CHAPTER 1

Introduction

If the public, through its judicial and penal system, finds it necessary to incarcerate a person, basic concepts of decency, as well as reasonable respect for constitutional rights, require that he be provided a bed.

—Judge William P. Gray, *Stewart v. Gates*, 1978

Not the least of the Sheriff's problems is the abysmal design of the jail. Architecturally, the jail is a gross case of malpractice in design.

—Judge James L. Facht, *Hudler v. Duffy*, 1980

Replacement [of the jail] must occur regardless of the source of funds. . . . The Court's power in this regard is a negative one: it cannot order respondent board of supervisors to appropriate funds. But it can, and will, order the facility closed, if necessary, to eliminate unlawful conditions.

—Judge Richard A. Bancroft, *Smith v. Dyer*, 1983

This court will not tolerate the miserable overcrowding in the jail which was existent in March when these hearings began. The responsible executives in the Sheriff's Office, Board of Supervisors, and the County Executive have offered nothing whatever in response to this most pressing problem.

—Judge Bruce Allen, *Branson v. Winter*, 1982

OVER THE PAST twenty or so years, courts have found conditions of confinement in many jails and prisons to be in violation of constitutional guarantees such as the Eight Amendment (banning cruel and unusual punishment) and the Fourteenth Amendment (guaranteeing due process rights). Correctional and government officials have been or-

dered to make sweeping changes to comply with court directives: to improve medical care and recreation services, to reduce chronic overcrowding, to increase staffing levels and improve training, to make use of various pretrial and postconviction release mechanisms, even to build new facilities—all under the watchful eye of the court.

In 1993, 40 states had at least one state prison under a court order or consent decree to limit population or improve general conditions of confinement; 11 of these states were operating their entire prison system under judicial decree (National Prison Project 1993). Many states (e.g., Alabama, Arkansas, Florida, Georgia, Mississippi, Rhode Island, Texas) have faced judicial scrutiny since the mid-1970s. Jail litigation did not develop as quickly as prison litigation. Prisons were bigger game, and jails received less press coverage. The statutory grounding for litigation, however, was similar, and litigation filed against jails steadily increased after 1980 (Taft 1983). In 1992, 27 precent of the nation's large jails (those with 100 inmates or more) were under court order to reduce overcrowding and/or improve general conditions of confinement (U.S. Department of Justice 1993). Overcrowding, the problem most frequently cited in court orders, severely limits an institution's capacity to provide adequate safety, medical care, food service, recreation, and sanitation.[1]

If we are ever to understand how our cities and counties got into this jail litigation "mess," or if we are ever to find our way out of it, we must more systematically locate problems, causes, and interventions within the broader legal, political, and organizational environments of jails. The problems of jails neither begin nor end at the gates of the institution. As Hans Mattick observed twenty years ago:

> Only a systematic, fundamental, sustained, and cooperative effort on the part of the legislative, judicial, and executive branches of government at all levels, together with an interested and informed public, will enable the jails of the United States to play a constructive role in a rational system of criminal justice. The problems that beset jails will not be "solved" by improvising a piecemeal political patchwork of minor ameliorations. They will not yield to the political opportunism of scapegoating a few jail administrators who are the prisoners of conditions over which they have little control. If we are serious about jail reform, more basic methods and changes are required. (Mattick 1974, 822)

This book attempts to identify some of the major gaps in our current knowledge about court-ordered reform and to define the questions and controversies we need to address. Seven key themes guide my analysis.

1. While most of the research on court-ordered correctional reform has examined state or federal prisons, city-or county-operated jails are distinct from state and federal prisons, and their unique problems require separate analysis.
2. The complex ways in which criminal justice agencies, governments, courts, and litigants interact to shape jail problems and policy responses have rarely been explicit foci of analysis. This gap calls for an explicit interagency approach to court-ordered change.
3. The impact of local environments on jail problems and litigation needs to be systematically analyzed. Unique dimensions of local legal and political environments (e.g., state statutory and regulatory law, local crime rates and punishment practices) dynamically influence the onset, process, and outcomes of litigation.
4. Previous analyses have failed to explain why most jails are not under court order, nor are they able to account for differences across jurisdictions that are under court order. A comparative approach can help identify which contextual factors distinguish cities or counties under court order from those that are not.
5. Legal process variables in jail litigation include level of court, nature of plaintiffs' and defendants' legal representation, and type of defendants. We need to investigate the interactive influence of these variables across a sample of jail reform lawsuits.
6. Impacts of court-ordered jail reform need to be examined empirically rather than speculatively, and different levels of change (at both micro and macro levels) must be considered. What are the intended and unintended outcomes of court-ordered change? How does change in one agency or institution affect entire justice systems?
7. Jail litigation raises questions about the usefulness of law as a means of social reform. What role do civil courts play in reforming jails, and to what degree do courts have the capacity to effect meaningful change in public institutions?

In this book, I develop an integrative model of jail litigation in order to explore the complex legal, organizational, and political factors that shape litigation and its impacts in an ongoing, dynamic manner. The data and analyses presented illustrate the systemic and political nature of jail litigation, and examine how connections between justice agencies, government, and the courts influence jail problems, court-ordered reforms, and outcomes.

