DETAINERS AND THE CORRECTIONAL PROCESS

If a person suspected of crime by the authorities of one jurisdiction is apprehended and imprisoned by those of another jurisdiction for other crimes, certain problems in administering criminal justice arise. The problems are caused by the inability of one member of our federal system to compel another's surrender of its prisoner for trial,[1] and the trouble and expense which would be involved if the prisoner were transported for trial to all the jurisdictions which wanted him.

These difficulties have given rise to the detainer system. The jurisdiction desiring custody files a detainer with the jurisdiction holding the prisoner. This detainer, or hold order, has two functions: it notifies the incarcerating authorities that the prisoner is wanted in the other jurisdiction, and it requests that the authorities desiring custody be forewarned of the prisoner's release date so they can arrange to pick him up at the institution. Thus, the incarcerating authority releases the prisoner into the custody of an agent of the requesting authority, who, by formal extradition proceedings, or more often, their waiver by the prisoner,[2] returns him to the requesting jurisdiction.

Generally, a detainer need not be supported by an indictment or information.[3] The requesting authority might want the prisoner merely for questioning.[4] Filing a detainer is an informal process which does not bind the requesting authority to act; in fact, it is estimated that one-half the detainers filed are never acted upon by the requesting authority.[5] They can be filed

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1. These problems arise not only when the two jurisdictions involved are equal sovereigns—two states, or a state and the federal government—but also between subjurisdictions of a single sovereign—two counties within a state, or two federal district courts. The latter situation is less difficult since no question of sovereignty is presented. Notes 45-58 *infra* and accompanying text.

2. At present, extradition is actually waived in a large majority of cases, thus eliminating the tedious and expensive process otherwise required. COUNCIL OF STATE GOVERNMENTS, INTERSTATE CRIME CONTROL 11 (rev. ed. 1955).

3. *E.g.*, Crow v. United States, 323 F.2d 888 (8th Cir. 1963). Iowa is the only state which has limited the prosecutor's freedom in this respect. IOWA CODE ANN. § 247.5 (Supp. 1965); see State *ex rel.* Fredenberg v. Byrne, 20 Wis. 2d 504, 125 N.W.2d 305 (1963) (interpreting WIS. STAT. ANN. § 955.22 (1966)).

4. See State *ex rel.* Faehr v. Scholer, 106 Ohio App. 399, 155 N.E.2d 230 (1958); Bennett, *The Correctional Administrator Views Detainers,* 9 Fed. Prob., July-Sept. 1945, pp. 8, 9.

5. UNIFORM MANDATORY DISPOSITION OF DETAINERS ACT, Commissioner's Prefatory Note, 9B U.L.A. 364; Donnelly, *The Connecticut Board of Parole,* 32 CONN. B.J. 26, 47 (1958).

by anyone with the official capacity to take a person into custody.[6] Detainers are by no means binding on the incarcerating authorities, but they are usually honored as a matter of comity between sovereigns. When more than one detainer is lodged, the authority first filing usually gets custody.[7]

Detainers are used quite frequently. Approximately five hundred inmates in the Missouri State Penitentiary have detainers filed against them from other jurisdictions,[8] and this situation is by no means unique.[9] As our society becomes increasingly mobile, the incidence of crime crossing jurisdictional boundaries will increase. Thus, detainers are likely to be a growing phenomenon.

This semi-official detainer system has developed as an answer to the problems of sovereignty and expediency which arise when two or more jurisdictions want the same man. It has developed simply because it is easiest for the prosecutors and least expensive for the states. Rather than become involved in the red tape which the extradition process entails or incur the expense of transporting the defendant from prison to trial and back to prison, prosecutors prefer to wait, knowing that the defendant will be available at a future date. This note will discuss the problems caused by this system, the alternatives available, and their merits.

I. Problems Caused by the Detainer System

The existence of a detainer has several adverse effects on the detainee. One is the serious restriction of prison privileges. He may be held under maximum security,[10] and may be denied many opportunities which other

6. Detainers can of course be filed by prosecutors. They can also be filed by courts, People v. Bryarly, 23 Ill. 2d 313, 178 N.E.2d 326 (1961), police chiefs, State *ex rel.* Faehr v. Scholer, 106 Ohio App. 399, 155 N.E.2d 230 (1958), and such governmental agencies as the Federal Bureau of Prisons, the Bureau of Immigration and Naturalization, and the armed forces, Heyns, *The Detainer in a State Correctional System,* 9 Fed. Prob., July-Sept. 1945, p. 15.

7. Hincks, *The Need for Comity in Criminal Administration,* 9 Fed. Prob., July-Sept. 1945, p. 3.

8. 1962, 1963 & 1964 St. Louis Cir. Ct. Probation Dep't Combined Reports 26 (1964).

9. For recent figures in Illinois see Note, 31 U. Chi. L. Rev. 535, 540 (1964). In 1945, the Director of Federal Bureau of Prisons stated that every fifth man in federal prison had one or more detainers filed against him. Bennett, *op. cit. supra* note 4, at 8.

10. Washington Dep't of Institutions, Mo-Instruction 380.2, p. 2 (1958) provides that:

> When the Associate Superintendent, Custody, receives notice of the arrival of a detainer warrant from the Superintendent's office, he is to notify the Assignment Officer and the inmate is immediately to be removed from any reduced custody status. *No inmate is to be classified as medium or minimum custody while a detainer is in effect. Where this involves the change of an inmate's program, the Associate Superintendent, Custody, shall notify the classification Committee to review the program of the inmate.* (Emphasis added.)

prisoners have: for example, transfer to a minimum security area,[11] the privilege of becoming a trusty, [12] or assignment to any job which involves some degree of trust.[13] In *United States ex rel. Giovengo v. Maroney,*[14] the court found that the detainer had an adverse effect on the commutation of the sentence; that it had removed any possibility of transfer to a minimum security prison or an institution more appropriate for youthful offenders; that it restricted the work assignments available; and also adversely affected the possibility of parole.

Ostensibly, the reason for this discrimination is that one who is wanted in another jurisdiction has more reason to escape than a man with only one sentence to serve.[15] This logic does not hold up, however, in all cases. For example, why should a man serving a one-year sentence in jurisdiction X for passing bad checks and wanted in jurisdiction Y for a similar offense have a greater desire to escape than one serving a two-year sentence in jurisdiction X? This policy may be explained, in part, by the general feeling that an inmate who is "wanted" is more likely to be a "hardened criminal" and less likely to be trustworthy.[16]

11. IND. DEP'T OF CORRECTION, INDIANA REFORMATORY AT PENDLETON, INDIANA 15 (1964); S.C. DEP'T OF CORRECTIONS, INMATE GUIDE 19 (undated) ("Inmates with a 'wanted' for felonies will not be eligible for transfer to wards."); see United States *ex rel.* Giovengo v. Maroney, 194 F. Supp. 154 (W.D. Pa. 1961). In *Maroney,* the petitioner's co-defendant was twenty years old; the petitioner was nineteen. Yet the co-defendant was sent to an institution for youthful offenders while the petitioner was sent to the penitentiary. The court noted that the only probable reason for this difference was a charge pending against the petitioner. 194 F. Supp. at 156.

12. Pellegrini v. Wolfe, 22 Ark. 459, 283 S.W.2d 162 (1955).

13. United States *ex rel.* Giovengo v. Maroney, 194 F. Supp. 154 (W.D. Pa. 1961). See generally Walther, *Detainer Warrants and the Speedy Trial Provision,* 46 MARQ. L. REV. 423 (1963). The following policy statement by the Washington Department of Institutions indicates the degree to which the detainee is restricted:

> It is the policy of the Division of Adult Correction that prisoners upon whom detainers have been filed shall not be granted reduced custody and shall not be permitted outside the main security area of the institution where they are confined for such purposes as participation in athletic contests, visits to death beds or funerals, or for transfer to honor camps. The only exception permitted is the transfer of an inmate to a hospital when the prison physician certifies that the inmate's life might be endangered by retaining him within the institution. In event it should become necessary to transfer an inmate to a local hospital for specialized care, he shall be under 24-hour custodial supervision and all necessary precautions to prevent an escape must be taken. Washington Dep't of Institutions, Mo-Instruction 380 2, p. 6 (1958).

14. 194 F. Supp. 154 (W.D. Pa. 1961).

15. The Committee will very seldom recommend minimum custody assignment for any inmate with a prior history of escape from any institution, juvenile or otherwise, or with a history of chronic absence—without leave—from the military services. It will *never* make such a recommendation in cases where there is a detainer, or notice that an inmate is wanted in some other legal jurisdiction. IND. DEP'T OF CORRECTION, INDIANA REFORMATORY AT PENDLETON, INDIANA 15 (1964).

