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Prisoners are People

Bruce P. Moore

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PRISONERS ARE PEOPLE

There are jails in New Mexico that are unfit for the incarceration of human beings.¹ To many citizens of this state who have never had an occasion to be inside a jail this fact may be surprising, but to those who have contacts with prisoners, and to those who have responsibility over jails this is no surprise, and to some may seem inevitable. To correct the unfit jail situation, public attention should be directed to the jails in the state and, with adverse publicity, support generated for a reform program.

Rarely will public attention be gained without some initial adverse publicity.² The recent decision of *United States ex rel. Curley v. Gonzales*,³ in which the City of Gallup, New Mexico was required to release approximately two-thirds of the prisoners held in the municipal jail because of overcrowded and unsanitary conditions,⁴ may provide the impetus for other legal actions. Because the decision in *Curley* was unreported its effects are likely to be limited to the region, but within this region just the knowledge that there is a possible judicial remedy to relieve the problem of unfit jails may produce legal response. This response may in turn produce enough adverse publicity to generate support for a reform program on a state wide basis, rather than jail by jail as suits are begun.

This is not intended to be an analysis of *Curley*;⁵ it is instead intended to show what can be done in this problem area by the

1. Correctional Management Associates and The New Mexico Council On Crime and Delinquency, Corrections, Prevention and Court Services In New Mexico ch. 22 (1969). As an example: "The jail is in a deplorable condition. It is in the basement of the County Court House with no emergency exits. Unsanitary conditions and poor ventilation exist and it is a fire hazard. The jail should be completely condemned and abandoned and a new jail provided." Interim Report of The Rio Arriba Grand Jury (filed April 17, 1969). cf. Task Force on Corrections, The President's Commission on Law Enforcement And Administration of Justice, *Task Force Report: Corrections* 24, 75 (1967) (hereinafter cited as *Corrections*); D. Brammer & J. Hurley, A Study of The Office of Sheriff in The United States, Southern Region 1967 112-114 (1968).

2. Comment, *Nebraska Jails: Cure or Cause?*, 49 Neb. L. Rev. 71, 87 (1969).

3. Misc. Nos. 8372-3 (D.N.M. preliminary injunction issued February 13, 1970).

4. The Gallup jail at the time of the injunction held 182 prisoners. There were cots for 66; 35 cots were used by two men; the remainder slept on the floor. The floor drain failed to work with the result that water stood on the floor on which 81 men slept. There were only three toilets and one shower for all the prisoners. No soap was provided and no prisoner was allowed to wash his clothes. There was only 47 plates and 53 glasses for all prisoners at meals, and at meals these were passed between prisoners without washing. There were only two cups for all prisoners for drinking water. These do not exhaust the inadequacies of the jail but are only among the more gruesome. *United States ex rel. Curley v. Gonzales*, Misc. No. 8373 (D.N.M. petition for habeas corpus denied February 12, 1970) (data found in the petition). The injunction limited the jail population to 60, senior prisoners to be released first, and the petitioners were given inspection rights.

5. Because of the preliminary nature of this case and the incomplete court records, an attempt at analysis would rapidly deteriorate to guesswork.

courts, what is and can be done by local governments in New Mexico to alleviate the problem, and what might be done by the state to prevent problem reoccurrence.

In either federal or state actions, prohibitions against cruel and unusual punishment are very likely to be the basis of suits brought as a result of repugnant jail conditions. The success of such suits will depend on whether the type and degree of conditions complained of can be matched against accepted standards for determining what amounts to cruel and unusual punishment. The preliminary question is then what are the standards and what types of conditions have been measured by the standards and found wanting.

"What constitutes cruel and unusual punishment has not been exactly decided."⁶ Whatever it is; it is variable with the times.⁷ There are, however, several tests that may be used to determine whether punishment is cruel and unusual. Each of these has been phrased in several different ways, but they essentially amount to the following:

Eighth Amendment *cruelty*, . . . may exist in one of four ways: (1) the *kind* or *type* of punishment is cruel on its face if it is similar to Star Chamber tortures or a contemporary innovation equally atrocious. (2) The *means* or *implementation* of a permissible kind of punishment is prohibited if it is unnecessarily painful or severe. (3) The infliction of a penalty unobjectionable in the abstract is forbidden if it is *disproportionate* to the offense involved. (4) And in some cases, the mere *fact* of punishment is tantamount to cruelty.⁸

Incarceration in a jail that is unfit to hold people decidedly fits into the second category, and if the idea is accepted that a prisoner "[w]hile he is not sent to prison for punishment, he has been sent there as punishment"⁹ then this kind of incarceration becomes a punishment added to that imposed by a court. This may make the penalty disproportionate to the offense, therefore, cruel and unusual punishment within the third category.

There may be any number of conditions that when sufficiently severe will cause incarceration in a particular jail to be declared cruel and unusual punishment, though in most cases many factors have gone into the mix, and it is usually impossible to identify any one controlling condition.¹⁰ These conditions have included dilapidated

6. *Weems v. United States*, 217 U.S. 349, 368 (1910).

7. *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, *Id.*

8. Sherman, " * * * *Nor Cruel and Unusual Punishments Inflicted*", 14 *Crime and Delinquency* 73, 77 (1968). The first three categories are given in different words in *Snider v. Cunningham*, 375 U.S. 889 (1963) (Dissenting opinion of Goldberg J.). The fourth category is the ruling in *Robinson v. California*, 370 U.S. 660 (1962).

9. *Nolan v. Scafati*, 306 F. Supp. 1, 3 (D.Mass. 1969).

10. *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); *Holt v. Sarver*, 38 U.S.L.W. 2462

and unsafe buildings;¹¹ unsanitary, unnutritious, and inadequate food;¹² overcrowding;¹³ filthy and unsanitary living quarters;¹⁴ insufficient lighting and ventilation;¹⁵ insufficient eating apparatus;¹⁶ insufficient medical facilities;¹⁷ and, improper guarding procedures by authorities.¹⁸ Doubtless this does not exhaust the list of possible conditions, but when a place is condemned as unfit for incarceration purposes one or more of the above conditions usually seems to be present.

