National Jail Project

A PRIMER FOR JAIL LITIGATORS

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A PRIMER FOR JAIL LITIGATORS:

SOME PRACTICAL SUGGESTIONS FOR SURVIVING AND PREVAILING IN YOUR LAWSUIT

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In 1984 this article in a possibly different form will appear in Volume III of the Prisoners'Rights'Sourcebook edited by Ira Robbins and published by Clark Boardman

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A Primer for Jail Litigators: Some Practical Suggestions for Surviving and Prevailing In Your Lawsuit

This article is meant to provide attorneys some practical suggestions for planning, preparing and prosecuting lawsuits which seek to improve the way prisoners are treated in local jails. We also hope it will help persuade jail officials and their lawyers that the best way to prevent litigation and to get out from under court-imposed rules and supervision is to provide safe and decent conditions for those confined in jails.

The suggestions in this article (as well as the questions to which they are addressed) stem from several years of litigating jail and prison lawsuits, providing information and advice to other attorneys, and monitoring the relevant trends in the law. We make no claim that this article is comprehensive in scope; we have attempted only to identify and respond to the most frequently asked questions. More specific questions should be addressed to the authors.[1]

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[1] In 1983, through the generous funding of the Edna McConnell Clark Foundation, the National Jail Project was established. The Project expanded the ability and in some sense formalized the function in which the authors had been engaged for years - to provide clearinghouse services and back-up legal assistance to those lawyers and others directly involved in jail litigation. Your specific litigation inquiries and questions should be addressed to The National Jail Project, 1346 Connecticut Avenue N.W., Suite 402, Washington, D.C. 20036/(202) 331-0500.

Section I. INTRODUCTION

Jail litigation is often slow, time consuming, expensive and frustrating for all concerned. It is not unusual for cases to go on for years and go through several waves of lawyers on each side. Discovery expenses, expert fees and costs are substantial. Moreover, trial and judgement do not usually end the case (or the expenses), as is the normal expectation of lawyers. It is not unheard of that cases are, in effect, tried several times even after a settlement has been reached or a comprehensive court order entered. Deadlines go by, enforcement proceedings are brought, motions for modifications are made, applications for attorney fees and costs are filed. Hearings and negotiations are held, settlements arrived at, and further orders handed down.

A. The Legal Context.

Jail conditions cases involve relatively well-settled legal principles, assuming you rely on the federal constitution and file your lawsuit in a federal district court.[2/] A reading of two Supreme Court cases is essential: Bell v. Wolfish,[3/] with respect to the rights of pretrial detainees, and Rhodes v. Chapman,[4/] with respect to the rights of sentenced prisoners.

2/ If you choose a state forum you must often look to state law, especially state procedural law. However most state courts will entertain lawsuits based on federal constitutional law, so federal substantive law principles retain their relevance even in a state forum. See §II.A.2. below.

3/ 441 U.S. 520 (1979).

4/ 452 U.S. 337 (1981). Particular attention should be focused on Justice Brennan's concurring opinion at 352-68.

You should be familiar with the post-Wolfish and Chapman cases from the federal circuit in which you are litigating.[5]

Although the tone of the Wolfish and Chapman majority opinions is not favorable for prisoners, lawyers are advised not to give in to despair. While the Supreme Court has certainly tightened considerably the legal standard and proof requirements in conditions litigation, it has not barred intervention and relief in appropriately pled and proven cases. This is because the facilities at issue in Wolfish and Chapman were, respectively, "the architectural embodiment of the best and most progressive penological planning"[6] and "unquestionably a top-flight, first class facility."[7] If your clients are favored instead with "barred cells, dank, colorless corridors, [and] clanging steel gates,"[8] upon this distinction will rest significant litigation possibilities. In fact, this type of comparative analysis is the common thread running through the post-Wolfish and Chapman cases.

Under the Supreme Court decisions, you must establish that the conditions of confinement deny substantive due process by subjecting pre-trial prisoners to "genuine privation and

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5/ See Appendix I for leading Post-Wolfish and Chapman Federal Decisions.

6/ Wolfish at 525. Also see id. at 543 n.27.

7/ Chapman at 341, quoting Chapman v. Rhodes, 434 F.Supp. 1007, 1009 (S.D. Oh. 1977).

8/ Wolfish at 525.

hardships over an extended period of time"[9] or to restrictions or conditions which are not "reasonably related to a legitimate goal," i.e., are "arbitrary or purposeless."[10] For convicted persons, you must show that conditions violate the Eighth Amendment in that they constitute "the wanton and unnecessary infliction of pain" or are "grossly disproportionate to the severity of the crime warranting imprisonment."[11] Particular

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9/ Wolfish at 542. A finding that conditions are merely "discomforting" or restrictive is inadequate. Id. at 541.

10/ Id. at 539. This standard is asserted in the context of a determination as to whether conditions and practices "amount to punishment,'" id., since the linchpin of the Court's due process analysis is detainees' right to be free of punishment before an adjudication of guilt. The concepts of punishment and of punitive intent actually add little to an analysis which boils down to a standard balancing of ends and means, except in the extremely rare case in which the defendants concede that they are engaged in punishing detainees. See D.B. v. Tewksbury, 545 F.Supp. 896, 903, 905 (D. Ore. 1982). See also Gawreys v. D.C. General Hospital, 480 F.Supp. 853, 855 (D. D.C. 1979) (use of particularly uncomfortable restraints deemed "punishment" where jail regulations forbade it and no reason was given for their use). For a general discussion of the theoretical issues presented by Wolfish, see "Note, Confused Concepts of Due Process for Pretrial Detainees -- the Disturbing Legacy of Bell v. Wolfish," 18 Am. Crim.L.R. 469 (1981).

11/ Chapman at 347. A finding of "harsh" conditions or practices is inadequate. Id.

Under the Chapman standard, it appears that the severity of the crime for which a prisoner was convicted is of some relevance in determining the Eighth Amendment's demands in a particular case. Since most prisoners in local jails will have been convicted of minor offenses, it is open to jail litigators to argue that conditions that have been upheld in prisons containing convicted felons cannot be permitted in a jail. So far, this argument has not been seriously explored by the courts (or even presented to them, to our knowledge). In making this argument, remember that it will probably be balanced against the relatively short lengths of stay of jail inmates. (See § IX.C. below for further discussion of length of stay.)

jail practices or conditions may also be struck down on the ground that they violate the more specific guarantees of the First, Fourth, Sixth Amendment, the guarantees of procedural due process or equal protection.12/ However, jail officials are entitled to "wide-ranging deference in the adoption and execution of policies and practices that in their judgement are needed to preserve internal order and discipline and to maintain institutional security"13/ unless there is "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations."14/ (See §§ I.X.C. below for additional comment on the "deference" standard.) These considerations are equally applicable to pre-trial detainees and to convicts.15/ In general, courts have assumed for rhetorical

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12/ See, e.g., Wolfish, at 544-60 (First Amendment, Fourth Amendment, and due process claims); Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982) (First Amendment claim); Smith v. Jordan, 527 F.Supp. 167 (S.D. Ohio 1981) (Fourth Amendment claim); Dawson v. Kendrick, 527 F.Supp. 1252, 1301, 1312-14 (S.D. W.Va. 1981) (procedural due process, Sixth Amendment, and equal protection claims).

13/ Wolfish at 547. But see Lock v. Jenkins, 641 F.2d 488, 498 (7th Cir. 1981) ("We do not read anything in Wolfish as requiring this court to grant automatic deference to ritual incantations by prison officials that their actions foster the goals of order and discipline."). Accord, Beckett v. Powers, 494 F.Supp. 364, 367 (W.D. Wis. 1980). Also note that, by implication, if a practice is not defended on grounds related to security and order, the deference rule should not apply. See Todaro v. Ward, 565 F.2d 48, 54 (2d Cir. 1977).

14/ Wolfish at 548, quoting Pell v. Procunier, 417 U.S. 817, 827 (1974).

15/ Wolfish at 547 n.29.

purposes that the Eighth Amendment sets a constitutional floor and that conditions for pre-trial detainees must be at least as favorable as those lawfully afforded convicts.[16] However, it is a mistake to conclude that any situation in which detainees are worse off than convicts automatically denies equal protection; length of stay or other conditions may provide a rational basis for such distinctions.[17]

For both pre-trial and sentenced prisoners the so-called "totality of circumstances" test is applicable:

> ...It is important to recognize that various deficiencies in prison conditions "must be considered together." Holt v. Sarver, 309 F.Supp., at 373. The individual conditions "exist in combination; each affects the other; and taken together they [may] have a cumulative impact on the inmates." Ibid. Thus, a court considering an Eighth Amendment challenge to conditions of confinement must examine the totality of the circumstances.[10]
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> n.10 The Court today adopts the totality-of-the-circumstances test. See ante, at 2399 (Prison conditions "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities") (emphasis added). See also Hutto v. Finney, 437 U.S. at 687, 98 S.Ct., at 2571 ("We find no error in

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16/ City of Revere v. Massachusetts General Hospital, ___ U.S. ___, 103 S.Ct. 2979, 2983 (1983); Lock v. Jenkins, 641 F.2d 488, 497 (7th Cir. 1981) and cases cited.

17/ Feeley v. Sampson, 570 F.2d 364, 373 (1st Cir. 1978) (detainees' short length of stay is one factor which justifies denial of contact visits); Dawson v. Kendrick, 527 F.Supp. 1252, 1286 (S.D. W.Va. 1981) (no equal protection claim where jails and prisons operated by different governmental units). But see Hill v. Hutto, 537 F.Supp. 1185 (E.D. Va. 1982) (equal protection violated where convicts "backed up" in county jails experienced less favorable conditions than those in state prisons). See also McGinnis v. Royster, 410 U.S. 263 (1973) (rational basis test applied in equal protection analysis of detainees vs. convicts).

> the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment") (emphasis added).
>
> Even if no single condition of confinement would be unconstitutional in itself, "exposure to the cumulative effect of prison conditions may subject inmates to cruel and unusual punishment." Laaman v. Helgemoe, 437 F.Supp. 269, 322-323 (N.H. 1977).18/

Virtually every lower federal court has utilized this test19/ with the notable exception of the Ninth Circuit which has been less than perfectly clear as to where it stands.20/

18/ Chapman at 362-63 (concurring op. Brennan, J.) Accord, Lock v. Jenkins, note 13 above, at 491-92 (it is "appropriate to consider together all the conditions of confinement in order to determine whether they meet the Wolfish test of amounting to punishment" (footnote omitted); Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980); Campbell v. Cauthron, 623 F.2d 503, 505 (8th Cir. 1980); LaReau v. Manson, 507 F.Supp. 1177, 1192-94, (D. Conn. 1980), aff'd as mod., 651 F.2d 96, 105-109 (2d Cir. 1981) (sentenced jail prisoners).

19/ See Appendix I below and Chapman at 353 n.1 (Brennan, J. concurring).

20/ Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981) at first rejects the totality approach but goes on to state:

> "Of course, each condition of confinement does not exist in isolation; the court must consider the effect of each condition in the context of the prison environment, especially where the ill-effects of particular conditions are exacerbated by other related conditions."

See also: Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982). But see Toussaint v. Rushen, 553 F.Supp. 1365 (N.D. Ca. 1983) (on remand from Wright v. Rushen) aff'd __ F.2d __ , #83-1678 (9th Cir. 1984); Martino v. Carey, 563 F.Supp. 984 (D. Ore. 1983); Fischer v. Winter, 564 F.Supp 281 (N.D. Ca. 1983).

Of necessity, therefore, these cases are fact-intensive in nature. Discovery, the use of experts, the use of prisoner witnesses, and trial preparation (all discussed later in this article) proceed from this basic fact.

> The court must examine the effect upon inmates of the conditions of the physical plant (lighting, heat, plumbing, ventilation, living space, noise levels, recreation space); sanitation (control of vermin and insects, food preparation, medical facilities, lavatories and showers, clean places for eating, sleeping, and working); safety (protection from violent, deranged, or diseased inmates, fire protection, emergency evacuation); inmate needs and services (clothing, nutrition, bedding, medical, dental, and mental health care, visitation time, exercise and recreation, educational and rehabilitative programming); and staffing (trained and adequate guards and other staff, avoidance of placing inmates in positions of authority over other inmates). See ibid.; Ramos v. Lamm, 639 F.2d, at 567-581. When "the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration," the court must conclude that the conditions violate the Constitution. Laaman v. Helgemoe, supra, at 323.[21]

B. The Importance of Remedy.

Another given in these cases is that liability -- the finding that the defendants have violated the constitutional rights of jail prisoners -- may be of secondary importance to the judge's interest in an appropriate and enforceable remedy. (See §§ II.B., III, IX and X below, for discussions of various remedy questions.) Negotiation, settlement and the entry of a consent decree is a common scenario in these cases. If the lawsuit goes

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[21] Chapman at 364 (Brennan, J., concurring).

to trial it may quickly become apparent that the judge is already convinced that there is a constitutional violation and is primarily interested in learning what remedial steps will be effective and are within the courts' powers. Experts as well as contacts with other lawyers and organizations can provide advice including references to localities that have gone through the same process. But the lawyer must be ready to provide or elicit the information the judge is seeking no matter at what point in the proceedings it is requested. Therefore it makes good sense to think about remedy from the very beginning of the lawsuit.

C. Political Realities.

You should consider the political terrain you will be travelling. It is generally a mistake to place all defendants or all the major actors you will deal with in any lawsuit into an enemy camp. In a local community, a major lawsuit about jail conditions will usually involve a variety of political considerations as well as the adversary process. You should have some idea of what and who these political factors are because they can make your job much easier or much harder.

A reform-minded sheriff or jailor can do a lot to persuade legislative or executive officials that the plaintiffs are right and the case should be settled. If such persuasion fails, their views on present conditions and proper remedies may be useful evidence in your favor if the case must go to trial. In dealing with them, stress the ways that the lawsuit can get more resources for the administrator.

Some jail administrators in local communities are hampered by ignorance of modern correctional thinking as well as by lack of resources. In many cases, your experts may become resources for the defendants' operation of the jail as well as for the plaintiffs' preparation of their lawsuit. Expert tours and other opportunities for your experts to make direct contact with jail administrators may be helpful in this regard. Such contacts may also help alleviate jail officials' suspicion or resentment of the lawsuit if the experts are able to develop a rapport with them.

In many cases, the most articulate and knowledgeable critics of the jail may be professional people who work in it, especially if they are not actual employees of the correction department or sheriff's office. Since lawsuits are often directed toward getting enough resources so that, for example, medical, dental, psychiatric and other services can be provided effectively, these people may be your natural allies.

Correctional officers and other low-level employees are also potential allies of jail litigators within certain limits. Many of the types of relief sought by lawsuits -- population reduction, classification, increased staffing, etc. -- will have a direct and beneficial effect on working conditions for jail employees. This natural alliance rarely takes form because of the political conservatism of most correctional employees' unions and because there are often other issues such as the control of brutality over which employees and the inmates' lawyers will be in direct conflict. Nonetheless, it may be possible to approach

jail employees or their unions and obtain substantial assistance in the form of testimony about jail conditions or informal information about jail practices. If a complaint is limited to issues like population, structure, and health and safety, this may be easy to do; it may also be feasible in a broader case if the plaintiffs first seek preliminary relief on these less volatile issues and not on issues more sensitive to employees.

