Buffalo Law Review

Volume 21
Number 3 *Prisons on Trial: A Symposium on the Changing Law of Corrections*
Article 4

4-1-1972

Prison Crisis Litigation: Problems and Suggestions

William E. Hellerstein
Legal Aid Society of New York City

Barbara A. Shapiro
Legal Aid Society of New York City

PRISON CRISIS LITIGATION: PROBLEMS AND SUGGESTIONS

WILLIAM E. HELLERSTEIN* AND BARBARA A. SHAPIRO†

I. INTRODUCTION

Rapidly growing concern about prisoners' rights and the outbreak of prison disturbances has created a need for the talents of what might be described as the "Prison-Crisis Lawyer." From what our own limited experience has taught us, this rapidly developing practice requires a combination of skills and resources that cuts across various specializations. An individual attorney or legal organization confronted with a prison crisis will quickly discover that prompt and extensive action in many different spheres is called for and that personal and organizational resources will be, to say the least, heavily taxed.

A prison crisis may be defined as a situation in which prison officials respond with unnecessary force or excessive punitive and retaliatory measures to a prison disturbance or to some other activity which is viewed by them as a threat to prison security. Indeed, it has been the immediate aftermath of several major prison disturbances that has given rise to much of the complex litigation to be discussed herein.[1] This article will attempt to explore a number of problems that can occur in the course of dealing with a prison crisis and to offer some guidelines and suggestions.

Primary emphasis will here be given to litigation under the

---

* Attorney-in-Charge, Criminal Appeals Bureau, Director of Prisoners' Rights Project, Legal Aid Society of New York City. A.B., Brooklyn College, 1959; J.D., Harvard University, 1962.

† Associate Attorney-in-Charge, Prisoners' Rights Project, Legal Aid Society of New York City. A.B., Radcliffe College, 1963; LL.B., Columbia University, 1966.

The views expressed in this article are those of the authors and do not represent those of the Legal Aid Society.

1. The authors have been heavily involved in litigation arising out of three major prison disturbances: Queens House of Detention for Men at Kew Gardens in October, 1970 (Valvano v. McGrath, 325 F. Supp. 408 (E.D.N.Y. 1971)); Long Island City Jail (Branch Queens) in October, 1970 (Cender v. Lindsay, Civil No. 70-1225 (E.D.N.Y., Nov. 23, 1970)); Attica in September, 1971 (Inmates of the Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971)). In addition, the authors are involved in a challenge to conditions of confinement in the Manhattan House of Detention for Men (the Tombs) (Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971)).

federal Civil Rights Act (42 U.S.C. § 1983) since most prisoners' rights litigation has been undertaken pursuant to that statute. However, state court remedies and administrative and political measures, either independently or in conjunction with federal litigation, should not be overlooked.[2]

II. Goals of Litigation

In a crisis situation, because of time pressures, there is a great temptation to take legal action without advance thought as to the aims of the suit and techniques to be employed. However, as in any other kind of litigation, the goals of the lawsuit should be carefully thought out prior to filing. A suit commenced without a well-defined goal or theory in mind can become unwieldly and difficult to manage.

In a prison crisis suit, long range goals may encompass some attempts at systemic alterations in prison life, but generally, the litigation will be directed to securing permanent injunctive relief against various kinds of unlawful official conduct. Thus, in this type of suit, long range aims will frequently be secondary to the more immediate necessities—those of obtaining prompt protection of prisoners from acts of violence and other forms of brutality; securing adequate medical care; gaining relief from unduly harsh living conditions imposed in the context of an "emergency"; and thwarting attempts at summary punishment, such as administrative segregation. The paradox of this type of suit is that all too often, the goal sought will be nothing more than restoration of the status quo as it existed prior to the disturbance.

In a suit brought primarily to challenge extreme punitive conditions in a prison rather than brutality, a good deal more attention will have to be paid to achievement of systemic changes within the prison. Therefore, such a suit may contain an attack on physical conditions, inadequate medical and psychiatric services, disciplinary procedures, censorship, visitation rights, and racial discrimination. Each of these abuses, however, could constitute a

2. Several important suits challenging jail and prison conditions have been successfully prosecuted in state courts. Commonwealth *ex rel.* Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971); Inmates of Wayne County Jail v. Wayne County Bd. of Comm'rs., Civil No. 173217 (Mich. Cir. Ct., May 25, 1971). As a general matter, however, many state courts have been exceptionally inhospitable to prisoners' rights suits. *See* Schwartz, *Prisoners' Rights and the Courts,* New York Law Journal, June 10 & 11, 1971, at 1, col. 4.

compact litigable unit by itself, with its own conceptual base. Thought should thus be given to whether an omnibus suit should be brought or whether it would be wiser to commence a series of actions challenging particular abuses separately. At times, omnibus suits can result in a hit or miss outcome, where victory is secured on some points but not others because in the course of litigation, some become obscured. Asking too much of a court at one time can be counter-productive. Goals that are achievable when the court's energies are not diverted by more serious issues may not be realized when made part of an omnibus suit. On the other hand, in some cases the constitutional violations may result from the combination of many factors which, when viewed separately, might not seem to be of constitutional magnitude.[3] In such a case, an omnibus suit might well be necessary.

A short-term purpose of crisis lawsuits not to be overlooked is the potential extra-legal consequence of the very commencement of the action. Involvement of a court in the crisis as quickly as possible brings needed exposure of official conduct by requiring state officials to account for their actions in answering papers or by testimony at a public hearing. Certain judges have proceeded immediately to the prison to hold such hearings and to inspect the conditions of the prison for themselves.[4]

Merely bringing the situation within the prison under public scrutiny may also have several important long range results. As the Second Circuit has recently observed:

> The tragic events at Attica have deeply affected vital interests not only of those directly involved, including inmates and correctional personnel, but of the pubic at large. The public wants to know the facts, with a view to preventing the recurrence of conditions that led to the uprising.[5]

When the crisis results from an inmate disturbance, successful prosecution of a lawsuit can also legitimize some or all of the

3. This has been particularly true in cases challenging generalized prison conditions of overcrowding, unsanitary facilities, etc. *E.g.*, Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, — F.2d —, No. 71-1865 (6th Cir., Mar. 14, 1972); Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971). *See also* Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941 (1970).

4. *See* note 68, *infra.*

5. Inmates of the Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 20 (2d Cir. 1971) [hereinafter cited as Inmates of Attica].

grievances of the inmates and can provide official recognition that the state has no qualms about engaging in its own brand of unlawfulness.

III. Some Threshold Problems

A. *Resources*

Prison crisis litigation requires the type of preparation that seldom can be accomplished by an individual attorney. Since an entire or substantial part of an institution is frequently involved, the task of gathering information alone can be overwhelming. Institutional defenders are usually best equipped to undertake this task as they possess the legal manpower and investigative staff that can be devoted to the project.[6] Much interviewing of inmates and others is required, as is extensive legal research, either prior to the commencement of the suit or during its course. Coalitions of legal organizations can be effective in pooling their otherwise limited resources.[7] The use of law students and paraprofessionals should also be given serious consideration.

B. *Access*

In order to prepare effectively any lawsuit involving operations within prison walls, it is essential to gain first-hand knowledge of what is going on inside. It should be remembered that in every prison case, the defendants have immediate access to witnesses and information often unavailable to plaintiffs' attorneys.

