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SYMPOSIUM COMMENTS

INCARCERATING THE INNOCENT: PRETRIAL DETENTION IN OUR NATION'S JAILS

I. THE NATURE OF THE PROBLEM

While the tragic epitaph inscribed by recent events at Attica has thrust the issue of prison reform into national prominence, our nation's jails simmer with similar explosive potential but are largely viewed with apathetic disregard. Eminent corrections officials have repeatedly urged that the overcrowded, unsanitary, and dehumanizing conditions prevalent in jails must be relieved.¹ And occasionally, the detention facilities themselves erupt in violent warning of the exigency of this problem, as in the 1970 riot in New York City's Manhattan House of Detention for Men (commonly known as "The Tombs").² Nevertheless, the pace of reform is at best uninspired, causing a destructive threat to loom in Damoclean fashion over our entire system of criminal justice.

With national attention currently focused on correctional reform, it is significant to note that Norman A. Carlson, Director of the United States Justice Department's Bureau of Prisons, has recently declared that "[p]robably the most pressing problem in the correctional sphere is the tragic situation in our nation's jails."³ One commentator has described the extent of this "pressing problem" in the following manner:

Conditions in short-term detention facilities are a national disgrace. Report after report of investigating commissions and grand juries disclose the existence of squalid, dehumanizing conditions in jails. The public should by now be aware that jails are overcrowded; unsanitary; heavily populated with perpetrators of 'victimless' crimes—(drunks, prostitutes, and vagrants)—with older offenders mingled with young first-timers, and with convicted criminals mixed with those awaiting trial but unable to make bail;

1. Writing in 1959, elder statesman of corrections Richard A. McGee advocated comprehensive jail reform to alleviate the social and psychological damage wrought by these inadequate facilities that even at that time had "been so obvious to every student of this problem for the past fifty years." McGee, *The Administration of Justice: The Correctional Process*, 5 NPPA J. 225, 228 (1959). In a recent article this author persists in his campaign. McGee, *Our Sick Jails*, 35 FED. PROB. 3 (Mar. 1971).

2. N.Y. Times, Aug. 11, 1970, at 1, col. 1.

3. Carlson, *The Law and Corrections*, 6 U. SAN FRANCISCO L. REV. 77, 83 (1971).

staffed by underpaid and untrained jailers who cannot prevent—or who even participate in—assaults, homosexual attacks, and other forms of brutality; lacking in facilities, money, and personnel to provide decent medical care, adequate nutrition, minimal recreational activities, or any educational or vocational program.⁴

Indeed, conditions in jails are consistently rated as being worse or harsher than those in penal institutions,⁵ and one study has reported that prisoners preferred penal institutions to detention facilities in the ratio of twelve to one.⁶

Certainly one element contributing to the substandard and deteriorating state of our jails is the age of the physical plants. In a revealing study of jails in Illinois, it is reported that almost 30 percent of all jails in use in that state are more than 75 years old.⁷ Moreover, more than half of all jails are more than 50 years old, and that figure swells to nearly 70 percent if only county jails, where inmates are confined for longer periods than in city jails, are considered.⁸ On a national level, a recent survey by the United States Census Bureau for the Law Enforcement Assistance Administration observed that more than 25 percent of detention cells were housed in buildings more than 50 years old and 6 percent in buildings more than 100 years old.⁹ The potential for deterioration is undoubtedly proportional to the age of the physical facility, but the age factor presents even more subtle ramifications. As the Illinois study pointed out:

Generally speaking, the architecture of a jail reflects the ideas about human nature that were in the minds of the teachers and textbooks that taught the architects who designed them. Therefore, the fact that a jail is 25, 50, or 100 years old means that it em-

4. Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 475 (1971) (footnotes omitted).

5. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 24 (1967) [hereinafter cited as PRESIDENT'S CRIME COMMISSION REPORT]; Council of the City of New York Subcommittee on Penal and Judicial Reform, Report on Prison Reform 11 (1971) [hereinafter cited as Burden Report]; Note, *Pre-Trial Detention in the New York City Jails*, 7 COLUM. J.L. & SOC. PROB. 350 (1971).

6. Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1144 n.235 (1965), citing A. TREBACH, *THE RATIONING OF JUSTICE: CONSTITUTIONAL RIGHTS AND THE CRIMINAL PROCESS* 83, 264 (1964).

7. H. MATTICK & D. SWEET, *ILLINOIS JAILS: CHALLENGE AND OPPORTUNITY FOR THE 1970's* 80 (Illinois Law Enforcement Commission 1970) [hereinafter cited as ILLINOIS JAILS].

8. *Id.* at 80-81.

9. U.S. Dep't of Justice, Law Enforcement Assistance Administration, 1970 National Jail Census 3-4 (Nat'l Criminal Justice Information and Statistics Serv., Series SC, No. 1, 1971) [hereinafter cited as 1970 National Jail Census].

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bodies ideas about how human beings ought to be handled and treated that are 75, 100, and 150 years old.¹⁰

Of course age alone does not render a detention facility incapable of constructive service if it has been adequately maintained and/or modernized to meet current heating, lighting and ventilation standards. But largely due to limited municipal and county budgets and an unenlightened public interest, such maintenance programs have failed to materialize. The Illinois study reports that in that state "[o]ver 40 percent of the jails have not been touched since their dedication" nor are there plans for any physical improvements contemplated in over 85 percent of all jails.¹¹ As a result many jails exist in a high state of disrepair; lacking in proper lighting, ventilation, or heating equipment; devoid of properly operative sanitary facilities; and often plainly insecure.¹² Many are quite literally fire traps; and, while some have been condemned, "it does not follow that they have been replaced."¹³

Compounding these factors and creating the most crucial stress on our aged and inadequate detention facilities is the problem of overcrowding. In 1966 it was estimated that 1,016,748 persons had been held in local jails, the average daily population being 141,303.¹⁴ Plainly, facilities that were built to accommodate populations of twenty-five, fifty or more years ago cannot cope with such numbers of inmates. As the country's population has increased the number of crimes committed has risen correspondingly. Utilization of modern and more efficient police methods is causing the apprehension and detention of more criminal offenders. The result is a serious crush on our nation's jails. A New York City study has estimated that detention facilities in that metropolis are filled to 161 percent of acceptable capacity,¹⁵ and other figures indicate that this number occasionally reaches 200 percent.¹⁶ Crowded conditions mean multiple inmate assignments to cells designed for single persons. The already inadequate sanitation fa-

10. ILLINOIS JAILS, *supra* note 7, at 79.

11. *Id.* at 107.

12. The Mattick and Sweet study reveals that "[i]n one jail, inmates carried the door of their cell to the jailer—the hinges had rotted away." ILLINOIS JAILS, *supra* note 7, at 81.

13. *Id.* at 80.

14. Burns, *The American Jail in Perspective*, 17 CRIME & DELIN. 446, 451 (1971).

15. Burden Report, *supra* note 5, at 20.

16. *See Note, supra* note 5, at 355.

cilities are so overtaxed that many jails offer toilets and washbasins at ratios that exceed one per every 12 inmates.¹⁷ Strained jail budget fail to provide for purchase of basic articles of personal hygiene such as soap, towels and toilet issue, not to mention major items like clothing, mattresses and linens. Inmates are consequently compelled to exist in conditions of squalor and misery. The Illinois Jail study has concluded that "provision of personal hygiene articles is far less than what is required for simple human decency" ¹⁸

Finally, it must be noted that since most jails are locally operated short-term detention facilities, construction programs generally anticipated only basic accommodations. Therefore, as the recent Census Bureau report points out, 86 percent of city and county jails across the nation have no recreational facilities, 50 percent have no medical facilities and 25 percent are without prisoner visitation areas.¹⁹

At this point the reader should be acutely aware that these institutions of justice, once mockingly labeled "crucibles of crime,"²⁰ are indeed a "national disgrace."²¹ Richard A. McGee, long-time corrections official, has conceded that "[w]hile I readily grant the necessity for places of temporary detention for most offenders . . . this initial step in the correctional process is more often destructive than corrective."²² And in an impassioned article which decries the atrocities of our jails, Karl Menninger, author of *The Crime of Punishment*, has been moved to write:

One-hundred and fifty thousand human beings, mostly young ones, are locked up in cages and dungeons in the name of 'justice' and mercy by agents of the very people who are being wronged. This expensive, futile, absurd, cruel business does not rehabilitate anyone; it does not reform anyone; it does not change anyone for the better. It only enrages and stupefies and crushes already unstable,

17. See, e.g., ILLINOIS JAILS, *supra* note 7, at 95-96.

18. *Id.* at 181. The report further suggests that the filthy conditions created when jails fail to make adequate provision for inmate hygiene has demoralizing effects on the inmates which contribute to security and handling problems. *Id.* See also Note, *supra* note 5, at 357-59.

19. 1970 National Jail Census, *supra* note 9.

20. This phrase is attributed to J. FISHMAN, CRUCIBLES OF CRIME: A SHOCKING STORY OF AMERICAN JAILS (1923).

21. See Turner, *supra* note 4 and accompanying text.

22. McGee, *The Administration of Justice: The Correctional Process*, *supra* note 1, at 228.

misdirected and confused people. It ruins them for life in the shape of a light disciplinary slap on the wrist. After a jail sentence, the best of prisons cannot accomplish much.²³

Thus, whether incarceration is viewed as an essential element of a deterrent criminal justice system or a primitive and regressive punishment not to be tolerated by a society enlightened by psychology and the social sciences, basic dysfunctions in the jail milieu must be acknowledged.

Such is the environment into which the jail inmate is cast. While the humanitarian may legitimately question the subjugation of any person to these environs, this comment is intended to focus upon only one segment of the total jail population—the pretrial detainee—whose confinement under such conditions is even more repugnant. These detainees are not incarcerated for punishment or rehabilitation, but solely because they are accused of committing a punishable offense and cannot “make” or are not allowed benefit of bail. Our system of criminal justice proclaims that the accused is to be presumed innocent until proven otherwise by judicial determination. Yet persons detained in local jails “who have not yet been convicted of a crime are subjected to the worst aspects of the American correctional system.”²⁴

While any investigation centered about restriction of personal freedoms will inevitably evoke consideration of constitutional protections, the instant discussion is not intended to concentrate on the constitutional questions.²⁵ Instead, the legitimate bounds of restrictions placed upon pretrial detainees will be explored with reference to the few recent cases that have dared venture into the realm of jail litigation. Such cases are important not only for the decisional principles established thereunder but also because they may herald a reversal of the traditional judicial disinclination to interfere in matters of institutional operation. The underlying thesis of this comment is that only a positive showing of legitimate state interest in assuring the presence of accused persons at trial can justify *any* restrictions upon the freedoms of such individuals.