Differences Between Jails and Prisons

The "central evil" of jails is perhaps the fact of local administration (Mattick 1974). Jails are different from prisons. For one thing, they are

operated at the municipal or county, rather than state or federal, level. Unlike prisons, they house convicted offenders generally serving sentences of one year or less and also pretrial detainees, typically about 50 percent of the jail's daily population (U.S. Department of Justice 1993). The latter point is particularly important. Any newly charged suspect, legally innocent until proven guilty, begins his or her journey through the justice system by being booked and charged at the local jail. If police form the "front line" of the criminal justice system, then jails are surely the second.

While serious problems in prison administration persist, conditions in local jails are often even more pronounced.

> Once a penal institution becomes part of a state correctional system, it is more likely to receive the attention of professional administrators who may be concerned with the possibility of instituting corrections functions; it is less likely to be a patronage dumping ground; uniform standards may be formulated and enforced; specialization of institutions and initial and in-service training of personnel can be undertaken; economies of scale become possible; transfers of prisoners and personnel between institutions become easier; civil service and merit promotions can be introduced; and, in general, more financial, human, and other resources become available. (Mattick 1974, 778)

The politics and demographics of jails are quite different from those of state or federal prisons, and their unique problems require separate analysis. First of all, jails have a very large turnover relative to prisons. There is a constant flow of inmates in and out of the jail, and the average inmate stays less than three days. Consequently, jails are characterized by a high number of both admissions and discharges. From 1990 to 1991, there were over 20 million admissions and releases from local jails (U.S. Department of Justice 1992a). Further, because jails are usually operated by the county, rather than the state, they face different fiscal pressures than do prisons (Advisory Commission on Intergovernmental Relations 1984). Counties have fewer discretionary funds available than do states; indeed, many counties are faced with strict limits on taxation and spending imposed by acts of state legislatures and the federal government. Further, local politics are often volatile (Welsh et al. 1990). Influential actors—including sheriffs, judges, district attorneys, and county commissioners or supervisors (who are responsible for fiscal allocations)—are locally elected and must keep one eye on their constituents' fears and prejudices.

Research on corrections has largely concentrated upon prisons and

ignored jails. A major reason for this deficiency has been the poor record-keeping practices of jails, and the lack of comprehensive jail surveys until the 1970s. Several good overviews of jail problems exist (e.g., Flynn 1983; Goldfarb 1975; Hall 1985, 1987; Mattick 1974). Empirical studies of jail operations (e.g., Abt Associates 1980; Gibbs 1983; Irwin 1985; Jackson 1991; Klofas 1987) or of jail litigation (Champion 1991; Kerle and Ford 1982; Mays and Bernat 1988; Welsh 1990, 1992a, 1992b, 1993a; Welsh and Pontell 1991) have been less common. However, lawsuits over jail conditions have refocused the attention of the courts, the public, policymakers, and researchers alike on the problems of jails (Feeley and Hanson 1986, 1990; Taft 1983). Thus, while the problems of jails are relatively old, constitutional challenges and court intervention are comparatively new.

A History of the Problem

Jails in the United States have been overcrowded and characterized by poor living conditions virtually since their inception. Recent massive increases in jail populations (from 158,394 in 1978 to 444,584 in 1992) have only magnified such longstanding problems as inadequate medical care, unsanitary living conditions, insufficient food services, exercise, and recreation, vague and discretionary disciplinary procedures, poorly trained and poorly paid staff, inadequate staffing levels, and institutional violence. These problems are not new, nor are they explainable purely by conditions within jails themselves.

Jail problems have been uncovered and compounded in recent years by government budget crises, "get tough" criminal justice policies, and civil lawsuits that have resulted in court orders to reform unconstitutional conditions of confinement. The result has been public and political backlash when jails are forced to relase inmates early or even to deny new admissions because of court-imposed population caps (Babcock 1990; Cuvelier et al. 1992; Dunbaugh 1990). To understand how "jail overcrowding" and court orders against jails have come to be defined as social problems in the United States, we need to locate jails within an interconnected system of criminal justice and county government, and within their historical, social, and cultural context.

The U.S. jail system has its roots in twelfth-century England as a device used by the county (shire) and its sheriff to detain people temporarily pending trial (Advisory Commission on Intergovernmental Relations 1984; Mattick 1974). It was not a place of punishment, but the massive population displacement and increases in crimes brought

about by industrialization and urbanization in England led to the passage of many new laws to control the dislocated and disorderly "rabble" (Irwin 1985). The jail became a tool of these policies.

Like their European counterparts, eighteenth-century American jails were used to detain persons pending state trial or some form of state punishment, complete with fee-type compensation for jail keepers. Prior to the American Revolution, incarceration as a form of punishment was rare. Instead, public and corporal punishments were the norm. Colonists' postrevolutionary concern for basic human rights and their fear of unrestrained government power over citizens eventually led to calls for reform.

Following the Declaration of Independence, colonists attempted various criminal code reforms based partly on their own adverse reactions to their earlier European experience, but also influenced by Enlightenment thinkers and the socially conscious, reform-oriented Quakers. Death penalties and corporal punishments were abolished except for the most serious crimes, and fines or periods of imprisonment took their place. At about the same time, the newly created states began to build their own state-run facilities for more serious offenders. It is something of a historical curiosity that jails took charge of less serious offenders and pretrial arrestees, while state prisons took charge of the more serious felons who previously would have been punished corporally or executed. This distinction may have been rooted in both convenience and precedent. Jails were already in existence and were handling a large turnover of minor offenders by the 1820s, and the temporary jailing of debtors, drunks, vagrants, and prostitutes had been common practice in England for many years (Mattick 1974, 784).