In a post-disturbance suit, the problems of access can be exceptionally severe.[8] Prison officials can be expected to make every effort to thwart attempts by outsiders to gain entry to the premises, including those by attorneys. When a request for entry has

6. At present, there is still an absence of available resources in these agencies. Public Defender systems throughout the country have barely scratched the surface in the prisoners' rights area.

7. Coalitions can sometimes present more problems than they solve. Litigation by committee, especially among groups that may have divergent philosophies and goals, can be difficult to manage. When undertaken, it is suggested that all participants agree either formally or informally upon the designation of a chief counsel who will have primary responsibility for mapping litigation strategies in the absence of time for consultation. Frequently, the trial judge himself will urge such a designation to facilitate his communication with counsel.

8. After both the Attica disturbance and the death of George Jackson at San Quentin, attorneys' visits were suspended for several days.

been turned down, there will be little alternative to seeking access by court order.[9]

In most other prison suits, however, the difficulties in gaining access are not nearly as severe. Relationships between inmates and attorneys (especially where institutional defender agencies are involved) have generally developed in advance of the suit either by the fact of prior or current representation of the inmate in his criminal case or through correspondence between the inmate and the attorney. Difficulties may occasionally arise only where, because of physical or personnel limitations, it has been impossible to obtain the express authorization of the inmates to commence legal action.[10]

Members of the State Legislature and other public officials can also be of assistance in the attempt to gain information as to what is going on inside the prison. For example, in New York, a legislator has a statutory right to enter a prison whenever he wishes [11] and legislators have begun to utilize that right. Attorneys

9. Even with a court order, access may be difficult in extreme situations. In the Attica case, such an order was obtained. The prison was retaken by exceptional force on September 13, 1971. That evening, counsel for the inmates obtained, ex parte, a temporary restraining order from the United States District Court in Buffalo which ordered that 33 named attorneys, together with doctors and nurses accompanying them, be admitted forthwith to the prison. The order also enjoined any interrogation by state officials of inmates in the absence of counsel and provided that the State Police were not to interfere with counsel as they were traveling from Buffalo to Attica. Such interference did not continue after the order was read to the State Troopers. At the prison, however, admission was refused in the face of the order. The restraining order was vacated the following day, but two days later, after a National Guardsman testified to having observed widespread brutality in the prison, correction officials in open court agreed to permit the attorneys to begin interviewing inmates. It ought not be assumed that all prison officials will defy a court order as was done at Attica.

10. In the Attica case, the state strenuously contested the right of the legal groups seeking to represent the inmates on the ground that they had not been asked by the inmates to do so. Apart from the fact that time did not permit these amenities, only an extremely narrow view of the attorney-client relationship can support the position that an attorney or agency that has represented an inmate as his trial counsel or is representing him on appeal is not his attorney for purposes of helping him in the aftermath of a rebellion. The State's position was rejected by the Second Circuit. *See* Inmates of Attica at 20-21.

11. N.Y. CORREC. LAW § 500-j (McKinney 1968) provides:

> The following persons may visit at pleasure all county jails and workhouses: the governor and lieutenant-governor, secretary of state, comptroller and attorney-general, members of the legislature, judges of the court of appeals, justices of the supreme court and county judges, district attorneys and every minister of the gospel having charge of a congregation in the town in which such jail or workhouse is located. No other person not otherwise authorized by law shall be permitted to enter the rooms of a county jail or workhouse in which convicts are confined, unless under such regulations as the sheriff of the county, or in coun-

for inmates should therefore attempt to work closely with them in the hope they can provide a vital source of information. Not infrequently, legislators have furnished supporting affidavits and have testified as plaintiffs' witnesses as to their observations. In similar fashion, members of the press should not be overlooked as yet another source of vital information and possible eyewitness testimony.[12] Members of the clergy can also be helpful.

IV. Preparation of the Complaint

In a prison crisis, attorneys may have to go into court on the basis of a very hastily prepared complaint.[13] Although it will not be possible under such circumstances to do the kind of factual and legal preparation that usually precedes the filing of a complaint in federal court, it must be remembered that the complaint will tend to determine the subsequent course of the litigation. Things added or omitted in haste may require extensive amendments to the pleadings, and may delay or confuse the litigation. However, due to lack of time for preparation of the complaint, it will frequently be necessary to take advantage of the statutory right to amend the complaint at least once.[14]

A. *The Plaintiffs*

The first consideration in drafting pleadings is whether the suit should be brought as a class action. In most prison crisis litigation, such a large number of inmates will be involved that a class action under Rule 23 of the Federal Rules of Civil Procedure will be appropriate.

The courts have held that inmates may bring class actions against prison officials in a variety of situations. Class actions

ties within the city of New York, the commissioner of correction of such city, or in the county of Westchester, the commissioner of correction of such county, shall prescribe.

12. In Cender v. Lindsay, Civil No. 70-1225 (E.D.N.Y., Nov. 23, 1970), news photographers took photographs of beatings of inmates by correction officers which were used in the federal lawsuit and also figured prominently in subsequent official investigations into the conduct of the guards.

13. In fact, in *Inmates of Attica,* Federal Judge John Curtin issued the order described in *supra* note 9 before a complaint had been filed, on the basis of the emergency situation.

14. Fed. R. Civ. P. 15(a). In an attempt to ameliorate the difficulties created by hasty drafting of pleadings, the *Prisoner's Rights Newsletter* has developed a "bank" containing briefs, memoranda, model complaints and other litigation aids for use by attorneys and inmates who plan to file such lawsuits.

against widespread and unchecked brutality by prison officials,[15] or by other inmates and inmate trustees[16] have been sustained. Class actions have also been deemed proper in prisoners' rights cases involving corporal punishment,[17] racial segregation[18] and general prison conditions.[19] Similarly, the use of class actions in cases involving widespread police misconduct has also been upheld.[20] However, class actions may be disallowed where the claims of each inmate rest on a distinct set of facts or where there exists a substantial conflict of interest among various members of the proposed class.[21]

A class action has many advantages in prison crisis litigation. The most obvious is that any relief obtained will protect all members of the class, not just a few selected clients. A class action will prevent the prison administration from rendering the case moot merely by transferring or giving special treatment to the individual plaintiffs.[22] If the case is brought on behalf of the entire class of inmates, the attorney will be given free access to all members of the class,[23] thereby avoiding difficulties that might otherwise arise in trying to interview potential parties or witnesses.[24]

15. Inmates of Attica; Valvano v. McGrath, Civil No. 70-1390 (E.D.N.Y., Feb. 1, 1971).

16. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

17. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

18. Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968).

19. Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, — F.2d —, No. 71-1865 (6th Cir., Mar. 14, 1972); Rhem v. McGrath, Civil No. 70-3962 (S.D.N.Y., Oct. 26, 1970); Inmates of the Cook County Jail v. Tierney, Civil No. 68-504 (N.D. Ill., Aug. 22, 1968) (oral opinion, transcript, at 7). *See also* Goodwin v. Oswald, Civil No. 71-388 (S.D.N.Y., Mar. 16, 1972) (correspondence rules).

20. BUILD of Buffalo v. Sedita, 441 F.2d 284 (2d Cir. 1971); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

21. In Inmates of Attica at 24, it was held that there could be no class action concerning interrogation by a special prosecutor investigating the riot when the proposed class included potential defendants, potential prosecution witnesses, and possibly uninvolved inmates.

