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Robert G. Lawson

University of Kentucky College of Law, lawsonr@uky.edu

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ARTICLES

Turning Jails Into Prisons—Collateral Damage from Kentucky's "War on Crime"

Robert G. Lawson¹

INTRODUCTION

AMERICA has not always incarcerated more people than any country on Earth. In 1972, the United States had about 326,000 inmates in its prisons and jails.² By the middle of 2004, this number had reached 2,131,180³—an increase of nearly 700 percent in slightly more than 30 years. In the early 1970s, America imprisoned 110 inmates for every 100,000 citizens,⁴ an incarceration rate that was slightly above the rates found in other countries;⁵ by 2004, America imprisoned 726 inmates for every 100,000 residents,⁶ an incarceration rate almost seven times higher than in the 1970s and off the charts in comparison with rates in other countries. "[T]he *average rate of imprisonment in the world is about 140 . . .* The United States . . . has an imprisonment rate of over 700 per 100,000 of its population."⁷ At least some of the lasting byproducts of these dizzying numbers should surprise no one—5.6 million Americans had served time in prison by the year 2001,⁸ 500,000 inmates leave prison every year for attempted reentries into communities around the country,⁹ and there are approximately 1000 more prisons and jails than existed just twenty years ago.¹⁰

The "war on crime" that produced these numbers for the country has

1 Charles S. Cassis Professor of Law, University of Kentucky. B.S. 1960, Berea College; J.D. 1963, University of Kentucky.

2 MARC MAUER, *RACE TO INCARCERATE* 19–20 (1999).

3 PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *PRISON AND JAIL INMATES AT MIDYEAR 2004* 1 (2005).

4 Marie Gottschalk, *Black Flower: Prisons and the Future of Incarceration*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 197 (July 2002).

5 *Id.*

6 Harrison & Beck, *supra* note 3, at 2.

7 Andrew Coyle, *Prison Reform Efforts Around the World: The Role of Prison Administrators*, 24 PAGE L. REV. 825, 825–26 (2004) (emphasis added).

8 Vincent Schiraldi, *Digging Out: As U.S. States Begin to Reduce Prison Use, Can America Turn the Corner on its Imprisonment Binge?*, 24 PAGE L. REV. 563, 563 (2004).

9 Alfred Blumstein et al., *Mass Incarceration: Perspectives on U.S. Imprisonment*, 7 U. CHI. L. SCH. ROUNDTABLE 127, 133 (2000) ("[W]e're going to have about half a million people exiting prison per year over the next number of years.").

10 Eric Schlosser, *The Prison-Industrial Complex*, 282 ATLANTIC MONTHLY 51, 52 (1998).

been waged in Kentucky with similar intensity. In the early 1970s, Kentucky held about 3,000 convicted felons in its prisons.¹¹ It had two major prisons for men, a small prison for women, and a separate facility for juveniles.¹² It had no inmates in private prisons, had none housed permanently in county jails, and “had not engaged in major prison construction for more than three decades.”¹³ By late 2005, the state held more than 19,850 felons in custody,¹⁴ an increase of more than 650 percent since the early 1970s. It operated thirteen state prison facilities (ten major prisons for men, a major prison for women, and two smaller facilities);¹⁵ it had more than 1,500 inmates housed in private prisons;¹⁶ and with all its prisons full, the state held more than 5,600 inmates in county jails across the state.¹⁷ Kentucky opened a new prison for men (almost 1,000 beds) in July 2005,¹⁸ and not long thereafter, the state contracted for an additional 400-bed private prison for women.¹⁹ Near this time, the state looked ahead and concluded that it would have 26,527 inmates by 2010 and 31,057 by 2014.²⁰ This means that the state will need a new 1000-inmate prison every year for the next decade and will incur truly staggering increases in prison operating costs.

Much has been written in recent times about the country’s long “war on crime” and its effect on prisons and prison inmates. Much less has been written about the war’s effect on jails and jail inmates, although jails may well have suffered more than prisons from the effects of the war. Jails have long been victimized by indifference and neglect, have almost always been overcrowded, and have spent most of the last thirty years simply trying to catch up with the explosions in inmate population described above. Some jails have suffered severely during this period (especially smaller jails) and now find themselves in a struggle for survival. Most other jails battle constantly to meet minimal standards and lose at least as many of these battles

11 Robert G. Lawson, *Difficult Times in Kentucky Corrections—Aftershocks of a “Tough on Crime” Philosophy*, 93 Ky. L.J. 305, 323 (2005) (“The state had 2838 inmates in 1970, 2992 in 1971, 3120 in 1972, 2991 in 1973, and 3093 in 1974, the year the new penal code was enacted into law.”).

12 *Id.* at 321–22.

13 *Id.* at 323.

14 See Ky. Dep’t of Corr., Adult Insts., Daily Count Sheet (Dec. 29, 2005) (on file with author).

15 See Ky. Dep’t of Corr., Insts. & Facilities, <http://www.corrections.ky.gov/instfac/> (last visited July 27, 2005).

16 See Ky. Dep’t of Corr., Adult Insts., *supra* note 14.

17 *Id.*

18 See Jack Brammer, *July 1 Set as Target to Open Prison*, LEXINGTON HERALD-LEADER, Feb. 11, 2005, at B1.

19 See John Cheves, *Floyd County Prison Contract Will Go to CCA*, LEXINGTON HERALD-LEADER, July 12, 2005, at A1.

20 See Ky. Dep’t of Corr., Forecasted Populations 2004–2014 (undated) (on file with author).

as they win. In the midst of such struggles, there is little room for concern over the conditions under which inmates are imprisoned and whether inmates might be made worse, rather than better, by their incarceration.²¹

The primary purpose of this article is to scrutinize Kentucky's ever-increasing reliance on local jails for the incarceration of state prisoners (hence the title of this article). This objective cannot be achieved without an examination of the problems that compel counties and cities to allow (and even encourage) the state to capture their jails for this use. The first half of the article (Parts I–IV) provides general information about jails (including some pertinent history), contains a detailed description of jail functions (including some that have descended upon jails by default), and concludes with a discussion of what the state has done over two decades to convert local jails into prisons. The second half of the article (Parts V–X) involves an unusual effort to look inside jails and prisons to determine the wisdom and potential implications of using local jails for long-term incarceration of inmates who would ordinarily serve their sentences in state prison.

I. ABOUT JAILS

A. *Introduction*

The jail as a penal institution has a very long and undistinguished history. Jails arrived on the American scene ahead of prisons and began early on to serve a multitude of purposes:

True to their English heritage the early settlers built jails as the first penal institutions. These places were either run by the sheriff or operated by one of his appointed staff. Jails held people awaiting trial as in England, those who were sentenced but not punished, and debtors . . . Jails in this period had no mission of reform or rehabilitation.²²

At first, jails were not used as places where offenders could serve full terms of incarceration. Early jails did, however, have most of the other characteristics of modern jails: they were locally owned and funded; served as an entry port for the justice system and a landing area for the underclass; displayed an exceedingly diverse and always changing inmate population;

21 See, e.g., Notes of Robert G. Lawson, Louisville Jail (Dec. 30, 2004) (on file with author) [hereinafter *Louisville Jail*]; Notes of Robert G. Lawson, Scott County Jail (Jan. 21, 2005) (on file with author) [hereinafter *Scott County Jail*].

22 KENNETH KERLE, *AMERICAN JAILS, LOOKING TO THE FUTURE* 5 (1998); see also PHILIP L. REICHEL, *CORRECTIONS: PHILOSOPHIES, PRACTICES AND PROCEDURES* 273 (2d ed. 2001) ("Jails were established in the American colonies as soon as people began gathering together in one location. One of the earliest jails was erected in 1653 at York Village, Maine; one at Williamsburg, Virginia, dated from 1701 . . .").

and contained physical facilities suitable mostly, if not exclusively, for punishment and detention.²³

The most significant and durable of these characteristics is the control that has always been exercised over jails by local government. This is significant because it has placed jails in government hands least able to afford them and has virtually guaranteed that jails will be engaged in a never-ending struggle for operating resources. In an early 1970s study of corrections, experts spoke candidly and pointedly on the subject of local control:

Typically, they are under the jurisdiction of the county government. In most instances, the local area has neither the necessary tax base from which to finance a jail adequately nor sufficient size to justify even the most rudimentary correctional programs Jails are left in a paradoxical situation: localities cling tenaciously to them but are unwilling or unable to meet even minimal standards. "The problem of American jails, put most concisely, is the problem of local control."²⁴

The situation is not so paradoxical now, thirty years later. Local control is still largely intact,²⁵ but the enthusiasm of localities for such control has withered away under the tremendous costs dumped on cities and counties by the "war on crime."

B. Inmates and Conditions

Jails are more complex than prisons and more difficult to manage, partly because of a much greater diversity in jail populations:

Jails . . . receive people who may never have been in such a situation, persons who are under the influence of alcohol or drugs at the time of their arrival [or are mentally ill], and people who range from the most violent in society to those who would never resort to violence.²⁶

At least as importantly, "jails have no control over who comes through their doors, and . . . very little control over how long people stay in their facilities."²⁷ At any time, police may elevate enforcement activities, judges may toughen their attitudes toward pretrial release, or the state may lack beds

23 REICHEL, *supra* note 22, at 273.

24 Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, *Local Adult Institutions*, in JAILS AND JUSTICE 47 (Paul F. Cromwell, Jr. ed., 1975) (citation omitted).

25 Six states are usually identified as having state owned and controlled jails: Vermont, Connecticut, Rhode Island, Delaware, Hawaii and Alaska. *See* KERLE, *supra* note 22, at 10.

26 REICHEL, *supra* note 22, at 283.

27 MARK A. CUNIFF, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, JAIL CROWDING: UNDERSTANDING JAIL POPULATION DYNAMICS 16 (Jan. 2002).

for inmates who are awaiting transfer to prison, any one of which can push a jail's population beyond its capacity. Furthermore, because jails operate under constant budgetary stress,²⁸ they are perpetually understaffed and far more likely than prisons to be stretched beyond their capabilities.

The words "overcrowding" and "poor living conditions" are almost synonymous with "jail." They have been part of the jail portrait from beginning to end, worse in some periods than others, but rarely, if ever, missing:

Beginning with one of the country's first jails (Philadelphia's Walnut Street Jail, which opened in 1773), there have been complaints about . . . poor living conditions. In 1871 the Board of State Commissioners said of the Adams County Jail in Illinois that it was "difficult to imagine any place more unfit to confine human beings than this jail, dark, damp, and extremely filthy" In 1959 Barnes and Teeters wrote that of all the places criminals are kept, jails were "the vilest from the standpoint of sanitation" By 1992 a review of jails noted that although there had been "many attempts in recent years to improve the conditions of jails, many jails are still old and plagued with inadequate security, space, and environmental problems" There seems to have been little progress from the 1770s to the 1990s.²⁹

In conducting the research needed for this article, I looked inside nine Kentucky jails, some new and some old, but saw none that can be fairly described as "vile," "filthy," or "unfit for humans." Jails may well be physically better than they have been in many decades, maybe even better than ever, and to some extent this progress must be credited to the "war on crime." They continue, however, to be plagued by overcrowding and poor living conditions, are at least as bad as most prisons, and in some instances are reminiscent of the "hard time" jails of the past.

C. Growing Importance of Jails

There are at least twice as many jails as prisons in America.³⁰ Prisons on any given day will have almost twice as many inmates as jails,³¹ but over the course of a full year, jails incarcerate a much higher number of inmates than prisons. Prisons exist mostly for one purpose (the incarceration of persons convicted of major crimes) while jails serve a multitude of purposes (holding persons for trial, holding state inmates for transfer to prison, incarceration of persons convicted of minor crimes, long term incarceration

²⁸ See NORMAN A. CARLSON ET AL., *CORRECTIONS IN THE 21ST CENTURY* 210 (1999) ("Practically every jail in every jurisdiction faces some sort of funding problem.").

²⁹ REICHEL, *supra* note 22, at 273.

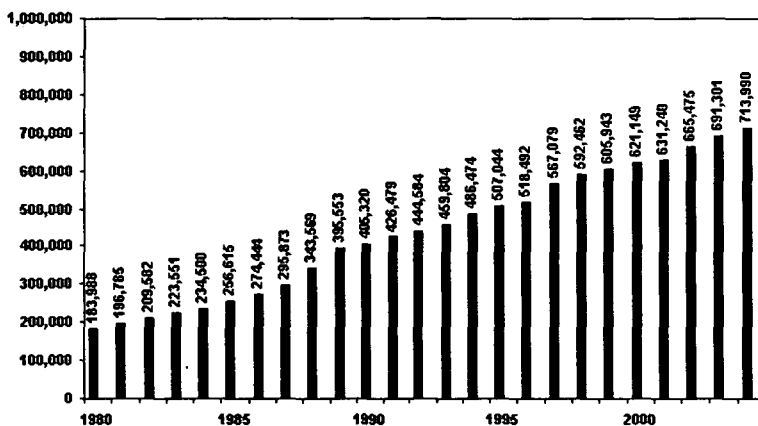
³⁰ James B. Jacobs & Elana Olitsky, *Leadership & Correctional Reform*, 24 PAGE L. REV. 477, 482 (2004) ("3,376 local jails, 1,320 state prisons, 84 federal prisons.").

³¹ See Harrison & Beck, *supra* note 3, at 1–2.

of state inmates, and some others of lesser magnitude).³² Because they do so much at so many levels of the justice system, jails are often described as the “most important” of all correctional facilities³³ and are undoubtedly more important today than they have ever been.

The country could not have waged a long and intensive “war on crime” without filling jails to the brim and beyond. Almost every person who comes into contact with the justice system enters through jails, meaning that most of the 1.41 million people now in prison and the more than five million people on probation and parole spent at least a short period of time in a local jail.³⁴ The toughness that has pushed the prison population off the charts has, over time, done much the same to the jail population. In 1972, America had only 130,000 inmates in local jail systems;³⁵ by 2004, slightly more than thirty years later, that number had reached 713,990.³⁶ This growth has outpaced the nation’s general population growth by a truly staggering margin (almost 450% to 41%),³⁷ has now been relentless for three decades, and is yet to show any sign of fatigue, as indicated in Figure 1 below:

Figure 1
America’s Jail Population—1980 to 2004



Source: United States Department of Justice Bureau of Justice Statistics³⁸

³² REICHEL, *supra* note 22, at 24, 267, 274.

³³ REICHEL, *supra* note 22, at 273.

³⁴ See *id.* at 274; Bureau of Justice Statistics, U.S. Dep’t of Justice, Table on Number of Persons in Custody of State Correctional Authorities, <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm> (last visited Mar. 27, 2005).

³⁵ MAUER, *supra* note 2, at 19.

³⁶ Harrison & Beck, *supra* note 3, at 1.

³⁷ See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 5 (1973); U.S. Census Bureau, American Fact Finder, <http://factfinder.census.gov/servlet/SAFFPopulation?sse=on> (last visited Sept. 15, 2005).

³⁸ See Bureau of Justice Statistics, U.S. Dep’t of Justice, *supra* note 34.

In light of these facts, it is much easier to see why jails are suffering than it is to understand why they continue to rest at the bottom of the justice system's priority list.

II. TRADITIONAL JAIL FUNCTIONS

A. Introduction

Arrest almost invariably produces a trip to jail and a stay that might last for months or only for a few minutes or hours. The cumulative effect of this common occurrence on the country's jail system was recently described in vivid terms by a leading authority on jails: "O'Toole estimated five years ago that more than 11 million people a year are booked into the American jail system and another 11 million are released from jails—a figure close to the entire population of Ohio and Illinois. The number is surely higher today."³⁹ If these numbers alone do not reveal the huge challenges facing the system, keep in mind that the mix of inmates arriving at jails includes the intoxicated, the elderly, the sick, the addicted, and the deranged. Many in this mix will arrive in need of substantially more than incarceration.⁴⁰ It also needs to be remembered that jails, unlike prisons, serve a multitude of purposes, none that can be brushed aside and several that can push facilities, staffs, and budgets beyond the breaking point.

