5	6.3	+8.2
Municipal government	5.6	.9	+4.7

NUMBERS OF DEFENDENTS DIVERTED ANNUALLY

<u>Number Diverted</u>	<u>Percent of Programs</u>
100 or less	26.5
101 - 200	24.5
201 - 250	12.7
251 - 500	20.6
501 - 1000	8.8
More than 1000	6.9
Total	100.0

SOURCE: Donald E. Pryor, *Practices of Pretrial Diversion Programs: Review and Analysis of the Data, Alternatives—Series A* (Washington, DC: Pretrial Services Resource Center, 1982), pp. 14-24.

formal diversion programs, that number fails to represent the sum of all such activities.

The above caveat aside, diversionary programs tend to operate under state statutory authority; the largest percentage are run under the auspices of the prosecutor's office; county governments provide the major source of funding; budgets are relatively small; and over half the programs divert 200 or fewer defendants annually.¹⁰ (See *Table II-1*.)

CLIENT-ORIENTED DIVERSION

Originating in the 1960s, diversion programs were rooted in a social philosophy that espoused sympathy for those guilty and allegedly guilty of committing crimes. Such individuals, it was felt, were driven to crime through inadequate employment opportunities, substandard education and training, and/or some other environmental variable that resulted in deviant or asocial behavior. Therefore, it has been argued, if the environmental pattern could be positively interrupted the deviant behavior would likewise be checked. Out of this philosophy grew the client-oriented approach to diversion.

Two notable programs employing the client approach were Project Crossroads in Washington, DC, and the Manhattan Court Employment Project initiated by the Vera Institute of Justice. Through each program certain individuals have been able to delay prosecution by agreeing to receive therapeutic counseling and educational and vocational assistance—the goal being dismissal of charges upon a favorable evaluation of program participation.¹¹

Initial analyses of both programs¹² were favorable, "citing reductions in rearrest rates of 10-15%."¹³ However, subsequent assessments of the Manhattan Project showed little or no reduction in recidivism, while some analysts contend that even successful evaluations may

reflect either a deterrence effect of the program supervision or the success of program administrators in shielding participants from arrest or indictment. . . . In addition, [in crossroads] participants have had a lower rearrest rate only while actually in the . . . program; after leaving it, their rearrest rates have been the same as the controls.¹⁴

As an earlier portion of this volume suggested, the jail often serves as the "social agency" of last resort.

Hence, it is a place where drunks, drug users, the disturbed, and the retarded often wind up in the absence of more appropriate facilities. Those advocating the diversion of such individuals assert that their prosecution, conviction and incarceration is not only inhumane but inappropriately taxes the scarce resources of the criminal justice system.

Of the categories listed above, public inebriates come closest to being prototypical, for they combine the high visibility of chronic drug users (whether alcohol or narcotics) with the generally harmless, noncriminal nature of the mildly disturbed—in many cases, the persistently inebriated are mentally ill or retarded and vice versa.¹⁵ Moreover, despite the fact that public drunkenness has been decriminalized in 33 states as well as the District of Columbia, Puerto Rico, and the Virgin Islands, inebriates are still one of, if not the most "jailed" of all classifications—often jailed for disorderly conduct or for purposes of protective custody. Yet, according to one expert, many county governments may possess the answer to their problem:

In addition to its traditional criminal justice functions, county governments possess major public health/mental health and social service responsibilities and thus are in a position to reallocate resources and to design more humane and cost-effective approaches to the problem.¹⁶

Indeed, a number of jurisdictions have done exactly that.

Thus, the Division of Alcoholism in King County, WA, provides emergency van patrols staffed by medical technicians; an alcoholic screening unit; a 96-bed detoxification unit; an 84-bed extended care facility; a vocational resource center and five Community Alcohol Centers that function as outpatient and counseling clinics.¹⁷ Other jurisdictions, such as West Palm Beach, FL, have similarly comprehensive programs, while a number of local governments contract with private organizations like the Salvation Army.¹⁸

Beyond humanitarian concerns, two important reasons have been advanced for offering the public inebriate alternatives to regular arrest and jail. First, over the past few years, local governments have become increasingly liable for violations of civil rights. In the case of publicly drunken individuals, the potential for damages suits is heightened because such people are more likely to become seri-

ously ill or harm themselves while incarcerated,²⁰ are protected to a certain extent by several court cases finding that incarceration of chronic public drinkers constitutes cruel and unusual punishment,²¹ and are shielded by law in over 30 states from being convicted solely on the basis of their alcoholism.

Second, because they constitute such a large proportion of the jailed population, the costs of arresting, prosecuting and incarcerating public inebriates can be astounding. For instance, the Los Angeles Superior Court found that in 1976 alone, Los Angeles spent \$7.4 million processing publicly drunken individuals through the criminal justice system, at a per person cost of \$232 for arresting, booking, arraigning and detaining.²² In 1981, in San Francisco, the cost for the same series of procedures averaged \$537.34.²³ Thus, bringing an alcoholic through the criminal justice system can be an expensive proposition.

Yet, just how much such costs are offset by diversion is subject to some dispute. Systems such as those in King County do not come cheap. Moreover, while it is likely that municipalities would realize immediate cost reductions due to "savings" in police and court hours and city lockup space, there remains the distinct possibility that counties, being major providers of social services, would actually have to spend more, or, at the very least, engage in quid pro quo shifting of costs from the criminal justice side of the ledger to the welfare side.

Nonetheless, there are several reasons to believe that in the long run the alcohol treatment center may be a relatively inexpensive local alternative to arrest

and jail. First, as mentioned above, cities and counties stand to save themselves the costs of potential litigation. And, even in the case of a suit, "treatment" provides a far better defense than "punishment." Second, recent findings suggest that full medical facilities are not usually necessary—90% of all public inebriates are able to "sleep it off." Hence, far less expensive "social settings" with some medical backup will generally suffice.²⁴ Finally, although short-run costs are likely to be higher and financial tradeoffs are certain to occur, some studies, such as one conducted in Minnesota, suggest that real savings can be realized. In that state, the local loss of over \$440,000 in criminal fines was more than offset by savings to the criminal justice system of between \$7 and \$8 million.²⁵

VICTIM-ORIENTED DIVERSION

If diversion programs were originally designed with the defendant in mind, the law and order movement of the 1970s caused policymakers to reassess their basic orientation. Thus, an increasingly popular condition of pretrial diversion calls for an alleged offender to perform some community service or victim restitution as part of his or her contract agreement. (See *Table II-2*.)

Clearly, in an era characterized by "get tough with criminals" sentiment such methods may become the real selling points of alternative programs which might otherwise be viewed as "coddling" wrongdoers. Yet, diversionary restitution and service programs may raise very grave due process questions, for they have the practical effect of punishing individuals who have not been found guilty of any crimes. Moreover, according to Elizabeth Gaynes of the Pretrial Services Resource Center, "it has not been demonstrated that the individuals targeted for such programs would otherwise have been sentenced to jail."²⁶ Rather, people so assigned tend to be those whose cases would have been dismissed or who would have been subjected to minor fines.²⁷

OTHER DIVERSIONARY TACTICS

Police Diversion

Although pretrial diversion is generally understood to mean any policy that keeps individuals out of the criminal justice system following arrest,²⁸ some communities have recently inaugurated "formal" prearrest diversion programs. In this case, the term "formal" is key, for informal, discretionary,

Table II-2

**PERCENT OF PROGRAMS REQUIRING
RESTITUTION AND/OR
COMMUNITY SERVICE AS
CONDITION OF PROGRAM ENTRY**

Restitution	37.3%
Restitution and/or community service	31.7
Community service	8
No such requirement	30.2

SOURCE: Donald E. Pryor, *Practices of Pretrial Diversion Programs: Review and Analysis of the Data, Alternatives—A Series* (Washington, DC: Pretrial Services Resource Center, 1982), p. 42.

often individual police policy has long worked as a safety valve to overcrowded jails and overtaxed court dockets.

A major area of formal police diversion practice is family crisis intervention. No doubt such intervention is the most long-lived (and one of the most dangerous) of all informal police diversionary tactics. Yet, legally sanctioned programs of this sort, such as the Family Intervention Unit of the New York Police Department, are relatively new. Thus, in the New York case, "[p]olice officers work in teams to calm family disputes without the use of violence or arrest and to identify cases in which referral to a community agency or other treatment is advisable."²⁹ According to the National Council on Crime and Delinquency, police departments in Oakland, Denver and Chicago have initiated similar policies.³⁰

Prearrest diversion programs also appear well suited to certain juveniles—particularly status offenders. In such cases, children are directed toward appropriate social service agencies rather than the criminal justice system. Examples include the Richmond, CA, Juvenile Diversion Program; the 601 Diversion Project in Santa Clara County, CA; and the Seattle Police Department's Social Agency Referral.³¹

Dispute Resolution

Finally, though seldom included in formal listings of diversion programs, dispute resolution or mediation has blossomed into

one of the country's newest court-reform movements. In 12 years, the use of mediation as an out-of-court method of resolving interpersonal disputes has grown from a single outpost in Philadelphia to nearly 200 programs nationwide holding as many as 200,000 hearings a year.³²

Dispute resolution, a voluntary procedure designed to keep minor controversies from becoming formal courtroom battles, generally manifests itself in one of three program forms:

- 1) programs positioned within the criminal justice system either as a part of the courts or a[s] wing[s] of [a] district attorney's or prosecutor's office (60%);
- 2) [programs run by] private nonprofit corporations [that] cultivate close ties with criminal justice referral sources for clients (30%); and

- 3) program[s that] discourage contact with the justice system (10%).³³

Endorsed by such strange bedfellows as Chief Justice Warren Burger and consumer advocate Ralph Nader, dispute resolution gained congressional sanction in 1980 through the *Dispute Resolution Act*, an American Bar Association (ABA) sponsored bill designed to provide "federal financial assistance to the states for the improvement of existing mechanisms, and the experimentation with new mechanisms, for the resolution of minor disputes. . . ." ³⁴ Originally authorized \$11 million, the act has never been funded.

Pretrial Release

Even more pertinent to the theme of this study, pretrial *release* may be defined in terms of any number of procedures specifically designed to keep individuals out of jail between the time of arrest and the time of trial (or in some instances, final case disposition). In that sense, pretrial release serves as a direct alternative to incarceration in jail as opposed to pretrial diversion which formally functions as an alternative to prosecution and only indirectly as an alternative to jail.

In two very important respects, locally-administered alternatives to regular incarceration are especially suited to individuals awaiting trial. First, by legal directive³⁵ and prevailing moral paragon, such people are presumed to be innocent. Ideally, unnecessary restraint before trial should be avoided. Yet, according to a recently completed survey of the nation's sheriffs, pretrial defendants make up as many as 61.1 % of the jail population.³⁶ Second, and particularly within the context of the community-based corrections model, those awaiting trial—far more than many of those convicted—are, by tradition, the responsibility of local government.

It is important to note that the term pretrial release may be used in two very different ways. In the first instance, it may be employed in a broadly generic sense. That is, release before trial encompasses all procedures *including traditional money bail* that keep individuals from spending time behind bars before they are tried and sentenced. Though some would disagree with our terminology, in this study, the phrase *pretrial release* will be used generically.

Second, and perhaps more in vogue currently, pretrial release is often employed when describing programs and procedures *excluding traditional money bail* aimed at releasing defendants before

trial. Indeed, the so-called pretrial release movement grew out of the bail reform movement of the 1960s. Nonetheless, for our purposes, such nontraditional programs and practices—though quite definitely falling under the generic, pretrial release—will be classified as *alternatives to traditional bail*.

BAIL: 1300 YEARS OF PRETRIAL RELEASE

With the possible exception of imposing the death penalty for the commission of heinous crimes (heinous crimes at one time ran the gamut from murder to stubbornness), pretrial release in the form of bail is probably the most ancient of Anglo-American criminal justice traditions. Introduced through the laws of Kings Hlothære and Eadric in the latter part of the Seventh Century, the earliest Anglo-Saxon system of bail demanded that “the accused must give ‘bohr’ (surety) and make any retribution prescribed by the judicial officer.” This early English method of pretrial release was not the result of a sudden and uncharacteristic attack of enlightened thinking on the parts of our otherwise fractious forebears. Quite simply, these warrior kings recognized an historically persistent truth: that “[i]mprisonment was costly and troublesome. . . .”³⁸ Moreover, to be entirely fair, while an analysis of early bail or surety laws reveals a surprising liberality, this was certainly liberality mitigated by the fact that “all the really dangerous and obviously guilty defendants [had] been hanged first.”³⁹ Nonetheless, if one’s chicanery did not rather swiftly land his neck in the noose, he probably would be released pending trial.

The more direct antecedents of the American practice of bail were a series of 17th Century reforms beginning with the Petition of Rights and culminating in the Bill of Rights of 1689. In fact, the relevant language of the Bill of Rights reads: “excessive bail *ought not* to be required.” That language leads, of course, to our own Constitution and the Eighth Amendment’s declaration that “Excessive bail *shall not* be required. . . .”

Through the Eighth Amendment, the English common law regarding bail took a strong foothold in the United States. Thus, a distinctive characteristic of the system was its prohibition against contracts to indemnify. In other words, although any defendant failing to appear at trial would be liable for that act in court, he was not liable to his surety (the person putting up the bail or otherwise assuring the defendant’s appearance) for the forfeited bail. This was so, according to an 1885 Queen’s Bench decision be-

cause, “if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal’s conduct, the surety has no interest in taking care that the condition of recognizance is performed.”⁴⁰ The surety, then, was more akin to a personal jailer than to a bail bondsman.

By 1912, however, the American contribution to the development of bail had been legally sanctioned. In *Leary v. United States*,⁴¹ the Supreme Court gave its approval to the contract system of bail—the financial cornerstone of the bail bond business—by noting that

The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for \$40,000, that sum was the measure of interest on anybody’s part, and it did not matter to the government what person ultimately felt the loss so long as it had the obligation it was content to take.⁴²

Today, federal and most state laws allow for the contract system of bail approved in 1912. Hence, a typical bail bond transaction involves the private bail bondsman exacting a nonrefundable fee (or premium) of 10% of the defendant’s bail. Thereafter, at least in theory, the bondsman is responsible for assuring the defendant’s appearance at trial. In the absence of such appearance, a forfeiture of the entire bond is ordered and collected from the private bonding agency. Only one state, Kentucky, has gone so far as to eliminate completely bonding for profit—the so-called surety option of bail—by making it a criminal offense. However, Illinois and Oregon have also, as a matter of practice, eliminated bail bondsmen and an additional 21 states have some form of public percentage bail on their books, designed to improve the system of release and enhance release opportunities for the poor.⁴³ In addition, a number of local jurisdictions have experimented with alternatives to the traditional bail system.

Bail: Constitutional Issues and Dilemmas

As noted previously, the first directive contained in the Eighth Amendment to the Constitution reads: “Excessive bail shall not be required. . . .” Taken at face value, the public protection afforded by that phrase is limited to circumscribing the judiciary’s power to set unreasonably exorbitant levels of bail.

It does not speak overtly to the questions whether bail must be offered to all individuals or whether a legislature may deny bail to whole classes of alleged criminal offenders. According to one observer:

The eighth amendment's interdiction against excessive bail is an anomaly among the liberties guaranteed by the Bill of Rights. History clearly indicates that the constitutional palladium under study does no more than prohibit the setting of excessive bail in cases prescribed bailable. The clause is therefore, not self-executing. It requires the legislation of Congress creating the right to bail to lend it sustenance. The extension of this interpretation results in the conclusion that the constitutional right is merely auxiliary to statutes which grant a qualified right to bail.⁴⁴

Interestingly, the *Judiciary Act of 1789*—which was wending its way through Congress coterminously with debate on the *Bill of Rights*—went so far as to guarantee a right to bail in all noncapital cases.⁴⁵ Moreover, almost no debate ensued on the issue. According to one observer: “[There is] nothing to indicate that anyone in Congress recognized the anomaly of advancing the basic right governing pretrial practice in the form of a statute while enshrining the subsidiary protection ensuring fair implementation of the right in the Constitution itself.”⁴⁶ That paradox, however, seems not to have unduly influenced the Supreme Court for in 1952 it ruled that

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our *Bill of Rights*, nothing was said to indicate any different concept.⁴⁷

Thus, notwithstanding a few lower court decisions⁴⁸ and some continuing though muted debate, most scholars agree that based solely upon a reading of the excessive bail clause, there is no absolute right to bail imbedded within the U.S. Constitution. However,

[t]he problem of such a patently incomplete

constitutional protection on the subject of bail led most states . . . to supplement the excessive bail clause by a clause granting the right to bail in all noncapital cases.⁴⁹

Perhaps the most compelling questions raised regarding the Constitutional legitimacy of the bail system are those revolving around wealth. Indeed, whether viewing it from a Constitutional perspective or simply in the light of cold hard reality, the payment of money for the purpose of obtaining release is impossible for many accused indigents. And that fact, in turn, raises the question whether such individuals' due process rights and guarantees to equal protection are being properly safeguarded.

A defendant who is jailed prior to trial is far more restricted in his or her access to legal counsel than one who is free on bail. While “balancing of risks is typical of due process adjudications,”⁵⁰ differentiation on the basis of wealth, if typical, is certainly suspect on equal protection grounds. Moreover, there is strong evidence to suggest that juries and judges are much more likely to sentence pretrial detainees to prison or jail than those released before trial. Thus, one study found that:

Among those with no record, 59% of the jailed defendants received prison sentences, compared to 10% of the bailed defendants. Among those with prior records, 81% of the jailed defendants were sentenced to prison, compared to 36% of the bail defendants. Thus, jailed defendants were 49 and 45% more likely to be sentenced to prison. These percentages are no smaller than the original difference of 47%, which existed before the factor of previous record was held constant.⁵¹

Those rather dismal statistics may be explained in part by inadequate counsel, but also partially by the taint of jail (he's already a criminal) which a pretrial detainee brings to the courtroom. It is curious that the Supreme Court, while going to great lengths to correct the inequities found in the system of legal counsel as it applied to indigent defendants, has never acted directly on the question of bail as it applies to the same class of defendants. Justice Douglas once held that

Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our Con-

stitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the court.⁵³

Yet, no definite Constitutional ruling on the subject of bail and its relationship to relative wealth has been forthcoming.

PRETRIAL ALTERNATIVES TO TRADITIONAL BAIL

The modern version of pretrial release services (what we are terming pretrial alternatives to traditional bail) was initiated in reaction to the real and perceived failings of the traditional money bail system. Money bail has long been considered by many to be:

- 1) inequitable, favoring the relatively wealthy over the relatively poor;
- 2) ineffective and inefficient;⁵⁴ and
- 3) costly, in the sense that a great many individuals are needlessly detained at considerable expense.⁵⁵

Such indictments against traditional bail practices fostered a move toward substitute procedures, the underlying assumptions of which are reflected in some of the standards adopted by the board of directors of the National Association of Pretrial Services Agencies:

1. A presumption in favor of pretrial release on a simple promise to appear should apply to all persons arrested and charged with a crime.
2. Release should be accomplished at the earliest time and by the least restrictive procedure possible.
3. There should be a presumption that an accused should be released on personal recognizance at initial appearance.
4. The presumption of release on personal recognizance must be overcome in order to impose restrictive conditions.
5. The use of financial conditions of release should be eliminated.⁵⁶

The genesis of the pretrial release movement and

model for subsequent projects may be traced to the Manhattan Bail Project begun in 1961. Funded by the Vera Institute of Justice, the Manhattan experiment was premised upon the belief that "certain persons with strong community ties could safely be released on their own recognizance, and that if an investigatory procedure verified this background and supplied this information to the courts, individuals could be released without financial security."⁵⁷

Working from that basis, the experimenters compiled a point system for the purpose of weighing four risk factors: residential stability, employment history, family contacts in the city and prior criminal record.⁵⁸ Vera personnel then interviewed arrested individuals and assigned points. Those obtaining favorable ratings were thereafter recommended for release on their own recognizance. The actual decision to so release rested with a judge.

In theory, the benefits of such a system would be tremendous, including an end to income-based inequalities in the pretrial process, enhanced public safety (making it more difficult for those judged dangerous to obtain release), and potential cost savings through diminished jail populations.⁵⁹ Moreover, initial assessments of the program showed that while the rate of bail bond forfeiture was 3%, only 1.4% of the experimental Vera defendants failed to appear at trial.⁶⁰ That evaluation, unfortunately, was followed by one several years later in which forfeitures under the traditional bail bond system had risen only slightly to 4.4% while forfeitures among those released on recognizance through the Vera program had skyrocketed to 15.4%.⁶¹ However, an Iowa study duplicating the Manhattan Project found "bail jumping" of only 1.5% among those released on recognizance⁶² and similar, though not identical, projects in San Francisco, Philadelphia, Miami, Tulsa, Baltimore, and Kalamazoo County, MI, also tended to exhibit fairly low rates of forfeiture among defendants released without posting cash bail.⁶³ In addition, a recent compilation of research findings has concluded that

1. The vast majority of defendants who are released awaiting disposition of their cases return for all court appearances and remain arrest-free while on release.
2. Release on recognizance and other non-financial forms of release are as effective as, and in some jurisdictions better than, financial methods of release in as-

sure appearance in court and minimizing pretrial rearrests.⁶⁴

According to the Pretrial Services Resource Center, in 1981, 135 formal alternative release programs were in operation nationwide.⁶⁵ That figure, however, "underrepresents the scope of pretrial release activity in the country,"⁶⁶ since many of the alternative procedures are utilized outside of formal program settings. Thus, for instance, the alternative mechanism known as release on recognizance may simply be one of many options employed by a judge in his or her regular courtroom milieu.

In general, pretrial release programs, like jails, are the financial dependents of county government, with 57.1% of all such programs receiving the majority of their funding from county revenues. That percentage represents a fairly dramatic change over figures from 1975 when Law Enforcement Assistance Administration (LEAA) and other federal funds accounted for fully 40.3% of primary program funding. At the same time, county governments were primarily responsible for fewer than 35% of the programs. In stark contrast, in 1980, the federal government bore prime financial responsibility for only 15.1% of the programs, leaving county government—and to a much lesser extent, state government—to pick up the slack.⁶⁷

Organizationally, alternative release programs tend to come under the auspices of local or state court systems—either a court directly or a court-accountable probation department. Moreover, trends favor court control. Over the eight-year period from 1972 to 1980 the number of court-run programs grew while those administered by autonomous probation departments and nonprofit agencies declined.⁶⁸

By and large, alternative pretrial release programs are small in terms of budgets, personnel, and clients served. Thus, more than half operate on annual budgets of \$100,000 or less; the largest percentage (31.9%) employ only five to ten full-time staff; and the majority (56%) interview 2,500 or fewer defendants each year.⁶⁹ (For selected highlights see *Table II-3*.)

Not surprisingly, the components of the procedures involved in such programs vary widely. And as mentioned previously, the formal program arrangements do not exhaust the universe of alternative pretrial release mechanisms. Indeed, both within and without these programs certain types of pretrial release procedures may be identified.

Citations and Summonses

The early success of the Manhattan Bail Project inspired the Vera Institute to explore even speedier pretrial release mechanisms and, thus, in 1964, was born the Manhattan Summons Project. Employing substantially the same weighted criteria that it did in its bail experiment, the institute implemented a system of post-arrest release in which the police, rather than the courts, would be instrumental. Considered a success in a single test precinct, by 1967 the citation project was extended throughout New York City where, in its first four years of operation, an estimated \$6.7 million in police time was saved and a relatively low failure-to-appear rate of 5% maintained.

Though implemented in various permutations nationwide, there are basically three types of citation release:

- 1) *Field Release* in which a police officer releases the individual on the arrest site;
- 2) *Station House Release* where the arrestee is taken to the police station prior to release; and
- 3) *Post-Detention Release* in which the formal booking and screening process take place before the prisoner is set free on citation.⁷¹

In nearly every situation, the detained individual is set free only after signing a legal statement describing his or her alleged offense and indicating the date and time at which the individual must appear before the court.

According to a 1977 study by the American Justice Institute:

- More than three-fourths of the nation's large police departments now use citation release for misdemeanors and/or regulatory violations.
- Most departments using this release option are satisfied with it.
- Use of the option is growing quickly.
- Most departments estimate that the procedure saves them 40 to 60 minutes per arrest.
- Most departments report no serious failure to appear problems, but some are facing this problem.

- There is some use of citation release in more than 45 states.
- Four states require the use of citations to some extent under statute or court rules.

- There is a trend toward more state laws mandating citation release in certain cases.
- Five states permit the use of citations in some felony cases.⁷²

Table II-3

DESCRIPTIVE PROFILE OF PRETRIAL RELEASE PROGRAMS UTILIZING ALTERNATIVES TO TRADITIONAL MONEY BAIL

1) PERCENT OF PROGRAMS OPERATING UNDER STATUTORY OR COURT AUTHORITY:

State or federal statute	43.6%
Court rule	27.7
Court rule and statute	5.9

2) ORGANIZATIONAL PLACEMENT OF PROGRAMS

<u>Type of Organization</u>	<u>Percent of Programs</u>
Courts	35.3%
Probation department	14.3
Probation under courts	13.4
Other public agency	21.0
Private nonprofit	12.6
Other	3.4
TOTAL	100.0%

3) ORGANIZATIONAL PLACEMENT: 1972 AND 1980

<u>Type of Organization</u>	<u>Percent of Programs</u>		<u>Percent Change</u>
	<u>1972</u>	<u>1980</u>	
Courts	29.5	35.3	+5.8%
Probation	33.0	27.7	-5.3
Other public agency	15.9	21.0	+5.1
Private nonprofit	21.6	12.6	-9.0
Other	0.0	3.4	+3.4
TOTAL	100.0	100.0	

SOURCE: Donald E. Pryor, *Practices of Pretrial Release Programs: Review and Analysis of the Data, Alternatives—A Series* (Washington, DC: Pretrial Services Resource Center, 1982), pp. 11-22.

Release on Recognizance

Closely related to citation release is release on recognizance of the sort originated by the Manhattan Bail Project. Release on recognizance, however, differs from citation release in at least one essential

respect: it is a court-based rather than police-based process. Thus, the decision to release is made by a judge or, in some counties, by a person or agency to whom the court has delegated release authority.

In most states formal screening is not legally prescribed, but under some release on recognizance

Table II-3 (continued)

DESCRIPTIVE PROFILE OF PRETRIAL RELEASE PROGRAMS UTILIZING ALTERNATIVES TO TRADITIONAL MONEY BAIL

4) NUMBER OF DEFENDANTS INTERVIEWED ANNUALLY				
	<u>Number Interviewed</u>	<u>Percent of Programs</u>		
	500 or less	11.2%		
	501 - 1000	19.4		
	1001 - 2000	18.4		
	2001 - 2500	7.1		
	2501 - 5000	17.3		
	5001 - 10,000	13.3		
	More than 10,000	13.3		
	TOTAL	100.0		
5) BIRTHDATES OF PROGRAMS				
	<u>Year Program Began</u>	<u>Percent of Programs</u>		
	1970 or earlier	19.3%		
	1971-72	20.2		
	1973-74	21.9		
	1975-76	24.6		
	Since 1976	14.0		
	TOTAL	100.0		
6) PERCENT OF PROGRAMS RECEIVING MAJORITY FUNDING FROM:				
	County government	57.1%		
	Municipal government	7.5		
	Federal sources	16.8		
	State government	12.7		
	Other	3.4		
	No majority funding	2.5		
	TOTAL	100.0		
7) SELECTED SOURCES OF PRIMARY FUNDING: 1975 and 1980				
	<u>Funding Source</u>	<u>Percent of Programs</u>		<u>Percent Change</u>
		<u>1975</u>	<u>1980</u>	
	Federal government	40.3	15.1	- 25.2%
	County government	34.9	57.1	+ 22.2
	Municipal government	11.9	7.5	- 4.4
	State government	9.2	12.6	+ 3.4

programs individuals are evaluated either through a point system of the type used by the Vera Institute or through a more subjective interview process.⁷³ Eligible individuals may thereafter be released on the basis of a promise to return for court appearance, though in some cases a certain amount of supervision may accompany the release.

Percentage Bail

In 1964, Illinois became the first of 24 states to enact a system of percentage bail. The law authorizes the courts to:

- 1) make bail jumping a separate criminal offense;
- 2) make liberal use of release on recognizance or signed citation; and
- 3) allow defendants to be released from custody upon the "deposit with the clerk of the court . . . a sum of money equal to 10% of the bail which had been set by the court and the clerk of the court . . . and retention of 10% of the amount so deposited as a bail bond cost."⁷⁴

The final provision, of course, is pivotal for unlike private bail bonding, the defendant is reimbursed all but a very small percent of his or her deposit upon appearance in court. Thus, for instance, if bail is set at \$1,000, the initial deposit would be \$100 of which \$90 would be returned to the accused—total financial loss being \$10 as opposed to \$100.⁷⁵ In some jurisdictions, the entire deposit is returned.

Two types of percentage bail commonly exist nationwide. The first is known as the defendant option system because the defendant is allowed to choose between percentage deposit bail and surety bail. On the other hand, the court option system grants judges that discretionary power. As of 1980,

- five states [had] a percentage deposit system as a defendant option with an accompanying administrative fee requirement;
- two states [had] percentage deposit as a court option with the administrative fee requirement;
- 14 states [had] percentage deposit as a court option without an accompanying administrative fee;⁷⁶

- 26 states [had] no legislation covering percentage deposit;⁷⁷ and
- four states—Michigan, Ohio, Wisconsin, and California—[had] some combination of the above depending on the charge.⁷⁸

Despite these variations, a recent analysis offered a number of generalizations regarding percentage bail:

- When a jurisdiction implements a *defendant option* percentage deposit system, bail bonding for profit will cease to exist.
- When a jurisdiction implements a *judicial or court option* percentage deposit system (assuming surety bond remains as an option), the percentage deposit option will rarely be used by the judiciary.
- A decrease in jail population *may* occur as a result of the implementation of a percentage deposit system.
- Insufficient data currently exist to determine if the implementation of a percentage deposit system will have any effect on a jurisdiction's re-arrest rate.
- Failure-to-appear rates will not increase with the implementation of a percentage deposit system.⁷⁹

Nonfinancial Conditional Release

The fact that many poor individuals may not be able to afford bail—even under the relatively inexpensive percentage system—has prompted some jurisdictions to experiment with release options that are not financially based. While two very popular such mechanisms are the citation and release on recognizance methods described earlier, it is felt that in some instances more than a good faith promise may be required. Thus, a judge may decide to condition a defendant's release upon his or her continued employment, periodic visits to a pretrial release center, or submission to some form of counseling or training program.

Although formal programs by no means cover the entirety of alternative pretrial release procedures, the figures in *Tables II-4 through II-6* regarding those programs are instructive. Hence, conditional release (both nonfinancial and financial) tends to be less a distinct type of release than a hybrid—normally combining an otherwise simple procedure

Table II-4

CONDITIONS AUTOMATICALLY IMPOSED AND SERVICES AUTOMATICALLY PROVIDED BY PROGRAMS FOR DEFENDANTS RECOMMENDED AND RELEASED THROUGH PROGRAM ON OWN RECOGNIZANCE

<u>Conditions or Services¹</u>	<u>Number of Programs</u>	<u>Percent of Programs</u>
Defendant calls in at specific intervals	41	36.3%
Defendant comes in to program at specified intervals	10	8.8
Defendant notified of court appearances	66	58.4
Counseling or other services provided by program	5	4.4
Referrals made to other services or programs	2	1.8
Miscellaneous	9	8.0
No conditions automatically imposed	64	56.6
No services automatically provided	45	39.8

¹Categories are not mutually exclusive, so numbers exceed the 117 programs responding to this question. Percentages based on 117.
 SOURCE: Donald E. Pryor, *Practices of Pretrial Release Programs Review and Analysis of Data, Alternatives—A Series* (Washington, DC: Pretrial Services Resource Center, 1982), p. 87.

Table II-5

EXTENT TO WHICH PROGRAMS MONITOR OR SUPERVISE DEFENDANTS ON DIFFERENT TYPES OF RELEASE

<u>Type of Release¹</u>	<u>Number of Programs</u>	<u>Percent of Programs</u>
Release OR against program recommendation	65	54.6%
Released on unsecured bond	43	36.1
Conditional release (nonfinancial conditions set by court)	85	71.4
Released on cash bail	42	35.3
Released on cash deposit bail (e.g., 10%)	44	37.0
Released on surety bond	34	28.6
Third-party release	46	38.7
Miscellaneous	4	3.4
Program monitors no releases except those released OR on program's recommendation	19	16.0

¹Including types of release other than defendants released on their own recognizance on program recommendations. Many programs monitor defendants on more than one type of release, so the totals exceed 119. All programs answered this question, so the percentages are based on 119.
 SOURCE: Donald E. Pryor, *Practices of Pretrial Release Programs: Review and Analysis of Data, Alternatives—A Series* (Washington, DC: Pretrial Services Resource Center, 1982), p. 87.

Table II-6

**CONDITIONS IMPOSED AND SERVICES PROVIDED FOR
NON-ON RECOGNIZANCE RELEASES MONITORED, BY PROGRAMS**

Percent of Programs in Each Category¹

<u>Conditions or Services</u>	<u>Automatic</u>	<u>Up to Program or Court</u>	<u>Total</u>
Defendant calls in at specified intervals	35%	45%	80%
Defendant comes into program at specified intervals	11	51	62
Defendant notified of court appearances	55	29	84
Counseling or other services provided by program	4	50	54
Referrals made to other services/programs	1	60	61
Miscellaneous	5	6	11

¹Since 100 programs monitor types of releases other than those defendants released OR on program recommendations, and since all 100 responded to this question, the numbers and percentages are exactly the same. The first column refers to those programs which *automatically* provide the services or impose the conditions for all non-OR releases which they monitor. The second column refers to those programs which *may* do so, depending on the program's and/or court's assessment of the defendant's needs. Since the first two columns are mutually independent, the third column is the sum of the first two and indicates the proportion of programs which ever use the conditions or services in monitoring/supervising non-OR defendants. Since the conditions and services are not mutually exclusive, the column totals exceed 100.

SOURCE: Donald E. Pryor, *Practices of Pretrial Release Programs: Review and Analysis of Data, Alternatives—A Series* (Washington, DC: Pretrial Services Resource Center, 1982), p. 88.

such as "own recognizance" release with some requirement or service. The release agency thereby gains a certain measure of control over the defendant. In that sense, conditional release (particularly nonfinancial) is very suggestive of probation at the post-trial level.

**Pretrial Release and Diversion:
Issues and Conclusions**

Unfortunately, the research done on pretrial release and diversion—for that matter, on all alternatives to incarceration—has been subject to almost as much criticism as the procedures and programs themselves.⁸⁰ Nor is the problem merely that of "bad" research. Indeed, in a field where Constitutional rights are of paramount concern, the selection of proper control groups may present an almost insurmountable hurdle. In addition, the use of various procedures and the development of programs in different jurisdictions tend to reflect local idiosyncracies, making comparisons difficult. And, even when fairly similar programs have been tested, findings have often been wildly disparate. Thus, accord-

ing to Barry Krisberg of the National Council on Crime and Delinquency, "Until good research is done, the argument for community alternatives will have to remain on ideological grounds."⁸¹ If not on ideological grounds, then at least primarily on normative judgments. Despite the inadequacies of the research, however, a general picture of the problems and benefits attached to pretrial release and diversion may be gleaned from a number of sources.

EFFECT ON JAIL OVERCROWDING

Above all else, pretrial diversion and release programs would be expected to relieve some of the population pressures now facing a number of the nation's jails. Because release is the antithesis of incarceration, logic would lead one to conclude that the more individuals set free, the fewer locked up. Moreover, despite the fact that many advocates of diversion stress the notion that its mission is to divert from prosecution and not from corrections, it would not be unreasonable to suppose that at least some marginal number of "diverted defendants," if prosecuted, would end up behind bars—either pre- or post-trial. Yet, such logic runs headlong into the

hypothetical proposition that jails are capacity-driven institutions—more free “bed space” creates an institutional “need” for more bodies to fill the space. According to this point of view, although certain target populations may be jailed less frequently, other groups will take their places behind bars. Indeed, between 1978 and 1982 the once numerically stable nationwide jail population mushroomed.

Of course, that situation may not be the result of institutional drives. The “capacity-driven” theory of jails is far from universally accepted—many jails (particularly those in rural areas) operate under capacity.⁸² In addition, the number of reported crimes did rise quite precipitously during the same period of time that diversion and release practices were gaining a foothold. Nonetheless, whether one accepts the notion that jail populations will grow in order to fill available space, or the idea that real increases in crime and more efficient criminal justice processing necessitated increased incarceration, or some combination of both theories, a recent study by the LEAA supports the conclusion that pretrial release programs do not, by themselves relieve jail population pressures.

Thus, despite the overall success of the LEAA experiment in reducing target pretrial populations in selected jurisdictions, “[e]xpectations that the *Average Daily Populations* in jails would also be reduced . . . proved unrealistic.”⁸³ In fact, “[m]ost jurisdictions experienced an increase in serious felony bookings over the life of the project, thus reducing the pool of persons most eligible for release. In addition, as pretrial jail space was cleared, in most jails the space was filled by other inmates (sentenced, awaiting transfer, etc.)”⁸⁴ Moreover, a recent and damaging evaluation by the Vera Institute of its own venerable Court Employment Project found, among other things, that the program failed to reduce the number of jail sentences.⁸⁵ Pretrial diversion and release procedures, then, are probably successful in reducing the possibility of jail for certain categories of arrestees but, implemented in isolation from other population reducing programs, do little or nothing to reduce the burden on local jails.

Such findings lend credence to the complaints of certain critics who maintain that pretrial release and especially diversion simply widen the net of the criminal justice system. “This,” according to Doeren and Hageman, “means that the criminal justice system now has to handle more people formally whereas in the past, those individuals might have been informally handled.”⁸⁶ Indeed, one observer alleges that

in certain cases, “[t]he diversion option provides the prosecutor with an opportunity to retain control over cases (and defendants) that would not be prosecutable.”⁸⁷

THE CONSTITUTIONAL ISSUE

The possibility that pretrial diversion and release may actually enlarge criminal justice activities has led both directly and circuitously to charges that such programs circumvent the due process rights of alleged offenders. Thus, “one of the major problems with diversion is its foundation—the presumption of guilt. Even though an overwhelming majority of programs do not require an admission of guilt, there is a presumption of guilt inherent in the system.”⁸⁸

The foregoing situation, of course, becomes especially acute when an individual is asked to make restitution or to perform community services as retribution of a crime for which he or she has not been convicted. This method of pretrial diversion is particularly prominent in prosecutor run programs—and prosecutor-run programs are becoming the norm.⁸⁹ In effect, then, increasingly many “diverted” people are punished without ever having had their day in court. According to Madeleine Crohn, the explanation for the popularity of these Constitutionally questionable programs is fairly simple:

[T]he heretofore forgotten party in the criminal justice system, i.e., the victim, started receiving increasing attention [in the 1970s]. The flexibility of pretrial diversion became an easy mechanism to compensate the victim—often more swiftly than through the traditional adversarial process. This victim sensitivity helped in gaining community support for the program.⁹⁰

Potential constitutional problems are not as likely to occur under pretrial release programs where the “right” to bail has never been established and where such practices as restitution and community service are not as prevalent.

COSTS

On the issue of dollars saved, the record of pretrial diversion and release is mixed. Certainly, if some jails continue to be overcrowded and if the total number of individuals processed through the criminal justice system is increased by “widening the net,” it becomes exceedingly difficult—almost im-

possible—to assess systemic net cost benefits. Moreover, it is important to keep in mind that such savings assume that released and especially diverted individuals would have been formally processed through the criminal justice system in the absence of alternative pretrial programs. Nonetheless, allowing for such caveats, fiscal savings appear to be one of the bright spots in the system of pretrial alternatives.

For instance, a study of the 18th Judicial District in Kansas found that diverting a mere 114 cases saved Wichita about \$405,000.⁹¹ In addition, an evaluation of Monroe County, NY, found that its program achieved a benefit-to-cost ratio of 1.3 to 1, attributable primarily to reductions in jail sentences, pretrial incarceration, and probation.⁹²

Obviously, different types of programs result in different levels of savings. Release on recognizance and citation release are less costly than tightly supervised release or diversion into the social service system.⁹³ On the other hand, offenders under the former programs may eventually face trial at an average cost of \$2.47 per minute,⁹⁴ while some persons under the latter programs may avoid court altogether. Moreover, savings may only be achieved over the long run—the start-up costs of any new program almost inevitably will be greater than those of the existing program. Because so many evaluations of pretrial release and diversion programs are undertaken during the first few years of operation, cost data may well be biased due to change-of-procedure costs.

Savings are most likely to be felt at the municipal lockup and court level. In the case of counties, successful programs like that in Monroe County may result in lower costs but they will generally require some trade-offs in terms of social agency spending.

OVERALL EFFECTIVENESS

Assessing the overall effectiveness of pretrial release and diversion is a highly idiosyncratic venture. As is the case with the other indicators, the lack of tightly constructed studies hampers evaluation. The effectiveness of a particular program is generally judged by how well it “works” and is accepted in a given community.

No doubt the most acclaimed and probably the oldest diversion project in the nation was the Vera-initiated New York Court Employment Project. Unfortunately for proponents of pretrial alternatives, the institute released an evaluation in 1980 of the

popular program so negative in tone as to force even Vera to recommend abolition of the pretrial component. Indeed, the assessment found that the project was accomplishing *none* of its original goals:

It was not reducing pretrial detention time; it was not significantly reducing the number of stigmatizing criminal convictions; it was not reducing the number of jail sentences; it was not having any impact on the behavior or lifestyles of its clients; it was not reducing its clients' recidivism.⁹⁵

If the Court Employment Project was dubbed a disaster with supposedly dire implications for other big city diversion programs, equally positive assessments have been made of other projects. Thus, a recent evaluation of the Shelby County, TN, Pretrial Diversion Program found that:

Overall, the assessment . . . is a favorable one. Diversion has an immediate effect in that 85% of its clients are successfully removed from the justice system, with subsequent significant reductions in jail and probation time served. Moreover, the frequency and seriousness of rearrests as well as the number of convictions and jail and probation sentences served are significantly reduced for the diversion group over the three-year follow-up period. . . .

Cost-effectiveness analysis indicated that, for the first year of operations, the diversion program did not engender any cost savings for local government. The burden of start-up costs coupled with the understandable delay in reaching full client complement resulted in defendant processing somewhat higher than traditional processing. The fact that processing costs for the two approaches were nearly equal should, however, be viewed optimistically. Subsequent operating years should produce significant cost savings due to changes noted above.⁹⁶

Ironically, the program's administrator was less than ecstatic over the favorable results, claiming that in his opinion, “It's just too much of a hassle. The clients don't care. The prosecutors don't care. Who cares?”⁹⁷

At least one program, the Monroe County, NY, Pre-Trial Diversion Program, is both popular and successful. Hence, the program has gained guarded

support from staff, clients, the district attorney's office, the public safety commissioner, and a number of judges. At the same time, a study conducted by the Center for Governmental Research⁹⁸ found that program successful in terms of reduced convictions, relatively low rates of recidivism, fewer days served in jail, and costs saved.⁹⁹

PRETRIAL DIVERSION AND RELEASE: THE CONTINUING DEBATE

Pretrial Diversion

As the foregoing suggests, when viewed in isolation from other community alternatives (i.e., post-trial and post-incarcerative programs and even pre-trial release programs such as citation release and release on recognizance), the overall record on pre-trial diversion, far from being amenable to descriptions such as good or bad, is nothing less than confusing. One explanation for this general bewilderment lies in the difficulty of evaluation; another in the diversity of programs; still another in the strong ideological leanings of many proponents and opponents. Yet, one long-time expert in the field of diversion offers a more basic explanation—an explanation grounded in the differences between policy conception and political reality.

According to Madeleine Crohn, pretrial diversion programs, originating amid the social turmoil of the 1960s, were conceived as "humanistic, and totally defendant-oriented."¹⁰⁰ Beginning in the 1970s, however, the combined forces of fewer available financial resources and a growing fear of crime and criminals demanded that such programs do more than assist those accused of wrongdoing. Indeed, the client orientation of the previous decade was considered somewhat frivolous, if not downright unfair both to victims and an overtaxed society. Cost effectiveness and reduction in crime became the desired objectives. Moreover, a policy once felt to be an alternative to the traditional criminal justice system was increasingly brought within the system's fold, as more and more programs were shifted from private nongovernmental agencies to the prosecutor's office. Thus,

The objectives underlying the proposed original reform, were supplanted by other objectives (systemic and political) that are at odds with the original format. . . . The net and major effect on the practice of pre-trial diversion is that it is now measured

almost solely on the basis of its capabilities to provide systemic support, expediency, and an opportunity to satisfy the current political climate.¹⁰¹

Such expectations, Crohn feels, doom pretrial diversion to ineffectiveness if not failure.

Rather than continuing on the current course—a course in which the alternative is no longer an alternative—Crohn suggests pretrial alternatives should focus upon policies that:

- channel antisocial behavior into non-criminal treatment modes . . . ;
- decriminalize certain activities that currently still overburden the system;
- transfer current criminal cases into administrative/civil procedures, when more appropriate;
- utilize noncoercive processes in instances where the adversarial system may be counterproductive [i.e., dispute resolution] . . . ; and
- decree which antisocial behavior and prosecutable cases should receive minimal constraints. . . .¹⁰²

Nor does all this suggest that Crohn is willing to throw in the towel on all existing programs. Instead, she believes that many diversionary programs would be both more effective and constitutionally sound if shifted to the post-adjudicative stage.

Pretrial Release

Like diversion, pretrial release—both in the forms of bail and alternatives to traditional bail—has had its share of detractors. This is particularly true within the ranks of the now 20-year old bail reform movement. Once the spawning ground for non (or less-) financially based pretrial release (alternatives designed to keep fewer people from being detained), bail reform is showing another, quite contrary face. Preventive detention rather than pretrial release is becoming the watchword.

In theory, the decision to release a defendant has long been based primarily on his or her likelihood of appearing at trial.¹⁰³ Those considered poor appearance risks could be denied bail, while the better "gamblers" could be offered release with or without conditions designed to reduce any residual risk.

Preventive detention advocates however, seek to bring another variable to the fore. Thus, in his 1981 address before the American Bar Association, Chief Justice Burger called for "return[ing] to all bail release laws the crucial elements of future dangerousness."¹⁰⁴

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;¹⁰⁵ the ABA's Pretrial Release Standard 10-5.9 supports consideration of dangerousness as one element in judicial determinations;¹⁰⁶ 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;"¹⁰⁷ 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."¹⁰⁸

What effect the preventive detention movement will have on pre-trial release is still unknowable. Nonetheless, it is possible to hazard the guess that while it will by no means end the practice of release, the preventive detention movement will probably change it—resulting in the increasing use of conditions and surveillance attached to release.

POST-TRIAL PROGRAMS

Widening-of-the-net arguments notwithstanding, pretrial release and diversion programs tend merely to alter local governmental responsibilities—the same clientele (albeit behind bars) would still find themselves under county or municipal auspices. Instead, it is at the post-trial stage that some potential increase in the scope of local activity may occur, for some of those sentenced to alternative programs would otherwise have gone to state institutions. It is important to note, however, that post-trial release is nothing new. Indeed, under the general rubric of probation, release following sentencing is both an enduring penal function and, by far, the most prevalent among all modes of correctional supervision. (See *Chart II-1*.)

Probation: The 63% Solution

According to the Bureau of Justice Statistics, dur-

ing 1981 a staggering 735,460 offenders entered community supervision on probation.¹⁰⁹ It is, as suggested by *Chart II-1*, an ubiquitous means of dealing with sentenced criminals. Though subject to various definitional nuances, this far-reaching practice may be said to include a number of distinguishing characteristics. Thus, probation is:

- (1) a community-based correctional alternative
- (2) that involves a sentence imposed by the court upon an offender after a finding, verdict or plea of guilty,
- (3) which does not require the incarceration of the offender
- (4) but which allows the offender to remain in the community
- (5) subject to conditions imposed by the court, and
- (6) supervision by a probation agency.¹¹⁰

In its current permutation it is a genuinely American innovation, but the conceptual underpinnings of probation can be traced to English common law and to an ancient practice known as "benefit of clergy." Hence, clerics and eventually all literate individuals (as well as those adept at and lucky in feigning literacy) could choose to be tried in an ecclesiastical as opposed to a secular court—the "benefit" supposedly being less severe sentences.¹¹¹

Another common law forerunner of probation was judicial reprieve. By that practice a judge could suspend sentencing in questionable cases in order to allow convicted individuals the opportunity to seek royal clemency.¹¹²

Although a number of additional practices are sometimes suggested as legal forebears of probation, its modern genesis is generally traced to 19th century Boston where a prominent businessman initiated the practice of supervised release.¹¹³

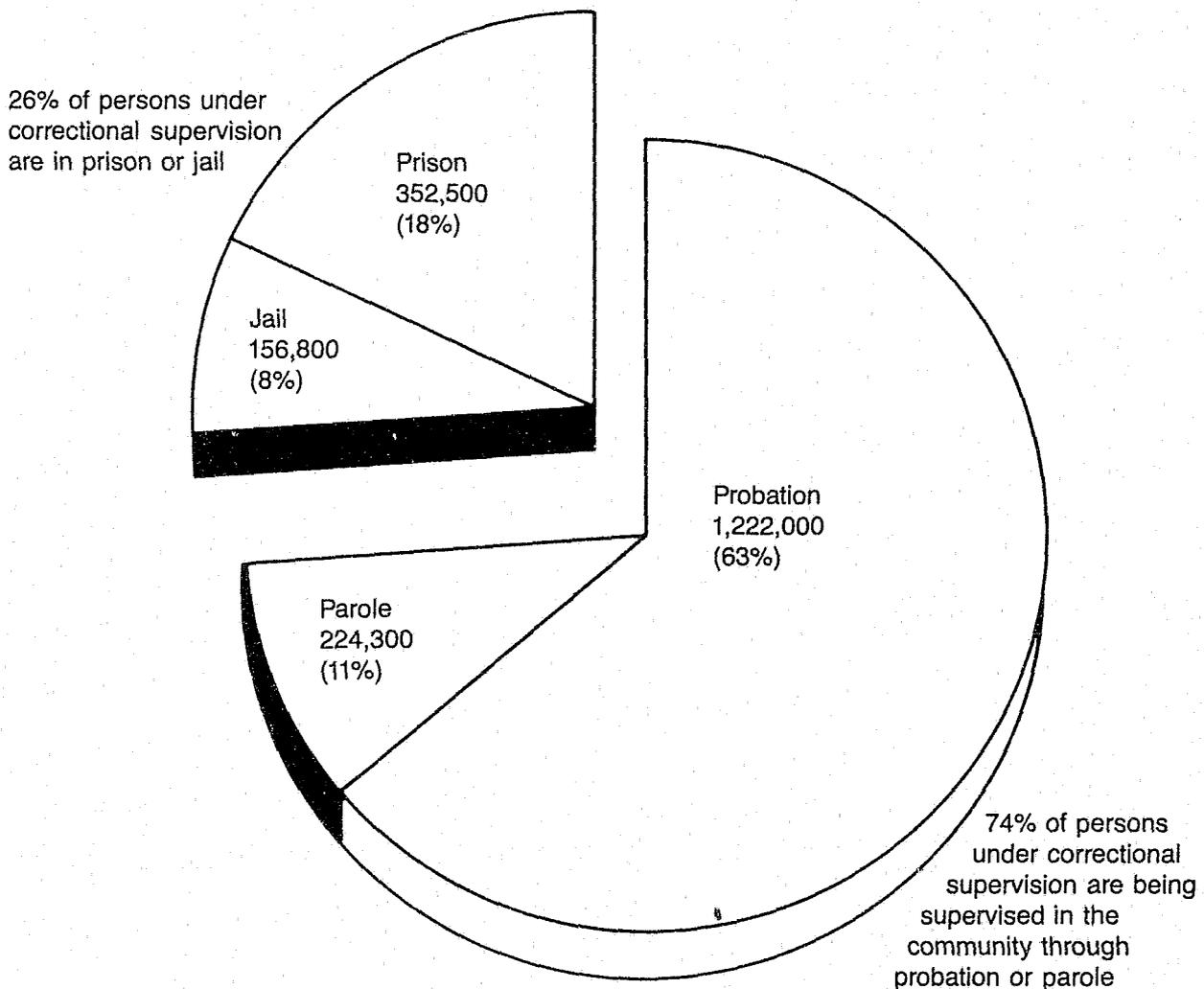
Today, the low cost of probation relative to the cost of imprisonment has made it the most common form of "correction" nationwide. It is, however, a common form characterized by extreme diversity. Thus, in 26 states adult probation is the exclusive responsibility of state-level agencies. In 22 states, state and local government share responsibility for adult probation. And, in California and New Jersey, the function comes under the sole purview of local government.¹¹⁴

Of the 26 state-run adult probation systems, 22 are administered by the executive branch, three are run jointly by the executive and judicial branches, and one (Hawaii) is administered exclusively by the judiciary.¹¹⁵

Contributing further to the variety, in those states where adult probation is handled at both the state

Chart II-1

ADULTS UNDER CORRECTIONAL SUPERVISION, YEAREND 1981



SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, "Probation and Parole 1981," Bureau of Justice Statistics Bulletin, August 1982.

and local levels, 18 states administer the function through the executive branch, while the localities administer it through the judiciary. In one state, New York, probation is an executive branch activity at both the state and local levels. In Idaho, Nebraska, and Texas, the judiciary administers adult probation at both levels. Finally, in a number of jurisdictions, agencies have multiple responsibilities over both adults and juveniles and/or probation and parole.¹¹⁶ (See *Table II-7*.) In all cases, the decision to grant probation lies with the courts, operating under statutory guidelines. And, in almost every case, the jurisdiction responsible for probation—whether state or local—finances that responsibility out of its own revenues.¹¹⁷

While everyone has some idea of what constitutes probation and the definition proffered earlier serves as an adequate guideline, the extreme dissimilarities among jurisdictions make it exceedingly difficult to ascertain the true extent of the practice. Indeed, from state to state and locality to locality virtually the same type of program may or may not be defined as probation.¹¹⁸ Yet, despite colossal measurement problems, *Chart II-1* suggests that at least 63% of all adults under correctional supervision are serving their sentences under some form of probation. As a

mechanism for relieving or avoiding institutional overcrowding and stress, probation appears to benefit both states and localities—the 1981 probation population split evenly between felons (those who would normally go to prison) and misdemeanants (those who, as a rule, populate jails.)¹¹⁹

Although probation is often viewed as being “liberal” or “soft on criminals,” it does have one feature that makes it attractive to liberals and conservatives alike—by almost any measure, it is less expensive than incarceration. Studies have found the costs of incarceration to be anywhere from ten to 14 times those of probation.¹²⁰ Yet, probation, no less than any other policy is subject to enhancement—for the sake of public safety or criminal rehabilitation or any range of motives or goals—and program enhancements do not come free. There is a vast difference between the costs involved in a simple monthly visit to the probation officer and those involved in an elaborate network of surveillance, counseling, and job training. Thus, according to one observer:

Money has always been the limiting factor in probation, probation workers say. In times of fiscal restraint, it is easier to cut back on programs identified as “soft”—that

Table II-7

NUMBER OF STATE AND LOCAL PROBATION AND PAROLE AGENCIES BY FUNCTION(S) AND LEVEL OF GOVERNMENT, SEPTEMBER 1, 1976

Function(s) of Agencies	State-Local Total	Level of Government		
		State	County	Municipal
Total agencies	3,868	2,364	1,430	74
Agencies with a single function	1,628	827	758	43
Adult probation only	340	103	212	25
Juvenile probation only	808	249	543	16
Adult parole only	121	118	2	1
Juvenile parole only	359	357	1	1
Agencies with dual functions	1,832	1,270	532	30
Adult and juvenile probation	546	121	400	25
Adult and juvenile parole	20	20	0	0
Adult probation and parole	702	657	41	4
Juvenile probation and parole	564	472	91	1
Agencies with three or four functions .	343	203	140	0
Parole Authorities	65	64	0	1

SOURCE: U.S. Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, *State and Local Probation and Parole Systems* (Washington, DC: U.S. Government Printing Office, 1978), p.2.

is social-service oriented—in the public's eye. Probation officers have considerable stake in not letting their programs be identified as such, according to some observers, which in turn explains why an increasing number of probation departments have been drifting into a control and surveillance mode. On the other hand, when ample funds are available, probation officials have tended to lavish them on programs they see as embodying the real mission of probation, whatever that might be.¹²¹

Community-Based Corrections: The Many Faces of Probation

Probation by any other name is a post-trial alternative to incarceration—another facet of the community-based corrections environment. As might be expected, then, much like pretrial alternatives, those at the post-trial level are as varied as the jurisdictions that administer them. Whether or not probation may be considered a community-based alternative, as our earlier definition suggests, however, is subject to some debate. Hence,

In some states probation is ordered only when thorough supervision will accompany the order; in others it often functions simply as a suspended sentence. Many probation agencies provide liaison between the court and various social service agencies; for example, probation officers monitor offenders' compliance with court-ordered conditions (such as attendance at drug rehabilitation centers, drunk driving schools, or family counseling sessions; payment of fines, restitution, or child support). Some states count persons monitored in this way as probationers, but some do not; and in some states such monitoring is not done by probation agencies at all.¹²²

Moreover, the General Accounting Office defines a community-based correctional program as "an alternative" between "probation, with or without restrictions, and confinement in an institution."¹²³ The distinctions are murky indeed and perhaps a better delineation would be between traditional or straight probation on the one hand and the newer, more inclusive forms of probation on the other. "More inclusive," in turn, may mean probation (post-conviction, supervised freedom) coupled with extensive

participation in social service programs; probation coupled with some additional form of nonconfining punishment such as restitution or community service; probation served in a halfway house; or split sentencing, in which probation is mixed with some incarceration.¹²⁴ For our purposes, then, probation is a post-trial, community-based alternative to regular jail or prison sentencing. And, an increasingly popular form is the community service sentence.

THE NEW YORK COMMUNITY SENTENCING PROJECT

Among innovative local programs, one of the most promising is the newest among the Vera Institute's arsenal of alternative projects, the New York Community Service Sentencing Project. Currently operating in three boroughs, the fledgling program is unique in addressing the problems of jail overcrowding through its selection of clientele.

Thus, a frequently echoed complaint with regard to alternative sentencing strategies is that they, like pretrial alternatives, simply widen the criminal justice net. In other words, the criticism goes, such sentences tend to be meted out to those who normally would not be sentenced to jail in the first place—i.e., white, middle class, first offenders. Far from saving local dollars, these alternatives merely add (sometimes expensive) community-based programs to the problems of overcrowded and costly jails.

As a result, the New York project uses, as a clientele "pool," primarily unskilled, unemployed, minority offenders, convicted of relatively petty crimes (i.e., property misdemeanors), and with prior records of conviction—in other words, those who in all likelihood would receive jail sentences of from 30 to 90 days. Instead, however, selected offenders are sentenced to 70 hours of supervised, unpaid community service work. Those who do not complete the 70 hours are referred back to court for resentencing.¹²⁵ The sentencing project, then, may be said to rest on a two-pronged foundation. First, by selecting society's small-time losers, it seeks to divert from jail those who really would be locked up—those who, for the most part, have been locked up many times previously. Second, by employing a fixed sentence and treating that sentence in a strictly penal manner—any training, social, or psychological support is strictly incidental—it seeks to avoid the "coddling criminals" charges that have undermined so many alternative programs. Indeed, while project staff are

more than happy to direct offenders to outside job training and support services, they have little hope that these primarily asocial individuals will be "rehabilitated." Thus, they do not attempt to rehabilitate.

Because the project is short-lived (it has been in effect on a small scale only since 1979), it has been difficult to assess its effectiveness. Nonetheless, Vera staff have made some preliminary judgments based on three criteria.

First, project staff are convinced that, at least on a small scale, the program has helped to depopulate city jails:

- Project participants who were sentenced between October 1, 1980, and June 30, 1981, in Brooklyn and the Bronx and between September 16 and December 16, 1981, in Manhattan averaged 8.5 prior arrests and 4.5 prior adult convictions.
- Forty-two percent were arraigned on felony charges.
- Not only did [participants] have the sorts of prior records that are generally associated with jail sentences, but as a group their prior arrests were recent ones—further indicators that the offenders were likely to go to jail. . . . Because courts usually increase the severity of sentences in an incremental fashion for each additional conviction, those who went to prison or jail for their last prior conviction are even further pushed in that direction for their current conviction. . . .
- Thirty-four percent of those participants sentenced to community service had been sentenced to jail or prison for the last prior conviction. . . . That offenders with one or more prior convictions were more likely to go to jail is clear from an analysis of sentencing patterns in the Bronx, Brooklyn and Manhattan criminal courts.¹²⁶

Second, though difficult to evaluate on a small scale, the project has resulted in real financial benefits to the city. Thus, comparing a 1978 figure of \$68 per day to house, feed, and care for New York City jail inmates with the average \$921 total cost to the city per sentencing project participant, the sentenc-

ing project fares very well in an economic sense.¹²⁷ Because participants probably would have served from 30 to 90 days in jail, the city theoretically saved from \$1,119 to \$5,199 per offender.

In addition, savings were realized over potential construction costs:

Annualizing the current rate of intake, we can project that about 30,000 cell-days would be required to house these persons, or roughly 83 cells per year. At \$100,000 per cell for construction costs, this alone amounts to about \$83 million, a considerable savings to the city.¹²⁸

Moreover, project participants spent an average of 5.6 weeks between time of arraignment and time of sentencing, while offenders deemed ineligible waited almost twice that long to be sentenced. Because those arraigned individuals may be expected to spend the waiting period in jail, costs to the city potentially were further reduced.¹²⁹

On the third criteria, subsequent criminal activity, the project record is somewhat mixed. However, because reduced recidivism in only an incidental goal, it is difficult to know how much importance to attach to rearrest figures. Nonetheless, after serving their community sentences, project participants showed a slightly lower rate of recidivism (42%) than those released from jail (49%).¹³⁰ Yet, in terms of arrests-during-sentence, the project was less efficient than jail—after all, "jail is 100% efficient [as a deterrent to outside crime] for the period when the offender is locked up."¹³¹ Of the Vera Offenders, 3.6% were rearrested during the period of their two-week sentences and 12% during the 30 days following community service as compared to 0% for jail inmates.¹³² While 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 the city's jails."¹³³ Thus, some minor risks may be offset by financial savings.

THE CALIFORNIA LEAGUE OF ALTERNATIVE SENTENCE PROGRAMS

A far more comprehensive approach to alternative sentencing falls under the loose auspices of the California League of Alternative Sentence Programs (CLASP). Membership includes most of California's

46 court referral and community service programs and encompasses 38 of the state's 58 counties.¹³⁴

A court referral or community service program, as defined by CLASP

is one which refers offenders to tax supported or private nonprofit agencies for performance of services which enhance the effectiveness of such agencies to the benefit of the public while fulfilling the offender's obligation to the court and community. Programs may differ in operational setting and funding base, but must minimally provide: indepth screening of offenders for placement purposes, task assignments made with regard for community needs and for the dignity of the individual assignee, training and assistance to staff or user agencies, monitoring of client progress, timely and accurate reports to the court and collection of statistical data.¹³⁵

CLASP itself serves as a resource and information exchange center, sponsoring regular regional meetings in Southern California, the Bay Area, the Central Valley, and Northern California.¹³⁶

Under the CLASP system, alternative sentences are generally understood to entail guaranteed probation in exchange for an offenders' "volunteering" to perform a certain number of community service hours. As a rule, probation departments or private nonprofit agencies act as sentencing brokers, determining where a "community need" lies and supervising offenders' fulfillment of those needs.

Unlike the New York project, the California system as a whole does not seek out the chronic offender. Although community service sentences in California counties are sometimes given to non-violent felons and repeat petty offenders, a great many clients are the first time convicted who might otherwise be fined or put on straight probation—thus, reducing the impact on the jail population. Nonetheless, participating CLASP counties have received substantial praise for the 10-15 million hours of community service provided in 1980 alone—service supposedly rendered at a total average cost of \$35 per volunteer.¹³⁷

Community Service: Is It Helping the Local Jail?

According to one estimate, there are at least 100 adult community service programs operating in the

United States today.¹³⁸ And despite the cut-off of federal funding—the initial impetus of most such programs—the popularity of community service as a sentencing option is growing steadily. Yet, whether those programs are doing much to ease the plight of local jails seems increasingly doubtful.

Such programs as Vera's New York project and Prisoners and Community Together (PACT) in Elkhart and Porter Counties, IN, notwithstanding, the evidence to date indicates that "judges have used community service mainly to add a further sanction to probation—not to cut down on the caseloads of overworked probation officers, nor to lessen the number of sentences to desparately crowded jails."¹³⁹ Indeed, community service more and more appears to be the "get tough" alternative to fines or straight probation for those convicted of drunk driving. As of May 1981, 13 states had authorized community service for driving while intoxicated. It is estimated that among the clientele in California's vast community service system one-half to two-thirds are drunk drivers and another one-quarter have committed non-liquor-related traffic offenses.¹⁴⁰ Moreover, under recently passed federal drunk driving legislation, the number of reckless drivers doing community time should mushroom even further. All of this, according to Jerome Miller of the National Center for Institutions and Alternatives, is "closing the door to that sanction for the people who are being sent to institutions."¹⁴¹ More serious and repeat offenders—the denizens of prisons and jails—are being "squeezed out."¹⁴²

Part of the problem may be due to philosophical ambiguity and confusion. Is the aim of community service punishment, reparation, rehabilitation, or all three?¹⁴³ Like so many penal programs inaugurated in the 1960s, the initial thrust of community service was toward rehabilitation. Changing attitudes, however, have altered that thrust. Punishment is now more often seen as the overriding goal of correctional programs. Ironically, that ideological modification may be responsible for the heavy emphasis on minor, first-time offenders.

Only several years ago, rehabilitation was still considered possible for the chronic offender—a goal whose resources were not to be squandered entirely on drivers crossing white lines. Yet, as rehabilitation—the longtime foundation of American criminology—increasingly fell victim to both public and professional cynicism, punishment pushed its way to the fore. Hence, on the one hand, community service is viewed as "soft time" for pick pockets, burglars,

and other property offenders, while, on the other hand, "crossing the white line" while under the influence is taken much more seriously. With rare exceptions, then, community service would appear to be joining those policies that widen the net of local criminal justice—adding to the responsibilities of local correctional administrators and doing little to alleviate the problems of the jail.¹⁴⁴

RESTITUTION

While community service seems to be the current vogue in post-trial alternatives to incarceration and so-called straight probation, it by no means stands alone. Thus, related to the practice of community service is that of restitution, "a court requirement that an alleged or convicted offender pay money or provide services to the victim of the crime. . . ." Discussed previously in the context of pre-trial diversion, post-trial restitution is usually imposed as a condition of probation or combined with jail or prison terms. It is, like community service (with which it is sometimes combined), sparking a great deal of interest.

A 1978 survey identified more than 40 restitution programs nationwide (some of which included *pre-trial* components.)¹⁴⁶ The small number of formal programs, however, probably belies the scope of the practice. According to the Bureau of Justice Statistics (BJS), "[i]n this country restitution has traditionally played an extensive and largely unpublicized role at various stages of the criminal justice process."¹⁴⁷

Typically, restitutive payment is made in cash or in kind. Because most reported crimes involve only small sums of money or valuables,¹⁴⁸ restitution was felt by the Law Enforcement Assistance Administration "to offer one of the few genuine alternatives to the limited repertoire of correctional dispositions."¹⁴⁹

At least two highly touted restitution programs are worth mentioning. Thus Quincy, MA, maintains an "Earn-It" program as part of the probation department under the joint sponsorship of the district court and the local chamber of commerce. According to Quincy's chief probation officer:

Usually hired at minimum wage, offenders not only earn sufficient funds to meet their court restitution obligations, but receive work experience—for many, their first—and references. More than 100 businesses participate in the Earn-It program.

