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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

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]

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]

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

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

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

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 ___, #82-6679 (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

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

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.

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

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

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 personnel112/ 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 perjury116/ 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,

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

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.

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

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 legal142/ 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

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]

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

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.

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/

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).

1. Absent class certification, there is a great likelihood that the individuals' claims will be mooted before judgement. (See §VI.A. above.) This danger is increased in jail cases both by the temporariness of the plaintiffs' status and by the relative complexity of the cases, both as to liability and as to remedy. It takes longer to take a jail conditions case to judgement than it does a challenge to a welfare regulation. By contrast, cases finding class certification unnecessary generally involve the legality vel non of a statute, regulation, or clearly defined administrative policy.179/ Moreover, the danger of mootness persists even after a judgement on the merits, since in a challenge to "a series of conditions in the jail...obedience of [the] court's order with respect to future detainees would not be as automatic or as simple as the non-enforcement of a statute."180/ Jail litigation is notoriously productive of post-judgement controversies (see §X. below), and absent class certification there may be no party entitled to enforce or defend any relief that is ordered.181/

179/ Mitchell v. Johnston, 701 F.2d 337, 345 (5th Cir. 1983); Hurley v. Ward, 584 F.2d 609, 611-612 (2d Cir. 1978); Ruiz v. Blum, note 177 above.

180/ Lucas v. Wasser, 73 F.R.D. 361, 363 (S.D. N.Y. 1976).

181/ Lasky v. Quinlan, 558 F.2d 1133, 1137 (2d Cir. 1977).

2. To the extent that the "lack of necessity" argument is based on a presumption of official regularity,182/ that presumption is misplaced in jail and prison litigation. The cases are legion in which correctional officials have been found not to have complied with prior court decisions.183/ This general argument should be supported by any readily available and incontrovertible proof that the particular defendants opposing certification are in plain violation of applicable case law, statutes, or regulations.

3. The scope of available relief may be drastically reduced by the denial of class certification, either because a record restricted to the named plaintffs' claims does not support broad relief184/ or because relief that is de facto class-wide

182/ Numerous "lack of necessity" decisions are also based on an affirmative representation by the defendants that they will extend the benefits of an adverse decision to all members of the putative class. See Mitchell v. Johnston, note 179 above, at 345; McCoy v. Ithaca Housing Authority, 559 F.Supp. 1351, 1354 (N.D. N.Y. 1983) and cases cited.

183/ See, e.g., Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98 (1st Cir. 1978); Inmates of Allegheny Co. Jail v. Wecht, 565 F.Supp. 1278 (W.D. Pa. 1983); Mobile County Jail Imates v. Purvis, 551 F.Supp. 92 (S.D. Ala. 1982); Miller v. Carson, 550 F.Supp. 543 (M.D. Fla. 1982); 524 F.Supp. 1174 (1981), and 515 F.Supp. 1375 (1981); Benjamin v. Malcolm, 528 F.Supp. 924 (S.D. N.Y. 1981) and 495 F.Supp. 1357 (1980); Jones v. Wittenberg, 509 F.Supp. 653 (N.D. Ohio 1980); Powell v. Ward, 487 F.Supp. 917 (S.D. N.Y. 1980); Jordan v. Arnold, 472 F.Supp. 265 (M.D. Pa. 1979); Palmigiano v. Garrahy, 448 F.Supp. 659 (D. R.I. 1978); Hamilton v. Love, 358 F.Supp. 338 (E.D. Ark. 1973); McGoff v. Rapone, 78 F.R.D. 8 (E.D. Pa. 1978).

184/ See, e.g., Hurley v. Ward, 549 F.Supp. 174 (S.D. N.Y. 1982).

may violate due process if imposed without the notice procedures required in class actions.185/

4. The absence of notice to the class (see §VI.E. below) may prejudice counsel's ability to prepare a factual case. The fact of incarceration is a substantial barrier to the search for witnesses and information; the distribution of class notice informs potential witnesses of the lawsuit's pendency and counsel's identity so they may come forward. In a case where the credibility of witnesses and the pervasiveness of conditions are at issue, counsel's access to a wide range of testimony is essential.186/

D. If Certification Is Denied.

In some jail cases, district judges have denied or have failed to decide motions for class certification. Since class certification motions are not appealable until final judgement even if they amount to the "death knell" of the litigation,187/ unless you can persuade a court to certify the question for

185/ Simer v. Rios, 661 F.2d 655 (7th Cir. 1981), cert. den., 102 S.Ct. 1773 (1982).

186/ Cf. Mitchell v. Johnston, note 179 above, at 345 (where notice was an essential part of relief, class certification necessary).

187/ Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). See also Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 481 (1978) (denial of class certification which "limits the scope of the relief that may ultimately be granted" is not appealable under 28 U.S.C. §1292(a)(1) as an order refusing an injunction).

appeal,188/ creative lawyering is required to protect your clients' interests. Our suggestions are as follows.

In every case, if the court cites any factual deficiency in your motion as a ground for denial, cure the defect if possible and renew the motion. The rules explicitly contemplate that class certification decisions "may be altered or amended before the decision on the merits"189/ "if, upon fuller development of the facts, the original determination appears unsound."190/

If this tactic is not available or does not work, counsel has two broad strategic options: try to deal with the problem at the trial court level or try to get before an appellate court as quickly as possible. This choice is constrained by the nature of the named plaintiffs' claims.

If the named plaintiffs' claims are quickly mooted, counsel can inform the court of this fact or enter into a stipulation of mootness with defense counsel. This will permit an appeal of the class certification decision.191/ If counsel deems it preferable to remain in the district court in this situation, it will be necessary to conduct a "relay race" of motions to intervene new

188/ 28 U.S.C. §1292(b). See Coopers & Lybrand v. Livesay, note 187 above, at 475, n.27.

189/ Rule 23(c)(1), F.R.C.P.

190/ Rule 23(c)(1), F.R.C.P., Supplementary Note of Advisory Committee regarding this rule.

191/ United States Parole Commission v. Geraghty, 445 U.S. 388, 404 (1980).

plaintiffs.192/ While there is no theoretical barrier to proceeding this way, in practice it is likely to be complicated, expensive and time-consuming.

If mootness is not an immediate problem, because of the named plaintiffs' prospects of longer confinement or because there are damage claims still pending, the option in the district court is to attempt to litigate the case as if the class had been certified and to renew the class motion repeatedly based on any resulting problems such as defendants' refusal to comply with broad discovery demands or counsel's lack of sufficient inmate contact because of the failure to post notice of the lawsuit. The object of this procedure is to demonstrate that class certification is, indeed, "necessary" if counsel is to pursue the relief sought in the complaint. To get to an appellate court, file a motion for a preliminary injunction on some severable aspect of the case that can be quickly prepared, and if the injunction is denied, you may appeal the denial as of right 193/ and may also request the court of appeals to consider the class certification question under its discretionary pendent jurisdiction.194/

Which of these strategies to adopt should depend in large measure on exactly what the problem is in the district court.

192/ See Cruz v. Hauck, 627 F.2d 710, 718-19 (5th Cir. 1980).

193/ 28 U.S.C. §1292(a)(1).

194/ Marcera v. Chinlund, 595 F.2d 1231, 1236 n.8 (2d Cir. 1979); Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 538 F.2d 164, 166 n.2 (7th Cir. 1976).

There are a few judges who are implacably hostile to class actions or to their use by prisoners. If you are before one of these judges, further education or cajolery in the district court is probably a waste of time. Moreover, you are more likely to convince an apellate court to find an abuse of discretion[195] if the trial judge is someone with a well-known bias. You should therefore research the district judge's prior record of class certification decisions and the court of appeals' treatment of that judge's decisions before deciding on a strategy.

E. Notice.

Notice to the class of the pendency of a class action is required only in actions certified under Rule 23(b)(3), the provision most frequently used for class damage claims.[196] However, the district court has discretion to order notice and to prescribe the form and manner of the notice in all class actions.[197] Counsel should without fail request that notice be given to the class. The best time and place to make this request is in the motion for class certification.

195/ Class certification decisions are generally reviewed under the "abuse of discretion" standard. Califano v. Yamasaki, 442 U.S. 682, 703 (1979).

196/ Rule 23(c)(2), F.R.C.P.

197/ Rule 23(d)(2), F.R.C.P.; Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 812 (5th Cir. 1982); E.E.O.C. v. General Telephone Co. of Northwest, 599 F.2d 322, 333 (9th Cir. 1979), aff'd, 446 U.S. 318 (1980). See 7A Wright & Miller, Federal Practice & Procedure §1786 (1972).

Notice to the class serves the basic principle of fairness that people should know about things that may affect their interests. More important to counsel, notice is an essential tool for effective litigation. Notice ensures that every member of the class has the opportunity to receive accurate information about the lawsuit and about the means of contacting plaintiffs' attorneys. The contacts with the inmate population that an adequate notice procedure will generate should provide a broad enough base of information so that counsel will learn of the full range of legal claims that should be pressed on behalf of the class, have access to a sufficient amount of eyewitness evidence to prove those claims, and be able to form an accurate impression of life inside the jail so as to judge the credibility of witnesses who come forward. Moreover, notice -- a procedure which the court directs the defendants to perform or permit -- shows the inmate population at an early stage in the lawsuit that the jail staff is not all-powerful even inside the jail. This is an important message to be conveyed to the staff as well as to the inmates.

Notice can take various forms. In a closed institution, a basic form of notice which should be sought in all cases is posting in common areas such as day rooms, bathrooms, mess halls, etc., where all inmates will have an opportunity to see it. Notices should remain posted through the pendency of the lawsuit, and continued posting should be verified by asking clients if the notices are still up and by looking for them on tours or visits to the jail. Counsel may also request that each inmate be given a copy of the notice individually at the beginning of the case, and even that each inmate entering the facility be given a notice

upon arrival. In a jail, it is practical for such mass notice to be given out by institutional staff, saving the enormous postage costs that accrue from personal notice in other kinds of litigation.

An effective notice should be simply written so that inmates with little education can understand it. It should contain the name of the case, the name of the court and the judge before whom the case is pending, a simple statement of who the class members are and what the complaint alleges, an explanation of the relief sought and of the right to intervene personally in the action, and the names and addresses of counsel. If plaintiffs are seeking only declaratory and injunctive relief, the notice should make it clear that damages are not being sought, so as to avoid the possibility of barring class members' damage claims through the operation of res judicata.198/

198/ Res judicata and collateral estoppel questions arising from class actions are too esoteric for extended discussion here. However, several well-reasoned opinions suggest that, at a minimum, if the class notice says that particular claims or issues will not be litigated, the class action judgement will not preclude them. Crowder v. Lash, 687 F.2d 996, 1008 (7th Cir. 1982); Bogard v. Cook, 586 F.2d 399, 408-09 (5th Cir. 1978). See also Jones-Bey v. Caso, 535 F.2d 1360 (2d Cir. 1976). But see Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979); International Prisoners' Union v. Rizzo, 356 F.Supp. 806 (E.D. Pa. 1973). On the other hand, it is possible that a class action victory may collaterally estop the defendants in a subsequent action by an individual class member. Bogard v. Cook, 586 F.2d at 409; Williams v. Bennett, 689 F.2d 1370, 1381-82 (11th Cir. 1982) cert. den. sub nom. Bennett v. Williams, 104 S.Ct. 335 (1983). See generally Bodensteiner, "Application of Preclusion Principles to Section 1983 Damage Actions after a Successful Class Action for Equitable Relief," 16 Clearinghouse Review 977 (March 1983).

The court has discretion under Rule 23(d) to issue appropriate orders, including further notice orders, for the conduct of litigation. Counsel might, for example, seek an order that the jail post notice that counsel will be present at a designated time to interview class members who so request.

Counsel may also wish to provide notice directly to class members of important events in the litigation without applying to the court. Ideally, counsel should be able to deliver copies of a notice to the jail for distribution. If defendants are not cooperative, counsel may have to resort to the mail. A current list of jail inmates should be obtainable through discovery for addressing purposes. Courts have been firm in protecting this type of communication.199/

F. Settlement or Dismissal.

Rule 23(e) provides, "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This requirement, an incident of the court's obligation to protect the interests of absent class members, may apply to lawsuits

199/ For a discussion of the appropriateness of such communications and the narrow limits within which a court can restrict them, see Gulf Oil v. Bernard, 452 U.S. 89, (1981). See also Williams v. United States District Court, 658 F.2d 430 (6th Cir. 1981); Coles v. Marsh, 560 F.2d 186 (3d Cir. 1977); Peoples v. Wainwright, 325 F.Supp. 402 (M.D. Fla. 1971)

containing class allegations even if the class has not actually been certified when the named parties attempt to end the litigation.200/

The proponents of a settlement are required to persuade the court that a settlement is fair, reasonable, and adequate.201/ In making this determination, the court must consider such factors as the strength of the plaintiffs' case weighed against the proffered relief; the possibility of collusion in reaching a settlement; the reaction of class members; the opinion of competent counsel; and the stage of the proceedings and the amount of discovery completed.202/ However, the approval of a settlement should not become the trial on the merits that settlement is intended to avoid.203/

Notice of settlement can be given in the same way as notice of the pendency of an action. However, it is preferable, if the

200/ Simer v. Rios, 661 F.2d 655, 664-65 (7th Cir. 1981); 3B Moore's Federal Practice ¶ 23.50 (1982).

201/ Holmes v. Continental Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983); Malchman v. Davis, 706 F.2d 426, 433 (2d Cir. 1983); Costello v. Wainwright, 489 F.Supp. 1100, 1101 (M.D. Fla. 1980).

202/ Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983); 3B Moore's Federal Practice ¶23.80 [4] (1982).

203/ Walsh v. Great Atlantic & Pacific Tea Co., Inc., 96 F.R.D. 632, 642 (D. N.J. 1983).

court can be persuaded, to permit counsel to meet personally with groups of interested inmates.204/ Often, counsel's personal explanation will go further than a written legal document in persuading class members that a proffered settlement is as good as or better than the likely result of a trial on the merits. Moreover, in our experience, counsel will invariably hear something unexpected in these meetings, often something that requires changes in the settlement or other action.

While it may seem strange to talk about further modifications after a settlement has been reached, the period between initial agreement and court approval may be a fruitful period for more negotiations, at least as to issues which are not completely new to the discussions and which would not impose major new problems or costs on the defendants. This is especially true if the support of the court can be enlisted. Judges are displaying an increasing willingness to scrutinize individual provisions of settlements and to demand changes rather than simply to approve or disapprove the settlement as a whole.204a/ At this stage of the litigation, with so much committed to the agreement, defendants are likely to be flexible in order to preserve what has been accomplished.

204/ See Costello v. Wainwright, 489 F.Supp. 1100, 1101 (M.D. Fla. 1980); see also Watson v. Ray, 90 F.R.D. 143 (S.D. Iowa 1981) (judge met with inmate group).

204a/ See, e.g., Reid v. State of New York, 570 F.Supp. 1003 (S.D. N.Y. 1983); Morales v. Turman, 569 F.Supp. 332 (E.D. Tex. 1983); Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983) ("If the court determines that the decree is problematic, it should form the parties of its precise concerns and give them an opportunity to reach a reasonable accommodation.").

SECTION VII. DISCOVERY

Discovery in jail cases often presents special problems because of some jails' unsophisticated administrative practices. In addition, many local government attorneys are unfamiliar with complex federal civil rights litigation and with jail operations; they may also lack the time and support staff to prepare proper and timely answers to comprehensive discovery demands.

For these reasons, the lawyerly impulse to begin discovery by filing interrogatories and requests for documents and to follow up by taking depositions about the responses may be counter-productive. Large-scale discovery requests may go unanswered for long periods or be answered incompletely or erroneously because of the ineptitude, ignorance or recalcitrance of counsel or other persons involved in preparing the answers. Baseless claims of privilege may be raised by lawyers unfamiliar with federal practice or unwilling to do the work involved in answering large-scale discovery demands. While plaintiffs will usually win motions to compel discovery in these situations, discovery disputes may take months to resolve, during which time the case will remain bogged down and counsel's credibility and contacts with the jail population will be eroded.