Local legislators and executives will be primarily concerned about money. It may be possible to go "over the heads" of recalcitrant jail administrators for settlement purposes if the threat of a substantial award of attorneys' fees, in addition to a grant of relief, can be made known early to those responsible for the local budget. Legislators and mayors may also be concerned to maintain a progressive image for the community; adverse publicity about the jail, whether or not caused by the lawsuit, may make them more receptive to change even if it makes the jail administrators more defensive.

Many states have agencies which are charged with responsibility to supervise, inspect, or regulate local jails. It may be possible to enlist such agencies in support of a lawsuit, either openly or implicitly. Their inspection or other reports may be very helpful as evidence or merely as background information. Similarly, if states or localities have agencies with accounting or inspection responsibilities for local government generally, it may be possible to interest them in investigating jail operations. A state or local agency saying the same thing as plaintiffs' lawyers may intensify the pressure

on jail administrators or higher local officials to settle the case or at least to make changes without waiting for a judgement.

Who represents the defendants, and to whom counsel is actually answerable, may largely determine the course of the lawsuit. If the case is being handled by an assistant corporation counsel in a large and bureaucratized office, there will be strong incentives for that attorney to settle the case to avoid being saddled with the grind of an immense, complicated and probably losing litigation. There may be many opportunities to drive a wedge between the attorney and his or her nominal client. It may be ambiguous as to exactly who the client is -- the jail administrator, the mayor, the city or county as a whole, etc. There may be opportunities to exploit this ambiguity and persuade the attorney, e.g., to go along with a settlement agreeable to the local executives even if the jail administrators prefer to fight to the end.

In smaller, more political offices, or in situations where the case is defended by house counsel to the sheriff or corrections department, the defense lawyer may be closely bound to a particular set of institutional or political loyalties. This can cut either way. A lawyer may represent the interests of a recalcitrant jail administrator when other portions of local government would prefer that the case be settled and/or that practices be reformed. Conversely, a lawyer may represent a reform-minded administrator who has no interest in defending the status quo in an antiquated and underfunded jail; in this

situation, little effective defense may be presented, even if local legislative and executive bodies oppose improvements or a settlement.

D. Your Clients.

In a jail case, your clients will be persons who are already deeply entangled in the legal system, prevented by their incarceration from doing many things for themselves, limited in education and sophistication, and highly suspicious of all official actions and pronouncements. These facts have consequences for your repesentation of them.

You will be subject to repeated requests or demands for personal favors, services, or information not directly related to the lawsuit. These will include conveying messages to prisoners' families, representing them in their criminal cases or in other individual litigation, assisting them with individual problems in the jail, etc. You will not be able fully to comply with all these requests because of time, but you should not ignore them all either. As a practical matter, maintaining contact with and getting the cooperation of witnesses and informants in the jail will require some level of positive reinforcement on your part beyond the promise of a favorable judgement long after they have left the jail. Moreover, many of these requests are perfectly legitimate and reasonable, and they will be directed to you only because no one else will pay any attention.

You should develop a consistent means of responding to individual requests early in the lawsuit. The most useful thing you can do is become sufficiently knowledgeable about the

criminal justice system to refer inmates to the person or agency best equipped to respond: parole and probation authorities, the public defender, legal services offices, agencies concerned with sentencing alternatives, etc. It can be extremely helpful to forward inmates' requests or write to these agencies on their behalf yourself. Unresponsive bureaucracies are more often moved to action by a lawyer's letterhead than by a handwritten letter from someone who they know cannot come in and yell at them.

You will probably receive many complaints or inquiries from prisoners who are dissatisfied with their criminal trial or appeal counsel. Most frequently, they will complain that their lawyers do not visit them or answer their letters. It is generally not appropriate to get involved in the merits of disputes with inmates' criminal lawyers, but it is definitely worthwhile to convey to their attorneys their clients' requests for visits or letters, in writing, with a copy to the complaining prisoner. This procedure may get the attorney to respond and, if not, it will provide the prisoner with some concrete evidence to persuade the trial judge to provide new counsel. It may also be helpful to direct prisoners to bar committees or to administrative officials who may hear their complaints about private or appointed counsel.

Individual complaints about jail matters should also be pursued where they appear meritorious, even if all that can be done is to write a letter to the warden or to opposing counsel. (You should probably reach an understanding with counsel early in the case as to which of these means to pursue.) If an individual

lawsuit appears justified but you cannot handle it yourself, you should direct the prisoner to any person or agency whom you think may be able to provide representation; you should also assist the prisoner in complying with any jurisdictional requirements that might later bar the lawsuit, such as notice of claim requirements. Your assistance may consist of as little as sending forms or telling the prisoner where to write for them and what the statute of limitations is.

The most important things to do in dealing with your clients are to answer your mail promptly and to avoid making promises you cannot keep. Prisoners are hypersensitive to these matters because of their daily experience of being ignored or lied to by persons in authority. Even if you will not have time to answer a prisoner's question for several weeks, an immediate acknowledgment that you have received the letter and will reply more fully later will be appreciated.

Sometimes inmates' letters and questions about the litigation or about other subjects may appear very hostile or suspicious in tone. In most cases, a reasoned explanation -- even one contrary to the questioner's desires or views -- will be accepted. It is the lack of any response, or an evasive response, that will fuel their anger and cause you to be perceived as "part of the system" and not as their advocate.

Section II. THRESHOLD DECISIONS

A. Choice of Forum

In most jurisdictions, litigation about jail conditions may be brought either in state or in federal court. Civil rights and civil liberties litigators have generally favored the federal forum because of its familiarity with constitutional issues, the litigators' familiarity with federal courts, and what has been perceived as more hospitable substantive law and procedure. For these reasons, and because we cannot canvass the law and procedures of the fifty states, we have referred mainly to federal court practice in the remaining sections of this article. However, these sections should all be read with the question in mind, "Can I do better than this in state court?"

In federal court, the right to sue for constitutional violations by state or local authorities is found in 42 U.S.C. §1983[22/] and the right to be heard in the district courts is found in 28 U.S.C.

22/ The statute provides:

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

The judicial gloss on §1983 and on other federal civil rights statutes is by now extensive. For a comprehensive review, see S. Nahmod, Civil Rights and Civil Liberties Litigation (Shepard's/McGraw Hill, 1979).

§1343(3) and §1331(a). If the jail is operated by the federal government, the claim will be based directly on the Constitution or on other substantive federal law whose violation is alleged, and jurisdiction of the district court will be found in 28 U.S.C. §1331(a).[23] While some courts have found that conditions of confinement may be litigated pursuant to the federal habeas corpus statutes,[24] there is no reason to do so because the litigator will be burdened with the requirement of exhaustion of state remedies[25] and with other rules limiting the usefulness of this remedy.[26]

At present, the retrenchment of federal courts in some jail and prison cases and the growing familiarity of state courts with institutional reform litigation make it worthwhile to investigate and consider filing your lawsuit in state court. Many important

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[23] Carlson v. Green 446 U.S. 14 (1980); Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979).

[24] Roba v. United States, 604 F.2d 215, 219 (2d Cir. 1979); Knell v. Bensinger, 522 F.2d 720, 726 n.7 (7th Cir. 1975). Contra, Crawford v. Bell, 599 F.2d 890 (9th Cir. 1979). See Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979) (question reserved by Supreme Court).

[25] Harris v. MacDonald, 555 F.Supp. 137, 141-42 (N.D. Ill. 1982).

[26] See, e.g., United States ex rel. Hoover v. Franzen, 669 F.2d 433 (7th Cir. 1982) (pendent jurisdiction not available under habeas corpus statutes).

jail cases have been litigated in state courts,[27] and at least one state court has rejected the Bell v. Wolfish analysis of pretrial detainees' rights and adopted a more liberal standard under its own state constitution.[28] Moreover, going to state courts may permit one to avoid certain restrictions on the federal courts' remedial powers (see §II.C.4, below) or to take advantage of local courts' supervisory or administrative power (e.g., over bail practices). Given the widespread perception that invoking federal jurisdiction means foreign intervention in local affairs, resort to a state court forum can be a tactically adroit decision.[29]

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[27] Wayne County Jail Inmates v. Lucas, 391 Mich. 359, 216 N.W. 2d 910 (1974); Comm. ex rel. Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (Pa. S.Ct. 1971) on remand 11 Cr.L. 2088 (Pa. Ct. Common Pleas, April 7, 1972) aff'd, Jackson v. Hendrick, 457 Pa. 405, 321 A.2d 603 (Pa. S.Ct. 1974); Wickham v. Fisher, 629 P.2d 896 (Utah S. Ct. 1981); Harper v. Zegeer, 296 S.E.2d 873 (W.Va. Sup.Ct.A. 1982); Morales v. County of Hudson, ___ A.2d ___ (N.J. Chan.Div., Hudson Co. Super.Ct., May 19, 1982); In re Inmates of Riverside Co. Jail v. Clark, 144 Cal. App. 3d. 850, 192 Cal. Rptr. 823 (Cal. Ct.App. 4th Dist., 1983); Michaud v. Sheriff of Essex County, 390 Mass. 523 (Mass. Sup. Jud. Ct. 1983).

[28] Cooper v. Morin, 49 N.Y.2d 69, 424 N.Y.S.2d 168, 399 N.E.2d 1188 (1979), cert. den., 446 U.S. 984 (1980). Also see De Lancie v. Superior Court, 31 Cal.3d 868, 183 Cal. Rptr. 859, 647 P.2d 142 (Cal. S.Ct. 1982) (held that state statutory provisions whose purpose were to protect state prisoners' rights were applicable to pre-trial prisoners as well).

[29] See generally Neuborne, "Toward Procedural Parity in Constitutional Litigation," 22 Wm. & M. L.Rev. 725 (1981) (hereinafter cited as "Neuborne.")

1. Factors influencing the choice of forum. The jail litigator should consider the following factors in making a decision between state and federal court.30/

(a) Choosing the appropriate judge. Who is on the bench and whether you can be sure of getting your case before a favorably disposed judge can obviously be all-important.31/ However, a liberal judge may not be much help if court rules or substantive or procedural law in that court are unfavorable. Moreover, a record of political liberalism or concern for human rights is not the only relevant consideration. In jail litigation, the content of the judgement may be less important than the effectiveness with which it is enforced, and a judge's firmness and persistence at the post-judgement stage may do more for your clients than an overwhelmingly favorable opinion. Consider, in this connection, a judge's track record in complex and acrimonious commercial litigation as well as in civil rights matters.

30/ See Avery and Rudovsky, Police Misconduct: Law and Litigation, §3.7 (1981) for a similar discussion more applicable to damage cases.

31/ One way for a jail litigator to judge-shop in a multi-judge court is to investigate pending lawsuits filed pro se by prisoners. If the court maintains a defendant-plaintiff index that the public may consult, counsel need only find out the names of the major officials in the jail to research the matter. If a pro se case is found pending before the desired judge, counsel may wish to approach the plaintiff directly, consistent with the Code of Professional Responsibility and local law. See In re Primus, 436 U.S. 412 (1978). Alternatively, counsel may be able to file a separate complaint on behalf of other named plaintiffs and seek to have it assigned to the judge in question pursuant to local rules concerning consolidation or transfer of related cases.

(b) The substantive law. Even if there are no favorable indications in the jail or prison area, you may detect a willingness on the part of the appellate bench to expand the reach of particular state constitutional or statutory provisions with regard to issues that heretofore were left to the federal courts.[32] Remember, though, that in most cases state law can be enforced in federal court, and vice versa;[33] thus, differences in law, even if large, may not dictate the choice of forum.

In some situations it may be tempting to file a state law action in state court and a constitutionally based action in federal court. Counsel should be extremely careful in choosing such a course; state law doctrines prohibiting "splitting causes of action" may result in the preclusion of one of the actions.[33a]

(c) State procedural law. Most state courts will entertain actions brought under 42 U.S.C. §1983.[34] In some states, habeas corpus is a perfectly appropriate vehicle for litigating conditions of confinement and obtaining broad

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[32] See Neuborne at 725 n.1 for an "unscientific sampling" of cases which demonstrate this trend.

[33] See §II.A.2 below.

[33a] Migra v. Warren City School District Board of Education, __ U.S. __, 52 U.S. L.W. 4151 (January 23, 1984).

[34] The only states that have rejected concurrent jurisdiction are Georgia and Tennesee. Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370 (1976); Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969). See Neuborne at 752 n.114 for a list of state courts which have entertained §1983 actions. Neuborne argues that as a matter of federal constitutional law state courts are obligated to hear §1983 cases. Id. at 753 et seq.

relief.[35] However, whatever form of action is available in state court should be carefully contrasted in several respects with practice under the Federal Rules of Civil Procedure and of Evidence. Burt Neuborne[36] provides a useful checklist, suggesting that counsel should be wary of filing in a state forum if it:

a. imposes burdensome pleading requirements;

b. applies an unfairly short statute of limitations;

c. restricts the availability of class actions;

d. fails to afford broad discovery;

e. imposes archaic notions of immunity, especially executive immunity;

f. applies technical evidentiary rules in civil cases; and

g. fails to provide for an award of attorneys' fees in appropriate circumstances.[37]

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[35] See, e.g., Comm. ex rel. Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (Pa. S.Ct. 1971); Harper v. Zegeer, 296 SE.2d 873 (W.Va. Sup.Ct.A. 1982); Bresolin v. Morris, 86 Wash.2d 241, 543 P.2d 325 (1975); State ex rel. Pingley v. Coiner, 186 S.E.2d 220, 231 (W.Va. Sup.Ct.A. 1972); McIntosh v. Haynes, 545 S.W.2d 647, 654 (Mo. S.Ct. 1977); Levier v. State, 209 Kan. 442, 497 P.2d 265, 272 (Kan. S.Ct. 1972). But see In Re Edsall 26 Oh.St. 2d 145 269 N.E.2d 848 (Oh. S.Ct. 1971); Foggy v. Eyman, 107 Ariz. 532, 490 P.2d 4, 5-6 (Ariz. S.Ct. 1971); State v. McCray, 267 Md. 111, 297 A.2d 265, 283 (Md. App. 1972).

[36] Neuborne at 736.

[37] Neuborne at 736. This checklist was applied by Neuborne to New York law, which was found wanting. Id. at 737-47. These factors should be balanced by a jail litigator in New York against the relatively favorable legal standard applied in a jail case by the state's highest court. See note 28 above.

(d) State remedial options. The litigator must determine whether state judges possess a remedial discretion as broad as that enjoyed by federal district courts,[38] and whether the kinds of remedies frequently used in jail and prison cases have any precedent in state court. Federal judges have often resorted to such devices as appointment of a master or monitor, mandatory compliance reporting by the defendants, etc.; the unavailability of such relief may severely limit the utility of a state forum. (See §§ II.B.1 and X. below for discussions of various aspects of remedial discretion.)