16. Some restrictions on detainees are, of course, completely reasonable. In Minnesota, Christmas discharges are allowed to inmates whose sentences are scheduled to

A consequence of great importance is denial of parole to an otherwise qualified prisoner because a detainer has been filed against him. This occurs in many jurisdictions.[17] The basic reason for refusing parole to a detainee is that "the detainer is a technical bar to parole since it prevents the offender from living in the community under supervision."[18] To many parole boards, releasing a man to a trial, conviction, and prison sentence in another jurisdiction does not constitute parole.[19] If the man is sent to another

expire between Christmas and the end of February. Inmates with detainers filed against them are not eligible. MINN. DEP'T OF CORRECTIONS, RULES GOVERNING THE GRANTING OF PAROLES AND DISCHARGES AND RELATED PROCEDURES (1963). The detainee will only be going to another prison upon his release, and whether he spends Christmas in prison X or prison Y probably matters little to him.

17. United States *ex rel.* Giovengo v. Maroney, 194 F. Supp. 154 (W.D. Pa. 1961); Pellegrini v. Wolfe, 225 Ark. 459, 283 S.W.2d 162 (1955); see *Ex parte* Schechtel, 82 P.2d 762 (Colo. 1938); State v. Kalkbrenner, 263 Minn. 245, 116 N.W.2d 560 (1962); Jones v. State, 164 So. 2d 799 (Miss. 1964); State v. Milner, 78 Ohio L. Abs. 285, 149 N.E.2d 189 (C.P. Montgomery County 1958); Cane v. Berry, 356 P.2d 374 (Okla. Crim. App. 1960).

Some parole board rules specifically state that the existence of a detainer will prevent parole:

> It is the policy of the Board to defer consideration on prisoners where detainers have been placed at our institution and where it is noted that the prisoner is wanted for prosecution on pending cases. . . . The Board will, however, give consideration to Parole applicants who have detainers placed against them at the State Penitentiary where it is indicated that the inmate has been sentenced and owes additional time in another state, or is to be returned to a penal institution in another State for Parole Violation. . . .
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> The prisoner will not be paroled to his detainer however if he does not owe sufficient time to complete the parole period of his Arkansas sentence, while completing balance of the sentence he would owe at some other institution in another state. ARK. BD. OF PARDONS, PAROLES AND PROBATION, RULES AND REGULATIONS AND GENERAL INFORMATION AS RELATES TO PRACTICE AND PROCEDURE 4-5 (1955).

The Tennessee Dep't of Correction, in listing some of the factors which the Parole Board takes into consideration, states, "additional sentences adjudged as a result of trial subsequent to commitment at Tennessee State Prison usually prevent consideration for a hearing for Probationary parole." TENN. DEP'T OF CORRECTION, GUIDANCE MANUAL FOR PRISONERS, TENNESSEE STATE PENITENTIARY 9 (1963).

Other boards state that while the existence of a detainer will not, of itself, bar parole, it is a factor. U.S. DEP'T OF JUSTICE, RULES OF THE UNITED STATES BOARD OF PAROLE 17 (1961); CONN. STATE PRISON, RULES AND REGULATIONS OF THE BOARD OF PAROLE 7-8 (1958); KAN. BD. OF PROBATION AND PAROLE, RULES AND REGULATIONS 3 (1963); W. VA. BD. OF PROBATION AND PAROLE, POLICY, ORGANIZATION, PROCEDURE, AND REGULATIONS GOVERNING THE PAROLE PROCESS 15 (1963). See REPORT OF CALIFORNIA ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE, vol. 22, no. 3, at 159 (1961-63), cited in Note, 18 RUTGERS L. REV. 828, 835 (1964): "When a detainer is placed against a prisoner it is often reason for automatic denial of parole, and at the very least is a factor that is taken into consideration."

18. Donnelly, *op. cit. supra* note 5, at 47.

19. A parole is usually defined as a conditional release from prison to the community at large under the guidance and supervision of a parole officer. STATE OF NEW YORK, FACTS AND FIGURES ABOUT THE ACTIVITIES OF THE BOARD OF PAROLE AND THE DIVISION OF PAROLE OF THE EXECUTIVE DEPARTMENT 4 (1964).

state, or to a federal district in another state, and is not convicted, an equally serious threat to the purpose of parole arises: he will be released far from the restraint and supervision which the incarcerating jurisdiction's parole officers are supposed to exercise. Although it is true that all fifty states are parties signatory to the Interstate Compact for the Supervision of Parolees and Probationers,[20] which allows a parolee from one state to be supervised by another state if he is a resident of the latter state or if that state agrees, this procedure involves red tape. Also, if the receiving jurisdiction refuses, the sending jurisdiction will have the task of regaining custody of the parolee.

Some parole boards have not allowed these problems to completely prevent parole. They have made use of the parole-to-detainer. This device operates to release the detainee to the requesting jurisdiction before the expiration of his sentence, and allows him to use his "parole period" to serve other sentences or answer other charges.[21]

The detainer makes the formulation of an effective rehabilitation program for the prisoner more difficult[22] because of the uncertainty about the

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20. THE PAROLE AND PROBATION COMPACT ADMINISTRATORS' ASS'N AND THE COUNCIL OF STATE GOVERNMENTS, THE INTERSTATE COMPACT FOR THE SUPERVISION OF PAROLEES AND PROBATIONERS, A PROTECTIVE DEVICE 2 (1964).

21. The following model parole-to-detainer procedure has been drafted by the American Law Institute:

> (3) The Board of Parole may parole a prisoner who is eligible for release to a warrant or detainer. If a prisoner is paroled to such a warrant or detainer the Board of Parole may provide, as a condition of his release, that if the charges on which the warrant or detainer is based are dismissed, or are satisfied after conviction and sentence, prior to the expiration of his maximum parole term, the authority to whose warrant or detainer he is released shall return him to serve the remainder of his maximum parole term or such part thereof as the Board may determine. (4) If a person paroled to a warrant or detainer is thereafter sentenced and placed on probation, or released on parole in another jurisdiction prior to the expiration of his maximum parole term less reduction for good behavior in this State, the Board of Parole may permit him to serve the remainder of his parole term, or such part thereof as the Board may determine, concurrently with his new probation or parole term. MODEL PENAL CODE § 305.24 (Tent. Draft No. 5, 1956).

In a few jurisdictions, the power to parole to a detainer is provided by statute. IOWA CODE ANN. § 247.5 (Supp. 1965); MICH. STAT. ANN. § 28.2303 (1948); MO. REV. STAT. § 549.271 (Supp. 1965).

Other parole boards have initiated this procedure by exercising their power to promulgate their own rules and regulations. U.S. DEP'T OF JUSTICE, UNITED STATES BOARD OF PAROLE 17 (1961); ARK. BD. OF PARDONS, PAROLES AND PROBATION, *op. cit. supra* note 17, at 4-5; CONN. STATE PRISON, RULES AND REGULATIONS OF THE BOARD OF PAROLE (1958); KAN. BD. OF PROBATION AND PAROLE, RULES AND REGULATIONS 4 (1963); LA. BD. OF PAROLE, RULES AND REGULATIONS (undated); WIS. PAROLE BD., PAROLE BOARD PROCEDURES AND PRACTICES (1963).

22. The following excerpt from a report by the St. Louis Circuit Court Probation Department illustrates the problem from the prison authorities' point of view:

> In order to intelligently appraise the current feeling toward detainers by correctional authorities a survey of twelve middle western states and the Federal Government was conducted by the St. Louis Circuit Court Probation Department. We received nine responses. Without exception, it was the opinion of the wardens,

detainee's future.[23] This uncertainty affects not only the prisoner's attitude, but also the ability of the correctional authorities to plan ahead with respect to his particular program. If one is accused and convicted of crime in a single jurisdiction, the correctional authorities know the length of time available to them in their attempt to make him a useful citizen. He will probably be given an indeterminate sentence in which the exact length of time may be determined when the inmate's attitude and prospects for rehabilitation are better known. If, however, he has been convicted in one jurisdiction and is wanted in another, the possibility of formulating a meaningful and well-planned program for him is almost nil. In the first place, he may be an automatic maximum security risk so long as the detainer remains and may be excluded from all jobs or training programs involving any degree of trust. Further, the correctional authorities are without the time guidelines needed for building a successful program. If they proceed slowly with the expectation that the program can be finished in an institution in the other jurisdiction, and the prisoner is not subsequently convicted, he will be released before completion of effective rehabilitation. If a full program is planned for the prisoner, a man who is ready in both attitude and training to become a useful member of society may be sent back to prison because of the detainer. Another variable is the difference in quality and approach among the several institutions. The effect of moving from one institution to another is bound to be harmful. Even if the educational, religious, vocational training, and counseling programs could be resumed at exactly the same level at which they were cut off in the other prison, which is doubtful, a prisoner still needs time to adjust to new surroundings.[24]

The seriousness of the problems caused by detainers is aggravated by

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administrators and directors of the departments of corrections, that detainers are a profound problem in custody, treatment and care. Throughout the responses from these men, who have the awesome responsibility for the creation of an atmosphere of hope and rehabilitation for their inmates, we found a feeling of frustration and handicap in meeting this responsibility for those inmates with detainers. Some of the practical limitations include classifying all inmates with detainers as maximum custody risks, limiting his work assignment or job training program, interfering with release and parole planning, adding burdensome administrative and clerical detail, requiring additional guard staff and adding fuel to the ever present danger of prison riots and disturbances. 1962, 1963 & 1964 ST. LOUIS CIRCUIT CT. PROBATION DEP'T COMBINED REPORTS 26 (1964).

