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# Book Review

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# BOOK REVIEW

**Jails.** By Ronald Goldfarb,[1] Garden City: Anchor Press/Doubleday, 1975. Pp. 451.

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Ronald Goldfarb's *Jails* takes a critical look at society's "ultimate ghetto," the local detention facility which primarily houses persons who are charged with criminal offenses and, because they are not permitted or are unable to post bail, are involuntarily confined pending trial. In addition to serving as a warehouse for the constantly shifting population of pretrial detainees, the local jail also serves as a penal institution for convicted persons serving short sentences for minor criminal offenses and as a temporary resting place for miscellaneous citizens, such as public drunks, for whose problems society has yet to devise an appropriate response. It has served this function for many years without significant changes in conditions or in the character of its inhabitants.

It is the inhabitants of the jail on which Goldfarb focuses, and it is by discussing their characteristics that he reveals the outrage of the jail's physical facilities and custodial traditions. Five not entirely discrete categories of the ultimate ghetto's typical inhabitants are identified in the same number of lengthy chapters, which are chock full of statistics and vivid, descriptive passages. The reader is apprised of the typical reasons for which the poor, the sick, the narcotics addict, the alcoholic, and the juvenile offender are incarcerated and of the way in which the jail treats (or, more appropriately, neglects) each one. A major thesis of each chapter is that it is the *poor* alcoholic, the *poor* juvenile, or the *poor* addict who is incarcerated, often for conduct or illness which should not constitute a criminal offense, while the wealthier person is either never arrested (at the discretion of the police) or secures release on bail or probation. The latter thus remains at liberty to cope with his legal, emotional or physical problem with the assistance of private persons or community services, while the former idles in jail with minimal or no assistance under conditions which in many instances actually aggravate his problems.

To a person unfamiliar with the institution or its inhabitants, *Jails* is invaluable, for it discusses a myriad of factors (police and judicial procedures, social attitudes, criminal laws, and custodial traditions) whose combined, negative impact on the jail's utility as a social institution is all too often ignored. *Jails* reveals the injustice of treating pretrial detainees, presumed innocent in the eyes of the law, in a more punitive and thoughtless

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fashion than convicted felons are treated at state penitentiaries; it reveals the inadequacy of jail facilities which are overly restrictive of the freedom of persons presumed innocent of any crime but are not sufficiently secure to prevent any determined criminal, who may be serving a short sentence there, from escaping; and it betrays the inconsistency in the judicial system which permits one class of persons to escape pretrial detention, while another class is incarcerated pending trial, simply because of the financial status of the class and without regard to the seriousness of the crime for which one of its members is arrested. *Jails* also contains a chapter which sets forth the constitutional basis for legal challenges to the conditions under which residents of the ultimate ghetto are detained[3] (although it must be noted that the chapter refers to no court decisions rendered after May 7, 1973, an omission which is disappointing, given the recent proliferation of lawsuits brought by jail inmates and the relatively receptive response given these suits by the Burger Supreme Court, and which results in a somewhat outdated characterization of the inmate's current legal status).

The breadth of analysis is both a weakness and a strength of *Jails*. Although he early states an intention to propose a new concept of jails which will avoid the problems and paradoxes of the existing institution, Goldfarb is unable in the one, relatively short chapter which is devoted to the subject[4] to deliver the convincing solution which the preceding, comprehensive chapters demand and which the reader has been led to expect. Rather, Goldfarb simply substitutes for the grandiose failure and reality of the typical jail an expansive vision of a new social institution which is equally unsatisfactory because its legal and logical foundations are not firmly placed.

The jail, according to Goldfarb, is an institution which should be changed fundamentally, not simply by physical renovation but by redefining the types of persons who, once arrested, should be incarcerated in a local facility. These persons are:

> (1) the pretrial detainee who may not otherwise show up for trial, or who is too dangerous to be released;
> (2) the offender whose problem is one of health or welfare, not punishment; who needs to be held in order to be examined and channeled to an appropriate specialized institution; and
> (3) the convicted offender who requires some local correctional institution to house him during that period when he is being reintegrated into the community.[5]

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[3] R. GOLDFARB, JAILS, ch. 7, at 345-415 (1975).
[4] *Id.*, ch. 8, at 416-51.
[5] *Id.* at 419.