Some of the conditions mentioned above were deliberately caused by administrative decision,¹⁹ but each had to do with the physical quality of the place of incarceration. There are other conditions inflicted on prisoners by administrative decision that may constitute cruel and unusual punishment.²⁰ But these are associated with the relationship between jailers and the jailed, and could be corrected by attitude change, rather than requiring an actual change of physical conditions. These conditions may make a penal institution just as unfit for the keeping of people as the former; however, they are subject to slightly different rules before being declared cruel and unusual punishment.²¹ There is also a line of cases dealing with the relationship between jailers and the jailed that is based on due

(E.D.Ark. February 18, 1970); *United States ex rel. Curley v. Gonzales*, Misc. Nos. 8372-3 (D.N.M. preliminary injunction issued February 13, 1970); *Hancock v. Avery*, 301 F.Supp. 786 (M.D.Tenn. 1969); *Holt v. Sarver*, 300 F.Supp. 825 (E.D.Ark. 1969); *Inmates of The Cook County Jail v. Tierney*, No. 68 C 504 (N.D.Ill. filed April 8, 1968); *Jordan v. Fitzharris*, 257 F.Supp. 674 (N.D. Cal. 1966); *Ex parte Pickens*, 101 F.Supp. 285 (D. Alaska 1951).

11. *United States ex rel. Curley v. Gonzales, Id.; Ex parte Pickens, Id.*

12. *United States ex rel. Curley v. Gonzales, Id.; Inmates of The Cook County Jail v. Tierney*, No. 68 C 504 (N.D.Ill. filed April 8, 1968).

13. *United States ex rel. Curley v. Gonzales, Id.; Holt v. Sarver*, 300 F.Supp. 825 (E.D. Ark. 1969); *Inmates of The Cook County Jail v. Tierney*, No. 68 C 504 (N.D. Ill. filed April 8, 1968); *Ex parte Pickens*, 101 F. Supp. 285 (D. Alaska 1951).

14. *Supra* note 10, all cases cited.

15. *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); *United States ex rel. Curley v. Gonzales*, Misc. Nos. 8372-3 (D.N.M. preliminary injunction issued February 13, 1970); *Hancock v. Avery*, 301 F.Supp. 786 (M.D.Tenn. 1969); *Jordan v. Fitzharris*, 257 F.Supp. 674 (N.D.Cal. 1966).

16. *Wright v. McMann, Id.; United States ex rel. Curley v. Gonzales, Id.; Hancock v. Avery, Id.; Jordan v. Fitzharris, Id.*

17. *Holt v. Sarver*, 38 U.S.L.W. 2462 (E.D. Ark. February 18, 1970); *United States ex rel. Curley v. Gonzales, Id.; Inmates of The Cook County Jail v. Tierney*, No. 68 C 504 (N.D.Ill. filed April 8, 1968).

18. *Holt v. Sarver, Id.; Holt v. Sarver*, 300 F.Supp. 825 (E.D.Ark. 1969); *Inmates of The Cook County Jail v. Tierney, Id.*

19. *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); *Hancock v. Avery*, 301 F.Supp. 786 (M.D.Tenn. 1969); *Jordan v. Fitzharris*, 257 F.Supp. 674 (N.D.Cal. 1966).

20. See Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 Va. L. Rev. 795 (1969); Note, *Prisoner's Rights Under Section 1983*, 57 Geo. L.J. 1270 (1969).

21. Comment, *Beyond The Ken of The Courts: A Critique of Judicial To Review The Complaints of Convicts*, 72 Yale L.J. 506 (1963).

process and equal protection.²² Both of these are related problem areas and may in some cases overlap into the problem area of the physical state of jails, but they are generally excluded in this note.

FEDERAL COURT ACTIONS

The foundation for cases arising in federal courts challenging the fitness of jails as places of incarceration is the federal constitutional right to be free from cruel and unusual punishment,²³ as that right is now applicable to the states through the Fourteenth Amendment.²⁴ A prisoner, because of problems inherent in the administration of penal institutions, loses many of the rights and privileges normally belonging to citizens,²⁵ but he retains a minimum level of rights and privileges protected by the federal constitution, including the right to be free from cruel and unusual punishment.²⁶

The Civil Rights Act of 1871²⁷ provides an action for "... the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . .," when the deprivation occurs under color of state law. Prisoners in both state²⁸ and local²⁹ institutions are included within the protection of this act. Actions may be brought against state and municipal employees who are active participants in the deprivation of protected rights,³⁰ though the governmental units are exempt from liability.³¹ Original jurisdiction to try these actions is vested in the federal district courts.³²

Several unique problems are present when an action is brought to challenge the fitness of a jail as a place of incarceration. Monetary damages will often be inadequate, usually because there will be no

22. *Washington v. Lee*, Commissioner of Corrections of Alabama, 263 F.Supp. 327 (M.D.Ala. 1966), *aff'd per curiam* 390 U.S. 333 (1968); *Baxstrom v. Herold*, 383 U.S. 107 (1966).

23. U.S. Const. amend. VIII; "... nor cruel and unusual punishments inflicted."

24. *Robinson v. California*, 370 U.S. 660 (1962).

25. *Price v. Johnston*, 334 U.S. 266 (1948); *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968).

26. "It is not appropriate that he (the prisoner) have all the liberties of a free man. Only such liberties are rightfully his as are indispensable to fair and decent treatment, to avoidance of cruel and unusual punishment, and to preclusion of invidious discrimination." *Nolan v. Scafati*, 306 F.Supp. 1, 3 (D.Mass. 1969). *Trop v. Dulles*, 356 U.S. 86 (1958); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968).

27. 42 U.S.C. § 1983 (1964); 42 U.S.C. §§ 1981, 1988 (1964) are also relevant civil rights statutes.

28. *Cooper v. Pate*, 378 U.S. 546 (1963), *per curiam*.

29. *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969).

30. *Monroe v. Pape*, 365 U.S. 167 (1960).

31. *Monroe v. Pape*, *Id.*; *Finley v. Rittenhouse*, 416 F.2d 1186 (9th Cir. 1969); *Mayhue v. City of Plantation, Florida*, 375 F.2d 447 (5th Cir. 1967).

32. 28 U.S.C. § 1343 (1964).

actual physical injury. For particular prisoners, the point will often be moot by the time the case is taken to court.³³ The class of persons incarcerated in unfit jails is often such that from ignorance, apathy, or mental condition they are often unable to conceive of a solution to the problem or to initiate action towards a solution.³⁴ These place some limitations on the scope of actions that can be beneficially brought. However, the Civil Rights Act does provide for equitable and other relief,³⁵ which can take the form of preliminary immediate relief.³⁶ Mootness may be avoided by the devise of the class action,³⁷ and there is some analogous authority that although a sentence has run a claim for equitable relief may still be considered on the merits.³⁸

The types of relief that may be granted in an action of this sort are monetary damages, injunctive relief, habeas corpus, and mandamus. As already noted monetary damages will not often be requested because of inadequacy. In some cases where incarceration has resulted in deterioration of a prisoner's physical or mental condition monetary damages would be appropriate.³⁹ But monetary damages as a means of reform may prove to be useless. Jails do not become unfit places for incarceration because there is a surplus in the government treasury. When the jail is unfit the supervisory personnel will often be grossly underpaid,⁴⁰ and these are the people against whom suit must be brought. The jail supervisory personnel are also not

33. As an example, the maximum length of time that a person can be sentenced to serve in a local or county jail in New Mexico for violation of a municipal ordinance is 90 days. N.M. Stat. Ann. § § 14-16-1, 38-1-3 (Repl. 1968, Repl. 1964).

