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PRISONER LAWSUITS AND PRISON OFFICIALS' LIABILITIES

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INTRODUCTION

The following material constitutes the first chapter of a book on correctional law for prison and jail officials and probation and parole officers that is now being prepared. It is being published in the Institute of Government's Administration of Justice Memoranda series in the hope that it will be of use to prison and jail administrators and their employees. Comments, especially critical ones, are invited.

Other chapters of the book will also appear in the Memoranda series. The next one will concern arrest and revocation procedures for probationers and parolees, as affected by the Morrissey and Gagnon decisions of the U.S. Supreme Court and the new North Carolina General Statutes Chapter 15A. Future chapters will deal with use of force by prison officials, constitutional rights of prisoners, and the limits on the sentencing judge's power to impose conditions of suspended sentence and probation.

MOST NORTH CAROLINA PRISON OFFICIALS will never be defendants in a court action arising from their official activity, but it is useful to know the kinds of actions that can arise. This memorandum deals with the various ways that prison officials can be sued or prosecuted in court for their conduct that affects prisoners, the applicable laws, and the kinds of penalties, liabilities, or other obligations that courts may impose on them.

This publication is issued occasionally by the Institute of Government. An issue is distributed to those of the following groups to whom its subject is of interest: sheriffs, general law enforcement officers, special-purpose law enforcement officers, police attorneys, judges, clerks, district attorneys, public defenders, adult correction officers, juvenile correction personnel, jailers, and criminal justice trainers. The upper left-hand corner lists those to whom this issue was distributed and indicates a topic heading for this issue, to be used in filing. Comments, suggestions for future issues, and additions or changes to the mailing lists should be sent to: Editor, Administration of Justice Memoranda, Institute of Government, P.O. Box 990, Chapel Hill, N.C. 27514.

SOURCES OF LAW

When a prisoner brings his complaint about treatment in a North Carolina prison to a court, the most important sources of applicable law are:

-- The U.S. Constitution, as interpreted by the U.S. Supreme Court, the U.S. Court of Appeals for the Fourth Circuit, and other federal and state courts
-- The North Carolina Constitution as interpreted by the North Carolina Supreme Court and the State Court of Appeals
-- Federal statutes[1] as interpreted by federal courts
-- North Carolina statutes as interpreted by state courts
-- Department of Correction regulations

The most commonly used parts of the U.S. Constitution are the cruel and unusual punishment clause of the Eighth Amendment and the equal protection and due process clauses of the Fourteenth Amendment. The Eighth Amendment forbids cruel and unusual punishment of prisoners; courts look at all the facts in a case to decide whether specific treatment in prison is "cruel and unusual." The Fourteenth Amendment says that no state may deny to any person the equal protection of the laws. In prisons, one sometimes hears the saying "different strokes for different folks." The equal protection clause requires that the prison administration have good reasons for classifying folks differently and assigning them different kinds of strokes. For example, prisoners may not be treated differently merely because of their race.

The Fourteenth Amendment also says that the state may not deprive any person of life, liberty, or property without due process of law. In free society, this means that the state government may not take away a person's liberty or life (for example, sentence him to prison or the gas chamber) without first going through the "process" that is "due"--in other words, the proper procedure of accusation, trial, and sentence. The process that is due--i.e., the proper procedure to follow--has been changed over time by the courts. Today it is improper for a court to sentence an indigent offender to prison unless he was offered the free services of an attorney at his trial; this part of the criminal "process" was not "due" (required) twenty years ago. Prisoners lose much of their constitutionally protected liberty in prison, but the due process guarantee still applies in prison. For example, "good time" (time off for good behavior) is in a sense a privilege that a prisoner may earn and not something he may expect as a right; nevertheless, once he has earned some good time, the prison administration may not take it away from him without a hearing. The hearing required (later memoranda will say more about it) is not as elaborate as a court trial, but it is the process that is due before a prisoner can be deprived of earned good time.

The North Carolina Constitution has provisions similar to the federal Constitution's due process, equal protection, and cruel and unusual punishment clauses. However, these provisions have not yet been applied by North Carolina courts to determine the rights of those in prison.

The most important federal statutes are the Civil Rights Act of 1871 (Title 42, Section 1983 of the U.S. Code, often called "Section 1983"); Title 18, Sections 241 and 242 of the U.S. Code (these sections make violation of constitutional rights a crime); and Title 28, Section 2254 of the U.S. Code, which permits a state prisoner to obtain a writ of habeas corpus in a federal court (the right to habeas corpus is also protected explicitly by Article I, Section 9, of the U.S. Constitution).

Chapters 143B and 148 of the North Carolina General Statutes deal respectively with the organization of the Department of Correction and the administration of prisons, probation, and parole. As a practical matter, most of their provisions would probably not be involved in most prisoner lawsuits. Some provisions, however, establish duties that could conceivably be enforced by state court action; for example, G.S. 148-22 requires that the Department of Correction provide for "humane treatment of prisoners and for programs to effect their correction and return to the community as promptly as practicable." Other state statutes authorize submission of prisoner grievances to the Inmate Grievance Commission and review by a state court (G.S. Ch. 148, Art. 11), prohibit corporal punishment of state prisoners (G.S. 148-20), and make it a crime for a jail keeper to do injury to a prisoner or confine him in a place other than one designated by law (G.S. 14-260, -261). The state criminal law is, of course, generally applicable to prison officials' and jailers' behavior toward prisoners.

The regulations of the Department of Correction and local jails are also an important source of legal authority. Courts will not quickly ignore or overrule these regulations when they have been carefully worked out to meet administrative needs.