2. Enforcing State Law in Federal Court and Vice Versa. In deciding whether to use a state or federal forum, bear in mind that either court may be able to enforce the law applied in the other.

A federal court may hear a state law claim against local officials or governments under its "pendent" jurisdiction as long as there is also a non-frivolous federal claim and the state and federal claims "derive from a common nucleus of operative

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38/ Neuborne has suggested that a state judge may in fact have a "more flexible remedial armory than does a federal judge, doubly constrained by the Article III case or controversy requirements and federalism concerns." Neuborne at 732; see id. at n.21. Michaud v. Sheriff of Essex County, 390 Mass. 523, 536 (Mass. Sup. Jud.Ct. 1983) (Court transfers jurisdiction of case to one justice of the Supreme Judicial Court to monitor compliance with previously issued and affirmed court order in jail case). This hypothesis doubtless has more validity in some states than in others. See, e.g., Jones v. Beame, 45 N.Y.2d 402, 408 N.Y.S.2d 449, 380 N.E.2d 277 (1978) (claims that would require court involvement in "management and operation of public enterprises" nonjusticiable even if law violated.)

fact."[39] The exercise of pendent jurisdiction is discretionary; courts will often decline to exercise it if it will create a possibility of jury confusion, if the state law is uncertain, or if there would be a predominance of state law issues in the case.[40] Federal jurisdiction over state claims against state officials is barred where "the relief sought and ordered has an impact directly on the state itself."[40a] Pendent jurisdiction can not be exercised where a Congressional policy is to the contrary.[41] Factors weighing in favor of the exercise of pendent jurisdiction are judicial economy[42] and, in

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[39] Hagans v. Lavine, 415 U.S. 528, 545-57 (1974); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). The "common nucleus" test has been interpreted to mean approximately the same transaction or occurrence. Nilsen v. City of Moss Point, Miss., 674 F.2d 379 (5th Cir. 1982).

[40] Moor v. County of Alameda, 411 U.S. 693, 715-17 (1973); Cancellier v. Federated Dept. Stores, 672 F.2d 1312 (9th Cir. 1982); Carrillo v. Illinois Bell Telephone Co., 538 F.Supp. 793, 799 (N.D. Ill. 1982).

[40a] Pennhurst State School and Hospital v. Halderman, __ U.S. __, 52 U.S. L.W. 4155, 4162 (January 23, 1984). Whether this holding bars all pendent claims against state officals remains to be seen. The Pennhurst opinion contains both a broader formulation than the above quoted language and passages that could be construed more narrowly. Compare id. at 4164 (". . . a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State. . . ." with id. at 4160 (emphasizing that all relief was "institutional and official in character").

The Pennhurst holding may apply to suits against county or local officials when their activities "are dependent on funding from the State." Id. at 4164 n.34.

[41] Aldinger v. Howard, 427 U.S. 1 (1976); United States ex rel. Hoover v. Franzen, 669 F.2d 433 (7th Cir. 1982); Clark v. Taylor, 710 F.2d 4, 11-13 (1st Cir. 1983).

[42] United Mine Workers v. Gibbs, note 39 above, at 726.

constitutional cases, the preference for finding a non-constitutional basis on which to rule.[43] In jail and prison cases, doctrines of "deference" to correctional authorities provide additional support for enforcing local or departmental standards that will also protect constitutional rights.[44]

Pendent claims should be explicitly pled as such; otherwise, the court may refuse to hear them on the ground of lack of notice to the defendants,[45] or may misperceive the claim as an attempt to "constitutionalize" local law contrary to the holdings of recent Supreme Court cases.[46]

In deciding whether to plead pendent claims, two pitfalls should be avoided. First, a federal court hearing a pendent

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[43] Hagans v. Lavine, note 39 above at 547; Anderson v. Redman, 429 F.Supp. 1105 (D.Del. 1977). See also Mills v. Rogers, ___ U.S. ___, 102 S.Ct. 2442, 2449 (1982) (where state law provides broader rights, federal constitutional rights "would not need to be identified in order to determine the legal rights and duties of persons within that State"). But see Lightfoot v. Walker, 486 F.Supp. 504, 508-09 (S.D. Ill. 1980) (court rules on constitutional rather than pendent claims).

[44] See Bell v. Wolfish, 441 U.S. 520, 548 (1979). But see Pennhurst State School and Hospital v. Halderman, note 40a above, at 4159 (". . . it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law"). Whether this reasoning applies beyond the Eleventh Amendment analysis of Pennhurst remains to be seen.

[45] Ruiz v. Estelle, 679 F.2d 1115, 1156-69 (5th Cir. 1982); J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981); United States ex rel. Flores v. Cuyler, 511 F.Supp. 386 (E.D. Pa. 1981).

[46] See, e.g., Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980); compare Paul v. Davis, 424 U.S. 693 (1976).

state claim is bound by other relevant state law.[47] Be sure there is not a state law rule that would defeat your claim or limit the remedies available under it. Second, be sure that the state law you invoke is not so ambiguous as to invite abstention as well as to defeat pendent jurisdiction.[48] You should also keep in mind that state law can be repealed or changed by state authorities; if there is a realistic probability that this will happen, pursuing a pendent claim may make less sense.

47/ Hoptowit v. Ray, 682 F.2d 1237, 1254-55 (9th Cir. 1982) (state law of standing); Jones v. Diamond, 636 F.2d 1364, 1379 (en banc) (state limitation of liability); Hamilton v. Roth, 624 F.2d 1204, 1208-12 (3d Cir. 1980) (state requirement of administrative exhaustion); Albers v. Whitley, 546 F.Supp. 726 (D. Ore. 1982) (state immunity statute).

48/ See Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 499-500 (1941); Manney v. Cabell, 654 F.2d 1280 (9th Cir. 1980). Abstention is a doctrine reserved for "exceptional circumstances", Colorado River Water Construction District v. United States, 424 U.S. 800, 813 (1976), and is generally disfavored in §1983 litigation. See e.g., Ramos v. Lamm, 639 F.2d 559, 563-64 (10th Cir. 1980); Campbell v. McGruder, 580 F.2d 521, 525 (D.C. Cir. 1978); Hanna v. Toner, 630 F.2d 442 (6th Cir. 1980); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Grubbs v. Bradley, 552 F.Supp. 1052, 1056-57 (M.D. Tenn. 1982). See generally Barber, "Pullman Abstention: A Discussion of Issues and Strategies," 16 Clearinghouse Review 1093 (April 1983).

Pendent jurisdiction has been exercised frequently in jail and prison cases over state law claims ranging from constitutional provisions to the internal rules of prison or jail authorities.49/

State or local law may come into play in a §1983 action in various other ways. State law may create "liberty interests" or "property interests" protected by procedural due process.50/ State law may be adopted as a remedy by a court that has found liability on constitutional grounds.51/ Violations of statutes or regulations may provide factual support for a claim that jail

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49/ See, e.g., Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1982) (assault and battery); Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979) (assault and battery); Miller v. Carson, 563 F.2d 757 (5th Cir. 1977) (state requirement that jail standards be promulgated); McCaw v. Frame, 499 F.Supp. 424 (E.D. Pa. 1980) (negligence in sexual assault case); Smith v. Jordan, 527 F.Supp. 167 (S.D. Ohio 1981)(state statute limiting strip searches); Marcera v. Chinlund, 91 F.R.D. 579 (W.D. N.Y. 1981) (state constitutional requirement of contact visits for detainees); French v. Owens, 538 F.Supp. 910 (S.D. Ind. 1982) (state statute governing treatment of juvenile inmates); Williams v. Lane, 548 F.Supp. 927 (N.D. Ill. 1982) (statute governing housing and programs in protective custody); Canterino v. Wilson, 546 F.Supp. 174, 216-17 (W.D. Ky. 1982) (state education release statute); Taylor v. Sterrett, 344 F.Supp. 411, 418 (N.D. Tex. 1972), aff'd as mod., 499 F.2d 367 (5th Cir. 1974), cert. den., 420 U.S. 983 (1975) (state statute regarding food handlers); Anderson v. Redman, 429 F.Supp. 1105, 1122 (D. Del. 1977) (prison department rules).

50/ Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981); Helms v. Hewitt, __U.S. __, 103 S.Ct. 864, 871-72 (1983) (prison regulations); Kozlowski v. Coughlin, 539 F.Supp. 852, 855-56 (S.D. N.Y. 1982) (state constitional provision).

51/ Gross v. Tazewell County Jail, 533 F.Supp. 413 (W.D. Va. 1982); Benjamin v. Malcolm, 495 F.Supp. 1357 (S.D. N.Y. 1980).

officials acted negligently or with "deliberate indifference,"[52] may defeat the defense of qualified or "good faith" immunity, or may help determine who can be held liable consistent with the "personal involvement" doctrine. (See §VIII.D. below for a discussion of qualified immunity, and §II.C.1. below for a discussion of personal involvement.)

Claims of federal constitutional violations may generally be litigated in state courts. Many states make provisions in their own statutes and court rules for determinations of constitutional claims,[53] and both the United States Supreme Court and many state courts have held that state courts may or must entertain actions under §1983.[54] Pleading one's claim under §1983 has the advantage that the state court will be required to apply the federal attorneys' fees statute.[55] The extent to which this

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[52] A "deliberate indifference" standard is applied to prisoners' claims of denial of medical care and other failures to protect their health and safety. Estelle v. Gamble, 429 U.S. 97 (1976); Smith v. Wade, ___ U.S. ___, 103 S.Ct. 1625, 1640 (1983). (See §IX.C.3 and 4 below for further discussions of these standards.)

[53] See, e.g., Kovarshy v. Housing Development Adminstration, 31 N.Y. 2d 191, 335 N.Y.S.2d 383, 286 N.E.2d 882 (1972).

[54] Martinez v. California, 444 U.S. 282, 283 n.7 (1980); New Times, Inc. v. Arizona Board of Regents, 20 Ariz.App. 422, 426, 513 P.2d 960, 964 (1973), vac. on other grds., 110 Ariz. 367, 519 P.2d 169, 176 (1974). See note 34 above.

[55] Maine v. Thibotout, 448 U.S. 1, 11 (1980).

"reverse Erie doctrine" requires state courts to apply other provisions of federal law in a §1983 action has not been fully explored in the courts.[56]

B. Remedial Options: Injunctions and Damages.

There are two main types of relief it makes sense to pursue in a jail conditions case: injunctions and damages. While declaratory judgements are theoretically available, they are most useful in cases challenging particular rules or practices; they are of little use to a litigator seeking far-reaching institutional reform in a context where enforcement is all-important.

1. Injunctive Relief. If you want to make life less oppressive for prisoners in a local jail, you will seek an injunction. In federal court, and in most state courts, injunctions may be broad or narrow, and may operate affirmatively, mandatorily or negatively (prohibitorily).[57] In injunctive cases, there is no right to a jury trial.[58] The judge is therefore the trier of fact. Certain defenses are not applicable, including the qualified immunity or "good faith" defense, statute of limitations, and the notice of claim defense. The so-called "personal involvement" requirement or no

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[56] For a general discussion of this problem, see Neuborne, passim. See also Martinez v. California, note 54 above, at 284 (state immunity statute could not be applied in state court §1983 action).

[57] For examples of the range of injunctive relief in jail cases, see the cases cited in Appendix I.

[58] See Johnson v. Teasdale, 456 F.Supp. 1083, 1089 (W.D. Mo. 1978) and cases cited.

respondeat superior defense is of lesser importance in injunctive actions. (See §II.C.1. below.) If proper service is made on the sheriff or the chief executive officer of a facility in a federal action, any subsequent court order is binding on their "agents, servants, employees, and attorneys...."[59]

2. Damages. Damages in jail cases are subject to the same general rules as in other types of litigation. In federal constitutional actions, as in ordinary tort litigation, compensatory damages are available to "make the victim whole," including both "special damages" (medical bills, lost earning, and other out-of-pocket costs) and "general damages" (pain and suffering, humiliation, emotional distress).[60] Most courts require concrete proof of either special or general damages to support an award of compensatory damages; proof of a constitutional violation without proof of consequential injury will permit only an award of $1.00 in "nominal damages."[61] Even

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59/ Rule 65(d), F.R.C.P. See also Shakman v. Democratic Organization of Cook County, 533 F.2d 344, 352 (7th Cir. 1976).

60/ Mary and Crystal v. Ramsden, 635 F.2d 590, 600 (7th Cir. 1980); Rhodes v. Robinson, 612 F.2d 766 (3d Cir. 1979); Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir. 1979).

61/ This rule was stated by the Supreme Court in the context of a procedural due process claim. Carey v. Piphus, 437 U.S. 247 (1978). Many courts have also applied it to substantive constitutional rights violations as well. Doe v. District of Columbia, 697 F.2d 1115, 1122-1123 (D.C. Cir. 1983); Kincaid v. Rusk, 670 F.2d 737, 745-46 (7th Cir. 1982); McNamara v. Moody, 606 F.2d 621, 626 (5th Cir. 1979). For arguably contrary authority, see Owen v. Lash, 682 F.2d 648, 657-59 (7th Cir. 1982) (Potter Stewart, J.) and cases cited. See also the discussion in Avery and Rudovsky, Police Misconduct: Law and Litigation §10.2(d)(2).

where proof of injury is presented, damages in jail and prison cases are often modest compared to tort recoveries generally.62/ Large awards are usually reserved for cases of serious physical injury or outrageously bad treatment, both in bench trials and in jury cases.63/ Punitive damages may be assessed against individuals (but not local governments)64/ on a showing of reckless indifference or malice,65/ but courts and juries are reluctant to award them.66/

Damage cases may be useful for redressing wrongs to particular individuals, but they are poor vehicles for broad institutional reform; they may tell the defendants what they shouldn't have done, but they offer little affirmative guidance and no continuing supervision. They may or may not have

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62/ See, e.g. Stanley v. Henderson, 597 F.2d 651 (8th Cir. 1979) ($1000 compensatory and $2500 punitive for beating); Steinberg v. Taylor, 500 F.Supp. 477 (D. Conn. 1980) ($475 for seizure of legal papers); Brooks v. Shipman, 503 F.Supp. 40 (W.D. Pa. 1980) ($100 compensatory and $50 punitive for improper search); Vaughn v. Trotter, 516 F.Supp. 886 (M.D. Tenn. 1980) ($2040 for harassment of jailhouse lawyer).

63/ Spicer v. Hilton, 618 F.2d 232, 235 (3d Cir. 1980) ($50,000 for amputation of foot); Redmond v. Baxley, 475 F.Supp. 1111 (E.D. Mich. 1979) ($130,000 for homosexual rape, beating, and consequent psychological damage); Tucker v. Hutto, #78-0161-R (E.D. Va. 1979) (approximately $500,000 settlement for medical mistreatment causing permanent paralysis).