. . . Because they do not offer permanent jobs, each business can afford to hire several offenders each year.

As a result of the program, Quincy court's restitution collections increased from a preprogram \$38,000 in 1975 to more than \$218,000 in 1981, which was received from more than 1,000 juvenile and adult offenders.¹⁵⁰

Often cited as a model correctional policy, the Community Service Restitution Program of Genesee County, NY, combines (as the name implies) both restitution and community service. Theoretically offered only to genuinely jail-bound individuals, the county's sheriff and program creator maintains that community service restitution is "an overdue attempt to bring civil law into the criminal justice system."¹⁵¹ The program director claims that between March and October of 1982, 80 offenders completed 5,114 hours of service at a savings of 852.7 jail days or \$25,581.¹⁵² Though such rosy individual assessments imply a bright future for restitution not all observers are quite so sanguine about its prospects. Indeed, according to analyst Alan T. Harland ambiguity and uncertainty over programmatic goals may threaten the whole concept of restitution:

The rapidly widening focus upon restitution in the criminal justice system is grounded only negligibly, if at all, in consideration of the theoretical, programmatic, and legal difficulties already encountered. It must be recognized at the outset that the current popularity of restitutive justice rests largely upon an intuitive sense of its rationality.

The very nature and purposes of restitutive justice remain so unclear. . . . This uncertainty is reflected in the goals of modern programs. Whereas one program may exhibit a strong commitment to offender rehabilitation, another program may emphasize victim satisfaction.

Approaching restitution in such a divided manner has resulted in an unbalanced consideration of the issues and a failure to respond to the more central question: Are there conditions under which restitution can be an effective and appropriate tool for dealing with certain criminal offenders *and* provide a meaningful benefit to the victim? Once the issues are addressed in this light

it becomes readily apparent that restitution is part of the ageless correctional dilemma of seeking to balance the interests of the individual offender against those of his victim and of society in general.¹⁵³

WORK RELEASE

As early as 1913, a system of work release was introduced in Wisconsin to allow county misdemeanants an opportunity to obtain salaried daytime employment outside of the jail. At night, such individuals returned to the jail and incarceration. Little utilized during the first few decades of its existence, application of the law was extended during the 1940s in order to meet severe labor shortages brought on by the war. Today, although 26 states authorize work release for local inmates, it is more commonly employed at the state level. And even there, participation is quite low.¹⁵⁴

One distinct institutional advantage of work release is the potential for sheriffs or other jail administrators to charge some room and board to those who are gainfully employed, thereby relieving—albeit slightly—some measure of fiscal stress. Yet, fewer than 40% of all jails containing work release prisoners charge room and board. Moreover, according to the National Sheriffs' Association, "In too many counties, the standard policy is to take whatever income a sheriff's department derives from a room and board charge and place this income in the general county fund."¹⁵⁵ Thus, any direct financial benefit to the jail is lost.

Of course, charging room and board is neither the only nor even the most important advantage of work release. Indeed, other monetary and nonmonetary benefits are often touted: improved self-esteem, job retention, maintenance of family relationships, and the always hoped for but seldom proven rehabilitation.¹⁵⁶ Less abstract and more easily measured, however, are additional dollars saved. Thus, a working offender presumably can continue to support her or his family (theoretically saving welfare dollars), pay federal, state and local taxes; discharge legal and consumer debts and court costs; and even, amass some modest savings.¹⁵⁷ Expecting a work releasee to accomplish all of the above would seem to require his or her being liberated to work days in a very substantial position. Nonetheless, it is certainly not unreasonable to anticipate some economic savings, particularly in the area of taxes paid. For instance, using a state example, 100 Kansas inmates were able

to pay a combined total of \$70,767.60 in federal and state taxes in 1979.¹⁵⁸

Obviously, work release programs are not trouble-free. Communities and labor unions often resist such programs out of fear and indignation that jobs are being taken from more upstanding citizens. People do escape (though statistically not often) while on the outside.¹⁵⁹ And, work release programs always run the risk of contraband materials and substances being brought into the jail after the day's work—a problem, however, that can be mitigated by thorough searches and separate celling.¹⁶⁰

OTHER POST-TRIAL ALTERNATIVES

Two other jail-based alternatives bear mentioning. *Study release*, while offering little toward the alleviation of jail headaches in the short-run, does have its own long-term reward: literate individuals are less likely to have to resort to crime. Yet, educational release is little utilized in local correctional facilities which, unlike state prisons, generally lack even in-house study facilities.¹⁶¹

In addition, some institutions *furlough* inmates for short periods, allowing them to visit family, seek employment, or accomplish other legitimate tasks. Ironically, however, furloughing is much more common among state and federal offenders—usually felons—than among presumably less dangerous local misdemeanants.

POST-INCARCERATIVE PROGRAMS: A BRIEF WORD

For the most part, well developed post-incarcerative programs tend to be limited to state and federal prisoners and thus fall outside the purview of this study. Nonetheless, the fact that such programs are located within and occasionally run by local communities merits brief attention.

Parole, of course, is the chief as well as generic form of post-incarcerative supervised release. Encompassing about 11% of all individuals under correctional supervision,¹⁶² it is the conditional release from prison by discretion of a paroling authority prior to expiration of sentence.¹⁶³ Placed under the supervision of a paroling agency, parolees are required to observe certain conditions under threat of revocation.¹⁶⁴ In every state, adult parole is an executive branch function, although in seven states it is supplemented by a local judicial branch system.¹⁶⁵

Though, again, primarily used for state and

federal offenders, a more appropriate topic for discussion of alternatives is the adult pre-release facility or halfway house.¹⁶⁶ These small community centers generally house offenders for 60 to 90 days prior to release on parole. While residents use the houses like group homes for the purposes of sleeping and eating, they are likely to work outside or go to school during the day.¹⁶⁷ Specifically,

the halfway house accepts exoffenders released from prison, provides the basic necessities of room and board, and attempts to determine each individual's reintegrative problems, plan a program to remedy these problems, and provide supportive staff to assist the resident in resolving problems and returning to society as a law-abiding citizen.¹⁶⁸

In a recent survey of 402 halfway houses, the National Institute of Justice found that a surprising 170 or 42% were privately operated. This number was exceeded only by the 207 state-run centers. Locally and federally operated halfway houses were clearly the exception, making up only 3.5 and 2.7% respectively of the total.¹⁶⁹ In terms of clientele served, government-run centers tended to be rather parochial—federal facilities held only federal offenders, state facilities mostly state offenders, and local facilities primarily local offenders. Privately-operated houses tended to be used by federal authorities.¹⁷⁰

While halfway houses appear to be quite popular, objective assessments have not been very favorable. Comparisons between experimental groups (residents) and control groups have shown little difference in recidivism rates, while one followup study indicated that halfway house "graduates" were far less likely to be gainfully employed a year after release than were members of a control group.¹⁷¹ Moreover, a recent report by the General Accounting Office concluded that "community facilities do not provide federal offenders with maximum opportunity for successfully assuming job, family and other community responsibilities."¹⁷²

Indeed, halfway houses are one of the few alternatives to incarceration with regard to which even the issue of costs saved is subject to dispute. Thus, while some studies have cited per diem rates at anywhere from one-quarter to one-half those of regular penal institutions, particularly where offenders pay room and board,¹⁷³ at least one research effort

indicates that pre-release facilities may be more expensive than prisons because large populations cost less to service on a per person basis.¹⁷⁴

THE FULL SPECTRUM COUNTIES

While many counties and large municipal governments offer alternative community programming of various kinds, the National Institute of Corrections estimates that fewer than 100 of the 3,042 counties nationwide have organized, professional departments of corrections. And, only a very small percentage of these offer a full array of services. Among those full service counties, the most exemplary are generally considered to be Bucks County in Pennsylvania, Polk County in Iowa, and Montgomery County in Maryland.

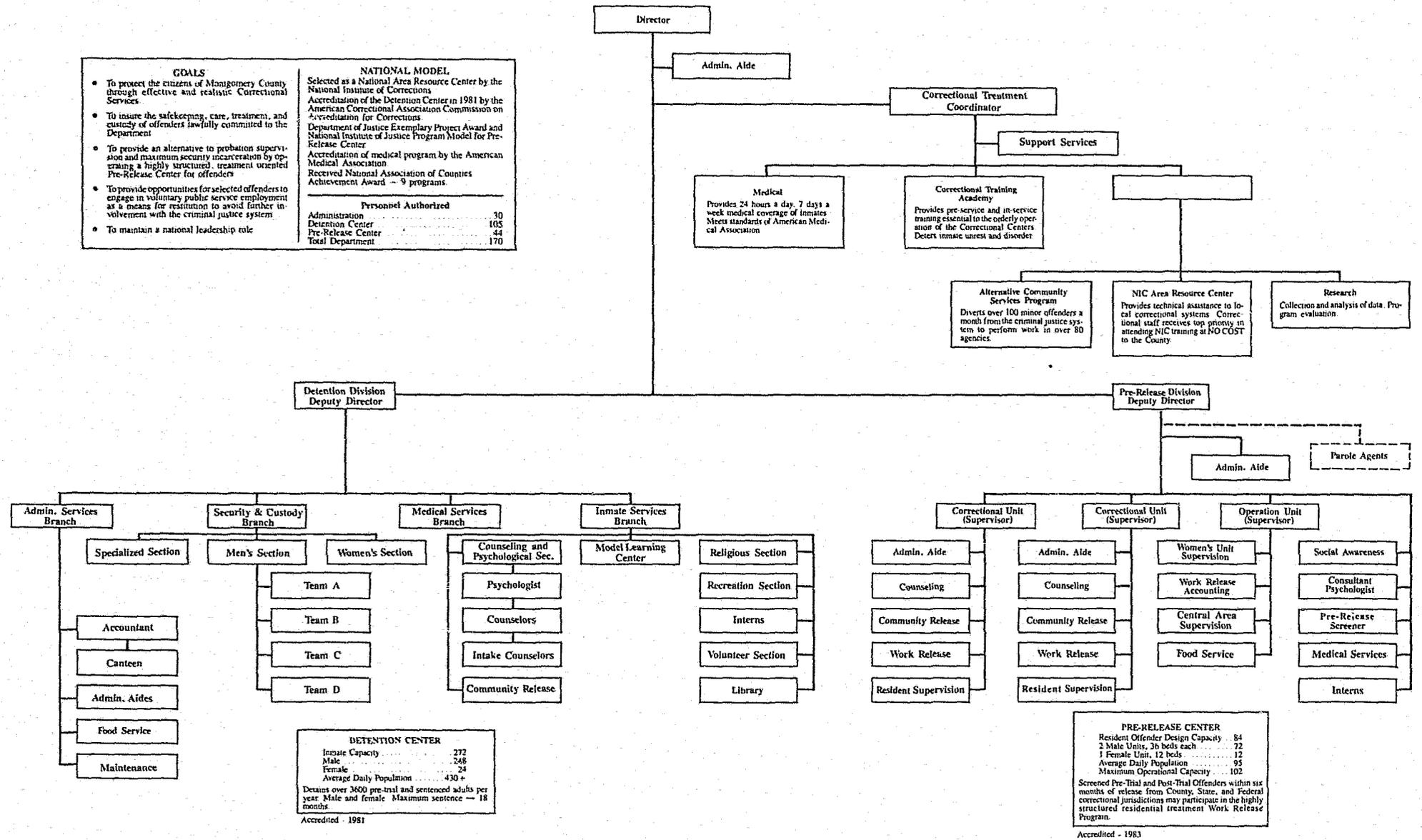
The National Institute of Justice has grouped such full spectrum counties under the "unified county-administered" model:

The county-administered corrections agency is, perhaps, the organizational option that best fits the theory and philosophy of community-based corrections. Under this model, correctional services are comprehensive, integrated, community-located, and locally controlled and financed. . . . Under this arrangement also, the electorate to which the program administrators are responsible is in a position to observe program successes and failures. Consolidation of programs within a single unit of government tends to avoid the clash of purposes that often frustrates multi-government efforts. Finally, the strategy is consistent with the more general goal of simplifying the operations of local government and enhancing their cost-effectiveness. This model thus represents a confluence of two strong movements whose time may have come: unified community corrections service delivery and broad-based reform of local government operations.¹⁷⁵

As *Chart II-2* demonstrates, a full spectrum county correctional department offers both alternative community programming and a host of inmate services. Thus, Montgomery County's Department of Correction and Rehabilitation includes a detention center, a

MONTGOMERY COUNTY DEPARTMENT OF CORRECTION AND REHABILITATION

<p>GOALS</p> <ul style="list-style-type: none"> • To protect the citizens of Montgomery County through effective and realistic Correctional Services. • To insure the safekeeping, care, treatment, and custody of offenders lawfully committed to the Department. • To provide an alternative to probation supervision and maximum security incarceration by operating a highly structured, treatment oriented Pre-Release Center. • To provide opportunities for selected offenders to engage in voluntary public service employment as a means for restitution to avoid further involvement with the criminal justice system. • To maintain a national leadership role. 	<p>NATIONAL MODEL</p> <p>Selected as a National Area Resource Center by the National Institute of Corrections Accreditation of the Detention Center in 1981 by the American Correctional Association Commission on Accreditation for Corrections Department of Justice Exemplary Project Award and National Institute of Justice Program Model for Pre-Release Center Accreditation of medical program by the American Medical Association Received National Association of Counties Achievement Award - 9 programs.</p>								
<p>Personnel Authorized</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td>Administration</td> <td style="text-align: right;">30</td> </tr> <tr> <td>Detention Center</td> <td style="text-align: right;">105</td> </tr> <tr> <td>Pre-Release Center</td> <td style="text-align: right;">44</td> </tr> <tr> <td>Total Department</td> <td style="text-align: right;">179</td> </tr> </table>		Administration	30	Detention Center	105	Pre-Release Center	44	Total Department	179
Administration	30								
Detention Center	105								
Pre-Release Center	44								
Total Department	179								



pre-release center, an alternative community services program, a training academy for correctional personnel, and an area resource center funded by the National Institute of Corrections.

The centerpiece of the county's correctional program is its pre-release center. Servicing a wide range of carefully screened pretrial and sentenced individuals,¹⁷⁶ the center gives offenders and accused the opportunity to participate in supervised work release or community educational programs. A "middle ground" or halfway house between jail and probation for state and local prisoners alike, the center allows residents to visit family through a "phased furlough program," offering an additional avenue of community reintegration. Inmates are required to pay 20% of gross income for room and board, reducing County incarceration costs by about \$123,000 annually.¹⁷⁷ In addition, according to county calculations, the program achieved the following economic successes in 1981:

□ Gross Earnings FY 81	\$545,978.38
□ Taxes Paid	115,159.36
□ Family Support	110,301.58
□ Fines Paid	2,065.51
□ Restitution and Attorney's Fees	7,335.18
□ Savings for Discharge	42,438.29 ¹⁷⁸

Finally, the center boasts both a relatively high program completion rate of 75% and a relatively low 12.6% rate of recidivism.¹⁷⁹

Through the Alternative Community Services Program, sentenced "volunteers" may choose to perform nonpaid public or not-for-profit work in lieu of fines or incarceration. Moreover, first offenders may, through community service, expunge their criminal records. The department estimates that in 1981, offenders completed 40,000 hours of community work valued at over \$160,000.¹⁸⁰

According to the National Sheriffs' Association, the number one jail problem cited by sheriffs across the country is the lack of well trained and motivated personnel.¹⁸¹ Responding to that need, Montgomery County has developed a Correctional Training Academy for its correctional staff. All personnel receive at least 40 hours of training,¹⁸² while some employees are educated in such additional fields as counselling and CPR technique.

Finally, the county jail, known by the more benign epithet, detention center, features a full canteen, an indoor gymnasium, an AMA accredited medical program, and an educational center.

Full spectrum counties such as Montgomery offer the combined advantages of efficient coordination and individually esteemed programs,¹⁸³ but they have not been without their own difficulties. Hence, the Montgomery Detention Center remains overcrowded, holding as many as 388 prisoners in a facility designed for 272;¹⁸⁴ an unexpected rise in the number of female offenders has taxed the bedding resources of even the Pre-Release Center;¹⁸⁵ and adequate treatment for the mentally ill who make up an estimated 10% of the inmate population is generally unavailable.¹⁸⁶ As may be surmised, such problems leave even the exemplary full spectrum counties open to charges that their services and alternatives have, in effect, widened the correctional net.

Perhaps the greatest problem facing the full spectrum counties, however, is financial. Once dependent on LEAA and CETA funding, these correctional departments have had to tap scarce county resources. While some have succeeded, others have had to settle for partial services, staff reductions, and ever more selective clientele.

ALTERNATIVES TO INCARCERATION: PROMISE AND REALITY

Some believe that available data does not conclusively show that diversion programs have lower recidivism rates than institutional programs, but the data does generally show that the success rates are at least equal. Thus, for many individuals there is no utilitarian rationale for jails; we can protect society just as well with diversion programs.¹⁸⁷

[T]here flows the strong suggestion that even if we can't "treat" offenders so as to make them do better, a great many of the [community] programs designed to rehabilitate them at least did not make them do worse. . . . The information on the dollar costs of these programs is just beginning to be developed but the implication is clear: *that if we can't do more for (and to) offenders, at least we can safely do less.*¹⁸⁸

The core of contemporary difficulties is the weight and power of the traditional American fusion of punishment and incarceration. Keep it, and relatively little progress

can be made. Break it, and all sorts of possibilities appear. The notion will die hard. Its strength is reflected in the language. . . . Americans make the word "convict" cover both an assessment of guilt and a person locked up. But while the weight of the past is considerable, it cannot be allowed to swamp the policy choices which ultimately determine the future.¹⁸⁹

Despite considerably different views on the efficacy of current alternatives to incarceration and community-based corrections, each of the authors quoted above agrees that continued widescale incarceration is at once penny foolish and pound pernicious. Nor is this view limited to those who advocate a moratorium on jail and prison construction. Indeed, James Q. Wilson, a strong supporter of new prison construction—believing it the "appropriate disposition for a large number of offenders"—also advocates "imaginative and constructive experimentation with other ways of handling the less serious, nonviolent offender. . . ."¹⁹⁰ Thus, just as the call for longer, mandatory jail and prison sentences is increasingly gaining support, the paradoxical realization that facilities that incapacitate are scarce and expensive resources is also gaining a foothold. Yet, whether the types of community-based alternatives currently in fashion address the needs of society on the one hand, or that perverse microcosm of society which is jail on the other, is subject to some debate. That debate, in turn, may be said to revolve around at least five general questions.

Do Alternatives Alleviate Jail Overcrowding?

Throughout this chapter, the above question, in various guises, has been posed with regard to a number of alternative programs. For the most part, unfortunately, the answer has been no. Moreover the same is true in the aggregate. However, it is important to note that arrests have been increasing. Thus, between 1970 and 1979 arrests for nonviolent property crimes increased 55.8%, with arrests for simple vandalism increasing 104.3%. In addition, certain nonviolent, nonproperty offenders were arrested more frequently—drunken driving leading the pack with a 62.3% increase.¹⁹¹ The relationship among arrests, local incarceration, and alternatives to incarceration is unclear. Proponents of alternatives are quick to point out that without their nonincar-

cerative options jails would have burst at the seams long ago. The less enthusiastic and the skeptical suggest that all of these alternatives have merely created more space in the criminal justice system; widening the net to the point that many, who in the past would have received an informal slap on the wrist, are now being formally processed. Meanwhile, the poor, the unskilled, the sick, and the socially dysfunctional—those who have always crowded the jails—are effectively forced out of the "alternative milieu." Neither side can easily prove its assertions, though there is probably some validity to each.

Related arguments are made about the more inclusive and full spectrum community-based correctional systems. Thus, Sherman and Hawkins contend that in an era of increasing public suspicion about "liberal" penal policies, the "excessive claims" of the most zealous advocates of community-based corrections "have only aggravated the suspicion":

The result has been that American society has given a quite different meaning to the term "community corrections": the jail, and not the group home, has attracted most of the less-serious offenders.¹⁹²

Similarly, Barry Krisberg and James Austin assert that:

Community corrections legislation appears not to reduce incarceration, but rather to change the location of imprisonment from state institutions to county jails.¹⁹³

Other individual studies of community-based corrections offered mixed results. For example, as the following chapter will demonstrate, jail commitments in Minnesota's counties have increased since implementation of the Community Corrections Act. On the other hand, at least one observer explains the increase by noting that such counties have recently "improved programming in local jails and . . . this has made the jails more appealing for judges to use." Moreover, there is a movement afoot in the state to apply sentencing guidelines (see *Chapter III* of this volume) to misdemeanants, thereby effectively capping jail populations. However, at present, the proposal is not given much chance of legislative acceptance.

Do Alternatives Cost Less?

Again, this question has been propounded

throughout the chapter. However, unlike the previous question, the answer this time is probably yes.¹⁹⁵ In fact, in the face of ever-escalating jail costs, it would be difficult to imagine any strategy more expensive than incarceration. Thus, according to F.W. Dodge, a building-information service:

[T]he total value of contracts awarded annually for the construction, expansion, and renovation of jails and prisons increased 602% during the last ten years, . . . [T]he aggregate cost came to \$2.3 billion—and that figure does not cover the sums paid to fight the lawsuits that preceded many of the projects. More than 370 jails are being built now, most of them under court order. Given runaway inflation, no one will guess what the cost will be.¹⁹⁶

Individually, of course, jail construction costs differ. Thus, while the National Coalition for Jail Reform estimates that construction costs nationwide average around \$50,000 per bed,¹⁹⁷ Fairfax County, VA, puts per cell construction costs at between \$50,000 and \$75,000,¹⁹⁸ and per bed construction with finance charges factored in has been pegged at \$200,000 in New York City.¹⁹⁹ Such costs, one observer notes, are equivalent to those of constructing (and selling for profit) a luxury condominium. "But, unlike a condominium, [the jail cell] doesn't yield any tax revenues. Instead, it constantly demands tax dollars to pay for guards and other correctional services."²⁰⁰

Indeed, the ongoing costs of maintaining prisoners in jail are not included in construction outlays. According to the National Institute of Justice, in 1978, it cost on average \$5,253 annually to house a single jail inmate for one year—and that figure includes the fiscal benefits of longer term care while excluding capital costs.²⁰¹ In New York City estimates range from \$68²⁰² to \$71.87²⁰³ per day to house, feed, and service one jailed individual.

Those figures may be compared to claims of savings made by a number of alternative programs. Thus, for example, repeating some figures proffered previously, in the area of pretrial diversion, deflecting a mere 114 cases away from jail saved the City of Wichita about \$405,000. And Monroe County, NY, diversion program achieved a benefit to cost ratio of 1.3 to 1.

Savings over the costs of jailing have also been realized in the area of post-trial alternatives. For

example, the New York Community Sentencing Project claims reduction in prisoner costs of anywhere from \$1,119 to \$5,199 per offender, while CLASP estimates that a California offender who volunteers for community services costs a mere \$35. Moreover, in each case, savings are claimed over potential construction costs and the amount of labor accruing to jurisdictions as a result of free community service. It should be stressed, however, that comparing the costs of alternative procedures and programs to potential institutional construction costs is a highly speculative—even dubious—endeavor and one that might be accused of entering the "apples and oranges" school of analysis. Moreover, the existence of alternatives has not proven thus far to be a palliative for the need to erect more jail space. Nonetheless, taking into account a number of real and potential factors, most alternatives to incarceration do appear to be less costly than most time spent in jail.

Do Alternatives Rehabilitate?

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 our presumption that conversations with a psychiatrist or a return to the community could achieve the same end.²⁰⁴

While not everyone views the rehabilitative capacity of nonincarcerative programs with the same amount of skepticism as the author of the above quote the evidence suggests that, on the whole, the recidivism rates of those exposed to alternatives are no less nor any greater than those confined. In fact, despite notable exceptions, the bulk of alternative programs appear to result in reduced recidivism in their infancy, with rates climbing and becoming comparable to post-trial and prison rates in maturity—suggesting little more than a criminal justice "Hawthorne Effect."

As has been noted previously, it is not easy to assess such statistics. Most studies have not been undertaken with adequate scientific rigor. However, the best analysis to date, completed in 1974 by sociologist Robert Martinson, suggests that community-based correctional alternatives accomplish little in the way of rehabilitation.²⁰⁵ Subsequent studies have done little to dispel Martinson's discouraging conclusions.²⁰⁶

Do Alternatives Protect and Satisfy Society?

Though the answers are difficult to quantify, two very important questions need to be asked of alternative correctional programs. First, "do they adequately protect society?" In an ideal world, the answer is no. However, when applied to the nonviolent bulk of smalltime offenders and when compared to jail, the answer seems to be yes. Thus, remembering that recidivism rates are at least no worse among those sentenced to alternative programs than among those sentenced to incarceration and that failure to appear at trial is no greater among those released on recognizance, for example, than among those released on traditional bail, society is protected (or not protected) equally as well from petty crimes through non- or less-incarcerative methods as through jail—and most probably at less cost.

If employed on a wide scale and directed at appropriate populations, alternatives to incarceration conceivably could free up existing jail (and prison) space for a purpose other than rehabilitation or punishment-as-usual—what Wilson calls the "isolation"²⁰⁷ and Sherman and Hawkins term the "incapacitation"²⁰⁸ of those who pose real dangers to society. The relatively few, then—murderers, rapists, armed robbers, and some small number of ostensibly nonviolent but particularly heinous offenders such as organized crime members—would, by virtue of their probable threat to society, be locked away for some specified period of time.

Equally important is the question, "do alternatives satisfy society's need for justice?" Sherman and Hawkins have described this justice-based model as the legalist paradigm:

From this perspective, the purpose of the criminal justice system is to articulate, embody and reinforce the legal norms of society. The legalists argue that even if a particular action by some part of the system makes no direct contribution to reducing the number of offenses, it may still perform a valuable social function. Criminal justice is regarded here as intended for the greater part of society that will obey the law, even as it anticipates a fraction that will break the law. . . . Punishment in general, imprisonment as its instrument, and such policies as restitution to victims are justified by many legalists as acts which

satisfy the collective conscience. Legalists maintain that punishment for infractions of criminal law is not important for its own sake, but as a distinguishable route to the goal of social order.²⁰⁹

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 American judge sentencing a shoplifter to 30 days of sexual violence and physical brutality. Yet such atrocities, if not the norm, do occur in jail. Moreover, according to a recent survey, pretrial defendants make up as many as 61.1% of the jail population.²¹⁰ 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 any determination of guilt.

On the other hand, the perception does exist that some, if not most, community-based alternatives (particularly for those found guilty) 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. Thus, according to Sherman and Hawkins:

community corrections fails to meet the need we have described as legalist. 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 spectrum.²¹¹

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.²¹²

Moreover, it not entirely clear that the general public is quite as "punishment-driven" as might be expected. In fact, a rather hopeful ambivalence rather than bloodthirstiness characterizes public opinion regarding the treatment of criminal offenders. Thus, a 1980 poll found that 83% perceived the

courts as being too lenient in their treatment of criminals.²¹³ Yet a 1981 poll on the objectives of imprisonment found that only 17% of those questioned viewed punishment as a proper goal of incarceration, while the largest bloc, 49%, saw rehabilitation as the ideal aim.²¹⁴

Like the institutions they were designed to replace, or at least to reduce, alternatives to incarceration were born of a desire to rehabilitate those who violated the social order. However, after two centuries of "experimentation," penal experts, if not the general public, are becoming increasingly skeptical about the possibilities of reform—neither correctional institutions nor correctional alternatives appear to correct. In this era of cynicism, then, is there a place for alternatives? The answer appears to be

yes and it appears to be rooted in fiscal realities:

[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.²¹⁵

FOOTNOTES

- 1 Stephen E. Doeren and Mary J. Hageman, *Community Corrections* (Cincinnati, OH: Anderson Publishing Company, Criminal Justice Studies, 1982), p. 16.
- 2 U.S. Department of Justice, National Institute of Justice, Office of Development, Testing, and Dissemination, *Program Models: Unification of Community Corrections* (Washington, DC: U.S. Government Printing Office, 1980), p. 13.
- 3 Michael Sherman and Gordon Hawkins, *Imprisonment in America: Choosing the Future* (Chicago: University of Chicago Press, 1981), pp. 77-78.
- 4 *Ibid.*, pp. 78-79. See also "Alternative Jail Conceptualizations" in 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 Correction's Jail Center, June 1980.
- 5 E. Eugene Miller, *Jail Management: Problems, Programs and Perspectives* (Lexington, MA: D. C. Heath and Company, 1978), p. 126.
- 6 Robert Cushman quoted in John Blackmore, "Can Communities Succeed Where the States Have Faltered?" *Corrections Magazine*, April, 1981, p. 22.
- 7 *Ibid.*, pp. 22-23.
- 8 Donald E. Pryor, *Practices of Pretrial Diversion Programs: Review and Analysis of the Data*, Alternatives—Series A (Washington, DC: Pretrial Services Resource Center, 1982), p. 3.
- 9 National Advisory Commission on Criminal Justice Standards and Goals, *Report on the Courts* (Washington, DC: U.S. Government Printing Office, 1973), p. 27.
- 10 Pryor, *Practices of Pretrial Diversion Programs*, p. 1.
- 11 David F. Greenberg, "The Correctional Effects of Corrections: A Survey of Evaluations," in *Corrections and Punishment*, David F. Greenberg, ed., Vol. 8: *Sage Criminal Justice System Annuals* (Beverly Hills, CA: Sage Publications, 1977), p. 113.
- 12 The Washington Program is now defunct and while the Court Employment Project remains operational it has dropped its diversionary component.
- 13 Greenberg, "The Correctional Effects of Corrections," p. 113.
- 14 *Ibid.*
- 15 First National Conference on the Public Inebriate, *The Public*

- Inebriate: Overview and Alternatives to Jail* (Madison, WI: Wisconsin Clearinghouse, 1980), p. 4.
- 16 Donald Murray, "Criminal Justice Report: The Public Inebriate," *County News*, August 18, 1980, p. 6.
- 17 Conference on the Public Inebriate, *The Public Inebriate*, p. 17.
- 18 *Ibid.*, pp. 17-18.
- 19 This development will be explored more fully in *Chapter IV*.
- 20 While relatively few alcoholics suffer violent delirium tremens during withdrawal, many do suffer from other severe physical problems such as fractures, wounds, gastrointestinal bleeding, heart and vascular disorders, and brain damage. Moreover, the alcoholic awakening to find him or herself in jail is a very likely candidate for suicide.
- 21 See especially a recent California case, *Sundance v. Municipal Court of Los Angeles*, finding that: (a) jailing of homeless public drunks constitutes cruel and unusual punishment, (b) the individuals involved had been deprived of due process since the state generally had no intention of bringing them to trial, (c) medical screening and monitoring of alcoholics is required; and (d) while developing programs for the diversion of alcoholics was a legislative prerogative, criminal processing of such individuals was a waste of taxpayers' money.
- 22 National Conference on the Public Inebriate, *The Public Inebriate*, p. 11, 21.
- 23 *Ibid.*, p. 21.
- 24 *Ibid.*, p. 14.
- 25 *Ibid.*, p. 22.
- 26 Letter from Elizabeth Gaynes, Technical Assistance Associate, Pretrial Services Resource Center, January 21, 1983.
- 27 Telephone conversation with Elizabeth Gaynes, August 30, 1982.
- 28 It should be noted, however, that programs for public inebriates discussed above do not necessarily involve arrest.
- 29 Nora Klapmuts, *Diversion From the Justice System* (Hackensack, NJ: National Council on Crime and Delinquency, n.d.), p. 11.
- 30 *Ibid.*
- 31 *Ibid.*, pp. 12-13.
- 32 John J. McCarthey, "Dispute Resolution: Seeking Justice Outside the Courtroom," *Corrections Magazine*, August 1982, p. 34.
- 33 *Ibid.*, p. 37.
- 34 Talbot D'Alemberte, Chairman of the American Bar Association's Special Committee on Resolution of Minor Disputes,

- Congressional Testimony, n.d., p. 2.
- 35 Actually, the presumption of innocence is simply a rule of evidence that allows a defendant to remain silent at his or her trial and places the burden of proof on government. However, pretrial defendants are protected by means of the Due Process Clause of the Constitution prohibiting the deprivation of life, liberty or property without due process of law.
- 36 National Sheriffs' Association, *The State of Our Nation's Jails, 1982* (Washington, DC: National Sheriffs' Association, 1982), p. 157.
- 37 William F. Duker, "The Right to Bail: A Historical Inquiry," 42 *Albany Law Review* 35 (1977).
- 38 *Ibid.*, p. 41.
- 39 Caleb Foote, "The Coming Constitutional Crisis in Bail: I," 113 *University of Pennsylvania Law Review* 981 (1965).
- 40 *Herman v. Jeuchner*, 15 Q.B.D. 56 at 563 (1885).
- 41 224 U.S. 567 (1912).
- 42 *Ibid.*, 575-76.
- 43 D. Alan Henry, *Ten Percent Deposit Bail* (Washington, DC: Pretrial Services Resource Center, 1980), pp. 25-29.
- 44 Duker, 42 *Albany Law Review* at 86.
- 45 *Judiciary Act of 1789*, ch. 20, 1 Stat. 73,91.
- 46 Foote, 113 *University of Pennsylvania Law Review* 959, 972.
- 47 *Carlson v. Landon*, 342 U.S. 524 at 545 (1952). See also *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *United States v. Radford*, 361 F. 2d 77 (4th Cir.), cert. denied, 385 U.S. 877 (1966); *White v. United States*, 330 F. 2d 811, 814 (8th Cir.), cert. denied 397 U.S. 885 (1964); *United States v. Galante*, 308 F. 2d 63, 64 (2d Cir. 1962); *Ward v. United States*, 76 S. Ct. 1063, 1066 (Frankfurter, Circuit Justice, 1956); *United States v. Weiss*, 233 F. 2d 463, 465 (7th Cir. 1956); *Heikkinen v. United States*, 208 F. 2d 738, 740 (7th Cir. 1953); *Forest v. United States*, 203 F. 2d 83, 84 (8th Cir. 1953); *United States v. Field*, 193 F. 2d 92, 98 (2d Cir.) cert. denied, 342 U.S. 894 (1951).
- 48 See for example *U.S. v. Mollow*, 10 F.2d 657 (7th Cir. 1926) in which a somewhat restricted view of the right to bail was posited.
- 49 Foote, 113 *University of Pennsylvania Law Review*, 959, 969.
- 50 Caleb Foote, "The Coming Constitutional Crisis in Bail: II," 113 *University of Pennsylvania Law Review* 1125 at 1151 (1965).
- 51 Rankin, "The Effect of Pretrial Detention," 39 *New York University Law Review* 641 at 646 cited in *ibid.*, p. 1150. See also a later study asserting that although pretrial custody cannot definitely be linked with conviction, it does influence sentencing outcomes—i.e., those held in custody at the pretrial level and later convicted are more likely to receive sentences involving incarceration. John Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger Press, 1979), pp. 185-211.
- 52 Foote, 113 *University of Pennsylvania Law Review*, 1125, 1147.
- 53 *Bandy v. United States*, 82 Sp. Ct. 11, 13 (Douglas, Circuit Justice, 1961).
- 54 According to the director of the District of Columbia Pre-trial Services Agency, "Most defendants who fail to appear are brought back into the system by law enforcement officers executing warrants not by bondsmen. In addition, where forfeitures are ordered, they are seldom, if ever, collected." U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on the Constitution, prepared statement of Bruce D. Beaudin in *Bail Reform*, Serial No. J-97-56, 97th Cong., 1st sess., 1981, p. 219. Moreover, the American Bar Association has stated that "in practice bondsmen do little or nothing to return their charges." American Bar Association, *Standards Relating to the Administration of Criminal Justice: Pretrial Release* (Chicago: American Bar Association, n.d.), p. 39. Unfortunately, assessments of bail and its alternatives vary widely (perhaps wildly is the more appropriate modifier.)
- For instance, at recent Congressional hearings on reform of federal bail laws, a spokesman for the bail bond industry refuted findings on Dallas' conditional release bonds (an alternative to money bail.) Thus, he contended that while the original assessment claimed that a mere 1.3% of those released failed to make court appearances, his study indicated that the rate was closer to 60%! Statement of Jerry Watson in Senate, Committee on the Judiciary, *Bail Reform*, No. J-97-56, p. 200.
- 55 That study found 28% needlessly detained. Cited in Tyce S. Smith and James W. Reilley, "The Illinois Bail System: A Second Look," 6 *The John Marshall Journal of Practice and Procedure* 33, 34 (1972).
- 56 National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Release and Diversion: Pretrial Release* (Washington, DC: National Association of Pretrial Services Agencies, July 1978), pp. 5-28.
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- 58 *Ibid.*, p. 36.
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- 60 Ares, Rankin, and Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole," 38 *New York University Law Review* 67 (1963) cited in Smith and Reilley, 6 *The John Marshall Journal of Practice and Procedure* 35 (1972).
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- 64 Donald E. Pryor and Walter F. Smith, *Pretrial Issues: Significant Research Findings Concerning Pretrial Release* (Washington, DC: Pretrial Services Resource Center, 1982), pp. 7-8.
- 65 Donald E. Pryor, *Practices of Pretrial Release Programs: Review and Analysis of the Data, Alternatives—A Series* (Washington, DC: Pretrial Services Resource Center, 1982), p. 3.
- 66 *Ibid.*
- 67 *Ibid.*, pp. 19-23.
- 68 *Ibid.*, p. 13.
- 69 *Ibid.*, pp. 15-19.
- 70 Janet Frohman, "A County Official's Guide to Pretrial Release," The National Association of Counties, p. 11.
- 71 *Ibid.*, p. 8. It should be noted, however, that the distinctions between stationhouse release and post-detention release are not always very clear in practice.
- 72 Walter H. Busher, *Citation Release: An Alternative to Pre-trial Detention* (Sacramento, CA: American Justice Institute, 1978), p. 3 cited in *Ibid.*, pp. 11-12.
- 73 *Ibid.*, pp. 13-14.
- 74 *Ill. Rev. Stat. Ch. 38, Section 110-7(a), (f)*, cited in Smith and Reilley, 6 *The John Marshall Journal of Practice and Procedure* 32 (1972).
- 75 The Supreme Court noted the preferability of the 10% system

- over its predecessor in *Schilb v. Kuebel*, 404 U.S. 357 (1971).
- 76 Includes the District of Columbia.
- 77 Some of these 26 states may have case law that interprets existing legislation to allow for the implementation of 10% within the statutory wording.
- 78 Henry, *Ten Percent Deposit Bail*, p. 6.
- 79 *Ibid.*, p. 11.
- 80 One author notes that the problems with much of the research thus far include: (1) lack of attention to design questions; (2) poorly written and organized reports; (3) failure to use [standard] program goals; (4) lack of definition of key terms; (5) use of "so-called" national failure-to appear rates, rather than proper designs for determining a program's impact; (6) use of subjective determinations rather than empirical data in making generalizations; (7) use of variables over which the program may have little control; and (8) lack of information on the way release programs affect detention rates. Michael P. Kirby, "Recent Research Findings in Pretrial Release," *Alternatives-A Series: Findings 1* (Washington, DC: Pretrial Service Resource Center, 1977), p. 1.
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STATE-LOCAL AND INTERLOCAL RELATIONS AND LOCAL JAILS

Although the construction, operation and maintenance of jails is basically a function of local government—most frequently the county—the subordinate status of localities vis-a-vis state government makes the local performance of that function critically dependent upon the laws, policies and practices of state government and all three branches of that government—legislative, executive and judicial. The effective provision of jail services by any city or county, moreover, frequently involves cooperation or other contact with other local governments. This chapter addresses the primary intergovernmental aspects of the functioning of local jails: those involving state-local and interlocal relations.

THE STATE AND LOCAL JAILS

The entire (criminal justice) system represents an adaptation of the English common law to America's peculiar structure of government, which allows each local community to construct institutions that fill its special needs. Every village, town, county, city and state has its own criminal justice system, and there is a federal one as well. All of them operate somewhat alike. No two of them operate precisely alike.¹

Like so many of America's governmental institutions, its local jails evolved from the history and tradition of England transmitted to this continent in colonial days. The first jail was established in Vir-

ginia virtually coincident with the founding of the Jamestown colony.² In 1642 the General Assembly enacted the initial legislation dealing with erection and maintenance of county jails. Virginia set the pattern that was generally followed by all the colonies.³ After the colonies were transformed into states by the *Declaration of Independence*, the state-local relationship was carried forward under the *Articles of Confederation* and then the *U.S. Constitution*, with the state authorizing and mandating certain jail requirements for localities.

Local jails receive little mention in state constitutions. Most frequently the legislature's authority with reference to jails is subsumed under its general responsibility for legislating on local government—including providing financial resources—and for establishing the system of criminal justice—the penal code, courts, police and corrections. Some states, such as Georgia, deal with local jails under their social welfare laws. In a few instances, constitutions specifically mention some aspect of the local jail function. The New York constitution, for instance, states that the legislature may provide for the maintenance and support of institutions for the detention of persons charged with or convicted of crime (Article XVII, section 5); the Texas constitution provides that the construction of jails shall be provided for by general law (Article XI, section 2); and the North Carolina charter requires "by competent legislation, that the structure and superintendence of penal institutions of the state, the county jails, and city police prisons secure the health and comfort of prisoners and that male and female prisoners be never confined in the same room or cell" (Article XI, section 6).

The authority of the governor and the executive branch to deal with local jail issues stems from their general constitutional responsibility for seeing that the laws are implemented, and from specific responsibilities imposed by legislation. Among the latter, for example, may be the obligation of a department of corrections or similar agency to develop jail standards and to inspect for compliance. The courts' responsibility vis-a-vis jails derives from their constitutional duty to protect individual rights and enforce public policy, including the penal code. Accordingly, they decide who is sentenced to jail and for how long; determine what kinds of official behavior or jail conditions violate the constitutional rights of inmates; see to it that legislative enactments and administrative regulations are carried out; and seek to protect inmates' right of access to the courts.⁴

This section focuses on the principal avenues through which state government influences the conduct of the local jail function and helps contribute to or ameliorate the "jail crisis": the penal code and sentencing structures, standards, inspections, subsidies, technical assistance and training. The section concludes with an extended discussion of experience in states that have adopted the community-based corrections approach to improving performance of the jail function and a brief reference to the six states in which local jails are administered from the state level.

Sentencing and Release Policies

Authority to control the arrival and departure of inmates resides primarily outside the corrections system, in the hands of courts, prosecutors, and parole boards. Prison officials have some control over length of stay (through commutation of time off for good behavior), but generally lack the power of primary gatekeepers, regulating the in-take of prisoners.⁵

The same may be said of jails: control of who enters and leaves is out of the hands of the jail administrator. For a large portion of the inmates—those serving sentences (constituting about 40% of the inmate population nationwide)⁶—the critical responsibility for their being in jail stems from the sentencing and release decisions of judges and parole officials. These decisions are framed to a large extent by 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 and release 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 given the judges and parole officers in applying the alternatives. There are 50 different sets of such state laws,⁷ but they fall into three general groupings on the basis of the amount of discretion

vested in the judges and parole officials: indeterminate, determinate and mandatory minimum sentences.⁸

Indeterminate—a type of sentence under which the judge is free to imprison, place on probation, or set varying conditions on probation. Where he 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 and 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.

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.

Mandatory Minimum—a statutory requirement that a certain penalty shall be set and carried out in all cases upon conviction for a specified offense or series of offenses. The statute usually provides that an offender convicted of a specified very serious crime or series of crimes be confined in prison for a minimum number of years especially established 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.

THE PURPOSES OF INCARCERATION

Which of these general structures a state chooses to follow—or, more realistically, what combination it chooses—is governed by what the legislature,⁹ and ultimately the public, view as the purposes of incarceration and whether those purposes are furthered by granting greater or lesser discretion to the judges and parole officials. Although the purposes have been variously identified and classified in the correctional literature,¹⁰ a common formulation identifies four competing and often conflicting objectives: retribution, deterrence, incapacitation and rehabilitation.¹¹

- *Retribution* stresses that the objective of incarceration is punishment or retribution for an offense committed and asks that offenders be judged on the severity of their crimes. The emphasis on fitting the punishment to the crime ("just deserts") holds that "no sanction should be imposed greater than that which is deserved by the last crime, or series of crimes, for which the offender is being sentenced."¹²
- The *deterrence* objective holds that the sentence should be severe enough to act as a deterrent to anyone contemplating a crime.
- The *incapacitation* goal proclaims that the main purpose of incarceration should be to sequester presumptively high-risk individuals who are thereby incapacitated for most crimes, at least while they are in prison.
- Advocates of *rehabilitation* contend that the purpose of imprisonment is to remake prisoners into useful functioning members of society, providing a positive setting for personal growth and change rather than the negative features of confinement. Rehabilitation is sometimes referred to as the "medical model," comparing the criminal to a person who is sick and in need of therapy.

The last three objectives are termed utilitarian, in that they are designed as the means to the ultimate goal of reducing or controlling crime. "Just deserts" or retribution is a different kind of sentencing goal in that the sentence is an end in itself—punishment for the crime.¹³ Emphasis among the objectives may shift over time as sentencing practice responds to changes in public attitudes. Also, different objectives may be given more or less emphasis depending on the nature of the offense and the offender's characteristics and history.

THE TREND IN SENTENCING POLICIES

The history of corrections in the U.S. in the past 15 years is one of a shift away from the rehabilitation goal in imprisonment toward one or more of the other objectives, but with continued emphasis in some states on rehabilitation outside prisons or jails, that is, in community corrections. In terms of the

type of sentences, this trend represents a general swing from indeterminate to determinate.

The rehabilitation objective took hold in the late 19th century, and by 1900, retribution or punishment had been disavowed by many legal theorists as unscientific and uncivilized.¹⁴ Thereafter, correctional institutions generally adhered to the rehabilitation model, so that by the 1930s, virtually every state sentencing code provided for the indeterminate sentence. Time served was determined as much by rehabilitative progress as by the severity of the offenses for which the prisoners had been convicted.

It was not until the late 1950s, however, that the rehabilitative objective was widely followed in actual correctional practice, even though much of what took place in some prisons still was very far from this approach. Illustrative of the widespread acceptance of the rehabilitative goal was the recommendation by President Johnson's Crime Commission in 1967 that correctional institutions be small, adjacent to urban centers, and based upon a "collaborative regime between staff and prisoners."¹⁵

Since the late 1960s, rehabilitation has been vigorously attacked by groups that once included its strongest supporters. Disillusionment set in partly because program evaluations failed to establish that correctional treatment was effective. California, once the leader in the rehabilitative approach, was among the first states to reverse its field. A succession of violent prison uprisings also raised doubts about the fairness and equity of correctional treatment, and particularly the indeterminate sentence.

Many scholars, legal practitioners and corrections administrators joined inmates in protesting the deleterious effects of release date uncertainty; the questionable ethic of constructive coercion implied by a model of imprisonment that conditioned release on prospects for rehabilitation; and the unwarranted disparity among sentences received and time served by similar offenders for similar crimes.¹⁶

With the fading of the rehabilitative ideal, support grew for reducing discretion at points in the criminal justice decision chain through determinate sentences and decision making guidelines for sentencing judges and/or parole boards. Emphasis was given to fixing terms more precisely at the point of sentencing or shortly after imprisonment.

By the end of the 1970s, moreover, a number of state legislatures passed laws providing that judi-

cially imposed sentences could not be significantly reduced by parole. In other states, administrative commissions were empowered to establish guidelines that set definite parole release dates shortly after imprisonment based on offense and offender characteristics.¹⁷

In assigning priority to sentencing according to the type and severity of the offense rather than the offender's presumed potential for improvement, the sentencing and imprisonment debate had turned almost full circle to where it had been at the beginning of the century. Incarceration again was being used for retribution or "just deserts."

Concurrent with the swing back toward "just deserts," however, interest has persisted in the traditional utilitarian purposes of imprisonment. Opinion polls find that the public strongly favors a "tough policy" in dealing with crime and lawlessness, and believes that the laws and the courts are too lenient or penalties not stiff enough.¹⁸ They suggest that the public holds that deterrence and incapacitation rather than rehabilitation or "just deserts" are the primary goals of incarceration.

Deterrence and incapacitation call for limiting sentencing discretion, even more than a "just deserts" policy of incarceration. Moreover, they are the central motivation for mandatory sentencing, which imposes even greater restrictions on sentencing decisions but has limited application to certain crimes or types of offenders. 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.¹⁹

While the goals of "just deserts," deterrence and incapacitation currently dominate scholarly and political debates, rehabilitation has not ceased to be an important consideration in criminal sentencing. Current emphasis, however, is on "facilitative rehabilitation" services—making such services available at the request of individual prisoners rather than imposing them as a condition of incarceration.

Still, many observers question the value of facilitative rehabilitation as long as it is administered within the prison setting.²⁰ They believe that the most promising setting is community-based corrections. In this context, community-based corrections include any noncustodial sanction (including fines and suspended sentence) as well as custodial corrections facilities and programs that provide residents with opportunities for regular contact with the com-

munity. Examples are pre-trial and pre-sentence diversion in treatment programs; nonresidential programs of post-conviction supervision; residential alternatives to incarceration, such as restitution and community corrections centers; pre-release programs and facilities; and parole supervision and related after care services.²¹

SENTENCING GUIDELINES: REDUCING DISPARITIES, CONTROLLING POPULATION

The change in emphasis from indeterminate to determinate sentencing reflects a basic shift in the purpose of incarceration from rehabilitating to punishing offenders. Another type of sentencing reform that has developed in recent years is the movement for reducing or eliminating sentencing disparity through the prescription of sentencing guidelines. These guide and structure judicial discretion, so as to aid judges in minimizing disparities in their sentencing decisions, providing greater assurance that persons with similar criminal histories committing similar offenses will receive a similar sentence.²² Inequitable treatment of persons in like circumstances is a major source of prisoner unrest and, of course, a frustration of justice.²³

The guidelines are represented by a decisionmaking grid that judges use to determine an offender's sentence. *Figure III-1* is the grid in use in Minnesota. Seriousness of the offense and the offender's criminal history are the two axes of the grid. The judge assigns a score to each of these factors according to specific instructions and these scores determine the prescribed range of imprisonment. Usually, any sentence imposed beyond the limits suggested by the guidelines must be accompanied by a written statement of reasons. In the Minnesota grid shown in *Figure III-1*, offenders falling below the heavy line are presumptively sentenced to the state prison.

In late 1982, the Maryland Sentencing Guidelines Project reported that 12 states were using multi-jurisdictional guidelines (mostly statewide), two had surrogate guidelines, ten were considering or interested in guidelines, 21 were not using or interested in guidelines, and on four there was no current information.²⁴ The three states that probably have received the most attention are Minnesota, Pennsylvania and Washington. In all three the sentencing guidelines were drafted by commissions established by the state legislature.²⁵ The Minnesota and Pennsylvania guidelines went into effect in 1980 and 1981, and Washington's are to be activated in July 1984.

The Minnesota and Washington guidelines are limited to felony sentences whereas those of Pennsylvania apply to misdemeanors as well.

In its 1982 report on the development and impact of the guidelines, the Minnesota Commission asserted that most of the effects have been positive.

There appears to be increased uniformity in sentencing with similarly categorized offenders receiving the same sentence more frequently than in the past. There also appears to be increased proportionality in sanctions, with more serious offenders receiving more severe sanctions. The combination of increased uniformity and increased proportionality indicates that disparity in sentencing has been reduced.

. . . The prison population has remained within capacity and is increasingly comprised of offenders sentenced for crimes against person and decreasingly comprised of offenders sentenced for crimes against property.²⁶

The reference to prison population was in response to the direction from the legislature that "proposed changes in the sentencing structure had to result in prison populations that would fit existing state correctional resources."²⁷ As noted below, the guidelines did have an impact on jail overcrowding. The Minnesota Commission also reported that over the first 20 months of experience, circuit judges departed from the guidelines in 6.2%²⁸ of their disposition decisions and 8.5%²⁹ of their durational decisions. An early check of Pennsylvania experience indicated 94% conformity with the guidelines, both as to disposition and duration.³⁰

CURRENT SENTENCING PRACTICES

Despite the swing toward determinate sentencing of the past decade or so, most states still follow a full or partial indeterminate sentencing scheme, according to a 1981 survey.³¹ The survey was made to describe and compare various state provisions relating to felony sentencing and, particularly, to determine the degree to which judicial and executive discretion is exercised in the sentencing system. The survey team developed its own typology because the conventional descriptors (of the type cited earlier in this section) did not identify adequately the diversity of state sentencing systems. The results are presented in *Figure III-2*.

Figure III-1
MINNESOTA
SENTENCING GUIDELINES GRID:
PRESUMPTIVE SENTENCE LENGTHS IN MONTHS

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. Offenders falling below the heavy line are presumptively sentenced to the state prison.

CRIMINAL HISTORY SCORE

SEVERITY LEVELS OF CONVICTION OFFENSE		0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle Possession of Marijuana	I	12*	12*	12	15	18	21	24 23-25
Theft-Related Crimes (\$150-\$2,500) Sale of Marijuana	II	12*	12*	14	17	20	23	27 25-29
Theft Crimes (\$150-\$2,500)	III	12*	13	16	19	22 21-23	27 25-29	32 30-31
Burglary—Felony Intent Receiving Stolen Goods (\$150-\$2,500)	IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
Simple Robbery	V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
Assault, 2nd Degree	VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
Aggravated Robbery	VII	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
Assault, 1st Degree Criminal Sexual Conduct, 1st Degree	VIII	43 41-45	54 50-48	65 60-70	76 71-81	95 89-101	113 100-120	132 124-140
Murder, 3rd Degree	IX	97 94-100	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
Murder, 2nd Degree	X	116 111-121	140 133-147	162 153-171	203 192-214	243 231-255	284 270-298	324 309-339

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

*One year and one day

SOURCE: Minnesota Sentencing Guidelines Commission, *Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines*, July 1982, p. 2.

Figure III-2

STATES, BY SENTENCING CLASSIFICATION¹
(1981)

DETERMINATE

Broad Range Discretion

Illinois, Maine

Limited Range Discretion

Colorado

Sentencing Guidelines

Minnesota

Presumptive Sentencing

California, Connecticut, Indiana,
New Mexico, North Carolina

INDETERMINATE

Statutory Minimum-Maximum

District of Columbia, Kansas,
Massachusetts, Nebraska, New
Hampshire, Virginia, West Virginia

Mandatory maximum

Michigan, Ohio

PARTIALLY INDETERMINATE

Alabama, Alaska, Arizona, Arkansas,
Delaware, Florida, Georgia, Hawaii,
Idaho, Iowa, Kentucky, Louisiana,
Maryland, Mississippi, Missouri,
Montana, Nevada, New Jersey, New
York, North Dakota, Oklahoma,
Oregon, Pennsylvania, Rhode Island,
South Carolina, South Dakota,
Tennessee, Texas, Utah, Vermont,
Washington, Wisconsin, Wyoming

¹ Key to Classification

DETERMINATE—the court may impose fixed sentence to be served in full, less applicable "good time" reduction. No parole.

Broad range discretion—the legislature sets broad offense categories with wide range permitted in each category. The court has considerable discretion.

Limited range discretion—the legislature has set narrow range of sentence for each class of offenses within which the court can determine fixed sentence term based on circumstances in each case.

Sentencing guidelines—suggested penalties are developed by a legislatively established commission for specific types of offenses, based on nature of offense and offender involved. Deviation by the court requires written justification.

Presumptive sentencing—the legislature establishes "typical" sentence for each class of offense that must be imposed unless mitigating or aggravating circumstances exist. If they do exist, the court may increase or decrease "typical" sentence within narrow range of years set by statute.

INDETERMINATE—the court may impose minimum, or minimum-maximum, term, with actual release date determined by parole authority.

Statutory minimum-maximum—the legislature allows court discretion in setting minimum as well as maximum within statutorily set range. The parole board sets the actual release date.

Mandatory maximum—the legislature sets maximum, leaving the court to set a minimum. But the parole authority still sets the actual release date.

PARTIALLY INDETERMINATE—the court may set the maximum with no authority over the minimum. The actual term is set by the parole authority.

SOURCE: Caroline S. Cooper, Debra Kelly, Sharon Larson, *Judicial and Executive Discretion in the Sentencing Process: Analysis of State Felony Code Provisions*, Washington, DC, The American University, 1981.

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 picture reflects the degree to which the indeterminate sentence once dominated state practice and its continuing staying power. The large number of "partially indeterminate" states also indicates that many states' determinate policies apply only to selected cases. By their nature mandatory minimums are selective.

A CAUTIONARY NOTE

While acknowledging that the shift from indeterminate to determinate sentencing practices reduces judges' and parole officials' discretion, criminal justice specialists caution against ascribing too much significance to the change. They point out that determinate sentencing may not be as constraining on officials' discretion as is thought, and that there are other influences outside the sentencing process that play a role in determining who is incarcerated and for how long. For example, determinate sentencing legislation often gives the sentencing judge latitude to decide between probation and imprisonment for first offenders convicted on most charges; laws exempt certain offenses from the probationary options, but even when prison sentences are mandated, the judge often has broad discretion in selecting sentence length; and prison officials may begin exercising powers formerly held by parole authorities, as in "good time" provisions that allow credits for good behavior that could amount to half of the term set by the legislation. Even mandatory minimum sentences do not remove all discretion from the sentencing process. The "in/out" (of prison) decision may still be within the judge's discretion, as may also the length of the term.

Where the legislation does effect an alteration in sentencing and release practice, moreover, it still may not achieve the ultimate objective—a tougher stance toward offenders, for example. In a study of mandatory sentencing in two states, the National Institute of Justice found:

In principle, each of these changes in sentencing and release practice shares the goals of reducing—or at least controlling—

the discretion available to judges or parole boards in order to reduce the disparity and uncertainty or to increase the deterrent value of criminal sanctions. A closer examination, however, often shows that moves to reform sentencing have actually taken the form of a transfer of discretion from one group of actors in the system to another. At least five major groups have a role in determining the penalty imposed for a crime:

- The legislature* which defines crimes and establishes the range of penalties;
- Police officers* who make arrests and preserve and record evidence;
- Prosecutors* who determine whether to charge, on what crimes, and how far to plea bargain;
- Judges* who select the nature and length of the penalty within the limits prescribed by the legislature;
- Parole boards* whose members control the actual time served in prison for the majority of prisoners.

In most statutory revisions, the total amount of control exercised by the state remains constant, but the balance of influence at each stage shifts, changing the point at which system policy is determined. . . . Perhaps the clearest lesson of the experience is that sentencing is only a part of the whole picture of crime and punishment, and that the results of legislation depend not only on the provisions of law, but on the environment in which the law operates.³²

As Miller, Roberts, and Carter note:

It is important to remember . . . that while a particular reform measure might be intended to confine the discretionary power of one decisionmaker, it may also alter the discretionary power of another decisionmaker.³³

SENTENCING STRUCTURES AND JAILS

The principal focus of interest in sentencing practices is on felons—those who make up the inmate population of prisons. This emphasis is understand-

able in view of the public safety issues involved, the greater public anxiety, and state government's priority concern for prisons. In addition, issues surrounding the utilitarian purposes of incarceration—deterrence, incapacitation and rehabilitation—are vastly more relevant to the confinement of those serving long-term sentences than to those sentenced to jails. Rehabilitation seems a particularly questionable goal for a jail because of the shorter sentences served and the more limited facilities.

Yet state sentencing and release policies obviously also have an impact on jails. They have a direct effect in setting the framework within which courts and parole officials determine who will be sentenced to jail, for how long, and what kind of treatment they shall receive. 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 the sentenced offenders. Thus, sentencing and release practices affecting prisons inevitably have a “spillover” effect on jails.

State Corrections Officials' Observations

Responses to the ACIR-NACo survey of state corrections officials in 1982 throw light on the impact of sentencing on jails. Respondents were asked whether there was a local jail crisis in each state and if so, whether they considered any of eight specified courses as a feasible way to ameliorate it. Seven of the 26 who reported a crisis indicated that one ameliorative step would be to explore new sentencing strategies. What many had in mind was greater use of alternatives to incarceration and more differentiation between violent and nonviolent offenders in sentencing decisions. For example:

State A

“Although county jails in . . . are not ‘overcrowded,’ the conditions are below those in state facilities. Treatment programs are almost nonexistent. A program currently being viewed by our department as an alternative to incarceration is the ‘intensive supervision’ program underway in (another state). The program provides strict supervision for nonviolent offenders at a cost of only one-fifth that of incarceration. Our statistics indicate that we are getting more property offenders, from 37% to 50% of total population over past five years, which is consistent with the state’s crime figures which show a decline in the rate of violent offenses. *We are dis-*

couraged by our current sentencing laws which do not reflect the above trend, and are providing longer sentences for nonviolent offenders” (emphasis added).

State B

“The major need is alternatives to prisons, i.e., probation, pre-trial diversion. . . . The long term resolution will be the exploration of new sentencing strategies and short term sentencing, otherwise resources will be exhausted in most all states.”

State C

“The crisis in corrections can be improved if less inmates are arrested—and jailed”

State D

“There must be a determined effort to maintain a consistent policy of who must be detained. Priorities must be developed and enforced. If the policy is to lock everyone up, then the public must provide the necessary resources to achieve that goal in a fair, humane fashion. It would seem that there are less costly alternatives.”

State E

“Widening the net must be stopped. [A]n increasing percentage of probation sentences involves a provision for jail time up to one year.”

State F

“Several jurisdictions are trying to institute innovative sentencing and alternative practices but are often unable to due to the costs involved.” Other observers have pointed out how the impact of sentencing policies on prisons is transferred to jails.

More restrictive bail and probation policies increase jail populations, but longer sentences mean that some offenders are removed from jails to prisons. One scrap of evidence is the finding by the Connecticut Governor’s Task Force on Jail and Prison Overcrowding that the length of the average minimum sentence for second-degree assault and second-degree larceny—the kinds of offenses likely to lead to jail rather than prison—increased 33% between July 1978, and July 1980. Though sentences also increased for more serious crimes, those

increases were not as large. Another piece of supporting evidence is a study in New York showing that the use of probation dropped from 46% of all felons in 1974 to 32% in 1978, while the proportion of inmates sentenced to jail has increased in relation to pretrial detainees. In Kansas City, MO, county corrections director Susan Stanton says a new state criminal code, along with the well publicized problems of state prisons, have caused judges to send more offenders to jail instead of prison. In Virginia, Sheriff Newhart finds the same trend.³⁴

Sentencing policies clearly are a contributing cause of prison overcrowding. When overcrowding occurs, a spillover effect can be felt in jails. As of February 15, 1978, about 6% of all jail inmates were held because of overcrowding elsewhere. The south had the bulk of these inmates and 88% were state prisoners who were either awaiting transfer to a state facility when space became available or were being housed under formal agreements with state authorities.³⁵ In the northeast a similarly large proportion of jail inmates held because of overcrowding elsewhere also were state prisoners, but in the north central and west regions they were preponderantly being held for other local jurisdictions.

These figures were substantiated by the ACIR-NACo survey. Eight of 35 state corrections officials responding to the question said that there had been transfers of state prisoners to local jails in the past two years. In six of these cases, the reason was overcrowding in state prisons; in one it was traceable to a state penitentiary riot and in the other "inmate protection" was cited as the reason. Ten of 36 respondents reported delays occurred in transferring prisoners from local jails to state prisons, predominantly for reasons of overcrowding in the latter.

Of itself, the custody of state prisoners in local jails is not a problem, if the state pays full costs and if it does not interfere with good correctional practice, as for example requiring the intermixing of violent offenders with nonviolent offenders, or taxing the capacity of the jail. But where the state reimbursement rate does not meet full costs, or local jails are pressured to accept the more serious offenders, or overcrowding is caused, the custody of state prisoners creates problems for jails.

Minnesota's Sentencing Guidelines Experience

Evidence of the interconnection between prisons

and jails in responding to sentencing practices has come from Minnesota's experience with its sentencing guidelines. In its July 1982, preliminary report, the Minnesota Sentencing Guidelines Commission reported that:

... in 1980-1981 46% of convicted felons were given time in a jail or workhouse as a condition of probation, compared to 35% in fiscal year 1978. About half of that 11 percentage point increase can be attributed to the impact of the sentencing guidelines. The 4-5% reduction in the rate of state imprisonment contributed to a 4-5% increase in local incarceration. The remainder of the increase is part of the continuing trend toward increased local incarceration and reflects the discretionary decisions of courts.

Sentenced felons are a relatively small proportion of jail and workhouse populations. Approximately one-third of the population are sentenced felons, another third of the population are pre-trial defendants and a third are sentenced misdemeanants. Jails and workhouses are increasingly experiencing crowding as a result of increases in incarceration levels of all three groups.

The commission concluded that "sentencing practices for felons is (sic) contributing to the [jail and workhouse] crowding situation."³⁶ Disparities in jail sentencing practices also concerned the commission, partly because incarceration in a jail or workhouse as a condition of a nonimprisonment punishment was the most frequent type of felony sanction used in the state.

The analysis of uniformity in the use of local incarceration indicated almost perfect nonuniformity. The use of incarceration in local facilities appears essentially random. The durations of jail and workhouse terms as a condition of a stayed felony sentence is similarly variable, with an average term of approximately three months in Hennepin County and an average term of approximately ten months in St. Louis County.

In addition to the nonuniformity in local incarceration, there is considerable disproportionality with more serious offenders receiving no incarceration at all and less serious offenders receiving up to a year in jail. There is also disproportionality in

sanctions for those given extensive jail time compared to the term of imprisonment for an executed sentence for similar offenders.³⁷

The commission found that, although the felony sentencing guidelines did not heighten the disparities in jail sentencing, neither did they reduce them:

Commission examination of jail and workhouse sanctions in 1980 and 1981 revealed that uniformity in use of jails and workhouses within guidelines categories (i.e., similar offense seriousness and criminal history) had not increased after implementation of guidelines for prison.³⁸

Responding to the findings of disparity and overcrowding, a legislative committee recommended that the commission explore the feasibility of establishing guidelines for the use of jails and workhouses. A majority of the commission concluded that it should not develop such guidelines for the time being. It cited four major factors that weighed in the decision, two in favor and two against setting guidelines. The two factors in favor:

- the existence of substantial disparity in the use of local incarceration that guidelines could address, and
- the need to allocate more rationally scarce jail and workhouse resources by reserving incarceration for more serious offenders.

The two factors opposed, which it deemed "more compelling":

- the inequality of jail and workhouse resources—both regarding quantity and quality—in various locations around the state, that render uniform guidelines unfeasible, and the strong opposition of the criminal justice community to guidelines for the use of jails and workhouses that creates a political climate unfavorable to successful implementation.³⁹

Regarding the inequality of jail resources, the commission observed that areas with more felons generally have more resources and vice versa, so that the problem is not as great as it initially appears. Yet even a lesser variation is not immediately

resolvable. Moreover, the source of funding raises a problem:

... capital costs and most operating expenses [of jails and workhouses] come from the county budget. There is some sentiment that if jails and workhouses are to be built and operated at county expense, the use of the facilities should be controlled by the county in cooperation with the county and district courts. The commission views uniform, statewide sentencing guidelines for use of locally funded and operated facilities as problematic. Uniform, statewide sentencing guidelines for use of jails and workhouses would almost certainly be accompanied by demands for some state funding of jails and workhouses.⁴⁰

Concerning the "unfavorable political climate," the commission stated:

The criminal justice community strongly opposes any further limitations on discretion in sentencing. The criminal justice system has just become relatively adjusted to guidelines for the use of prison. The commission believes that the imposition of guidelines for the use of jails and workhouses at this time would result in a political backlash that would jeopardize the existing sentencing guidelines.⁴¹

It should be noted that because of its limited charge from the legislature, the commission's consideration of guidelines for jails and workhouses was confined to their possible application to the incarceration of felons only. It seems likely, however, that it would have found the same objections, if not more so, if it had considered applying guidelines to both misdemeanants and felons sentenced to jails and workhouses.