23. Menninger, *Our Dreadful Jails*, 6 U. SAN FRANCISCO L. REV. 1 (1971). This article appears as a preface to a series of articles entitled *Symposium: The Purposes of Corrections—Directions for Improvement*. *Id.*

24. PRESIDENT'S CRIME COMMISSION REPORT, *supra* note 5, at 24.

25. For an examination of constitutional considerations relating to pretrial confinement the reader is referred to Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941 (1970).

Even when pretrial detention is deemed imperative, the presumption of innocence must operate to insure that the detainee retains rights commensurate with those of his counterpart who is liberated by the bail system. Only those restrictions which are necessarily inherent in imprisonment can be tolerated.²⁶

II. THE BURDENS OF CONFINEMENT

As a prelude to discussion of recent jail litigation, it is appropriate to briefly investigate the composition of jail populations and the consequences of detention, with special emphasis on the pretrial detainee. Such an investigation is essential for an understanding of the potential abuses of inmates' rights and for a determination of those areas most appropriate for judicial and administrative relief.

A. *The Jail Population*

Jails are operated primarily by county or municipal administrations as short-term detention facilities. These institutions house two basic classifications of persons—convicted misdemeanants sentenced to terms of confinement of one year or less, and accused persons awaiting trial. Inmates in the former category probably do not present a clear danger to society—being “annoying but . . . seldom vicious.”²⁷ Thus a leading correctional official has recently written:

As a practical matter . . . we find the local jail being occupied principally by drunks, addicts, and petty thieves. And as for the women, if the prostitutes were eliminated from the jail populations, most of the women's quarters would be virtually empty most of the time.²⁸

However, the instant concern centers about those persons awaiting trial and, perhaps surprisingly, the United States Census Bureau has recently determined that this group constitutes more

26. At least one court has supported this assertion. The opinion in *Butler v. Crumlish*, 229 F. Supp. 565, 567 (E.D. Pa. 1964) proclaimed that:

The constitutional authority for the State to distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not, furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself.

See also *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944).

27. Burns, *supra* note 14, at 454.

28. McGee, *Our Sick Jails*, *supra* note 1, at 4.

than half of all populations in our nation's jails.²⁹ Other studies have indicated that in some metropolitan jurisdictions as many as 60³⁰ or 70³¹ percent of jail inmates are unconvicted.

The reasons usually suggested as justification for the confinement of these presumably innocent persons are twofold: to insure the appearance of the accused at trial and to protect such persons who may be called to appear as witnesses from harassment by the accused.³² The former rationale is certainly the most widely espoused and has been described as basic to our system of criminal justice. Thus one commentator has written:

[W]e have realized that a deterrent system cannot function at all unless society can successfully prosecute lawbreakers. Hence we have traditionally detained individuals likely to flee or otherwise avoid prosecution. This limited form of pretrial detention is considered essential to the preservation of a system that seeks to control crime by threat of subsequent punishment³³

However, it is not every accused that is subject to this "traditional" scheme of secured appearance. Since the passage of the Judiciary Act of 1789,³⁴ persons accused of non-capital offenses may obtain release before trial by giving adequate assurance that they will stand trial and submit to sentence if judged guilty.³⁵ Our society has determined that such "adequate assurance" shall be the deposit of money, or bail, held by the "court" and forfeited upon non-appearance. As a practical matter the bail system is administered by professional bail bondsmen who charge fees commonly fixed

29. 1970 National Jail Census, *supra* note 9, at 2.

30. McGee, *Our Sick Jails*, *supra* note 1, at 4. The Mattick and Sweet study of Illinois detention facilities produced the following table concerning the status of inmates in all state jails:

INMATE STATUS	PERCENTAGE OF TOTAL JAIL POPULATION
Awaiting Trial	60.1
Under Jail Sentence	30.4
Awaiting Transfer	4.0
Held for Other Authorities	5.2

ILLINOIS JAILS, *supra* note 7, at 72 (headings supplied).

31. Burden Report, *supra* note 5, at 7.

32. Note, *supra* note 5, at 351-52 & n.14.

33. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 376-77 (1970).

34. 1 Stat. 73 (1789).

35. *Id.* at 91. See *Stack v. Boyle*, 342 U.S. 1, 4 (1951). Pertinent sections of the Judiciary Act of 1789 are now embodied in FED. R. CRIM. P. 46(a)(1) which provides in part: "A person arrested for an offense not punishable by death shall be admitted to bail."

by statute.³⁶ This right to have bail set in non-capital cases is guaranteed to federal prisoners by Federal Rule of Criminal Procedure 46(a)(1). Most states have similar provisions guaranteed either by state constitution³⁷ or by statute;³⁸ however, a few permit discretionary denial of bail where a felony is charged.³⁹ This brief digression into the operation of the bail system indicates that most pretrial detainees are confined either because they are accused of a non-bailable offense or because individual poverty prohibits payment of the required sum when bail is granted. As this latter point suggests, the indigent defendant will more often be subjected to pretrial detention than will the accused who enjoys an economically superior status.⁴⁰

Several additional means through which accused persons may be jailed before trial deserve mention. Persons who are accused of violating probation or parole are generally not eligible for bail. In addition, there is some current movement toward institution of a system of preventive detention. Under this practice, which has been advocated by President Nixon as part of his omnibus recommendations for crime control,⁴¹ certain "hardcore recidivists" could be held in pretrial detention when accused of crimes and when their release would pose a danger to the community.⁴² Implementation of this procedure has been widely attacked⁴³ and consequently not yet widely accepted. But a practice closely akin to the notions underlying preventive detention is exercised by many jurisdictions. This involves requiring a higher than normal bail amount for defendants having records of multiple arrests or facing

36. In fairness it must be mentioned that bondsmen do not exercise control over the fate of every accused. The Federal Bail Reform Act of 1966, applicable to those accused of federal offenses, provides for release without bail whenever possible. 18 U.S.C. § 3146 (1970). In addition a number of states have some form of bail release program which attempts to extend this same benefit. See Ares, Rankin & Sturz, *The Manhattan Bail Project*, 38 N.Y.U.L. REV. 67 (1963); R. MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL (1966).

37. See, e.g., N.J. CONST. art 1, ¶ 11.

38. See, e.g., GA. CODE ANN. § 27:901 (1953).

39. See, e.g., N.Y. CRIM. PROC. LAW § 530.20(2) (McKinney 1971).

40. See R. CLARK, CRIME IN AMERICA (1970) wherein the author remarked: "For the want of a few hundred dollars millions of impoverished Americans have suffered in jail awaiting American justice." *Id.* at 299. See also Foote, *supra* note 6.

41. N.Y. Times, Feb. 1, 1969, at 15, col. 4.

42. See also Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969) wherein the former Attorney General defends the necessity and propriety of this recommendation.

43. See, e.g., R. CLARK, *supra* note 40; Tribe, *supra* note 33; Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1970).

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serious criminal charges. The increased amount of bail frequently frustrates the accused's designs upon liberty and assures his membership in the jail population.

Given this sketch of the typical jail population with its heavy concentration of indigent inmates, and bearing in mind the inhumane conditions prevalent in our detention facilities, the layman may still be able to persuade himself that pretrial detention involves only minimal sacrifices of human rights. After all, are not detainees merely held for the brief period between arrest and trial? Unfortunately this conception that pretrial detention is limited to an abbreviated length of a few hours or days has become, for many, a utopian myth. In a study of Illinois jails released in 1970, researchers compiled detailed information concerning length of detention periods of unconvicted persons. The findings relative to average periods of confinement awaiting trial were presented in the following table:⁴⁴

AVERAGE STAY AWAITING TRIAL	PERCENT OF TOTAL JAILS
Less than 8 hrs.	5.6
8-12 hrs.	12.5
13-24 hrs.	9.4
1-2 days	12.5
3-7 days	23.7
8-14 days	6.9
15-30 days	11.2
1-2 months	8.8
More than 2 months	6.3
No response	3.1

An analysis of these figures reveals that almost one-third (33.2%) of all inmates are detained for periods of more than one week. Fifteen percent are confined for more than a month. It should be noted, however, that this study made no attempt to exclude cases in which payment of bail resulted in quick release from detention. A New York City study which eliminated such periods determined the average jail stay to be 140 days.⁴⁵ A more recent investigation

44. ILLINOIS JAILS, *supra* note 7, at 74 table 20.

45. Note, *supra* note 5, at 373, citing VERA INSTITUTE, A REPORT TO THE MAYOR'S CRIMINAL JUSTICE COORDINATING COUNCIL: THE PROBLEMS OF OVERCROWDING IN THE DETENTION

conducted in New York City suggested that average periods of detention were increasing so that "it was not uncommon for men to be in detention for six to twelve months, with some prisoners detained more than a year."⁴⁶ Clearly, the average stay computed by the latter studies exceeds the median stay of 3-7 days established in the Illinois report.

Several factors explain this discrepancy. As already indicated the Illinois report includes periods of confinement for all persons arrested during the study, whereas the New York City studies excluded cases in which quick release was obtained by payment of bail. Second, the Illinois report surveyed all jails throughout the state, both city and county, located in large cities and small towns. The New York City reports were confined to that metropolis. Undoubtedly, the length of pretrial detention in any jail bears some correlation to the level of activity of the courts responsible for adjudicating cases in those jails. The notorious overcrowding of court calendars in our metropolitan tribunals may cause lengthy delays in the trial process, and New York City courts are the rule rather than the exception. Courts serving smaller populations, on the other hand, are frequently more able to provide defendants with a speedy trial. These differences relating to the character of the samples used are reflected in the results of each study. Consequently, the studies limited to city jails have yielded a longer average detention period. Of course the regional fluctuation in crime rates and the generally difficult task of standardization affect attempts at generalization and are not to be discounted in assessing the differential. Thus, the 1967 Presidential Crime Commission Report irresolutely stated that the "average time served in detention ranged from 6 weeks to 8 months in some jurisdictions."⁴⁷

The central point, however, must not escape us. For persons not convicted of any offense, any period of detention is intolerable when 5 and 6 inmates are crowded into a cell designed for one; when homosexual attacks are frequent and unchecked; when toilets are cracked and leaking and showers and washbasins are un-

INSTITUTIONS OF NEW YORK CITY 59 (1969). The period expressed in this report roughly coincides with an estimated figure of more than four months reached by a more recent New York City survey. Burden Report, *supra* note 5, at 20.

46. Note, *supra* note 5, at 373, citing N.Y. STATE SENATE COMMITTEE ON CRIME AND CORRECTION, REPORT ON THE TOMBS DISTURBANCES 48 (1970).

47. PRESIDENT'S CRIME COMMISSION REPORT, *supra* note 5, at 25.

available; when the basic implements of personal hygiene are unsecurable and the detainee's only clean clothes are those on his back when arrested.