64/ City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

65/ Smith v. Wade, ___ U.S. ___, 103 S.Ct. 1625 (1983); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976). See also Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975), cert. den., 429 U.S. 118 (1976).

66/ See Simpson v. Wecks, 570 F.2d 240, 243 (8th Cir. 1978), quoting from Lee v. Southern Homesites Corp., 429 F.2d 290, 294 (5th Cir. 1970).

substantial deterrent value, depending on how large the judgement is, who pays it,[67] and how familiar jail officials are with prisoner litigation. The most effective jail damage case may be the first one in a particular jail, because it informs personnel of their potential vulnerability and provides the community a glimpse of jail conditions which may not have been previously publicized. Once these purposes have been served, the marginal utility for reform of additional damage cases may be relatively small. Damage cases also have little or no value as test cases for establishing new rules of law; if the plaintiff's claim is novel, defendants will almost certainly be entitled to the defense of qualified immunity (see §VIII.D. below), and the merits will not be reached.

You should realize that although an individual damage action may initially seem less complicated than a class action for injunctive relief, damage actions may actually involve significant complications. They require consideration of various defenses such as immunity and the statute of limitations as well as strict adherence to doctrines of personal liability. (See §§ II.C., VII.D. below.) Most importantly, in many damage claims

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[67] In many communities, defendants will be provided with counsel by the local government; judgements may also be paid by the local government pursuant to an indemnity statute or a labor contract, or by an insurance company. Wherever possible, lawyers tend to pursue the governmental "deep pocket" through Monell actions or respondeat superior suits in state court, see §II.C.2 below. At the other extreme, judgements against lower-level employees who are neither insured nor indemnified may be unenforceable because of the defendants' lack of resources.

you will be dealing with sharp factual disagreements between two hostile or antagonistic groups, prisoners and jail staff, in which you are asking a local jury to make a decision. Even if a jury believes prisoner testimony,[68] it is a quantum leap to convince it to come in with a significant monetary award or any award at all.[69] Moreover, damage actions may provoke more than the usual level of opposition from defendant attorneys (and sometimes judges) who do not think prisoners should be the recipients of damage awards under any circumstances. As a result, more time, money and resources are put into these cases than one might initially assume.

You should be particularly careful in joining damage and injunctive claims in the same lawsuit. Do not assume that you can pursue both remedies with little more effort than is required to litigate one; each involves a number of legal and factual issues which the other one does not. It is very likely that you will have to try them separately. Litigators sometimes find also that the perceived urgency of injunctive claims causes discovery and preparation of related damage claims to be postponed until

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[68] See Darbin v. Nourse, 664 F.2d 1109 (9th Cir. 1981), where the Court of Appeals reversed a decision of the trial court for refusing to ascertain during voir dire whether prospective jurors would believe testimony of law enforcement personnel over prisoners solely on the basis of the former's official positions.

[69] See, e.g., Picarriello v. Fenton, 491 F.Supp. 1021, 1022 (M.D. Pa. 1980), where a jury found liability against a warden and other correctional staff for beating and torturing prisoners but nonetheless determined that defendants "acted with a reasonable good faith belief that their actions were lawful."

evidence is stale and hard to find. Defense lawyers may also demand that damage claims be waived before they will settle injunctive claims; in a class action, this may place the named plaintiffs in a conflict of interest with the class members. This is not to say that the two remedies should never be joined. Where you are confronted with serious injuries caused by persistent conditions and practices, it may be irresponsible not to pursue both. However, you must begin with a realistic understanding of the complications that may result. If you are planning a large-scale injunctive case -- especially one in which medical care or protection from assault will be at issue -- you may wish to arrange in advance to refer meritorious damage cases to other attorneys.

The courts are only beginning to explore the availability of class damages for entire groups of prisoners subjected to unlawful conditions.(See §VI below for further discussion of class actions.) In Doe v. District of Columbia, a jury awarded approximately $500,000 -- one dollar for each day of incarceration during a four-year period -- to a class of prisoners based on proof of exposure to the danger of violent assault and sexual abuse.70/ Although the court of appeals overturned the verdict based on defective jury instructions, it remanded for a new trial without objection either to the class

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70/ 697 F.2d 1115 (D.C. Cir. 1983).

format of the case or to the standardized award of damages.[71] Similarly, in McElveen v. County of Prince William, the trial judge rejected defendants' motion for a judgment notwithstanding the verdict after a jury awarded $210,000 to a class of 7,000 prisoners subjected to unconstitutional conditions, including severe overcrowding, for a year and a half.[72] Courts have also approved awards in cases involving a single transaction or course of conduct involving large numbers of prisoners.[73]

Despite these favorable precedents, class damages cases present some major theoretical and management problems, and counsel should think them through before filing the complaint (and have answers for the trial judge at the time class

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[71] But see Doe v. District of Columbia, 701 F.2d 948 (D.C. Cir. 1983) for additional separate statements concerning, inter alia, the appropriateness of class treatment of the case.

[72] McElveen v. County of Prince William, #81-1049-AM (E.D. Va., July 21, 1982). On appeal the Court upheld the class damage award stating that "Numerous actual and compensable injuries were presented by plaintiffs at trial. Fact-finding by a jury will be set aside only where the evidence...is so clear the reasonable persons could reach no other conclusion than that asserted on appeal." __ F.2d __, #82-5679 (4th Cir. 1984). Slip Op. at 10.

[73] Dellums v. Powell, 566 F.2d 167, 188 n.56, 197 n.89 (D.C. Cir. 1977) (class certification approved, class damages approved in part and vacated in part in mass arrest and detention case); Dellums v. Powell, 566 F.2d 216, 227-28 (D.C. Cir. 1977) (class should have been divided into subclasses for Eighth Amendment damage calculation); Allman v. Coughlin, 82 Civ. 1149 (S.D. N.Y., June 10, 1983) (Memorandum Decision) (class certified in damage action based on physical abuse and destruction of property after disturbance at jail). See also Anderson v. Breazeale, 507 F.2d 929, 931 (5th Cir. 1975) (sustaining uniform awards of $500 to 157 plaintiffs based on proof of conditions suffered after mass arrest; no class certification).

certification is sought). What is the quantum of proof required to support class liability? How many class members must testify? Can damages be sufficiently standardized to permit a class award?74/ If not, should subclasses be created, or should class certification be limited to the question of liability? How will class members be identified and located for purposes of notice and distribution of any damages that are awarded? Counsel should look to other types of mass tort litigation for helpful analogies.

3. Preliminary Relief. In preparing a lawsuit or in its initial stages, the question of seeking preliminary relief arises. Conventional wisdom in "totality of circumstances" cases teaches that seeking and obtaining such relief will have the detrimental effect of compartmentalizing issues that should be presented together to that emphasize their interdependence. There is also the tactical advantage of stronger issues carrying weaker ones. Moreover, if you wait for a plenary trial, you obviously have more time to prepare.

Although the above analysis makes sense, other considerations may support the opposite conclusion:

(a) the benefits to your clients of immediate partial relief;

74/ Variations in the degree of plaintiffs' injury may make class treatment inappropriate or difficult as to compensatory damages. However, no such problem is presented by punitive damages, since these are tailored to the conduct and situation of the defendant and not to the injuries of the plaintiff. See McFadden v. Sanchez, 710 F.2d 907, 913-14 (2d Cir. 1983).

(b) the nature and scope of pressure from your clients to take some action to ameliorate their situation;

(c) the necessity of demonstrating to jail officials that prisoners can invoke judicial power and get a hearing;

(d) the necessity of focussing the attention of an uninvolved, lazy or unsympathetic judge;

(e) the importance of capitalizing on publicity or political momentum created by the filing of the lawsuit;

(f) the necessity of focussing the attention of jail officials and perhaps forcing defendants to negotiate;

(g) the possibilities of obtaining a sympathetic judge or avoiding an unsympathetic one, depending upon the jurisdiction and court rules;

(h) the need to prevent mootness of the case or staleness of your evidence;

(i) the need to protect your clients against reprisals or threatened reprisals for bringing the lawsuit[75/];

75/ Such a claim may be pressed in a motion for preliminary relief or as a separate lawsuit. See, e.g., Haymes v. Montanye, 547 F.2d 188 (2d Cir. 1977); Milhouse v. Carlson, 652 F.2d 371 (3rd Cir. 1981); Ruiz v. Estelle, 550 F.2d 238 (5th Cir. 1977); Ruiz v. Estelle, 550 F.2d 238 (5th Cir. 1977); Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979); Wolfel v. Bates, 707 F.2d 932 (6th Cir. 1983). See also Kush v. Rutledge, ___ U.S. ___, 103 S.Ct. 1483 (1983).

(j) the ability to blunt the "improved conditions" defense (see §VIII.B. below) by getting into court before substantial improvements are made;

(k) the likelihood that you will work harder than your adversary and that time pressure will therefore be to plaintiffs' advantage;

(l) the benefits of litigating issues in a setting that you have structured, rather than spending your time responding to defendants' motions to dismiss or for summary judgment;

(m) the need to avoid getting the case bogged down in protracted discovery disputes or other side issues; and

(n) the benefits of obtaining an appealable order at an early stage in the case.

In deciding whether to move for preliminary relief, you should consider how much discovery and trial preparation is necessary; it may be that a motion for preliminary relief will involve so much work that you may as well go ahead and try the entire case. Also, a judge may find your motion so complex and weighty that he or she prefers to consolidate the motion with the plenary trial. (This may be a way of getting an early trial date in a court with a large trial backlog.)

To obtain preliminary relief, you must convince a judge that prisoners will suffer irreparable harm during the pendency of the

lawsuit if you do not obtain an order;[76] that there is a probability of success on the merits;[77] that if you balance the hardships suffered by the parties the prisoners will suffer the greater harm if an order is not entered; and that it is in the public interest to grant the requested relief.[78] If you allege that jail officials have violated the Constitution, statutes or even jail rules and regulations, they of course are not acting lawfully and therefore not in the public interest.[79]

In the federal courts, the district court may require a person obtaining a preliminary injunction to post a security bond under Rule 65(c) of the Federal Rules of Civil Procedure. If you

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[76] A showing of a violation of constitutional rights is sufficient to establish irreparable harm. Elrod v. Burns, 427 U.S. 347 (1976); Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981); Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978).

[77] Likelihood of success need not constitute a mathematical probability. Washington MATC v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977); Williams v. Barry, 490 F.Supp. 941, 943 (D. D.C. 1980). If you can show irreparable injury and that the balance of interests and public policy strongly favor injunctive relief, the court may grant an order even though your chances of winning your case on the merits are weaker.

[78] See Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944).

[79] Preliminary relief has been granted in numerous jail and prison cases. See, e.g., Miller v. Carson, 401 F.Supp. 835 (M.D. Fla. 1975) (jail overcrowding conditions); Vasquez v. Gray, 523 F.Supp. 1359 (S.D. N.Y. 1981) (jail overcrowding); Inmates of Attica C.F. v. Rockefeller, 453 F.2d 12 (2d Cir. 1971) (brutality after retaking of prison); Liles v. Ward, 424 F.Supp. 675 (S.D. N.Y? 1976) (transfer to hospital for criminally insane); Northern Penn. Legal Services v. County of Lackawanna, 513 F.Supp. 678 (M.D. Pa. 1981) (retaliation by County for bringing jail and other institutional litigation).

are proceeding in forma pauperis under Title 28 U.S.C. §1915, requiring such a bond is especially inappropriate.80/

Like success at trial, success on preliminary motions for relief is usually dependent on the preparation of expert witnesses. Identification of your needs and obtaining access to the facility for these individuals is obviously a must. If you cannot arrange a tour by agreement, a Request for Entry Upon Land should be made. (See §VII below.)

If plaintiffs obtain preliminary relief in a §1983 case, they may be entitled to a fee award and reimbursement of costs on an interim basis. (See §XI.C. below.) Funds obtained in this manner may be utilized to support later discovery and expert expenses incurred in the case. Optimism in this respect should be tempered by the realization that fees awards are very often appealed or resisted in other ways so that the date of payment can rarely be predicted. On the other hand, a substantial fees award early in the case may have a salutary effect on jail officials, defense attorneys and the fiscal authorities to whom they are ultimately responsible, by discouraging "stonewalling" litigation postures that will be reflected in the final attorneys' fees bill.

C. Naming the Proper Defendants.

Whom to name as defendants in a jail case depends both on the facts of the case and, in a §1983 case, on a variety of legal

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80/ J.L. v. Parham, 412 F.Supp. 112 (N.D. Ga. 1976), rev'd. on other grds., 442 U.S. 584 (1979).

considerations discussed in this section. In state law actions, the proper defendants will be determined by state law.

1. Respondeat Superior vs. Personal Responsibility. The scope of §1983 liability is outlined in the statute itself, which prescribes liability for any person who under color of state law "subjects, or causes to be subjected" the plaintiff to a violation of federal law. Under §1983, the doctrine of respondeat superior -- an employer's vicarious liability for torts committed by employees in the course of employment -- has no application.[81] The defendants must either have been personally involved in the unlawful conduct or have acted or omitted to act in a manner which caused the plaintiff to be subjected to a violation of federal law.[82]

This principle has its primary application in damage cases, in which the pinpointing of fault for the plaintiff's injury may be the most important factual and legal issue.[83] In injunctive cases, courts rarely stop to parse lines of authority as long as the higher-level administrators of the jail are named as

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[81] Parratt v. Taylor, 451 U.S. 527, 537, n.3 (1981).

[82] Rizzo v. Goode, 423 U.S. 362, 370-71 (1976).

[83] See, e.g., Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), cert. den., sub nom. Bennett v. Williams, 104 S.Ct. 335 (1983).

defendants.[84] However, it is the better practice, even in an injunctive case, to join all those persons up and down the chain of command whose acts or omissions might be said to "cause" the constitutional violations. This is particularly true when dealing with a specialized and technical aspect of jail life such as medical or psychiatric care, where a sheriff or warden may claim to have no involvement or knowledge beyond hiring personnel with appropriate qualifications. Joining all those persons who may have some causative role in the violations may minimize wasteful pre-trial motion practice and reduce the defendants' opportunity to point the finger at an off-stage "fall guy." Certainly, no litigator should rely on the statements made in a few cases that respondeat superior applies in § 1983 injunctive cases.[85]

The list of defendants should not be limited to jail personnel. Local political and budgetary authorities should also be named, since full relief may require additional staffing,

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84/ In Rizzo v. Goode, 423 U.S. 362, 375-76 (1976), an injunctive case not involving a jail or other closed institution, the "no respondeat superior" doctrine was invoked where the link between the named defendants' conduct and the claimed constitutional violation was held unduly remote. Such a ruling is less likely in a jail or prison case, where the alleged violations take place in a restricted setting controlled by a small number of identifiable officials and employees. See also Ruiz v. Estelle, 679 F.2d 1115, 1154-55 (5th Cir. 1982); Campbell v. McGruder, 580 F.2d 521, 526 (D.C. Cir. 1980); Doe v. New York City Department of Social Services, 649 F.2d 134, 142 (2d Cir. 1981).