34. Compared to the general population, prisoners tend to have lesser educational backgrounds and work experience. *Corrections*, supra note 1, at 2-3. Large portions of the jail population will be habitual drunks. *Corrections*, id., at 73. Prisoners with less education and knowledge than the general population are not likely to realize that the system can be legally challenged. Alcoholics suffer from a disease that to a large degree prevents them from dealing in an effective manner with the real world, including the jails they dry out in.

35. 42 U.S.C. § 1983 (1964); "... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

36. E.g., *United States ex rel. Curley v. Gonzales*, Misc. No. 8372 (D. N.M. preliminary injunction issued February 13, 1970).

37. Fed. R. Civ. P. 23.

38. *Carafas v. LaVallee*, 391 U.S. 234 (1968); *United States ex rel. Miller v. Mazurkiewicz*, 307 F.Supp. 68 (E.D. Pa. 1969). If a habeas corpus action is begun in federal court prior to the end of a sentence, the subsequent end of the sentence neither makes the point moot nor deprives the court of jurisdiction.

39. See *Roberts v. Williams*, 302 F.Supp. 972 (N.D. Miss. 1969) for an instance where monetary damages were highly appropriate.

40. The maximum sheriff's salary in the state is \$8710, N.M. Stat. Ann. § 15-43-4 (Repl. 1968, Supp. 1969), and the minimum is \$2750, N.M. Stat. Ann. § 15-43-4.8 (Repl. 1968, Supp. 1969). Considering the responsibilities of these officers, including that of running the county jail, these are pathetically low. The Rio Arriba County sheriff has a salary of \$6930 and see, supra note 1, for a description of the Rio Arriba County jail. See also *Corrections*, supra, note 1, at 164-5.

usually the people who control the money that might be spent to improve jail conditions.⁴¹ If the suit is based on a bond, the purposes of improving jail conditions are avoided. No direct order to improve conditions results, and the loss is placed on a surety who may pass this loss on to the public but will do so in a manner that taxes the individual citizen in such a small way that no political pressure for reform is generated.

Injunctive relief has the advantage of either immediately correcting the problem,⁴² forcing initiation of corrective action by authorities,⁴³ or of bringing the problem into public view in a way that forces corrective action either by political pressure or by citizen initiation of substitute programs.⁴⁴ It can also be tailored to fit the problem, going no further than necessary to correct the problem, while protecting the valid public interest of maintaining an effective jail organization.⁴⁵ Injunctive relief may be granted irrespective of whether a valid and viable claim at law exists.⁴⁶ Likewise, injunctive relief is independent of the availability of a state remedy,⁴⁷ because of the unwillingness on the part of some state courts to protect the rights of citizens from government interference.⁴⁸ Because of flexibility, injunctive relief, either positive or negative in form, seems to be favored over other remedies both by courts and by prisoners.

Habeas corpus would seem to be a valid means of challenging the fitness of a jail for purposes of incarceration. New Mexico denies the

41. On a county basis the function of distributing funds to the jail belongs to the Board of County Commissioners, N.M. Stat. Ann. § 15-37-15 (Repl. 1968), and on the municipal level it belongs to the governing body of the municipality, N.M. Stat. Ann. §§ 14-10-4, 14-11-3, 14-13-12 (Repl. 1968).

42. *Jordan v. Fitzharris*, 257 F.Supp. 674 (N.D. Cal. 1966).

43. *Holt v. Sarver*, 38 U.S.L.W. 2462 (E.D. Ark. February 18, 1970).

44. *United States ex rel. Curley v. Gonzales*, Misc. Nos. 8372-3 (D. N.M. preliminary injunction issued February 13, 1970). A letter contained in the court records of this case by Mr. Theodore Mitchell of Dinebeiina Nahiilna Be Agaditahé indicated that the citizens of Gallup after the injunction were beginning to discuss and attempt to deal with the problem of what to do with the drunks who had previously been hustled off to the municipal jail and there hidden from public view.

45. *E.g.*, *United States ex rel. Curley v. Gonzales, Id.*

46. *Brewer v. Hoxie School District No. 46 of Lawrence County, Arkansas*, 238 F.2d 91 (8th Cir. 1956); *Lucia v. Duggan*, 303 F.Supp. 112 (D. Mass. 1969).

47. *Monroe v. Pape*, 365 U.S. 167 (1961); *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); *Rodriguez v. McGinnis*, 307 F.Supp. 627 (N.D. N.Y. 1969); *Redding v. Pate*, 220 F.Supp. 124 (N.D. Ill. 1963); *cf. Houghton v. Shafer*, 392 U.S. 639 (1968); *Damico v. California*, 389 U.S. 416 (*per curiam*, 1967).

"Indeed, the objectives of the Civil Rights Act would be defeated, if we decided that this federal claim grounded on an alleged violation of the federal constitution would have to stagnate in the federal court until some nebulous or nonexistent remedy was pursued like a will-o'-the-wisp in the state court."

387 F.2d at 525. *But see Potwora v. Dillon*, 386 F.2d 74 (2d Cir. 1967).

48. *Monroe v. Pape, Id.*

writ of habeas corpus to convicted prisoners.⁴⁹ Because there are no state remedies to exhaust, application for a writ may be made any time after conviction.⁵⁰ The preclusion of habeas corpus as a remedy for convicted prisoners in the state courts does not preclude that remedy in the federal courts.⁵¹ A prisoner held in a jail that is unfit for incarcerating people would seem to fit into the category of prisoners eligible for a federal writ of habeas corpus because “[h]e is in custody in violation of the Constitution or laws . . . of the United States.”⁵² However, habeas corpus has traditionally been used to challenge “. . . the legality of confinement rather than the manner in which detention is administered.”⁵³

Despite tradition there has developed a doctrine that would allow review of the nature and conditions of a prisoner's otherwise lawful confinement in rare and exceptional circumstances.⁵⁴ In these rare and exceptional circumstances, the writ may be used to prevent cruel and unusual punishment or continuation of other illegal activity,⁵⁵ but it is not used to free the prisoner. Nor is it to be used when other remedies are adequate and available,⁵⁶ though it may be requested and used in conjunction with other remedies.⁵⁷ Though habeas corpus has traditionally been an individual action; it is a civil action to which the Federal Rules of Civil Procedure apply,⁵⁸ and class actions⁵⁹ for a writ may properly be brought.⁶⁰ Viewed in this manner, the use of habeas corpus in this problem area is merely a slight extension of an old remedy that is not inconsistent with historical purposes.