Early reformers clearly emphasized rehabilitation, yet they did not suggest that jails or prisons should be pleasant places. In 1867, the Pennsylvania Prison Society noted that its purpose was,

> not to destroy prisons, not to destroy their just terrors, but to have their discipline so regulated that no bad principles in the man incarcerated shall be made worse, and the whole administration of the penal laws so modified and enforced, that no injustice, no extreme of infliction, and no sentiment of maudlin humanity shall make the prison less than a place in which to guarantee society against violence and fraud, and to ensure to the guilty a just punishment for crime, while that punishment is made to minister to the moral improvement of the convicted offender. (Quoted in Atherton 1987, 4)

The negative effects of isolation were not anticipated, nor was the flood of inmates that soon inundated the jail (Allen and Simonsen

1986; Mullen 1985). In fact, the director of Philadelphia's Walnut Street Jail resigned in 1801 in disgust at the horrible conditions that had developed there (Mullen 1985). In 1820, a committee of the Pennsylvania Society of Friends visited the jail and decided that the current building was unfit; prisoners were not being adequately segregated according to age, sex, or offense; overcrowding severely weakened the penal goal of reform; and prisoners were too often idle. Larger and better-planned facilities, rather than abandonment of the "separate" system of confinement, were seen as the solution. State prisons based on the Pennsylvania system were erected in Pittsburgh (Western Penitentiary), Philadelphia (Eastern Penitentiary), and several eastern states (Hawkins and Alpert 1989). Competing models of imprisonment—such as the "congregate" system at Auburn, New York—emerged at about the same time. The idea of incarceration as a social response to crime was becoming firmly entrenched.

As in England, the advent and expansion of the industrial age in America was accompanied by social upheaval, displacement of people from the countryside to the city, and a vastly increased correctional population. Although displacement appears to have followed, rather than preceded, the construction of large prisons in America (Hawkins and Alpert 1989), it is clear that jail and prison capacities rarely kept pace with admissions. By the early nineteenth century, most large cities or counties had erected jails. As industrialization expanded into the West and Midwest, jails proliferated as a means of controlling increasing numbers of unruly persons, thieves, and drifters (Irwin 1985).

Despite two hundred years of periodic reforms, modern jails are criticized for many of the same problems as their ancestors: inadequately trained personnel; official misuse, misjudgment, or mismanagement of capacity; failure to provide for basic human needs while expending maximum fiscal resources; and failure to protect the safety of inmates or the public (Advisory Commission on Intergovernmental Relations 1984). To some, the jail has become an infamous veteran of government institutions: "a millenarian albatross that has remained stubbornly immune to successive attempts toward reform" (Advisory Commission on Intergovernmental Relations 1984, 3).

Chronic deficiencies in jail conditions have included inadequate (or absent) medical care, little or no recreation, poor sanitation (e.g., chronically inadequate and malfunctioning plumbing; rodent and insect infestation), poor food services (inadequate nutritional content, quantities, and delivery of food), and inadequate personal safety (homicides, suicides, gang violence, and sexual assault). Alvin Bronstein, di-

rector of the ACLU's National Prison Project, provides a vivid list of such conditions:

> physical brutality, gross medical neglect, the silence rules, racial discrimination, kangaroo courts for disciplinary matters, incredible tortures such as the Tucker telephone (a device used at the Tucker reformatory in Arkansas where live telephone wires were attached to the prisoner's genitals), hot boxes and dark cells (segregation cells with a solid door and no light), chain gangs, bread and water diets and worse, economic exploitation by the convict lease system and otherwise, rigid censorship of mail and reading matter, narrowly restricted visitation rights, along with meaningless and brutally hard work. The list is lengthy and as varied as the depth of human cruelty, about which Auschwitz and Attica have taught us so much. (Bronstein 1980, 20)

Such abuses have been well documented in state prison systems, such as those of Texas (e.g., Martin and Ekland-Olson 1987; Crouch and Marquart 1989), Alabama (Yackle 1989), and Arkansas (Harris and Spiller 1977).

Litigation as a Means of Jail Reform

The Prisoner Rights Movement

Until recent years, the courts followed a "hands-off" policy regarding corrections. Courts refused to hear prisoner rights cases, essentially viewing the inmate as a "slave of the state" who had forfeited his/her rights as a consequence of his/her crime. The courts generally claimed that they lacked jurisdiction over such matters, and deferred to the presumed administrative expertise of prison officials.

Two cases were significant in changing this hands-off policy. The Supreme Court decision in *Monroe v. Pape* (1961), which resurrected the Civil Rights Act of 1871, allowed lawyers to seek damages and injunctions in federal courts for state abuses against individual rights. The first corrections case heard under the Civil Rights Act was *Cooper v. Pate* (1964), concerning allegations of religious discrimination against imprisoned Black Muslims. The scope of the Supreme Court decision was narrow, but it was highly significant in allowing inmates to pursue their constitutional rights in court. The Supreme Court issued an affirmation of prisoner rights in *Wolff v. McDonnell* (1974): "There is no iron curtain drawn between the Constitution and the prisons of this country" (418 U.S. 539 at 555).