B. Pretrial Detention

The oldest function performed by jails is pretrial detention, one they have served since colonial times. Jails continue to perform this function, primarily because they are located near the courtrooms where trials are held. It is estimated that about half of the inmates in jail are held for purposes of trial.⁴¹ While very few jail functions are easy to perform under the circumstances that now exist in most jails, probably no function is more difficult to manage than this oldest one, pretrial detention.

The mixture of inmates held for this purpose is the primary source of the difficulty, exacerbated by the fact that modern jails house inmates in dormitory areas (rather than cells) and staff have limited knowledge about most inmates at booking. The pretrial population of any sizeable jail will include violent and nonviolent offenders, first-timers and repeat offenders, inmates with serious mental illnesses and suicide potential, persons likely to victimize inmates and persons likely to be victimized, more women than

39 Kenneth Kerle, *Women in the American World of Jails: Inmates and Staff*, 2 MARGINS 41, 42 (2002) (internal citations omitted).

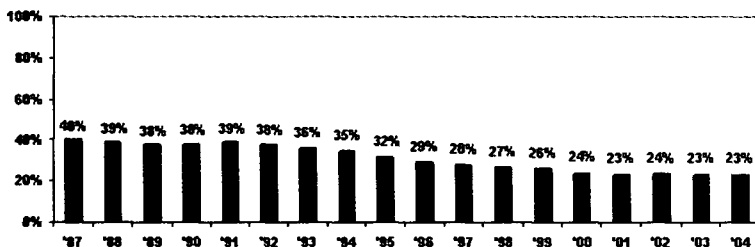
40 See REICHEL, *supra* note 22, at 274; Harrison & Beck, *supra* note 3, at 11.

41 See EDWARD LATESSA & HARRY E. ALLEN, CORRECTIONS IN THE COMMUNITY 56 (3d ed. 2003).

ever before, inmates who have committed the most minor of crimes and some who have committed the worst, and a few who have committed no crimes at all.⁴² In an ideal world, there would be at least a separation of charged and convicted inmates, dangerous and harmless persons, and first-time offenders and hardened criminals; in the real world, the ideal gives way to the challenge of finding somewhere for additional inmates to sleep in cells and dormitories that bulge at every seam.

Although pretrial detention is a service provided by jails to the justice system (at a heavy cost to cities and counties), the justice system has made it harder than ever for jails to provide that service. The number of inmates being held for trial at any one point in time is heavily dependent upon the pretrial release practices of the court system, practices that in turn depend upon a willingness of courts to run risks that are inherent in pretrial release (nonappearance for trial and commission of other crimes if released). Clearly and unmistakably, there has been in the state's court system a steady decline of willingness to run these risks, and thus a corresponding decline in the numbers of inmates released pending trial, as shown in Figure 2 below:

Figure 2
Rates of Pretrial Release



Source: Administrative Office of the Courts—Pretrial Services⁴³

While this rate has steadily decreased for nearly twenty years, the arrest rate has been going in the opposite direction,⁴⁴ producing more inmates than ever for pretrial detention and more difficulty for jails to provide this service (and more costs for strapped cities and counties who have always borne the financial burden of pretrial detention).

42 See KERLE, *supra* note 22, at 18; LATESSA & ALLEN, *supra* note 41, at 56; REICHEL, *supra* note 22, at 283.

43 PRETRIAL SERV. DIV., ADMIN. OFFICE OF THE COURTS—KENTUCKY, PRETRIAL SERVICES STATISTICAL REPORT—1976–2004 (undated).

44 *Id.* (showing 144,677 arrests in 1986–87 and 210,680 in 2003–04).

C. Minor Offenders

The second oldest function performed by jails is the incarceration of minor offenders for service of sentence. This is something jails have done since early colonial times for no particular reason other than the logic of using local jails rather than distant prisons for short-term incarcerations. Jails are probably better suited to perform this function than any other facility since minor offenders are incarcerated only for the purpose of punishment; both old and modern jails have been designed with hardly anything but punishment in mind. No one, however, would argue that this function is easy to perform under the conditions that now exist in most jails.

The minor offender population of jails is anything but a cross-section of the general population. It includes a variety of common criminals, to be sure, but is dominated by groups that simply move society's most vexing, intractable problems from the streets to the jails: the disturbed and disorderly, the drunks and drug addicts, the vagrants and prostitutes, and the sick and homeless. The challenges of dealing with such groups on the streets do not vanish upon their arrival in the jails, and in some instances might even be elevated by the overcrowded conditions that are prominent in most jails.⁴⁵

Data on Kentucky's jail populations is scattered and scarce, complicating any effort to calculate the effects of the "war on crime" against the minor offender population of jails. Harsher punishment is the trademark of this war, is widely credited (or blamed) for the inmate explosion of the prison system,⁴⁶ and almost surely deserves a substantial share of credit (or blame) for the population explosion of the jail system,⁴⁷ at least partly because of the application of long-standing sentencing laws. Minor offenders are sentenced to fixed terms of imprisonment, are ineligible for parole, and get no credit for good time served. If courts get tougher in the treatment of such offenders, that tougher treatment inevitably produces more prisoners for the jail system and more costs for city and county governments (since the costs for incarceration of minor offenders are also imposed upon local government).

45 See REICHEL, *supra* note 22; CARLSON ET AL., *supra* note 28.

46 See Lawson, *supra* note 11, at 311–21.

47 Historical data concerning the Louisville jail (Kentucky's biggest) shows clear signs of this kind of effect on its population. In 1994, the average inmate spent 15.4 days in this jail, while in 2003, the average inmate spent 19.3 days in the jail; the average daily population of the jail stood at 1,473 in 1994, but at the end of this 10 year period (in 2004), it stood at more than 1,900. See LOUISVILLE METRO. CORR. DEP'T, ANNUAL STATISTICS (undated); Kim Allen, *Correcting Corrections: The Necessity for New Solutions to Old Problems*, Address at the Law Club (Oct. 22, 2004).

D. *Controlled Intake*

Jails' responsibility for the incarceration of persons prosecuted for felony crimes ends with conviction and imposition of sentence and passes to the Department of Corrections.⁴⁸ The end of responsibility for incarceration of such offenders, however, does not necessarily mean the end of incarceration itself. In order to allow the state needed time and flexibility for the movement of convicted felons from jail to prison, the Department of Corrections engages in what it calls "controlled intake." "Controlled intake" is intended to provide for a *temporary, short-term* incarceration of felony offenders in the jail system.⁴⁹ The reality is that the state's prisons are almost always either full or overcrowded by standard yardsticks,⁵⁰ and the result is a sizeable and relatively stable population of state prisoners in the jail system that is "controlled" by the availability of beds (or lack thereof) in the state's prisons.

The attitudes of jails (and local governments) toward "controlled intake" (and the jail population it produces) have shifted dramatically over time. In the 1980s, cities and counties attempted through litigation to halt the use of jails for the incarceration of state inmates. The cities and counties lost that effort but got what they really wanted—a decision by the Supreme Court holding that the state must compensate jails for the incarceration of state inmates.⁵¹ At the present time, a few jails want nothing to do with "controlled intake" and push (or urge) the state to move inmates to prison as soon as possible.⁵² Others see "controlled intake" as a source

48 The Kentucky Supreme Court has held that the Kentucky Constitution (sections 253 and 254) requires the state to accept for imprisonment all persons convicted of felony crimes and to provide for their needs; "[N]o one has seriously questioned the constitutional mandate that state prisoners must be kept in the care and custody of the state penal system . . ." See *Campbell County v. Ky. Corr. Cabinet*, 762 S.W.2d 6, 8 (Ky. 1988). In furtherance of this requirement, the 1974 Penal Code requires courts to commit felony offenders "to the Department of Corrections for the term of [their] sentence[s] and until released in accordance with law." KY. REV. STAT. ANN. § 532.100(1) (West 2006).

49 The most unmistakable indication of this intent is the statutory provision that "[s]tate prisoners . . . shall be transferred to the state institution within forty-five (45) days of final sentencing." KY. REV. STAT. ANN. § 532.100(7) (West 2006).

50 "Most experts agree that a prison is crowded when more than eighty-five percent of its cells are occupied. . . . Extra beds provide room in which to juggle inmates; one can place the vulnerable and the dangerous on hold in spare space until the least destructive permanent assignments can be worked out. The absence of such provisions at best yields chaotic interludes and unmanageable places. . . ." Hans Toch, *Warehouses for People?*, 478 ANNALS AM. ACAD. POL. & SOC. SCI. 58, 64 (Mar. 1985). None of Kentucky's prisons could qualify as under-occupied by this standard. See Ky. Dep't of Corr. Adult Inst., *supra* note 14.

51 See *Campbell County*, 762 S.W.2d at 32–33.

52 The jail in Louisville (Kentucky's biggest) is pushed to its capacity by purely local needs (incarceration of pretrial detainees and minor offenders), operates above capacity because of state inmates, and pushes hard for prompt transfers to state institutions; the jail in Scott County (one of Kentucky's smallest) seeks only to serve the needs of local government,

of needed revenue for jail operations, seek state inmates with enthusiasm, and are far more likely than the first group to get what they want. The state commenced year 2005 with 1,610 inmates in “controlled intake.”⁵³ It opened and filled a new prison for men during the year (860 inmates), filled a new private prison for women (380 inmates), and still ended the calendar year with almost 1,200 inmates in local jails awaiting transfer to the prison system.⁵⁴ It is likely that this number will move higher, maybe much higher, in the years ahead.

III. UNWARRANTED JAIL FUNCTIONS

A. Introduction

Jails have long been used to some extent as dumping grounds (a way to collect debts and a temporary depository for “vagrants, petty thieves, prostitutes, and disorderly persons”⁵⁵), and they continue to be assigned default functions that they are ill-equipped to perform and that rightfully belong to other social services. Two such functions that have fallen on jails in recent years have grown increasingly burdensome for both jails and counties.

B. Last-Resort Treatment

Daniel Hall was arrested on December 23, 2005, on drug charges and put in the Fayette County Detention Center. He was found unconscious in his cell area on December 25, 2005, and was pronounced dead within minutes at the University of Kentucky Medical Center. He was 43 years old, weighed 396 pounds, and had cardiovascular disease and high blood pressure, but he reported at booking that he had no medical conditions.⁵⁶ His death (blamed on a heart attack) was the fourth in this jail within five months, “all apparently natural or accidental.”⁵⁷ The newspaper, hinting that it had looked for fault without finding any, said about the four deaths that “[t]here is apparently nothing that links them.”⁵⁸ No one who is familiar with jails would agree with this statement.

is well financed for operations, and neither needs nor desires to house inmates for the state. See Louisville Jail, *supra* note 21, at 2; Scott County Jail, *supra* note 21, at 1.

53 See Ky. Dep’t of Corr., Adult Inst., Daily Count Sheet (Jan. 4, 2005) (on file with author).

54 *Id.*; see also Ky. Dep’t of Corr., Adult Inst., *supra* note 14.

55 KERLE, *supra* note 22, at 4.

56 See Art Jester, *Inmate’s Death Ruled Natural*, LEXINGTON HERALD-LEADER, Dec. 26, 2005, at B1.

57 *Id.*; see also Cassondra Kirby, *Third Fayette Jail Inmate in 3 Months Dies*, LEXINGTON HERALD-LEADER, Nov. 16, 2005, at A1; Brandon Ortiz, *Booked as Drunk, Carried Out Comatose*, LEXINGTON HERALD-LEADER, Oct. 2, 2005, at A1.

58 Jester, *supra* note 56, at B1.

Jail populations, like the one that endured these four untimely deaths, include a vastly disproportionate share of very unhealthy people. Like Daniel Hall (and perhaps the others), many inmates seriously abuse drugs and alcohol, have the worst nutrition known to medicine, have often never heard of health insurance or regular checkups, need medications that they sometimes get for the first time upon arrival at the jail, suffer serious illnesses with little or no knowledge of that fact, and arrive at jails for booking as perfect pictures of bad health. Jails are forced to serve as treatment centers of last resort for very large numbers of such people, compelled by law⁵⁹ and by circumstances to perform medical services at the expense of more traditional functions.

As residual-treatment centers, jails are especially challenged by the arrival of greater than ever numbers of female inmates.⁶⁰ Women in jail populations are more likely than men to have lived on the economic edge,⁶¹ are more likely to be in jail because of serious drug or alcohol abuse,⁶² and are thus more likely than men to arrive at booking with major health problems. More significantly, women who arrive at jail booking stations are relatively young and more than occasionally pregnant. "Between 6 percent and 10 percent of all women entering correctional facilities are pregnant, most with high-risk prenatal conditions."⁶³ Needless to say, the pregnancy of inmates presents the most unique of all medical conditions for jails, conditions that produce exceptional health care costs that are far exceeded by the huge challenge of holding pregnant women in penal facilities designed primarily for incarceration of aggressive males.⁶⁴ If there is credence to the

59 "Except as provided in subsections (4) and (5) of this section, the cost of providing necessary medical, dental, and psychological care for indigent prisoners in the jail shall be paid from the jail budget." KY. REV. STAT. ANN. § 441.045(3) (West 2006).

60 "In the 1990s alone the number of women in prison more than doubled (110 percent), compared with a 77 percent rise in the male prison population. Similar patterns can be seen in adult jails: Women constituted 7 percent of the population in the mid-1980s, but today account for 11.4 percent of the total." Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Incarceration*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 79, 81 (Marc Maver & Meda Chesney-Lind eds., 2002) (internal citations omitted).

61 "Less than 40 percent of women in state prisons report they have been employed full-time prior to arrest, and about 35 percent had incomes less than \$600 each. Only 39 percent had [a] high school diploma or GED." Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 136, 138 (Marc Maver & Meda Chesney-Lind eds., 2002).

62 "And for women, the impact of drug policies has been even more dramatic than for men, with one-third of the women in prison currently serving a drug sentence." Marc Maurer & Meda Chesney-Lind, *Introduction*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 1, 3 (Marc Maver & Meda Chesney-Lind eds., 2002).

63 Richie, *supra* note 61, at 140.

64 The Christian County Jail in Hopkinsville is one of Kentucky's bigger jails. It has an average daily population between 650 and 750, a large group of state inmates serving ex-

claim that “women were correctional afterthoughts,”⁶⁵ it can be found in the prominence of pregnancy in the inmate population of jails.

Jails do not serve as treatment centers of last resort by choice, are not as capable as prisons in providing such service, and are almost sure to lack the resources needed for anything more than minimal care. Most jails are likely to be challenged just to provide basic inmate medication needs, as demonstrated by recent experiences of a typical jail and described in Figure 3 below:

Figure 3
Medication Needs—Kenton County Jail

| Mo. | Year 2003 | | Year 2004 | |
|-------|-----------------------|--------------------------|-----------------------|--------------------------|
| | Avg. Daily Population | Medications (Percentage) | Avg. Daily Population | Medications (Percentage) |
| Jan. | 364 | 74% | 364 | 76% |
| Feb. | 370 | 77% | 357 | 77% |
| Mar. | 385 | 74% | 382 | 78% |
| Apr. | 385 | 75% | 412 | 75% |
| May | 381 | 81% | 394 | 73% |
| June | 391 | 82% | 421 | 75% |
| July | 375 | 75% | 469 | 72% |
| Aug. | 379 | 80% | 482 | 72% |
| Sept. | 387 | 73% | 485 | 68% |
| Oct. | 390 | 70% | 485 | 70% |
| Nov. | 392 | 69% | 464 | 75% |
| Dec. | 342 | 87% | 447 | 71% |

Source: Kenton County Detention Center⁶⁶

Hardly anyone outside jail circles would expect seventy-five percent of a jail's population to need medication; to know that a jail of this size might need 16,262 prescriptions for inmates in a single year (at a cost of

tended terms in the jail, and a significant number of women. Six of these women delivered children while under incarceration in a recent calendar year. One unexpectedly gave birth in the jail facility. The others were taken to a local hospital for delivery, the newborns were left with family members or child protective services, and the mothers were returned to the jail for resumption of incarceration. *See* Notes of Robert G. Lawson, Christian County Jail (July 7, 2005) (on file with author) [hereinafter Christian County Jail].

