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County Jail Reform in Kentucky--A Second Look

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County Jail Reform in Kentucky — A Second Look

INTRODUCTION

The past decade has witnessed a tremendous growth in federal judicial intervention in the operation and maintenance of state and local prisons and jails. Federal judges have ordered various types of reform, ranging from the prohibition of certain institutional practices to jail closure absent extensive changes in unconstitutional conditions. Despite this growing activism by the federal judiciary, Kentucky, for the most part, has done little to ensure that its local jails meet constitutional standards. As a result, many of the local jails in Kentucky are susceptible to constitutional challenges by prisoners. A successful challenge could impose a substantial fiscal hardship on many of Kentucky’s smaller and poorer counties.

The Kentucky General Assembly has an opportunity to enact programs to protect its cities and counties from the potential problems raised by the spectre of federal judicial reform. One of the major programs presently under consideration by the legislature calls for the implementation of a system of state-run district jails to replace the unorganized myriad of county and city jails. The failure of the legislature to enact the district jail proposal, or to formulate some other viable alternative, could well result in judicially-ordered jail reform in Kentucky.

This Note will not present a statistical analysis of the actual physical conditions in Kentucky’s local jails. Rather, the

1 Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (temporary restraining order against the use of a “dry cell.” A dry cell was a room used for solitary confinement. It had no furnishings, a single hole in the floor for elimination of body wastes and the only lighting was from artificial light filtering through “slit screens” in the cell door).
2 Pugh v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976). District Judge Frank Johnson threatened to close any state prison which failed to comply with the minimum constitutional standards set forth in his opinion.
3 See notes 213-41 and accompanying text infra for a discussion of the district jail proposal.
4 Such an analysis already has been articulated. See Note, An Analysis of the
Note will provide minimum constitutional guidelines for legislative reform. Beginning with a review of federal cases dealing with federal constitutional attacks on physical conditions in local jails, the discussion will focus on the constitutional standards which have been fashioned by the federal courts in that context. These standards will then be applied to the existing local jails in Kentucky in an attempt to determine roughly their compliance with such constitutional requirements. Finally, this Note will consider the district jail proposal and how it might provide an adequate solution to the fiscal problems of cities and counties while preserving inmates' constitutional guarantees.

I. THE ROLE OF FEDERAL COURTS IN STATE PRISON REFORM

A. From "Hands-Off" to Judicial Activism

Federal judicial activism in the area of state prison reform is a relatively recent occurrence. Prior to 1964, federal courts adhered to a "hands-off" policy in cases involving complaints made by state prisoners, refusing to entertain most suits by prisoners in state jails. Two primary justifications have been offered for adherence to the policy. First, it has been argued that the federal courts have no jurisdiction in these cases due to preemption by state legislative and executive power. Second, the complexity of the problems in the jails caused some to suggest that it was better to vest the administrative chores

Question of County Jail Reform in Kentucky, 65 Ky. L.J. 130 (1976) [hereinafter cited as County Jail Reform in Kentucky].


in those who were more familiar with the problems, rather than in a judiciary which lacked expertise in penology.\(^7\)

1. Demise of the Hands-Off Policy

The first indication that the Supreme Court might abandon the traditional hands-off policy was demonstrated in the *per curiam* decision of *Cooper v. Pate*.\(^8\) The petitioner, an inmate at the Illinois State Penitentiary, filed suit claiming that prison officials had refused to allow him to purchase certain religious material. The district court dismissed the suit for failure to state a claim upon which relief could be granted, and the Seventh Circuit Court of Appeals affirmed.\(^9\) The Supreme Court reversed, holding that, if true, the allegations contained in the complaint stated a cause of action.\(^10\)

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\(^7\) *Judicial Politics*, supra note 5, at 806-10; Comment, *Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?*, *supra* note 6, at 99-101. This feeling was reflected in Mr. Justice Powell’s majority opinion in *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), when he wrote:

> Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

\(^8\) 378 U.S. 546 (1964).

\(^9\) 324 F.2d 165 (7th Cir. 1963).

\(^10\) The Supreme Court cited two cases, *Sewell v. Pegelow*, 291 F.2d 196 (4th Cir. 1961) and *Pierce v. LaVallee*, 293 F.2d 233 (2nd Cir. 1961). In both of these cases, suit had been filed claiming that prison officials had interfered with the prisoners' religious practices. The respective district courts dismissed the complaints. Each circuit court reversed and, by doing so, rejected the "hands-off" policy.
The Cooper decision was followed by Lee v. Washington\(^\text{11}\) and Johnson v. Avery,\(^\text{12}\) in which the Supreme Court invalidated prison regulations which violated the prisoners' constitutional rights. In these cases, the Supreme Court implied that the hands-off doctrine would no longer preclude federal court review of state prison matters which involved alleged violations of the constitutional rights of prisoners.\(^\text{13}\) This proposition was supported by the case of Wolff v. McDonnell\(^\text{14}\) in which Mr. Justice White, writing for the majority, stated: "A prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."

2. **Civil Rights Protections: Fuel for Judicial Activism**

Two Supreme Court decisions which liberally construed the scope of civil rights protections hastened the decline of the "hands-off" doctrine in the federal courts. The first of these was Monroe v. Pape.\(^\text{15}\) In Monroe, the Court ruled that in actions based upon the Civil Rights Act of 1871 there is no need

\(^{11}\) 390 U.S. 333 (1968) (per curiam).

\(^{12}\) 393 U.S. 483 (1969).

\(^{13}\) In Lee, the jail's practice of segregating the prisoners according to race was struck down. The Johnson Court invalidated a prison regulation which prohibited inmates from helping other inmates to prepare writs or other legal papers.

\(^{14}\) 418 U.S. 539, 555-56 (1974). These decisions should not be construed to mean that the Supreme Court has totally rejected the "hands-off" doctrine. Indeed, the Court still allows great deference to prison officials. At least one writer has suggested that the Supreme Court has obtained the same result under the "deference" policy as it would have under the "hands-off" doctrine:

> Through such deference, the Court has achieved a result that it could much more easily and candidly have achieved had it simply declared that prisoners are not entitled to constitutional protection. The Court has continued to profess, however, that the Constitution does protect prisoners, and under cover of that assertion, has permitted a hardy weed, the "hands-off" approach, to creep back into the prison yard from which it ostensibly had been banished.


\(^{15}\) 418 U.S. at 555.

\(^{16}\) 365 U.S. 167 (1961). In this case, a black family filed suit against the City of Chicago and thirteen policemen, claiming that the policemen had violated their fourteenth amendment rights by breaking into their house without a warrant and holding them for questioning. The district court dismissed the case and the court of appeals affirmed, 272 F.2d 365 (7th Cir. 1959). The Supreme Court reversed.
to exhaust state remedies prior to seeking redress in federal court.\textsuperscript{17} The second of these civil rights precedents was \textit{Cooper v. Pate},\textsuperscript{18} in which the Court ruled that the Civil Rights Act of 1871 could be invoked to protect inmates of state prisons and jails.\textsuperscript{19}

The significance of \textit{Monroe} and \textit{Cooper} should not be underestimated. Prior to their decision, a prisoner being held in a state prison could obtain relief in federal court only by filing a writ of habeas corpus, a writ of mandamus or a civil action in tort.\textsuperscript{20} The problems with using a habeas corpus action are two fold. First, the writ is unavailable unless the prisoner has exhausted all available state remedies or there is no adequate state remedy.\textsuperscript{21} This provision effectively postpones federal judicial review indefinitely since most states have statutory schemes under which prisoners can pursue their constitutional claims. However, as a general rule, state courts have not been

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\item \textsuperscript{17} 365 U.S. at 183. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." \textit{Id.} This view was reaffirmed in the 1963 case of McNeese v. Board of Education, 373 U.S. 668, 674 n.6 (1963), in which the Court quoted the following language from the case of Stapleton v. Mitchell, 60 F. Supp. 51, 55 (D. Kan. 1945):

\begin{quote}
[W]e yet like to believe that wherever the Federal courts sit, human rights under the federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.
\end{quote}

\item \textsuperscript{18} 378 U.S. 546 (1964)(per curiam).

\item \textsuperscript{19} \textit{Id.} (by implication).

\item \textsuperscript{20} See County Jail Reform in Kentucky, supra note 4, at 153-62.

\item \textsuperscript{21} 28 U.S.C. § 2254(b)(c) (1948), which reads as follows:

\begin{itemize}
\item (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

\item (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The reason for this requirement "is to avoid unnecessary friction between federal and state courts which would result if a lower federal court overturned a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors." \textit{Cruel But Not So Unusual}, supra note 5, at 34-35 n.22, citing as authority Presser v. Rodriguez, 411 U.S. 475, 491-92 (1973).
\end{itemize}
\end{itemize}
very sympathetic to such claims, as evidenced by the scarcity of cases in which the state judiciary has ordered some type of jail reform.22

Another shortcoming associated with federal habeas corpus relief is that the kinds of relief are severely limited. For example, where a federal judge finds that the conditions or practices of the state jail are unconstitutional or unlawful, he can order the release of the prisoner who brought the action.23 However, the judge cannot prohibit the existing conditions or practices which precipitated the action.24 Therefore, although a federal court may offer specific relief, it cannot effectuate changes generally in the jail to protect the collective rights of jail inmates.25

Both because of these problems inherent in habeas corpus relief and due to the decisions in Monroe and Cooper, prisoners' suits based on § 1983 of the Civil Rights Act of 187126 became the most desirable method of attacking conditions of confinement in state and local jails.27 The advantages provided by a § 1983 action are significant. First of all, § 1983 is available in class actions.28 Thus, if a court makes a determination as to the

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23 Id. at 383.


25 The writ of habeas corpus is a personal remedy and thus cannot be used in a class action. County Jail Reform in Kentucky, supra note 4, at 161-62. Thus, federal courts can evaluate the conditions at local or state jails only upon a case by case method. This factor, in addition to the exhaustion of state remedies requirement, makes it clear why habeas corpus actions are an inefficient manner in which to initiate jail reform.