LIABILITIES THAT PRISON OFFICIALS CAN INCUR IN STATE AND FEDERAL COURTS

When the court decides that a prisoner's complaint is valid, it can order prison or jail officials to take certain actions or refrain from certain actions (this order is known as an injunction). If the officials fail to obey the order, they may be found in contempt of court and fined or imprisoned. The court can also direct the officials to pay damages (money) to the prisoner to compensate him for the wrong done to him. It can also in some instances order payment of additional "punitive damages." (Punitive damages are imposed as a punishment, but unlike a fine in a criminal case, the money is paid to the person who brought the lawsuit rather than to the government, and no criminal conviction is involved.) If the prisoner can prove that a prison official committed a crime under state or federal law, the official can be prosecuted in state or federal court. If convicted, he may be fined or imprisoned and also may lose his job.[2]

The kinds of legal actions the prisoner is likely to take against prison officials or prison agencies include the following:

-- A Section 1983 suit in federal court
-- A federal habeas corpus action
-- A suit in state courts for damages or an injunction

-- Criminal prosecution
-- Filing a complaint according to the Department of Correction's inmate grievance procedure pursuant to the Inmate Grievance Commission statute (this remedy is available only to state prisoners)

Section 1983 Suit for Violation of Prisoner's Constitutional Rights

The most popular form of court action by prisoners today is a civil suit in federal court for damages or an injunction under Title 42, Section 1983 of the U.S. Code. The number of these suits has increased enormously in the last few years. Section 1983, also known as the Civil Rights Act of 1871, provides that a person may bring a lawsuit in federal court against any person who deprives him of a constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State." When it was enacted, the statute was intended to provide a remedy for black citizens when their constitutional rights had been violated by state or local officials and they could not receive justice in their local courts. In 1961, the U.S. Supreme Court held that Section 1983 authorized civil suits against individual law enforcement officers who, by abuse of their authority, violate suspects' constitutional rights (the Court also held that Section 1983 actions could not be brought against government agencies).[3] In 1964, the Supreme Court decided that Section 1983 could be used by state prisoners to sue state prison officials for violating their constitutional rights,[4] and it is clear by implication that local jail inmates may sue their jailers as well. The 1961 decision also held that the citizen whose rights are violated need not "exhaust" (use) all available state court remedies before bringing his Section 1983 suit to federal court. (Section 1983 should not be confused with federal habeas corpus. Federal habeas corpus, discussed later in this memorandum, is used to obtain immediate release or shorten confinement and requires that state remedies be exhausted; Section 1983, on the other hand, cannot be used to obtain release or shortening of confinement, can be used to obtain an injunction or damages, and does not require exhaustion of state remedies.)

When the federal court decides a Section 1983 action in favor of the prisoner, the most common form of relief it grants is an injunction (court order), although it sometimes may award damages to the prisoner. The injunction may direct that some specific procedure be followed by prison officials or that they stop some particular form of treatment. Often, the court order affects a large class of prisoners, not just the prisoner who brought the suit. Sometimes courts order sweeping changes in a prison system. For example, a federal court found a wide variety of violations of prisoners' constitutional rights in Arkansas state prisons. In its order directing officials to stop these violations, the court made it clear that lack of funds was no excuse; if the violations could not be stopped, the prisons would have to be shut down.

> Let there be no mistake in the matter; the obligation of the Respondents [Arkansas Board and Commissioner of Corrections] to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.[5]

After extended litigation involving the Mississippi prison system, a federal court recently ordered some prison facilities closed and limited admissions to others. A federal court recently ordered Alabama prison officials not to accept any new inmates until the prison population (reportedly 50 per cent over design capacity) was reduced or new facilities were built, after the state conceded that incarceration in its prisons is cruel and unusual punishment.[6]

If prison officials fail to obey a court's order, they may be found in contempt of court. A federal court recently ordered that top prison officials in Virginia pay a fine of $25,000 for failing to obey its order to stop an inhumane treatment of prisoners that the court had earlier found to be cruel and unusual punishment; the fine was suspended, however, on condition that the officials obey the order.[7]

In rare instances federal courts award damages to prisoners in Section 1983 suits. For example, in one case in which a federal court found that solitary confinement had been imposed because of the prisoner's political beliefs, it ordered the warden to pay the prisoner $25 for each day in solitary.[8] In the Virginia case just mentioned, the federal court ordered the Virginia director of correction to pay a total of $21,265 in damages to several prisoners.[9] The purpose of awarding damages is usually to compensate the prisoner for the violation of his constitutional rights. However, if the prisoner seeks financial compensation not only for the violation of these rights but also for a "tort"--a physical injury or other loss that he would ordinarily have to sue for in a state court (see the pages below on tort suits)--a federal court can award damages for that loss too.[10] The $25,000 damages in the Virginia case covered lost prison wages, compensation for pain and suffering, and the cost of future psychiatric treatment required as a result of the unconstitutional treatment of the prisoners.

When a prisoner sues a North Carolina state prison official (or any other state employee) for damages, the state will normally provide legal defense to the employee and pay the damages up to $30,000. (See discussion of General Statutes Chapter 143, Article 31A, on page 8.)

Some Defenses in Section 1983 Suits for Damages

The following material lists some of the usual defenses made by prison officials when they are sued for damages under Title 42, Section 1983 of the U.S. Code. It should be emphasized that none of these defenses can be used when the prisoner seeks an injunction -- a court order directing the prison official to do specific things or refrain from doing specific things.

A prison administrator could defend himself against a Section 1983 action for damages by proving that he did not direct his subordinates to perform the unconstitutional acts complained of and did not know that the acts were being performed. The director of the Virginia Division of Corrections in the suit just mentioned argued that he did not know of the unconstitutional treatment of the prisoners who sued. The court found that although he might not have specifically ordered his subordinates to perform the acts complained of, he knew that the prisoners were being kept in solitary under inhumane conditions because, under prison regulations, solitary confinement had to be personally approved by him every thirty days. In the same case, the prisoners had sued the director of the Department of Welfare and Institutions,

presumably the parent agency of the Division of Corrections. This official, the court found, was too far removed from the activities of guards and wardens to permit the inference that he had knowledge of their acts, and so was not liable (did not have to pay damages) to the prisoners. In a case involving Attica Prison in New York, a federal court held that both the superintendent and the state commissioner of correction could be liable for unconstitutional punitive segregation, because the New York prison regulations required that both these officials be notified of the punitive action, and they had been notified.[11]

Another defense that prison officials may make to Section 1983 damage suits is that they believed in good faith that their actions were constitutional and their belief was reasonable at the time.[12] This defense could be used, for example, if an official did something that the U.S. Supreme Court later ruled unconstitutional but he reasonably believed to be all right at the time. In the Virginia case, the court found that the director of corrections could not have reasonably believed the treatment complained of was constitutionally permissible; in fact, the court said, some of the treatment was so shocking that no reasonable man could have believed it was constitutional.

