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# An Analysis of the Question of County Jail Reform in Kentucky

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# NOTE

## AN ANALYSIS OF THE QUESTION OF COUNTY JAIL REFORM IN KENTUCKY

One of Kentucky's most critical but least publicized criminal justice and civil rights problems is the deterioration of its county jail system. As the Commonwealth begins a new era of judicial and legal reform,<sup>1</sup> the typical county jail remains a 19th century house of horror. Even though Kentucky and other states have recently taken important steps to confront the problems of the county jail system, it is not yet clear that these steps indicate a new attitude toward resolution of problems long facing county jails.

This note discusses the questions and issues involved in county jail reform. The first three sections discuss conditions within the jail system, reasons for their existence, and solutions recently proposed or implemented in Kentucky. Section IV offers a synopsis of the legal precedents bearing on judicial reform of the system. This reform will be necessary if suitable legislative and administrative controls are not forthcoming.

While Kentucky is the frame of reference for this note, the problems of county jails and the avenues of reform are not limited to Kentucky; the dilemma exists in other jurisdictions and each can benefit from the following analysis.

### I. THE PROBLEM WITHIN OUR COUNTY JAILS

Each of Kentucky's 119 county jails is required to fulfill three basic functions:<sup>2</sup> pretrial confinement of accused felons,

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<sup>1</sup> This reform is highlighted by the adoption of the recent judicial amendment to the Kentucky constitution. Ky. Acts. 1974, ch. 84, S.B. 183.

<sup>2</sup> These three duties are basic and indisputable. Whether there is a fourth duty of rehabilitation is a hotly contested issue. Justice Lewis Powell, speaking for the majority in the case of *McGinnis v. Royster*, 410 U.S. 263, 271 (1973), stated in dictum that "county jails . . . serve primarily as detention centers." He added that while some recreational and rehabilitative facilities exist within county jails, their rehabilitative effort is minimal especially when compared to state prisons. Powell seemed to agree with the State of New York which argued that the typical county jail really was not equipped nor intended to do any more than detain. *Id.*

Justice Powell's comments mirror the reality of the county jails in Kentucky. Few

confinement of misdemeanants both before and after trial,<sup>3</sup> and confinement of convicted felons awaiting transfer to state facilities. The Kentucky legislature, however, has not fully defined who is responsible for the jails' operation and for the consequence of their misoperation.<sup>4</sup>

According to statute, each jailer has custody, rule, and charge of his own particular county jail<sup>5</sup> and must keep it warm and clean.<sup>6</sup> The statute further provides that all prisoners shall be treated humanely and furnished with proper food and lodging during confinement.<sup>7</sup> To insure that these conditions are met, the county judge has been made the jail's overseer. Ken-

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of Kentucky's jails carry on rehabilitative programs, and in those instances where serious programs exist, they exist solely because of the personal commitments of a local jailer or other county official. They are not the result of any organized or formal statewide initiative.

It may be academic at this time to argue whether rehabilitation is a proper function of the county jail. There would certainly be problems creating an effective program, and this would be further complicated by the fact that the average county prisoner is there only on a temporary basis. Furthermore, until state prison rehabilitation programs can be successfully structured, it seems doubtful that there can be a successful program on the county level. Many county jails are not presently meeting their basic responsibilities of safe and secure confinement; these duties should be met before new ones are assumed.

<sup>3</sup> Forty percent (40%) of those incarcerated in Kentucky jails are held for drunkenness or drunk related offenses. Many of these chronic repeaters will receive neither medical attention during incarceration nor rehabilitative services after conviction.

KENTUCKY COMMISSION ON LAW ENFORCEMENT AND CRIME PREVENTION, REPORT ON KENTUCKY JAILS 12 (1969) [hereinafter cited as KENTUCKY JAILS].

<sup>4</sup> The attitude of the legislature reflects the historical position that jails are a question of local concern. Most states have taken a similar posture, although there is a trend toward greater state involvement:

Throughout the nation, jail administration is predominantly a local function. With 3500 local facilities, only about 40 percent of the states provide standards for their operation, and the majority of standards are centered on health and construction requirements. Although 19 states inspect local jails, only six subsidize necessary improvements. Sixteen states provide consultant services for jail operations, but only 12 gather statistics on the prisoners and programs involved.

*Id.* at 14 summarizing THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 80 (1967). For the most recent survey on this subject see, ABA COMM. ON CORRECTIONAL FACILITIES & SERVICES, SURVEY AND HANDBOOK ON STATE STANDARDS AND INSPECTION LEGISLATION FOR JAILS AND JUVENILE DETENTION FACILITIES (2d ed. 1973).

<sup>5</sup> KY. REV. STAT. § 71.020 (1971) [hereinafter cited as KRS].

<sup>6</sup> KRS § 71.030.

<sup>7</sup> KRS § 71.040.

tucky Revised Statutes § 441.010 (hereinafter referred to as KRS) provides that the county judge "shall" inspect the jail at least once a month and "shall" prescribe rules for the "government and cleanliness of the county jail and the comfort and treatment of prisoners." Unfortunately, the county judge is neither required to make a written report of his monthly findings nor publish the jail's operational rules.

If an individual judge promulgates rules of operation which are violated or if a jailer neglects his official duties, the county judge may fine the jailer to compel obedience or action.<sup>8</sup> In turn, a circuit court judge who reviews the actions of the county judge and believes that the jail is not secure, may order the transfer of prisoners to a secure facility.<sup>9</sup> The word "secure," however, has not been defined by the legislature or courts in Kentucky. Once again, this reflects the accepted notion that every community sets its own standards and goals without state interference. A test case is needed; the argument must be made that a jail with wholly inadequate heating, facilities, food, or staff is insecure.<sup>10</sup>

The Rowan County jail is a case in point. In October of 1972, the county jail was closed by order of Special Judge Henry V. Pennington.<sup>11</sup> Judge Pennington took this action when he discovered that the jail's female and juvenile offenders' area had no bathing facilities or hot water, was inadequately ventilated, had dangerous and inadequate heating, and was so isolated from the jailer that a prisoner would be unable to summon help in case of fire or other emergency. Judge Pennington also ordered that the area of the jail used for adult males be closed except for those persons awaiting trial or arraignment. In no event, however, could any person be incar-

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<sup>8</sup> KRS § 441.010 (1975). A jailer may also be indicted, in his home county, for misfeasance or malfeasance in office and for willful neglect in the discharge of his duties. If convicted, the jailer must vacate his office and is subject to a \$100 to \$1000 fine. KRS § 61.170(1). On March 24, 1976, the Grand Jury indicted four magistrates and the county judge of Rowan County, Kentucky, for malfeasance and neglect. This action was brought under KRS § 61.170 for failure to secure, erect or keep in repair a sufficient jail. Rowan Circuit Court, Indictments No. 76-16, 76-17, 76-18, 76-19, 76-20 (Mar. 24, 1976).

<sup>9</sup> KRS § 441.030 (1975).

<sup>10</sup> See Section IV *infra* for the possible precedents for such an argument.

<sup>11</sup> A copy of this order is on file at the KENTUCKY LAW JOURNAL.

cerated in this area for more than 5 days. In this area of the jail the judge discovered windows lacking screens or glass, a dangerously vented and completely unprotected pot belly stove as the only source of heat, and "three beds and a picnic table with broken seats" as the only available furniture.<sup>12</sup>

The same or worse can be found in other counties. A full 60 percent of Kentucky's county jails are situated in buildings over 50 years old, with over 20 jails in buildings over 100 years of age.<sup>13</sup> More than half of the county institutions can hold 20 or fewer inmates.<sup>14</sup> Even with this small and inefficient capacity, however, the majority are less than one third full on any given day.<sup>15</sup> On that same day, 18 jails are completely empty.<sup>16</sup> It is clear that not every Kentucky county can support its own jail. Counties such as Carlisle, Crittenden, Elliott, Gallatin, Hancock, Hickman, Livingston, Lyon, Nicholas, Pendleton, Robertson and Trimble had less than 300 arrests in 1973.<sup>17</sup> In these and many other instances the jails serve only as an economic drain on the counties' already limited resources.

The following chart is a county by county breakdown of the Kentucky jail system and shows how each jail has been rated with regard to structure and physical plant.<sup>18</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> KY. JAIL CONSULTANT, REPORT TO BUREAU OF CORRECTIONS, (September 1, 1976).

<sup>14</sup> KENTUCKY JAILS, *supra* note 3, at 7.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.*

<sup>17</sup> DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS OF THE COMMONWEALTH OF KENTUCKY 78-87 (1974).

<sup>18</sup> These ratings were released by the Office of Jail Consultant, Bureau of Corrections. The Office of Jail Consultant, a division of the Bureau of Corrections, employs five regional consultants situated throughout the state with an average jurisdiction of 23 counties per consultant. The Office serves as an advisor to local jailers and suggests new techniques ranging from meal preparation to operational procedures. Pursuant to authority granted to the Bureau of Corrections by the legislature, the Jail Consultant also monitors and approves all new construction and major renovations of county jails. KRS §§ 441.420-450 (Supp. 1976). Fiscal year 1974-75 was the first full year of a uniform inspection and reporting system by the Jail Consultant's Office. As will be discussed *infra*, the Office of Jail Consultant seems destined to play a more autonomous and authoritative role in the future of Kentucky jails. If for no other reason, this independence should come about because the Office of the Jail Consultant is the only department within the Bureau of Corrections which deals with county jails. The current status of the Jail Consultant's Office, however, is in a state of flux due to the current reorganization of the Bureau of Corrections.