23. Bennett, *op. cit. supra note* 4, at 8; Note, 48 COLUM. L. REV. 1190, 1192 (1948).

24. It should be pointed out that the problem caused by changing institutions could not be solved by a speedy trial, because the detainee would still have the subsequent sentence to serve. The problem could be eliminated, however, if the charges in all jurisdictions could be simultaneously disposed of before the prisoner is committed to prison. See text accompanying notes 73-79 *infra.*

the ease with which a detainer can be filed.[25] Since the legal basis for a detainer is rarely examined,[26] a prisoner can suffer loss of privileges and parole because of a charge for which there is not sufficient proof to obtain an indictment. Undoubtedly, detainers are sometimes used by prosecutors to exact punishment without having to try a charge which they feel would not result in a conviction.[27] Once the detainer is filed by a prosecutor he has no reason to concern himself with the validity of the charge again until the detainee is released by the other jurisdiction. Subsequent discoveries or changes which destroy the basis for the detainer will likely be communicated to the incarcerating authorities only by the most conscientious prosecutors.

A detainee faces one other hardship which is caused by our federal system rather than by detainers themselves. A multi-jurisdictional offender who is tried and convicted in several jurisdictions will probably serve a longer total sentence than would a man who committed the same offenses against a single jurisdiction. Each state is likely to demand full satisfaction for the offenses against it, ignoring the defendant's criminal liability to other jurisdictions. If only one court were involved, it could more easily view the criminal in relation to the entire series of offenses, and prescribe sentence with a view to both the amount of punishment necessary and the possibility of rehabilitation.

II. Constitutional Limitations on the Use of Detainers

A. *Interstate and Federal-State Situations*

Both the Constitution of the United States[28] and the constitutions of most states[29] guarantee the right to a speedy trial. Often, however, a prisoner who has been charged or indicted in one jurisdiction is not tried until he has served all or a substantial part of his sentence in another jurisdiction. This time lag is often substantial.

It is clear that if a detainee is forced to wait years before he is tried, he is subject to many of the prejudices which the constitutional guarantees are intended to prevent. Delay can result in the death of, or the loss of

25. Notes 2-5 *supra* and accompanying text.

26. Notes 3-6 *supra* and accompanying text.

27. See, *e.g.*, People v. Kenyon, 39 Misc. 2d 876, 879, 242 N.Y.S.2d 156, 159 (Schuyler County Ct. 1963) (implication that practice of prosecutor was to hold untried indictments for "future ammunition"); Cane v. Berry, 356 P.2d 374 (Okla. Crim. App. 1960).

28. U. S. Const. amend. VI.

29. New York and Nevada are the only states which do not have constitutional provisions which can be interpreted as requiring a speedy trial. Note, 18 Rutgers L. Rev. 828 (1964).

contact with, witnesses, the loss of documents, or the fading of memories. The detainee is also hampered in that prison is not an ideal place from which to organize a defense.[30]

This fact, however, does not entitle a detainee to invoke the constitutional guarantee as a bar to the pending charges against him. There is another important factor to consider—our federal system of government. When the two jurisdictions involved are two states or a state and the federal government, both are sovereign; one cannot compel the other to release a detainee for trial. A prisoner may be removed for trial in another state only at the discretion of the governor of the incarcerating state[31] (the Attorney General when the federal government is involved),[32] or by a parole-to-detainer which is discretionary with the parole board of the incarcerating jurisdiction.[33]

The power to refuse extradition does not exist only in theory. In spite of the comity between the different jurisdictions, incarcerating jurisdictions have in many instances, and for reasons of their own, refused to release their prisoners to other jurisdictions.[34] The courts have taken note

30. The detainee does not, of course, suffer the most obvious disadvantage which the lack of a speedy trial usually entails; his incarceration is not the result of an untried charge.

31. It has long been held that the delivery of a fugitive by one sovereign to another within our federal system is a matter of comity rather than a duty. Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860). The Uniform Criminal Extradition Act § 5, 9 U.L.A. 263 (1957), provides a procedure whereby governors *may* allow a prisoner of their state to be extradited for trial in another state. It reads:

> When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the Governor of this state may agree with the Executive Authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated. 9 U.L.A. 295 (1957).

Forty-four states have adopted the Act. Note, 31 U. CHI. L. REV. 535, 545 (1964).

32. 18 U.S.C. § 4085(a) states that the Attorney General "shall, if he finds it in the public interest to do so . . ." cause the indictee to be transferred to the requesting state prior to release.

33. When a parole-to-detainer is granted, the detainee is required to waive extradition to the other state.

34. People v. South, 122 Cal. App. 505 (1932); see Kirby v. Warden of the Md. Penitentiary, 214 Md. 600, 133 A.2d 421 (1957). Indiana has specifically forbidden the removal of any life convict from any of its prisons except for treason or first degree murder. Wzesinski v. Amos, 143 F. Supp. 585 (N.D. Ind. 1956). It has been suggested that a refusal might be based on the incarcerating jurisdiction's fear the prisoner may try to escape, see Kyle v. United States, 211 F.2d 912, 914 (9th Cir. 1954), or that it will not be able to secure the return of the detainee after his trial in the requesting jurisdiction. Note, 48 COLUM. L. REV. 1190, 1193-94 (1948). Executive or administrative discretion to refuse extradition may also be exercised when there is reason to suspect that the requesting jurisdiction will not grant a fair trial or that its treatment

of this inability of one jurisdiction to compel another's release of a prisoner in deciding whether a detainee has been denied his right to a speedy trial. They have held almost unanimously that failure to try a defendant until his completion of a sentence in another jurisdiction does not violate the speedy trial guarantee.[35]

Such a decision seems reasonable if a temporary release of the prisoner has been refused by the incarcerating authorities, or there is reason to believe, from past refusals, that a request will be denied. The majority of courts, however, do not consider whether an effort to obtain release has been made, or whether an effort would have been successful. They state only that delay caused by prior incarceration does not constitute denial of the right to a speedy trial. In fact, some courts have explicitly stated that no effort need be made.[36]

A few courts have openly based their decision on the cost factor. They have held that a state is not required to incur the expense of returning a prisoner for trial before the expiration of his sentence in another jurisdiction.[37]

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of the detainee will be unduly harsh. *Id.* at 1207. Whatever the reason, the result is that by refusing the incarcerating authorities arrogate to themselves the decision whether the detainee will receive a speedy trial.

35. Bistran v. Minnesota, 330 F.2d 450 (8th Cir. 1964); Wzesinski v. Amos, 143 F. Supp. 585 (N.D. Ind. 1956); *In re* Petition of Yager, 138 F. Supp. 717 (E.D. Ky. 1956); United States v. Jackson, 134 F. Supp. 872 (E.D. Ky. 1955); Accardo v. State, 267 Ala. App. 694, 102 So. 2d 913 (1958); *Ex parte* Douglas, 95 P.2d 560 (Ariz. 1939); *Ex parte* Schectel, 82 P.2d 762 (Colo. 1938); State v. Hall, 266 Minn. 74, 123 N.W.2d 116 (1963), *cert. denied,* 375 U.S. 978; People v. Peters, 101 N.Y.S.2d 755 (Columbia County Ct. 1951); Traxler v. State, 90 Okla. Crim. 231, 251 P.2d 815 (1952); Commonwealth v. Harmon, 21 Pa. D. & C.2d 251 (1960); Barton v. State, 214 Tenn. 9, 377 S.W.2d 900 (1964); Raine v. State, 143 Tenn. 168, 226 S.W. 189 (1920). Some courts reach the same result using the rationale that the defendant by his own act placed himself outside the jurisdiction of the prosecuting authorities and thus caused the delay. Morland v. United States, 193 F.2d 297 (10th Cir. 1951); Cunningham v. State, 188 A.2d 359 (Del. 1962); Minnesota v. Larkin, 256 Minn. 314, 98 N.W.2d 70 (1959); People v. Brandfon, 4 App. Div. 2d 679, 163 N.Y.S.2d 1007 (1957).

36. McCary v. Kansas, 281 F.2d 185 (10th Cir.), *cert. denied,* 364 U.S. 850 (1960); Lee v. State, 185 Ark. 253, 47 S.W.2d 11 (1932); State v. Hall, 266 Minn. 74, 123 N.W.2d 116 (1963), *cert. denied,* 375 U.S. 978 (1964); State v. Larkin, 256 Minn. 314, 98 N.W.2d 70 (1959); *cf.* Bistram v. Minnesota, 330 F.2d 450 (8th Cir. 1964).