Sometimes, following established prison regulations or practices can be a basis for a "good faith" defense. For example, in a case involving Montana prisons, punitive segregation in "the hole" was imposed by prison officials. They followed established Montana procedures, even though they did not conform to procedures that the U.S. Supreme Court, two years later, held to be constitutionally required. The federal court said:

> Liability should not be imposed upon prison officials for acts done in good faith and in conformity with established prison practice at a time prior to the formulation of the due process standards relating to prison discipline.[13]

This decision, like the one involving Attica Prison, shows the importance of following prison regulations when constitutional requirements have not been made clear by the courts. Although a federal court may order a prison official to stop or modify a practice that it finds unconstitutional, it may not hold him liable for damages if he can show that the practice was prescribed by regulations.

A third defense that may be available to prison administrators is "official immunity." This phrase generally refers to a policy of protecting government officials from damage suits for acts performed while carrying out their official duties. (Official immunity will be discussed further in the pages below in connection with tort actions in state courts.) The U.S. Supreme Court has said that, in enacting the Civil Rights Act of 1871 (now Title 42, Section 1983 of the U.S. Code) Congress did not intend to "abolish wholesale all common-law immunities."[14] (For example, in Section 1983 suits, judges retain their traditional immunity from liability for damages for acts done while exercising their power as judges.) In damage suits against prison administrators, federal courts have treated the official immunity defense like the "good faith and reasonable belief" defense mentioned earlier. For example, when the warden of a New Hampshire prison decided that he had an emergency on his hands due to prisoner unrest (and possibly rebellious

prison guards) and for that reason imposed an "extended lockup" of many prisoners that lasted three weeks to two months, a federal court said that the warden could not be liable for damages. His official immunity protected him, the court said, as long as he believed in good faith that he had to act as he did. Besides, the court pointed out, the constitutional law on handling prisoners in an emergency was unclear, so the warden had no standards to follow.[15] On the other hand, the prison administrator may lose his immunity if his belief in the correctness of his action is unreasonable; this is illustrated by the Virginia case in which the court found the treatment of prisoners so shocking that it was unreasonable to believe the treatment was constitutional.

Constitutional Rights Suits in State Courts

North Carolina prisoners generally do not complain of violations of their rights under the U.S. Constitution in state courts. Why is this? Briefly, prisoners know, or are advised, that they are more likely to get relief in a federal court. A short discussion of the limitations on making federal constitutional claims in state courts may help to explain why federal courts are preferable from the prisoner's point of view.

The U.S. Constitution, as interpreted by the U.S. Supreme Court, is law that North Carolina courts must apply, just as they apply the State Constitution, statutes, and common law. For example, North Carolina courts must exclude from criminal trials evidence that has been obtained in violation of the defendant's rights under the U.S. Constitution. But while there is a remedy in the state courts for subjecting him to an unconstitutional search, for example (namely exclusion of illegally seized evidence), for many violations of constitutional rights, no specific remedy is available in state courts. The General Assembly probably has the power to authorize North Carolina courts to award damages for abuse of constitutional rights, just as Congress authorized the federal courts to award damages under Title 42, Section 1983 of the U.S. Code.[16] The North Carolina Supreme Court might simply decide that North Carolina courts had this power, as New York's highest court recently decided that its state's courts did.[17] However, in North Carolina as in most other states, neither the state legislature nor the highest court has established a general power in state courts to hear lawsuits for violations of federal constitutional rights. (The superior court of Wake County is authorized to consider questions of federal or state constitutional rights; but not damage claims, when reviewing action taken under North Carolina's inmate grievance procedure; this will be explained later.)

If the prisoner who thinks his constitutional rights have been violated wants to obtainn damages in North Carolina court, he can sue prison officials for what is known as a tort--a wrongful act for which the law requires the wrongdoer to pay compensation to the victim. For example, suppose a prison guard beats a prisoner simply because he does not like him. This treatment violates the prohibition of cruel and unusual punishment of the United States; it may also cause the prisoner permanent injuries and mental and physical suffering. If he sues the guard in a state court for the tort of assault and battery, the prisoner cannot obtain damages to compensate him for the violation of his constitutional right not to be cruelly and unusually punished. He can obtain damages for his actual injury, pain, and suffering and possibly

punitive damages, but no price tag is attached to the loss of his constitutional rights as such. To take another example, suppose the prisoner had been placed in solitary confinement unconstitutionally. Because the North Carolina court would probably consider itself authorized only to provide one of the traditional tort remedies in this situation, the prisoner would have to try to apply one of those. The only tort that seems to apply is false imprisonment. However, since suits for false imprisonment are usually brought by people in the free community who are imprisoned, it would be difficult for a person who had merely been transferred from one form of prison to another to prove damages. Thus, a North Carolina court would probably not provide compensation for unconstitutional solitary confinement.

In addition to the limited variety of tort remedies available, the prisoner suing in a state court would be faced with the defense of official immunity, which is discussed below.

Although it has apparently never been done, a prisoner could sue in a North Carolina court to obtain an injunction compelling prison officials to stop violating his rights under the U.S. Constitution. North Carolina courts would probably be more reluctant than federal courts to intervene in any matter affecting prison administration. A state prisoner would have to exhaust the inmate grievance procedure before suing for an injunction in a state court (see pages 12-14 below).