RATINGS<sup>19</sup>  
July 2, 1975

RATED VERY GOOD

	Allen	Calloway	Kenton	Re Robertson
Re	Bell	Re Carter	Mason	Taylor
	Bourbon	Ce Clinton	McCreary	
	Caldwell	Henderson	McLean	

RATED GOOD

Re	Boyd	Franklin	Cu Re	Jefferson	Rockcastle
Re	Clark	Gallatin		Magoffin	Cu Russell
Ce	Crittenden	Grant	Re	Marion	Shelby
	Cumberland	Re Green		Marshall	Warren
Re	Estill	Greenup	Ru	Ohio	Webster
Cu	Fayette	Hardin	Ru	Pike	Ru Woodford
Cd	Floyd				

RATED FAIR

	Adair	Ru Daviess	Lawrence	Monroe
Ru	Bath	Fleming	Larue	Cd Montgomery
Cd	Boone	Jessamine	Ru Letcher	Re Nelson
	Breathitt	Ru Johnson		Lincoln
	Campbell	Knott	Ru	McCracken
		Knox	Ru	Metcalfe
				Simpson

RATED POOR

Cu	Barren	Re Grayson	Henry	Pendleton
Cu	Boyle	Graves	Cd Hopkins	Perry
	Bracken	Hancock		Madison
	Bullitt	Ru Hart	Re	Martin
	Garrard	Harrison		Morgan
				Pulaski
				Ru Scott

RATED VERY POOR

	Anderson	Elliott	Livingston	Cd Rowan
	Ballard	Ru Fulton	Cd Logan	Spencer
Cd	Breckinridge	Harlan	Cu Lyon	Todd
	Butler	Hickman	Cu Meade	Cd Trigg
	Carlisle	Ru Jackson		Menifee
	Casey	Ce Laurel		Mercer
Cu	Clay	Cd Lee		Muhlenberg
Cu	Christian	Leslie		Nicholas
Re	Edmonson	Cd Lewis	Ru	Owsley
				Whitley
				Cd Wolfe
				Washington

<sup>19</sup> 1974-1975 REPORT OF JAIL CONSULTANTS, Table 4. These ratings were released by the Office of Jail Consultant, Bureau of Corrections, on July 2, 1975 and are the most recent ratings available at time of publication. The ratings reflect, among other things:

These ratings are not infallible; several have been disputed by local officials. For example, while the Jail Consultants listed the Mercer County Jail as one of the worst in the entire state, this facility has received more than satisfactory ratings from the county grand jury. In a recent evaluation, the Grand Jury stated:

This GRAND JURY was impressed at the cleanliness of the Mercer County Jail. This GRAND JURY was aware of recent state reports that rated the Mercer County Jail very low; however, we do not agree with the conclusion reached by state inspectors. We found the jail extremely clean and in a good state of repair. We feel that it is more than adequate for the service for which it is intended. Except for maximum security prisoners, we feel the Mercer County Jail secure, it is clean and we would not recommend the construction of a new jail or substantial outlays with public money to improve the facility.

We were not in the jail during night hours, but we have some concern about the extent of lighting available for reading and other activities of the prisoner after dark. As with the summary of the May, 1975 GRAND JURY, we would conclude and emphasize to the public that the existing jail building is more than adequate for the detention of adult male prisoners.<sup>20</sup>

Given a certain margin for differences in opinion, conclusions can still be drawn from the numbers. Fifty-seven county jails are rated poor or very poor; an additional 23 jails are rated fair. This leaves only 39 jails, less than one-third of the total, classified as good or very good by a responsible state agency.<sup>21</sup>

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security procedures, security devices, jail climate, the existence of separation facilities, visitation procedures, ventilation, lighting, heating, screening, plumbing, bathing facilities, bedding, food preparation, food storage, housekeeping, and sanitation.

The explanatory signals indicate any significant construction completed or planned since July 2, 1975.

Cc—Construction Completed

Rc—Renovation Completed

Cu—Construction Underway

Cd—Construction in "Drawing Board" Stage

<sup>20</sup> MERCER CIRCUIT COURT, GRAND JURY REPORT 3, September Term, 1975.

<sup>21</sup> See chart accompanying note 19 *supra*. These figures however, show improvement over 1974. In 1974, 30 jails were rated as good or very good, 25 were rated as fair and 64 were considered poor or very poor. Twenty-five jails were rated higher in 1975 than they had been in 1974, while ten jails were lower. STATE JAIL CONSULTANT, REPORT

An additional source of information about conditions in Kentucky's county jails has been supplied by the Kentucky Public Health Association. In January 1974, the Association released the report of its Task Force on Prison and Jail Health.<sup>22</sup> The Task Force, through a series of questionnaires and visitations, formulated a lengthy series of recommendations for both state and local institutions. The results of this research support the conclusions of the jail consultants and are startling in their own right.

Thirty-one percent of the institutions surveyed had inadequate lavatories, with six percent having no lavatory facilities at all available to prisoners. Twenty-three percent did not have hot and cold running water. Seventeen percent had no showers or bathing facilities. Thirty-eight percent did not provide towels.<sup>23</sup>

Over 60 percent of the jails surveyed provided no sheets or pillows to inmates, although every institution provided some type of mattress.<sup>24</sup>

Fifty percent had no fire extinguishers, and at least twenty-seven percent had no formulated plans for removing prisoners in case of fire.<sup>25</sup>

Fifty-four percent of the institutions had inadequate lighting,<sup>26</sup> and twenty-three percent had inadequate heating. Twenty-five percent had inadequate ventilation.<sup>27</sup>

Insects and rodents were found in 33 percent of the institutions surveyed; 29 percent did not employ a commercial pest control operator. Few of the jails used screens to prevent insects from entering the building.<sup>28</sup>

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OF KENTUCKY JAILS (1974). It should also be noted that when all present construction and renovation projects are finished the number of jails classified as poor or very poor should be reduced to 35 or less.

<sup>22</sup> TASK FORCE ON PRISON AND JAIL HEALTH, *THE CAPTIVE PATIENT: PRISON HEALTH CARE* [hereinafter cited as *TASK FORCE REPORT*]. The figures cited include county and city jails.

<sup>23</sup> *Id.* at 23. Given these findings, the task force noted with some disbelief that 73.8 percent of the "jailers thought their toilet and bathing facilities were adequate." *Id.*

<sup>24</sup> *Id.* This seems an undisguised violation of KRS § 71.030 which provides in part: "The jailer . . . shall provide prisoners confined in the jail with a sufficiency of bed-clothing to make them comfortable."

<sup>25</sup> *TASK FORCE REPORT, supra* note 22, at 23.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 25.

<sup>28</sup> *Id.* at 27.



If the same requirements for an average restaurant were applied to jail facilities, 17 percent of the institutions would be closed.<sup>29</sup> The greatest hazard from environmental deficiencies and improper food service existed in the city and county jails of rural or relatively sparsely populated areas.<sup>30</sup>

An inmate had access to physicians in only 50 percent of Kentucky's county jails, and 30 percent of the city jails. Only 8.3 percent of the large county institutions had doctors available on a regular basis,<sup>31</sup> and few, if any, jails kept medical records.<sup>32</sup> In the majority of situations, nonmedical personnel determined who needed medical attention. The jailer was most often the person to decide; he not only had to decide who needed routine medical care, but also who needed emergency care and treatment for *delirium tremens* or drug overdoses.<sup>33</sup>

The average amount of money allocated for intra-jail medical expenses in county jails located in fourth, fifth, or sixth class cities was \$278.00 per year. Of that amount \$73.00 was spent on prescription services. The annual average spent on hospital services was \$104.00, with 26 of the 45 rural jails surveyed indicating that nothing had been expended for hospital care.<sup>34</sup> While the average daily population of the Kentucky jail system was 2,306,<sup>35</sup> the average amount spent for medical services, combining the expenditures of all institutions regardless of size, was \$1,039.00 per year.<sup>36</sup>

The Medical Association's Task Force concluded that:

Although many gross deficiencies [are] quite evident in the health care and environmental conditions in the Commonwealth's penal institutions, there [are] also some fine examples of facilities that [are] operated in a most satisfactory manner, especially in the face of the often quite limited resources available.<sup>37</sup>

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<sup>29</sup> *Id.* at 35.

<sup>30</sup> *Id.* at 38. This is just one example of benefits that would be derived from a move to regional rather than county jails.

<sup>31</sup> *Id.* at 59.

<sup>32</sup> *Id.* at 71.

<sup>33</sup> *Id.* at 65-66. It is foolish and unfair to force this upon the jailer; the risks of injury to the prisoner and legal liability for the jailer are too great.

<sup>34</sup> *Id.* at 75.

<sup>35</sup> KENTUCKY JAILS, *supra* note 3, at 8.

<sup>36</sup> TASK FORCE REPORT, *supra* note 22, at 75.

<sup>37</sup> *Id.* at 123.

Kentucky is attempting to make the good jail the rule rather than the exception, but there is a long road ahead. The importance of this challenge is evident from the rate of recidivism. County jails average over a 76 percent prisoner return. Only one prisoner in four is in a county jail for the first time; city jails have experienced a slightly lower 71 percent figure,<sup>38</sup> while the rate of recidivism for prisoners at the state's Eddyville Penitentiary, LaGrange Reformatory and other adult institutions, is lower still.<sup>39</sup>

The problems faced by Kentucky's county jails are shared by the majority of states. While this note does not pretend to be a treatise in the affairs of the other 49 states, some references may be enlightening. In Alabama, for example, the United States' Justice Department has attempted to charge the officials of all 232 municipal and county jails with violations of prisoners' constitutional rights because of the abhorrent conditions in Alabama's jails.<sup>40</sup> Another study indicates that federal inspectors visiting 3115 local facilities across the country labeled 99 percent of those surveyed as unsatisfactory.<sup>41</sup> The need for reform is a well-documented, nationwide concern.<sup>42</sup> As a nation, we spend an average of only \$2.86 per jail prisoner per day.<sup>43</sup> This amount must provide the prisoner's daily requirements of food, clothing, shelter, heating, lights, and in many instances the salary of the jailer and his deputies. While Kentucky shares many of the problems of other states, the underly-

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<sup>38</sup> *Id.* at 102.

<sup>39</sup> *Id.*

<sup>40</sup> Lexington Herald Leader, March 29, 1975, § A, at 2, col. 5.

<sup>41</sup> THE AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 49 (3d ed. 1966).

<sup>42</sup> Ashman, *Lock-Up: North Carolina Looks at its Local Jails*, Institute of Government, University of North Carolina at Chapel Hill (1969); Mann & Taedter, *The Jails of Missouri, A Report for the Governor's Citizen's Committee on Delinquency and Crime*, St. Louis, Missouri (1968); Justice, Glendening & Wildey, *Pilot Justice Project: A Survey of Six Indiana County Jails*, 49 IND. L.J. 260 (1974); Comment, *Nebraska Jails: Cure or Cause*, 49 NEB. L. REV. 71 (1969); See also Burns, *American Jail in Perspective*, 17 CRIME AND DELIN. 446 (1971). This article is particularly interesting for Kentuckians because Mr. Burns is a past Deputy Commissioner of the Kentucky Department of Corrections.

<sup>43</sup> NATIONAL COUNCIL OF CRIME & DELINQUENCY, CORRECTIONS IN THE UNITED STATES, (1967) printed in 13 CRIME & DELIN. 1 (1967) (a survey for the Presidential Commission on Law Enforcement and the Administration of Justice).

ing causes of its problems are, in some ways, special and peculiar.