The remaining remedy, mandamus, may in certain situations be the proper remedy in a Civil Rights action.⁶¹ The alleged deprivation

49. N.M. Stat. Ann. § 22-11-2 (1953); *Orosco v. Cox*, 75 N.M. 431, 405 P.2d 668 (1965).

50. 28 U.S.C. § 2254 (1964).

51. *Fay v. Noia*, 372 U.S. 391 (1963); *Whippler v. Balkcom*, 342 F.2d 388 (5th Cir. 1965).

52. 28 U.S.C. § 2241(c)(3) (1964).

53. *Long v. Parker*, 390 F.2d 816, 818 (3rd Cir. 1968); *cf. Johnson v. Avery*, 393 U.S. 483 (1969); *Ex parte Pickens*, 101 F.Supp. 285 (D. Alaska 1951).

54. *Cagle v. Ciccone*, 289 F.Supp. 857 (W.D. Mo. 1968); *Konigsberg v. Ciccone*, 285 F.Supp. 585 (W.D. Mo. 1968); *Harris v. Settle*, 322 F.2d 908 (8th Cir. 1963); *Petition of Baptista*, 206 F.Supp. 288 (W.D. Mo. 1962); *United States ex rel. Yaris v. Shaughnessy*, 112 F.Supp. 143 (S.D. N.Y. 1953).

55. *Konigsberg v. Ciccone, Id.*, at 589; *cf. United States ex rel. Yaris v. Shaughnessy, Id.*

56. *Konigsberg v. Ciccone, Id.*

57. *Rodriguez v. McGinnis*, 307 F.Supp. 627 (N.D. N.Y. 1969).

58. Fed. R. Civ. P. 81(a)(2); *Harris v. Nelson*, 394 U.S. 286 (1969).

59. Fed. R. Civ. P. 23.

60. *Adderly v. Wainright*, 46 F.R.D. 97 (M.D. Fla. 1968).

61. *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970).

of constitutional rights must be established;⁶² all other remedies, both state⁶³ and federal⁶⁴ must either be exhausted or inadequate;⁶⁵ and the duty sought to be enforced must be clearly ministerial rather than discretionary.⁶⁶ This means that mandamus will rarely be used to protect constitutional rights from official dereliction of duty, though several courts have granted what essentially amounts to mandamus while calling it by a different name.⁶⁷ Jail prisoners in this respect are in no different position from anyone else. Disregarding for the moment the effectiveness of state remedies, most jail conditions of interest here can be corrected by injunctive remedies, if by no other means than by enjoining the use of the jail, thus precluding mandamus.

STATE COURT ACTIONS

New Mexico places the county jail under the authority of the county sheriff.⁶⁸ He is charged with the responsibility for keeping the jail clean and healthy,⁶⁹ maintaining the personal cleanliness of prisoners,⁷⁰ supplying food for prisoners of good and wholesome quality and sufficient to maintain life,⁷¹ and supplying all of the housekeeping equipment and supplies necessary to operate a jail.⁷² The sheriff is charged with responsibility for his prisoners, except to the extent that an officer from a different government or branch of government retains custody of the prisoners.⁷³ As a check, to be certain that jails meet the standards imposed on the sheriffs, both the county commissioners and the county grand jury are required to periodically inspect the jails.⁷⁴ If any county jail is reported by the

62. *Peek v. Mitchell, id.*; *Startti v. Beto*, 405 F.2d 858 (5th Cir. 1969), *cert. denied* 395 U.S. 929 (1969).

63. *Vida v. Cage*, 385 F.2d 408 (6th Cir. 1967); *Pennsylvania ex rel. Rawlings v. Botula*, 260 F.Supp. 298 (W.D. Pa. 1966); *United States ex rel. Johnson v. Pennsylvania*, 247 F.Supp. 365 (E.D. Pa. 1965).

64. *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969).

65. *Carter v. Seamans, Id.*

66. *United States v. Walker*, 409 F.2d 477 (9th Cir. 1969); *Kirby v. Thomas*, 336 F.2d 462 (6th Cir. 1964).

67. *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *N.A.A.C.P. v. Thompson*, 357 F.2d 831 (5th Cir. 1966).

68. N.M. Stat. Ann. § 42-2-1 (Repl. 1964).

69. N.M. Stat. Ann. § 42-2-4 (Repl. 1964).

70. N.M. Stat. Ann. § 42-2-4 (Repl. 1964).

71. N.M. Stat. Ann. § 42-2-5 (Repl. 1964). There may be a pragmatic conflict between this duty and the maximum amounts a sheriff is allowed to spend on food for prisoners. N.M. Stat. Ann. § 15-43-14.1 (Repl. 1968, Supp. 1969).

72. N.M. Stat. Ann. § 42-2-8 (Repl. 1964).

73. (1965) N.M. Att'y Gen. Rep. 86.

74. N.M. Stat. Ann. § 42-2-3, 41-5-9 (Repl. 1964, Supp. 1969). See also (1963) N.M. Att'y Gen. Rep. 369.

county commissioners as failing to meet minimum standards of cleanliness and healthfulness, the district attorney, by order of the district court, is to initiate an action against the sheriff for violation of duty.⁷⁵

The major problem likely to arise with respect to county jails is simply a lack of money which would enable the sheriff to carry out his duties. Several provisions are made for this situation, none of which will be popular. First, if the county collects inadequate revenue to pay operating costs,⁷⁶ salaries are reduced and creditors are paid off gradually within the limits of actual income – with a provision that the actual expenses of boarding prisoners will be fully paid before any other bill, expense, or salary.⁷⁷ The scope of this is limited, but it indicates a priority of payments that is not likely to be given full effect by county officers because it cuts into their own income. Second, if a county does not have a jail or courthouse or does not have a suitable jail or courthouse, the county commissioners may levy a five mill tax for the purpose of creating a fund to finance a suitable jail or courthouse.⁷⁸ The county commissioners may also levy a two mill tax for only the purpose of jail and courthouse repair.⁷⁹ Taxes are never popular, and, if not already existing, are difficult to institute. If these taxes are already being collected, too often they may be spent only on courthouse repair.⁸⁰