Civil Suit in State Courts

When a North Carolina prisoner has a complaint other than one regarding a violation of his constitutional rights and wants to obtain damages or an injunction, he cannot sue in federal court because no question of federal law is involved. His remedy is to sue in state court. If he wants to recover damages, he must sue for one of the traditional torts (wrongful acts such as negligence for which the wrongdoer must pay compensation to the victim). Whom should he sue? He will want to sue the unit of government holding him in prison, if he can, because it has more money than any individual prison or jail official. Under the principle known as "sovereign immunity," a unit of government cannot be sued unless it consents (or is authorized by law) to be sued. Until recently, a prisoner in a North Carolina jail could not sue the county or city government that operated the jail for torts committed by jail personnel in the course of their duties, because there was in general no law authorizing such suits.[18] However, both cities and counties may now buy liability insurance that covers all torts of their employees; by doing so they "waive" (give up) their immunity to lawsuits to the extent of the insurance coverage. A number of the larger counties and cities have purchased insurance that covers torts of jail personnel, thus allowing jail prisoners to sue the county or city.

If a state prisoner suffers harm or loss because of something a prison official did or failed to do, North Carolina law provides two remedies. One remedy is to bring a tort action in a state court against the individual official who the prisoner thinks has wronged him. Under Chapter 143, Article 31A of the General Statutes,[19] the state may provide for the legal defense of any state employee in any civil or criminal action in a state court of any state or a federal court, and if the state employee is found liable to the person suing (i.e., owes him damages), the department of state government that

employs him must pay the damages up to a maximum of $30,000. If damages exceed this amount, the employee must pay. Thus, the state provides considerable protection to state prison employees from suits by prisoners. However, there are some limits to the protection. The state will not provide legal defense or pay the damages unless:

(1) The act or omission that the prisoner is suing for is within the scope of the prison official's employment -- i.e., is something that he did or failed to do while engaged in doing his job; and

(2) The state's providing legal defense would not create a conflict of interest between it and the employee; and

(3) Defense of the action is determined by the Attorney General to be in the best interest of the state; and

(4) There was no actual fraud, corruption, or actual malice by the state employee. [G.S. 143-300.4(a).]

In general, the last condition means that although the state will provide legal defense and pay damages in all civil actions, including actions for intentional torts as well as negligent acts and omissions, it will not assist employees when extreme misconduct is involved. For example, suppose a prisoner was injured in an accident caused by a prison truck with defective brakes. If the brakes were defective because of the failure of the responsible prison official to exercise ordinary care, the prisoner could sue the official and the damages could be paid by the state. But suppose the reason that truck maintenance has been neglected is that the prison official has been siphoning off funds for truck repair into his own pocket and falsifying inspection records. Then, presumably, the state would not provide legal defense or pay damages because "actual fraud" is involved. To take another example, suppose a guard uses what he thinks is necessary force against an inmate and permanently injures him. A court could in some circumstances (e.g., if the force were unnecessary or unreasonable) award damages to the prisoner; in that case, the state would probably provide legal defense and pay the damages. But suppose the evidence indicates that the guard was bribed by someone to beat and injure the prisoner or he had a grudge against the prisoner and had sworn to get even with him. Then, presumably, since "actual malice" is involved, the state would neither provide legal defense nor pay damages. Exactly where to draw the line is not clear, but it is important to remember that there is a limit to the support the state must give to its employees.

Another remedy the prisoner has is to sue the <u>state</u>, rather than[20] (or in addition to) the individual state employee. The Tort Claims Act authorizes the state to be sued for negligent acts by state employees acting within the scope of their employment, up to a limit of $30,000. This statute does not allow suits for <u>intentional</u> torts[21] or for <u>negligent</u> <u>omissions</u>.[22] For example, if a prison guard intentionally beat and permanently injured a prisoner, the state could not be sued. (However, the <u>guard</u> could be sued, and, if the guard acted without "actual malice," the state would have to provide legal defense and pay up to $30,000 of the damages under the statute discussed in the preceding paragraph.) If the guard forgot to put on the emergency

brake when he parked a truck on a hill--a negligent omission--and as a result the truck rolled and permanently injured a prisoner, the prisoner could not sue the state. (However, he could sue the guard, and the state would have to provide legal defense and pay up to $30,000 of the damages.) On the other hand, if the prisoner were riding in the truck with the guard driving and the guard carelessly ran a red light--negligent act--causing a collision that injured the prisoner, the prisoner could sue the state. (He could also sue the guard, and the state would have to provide legal defense and pay up to $30,000 of the damages.)

What is the over-all limit of the state liability in suits of the kind just discussed? The Tort Claims Act and Article 31A of Chapter 143 are written as if they established two separate types of liability. Nevertheless, a court would probably read the two statutes together, to set an over-all limit of $30,000 whether the prisoner sued an individual state employee or the state or both.

When a prisoner seeks monetary compensation for a wrong other than a violation of his constitutional rights, he will sue either individual prison or jail officials or the unit of government that employs them. Usually his suit will take the form of one of the recognized tort actions. For example, he could sue for the tort of assault and battery or the tort of negligence. If a prison official took property for his own use that rightfully belonged to the prisoner, the prisoner could sue for the tort of "conversion." The prisoner's widow or child or the representative of his estate could sue the official for "wrongful death" to recover the financial loss caused by death of the prisoner for which the negligence or other wrongful act of the prison official was responsible. Prison officials have the same legal duties toward prisoners as toward other persons--for example, the duty to exercise reasonable care and avoid injuring other persons negligently, and the duty to refrain from assaulting other persons. They have other duties imposed by statute. State law requires that local jails "be operated so as to protect the health and welfare of prisoners and provide for their humane treatment,"[23] and provides that if the "keeper of a jail" does "any wrong or injury" to his prisoner, he must pay treble damages--triple the amount of actual damages--to the injured prisoner.[24] (The treble-damages statute is probably not applicable to state prison officials.) State law also requires the Department of Correction to "provide the necessary custody, supervision, and treatment to control and rehabilitate criminal offenders,"[25] and to "provide for humane treatment of prisoners and for programs to effect their correction and return to the community as promptly as practicable,"[26] and it forbids the corporal punishment of state prisoners.[27] A state court could infer from these statutes a special duty on the part of prison officials to treat prisoners humanely and could entertain a lawsuit for breach of that duty entirely apart from any other tort. For example, in 1939 the North Carolina Supreme Court held that a jailer could be found liable to a prisoner for negligently closing a door on his thumb (thus cutting it off) under the treble-damages statute.[28]

What defenses does the prison official have when sued for damages for a tort? He can always raise defenses relating directly to his responsibility--such as contending that he did not do the thing the prisoner complains of, or did not know of it, or did it despite exercising reasonable care. Also, in a negligence suit, the official could defend himself by proving that the

prisoner's own negligence contributed to the injury or damage he has suffered; such "contributory negligence" would excuse the official from liability under North Carolina law.