65 Chesney-Lind, *supra* note 60, at 79.

66 *See* Kenton County Det. Ctr., Report on Medications 2000–2004 (on file with author).

\$351,352);⁶⁷ to appreciate the demands on a jail of administering so much medication to so many inmates; or to know enough to understand the consequences of requiring jails to serve as treatment centers of final resort, even after hearing of four deaths in five months in a single jail.

C. Residual Asylums

In the 1950s, America had almost 560,000 people in state mental hospitals.⁶⁸ Litigation, law reform, and other forces produced a change of direction across the country known as "deinstitutionalization."⁶⁹ This program was designed to remove patients from state mental hospitals and to provide for their care and treatment in community-based facilities. The impact was dramatic to say the least:

In 1955 when the number of patients in state hospitals reached its highest point, 559,000 persons were institutionalized in state mental hospitals out of a total national population of 165 million. Now the figure is 72,000 for a population of more than 250 million. In about 40 years, the U.S. has reduced its number of occupied state hospital beds from 339 per 100,000 population to 29 per 100,000 on any given day.⁷⁰

Kentucky's deinstitutionalization experience is a carbon copy of the national experience; it held 7,700 patients in state hospitals in 1955, held 645 in 1994,⁷¹ and probably holds even fewer today.

Deinstitutionalization worked well at the front end and poorly at the back end. Facilities and support needed for effective community-based treatment were never delivered, streets and homeless shelters became places of refuge for patients previously held in hospitals, and in due course, the country's prisons and jails inherited another function (or social service) that they are poorly equipped and insufficiently staffed to perform: mental health care. No one disputes an observation by the American Psychiatric Association that "jails and prisons . . . have become the primary mental health care facilities in the United States today."⁷²

67 See Notes of Robert G. Lawson, Kenton County Jail (Feb. 11, 2005) (on file with author) [hereinafter Kenton County Jail].

68 AM. PSYCHIATRIC ASS'N, MENTAL ILLNESS AND THE CRIMINAL JUSTICE SYSTEM: REDIRECTING RESOURCES TOWARDS TREATMENT, NOT CONTAINMENT 2 (2004).

69 *Id.*; see also Joanmarie Davoli, *No Room at the Inn: How the Federal Medicaid Program Created Inequities in Psychiatric Hospital Access for the Indigent Mentally Ill*, 29 AM. J.L. & MED. 159, 161 (2003).

70 H. Richard Lamb & Linda Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERVS. 483, 486 (1998).

71 Davoli, *supra* note 69, at 182.

72 AM. PSYCHIATRIC ASS'N., *supra* note 68, at 2.

Most authorities put high numbers on the estimates of prison and jail inmates who suffer from mental illnesses,⁷³ place blame for the problem on the nation's abandonment of mental hospitals,⁷⁴ and openly acknowledge the inability of penal institutions to deliver the needed care:

Clinically, incarcerating people with mental illnesses in a jail or prison makes no sense. The correctional facility environment is not intended to be therapeutic, staff is not trained in providing mental health treatment, and any progress a person might have been making toward mental wellness before the incarceration is interrupted. The probabilities for successful treatment in the future are changed.⁷⁵

Prisons and jails are forbidding places for healthy people. They are designed and built for confinement and punishment, and are almost always stretched to the limit merely to provide safe and minimally destructive custody for mentally ill inmates. And “[b]y all accounts, jails . . . are . . . less able to care for mentally ill prisoners than prisons.”⁷⁶

Most jails are inadequately staffed to detect anything but obvious mental illness and even less adequately staffed to provide anything beyond basic mental health services.⁷⁷ Most have few if any diversion options,⁷⁸ no segregated areas for mentally ill inmates,⁷⁹ nothing but bad choices for

73 “Most commentators point to statistics provided by BJS [Bureau of Justice Statistics], indicating that approximately 16% of state prison inmates are mentally ill. Some accounts, such as a recent Human Rights Watch report, put the rate of mental illness of prison inmates at 20% or higher.” Daniel P. Mears, *Health Law in the Criminal Justice System Symposium: Mental Health Needs and Services in the Criminal Justice System*, 4 Hous. J. Health L. & Pol’y 255, 257 (2004).

74 See e.g., Lamb & Weinberger, *supra* note 70, at 486 (“It is the impression of clinicians and researchers that a large proportion of the severely mental ill persons they see in jails and prisons are similar in almost every way to long-term patients in state hospitals before deinstitutionalization.”); Ralph Slovenko, *The Transinstitutionalization of the Mentally Ill*, 29 OHIO N.U. L. REV. 641, 660 (2003) (“The overall population of individuals in state psychiatric hospitals has been reduced from 559,000 in 1955 to less than 70,000 today. Many of the seriously mentally ill are now walking the streets or sitting in jails or prisons.”).

75 AM. PSYCHIATRIC ASS’N., *supra* note 68, at 6; see also Davoli, *supra* note 69, at 176 (“Incarceration remains the standard in every state, repeating the cruelty of the 18th and 19th centuries’ criminalization of mental illness.”).

76 HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* (2003), <http://www.hrw.org/reports/2003/usa1003/3.htm>.

77 See KERLE, *supra* note 22, at 23 (“The study . . . cites thirty-five jails nationwide with model mental health treatment programs. That’s 35 out of over 3,000!”).

78 “[T]he perennial question that comes up whenever people talk about the importance of diverting people with mental illness out of the criminal justice system [is]: ‘Diversion to what?’” Heather Barr, *Connecting Litigation to a Grass Rooms Movement: Monitoring, Organizing, and Brad H. v. City of New York*, 24 PACE L. REV. 721, 728 (2004).

79 The state’s biggest and best funded jails are the ones most likely to have areas set aside for mentally impaired inmates. For example, the Louisville Jail (Kentucky’s biggest)

the housing of such inmates (either in overly crowded dormitory areas to be victimized by other inmates⁸⁰ or in isolation custody that is almost certain to worsen their mental illnesses⁸¹), and no special funds to cover the heavy costs of caring for the mentally ill.⁸² Jails are no better situated at the end of incarceration than at the beginning to serve this population. Jails pass some of the mentally ill to the prison system, release many into communities that have no treatment centers, provide them with little or no support (oftentimes not even needed medications), and wait for the revolving door to bring them back for more incarceration—once again to a penal institution that has been converted into a residual asylum by a public-policy failure of huge and shameful proportions.

IV. TURNING JAILS INTO PRISONS

A. *Introduction*

Jails have no spare capacity and no room for new and expanded responsibilities.⁸³ No one familiar with jails could reasonably believe to the contrary. Why then do lawmakers and policymakers add to the jail agenda the incarceration of state inmates (felony offenders who have for most of 200 years been incarcerated solely in state prisons)? Why do jails (and local governments) spare no political effort to maintain the right to incarcerate state prisoners in local facilities that are callously and chronically overcrowded without them?

has a separate wing for such inmates, and more professional help for such inmates than is found in most jails.

80 "Jails . . . are not gentle places. Being incarcerated is a stressful situation for anyone. For the person with mental illness, who is already in fragile condition, being thrown into the hostile world of the prisoner is almost certain to make any existing psychiatric condition worse." AM. PSYCHIATRIC ASS'N., *supra* note 68, at 4.

81 I was shown such custody by one of Kentucky's small-town jailers. The isolation cell was located in a remote section of the jail, was no more than five to six feet wide and eight to nine feet long, had solid concrete walls with little if any outside light, had a solid metal door with a narrow food port, and no room for anything other than a small bed near the floor and a stainless steel sink and commode. The inmate ate all meals in the isolation cell, had no social interaction whatsoever with inmates or staff, and had no access by sight or sound to the outside world. The isolation was complete enough to produce a real fear of abandonment in normal minds and something much worse in deranged minds.

82 "[T]aking care of mentally ill prisoners costs the criminal justice system far more than caring for prisoners without mental illness. The Pennsylvania Department of Corrections estimates it costs them \$140 a day to incarcerate an inmate with a serious mental illness, while it only costs them \$80 a day for an average inmate." AM. PSYCHIATRIC ASS'N., *supra* note 68, at 5.

83 See Ky. Dep't of Corr., Adult Insts., Daily Count Sheet (Dec. 29, 2005) (on file with author).

B. The Roots

The practice of separating minor and major offenders for service of sentence is ancient.⁸⁴ For most of Kentucky's history, cities and counties held misdemeanor offenders in local jails (bearing the cost) and the state held felony offenders in prison (at its cost in what the Constitution calls the "House of Reform"⁸⁵). The General Assembly placed its seal of approval on this separation in its 1974 reform of criminal law, directing courts to commit minor offenders to local correctional authorities and felony offenders to the Department of Corrections.⁸⁶ The state had no inmates in the county jail system at this time, was able to move felony offenders from jail to prison in a timely fashion, and had no apparent conflict with local governments over incarceration responsibilities.

The "war on crime" began to affect the prison population of Kentucky in the mid-1970s, produced sufficient inmates to fill existing and newly built prisons by the end of the decade, and soon thereafter produced more inmates than the state could handle.⁸⁷ Inmates filed class actions, a federal court intervened, and the state found itself in the early 1980s operating under federal court orders "restricting the number of inmates in designated institutions,"⁸⁸ all in the face of an inmate explosion of unprecedented proportions.⁸⁹

The state continued to expand its prison capacity⁹⁰ but could not keep pace with inmate growth. Before long the state's prisons felt the full effects of the court orders that had closed the main prisons to additional inmates. The state had no choice, it would later argue, but to slow the flow of inmates from the jail system to the prisons and to plant the first seeds for a conversion of jails into prisons.⁹¹

84 "The state of Kentucky built the first prison west of the Allegheny Mountains in Frankfort in 1799, and imprisoned its first inmate in 1800." Lawson, *supra* note 11, at 321.

85 KY. CONST. § 252.

86 See 1974 Ky. Acts 874 (codified at KY. REV. STAT. ANN. § 532.100(1) (West 2006)).

87 The state had no spare prison capacity as it toughened sentencing laws and its attitudes toward crime and criminals. "For much of the 1970s, and even earlier, the state's primary prison facilities were operating at full capacity or above, which is nothing out of the ordinary since prisons are built to be filled, and thus are almost always bulging at the seams." See Lawson, *supra* note 11, at 324.

88 *Campbell County v. Ky. Corr. Cabinet*, 762 S.W.2d 6, 8 (Ky. 1988). The federal court orders capped the populations of the state's two main prisons—the penitentiary at Eddyville, and the reformatory at LaGrange. See Ky. Dep't of Corr., History and Overview, <http://www.corrections.ky.gov/ksr/about/> (last visited Sept. 18, 2003).

89 "[T]he inmate population more than doubled during the 1980s (from 3723 to 8824). . . ." Lawson, *supra* note 11, at 325.

90 "The state opened a new prison at LaGrange . . . in 1981, opened a second facility in 1983 (Northpoint Training Center) . . . and expanded most of its other facilities throughout the 1980s." *Id.* at 326.

91 See *Campbell County*, 762 S.W.2d at 10.

The state labeled its response "controlled intake,"⁹² only hinting at the magnitude of the problem created by the effects of the inmate explosion and prison population caps imposed by the federal court. The following description by the Kentucky Supreme Court provided a better picture of the state's dilemma: "This plan, known as the controlled intake policy, refuses to accept transfer of state prisoners from the local county jails to state penal facilities except on a space available basis."⁹³ The prisons had no open beds, the federal court stood guard at the gates, and state courts continued to sentence convicted felons to prison (as required by law). Although jails pressed hard for prompt transfers, the state responded by admitting to prison only as many inmates as it could release ("space available basis"). Jails were left to hold state inmates for indefinite periods (until there was available space in prison) and inmates were left to serve prison time in the tighter quarters and under the more burdensome conditions of jail. The numbers started low, increased slowly for a couple of years, and then headed much higher.⁹⁴

C. The Campbell County Case

Litigation over "controlled intake" started quickly and mushroomed into the most important prison case in the state's history.⁹⁵ Convicted felons filed class actions to get themselves sent to prison, arguing that the Kentucky Constitution gave them a right to the superior conditions and programs of the prison system. The jails (and counties) sued to compel the state to comply with its constitutional obligation to imprison convicted felons, arguing above all else that the state was using "controlled intake" to shift the burden of its obligation to local government.⁹⁶ The state injected its predicament into the litigation as a necessity defense but essentially argued that the state's laws do not "in so many words"⁹⁷ require it to accept the custody of convicted felons from the jail system and that "its controlled intake procedure is both an appropriate response and a complete defense."⁹⁸

⁹² See *id.* at 7.

⁹³ *Id.*

⁹⁴ "The number of inmates . . . was small at first (564 in 1983) and stayed that way for a few years (623 in 1986), but . . . soon began to reflect the state's inability to build prisons as rapidly as the judicial system delivered inmates for incarceration." Lawson, *supra* note 11, at 327.

⁹⁵ See *Campbell County*, 762 S.W.2d at 6.

⁹⁶ For a time, the state paid no fees to the counties for housing state inmates after imposition of sentence. Starting in 1984 the state paid \$10 per day, and at the time of the litigation was paying a fee of \$13.50 per day, a sum less than half of the cost of maintaining inmates in the county jail system. See *id.* at 8 n.1.

⁹⁷ *Id.* at 8.

⁹⁸ *Id.* at 10.

The Kentucky Supreme Court expressed some surprise over the state's foundation defense: "For almost 100 years no one has seriously questioned the constitutional mandate that state prisoners must be kept in the care and custody of the state penal system."⁹⁹ It rejected the necessity defense out of hand,¹⁰⁰ ruled that the state constitution "imposes responsibility on the state prison system to take custody of convicted felons and to supervise their care,"¹⁰¹ and concluded (to the joy of counties) that the state cannot shift the financial burden of this responsibility to local government.¹⁰² The Court was considerably less generous in ruling on claims by inmates, holding that the constitution gives convicted felons a right to "custody and care" by the state but not a constitutional right to custody and care in a state prison.¹⁰³

Although perhaps unwittingly, the Supreme Court gave the state the final ingredients needed for a conversion of jails to prisons. It eliminated the basis for opposition at the jail level (by allocating incarceration costs to the state), removed from the hands of inmates a constitutional obstacle to conversion, and in some dicta even provided a measure of guidance on how to move in that direction:

Our decision does not imply that state government cannot contract with county government and county (or regional jail) facilities to house and care for state prisoners as agents caring for state prisoners under the direct supervision of state government. Where there is space and available facilities, and those facilities are adequate to meet minimum standards for care of state prisoners . . . the state may contract to provide for the carrying out of its constitutional responsibility.¹⁰⁴

The Court said in its opinion that "county jail facilities . . . are not the equal of state penal institutions,"¹⁰⁵ and that state inmates in local jails are entitled to "minimum standards for care of state prisoners."¹⁰⁶ However, the Court did not say, as did a concurring justice, that inmates under state custody have "a right to be imprisoned in the equivalent of a state penal

⁹⁹ *Id.* at 8.