Guidelines in Other Jurisdictions

Minnesota has advanced farther than any other state in exploring the application of sentencing guidelines to jails. The Pennsylvania commission on Sentencing, unlike the Minnesota Commission, is directed to develop guidelines for the sentencing of misdemeanants as well as felons,⁴² but thus far it has backed away from developing jail guidelines because of the political difficulties involved.⁴³ The work of the Sentencing Guidelines Commission of the State of Washington is limited to sentencing of felony offend-

ers and, as in Minnesota, would affect jails to the extent that they handle felons. Moreover, the commission is instructed to estimate the population consequences of the recommended guidelines for prisons and jails.⁴⁴

A distinguishing feature of the Washington approach is the emphasis on community-based alternatives for short-sentence nonviolent offenders. The legislature directed the commission to draft its standard sentence ranges to include at least one of the following: total confinement, partial confinement, community supervision, community service, and fines. In response, the commission determined that, for sentences of nonviolent offenders for less than one year, the court should give priority to available alternatives to total confinement and justify its reasons if these alternatives are not used. The judge establishes the sentence in terms of total confinement and then uses his discretion in substituting alternatives for any portion of the sentence according to conversion rates specified in the guidelines. These rates are: one day of partial confinement or eight hours of community service can replace one day of total confinement. The community service conversion is limited to 240 hours or 30 working days. One year of community supervision also may be imposed to ensure that the terms of the alternative sentence are met. Fines may be assessed pursuant to a formula scaled according to the seriousness of the felony. The above procedure does not apply to first time nonviolent offenders but an earlier statute already empowered judges to sentence such offenders to a wide range of alternative sanctions.⁴⁵ The Washington sentencing guidelines go into effect in July 1984.

At least four cities adopted guidelines applicable to their local courts: Chicago, Denver, Newark and Philadelphia. Their experience was not very useful, however; compliance was voluntary and there were no sanctions for disregarding the guidelines altogether or for failing to provide written reasons for individual departures from them.⁴⁶

CONCLUSION

The number and type of offenders sentenced to a state's correctional institutions, the length of their terms, and the demands they place upon the facilities are the composite result of a chain of decisions involving the police, the prosecutor, the courts and parole officials. Among the most important influences on these decisions are the state's sentencing and release policies, reflecting the attitudes of the

community and the various elements of the criminal justice system toward the purposes of incarceration.

Inevitably the more serious offenders and offenses are the primary focus of sentencing policies and thus the principal impact is felt on state prisons. But the impact on local jails where the less serious offenders are incarcerated can not be ignored, as responses to the ACIR-NACo survey indicate. A number of the survey respondents expressed the view that the "jail crisis" would be relieved by greater reliance on alternatives to incarceration and other changes in sentencing policies. Further evidence of the connection between sentencing policies and jail problems is that state correction policies often treat local jails as available facilities to take care of overflow from state prisons or to hold offenders temporarily pending transfer to prisons. In the community corrections act states of Minnesota and Oregon, moreover, jails feel the impact of judges' using "split sentencing"—the sanction of probation plus a jail term—as an alternative to prison for sentenced felons.⁴⁷

Experience with sentencing guidelines in Minnesota has demonstrated their potential for controlling the size of the prison population and reducing sentencing disparities among felons. This experience suggests that guidelines might have a similar salutary effect on jails, since over-crowding and sentencing disparities are problems that beset jails as well as prisons. The possibility has not been tested as yet, although upon the recommendation of a legislative committee the Minnesota Guidelines Commission considered applying guidelines to felons incarcerated in jails. The commission decided against recommending that course on grounds of the inequality of jail resources throughout the state and an unfavorable political climate generated by strong opposition from the criminal justice community to further restrictions on sentencing discretion. The commission reached this conclusion despite its own finding that sentencing practices for felons—the central concern of the commission—contributed to the crowding situation in jails. "Political difficulties" also are cited to explain the failure to apply sentencing guidelines to jails in Pennsylvania.

State Jail Standards and Inspections

Until well into the 20th century, counties and cities generally were 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.⁴⁸

THE MOVEMENT FOR STATE STANDARDS

From the earliest days of the republic, state legislatures have prescribed requirements for local jails. As early as 1807, Alabama statutes required that jails be secured by timber, grates, bolts, and locks, and supplemented with pillories, whipping posts and stocks, and, in 1822, Mississippi mandated strong fortifications of stone or brick. Elsewhere state regulations prescribed requirements for feeding, reimbursing sheriffs, and even distributing bibles.

Yet it was not until the mid-20th century that a sizeable number of states undertook to look at local jails in a concerted fashion and adopt a comprehensive set of standards for guidance in constructing, renovating, and operating local jails.⁴⁹ While some of the impetus for this movement came from the efforts of corrections and other officials and employees within local and, particularly, state government, the principal pressure emanated from outside sources. It stemmed from the growing number and visibility of prison disorders, more frequent inspections by public and private agencies, media investigations of prison and jail conditions, and a judiciary increasingly willing to bring the conditions of confinement under the scope of Eighth Amendment review.⁵⁰ From these influences emerged two types of standards as measures of the adequacy of prison and jail conditions:

- The minimum standards of constitutional decency devised by the federal courts in decisions challenging the conditions of confinement.
- The growing body of self-regulatory standards and accreditation procedures promulgated by professional and federal executive agencies to stimulate facility improvement through voluntary, administrative action.⁵¹

The important role of the federal courts is described in detail in *Chapter IV*: the way in which,

since the mid-1960s, they have abandoned their previous “hands-off” attitude toward corrections cases and by their rulings increasingly have established the need for upgrading the conditions in prisons and jails. Related to the courts’ role was the movement for self-regulatory standards and procedures. As the National Institute of Justice noted:

Not surprisingly, the new judicial activism has added a sense of urgency to the development of increasingly specific self-regulatory standards by executive and professional organizations. In turn, the availability of these standards promises to introduce a new level of objectivity to litigation challenging the conditions of confinement.⁵²

Professional, Reform Group Initiatives

The promulgation of regulatory standards by outside professional or reform groups goes back at least to 1870 when the National Congress on Penitentiary and Reformatory Discipline (forerunner of the current American Correctional Association) issued a declaration of principles of prison discipline.⁵³ It raised the issue of providing minimum standards to assure adequate living conditions in penitentiaries and reformatories. Actual dissemination of standards materials began in the 1930s when the Federal Bureau of Prisons published minimum standards for its own system and developed a program for inspecting jails where federal prisoners were boarded. In 1931, the National Commission on Law Observance and Enforcement (Wickersham Commission) issued many recommendations affecting standards of good correctional practice, including some directed at action by state governments. Among the latter it urged giving a state agency authority to set standards covering food, sanitation, and living conditions, to inspect facilities for compliance, to approve construction plans, to close substandard jails, and to transfer prisoners, at county expense, in the interest of community and prisoner welfare.⁵⁴

Among the organizations that subsequently issued substantive recommendations for upgrading prison conditions are the American Correctional Association (1946-1966), the National Council on Crime and Delinquency (1966), the President’s Commission on Law Enforcement and Administration of Justice (1967), the Advisory Commission on Intergovernmental Relations (1971),⁵⁵ the American Bar Association’s Commission on Correctional Facilities and Services (1974, 3rd edition), and the National Ad-

visory Commission on Criminal Justice Standards and Goals (1973).⁵⁶

The most comprehensive standards-setting by such outside groups was that of the Commission on Accreditation for Corrections, established by the American Correctional Association in 1974. The commission's aim has been to develop a uniform set of standards that provide measurable criteria for assessing the safety and well-being of staff and inmates. Standards have been published in ten volumes covering both juvenile and adult corrections agencies responsible for institutional and community-based supervision as well as aftercare services. One of these volumes is *Standards for Adult Local Detention Facilities*.⁵⁷

The Commission uses the standards as the basis for its voluntary accreditation process. This process includes a self-evaluation by the applicant corrections agency, in which the agency proposes a plan for correcting known deficiencies; and a standards compliance audit by a visiting committee. The committee may recommend granting the agency "accreditation" status if it meets 90% of all "essential" standards, 80% of all "important" standards, and 70% of all "desirable" standards. By November 1982, nine local detention facilities in six states had been accredited and 27 additional institutions were in the process of being evaluated.⁵⁸

Another set of corrections standards has focused on the legal status and physical well-being of correctional institution inmates. The American Bar Association produced 17 volumes of Standards for Criminal Justice between 1964 and 1973, centering primarily on due process issues and legal procedures. It began work on the legal status of prisoners in 1971 and completed its fourth tentative draft of the standards in June 1980, which in February 1981, were deemed to constitute formal ABA policy.⁵⁹ Other sets of standards concerned with the well-being of prisoners have been produced by the American Medical Association, and the American Public Health Association.⁶⁰ The former provide the basis for an accreditation program similar to that of the Commission on Accreditation for Corrections.

Finally, in 1977 Attorney General Griffin Bell directed a Department of Justice task force to "undertake a comprehensive review of Federal corrections policy and to develop standards that are responsive to the rights and needs of inmates as well as to the requirements of institutional security and management." The task force reviewed the standards work of the groups cited above, particularly that of the

Commission on Accreditation for Corrections. The publication was issued in final form in December 1981, as *Federal Standards for Prisons and Jails*. These standards are voluntary.

State Progress

The impact of this concern for standards development—by both the courts and professional and reform groups—on state prescription of jail standards has been slow but steady. One reason progress has been no faster is that the main focus of reform has been on prisons, where more dangerous offenders are incarcerated and more large scale disorders occur. An earlier indication of the lesser emphasis on jails came in the results of a survey conducted by the president of the American Correctional Association in 1958 relative to the major professional concerns of 100 representative and leading correctional administrators. The tenth and last "concern" listed was "the disgraceful conditions of local jails and other short-term institutions." Matters of higher concern included "development of constructive correctional industries and outlets" and "antiquated penal codes and criminal statutes."⁶¹

A 1966 survey provides an early benchmark of the extent of state standards activity. The survey reported that 12 states set standards for local institutions and 19 set jail standards for personnel, construction, salaries, health, etc. The report did not explain the difference between "standards for local institutions" and "jail standards." Over 60% of the states accepted no responsibility for standards in local institutions and jails.⁶² In 1971 the National Sheriffs' Association "found a pressing need for publishing a set of uniform standards to govern the operations of jails. Few states had adopted standards; some were studying legislation to introduce jails inspection service and others had no plans."⁶³

Tracking subsequent state progress is difficult because published data is scarce and data comparability is uncertain. In 1974, the Statewide Jail Standards and Inspections Project of the Commission on Corrections Facilities and Services of the American Bar Association reviewed state jails standards legislation.⁶⁴ It found that, of the 45 states with locally operated jails,⁶⁵ 27 had statutory authority to establish jail standards. It did not make clear the extent to which the 27 actually used the authority.

In 1978 the National Sheriffs' Association surveyed much of the same ground covered by the ABA, with somewhat more emphasis on the operation of

enforcement programs.⁶⁶ It found that 28 states had statutory standards. Another 1978 survey, by the National Clearinghouse for Criminal Justice Planning and Architecture, reported that 45 states had jail standards, compared with the 26 states that had them in 1971.⁶⁷

The ACIR-NACo 1982 Survey

The latest data on the status of state jails standards adoptions are from the ACIR-NACo survey of state corrections officials in the summer of 1982. Of the 44 states with local jails,⁶⁸ 39 responded. Thirty of these reported they had standards and one (Kentucky) indicated that it would initiate them in 1983. Of the 31 positive responses, six reported that their standards were voluntary rather than mandatory. Of the five that had not responded, it was known from other sources⁶⁹ that three (New York, Oklahoma and Tennessee) had standards. In sum, out of the 44 states with locally administered jails, 33 had state standards and one will inaugurate them in 1983. In addition, two states had voluntary standards developed and implemented by the state association of counties in cooperation with the state sheriffs' association (Idaho) or by the county association alone (New Hampshire).⁷⁰

The current status of state standards-setting activity is summarized in *Figure III-3*. Viewed in the perspective of the last 16 years, it shows steady progress but a substantial number of states still without mandatory standards.

THE EFFECT OF STATE STANDARDS

How successful has the spread of standards activity been in improving jail facilities and operations? An empirical evaluation is beyond the scope of this study, but a judgment is suggested by a number of indicators. Two subordinate questions are involved: How good are the standards? How well are they enforced?

The Quality of the Standards

Several pieces of evidence indicate that state-imposed jail standards have improved in quality as well as quantity over the past 16 years. The 1978 survey by the National Clearinghouse for Criminal Justice Planning and Architecture assessed substantive changes between 1972 and 1978 and found that a greater proportion of states in 1978 called for single occupancy living units in their standards (22%) than in 1972 (4%).⁷¹ The 1978 standards specified a larger

area for both single and multiple living units. These standards also were higher than those of 1972 in regard to requiring day space and the size of such space. The earlier survey showed that only 65% of the standards permitting the holding of juveniles mandated the separation of adults and juveniles, while 91% of the current standards made this demand. The vast majority of standards in both years required the provision of medical services, with a larger percentage in 1978.

In general, the 1978 standards were found to be stronger than their 1972 counterparts in providing for better treatment of inmates with respect to lighting, ventilation, temperature and acoustical levels, visitors, availability of telephones, indoor and outdoor recreation, and access to a library or legal library.

Another index of improvement in standards is the growing influence of professional and reform groups and the federal government. In the late 1960s and early 1970s the standards and recommendations that emerged from efforts of the various national study commissions and reform groups were

cast as statements of general intent rather than precise guides for daily practice or policy determination. While many were extremely comprehensive in their descriptions of prison programs and facilities, the use of such terms as "appropriate," "as necessary" or "based on reasonable evidence" offered little guidance in measuring institutional compliance.⁷²

In 1970, through amendment of the *Omnibus Crime Control and Safe Streets Act*, the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice was authorized "to encourage states and units of general local government to develop and implement programs and projects for the construction, acquisition, and renovation of correctional institutions and facilities, and for the improvement of correctional programs and practices."⁷³ To that end, LEAA funded the development of very specific corrections standards by the American Correctional Association through the Commission on Accreditation for Corrections. Since then, LEAA and its successors in the Department of Justice have provided financial and technical assistance to standards drafting bodies in a number of states. Such assistance is cited, for example, in the jail standards work of Mississippi, Texas and Utah. Apart from these, the influence of the ACA model is

Figure III-3

**STATUS OF JAIL STANDARDS
BY STATE
(November 1982)**

STANDARDS ADOPTED BY STATE GOVERNMENT

Information Received in ACIR-NACo Survey

Mandatory Standards (25)	Voluntary Standards (6)	Voluntary Standards Adopted by Local Officials' Associations (2)	No Standards (6)
Arkansas	Arizona	Idaho	Alabama
Florida	California	New Hampshire	Colorado
Illinois	Georgia		Missouri
Indiana	Kansas		Montana
Iowa	Mississippi		New Mexico
Louisiana	Utah		Wyoming
Maine			
Maryland			
Massachusetts			
Michigan			
Minnesota			
Nebraska			
New Jersey			
North Carolina			
North Dakota			
Ohio			
Oregon			
Pennsylvania			
South Carolina			
South Dakota			
Texas			
Virginia			
Washington			
Wisconsin			
Kentucky (eff. 1/1/83)			

Information Received from Other Sources (3)

New York
Oklahoma
Tennessee

SOURCE: ACIR-NACo survey, Summer 1982; Susan R. Buckman, "Selected Jail Standards: A Comparative Survey," *The Justice System Journal*, Fall 1978, pp. 100-13; Third National Assembly on the Jail Crisis, Washington, DC, November 13, 1982.

credited in the organization and coverage of the standards of Arizona and New Jersey, among others.

To say that state standards reflect decided qualitative improvement over the past 16 years does not, of course, mean that the millennium has been reached. Some states' standards are still fairly new, limited in scope, and/or "statements of general intent rather than precise guides." Yet there can be no denying the general improvement in quality.

The Issue of Enforcement

State-prescribed standards alone are not sufficient to improve jail conditions. They have to be enforced to accomplish their purpose. Compliance may be forthcoming voluntarily but is not likely to be very widespread, particularly if it requires expenditure of money and the alteration of behavior patterns by responsible officials and personnel, which it invariably does. Reliance must be placed on pressure from an external authority, in this case the state government, and this requires a system of inspection to ascertain whether the standards are indeed being adhered to and followup action to see that discovered deficiencies are corrected.

State Jail Inspections

The National Sheriffs' Association (NSA) in 1978 compiled information about state jail inspection programs, aided by a grant from the National Institute of Corrections.⁷⁴ It found that:

- Thirty-two of the 44 states with locally operated jails had jail inspection programs that were statewide in scope and centrally administered, with inspections being made on a regular basis. In 1971, only 17 states had jail inspection services.⁷⁵
- Twenty-two programs required that every jail be inspected at least once per year, two every two years, five on a quarterly basis, and three every six months. Many states reported that "problem" jails received one or more follow-up visits. The report noted that, because of the number of jails in some states, minimum inspection interval requirements were sometimes difficult to meet. Also, few states showed an interest in lessening the inspection burden through some sort of self-certification program.

- The average staff complement consisted of four professional employees, which included administrative personnel as well as jail inspectors. The average budget of the states reporting budget figures was \$200,000.

The NSA concluded:

The scope of this study was not intended to provide a basis upon which to draw qualitative judgments about the adequacy and effectiveness of existing jail inspection efforts. However, it is clear that jail inspection has come of age. Not only do 32 states currently have such programs in operation, but several others have indicated that they are in the process of attempting to draft the requisite enabling legislation.⁷⁶

The ACIR-NACo survey found indications of progress in state jail inspection programs between 1978 and 1982, although not as great as might have been expected from the NSA conclusion:

- Three additional states had initiated inspection programs since 1978—Arizona, Idaho and South Dakota. Arizona's and Idaho's were in states with voluntary standards.
- On the average, the states had made a modest reduction in the length of intervals between inspections.

The ACIR-NACo survey also established that statutory mandating of inspections was widespread, giving greater institutional force to the inspection process. In 23 of the 24 states with mandatory standards, inspections were required by statute and the one exception (Virginia) reported that while inspections were not mandated by law, they were "implied." In addition, in two states with voluntary standards (California and Kansas) and one with no standards (Alabama), inspection also was mandated statutorially. The state-by-state record of the status of inspections reported in the ACIR-NACO survey as of November 1982, is shown in *Figure III-4*.

The Level of Compliance. Taking the results of the NSA and ACIR-NACo surveys together, it seems reasonable to conclude that, in formal terms at least, state jail inspection "has come of age" and continues to show progress, however modest. But the existence of formal inspections systems does not carry assurance of the desired payoff: enforcement of stan-

Figure III-4
STATE JAIL INSPECTION PROGRAMS*
 (November 1982)

Type of Standards	Inspection Program?		Required by Statute?	
	Yes	No	Yes	No
Mandatory	Arkansas, Florida, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Washington, Wisconsin		Arkansas, Florida, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Washington, Wisconsin	Virginia
Voluntary	California, Georgia, Kansas	Arizona, Mississippi, Utah, New Hampshire	California, Kansas	Arizona, Georgia, Idaho, Mississippi, New Hampshire, Utah
None	Alabama	Colorado, Idaho, Kentucky, Missouri, Montana, New Mexico, Wyoming	Alabama	Colorado, Kentucky, Missouri, Montana, New Mexico, Wyoming

*No responses received from Nevada, New York, Oklahoma, Tennessee or West Virginia.

SOURCE: ACIR-NACo questionnaire survey, Summer 1982.

dards. Unfortunately, the inspection system does not always produce compliance, even where both the standards and inspection system are statutorily mandated. In 1975, Ronald Goldfarb observed that "such legislated standards as do exist are for the most part vague and unenforced."⁷⁷ The NSA's 1978 survey found that only 29 states had enforcement powers.⁷⁸ Moreover, the effectiveness of some of this inspection and enforcement activity is suspect. One unidentified jail administrator commented that "the only difference in this state between an accredited jail and one that isn't, is the plaque on the wall of the Sheriff whose jail is accredited."⁷⁹ This judgment has been confirmed by a number of respected observers, such as Francis R. Ford of the NSA and Kenneth Kerle, a consultant on jails for that organization. They have written that even in those states that require jail inspections "a majority of state inspections amounted to a bad joke."⁸⁰ In a letter to ACIR staff, moreover, Kerle expresses doubt that a state should be credited with having mandatory standards unless the state inspector has authority to close down any facility found out of compliance.⁸¹

Apart from these kinds of judgments, there is little evaluative data on the effectiveness of the standards/inspection system. The incidence of court orders applying to jails provides an indirect indication, however. According to the ACIR-NACo survey, 25 of 33 states responding to the question indicated that they had jails under court orders, with the number in any one state ranging as high as 10 in Indiana, 12 in California, 13 in Texas, 17 in Louisiana, and 20 in Mississippi (see *Figure III-5*). A recent survey by the National Sheriffs' Association of individual jails found that almost 11% were currently under court orders, most usually for overcrowding. Among the largest facilities (63 beds and over), 26.3% were under court orders.⁸²

The existence of court orders may be evidence of a functioning standards/inspection system, since some states use the petition to a court for a closing or restrictive order as their principal enforcement power. The NSA's 1978 survey reported that this was the case for 16 of the 29 states that had standards enforcement power at that time.⁸³ Obviously, however, these by no means account for all court orders applying to jails. A substantial number are issued on the initiative of the court itself in response to a lawsuit,⁸⁴ a grand jury report, or other action outside the inspection process. The existence of these orders is further evidence of the failure of the nonjudicial standards/inspection process to achieve the upgrading of jail facilities and programs.

CONCLUSION

The development, promulgation and enforcement of standards represent a significant part of states' responsibility for maintaining and improving the conditions of local jails. States have made steady progress over the past decade in fulfilling this responsibility. Much of this progress had been in response to pressures from reform and professional groups and financial and technical encouragement from the federal government's criminal justice program. But states still have a distance to travel to fulfill their standards/enforcement responsibility. A substantial number either have not established standards or have made them only voluntary. Many states do not have inspection programs, and even in those that do, the effectiveness of enforcement frequently is not assured. Witness the continuing resort to court orders to compel compliance with constitutional and/or statutory standards. Some would question the mandatory nature of standards if the inspection agency does not have authority to close down a facility that does not meet standards.

Some of the reasons why states have not made more progress have been identified or strongly inferred in the foregoing discussion. Certainly one of the most obvious is the lack of money, or the failure to give jails a sufficiently high priority in the allocation of limited local resources. Various state actions have been urged to help overcome this problem, one of which is the subject of the next section.

State Subsidies

Inevitably, many local units of government will be unable to assume the financial burden of compliance with statewide standards. Since failure to meet legislated standards will have the effect of reducing local capacity, many states—particularly those where prisoners under state jurisdiction make up a sizeable fraction of the jail population—will have a higher stake in the operation of local jails than ever before. Under the circumstances, a compelling case might be made for state grants to aid affected counties.⁸⁵

Individual states have been subsidizing local adult corrections since the 1940s and by 1976, nine were doing so, according to a survey by the Council of State Governments (CSG).⁸⁶ The nine had 12 operating subsidy programs, with an additional three authorized by the legislatures but not funded or imple-

Figure III-5

LOCAL JAILS UNDER COURT ORDERS, BY STATE*
(November 1982)

States With:	Under Court Order**	Not Under Court Order	Status Unreported
Mandatory Standards	Arkansas - 6 Indiana - 10 Iowa Louisiana - 17 Maryland Michigan - 7 Minnesota - 2 Nebraska - 1 North Dakota - 2 Ohio Pennsylvania South Carolina - 1 South Dakota - 2 Texas - 13 Washington - 3 Wisconsin - 3	Maine New Jersey North Carolina Virginia	Florida Illinois Massachusetts Oregon
Voluntary Standards	Arizona - 2-3 California - 12 Georgia - 5 Mississippi - 20 New Hampshire - 1	Idaho Kansas Utah	
No Standards	Alabama - 16 Colorado Kentucky - 2 Missouri - 3 Montana - 2		New Mexico Wyoming

*Based on reports from 45 states. Six states do not have local jails: Alaska, Connecticut, Delaware, Hawaii, Rhode Island and Vermont. Five states did not respond to the survey: Nevada, New York, Oklahoma, Tennessee and West Virginia.

**Number following name of state is number of jails under court order as reported. Blank following names in this column indicates respondent did not specify the number of jails under court order.

SOURCE: ACIR-NACo survey.

mented in that year.⁸⁷ The largest number of discrete programs in any state was Minnesota's three. Of the 12 total, eight were adult and five were a combination of adult and juvenile.

Both residential and nonresidential local programs of adult corrections were subsidized. Seven were for local residential alternatives to state incarceration, particularly such treatment facilities as halfway houses and work-release centers. Only two of the 12 were exclusively nonresidential—for adult probation services—and four supported both residential and nonresidential community services.

Subsidies mostly were used for agency operational and maintenance costs or expenses related to salaried personnel. The former occurred in nine programs and the latter in six. Rarely were subsidies targeted for direct purchase of services from private vendors or other public agencies; rather, such purchases were made through local corrections agencies. Also, only four of the subsidies could be used for facilities construction.

The quotation from *American Prisons and Jails*, which opened this section, viewed state subsidies as a way to help localities comply with minimum state standards. Yet this was a primary objective in only four programs in 1976. According to the CSG report, the most common motivation was encouraging the development of community-based corrections alternatives to incarceration, identified in nine programs. In five subsidies, a principal objective was reducing commitments to state-operated adult institutions. The least frequent was stimulating interlocal or regional cooperation and coordination (3 programs).

On the matter of program purpose, the authors of the CSG report commented:

... most subsidies are not developed for the purpose of sharing the cost of existing services; rather, they are intended to promote additional services which are made possible with state financial assistance. Therefore, state subsidies in most cases are not an answer to a hard-pressed county budget. On the other hand, subsidies enable local governments to provide a level or type of service which they probably could not provide without state assistance. Subsidies help local governments expand services at relatively low cost to themselves.⁸⁸

THE ACIR-NACo SURVEY OF 1982

The ACIR-NACo questionnaire survey in 1982

provides more current data on local adult detention subsidies. The 1982 results and those of the earlier CSG canvass are compared in *Figure III-6*, using the classification of subsidies employed in the 1982 survey.⁸⁹ More complete information on the individual programs identified in 1982 is provided in the *Appendix* to this chapter.

Comparison of the data from the two surveys has several limitations. Only those states were compared that returned ACIR-NACo questionnaires in 1982. Consequently, the subsidy program in New York state that was reported in the 1976 report is left out (New York had a subsidy for "alternatives to incarceration" with expenditures of \$15.4 million in 1975. None of the other non-reporting states had subsidies in 1976, according to CSG). Also, the fiscal data reported are a mixture of expenditures, appropriations, and authorizations.

Despite these shortcomings, the comparison does reveal some trends. For the 39 states with locally administered jails that reported in the 1982 survey, it shows that the number of separate subsidy programs had increased from 12 in nine states in 1976 to 24 in 17 states in 1982. The six-year period saw a slight increase in the number of subsidy programs classified as "alternatives to incarceration" and a decided increase in the number of subsidies for physical plant and "general and miscellaneous," particularly the former.⁹⁰ In 1977, there were three programs with funds partially or entirely for physical plant, nine with funds partially or entirely for incarceration alternatives, and two for general and miscellaneous. In 1982 the comparable figures were ten, ten, and five. The five classified as general and miscellaneous were subsidies for county jail facilities and operations (Arizona), selection and training standards for correctional personnel (California), certain operating costs for a community adult rehabilitation center (Maryland), reimbursement for the cost of care of misdemeanants (North Carolina), and the costs of incarceration of prisoners convicted under state law (Virginia).

In dollar terms, the expenditures or appropriations for incarceration alternatives in 1982 were over three times what they were in 1976. The relative increase in funds for capital facility subsidies from 1976 to 1982 appeared to be even greater although the precise amount of change is undeterminable from the data available in the earlier year. Capital outlays are more subject to year-to-year fluctuations than operating and maintenance expenditures, so that the level of physical facility subsidies in 1982 is

Figure III-6

STATE SUBSIDIES FOR LOCAL ADULT CORRECTIONS*
(1976 and 1982)

	1976 Funding Target					1982 Funding Target				
	Physical Plant	Health Services	Alternatives to Incarcer.	General and Miscel.	Funding Level**	Physical Plant	Health Services	Alternatives to Incarcer.	General and Miscel.	Funding Level**
Arizona						X			X	\$1,000e(1)
California			X		\$20,093e(2)			X		63,370a
						X			X	39,300e
										2,092
Colorado	X		X		UK					
			X		253e					
Indiana								X		250e
Iowa			X		3,475a			X		12,500e
						X				200e
Kansas								X		1,463e
Kentucky						X				UK(3)
Louisiana						X				74,292a
Maine			X		123e					
Maryland						X				17,000a
									X	1,500au
Massachusetts						X				26,000e(4)
Michigan			X		100e					
Minnesota			X		3,000e			X		11,335a
			X		178e			X		100e
				X	227e					
North Carolina									X	1,511e
Ohio								X		175e
Oregon								X		5,948e
Pennsylvania			X		1,526e					
Texas						X				400e
Utah							X			647e(5)
								X		730a(6)
Virginia	X			X	6,868e	X			X	17,710e
								X		820e
Washington	X				(7)	X				40,000e

* Limited to the 39 states with locally administered jails that responded to the ACIR-NACo questionnaire. The five nonresponding states are Nevada, New York, Oklahoma, Tennessee and West Virginia.

** Funding level: e—expenditures, a—appropriations, au—authorization, UK—unknown.

(1) 1983

(2) FY 1975

(3) Legislation enacted in 1982.

(4) 1983

(5) Excluding amounts provided private contractors.

(6) Goes into effect July 1983.

(7) Total authorization \$25 million; annual expenditures vary.

SOURCE: 1976: The Council of State Governments, *State Subsidies to Local Corrections: A Summary of Programs*, Lexington, KY, The Council, 1977, as adapted by ACIR staff. 1982: ACIR-NACo questionnaire survey and phone interviews with state corrections officials.

not as likely to be sustained as the level of subsidies for alternatives to incarceration.

The increasing number of capital facility subsidies may well reflect a response to the expanded volume of court orders. The NSA's 1982 survey reported that crowded conditions and structure were the first and third leading causes, respectively, of court orders.⁹¹ The shift may also be read to signify a greater inclination by states to use subsidies more directly to assist localities in meeting minimum acceptable standards. Although providing alternatives to incarceration may help localities upgrade standards by relieving pressure on space and in-house programs, it is less direct than expanding and improving physical facilities.⁹²

The slight increase in the number of subsidies for incarceration alternatives conceals the considerable change that occurred in this group of programs. As discussed at greater length later in this chapter, since 1976 several states have enacted community-based correction acts, featuring substantial state financial incentives for localities to pursue alternatives to incarceration. Indiana, Kansas, Ohio, Oregon and Virginia all adopted such programs since 1976. The Indiana and Ohio programs are still in the experimental or demonstration stage because of the states' fiscal problems, but the other three already have had sizeable expenditures. In general, the ten "alternatives to incarceration" programs in 1982 represent a more comprehensive state approach to stimulating community-based corrections and a much larger sum of money overall than the nine programs so classified in 1976.

The ACIR-NACo survey shed some light on the views of state correction officials regarding the need for and suitability of future jail subsidies. Of the officials from 28 states who said they had a crisis in local jails, a little more than one-third (10) indicated "state financial or technical assistance" was a possible ameliorator. Four of these states already have subsidies: Arizona, Louisiana, Minnesota and Ohio. The other six do not: Arkansas, Colorado, Missouri, Montana, New Mexico and Pennsylvania.

The linkage of technical and financial assistance in the question suggests caution in drawing conclusions about the officials' attitudes toward subsidies as a way to help deal with jail problems. It seems likely, however, that since overcrowding and related physical conditions are so often the major part of the jail problem, financial assistance weighed more heavily in their minds than technical assistance. This interpretation is supported by the additional comments in

the questionnaire. In any case, it is clear that "financial and technical assistance" was by no means the respondents' preferred method for dealing with the jail crisis. Seventeen identified "encouraging multi-county or regional cooperative arrangements," and 16 chose "using alternatives to incarceration" as the path to improvement.

These are, of course, the judgments of state officials; the views of local officials probably would be different. In fact, the NSA survey asked the sheriffs to list the five most serious problems in their jails in order of importance in the local situation. "Funding" was identified as the fifth most serious, after personnel, modernization, overcrowding and recreation.⁹³ Dealing with the latter four well might depend upon the availability of more money.

It is significant, moreover, that state legislatures also might have a different view than state corrections administrators on providing financial aid for local jails, based on their different perceptions of the purpose of state jail subsidies. The authors of the CSG report commented:

... financial incentive programs were invariably initiated by corrections administrators while cost-sharing programs were invariably initiated in the political arena. This might suggest differing motivations for subsidies, the former coming from an attempt by state corrections administrators to use subsidies as a policy and program response to state prison population growth and institutional overcrowding; the latter coming from a legislative concern for improvement in corrections services at the local level as a worthy goal in itself.⁹⁴

It would seem risky to conclude, therefore, that the large proportion of state corrections officials who do not believe that state subsidies are an answer to the jail crisis indicates poor chances of obtaining such subsidies. The legislature has the final say and it responds to many different voices, including those of local officials.

OTHER OBSERVATIONS IN CSG REPORT

The authors of the 1977 CSG report contributed additional insights concerning the politics of state subsidies for local adult corrections. Regarding the different perceptions of local elected officials and state and local professional correctional personnel:

It seemed that [local] elected officials val-

ued subsidies because of their fiscal benefit rather than because they had a particular interest in the service being subsidized . . . [they] were satisfied (in most instances) with the corrections subsidy program only to the extent that they felt participation was worth the dollars received. The services supported by the subsidy seemed irrelevant. Corrections subsidies were viewed quite differently by the social service community. The subsidy programs were welcomed by both state and local corrections professionals who often worked together to get the program through the legislature.⁹⁵

Regarding the state's objectives in using subsidy programs:

Subsidy programs can contribute to standardizing services statewide. . . . In effect, it served as a foot in the door for the state's provision of other services such as technical assistance, information services, training opportunities, etc. . . . Some subsidies are intended to encourage the development of new services or expansion of existing services. . . . In the programs studied here, these objectives were met to a greater or lesser degree . . .

Given a policy decision at the state level to shift some of the responsibility for delivery of corrections services from state to local governments, subsidies appear to be an effective method of implementing that policy.⁹⁶

CONCLUSION

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. 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.

Drawing conclusions as to the significance of these changes is hazardous without more knowledge of the background and objectives of the individual programs. It might seem that there had been a shift toward more emphasis on meeting minimum performance standards, since in 1982, subsidies for phys-

ical facilities were far more plentiful than they had been six years earlier, and the physical condition of jails, particularly overcrowding, was a frequent objective of court orders and therefore of state efforts to upgrade jail standards. On the other hand, some might interpret the expanded number of physical plant subsidies as reflecting a subtle shift toward facilitating and accommodating a correctional philosophy that places more emphasis on locking up offenders. Yet that interpretation fails to give due weight to the increase in more comprehensive community-based correction subsidy programs, with their basic stress on nonincarcerative alternatives.

Probably the explanation of the seeming paradox is that different forces were at work, or had different strengths, in different states and there was no consistent national trend.

Corrections officials from states responding to the ACIR-NACo questionnaire did not rate state financial and technical assistance as the preferred way to ameliorate the "local jail crisis," which suggests that perhaps no great surge can be expected in additional jail subsidies. Yet state corrections officials' views are not a sure indicator of what will happen, considering the different perceptions of state legislators concerning the objectives of state jail subsidies and the continuing high incidence of court actions directed at jail crowding and safety conditions. Court actions have been a critical stimulant to political action at both the local and state levels.

State Technical Assistance and Training

Subsidies are one way states help their localities deal with jail problems. Two other, much more extensively used ways are technical assistance and training. Unlike subsidies, these types of aid are generally free of controls or conditions imposed by state government.

TECHNICAL ASSISTANCE DEFINED

A standard work on the subject defines state technical assistance as including "all forms of aid provided by state governments, related to techniques of government, that are available to local government officials and their staffs."⁹⁷ The term embraces formal and informal assistance, with the former sanctioned in constitutions, statutes, or administrative regulations, and the latter covering any form of aid provided above and beyond the direction of formal provisions.

Technical assistance takes several general forms: consultation and expert advice, conferences, institutes, special studies and reports, clearinghouse and information programs, and manuals and models. Other devices include state demonstrations, systems installations, legislative drafting and personnel recruitment.⁹⁸ Training is considered a separate activity.

A number of states have provided statutory authority for state agencies (usually corrections) to render technical assistance or training for local governments' jail programs. For example, the Arkansas Criminal Detention Facilities Board is responsible for providing "consultation and technical assistance to local government officials with respect to criminal detention facilities" and for reviewing and commenting on "plans for the construction and major modification or renovation of such criminal detention facilities."⁹⁹ The Louisiana Commission on Law Enforcement and the Administration of Criminal Justice is directed to "provide technical assistance to parishes regarding minimum standards for parish jail facilities upon request of appropriate parish authorities."¹⁰⁰ In Maryland, the Commission on Correctional Standards may, "to the extent authorized in the budget, provide technical assistance to aid the various jurisdictions in their effort to comply with the mandatory and approved standards."¹⁰¹ The Illinois Department of Corrections

shall provide consultation services for the design, construction, programs and administration of detention, shelter, care and correctional facilities and services for children and adults operated by counties and municipalities and shall make studies and surveys of the programs and the administration of such facilities. . . . The department shall provide courses of training for the personnel of such institutions and conduct pilot projects in the institutions.¹⁰²

Finally, Colorado has imposed a technical assistance responsibility on a state agency via executive order. The Jail Standards Criteria Planning Commission in the Department of Local Affairs, Division of Criminal Justice, is charged with the responsibility to:

make recommendations to the governor and the legislature regarding the enactment of various jail standards/criteria as well as the mechanism for ongoing promulgation and enforcement of such stan-

dards, including a mechanism for providing technical assistance to jurisdictions in need of upgrading their jails.¹⁰³

It is noteworthy that these formal sanctionings of technical assistance, training or both commonly are related to the state's prescription of jail standards.

THE EXTENT OF TECHNICAL ASSISTANCE AND TRAINING PROGRAMS FOR JAILS

In 1978 the National Sheriffs' Association undertook a national survey of state standards and inspection programs for local jails. Information was obtained on the states that provided technical assistance and training along with their inspection programs. NSA found that 30 states offered technical assistance and 23 provided training. It noted that when the inspection agency did not provide training assistance, it was frequently provided by another agency such as a separate correction agency or institute.¹⁰⁴ Information received by ACIR in the course of this study indicates that at least three more states have initiated technical assistance activities since 1978: Louisiana (cited above), Mississippi, and New Mexico.

Annual and biennial reports by state agencies give an indication of the scope and emphasis of technical assistance and training activities affecting jails. The Pennsylvania Bureau of Correction, for example, reported in October 1981 that over the previous 18 months, more than 3,000 state and county employees received basic, specialized or advanced training through the bureau's training academy. It also noted that provision of technical assistance and advisory services to county jail administrators and their boards had become an important function of the Special Services Division. A total of 1,279 county employees participated in on-site training offered at various county prisons.¹⁰⁵

Among the services offered by the Corrections Division of the Oregon Department of Human Resources in 1981-82 were consultations with jail officials on the maintenance of minimum standards and planning and implementation of misdemeanor programs, and assisting localities in making maximum use of available services from state agencies.¹⁰⁶

The Minnesota Department of Corrections is legislatively mandated to give financial and technical assistance to public and private agencies or organizations to provide services to victims of crimes. The Community Services Division of the department acts as a clearinghouse on architectural plans for

local correctional facilities and provides technical assistance in the design and remodeling of such facilities. Training of local jailers is also one of its top priorities: In fiscal years 1979 and 1980 it gave a total of 65 training sessions for county jail staff, involving 1,557 individuals and more than 25,000 hours of training.¹⁰⁷

The Kansas Department of Corrections reported that in 1981 its jail inspection staff made 77 on-site contacts to provide technical assistance on the custody, care, and treatment of inmates. The contacts included review and comment on plans for construction or major modification of local jail or detention facilities. The number of requests for technical assistance had increased by 26% over 1980.¹⁰⁸

In California, a 1979 statute directed the Board of Corrections to establish recruiting, selection and training standards for county correction and probation personnel and created the Correctional Training Fund to subvent local training. The fund derives its money from traffic penalty assessments and amounts to about \$7 million each year. As of June 1982, 53 of 58 (91%) counties were participating, including 39 sheriff's departments, and about 13,100 corrections and probation personnel were being served. The California Board also encourages and helps counties to plan jails and has developed and published five handbooks on corrections planning.¹⁰⁹

In its 1978 annual report, the New York State Commission of Correction stated that:

Technical assistance provided by the Commission's facility review staff has been a major factor in [improving local correctional facilities]. Although the basic responsibility of Local Review staff is to evaluate each facility for compliance with the Commission's minimum standards, review staff has been effective in assisting local officials in developing programs in counseling, education, vocational training and recreation. . . . Local libraries and the state library network have been most helpful in providing much needed services to jails.¹¹⁰

ACIR-NACo SURVEY DATA

The preceding section on state subsidies indicated that ten of the 28 state correction officials who said their states had a local jail crisis believed that one way to ameliorate the crisis was through financial and technical assistance. It was suggested that, considering the heavy emphasis on the kinds of jail

needs that require money (overcrowding and related physical conditions), the respondents probably would be more inclined to emphasize financial than technical assistance. On balance, it seems fair to conclude that state correction officials as a whole do not regard technical assistance as the most important step that is needed to cope with jail problems in their states.

At the same time, the response to another question in the survey indicates that technical assistance is a significant way that states respond to local cries for help. The survey asked whether any local jails were currently operating under court orders and, if so, whether the state was giving them any financial or technical assistance. Twenty-six states reported local jails under court orders. In 14, the state was providing technical assistance, and in three, financial assistance. Two states (California and Louisiana) were giving both kinds of aid and are included in both of the total figures.

NSA SURVEY

The National Sheriffs' Association's 1982 jail survey provides some valuable information on the state of training for jail personnel and a commentary on state government's role in that training. The report was prepared by Francis R. Ford and Kenneth E. Kerle, who offered tentative conclusions that they emphasized are not necessarily those of the NSA.

Probing jail practices in screening applicants for jobs, the survey found the following percentages of respondents using the various types of screen: oral review—79.7%; background check—78.2%; physical testing—34.1%; written testing—28.8%; lie detector test—8.6%; psychological testing—1.9% and other—6.8%.¹¹¹ The authors commented:

Most [hiring practices] are deficient in the areas of physical, written, and psychological testing. . . . Many jails which we have examined have no educational requirement at all for the jail officer position although a few states now require a high school diploma or a GED equivalency certificate.¹¹²

The survey inquired about the number of preservice and inservice training hours required but did not obtain useable data. On the issue of "who does the training?" it yielded the following results: in-house jail staff—47.9%, law enforcement academy—33.1%, correctional academy—20.5%, police officers standard training—15.4%, correspondence course—

12.5%; college or university—11.0%. The report commented:

Nearly 50% of the participants say training is done by in-house jail staff. Only the big urban jails have the luxury of a permanent training division. In-house training may be good or bad depending upon who does it. However, this statistic does indicate that jail training is still an extremely low priority in local facilities. Jail training today is where police training was 20 years ago. Until sheriffs and county governing personnel understand the necessity of a well trained jail staff, problems will continue to plague jails.¹¹³

The authors have a decidedly negative comment on state training, casting some doubt on the statements made by state agencies, such as those quoted earlier from state reports:

A fifth of the people who responded stated that the training is done in a correctional officer training academy. Usually these are run by the state. Though not as bad as having police doing correctional training, it is also wrong, we feel, to have state correctional staff training local jail personnel. Jails are not prisons, nor are prisons jails. The local jails process 6.3 million persons a year and the innumerable problems of short-term confinement simply don't exist in penitentiaries. Jail officers need special skills to confront the new prisoner who may be diseased, a suicide candidate, or violent because of his alcoholic or drug-induced state of mind. By the time a person reaches an institution of long-term confinement, he/she has already matriculated through the jail system and is more resigned to incarceration than are first offenders who are booked into the jail.¹¹⁴

The survey concluded by asking the sheriffs and jail officers to list the five most serious problems in their jails, in order of importance. Training was eighth but the first was personnel, followed in order by modernization, overcrowding, recreation, funding, security, and medical.¹¹⁵ In their assessment of these and related findings, the authors commented:

The respondents to the survey made it

clear that personnel is the number one problem confronting jails today. Nearly a decade ago, the National Advisory Commission on Criminal Justice Standards and Goals wrote standard 9.6 on staffing patterns for locally based correctional institutions and programs. It stated that at least one correctional worker should be on the staff for every six inmates with the specific number on duty adjusted to fit the relative requirements for the three shifts. All nationally recognized standards have since skirted this issue. Several states have staffing requirements for jails which are frequently ignored. . . .

In many of the small jails, the counties still attempt to operate them with untrained radio dispatchers doing the jail work. Eventually they will have cause to regret it. *Training for bonafide jail staff does not exist in many states, something that the legislatures could correct if the leadership were forthcoming* (emphasis added).¹¹⁶

CONCLUDING COMMENT

An in-depth evaluation of the extent and effectiveness of state technical assistance and training efforts vis-a-vis local jails in the 50 states obviously is beyond the scope of this study. Surveys, statutory provisions and annual reports of state agencies clearly show, however, that these activities are performed in varying degree by all but a few of the states. In most cases, they 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.

The ACIR-NACo survey also indicated that state corrections officials consider "state financial and technical assistance" an important ameliorative step in dealing with the local "jail crisis," but not the most important. It would have been useful to know how state officials would have rated "personnel improvement" if that item had been specified in the questionnaire form as one of the possible ameliorative steps. The local sheriffs and jail officers surveyed in the NSA's study placed "personnel" at the top of their list of problems in their jails. Training and to some

extent technical assistance can be important contributors to upgrading jail personnel.

A Closer State-Local Partnership: Community Corrections Act States

In an effort to improve their state-local corrections activities, several states have adopted state-wide community corrections programs, funded by the state but administered by local governments. These programs aim to promote the use of community-based alternatives to incarceration, so they have an obvious impact on jails. Their community orientation makes success critically dependent on the cooperation and support of local government. For the state, they involve use of familiar intergovernmental aid and oversight mechanisms: subsidies, technical assistance, training, standards and inspections, and monitoring. They are among the most significant recent developments in state initiatives affecting local corrections in general and jails in particular.

These state-fostered programs did not, of course, originate the idea of community corrections nor do they now encompass all community correction activities in the nation. Such activities are found in every state in varying degrees, conducted and promoted by local government, state government, or both. For this reason, and because community corrections *per se* constitutes an important approach to corrections, both in theory and practice, it was the sole subject of *Chapter II*. The present chapter's focus is on the intergovernmental aspects of the few statewide-sponsored and encouraged programs with particular reference to the impact on jails, rather than on the nature and significance of community corrections as such.

COMMUNITY CORRECTIONS DEFINED AND ILLUSTRATED

In this discussion of the state community corrections programs, nevertheless, it is useful to bear in mind the meaning of community corrections *per se*. The definition in *Chapter II* was derived by identifying the characteristics that distinguish "community-based corrections" from traditional forms of local corrections. A community-based corrections program, the definition holds,

- relies less on incarceration;
- places greater emphasis on support than on punishment;
- attempts to reintegrate offenders and arrestees into their own communities;

- stresses decentralization over centralization; and
- varies considerably in scope from community to community.

The various types of programs are classified according to where they occur in the criminal justice process. Pretrial programs include diversion, bail, citations and summonses, release on recognizance, percentage bail, counseling and assistance programs, restitution, and programs for special populations, such as alcohol and drug abusers. Post-trial programs include probation, restitution and work release. Post-incarcerative programs include parole and the use of an adult prerelease facility or halfway house.¹¹⁷

THE CCA PROGRAMS: CHRONOLOGY, PURPOSE

State Community Corrections Act (CCA) programs are a relatively recent development. Minnesota led the way with the passage of its legislation in 1973. The same year Iowa established a community corrections approach and added major organizational components in 1976. Subsequently, Oregon in 1977, Kansas in 1978, Indiana and Ohio in 1979, and Virginia in 1980 enacted their laws. Even prior to the 1970s, California had a Probation Subsidy Act, which had some key elements of the later acts but was more narrowly focused. It existed from 1966 until 1978, when the legislature enacted the County Justice System Subvention Program, funding a broad range of alternatives to incarceration.

The authorizing statutes in these states vary in their definitions of the purpose of the CCA program. The Minnesota legislation, for example, provides that "for the purpose of more effectively protecting society and to promote efficiency and economy in the delivery of correction services, the commissioner [of corrections] is hereby authorized to make grants to assist counties in the development, implementation, and operation of community based corrections programs. . . ." ¹¹⁸ Kansas' language is similar. ¹¹⁹ Oregon's law states that its intended purpose is "to provide improved local services for persons charged with criminal offenses with the goal of reducing the occurrence of repeat criminal offenses."¹²⁰ The intent of the Virginia Community Diversion Incentive Act is more narrowly focused: "to enable localities to develop, establish and maintain community diversion programs to provide the judicial system with sentencing alternatives for certain nonviolent

offenders who may require less than institutional custody but more than probation supervision.¹²¹ The law's purposes include allowing localities greater flexibility and involvement in dealing with crime, providing more effective protection of society and promoting efficiency and economy in the delivery of correctional services, offering offenders more opportunity to make restitution to victims of their crimes, permitting localities to operate rehabilitative programs, and reducing the incidence of repeat offenders.

Taken as a group, these explicit statements of purpose supplemented by other provisions of these laws identify several common goals: improving public safety; reducing costs and improving efficiency; expanding and improving community correctional programs; reducing recidivism; reducing commitments to state institutions and concomitantly retaining offenders in the community; and decentralizing correctional authority from the state to the local level.

THE SIX ACTIVE STATE PROGRAMS

In all but two of the eight states identified as having CCA legislation the programs are in full effect. The two exceptions are Ohio and Indiana. In Ohio the program has been underfunded and confined to six rural counties on a pilot basis. A similar situation exists in Indiana where only three counties have been aided so far, two of which are small.¹²² The following discussion of the current status of CCA programs, therefore, is based on reported experience in Minnesota, Oregon, Kansas, Virginia, Iowa and California.

Minnesota's law¹²³ authorizes the state to provide subsidies or financial grants to counties to develop and operate community-based corrections programs for adults and juveniles. In order to discourage commitments to state prisons, the original legislation charged the county the daily cost of confinement of adults and juveniles to state institutions if they had been convicted of an offense carrying a maximum penalty of five years or less. Thus, commitments to a state prison of persons suitable for community corrections imposed a financial penalty on the county. In 1981, when newly initiated sentencing guidelines proved to be an effective method of limiting the population of state prisons, this "chargeback" requirement was eliminated for adult offenders, though it remains in effect for juveniles.¹²⁴ Counties with a population of 30,000 or more are eligible to

participate. Smaller counties may join with contiguous counties, and, if together they meet the 30,000 population requirement, provide the services on a regional level. Participation is voluntary, and so far 27 of Minnesota's 87 counties, representing more than 70% of the state's population, have established programs. Five counties participate singly and the rest are members of seven multicounty regional organizations.¹²⁵ For counties to participate, they must establish a corrections advisory board consisting of 18 to 20 members representing law enforcement, the judiciary, prosecution, education, the welfare board, the public defender, parole or probation services, corrections, social services and health care. In addition, an ex-offender and at least four to six citizens must be appointed and minority representation must be guaranteed. The board is responsible for developing an annual comprehensive plan which identifies local needs and describes programs designed to meet local objectives. Initial and continuing eligibility for the subsidy is contingent upon the approval of the annual comprehensive plan by the Commissioner of Corrections. Counties then implement their programs, but they may withdraw upon three months notice to the state.

The state pays the subsidy based on a formula with four factors: per capita income, per capita taxable value, expenditure for corrections per 1,000 population, and the percent of county population six through 30 years of age. Since counties must continue spending their own funds at the same level as the year before, the subsidy is used for new and expanded services. Appropriations were \$10.9 million in FY 1981 and \$11.3 million in FY 1982.¹²⁶

The Kansas Community Corrections Act¹²⁷ is very similar to Minnesota's. A community corrections advisory board prepares a plan for county and then state approval. Although the composition of the advisory board is somewhat different from Minnesota's, the objective is the same—to represent the major components of the criminal justice system, human services, and the public. Participating counties provide community corrections programs for most class D and E felons (the less serious felony offenders) and for juveniles. In turn, the state provides a subsidy with a formula based on the county's per capita income, per capita adjusted valuation, crimes per 1,000 population (a difference from Minnesota's formula), and percent of county population aged five through 29.

Other provisions are similar including voluntary

county participation, a 30,000 population requirement for a county to join, permission for joint participation by smaller counties, and procedures for withdrawal. Of the 105 counties, nine are participating—three in a multicounty program. Though the number is small, they represent the major population centers of the state.¹²⁹ The main difference between Kansas and Minnesota is that Kansas maintains an operating chargeback system to encourage counties to keep nonviolent adult and juvenile offenders in the county. The chargeback is the daily cost for state confinement, except the charge for juveniles is a one-time fee of \$6,000 per commitment. Counties are not charged for adult offenders sent to a state institution who have committed more serious class A, B, or C offenses nor for those committed for D and E felonies for the third time or committed under the Mandatory Firearms Act and also for certain sex offenses.

Generally, the thrust of *Oregon's* Community Corrections Act¹²⁹ is similar to Minnesota's with one major variation. Like the original Minnesota and current Kansas acts, Oregon involves the same combination of a subsidy to encourage the establishment of community corrections programs and a penalty to discourage county commitments of lesser-offense adults to state institutions. The Oregon program, however, does not cover juveniles.¹³⁰ The state offers two levels of county participation—full or partial. Twelve of the state's 36 counties are fully participating and 20 are partially participating.¹³¹

Fully participating counties have a system similar to those in Minnesota and Kansas. A local community corrections advisory committee is formed with membership representing the criminal justice community and citizens. In addition, one member must be a county commissioner. The committee plan must be approved by the county board before state approval. Funding for the programs comes from three sources: (1) enhancement grant funds for the development of community programs, (2) mental health funds to be spent on mental health services and drug and alcohol abuse, and (3) corrections division field services budget funds. The corrections money amounts to the sum previously spent by the state in the county for probation and parole supervision and must be spent by the county for those services. The enhancement and mental health monies are distributed among participating counties according to a formula based on each county's share of the state's total of three factors: general population, adults aged 15 through 29, and total reported

crime. Fully participating counties do pay a chargeback of \$3,000 from their enhancement grant for each class C felon (the least serious) sentenced to a state institution. Again reflecting concern over chargebacks, the penalty is a flat fee for the first full year of commitment only.

Counties choosing partial participation may receive money for community corrections, but the state assumes more planning and operating responsibility. If a county selects this option, the State Corrections Division's Field Services regional manager for the county appoints a local committee (usually after consulting with the county commissioners)¹³² which develops the plan. As a courtesy, the regional manager seeks approval of the plan by the county commission before submitting it for state approval.¹³³ The Regional Manager then has the responsibility for implementing the plan.

The subsidy for partial participation counties is about half of the full community corrections or enhancement grant, though they still receive the entire amount of a separate mental health grant for community corrections. In contrast to fully participating counties which may use CCA funds for a variety of services—including preventive or diversionary correctional programs, probation, parole, work release, and residential centers—partially participating counties are limited to such post-trial services as presentence investigations and enhanced probation services as determined; by the state guidelines for fiscal year 1981.¹³⁴ Partially participating counties also do not come under the payback part of the act.

To participate, counties must have a population exceeding 30,000 and those with less may voluntarily join with contiguous counties and prepare a regional plan. Counties may withdraw from the program upon notification 180 days before its termination.

State appropriations for the Oregon CAA program were \$6.2 million in FY 1981 and \$5.9 million in FY 1982.¹³⁵

California's County Justice System Subvention Program (CJSSP)¹³⁶ aims to improve a broad range of criminal justice activities at the county level, one of which is corrections. It covers both juvenile and adult programs but thus far in practice has been weighted fiscally on the juvenile side.

With regard to corrections, the CJSSP has the basic traits of the Minnesota, Oregon and Kansas CCA programs. Applications are required from each county desiring to participate and must be approved by the director of the Department of Youth Authority (DYA), which also provides technical assis-

tance and consultation to the counties. The DYAs' responsibility for administering the CJSSP at the state level reflects the fact that the CJSSP replaced two prior state subsidy programs for probation and juvenile camps and schools and incorporated the funding for the former Juvenile Court Reform Act.

Each county must establish an advisory group or may substitute an existing governmental entity that satisfies the representation requirements of such a group. The advisory body assesses criminal justice system needs, evaluates alternative programs for meeting those needs, and makes recommendations to the county board of supervisors. The county board of supervisors decides on the program, based on these recommendations.

Funding is based either on population or the amount the county historically would have received from two previous subsidy programs. Incentive for decentralization of criminal justice activities is provided by making funding contingent on the county's not exceeding a basic rate of commitment of juvenile and criminal offenders to the state youth and corrections agencies. The basic rate is the average of the county's actual rate of commitment in the fiscal years 1974 and 1977. Excluded from the rate are commitments for certain violent offenses. Funds are withheld or required to be paid back where counties exceed the basic commitment rate.

All 58 counties participated in FY 1981-82 and the state appropriated \$63.4 million for that year and \$62.8 million for the following one.¹³⁷ Funding for all adult programs was a small part of the total: 16.3% in FY 1979, 19.8% in FY 1980, 20.9% in FY 1981, and 14.9% in FY 1982.¹³⁸ Adult corrections was a subpart of those parts.

Iowa's community corrections program differs significantly in structure from those of the other states.¹³⁹ Instead of being a voluntary program for counties with the option of multicounty cooperation, it is a state-imposed regional system using the eight judicial districts. A district department of correctional services is established in each district. The department is headed by a board of directors made up of one member from each county board of supervisors, one member from each project advisory committee, and one additional member appointed by the district judges and equal in number to the project advisory committee members. A separate project advisory committee is appointed by the board to advise the department director on each corrections project in the district. The director is the board's administrative officer.

The district departments are required to provide four programs: pre-trial services; presentence investigation, probation and alternative residential services. The state department of social services has promulgated rules for administration of the district programs and monitors performance through a periodic "accreditation" process.

The departments obtain state funds through the regular state budget process, submitting their requests through the Department of Social Services. A small amount of funding comes from local sources, such as resident client fees. Total expenditures for the program were \$11.7 million in FY 1981 and \$12.5 million in FY 1982.¹⁴⁰

Virginia's Community Diversion Incentive (CDI) Act authorizes the state department of corrections to provide direct funding to counties and cities or combinations thereof to enable them to set up community diversion programs. These programs are designed to provide the judicial system with sentencing alternatives for certain nonviolent offenders who may need less than institutional custody, but more than probation supervision. Unlike the other state CCA programs, the Virginia approach emphasizes the central importance of the courts in turning the local correction system toward the use of alternatives to incarceration.

The governing bodies of cities, counties or combinations thereof are eligible to apply for CDI funds. They must create a Community Corrections Resources Board, consisting of an equal number of members appointed by the local governing body and the local circuit court judge and one appointment by a regional officer of the state department of corrections. The board provides for the purchase or development of community services and programs for use by the courts in diverting offenders from incarceration, and it oversees operation of the local program.

The court may refer to the board felons convicted of nonviolent offenses.¹⁴¹ On the basis of a diagnostic evaluation of each case, the board makes a recommendation to the court as to whether the offenders should be assigned to a community correctional service that is more restrictive than probation but less restrictive than incarceration in the state prison.

The subsidy consists of up to \$30,000 annually for each jurisdiction for administrative purposes; \$400 for each diagnostic evaluation; and \$3,600 per year for each offender actually diverted to a community correction alternative.¹⁴²

By October 1982, 13 localities had qualified for CDI

programs, including one regional arrangement. By the end of the first biennium, \$1,009,872 had been spent, and \$1,350,300 was budgeted for the ensuing biennium (1982-83).¹⁴³

THE STATE ROLE

Beyond supplying the money and approving the community-developed corrections plan, state governments play an assistance, guidance, and controlling role in the CCA programs, usually through the state corrections agency. Generally these powers are exercised so as to yield wide latitude to local governments, which have primary responsibility for delivering corrections services. As David Rooney, director of corrections for Dodge-Olmstead-Fillmore counties in southeastern Minnesota, said of his state's program, "by giving us [counties] the authority and most of the money to do the job, the state has put the ball in our court."¹⁴⁴

The state provides technical assistance in preparing local community corrections plans, and adopts rules and regulations for overall implementation. Minnesota, Oregon, Kansas and Virginia also authorize the state corrections agency to develop standards for operating the local correctional services. The Oregon law states that "the standards shall be sufficiently flexible to foster the development of new and improved supervision or rehabilitation practices."¹⁴⁵ In all four states, the regulations are quite general and thus, in practice, counties are given considerable freedom to choose what types of community corrections services they wish to provide.

Exceptions to this pattern of state control are Iowa and the partially participating counties in Oregon. Iowa prescribes four programs that the judicial districts must provide—pre-trial release, presentence investigation, probation services and residential treatment centers throughout the district as necessary. Moreover, the rules implementing this clause are much more specific as to the content and administrative procedures to be followed in these four programs. For this reason, and because Iowa's program is basically state-imposed, Iowa has a more uniform system than any other community corrections state.

In Oregon's partially participating counties, the state appoints the local advisory committee, which develops the plan (though the state seeks county approval as a courtesy) and then implements it. These counties cannot perform the full range of community corrections programs. Instead they are limited to post-trial programs¹⁴⁶ that under the

guidelines in place in fiscal year 1981 consisted of presentence investigations and enhanced probation services.¹⁴⁷

The state corrections agencies also have a continuing oversight role once the county implements its program. Minnesota and Kansas require an annual review of the comprehensive plan, and the top state corrections official is authorized to examine the books, records, facilities and programs for the purpose of recommending needed changes or improvements. Minnesota, Oregon, Kansas, California and Iowa also have a compliance provision. In the first three, if the state believes that the county or group of counties, after proper notice and a hearing, is not in substantial compliance and making progress, the state may suspend all or a portion of the grant. In California, the state may withhold funds if the county exceeds its basic commitment rate. In Iowa, if the state department finds a district correction program out of compliance with requirements, it may assume direct responsibility for administering the program.

Finally, a key responsibility of the state is to provide the funds to develop the programs. As indicated earlier, these amount to substantial sums and are distributed by legislative formula, except in Iowa where they are determined in the regular state budget process, and in Virginia, where distribution is by administrative formula.

EVALUATION OF STATE ROLE

Only Minnesota has made a formal evaluation of exactly how a state performs its technical assistance, plan approval, standard setting, and oversight and compliance responsibilities vis-a-vis local community corrections programs. The Department of Corrections (DOC) evaluation found that individuals involved in local CCA organizations believed that what the DOC provided in rule promulgation, review of standards compliance, and technical assistance was "good and timely," and that interlevel cooperation was good.¹⁴⁸ At the same time, CCA administrators and staff as a group felt that the DOC could have generated more rules, guidelines or criteria to aid in implementing the act. Also, they viewed review of local compliance with standards as being inconsistent from county to county. In addition, they believed that CCA should clarify the DOC's responsibility for providing technical assistance. The act currently only requires technical assistance in preparing comprehensive plans, but the traditional role of the DOC as the coordination-control mechanism for corrections and its statutory authority in admin-

istering the CCA strongly imply that it should provide technical assistance in all phases of community corrections, including research, information systems, budgeting and planning.¹⁴⁹

THE EFFECT OF CCA PROGRAMS ON JAILS

Community corrections act states have had a relatively short history, so that experience has been limited and its evaluation even more so. Of the six states, only two—Minnesota and Oregon—have had formal evaluations that address the impact on jails.¹⁵⁰ They yield few conclusions and even these are tentative.

Perhaps the slight attention given to evaluation of the impact on jails stems from the fact that jails were not prominent in the enabling legislation. The California, Iowa, Minnesota and Virginia acts do not refer to jails specifically. The Kansas act forbids the construction of new local detention facilities or their expansion with CCA funds, although a comprehensive plan may include a provision to remodel some part of an existing facility in order to provide a community corrections program.¹⁵¹ The California law provides that counties may not use more than 10% of their subvention funds for capital purposes, which in corrections would likely involve jails.¹⁵²

In Oregon, CCA funds "shall not be used to develop, build or improve local correctional facilities."¹⁵³ The Oregon law, however, does specify that jails are to be included with halfway houses and work release centers in the location and description of facilities to be used by the county in its community corrections program. Any funds used for detention are limited to providing staff, programs and services.¹⁵⁴

Despite the relative silence of the laws, the CCA programs are bound to affect jails, inasmuch as two of the programs' major objectives are decentralization of corrections responsibility from the state to localities and emphasis on alternatives to incarceration at the community level. Based on these objectives alone, it would be difficult to anticipate what kind of effect the program would have on the use of jails, since the objectives pull in opposite directions.

Increased Usage

In fact, the two evaluation studies indicate jail usage has been affected mainly by judges' actions to reduce incarceration at the state level. Thus, in the early years of the Minnesota act it became apparent that jails were increasingly being used as an alternative to prison for sentenced felons.

The use of straight probation and fines decreased in all but one CCA area after joining the act. The use of "split sentencing," the sanction of probation plus a jail term, increased by an average of 80% in CCA counties.¹⁵⁵

The lack of parallel changes in comparison counties led to the conclusion that "an increase in the use of jail is indeed due to the CCA."¹⁵⁶ Length of jail time served, however, did not increase as a result of the CCA program.¹⁵⁷

In Oregon, the fully participating counties had an experience similar to Minnesota's in regard to offenders who received split probation-jail sentences. The number of "C felons" given these split sentences (those targeted for diversion from state institutions) increased by 267 cases from 1977 to 1979, a rise from 11% to 27% of all convictions. Yet in some counties there was a drop in total jail sentences from 26% of all convictions to 14%—an absolute decline of 369 in the face of a very large increase in total cases. The explanation lies in a substantial decline in the rate of jail sentencing of lesser offenders—from 35% to 17% of all sentenced misdemeanants.¹⁵⁸

The partially participating (Regional Manager) counties also had a jump in percentage of "C felons" given split jail-probation sentences, but not as substantial as that in the fully participating jurisdictions—from 13% to 20%. Unlike the fully participating counties, however, the partially participating ones experienced an increase in the overall jail sentencing rate—from 21% to 26%.¹⁵⁹ One might theorize that the difference is traceable to the CCA program, because the fully participating counties are authorized to use the state subsidy to fund a full range of alternative services, whereas the partially participating ones are limited to using the money for pre-sentence investigations and enhanced probation services. The evaluation study did not offer comment on that theory, however.

Program Upgrading

Some observers see another effect of the CCA program on jails—an upgrading of jail programs.