22. Transfer or release of the named plaintiffs in a class action does not make the case moot. *E.g.*, Inmates of the Cook County Jail v. Tierney, Civil No. 68-504 (N.D. Ill., Aug. 22, 1968); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968); Ferguson v. Buchanan, Civil No. 64-107 (S.D. Fla., Mar. 12, 1965). In Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) the named plaintiff in a class action to end employment discrimination on the basis of race was allowed to continue as the representative party even after he had been promoted out of the class.

23. Inmates of Attica; Valvano v. McGrath, Civil No. 70-1390 (E.D.N.Y., Dec. 8, 1970).

24. For example, in prisons in New York State an inmate can normally be interviewed only by an attorney who already represents him or from whom he has requested legal assistance in writing.

Additionally, when a suit is declared a class action, the members of the class must be notified of the suit and of the names and addresses of the plaintiffs' attorneys.[25] Once the inmates are thus notified of the class action, they will be able to correspond with the attorneys for the class.[26]

There may, on the other hand, be certain disadvantages to a class action which should be considered. Litigation of the case, including the class action question itself, may be more time consuming than trying an action for individual plaintiffs only.[27] This will be a problem especially where personal injuries must be proved in a damage action. There may also be serious management problems in maintaining a class action in a large prison. The attorney for the class may receive voluminous correspondence from inmates on matters not pertinent to the class action. In sum, however, the advantages of a class action far outweigh the disadvantages except possibly where damages are sought. Therefore, suits for injunctive relief should be brought as class actions whenever possible.

In drafting a class action complaint, the statutory requirements of Rule 23 of the Federal Rules of Civil Procedure must be kept in mind.[28] However, particular attention should be given to those problems which are most likely to arise in a crisis situation. For example, an issue may be raised as to whether there are questions of law and fact common to the class,[29] whether the claims of the representative parties are typical of the claims of

25. FED. R. CIV. P. 23(c) requires notice to all members of a class under 23(b)(3). However, it has been held that due process requires notice in all class actions. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 568 (2d Cir. 1968); Valvano v. McGrath, Civil No. 70-1390 (E.D.N.Y., Feb. 1, 1971); Rhem v. McGrath, Civil No. 70-3962 (S.D.N.Y., Oct. 26, 1970).

26. In *Valvano v. McGrath,* the notice to the inmates informed them that they could write to the attorneys for either side. They were also allowed to address letters to the court, with instructions as to which attorneys should receive the letter, if they wanted to prevent anyone in the prison from learning the destination of the letter.

27. Of course, an evidentiary hearing on a motion for preliminary relief need not be postponed until after the determination of the class action issue. Evidentiary hearings were held prior to the class action determinations in both *Inmates of Attica* and *Valvano.*

28. The complaint should allege that the proposed class meets all the requirements of FED. R. CIV. P. 23(a) and the requirements of at least one subdivision of 23(b). Demarco v. Edens, 390 F.2d 836 (2d Cir. 1968); United States v. Preston, 352 F.2d 352, 354 n.10 (9th Cir. 1965); Hickey v. Illinois Cent. R.R., 278 F.2d 529 (7th Cir. 1960), *cert. denied,* 364 U.S. 918 (1960); Lunch v. Kenston School Dist. Bd. of Educ., 229 F. Supp. 740 (N.D. Ohio 1964).

29. FED. R. CIV. P. 23(a)(2).

the class,[30] and whether the named parties will fairly and adequately represent the class.[31] The interpretations of the requirements of Rule 23 (a) (2), (3) and (4) vary from case to case, and tend to overlap to a large extent.[32] Attacks upon the propriety of the class under these sections generally resolve themselves into two basic questions. First, do the acts complained of affect, or are they likely to affect, all inmates? Second, to what extent will the relief sought by the named plaintiffs be beneficial to or desired by the other inmates?[33]

In cases involving brutality or other unconstitutional use of force, not all the inmates in the institution will have been subjected to such conduct. Nevertheless, if the brutality or force has been inflicted upon a large number of inmates and there is a continued threat or possibility of such action against the rest of the inmate population, a class action for injunctive relief can be maintained.[34] Of course, if it had to be shown that the constitutional rights of all members of the class had already been vio-

---

30. FED. R. CIV. P. 23(a)(3).

31. FED. R. CIV. P. 23(a)(4).

32. For example, it has been held that the requirement of rule 23(a)(2) is virtually identical to that of 23(a)(3). American Airlines, Inc. v. Transport Workers Union, 44 F.R.D. 47 (N.D. Okla. 1968); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968). Rule 23(a)(4) has been held to require consideration of whether the interests of the named parties are coextensive with those of the class, whether they are antagonistic to the interests of other class members, the percentage of the class named as plaintiffs, and other factors. Advertising Speciality Nat'l Ass'n. v. Federal Trade Comm'n, 238 F.2d 108, 119-20 (1st Cir. 1956). Other courts have held that less is required by 23(a)(4), looking mainly to whether or not the named parties will prosecute the case vigorously. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968); Mersay v. First Repub. Corp. of America, 43 F.R.D. 465, 469 (S.D.N.Y. 1968).

33. However, in one case, the opposition to the class action was on totally different grounds. It was argued that declaring the case a class action would require notice to the members of the class, and that the distribution of notice of the pending action concerning jail conditions would create a security risk. The case was declared a class action and notice ordered nevertheless. Rhem v. McGrath, Civil No. 70-3962 (S.D.N.Y., Oct. 26, 1970).

34. Inmates of Attica at 24 n.11; Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968). The individual situations of all members of the class need not be identical. The requirements of 23(a) generally have been liberally construed in this regard in favor of allowing individuals to bring class actions, particularly in civil rights cases. *E.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969) (news photographer on behalf of all news media personnel); Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir. 1968); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966); Potts v. Flax, 313 F.2d 284, 288-89 (5th Cir. 1963); Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969); Broughton v. Brewer, 298 F. Supp. 260 (S.D. Ala. 1969); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd*, 393 U.S. 266 (1968) (suit to desegregate correctional institutions).

lated, the value of the injunction as a preventive remedy would be destroyed.

A different situation might be presented if the plaintiffs, in addition to seeking injunctive relief against brutality, also seek damages for personal injury on the same facts.[35] Unless the damage claims arise from similar acts against a large number of inmates, a class damage action would not be advisable. Of course, an action may be maintained as a class action for injunctive relief while damage claims are maintained only on behalf of the named plaintiffs.[36]

Although Rule 23 (a) has been liberally construed to allow class actions, there may be cases in which the interests of the named plaintiffs are so antagonistic to those of other members of the class that a class action will not be allowed.[37] For example, in *Inmates of Attica Correctional Facility v. Rockefeller*[38] it was held that the interests of inmates who expected to be indicted as a result of the riot, and those who were not involved or who might cooperate with the prosecution, were sufficiently antagonistic to defeat a class action for an injunction against official interrogations.

If the interests of the named plaintiffs are not antagonistic to those of other members of the class, there is no need to establish that all, or even a majority, of the inmates actually support the action.[39] Class actions have been allowed even though a few mem-

35. Class damage suits have been allowed in other contexts under rule 23(b)(3). *E.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968); Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968); Brennan v. Midwestern United Life Ins. Co., 286 F. Supp. 702 (N.D. Ind. 1968). Class damage suits have been preferred when individual suits would have been more time consuming, Minnesota v. U.S. Steel, 44 F.R.D. 559 (D. Minn. 1968), although in other class actions the amount of damages had to be determined separately for each individual. American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155, 157 (N.D. Ill. 1969). *See* Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 78 (E.D. Pa., 1970) (a class action may be proper in a personal injury case).

