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Council of State Governments

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MULTIJURISDICTIONAL ASPECTS OF CORRECTIONS

Mitchell Wendell*

Each of the states and the federal government maintain separate correctional establishments. They do so for a variety of policy reasons, historic considerations, and legal necessities arising out of constitutional doctrine. As a practical matter, there are both advantages and disadvantages to this decentralized approach to corrections. To some extent it is appropriate to examine the merits of our present system, even in an article devoted to devices available for bridging jurisdictional lines in the correctional field. But since the basic character of the division of responsibilities for correctional administration and policy go far beyond the correctional field itself and would require much larger adjustments in our entire pattern of government than can be considered within the present compass, it becomes immeasurably more important to emphasize at the very outset that our choice is not between a multitude of state and federal correctional systems operating in virtually complete isolation from one another and a single system with all inclusive judicial and administrative jurisdiction.

Considerations of economy and efficiency may have some relevance to studies of optimum size and scope for individual penal systems. But the main reason for pursuing inquiries along these lines is that a large number of individuals who have been convicted of crime and who will sooner or later be returned to the street are constantly being punished, restrained, rehabilitated, and reformed, embittered, or worked on without visible effect by more than one of these systems. Sometimes it is the federal prison system and a state prison system that have a concurrent or consecutive effect on the individual; sometimes it is two or more states. In any case, there are social, clinical, administrative, and economic reasons for producing as close to a unified program of treatment for each inmate, and for each parolee or probationer, as possible. The history of interstate programs for this purpose is at least thirty years old. There are some concrete accomplishments on the record. There are also a number of possibilities for further action which are suggested by experience to date, and undoubtedly many more which could result from the application of creative analysis and imagination.

I. BASES OF THE PRESENT MULTIJURISDICTIONAL SYSTEM

The multiplicity of penal systems in the United States seems to

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be a result of the construction of our federalism, rather than of a decision specifically taken on account of policies directly related to the administration of law enforcement or rehabilitative programs. The enumerated powers in the federal constitution nowhere refer to the establishment and maintenance of a federal penal system. Indeed, the closest approximation of any such reference is in the fifth, sixth and seventh amendments which by prescribing certain requirements for trials in criminal cases in the federal courts assume the existence of a federal criminal law enforcement program, at least up to and including the verdict and sentence. As is well known, the police power remained with the states.

It also seems to have been a basic assumption of the federal system that each independent jurisdiction within it was to have the power to prescribe penalties for violations of its own laws and to administer their imposition. This inevitably means a penal system in each of the states and in the federal government.

While it does not follow as a matter of inexorable logic that separate state and local police systems and separate court systems to try and sentence persons for the commission of crimes necessitates separate programs and sets of facilities in each jurisdiction to handle the postconviction custody and treatment of offenders, such separatism does seem to have flowed naturally from the operation of independent law enforcement systems. It had the internal governmental logic of enabling each state and the federal government to legislate for and administer a complete system of criminal jurisprudence and correctional programs to implement its own penal statutes and social policies. It can be argued that this ability of each government having constitutional status within the federal system to work out its own means of dealing with offenders against its laws is an important element of the independence underlying the basic division of powers on which the American governmental framework rests. On a less philosophic plane, it can be observed that just as public school systems, mental health hospitals and programs, and most social welfare facilities and programs are inaugurated and operated on a decentralized basis (at the state and local levels of government), so it is with correctional activities, both of an institutional and community character. There are benefits from having these programs and services close to the people they serve or regulate, especially if it is presumed that the states are to continue to be effective and significant lawmaking and enforcing units of government.

All of this is not to gainsay the problems inherent in or created

by a multiplicity of correctional systems. The optimum size for a penal program or for particular parts of it is not easy to determine. If an entity is too small it is likely to lack sufficient resources; if it is too large, it may become unwieldy and unresponsive to public and individual needs. If the objects upon which the correctional systems operate move about but each of the systems remains territorially or otherwise fixed in its jurisdiction, a desirable unity or coordination of program for the individual offender may never become a reality. Given the configuration of our federal system, the principal focus of our attention should be on what can be done to encourage improved, and wherever desirable, coordinated or unified treatment of individual offenders.