A major emphasis of every county or group of counties participating in the [Minnesota] Community Corrections Act is to beef up jail programming—in fact, this is regarded by many as the key to the success or failure of the entire enterprise. To make sure that jail time was no longer dead time,

the Olmstead-Dodge-Fillmore officials . . . doubled the existing jail staff. A full complement of jail programming is now in operation, including counseling, work-release, educational and employment programs.¹⁶⁰

One student of the Minnesota scene found that county officials believed that this improvement accounts in some degree for the judges' increased resort to split probation-jail sentencing:

The [Minnesota] evaluation criticized the increased use of jail as a local sanction. The counties, on the other hand, point to the CCA impetus to improve programming in the local jails and say this made the jails more appealing for judges to use.¹⁶¹

The contention that judges needed the attraction of improved jails as an incentive to increase their use of these facilities is supported by the fact that the CCA itself did not encourage the substitution of local jails for state incarceration:

. . . it was not the original intent of the act that local jail sanctions would substitute for state incarceration or that jail sentences would serve as supplemental sanctions for those who ordinarily would have received probation or other non-secure sanctions.¹⁶²

THE FUTURE IMPACT OF CCAs ON JAILS

The record of CCA program experience thus far suggests that several key factors are likely to have basic influences on how those programs affect jails in the future. A most obvious one—suggested pointedly by the reference to the intent of the Minnesota act—is whether a state's CCA program includes incarceration as an acceptable part of community corrections programming entitled to state funding support.

Are Jails Part of Community Corrections?

As indicated at the outset of this section, the definition derived for this study from a thorough sifting of the literature in the field distinguishes community corrections from traditional forms of local corrections in several ways, including "being less reliant (though not necessarily unreliant) on incarceration." Under this formulation, therefore, some use of jails is not ruled out. But states are faced with deciding whether they want to accept this definition or exclude incarceration entirely.

It can be argued that incarceration in jail is a community sanction. "An advantage of the use of jail terms is that it allows the offender to remain in the community, close to family and friends."¹⁶³ Thus, it is preferable to state imprisonment.¹⁶⁴ Some even see the jail as a community correction center with the full range of community services: pre-trial release, diversion, work release, furloughs, employment and drug counseling, etc.¹⁶⁵

The evidence in Minnesota, as we have seen, is that the CCA has already improved jail programming. Some argue further that inclusion of the jail may be essential to community corrections. As a Kansas county commissioner said:

To the extent we try to provide for a coordinated organizational structure for corrections and leave the county jail under a separate structure, we will not be planning comprehensively.¹⁶⁶

That line of reasoning apparently is persuasive in Oregon, which requires that jails be included in the facility planning for community corrections. Finally, it is contended that "community control" is an important emphasis in community corrections, meaning that the community has discretion to use whatever sanctioning alternative it wishes, including incarceration in jail.

Those who oppose incarceration as an acceptable component of community corrections contend that it inevitably conflicts with another important emphasis in community corrections—deinstitutionalization. Though occasional use of the jail may be necessary, they argue, it should be the least possible. In other words, the interpretation given to "community" is not control, but "out in the community," that is, away from the public institution. It can further be contended that community corrections programs will do a better job of integrating the offender into the community if whatever facilities are needed to carry out programs, such as work and educational release and furloughs, are separate from the jail or detention center.

It is pertinent to note that most of the participants in a 1981 conference of national corrections authorities called to review the record of the Minnesota CCA took a negative view of the burgeoning use of county jails as a local sentencing alternative but divided on the question of whether the county jail had an appropriate role in community-based corrections.¹⁶⁷ For those who had operated community programs, the availability of local jail beds for short

term sanctions was seen as a critical feature. "There has to be an intermediate sanction [between local programs and state institutions], a cooling off place, for participants of community programs who go out of control."¹⁶⁸ Others saw an appropriate place for the jail in community corrections as "one step in a hierarchy of sanctions available to my local decision makers."¹⁶⁹ Still others, however, were adamant in insisting on deinstitutionalization. "I will not buy the jail as an alternative to the state prison," commented the director of the New York City Project on Community Alternatives.¹⁷⁰

The way states weigh these and other arguments pro and con regarding inclusion jails in their community corrections act programs obviously will have a profound influence on what happens to jails in those states.

The Cost of Alternatives

Another key issue affecting the future impact of CCA programs on jails is that of cost. One leading Minnesota corrections official believes that the cost factor in the long run will work against the incorporation of jails into community corrections programs:

"Keep in mind that it is still quite expensive to keep a person confined on a 24-hour-a-day, seven-days-a-week basis," he said in 1977. "There is also a certain financial pressure to go to the next step and say, 'But it's costing us a lot of money to send them to jail, so maybe we ought to define down that population a little more.' I think the incentives and disincentives of the act will ultimately work against the use of the jail or any 24-hour facility."¹⁷¹

The significance of cost in community corrections in general was discussed at greater length in *Chapter II*.

The Central Role of Judges

A final major factor affecting the impact of CCAs on jails is how judges respond to the program. As indicated in detail at the opening of this chapter, sentencing decisions are critically important in determining the direction of the entire criminal justice system. Certainly they are central to determining how a state CCA program affects the use of jails. This is one lesson that has come out of the evaluations of the existing programs, limited as they are.

Of all the state community corrections acts, Virginia's seems most clearly to grasp the key role of the judiciary in promoting alternatives to incarceration. The structure and process of the Community Diversion Incentive Act centers on the judges' decisions. Thus, while the local advisory board is set up to plan and develop community corrections resources, the principal focus of its efforts is on the recommendations it makes to the court concerning the disposition of individual offenders. The nature and scope of the community corrections program depend heavily on judges' sentencing decisions in response to those recommendations.

Another approach that states can use to influence judges' exercise of sentencing discretion and thus affect the way they respond to community correction goals is to establish sentencing guidelines that apply to jails. Such guidelines can specify "community disposition" and make it plain whether such disposition shall include jail sentencing.¹⁷² As indicated in the earlier discussion of sentencing strategies, however, no states have chosen to apply sentencing guidelines to jails as yet, although the matter has been given attention in Minnesota and Pennsylvania. The new Washington state guidelines, moreover, require judges to give priority to available alternatives to total confinement when sentencing nonviolent offenders for less than one year. If judges do not give such priority, they must state their reasons.

CONCLUDING COMMENT

This discussion of state community corrections programs is presented as the example of the most comprehensive involvement—short of complete takeover—of state government in matters affecting jails and their problems. 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 indicated that these programs have had 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. It also suggests in one state 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 state CCA programs thus far, however, do not yield clear conclusions about the long-run influence of these CCA programs on jails.

Most important is the issue whether the community corrections approach, in light of its emphasis on deinstitutionalization, should include local incarceration as one of its components. Thus far the state programs do include it; hence, jails are directly affected. But the continuing debate on the issue suggests that it 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 nearly universally bleak fiscal outlook currently at all levels of government suggests that the cost factor may be as significant as any 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 expressed 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

The ultimate state involvement in operating local jails is state assumption and administration of the jail functions as part of an integrated state-local corrections system. Six states have taken this approach—Alaska, Connecticut, Delaware, Hawaii, Rhode Island and Vermont. The process by which they moved toward state assumption and the resulting arrangements reflect the particular history and circumstances of each state.

THE SIX STATE-ADMINISTERED SYSTEMS¹⁷³

When *Alaska* became a state in 1959, it assumed responsibility for running the jails that had been operated by the federal government when it was a territory. Adult offenders are under the custody and treatment of facilities run by the Department of Corrections, with the exception of 13 so-called "bush" jails. These are facilities in certain small and remote communities in the Alaskan "bush" where the courts require offenders to be held before trial and sentencing. The "bush" facilities are also used for serving very short sentences to avoid excessive transportation costs. These jails are under the supervision of the state Department of Corrections, are administered by law enforcement personnel under local government administration, and are reim-

bursed by the state under a contract arrangement, except where offenders are arrested for violation of local ordinances. Most of the 13 municipalities have no criminal ordinances, however, so that in those jurisdictions every local violation is an infraction of state law.

Juveniles are under the Division of Family and Youth Services of the Department of Health and Social Services except in Juneau, where a facility for women also includes juveniles. This facility is also under the Department of Corrections.

In 1960, *Connecticut* county government was abolished and its functions were transferred to the state government. However, the former county boundaries were retained for election and judicial purposes. The county sheriff remains, but only to carry out certain administrative duties, including that of serving process for the state courts in his/her region, but not as a law enforcement or jail official.

When county governments were abolished, the former county jails were taken over by the newly created State Jail Administration. In 1968 the present Department of Correction was created to assume total responsibility for all incarcerated adult persons. Jails were brought under it and redesignated community corrections centers (CCCs). Several subsequently were closed so that there are now six CCCs, plus a central misdemeanor facility. The department also operates an array of other correctional units for felons. The commissioner of corrections has total discretion to hold prisoners wherever he wishes.

Many cities and towns have local lockups for holding persons for no more than six hours, except when they are taken into custody late at night, on weekends, and on holidays. The next day they are transferred to a CCC.

Delaware converted to a state-administered, state-financed system in 1956. Prior to that time there was a jail in each of the state's three counties. State assumption was undertaken as a reform and economy move, with the state assigning to the Department of Health and Social Services the responsibility for all corrections, juvenile as well as adult. In 1975 the newly created Department of Corrections took over all correction activities. Jails as such no longer exist. A multipurpose criminal justice facility in Wilmington is the principal institution for holding pre-trial, pre-sentence offenders. The six other facilities include one for women and one that is community-based.

Hawaii had local jails run by county police departments when it became a state in 1959. In 1970 the legislature asked an ad hoc committee of representatives from all state criminal justice agencies to prepare the parameters of a master plan for improving the state's entire correction system, based on several studies completed in the previous five years. After two years the committee recommended a consolidated state-local correction system, and the resulting enabling legislation in 1973 authorized the state to begin the legal/administrative process to transfer all jails to the state. Such processes have been completed for the four counties. Now all persons detained for pre-trial or pre-sentence purposes, and all those sentenced for misdemeanors, are incarcerated in state-administered and financed facilities. The responsible agency is the Division of Corrections in the Department of Social Services.¹⁷⁴

County government was abolished in *Rhode Island* in 1956, but unlike Connecticut, that was not the turning point in jail administration in that state. Jails have been a state function since at least the 18th century. The state's size—in area and population—has a lot to do with that fact, as well as with the manner in which the jail system is administered.

The Department of Corrections is responsible for adult offenders in seven facilities. One of these is a jail, in Cranston, which serves as an intake services center with a capacity of about 240. An average of about 200 inmates are awaiting trial. Their length of stay varies from overnight to eight to nine months, but averages seven to 12 days. The remainder of the jail's inmates are sentenced and undergoing admissions and orientation processing, after which they are sent to one of the other six state institutions. All seven facilities are within an area of two square miles.

Most of the state's 39 cities and towns have lockup or drunk tank type facilities where arrestees are detained overnight. They are picked up routinely every morning for delivery to the intake services center. The cost is borne locally.

The Department of Corrections has been under a federal district court order since August 1977, for "totality of conditions." A major cause was failure to separate those awaiting trial from sentenced inmates. These and other problems have been remedied except for substandard physical plant conditions in the system's oldest (over 100 years old) unit.

Prior to 1968-69, *Vermont* had county jails that were responsible for pre-trial detention and custody

of convicted misdemeanants up to one year. There was also a central state prison—a house of correction.

In 1968-69, the state took over the county jails and made them state-operated facilities. The larger of these are regional facilities for pre-release, pre-trial, and medium post-conviction custody of up to two years. Vermont has no state prison. Offenders with longer terms are placed with the U.S. Bureau of Prisons under contract with the state. The number varies up to 40.

State law also provides for a system of local facilities that serve as 24 hour lockups and hold arrestees in pre-arraignment status for up to 72 hours. By law these are municipal lockups but in a few cases they are sheriffs (county) facilities. They are funded locally. The state also contracts to place state offenders in these lockups for weekends when its facilities are overcrowded. There is no limit on the length of these stays; it is up to the discretion of the commissioner of corrections.

COMMON DENOMINATORS

While no two of the six states are alike in the manner in which they provide traditional functions of local jails, there are several features that are common to the way all or most came into being and now operate.

- They are small in area (all but Alaska) and population (all but Connecticut). Five of the states are 43rd, 47th, 48th, 49th and 50th in area, and five are 39th, 40th, 47th, 48th and 50th in population.
- County government, the most common unit with jail responsibility in our system of local government, has been abolished (Connecticut and Rhode Island), or is weak (Vermont), and/or the state government is clearly dominant in the sharing of state-local financing and spending responsibility (Alaska, Delaware, Hawaii).¹⁷⁵
- State assumption of the jail function took place in several states in the context of a more comprehensive reform of correctional activities within the state, as in Delaware, Hawaii and Vermont.

THE PROS AND CONS OF STATE TAKEOVER

State takeover of the local jail function has been popular among professional and reform groups. As one state study observed: "It should be understood that almost everyone who has written about county jails recommends that the state take over their control."¹⁷⁶ Notable among the proponents was the National Advisory Commission on Criminal Justice Standards and Goals, which in 1973 recommended that:

all local detention and correctional functions both pre- and post-conviction, should be incorporated within the appropriate state system by 1982. (Standard 9.3).¹⁷⁷

In favor of state assumption it is argued that many county governments suffer from an unavoidable lag in ability to cope with critical jail problems due to: the persistence in many cases of a patronage system in the staffing of local jails; fragmentation of responsibility, making it impossible to hold either the county board or the sheriff accountable; the inadequacy of the tax base; and the difficulty of providing modern facilities and treatment to a jail population that in most cases is small. States, it is argued, have greater fiscal resources and the advantage of broader geographical range and powers, enabling them to provide better coordination within an integrated criminal justice system and thus to handle more effectively the detainees and offenders referred to the typical jail. With their greater powers, responsibilities and resources, they are better suited to attract, hold and train competent personnel, exercise flexibility in transferring inmates among facilities, achieve management economies,¹⁷⁸ and assure uniform treatment of offenders throughout the state.

That no more than six states have seen fit to follow the state assumption path indicates that there are strong arguments on the other side. Opponents and skeptics maintain that the jail function is a "natural" local function because of the local orientation of law enforcement, the desirability of easy access to detainees by family, friends, and lawyers, and the type of offender usually detained. They argue that better financing is by no means assured at the state level: the state may have greater resources, but it also has greater needs. It also is contended that those concerned about adequate funding for the "jail" phase of the correction process will find after state assumption that jails must compete for funds with the other segments of the total correction system, as well as noncorrection agencies. This is only part of the

power struggle that jail officials will face with the rest of the correction bureaucracy. The inevitable movement away from ties with the community, it is further argued, runs counter to the current trend toward greater emphasis on community-based programs. Finally, it is contended that many of the virtues of state assumption may be achieved by less drastic measures, such as regionalization—offering many of the advantages of larger scale administration—or adept state use of subsidies, technical assistance and training.¹⁷⁹

CONCLUSION

Is state assumption of the jail function into an integrated correction system a likely solution to the problems besetting jails? The pro and con arguments yield no clearcut answer; although of course they would strike various balances when applied to the different circumstances of the 50 states. It seems likely, for example, that a state government that is pushing more effective coordination of all corrections and is particularly interested in stimulating community correction alternatives to incarceration might find the arguments for state assumption persuasive. The pragmatic evidence as of this moment, however, suggests a negative answer to the question, because no state for almost a decade, even in the face of difficult problems with its jails, has opted to assume the function.¹⁸⁰ This conclusion is supported by the comments of state officials queried in the ACIR-NACo survey. In response to a question on the possibility of some sort of state-local cooperative corrections policy, about one-fourth of the respondents volunteered references to state takeover and did so in negative terms, based largely on their perception of strong objections, particularly from local officials, to any encroachment on local control.

States seem more inclined to choose the less drastic alternatives for state involvement: subsidies, standards and inspections, and technical assistance and training, even though many pursue some or all of these alternatives with less than total zeal.

INTERLOCAL COOPERATIVE ARRANGEMENTS

Up to this point in the chapter, attention has centered on state-local relations as they affect the problems and performance of local jails. Now we turn to the other major focus of intergovernmental relations at the subnational level: interlocal cooperative arrangements. Localities enter into such arrange-

ments primarily to obtain service of a better quality and/ or at a lower cost. These undertakings are of two types: interlocal service contracts or agreements, under which one locality agrees to provide services to another, and joint agreements, under which participating jurisdictions agree jointly to provide services for all participants.¹⁸¹

In the corrections field, both arrangements sometimes are called regional approaches, presumably because they both involve a single provider supplying jail service over a multijurisdictional territory.¹⁸² Yet there is a basic difference between the two in that under the interlocal contract the providing locality generally controls the scope and daily performance of the service, whereas under the joint agreement, the participating jurisdictions jointly share overall policy and management responsibility.

The difference in the commitments of the participants and their sharing of responsibility makes a difference in how jail servicing and planning are performed in the long run under the two approaches. As a New Jersey report noted: "The first type [interlocal contracting] is unlikely to be a constructive force for change in the long run, for . . . the counties who contract for jail space may later build their own jails, and counties are unlikely, nor should they build large regional facilities unjustified by their own jail populations simply in anticipation of profit from other counties."¹⁸³

Accordingly, this discussion differentiates between these two types of "regional" approaches. One is termed an interlocal contract and the other an interlocal joint agreement or, more frequently, a regional or multijurisdictional arrangement.

State Authorization and Encouragement

Although local initiative is central to interlocal arrangements, the state also has roles to play. The most basic one is to provide the necessary legal authority to engage in such arrangements. Not all states grant the authority. According to a 1976 study, 44 permitted localities to undertake joint or cooperative provision of services and 32 permitted interlocal contracting.¹⁸⁴ Authorizations of the former type of arrangement, moreover, were restricted in many states so that they impeded local government agreements. The restrictions were mainly of two types: (1) the requirement in 31 states that all local governments party to the agreement have the authority to perform the service; and (2) the failure to permit the general cooperation law to supersede any

individual laws allowing intergovernmental cooperation in specific functional areas.¹⁸⁵

States not only authorize interlocal cooperative arrangements; they sometimes also encourage them, usually through their subsidy programs. State community correction act programs probably are the best examples. The Minnesota act provides that:

One or more contiguous counties, having an aggregate population of 30,000 or more persons or comprising all the counties within a region . . . may qualify for a grant . . . by the enactment of appropriate resolutions creating and establishing a corrections advisory board and providing for the preparation of a comprehensive plan for the development, implementation and operation of the correctional services . . . and providing for centralized administration and control of those correctional services. . . .¹⁸⁶

Similarly, in Kansas a county of less than 30,000 population may qualify for grants under the community corrections act if it has entered into a cooperative agreement for the purposes of the act with one or two other counties located within one or more contiguous judicial districts and having a total population of at least 20,000.¹⁸⁷

Extent of Use

The extent of actual use of interlocal cooperative arrangements for the delivery of jail services is not known with a great degree of completeness or currency, particularly the use of interlocal contracts. Since it was beyond the scope of this study to undertake the type of survey necessary to bridge this information gap, reliance is placed on existing data sources. These are more satisfactory on regional arrangements than on interlocal contracts.

Jail Services by Interlocal Contract

The best clue as to the extent that jail services are provided by interlocal contract comes from two surveys of local officials conducted in the early 1970s. In 1972 the ACIR and the International City Management Association (ICMA) surveyed 5,900 municipalities over 2,500 population on the subject of intergovernmental cooperative arrangements. Among the 2,375 responding municipalities, 1,491 or 63% reported having such agreements. There were 472

agreements for jails and detention facilities the single most frequently provided service under these arrangements.¹⁸⁸

A year earlier a survey conducted by ACIR, ICMA and the National Association of Counties found that jail services were the service that counties supplied most frequently under contract with jurisdictions within their boundaries. Eighty-two agreements were in effect among the 848 counties that responded to the survey question.¹⁸⁹

Information from another source provides inferential evidence of the degree to which counties rely on other counties to provide jail services. The Institute for Economic and Policy Studies, Inc., compared the list of jails in the U.S. Department of Justice's 1978 jail census with the list of counties in the U.S. Bureau of the Census' *City/County Data Book*.¹⁹⁰ It found that 334 counties reported no jails. Since maintaining a jail is generally a state-prescribed county function, it seems likely that many of these counties are discharging their responsibility through contracting with other, in most cases larger, counties.

Regional (Multijurisdictional) Jails

The most recent data on the number and characteristics of regional jails were compiled by Price and Newman in a study funded by the National Institute of Corrections.¹⁹¹ They identified ten jails in the United States in 1979 that generally met their definition of a multijurisdictional or regional jail:

. . . a facility with a joint agreement by two or more units of government to organize, administer, and operate a jail facility(ies) to be used exclusively by the participating governments for all pre-trial and sentenced inmates. Such multijurisdictional facilities usually operate with a jail board which is drawn from representatives of the participating jurisdictions. Board members are generally elected public officials; in some cases a limited number of community representatives are also participants. The functions of boards range from policy formulation, budget development, fiscal control, and direct jail operation to a more limited broad oversight of jails.¹⁹²

Figure III-7 identifies the major features of the ten regional jails. Among other things, it shows that the regional bodies are formed away from major

population centers, and that, even after consolidating the needs of as many as seven jurisdictions, their overall capacity may be only 30. The chart also shows that in eight of these arrangements the state plays another critical role besides providing legal authority: it is a source of funds. In the Minnesota, Kansas and Virginia regions the funding is an integral part of the state's community corrections act (CCA), serving as an incentive for local formation of CCA regions, as described in an earlier section.

Among the ten regional jails, Price and Newman noted differences with respect to whether: (1) the participating jurisdictions continue to operate their own jails for pretrial or sentenced inmates, or both, and accept referrals from other participating jurisdictions and the state; (2) the regional jail accepts inmates on a set fee-for-service basis; and (3) the regional jail is a consolidated city-county jurisdiction, rather than a multicounty jurisdiction. Only three strictly meet all the requirements of the authors' definition, the principal disqualifying factor being that one or more of the participating jurisdictions continues to maintain some type of jail, for pretrial or sentenced inmates, or both.

Concluding that it was practically impossible to describe a typical multijurisdictional jail other than to say that it tends to be small, the authors nevertheless offered this summary description:

Most are rural, but a few are urban. Many have jail boards for advisory and management purposes with representatives from all participating jurisdictions; some do not. Most hold pretrial and sentenced inmates; a few hold only sentenced offenders. Most serve their region exclusively; a few do not. Almost all are funded by more than one level of government (city, county or state); a few are funded only at the county level. Most regional jails require an agreement by participating jurisdictions to support the jail on an annual basis (pro rata); a few utilize a fee-for-services contract. . . . Operationally, wide differences exist both among and between regional jails and traditional county facilities.¹⁹³

Price and Newman reported that in addition to the ten bona fide regional jails they identified, a larger (but unspecified) number of quasi-regional consolidated jails also existed. The latter undoubtedly in-

Figure III-7

SELECTED CHARACTERISTICS OF REGIONAL (MULTIJURISDICTIONAL) JAILS
1979

Name of Facility	Type	Other Jails in Region	Function	Participating Jurisdictions	Resident Capacity	Source of Funds	Charge to Participating Units	Administrative Responsibility For Jail	Jail Board Responsibility	Comments
	Column (1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Albermarle District Jail Elizabeth City, NC	I	No	Pt,S	7	44	County	Prorata (4) Fee (3)	Chief Jailer	PH,B O	* Regional Concept
N.W. Regional Correctional Center, Crookston, MN	I	No	Pt,S	7	30	County State	Prorata (3) Fee (4)	Director	PH,B O	* Regional Concept
Middle Peninsula Regional Security Center, Saluda, VA	I	No	Pt,S	5	30	County State	Prorata	Jail Administrator	B,PER	* Regional Concept
Regional Corrections Center Huron, SD	II	Yes	Pt,S	5	20	County State	Prorata	Sheriff	None	
N. California Regional Rehabilitation Center Whiskeytown, CA	III	Yes	S	11	75	County State	Fee	Sheriff	None	
N.E. Regional Correctional Center, Saginaw, MN	III	Yes	S	6	60	County State	Prorata	Director	PH,B O	* Regional Concept
Olmstead County Jail Rochester, MN	IV	Yes	Pt,S	3	53	County State	Prorata	Sheriff	PH,O O	* Regional Concept
S.E. Kansas Correctional Center, Fort Scott, KA	V	Yes	Pt,S	9	41	County	Fee	Administrator	PH,O	Accepts State Work Release Prisoners
Rappahannock Security Center, Fredericksburg, VA	VI	No	Pt,S	3	53	City County State	Fee	Sheriff	None	
Albermarle-Charlottesville Joint Security Complex Charlottesville, VA	VII	No	Pt,S	2	84	City County State	Prorata	Jail Administrator	PH,B O	

Legend: Pt—Pretrial; S—Sentenced; PM—Policy Making; B—Budget; O—Oversight; PER—Personnel

SOURCE: Barbara Raffel Price and Charles L. Newman, *Multijurisdictional and State Jails: A Study in Organization and Management*, February 1979.

clude some of the multijurisdictional facilities referred to in various state corrections reports. At the end of 1981, for example, the state of Washington reported that, of 36 jurisdictions funded under a total of \$236.5 million in jail bond appropriations, "The majority of 36 projects represent city-county consolidations and 19% represent multicounty consolidations or jail service agreements."¹⁹⁴ And Virginia identified 34 county or city jails that were used by more than one county or city. Because Virginia does not grant interlocal contracting authority, there must have been joint agreement arrangements.¹⁹⁵

The Pros and Cons of Interlocal Cooperative Arrangements for Jail Services ¹⁹⁶

The basic attraction of interlocal arrangements is their pooling of resources. Participants are able to obtain economies of scale in constructing, maintaining and operating physical facilities and in developing and conducting diversified programs. Local officials responding to the ACIR's 1972 survey on interlocal agreements stated "with near unanimity" that economy of scale was the reason their jurisdictions entered into a cooperative enterprise.¹⁹⁷ Economy of scale explains why these arrangements appeal so strongly to small governments.

Besides reducing costs, a larger scale operation can foster professionalization of jail management and staffing, which is good in itself, but it also can enhance the public's regard for the criminal justice system. In some counties, law enforcement officers often must serve as jail custodians. Substituting trained, specialized jail personnel can free up such officers for their primary crime control and service duties, making law enforcement more effective.

When a regional body is formed by taking over control of jails formerly run by individual participating jurisdictions, it makes possible a distribution of inmate population among those facilities to remedy overcrowding or underutilization. For localities entering into a contract to purchase jail service from another jurisdiction, the arrangement offers the additional attraction of flexibility: if a "buying" locality is careful to protect its options in negotiating the contract, it can retain the discretion to seek another supplier if the present one proves unsatisfactory. That kind of option is not likely to be available to a locality entering into a joint regional agreement, since permitting the participating localities to retain such flexibility might jeopardize the viability of the regional entity.

With such a good case for localities to enter into interlocal cooperative arrangements for jail services, one might expect to find numerous such arrangements. That they are not more plentiful testifies to the problems connected with establishing them. One is the lack of necessary legal authority in a number of states. Another is that, as in any instance where service responsibility is turned over to another party, the ceding party loses a degree of control for the period of the agreement. Resistance to the idea then comes from the implicit threat to local authority. An additional drawback is that localities that give up an existing jail operation in order to enter into a contract or regional organization may find the costs of transporting offenders to the more distant cooperative jail offset some of the saving otherwise expected. Other costs also may increase:

Detailed analysis . . . will sometimes show increased resource needs. . . . The reasonableness of consolidation depends on the objectives set for each facility; population flows between different parts of the criminal justice system; the proportion of inmates in pre-trial, presentencing, felon and misdemeanor statutes; and many other cost and noncost-related variables.¹⁹⁸

Apart from cost, transportation to regional jails is a particular problem for the pre-sentence detainees who make up a substantial share of local jail inmates. They may be required to be in and out of court several times during the course of their detention, and the court may be located elsewhere than at the seat of the regional jail. For this reason, it is argued, the handling of presentence detainees is less suitable for regionalization than the confinement of misdemeanants.¹⁹⁹ Still, it is noteworthy that eight of the ten regional jails identified by Price and Newman served both pretrial and sentenced offenders.

A further possible disadvantage, particularly for the regional approach, is that placing the jail service on a new jurisdictional basis may complicate coordination with other elements of the criminal justice system that are not organized on a similar basis. Finally, those who favor greater emphasis on community-based corrections fear that interlocal contracting and regional bodies, by centralizing jail administration in larger, albeit still local units are contrary to the spirit and direction of community-based corrections because these facilities tend to remove offenders from proximity to their families and other ties to their local communities. Support-

ers of community-based corrections act programs that encourage regionalization, on the other hand, contend that combining small jurisdictions through regionalization may be the only way to obtain the pooling of resources necessary to support the variety of activities needed in a viable community corrections program.

Some of the negative arguments apply more to the interlocal contract than to the regional approach, and vice versa. As an aspect of the loss of control, the agreement under an interlocal contract is more subject to termination without ample opportunity to make other arrangements. From the standpoint of the service provider, on the other hand, the contract may place constraints on its ability to plan ahead, depending on the terms and length of the individual contracts it holds. Finally, a locality's entering into a contract may serve to deflect it from facing a more fundamental strategic decision, such as whether to join other jurisdictions in creating a full-blown regional jail authority.

A concern that may deter potential participants from joining in a regional jail enterprise is the considerable degree of planning, negotiation and coordination that is required to establish such a body and to keep it functioning smoothly. Maintaining harmony on budget, program and personnel decisions requires continuing exercise of restraint and a cooperative attitude by all participating jurisdictions, which are not easily achieved.

Organizations For and Against

National organizations that have taken a position on regionalization of jails have been overwhelmingly in favor. In 1967 the Corrections Task Force of the President's Commission on Law Enforcement and the Administration of Justice asserted:

Regionalization of misdemeanor corrections is another important approach to improvement. Most rural counties cannot afford the personnel, facilities and services a good short-term institution should have. Possibly under state control or with state assistance, many "satellite" camps or institutions could be established to which inmates could be sent. Small jurisdictions should arrange to contract with nearby metropolitan areas for all the needs they cannot meet effectively themselves.²⁰⁰

In 1973 the National Advisory Commission on

Criminal Justice Standards and Goals stated:

A regionalized service delivery system should be developed for service areas that are sparsely populated and include a number of cities, towns or villages. Such a system may be city-county or multicounty.²⁰¹

Endorsements of the regional approach have also come from the American Correctional Association (ACA), the U.S. Bureau of Prisons,²⁰² and the Advisory Commission on Intergovernmental Relations. In 1971 the ACIR recommended that,

states authorize and encourage local governments through financial incentives and technical assistance to contract with larger local units for the custody of their prisoners, or enter into agreements with other local units for the joint establishment and operation of regional jails and local institutions to handle such offenders.²⁰³

The National Association of Counties has taken a similar position.²⁰³

In response to an inquiry from the ACIR staff regarding the National Sheriffs' Association's position on regional jails, the NSA's executive director wrote:

For me not to recognize the fact that there are instances where regional jails have worked would be unfair, but for the most part there are too many stumbling blocks that prevent regional facilities from starting up or when they do get off the ground, from being effective.²⁰⁵

Among the problems he cited were: the difficulty of getting a consensus on the jail's location; the effect of travel distance on attorneys' and visitors' access; the uncertainty of continuity of policies and commitments due to turnover in county officials; the need for some counties involved in a regional facility to maintain lock-ups, cutting down savings from consolidation; and participating sheriffs' uncertainty about their respective roles.²⁰⁵

State Corrections Officials' Comments In ACIR-NACo Survey

The ACIR-NACo 1982 survey of state corrections officials provides insights into these officials' attitudes toward regionalism and their assessment of

its current status and future prospects. In response to the question: "Has any thought been given in your state to instituting some sort of state-local cooperative corrections policy?" the following comments were received:

- There have been some discussions of the regional jail concept that the state would provide part of the funds with several counties funding and staffing the facility, but as yet no concrete decisions nor work have begun on such a project.
- The idea which is presently being discussed is for regional jail/prison facilities to be built in approximately four different areas within (state). These facilities would be shared by local and state government on a pre-determined ratio. This idea has not been thoroughly explored by either state or local governments as of this time.
- . . . Regional facilities would be built which would house both sentenced state and sentenced jail persons. This idea is very embryonic at this time with little discussions on such problems as custody, financing, staffing, turf, separation of inmates and where they would be located.
- Approximately 12 years ago, the state pushed for regional jails—defeated rather badly.
- Several options have been discussed. . . . Local corrections advisory boards. Multicounty jail program sharing. There is no plan to establish state run jails. Execution of plans is tied in with money.
- The (state) county officials association has had some preliminary discussion on the subject of the state building and operating regional jails throughout the state. This plan of action seems to go hand in hand with the philosophy, "if the state is going to require that minimum standards be met, then the state should pay for the cost." As of this date, any bills introduced at the legislature to help pay for new jails have failed.

As noted earlier, the officials also were asked whether their states had a "crisis in local jails" and if so, whether they thought various specified measures

were the way to ameliorate it. Of the 28 who thought there was a crisis, 17 said one way to ameliorate it was to encourage multicounty or regional cooperative arrangements. Seventeen was the most "votes" cast for any of the eight specified solutions. Several respondents added relevant comments:

- Though regional jails don't hold too much promise in the pretrial area, regional or state-local jail construction may make sense for sentenced prisoners. This could reduce the cost of constructing and operating at least the support services (kitchen, laundry, etc.) and possibly maximize the useability of beds.
- Although this (regional jails) seems to be a good idea, there appears to be difficulty in getting local governments to cooperate. (State) is geographically a large, sparsely populated state which makes multicounty or regional considerations particularly difficult.
- Need multicounty facilities where sparse population and contiguous borders for three or more counties permit.

Conclusion

Interlocal cooperative arrangements hold considerable appeal for economy-, efficiency-conscious localities, particularly small jurisdictions. Solid information is lacking—especially on the extent of interlocal contracting—to judge unequivocally whether their response has been commensurate with that appeal. Yet, several facts suggest that it has not. One is the views of state corrections officials that interlocal cooperative arrangements are among the best alternatives for dealing with the local jail crisis in many states. Presumably they would not express that view if the approach already were being used as extensively as it might. The second is the fact that there continue to be so many small jails in the country. The *1978 Census of Jails* found that almost two-thirds of the nation's jail inmates were confined in jails with an average daily population of less than 20 inmates.²⁰⁷

The fact that localities have not taken adequate advantage of the opportunities offered by interlocal cooperative arrangements suggests that the factors deterring such arrangements are indeed strong: the lack of state legislative sanction and financial and technical encouragement; the reluctance to sur-

render local control, whether it be by local sheriffs, local governing boards, or both; the cost and inconvenience of transporting prisoners a long distance, with its inevitable diversion of law enforcement personnel from other duties; the concern that larger-area administration might interfere with community-based corrections; and the anticipation of difficulties in achieving the degree of mutual trust among the participants that is essential to making a cooperative enterprise succeed.

CONCLUDING COMMENT

This chapter has addressed the issue of the states' responsibility for local jails and how they discharge it. Constitutionally, states have ultimate responsibility for jails, as they have for all functions of local government in the American system of federalism. Historically, however, jails have evolved—and continue to be regarded—as one of the most “local” of governmental functions. As a consequence, except for the six states that have taken over the entire state-local incarceration function, state government's role *vis-a-vis* jails is one of oversight, stan-

dards-setting, prodding, and helping. In addition, of course, state government influences the provision of local jail services through its pervasive effect on the various elements of the criminal justice network: the police, the prosecution, the courts, and the state prisons. Especially critical in this regard are the sentencing policies and practices of the courts, fashioned and carried out within the framework set by the Constitution and state legislature.

The chapter has described and, when possible, evaluated the 50-state performance in each of the roles that affect local jails. These descriptions and evaluations were summarized and highlighted at the end of each section. They point to the conclusion that, although the record varies from state to state, as a group states in the past decade or so have demonstrated increased involvement with their localities in dealing with the problems of local jails, notably in standard-setting, the number and dollar amount of subsidy programs, and the fostering of community-based corrections programs. At the same time, the record suggests that there is substantial room for improvement on all fronts, and particularly in standards enforcement, training and better guidance for sentencing practices.

FOOTNOTES

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- 18 See for example *Public Opinion* (August/September 1982): 26.
- 19 Miller, Roberts, and Carter, *Sentencing Reform*, p. 36.
- 20 Some believe, however, that, whatever their other effects, rehabilitation activities are valuable ways of keeping order in prisons. See Kevin Krajick and Steven Gettinger, *Overcrowded Time* (New York, NY: Edna McConnell Clark Foundation, 1982), p. 12.
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- 119 *Kansas Statutes Annotated, Supplement*, 75-5290.
- 120 *Oregon Revised Statutes*, 423.505.
- 121 *Code of Virginia*, 53.1-180-53.1-185.
- 122 ACIR staff phone interviews 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.
- 123 *Minnesota Statutes Annotated*, Chapter 401, Section 401.01-401.16.
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 - 154 Oregon Corrections Division, Local Government Corrections Section, *Oregon's Community Corrections Act: Twenty Questions and Answers*, Salem, OR, 1978, Question 9.
 - 155 John Blackmore, *The Minnesota Community Corrections Act: A Policy Analysis*, prepared for the National Institute of Corrections, Grant #DF-6, March 31, 1982, pp. 47-48.
 - 156 Minnesota Department of Corrections and Minnesota Crime Control Planning Board, p. 46.
 - 157 *Ibid.*
 - 158 Applied Social Research, Inc., *Summary Report*, Figure 2, p. 19.
 - 159 *Ibid.*, pp. 27-28.
 - 160 *Corrections Magazine*, March 1978, cited in Jan Ingrid Smaby, "A Response to the Minnesota CCA State Evaluation Draft Report," Minneapolis, MN, Hennepin County Office of Planning and Development, December 1, 1980, p. 8. The Minnesota Sentencing Guidelines Commission also noted the positive effect of the CCA program on jails: "The imposition of jail and workhouse terms for felons has been increasing consistently since 1974 when money distributed via the Community Corrections Act became available and was used to enhance staff and programs in local facilities." Minnesota Sentencing Guidelines Commission, *Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines*, p. 63.
 - 161 Lynn Zeller Barclay, "Community Corrects Act Evaluation," General Memorandum, Kansas Department of Corrections, Topeka, KS, July 24, 1982, p. 7.
 - 162 Blackmore, *The Minnesota Community Corrections Act*, p. 47.
 - 163 Richard P. Seiter, "Community-Based Corrections: Theory and Operation," in Cleon H. Foust and D. Robert Webster, eds., *An Anatomy of Criminal Justice* (Lexington, MA: D.C. Heath and Co., 1980), p. 224.
 - 164 ACIR staff phone interview with Kenneth Schoen, April 3, 1982.
 - 165 Blackmore, "Can the Communities Succeed Where the States Have Faltered?" p. 22 and Seiter, "Community-Based Corrections," p. 225.
 - 166 *Topeka Capital Journal*, March 16, 1980, quoted in Paula Wright and Dennis Palumbo, "The State of Community Corrections in Kansas," *Kansas Government Journal* (September 1980): 254.
 - 167 John Blackmore, *The Minnesota Community Corrections Act: A Policy Analysis*, p. 92. The conference polled participants on the statement, "The county jail is not and should not be considered a community corrections entity unless its programming is vastly modified." Five agreed, six disagreed and three indicated "no comment/not sure." *Ibid.*, p. 102.
 - 168 *Ibid.*, p. 93
 - 169 *Ibid.*, p. 94
 - 170 *Ibid.*, p. 94
 - 171 *Ibid.*, p. 49.
 - 172 *Ibid.*, p. 50.
 - 173 This section is based mainly on information obtained by ACIR staff in phone conversations with state corrections personnel and on the report, Barbara Raffel Price and Charles L. Newman, *Multijurisdictional and State Jails: A Study in Organization and Management* (University Park, PA: Pennsylvania State University, 1979), pp. 21-22.
 - 174 Susan Claveria, *Review of the Implementation of the Hawaii Correctional Master Plan* (Honolulu, HI: Legislative Reference Bureau, Report No. 1, 1982).
 - 175 See Advisory Commission on Intergovernmental Relations, *State and Local Roles in the Federal System*, A-88 (Washington, DC: U.S. Government Printing Office, 1982), Table 20, p. 38.
 - 176 Richard Kolb Milin, *Report of the Task Force on the County Jails* (Trenton, NJ: New Jersey Association on Correction, 1979), p. 98.
 - 177 National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*.
 - 178 "The integrated corrections model in Connecticut has meant that a number of economies were possible. The system has a central training academy to serve all personnel. A central, accredited hospital in the system's largest institution provides surgical and treatment resources for all system prisoners. Special prisoner rehabilitation programs are available via transfer throughout the system." Letter from Robert Brooks, Chief of Program Planning, Connecticut Department of Correction, December 29, 1982.
 - 179 For elaboration of these arguments, see Milin, *op. cit.*, pp. 98-101; Barbara Raffel Price and Charles L. Newman, *Multijurisdictional and State Jails: A Study in Organization and Management*, manuscript prepared for the National Institute of Corrections, February 1979, pp. 21-25; and Capital District Regional Planning Commission, *Need for Inter-*

- governmental Cooperation to Alleviate the Misdemeanant Correction Problem on the County Level, Albany, NY, February 1981, pp. 6-7.
- 180 Massachusetts is giving signs of possible eventual state takeover. Under its County Financial Assistance program (see *Appendix*), the state holds title to all new jail facilities constructed with state money from the program. The state also assumes administrative responsibility for construction of these facilities as well as for renovation work funded by the assistance program. One state official indicates that these moves may be precursors to ultimate state takeover of local corrections.
- 181 ACIR, *State and Local Roles in the Federal System*, p. 327.
- 182 See for example the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, p. 80, and Robert M. Carter, Richard A. McGee, and E. Kim Nelson, *Corrections in America* (Philadelphia, PA: J. B. Lippincott Co., 1975), p. 79.
- 183 Richard Kolb Milin, *Report of the Task Force on the County Jails*, p. 91.
- 184 Advisory Commission on Intergovernmental Relations, *Pragmatic Federalism: The Reassignment of Functional Responsibility*, M-105 (Washington, DC: U.S. Government Printing Office, July 1976), pp. 11-12.
- 185 ACIR, *State and Local Roles in the Federal System*, p. 327.
- 186 *Minnesota Statutes Annotated*, Chapter 401.02, Subdivision 1.
- 187 *Kansas Statutes Annotated*, Chapter 75-5292.
- 188 Advisory Commission on Intergovernmental Relations, *The Challenge of Local Governmental Reorganization*, A-44 (Washington, DC: U.S. Government Printing Office, 1974), Appendix Table III-A.
- 189 *Ibid.*, pp. 44-45.
- 190 Letter and tabulation from Randall Guynes, Institute for Economic and Policy Studies, Inc., Correctional Economics Center, Alexandria, VA, May 12, 1982.
- 191 Barbara Raffel Price and Charles L. Newman, *Multijurisdictional and State Jails*, p. 9.
- 192 *Ibid.*
- 193 Price and Newman, *Multijurisdictional and State Jails*, p. 20.
- 194 Washington State Jail Commission, *1981 Annual Report*, n.d., p. iv.
- 195 Virginia Department of Corrections, *Commitments to Jails FY 1981*, n.d., Appendix II.
- 196 For discussions of the pros and cons of regional arrangements, see Price and Newman, *Multijurisdictional and State Jails*, Chapter II; Milin, *Report of the Task Force on County Jails*, pp. 91-93; Capital District Regional Planning Commission, *Need for Intergovernmental Cooperation to Alleviate the Misdemeanant Correction Problem on the County Level*, pp. 8-9; U.S. General Accounting Office, *Conditions in Local Jails Remain Inadequate Despite Federal Funding Improvements* (Washington, DC: U.S. Government Printing Office, 1976), pp. 9-10; and E.K. Nelson, Jr., Robert Cushman, and Nora Harlow, *Program Models: Unification of Community Corrections* (Washington, DC: U.S. Government Printing Office, 1980), Chapter IV.
- 197 ACIR, *The Challenge of Local Governmental Reorganization*, p. 39.
- 198 Billy L. Wayson, et al, *Local Jails*, p. 15.
- 199 Daniel L. Skoler, *Organizing the Non-System* (Lexington, MA: D.C. Heath and Co., 1977), p. 230.
- 200 The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, p. 80.
- 201 National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (Washington, DC: U.S. Government Printing Office, 1973), p. 290.
- 202 Cited in Capital District Regional Planning Commission, *The Need for Intergovernmental Cooperation*, p. 8.
- 203 ACIR, *State-Local Relations in the Criminal Justice System*, p. 60.
- 204 National Association of Counties, *American County Platform and Resolutions, 1981-82*, 2.2.4.F.
- 205 Letter from NSA Executive Director, L. Gary Bittick, May 4, 1983.
- 206 *Ibid.*
- 207 U.S. Department of Justice, Bureau of Justice Statistics, *Census of Jails, 1978, Vol. III. Data for Individual Jails in the South* (Washington, DC: U.S. Government Printing Office, 1981), Table A, p. 2.

Appendix

**STATE SUBSIDY PROGRAMS FOR LOCAL ADULT CORRECTIONS¹
(1982)**

ARIZONA	
Program title:	Criminal Justice Enhancement Fund
Citation:	Arizona Revised Statutes, Section 41-2401.
Purpose:	15% of the fund goes to enhance county jail facilities and operations.
Fund allocation:	25% equally to the sheriffs of each of 15 counties for training, 25% to same group for any jail purpose, 50% to counties on basis of number of detention officers.
Participating jurisdictions:	15 counties.
Total funds:	1983 allocation: estimated at \$1,000,000 to \$1,600,000.
Comment:	Source of funds is a penalty assessment equal to 37% of every fine, penalty and forfeiture imposed and collected by the courts for criminal offenses, including any fine, penalty or forfeiture for a violation of the motor vehicles statutes, or for any local ordinance relating to stopping, standing or operation of a vehicle, or for a violation of the game and fish statutes.
CALIFORNIA	
Program title:	County Jail Capital Expenditure Fund
Citation:	California Penal Code, Section 6029.1.
Purpose:	To assist counties in financing jail construction.
Fund allocation:	Counties must have completed a needs assessment process, applied for funds, and have adequate ranking in terms of need and their past efforts to solve their own problems.
Participating jurisdictions:	In FY 1981-82, 22 of 58 counties were funded.
Total funds:	1981-82 expenditures: \$39.3 million.
CALIFORNIA	
Program title:	Standards and Training for Corrections Program
Citation:	SB 924 (1979).
Purpose:	To increase the level of competence of local corrections personnel through the establishment of minimum selection and training standards.
Fund allocation:	To all counties that have an ordinance committing them to adhere to the minimum selection and training standards.
Participating jurisdictions:	In 1981-82, 40 of 58 counties.
Total funds:	1981-82 expenditures: \$1,569,382.

CALIFORNIA

Program title: County Justice System Subvention Program

Citation: Welfare and Institutions Code, 18055 ff, added in 1978.

Purpose: To improve local justice system offender-centered services of probation departments, county and city law enforcement agencies, courts, and public and private agencies, and, among other things, to establish and maintain public and private adult corrections programs and facilities, including county jail programs.

Fund allocation: All counties are eligible to receive subvention funds. Funding based either on population or the amount the county historically would have received from two previous subsidy programs. Funding is contingent on the county's not exceeding a basic rate of commitment of juvenile and criminal offenders to the state youth and corrections agencies.

Participating jurisdictions: In 1981-82, all 58 counties.

Total funds: 1981-82 appropriation: \$63.4 million. *The portion used for jails is not known.*

INDIANA

Program title: Community Corrections

Citation: Indiana Code 11-12-1 and 11-12-2.

Purpose: Provide community-based or community-oriented services for persons sentenced to imprisonment in a county or local penal facility, other than a state-owned or operated facility.

Fund allocation: By Commissioner of Correction in response to application.

Participating jurisdictions: Three in 1982 because of limited funding.

Total funds: Expenditure FY 82: \$250,000. (Requested of legislature for 1983-84 biennium; \$2,800,000.)

IOWA

Program title: Grants for Physical Plant

Citation: Chapter 80C, Iowa Code Annotated (Acts 1969).

Purpose: To assist counties to bring physical plants into compliance with jail standards.

Fund allocation: Grants discretionary with the State Crime Commission, on basis of county applications. 50% match required.

Participating jurisdictions: 70 (70% of total counties).

Total funds: 1981 expenditures: \$200,000.

IOWA

Program title: Community-Based Correction Program

Citation:	Iowa Code Annotated, Chapter 905.
Purpose:	To encourage alternative community-based correction programs. Four programs required: pretrial services, presentence investigation, probation and alternative residential services.
Fund allocation:	By State Department of Social Services among the eight judicial districts. Allocations determined by review of districts' requests via regular budget process.
Participating jurisdictions:	All of the eight judicial districts.
Total funds:	1981 expenditures: \$11.7 million.
KANSAS	
Program title:	Community Corrections Act
Citation:	Kansas Statutes Annotated, 75-2590 - 75-52108.
Purpose:	To provide local alternatives to state incarceration of nonviolent, nonhabitual offenders and to provide other local correctional services based on community needs.
Fund allocation:	Allocated to participating counties according to a formula weighing county's per capita income, per capita adjusted valuation, crimes per 1,000 population, and percent of county population five through 29.
Participating jurisdiction:	Legislature has frozen at nine the number of counties it will permit to participate. These account for half the state's population.
Total funds:	Expenditures FY 1982: \$1,462,527.
KENTUCKY	
Program title:	Local Correctional Facilities Construction
Citation:	H. B. 441, 1982.
Purpose:	To provide bond proceeds for construction and renovation of jails (\$20,000,000).
Fund allocation:	Method not yet determined.
Participating jurisdictions and total funds:	May not issue bonds until \$2,000,000 "base fund" is accumulated. Base fund is built up from fee levied on court costs. Fund is not expected to be completed until fall 1983.
LOUISIANA	
Program title:	Jail Standards and Assistance Act
Citation:	Acts 1980, No. 753.
Purpose:	To finance the planning, acquisition, construction and renovation of parish jails.
Fund allocation:	Determined by Louisiana Commission on Law Enforcement and the Administration of Criminal Justice based on: priorities determined by the Commission, submission and approval of architectural design/ schematic plans, and compliance with court orders and jail standards.

Participating jurisdictions:	17 parishes.
Total funds:	1981 authorization: \$39.3 million.
MARYLAND	
Program title:	Regional Detention Centers
Citation:	Maryland Code Annotated, Article 27, section 705.
Purpose:	Financial assistance for construction or enlargement of regional detention centers.
Fund allocation:	County or a group of counties applies to the Commissioner of Corrections for financial assistance for construction or enlargement of facility. Recipient must certify that matching funds (50% match) are available.
Participating jurisdictions:	Eight of 23 counties.
Total funds:	1981 appropriation: \$3,003,000.
MARYLAND	
Program title:	Community Adult Rehabilitation Centers
Citation:	Maryland Code Annotated, Article 27, sections 706-710E.
Purpose:	To finance the construction and operation of such centers in each county or multicounty region of the state.
Fund allocation:	Secretary of Public Safety and Correctional Services, with assistance and advice of Commissioner of Correction, determines the need for a grant, based on determination of where there are and will be residents of the county or region convicted of crimes who can best be rehabilitated in community-based facilities without substantial danger to the community.
Participating jurisdictions and total funds:	Appropriation of \$1.5 million for one center, so far. Legislature aborted rest of appropriation after approving a rehabilitation center for Cecil County only.
MASSACHUSETTS	
Program title:	County Financial Assistance
Citation:	Chapter 347, Acts of 1982.
Purpose:	To grant capital funds to counties for the renovation, design, and construction of county facilities.
Fund allocation:	At the discretion of the Secretary of Human Services, pursuant to regulations and after review of county applications by Department of Corrections. \$26 million made available in 1983.
Participating jurisdictions:	Six counties in 1983.
Total funds:	Appropriation 1982: \$50,000,000.

MINNESOTA

Program title: Minnesota Community Corrections Act
Citation: Minnesota Statutes 401.01-401.16.
Purpose: To protect society more effectively and promote efficiency and economy in the delivery of correctional services by assisting counties in developing, implementing, and operating community-based correction programs. "Community-based programs" include preventive or diversionary correctional programs, probation, parole, community corrections centers and facilities for detention or confinement, care and treatment of persons convicted of crime or adjudicated delinquent.

MINNESOTA:

Program title: Community Corrections Centers Act
Citation: Minnesota Statutes Chapter 761, Sections 241.31, 241.32.
Purpose: To encourage development of local alternatives to incarceration in particular residential treatment centers.
Fund allocation: At the discretion of the Department of Corrections.
Participating jurisdictions and total funds: Expenditures about \$100,000 for 1982, limited to two small facilities.

NORTH CAROLINA

Program title: Local Confinement
Citation: North Carolina General Statutes, Chapter 148-32.
Purpose: Reimbursement for male inmates serving sentences of 30 to 180 days (mostly misdemeanants). These are inmates who had been going into the state prison system but who are considered a local responsibility by the state.
Fund allocation: On a per person basis.
Participating jurisdictions: 74 of 100 counties (74%).
Total funds: Expenditures FY 1981: \$1,383,000.

OHIO

Program title: Community Corrections Act
Citation: Ohio Revised Code, Sections 5149.30-5149.37.
Purpose: To reduce prison commitment, develop diversion programs, and improve local corrections. Community-based programs include probation, parole, preventive or diversionary correction programs, release on recognizance, and specialized treatment for alcoholic and narcotic-addicted offenders.
Fund allocation: By formula, weighing (a) per capita income, (b) per capita taxable value, (c) per capita expenditures for corrections, (d) population.

Participating jurisdictions and total funds:	15 governmental units were to be invited to participate in demonstration program. Ten responded but when the state appropriation was cut back, only six were funded in 1981. Total funds: \$117,000.
OREGON	
Program title:	Community Corrections Act
Citation:	Oregon Revised Statutes 423.500.
Purpose:	To provide appropriate sentencing alternatives and improved local services for persons charged with criminal offenses with the goal of reducing the occurrence of repeat criminal offenses.
Fund allocation:	In two parts: (1) Moneys appropriated to Corrections Division for supervision of parolees and probationers. Each county's share of this part is based on its share of persons under felon probation or parole supervision. (2) Enhancement grants, based upon statewide crime and demographic data. County application required.
Participating jurisdictions:	36 counties (100%).
Total funds:	1981 expenditures: \$6,223,065.
TEXAS	
Program title:	Criminal Justice Planning Fund
Citation:	Texas Statutes 1981, Chapter 495.
Purpose:	To award grants to units of local government from the Criminal Justice Planning Fund for programs and projects that address the goals, priorities, and standards established in the state comprehensive criminal justice plan and similar local and regional plans.
Fund allocation:	Each of the 24 regions has a criminal justice planning unit that develops a local criminal justice plan, based on needs identified and prioritized by locally elected officials and local criminal justice professionals. Each region's project proposals are ranked by a regional criminal justice advisory board consisting of membership from law enforcement, courts, adult corrections, juvenile justice, and citizens of the region. Before developing its plan, the regional planning unit is notified of amount of funds to expect to budget for the coming year, based on its share of population and crime. Regional plans submitted to State Criminal Justice Division staff for analysis, then to Criminal Justice Board, then to Executive Funding Committee, which decides on distribution of grants.
Participating jurisdictions:	24 regions.
Total funds:	1981 expenditures for local adult corrections: \$400,000 (estimated) for physical plant.
Fund source:	Special court fee assessed for a moving traffic offense, misdemeanor, or felony conviction.

UTAH

Program title: Public Inebriate Program

Citation: Utah Code Annotated 63-43-1-63-43-7.

Purpose: To promote or establish programs for publicly intoxicated persons in order to provide an alternative to incarceration.

Fund allocation: Allocated among 11 planning districts by formula weighing 70% on population, 15% on liquor sales, 15% on liquor arrests. Planning district units propose how they will spend their allocation. Division of Alcoholism and Drugs, Department of Social Services, reviews proposals and makes grant.

Participating jurisdictions: 29 counties (100%).

Total funds: Expenditures 1981-82: \$647,000 for all units of government, primarily counties. Another \$598,000 went to private contractors.

Fund source: Assessment up to \$150 in addition to fine for driving while intoxicated. Assessments are credited to "intoxicated driver rehabilitation account" to be used by Division of Alcoholism and Drugs exclusively for activities related to supporting rehabilitation of persons convicted of driving while under influence.

UTAH

Program title: County Jail Incarceration as Condition of Probation

Citation: Utah Code Annotated 77-18-1.

Purpose: To require state to reimburse counties for the jail incarceration expenses of convicted felons sentenced to jail as a condition of probation.

Fund allocation: Program effective July 1983. Legislature currently (February 1983) considering distribution method.

Participating jurisdictions: All counties eligible (29).

Total funds: Estimated at \$730,000 for first year (1983-84).

VIRGINIA

Program title: Community Diversion Incentive Act

Citation: Code of Virginia, 53.1-80 - 53.1-185.

Purpose: To enable localities to develop, establish and maintain community diversion programs to provide the judicial system with sentencing alternatives for certain nonviolent offenders who may require less than institutional custody but more than probation supervision.

Fund allocation: Up to \$30,000 annually for each jurisdiction for administrative purposes; \$400 for each diagnostic evaluation; \$3,600 per year for each offender actually diverted to a community correction alternative.

Participating jurisdictions: 13.

Total funds: 1981-82 expenditures: \$1,009,872.

VIRGINIA

Program title: Financial Assistance for Adult Confinement in Local Facilities

Citation: Code of Virginia, 53.1-84.

Purpose: Financial assistance for the confinement of persons in local facilities. For maintenance and operations costs only.

Fund allocation: By block grant in 1982, on basis of prior year's level of expenditures. (1983 General Assembly considering a new block grant formula.)

Participating jurisdictions: 94 (100% of the counties and cities with jails).

Total funds: 1981 expenditures: \$14,121,000.

WASHINGTON

Program title: City and County Jails Act of 1977.

Citation: Revised Code of Washington, Chapter 70.48.

Purpose: State funding of minimum cost of cities' and counties' bringing longer-term jails up to state physical plant standards.

Fund allocation: The State Jail Commission allocates available funds to the projects approved for funding in accordance with moneys actually available and the priorities established by the Commission. Takes account of the degree to which the applicant implements physical plant standards, encourages voluntary consolidation of contiguous jail facilities, and uses pretrial and post-trial alternatives to incarceration.

Participating jurisdictions: 36 counties (86% of total).

Fiscal dimension: 1981 expenditures: \$30,000,000.

Total funds: \$236.5 million in jail bond appropriations.

¹Based on reports from 39 of the 44 states with locally administered jails. The five nonreporting states are Nevada, New York, Oklahoma, Tennessee and West Virginia.

SOURCE: 1982 ACIR-NACo questionnaire survey, state corrections agencies reports, and ACIR staff phone interviews with state corrections officials.

THE FEDERAL ROLE IN LOCAL JAILS: FROM LAW ASSISTANCE TO LAW SUITS

In *Chapter I*, the jail was described as the quintessential local institution. Yet, as much of the foregoing text suggests, local jails, like the governments that sustain them, are touched daily by the actions (and inactions) of state legislatures, executives and judiciaries. Decisions made at the state level define criminal behavior; create sentencing structures to chastise that behavior; mandate standards for jail facilities and operations; occasionally punish or seek to alter errant institutions; and sometimes offer financial or technical assistance or both.

Nor is this merely a bilateral arrangement. The federal government also participates to a profound, if visibly lesser, degree. Indeed, the relationship between the local jail administrator and federal authorities may run very deep. The former may seek federal aid or reel under its diminishment; may request federal training and technical support; may house national prisoners; may encounter hurdles—direct and indirect—resulting from federal legislation; and may—running headlong into the national Constitution—encounter confrontation in a federal courtroom. Thus is the jail—the local institution's local institution—a creature of the intergovernmental milieu.

Just as changes have occurred in state-local correctional relations over the past decade, so have changes occurred 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 federal government, through its court system, has recently begun to shape state and local correctional policies in a

most profound manner. Thus, although 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, and because "there has been no linear progression from one relationship to the next between federal policies and county jail operations,"¹ this chapter will first examine the rise in federal court orders designed to bring local institutions into compliance with the U.S. Constitution, and only later discuss earlier and coterminous federal correctional approaches carried out by the legislative and executive branches. The first section, then, will concentrate on the Constitutional approach, while succeeding sections will focus on contractual, financial and regulatory strategies respectively.

THE CONSTITUTIONAL APPROACH: JUDICIAL INTERVENTION INTO LOCAL CORRECTIONS

The impact and sheer magnitude of institutional litigation and resulting judicial actions (including not only prisons and jails but juvenile facilities and mental institutions as well) have been all the more intensely felt because such actions have been so chronologically condensed. Strong judicial involvement in jails, then, has been a relatively short-term trend, spurred on by three major legal developments—the collapse of the "hands off" doctrine, reinterpretation of Section 1983 of the *Civil Rights Act of 1871*, and the rise of the managerial judge—and one important institutional fact of life—the local jail's mixed population.

The Collapse of the "Hands Off" Doctrine

While the safeguarding of Constitutional rights is an ancient judicial function, applying those safeguards to the states through their incorporation in the 14th Amendment is relatively new, and newer still is the judicial belief that federal judges should remedy violations involving institutional inmates. Indeed, until as recently as the mid-1960s, the federal courts had consciously employed a "hands off" doctrine, refusing to decide corrections cases on their merits. Prisoners were considered legal "slaves" of the states and institutional administration a *purely* administrative function.

Ironically, the great rise in prisoner-related judi-

cial action occurred not during the so-called "activist" Warren Court era but rather during the allegedly more conservative Burger Court years. As one observer notes:

The Warren Court, known for its liberal decisions in the areas of civil rights and liberties generally, did little in the area of correctional reform. Interestingly, Chief Justice Burger, touted as a traditionalist who would lead a more conservative court back to the old verities by strictly construing the Constitution, has spoken out about the need to attend to the correctional process and has pushed the organized bar to assume more responsibility in this area.²

Currently, inmates may seek to redress grievances in federal court through a number of means: initiating civil suits against corrections officials; attempting to attain writs of mandamus against corrections officials;³ commencing criminal prosecutions of officials acting illegally; introducing contempt citations against officials who fail to obey court orders; trying to persuade the federal courts to issue writs of habeas corpus (now becoming more restricted);⁴ and the increasingly popular method of bringing suit under Section 1983 of the *Civil Rights Act of 1871*.

The Rise of Section 1983

Like biblical lineage, the *Civil Rights Act of 1866* begat the 14th Amendment, the 14th 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 begetting itself—begetting some condemnation, some commendation and a great deal of consternation.⁵

The above quotation might well have added: "The begetting of jail litigation," for the flood of suits against jails—slower to take off than those against prisons—has been greatly abetted by recent judicial developments concerning Section 1983 of the *Civil Rights Act of 1871*. Section 1983 allows those who, by some state action, have been deprived of Constitutional or federal statutory rights, to seek legal remedy against the official "person(s)" who have violated their rights.⁶ Thus, following almost a century of *underutilization*, in 1961, the Supreme Court be-

began the process of liberalizing Section 1983⁷—a process that, for our purposes, culminated in two decisions handed down in 1978 and 1980.

Those decisions held that (1) 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.⁸ While neither of those cases involved 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.”⁹ Instead, inmates may be able to demonstrate that such officials were tied to the constitutional violations by proving any number of official deficiencies, including

Negligent Hiring—failure to institute a hiring system which weeds out obviously inept people and which attempts to place qualified people in jobs they can competently perform;

Failure to Train—failure to provide jail personnel with the degree of knowledge and skill necessary to perform assigned tasks competently;

Negligent Assignment—placing of personnel in a job or situation which they are not equipped to deal with competently in instances where superiors have reason to know that such personnel are not so equipped;

Failure to Direct—failure to provide jail personnel with written up-to-date policies and procedures to guide them appropriately in the performance of their duties.

Negligent Supervision—failure to correct recurring problems or to guide employees’ direction in situations that recur with some frequency; and

Negligent Retention—failure to dismiss a person obviously unfit to be a jailer.¹⁰

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.”¹¹

In 1983, a bitterly divided Court considered whether punitive damages¹² are available under Section 1983 and, if so, what underlying threshold of conduct will trigger awarding of such damages.¹³ The case in question involved an inmate of a Missouri reformatory who was beaten and sexually assaulted by his cellmates. The inmate, Wade, historically had been the subject of 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. Thus, for the first time, the Court sanctioned 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.

The Effects of Special Inmates

Jails, unlike adult prisons and penitentiaries, routinely house two (often overlapping) varieties of inmates—pretrial detainees and juveniles—that make them particularly susceptible to federal legal action.¹⁴ As recently as three years ago, the Supreme Court spoke to the issue of those awaiting trial. While the Court’s decision against the prisoners rested on a wide-ranging deference toward the methods used by jail administrators both to insure detainees’ presence at trial and to efficiently manage the jail facility, it did assert that “a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”¹⁵ Where the “punishment line” is crossed, is not clear. Yet, the conditions that existed at the New York detention center in question (a modern facility designed almost exclusively to hold those awaiting trial) and its alleged pretrial punishments (double-bunking, cell and cavity searches, and book restrictions) contrast sharply

with conditions found in "less benevolent" facilities where pretrial detainees are housed with convicted criminals and where violence is a routine, if not daily, occurrence. Thus, in March 1982, the U.S. District Court for Western Virginia held that

It is abundantly clear that extreme overcrowding in a local jail is of greater practical effect and Constitutional consequence than in a larger institution or a common road camp. Simply stated, all overcrowding is not equal. Perhaps more importantly, the local jail houses a high percentage of pre-trial detainees. . . . As a matter of common sense and fundamental fairness, the criminal justice system must insure that pretrial detainees are not housed in more deprived circumstances than those accorded to convicted persons. . . . Overcrowding in a local jail cannot be qualitatively equated with overcrowding in a state penal institution.¹⁶

Despite recent declines,¹⁷ the number of children (under 18 years of age) who are incarcerated every year in adult jails and lockups is still estimated by various sources at between 100,000 and 1 million.¹⁸ In addition to being a moral issue, the legality of juvenile detention in adult facilities is increasingly being questioned.

Because juveniles in jail are overwhelmingly pre-trial detainees, their confinement in unsuitable institutions causes many of the same legal problems as the confinement of adult pretrial prisoners. Youths, however, increasingly appear to have an additional line of defense—namely, their age.

Thus, throughout the 1970s, various courts have opined that

[detaining youths in adult jails], even though these commitments be for limited periods of time, constitutes a violation of the 14th Amendment in that it is treating for punitive purposes the juveniles as adults and yet not according them for due process purposes the rights accorded to adults.¹⁹

The worst and most illegal feature of all these proceedings is in lodging the child with the general population of the jail, without his ever seeing some officer of the court.²⁰

[T]he evolving standards of decency that mark the progress of a maturing society require that a more adequate standard of care be provided for pre-trial juvenile detainees.²¹

While there has never been a definitive Supreme Court ruling on the practice of detaining children in adult jails, two important legal actions occurring in 1982 could have profound consequences.