26 42 U.S.C. § 1983 (1970) reads as follows:

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

27 See Remington, State Prisoner Litigation and the Federal Courts, 1974 Ariz. St. L.J. 549, 551 n.5, citing DIS. ADMIN. OFF. U.S. COURTS U.S. COURTS ANN. REP., IX-33 (prelim. ed. 1974). This report stated that some judges were spending up to 25% of their time on prisoners' suits brought under § 1983. For further data on the number of suits brought under § 1983, see Judicial Politics supra note 5, at 823-25.

28 Nearly all of the recent cases by prisoners challenging conditions or practices
legality of the conditions of the jail, it affects all the members of the class, which may consist of all jail inmates. Also, even if the class representative's claim is mooted, the class suit may usually continue.29

Another advantage of the § 1983 action is its remedial flexibility. If the physical conditions are deemed unconstitutional, the court has several alternative means of relief in its arsenal. For example, it can provide injunctive relief.30 This alternative is often the most effective since it has lasting consequences. Through the use of injunctive remedies, a federal court can require extensive changes in the conditions and practices of the jail.31 If the prison officials fail to adhere to the court order, they can be sanctioned for contempt.32


The Supreme Court, in Sosna v. Iowa, 419 U.S. 393, 402 (1975), held that a "controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." See also Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). But cf. White v. Keller, 438 F. Supp. 110 (D. Md. 1977), aff'd, 588 F.2d 913 (4th Cir. 1978)(controversy still existed after the claim of two named plaintiffs had become moot only because the claim of a third named plaintiff remained in contention).

This type of relief is usually given together with a declaratory judgment for the prisoners. The Court will first find that the prisoners' rights have been violated, then order the jail officials to stop certain practices and/or take certain actions to protect the prisoners' rights. See generally Cruel But Not So Unusual, supra note 5, at 40 n.63.


As a general rule, most cases involving jail conditions since 1970 have resulted in extensive court-ordered relief, covering almost every aspect of jail operations. See Mitchell v. Unterreiner, 421 F. Supp. 886 (N.D. Fla. 1976); Campbell v. McGrunder, 416 F. Supp. 100 (D.D.C. 1975), aff'd in part and remanded, 550 F.2d 524 (D.C. Cir. 1977). See also Cruel But Not So Unusual, supra note 5, at 40 n.63; County Jail Reform in Kentucky, supra note 4, at 165.

Cruel But Not So Unusual, supra note 5, at 40. The court will usually retain jurisdiction over the case in order to ensure that the jail officials comply with their order. See Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd sub nom.
One of the more important remedial advantages of a § 1983 action is that a prisoner whose rights have been violated can recover monetary damages from the jail officials.\textsuperscript{33} Such awards, consisting of compensatory and punitive damages, could become the most effective remedy available under § 1983. Surely local officials would be less likely to tolerate jails which fail to meet constitutional standards if the threat of civil penalty were present.\textsuperscript{34} Given the potential effectiveness of this remedy, it is somewhat surprising that in most of the cases involving claims by prisoners under § 1983, the federal courts have refused to award monetary damages.\textsuperscript{35}

There are two major reasons for the hesitancy of federal courts to award monetary damages in § 1983 actions. The most significant impediment to such an award is that plaintiffs must show that the officials acted in bad faith or with malice and that the officials intentionally deprived the prisoners of their constitutional rights.\textsuperscript{36} Mere negligence is insufficient to sustain such damages, even when jail conditions are horrendous. An example of this may be seen in Jones v. Wittenberg.\textsuperscript{37} In finding the condition of Lucas County Jail in Toledo, Ohio to

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\item Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). Some courts, in order to monitor compliance with their order, have appointed a master to observe and report to the court. Palmigiano v. Garrahy, 443 F. Supp. 956 (D. R.I. 1977). One court went so far as to appoint an eighty-nine member Human Rights Committee to monitor compliance. Puch v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976). The court of appeals later reversed this part of the decision, saying that a less intrusive manner of monitoring compliance would have been better. The court specifically stated that this monitoring function should be turned over to a magistrate or a monitor. Newman v. Alabama, 559 F.2d 283, 289 (5th Cir. 1977). Some courts, in order to monitor compliance with their order, have appointed a master to observe and report to the court. Palmigiano v. Garrahy, 443 F. Supp. 956 (D. R.I. 1977). One court went so far as to appoint an eighty-nine member Human Rights Committee to monitor compliance. Puch v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976). The court of appeals later reversed this part of the decision, saying that a less intrusive manner of monitoring compliance would have been better. The court specifically stated that this monitoring function should be turned over to a magistrate or a monitor. Newman v. Alabama, 559 F.2d 283, 289 (5th Cir. 1977).
\item Note that state officials, if sued in their official capacity rather than individually, could not be held liable for monetary damages under § 1983 because of the eleventh amendment. Comment, Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?, supra note 6, at 103 n.61. However, state officials might be held personally liable if sued individually rather than in their official capacity.
\item This is not to say that monetary damages may not be awarded. For a list of some of the cases which have awarded compensatory damages, see Cruel But Not So Unusual, supra note 6, at 40 n.62.
\item Comment, Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?, supra note 6, at 103 n.61; County Jail Reform in Kentucky, supra note 4.
\end{itemize}
be unconstitutional, the federal district judge wrote:

[W]hen the total picture of confinement in the Lucas County Jail is examined, what appears is confinement in cramped and overcrowded quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts, except with others in the same sub-human state, no exercise or recreation, little if any medical attention, no attempt at rehabilitation, and for those who in despair or frustration lash out at their surroundings, confinement, stripped of clothing and every last vestige of humanity, in a sort of oubliette.35

Even with these horrifying conditions, the federal judge refused to impose monetary damages, stating that there was no evidence of any malice or ill will on the part of the officials.39

The other obstacle to an award of monetary damages is the common law doctrine of governmental or official immunity.40 However, as more and more states reject the defense of immunity,41 it will become less of a barrier to relief. Nevertheless, those seeking damages under § 1983 will still have to contend with the difficulty of proving bad faith or intent on the part of the jail officials.

The final advantage of § 1983 actions over habeas corpus relief is that prisoners need not exhaust state remedies before

35 Id. at 99.
39 Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). A corollary is that many judges feel that it is unfair to subject prison officials to personal liability when they are only doing what a great number of people think should be done. Again, an excerpt from the Jones decision is enlightening:

It does not seem equitable to single out these defendants and mulct them in damages for continuing practices which are commonplace, and of very ancient usage. Especially would it seem unjust to do so when it is clear that up to at least a time shortly before this action was commenced, it was and perhaps it still may be the desire of a majority of the electorate that the county jail be an unpleasant and degrading, perhaps even a savagely cruel, place to be. Should the servant be punished for not refusing to obey the wishes of his master? At least in this case, this Court thinks not.

Id. at 722.
40 Comment, Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?, supra note 6, at 103 n.61; County Jail Reform in Kentucky, supra note 4, at 165.
41 County Jail Reform in Kentucky, supra note 4, at 157.
seeking relief in the federal courts. As noted above, this restriction severely curtailed the number of instances in which the federal judiciary could effectuate any reform in state prisons and jails through habeas corpus petitions. This advantage, probably more than any other factor, caused prisoners to turn to § 1983 as the primary safeguard of their civil rights.

B. The Search for Standards Under the Eighth Amendment

A prisoner must prove that he has been deprived of his constitutional rights to prevail in a suit under § 1983. Therefore, a suit based upon prison conditions or practices must allege and demonstrate constitutional violations. Most challenges to the conditions of confinement have been grounded upon the inmates' eighth amendment right to be free from cruel and unusual punishment. Accordingly, it is important to understand the standards utilized by the federal courts to determine whether or not the eighth amendment has been violated.

1. The Weems and Trop Standard

The prohibition against cruel and unusual punishment did not originate in the United States Constitution. Rather, this prohibition "was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta." It was originally thought that

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44 It is of no consequence that the jail conditions and practices may seem "bad" or even disgusting to the federal judge hearing the case. Unless the conditions or practices are so unpalatable as to violate the Constitution, the federal courts are powerless to intervene. See Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 Va. L. Rev. 841, 850 (1971) [hereinafter cited as Decency and Fairness].

45 The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

46 Trop v. Dulles, 356 U.S. 86, 100 (1957) (plurality opinion). For a more complete and detailed historical analysis of the origin of the phrase "cruel and unusual punishment," see Granucci, Nor Cruel and Unusual Punishments Inflicted: The Original
what constituted cruel and unusual punishment was determined by what acts were prohibited by the phrase when it was first adopted in England.47 Under this standard, the amendment prohibited only those kinds of punishment which were "inherently cruel," such as those which involved torture.48 If this standard were still in effect, it would be of little use in attacking physical conditions or practices of jails, for these would pale when compared to the punishments which were used in England long ago.49

This historical standard was discarded by the Court in Weems v. United States.50 In Weems, a United States official in the Phillipines was convicted, under Phillipine law, of falsifying official records. His sentence provided for fifteen years of cadena temporal.51 In determining whether this punishment was prohibited by the cruel and unusual punishment clause,52 the Court discarded the borrowed historical meaning which previously had been given to the amendment. The Court noted that the Constitution cannot remain static, but rather must acquire new meaning as the society grows and changes. Further, the Court stated that the Constitution, and particularly

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Meaning, 57 CAL. L. REV. 839 (1969). Granucci argues that those who included that phrase in the United States Constitution misconstrued the phrase as it was used in England. According to the American interpretation, the phrase prohibits cruel methods of punishment. However, in England, this phrase was not interpreted to prohibit cruel methods of punishment but rather excessively harsh punishments.

48 Comment, Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?, supra note 6, at 96.
49 This phrase did not prohibit certain practices in England which would be considered barbaric today. For example, the authorities were allowed to draw and quarter the prisoner, to disembowel him or to burn him alive. Comment, The Eighth Amendment and Prison Conditions: Shocking Standards and Good Faith, 44 FORDHAM L. REV. 950, 952 n.15 (1976), quoting from 2 W. BLACKSTONE, COMMENTARIES, BOOK IV, 376-77 (Cooley ed. 1899).
50 217 U.S. 349 (1910).
51 This phrase meant imprisonment at hard labor, with the prisoner being required to "carry a chain at the ankle, and hanging from the wrists." Also, the prisoner lost all civil rights during his imprisonment, lost all future political rights and was subject to surveillance by the government for the rest of his life. Id. at 364.
52 It should be noted that the Court was interpreting this clause as it was used in the Phillipine Bill of Rights. The Court said, however, that inasmuch as the phrase was taken directly from the United States Constitution, the interpretation given to the phrase in the Constitution would likewise be applicable to the phrase in the Phillipine Bill of Rights. Id. at 367.
the eighth amendment, "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Applying this premise, the Court held that the sentence in the case was so excessive as to violate the prohibition against cruel and unusual punishment.