Several important decisions have followed (thoroughly reviewed in

Bronstein 1980; Call 1986; Cooper 1988; Jacobs 1980; Palmer 1987; Robbins 1987). Jail litigation on behalf of pretrial prisoners often alleges violations of due process under the Fourth and Fourteenth Amendments, while convicted prisoners often claim violations of the Eighth Amendment, which bans cruel and unusual punishment. This is an important distinction.

Bell v. Wolfish (1979) set the precedent for litigation involving pretrial prisoners. The case addressed conditions of confinement in a large New York City jail. The Court ruled that double-bunking was not unconstitutional per se, and that obtrusive security measures like body cavity searches were not unconstitutional where genuine security interests were at stake. *Bell v. Wolfish* established that the constitutional standard for pretrial detainees is whether the conditions they were subjected to constituted punishment or not; due process considerations prevent the state from applying sanctions to those not yet found guilty of any crime.

Rhodes v. Chapman (1981) significantly affected litigation involving convicted inmates. The Supreme Court decision confirmed that the Eighth amendment is the standard to be used for such cases. It was the first time the Court interpreted that amendment in the context of jail or prison overcrowding, indicating that: "conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting punishment" (452 U.S. 337 at 339). *Rhodes v. Chapman* thus framed the new standard of constitutionality for convicted offenders. Yet the Court's decision reiterated the need for judges to defer to the expertise of correctional administrators while doing little to clarify what conditions actually violated constitutional guarantees. As a result, the lower courts often take conflicting approaches, with some concentrating on a "totality of conditions" approach prescribed by the Supreme Court, and others focusing on "core conditions" such as medical care, prisoner safety, and sanitation (Gottlieb 1988). The Supreme Court refused to review these standards in subsequent cases, presenting lower courts with a difficult task.

In a more recent ruling, *Wilson v. Seiter* (1991), based heavily on *Estelle v. Gamble* (1976), the Supreme Court ruled that conditions of confinement were not unconstitutional unless deliberate indifference to basic human needs could be demonstrated. It is not yet clear whether this ruling has had a chilling effect on prisoner litigation, although some argue that its issuance led to the immediate dismissal of many prisoners' claims in lower federal courts (Wohl 1992). The *Wilson v.*

Seiter ruling certainly increases the burden of proof upon plaintiffs. Some fear that defendants may simply cite the lack of funds to avoid "deliberate indifference" claims, but previous rulings by federal courts (e.g., *Gates v. Collier*, 1974; *Miller v. Carson*, 1975) make such excuses questionable (see also Koren et al. 1988, 17–43).

Controversies over Judicial Intervention

U.S. courts have become increasingly involved in social policy cases since the 1960s (Cooper 1988; Feeley and Krislov 1985; Horowitz 1977; Neely 1981). Although U.S. courts have traditionally heard a larger variety of policy-related cases than courts in other countries, the involvement of judges was new in at least three ways. First, many completely new areas of adjudication were opened up in housing, welfare, and prisoner rights, largely because of legislative neglect: "The very idea is sometimes to handle a problem unsatisfactorily resolved by another branch of government" (Horowitz 1977, 6). Second, the types of remedies pursued by courts have become more complex, often requiring a whole course of conduct rather than one simple act. Finally, such litigation has tended more toward explicit problem-solving and less toward traditional grievance-answering.

Judicial intervention in corrections has been controversial (Bronstein 1980; Cooper 1988; Frug 1978; Glazer 1975, 1978). The separation of powers (among legislative, executive, and judicial branches) may be violated, and judges may lack the necessary expertise to make reform-oriented changes in corrections. Further, judicial intervention is reactive rather than proactive. Courts narrowly define and respond to the particular issues put before them, not to the range of issues that are intertwined in complex social problems (Millemann 1980). Fact finding in adjudication is said to be ill-adapted to determination of social facts, the recurrent patterns of behavior on which policy is based. Judges function at some distance from the social milieu, and tend to handle social facts either by neglect or by improvisation (Horowitz 1977).

Social policy cases concern polycentric problems (Fuller 1978), and it is difficult to forecast effects and structure solutions. Courts are more likely to prohibit current courses of action than to direct positive reform, and they look to past doctrine to form decisions, so that change in this context is likely to be slow and piecemeal (Horowitz 1977). Courts are also ill-equipped to monitor compliance with their directives, although the growing use of "special masters" for this purpose has achieved significant results in some cases.

In addition to problems raised by the adjudicative process, prob-

lems surface with personnel—judges and lawyers (Horowitz 1977). First of all, judges must assume a "generalist" position, filling knowledge gaps with their own "generalized normative axioms." It is difficult for them to process specialized information related to correctional administration, such as prison classification measures. Second, legal reasoning tends to be nonprobabilistic and absolute. Lawyers' tendency to invent hypothetical arguments and articulate all possible contingencies (in the enforcement of the decree, for example) may impose overly complex requirements on legal processes.

On the other hand, there may also be important advantages to having courts, as opposed to legislative or executive branches, deal with policy cases. First, their decisions must be based on evidence and reasoning, while other branches may be less "rational." Moreover, precise steps of procedure for hearing and deciding cases are spelled out in advance, and the judicial process, at least ideally, is less subject to political influences than other branches are.