If a jail is unsuitable and the above tax solutions do not provide sufficient viability to alleviate the problem, there are several other measures that a county might take. These are inherently temporary and cannot serve as final solutions, but they may be helpful. First, the county commissioners can make arrangements with another county for the confinement of its prisoners when there is no "proper place of confinement for its prisoners."⁸¹ Second, "[w]henver the public welfare or the safe custody of a prisoner shall require, any district judge . . . may order any person . . . to be removed to another county jail . . . or to any other place of safety. . . ."⁸² Thirdly, those

75. N.M. Stat. Ann. § 42-2-3 (Repl. 1964).

76. The county is supposed to stay within its ability to pay. N.M. Stat. Ann. § 11-6-6 (Repl. 1966).

77. N.M. Stat. Ann. § 11-6-8 (Repl. 1966).

78. N.M. Stat. Ann. § 15-47-1 (Repl. 1968).

79. N.M. Stat. Ann. § 15-47-5 (Repl. 1968).

80. In fiscal 67-68 in at least Colfax, Guadalupe, Mora, Rio Arriba, and Taos counties there were no expenditures for jail repair while expenditures for court house repair in these counties were respectively \$1800, \$3054, \$300, \$1204, and \$1500. The 68-69 projections showed the same tendency with only Guadalupe county budgeting money for jail repairs in the sum of \$1900. Colfax, Guadalupe, Mora, Rio Arriba, and Taos county, Official Budget Estimated, Fiscal 1968-1969.

81. N.M. Stat. Ann. § 42-2-16 (Repl. 1964).

82. N.M. Stat. Ann. § 42-2-13 (Repl. 1964).

charged with a crime committed in the county may be held in custody in another place if the sheriff is of the opinion the prisoner's life is endangered.⁸³ Taken out of context these provisions could be used to justify transferring prisoners from a county jail that is unfit for human habitation. If the problem is essentially caused by overcrowding, the county sheriff, with the approval of the district court, could institute a general policy of reducing every prisoner's sentence by one-third; the maximum "good time" that a prisoner can get.⁸⁴ This could reduce a jail population by as much as a third.

County sheriffs are required to accept federal prisoners and keep them in custody,⁸⁵ provided, that by accepting custody of federal prisoners, the county jail does not become so overcrowded that county prisoners are kept out.⁸⁶ Once a federal prisoner is in a county jail, that jail becomes a jail of the United States and the jailer becomes an officer of the United States with respect to that prisoner.⁸⁷ This brings the full import of federal law concerning places of incarceration to bear on the county jail, including minimum physical conditions. If a jail housing federal prisoners falls below standards, it would seem that federal remedies for federal institutions (not discussed here) could be put into play to coerce a county to upgrade its jail.

Municipal jails and lockups present a slightly different problem. These types of jails are no longer expressly permitted by law,⁸⁸ however, they are implicitly allowed and approved.⁸⁹ State law does not point to particular persons who are to be responsible for municipal jails, though this responsibility is implicit in the duties and responsibilities assigned to the governing bodies or persons of municipalities.⁹⁰ Municipalities in turn rarely designate the person directly responsible for the jail, though the existence of the municipal jail may be freely acknowledged and the acts that would justify incarceration are set out in detail.⁹¹ Even should the responsible person be

83. N.M. Stat. Ann. § 42-2-11 (Repl. 1964).

84. N.M. Stat. Ann. § 42-2-7.1 (Supp. 1969).

85. N.M. Stat. Ann. § 42-2-14 (Repl. 1964).

86. (1957) N.M. Att'y Gen. Rep. 352.

87. *In re Birdsong*, 39 F. 599, 4 L.R.A. 628 (S.D. Ga. 1889).

88. N.M. Stat. Ann. § 14-21-25 (1953), (repealed 1965).

89. *E.g.*, N.M. Stat. Ann. § 42-2-19 (Repl. 1964).

90. N.M. Stat. Ann. §§ 14-10-4, 14-10-6, 14-11-3, 14-13-12, 14-13-14, 14-16-1, 14-17-1 (Repl. 1968).

91. *See* Gallup, New Mexico, Code (1961); Carlsbad, New Mexico, Code (1958); Carrizozo, New Mexico, Code (1959); Farmington, New Mexico, Code (1959); Hobbs, New Mexico, Code (1958); Roswell, New Mexico, Code (1952); *contra*, Grants, New Mexico, Code, ch. 17, § 3 (1962).

explicitly designated, his duties with regard to jail conditions may not be given.⁹²

This is not to say that municipal jails are not in some degree controlled by outside regulation. The maximum period of incarceration is set at 90 days.⁹³ The inspection requirements placed on grand juries and county commissioners with respect to county jails are drawn in language broad enough to cover municipal jails.⁹⁴ Municipal jails that are more than 50 miles from the county seat may be used for the incarceration of county prisoners, and for that purpose are to be considered as county jails.⁹⁵ Every municipal jail in this category is subject to the rules regulating county jails, including those regulations mentioned concerning jails in which United States prisoners are held in custody.⁹⁶ But other than the above mentioned regulations, municipal jails effectively escape state regulation.

Some municipalities escape the problem of jails unfit for human incarceration by the simple expedient of not having a jail. No figures were found, but undoubtedly most municipalities do have jail facilities available,⁹⁷ though the municipality may not own the jail.⁹⁸ Any municipality may use the facilities of the county jails subject to requirements imposed by law and the county commissioners.⁹⁹ If the municipality happens to be a county seat, and, if it issued bonds for the benefit of the county in value equal to the value of the grounds on which the county was built, it may make arrangements with the county commissioners to use the county jail.¹⁰⁰ These municipalities are not of concern here.

New Mexico courts have never had to face the problem of substandard jails in any reported case. There is some language in the cases that mention jails that does tend to indicate that incarceration

92. Grants, New Mexico, Code, ch. 17, § 3 (1962); *contra*, Deming, New Mexico, Ordinances, ord. 6, § 10 (1908).

93. N.M. Stat. Ann. §§ 14-16-1, 38-1-3 (Repl. 1968, Repl. 1964).

94. "The grand jury is obliged, and the district judge shall charge that they are, to inquire into:

• • • •

(B) the condition of every person imprisoned in the county not lawfully committed by a court and not indicted or informed against; and . . .

(C) the condition and management of every public jail or prison within the county." N.M. Stat. Ann. § 41-5-9 (Supp. 1969).

"The county commissioners of the several counties of this state shall be the inspectors of the prisons in their respective counties. . . ." N.M. Stat. Ann. § 42-2-3 (Repl. 1964).