This flexible reading of the eighth amendment was pronounced again by the Supreme Court in *Trop v. Dulles*, where the petitioner had been court-martialed and convicted for war-time desertion. As a result of conviction, the petitioner was stripped of his U.S. citizenship pursuant to the Nationality Act of 1940. The Court held that this punishment violated the eighth amendment. The Court followed *Weems*, stating: "The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." This case is important not only because it firmly adopted the philosophy of *Weems*, but also because it held that the eighth amendment is applicable to any form of punishment, regardless of whether or not it involves actual physical mistreatment.

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53 Id. at 378. In another portion of this opinion, the Court expounded on this theory in greater detail:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

Id. at 373.

54 Id. at 382.

55 356 U.S. 86 (1958) (plurality opinion).

56 Id. at 87.

57 Id. at 100-01.

58 Id. at 101.
2. Implementation of the Weems/Trop Standard: Three Tests

Using the principles fashioned in Weems and Trop, the federal judiciary began to apply the eighth amendment to state and local prisons and jails. The major problem presented by such application was the difficulty in dealing with individual fact patterns. It was and is obvious that these "standards" were really not standards at all. For instance, it is difficult to determine what constitutes the "evolving standards of decency that mark the progress of a maturing society." It is even more difficult to apply this platitude to particular jail conditions and/or practices.

The federal courts have created three tests to implement this broad language. The first and most popular is the "shock the conscience" test, which provides that the punishment is unconstitutional if it "is so foul, so inhuman and so violative of basic concepts of decency that it shocks the conscience of the court." The greatest attribute of this test is flexibility; the primary weakness is subjectivity. The constitutionality of a practice or condition consequently rests upon the sensitivity of the particular judge. It has been observed that "[t]he word 'shocking' is one that essentially appeals to the emotions. Emotional content added to imprecise concepts such as 'the evolving standards of decency' make measurement of a particular situation almost impossible." Another problem is that the test does not permit jail officials to anticipate what kind of

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59 In Robinson v. California, 370 U.S. 660 (1962), the Supreme Court recognized that the protections afforded by the eighth amendment are mandatory to each state by way of the Due Process Clause of the fourteenth amendment.


61 This phrase was first utilized in Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965).

62 Robbins and Buser, Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment, 29 Stan. L. Rev. 893, 902 (1977) [hereinafter cited as Punitive Conditions], quoting from Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967); See also Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965); Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal., 1966).

63 But see Punitive Conditions, supra note 62, at 902.


conditions violate the constitution and which do not, thus making it impossible to take corrective actions prior to litigation.\textsuperscript{68}

Under the second test created by the courts, the punishment is deemed unconstitutional if it is "greatly disproportionate to the offense for which it was imposed."\textsuperscript{67} This test follows the criterion utilized in \textit{Weems}.\textsuperscript{68} To determine if the punishment is excessive, however, it is necessary to apply the "standards of decency" concept used in the first test.\textsuperscript{69} Accordingly, a certain degree of subjective evaluation is also included in the second test.

The final test is a combination of the first two. It requires constitutional invalidation if "although applied in pursuit of a legitimate penal aim, it [the punishment] goes beyond what is necessary to achieve that aim; that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used."\textsuperscript{70} This test, like the other two, requires subjective considerations and provides little more predictive guidance to the corrections system.

Most of the earlier cases in which the above tests were utilized involved attacks on methods of prison discipline.\textsuperscript{71} Although these tests had inherent weaknesses, they worked well when applied to instances involving prison discipline. This result is not unusual because prison discipline is undoubtedly a form of punishment in the classical sense for which these tests were promulgated.\textsuperscript{72} Therefore, the only determination to be

\textsuperscript{64} Punitive Conditions, supra note 62, at 903.
\textsuperscript{66} See notes 50-54 and accompanying text supra for a discussion of the \textit{Weems} decision.
\textsuperscript{67} Decency and Fairness, supra note 44, at 849.
\textsuperscript{68} Jordon v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966). See also Punitive Conditions, supra note 62, at 904-06; Decency and Fairness, supra note 44 at 849.
\textsuperscript{69} Comment, Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?, supra note 6, at 104-06. By far the majority of these cases involved attacks on solitary confinement as a means of prison discipline. Id. at 105 n.67. See, e.g., Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordon v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).
made was whether the punishment was shocking, excessive, or went beyond the pursuit of a legitimate penal aim.\textsuperscript{73}

These tests, however, became meaningless when applied to challenge physical conditions of confinement. For example, it is easy to agree that the conditions described in Jones v. Wittenberg\textsuperscript{74} were indeed “shocking” to the conscience of the court.\textsuperscript{75} However, would those conditions have been considered unconstitutional if all of the conditions except overcrowding had been present? Would the overcrowding itself have been sufficient to “shock” the court’s conscience? This illustrates the difficulty in applying the three traditional tests described above to cases challenging jail conditions. These tests simply are not precise enough to benefit either the federal judiciary or state and local corrections systems.\textsuperscript{76}

3. “Totality of the Conditions” Test

Because of the inherent inadequacies of the three traditional tests, the federal courts began to search for a new standard to guide them in applying the eighth amendment to prison and jail conditions. The test which more and more federal courts have begun to favor may be described as the “totality of the conditions” test. The case of Holt v. Sarver\textsuperscript{77} is credited with being the first case to employ this test.

Holt involved a challenge of the conditions and practices in the facilities of the Arkansas State Penitentiary System.\textsuperscript{78} The Court began its analysis of the prisoners’ eighth amendment claims by stating that the conditions of confinement by themselves may violate the eighth amendment even absent any

\textsuperscript{73} See notes 61-70 and accompanying text supra for a discussion of these three tests.


\textsuperscript{75} See text accompanying note 38 supra for a description of the conditions at the Lucas County Jail in Toledo, Ohio.

\textsuperscript{76} One writer has noted that these tests, despite their deficiencies, have been utilized by several courts in cases involving attacks on prison conditions. Punitive Conditions, supra note 62, at 906, citing, among others: Estelle v. Gamble, 429 U.S. 97 (1976); Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), order, 354 F. Supp. 1302 (E.D. Va. 1973).

\textsuperscript{77} 309 F. Supp. 362 (E.D. Ark. 1970), aff’d, 442 F.2d 394 (8th Cir. 1971).

\textsuperscript{78} Id. at 364-66.
disciplinary action. In determining the constitutionality of
the prison conditions, the Court considered all of the conditions
in their totality rather than analyzing each condition sepa-
rately. The Court reasoned as follows:

The distinguishing aspects of Arkansas penitentiary life
must be considered together. One cannot consider separately
a trusty system, a system in which men are confined together
in large numbers in open barracks, bad conditions in the
isolation cells, or an absence of a meaningful program of reha-
bilitation. All of those things exist in combination; each af-
facts the other; and taken together they have a cumulative
impact on the inmates regardless of their status.

The conditions which the Court considered in its eighth
amendment analysis included the use of a trusty system, the
use of open-barrack sleeping arrangements, understaffing,
the lack of a rehabilitation program, inadequate medical and
dental care, lack of sanitation and the lack of concern for the
prisoners' personal hygiene. Based upon the totality of these

79 Id. at 372-73. This is significant because in most of the cases decided prior to
Holt, courts had deemed jail conditions violative of the eighth amendment only when
they were considered in conjunction with some type of disciplinary action, usually
solitary confinement. See note 71 and accompanying text supra for a discussion of this
transition in protection of inmates' constitutional rights.
80 309 F. Supp. at 373.
81 Id. at 373-76. Under the trusty system, certain prisoners were selected to per-
form many administrative functions in the prison, including guarding the other in-
mates. The court condemned this system, saying:

[It] creates an unhealthy prison climate and atmosphere; it breeds fear and
hatred between the guards, on the one hand, and those guarded, on the other
hand; it tends to be brutal and to endanger the lives of the inmates who live
and work "under the guns" of other convicts; and it leads to other abuses.

Id. at 373.

82 Id. at 376-78. The open barracks arrangement was condemned because it en-
couraged sexual assaults and violence among the prisoners.

83 Id. at 373. One prison in the Arkansas system housed 1000 men, yet the prison
employed only 35 "free world" people. Only eight of these worked guard duty, and only
two were on duty at night. Id.
84 Id. at 378-79. The court noted that the absence of a rehabilitation program is
not per se unconstitutional. However, it is a factor to be considered in the totality of
the circumstances.
85 Id. at 380.
86 Id.
87 Id. The prisoners had no towels, insufficient socks and underclothing, and un-
clean bedding.
conditions, the Court held that the Arkansas Prison System violated the prisoners' eighth amendment rights as protected from "state action" by the fourteenth amendment.