37. Auten v. State, 377 P.2d 61 (Okla. Crim. App. 1962); Application of Melton, 342 P.2d 571 (Okla. Crim. App. 1959). In Norman v. State *ex rel.* Bove, 177 A.2d 347 (Del. 1962), the prosecutor refused to bring petitioner from Kansas because of the cost. The Superior Court below ruled that petitioner's right to a speedy trial was not violated. The Supreme Court of Delaware dismissed the petition on a procedural point, and did not reach the merits of the case.

Is the cost factor of any unspoken weight in the decisions of those courts which have explicitly dealt with whether an effort should be required of the prosecutor to retrieve the detainee? No language in the cases gives any hint that this may be so, but a glance at the relative geographical proximity of the two jurisdictions involved in the cases in-

A number of cases have recognized that an effort by the requesting authority to secure temporary custody can often result in a speedy trial for the detainee.[38] When a detainee requests dismissal of pending charges alleging that his right to a speedy trial is being denied, these courts hold that dismissal will follow unless the prosecutor immediately makes a reasonable effort to obtain custody. These decisions goad prosecutors into action, but they by-pass the question whether the delay which has already occurred violates the detainee's speedy trial right.

A few recent cases have rejected the reasoning of the majority of courts; they conclude that the failure of a prosecuting authority to attempt to obtain custody of an indictee incarcerated in another jurisdiction can, in some cases, be so prejudicial to the right to a speedy trial that it requires reversal of a subsequent conviction.[39]

In *Taylor v. United States*,[40] the District of Columbia Court of Appeals unanimously reversed a conviction for housebreaking and robbery because of a six-year delay from the commission of the offense to the trial, and a two-year delay from indictment to trial, caused by incarceration in another jurisdiction. The court stated that incarceration does not excuse such de-

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dicates that cost might have been a factor. In the seven cases requiring an effort, the jurisdictions were not widely separated, *i.e.*, Pennsylvania and New Jersey; Texas and Arkansas; Minnesota and Wisconsin; Virginia and New Jersey; California and Oregon; Illinois and Ohio; New York and the District of Columbia. The three cases reversing convictions because no effort was made involved nearby areas: Illinois and Ohio; New York and the federal detention headquarters in New York; New York and the District of Columbia. But in three of the six decisions explicitly holding no effort need be made, there was substantial distance between jurisdictions: Georgia and Arkansas; Arizona and Washington; Minnesota and Washington. *But see* State *ex rel.* Fredenberg v. Byrne, 20 Wis. 2d 504, 512, 123 N.W.2d 305, 310 (1963) ("We will not put a price tag upon constitutional rights").

38. Pellegrini v. Wolfe, 225 Ark. 459, 283 S.W.2d 162 (1955); State v. Patton, 76 N.J. Super. 353, 184 A.2d 655 (1962) (ten-year delay with no effort violates detainee's rights); State *ex rel.* Fredenberg v. Byrne, 20 Wis. 2d 504, 123 N.W.2d 305 (1963); *cf.* Kyle v. United States, 211 F.2d 912 (9th Cir. 1954) (seventeen-year delay in trial); State v. Von Atzinger, 81 N.J. Super. 509, 196 A.2d 241 (1963) (dictum). In Kyle v. United States, *supra* at 914, the federal court "suggested" to the United States Attorney General that he make an effort to remove the state-incarcerated prisoner. The Attorney General had said before the case arose that he would make no such effort.

39. Taylor v. United States, 238 F.2d 259 (D.C. Cir. 1956); People v. Bryarly, 23 Ill. 2d 313, 178 N.E.2d 326 (1961); People v. Piscitello, 7 N.Y.2d 387, 165 N.E.2d 849, 198 N.Y.S.2d 273 (1960).

California has recently passed a statute which codifies the recent trend toward requiring an effort. CAL. PENAL CODE § 1381.5 (Supp. 1966), requires that if an indictee held by federal authorities wants to dispose of a pending California charge, the state authorities must check with the federal government to see if the indictee can be released for trial.

40. 238 F.2d 259 (D.C. Cir. 1956).

lay absent a showing that the federal government sought but was unable to procure the detainee's early return. The *Taylor* court found the evidence weak, and, therefore, held that the delay prejudiced the defendant's case. The court limited its holding to the facts of the case,[41] but it is clear that it will examine the circumstances in these cases and will strike down convictions when prejudice has clearly occurred.

The Illinois Supreme Court's decision in *People v. Bryarly*[42] was even less equivocal. In striking down a conviction for assault with intent to kill because the eight-year delay constituted denial of the right to a speedy trial, the court noted the availability of extradition,[43] and the absence of a showing that the authorities in the incarcerating jurisdiction would have acted unfavorably.

The courts in these cases reason that, since a request for custody may often be honored, failure to make this request can result in a denial of the right to a speedy trial. While the majority of courts would dismiss the defendant's contention while at the same time pointing out that "comity prevails,"[44] those courts rejecting the majority reasoning argue, in effect, that since comity prevails, it should be used.

B. *Intra-state and Intra-federal Situations*

When a prisoner is wanted by more than one subdivision of the same jurisdiction, the speedy trial problem is much less acute because only one sovereign is concerned. The rule in virtually all the state[45] and federal

41. "We do not wish to be understood to do other than apply the rule to the facts and circumstances of this particular case." *Id.* at 262.

42. 23 Ill. 2d 313, 178 N.E.2d 326 (1961).

43. The court relied on the existence of the Uniform Criminal Extradition Act. "The constitutional guaranty of speedy trial contemplates that the means that are available to meet its requirements shall be utilized. Under the circumstances of this case we think that the burden of taking the steps necessary to bring about a prompt trial rested on the people." *Id.* at 319, 178 N.E.2d at 329.

44. *E.g.*, Nolan v. United States, 163 F.2d 768 (8th Cir. 1947), *cert. denied*, 333 U.S. 846 (1948); *Ex parte* Schectel, 103 Colo. 77, 82 P.2d 762 (1938).

45. People v. Patheal, 27 Ill. 2d 269, 189 N.E.2d 309 (1963); Hottle v. District Court, 233 Iowa 904, 11 N.W.2d 30 (1943); State *ex rel.* Lotz v. Hover, 174 Ohio St. 68, 186 N.E.2d 841 (1962), *rev'd on other grounds*, 174 Ohio St. 379, 189 N.E.2d 433 (1963); Thacker v. Marshall, 331 P.2d 488 (Okla. Crim. App. 1958); State *ex rel.* Moreau v. Bond, 114 Tex. 468, 271 S.W. 379 (1925); Hollandsworth v. Godby, 93 W. Va. 543, 117 S.E. 369 (1923); State v. Keefe, 17 Wyo. 227, 98 Pac. 122 (1908). *But see* McCullough v. Hudspeth, 168 Kan. 39, 210 P.2d 413 (1949). The latter case held that the failure of a county prosecutor to secure custody of the accused while he was in the state prison did not violate the state's speedy trial guarantee. The enactment of the Uniform Mandatory Disposition of Detainers Act in Kansas has nullified McCullough. Note 70 *infra* and accompanying text.

courts[46] is that the prisoner can assert the jurisdiction's constitutional guarantee of a speedy trial.

Most states have enacted statutes to implement the guarantee. These statutes typically require that one against whom an indictment or information has been filed must be brought to trial within a certain period of time or a prescribed number of terms of the court in which the charge is pending, unless the delay occurs on the application of the accused.[47] Some states provide only release on bail or discharge from jail.[48] Since neither of these remedies would be of any benefit to the convict, he must rely on the constitutional guarantee in those states. Statutes in other states provide for dismissal of the charges. Subsequent prosecution for the same offense after its dismissal is barred unless the statute incorporates an express provision to the contrary.[49] The remedy of dismissal of the charges is usually available to a convict within the state,[50] but in states where the statute provides for dismissal only to persons in jail or out on bail, some courts have held the relief inapplicable to convicts because they are not being held in jail on the indictment or information in question.[51] Here again the convict must rely on the constitutional right.

In the majority of jurisdictions, the right to a speedy trial is conditioned upon a demand for trial by the accused on the theory that failure to demand trial constitutes waiver of both the constitutional and the statutory right.[52]

46. United States v. Fox, 47 F.2d 988 (5th Cir. 1931); McCarty v. United States Dist. Ct., 19 F.2d 462 (8th Cir. 1927); Frankel v. Woodrough, 7 F.2d 796 (8th Cir. 1925). *But see* Frizzel v. United States, 2 F.2d 398 (D.C. Cir. 1924).

47. *E.g.,* MICH. STAT. ANN. § 28.978 (1954); OKLA. STAT. ANN. tit. 22, § 812 (1937); PA. STAT. ANN. tit. 19, § 781 (1964).