Law and Social Change

Courts have arguably become the "final repositories of social trust" (Lieberman 1981) for inmates with no other recourse. Inmates receive little sympathy from the public or their elected officials. As a result, correctional institutions in general, and jails in particular, have long escaped public scrutiny. Bronstein (1980) points out the implications of this apathy.

> Of crucial importance . . . has been the invisibility of these institutions. Prisons are usually far away, physically and emotionally. . . . the community ordinarily has as little interest in the people it sends to prison as most of us have in our garbage—we want it disposed of safely, quickly, and without much mess, but we don't particularly care how. (Bronstein 1980, 7)

Perspectives on law and social change have traditionally been guided by two questions (Handler 1978): To what degree can the legal system be used to change social institutions or structural conditions; and to what degree is law merely a codification of societal practices and attitudes? These competing traditions (law as a change agent versus law as repository of social norms) have influenced much thinking about court-ordered correctional reform. Prisoner litigation can be viewed both as an outgrowth of social change and as an impetus toward it.

The growth of prisoners' rights was indeed facilitated by social and cultural change in the United States. C. Ronald Huff dates "the real trust and momentum which brought about a rapid proliferation of prisoners' rights" to the 1960s (1980, 47). The extension of legal rights to

prisoners can be seen as a manifestation of social differentiation and the development of mass society. As societies move from simple to complex, their systems of social control become increasingly formal and codified (Durkheim 1947 [1893]). Informal control mechanisms are unlikely to suffice in more complex societies, and there is a greater need to clarify the rights and responsibilities associated with each social position. Although penology was not widely integrated into formal legal codes prior to the 1970s, "the discovery of prisoners' rights signals the emergence of a more formal model of penal jurisprudence" (Huff 1980, 50). The evolution of an increasingly sophisticated, formal codification of prisoners' rights can be seen as an example of the evolution of law in society.

Continuing in a Durkheimian approach, we might also argue that the predominant social and institutional norms and values in a mass society tend to be extended over time to include previously marginal groups (Huff 1980). Prisoners, like other marginal groups, gained a measure of credibility and influence as civil rights concerns gained attention and precipitated various legal and social actions to gain greater recognition of basic rights (Graham 1970). As a result, the 1960s and early 1970s witnessed increasing public and official attention to the dignity and humanity of the masses (see also Rosenberg 1991) and the extension of legal rights to certain minority groups, including prisoners.

Court-ordered change can also play a causal role, leading to important changes in the use of social control in society—not necessarily the ones intended. Thus, court-imposed population caps may lead to frantic attempts by policymakers to reduce inmate populations in current facilities and mostly unsuccessful plans to raise enough money to construct new facilities. Expanding probation, parole, and "alternatives" to incarceration as means of coping with growing offender populations (Cohen 1979) may make social control more diffuse and pervasive. In California, 2 percent of all residents eighteen years of age or older were under correctional supervision in 1992, with 182,000 in jail or prison, and 380,000 on probation or parole (Petersilia 1992). Moreover, intermediate sanctions adopted as "alternatives" to cope with overcrowding (Byrne, Lurigio, and Petersilia 1992; Morris and Tonry 1990; Petersilia 1987) often become "supplements" to the incarcerative apparatus, rather than effecting needed population reductions (Austin and Krisberg 1982; Busher 1983; Scull 1984).

Litigation can be a double-edged sword. Court rulings may question how jails and prisons are operated or legitimize the widespread use of

incarceration (Millemann 1980). Because inmates lack political power, litigation may be the only way to create and implement basic prisoner rights. But how far do the legal rights of individual prisoners extend, and how much broad structural change is implied or driven by court intervention (see Bronstein 1980; Huff 1980)? Unfortunately, litigated change may suggest to many that prisons have become humane, even "country clubs," while in reality such change more often leads to minimal reform and compliance with very basic constitutional standards. The mistaken impression that the courts have vindicated jails and prisons through their very limited demands for reform is what David Rothman (1973) calls the "noble lie": the notion that with some tinkering, prisons can be made humane or rehabilitative.

At the same time, court intervention, coupled with fiscal realities, has led us to reconsider our entire system of criminal sanctions. Strong signals by the courts that overcrowded and inhumane conditions of incarceration will not be tolerated have inevitably limited the effectiveness of simplistic "get tough" programs such as the "war on drugs." Through the unrelenting passage of new and tougher laws sending more people to prison for longer periods of time, the war on drugs in the 1980s contributed to massive expenditures for prison construction, early releases of inmates, a shortage of experienced correctional staff, but no declines in crime (Austin and McVey 1989). It is ironic that the overuse of criminal sanctions and overconfidence in their presumed deterrent effects actually leads to a diminished capacity to punish (Pontell 1984). In fact, the "common knowledge" that crime is increasing, or that our need to punish is increasing, is at best questionable (Clear and Harris 1987). Even the most conservative thinkers have begun to ask whether prison can punish in an effective or humane manner, for which crimes it is suitable, and for which crimes and offenders certain nonincarcerative sanctions are appropriate. And yet, public officials seem reluctant to question the overuse of jails. John Irwin (1985) argues that jails serve a latent function of "controlling the underclass," including drug addicts and the mentally ill. Herbert Packer (1968) argues that overextension of the criminal justice system taxes its credibility and capacity: "Another, more benign but equally illegitimate, covert function is the use of the criminal sanction to perform needed social services that for one reason or another we are not prepared to perform directly and on their own merits" (p. 294).