It is probably better to begin depositions immediately, without waiting for answers to written and documentary discovery. The early depositions should be of persons with broad knowledge and authority within the jail. This tactic may preclude asking the deponents about documents produced later in

the case. However, this may be a small loss if the jail is one where written procedures and record-keeping have not caught on yet. Also, proceeding immediately with depositions has the advantage of providing some useful information at the outset, establishing the lawsuit's presence more firmly in the defendants' minds, and opening valuable face-to-face contact with jail authorities. It also permits counsel to ask about the existence of written policies and procedures and about record-keeping practices, which should make subsequent written and documentary discovery more focused and effective. Technical objections and claims of privilege are less likely to be asserted in the give-and-take of an oral deposition; there, the path of least resistance for a lazy adversary is to let the witness answer rather than to object.205/

A productive middle course is to serve a subpoena duces tecum in connection with the notice of deposition.206/ In some cases, this may result in documents being assembled by the deponent or under the deponent's supervision and not by a less knowledgeable secretary or clerk. Documents are more likely to be produced

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205/ In federal court, deposition costs may be reduced by using tape recorders rather than stenographers. Rule 30(b)(4), F.R.C.P. In our experience, these savings may be consumed by the necessity to correct the many errors that inevitably appear in a transcript made from a tape. If it is clear that you will need a written transcript, it is preferable to use a stenographer in the first instance. In some cases, the need for a transcript may be obviated by turning the significant information obtained into requests for admissions. Requests for admissions are discussed later in this section and in §IX.B. below.

206/ See Rules 30(b)(5),(6), and 34, F.R.C.P.

quickly using this procedure, and the deponent can be questioned about them; if they are not initially produced as requested, defendants can hardly object to a continuance for this purpose, and counsel will get two cracks at the witness. This device does have limitations. A subpoena duces tecum should not be too extensive; if it is, the deponent may be unable to comply by the deposition date, or counsel will be unable to sort and study the documents quickly enough to use them at the deposition.

Sometimes defendants will respond to a large or complex request for documents by suggesting that counsel come to the jail and inspect and copy whatever he or she wants. Such offers are usually made to save defendants or their lawyer work, but they should be accepted with alacrity. Even if it is inconvenient and unpleasant to go to the jail for this purpose, the alternative -- demanding formal production in counsel's office -- will probably be more inconvenient and unpleasant in the long run, for the following reason. A request for documents will usually be written in general terms without knowledge of how defendants organize and label their documents; it will be served on an attorney who probably knows even less about the jail's records than plaintiff's counsel; then it will be forwarded to jail personnel who are unaccustomed to interpreting legal documents and who probably have a pretty haphazard record-keeping system to begin with. Going to the jail, looking at the records, and asking questions about the records will put you in a much better position to get a prompt and complete response than will demanding delivery to your office. Even if you ultimately do

demand such production, a visit to the jail will permit you to revise your request in a way that the defendants and their lawyer can understand easily (e.g., "Produce all the green sheets since January 1, 1980" instead of "Produce all documents reporting, summarizing, or commenting on physical altercations between inmates or between inmates and jail personnel, or on injuries sustained in said altercations, since January 1, 1980.").

Another discovery device which should be used, and used early, is the tour with experts, obtained through a request for entry upon land pursuant to Rule 34 of the Federal Rules of Civil Procedure. (See §IV.B.3. above for additional discussion of tours.) There is no substitute for an actual view of the jail, both for understanding its problems and for bolstering the credibility of your expert witness. This is especially true in a case where physical conditions are at issue. Tours with experts have other advantages as well. They provide face-to-face contact with jail personnel; they demonstrate to jail personnel that there are respected corrections professionals who sympathize with the litigation; and the mere presence of plaintiffs' lawyers in the jail enhances their credibility with both inmates and staff.

Requests for admissions[207] may also be extremely useful in jail litigation. They have the advantage that if they are not timely answered, they are deemed admitted, and if they are objected to, an explanation of the reasons must be provided. Their utility will be greatest later in the litigation, after

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[207] See Rule 36, F.R.C.P. Also see §IX below.

counsel has obtained enough information to draft admissions completely and accurately. Often, requests for admissions can readily be converted into proposed findings of fact or used in support of motions for summary judgement or preliminary relief, and they should be drafted with these purposes in mind. Requests for admissions are also useful for establishing the authenticity of documents.[207a/]

The topics of discovery will obviously be determined by the claims raised in the complaint. However, there are some basic approaches, supplemental to a basic inquiry into the facts, that can be used in connection with most if not all jail conditions issues.

1. Ask the defendants what efforts they have made to remedy or improve the situation -- for example, requests for more staff or money. Answers to these questions may lead to (or even constitute) virtual concessions of liability and to clearer conceptions on counsel's part of the remedial options. If the people running the jail have requested something similar to what plaintiffs' counsel wants, the Bell v. Wolfish principle of "deference" to prison officials' judgement may be turned to support judgement for the plaintiffs. (See §IX.C.1. below for further discussion of deference.) Often there is no better plaintiffs' witness than a frustrated jail administrator; asking

207a/ The foregoing discussion is based on a general understanding of the Federal Rules of Civil Procedure governing discovery. Be aware that many district courts have supplemented these rules with local ones.

the defendants about their attempts to improve the jail may lay the groundwork for a tacit alliance between plaintiffs' counsel and the jail administration against a recalcitrant funding source. This tactic may be especially fruitful with medical, dental and psychiatric staff. Also, you should determine if the case is likely to be defended by a claim of improved conditions. (See §VIII.B. below for further discussion of the improved conditions defense and related discovery issues.)

2. Orient your questions around your proposed remedies and ways they could be implemented. Changing the emphasis from "how bad" to "how to" may make the witness less defensive, convince the witness you are not necessarily the enemy, elicit more useful information than a confrontational type of examination, and shift the focus from security concerns to staffing, funding and plant issues. Asking a jailor "Why don't you have contact visits?" is likely to elicit an answer about the dangers of contraband; asking "What would you need in order to operate a secure contact visiting program?" may lead you to more tractable questions about numbers of officers and post-visit search procedures. Your experts may be able to suggest types of questions about remedy that should be asked.

3. Use relevant correctional standards in questioning jail officials.[208/] While it is true that these standards do

208/ See Appendix II for a list of and where to obtain correctional and other relevant standards.

not establish constitutional requirements,[209] defendants' responses to them may be helpful in several ways. In the worst case -- a jail official who is completely ignorant of the standards of his or her profession -- you can argue that the official's views are entitled to less deference because of his or her lack of expertise.[210] If the witness can be persuaded to agree with a standard which the jail does not meet, it will be difficult thereafter for the witness to defend existing practices on security grounds; again, you may be able to shift the ground from security concerns to staffing and funding. If the witness does not agree with a standard, probing the reasons for this rejection of a professional consensus may help you argue that the jail's practices constitute an "exaggerated response" to security concerns. When the standard is one pertaining to health and physical safety, areas in which "deliberate indifference" is the constitutional standard, ask the witness what he or she thinks the purpose of the standard is, whether the jail practice is equally protective of health or safety, and if not, why a different method was chosen. This may set up an argument that "deliberate indifference caused an easier and less efficacious

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209/ Bell v. Wolfish, 441 U.S. 520, 543-44 n.27 (1979). Standards may be given more weight by state courts, especially if they are promulgated or endorsed by state agencies. See, e.g., De Lancie v. Superior Court, note 28 above (state prison regulations); In re Inmates of Riverside Co. Jail v. Clark, note 27 above (state jail regulations).

210/ See Beckett v. Powers, 494 F.Supp. 364, 367 (W.D. Wis. 1980) (deference is due only when "the practice reflects an informed judgement of prison administrators") (emphasis in original).

[method] to be consciously chosen...."[211] (See §IX.C. below for additional discussion of the deliberate indifference standard.)

Depositions of expert witnesses are not favored under the Federal Rules of Civil Procedure, which provide that normally, discovery as to experts who will be called at trial is limited to interrogatories seeking the identity of witnesses and the subject matter and substance of the testimony to be given. Further discovery, and any discovery as to experts who will not testify, generally requires leave of court. A party seeking discovery may be required to pay the expert.[212] Despite the rules, in many jurisdictions it is common practice for the parties to depose each other's experts by agreement. This can be advantageous in a jail case not only for the usual reasons of assisting in trial preparation but also to let the defendants know early on what they are up against. Depositions of your experts may be useful tools in persuading defendants to settle.

Counsel should bear in mind the possibility that jail personnel may be presented by defendants as expert witnesses. Their credentials and their opinions should be explored in

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211/ Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974), quoted with approval in Estelle v. Gamble, 429 U.S. 97, 104 n.10 (1976).

212/ Rule 26(b)(4), F.R.C.P.

depositions.213/ If defendants' counsel objects to and prevents answers to questions elicting opinions, plaintiff's counsel may either pursue the matter through a motion to compel discovery or may seek a stipulation that the witness will not offer his or her opinion at trial.

213/ The restrictions of Rule 26(b)(4) do not limit inquiry into the opinions of parties or their agents who may also be experts. Rodriguez v. Hrinda, 56 F.R.D. 11 (W.D. Pa. 1972); Broadway & 96th St. Realty Co. v. Loew's Inc., 21 F.R.D 347, 360 (S.D. N.Y. 1958).

SECTION VIII. DEFENSES IN JAIL CASES

Jail officials typically raise a number of defenses to conditions lawsuits besides the usual defenses that the plaintiffs' allegations are not true or do not state a claim. These defenses often speak to the reluctance of federal judges to intervene in the affairs of local institutions.

Some of these defenses may usually be dismissed out of hand. Plaintiffs' failure to exhaust administrative remedies is not a defense under §1983 except under the restricted circumstances set forth in the Civil Rights of Institutionalized Persons Act.214/ Exhaustion of administrative remedies may be

214/ Patsy v. Board of Regents of State of Florida, ____ U.S. ____, 102 S.Ct. 2557 (1982). The Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997(e)(1976 ed., Supp. IV) provides that if a state creates "plain, speedy, and effective" administrative remedies which are certified as acceptable by the United State Attorney General, or which a court finds meets the Attorney General's standards, the court may stay the action for 90 days if so doing would be "appropriate" and "in the interests of justice." These provisions will seldom apply to substantial challenges to jail conditions because, so far, no jail officials have successfully obtained certification and, in any case, it is a rare administrative remedy that will make available the scope of relief typically sought in a §1983 jail case.

required in a state court suit pursuant to state law. Similarly, plaintiffs in a jail conditions case are not required to exhaust state judicial remedies.215/

The Eleventh Amendment immunity of states against federal lawsuits generally does not protect local governments,216/ nor does it usually bar federal lawsuits involving state activity as long as the named defendants are individual state officials and not the state or its agencies.217/ The doctrine of federal court

215/ Monroe v. Pape, 365 U.S. 167, 183 (1961). Judicial exhaustion is required only in cases which seek the immediate or earlier release of inmates and are therefore deemed to fall within the "heart of habeas corpus." Preiser v. Rodriguez, 411 U.S. 475, 498 (1973). In cases challenging jail conditions in which release has been contemplated solely as a means of ensuring constitutional conditions, this requirement has not been deemed to apply. See Duran v. Elrod, 713 F.2d 292, 297-98 (7th Cir. 1983); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975); Inmates of the Allegheny County Jail v. Wecht, Civil Action No. 76-743, Memorandum Opinion and Order, (W.D. Pa., Oct. 10, 1983); Benjamin v. Malcolm, 75 Civ. 3073, Proposed [sic] Order (S.D. N.Y., Oct. 31, 1983), enforcing 564 F. Supp. 668 (S.D. N.Y. 1983). Vazquez v. Gray, 523 F.Supp. 1359, 1366 (S.D. N.Y. 1981); Anderson v. Redman, 429 F.Supp. 1105, 1127-28 (D. Del. 1977); Padgett v. Stein, 406 F.Supp. 287, 303 (M.D. Pa. 1975).

216/ See Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280-81 (1977).

217/ Compare Milliken v. Bradley, 433 U.S. 267, 289 (1977) (federal court injunction against state officials requiring prospective expenditures upheld) with Alabama v. Pugh, 438 U.S. 781 (1978) (federal suit barred against state itself). The Supreme Court has recently held that the Eleventh Amendment's prohibition does bar federal lawsuits against state officials based on state law claims. Pennhurst State School and Hospital v. Halderman, note 40a above. This holding may extend to local officials and governments when their activities are funded by the state. Id. at 4164, n.34. (See §§ II.A. and II.C., above, for additional comment on this subject.)

abstention is also rarely applicable, being reserved for those exceptional circumstances where a state court determination of state law might moot or alter a constitutional question, where difficult state law questions or a complex state regulatory scheme are involved, or where a pending state law enforcement action is pending.218/ These considerations rarely exist in a jail or prison conditions case and abstention is routinely rejected in them.219/ "Good faith" is also not a defense to an injunctive lawsuit under §1983.220/

A. Lack of Funding Defense.

Defendants may claim that they should not be held liable because they do not have sufficient funds to make the improvements demanded by plaintiffs. However, it is well established that "[i]nadequate resources of finances can never be an excuse for depriving detainees of their constitutional

218/ Colorado River Water Conservation District v. United States, 424 U.S. 813-17 (1976); Chancery Clerk of Chickasaw County, Miss. v. Wallace, 646 F.2d 151 (5th Cir. 1981).

219/ Ramos v. Lamm, 639 F.2d 559, 563-64 (10th Cir. 1980); Grubbs v. Bradley, 552 F.Supp. 1052, 1056-57 (M.D. Tenn. 1982); Capps v. Atiyeh, 559 F.Supp. 894 (D. Ore. 1982); Robert E. v. Lane, 530 F.Supp. 930 (N.D. Ill. 1981); Lucas v. Wasser, 425 F.Supp. 955, 957-61 (S.D. N.Y. 1976); Cudnik v. Kreiger, 392 F.Supp. 305, 308-09 (N.D. Ohio 1974); Jones v. Wittenberg, 323 F.Supp. 93, 98 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). Contra, Manney v. Cabell, 654 F.2d 1280 (9th Cir. 1980); Bergstrom v. Ricketts, 495 F.Supp. 210 (D. Colo. 1980).

220/ National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975).

rights,"[221] although fiscal considerations may play a role in determining the scope and form of relief after liability is found.[222] (See §X.B. below for discussion of defendants' failure to provide funding after a judgement.)

B. Improved Conditions Defense.

Frequently, defendants too seek to avoid a direct confrontation, either over the federal courts' powers or over an adverse judgement by claiming that conditions have improved sufficiently by the time of decision that no judicial intervention is warranted.

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[221] Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975). Accord, Smith v. Sullivan, 611 F.2d 1039, 1043-44 (5th Cir. 1980) and cases cited; Nicholson v. Choctaw County, Ala., 498 F.Supp. 295, 311 (S.D. Ala. 1980); Feliciano v. Barcelo, 497 F.Supp. 14, 36 (D. P.R. 1979); Benjamin v. Malcolm, 495 F.Supp. 1357, 1363 (S.D. N.Y. 1980) and cases cited. See also Watson v. City of Memphis, 373 U.S. 526, 537 (1963) ("...it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them."). As one court observed, permitting cost considerations to influence the determination of constitutionality "would lead to this perverse result: the worse the conditions existing in a facility and the more costly the expenditures required to correct such conditions, the less likely that such conditions could be unconstitutional." Jordan v. Wolke, 460 F.Supp. 1080, 1088 (E.D. Wis. 1978), rev'd on other grds., 615 F.2d 749 (7th Cir. 1980).

[222] LaReau v. Manson, 651 F.2d 96, 104 (2d Cir. 1981); Wright v. Rushen, 642 F.2d 1129, 1134 (9th Cir. 1981); Dawson v. Kendrick, 527 F.Supp. 1252, 1283 (S.D. W.Va. 1981); Heitman v. Gabriel, 524 F.Supp. 622, 624 (W.D. Mo. 1981); McMurry v. Phelps, 533 F.Supp. 742, 769 (W.D. La. 1982). Lack of resources may be defense to a damage action against an individual, see Williams v. Bennett, 689 F.2d 1370, 1387-88 (11th Cir. 1982), cert. den. sub nom., Bennett v. Williams, 104 S.Ct. 335 (1983). However, if the local government itself is sued, underfunding will not be a defense and may in fact help prove liability. See §II.C.2. above.