¹⁰⁰ "The basic equation is the state cannot pass penal statutes and create penalties that generate more prisoners than it is willing and prepared to provide for." *Id.* at 14.

¹⁰¹ *Id.* at 13.

¹⁰² "[I]t cannot by statute or by executive regulation, directly or indirectly, impose that constitutional responsibility on the counties nor compel the counties to bear the expense attendant to such responsibility." *Id.* at 15.

¹⁰³ *Id.* at 13–14.

¹⁰⁴ *Id.* at 14–15.

¹⁰⁵ *Id.* at 15.

¹⁰⁶ *Id.*

institution.”¹⁰⁷ The state had 1,146 inmates in local jails by the posting of this decision¹⁰⁸ and hardly anything stood in the way of an expansion of that population.

D. Endorsed and Defined

The state managed its inmate population after *Campbell County* as it had before, moving convicted felons from jail to prison on a “space available basis.” Inmate flows into the state system were increasing more rapidly than before,¹⁰⁹ federal court caps on prison populations remained in place, and the population of state prisoners in county jails moved ever higher. In other words, things were much the same as before the litigation except for one very important change of attitude. Namely, the jails and counties had developed a taste and growing appetite for state prisoners because of the revenue for jail operations that accompanied the prisoners. By 1990 the state had 1,795 convicted and sentenced felons in local jails, exactly 1,795 more than it had in 1980 and slightly more than twenty percent of its total inmate population,¹¹⁰ all without the slightest direction from lawmakers.

The General Assembly said nothing about the long-term incarceration of state inmates in local jails until 1992.¹¹¹ In that year, it entered the picture in dramatic fashion, endorsing the state’s use of jails for convicted felons but moving far beyond the existing program (a “needs only” use of jails) to *require* that persons sentenced to no more than five years’ imprisonment (Class D felons) be sent to county jails for service of sentence.¹¹² The expanded program was called the “Class D Program.”¹¹³ While the program was modified in 1996 to give counties an option not to take convicted felons into their jails,¹¹⁴ it officially sealed the fate of the longstanding policy of separating misdemeanor and felony offenders for service of sentence, with little or no consideration of the risk involved in mixing such offenders together in the jail environment.

The General Assembly was not long in allowing for even greater use of jails for state prisoners, providing in 2000 that the Department of Correc-

¹⁰⁷ *Id.* at 17 (Wintersheimer, J., concurring).

¹⁰⁸ See Ky. Dep’t of Corr., State Felons Housed in Jails (2003) (on file with author).

¹⁰⁹ State prisoners went from 6,843 in 1988 (the year of the landmark decision) to 7,811 in 1989, 8,824 in 1990, 9,425 in 1991, and 10,196 in 1992. See Lawson, *supra* note 11, at 325.

¹¹⁰ See Lawson, *supra* note 11, at 325 fig.3, 329 fig.4.

¹¹¹ In actuality, the General Assembly had spoken against such use in the 1974 Penal Code by requiring courts to commit convicted and sentenced felons to the Department of Corrections, a requirement that was still intact in 1992 when the General Assembly began to speak about use of jails for state inmates. See 1974 Ky. Acts 874 (codified at Ky. REV. STAT. ANN. § 532.100(1) (West 2006)).

¹¹² See 1992 Ky. Acts 722 (codified at Ky. REV. STAT. ANN. § 532.100 (West 2006)).

¹¹³ See *id.* at 725–26.

¹¹⁴ See 1996 Ky. Acts 378.

tions could use jails for the incarceration of persons convicted of Class C felonies (punishable by imprisonment for five to ten years)¹¹⁵ and Class D felons sentenced to more than five years.¹¹⁶ It provided in this instance for discretionary (rather than mandatory) use of local jails and for needs-based incarceration only (when “[s]tate facilities are at capacity”¹¹⁷), a program that the Department of Corrections calls “Community Custody” mostly for separation from the “Class D Program” described above.

E. Growing Reliance

The state has built prisons at an unprecedented rate since the birth of “controlled intake,” but not nearly fast enough to match the “war on crime’s” production of inmates.¹¹⁸ Driven almost exclusively by necessity, the Department of Corrections has left more and more of its prisoners in the local jail system. The Department used the “Community Custody” program cautiously for a while¹¹⁹ but not too cautiously, as the total inmate population increased further and further.¹²⁰ The state has now been using local jails for the permanent housing of convicted felons for slightly more than twenty years and at the present time finds itself with enough inmates in jails to fill almost six 1000-bed prisons, all as shown by the data in Figure 4 below:

115 See KY. REV. STAT. ANN. § 532.020(1)(b) (West 2006).

116 See 2000 Ky. Acts 1053 (codified at KY. REV. STAT. ANN. § 532.100 (West 2006)).

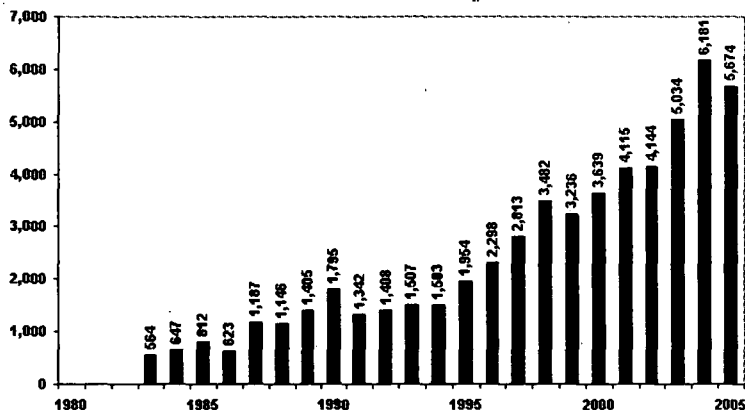
117 KY. REV. STAT. ANN. § 523.100(4)(b)(1) (West 2006).

118 The inmate population more than doubled in the 1980s (from 3,723 to 8,824), almost doubled again in the 1990s (from 8,824 to 15,444), and headed still higher at the turn of the century. See Lawson, *supra* note 11, at 325.

119 On January 1, 2003, two years after the General Assembly approved the program, the Department held only 252 inmates in Community Custody. See Ky. Dep’t of Corr., Inmate Profile Tables 58 (Jan. 2003), available at <http://www.corrections.ky.gov/NR/rdonlyres/C146FE90-E73F-412F-BD3B-A18DF4390E8A/0/profile2003.pdf>.

120 The number moved to 754 by the end of year 2004 (and included 198 inmates with sentences of ten years or more). See KY. DEP’T OF CORR., 2004 ANNUAL REPORT 105 (2004). It moved exceedingly close to 1,000 inmates at one point during 2005 and ended that year with more than 900 long term inmates in the jail system. See Ky. Dep’t of Corr., Adult Inst., Daily Count Sheet (Dec. 31, 2005) (on file with author); Ky. Dep’t of Corr., Adult Inst., Daily Count Sheet (Aug. 22, 2005) (on file with author).

Figure 4
Kentucky Department of Corrections—
State Felons Housed in Jails



Source: Kentucky Department of Corrections¹²¹

For perspective, it is helpful to know that at the close of 2005, the state had almost twenty-nine percent of its inmates (5,674 out of 19,852¹²²) incarcerated in jails, that virtually half of the state's inmate population increase since 2000 has gone to jails (2,035 out of 4,408¹²³), and that the state's jail population declined by only 500 inmates during 2005 although the state opened two new prisons that year (a 960-bed prison for men and a 400-bed prison for women).¹²⁴ The state has a dramatically increasing inmate population¹²⁵ and no prison construction underway at the present time, with few if any alternatives to a still greater dependence on local jails for incarceration of convicted felons. All of these factors point to a higher number of jail inmates (probably much higher) in the years ahead.

¹²¹ See Ky. Dep't of Corr., Adult Inst., Daily Count Sheet (Dec. 31, 2005) (on file with author); Ky. Dep't of Corr., Adult Inst., Daily Count Sheet (Dec. 30, 2004) (on file with author); Ky. Dep't of Corr., State Felons Housed in Jails (2003) (on file with author).

¹²² See Ky. Dep't of Corr., Adult Inst., Daily Count Sheet (Dec. 31, 2005) (on file with author).

¹²³ The state's total inmate population was 15,444 in 2000 and 19,852 in 2005 (an increase of 4,408), while the state's jail population was 3,639 in 2000 and 5,674 in 2005 (an increase of 2,035). See Ky. Dep't of Corr., Adult Inst., Daily Count Sheet (Dec. 31, 2005) (on file with author); Ky. Dep't of Corr., Felon Population Projections (Mar. 3, 2003) (on file with author).

¹²⁴ See Ky. Dep't of Corr., Adult Inst., Daily Count Sheet (Dec. 31, 2005) (on file with author).

¹²⁵ During the two year period from January 1, 2004 to December 31, 2005, the state's overall inmate population increased a whopping 2,451 (enough for almost three prisons like the one opened for men in 2005). See Ky. Dep't of Corr., Adult Inst., Daily Count Sheet (Dec. 29, 2005) (on file with author); Ky. Dep't of Corr., Adult Inst., Daily Count Sheet (Jan. 5, 2004) (on file with author).

F. Conclusion

Kentucky is second in the ranking of states for the number of inmates it has in local jails.¹²⁶ It headed in this direction without serious consideration of the implications of traveling an uncharted path. Some argue that incarceration of inmates close to home allows them to maintain family connections that are crucial to a crime-free life after imprisonment, and allows jails to use the inmates to provide public services that are beneficial to both the inmates and their communities. Critics argue that the state's use of jails has virtually no corrections value and that it is driven exclusively by state and local financial incentives (lower costs for the state¹²⁷ and supplemental state funding for jails). There is very little reliable information about what jails are actually delivering to the state and its inmates, and there are far more questions than answers about the wisdom of turning jails into prisons.¹²⁸

Is there corrections value in the local incarceration of convicted felons? Are jails suitable places for inmates who need rehabilitative services? Are jails capable of delivering programs that would be beneficial to inmates after incarceration? Does the state's heavy reliance on local jails for housing of its inmates contribute to the overcrowding that exists in such facilities? Does the use of jails for incarceration of felony offenders impair the ability of jails to perform their traditional functions and services?

The rest of this article is about an unconventional effort to shed light on these questions and more generally on the state's use of jails for incarceration of convicted felons. This unconventional effort included an examination of nine jails across Kentucky,¹²⁹ visits to and inspections of three prisons of the types that hold state inmates like those now imprisoned in jails,¹³⁰ and comprehensive discussions with jailers and wardens about the

126 The Bureau of Justice Statistics reported in 2003 that most states have a few inmates in local jails and many states have almost none. Louisiana ranked first with 47.3 percent of its inmates in local jails, and Kentucky ranked second with 28.5 percent. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics Online*, <http://www.albany.edu/sourcebook/pdf/t6322004.pdf> (last visited Jan. 31, 2006).

127 The state reported for fiscal year 2004–05 an average annual cost for imprisonment of \$17,198.40 and a cost for jail incarceration of \$9,958.80. *See* Ky. Dep't of Corr., *Cost to Incarcerate FY 2004–2005* (Oct. 2005), www.corrections.ky.gov/NR/rdonlyres/5169FCC6-5F37-4E1B-A5FC-05AA26FEC631/0/Costs05.pdf. It has since increased the per diem for reimbursement of jails (from \$27 to \$30), and next year will show a somewhat higher cost for jail incarceration.

128 The one exception to this observation is a report published in late 2005 about a study of jails done for the Department of Corrections by consultants connected with the University of Louisville. *See* PRICE FOSTER ET AL., *KENTUCKY DEPARTMENT OF CORRECTIONS JAIL EVALUATION STUDY* (2005).

129 The jail visits were arranged by local judges who had professional contacts with the jailers and could provide them assurances that the visitor was interested only in law reform and should be given full access to the jail facility.

130 The prison visits were arranged by the Commissioner of Corrections and provided

reality of life inside jails and prisons. The discussion of this effort begins with a description of the places visited (Part V), includes segments on life in jail and life in prison (Parts VI and VII) and on rehabilitation opportunities in jail and prison (Part VIII), and ends with a paroled inmate's account of personal experiences in the state's local jail and prison systems (Part X).

V. JAIL AND PRISON FACILITIES

A. Introduction

The nine jails visited for the study were selected to represent a substantial variety of sizes, shapes, conditions, and operations. One stands in very sharp contrast to the others: it always operates at or below capacity, is given sufficient funds for operations by local government, serves only the needs of its community, and has no interest at all in holding state inmates.¹³¹ A second jail stands in sharp contrast to the others in a different way: it has ten times as many inmates as the first jail, takes in prisoners from any and all sources, holds hundreds of state prisoners and wants more, and belongs to a group that jail professionals call "profit center jails."¹³² The other seven are typical of the state's jails: they suffer from the serious deficiencies that dominate the jail scene, participate significantly in the state's jail program, and in varying degrees struggle to find adequate resources for jail operations.

The three prisons visited for the study are owned and operated by the state, imprison only males, and hold more inmates today than ever before. One is a minimum-security prison, the others are medium security, and all hold a wide variety of convicted felons.

B. The Jails

Jails are designed to secure and punish inmates, are more compact and confined than prisons, and rarely if ever have any open space. They always have kitchens but never have dining areas, have books and reading materials but no real libraries, are likely to have small spaces for religious services, may have space for minimal medical care, and under the state's jail standards are required to have facilities for visitation and exercise activities.¹³³ Most jail visitation areas are tiny and allow only for personal contact by telephone communication (although a few jails seem to have facilities for contact visitation). The only exercise area found in most jails is a small basketball court. The court is usually located in the center of the jail and

the same kind of full and helpful access to the facility that was allowed at the jails.

¹³¹ See Scott County Jail, *supra* note 21.

¹³² See Christian County Jail, *supra* note 64, at 1-2.

¹³³ See 501 KY. ADMIN. REGS. 3:050 § 6 (2006).

is secured by very high walls and a ceiling enclosure that opens the court to outside air (and bad weather) but not to escape. Jails have no space to waste and certainly waste none on visitation and exercise facilities.

Jail space is consumed mostly by inmate living areas that are unlike anything that existed in older-generation jails. The cells that once dominated jails are mostly missing from the modern jail, replaced by open areas called pods in some places and dormitories in others.¹³⁴ The pod areas vary in size from jail to jail, have a line of double bunk beds along the back wall, include a toilet/bath section that is partially open to view from an outer corridor, have one or more steel tables for inmate activities, and always have a television monitor attached high on a pod wall and out of the reach of inmates. The inmates rarely have any natural light and have no means of escape from the communal living these jails are designed to foster. When not overcrowded, jails provide about as much living space per inmate as would be found in a large closet in an average American home.

C. Eastern Kentucky Corrections Complex (EKCC)

This prison is located in a mountainous section of the state, incarcerates almost 1700 inmates (with all but about fifty classified as medium-security prisoners), is the newest and most impressive of the prisons visited, and looks like a mansion in comparison to jails. It has inside a fenced compound two large, identical, and dominant structures that provide living areas for most of the prison's inmates;¹³⁵ a large facility for the state's corrections industries; and an assortment of other buildings that are used for various inmate and staff activities. The prison has a dining area for inmates, a substantial facility for visitation between inmates and family members, a classroom with computers and other equipment, and exercise facilities to accommodate a wide variety of interests (two full-size basketball courts, a softball field, a running/walking track, weight rooms and equipment, a handball court, and others).¹³⁶ It sits on 157 acres, offers inmates a lot of access to the outdoors, and has open space from one end of the fenced compound to the other.¹³⁷

¹³⁴ Most jails have a pod area or two with connected cells that are used for problem inmates and all jails have at least a few stand alone cells for special inmates and special needs. A very high percentage of jail inmates, however, will be housed in the pod areas described in this paragraph.