While much dichotomous thinking in the past contrasted law as a "repository of social norms" with law as a "vehicle of social change," a more sophisticated question with genuine policy implications has

gained priority: In which situations can the law be used to effect change, and which contingencies facilitate or impede such attempts at change? This book attempts to shed light on these and other unanswered questions about court-ordered correctional reform.

Models of Court-Ordered Change

Making sense of the complexities involved in the court-ordered reform of public institutions requires us to synthesize, integrate, and simplify diverse findings. As a result, many authors have formulated models of court-ordered change that attempt to explicate the major contingencies mediating the effects of court-ordered reform. Most commonly, the models express legal outcomes as a result of two key variables: the nature of judicial intervention, and defendents' willingness or ability to comply. Most of these models oversimplify. They inadequately operationalize the predictive variables and the outcomes they hypothesize, and they leave out critical stages of litigation onset, process, and outcome.

In one such model, Robert Wood (1990) suggests that the level of judicial intervention (low, intermediate, or high) should be based on three contingencies: the breadth of constitutional violations (narrow, intermediate, or broad), the competence of the target agency (low, intermediate, or high), and the support within the larger political culture for the court's actions (low, intermediate, or high). According to this model, problems occur when there is a mismatch between level of judicial intervention and the contingencies affecting outcome—for example, when judicial intervention is high, but constitutional violations are narrow, the target agency is competent, and the political community is supportive. Unfortunately, the key variables are not well operationalized, and the assignment of any legal case to any one of the cells in a three-by-three matrix is highly subjective. Thus, "level of judicial intervention" oversimplifies the judicial role by operationalizing "low" intervention as a consent decree, "intermediate" judicial intervention as "bench oversight," and "high" judicial intervention as "receivership." Such examples grossly underestimate the range, flexibility, and dynamic fluctuation of judicial behavior in social reform cases. The model is conceptually useful in diagramming a limited portion of what judges and litigants do, but has limited utility for capturing the complexities of court-ordered reform and generating empirically testable hypotheses.

The model proposed by Erwin Hargrove and John Glidewell (1990)

focuses more narrowly on the judicial role. The roles of judges in social policy cases, it is argued, resemble other "impossible jobs" in public management, which are characterized by high conflict, low legitimacy of clients, and low respect for professional authority. The model has face validity and provides a conceptually useful framework for locating social policy cases within their larger social milieu. Unfortunately, the concepts are not easy to operationalize, and the analytical process becomes somewhat subjective. In the example of court-ordered jail reform, one might suggest that conflict is high because of the adversarial nature of legal proceedings, but also because of the diverse constituencies with an interest in correctional policy and expenditures—inmates, the public, correctional officials, various county agencies, county executives, state legislators. The legitimacy of clients (inmates) could be judged as low because of widespread but not unanimous perceptions that criminals are responsible for their behavior and deserve harsh punishment. Finally, the expertise and authority of judges to make decisions that influence or determine correctional policy and administration has been granted grudgingly at best (e.g., Glazer 1978). Given such circumstances, judges face considerable obstacles and frustrations. In response, they may, over time, become increasingly directive in their orders and assertive in their attempts to gain compliance.

Drawing upon work by Donald Horowitz (1977) and others, Gerald Rosenberg (1991) identifies two competing models of the court's ability to influence social policy. The "constraint" model focuses on courts' legalistic nature and limited ability to diagnose complex social problems. The "dynamic model," on the other hand, emphasizes their political autonomy and capacity for formulating incremental change. While his analysis favors the constraint model, Rosenberg attempts to identify factors influencing the level of social change resulting from court intervention in specific areas like desegregation and abortion rights.

Rosenberg suggests that courts have some effect on social conditions, but only when other political and social forces are already moving in that direction. Four conditions influence the effectiveness of court-ordered change: the availability of incentives for compliance with court orders, the availability of sanctions for noncompliance, the relevance of markets to implementing court-ordered reforms, and the degree to which institutional actors are already poised to proceed with reform and can use the courts as "scapegoats" for controversial actions.

As in other models, the concepts proposed in this framework are not easy to operationalize. The analytical process relies upon limited quantitative data and becomes somewhat subjective. For example,

Rosenberg examines the degree to which media coverage of cases like *Brown v. Board of Education* (1954, 1955) heightened public awareness of desegregation. To do so, he counts the number of magazine articles on civil rights issues between 1940 and 1965. The analysis largely ignores court process: "The risk in Rosenberg's approach is treating institutions, including the courts, as little more than black boxes through which some kind of exogenous social energy passes on its way to constituting new political forms" (Simon 1992, 939). The model also fails to emphasize the courts' interaction with legal and political environments, local institutional conditions, and surrounding social conditions to produce diverse micro- and macro-level changes.