## II. REASONS FOR THE PROBLEM

The responsibility for the condition of Kentucky's jail system is diversely held. As already noted, the lack of state inspection and central control is partially to blame; furthermore, jails in the majority of communities are at the bottom of the spending priority list. Fiscal courts, especially in rural areas, are hard pressed to spend money on county jails when funds are not even available to maintain the county courthouse properly.<sup>44</sup> Across the state, the absence of funds is a key roadblock to reform.

The lack of trained and qualified jailers is also partially responsible for the ineffectiveness of the system. The Kentucky Constitution mandates that each county have an elected jailer;<sup>45</sup> the jailer's training and qualifications, however, are not so carefully designated.<sup>46</sup> The only qualifications imposed on a jailer are that he be at least 24 years of age, a citizen of Kentucky, a resident of the state for at least 2 years and a resident of the particular county for 1.<sup>47</sup> Once elected, the jailer must also post bond as required by law and take a constitutionally prescribed oath.<sup>48</sup> There are, however, no mandatory training programs presently in existence for county jailers,<sup>49</sup> and no one

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<sup>44</sup> Earlier in this note the order which closed the Rowan County jail was discussed. See text accompanying note 11, *supra*. In that same county, the Circuit Court is forced to meet in the county library because the regular courthouse has been condemned by the State Fire Marshall. Lexington Herald, Nov. 13, 1975, § C, at 2, col. 1.

<sup>45</sup> KY. CONST. § 99. Kentucky is the only state in the Union with such a constitutional provision. LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS 158 (1959).

<sup>46</sup> See LEGISLATIVE RESEARCH COMMISSION, DUTIES OF ELECTED COUNTY OFFICIALS, Informational Bull. No. 99 (1972) [hereinafter cited as COUNTY OFFICIALS].

<sup>47</sup> KY. CONST. § 100.

<sup>48</sup> *Id.* at §§ 100, 228.

<sup>49</sup> The Office of Jail Consultant and the Kentucky County Jailers Association have sponsored several voluntary training measures. It should also be noted that there is a lack of trained personnel on all levels, not just on the level of custodial employees. The Kentucky Commission on Law Enforcement and Crime Prevention reported in 1969 that:

Although there are no reliable statistics on the functions of jail personnel in Kentucky, national studies show that most institutions dealing with convicted misdemeanants lack the most rudimentary correctional programs and social services . . . . The nation's 3,500 misdemeanor institutions average

can argue that experience is a proper substitute for training; the majority of Kentucky's jailers have held their positions for less than 4 years.<sup>50</sup>

The lack of organization, money, and trained personnel are problems shared by almost every state. Kentucky, unfortunately, is plagued by an additional problem, the county fee system. Because this fee structure is an important source of the system's ineffectiveness and because Kentucky is the only state which maintains this fee payment method for jailers, this structure will be analyzed and its need of revision shown.

The majority of states pay their elected county officials a set salary, with salaries often varying according to duties as well as the population and property value in the official's county. In almost every case there is some minimum salary which insures the county official a living wage. In Kentucky the situation is radically different. Jailers and other county officials are compensated according to a statutory fee schedule for services performed.<sup>51</sup>

#### Jailers Fees Paid by the State<sup>52</sup>

<u>Amount</u>	<u>Service Performed</u>
\$ .75	Imprisoning and releasing a prisoner charged with felony or contempt of court.
\$4.75	Per diem for keeping and dieting a prisoner charged with felony or contempt of court.
\$ .50	Putting in irons a prisoner charged with felony or contempt of court.
\$6.00	Per diem for attending circuit court.
up to \$2.00	Per diem for furnishing fuel, water and lights to the circuit court. <sup>53</sup>

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one psychologist for each 4,300 inmates, one academic teacher for every 1,300 prisoners, one vocational instructor for each 1,031 misdemeanants, and one social worker per 846 inmates. KENTUCKY JAILS, *supra* note 3, at 11.

<sup>50</sup> TASK FORCE REPORT, *supra* note 22, at 67.

<sup>51</sup> The fees are paid by the city, county, state and federal government, depending on who requires the services. KRS § 64.150 (Supp. 1976); KRS § 441.020 (1975). For an in depth report on the fee system see LEGISLATIVE RESEARCH COMMISSION, THE COUNTY FEE SYSTEM: A NEED FOR REVISION, Research Report No. 63 (1971) [hereinafter cited as COUNTY FEE SYSTEM].

<sup>52</sup> KRS § 64.150(3) (Supp. 1976).

<sup>53</sup> The jailer is entitled to this fee if he does nothing more than turn the courtroom

Jailers Fees Paid by the City or County<sup>54</sup>

<u>Amount</u>	<u>Service Performed</u>
\$6.00	Per diem for attending county and quarterly court.
up to \$2.00	Per diem for furnishing fuel, and lights to county and quarterly court.
\$ .50	Putting a prisoner in irons for an offense other than a felony.
\$4.75	Per diem for keeping and dieting prisoners when confined for an offense other than a felony or contempt of court.
\$ .75	Imprisoning and releasing a prisoner charged with a misdemeanor.

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lights on and off. *Talbott v. Caudill*, 58 S.W.2d 385 (Ky. 1933).

<sup>54</sup> KRS § 64.150(1) (Supp. 1976). In addition to the usual fees:

The county treasurer of any county from which a prisoner is sent to another county to be held for a court of the former county shall pay to the treasurer of the holding county the sum of \$4.00 per day for each day such prisoner is held, the payment to be in addition to any fees to which the jailer of the holding county is entitled by law.

When an out-of-state person has broken his parole and is imprisoned in a Kentucky jail, the Kentucky jailer receives the same amount to which he is entitled for imprisoning a Kentuckian charged with felony or contempt. Before the jailer can receive this fee, the state granting the probation or parole must have executed a compact with the Commonwealth of Kentucky in accordance with KRS § 439.560. Any jailer who receives and confines a person committed under the laws of the United States can collect the fees allowed by the county or state for the same type of services. [KRS § 441.020 (1975)]. If a prisoner is confined for a breach of the by-laws or ordinances of a city or for a violation of a statute where the city gets the benefit of the fine, the fees for keeping, dieting, imprisoning and releasing him are paid by the city. [KRS § 64.150(2) (Supp. 1976)]. The fiscal court can also pay the jailer a reasonable sum for his services in keeping the courthouse and public square in clean and comfortable condition. COUNTY OFFICIALS, *supra* note 46, at 88.

While no minimum is established, a jailer's total compensation may not exceed \$14,300 in any given year.<sup>55</sup> In counties with a population greater than 75,000 all collected fees are deposited with the executive department for finance and administration.<sup>56</sup> Twenty-five percent of the total collected is returned to the local fiscal court for the county's general fund; the remaining seventy-five percent is used to pay the operating cost of the jail itself as well as the salaries of the jailer and his deputy or deputies.<sup>57</sup> In counties with a population of less than 75,000, the fees are not subject to state collection or supervision.<sup>58</sup>

"[E]very two years the [Kentucky] General Assembly is confronted with demands to raise the fees being charged so that county officials may further augment their compensation and keep up with the rising cost of living."<sup>59</sup> Though the legislature has granted increases with regularity,<sup>60</sup> this is a reaction rather than a solution to the problem. During the inevitable time lag between legislative reviews, the prisoners and jailers alike suffer.<sup>61</sup>

The fee system is the Kentucky "jailer's number one problem."<sup>62</sup> A simple analysis helps dramatize this point. Because

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<sup>55</sup> KRS § 64.535 (Supp. 1976).

<sup>56</sup> KRS § 64.345(3) (Supp. 1976).

<sup>57</sup> KRS §§ 64.350, 64.345 (Supp. 1976).

<sup>58</sup> The State Auditor of Public Accounts, however, has statutory authority to examine the books of any county officer receiving or disbursing county funds. KRS § 43.070. The fiscal court of each county may also audit the jailer's books. KRS § 64.540 (Supp. 1976).

<sup>59</sup> COUNTY FEE SYSTEM, *supra* note 51, at 1.

<sup>60</sup> KRS § 64.150 (Supp. 1976). The schedule of fees has been amended on at least nine different occasions.

<sup>61</sup> There are a plethora of variations or substitutes available for the fee system including: (a) A salary scaled to county population and property assessment with a designated minimum and maximum wage, or (b) a salary system combined with a limited and modified accompanying fee structure, with all fees payable directly to the county treasurer and an expanded state accounting procedure. For details on the application of these systems in Pennsylvania, Illinois, Tennessee and other states, see COUNTY FEE SYSTEM, *supra* note 51, at 3-8.

<sup>62</sup> Statement of Lloyd B. Berry, Mason County jailer and president of the Kentucky Jailers Association. A recent questionnaire seems to establish that the rank and file agree with Mr. Berry's comment. According to that survey, written and distributed by Mr. Fred James, Local Facilities Planning Manager for the Office of Jail Consultants, 82 percent of the jailers surveyed wanted the fee system abolished. The survey also showed that a majority of the jailers surveyed wanted a minimum salary established and recommended a figure which was less than the present statutory maximum

of the fee system, a jailer's salary is a direct function of the number of prisoners he handles. Every jailer, therefore, is severely restricted in his ability to earn an income by factors completely unrelated to effort. Initially, he depends on the number of arrests made by local officers. This means that a good relationship must be maintained with these people at all costs. In addition, he is limited by the size of his county's jail. The 1973 audits of Public Accounts emphasizes the problem. Jailers in 85 counties failed to earn their statutory maximum, which was \$12,600 in 1973,<sup>63</sup> from statutory fees paid by the state. Fifty-five earned less than \$10,000 and fifteen less than \$5,000. The jailer of Robertson County for example earned the grand sum of \$628.93 from the state for his total yearly efforts, and the jailers of Carlisle, Lee and Livingston each made less than \$2,000 from the state.<sup>64</sup> The total *county and state* fees paid to jailers are not available but it is not unreasonable to conclude that the fee system fails to provide many jailers with a living wage. This forces the jailer to take outside employment in order to sustain his family. The family then assumes many of the jailer's original responsibilities; the wife often becomes matron for female prisoners, and the children substitute as deputies. The end result is an unattended or poorly attended jail. Unless reform comes soon, the responsible people presently in the system will start seeking alternate employment. "This situation is, in fact, already occurring; during the past 2 years 20 county jailers have resigned, primarily because the position did not provide a living wage."<sup>65</sup> As soon as a suitable minimum wage is guaranteed, the public will be able to demand better qualifications and training for jailers; until then public complaint cannot be justified.