On April 26, an Ohio county judge agreed in an out-of-court settlement to end his practice of incarcerating juveniles. In addition, the judge, along with county commissioners and the sheriff, consented to pay a total of \$40,500 in damages to two 15-year olds who had been incarcerated in the county's adult facility.²²

Even more significant, in August 1982, U.S. District Court Judge Helen Frye ruled that the practice of detaining juveniles in adult jails is "unconstitutional per se."²³

. . . [T]o put such a child [status offender] in jail—any jail—with its criminal stigma—constitutes punishment and is a violation of that child's due process rights under the 14th Amendment. . . . To lodge a child in an adult jail pending adjudication of criminal charges against that child is a violation of that child's due process rights under the 14th Amendment to the *United States Constitution*.²⁴

According to one observer, Judge Frye's ruling "will have major impact not only in Oregon, but nationally. . . . The decision means that it is illegal to hold children in adult jails anywhere."²⁵

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 imple-

mentors, 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.²⁶

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.²⁷

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.²⁸

[I]t is representative of the trend toward demanding performance that cannot be measured in one or two simple acts but in a whole course of conduct, performance that tends to be open-ended in time and even in the identities of the parties to whom the performance will be owed. Remedies like these are reminiscent of the kinds of programs adopted by legislatures and executives. If they are to be translated into action, remedies of this kind often require the same kinds of supervision as other government programs do.²⁹

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 a judge's "tunnel vision"; . . . he has no occasion to be concerned about the impact of his ruling on limited state or local financial resources. Understandably, the judge is likely to say that Constitutional rights cannot be denied by an appeal to budget difficulties. As a result, public resources may fund a function or service which is the subject of litigation at the expense of other valuable services not before the court. 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.³⁰

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?³¹

The Supreme Court: Delivering a Message of Deference

Exactly how the Supreme Court feels about the day-to-day judicial management of state institutions is less than clear. However, three fairly recent cases have been characterized by not so veiled calls for increasing judicial deference.

In 1981, the Court was asked to rule on the Constitutionality of double-celling at the Southern Ohio Correctional Facility, an otherwise “unquestionable . . . topflight, first-class facility.”³² That circumstances at the institution in question differed markedly from conditions found in many state and local detention facilities caused the majority to rule that the double-celling of prisoners, in and of itself, did not constitute cruel and unusual punishment. The Court, however, then went on to note

When conditions of confinement [do] amount to cruel and unusual punishment, “federal courts will discharge their duty to protect Constitutional rights.” In discharging this oversight responsibility, however, *courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system.*³³

More elusive from an institutional standpoint but potentially more consequential were two nonpenal decisions—*Rizzo v. Goode*³⁴ and *Youngberg v. Romeo*³⁵—handed down in 1976 and 1982 respectively. To understand the Court’s reasoning in *Rizzo*, one must understand what has come to be known as the *Younger* doctrine,³⁶ “a series of rules designed to protect the institutional autonomy of state governments by limiting the power of federal courts to enjoin or grant declaratory relief against unconstitutional state action in circumstances where parallel state proceedings provide federal litigants with an adequate forum for airing their Constitutional claims.”³⁷ The *Younger* doctrine was originally formulated for, and generally thought to apply to

comity between federal and state judicial proceedings. In *Rizzo* however, the Court—in attempting to balance federalism concerns with individual rights (a perennial American dilemma)—invoked the *Younger* principles to overturn a district court injunction against the Philadelphia police force.

Again, at issue in *Youngberg v. Romeo* was not the treatment of prisoners but rather treatment afforded a severely retarded resident of a state mental institution—an individual who could be expected to evoke a far greater degree of sympathy than one accused of, or convicted of a crime. Yet, the Court ruled against the patient and in so doing developed a test for determining whether a state has adequately protected the rights of the involuntarily confined. The crux of that test is a wide-ranging judicial deference toward “professional” judgment:

. . . ‘the Constitution only requires that the courts make certain that professional judgment was indeed exercised. It is not acceptable for the courts to specify which of several professionally acceptable choices should have been made.’ . . . [C]ourts must show deference to the judgment exercised by a qualified professional. *By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.* . . . In determining whether the state has met its obligations in these respects, decisions made by the appropriate professional are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function.³⁸

Whether *Youngberg* will have much effect on future litigation and judicial actions over jail and prison conditions is uncertain. What is certain, however, is that the Supreme Court has ordered the federal judiciary to at least presume professional correctness. And professionalism is not limited to the mental health community.

At least one observer does perceive a Supreme Court-inspired change at the lower court level:

Corrections law is developing in such a way as to retain strong civil rights enforcement, but the enforcement mechanisms are private, traditional legal remedies. This is a

dramatic shift from equitable "clean-up" decrees administered by federal district court judges.³⁹

Nonetheless, the Supreme Court's overall message on institutional reform appears ambivalent:

. . . Burger Court opinions, especially *Rizzo* and some of the school desegregation cases, reflect a restlessness about the sweep of federal court injunctive power, especially where it is used to undertake systematic reform of state and local institutions. In those opinions, federalism becomes a factor to weigh in reviewing the legitimacy and propriety of remedies ordered by lower courts. Yet, when one looks at the overall thrust of Burger Court opinions, it is difficult to conclude that the federal courts have been swayed in any fundamental way from their pattern in exercising equity powers.⁴⁰

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."⁴¹ "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 1980⁴² to 16,741 in 1981.⁴³ 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.⁴⁴ The majority of such actions were brought or are being brought in federal court. Most observers would agree that no recent initiative in the field of corrections—federal, state or local—has had the sort of profound impact that federal judicial intervention has had on state and local institutional and administrative arrangements.

The role of the federal judge in the local jail is possibly a troublesome one. On the one hand, many would argue that a high degree of judicial intervention has been necessitated by the refusal of state legislatures and county boards 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."⁴⁵

Jail, the always 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 about separation of powers but about federalism as well. Thus, the new judicial mandates are like the proverbial two-edged sword—cutting for jail improvement, but against local discretion.

The Impact of Unconstitutional Prisons on Jails

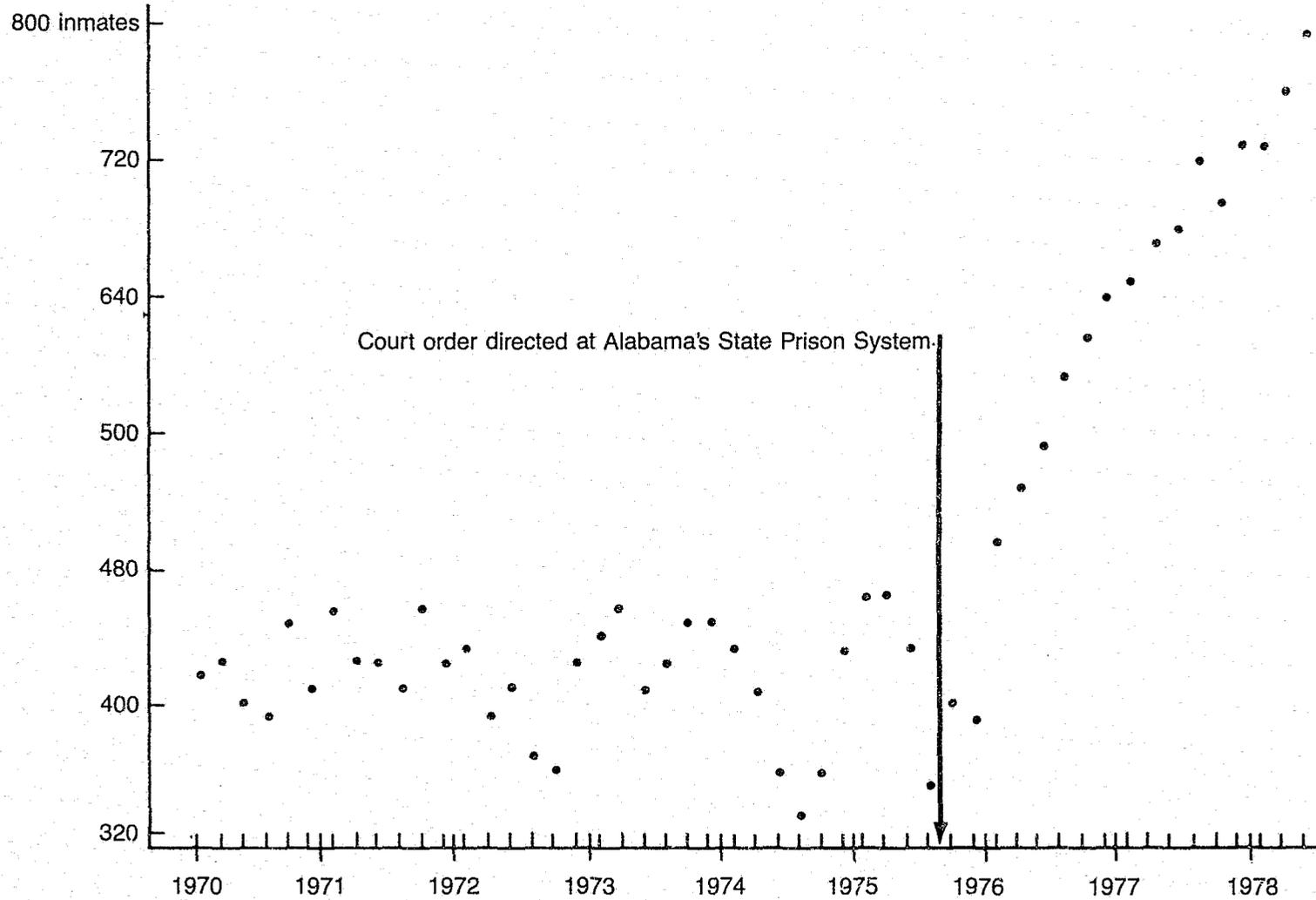
Before leaving the subject of judicial intervention, it is important to note—however briefly—a secondary yet extremely salient effect. That is, at the same time that federal judges are *directly* working to assure that local jails are up to passing Constitutional muster, ironically, federal court orders on state prisons and prison systems may work *indirectly* to exacerbate existing unconstitutional conditions at the local level.

For example, in order "to reduce inmate populations," U.S. District Court Judge Frank Johnson prohibited most new admissions to Alabama's major prisons. "[T]he freeze . . . meant a backup of many inmates in local jails where conditions frequently were even worse than those in the state institutions."⁴⁶ At its height, in the late 1970s, this prohibition resulted in 1,800 state prisoners being held in local facilities.⁴⁷ That number was reduced only, slightly to 1,485 in 1981.⁴⁸

Nationwide, an estimated 8,600 state inmates were incarcerated in local jails in 1981, an increase of 1,500 over the previous year.⁴⁹ Although it is difficult to ascertain exactly how many of these individuals are so detained because of court orders, the precipitous increase in their number coincides with an increase of federal judicial activity at the state level (*see Graph IV-1*). Thus, "[d]uring 1981, the number of states under court orders to reduce overcrowding rose from 28 to 31, while the number involved in

Graph IV-1

**DAILY POPULATIONS. BIMONTHLY, JEFFERSON COUNTY JAIL
(BIRMINGHAM, AL): 1970 TO 1978**



Source: Jefferson County Jail Records, U.S. Department of Justice, National Institute of Justice, *American Prisons and Jails*, vol. 1: *Summary and Policy Implications of a National Survey* (Washington, DC: U.S. Government Printing Office, 1980), p. 38.

litigation about overall prison conditions increased from 32 to 37.⁵⁰

In some jurisdictions, the spillover of state prisoners has produced a great deal of friction between state and local officials—friction over mixing felons with misdemeanants and pretrial detainees and, even more so, over adequate reimbursement amounts. Accounts of bizzare last-ditch-efforts by frustrated sheriffs have appeared in newspapers over the last few years. For example, in 1981, the sheriff of Pulaski County, AR, chained 19 prisoners held in his jail to posts and fences outside two state prisons. The prisoners had been retained in the county jail because the state was under court order to improve its own system.⁵¹ Obviously, such publicity-generating ploys are rare but as pressures for more adequate living arrangements increase at both levels, intergovernmental friction is also likely to increase.

Although the prison overcrowding issue lies outside the purview of this study, it is becoming increasingly evident that some states will soon be forced to find alternatives to the stop-gap use of the county jails as more and more local institutions find themselves under court orders limiting the number of inmates they can house. In some cases, as recently occurred in New York, such orders are aimed specifically at removing state inmates from local facilities whether or not the state has had time to construct sufficient bedspace of its own. In addition, a new trend in overcrowding litigation—case consolidation—may make implementing jurisdictional inmate transfers more difficult. For instance, in the case of *Hamilton v. Morial*, the U.S. Court of Appeals for the Fifth Circuit recently ordered all pending and future correctional institution cases in Louisiana (including 25 ongoing jail cases) to be consolidated under the aegis of one district judge. Speaking directly to the practice of passing state overcrowding problems on to local facilities, the court cautioned that “[c]onsolidating all court actions allows the issue that will not go away to be faced squarely without harrassment.”

THE CONTRACTUAL APPROACH: LOCAL JAILS FOR FEDERAL PRISONERS

If the federal government, through its judicial branch has acquired the role of commander vis-a-vis

the local jail, that same government, through the limitations of its own prison system, has been forced to don the robes of suppliant.⁵² Very simply, the United States does not maintain penitentiary space sufficient to house its own prisoners and has long relied on state and local correctional facilities. Nor is this merely a supplementary arrangement—in 1982, two-thirds of all federal prisoners resided in non-federal institutions.

Responsibility for placing federal prisoners rests with the U.S. Marshals Service, a division of the Department of Justice. Although all 50 states have passed laws requiring or allowing local governments to accept federal prisoners, the service does not force its wards on local jails. Rather, through a process of negotiation, the marshals and receptive local jurisdictions enter into intergovernmental service agreements providing some reimbursement for local costs. In fiscal year 1982, the federal government spent about \$26 million to house its prisoners in local facilities at an average daily rate of \$27.29. Unfortunately for the federal prison system, such agreements have fallen on hard times. In the past several years, the number of local contracts has dropped from over 1,000 to 733, including 167 “major use contracts” in federal court cities. The combination of a projected substantial enlargement in the federal prisoner population due to the Administration’s drug and organized crime initiatives and increasingly recalcitrant local governments has become cause for a great deal of federal anxiety.

At one time federal prisoners were readily, if not always gladly, accepted by local jails as an additional source of income, but real and perceived problems of housing federal inmates now have caused more and more local jurisdictions to close their doors to the Marshals Service. Thus, as much of the foregoing suggests, many jails are overcrowded with their own or state prisoners; are under court order to alleviate conditions of confinement; or view federal criminals as many times more dangerous than local or even state offenders. Moreover, there exists a widespread preception that federal prisoners tend to be a legally sophisticated lot, capable of tossing off Section 1983 suits at the drop of a hat. In fact, however, of the 17,775 civil rights actions filed by prisoners in 1982, only 834 were filed by federal prisoners and most of those were filed against the federal government. Nonetheless, for many jail officials, fear of Section 1983 and other civil rights actions appears to outweigh the potential benefits of \$27 per day.

In response to such concerns, the Marshals Serv-

ice has initiated a number of recent innovations in hopes of rekindling some interest in housing federal prisoners. First, in order to reduce the amount of red tape endemic to any contractual agreement, the Office of Management and Budget (OMB) has waived the regular federal procurement form requirement for contracts between the marshals and local jail authorities. Rather, local administrators now need only sign a relatively simple intergovernmental service agreement.

Second, the Marshals Service recently initiated the Federal Excess Property Program. Its purpose is to supply local jail with excess federal materials such as clothing and blankets. Thus far, \$1.5 million worth of property has been funneled into local facilities. The program, however, is not without strings. The value of excess property cannot exceed the annual contract value and, much to the chagrin of some jail administrators, the accountable property remains in control of the marshals.

Third, under the Cooperative Agreement Program, local jails in "major use cities" currently under court order or facing litigation may be eligible to receive money from the service for renovations, additions, new construction, and supplies deemed necessary to achieve compliance. In return, such jails must agree to guarantee to house federal prisoners for some specified period of time. Twenty-six million dollars has been made available to the program in 1983.

Fourth, the service has 120 inspectors available nationwide to provide technical assistance and training to local jail personnel. While some of this assistance is provided gratis, in other cases a fee for service is charged.

Fifth, in some cases federal lawyers may now represent local jails in suits brought by federal prisoners. Jails receiving such representation, however, must demonstrate compliance with Department of Justice *Prison and Jail Standards*.

Finally, the Marshals Service and the Bureau of Prisons have proposed a new Surplus Real Property Program. If passed, the program would allow the General Services Administration and the military to deed certain properties to states and local governments for the purpose of maintaining prisoners. However, while legislation passed the Senate in 1982 it remained stalled in the House Governmental Affairs Committee and current prospects for passage in 1983 appear dim. Meanwhile, the service is also attempting to secure the authority to donate excess personal property directly to local jails.

THE FINANCIAL APPROACH: USING THE DOLLAR TO PURSUE CORRECTIONAL AND CONSTRUCTION STRATEGIES

Even today, when one thinks of a federal role in the broadly disparate field of state and local law enforcement and criminal justice, neither the federal courts nor the U.S. Marshals Service is likely to come to mind initially. Rather, a now defunct agency has left in its wake an ambivalent but powerful legacy of negative impressions on the one hand and feelings of marked improvements on the other. Such was the lasting bequest of the Law Enforcement Assistance Administration.

A thorough assessment of the impact of LEAA on local corrections is well beyond the scope of this study. However, a brief historical description of the program is worthwhile because it was the genesis of significant intergovernmental relations in criminal justice generally and in corrections particularly.

LEAA and the Intergovernmentalization of Justice

On March 8, 1965, President Lyndon B. Johnson announced to Congress that crime was no longer merely a local problem.⁶³ He further announced creation of a presidential Commission on Law Enforcement and the Administration of Justice and asked Congress to institute a pilot program of grants-in-aid. Congress responded in the same year with the *Law Enforcement Assistance Act*, launching a new Office of Law Enforcement Assistance (OLEA) and a \$7 million annual project grant program. Interestingly, the only state-local interest group to campaign actively for the measure was comprised of corrections officials favoring experimental programs in community-based corrections.

Following release of his Commission's recommendations in 1967,⁶⁴ President Johnson asked Congress to pass an extensive program of categorical grants to state and local governments. A motherhood and apple pie issue, the anticrime proposal, nonetheless, left some members of Congress feeling uneasy over the prospect of a strong new federal role in such long-time state and local functions as policing, prosecuting and penalizing. Thus, some feared the genesis of a federal police force circumventing or preempting the traditional police powers of the states while others expressed concern that such legislation might create a "Super Cop" in the person of the U.S. At-

torney General, overseeing and directing all state and local law enforcement activities.

The result of those anxieties, coupled with the even greater fear of crime and its effects, was the *Omnibus Crime Control and Safe Streets Act of 1968*, a heavily block grant-oriented program to be administered by the Law Enforcement Assistance Administration (LEAA) in the Department of Justice. Specifically, the act provided for "action grants," 85% of which were to be allocated to the states on the basis of population as a block grant, with 75% of those funds to be passed through to local governments. The remaining 15% of the grants were to be used at the discretion of LEAA. The federal government agreed to cover up to 75% of the costs of organized crime and riot control programs, 50% of construction programs, and 60% of other action programs.

Responding to the perennial problem of the near-chaotic criminal justice system, the law provided for creation of state planning agencies (SPAs) to be designated by governors for the purpose of developing comprehensive criminal justice plans. Grants were made available to cover up to 90% of the operating costs of the SPAs. Finally, the act initiated a program of training, education and research. In 1969, \$100 million was authorized of which \$25 million was to be allocated to planning, \$50 million to action grants, and the remaining \$25 million to research, education, and training endeavors.

For the purposes of this study, the most important amendments to the crime fighting act were those that added a new Part E for correctional enhancement. Passed in 1971, the amendments provided for grants with a federal share of up to 75% for constructing, acquiring and renovating correctional facilities. The emphasis was to be on community-based programs and facilities. Fifty percent of the funds under Part E were to be made available to SPAs in block grant form while the remainder were to be disbursed at the discretion of LEAA.

To assure a corrections emphasis, SPAs were instructed not to reduce the amount of action monies previously available for corrections, thus tying Part C (action grants) to Part E funding. Indeed, 25% of all LEAA appropriations were now earmarked for correctional purposes. Responding to complaints that no correctional "system" existed, SPAs were additionally required to submit comprehensive corrections plans.

At its height, the federal law enforcement program was again amended by the *Crime Control Act*

of 1973. While the new legislation added criminal rehabilitation and prevention of juvenile delinquency to the goals of LEAA and altered its administration, its major thrusts were in the area of planning. Thus, representation on planning agencies—both SPAs and Regional Planning Units (RPUs)—was extended to citizen, professional, and community organizations and states were required to provide procedures for submitting local annual plans to the SPAs. The fact that LEAA was still viewed with some favor was evident in Congressional authorizations of \$1 billion each for FY 1974 and FY 1975 and \$1.25 billion for FY 1976.

If 1971 was the year of corrections and 1973 the year of planning, 1976 was the year of the judiciary. SPAs were required to set up judicial planning committees to prepare plans, make available \$50,000 annually to those committees, and establish priorities for court improvement. 1976 was, in addition, notable for the establishment of the Community Anti-Crime Program.

The long and painful legislative death of LEAA began in 1979 with passage of the *Justice System Improvement Act*. The act created an Office of Justice Assistance, Research and Statistics (OJARS) designed to coordinate the activities of and provide support services to LEAA, the National Institute of Justice (NIJ), and the Bureau of Justice Statistics (BJS). LEAA's authorizations had declined from a massive \$1.75 billion in FY 1973⁶⁵ to a relatively paltry \$486 million, only part of which it would receive under the umbrella of OJARS.⁶⁶ Moreover, and perhaps as telling, the thrust of LEAA was changed. Always encouraged to spend on innovative projects, it was now required to fund only programs having "a record of proven success, or . . . a high probability of improving criminal or juvenile justice system functions."⁶⁷ And, in fact, fiscal year 1980 was the last year in which there was an appropriation for LEAA grant programs. Instead, according to one observer, "From FY-80 up until the present, LEAA (and its successor agency, OJARS) has been in a phase-out operation, letting existing projects run their course and closing out all remaining grants and projects."⁶⁸

Fourteen years and \$7.7 billion later, LEAA expired officially in April 1982. Born amid the highest expectations, the crime program foundered on a number of perceptions and realities, including rising crime rates; the continued deterioration of prisons and jails; allegations that it was a mere boondoggle for police departments with illusions of high tech grandeur; "creeping categorization" in an era of dis-

enchantment with categorical grants; and the need to balance the federal budget.

A complete rundown of all LEAA-sponsored local correctional programs and facility support projects over its 14 years of operation is beyond the capacity of this study.⁵⁹ Nonetheless, in a report prepared for the National Coalition for Jail Reform, LEAA attempted to delineate its jail and jail-related programs for the years 1978 and 1979 only. Generally, the agency reported that

LEAA has primarily impacted jail operations and facility construction by two methods: discretionary grant awards for programs that will upgrade jail conditions and technical assistance to those facilities that require outside help to develop, implement and/or evaluate advanced practices in correctional planning, programs and architecture.⁶⁰

More specifically, during those years LEAA aided local corrections in the following ways:

- Just over \$8 million was awarded during FY 78 and FY 79 to 40 jails for renovation of existing facilities or construction of new facilities.
- Twelve jails received \$1.1 million in FY 78 to upgrade facility medical and health services.
- Another 11 jails received approximately \$700,000 in FY 78 and FY 79 to establish comprehensive drug and alcohol treatment and identification programs responsive to the needs of their residents.
- Seven restitution grant awards totalling about \$1.3 million and affecting at least 19 county or local jails were made in FY 79.
- LEAA has nearly \$5 million invested in 21 TASC (Treatment Alternatives to Street Crime) programs that are currently operating.
- Since 1978, about \$2.7 million has been used to establish about 50 projects (which affect at least an equal number of jails) to study strategies to reduce the incidence of jail overcrowding by shortening lengths of pretrial detention.

- Approximately 60 project sites have been funded since 1978 to reduce court delay—at a total cost in excess of \$3 million.
- In 1978 LEAA awarded in excess of \$1.2 million to the American Medical Association (AMA) to provide technical assistance to ten jails in each of 22 states, for a total of 220 jails, county and local.
- In 1978 LEAA awarded a total of \$1.2 million to the Midwest Research Institute and the National Clearinghouse for Criminal Justice Planning and Architecture (NCCJPA) to provide planning, programmatic and architectural assistance to agencies eligible to apply for Part E discretionary grant funds. During the course of the contract 73 jails were served.
- 1978 marked the completion of a 2-year, \$10 million study by the Office of Juvenile Justice and Delinquency Prevention to develop community-based alternatives for status offenders. Eleven jurisdictions participated.⁶¹

Moreover, in the long-run, LEAA has received praise for its innovations in and encouragement of community-based corrections, professional standards, educational programs and correctional architecture.

While such figures and programs are impressive, it should be noted that even with the infusion of LEAA funds, the federal share of state and local correctional spending has always been small. For instance, in 1979, "for every federal [correctional] dollar spent . . . State governments spent \$9.62 and local governments \$5.60."⁶² In 1981, states spent \$11.66 and localities \$6.24 for every federal correctional dollar.⁶³

Current Federal Assistance

The dissolution of LEAA brought with it a rather abrupt end to anything approximating a substantial federal financial commitment to local corrections. Nonetheless, the federal government, through the National Institute of Corrections (NIC), does maintain a direct, ongoing, and positive interest in the local jail.

NIC was created in 1974 "to help advance the

practice of corrections at the state and local levels.⁶⁴ Recent programs and activities have included:

- *Jails area resource centers*—a network of advanced jail systems that are funded by the institute to provide practical training, technical assistance and information to other jailers in their geographic areas.
- *Standards development and implementation*—a project where state agencies are funded to develop, revise and implement jail standards for local jails in those states.
- *Small jails assistance*—an ongoing program that enables state jail inspectors, sheriffs' associations, and other relevant parties to deliver technical assistance and training to small, often rural jail systems. . . . [T]raining and assistance are brought to them.
- *Planning new institutions*—a program providing training and technical assistance in architectural design, correctional standards, systems planning, community involvement and relevant legal considerations to jurisdictions planning construction or renovation of a jail. . . .
- *Training of jail authorities*—programs specifically designed to meet the training needs of sheriffs, jail administrators and others responsible for the operation of jails. County commissioners and state jail inspectors also participate in select programs.
- *Building state capacity to serve jails*—an ongoing program where the institute works with organizations and agencies within the states to build the state's long-term capacity to provide training and technical assistance to its jails.⁶⁵

While NIC does maintain a modest grant program for research and development purposes,⁶⁶ its major direct link to individual jails is in training, technical assistance and information dissemination.⁶⁷

In addition to those NIC programs obviously aimed at jails and local corrections, 228 federal programs in widely disparate fields have been identified as sources or potential sources of aid for correctional

organizations, staff and clientele.⁶⁸ Running the gamut from the price support and loan activities of the Department of Agriculture to the Community Development Block Grants of the Department of Housing and Urban Development to the Aerospace Education Services Project of the National Aeronautics and Space Administration, the programs tend to be only peripherally (if at all) related to corrections. Consequently, they are little known to or sought out by corrections officials.

THE REGULATORY APPROACH: MANDATES, STANDARDS AND PRISONERS' RIGHTS

The federal approach of providing financial resources, technical assistance and useful research is on the wane. In its place the federal government is showing signs of shaping a new role for itself—that of regulator.

The remarkable aspect of this development is that this transformation in the federal role is taking place without an articulated policy. The LEAA program is the casualty of the push for a balanced budget. No federal policy has been articulated to explain its phase-out, and equally little attention has been paid toward rationalizing the emerging federal regulatory role. In fact, recent developments leave the impression that the new direction is being generated because of specific federal interventions into state and local criminal justice operations: activities are generating policy rather than the reverse.⁶⁹

Indeed, while federal assistance to local jails—and state-local criminal justice generally—has waned, at least three federal laws and one executive branch document continue, to some degree, to influence their operation.

The Juvenile Justice and Delinquency Prevention Act

In 1974, Congress passed the *Juvenile Justice and Delinquency Prevention Act (JJDP)*. Originally designed as a broadly based formula grant with the goal of increasing "the capacity of state and local governments for the development of more effective education, training, research, prevention, diversion,

treatment and rehabilitation programs in the area of juvenile delinquency and programs to improve the juvenile justice system,"⁷⁰ through a series of amendments *JJDP* "has become increasingly preoccupied with obtaining one specific goal that of removal of [juveniles] from detention and correctional facilities."⁷¹

Thus, "the principal amendment contained in the 1980 reauthorization to the *Juvenile Justice and Delinquency Prevention Act* mandated that those states and territories receiving grants under the legislation must remove juveniles from adult jails and lockups by 1985."⁷² With 52 states and territories currently receiving formula grants under the program and, as previously mentioned, anywhere from 100,000 to 1 million juveniles jailed annually nationwide, the 1980 amendments represent a tall order.

The problems associated with incarcerating juveniles alongside adults are not to be lightly dismissed; nor is a policy which seeks their removal from such institutions. Indeed, many practitioners and non-practitioners would agree that current methods integrating adults and children in secure facilities are not only counterproductive but may be dangerous and debilitating to the youths involved and, as a previous section of this chapter noted, are being Constitutionally questioned in some courts. Yet in its report to Congress on the costs of removing juveniles from jail, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) indicated that the Congressionally mandated 1985 removal date might be difficult to attain in some states. OJJDP cited the following potential obstacles to complete removal:

- a lack of locally accessible alternative programs and services (including transportation);
- a lack of specific release/detain criteria (i.e., objective intake screening);
- state statutes which allow law enforcement the authority to detain youth pre-dispositionally in adult jails;
- economic obstacles evidenced by small tax bases and a low priority given to the issue of children in jail;
- political obstacles that often occur when several counties pool efforts and resources together in a cooperative removal plan; and
- perceptual differences regarding the

type and scale of alternatives needed (for example, secure detention perceived as the single-solution alternative to adult jail).⁷³

In the absence of more substantial federal financial and technical assistance, such impediments may doom the nearby attainment date to the status of a legal pipedream in some states. Moreover, according to one observer:

[The amendments] could not only cost state and local governments more money to participate in the program, but [they] could also be counterproductive. The adverse effect could come about as a result of economy of scale. Building separate facilities for juveniles potentially creates more bed-space for juveniles. This increase in bed space would create pressure to fill the beds in order to justify the facility.

The problems with an approach like that of the *Juvenile Justice and Delinquency Prevention Act* are not with the goals but with the implementation strategy. A national mandate is enunciated and backed up with specific substantive regulations, displacing the partnership approach with one that seeks compliance.⁷⁴

Alcohol Traffic Safety and National Driver Register Act

In the fall of 1982, Congress passed the *Alcohol Traffic Safety and National Driver Register Act*. The act does not directly affect local jails but it may eventually have an indirect impact.

Title I of the act authorizes the Secretary of Transportation to "make grants to those states which adopt and implement effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol."⁷⁵ Although the rulemaking process is still going on, the legislation itself suggests such changes in state laws as:

- 1) providing that a person with a blood alcohol concentration of 0.10% or greater when driving shall be deemed to be driving while intoxicated;
- 2) raising the perceived threat of apprehension through greater enforcement by the police and highway patrol and more warn-

ings via television, radio, the press and the schools;

3) establishing or expanding a statewide driver record system readily accessible to the courts and the public which can identify drivers repeatedly convicted of drunk driving;

4) *affording the courts a wide array of sanctions from which to choose for punishing and treating convicted drivers, e.g., community service, fines, imprisonment, education and treatment.* . . .⁷⁶

The fourth item mentioned, of course, is the most pertinent to the subject at hand. Hence, while the incentive grants will be distributed directly to the states with no pass-through provision,⁷⁷ the most cost-intensive suggested change—the actual implementation of court-ordered sanctions—will come, for the most part, at the expense of local governments, correctional agencies and jails. Whether individual states will choose to reimburse localities for the costs of the law remains to be seen. However, California offers an instructive example of potential conflict. There, counties are suing the state to pay the increased costs of implementing a number of expensive new mandates. The biggest bone of contention is a law setting mandatory penalties for drunk driving. Counties claim that the mandate is taxing jail facilities to the limit.

The Civil Rights of Institutionalized Persons Act

As the first section of this chapter illustrated, it is not just through the provision of assistance (with or without strings attached) that the federal government affects local jails. The now familiar phrase, “judicial power of the purse,” has nothing to do with the dispensing of largess out of some courtroom fund. In the same vein, not all Congressional nor Executive Branch activities are designed to financially aid state and local governments. For instance, in May 1980, in response to court rulings that in the absence of specific legislation the Department of Justice lacked standing to bring suit on behalf of state or locally institutionalized persons, Congress passed the *Civil Rights of Institutionalized Persons Act*. The act contains three provisions of special import to local governments and jail administrators.

First, it authorizes the Attorney General, after consultation with state or local officials, to institute

civil actions in federal court against states, local governments or their agents believed to be harming institutionalized persons through a pattern of resistance to the safeguarding of Constitutional or statutory rights, privileges or immunities. Such suits would be designed to gain equitable relief for the purposes of taking corrective action.⁷⁸

Second, the Attorney General may intervene on behalf of aggrieved inmates in suits brought against state or local institutional practices.⁷⁹

Finally, the Attorney General, in consultation with appropriate state and local agencies, is authorized to promulgate minimum standards for the development of grievance resolution procedures for jail and prison inmates.⁸⁰

A reading of the act could (and has) lead to accusations of undue federal intrusion into state and local institutional management. However, implementation “activities” to date reveal the law to be little more than a statutory paper tiger. Thus, the Reagan Administration has been anything but a vigorous enforcer. Indeed, as of February 1983, the Attorney General had not initiated any actions under authority of the act and had intervened in but a single suit involving a mental institution.⁸¹ This apparent ennui, in fact, appears to reflect a concerted effort by the Administration to back away from state-local prisoner support actions generally. For example, U.S. District Court Judge William Keady recently dismissed the Department of Justice from participation in a long-standing Mississippi prisoners’ rights case, claiming that the department had taken “inconsistent positions.” Judge Keady’s order came on the heels of a department brief that questioned the authority of federal courts to order inspections of local jails.⁸²

Nor has there been a “groundswell of interest” at either the federal or state and local levels in developing inmate grievance plans.⁸³ Again, as of February 1983, only one state plan—that of Virginia—had been certified by the Bureau of Prisons and only a handful of additional jurisdictions had even bothered to submit plans.⁸⁴

Federal Standards for Prisons And Jails

On December 16, 1980, the Department of Justice under then Attorney General Benjamin Civiletti released a detailed set of voluntary federal standards for adult correctional facilities including state and local prisons and jails.⁸⁵ The standards cover 21 top-

ics ranging from inmate rights to sanitation to classification to administration and management. Developed as mere guidelines, the Carter Justice Department nonetheless stressed the fact that the standards would be used

. . . in administering any Department of Justice financial or technical assistance in the area of corrections [and] in evaluating corrections grant applications, research proposals and other requests for financial or technical assistance. . . . [and]

. . . [to] provide guidance to the litigating divisions of the Justice Department . . . when they are engaged in litigation involving federal, state or local correctional systems. . . .⁸⁶

In fact, then, the voluntary nature of the standards was mitigated to a certain—and potentially significant—extent.

As in the case of the *Civil Rights of Institutionalized Persons Act*, however, the Reagan Administration and Attorney General William French Smith moved fairly swiftly to dispel notions that the standards would be anything but “advisory guidelines.” Substantially curtailing the preamble, DOJ also pointedly retrenched from utilizing the standards for grant purposes or as the bases of department litigation.⁸⁷

The Reagan Approach: A Declining Role for Mandates and Standards

As much of the foregoing suggests, the Reagan Administration approach to regulating nonfederal correctional institutions may be characterized as exceedingly restrained. That description, of course, is not limited to state prisons or local jails. Nor does it imply disinterest or impotence. On the contrary, the Administration has consistently and vigorously pledged to cut back on federal regulations—both those affecting the private sector and those directed at state and local governments.

Thus, although neither the *Civil Rights of Institutionalized Persons Act* nor the *Federal Standards for Prisons and Jails* have been among the rules targeted by the Presidential Task Force on Regulatory Relief, Administration reinterpretations of, and actions under both have been dramatic. In the case of the civil rights legislation the result has been

veritable inaction while the jail standards have been altered from Carter-era grant conditions and causes for litigation to mere federal suggestions.

Moreover, Attorney General Smith has more than hinted at Administration displeasure over the role of federal courts in the institution cases:

. . . federal courts have attempted to restructure entire school systems in desegregation cases and to maintain continuing review over basic administrative decisions. They have asserted similar control over entire prison systems and public housing projects. They have restructured the employment criteria to be used by American business and government, even to the extent of mandating numerical results based upon race or gender. No area seems immune from judicial administration. . . .

In the area of equitable remedies it seems clear that the federal courts have gone far beyond their abilities. In so doing, they have forced major reallocations of governmental resources, often with no concern for budgetary limits and the dislocations that inevitably result from the limited judicial perspective.⁸⁸

That “displeasure” was further illustrated in late 1982 when proposed rules for limiting the use of Legal Services Corporation funds were published in *The Federal Register*.⁸⁹ If finalized,⁹⁰ the rules would severely limit the ability of fund recipients to file class action lawsuits against federal, state or local government agencies. In the past, such suits have been brought against correctional institutions.

Finally, as a way of limiting federal court intervention into state court decisions, the federal government’s chief law enforcer has recommended amending the habeas corpus statutes⁹¹—an approach which may not be necessary given recent restrictive Supreme Court rulings in that area.

THE FUTURE OF THE FEDERAL ROLE: A LOOK AT SOME RECENT PROPOSALS

The Reagan Agenda

While President Reagan long has been deemed a “law and order conservative,” his record on criminal justice issues since assuming office has been an am-

bivalent one—certainly ambivalent to the extent that major initiatives are apt to fly in the face of fiscal austerity. Nonetheless, the Administration has taken several opportunities to address the problems of crime in America and to suggest potential policies for alleviating those problems.

THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME

On April 10, 1981, Attorney General Smith appointed an eight-person task force "to make specific recommendations to [him] on ways in which the federal government could do more to combat violent crime."⁹² Jointly chaired by Carter Attorney General Griffin B. Bell and Illinois Governor James R. Thompson, the task force considered many topics including federal assistance to state and local corrections, finally recommending \$2 billion for constructing state facilities.⁹³

Although the panel acknowledged the "needs" of local correctional authorities, it nonetheless asserted that

Another outcome of resource limitations is that the federal government cannot effectively meet the construction needs of both states and local governments. There are simply not enough dollars to go around. Consequently, we have determined that available monies should be given to the states, as we perceive them to exhibit the greatest need. . . . We do believe, however, that the needs of local correctional agencies should continue to be examined. . . .⁹⁴

As a result, no direct federal financial assistance was recommended for the local jail. However, the report did suggest:

- 1) amending the *Federal Property and Administrative Services Act of 1949* to "permit the conveyance or lease at no cost of appropriate surplus federal property to state and local governments for correctional purposes. . . ."⁹⁵
- 2) making "available, as needed and where feasible, abandoned military bases for use by states and localities as correctional facilities on an interim and emergency basis only [and] mak[ing] available, as needed and where feasible, federal property for use by states and

localities as sites for correctional facilities,"⁹⁶ and

- 3) amending "the *Vocational Education Act* and other applicable statutes to facilitate state and local correctional agencies' ability to gain access to existing funds for the establishment of vocational and educational programs within correctional institutions."⁹⁷

REAGAN 1981: A BULLY PULPIT BUT NO AID

In the same month that the Attorney General's Task Force announced its 64-point anticrime program, White House counselor Edwin Meese III, was warning those concerned with state and local corrections, "Don't count on any new money."⁹⁸ That pithy statement—not the detailed Justice report—was to be the harbinger of Presidential sentiment.

Thus, in late September, Reagan delivered a decidedly hard-line speech to the International Association of Chiefs of Police (IACP) containing "only two sentences directed at corrections"⁹⁹ and nary a word aimed at federal financial support. Stating that "Only our deep moral values and strong social institutions can hold back [the] jungle and restrain the darker impulses of human nature,"¹⁰⁰ the Chief Executive promised to use the "bully pulpit" of the Presidency to remind the public of the seriousness of [the crime] problem and the need to support [state and local] efforts to combat it."¹⁰¹ Such an approach, if felt by some to be inconsistent with the President's hard-line rhetoric, was entirely consonant with and even prescient of his "New Federalism" initiatives which would first be propounded only four months after the IACP speech. After all, criminal justice in nearly all its permutations has always been primarily a state and local function. Moreover, 1981 marked the first year of a presidency committed to drastically curtailing federal domestic spending. Finally, the Administration was known to be less than enthusiastic about propounding a strategy that might result in "LEAA Revisited." Indeed, Associate Attorney General Rudolph Giuliani summed up, in the bluntest terms possible, Administration feelings on the subject:

[M]aybe [state and local governments] should stop crying. We have gone through the era of spending \$8 billion on crime through the Law Enforcement Assistance Administration and the crime rate didn't go

down. Eight billion dollars thrown into the problem of crime is like spitting into the ocean. And what happened with LEAA was that it was starting to become a crutch for state and local governments.¹⁰²

The billions were used as an excuse for state and local politicians to avoid making the tough choices necessary—choices that would reallocate state and local tax dollars to law enforcement in general and to corrections in particular.¹⁰³

Politically, economically, and to a degree ideologically, then, 1981 could hardly have seemed an auspicious time to propose a major new grant-in-aid program.

REAGAN 1982-83: FROM THE BULLY PULPIT, A DECLARATION OF WAR

[M]illions of dollars will be allocated for prison and jail facilities so that the mistake of releasing dangerous criminals because of overcrowded prisons will not be repeated. . . . [L]et this much be clear: Our commitment to this program is unshakable; we intend to do what is necessary to end the drug menace and cripple organized crime.¹⁰⁴

On October 14, 1982—just a little more than a year after delivering his “no frills” message to the nation’s police chiefs—the President unveiled a plan for combating drug traffic and organized crime that included “millions . . . for prison and jail facilities.” In addition to the call for jail and prison funds, the Reagan package called for: (1) establishing 12 regional drug task forces; (2) creating a blue ribbon panel to analyze the nationwide influence of organized crime; (3) forming a 50-state project, including participation by the governors, to examine possible criminal justice reforms; (4) instituting a cabinet-level committee under the aegis of the Attorney General to review interagency and intergovernmental cooperation in the fight against organized crime; (5) establishing under the Departments of Justice and Treasury, a National Center for State and Local Law Enforcement Training; (6) initiating “a new legislative offensive” to amend federal bail and sentencing laws and to override certain aspects of the exclusionary rule; and (7) instructing the Attorney General to submit an annual report on the status of federal crime fighting endeavors.¹⁰⁵

Congressional response to the President’s proposal came in the waning days of the 97th Congress’ chaotic post election session. Clearing both houses on December 20, the crime package represented a hodgepodge of amendments to what had been a relatively simple bill reauthorizing drug treatment for federal offenders. Of particular interest, the new bill included a Title II “Justice Assistance Act”, a scaled down LEAA clone providing for

- an Office of Justice Assistance to administer a program of about \$130 million in block grants to states;
- a discretionary grant program authorized at about \$35 million;
- a states’ and local communities’ match for any federal grant;
- the minimum block for any state [to] be \$250,000; and
- the amount of block grants [to be based] on population.¹⁰⁶

The Administration wasted little time in hinting to the press that the bill was unacceptable. The chief bone of contention, however, had nothing to do with creation of a new spending program. Rather, Justice Department officials demurred at Title III establishing a cabinet-level office of National and International Drug Operations and Policy to be headed not by the Attorney General but by what swiftly became known in the popular parlance as an independent “drug czar.” Taking such concerns seriously, the President vetoed the bill in January 1983.

Almost simultaneous with his veto, Reagan released his fiscal year 1984 budget

requesting budget authority of \$90 million in 1984 for a new *criminal justice assistance grant program*. The program would provide training, technical assistance, and financial assistance to state and local criminal justice agencies with a special focus on the apprehension of violent and repeat offenders.¹⁰⁷

While apparently not terribly dissimilar in broad outline to the just interdicted Justice Assistance Act, the President’s 1984 proposal may run up against Congressional foes disgruntled over what they consider an unfortunate and embarrassing veto.

Corrections in the 97th Congress

The Justice Assistance Act was not the only Congressional attempt during 1981 and 1982 to aid state and local criminal justice activities. Indeed, at least six such assistance proposals were introduced without success in the 97th Congress.

THE CRIMINAL JUSTICE CONSTRUCTION REFORM ACT

On November 19, 1980, Senator Robert Dole (R-KS) introduced a bill designed to assist states and localities in constructing and renovating correctional and other criminal justice facilities. Reintroduced early in the first session of the 97th Congress, the "Criminal Justice Construction Reform Act" proposed the following:

- 1) a \$5.5 billion authorization to cover fiscal years 1982 through 1987 of which
 - a) \$4.5 billion would be allocated among the states on a formula basis for the purposes of constructing new or modernizing existing state and local correctional facilities and
 - b) \$965 million would be used to support demonstration projects designed to test advanced correctional planning, construction and modernization techniques;
- 2) submission by grant-seeking states of state plans to include among other requirements
 - a) development of a comprehensive statewide program for construction and modernization,
 - b) assurances that local needs would be taken into account, and
 - c) provision for the balanced allocation of funds between state and local government projects;
- 3) establishment of a Clearinghouse on Construction and Modernization of Facilities to collect and disseminate information; and
- 4) creation within the Department of Justice of a Criminal Justice Facilities Administration to carry out the purposes of the act.¹⁰⁸

If a multibillion dollar program seemed an unlikely candidate for passage in 1981, its sponsor was

no more optimistic, viewing the bill primarily as "a catalyst for discussion between members of Congress and representatives from criminal justice agencies and interested groups."¹⁰⁹ Not unexpectedly, the bill did gain support from a number of state directors of corrections,¹¹⁰ the International Association of Chiefs of Police, the National Criminal Justice Association and the National Sheriffs' Association.¹¹¹ However, while certain members of the Justice Department and White House staff offered guarded support for the legislation, Budget Director David Stockman opposed the envisioned massive new expenditures.¹¹² Moreover, the National Association of Counties, among others, was resistant to the proposed legislation on the grounds that "[a] program of renovation and construction alone would only exacerbate . . . existing problems by unnecessarily promoting the expansion of jail population as well as the high costs of incarceration."¹¹³ The bill failed to emerge from the Judiciary Committee.

OTHER PROPOSALS

The Dole bill, by virtue of planned authorizations alone, was certainly the most dramatic and well publicized piece of corrections or criminal justice-related legislation to emerge during the 97th Congress, but it was by no means unique in its thrust. And while a number of unsuccessful proposals were LEAA-like in nature,¹¹⁴ at least two House bills were specifically aimed at state and local corrections.

One propounded piece of legislation would have authorized the Secretary of Commerce to make grants available to the states for acquiring, constructing, expanding, repairing, and renovating state and local prisons and jails and for improving correctional programs and practices.¹¹⁵ Still another would have allowed the Attorney General to enter into contracts with states and local governments for the purpose of making available proposed federally constructed regional correctional centers.¹¹⁶ Each bill subsequently foundered in committee. Criminal justice bills containing varying degrees of corrections emphases have similarly emerged during the first session of the 98th Congress.

The Chief Justice: Toward a National Correctional Policy

Along with correctional administrators and guards, perhaps no profession has better reason to be concerned with the state of jails, prisons and penitentiaries than judges. They, after all, bear ulti-

mate responsibility for sending individuals to such institutions. Among the thousands of judges nationwide, none has been more outspoken on the subject of correctional reform than the country's highest ranking jurist, Chief Justice Warren E. Burger.

Despite his long-espoused deference toward independent state functions and institutions, the Chief Justice recently asserted:

Correctional policy, particularly during times of rapidly increasing prisoner populations and prison overcrowding, can no longer remain confined to one level of government or one segment of society. State, local and federal authorities must focus on these problems and in concert—within the framework of federalism—develop a national correctional policy to deal with them.¹¹⁷

To accomplish that objective, Burger has made it be known that in 1983 he "will propose that Congress create a National Commission on Corrections Practices to review these matters and propose remedial programs."¹¹⁸

The Future of the Federal Role in Local Corrections: The Fears, the Fisc and Federalism

Crime, the courts, and corrections—every facet of the nation's sprawling criminal justice nonsystem—are once again gaining nationwide attention. The crime rate appears, by some indicators, to be going down, yet the public expresses increasing fear of criminals. The clarion call for victims' rights is rapidly becoming a national movement. Court dock-

ets at every level of government increasingly emulate the old adage that "Justice delayed is justice denied." Prisons are bursting at the seams and jails are widely said to be in a state of crisis—simultaneously overcrowded and underutilized, poorly staffed, and warehouses that produce only endlessly idle hours.

National politicians and the media, too, are once more focusing on these seemingly intractable problems. To the President of the United States the answer would appear to lie in getting the "new privileged class" of "predators" off the streets. The Chief Justice wonders, "where and what to?" They are all—President, Chief Justice, and Congress—mired in a policymaker's nightmare—a problem that for decades has appeared to be insoluble. Nonetheless, they all express commitment to "do something."

"Doing something," however, is continuously expressed in dollar amounts, i.e., so many billions for construction and millions for programming. The result, over the past few years, has been deadlock.

At the same time, the ideology of the New Federalism presents an additional barrier to a redoubled federal effort in the field of criminal justice. Even during the height of LEAA, the federal role in criminal justice was relatively minor. States, historically, have been the overwhelming possessors of the police power with all its attendant functions.

Hence, the fear of crime faces formidable obstacles in the beleaguered fisc and in the New Federalism. Whether the fear is greater than the obstacles will determine the future of the federal role in criminal justice generally and local corrections particularly. In the meantime, in the absence of any major statutory initiatives and in the face of executive ambivalence, the federal judge will continue to hold center stage in relations between the local jail and the national government.

FOOTNOTES

1 Letter from Mark A. Cunniff, Executive Director, The National Association of Criminal Justice Planners, March 22, 1983.

2 Ronald Goldfarb, *Jails: The Ultimate Ghetto* (Garden City, NY: Anchor Press, 1975), p. 350.

3 A writ of mandamus is a legal order directing an executive, administrative, or judicial officer to perform an official duty.

4 The 1981-82 Supreme Court term saw the beginning of a move to restrict the use of habeas corpus petitions including the adoption of a "total exhaustion" requirement for petitions brought by state prisoners. See: *Rose v. Lundy*, 50 LW 4272 (1982). A writ of habeas corpus directs an official to produce a

prisoner in court with an explanation of the reasons for his or her detention.

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

6 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."

7 *Monroe v. Pape*, 365 U.S. 167 (1961).

8 *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and *Owen v. City of Independence*, 445 U.S. 622 (1980).

- 9 Charles Swanson, "Is Your Jail a Liability Trap?" *Georgia County Government Magazine*, December 1981, p. 56.
- 10 *Ibid.*, pp. 56-57.
- 11 James A. Rowenhorst, "Legal Actions Against Law Enforcement and Jails," *South Dakota Municipalities*, May 1982, p. 8.
- 12 *Compensatory* damages are awarded to individuals in order to make good some injury actually suffered. They have long been available under Section 1983. *Punitive* damages, on the other hand, are assessed to penalize the individual who has inflicted the injury and to deter that individual from violating rights in the future.
- 13 *Smith v. Wade*, 51 LW 4407 (1983).
- 14 For a more complete discussion of the different sorts of inmates held by jails see *Chapter I* of this report.
- 15 *Bell v. Wolfish*, 441 U.S. 520 (1979).
- 16 *Gross v. Tazewell County Jail*, 31 CrL 2061 (USDC Western VA., 3/2/82).
- 17 U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates: Sociodemographic Findings from the 1978 Survey of Inmates of Local Jails*, National Prisoners Statistics Report SD-NPS-J-6, NCJ-65412 (Washington, DC: U.S. Government Printing Office, 1980), p. 2.
- 18 National Coalition for Jail Reform, "Juveniles in Jail: Fact and Fiction," (Washington, DC: National Coalition for Jail Reform, n.d.), p. 1.
- 19 *Baker v. Hamilton* cited in U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Removing Children From Adult Jails: A Guide to Action* (Washington, DC: U.S. Government Printing Office, 1980), p. 24.
- 20 *Cox v. Turley* cited in *ibid.*
- 21 *Swansey v. Elrod* cited in *ibid.*, p. 25.
- 22 *Doe v. Burwell*, class action suit, cited in *Criminal Justice Newsletter*, 10 May 1982.
- 23 *D.V. v. Tewksbury*, Civil No. 80-187 FR (USDC OR, 8/6/82).
- 24 *Ibid.*
- 25 Laverne Pierce, director of the Youth Advocacy Project of the Oregon Youth Alliance quoted in *Criminal Justice Newsletter*, 25 October 1982.
- 26 Charles Fried, "Curbing the Judiciary," *The New York Times*, 10 November 1981, p. A23.
- 27 *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark., 1970), *aff'd* 442 F. 2d 304 (8th Cir. 1971).
- 28 Gerald E. Frug, "The Judicial Power of the Purse," 126 *University of Pennsylvania Law Review* 715 (1978), 735-36.
- 29 Donald L. Horowitz, *The Courts and Social Policy* (Washington, DC: The Brookings Institution, 1977), p. 7.
- 30 A. E. Dick Howard, "The States and the Supreme Court," 31 *Catholic University Law Review* 375, 426 (Spring 1982).
- 31 Archibald Cox, *The Role of the Supreme Court in American Government* (London: Oxford University Press, 1976), pp. 95-96.
- 32 *Chapman v. Rhodes*, 434-F. Supp. 1007 at 1009 (S.D. OH 1977).
- 33 *Rhodes v. Chapman*, LW 4677 at 4680 (1981). (emphasis added)
- 34 423 U.S. 362 (1976).
- 35 50 LW 4681 (1982).
- 36 See *Younger v. Harris*, 401 U.S. 37 (1971).
- 37 Laurence H. Tribe, *American Constitutional Law* (Mineola, NY: The Foundation Press, 1978), p. 152.
- 38 50 LW, at 4684-85. (emphasis added)
- 39 Candace McCoy, "New Federalism, Old Remedies, and Corrections Policymaking," *Policy Studies Review* 2 (November 1982): 271.
- 40 Howard, 31 *Catholic University Law Review* 375, 429 (Spring 1982).
- 41 Linda Moore, "Prison Litigation and the States: A Case Law Review," *State Legislative Report* 8 (November 1981): 1.
- 42 Howard, 31 *Catholic University Law Review* 375, 379 (Spring 1982).
- 43 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.
- 44 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.
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- 47 Wendell Rawls, Jr., "Judges' Authority in Prison Reform Attacked," *New York Times*, 18 May 1982, p. A1.
- 48 U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 1981*, Bulletin (Washington, DC: U.S. Department of Justice, 1982), p. 3.
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FINDINGS AND RECOMMENDATIONS

The nation's jails are now said 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 recently have been joined by the courts, armed with the force of the Constitution, imbues the age-old "crisis" with a renewed urgency.

In this study, the Commission has highlighted and attempted to come to grips with the problems—both intrinsic and intergovernmental—facing local jails. The four preceding chapters have described and analyzed (1) a variety of issues endemic to the jail as a unique institution; (2) a number of currently employed correctional alternatives to jail; (3) state-local and interlocal relations affecting the operation of the local jail; and (4) federal policies that have in the past influenced and continue to influence jails. This review has suggested that **although jails are, by tradition and current practice, overwhelmingly local institutions, they have been profoundly affected by policy decisions made at other levels of government.**

SUMMARY FINDINGS

The following statements summarize our major findings:

- The sentencing policies of state governments have had a profound, though often indirect and sometimes ill-considered effect on the nation's jails.

- Overcrowding in many local jail facilities has been exacerbated by limits imposed on state prison populations.
- Although states have made steady progress over the past decade in developing and enforcing jail standards, inspection programs are often inadequate and enforcement is often uncertain.
- Though they have become somewhat more prevalent, regular state to local subsidy programs aimed at improving local corrections are relatively rare.
- State community corrections act programs, geared to promoting the use of community-based alternatives to incarceration, are one of the most significant recent state initiatives affecting jails.
- Though once advocated as a way to reform local corrections, state assumption of the jail function has been very rare.
- Interlocal cooperative arrangements, offering the possibility of economies of scale, appear to be in wide use for providing jail services.
- No recent initiative in local or state corrections can equal the impact of federal judicial intervention.
- At the same time that federal judicial activity in the field of local corrections has increased, there has been a marked lessening in federal Congressional and executive branch involvement.
- Jails are among the most complex of institutions; their problems, therefore, are equally complex.
- Among the many complex problems facing local jails today, inadequately trained, motivated and compensated personnel appears to be one of the greatest.
- A major portion of the administrative problems confronting local jails stem from the disparate groups that populate them.
- Any number of alternatives to incarceration for both pre-trial defendants and convicted misdemeanants may be an effective and relatively cost-efficient

means to alleviating some of the jail's insitutional stress.

Each of these findings is discussed briefly below.

Finding 1

THE SENTENCING POLICIES OF STATE GOVERNMENTS HAVE HAD A PROFOUND, THOUGH OFTEN INDIRECT AND SOMETIMES ILL-CONSIDERED EFFECT ON THE NATION'S JAILS

The number and type of sentenced offenders, the length of their terms, and the demands they place on jails are the composite result of a chain of decisions involving the police, the prosecutor, the courts and parole officials. Among the most important influences on these decisions are the state's sentencing and release policies, reflecting the attitudes of the community and the various elements of the criminal justice system toward the purposes of incarceration.

State sentencing policies 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. Which of these general structures a state chooses to follow is governed by what the legislature and the public view as the goals of incarceration. Four competing and often conflicting purposes are commonly identified: "just deserts" (punishment), deterrence, incapacitation and rehabilitation. Corrections in recent years have shifted away from the rehabilitation goal toward one or more of the other objectives, but with continued emphasis in some states on rehabilitation outside prisons or jails, that is, in community corrections. This trend reflects a swing from indeterminate to determinate sentences.

Although state sentencing policies have their primary impact on serious offenders and offenses, and hence prisons, they also have an impact on jails.

They affect jails through their emphasis on nonincarcerative alternatives (community corrections), the degree to which they treat local jails as available facilities to take care of overflow from state prisons, and the extent to which jail sentences are made a part of stayed prison sentences.

Sentencing guidelines are one of the most promising new means for reducing disparities in sentencing and at the same time controlling the population of prisons and jails. About a dozen states have guidelines that are currently in use or will soon be put into effect.

The guidelines prescribe a presumptive sentence based on the offense and the offender's history. The judge must provide a written justification if he or she departs from the prescription. One state's evaluation of guideline experience reported that disparities among prison inmates were reduced, prison populations were held within capacity, and more emphasis was given to incarcerating offenders against persons rather than offenders against property.

At the same time, the guidelines heightened disparities in the sentences of jailed offenders, because they encouraged judges to give probation-jail split sentences in lieu of prison sentences. These disparities recently led the Minnesota Sentencing Guidelines Commission to consider applying guidelines to jails. Although the Minnesota Commission found that this action would help reduce disparities and produce a more rational allocation of scarce jail resources, it found more compelling the opposing arguments: that the inequality of jail resources in the state rendered uniform guidelines unfeasible and such guidelines would be opposed strongly by the criminal justice community. Consequently, the Commission did not recommend developing nonimprisonment guidelines at this time.

Finding 2

OVERCROWDING IN MANY LOCAL FACILITIES HAS BEEN EXACERBATED BY LIMITS IMPOSED ON STATE PRISON POPULATIONS

Those limits, in turn, have resulted in a spillover of state prisoners into local jails.

As of April 1980, 30 states were involved in litigation over prison conditions and overcrowding. In contrast, by March of 1982, 38 states (plus the District of Columbia, Puerto Rico and the Virgin Islands) were operating under existing court decrees or were involved in pending litigation affecting either the entire prison system or some major correctional institution.

The fact that so many state institutions are now

taxed to the limit was reflected between 1980 and 1981 in an increase in the number of reported state prisoners being held in local jails because of overcrowding—an additional 1,500, for a total 1981 figure of 8,576.

While the obvious consequence of such large numbers of state inmates being, quite literally, backed up in jails is the overcrowding of some local facilities, the presence of state prisoners may result in other managerial and fiscal difficulties. Thus, for instance, state prisoners are, by and large, felony offenders while jail inmates tend overwhelmingly to be pre-trial defendants and convicted misdemeanants. The already serious problems faced by jail administrators attempting to deal with the disparate populations endemic to jails are compounded by mixing serious offenders with petty criminals. Moreover, in a number of states, local officials have begun complaining about the inadequate reimbursement rates that they feel states offer for the retention of their prisoners—rates that those officials claim barely cover the regular daily expenses of housing prisoners, much less any extraordinary expenses such as those incurred for medical emergencies.

Finding 3

ALTHOUGH INCREASINGLY MANY STATES HAVE DEVELOPED JAIL STANDARDS OVER THE PAST DECADE, INSPECTION PROGRAMS ARE OFTEN INADEQUATE AND ENFORCEMENT OFTEN UNCERTAIN

Over the past decade, more states have developed and begun enforcing jail standards. Nonetheless, a substantial number either have not established standards or have made them voluntary. Moreover, many states do not have inspection programs, and even in those that do, effective enforcement is often uncertain.

A 1966 survey found that over 60% of the states accepted no responsibility for standards in local jails. By 1982, a second survey found that, of the 44 states with locally administered jails, 33—or 75%—had state standards and one would inaugurate them in 1983. Another study concluded that the quality of standards had improved from 1972 to 1978, calling for better treatment of inmates in providing single occu-

pancy living units, more living space, separating adults from juveniles, medical services, and a number of other physical and program features. Finally, a 1978 survey by the National Sheriffs' Association concluded that jail inspection had "come of age": 32 of 44 states with local jails had bona fide statewide programs, compared to 17 in 1971. A later ACIR-NACo survey found progress continued through 1982.

Yet inspections do not necessarily produce compliance and a number of informed jail observers doubt the effectiveness of the standards/inspection process in many states. The number of states with jails under court orders is suggestive on this point: the ACIR-NACo survey found that 25 of 33 states reported that they had jails under court orders.

Finding 4

**THOUGH THEY HAVE BECOME
SOMEWHAT MORE PREVALENT,
REGULAR STATE TO LOCAL SUBSIDY
PROGRAMS AIMED AT
IMPROVING LOCAL CORRECTIONS
ARE STILL RELATIVELY RARE**

The number of states providing subsidy programs for local jails increased from 12 programs in nine states in 1976 to 24 programs in 17 states in 1982.

The six-year period saw a slight rise in the number of state subsidy programs for "alternatives to incarceration" and a marked increase in the number for physical plant and "general and miscellaneous." In dollar terms, the funds available for incarceration alternatives in 1982 were over three times the amount in 1976, and the relative increase for capital facility subsidies was even greater. The larger number of capital facility subsidies may reflect a response to the expanded volume of court orders and states' greater inclination to use subsidies more directly to assist localities in meeting standards.

About three-fifths of the states offer technical assistance to localities for jail problems, and about one-half provide jail-related training. Overall, however, jail training appears to be a low priority in the states, even though some close observers consider it the number one jail problem today.

Finding 5

**STATE COMMUNITY CORRECTIONS
ACT (CCA) PROGRAMS, GEARED TO
PROMOTING THE USE OF COMMUNITY-
BASED ALTERNATIVES TO
INCARCERATION, ARE ONE OF THE
MOST SIGNIFICANT RECENT STATE
INITIATIVES AFFECTING JAILS**

Six states have fully active programs.

The programs all include a state subsidy and rely on local initiative and planning. Several also employ a negative incentive by charging localities for sending certain offenders to state prisons. The annual state contribution in 1982 varied from \$1 million to \$63 million. Besides supplying money and passing judgment on locally developed corrections plans, state governments play an assistance, guidance and controlling role in the CCA programs, yielding wide latitude to local governments. Despite the emphasis on nonincarcerative alternatives, experience in two states indicates that the CCAs increase the use of jails when judges, influenced by the act to reduce incarceration at the state level, resort increasingly to "split sentencing"—imposing probation plus a jail term—as an alternative to prison sentences.

Finding 6

**THOUGH ONCE ADVOCATED AS A WAY
TO REFORM LOCAL CORRECTIONS,
STATE ASSUMPTION OF THE JAIL
FUNCTION HAS BEEN RARE**

In six states, jails are administered by the state government as part of an integrated state-local corrections system.

Although each of the six moved toward state assumption in its own way, there are several features common to the way all or most came into being and now operate: (1) the states are small in area or population, or both; (2) county government has been abolished, or is weak, or the state government is dominant in state-local financing and spending responsibility; and (3) assumption took place in the context of a more comprehensive reform of correctional activities within the state. Principal considerations in favor of state assumption are the state's ability to

pool resources, achieving economies of scale, and the integration of criminal justice functions. Opposition stems from a strong belief that jails are a "local" function and that the goals of state assumption can be better achieved by regionalization or adept state use of subsidies, technical assistance and training.

Finding 7

**INTERLOCAL COOPERATIVE
ARRANGEMENTS, OFFERING THE
POSSIBILITY OF ECONOMIES OF
SCALE, APPEAR TO BE IN WIDE USE
FOR PROVIDING JAIL SERVICES**

Still, the potential for additional use is by no means exhausted.

Surveys in the early 1970s revealed that jails and detention services were the activities most frequently covered by agreements among municipalities over 2,500 population and between counties and their underlying municipalities. The potential for greater use is suggested by state corrections officials who consider interlocal cooperative arrangements among the most promising alternatives for dealing with local jail problems, and by the continued existence of many small jails. One barrier to expanded use of interlocal arrangements is the lack of state legislative authority in a number of states.

Finding 8

**NO RECENT INITIATIVE IN LOCAL OR
STATE CORRECTIONS CAN EQUAL THE
IMPACT OF FEDERAL JUDICIAL
INTERVENTION**

The results of that intervention—both in terms of actual judicial decrees and litigious actions—have been impressive. Thus, one out of every five cases filed in federal courts today is on behalf of prisoners; civil rights petitions filed by state prisoners in federal courts increased from 218 in 1966 to 16,741 in 1981; between ten and 13% of all jails are under court order; between 16 and 22% have been involved in court actions; and between 17 and 20% are now party to a pending lawsuit.

Though statistically significant, judicial interest in conditions found in state and local correctional institutions also has been marked by an unusual atten-

tion to managerial detail. Hence, unlike traditional court actions, more recent rulings often include demands for immediate conformance with judicially designed plans for jail and prison improvement. That sort of judicial intervention has led some critics to charge that, although deficient institutions must be brought into compliance with Constitutional standards, such mandates do not warrant judges making decisions normally left to elected legislators and executive officials.

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 the refusal of state legislatures and county boards to remedy constitutional violations. Indeed, a number of local jail administrators have secretly welcomed such "intrusions" as the only way to obtain money for improvements, badly needed and long requested. Such administrators have every reason to feel that they 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, allocating 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.

Finding 9

**AT THE SAME TIME THAT FEDERAL
JUDICIAL ACTIVITY IN THE FIELD OF
LOCAL CORRECTIONS HAS
INCREASED, THERE HAS BEEN A
MARKED LESSENING IN FEDERAL
CONGRESSIONAL AND EXECUTIVE
BRANCH INVOLVEMENT**

Recent Congressional and executive branch posture vis-a-vis local corrections reflects the general contraction of the federal role that began in the late 1970s and has continued through the present Administration.

Until its demise in 1982, the Law Enforcement Assistance Administration (LEAA) was the main

instrument of federal involvement in state and local criminal justice. It primarily affected jails by discretionary grants to upgrade jail conditions and by technical assistance to encourage advanced correctional practices. Its impact on jails peaked in 1978 and 1979, when about \$25 million was spent for such jail-related projects as construction and renovation, medical and health services, drug and alcohol treatment programs, reduction in court delays, and planning, programmatic, and architectural assistance. Even so, federal funds represented only a small part of state and local correctional spending, and the lasting effects of the federal money were questionable.

Since the dissolution of LEAA, the federal government has maintained a direct yet diminished interest in local jails primarily through the National Institute of Corrections, and this primarily in the areas of research, technical assistance and training. Moreover it has placed more emphasis on regulatory activity, through such legislation as the 1974 *Juvenile Justice and Delinquency Prevention Act* and the 1980 *Civil Rights of Institutionalized Persons Act*. Recent actions by the Reagan Administration, however, indicate a disinclination to delve deeper into some sectors of the regulatory field.