Another defense the official could raise is "official immunity." As explained earlier, high government officials such as judges and legislators are given immunity from lawsuits so that they can perform their important functions. To some extent, the same sort of immunity is given to administrative prison officials. If an official's duties are "ministerial," in the sense that he has little discretion in doing his job and for the most part just follows the instructions of higher-ups, he is ordinarily not protected by official immunity. (This would presumably include most custodial officers who work directly every day with prisoners.) On the other hand, if his duties are "discretionary," in the sense that the law gives him considerable discretion in doing his job, a court may decide he has immunity from lawsuits. However, this immunity would be lost if he grossly abused his official powers.

For example, suppose a prison administrator gives orders that certain equipment be used by prisoners in prison industry. As far as the administrator knows, the equipment is safe; there is a record that tells him that the equipment has recently passed safety inspections. In fact, and without his knowledge, the record has been falsified and the equipment is unsafe. In using the equipment, a prisoner is permanently crippled. Here the prisoner probably could not sue the administrator because it was within the administrator's official discretion to decide to use the equipment and it was reasonable for him to rely on the safety record. Now, however, suppose the administrator knows the equipment is unsafe--in fact, someone who used it yesterday was nearly badly hurt. He has been informed of this near-accident, but the prison budget is short this year, so he decides to order that the equipment be used anyway. In this situation a court might well find that the administrator had abused his official discretion by "gross negligence" and was liable to a prisoner who was injured while using the equipment.

In a sense, the concept of "official immunity" is misleading. Administrative officials really have the same duty to exercise reasonable care as guards do, but because the broader decisions made by administrators necessarily have to rely more on information supplied by subordinates[29] and affect more prisoners than the decisions made by guards, courts will protect administrators from liability when they make honest mistakes as long as they have acted reasonably. This may be called "official immunity," but it is the same in principle as a court's excusing an unconstitutional arrest by a law enforcement officer when he reasonably believes at the time that the arrest is constitutional, or excusing the use of deadly force when the officer reasonably believes it necessary to protect human life.

If a tort is committed by a prison or jail guard or a sheriff's deputy, the prisoner may want to sue the supervisor of the guard or deputy--for example, the warden or sheriff--as well as, or instead of, the guard or deputy himself. The prisoner may contend that the legal doctrine of respondeat superior applies-that is, the supervisor is responsible for the acts of his subordinate committed in the course of carrying out his duties. In North Carolina, it is clear that a sheriff is responsible for the torts of his deputy committed "under color of his office" (i.e., while carrying out his official

duties).[30] The law is not clear on the responsibility of a warden or other supervisory prison official for a tort of his subordinate, but probably a supervisor would not be held liable unless he closely supervised the subordinate's work or had actual knowledge of the tortious conduct and did not stop it.[31]

Actions for Injunction in State Court

Theoretically--although it is very rarely done--a jail prisoner could obtain a North Carolina court order directing a local jail administrator to modify treatment of prisoners or a prison condition that clearly violates state law. For example, the law requires that local jails operate so as to protect the health and welfare of prisoners and provide for their humane treatment,[32] and a jail prisoner might obtain an injunction from a state court directing the sheriff to correct unhealthy or inhumane conditions.

Before 1974, a state prisoner could have obtained from a state court the same sort of injunction against the Department of Correction. Legislation passed in 1974 (described below) probably means that the prisoner must exhaust an inmate grievance procedure before a state court can issue an injunction of this kind.

The Inmate Grievance Commission and the Division of Prisons' Internal Grievance Procedure

In 1974, the North Carolina General Assembly created the Inmate Grievance Commission. The statute[33] that was enacted was modeled on a nearly identical Maryland law.[34] It provides that any state prisoner who has "any grievance or complaint against any officials or employees of the Department of Correction" (emphasis added) may submit it to the Inmate Grievance Commission. At first the Department of Correction and the Commission took the position that the Commission's jurisdiction did not include matters of prison discipline, even though the drafters of the statute probably did not intend to exclude disciplinary matters. (Maryland's Inmate Grievance Commission considers disciplinary matters an important part of its jurisdiction, and nearly half of its complaints do involve discipline.[35]) Later the Commission decided that it would hear appeals from decisions of prison disciplinary committees for the purpose of reviewing the decisions to see whether inmates were disciplined under fair procedures, but would not recommend modification of any disciplinary actions unless the actions were clearly erroneous, and would not conduct its own hearing on the facts. Under the statute, it would seem that a state prisoner has a right to a full hearing by the Commission on a disciplinary matter unless the Commission finds his complaint is wholly without merit.

The statute authorizes the Commission to require a prisoner to exhaust an internal grievance procedure of the Department of Correction if the Department has one (which it does) and if the Commission considers this procedure "reasonable and fair" before it will hear the complaint. The Commission has chosen to require the exhaustion of the Department's internal procedure[36] in which the prisoner fills out a "DC 410" grievance form and the complaint is investigated and acted on by prison officials--first by the officer in charge

of the prisoner's cell block or unit and then by successively higher levels of prison administration. If the response does not satisfy the prisoner, he may submit his complaint to the Commission. For disciplinary matters, there is a separate internal procedure.[37] Punishment is imposed after a hearing; a prisoner may then appeal to higher authority within the Department, the ultimate appeal being to the Director of Prisons. (As already explained, the Commission has thus far chosen not to exercise fully its jurisdiction over disciplinary matters. Of course, the prisoner can still take the matter to court.)