The fee system fosters even greater problems for the prisoners. Because the present statute sets one per diem fee for keeping *and* feeding prisoners, there is no specific amount set

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for fees and which varied according to the class of their city. *A Survey of the Fee System*, on file at the KENTUCKY LAW JOURNAL.

<sup>63</sup> Ky. Acts, ch. 72 § 1 (1970). This was increased to \$14,300 in 1974. KRS § 64.135 (Supp. 1976).

<sup>64</sup> A county by county breakdown of state fees paid to jailers and other county officials for 1973 is available at the KENTUCKY LAW JOURNAL.

<sup>65</sup> COUNTY FEE SYSTEM, *supra* note 51, at 48.

aside to provide an adequate meal. As more money is spent feeding prisoners, less is available to pay the jailer. Conversely, the cheaper a prisoner is fed, the more the jailer makes on any given day. The choice is left solely to the jailer; the only guide is his own good conscience.

The fee system also has a damaging, though unintended, effect on the treatment of alcoholics. Over 40 percent of the inmates passing through Kentucky's county jails do so because of public drunkenness or other alcohol related offenses.<sup>66</sup> These are the jailer's bread and butter. Not only are they numbers and therefore fees, but most frequently these inmates remain in jail only overnight. The significance of this is not subtle. If a public drunk is arrested and jailed at 11:00 Saturday night and released sometime before breakfast the next morning the jailer collects fees for keeping the prisoner for two days without incurring any feeding expenses.<sup>67</sup> It is not surprising, therefore, that a local comprehensive care unit operating an alcoholic detoxification unit would be met with great opposition. Any effort at alcoholic rehabilitation is a business threat to the local jailer, an elected county official. Many states are caught in the revolving door of arrest and release of public alcoholics, but Kentucky seems to be the only state which gives the revolving door a helping shove.<sup>68</sup>

Survival of this type of inefficient system may be due more to apathy than to conscious choice. Jails are not a politically popular subject; no Kentucky governor has ever been elected because he stood up for the rights of prisoners. In addition, there has been some conjecture that the county and circuit court clerks of Kentucky support the fee system. In some ways, the fee system has proved more profitable for these individuals than for jailers.<sup>69</sup> The clerks may feel that providing for a

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<sup>66</sup> See note 3, *supra*.

<sup>67</sup> OAG 71-136.

<sup>68</sup> For case law on the problem of the alcoholic within the county jail system, see *Powell v. Texas*, 392 U.S. 514 (1967) and *Robinson v. California*, 370 U.S. 660 (1962). See also *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966). There the court held that chronic alcoholism is a defense to a charge of public intoxication and that one who has committed no crime cannot be validly sentenced as a criminal because of a lack of rehabilitative and caretaking facilities.

<sup>69</sup> The audits of Public Accounts for 1973 show that a minimal number of county clerks made less than the \$12,000 minimum in state fees and that the average circuit clerks made more than jailers.



jailer's salary would erode the entire fee system and threaten their revenue. It seems questionable, however, that their fear is justified; a salary method could certainly be structured to benefit all. Even if conscious support of the fee system does exist, its future is highly questionable. More than one observer of Kentucky politics has suggested that the recent passage of the Judicial Reform Amendment indicates a shift in political strength away from county officials and with greater state involvement in local affairs, the pressure for reform should be heightened.

### III. THE SOLUTIONS BEING CONSIDERED

Although the fee system has retained its basic character through the years, changes have occurred in other areas, especially in the last 3 years, which affect the county jail system. The importance of county facilities is slowly being recognized.<sup>70</sup> While reform has come in a somewhat piecemeal fashion, the reform that has occurred has been important. This section will focus on the recent efforts, both successful and unsuccessful, of the Office of Jail Consultants, the Department for Human Resources, and the Kentucky Advisory Commission on Criminal Justice, Standards, and Goals.

As stated previously, the Office of Jail Consultants, an organization within the Bureau of Corrections, has the only Bureau personnel who deal directly with the county jail system. The Jail Consultant assists county jailers to perform their jobs better by eliciting their voluntary participation in training programs. In addition, the consultant offers technical assistance in areas such as planning menus and devising operational standards. He also examines jail conditions and recommends improvements. The words "offer" and "recommend," however, are controlling; the Jail Consultant and his staff have no power to compel compliance with their recommendations. Instead, they attempt to convince the jailer and the local fiscal court that jail reform is in their own individual and their community's self-interest.

The Jail Consultant, nonetheless, does have some power. The Kentucky Revised Statutes require all counties desiring to

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<sup>70</sup> See Burns, *American Jail in Perspective*, 17 CRIME & DELIN. 446, 449 (1971).

construct new jail facilities or renovate old ones to make application to the state. The Bureau of Corrections must approve the plans before construction can begin.<sup>71</sup> This requirement is implemented by administrative directives promulgated by the Bureau of Corrections.<sup>72</sup> State involvement is immediate, for the Jail Consultant in addition to other corrections personnel must be involved in the institution's planning and design from almost the minute the county announces its intention to build.<sup>73</sup> In addition to being required to submit working plans to the local health department,<sup>74</sup> county officials must also allow the Department of Natural Resources and Environmental Protection, the Department of Human Resources, and the State Fire Marshall to review the plans to insure that the proposed facility will meet minimum state standards.<sup>75</sup> Only after all these agencies have approved the plans will the Bureau of Corrections begin its examination.<sup>76</sup> The Bureau scrutinizes the plans to determine if they are consistent with an overall scheme of "Criminal Justice Planning" and if they "will insure minimum standards for the health and welfare of people confined" in the jails.<sup>77</sup> While the standards' length and detail make them impossible to summarize, the probability of plan approval is slim if the detailed building, security, and safety standards are not met.

The Office of Jail Consultant further extended its influence over county jails through "The Deputy Jailer Subsidy Program,"<sup>78</sup> designed "to relieve the jailer of his 24 hour duty so that he may attend training and professional conferences,

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<sup>71</sup> KRS §§ 441.410-450 (1975).

<sup>72</sup> KY. DEPT. OF JUSTICE, BUREAU OF CORRECTIONS, PROPOSALS FOR JAIL CONSTRUCTION AND RENOVATION, DIRECTIVE #50, (Feb. 19, 1975). No regulation pursuant to KRS ch. 441 appears to have been published in the KENTUCKY ADMINISTRATIVE REGISTER as of August 1, 1976.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> This program was begun in January of 1975. See ANNUAL REPORT OF OFFICE OF JAIL CONSULTANTS 2 (1975). I was recently informed verbally by the Office of Jail Consultants that for an undesignated reason the Deputy Jailer Subsidy Program was not being refunded. This program, if explained, publicized, and refunded would be a great benefit to the county jail system.

and offer an incentive for the local government to upgrade the local jail facility.”<sup>79</sup> This program provides a minimum “net” monthly salary of \$333.00 to enable qualifying counties to hire a deputy jailer.<sup>80</sup> To qualify the county must not contain a first or second class city, and must meet *and* maintain certain security, safety, health, training, and food standards.<sup>81</sup> Like the construction standards, the guidelines a county must meet to qualify are detailed but practical. On their face these standards confront at least some of the problems previously discussed.

Unfortunately, there is no way to evaluate the method or strictness of the standards’ enforcement directly. One indirect evaluation, however, is available; only 28 jails have been accepted into program.<sup>82</sup> This indicates that only 28 jails have been certified as meeting the standards established by the Office of Jail Consultant. When one considers that no county with a first or second class city would qualify, this figure is not out of proportion to those 39 jails previously rated by the Office of Jail Consultant as good or very good. These statistics indicate that this program is a serious, well-regulated, and meaningful attempt to cause reform.

The second group with potential to act for jail reform in Kentucky is the Department for Human Resources. Unfortunately, this Department is the most inactive and ineffective organization in the reform movement to date. The majority of the Department’s power or potential power is drawn from the Confinement Facilities Health Act of 1974,<sup>83</sup> which gives it the authority and the duty to adopt regulations and standards “relating to the public health *or health aspects* of the operation of state and local confinement facilities.”<sup>84</sup> Under the provisions of this Act, the Department is also responsible for:

1. Collecting, evaluating and disseminating information from state and local confinement facilities as it relates to public health;
2. Developing a comprehensive plan for the elimination of

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<sup>79</sup> *Id.*

<sup>80</sup> Directive No. 58, *supra* note 73.

<sup>81</sup> *Id.*

<sup>82</sup> Directive No. 58, *supra* note 73.

<sup>83</sup> KRS §§ 211.920-.945 (Supp. 1976).

<sup>84</sup> KRS § 211.925 (Supp. 1976) (emphasis added).

conditions in state and local confinement facilities which adversely affect the public health or the health of anyone confined or likely to be confined therein;

3. Inspecting state and local facilities to determine their compliance with promulgated standards and investigating the operation of such facilities to determine their effect on health;

4. Advising, consulting and cooperating with other agencies in the Commonwealth regarding the effects of confinement facilities on health; and

5. Accepting public and private gifts or grants for the purpose of implementing the Act.<sup>85</sup>

As of August 1, 1976, however, this Department has published only one regulation pursuant to the Act.<sup>86</sup> This regulation, dealing with environmental health, regulates sanitary facilities and controls, jail equipment and facilities; cell construction; lighting, heating and cooling; ventilation; safety; vermin control; bedding; supplies for inmates; food service; and food manufacturing; but does not cover medical and dental care, or jailer training.<sup>87</sup> In addition, this regulation establishes a less rigorous and less specific standard for existing facilities than for new facilities:

Notwithstanding the other provisions of this regulation, existing facilities and equipment may be continued in use if in good repair, capable of being maintained in a sanitary condition, and creates [sic] no public health hazard.<sup>88</sup>

A limited exemption to existing facilities is both practical and realistic; one cannot shut down the entire county jail system while awaiting an alternative place to house prisoners. It is unfortunate, however, that the regulation does not provide a more specific time table or incentive for reform in the counties with older jails. It is also unfortunate that there is no public evidence that the Department of Human Resources has taken

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<sup>85</sup> *Id.*

<sup>86</sup> 902 Ky. ADMIN. REG. 9:010, *printed in 2 ADMINISTRATIVE REGISTER OF KENTUCKY* 541 (1976).

<sup>87</sup> Draft copies of proposed standards for medical care and dental care have circulated in Frankfort since December 5, 1974.

<sup>88</sup> 902 Ky. ADMIN. REG. 9:010 § 13, *printed in 2 ADMINISTRATIVE REGISTER OF KENTUCKY* 542 (1976).

an aggressive stance on their other statutory duties under the Act.