Although the *Holt* Court was the first to employ the totality test, its example proved to be of little help to other courts dealing with similar cases. As two commentators observed, "the extreme factual situation [in *Holt*] qualified its value for subsequent litigation by removing the necessity of discussing minimum constitutional standards. Moreover, the court's principle reliance upon two particularly grievous conditions [(the trusty system and open barracks)] limited its precedential value in cases involving relatively more typical prison conditions."89

*Jones v. Wittenberg*90 was the first decision in which the totality of the conditions test was applied in such a way as to create minimum constitutional standards for jail conditions.91 The court carefully analyzed every aspect of the Lucas County Jail, Toledo, Ohio, ranging from its food service to its physical facilities. Unlike *Holt*, the court in *Jones* was not faced with the problems generated by the trusty system and the open barracks.92 Rather, the court was more concerned with condi-

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88 Id. at 381.
89 *Punitive Conditions, supra* note 62, at 907.
91 Many writers have identified *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd and remanded sub nom.* *Newman v. Alabama* 559 F.2d 283 (5th Cir.), *cert. denied*, 438 U.S. 915 (1977), as the first case to adequately utilize the totality of the conditions test. *See* Robbins, *Federalism, State Prison Reform, and Evolving Standards of Human Decency: On Guessing, Stressing, and Redressing Constitutional Rights, supra* note 64, at 556; *Punitive Conditions, supra* note 62, at 907. However, a close reading of *Pugh* and *Jones* reveals that both courts identified nearly the same conditions which caused the jail or prison to be declared unconstitutional. *Jones*, however, was decided five years earlier than *Pugh*. The only difference between the two cases is the fact that the jail in *Jones* housed some pretrial detainees. 323 F. Supp. at 96 (three-fourths of the inmates were unconvicted detainees). However, the court in *Jones* analyzed the conditions according to the standards under the eighth amendment, saying that if the jail's conditions inflicted cruel and unusual punishment upon the convicted inmates, then the detainees' due process rights under the fourteenth amendment were violated. *Id.* at 99-100.
tions which are not uncommon to many local jails existing in Kentucky and other states. By analyzing the standards set forth in Jones and other federal cases which followed, it is possible to identify the factors courts consider and their respective importance in determining the validity of eighth amendment claims. State and local correctional officials as well as inmates may evaluate the boundaries of the protection of the eighth amendment by scrutinizing these significant criterion.

C. Identification of Factors in the "Totality of Conditions" Test

1. Overcrowding

Overcrowding is one factor which many courts have considered in determining if the conditions of the jail constitute cruel and unusual punishment. Overcrowding in jails is almost universally condemned for a number of reasons. First, it often deprives the prisoner of any semblance of privacy. Second, it can result in an increase of prisoner violence since the prisoners are crowded into a closer proximity with each other. Finally, it often overtaxes the limited resources of the jail.

In determining if the jail is overcrowded, the courts have examined several considerations. Often the jail will house more prisoners than it was originally constructed to hold. This fac-


\[\text{Miller v. Carson, 401 F. Supp. 835, 873-74 (M.D. Fla. 1975), aff'd in part, modified in part, 563 F.2d 741 (5th Cir. 1977). Although the prisoner has no constitutional right to privacy, Chapman v. Rhodes, 434 F. Supp. 1007, 1020 (S.D. Ohio 1977), privacy is one of the factors which courts consider in determining if constitutional violations exist. See Miller, 401 F. Supp. at 874.}

\[\text{Overcrowding, as well as the use of open barracks, was cited as a factor contributing to the pervasiveness of violence in the Arkansas prison system. Holt v. Sarver, 309 F. Supp. 362, 376-77 (E.D. Ark. 1970).}


\[\text{Miller v. Carson, 401 F. Supp. 835, 873 (N.D. Fla. 1975) (jail designed to hold 432 prisoners was holding 600 or more); Jones v. Wittenberg, 323 F. Supp. 93, 96 (N.D.}


tor seems to weigh heavily in the courts' deliberation. Another factor which the courts have considered is the number of square feet allowed per prisoner. Although it is not clear what minimum space is allowable, most authorities state that there should be between fifty and seventy-five square feet minimum for each prisoner. Clearly, any jail which provides less than fifty square feet per prisoner would be subject to close scrutiny.

2. Understaffing

A corollary to the problem of overcrowding is that of understaffing in the jail. There are several problems associated with understaffing. First and foremost is the fact that the prisoners' safety cannot be protected without an adequate staff. Absent adequate backup personnel, guards rarely enter the cell blocks and thus there is little protection against assaults by other prisoners. Also, as a result of inadequate staffing, a prisoner in need of medical assistance may be required to wait several hours until there is a sufficient backup crew to allow the guards to enter the cell.

Ohio 1971); order, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (jail designed to hold 150 prisoners held an average of 200 prisoners, and at one time held 272).

98 See citations listed in note 97 supra.


100 Id. at 1021. It should be noted that the Supreme Court has stated that while the figures cited by these authorities are instructive, they do not set the minimum space allowable under the Constitution. Bell v. Wolfish, 99 S. Ct. 1861, 1876 n.27 (1979).


102 Ahrens v. Thomas, 434 F. Supp. 873, 894 (W.D.Mo. 1977), aff'd in part, modified in part, 570 F.2d 286 (6th Cir. 1978). Due to understaffing, there was inadequate control over the prisoners, resulting in fights causing serious injuries to the prisoners.


3. Physical Facilities

Most jails which have been the subject of prisoners’ suits were very old when the suits were initiated. A good example was the jail in *Jones v. Wittenburg*, which was built in the 1890's. Because of their age, many of the jails have substandard physical facilities which almost all of the courts have cited as being a major factor in determining the constitutional compliance of a jail. It is clear from *Jones* and subsequent cases that courts are very critical of jails which: (1) provide little or no lighting inside the jail cell; (2) have inadequate cooling in the summer and heating in the winter, as well as inferior overall ventilation; (3) have plumbing and electrical wiring which...
are in disrepair and which do not comply with the applicable building and housing codes;¹⁰⁰ (4) have an insufficient number of working showers and commodes to adequately serve the inmate population;¹¹⁰ or (5) have no sprinkler or alarm system to guard against possible fires and which have no workable evacuation plan to be used during emergencies.¹¹¹

4. Sanitation and Personal Hygiene

Closely associated with conditions of overcrowding and antiquated physical facilities is the problem of sanitation and personal hygiene of the inmates.¹¹² Usually, this factor is precipitated by the presence of these other two difficulties. In determining if a jail is unsanitary, the courts usually consider whether: (1) the plumbing is inadequate so as to cause water...
and sewage to leak into the jail;\textsuperscript{113} (2) the jail appears filthy;\textsuperscript{114} and (3) roaches, mice and rats are present.\textsuperscript{115} Concerning the personal hygiene of the prisoners, the courts consider whether the prisoners are: (1) provided items such as a comb, toothbrush, razor blade and clean towels and washcloths;\textsuperscript{116} (2) allowed to bathe or shower on a regular basis;\textsuperscript{117} (3) furnished


\textsuperscript{115} Ahrens v. Thomas, 434 F. Supp. 873, 891 (W.D. Mo. 1977), \textit{aff'd in part, modified in part}, 570 F.2d 286 (8th Cir. 1978); Pugh v. Locke, 406 F. Supp. 318, 323 (M.D. Ala. 1976), \textit{aff'd sub nom.} Newman v. Alabama, 559 F.2d 283 (5th Cir.), \textit{cert. denied}, 438 U.S. 915 (1977); Miller v. Carson, 401 F. Supp. 835, 871-72 (M.D. Fla. 1976), \textit{aff'd in part modified in part}, 563 F.2d 741 (5th Cir. 1977). The rodent problem in Miller was so bad that the inmates sometimes passed their idle time trapping mice and rats. There was also evidence of rat and cockroach excreta in the kitchen and officer dining room areas located on the first floor of the jail. Id. Another jail exhibiting these problems was the Suffolk jail in Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 680 (D. Mass. 1973), \textit{aff'd}, 494 F.2d 1196 (1st Cir.), \textit{cert. denied}, 419 U.S. 977 (1974)("Toilets and sinks in the cells are corroded, filth encrusted and often a serious health hazard.").

\textsuperscript{116} Miller v. Carson, 401 F. Supp. 835, 871 (M.D. Fla. 1975), \textit{aff'd in part, modified in part}, 563 F.2d 741 (5th Cir. 1977). In Miller, there was only one shower per cellblock,
with an adequate supply of clean clothing; and provided with clean bedding (mattress and sheets).

5. Medical Facilities

Inadequate medical facilities are a contributing factor in nearly all cases involving constitutional attacks on jail conditions. Unlike the above conditions, however, inadequate provision of medical care has been addressed by the Supreme Court in the eighth amendment context. In *Estelle v. Gamble*, an inmate held by the Texas Department of Corrections brought suit alleging that his eighth amendment rights had been violated when the prison officials had failed to adequately treat his back injury. The inmate was seen “by medical personnel on 17 occasions spanning a three month period...”, and was treated for lower back sprain. The Supreme Court held that the inmate’s claim of inadequate medical treatment was insufficient to support his claim under the eighth amendment. Justice Marshall, writing for the major-
ity, formulated the following test to determine the constitutionality of medical service to prisoners: "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment."\(^{125}\)

In most lower court cases in which medical treatment has been a factor, the circumstances have been significantly different than those described in *Estelle*. In *Estelle*, the claim involved inadequate medical treatment. In the other cases, the claim has usually involved inadequate facilities as well as inadequate treatment.\(^{126}\) Therefore, *Estelle* arguably does not control where inadequate facilities also are involved.\(^{127}\)

Most courts have noted two deficiencies when analyzing medical facilities in jails. The most important of these deficiencies is the lack of adequate medical facilities inside the jail. In some cases, the jail had no medical facilities.\(^{128}\) In such instances, medical examination and treatment were provided inside the prisoner’s cell or outside the jail.\(^{129}\) In those jails providing separate medical facilities, they were so small and under-equipped that they were described as “primitive,”\(^{130}\) or

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\(^{125}\) *Id.* at 106.

\(^{126}\) See citations listed in note 120 *supra* for some cases involving inadequate medical facilities.


However, the test formulated in *Estelle* is still utilized in all instances in which the medical treatment provided by jails is attacked under the eighth amendment. In cases alleging inadequate medical facilities, courts have applied the *Estelle* test in a manner similar to the following:

An individual seeking relief must prove “deliberate indifference to a prisoner’s serious illness or injury,” ... In the case of a class action challenging the entire system of medical care delivery, “deliberate indifference” can be shown ... by evidence that “the medical facilities [are] so wholly inadequate for the prison population’s needs that suffering would be inevitable.”

Palmigiano v. Garrahy, 443 F. Supp. 956, 983-84 (D.R.I. 1977). Thus, courts have been able to adapt the *Estelle* test to cases involving inadequate medical facilities. See also Martinez Rodriguez v. Jimenez, 409 F. Supp. 582, 584 (D. Puerto Rico, 1976), which used a test similar to Palmigiano, but was decided prior to *Estelle*.