Despite this rollback in the federal role, there recently has been increasing support from many quarters of the federal government for doing something about the crime problem, including the sorry condition of many jails. Costs, however, as well as very real concerns over what factors justify federal forays into traditional state and local functions have posed major obstacles to translating interest into action.

Finding 10

JAILS ARE AMONG THE MOST COMPLEX OF INSTITUTIONS; THEIR PROBLEMS, THEREFORE, ARE EQUALLY COMPLEX

Among the problems facing the local jail are those involving personnel, population, short-term service delivery, utilization and financial uncertainties.

Indeed, each of the above is itself a multifaceted problem. Hence, jail personnel tend to be both inadequately trained and inadequately compensated, with each inadequacy exacerbating the other. Un-

like prisons that routinely house only one sort of person—convicted adult felons—jails routinely house pre-trial defendants as well as convicted offenders; adults as well as juveniles; the mentally ill, retarded and substance abusers as well as presumably rational malefactors; females as well as males; and, as mentioned previously, local misdemeanants as well as state felons. While jail overcrowding has become a significant problem in many institutions, the bulk of small, uncrowded facilities find the delivery of such services as medical care, recreation, and accessibility to reading materials to be exceedingly difficult. Finally, in an era of scarce resources, jails face both high operational and high capital costs.

Finding 11

AMONG THE MANY COMPLEX PROBLEMS FACING LOCAL JAILS TODAY, INADEQUATELY TRAINED, MOTIVATED, AND COMPENSATED PERSONNEL APPEARS TO BE ONE OF THE GREATEST

The nation's sheriffs, the Chief Justice of the United States, and the Director of the Bureau of Prisons are among those who have identified personnel as the grave weakness of American jails.

Commenting on the results of a survey of sheriffs published in 1982, the National Sheriffs' Association asserted that:

Today, many non-jail experts have suggested that overcrowding is the biggest problem. [Our] 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.

Unfortunately, that assessment mirrors a finding of this Commission made over a decade ago averring that "the average jail is still characterized by . . . untrained and apathetic personnel."

The job of the jailer is a difficult one. It demands the special training and the physical and intellectual capacity to deal not only with "rational" criminals,

but with the mentally ill and retarded, the extremely intoxicated, frightened children, and individuals so despondent that suicide becomes preferable to spending even a little time behind bars. Despite those facts, the average starting salary of jail personnel is just \$10,780—14% less than that paid to rookie patrol officers. Moreover, many jails demand no particular educational achievement level from recruits and even the most minimal training remains one of jails' lowest priorities.

Finding 12

A MAJOR PORTION OF THE ADMINISTRATIVE PROBLEMS CONFRONTING LOCAL JAILS STEM FROM THE DISPARATE GROUPS THAT POPULATE THEM

Many of those individuals do not belong in jail.

Jails, unlike prisons, tend to confine not just convicted criminals but a whole amalgamation of socially and psychologically disparate groupings. Specifically, at any given time the local jail may house pre-trial defendants alongside convicted offenders; runaway or truant children alongside experienced and grown-up criminals; simple misdemeanants alongside state felons; women alongside men; the mentally ill, retarded and intoxicated alongside presumably rational malefactors.

Ideally, such groups should be segregated, not only by cell but by sight and sound—females from males, children from adults, public inebriates from rapists, and those being punished from those awaiting trial. A major dilemma even for large jails, segregation based upon distinct classifications is an utter nightmare for small jails with limited floor and cell space.

Indeed, the need for difficult-to-implement segregation policies could be greatly mitigated by programs and policies designed to rid the jails of many such groups. After all, most of the nation's mentally ill and retarded, as well as public inebriates, find themselves in jail only for lack of community shelters and adequate social service agencies. Jail thus becomes the "social agency of last resort"—a function for which it is ill-equipped. Moreover, many correctional specialists and government officials believe strongly that juveniles—and especially status offenders—do not belong in adult jails under any circumstances.

To alleviate the problem of co-mingling pre-trial defendants with convicted offenders, states and localities could make greater use of a number of pre-trial alternatives to incarceration such as release on recognizance, citation release and less restrictive bail laws. Many pre-trial detainees spend time in jail simply because they cannot afford to meet the high costs of the bail bondsman.

Finding 13

ANY NUMBER OF ALTERNATIVES TO INCARCERATION FOR BOTH PRETRIAL DEFENDANTS AND CONVICTED MISDEMEANANTS MAY BE AN EFFECTIVE AND RELATIVELY COST-EFFICIENT MEANS TO ALLEVIATING SOME OF THE JAIL'S INSTITUTIONAL STRESS

Although alternatives to incarceration are by no means a panacea for all the difficulties facing local jails, used judiciously they can be beneficial both to those institutions and to individuals.

If, as some believe, the costs and conditions of local jails make their use at continued and even greater levels an expensive and ultimately harmful public policy, what are the alternatives? And are they any more effective than that which they are designed to replace?

Unfortunately, the above is not an easily resolved question. The debate over the proper use and extent of substitutes for incarceration is far from open and shut—the pros and cons of alternatives often being argued on ideological grounds. Moreover, empirical data used to assess such programs and procedures have been roundly criticized. Finally, and obviously, all alternatives are not alike. Post-conviction community service and retribution programs do not equate with pretrial diversion and release procedures.

Nonetheless, some generalizations can be made within the broad context of alternatives to incarceration. First, do alternatives alleviate jail overcrowding? On a number of levels, the answer appears to be no—at least not as presently employed. Thus, though the use of alternatives to incarceration seems to be growing, the jail population nationwide has also grown substantially over the past several years. Although the relationship among arrests, incarcera-

tion and alternatives to incarceration is unclear, there is some evidence to suggest that using alternatives simply creates more sanctions within the criminal justice system. That is, rather than replacing jail as a punishment, alternatives have been used, on the one hand, to penalize those who normally would not have gone to jail in the first place while, on the other hand, they increasingly are used *in addition to* jail terms. Whether such uses of alternatives are proper or improper as modes of punishment is a question whose answer depends largely upon societal values. However, if one desired practical outcome of alternatives is the alleviation of jail overcrowding, they appear to have failed.

Second, do alternatives (in this case, post-trial) rehabilitate? Again, if one of the purposes of alternatives is to reform the errant, they appear overall—when using recidivism rates as a measure—to have accomplished little more than incarceration.

Third, do these alternatives protect society? The answer to this question is somewhat more elusive. Obviously, during the period that an individual is incarcerated the nonincarcerated population is almost perfectly protected. However, it is doubtful that even the staunchest advocates of widespread criminal incarceration and pretrial detention would condone locking-up every petty offender and alleged offender. The costs, quite simply, would be prohibitive. Thus, remembering that recidivism rates are at least no worse among those sentenced to alternatives than among those sentenced to short periods of incarceration and that failure to appear at trial is no greater among those released on recognition, for example, than among those released on traditional bail, society is protected (or not protected) equally as well from petty crimes through non- or less-incarcerative methods as through jail—and most probably at less cost. Fourth, can alternatives satisfy society's need for justice?—a question even more elusive than the one preceding. The answer, not surprisingly, is equally subtle. Hence, society's accepted mode for achieving justice in the face of wrongdoing is punishment; yet, alternatives to incarceration, particularly for convicted offenders, are often perceived as being "soft time"—a fact that has made them politically suspect. All alternatives, however, are not "cushy" nor need they be portrayed as such. While it is understandable that the public might perceive such post-trial alternatives as time spent in counseling or straight probation as easy time, it is difficult to discount the justice-achieving qualities of the more punitive alternatives like com-

munity service, restitution, heavy fines and limitations on leisure short of traditional "full-time jailing." Such alternatives are not only punishment-oriented but may result in an economic gain (or at the very least, some recovery of economic loss) to society.

Finally, do alternatives cost less than incarceration? Again, it is important to note that all alternatives are not alike and therefore costs incurred may cover a vast range. Simple release on recognition 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 then it becomes logical to assume that the system may be incurring additional costs over and above those of incarceration—whether or not some other system or society as a whole benefits. 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 substitutes for jail (and keeping in mind that such programs and procedures tend to perform no worse on a number of counts than do jails) alternatives to incarceration may fulfill important cost saving objectives.

RECOMMENDATIONS

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 non-financial 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.

From its inception as many as 900 years ago in England, the local jail has held those awaiting trial or other legal disposition. In fact, until relatively recently in history, the jail functioned almost exclusively as a holding facility—holding the suspected criminal for the judge and the convicted criminal for the hangman. Only over the past 200 years has the idea evolved that the jail could serve as punishment in and of itself. Thus, the “mixed use” facility—jail as both holder and punisher—is a comparatively modern concept.

It is, moreover, a concept unique to the jail. State prisons and federal penitentiaries are, as a general rule, designed to punish, incapacitate or rehabilitate only convicted persons serving relatively long terms. Jails, on the other hand, serve both as short-term correctional institutions for less serious offenders and as temporary repositories for those awaiting various stages of adjudication—housing those who have been found guilty as well as those who are presumably innocent. That dual function engenders a number of legal and administrative difficulties.

The Supreme Court has clearly articulated the principle that “a detainee may not be punished prior to an adjudication of guilt.”¹ Pretrial detention, in other words, should not be employed as a sanction or a correctional disposition—its principal legal function being to insure that a defendant will appear in court.² Yet, when conditions of overcrowding, deficient servicing, poorly trained personnel and violence do occur in jails they affect not only the minority of convicted offenders but the majority of pretrial

detainees as well. That such conditions exist is unacceptable in and of itself. That they exist for the pretrial defendant may be patently illegal. According to a U.S. District Court decision:

It is abundantly clear that extreme overcrowding in a local jail is of greater practical effect and Constitutional consequence than in a larger institution or a common road camp. Simply stated, all overcrowding is not equal. Perhaps more importantly, the local jail houses a high percentage of pretrial detainees. . . . As a matter of common sense and fundamental fairness, the criminal justice system must insure that pretrial detainees are not housed in more deprived circumstances than those accorded to convicted persons. . . . Overcrowding in a local jail cannot be qualitatively equated with overcrowding in a state penal institution.³

Constitutional considerations notwithstanding, pretrial detainees—by sheer numbers alone—contribute mightily to the administrative problems brought on by jail overcrowding. The majority—over 60% or almost 119,000 on a given day and over 4 million annually—of all jail inmates are pretrial detainees.

That most such individuals should—both from a legal and administrative standpoint—be afforded the opportunity to retain their freedom between the time of arrest and conviction is a long established principle in the Anglo-American criminal justice tradition. Release on bail predates by 300 years even the institutional jail. And the Eighth Amendment carries the prohibition that, “excessive bail shall not be required. . . .” Institutional confinement was recognized even by our early forebears as being “costly and troublesome. . . .”⁴ Moreover, the interned defendant faces restricted access to legal counsel and loss of livelihood, as well as a higher probability of conviction than his or her unfettered counterpart. Yet, the distinctly American system of surety or contract bail often imposes an extraordinary burden on the accused indigent who is unable to pay the bail bondsman his due. Because so many arrested individuals are poor, the jails become clogged with persons incarcerated simply because they lack the financial resources to be free.

One widely recommended alternative to correcting this problem is reform of the bail system. Only one state, Kentucky, has gone so far as to eliminate bonding for profit completely by making it a criminal

offense. However, Illinois and Oregon have also, as a matter of practice, eliminated bail bondsmen and an additional 21 states have some form of public percentage bail on their books. These practices improve the system of release and enhance release opportunities for the poor.

In 1964, Illinois became the first state to enact a system of percentage bail. The law authorizes the courts to:

- 1) make bail jumping a separate criminal offense;
- 2) make liberal use of release on recognizance or signed citation; and
- 3) allow defendants to be released from custody upon the "deposit with the clerk of the court [of] a sum of money equal to 10% of the amount so deposited as a bail bond cost."⁵

The final provision is pivotal. Unlike private bail bonding, the defendant is reimbursed for all but a very small percentage of his or her deposit upon appearance in court. For instance, if bail is set at \$1,000, the initial deposit would be \$100 of which \$90 would be returned to the accused—the total financial loss is \$10 rather than \$100. In some jurisdictions, the entire deposit is returned.

Two types of percentage bail exist nationwide. The first is known as the defendant-option system because the defendant is allowed to choose between percentage deposit bail and surety bail. The other type, the court-option system, grants judges that discretionary power. As of 1980,

- five states [had] a percentage deposit system as a defendant option with an accompanying administrative fee requirement;
- two states [had] percentage deposit as a court option with the administrative fee requirement;
- 14 states [had] percentage deposit as a court option without an accompanying administrative fee;⁶
- 26 states [had] no legislation covering percentage deposit;⁷ and
- four states—Michigan, Ohio, Wisconsin and California—[had] some com-

ination of the above depending on the charge.⁸

Despite those variations, a recent analysis offered a number of generalizations regarding percentage bail:

- When a jurisdiction implements a *defendant option* percentage deposit system, bail bonding for profit will cease to exist.
- When a jurisdiction implements a *judicial or court option* percentage deposit system (assuming surety bond remains as an option), the percentage deposit option will rarely be used by the judiciary.
- A decrease in jail population *may* occur as a result of the implementation of a percentage deposit system.
- Insufficient data currently exist to determine if the implementation of a percentage deposit system will have any effect on a jurisdiction's re-arrest rate.
- Failure-to-appear rates will not increase with the implementation of a percentage deposit system.⁹

The fact that many poor individuals may not be able to afford bail—even under the relatively inexpensive percentage system—has prompted some jurisdictions to experiment with release options that are not financially based. One such option is citation release. Though implemented in various permutations nationwide, there are basically three types of citation release:

- *Field Release* happens when a police officer releases the individual on the arrest site.
- *Station House Release* is when the arrestee is taken to the police station prior to release.
- *Post-Detention Release* occurs when the formal booking and screening take place before the prisoner is set free on citation.¹⁰

In nearly every situation, the detained individual is set free only after signing a legal statement describing his or her alleged offense and indicating the date

and time at which the individual must appear before court.

According to a 1977 study:

- More than three-fourths of the nation's large police departments now use citation release for misdemeanors and/or regulatory violations.
- Most departments using this release option are satisfied with it.
- Use of the option is growing quickly. Most departments estimate that the procedure saves them 40 to 60 minutes per arrest.
- Most departments report no serious failure to appear problems, but some are facing this problem.
- There is some use of citation release in more than 45 states.
- Four states require the use of citations to some extent under statute or court rules.
- There is a trend toward more state laws mandating citation release in certain cases.
- Five states permit the use of citations in some felony cases.¹¹

Closely related to citation release is release on recognizance. It differs from citation release in at least one essential respect: it is a court-based rather than police-based process. The decision to release is made by a judge or, in some counties, by a person or agency to whom the court has delegated release authority.

Although formal screening is not legally prescribed in most states, under some release-on-recognizance programs individuals are evaluated either through means of an objective point system or through means of a more subjective interview process. Eligible individuals may thereafter be released on the basis of a promise to return for a court appearance, though in some cases a certain amount of supervision may accompany release.

Although the Commission is convinced that most defendants should be released to the community pending trial—thus mitigating some of the jail's population pressures and assuring a fairer and more equitable criminal justice process—it also realizes that a small number of such individuals pose a poten-

tially serious threat to community safety. Indeed, recent studies by the Rand Corporation indicate that most serious felonies are committed by a very few "violent predators." "[T]hese 'omni-felons,' deeply entrenched in a life of multiple drug use and violence, constitute an important criminal threat to society."¹²

At least in theory, the decision to release a defendant has long been based primarily on the likelihood of his or her appearing at trial. Those persons considered poor appearance risks could be denied bail, while the better "gamblers" could be offered release with or without conditions designed to reduce any residual risk. Preventive detention advocates, however, seek to bring another variable to the fore. Thus, in his 1981 address before the American Bar Association (ABA), Chief Justice Warren Burger called for "return[ing] to all bail release laws the crucial elements of future dangerousness."¹³

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;¹⁴ the ABA's Pretrial Release Standard 10-5.9 supports consideration of dangerousness as one element in judicial determinations;¹⁵ 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;"¹⁶ 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."¹⁷

Some analysts believe that in the absence of a definitive Supreme Court ruling on the subject, preventive detention should be avoided as potentially unconstitutional. Such individuals believe strongly that to deny release to one who has not been found guilty simply because he or she *may* commit some future crime flies in the face of justice.

Concerns about an individual's freedom are indeed legitimate, but the safety of the community is also a legitimate concern of the criminal justice system. Thus, although preventive detention should always be used very sparingly, its use may be warranted after a pretrial detention hearing in cases where, for example, (a) an individual has a proven record of previous criminal activity while released pending trial; (b) he or she has violated conditions of release designed to protect the community; and (c) there is a substantial probability that the person committed

the offense for which he or she is presently before the court.

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 nonviolations 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 undermine 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.

One of the more unfortunate roles that the local jail has had to play is that of "social agency of last resort." For a variety of reasons many troubled people have not benefited from relevant social service agencies. Such agencies, when they do exist, often lack resources sufficient for serving these population groups.

All too often the people who fall through the gaps in the social service system end up at the local jail—an institution whose ultimate purposes are to detain the accused and to punish less serious offenders. The Commission finds that three groups of people are particularly ill-served by this state of affairs: juveniles, the mentally ill and retarded, and public inebriates. Individuals in each of these groups are highly vulnerable and sometimes subject to serious harm when placed in jails, even when only incarcerated for brief periods of time.

Juveniles

Numerous national groups are on record as opposing the jailing of juveniles, including the National Advisory Commission on Criminal Justice Standards and Goals, the American Bar Association, the Institute For Judicial Administration, the National Sheriff's Association, the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice, and the National Coalition for Jail Reform.

Even though many states have laws prohibiting the practice, juveniles are often housed with adults in jails. The federal *Juvenile Justice and Delinquency Prevention Act* has as two goals: first removing from, and keeping out of jails all juvenile status offenders and then doing the same for all juvenile offenders. These efforts notwithstanding, the housing of juveniles along with adults still occurs in great numbers, including in those states with laws to the contrary. Estimates of the number of juveniles in jails at any time during a year range from 100,000 to over 1 million.

The problem here is three-fold. First, society loses in the long term; a major concern is that juveniles can and do "learn crime" from adults with whom they share cells.¹⁸ High recidivism rates have been found among formerly jailed youths, posing long-term problems for those individuals and for society.¹⁹ Sec-

ond, the experience of residing in a jail may mar normal growth and adjustment²⁰ and cause long-run psychological harm. Finally, jailing juveniles, whether with adults or separately, seriously exacerbates what is already a national problem of great dimensions: suicide. "The rate of suicide among children held in adult jails and lockups [is] significantly higher than that among children in juvenile detention centers and children in the general population of the United States."²¹

Effects such as these are hard to justify with respect to any group of people in the society let alone persons 18 years of age and younger. The Commission believes that jailing juveniles with adults becomes more indefensible given the offenses for which most are jailed.

A 1976 study that entailed visits to jails in nine states found the following:

- children were in adult jails in every state visited;
- 11.7% of the children found in adult jails were alleged to have committed serious crimes against persons;
- 88.3% were being held in jails, often with adults, for property or minor offenses;
- the 88.3% does not tell the whole story: 17.9% of the total were jailed for having committed "status offenses," that is, acts that are only crimes when committed by children, but not by adults, including truancy, running away and incorrigibility. Moreover, 4.3% were being jailed not for having committed any offense, but rather because there was simply nowhere else to put them.²²

The Commission recognizes that juveniles who commit crimes, whether major or minor, may warrant punishment. However, the Commission believes that as a general rule this punishment should not be meted out in adult jails.

Mentally Ill and Retarded Persons

The mentally ill and retarded are another special group who are poorly—even adversely—served by incarceration in jails. Unlike juveniles, however, the mentally ill and retarded are often difficult to recognize; few police or jail personnel have the training and expertise required to identify a person as having

such problems, especially in the heat of the moment when responding to a call.

Even if police and jail personnel had such skills, many people with severe emotional problems still would be found in our jails given the absence of viable alternatives. Recent studies indicate that anywhere from 20 to 60% of all individuals confined in jails are mentally ill or disordered.²³ According to the National Coalition For Jail Reform about 600,000 mentally ill or retarded persons pass through America's jails each year.

The dangers to mentally ill and retarded persons placed in jails are similar to those suffered by juveniles. They too are vulnerable to physical, mental and sexual abuse by other detainees. Most importantly, their condition is liable to deteriorate further while in jail, increasing the risks to themselves. For example, the Los Angeles jail medical program is considered one of the best in the nation, but even it is the subject of a lawsuit charging that "the mental health of mentally disordered prisoners deteriorates during their incarceration."²⁴

The jails in this nation were never intended to provide services for these people. Yet, one authority believes that "[t]he jail is turning into a second-rate mental hospital,"²⁵ while another comments that "[i]n all but the major metropolitan areas, very few jails provide any psychiatric care at all."²⁶

The situation tends to differ between large and small jails. Large jails are more apt to have some sort of mental health care just as they are also likely to have more inmates requiring that care. But setting aside space to house and treat these people may exacerbate the strain on already overtaxed jail resources.

Small jails often do not have the "luxury" of creating a separate ward for mental patients; the numbers simply do not justify such arrangements. The only way to remove these people from the general population may be to isolate them. Isolation, however, tends to create fear and suspicion among mentally ill detainees, further undermining their mental state and sometimes leading to suicides.²⁷

Jails appear to be less a cause than a recipient of the problems. Numerous well-intentioned laws were passed within the last 20 years making it harder to commit and keep a person in a mental hospital. During the same period many of these facilities were closed due to a shortage of resources and a belief among mental health planners that the problems should and would be handled in the community. The envisioned community-based alternatives, however,

have been too few and too slow in developing. As a result, whether mentally ill or retarded persons had committed serious offenses or were just acting strangely, they were often brought to jails—the only place left to “put” them and the only institution that cannot say “no.”

The Commission is aware of the problems inherent in weighing mental illness versus criminality. Without commenting on the degree to which mentally ill persons should or should not be punished, the Commission is convinced, nonetheless, that the jail is an improper place for dealing with the mentally ill and retarded.

Public Inebriates

The third group of people the Commission finds detained inappropriately in the nation's jails is public inebriates. This group includes persons who are repeatedly drunk in public, have frequent contact with police, courts and jails, and have limited financial resources. Though they are often a nuisance, an eyesore, and at times perceived as a threat to the personal safety of others, the Commission finds that the problems of public inebriates generally should be dealt with by means other than the criminal justice system.

Public inebriates pose a large problem. According to the National Coalition for Jail Reform:

- one of every three arrests in the U.S. is for public inebriation—more than 1,000,000 each year;
- 25 to 50% of the people in jail are there for public intoxication;
- arresting, booking, jailing and trying public inebriates costs in excess of \$300 million annually. Besides monetary costs, the time taken by criminal justice personnel and the space utilized by public inebriates could be better used for those charged with serious crimes;
- many of those arrested for public inebriation are repeat “offenders,” with hundreds or more arrests for this or related charges;
- public inebriation is often a complex of problems: a sample study of more than 3,000 public inebriates in New York found that 20% had bone fractures, 50% had wounds, cuts or burns, 20%

had hallucinations, 20% had severe gastrointestinal bleeding, 15% had cardiopulmonary problems and 25% had indications of seizure disorder; and

- half the nation's jails have no medical services and three of four have no rehabilitation services.²⁸

As with the other two groups already discussed, jailing generates great costs to the individual inebriates and to society. According to one study, approximately 85% of those who committed suicide in jail were intoxicated at the time of death and more than half the suicides occurred in the first 12 hours of confinement.²⁹ Financial costs of jailing such people are substantial. It is expensive to jail public inebriates; according to the U.S. Department of Justice, jail construction costs per bed range from \$20,500 to \$41,600 with an annual per person operating cost of about \$5,000.³⁰ Though obviously not measurable, the social costs may be even greater. After all, what price does a society pay when sick and troubled humans are shuffled between street and cellblock—affording little opportunity for treatment and few of the most rudimentary elements of human existence?

Alternatives

The Commission recommends a series of steps for improving the way juveniles, mentally ill and retarded people, and public inebriates are handled. First, the Commission recommends that states make maximum practicable efforts to remove these people from jails and stop detaining them in jails in the future. The Commission recognizes that in some cases this recommendation is not immediately practicable. In such cases, juveniles, the mentally ill and retarded, and public inebriates should be kept separate from others and monitored carefully. In the long run, however, the Commission believes that states and communities should, where possible, make other options available to these groups.

Alternatives for juveniles include diversion programs providing counseling for troubled youths; specialized services like advocacy, tutoring, counseling and employment referrals; shelter care homes that provide temporary shelter for youths during periods of crisis; and home detention where juveniles continue to live with their parents while meeting daily with probation officers and receiving counseling along with their parents.

There is a need for increased training of law enfor-

cement personnel so they can better identify mentally ill and retarded people. Further, the mental health system needs to have counseling, crisis center and long-term programs to help these people. Better intake and screening procedures are needed to get these people quickly to where they can be helped.

Although public inebriates may need a full range of services, some may merely need a clean social setting in which to "sleep it off." Entry services like shelters and reception centers can provide life sustaining essentials that inebriates often miss, including food, shelter, clean clothing and other simple basics. Beyond that lies the need for services aimed more precisely at the underlying problems facing inebriates: detoxification services to help them safely withdraw from alcohol addiction; short and long-term counseling; domiciliary care for chronic abusers who because of age or long years of poor nutrition and medical care may never be productively able to rejoin society; and better information systems about many services that might already exist, like housing and job training.

The Commission is mindful of the many difficulties entailed in keeping these people out of jails. Some of the alternatives discussed above may be expensive. Money for new alternatives or for improving those already operating is not easy to come by when spending at all levels of government is constrained. By and large, people tend to prefer spending scarce public monies for purposes that show more direct benefits. The Commission believes that a solution lies in a systemic approach, one that includes cooperation between and among federal, state and local governments as well as the existing state, local and private social service agencies and the criminal justice system.

Despite the difficulties of implementing such solutions, the Commission finds the problems and costs of jailing juveniles, mentally ill and retarded persons, and public inebriates so great that the approach recommended here is fully warranted.

Recommendation A.3

STRENGTHENING COMMUNITY-BASED CORRECTIONS AND ALTERNATIVES TO INCARCERATION

The Commission concludes that institutional confinement of 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.

Convicted jail inmates—constituting about 40% of the jail population—are mostly misdemeanants.²⁹ Though a tangible need exists to protect society from those people whose crimes suggest they constitute a real threat, the Commission believes that alternative sentencing for less serious offenders may be more beneficial for the offenders, for the community, and for the victims. Community-based alternatives, like community service and restitution, may save money and better rationalize the use and role of jails in our criminal justice system.

As noted in the previous recommendation, time spent in jails is expensive. Moreover, there are important nonfinancial costs to be weighed. Overcrowding, if not the norm, has at least become commonplace and carries its own pricetag. Its price includes higher tension among inmates, less ability to segregate populations such as juveniles who warrant protection, and a greater probability of the jail having to respond to a lawsuit.

Time spent in jail is idle time. Intended to house people, both convicted and awaiting trial, for relatively brief periods, jails typically lack the resources to support many of the services often found in prisons—services such as recreational, occupational and educational programs. Thus, the period of time that people are held in jails is largely unproductive.

Indeed, from a societal perspective, the time spent in jails may be counterproductive. Virtually everyone who enters a jail eventually exits, often returning to his or her own community. Although incarceration protects society absolutely from any crimes a jailed individual might have committed during the time of sentence, it does not directly make amends to either the victim or the community. From the viewpoint of the victim, if not society, then, justice may not have been adequately served.

As people languish in jail, draining scarce public

resources, the community is deprived of their potential productivity. Furthermore, because of their idleness and because of the effects of overcrowding, people released into the community from jails may be worse off, less prepared to contribute to society, and perhaps a greater threat to it than they were before incarceration.

Jails should be used for what they do well: immobilizing convicted and alleged criminals. They were never meant for, and thus most have never been completely competent at doing much else. Recognizing the potential problems of alternatives to incarceration—especially the increased risk to the general citizenry—the Commission finds that some alternatives to incarceration for some offenders offer at least the possibility of equal social benefits at lower costs than jail.

The impulse for just such an alternative is evidenced by the fact that nearly two-thirds of all persons under correctional supervision are being supervised in the community through probation. Although the forms of probation differ greatly across the nation, their respective costs are typically 10 to 14 times less than that of imprisonment.³⁰

Straight probation usually refers to loosely supervised or structured release from the criminal justice system. It uses fewer resources and it is less costly than incarceration. However, the lack of sanctions typically contained in probation may appear slight and fail to convince either the victim or the general public that justice is being served. Without condemning the use of "straight" probation, the Commission sees the need for alternatives that fall short of the penalty of imprisonment but go beyond setting someone free, with only minor restrictions.

Community Service

Although community service programs may differ according to the needs of particular communities, they generally entail formally sentenced offenders—usually less serious felons and misdemeanants—performing some task that will benefit the community as a whole. Ideally, community service will reduce jail populations, produce increased tangibility between crime and punishment by making a criminal "pay back" the community that he or she has offended, and cost less than incarceration.

The New York Community Service Sentencing Project, a program created and operated by the Vera Institute, is a promising example of an intermediate community service penalty.

The primary objective of the Community Service Sentencing Pilot Project was to induce regular use of a new penal sanction—one that is more positive, less burdensome and less costly than jail time, but more burdensome, more likely to be enforced and, thus, more credible than the present alternatives to jail.³¹

Any program geared to reducing costs through decreasing jail overcrowding must address the "widening the net" issue. That is, does the program truly keep people out of jail who otherwise would have been sentenced there, or does it bring under criminal justice "treatment" more people than would have been otherwise, without reducing the real number of people in jail? Obviously cognizant of this issue, the Vera program designed a process that selected only those people who probably would have received jail sentences of from 30 to 90 days. Selected offenders are sentenced to 70 hours of supervised, unpaid community service work. Those who do not complete the 70 hours are referred back to court for resentencing. The program appears, at least on a small scale, to have helped reduce city jail populations while producing some financial benefits to the city.

The project's record is more mixed when comparing subsequent criminal activity relative to that of jailed persons with comparable records. Most importantly, the project was obviously less efficient than jail in terms of arrests-during-sentence. This raises a key question that any program trying to keep people from being jailed must confront: what is the additional risk to the public of doing this and can that risk be justified? Indeed, the Vera program did result in some moderately increased risk. During their sentence more offenders under the Vera program were re-arrested than were comparable jailed offenders. But virtually all arrests were for petty crimes, and fully 88% were not re-arrested.³² In sum, to prevent one person from committing a crime and getting re-arrested during this 30-day period, nine persons would have had to be locked up.

Although reducing recidivism was not a primary goal of the program, it turned out to be an unexpected benefit. A slightly lower rate of recidivism was found among those who completed the community service sentence than among a comparable group released from jail. Providing benefits to the public is another unintended benefit. The actual community service done—43,000 hours worth of free

labor at the time of the program's evaluation—provided local people with valuable physical and aesthetic benefits. Having convicted criminals give something back to the community creates a tangible relation between the crime and its punishment and may bolster public assessments of the justice system.³³

Restitution

Restitution is a court mandate that a convicted offender pay cash or render in-kind services to the victim of the crime for which he or she has been convicted. Restitution may be imposed as a condition of probation or combined with jail or prison terms. It differs from community service, however, in one important way: community service focuses on making amends to a vague or general community, while restitution's aim is to pay back the specific victim.

With the growing attention to the needs of crime victims, restitution has enjoyed a parallel popularity. A survey taken in 1983 identified more than 40 restitution programs nationwide, and the Department of Justice has found evidence of a longstanding informal tradition of restitution at various stages of the criminal justice process.³⁴

The apparent success of two such programs is illustrative of the best that this approach has to offer. A program in Quincy, MA, operates as part of the probation department under the joint sponsorship of the district court and the local chamber of commerce. Offenders are usually hired at minimum wage to do temporary jobs for local businesses. Besides increasing restitution collections from \$38,000 in 1975 to \$218,000 in 1981, the program has provided convicts with experience and references, the first of each for many of these people.³⁵

A program in Genesee County, NY, combines restitution and community service for otherwise jail-bound individuals. The program director claims that between March and October 1982, 80 offenders completed 5,114 hours of service at a saving of 852.7 jail days or \$25,581.³⁶

Notwithstanding these apparent successes, some important questions about restitution remain. First, if restitution is a policy, it is a vague one. Its appeal is visceral—to strike back at crime and at criminals and to see victims compensated appropriately by those who victimized them; its acceptance as rational policy is usually intuitive. Moreover, goals are not clear—does restitution seek to satisfy the victim

or rehabilitate the offender, and is it possible to do both? Competing interests generated by unclear goals can cause severe problems for any program.

Labor issues must be considered as well. Will those programs where offenders earn less than the prevailing wage undercut local labor? Are convicts receiving jobs that people without criminal records could and would do?

The Commission is mindful of these issues and, while still encouraging the use of this option, recommends that those involved in, or planning to establish restitution programs give them due attention.

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.

Sentencing disparities are a pervasive problem, affecting prisons, jails and sentencing practices throughout the country. Some reform has come in recent years as an offshoot of the movement to shift from indeterminate to determinate sentencing, to make greater use of mandatory minimum sentences,

and to reduce the authority of probation officials. Since the mid-1970s, however, increasing attention has focused on sentencing guidelines as a way of achieving greater consistency and equity in sentencing practices.

Guidelines define categories of offenders and indicate the presumed sentence, or range of sentences, for each category. They specify different sanctions for offenders who are presumed to deserve different sentences and like sanctions for offenders within each category. In simplest form, the guidelines are presented as a grid or matrix, with offenses ranked according to severity on one axis and criminal histories of increasing seriousness arrayed along the other. (For an example, see the Minnesota guidelines in *Figure V-1*.) In places where judges are mandated to use the guidelines, they are required to provide a written explanation if they choose to depart from the presumed sentence.

In constructing guidelines, some assumptions are made inherently about available prison and jail capacity because the guidelines determine which offenders shall be sent to prison and the duration of their sentences. In at least two states (Minnesota and Washington) the legislatures have directed the guideline drafters to be sensitive to the existing incarceration capacity. Guidelines thus are not only a means for reducing disparities but also can be a tool to help control the size of prison and jail populations.

Sentencing guidelines have been endorsed by a number of groups, including the American Bar Association and the National Conference of Commissioners of Uniform State Laws. The Judicial Conference of the United States has recently proposed legislation that contains a form of a determinate sentencing guidelines system. The National Institute of Justice of the Department of Justice has provided financial encouragement for research and demonstration on guidelines at the state and local levels. Guidelines were included last year in a criminal justice reform bill passed by both Houses of Congress but pocket vetoed by the President. The Reagan Administration's proposed "Comprehensive Crime Control Act of 1983" provides for federal sentencing guidelines.

About a dozen states have guidelines that are currently in use or will soon be put into effect. Another dozen are reported to be considering or interested in adopting guidelines. The three states that probably have received most attention are Minnesota, Pennsylvania and Washington. The guidelines in all three were drafted by special sentencing commissions es-

tablished by statute. Minnesota's have been in effect since May 1980, Pennsylvania's since July 1982, and Washington's are to be activated in July 1984. The Minnesota experience was endorsed and significantly reflected in the guidelines incorporated in the Reagan Administration's proposed crime bill.

The guidelines of the three states apply in various ways to the problems of jails. Minnesota's apply only to felony offenders, yet have had a direct effect on jails. In almost half of the sentences meted out to convicted felons, the judge stays the sentence and gives the felon time in a jail or workhouse as a condition of probation. The jail part of the stayed sentence has contributed to jail overcrowding. Moreover, the Sentencing Guidelines Commission has not provided judges with nonimprisonment guidelines, so determining the "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. In sum, the Minnesota guidelines, limited as they are to imprisonment sentences for felony offenders, 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.

Pennsylvania's guidelines apply to both felonies and misdemeanors. Reports on that experience since mid-1982 are limited but indicate that so far the guidelines have had their main impact on persons driving under the influence of alcohol or controlled substances, and on mid-level misdemeanants, for which some jail confinement is provided. The usual jail sentence is 12 months or less.

The state of Washington's pending guidelines differ from both the Minnesota and Pennsylvania standards and have benefited from the experience of these two states. They apply only to felony offenders but, unlike Minnesota's, provide for both prison and jail sentencing. Sentences for 12 months or less of confinement are served in a county jail.

Unlike the Minnesota and Pennsylvania guidelines, moreover, Washington's encourage judges to use alternatives to incarceration in the sentencing of lesser offenders. The legislature instructed the Sentencing Guidelines Commission to have its standard sentence ranges include at least one of the following: total confinement, partial confinement, community supervision, community service and

Figure V-1

**MINNESOTA
SENTENCING GUIDELINES GRID:
Presumptive Sentence Lengths in Months**

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. *Offenders falling below the heavy line are presumptively sentenced to the state prison.*

CRIMINAL HISTORY SCORE

SEVERITY LEVELS OF CONVICTION OFFENSE		0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle Possession of Marijuana	I	12*	12*	12*	15	18	21	24 23-25
Theft-Related Crimes (\$150-\$2,500) Sale of Marijuana	II	12*	12*	14	17	20	23	27 25-29
Theft Crimes (\$150-\$2,500)	III	12*	13	16	19	22 21-23	27 25-29	32 30-34
Burglary—Felony Intent Receiving Stolen Goods (\$150-\$2,500)	IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
Simple Robbery	V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
Assault, Second Degree	VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
Aggravated Robbery	VII	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
Assault, First Degree Criminal Sexual Conduct, First Degree	VIII	43 41-45	54 50-48	65 60-70	76 71-81	95 89-101	113 100-120	132 124-140
Murder, Third Degree	IX	97 94-100	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
Murder, Second Degree	X	116 111-121	140 133-147	162 153-171	203 192-214	243 231-255	284 270-298	324 309-339

First Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

*One year and one day.

SOURCE: Minnesota Sentencing Guidelines Commission, *Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines*, July 1982, p. 2.

ines. Consistent with this direction, the commission determined that, for sentences of nonviolent offenders for less than one year, the court shall give priority to available alternatives to total confinement and justify its reasons if they are not used. With the exception of a first-time nonviolent offender, the judge must establish the sentence in terms of total confinement. (An earlier statute already empowered judges to sentence first-time nonviolent offenders to a wide range of alternative sanctions.) Judges then have the discretion to substitute alternatives for any portion of the sentence. The guidelines specify the conversion rates: one day of partial confinement (typically work release) or eight hours of community service can replace one day of total confinement. The community service conversion is limited to 240 hours or 30 working days. The judge may also impose up to one year of community supervision to ensure that the terms of the alternative sentence are met. Fines may be assessed pursuant to a formula scaled according to the seriousness of the felony.

The Minnesota Sentencing Guidelines Commission reported that over the first 20 months of experience, circuit judges departed from the guidelines in 6.2% of their disposition decisions and in 8.5% of their durational decisions. An early check of the Pennsylvania experience indicated 94% conformity with the guidelines, both as to disposition and duration. Minnesota reported further that the guidelines had produced increased uniformity in sentencing and increased proportionality in sanctions, with more serious offenders receiving more severe punishments. In short, disparity has been reduced. Minnesota made two other significant findings: prison population remained within capacity, and it increasingly comprised offenders sentenced for crimes against persons and decreasingly comprised offenders sentenced for crimes against property.

Given Minnesota's experience, Pennsylvania's more limited record, the endorsement of several prestigious interest groups, the support of key members of Congress and the Administration and rather widespread general interest among the states, it is somewhat surprising that more states have not already moved to adopt guidelines. Part of the hesitancy stems from the relative newness of the concept and the limited practical experience with guidelines. It takes time for such a departure from long-established practice to be tried and to gain acceptance. Time has been required especially to confront and deal with two particular criticisms of the early guidelines. First, the early guidelines were "de-

scriptive," based on an analysis of prior sentencing behavior in the jurisdiction and projecting this historical experience forward through statistical means. This approach produced consistency in sentencing but perpetuated disproportionality because there was no assurance of an equitable relationship between the terms imposed for offenses of varying severity or on offenders with different criminal histories. Guidelines advocates respond by urging a "prescriptive" instead of a "descriptive" approach. The prescriptive approach involves deliberately developing a sentencing policy by thoroughly examining policy issues and sentencing philosophies, with ultimate choices based on decisionmakers' values. Current sentencing practices are considered, but they are weighted along with other sentencing options. The Minnesota and pending Washington guidelines are examples of the prescriptive approach.

A second early—and still prevailing—criticism of the guidelines is that they are biased against the poor and minorities. Guideline defenders contend that guidelines should not be blamed for this bias. They contend that society and the criminal justice system generally are responsible if the poor and minorities commit a disproportionate amount of disproportionately serious crimes. Advocates concede, however, that such bias may be aggravated if the guidelines incorporate socio-economic variables in evaluating an offender's criminal history. Supporters declare their awareness of such possible bias and express determination to avoid or remove it in developing and monitoring guidelines.

Undoubtedly the most powerful cause of the states' slowness in adopting guidelines is legislative reluctance to place restrictions on judges' discretion, preferring to limit discretion in other ways, such as prescribing greater use of determinate sentencing and mandatory minimum sentences. Guidelines advocates stress the discretion that remains with judges: presumptive sentences are stated as ranges of time rather than as specific numbers of years and months, and the judge may depart from the guidelines as long as the reasons are explained in writing. Such reassurances frequently are not strong enough, however, to overcome legislative and judicial resistance to what is regarded by some as a radical departure from the traditional breadth of sentencing discretion our criminal justice system grants to judges.

Weighing these pros and cons and the record of experience to date, the Commission concludes that

sentencing guidelines can be effective mechanisms for reducing sentencing disparities, achieving proportionality in sentencing, and making sentencing decisions more responsive to jail and prison capacities, while simultaneously preserving an appropriate amount of discretion for the judiciary. The Commission believes, therefore, that states should adopt sentencing guidelines.

However, the guidelines proposed and used so far apply, with a single exception, only to felony offenders and do not have much impact on jails, which house a large complement of sentenced misdemeanants. Should states continue this pattern or should they adopt sentencing guidelines that apply as well to at least some misdemeanor offenders? Several issues appear to be pertinent in considering this question: experience to date, administrative implications, the problem of unequal local resources, and limits on reducing judicial discretion.

First, experience suggests limiting the guidelines to felons who are the focus of guidelines in all but one state (Pennsylvania). Limiting the coverage to felonies, moreover, does not exclude the guidelines from having some impact on jails, where many of the less serious felony offenders are placed.

Second, extending guidelines to misdemeanor sentences has important implications for administration. Misdemeanants make up the largest share of sentenced inmates in jails and represent the bulk of cases that are funneled through the lower courts. As the least serious and complex of the courts' cases, misdemeanors are generally handled with relatively greater dispatch. The guidelines sentencing process adds time to rendering sentences in these cases because it requires establishing the offender's history and completing certain forms, including an explanation when the judge decides to depart from the guidelines. Skeptics fear that this added process would slow down a judicial system that is already charged with being unduly slow. In response, those who advocate including misdemeanors maintain that, at least at the start, the guidelines can be applied only to the serious cases, so not all misdemeanants need be covered and the factors to be considered can be simpler than those required when applying the standards to felons. Alternatively, as one witness suggested to this Commission, the sentencing guidelines commission could define a large class of misdemeanors for which only the offense would be considered at sentencing, and for which jail would not be recommended. This could apply to the great majority of traffic and regulatory misde-

meanor offenses, such as swimming at a beach after closing hours. Criminal history information could be considered only for a limited number of more serious misdemeanors, such as assaults and thefts. For these, criminal records searches could begin at arrest or at charging, so they would be available by sentencing.³⁷

With respect to the expeditious availability of data on an offender's criminal history, guideline advocates maintain that availability should not be an insuperable problem if a state has an adequate system of central criminal records. They cite Pennsylvania as an example, where a request is automatically sent to the state criminal record file upon the arrest of a suspect. By the time the suspect comes to trial, the record is available to the court.

A third issue concerns the impact of statewide guidelines on facilities that are financed and operated at the local, usually county, level. Requiring judges in all parts of a state to follow the same guidelines ignores the fact that the local governments responsible for jailing sentenced misdemeanants do not have equal resources to provide jail facilities and services. The guidelines may place inequitable burdens on localities with slim resources. Guideline proponents have a twofold response: in general, areas with more misdemeanants have more resources, and vice versa, so the problem is not as great as it initially appears. Moreover, they claim the state has some responsibility to help localities financially in meeting new state-imposed requirements.

Fourth, it is contended that extending guidelines to misdemeanors will stimulate greater opposition among the criminal justice community, particularly among the judiciary, because they appear to make further inroads on discretion in sentencing. Such opposition might create a backlash that endangers guidelines for felony offenders as well as misdemeanants. Advocates reply that the guidelines retain substantial judicial discretion.

On balance, the Commission believes that states should adopt sentencing guidelines that apply to both felonies and serious misdemeanors to enhance the impact on jails with respect to disparities, proportionality, and responsiveness to capacity. Experience with misdemeanor guidelines has not been as extensive as might be hoped, but it is still substantial. Criminal histories of misdemeanor offenders are likely to be less extensive than for those committing more serious crimes and therefore should require less administrative effort to obtain, or, as suggested above, they can be dispensed with entirely for many

misdemeanors. Moreover, application of the guidelines can be limited to the more serious misdemeanors at the outset. Such an approach would give states and affected localities leeway in accommodating courts' administrative capacities to the increased workload. As the criminal justice system becomes accustomed to the guidelines process, it may be possible to narrow if not entirely eliminate the excluded classes of misdemeanors.

The extent to which judges recognize alternatives to incarceration in their sentencing depends upon a number of factors, including the availability of community-based services. Most critical, however, is the judges' awareness of the alternatives available and their willingness to use them. The Commission believes that having guidelines that require judges to consider alternatives as part of their decision-making process, as provided in Washington state, encourages greater use of alternatives to incarceration. The guidelines can provide very specific guidance for converting time in jail into various types of non-incarcerative alternatives for non-violent offenders. Such practices can lessen the strain on local jails and enhance the possibility of better integrating the offender into society.

Because of the inherent influence of guidelines on the number of persons sent to prison and jail, and the durations of their stay, the guidelines have profound implications for the state's policy on prison and jail capacity. This policy is the responsibility of the legislature. The legislature, therefore, should instruct the guidelines commission as to the population maximums it should use in constructing the guidelines.

With guidelines of the type recommended, the Commission believes that jails will be improved through greater equity among the sentences being served by jail inmates, through greater sensitivity to the availability of jail resources, and through greater recognition of community-based alternatives to jail incarceration.

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 pretrial 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.

The problem of maintaining state prisoners in local jail facilities is not a new one. However, a precipitous increase in the number of state felony cases placed in local jails has given the issue renewed urgency. Between 1980 and 1981 alone, the number of inmates "misplaced" due to prison overcrowding grew over 20% from 7,130 to 8,576. (See *Table V-1*.)

One major reason for the recent increase has been the rise in the number of state prisons under court orders or facing pending litigation. As of April 1980, 30 states were involved in litigation over prison conditions and overcrowding. Two years later, in March 1982, 38 states (plus the District of Columbia, Puerto Rico and the Virgin Islands) were operating under existing court decrees or were involved in pending litigation affecting either the entire prison system or some major penal institution.

Although the increase in litigation and in court orders aimed at improving state facilities (often by placing caps on prison populations) has probably been the chief reason for the backup of state prisoners into local jails, the other branches of government may also, in attempting to avert prison crises, cause the overtaxing of jail facilities. For instance, in 1981, responding to overcrowded prison conditions that stemmed from new and tougher sentencing laws, Governor Brendan Byrne of New Jersey issued an emergency decree ordering county jails to retain state prisoners already in their care and to house additional state wards as the need arose. The order resulted in at least 11% of state inmates being housed in local cells. The New Jersey state prison system remained at just 103% of capacity, but a number of the larger urban county jails were holding hundreds more prisoners than their cell capacities warranted.

Three major issues may arise in conjunction with housing state prisoners in local jails. First is the issue of adequate payment—an amount that is likely

Table V-1

**STATE PRISONERS HELD IN LOCAL JAILS
BECAUSE OF PRISON OVERCROWDING**
(1980 and 1981)

	1981	1980
Total	8,576	7,130
Alabama	1,485	1,410
Florida	288	285
Georgia	1,729	770
Kentucky	104	94
Louisiana	793	1,267
Maine	23	6
Maryland	71	277
Massachusetts	-	125
Michigan	162	75
Mississippi	1,172	1,243
Montana	1	1
New Hampshire	19	-
New Jersey	945*	200*
New Mexico	18	13
New York	39	-
Oklahoma	72	124
South Carolina	544	609
Tennessee	212	178
Utah	29	-
Virginia	846**	368
Washington	24	85*

*Not included in this state's official prison count

**Included some persons held for reasons other than overcrowding.

SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, "Prisoners in 1981," Bulletin, NCJ-82262, May 1982, p. 3.

to differ not only between states but, in some cases, among local jurisdictions within a state. The problem has been especially acute in some southern states, where, because of particularly far-reaching systemwide judicial intervention, states have felt the need to retain unusually large numbers of their felons in county facilities. In one such state the rate of reimbursement for each state prisoner's upkeep is only \$5 a day, an amount that has rankled many county commissioners who, when faced with overcrowding in their own facilities, have been forced to contract with neighboring jurisdictions at daily rates as high as \$18.50. Noting the great financial burden

that the upkeep of state prisoners often visits upon local jurisdictions, the Arizona Supreme Court recently ruled that that state must pay the full cost of keeping sentenced prisoners in county jails pending transfer to prison.³⁸

Although adequate reimbursement rates have been a major point of contention between state and county officials, by no means are all state payments niggardly. Officials in a few local jurisdictions have actually used more generous rates to *make* money. One sheriff has been quoted as saying, "Hell, it helps to tell my county board that I made \$100,000 last year taking in prisoners. I got a good thing going."³⁹

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A second issue arising out of local housing of state prisoners is the shifting of certain problems from one level of government to another. Clearly, the basic dilemma of an overtaxed correctional system cannot be solved by playing a game of "musical prisoners."

A third and related issue emanating from the "state prisoners in local facilities" quandry is that housing of long-term felons is simply not a traditional function of the jail. Rather, jails are short-term institutions designed to hold minor offenders and pretrial defendants—the retention of sentenced felons ideally being limited to the few days necessary to affect their transfer to state institutions. The long-term confinement of such individuals in local jails is potentially unfair not only to the regular denizen of the jail but to the state prisoner as well. Short of total segregation, pretrial defendants and minor misdemeanants must commingle with much more serious and sometimes dangerous criminals. And the felon, facing a long time behind bars, must resign him or herself to the fact that some portion of that seemingly interminable period may be spent without the supporting services that prisons, as long-term institutions, can offer more readily than the jail—namely, more regular opportunities for work, recreation and education.

The prison overcrowding issue lies outside the purview of this study, but it is becoming increasingly evident that many states soon will be forced to find alternatives to the stop-gap use of the county jail. More and more jails are finding themselves under court orders that limit the number of inmates they can house. In some cases, as recently occurred in New York, such orders are aimed specifically at removing state inmates from local facilities whether or not the state has had time to construct sufficient bedspace of its own. In addition, a new trend in overcrowding litigation—case consolidation—may make implementing the subterfuge of jurisdictional inmate transfers more difficult. For instance, in the case of *Hamilton v. Morial*, the U.S. Court of Appeals for the Fifth Circuit recently ordered all pending and future correctional institution cases in Louisiana (including 25 ongoing jail cases) to be consolidated under the aegis of one district judge. Speaking directly to the practice of passing state overcrowding problems on to local facilities, the court cautioned that "Consolidating all court actions allows the issue that will not go away to be faced squarely without harassment."

Although the Commission realizes that the housing of state prisoners in local jails is a less than ideal

solution to overcrowding in state prisons, it also acknowledges the fact that future exigent situations may occasionally necessitate the continuation of that policy. Therefore, while urging that states develop other measures to cope with the overflow of state prisoners, where such measures are not immediately available, the Commission endorses fair and adequate reimbursement to affected local jurisdictions.

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 multi-government correctional systems.

The Commission based its 1971 recommendation on the conclusion that, realistically, an adequate, properly equipped and staffed local correctional institution that could meet modern program standards was beyond the financial means of most local governments except urban counties and large cities. On the basis of our current study, we find conditions little changed from 12 years ago.

Small jails still exist in great numbers. The U.S. Department of Justice's 1978 census of jails reported that 65% of the nation's 3,493 jails had average jail populations of 20 or fewer inmates. Their small size makes it impractical to provide some of the program and administrative features required of an up-to-date jail. The National Sheriffs' Association's 1982 jails survey found, for instance, that the smallest

jails (0-16 beds) were substantially behind the larger facilities in providing such educational services as GED (general equivalency diploma), adult basic education, vocational training, job placement and life skills; in offering substance abuse, personal and group counseling services; and in providing an array of medical, dental and recreational services. Furthermore, the staffs in small jails were more frequently rotated between jail and patrol duties, diluting their ability to concentrate on correctional services.⁴⁰

The basic attraction of the interlocal arrangements urged in this recommendation is that they enable the participants to obtain economies of scale in constructing, maintaining and operating jail facilities and in developing and conducting diversified programs. A larger scale operation helps foster professionalized jail management and staffing, which can, besides improving jail services, improve law enforcement by relieving law enforcement officers of custodial duties. It also offers an opportunity to deal more effectively with certain special groups among jail inmates, such as women.

Women generally are a small minority of the whole inmate population, especially in smaller jurisdictions. It is expensive on a unit basis to provide to female inmates the same level of services and facilities as are given to men. One possible solution is combining the facilities and services of two or more jurisdictions, either through one serving all or several setting up a jointly administered facility and program.

The NSA survey found that this practice already exists. A substantially greater percentage of the smaller jails than the larger jails reported contracting with other jurisdictions to house female prisoners. Interestingly, the smallest jails also led in the percentage of facilities contracting with other jurisdictions to house another special group of inmates: juveniles.⁴¹

Interlocal contracting for jail services and joint or regional arrangements are not, of course, without their problems and critics. For one, these approaches involve giving up a certain amount of direct local control. In addition, the costs of transporting offenders to a more distant jail may offset some of the expected savings. Transportation is a particular concern with pre-sentence detainees who make up a substantial share of local jail inmates. They may need to be in and out of court several times during the course of their detention, which can create a burden if the court is located some distance from the

seat of the multijurisdictional jail. Location away from the detainee's home jurisdiction can also complicate access by his lawyer and family. One answer to this problem is to keep pre-sentence detainees out of the joint arrangement and have the participating jurisdictions continue to maintain smaller detention facilities. Advocates of joint arrangements, however, argue that all these transportation problems may be exaggerated in light of modern transportation facilities.

Another reason for some hesitation in moving toward multijurisdictional arrangements is that they may complicate coordination with other elements of the criminal justice system that are not organized on a similar jurisdictional basis. In addition, supporters of community-based corrections may resist interlocal contractual and joint arrangements as a centralizing force that runs counter to the decentralizing thrust of community-based corrections. However, some supporters of community-based corrections act programs that encourage regionalization contend that combining small jurisdictions is the only way to pool the resources necessary to support the variety of activities needed in a viable community corrections program.

Establishing a multijurisdictional corrections enterprise and keeping it functioning smoothly requires a lot of planning, negotiation, and coordination. Among the prickly issues that have been raised are: achieving consensus among the cooperating (perhaps contending) localities regarding the site of the joint facility(ies); sharing responsibility and costs among the governing bodies; turnover in office among officials who first enter into the pact; and the size and role of any advisory committees.

The Commission does not underestimate the difficulties involved in engaging in interlocal cooperative agreements, particularly those involving a multijurisdictional corrections entity. Yet it believes that their benefits may well justify the effort and compromises entailed. Agreements must be pragmatic and adapted to specific jurisdictional needs and circumstances. For example, it may be expedient for small lock-up or detention-type facilities to be retained in one or more of the participating jurisdictions in addition to the main facilities at the central location.

The Commission's and National Association of Counties' 1982 joint survey of state corrections officials supports the conclusion that many local jurisdictions would benefit from using interjurisdictional approaches to jail services. The officials were asked whether their states had a "crisis in local jails" and if

so, whether they thought various specified measures were the way to ameliorate it. Of the 28 who thought there was a crisis, 17 said one ameliorative step was to encourage multicounty or regional cooperative arrangements. Seventeen was the most "votes" cast for any of the eight specified solutions.

Complete current information is lacking on the extent to which interlocal contracts and joint agreements are used to provide jail services, but there are some clues as to their magnitude. Over one-tenth of the nation's counties have no jails. Because maintaining a jail generally is a state-prescribed county function, it seems likely that many of these counties already are discharging their responsibility by contracting with other, in most cases larger, counties. One study found that, among municipalities, jails were the most common subject of intergovernmental cooperative arrangements.⁴² A 1979 report for the National Institute of Corrections identified only ten multijurisdictional or regional correctional systems based on joint agreements, but an unspecified number of quasi-regional consolidated systems.⁴³ Clearly interjurisdictional cooperative arrangements are in place but there is certainly room for expansion.

Part of the reason that the use is not more extensive is the lack of state authorization for localities to enter into interjurisdictional arrangements. A 1976 ACIR study revealed that six states did not permit localities to provide services jointly or cooperatively and 18 did not permit interlocal contracting.⁴⁴ The first supportive action states need to take, therefore, is to authorize localities to make use of interjurisdictional agreements for jail services. Further, the Commission believes that states should use technical and financial assistance to encourage interjurisdictional approaches. For example, the community corrections act states of Minnesota and Kansas make state subsidies available for community corrections alternatives if small counties combine with other counties to reach a minimum aggregate population.

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.

As has been amply documented in this report, many jails have been found by the courts to violate the rights of their inmates. These violations are especially deplorable in the case of pretrial detainees who make up over 60% of the jail population. The courts have responded with orders to close down the unconstitutional facilities or to correct the conditions that cause abusive treatment, overcrowding, and other threats to health and safety, such as poor lighting, sanitation or ventilation, and lack of necessary medical care. A National Sheriffs' Association survey found that in 1982 between 10% and 13% of all jails were under court order; between 16% and 22% had been involved in court actions; and between 17% and 20% were party to a pending lawsuit.⁴⁵

Jails are primarily a "local" function, so that local governments have first responsibility to see that they are operated properly, just as they are obliged to perform any of their functions effectively and according to law. In the case of jails, this standard requires, among other things, being sensitive to the community's attitude toward the purposes of incarceration and avoiding conditions and treatment that cause inmates to seek relief in the courts. Yet state governments also have a duty to see that the constitutional rights of jail inmates are not infringed, stemming from the prohibitions against cruel and inhuman punishment and the guarantees of due process and equal protection of the laws contained in the bills of rights of the constitutions of the United States and the 50 states. States can discharge this responsibility by developing minimum standards of performance that, if followed, assure protection of those basic rights.

Many states have already adopted such standards. The Commission believes the rest should do likewise after consulting with localities to assure that the standards reasonably reflect the experience of those most familiar with the problems of running jails. Some states have appointed special governmental commissions to write the standards; others have relied on private professional organizations; still others have combined both approaches.

A survey by the American Bar Association in 1974 found that 27 of the states with locally administered jails had statutory authority to establish jail standards. By 1983, a survey of state corrections officials by the ACIR and the National Association of Counties (NACo) found that 34 of the 44 states with locally administered jails had state standards and two had voluntary standards developed by outside sources. Of the 34 with state standards, 28 were mandatory and six were voluntary.

The effectiveness of state standards depends to a great degree on their quality. Measured on this basis, states as a group have even further to go in their standards work, despite the fact that they have made progress in recent years. Thus, one survey found that 1978 standards were stronger than their 1972 counterparts in mandating better treatment of inmates with respect to lighting, ventilation, temperature, acoustical levels, visitor access, availability of telephones, indoor and outdoor recreation and access to a library or legal library. Yet other studies found that some states' standards were still primitive, limited in scope, and often mere statements of general intent rather than precise guides.

States' inspection efforts to ascertain the status of compliance with standards reflect a similar pattern: progress, but room for considerable improvement in many states. The National Sheriffs' Association (NSA) found that the number of states with jail inspection programs increased from 17 in 1971 to 32 in 1978.⁴⁶ The ACIR-NACo survey added three more in 1982.

Another essential element of an effective standards program is enforcement. A 1978 survey found that only 29 states had enforcement powers, and even in some of these, the effectiveness of inspection and enforcement activities was suspect. As one administrator commented, "The only difference in this state between an accredited jail and one that isn't, is the plaque on the wall of the sheriff whose jail is accredited."

Clearly one of the deterrents to local governments' complying with state standards is their inability to

come up with the requisite funds. For this reason, the Commission recommends that state legislatures permit state agencies to furnish financial assistance to localities in meeting the standards.

Our study found that the number of states providing funds for local adult corrections and the number and dollar amount of those subsidies all increased in the six years between 1976 and 1982. In 1976, there were three programs with funds partially or entirely for physical plant, nine with funds partially or entirely for incarceration alternatives, and two for "general and miscellaneous." The comparable figures for 1982 were, ten, ten, and five. These subsidies, particularly those for physical plant, reflect heightened state response to jails' needs for financial assistance to help meet standards, but they also show most states are not providing such financial assistance.

To some extent localities' difficulties in meeting state-prescribed jail standards reflect their shortcomings in understanding the requirements and in knowing how to use their available resources most effectively to meet them. States can help localities cope with these problems by offering technical assistance. Such assistance can take many forms, including consultation and expert advice, conferences, special studies and preparing manuals and models. States have a wide range of staff resources upon which to draw for these efforts, including the corrections agency, the inspection agency (if it is outside the corrections agency), the state fire marshal, and the social services, health and education agencies.

Information is incomplete on the actual extent of states' technical assistance efforts. A 1978 survey by the National Sheriffs' Association found that 30 offered such help as a part of their jail inspection programs.⁴⁷ This finding suggests that technical assistance is another area where states need to improve their performance in behalf of local jails.⁴⁸

To sum up, then, states have a basic obligation to see that local governments respect the Constitutionally-guaranteed rights of jail inmates. The Commission believes that states can discharge this obligation effectively by developing operating standards for jails and by permitting state agencies to offer technical or financial assistance to localities in meeting the 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 governments 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.*

As pointed out in *Chapter I* of this report, personnel has been identified by many knowledgeable individuals and groups as a leading, if not the leading, problem with contemporary jails. Among those citing the personnel issue are Chief Justice Warren Burger, the Director of the U.S. Bureau of Prisons, and the National Sheriffs' Association (NSA). The NSA comment came in a 1982 survey, in which sheriffs were asked to list the five most serious problems in their jail "in order of importance to your situation." Clearly at the top of the list was personnel. Related issues of training and salaries ranked 8th and 13th, respectively, in the whole list of 37.⁴⁹

Our study shows, moreover, that the personnel problem basically flows from the low prestige associated with a career as a jail officer, making it unappealing to persons of high caliber and ambition. That condition is aggravated by poor training, low salaries, and the absence of other benefits necessary to attract qualified personnel.

The NSA survey is revealing on these and related points.

- on recruitment, its authors found that:
Too often, there are no standards for recruitment and warm bodies are taken off the street, put into uniform, given a set of keys, and told to go to work. At times, one finds line officers in the golden age category—a job men and women take to supplement a social security or retirement check. Most people in the over 60 bracket are not physically capa-

ble of handling the younger inmates who act out in a physically violent manner.⁵⁰

- on screening job applicants:
Most [jails] are deficient in the areas of physical, written, and psychological testing. . . . Many jails which we have examined have no educational requirement at all for the jail officer position although a few states now require a high school diploma or a GED [general equivalency diploma] certificate.⁵¹
- on training:
. . . jail training is still an extremely low priority in local facilities. Jail training today is where police training was 20 years ago. Until sheriffs and county governing personnel understand the necessity of a well-trained jail staff, problems will continue to plague jails. Training seems to be the most expendable item in budgets and frequently budget cuts are given as the excuse for not conducting training. . . . Most state and local governments have defaulted on their responsibility to give training to jail officers on any consistent basis.⁵²
- on salaries, they found that the average starting salaries for jail officers were 14% less than those for sheriff's patrol officers:
Jail officer careers will never achieve the status they deserve so long as counties continue to pay jail officers less money than the officers assigned to police duties. Part of the problem facing counties today is not only the lack of sufficiently trained staff, but the lack of qualified staff in terms of education. Education relates to salaries. No person wants to make a career where the reward is lousy wages. You can't attract the people who have the potential to be the best officers by paying them wages in the poverty range.⁵³

These findings point unequivocally to the need for strengthening the recruitment, testing, training and compensation practices applicable to jail personnel, and for further enhancing the career aspects of jail work and improving promotion policies and practices as well.

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

Initial and basic responsibility rests, of course, with the appropriate local jurisdiction, but the state has an important supportive role to play. State standards, cited in an earlier recommendation, should include minimum requirements in several critical aspects of personnel administration. As an indication of what those requirements might cover, the 1981 standards of the American Correctional Association are worth noting. They require, for example:

- a written policy and procedure for the selection, retention and promotion of all personnel on the basis of merit and specified qualifications;
- compensation and benefit levels for all facility personnel that are comparable to similar occupational groups in the state or region, and to those for law enforcement officers working in the same organization; and
- a training program for all employees that is specifically planned, coordinated and supervised by a qualified employee at a supervisory level.⁵⁴

States should help localities meet standards by providing training in connection with technical assistance efforts. Providing training is an obvious adjunct to states' mandating standards and inspecting for compliance. An NSA survey in 1978 found, however, that only 23 states provided training along with their inspection programs.⁵⁵

The training that states currently provide local jail personnel is not always well designed. It has been criticized, for example, for using state correctional employees or police for instructional staff. Police are not deemed acceptable teachers because they are not experienced correctional officers unless they work in departments where correctional and police work are rotated. State correctional staff are not suitable, on the other hand, because jails are not prisons, and jail officers need special skills

to confront the new prisoner who may be diseased, a suicide candidate, or violent because of his alcoholic or drug-induced state of mind. By the time a person reaches an institution of long-term confinement, he/she has already matriculated through the jail system and is more resigned to incarceration than are first offenders who are booked into jail.⁵⁶

Thus, states need to provide training help for jails but it must be attuned to the special knowledge and skills required of jail personnel.

If personnel is the number one problem of jails, it seems obvious to this Commission that upgrading personnel policies and practices in the areas identified in this recommendation deserves the highest priority for localities and states concerned about the conditions of their 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-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.

In its 1971 report, *State-Local Relations in the Criminal Justice System*, the ACIR decried the effect of having local jails administered by law enforcement officials:

In some counties and cities where law enforcement officials are responsible for the management and operation of jails and other local short-term institutions, the rehabilitative and restorative objectives of the corrections process are severely curbed. Most county sheriffs, for example, have neither the time nor the training to deal with inmate rehabilitation. As a result, short-term offenders are often merely incarcerated until their sentence expires;

counseling and similar services are not made available to them.

The Commission believes that local law enforcement officials should be divested of their role in managing and operating jails, excluding temporary lock-ups and similar facilities holding persons for less than 48 hours, and this responsibility should be turned over to corrections professionals. From both a philosophical and a practical standpoint, there is little justification for merging responsibilities for detection and apprehension with those for the care and rehabilitation of offenders. After all, the task of law enforcement officials is difficult enough without adding to it the burden of prisoner care. Moreover, to put it bluntly, some law enforcement officials lack attitudes which are conducive to offender rehabilitation. Their involvement can undermine rehabilitative efforts, not strengthen them.

The Commission concluded by recommending that "short-term penal institutions be administered by appropriately trained correctional personnel."

We find that the conditions that led to this recommendation 12 years ago are still essentially the same. Jails generally are in the charge of law enforcement officials, with over 80% being the responsibility of sheriffs. Although the emphasis in corrections has swung away from rehabilitation, it still has a basically different emphasis than law enforcement, stressing, for example, such services as counseling and vocational training as necessary to help prepare inmates for their return to the community.