II. COOPERATIVE USE OF INSTITUTIONS

The states are territorial units of government. While there are some significant circumstances under which their jurisdiction may be made to extend beyond their borders, the normal rule is that jurisdiction ends at the state line. Only the authority of the federal government can be exercised directly from one end of the nation to the other, but its criminal jurisdiction too is limited. The nature of the restriction derives from the backhanded way in which most of the federal criminal law must be built to satisfy the constitutional division of powers between the national government and the states. Most federal crimes are not legally described as the commission of acts constituting murder, arson, rape, larceny, fraud, etc. Instead the prohibited conduct is using the channels of interstate commerce to flee from prosecution; interfering with the civil rights of a person; destroying federal property; transporting a woman in the channels of interstate commerce for immoral purposes; transporting a stolen motor vehicle in interstate commerce; or using the mails to defraud. For constitutional reasons (i.e., because the congressional power to legislate must be pegged to a delegated power found in the Constitution), the legal fiction studiously preserved is that the evil is not the act which most people would recognize as antisocial, but some auxiliary feature of it such as the intrinsically harmless or largely irrelevant movement in interstate commerce. Consequently, the federal prison and conditional release authorities have responsibilities toward arsonists who have burn-

ed down post offices, but not those who have set the torch to private homes or factories; sex offenders and procurers whose sin consists in their being mobile, but not those who are content to do their business in the neighborhood; “con men” who write letters to advance their swindles, but not those who restrict themselves to face-to-face conversation. Needless to say most of the offenders who perform these acts have no moral compunctions concerning whether the property they steal or destroy is federal or private, or whether they cross political boundaries in the conduct of their crimes. Nevertheless, these distinctions have a bearing on who turns up in the federal and state correctional systems. In the case of multiple or repeated offenders, it makes it virtually inevitable that many of them will be objects of the correctional efforts of both state and federal authorities at different times in their lives. In fact, in the vast majority of cases, the conduct which makes a defendant amenable to a federal charge also spells out a state crime, even if the offenses may be described somewhat differently in order to meet the specific language of the federal or state statute. In a somewhat lesser but still very large number of instances, a defendant in a state prosecution could, on the same facts, be charged with the commission of a federal crime. Whenever a conscious effort is made to have the prosecuting agency of one jurisdiction defer to that of another jurisdiction, it may be done in explicit recognition of considerations such as the length and type of sentence likely on the comparable federal and state offenses and so, at least in part, on the basis of the penal program likely to follow from conviction of one or the other crime.

III. COOPERATIVE INSTITUTIONS AND PROGRAMS

One way to reduce the disadvantages inherent in a multiplicity of correctional jurisdictions is to develop multijurisdictional institutions and programs. Even though the federal government and the states would still remain separate in their lawmaking and enrollment responsibilities, joint use of facilities, personnel and programs

8 Even if the specific acts or course of conduct constituting the federal crime is identical with the facts or course of conduct constituting the state crime, separate prosecutions and convictions for each offense do not constitute double jeopardy. See Bartkus v. Illinois, 359 U.S. 121 (1959); Jerome v. United States, 318 U.S. 101 (1943); United States v. Lanza, 260 U.S. 377 (1921); Pettibone v. United States, 148 U.S. 197 (1893); United States v. Lackey, 99 Fed. 952 (2d Cir. 1900); People v. Sichofsky, 88 Cal. App. 257, 208 Pac. 340 (1922).

9 This comes about because state crimes are more generic: e.g., theft rather than theft of particular objects; homicide rather than homicide in particular locations.
would make it less likely that individual offenders would become involved with more than one set of prison officials, social workers, psychiatrists, and parole or probation agents taking their separate routes, albeit at different times, in trying to punish or treat him. To the extent that federal authorities have generally lodged limited numbers of prisoners in state and local detention or correctional facilities, if they had no institutions of their own in the area, such a reduction may be said to have long standing precedent. But as a major tool for consolidating significant segments of the correctional apparatus, there is no federal-state cooperative program. On the interstate level, there are a number of interesting beginnings of consolidation or of some other type of cooperation aimed in one way or another at coordinating the correctional program for individual prisoners or at improving some aspect of their treatment.

A natural concomitant of the present approach to the penal functions is that each state must build and operate prisons and varying numbers and kinds of auxiliary facilities for its inmate population. Perhaps the basic reason why these institutions and the programs they house are usually judged inadequate is that most people are not very enthusiastic about large expenditures of public money for correctional activities. They assign higher priorities to the more “deserving” elements of society, or to governmental activities which bring more tangible benefits to the economic, recreational, educational, or health needs of the community. But to whatever extent available resources can support correctional institutions and services, sharing of them by groups of states could either reduce the cost to each of them or improve the facilities and programs purchasable with any given amount of dollars. This statement is probably truest of states with small populations which cannot expect to have prison populations of optimum size for economic and clinical efficiency. Consequently, it is not surprising that the first moves toward multistate correctional facilities have been made either wholly or largely by these smaller states.