48. *E.g.,* MASS. ANN. LAWS ch. 277, § 72 (1956) (bail); S.C. CODE ANN. § 17-509 (1962) (bail/discharge).

49. *E.g.,* CAL. PEN. CODE § 1387; Annot., 50 A.L.R.2d 943, 946 (1956).

50. Smith v. State, 201 Ark. 1185, 146 S.W.2d 158 (1941); Fulton v. State, 178 Ark. 841, 12 S.W.2d 777 (1929); Rader v. People, 138 Colo. 397, 334 P.2d 437 (1959); People v. Patheal, 27 Ill. 2d 269, 189 N.E.2d 309 (1963); People v. Huston, 41 Misc. 2d 530, 246 N.Y.S.2d 357 (Yates County Ct. 1964); Hollandsworth v. Godby, 93 W. Va. 543, 117 S.E. 369 (1923); State v. Keefe, 17 Wyo. 227, 98 Pac. 122 (1908).

51. Chelf v. State, 223 Ind. 70, 58 N.E.2d 353 (1944); State v. Milner, 78 Ohio L. Abs. 285, 149 N.E.2d 189 (C.P. Montgomery County Ct. 1958). In both of these cases the defendants were held not within the scope of the statute though their constitutional rights had been violated. *Contra,* Smith v. State, 201 Ark. 1185, 146 S.W.2d 158 (1941).

52. Harlow v. United States, 301 F.2d 361, (5th Cir.), *cert. denied,* 371 U.S. 814 (1962); Worthington v. United States, 1 F.2d 154 (7th Cir.), *cert. denied,* 266 U.S. 626 (1924); Phillips v. United States, 201 Fed. 259 (8th Cir. 1912); *Ex parte* State *ex rel.* Attorney General, 255 Ala. 443, 52 So. 2d 158 (1951); People v. Wilson, 60 Cal. 2d 139, 32 Cal. Rptr. 44, 383 P.2d 452 (1963); Kominski v. State, 51 Del. 163, 141 A.2d 138, *cert. denied,* 358 U.S. 850 (1958); State v. Coutre, 156 Me. 231, 163 A.2d 646 (1960); Harris v. State, 194 Md. 288, 71 A.2d 36 (1950); Livingston v. Pipkin, 348 P.2d 334

In some states the statutes specifically require such a demand.[53] If a demand is required, an accused who is unaware of the pending charge should not be held to have waived his right to a speedy trial because of failure to demand. This is usually the result in cases which discuss the problem,[54] but the majority of cases do not mention it.

It has been suggested that the majority rule requiring demand is particularly harsh when applied to convicts.[55] Since a prosecutor is assured that the convict will, due to his imprisonment, be available for trial, he might feel it unnecessary to notify him of the pending charge. Even if the prisoner is informed of a charge, he is in a poor position to know his rights in the matter or to act upon them.[56] Some states recognize the plight of prisoners and make exceptions for them.[57] A number of jurisdictions in construing their speedy trial statutes put the burden on the state to give the accused a speedy trial, rather than requiring a demand on the part of the defendant.[58]

III. Legislation Specifically Limiting the Use of Detainers

A. *Interstate Legislation*

The Council of State Governments has, after lengthy study, drafted a Compact providing for the mandatory disposition of interstate detainers.[59] The first section of the agreement states the policy behind the statute:

(Okla. Crim. App. 1959); Goss v. State, 161 Tex. Crim. App. 37, 274 S.W.2d 697 (1954); see People v. Fink, 12 App. Div. 2d 686, 207 N.Y.S.2d 741 (1960) (voluntary plea constitutes waiver); Everhart v. Maxwell, 175 Ohio St. 514, 196 N.E.2d 589 (1964).

53. *E.g.*, Mich. Stat. Ann. § 28.978 (1954); R.I. Gen. Laws Ann. § 12-13-7 (1956).

54. United States v. Hill, 310 F.2d 601 (6th Cir. 1962); Fouts v. United States, 253 F.2d 215 (6th Cir.), *cert. denied*, 358 U.S. 884 (1958); *Ex parte* State *ex rel.* Attorney General, 255 Ala. 443, 52 So. 2d 158 (1951); Smith v. State, 201 Ark. 1185, 146 S.W.2d 158 (1941); Rader v. People, 138 Colo. 397, 334 P.2d 437 (1959); State v. Coutre, 156 Me. 231, 163 A.2d 646 (1960).

55. Pellegrini v. Wolfe, 225 Ark. 459, 283 S.W.2d 162 (1955) (dissent); Note, 18 Rutgers L. Rev. 828 (1964).

56. See Note, *supra* note 55, at 844.

57. Fulton v. State, 178 Ark. 841, 12 S.W.2d 777 (1929); Arrowsmith v. State, 131 Tenn. 480, 175 S.W.2d 545 (1915).

58. Hicks v. People, 148 Colo. 26, 364 P.2d 877 (1961); Zehrlaut v. State, 230 Ind. 175, 102 N.E.2d 203 (1951); State v. Hess, 180 Kan. 472, 304 P.2d 474 (1956); Shafer v. State, 43 Ohio App. 493, 183 N.E. 774 (1932); State v. Chadwick, 150 Ore. 645, 47 P.2d 232 (1935); People v. Huston, 41 Misc. 2d 530, 246 N.Y.S.2d 357 (Yates County Ct. 1964); *Ex parte* Hollandsworth, 93 W. Va. 543, 117 S.E. 369 (1923).

59. Council of State Governments, Suggested State Legislation 84-90 (1958) [Hereinafter cited as Suggested State Legislation].

> The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints . . . produce uncertainties which obstruct programs of prisoner treatment and rehabilitation . . . [I]t is the policy of the party states . . . to encourage the expeditious and orderly disposition of such charges . . . [P]roceedings with reference to such charges cannot properly be had in the absence of cooperative procedures. . . .[60]

To date, only a few states have adopted the Compact.[61] Both the incarcerating and the requesting jurisdictions must have enacted the Compact before it becomes operative.[62]

The Compact requires that a prisoner against whom a detainer has been filed be promptly notified and informed of his rights regarding its disposition by the warden or other official.[63] He may then request trial on the charge; this request is sent to the prosecutor in the jurisdiction which filed the detainer,[64] and trial must be had within 180 days thereafter.[65] Extradition is not a problem because the incarcerating state, by enacting the Compact, agrees to surrender temporary custody, and the prisoner, by making the request, automatically waives extradition.[66] If trial is not had within 180 days and the delay is not for good cause shown in open court, the charges are dismissed with prejudice.[67] This provision gives teeth to the Compact.[68]

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60. *Id.* art. I, at 84.

61. CAL. PEN. CODE ANN. § 1389 (1961); CONN. GEN. STAT. tit. 54, 54-186 (1958); MICH. STAT. ANN. § 4.147 (Supp. 1965); MONT. REV. CODES ANN. § 94-1101 (Supp. 1963); N.H. REV. STAT. ANN. ch. 606-A (Supp. 1965); N.J. STAT. ANN. 2A:159 A-1 (Supp. 1965); N.Y. CRIM. CODE § 669(b) (1958); PA. STAT. ANN. tit. 19, § 1431 (1964); Neb. Laws 1963, ch. 154, at 453.

62. Commonwealth v. Bressler, 194 Pa. Super. 208, 166 A.2d 549 (1960), *cert. denied*, 366 U.S. 932 (1961).

63. SUGGESTED STATE LEGISLATION art. III(c), at 85.

64. *Id.* art. III(b), at 85. "The request shall operate as a request for the disposition of all charges pending in the other jurisdiction." *Id.* art. III(d), at 85-86. Escape after the request voids the request. *Id.* art. III(f), at 86.

65. *Id.* art. III(a), at 84-85.

66. *Id.* art. III(e), at 86.

67. *Id.* art. III(d), at 85-86.

68. Section IV of the Compact provides that extradition proceedings can be initiated by the prosecuting authority in the state where the "untried indictment, information or complaint is pending." However, a thirty-day grace period is allowed before the request need be answered, "within which period the governor of the state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner."

Article IV(d) states, however, that:

> Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

If the detainee does not initiate action, there may be a strong justification for the usual loss of privileges and parole. It is reasonable to infer that when a detainee seeks to avoid final disposition of an untried charge, he is trying to evade what he knows to be certain conviction, hoping that with the passage of time the charge will be dropped or public opinion fade. The prisoner is clearly acquiescing in the delay if, after being informed of the detainer, he does not request trial.

To be effective, the Compact requires the cooperation of officials from both jurisdictions involved. There is, however, no specific machinery in the agreement for insuring this cooperation. Although it is clear that dismissal of the charges will result if the requesting prosecutor causes delay, if the delay is caused by a recalcitrant official in the incarcerating jurisdiction the imposition of sanctions is difficult. It is unlikely that the courts of the requesting state would feel bound to dismiss charges against a detainee merely because an official in the incarcerating state had failed to notify the defendant of the charge and of his right to remove, or had failed to forward the defendant's request for removal.[69] The mandatory terms in which the duties of the incarcerating officials are stated in the Compact indicate that mandamus should be available to compel compliance in such situations.