One change has occurred in this general picture. The level of sheriffs' training has improved. A 1983 survey found that 80% had management administration training and 65% had corrections training.⁵⁷ Yet this improvement cannot overcome the basic problem with sheriffs' having responsibility for jail management. Their primary concern for law enforcement necessarily inhibits their ability to give proper attention to the role and functioning of the jail. As a recent report aptly described the situation:

The jail is under the control of the sheriff, but the sheriff sees his/her major responsibilities as maintaining law in the county. In decisions which involve allocating personal time and resources, as well as organi-

zational resources, the sheriff usually opts to place those resources in law enforcement rather than in the jail. When a place to put someone is needed, the jail is a convenience. When there are problems in the jail, it is an albatross. In any event, it is not the sheriff's priority.⁵⁸

In this recommendation, therefore, the Commission builds on its earlier recommendations with respect to proper training for jail personnel by emphasizing the need for the person in charge to have the jail as his or her full-time responsibility.

In making this recommendation, moreover, the Commission recognizes that many jails may not have the inmate load to require, nor the resources to support, a full-time trained administrator. That situation, we believe, is a signal that the jurisdiction concerned is too small to warrant maintaining a jail and in the interest of economy and better service it should join with other jurisdictions in creating a multijurisdictional entity to provide incarceration services. This situation is one which our earlier recommendation on interlocal cooperative arrangements is intended to address.

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.

Chief Justice Warren Burger succinctly stated the

basic rationale for this recommendation when he declared that "every correctional institution must be made a[n] . . . educational institution . . . or we will continue the melancholy business of releasing inmates less fit to resume private life than before conviction."⁵⁹ Yet there is an important secondary reason for making better use of the jail as an instructional institution. As one report noted:

Jail staffs are too often confronted with the situation of prisoners who have idle time on their hands with nothing constructive to do. Most jail officers will testify that an "idle mind is the devil's workshop" and this kind of situation makes the jail more difficult to run.⁶⁰

It can be argued that it is more realistic to press the case for educational programs in prisons than in jails, considering the much longer terms served in prisons. But we believe the issue is only one of degree; the time available in jails may be shorter but it still should be used productively for the benefit of the inmate, the institution, and society at large.

In-house educational programs obviously are feasible only where the jail population is of a certain minimum size. Even in the largest jails, however, such programs evidently are frequently lacking today. In 1982, among jails with populations of 63 or more inmates, only 54.9% had GED (general equivalency diploma) programs, 35.9% provided adult basic education courses, 17.5% conducted vocational training, and 32.7% allowed "educational release" for inmates to get instruction outside the walls.⁶¹ Moreover, only 53.4% of these largest facilities had designated space for a library.⁶²

The smaller jails need not go without an educational program. Here arrangements may be made with various community institutions to bring educational and training programs to the jail. The public schools and community colleges are the most obvious candidates for service delivery. Universities might find their extension programs a good vehicle for making various course offerings available to inmates. The community's libraries also should be used, with bookmobile service perhaps being most adaptable to the jail's needs.⁶³

Some corrections and educational professionals question whether jails should provide vocational education as well as GED and adult basic education. They cite the high cost of providing specialized shops, the limitations of space in the average jail, and the slim prospects of having much impact among

inmates who are in for only short periods. That such a small percentage of jails currently provide vocational training, they contend, reflects sound judgment as to the cost-effectiveness of such programs. Vocational education supporters concede some cost concerns but argue that, considering the backgrounds and career prospects of many of the inmates, vocational training is likely to benefit them as much in their post-incarceration lives as the equivalent time given to GED and adult basic education. On balance, the Commission believes that jail training programs should not include vocational training.

The Commission is aware of the fact that in many jurisdictions educational services to law-abiding citizens need to be upgraded and that the provision of such services is a prime responsibility of government. Providing jail inmates with such minimal educational services as GED programs, however, should not normally interfere with providing solid educational services to the general public. Moreover, the Commission believes that furnishing incarcerated individuals with basic education will benefit not only those individuals, but, in the long run, society generally.

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 these educational efforts will never 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 pri-

vate companies and correctional institutions, including jails, under which convicted inmates can produce, for sale in the open market, certain goods and services that are not in unfair competition with the private sector. The Commission further recommends that states enact legislation authorizing the sale of such goods and services within their own borders.

Over the past decade, interest in the productive capacity of correctional institution inmates has risen rapidly. It is the focal point of some state legislative and Congressional bills and enactments and is the chief topic of more than one speech by the Chief Justice of the United States. Unlike earlier phases of our correctional history when prison labor was exploited by private industry and prison-made goods competed unfairly in the open market, the present approach to correctional institution-private company collaboration in producing goods and services emphasizes that inmates "would receive a meaningful assignment, enhance their employment skills, and earn money which could be used at release."⁶⁴

The correctional theory underlying this approach, known to many as the Free Venture program, is that the work ethic has as much rehabilitative promise as any of the correctional institution-based treatment programs.⁶⁵ The fiscal argument raised is that these programs are too costly to operate.

The Free Venture program, in large measure, grew out of the Law Enforcement Assistance Administration's (LEAA) recognition in the early 1970s of the potential value of properly managed prison industry programs and its subsequent funding of research studying both the economic and rehabilitative results of such programs.⁶⁶ The Free Venture effort initially sought to encourage states to introduce private industry concepts into prison industries, thereby prompting a gradual shift from instructional program-oriented workshops to actual business environments within the prison. By the late 1970s, the goal became one of actually bringing private companies into the prisons on a contractual basis.⁶⁷

The reasons advanced for this significant shift were largely three-fold: (1) businesses were felt to be more efficient than correctional agencies in organizing and operating such industries; (2) private sector employment was thought to provide more to inmates than correctional-run shops by way of supervision, equipment, wages and, above all, a meaningful work record; and (3) private industry was believed to have

the potential of converting correctional institutions, as the Chief Justice has phrased it, from "warehouses into factories with fences around them."⁶⁸

To achieve these goals, state as well as federal legal barriers had to be lowered or limited. By 1982, more than 20 states had passed legislation authorizing some form of access to private commercial markets within their respective jurisdictions and some form of private company involvement with corrections industries, chiefly those in prisons. Alaska, Florida, Indian, Kansas, Minnesota, Ohio and Washington enacted the more innovative and far-reaching of these statutes.⁶⁹ This Commission recommendation, of course, urges the remaining states to take comparable action, while carefully assessing the goals of such programs and the best ways of achieving them.

Rehabilitation, ending idleness, and profitability are frequently cited as the prime purposes of correctional industries. Initial assessments of the existing state-authorized programs highlight the need for a clear definition of the program's purposes and for recognizing the potential as well as actual conflict between and among the three goals. Most of the existing authorizing statutes fail to articulate these goals in a clear or mutually consistent fashion. Furthermore, common sense and practice suggest that reconciling all three within a single system probably is not possible. "Idleness," as one group of experts warns, "can be resolved by employing large numbers of inmates in labor-intensive jobs, but this conflicts with a capital-intensive economy and the concept of rehabilitation. Providing rehabilitation involves extensive vocational training which, if provided by industries' shops, effectively obviates profit."⁷⁰

Recognizing the need for carefully drafted enabling legislation and for an awareness that all of the goals of the Free Venture model may not be simultaneously achieved, the Commission is convinced that an expansion of state efforts in enacting and refining Free Venture programs is justified. In lieu of such efforts, the nation will simply continue on the counterproductive course of warehousing human beings.

Even though this approach thus far has focused on state prisons and their long-term inmates, the Commission recommends that states extend the potential benefits of the program to jails and their shorter term convicted inmates. Although sentences in jails typically range from 90 days to a year at the most, idleness is not absent during these periods. The proximity of many jails to large service and manufac-

turing areas, inmate awareness of their early reentry into society, and the chance to combine the program with work-release constitute favorable factors that prison-based programs often lack. The National Association of Counties has concluded that the Free Venture program can be adapted to many local jails, while noting that it might not, in all cases, be economically feasible. The Commission accepts this policy position along with its caveat.

A crucial factor in developing successful Free Venture programs is the cooperation of business, labor and the communities in which jails and prisons are located. Hence in the drafting of state legislation or in developing perfecting amendments, the Commission urges full and frank consultation with these affected groups. Without their ultimate support, after all, the Free Venture alternative will remain a limited, largely untried option and its potential for ending inmate idleness and reducing correctional costs will be largely a theoretical one.

In overcoming possible opposition to Free Venture legislation and its implementation, not only should these potential benefits be stressed, but special care should be taken, especially in periods and areas of high unemployment, to emphasize that basic fair labor standards will be met. Authorizing state legislation, therefore, might—as many of the existing statutes do—stipulate that (1) inmates may only participate voluntarily; (2) wages must be paid for goods destined for the private market at a rate comparable to those paid for work of a similar character in the locality; (3) wages for goods and services used solely for public purposes may be paid at a rate less than the prevailing wage within the state, but not at less than the federal minimum wage; (4) deductions may be taken from inmate wages to reimburse state or local governments for the costs of confinement, to pay for dependents, to pay for any restitution pursuant to a court order, or to add to a savings account for use on release; and (5) paid inmate employment must not result in displacing employed workers or in impairing existing contracts for services.

These or comparable provisions can be combined to provide protection for prison and jail labor, while giving due consideration to the rights of free labor. Experience suggests that if some such balancing of these potentially conflicting interests is not struck, the Free Venture alternative will be a rarely used one. For these reasons, the Commission urges clear consideration of the “unfair competition” issue in the authorizing legislation.

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.

Each of the foregoing recommendations focused on some proposal for local correctional reform that could be addressed by local and state actions. The following recommendations speak to the somewhat more controversial role of the federal government in correctional activities.

Although the national government has long maintained an interest in subnational prison and jail policies because it must sometimes house federal defendants and, occasionally, offenders in such facilities, the notion of large-scale federal involvement in state and local criminal justice activities was first officially articulated in the late 60s with the inauguration of the Law Enforcement Assistance Administration (LEAA). Over 14 years, the now defunct agency poured nearly \$8 billion into criminal justice activities of all kinds, including corrections. Such figures are impressive, but it should be noted that the federal share of state and local correctional spending was always small. For instance, in 1979, “for every federal [correctional] dollar spent . . . state governments spent \$9.62 and local governments \$5.60,”⁷¹ while in 1981, states spent \$11.66 and localities \$6.24 for every one federal dollar.⁷²

Although the utility and propriety of federal criminal justice spending has been questioned repeatedly throughout the years, supporters of federal efforts point to a number of LEAA's accomplishments, the foremost being seed money for many successful community-based programs offering alternatives to incarceration. Moreover, despite the fact that conservatives were among the most vocal critics of LEAA, the current Administration's proposed "Comprehensive Crime Control Act of 1983" contains a package of aid to states and localities.

Whether or not any of the current "crime bills" wend their ways through Congress, the federal government remains involved in both state and local corrections through a number of programs and agencies, most notably, the National Institute of Corrections (NIC). Established in 1974 "to help advance the practice of corrections at the state and local levels,"⁷³ NIC has concentrated its efforts in the areas of training, technical assistance, information dissemination and research and development—activities that even many vociferous critics of federal involvement in state-local functions believe the national government does well.

Specifically, in fiscal year 1983 through its National Academy of Corrections—an agency division created in 1981 in direct response to Chief Justice Warren Burger's call for a centralized, national training center—NIC conducted six sets of Jail Special-Issue Seminars. Seminar topics included: (1) developing state resources to assist jails; (2) state jail inspectors seminar; (3) jail facility and architectural plan review; (4) corrections as part of county government; (5) development/implementation of state jail standards; and (6) emerging issues in the jail area. Moreover, through its Outreach Program, the academy planned in 1983 "to support and encourage the presentation of 50 state or local training seminars that will reach an additional 1,000 correctional staff."⁷⁴

In the area of technical assistance, NIC offers short-term direct assistance designed to support 900 services nationwide to state and local prisons, jails, probation and parole agencies, and community programs. In addition, the agency offers a number of technical assistance grants including those aimed at (1) general operations in jails and community corrections; (2) planning new institutions; (3) jail area resource centers; and (4) development of state resources to assist jails. NIC's Information Dissemination Service is provided free to state and local corrections practitioners. The Information Center in Boulder, CO, maintains a computerized library of

pertinent materials and an information search service.

Finally, through its Policy Development and Evaluation Program, NIC made grants available for studying state-local probation practices, mentally ill and retarded inmates, and prison industry programs. Major ongoing studies included a prison overcrowding project and a study of differential incarceration rates.

Some critics of the current federal role in state and local corrections maintain that because operating prisons, jails, and related correctional activities is so traditional a state and local function, federal involvement of almost any kind is improper. Such critics contend that although activities like research and development are minor in scope and intrusiveness, they often represent the opening wedge for broader and more interventionist federal policies.

On the other hand, a different set of critics complain that NIC's annual appropriation of about \$11 million is hardly sufficient to the large task at hand. After all, the poor training of personnel is widely cited by correctional experts as the number one problem facing jails today. NIC's yearly expenditures of around \$5 million for training purposes—diluted even further because it is divided among correctional managers and staff, incarceration and nonincarceration specialists, and state and local employees—barely scratches the surface of what the Chief Justice has called the "grave weakness" of correctional training.⁷⁵

This Commission agrees with the Chief Justice and others that the federal government can play an important role in the area of training, on a voluntary basis, both jail managers and guards. Moreover, the Commission is convinced that the federal government, with its centralized resources, can aid corrections research and development and provide much-needed expert information to jails across the nation in the forms of practical responses to individual inquiries; publications on significant issues facing corrections; and the exchange of information on current practices. Finally, the Commission believes that there is an urgent need for the continued provision by the federal government of technical assistance to states and localities. Such assistance can help to identify problems within an institution and thereafter provide professional consultation aimed at solving those problems. For those reasons, the Commission urges continued involvement by the federal government in 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.

A sensible, salutary and even traditional approach to defining a legitimate federal role is reflected in this recommendation. The authorized donations might be made either gratuitously or at a price discount. Presently, states and localities may acquire federal surplus property for corrections and related purposes only through leasing agreements or negotiated sales. The Commission feels these activities warrant the same, if not greater, priority treatment to that accorded functions now cited in the Act.

This proposal, it should be noted, represents an adaptation of a recommendation made by the Attorney General's Task Force on Violent Crime.⁷⁶ It differs insofar as it includes not only correctional facilities but also agencies providing community-based services. By focusing on a range of interrelated functions that runs the gamut from probation to parole; to community-based programs for the convicted as well as for juvenile offenders, the mentally ill and retarded, and substance abusers; to straight incarceration; the Commission is mindful of the composition of our present jail population and of the need to separate out various types of nonoffenders, juveniles, and minor misdemeanants from its ranks.

A clearinghouse on federal surplus property already has been set up within the Federal Bureau of Prisons as a follow-up to a recommendation of the President's Task Force. Its job is to assist state and local correctional agencies by informing them of suitable surplus properties. Final responsibility for processing and approving applications, of course, remains with the General Services Administration.

The Commission's recommendation, if enacted, would expand the types of surplus property as well as the purposes for which such property might be donated. But the Department of Justice's clearinghouse would be retained, serving as the agency through which the Attorney General would screen conveyances and make recommendations to the Administrator of the General Services Administration. The latter, of course, would exercise ultimate administrative responsibility. In practice, the GSA Administrator would determine whether or not a proposed donation is properly justified in light of the value or nature of the surplus property involved. Where a donation is found faulty on either ground or where no proposal is pending, the property in question would

be made available for other purposes stipulated in the act or in related legislation. Finally, in cases where an application for correctional or related uses, in effect, competes with applications for other purposes detailed in Section 203, the Administrator would select the recipient after reviewing the applications on the basis of their respective purposes, the adaptability of the property involved for those purposes, the benefits to be derived under each of the proposals, and the character and value of the real property at stake.

Those opposing this recommendation advance four different and sometimes conflicting arguments. Some contend that its proposed expansion of the fairly lengthy current list of preferred activities in the act would only serve to deplete the limited supply of what surplus federal real property there is. A few maintain that the presently eligible functions—schools and hospitals, parks and recreation, airports and historic monuments, fish and wildlife—deserve their preferred status under the surplus property law and that correctional and related activities are not in the same class and lack the level of consensual support that the others possess. Other opponents of this proposal contend that, if enacted, it simply would lead to more jails and prisons and ignore non-incarceration alternatives as well as many of the root causes of jail overcrowding. Finally, a contrasting cluster of critics maintains that the recommendation represents a paltry and parsimonious federal response to jail, prison and community-based corrections needs, given the limited supply of surplus property, the number of other preferred competitors, the unsuitability of many surplus properties for correctional or community-based purposes, and the cost to states and localities of modernizing those properties deemed suitable.

The Commission finds each of these criticisms to be faulty. The depletion argument ignores the fact that not all surplus federal property is appropriate for the preferred purposes cited in the act and realistic competitors recognize that the supply is not limitless. Assigning a lower preferred status to correctional and related activities reflects judgments from the past; current public and political opinion certainly places them on a par, if not at a higher level. The worry that prisons and jails will dominate the donation process ignores the Commission's careful inclusion of community-based correctional, juvenile and other rehabilitative service programs as equally deserving of Department of Justice and GSA consideration. It also ignores the not-so-fragile forces that

espouse the goals of these nonincarceration alternatives. The contention that this proposal represents a meager federal response to a major national problem ignores the federalist's preference for moderate but meaningful forms of nonintrusive national assistance. Moreover, the Commission scarcely claims this recommendation to be a cure-all.

The Commission urges that the various bills now pending before Congress for amending the *Federal Property and Administrative Services Act of 1949*⁷⁷ be modified to conform to the specific thrusts of this recommendation. Such action, the Commission is convinced, would broaden the political support for passage and contribute to ameliorating jail overcrowding, albeit moderately.

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.

Preceding recommendations have addressed a wide range of individual problem areas. Yet, some prominent observers have come to believe that the issues confronting local corrections are so complex and interrelated that they can no longer be addressed in isolation but must be considered in a comprehensive, integrated fashion from a national perspective. As Chief Justice Warren Burger recently declared:

Correctional policy, particularly during times of rapidly increasing prisoner populations and prison overcrowding, can no longer remain confined to one level of government or one segment of society. State, local and federal authorities must focus on these problems and in concert—within the framework of federalism—develop a national correctional policy to deal with them. . . . I will propose that Congress create a

National Commission on Corrections Practices to review these matters and propose remedial programs.⁷⁸

Similarly, the National Institute of Corrections has concluded that "no commonly accepted national policy [on corrections] exists."⁷⁹

Although it is sensitive to the problems that have generated such proposals, this Commission rejects both the need for, and the legitimacy of establishing a national body for determining corrections policy. Corrections remains an overwhelmingly state and local responsibility and federal involvement is properly confined primarily to those limited areas concerning the federal corrections system and violations of federal law and the Constitution. In addition, the Commission believes, as stated in the two previous recommendations, that the federal government may assist state and local corrections through such unintrusive and unprescriptive means as technical assistance and the donation of surplus property.

The Commission takes this position as a matter of principle, consistent with its earlier recommendations urging a clearer separation of national, state and local responsibilities in the intergovernmental system.⁸⁰ It believes that although many of the nation's jails are in a very troubled condition, requiring a well-planned and coordinated corrective strategy, problems existing within individual states and even among individual local governments are sufficiently different that a single national policy approach is unwarranted. Moreover, the proposed commission on corrections practices could become a "foot in the door" for future, unnecessary, and possibly intrusive expansions of federal involvement in this field.

At the same time, the Commission recognizes that there is a need in certain states to address, in an integrated and coordinated way, a wide range of pressing issues and possible reforms in corrections policy. Because a variety of different officials at both the state and local levels of government should be involved in these explorations, the ACIR suggests that correctional commissions be established in such states—with both state and local members—to assist them in developing comprehensive corrections policies. It emphasizes, however, that the decision to create such bodies is best left to state and local officials in the respective states. In this way, leadership in correctional reform will rest at the levels that have the prime legal authority and basic fiscal responsibility for instituting changes in this area.

Recommendation D.4

NO NEW 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.*

This recommendation, together with existing ACIR recommendations about the circumstances that warrant new federal assistance programs, expresses the Commission's firm belief that proposals for further federal involvement in local corrections must be given careful and searching scrutiny by Congress and by officials at all levels of government. Despite periodic claims that the problems confronting local jails have reached crisis proportions and have been exacerbated by federal government policies affecting, among others, pretrial federal detainees, the mentally ill and juveniles, the strong tradition of state and local responsibility for jails and the mixed record of past federal aid efforts in this area demand that the utmost caution be exercised before proceeding with new aid proposals.

The Commission is aware that serious arguments have been made for new forms of federal financial assistance to help deal with problems in local corrections. One proposed approach would have the federal government provide incentive grants to stimulate state-local criminal justice partnerships. Recognizing the crucial state role in reforming local corrections and the clear need for effective state-local collaboration in nearly all aspects of this problem area, this strategy attempts to reform local corrections practices by stimulating progressive intergovernmental partnerships and collaboration.

This approach to federal assistance has been endorsed by the National Association of Counties (NACo), which has stated in Congressional testimony that:

. . . federal legislation that provided incentive funding to states that developed in partnership with county governments com-

*Commission member County Board Chairman Gilbert Barrett dissented.

munity corrections legislation could in our judgment substantially reduce unnecessary confinement if properly linked to well conceived sentencing guidelines. Statewide community corrections programs . . . serve to promote multicounty programming . . . support a planning process to manage and evaluate correctional resources at the local level . . . [and] offer both states and counties a major solution to the problems of overcrowding and substandard conditions in prisons and jails.⁸¹

Advocates of this approach to federal aid suggest that it would not be entirely unprecedented, noting that some of the \$7.7 billion spent by the U.S. Law Enforcement Assistance Administration (LEAA) in the 1960s and 1970s helped fund early local experiments in community corrections.

Other proposals for federal financial assistance focus more narrowly on the immediate and growing problems of jail overcrowding and substandard conditions. They entail creating a large scale program of federal aid for jail construction and modernization. Advocates of this approach point to data illustrating the problems of jail overcrowding and substandard conditions, including recent increases in jail populations,⁸² to the growing numbers of jails that exceed their planned capacity,⁸³ and to the large numbers of jailed inmates housed in inadequate amounts of space. To deal with such problems, legislation providing federal aid for jail and prison construction has been introduced in recent years in both houses of Congress.⁸⁴

The ACIR supports neither of these approaches for providing federal assistance to state and local correctional systems. Philosophically, the Commission is already on record against expanding federal government involvement in traditional state and local activities.⁸⁵ The Commission also has cautioned against further enlarging the categorical aid system.⁸⁶ Instead of ad hoc accretions to a still vast and often unmanageable system of federal aid, the ACIR has urged greater "sorting-out" of functional responsibilities among the different levels of government, with each level concentrating greater efforts on its own areas of primary concern. The Commission believes that if the federal government assumed greater responsibility for concerns that are more clearly national in character, such as income maintenance and health care for the needy, state and local governments could cope more effectively with the demands

being placed on local jails—without federal assistance. Rather, the Commission believes that its prior recommendations in this report addressed to state and local governments, if properly and fully implemented, would enable these governments to resolve most local correctional problems on their own.

Despite this general position, the Commission does not absolutely rule out further federal financial assistance for local corrections under all conceivable circumstances. It believes that such aid might be justified under limited conditions where it is carefully targeted to serious problems that are clearly and closely linked to significant national interests. One area that may merit further study under this standard involves the incarceration of illegal aliens and refugees in state and local correctional systems. By one estimate, there are approximately 4,000 aliens currently being held in state prison systems, at an estimated annual cost of \$57 million.⁸⁷ That estimate does not include additional costs imposed on local jails for which no estimate presently exists. Because these persons are present in the states wholly or partially as a consequence of national immigration policies and enforcement practices, some policymakers have proposed that the national government reimburse state (and by implication local) governments for the costs of such prisoners. Although the Commission has not studied this problem in detail, it recognizes that on rare occasions such issues may warrant careful scrutiny by Congress to determine if a powerful national interest overrides the prudent overall policy of nonfederal involvement in state and local corrections practices.

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.

From small beginnings only a little over a decade 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.”⁸⁸ “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,”⁸⁹ to 16,741 in 1981.⁹⁰ 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.⁹¹ As of March 1982, 38 states, as well as the District of Columbia, Puerto Rico and the Virgin Islands, were operating under existing court decrees or were involved in pending litigation affecting either the entire prison system or some major institution.⁹² The majority of such actions were brought or are being brought in federal courts. Most observers would agree that no recent initiative in the field of corrections has had a comparable impact to that of federal (and, to a certain extent, state) judicial intervention into state and local institutional arrangements.

If nothing else, the so-called “institution cases” ruling on, and ordering changes in state prisons, mental institutions, and increasingly in local jails,

are notable for their volume. Yet, the quantity of such cases is not their most distinguishing characteristic; 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. . . . 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.⁹³

Few would dispute the findings in most such court decisions that the conditions in the institutions under order are deplorable. And with findings of un-Constitutional conditions in hand, it would be extremely difficult for even a moderately compassionate jurist not to order changes. Findings of Constitutional violations simply 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, that 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—in theory, 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 [this state] 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*.⁹⁴

Thus, judges of the 1970s and 1980s who oversee the era of jail litigation have taken on the additional functions of state and local legislators and executives. 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 violations. 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 governmental funds.⁹⁵

Sweeping use of the 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. . . . [The judge] has no occasion to be concerned about the impact of his ruling on limited state or local financial resources. Understandably, the judge is likely to say that Constitutional rights cannot be denied by an appeal to budget difficulties. As a result, public resources may fund a function or service which is the subject of litigation at the expense of other valuable services not before the court. 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.⁹⁶

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?⁹⁷

Unfortunately, the Supreme Court has offered the lower courts only limited guidance in this area. However, what guidance there has been appears to

lean toward encouraging a greater measure of judicial deference. For instance, in 1981, the Court opined:

When conditions of confinement [do] amount to cruel and unusual punishment, "federal courts will discharge their duty to protect constitutional rights." In discharging this oversight responsibility, however, *courts cannot assume that state legislatures are insensitive to the requirements of the Constitution or to the perplexing sociological problem of how best to achieve the goals of the penal function in the criminal justice system.*⁹⁸

Moreover, in a more recent institutional decision dealing with the rights of the involuntarily confined (in this case, residents of a state mental hospital), the Court indicated that judges should generally yield to "professional" determinations:

It is not acceptable for the courts to specify which of several professionally acceptable choices should have been made. . . . [C]ourts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized. . . . In determining whether the state has met its obligations in these respects, decisions made by the appropriate professional are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function.⁹⁹

At least one observer does perceive the beginnings of a Supreme Court-inspired change at the lower court level:

Corrections law is developing in such a way as to retain strong civil rights enforcement, but the enforcement mechanisms are private, traditional legal remedies. This is a dramatic shift from equitable "clean-up" decrees administered by federal district court judges.¹⁰⁰

Others, however, believe that the High Court's mes-

sage has been far too ambivalent to effect any wide-ranging changes in the way district and appellate judges deal with institutional reform:

. . . Burger Court opinions . . . reflect a restlessness about the sweep of federal court injunctive power, especially where it is used to undertake systemic reform of state and local institutions. In those opinions, federalism becomes a factor to weigh in reviewing the legitimacy and propriety of remedies ordered by lower courts. Yet, when one looks at the overall thrust of Burger Court opinions, it is difficult to conclude that the federal courts have been swayed in any fundamental way from their pattern in exercising equity powers.¹⁰¹

The role of the federal judge in the local jail is obviously a troublesome one. On the one hand, many persons legitimately argue that a high degree of judicial intervention has been necessitated by the refusal of state legislatures and county boards 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 commissioner. So go ahead and sue me."¹⁰²

Jails and jail inmates may finally have found some measure of relief 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." Raising, allocating, and spending public funds are legislative and executive prerogatives—in these cases, *state and local* prerogatives. Disturbing questions are raised not only about the separation of powers but about federalism as well. The new judicial mandates are like the proverbial two-edge sword—cutting for jail improvement, but against local discretion. Although that judicial sword must remain available for correcting those situations where appropriate authorities refuse to act, the Commission believes that federal principles, separation of power doctrines, and practical considerations demand that it be more carefully drawn and more readily sheathed.

FOOTNOTES

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- 2 *Stack v. Boyle*, 342 U.S. 1 (1951).
- 3 *Gross v. Tazewell County Jail*, 31 CrL 2061 (W.D. VA., March 2, 1982).
- 4 William F. Duker, "The Right to Bail: A Historical Inquiry," 42 *Albany Law Review* 35 at 41 (1977).
- 5 *Illinois Rev. Stat.* ch. 38, Section 110-7(a), (f).
- 6 Includes the District of Columbia.
- 7 Some of the 26 states may, in fact, have case law that interprets existing legislation to allow for the implementation of 10% within the statutory wording.
- 8 D. Alan Henry, *Ten Percent Deposit Bail* (Washington, DC: Pretrial Services Resource Center, 1980), p. 6.
- 9 *Ibid.*, p. 11.
- 10 Janet Frohman, "A County Official's Guide to Pretrial Release," draft, National Association of Counties, p. 11.
- 11 Walter H. Busher, *Citation Release: An Alternative to Pretrial Detention* (Sacramento, CA: American Justice Institute, 1978), p. 3.
- 12 Jan M. Chaiken and Marcia R. Chaiken, *Varieties of Criminal Behavior*, R-2814-NIJ cited in "Portrait of a Career Criminal: Youth, Drugs, Violence," *Rand Research Review* VII (Spring 1983): 4.
- 13 Chief Justice Warren Burger, address before the annual meeting of the American Bar Association, February 8, 1981.
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- 15 Cited in *Criminal Justice Newsletter*, 3 August 1981, p. 3.
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- 20 M.G. Rector and D. Gilman, "How Did We Get Here and Where Are We Going—The Future of the Juvenile Court System," in *Criminal Justice Review* 1 (1976) cited in Legge and Webb, "Removal of Juvenile Offenders From Adult Jails," p. 230.
- 21 M. Flaherty, *An Assessment of the National Incidence of Juveniles in Adult Jails, Lockups, and Juvenile Detention Centers* (Washington, DC: U.S. Government Printing Office, 1980) cited in the National Center on Institutions and Alternatives, *And Darkness Closes In: National Study of Jail Suicides* (Washington, DC: The National Center on Institutions and Alternatives, 1981), p. 5.
- 22 Children's Defense Fund, *Children in Adult Jails* (U.S.: Washington Research Project, Inc., n.d.), pgs. 3-4.
- 23 See *Chapter I* of this report.
- 24 Rob Wilson, "Who Will Care For the 'Mad and Bad'?" *Corrections Magazine*, February 1980, p. 14.

- 25 Joseph Rowen as quoted in *ibid.*
- 26 Matthew Meyers as quoted in *ibid.*
- 27 National Coalition For Jail Reform, *Jail Is The Wrong Place To Be For Mentally Ill and Retarded Persons* (Washington, DC: National Coalition for Jail Reform, n.d.).
- 28 National Coalition for Jail Reform, *The Public Inebriate: Jail is Not the Answer* (Washington, DC: National Coalition for Jail Reform, n.d.).
- 29 *Ibid.*
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- 31 Vera Institute of Justice, *The New York Community Service-Sentencing Project*, (New York: Vera Institute of Justice, May, 1981), p. 6.
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- 35 See Chapter II of this report.
- 36 See Chapter II of this report.
- 37 See testimony of Dale G. Parent in the Appendix B to this report.
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- 47 *Ibid.*, p. 4.
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- 50 *Ibid.*, p. 231.
- 51 *Ibid.*, p. 119.
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- 53 *Ibid.*, p. 151.
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- 62 *Ibid.*, p. 97.
- 63 *Ibid.*, p. 97.
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- 81 Testimony of Donald Murray, Director, Criminal Justice Program, National Association of Counties, before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 98th Cong., 1st sess., February 24, 1983, pp. 7, 8.
- 82 U.S., Department of Justice, Bureau of Justice Statistics, "Jail Inmates, 1982," Bulletin, NCJ-87161, Washington, DC, February 1983, pp. 2-3.
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- 97 Archibald Cox, *The Role of the Supreme Court in American Government* (London: Oxford University Press, 1976), pp. 95-96.
- 98 *Rhodes v. Chapman*, 49 LW 4677 at 4680 (1981). (emphasis added)
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- 100 Candace McCoy, "New Federalism, Old Remedies, and Corrections Policymaking," *Policy Studies Review* 2 (November 1982): 271.
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Recommendations from State-Local Relations in The Criminal Justice System

The following are Commission recommendations from a previous report, *State-Local Relations in the Criminal Justice System* (A-39). These recommendations address a variety of issues revolving around the courts and the administration of justice. They were adopted by the Commission at its September 11, 1970, and January 22, 1971, meetings.

Recommendation 16

A UNIFIED, SIMPLIFIED STATE COURT SYSTEM

The Commission recommends that each state establish a simplified and unified court system, consisting of a supreme court, an intermediate court of appeals if necessary, a general trial court and special subdivisions of the general trial court performing the duties of courts of limited jurisdiction. The Commission also recommends that the states abolish justice of the peace courts, or overhaul them by placing them under state supervision, direction and administration; by compensating justices by salary rather than by fees; and by requiring them to be licensed to practice law in the state or pass an appropriate qualifying examination. The Commission further recommends that all courts be subject to administrative supervision and direction by the supreme court or the chief justice; to uniform rules of practice and procedure promulgated by the supreme court subject to change by the legislature; and to the flexible assignment by the supreme court or chief jus-

tice of judges from court to court within and between levels.*

Examination of state criminal court systems reveals that a number of their basic problems stem from organizational and administrative weaknesses. These have a particularly serious effect on the lower courts—where the most critical problems are found—but they also hamper the rest of the system.

In most states at the present time, constitutions and statutes disperse responsibility for court operations widely among the individual courts at the general trial and lower court levels. One state reported to the federal Law Enforcement Assistance Administration, for example, that each of its general trial courts is a judicial “kingdom” with its own jealously guarded prerogatives. For the lower courts, the lack of pinpointed statewide responsibility for the judiciary is an underlying cause of the neglected conditions in which many find themselves.

Present constitutional and statutory provisions also frequently vest individual courts at the same or different levels (i.e., general trial and lower courts) with concurrent jurisdiction over certain kinds of criminal cases. Thus, in a number of cities an offender may be charged with petit larceny in any one of three or more courts—a city or municipal police court, a county court, or a state trial court of general jurisdiction. Each of these courts may have different rules and policies resulting from differences in judges, prosecutors and traditions. While one court may be swamped with cases, the docket of another is current. In one set of courts the judges may be nonlawyers, cases may be prosecuted by police officers, and probation services may be nonexistent. In contrast, other courts may have judges trained in the law, professional prosecutors, and probation officers. Judicial and prosecutorial salaries and the budgets for probation services in the same city also may differ.

Thus, proliferation of lower courts and overlapping of jurisdictions leads to an uneven administration of justice. The treatment an offender receives depends in large part on which of the several available courts he is tried in. Moreover, the taxpayer has to pay for maintaining two or more parallel sets of courts.

*Governor Hearnese dissents from that portion of *Recommendation 16* dealing with the reform of the justice of the peace courts and states: “I believe that full-scale court unification can be best accomplished through the abolition of the post of justice of the peace rather than its overhaul.”

What is needed is a simplification and unification of court structure and a clear fixing of overall responsibility for seeing to it that the courts function as a system in a reasonably coordinated and consistent manner. Considering the separation of powers, this overall responsibility must be placed within the judiciary branch itself and the obvious place to put it is in the supreme court or its chief justice.

To exercise this responsibility in a manner calculated to achieve the ends of fair, swift and efficient justice, the supreme court needs certain minimum powers: the authority to promulgate rules of practice and procedure, subject to legislative review; the power to prescribe and monitor statistical reporting system, and to examine and recommend administrative practices, all designed to assure the equitable and expeditious handling of individual cases; and the power to assign judges to avoid the buildup of case backlogs and reassign in one court while in other courts judges enjoy light schedules. Only with the effective exercise of these basic powers can justice be administered throughout a state court system in a fair, effective manner.

The President's Commission on Law Enforcement and the Administration of Justice found that the lower courts—those which dispose of cases that are typically called misdemeanors and that process the first stages of felony cases—are the principal focus of difficulties in state court systems. Their finding was not unique: it was made by many other study groups at the national, state and local levels prior to the President's Crime Commission and has been reiterated in this report. Certainly the causes of lower court difficulties involve more than their place in the overall state system. The quality and quantity of judicial and nonjudicial personnel, and the source of financing also are critically involved. We direct our attention to these matters in subsequent recommendations. While acknowledging these matters, it is the Commission's firm conviction that the reduction in numbers and kinds of lower courts, the clarification of jurisdiction, and the clear pinpointing of overall administrative responsibility in the supreme court—with the instrumental powers referred to—are essential elements of any program of reform of these courts.

The President's Crime Commission concluded that an underlying cause of the problems of the lower courts is the neglectful and negative attitude toward them on the part of the public, the bar and even the judiciary, summed up in the word “inferior” which is often applied to them. Many noted authorities,

however, have emphasized that it is a mistake to use this term of reference, for these are the courts that handle the great bulk of criminal cases; the only courts to which most people are exposed; and the courts which are most influential in determining whether an accused continues on a career of crime or becomes a law-observing citizen. Yet, deserving the name or not, the lower courts have it, and will continue to have it unless drastic measures are taken to end their position of neglect.

The President's Crime Commission recommended that the basic structural solution to the problem of lower courts in urban areas was to merge them with the general trial courts. The present system of separate urban lower courts, its members contended, has produced lower standards of judicial, prosecutorial, and defense performance in the misdemeanor and petty offense courts. Procedural regularity has been a casualty. Both the community and the offender suffer when the offender is processed through these courts, for he often receives a lighter sentence than is appropriate, and is unable to benefit from rehabilitative facilities more frequently utilized by the higher courts.

By consolidating the lower courts with the general trial courts, in accord with the Crime Commission's proposal, all criminal prosecutions would be conducted in a single court manned by judges who are authorized to try all offenses, and all trial judges would be of equal status. Such unification would not change the grading of offenses, the punishment, or the rights to indictment by grand jury and trial by jury. But all criminal cases would be processed under generally comparable procedures, with stress on procedural regularity and careful consideration of dispositions. The Crime Commission noted, however, that the precise form of unification would have to reflect local conditions.

Some feel that merger of the misdemeanor and petty offense courts with courts of broader jurisdiction may be ideal from a psychological point of view, but that it is not practical. There is an essential difference between the two types of cases and they will inevitably be given different kinds of treatment, these observers contend. They cite the court unification accomplished in the State of Illinois by constitutional amendment in 1962, whereby all lower courts were abolished. Yet in recognition of the practical differences in types of cases, the amendment authorized the general trial (circuit) court to appoint magistrates to handle cases formerly handled by the separate courts. While the magistrates are parts of

the circuit courts, they are clearly not of equal status with the circuit judges.

It is also worth noting that consolidation of all lower courts with general trial courts may run into the problem of municipal courts authorized by separate constitutional provision, as happened in Colorado. To avoid disturbing a sensitive home rule article in this type of case, it can be urged that it is wiser to accept continuance of the separate municipal courts.

The National Municipal League's model state constitution offers an alternative approach to cleaning up the structural problems of the lower courts. It limits courts to those that can be established uniformly throughout the state. This approach would at least avoid the cheapening effect of proliferation of minor courts as well as assuring the avoidance of overlapping jurisdictions. Municipal courts authorized under home rule charters would seem to fit the uniformity provision.

In our judgment, special subdivisions of the general trial court should assume the duties of courts of limited jurisdictions. This approach would make the most significant improvement in the structure of the state trial courts. It would eliminate the problem of proliferation, enhance the goal of more uniform procedures, and generally provide a more even administration of justice.

Turning to nonurban lower courts, this Commission believes that unification and simplification of the court system should include abolition or substantial overhauling of the justice of the peace courts. These courts are a "universal and universally condemned, American institution." The JP is paid by fees in most of the 33 states which still have them. In these states, the JP collects only when he convicts, so that he has come to be called "justice for the plaintiff." His adjudication of traffic violations within a small unit—frequently his major task—interferes with uniform traffic law enforcement, and tempts him to discriminate against the "outsider" and in favor of the local offender. This parochial loyalty is fortified by his lack of legal training. Most of the 33 states require no legal training for the office. Finally, poor court facilities and lack of decorum in JP proceedings tends to undermine public confidence in the entire judicial system.

The justice of the peace, in many respects, is a relic of earlier and simpler days and, as presently constituted, is not capable of meeting the demands of contemporary justice. A key indicator is the high rate of inactivity in the office in some states. As long ago as 1955, only 167 of Kentucky's 678 justices were

active, and not more than half of them tried many cases. In 1967, Kentucky JPs were active in criminal cases in only 37 of the state's 120 counties, and only 101 of the 626 JPs were performing judicial duties.

The Commission notes that if justice of the peace courts are abolished, their functions could be taken over by courts of general jurisdiction as was done in Illinois in the early 1960s; or their place could be taken by a consolidated magistrate or county court, as was done in Missouri in 1945, in Tennessee in 1959, in Maine in 1961, and in South Dakota in 1966.

If retained, the JPs, in our judgment, should be required to be compensated by salary so as to avoid the temptation of having their judgments turn on the source of compensation rather than the merits of the case and the law. Many jurisdictions have taken this step, including Delaware in 1965; and North Carolina starting in 1970. To make the office worthwhile and attractive, and yet within the financial resources of localities, this would probably mean a reduction in the number of justices.

A second condition for retention of JPs is that they be required to be lawyers or to have completed rigorous judicial training prior to assuming office. Several states have such requirements. All New Jersey judicial officers entering office since 1947 have been required to be trained in the law; judicial officers in Washington's three largest counties must be attorneys; and in New York, Mississippi and Iowa, justices are required to complete training courses.

Finally, JPs should be made administratively accountable to, and placed under supervision of the state court system. The trend is toward vesting this overall supervisory responsibility in the supreme court, or its chief justice, aided by full-time professional administrators. Such supervision should require that JPs keep records, prescribe the kinds of records to be kept, and provide guidance in keeping them. Delaware has been a leader among the states in providing supervision of JPs. In 1964, the legislature of that state provided the supreme court with a deputy administrator to render such supervision. Later, in an overhaul of the JP system in 1965 and 1966, the legislature gave the deputy administrator additional authority to assign justices to hold court where needed.

The overall reorganization the Commission proposes is not new—in theory or in practical adoption by many states. The merits of unification and simplification of state court systems have generated the support of many groups and individuals concerned with the improvement of the administration of jus-

tice, from Dean Roscoe Pound in 1906—who is credited with originating the idea—to such groups as the American Judicature Society, the American Bar Association, the National Municipal League and the President's Crime Commission. The Conference of Chief Justices in 1953 resolved that all trial courts of first instance in the state should be fully integrated into the judicial system of the state and wherever necessary a reorganization of the statewide system of courts should be undertaken to accomplish this objective.

Whether through the influence of the views of these authorities or the sheer force of the proposed system's merits, states have shown an increasing tendency to move toward the unified, simplified system of court organization. A total of 18 states can be considered as having unified or substantially unified court systems. As detailed in Chapter 4,* at least 20 additional states have made notable structural reforms in their court systems in recent years, many of them in the direction of a unified, simplified system. Yet, Maryland and New York, have had constitutional revision proposals before their voters encompassing unification and simplification reform, only to see them defeated because of opposition generated by other parts of and overall draft. Maryland subsequently approved a judicial reform article in 1970. In Georgia and Florida, the legislature in 1968 failed to approve submission to the voters of court reform proposals made by a legislative or other study committee.

Voter and legislative hostility to court modernization bring us to the criticisms of these reform proposals. Apart from the kind of situation cited in Maryland and New York, the obstacles of tradition and standpattism loom large, as they usually do on issues of major institutional alteration. Apprehension about changes in the status quo almost always explain a sizeable proportion of an "anti"-vote. In addition, the simplification and restructuring of courts at the general trial and lower court level, including the abolition of justices of the peace, raises the specter of possible abolition of other judicial offices. This threat nearly always arouses the opposition of those whose jobs are involved. Similarly, judges of general trial courts may resist the idea of elevating the status of lower courts, which they would regard as diluting their own power and prestige. Some members of the bar tend to oppose certain court reorganizations because they require an

*All references are to report A-38.

accommodation to new institutional arrangements. Moreover, they naturally may feel a reluctance to support a proposal which threatens the position of a judge whose office may be abolished by such a reform.

These more temperamental objections to a unified, simplified court system come under the general heading of "resistance of any major change." Others concern substantive policy issues and focus on the drawbacks of the change. Some argue against unification and centralization of authority in the supreme court as going too far in the direction of "bureaucratization" of the judiciary. Most of these critics, in effect, prefer the present system of decentralized judicial authority, perhaps with some attempt at fixing overall supervisory responsibility within each level: lower courts, general trial courts, appellate tribunals and the highest court. With respect to the JP courts, some fear that their abolition would do away with the "common man's court" where small cases can be heard informally. Old style home rule advocates, of course, oppose amalgamation of county or municipal-level courts with a state system. And a few judges fear the role that court administrators would gradually assume with a major reorganization.

Some of these reservations about unification and simplification have merit, but the Commission believes on balance that the advantages to be gained in terms of establishing a structural pattern of responsibility for continuing surveillance and improvement of the entire state judiciary far outweigh any disadvantages. Regarding "bureaucratization", this charge can always be leveled against an organizational structure needed to deal with the inevitable problems of large scale administration of a program over a large area—whether it is the administration of justice, health, education or whatever. The alternative, unfortunately, is what currently prevails in many states: a dispersion of authority among individuals courts or levels of courts, producing an unevenness of treatment that is inconsistent with a fair administration of justice. Against the claim that the JP court is easily available and the court of the average citizen, it can be argued that a new magistrate's court system or a subdivision of a general trial court can be administered in a manner to continue to assure accessibility and the atmosphere of a small man's court. By "riding a circuit," judges of such courts can assure availability in all sparsely settled areas that do not warrant a full-time magistrate.

With respect to the provision authorizing the leg-

islature to change rules of practice and procedure proposed by the supreme court, we generally tend to agree with the National Municipal League that such a provision is necessary to guard against untrammelled judicial rulemaking, threatening an invasion of the area of substantive law. At the same time and unlike the National Municipal League, we do not feel that an extraordinary majority is needed to protect against the threat of legislative interference in strictly procedural matters. In our judgment, the regular legislative process in the states provides adequate safeguards against this possible abuse.

To sum up, the Commission believes that the time has come to end the feudalism in a majority of the judicial systems at the state and local levels. Witness the overlapping jurisdictions, varying procedures, uneven dockets, administrative autonomy and jurisdictional proliferation that still are characteristic of half of these so-called systems at the present time. The prestige, purpose, and proper role of the judiciary are all brought into question as a result of the failure to achieve basic structural reforms, reforms that have been recommended for more than three score years. A simplified and unified system, reform or abolition of the justice of the peace courts, centralized administrative supervision, uniform rules of practice and procedure, and the flexible assignment of judges—these are essential measures of constructive change and basic features of this Commission recommendation.

Recommendation 17

STATE COURT ADMINISTRATIVE OFFICE

The Commission recommends that all states provide an administrative office of the state courts, headed by a professional administrator, to assist in the administrative supervision and direction of the state court system.

state court systems are large-scale operations. Expenditures on judicial activities in fiscal year 1968-69 amounted to approximately \$900 million. State governments alone employed 15,576 people in the courts, and cities and counties employed over 63,000 such personnel in the same year.

Any enterprise of this magnitude must be concerned with getting the most output for the dollar, to put the matter in cold fiscal terms. Moreover, in terms of its paramount purpose—fair and swift administration of justice—the court system must be

concerned that the administration of its affairs avoids backlogs and delays. Those, after all, are a principal shortcoming of many courts, particularly at the lower and general trial levels. For purposes of justice as well as sheer economics then, state and local courts must modernize their management policies and practices.

Administrative modernization involves making continual studies of work processes, so as to improve court procedures affecting the flow of court work. It means the installation of new procedures and modern techniques employing computer technology and hardware as well as microfilming. On the important personnel side, it means up-to-date recruiting, testing, and training techniques.

In fiscal administration, it involves revamped budgeting, purchasing, auditing and payroll preparation methods. Finally, in the matter which most intimately concerns the movement of cases through the courts, it means modern systems of statistical recording and reporting, because with these management aids, those responsible for seeing that delays are kept to a minimum will know how the caseload is flowing and where and when to intervene if necessary.

Individual judges or groups of judges are responsible for administration of individual courts. Where states have chosen to vest overall supervisory responsibility for the entire system in one point, they have placed it in the supreme court or its chief justice. Thus, technically, a judicial officer must be held ultimately responsible for the administrative affairs of the court systems. Yet, the knowledge, skills, and interests required to handle effectively the administrative operations of a court system are not necessarily associated with the qualifications or inclinations of a judge. This explains the growing recognition that state court systems need to be equipped with a professionally manned administrative office. This development has worked to the point now where 35 states are served by court administrative offices. Moreover, 1970 saw the initiation of the new Institute for Court Management, the purposes of which is to develop court executive officers for the state and federal courts.

Where the state has vested administrative responsibility for the entire state judiciary in the supreme court or the chief justice, it is, of course, logical to place the administrative office directly under the court or official. In states which have not done this, the administrative office might well be placed under the general direction of the judicial council or con-

ference which, as of 1968, existed in all but one state. In several cases, councils or conferences appoint existing administrative officers, which is a reasonable arrangement considering these bodies long have been responsible for the conduct of administrative studies and the submission of recommendations for improvements in this area. In a sense, administrative officers are inheriting these functions of judicial councils and conferences.

The scope of duties assigned to the administrative office naturally will depend upon the administrative powers and responsibilities of the body or official to whom it reports. In a state with a highly unified, simplified court system, the powers will be broad, covering the full gamut of expediting court business, performing fiscal duties, adopting standards of practice for nonjudicial personnel and perhaps hiring and training employees. They will also include studying and making recommendations for improvement of administrative organization and procedures, as well as serving as the secretariat to the judicial council and other statewide judicial bodies. Equally significant, the power exercised in these regards will extend not only to the highest court, the intermediate appellate court, and the general trial courts, but also down to the lower trial courts. The effective direction and supervision of a unified state judiciary require that the powers extend that broadly and that deeply.

The probability that a court administrative office in a state with a unified court system would exercise broader powers than its counterpart in other states was confirmed by the survey conducted jointly by the Commission and the National Conference of Court Administrative Officers. The survey found that the administrators of 15 unified state systems reported a higher degree of involvement with general trial and lower courts than the other 16 reporting administrators. It found that these officers were more intensively engaged in supervising or providing services to these lower courts, and employed noticeably more resources in discharging their duties.

Court administrative offices can not exceed the authority to supervise or serve that is bestowed upon the individual or body to which they are responsible. Thus, unless and until a state adopts a unified court structure, the scope of the authority of such offices will be limited. The Commission urges, however, that such states develop those offices to exploit to the fullest their opportunities for administrative assistance and supervision. The same, of

course, applies to the states with unified systems. The ACIR-NCCAO survey indicated that the participating State administrative offices were least involved with assisting in the dispatch of judicial business (such matters as helping in the assignment and reassignment of judges and implementing standards and policies on hours of court) and with supervision of nonjudicial personnel. Further efforts by these offices to attain and implement more substantive administrative responsibility is therefore indicated.

In his August 10, 1970, address to the American Bar Association, Chief Justice Burger declared: "The management of busy courts calls for careful planning, and definite systems and organization with supervision by trained administrator-managers . . . We need them to serve as "traffic managers," in a sense as hospitals have used administrators to relieve doctors and nurses of managerial duties. We are almost a century behind the medical profession in this respect." Quite clearly, the state judiciary has as much need of this form of assistance as the federal, perhaps more so; hence the Commission's support for a state court administrative office.

Recommendation 18

TRIAL COURT ADMINISTRATIVE OFFICES

The Commission recommends that states authorize and encourage establishment of administrative offices for the general trial courts of large urban areas. The Commission further recommends that such offices be headed by professional administrators and be under the general supervision of the state court administrator where one exists.

Fifty-five counties over 500,000 population spent in excess of \$223 million each on judicial activities in fiscal year 1968-69. Forty-three cities over 300,000 population spent more than \$131 million each for courts in the same year. These figures suggest the magnitude of court operations in large urban areas. The size of their court operations, plus the significance of the general trial courts in the administration of criminal justice, convince the Commission that the general trial courts in urban areas would do well to have professional administrative assistance. The reasons basically are the same as those supporting administrative assistance for the entire state system, although the range of the latter's responsibilities is inherently wider.

As with the office of state court administrator, the office of trial court administrator is not new. In fact, there are enough of them to have organized their own association—the National Association of Trial Court Administrators (NATCA)—which has approximately 60 members. Moreover, their number can be expected to increase with the recent establishment of the Institute for Court Management.

A survey conducted by NATCA in early 1970 provides information on these offices. The 29 offices that responded are located in 13 states, and all but one function in general trial courts. The number of judicial personnel manning these offices ranges from two in Contra Costa County, CA, to 253 in Cook County, IL, with a median of 13. The number of nonjudicial personnel in the 26 offices reporting on this item vary from 20 in Las Vegas, NV, and Ramsey County, MN, to 1600 in Philadelphia, with a median of 48. All but a few of the offices reporting on personnel and fiscal duties indicated that they are responsible for hiring, discharging, demoting, and reassigning employees; preparing budgets; accounting; and administering payrolls.

Among other duties considered basic for trial court administrative offices are budget execution, management of physical court facilities, information services, intergovernmental relations assistance, jury administrative services, statistical management, analysis of administrative systems and procedures, and case calendar management. Important tools for performance of the latter three functions are computers and microfilming. Most of the offices responding to the NATCO 1970 survey indicated that they used these two aids.

The Commission believes that the state, as the jurisdiction which is basically responsible for the general trial courts, should authorize and encourage the creation of the administrative office at that court level. The Commission believes that a good case can be made for requiring these courts to create their own office of administration. Yet, recognizing that states vary in the degree to which they have achieved an effective unification of their court systems, the Commission believes each state at this point in time must decide for itself whether it can in fairness mandate such establishment.

An additional factor relating to a state's imposition of such a requirement is that of financial responsibility. To the extent that states finance all or a substantial part of the trial courts' operations—as this Commission urges in this report—it is justified in imposing such a mandate. On the other hand, if a

state contributes little or nothing to the cost of such operations, the Commission feels that it would be unjustified in making such a demand. If a state decides that the administrative office is a critical need, and if it is willing to foot a substantial part of the bill for such an office, the Commission believes such an office should be mandated.

In those states with a state court administrator, it appears logical that the trial court administrators should be under the general supervision of that state official. This is particularly necessary where the state judiciary is unified with strong central direction from the highest court.

The Commission thus views trial court administrative offices as a vital adjunct of the broader effort to modernize the management of the judiciary in urban areas. Where an overall unified court system has been established and financed largely by the state, then such offices should be required. In states that are moving more slowly on the road to judicial reform, then the authorization and encouragement constitute the proper approach. In the long run, however, the Commission believes that general trial courts in the nation's metropolitan areas cannot function effectively, if this management tool is ignored.

Recommendation 19

METHOD OF SELECTING JUDGES— THE "MERIT PLAN"

The Commission recommends that state and local governments, where needed, adopt the "Merit Plan" of selecting judges, whereby commissions consisting of representatives of the bar, the judiciary, and the public screen and nominate qualified candidates for appointment by the chief executive. The Commission further recommends that judges so appointed be required to submit themselves to voter approval or disapproval at an election at the end of each term.

Many elements go to make up a good court system, but none is more significant than the judge. A competent judge may succeed, despite organizational, procedural, and fiscal shortcomings of the courts. Without these handicaps, such a judge would probably succeed handsomely. But without an able judge, the court will not be competent; it will not dispense justice fairly and efficiently. Thus, the provisions for selection and tenure of judges are critical for the upgrading of our criminal courts. And

the Commission believes that the so-called "Merit Plan," of which one version is the "Missouri Plan," is the best of the various methods of selecting and retaining judges.

Our study has found that despite continuous efforts at reform, election still is the dominant selection method in 25 states, with 15 of these having partisan elections and ten nonpartisan. This method first came into popular favor with the advent of Jacksonian democracy and gained renewed strength with the Populists in the 90s and the Progressives a decade later. It grew out of the belief that it meant more democracy and more sensitivity to public opinion. Yet, in our judgment, it for the most part has failed to realize this promise. It has produced neither greater responsiveness to the citizenry, nor has it notably improved the quality of justice.

The elective process tends to place a premium on a candidate's ability to appeal to the largest number of voters, which we consider hardly an appropriate subject for meaningful campaign debate nor a valid index of the candidate's judicial qualifications and temperament. The capacity to leave the bench and mount the rostrum is scarcely a test of judicial capacity. Moreover, in some urban jurisdictions, the election process provides no real contest. Where the strength of the political parties is about equal, selection of a candidate is frequently negotiated by the parties. In "one-party" jurisdictions, the contest is meaningless. The process is further compromised by the fact that in states where judges are elected they usually go first to the bench by appointment to fill a vacancy. Partisan elections have the further handicap of immersing the judicial candidate in party politics and tend to put a premium on party loyalty rather than fitness for the job. Nonpartisan elections, on the other hand, tend to reduce popular interest and participation in the election and undercut one of the positive features of partisan elections, namely, the influence of responsible party organizations in putting up able judicial candidates.

Experience at the federal and state levels has demonstrated the merits of judicial appointment by the chief executive. Doubtless, this stems from the pinpointing of responsibility on the chief executive and his superior opportunity for obtaining information and making intelligent appraisals of judicial candidates. The principal drawback to this method—and one which we consider critical—is that the chief executive has neither the time nor the personal knowledge to do the job alone. He usually is compelled to rely on the advice of others, in which party

or patronage considerations can carry too much weight. Experience in many states with varying political climates indicates that party politics, and all that the term implies, plays far too great a role in the straight executive appointment system for selection of judges.

The Commission believes that the Merit Plan improves the system of appointment by the chief executive by using a formal screening panel which, in its nominations to the chief executive, assures that objective qualifications for the job are kept paramount. This assurance is provided by the makeup of the nominating panel with members drawn from the bar, the judiciary, and the public-at-large.

The Commission also believes that judges appointed under this system should submit themselves to voter approval or disapproval at the end of a term. This type of election process avoids the shortcomings described earlier. The incumbent runs on his record rather than against an opponent, hence, the opportunity for the usual campaign jousting is minimized. Equally significant, this procedure affords the electorate an opportunity to pass judgment periodically on the manner in which the appointment system is working. And this need should not be minimized in a period of disaffection and alienation. From a practical viewpoint, moreover, this procedure provides a balancing factor in the system—one that tends to make it more palatable in states with strong direct democracy traditions.

The Merit Plan of judicial selection is not without its shortcomings, of course. For one thing, it could require setting up separate nominating commissions for each appellate division, trial district, and when extended to local courts, to each municipality. Thus, a considerable organizational effort would be required. On the other hand, the establishment of these separate bodies would assure wide geographic representation in the screening. This is important since critics sometimes challenge the representativeness of the process.

On the question of representation, we are impressed by the finding of a Missouri study, cited in Chapter 4, that the spectrum of community interests is being reflected in the screening process via the tapping of members of the bar who represent various interest groups. This practice refutes the charge of malrepresentation expressed by many critics.

The increasing adoption of the Merit Plan, in our opinion, testifies to its soundness. Seventeen states have adopted the plan for one or more courts. In most cases, it applies statewide, but in a few it covers

only certain jurisdictions. Ten of the states installed the system during the past decade, and six since 1966. Efforts to adopt the plan are continually being made in many other states. We are further convinced of the value of the Merit Plan approach by the endorsements it has received. These include the American Bar Association, the American Judicative Society, the National Municipal League, the President's Commission on Law Enforcement and Criminal Justice, and The American Assembly.

To summarize, the Commission sanctions the Merit Plan approach to judicial selection because it gives balanced consideration to executive direction, professional judgment, and direct popular control. By combining these diverse and sometimes conflicting strands of the American political tradition, the procedure constitutes a delicate compromise, a compromise that experience and the judgment of a number of authoritative groups suggests is a good method in most instances of selecting good judges. Experience under the Merit Plan, as used in Missouri, indicates that sitting judges are almost certain to be retained in office by subsequent elections. While this system, in effect, produces life tenure, this Commission has no quarrel with that result so long as the safeguards described above are maintained. For these basic reasons, the Commission strongly endorses this approach and urges more states to adopt it.

Recommendation 20

JUDICIAL DISCIPLINE AND REMOVAL: THE CALIFORNIA-TYPE COMMISSION ON JUDICIAL QUALIFICATIONS

The Commission recommends that, where lacking, states establish machinery for the discipline and removal of incapacitated or unfit judges, patterned after California's Commission on Judicial Qualifications.

Like the question of selection, discipline and removal procedures have a direct bearing on the quality of judges which are attracted to and retained in the court system. No selection method can guarantee that all judges selected under it will remain mentally, physically, and ethically competent during their entire term.

States by and large still rely on impeachment, legislative address, and recall for removing judges who are guilty of misconduct or are physically or mentally incapacitated. Most observers regard

these methods as inadequate, because they are cumbersome and unsuitable for disciplinary actions short of removal. Of the several alternative methods proposed or used for discipline for removal, we believe the judicial qualifications commission created by constitutional amendment in California and, by the end of 1970, used with some modifications in 17 other states, is most desirable.

These commissions are usually composed of judges, lawyers and laymen appointed respectively by the supreme court, the state bar association, and the governor. Their chief function is to receive and investigate complaints against judges, which may be filed by any citizen. The commission evaluates complaints, rejects those it considers unfounded, and cautions the accused on those not very serious or orders a formal hearing on serious ones. On the basis of the hearing, the commission may dismiss the charges or recommend to the supreme court that it impose involuntary retirement or undertake removal or some lesser disciplinary action.

We believe that this system meets criteria for an effective, fair removal and disciplinary procedure. It uses removal for misconduct only as a last resort, relying principally on less drastic disciplinary measures. It assures thorough investigation of complaints before they are presented as a formal charge. It protects the rights of all persons involved, by providing for the conduct of hearings in private unless the accused requests otherwise. It involves non-judicial personnel in the proceedings, while leaving the final decision to the supreme court. Finally, it applies to all judges in the state-local judiciary.

Unlike other removal and disciplinary mechanisms—including New Jersey's commission for involuntary retirement, New York's court on the judiciary, and the "model" proposals of the American Bar Association and the National Municipal League—membership on the mechanism here proposed is not limited to judges. We concur in the criticism of the President's Crime Commission of systems that restrict the membership in this fashion. We share its views that "a disciplinary system employing procedures entirely hidden from public view may be discredited by the suspicion that the supreme court is not diligent in correcting judicial misconduct."

The ABA model provides for removal of supreme court justices by the governor after certification by the judicial nominating commission that the justice is incapable of performing his duties. It further provides for the supreme court to remove and discipline judges below the highest court. The NML

model makes a similar provision for the courts down through the general trial court level, leaving to the legislature the establishment of procedures and mechanisms for disciplining lower court judges. In both cases, reliance on action by the supreme court exclusively can be defended as necessary for its supervision of the total judiciary. We do not believe that the judicial qualifications commission approach is inconsistent with this objective. The supreme court still retains the final decision, and the system has the additional advantage, already cited, of opening up the investigatory and recommendatory process to nonjudicial personnel, which we consider critical.

One criticism voiced against the California Plan is that for smaller states it may involve too much machinery for the job to be done. In rebuttal, it may be noted that, Nebraska—among the smaller one-third of the states in population—uses the California approach.

All things considered, including the strong endorsements of the President's Crime Commission and the 1964 American Assembly, we believe other states would do well to follow the California method of disciplining and removing judges.

Recommendation 21

JUDICIAL QUALIFICATIONS

The Commission recommends that states require all judges to be licensed to practice law in the state.

The Commission is convinced that a judge can not be competent unless he is licensed to practice law. We therefore recommend that all states establish such a requirement for selection to judicial posts at all levels.

Various arguments have been and can be raised against the requirement that an attorney's license is a prerequisite to serving in a judicial post. Some critics argue that judges, in effect, translate into law elements of their own social philosophy in many of their decisions, as in interpreting contracts, property rights, or due process. Given their common training, lawyers as a group, so the argument runs, can be expected to represent a much narrower spectrum of social attitudes than the population as a whole. To assure a reflection of political and social philosophies of the broadest range, these opponents contend that membership on the bench should not be limited to licensed lawyers. To assure basic competence of non-

layers so chosen, such critics maintain that pre- and in-service training can be required of them—as now is the case in some jurisdictions. Such training could provide instruction in substantive law and the rules of evidence and procedure.

In opposition to this argument, those who insist on legal training point out that nonlegal, political and social aspects of judging are present in every human institution. The important thing they stress is that judges have legal training to recognize precedent and know the restrictions imposed by the collective judgment of the profession over the years. Only within these limits, so the argument runs, can a judge effectively curb his natural inclination to apply his own social and economic predilections to a case. Moreover, defenders of the requirement point out that legal training does not exclude judges of broad and differing philosophies. Some also maintain that the vast majority of questions coming before judges of the state and local courts are little affected by social and economic attitudes; they mainly require the application of rules of conduct, about which there is little dispute, to a range of factual situations. Legal training, they argue, is vital to assure that the right rule of conduct is applied. Finally, some argue that proper professional training is vital to revamping the public image of the judiciary. Untrained or informally trained judges, they contend, do little to enhance the prestige of the judicial branch. With neither the sword nor the power of the purse and only the power of judgment, to paraphrase Alexander Hamilton, only an effectively trained judiciary can sustain popular esteem for this branch of government.

The issue of legal training and experience comes up mainly in the lower courts, and particularly those in sparsely settled areas, where fiscal resources and caseload are insufficient to warrant a full-time judge and lawyer candidates for judicial positions are in short supply. In answer to these arguments, it is asserted that this is a problem of court organization. Consolidation and unification of trial courts and appropriate drawing of jurisdictional boundaries to embrace an adequate supply of lawyer candidates, can remedy these difficulties. Even without changes in jurisdictional boundaries, moreover, the removal of residence requirements would make it possible to select lawyers from other parts of the state to serve in rural jurisdictions.

We see merit to arguments on both sides. Overall, however, we believe that lawyers as a group more and more represent the broad spectrum of political

and social attitudes, particularly with the increasing emphasis in the legal profession on protection of consumer and minority group interests. Also, we feel that court unification and simplification, which we earlier endorsed for the state-local judiciary, will do much to remedy the problem of the availability of legally trained judicial candidates in all parts of a state. We therefore urge states to require legal training and experience as a condition for service on the bench.

If we are serious about judicial reform, and this Commission believes that effective criminal justice will not be achieved unless we are very serious about this facet of the broader problem, then a qualified judiciary from top to bottom is indispensable. Fourteen states still do not require their appellate or trial judges to be learned in the law, and three more do not require it of their appellate judges. Half the states do not stipulate a minimum period of legal training for judges of both classes of courts. Most of the 33 states having justice of the peace courts provide no legal training requirement for their personnel.

All this suggests that there is ample room for vigorous action on the qualifications front. And at this point in time, the Commission holds to the opinion that legal training is a fundamental prerequisite for a truly qualified judiciary. Organizational changes will not live up to their promise, if this issue is overlooked. The argument against assigning removal and disciplining power to a commission on judicial qualifications may be lightened if this issue is confronted squarely. But above all, this Commission believes this reform is essential if the public's respect for courts in the state system is to be revitalized and sustained. For all these reasons, we support this recommendation and urge states that have not done so to move on this front.