36. The use of subclasses under Rule 23(c)(4) should also be considered in this context.

37. Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968). (Inmates of work camps could not bring a class action to abolish work camps because some other inmates might prefer work camps to the penitentiary.) *See generally* Hansberry v. Lee, 311 U.S. 32 (1940); McArthur v. Scott, 113 U.S. 340 (1884); Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); Weiss v. Tenney Corp., 47 F.R.D. 283, 290 (S.D.N.Y. 1969); Mersay v. First Repub. Corp. of America, 43 F.R.D. 465, 468-69 (S.D.N.Y. 1968).

38. 453 F.2d at 24.

39. Berman v. Narragansett Racing Ass'n. Inc., 414 F.2d 311, 317 (1st Cir. 1969); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 n.7 (2d. Cir., 1968) ("[a] class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his right.").

bers of the plaintiff class have testified for the defendants,[40] or have objected to the action.[41]

In an action for injunctive relief, prison inmates as a class will generally satisfy the requirements of both 23 (b) (2) [42] and 23 (b) (3).[43] In such a situation it should be considered a suit under 23 (b) (2),[44] so that the judgment will be binding on all members of the class.[45]

B. *The Defendants*

In determining who are to be the defendants, attention must be given to the question of who is directly or indirectly responsible for causing the acts complained of and who has the power to remedy any conduct or conditions which are the subject of the complaint. Any state or local official, such as the prison warden, the commissioner of correction, state judge or the governor can be joined as defendants if he or she has any power or duty to take corrective action. Thus, in *Rhem v. McGrath,*[46] the court, most significantly, held:

40. In Valvano v. McGrath, Civil No. 70-1390, at 15-18 (E.D.N.Y., Nov. 11, 1971) several inmates testified on behalf of the defendants at the first hearing on a motion for preliminary relief.

41. Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 315-16 (1st Cir. 1969), *cert. denied,* 396 U.S. 1037 (1970) (share of recovery due each member of class subject to dispute); Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969); Coskery v. Roberts & Mander Corp., 97 F. Supp. 14 (E.D. Pa.), *appeal dismissed,* 189 F.2d 234 (3d Cir. 1951) (owners of 1,600 shares out of 330,000 opposed to the action). *But see* Fitzgerald v. Jandreau, 16 F.R.D. 578 (S.D.N.Y. 1954).

42. FED. R. CIV. P. 23(b) (2) provides for a class action when:

> [T]he party opposing the class has 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 . . . .

43. FED. R. CIV. P. 23(b)(3) provides for a class action when:

> [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

44. Inmates of Attica at 24; Rhem v. McGrath, Civil No. 70-3962 (S.D.N.Y., Oct. 26, 1971); Van Gemert v. Boeing Co., 259 F. Supp. 125 (S.D.N.Y. 1966); *cf.* Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968).

45. In Valvano v. McGrath, Civil No. 70-1390 (E.D.N.Y., Oct. 21, 1971), the court allowed inmates to "opt out" of the class to bring individual damage suits even though it was a properly constituted class under rule 23 (b)(2).

46. Civil No. 70-3962 (S.D.N.Y., Dec. 16, 1971).

> [W]hen conditions are permitted to exist which have the effect of violating a person's constitutional rights, the official charged with responsibility for those conditions has a *constitutional* obligation to alleviate those conditions, whether his statutory power to act be cast in terms of discretion or duty.[47]

In general, unless money damages are sought from individual prison guards, there is no reason to name them as defendants if the warden has been named. An injunction against the warden will be binding on all prison employees.[48] However, if enforcement against any of the warden's superiors or any other state officials is desired, such officials should be named in the complaint. It is possible that the state or a municipal or county government may also be added as a party defendant for injunctive relief.[49]

Even if damages are sought, it may be possible to add the state (or county or municipality) as a party defendant. Although 42 U.S.C. §1983 does not, by itself, authorize recovery of damages from governmental bodies,[50] it has been held that damages can be recovered under §1983 to the extent that there has been a waiver of immunity.[51] In addition, a pendent state law tort claim against

---

47. *Id.* at 3-4. *See also* BUILD of Buffalo v. Sedita, 441 F.2d 284, 288 (2d Cir. 1971). A careful check of state statutes may reveal that a substantial number of state and local officials can be joined as defendants. *E.g.*, N.Y. CORREC. LAW § 504 (McKinney 1968) (presiding justice of Appellate Division in cases involving New York City jails).

48. FED. R. CIV. P. 65(d) provides:

> Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Cf. Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1944).

49. A number of courts have held that injunctive relief cannot be granted against a municipality under 42 U.S.C. § 1983. *E.g.*, Patrum v City of Greensburg, Ky., 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); United States *ex rel.* Gittlemacker v. County of Philadelphia, 413 F.2d 84 (3d Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970); Wallach v. City of Pagedale, 359 F.2d 57 (8th Cir. 1966); Spampinato v. City of New York, 311 F.2d 439 (2d Cir. 1962), *cert. denied*, 372 U.S. 980 (1963). Other courts have allowed such injunctive suits under § 1983. *E.g.*, Garren v. City of Winston-Salem, N.C., 439 F.2d 140 (4th Cir. 1971); Harkless v. Sweeny Indep. School Dist., 427 F.2d 319, 321-23 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); Dailey v. City of Lawton, Okla., 425 F.2d 1037 (10th Cir. 1970); Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961). *See generally* Comment, *Injunctive Relief Against Municipalities Under Section 1983*, 119 U. PA. L. REV. 389 (1970).

50. Monroe v. Pape, 365 U.S. 167, 187-92 (1961).

51. Carter v. Carlson, 447 F.2d 358, 368-70 (D.C. Cir. 1971), *cert. granted sub nom.* District of Columbia v. Carter, No. 71-564 (U.S., Jan. 10, 1972); McArthur v. Pennington, 253 F. Supp. 420, 430 (E.D. Tenn. 1963). *But see* Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 92 S. Ct. 1190 (1972).

the state or municipality and the responsible individuals may be added to the complaint.[52]

C. *Damages*

In drafting a complaint in a prison crisis, a determination will have to be made as to whether or not to sue for damages. Damages can be awarded for violations of constitutional rights by prison officials.[53] However, the amount of the recovery may be limited to compensatory damages,[54] which in most cases will not be great, particularly since inmates get free medical care and do not have any substantial income to lose as a result of injury or illness. Yet a small damage award may be very important to an inmate because of his indigency, and should not be minimized by comparison with a free citizen who has been slightly injured.

There are some strategic advantages to requesting damages. The damage claim will remain viable even if the claim for injunctive relief is rendered moot by the remedial actions of the defendants. If damages are finally recovered, either from individuals or from the state, the deterrent effect may be as significant as injunctive relief in the long run. Finally, the named plaintiffs may want damages, and failing to claim damages in the federal suit may bar them from recovering damages in any other manner.[55]

On the other hand, there may be serious disadvantages to adding damage claims. An attorney pursuing such a claim may find

52. *E.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (the pendent claim and the federal claim must "derive from a common nucleus of operative facts."); Price v. United Mine Workers, 336 F.2d 771 (6th Cir. 1964) (pendent state punitive damages claim in suit under federal labor-management laws); Rumbaugh v. Winifrede R.R. Co., 331 F.2d 530 (4th Cir. 1964) (state damage claim joined with federal claim under the Railway Labor Act). The pendent state claim need not be for the requisite jurisdictional amount under 28 U.S.C. § 1331. Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966); Stewart v. Shanahan, 227 F.2d 233 (8th Cir. 1960); American Fidelity & Cas. Co. v. Owensboro Milling Co., 222 F.2d 109 (6th Cir. 1955). The defendant in the pendent claim need not be a defendant in the federal claim as long as the state claim can be joined under the rule of United Mine Workers v. Gibbs, *supra*. See Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971).