B. *Intra-state legislation*

Only a few states have enacted statutes providing mandatory disposition of intra-state detainers.[70] These statutes are often similar to the Compact,

69. The problem came up in State v. West, 79 N.J. Super. 379, 191 A.2d 758 (1963). The warden in New Jersey did not tell the prisoner of the detainer which Pennsylvania had lodged against him. The Compact was in force. After learning of the detainer from a social worker, the prisoner wrote the Pennsylvania district attorney who caused to be issued by the Pennsylvania court a writ of *habeas corpus ad prosequendum* directing the warden to produce the prisoner in the Pennsylvania court. The warden never honored the writ. The prisoner sought dismissal of the Pennsylvania charges in the New Jersey court but the court would not attempt this since it had no jurisdiction to dismiss charges of another state. But what if the prisoner had sought this dismissal in the Pennsylvania court? The difficult question is whether the refusal of the New Jersey warden to honor the Pennsylvania court's writ should work to the detriment of Pennsylvania. In People v. Esposito, 37 Misc. 2d 386, 201 N.Y.S.2d 83 (Sup. Ct. 1960), a New York charge was dismissed with prejudice when the delay was caused by the New Jersey warden, but in that case it was shown that the New York prosecutor acceded to the warden's failure to comply with the Compact. *But see* Commonwealth v. Udelson, 10 Chester County R. 541 (Pa. C.P. 1961).

70. Most states which have detainer legislation have adopted the Intrastate Detainers Statute proposed by the Council on State Governments or based their legislation on it. CAL. PEN. CODE § 1381 (Supp. 1966); CONN. GEN. STAT. ANN. § 54-139 (Supp. 1965); FLA. STAT. ANN. § 915.02 (Supp. 1965); ILL. CODE CRIM. PROC. § 103-5(e) (1964); MICH. STAT. ANN. § 28.969(1) (Supp. 1965); N.Y. CODE CRIM. PROC. § 669 (a) (1958); ORE. REV. STAT. 134.510 (1965); PA. STAT. ANN. tit. 19, § 881 (1964);

though phrased in intra-state language. The Compact's remedial provision, requiring the prosecutor to begin the trial within a certain number of days after demand or suffer dismissal with prejudice, is employed in most intra-state statutes. This is the detainer legislation's main advantage over many speedy trial statutes.[71] In those states with speedy trial statutes which do provide for dismissal with prejudice, there is no advantage to a detainer statute. In one respect the detainer statute might be less adequate. A demand is always required before the statute's protection goes into effect, but many courts hold that their speedy trial statutes operate without a demand.[72]

IV. Administrative Methods for Dealing with Detainers

A. *Before Commitment to Prison*

When a defendant is brought to trial, there are methods available before sentencing, that arrange for the total satisfaction of his criminal liability. One method is negotiation between the officials of the jurisdictions involved. One trial judge has outlined the negotiation process which he uses toward this end.[73] He suggests that the sentencing judge investigate charges pending in other jurisdictions, and in the proper circumstances—for example, where one act violates the laws of two sovereigns or the defendant admits the other crimes—communicate to the other jurisdictions his intention to give the defendant a greater minimum sentence to encompass the offenses in all

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Wash. Rev. Code § 9.98.010 (1961); Wis. Stat. Ann. § 955.22 (Supp. 1966); see N.C. Gen. Stat. § 15-10.2 (Supp. 1965) (provides no remedy for its violation). In addition, two states, Missouri and Kansas, have adopted the Uniform Mandatory Disposition of Detainers Law. Kan. Gen. Stat. Ann. ch. 62, § 62-2901 (1964); Mo. Rev. Stat. § 222.080–.150 (1959).

There is one significant difference between the Uniform Law and other intrastate legislation. It states that the incarcerating authorities must tell the detainee of the untried detainer "promptly," but nevertheless allows a year to pass before failure to do so results in dismissal with prejudice. The other statutes (and the Interstate Compact as well) require only that the detainee be "promptly" informed. In all other respects, the Uniform Law is essentially the same as other statutes.

71. Note 49 *supra* and accompanying text.

72. However, there may be disadvantages to speedy trial statutes grounded not in their explicit operation, but in some courts' attitude toward them when a detainee has been incarcerated for life or sentenced to death. Though this consideration seemingly should not affect the right to a speedy trial, some courts are less concerned with the denial of this right to such a prisoner; acquittal on the pending charge would not affect his future in any way. In Leggett v. State, 231 Ark. 7, 238 S.W.2d 250 (1959), the court expressly stated that it did not construe the state's speedy trial statute to include indictees sentenced to death. This exception to the statute is without any legislative mandate, and completely ignores the possibility of commutation of sentence or pardon by the governor.

73. Hincks, *The Need for Comity in Criminal Administration,* 9 Fed. Prob., July-Sept. 1945, p. 3.

jurisdictions. He would then ask that the pending charges and the detainer be dropped. The "term of court [could be] kept alive for the duration of the sentence," so the sentence could be reduced if the other prosecuting authorities fail to keep their agreement.[74]

Pre-sentence investigation can implement this negotiation process. The probation officers conducting the investigation can contact the requesting authorities and determine under what circumstances they would be willing to drop their detainers. If the investigation shows the detainer is based on inadequate grounds—a nuisance detainer—the judge can order that it be ignored by prison and parole officials.

Concurrent sentencing, although not often available, offers a complete answer to the detainer problem in the cases in which it may be used. A defendant would be tried, as soon after his apprehension as possible, by all jurisdictions wanting him. If the defendant is convicted by more than one jurisdiction, some means of joint sentencing would take place. The judges could consult one another and agree on a suitable maximum-minimum sentence to be served in the jurisdiction where the first conviction was obtained. Alternatively, a court sentencing a man already convicted and sentenced in another jurisdiction could order that the prisoner's sentence be served concurrently with the first sentence.[75]

The federal courts have employed concurrent sentencing in some cases by directing the Attorney General to incarcerate the prisoner in a state prison where his sentence can run concurrently with an existing state sentence.[76] The Attorney General has authority under 18 U.S.C. 4082 (1964) to designate the place of imprisonment "whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted."[77]

In intra-state situations, many courts practice a type of joint sentencing by taking into consideration other pending charges as a factor in sentencing.[78] Wisconsin has provided by statute that a defendant may, at his

74. *Id.* at 5-6.

75. Of course, such a procedure could work only if there were some sort of agreement between the executive branches of the jurisdictions involved as to the place of incarceration, the arrangements for sharing the prison expenses, and related matters.

76. In Goodwin v. Looney, 250 F.2d 72 (10th Cir. 1957), petitioner was sentenced to the custody of the Attorney General for imprisonment for a period of five years to run concurrently with a sentence being served in a state penitentiary.

77. There is no doubt that this discretion is used by the Attorney General in placing federal prisoners in state institutions to serve their federal and state sentences concurrently. "[F]ederal prisoners are sometimes confined in state institutions when they are serving concurrent state-federal terms and/or have short sentences." 1964 U.S. BD. OF PAROLE ANN. REP. 5.

78. Judge Hincks, speaking of intra-state situations says, "I believe it to be widespread

trial, plead guilty to all charges he has committed in the state and be sentenced once for all of them.[79]

B. *After Commitment to Prison*

Parole boards possess great discretion over a convict's period of imprisonment. They determine the actual length of sentences within the minimum-maximum guidelines imposed by trial judges. Parole boards are therefore in an excellent position to negotiate with other jurisdictions for the removal of detainers. A careful investigation to determine the validity of charges in other jurisdictions may be undertaken to eliminate nuisance detainers. If guilt and convictability are clear, the parole board can agree with the requesting jurisdiction's prosecutor to delay releasing the prisoner on parole in exchange for his dropping the charges and the detainer.

Parole boards can prevent denial of parole by using paroles-to-detainers which release the detainee to the requesting jurisdiction before the expiration of his sentence, allowing him to use his "parole period" to serve other sentences or answer other charges.[80]

The circumstances under which an inmate will be paroled to a detainer vary among the states. There are two situations to which a parole-to-detainer is applicable. The first is when the detainee has a sentence pending in another jurisdiction because he has escaped from an institution or has violated his parole or probation, or because he has been tried and sentenced by a court in another jurisdiction during his present sentence. In these circumstances there is no doubt as to the detainee's future: he will go back to prison. In the second situation, he may be wanted for trial, questioning, or possible deportation. Here, the detainee's future is uncertain: there is a possibility that he will be released by the requesting jurisdiction.