No convicted persons, other than those described in category (3) would be housed in the new detention facility.[6]

In recognition of the fact that these three classes of persons have little in common except the convenience and propriety of keeping them in the community in which they have lived, Goldfarb's proposed new institution contemplates that each class be housed in one of 3 separate wings of the institution. The description of each wing of the new facility is only superficially appealing.

Pretrial detainees are to be housed in the first wing.[7] Central to the purpose which the first wing is to serve is the replacement of the bail system now in operation with new guidelines, under which wealth is no longer the determining factor, to discriminate between persons who should be detained pending trial and those who should not. Under Goldfarb's new pretrial classification scheme, only those persons who are determined to be unlikely to appear for trial or "whose personal dangerousness warrants limited pretrial detention"[8] will be confined pending trial.[9]

Goldfarb's proposed reform of the bail system is thought provoking,[10] but one wonders why he believes that a redefinition of the class of persons who are detained pending trial will or should alter the fundamental operation of the institution. Goldfarb argues that, under the new pretrial release procedures, the number of persons incarcerated pending trial will be reduced.[11] If in fact that occurs,[12] any problems produced or aggravated by overcrowding and which plague today's jails can be avoided. But the critical attribute of all persons detained under either a bonding procedure or

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[6] Goldfarb states that this redefinition would leave local authorities with no facility suitable for housing persons convicted of misdemeanors and serving short sentences. In characteristic fashion, he disposes of this problem by facilely concluding that the effect of the exclusion will be beneficial as it will result in an expanded use of pretrial diversion from the criminal system and probation. *Id.* at 420. He ignores two equally plausible alternative results: (1) that misdemeanants will be channeled into the state penal system along with convicted felons, or (2) that old, abandoned jail facilities will continue to be used for the housing of these misdemeanants.

[7] *Id.* at 421-30.

[8] *Id.* at 420.

[9] The details of this system are only outlined in *Jails*, *id.* at 421-30, but are more fully discussed in another Goldfarb book, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM (1965).

[10] One must note, however, that Goldfarb identifies, but does not resolve, the constitutional problems inherent in a system of preventive detention. GOLDFARB, *supra* note 3, at 427-30. For an analysis of preventive detention systems, see Dershowitz, *Preventive Confinement*, 51 TEX. L. REV. 1277 (1973).

[11] GOLDFARB, *supra* note 3, at 429.

[12] One wonders whether this scheme will reduce the population of pretrial detainees, for it authorizes the detention of persons which the prosecutor feels it is "in the public interest" to detain prior to trial. Those persons include: those who have been charged with "crimes of extreme violence; pathological crimes; subversion cases where violence, sabotage or treason were involved; and cases where recidivism or obstruction of justice is anticipated." *Id.* at 426.

the revised pretrial release system is that they are all presumed innocent and must, therefore, be detained under the least restrictive conditions consistent with the fact of their confinement, and be accorded all legal rights which are not inconsistent with the need to assure both their presence at trial and the security of the jail.[13]

The first wing of the proposed institution would certainly improve the living conditions of the pretrial detainee, but in no qualitatively different way than could be achieved by the renovation of existing jail facilitites. Insofar as prison rules and regulations are concerned, it is arguable that more, not less, justification exists for restricting correspondence, visitation, and other legal rights of pretrial detainees under Goldfarb's revised system, which authorizes pretrial detention for dangerous persons and those who are security risks, than under the current bail system, which admittedly results in the detention of persons who are neither dangerous nor unlikely to appear for trial. Thus, it is not at all clear that the construction of a new first wing either is necessary to ensure the physical comfort of pretrial detainees or will in fact result in a less restrictive, security-oriented atmosphere, as predicted by Goldfarb.

The second wing of the new institution is to function as a center for the diagnosis, treatment, and possible referral to other, non-penal institutions, of all arrested defendants.[14] Exceptions are made for those persons who, under Goldfarb's new pretrial release procedures, initially are not detained by police but are simply issued a summons to appear in court for trial, or for "those defendants whose crimes [are] so minimal, dangerousness so unlikely, and condition apparently normal that an early decision to release [is] made by the police or juvenile authorities."[15] The screening and diagnosis is intended to enable officials to identify "public health problems' "[16] so that *all* arrestees will receive adequate medical care. Goldfarb contemplates treatment of arrested persons who are released pending trial as well as of persons who are detained by the authorities, for those persons who are not detained may be required, as a condition of release, to submit to treatment or rehabilitation provided by community services.[17]

The major flaw in the program to be administered through the second

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[13] *See, e.g.*, Rhem v. Malcolm, 506 F.2d 333, 336 (2d Cir. 1974).