Recommendation 22

MANDATORY RETIREMENT

The Commission recommends that, where lacking, state laws require mandatory retirement of state and local judges upon reaching age 70.

Mandatory retirement is a topic that can always generate heated debate. Those favoring it usually contend that it is the only sure way to cope with the problem of old, tired and out-of-touch judges. They cite the growing pressures of heavy dockets, of the many changes in the law, of rapidly changing social

and governmental conditions as key reasons for initiating compulsory retirement. Energy, a fine sense of equity, and an eagerness to grapple with new legal and statutory developments, some maintain, are the necessary traits of a good judge in our times and these are likely to be characteristic of a younger—rather than an older—man.

Opponents of the requirement maintain that there is no foolproof way of assuring these traits in any judge. They note that age has little to do with whether a judge is judicially fit or intellectually equipped. Mandatory retirement at any of the ages generally cited would have compelled Brandeis, Holmes and Black to step down at a time when they were still creative, capable and conscientious. The more sensible and sensitive way to handle the problem is to rely on commissions on judicial qualification, so the argument runs. Such commissions after all, already are charged with handling cases involving alleged incapacity or incompetence.

Turning to state experience, 23 now make provision for compulsory retirement usually at the age of 70. In five of these, the limit is extended to the end of the term in which the limit is reached. One state fixes the age at 71, two at 72, and four at 75.

On balance, the Commission believes that the arguments favoring mandatory retirement have merit. We concur with the opinion that a judge's most productive years are likely to fall before he reaches the age of 70. At the same time, we see some merit in the New York provision which establishes a retirement ceiling at 70, but permits extension in individual cases. Overall, however, the Commission supports the basic contention that retirement should not be left wholly to chance and that 70 is an appropriate year for retirement.

Recommendation 23

FULL-TIME JUDGES

The Commission recommends that states require all judges to devote full-time to their judicial duties.

In all 37 states with the justice of the peace system as of 1965, the justices were permitted to engage in outside work. In other words, the office did not demand full-time work of the justice. Similarly, according to the latest information from the American Judicature Society, in at least 14 states in 1968 the judges of lower courts—other than JP courts—similarly were not required to render full-time service.

These included mainly city, municipal and county courts.

In the Commission's opinion, if state and local governments are to attract and hold in judicial posts persons of necessary skills and dedication, they will have to make the job full-time. To make it less than this tends to downgrade the importance of the job. In addition, it opens up the possibilities of conflict of interest between the judge's official duties and his private interests.

In its canons of Judicial Ethics, the American Bar Association points out that a judge who is allowed to practice law "is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success." We think that allowing outside employment, whether or not it is the practice of law, needlessly invites a possible conflict of interest.

Some contend that municipalities or counties may be too small to pay the salary of a full-time judge, or the workload of his court may be too little to warrant his full-time, attention. In our judgment, this problem should be solved by a restructuring of the court system along the lines recommended earlier, rather than jeopardizing the quality of judicial officers through the part-time nature of the job. Specifically, the geographic base of the court should be enlarged until it encompasses enough fiscal resources and a caseload to support a full-time judge, as has been done in Hennepin County, MN, where the municipal court of Minneapolis and the surrounding suburbs were supplanted by a Hennepin County court. In more rural areas, judges might travel the circuit holding court in different population centers at periodic intervals. The preferred organizational basis for achieving this would be the abolition of all inferior courts and transfer of their duties to the general trial courts or a subdivision thereof. This basic reform coupled with the power of the supreme court or its chief justice to assign judges from court to court within and between levels ought to go far toward assuring that all judges within the system will devote full time to their official duties.

Certain improvements in the criminal justice system proposed in other recommendations of this report, if implemented, will tend to reduce the burden of nonjudicial duties now carried by some local judges. Such improvements include recommendations to strengthen the state role in the administration of the corrections program, especially the increased state responsibility in the assignment and transfer of con-

victed prisoners, the reassignment of responsibility for administration of adult probation services from local courts to a state department of corrections, and the reassignment of responsibility for any local controlled juvenile correctional institutions to the appropriate state agency. As these recommended changes are implemented, judges will be able to devote more time to judicial duties and their work docket can be more efficiently structured.

The recommendation advanced here thus complements the other judicial reforms the Commission has sanctioned. It serves them by being an operating guide for the system. Court administrative officers and supreme court judges responsible for assigning general trial court personnel should all be mindful of this basic functional goal. A full day for full pay is after all as pertinent a maxim for this body of public servants as it is for any other. The prestige and, at this point in time, the overall performance of the judiciary, is brought seriously into question if less stringent procedures are permitted for the judiciary.

Recommendation 24

FULL STATE ASSUMPTION OF COURT COSTS

The Commission recommends that states assume full responsibility for financing state and local courts.

In all but a few states, the expenses of the court system are shared by the state and its local governments, with the local governments picking up more of the tab at the lower levels of the judicial hierarchy. In the aggregate, the states provide approximately one-fourth of the total state-local court costs. Yet, there appears to be a gradual but steady movement in the direction of greater assumption of court expenses by state government, with nine states now picking up 61% or more of court costs. The Commission believes that this tendency is based on sound reasons and that they point logically toward full state assumption of court financing. The Commission's earlier recommendation calling for establishment of a simplified and unified court system only strengthens our belief that this is the proper course to pursue on the fiscal front.

Even where a fragmented system exists, the state government has a fundamental responsibility for seeing to it that all state and local courts administer justice fairly, consistently and effectively. This holds true even for local courts that may be exclusively

concerned with trying violations of local ordinances. Those ordinances after all are, in effect, an extension of state criminal laws since the state would have to provide for comparable local regulations if such ordinances did not exist. To put it another way, all judicial personnel directly or indirectly are part of a state system, no matter now disjointed it may be, and this fact argues strongly for full state financing.

It is difficult if not impossible for the state to discharge its responsibility for assuring statewide consistency of court operations, if it relies heavily on local funding. Variations in local levels of financing produce wide disparities in the performance of the courts. In addition, as a Maryland study pointed out, reassignment of judges from court to court to meet shifting workloads and thus to avoid delays throughout the system is made difficult if varying local financing patterns produce disparities in salaries for judges of the same type of court.

The state, it can be argued, can overcome this problem by prescribing salary levels, the numbers of judges, and other cost items for general trial courts or courts of the lower level. Prescription of salaries and numbers of courts would take care of the judges, but much discretion would be left in the hands of the local governments with respect to other important objects of court financing: physical facilities and non-judicial personnel, to name only two. This situation was criticized in the California legislative study cited in Chapter 4.

Moreover, state prescription of expenditures—whether applicable only to judicial salaries and the number of judges or to the whole sweep of court expenses—is open to the familiar objection that a state should not mandate expenditures on local governments when it is not prepared to foot the bill or at least a substantial part of it. This raises the basic issue then of the state's ducking its financial responsibility. In our judgment, the only defensible way for the state to secure a consistent level of court performance is to assume the total financing for this function.

Still another fundamental argument can be made for this fiscal recommendation. The logical result of effective state assumption of overall responsibility for the state-local judiciary is a unified, simplified system with the supreme court or chief justice responsible for seeing that the system operates properly. This is why we have urged state adoption of a unified system. It seems clear to us that the powers vested in the highest court or its chief justice for administration or a unified system—administrative

supervision, rulemaking, and assignment of judges—can be of little consequence if local governments have to be relied on to provide the money for the trial courts.

A number of objections, of course, are raised against full state absorption of court expenses. It is asserted that such action would reduce, if not eliminate, local responsiveness in the general trial and lower courts. We are not prepared to accept a high degree of responsiveness to local needs, if it means uneven and inequitable application of the law between jurisdictions. Moreover, we do not concede that state financing will mean necessarily that the judiciary acting at the local level will automatically be insensitive to local conditions within the range of reasonable consistency. For one thing, judges are likely to continue to be selected locally.

Local governments that now derive a "surplus" above and beyond their judiciary costs from fines and fees (mainly traffic fines) will object to surrendering this fiscal advantage. This objection was answered satisfactorily, we believe, by the Idaho Legislative Council when it stated that the operation of any court as a revenue-raising device should not be condoned. The violations for which the fines are assessed are after all violations of state law or—when ordinances are involved—at least the extension of the state law within the city or county.

In some local jurisdictions, court fines go into general revenue of the city or county so that they become available for financing other local activities. Sometimes in practice, if not in law, they are earmarked for police operations. In that case, localities could argue that removing the revenues from their coffers will tend to diminish the zeal of the police in enforcing state law. The answer to that argument is that the police, just as the courts, should not use their powers of enforcing the law as a revenue-raising measure.

For their part, some states might object to taking on the additional fiscal burden involved in placing full financing responsibility in their laps. The goal of a consistent, even-handed and competent court system is, after all, what is at stake here. While we do not believe that the shift in funding should be made simply on the basis of relative fiscal capabilities and burdens, at the same time, it is true that the states generally have greater fiscal resources than their local governments.

Balancing all the pros and cons, we are firmly of the opinion that the state court system should be fully financed by the state governments. Without it,

the two above goals of judicial reform—a simplified, unified system and a more efficient and even-handed administration of justice—are not likely to be fully realized.

Recommendation 25

IMPROVED FEDERAL-STATE COURT RELATIONS

The Commission urges state and federal district judges, judicial officers and bar associations to initiate and support the development of State-Federal Judicial Councils composed of chief judges of state and appropriate federal district courts to cooperatively explore problems of joint concern, including procedures for review of post-conviction petitions.

The Commission is convinced that there is an increasing need for a closer relationship between the state and federal court systems and that this could be accomplished—at least in part—by the creation in each state of an informal State-Federal Judicial Council. Membership of the council could include a member of the highest state court, the chief judges of the larger state trial courts, and the chief judges of the federal district courts serving the state. The State-Federal Council could establish relationships with, or be an adjunct of, the state judicial councils which now exist in 49 states.

The idea of establishing a joint judicial council in each state is fairly new. Chief Justice Burger, however, championed their establishment in his August 10, 1970, speech to the American Bar Association.

Some state court, federal district courts, and individual judges have developed effective relationships, screening devices and innovative procedures to deal with the increasing problem of post-conviction petitions. Moreover, improved legislation relating to the problem of post-conviction review has been enacted in a few states and by the Congress, and some may feel these efforts will prove adequate. While the Commission supports the further development of such measures by states and individual judges, we believe that the general problem of developing more effective federal-state relations in the judicial field is of sufficient magnitude to warrant establishment of joint judicial councils in all states. The Commission feels this can best be done on an informal basis with the full cooperation of the judges.

An immediate goal of a council might be the de-

velopment of expeditious procedures for handling prisoner petitions. This would include recognition and adherence to federal Constitutional standards in the processing and adjudication of criminal offenses, and, where appropriate, the development in each state of post-conviction procedures which meet recognized standards, such as those developed by the American Bar Association.

The number of petitions filed by state prisoners seeking habeas corpus relief in the federal courts has increased from 89 in 1940 to approximately 12,000 in 1970. The continuing increase in these cases threatens to engulf the federal district courts and has placed a great strain on federal-state judicial relationships.

As the President's Commission on Law Enforcement and Administration of Justice pointed out, the ready availability of habeas corpus and similar procedures for convicted offenders must be reconciled with the desire to achieve finality in criminal judgments as well as the concern for fairness of the criminal process. The increase in prisoner petitions is the result of many factors including: improved statistical reporting; the increase in criminal trials; broader, more liberal interpretations of constitutional protections by state and federal courts; disparities in criminal procedures among state courts and between state and federal court systems, and lack of adequate and uniform procedures among the states in dealing with post-conviction claims.

The increase in such petitions, of course, has been

felt at the state court level, but, because of the constitutional questions raised, the impact has been far greater on federal district courts. Moreover, there is concern that the federal courts are involving themselves too intimately in the state criminal justice processes, although recent Supreme Court decisions may signal a shift on this front.

Expeditious processing of prisoners' petitions and related post-convicted remedies are important aspects of the criminal justice system, even though experience indicates that only a small fraction of such claims are valid. The Commission finds, however, that the problem raised by these petitions is more important as a symptom of the need to improve communications and working relationships between the state and federal court systems. The need then is to provide in each state a mechanism which, through consultation, advice and interchange of information and experience, will help federal and state jurists to reduce disparities and inequities throughout the criminal justice system.

The related long range goal for such councils might be a program stimulating and assisting in the development of more uniform criminal codes, sentencing procedures and judicial rules. The council mechanism might also provide continuing benefits in exchange of ideas and experience on administrative matters related to such things as analyses, classification and assignment of case loads, management of case loads, relationships with lawyers and the bar association, and similar matters.

Witness Statements

At its June 16, 1983, meeting, the Commission heard from several expert witnesses regarding its *proposed* recommendations on jails. (For *final* recommendations, see *Chapter V* of this volume.) The following are the formal statements of those witnesses.

Statement of

Anthony P. Trivisono
Executive Director
American Correctional Association

Mr. Chairman, Members of the Advisory Commission on Intergovernmental Relations, I am Anthony P. Trivisono, Executive Director of the American Correctional Association (ACA), and I am here today on behalf of the membership of the ACA to serve as a witness prior to the Commission's deliberations on *Jails: Intergovernmental Dimensions of a Local Problem*.

The ACA today has over 11,500 professional members representing such diverse areas of corrections as: state, local and territorial correctional agencies, institutions, jails, pretrial programs, as well as federal and state probation, parole and institutional agencies.

The purpose of the association is to exert a positive influence on the shaping of national correctional pol-

icy and to promote the professional development of persons working in all aspects of corrections.

Your Commission's recommendations and findings are important and will describe what is required to improve correctional services. There is little disagreement about what needs to be done regarding our "community social service and protection centers of last resort," commonly referred to as jails. What is presently needed is ACTION—our jails are full of juveniles, drunks, the retarded and the mentally ill *and* also with those who indeed should be locked up in jails. We have a crisis. Basically, we know what needs to be done; the problem is accomplishing our objectives through wide-scale implementation of appropriate well thought-out policies and procedures.

Corrections is a shared responsibility and to be able to accomplish positive change we need to stop the isolation from other community agencies. As the Correctional Service of Canada has done, we must also develop a "correctional constituency." This constituency necessary for decision making, planning and the development of responses to our complex problems must include persons at all levels.

We must directly involve other components of the criminal justice system—law enforcement and the courts—as these other elements directly impact jails and other correctional services.

Because we share the same clients, we must also form a partnership with the social and mental health institutions of the community which often times are the more appropriate resource for those who are sent to jail. Certainly, if those in jail cannot be diverted to these programs, then the best strategy would be to make use of this resource network through formal contracting for these services. This has been done in various jurisdictions (such as Contra Costa County, CA; Boulder County, CO; Hamilton County, OH), and there is no question that it works.

The public must also be included so that they understand the problems which corrections face and how these problems impact the community. The community's response and support and how this is interpreted to political leaders is often what determines the success or failure of correctional goals. The hard line view by the public which is more apparent today due to high crime rates may make it more difficult to accomplish our goals or to be more innovative in our approach. However, the impetus for reform may also result from growing fiscal concerns, highlighted by jail overcrowding. The public may soon see that there are alternatives to jail which are

viable solutions, particularly if they do not need to build or renovate a costly confinement facility.

We cannot exclude from this process the offender on whom our services directly affect. This population can also provide us with meaningful insight into what works best.

What I am trying to say is that corrections cannot solve its problems alone. In order to follow through on the recommendations of this Commission, it is necessary that we interact with, and obtain the support of those significant others whom I have mentioned.

I am generally in agreement with the recommendations of the Commission and would like to focus in my discussion on those recommendations which provide for alternate strategies.

Recommendation A.4

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

Alternative A, which recommends the adoption of guidelines applicable to both felony offenders and serious misdemeanants provides a more comprehensive approach, albeit one that is more difficult to apply.

By including misdemeanor offenders in the guidelines process, there is more probability that jails will be positively impacted because misdemeanants do occupy a large percentage of the jail population.

It has been shown that guidelines are helpful in reducing sentencing disparity, but they are not a panacea. These guidelines need to be flexible taking into account available resources in the community and mitigating circumstances of the offense or offender. The ability to use alternatives must be built into these guidelines so that sentences, other than confinement, will be used. As the Commission report noted, in Minnesota where non-imprisonment guidelines were not included there was inconsistent sentencing and the the guidelines have *added* to the jail overcrowding problem.

The alternatives which need to be stressed are those that are least costly to society and least drastic for the offender. These costs of which I speak are not limited to the great financial expense of confinement, but also include costs associated with a loss of productivity and costs of maintaining the family of in-

mates many of whom may be forced to obtain public assistance.

If the goal of a sentence is to restore the offender to society, jail seems less than appropriate for many for while it penalizes the offender it does not benefit the victim (via the possible use of restitution programs) and it places a great financial burden on the community.

Judges must be kept informed as to the alternatives that exist and, if possible, monitor their use of these alternatives in sentencing. Again, I can only stress that cooperation with the courts and others is necessary before these alternatives will be used to the best advantage.

Parole, the value of which is now being debated, should not be excluded from a guidelines procedure. Parole continues to serve a major role in corrections through the selective release of inmates from the institution prior to expiration of the sentence. It is applicable to both jails and prisons and provides the means for supervision of the offender upon release to the community. Guidelines in parole can take many forms and should provide a more objective approach indicating who should be released to the community. Parole can have positive impact on institutional management. It can act as a management tool by creating information on anticipated release dates early in the term of confinement. Parole also provides an opportunity for an administrator to estimate what the population will be to plan for deployment of resources. This information can also be used for individual case management to plan treatment programs for the inmate which coincide more closely with length of stay. Inmates can also be moved through levels of custody so that they are in the appropriate custody status for release.

Finally, it is important in developing any guidelines that the public is aware of their effect and can state their views on possible community impact.

Recommendation C.5

CORRECTIONS INSTITUTIONS: WORK PLACES, NOT WAREHOUSES

It is strongly agreed that correctional institutions must provide meaningful work situations for inmates in prisons and jails. The private sector program, which I support, provides inmates the opportunity to work in a real world job situation, learn marketable skills, develop good work habits necessary to employment and give a sense of dignity and worth to the inmate. Without the widespread implementation

of this type of program and the reduction of barriers to interstate commerce of prison-made goods, idleness in our institutions will continue, most often resulting in increased tension and violence among inmates.

The idea that prison-made goods on an open market will somehow affect employment within the community is overly exaggerated. Only about 35% of prison employees would be employed nationwide in such programs, or approximately 140,000 (35% of 400,000) which is 0.1% of the entire labor force. No one should feel threatened by this meager competition.

Interestingly enough, when Kansas and Minnesota began their prison industries simulating free world business they encountered no opposition from organized labor (*Corrections Magazine*, April 1981). This may have had to do with their method of implementation; that is, Kansas brought in an industry from out of state so as not to affect Kansas workers, and Lino Lakes Facility, MN, the job functions were overload, doing work that a company's regular employees could not keep up with. These particular examples show that some innovation may be necessary so that labor and the community will accept the program. In this way, such a concept can be introduced and accepted.

Prison officials are eager to attempt to provide full employment to as many inmates as possible and although there may be different problems associated with the private sector, the benefits can outweigh the problems. Some of these benefits include:

- development of positive work habits which will carry-over to when an inmate is released and working in the community;
- development of productive members of society who pay taxes and who are able to support themselves and their families;
- inmates will pay room and board while confined thus reducing the costs to the public; and
- income earned may also be used for restitution payments thus helping victims and literally repaying debt to society.

These programs can also be used to some extent in local jail facilities particularly in conjunction with work release programs. Inmates in jails are usually closer to the community industrial centers so the convenience is there, and more successful reintegra-

tion of the inmate into the community is possible (reference Hennepin County Jail, MN).

Recommendation D.4

FEDERAL FINANCIAL ASSISTANCE FOR LOCAL CORRECTIONAL SYSTEMS

A comprehensive approach in corrections must involve all levels of government including federal financial assistance which is necessary so that states and localities can proceed with correctional reform. The debate based upon whose responsibility the jail is has prevented major reform from taking place. The debate is as old as the Walnut Street Jail in Philadelphia, PA, and today represents a smoke screen clouding the reform issue.

Federal, state and local corrections partnerships need to be encouraged so there can be a more comprehensive and adequate delivery of services for the good of all Americans.

A jurisdiction where federal presence has encouraged state-local cooperation is in Texarkana. With the assistance of funds from the Law Enforcement Assistance Administration (LEAA), two city jails and two county jails (all of which were considered substandard) in two different states will be closed. In their place will be one large facility crossing the state borders of Texas and Arkansas. Careful planning has removed the legal problems inherent in any facility which crosses state lines, and the cities and counties involved have developed contractual agreements allowing for the smooth operation of the facility. Additionally, by design, pre- and post-trial inmates will be housed separately. This jail facility which is 90% complete was envisioned by LEAA as a model program and hopefully it will provide incentive for other agreements.

Matching funds to state and local governments is also recommended for facility construction. In jurisdictions that have overwhelming problems, some flexibility may be required and a larger federal share could be extended to that region.

This type of assistance has already been recommended in the Attorney General's Task Force Report on Violent Crime. In this report it was recommended that legislation be enacted calling for \$2 billion over four years to be made available to states for construction of facilities. It was felt that these federal dollars should be used for maximum security

facilities, but not penalize states which have already funded maximum security space but do not have sufficient, less restrictive space for nonserious offenders. Today, Senator Robert Dole (R-KS) has a bill, as does Senator Arlen Specter (R-PA), both indicating large grants to states and localities for jail and prison construction.

Recommendation D.3

CREATING STATE OR NATIONAL COMMISSIONS ON CORRECTIONS PRACTICES

States, where lacking, need to establish broadly based state correctional commissions with local as well as state members to develop comprehensive state and local correctional policies. These commissions should urge the use of regional facilities which can be more economical than many small, independently operated jails. Standards which the state enforces are also necessary in order to have facilities that provide inmate safety, adequate treatment programs and meet Constitutional requirements. Adequate training of correctional personnel must be instituted so that personnel can handle the multiplicity of tasks required and be able to deal with the many types of inmates under their supervision. A lack of training has been viewed as a major problem for local jails.

As I have said, there is no disagreement about what needs to be done. Many of these recommendations center around the need for alternatives to confinement and improving the jail environment for those who need to be there. The use of alternatives either pre- or post-trial for those who are not appropriate candidates for incarceration is a method by which costs can be reduced and attention focused on improvement in delivery of services, training of personnel and improvement of jail management.

Jails have been inadequate for too long. However, there are jurisdictions where this is beginning to change. This change has often been initiated through litigation rather than cooperative efforts. Although litigation is an expensive way of solving problems, often times it has been the only way available to force states and localities into reform of their systems. It also may be a moving force behind joint efforts needed so badly to improve conditions.

Statement for the Record by

**Judith Johnson
Executive Director
The National Coalition for Jail Reform**

Mr. Chairman and members of the Commission, I am pleased to testify today on behalf of the National Coalition for Jail Reform on the intergovernmental dimensions of jails.

The Advisory Commission on Intergovernmental Relations is to be complimented for its extensive and thorough report on local jails. The report reflects the complexity of the problem and offers no easy solutions. It is a thoughtful, well researched and documented discussion of the issues and the findings are accurate and well reasoned.

Local jails are a neglected or forgotten community institution. In our civics classes, we visit the police station, fire department and hospital, but we rarely visit our jail. Yet the jail mirrors the problems of the rest of the community.

Many of the people in jail are there because we, as a society, have found no other place for them. If a community does not have a detoxification program for alcoholics, they will end up in jail. If a community does not have a mental health clinic open 24 hours a day which will take referrals from the police, the mentally ill will be found in the jail. If a community does not have an effective pretrial release program, the poor will be found in the jail, unable to raise a minimal bond.

The Commission's report gives a good picture of the many levels of government that affect the jail and the problems of lack of coordination among those levels. What with local funding, state prisoners, state standards, federal policies—the problems of the jail are very complex. Solving these intergovernmental problems will take coordination among the various levels of government and this report is a significant first step towards that end.

Jails are a complex subject to deal with because so many groups are involved in the problem. The National Coalition for Jail Reform was formed on the premise that all the groups that affect the jail should be part of the solution. Thus, the coalition includes those who fund jails, those who run them, those who monitor them and those who sue them, those who put people in them and those working to get people out of them.

The membership of the coalition includes the

American Bar Association, National Sheriffs' Association, National Association of Counties, National League of Cities, National Criminal Justice Association, National Center for State Courts, National Association of Criminal Justice Planners—39 members in all.

The coalition is the first diverse coalition in the criminal justice field. As such, it is a major forum for discussion of jail issues. Problems are looked at from all points of view and policy is developed which represents the viewpoint of all facets of the criminal justice field. The coalition makes decisions by full consensus and all 39 members have agreed on five positions.

Position on Jail Conditions

The mission of the National Coalition for Jail Reform is to reduce inappropriate confinement and inappropriate conditions in the nation's jails. The National Coalition for Jail Reform strongly believes that the first attention of a jurisdiction should be directed to reducing the jail population and removing those who are inappropriately confined. Furthermore, the coalition urges jurisdictions to take action to ensure that no one is held in jail under conditions which violate his or her rights under the Constitution and urges that jurisdictions develop plans to ensure conditions appropriate to the protection of the physical and mental health and welfare of those held.

Juvenile Position

The National Coalition for Jail Reform endorses the goal that no juvenile should be held in an adult jail.

Inappropriate Confinement of Mentally Ill And Mentally Retarded Persons

The National Coalition for Jail Reform endorses the goal that no one should be confined in jail who is mentally ill or mentally retarded. Mentally ill or retarded persons who have not been charged with serious crimes never should be subject to jail confinement. For those charged

with serious violations of criminal law, each jurisdiction should develop plans and procedures for identifying and implementing suitable alternatives to jail confinement.

Inappropriate Confinement of Public Inebriates

It is the position of the National Coalition for Jail Reform that Public Inebriates should not be subject to criminal prosecution or jail confinement because of their consumption of alcoholic beverages.

Pretrial Release Position

The National Coalition for Jail Reform recommends that jurisdictions recognize a presumption favoring pretrial liberty and eliminate unnecessary pretrial detention.

The problems of the jail are extensive. Let me review a few facts about jails.

- Jails are different from prisons. Prisons hold those convicted of a felony and there is relatively little turnover in population, since people stay there over a year.
- There are approximately 50,000 people in federal prisons and 300,000 in state prisons. Through 3,493 local, county or city jails, there pass 7 million people a year. Sixty percent of these people are awaiting trial, presumed innocent. The others are serving a sentence of lation, thus exacerbating all other problems.
- Almost 11% of our jails are under court order to improve jail conditions. 19.9 percent are involved in a pending lawsuit for overcrowded conditions, lack of recreation programs, outdated facilities and inadequate medical care.
- seventy percent of jail inmates are incarcerated for nonviolent offenses.
- About 600,000 mentally ill and retarded people are sent to jail each year.
- As many as 25-40% of jail inmates in some jurisdictions are there for public intoxication (not drunk drivers).

- sixty-one percent of the people in jail awaiting trial remain there because they cannot afford bail. Some 10,000 of these cannot afford even \$125 in bail.
- The average cost of building a new jail is 8.1 million dollars.
- Every dollar of construction cost will require \$16.00 in operating costs over the 30 year life of the jail. Thus, the 8.1 million dollars new jail will cost 130 million dollars to operate over 30 years.

Jail is an expensive and scarce resource which should be saved for those who need secure confinement. By reducing the number of minor offenders or those who are held merely because they are public drunks or mentally ill, we would free up jail space for those who need secure confinement.

Recommendation A.1

The coalition has general policy encouraging pretrial release and thus *endorses the enactment of defendant based percentage bail laws and the greater use of nonfinancial pretrial release options.*

The National Coalition for Jail Reform believes that the number of persons held pretrial should be reduced dramatically and that such a reduction could be achieved smoothly if a determined effort is made. The coalition believes that much of the jailing that now occurs rests on misperceptions and misinformation. Many people seem to think that only individuals who have been charged with the most serious crimes and who would be unlikely to appear for trial are held in jail. That perception is far from accurate. Large proportions of those detained are released within a few days. Others ultimately have their charges dropped or are found not guilty; of those found guilty, many are not sentenced to jail or prison.

All too frequently a pretrial detainee is held simply because of an inability to post bail: bail has been set but not made for eight out of every ten pretrial detainees. Data indicate that many persons remain in jail despite minor charges and low bail simply because they are too poor to raise the small amounts required. The words of President Lyndon B. Johnson, in signing the 1966 federal *Bail Reform Act*, are as appropriate today as they were then:

The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months, and perhaps even years, before trial. He does not stay in jail because he is guilty. He does not stay in jail because any sentence has been passed. He does not stay in jail because he is more likely to flee before trial. He stays in jail for one reason only—because he is poor.

Recommendation A.2

The coalition strongly endorses keeping inappropriate populations out of jails.

Detaining people pretrial could be, and should be avoided in most cases.

Many communities today have no pretrial release programs or systematic procedures for determining who should be held. Others have programs which limit unduly the types of persons who are eligible for release. Only 27 states and the District of Columbia have adopted an explicit preference for release on recognizance or under the least restrictive conditions, a preference that the coalition believes should be employed in every jurisdiction. Increased support for the existence of progressive release programs and procedures has important practical implications for local jails throughout the country.

While the coalition endorses *Recommendation A.1* it cannot endorse lines 6–11 within the brackets. The coalition does not have consensus on the issue of “preventive detention,” the holding of an individual (who does not stand convicted on current charges) because of a belief that the individual is likely to seriously threaten public safety if released. Some member organizations believe that those defendants who are deemed to be a clear and present danger to public safety must be detained until they can speedily be brought to trial. These same organizations also agree that securing the accused’s appearance at trial should be a major criterion in the pretrial release decision, but do not feel that it should be the sole consideration. They do, however, believe that a person should only be held for public safety reasons if the threat of community harm is real and immediate. Other member organizations believe that it is unjust (and, some argue, unconstitutional) to deprive people of liberty on the basis of a belief that they may commit crimes in the future. These organizations assert that assuring appearance at trial should be the only consideration governing pretrial release decision-making in all cases and oppose any form of pretrial detention aimed at preventing crimes that might be committed if the defendant were released.

- Thirty-two states and territories have decriminalized public intoxication—but the same people are still going to jail. Until the alternatives are in place, the same inebriates will be picked up—charged now with loitering or disorderly conduct—and held in jail.
- In 1980 Congress amended the *Juvenile Justice and Delinquency Prevention Act* to require the removal of juveniles from adult jails and lockups. Participating states have until 1987 to comply with this provision.

I suggest that information on both these legislative trends be included in the report. Most states are already in the process of removing juveniles and public inebriates from jail. To ensure the removal of these groups and the mentally ill, coordination is needed between, on the one hand, alcohol, mental health or juvenile agencies and on the other hand, the criminal justice system. There is a great need for better coordination among local social service agencies to deal with these people who end up in jail for lack of other alternatives. And there are many alternatives to jail that are more effective or cheaper than jail.

The San Diego jail costs \$44 a day to provide for one inmate. For the police to pick up a public drunk and take him to the jail also costs police time and money. The San Diego alcohol reception center takes 80 people a day at a cost of \$7.87 each and its social setting detoxification program costs \$33 per person. The program also recovers \$50,000 a year by charging people \$5 a day. This is a cost-effective alternative to jail for the many people who are in jails across the country for public intoxication.

Los Angeles, CA, saved \$149 a person by contracting with the Volunteers of America to sober-up public inebriates instead of arresting, booking, arraigning in court and using the jail to sober them up.

The Montgomery County, PA, Emergency Service provides 24-hour emergency mental health care, particularly for persons who come to the attention of the criminal justice system. It works with 57 police precincts to keep the mentally ill out of jail and get them the help they need.

In Galveston, TX, sheriff's deputies are trained as mental health officers. When a mentally ill person is acting out, they pick him up and instead of charging him and taking him to jail—they handle the immediate crisis and then take the troubled person home or to a more appropriate facility.

Philadelphia has a pretrial release agency and a system that allows people awaiting trial to pay only a deposit on their bail to ensure their appearance in court. This has reduced the Philadelphia pretrial jail population by 28% and saved the community \$1,500,000.

The EARN IT program in Quincy, MA, punishes youths by requiring them to repay their victims. The offender learns a lesson he or she would never learn in jail, the victim is compensated, and the community is saved the cost of jail time.

In Montgomery County, MD, the Juvenile Court sentences juveniles to perform unpaid community service work. The young offenders repay the community for their offenses by cleaning parks, painting schools, performing janitorial work in nursing homes and washing police cars.

Line 8-11 should be deleted. To provide proper care in jail for intoxicated, mentally ill, or minor persons would be very expensive. The money required for this would be better used in developing the alternatives to jail. In order to house people separately, they are often put in solitary confinement—where the rate of suicide is very high. Jails are not designed to care for these people and the emphasis should be on removal, not on care in jail.

Recommendation A.3 and A.4

The coalition does not have a position on sentencing alternatives, but would urge communities to develop planning processes at the local level which would look at community-based alternatives to incarceration such as community service and restitution. Jail space is expensive and should be saved for those who need to be held securely. There are many other alternative punishments that benefit society and the offender and free up the scarce jail space.

Alternatives without rational sentencing guidelines may, indeed, just mean that more people are under the jurisdiction of the courts. The purpose of sentencing guidelines should be to reduce the inmate population and thus ought to specify maximum populations. *The wording in the recommendation on "controlling inmate population" should be added to A.4 Alternative A.* The commissions back-

ground sections on A.3 and A.4 lay out the issues well.

Recommendations

A.5, B.1, C.1, C.2, C.3, C.4, C.5.

The coalition does not have positions on these issues, but they are all very reasonable recommendations.

Recommendation D. 1

The coalition endorses EXPANDED federal research, training and technical assistance for local corrections.

The National Institute of Corrections is an excellent example of how the federal government can help local officials with the jail problem. NIC is one of the most respected federal agencies. With a small budget and small staff, they provide excellent training and technical assistance to jail administrators, and elected officials. NIC's training in jail management, planning for a new jail, and assistance to communities in developing alternatives to jail to relieve their overcrowded jail is invaluable. All across the spectrum and in all fields, I hear nothing but praise for NIC and its staff. Continued support for NIC is one of the major roles the federal government can play.

Recommendation D.2

The costs of constructing a jail are only 1/6th of the total cost of the jail over 30 years. Local jurisdictions cannot afford to operate more jails. The problem is not, "not enough space in jails," but, too many people who do not need to be there.

The National Coalition for Jail Reform strongly believes that the first attention of a jurisdiction should be directed to reducing the jail population and removing those who are inappropriately confined. The addition of language allowing surplus federal property to be used for programs for alcoholics and the mentally ill is excellent. Development of these alternative programs would go far towards reducing the jail population.

Recommendation D.3

The coalition endorses the formation of BOTH state and national commissions on corrections practices.

As has been mentioned earlier, there is a great need for state and local planning in criminal justice and thus it makes sense for a commission of state and

local members to develop comprehensive state and local correctional policies.

The more attention that can be focused on our overcrowded correctional institutions, the better. To this end, a National Commission on Corrections Practices which would highlight these problems, would be an asset.

But to some degree, this is one of the roles of the National Institute of Corrections. NIC was envisioned as "a center for correctional knowledge (and the development of) national policies for the guidance and coordination of correctional agencies" (Senate Judiciary Committee, 1974). On the assumption that "no commonly accepted national policy exists, one of its missions is to "formulate and disseminate correctional policy, goals, standards and recommendations." Its *Mission For the 80's* statement says, "The National Institute of Corrections will continue as the primary national advocate for federal correctional policy affecting state and local correctional programs."

The NIC advisory board is an independent body consisting of 16 members and including six federal officials serving ex-officio, five correctional administrators and five individuals from the private sector with an interest in, and commitment to improving corrections. Appointments are made by the U.S. Attorney General for three-year periods. The board does not, though, include state and local elected officials.

Yet, it would be difficult for a federal agency to really set national policies and thus a national commission should in no way conflict with NIC's role.

Recommendation D.4

The coalition has no specific policy on community corrections, but does not support reducing incarceration, and providing alternatives to incarceration for those who need it. I would suggest adding *The Commission recommends that Congress enact legislation providing incentive grants to state governments to develop comprehensive community corrections strategies EMPHASIZING NONCONFINEMENT OPTIONS in partnership with local governments.*

The coalition strongly believes that the first attention of a jurisdiction should be directed to reducing the jail population and removing those who are inappropriately confined. After jurisdictions have demonstrated that maximum efforts have been taken to reduce jail populations, the coalition urges jurisdictions to take action to ensure that no one is held in

jail under conditions which violate his or her rights under the Constitution and urges that jurisdictions develop plans to ensure conditions appropriate to the protection of the physical and mental health and welfare of those held. The Coalition is concerned that communities may see the answer to overcrowding to be building more jails. Realizing that building more jails will not necessarily solve the problem, the jail coalition urges members of the community to look first at who is in its jails and begin by removing those people who do not need secure confinement.

Recommendation E.1

Many organizations within the coalition, including judges and civil rights lawyers, would have a problem with this recommendation. The statement in the background section . . . "the newer court orders are often marked by demands for immediate conformance with court-designed plans . . ." is not true.

Courts are making every effort to stay out of developing plans for jurisdictions and only do so when the elected officials have failed to do so. The first thing courts do is to ask the defendant to present a plan. This plan, of course, may require the jurisdiction to appropriate money, but how else are the constitutional requirements to be met?

Rarely do courts order detailed remedies as the first step. Ratifying a consent decree is much more effective than prescribing detailed remedies. *But*, when a jurisdiction has failed to come up with an acceptable plan or has failed to implement it, the court has no other alternative but to order specific remedies. Even when they order specific remedies, they tend to base them on state or national standards, not their own judgement.

Recommendation E.1 is based on a misperception and does not reflect what is really happening.

There is a tendency to see the courts, especially the federal courts, as threatening local communities and ordering unreasonable things. It is much better for communities, on their own, to bring their jails up to Constitutional standards. If they did so, there would be no need for the courts to be involved. But courts do not wield weapons nor order unreasonable detailed remedies. As a judge in Georgia wrote in his order,

From this brief reminder, one can readily see that the constitution is not some sort of "weapon" carried about by federal judges who apply it in a meddlesome way to the

people and their institutions. Rather, it is the other way around. If it be a weapon, it is the weapon of the people with which they safeguard their freedoms from the intrusions of government. If, as was tentatively suggested at our conference, all parties are aware of the facts and the facts show the jail to be constitutionally inadequate, then there should be no need for a federal court to be involved at all. The court should be used by the people and their institutions to resolve disputes and not used as a haven to which the timid may repair for an order that they do that which, they should do without any order.

Inmates of the Henry County Jail vs Parham (430 F. Supp. 304 Northern District of Georgia, 1976)

The two parties in this case then returned with an agreement which the court ratified.

I do not see a need for this recommendation, but if there is, I would suggest the following language:

The courts role is to assure that the procedures and conditions in jails meet Constitutional standards. When inadequate conditions or procedures are found, the court should encourage the appropriate officials in other branches of government to develop, fund, and implement plans to remedy the unconstitutional conditions.

**Aldine Mosher & Kenneth Kerle
National Sheriffs' Association**

The Advisory Commission on Intergovernmental Relations (ACIR) is to be commended on its thorough job of jail research. The people might disagree with the recommendations or agree; some would argue for a prioritizing of the issues. The National Sheriffs' Association is grateful for the opportunity to participate in the Commission's deliberation on *Jails: Intergovernmental Dimensions of a Local Problem*.

The recommendations would indicate a good deal of thought and consideration has been given to their formulation. In general NSA concurs with the thrust, but we would like to make observations on recommendations which we feel could benefit by deleting or amending certain portions.

Recommendation A.2

**KEEPING INAPPROPRIATE POPULATIONS
OUT OF JAILS**

NSA has been a member of the National Jail Coalition since its inception and as everybody knows its reason for being is to remove the juvenile, the mentally ill and retarded, and publicly inebriated detainees from jails to more appropriate settings for treatment and/or confinement. The recommendation is weakened by the inclusion of the words "where resource constraints render these proposals impracticable, etc." Groups for years, including NSA, have agreed that this action should be taken, but all too often nothing is done. A recent article in *Federal Probation*, in reference to confining the mentally ill in jail, made the point that since progress has not been made that jail administrators, etc., should just accept the fact that the mentally aberrant will be confined in jails and opt for a jail treatment model. (i.e., mental health counselors who work for the jail or some other forms of community resources provided). This last sentence is nothing but a "cop out" for things can be accomplished if priorities are set right. It is interesting to note that last year in the Harper case, the West Virginia Supreme Court ordered that chronic alcoholics no longer be confined in jails even though public drunkenness in West Virginia

is still a crime. Realizing the dearth of resources to deal with the problem, the court ordered the state to make available some 14 million dollars through a state department of health to develop alternative counseling and treatment centers.

Recommendation A.5

**REMOVING STATE PRISONERS FROM
LOCAL JAILS**

Most Sheriffs would say "it's about time!" We agree that jails should be properly reimbursed for holding state prisoners, for often counties are grossly underpaid. Recently on a trip to Autauga County, AL, we learned that the sheriff was reimbursed by the state at the rate of \$1.75 per day for each state inmate in the Autauga County Jail.

We feel, however, that this recommendation is too weak. We propose a clause which says, in effect that "no more than 20% of the jail's population shall be state prisoners without the express approval of the sheriff." Further, any money derived by local governments from this kind of arrangement should go directly into the jail budget of the sheriff and not into the county general fund. This was one of the main factors in the crowding of the New Jersey jails—the state gave the money over to the Boards of County Freeholders. The Sheriff of Monmouth County, NJ, got fed up and finally sued the state department of corrections in an attempt to force the removal of nearly 200 state sentenced inmates from the crowded county jail. (Page 10 of *The Pre-Trial Reporter*; December 1982).

Recommendation C.1

**STATE STANDARDS, MONITORING AND
REIMBURSEMENT**

We think that this recommendation could be made stronger. States should be urged to enact legislation providing funding for jail renovation and capital construction and technical assistance. Once the state has agreed to provide the money, it should insist upon jail standards which are *mandatory*. In this

regard the powers of state jail inspectors should be increased which would enable the inspectors to compel compliance without the necessity of getting a court order. Failure to comply would mean the withdrawal of state support and failure to comply with *life safety* standards would be basis for closing the jail down.

Recommendation C.2

UPGRADING JAIL PERSONNEL

This is a good recommendation. We feel it could be improved by the inclusion of another sentence which would further explain the last clause "pay particular attention to personnel and training in mandating standards for local jails." *States should be encouraged to appoint jail advisory training committees composed of sheriffs and jail staffs to guide the development of implementation of such training.* In states involved in correctional training, it is often left up to the state department of corrections staff who reasonably have more interest in state institutions than they do jails. Often state trainers have never worked in a jail. There is a big difference

between a jail and a prison and a considerable difference in the kinds of problems confronting people who work in them. For example, more than 6,000,000 people are processed through American jails in contrast to penal institutions where prisoners will be there for a considerable length of time. The Jail suicide rate is 3½ times higher than the national average and much higher than experienced in state prisons. Accordingly, good training would indicate a great deal more time spent on suicide prevention techniques with jail officers.

Recently, Supreme Court Justice Burger at Pace University in New York City said institutions should be involved as training schools and factories with fences instead of "human warehouses." Justice Burger addressed areas touched on in *Recommendation C.5*. NSA would like to emphasize the point made by the Chief Justice in regards to:

Cooperation by leaders of business and labor in the development of programs designed to produce goods in the jail and prison setting. NSA feels this would help to eliminate a great deal of idleness, frustration and dead time with which many prisoners are now confronted.

Statement of

**John O'Rourke
County Councilman
Baltimore County, Maryland
President, Maryland Association of Counties
and
Chairman, Corrections Committee,
The National Association of Counties**

I wish to compliment Chairman Hawkins and the Commission for conducting this important study on the intergovernmental dimensions of the jail crisis. It is a subject that rarely receives any national attention.

The National Association of Counties (NACo)* firmly recognizes that it is only in the context of an intergovernmental framework that rational and long-range solutions to the jail and prison crisis in our country can be found—solutions to jail and prison over-crowding, sub-standard conditions of confinement, the lack of alternatives to incarceration, the widespread disparity in sentencing, the back-up of state inmates in local jails, the growing pressures of housing federal inmates, and above all, the serious lack of comprehensive planning and partnership arrangements between state and county governments.

The following comments relate to the draft recommendations.

Recommendation A.1

PRETRIAL RELEASE

NACo policy is very clear in its support of alternatives to commercial bonding practices as well as non-financial pretrial release options. We recognize that there are many in jail awaiting trial who pose no threat to the community but are simply too poor to post bail. The county is a major victim of the com-

mercial bail system since we pay the bill for unnecessary confinement. The latest national jail census (1982) found that 60% of jail inmates were awaiting trial. *NACo supports lines 1-6 of this recommendation without change.*

Although NACo has no policy with respect to Option A, we do have policy supporting Option B which would permit "community safety" as a consideration in judicial determinations of bail or other pretrial options.

Recommendation A.2

**KEEPING INAPPROPRIATE POPULATIONS
OUT OF JAIL**

NACo favors the spirit of this recommendation as contained in Lines 1-7, although we would suggest alternative language to emphasize the important role of local governments as well as the states in this process:

Local governments in partnership with state governments should develop alternatives (1) for removing public inebriates, the mentally ill and retarded and juveniles from adult jails and (2) design improved coordination and cost sharing strategies for accomplishing these objectives.

The last sentence of this recommendation (lines 7-11) should be deleted since it weakens the thrust of the recommendation. To advocate separate housing and close attention to these populations, where resources are lacking, is contrary to sound practice and would probably cost more to institute than the necessary reforms. Many of our 2,500 rural jails would have to be renovated or rebuilt to meet the separation requirement. Separating juveniles in adult jails was an original requirement of the juve-

*NACo is the only national organization representing county government in America. Its membership includes urban, suburban and rural counties joined together for the common purpose of strengthening county government to meet the needs of all Americans. By virtue of a county's membership, all its elected and appointed officials become participants in an organization dedicated to the following goals: improving county government; serving as the national spokesman for county government, acting as liaison between the nations' counties and other levels of government, and achieving public understanding of the role of counties in the federal system.

nile justice and delinquency prevention act but this provision has been changed in favor of complete removal over a seven year period.

Recommendation A.3

**STRENGTHENING COMMUNITY-BASED
CORRECTIONS**

NACo supports the thrust of the recommendation but the language should link alternatives to a planning process. I would suggest the following language:

The Commission recommends that state governments encourage local governments through financial and technical assistance to develop a comprehensive planning process at the local level and to make increased use of community-based alternatives to incarceration such as community service and restitution.

Recommendation A.4

SENTENCING GUIDELINES

Alternative A is totally consistent with NACo policy. Alternative B would benefit the states but not the counties since its focus is sentenced felony offenders. NACo policy supports guidelines which cover "serious misdemeanor offenders" as well.

What's missing from Alternative A, however, is language setting forth a relationship to population capacity. I would suggest the following amendment to Alternative A:

Such guidelines should be based on legislatively pre-determined population maximums at both the state and local level.

Recommendation A.5

**REMOVING STATE PRISONERS FROM
LOCAL JAILS**

NACo Supports this recommendation although we recognize that the back-up of state inmates in local jails in only *symptomatic* of the lack of planning and partnership strategies between state and county governments.

Recommendation B.1

INTERLOCAL AGREEMENTS

NACo supports this recommendation with two

minor changes. On line 3 the word *prisoners* should be changed to inmates since many are awaiting trial — the term prisoner usually refers to someone serving time. On line 5, I would suggest striking out the words *to handle such offenders* and end the sentence after the word systems.

Recommendation C.1

STANDARDS AND STATE ASSISTANCE

NACo supports this recommendation with minor changes:

Line 2—Strike *after* and insert the word *in*.

I would suggest that the bracketed language not be included. State government should enforce standards, close jails, etc., but it would be improper for the state to take over county responsibilities—the state or the courts have the authority to close jails and that should be sufficient. The problem is that the majority of state governments have generally failed to invest in local adult corrections, not that counties have failed to act when state investment has been forthcoming.

Recommendation C.2

UPGRADING JAIL PERSONNEL

NACo supports without change.

Recommendation C.3

UPGRADING JAIL MANAGEMENT

NACo supports without change.

Recommendation C.4

**EXPANDING ACADEMIC AND
VOCATIONAL TRAINING**

NACo supports without change.

Recommendation C.5

**CORRECTIONS INSTITUTIONS:
WORK PLACES, NOT WAREHOUSES**

NACo supports this recommendation if the phrase *in consultation with organized labor* is inserted in line 1 after the word legislatures.

Alternative A—NACo could support if the above phrase was added

Alternative B—This is less ambitious but a step in the right direction. We could support without change.

Recommendation D.1

**FEDERAL RESEARCH, TRAINING AND
TECHNICAL ASSISTANCE**

NACo supports with word *expand* on line 2. The federal governments research, training and technical assistance efforts should place increased emphasis on intergovernmental relations and corrections reform.

Recommendation D.2

**AMENDING THE FEDERAL PROPERTY AND
ADMINISTRATIVE SERVICES ACT**

NACo policy favors use of federal surplus property for jail purposes after the county in question has taken all reasonable measures to develop alternative programs prior to seeking the use of such a facility. Operating expenses for jails are now estimated to be 16 times the cost of construction over a 30 year period.

Although NACo does not have policy covering all the possibilities listed under the recommendation, logic would suggest that *limited* federal surplus property should be distributed on the basis of a needs assessment to maximize the benefits of federal investment and to avoid unnecessary institutionalization.

Recommendation D.3

STUDY COMMISSIONS

NACo supports Alternative A & B striking lines

6-8. NACo recognizes the jail crisis to be a national problem. A national commission would provide follow-up to the ACIR report. The need for state correctional commissions to "develop comprehensive state and local correctional policies" is also a basic need but unfortunately such commissions exist only in a few states.

Recommendation D.4

**FEDERAL FINANCIAL ASSISTANCE FOR
LOCAL CORRECTIONAL SYSTEMS**

NACo policy supports Alternative A, Parts I *and* II.

I would suggest on line 2 that the words *or enhance* be inserted between the words develop and comprehensive so as not to penalize any state that had already instituted such programs.

Recommendation E.1

JUDICIAL INTERVENTION

NACo supports this recommendation.

One of the major problems with court orders is that they are aimed at specific constitutional violations as opposed to the systemwide reforms that are almost always required. Elected policymakers are in the best position to deal with systemwide reform — aside from their constitutional obligations.

Mr. Chairman, I appreciate the opportunity to make these comments and recommendations.

Statement of
Dale G. Parent

Mr. Chairman and members of the Commission:

It is an honor to be invited to comment on this study and its recommendations. The materials before you are testimony to the diligence of the Commission and its staff, and reflect the complex problems faced by American jails. By recommending policies along a broad front, the study provides a comprehensive agenda for reform. It suggests, accurately, that no quick and easy solution is possible.

But it is the nature of the political process to seek quick fixes, and some jurisdictions will be tempted to implement bits and pieces of the recommendations before you. Such an approach may only exacerbate the problems. Let me draw some illustrations from Minnesota's experience.

In 1971 Minnesota decriminalized public drunkenness, and there was a sudden and substantial drop in jail populations. But the criminal justice system responded to this newly available resource, sentencing practices were changed, and within a year or two the jails were more full than before.

In 1973 Minnesota enacted its Community Corrections Act (CCA) to reduce reliance on state imprisonment by expanding local sentencing options, and by applying financial incentives and disincentives to participating counties. The incentive was a subsidy, which increased the more counties cut their imprisonment rate for property offenders. The disincentive was a "chargeback" which reduced each county's subsidy by the state's per diem cost for each property offender they imprisoned.

The CCA produced a very modest, and over the long haul, minimal reduction in state imprisonment for property offenders. In retrospect, it is clear that the financial rewards and penalties, which applied to the executive branch of county government, had little impact on judicial sentencing practices. The CCA was highly successful in expanding local correctional programs. But, it did not provide, and did not require the counties to provide, effective standards for the use of these expanded local programs. As a result, two things happened.

First, from the viewpoint of the CCA, the new correctional programs were used for the wrong offenders—those who otherwise would have been given straight probation, rather than ones who would have gone to prisons. This "widening of the

net" has occurred in many other jurisdictions as well.

Second, the new sentencing options were used in an additive fashion. Instead of getting straight probation, an offender might get a period of probation, plus in-patient drug treatment, plus be required to pay restitution, and serve a short jail term. Additive sanctions increased the chance that the offender would fail to complete all the conditions, and would end up serving jail or prison time as a probation violator.

Clearly, straight probation was an inadequate disposition for some offenders, and a wider range of appropriate options was needed. But without standards for their use, there was a tendency to use too many programs for too many offenders.

In addition, the CCA considered the local jail a community correctional resource, and funded jail programs like work release, counselling, education and treatment. The jail became a more attractive option to the judge, because it no longer was "dead time". This led to jail use for more offenders for longer terms, and further widened the net by jailing offenders who would have gotten neither jail nor prison terms in the past.

But the CCA had another important consequence: it created a politically powerful local correctional organization. Local correctional interests now had reasons to organize and unite for political action—namely, a common financial interest, and a common "enemy"—the Department of Corrections. By 1980 CCA counties elected 75% of the state legislators, and had the political muscle to win legislative fights with the DOC.

This increased political power of local corrections, and their opposition to jail guidelines, was one factor which led the Minnesota Sentencing Guidelines Commission to reject developing jail guidelines.

These illustrations point out that reform options are not discrete policies. Rather, they can interact in ways that may work against the initial objective and end up making it worse. Thus, it is important to assure the proper mix of reforms and to consider the sequence of those reforms. In Minnesota, if sentencing guidelines had been developed along with community corrections and decriminalization of drunkenness, it is likely that net widening could have been

limited, additive sanctions controlled, jail populations kept at lower levels, and jail guidelines introduced.

Let me turn to the topic of sentencing guidelines, and the recommendations relating to jail guidelines. The concept of sentencing guidelines has been around for about a dozen years, and two different models of guideline development have emerged.

The first model may be labelled "descriptive/voluntary" guidelines. Under this approach, the usual past practices of the courts, as determined by research, are formulated into sentencing guidelines which effectively describe what judges have been doing. When sentencing individual cases judges may consult these guidelines or they may choose to ignore them. If they consult the guidelines, but give a different sentence than the usual sentence of the past, they are requested, but not required, to state their reasons for doing so. Descriptive/voluntary guidelines do not expand an offender's right to appeal a sentence.

The other model, typified by the Minnesota experience, can be labelled "prescriptive/presumptive" guidelines. Under this approach the legislature creates a sentencing commission and directs it to develop sentencing guidelines. Those guidelines may, or may not, correspond to past practices. Judges are required by law to use the guidelines in sentencing future cases, and must overcome the presumption in favor of the guidelines sentence when they depart by giving written reasons. Finally, there is a right to appeal the sentence given.

There have been a large number of local, and a few statewide descriptive/voluntary sentencing guidelines. Three states—Minnesota, Pennsylvania, and Washington—have developed prescriptive/presumptive statewide guidelines, although only Minnesota's have been in effect long enough for preliminary evaluation. What conclusions can be offered?

First, if you want to change sentencing outcomes to achieve certain objectives—for example, to reduce disparity, to make sanctions more or less severe for certain offenses, to limit jail or prison populations—guidelines must change the sentencing behavior of the courts. That means that the range of choice, or discretion, open to the judge must be narrowed, and that judges must follow the guidelines in the great majority of the cases.

That does not mean that judicial discretion should be eliminated or that it is unimportant under sentencing guidelines. Indeed, the opposite is true. Aristotle said that justice consists of treating equals

equally and unequals unequally. In a sense, that is what sentencing guidelines are all about. The guidelines provide the means of treating equals equally. They define offenders into categories based on their criminal record and the offense of conviction, and for each category recommend a uniform punishment. Guidelines rely on judges to spot the highly unusual case—the unequal case, if you will—and to pronounce a more appropriate and just sentence.

For example, assume there are ten offenders convicted of armed robbery. None of the ten have a prior criminal record, and a similar amount of money was taken in each robbery. Based on these facts, the guidelines recommend the same sentence for each. But the judge discovers at sentencing, that nine of the victims were uninjured, while the tenth, an elderly person, was pistol-whipped and kicked, and was hospitalized for several weeks. Justice requires that the sentence for the last offender be more severe than the first nine, and judicial departures are a vital means of assuring such just sentences.

A second tentative conclusion is that descriptive/voluntary guidelines do not change sentencing practices. An evaluation by the National Center for State Courts found that such guidelines had no discernable impact on sentencing outcomes. There were several reasons for this. First, because the guidelines were designed to represent past practice, judges who continued their past sentencing practices should conform to the guidelines most of the time, even if they never consulted them. Also, such guidelines gave judges very wide ranges of choice, so that most sentences a judge might be inclined to give would fit within the guidelines. Finally, judges simply viewed the guidelines as one more piece of information to be considered in sentencing, and felt free to disregard them at will.

A third tentative conclusion is that presumptive/prescriptive guidelines may change sentencing outcomes. One cannot generalize based on the experience of one state. But in Minnesota the guidelines have reduced disparity, have produced substantial changes in sentencing outcomes, have kept prison populations at projected levels—just below capacity—and there has been a high rate of judicial compliance. Only time will tell if those trends hold up over time, or if they will also emerge in Washington and Pennsylvania.

On the more specific issue of jail use guidelines, what can be learned from Minnesota's experience? The enabling legislation permitted, but did not re-

quire, the commission to develop jail guidelines. The commission had one year to develop the guidelines and submit them to the legislature. It was half-way through the 11th month of that year before they concluded work on most aspects of the mandated prison-use guidelines. They decided to defer the issue of jail guidelines to some future date.

Major criminal justice interests had expected the commission to include jail guidelines in its initial effort. They were not especially delighted with the idea, but they were too busy working for particular policies in the prison use guidelines to object strenuously the jail guidelines. When the commission deferred the decision, these groups re-grouped and re-trenched, and staunchly opposed jail guidelines in succeeding years.

On issues for which the legislature had mandated the commission to act, it did so decisively, and at times courageously. When the legislature permitted, but did not require, the commission to act, it was less than courageous in the face of opposition.

Thus, one lesson is that the legislature should require a sentencing commission to develop jail guidelines. Political opponents can muster their forces before the legislature, and, if they lose, they are unlikely to intimidate a sentencing commission from proceeding with jail guideline development. A second lesson is that the commission should be given enough time to do the job properly.

The materials before you raise a number of issues on which the commission's experience may be instructive. The first issue is whether statewide jail use guidelines are possible, due to variable jail resources from county to county. In Minnesota it appeared that resource variability was not an insurmountable problem. The counties with large numbers of offenders had bigger and better jails than small counties with fewer offenders. Tests of various jail guideline models showed that in most cases local resources would be adequate. The counties which would have inadequate jail resources under these hypothetical jail guidelines were also the counties that had inadequate jail resources under the existing sentencing system. Thus, jail guidelines would not create a problem that did not already exist. Moreover, those counties, under existing sentencing practices, resolved their problem by contracting with a neighboring county which had surplus jail space. Under the hypothetical jail guidelines, those counties would have to continue, and in some cases slightly expand such contracts. Thus, the solution to resource imbalance under jail guidelines was also not a

new approach, but one already widely used.

The second issue is whether jail guidelines should cover only felons (*Recommendation A.4, Alternative 2*) or should apply to misdemeanants as well as felons (*Recommendation A.4, Alternative 1*). I would recommend Alternative 1. While this does pose the risk of increasing political opposition, it does provide a more effective and equitable framework for resolving the problems. First, it will cover more of the jail population and, thus, have a better chance of resolving the crowding problem. Second, it permits development of a more fair and rational penalty structure. For example, if Minnesota had developed jail guidelines for felons, but not for misdemeanants, and those guidelines recommended a particular felon should serve three months in the jail, that offender might serve his sentence alongside an offender convicted of a gross misdemeanor—a less serious offense—who the judge had sentenced to a full year in jail.

Third, the materials suggest that misdemeanor jail guidelines could increase court processing time by requiring consideration of criminal history information in sentencing, which seldom is done now. This need not be the case. The commission could define a large class of misdemeanors for which only the offense would be considered at sentencing, and for which jail would not be recommended. This could apply to the great majority of traffic and regulatory misdemeanor offenses—such as swimming at a beach after closing hours, etc. Criminal history information could be considered only for a limited number of more serious misdemeanors—such as assaults, thefts, etc.—and for these, criminal records searches could begin at arrest or at charging, so they would be available by sentencing.

Fourth, I note a curious and, I think, a serious omission in the recommendations. Presumably, one reason for enacting jail guidelines is to reduce jail populations, or, at least to prevent overcrowding. But no where is there explicit language stating that under the guidelines jail populations should not exceed jail capacity. If it is your intent that guidelines reflect resource limits, then language to that effect should appear in your recommendation and in any enabling legislation enacted by states.

A sentencing commission will face considerable opposition to the notion of considering available prison or jail beds in allocating punishment. Unless they have been directed to do so, they may well conclude—as did the Pennsylvania Sentencing Commission—that jail or prison overcrowding is none of

their concern.

In summary, I would urge you to endorse *Recommendation A.4*, Alternative 1, and to amend it in the following ways:

1) that the legislature create a sentencing commission to develop those guidelines; and,

2) that the commission produce guidelines under which projected jail and prison populations would not exceed available capacity.

Again, I want to thank the Commission for inviting me to comment on your study and recommendations, and I stand ready to respond to any questions.

Statement of

Jack Schaller

American Institute of Criminal Justice

Inmate work opportunities in jails today are extremely limited. Institutional maintenance and public works probably constitute the bulk of inmate jobs, with work release programs offering paid employment available to only a small proportion of the inmate population due to security and transportation problems. Some larger county facilities do operate industrial programs; we have found, however, that these are often low priority operations characterized by antiquated, failing equipment; unmotivated, poorly supervised inmate workers; an absence of manufacturing and financial controls; and an unclear concept of the market for goods capable of being produced.

These are a number of factors which must be taken into consideration in recognizing the limited availability of work opportunities for jail inmates. Lack of space, lack of staff, lack of funds, lack of legal authorization, even the inherent limitations present in the labor force so in need of employment, all are problems which must be addressed by any plan to establish a jail-based business.

None of these problems, however, are intractable. Virtually all of these difficulties have been faced at some time by state correctional institutions, and successful resolutions have been found. Our work with state prison industry programs has revealed successful industrial programs operating in lower security facilities having average lengths of stay comparable to those of many county and municipal prisons.

The issue of idleness in local jails has not as yet been subjected to the same kind of judicial scrutiny this issue has received at the state and federal level. No doubt this is largely true both because of the presence of more immediate physical conditions crying out for attention at the local level, and because length of stay in jail facilities is typically much shorter than in state operated correctional facilities.

This situation will probably not hold indefinitely, however. It is both dangerous and foolish to doubt that, eventually, lack of program opportunities in jails for sentenced inmates will spark some form of judicial intervention. This very situation has come to pass in my own city of Philadelphia, and is no doubt

occurring—or about to occur—in other municipalities as well.

It is therefore appropriate for jail planners and jail administrators to begin to explore possible solutions to the problem of idleness in county jails. The solution I favor is the creation of businesses within the jail, utilizing sentenced inmates as the principal labor force. These businesses may be privately or publicly managed, may be profit or community service oriented, and may or may not focus on the acquisition of technical skills useful in today's employment market. What all of these businesses *would* do, however, is put into use a human resource which is at present being totally wasted, while at the same time generate revenues for the jail, the county government, and the inmate him or herself.

We strongly believe that employment opportunities for jail inmates can—and should—be expanded. We further believe that, given the problems cited earlier, probably the best way to accomplish this is through various forms of partnership with the private sector.

As many of you are aware, such partnerships are beginning to blossom at the state level. There are now about a dozen such joint ventures in existence around the country, seven of these by virtue of a Congressionally mandated pilot project presently administered by the Department of Justice (for which my organization serves as principal consultant). I will be happy to provide details on any or all of these projects should you so desire.

Of these dozen, there are roughly three forms of private sector involvement in correctional work programs that we have seen. First is what we call the direct employment model, where inmates are placed directly on the payroll of a private firm and are directly supervised by that firm's staff. The second model is the purchase model, where a private firm agrees to buy the output of a prison-based, state-supervised business, often furnishing raw materials, specs and production standards to the prison. Hennepin County's Industrial Project is an example of this latter model. Finally, there is the resident owner model, where the inmate himself becomes in effect the private sector participant, operating his own

business with whatever assistance he can gather.

The outcome of all of these models is essentially the same in theory. The inmate receives a wage by virtue of his labor, generating new revenues not otherwise available in the public sector. From this wage the prisoner contributes something to the correctional system to defray the expense of incarceration, pays taxes, contributes to dependent support, makes restitution or contributes to a victim compensation fund, and builds a savings account to be used at release.

We believe that any of these models can work in county facilities, although the first two models are more well suited for the shorter confinement periods experienced at the local level.

ACIR's *Recommendation C.5* concerning the open market sale of goods and services produced by jail inmates lends important support to the expansion of employment opportunities as discussed in these remarks. I strongly endorse this recommendation.

The Commission recommendation also presents two alternatives detailing how this expansion is to be accomplished. The first calls for the elimination of federal criminal penalties now in force for the interstate shipment of prison made goods, while the second calls for a case-by-case waiver of those penalties for certain selected projects.

I am uncomfortable with the first alternative because I think it is too vague concerning protections still available to inmates and free labor in its delegation of authority to states. If a federal enforcement role is totally eliminated and all conditions for participation are set at the state level, I fear a too-easy return to exploitation, unfair competitive advantage, and to the same kind of abuses which originally led to the passage of federal restrictive legislation. I see no point in abolishing the wheel just so we can reinvent it.

I am more comfortable with the second alternative, although I have problems with that approach, too. I think that some level of federal oversight is needed in this area, and that some of the issues involved, in that they transcend state borders, are only resolved at the federal level. To create artificial limits on the number of projects, however, is to excessively "bureaucratize" the effort, and create a sort of implicit competition among correctional agencies for available "slots" where no such

competition is necessary.

My recommendation to the Commission, then, would be to call for continuation of a federal oversight role, but to make the program open to all correctional agencies that wish to participate. There is a precedent for such a policy in the federal administration of work release eligibility criteria under federal Executive Order No. 11755.

Under this executive order, any correctional agency that wishes to employ work-release inmates in companies doing federal contract work (e.g., highway construction) must ask the U.S. Department of Justice to review its work release laws and regulations to insure compliance with the requirements of the executive order. At the conclusion of this review, the Justice Department "certifies" the state work release program to permit work release inmates to participate in federal contract work.

It seems to me that private sector employment of incarcerated offenders could be handled in the same fashion. States and counties wishing to establish joint ventures with the private sector would submit their laws and regulations to the Justice Department for review to establish compliance with 1761(c) as amended, and if in compliance, would be "certified" to establish whatever joint ventures they desired under those laws and regulations. This procedure would be less cumbersome than the present procedure, which is embodied in the second alternative recommendation, while still providing a level of protection currently lacking in the first alternative suggested.

To conclude, I think the Commission should be commended for taking the stand that it has on the employment of jail inmates. I personally endorse the assumptions implicit in many of the other recommendations, which address such issues as reducing jail populations, expanding the use of alternative sentencing, implementing more effective restitution and community service programs, and other needed reforms. I am enough of a realist, however, to recognize that, even when all these things are done, we will be left with a residual jail population of staggering dimensions, larger than the populations of many American cities. I believe that these individuals should have the opportunity to be productively employed. I'm pleased that the Commission recognizes this need and has addressed it forthrightly and intelligently.

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 slates nominated by the National Governors' Conference, the Council of State Governments, 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.

WHAT IS ACIR

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 ad-



ministration, 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.