¹³⁵ EKCC was built in the late 1980s and 1990s in two phases and received inmates for the first time in 1990. In addition to the two principal inmate living quarters described above, the prison also has a small minimum-security building (with 50 beds) that stands alone outside the prison compound. See Ky. Dep't of Corr., About EKCC, <http://www.corrections.ky.gov/ekcc/about> (last visited Feb. 19, 2006).

¹³⁶ See Notes of Robert G. Lawson, Eastern Kentucky Corrections Complex 3, 6 (Aug. 3, 2005) (on file with author) [hereinafter Eastern Kentucky Corrections Complex].

¹³⁷ See Ky. Dep't of Corr., About EKCC, <http://www.corrections.ky.gov/ekcc/about> (last

The basic confinement area of this prison is a cell that is occupied by two inmates. Each cell is part of a block of twelve cells, and each cellblock is part of a much bigger unit that opens into an activities area called a "bullpen." Inmates have the personal space of the cell, free and open access to the cellblock, and liberal but regulated access to the bullpen. The cells are small (sixty square feet), modestly equipped (bunk bed, sink, commode, and storage space), and tight for double occupancy; they are wired for television reception and usually have a set (with earphones).¹³⁸ The prison also has a maximum-security unit for inmates who must be kept in close confinement around the clock, as well as a "meritorious" unit for inmates who earn a right through good behavior to live in single-bed cells.¹³⁹

D. Northpoint Training Center

This prison is located in rural central Kentucky, has about 1,250 inmates, and has no empty beds.¹⁴⁰ It occupies land and buildings that once constituted a state mental hospital,¹⁴¹ is a medium-security prison (with a few minimum-security beds), and is much like the Eastern Kentucky Corrections Complex, the prison described above. It operates inside a double-fenced compound that has all of the following facilities and more: six two-story dormitories for housing inmates; a building for corrections industries; an educational building; a well-equipped and accommodating visitation center; a medical center (with doctor, dentist, clinical psychologist, nurse, and other medical personnel); a chapel; and a full complement of exercise facilities (a gymnasium, fully equipped inside and outside weight rooms, outside basketball and volleyball courts, handball courts, a softball field, a running/walking track, and more). The prison sits on 551 acres¹⁴² and has more open space than is found in all the state's jails combined.

The inmates of this prison are confined in dorm areas that imprison from forty-four to fifty-eight inmates.¹⁴³ The dorm areas have two rows of double bunk beds that sit along the dorm walls divided by a narrow aisle, lockers at the end of the beds for inmate belongings, and a T.V. set with earphones at the end of both the upper and lower beds; each area has shower/toilet facilities but very limited living space for the number of inmates under confinement (between thirty and thirty-six square feet of

visited Feb. 19, 2006); Eastern Kentucky Corrections Complex at 1-2.

¹³⁸ Eastern Kentucky Corrections Complex, *supra* note 136, at 1-2.

¹³⁹ *Id.* at 2.

¹⁴⁰ See Notes of Robert G. Lawson, Northpoint Training Center 3 (Oct. 1, 2005) (on file with author) [hereinafter Northpoint Training Center].

¹⁴¹ JAMES L. MORGAN, NORTHPOINT TRAINING CENTER I (2005).

¹⁴² *Id.*

¹⁴³ See Northpoint Training Ctr., Distribution of Plumbing Fixtures and Living Space 1-2 (undated) (on file with author).

unencumbered floor space per inmate).¹⁴⁴ The prison has an “honor dorm” that has no more space than the others but does have a fenced yard that is accessible only to honor dorm inmates. The prison also has a maximum-security unit that is used for segregation of problem inmates (around the clock confinement except for an hour of exercise inside the unit once a day).

E. Blackburn Corrections Complex

This is a minimum-security prison with 590 beds and 590 inmates. It earlier served as a juvenile detention facility, is located inside the city limits of Lexington, and sits on about 250 acres of unfenced land (except for planks). The prison has a variety of dormitories scattered across the grounds as well as most if not all of the facilities of the bigger prisons described above (a chapel, a dining hall, corrections industries and skills training facilities, a treatment center, inside and outside visitation areas, a full-size gymnasium, walking/running track, etc.). It has a farm operation that is used for job training, a well-equipped and well-staffed building dedicated to basic educational programs, and a library with a professional librarian. The facility has even more open space for inmate activities than the medium-security prisons.¹⁴⁵

The confinement areas of this prison are dormitories rather than cells. Most of the dormitory areas are found in older buildings, confine between twenty-five and fifty inmates each, have the standard double bunk bed and shared shower/toilet accommodations, and are less intimidating than the living areas of the medium-security prisons. The prison has a living area for handicapped inmates, a new building with four dormitory areas holding 50 inmates each, and a small “honor” dorm for inmates who earn the right to a private cell.¹⁴⁶

F. Conclusion

The picture of jails that emerges when one looks at the physical facilities alone is not dramatically different from the picture that emerges of prisons. Jails are compact, prisons are open; jails secure inmates behind bars, prisons secure them by use of razor wire and guard towers; jails are designed to punish and hold, prisons are designed to punish and reform. On the other hand, the picture that emerges when one looks at the two kinds of facilities with inmates in place is something quite different indeed, especially when one sees the facilities filled to capacity and beyond, as they always are.

¹⁴⁴ *Id.*

¹⁴⁵ See Notes of Robert G. Lawson, Blackburn Corrections Complex (Sept. 16, 2005) (on file with author) [hereinafter Blackburn Corrections Complex].

¹⁴⁶ *Id.* at 2.

VI. JAILS AND PRISONS WITH INMATES

A. *Introduction*

It is most ironic that convicted felons are jailed rather than imprisoned (or at least once were) because of overcrowded conditions in state prisons. The most common and most destructive of all jail conditions is undoubtedly the overcrowding that exists from one end of the jail system to the other, which affects jail operations and inmates more than any other factor (maybe even more than all other factors combined). It has been said that "prison crowding and jail crowding are both part of the same problem," and they undoubtedly are.¹⁴⁷ But there is a huge difference in the ability of jails and prisons to deal with the problem and a huge difference in the magnitude of the problem in the two types of institutions; on both counts, jails come up far short of prisons.

B. *The Jails*

1. *Pike County Jail*.— The jail in this eastern Kentucky county had 142 beds on the day of the visit and 236 inmates (it recently had held 290 inmates, two for every bed).¹⁴⁸ Most of the inmates were confined in pod areas that appeared to have about 400 square feet of floor space (about the size of an average law office); jail standards in effect at the time of the visit fixed the occupancy level of these pods at eight inmates per pod (or fifty square feet per inmate).¹⁴⁹ On this day, the jail held sixteen inmates in each area (twice the number allowed by the standards),¹⁵⁰ leaving inmates with an average of about twenty-five square feet of living space (about the span of a small man's arms and probably little more space than animal shelters provide for large dogs).

Half the inmates occupied double bunk beds along the back walls of the pods and half occupied beds (mattresses) scattered across the floor of the pods. The jail had about twice as many inmates for each toilet/bath area as allowed by jail standards and obviously had very little space in the pods for inmate activities. The jailer said that the jail had "less than half of the required amount" of floor space for the inmates.¹⁵¹ The jail population on this day included a total of eighty-nine state inmates,¹⁵² only slightly less

¹⁴⁷ Anne Bolduc, *Jail Crowding*, 478 ANNALS AM. ACAD. POL. & SOC. SCI. 47, 49 (Mar. 1985).

¹⁴⁸ See Notes of Robert G. Lawson, Pikeville Jail 1 (Jan. 5, 2005) (on file with author) [hereinafter Pikeville Jail].

¹⁴⁹ See 501 KY. ADMIN. REGS. 3:050 § 6 (2006).

¹⁵⁰ See Pikeville Jail, *supra* note 148, at 3.

¹⁵¹ *Id.*

¹⁵² All of the state inmates were from the area and most were class D felons (although

than the number of inmates occupying the jail in excess of the jail's bed capacity. The jailer freely acknowledged that the revenue from incarceration of state inmates was critical to his budget and to jail operations.¹⁵³

2. *Kenton County Jail*.—This jail had 348 beds and 385 inmates on the day of the visit, considerably below recent levels.¹⁵⁴ The jailer said that he normally had between 466 and 475 inmates in custody and on one occasion held 519 inmates in the jail.¹⁵⁵ The living areas of the jail were much like the ones in the Pikeville Jail (maybe somewhat larger and somewhat less congested); the areas had beds for a higher percentage of the population but had inmates on the floor of every pod area, which from a hallway corridor looked to be very crowded. One living area was clearly more inadequate than the others; it was a sizeable open living area, held at least twenty to twenty-five inmates on the day of the visit, and had every single inmate of the pod area sleeping on the floor (on mattresses that seemed to reach from side to side and front to back).¹⁵⁶

The jail held almost 150 state prisoners on the day of the visit, almost equally divided between convicted felons in the "Class D Program," convicted felons in "controlled intake" awaiting delivery to the Department of Corrections, and parolees held in jail pending transfer to the state for parole violation proceedings.¹⁵⁷ The jailer had consciously reduced his participation in the "Class D Program"¹⁵⁸ (even though badly needing its revenues for jail operations) in an effort to reduce overcrowding in the facility, something he accepted and characterized as a permanent challenge.¹⁵⁹

3. *Pulaski County Jail*.—The jail in this rural county has a capacity for 169 inmates and held 250 prisoners on the day of the visit (about average but considerably less than it has held on occasion);¹⁶⁰ having recently added

there were at least two or three class C felons in the group); the number was higher than normal and more than the jailer had anticipated. *Id.* at 3–4.

¹⁵³ *Id.* at 4, 8.

¹⁵⁴ The state removed twenty-six inmates from the jail on the day of the visit, reducing the population from 419 to 385 (a level not likely to hold for very long). See *Kenton County Jail*, *supra* note 67, at 1.

¹⁵⁵ *Id.*

¹⁵⁶ In showing and describing this part of the jail, the jailer (a very competent and professional official) said, "I'm not proud of this area." *Id.* at 2.

¹⁵⁷ See *Kenton County Det. Ctr., Inmate Population Statistics* (Feb. 10, 2005) (on file with author).

¹⁵⁸ The jail once reserved ninety beds for state prisoners in the "Class D Program" but had approximately half as many on the day of the visit, with the jailer saying that he wanted to limit the program to twenty-five inmates. See *Kenton County Jail*, *supra* note 67, at 1.

¹⁵⁹ *Id.* at 1, 3.

¹⁶⁰ See *Notes of Robert G. Lawson, Pulaski County Detention Center*, at 1 (Apr. 15, 2005) (on file with author) [hereinafter *Pulaski County Jail*].

beds (anticipating a change of jails standards, to be discussed later), the jail had only about fifty of its total population sleeping on the floor.¹⁶¹ The jail held 142 state inmates on the day of the visit, forty-five of which were permanently housed in the jail (most in the "Class D Program" but six or seven class C felons in "Community Custody") and the rest in "controlled intake" or in temporary jail custody for violation of parole.¹⁶² Without exception, the living areas looked crowded and cluttered from the outside.

Unlike most jails, this one has a separate building for incarceration of inmates in the "Class D Program"—an L-shaped, cheaply constructed facility near the main jail with its own entrance. It has rows of bunk beds along its walls and a mostly open toilet/bath area at the rear of the building, has no natural light at all, and is at least as unappealing as the inside pods (even without the nearly fifty inmates that occupy it when not occupied by community service).¹⁶³ The jail's incarceration of state inmates is driven by its need for state revenue for jail operations,¹⁶⁴ a need that has the jail in pursuit of a huge expansion (200 more beds) that would be used to attract and hold greater numbers of state prisoners.¹⁶⁵

The overcrowding of this jail produced a particularly difficult set of conditions for female inmates (conditions that might well exist elsewhere given the recent explosion of this segment of the jail population). The jail had but one living area for females, capable by then-existing jail standards of holding sixteen inmates but housing on the day of the visit a total of thirty-five inmates¹⁶⁶ (providing something less than twenty-five square feet of living space per inmate). The word "overcrowded" is inadequate to describe the conditions that exist in a jail pod that has about 800 square feet of space and 35 inmates who sleep, eat, and live almost around-the-clock in that space.

4. *Louisville Jail.*—The authorities of this jail (the state's biggest) fixed its "ideal capacity" at 1,525 inmates and its "ceiling" capacity at 2,090.¹⁶⁷ It had 1900 inmates in custody on the day of the visit or, in the words of jail officials, about 300 over capacity.¹⁶⁸ Most of the inmates lived in dormitory

161 *Id.* at 5.

162 *Id.* at 1–2.

163 *Id.* at 2.

164 The county appears to get about \$1.1 million dollars from the state for jail activities, more than it gets from local government for jail operations. *Id.* at 4–5.

165 The intent of the county to use the jail expansion in order to get more state inmates, more revenue for jail operations, and decreased costs to local government was confirmed by the county judge in a discussion of local jail problems arranged by the local judge who had facilitated the jail visit. See Notes of Robert G. Lawson, County Judge—Pulaski County (Apr. 15, 2005) (unpublished memorandum, on file with author).

166 See Pulaski County Jail, *supra* note 160, at 1.

167 See Louisville Jail, *supra* note 21, at 2.

168 *Id.*

areas that were larger than comparable areas observed in other jails but that had the same signs of overcrowding (mattresses on the floor of all pod areas, clothing hanging from all the bunk beds, and congestion in every square foot of living space).

Authorities perceived the jail to be a purely local facility, wanted no part of the state's jail program, and had exercised the city's right to refuse participation in the "Class D Program." Yet on the day of the visit, the jail had 300 state inmates (exactly the number it reported above its capacity), all in the "controlled intake" program (sentenced felons and parole violators awaiting past-due transfers to state prison).¹⁶⁹ The jail pushed hard to get the state inmates removed from the facility, a push driven partly by the overcrowding caused by such inmates and partly by the fact that the city was paid less than half of its actual costs for this incarceration.¹⁷⁰

5. *Others.*—Similar conditions as these, varying from one facility to another, were encountered in other jail visits.¹⁷¹ In a study recently conducted for the Department of Corrections, outside consultants quantified jail overcrowding:

According to a DOC weekly report from jails for the week of June 24, 2005, the 73 full-service county jails in Kentucky had a capacity of 12,225 inmate beds. The DOC report indicated that 14,880 inmates were actually housed in jails during that week, meaning that Kentucky jails were over capacity by 2,655 inmates, or 22%. This overcrowding pattern was also observed among

¹⁶⁹ *Id.* at 1, 3.

¹⁷⁰ Authorities at the jail reported that the state reimbursed them at a rate of \$24.50 per diem for inmates held after sentencing, while their per diem cost of incarceration per inmate stood at about \$65 per day. *Id.* at 3.