One state which grants paroles-to-detainers clearly does so only in the first situation.[81] One who is to be paroled to serve another sentence need not necessarily meet the usual standards for parole, since there is no danger

practice for the judges of the high courts, when they formulate their sentences, to take into account pending charges which are admitted, and for the prosecuting authorities in the city courts to nol-pros the petty charges in view of the substantial sentence of the higher court." Hincks, *The Need for Comity in Criminal Administration,* 9 Fed. Prob., July-Sept. 1945, p. 5.

79. WIS. STAT. ANN. § 956.01(13) (1958). The Federal Rules of Criminal Procedure and the Model Penal Code contain similar provisions. FED. R. CRIM. P. 20; MODEL PENAL CODE § 7.05(4) (Tent. Draft No. 2, 1954).

80. See note 21 *supra* and accompanying text.

81. See the discussion of the policy of the Arkansas Board of Parole, *supra* note 17. There, paroles to serve a sentence in another jurisdiction are limited to situations where the time remaining to be served in the incarcerating jurisdiction is less than the time owed to the requesting jurisdiction.

of his immediate release to the community.[82] In this sense, it is possible that the existence of a detainer may be of benefit to the prisoner.

In jurisdictions which also grant paroles-to-detainers in the second situation, the detainee may not be paroled "unless the usual criteria for parole selection can be met"[83] since he may be released to the community at large. The parole board provides for the contingency that the detainee may not be convicted in the other jurisdiction by conditioning his release on the agreement of that jurisdiction to retain him if no conviction is obtained[84] or by arranging for parole supervision by the other state if possible.[85]

In the jurisdictions which grant paroles-to-detainers in the first situation or not at all, the existence of a detainer can cause one who would normally be paroled after serving a portion of his sentence to serve all of it.

CRITIQUE

The detainer system has been developed by prosecutors and penal authorities as a semi-official answer to some of the problems in the administration

82. Some parole boards seem to require that the detainee be otherwise eligible for parole regardless of the situation. CONN. STATE PRISON, RULES AND REGULATIONS OF THE BOARD OF PAROLE 7 (1958). U.S. DEP'T OF JUSTICE, RULES OF THE UNITED STATES BOARD OF PAROLE 17 (1961), states "the Board may grant to such detainer if a prisoner is considered in other respects to be a good parole risk." Others make no mention of eligibility requirements. Louisiana states only that:

> When it is the opinion of the Board of Parole that it is in the best interest of both society and the individual in question, a parole may be granted contingent on the conditions of existing detainers that are held by Federal authorities, or authorities of other states. LA. BD. OF PAROLE, RULES AND REGULATIONS (undated).

The Wisconsin Parole Board seems to admit that paroles-to-detainers are sometimes given when the detainee would not be eligible for a regular parole. They state that "*usually* parole is not granted to a detainer unless the usual criteria for a parole selection have been met." WIS. BD. OF PAROLE, PAROLE BOARD PROCEDURES AND PRACTICES (1963) (Emphasis added). Kansas rules provide that when an inmate has been paroled to a detainer which is thereafter cancelled, he "shall be scheduled to appear for further consideration at the next Board hearing. . . ." KAN. BD. OF PROBATION AND PAROLE, RULES AND REGULATIONS 45-6-6(g) (1963). This indicates that the criteria are different for regular parole and parole-to-detainer.

83. U.S. Dep't of Justice, RULES OF THE UNITED STATES BOARD OF PAROLE 17 (1961).

84. MODEL PENAL CODE § 305.24 (3) (Tent. Draft No. 5, 1956).

85. 1964 N.Y. BD. OF PAROLE ANN. REP. 181.

When a parole board has the power to release a man to be tried in another jurisdiction, we again have the interesting possibility that a detainer can be beneficial. One can imagine a situation in which a penal institution is seriously overcrowded and the parole board, in partial answer to this problem, seeks to unload as many prisoners as possible on other jurisdictions. Their decision might be influenced by the prisoner's place of residence. If he is not likely to return to their state regardless of the outcome in the other jurisdiction, the parole board might release to a detainer a prisoner who would otherwise be unacceptable for parole, with the thought that if he is released he will be someone else's problem.

of criminal justice caused by the sovereignty of the several states and the expense and red tape involved in providing speedy trials to multi-jurisdictional offenders. As it stands today, the system is unsatisfactory; it causes problems as serious as those it was intended to alleviate. The detainer causes serious correctional problems, and the inability of the detainee to compel his removal for trial until the expiration of his sentence often results in serious delays.

Many of the system's inadequacies stem from the fact that it was developed by administrators for administrators, with little interference from courts or legislatures. It is, therefore, not surprising that convenience and expediency are its main concerns, rather than protection of the rights and welfare of individual detainees. Lack of regulation and meager or nonexistent requirements for filing a detainer leave the system open to much abuse, adding to the gravity of the problem.

The courts have not provided an adequate solution to the problem of the multi-jurisdictional offender. Most courts will not even require that an effort be made by the requesting jurisdiction to obtain temporary custody for trial.[86] They feel that ruling on these problems would interfere with the criminal processes of other states and thus destroy the relations between the states. In answer to this contention, it is submitted that (1) a request will not unduly interfere with the processes of the incarcerating jurisdiction because they are under no compulsion to acquiesce; and (2) the right to a speedy trial is surely important enough to merit the modicum of protection afforded by a mere request.

In fact, the problem of the denial of a speedy trial to the multi-jurisdictional offender cannot be solved by the courts. Courts must be reticent in striking down convictions. A few recent cases, such as *Bryarly,* have held that failure by a prosecutor to make an effort to obtain custody of an indictee imprisoned in another state can result in the denial of the right to a speedy trial.[87] However, these cases did not make that failure the sole basis for reversing the conviction, but rather weighed many factors: Did the detainee know of the charges? If so, did he attempt to have them brought to trial? What was the likelihood that extradition would have been allowed? To what extent did the delay actually harm the detainee's case? Was the delay in itself sufficiently long to amount to denial of the right to a speedy trial? Consideration of these factors will greatly limit the number of cases to which the sanctions of reversal of conviction or dismissal of charges will apply; thus, the requirement of an effort by the prosecutor is difficult to enforce.

86. See text accompanying notes 34-36 *supra.*

87. See text accompanying notes 39-44 *supra.*

The main stumbling block to this method of attacking the detainer problem is that while an effort by prosecutors can be required, acquiescence on the part of the other jurisdiction cannot. Thus, the *Bryarly* decision probably represents the outer limits of court action in this area. Though such decisions are beneficial in making prosecutors and other officials aware of the problems and the possible consequences of ignoring them, in the absence of legislation dealing with multi-jurisdictional offenders, the courts are not capable of providing a complete solution.

A complete solution must come from the legislatures and the authorities directly involved. Practically speaking, the best remedy that can be formulated is the detainer Compact. Important advantages clearly inhere in this legislation. The fact that the Compact will insure prompt trials is its primary advantage; both the detainee and society stand to gain from prompt adjudication. The uncertainty about the detainee's future will be removed, and intelligent planning of a program of rehabilitation will become possible. The cooperation of the inmate should be substantially increased for the same reasons. There will also be less need to investigate pending detainers because invocation of the Compact's process by the detainee serves essentially the same function.

The Compact has its limitations too. In the first place, it eliminates only detainers based on an "untried indictment, information or complaint."[88] This obviously does not include probation or parole violation detainers, deportation detainers, or detainers based on convictions. If, pursuant to the terms of the Compact, the detainee receives a speedy trial and is convicted, he remains a detainee, still subject to the loss of privileges and parole possibilities which detainers often cause.[89]

From its wording, the Compact does not seem to apply to "nuisance" detainers or detainers based on suspicion, if they are not supported by an "indictment, information or complaint." There is nothing in the Compact which requires that a charge be filed, and in the absence of a charge, the Compact's sanction, mandatory dismissal of the charges, is meaningless. The prosecutor need only comply with the statute of limitations.[90] This defect is not overcome by the provision that the Compact should be construed so as to effectuate its general purpose.[91] This problem can be eliminated by the addition of a provision requiring that a detainer not supported

88. SUGGESTED STATE LEGISLATION art. III(a), at 84.

89. Notes 10-20 *supra* and accompanying text.

90. The legislation does not apply when another jurisdiction has an outstanding charge against the prisoner upon which no detainer has been filed. In this situation the prisoner can appeal only to the courts to protect his right to a speedy trial. The shortcoming is serious but is beyond the scope of this note, since detainers are not involved.

91. SUGGESTED STATE LEGISLATION art. IX, at 90.

by an information or indictment be disregarded. Iowa has included this requirement in its detainer legislation. Section 247.5 of the Iowa Code provides that:

> Any detainer filed against a prisoner must within six months be supported by a grand jury indictment or county attorney's information. In the event such indictment is returned or information is filed, the prisoner shall have the right to demand immediate trial at the next term of court where the charge is filed. . . . In the event a detainer is not supported within six months by a county attorney's information or grand jury indictment, or in the event the prosecuting agency refuses or fails to give the prisoner immediate trial, . . . the detainer shall be held to be invalid and the parole board shall disregard such detainers in considering a prisoner for parole.[92]

There is no reason why a provision requiring dismissal of detainers unsupported by indictment or information could not be incorporated into the Compact or adopted by the jurisdictions individually.