There are several possible reasons for the inadequacy and delay in the publication of regulations pursuant to the Confinement Facilities Health Act.<sup>89</sup> In addition to the Act being an attempt to initiate state regulation of an area that has historically been left to strict local control, and the fact that 1975 was a gubernatorial election year, one must also consider the explosiveness of the Act, itself. The impact of the Act is found not only in its current and anticipated regulations but also in its promise of enforcement; enforcement that could close down a significant number of Kentucky's jails. Any person confined in a facility which does not meet the rules, regulations, or standards duly established by Human Resources may petition the appropriate court for transfer to a facility which is properly maintained.<sup>90</sup> Under the fee system a jailer of a noncomplying jail will eventually be run out of business or forced to meet the minimum standards. In rural areas, one can picture jailers competing to provide detention services. The pressure is even stronger on fiscal courts, for the statute explicitly states that:

The governmental unit having jurisdiction over the confined person shall pay the cost of the transfer and shall pay the supervising and maintaining authorities, at the approved facility to which the person is transferred, all lawful charges related to the daily maintenance and supervision of the confined person.<sup>91</sup>

It is evident that the heart of this Act, the enforcement procedure, hinges on the existence of the fee system. Jailers are concerned with prisoners' transfers to qualifying institutions only because they are dependent on the per prisoner per diem fee. If the fee system is revised or replaced, this Act and its

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<sup>89</sup> KRS § 211.930 (Supp. 1976) provides:

Six (6) months after June 21, 1974, no person responsible for the supervision or maintenance of a state or local confinement facility shall knowingly cause or permit such facility to be operated in violation of rules, regulations, or standards promulgated by the department pursuant to KRS §§ 211.920-.945.

No regulation was promulgated by the department until almost 2 years after the passage of the statute.

<sup>90</sup> KRS § 211.940 (Supp. 1976).

<sup>91</sup> *Id.*

transfer provisions must also be modified or the effectiveness of the Act will be eroded.

The third organization affecting county jail reform is the Kentucky Advisory Commission on Criminal Justice Standards and Goals<sup>92</sup> (hereinafter referred to as the Kentucky Commission or the Commission). The Commission was created by the state government to propose a comprehensive set of standards for the entire state criminal justice system. In the area of corrections, the Commission has or will consider the rights of offenders, pretrial release and detention, sentencing, classification of offenders, juvenile intake and detention, local adult facilities, and probation and parole. Standards or recommendations forwarded by the Commission, however, do not have the force of law, and are not intended to have an immediate impact. Rather, they serve as a broad and long term plan of action, a series of guidelines for future legislative efforts. Ultimately, the standards may also effect the direction and dispersal of federal money, including Law Enforcement Assistance Agency funds, to various state agencies.<sup>93</sup>

The highest level of the Commission is composed of the Kentucky Crime Commission's Executive Committee plus four additional gubernatorial appointees. The Commission is then broken into five separate Task Forces, each assigned a different sector of the criminal justice system, Courts, Corrections, Police, Juvenile Delinquency, and Assessment (a catch-all Task Force). Several of the Task Forces are further departmentalized into subcommittees, which are normally the working, producing bodies of the Task Force and the Commission.

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<sup>92</sup> The majority of information regarding this Commission was obtained in an interview with Gerard R. Gerhard, Kentucky Department of Justice, Probe Unit, in Frankfort, Ky., Nov. 1975.

<sup>93</sup> The initiative for this Commission was largely federal. A distribution of LEAA funds was originally provided for under the Crime Control Act of 1973, PL 93-83 (87 Stat. 197) and the Omnibus Crime Control and Safe Streets Act of 1968, PL 90-351 (82 Stat. 197). As a prerequisite to the receipt of such funds, the LEAA now requires that each state develop standards and a long term plan for its justice system. LEAA feels that this requirement can be satisfied if each state would "address" itself to the standards and recommendations already formulated by the National Advisory Commission on Criminal Justice Standards and Goals. The National Standards were published in 1973 and are available in several volumes through the U.S. Government Printing Office. The standards for local jails are contained in NATIONAL ADVISORY COMMISSION, REPORT ON CORRECTIONS (1973).

One Task Force which is structured into subcommittees is Corrections. One of its subcommittees is assigned solely to the review of standards for the operation of local institutions. This Local Institutions Subcommittee consists of jailers, lawyers, psychologists, and other persons involved in criminal rehabilitation. The subcommittee has approved many recommendations and forwarded them to its parent Task Force.<sup>94</sup> In an effort to modify the existing fee system, the subcommittee has recommended that all county fees be pooled through the Kentucky Association for County Officials, that a budget commission be established within each county and a statewide commission established to subsidize needy counties, and that a minimum salary of \$10,500 be guaranteed for all elected county officials. In addition, the subcommittee refused to support the creation of a newly elected county budget officer, but supported an optional budget officer to coordinate the county budget. The subcommittee also favored legislation to develop the concept of regional jails, provided a salary for local jailers was guaranteed. Other legislation favored by the subcommittee included legislation to permit counties and local governments to contract with the state to provide their own correction services and facilities, and legislation to create the Office of Jail Consultant as an autonomous body responsible to the Secretary of Justice. This legislation would give the Jail Consultants the authority to coordinate the inspection duties of other agencies and to initiate condemnation proceedings when necessary. Furthermore, the subcommittee recommended the development of legislation which would require training standards for jailers and support personnel before fees could be received for housing state prisoners.

While there is no assurance that the Task Force will accept these recommendations or that the General Assembly will act in accordance with them, their content provides still another indication of the wide-spread dissatisfaction with the fee system and the overall condition of Kentucky's jails.

The efforts of these three groups have been reviewed and to some extent incorporated in a recent report commissioned

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<sup>94</sup> Memorandum from George W. Wilson—Probe, Criminal Justice Planning Analyst, to the Local Institution Subcommittee, October 16, 1975. This memorandum summarizes the subcommittee's actions taken on October 2, 1975.

by the Commonwealth and published on December 1, 1975.<sup>95</sup> This report notes that 40 percent of Kentucky's jail population is awaiting trial, 38 percent actually serving sentences, and 19 percent either awaiting sentence or awaiting transfer to other facilities.<sup>96</sup> The report also comments on the lack of training or experience requirements<sup>97</sup> and adds that, according to their surveys, the "interpersonal skills" of Kentucky's jailers are "far below minimal levels of effectiveness."<sup>98</sup> Summarizing the status of Kentucky's jails the report states that: "For 95% of the population, the jails are simply a warehouse—no more, no less. And the effects are evident."<sup>99</sup>

The report also makes a series of recommendations. It suggests the immediate adoption of a comprehensive system of regional jails to insure the economies of scale in the construction and maintenance of facilities and to insure the continued existence of facilities capable of providing rehabilitation, sanitary conditions and proper security.<sup>100</sup> The report also recommends that the fee system be immediately replaced with a guaranteed salary,<sup>101</sup> and encourages the immediate development of a prisoner rehabilitation program, a comprehensive series of regulations governing jail quality and a similar series of regulations governing staff training.<sup>102</sup> Finally, as a future goal, the report proposes that the role of regional jails be expanded to include the housing of convicted felons who have drawn short sentences or are in need of pre-release services.<sup>103</sup> This would typically include the felon who will be eligible for parole in less than a year.<sup>104</sup>

These recommendations have yet to be formally acted on by the state's legislative or executive department.<sup>105</sup> Indeed it

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<sup>95</sup> CARKHUFF ASSOCIATES, KENTUCKY MASTER PLAN FOR ADULT CORRECTIONAL SERVICES (1975).

<sup>96</sup> *Id.* at 48.

<sup>97</sup> *Id.* at 49.

<sup>98</sup> *Id.* at 50.

<sup>99</sup> *Id.* at 51.

<sup>100</sup> *Id.* at 308. A total of 26 regional jails are listed, chosen for their location, population size and present facilities. *Id.* at 314-22.

<sup>101</sup> *Id.* at 324.

<sup>102</sup> *Id.* at 325-28.

<sup>103</sup> *Id.* at 328.

<sup>104</sup> *Id.* at 329.

<sup>105</sup> In an interview, November 16, 1976, Lloyd Berry, President of the Kentucky



is difficult to forecast how quickly any reaction might be forthcoming. If it achieves nothing else, however, the report once again emphasizes the basic need for reform.

#### IV. COURT ORDERED REFORM

Thus far, we have discussed the extent of the county jail problem, its reasons and causes, and the administrative and legislative solutions which have been proposed or are currently in force. If the remedies discussed in section III prove ineffective, the practitioner must turn to the courts.<sup>106</sup>

##### A. *Mandamus*

One option is the initiation of court ordered reform through petition for a writ of mandamus against the jail or county officials. Although this process has been rated by many commentators as the least useful of the four procedures to be discussed in accomplishing reform,<sup>107</sup> it is still important.

The federal statute governing mandatory relief states that: "[T]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."<sup>108</sup> This statute appears to be of limited utility when applied to county jails because the various officials involved are neither officers nor employees of the United States, but it could still be relevant if federal prisoners were being housed in county jails. Under such a contractual arrangement the local officials might be construed as United States employees. While the federal statute may thus provide mandamus relief in limited circumstances, it is more appropriate to focus on mandatory relief under state law.

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Jailers Association stated that Governor Julian Carroll has agreed to place legislation regarding minimum salaries for jailers, prisoner dieting and prisoner medical standards before the Special Session of the Legislature, scheduled for December of 1976. Located in Maysville Ledger Independent, (Nov. 16, 1976), p. 1.

<sup>106</sup> See generally Zagaris, *Recent Developments in Prison Litigation: Procedural Issues and Remedies*, 14 SANTA CLARA LAWYER 810 (1974).

<sup>107</sup> See Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970).

<sup>108</sup> 28 U.S.C. § 1361 (1970). For a more complete discussion of the law of mandatory relief in the federal courts see K. DAVIS, *ADMINISTRATIVE LAW* §§ 23.09, 23.10 (Supp. 1970).