About fifteen years ago, a group of western states seemed to be on the verge of concluding arrangements for the establishment of a regional women’s prison. The fact that female inmates are generally far less numerous than male prisoners meant that in virtually all of the sparsely populated western jurisdictions the difficulty of justifying adequate institutions and programs for very small numbers of women convicted in the courts of a single state was acute. Dovetailing with this need was the happy circumstance that the California Women’s Prison at Tehachapi was about to become vacant through the moving of its inmates to a new facility. Consequently, the states surrounding California and having minimal
facilities of their own were interested in having their needs met on a pooled basis. On the other hand, California seemed amenable, if the states directly benefited were willing to pay equitable shares of the cost of a cooperative undertaking. With the stage so well set for a pioneering venture on a fairly large scale, an earthquake destroyed the Tehachapi prison. The disappearance of the facility brought the project to an abrupt halt, and nothing tangible was to eventuate until 1958.

In the meantime, the southern states began to have similar ideas. They had no ready made Tehachapi, but they did have small single-state women prisoner populations, and many of them had inadequate facilities. After a series of negotiations and drafting efforts, a "South Central Corrections Compact" was developed. While its language was fairly broad, the immediate point was to find some way of improving the resources of the region available for the institutional treatment of women prisoners. Tennessee and Arkansas enacted the compact in 1955, but interest in the idea waned before anything came of the project. The parallel with the western episode was observable. The southerners had been nourished in their hopes by what seemed to be an imminent prospect that one or more of their states were about to build new women's institutions which, with proper foresight and commitments, could be used for regional purposes, as well as for the needs of the single states contemplating the construction. When it became apparent that financial and other obstacles were delaying the building programs and that the facilities in question might not materialize, the urgency seemed to go out of further consideration of the compact.

In the West the idea of regional cooperation relating to use of correctional institutions was revived in the late 1950's. While speculation about the possibility of securing at least one facility already in existence that could be turned over for regional use was again in the picture, neither the scope of the Western Corrections Compact as it took shape nor its immediate legislative success depended on the occurrence of such an event. Within a short time the eleven states and the Territory of Guam now party to the compact had joined. Once again, however, the potentialities of multistate use of correctional institutions seem so far to have been realized only in minimal degree. Contracts for the transfer of a few prisoners on an individual basis have been negotiated, but there seems to be nothing like the varied and significant reliance upon the compact to provide the facilities and services needed to meet a major part of

\[10\] The states party to this compact are Alaska, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming and the Territory of Guam.
any state's correctional obligations.

Only several years after the Western Interstate Corrections Compact became a legal reality, if not a continuously used instrument, the six New England states took up the idea. Their compact, now in force among all six of them,\(^{11}\) is a virtual word for word copy of the Western agreement. But in this instance, actual use of the compact to incarcerate prisoners in party states other than the one in which conviction was had is noticeable and growing.\(^{12}\) Also, the New Englanders appear to be more flexible and inventive in their conception of the types of cooperative use of institutions which may be beneficial.

Of course, the possibility of one or more institutions actually constructed and operated on a regional basis is in the New England thoughts too. In fact the sparsely populated Northern New England States are actively studying the matter. However, the concept of existing prisons in each of the party states as regional resources seems to be taking hold in a way not observable elsewhere. An article by a state official who had much to do with the negotiation and early administration of the New England Corrections Compact is very revealing in this respect.\(^{13}\) Commissioner McGrath begins with an account of a Maine prisoner who was being kept in solitary confinement at his own request in order to protect him from possible reprisals. Among its unfortunate effects, this isolation made it impossible to make this prisoner part of any of the normal rehabilitative and other programs of the institution. Accordingly, he was transferred to a prison in another party state, where it was possible to treat him as an inmate in the regular program of the institution. Some other elements of the New England concept are most easily and succinctly conveyed in Commissioner McGrath's own words:

> Prison administrators also can use the compact when necessary to break up hostile groups of inmates or to provide for emergencies, such as sudden overcrowding, or the destruction of cell blocks by fire or other causes.\(^ {14}\)

Both the New England and Western Interstate Corrections Compacts are enabling devices. They authorize the cooperative construction and use of correctional institutions by the party states on a regional basis. The institutions concerned can be specially con-

\(^{11}\) The text of the compact is embodied in the statutes of each of the party states.


\(^{13}\) Ibid.

\(^{14}\) Id. at 18.
structed for operation under the compacts, or they can be facilities already in existence and used in greater or lesser part as single state institutions, with space made available to prisoners placed there pursuant to the interstate agreement. The compacts also set forth the procedures for safeguarding the civil rights of inmates, transferring them between or among the party states, and expressly describe the basic rights of party states in respect to facilities being used as compact institutions and prisoners lodged therein. However, neither compact makes actual provision for the cooperative incarceration of any prisoners. This must be done pursuant to contracts for the purpose. The compact provides authority for the making of these contracts by the appropriate officials of each party state.