B. *The Consequences of Detention*

*The imprisonment of an accused prior to a determination of guilt is a rather awesome thing: it costs the taxpayers tremendous sums of money; it deprives the affected individual of his most precious freedom, liberty; it deprives him of the ability to support himself and his family; it quite possibly costs him his job; it restricts his ability to participate in his own defense; it subjects him to the dehumanization of prison; it separates him from his family; and, without trial, it casts over him an aura of criminality and guilt.*⁴⁸

However essential to a "deterrent" system of criminal justice pretrial detention is thought to be,⁴⁹ the presumption of innocence dictates that such confinement itself is not supposed to deter or punish criminal acts.⁵⁰ Yet the preceding discussion of jail conditions and a reading of the passage quoted immediately above make it eminently clear that grave burdens are being placed upon pretrial detainees.⁵¹ Whatever the strength of positions which claim that these burdens are inherent incidents of confinement, it cannot be rationally maintained that the detrimental consequences of detention should be allowed to fall upon one who is presumed innocent of any transgression. And yet we permit this fate to befall more than a million persons annually.

The burdens of confinement even spread to the innocent members of the detainee's family, as they are forced to work or otherwise provide for their own welfare. Imprisonment often frustrates the individual's efforts to prepare, or assist legal counsel in preparation of an adequate defense,⁵² and may hamper the ability

48. Commonwealth *ex rel.* Hartage v. Hendrick, 439 Pa. 584, 601, 268 A.2d 451, 459 (1970) (Roberts, J., dissenting) (footnote omitted).

49. See *supra* note 33 and accompanying text.

50. Anderson v. Nossner, 438 F.2d 183, 190 (5th Cir. 1971). See also Note, *supra* note 5, at 352.

51. See generally ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PRETRIAL RELEASE (Tent. Draft, Mar. 1968) [hereinafter cited as ABA REPORT].

52. Because of the recognized importance of the period between arrest and trial on preparation of a defendant's case the Supreme Court has described this time as "perhaps the most critical period in the judicial proceedings." Powell v. Alabama, 287 U.S. 45, 57 (1932).

to secure witnesses.⁵³ And even though many pretrial detainees are subsequently discharged of all criminal liability and released,⁵⁴ the individual may discover that he has lost his employment and is tinged with the stigma of criminality.

Even more shocking, if one's sensibilities are not already numbed, is information which suggests that failure to secure pre-trial release may affect the ultimate disposition of one's case and even the sentencing process.⁵⁵ One recent case study reports that "inhumane conditions in . . . jails frequently lead [detainees] to plead guilty in order to insure a quick transferral to a 'more humane' state prison."⁵⁶ When a case does go to trial, the unkempt appearance of an accused who has spent weeks or months in jail may influence the "demeanor" aspect of his testimony.⁵⁷ It has also been suggested that since the accused has already been confined to jail, presumptions of guilt may arise in the minds of jury members and even the judge.⁵⁸ A recent American Bar Association report noted that studies conducted in New York, Philadelphia, and the District of Columbia "all indicate that the conviction rate for jailed defendants materially exceeds that of bailed defendants."⁵⁹ Effects on sentencing may be similarly adverse. One investigation revealed that the likelihood of receiving a prison sentence increased proportionally with the period of detention before

53. See Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 725 (1958).

54. For statistical data supportive of this assertion, see ABA REPORT, *supra* note 51, at 24.

55. See Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964).

56. Note, *Pre-Trial Detention in the New York City Jails*, 7 COLUM. J.L. & SOC. PROB. 350, 353 & n.20 (1971).

57. Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631, 632 (1964). This article appears as a prefatory summary to statistical investigation by Anne Rankin relating the effects of pretrial detention to judicial disposition of the detainee's case. See Rankin, *supra* note 55.

58. Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125 (1965).

59. ABA REPORT, *supra* note 51, at 3. Similar conclusions were reached in another study and published in the following table:

Disposition	Bail (%)	Jail (%)
Sentenced to Prison	17	64
Convicted without Prison	36	9
Not Convicted	47	27
Number of Defendants	374	358

Rankin, *supra* note 55, table 1 at 642. This researcher determined that the correlation between detention and ultimate sentence existed independent of such common factors as prior criminal record, employment stability, familial influences and type of legal counsel.

trial. Even persons who were jailed for only a portion of the period between arrest and trial were found to receive more favorable sentences than those continuously jailed, regardless of the brevity of this continuous detention.⁶⁰ Even more disturbing were the statistical effects of pretrial detention on first offenders.

[J]ailed first offenders not only are twice as likely to be convicted and six times as likely to receive prison sentences as are bailed first offenders, but . . . jailed first offenders are half again as likely to receive prison sentences as bailed repeat offenders.⁶¹

The burdens associated with pretrial detention are by no means limited to the accused and his family but extend to the tax-paying public in an expensive and real fashion. The yearly cost of housing and feeding defendants detained pending trial in Philadelphia alone was recently estimated at nearly \$5 million.⁶² Even as early as 1962, New York City reportedly spent twice that amount in annual detention costs and "[o]ther cities report similar figures."⁶³ On the national level, a recent estimate of yearly operating expenditures for all jails was placed at \$147,794,214.⁶⁴ And it should be noted that such figures do not express ancillary costs such as welfare payments made to detainees' families. The total supportive costs of pretrial confinement clearly constitute a substantial fiscal resource drain. But while monetary considerations are often accorded a preferred priority in our society, pretrial detention spawns additional, more subtle, social burdens, the effects of which are certainly more acute.

For many accused, pretrial detention represents the initial and sole contact with our correctional institutions. Thus, the part which the jail plays in our criminal justice system "cannot be overestimated."⁶⁵ Exposure to the kinds of physical conditions and individual burdens associated with our jails can only operate to demoralize the spirit and attitude of the accused. When release is effectuated, whether it be by acquittal or after service of sentence, the resentments and attitudinal prejudices gleaned from the

60. Wald, *supra* note 57, at 635.

61. *Id.*, citing Rankin, *supra* note 55, table 3 at 647 (footnote omitted).

62. Commonwealth *ex rel.* Hartage v. Hendrick, 439 Pa. 584, 601 n.11, 268 A.2d 451, 459 n.11 (1970) (Roberts, J., dissenting).

63. ABA REPORT, *supra* note 51, at 3.

64. Burns, *supra* note 14, at 451.

65. *Id.* at 449.

jail experience remain. When the jail environment has been the first contact with our penal system, this first dose of American "justice" can prove particularly disillusioning. These acquired feelings of suspicion and distrust for the criminal justice system are internalized and carried with the detainee back into his particular social milieu, where they are communicated to family and friends. Each year hundreds of thousands of persons move through this process of demoralization, internalization and communication until vast segments of our population are affected. And since the poor⁶⁶ and minority groups⁶⁷ constitute a large percentage of the jail population, it is not surprising that the fears and suspicions enumerated are perhaps most prevalent in these segments of our society. The outward manifestations of these acquired prejudices are distrust and resentment toward the courts and police, this latter group being perceived as having caused the unpleasant ordeal at the outset by effecting the arrest. The resentment of police breeds friction; and friction contempt.

The foregoing discussion has briefly examined the conditions present in the American jail environment and has outlined some of the perceived burdens, both individual and social, which inhere in our present system of pretrial detention. In keeping with the scope of this comment, the discussion shall next proceed to an examination of means by which the recognized burdens of confinement may be minimized. Even former Attorney General John Mitchell, while serving as the nation's chief law enforcement official, conceded that a criterion implicit in due process of law is that burdens of pretrial detention must be minimized as far as practicable.⁶⁸ A search for the appropriate body capable of redressing burdens upon individual liberties and fundamental human rights would almost certainly lead one to our court system. But as shall soon

66. It is widely acknowledged that the bail system as presently administered in this country inevitably discriminates against the poor. Indigents are therefore more frequently committed to detention than accused persons of economically superior status and consequently constitute a large percentage of the jail population. See generally R. CLARK, *supra* note 40, at 298-306; ABA REPORT, *supra* note 51, at 1; Foote, *supra* note 58.

67. In his recent book, former Attorney General Ramsey Clark presented figures which indicate that blacks were involved in certain crimes in a greater proportion than their numbers in the total population (warning, however, that this is a function of the "brutalization and dehumanization of racism, poverty, and injustice" and is not to be misconstrued as supportive of racist arguments). R. CLARK, *supra* note 40, at 50-51. Such crime rates are certainly one factor contributing to the large numbers of blacks being arrested and subjected to pretrial detention.

68. See Mitchell, *supra* note 42.

become obvious, the effectiveness of court activity in the area of jail litigation has been diminished by adherence to a traditional disinclination to interfere in matters of institutional operation.

III. THE EVOLUTION OF JUDICIAL INVOLVEMENT

A. *The Tradition of Nonintervention*

Until very recently, federal courts have steadfastly and unanimously refused to redress the grievances of inmates in state penal institutions.⁶⁹ It was apparently felt that acting on prisoners' complaints would involve the courts in the "internal management" of the state's penal system—something which the courts thought they should avoid for many reasons.⁷⁰ First was the "separation of powers" principle, *i.e.*, since penal institutions are administered under authority of the executive branch of government, the judicial branch should not interfere. One court stated it this way: "The prison system is under the administration of the Attorney General . . . and not . . . the district courts."⁷¹ Derived from separation of powers were two other rationalizations for noninvolvement. One was the court's lack of expertise in penology. The other, perhaps more fundamental, was the fear that judicial intervention in this area would subvert prison discipline and undermine the authority of prison officials.⁷² Additional difficulties were presented when federal courts were faced with complaints from state prisoners, because intervention by federal courts was thought to violate fundamental principles of federalism.⁷³ These principles proscribed federal intervention in matters solely the concern of the state, as prisons and jails were thought to be. Less often articulated, but probably just as influential on the thinking of the courts, was the fear of being deluged with prisoners' complaints which could absorb far too much judicial time and attention.⁷⁴ Probably underlying this overworked justification for a court's unwillingness to grapple with difficult problems was a belief that

69. Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

70. Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 (1970).

71. *Powell v. Hunter*, 172 F.2d 330, 331 (10th Cir. 1949).

72. *See, e.g., Golub v. Krinsky*, 185 F. Supp. 783 (S.D.N.Y. 1960).

73. *United States ex rel. Atterbury v. Ragen*, 237 F.2d 953 (7th Cir. 1956), *cert. denied*, 353 U.S. 964 (1957).

74. *Barnett v. Rodgers*, 410 F.2d 995, 1004 (D.C. Cir. 1969) (Tamm, J., concurring).

many if not most complaints by prisoners would be over-stated if not completely baseless in fact. Though these reasons were seldom if ever scrutinized for their cogency and force, they were asserted time and time again until this judicial tendency was dubbed the "hands-off" doctrine by a document prepared for the Federal Bureau of Prisons.⁷⁵ Thus, the courts stated the position this way: "We think that it is well-settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."⁷⁶ Solace in this position was taken from a statement by the Supreme Court in *Price v. Johnston*: "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."⁷⁷ Thus, complaints about violations of rights were dismissed as being the necessary consequence of incarceration, and the only question left for judicial determination was the legality of that incarceration. Prisoners' remedies were consequently limited to seeking writs of habeas corpus.