¹⁷¹ The Woodford County jail had sixty-three beds and seventy-nine inmates on the day of the visit, had fifteen to twenty inmates in the "Class D Program," wants more state prisoners notwithstanding overcrowding in the facility, sees the state program as a source of revenue for jail operations, and engages in jail expansion at the present time. Pod areas all have mattresses on the floor and look very crowded from outside. See Notes of Robert G. Lawson, Woodford County Jail (Jan. 18, 2005) (on file with author) [hereinafter Woodford County Jail]. The Rockcastle County Jail had seventy beds and 112 inmates on the day of the visit (approximately fifty percent more than allowed by jail standards even though the population was the lowest it had been in some time). Of all the jails visited, this one appears to be more dependent on state prisoners than any other (with eighty-three of the 112 total being state prisoners of one category or another), with the jailer presently pushing local government to expand the jail to 300 to accommodate more state inmates. See Notes of Robert G. Lawson, Rockcastle County Jail (Apr. 15, 2005) (on file with author) [hereinafter Rockcastle County Jail]. The Hardin County Jail claimed capacity at 550, had about 500 inmates on the day of the visit, and had a few sleeping on the floor of the living areas (with the jailer claiming "I just don't want inmates on the floor"); its population was well below the prior year's level, when its population exceeded 600 for nine months and was close to 700 for four months. The jail held about 130 inmates in the "Class D Program" and a smaller than average number in controlled intake. See Notes of Robert G. Lawson, Hardin County Detention Center (June 21, 2005) (on file with author) [hereinafter Hardin County Jail].

the 25 jails in our sample The DOC report indicated that for the same week in June 2005, the sampled jails had 3,426 beds but housed a total of 4,302 inmates, representing a total of 876 (25.5%) inmates over capacity across all 25 jails. On average, there were 137 jail beds for 170 inmates.¹⁷²

Professionals say that penal facilities are full when eighty-five percent of the beds are occupied,¹⁷³ an observation that at least provides perspective on the overcrowding that exists in Kentucky jails (with twenty-five percent of jail inmates on the floor *on average* and obviously more than twenty-five percent on the floor in some if not most jails). Without a doubt, overcrowding is a truly overwhelming problem from one end of the jail system to the other, an unmanageable condition that affects every aspect of life inside jail living areas.

C. Living in Jail

Eight inmates living in 400 square feet of space are provided fifty square feet of living space (the requirement under jail standards in effect during the visits conducted for this study),¹⁷⁴ but in this close a confinement inmates have no way to claim possession of even a small corner of the pod (except maybe the space that is occupied for sleep). They share the tight space day and night, struggle with human density never before experienced (unless earlier in jail), and search hopelessly for even a moment of solitude. There is no privacy for even the most basic of human acts and no defense to the humiliation that is inherent to these conditions.

We tend to forget that incarceration is a stressful experience under the best possible circumstances and far worse when it involves a near total deprivation of basic human needs. The congested pod offers almost no opportunity for positive contacts between inmates, none of the normal links that develop around meaningful activities, and very few if any trusting relationships, all made worse by the constant rollover of jail populations; it offers inmates next to nothing except a stifling idleness that is almost sure to make them worse from the experience. If hard time in prison or jail is time without meaning, there might be no equal to long periods of time in the seriously overcrowded living areas of jails; for above all else (and clearly in comparison to time in prison), jail time is dead time.¹⁷⁵

There are few opportunities for escape from the disabling effects of these conditions. All meals are served in the sleeping quarters of jails, toi-

¹⁷² See Foster et al., *supra* note 128, at 9.

¹⁷³ See Toch, *supra* note 50, at 64.

¹⁷⁴ 501 KY. ADMIN. REGS. 3:050 § 6 (2004).

¹⁷⁵ "The daily routine generally is one of unrelieved idleness. Card playing, conversations, meditation, and occasional television viewing, are the only options available." See Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, *Local Adult Institutions, in JAILS AND JUSTICE* 55 (Paul F. Cromwell, Jr. ed., 1975).

let and bath facilities are maintained inside the pods, and the close confinement described above is sustained around the clock except when interrupted by visitation or exercise. Most jails allow inmates to have visitors twice a week for periods lasting no more than twenty to thirty minutes and open exercise areas to inmates typically two or three times a week for no more than an hour at a time (weather permitting). At all other times (approximately 23.5 hours a day on average), many if not most jail inmates are left to cope with the difficult conditions that exist inside the pods.

D. The Prisons

EKCC has “double-bunked” almost all of its confinement facilities (cells designed for one inmate have two, cellblocks designed for twelve inmates have twenty-four); on the day of the visit, it held 1693 inmates in facilities that were designed for 975.¹⁷⁶ Northpoint has most of its inmates sleeping in the old mental hospital dormitories in very close confinement (thirty to thirty-five square feet of space per inmate);¹⁷⁷ it opened in the 1980s with about 600 inmates, has added living space for sixty inmates, and held 1,250 inmates on the day it was visited.¹⁷⁸ Blackburn has 590 beds and 590 inmates—twice as many inmates as it had ten years ago—and lives with a standing order to fill every bed as soon as it empties.¹⁷⁹ None of the three prisons has an excess of inmate jobs; two fall far short of needs,¹⁸⁰ a clear sign of overcrowding in these two prisons.

State inmates are imprisoned in jails because prisons are full. In early 2006, the state reported an operational capacity for the prison system of 13,673 and a daily count of 13,685.¹⁸¹ Flows into the system exceed flows out of the system, which means that the prison population is governed by “controlled intake” (“a space available basis”).¹⁸² All of the state’s prisons hold more inmates now than they have ever held and by most standards have more inmates than they should. In this regard, there is nothing different about the prisons visited for this study: they are full, and they are crowded.

176 See Eastern Kentucky Corrections Complex, *supra* note 136, at 1, 7.

177 See Northpoint Training Center, *supra* note 140, at 1–2.

178 See *id.* at 3–4.

179 See Blackburn Corrections Complex, *supra* note 145, at 4.

180 EKCC reports that it needs 543 jobs to keep inmates busy during incarceration. See Eastern Kentucky Corrections Complex, *supra* note 136, at 5. Northpoint Training Center identifies “expansion of its inmate work program” as a critical need. See JAMES L. MORGAN, NORTHPOINT TRAINING CENTER 13 (2005).

181 Ky. Dep’t of Corr., Adult Inst., Daily Count Sheet (Feb. 23, 2006).

182 The Department of Corrections has a category of jail inmates called “controlled intake,” meaning that they will be moved to prison when there is room. In early 2006, the Department reported that it held in this category 1,296 inmates (or about 20% of its total inmate population in the jail system). *Id.*

E. Living in Prison

The congestion of prisons is not to be dismissed as insignificant, for it produces circumstances that elevate the inherent cruelty of imprisonment and oftentimes pushes weakened personalities over the edge.¹⁸³ The congestion of prisons, however, is not even in the same universe with the congestion of jails—not because of enormous differences in spatial density, but rather because of enormous differences in the exposure of inmates to that density. Prison inmates are not caged around the clock and are not totally deprived of all sustaining influences and activities.

Prison inmates leave their confinement areas three times a day for meals in dining halls. They have access to open spaces (the so-called prison yard), use of a running/walking track for an occasional walk, and the means to find some moments alone or with close friends.¹⁸⁴ They have real rather than symbolic access to exercise activities¹⁸⁵ and opportunities for substantial and meaningful visitations with members of their families.¹⁸⁶ They have access to libraries, chapels, and recreation (horseshoes, billiards, board games, etc.), which adds some normalcy to their lives and some ac-

183 "What I can confidently maintain is that we are doing destructive things to people and that the problems we produce will escalate. I am not sure that felons—however reprehensible they may be—deserve the fate that congested prisons risk, and I have suggested in this article that the question will become more heart-wrenching as we gather more data" Toch, *supra* note 50, at 71-72.

184 All of the following were seen at the Blackburn prison and are typical of what was seen at the other prisons: An older inmate sat alone on a bench enjoying a cigarette and some solitude, a group of six or eight sat at a table outside one of the living areas in conversation, a larger group stood together outside a dining hall awaiting their turn, and others walked around the grounds either alone or with another. See Blackburn Corrections Complex, *supra* note 145, at 3-4.

185 Jails have very limited exercise facilities and insufficient staff to oversee extensive activities in those facilities. As a result, jail inmates have access to exercise two or three times a week for an hour each, and probably do much less than that in fact. Prisons have very substantial exercise facilities, have full-time staff members assigned to promote and supervise a wide variety of organized and unorganized activities, and want inmates involved in such activities in their free time. They freely open the facilities to inmates (during work days, evenings, and especially weekends). There were no exercise activities observed during eight jails visits, and only one activity in a miniature basketball court by two inmates on a ninth jail visit. On the other hand, during every prison visit there were exercise activities in various facilities involving large numbers of inmates, which lasted through the visits and beyond.

186 Jail visitation is usually brief (a few minutes at a time twice a week) and often unnatural (telephone conversation through a plexi-glass separation); prison visitation is welcomed and promoted by the institutions. At Blackburn, for example, there are both outside and inside visitation facilities allowed for contact visits and a program allowing and encouraging mothers to leave children with their incarcerated fathers for an extended period of close interaction. See Blackburn Corrections Complex, *supra* note 145, at 8. At Northpoint, visitation is available on all weekends and holidays (and for honor inmates on Friday evenings as well), often involves meals with spouses and family members, and occurs in a building that is especially equipped for visitations. See Northpoint Training Center, *supra* note 140, at 3, 5.

tivities in substitution for the idleness of the cellblocks. They have access to educational programs, and most importantly of all, they have jobs—not the most challenging jobs in the world to be sure, but jobs that give them something meaningful to do with their time and something other than the unbearable idleness and dead time of prison cells and jail pods.

F. Conclusion

Jails are designed to punish and do that well; prisons are called “houses of reform” and are meant to do more than punish. Both are more difficult places for inmates than they have ever been and probably leave few inmates unscathed by their experiences. But jail confinement is much more unnatural and abnormal than prison confinement and is surely harmful to those who already have no lasting sense of self-worth or personal value. In prison, there is something resembling life in the outside world; in jail, there is confinement, substandard living conditions, and potentially irreversible damage to personal initiative.

VII. A FOOTNOTE ON JAIL OVERCROWDING

A. Introduction

In the 1980s, jail standards required “60 square feet of confinement space per inmate—roughly the size of an average bathroom.”¹⁸⁷ In the 1990s, those standards softened under the pressure of inmate flows to require only fifty square feet of space per inmate. In the 2000s, under more pressure from inmate flows, the standard in question converted by practice into a jail standard on beds (from “[f]ifty feet per prisoner”¹⁸⁸ to fifty feet per jail bed). The end result was eight beds for 400 square feet of pod space (or ten beds for 500 square feet), mattresses on the floor not counted as beds, and inmates with far less than fifty square feet of living space.

B. Beds or Space

In 2005, with inmates on the floors of most jails, the state reexamined its position on spatial density without good options on the table. It apparently believed that it had no means to enforce the standard in place, could do nothing to stem the flow of inmates into the jail system, and could not hope for faster facilities expansion in a period of already-out-of-control corrections costs. The jails and counties wanted more beds and the state gave them what they wanted—by changing the density standard from fifty to

¹⁸⁷ Joan Mullen, *Prison Crowding and the Evolution of Public Policy*, 478 ANNALS AM. ACAD. POL. & SOC. SCI. 31, 35 (Mar. 1985).

¹⁸⁸ See 501 KY. ADMIN. REGS. 3:050, § 6.16(b)(5)(a) (2004).

forty square feet of confinement space per inmate¹⁸⁹ (or, as read by the jails, forty square feet per bed). The change moved some jail inmates from the floor to beds, reduced the “overcrowding” of jails by twenty percent, reduced the “overcrowdedness” of jails by zero percent, and may have laid the foundation for still greater congestion in jail pods in the years ahead. If jails are permitted to do what they usually do (cram as many inmates as possible in available space), the state will have made itself a full partner in confinement that risks full and permanent loss of most if not all penological legitimacy.

C. Close Confinement

Forty square feet of living space is “close confinement” by any reasonable measure of minimal human accommodation. It provides for each inmate about as much space as exists on the surface of an ordinary bed and thus guarantees inevitable crowdedness. In the abstract, it might track on the bare edge of bearable conditions; in the reality of the jail pod, it begins to look more like a storage bin or human warehouse than a penal institution in pursuit of corrections. In a jail converted into a prison (and holding inmates in close confinement for years rather than days), it is almost sure to harden the unhardened and do far more harm than good to the whole troubled lot that supplies most of the jail population.

VIII. JAIL AND PRISON REHABILITATION

A. Introduction

The question of what jails (and prisons) might do to inmates is only one piece of a fair assessment of whether it makes sense to leave state inmates in county jails for months and years. The question of what jails (and prisons) might do *for* inmates is a separate piece of that assessment that is at least as important as the first, given the huge needs of the inmate population:

Most inmates come to prison with little capital of any kind. About half of all inmates free a year or more before their arrest possessed incomes below \$10,000 and nearly twenty percent reported incomes less than \$3,000. One-third lacked any employment at time-of-arrest and another twelve percent had only part-time employment. Half dropped out of school before the eleventh grade and the typical inmate functions two or three grades below that level. Three-fourths cannot read above an eighth grade level; half are functionally illiterate. As many as 10% of the custodial population suf-

¹⁸⁹ See 501 KY. ADMIN. REGS. 3:050, § 6.16(b)(5)(a) (2005).

fer from serious mental illness and anywhere from 15% to 40% experience moderate mental illness. Substance abuse rates reach 80%.¹⁹⁰

The delivery of therapeutic and rehabilitative services to such a deficient group is difficult under the very best of circumstances and is almost sure to be more difficult for jails than prisons. Prisons have had rehabilitation as an objective from the beginning, they are designed and equipped to deliver such services, and yet they have a hard time delivering more than minimal assistance to inmates. Jails have never had rehabilitation as an objective, they are designed to punish rather than reform inmates, and they are yet to prove that they can deliver anything to help inmates pick up the pieces of their damaged lives and head in a different direction upon release from custody.

B. Jails and Inmate Education

About the only educational service offered by jails is the remedial program for high school dropouts (General Educational Development or “GED”).¹⁹¹ The need for this program is substantial to say the least, and jailers deserve credit for delivering this service; jailers are encouraged by the Commissioner of Corrections¹⁹² to provide this program to state inmates and often cite to achievements in this regard in justifying the “Class D Program” (and the use of jails for state inmates). But even in this most basic of educational efforts, jails must overcome serious obstacles to the delivery of an effective product, for jails have no teachers, no libraries, and no classrooms for serious instruction.

The most serious of the impediments to education in the jail system were revealed by a GED session observed during one of the jail visits conducted for this study.¹⁹³ The “classroom” was one of the jail’s pod areas (which was not then being used for confinement of inmates and thus was empty); it had no windows, no natural light, no blackboard, no desks, and no equipment except for the stainless steel table that is standard for jail pods. The instructor (not from the jail staff) sat at the steel table in the presence of three or four inmates (all sitting on the steel benches that go with pod tables); he was providing instruction to the three or four inmates sitting around the table and to another ten to fifteen inmates sitting or lying on the floor of the pod. The teaching materials for the session appeared to

190 James E. Robertson, *A Punk’s Song about Prison Reform*, 24 PACE L. REV. 527, 542 (2004).

191 See Eastern Kentucky Corrections Complex, *supra* note 136, at 4.

192 Inmates are awarded sixty days of credit on their sentences for successful completion of the GED program and \$150 in cash from incentive funds provided by Commissioner Rees. See *id.*

193 See Rockcastle County Jail, *supra* note 171, at 3.

be machine-made copies of a two- or three-page writing.¹⁹⁴ A poorer environment for teaching and learning than this one could not be purposefully designed. It is sure to be argued that other jails do better, and some probably do. But it is worth repeating that jails have no teachers, no libraries, no classrooms, and sometimes no proven teaching materials. The important point, however, is not what jails do in delivering this service but rather what they do in comparison to prisons.

C. Prisons and Inmate Education

The visit to Blackburn prison presented an opportunity to observe a very different GED session.¹⁹⁵ The "classroom" in this instance was in the "Education Building" and was in fact a classroom (windows, natural light, desk for the instructor, student desks like those found in most college classrooms, and no inmates on the classroom floor). The instructor was a full-time faculty member at the local community college with a full-time assignment at Blackburn; he was experienced in remedial instruction at various levels of need (high school dropouts, illiterates, and anything in between).¹⁹⁶ The instructor had at his disposal two walls lined with personal computers for student use and several shelves full of manuals, handbooks, textbooks, and other teaching materials.¹⁹⁷ The teaching/learning environment of Blackburn was a full world apart from the one observed in the jail setting, and it is only one piece of a broader offering of educational programs at the prison.