Sometimes this defense is expressed in terms of mootness. However, it is clear that the voluntary cessation of unlawful conduct after a lawsuit is filed does not moot the case, since without a court order, the defendant remains free to resume the unlawful conduct.[223] Even the construction of a new jail may not moot a case where there is a danger that the new one will be operated in an unlawful manner.[224]

The argument may also be phrased in terms of the court's discretion in granting injunctive relief; even though the merits should be decided based on conditions at the time the complaint was filed,[225] the scope of relief may be more closely tied to conditions at the time of decision.[226]

In responding to the "improved conditions" defense you should be prepared to argue that it was only the lawsuit that prompted the improvements and that conditions are likely to deteriorate again unless the court enters an order. You should be conscious from the outset of the possibility of improved conditions and be careful to preserve evidence of the conditions at the time the

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[223] City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) and cases cited; Jones v. Diamond, 636 F.2d 1364, 1375 (5th Cir. 1981) (en banc).

[224] Jones v. Diamond, id.; Jones v. Wittenberg, 73 F.R.D. 82, 84 (N.D. Ohio 1976).

[225] Martino v. Carey, 563 F.Supp. 984, 987-88 (D. Ore. 1983); Owens-El v. Robinson, 442 F.Supp. 1368, 1374 (W.D. Pa. 1978). Contra, Lovell v. Brennan, 506 F.Supp. 672 (D. Me. 1983), appeal pending in First Circuit.

[226] City of Mesquite v. Aladdin's Castle, Inc., note 223 above, at 289; Campbell v. McGruder, 580 F.2d 521, at 542-43 (D.C. Cir. 1978).

complaint was filed; for this purpose, it can be very important to maintain contact with the original named plaintiffs even if they have been released. In discovery, inquire into the timing and motivation of improvements, and demand documentary proof if defendants claim that improvements were planned before the lawsuit. Also call the court's attention to any evidence showing that improvements will be transitory without an injunction: for example, rising population, budget cuts, or physical dilapidation that cannot be permanently repaired.[227] Your expert witnesses may be extremely valuable in assessing the likely permanence of purported reforms.

C. Future Improvements Defense.

A variation of the "improved conditions" defense is the promise of future improvements. Sometimes the promised improvements consist of a completely new jail. Again the argument is likely to be couched in terms either of mootness or of equitable restraint.

Plaintiffs' counsel should respond to the "future improvements" defense in several ways: test the credibility of the promises, try to get them embodied (with a schedule) in a court order, and attempt to get involved (with your expert witnesses), either as critic or as negotiator, in planning the improvements. Perhaps most important to your clients, counsel should also insist on substantial interim relief for those presently incarcerated.

227/ See Campbell v. McGruder, id. at 541-42.

In practice, the "future improvements" defense often does not stand up to close examination, either because the defendants do not actually have any concrete plans or because they are incapable of acting on their plans in any timely fashion. The best attack on this defense is intensive discovery; demand to know exactly what the defendants propose to do, when they propose to do it, whom they will hire to do the work, where they will get the money, etc. In many cases, the vagueness and insubstantiality of their claims will be revealed; in most other cases, pinning defendants down to particular time commitments will help demonstrate the need for judicial relief when the proclaimed deadlines pass and the improvements are not in place. The latter demonstration may be particularly helpful where defendants intend to open a new jail; counsel should try to show that, like any other major construction project, the new facility is likely to be long delayed[228] and the court must deal meanwhile with conditions in the old jail. Interim relief regarding an old jail is available even when a new one is

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228/ See Duran v. Elrod, 713 F.2d 292, 296 n.2 (7th Cir. 1983); Palmigiano v. Garrahy, 443 F.Supp. 956, 978 (D. R.I. 1977); Inmates of Allegheny County Jail v. Wecht, 565 F.Supp. 1278, 1295 (M.D. Pa. 1983).

planned;229/ its scope may depend on how much doubt plaintiffs' counsel can cast on the plausibility of defendants' plans and schedules.

Discovery as to planned improvements should be retrospective as well as prospective. Defendants' claims may well be based on plans and proposals which have been floating around without action for years and which have been dusted off solely in order to ward off judicial intervention. This is particularly true of large budget items like new facilities. Showing the court that the defendants have a history of not acting on their own remedial schemes may provide powerful evidence of the need for an injunction.230/

When defendants promise future improvements, timing may become the major issue in the lawsuit. Defendants may seek long adjournments of the trial or of substantive motions, or even a stay of discovery, pending making improvements, completing plans, etc. Counsel should strenuously oppose such delays unless defendants are willing to sign a consent decree committing them to make constitutionally acceptable changes by dates certain. As a minimum fallback position defendants should be required to

229/ Martinez Rodriguez v. Jimenez, 409 F.Supp. 582, 595 (D. P.R. 1976), stay den., 537 F.2d 1 (1st Cir. 1976); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676, 689 (D. Mass. 1973); Hamilton v. Love, 328 F.Supp. 1182, 1190 (E.D. Ark. 1971). See also Duran v. Elrod, 713 F.2d 292, 295-98 (7th Cir. 1983) (release pursuant to prior judgment ordered even though new construction had been approved).

230/ See, e.g., Ramos v. Lamm, 485 F.Supp. 122, 133 (D. Colo. 1979); Palmigiano v. Garrahy, 443 F.Supp. 956, 978 (D. R.I. 1977).

submit frequent and regular reports on their progress. If defendants are not willing to do this, that fact in itself should cast doubt on their bona fides. Moreover, even if defendants are proceeding in good faith, experience suggests that results are actually forthcoming more readily when there is an impending court deadline.231/ Defendants' minds tend to wander to other priorities during long adjournments. For these reasons, a motion for a preliminary injunction is often a productive tactic in jail cases. It is a means of putting serious pressure on the defendants much earlier than a date for trial. Moreover, in the worst case -- a judge who prefers to do nothing indefinitely in hopes that the defendants' actions will someday make the case go away -- the denial of a preliminary injunction will create the option of an immediate appeal. (See §II.B.3. above on preliminary relief.)

Where defendants are willing to make improvements, it may be possible for plaintiffs' counsel to have substantial impact on their plans, either by threatening further litigation about them or by convincing defendants that plaintiffs' counsel may have access to helpful resources and insights. If defendants are not immediately receptive to plaintiffs' counsel's involvement, discovery may provide a means of breaking the ice. Counsel should try to find out who is involved in planning and executing any changes or construction; depositions of those persons may

231/ See Campbell v. McGruder, 580 F.2d 521, 541 (D.C. Cir. 1978).

prove highly educational for the deponents if defendants have not done their homework (e.g., "Mr. Architect, are you aware of Standard X of the National Sheriffs Association which calls for Y?"). Ideally, counsel should emerge from a case where a new jail is planned with a judgement concerning present conditions in the old jail and a consent judgement governing conditions in the jail to be built.232/

D. Damage Case Defenses.

Defendants often rely on official immunity defenses in damage cases. Absolute immunities of various types are discussed in §II above. Most officials are, however, entitled only to "qualified immunity," under which they are liable if they "knew or should have known" that they were violating the plaintiff's right because they were violating "clearly established constitutional or statutory rights of which a reasonable person would have known" at the time the acts were committed.233/ Qualified immunity may be defeated if defendants violated a statute, a judgement against them, or the holding of a previously decided

232/ Some courts are reluctant to enter orders concerning facilities which do not yet exist. See Ahrens v. Thomas, 570 F.2d 286 (8th Cir. 1978). For this reason, dealing with future construction through negotiation (backed up with the threat of a new lawsuit when the new facility opens) is preferable. Counsel should also consider structuring the class certification in such a way that the definition of the class is not irrevocably tied to a particular physical structure.

233/ Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2727, 2738 (1982). Formerly, officials could be held liable for malicious acts whether or not they violated clearly established rights; however, the court in Harlow ruled that a showing of malice would no longer defeat qualified immunity.

case binding in their jurisdiction.234/ Some courts have held that qualified immunity is defeated if defendants violated their own regulations235/ or an established constitutional standard even if there is no prior case involving identical facts.236/

Defendants have the burden of pleading qualified immunity; it is waived if not pled.237/ Most courts hold that defendants also have the burden of proving it.238/ Immunity can be raised on a motion for summary judgement.239/

234/ Harlow v. Fitzgerald, note 233 above, at 2739; Procunier v. Navarette, 434 U.S. 555 (1977); Scott v. Plante, 691 F.2d 634 (3rd Cir. 1982); Williams v. Treen, 671 F.2d 892 (5th Cir. 1982); Williams v. Bennett, 689 F.2d 1370, 1385-86 (11th Cir. 1982); Powell v. Ward, 643 F.2d 924, 934 n.13 (2d Cir. 1981); Chavis v. Rowe, 643 F.2d 1281 (7th Cir. 1981); Bryant v. McGinnis, 463 F.Supp. 373 (W.D. N.Y. 1978); Ware v. Heyne, 575 F.2d 593 (7th Cir. 1978).

235/ McCray v. Burrell, 622 F.2d 705 (4th Cir. 1980); Strachan v. Ashe, 548 F.Supp. 1193, 1205 (D. Mass. 1982); O'Connor v. Keller, 510 F.Supp. 1359 (D. Md. 1981).

236/ Layne v. Vinzant, 657 F.2d 468 (1st Cir. 1981); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980); Chapman v. Pickett, 586 F.2d 22 (7th Cir. 1980); Little v. Walker, 552 F.2d 193, 198 (7th Cir. 1977); Masjid Muhammad-D.C.C. v. Keve, 479 F.Supp. 1311, 1326 (D. Del. 1979); Picha v. Wielgos, 410 F.Supp. 1214, 1219 (N.D. Ill. 1976); Landman v. Royster, 354 F.Supp. 1292, 1318 (E.D. Va. 1973). But see Picariello v. Carlson, 491 F.Supp. 1020 (M.D. Pa. 1980).

237/ Gomez v. Toledo, 446 U.S. 635 (1980); Boyd v. Carroll, 624 F.2d 730 (5th Cir. 1980); Perkins v. Cross, 562 F.Supp. 85 (E.D. Ark. 1983).

238/ Alexander v. Alexander, 706 F.2d 751 (6th Cir. 1983); Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983); Wolfel v. Sanborn, 666 F.2d 1005 (6th Cir. 1982); Williams v. Treen, 671 F.2d 892 (1982); Dehorty v. New Castle County Council, 560 F.Supp. 889 (D. Del. 1983); Contra Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982); Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982).

239/ Harlow v. Fitzgerald, note 233 above, at 2739.

Qualified immunity has often been referrred to as "good faith immunity." It is preferable to use the term "qualified immunity" because the words "good faith" seem to focus on the subjective motivation of the defendant, which is not properly an issue and which may distract from the more technical question of what the defendant "knew or should have known." Courts using the "good faith" terminology have sometimes reached results seemingly inconsistent with the qualified immunity doctrine.240/

The other major defense in §1983 damage cases is usually a claim that higher-ranking or supervisory defendants are not liable because they were not personally involved in the claimed deprivation of rights. Strictly speaking, this is not really a defense but part of plaintiff's case on which plaintiff bears the burden of proof. However, as a practical matter, the scope of particular defendants' liability is generally raised defensively on motions to dismiss or for summary judgement filed by the defendants, as well as at trial. (See §II.C.1. for further discussion of personal involvement.)

240/ See, e.g., Giles v. City of Prattville, 556 F.Supp. 612 (M.D. Ala. 1983).

SECTION IX. PROVING THE CASE

Trying a complex jail case presents two major challenges for counsel: making it real and making sense out of it. The trier of fact must come away from the trial with some idea of what it is like to be subjected to the conditions and practices that exist at the jail. He or she must also be provided with the means to write a favorable decision that will stand up on appeal.

A. Making It Real.

There are three basic ways of bringing a jail conditions case to life: testimony, photographs, and a tour by the court.

Eyewitness testimony as to jail conditions will mostly come from three sources: present and former inmates, your experts who have toured the jail, and employees or officials of the jail. (See §IV for a discussion of expert testimony.) Occasionally there will be other witnesses, such as health or fire inspectors or persons involved in religious or social programs who are permitted to enter the jail. Most eyewitness testimony usually will be provided by inmates.241/

Jail and prison inmates have some limitations as witnesses because most will be subject to attacks on their

241/ Prisoners' parents, spouses and children can be powerful witnesses as to visiting conditions, problems with mail and telephone communications, and in some cases their observation of physical injuries of inmates who have been assaulted. Even if their testimony is somewhat cumulative, it can be very helpful to have corroboration of prisoners' testimony by persons not viewed by the trier of fact as criminals. Contacts with these persons can be made either through information provided by prisoners or by approaching them in the visitors' waiting area or outside the visitors' entrance. In our experience, they are rarely reluctant to talk about problems at the jail.

credibility.242/ However, in our experience, with adequate preparation and selection their testimony can be more credible and compelling than that of jail employees. We suggest the following rules of thumb in preparing your eyewitness case.

1) Select a variety of witnesses. While an obvious professional criminal or young tough may not be credible viewed in isolation, his or her testimony may be very credible if it is substantially consistent with that of other witnesses. Look for a balance according to race, sex, age, criminal record, physical size, demeanor and attitude. Don't spend a lot of time looking for the one perfect witness, and even if you find one (the straight-A college student picked up for drunken driving, etc.), don't cut back on other inmate testimony. Also, don't write off witnesses who are not very smart or not very articulate. Sometimes these persons can be the most powerful witnesses; their obvious inability to fabricate or embellish may make their accounts all the more stark and compelling. (A judge may even wonder what someone with very limited mental abilities is doing in jail in the first place.)

242/ Counsel may be able to have witnesses' criminal records excluded from evidence pursuant to Rule 609(a), F.R.Ev., although there is dispute as to whether this provision applies to civil cases. Compare Howard v. Gonzales, 648 F.2d 352, 358-59 (5th Cir. 1981) with Garnett v. Kepner, 541 F.Supp. 241, 244-45 (M.D. Pa. 1982). Rule 403, F.R.C.P., may also permit the exclusion of criminal convictions. Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978). Whether it is worthwhile to seek their exclusion in a nonjury case is questionable.

Even if a criminal record is allowed in, counsel can seek to reduce its impact by immediately placing the record before the trier of fact and putting it in the best light possible to the prisoner.

2) Interview a lot of inmates. You should talk to as many inmates as possible243/ during the course of the lawsuit and find out how to keep up with them after they are released or (in many cases) sentenced to state prison. Given the high turnover in jails, you cannot assume that any individual will still be there at the time of trial. You also cannot assume that everyone who is willing to testify in January will still be interested in June. You should therefore keep a fairly long list of potential witnesses and be prepared to make last-minute substitutions.

Interviewing a large number of inmates has other advantages. The more inmates you talk with, the better you will get at assessing their credibility and judging how they will fit in with the rest of your proof. Also, the more inmates you talk with, the better known you will become at the jail, and the more inmates will seek you out and provide information.

3) Look for "horror stories." Assaults, stabbings, rapes, medical neglect, and suicide attempts may grab the attention of an otherwise uninterested judge and may graphically demonstrate the seriousness of issues of staffing, supervision and procedures that otherwise may seem like technical disputes. You should not rely exclusively on direct contacts with inmates

243/ If the jail is large and your time is limited, it may be worthwhile to try to distribute a questionnaire among inmates as a means of finding potential witnesses and deciding which ones are most worth interviewing. The means for distributing such a questionnaire range from mailing it to individuals to having it made available in housing units or libraries, depending on how cooperative defendants are. Also, a court probably has the authority to order distribution in a class action pursuant to Rule 23(d), F.R.C.P. The National Jail Project will supply a model questionnaire on request.

to find such witnesses. If there are records of serious injuries or altercations at the jail, it is worthwhile to try to track down the victims even if they are no longer at the facility.

Horror stories must, however, be put in a context and connected with regular practices at the jail. If your only inmate testimony is accounts of stabbings and rapes, the court may be tempted to write these incidents off as aberrations. Corroborating testimony about the underlying problems should also be presented. If a witness testifies that he or she was jailed for a weekend and raped and that the guards never came to the cell area, other witnesses should also testify regarding the lack of supervision even if they were not raped or assaulted.

4) Look for corroboration. Obviously, your witnesses' stories -- especially horror stories -- should be checked against any available source of corroboration (including jail records and the stories of the defendants and other inmates) so you can avoid presenting false or incredible testimony. You should also be prepared to present any corroborating evidence that you do find even if defendants do not seriously contest your witness's account. Even if the evidence only supports part of the testimony -- e.g., a medical record showing injuries but not reflecting their cause -- it is helpful to begin showing the judge as early as possible that your witnesses are to be believed.