A good example of the ineffectiveness of the habeas corpus remedy was *Ex Parte Pickens*,⁷⁸ decided in 1951. Pickens, along with 40 other prisoners, 36 of whom were being held for trial, was confined to a room 27 feet square, heated by an ancient coal stove, with fewer than 20 bunks, virtually no ventilation, and one unsanitary latrine. Pickens, one of those being held for trial, sought a writ of habeas corpus, on grounds that his imprisonment was illegal, being in violation of the eighth amendment's prohibition against cruel and unusual punishment. Recognizing "that the protection of the Eighth Amendment extends not only to those convicted but to those held for trial,"⁷⁹ the court nevertheless denied the writ of habeas corpus. And though the conditions were "rightly to be deplored and condemned by all people with humane instincts,"⁸⁰ it did not constitute cruel and unusual punishment because: (1) solving the problems was beyond the authority of

75. See FRITCH, *CIVIL RIGHTS OF FEDERAL PRISON INMATES* 31 (1961).

76. *Stroud v. Swope*, 187 F.2d 850, 851-52 (9th Cir. 1951).

77. 334 U.S. 266, 285 (1948).

78. 101 F. Supp. 285 (D.C. Territory of Alaska, 1951).

79. *Id.* at 288.

80. *Id.* at 289.

those responsible for the jail; (2) those responsible had tried unsuccessfully to get additional funds from the legislature in order to make improvements; (3) the jail was the only holding facility near the place of trial; and (4) the conditions imposed would not be deemed cruel and unusual punishment by every other civilized society—the then most commonly employed standard in judging the bounds of acceptable punishment under the eighth amendment. We have enumerated these reasons because they repeatedly arise as the most frequent obstacles to effective court action. The inadequacies of the habeas corpus remedy and the protection afforded by the eighth amendment are readily apparent.

B. *The Erosion of "Hands-Off"—Recent Developments*

The abrogation of the hands-off doctrine began with the Supreme Court's ruling in *Monroe v. Pape*⁸¹ that exhaustion of state remedies was not a condition precedent to a federal court's accepting jurisdiction under the federal Civil Rights Act of 1871. Shortly thereafter, in *Robinson v. California*,⁸² the Court ruled that the eighth amendment did apply to the states through the fourteenth amendment. Finally, *Cooper v. Pate*⁸³ dispelled any remaining doubt that a prisoner in a state institution could bring an action in federal court under the Civil Rights Act. This history was traced and relied upon in *Wright v. McMann*⁸⁴ to reverse and remand the dismissal of a complaint by a state prisoner that various conditions and treatment constituted cruel and unusual punishment.

By 1967, the hands-off doctrine, though still surviving, had been weakened. Exceptions to the doctrine could now exist, and the reformulation was stated as follows:

The matter of the internal management of prisons or correctional institutions is vested in and rests with the heads of those institutions operating under statutory authority, and their acts and administration of prison discipline and overall operation of the institution are not subject to court supervision or control, *absent most unusual circumstances or absent a violation of a constitutional right*.⁸⁵

81. 365 U.S. 167 (1961).

82. 370 U.S. 660 (1962).

83. 378 U.S. 546 (1964).

84. 387 F.2d 519, 522 (2d Cir. 1967).

85. *Douglas v. Sigler*, 386 F.2d 684, 688 (8th Cir. 1967) (emphasis added).

This is a significant departure from the rule as previously stated. Rather than limiting the inquiry to the legality of the incarceration, the federal courts could now, in certain circumstances, take action to correct flagrant abuses or violations of constitutional rights.⁸⁶ It is hardly surprising, then, that many avenues were explored in an attempt to establish violations of the constitutional rights of prisoners.

Following the lead of *Wright v. McMann*,⁸⁷ the cruel and unusual punishment clause of the eighth amendment was a logical place to begin. At least one reason why the eighth amendment approach appeared productive was because, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁸⁸ It was further recognized that the words of the amendment are "not precise, and that their scope is not static."⁸⁹ Thus, what was not cruel and unusual punishment for Pickens in 1951 might be cruel and unusual punishment today.

The eighth amendment approach was taken by inmates of the Arkansas penitentiary system in *Jackson v. Bishop*,⁹⁰ where an injunction was sought to bar use of a strap as a disciplinary measure. Then Circuit Judge Blackmun, in delivering the opinion of the court, repeated the standard litany in support of the hands-off doctrine, but then stressed that the federal courts will not hesitate to grant relief where violations of fundamental rights are asserted and proved.⁹¹ Here, the court found that the factual showing of cruel and unusual punishment established the violation of a constitutional right, and therefore, the injunction was issued.

A similar eighth amendment approach was used by prisoners of the Arkansas state prison again when they sought to have various other practices and *conditions* declared unconstitutional. Ruling in favor of the inmates, the court said: "However constitutionally tolerable the Arkansas system may have been in former years, it

86. Support by implication is derived from language in *Johnson v. Avery*, 393 U.S. 483 (1969), in which the Supreme Court seems to have rejected the position that the exigencies of prison discipline are always sufficient to restrict human liberties. See also *Lee v. Washington*, 390 U.S. 333 (1968), in which racial segregation to maintain good order and discipline of the prison was constitutionally prohibited.

87. 387 F.2d 519 (2d Cir. 1967).

88. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

89. *Id.*

90. 404 F.2d 571 (8th Cir. 1968).

91. *Id.* at 577.

simply will not do today as the Twentieth Century goes into his [*sic*] eighth decade.”⁹² Importantly, it was the living conditions themselves which were being found unconstitutional. The court put it this way:

In the Court’s estimation *confinement itself* within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary action.⁹³

Thus, the rights of these prisoners were being violated by simply subjecting them to the filth and other indignities which characterized the Arkansas prisons.

Given this approach, the logical, indeed mandatory, next step had to be taken—to apply this standard to state jails. Not only were conditions in the state jails just as bad if not worse than in the prisons, but the people in the jails were, for the most part, pretrial detainees—presumably innocent under our system of justice. For them, punishment of *any* kind, whether it be cruel and unusual or not, is totally unjustifiable. If some punishment must be considered a necessary, to some even desirable, part of our penal system, and thus may be justifiable for convicted criminals, it is certainly not appropriate for innocent people, who are only awaiting trial in jail probably because they could not afford bail. This was recognized in *Hamilton v. Love*,⁹⁴ an action brought by the inmates of Arkansas’ Pulaski County Jail. Though the state challenged maintenance of the suit in federal court, they were overruled. The jail was inspected by the court, and the utter inadequacy of the facilities was then stipulated by the parties. Noting the irony that the lot of those awaiting trial appeared to be worse than those convicted and serving sentences, the court stated that the conditions for pretrial detention must not only be equal to, but superior to, those permitted for convicted prisoners, and that, generally, the holding function, which is constitutionally permissible, must be accomplished in the least restrictive way possible.⁹⁵

92. *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970), *aff’d*, 442 F.2d 304 (8th Cir. 1971).

93. *Id.* at 372-73 (emphasis added).

94. 328 F. Supp. 1182, 1191 (E.D. Ark. 1971).

95. *Id.* at 1191-92.

Furthermore, the equal protection clause of the fourteenth amendment prohibited classifying detainees with those who had already been convicted of a crime. After opening up this special avenue for detainees, the court issued orders setting a maximum inmate capacity for the jail, and requiring the correction of the specified conditions. It sought to insure compliance by threatening to entirely prohibit detention if it could not be done in accordance with minimum constitutional standards.⁹⁶

Many of the same considerations prompted the Fifth Circuit Court of Appeals to find in favor of a group of pretrial detainees in *Anderson v. Nosser*.⁹⁷ Here, plaintiffs were arrested for parading without a permit. After arrest, they were transported over 200 miles to the Mississippi State Penitentiary where they were forced to strip naked, consume a laxative, and were then confined eight men to a cell for up to 36 hours in temperatures of 60-70 degrees. The bunks in each cell were without mattresses or bedding of any kind; neither towels nor soap were provided. When the prisoners were finally released, they brought an action for damages under section 1 of the Civil Rights Act of 1871.⁹⁸ "Defendants' primary defense [was] that the matter of plaintiffs' treatment . . . was one of internal prison discipline, not reviewable by the courts."⁹⁹ The court rejected this argument, after discussing the hands-off doctrine and the reasons for it, and found serious violations of plaintiffs' constitutional rights under the eighth amendment.¹⁰⁰ In so finding, the court stated:

We should be even more alert where one of the basic underpinnings of the 'hands-off' policy is absent. Incarceration after conviction is imposed to punish, to deter, and to rehabilitate the convict. . . . Some freedom to accomplish these ends must of necessity be afforded prison personnel. Conversely, *where incarceration is imposed prior to conviction, deterrence, punishment, and retribution are not legitimate functions of the incarcerating officials. Their*

96. *Id.* at 1194.

97. 438 F.2d 183 (5th Cir. 1971).

98. 42 U.S.C. § 1983 (1970):

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.

99. *Anderson v. Nosser*, 438 F.2d 183, 189 (5th Cir. 1971).

100. *Id.* at 194.

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*role is but a temporary holding operation, and their necessary freedom of action is concomitantly diminished.*¹⁰¹

The implications of this statement and these rulings are significant for both the hands-off doctrine and the constitutional rights of pretrial detainees. The hands-off doctrine will have very limited application to actions brought by pretrial detainees, because what the incarcerating officials may do is restricted to what is required to perform their "temporary holding function." Any deviation from this will be considered a violation of the pretrial detainee's rights, and therefore actionable. Constitutional rights and their violation are more easily established: their eighth amendment rights are violated by the imposition of conditions which are cruel and unusual; "even if that punishment were not cruel and unusual, it would still be proscribed for them, since it is imposed as a matter of form and routine, and without any semblance of due process or fair treatment";¹⁰² and their rights to equal protection are violated when they are treated in the same way convicts are. Thus, "they are not to be subjected to any hardship except those absolutely requisite for the purpose of confinement only, and they retain all the rights of an ordinary citizen except the right to go and come as they please" ¹⁰³ Accordingly, due process rights—the right not to be punished except by due process of law—can be added to those constitutional rights available to pretrial detainees as they seek to redress their grievances and escape the burden of horrendous living conditions.

Given the practices of and conditions in the vast majority of our nation's jails, these are important developments, a long way indeed from the *Pickens* case. The boundaries of legitimate action by penal officers have changed from freedom to impose any burden or restriction or maintain any condition under the guise of internal management, to permission to do only what is minimally necessary to hold a person for trial and maintain the order of the institution. One must hope that these legal advancements will begin to bring real improvements in the actual conditions which exist in jails, for they have not been significantly upgraded since the days of *Pickens*.