After it receives a complaint, the Commission or its staff conducts a preliminary review. If the complaint is wholly lacking in merit, it is dismissed; otherwise, the Commission holds a hearing. The Commission members either dismiss the matter, if they find no basis for the complaint, or issue a disposition that is forwarded to the Secretary of Correction. This disposition is called an "order" in the statute but is really only a recommendation to the Secretary that certain action be taken. (The Commission has no authority to "order" anything.) The Secretary is free to take whatever action he finds necessary, including none.

Once the Secretary of Correction has made his final decision (which he must do within 15 days of receiving the Commission's recommendation regarding the prisoner's complaint), the prisoner may obtain judicial review of the decision by petitioning the superior court of Wake County. The court's review is limited to looking at the record of the Commission's hearing and the Secretary's decision to see whether there is a "substantial basis" for the Secretary's decision and "whether there was a violation of any right of the inmate protected by federal or State constitutional requirements or laws."[38] Presumably this statute is intended to authorize the court to set aside or modify the Secretary's decision if there is not a "substantial basis" for it or if the decision violates constitutional rights or state laws. (The court perhaps would have this power even without the statute, but the statute clarifies its authority.) Earlier we said that, while the U.S. Constitution is part of the law that state courts apply, inmates use it very little in supporting a complaint in a state court. The statute establishing an inmate grievance procedure provides a way of raising constitutional questions in a North Carolina court relative to a prisoner's complaint. Presumably, if the prisoner alleges that his treatment by the Department of Correction violates his constitutional rights, he can raise that issue, among others, in his complaint to the Inmate Grievance Commission and then to the Wake County superior court when it reviews the Secretary's decision.

One very important feature of the Inmate Grievance Commission statute is that the grievance procedure it authorizes is intended to take the place of certain other remedies a state prisoner may have. G.S. 148-113 provides:

> No court shall entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies provided in this section. . . .

Clearly, the General Assembly did not mean to (nor could it) deny the state prisoner access to federal court. The section just quoted also provides that the superior court's review of the Secretary's decision will not bar any future

consideration of any issue the prisoner may later raise in a U.S. district court. Also, presumably, the statute was not intended to take away the prisoner's right to sue for damages in a state court. Probably the only remedy the state prisoner would otherwise have that this statute takes away is the right to go directly to a state court for an injunction. After the prisoner's complaint has been acted on by the Grievance Commission and the Secretary of Correction has made his decision, the superior court of Wake County can still issue an injunction directing prison officials to refrain from unlawful actions or to perform actions required by law; however, this court can act only on the record of the Commission's hearing. Thus, it is especially important for the Commission to investigate each complaint fully and keep a complete record of each hearing.

Those who drafted the Inmate Grievance Commission statute hoped that the Commission and the Department's internal grievance procedure would discourage federal litigation. They expected that federal courts would require prisoners to exhaust the North Carolina grievance procedure before filing a Section 1983 suit. However, the U.S. Court of Appeals for the Fourth Circuit recently ruled that such exhaustion would not be required.[39] (Its decision is being appealed to the U.S. Supreme Court.) The effect of this ruling is that a state prisoner may take his complaint to a federal court directly without first following the grievance procedure, or he may use the grievance procedure first and then, if he does not like the result, sue in federal court.

Prosecution of Prison Officials for Crimes

The distinction between tort and crime is worth mentioning here. Most crimes involve some tort, but not every tort constitutes a crime. The act of maliciously beating someone is both a tort and a crime. It is a tort, or "private wrong," because the law allows the victim to sue the assailant for assault and battery and collect damages to compensate for his injury. It is a crime, or "public wrong," because it threatens the peace and security of society, and because the law authorizes the prosecution of the offender for the crime of assault and certain kinds of punishment if he is convicted. For the crime, the offender "pays a debt to society"; for the tort, he merely pays compensation to the one injured by his action. Many torts do not involve any criminal act. For example, most people that courts find liable for negligence have not committed any crime. To constitute a crime, one's actions must be either intentional or grossly (extraordinarily) negligent.

The preceding pages have concerned various civil (noncriminal) remedies available to prisoners who are wronged by prison officials. In addition, sometimes a prisoner may seek criminal prosecution of a prison official. To do this, the prisoner (or his attorney) would ordinarily begin by telling his story to a prosecutor--a U.S. attorney if a federal crime is involved or a state district attorney if a crime under North Carolina law is involved. If the prosecutor investigates the prisoner's complaint and finds enough evidence, he can charge the prison official with a crime (an indictment, or formal accusation by a grand jury, would be necessary if a felony under North Carolina law were charged) and bring him to trial.

Title 18, Section 242 of the U.S. Code makes it punishable by a $1,000 fine or up to one year's imprisonment for anyone (including a prison official) to deprive any person of rights under the U.S. Constitution, "under color of any law, statute, ordinance, regulation, or custom." This criminal statute applies to state and local officials who abuse the powers of their office and thereby violate someone's constitutional rights. Charges of violating this statute are rare and confined to instances of gross abuse of official power. For example, a sheriff and a deputy in Georgia arrested a suspect, took him to jail, and beat him so badly that he died. The evidence indicated that a private grudge was involved. The officers were charged with violating this federal criminal statute, but the particular constitutional rights violated were not specified in the charge. The jury--before reaching its verdict of guilty--was instructed by the judge that the defendants were guilty if they had used more force than was necessary to effect the arrest or protect themselves. The U.S. Supreme Court, reversing the conviction, said that in order for a person to be guilty of violating Section 242, the government would have to charge, and the jury would have to find, that he specifically intended to deprive another person of a constitutional right.[40] The Court further said that "the fact that a prisoner is assaulted, injured, or even murdered by state officials [here, the use of excessive force by the sheriff and deputy probably was a crime under Georgia law] does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States."[41] (The Court did, however, make it clear that the sheriff and deputy had acted "under color of law"; it was part of their job to make the arrest and prevent the suspect from escaping, and their beating of the suspect occurred in the course of doing that job, even though they abused their authority.) Later, in Arkansas, a prison guard allegedly beat a prisoner badly without any justification. He was indicted by a federal grand jury for beating the prisoner with the intention of depriving him of specific constitutional rights, such as the right to personal security while in the custody of the prison and the right not to be subjected to punishment without due process of law. A federal court of appeals held that the form of this indictment was proper to charge the guard with violating Section 242, since these rights are protected by the Fourteenth Amendment's guarantee that no person shall be deprived of his liberty without due process of law.[42] Thus, even though what the guard did might have been a crime under Arkansas law, it could also be a federal crime under Section 242, but the intent to violate constitutional rights had to be specifically charged.