5) Be prepared for efforts to limit testimony. Some judges feel that they should not have to listen to a parade of inmates testifying to the same conditions. If the court or the defense objects to your inmate testimony as cumulative, ask the

defendants if they will stipulate to the truth -- and more importantly, the typicality of what your witnesses have said; if not, you should argue that when the facts are contested, it is inappropriate to limit a party's ability to buttress its case. You should also have prepared offers of proof for each inmate so that if the judge is inclined to limit your presentation you can at least get it on the record that others would testify similarly. You may also wish to ask the defendants for stipulations regarding your offers of proof.

Obviously it is better to avoid this situation. One way to do so is to intersperse inmate testimony with the testimony of other witnesses so its cumulativeness is less obvious; another approach is to emphasize in each witness's testimony those elements which are not cumulative.

Photographs may also be used to great effect in jail cases. Photographs can be used to demonstrate dilapidation, inadequate sanitation practices, cramped conditions, "strip cells," and other physical conditions, as well as injuries suffered by

inmates.244/ Often the best way to use photographs is in connection with the testimony of an expert who toured the jail.

Sometimes the best way for a judge to find out what the jail is like is to go there. Court tours have become an accepted practice in jail and prison cases.245/ It is better if the tour can be conducted with little or no advance notice so the defendants have no opportunity to make cosmetic changes in advance. In a few cases, judges have stayed overnight in jails.246/ While few judges will go so far, it may be useful to propose an overnight stay if only to elicit an admission from the defendants that they cannot guarantee the judge's safety. Keep in mind that in an adversary system counsel should not propose that the judge go anywhere or do anything unless counsel is willing to go along.

244/ For a published example of the effective use of photographs in a jail case, see Rhem v. Malcolm, 432 F.Supp. 769, 790 (S.D. N.Y. 1977).

When a practice or procedure is at issue, videotaping may be helpful. For example the Legal Defense Fund, incident to its litigation concerning contact visitation, O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582 (E.D. Mich. 1977) and 446 F.Supp. 436 (1978), obtained a videotape of the facility's court-ordered procedure for such barrier-free visits. 437 F.Supp. 582 (E.D. Mich. 1977) and 446 F.Supp. 436 (1978). The district court on remand after Wolfish, 620 F.2d 303 (6th Cir. 1980), permitted termination of the program. 529 F.Supp. 206 (1981). At the appellate argument the tapes which were made part of the record, were shown to the panel which heard the case. At this writing the case is submitted; however, it is likely the panel will await Supreme Court action in Block v. Pitchess, certiorari granted inter alia on the contact visitation issue, 104 S.Ct. 390 (1983); see Rutherford v. Pitchess, 710 F.2d 572 (9th Cir. 1983) for the decision below.

245/ See, e.g., Benjamin v. Malcolm, 564 F.Supp. 668, 671 (S.D. N.Y. 1983); United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 119 (S.D. N.Y. 1977), aff'd in part, rev'd in part sub nom. Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), rev'd on other grds. sub nom Bell v. Wolfish, 441 U.S. (1979).

246/ Inmates of Suffolk County Jail v. Eisentadt, 360 F.Supp. 676, 678 (D. Mass. 1973).

B. Making Sense Out of It.

A multi-issue injunctive jail suit requires counsel to organize a disparate mass of evidence -- lay testimony, expert testimony, jail documents, depositions and interrogatories for the defendants, photographs, etc. -- into a coherent whole intelligible to the trial judge and, if necessary, to an appellate court. There are a number of techniques which will assist counsel in getting a clear understanding of his or her own case and in putting it across to the judge.

First, counsel should break the case down into issue parcels reflecting each subject that will be the subject of proof: lighting, heating, sick call, emergency medical services, protection from inmate assault, protection from staff assault, etc., etc. Even under a "totality of circumstances" standard, the best way to put the case together is first to take it apart. Once one has identified all the issues, one should ask about each:

- What do the defendants claim is their policy?
- What is their actual practice?
- What are the relevant physical conditions?
- How does the policy, condition or practice deviate from relevant statutes, regulations, or standards?
- What are the consequences for inmates of the policy, conditions, or practices?
- What must be done to remedy the existing situation?

This process, which should be begun early in the litigation and should be continued or repeated as the case progresses, will

serve as a guide to discovery and preparation efforts up to the time of trial. It should also reveal to counsel new issues and new relationships among issues which will have to be spelled out for the court (e.g., the amount of training nurses should have may depend on the way sick call is conducted, and the organization of sick call may depend on physical features of the building; lack of staffing may be aggravated by lack of a classification procedure and both may contribute to violence in the facility).

Second, counsel should do as much as possible to reduce the proof to manageable form. There are a series of steps which can be taken to this end, and counsel should realize that several of them -- requests for admissions, stipulations, the pre-trial order, and proposed findings of fact -- may involve variations on a single basic document, one which can be prepared relatively easily using the issues outline described above.

A request for admissions should involve a series of clear and succinct statements which, if admitted, will help plaintiffs establish their case. (See §VII. above for further discussion of admissions.) A compact and well organized request for admissions can do great service in abstracting kernels of relevant evidence from the mountains of chaff to be found in the depositions of confused and inarticulate jail officials, the voluminous records maintained by the jail, and other reports, correspondence, and documentation which refer to jail affairs. For example, counsel may have to take five or six depositions to find out how sick call is supposed to work, how often a doctor comes to the jail, and how a sick or injured inmate can get taken to an emergency

room. Having done so, counsel can probably summarize the information in ten sentences. If admissions as to these can be obtained, counsel can avoid the whole rigmarole of putting the depositions into evidence247/ or calling the witnesses at trial. Multiply this example by the number of issues to be dealt with, and it is clear that the use of requests for admissions can greatly simplify counsel's task at trial and the court's task after trial.

Other uses of requests for admissions include obtaining concessions as to the validity of summaries of voluminous records such as reports of injuries, assaults, suicides, attempts at suicides, medical procedures, or disciplinary proceedings, and as to the contents of documents that are difficult to read. In addition, admissions can be sought as to the authenticity of documents that will be produced at trial, and for that matter as to their admissibility in the face of other possible objections.

Counsel should remember in drafting admissons to leave room for the evidence to be presented at trial. An admission regarding defendants' policy in some regard should be drafted so as not to exclude proof that defendants have not met the requirements of that policy. Moreover, proof that may be more effective presented live -- for example, narratives of assaults and rapes -- should not be reduced to admissions even if you

247/ Using portions of the actual depositions often leads to the annoying scenario in which the adverse party then introduces the whole deposition pursuant to Rule 32(a)(4), F.R.C.P., giving the judge more hundreds of pages to slog through.

think the defendant will admit them. A photograph of a dead rat in the kitchen will probably have more impact than an admission about it.

Even if plaintiffs' admissions are mostly denied and if the court declines to compel a different response,[248] the work involved in drafting them will not be wasted, since, as noted above, they can be recycled as portions of a pre-trial order or as proposed findings of fact.

Material that is appropriate for admissions is also appropriate for ordinary stipulations, and if one has a good working relationship with opposing counsel this may be a satisfactory way to proceed. Admissions have the advantage that if no response is made within a set time, they are deemed admitted, placing some constraint on an adversary who is lazy, inept, or uncooperative.

The pre-trial order is a mechanism used in various and discretionary ways by federal judges to narrow issues and make trials more manageable. Rule 16, F.R.C.P., authorizes the court to hold a pre-trial conference to discuss various issues pertaining to trial management and to issue an order memorializing the results of the conference. In practice, many judges first direct the parties to prepare a pre-trial order of

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248/ Rule 36(a), F.R.C.P., permits the party seeking admissions to move to determine the sufficiency of the answers.

more or less specificity and then either dispense with the conference or hold a conference only about those matters which cannot be resolved in the written order.

Pre-trial orders can be of immense help in institutional litigation. A comprehensive pre-trial order may contain stipulated facts, contested facts, contested legal issues, lists of each party's exhibits and objections to exhibits, lists of each party's lay and expert witnesses, and the expected length of the trial. The great virtue of the pre-trial order procedure is that it compels one's adversary to determine exactly what his or her defense will be, which otherwise may be unknown until the trial begins. However, it is often very difficult to get defendants' counsel to deal responsibly with the pre-trial order; one should begin pressing early to avoid a last-minute crush before the court's deadline. Too often, the opposing counsel meet at the last minute, waste their time quibbling about trivia, and wind up submitting what amounts to independent reports to the court.

Pre-trial conferences and orders may also provide a useful forum for the commencement of settlement negotiations. Often it is not until opposing counsel for the first time is forced to confront the reality of trial that he or she becomes interested in settlement. This epiphany on the part of defense counsel carries risks as well as benefits to plaintiffs. Last-minute settlement negotiations may drag on until plaintiffs' evidence is stale and witnesses are scattered posing serious risks to the case if negotiations break down. Counsel should remember that

the most powerful incentive for meaningful negotiations is an impending trial date and should therefore not consent to more than a brief adjournment until there is a signature on an agreement.

At the trial, one's options regarding the order of witnesses are likely to be limited by the need to accommodate the schedules of expert witnesses. If possible, however, it is often effective to begin with a strong general expert witness (usually a present or a former correctional official) who has toured the jail and who can give an overall view of the jail's problems and provide a context in which the judge can place the more limited or specific testimony of the witnesses to follow.

After the trial, it is appropriate, at the judge's option, to submit proposed findings of fact and conclusions of law or a post-trial brief. The former may be easier, since if you have drafted admissions, stipulation, or a pre-trial order you should be able to transplant much of their contents with little change except to add appropriate citations to the record. Depending on the judge's familiarity with the issues and on whether a pre-trial brief was submitted, you may wish to submit a document with a statement of facts in the form of proposed findings but a legal argument in the usual brief style rather than in the form of conclusions of law.

C. Fitting the Facts to the Law.

There are a number of recurrent factual problems that arise in trying to meet the relevant legal standards in jail cases.[249]

1. Deference. In Bell v. Wolfish the Supreme Court held -- repeatedly -- that courts should accord "wide-ranging deference" to prison administrators in matters related to preserving institutional security.[250] (See §I.A. for additional comments on "deference.") At first blush, this rule appears to present a purely legal issue. However, there is room for factual maneuver within the confines of the "deference" standard. There may be someone to whom the court can "defer" who supports the plaintiffs' position. In places, the Wolfish opinion suggests that the basis for deference is the expertise of corrections officials;[251] the opinion also acknowledges, however, that this expertise may sometimes be nonexistent, and expresses the view that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our

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249/ The following highly selective discussion of particular substantive issues does not reflect our view of the relative importance of the issues; rather, we have selected the issues about which we have something useful to say. For a recent catalogue of substantive issues in prison and jail cases, see Manville and Boston, Prisoners' Self-Help Litigation Manual, (Oceana Press 1983), Chapter V.

250/ 441 U.S. 520, 547 (1979); see also id at n.29, 548, n.30, 551, n.32, 554-55, n.40, 563.

251/ Id. at 548.

Government, not the Judicial."[252] This language suggests that if there is a state law or regulation, or even a non-binding standard promulgated pursuant to statutory authority, which the jail violates, the deference standard can be invoked to support relief.[252a] Conversely, if the jail administrator expresses a supportive view contrary to that of the commissioner, sheriff, or mayor, counsel can argue that the expert administrator who has day-to-day familiarity with jail operations should be deferred to. There may be other permutations of these strategies. In some cases, it may be possible to show such a conflict of views that the idea of deference to anyone becomes nonsensical. The essential point is that counsel should identify all persons and organizations in positions of authority vis-a-vis the jail and explore their views.

Counsel should also exploit any inconsistencies in defendants' justifications for their policies. A practice defended as essential to security during litigation may have been presented solely as a money-saving device or a convenience at some other time. If this is the case, counsel should press the court for a factual finding that defendants' views regarding security are not sincerely held. Such a finding not only undermines the requirement of deference but is also less vulnerable on appeal than a legal conclusion that the defendant's views constitute an "exaggerated response."[253]

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[252] Id.

[252a] See e.g. Michaud v. Sheriff of Essex County, 390 Mass. 523 (Mass. Sup. Jud. Ct. 1983) (State sanitary regulations reflect current standards of decency against which court measures violations of constitutional rights.)

[253] See Morris v. Travisono, 707 F.2d 28, 31 (1st Cir. 1983).

2. Length of Stay. The constitutionality of jail conditions may depend on how long they must be endured. In Bell v. Wolfish, the Court emphasized that "[n]early all of the detainees are released within 60 days."[254] Length of stay may become a major factual issue. Even if the underlying facts are undisputed, what they mean may depend on who does the arithmetic.

First, one must decide what data to use. A calculation may be made based on all the inmates who pass through the jail during a year or other long period of time. This method will emphasize the short-term, high-turnover population of inmates who are bailed after arrest or who receive short sentences for petty offenses. Alternatively, one can base the calculation on a one-day "slice" including all persons found in the jail on a particular date. "Neither of these opposing statistical approaches is dishonest. They merely measure different things."[255] In either case, one should use a period far enough in the past that most of the inmates in question will have been released so their full terms of incarceration will be reflected.

Once one has selected the data base, the impulse may be to calculate a mean (average) or median. However, for a court to rule on this basis is like building a bridge based on the average height of the ships that will pass under it. It is preferable to break length of stay down into intervals (e.g., 0-30 days, 31-60

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[254] Note 250, above, at 544. See also Hutto v. Finney, 437 U.S. 678, 686-87 (1978) (length of stay emphasized in Eighth Amendment analysis).

[255] LaReau v. Manson, 651 F.2d 96, 102 (2d Cir. 1981).

days, 60-90 days, etc.), which will usually show that, along with a large short-term population, there is also a substantial long-term population of persons serving sentences of several months or awaiting trial on serious charges. This presentation is the best way to show that some portion of the jail population is subjected to "genuine privation and hardship over an extended period of time."256/

3. Medical Care. The constitutional standard for prison and jail medical care prohibits "deliberate indifference to serious medical needs of prisoners...."257/ When the focus is on the health care system and not on the treatment of a particular individual, courts have interpreted the ill-adapted "deliberate indifference" standard258/ to hold that "a series of incidents closely related in time...may disclose a pattern of conduct amounting to deliberate indifference" and that injunctive

256/ Bell v. Wolfish, note 250, above, at 542.

257/ Estelle v. Gamble, 429 U.S. 97, 105 (1976). Estelle based its holding on the Eighth Amendment's prohibition of the "unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 182-83 (1976). Pre-trial detainees enjoy due process rights "at least as great as [these] Eighth Amendment protections." City of Revere v. Massachusetts General Hospital, ___ U.S. ___, 103 S.Ct. 2979, 2983 (1983). It is unlikely that the due process standards will ever be defined as significantly more favorable than the Eighth Amendment standard. Since deprivation of care for serious medical needs is presumably not a legitimate means of punishment, the difference between "punishment" and "cruel and unusual punishment" in this context should be minimal.

258/ For criticism of this standard, see Estelle v. Gamble, note 257 above, at 117 (Stevens, J., dissenting); Neisser, Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care, 63 Va. L.Rev. 921 (1979).

relief can be granted "if it can be shown that the medical facilities were so wholly inadequate for the prison population's needs that suffering would be inevitable."259/ In such cases, evidence of subjective motivations of jail personnel may be beside the point.260/

Although the above quoted standard suggests that the "series of incidents" and "inadequate facilities" are alternative bases for granting injunctive relief, the prudent litigator will pursue both avenues of proof. Evidence of a series of failures of the medical system may prove that something is wrong, but without evidence concerning systems and procedures the court will have little basis on which to formulate an injunction; conversely, without proof that individuals have suffered, experts' criticism of the system and proof of its deviation from standards may be dismissed as mere theorizing or as policy differences that do not rise to a constitutional level.

The Estelle v. Gamble standard also requires that "serious medical needs of prisoners" be involved. A "serious" medical need has been defined as "one that has been diagnosed by a

259/ Bishop v. Stoneman, 508 F.2d 1224, 1226 (2d Cir. 1974) (emphasis supplied).

260/ Thus, in one leading case, the court found systemic deficiencies in medical care to violate the "deliberate indifference" standard at the same time that it found that the prison medical staff "appeared to be truly concerned with the well-being of the inmates they served." Todaro v. Ward, 431 F.Supp. 1129, 1160 (S.D. N.Y. 1977), aff'd, 565 F.2d 48 (2d Cir. 1977). Accord, Wellman v. Faulkner, 715 F.2d 269, 273 (7th Cir. 1983) (violation found despite "apparent good intentions of prison officials").

physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention."261/ However, courts sometimes dismiss medical lapses which might otherwise state a constitutional violation on the ground that they do not relate to serious needs.262/ You should therefore be sure to present evidence of the actual or potential consequences of the kinds of medical failures that you prove. This should be done both through expert testimony and through testimony of inmates who have suffered. It should be sufficient to show that a condition causes significant pain.263/

4. Protection from Inmate Assault. Prisoners are entitled to protection from assault by other inmates; the constitutional standard forbids "deliberate indifference" to

261/ Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. den., 450 U.S. 1041 (1981) and cases cited.