101. *Id.* at 190 (emphasis added).

102. *Jones v. Wittenberg*, 323 F. Supp. 93, 100 (D. Conn. 1971).

103. *Id.* at 100.

C. *Blueprint for Involvement—The Example of Wayne County*

If the courts can overcome the self-imposed restraints of the hands-off doctrine, there is good reason to believe that they can remedy some, though certainly not all, of the ills of our jails. Correcting abusive treatment by injunction, as was done in *Jackson v. Bishop*, is a straight-forward judicial remedy. The more difficult questions regard conditions—the overcrowding, the unsanitary and unhealthy, deteriorating facilities, the lack of medical care and recreational facilities, and all the rest. Previously, these were considered to be part of the “internal management” of the institution, and therefore the exclusive province of the institution’s officials—beyond the jurisdiction or the competence of the courts. It is understandable that the courts did not want to assume responsibility for the day-to-day running of the state’s penal institutions. That concern was expressed as follows:

It is hard to believe that persons . . . convicted of crime are at the mercy of the executive department and yet it is unthinkable that the judiciary should take over the operation of the places of detention and prisons. There must be some middle ground between these extremes. The courts have proceeded very slowly toward defining it.¹⁰⁴

Recently, such efforts have been made, and the boundaries of court action are being defined.

With the erosion of the hands-off doctrine came a recognition that when jail conditions deteriorate so that they become violations of laws or rights under the Constitution, they do become matters for the court, and the court should not shun the responsibility to fashion appropriate orders to remedy the situation. This was recognized and stated by the Fifth Circuit Court of Appeals in remanding the dismissal of a complaint about various conditions by prisoners on “Death Row”: “Although federal courts are reluctant to interfere with the internal operation and administration of prisons, we believe that the allegations appellant has made go beyond matters exclusively of prison discipline and administration”¹⁰⁵ It hardly needs restating that leaky, unsanitary toilets, filthy food trays, dishes and utensils, lack of heat, bedding and medical facilities, and all the other ills have no relationship

104. *United States ex rel. Yaris v. Shaughnessy*, 112 F. Supp. 143, 144 (S.D.N.Y. 1953).

105. *Sinclair v. Henderson*, 435 F.2d 125, 126 (5th Cir. 1970).

to maintenance of discipline and order within the institution. If anything, these are the very conditions which breed discontent and turmoil. They thus warrant judicial intervention when a demand for relief is properly made.

One method of relief, admittedly rather extreme, is the outright release of all pretrial detainees. The presumption of innocence protects the detainee from punishment of any kind. Thus when conditions of incarceration are so severe that they can only be considered punishment, incarceration becomes illegal. In this situation, courts have threatened the widespread use of habeas corpus—the traditional judicial remedy for illegal incarceration¹⁰⁶—to release all pretrial detainees (or at least those in excess of a judicially fixed limit).¹⁰⁷ The repercussions for both the community and the court may be undesirable however. Serious doubt must be entertained as to whether any amount of legal explanation could justify to the community the wholesale release of inmates awaiting trial. Further, habeas corpus has most commonly been a remedy sought by individual prisoners, on a case by case basis. Certainly hearing hundreds of pleas for habeas corpus on an individual basis could prove an awkward and burdensome form of relief. For these reasons, a more palatable method needs to be found.

One such method might base relief upon the standards set in state or city housing and sanitation codes. Recent litigation has determined that these standards apply to penal institutions and may be appropriate grounds upon which to base judicial relief.¹⁰⁸ A class action was brought by the inmates awaiting trial in Detroit's Wayne County Jail alleging various violations of their constitutional rights and alleging that the jail conditions were illegal as not conforming to state housing laws. Defendants, certain county and jail officials, set up the standard defenses: that they had no control over crowded conditions because the Sheriff was required by law to accept all those referred to him; that appropriation of funds necessary to make needed repairs was beyond their control;

106. *See Stroud v. Swope*, 187 F.2d 850 (9th Cir. 1951).

107. *See Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971).

108. *Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs*, No. 173217 (Mich. Cir. Ct., May 25, 1971) (all paginations cite to the "slipsheet" opinion). This decision is summarized in 5 *CLEARINGHOUSE REV.* 108 (1971).

that state or city housing, health, or safety laws did not apply to the jail. The court rejected each of these contentions.

First. "The prisoners at the Wayne County Jail have a legal right to be housed in a physical facility which complies with the laws of our state and nation. This right is being infringed by the Defendants."¹⁰⁹ The court found that state housing laws establish minimum floor and air space requirements for all rooms, including those in jails,¹¹⁰ and that the jail did not meet these requirements. Likewise, the plumbing, heating, ventilation, fire and sanitation facilities were found not to comply with minimum statutory standards. In fashioning a decree to remedy the situation, the court employed a unique approach. With regard to the overcrowding, it differentiated between the "rated capacity" of 1240 inmates, which included placing several men in single cells; "design capacity" of 813 men, the number for which the structure was designed and built; and "lawful inmate capacity" which was "clearly less" than 813, or the maximum number the jail could hold to meet all state and city statutory requirements.¹¹¹ Noting "that instant compliance with overcrowding laws could result in the release of roughly half of the prisoners now confined," and that doing this was probably inimical to the public interest, the court adopted a three-stage approach to reaching "lawful inmate capacity."¹¹² Thus, the court ordered that "rated capacity" had to be reached in 90 days: "[t]hree men to an under-sized one-man cell has created an explosive situation which needs immediate defusing."¹¹³ Nine months was given to achieve "design capacity," and two and a half years to reach "lawful inmate capacity." The court suggested numerous ways in which this could be done, including temporary use of federal or state facilities, leasing of additional facilities, greater use of pretrial release programs, and refusal to accept prisoners in excess of "rated capacity."¹¹⁴

Second. The court recognized that compliance with these decrees would cause inconvenience and require the expenditure of funds. But, on balance, the court thought that "considerations

109. *Id.* at 6.

110. The court refused to include the hallway in front of each cell in the computation of space requirements. *Id.* at 11-12.

111. *Id.* at 21.

112. *Id.* at 22.

113. *Id.* at 24.

114. *Id.* at 26-27.

of convenience and thrift do not outweigh the rudiments of human decency. Inconvenience and expense are the inevitable price to be paid for many years of callous neglect. . . . As always, convenience and thrift must yield to the mandate of the law.”¹¹⁵ This statement represents an increasing awareness by the courts that they should not hesitate to order the expenditure of funds necessary to avoid the imposition of illegal or unconstitutional burdens. A federal court strongly stated the position as follows:

Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons.¹¹⁶

Just as the courts will order cessation of abusive physical treatment by jail authorities, so should they correct conditions which are equally harmful to the inmate's health and well-being. The fact that correcting conditions will require expenditure of funds should not bar appropriate judicial relief.

Recently, in *Commonwealth ex rel. Carroll v. Tate*,¹¹⁷ the Pennsylvania Supreme Court held that the judicial branch can compel appropriation of monies “reasonably necessary” for its proper functioning. The Judges of the Court of Common Pleas in Philadelphia brought an action to compel the Mayor and City Council to appropriate additional funds, after their request had been turned down once following hearings before the city legislature. In deciding first whether the court could determine what is reasonably necessary for its operation and then if it had power to compel appropriation of funds, the court said that such a power must exist if it is in reality to be a coequal, independent branch of government. “[T]he deplorable financial conditions in Philadelphia must yield to the Constitutional mandate that the Judiciary shall be free and independent and able to provide an efficient and effective system of Justice.”¹¹⁸ The only difference of opinion on the court was in deciding what was “reasonably necessary.” Justice Roberts, concurring and dissenting, would have included a bail project the purpose of which was to avoid the injustices of the present bail system and the concomitant needless pretrial deten-

115. *Id.* at 28 (footnotes omitted).

116. *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971).

117. 442 Pa. 45, 274 A.2d 193 (1971).

118. *Id.* at 56, 274 A.2d at 199.

tion. "In sum," Justice Roberts writes, "the proposed bail project presents a rare and realistic opportunity to improve the administration of justice and minimize the social costs of pretrial imprisonment, all at a substantial savings to the taxpayers."¹¹⁹ Even though the majority did not concur in this, all were agreed on the larger issue—that the judiciary could order monies spent in order to maintain the integrity and viability of the administration of justice. With the "reasonably necessary" standard, the opportunity is available for the courts to order the correction of other conditions which impede the administration of justice, including those found in jails.

Third. Just as responsibility for correcting terrible conditions cannot be shunned because of lack of funds, neither can jail authorities shun their responsibility to guarantee the health and safety of the inmates. "Under common law, bailees, including sheriffs, must take reasonable care of the chattels in their custody. No less is required of jailers who have custody of human beings."¹²⁰ This duty has been recognized and codified.¹²¹ Thus, when a government deprives a person of his freedom to look after his own health and safety by imprisoning him, "no one should be surprised that the common law recognizes a duty on the part of the jailer to give . . . [him] . . . reasonable protection against assault, suicide and preventable illness."¹²² In each instance, the court found the degree of risk in the Wayne County Jail unreasonably high. In the first eleven months of 1970, there were 96 assaults; 47 suicide attempts; there was a high incidence of infectious disease. The opinion of the court goes on and on, describing what is minimally required in order to meet fundamental standards set by law and human decency, and explaining how the situation in the Wayne County Jail failed in each case to meet these standards. In each case, the court ordered the inadequacy corrected or improved. Some things could be accomplished at once: scrubbing the floors and shower walls, ordering new mattresses, providing towels, toilet paper, and other sanitary items. For what could not be accomplished at once, the court re-

119. *Id.* at 62, 274 A.2d at 206 (Roberts, J., concurring and dissenting).

120. *Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs*, No. 173217, 30-31 (Mich. Cir. Ct., May 25, 1971).

121. *See e.g.*, N.Y. CORREC. LAW § 500(c), (d) (McKinney Supp. 1971).

122. *Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs*, No. 173217, 31 (Mich. Cir. Ct., May 25, 1971).

quired submission of plans to solve the problem: plans for—adequate vermin control; disinfecting all cells, and keeping them that way; recreation; treatment of drug addicts; adequate medical care; separating of the dangerous or mentally ill inmates; etc. Depending upon the complexity of the problem, from 30 to 60 days was allowed for submission of each plan.¹²³

Although it is too soon to make any conclusive judgments about the effectiveness of the court action in *Wayne County*, there is no reason to believe that the consequences of the action will be undesirable for either the court or the jail. Ordering compliance with this comprehensive scheme to restore lawful operation of the jail certainly is a dramatic step, in the context of previous judicial unwillingness to become involved at all. But if the remedies seem dramatic it is only because the problems themselves are so great, and so many in number. With many jails, we are not concerned simply about the violation of one right, but with many rights being violated in many different ways. Applying state and city housing and health codes to jails is a significant step forward, because it may allow state courts to avoid (1) deciding complex constitutional issues; and (2) basing relief upon vague, generalized constitutional standards.