85/ See Isaac v. Jones, 529 F.Supp. 175 (N.D. Ill. 1981); Ganguly v. New York State Dept. of Mental Hygiene, 511 F.Supp. 420, 424 (S.D. N.Y. 1981). See also Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979) (overruling prior cases adopting state respondeat superior doctrines in §1983 cases).

funding, construction, or other actions not within the authority of the jailer or warden. The higher-level defendants should generally include some combination of sheriff, jail administrator, or corrections commissioner, the mayor or city manager, the local legislative body, the city or county government, and the sheriff's department or correction department. Depending on the structure of local government in your state, you may also wish to sue one or more state officials with supervisory or budgetary authority over local jails. (Particular problems involved in suing these and other types of defendants are discussed later in this section.)

Obviously, selecting the proper defendants in a §1983 jail case require substantial information about how the jail is operated, financed, and ultimately governed. If this information is not readily available before the lawsuit is brought, questions of particular officials' responsibility and involvement in jail affairs must be promptly pursued in discovery, with the object of filing an amended complaint adding or dropping parties as necessary.

In determining whom to sue, keep in mind that "[a]cts of omission are actionable...to the same extent as acts of commission."86/ Thus, §1983 liability may be based on knowledge

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86/ Smith v. Ross, 482 F.2d 33, 36 (6th Cir. 1973). See also Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("acts or omissions"); Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978) ("nonfeasance as well as misfeasance").

of and acquiescence in the constitutional violation, however manifested; 87/ in some cases, knowledge and acquiescence may be inferred from surrounding circumstances.88/ Liability may be premised on the promulgation of an unconstitutional policy89/ or on the failure to have any policy.90/ Failure to perform a duty imposed by a statute or regulation may support liability if it causes a violation of federally protected rights.91/ The failure of supervisory officials to train and supervise their subordinates may support the liability of supervisory officials.92/ However, the courts will not infer a failure to

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87/ See Harris v. Chanclor, 537 F.2d 203, 206 (5th Cir. 1976) (failure to intervene in unlawful beating); Villanueva v. George, 659 F.2d 851 (8th Cir. 1981) (en banc) (failure to correct unconstitutional living conditions); Holland v. Connors, 491 F.2d 539 (5th Cir. 1974) (same); Vaughn v. Franzen, 549 F.Supp. 426 (N.D. Ill. 1982) (inadequate disciplinary procedures).

88/ See McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979).

89/ Ruiz v. Estelle, 679 F.2d 1115, 1154-55 (5th Cir. 1982); Black v. Stephens, 662 F.2d 181 (3d Cir. 1981); Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980); Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977).

90/ Murray v. City of Chicago, 634 F.2d 365 (7th Cir. 1980); Fowler v. Cross, 635 F.2d 476 (5th Cir. 1981); Williams v. Heard, 533 F.Supp. 1153 (S.D. Tex. 1982); Doe v. Burwell, 537 F.Supp. 186 (S.D. Ohio 1982); Redmond v. Baxley, 475 F.Supp. 1111 (E.D. Mich. 1979); Bryant v. McGinnis, 463 F.Supp. 373 (W.D. N.Y. 1978).

91/ Tatum v. Houser, 642 F.2d 253 (8th Cir. 1981); Doe v. New York City Dept. of Social Services, 649 F.2d 134 (2d Cir. 1981); Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978); United States ex rel. Larkins v. Oswald, 510 F.2d 583, 589 (2d Cir. 1975).

92/ Pearl v. Dobbs, 649 F.2d 608 (8th Cir. 1981); O'Connor v. Keller, 510 F.Supp. 1359 (D. Md. 1981).

train and supervise from the mere fact of misbehavior by subordinates, and most courts require a concrete showing of "deliberate indifference" before they will impose liability on this basis.[93]

2. Monell Actions: Direct Liability of Local Government. You may sue a city or county government or agency under §1983; however, local government liability is also limited by the "no respondeat superior" rule. Monell liability (so called after the case which established local government liability under §1983) is restricted to federal law violations which arise from "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or from "customs" of the municipal government.[94] Some courts have held that acts or decisions by high-level executive officials meet the requirements for Monell liability without much further inquiry into whether they actually represent official policy.[95] Acts of omission -- failure to provide adequate funding, failure to deal with an overcrowing problem,

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93/ Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979), cert. den. sub nom. County of Nassau v. Owens, 444 U.S. 980 (1979). Jones v. Denton, 527 F.Supp. 106 (S.D. Ohio 1981).

94/ Monell v. New York City Department of Social Services, 436 U.S. 658, 690-94 (1978). "Custom" has been defined as "the deeply imbedded traditional ways of carrying out...policy." Knight v. Carlson, 478 F.Supp. 55, 59 (E.D. Cal. 1979). See also Webster v. City of Houston, 689 F.2d 1220, 1225-27 (5th Cir. 1982); Wolf-Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1983).

95/ Bennett v. City of Slidell, 697 F.2d 657 (5th Cir. 1983); Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980); Jones v. City of Philadelphia, 491 F.Supp. 284 (E.D. Pa. 1980). But see Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980).

failure to establish required procedures -- may constitute "decisions" or "customs" of the municipality for this purpose.[96] As with suits against individual supervisory officials, failure to train and supervise may support Monell liability if a sufficient factual showing is made.[97]

3. Individual and official capacity. When naming individual defendants, it is the usual practice to name them "in their individual and official capacities." This distinction is mainly relevant to damage suits against state officials, helping define those monetary awards which are barred by the Eleventh Amendment immunity of states.[98] The distinction has little relevance to injunctive cases. In suits about local jails, in

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96/ Powe v. City of Chicago, 664 F.2d 639 (7th Cir. 1981); Parnell v. Waldrep, 538 F.Supp. 1203 (W.D. N.C. 1981); Mayes v. Elrod, 470 F.Supp. 1188 (N.D. Ill. 1979); Watson v. McGee, 527 F.Supp. 234 (S.D. Ohio 1981); McKenna v. County of Nassau, 538 F.Supp. 737 (E.D. N.Y. 1982).

97/ Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981); Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979), cert. den. sub nom. County of Nassau v. Owens, 444 U.S. 980 (1979); Popow v. City of Margate, 476 F.Supp. 1237 (D. N.J. 1979). But see Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983); Turpin v. Mailet, 619 F.2d 196 (2d Cir.) cert. den. sub nom. Turpin v. West Haven, 449 U.S. 1016 (1980); Harlee v. Hagen, 538 F.Supp. 389 (E.D. N.Y. 1982).

98/ Owen v. Lash, 682 F.2d 648, 655 (7th Cir. 1982); Jacobson v. Coughlin, 523 F.Supp. 1247, 1248-49 (N.D. N.Y. 1981).

which the Eleventh Amendment will not usually be an issue,[99] the individual/official capacity distinction serves only to indicate whether the official or the local government is liable for a money judgement. Indeed, there is no difference between a suit against a local government official in his or her official capacity and a Monell claim against the government itself.[100] However, the prudent practice in this technical and sometimes poorly understood area is probably to name all defendants in both individual and official capacities and name the county, city, or other local agency as well. This tactic will not only prevent dismissal; it will also save you potential headaches caused by the unavailability of certain kinds of discovery against non-parties.[101]

4. Non-Jail Defendants. Particular types of defendants may present special problems under §1983.

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[99] The Eleventh Amendment generally does not apply to counties and municipal corporations. Mt. Healthy City School District v. Doyle, 429 U.S. 274, 280 (1977). However, if local activities "are dependent on funding from the state," the Eleventh Amendement may bar relief against the locality as well as pendent state claims. Pennhurst State School and Hospital v. Halderman, note 40a, at 4164 n.34.

[100] Monell v. New York City Department of Social Services, note 94 above, at 690 n.55; Kincaid v. Rusk, 670 F.2d 737, 741-42 (7th Cir. 1982). However, one federal court has recently held that the governmental body must be joined as a party if liability is sought against it. Hart v. Walker, 720 F.2d 1443, 1445 (5th Cir. 1983).

[101] Rules 33, 34, F.R.C.P.

Local legislators are generally held to be immune from both injunctive relief and damages for their legislative acts.102/ However, action or inaction by a legislative body clearly meets the standards for Monell liability discussed above, so this personal immunity poses no real difficulty; counsel need only join the local government itself.103/

Judges and prosecutors are held to be absolutely immune from damages for acts taken, respectively, in a judicial capacity or in the course of initiating and presenting a criminal prosecution.104/ This immunity has not yet been extended to

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102/ Supreme Court of Virginia v. Consumers Union, 446 U.S 719, 732 (1980); Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980). Contra, Jones v. Diamond, 519 F.2d 1090, 1101 (5th Cir. 1975). Some courts have held that legislative immunity is not applicable where the challenged action was not legislative in nature. See cases collected in Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 404 n.26.

Even if counsel believes that local legislators may be sued individually, it is debatable whether joining them is worthwhile. This judgement should probably be made based on what one reasonably expects from the legislators. If the local legislature has been a stumbling block, suing its members may have some salutory effect on their attitude. By contrast, if one hopes that the legislature will be a more positive force helping counsel to "get past" the jailor, naming and serving the legislators may antagonize them for no useful purpose. The emotional impact of being sued and served with process is likely to be greater in small communities whose legislators are often part-time, unpaid, and unfamiliar with litigation.

103/ Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981).

104/ Stump v. Sparkman, 435 U.S. 349 (1978); Imbler v. Pachtman, 424 U.S. 409 (1975).

injunctive actions, although the question is open.[105] However, in federal courts injunctive relief against state courts and their personnel has often been rejected based on ill-defined doctrines of "comity" and "equitable restraint." [106] In other cases, federal court injunctions have been entered requiring changes in state court practices.[107] Litigators should be aware that this area of the law involves many unsettled questions about the power of the federal courts. The perceived need to join judges or prosecutors as parties defendant in a jail case will usually be related to overcrowding, since it is generally the courts and not the jailors who are responsible for filling the jails beyond capacity. One approach to this problem which balances the need for meaningful relief against sensitive questions of federalism and avoids enjoining courts or judges is

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105/ Supreme Court of Virginia v. Consumers Union, note 102 above at 735.

106/ O'Shea v. Littleton, 414 U.S. 488, 499-502 (1974); Newman v. Alabama, 683 F.2d 1312, 1320 (11th Cir. 1983); Wallace v. Kern, 520 F.2d 400 (2d Cir. 1975), cert. den., 424 U.S. 12 (1976). See Inmates of Middlesex County v. Demos, 519 F.Supp. 770 (D. N.J. 1981) (judges could not be joined as defendants absent allegation that their bail, sentencing or calendar practices cause unconstitutional results).

107/ Gerstein v. Pugh, 420 U.S. 103 (1975), on remand sub nom. Pugh v. Rainwater, 422 F.Supp. 498 (S.D. Fla. 1976); Allen v. Burke, 690 F.2d 376, 377-78 (4th Cir. 1982); Fernandez v. Trias Monge, 586 F.2d 848 (1st Cir. 1978); Conover v. Montemuro, 477 F.2d 1073 (3d Cir. 1973) (en banc). See Newman v. Alabama, ___ F.Supp. ___ Civ. Action #3501-N Memorandum Opinion (M.D. Al. November 4, 1983), appeal pending (state court proceedings enjoined where they would interfere with compliance with federal court orders). See also Gilliard v. Carson, 348 F.Supp. 757 (M.D. Fla. 1972); Ackies v. Purdy, 322 F.Supp. 38 (S.D. Fla. 1970).

to seek to impose a population cap on the jail. Such an order may also prescribe a formula for deciding which prisoners are to be released if the population limit is exceeded and give authority to jail authorities to release prisoners to maintain the cap, while permitting any state court of competent jurisdiction to substitute a different release formula.108/ In state court, of course, these problems of federalism will not be on issue.

In some cases, there are persons or agencies outside the sheriff's office or correction department and the higher executive and legislative authorities of the locality who should be joined as parties defendant. Some states and localities have separate agencies whose job is to regulate, inspect or monitor

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108/ Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983); Gross v. Tazewell Co. Jail, 533 F.Supp. 413 (W.D. Va. 1982) (release order to issue if cap cannot be maintained); Inmates of Allegheny Co. Jail v. Wecht, 565 F.Supp. 1278 (W.D. Pa. 1983) (staged population reduction ordered); Valvano v. Malcolm, No. 70-C-1390, Partial Final Judgment at 3 (E.D. N.Y. Jan. 8, 1976), on remand from Detainees of Brooklyn House of Detention for Men v Malcolm, 520 F.2d 392 (2d Cir. 1975). See also Benjamin v. Malcolm, 564 F.Supp. 668 (S.D. N.Y. 1983) (population cap reaffirmed); West v. Lamb, 497 F.Supp. 989 (D. Nev. 1980) (population cap imposed).

local jail conditions.[109] In some cases, other specialized agencies, such as health departments or fire safety agencies, may have oversight over particular conditions and practices in jails.[110] Or other state or local agencies may be directly involved in providing services or designing programs.[111] These agencies or their personnel[112] may be joined as defendants under the same standards of personal involvement described above; if there is a factual basis for claiming that their acts or omissions caused the federal law violations complained of, they

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[109] In New York, the State Commission on Corrections is statutorily required to promulgate and enforce certain rules governing local jails and to create a grievance mechanism for their inmates. 10B McKinney's Correction Law, §§41, 45 (Supp. 1982-83), see Lucas v. Wasser, 425 F.Supp. 955, 961 (S.D. N.Y. 1976). A separate New York City Board of Corrections has regulatory authority over York City jails. New York City Charter §626. In Michigan and Massachusetts, the state corrections departments have similar supervisory authority over local jails. Dimarzo v. Cahill, 575 F.2d 14, 17-18 (1st Cir. 1978); Michigan Stat. Ann. §23.2322. See also Fla. Stat. Ann. §951.23(2) and Texas Civ. Stat. §5115. See also Miller v. Carson, 563 F.2d 757, 760 (5th Cir. 1977).

[110] For example in Alabama, county health departments and the state Fire Marshal have statutory responsibility to inspect and regulate local jails. Adams v. Mathis, 458 F.Supp. 302 (M.D. Ala. 1978).

[111] In New York City, the municipal Department of Health has substantial responsibility for providing health care in New York City jails. In Kentucky, the state Department of Education provides vocational training in state prisons. Canterino v. Wilson, 546 F.Supp. 174, 188 (W.D. Ky. 1983).

[112] State agencies cannot be sued in federal court because of their Eleventh Amendment immunity. Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); Ruiz v. Estelle, 679 F.2d 1115, 1136-37 (5th Cir. 1982). This immunity may be avoided simply by suing the state officials involved in their individual capacity.

are proper defendants.[113] Before joining them as defendants, however, one should think through the practical consequences. It may be easier to get discovery -- and possible to get an injunction -- against a regulatory or supervising agency if it is a party defendant. On the other hand, it may be preferable, if the agency is cooperative, to keep one's contacts informal. It may also be possible to present such an agency as an impartial third party for purposes of monitoring a judgement or developing standards to be incorporated in a judgement;[114] this would be more difficult to do (and the agency might be less willing to cooperate) if the agency had been sued.