Blackburn has a solid library with a collection that is spectacular in comparison to what is seen in the best of the jail libraries, as well as a professional librarian to promote and assist in the library's use by inmates.¹⁹⁸ In addition to the GED teacher described above, Blackburn has two other full-time staff members who provide and administer basic adult educational programs to the inmates. The prison also offers, from time-to-time, college credit courses that are delivered to inmates at the institution. In most respects, the educational programs of Blackburn are duplicated at the other prisons visited for this study.¹⁹⁹

¹⁹⁴ See *id.*

¹⁹⁵ See Blackburn Correctional Complex, *supra* note 145, at 5.

¹⁹⁶ The instructor at Blackburn was well informed about the needs of inmates across the state system, and obtains information about his own students' needs before placing them in an instructional program. He has twenty-seven students in the classroom in the morning (all it will hold) and a different twenty-seven in the afternoon, all spending at least fifteen hours per week in the classroom. *Id.*

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ EKCC has an educational facility that is called the "academic school." It has multiple classrooms that are well equipped with computers and other technology, that look like college classrooms, and that have an adjoining library of substantial proportions. It has staff

D. Job Training

The inmates of jails and prisons need the educational programs described above but probably have a more critical need for job training that will give them hope for gainful employment after incarceration. The professionals in the Department of Corrections have a full appreciation of this need and provide inmates of the prison system with an array of opportunities for meaningful job training. The prison at Blackburn offers skills training in carpentry, masonry, welding, horticulture, and other areas, all provided by full-time staff in facilities that are used solely for training purposes.²⁰⁰ EKCC offers occupational training in plumbing, carpentry, air conditioning, small engine repair, and masonry, also provided by full-time staff in a building set aside for these programs.²⁰¹ The prison at Northpoint has virtually the same training programs that are found at EKCC. All three prisons offer at least some additional job training in their corrections industries program.²⁰²

The skills training programs of the prisons provide assistance to relatively small numbers of inmates and will not cure the massive employment deficiencies of the prison population. However, they are substantial when measured against the job training efforts of jails, where there are no facilities, no staff, no resources, and thus no programs aimed at providing job training for inmates. If there is anything in the jails even remotely comparable to the job training of the prison system, it will have to be found in the community services programs that are highly touted by jailers in their efforts to justify the state's growing use of jails for incarceration of state inmates.

members who are full-time and fully certified to offer pre-GED, GED, and other adult educational programs, including college offerings from a nearby community college that are provided cost-free to inmates. See Eastern Kentucky Corrections Complex, *supra* note 136, at 3–4; Ky. Dep't of Corr., Eastern Kentucky Correctional Complex, Inmate Programs, at 3 (Dec. 9, 2004), available at <http://www.corrections.ky.gov/ekcc/about/inmateprog.htm> (last visited July 25, 2005). The prison at Northpoint has much the same as EKCC in its educational offerings: "all levels [of education] from non-reader through attainment of a GED diploma" as well as college credit courses delivered at the institution. See JAMES L. MORGAN, NORTHPOINT TRAINING CENTER 8 (2005); Ky. Dep't of Corr., Northpoint Training Center, Inmate Programs, at 2 (Nov. 18, 2004), available at <http://www.corrections.ky.gov/ntc/about/programs.htm>.

200 See Blackburn Corrections Complex, *supra* note 145, at 5–6.

201 See Eastern Kentucky Corrections Complex, *supra* note 136, at 4.

202 Northpoint has corrections industry programs in furniture restoration and upholstery and furniture assembly. Blackburn has programs in construction and assembly of office furniture and an impressive program in restoration/reconstruction of old computers. EKCC has programs in restoration of steel furniture, furniture manufacture and upholstering, and others. See Northpoint Training Center, *supra* note 140, at 7–8; Blackburn Corrections Complex, *supra* note 145, at 4; Eastern Kentucky Corrections Complex, *supra* note 136, at 4–5.

E. Community Service from Jails

The community services component of the state's jail program works as follows: the Department of Corrections classifies inmates for release into the community, jails choose the activities to be performed by such inmates and provide for supervision during release, and the law gives inmates credit on their sentences for the performance of such services (one day of credit for one full week of work).²⁰³ The worth of the program to communities is substantial and undeniable (especially those with large jails and many state inmates²⁰⁴); the worth of the program to inmates is highly suspect to say the least when account is taken of its implementation by jails.

What are inmates required (or permitted) to do when released from jail for community services? (The jailers interviewed for this study were remarkably consistent in responding to this question.) They pick up trash from streets, roads, and highways;²⁰⁵ mow grass in parks and clean cemeteries;²⁰⁶ work in local sanitation departments (riding garbage trucks);²⁰⁷ provide janitorial, cleaning, and maintenance services for public agencies and local charities;²⁰⁸ and provide assistance in recycling centers, animal shelters, and jail gardens.²⁰⁹ Some inmates may be used for more challenging

203 KY. REV. STAT. ANN. § 441.127 (West 2006) ("Sentence credits shall be deducted from the maximum expiration date of the sentence.").

204 The Christian County Jail recently reported that its state inmates had performed public services for the community valued at \$2,156,110. *See* Christian County Jail, Community Work Program, 2003–2004 (on file with author). The Hardin County Jail recently reported that its state inmates provided more than 200,000 hours of free labor for the surrounding communities. *See* Hardin County Jail, *supra* note 171, at 4.

205 This is the most common of all reported activities and is undoubtedly near the top of the list of things done by state inmates. One of the visited jails quantified the activity in its annual jail report by reporting that the jail's inmates had in one year cleaned 1.34 thousand miles of roadway and removed from these roads 110 thousand pounds of trash. Louis Lawson, Jailer, Hardin County Det. Ctr., Annual Report 2004, at 38 (on file with author). Two jails reported having regular "litter crews." *See* Rockcastle County Jail, *supra* note 171, at 3; Pulaski County Jail, *supra* note 160, at 4.

206 *See* Pikeville Jail, *supra* note 148, at 4; Woodford County Jail, *supra* note 171, at 2.

207 *Id.*; *see also* Christian County Jail, *supra* note 64, at 3.

208 The following activities were among those listed by a jailer with a very substantial and active community service program: cleaning probation and parole offices, working at the Salvation Army facility, repairing and rebuilding city sidewalks, cleaning and maintaining the old courthouse, collecting used tires for disposal, and washing cars at the police station. *See* Hardin County Jail, *supra* note 171, at 4. The following entities were the beneficiaries of public service work by inmates of one of the bigger jails: housing authority, county road department, recreation department, courthouse, solid waste facility, Habitat for Humanity, state highway department, veteran's cemetery, and others. *See* Christian County Jail, Community Work Program—2003–2004 (undated).

209 *See* Pulaski County Jail, *supra* note 160, at 3 (mentioning service work in public parks, animal shelter, public library, courthouse, fire department, and jail garden); Woodford County Jail, *supra* note 171, at 2 (mentioning activities on the local roads, public parks, and recycling

activities (such as renovation of public properties²¹⁰ or repair of government vehicles²¹¹), but a very, very high percentage of the inmates in the program are clearly performing services that in the open market are provided by *totally unskilled laborers*. If there is lasting worth in these activities for inmates (who are very poorly educated and have virtually no job skills), as some jailers argued,²¹² it is minimal at best and, once again, is not even in the same ballpark with the skills training offered to inmates of the prison system.

It is beyond dispute that jail release for these activities is much better for inmates than the unrelieved idleness of the jail pod, which brings to the forefront a second shortcoming of this component of the jail program as implemented by the jails. The Department of Corrections classifies for release into the communities a very high percentage of state inmates housed in the jail system, a percentage that is totally at odds with the percentage of state inmates that is actually released for services in the community. Only one of the jails visited for this study reported that all of its qualified state inmates were used in the community services program;²¹³ most of the jails used fewer than half of its qualified inmates and some used significantly less than half.²¹⁴ Corrections Department consultants recently reported that in some counties, the state's inmates are not allowed to leave the jail for community service under any circumstances:

In some counties, state inmates are only allowed to work inside the jail Some jailers . . . will not allow any local inmate to work out in the community regardless of risk level or seriousness of the offense, so only inmates from other counties can participate in trash pickup or other community work programs. Some jailers reported that their community work programs

center).

210 See Hardin County Jail, *supra* note 171, at 4 (citing to renovation of an old jail and a one-room school house).

211 See Kenton County Jail, *supra* note 67, at 2; Hardin County Jail, *supra* note 171, at 4.

212 The jailer with the very best community services program believes that inmates get some job training from their public services work but also learn to respect other people, their communities, and even work itself. See Hardin County Jail, *supra* note 171, at 4. Some jailers see more benefits to communities than to inmates from the public services program, while at least one jailer states rather frankly that there are no lasting benefits to inmates from the program. See Kenton County Jail, *supra* note 67, at 2; Pikeville Jail, *supra* note 148, at 4.

213 The Hardin County Jail had 130 inmates in the "Class D Program," kept about one-fifth of them in the jail for a state-sponsored drug treatment program, and used nearly all the others in the community services program. See Hardin County Jail, *supra* note 171, at 3.

214 One jail, for example, had eighty-nine state inmates and released only twenty-five for community service. See Pikeville Jail, *supra* note 148, at 4. Another jail had 152 inmates in the "Class D Program" but took only sixty-five into the community for public service activities. See Christian County Jail, *supra* note 64, at 3–4. A third jail had forty-five in the "Class D Program" and took an average of about forty percent of them to the community. See Pulaski County Jail, *supra* note 160, at 2.

are very limited because of staffing, and one stated that his county attorney requires an armed guard to be present²¹⁵

On top of “qualified” inmates who are not released into the community for one reason or another, there is the very large group of state inmates in the “controlled intake” program that is not even qualified for release, producing a very large number of state inmates who spend nearly every hour of every day in the difficult conditions of the jail pod. Perhaps in theory, the community services program offers some modest support for use of local jails for long-term incarceration of convicted felons; in practice, the program falls miles short of its alleged worth.

F. Parole Decisions

The relationship between rehabilitation and parole is deeply embedded in the law. The parole statutes require the Parole Board to consider an inmate’s plan for “proper employment” and to find that he or she is “able and willing to fulfill the obligations of a law abiding citizen.”²¹⁶ The Board’s regulations require that it consider an inmate’s involvement in “work and program[s]” during incarceration.²¹⁷ In its opinion in *Campbell County*, the Supreme Court said that rehabilitation programs are “intrinsically beneficial and extrinsically essential to parole considerations.”²¹⁸

The Parole Board has three options when deciding what to do with a parole request—grant parole, defer until a later date, or order a serve-out of the sentence; the third option is obviously the worst of all situations for inmates. If the Board does in fact look at “work and programs” and if such programs are “essential” to parole as the Supreme Court says, what would you expect to find in parole decisions involving inmates incarcerated in jails where rehabilitative services are limited at best? What you would in fact find in recent decisions, as shown in Figures 5 and 6 below, is that a state inmate in jail is three to four times more likely to get a serve-out order than is a state inmate in prison:

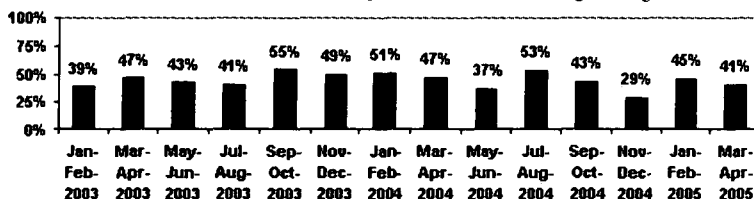
215 See FOSTER ET AL., *supra* note 128, at 24.

216 “A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes he is able and willing to fulfill the obligations of a law abiding citizen.” KY. REV. STAT. ANN. § 439.340(2) (West 2006).

217 501 KY. ADMIN. REGS. 1:030, § 4(1)(C) (2005).

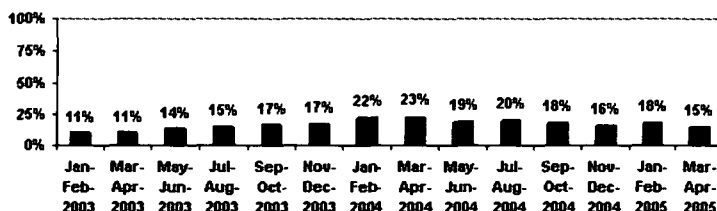
218 *Campbell County v. Ky. Corr. Cabinet*, 762 S.W.2d 6, 15 (Ky. 1988).

Figure 5
Serve-Out Orders—Jail Inmates—2003–2005



Source: Kentucky Department of Corrections²¹⁹

Figure 6
Serve-Out Orders—Prison Inmates—2003–2005



Source: Kentucky Department of Corrections²²⁰

State inmates in jail have generally committed less serious crimes than state inmates in prison, and would seem to be at least as suitable for release on parole as state inmates in prison if incarcerated under similar conditions and given equivalent access to rehabilitative services. If they are not incarcerated under similar conditions and not provided comparable rehabilitative services, one gets the very-hard-to-defend disparities that are reported in Figures 5 and 6 above.

G. Conclusion

Rehabilitation is an afterthought in the local jail system, driven mostly by the financial incentives of the state's jail program. Subject to a few exceptions,²²¹ the jails are not designed, equipped, staffed, or funded to deliver inmate-oriented programs that have anything more than a faint hope of

²¹⁹ KY. DEP'T OF CORR., PAROLE STATISTICS (2005).

²²⁰ *Id.*

²²¹ Two of the most promising rehabilitation programs observed in the visits to jails and prisons conducted for this study were drug treatment programs in two of the visited jails. The jail in Hardin County has had a state-funded program for about 30 inmates for several years and is destined to get a second program of this type for women in the near future. See Hardin County Jail, *supra* note 171, at 5–6. The jail in Christian County also has a drug treatment program of this type, for about the same number of inmates and funded by either the state or federal government. See Christian County Jail, *supra* note 64, at 5–6.

helping inmates after incarceration. Jails are good at punishing inmates but not at preparing them for a successful return to their communities as law-abiding citizens, an undeniable reality that ought to be more of a factor than it has been in the decision to use jails for incarceration of state inmates.

IX. JAIL FUNDING AND JAIL PROBLEMS

It would be an understatement of massive proportions to say that jails have serious funding problems. At the end of an important 2005 survey and study of the Kentucky jail system, the state's auditor of public accounts made the following statement about this problem:

Throughout the nation, county jail budgets are increasing exponentially. Exploding inmate populations are pushing jail capacities to the limit of both monetary and physical capabilities. Kentucky is no exception . . . Kentucky county jails accounted for a total of \$244 million in expenditures for fiscal year 2005. The need to control jail expenditures is clearly evident. Factor in the dependency that most county jails have on counties' general funds and the need to decrease expenditures becomes paramount.²²²

The auditor was subtle in assessing blame for the funding problem and to some extent even spread the blame around, although the state's biggest newspapers heard the auditor assign much of the blame to the jails (a "managerial mess"²²³ and "imprisoned by inefficiency [and] waste"²²⁴), an assignment that should not go unchallenged.