It is also important to realize that the action taken by the court is designed only to correct illegal and unconstitutional abuses and stops far short of assuming management of the jail. Good faith efforts by jail administrators to correct conditions and to comply with legal requirements are usually sufficient to stay¹²⁴ or end¹²⁵ close judicial supervision over the operational conditions in the jail. This is done in the realization that it will take time to rectify some matters. Thus a clear line of distinction is drawn between violative conditions which can be immediately corrected and those which are more long-range and which will require substantial reliance on the good faith efforts of the jail's administrators.

Furthermore, not every restriction placed on pretrial detainees will violate their rights. Once the decision to incarcerate is made, the person gives up only those rights, privileges and immunities necessarily or reasonably taken "for the security or good

123. A similar requirement for submission of plans was used by a federal court. See *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971).

124. *Rhem v. McGrath*, 326 F. Supp. 681 (S.D.N.Y. 1971).

125. *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971).

order of the penal institution.”¹²⁶ For pretrial detainees, the court determined that the curtailment of liberties or the imposition of burdens is not punishment without due process of law if certain tests were met:

1. The purpose of the imposition or restriction must be the security or good order of the institution and not the exaction of a penalty for the offense charged.

2. The burden, hardship, or restriction must be reasonably related to the security or good order of the institution.

3. The burden, hardship, or restriction must not be overly broad in scope; that is, it must be no more onerous than is reasonably necessary to accomplish its institutional purpose.

4. The purpose or goal of the burden or restriction must not be the pursuit of some malicious or sadistic objective of the jailer.¹²⁷

There can be little doubt about the propriety of the legal standards as established by these tests. Here, as in *Commonwealth ex rel. Carroll v. Tate*, the court relies upon a traditional common law formulation—“reasonable necessity.” The court states that it will also inquire into the relationship between the burden being imposed and the ends (security or good order) for which the burden is imposed. These formulations are highly suggestive of other tests for determining the constitutional validity of any exercise of the police power of the state. They place the action of the court, both now and in the future, squarely within the boundaries of appropriate judicial behavior. They give jail officials the leeway and flexibility needed to deal with a rowdy inmate, or to see that contraband is not smuggled into their jail. The court is simply telling the jail’s officials that they must run their institution within the boundaries of the law and not use great force or action when a little will do. These concepts are by no means new to the law. Blackstone wrote in 1765:

[T]his imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or [*sic*] subjected to other hardships than such as are absolutely requisite for the purpose of confinement only¹²⁸

126. *Wayne County Jail Inmates v. Wayne County Bd. of Comm’rs*, No. 173217, 66 (Mich. Cir. Ct., May 25, 1971).

127. *Id.* at 67.

128. 4 W. BLACKSTONE, COMMENTARIES *300.

If there is any newness at all, it is in their application to officials of penal institutions. And that was long overdue.

IV. EXTRA-JUDICIAL RELIEF—A SURVEY OF SUGGESTED APPROACHES

However much judicial action of the type evidenced in *Wayne County* can accomplish, it is clear that many deficiencies attributed to our jails fall outside the scope of judicial competence. It is certainly true that “[c]ourts can perform only a small part of the role of overseeing the correctional system.”¹²⁹ Thus, the solution of the problem will require action by our legislatures and the agencies responsible for penal administration. Public interest groups also must become involved, perhaps joining with local and national bar associations to press for reform measures. This section shall present several of the various approaches which have been suggested to relieve obnoxious jail conditions and comment upon the viability and perceived effectiveness of each.

The most radical measure advocated to eliminate the recognized injustices of our correctional system is complete abolition of jails. The authors of this comment are not prepared to grant the desirability of such an extreme step. Until elaborate governmental agencies can be established for extra-institutional supervision of convicted misdemeanants and acknowledged recidivists, we are willing to concede service of a legitimate function by our jails. But the existence of conditions and procedures in jails which violate fundamental notions of justice and human decency must be recognized. It is with these violations in mind that reforms must be implemented to protect rights and freedoms of the innocent that are basic to our legal system. As one correctional official put it: “We are in desperate need of innovations which will show us how to deal with this problem more decently and effectively.”¹³⁰ It is our position that pretrial detention must be completely eliminated where assurances of public safety make it practicable.

Given this objective, it is clear that other proposed measures falling at the opposite end of the reform spectrum from abolition

129. Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 320 (1970).

130. McGee, *The Administration of Justice: The Correctional Process*, *supra* note 1, at 228.

of jails would provide insufficient remedies for the pretrial detainee. Since these measures do, however, offer some relief, it is appropriate to briefly discuss their merits.

It has been suggested that the greatest obstacle to reform is overcrowding.¹³¹ Therefore, one proposed reform measure aims directly at eliminating this problem. This program is directed to removing one type of "recidivist," the chronic alcoholic, from the jail population. "[S]hort stays in jail are a way of life for thousands of deteriorated middle-aged alcoholics,"¹³² and their repeated presence in the jail population contributes immeasurably to the overcrowded state of our detention facilities. Thus in some jurisdictions, programs for detoxification and rehabilitation of alcoholics have been established which operate outside of the jail system. Identified alcoholics are referred to such programs for care rather than being arrested and jailed. It has recently been reported that one such project conducted by the St. Louis Metropolitan Police Department has reduced the number of arrests by 54 percent in that metropolis with corresponding relief to city jails.¹³³ Further, it appears that similar programs for drug addicts could be established which would lessen the burden on already crowded jail facilities even more. Drug users contribute heavily to jail populations. As recently indicated in the *Wayne County* opinion, about half of all prisoners newly admitted to that Detroit jail were narcotics addicts.¹³⁴ Such programs for alcoholics and addicts offer a concrete solution to reduce overpopulated jails and should be established where budgets will permit employment of the medical and supervisory personnel necessarily required.

Certain of the suggested reform measures are directed at improving the quality of the institution itself and of the officers and guards within it. A central motivation in this regard is to reduce the stringent controls normally imposed on pretrial detainees. Thus a report prepared for the Council of the City of New York has recently recommended that:

It shall be the policy of the department of corrections that all persons under the care and custody of the commissioner prior to dis-

131. Burden Report, *supra* note 5, at 1.

132. McGee, *Our Sick Jails*, *supra* note 1, at 4.

133. See 35 FEB. PROB. 83 (Mar. 1971).

134. *Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs*, No. 173217, 35 (Mich. Cir. Ct., May 25, 1971).

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position of their cases at trial, or [who are placed in custody] to secure their attendance as witnesses in any criminal proceeding, shall be subject to detention only under such conditions of *minimum security* as are necessary to assure their appearance in court as required.¹³⁵

Implementation of such a policy would be a major victory for reform, as the typical detention facility is presently "operated under maximum-security conditions,"¹³⁶ which generally entail strict supervision and close surveillance of detainees' activities, and frequent searches.¹³⁷ The move to a minimum security atmosphere would be in keeping with the presumption of innocence guaranteed each accused.

In this same vein are proposals to convert large sections of present jail cell blocks into dormitory-style quarters.¹³⁸ Such a living arrangement would allow detainees greater freedom of movement and association and perhaps remove some of the demeaning connotations that are connected with detention in a barred cell. Certainly the more efficient utilization of available space would do much to relieve overcrowded conditions. Such remodeling of course would require expenditure of funds which many jail administrators deny are currently available. Hence legislatures must act to appropriate necessary funds (which would certainly be less than the costs involved in building new physical plants).

Another proposal related to improving the detention atmosphere and hence reducing certain burdens on pretrial detainees relates to separation of inmates according to various categories.¹³⁹ Thus pretrial detainees would be separated from convicted inmates and further distinctions may be drawn by considerations of age and sex. Identified addicts and homosexuals would also presumably be confined apart from other inmates.

In the area of prison administration, Federal Bureau of Prisons Director Norman A. Carlson has recently indicated that fed-

135. Burden Report, *supra* note 5, app. B at 2 (emphasis added).

136. PRESIDENT'S CRIME COMMISSION REPORT, *supra* note 5, at 24.

137. *Id.*

138. See Note, *Pre-Trial Detention in the New York City Jails*, 7 COLUM. J.L. & Soc. PROB. 350, 357 (1971). New York State's Minimum Standards and Regulations for Management of County Jails and Penitentiaries provides that "detention facilities need not consist entirely of cells." 7 N.Y. OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS § 5100.2(b) (1971).

139. Burden Report, *supra* note 5, app. B at 1.

eral assistance is beginning to be infused into jail programs.¹⁴⁰ Further, a series of training manuals is being prepared for local use to assist in educating jail personnel in current correctional procedures and standards.¹⁴¹ Since jails are typically operated and funded by local county or municipal governments, funds are seldom available to provide professionally trained staffs. Nor is the fact that many jail staff members are employed through political patronage particularly conducive to professionalization. Thus, most jails are presently "supervised by ill-trained, underpaid personnel."¹⁴² Programs designed to increase the competence of jail staffs can do much to upgrade the conditions of treatment in detention facilities and are badly needed.

Another kind of proposed reform is aimed at limiting the lengthy periods of detention which, as we have previously noted, are imposed on large portions of the pretrial population. The first of these would establish time limits on the allowable period of detention before trial. Several variations of this basic approach have been offered. One plan would limit the period of detention to the length of the maximum sentence the detainee could receive for the offense with which he is charged. And in no event should this period exceed six months except upon court order.¹⁴³ Another would establish shorter and more concise limits. Thus it is suggested that the limit from arrest to preliminary hearing be 72 hours, to indictment 15 days, and to commencement of trial 60 days.¹⁴⁴ In New York State, the Administrative Board of the Judicial Conference has recently adopted the so-called "prompt trial" rules¹⁴⁵ which were to have become effective May 1, 1972.¹⁴⁶ These rules, pertinent to all but homicide cases, generally require that persons accused of criminal charges must be released on affordable bail or parole if through no fault of their own they have not been brought to trial within 90 days after arrest. If trial has not begun within 6 months the charges must be dismissed. Each of the afore-

140. Carlson, *The Law and Corrections*, 6 U. SAN FRANCISCO L. REV. 77, 83 (1971).

141. *Id.* at 83-84.

142. PRESIDENT'S CRIME COMMISSION REPORT, *supra* note 5, at 75.

143. Burden Report, *supra* note 5, at 31.

144. N.Y. STATE SENATE COMM. ON CRIME AND CORRECTIONS, REPORT ON THE TOMBS DISTURBANCES 50 (1970).

145. 22 N.Y. OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS §§ 29.1-29.7 (1971).