Title 18, Section 241 of the U.S. Code--a companion statute to Section 242--makes it a crime punishable by $10,000 fine or imprisonment up to ten years for "two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise of enjoyment of any right or privilege secured to him by the Constitution or laws of the United States"; if the crime results in the death of the person conspired against, the offenders may be sentenced to any term of years up to life. The technicalities of conspiracy are beyond the scope of this publication, but it is clear that Section 241 applies to state and local prison officials who conspire with each other or with private citizens to oppress anyone in the exercise of a constitutional right.[43]

Prison officials could also be charged with crimes against prisoners under North Carolina law. These include all the crimes that any person can commit, such as assault, larceny, murder, rape, and so on. Also, as

already mentioned, there are some specific crimes that only prison and jail officials can commit. For example, it is a misdemeanor punishable by fine and/or imprisonment for up to two years for the "keeper of a jail" to do "any wrong or injury" to his prisoners, and for a sheriff or jailer to "wantonly or unnecessarily confine" his prisoners "in any apartment" other than the place designated by law.[44] Another statute[45] makes it "unlawful" for any state prison official to whip, flog, or administer any similar corporal punishment of a prisoner or to give, make, or enforce any rule requiring such punishment. This probably means that corporal punishment of a state prisoner is a misdemeanor punishable by fine and/or imprisonment for up to two years;[46] also, it could be prosecuted as the ordinary crime of assault. (This subject will be considered further in a later memorandum on the use of force.) The common law crime of "oppression" should also be mentioned. It is committed when a public officer, acting under color of his office, corruptly causes any harm or disadvantage to a person.[47] A prison guard could be charged with this offense if he used his official power to harass a prisoner maliciously without lawful justification--for example, kept the prisoner from receiving a meal because he has a personal dislike for him.

Habeas Corpus

A writ of habeas corpus is an order issued by a court to those who hold a person prisoner to bring that person before the court so that it can determine whether his confinement is lawful. The right of an imprisoned person to ask for a writ of habeas corpus is specifically protected by the U.S. Constitution (Article 1, Section 9) and the North Carolina Constitution (Article 1, Section 21).

Let us first consider a petition for habeas corpus in a federal court under Title 28, Section 2254 of the U.S. Code. Originally, federal habeas corpus was used only to obtain immediate release from prison because of a defective conviction -- i.e., when a court had made an error in convicting the prisoner. Federal courts have extended the scope of federal habeas corpus. It can now be used to order prison officials to change unconstitutional prison conditions or treatment--this would include ordering release from solitary confinement[48] or transfer from a more restricted to less restricted form of confinement[49]--and to shorten the term of confinement[50] (for example, when a prisoner seeks restoration of accumulated good time that has been taken away unconstitutionally). In other words, a prisoner can use federal habeas corpus not only to get out of prison immediately or sooner than he otherwise would but also to change his treatment while he is in. (Section 1983 of Title 42 can also be used to attack conditions of confinement--by obtaining either a court order or compensatory damages--but, unlike federal habeas corpus, it cannot be used to obtain immediate or speedier release.[51])

The problem for the prisoner in using federal habeas corpus is that the federal statute does not allow him to obtain habeas corpus in federal court until he shows that he has "exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."[52] In other words, the prisoner must either use whatever remedies his state provides or show that there are no

appropriate state remedies before he can go to federal court. This may mean a long period before federal habeas corpus is available.

What North Carolina remedies might a prisoner have to exhaust before he can apply to a federal court for habeas corpus? If he believes there were errors or violations of his constitutional rights in the trial that convicted him, he must either raise those errors on direct appeal from his conviction or under the Post-Conviction Act (G.S. 15-217 through -222). He could also apply for habeas corpus in a state court under Chapter 17 of the General Statutes. This remedy is very limited in scope; a prisoner can use it only to have a state court determine whether he is in prison because of a sentence imposed on him by a court, and whether that court's sentence was within its jurisdiction.[53] If the prisoner wants a court to order prison officials to change prison conditions or treatment (including, for example, solitary confinement) or to restore good time, state habeas corpus and the Post-Conviction Act are not available to him. One remedy a state prisoner has is the inmate grievance procedure described earlier -- filing a complaint, pursuing it through the prison administration, taking it to the Inmate Grievance Commission, and (after the Secretary of Correction has made his decision) obtaining judicial review in the superior court of Wake County. However, the inmate grievance procedure could not now be used if what the prisoner is complaining about involves discipline (for example, if the segregated confinement he wants to be released from was imposed as a punishment) because, as explained earlier, the Inmate Grievance Commission has thus far refused to exercise its jurisdiction to hold hearings in disciplinary matters. Another limitation of the grievance procedure is that it is available only to state prisoners and not to prisoners in local jails.

There is another state remedy for the prisoner who believes that he is entitled to have his sentence shortened because of time spent in pre-trial detention or in a mental institution to determine his capacity to be tried on criminal charges. G.S. 15-196.4 provides that he can simply petition the court that committed him to prison to determine the credit due and apply it to his sentence. Presumably he could use the same procedure to obtain credit, if not already given, against his active sentence for time spent on parole.[54]

In conclusion, it is not clear exactly which state remedies a prisoner in North Carolina must exhaust before seeking federal habeas corpus when he is not claiming that his conviction was defective but instead is complaining about conditions of confinement or loss of good time. (There are no reported cases of federal habeas corpus involving North Carolina prisoners with this type of complaint). Probably a federal court would require the prisoner to exhaust the inmate grievance procedure, if he is a state prisoner, or try to obtain an injunction in a North Carolina court if he is a jail prisoner.