Even though the writ of mandamus has technically been abolished in the Commonwealth of Kentucky, the applicable Rule of Civil Procedure states that:

Relief heretofore available by the remedies of mandamus, prohibition, scire facias, [or] quo warranto . . . may be obtained by appropriate action or by appropriate motion, for injunction or otherwise, under the practice prescribed in these Rules . . . .<sup>109</sup>

It is clear, therefore, that one can still maintain an action to realize the substantive rights once achieved through mandamus.<sup>110</sup> The purpose of this form of action is to compel the performance of a duty owed the petitioner. Mandamus may be used only to direct how a *ministerial* duty is to be performed or to direct that a *discretionary* duty must be performed. It cannot, however, be used to direct *how* the discretionary power is to be carried out.<sup>111</sup> To use the mandamus type action to achieve jail reform, the practitioner must be cognizant of this discretionary-ministerial dichotomy. It is also important to note that mandamus proceedings must be initiated against the individual member or members of the agency whose actions are sought to be controlled, not the agency itself.<sup>112</sup>

Kentucky establishes the duties of the county fiscal courts and jailers by statute. "[F]iscal court(s) may: . . . (4) Secure a sufficient jail and a comfortable and convenient place for holding court at the county seat . . . ." <sup>113</sup> and the Kentucky Court of Appeals has stated that:

The refusal of the fiscal court to appropriate any amount, or not a sufficiency to enable the jailer to perform his duties outside of and beyond the keeping of prisoners under his charge, may be corrected by mandatory orders of the circuit court in appropriate actions for that purpose . . . .<sup>114</sup>

While this rationale embraces a suit by the jailer against the

<sup>109</sup> Ky. R. Civ. P. 81.

<sup>110</sup> CLAY, KENTUCKY PRACTICE CIVIL RULE 81 (3d ed. 1974).

<sup>111</sup> Crawford v. Lewis, 186 S.W. 492, 493 (Ky. 1916).

<sup>112</sup> Turner v. Department of Parole & Probation, 394 S.W.2d 889, 890 (Ky. 1965); Bruner v. City of Danville, 394 S.W.2d 939 (Ky. 1965).

<sup>113</sup> KRS § 67.080(4) (Supp. 1976).

<sup>114</sup> Leslie County v. Hensley, 125 S.W.2d 255, 256 (Ky. 1939). See also Bath County v. United Disinfectant Co., 58 S.W.2d 239 (Ky. 1933).

fiscal court, a similar suit could be initiated by one of the jail's inmates.

The jailer's obligations, also statutorily imposed, include the duty to "keep the jail comfortably warm, and clean and free from nauseous odors, and . . . provide prisoners confined in the jail with a sufficiency of bedclothing to make them comfortable."<sup>115</sup> Jailers must also treat prisoners "humanely and furnish them with proper food and lodging during their confinement."<sup>116</sup> In light of this statutory language there is little merit to an argument that these duties are discretionary. The jailer is required by statute to perform these ministerial functions, and actions against the jailer to compel performance would significantly promote jail reform.

### B. *Damages in Tort*

The county jail prisoner's second potential remedy is a suit in tort for damages. *Hall v. Midwest Bottled Gas Distributors, Inc.*<sup>117</sup> is a recent example of this approach in Kentucky. In this case prisoners were killed when a fellow prisoner caused an explosion by breaking an exposed gas line in the jail's bullpen. The estates of the deceased inmates sued alleging that the jailer, his assistant, and the members of the local fiscal court were negligent in breaching their duty to control and supervise the county jail. After the trial court granted the defendants' motion for summary judgment, the Court of Appeals affirmed the judgment in favor of the fiscal court members, but held that the question of negligence by the jailer and his assistant should have gone to the jury.<sup>118</sup> The Court's analysis provides a good synopsis of Kentucky's law concerning damages due to the operation of county jails.

While jailers and jailers' assistants have the duty to protect prisoners from unnecessary or illegal harm,<sup>119</sup> they are not negligent if they merely fail to prevent what they could not reasonably anticipate.<sup>120</sup> Whether the jailer knew or should

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<sup>115</sup> KRS § 71.030.

<sup>116</sup> KRS § 71.040.

<sup>117</sup> 532 S.W.2d 449 (Ky. 1976).

<sup>118</sup> *Id.* at 453.

<sup>119</sup> *Id.* at 452; *Ratliff v. Stanley*, 7 S.W.2d 230 (Ky. 1928).

<sup>120</sup> *Louisville v. Humphrey*, 461 S.W.2d 352 (Ky. 1971); *City of Lexington v.*

have known that a prisoner was in danger is a question of fact.<sup>121</sup> The fiscal court and its members individually also owe county prisoners a duty of care and this duty too can be enforced through mandamus type injunctions.<sup>122</sup> In addition, there is potential liability for damages. As with jailers the liability of the fiscal court and its members is a question of fact turning on foreseeability and reasonable anticipation.<sup>123</sup>

An obstacle to recovering from county officials in their individual capacity, however, is the concept of official immunity. This common law theory is an attempt to allow officials to perform their public duties while remaining free from the threat of personal liability.<sup>124</sup> Although this does not insulate the official from declaratory or injunctive relief,<sup>125</sup> he will not be liable for damages resulting from performance of his official tasks unless he acted in bad faith. "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."<sup>126</sup> This immunity is not a per se bar to suit but is an affirmative defense, to be raised on the merits.<sup>127</sup> Like any other affirmative defense, it can be waived and should not therefore prevent the initiation of the suit. Even if stripped of all possible immunities, the public officer in the ordinary situation will be liable only for his own negligence or misfeasance. He is liable for the conduct of

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Greenhow, 451 S.W.2d 424 (Ky. 1970); *Ratliff v. Stanley*, 7 S.W.2d 230 (Ky. 1928).

<sup>121</sup> *Glover v. Hazelwood*, 387 S.W.2d 600 (Ky. 1964); *Lamb v. Clark*, 138 S.W.2d 350 (Ky. 1940). *But see* *Bartlett v. Commonwealth*, 418 S.W.2d 225, 228 (Ky. 1967). If the injured prisoner is a juvenile the theory of *loco parentis* may increase the jailer's duty by creating a presumption of notice. *Id.*

<sup>122</sup> See text accompanying notes 106 to 116, *supra*.

<sup>123</sup> The majority of Kentucky cases involve one prisoner injuring another. This situation always raises the issue of whether the prisoner's action intervenes and supercedes any negligence by county officials. *E.g.*, *Hall v. Midwest Bottled Gas Distributors, Inc.*, 532 S.W.2d 449 (Ky. 1976). What is needed is a suit involving injuries caused primarily by the jail's physical condition. In such a case the local grand jury reports and state ratings would prove to be valuable evidence in determining whether an injury was foreseeable.

<sup>124</sup> *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974).

<sup>125</sup> *Ex parte Young*, 209 U.S. 123 (1908); *Shehan v. Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974), *vacated on other grounds*, 421 U.S. 983 (1975).

<sup>126</sup> *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974).

<sup>127</sup> *Weathers v. West Yuma County School Dist. R-J-1*, 387 F. Supp. 552 (D. Colo. 1974).

his employees only if he fails to employ persons of reasonable skill.<sup>128</sup>

Similarly, a suit against the governmental entity itself and not the individual official presents a possible defense of sovereign immunity. While the Federal Tort Claims Act removes this obstacle for a federal prisoner detained in a federal prison,<sup>129</sup> the defense of sovereign immunity still presents problems for state, county, and city prisoners.

In the midst of severe criticism of the immunity defenses, a majority of jurisdictions have at least partially rejected the doctrine of sovereign immunity.<sup>130</sup> The leading case in this decline involved a prisoner who suffocated when fire broke out in an unattended city jail.<sup>131</sup> In Kentucky, sovereign immunity has been limited but not completely abandoned. Kentucky has established a board of claims to compensate for personal or property damage proximately caused by negligence of the Commonwealth; its departments or agencies; or its officers, agents, or employees acting within the scope of their employment.<sup>132</sup> This statute, however, does not allow recovery for pain and suffering,<sup>133</sup> and places an overall limit of \$20,000 on recovery.<sup>134</sup>

Moreover, the board of claims statute has several glaring deficiencies when dealing with suits concerning county jails. First, the board lacks jurisdiction over suits prosecuted against individual state officials or agents. For this reason the question of official immunity still exists.<sup>135</sup> In addition, the board of claims statute does not waive the immunity of county govern-

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<sup>128</sup> *Moores v. Fayette County*, 418 S.W.2d 412 (Ky. 1967). This case raises the interesting question of whether members of the fiscal court could be individually liable for the acts of an untrained or inexperienced jailer under the theory of *respondet superior*.

<sup>129</sup> 28 U.S.C. §§ 1346, 2680 (1970); *United States v. Muniz*, 374 U.S. 150 (1963). *But see* 28 U.S.C. § 2671 which exempts contractors from the Act's coverage. *See also* *Close v. United States*, 397 F.2d 686 (D.C. Cir. 1968), indicating that the waiver of immunity should be extended to federal prisoners incarcerated in nonfederal institutions.

<sup>130</sup> W. PROSSER, *TORTS* 985 (4th ed. 1971).

<sup>131</sup> *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957).

<sup>132</sup> KRS § 44.070 (Supp. 1976).

<sup>133</sup> KRS § 44.070(1) (Supp. 1976).

<sup>134</sup> KRS § 44.070(5) (Supp. 1976).

<sup>135</sup> *See* *Slusher v. Miracle*, 382 S.W.2d 867 (Ky. 1964); *Spillman v. Beauchamp*, 362 S.W.2d 33 (Ky. 1962).

ments.<sup>136</sup> Although counties are not immune from suit under the 11th amendment,<sup>137</sup> a series of cases indicate that Kentucky counties are still protected by the doctrine of sovereign immunity;<sup>138</sup> these cases appear to represent the current state of the law even though they were decided before passage of the most recent board of claims statute.<sup>139</sup> It is ironic that a county can enjoy the protection of sovereign immunity because it is a political subdivision and yet avoid the state's statutory abrogation of the doctrine.

Another paradox in Kentucky law is that a city jail prisoner may be able to sue for damages whereas a county prisoner may not. The doctrine of municipal immunity was partially abrogated in *Haney v. City of Lexington*.<sup>140</sup> In *Haney*, the Court concluded that municipal corporations may be liable for the torts committed by their agents in the scope of employment. The Court further stated, however, that "[i]t is not our intention at this time to consider the liability of any governmental unit other than that of a municipal corporation and its agents."<sup>141</sup> This decision was reconsidered and explained in *City of Louisville v. Louisville Seed Co.*,<sup>142</sup> and *City of Lexington v. Yank*.<sup>143</sup>

Where the act affects all members of the general public alike, it would be unreasonable to apply to it the broad principles of tort liability . . . . But, when the city, by its dealings or activities, seeks out or separates the individual from the general public and deals with him on an individual basis, as any other person might do, it then should be subjected to the

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<sup>136</sup> *Ginter v. Montgomery County*, 327 S.W.2d 98, 100 (Ky. 1959).