53. Sostre v. McGinnis, 442 F.2d 178, 204-05 (2d Cir. 1971); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss. 1969), *aff'd*, — F.2d —, 9 CRIM. L. REP. 2052 (5th Cir. 1971), *cert. denied*, — U.S. —, 10 CRIM. L. REP. 4011 (Oct. 13, 1971).

54. Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971); Wright v. McMann, 321 F. Supp. 127, 144 (N.D.N.Y. 1970), *aff'd in part, rev'd in part*, — F.2d — (2d Cir., Mar. 26, 1972).

55. *Cf.* Valvano v. McGrath, Civil No. 70-1390 at 6 (E.D.N.Y., Oct. 21, 1971).

himself in the position of having to litigate separately the damage claims for each of the named plaintiffs. Litigation of a damage claim also may require considerable time and substantial expenditures for discovery, with only a small chance of a meaningful financial recovery.[56]

D. *Scope of the Complaint*

The Federal Rules of Civil Procedure allow a simplified form of pleading.[57] However, in pleading violations of prisoners' rights under the eighth amendment, relatively detailed pleadings may be required. To state a cause of action for injunctive relief under the eighth amendment it is necessary to allege both the original violation (such as beatings, unnecessary force and violence) and facts which show that there is a real danger of continued or renewed violations (recurrent beatings, harassment, threats, verbal abuse, lack of affirmative action on the part of responsible officials).[58] If it is claimed that the conditions of confinement are so inhuman as to violate the eighth amendment, enough must be alleged to establish an overall picture of constitutional deprivation.[59]

In drafting a complaint for prisoners in this type of case, there may be a temptation to include a wide range of possibly unconstitutional acts or practices. Claims such as unwarranted confiscation of personal property, routine and harassing "strip searches," [60] mail censorship, lack of special diets or religious services for groups such as Black Muslims, arbitrary discipline, unsanitary

56. There are still relatively few cases in which prisoners have been awarded damages. Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971) ($25 a day for 372 days of unlawful segregation); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1970), *modified en banc*, No. 28971 (Mar. 3, 1972); Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970) ($1500); Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss. 1969) ($85,000 for negligence resulting in blindness and possible brain damage).

57. Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." *See also* BUILD of Buffalo v. Sedita, 441 F.2d 284 (2d Cir. 1971).

58. *Cf.* Inmates of Attica at 22-23; Valvano v. McGrath, Civil No. 70-1390 at 26-29 (E.D.N.Y., Nov. 11, 1971); Cender v. Lindsay, Civil No. 70-1225 (E.D.N.Y., Nov. 23, 1970).

59. In cases in which conditions have been held unconstitutional, the courts have relied on a combination of a large number of specific factors which individually might not violate the eighth amendment. Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, — F.2d —, No. 71-1865 (6th Cir., Mar. 14, 1972).

60. "Strip searches" are thorough body searches (which often include a rectal examination) of inmates, often conducted before and after court appearances or visits, including attorney visits, and at other times as well.

conditions, and inadequate medical care may be made by the inmates. However, addition of a large number of these claims, some of which cannot easily be proved, may detract from the likelihood of success on the issues that are of a crisis nature.

Since it can be very difficult to check the information an attorney receives from his clients, great care should be taken in making factual allegations in the complaint. Some of the information received may be rumor or hearsay; it may be difficult to find an eyewitness willing or able to testify to events that many inmates have described to the attorney.

Finally, in a post-disturbance situation, great care must be taken not to set forth information which might tend to incriminate any plaintiff. A suggested approach to this problem is to confine the allegations and claims of the complaint strictly to post-disturbance events. It should be remembered that plaintiffs are subject to pretrial discovery concerning all allegations in the complaint.

V. Trying the Issues

The nature of prison crisis litigation renders motion practice of crucial importance. Certainly where urgent relief is needed, as is most often the case in a post-disturbance suit, a trial on the merits may be too late to be very effective.[61]

In virtually every prison crisis situation, the first important motion will be an application for a temporary restraining order seeking immediate access to the institution and cessation of any brutality. Under Rule 65 (b) of the Federal Rules of Civil Procedure, such an order may be granted without notice to one's adversary only if two conditions are met. It must clearly appear from facts set forth in an affidavit or *verified* complaint that immediate and irreparable injury will occur before the other side can be heard. The applicant's attorney must also certify to the court in writing the efforts that have been made, if any, to contact the other side, and why notice should be dispensed with. As a practical matter, most judges will insist or request that defend-

61. Counsel should also be aware of Rule 65(a)(2) of the Federal Rules of Civil Procedure which states that "[b]efore or after the commencement of the hearing of an application for a preliminary injuction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."

ant's counsel be given informal notice. Since defendant's counsel will usually be the State Attorney General, City Corporation Counsel or County Attorney, this should not be difficult.

A problem that will arise in the preparation of initial papers is that much of the information that would bolster supporting affidavits may be obtainable only after access to the institution is granted. However, there is usually little time to worry about this dilemma, and supporting affidavits from attorneys reciting what they have learned from other sources have been sufficient in some cases.[62] When an attorney's affidavit is all that is submitted, it should be as specific as possible, setting forth the nature of the abuses complained of and the manner of their occurrence, including references to times and places. Whenever available, affidavits from inmates or other eyewitnesses should be obtained.

The application for a temporary restraining order must be accompanied by a complaint. However, in an extreme emergency it is possible that a court will act before a complaint has been filed.[63] Even if a temporary restraining order is granted, a motion for a preliminary injunction will have to be made. Counsel should press for an immediate evidentiary hearing on that motion. The court must grant a hearing whenever there is an actual dispute as to the facts.[64]

The hearing on the motion for a preliminary injunction should be approached with the greatest of seriousness. The plaintiffs must meet

> the burden of showing probable success on the merits and some irreparable injury or, where the showing of probable success is uncertain, that the balance of hardships tips decidedly in their favor.[65]

In establishing irreparable injury, the key factor is whether "there is some cognizable danger of recurrent violation." [66] The mere

62. *See supra* note 9. In Cender v. Lindsay, Civil No. 70-1225 (E.D.N.Y., Nov. 23, 1970), the application for a temporary restraining order was based upon radio and newspaper reports of brutality.

63. In *Inmates of Attica,* the temporary restraining order was issued before a complaint was filed. *See supra* note 9.

64. SEC v. Frank, 388 F.2d 486, 490, 492 (2d Cir. 1968); Hawkins v. Board of Control, 253 F.2d 752, 753 (5th Cir. 1958); City Line Center, Inc. v. Loews, Inc., 178 F.2d 267 (3d Cir. 1949); Sims v. Greene, 161 F.2d 87 (3d Cir. 1947).

65. Inmates of Attica at 20; Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir. 1969); Clairol, Inc. v. Gillette Co., 389 F.2d 264 (2d Cir. 1968); Dino DeLaurentiis Cinematografica, S.p.A. v. D-150, Inc., 366 F.2d 373, 374-75 (2d Cir. 1966).

66. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). *See also* NLRB v. Raytheon Co., 398 U.S. 25 (1970); Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963).

cessation of the practice or action complained of after the filing of the lawsuit will not itself justify the denial of relief.[67]

There are a number of important tactical determinations to be made concerning the actual conduct of the hearing. One is the location of the hearing. An effort should be made to persuade the judge to either visit the prison or to conduct some part of the hearing at the prison.[68] There may be competing factors as to the wisdom or desirability of having any part of the hearing at the institution. There exists the possibility that inmate witnesses may be intimidated by the immediate surroundings, especially if correction officers are permitted to remain in the hearing room. The warden will urge that security so requires. The court should be persuaded to exclude as many correction officers from inside the room as possible, particularly those who may be directly involved in the lawsuit. The use of federal marshals to maintain security should be urged as a reasonable alternative, with the correction officers maintaining their posts outside the hearing room. On the other hand, the judge's presence at the prison for part of the hearing may have a stabilizing effect. It may underscore the seriousness of the lawsuit and provide the inmates with additional assurance that their grievances are being given serious consideration.

Skill in the selection of witnesses and presentation of evidence is also of great importance. Prison crisis suits will always involve large numbers of potential witnesses—inmates, correction officials and others. First, efforts should be made to present whatever non-inmate witnesses are available if they have firsthand information, especially members of the press, clergy or legislature. Courts may be suspicious of prisoner testimony,[69] and corrobora-

67. Inmates of Attica; Matthews v. Hardy, 420 F.2d 607 (D.C. Cir. 1969); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966); NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966); Strasser v. Doorley, 309 F. Supp. 716 (D.R.I. 1970); United States v. Richberg, 398 F.2d 523 (5th Cir. 1968). *But see* Belknap v. Leary, 427 F.2d 496 (2d Cir. 1970); Valvano v. McGrath, 325 F. Supp. 408, 410 (E.D.N.Y. 1971).

68. There is a growing body of precedent for this procedure: Arif v. McGrath, Civil No. 71-1388 (E.D.N.Y., Dec. 9, 1971); Valvano v. McGrath, 325 F. Supp. 408 (E.D. N.Y. 1971); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971). Counsel should be alert to thwart efforts to give the judge only the "Red Cross tour"—where prison officials seek to show only those parts of the institution that will reflect favorably on their conduct.

69. An interesting contrast is presented in the court's decision in *Valvano,* vacating the findings of a magistrate whom the court had designated to take testimony and make factual findings on the issue of post-riot brutality. The only witnesses called by plaintiffs

tion by independent sources such as non-inmate testimony and prison disciplinary and medical records will be quite helpful.

An attempt should also be made to obtain as witnesses a wide cross section of the prison population. In addition to ethnic factors,[70] the inmate's criminal record, age, location in the institution, job status, prison disciplinary record and articulateness or the lack of it should all be considered.[71]

Inmates called as plaintiffs' witnesses are in a delicate position and every effort must be made to protect their personal interests. First, every prisoner must be warned that his testimony may lead to reprisals by prison officials, especially correction officers in whose immediate custody he is confined. Although courts are becoming increasingly sensitive to this danger,[72] the inmate should also be apprised that he cannot be fully protected against all future harassment in retaliation. A pretrial detainee must be advised that his being a witness could have an adverse effect on his criminal case, particularly in plea negotiations and at sentence.[73] A convicted prisoner should be forewarned of the risk of an adverse effect upon his prison assignment or parole status.[74]

---

were inmates whose testimony was totally rejected by the magistrate. The court wrote:

> Where all the witnesses on one side have been considered untruthful and all the witnesses on the other side have been considered credible, it is almost inevitable that the conclusion is mistaken at least in part.
>
> The Special Master appears to have given considerable weight to the fact that plaintiffs' witnesses had prior felony convictions and many had records of addiction. A trial judge knows that the government frequently relies on convicts and addicts to prove its case and that juries frequently believe their testimony beyond a reasonable doubt, depending on the independent corroboration or impeachment that may be provided by documentary evidence and other oral testimony.

Valvano v. McGrath, Civil No. 70-1390 at 24 (E.D.N.Y., Nov. 11, 1971).

70. Inmate differences may follow racial patterns or a prison disturbance may be blamed by the authorities on a particular ethnic or religious group. For example, where a major role in a prison disturbance is attributed to the black population, supportive testimony from white inmates can be persuasive.

71. An inmate's inability to express himself may add to, rather than detract from his credibility. Preparation of inmate testimony will be greatly facilitated if, from the outset, a separate file is maintained for each inmate interviewed.

72. Inmates of Attica at 23. "The situation here is unique in that plaintiffs, being prisoners, are at the mercy of their keepers."

73. A pretrial detainee's criminal lawyer should always be contacted prior to his participation in the suit.

74. In Valvano v. McGrath, 325 F. Supp. 408 (E.D.N.Y. 1971), the court sought to protect those who testified by enjoining the defendants "from forwarding any information to any other penal institution or employee thereof concerning any testimony given in court by any inmates, or any involvement in this lawsuit or the making of any charges against any Correction Officer." *Id.* at 411.

The inmate's fifth amendment privilege against self-incrimination must also be protected zealously prior to his taking the stand and throughout the course of his testimony. The trial judge should be asked to restrict the scope of cross-examination to preclude inquiry into pending criminal charges or involvement in possible criminal conduct during a prison disturbance. In both *Valvano v. McGrath* and the *Attica* case, the district court precluded cross-examination along these lines.

If parties or witnesses report that they are being harassed and intimidated, application should promptly be made to the court for their protection. A federal court has plenary power to take all steps necessary to safeguard its fact-finding processes, including the transfer of inmates confined in state or municipal facilities to federal custody during the course of the proceedings.[75] A court can even enjoin state criminal prosecutions if they are instituted in bad faith in order to intimidate parties or witnesses.[76]

In preparing a large number of witnesses in a short time, particular care should be taken to guard against conflicting testimony. Inmates will frequently describe events on the basis of hearsay or rumor rather than upon firsthand observation. It should be remembered that inmates' freedom of movement and thus opportunity for observation is limited by the very nature of their confinement. As a result, there may be serious variances in the descriptions of events especially in the tense atmosphere of a

---

75. This was done in the *Valvano* case. *Cf.* Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944). In addition, the court in *Valvano* ordered:

> I. That the defendants take all reasonable steps to assure the safety of all inmates who have given statements to representatives of either side in this action, or have been interviewed by representatives of either side or have testified in court in this proceeding, or who may testify in any other action or proceeding arising out of the disturbance of October 2 to 4, 1970 or out of this action.
>
> II. That the defendants and all Correction Officers and other personnel in Queens House of Detention for Men are restrained until further order of the court from making any threats against any person who has been interviewed or has given a statement or testified as set forth above.
>
> III. That all inmates of Queens House of Detention for Men are restrained until further order of the court from making any threats against any person who has been interviewed or has given a statement or testified as set forth above.

325 F. Supp. at 411.

76. The Supreme Court's decisions in Younger v. Harris, 401 U.S. 37 (1971), Samuels v. Mackell, 401 U.S. 66 (1971), Boyle v. Landry, 401 U.S. 77 (1971), and Perez v. Ledesma, 401 U.S. 82 (1971) should not be considered obstacles to the court's issuing any injunction which is necessary to protect essential witnesses and parties, and thereby to "protect its jurisdiction" under 28 U.S.C. § 2283. See the discussion of Dombrowski v. Pfister, 380 U.S. 479 (1965) in Younger v. Harris, *supra* at 47-54.

crisis. Consequently, as much time and resources as possible should be devoted to the checking out of information before it is offered in court.