262/ See, e.g., Butler v. Best, 478 F.Supp. 377 (E.D. Ark. 1979) (ten-day failure to give prescribed medication did not relate to serious medical needs).

263/ West v. Keve, 571 F.2d 158, 162 (3d Cir. 1978); Case v. Bixler, 518 F.Supp. 1277 (S.D. Oh. 1981).

prisoners' physical safety.264/ This standard may be met either by showing a failure to act in the face of a known risk to a particular prisoner265/ or by proving the existence of a "constant threat of violence"266/ or of a "pervasive risk of harm" to all prisoners or to some identifiable group of them267/ combined with a failure to take adequate remedial measures. In finding such a failure, courts have cited such factors as an extensive history of prior assaults,268/ a well-entrenched subculture of sexual violence and a failure properly to classify prisoners,269/ and overcrowding, understaffing and/or underfunding which materially contributed to the risk of

264/ Branchcombe v. Brewer, 669 F.2d 1297 (8th Cir. 1982); Holmes v. Goldin, 615 F.2d 83 (2d Cir. 1980); Little v. Walker, 552 F.2d 193 (7th Cir. 1977) cert den. 435 U.S. 932 (1978). Courts have also used a variety of other terms, such as "reckless disregard," "gross negligence," and "callous indifference," to state essentially the same standard. See Wade v. Haynes, 663 F.2d 778 (8th Cir. 1981), aff'd on other grds. sub nom. Smith v. Wade, __ U.S. __, 103 S.Ct. 1625 (1983); Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979) (conduct so grossly incompetent, inadequate or excessive as to shock the conscience or be intolerable to basic fairness). As with medical care, no meaningful distinction between convicts and detainees has so far been drawn.

265/ Gullatte v. Potts, 654 F.2d 1007 (5th Cir. 1981); Wade v. Haynes, note 264 above; Holmes v. Goldin, note 264 above.

266/ Ruiz v. Estelle, 679 F.2d 1115, 1140-42 (5th Cir. 1982); Ramos v. Lamm, note 261 above, at 572.

267/ Withers v. Levine, 615 F.2d 158, 161 (4th Cir. 1980).

268/ Stevens v. County of Dutchess, N.Y., 445 F.Supp. 89 (S.D. N.Y. 1977).

269/ Doe v. Lally, 467 F.Supp. 1339 (D. Md. 1979); Redmond v. Baxley, 475 F.Supp. 1111 (E.D. Mich. 1979).

assault.270/ The point to keep in mind is that plaintiffs must show some fault on the part of jail officials or other local authorities, both to establish liability and to formulate a remedy.

In proving a "risk of assault" case, one should look carefully at protective custody cells or units (if any) in the jail. An unusually large protective custody population is one indirect measure of lack of safety.271/ Records (if any) of the reasons why individuals are in protective custody may also be revealing. It may be also that provisions for protective custody do not provide adequate safety. Find out how many protective cells there are and ask a correctional expert if there are enough. Find out if protective custody inmates are intermingled with inmates who have been segregated for other reasons such as violent acts.272/ Explore the means by which prisoners are admitted to protective custody: are requests ever rejected? Must inmates "name names" and risk retaliation?

270/ Ruiz v. Estelle, note 266 above, at 1140-42 (crowding and understaffing); Dawson v. Kendrick, 527 F.Supp. 1252, 1289 (S.D. W.Va. 1981) (understaffing); Finney v. Mabry, 534 F.Supp. 1026, 1039 (E.D. Ark. 1982) (crowding which made proper surveillance impossible); McKenna v. County of Nassau, 538 F.Supp. 737 (E.D. N.Y. 1982) (crowding); Mayes v. Elrod, 470 F.Supp. 1188 (N.D. Ill. 1979) (underfunding).

271/ Ramos v. Lamm, 485 F.Supp. 122, 141 (D. Colo. 1979), aff'd in part and remanded, 639 F.2d 559 (10th Cir. 1980), cert. den., 450 U.S. 1041 (1981); Palmigiano v. Garrahy, 443 F.Supp. 956, 967 (D. R.I. 1977).

272/ Palmigiano v. Garrahy, id.

One should also look for architectural "blind spots"273/ and other physical features which impede surveillance in housing units and common areas. These structural issues can be particularly crucial in facilities containing dormitory housing, since without adequate supervision there may be nowhere an inmate can be safe.

Records of "unusual incidents" or of officers' use of force, of injuries to inmates, and of disciplinary proceedings may be a productive source of proof of a personal safety claim. However, one must not simply rest on the jail's records in proving such a claim. The jail's records should be the subject of commentary by an expert witness who will be able to say whether the level of violence shown by the records is more or less than it should be under appropriate safeguards, and what the causes and remedies of excessive violence are in the particular jail. One should also be aware that jail records, no matter how well they are maintained, are unlikely to reflect the full incidence of assaultive behavior because of the fear or unwillingness of inmates to inform on each other.274/ Often, jail officials themselves will acknowledge that many assaults are never

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273/ Ramos v. Lamm, note 271 above, at 141; Palmigiano v. Garrahy, note 271 above.

274/ See Grubbs v. Bradley; 552 F.Supp. 1052, 1078-81 (M.D. Tenn. 1982) for an extensive discussion of the "inmate code" and inadequacy of institutional records to establish the level of violence. See also Ramos v. Lamm, note 271 above, at 141.

reported; one official at a large urban jail recently estimated that no more than 20 percent of assaults resulted in any written record.

This point is of the utmost importance if -- as is often the case -- you are litigating personal safety issues in connection with overcrowding. It is a truism among corrections professionals that crowding increases the risk of assault. However, in Rhodes v. Chapman, the Supreme Court emphasized in reversing the lower court's finding of unconstitutionality that the demonstrated increase in violence was "only in proportion to the increase in population."275/ Thus, the risk of assault for each prisoner was not increased. To avoid a similar finding (if you do not obtain an admission), you should be prepared either to show from jail records that assaults have increased at a rate disproportionate to the increase in population, or to argue that the jail records do not accurately reflect the increase which must exist based on your expert's testimony about the relationship of crowding and violence. You should also argue that the more crowded and chaotic the jail is, the more likely it is that assaults will go unnoticed or unrecorded by overworked employees.276/

275/ 452 U.S. 337, 373 (1981). In Rhodes, unlike Grubbs v. Bradley, the prison's records were uncontroverted and were found by the district court to be credible. Id. at 349 n.15.

276/ See Fischer v. Winter, 564 F.Supp. 281, 291-2 n.10 (N.D. Calif. 1983).

5. Access to Courts. Prisoners have a right of access to the courts which may be satisfied either by access to an adequate law library or by adequate assistance from persons with legal training.277/ This requirement extends to local jails as well as to state and federal prisons, although small jails may be permitted to have small libraries.278/ In jail cases, where most inmates are pre-trial detainees, defendants will often claim that the provision of criminal defense counsel sufficiently protects the right of court access. As to criminal defense, that is correct; even if an inmate chooses to proceed pro se, the offer of a lawyer's assistance obviates the necessity to provide access to a law library.279/ However, the right of court access also encompasses habeas corpus proceedings, civil rights actions, and other matters in which there is no right to appointed counsel.280/ In a jail case, counsel should carefully explore and prove the limitations in services of the local public defender or legal aid office or of any other source of legal

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277/ Bounds v. Smith, 430 U.S. 817, 827 (1977).

278/ Leeds v. Watson, 630 F.2d 674 (9th Cir. 1981); Parnell v. Waldrep, 511 F.Supp. 764 (W.D. N.C. 1981); Fluhr v. Roberts, 460 F.Supp. 536 (W.D. Ky. 1978). But see Williams v. Leeke, 584 F.2d 1336, 1340 (4th Cir. 1978) (suggests some jails may be exempt from law library requirement).

279/ United States v. Garza, 664 F.2d 135 (7th Cir. 1981) cert. den. 102 S.Ct. 1620 (1982); Almond v. Davis, 639 F.2d 1086 (4th Cir. 1981).

280/ Bounds v. Smith, note 277 above, at 827; Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Johnson v. Avery, 393 U.S. 483, 489 (1969).

assistance available to prisoners.281/ This prescription holds true even if there is a legal services agency which is specifically charged with providing civil legal services to jail inmates; either by contract or because of large caseloads, these agencies may exclude important categories of claims, such as damage cases, from consideration.

In injunctive challenges to the inadequacy of court access, courts are usually satisfied with proof that the existing means of access do not meet the needs of all prisoners.282/ It should not be necessary to present evidence that particular inmates have lost or been unable to file meritorious legal claims. However, counsel should at least present testimony by inmates who have sought or have needed legal services or information that were not available. Otherwise, the court may find that no actual need for court access has been shown on the record.

Even if the jail has a law library, it may not be adequate. Counsel should look closely at the arrangements for gaining access to the library and for using it once one is there. If the

281/ Spates v. Manson, 644 F.2d 80, 84 (2d Cir. 1981); Leeds v. Watson, note 278 above; Hooks v. Wainwright, 578 F.2d 1102 (5th Cir. 1978); Carter v. Mandel, 573 F.2d 172 (4th Cir. 1978). But see Kelsey v. State of Minnesota, 622 F.2d 956 (8th cir. 1980) (program that excluded "lawsuits against public agencies or public officials to change social or public policy" adequate).

282/ Williams v. Leeke, note 278 above; Hooks v. Wainwright, 578 F.2d 1102 (5th Cir. 1978), on remand, 536 F.Supp. 1330 (M.D. Fla. 1982); Nadeau v. Helgemoe, 561 F.2d 411, 418 (1st Cir. 1977); Carter v. Mandel, note 281 above; Cruz v. Hauck, 627 F.2d 710 (5th Cir. 1980); Battle v. Anderson, 614 F.2d 251, 254-56 (10th Cir. 1980).

hours are limited,283/ if there is no actual physical access to the library,284/ or if cumbersome or harassing procedures are required in order to use the library,285/ the Constitution may be violated. It may also be possible to show that most inmates are not capable of effectively using a law library without some assistance by trained personnel; several courts have required some trained assistance in addition to the mere provision of a library.286/

283/ Cruz v. Hauck, 627 F.2d 710, 720 (5th Cir. 1978); Walker v. Johnson, 544 F.Supp. 345 (E.D. Mich. 1982); Ramos v. Lamm, 485 F.Supp. 122, 166 (D. Colo. 1979), aff'd in part and rev'd in part, 639 F.2d 559 (10th Cir. 1980), cert. den., 101 S.Ct. 1759 (1981).

284/ Leeds v. Watson, note 288 above; Williams v. Leeke, note 278 above; United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 129 (S.D. N.Y. 1977), aff'd in pertinent part sub nom. Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), rev'd on other grds. sub nom. Bell v. Wolfish, 441 U.S. 520 (1979); Hooks v. Wainwright, 536 F.Supp. 1330 (M.D. Fla. 1982).

285/ Ruiz v. Estelle, 679 F.2d 1115, 1154 (5th Cir. 1982).

286/ Cruz v. Hauck, 627 F.2d 710, 721 (5th Cir. 1980); Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980); Hooks v. Wainwright, 536 F.Supp. 1330 (M.D. Fla. 1982); Glover v. Johnson, 478 F.Supp. 1075 (E.D. Mich. 1979).

SECTION X. ENFORCING AND DEFENDING A JUDGEMENT.

Most lawsuits end with a judgement. In jail litigation, the judgement often seems to be only the beginning. Jail officials are frequently unable or unwilling to comply even with judgements they have consented to, requiring enforcement motions by the plaintiffs,[287] and second thoughts or new developments often lead to motions to vacate or modify judgements.[288] Translating a paper victory in litigation into permanent benefits for the plaintiffs may be the greatest challenge in a jail conditions case.

A. Writing an Enforceable Judgement.

Effective post-judgement work depends on what is in the judgement. Plaintiffs' counsel will have more or less to say about the terms of a judgement depending on defendants' style of negotiations and the judge's practices in writing or settling litigated judgements. However, there are certain basic ideas that should be kept in mind in negotiating a settlement or drafting a proposed judgement.

287/ See, e.g., West v. Lamb, 497 F.Supp. 989 (D. Nev. 1980); Padgett v. Stein, 406 F.Supp. 287 (M.D. Pa. 1975); Jones v. Wittenberg, 323 F.Supp. 93 (N.D. Oh. 1971), supplemented, 330 F.Supp. 707 (N.D. Oh. 1971), aff'd on other grds. sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972), motion to vac. den., 357 F.Supp. 696 (N.D. Oh. 1973), defendants held in contempt, 73 F.R.D. 82 (N.D. Oh. 1976), further relief ordered, 440 F.Supp. 60 (N.D. Oh. 1977), further relief ordered, 509 F.Supp. 653 (N.D. Oh. 1980).

288/ See, e.g., Benjamin v. Malcolm, 564 F.Supp. 668 (S.D. N.Y. 1983); Benjamin v. Malcolm, 528 F.Supp. 925 (S.D. N.Y. 1981); McGoff v. Rapone, 78 F.R.D. 8 (E.D. Pa. 1978).

- Spell out the defendants' obligations explicitly. Avoid vague words and terms such as "reasonable" or "best efforts" wherever possible. A judgement that contains such terms is subject to reinterpretation by the defendants for their own ends and may be too unclear to be the subject of a contempt finding.[289]

Some judges have an aversion to judgements that they think are "too detailed" or that they think go beyond constitutional requirements, even if the parties agree to them.[290] The underlying concern appears to be that imposing detailed rules on jail officials will drag the court into a morass of disputes about what the judgement means. If the judgement is a proposed consent judgement, try to get the defendants to say that they would rather have an unambiguous set of rules so their staff will always know what their obligations are, and point out that the more specific the judgement is the less likely the court will be required to clarify or interpret it. Suggest to the court that if the defendants have agreed to particular terms, to reject the settlement in favor of a different or less detailed order formulated by the court after litigation would be contrary to the spirit of the Bell v. Wolfish "deference" principle. (See §§ I.A., IX.C.1. for further discussion of deference.) Remember (and remind the judge) that every term of a judgement need not be

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289/ See Folsum v. Blum, 554 F.Supp. 828 (S.D. N.Y. 1982); Rinehart v. Brewer, 483 F.Supp. 165, 170-71 (S.D. Ia. 1980); Jordan v. Arnold, 472 F.Supp. 265, 289 (M.D. Pa. 1979).

290/ See Morales v. Turman, 562 F.2d 993, 999 (5th Cir. 1977).

independently compelled by the Constitution; rather, the judgement as a whole should be designed to remedy the constitutional violation.291/

Often, jail practices violate not only the Constitution but also state or local statutes, regulations or standards. Tracking the language of a state or local rule in the judgement has the advantage of giving the defendants a single standard to obey and thus avoiding a possible source of confusion. A federal judge may also be more willing to enter a detailed judgement when it embodies pre-existing state or local policy.292/ When the case is litigated to judgement rather than settled, adopting the terms of state or local law is arguably more consistent with the

291/ Hutto v. Finney, 434 U.S. 678, 685-88 (1978); Ruiz v. Estelle, 679 F.2d 1115, 1155 (5th Cir. 1982). One court has observed that "an equitable decree properly may prohibit more than the statute on which the decree is based prohibits, in order more completely to restore the status quo ante, or more securely to prevent a repetition of the alleged violation by making the decree easy to administer...." Larsen v. Sielaff, 702 F.2d 116, 118 (7th Cir. 1982) cert. den. 104 S.Ct. 372 (1983) (dictum). But see Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983) (consent judgement not enforced where terms not required by Constitution and where Attorney General lacked power under state law to bind state to terms). Some recent caselaw has suggested that litigated judgements should be carefully limited to assure that they do not do more than the law requires, and that the district court should approach the remedial process in stages in order to assess precisely how much relief is necessary to remedy the constitutional violation. Ruiz v. Estelle, 679 F.2d 1115, 1144-46 (5th Cir. 1982); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982).

292/ See Padgett v. Stein, 406 F.Supp. 287, 292 (M.D. Pa. 1975).