\(^{129}\) See citations listed in note 128 *supra* for instances in which medical examinations had to be done either in the prisoner’s cell or just outside of the jail.
at least inadequate to meet the needs of a growing jail population.\textsuperscript{131}

Even if the facilities themselves are adequate, the medical services may be deemed deficient because of the lack of an adequate medical staff. In many instances, jails neither employ doctors and dentists on a full time basis nor have them available for call at all times. Rather, they merely visit the jail periodically to treat the prisoners.\textsuperscript{132} The part-time treatment of inmates has caused several problems. First, it meant that medical care will not always be available. In case of emergencies, crucial decisions have been left to non-medical personnel.\textsuperscript{133} Second, it meant that often there were no medical personnel to supervise the distribution and consumption of prescribed medicines.\textsuperscript{134}

As a result of inadequate facilities and staffing, most jails which were the subject of prisoners' suits had been unable to provide physical examinations for incoming prisoners. This inadequacy has been condemned by most courts.\textsuperscript{135} The reason


\textsuperscript{132} Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 202-03 (8th Cir. 1974).

\textsuperscript{133} Vest v. Lubboch County Comm'r's Court, 444 F. Supp. 824, 830 (N.D. Tex. 1977)(doctor was scheduled to visit the jail twice a week but often came only once a week); Miller v. Carson, 401 F. Supp. 835, 876 (M.D. Fla. 1975), \textit{aff'd in part, modified in part}, 563 F.2d 741 (5th Cir. 1977)(medical staff consisted of a physician who was available one-half day per week and four registered nurses who were off duty from eleven o'clock p.m. to seven o'clock a.m. on weekdays and four o'clock p.m. to seven o'clock a.m. on weekends); Jones v. Wittenberg, 323 F. Supp. 93, 97 (N.D. Ohio 1971), \textit{aff'd sub nom.} Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972)(physician came to the jail two or three afternoons a week).

\textsuperscript{134} Miller v. Carson, 401 F. Supp. 835, 876 (M.D. Fla. 1975), \textit{aff'd in part, modified in part}, 563 F.2d 741 (5th Cir. 1977). The court also noted that even in situations involving non-emergency medical needs, the prisoner was dependent upon a non-medical correctional staff to deliver his request to a doctor or other medical assistant. \textit{Id. See} Ahrens v. Thomas, 434 F. Supp. 873, 892-93 (W.D. Mo. 1977), \textit{aff'd in part, modified in part}, 570 F.2d 286 (8th Cir. 1978).

\textsuperscript{135} Vest v. Lubboch County Comm'r's Court, 444 F. Supp. 824, 831 (N.D. Tex. 1977).

for this initial examination is to prevent the spread of communicable diseases carried by a new inmate.\textsuperscript{136}

6. Classification

Lack of an adequate classification system for prisoners has been cited by many courts in ruling jail conditions to be unconstitutional.\textsuperscript{137} In most instances there was no classification other than between sexes and between juveniles and older offenders.\textsuperscript{138} For example, in the Duval County Jail in Jacksonville, Florida, the only classification other than that of sex was based on race.\textsuperscript{139} Failure to classify inmates has been criticized because: (1) it does not separate pretrial detainees from convicted inmates;\textsuperscript{140} (2) it fails to separate the violent inmates from the weaker ones and thus the weaker ones are subject to violence, extortion and sexual assault;\textsuperscript{141} and, (3) it does not allow those with emotional and physical disabilities to receive the care that they need.\textsuperscript{142}

\textsuperscript{136} In Ahrens v. Thomas, 434 F. Supp. 873, 892 (W.D. Mo. 1977), aff'd in part, modified in part, 570 F.2d 286 (8th Cir. 1978), the jail's failure to provide an initial examination caused the entire jail population to be exposed to hepatitis. See Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974); Vest v. Lubboch County Comm'rs Court, 444 F. Supp. 824, 837 (N.D. Tex. 1977).


\textsuperscript{138} In some cases, even this separation was not adequately maintained. For instance, in Ahrens v. Thomas, 434 F. Supp. 873, 895 (W.D. Mo. 1977), aff'd in part, rev'd in part, 570 F.2d 286 (8th Cir. 1978), the cells were situated in such a way as to allow male prisoners, visitors and guards a complete view of the juveniles' and women's cells. In Miller v. Carson, 401 F. Supp. 835, 874 (M.D. Fla. 1975), aff'd in part, modified in part, 563 F.2d 741 (5th Cir. 1977), separation was not maintained between juveniles and adult felony offenders. This situation resulted in an adult prisoner's rape of a juvenile.

\textsuperscript{139} Miller v. Carson, 401 F. Supp. 835, 874 (M.D. Fla. 1975), aff'd in part, modified in part, 563 F.2d 741 (5th Cir. 1977).


\textsuperscript{142} See citations appearing in note 141 supra for an exposition of this problem.
7. Recreation, Education and Work

A jail's failure to provide adequate exercise or recreational facilities, or any educational or work opportunities has been considered important by the courts. The supporting rationale is that it is cruel to require prisoners to remain idle during the entire period of incarceration. The significance of this factor is demonstrated by the words of Judge Bohanon in Battle v. Anderson:

Where inmates are confined to their cells for periods up to one year and subjected to continual and enforced idleness without affording them any opportunities for physical exercise, voluntary work, or educational programs, it must be concluded that such conditions of confinement constitute cruel and unusual punishment in violation of the Eighth Amendment.

Even if some indoor recreational facilities are available, courts have been critical of the fact that the prisoners are not allowed to be outside in the sunlight.

The federal courts of appeals have been less concerned with this factor than have the federal district courts. Most circuit courts have held that there is no absolute right to rehabilitation (exercise and vocational and educational training). In McCray v. Sullivan, the Fifth Circuit Court of Appeals ruled that the failure to provide rehabilitation programs for prisoners did not by itself violate the eighth amendment. In Newman v. State of Alabama, the Fifth Circuit reiterated its

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145 Id. at 424.

146 Miller v. Carson, 401 F. Supp. 835, 881-82 (M.D. Fla. 1975), aff'd in part, modified in part, 569 F.2d 741 (5th Cir. 1977). As a part of its remedy, the court required that the jail provide some type of outdoor recreation. Id.


149 Id. at 335.

position on rehabilitation requirements by stating:

The mental, physical, and emotional status of individuals, whether in custody or not, do deteriorate and there is no power on earth to prevent it. . . . If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligation under Amendment Eight.151

The view taken by the Fifth Circuit, however, should be contrasted with that of the Eighth Circuit. In Finney v. Arkansas Board of Correction,152 the court ruled that the lack of rehabilitation programs should be a factor in determining if the eighth amendment had been violated: "In Holt II, the district court said that the lack of rehabilitative programs could, in the face of 'other conditions,' be violative of the Eighth Amendment. With this we agree."153 It appears, therefore, that even if there is no constitutional right to rehabilitation, it may be a factor for consideration under the totality of the conditions test.

8. Food

Inadequate food and food service also may be considered in determining the constitutional compliance of jails. Several aspects of food services programs have warranted criticism. Many cases have focused on the fact that the food fails to provide a minimum nutritional requirement.154 Others point

151 Id. at 291. It is interesting to note that although the Fifth Circuit ruled that a lack of rehabilitative services should not be considered, it upheld the district court's ruling requiring reasonable recreational facilities at the jail, saying that they did so "because such facilities may play an important role in extirpating the effects of the conditions which undisputably prevailed in these prisons at the time the District Court entered its order." Id. It also upheld the district court's order that each prisoner shall be assigned a meaningful job, stating that such an order would not burden the jail officials. However, the court noted that this element was not constitutionally mandated, and that it should have no precedential value in future cases. Id. at 292.

152 Id. at 209. See also French v. Heyne, 547 F.2d 994, 1002 (7th Cir. 1976); Palmigiano v. Garrahy, 443 F. Supp. 956, 981 (D.R.I. 1977).

out the fact that the food is stored and prepared in an unsanitary manner. Courts also have recognized that most of the meals are generally unappetizing. As a result of these inadequacies in prison food, the prisoners have been forced to "suffer from malnutrition, poor health and disease."

9. Other Constitutional Rights

Although other federal constitutional protections are not necessarily considered in each eighth amendment claim, they are raised frequently in cases in which the totality of the conditions test is used. Therefore, it seems appropriate to mention briefly a few of the rights which often are involved in determining the constitutionality of prison or jail conditions.

Some prisoners have used the first amendment to attack an institutional policy of censoring all outgoing and incoming mail. The Supreme Court, in Procunier v. Martinez, ruled that jails may censor mail if it is necessary to further a "substantial governmental interest unrelated to the suppression of expression." Such substantial interests could include security, order and rehabilitation. Second, the Court held that censorship must be no greater than that which is necessary


155 Pugh v. Locke, 406 F. Supp. 318, 323 (M.D. Ala. 1976), aff’d sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1977) (food stored in dirty area, often infested by insects; food service personnel often did not follow sanitation procedures); Miller v. Carson, 401 F. Supp. 835, 880 (M.D. Fla. 1975), aff’d in part, modified in part, 563 F.2d 741 (6th Cir. 1977) (most food was prepared by untrained and unsupervised inmates who had not received health certificates; kitchen facilities failed to comply with minimum health standards); Jones v. Wittenberg, 323 F. Supp. 93, 96 (N.D. Ohio 1971), aff’d sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (food was not stored in accordance with health regulations; kitchen ceiling was traversed by sewage pipes which often leaked onto the floor).


160 Id. at 413.

161 Id. "Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements." Id.
to protect these interests.\textsuperscript{162} Some prisoners also have used the first amendment to attack a jail's stringent visitation policy.\textsuperscript{183} Finally, the amendment may be the basis for attacks on jail regulations which inhibit inmates' religious practices.\textsuperscript{184}

Both the first and fourteenth amendments have been used to challenge the inadequacies or absence of a law library.\textsuperscript{185} In \textit{Bounds v. Smith},\textsuperscript{186} the Supreme Court ruled that indigent inmates' rights of access to the courts under the Constitution "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."\textsuperscript{187} Similarly, inadequate facilities for private attorney-client meetings have been challenged on sixth amendment grounds.\textsuperscript{188}

Finally, jail disciplinary procedures have been challenged under the due process clause of the fifth and fourteenth amend-

\textsuperscript{162} Id.