There are three basic legal questions which must be answered satisfactorily if any program contemplating multistate use of penal institutions is to succeed: (1) Can the necessary administrative and judicial jurisdiction over prisoners be maintained when they are moved beyond the territorial limits of the state of conviction?; (2) Can procedures be developed to meet due process and equal protection requirements relating to the civil rights of prisoners?; and (3) Can legally and administratively feasible arrangements be made for the financing and operation of institutions on a shared basis?\[15\] While a thorough exploration of all significant facets of these questions would take more than a single article, it can be said that each of these matters was carefully considered in the development of the Western and New England Compacts. The principal elements of the solutions can be summarized in relatively brief compass.

When the correctional facility is in the same state where the court which convicted and sentenced the offender, there is no doubt that jurisdiction to incarcerate exists. Whether custody of the prisoner is technically retained by the court or whether it is turned over to an administrative agency (e.g., the state department of corrections), depends on the statutory scheme established by the legislative enactments of the different states. In any case, however, state process may be presumed sufficient within its own borders. On the other hand, we are not accustomed to think of State X having any power to act within State Y, certainly not if an exercise of

\[15\] The first two of these questions are discussed in detail (with the inclusion of appropriate citations) in a legal brief prepared for The Out-of-State Incarceration Amendment to the Interstate Compact for the Supervision of Parolees and Probationers, Council of State Governments, Interstate Crime Control 84–89 (rev. ed. 1955). The text of the amendment and other materials related to it appear in Chapter V of the Handbook.
regulatory authority is involved.

Fortunately for the success of the type of interjurisdictional cooperation under discussion, it was long ago determined that states could achieve some extraterritorial effects by adopting interstate compacts. Indeed some of these instruments have even conferred outright criminal jurisdiction on one party state in lands or waters of other party states.

The much litigated Interstate Compact for the Supervision of Parolees and Probationers (discussed later in this article) has firmly established that jurisdiction sufficient to support the supervision of persons on conditional release from incarceration may be maintained on an interstate basis. Since parole and probation rest on the same legal foundation as incarceration and are simply the result of judicial or administrative decisions to restrain persons outside prison walls rather than within them, it follows that a state which may validly cause the supervision of a person convicted of crime to take place in another state may also cause his incarceration there. In each case the determinative question is whether the restraint is accomplished pursuant to sufficient authorizing law and under procedures which safeguard constitutional guarantees.

Since the compacts are statutes of the party states and specifically authorize incarceration in any other party state, they meet the first of these requirements. The matter of prisoners' rights

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17 Ibid.
18 For a collection of the authorities see Interstate Crime Control, op. cit. supra note 15, ch. IV.
20 Almost without exception interstate compacts are enacted by the legislatures of the states pursuant to the same procedures as the enactment of ordinary statutes. Once enacted they are statutory law and have a force even superior to that of ordinary statutes. See State ex rel. Dyer v. Sims, 341 U.S. 22 (1951); Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823); State v. Hoofman, 9 Md. 28 (1836); President, Managers & Co. v. Trenton City Bridge Co., 13 N.J. Eq. 46 (Ch. 1860); State v. Faudre, 54 W. Va. 122, 46 Atl. 269 (1903). Cf. Coffee v. Groover, 123 U.S. 1 (1887). See also Union Fisherman's Co-op. Packing Co. v. Shoemaker, 98 Ore. 659, 193 Pac. 476 (1920).
requires somewhat more explanation because it involves several related but separate problems. A clear understanding of the problem and its solution can be gained best by asking what a prisoner must receive and then by seeing whether there is any reason why it cannot be afforded in another state as well as in the state of conviction.

It seems quite clear that no prisoner is entitled to be incarcerated in any particular geographic location, and certainly not in a place close to the locale of the crime or of the convicting court. If any such proximity was a constitutional necessity, the federal prison system could not function on anything like its present basis. Since the relevant protections of the Bill of Rights are at least as demanding as anything required of the states by the fourteenth amendment, it would seem that incarceration within the geographic confines of any given state is no more essential to the personal rights of an inmate in a state prison than in a federal prison.

A prisoner is entitled to treatment which satisfies the standards of humanity imposed by due process and the avoidance of cruel and unusual punishment. In addition, the prisoner must have access to the courts to test the legality of his detention and must be afforded whatever statutory rights, such as hearings, as the laws of the state of conviction may confer upon prisoners in similar circumstances. The compacts provide for all of these matters. The several excerpts from the identical language of the Western and New England agreements illustrates the specifics of the approach.

The problems of cost sharing must be looked at in two ways, depending on the method chosen for establishing and operating the institutions. If the facilities are either existing or projected correctional institutions, built, staffed and operated by a single state, either wholly or partly for prisoners under a compact, the question of financing necessary to the undertaking can be answered in exactly the same way as it would be if the state were building its own institution, with no thought of serving any but its own prisoners. The normal appropriative or borrowing processes of the state are the ones to be followed. The ownership of the facilities is not in question. The incarceration of prisoners for other party states is handled pursuant to contracts for services among the "sending" and

21 The widely employed rule stemming from Palko v. Connecticut, 302 U.S. 319 (1937), is that many but not all of the protections of the first eight amendments to the United States Constitution are applicable to the states by reason of the due process and equal protection clauses of the fourteenth amendment.