FOOTNOTES

1. "Statutes" and "statutory law" refer to law enacted by a legislature, such as the United States Congress or the North Carolina General Assembly. This kind of law is usually distinguished from "common law"--law that is made and applied by judges and found in printed court decisions.

2. See N.C. Dept. of Correction, "Conduct of Employees," State Correction Service Guidebook, Ch. 1, art. 3; N.C. State Personnel Commission, State Personnel Manual (issued under G.S. 126-4(6)); N.C. Gen. Stat. § 128-16 (removal from office of sheriffs for conviction of felony and certain other misconduct.)

3. Monroe v. Pape, 365 U.S. 167 (1961).

4. Cooper v. Pate, 378 U.S. 546 (1964).

5. Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971).

6. Gates v. Collier, ___F. Supp. ___, 17 Crim. L. Rptr. 2463 (N.D. Miss. 1975); Raleigh, N.C. News and Observer, Aug. 30, 1975, pp. 1-2.

7. Landman v. Royster, ___F. Supp. ___, 2 Prison L. Rptr. 210 (E.D. Va. 1973).

8. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), cert. den., 405 U.S. 978 (1972); see also Wright v. McMann, 460 F.2d 126 (2d Cir. 1972).

9. Landman v. Royster, ___F. Supp. ___, 2 Prison L. Rptr. 206 (E.D. Va. 1973).

10. See Roberts v. Williams, 456 F.2d 819 (5th Cir. 1972), cert. den., 404 U.S. 866 (1972).

11. U.S. ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975).

12. Pierson v. Ray, 386 U.S. 547 (1967); Scheuer v. Rhodes, 416 U.S. 232 (1974).

13. Fife v. Crist, 380 F.9 901, 911 (D. Mont. 1974).

14. Pierson v. Ray, 386 U.S. 547, 554 (1967).

15. Hoitt v. Vitek, 497 F.2d 598 (1st Cir. 1974).

16. Dellinger, Of Rights and Remedies: The Constitution As a Sword, 85 Harvard L. Rev. 1532, 1537-42, 1539, n. 46.

17. Wilkinson v. Skinner, 356 N.Y.S.2d 15 (1974); Note, 1 New Eng. J. Prison Law 255 (1974).

18. N.C. Gen. Stat. §§ 153A-435; 160A-485 as amended by N.C. Sess. Laws 1975, Ch. 723.

19. N.C. Gen. Stat. §§ 143-300.2 through -300.6, as amended by N.C. Sess. Laws 1975, Ch. 209.

20. N.C. Gen. Stat. Ch. 143, Art. 31 (§§ 143-291 through -300.1). This provides a remedy for state prisoners; see Ivey v. Prison Department, 252 N.C. 615 (1960).

21. Jenkins v. Department of Motor Vehicles, 244 N.C. 560 (1956).

22. Ayscue v. North Carolina State Highway Commission, 265 N.C. 373 (1965).

23. N.C. Gen. Stat. § 153A-216(1).

24. N.C. Gen. Stat. § 14-260.

25. N.C. Gen. Stat. § 143B-261 (Supp. 1974).

26. N.C. Gen. Stat. § 148-22(a).

27. N.C. Gen. Stat. § 148-20 (Supp. 1974).

28. Davis v. Moore, 215 N.C. 449 (1939).

29. See Schmidt v. Wingo, 499 F.2d 70 (6th Cir. 1974) (warden not liable in wrongful death action where he relied on advice of prison doctor and prisoner died).

30. Davis v. Moore, 215 N.C. 449 (1939).

31. See Landman v. Royster, 354 F. Supp. 1302, 1316 (E.D. Va. 1973); Wright v. McMann, 460 F.2d 126, 135 (2d Cir. 1972); Thompson v. Montemuro, 383 F. Supp. 1200 (E.D. Pa. 1974).

32. N.C. Gen. Stat. § 153A-216(1) (Supp. 1974).

33. N.C. Gen. Stat. § 148-101 through -113 (Supp. 1974).

34. Md. Ann. Code, Art. 41, § 204F (Supp. 1974).

35. Personal communication with director of Maryland Inmate Grievance Commission, March 1975.

36. N.C. Department of Correction, Division of Prisons, Correctional Grievance Procedure for Inmates (July 1974).

37. N.C. Department of Correction, "Disciplinary Actions," Correction Service Guidebook, Ch. 2, art. 4, § 2-407 (adopted 1975).

38. N.C. Gen. Stat. § 148-113.

39. McCray v. Burrell, ___ F.2d ___, 17 Crim. L. Rptr. 2108 (4th Cir. 1975).

40. Screws v. U.S., 325 U.S. 91 (1945).

41. Id. at 108-09.

42. U.S. v. Jackson, 235 F.2d 925 (8th Cir. 1956).

43. U.S. v. Price, 383 U.S. 787 (1966).

44. N.C. Gen. Stat. § 14-261, -262.

45. N.C. Gen. Stat. § 148-20.

46. State v. Rippy, 127 N.C. 516 (1900); see also State v. Blackmon, 260 N.C. 352 (1963).

47. Perkins, Criminal Law 491 (1969).

48. Johnson v. Avery, 393 U.S. 483 (1969).

49. Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944); Wilwording v. Swenson, 404 U.S. 249 (1971).

50. Preiser v. Rodriguez, 411 U.S. 475 (1973); Wolff v. McDonnell, 418 U.S. 539 (1974).

51. Preiser v. Rodriguez, 411 U.S. 475 (1973).

52. 28 U.S.C. § 2254(b).

53. N.C. Gen. Stat. §§ 17-4(2); State v. Hooker, 183 N.C. 763 (1922).

54. N.C. Gen. Stat. § 148-58.1 (Supp. 1975) (N.C. Sess. Laws 1975, Ch. 618, Sec. 2; Ch. 720, Sec. 3). This statute grants credit for all time on parole except the last six months. The U.S. District Court for the Western District of North Carolina recently held that credit is constitutionally required for all parole time including the last six months; see Howie v. Byrd, ___ F. Supp. ___, 17 Crim. L. Rptr. 2185 (W.D. N.C. 1975).