146. N.Y. Times, April 30, 1971, at 1, col. 2.

mentioned plans would offer some relief in terms of shortening the jail stay for pretrial detainees. The former suggestion is, of course, least helpful as the average jail stay already approximates the six month limit. Such a maximum limit would not, therefore, alleviate overcrowding in any great measure. But each plan suffers from a common shortcoming; specifically, each would still require at least some period of detention. Although the stay may be shortened somewhat, the presumably innocent accused is still subjected to the inhumanity of confinement.

A second suggested reform designed to limit the length of detention, which apparently is being employed in some jurisdictions, would give priority on court calendars to those in jail as opposed to those accused and free on bail.¹⁴⁷ This system, it seems, can offer only a slight benefit to the length of detainees' stays in jail, for there is a limit beyond which the cases of bailed defendants can no longer be postponed without jeopardizing their rights to a speedy trial.¹⁴⁸ Even so, this plan would also require at least some period of detention. It is our belief that wherever practicable, detention should be eliminated altogether.

Having examined reform measures which either offer insufficient relief to pretrial detainees or, as in the case of complete abolition of our jails, exceed the perceived bounds of legitimate change, the discussion shall turn to more medial yet efficacious methods for implementing large-scale release programs. Gross reductions in the number of persons jailed pending trial should be the goal of every jurisdiction. The release of substantial percentages of pretrial detainees and establishment of procedures designed to insure continued release of most accused persons presents a most effective remedial measure. As the Illinois jail study concluded:

Very possibly, with expanded use of release-on-recognizance and other pretrial release mechanisms, the local jail population could be substantially reduced and the criminal justice system made less discriminatory against the poor.¹⁴⁹

147. See McGee, *Our Sick Jails*, *supra* note 1, at 4.

148. The Federal Constitution provides that an accused is entitled to a speedy trial. U.S. CONST. amend. VI. In addition some state statutes require that a trial be brought within a given time. See, e.g., IND. STAT. ANN. § 9-1403 (Burns, 1956 repl.) generally limiting the period to no more than "three [3] terms of court"; WIS. STAT. § 971.01(2) (1970) setting a six month maximum period before trial.

149. ILLINOIS JAILS, *supra* note 7, at 73.

The latter portion of this statement is important, for it implies a policy aimed at maximizing the number of releases before trial that would require major alterations in presently existing bail procedures. Legislatures should not be hesitant to revamp any program which so obviously discriminates against indigent defendants,¹⁵⁰ and an excellent model is already available in the Federal Bail Reform Act of 1966.¹⁵¹ And, of course, the central objective of such release procedures—elimination of the burdens on individual rights and freedoms—would be served. "Every release would mean circumvention of the tremendous social damage wrought by the moral contamination that occurs in these jails" ¹⁵²

The effectuation of pretrial release procedures designed to maximize release of accused persons is not a radical concept. As the American Bar Association Advisory Committee on Pretrial Proceedings has recently asserted: "The law favors the release of defendants pending determination of guilt or innocence."¹⁵³ Nor need large-scale release of accused persons pose a threat to other members of society. Many pretrial detainees are charged with so-called "victimless crimes"—vagrancy, drunkenness, prostitution—which tend to threaten the individual more than his fellow humans. More fundamentally, it must be remembered that large portions of our jail population are indigents who would be free if requisite funds for bail were possessed. To deny unrestricted release to such persons merely because of some perceived "dangerousness" amounts to contending that it is proper to release those who are "dangerous" and wealthy but not those who are "dangerous" and impoverished. Such an assertion represents the kind of blatant discrimination on the basis of financial ability that the United States Supreme Court condemned in *Griffin v. Illinois*.¹⁵⁴ Correctional official Richard A. McGee has recently estimated that "it is probable that the daily populations of the Nation's local jails could be cut by as much as 50 percent without risk to the public

150. See *supra* note 40 and accompanying text.

151. 18 U.S.C. § 3146 (1970).

152. McGee, *The Administration of Justice: The Correctional Process*, *supra* note 1, at 228.

153. ABA REPORT, *supra* note 51, at 9.

154. 351 U.S. 12 (1956) wherein the Court stated that: "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Id.* at 17.

safety.”¹⁵⁵ We suspect that if adequate security and supervisory measures could be provided during release this percentage would be much higher.

Another common argument against extensive pretrial release programs asserts that such programs would cause drastic increases in “skip rates”—percentages of defendants failing to reappear for trial after release. Available statistics indicate this belief is fallacious. Consider the following. A 1964 report discussing the success of the Manhattan Bail Project reported that of 2,195 felony defendants released on their own recognizance, less than one percent failed to appear when required.¹⁵⁶ In 1965 the Eastern District of Michigan federal court released 84 percent of all prisoners accused of crime. “Only one of the 711 persons thus released defaulted.”¹⁵⁷ A recent Pennsylvania case reported that during 1966 and 1967 a Philadelphia Bar Foundation bail project released some 878 defendants on their own recognizance. The computed “skip rate” for this project was “between 1.9% and 4%, and compared most favorably with an estimated bonding company skip rate of 20%.”¹⁵⁸ And although one source has reported that skip rates for those released on self-recognizance had been increasing, “the rate . . . by those who can afford bail is even greater.”¹⁵⁹

What remains, then, is consideration of the proposed methods suggested for implementing these large-scale pretrial release programs. One approach already widely used in our major cities involves creation of an investigative staff trained to conduct interviews with jailed defendants. Such prisoner release programs are supported or sponsored by local bar associations and are typically staffed primarily by law school students. Interviewers collect information concerning a defendant’s history of arrest, employment stability, familial relations, etc., and make recommendations to the courts for lowered bail amounts or release on self-recognizance. Programs of this type have operated with some success, given limited human and financial resources. A large scale, professionally

155. McGee, *Our Sick Jails*, *supra* note 1, at 5 (emphasis deleted).

156. ABA REPORT, *supra* note 51, at 2, *citing* D. FREED & P. WALD, *BAIL IN THE UNITED STATES* 62 (1964).

157. R. CLARK, *CRIME IN AMERICA* 304 (1970).

158. Commonwealth *ex rel.* Carroll v. Tate, 442 Pa. 45, 61, 274 A.2d 193, 205 (1971) (Roberts, J., concurring and dissenting).

159. Note, *supra* note 138, at 380, *citing* SCHAFFER, *BAIL AND PAROLE JUMPING IN MANHATTAN IN 1967* (1970).

staffed investigative agency could be established for even more extensive release potential. Since greater releases before trial would reduce the size of jail populations, the savings that would result from corresponding reductions in jail expenditures could perhaps be applied to costs of hiring and training investigators, counselors and classification personnel.

Bail release programs would certainly go far toward eliminating the burdens of confinement for large numbers of defendants. But implementation of standards recently established by the American Bar Association Advisory Committee on Pretrial Proceedings would make even greater strides toward the goal of eliminating pretrial detention wherever possible.¹⁶⁰ The underlying principle of the ABA's recommended procedures recognizes that pretrial release, preferably on one's own recognizance, is a far superior alternative to the hardships imposed on defendants, their families, and society by incarceration. Toward that end the ABA Committee recommends issuance of "citations"—freeing the accused upon order to appear in court at a designated time—in lieu of arrest.¹⁶¹ The rationale behind this procedure is that "[i]t makes little sense to jail a man who, when he appears before the judge, will be clearly qualified for release without bail."¹⁶² Even where arrest is made, the report recommends that mandatory issue of citation be subsequently made where the sentence for the charged offense would not exceed 6 months. In all cases where issuance of a citation is inappropriate, the accused is to be granted an appearance before a judicial officer as soon as possible after arrest. Even where the accused is subject to sentence exceeding one year, the judicial officer is empowered to order release on self-recognizance unless such release is opposed by the arresting officer or prosecution counsel. Where such opposition is made, an investigating agency will conduct an exploratory inquiry into the defendant's employment status, family relationships, etc. and make recommendations to the court concerning the desirability of unrestricted release. But even when such investigation concludes that unrestricted release is not indicated, courts are still urged to order pretrial release with im-

160. See generally ABA REPORT, *supra* note 51.

161. New York has adopted a similar procedure in its recently revised criminal procedure laws, but uses the term "appearance ticket" instead of "citation." N.Y. CRIM. PROC. LAW § 150.10 *et seq.* (McKinney 1971).

162. ABA REPORT, *supra* note 51, at 31.

position of any reasonable *non-monetary* conditions designed to assure the defendant's appearance at trial. Such restrictions may range from assignment to supervision by a third person (as recommended by the Federal Bail Reform Act of 1966)¹⁶³ to requiring the defendant to return to custody during non-working hours.¹⁶⁴ The recommendation for non-monetary restrictions is an important feature, as it emphasizes the policy of minimizing payment of bail. As the report states: "Reliance on money bail should be reduced to minimal proportions. It should be required only in cases in which no other condition will reasonably ensure the defendant's appearance."¹⁶⁵

The minimal stress given to bail payments is an outstanding feature of this fine program of proposed reforms. It clearly will relieve the discriminatory aspects of traditional pretrial release procedures which practically assure incarceration of the indigent. The authors of this comment urge that legislatures responsible for promulgating regulations and procedures relating to jail administration enact and support policies patterned after the ABA proposals which will eliminate pretrial detention in every case practicable.

It would indeed be unfortunate for our system of criminal justice and our society as a whole to reject the adoption of such vital reform measures as those proposed by the ABA and continue to pursue a traditional policy of building ever larger detention facilities. No matter how well intentioned are views favoring harsh response to increased crime rates through strict detention procedures, such a policy represents a commitment to institutionalization, not freedom. That is to say, such a policy would be a statement of our society's willingness to institutionalize larger and larger numbers of people, while the problem instead demands a willingness to employ any and all possible means of pretrial release. The sociological and psychological insights that have been gained through years of painful progress in penology prove the failure of strict notions of retribution. Construction of new penal facilities on a large-scale basis with the intention of incarcerating more and more accused represents a concession to anachronistic ideas of penology. In addition, such grand construction commits

163. 18 U.S.C. § 3146 (1970).

164. ABA REPORT, *supra* note 51, at 56-58.

165. *Id.* at 9.

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vast financial resources to a measure which ignores the crime problem by locking defendants out of sight rather than to programs of reform and rehabilitation. All this comes at the expense of thousands of persons who will ultimately be found not guilty of any criminal liability. Encouraging pretrial release reforms is not only consistent with fundamental notions of human rights and freedoms, but as has been suggested, such a program could conserve, not consume, public monies.

V. ADVANCING THE CAUSE OF PRISONERS' RIGHTS— THE ROLE OF PRETRIAL LITIGATION

Thus far this comment has focused on persons detained in jail awaiting trial—examining the conditions of detention and the rights that are violated by imposition of those conditions. In addition, the remedies and solutions, judicial and otherwise, which might be employed to end these hardships have been discussed. An evaluation of recent developments in this area leads to the follow conclusions:

1. Given the substandard conditions which exist in most jails throughout the nation, immediate improvements must be made or wide-scale release programs must be initiated in order to avoid serious violations of substantive rights of thousands of presumably innocent people.