22 See Article IV of the Western Interstate Corrections Compact reproduced in the appendix.
"receiving" states. The payments made by the sending state can be arranged on any reasonable basis set forth in the contract and can cover benefits actually provided. As explained in the brief historical account of the development of the two compacts, all of the actual experience to date is with prisoners handled in this way by institutions primarily used for inmates of the state in which the facility is located.

On the other hand, it may be that some states will want to build new facilities entirely or largely for regional purposes. If two or more states are to contribute significantly to the capital construction costs of new institutions, questions of ownership rights and status could arise. Both compacts seek to avoid problems of this sort by treating such capital construction as purchases of contract rights. Since the compact language setting forth the envisaged method is not long, the easiest way to explain it is by quotation.

It will be noted that both the use of existing single-state institutions for compact purposes and construction of new facilities with some degree of availability for compact use are so arranged as to result in an operational facility and program basically administered by a single entity. This was done for purposes of simplicity, which seemed especially compelling because of the pioneering nature of the concepts. At least in theory, there is no reason why such regional correctional facilities could not be truly joint—owned and administered by interstate agencies established by compact. The most desirable approach is dictated by policy considerations.

IV. PAROLE AND PROBATION

The oldest and by far the largest interstate correctional pro-

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23 "Prior to the construction or completion of construction of any institution or addition thereto by a party state, any other party state or states may contract therewith for the enlargement of the planned capacity of the institution or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific per centum of the capacity of the institution to be kept available for use by inmates of the sending state or states so contracting. Any sending state so contracting may, to the extent that monies are legally available therefor, pay to the receiving state, a reasonable sum as consideration for such enlargement of capacity, or provision of equipment or structures, and reservation of capacity. Such payment may be in a lump sum or in installments as provided in the contract." Western Interstate Corrections Compact, Article III(b).

24 When legislation to enact the New England Interstate Corrections Compact was before the Massachusetts Legislature it was submitted to the Supreme Judicial Court for an advisory opinion. The opinion was favorable to the legislation and Massachusetts joinder. Opinion of the Justices, 344 Mass. 770, 184 N.E.2d 353 (1962).
gram is in parole and probation. Pursuant to the Interstate Compact for the Supervision of Parolees and Probationers, it is possible for persons convicted in one state to be supervised on parole or probation in another jurisdiction. All fifty states, Puerto Rico and the Virgin Islands are parties to the compact. Only the District of Columbia for which Congress acts as the legislature and which would have to function as the enacting authority, does not participate.

The compact received its first adoptions in 1936, immediately after having been drafted. By 1951 all of the states were parties to it. During recent years, between ten and fifteen thousand persons have regularly received correctional services pursuant to the compact.

The compact itself is a relatively brief and simple document. Its essential provisions can be summarized as follows:

1. A parolee or probationer may be placed under supervision in a party jurisdiction other than the one where conviction occurred if he is a resident of the state where supervision is to be had (receiving state), if employment opportunities are suitable there, or if there is some other connection with the receiving state which makes it appear that rehabilitative opportunities will be improved by sending the parolee or probationer to the receiving state.

2. The authority for keeping the parolee or probationer on conditional release derives from the state of conviction (sending state), but the standards of supervision employed are those of the receiving state.

3. A supervisee under the compact may be retaken by the sending state at any time and only the courts of the sending state may adjudicate questions relating to the parole or probation or the retaking.

Partly because any law for the incarceration or partial restraint of individuals is likely to be contested by those who are restrained, and partly because the parole and probation compact was a pioneering effort to achieve an interjurisdictional correctional program of major proportions, there have been more court tests of this compact than of any other. It has survived them all, with not

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25 The text of the compact is contained in the statutes of each of the fifty states. It is also to be found in INTERSTATE CRIME CONTROL, supra note 15, together with considerable explanatory material.

26 The Council of State Governments collects statistics on an annual basis showing the case load under the compact. This information is available in mimeograph form.
a single successful attack on its validity. While the very idea that a person could be effectively restrained of his liberty on a continuing basis pursuant to the penal power of another jurisdiction was unfamiliar to traditional concepts of American criminal jurisprudence, constitutional questions were eased, if not entirely dissipated, by certain discretionary and consensual features of proceedings under the compact. In the first place, no person has a constitutional right to be placed on parole or probation. Such status is dependent on the existence of statutes creating the form and substance of conditional release, as well as the procedures for obtaining and keeping it. Moreover, every parole and probation system in the United States provides that conditional release is afforded at the discretion of the paroling authority or court when it finds that in its judgment the prisoner is likely to make a proper adjustment outside of prison walls. Since parole or probation can continue only until the expiration of the maximum term of a validly imposed sentence, any challenge which a parolee or probationer may wish to make to his disposition must contend with the proposition that he could legally have been compelled to remain in the higher degree of restraint inherent in incarceration.