\textsuperscript{183} Ahrens v. Thomas, 434 F. Supp. 873, 899 (W.D. Mo. 1977), \textit{aff'd in part, modified in part}, 570 F.2d 286 (8th Cir. 1978). The rationale behind this contention is that the stringent visitation policies unnecessarily restrict the prisoner's rights to communicate with his family and friends. \textit{Id.} See Mitchell v. Untreiner, 421 F. Supp. 886, 895 (N.D. Fla. 1976); Tate v. Kassulke, 409 F. Supp. 651, 655-56 (W.D. Ky. 1975)(one fifteen-minute visitation period per week with only two visitors allowed and with only five people listed as approved visitors was struck down as being overly broad and stringent).


\textsuperscript{187} 430 U.S. at 828.

\textsuperscript{188} Ahrens v. Thomas, 434 F. Supp. 873, 898 (W.D. Mo. 1977), \textit{aff'd in part, modified in part}, 570 F.2d 286 (8th Cir. 1978)(attorney-client meetings were not private); Mitchell v. Untreiner, 421 F. Supp. 886, 891 (N.D. Fla. 1976)(attorney-client meetings were not private and the visitation hours for such meetings were very restricted); Miller v. Carson, 401 F. Supp. 835, 886 (M.D. Fla. 1975), \textit{aff'd in part, modified in part}, 563 F.2d 741 (5th Cir. 1978)(attorney-client calls were monitored; attorney's visiting hours were restrictive; meeting rooms were inadequate).
ments. In *Miller v. Carson* a disciplinary procedure was invalidated because, among other grounds: (1) rules and penalties were not posted; (2) prisoners did not receive adequate notice of the charge against them; (3) a determination of guilt was not made by an impartial factfinder; (4) prisoners were not guaranteed the right to be heard; and (5) there was no guarantee that the decision-making process complied with due process requirements.

D. **Minimum Standards Under the Totality of the Conditions Test**

The nine factors identified above have consistently been evaluated by courts under the totality of the conditions test. After considering each of them separately, courts still must determine if the eighth amendment’s protective threshold has been violated. As in the three traditional tests which were discussed earlier, there is subjectivity involved in this final weighing process. However, the totality of conditions test is preferred because it allows for the development of minimum standards which prisons and jails must meet in order to satisfy constitutional strictures. Based upon each of the nine factors and their respective weight, it is possible to frame a non-exhaustive list of the minimum standards which courts have created.

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171 Id. at 875.

172 See notes 61-70 and accompanying text supra for a discussion of these three tests utilized by federal courts in determining minimum conditions for jails to meet the eighth amendment.

173 This list is a compilation of the requirements formulated by the courts in the cases cited in notes 93-171 supra. Since the courts do not agree as to precisely what the minimum constitutional standards should be, the list is effective only in a general way. However, it should be a useful guide in an evaluation of the conditions at any jail or prison. This compilation also draws from some of the recommendations found in Mesmer, Bourdon and Foley, *Constitutional Guidelines for New Hampshire County Jails and Houses of Correction*, 4 New Eng. J. Prison L. 33, 89-101 (1977).
Minimum Standards

1. Overcrowding
1. A jail should house no more prisoners than design capacity allows.
2. Double-ceiling should be avoided if at all possible.
3. Each prisoner should have at least fifty square feet of floor space in his cell or dormitory.

2. Staff
1. All staff personnel should receive adequate training.
2. Some personnel should be on duty at all times.
3. There should be an adequate number of personnel on duty at all times to adequately protect the prisoners and to enable guards to enter the cells to aid a prisoner.

3. Physical Facilities
1. Each cell should have sufficient light to enable the prisoner to read comfortably.
2. Each jail should be equipped with adequate ventilation, providing adequate heat in the winter and cooling in the summer.
3. All plumbing and electrical work should be in good working order and should conform with applicable building, housing and fire codes.
4. Each cell should have a sink with hot and cold water and a commode. Each dormitory should have one toilet for every fifteen inmates, and one lavatory for every ten inmates.
5. There should be an adequate number of showers to enable the inmates to shower on a regular basis.
6. The jail should have an operable sprinkler system. Also, there should be an evacuation plan to be used in the event of an emergency.

4. Sanitation and Personal Hygiene
1. The jail should be cleaned at regular intervals.
2. Cleaning supplies should be provided to the inmates to enable them to clean their own cells.
3. There should be periodic extermination service to rid the jail of all vermin.
4. The jail should be inspected by local health officials.
5. Clean linen should be provided to every new prisoner and each inmate should thereafter be issued clean linen periodically.
6. Every inmate should be issued a comb, toothbrush, toothpaste, soap and a razor if he does not have them when he enters the jail.
7. Each inmate should be provided with adequate clothing. Provisions should be made to allow the prisoners to clean their clothes or to have them cleaned.

5. Medical Services
1. Each inmate should be given a physical examination upon entry to the jail.
2. A doctor should be on call twenty-four hours a day.
3. There should be a daily sick call. However, nonmedical personnel should not be allowed to determine whether medical attention is necessary.
4. A system should be implemented whereby medication is distributed only by medical personnel.
5. The jail should have an examination room which is properly equipped.
6. Dental care, both curative and preventive, should be provided on at least a part-time basis.
7. A system should be devised to transport inmates to a hospital quickly in case of an emergency.

6. **Classification**

A classification system should be adopted which provides for the following:
1. Inmates should be segregated by sex.
2. Juveniles should be segregated from adults.
3. Pretrial detainees should not be put in a cell with a convicted inmate.
4. Special arrangements should be made for inmates who are violent, who suffer from alcoholism, drug abuse or mental illness, and for those who are sexually deviant.

7. **Recreation, Education and Work**

1. All inmates should be allowed some outdoor recreation. Indoor recreation should also be provided.
2. If feasible, educational and occupational training should be provided.

8. **Food**

1. Food storage areas should be regularly cleaned and inspected.
2. The food should provide minimum nutritional requirements.
3. The kitchen and kitchen equipment should comply with the minimum standards for public restaurants, and should be inspected by the health officer.
4. All kitchen personnel should receive regular medical examinations.

9. **Mail**

1. All mail may be checked for contraband. However, no mail should be censored unless necessary to promote jail security, order, or rehabilitation.
2. Strict guidelines should be initiated to govern any censoring of mail.

10. **Visitation**

1. The jail should have a reasonable visitation policy. Visitation should be allowed on more than one day for the friends and family of the inmate.
2. Adequate visitation facilities should be maintained.

11. **Religion**

1. An inmate should be allowed, within reason, to practice the religion of his choice.
2. Considerations should be given to special diets required by religious observances.
3. Some arrangement should be made to provide a facility to be used by the inmates in their religious practices.

12. **Attorneys' Visits**

1. A liberal visitation policy should be instituted to include visits by attorneys.
2. Private facilities should be maintained for use by the attorney and the inmate.
13. Law Library

The jail should provide an adequate law library for use by the inmates. In the alternative, some program should be initiated to provide the inmates with comparable legal materials or legal aid.

14. Discipline

1. Jail rules and penalties should be posted.
2. Each inmate should be fully informed of any charge against him.
3. Each inmate charged with breaking a rule should be given a fair hearing, and should have the chance to present his own case.

Under the totality of the conditions test, failure to meet one of the above standards does not automatically mean that the eighth amendment has been violated. Rather, courts are required to weigh all of the factors and determine if the cumulative effect of any or all of these factors results in cruel and unusual punishment. As stated above, this test allows for some judicial subjectivity, but it provides a steady guide for the jail officials, the prisoners and the courts.

II. Evaluating Kentucky’s Local Jails Under the Totality of the Conditions Test

By applying the totality of the conditions test to Kentucky’s local jails, certain conclusions can be reached about the problems now facing jail administrators in Kentucky. These conclusions, however, have two limitations. First, there is a scarcity of current, extensive research data on local jail conditions in Kentucky. Most of the available data is at least five

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174 For example, in West v. Edwards, 439 F. Supp. 722 (D.S.C. 1977), evidence was introduced to show that the jail was overcrowded. However, none of the other factors which have been identified herein were present. The court held overcrowding, absent other conditions, did not violate the eighth amendment.

175 Punitive Conditions, supra note 62, at 908-09:

[Judges and prison officials must determine the types, degrees and number of prison conditions necessary to trigger the prohibition of the cruel and unusual punishment clause. Although the answer to this question is an equation replete with variables; there is one constant, suggested by Pugh v. Locke and expressed elsewhere: “[T]he constitutionality of the conditions of confinement depends both on the details of those conditions and the duration of the confinement.”


176 Mr. Fred A. James, former Director of the Division for Regional Jails, Bureau of Corrections, furnished excerpts from an incompletely compiled survey of the city and county jail facilities in Kentucky for the author’s use. A copy of these excerpts
years old and may be outdated. Second, any conclusions will be general. As was demonstrated above under the totality of the conditions test, a jail may be deficient in several areas and still comply with the Constitution. Consequently, without focusing on specific jails, it is impossible to determine precisely how many jails fail to meet minimum constitutional standards. Even with these limitations, an application of the test to Kentucky's local jails is beneficial inasmuch as it will identify existing problems as they relate to the nine factors under the totality of the conditions test.