Ashwander doctrine 293/ of avoiding unnecessary constitutional adjudication than is entering a wholly court-written judgement. For that reason, borrowing such existing provisions may be particularly attractive to a federal judge.

- Place the burden of showing compliance on the defendants. Defendants may be required to keep records, to make them available to the court or plaintiffs' counsel, to submit reports, or otherwise to demonstrate their compliance with a judgement.294/ Although counsel cannot rely exclusively on defendants' records, these will often reveal compliance problems. Moreover, the necessity of keeping records or making reports may cause the defendants to approach their substantive tasks in a more organized fashion and may reveal correctable administrative or procedural defects in their operations.

- Ensure counsel's access to the jail for assessing compliance. Many failures of compliance will not be evident from defendants' records. Physical access to and inspection of the jail are necessary, especially where physical renovations or delivery of medical, psychiatric or other services are

293/ See Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

294/ West v. Lamb, 497 F.Supp. 989, 996, 1006 (D. Nev. 1980); Davis v. Watkins, 384 F.Supp. 1196, 1203-05 (N.D. Ohio 1974); Alberti v. Sheriff of Harris County, 406 F.Supp. 649, 678-82 (S.D. Tex. 1975); Valvano v. McGrath, 325 F.Supp. 408, 411-12 (E.D. N.Y. 1971); Cronin v. Holt, 81-8309-CIV-EPS (S.D. Fla., September 25, 1982) (Stipulation and Order); Jensen v. County of Lake, H-74-230 (N.D. Ind., June 26, 1983) (Judgment and Order).

concerned. Provisions can be written permitting counsel and experts to tour part or all of the jail at stated intervals or upon request.295/

- Ensure continuing inmate contact and continuing publicization of the judgement. Counsel must maintain contact with the inmates in order to assess compliance. After a judgement is entered, inmates will generally no longer receive notice of the lawsuit's existence and counsel's identity, and they may soon be forgotten, especially in a high-turnover institution like most local jails. There are several means of avoiding this, any and all of which can be provided for in a judgement:

a. Require that new inmates be notified of the judgement's terms and counsel's identity in some fashion.296/

295/ See New York State Association for Retarded Children v. Carey, 706 F.2d 956, 960-61 (2d Cir. 1982) (post-judgment tours by plaintiffs' counsel and expert witnesses approved as enforcement measure); Cronin v. Holt, note 294 above; Jensen v. County of Lake, note 294 above (establishes "community committee" to keep public advised of living conditions at jail; access to jail, staff and prisoners as well as jail records required); O'Bryan v. County of Saginaw, Mich., 446 F.Supp. 436, 446 (E.D. Mich. 1978) (weekly inspections by plaintiffs' counsel); Martinez v. Board of County Commissioners, 75-M-1260, Consent Judgment at 3 (D. Colo., December 11, 1975) (plaintiffs' counsel permitted to tour without notice); Jackson v. Hendrick, No. 2437, Final Decree I at 13 (Pa. Ct. of Common Pleas, November 20, 1976) (counsel may inspect on one day's notice and consult with any inmate or group of inmates).

296/ See Shakman v. Democratic Organization of Cook County, 533 F.2d 344, 352 (7th Cir. 1976) (judgement provided for notice to all employees; notices still posted three years later).

b. Permit counsel to meet with inmates during the jail tours discussed above.

c. Permit counsel to meet regularly with an inmate council or other representative body if one exists.

- Get outside assistance in monitoring and assessing compliance. The use of monitors, special masters, and other impartial third parties is well established in jail and prison litigation.297/ The great advantage of these devices is to remove some of the long-term burden of monitoring and enforcement from plaintiffs' counsel. The disadvantage, of course, is that some influence and control over enforcement is shifted away from plaintiffs' counsel. However, if counsel's resources are limited and the monitoring task is large, the trade-off may be fully justified.

The value of a monitoring arrangement depends absolutely on who is chosen for the job. Courts have approved or appointed magistrates, attorneys, academics, corrections professionals, medical and other experts, and agencies of government to assess compliance, depending on the nature of the task and the expertise

297/ See, e.g., Miller v. Carson, 563 F.2d 741, 752-53 (5th Cir. 1977); Lightfoot v. Walker, 486 F.Supp. 504, 528-29 (S.D. Ill. 1980); Finney v. Mabry, 458 F.Supp. 720, 724 (E.D. Ark. 1978); Owens-El v. Robinson, 457 F.Supp. 984, 988 (W.D. Pa. 1978); Palmigiano v. Garrahy, 443 F.Supp. 956, 989 (D. R.I. 1977). See also Note, "Mastering" Intervention in Prisons, 88 Yale L.J. 1062 (1979); V.M. Nathan, The Use of Masters in Institutional Reform Litigation, 10 Toledo L.Rev. 419, 427-28 (1979).

required.298/ Counsel should carefully consider the exact nature of the monitoring task, to the extent it can be predicted, in proposing or selecting a monitor. Whether the task will be primarily fact-finding and reporting, negotiating and consulting with jail officials, or advising the court and the parties concerning remedial modifications or improvements, and whether the activities to be monitored involve specialized technical expertise, will be major considerations influencing this decision.

- Try to limit the defendants' post-judgement options. You should assume from the beginning that defendants will be unable or unwilling to comply with any judgement and will try to get out of it whenever its terms become inconvenient. (Plaintiffs' strategy in responding to attempts to vacate or

298/ Campbell v. Cauthron, 623 F.2d 503, 508-09 (8th Cir. 1980) (dietitian); Miller v. Carson, 563 F.2d 741, 752-54 (5th Cir. 1977) (magistrate); Powell v. Ward, 540 F.Supp. 515 (S.D. N.Y. 1982) (attorney); Milburn v. Coughlin, 79 Civ. 5077 (RJW), Stipulation for Entry of Final Judgment (S.D. N.Y., Aug. 20,1982) (social medicine department of hospital); Union County Jail Inmates v. Scanlon, 537 F.Supp. 993, 998 (D. N.J. 1982), rev'd on other grds. sub nom. Union County Jail Imates v. Di Buono, 713 F.2d 984 (3d Cir. 1983) (retired state court judge); Owens-El v. Robinson, 457 F.Supp. 984, 985 (W.D. Pa. 1978) (former warden and penology expert); Palmigiano v. Garrahy, 448 F.Supp. 659, 662 (D. R.I. 1978) (corrections expert) Goldsby v. Carnes, 429 F.Supp. 370, 381 (W.D. Mo. 1977) (Community Relations Service of U.S. Justice Department); Negron v. Ward, 74 Civ. 1480, Order (S.D. N.Y., July 12, 1976) (psychiatrist); Lasky v. Quinlan, 419 F.Supp. 799, 808 (S.D. N.Y. 1976), vac. as moot, 558 F.2d 1133 (2d Cir. 1977) (director of county board of health); Taylor v. Perini, 413 F.Supp. 189, 198 (N.D. Ohio 1976) (law professor); Valvano v. McGrath, 325 F.Supp. 408, 411, 12 (E.D. N.Y. 1971) (city agency with supervisory power over jails).

modify the decree is discussed in more detail in §X.B. below.) Counsel should try to anticipate the most probable post-judgement problems and draft language specifically addressing them. For example, one consent decree contained terms estopping defendants from relying on economic considerations in seeking to escape the decree's obligations.299/ If a decree contains an "escape clause" for emergency situations, counsel might attempt to define or limit the term "emergency," e.g., by stating in the decree that shortages of personnel or overcrowding do not constitute an emergency.300/ Counsel should also seek to avoid the situation in which defendants attempt to vacate the decree and litigate the merits de novo at a time when plaintiffs' proof is stale and there is an impending crisis of jail population or manageability which places political pressure on the court. One approach to this problem -- one which will usually be strongly resisted by defendants -- is to demand concessions of unconstitutionality, in the decree.301/ While none of these provisions will be immune from subsequent modification, they should serve to increase the defendants' burden in seeking to avoid the decree's terms and should also refute any argument that the problems the provisions address are new and unforeseen.

299/ West v. Lamb, 497 F.Supp. 989, 996 (D. Nev. 1980).

300/ See Costello v. Wainwright, 489 F.Supp. 1100, 1107 (M.D. Fla. 1980) (limited definition of emergency in consent decree.)

301/ See Benjamin v. Malcolm, 564 F.Supp. 668, 670-71 (S.D. N.Y. 1983).

B. Enforcing an Injunction.

If defendants do not comply with a judgement, one must usually go to court to make them. Sometimes negotiations or the threat of an enforcement motion can resolve minor and technical compliance problems. Noncompliance in politically sensitive areas like population reduction or complicated and expensive ones like physical renovation is rarely corrected without court intervention.

A federal court has the inherent power to enforce its orders through civil contempt;[302] it has power under statute, court rule, and traditional equity doctrines[303] to make further orders necessary to effectuate its judgements. A finding of contempt permits the imposition of coercive relief including fines or incarceration.[304] Even without a contempt finding, courts may grant further relief to effectuate the original injunction's purpose.[305] Such relief may include new inspection, record-

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302/ United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947) McComb v. Jacksonville Paper Corp., 336 U.S. 187 (1949); Powell v. Ward, 487 F.Supp. 917 (S.D. N.Y. 1980), aff'd as mod., 643 F.2d 924 (2d Cir. 191), cert. den., 454 U.S. 832 (1982); Miller v. Carson, 550 F.Supp. 543 (M.D. Fla. 1982); Palmigiano v. Garrahy, 448 F.Supp. 659 (D. R.I. 1978).

303/ 28 U.S.C. §1651 (All Writs Act); Rule 60(b), F.R.C.P.; United States v. United Shoe Machinery Corp., 391 U.S. 244, 248-49 (1968).

304/ Newman v. State of Alabama, 683 F.2d 1312, 1318 (11th Cir. 1982) Mobile County Jail Inmates v. Purvis, 551 F.Supp. 92 (S.D. Ala. 1982); Miller v. Carson, 550 F.Supp. 543 (M.D. Fla. 1982).

305/ United States v. United Shoe Machinery Corp., note 303 above, at 248-49; but see Newman v. State of Alabama, id. at 1319-20 (further injunctive relief not available until coercive sanctions of contempt found inadequate).

keeping or reporting requirements,[306] appointment of a master or monitor,[307] or even substantive modifications of the prior injunction.[308] Such modifications need not be predicated on a finding of "grievous wrong";[309] plaintiffs need only show that the existing order has not accomplished its purpose.[310] If the modifications sought are sweeping, however, the proceeding may amount to a *de novo* consideration of the constitutionality of conditions at the time of the motion.[311]

Enforcement of judgements in complex jail conditions cases is frequently frustrating and difficult. Many judges are extremely reluctant to hold jail officials in contempt; many are frightened of the politically explosive issue of jail population; others become worn down by the sheer ineptitude and sloth demonstrated by many jail officials. At best, defendants are likely to be given many extensions of time and opportunities to comply before

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306/ Powell v. Ward, note 302 above; Todaro v. Ward, 74 Civ. 4581 (RJW), (S.D. N.Y., November 21, 1979) (Order).

307/ Powell v. Ward, note 302 above; Jones v. Wittenberg, 73 F.R.D. 82 (N.D. Ohio 1982); Jensen v. County of Lake, note 304 above.

308/ Inmates of Allegheny County Jail v. Wecht, 565 F.Supp. 1278, 1297 (W.D. Pa. 1983) (overcrowding limited based on finding that it impeded implementation of prior conditions orders); Toussaint v. Rushen, 553 F.Supp. 1365, 1386-87 (N.D. Calif. 1983) (additional procedural safeguards added where abuses in use of segregation persisted).

309/ See text accompanying notes 319-324 below.

310/ United States v. United Shoe Machinery Co., note 303 above, at 248-49, King-Seeley Thermos Co. v. Aladdin Industries, Inc., 418 F.2d 31, 35 (2d Cir. 1969); English v. Cunningham, 269 F.2d 517, 523 (D.C. Cir. 1959).

311/ Fischer v. Winter, 564 F.Supp. 281, 299 (N.D. Calif. 1983).

the court takes any decisive action. For this reason, it makes little sense to delay enforcement motions if compliance is not forthcoming immediately or by a court-set deadline. It is generally wishful thinking to believe that the defendants will shape up if plaintiff's counsel goes easy for a while. The sooner the court learns of the noncompliance and begins to hear the defendants' sequence of lame excuses and changing explanations, the sooner its patience will be exhausted and meaningful enforcement will commence.

Plaintiffs' counsel should keep in mind that in enforcement situations it is often necessary to do defendants' work as well as their own. For example, there are numerous ways to reduce a population of pre-trial detainees short of court-ordered release.312/ Defendants can usually be relied upon not to implement or even canvass these alternatives unless forced to do

312/ See Benjamin v. Malcolm, note 301 above, 688-91; West v. Lamb, note 301 above, at 1006, 1008-13; Alberti v. Sheriff of Harris County, note 294 above; Cronin v. Holt, note 294 above; Cherco v. County of Sonoma, C-80-0334-SAW (N.D. Calif., September 27, 1982) (consent decree required county to reduce population through citation program and to improve pretrial release efforts through increase in staffing and resources). Litigators are advised to consult with their experts and with agencies and organizations which provide information and materials on alternatives to incarceration, such as the National Jail Project. Another valuable source of assistance is the Pretrial Services Resource Center, 918 F Street N.W., Washington, D.C. 20004-1482, (202) 638-3080, a non-profit federally-funded agency which provides technical analysis and assistance materials. The Resource Center also contracts independently and through the National Institute of Corrections (NIC) Jail Center to assess the effects of pre-trial practices on jail populations and recommends appropriate remedial alternatives. NIC, an agency of the U.S. Department of Justice, provides assistance to local correctional agencies through the Jail Center, 1790 30th Street, Suite 140, Boulder, CO 80301, (303) 497-6700.

so.313/ Counsel should also consider the advantages of having a monitor or master with relevant experience who can canvass remedial alternatives and make recommendations to the court. As a practical matter, it is plaintiffs' burden to bring these solutions to defendants' and the courts' attention, both to assist the defendants in meeting their obligations and to show the court that noncompliance is in fact caused by defendants' nonfeasance and not inexorable fate. In this area and in others, the assistance of experts may be as important after judgement as before judgement.

The difficult question is what the court is to do if a legislature or other funding source simply refuses to provide the required funds after the court rules against them. The federal courts have not agreed as to whether and how they can directly

313/ See, e.g., Mobile County Jail Inmates v. Purvis, 551 F.Supp. 92, 96 (S.D. Ala. 1982); Anderson v. Redman, 429 F.Supp. 1105, 1123 (D. Del. 1977) (noting prison officials' inability to act "unless and until supplied with the protective succor and warmth of a federal court order"). See also Special Project, "The Remedial Process in Institutional Reform Litigation," 78 Columbia L. Rev. 784, 795-96 (1978).

order expenditures of funds by state and local governments,[314] and have preferred to avoid the question where possible.[315] However, there is little doubt that if the defendants fail to make the required expenditures or improvements, the court can

[314] Compare Griffin v. School Board of Prince Edward County, 377 U.S. 218, 232-23 (1963) (district court could require court officials to levy taxes to reopen schools); Jones v. Diamond, 519 F.2d 1090, 1101 n.20 (5th Cir. 1975) (county supervisors proper defendants "by virtue of their statutory duties and their control over the budget"); Inmates of Suffolk County Jail v. Eisenstadt, 518 F.2d 1241, 1242 (1st Cir. 1975) (continued funding of Bail Appeal Project required); United States v. Missouri, 515 F.2d 1365, 1372-73 (8th Cir. 1975), cert. den., 423 U.S. 957 (1975) (district court could direct school tax levy); Jones v. Metzger, 456 F.2d 854, 856 (6th Cir. 1972) (local government funds ordered redirected to jail improvements); Hamilton v. Landrieu, 351 F.Supp. 549, 552-53 (E.D. La. 1972) (funding of "Prison Ombudsman" required) with Smith v. Sullivan, 553 F.2d 373, 380-381 (5th Cir. 1977) (order to raise guards' pay reversed); Rhem v. Malcolm, 507 F.2d 33, 341 (2d Cir. 1974) (district court should avoid "difficult position of trying to enforce a direct order to the City to raise and allocate large sums of money"); Padgett v. Stein, 406 F.Supp. 287, 303 (M.D. Pa. 1975) (court lacks power to order public funds expended); Hamilton v. Love, 328 F.Supp. 1182, 1194 (E.D. Ark. 1971) (same). See also Cabrera v. Municipality of Bayamon, 622 F.2d 4 (1st Cir. 1980) (contempt fines may be imposed and the funds used to implement remedial measures); Palmigiano v. Garrahy, 448 F.Supp. 659 (D. R.I. 1978) (same); Mobil County Jail Inmates v. Purvis, Civ. Action #76-416P, Memorandum Order (S.D. Ala. December, 1983) (contempt fine used to create bail fund to help relieve jail overcrowding).