All such models, however, despite their limitations, have furthered our understanding of how law influences social change and broadened the questions we ask about court-ordered reform. We are no longer content to debate *whether* judges exercise power in the political realm, or *whether* they should do so or not. Instead, we have begun to seek answers to more complicated, policy-relevant questions: *How* and *why* are legal challenges to institutional conditions mobilized? *How* do litigants and judges exercise power in particular environments? *What* changes (both intended and unintended) occur in institutional (micro) and social (macro) conditions? *How* do different contingencies mediate the effects of judicial intervention? My intention in this book is to develop a framework to support further theory and research in these directions—one that will allow us to consider the dynamic and interactive influence of factors within the legal, political, and organizational environments of jails, and to examine (on many levels) the emerging impacts on institutions and agencies of actions and events at previous stages. The model articulates specific outcomes to be explained at each of five stages of litigation—triggering events, determinations of legal liability, decree formulation, postdecree monitoring and compliance, and impacts—and identifies critical explanatory concepts and contingencies at each stage.

A Research Model for Court-Ordered Reform

To evaluate court-ordered jail reform and improve policy formulation, we need a more integrated, coherent research plan. I propose a model consisting of five analytical categories: a Trigger Stage, a Liability Stage, a Remedy Stage, a Postdecree Stage, and an Impact Stage (see Figure 1). Based on Cooper's (1988) model of social policy litigation, this is an "open system" model: Input from the environment shapes the onset

and transformation of disputes in a dynamic manner. Thus, the five stages continually interact; only a rough chronology is implied. Once key variables at each stage are identified, relationships between them can be further explored within an organized analytical framework.

We can examine hypotheses generated by the model through the use of several research methods, including archival analyses, case studies, interviews, and examination of justice statistics. The model prescribes a comparative approach in which hypotheses are examined across different jurisdictions and legal cases.

In the Trigger Stage, longstanding practices and policies within a particular jurisdiction act in concert with some triggering event (a change in law, a riot, a major legal decision, etc.) to push a conflict across a threshold where legal action is initiated. We need to explicitly consider the environmental inputs into this process, which include official policies and actions regarding the use of punishment and incarceration, and relevant case law and statutes affecting prisoners' access to legal forums. Which variables affect the mobilization of jail lawsuits? What influence do multiple parties exert? How do historical practices influence the probability of litigation? Jurisdictions with high incarcer-

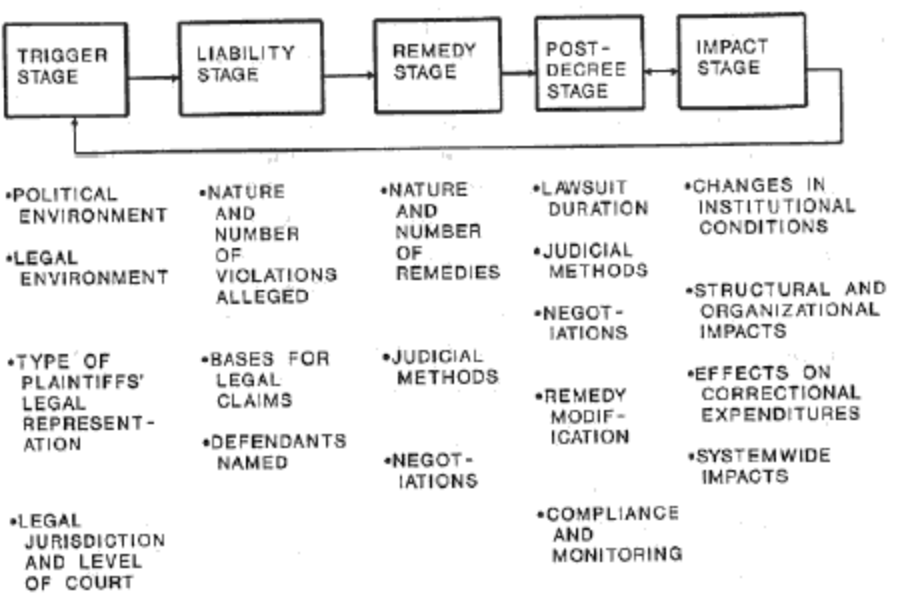

FIGURE 1 *Research Model of Court-Ordered Jail Reform*

ation rates and low rates of expenditure, for example, are more likely to face judicial intervention, while states with supportive statutory laws and state constitutions foster higher rates of prisoner litigation. Contextual factors (discussed in more detail below) include the type of plaintiffs' legal counsel and the strategies they adopt, and whether the lawsuit is filed in state or federal court. The onset of jail litigation and its eventual form will be at least partly determined by such prelitigation factors, which vary across cases and across jurisdictions.

Development of a case at the Liability Stage is shaped by the interactive efforts of lawyers for plaintiffs and defendants. Each attempts to create a strong record to shape judicial decisions. In the complaint, several crucial decisions are made: plaintiffs' lawyers name certain officials as defendants; they allege certain violations of law; and they suggest specific remedies. Because fiscal responsibility for local jails lies with local government, city or county officials are often named as defendants. The influence of these key actors on jail planning and reform needs to be examined in a systematic manner. The number of violations alleged in a case may reflect the complexity of issues in a particular case, the animosity between litigants, or both. The number and types of violations alleged depend upon applicable state law, strategies adopted by plaintiffs' legal counsel, and local jail conditions and punishment practices. The specific issues litigated then play a crucial role in transforming the initial dispute.