<sup>137</sup> *Lincoln County v. Luning*, 133 U.S. 529 (1890). See also *Edelman v. Jordan*, 415 U.S. 651 (1974).

<sup>138</sup> *Jones v. Board of Educ.*, 470 S.W.2d 829 (Ky. 1971); *Board of Educ. v. Lewis*, 449 S.W.2d 765 (Ky. 1970); *Moores v. Fayette County*, 418 S.W.2d 412 (Ky. 1967); *Cullinan v. Jefferson County*, 418 S.W.2d 407 (Ky. 1967).

One possible way to reach the county is to successfully argue that the county is maintaining a public nuisance. *Brown v. Marshall County*, 394 F.2d 498 (6th Cir. 1968). See also *Edelman v. Jordan*, 415 U.S. 657 (1974), for a case involving sovereign immunity when a state official is sued in federal court for violation of the federal law or constitution.

<sup>139</sup> KRS § 44.070 (Supp. 1976).

<sup>140</sup> 386 S.W.2d 738 (Ky. 1964).

<sup>141</sup> *Id.* at 742.

<sup>142</sup> 433 S.W.2d 638 (Ky. 1968).

<sup>143</sup> 431 S.W.2d 892 (Ky. 1968).

same rules of tort liability as are generally applied between individuals. This, likewise, is true when the negligent act of the city per chance falls upon the isolated citizen as distinguished from the general public. When the act does not involve the ultimate function of government, the city should be required to respond in damages. This is true without regard to whether the function would have been classified as proprietary or governmental under our old classification.<sup>144</sup>

It has not yet been determined whether the operation of a jail is an "ultimate function of government" which "affects all members of the public alike." Only after this determination is made will it be clear whether city prisoners in fact can avoid the defense of sovereign immunity.

Although the practitioner must expect to encounter both sovereign and official immunity, he should always sue governmental representatives in both their official and individual capacities. The doctrine of sovereign immunity does not bar a suit against the individual, and official immunity does not affect a suit for acts outside official capacities. In addition, both immunities can be waived.

### C. *Habeas Corpus*

The third procedure available to secure reform for the county prisoner is the writ of habeas corpus.<sup>145</sup> This writ will generally be issued whenever a person is confined in violation of the federal constitution or federal law.<sup>146</sup> The eighth amendment, mandating that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*,"<sup>147</sup> and applied to the states through the fourteenth amendment, is the federal provision normally relied upon to activate the habeas corpus sections and mandate jail reform.<sup>148</sup> Although the writ's use was once limited to challenges to a conviction's validity rather than challenges to the

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<sup>144</sup> *Id.* at 894, quoting *City of Louisville v. Louisville Seed Co.*, 433 S.W.2d 638, 643 (Ky. 1968).

<sup>145</sup> 28 U.S.C. §§ 2241-2255 (1970).

<sup>146</sup> 28 U.S.C. § 2241 (c)(3) (1970).

<sup>147</sup> U.S. CONST. amend. VIII (emphasis added).

<sup>148</sup> *E.g.*, *Konigsberg v. Ciccone*, 285 F. Supp. 585 (W.D. Mo. 1968), *aff'd* 417 F.2d 161 (8th Cir. 1969), *cert. denied*, 397 U.S. 963 (1970).

conditions of incarceration, it is now recognized that habeas corpus is appropriate to secure release from conditions which constitute cruel and unusual punishment.<sup>149</sup>

While the crucial question is usually what constitutes "cruel and unusual punishment," the case law dealing with this question does not provide a list of conditions which will always be considered violations. A federal district court in Ohio, for example, found that:

[C]onfinement in cramped and overcrowded quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts . . . no exercise or recreation, little if any medical attention [and] no attempt at rehabilitation [was cruel and unusual punishment] . . . .<sup>150</sup>

Another federal case states that the adequacy of confinement conditions, such as medical treatment and physical facilities, can be considered in finding a violation of the eighth amendment.<sup>151</sup> The real problem for the petitioner in the quest for jail reform is that one cannot generalize from courts' statements; each jail must be considered separately and what is found to be "cruel and unusual" depends on the philosophy and experience of the finder of fact.<sup>152</sup>

A Washington habeas corpus case, *Woods v. Burton*,<sup>153</sup> deserves special attention. Washington, like Kentucky, had a series of minimum administrative standards for the operation of jails and other detention facilities. While these standards were published by the director of Washington's Department of Institutions, they were only recommendations, not laws or regulations with the force of law. The court conceded that the jail in question violated the minimum standards in at least 25 ways, but denied the writ stating that the conditions were not

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<sup>149</sup> Coffin v. Richard, 143 F.2d 443 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945).

<sup>150</sup> Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971). For other examples of confinement found to be "cruel and unusual," see Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), remanded, 321 F. Supp. 127.

<sup>151</sup> Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).

<sup>152</sup> For a description of conditions held not to constitute cruel and unusual punishment, see Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975).

<sup>153</sup> Woods v. Burton, 503 P.2d 1079 (Wash. 1972).



such as to shock the conscience or offend human dignity. The court further noted that:

[M]inimum standards do not provide remedies for enforcement, nor do they establish penalties for non-compliance. These are legislative problems which the court should not resolve. We would hope, however, [that] . . . these conditions will be improved.<sup>154</sup>

In short the violation of "minimum standards" is not cruel and unusual punishment per se.

Although habeas corpus is the correct avenue for relief when the immediate objective is the release of the person in confinement, section 1983 of the 1871 Civil Rights Act<sup>155</sup> may be more productive especially when a damage award is sought.<sup>156</sup> Section 1983 may be preferred for several reasons.

A state or county prisoner may not seek a writ of habeas corpus until all available state remedies have been exhausted,<sup>157</sup> and no state remedy heretofore available may be "deliberately bypassed."<sup>158</sup> In most cases this will delay the prisoner's relief. This exhaustion is not required in the pursuit of section 1983 remedies.<sup>159</sup> In addition, the Federal Rules of Civil Procedure provide liberal discovery for all suits under the Civil Rights Act while discovery in habeas corpus proceedings is available only upon application to the court.<sup>160</sup> Actions under section 1983 may also be brought on behalf of a class, thus providing the possibility of broad injunctive relief. The writ of habeas corpus, on the other hand, is not available to a class and

<sup>154</sup> *Id.* at 1082.

<sup>155</sup> Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). See also section IV (D), *infra*.

<sup>156</sup> The Supreme Court sought to define the relationship of habeas corpus to section 1983 in *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

<sup>157</sup> 28 U.S.C. § 2254(b) (1970). See *Faye v. Noia*, 372 U.S. 391 (1963).

<sup>158</sup> *Murch v. Mottram*, 409 U.S. 41 (1972); *Henry v. Mississippi*, 379 U.S. 443 (1965); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>159</sup> *Wilwording v. Swenson*, 404 U.S. 249 (1971); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961); *Palmigiano v. Mullen*, 491 F.2d 978 (1st Cir. 1974). See also *Edwards v. Schmidt*, 321 F. Supp. 68 (W.D. Wisc. 1971).

Some courts have suggested that exhaustion may be required when a truly effective state grievance procedure has been bypassed by the prisoner. *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970); *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973); *Hyde v. Fitzberger*, 365 F. Supp. 1021 (D. Md. 1973).

<sup>160</sup> See *Harris v. Nelson*, 394 U.S. 286 (1969). See also *Hirshkop, Litigating an Affirmative Prisoners' Rights Action*, 11 AM. CRIM. L. REV. 39 (1972).

does not result in an injunction. Finally, contrary to popular belief, writs of habeas corpus rarely result in the prisoner's actual release.<sup>161</sup>

#### D. Section 1983

An action under 42 U.S.C. § 1983 is an often used challenge to conditions in county jails. The purpose and scope of a section 1983 action is set out in *Monroe v. Pape*.<sup>162</sup> The Supreme Court in *Monroe* held that police officers' aggravated unconstitutional search, arrest, and detention could violate section 1983, and could therefore result in personal liability.<sup>163</sup> *Monroe* emphasizes that the basic intent of the statute is to provide a federal remedy where state remedies are inadequate. In this way federal courts have concurrent jurisdiction over questions which could be litigated in state court. To obtain federal jurisdiction under 1983 the petitioner must allege that his federally guaranteed rights were abridged under the color of state law.<sup>164</sup>

While 1983 gives federal courts concurrent and not exclusive jurisdiction over suits challenging jails' conditions, federal jurisdiction is often sought. "Historically, the federal courts have provided far greater protection for those who allege denial of their constitutional rights than have state tribunals."<sup>165</sup> Moreover, federal courts will accept jurisdiction. Abstention is usually not proper in 1983 actions, and federal courts will not automatically defer to their state counterparts.<sup>166</sup>

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<sup>161</sup> C. WRIGHT, FEDERAL COURTS 217 (2d ed. 1970).

<sup>162</sup> 365 U.S. 167 (1961).

<sup>163</sup> *Id.*

<sup>164</sup> 42 U.S.C. § 1983 (1970) provides that:

Every person who, under the color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

It is clear that a federal court has jurisdiction to prohibit the action of any state or county which violates a prisoner's federally guaranteed constitutional rights. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).

<sup>165</sup> RUDOVSKY, THE RIGHTS OF PRISONERS: ACLU HANDBOOK, (1973).

<sup>166</sup> *Monroe v. Pape*, 365 U.S. 167 (1961). See also *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Taylor v. Sterrett*, 499 F.2d 367 (5th Cir. 1974).

Both legal and equitable relief can be sought under section 1983. In *Johnson v. Lark*<sup>167</sup> a federal prisoner awaiting trial in the St. Louis city jail sought this twin relief.<sup>168</sup> Mr. Johnson used 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. § 2201 to bring a class action on behalf of all the jail's federal prisoners,<sup>169</sup> and prayed for injunctive relief alleging that incarceration in the St. Louis jail was cruel and unusual punishment.<sup>170</sup> There was also a demand for damages for breach of contract. Johnson asserted that the jail's conditions breached a contractual arrangement under which federal prisoners were housed in the city institution, and as third party beneficiaries the prisoners were due damages.<sup>171</sup> The court allowed the injunction<sup>172</sup> but

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<sup>167</sup> 365 F. Supp. 289 (E.D. Mo. 1973).

<sup>168</sup> It is important to distinguish between pretrial detainees and convicted prisoners. Conditions, restrictions, and treatment that may be justified in the case of convicted prisoners will not always be permissible when dealing with the unconvicted. Otherwise the presumption of innocence is meaningless.