If counsel does elect to join a state official as a defendant, the claim must be carefully framed to allege a federal law violation. The Supreme Court has recently held that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected [sic] by the Eleventh Amendment.[114a] If state officials can be shown to have caused a constitutional violation by failing to perform their state law duties, a federal court may presumably still direct that state law be followed as a remedy for the constitutional wrong.

113/ See cases cited in notes 109 - 111 above.

114/ See, e.g., Vest v. Lubbock County Commissioners Court, 444 F.Supp. 824, 837-38 (N.D. Tex. 1977); Campbell v. McGruder, 416 F.Supp. 100, 105 (D. D.C. 1976); Alberti v. Sheriff of Harris County, 406 F.Supp. 649, 677 (S.D. Tex. 1975); Jones v. Wittenberg, 330 F.Supp. 707, 716 (N.D. Ohio 1971); Valvano v. McGrath, 325 F.Supp. 408, 411-12 (E.D. N.Y. 1971).

114a/ Pennhurst State School and Hospital v. Halderman, note 40a above, at 4164 (emphasis supplied).

SECTION III. PRELIMINARY PLANNING AND RESEARCH

Before one commences a challenge to jail conditions, some initial planning and research effort is advisable. Once these preliminary steps are accomplished, drafting a complaint, responding to motions to dismiss or for summary judgement, and planning discovery will be made much easier.

A. Initial Contact with Plaintiffs.

We have assumed that you have received a complaint about jail conditions from a prisoner or other individual. Perhaps a prisoner has sent a letter or filed a pro se complaint with a local judge or court.[115] (See §V below about the content of the complaint.) Your first step must be to interview the individual prisoner and independently check out his or her story with witnesses the prisoner identifies, with others familiar with the jail, and through such documents as are available. It is wise to obtain an affidavit or a declaration under penalty of perjury[116] from your proposed client in order to nail down the story and as a means of protection as recollections fade or change over the course of years; such a sworn statement may also be useful later in moving for preliminary relief or summary judgement or in resisting motions by the defendants.

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[115] If you have a pro se pleading, amending it may be useful. See Rule 15, F.R.C.P.

[116] See Title 18 U.S. §1746. This device can be used in federal court proceedings.

Also because of the lengthy nature of these cases and because jail confinement tends to be of short duration, you should at the first opportunity obtain the names and addresses of someone always in touch with the individual prisoner and the names of other prisoners who have similar or other complaints and interview them. Litigators should attempt to stay in touch by letter, phone or visits with the named plaintiff or plaintiffs concerning significant incidents at the jail, and worsening or improvements in conditions of confinement.

B. Gathering of Documents.

Counsel should as a preliminary matter begin gathering materials and documents that are generally available or available to the public. Clippings from local newspapers are good sources of information about incidents, occurrences, lawsuits, budget battles and other controversies concerning the jail, the local courts and governmental entities that bear on the case. Public documents such as grand jury reports, budget requests, transcripts of budget hearings and testimony before funding agencies and bodies, prior consultant or planning agency reports, state and local regulatory agency reports or audits will be very useful.(See §II.C.4. above concerning regulatory bodies.) You should request from the sheriff or jail administrator copies of any written rules, regulations or policies in effect at the jail. The budget process over the previous years is a fertile source of information about the various positions of the major actors, (see §I.5. above), potential defendants, (see §II.C. above), and possible allies. This material may also reveal

potential defenses that may be raised in response to the lawsuit. Where material is not readily available to the public, state or local freedom of information laws may be helpful.

C. Other Sources of Information and Assistance.

Your interviews with prisoners and the initial gathering of materials should lead you to sympathetic individuals and organizations which may provide further relevant information, assistance and resources. Former prisoners, family members, lawyers from the community, public defender or legal aid lawyers, social service or church groups should be contacted and a continuing relationship should be developed. Former (or even present) jail staff may provide useful information initially, although one should be wary about their later use at trial. They might have or be perceived to have an "axe to grind" or some other agenda that could compromise their testimony if not their information.

D. Preliminary Tour.

Extremely useful at this stage if it can be achieved is a tour of the facility itself. A tour will help orient and familiarize you with the layout and put the information you have already gathered into context. If you are provided a tour, do not hesitate to take the opportunity of speaking to staff and prisoners, reading written notices and policies that may be posted, and requesting any relevant published or written policies, rules and regulations of the jail.

An expert tour, if it can be arranged, can be the single most important step at this early stage of your lawsuit. (See §IV.

above concerning experts.) Not only can you get a jump on discovery and trial preparation, you may be able to use an expert's report (not necessarily in written form) as a way of getting the defendants to begin thinking and perhaps talking settlement.

E. Resources and Money.

These cases are expensive in terms of both out-of-pocket expenses and the use of lawyer and staff time. A budget must be prepared which realistically reviews likely expenses and funding sources.

The largest items on the expense side are probably experts and depositions. Both are virtual necessities for jail litigation. (See §§IV, VII below.) The total amount for each varies considerably with the nature and scope of the litigation planned -- the size of the facilities, the number of issues involved, the numbers of defendants and persons to be deposed, degree of opposition, and the length of time over which the case is litigated. Particularly with respect to the experts there will be an enormous variation depending on reputation, experience, and qualifications.[117/] Obviously, local experts will probably charge less in terms of fees than nationally-known experts and certainly travel expenses will be less. The only way you can really assess these costs is to identify individuals and

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117/ In the mid-1970's, when experts were first introduced into jail and prison litigation, many experts would work virtually pro bono, asking only reimbursement for expenses. Since then fees have gradually increased and within the last few years have increased dramatically.

find out what they are charging. If possible, you should plan for two tours of the facility for each expert: an early tour to help you prepare and a "brush-up" tour just before the expert testifies.118/

Depositions are generally used heavily in jail and prison litigation. (See §VII below.) One way to economize is to tape-record depositions and have them transcribed in your own offices (or not have them transcribed at all if you do not expect to use them in court). A stipulation by the parties or a motion is required.119/

Expert fees and expenses can be reduced by seeking court appointment.120/ You should be aware however of the potential dangers associated with this technique, including losing control of selection of the expert and the ability to help structure the expert's report and testimony.

The inevitable question faced by litigators is where the money is to come from adequately to support this litigation. Currently it is our impression that jail litigation is funded primarily by Legal Services organizations,121/ the private bar on

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118/ Settlement may cut down on your costs, but remember that you probably will need an expert tour and advice in the inevitable enforcement phase. See §X.B. below concerning enforcement.

119/ Rule 30(b)(4), F.R.C.P.

120/ See Stickney v. List, 519 F.Supp. 617 (D. Nev. 1981); Lightfoot v. Walker, 486 F.Supp. 504, 506 (S.D. Ill. 1980).

121/ The recent cut-back in funding for the Legal Services Corporation necessarily has diminished its ability to finance and provide staff.

an appointment basis,122/ and other organizations such as the American Civil Liberties Union 123/(through its state affiliates and local chapters) or the Legal Defense Fund (through and with its network of local cooperating attorneys).124/ The availability of funds depends primarily on the financial support of these organizations and, in the case of appointed counsel, on the financial resources of the firms with whom they are associated.

With the advent of the Civil Rights Attorney Fees Award Act of 1976,125/, prevailing parties in §1983 actions can obtain reasonable attorney fees and have their costs reimbursed. Because these fees and costs are contingent on success and the

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122/ Title 28 U.S.C. §1915(d) provides for the discretionary appointment of counsel upon a finding of indigency. There is no provision for the payment of counsel or for litigation expenses, except that prepayment of fees and costs may be excused, and costs of preparing a record may be paid under some circumstances.

123/ The National Jail Project, described above at note 1, is a special project of the ACLU Foundation. Presently it has no funds to underwrite litigation efforts.

124/ The U.S. Department of Justice, Civil Rights Division through its Special Litigation Section, has in the past filed and prosecuted jail cases. Under the Civil Rights of Institutionalized Persons of 1980, 42 U.S.C. §§1997 et seq., it is authorized to file such lawsuits or intervene in on-going cases. Since the statute was passed, it has filed and intervened in none.

125/ 42 U.S.C. §1988.

amount awarded and the date received are speculative, you really cannot budget for them. (See §XI below for a discussion of attorneys' fees.)

Staffing of a jail case is another factor to be planned for. Considering the multi-issue and factual nature of these cases, as well as the emergencies that tend to crop up, it is advisable always to have two attorneys assigned to the case or at the very least, one full-time attorney and a back-up lawyer to assist. Para-professionals, legal assistants or interns are extremely useful especially in the discovery and enforcement phases of the case. Law students can be helpful but remember that they may only be available during school terms and usually have other obligations as well. Certainly, bright and resourceful non-legal volunteers can be useful as well.

It is not our purpose to discourage attorneys from taking jail cases. We intend the opposite. However, if a jail conditions case cannot be supported properly, it should not be brought at all. In a case where resources are unavailable but the situation cries out for action, counsel may wish to look for a particularly dramatic damage case, or bring an injunctive action limited to one or two life- or health-threatening issues, thus avoiding the danger of a bad decision as to other issues which might preclude future, better-funded litigation.

SECTION IV. EXPERTS.

A jail conditions case cannot be litigated without the use of experts. Experts can profitably be used at every stage of the lawsuit, beginning before the complaint is filed. The number and type of experts required will depend on the issues raised and perhaps on the seriousness of defendants' opposition.

A. Types of Experts.

Expert witnesses may testify as to any subject where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue...."126/ Most expert testimony used in jail cases falls into the following broad areas:

1. Corrections and security. Persons with experience working in, supervising, or studying jails and prisons often testify concerning the necessity, adequacy, or consequences of jail conditions, jail officials' practices, the availability of alternative measures, the causes of particular problems, etc.127/

126/ Rule 702, Federal Rules of Evidence (F.R.E.).

127/ See, e.g., Dawson v. Kendrick, 527 F.Supp. 1252, 1269-70 (S.D. W.Va. 1981); Parnell v. Waldrep, 511 F.Supp. 764, 767, 771 (W.D. N.C. 1981); Ramos v. Lamm, 485 F.Supp. 122, 139 (D. Colo. 1979), aff'd in part, vac. in part, 639 F.2d 559 (10th Cir. 1980), cert. den., 450 U.S. 1041 (1981).

2. Medical care. Physicians, medical administrators, and nurses often testify as to the adequacy either of the system for medical care delivery or of the treatment provided to particular prisoners.128/

3. Mental health. Psychiatrists, psychologists, and mental health administrators may offer testimony concerning the system for providing mental health care, or the care provided to particular prisoners.129/ Mental health professionals may also offer opinions as to the psychological consequences of other conditions and practices or of the totality of conditions in the institution.130/

4. Environmental health. Public health experts, sanitarians, plumbers, dietitians, exterminators, and other technical specialists may testify regarding the cleanliness of a jail, its food services, pest control, heating, ventilation, plumbing and water supply, etc. 131/

128/ See, e.g., Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 760 (3d Cir. 1979); Canterino v. Wilson, 546 F.Supp. 174, 200 (W.D. Ky. 1982); Palmigiano v. Garrahy, 443 F.Supp. 956, 973-76 (D. R.I. 1977).

129/ See, e.g., Inmates of Allegheny Co. Jail v. Pierce, note 128 above, at 761, on remand 487 F.Supp. 638 (W.D. Pa. 1980); Canterino v. Wilson, note 128 above, at 200-01.

130/ See, e.g. Canterino v. Wilson, note 128 above, at 182-83, 186-88; Owens-El v. Robinson, 442 F.Supp. 1368, 1380 (W.D. Pa. 1976), aff'd, Inmates of Allegheny Cty. Jail v. Pierce, note 128 above; Frazier v. Ward, 426 F.Supp. 1354, 1365 (N.D. N.Y. 1977).

131/ Canterino v. Wilson, note 128 above, at 198; Dawson v. Kendrick, note 127 above, at 1275; Palmigiano v. Garrahy, note 128 above, at 961-64, 968; Owens-El v. Robinson, note 128 above, at 1376.

5. Structure. Architects and engineers may testify as to the physical condition of a jail, whether it can continue to be used safely for confinement purposes, and what repairs or renovations are necessary to restore it to usable condition.132/

B. Uses of Experts.

1. Legal Limitations. Counsel should understand the courts' reservations about the use of experts in prison and jail litigation. The Supreme Court has stated that it is error to "assum[e] that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency"; that expert opinions "may be helpful and relevant with respect to some questions, but they simply do not establish the constitutional minima; rather they establish goals recommended by the organization [sic] in question'"; and that "generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as the public attitude toward a given sanction.'"133/ These comments do not reject reliance on expert testimony;134/ rather, they appear to reflect the Court's view that expert testimony should remain confined to its

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132/ See, e.g., Ramos v. Lamm, note 127 above, at 136; Palmigiano v. Garrahy, note 128 above, at 977.

133/ Rhodes v. Chapman, 452 U.S. 337, 348 n.13, (1981), quoting Bell v. Wolfish, 441 U.S. 520, 543-44 n.27 (1979) and Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion).

134/ See Rhodes v. Chapman, note 133 above, at 363 (Brennan, J., concurring) ("...in seeking relevant information about conditions in a prison, the court must be open to evidence and assistance from many sources, including expert testimony and studies on the effect of particular conditions on prisoners").

traditional role of assistance in the fact-finding process rather than become a source of ultimate policy judgements which the courts are not authorized to make.

For this reason, counsel should be careful to tie expert testimony very carefully to factual arguments rather than to ultimate conclusions or to professional standards as to the desirability or acceptability of a practice or condition. Thus, if counsel is using expert testimony to support a demand for a higher staff/inmate ratio, it is not enough that a professional consensus or the standards of a particular organization require the higher ratio; the expert must explain that the reason for the requirement is that a lower ratio presents risks of inadequate supervision resulting in pervasive inmate-on-inmate violence and inadequate response to fires, medical emergencies, suicide attempts, and other dangers to health and safety. It is this last conclusion that gives the expert opinion some weight in a constitutional case.[135/] Expert testimony concerning appropriate medical care, environmental conditions, or any other aspect of confinement must ultimately connect with some factual assertion about conditions in the jail that arguably states a violation of law.

2. What To Do With Your Expert. Experts can be of great assistance before the complaint is filed or even drafted. They can review documentary materials or inmate complaints,

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135/ See Ruiz v. Estelle, 679 F. 1115, 1140-41 (5th Cir. 1982); Ramos v. Lamm, 639 F.2d 559, 572-74 (10th Cir. 1980), cert. den., 101 S.Ct. 1759 (1981); Dawson v. Kendrick, 527 F.Supp. 1252, 1265 n.7, 1268-70, 1290-91 (S.D. W.Va. 1981) (jail); Palmigiano v. Garrahy, 443 F.Supp. 956, 980 (D. R.I. 1977).

advise counsel of the factual merits of various issues, and in some cases identify issues previously unknown to counsel. In some cases, where the impending lawsuit is no secret or there seems to be no reason to keep it a secret, you may be able to arrange a tour with your expert based on the representation that a pre-filing view may narrow the issues and thus save both sides time and money. You can also offer to meet with the defendants after the tour and discuss deficiencies and possible remedies with an eye toward avoiding litigation or filing a settlement shortly after the complaint. You should make it clear that you will get your tour eventually in discovery so that there is no advantage to defendants in refusing your pre-filing request.