[14] GOLDFARB, *supra* note 3, at 434-45.

[15] *Id.* at 436. Goldfarb adds, however, that "[p]erhaps this group, too, should be required to submit at some date before their trial or other disposition of their case to this brief, public health examination." *Id.*

[16] GOLDFARB, *supra* note 3, at 434. Goldfarb does not give the reader a precise definition of what constitutes a public health problem, so it is impossible to know what will be the exact nature of the short battery of tests and examinations to which arrestees will be subjected, but it is apparent that he is especially concerned with identifying the alcoholic and narcotics addict. *See generally id.* at 113-285, 438-45. Goldfarb believes that one goal of the screening process should be the identification of persons with mental problems. *Id.* at 88-112, 439.

[17] *Id.* at 434-45, in particular 436, 443.

wing is the questionable constitutional validity of requiring all arrestees — even those persons who will not be detained pending trial — and who, it must be emphasized are presumed innocent,[18] to submit to an involuntary screening procedure or to treatment.[19] The fact that arrested persons who wish to undergo diagnosis will now have an opportunity to choose voluntarily to take advantage of the free medical care offered by the second wing and the fact that this will mean that poor persons, who have not been reached by other community medical services, will now receive adequate medical care, does not justify ignoring this constitutional problem.[20]

Goldfarb does not ignore all legal questions raised by the second wing's programs, but for the most part he makes no attempt to resolve those questions even though their resolution is crucial to effective implementation of his proposal.[21] For example, he notes that the screening and diagnostic procedures he proposes might be questioned if the results could be used to commit a person involuntarily to a civil rehabilitation center,[22] but he does not carry the discussion any further or conclude that in the absence of prohibitions on such a use of the results, they should not be required. He recognizes that voluntary agreement to participate in a particular program may be necessary to ensure the program's constitutionality, but he does not seek to ensure voluntary participation. Rather, the constitutional problem is deemphasized by offsetting it against the practical benefits to

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[18] Goldfarb sometimes forgets that he is dealing with persons who have not been convicted of a criminal offense. As he sees it, the "people who would be served by this diagnostic wing would be the people who are most seriously mis-served by present-day jails: the men, women and children whose offenses are identical with, or directly caused by their afflictions." *Id.* at 438. His description presupposes the guilt of the person arrested.

[19] At times, Goldfarb seems to recognize that it may be legally impermissible to require any individual to participate involuntarily in such a screening program. At other times, however, he appears to see constitutional problems only in requiring an individual to participate in the rehabilitation or treatment programs which would follow the screening procedure. *See, e.g., id.* at 436-37.

[20] In an apparent attempt to blunt this argument, Goldfarb referred to standard 4.8 of the National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON CORRECTIONS 133 (1973): [T]he following rules should govern detention of persons not yet convicted of a criminal offense:

> . . . Any action or omission of governmental officers deriving from the rationales of punishment, retribution, deterrence, or rehabilitation should be prohibited.

GOLDFARB, *supra* note 3, at 418.

[21] *See, e.g., id.* at 442. Before the second wing concept is adopted it is absolutely necessary to determine whether the government has a right to impose a broad program of involuntary rehabilitation upon individuals who are presumed innocent of any crime and who have come to the attention of the state simply because they have been charged with a criminal offense. Likewise, before any conditional pretrial release program can be considered, it is essential to determine whether the government can require persons, who are not detained pending trial because they are not security risks, to submit to community-based rehabilitation programs. Neither of these questions is resolved.