Overcrowding does not appear to be a prevalent problem among local jails in Kentucky. For example, although a majority of county jails are designed to hold fewer than twenty inmates,177 most are never more than one-third full.178 Often, many of these jails are empty.179 Although the jails do not house more prisoners than they were designed to hold, many still may not provide sufficient space for each prisoner. For example, fifty-four local jails do not provide day rooms for the prisoners,180 which means that the prisoner is confined to his cell during his period of incarceration. If these cells do not give each prisoner at least fifty square feet of floor space, a jail may be deemed to be "overcrowding" the prisoner even though it is operating at less than full capacity.181 Although current data on

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177 County Jail Reform in Kentucky, supra note 4, at 133, citing KENTUCKY COMMISSION ON LAW ENFORCEMENT AND CRIME PREVENTION, REPORT ON KENTUCKY JAILS (1969).
178 Id.
179 Id.
180 Jail Survey Excerpts, supra note 176.
181 An example is the Campbell County jail in Newport, Kentucky. In August of 1978, a suit was filed in the United States District Court, Eastern District of Kentucky, challenging the conditions of the Campbell County Jail. Sebastian v. Heil, Civ. No. 78-76 (E.D.Ky., filed Aug. 21, 1978). In connection with this suit, a report on the jail was prepared by Anthony S. Kuharich, a jail consultant from Illinois. One of the findings of this report is that the Campbell County jail provides an inadequate amount of space for each prisoner. For example, the first floor confinement area is composed of two cell blocks. Each cell block has three cells and a day room. Each cell has four bunks and forty-two square feet of floor space. However, thirty-two square feet of the floor space is taken up by bunks, leaving only ten square feet of floor space for four prisoners, or 2.5 square feet per prisoner. The day room has 270 square feet, or 22.5 square feet per prisoner based upon full occupancy. Therefore, if the cell block is full, and the floor space covered by the bunks is excluded, each prisoner has twenty-five.
this problem is unavailable, it is likely that it remains in a number of the older and smaller jails.

Understaffing is clearly a problem which is evident in many of Kentucky's local jails. In the 1970 National Jail Census, forty-eight of Kentucky's county jails reported having no full time employees.\textsuperscript{182} Twenty-two of those jails reported having only one full-time or one part-time employee.\textsuperscript{183} These facts would indicate that a large number of the county jails are operated exclusively or primarily by the elected county jailer.\textsuperscript{184} Another problem with the staffing of the jails is that, as a general rule, no training is required to run for the office of jailer or to serve as a deputy jailer.\textsuperscript{185}

The physical conditions of Kentucky's local jails are by far the single most serious deficiency under the totality test. In the 1970 National Jail Census, Kentucky reported having 332 cells which were over 100 years old.\textsuperscript{186} As of 1976, sixty percent of Kentucky's jails were over fifty years old and twenty jails were over one hundred years old.\textsuperscript{187} Because of their age, numerous problems inhere in the physical facilities. A 1974 Kentucky

\begin{itemize}
  \item \textsuperscript{182} Law Enforcement Assistance Administration, U.S. Dep't of Justice Nat'l Criminal Justice Information and Statistics Service, Report SC-1A, Local Jails, 374-79 (1973).
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Id.
  \item \textsuperscript{186} Law Enforcement Assistance Administration, U.S. Dep't of Justice Nat'l Criminal Justice Information and Statistics Service, Series SC-No. 1, Nat'l Jail Census 17 (1971) [hereinafter cited as Jail Census]. Only three states, Massachusetts, Ohio, and Pennsylvania, had more cells over 100 years old. Id.
  \item \textsuperscript{187} County Jail Reform in Kentucky, supra note 4, at 133.
\end{itemize}
Public Health Association Task Force on Prison and Jail Health found that: "Thirty-one percent of the institutions surveyed had inadequate lavatories, with six percent having no lavatory facilities at all available to prisoners. Twenty-three percent did not have hot and cold running water. Seventeen percent had no showers or bathing facilities. Fifty-four percent of the institutions had inadequate heating.” As of 1979, seventy-six jails lacked air conditioning and seventy did not provide for exhaust or return of the air in the cell.

A corollary problem is that many of the jails have no sprinkler or alarm system and are constructed in such a way as to make evacuation difficult. Eighty-one local jails have no smoke detection device and ninety-five have no alarm system. Sixty-nine of the jails are not even equipped with fire hoses or extinguishers, and 111 jails are not equipped with sprinkler systems. Furthermore, seventy-two jails lack any means of egress in the event of an emergency. Clearly, many of Kentucky's local jails are seriously deficient in safety provision for their inmates.

Another problem related to the age of the local jails is that sanitation is not always maintained at an acceptable level. An investigation in 1974 revealed "[i]nsects and rodents . . . in 33 percent of the institutions surveyed; 29 percent did not employ a commercial pest control operator. Few of the jails used screens to prevent insects from entering the building." Based upon these findings, the Task Force concluded that "[i]f the same requirements for an average restaurant were applied to jail facilities, seventeen percent of the institutions would be closed.

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188 Id. at 136, citing Task Force on Prison and Jail Health, The Captive Patient: Prison Health Care, at 23.
189 Jail Survey Excerpts, supra note 176. A good example of inadequate ventilation can be found in the Anderson County jail in Lawrenceburg, Kentucky. In this jail, the ventilation in the men's cells consists of a six-inch square area of holes leading to the outside, each hole being about the size of a pencil. Anderson News, Oct. 4, 1979, at 20, col. 4.
190 Jail Survey Excerpts, supra note 176.
191 Id.
192 County Jail Reform in Kentucky, supra note 4, at 136, citing Task Force Report at 27.
193 Id. at 137, citing Task Force Report at 35.
There is little data on the maintenance of personal hygiene of the prisoners in local jails. However, there are some indications that the prisoner's personal hygiene often suffers while incarcerated. For instance, in 1974 it was reported that over sixty percent of the local jails "provided no sheets or pillows to the inmates" and thirty-eight percent provided no towels.\textsuperscript{134} Also, there is little reason to believe that the prisoners in the smaller jails are furnished such items as a comb, toothbrush, razor, or adequate clothing. Obviously the jailer cannot afford to furnish such items out of his meager salary.\textsuperscript{135}

The lack of medical facilities is another major problem facing Kentucky's local jails. As of this year, 108 local jails had no medical examining room.\textsuperscript{136} This situation may create circumstances like those found in the Campbell County jail where the doctor is forced to hold sick call in the jail kitchen.\textsuperscript{137} Few, if any, jails employ a physician on a full-time basis. As a result, it is probable that few of the prisoners receive examinations prior to admittance to the jail.\textsuperscript{138} Lack of a physician also may cause the prisoner to be dependent upon the jailer for his medical needs. As one writer noted: "In a majority of situations, nonmedical personnel determined who needed medical attention. The jailer was most often the person to decide; he not only had to decide who needed routine medical care, but also who needed emergency care and treatment for delirium tremens or drug overdoses."\textsuperscript{139} Other jail medical problems that occur frequently include the lack of any medical records kept by the jail officials\textsuperscript{200} and the dispensing of medication by nonmedical personnel.\textsuperscript{201}

\textsuperscript{134} Id. at 136, citing Task Force Report at 23.

\textsuperscript{135} As a rule, few jailers in the smaller counties make enough money to live adequately. The reason is that under the fee system, the jailer is compensated a very small per diem rate for each prisoner. Since these jails have few prisoners, the jailer does not make enough money to furnish such items to the prisoners. See County Fee System, supra note 184, at 47. See also County Jail Reform in Kentucky, supra note 4, at 143 (In 1973, fifty-five of the county jailers made less than $10,000 per year and fifteen made less than $5,000 per year).

\textsuperscript{136} Jail Survey Excerpts, supra note 176.

\textsuperscript{137} Report on the Campbell County Jail, supra note 181, at 23.

\textsuperscript{138} See, e.g., id. at 22.

\textsuperscript{139} County Jail Reform in Kentucky, supra note 4, at 137, citing Task Force Report at 65-66.

\textsuperscript{200} Id., citing Task Force Report at 71.

\textsuperscript{201} Report on the Campbell County Jail, supra note 181, at 23.
The only classifications of prisoners in local jails required by Kentucky law is that there be a separation of men from women, juveniles from adults and regular inmates from mentally disturbed inmates. Use of any other type of classification at local jails would therefore seem to depend upon the preference of the local jailer. There is no data available to determine if any type of classification beyond that required by state law is utilized in the local jails, but there is evidence that many of the jails are unable to even carry out the limited classification required by law. Fifty-four local jails are unable to provide maximum separation of men and women and sixty-three jails are unable to provide maximum separation between male juveniles and adults. Fifty-one facilities provide no separate quarters for mentally disturbed inmates. Since these jails are unable to carry out the limited classification required by state law, it is doubtful that they would utilize any other type of classification system.

Because of the age and size of a number of local jails, most do not offer any recreational, educational or occupational opportunities. According to the 1970 National Jail Census, 95.1% of Kentucky's local jails had no recreational facilities and 96.7% had no educational facilities. Therefore, in most instances prisoners are forced to remain indoors and idle for the duration of their incarceration.

There is very little data regarding the food service in Kentucky's local jails. Likewise, there is no data on compliance with other constitutional rights of the prisoners in those jails. Therefore, no conclusions may be drawn with regard to these factors under the totality of the conditions test.

Based upon the above presentation, it seems evident that a significant number of Kentucky's local jails fail to meet the

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205 Id.
206 Jail Survey Excerpts, supra note 176.
207 Id.
208 Id.
209 Id.
210 Id.
211 JAIL CENSUS, supra note 186, at 18. See also, Report on the Campbell County Jail, supra note 181, at 11. This jail had no facilities for either indoor or outdoor recreation and exercise. The jail consultant recommended that an outdoor recreational area be provided by erecting a chain link fence around an area adjacent to the jail. Id.
minimum standards required by federal courts under the totality of the conditions test. Thus, these jails are susceptible to lawsuits by prisoners challenging the conditions of the jails.\(^{209}\) If these suits are successful, the local governments could be faced with the choice of closing their jails or spending large sums of money to correct their constitutional deficiencies. This dilemma places the local governments between the proverbial rock and the hard place. On the one hand, under Kentucky law, counties are required to maintain and operate a county jail.\(^{210}\) But, on the other hand, the federal courts have said repeatedly that if the states and their local governments are going to operate jails, they must meet constitutional standards.\(^{211}\) Furthermore, the federal courts have consistently held that lack of funds is not a valid excuse for operating jails which violate inmates’ constitutional rights.\(^{212}\)

The foregoing discussion clearly identifies the problems which now face the city and county governments throughout Kentucky. They are problems which have no easy answers and no cheap solutions. It is apparent that they cannot be adequately solved at the local level, because local governments have neither the expertise nor the financial ability to correct the constitutional deficiencies existing in the jails. Any viable solution to these problems necessarily must come from the state government which has both the expertise and financial ability to solve them.