Of at least equal importance to the avoidance of constitutional issues under this particular compact has been the voluntary character of the interstate aspect. No candidate for parole or probation is forced to accept supervision in another state. If granted parole or probation, the necessary circumstance leading to supervision in another jurisdiction under the compact is his agreement to go there. In fact, as a practical matter, the process is initiated by the desire of an inmate applying for parole or a convicted defendant being considered for probation to go home or to go to a place where, for whatever reason, he believes that things will be better for him than if he remains in the sending state. The official forms promulgated by the Parole and Probation Compact Administrators Association

27 Supra note 18.
reflect and reinforce this situation, from the evidentiary point of view. One of these forms recites that:

I, ________________, in consideration of being granted (parole) (probation) by the ________ and especially being granted the privilege to leave the state of ________ to go to ________, hereby agree: ... 2. That I will comply with the conditions of (parole) (probation) as fixed by both the states of ___________ and ___________; 3. That I will, when duly instructed by the ________ return at any time to the state of ___________; 4. That I hereby waive extradition to the state of ___________ from any jurisdiction in or outside the United States where I may be found and also agree that I will not contest any effort by any jurisdiction to return me to the state of ___________; 5. Failure to comply with the above will be deemed to be a violation of the terms and conditions of (parole) (probation) for which I may be returned to the state of ___________.

Until and unless an interstate correctional agency is created to administer one or more correctional programs which would then constitute the only means of dealing with convicts of a given class, the question always lurking in the background is equal protection. As the long line of cases dealing with segregated public education demonstrate, the only way of being absolutely certain that literal equality of opportunity, services or treatment exists is to give people identical programs in the very same facility, operated by the very same personnel. It is an obvious fact that supervision in State X rather than in State Y is bound to be supervision in a different place, by different parole or probation officers and, at least to this extent, under different conditions than would pertain in State Y. It is in this connection that the compact’s provision to the effect that the standards of supervision shall be those of the receiving state merits special explanation.

The only thing that makes the Parole and Probation Compact feasible is that each party state maintains its own system for the supervision of persons on conditional release. Most of the subjects of these systems are intrastate parolees and probationers, and it is the need to deal with these convicts which provides the primary justification for the existence of the particular programs. Since they already exist, it is reasonable to extend their operations to cover parolees and probationers who come from other jurisdictions. But it would present an insurmountable administrative problem if personnel operating or employed by these programs were required to adapt their routines in individual cases to the idiosyncrasies of similar programs functioning in the jurisdictions and under the
Statutes and regulations of each state from which a supervisee comes under the compact.

Fortunately, it has never been seriously suggested that everybody, even within a single state, has an immutable right to get his education in the same building, from the same teacher, at the same time of day; and even less that an object of a correctional program must be in the same prison or have the services of the same parole officer as each other subject of the system.

In equating the reasonable requirements of equal protection with the realities and legal necessities of interstate parole and probation, there are several essential tests which the compact and operations under it must meet. The substantive and procedural elements of the parole or probation program being used for interstate supervisees must afford the basic constitutional guarantees of which due process is the most pervasive. The working of the compact presents no special problem on this score. Of course, it is true that any conditional release program can be lacking in due process, but if so, it is also defective as applied to the intrastate parolee or probationer which it serves, and any remedy necessary will be the same for both intrastate and interstate supervisees. Then too, the authority by which the parolee or probationer is kept subject to the program must be one with legally supportable jurisdiction over him. This requirement is met under the compact because, no matter where the supervision takes place, the parole or probation is always from the incarcerating power of the sending state. The supervisee remains legally a parolee or probationer of the sending state and is retaken, discharged, or continued on a status of conditional release only by decisions ultimately made by the appropriate authorities of the sending state.