[22] For a recognition of the limits which this possibility may have on the success of an addict identification program, see *id.* at 143-47.

be obtained from the program: "[T]he constitutionality of this subtly coercive procedure may be open to questions, [but] its efficacy is not."[23]

Goldfarb's proposal raises a number of more practical questions which he also leaves unresolved. First, just as effective treatment of individuals confined in existing jails is often impossible because of the temporary nature of confinement, thereby making the success of any existing diagnostic and rehabilitation program depend on the adequacy of community-based services to provide for the needs of persons who are released, the success of the new institution's diagnostic and referral efforts will also depend on the adequacy of those services. Goldfarb recognizes the necessity for revamping existing community programs but does not explain how it can be done in order to accommodate persons who have been referred from the second wing. Second, throughout *Jails* Goldfarb criticizes the existing criminal pretrial system for penalizing persons solely because of their poverty by detaining only those persons pending trial. It is not unreasonable to suggest that, under Goldfarb's pretrial system, it will still be the poor who are penalized. Under Goldfarb's proposal, officials are given the discretion to determine which arrestee will be referred initially to the second wing or released pending trial under the condition that he submit to rehabilitation. It is not unlikely that, more often than not, it will be poor persons who are detained or released only under restrictive conditions. It is their constitutional rights which will be compromised, all in the name of a beneficent state purpose to be sure, while the wealthy individual will remain free to control his own rehabilitation.

In discussing the failure of the juvenile justice system, Goldfarb describes the way in which beneficient purposes and flexible procedures have been perverted to punitive and discriminatory effects.[24] Although juvenile detention facilities were designed as training centers, "offenders were not to be stigmatized by being called criminals, but were to be classified as 'juvenile delinquents'; procedures were to be informal and non-adversary; treatment was to be non-penal and humane;"[25] and the intent was to "rehabilitate non-criminal children whose environment or behavior seemed harmful," the result was detention of a punitive nature which was

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[23] *Id.* at 167. Another example of the cursory treatment given to crucial constitution questions follows:

> Advocates concerned with the legal rights of accused juveniles disapprove the practice [of releasing youngsters on condition that, if they obey certain strictures set down by the intake staff, no petition for detention will be filed]. The child, after all, has been charged with and convicted of nothing. Proponents of "institutionalized non-adjudicatory procedures," argue that it nevertheless may prevent a child from institutional placement.

*Id.* at 305.

[24] *Id.* at 298-99.

[25] *Id.* at 298.

inflicted primarily on the poor and members of racial minority groups.[26] Given the possibility of the same sort of perversion of the beneficient purposes of the second wing, it might very well be better to deal with public health problems outside the criminal justice system, particularly when financing and building the second wing might actually encourage the arrest of individuals in order to achieve the beneficient goal of rendering medical treatment and provide an incentive to continue to handle social problems like alcoholism and drug addiction through the criminal process.

The third wing of the new jail facility is to be a dormitory for convicted persons who are being reintegrated into the community through work release or similar programs.[27] Goldfarb proposes that this wing be added to the new facility because adequate facilities to house convicts participating in these programs are not now available and because communities are reluctant to provide for them, thereby limiting the use of work release programs.[28] Goldfarb makes a convincing case for the expanded use of work release programs, but one wonders if a community will be any more anxious to provide for the third wing of his new jail facility than it now is to provide for halfway houses. After all, it is the reluctance of the community to accept convicted and presumably dangerous persons living in its midst that causes concern, not the type of facility (be it renovated house or new third wing) which serves as the dormitory for those convicted persons.

As Goldfarb notes, "Americans have an edifice complex when it comes to solving social problems, . . . and nowhere is this phenomenon truer than in the world of so-called 'correction.' "[29] It appears that Goldfarb also suffers from this complex. The first wing of his brand-spanking-new facility differs from the present jail facility only in that it will be newer, and therefore presumably more comfortable, more liveable. It will still house, under restrictive rules and regulations, the same persons now housed in jails — pretrial detainees who have been charged with a criminal offense but who are presumed innocent. The third wing is simply a new dormitory facility. The second wing does represent a major functional change in the jail which cannot be dismissed as a mere manifestation of the edifice complex. To the extent that the existence of this second wing results in better medical care for persons incarcerated in the two other wings of the institution, its benefits cannot be denied. But the cost of maintaining the second wing will undoubtedly be substantial. Assuming that adequate medical treatment can be afforded inmates incarcerated in existing jail facilities, and keeping in mind the substantial legal and practical questions which Goldfarb leaves unresolved, one can only conclude that the desire to identify and treat public health problems may not justify the construction of an entirely new jail facility.

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[26] *Id.* at 298-99.
[27] *Id.* at 445-51.
[28] *Id.* at 445.
[29] *Id.* at 6.