To prove an affirmative case at the preliminary injunction hearing, it will often be necessary to call prison officials. Absent time for extensive discovery, the examination of prison officials requires exceptional caution. Direct examination of prison officials should generally focus on what is being done to remedy the conduct or conditions which are the subject of complaint. However, prison officials may frequently disclaim any knowledge of unlawful conduct. Any conduct that is admitted will undoubtedly be defended on the grounds that it is necessary to the maintenance of prison "security." However, if the witness does not provide a more specific explanation of the conduct, it will subject his broader representations to doubt. Of course, he should be held to any specific representations he has ventured to make.

At the hearing, the defendants may seek to refute plaintiffs' case in several ways. They may rely solely on cross-examination of plaintiffs' witnesses or they may decide to call their own witnesses, including other inmates. Prison officials may attempt to exploit disunity among the inmate population. Possible bias of an inmate witness against the plaintiffs should be explored. Prison officials may offer inducements to inmates in exchange for favorable testimony. Such inducements might include preferred treatment within the institution, especially in job assignments; special consideration from the parole board; or offers to secure the district attorney's or the court's leniency in the inmate's criminal case.[77] Thus any inmate called by the defendants should be severely examined on the subject of inducements and the records in his criminal case should be checked.

The defendants may also call prison officials and guards. Much of the testimony will be based on their own "expertise" and the need for prison "security." The "expertise" of each witness should be closely scrutinized. He may lack familiarity with the rules, regulations and operations manuals that govern the in-

77. In *Valvano,* the court noted that an inmate who testified for the defendants was permitted to withdraw his plea of guilty to manslaughter in the second degree and to plead instead to criminally negligent homicide with a sentence to time served. *See* Valvano v. McGrath, Civil No. 70-1390 at 24a (E.D.N.Y., Nov. 11, 1971).

stitution. Lower level correction officers can be especially vulnerable to this type of examination since many have had limited training and may have spent little time reading the requirements of their own positions. Moreover, prison rules and regulations may be incomplete or contradictory. "Expertise" can also be challenged in the traditional manner by examination of the individual's background and credentials. Lastly, cross-examination may demonstrate that the issue in question has no relationship to the witness' proferred "expertise."

Particular attention should be paid to witnesses who have a special responsibility in connection with investigating the circumstances of a disturbance or charges of misconduct by prison guards. Examination of such officials should explore the possibility of conflicts of interest between their official responsibilities and their role as witnesses.

On occasion, it may also appear that the attorney for the defendants is vested with the responsibility of prosecuting prison personnel for misconduct. This type of conflict of interest has drawn comment from at least one federal court.[78]

A. *Preliminary Relief*

Various kinds of preliminary relief can be granted by the court in addition to an injunction against brutality or other flagrant constitutional violations. The court's order might include provisions for the enforcement of the injunction. For example, the court can provide for free access to all inmates by both attorneys and law students or paraprofessionals in their employ.[79] The court can appoint monitors [80] or it might order the temporary suspension or reassignment of particular correction officers.[81] The court can also order that inmates be released from punitive

78. *Id.* at 6.

79. Arif v. McGrath, Civil No. 71-1388 at 21-23 (E.D.N.Y., Dec. 1971).

80. Inmates of Attica at 25 (holding that the district court should consider the use of federal monitors to enforce its injunction against brutality and harassment); Valvano v. McGrath, 325 F. Supp. 408, 411-12 (E.D.N.Y. 1971) (requesting the New York City Board of Correction to serve as monitors and report to the court).

81. *Cf.* Valvano v. McGrath, Civil No. 70-1390 at 29-30, 34-45 (E.D.N.Y., Nov. 11, 1971), where the defendants were ordered to begin independent departmental prosecutions of correction officers alleged to have been involved in acts of brutality against inmates. *See also* Biehunik v. Felicetta, 441 F.2d 228, 230-31 (2d Cir. 1971), *cert. denied,* 403 U.S. 932 (1971).

segregation or solitary confinement unless they are given hearings on disciplinary charges.[82]

However, in dealing with a crisis, it must be kept in mind that some concessions to post-crisis security may have to be made. For example, it has been held that a 24 hour lockup of prisoners for a period of several weeks following a riot is permissible as long as there are plans to return to normal at some time.[83] It has also been held that prison officials can temporarily isolate suspected "trouble makers" without any formal proceedings.[84] Prison officials may also be granted a reasonable period of time to restore exercise and other normal privileges following a riot or disturbance.[85] In general, where a strong argument is made that restoration of privileges will create a "security" risk, courts will hesitate before ordering an immediate return to pre-riot procedures.

Much of what we have discussed so far is also applicable to a trial on the merits. However, as in most federal litigation, the liberal provisions for pretrial discovery should be fully utilized. In prison crisis litigation, discovery will normally be directed to the following items: institutional disciplinary records of both inmates and guards; unpublished rules and regulations; medical records; criminal records of defendants' witnesses. Where actual conditions are in issue, a motion to inspect and photograph all parts of the prison should be made under Rule 34.[86] Detailed interrogatories, requests for admissions and extensive depositions into all aspects of prison management may also be called for.

VI. Substantive Problems

Federal courts have repeatedly exercised their jurisdiction in the area of prisoners' rights [87] and it is well established that they

82. Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970); Smoake v. Fritz, 320 F. Supp. 609 (S.D.N.Y 1970). *But see* Inmates of Greenhaven v. Zelker, Civil No. 71-4676 (E.D.N.Y., Nov. 15, 1971). *See also* Nieves v. Oswald, Civil No. 1971-526 (W.D.N.Y., filed Nov. 16, 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).

83. Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971).

84. Inmates of Greenhaven v. Zelker, Civil No. 71-4676 (E.D.N.Y., Nov. 15, 1971); Arif v. McGrath, Civil No. 71-1388 at 16-20 (W.D.N.Y., Dec. 9, 1971).

85. Rhem v. McGrath, 326 F. Supp. 681, 690 (S.D.N.Y. 1971).

86. Rhem v. McGrath, Civil No. 70-3962 (S.D.N.Y., Apr. 21, 1971).

87. It is well settled that inmate claims of denials of constitutional rights are within the jurisdiction of the federal courts under the Civil Rights Act, 42 U.S.C. § 1983 (1971). 28 U.S.C. § 1343 (1971); Haines v. Kerner, 92 S. Ct. 594 (1972); Johnson v. Avery, 393 U.S. 483

have the power, and even the duty, to step into a prison crisis to remedy flagrant violations of inmates' constitutional rights at the hands of prison officials. They have enjoined continuing physical brutality by prison officials [88] and by other inmates as well.[89] The use of corporal punishment has been enjoined,[90] as have barbaric forms of solitary confinement in "strip cells." [91] Federal courts have also acted in cases of alleged racial discrimination,[92] degrading and inhuman prison conditions,[93] disciplinary procedures which violated constitutional due process,[94] denials of access to the courts,[95] and interference with freedom of speech [96] or religion.[97]

However, there is a great difference between successfully invoking federal jurisdiction and establishing the right to relief. Although in cases involving first amendment rights courts have generally required prison officials to produce substantial justifi-

---

(1969); Lee v. Washington, 390 U.S. 333 (1968); Inmates of Attica; Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966). It is also clear that exhaustion of remedies is inappropriate in these cases. Wilwording v. Swenson, 92 S. Ct. 407 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); Monroe v. Pape, 365 U.S. 167 (1961); Rodriguez v. McGinnis, No. 34567 (2d Cir., Jan. 25, 1972); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967). And abstention is unwarranted because there is generally never any need for construction of a state statute so as to avoid a constitutional question. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Rodriguez v. McGinnis, No. 34567 (2d Cir., Jan. 25, 1972); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967). *See generally Prisoner's Rights Under Section 1983,* 6 CRIM. L. BULL. 237 (1970); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation,* 23 STAN. L. REV. 473 (1971).