Experts can be of great assistance in helping you formulate discovery requests. A medical administrator, for example, can identify types of records or logs which will reveal deficiencies in access to medical care (or whose nonexistence is itself a deficiency). Experts can also review discovery you have already obtained and tell you what, if anything, it proves, and what additional information you must pursue to complete the picture. Expert testimony may also be required in interpreting discovery materials such as medical records.

Expert testimony may take various forms. The distinguishing feature of expert testimony is that an expert, once qualified, may give an opinion.136/ The Federal Rules of Evidence have

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136/ Rule 702, F.R.E.

substantially relaxed former rules or customs requiring the use of hypothetical questions and the introduction into evidence of all bases for the expert's opinion.[137] The precise form of expert testimony is therefore largely a matter of tactical judgement rather than rules. Sometimes the traditional style of hypothetical questions has great rhetorical or summarizing value; in other circumstances, it may be cumbersome and confusing.

Experts may assist in suggesting or formulating remedies for challenged conditions. This may be appropriate either after judgement when the parties are settling an order or at the liability stage, where the availability of alternatives may influence the court in determining whether existing practice constitutes an "exaggerated response" to security or other concerns.[138]

Finally, experts may assist in settlement, either by advising counsel or in some case by actually taking part in the negotiations. A jail administrator may be more willing to listen to a professional colleague than to a lawyer with no correctional experience.

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[137] Rules 703, 705,, F.R.E. See also Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 3399-40 (1983).

[138] Bell w. Wolfish, 441 U.S. 520, 548 (1979), quoting Bell v. Procunier, 417 U.S. 817, 827 (1974). See also Rutherford v. Pitchess, 710 F.2d 572, 575-76, 577 (9th Cir. 1983), cert. grant. sub nom. Block v. Rutherford, 104 S.Ct. 390 (1983).

3. The Expert Tour. In most cases it is indispensable to take the expert on a tour of the facility.[139] (See §VII below for additional discussion of tours.) In matters pertaining to physical structure and conditions, there is no substitute for a view of the premises; even as to matters like medical care delivery and recreation and visiting procedures, a "walk through" of the process is invaluable to the expert's (and counsel's) understanding. Moreover, a witness who has seen what he or she is talking about will carry far more weight with the trier of fact.

An effective tour requires preparation. You should find out from the expert what he or she needs to see and make sure that the tour includes those things.[140] If the expert has testified or has made reports in prior cases, you should read these to help you understand what the expert will be looking for.

You must accompany the expert on the tour. You will need to take notes of the expert's comments and of information elicited

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[139] Exceptions may occur in cases where the expert is asked to testify on an extremely narrow point, such as the interpretation of a particular prisoner's medical records or the psychological impact of strip searches.

[140] The best way to do this is to spell out the scope of the tour in a written notice. See Rule 34, F.R.C.P. The notice should specify the purpose of the tour, the areas of the jail to be viewed, the approximate length of the tour, the names of inmates and staff, if known, that the expert may wish to speak with at length, the type of records that the expert may wish to review, and the names and titles of persons who will accompany the expert on the tour.

by the expert from staff and inmates.141/ You should also note your own observations and communications with inmates and staff.

After the tour, you should debrief your expert. You should go through your notes and clear up any factual questions you have. You should have the expert give you an opinion of the relevant conditions, their compatibility with professional standards, and the possible effect on prisoners if the conditions are not remedied. You should also discuss the remedies necessary to bring the facility to an acceptable standard and, if you know of the defenses that will be raised, ask for comments on them. You should not wait for the expert to send you a written report. A post-tour discussion with the expert may help structure any written report so it will be more useful to you. In some cases (e.g., where you do not find the expert's opinion helpful), you may wish to dispense with the written report altogether. (See §VII below concerning discoverability of experts' reports and opinions.)

C. Finding and Selecting Experts.

Before seeking an expert, you must make at least a preliminary identification of the issues in the lawsuit for which

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141/ It is accepted in institutional litigation that experts touring the premises must have substantial freedom to question staff and inmates. New York State Association for Retarded Children v. Carey, 706 F.2d 956, 960-61 (2d Cir. 1983), cert. den. 104 S.Ct. 277 (1983). Testimony based on such questioning is discussed in Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979); Garrity v. Thomson, 81 F.R.D. 633 (D. N.H. 1979); Lightfoot v. Walker, 486 F.Supp. 504, 507 (S.D. Ill. 1980); Battle v. Anderson, 447 F.Supp. 516, 524 (E.D. Okla. 1977).

expert testimony or advice will be necessary. This judgement will probably be subject to revision as the litigation progresses.

The next step is to obtain the names of possible experts. This information can be obtained from national organizations, both legal[142/] and professional, attorneys who have previously litigated jail or prison cases, and judicial opinions recounting relevant testimony. For technical subjects like fire safety, sanitation, pest control, etc., you may be able to obtain from state or local regulatory agencies the names of retired or other former employees with expertise. Academics may also be useful in subject areas which are highly technical (e.g., noise measurement) or in which they have actually conducted research in prison environments (e.g., the causes of violence or the effects of overcrowding). Whenever you learn of a possible expert, you should seek whatever documentary material is available -- resume, reports, prior testimony, publications -- to determine whether the person in question has the background and approach needed in your case. If the expert has testified before, you should find out from the attorneys involved what that person was like to work with, what his or her presence on the witness stand was like, how the expert reacts to questioning and cross-examination, and what

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142/ E.g., the National Jail Project of the American Civil Liberties Union, see note 1 above, maintains lists of such experts with their credentials, prior depositions or testimony, publications and lawyers who have used their services. The National Coalition on Jail Reform, 1828 L St., N.W., Suite 1200, Washington, D.C. 20036, also maintains such lists.

other strengths and weaknesses the expert may have.

There are many considerations that may influence the selection of an expert witness. Expense is obviously important. So is national reputation, but it may cut different ways; a nationally known expert may have less time and attention to give to your case and may appear poorly informed as to the facts of the particular jail. You should consider whether the judge you are before is more likely to be impressed by local or by out-of-town witnesses. You should consider whether a local witness has connections with the defendants or with the local political structure that will cause him or her to be reluctant to criticize or to weigh local fiscal concerns too heavily. You should try to engineer a precise fit between the qualifications of the expert and the testimony that is to be given. For example, a former line correctional officer with some administrative experience may be more convincing on the subject of strip search procedures or the proper limits on the use of force than a former Commissioner of Corrections with no experience actually working in a facility. With respect to medical, dental and mental health care and food services, you should understand that their organization and delivery in prisons and jails is by now a separate field of specialization, and you should seek experts with some corrections background to testify as to defects in a jail's system. For narrower purposes, however -- analysis of particular individuals' medical records, say, or the nutritional adequacy of menus or the cleanliness of the kitchen -- a local expert with no jail or prison experience may be satisfactory (and cheaper). Sometimes

the most effective approach will be to use a combination of experts -- e.g., a prison health administrator to explain why a jail's medical system is inadequate, and a local physician to show that the actual care delivered to particular inmates is inadequate.

SECTION V. DRAFTING THE COMPLAINT.

Federal courts adhere to the philosophy of "notice pleading" under which the primary purpose of the complaint is to provide notice of the factual basis of the claim without regard to technical pleading rules.[143]

A federal complaint should also contain "a short and plain statement of the grounds upon which the court's jurisdiction depends,"[144] which will include 28 U.S.C. §§1331(a) and 1343(3) in almost all cases, plus the court's pendent jurisdiction where state law claims are raised. (See §II.A.2. above concerning pendent jurisdiction.)

The complaint should list and identify the parties both in the caption and in the body. In the body of the complaint, you should spell out the relationships between the parties, noting whether a party is an agent of employee of another party of a federal, state or local government agency. Plaintiffs should be identified as pre-trial detainees or as convicted misdemeanants or felons. In a §1983 action you must allege that the defendants act or acted "under color of state law".[145] This is rarely a serious issue in jail cases, and it is sufficient to state each

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[143] Rule 8(e)(1), F.R.C.P. This pleading philosophy is increasingly prevalent in state courts as well. Be sure you know the difference, if any, between federal and state pleading requirements before you file. The National Jail Project will provide samples of acceptable complaints in jail cases.

[144] Rule 8(a), F.R.C.P.

[145] Monroe v. Pape, 363 U.S. 167, 184 (1961).

defendant's official position and allege that all of them act under color of state law. The caption should also note that the defendants are sued in their "individual and official capacities." (See §II.C.3. above for a discussion of these concepts.) Individuals whose identity you have not been able to determine may be named as "John Doe" defendants and their names substituted when they are learned during discovery.146/

If the case is to be brought as a class action, the complaint should allege the facts required to support class certification (see §VI.B. below) and the complaint should probably be labelled "Class Action" on the front page. Many district courts have specific requirements in this regard in their local rules.

For purposes of clarity, it is useful to organize the factual allegations into "claims" containing all allegations related to a particular subject (e.g., medical care, physical condition of the premises, etc). For each claim, there should be one or more summary paragraphs stating what provision of law is violated by the facts alleged in the claim: for example, "The actions of the defendants described in paragraphs 3-24 denied the plaintiff the due process of law. U.S. Const., Amend. XIV." These summary paragraphs can appear at the end of each claim or can be collected after all the claims. There should be a separate summary paragraph for each legal theory, including pendent state

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146/ See McCurry v. Allen, 688 F.2d 581, 584-85 (8th Cir. 1982); Wood v. Woracheck, 618 F.2d 1225, 1229-30 (7th Cir. 1980); Gillespie v. Civiletti, 629 F.2d 637 (9th Cir. 1980); Davis v. Krauss, 93 F.R.D. 580 (E.D. N.Y 1982); Campbell v. Bergeron, 486 F.Supp. 1246 (M.D. La. 1980).

law theories, on which counsel plans to rely. This organization can be immensely helpful to the court in understanding the gravamen of a multi-issue lawsuit; it can also be extremely valuable to counsel in clarifying positions which may not have been fully thought through.

A federal complaint should also contain "a demand for judgment for the relief" which counsel seeks.147/ Relief may be sought in the alternative. It is not necessary to be very specific as to the relief sought; a request that the court "order the defendants to provide adequate medical care to the plaintiffs" (or adequate recreation, or humane living accommodations, etc.) will suffice.148/

It is rare for a jail case to be litigated on a single complaint. Changes in the facts, or changes in counsel's understanding, generally require the filing of an amended or supplemental complaint. In federal court, a complaint can be amended once as a matter of right before an answer is filed; subsequent amendments must be sought by motion and are required to be "freely granted."149/ When counsel comes into a case that

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147/ Rule 8(a), F.R.C.P.

148/ If you are too specific in the complaint about the nature of the relief sought, you may get bogged down in a dispute about the propriety of particular relief at an inappropriately early stage, e.g., on a motion to dismiss before there is time for substantial discovery. Moreover, remedial choices should be made only after you are sure what the problems are and understand the physical and administrative structures into which they must fit. In the course of a multi-isssue jail lawsuit, your views as to remedies may change more than once.

149/ Foman v. Davis, 371 U.S. 178, 182-83 (1962). See Rule 15, F.R.C.P.

has been brought pro se, it is almost always necessary to amend the complaint; usually, some addition of parties defendant is necessary.

SECTION VI. CLASS ACTIONS

Class certification is far more important in jail reform cases than in other civil rights litigation. Because confinement in jails is normally short and often unpredictable in length, without class certification most injunctive cases will be mooted before decision. Also, class certification notice procedures are vital to counsel's ability to maintain contact with a high-turnover jail population. Thus, the ultimate success of the lawsuit may depend on the successful pursuit of class certification.

A. Preparation for Filing.

Generally, to avoid mootness, the named plaintiff or plaintiffs in a putative class action must be members of the class at the time the class is certified.150/ In pre-trial detention cases, this requirement is relaxed to permit certification if the named plaintiffs were members of the class when the complaint was filed.151/ This places the burden on plaintiffs' counsel at a minimum to get a complaint drafted and filed while the named plaintiffs are still in the jail. Sometimes the best way to accomplish this is to obtain a large number of named plaintiffs so the release of a few will not

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150/ Sosna v. Iowa, 419 U.S. 393, 402 (1975).

151/ Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); Ahrens v. Thomas, 570 F.2d 286, 288 (8th Cir. 1978); Inmates of San Diego County Jail v. Duffy, 528 F.2d 954, 956 (9th Cir. 1975). But see Inmates of Lincoln Intake and Detention Facility v. Boosalis, 705 F.2d 1021 (8th Cir. 1983) (burden on plaintiffs to prove that case could not reasonably have been certified before mootness of individual claims).

matter. Alternatively, counsel can file with a few plaintiffs and be prepared to file motions to intervene new ones as necessary. Counsel should not rely on sentence lengths or court schedules that seem to suggest that particular inmates will have long stays. Jail officials may have named plaintiffs released or transferred for the precise purpose of mooting the case.

Counsel should also be prepared to move for class certification as quickly as is consistent with adequate factual preparation.[152] The class allegations in the complaint and in the certification motion should be as factually specific as possible. The burden is on the party seeking certification to show that the requirements for certification have been met.[153] In some cases, discovery will be required to establish the facts; if not, the certification motion should be filed with or immediately after filing the complaint.

Courts usually determine class motions on papers, but some have a preference for a hearing, and if there are factual disputes counsel should probably seek a hearing.[154]

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[152] Rule 23(c), F.R.C.P., prescribes that the class certification decision shall be made "[a]s soon as practicable after the commencement of an action...." Some district courts have promulgated fixed time limits for class certification motions in their local rules. Untimeliness of a class certification motion is not by itself grounds for refusing certification. Pabon v. McIntosh, 546 F.Supp. 1328, 1331-32 (E.D. Pa. 1982); see also Cruz v. Hauck, 627 F.2d 710, 716 (5th Cir. 1980).

[153] Zeidman v. J. Ray McDermott & Co., Inc., 651 F.2d 1030, 1038 (5th Cir. 1981); 3B Moore's Federal Practice ¶ 23.020-2.

[154] The trial court's failure to hold a hearing in the face of an inadequate record to determine whether the class should be certified may be an abuse of discretion. Jones v. Diamond, 519 F.2d 1090, 1098 (5th Cir. 1975); Mead v. Parker, 464 F.2d 1108, 1112 (9th Cir. 1972).

B. Requirements for Certification.

There are five requirements for certification as a federal class action seeking injunctive or declaratory relief, set out in Rules 23(a) and (b)(2), F.R.C.P.:155/

(1) The class must be so numerous that joinder of all members is impracticable;

(2) There must be questions of law or fact common to the class;

(3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class;

(4) the representative parties must fairly and adequately protect the interests of the class;

155/ Declaratory and injunctive jail reform cases may also satisfy the requirements of Rule 23(b)(1), which refers to cases in which the prosecution of individual lawsuits would risk

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests....