In the Remedy Stage, a liability opinion is issued, eventually leading to a core remedy in the form of one or more decrees. The judge must consider the nature, scope, and duration of relief available. The nature of relief provided is affected by the remedies plaintiffs request, the plans defendants present, what case law and statutes allow, and the degree to which proposed remedies provide redress of violations. The means by which judges determine and exercise their policy range at this stage are crucial to implementation and compliance efforts in the Postdecree Stage. Remedies may also be influenced by such prior contextual variables as the nature and frequency of alleged violations, the level of court chosen, and the strategies of plaintiffs' and defendants' legal counsel. Each of these variables can be investigated across a sample of cases, and hypotheses can be examined through both quantitative and qualitative method.

In the Postdecree Stage, orders are implemented, monitored, and refined through complex interactions between litigants, judges, and other stakeholders. Contextual factors from prior stages (e.g., legal

representation, litigant behavior, level of court) influence judicial methods, negotiations, and the duration of a lawsuit. For example, cases involving ideologically committed plaintiff attorneys and government defendants evidence high levels of conflict. Ideologically motivated attorneys fight harder and longer as a result of their commitment and experience, while government officials mount greater resistance as a result of their political power and access to broad county resources. The complexity of a case, as indicated by the number of violations alleged in the complaint, influences lawsuit duration because a greater number of issues must be litigated, requiring more detailed presentation of evidence, testimony, expert witnesses, negotiations, formulation of plans, and monitoring. Cases heard in federal courts may last longer, on average, because of more flexible options available in federal law, and the greater expertise, resources, and persistence of federal judges. This is the stage at which courts may appoint special masters or use contempt orders to encourage compliance—two strategies that have yet to be studied in a systematic manner.

Finally, the Impact Stage focuses attention on criminal justice agencies and systems. To what degree do court-mandated jail reforms alter institutional conditions and service delivery, organizational structures, city or county correctional expenditures, and such systemic features as interagency relationships and local criminal justice processes? These impacts then provide new inputs into an ongoing, dynamic system. For example, if jail population in a specific jurisdiction rises once again to unacceptable levels, courts may reopen dormant lawsuits.

The five-stage model of court-ordered change I present here attempts to advance our understanding of jail problems and organizational reforms by integrating diverse perspectives on the causes, evolution, process, and impacts of litigation against jails. Substantial gaps in our understanding of jail problems and litigation have hindered the development of useful theory and rational policy in this area.

Data and Methods

This book addresses the onset, process, and outcome of court-ordered jail reform in a systematic manner using several measures and methods, both qualitative and quantitative. I offer five prescriptions to overcome the shortcomings of previous scholarly work: Conduct analyses across different jurisdictions (the comparative approach); integrate qualitative and quantitative research methods (convergent data sources); describe litigation process and outcomes empirically (the em-

pirical approach); specify and test a theoretical model of court intervention (the theoretical approach); and consider both intended and unintended effects of change (the open system approach).

On a national level, I use data from the quiennial Census of Jails and the Annual Survey of Jails, both conducted by the Bureau of Justice Statistics in cooperation with the U.S. Bureau of the Census, to illustrate patterns and trends in jail operations, populations, and litigation, and to examine relationships between model variables across jail jurisdictions.

At the county level, I use comparative data obtained from a study of all jail litigation in California between 1975 and 1989 (see also Welsh 1992a; Welsh and Pontell 1991), when jails in 35 of the 58 counties (60 percent) were under court order. Because California is home to 10 of the 25 largest jail systems in the country (U.S. Department of Justice 1991a), and because its 64,000 inmates constitute the largest jail population in the United States (U.S. Department of Justice 1991a), it provides a good barometer of jail problems and court orders. Studying all jail cases across a single state avoids potential confounding factors due to differences in state statutory, regulatory, and case law. A comparison of 58 counties far surpasses the limited generalizability of results from single-case studies. Generalizability of *results* to other states awaits further empirical observation, but I suggest that the *processes* affecting jail litigation onset, process, and outcome are highly similar to those described in the analytical model developed here. Indeed, the model has built upon and extended theoretical relationships and findings suggested by diverse but fragmented studies.

I examined three major types of data across California counties. First, statistical data were obtained from state and county agencies to assess differences and changes over time in the legal and political environments of jails (e.g., arrest rates, incarceration rates) and jail operations (e.g., jail populations, correctional expenditures) across counties. Second, court documents were examined and coded to assess differences in litigation process (e.g., frequency and type of alleged violations) and outcome (e.g., frequency and type of relief granted). Finally, I used the more micro-level "case study" approach typical of research on jail and prison litigation to supplement other data methods. Interviews with criminal justice and county government personnel in three jurisdictions allowed me to assess organizational climates, interorganizational relations, and responses to litigation. The overall methodology is described in more detail in the Appendix.

Summary

While jail problems are not new, court intervention is relatively recent. Many argue that the capacity of the judiciary to effect meaningful reform in jails is limited, but court intervention spurs diverse adaptations and responses, including reevaluation of the purposes and forms of punishment. As change reverberates throughout local criminal justice systems, court-ordered reform requires adaptations to change by each county agency involved. The micro-level impacts of judicial intervention on correctional systems (e.g., institutional conditions) must be informed by more macro-level, comparative conceptions of the legal, social, and political context in which change occurs. I propose an integrative, comparative model of court-ordered reform that examines critical outcomes, explanatory variables, and contingencies at the Trigger, Liability, Remedy, Postdecree, and Impact stages. Accordingly, the next five chapters discuss major outcomes and influences at each phase of litigation and examine evidence across a sample of legal cases.