88. Inmates of Attica.

89. Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971).

90. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

91. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

92. Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd,* 390 U.S. 333 (1968).

93. Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971).

94. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971), *aff'd sub nom.* Jones v. Metzger, — F.2d —, No. 71-1865 (6th Cir., Mar. 14, 1972).

95. Johnson v. Avery, 393 U.S. 483 (1969); *Ex parte* Hull, 312 U.S. 546 (1941); Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 92 S. Ct. 250 (1971).

96. *E.g.,* Nolan v. Fitzpatrick, 326 F. Supp. 209 (D. Mass. 1971); Fortune Soc'y v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970).

97. Cooper v. Pate, 378 U.S. 546 (1964); Sostre v. McGinnis, 442 F.2d 178, 189 (2d Cir. 1971). *See also* Cruz v. Beto, 92 S. Ct. 1079 (Mar. 20, 1972).

cation for restricting the rights of inmates,[98] quite the contrary approach has been taken in cases arising under the eighth amendment where a heavier burden is placed on inmates. Since in a prison crisis, reliance will generally be placed upon the eighth amendment's prohibition against cruel and unusual punishment, plaintiffs must be prepared to make a strong factual showing.

Although outright beatings and physical torture clearly violate the eighth amendment,[99] other forms of official conduct which can be labelled "punishment" may be insulated from constitutional attack:

> For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes. It is not only that we, trained as judges, lack expertise in prison administration. Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us *as a federal court* to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or *personally* repugnant.[100]

Thus, courts have held that punishments violate the eighth amendment only in extreme cases.[101] The plaintiff in *Wright v. McMann,* for example, was placed unclothed in an unheated cell in freezing weather without soap or toilet paper. Such punishment was held to

> destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of the basic concepts of decency.[102]

Similarly, corporal punishment was held unconstitutional because it was degrading, counter-productive, subject to widespread abuse by sadistic guards, and also offensive to contemporary stan-

---

98. "Only a compelling state interest centering about prison security, or a clear and present danger of a breach of prison discipline, or some substantial interference with orderly institutional administration can justify curtailment of a prisoner's constitutional rights." Fortune Soc'y v. McGinnis, 319 F. Supp. 901, 904 (S.D.N.Y. 1970).

99. Inmates of Attica at 22-23.

100. Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971).

101. *E.g., In re* Birdsong, 39 F. 599 (S.D. Ga. 1889) (chaining inmate by neck; held unconstitutional); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (no light or ventilation; no regular toilet; no soap, towel, toilet paper; restricted diet; held unconstitutional); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (similar to *Hancock;* plaintiff naked, no bed; held unconstitutional).

102. 387 F.2d at 526.

dards of decency as evidenced by the fact that it had already been outlawed in all but two states.[103] However, punishments which the courts have found to be "counter-productive as a correctional measure," "personally abhorrent" and only "several notches above those truly barbarous and inhumane conditions heretofore condemned by ourselves and other courts as 'cruel and unusual,' " have been held to be constitutional.[104]

Similar difficulties will be encountered when the state asserts reasons of security, particularly in the wake of a prison rebellion, as justification for acts which might otherwise be held unconstitutional. For example, in the name of security, officials have been permitted to hold "suspected agitators" in administrative segregation without hearings.[105] Prison officials have been allowed to keep inmates locked in their cells twenty-four hours a day, without exercise, recreation, or family visits, and otherwise restrict inmate privileges, when the officials' actions were taken as temporary "security measures" following a prison rebellion.[106]

Even after a clear constitutional violation has been established, inmates may be required to show that there is a danger of repetition of such conduct before injunctive relief will be granted.[107] In determining the likelihood of repetition, a court will consider whether there has been a widespread pattern of conduct or whether initial unlawful conduct has been followed by harassment, and threats of repetition. The court will also consider whether officials have taken adequate steps to prevent a recurrence.[108] However, once a danger of repetition has been established, the courts has a duty to act.[109]

---

103. Jackson v. Bishop, 404 F.2d 571, 579-80 (8th Cir. 1968).

104. Sostre v. McGinnis, 442 F.2d 178, 193-94 (2d Cir. 1971). *See also* Ford v. Board of Managers, 407 F.2d 937 (3d Cir. 1969) (no running water or wash bowl; bread and water diet except one regular meal each third day; held constitutional); Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), *cert. denied,* 388 U.S. 920 (1967) (diet of bread and water for two days, two meals on third day; no tooth brush or personal items; tear gas used; held constitutional); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd,* 435 F.2d 1255 (3d Cir. 1970), *cert. denied,* 403 U.S. 936 (1971) (400 days segregation; held constitutional).

105. Inmates of Greenhaven v. Zelker, Civil No. 71-6476 (E.D.N.Y., Nov. 15, 1971).

106. Rhem v. McGrath, 326 F. Supp. 681, 684-85 (S.D.N.Y. 1971). *See also* Edwards v. Sard, 250 F. Supp. 977, 981 (D.D.C. 1966).

107. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953); Inmates of Attica at 23-25; Belknap v. Leary, 427 F.2d 496 (2d Cir. 1970); Valvano v. McGrath, Civil No. 70-1390 at 27-28 (E.D.N.Y., Nov. 11, 1971); Cender v. Lindsay, Civil No. 70-1225 (E.D.N.Y., Nov. 23, 1970).

108. Inmates of Attica at 23-25.

109. *Id.* at 22; United States v. Richberg, 398 F.2d 523, 531 (5th Cir. 1968).

Even without proof of likely repetition, it can be argued that in cases of particularly egregious violations of inmates' rights by prison officials, the courts should act if only to condemn the violations.[110]

> It is of the highest importance to community morale that the courts shall give firm and effective reassurance, especially to those who feel that they have been harassed by reason of their color or their poverty.[111]

Such reassurance by federal courts is particularly important in cases involving prisoners, who have so few legitimate avenues for the presentation of their grievances.

CONCLUSION

Recent history has taught us that the manner in which state and prison officials respond to intolerable prison conditions and inmate disturbances protesting such conditions requires that lawyers be equipped to deal with the crises that ensue. The legal efforts made on behalf of prisoners caught up in a crisis may produce results ranging from changes in prison conditions to the saving of life and limb.

From the brief survey of case law presented above, it can be anticipated that inmates in a crisis situation may have unusual difficulty in establishing the right to relief in a federal court. Therefore, despite the pressures of time, lack of resources and the need for prompt action, able handling of a prison crisis lawsuit through planning, preparation, ingenuity and appreciation of the complexities of federal litigation is essential and should increase the chances for positive results.

---

110. Strasser v. Doorley, 309 F. Supp. 716, 725-26 (D.R.I. 1970) (declaratory relief on the basis of one incident of unconstitutional police conduct).

111. Lankford v. Gelston, 364 F.2d 197, 204 (4th Cir. 1966).