95. N.M. Stat. Ann. § 42-2-19 (Repl. 1964).

96. *Supra* notes 85-87.

97. *Corrections, Prevention and Court Services In New Mexico, supra* note 1.

98. *E.g.*, Las Cruces, New Mexico, Code, § 9-131 (1950).

99. N.M. Stat. Ann. § 14-17-16 (Repl. 1968).

100. N.M. Stat. Ann. § 15-34-7 (Repl. 1968).

in unfit jails will be considered as cruel and unusual punishment.¹⁰¹ The early cases defining cruel and unusual punishment defined it as torture.¹⁰² That definition was in line with the current of thought for those times.¹⁰³ There has been no occasion since those early cases for a redefinition of cruel and unusual punishment, but presumably the New Mexico courts would stay in line with contemporary thought,¹⁰⁴ using in some degree all classifications of cruel and unusual punishment previously cited.¹⁰⁵

Assuming that the state courts could be roused to action, the next question is what could and what might they do to remedy the situation. If monetary damages are inappropriate in federal courts, they are no more appropriate a remedy in the state courts. Here also some form of injunctive relief would appear to be the most appropriate. The district courts clearly have the power to enjoin the use of unfit jails.¹⁰⁶ Though, the courts have this power, it will probably not be used, if use means releasing of prisoners or continued freedom for those who will be tried and convicted.¹⁰⁷ But there is a statutory provision that would allow the court to transfer the entire jail population to suitable jails.¹⁰⁸ Such a transfer would avoid the politically sensitive issue of releasing convicted persons, while having some of the impact of enjoining the use of the jail because of the costs involved. If the unfitness of the jail concerns only a portion of the jail population, injunctive relief can be used without unduly interfering with internal administration, while vindicating the constitutional rights of prisoners and perhaps producing publicity favorable to reform.¹⁰⁹

101. "Some personal discomfort, occasioned by being jailed for a few hours awaiting preliminary examination, does not constitute a denial of due process or equal protection, nor can it be said to constitute cruel and unusual punishment." *Christie v. Ninth Judicial District*, 78 N.M. 469, 470, 432 P.2d 825 (1967) (emphasis added).

102. *New Mexico v. Ketchum*, 10 N.M. 718, 65 P. 169 (1901); *New Mexico v. Garcia*, 1 N.M. 415 (1869).

103. *Ex parte O'Shea*, 11 Cal. App. 568, 105 P. 776 (1909); *Hobbs v. State*, 133 Ind. 404, 32 N.E. 1019 (1893); *State v. Williams*, 77 Mo. 310 (1883); *Wilkerson v. Utah*, 99 U.S. 130 (1878); *Hart v. Commonwealth*, 131 Va. 726, 109 S.E. 582 (1921).

104. *Supra* note 8; *Green v. State*, 390 P.2d 433 (Alaska 1964); *Weber v. Commonwealth*, 303 Ky. 56, 196 S.W.2d 465 (1946); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. Ct. App. 1968).

105. *Id.*, but see *McCutcheon v. Cox*, 71 N.M. 274, 377 P.2d 683 (1963).

106. N.M. Const. art. VI, § 13 (1911); *See also* N.M. Const. Art. VI, § 3 (1911) giving the state supreme court this same power, though presumably the supreme court wouldn't issue an original injunction except in cases of necessity. Cf. *Ex parte Nabors*, 33 N.M. 324, 267 P. 58 (1928); *State ex rel. Owen v. Van Stone*, 17 N.M. 41, 121 P. 611 (1912).

107. *Ex parte Ellis*, 76 Kan. 368, 91 P. 81 (1907).

108. N.M. Stat. Ann. § 42-2-13 (Repl. 1964); this was the procedure used in *Stuart v. Board of Supervisors of La Salle County*, 83 Ill. 341, 25 Am. Rep. 397 (1876).

109. *See Howard v. State*, 28 Ariz. 433, 237 P. 203, 40 A.L.R. 1275 (1925).

Habeas corpus currently cannot be used to remedy the type of situation dealt with here. Though the right to habeas corpus is guaranteed,¹¹⁰ it is limited exclusively to attacking the judgment because the sentencing court was without jurisdiction.¹¹¹ Should this not be the case, the doctrine that habeas corpus should not be used to attack conditions of confinement might well prevail,¹¹² though the better view would allow habeas corpus to serve that function.¹¹³

Mandamus seems to be a promising remedy,¹¹⁴ but it has limitations that might make it ineffective. The district courts have jurisdiction to issue the writ.¹¹⁵ The basic requirements for the writ to issue are that there be no adequate remedies at law,¹¹⁶ that the duty owed by the officer be to the public and not to the government itself, and that application be made by a citizen whose rights are affected in common with those of the general public.¹¹⁷ This last requirement could be used as a basis for argument that the duty owed was to prisoners alone and not to the general public. However, the duty is owed to the public; few duties owed that mandamus may issue for go to the entire public at any one time, though any member of the public may be affected by the duty at any time. This is exactly the position of the duty of jailers; the jail population at any one time is small, though at any time any member of the public may find himself in jail.

If all of the requirements are fulfilled, if the duty is clear, and, if there is no excuse for failure to perform the required action, a peremptory writ may issue *ex parte*.¹¹⁸ This presents the major block to the usefulness of mandamus. Where the jail conditions are sufficiently bad for a writ of mandamus to issue, the jailer will often have the valid excuse of inadequate funding dispersed by the governing body to handle the prisoner load or of inadequate funding for maintenance purposes.¹¹⁹ Though the excuse provisions seem only to

110. N.M. Const. art. 11, § 7 (1911).

111. N.M. Stat. Ann. §§ 22-11-2, 22-11-16 (1953); *Orosco v. Cox*, 75 N.M. 431, 405 P.2d 668 (1965).

112. *Howard v. State*, 28 Ariz. 433, 237 P. 203, 40 A.L.R. 1275 (1925); *Ex parte Ellis*, 76 Kan. 368, 91 P. 81 (1907); *Ex parte Terrill*, 47 Okla. Crim. 92, 287 P. 753 (1930).

113. *In re Riddle*, 22 Cal. Rptr. 472, 372 P.2d 304 (1962); *cf. Commonwealth ex rel. Stanton v. Francies*, 250 Pa. 350, 95 A. 798 (1915).