[315] See Welsch v. Likins, 550 F.2d 1122, 1131-32 (8th Cir. 1977); Palmigiano v. Garrahy, 599 F.2d 17, 20-21 (1st Cir. 1979).

order the institution closed or inmates released.[316] Generally, in these cases push does not come to shove, and local governments eventually shoulder their legal obligations.[317] (See §XI.K. below for comment on enforcement of attorneys' fees awards.)

C. Modification of Judgements.

Increasingly, jail and prison officials who find themselves inconvenienced by or unable to comply with court orders are seeking to have them vacated or modified. In federal court, such relief is sought under the authority of the rule providing inter alia, when "a prior judgement upon which [the challenged judgement] is based has been reversed or otherwise vacated, or it is no

[316] Duran v. Elrod, 713 F.2d 292, 299-98 (7th Cir. 1983); Dimarzo v. Cahill, 575 F.2d 15, 19-20 (1st Cir. 1978); Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98, 101 (1st Cir. 1978); Rhem v. Malcolm, 507 F.2d 333, 340-41 (2d Cir. 1974); Parnell v. Waldrep, 511 F.Supp. 765 (W.D. N.C. 1981); Barnes v. Government of Virgin Islands, 415 F.Supp. 1218, 1227, 1230 (D. V.I. 1976). See also Lightfoot v. Walker, 486 F.Supp. 504, 524 (S.D. Ill. 1980) (if medical services not enhanced, prison population must be reduced to level commensurate with existing services). One court, however, has held that an injunction regarding conditions must be enforced at least initially through contempt and not by a release order. Newman v. State of Alabama, 683 F.2d 1312 (11th Cir. 1982) cert. den. 103 S.Ct. 1312 (1983). On remand, the district court entered both a judgement of contempt and a new release order to take effect some months later. Newman v. Alabama ___ F.Supp. ___, Civ. Action # 3501-N, Order and Judgement and Memorandum Opinion (M.D. Al. 1983), appeal pending in 11th Circuit. See also Mobil County Jail Inmates v. Purvis, note 314 above (bail fund created by court order). See generally Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 721 (1978); Comment, "Enforcement of Judicial Financial Orders: Constitutional Rights in Search of a Remedy;" 59 Geo. L.J. 393, 418-19 (1970).

[317] Harris and Spiller, Resource Center on Correctional Law & Legal Services, Commission on Correctional Facilities and Services, American Bar Association, After Decision: Implementation of Judicial Decrees in Correctional Settings, 22-23 (1976).

longer equitable that the judgement should have prospective application; or...any other reason justifying relief from the operation of the judgment."318/

Traditional doctrine holds that when defendants seek to escape the terms of an injunction, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decided after years of litigation."319/ This doctrine is applicable equally to consent decrees and to litigated judgements.320/ The "grievous wrong" standard has been followed by many modern courts in jail and prison cases and in other contexts.321/ Other courts have declined, often without explanation, to hold jail and prison officials to the usual standard.322/ One federal circuit has adhered to the "new and unforeseen conditions" requirement while

318/ Rule 60(b) (5) and (6), F.R.C.P.

319/ United States v. Swift & Co., 286 U.S. 106, 119 (1932). Plaintiffs seeking additional relief to effectuate the intent of an injunction are governed by a less exacting standard. See text accompanying note 310.

320/ Note 319 above, at 114.

321/ Duran v. Elrod, 713 F.2d 292, 296-97 (7th Cir. 1983); Mayberry v. Maroney, 529 F.2d 332, 335 (3d Cir. 1976) ("exceptional circumstances"); Humble Oil Refining Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir. 1969), cert. den., 395 U.S. 905 (1969) ("oppressive hardship"); Frazier v. Ward, 528 F.Supp. 80 (N.D. N.Y. 1981); Rhem v. Malcolm, 432 F.Supp. 769, 780 (S.D. N.Y. 1977).

322/ Campbell v. McGruder, 554 F.Supp. 562 (D. D.C. 1982); Thompson v. Enomoto, 542 F.Supp. 768 (N.D. Calif. 1982); Merriweather v. Sherwood, 518 F.Supp. 355 (S.D. N.Y. 1981); Imprisoned Citizens Union v. Shapp, 461 F.Supp. 522 (E.D. Pa. 1978); Gates v. Collier, 454 F.Supp. 579, 582 (N.D. Miss. 1978).

relaxing the "grievous wrong" standard.323/ Another federal circuit has held that the "grievous wrong" standard is inapplicable in complex injunctive cases if the proposed modification is not "in derogation of the primary objective of the decree."324/ The courts are divided as to whether changes in decisional law constitute a basis for modification.325/

In opposing a motion to modify, there are various approaches to take, depending on the issue, the facts, and the nature of the judgement. Under the traditional modification standard, counsel should emphasize defendants' failure to show new and unforeseen circumstances and their failure to show sufficiently serious problems to justify disturbing the finality of judgements.326/ Sometimes these may be apparent on the face of the papers, and counsel should attempt to have the motion dismissed without a

323/ Compare Nelson v. Collins, 700 F.2d 145 (4th Cir. 1983) (modification prohibited without proven changes in circumstances after entry of judgement) with Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) ("review anew" justified by changed conditions and Supreme Court decisions).

324/ New York State Association for Retarded Children v. Carey, 706 F.2d 956, 969 (2d Cir. 1983), cert. den., 104 S.Ct. 277 (1983). See Benjamin v. Malcolm, 564 F.Supp. 668, 685-87 (S.D. N.Y. 1983) (modification denied where in conflict with primary objective of decree).

325/ Compare Coalition of Black Leadership v. Ciana, 570 F.2d 12, 16 (1st Cir. 1978); Morris v. Travisono, 499 F.Supp. 149, 154 (D. R.I. 1980) Wallace Clark & Co., Inc. v. Acheson Industries, Inc., 394 F.Supp. 393, 395 n.4 (S.D. N.Y.), aff'd, 532 F.2d 846 (2d Cir.), cert. den., 425 U.S. 976 (1976) with Gomes v. Moran, 605 F.2d 27 (1st Cir. 1979); Jordan v. School District of Erie, Pa., 583 F.2d 91 (3d Cir. 1978); Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981).

326/ See Frazier v. Ward, 528 F.Supp. 80 (N.D. N.Y. 1981) (staffing problems not "oppressive hardship").

hearing. If there is to be a hearing, counsel should seek discovery. Depositions are preferable for this purpose, since they are likely to expose defendants' lack of foresight and failure to think through their positions; written discovery may sensitize them to these problems in time to cover them up. Further expert tours might be advisable. Under a more relaxed modification standard, plaintiffs should be prepared to demonstrate that the constitutional violation persists, or that it would recur under the defendants' proposal (although the burden of proof should presumably be on the defendant). Expert testimony and consultation is plainly called for under these circumstances. If the judgement is a multi-issue consent judgement and defendants seek relief as to one or a few issues, counsel should argue that the judgement is a product of give and take in which the parties may have sacrificed benefits on some issues to obtain benefits on others; in that context, it is unfair to permit a party to reopen only those issues as to which it is dissatisfied.327/ An alternative position is to request that the court, if it considers defendants' motion on the merits, also reopen issues on which the plaintiffs might be entitled to more relief; if attorneys' fees have been settled, reopening the

327/ See United States v. Armour & Co., 402 U.S. 673, 681 (1971) ("...in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.")

amount of fees. They may be a fruitful subject for a counter-motion. Counsel's object should be to preserve the integrity of the judgement by making any reopening of it more risky and burdensome for the defendants and more inconvenient for the court.

SECTION XI. ATTORNEYS' FEES

Under the Civil Rights Attorney's Fees Awards Act of 1976, codified in 42 U.S.C. §1988, successful §1993 litigants will probably be compensated to some extent for their time and efforts. The Act provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost." Legislative history makes it clear that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust."328/ Attorneys' fees motions are more hotly contested than the merits in many cases. There is consequently an enormous body of fees caselaw in every federal jurisdiction. This brief review is

328/ S.Rep. No. 94-1011, 94th Cong. 2d Sess., 4 (1976), quoting from Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). Prevailing defendants are entitled to fees only if the plaintiffs' action was frivolous or in bad faith. Hughes v. Rowe, 449 U.S. 5, 14 (1980); Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978).

Substantial awards have been made in many jail cases, with rates and amounts depending on the jurisdiction, when the work was done, the length and complexity of the case, and the credentials of the lawyers. See, e.g., Robinson v. Moreland, 655 F.2d 887 (8th Cir. 1981) ($40-$60 an hour); Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980) ($2,000 for prosecuting appeal); Miller v. Carson, 563 F.2d 741 (5th Cir. 1977) ($45,792 at $30-$60 an hour); Miller v. Carson, 628 F.2d 346 (5th Cir. 1980) ($17,407.50 for further proceedings); Martino v. Carey, 568 F.Supp. 848 (D. Or. 1983) ($125 and hour plus $75 an hour multiplier; total award of $195,470); Forney v. Wolke, 483 F.Supp. 809 (E.D. Wis. 1980) ($17,047.90 at $50-$75 an hour); Adams v. Mathis, 458 F.Supp. 302 (M.D. Al. 1978) ($50 an hour); Penland v. Warren County Jail, Civ-4-82-9 (E.D. Tenn., 1983) ($14,465 at $65 an hour); Brown v. Barr, CA 78-3046 (S.D. W.Va., 1981) ($50 an hour in court and $35 out-of-court time for further proceedings).

intended only to suggest the courts' basic approaches to some of the common fees issues jail litigators will face.329/

A. Record Keeping. From the beginning of the litigation, counsel should be careful to document hours expended with the same care that would be accorded billing records of a private paying client. Although the courts were initially somewhat lenient with lawyers who reconstructed the hours spent on litigation, rather than submitting contemporaneous records, those days are now gone. The lack of contemporaneous time records can be expected to result in a reduction of fees, if not an outright denial.330/ The records for each lawyer should be kept on standardized forms, with a designation of all requested hours and a brief description of the nature of the tasks performed during these hours.

B. Prevailing Party Status. In jail litigation, it is likely that the single most recurrent issue will be the plaintiff's entitlement to a full fee award when the plaintiff succeeds on one or more, but not all issues. The problem routinely arises in totality of conditions jail litigation involving numerous issues and requests for relief. The Supreme

329/ A comprehensive review of attorneys' fees issues may be found in Larson, Federal Court Awards of Attorneys' Fees, (Harcourt Brace Jovanovich, Publishers, 1981) (hereinafter, "Larson").

330/ Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 1939 (1983). At least three Circuits have now announced a requirement of contemporaneous records. New York State Ass'n. for Retarded Children v. Carey, 711 F.2d 1136, 1147 (2d Cir. 1983); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); and National Ass'n. of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

Court has addressed but has done little to clarify this issue. It does appear, however, that the court has adopted the view that plaintiffs may be considered prevailing parties for purposes of awarding fees if they succeed on any significant issue in litigation on the merits.331/

Nevertheless, achieving the position of prevailing party is but the first hurdle. If plaintiffs are prevailing parties, the trial court must determine the number of hours reasonably expended on the litigation under a reasonable hourly rate. After that determination, the trial court can adjust the amount awarded in either direction. If the lawsuit presented distinctly different claims for relief based on different facts and legal theories, time on an unsuccessful, unrelated claim can not be compensated.332/ As a practical matter, this should not be a common problem for successful counsel in jail cases. As the Supreme Court acknowledges, in civil rights cases, completely unrelated claims are unlikely to arise with great frequency. Moreover, the Supreme Court also recognized that it would be difficult to divide the hours expended on a claim-by-claim basis.333/

331/ Hensley v. Eckerhart at 1939 and cases cited. But see Best v. Boswell, 696 F.2d 1282, 1289 (11th Cir. 1983) (plaintiff who did not prevail on "central issue" not entitled to fees).

332/ Hensley at 1940-41; McCann v. Coughlin, 698 F.2d 112, 129-30 (2d Cir. 1982).

333/ Hensley at 1940. See Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc) (acknowledges "overlapping and intertwined" issues).

Accordingly, the practical problem is the status of issues of related but unsuccessful claims. First, in its examination, the Supreme Court notes that "in some cases of exceptional success," an enhanced award (multiplier) may be given. In such circumstances, the award should not be reduced simply because the plaintiff has not been successful on every claim. When the plaintiff has achieved only partial or limited success, then the trial court must examine the total fee, as determined by multiplying the time reasonably expended by the hourly rate, and determine whether that fee remains reasonable in light of the results obtained.334/

C. Interim Awards.

In injunctive actions, when plaintiffs succeed in obtaining preliminary relief on the issues, an application for fees is in order.335/ However, interim procedural victories are not

334/ Hensley at 1940-41.

335/ See, e.g., Fitzharris v. Wolf, 702 F.2d 836 (9th Cir. 1983) (fees awarded for obtaining temporary restraining order even though case was later mooted); Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 339 (5th Cir. 1981) (fees to be awarded based on preliminary injunction); Coalition for Basic Needs v. King, 691 F.2d 597 (1st Cir. 1982); Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980); Bucktown v. NCAA, 436 F.Supp. 1258 (D. Mass. 1977); Howard v. Phelps, 443 F.Supp. 374 (E.D. La 1978) (interim award in jail case). But see Planned Parenthood of Minn. v. Citizens for Community Action, 558 F.2d 861, 871 (8th Cir. 1977) (inequitable to provide fees in initial stages of lawsuit); Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980) (Title VII case where plaintiffs won reinstatement through a preliminary injunction but ultimately lost case after trial not prevailing party for attorney fee purposes). See also Larson at 244-49; §II.B.3. above for additional comments on interim fee motions.

compensable until and unless plaintiffs establish their entitlement to some relief on the merits.336/

D. Awards to Public Interest Lawyers.

Most courts have held that the fact that plaintiffs' counsel was provided by legal services lawyers or by a public interest organization like the Legal Defense Fund or the American Civil Liberties Union was irrelevant to a fees award.337/ One Court of Appeals recently held that hourly fees for public interest lawyers should not be higher than hourly fees for comparable lawyers on the lower end of billing rates in the community, unless the public interest lawyers can demonstrate overhead costs justifying a higher hourly rate.338/ As we write, the Supreme Court has granted certiorari in a case which presents the question of the proper compensation of Legal Aid Society lawyers.339/

E. Prevailing Under a Consent Decree.

When the plaintiffs obtain relief through a settlement agreement, they have prevailed and are entitled to a fee on the

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336/ Hanrahan v. Hampton, 446 U.S. 754, 757 (1980).

337/ Ramos v. Lamm, 713 F.2d 546, 551 (10th Cir. 1983) and cases cited; Larson at 99-113.

338/ New York Association for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2d Cir. 1983). This decision reflects judicial concern over the high billing rates prevalent among prestigious private lawyers in New York City. Counsel should argue that its holding is limited to New York and similar legal markets (if any).

339/ Stenson v. Blum, 512 F.Supp. 680 (S.D. N.Y. 1981), aff'd, 671 F.2d 493 (2d Cir. 1981), cert. grant., 103 S.Ct. 2426 (1983).

same basis as if the case had been fully litigated.340/ Sometimes defendants refuse to settle on the merits unless plaintiffs waive fees, presenting a major ethical problem for plaintiffs' counsel, who face a conflict between their clients' best interests and their own. A number of courts have suggested that putting counsel in this position is unethical,341/ but the Supreme Court has stated:

> Although sensitive to the [ethical] concerns that petitioner raises, we decline to rely on this proferred basis. On considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability for both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.342/

Despite this language, some civil rights lawyers take the position that there can be no discussions bearing on fees while negotiations on the merits are proceeding. A possible alternative is to indicate to defendants the total number of hours billed in the case and what the lawyers consider their

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340/ Maher v. Gagne, 448 U.S. 122 (1980).