It is clear that the Compact does not provide a complete answer. In fact, in some cases the requesting authority might be forced to resort to negotiation in order to avoid the Compact's sanction. If a prisoner held in New Jersey and wanted in California requests a trial, California must decide between incurring the expense of transporting the prisoner to California for trial or acquiescing in a dismissal of its charges. Since neither alternative is particularly attractive, the California authorities may well choose to negotiate with New Jersey by agreeing to drop the charge in exchange for the New Jersey Parole Board's promise to delay the prisoner's release on parole. The Compact does not preclude such negotiation; the discretion of the prosecuting and incarcerating authorities is left unabridged. Although this means that some abuse is possible—for example, a prosecutor, instead of filing a nuisance detainer, could negotiate for a longer imprisonment in exchange for not seeking an indictment he would have been unable to obtain anyway—negotiation usually results in an improvement of the detainee's situation.

In intra-state and intra-federal situations, there seems to be no valid reason why all known charges against the defendant in other subjurisdictions should not be disposed of before his commitment to prison. Transportation to the various counties or districts where charges are outstanding can be arranged, or the state can save itself some expense by allowing a single court to sentence a defendant on all admitted offenses against the sovereign. If such arrangements are not provided, the detainee can usually invoke the aid of the constitutional guarantee or the state speedy trial statute

92. IOWA CODE ANN. § 247.5 (Supp. 1965).

to dispose of the outstanding charges. In states where the speedy trial statutes are not available to convicts,[93] or if available, do not provide dismissal of charges with prejudice, the intra-state detainer legislation should be adopted to implement the detainee's rights.[94]

Neither speedy trial statutes nor most intra-state detainer statutes provide any remedy for nuisance detainers which are unsupported by indictment, information, or complaint. This problem can be solved by enactment of an Iowa-type provision requiring that detainers for untried offenses be ignored unless supported by an indictment or information.[95]

The primary goal in solving the detainer problem is to insure to the extent possible, identical treatment of one accused of multi-jurisdictional offenses, and one accused of the same crimes against a single jurisdiction. If all of the defendant's criminal liability could be satisfied by one sentence in one court, detainers would be eliminated. This result is not impossible, but it can be accomplished only by the cooperative efforts of the officials of the several jurisdictions involved.

Prosecutors have discretion to decide whether or not an accused person will be brought to trial.[96] In the exercise of this discretion, they often do not prosecute on all available charges when they feel that conviction of less than all will sufficiently handle the defendant's criminal liability.[97] Prosecutors should be encouraged to use this discretion when dealing with multi-jurisdictional offenders by releasing them to another jurisdiction for trial when they find that the potential sentence in the other jurisdiction will be sufficient in light of the offender's total criminal conduct. When this decision is possible, the need for a detainer is eliminated.

Negotiation, if successful, can also remove the need for detainers by causing the charges outstanding in other jurisdictions at the time of trial to be dropped. An agreement, between the court trying the offender and the prosecutors of the jurisdictions where charges are pending, to increase the sentence in return for dropping the other charges will, by eliminating de-

93. Notes 48, 51 *supra* and accompanying text.

94. The detainer legislation should complement, not replace, the rights under the speedy trial statutes. People v. Huston, 41 Misc. 2d 530, 246 N.Y.S.2d 357 (Yates County Ct. 1964).

95. IOWA CODE ANN. § 247.5 (Supp. 1965).

96. See, *e.g.*, United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174 (1965); Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955).

97. "Charging a single offense may be the practice where the sentencing range available to the judge is adequate to deal with the offender taking cognizance of the totality of his criminal conduct. Charging a number of offenses may be the practice where the penalty for one offense is thought to be disproportionately low in relation to the conduct involved." Miller and Remington, *Procedure Before Trial*, 339 Annals 111, 120 (1962).

tainers, also eliminate the denial of privileges which the detainer causes. It also solves the speedy trial problem because there will be no later trial. If the detainee is actually guilty of the pending charge, negotiation is beneficial to all concerned: the requesting jurisdiction is saved the time and effort of convicting him; the prison authorities can formulate a program of rehabilitation with knowledge of the total period of incarceration; and the prisoner will be more amenable to rehabilitation, the uncertainty as to his future having been cleared up. Negotiation and concurrent sentencing are the only methods which solve the problems caused by a prisoner's switching institutions.

However, negotiation is by no means a perfect solution. If the prisoner is not guilty of the pending charge, this remedy can lead to disastrous results. In all negotiation, the prisoner is assumed guilty without the benefit of trial. Since negotiation will result in a longer sentence than would have been imposed, it should be undertaken only with the consent of the defendant, and only if there is no doubt of guilt and convictability. Further, there is no means of forcing the prosecutor in the requesting jurisdiction to honor the agreement after the expiration of the initial sentence. The possibility of dishonor is inherent in all informal agreements. Any change in the identity of the prosecuting authorities adds to the likelihood of this possibility. Therefore, negotiation should be used only when the agreement is likely to be honored. Joint sentencing would offer the perfect solution to the detainer problem. Joint sentencing is superior to informal negotiation in two ways: (1) a conviction, unlike an informal agreement, cannot be dishonored; and (2) any increase in sentence length is based on a trial and conviction. However, joint sentencing does involve the expense of transporting the prisoner to and from his several trials.

Joint sentencing does not enjoy wide use. This is probably due to both the hesitancy of states to relinquish some part of their criminal administrative functions, and the fear of having to assume the expense of a disproportionate number other states' prisoners. The fifty states are, however, parties to the Reciprocal Agreement to Supervise Out-of-State Parolees,[98] which is somewhat analogous to joint sentencing though potentially not as expensive. There seems to be little valid reason why the states could not enter into interstate compacts to sentence prisoners concurrently, allowing the sentence to be served in one jurisdiction, just as they have joined in a reciprocal agreement on out-of-state parolees. Such plans should ease the administrative burden of the states, reducing the number of prisoners if not the time served by the multi-jurisdictional offender and eliminating detainers and

98. COUNCIL OF STATE GOVERNMENTS, INTERSTATE CRIME CONTROL 57 (1955).

their disruptive effects. Allocation of the financial burden among the parties involved could be arranged to make the agreements practical.

To facilitate either negotiation or concurrent sentencing, investigation of the bases of detainers and the possibilities for their disposal should be a part of all pre-sentence reports in which there is evidence of a detainer.

It must be noted that even if these two suggestions were widely used, they would not eliminate detainers. Devices to dispose of all multi-jurisdictional charges will not always meet with success, and alternatives which are subject to the discretion of the officials involved are not intended to be used in every case.[99] Further, the problems of detainers would still exist because the identity of a potential defendant may not become known to the requesting authorities until after his sentence to prison in another jurisdiction. Neither will mandatory removal eliminate detainers; if a conviction occurs and a sentence is imposed, a detainer will again be filed on the prisoner. Total elimination of the ill effects of detainers will still remain with the penal authorities and parole boards.

A careful re-examination by correctional authorities of the bases which underlie the present correctional response to detainers seems to be necessary. Is the detainee always a greater escape risk than other prisoners? Is he always a problem inmate? If detainees are generally found to be relatively less amenable to rehabilitation, is this poor attitude the result of, rather than the reason for, more strict treatment and lack of privileges?

Automatic denial of prison privileges whenever a detainer is filed against a prisoner is an easy alternative to avoid solving a difficult problem. The goal of rehabilitation would be better served if all the factors in each case were considered, the existence of a detainer being just another factor.

The arbitrary denial of parole to a detainee can be avoided by the use of the paroles-to-detainers.[100] The privilege of parole is mainly a tool of rehabilitation, allowing the parolee to acclimate himself to society under supervision while the parole authorities judge his progress. Parole, however, is undoubtedly regarded by the prisoner, not so much as a learning experience, but as an opportunity to reduce his sentence—an incentive to compile a good prison record. An inflexible definition of parole[101] which fails to take into account the position of the detainee seems not only unfair, but also unsound penology. If the rewards open to others are denied the detainee, rehabilitation will be more difficult, and, in fact, might be actively resisted if the detainee feels himself the victim of discrimination. Parole boards should, also, use investigative processes to eliminate from considera-

99. See text accompanying note 74 *supra.*

100. See notes 80-85 *supra* and accompanying text.

101. Notes 18-19 *supra* and accompanying text.

tion detainers which will not be acted upon, and should employ the negotiation process whenever feasible.

There is clearly no simple solution to the problems caused by detainers. They can be eliminated completely only by the efforts of persons who act at every stage of the criminal justice process: legislatures, prosecutors, probation officers, trial judges, appellate courts, penal authorities, and parole boards. The answer lies, to a great extent, in making these groups aware of the defects in the detainer system, and the means available for removing them.