However, since Rule 23(b)(2) is most clearly applicable to the cases under discussion, and there are no practical advantages to certification under Rule 23(b)(1), we will not discuss the latter rule.

Class damage claims must be certified under the more stringent standard of Rule 23(b)(3), which requires that common questions of law or fact "predominate" over individual questions and that the court find a class action superior to other available methods of adjudication. (See §II.B.2. below for further comment on class damage actions.)

(5) the party opposing the class must have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

These five requirements will be discussed in turn.

1. Numerosity and Impracticability of Joinder. Often there will be public documents available showing average daily population and highest daily population totals. If the exact population is not known, a class may be certified based on a reasonable approximation supported by facts.[156/] Thus, if you know the number of cells in the jail and that most them hold two inmates, you can provide such an approximation. In a small jail, an affidavit from one or more of the inmates may suffice. If necessary, defendants can be asked this information in interrogatories or a request for admissions can be filed.

As a practical matter, jails with average daily populations of 40 or more will generally meet the numerosity requirement

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156/ Sims v. Parke Davis & Co., 334 F.Sup. 774 (E.D. Mich. 1971), aff'd., 453 F.2d 1259 (6th Cir. 1971), cert. den., 405 U.S. 978 (1972).

without serious question.157/ Even in smaller jails, class certification should be pursued because of mootness problems in the absence of a class action. The argument should be made that size is but one factor in determining whether joinder is impracticable. In jail litigation, by its nature, the putative class is fluid, rather than fixed at the beginning of the lawsuit. While there may be very few class members at any given time, the changing membership of the class makes joinder impracticable.158/ It may be helpful in this respect to determine or estimate for the court the total number of inmates who pass through the jail in the course of a year.

157/ See Nadeau v. Helgemoe, 423 F.Supp. 1250, 1254 (D. N.H. 1976) (class of 35 prisoners); Cudnik v. Kreiger, 392 F.Supp. 305, 310 (N.D. Ohio 1974) (class of 35 jail inmates); United States ex rel. Walker v. Mancusi, 338 F.Supp. 311, 316 (W.D. N.Y 1971), aff'd, 467 F.2d 51 (2d Cir. 1972) (class of 38 prisoners); Adderly v. Wainwright, 46 F.R.D. 97, 98 (M.D. Fla. 1968) (class of 50 prisoners). See also Ballard v. Blue Shield of Southern West Virginia, Inc., 543 F.2d 1075, 1080 (4th Cir. 1976), cert. den., 430 U.S. 922 (1977) (class of 45); Cortright v. Resor, 325 F.Supp. 797, 807 (E.D. N.Y. 1971), rev'd on other grds., 447 F.2d 245 (2d Cir. 1971) (class of 56).

158/ For representative cases discussing the appropriateness of certifying a fluctuating class in the context of litigation against institutions, see Green v. Johnson, 513 F.Supp. 965 (D.C. Mass. 1981); Glover v. Johnson, 85 F.R.D. 1 (E.D. Mich. 1977); Jones v. Wittenberg, 323 F.Supp. 93 (N.D. Ohio 1971) aff'd sub nom. Jones v. Metzger, 456 F.2d 1654 (6th Cir. 1974); Santiago v. City of Philadelphia, 72 F.R.D. 619 (E.D. Pa. 1976). See also Leeds v. Watson, 630 F.2d 674 (9th Cir. 1980) (jail class is certified without discussion in cases involving an injunction that limited population to 14 with certain exceptions); Nicholson v. Choctaw Co., Ala., 498 F.Supp. 295 (S.D. Ala. 1980) (class certified without discussion of numerosity where current daily population was approximately 11 or 12).

The fact that many class members are poorly educated or have little access to attorneys -- which is certainly true in most jail cases -- also makes joinder of individuals impracticable and supports class certification.159/

2. Commonality. Ordinarily, in a challenge to the totality of conditions at a jail, or in a challenge to one or more policies affecting all inmates, there is little difficulty demonstrating the existence of common factual or legal questions.160/ The latter may be written policies or unwritten practices regarding exercise, disciplinary procedures, or visiting, or pervasive conditions such as physical dilapidation or unsanitary food preparation. If immediate certification is sought, the named plaintiffs may file affidavits indicating that they are in a position to observe the situations of other inmates, and these inmates suffer from the same conditions that the named plaintiffs raise in the lawsuit. Alternatively, the uniformity of policies or conditions can be established through discovery.

Courts have generally interpreted the commonality requirement permissively and have emphasized that not all questions of law or

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159/ United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1126 (2d Cir. 1974).

160/ While virtually all major prison and jail cases have been litigated as class actions, frequently the commonality requirement has provoked little discussion. For prison and jail cases explicitly discussing it, see Martarella v. Kelley, 349 F.Supp. 575 (S.D. N.Y. 1972); Holland v. Steele, 92 F.R.D. 58 (N.D. Ga. 1981); Glover v. Johnson, 85 F.R.D. 1 (E.D. Mich. 1977); Inmates of Lycoming County Prison v. Strode, 79 F.R.D. 228 (M.D. Pa. 1978).

fact raised in the case must be common.[161] If one or more common issues exist, other factual variations among individuals will not defeat class certification.[162] Even a difference in applicable legal standards -- for example, between pre-trial detainees and sentenced inmates -- goes only to the relief that might be granted to different subclasses and not to the commonality of factual issues at the point of certification.[163]

Two major cases point in opposite directions on the feasibility of certifying statewide classes of plaintiffs or defendants in jail conditions cases.[164] Certification of a state-wide class of jail prisoners has been granted in cases

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[161] Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982); McCoy v. Ithaca Housing Authority, 559 F.Supp. 1351, 1355 (N.D. N.Y. 1983); In re Federal Skywalk Cases, 93 F.R.D. 415, 421 (W.D. Mo. 1982). See Wright & Miller, 7 Federal Practice and Procedure §1763 (1972).

[162] Like v. Carter, 448 F.2d 798, 802 (8th Cir. 1971); Escalera v. New York City Housing Authority, 425 F.2d 853, 867 (2d Cir. 1970).

[163] See Holland v. Steele, 92 F.R.D. 58 (N.D. Ga. 1981).

[164] Compare Marcera v. Chinlund, 565 F.2d 253 (2d Cir. 1977), subsequent opinion, 595 F.2d 1231, 1237-1240 (2d Cir. 1979), vac. sub nom. Lombard v. Marcera, 442 U.S. 915, (1979), opinion on remand, 91 F.R.D. 579 (W.D. N.Y. 1981), with Stewart v. Winter, 669 F.2d 329 (5th Cir. 1982).

where the plaintiffs charged that the responsible state agency had failed to perform its statutorily mandated role in supervising local jails.[165]

3. Typicality. Typicality is hard to distinguish from commonality, and it has been argued that the typicality requirement simply duplicates other requirements for certification.[166] Again, the named plaintiffs may file affidavits describing their particular situation, such as a denial of medical treatment, and indicate that they have observed other inmates with similar complaints regarding the conditions or practices.

The requirements of Rule 23(a)(3) are met if the claims of the class representatives are based on the same legal or remedial theory as the claims of the class members.[167] This is obviously the case when institutional conditions are challenged.

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[165] Arias v. Wainwright, TCA 79-792 (N.D. Fl. 3/10/81) (certification of class which includes all persons who now or in the future will be confined in Florida jails); Bush v. Viterna, #A-80-CA-411 (W.D. Tex. 12/1/82) (class certification order similar to Arias). See also, note 109 above for examples of such statutorily mandated state supervision of jails.

[166] 3B Moore's Federal Practice ¶ 23.06-2 (1982).

[167] Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1189 (10th Cir. 1976); 7 Wright & Miller, Federal Practice and Procedure §1764 (1972).

Accordingly, differences in the factual details of the situations of the named plaintiffs and other members of the class will not defeat class status.168/

Sometimes certification is opposed on the ground that the named representatives have not personally experienced the harm that the litigation challenges. Where pervasive conditions are alleged, but the named plaintiffs have not yet suffered concrete injury from them, the Fourth Circuit has treated the question as one of standing; however, its reasoning could equally support a finding of typicality of the claims:

> It is true that plaintiff has not alleged that brutality or other misconduct has been practiced on him, but he has, in effect, alleged that he is part of an institutional population which must live from day to day under the constant threat of brutality and misconduct. It would seem, therefore, that plaintiff is "injured," is a member of a class that is "injured" and is thus competent to maintain a class action for himself and others similarly situated.169/

The same rule should apply to issues such as inadequate medical care when plaintiffs allege that systemic inadequacies pose a potential threat to every member of the class.170/

168/ See Newberg, Class Actions §1115c (1977). See also Stewart v. Winter, 669 F.2d 329, 333-34 (5th Cir. 1982) (differences in length of stay should not defeat certification).

169/ Hayes v. Secretary of Dept. of Public Safety, 455 F.2d 798, 801 (4th Cir. 1972).

170/ See, e.g., Bishop v. Stoneman, 508 F.2d 1224 (2d Cir. 1974); Smith v. Sullivan, 553 F.2d 373 (5th Cir. 1977); Allegheny County Jail Inmates v. Pierce, 612 F.2d 754 (3d Cir. 1979); Martino v. Carey, 563 F.Supp. 984 (D. Ore. 1983).

A slightly different problem is presented when the jail contains separate populations whose conditions of confinement are not identical or identifiable subgroups who should be separated or who have special needs. If the jail contains detainees and sentenced inmates, males and females, juveniles and adults, you should attempt to have named representatives from each group, whether your claim is that their separate treatment violates the law or that they must be segregated within the jail. If you allege a lack of specialized treatment for particular types of inmates -- e.g., the mentally ill, or those in need of protective custody -- representatives of these groups should be included among the named plaintiffs if possible. In some cases it may not be practicable to join individuals in all these categories initially; the alternative is to add them later by a motion to intervene.[171]

4. Adequate Representation. The adequacy of the named plaintiffs' representation of the interests of the class is determined by two factors: (1) the plaintiffs' attorneys must be qualified, experienced, and generally able to conduct the proposed litigation, and (2) the plaintiff must not have interests antagonistic to those of unnamed class members.[172]

Because the named plaintiffs will usually have been released from jail long before trial, it is beside the point to be greatly

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[171] See Rule 24, F.R.C.P.

[172] Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir. 1975), cited with approval in 3B Moore's Federal Practice ¶23.07[1] (1982).

concerned with how vigorously the named plaintiffs, as distinct from their lawyers, will prosecute the case. Indeed, in one pre-trial detention case, the Supreme Court acknowledged that the named plaintiffs' role was largely formal in nature; the Court upheld class certification in the face of the probable mootness of the named plaintiffs' claims and pointed to the institutional interest of the plaintiffs' counsel, a public defender, in pursuing the claims of the class.[173/] Nonetheless, counsel should include in the certification motion affidavits by the named parties attesting the lack of any interest antagonistic to that of other class members. Since improvements in jail conditions will hardly be harmful to jail inmates, this will rarely be a controversial point.[174/]

The real focus of the plaintiffs' submission as to this requirement should be on the adequacy of counsel to press plaintiffs' claims. Because of counsel's enhanced responsibilities in jail litigation for substantive decisions as well as technical expertise, it is particularly appropriate to inquire into the competence, experience, vigor, and integrity of

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173/ Gerstein v. Pugh, 420 U.S. 103, 111, n.11 (1975).

174/ Although a number of court decisions speak of a requirement that the interests of the named plaintiffs be coextensive with those of other members of the class, this is essentially but a restatement of the rule that the claims of the representative party must be typical, and the requirement of adequate representation should not be read to impose a higher standard than that imposed under the typicality requirement. See 3B Moore's Federal Practice ¶ 23.07[2] (1982); 7 Wright & Miller, Federal Practice and Procedure §1769 (1972).

counsel. Although courts tend to review counsel's competence in a relatively pro forma manner, counsel should place in the record relevant information regarding experience in federal litigation, in particular civil rights litigation, and in class action and other complex litigation. This can be done by affidavit.

The second aspect of the adequacy of counsel is the adequacy of the provisions for the costs of litigation made by plaintiffs. In jail litigation, as a practical matter, this generally means the ability of counsel, or an organization, to advance the costs of litigation. Accordingly, the plaintiffs' submissions to the court should allow the court to conclude that reasonable provision for the anticipated costs of the action has been made.[175/]

5. Injunctive Relief. The last requirement for a Rule 23(b)(2) class action should be satisfied by a prayer for final declaratory or injunctive relief in the complaint. Since this is a legal rather than factual requirement, no factual submission as to this criterion should be necessary.

The fact that individual damage claims are attached to an action will generally not defeat certification under Rule 23(b)(2) so long as the action remains primarily directed toward

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175/ Plaintiffs should, however, resist free-wheeling, harassing discovery into the financial resources of the lawyers or their clients. See cases cited in 3B Moore's Federal Practice ¶23.07[1-.1], n.10 (1982).

injunctive relief.[176] If damages are sought for the class as a whole, certification should probably be sought under Rule 23(b)(3). (See §II.B.2. above for additional discussion of class damages.)

C. The "Lack of Necessity" Argument.

Even when the requirements of Rule 23 are met, class certification is sometimes opposed and denied on the ground that it is "unnecessary" because "it may be assumed that the defendants, as government officials, will respect the judgement of the court and the invalidated policy will not be applied to all others similarly situated as the plaintiff."[177] This argument is badly flawed as applied to jail conditions cases, whatever its merits in other contexts. The following points should be made in response to it.[178]

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[176] See 3B Moore's Federal Practice ¶23.40[4](1982); 7A Wright & Miller, Federal Practice and Procedure §1775 (1972). Some courts have certified a class under Rule 23(b)(2) even though some monetary relief is requestd if the primary relief sought is injunctive or declaratory, and the monetary relief is either incidental or equitable in nature. Marshall v. Kirkland, 602 F.2d 1282 (8th Cir. 1979); Elliot v. Weinberger, 564 F.2d 1219 (9th Cir. 1977); Lo Re v. Chase Manhattan Corp.,431 F.Supp. 189 (S.D. N.Y. 1977).

[177] Ruiz v. Blum, 549 F.Supp. 871, 878 (S.D. N.Y. 1982). Accord, Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1972), cert. den., 417 U.S. 936 (1974).

[178] Some federal courts have simply rejected the notion that lack of "need" can justify the denial of class certification when the requirements of Rule 23 are met. Vergara v. Hampton, 581 F.2d 1281, 1284 (7th Cir. 1978), cert. den., 447 U.S. 905 (1980); Geraghty v. United States Parole Commission, 579 F.2d 238, 252 (3d Cir. 1978), vac. and remanded on other grds., 445 U.S. 388 (1980); Johnson v. State of Mississippi, 78 F.R.D. 37 (N.D. Miss. 1977), remanded, 586 F.2d 387 (5th Cir. 1978); Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307 (S.D. Oh. 1976).