114. N.M. Stat. Ann. § 22-12-5 (1953).

115. N.M. Const. art. VI, § 13 (1911).

116. N.M. Stat. Ann. § 22-12-5 (1953); *Conklin v. Cunningham*, 7 N.M. 445, 38 P. 170 (1894).

117. *State ex rel. Burg v. City of Albuquerque*, 31 N.M. 576, 249 P. 242 (1926), *reh. denied*.

118. N.M. Stat. Ann. § 22-12-7 (1953); *Rivera v. Nunn*, 78 N.M. 208, 430 P.2d 102 (1967).

119. Admittedly, much in the way of maintenance work can be performed by prisoners,

apply to peremptory writs, it must also apply to writs issued in the normal course of affairs; even a statutory duty must be viewed in the light of reality. Nothing is served by ordering one to do what he cannot do. For this reason and the usual adequacy of injunctive relief, mandamus will be a rarely, if ever, used remedy, though it might be used profitably in requiring grand juries and county commissioners to perform their duties of jail inspection.¹²⁰

The state courts as well as the federal courts have one major tool, the injunction, to use in correcting the problem of unfit jails whenever that problem should arise. The other possible remedies—monetary damages, habeas corpus, and mandamus—are available for the rare case where injunctive relief would neither be appropriate or adequate. However, remedies can only serve to alleviate the problem, not to prevent it. Prevention will require some degree of restructuring of duties and responsibilities for jails, both operational and financial.

CORRECTIVE RECOMMENDATIONS

Successful actions in either federal or state courts might provide the needed impetus for reform of our state's penal system. Probably, only through legislative action can we insure that all prisoners in New Mexico will be incarcerated in jails fit for human habitation.

Remedial action can take any number of forms on many different levels. Because the problem cuts across jurisdictional lines, only state-wide action will be truly effective, though county and town reform would be helpful in the absence of state reform. The key to the following recommendations is a minimum set of jail standards,¹²¹ that should be made applicable to all places of incarceration within the state. Irrespective of what reforms may be instituted, if there are no minimum standards, reform measures will be haphazard in application depending on individual beliefs of what minimum standards should be.

State Control. All jails within the state could be placed under the responsibility and control of the Department of Corrections. This is the method used in Alaska, Connecticut, Delaware, and Rhode Island.¹²² Smaller towns and rural areas are now often unable to

but this does not eliminate the need for maintenance supplies nor the need for outside assistance for specialized repairs.

120. *Supra* note 94.

121. For an example of a minimum set of standards see, The American Correctional Association, *Manual of Correctional Standards* 44-45 (3rd ed. 1966) (hereinafter cited as *Manual*).

122. *Corrections, supra* note 1, at 59; Conn. Gen. Stat. Rev. § 18-78 (Supp. 1970); Del. Code Ann., tit. 11, § 6501 (Supp. 1968); R.I. Gen. Laws Ann. § 13-2-1 (1956).

afford jails, and projections indicate that in the future they will be less able to afford adequate jails.¹²³ The financial pinch will become greater as developing concepts in penology become accepted.¹²⁴ The positive services a jail in the future will be expected to provide will simply be beyond the taxing power of many jurisdictions. Putting all jails under the responsibility of the Department of Corrections would insure that each jail would be adequate and would provide a reasonable chance that as the concept of the function of jails evolves the jails within the state could maintain pace.

State Supervision. Localities may retain day to day control over the operation of jails, with the Department of Corrections acting in an advisory and supervisory capacity.¹²⁵ The Department of Corrections in this scheme would have the power to establish and enforce regulations concerning prisoner health, welfare, safety, and discipline. Inspections would be periodically carried out to determine whether regulations were being enforced, and, if not, a jail could be closed or its operations curtailed. The state should also approve or disapprove local plans for the development of jail facilities, including the financing.¹²⁶

Regional Jails. Areas that are unable to afford adequate jails may consolidate their efforts into regional jails. These jails could either be under state or regional control, though to keep local political rivalry minimized state control might be best. The major benefits to be derived from this system are avoiding duplication of effort in each jurisdiction with resulting cost savings and, by centralization, all of the different types of correctional treatment may be provided to prisoners as need requires; something only wealthy jurisdictions can now hope to provide.¹²⁷ Thus, special treatment facilities might be provided for alcoholics, vocational training might be provided for the unemployable, and counseling services might be provided to the lost in a confusing world.

Jail Function. The function of the American jail is currently ill conceived. It serves many purposes for which it was never intended, such as being a convenient place to dry out drunks and keep them

123. *Corrections, supra* note 1, at 80.

124. An indication of the types of programs that penology is developing can be found in K. Menninger, *The Crime of Punishment* (1968), and *Corrections, supra* note 1, ch. 10. From these a rough estimate of the costs of these programs can be made.

125. This is the method adopted by Virginia, Va. Code Ann. § § 53-133 to 134 (1967).

126. These are an amalgam of ideas suggested in: *Manual, supra* note 121, at 45-46; Model Penal Code § § 303.1, 401.1, 401.2 (Proposed Official Draft 1962); *Corrections, Prevention and Court Services In New Mexico, supra* note 1, recommendations for section IV; National Council On Crime and Delinquency, *Standard Act For State Correctional Services*, § 3, Institutional Administration (1966); *Corrections, supra* note 1, at 205-6.

127. *Manual, supra* note 121, at 46; *Corrections, supra* note 1, at 80.

out of public view for a while.¹²⁸ Functions like this can be better served by institutions other than jails, or by jails whose function has been explicitly modified.¹²⁹ Institutions will continue to be needed for the purpose of incarceration, but with identification of the needs of each prisoner, he can be placed with the proper penal institution which has the function of dealing with a particular class of prisoners, or, if more appropriate the prisoner can be placed under the control of a nonpenal agency. Jails of the type of concern here could then assume their proper function—keeping in custody those prisoners who are awaiting trial.¹³⁰

Segregation of Prisoners. Prisoners fall into many classifications. The following should be segregated for obvious reasons: females from males, juveniles from adults, noncriminal types (such as those held as witnesses) from criminal types, high escape risks from more complacent prisoners, first-offenders from habitual offenders, prisoners on work release from those strictly confined, and problem prisoners—alcoholics, addicts, sex deviates, etc.—from all others.¹³¹ This high degree of segregation is impossible for smaller communities with very limited resources,¹³² thus emphasizing the need for regional sharing to get the maximum benefit for the limited money available.

Modified Sentencing Techniques. Many of the problems of unfit jails are a direct result of too many prisoners for the money expended on jails. Presumably, in some jurisdictions merely reducing prisoner population significantly would go far to eliminate the problem.¹³³ There are several steps that could be taken towards this goal. Nationally approximately 50% of the commitments are for offenses related to alcohol and recidivism is the rule rather than the exception.¹³⁴ The result is that large numbers of people essentially spend their adult lives in local jails serving consecutive short sentences,¹³⁵ because of the common policy of sentencing without

128. *Corrections, supra* note 1, at 73.