\(^{209}\) There are at least two lawsuits pending which challenge the constitutionality of physical conditions at county jails. They involve the Campbell County Jail and the Clark County Jail. Both suits are docketed in the Federal District Court for the Eastern District of Kentucky.

\(^{210}\) Ky. Rev. Stat. § 67.080 (4) (Supp. 1977). This statute has been interpreted by the Kentucky Attorney General in a recent opinion to mean that “a fiscal court has a continuing duty to maintain an adequate county jail.” Op. Ky. Att’y Gen. 78-129. According to this opinion, the fiscal court cannot avoid budgetary problems by closing its jail.


\(^{212}\) See, e.g., Gates v. Collier, 501 F.2d 1291, 1319-20 (5th Cir. 1974); Palmigiano v. Garrahy, 443 F. Supp. 956, 985 (D.R.I. 1977). See also Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971): “Inadequate resources can never be an adequate justification for the state’s depriving any person of his constitutional rights. If the state cannot obtain resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons.”
III. KENTUCKY DISTRICT JAIL PROPOSAL

The 1978 Kentucky General Assembly created a Special Task Force to study the Commonwealth's legal system. A subcommittee of this Task Force analyzed the problems of the local jails in an attempt to formulate proposed legislation for the 1980 legislative session. This subcommittee conducted meetings throughout the state and collected testimony from various state and local officials concerning the problems of the local jails. The subcommittee also received a concept paper prepared by the Kentucky Bureau of Corrections on implementation of a district jail system. The subcommittee recommended that the proposal submitted by the Bureau of Corrections "be adopted as a base for future legislation." The Task Force adopted this recommendation in September, 1979.

Under the plan created by the Bureau of Corrections, the district jail system would consist of three types of detention facilities. The first type would be the district jail. The plan calls for 36 district jails to be located strategically throughout the state. These jails would serve as the primary detention facility for most state prisoners. A candidate for jailer would

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213 LEGISLATIVE RESEARCH COMMISSION, ISSUES CONFRONTING THE 1980 GENERAL ASSEMBLY, INFORMATIONAL BULLETIN NO. 131, (1979). The 1980 Kentucky General Assembly had not enacted the proposed district jail plan as this Note went to press, and the probability of enactment in 1980 appeared slight. The plan, as embodied in SB.278, was referred to the Committee on Counties and Special Districts in an effort to resolve funding difficulties. Lack of appropriations from the general budget presented a serious obstacle. See Minutes of the Committee on Counties and Special Districts (March 13, 1980) Kentucky General Assembly, 1980 session.

214 KENTUCKY BUREAU OF CORRECTIONS, DRAFT CONCEPT FOR THE IMPLEMENTATION OF A COMPREHENSIVE DISTRICT JAIL SYSTEM, (1979) [hereinafter cited as DRAFT CONCEPT] A copy of this paper is on file at the KENTUCKY LAW JOURNAL offices.

215 Id.

216 Id., Sept. 20, 1979, at 22, col. 4.

217 DRAFT CONCEPT, supra note 214, at 6. These jails would be located in the most populous regions of the state. The counties in which these jails would be located contain more than seventy-five percent of the state's population and presently hold more than seventy percent of the state's prison population. Id.

218 Id. at 5. This proposal identified nine functions of the district jail:

a) detention for all offenders arrested in the respective county containing the district jail;

b) detention of misdemeanants from surrounding counties with sentences exceeding thirty (30) days;

c) detention of pre-sentenced felons from surrounding counties, post arraignment;
be required to meet certain qualifications to be eligible for election by the public. The state would pay the jailer a fixed salary, and would also assume responsibility for operating and staffing the jail.

The district jail system would be phased into operation over a six-year period. In the 1980-1982 Biennium, ten existing county jails would be certified to serve as district jails. These jails are fairly new, and would require only “minimal expenditures for facility modification, primarily in the areas of safety equipment and recreation space.” Fifteen additional jails would be certified in the 1982-1984 Biennium. These jails would require some construction of building additions and some facility upgrading. The final eleven jails would be added during the 1984-1986 Biennium. These facilities would have to be newly built since the remaining existing facilities cannot be renovated to meet minimum standards. Local governmental units would be required to finance any renovation and construction of the district jails.

The second type of facility under this proposal is the “feeder” jail. Located in forty different counties, the feeder jails would be used “to provide detention support to the district jails.” If the jailer meets minimum training requirements,

d) detention of pre-release or gradual release felons;
e) implementation of comprehensive care programs and mental diagnostic services;
f) utilization of educational and vocational training programs;
g) utilization of work release and public works release programs;
h) provisions for recreational and leisure time programs;
i) local base for Community Services staff.

Id. at 5-6.

Id. at 5. The report states that these qualifications would be similar to those now required of the Property Valuation Administrator. Although this definition is somewhat unclear, it indicates that each candidate would be required to pass some test showing the candidate’s skill in jail management.

Id. at 5, 7. The state would provide personnel in the following areas: security, food service, maintenance, health and treatment. Id. at 7.

Id. at 7.

Id.

Id.

Id. at 8. These jails would serve four functions:

1) detention of presentenced misdemeanants;
2) detention of misdemeanants with sentences less than thirty (30) days
the state would pay his yearly salary. However, the state would not be responsible for staffing the jail, although the jail would be required “to meet minimal staffing levels and training requirements” before it could be certified. The state would reimburse “the county for all operating costs, such as: food, utilities, medical, and supplies . . . .” Additionally, the state would reimburse the county for all costs incurred while transporting the prisoner. Like the district jails, the feeder jails would be phased in over a six-year period. Again, the local jails would be responsible for any renovation or construction necessary to bring the jails up to minimum standards.

The third type would be temporary holding facilities which would be located in the forty-four counties which have neither a district jail nor a feeder jail. Upon meeting minimum physical plant standards and staff training requirements, the jails would be certified by the state. These jails “would be used primarily as temporary detention for offenders arrested in the respective county, with a holding limit of seventy-two (72) hours.” If the prisoner is not released before the end of the seventy-two hour period, he is then transported to a feeder jail. State support of these jails “would be limited to medical and transportation costs.” Presumably, the fee system would still be utilized to pay the salaries of the jailer in these counties, as well as to provide for the feeding of the prisoners. These jails would also be phased in over a six-year period, and, presumably, the local governments would be responsible for any renovation and construction.

At the end of the 1984-1986 Biennium, the district jail system would be fully implemented. At that time, no county

3) detention of prearraigned felons and whose trial date is greater than thirty (30) days;
4) detention of gradual releases.”

Id. at 9.

Id. at 9.

Id.

Id. at 8, 9 (by implication).

Id. at 9-10.

Id. at 10.

Id.

Id.
seat in Kentucky would be further than twenty-five miles from either a feeder jail or a district jail, and all counties would have some type of detention facility.

The Bureau of Corrections also included a cost projection for their district jail proposal. Although this projection is only an estimate, it gives some idea of the total costs of the implementation. The Bureau calculated the total cost for the first Biennium, 1980-1982, to be $9,117,439. The second Biennium, 1982-1984, would require $13,400,000, with another $9,600,000 needed in the third Biennium, 1984-1986.

There are several advantages to a system such as that proposed by the Bureau of Corrections. First, it would ensure that the local jails which hold prisoners for any significant period of time would meet most, if not all, of the minimum standards established under the totality of the conditions test. This would serve to preclude most judicially-ordered reform and the problems that it would present. The system would provide for centralized administration and management of the jails, thus reducing duplicative services and producing cost benefits. Also, it would provide more services to the prisoners, such as misdemeanant programming, mental health programs and gradual release programs.

However, this proposal is not without its problems. First, it would cost a tremendous amount of money over a six-year period. During this era of fiscal conservatism, legislators will not view a large expenditure of funds with favor. Also, this plan will require major capital outlays by some counties to renovate their existing jails or to construct new ones. This burden will not be received well by already financially-pressed county governments. A second problem under the plan is that a prisoner will likely be incarcerated in some place other than his own community. This situation could work a hardship on the family.

\footnote{id}{Id. at 8-9.}
\footnote{id}{Id. at 16.}
\footnote{id}{Id. at 17.}
\footnote{id}{Id. at 2-3. In many of the cases involving challenges to jail conditions, federal courts have shown a willingness to delay final judgment if an effort is being made to upgrade conditions at the jail. See Ahrens v. Thomas, 434 F. Supp. 873, 876-80 (W.D. Mo. 1977), aff'd in part, modified in part, 570 F.2d 286 (8th Cir. 1978).}
\footnote{draft}{Draft Concept, supra note 214, at 4.}
\footnote{id}{Id. at 3-4.}
of the prisoner since they would be required to travel in order to visit, and additional money and staff would be required to transport the prisoner from the jail to the community where the offense occurred. Third, many counties may be unwilling to relinquish control of their jails to the state.\textsuperscript{240}

Even with these problems, the district jail proposal serves to eliminate many of the aforementioned problems which exist in Kentucky's local jails. If implemented fully and financed adequately, the district jail system could make Kentucky's jails acceptable to both the federal judiciary and to society as a whole.

CONCLUSION

The people of Kentucky and their elected representatives will face hard decisions in the 1980's. For too long, the state legislature has abdicated its duty to ensure that its local jails meet minimum constitutional standards, even in the face of a growing activism on the part of the federal courts in the area of jail reform. The time has come for the legislature to shoulder this burden and to implement some type of program upgrading the conditions in Kentucky jails.

Should the legislators fail to act on this problem, they will leave Kentucky's jails susceptible to judicially-ordered reform. The choice is between a systematic program adopted by the legislature and reform ordered by the federal judiciary on a case by case basis. Clearly, the former choice is preferable for all concerned. Thus, the legislature should take some type of prompt action to provide that the conditions of the local jails meet the minimum constitutional standards as required under the totality of the conditions test. The district jail proposal, or some variation thereof, would largely ensure that the local jails meet these standards. For this reason, the proposal merits serious consideration by the Kentucky General Assembly.

\textit{Wm. Barry Birdwhistell}

\textsuperscript{240} These problems are discussed generally in the \textit{Report to the Congress by the Comptroller General of the United States: Conditions in Local Jails Remain Inadequate Despite Federal Funding for Improvements}, 9-10 (1976).