2. If a system of pretrial incarceration is maintained, no restrictions should be placed on such individuals except those which are reasonably necessary in order to hold the person for trial or to maintain the security or good order of the jail.

3. Unhealthy or undignified conditions must not be imposed on pretrial detainees, and their imposition violates fundamental legal rights of the detainees.

4. Courts should not hesitate to intervene and terminate those restrictions and/or conditions which are not reasonably related to the holding function.

Though these conclusions are made with particular reference to pretrial detainees, we should understand or at least explore briefly the extent to which they are or should be applicable to all jail inmates, or, for that matter, prison inmates as well. The applicability of these conclusions will depend upon the extent to which meaningful differences can be found between pretrial detainees

and other inmates. If no substantive distinctions can be drawn between these two groups, what has been achieved by litigation on behalf of pretrial detainees may be very important in the attempt to secure the rights of other prisoners.

The one obvious feature which distinguishes the pretrial detainee is the presumption of innocence to which he is entitled. This presumption has been extremely influential in establishing the pretrial detainee's "preferred legal status" among inmates¹⁶⁶ and in persuading the courts to act to correct terrible conditions to which pretrial detainees are exposed. But we must question what consequences should flow from the status of being convicted. That is to say: can the determination of guilt justify the imposition of greater restrictions on the convicted inmates' liberties than would be permitted for pretrial detainees? And is the fact of conviction a sufficient reason for courts to ignore complaints which would be proper for adjudication for pretrial detainees?

The answers to these queries lie in the extent to which one considers punishment beyond simple incarceration to be a legitimate function of a penal institution. Certainly deterrence and punishment have been traditional functions of the penal system. But we need only mention Karl Menninger's *The Crime of Punishment* to allude to the growing body of literature which points out the inhumanity and ineffectiveness of traditional notions of punishment. When considering this problem, it is important to remember that in jail with pretrial detainees are those who have been convicted of misdemeanors—by definition very minor offenses against society. Given the nature of the offense, it is clear that the punishment meted out by the conditions in today's jails are unjustifiably harsh and far in excess of what may be necessary to express society's disapproval of the offending action. Under these circumstances, the efficacy of such punishment must be seriously questioned; it may well do more to turn the individual against society than demonstrate to him the wisdom of conformity. Thus, we query whether it is at all appropriate for jails to exceed a *simple holding function* for misdemeanants as well as for pretrial detainees. People are sent to jail or prison not *for* punishment, but *as* punishment.

166. See Bass, *Correcting the Correctional System: A Responsibility of the Legal Profession*, 5 CLEARINGHOUSE REV. 126, 148 (1971).

Under this analysis, awaiting trial is legally identical to serving a sentence; in both cases, people are being held by law until some point in time is reached—in one case it is trial, and in the other it is the expiration of sentence. In both cases, the jails are called upon to perform a simple holding function, assuming that punishment is not appropriate and that rehabilitation, though a legitimate goal, is not feasible. Accordingly, rights are violated when unhealthy and/or undignified conditions are imposed; no restrictions should be imposed which are not reasonably related to the holding function; and courts should not hesitate to adjudicate the grievances of inmates. In this way, the legal developments made on behalf of pretrial detainees can be applied to convicted jail inmates.

As stated, this argument depends upon undermining the notion that one function of jails is to punish the misdemeanor offender. Without the motive of punishment, there is no reason to treat convicted inmates differently from unconvicted ones. But can the notion be pushed even farther and applied to inmates in prisons? The question then becomes whether commission of a more serious offense against society, a felony, is sufficient to permit infliction of any punishment beyond simple incarceration. The answer to this inquiry must be examined in light of the traditionally recognized functions of the prison: retribution and rehabilitation.

Certainly the motive for retribution increases with the severity of the offense, and is therefore greater for prison inmates than it is for jail inmates. This is reflected in the degree of caution taken in incarceration; felons are most frequently sent to "maximum security" institutions; and even the cells within an institution may vary in degree of security. Most probably, such a designation reflects the greater level of concern about isolating felons from the rest of society, and a recognition that the motivation to escape is greater when facing a more lengthy sentence than it is with a shorter jail sentence. The greater precautions taken in prisons to prevent escape are primarily directed to the holding function and not to the retributive function. The emphasis upon security may demand a tighter regimentation of prisoners' lives, and this may indeed raise nice questions in balancing prisoners' liberties against the need for security. No doubt the inclination is much greater in the case of prisons to justify the imposition of

virtually any inhumanity on the ground that "he deserves whatever he gets." Similar is the notion that prison life should not be too easy; it should be arduous, sometimes even miserable so that the threat of imprisonment can maintain a deterrent effect. Yet, high recidivism rates¹⁶⁷ and recent developments in the prisons suggest that the deterrent effect is not potent. Instead of deterring, unnecessary deprivations may engender rebellion and turmoil.

The courts face the issue of involvement when these deprivations or restrictions become so serious as to violate fundamental rights. In our context, the question one needs to ask is whether prison officials should be given greater latitude than jail officials in the burdens they can impose upon prisoners without court intervention? Or, to put it another way, should the courts permit imposition of burdens or restrictions on prisoners which are not reasonably necessary to hold the person or do not relate to maintenance of good order and discipline within the institution? Unless one blindly accepts the punishment for deterrence notion, there seems to be no good reason to allow prison officials this increased flexibility. Increased security measures certainly can be justified under this formulation if they really are reasonably related to the holding function. Likewise, it seems that nearly everything done to inmates in prisons might be justified on grounds that it was necessary to maintain good order and discipline. The real difference then is the attitude with which courts will approach these problems and the level of scrutiny to which they will submit them. For instance, while 373 days in solitary confinement was not, in the opinion of the Second Circuit Court of Appeals in *Sostre v. McGinnis*,¹⁶⁸ so shocking to the conscience as to constitute cruel and unusual punishment, it would seem much more difficult to show that such a punishment was reasonably necessary to maintain discipline in the institution. Were the court to use this standard, and we have tried to show that there is no reason why they shouldn't, the outcome in that case might have been quite different. Thus, though the motivation behind such tests was to help the unconvicted inmate, there seems to be no logical, forceful reason why

167. R. CLARK, *supra* note 155, at 215.

The most important statistic on crime is that one which tells us that 80 per cent of all felonies are committed by repeaters. Four-fifths of our major crimes are committed by people already known to the criminal justice system.

168. 442 F.2d 178, 185 (2d Cir. 1971).

they should not now be applied to convicted inmates in prisons and jails.

One might suggest, however, that the other end being served by the penal institution, rehabilitation, will justify the courts in giving greater freedom and flexibility to prison officials than to jail officials. The shortness of the sentence, the limitations of the facilities, and the comparatively innocuous nature of the offense make rehabilitation a rather moot concept in the context of jails. But, that is obviously quite different for prisons—where the time is longer, the need is greater, and more facilities are made available. Certainly these distinctions are valid; the promise of rehabilitation is perhaps the only positive aspect of the prison system. Yet, however meritorious the end, courts should not refrain from scrutinizing the process to be sure that it is not being abused. Violation of inmates' rights, even in the name of treatment or rehabilitation, should not be ignored. Yet this is exactly the rationalization used by the Second Circuit to justify its refusal to help *Sostre*:

Most important, we think it inadvisable for a federal court to pass judgment one way or another as to the truly decisive consideration, whether formal due process requirements would be likely to help or to hinder in the state's endeavor to preserve order and discipline in its prisons and to return a rehabilitated individual to society.¹⁶⁹

By this standard, it is difficult to imagine when, if ever, the court would find sufficient violations of rights to justify intervention by the court.

In view of other developments in the case law, encouraging the abdication of judicial responsibility in the area of prisoners' rights can only be seen as regressive. Whether the burden is imposed to punish or to rehabilitate is legally insignificant in deciding if rights have been violated. Thus, if the burden might not be reasonably necessary for the good order and discipline of the institution or for maintaining custody over the inmate, it should be carefully reviewed by the courts and perhaps even struck down as having no place in our system of criminal justice.

Should the courts accept this approach and apply the same standards to unconvicted and convicted inmates it will have come about through a rather ironic quirk in judicial development. As

169. *Id.* at 197.

traced above, the erosion of the hands-off doctrine was motivated largely out of concern for the maltreatment received by pretrial detainees. However, as we have suggested, the tests established for their protection may be equally applicable to all inmates, even those in prisons. In an effort to keep pretrial detainees from suffering punishment worse than that of convicted felons, the courts may have begun a cycle which will result in effective judicial adjudication of *all* prisoner grievances. Hopefully, the consequence of judicial intervention will be the upgrading of our entire system of criminal justice.

Yet the path of future developments is not as clear as it might seem from the preceding investigation of recent trends in the case law. Courts may be slow to discard established concepts, such as the hands-off doctrine. Witness, for example, a statement recently made by the Eighth Circuit Court of Appeals: "[I]t is not the function of the courts to run the prisons, or to undertake to supervise the day-to-day treatment and disciplining of individual inmates [T]he exercise of [jurisdiction by the courts] should be sparing."¹⁷⁰ Other tenets which have defeated judicial intervention in the past, such as separation of powers and lack of competence in penology, recur with uncanny vitality. This statement by the Second Circuit Court of Appeals embodies both:

For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes. . . . Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us *as a federal court* to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or *personally* repugnant.¹⁷¹

The court does not suggest why it can determine the legal validity of extraordinarily complex, technical patents, for example, but it cannot determine whether an action by state prison officials consti-

170. *Sawyer v. Sigler*, 445 F.2d 818, 819 (8th Cir. 1971).

171. *Sostre v. McGinnis*, 442 F.2d 178, 191 (2d Cir. 1971) (emphasis in original). Then, however, the court turned around and seemed to express a judgment about the facts of the case:

Although the conditions Sostre endured were severe, we cannot agree with the district court that they were 'so foul, so inhuman, and so violative of basic concepts of decency' . . . as to require that similar punishment be limited in the future to any particular length of time.

Id. at 191-92.

tutes a violation of an inmate's constitutional rights. It should be noted that both cases cited above deal with prison inmates. This suggests the preferred legal status of pretrial detainees and illustrates how important their litigation has been in overcoming these rationalizations for judicial inaction.

Thus, while some legal strides have been taken to allow effective adjudication of inmates' grievances, much remains to be done. Each day thousands of persons are subjected to the nightmare which we call jails and prisons. Rebuilding these institutions and reshaping our policies will challenge the mettle of our legal system and the resourcefulness of our legislatures. There is hardly a more pressing problem in the whole area of criminal justice. The situation in our jails and prisons simply must be improved—dramatically and immediately. Our challenge is to make what must be, what will be.

MIKE PLACE
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