Incarceration after conviction is imposed to punish, deter, and to rehabilitate the convict . . . . Some freedom to accomplish these ends must of necessity be afforded prisoner personnel. Conversely, where incarceration is imposed prior to conviction, deterrence, punishment, and retribution are not legitimate functions of the incarcerating officials. Their role is but a temporary holding operation and their necessary freedom of action is concomitantly diminished. *Anderson v. Nossner*, 438 F.2d 183, 190 (5th Cir. 1971).

There are a number of cases which involve the rights of the pretrial detainee: *Cudnick v. Kreiger*, 392 F. Supp. 305 (E.D. Ohio 1974); *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y. 1974); *Mohr v. Jordan*, 370 F. Supp. 1149 (D.C. Md. 1974); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973); *Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971); *Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971); *Davis v. Lindsay*, 321 F. Supp. 1134 (S.D.N.Y. 1970). See also Comment, *Discipline in Jails: Due Process Rights of Pre-Trial Detainees*, 54 B.U.L. REV. 796 (1974).

The question of pretrial rights may become quite important in Kentucky where the conditions in state prisons for convicted felons arguably are superior to those in many county jails.

<sup>169</sup> *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973).

<sup>170</sup> The typical jail inmate's suit involves either the 8th amendment in "condition" cases or the 14th amendment due process clause in "discipline" cases.

For additional detail, see: ANNOT., 51 A.L.R. 3rd 111 (1973); Comment, *The Role of the Eighth Amendment in Prison Reform*, 38 U. ARIZ. L. REV. 647 (1971); Comment, *The Eighth Amendment and Prison Reform*, 51 N. CAR. L. REV. 1539 (1973).

<sup>171</sup> 18 U.S.C. § 4002 (1970) is the basic statute controlling questions involving federal prisoners in state jails. This same argument could potentially be used by a state prisoner in a county jail under the fee system.

<sup>172</sup> In their order the court included specific regulations governing the maximum number of prisoners to be housed in the jail, the capacity of which was 433 prisoners, although it housed 542 inmates when this action was commenced. The order also

did not grant damages; 18 U.S.C. § 4002, said the court, was not intended as a basis for a private, civil cause of action.

It was not surprising that the *Johnson* court did not allow damages; damages under § 1983 are probable only when a prisoner can show intentional misconduct by jail officials coupled with a serious violation of his constitutional rights.<sup>173</sup> Damages have been awarded or would clearly be appropriate when a prisoner suffers physical or mental injury from illegal solitary confinement,<sup>174</sup> loses the advantages of work details or work release because of illegal solitary confinement,<sup>175</sup> or suffers physical or mental injuries or aggravates existing injuries because medical treatment is refused or not available.<sup>176</sup> Prisoners

regulated the use of segregation cells and corporal punishment, and the proper maintenance of the facility. *Johnson v. Lark*, 365 F. Supp. 289, 304-305 (E.D. Mo. 1973).

<sup>173</sup> *Roberts v. Williams*, 302 F. Supp. 972 (N.D. Miss. 1969). See also *Barnes v. Dorsey*, 480 F.2d 1057 (8th Cir. 1973); *Cates v. Ciccone*, 422 F.2d 926 (8th Cir. 1970).

Just how difficult it is to get damages is shown by the court's decision in *Rodgers v. Westbrook*, 362 F. Supp. 353 (E.D. Mo. 1973). The court granted that:

[C]onditions at the jail were as follows: no attendant on duty at any time; confinement in an open bullpen; no medical care present; jail dirty and filthy with rats and cockroaches; two meals a day; two steel cots, four mattresses and four blankets that were dirty and filthy; toilet that does not flush completely and washbasin (also to drink from) that does not drain properly; broken windows and glass all over jail; no visiting hours; butane gas heater with pilot light that goes out and leaks fumes all over jail; mail censored; inadequate lighting; homicidal maniac incarcerated with plaintiff in jail one night; and verbal abuse by the sheriff. *Id.* at 354.

Nevertheless, the court concluded:

Collectively, the conditions set forth in the complaint, while unpleasant, do not rise to such a level as to "shock the general conscience or to be intolerable in fundamental fairness . . . ."

. . . .

The allowance of damages in this instance under 42 U.S.C.A. § 1983 would be attacking a presumptively invalid state conviction, and, in effect, circumvent the recognized doctrine of comity which allows the state courts to test the validity of a conviction before the federal courts. *Id.* at 355.

<sup>174</sup> *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc); *Wright v. McCann*, 321 F. Supp. 127 (N.D.N.Y. 1970); *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970); See also *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Clutchette v. Procnier*, 328 F. Supp. 767 (N.D. Cal. 1971).

<sup>175</sup> *United States ex rel. Motley v. Rundle*, 340 F. Supp. 807 (E.D. Pa. 1972).

<sup>176</sup> Many federal courts, including the Eastern District of Kentucky, allow recovery for inadequacy or denial of medical care only if this "shocks the conscience of the court." *Corby v. Conboy*, 457 F.2d 251 (2d Cir. 1971); *Rimka v. Fayette County*, 360 F. Supp. 1263 (E.D. Ky. 1973). See also *Johnson v. Glick*, 481 F.2d 1078 (2d Cir. 1973); *Martinez v. Mancusi*, 443 F.2d 921 (2d Cir. 1971); *Tubert v. Eynam*, 434 F.2d 625 (9th Cir. 1970); *Kersh v. Bounds*, 364 F. Supp. 590 (W.D.N.C. 1973).

must also be able to prove the amount of damages sought under the normal remedy standards of certainty and proximate cause.<sup>177</sup> In some jurisdictions the defense of sovereign immunity must also be anticipated.<sup>178</sup>

The injunctive aspect of section 1983 is in many ways more important than its damages counterpart, since injunctive relief typically provides a more satisfactory remedy to the county jail prisoner because of the speed with which it can be obtained. Furthermore, injunctive relief under section 1983 can be fashioned to prevent future violations of constitutional rights.

Where unconstitutional prison practices are systematically employed, the courts may, in class actions, require prison officials to develop and propose for approval by the court a new plan of prison operations, or file regular reports with the court regarding progress made in eliminating violations of prisoner's rights.<sup>179</sup>

*Jones v. Wittenberg*<sup>180</sup> is an example of such an injunction. In *Jones* the prisoners of the county jail obtained a detailed court order commanding immediate improvement of the physical facilities. While the court-ordered remedial plan stopped short of ordering release, the court threatened contempt citations and fines against appropriate officials if the order was not fully and quickly carried out. The court also made it clear that the order bound not only the present jailer but his successors as well.

In a similar case, the federal district court of Arkansas ordered county jail officials to stop censoring detainees' mail; develop and implement a reasonable exercise and recreation program; inform each incoming detainee of the jail's rules of

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<sup>177</sup> *Arip v. McGrath*, No. 71-C-1388 (E.D.N.Y. Feb. 4, 1974), reported in 3 PRISON L. REPTR. 183 (1974).

<sup>178</sup> See *Baker v. Washington*, 448 F.2d 1200 (D.C. Cir. 1971).

<sup>179</sup> Ragaris, *Recent Developments in Prison Litigation: Procedural Issues and Remedies*, 14 SANTA CLARA LAWYER 810, 816 (1974).

For an example of how far the plan can go, see *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (1973). See also *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969).

<sup>180</sup> 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd* *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972) (conditions declared unconstitutional); *Jones v. Wittenberg*, 357 F. Supp. 696 (N.D. Ohio 1973) (remedial plan ordered).

conduct; provide each detainee with necessary shaving and toilet articles, clothing and laundry; make any improvements necessary to achieve an adequate and healthy cooling and ventilation system; and immediately repair and clean the jail to meet normal, nonpenal, institutional standards.<sup>181</sup> When it was discovered that these orders had not been executed, the court fined the county officials responsible for the jail's condition and operation for contempt.<sup>182</sup> The court also ordered the defendants to pay a substantial portion of the plaintiff's attorneys' fees, and did not permit them to argue that the necessary funds did not exist. "[I]nadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights."<sup>183</sup>

If the federal courts in Kentucky adopted similar policies the results would be incredible. This author is not aware of a single Kentucky county jail, even the new facility recently constructed in Fayette County, which would satisfy all the requirements demanded by the court in Arkansas.

## V. CONCLUSION

Reform of the county jail system is a necessity, and to accomplish this Kentucky must either abandon its concept of local control over county jails, or at a minimum provide for systematic and credible state inspection. This means state inspectors must be given the power of condemnation and be completely independent of local county officials and the Bureau of Corrections.

Kentucky must move toward a system of regional jails. Construction of new jail facilities should be forbidden unless it is suitable for regionalization. Sites must be predetermined, and political factors must not be controlling, even though:

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<sup>181</sup> *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971).

<sup>182</sup> *Hamilton v. Love*, 358 F. Supp. 338 (E.D. Ark. 1973).

<sup>183</sup> *Id.* See also *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) per J. Blackmun; *Valvano v. Malcolm*, 325 F. Supp. 408 (E.D.N.Y. 1971).

Our governmental structure requires that court orders be obeyed until set aside . . . . If the ordinary citizen owes this duty, then these public officials, who are charged with making and enforcing law, must be bound no less strongly by the same obligation. *Holland v. Donelson*, Civil Action No. 71-1442 (E.D. La. June 26, 1974), reported in 3 PRISON L. RPTER. 288, 290 (1974).

[R]egionalization would eliminate some elective and appointive positions, reduce patronage opportunities, and jeopardize related interests of bail bondsmen and tradesmen.<sup>184</sup>

If and when Kentucky develops a regional system, the local county jail will still exist, but with limited duties. Regulation, however, will still be required.

Kentucky needs to insure that jail personnel are adequately trained and supervised. This can be achieved by replacing the fee system and providing every jailer a decent wage. When the jailer is paid a reasonable wage, the taxpayer can demand reasonable effort. Training should also be mandatory. In addition every jail should develop and use a work release and recreational program. The responsibility for these programs as well as the facilities' physical condition rests ultimately with those who are financially responsible for the institution. At the present time this is the fiscal court. If its members fail to implement basic programs and meet basic physical plant requirements, they should be sued in both their individual and representative capacities.

The list of reforms can go on, but certainly these are some of the most essential changes. The Kentucky lawyer now faces a large and very real question, a question not involving a choice of remedy, but preceding it, a commitment to making a part of the system work again.

*William A. Hoskins*

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<sup>184</sup> Burns, *American Jail in Perspective*, 17 CRIME AND DELIN. 446, 454 (1971).