129. See Pinarci, *The Chronic Drunkenness Offender, What One City Is Doing About The Revolving Door*, 12 *Crime and Delinquency* 339 (1966); Rubington, *Alcoholic Control on Skid Row, Preliminary Draft of a Research and Demonstration Proposal*, 13 *Crime and Delinquency* 531 (1967).

130. *Manual, supra* note 121, at 68.

131. *Manual, Id.*, at 48; Model Penal Code § 303.3 (Proposed Official Draft 1962).

132. *Corrections, supra* note 1, at 24.

133. Cf. *United States ex rel. Curley v. Gonzales*, Misc. Nos. 8372-3 (D. N.M. preliminary injunction issued February 13, 1970).

134. *Corrections, supra* note 1, at 163.

135. *Corrections, Id.*; Gallup, New Mexico has a policy of sentencing for the first drunkenness offense to a suspended sentence, for the second five days or \$25, for the third ten days or \$50, for the fourth 30 days or \$150, for the fifth and subsequent offenses 60 days or \$300. Gallup, New Mexico, Code § 1-3-5 (1961). However, as indicated in the

considering cause underlying the offense. A sentencing policy looking to cause and attempting to adjust sentences in order to break the chain of causation is likely to be much more effective in reducing jail population than is blind sentencing. Similar policy can be applied to prisoners other than alcoholics who have analogous problems as the treatment techniques become available. Several pilot programs have had moderate success in breaking the recidivist cycle of alcoholics;¹³⁶ these or others might be used to reduce prison population.

Next, sentencing should be made a personal process. Within practical limits sentences should be tailored to the person. Work release programs should be utilized as much as possible to avoid reenforcing the recidivist cycle.¹³⁷ If the prisoner is allowed to work at his job during his sentence, the adjustment process upon release is less violent resulting in a higher probability that that person will not become another recidivist statistic.¹³⁸ Also in line with personalized sentencing, alternative sentences might be imposed. A fine may have as much corrective value as a jail sentence. But if fines are to be imposed, consideration should be given to the ability of the person to pay.¹³⁹ Days for dollars equations are ridiculous; one day in the life of any man is worth more than five dollars.¹⁴⁰ If the method of equating money and time is necessary, either the court should set the equivalency based on individual characteristics or at least a reasonable daily value should be set.¹⁴¹ This would go far in keeping out of jail for overly long periods of time those whose major crime is being poor.

Personnel. Jails are under the authority of enforcement departments in many cities in the state and all counties.¹⁴² Enforcement is an immediate need; corrections and incarceration has a lesser priority. When the two functions are combined in one department, corrections and incarceration suffers because enforcement takes most

petition in United States *ex rel.* Curley v. Gonzales persons convicted of drunkenness were given "flat time" rather than a time or money option.

136. *Supra* note 129; Task Force on Drunkenness, The President's Commission On Law Enforcement and Administration of Justice, *Task Force Report: Drunkenness* 101-104 (1967).

137. *Corrections, supra* note 1, at 11, 78.

138. *Manual, supra* note 121, at 70-1.

139. *People v. Gittelson*, 25 A.D.2d 265, 268 N.Y.S.2d 779 (1966).

140. Five dollars equals a day in a man's life is the equation used in New Mexico. N.M. Stat. Ann. § § 14-16-1, 38-1-3, 42-2-9 (Repl. 1968, Repl. 1964, Repl. 1964, Supp. 1969).

141. *People v. McMillan*, 53 Misc.2d 685, 279 N.Y.S.2d 941 (1967).

142. *Corrections, supra* note 1, at 79; Office of the City Manager, Albuquerque, New Mexico, Albuquerque Municipal Government: A Primer 12 (rev. ed. 1965); N.M. Stat. Ann. § 42-2-1 (Repl. 1964); state law does not require municipal jails to be under police department control. N.M. Stat. Ann. § 14-2-2 (Repl. 1968).

of the time, money, commitment, and expertise.¹⁴³ Many enforcement officers believe that the two functions should be separated.¹⁴⁴ Only when corrections and incarceration is upgraded to the level of a separate department within the government structure, can it begin to carry out its function in an effective manner. When separation occurs, and even if separation should not occur, corrections and incarceration personnel should receive pay commensurate with responsibility and ability.¹⁴⁵ Pay for persons in corrections should be comparable to that received in police and fire department.¹⁴⁶ The corrections personnel should also be brought within the civil service system in order to facilitate attracting the best possible with a limited budget.

Judicial Remedies. As already noted above, the state district courts have jurisdiction over jails and have remedies available that can be used effectively. A statute declaring the public policy of this state to be that all places of incarceration within the state must meet certain designated minimum standards; and the district courts should be given explicit jurisdiction to act in this problem area. The remedies that a court might grant should be listed up to and including the power to close a jail and free all the prisoners for the extreme case. High priority should be given to these types of cases at both the district court and appellate court levels, so that an unfit jail situation exists no longer than necessary.

CONCLUSION

When we put any man in a jail that is unfit for human habitation, we do more than endanger and degrade him; we also endanger and degrade ourselves. An unfit jail does nothing to keep a person from returning to that or another jail. At the same time it corrodes the fragile spirit of humanity binding us all together. Reform is necessary to stop this corrosion. Reform can either take the form of improvement of individual jails as conditions become known or it can take the form of an improvement over the entire system of jails. Either alternative requires information. The information that will generate

143. *Corrections, supra* note 1, at 79.

144. *Corrections, Id.*, at 79; Task Force On The Police, The President's Commission On Law Enforcement and Administration of Justice, *Task Force Report: The Police* 88-89 (1967).

145. *Manual, supra* note 121, at 51; *Corrections, supra* note 1, at 197-8. The reader should compare the salaries of the county jailers and deputy sheriffs in the various county official budget estimates. At least with respect to salaries of county jailers this point has been recognized as valid by the Bernalillo County Grand Jury. (July 1969 Term) Grand Jury Report, Bernalillo County, New Mexico (Filed January 14, 1970).

146. *Manual, Id.*

action on the first alternative is also the only information that can generate movement towards the second. Before a reform movement can be effective the basic information must be placed in the minds of the political public, and while suits to challenge unfit jails may not be the only or the best way to convey this information it is one way. If this is the method chosen, it will require a certain amount of sympathy on the part of all parties concerned—lawyers, judges, and the general public.

Bruce P. Moore