Because interstate parole and probation are administered by the same people, acting pursuant to essentially the same statutes as apply to intrastate parole and probation, it is inevitable that rehabilitation under the compact has the same merits and deficiencies attributable to this aspect of our correctional system generally. However, the compact can be credited with two very important accomplishments. First, it has introduced a highly desirable element of flexibility into state parole and probation programs by permitting them to escape the narrow territorial confines of single state boundaries. One of the great advantages enjoyed by the federal correctional system is that its authority extends throughout the entire country. This makes it possible to administer supervision wherever the needs of an individual convict can be served best. The compact makes it possible for the state systems to afford similar service. Secondly, the compact does have some intangible but
real effects on the general level of individual state parole and probation systems. While it was earlier explained that the standards of supervision employed under the compacts are those of the receiving state and that in all probability no other arrangement is feasible, the transfer of parolees and probationers from one state to another inevitably has increased contacts among the relevant officials of all the states. Such contacts have forced comparisons of the quality and extent of the programs available in the several jurisdictions. It is the repeatedly voiced opinion of knowledgeable persons in the states that such compelled comparisons have acted as a leaven in securing improvements in the poorer systems, so that the authorities responsible for them might no longer be embarrassed by continuing failure to match the programs of their associates.

V. DETAINERS

Detainers are used by a variety of law enforcement and corrections officials to promote the securing by them of persons already in custody. They are really notices, usually addressed to prison administrators, that a named prisoner is wanted and that warning of release should be given so that the sender may be present to pick the prisoner up. A detainer may be lodged by a police department, a prosecuting officer, a court, or a correctional official. Its basis can be anything from an allegation of intention to undertake preliminary steps toward arraignment of the subject to the contention that the prisoner is wanted for return to a penal institution from which he has escaped. Prison authorities generally honor detainers, because they consider themselves under a legal and moral obligation not to shelter persons from other law enforcement officials (either of their own or other jurisdictions) who assert interest in an inmate who may have committed offenses in addition to the one for which he is presently incarcerated.

Aside from the assistance which detainers afford in securing persons for trial and punishment on account of crime, their chief significance lies in their effect on the correctional program already in progress. To the extent that incarceration is intended to provide a setting and opportunity for rehabilitative services to make the inmate ready for return to normal society, both the rehabilitators and the object of their attention should have considerable certainty concerning the course of treatment, its duration, and the circumstances under which it will be brought to a successful end. So long as the sentence being served represents the only bar to outright release of the prisoner, the limits within which the correctional program is functioning and its terminal possibilities are known. But as soon as a detainer is lodged against an inmate, the future
becomes uncertain, and the resources for present treatment are diminished.

The first uncertainty arises from the fact that it cannot be known what will happen to the prisoner at the time of release. The source of the detainer may or may not be serious about claiming the prisoner; or having once been serious, the officials concerned may lose interest; or the passage of time may have dissipated the chances of making a case on the charge which originally formed the basis of the detainer. It has been the experience of many jurisdictions that over half of all detainers yield no pick up when the date of release actually arrives. If the prisoner is claimed, he may be released by the claiming authorities in fairly short order; he may be acquitted of the outstanding charge, or he may ultimately have a new sentence to serve. Consequently, neither the correctional authorities nor the inmate has any clear idea whether the present course of treatment has any realizable goal or when it can be achieved.

In addition, the curtailment of rehabilitative opportunities can be severe. The lodging of a detainer against an inmate means that the prison authorities must become especially solicitous of his security. Special pains frequently are taken to make sure that the prisoner will be available for delivery at the end of the present sentence. Parole may be denied, because the degree of freedom which it imports is inconsistent with security. Or many types of work rehabilitation and training, requiring lessened security or temporary presence outside the prison walls, may be foreclosed.

The restrictive effects of the detainer system within a single state flow from and can be approached by law and practice within that state. If statutory changes are deemed advisable, they can be made in the normal manner. If changes in administrative practice are called for, they lie within the power of single agencies. But when detainers come from another jurisdiction, cooperative action is necessary to find the best way of preserving or disposing of them in accordance with the equities.

The Agreement on Detainers is an interstate compact designed to eliminate or minimize these problems when they occur on an interjurisdictional basis. At the present writing, fifteen states have enacted it. The Agreement covers only detainers lodged against a prisoner from another party jurisdiction on the basis of "untried indictments, informations or complaints." Consequently,

29 California, Connecticut, Hawaii, Iowa, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania and South Carolina.
it is aimed at producing a greater degree of certainty with respect
to the possibility of new sentences which may have to be served by
an inmate. By encouraging early trials—usually postponed until
release from the present sentence makes the prisoner available for
prosecution in the other jurisdiction—the Agreement also reduces
the number of instances in which legitimate prosecutions must
be dropped because the passage of time has dissipated necessary
evidence.

The basic feature of the Agreement on Detainers is that it
provides an expeditious means of making a prisoner already serving
a sentence available for trial in another jurisdiction. The availabil-
ity is only for the purpose of disposing of the untried indictment,
information or complaint on the basis of which a detainer has been
lodged. For every purpose other than that of the prosecution and
attendant detention in the other jurisdiction, the state where the
prisoner was incarcerated retains jurisdiction over him. Upon
completion of the proceeding, the prisoner is returned. But at this
stage it is known whether the inmate has been cleared of the charge
on which the detainer was based or whether a new sentence awaits
the prisoner upon his release from the present incarceration.