The huge and growing costs of operating jails are far more attributable to state policies and practices than to anything done by jails and counties. The pretrial detention population of local jails is bigger than ever because *state* court judges have become tougher in their pretrial release practices (not because of county fiscal court actions).²²⁵ The minor offender population of jails is bigger than ever because *state* court judges (driven by the *state's* tough-on-crime policies) are tougher than ever on minor offenders (not because of actions by governing bodies in the cities of Louisville and Lexington).²²⁶ The mentally ill population of jails (and its monumental costs) is bigger than ever because the *state* has defaulted in its obligation to this population (not because of what has or has not been done by local

222 CRIT LUALLAN, REPORT FROM THE STATE AUDITOR: KENTUCKY JAILS, A FINANCIAL OVERVIEW I (2006).

223 Editorial, *County Jails Need Help that Only State Can Give*, COURIER-J. (Louisville, Ky.), Feb. 27, 2006, at 6A.

224 Editorial, *Jailhouse Jumble—Facilities Imprisoned by Inefficiency, Waste*, LEXINGTON HERALD-LEADER, Mar. 3, 2006, at A10.

225 See *supra* notes 39–54, fig.2, and accompanying text.

226 See *supra* note 47 and accompanying text.

government). The “war on crime” that has filled prisons and jails beyond their capabilities is a purely state initiative that cannot be dumped on the doorsteps of local governments. And for the most part, the same must be said about the funding problem identified by the state’s auditor.

The pertinent point about this funding problem is not assignment of blame. Instead, it is the undeniable fact that in trying to deal with the problem, jails and counties have grown increasingly dependent on state funds that they generate through the incarceration of state inmates. They started relying on this source of revenue early on (once it was settled that the state had to pay for this service) and are now fully addicted to it, as evidenced by the fact that they look ahead with high hopes for still higher numbers of state inmates in the jail system.²²⁷ Four of the nine jails visited for this study have plans for expansion, all with an eye on state inmates and all with an unmistakable intent “to offset the costs of holding their county prisoners.”²²⁸

There is a problem with that. Substantial parts of jail operating costs are fixed and do not increase with the addition of more inmates, giving financially distressed jails a strong incentive to overcrowd their facilities to produce added revenues for operations. Stated differently and more bluntly, the state’s jail program provides an incentive to local jails to overcrowd their facilities, and they have done exactly that. After her comprehensive survey of jails and jail budgets, the state’s auditor minced no words when speaking about this issue: “The state’s practice of leaving state prisoners in the county jails (Controlled Intake) or placing state prisoners in county jails (Class D felon program) either exacerbates or causes overcrowding in 53 of the state’s 73 full service and regional jails.”²²⁹

In this regard, the future looks no different than the past. Jails are in critical need of operating resources, and the incentive to overcrowd facilities remains intact, which means that the harsh conditions of jail confinement are more likely to get worse than get better, unless the state finds some way to curb its growing appetite for jail space.

Curbing its appetite for jail space will not be easy for the state. The inmate explosion continues, corrections costs stand at an all-time high, jail space is cheaper than prison space, and the considerations that weigh against use of the cheaper space are intangible and difficult to measure. It appears, for example, that state inmates in jail serve more of their sentences than state inmates in prison,²³⁰ maybe enough to eliminate the cost advantage of using cheaper jail space. State inmates in jail are offered less

227 In the state auditor’s recent survey and study of jails and their budgets, it was noted that revenue projections for counties “are based on state prisoners being placed in their facility.” LUALLEN, *supra* note 222, at 12.

228 *Id.* at 9.

229 *Id.* at 2.

230 See *supra* figs.5 & 6.

rehabilitation opportunities than state inmates in prison, are less prepared for a return to the free world, and are more at risk of returning to state custody for new incarceration (and new costs to the state). Additionally, there is the risk that has caused authorities to believe for most of 200 years that felony and misdemeanor inmates should be kept apart during service of sentences:

The idea of incarcerating felons alongside misdemeanants is also dangerous in another sense if there is any validity to Edwin Sutherland's theory of differential association (suggesting that criminal behavior is learned behavior, acquired through association with criminals). This exposure to felons could transform America's jails into finishing schools of crime. Two well-known criminologists have suggested precisely that . . .²³¹

Against the only yardstick that ought to matter—whether a corrections expenditure has the desired effect of reducing crime—it is not at all clear that jail space is as cheap as it appears to be.

X. JAILS AND PRISONS—AN INSIDE VIEW²³²

A. Introduction

James Phillips²³³ is thirty-three years old, has been involved with illegal drug use for at least a decade and a half, and has seen the inside of several jails and one prison. He has a lengthy record of drug crimes (possession of drugs, forged prescriptions, possession of drug paraphernalia, etc.) and crimes often associated with drug addiction (check forgery, nonsupport of children, and others). He had two early experiences in local jails (as a state inmate), spent time on parole after these experiences, and after committing new crimes, returned to the penal system (as a state inmate) for a more eventful trip that began in the jail system and ended in state prison. He speaks from personal experience and with credibility about the differences between life in jail and life in prison.

²³¹ J.C. Oleson, *The Punitive Coma*, 90 CAL. L. REV. 829, 847 n.88 (2002).

²³² This is about personal experiences of a state inmate who served time in three jails as a convicted felon and then served additional time in state prison (at the Kentucky State Reformatory), experiences which he recounted in an interview conducted in the home of his parents (in their presence) after being paroled from state prison. Between the interview and this writing, his parole has been revoked and he is once again incarcerated as a state prisoner. His request for protection of his true identity is honored in this writing.

²³³ For reasons stated in the preceding footnote, this is a name that is used in substitution of the real name of the individual who had these experiences.

B. Early Jail Experiences

Phillips was introduced to the state's penal system in the Clark County Jail (where he served ten months of a two-year sentence for drug crimes that put him in the state's "Class D Program"). He lived in a pod area that had bunk beds for half of the inmates and mattresses on the floor for the rest.²³⁴ He was classified by the state for release into the community but was denied that opportunity by jail authorities.²³⁵ He spent every day of his sentence confined to the pod, except for family visitation twice a week (for about thirty minutes each) and fifteen-minute trips to a jail vending area three times a week. For all but about two hours a week, he watched television, played cards, and laid in bed. He later served a short sentence as a state inmate in the Montgomery County Jail, again confined almost around the clock under slightly tougher conditions than existed in the Clark County Jail.²³⁶

C. New Jail Term

Phillips spent time on parole after these experiences, committed new felonies, was sentenced to nine years (four from earlier crimes and five for new felonies), and began service of this sentence in the Clark County Jail again as a state prisoner. He lived in a crowded pod with a mixture of state and local prisoners (and some pretrial detainees), occupied a mattress on the floor of the pod (claiming that guards gave beds only to local inmates), and spent most of his time once again confined to the pod (although classified for release into the community).

He ate his meals in the pod, had no access at all to exercise facilities, left the pod for very short periods for religious services (twice a week), went to Alcoholics Anonymous meetings inside the jail until they ended without explanation, and spent almost every hour of every day "watch[ing] a little T.V. and lay[ing] around."²³⁷ He avoided trouble inside the pod (although fights were common²³⁸) and received regular visits from his parents who lived in the vicinity, but like most of the state's inmates, he spent a considerable amount of his idle time wishing for a transfer to state prison. About nine months into his new sentence, he got a transfer but not to state prison.

²³⁴ See Memorandum from James Phillips (Mar. 1, 2005) (on file with author) [hereinafter James Phillips Memorandum].

²³⁵ He estimates that no more than half of the state inmates were permitted to leave the jail for community service activities. See *id.* at 1.

²³⁶ *Id.*

²³⁷ *Id.* at 2.

²³⁸ "Most of the time guards did nothing about inmate fights. The fights would just play out: 'if you got whipped, you got whipped.' If it got bad enough, the guards would intervene." *Id.*

D. Bigger Jail

Phillips was moved (with other state inmates) to the bigger county jail in Madisonville. The living areas of this jail were larger, had more occupants than beds (with twenty percent sleeping on the floor), and were occupied by a mixture of local and state inmates. The jail had a large population of state inmates; it worked some inmates inside the jail and worked others in the community, but kept many in the close confinement of the jail pods. Phillips was grouped with those not allowed to leave the jail (although classified for release into the community). He encountered more conflict inside this jail than he had experienced before,²³⁹ was confined to his jail pod almost around the clock (except for exercise and church services twice a week for brief periods), and engaged in a never-ending unsuccessful search for meaningful activities. He had no space, no sustaining influences, and no means of retreat even unto himself. He had only a place to sleep, a place to eat, and a place to waste away doing absolutely nothing.

He got lucky when the jail moved into his pod a very aggressive local who struggled unsuccessfully with the inescapable stress of jail life. Phillips and the local lived in relative harmony for about a month, then found themselves in conflict over nothing ("a piece of paper on the floor near their bunk"²⁴⁰) and spent about ten minutes in two separate fistfights in the pod in the presence of cellmates (ending with Phillips having a tooth embedded in an open wound on one of his hands). He spent the next two weeks visiting community treatment facilities (an infirmary for a tetanus shot, an emergency room for treatment, and finally a hospital) and ended the period with an ugly hand and arm and signs of gangrene infection.²⁴¹ After a short additional period in the jail, he was taken to the medical ward of the state's biggest prison (the Kentucky State Reformatory) and from there to a Louisville hospital for emergency surgery. At the end of this journey, he got what the Supreme Court once called a "bizarre" wish—time in state prison.²⁴²

239 He witnessed fights almost every day, although not in his pod area. Most of the fights were between state inmates and locals. He attributed ninety percent of the fights to the stress of close confinement and ten percent to "somebody wanting to be a smart aleck." *Id.* at 3.

240 "The [local] man said that . . . [he] was going to have to pick up the piece of paper or he was going to kick his ass." *Id.*

241 "We are now a couple of weeks away from the fight. His hand is swollen and pulling his fingers apart. Now [it] had green stuff leaking out of it . . . He stays in the jail three days and his situation gets worse. His temperature is 104 or 105." *Id.* at 4.

242 "These cases present a bizarre picture of convicted felons and parole violators fighting for the right to get *into* state prison . . ." *Campbell County v. Ky. Corr. Cabinet*, 762 S.W.2d 6, 7 (Ky. 1988).

E. Prison

Phillips exchanged the county jail pod for a cellblock in the state's biggest prison.²⁴³ He shared a cell with one inmate and a cellblock of thirty-six separate cells with seventy-two inmates (two beds and two inmates in each cell).²⁴⁴ He had open access to a large cellblock common area, and from there he had restricted but liberal access to the "prison yard" (from six in the morning until eight or nine at night²⁴⁵). He had a claim to the space inside the cell, a key that provided security day and night, use of a television set (with earphones) without distress to others, and most importantly, the possibility of some private moments in his life ("a quiet game of chess or rummy"²⁴⁶). He had a say in the selection of his cellmate and the opportunity through good behavior to earn a single bed cell of his own.

Phillips was confined to the cellblock area during the night but consumed large amounts of time in other parts of the prison during daylight hours. He had a prison job that removed him from the cellblock for hours a day; had his meals in a common dining area with other inmates; had relatively free access to the yard and exercise facilities inside the prison (gym, soccer and softball fields, and others); had something resembling normal contacts with both inmates and staff; and, with some effort, could even find space for private moments all alone. He tried to get drug treatment and job training during his eighteen months in the prison facility but remained on a waiting list for those programs through his release on parole. Despite these failures and many difficulties with the prison experience, he rated his time in jail many, many times worse than his time in prison. In jail he found a way to survive (barely); in prison he found a way to live.

XI. CONCLUSIONS

It is easy to put people like James Phillips in jail or prison and not worry about what happens to them. They choose to violate the law, know what they are doing, may have wasted opportunities to change their lives, and deserve the punishment being imposed. So why should we care if the state packs inmates into penal facilities that allow them to survive but not live, that deprive them of all but the most basic of human needs, and that push them to the edge of what fragile and even normal personalities can tolerate?

We cared enough about prisoners in our earliest days to insert in our

243 Although it had a few less upon Phillips' arrival there, the Kentucky State Reformatory holds in excess of 1,900 inmates. See Ky. Dep't of Corr., Adult Inst., Daily Count Sheet (Feb. 2, 2006).

244 See James Phillips Memorandum, *supra* note 234, at 5.

245 *Id.*

246 *Id.*

constitutions basic protection against "cruel and unusual" treatment.²⁴⁷ In our now thirty-year-old "war against crime and drugs" and under the influence of our obsession with incarceration, we may have lost our bearings to some extent. But we have not lost our appreciation for the fact that we degrade our justice system by closing our eyes and minds to harsh and mean treatment of people who violate our criminal laws. We put citizens in prison and jail in the name of justice, but we must not forget that there is no justice in the absence of decent treatment.

Maybe the most resilient of jail inmates can survive the harsh conditions of the jail pod without a loss of emotional stability. But what about the impact of these conditions on more typical jail inmates—the misfits who perpetually live on the economic and social fringe when not imprisoned, who suffer emotional and mental disabilities in disproportionate numbers, and who struggle to cope with surroundings even in an optimal environment? What are we doing to the physical and mental wellbeing of weakened people who are confined around the clock for months (and years) without positive contacts, constructive activities, and anything resembling normal relationships?

Prison professionals struggle to find meaningful work and activities for their prisoners, for they know from long experience of the "[m]oral and physical deterioration of inmates through idleness,"²⁴⁸ which is the most prominent and easily the most debilitating of all the difficult conditions of long-term confinement in the jail system. In lieu of programs that might give them a chance and a hope for a constructive life after imprisonment, we give inmates months (and years) of total and absolute idleness; we force them to do nothing (lying around, sleeping, and wasting away), and in so doing, may well enhance the deficiencies that contribute to their criminality. It is easy to forget that "the people society has put out of sight and out of mind continue to exist, and . . . are shaped—or warped—by the conditions to which we have relegated them."²⁴⁹ If we relegate them to conditions that are likely to make them worse rather than better, we should do so with full awareness that all but a few will sooner or later leave the confines of the jail and come back into our sights to live and behave (or misbehave) amongst us.

About twenty years ago, the state argued that it had no choice but to leave convicted felons in local jails; in a simple but profound response, the Kentucky Supreme Court said that "the state cannot pass penal statutes and create penalties that generate more prisoners than it is willing and

247 See, e.g., U.S. CONST. amend. VIII; KY. CONST. § 17.

248 John D. Case, "Doing Time" in the Community, in *JAILS AND JUSTICE* 164 (Paul F. Cromwell, Jr. ed., 1975).

249 Peter Y. Sussman, *Media on Prisons: Censorship and Stereotypes*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 275 (Marc Maver & Meda Chesney-Lind eds., 2002).

prepared to provide for.”²⁵⁰ The state has persistently toughened its penal laws since the Court spoke, and has now produced the largest and most costly corrections system in the state’s history; it has tripled the inmate population (from about 6,800 to more than 20,000²⁵¹), has filled the prisons beyond their design capacities, and has flooded the jails. The state now finds itself with an inmate growth rate far above anything ever before experienced (adding in the last two years alone almost 2,500 state inmates²⁵²), and has yet to show the first sign of changing its course. It has almost 6,000 citizens in jails across the state and the same lame excuse it had twenty years ago. This is a situation that is certain to get worse before it gets better and maybe bad enough for the Supreme Court to once again say, and this time mean, that the state cannot generate more prisoners than it is willing and prepared to provide for.

250 Campbell County v. Ky. Corr. Cabinet, 762 S.W.2d 6, 14 (Ky. 1988).

251 See Ky. Dep’t of Corr., Adult Inst., Daily Count Sheet (Mar. 20, 2006) (on file with author) (showing 20,134 inmates on March 20, 2006); Ky. Dep’t of Corr., Felony Population Projections (2003) (on file with author) (showing 6,843 inmates in 1988).

252 See Ky. Dep’t of Corr., Adult Inst., Daily Count Sheet (Dec. 28, 2005) (on file with author) (showing the state holding 19,862 inmates at the end of 2005); Ky. Dep’t of Corr., Adult Inst., Daily Count Sheet (Jan. 5, 2004) (on file with author) (showing the state holding 17,401 inmates at the beginning of 2004).