341/ Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3rd Cir. 1977); Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980); Obin v. District No. 9 of the Int'l. Ass'n. of Machinists, 651 F.2d 574, 582-83 (8th Cir. 1981); Munoz v. Ariz. State University, 80 F.R.D. 670, 671-72 (D. Ariz. 1978); Lyon v. State of Ariz., 80 F.R.D. 665, 669 (D. Ariz. 1978); Regalado v. Johnson, 79 F.R.D. 447, 451 (N.D. Ill. 1978). See also Rule 1.46, Manual for Complex Litigation, 62.

342/ White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 454, n.15 (1982).

normal billing rates to be. In that manner, the defendants are informed of their total potential liability, but plaintiffs' counsel is not in the position of trading fees for the rights of the clients.343/ In one case where defendants adamantly refused to negotiate without a waiver of fees, the Court ordered the defendants to enter settlement negotiations on the merits separately from the question of the plaintiffs' entitlement to attorneys fees.344/

F. Prevailing as a Catalyst for Relief.

Sometimes plaintiffs' claim to prevailing party status is based neither on a favorable decision nor on a formal consent judgement, but on a claim that the lawsuit acted as a catalyst to produce the relief sought by plaintiffs. In one widely cited case the First Circuit held that it is plaintiffs' burden to show that the lawsuit is causally related to defendants' actions that afforded relief.345/ In another case the Fifth Circuit remanded for the district court to determine whether the lawsuit was "a substantial factor or a significant catalyst in motivating the

343/ This has been the practice of staff attorneys with the National Prison Project and has been proposed for all ACLU attorneys in Barrett, "Settlement of Cases in Which Statutory Attorneys Fees Are Authorized: An Ethical Dilemma," 10 ACLU Lawyer 5 (1983).

344/ Lisa F. v. Snider, 561 F.Supp. 724 (N.D. Ind. 1983). Cf. Shadis v. Beal, 685 F.2d 824 (3rd Cir. 1982) (the court voided a provision in legal services contract prohibiting attorneys' fees awards as against public policy).

345/ Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978). See also Mendoza v. Blum, 560 F.Supp. 284 (S.D. N.Y. 1983) (fees awarded where lawsuit "encouraged" action by defendants); Jordan v. Multnomah County, 694 F.2d 1156, 1158 (9th Cir. 1982) (jail case); Martino v. Carey, 568 F.Supp. 848, 853 (D. Or. 1983) (jail case); Larson at 68-74.

defendants to end their [challenged] behavior."346/ While in an Eighth Circuit case the court simply stated that plaintiffs were probably catalysts and were therefore prevailing parties.347/

G. Prevailing on Claims Other than §1983.

Sometimes the plaintiff prevails, but prevails on a non-§1983 claim. Maine v Thiboutot 348/ and Maher v. Gagne, 349/ when taken together, hold that attorney's fees are available in state or federal court in §1983 actions based on a federal statutory claim. In addition, the Supreme Court held in Thiboutot, in language that also appears to apply to pendent claims based on state law, that fees may be awarded when the plaintiffs prevail on a claim pendent to a substantial constitutional claim or one in which a substantial constitutional and a pendent claim are settled favorably to the plaintiffs without adjudication. (See §II.A.2. above concerning pendent state claims.) However, plaintiffs may not be entitled to fees if they prevail on a non-§1983 claim but lose on the §1983 claim.350/

346/ Robinson v. Kimbrough, 652 F.2d 458, 466 (5th Cir. 1981). In a withdrawn opinion, the court had held that the chronological sequence of events had established the lawsuit's catalytic effect. 620 F.2d 468 (5th Cir. 1980).

347/ Williams v. Miller, 620 F.2d 199 (8th Cir. 1980).

348/ 448 U.S. 165 (1980).

349/ 448 U.S. 122 (1980).

350/ Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980); Allen v. Housing Authority of County of Chester, 563 F.Supp. 108, (E.D. Pa. 1983). But see Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981) (fees awarded where plaintiff recovered compensatory damages on pendent claim but only nominal damages under §1983).

Finally, for those lawsuits brought against federal jails, in which §1988 is not applicable, fees may be awarded against the federal govenment pursuant to the Equal Access to Justice Act[351] if the United States cannot establish that its position was substantially justified.[352]

H. Recovering Experts' Costs and Other Litigation Expenses.

In many jail cases the plaintiffs will have substantial outlays for experts' fees and expenses. In Jones v. Diamond,[353] the Fifth Circuit held that successful plaintiffs could recover these outlays as part of the attorney's fees award. The Supreme Court subsequently granted certiorari on this issue, then dismissed the case after the parties settled among themselves.[354] Other courts have awarded expert fees in §1983 cases;[355] some have refused to do so.[356] The lower federal

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351/ 28 U.S.C. §2412(d).

352/ For an example of an award under the act in jail litigation, see Boudin v. Thomas, 554 F.Supp. 703 (S.D. N.Y. 1982).

353/ 636 F.2d 1364 (5th Cir. 1981) (en banc).

354/ Ledbetter v. Jones, 452 U.S. 959; 453 U.S. 911; ___ U.S.___, 102 S.Ct. 27 (1981).

355/ See, e.g., Wuori v. Concannon, 551 F.Supp. 185 (D. Me. 1982) (expert fees and costs recoverable as costs); Loewen v. Turnipseed, 505 F.Supp. 512 (N.D. Miss. 1980) (consultant and expert fees reimbursed under §1988).

356/ Miller v. City of Mission, Kansas, 516 F.Supp. 1333 (D. Kan. 1981).

courts have taken various approaches as to what other out-of-pocket costs can be reimbursed and whether they are to be awarded under §1983 or as ordinary costs.[357]

I. Recovering Fees Against the Governmental Unit.

In most cases, attorneys' fees will be assessed against the relevant unit of government or against the defendants in their official capacities, which amounts to the same thing.[358] Some cases have awarded fees against defendants in their individual capacities when the acts for which liability was found could not be said to represent official policy,[359] using the criteria of Monell v. New York City Department of Social Services.[360] So far, this distinction has been reserved for damage claims and not injunctive cases.

357/ See, e.g., Dowdell v. City of Apopka, Fla., 698 F.2d 1181, 1192 (11th Cir. 1983) (all reasonable expenses except normal office overhead compensable under §1988); Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983) (deposition costs compensable under §1988); United Nuclear Corp. v. Cannon, 564 F.Supp. 581, 591-92 (D. R.I. 1983) (law clerk, paralegal, Lexis costs reimbursed under §1988); Wuori v. Concannon, note 355 above (copying, travel, telephone expenses recoverable under §1988; deposition expenses recoverable as costs); Dickerson v. Pritchard, 551 F.Supp. 306 (W.D. Ark. 1983) (telephone and copying recoverable as costs; travel, accommodations and parking not recoverable); Ruiz v. Estelle, 553 F.Supp. 567, 596 (S.D. Tex. 1982) ("all reasonable expenses, including travel expenses" reimbursed).

358/ See Hutto v. Finney, 437 U.S. 678, 692-93 (1978).

359/ Morrison v. Fox, 660 F.2d 87 (3d Cir. 1981); Williams v. Thomas, 511 F.Supp. 535, 545 (N.D. Tex. 1981). See Collins v. Thomas, 649 F.2d 1203, 1205 (5th Cir. 1981).

360/ 436 U.S. 658, 694 (1978).

J. Compliance Work.

A final issue arises when the plaintiffs' lawyers, after winning relief for their clients, find that they must expend additional time in enforcement litigation and monitoring of compliance. In general, courts hold that successful compliance efforts are as compensable as any other work in the case.361/ Indeed, courts have awarded fees for unsuccessful compliance efforts, once plaintiffs were initially prevailing parties.362/

K. Getting Paid.

Unfortunately, fee awards are not self-enforcing. Although it seems clear that state statutes, procedures, or actions that have the effect of denying payment are unlawful,363/ counsel may be relegated under Rule 69(a), F.R.C.P. to the state's procedures for enforcing judgements, however cumbersome or time consuming.364/ It may be that, upon a showing that timely payment is essential to continue the litigation, speedier

361/ See Taylor v. Sterrett, 640 F.2d 663 (5th Cir. 1981); Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980); Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979) cert. den., 447 U.S. 911 (1980). See also Rutherford v. Pitchess, 713 F.2d 1416, (9th Cir. 1983).

362/ Mader v. Crowell, 506 F.Supp. 484 (M.D. Tenn. 1981).

363/ Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982); Collins v. Thomas, 649 F.2d 1203 (5th Cir. 1981); Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980). See Hutto v. Finney, 437 U.S. 678, 793-95 (1978) (fee statute abrogates states' Eleventh Amendment immunity)

364/ Preston v. Thompson, 565 F.Supp. 294, 300-310 (N.D. Ill. 1983).

procedures may be required. Some courts have required the creation of a fund for the payment of future awards based on defendants' history of delay in payment.365/ "In order to minimize the effect of appellate delay" on the payment of fee and cost awards, attorneys are advised to seek an order requiring immediate payment of any conceded or uncontested amounts.366/

365/ Miller v. Carson, 628 F.2d 346, 349 (5th Cir. 1980); Ruiz v. Estelle, 555 F.Supp. 567, 596 (S.D. Tex. 1982).

366/ Martino v. Carey, 568 F.Supp 848 (D. Or. 1983) (defendants' experts' lowest estimate of appropriate fee ordered paid immediately).

Appendix I

Leading Post-Wolfish and Chapman Federal Decisions

First Circuit:

Blake v. Hall, 668 F.2d 52 (1st Cir. 1981) (prison case).

Second Circuit:

Benjamin v. Malcolm, 495 F.Supp., 1357 (S.D. N.Y. 1980); 528 F.Supp. 925 (S.D. N.Y. 1981); 564 F.Supp. 668 (S.D. N.Y. 1983);
LaReau v. Manson, 507 F.Supp. 1177 (D.Conn. 1980) aff'd as mod. 651 F.2d 96 (2d Cir. 1981).

Third Circuit:

Union Co. Jail Inmates v. DiBuono, 713 F.2d 984 (3rd Cir. 1983) pet. for reh. den., 718 F.2d 1247 (1983) (Gibbons, J. dissenting);
Inmates of Allegheny Co. Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979), on remand, 487 F.Supp. 638 (W.D. Pa. 1980); further relief granted, Inmates of Allegheny Co. Jail v. Wecht, 565 F.Supp. 1278 (W.D. Pa. 1983).

Fourth Circuit:

Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981);
Gross v. Tazewell Co. Jail, 533 F.Supp. 413 (W.D. Va. 1982);
Parnell v. Waldrep, 511 F.Supp. 764 (W.D. N.C. 1981).

Fifth Circuit:

Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (en banc);
Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980);
Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980) aff'd in part, vac. in part, vac. without prejudice in part remanded for further proceedings, 659 F.2d 1115 (5th Cir. 1982) (prison case).

Sixth Circuit:

Malone v. Colyer, 710 F.2d 258 (6th Cir. 1983);
Jones v. Wittenburg, 509 F.Supp. 653 (N.D. Oh. 1980);
Grubbs v. Bradley, 552 F.Supp. 1052 (M.D. Tenn. 1982) (prison case).

Seventh Circuit:

Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981);
Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980);
Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983);
Smith v. Fairman, 690 F.2d 122 (7th Cir. 1982) (prison case);
Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983) (prison case).

Eighth Circuit:

Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980);
Hutchings v. Corum, 501 F.Supp. 1276 (W.D. Mo. 1980);
Heitman v. Gabriel, 524 F.Supp. 622 (W.D. Mo. 1981).

Ninth Circuit:

Rutherford v. Pitchess, 710 F.2d 572 (9th Cir. 1983); cert. granted sub nom., Block v. Rutherford, 104 S.Ct. 390 (1983).
Leeds v. Watson, 630 F.2d 674 (9th Cir. 1980);
Martino v. Carey, 563 F.Supp. 984 (D. Or. 1983);
Fischer v. Winter, 564 F.Supp. 281 (N.D. Cal. 1983);
Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1983) (prison case);
Touissant v. Rushen, 553 F.Supp. 1365 (N.D. Cal. 1983) aff'd, 722 F. 2d 1490 (9th Cir. 1984) (prison case).

Tenth Circuit:

Littlefield v. Deland, 641 F.2d 729 (10th Cir. 1981);
Ramos v. Lamm, 485 F.Supp. 122 (D. Col. 1979), aff'd in part and remanded, 639 F.2d 559 (10th Cir. 1980), cert. den., 101 S.Ct. 1259 (1981); on remand 520 F.Supp. 1059 (D. Col. 1981) (prison case);
Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983) (prison case).

Eleventh Circuit:

See Fifth Circuit cases above. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209-12 (11th Cir. 1981) (en banc) (pre-September 30, 1981 decisions of Fifth Circuit panels adopted as binding precedent by newly created court); Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982) (post-September 30, 1981 decisions of Unit B of the former Fifth Circuit also adopted as binding precedent).

D.C. Circuit:

Campbell v. McGruder, 554 F.Supp. 562 (D.C. D.C. 1982);
Doe v. District of Columbia, 701 F.2d 948, 957-58 (D.C. Cir. 1983) (Separate Statement of Edwards, J.) (discussion of totality approach in prison context).

Appendix II

A List of Correctional and Other Relevant Standards (and Where to Obtain Them)

1. NAC Standards
National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections (1973)

   Superintendent of Documents
   U.S. Gov't. Printing Office
   Washington, D.C. 20402

   Price: $6.95
   Stock No.: 027-000-00175-1

2. ABA Standards
American Bar Association, Fourth Draft of Standards Relating to the Legal Status of Prisoners (1980) (Approved as ABA policy by The House of Delegates on 2/9/81)

   Richard P. Lynch
   ABA
   1800 M St., N.W.
   Washington, D.C. 20036

   Price: $10.00

3. ACA Standards (also known as the CAC Standards)
Commission on Accreditation for Corrections,
Manual of Standards for Local and Adult Detention Facilities, 2d ed. (1981)

   American Correctional Association Publications
   4321 Hardwick Road, Suite L-208
   College Park, MD 20740

   Price: $10.00

4. U.S. Dept. of Justice Standards (DOJ Standards)
Federal Standards for Prisons and Jails (1980)

   Superintendent of Documents
   U.S. Gov't. Printing Office
   Washington, D.C. 20402
   (202) 783-3238
   Stock #027-000-01083-1

5. UN Standards
The Standard Minimum Rules for the Treatment of Prisoners - In Light of Recent Developments in the Correctional Field

   United Nations
   2101 L Street, N.W., Suite 209
   Washington, D.C. 20036

6. National Sheriffs' Association Standards (NSA Standards) - Set of seven monographs entitled: Jail Architecture; Sanitation in the Jail; Jail Programs; Food Service in Jails; Jail Security: Classification and Discipline; Inmate Legal Rights; and Jail Administration

   Publications Division
   National Sheriffs' Association
   1250 Connecticut Ave., N.W.
   Suite 320
   Washington, D.C. 20036

   Price: $2.00 per monograph, $10.00 for a set of 7

7. AMA Standards
American Medical Association Jail Project
Standards for Health Care In Jails

   AMA Jail Project
   535 North Dearborn
   Chicago, IL 60610

   Price: One copy free and each copy thereafter $2.50

8. Della Penna, Health Care in Correctional Institutions

   Superintendent of Documents
   U.S. Gov't. Printing Office
   Washington, D.C. 20402

   Price: $3.00
   Stock No.: 027-000-00349-4 (please include)

9. APHA Standards
American Public Health Association: Standards for Health Services in Correctional Institutions (1978)

   APHA
   1015 15th Street, N.W.
   Washington, D.C. 20036

   Price: $5.00

10. American Association of Correctional Psychologists
Standards for Psychological Services in Adult Jails and Prisons (1979)

   Dr. S.W. Wing
   President American Association of Correctional Psychologists
   Legal Offender Unit
   Western State Hospital
   Fort Steilacoom, WA 98984

   Price: $2.00

11. ABA Mental Health Standards
American Bar Association Standing Committee on Association Standards for Criminal Justice, First Tentative Draft, Criminal Justice Mental Health Standards (July 1983)

Standing Committee on Association Standards for Criminal Justice
ABA
1800 M Street, N.W.
2nd Floor, South Lobby
Washington, D.C.

Price: No charge

12. Life Safety Standards
National Fire Protection Association
Life Safety Code 101-81

National Fire Protection Association
Battery March
Quincy, MA 02269

Price: $10.50

13. NAPSA Standards
National Association of Pretrial Services Agencies
Performance Standards and Goals for Pretrial Release and Diversion (1978)

National Association of Pretrial Services Agencies
918 F Street, N.W., Suite 500
Washington, D.C. 20004

Price: No charge