Either a prisoner against whom a detainer has been lodged or
the prosecutor in the jurisdiction lodging it may precipitate the
production of the prisoner for trial. If the former invokes the rem-
edy afforded by the Agreement, the defendant must be brought
to trial within 180 days; if the latter demands that the prisoner be
made available, the defendant must be brought to trial within 120
days. The shorter time in the case of a proceeding precipitated
by the prosecutor is appropriate because the prosecutor can time his
demand in accordance with his own case load and the proximity of
an appropriate session of court. It may be observed, however, that
both of these time limits are such as to make the Agreement on
Detainers of little significance for short term prisoners. Such a fail-
ure of effective coverage for this group of inmates would seem
inevitable in any system simply because any remedy takes some
time to apply. On the other hand, the short term prisoner presents
a situation of lesser need, because uncertainties with respect to his
future will be resolved relatively soon in any case. Finally, it
should be noted that failure of a prosecutor to bring the prisoner to
trial within the prescribed time limits results in the dismissal of the
charge with prejudice, and consequently in the voiding of the de-
tainer.

One should expect a considerable body of litigation to develop
under the Agreement on Detainers. It involves in a very sensitive
way the presence or absence of personal freedom for prisoners, and
the course which their treatment may take. However, to date there has been no litigation questioning the Agreement's validity, even though some states have been operating under the Agreement for almost ten years.

It was noted earlier in this article that the federal government has never been contemplated as a possible party to the Interstate Compact for the Supervision of Parolees and Probationers. On the other hand, the Agreement on Detainers expressly makes the federal government an eligible party. While the nationwide jurisdiction of the United States makes it possible for its own parole and probation agents to supervise persons anywhere in this country, the mere fact of geographic inclusiveness does not solve the detainer problem for the federal government. Federal and state jurisdiction are separate, both legally and administratively, even when the correctional institutions and courts of each may be in the same state. Consequently, a federal prisoner with a state detainer or a state prisoner with a federal detainer against him labors under the same disabilities as a state prisoner with a detainer against him from another state. However, Congress has not yet taken any action to make the federal government a party to the Agreement.\(^\text{30}\)

VI. CONCLUSION

This article has discussed only the major interstate correctional programs now in operation. Each of them could have been examined in greater detail, but only by exceeding the reasonable bounds of periodical literature. In addition, there are a number of other correctional problems of an interjurisdictional nature that may become the subjects of interstate cooperation. For example, the Midwestern Governors' Conference has recently developed the draft of a Mentally Disordered Offenders Compact which, among other things, would make possible the cooperative use by two or more states of institutions for this group of persons. The problem of the habitual offender also has its interjurisdictional aspects, because the records of many such individuals show convictions from two or more states, or from states and the United States. Moreover, if one turns from the prisoner himself to the personnel needed to treat him, it is almost universally observed that resources are far from

\(^{30}\) The reports of the New York State Joint Legislative Committee on Interstate Cooperation for the several years when the Agreement on Detainers was being developed and placed in initial operation provide much background information. In particular see the report for 1956, pp. 106-07; report for 1957, pp. 151-57; report for 1958, pp. 144-45; report for 1959, pp. 183-84; report for 1960, pp. 145-46; report for 1961, pp. 137-39.
adequate, either in quality or quantity. Perhaps much more will be done in the future to educate and train such personnel on a cooperative basis. Thoughtful people with knowledge of corrections undoubtedly could extend this list of possible multijurisdictional undertakings at great length.

There is no single mould for interjurisdictional cooperation in the corrections field. Even informal contacts among judges, prison administrators, parole and probation officials, and many others can do much—witness the activities of the many regional and national organizations of professional persons concerned with the several aspects of penology. But it also should be remarked that the examples of interstate correctional programs reviewed in this article have been concerned exclusively with programs undertaken via interstate compact. One may properly conclude from this fact that the compact is especially well suited to undertakings of this type. In this connection, two attributes of the compact as a legal form stand out. It is the only reliable means the states have of extending and fusing their individual jurisdictions so as to conduct regulatory programs across state lines. Secondly, the compact is both statutory and contractual in nature. Accordingly, the parties to it and the beneficiaries of its programs can count on certainty and stability in the definition of their rights and obligations.
APPENDIX

Western Interstate Corrections Compact

Article IV

PROCEDURES AND RIGHTS

(a) Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary in order to provide adequate quarters and care or desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

(b) The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(c) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article III.

(d) Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have the benefit of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

(e) All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable
and humane manner and shall be cared for and treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

(f) Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state. Costs of records made pursuant to this subdivision shall be borne by the sending state.

(g) Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

(h) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

(i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.