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THE IMMUNITY OF PUBLIC DEFENDERS UNDER SECTION 1983

In *Robinson v. Bergstrom,* the United States Court of Appeals for the Seventh Circuit held that a public defender has absolute immunity from suits brought under 42 U.S.C. § 1983 for acts done in the performance of his duties as a public defender. The defendant, Bergstrom, a part-time Assistant Public Defender, had been appointed to represent Robinson on the appeal from a 1968 murder conviction. When Bergstrom resigned his position five and one-half years later, the appeal still had not been filed. The plaintiff brought an action pursuant to section 1983 alleging that the public defender had violated his Sixth Amendment right to effective counsel.

*Robinson* is the latest in a series of federal court cases in which the question of a public defender’s liability has been decided. The Circuit Courts of Appeals that have considered the issue — the Third, Fourth, Fifth, Seventh, and Ninth — have all held public defenders or court-appointed counsel immune from personal liability for actions taken in the course of representing their clients.

This note will examine the ways in which the courts have disposed of these cases, discuss factors that have inclined federal courts to grant immunity to public defenders under section 1983, and weigh the advisability of personal liability for malpractice of those who defend indigent defendants in criminal trials.

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1. 579 F.2d 401 (7th Cir. 1978).
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
3. The brief was filed in May of 1974 by a newly established State Appellate Defender’s Office. The appeal was denied in November, 1974. Bergstrom testified that his delay had been due to an error in his judgment regarding his caseload; he carried a caseload of from six to nine hundred cases per year in addition to his private practice. 579 F.2d at 402.
4. The sixth amendment states, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.” U.S. CONST. amend. VI.
7. O’Brien v. Colbath, 465 F.2d 358 (5th Cir. 1972); Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971) (a diversity jurisdiction civil malpractice action).
8. Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978); John v. Hurt, 489 F.2d 786 (7th Cir. 1973); Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973) (a diversity jurisdiction malpractice action).
10. The attorneys in *Jones, Sullens* and *Walker,* supra notes 5-9, were court appointed; the attorney in *Minns,* supra note 6, was appointed, pursuant to the Code of Virginia § 53-21.2 (1974), to assist prisoners in preparing appeals, a position which probably should be classified as a part-time defender. The defendants in the other cases, * supra* notes 5-9, were full-time public defenders.
I. COLOR OF STATE LAW

To bring suit under section 1983, a plaintiff must establish two things: that he has been deprived of a right protected by the Constitution and that the deprivation occurred "under color of" state law.\(^{11}\) The first presents no problem in suits against a defense attorney; effective assistance of counsel is a right clearly protected by the Sixth Amendment.\(^{12}\) The second requirement has been more difficult for the courts to deal with. Federal courts uniformly have held that an attorney who is privately retained is not acting under color of state law; being an "officer of the court" is not enough.\(^{13}\) It also has generally been held that a private attorney appointed by the court to represent an indigent defendant is not acting under color of state law,\(^{14}\) even when the state provides his compensation or structures the organization through which he volunteers.\(^{15}\)

The federal court treatment of court-appointed attorneys contrasts with that given in the cases of other private individuals, whose actions are often found to be "state action" for purposes of section 1983 jurisdiction.\(^{16}\) The more typical approach of the federal courts is seen in *Chalfant v. Wilmington Institute*,\(^{17}\) in which the Third Circuit found state action in the decisions of a public library board of managers, most of whom were unpaid private citizens, and in *Robinson v. Jordan*,\(^{18}\) in which a doctor who treated a prisoner in county jail was held to be acting under color of state law despite the fact that the state did not direct the doctor's professional judgment. The effort of court-appointed attorneys, however, has not been held to be state action for purposes of section 1983.

This uniform characterization of court-appointed attorneys disregards the many methods of providing counsel for indigent defendants in criminal cases.

\(^{13}\) E.g., Harkins v. Eldred, 505 F.2d 802 (8th Cir. 1974); Szijarto v. Legeman, 466 F.2d 864 (9th Cir. 1972); Nelson v. Stratton, 464 F.2d 1155 (5th Cir. 1972), cert. denied, 410 U.S. 957 (1973).
\(^{14}\) The rationale for this holding is that a court-appointed attorney acts not as a functionary of the state, but rather in his private capacity on behalf of his client. See, e.g., Thomas v. Howard, 455 F.2d 228 (3d Cir. 1972); French v. Corrigan, 432 F.2d 1211 (7th Cir.), cert. denied, 401 U.S. 915 (1970); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968). Accord, Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973); Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973).
\(^{16}\) E.g., Reitman v. Mulkey, 387 U.S. 369 (1966) (state action existed by virtue of amendment to state constitution which proclaimed freedom of real property owners to dispose of property in racially discriminatory manner); United States v. Davis, 482 F.2d 893 (9th Cir. 1973) (government requirement of airport anti-hijack screening procedures constituted state action to bring searches thereby conducted by airline personnel within fourth amendment scrutiny); Adams v. Miami Police Benevolent Ass'n, Inc., 454 F.2d 1315 (5th Cir.), cert. denied, 409 U.S. 843 (1972) (private organization found to be "adjunct" of city police department for purposes of state action requirement due to use of "police" name to solicit funds, use of police facilities, and integral involvement in police policy and employment procedures); McQueen v. Drucker, 438 F.2d 781 (1st Cir. 1971) (governmental initiation, subsidy, and continued regulation of public housing project attached coloration of state law to acts of developer). For view that courts are most willing to find state action in cases where racial discrimination is alleged, see Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).
\(^{17}\) 574 F.2d 739 (3d Cir. 1978) (en banc).
\(^{18}\) 449 F.2d 793 (5th Cir. 1974).
Court-appointed attorneys are connected in varying degrees with the state. Lawyers may be assigned by the judge or by the local bar association; they may be paid from state or county funds or they may receive no compensation. And while a system of assigned counsel is still widely used, public defender offices are growing steadily in number and importance. Public defenders also may be paid entirely by public funds, may be supported by private gifts, or may be part of a private organization that depends on a combination of public and private funds. The function of each of these lawyers, once assigned, is the same; whether he is a court-appointed attorney or a public defender he is to represent the indigent suspect with the same professional competence as if he had been retained by a fee-paying client.

With the advent and growth of public defender offices, the focus in the federal courts shifted from the liability of court-appointed counsel to the liability of the attorneys in the public defenders offices. The leading case on the question of a public defender's liability arising from his official actions is Brown v. Joseph. In Brown, the Third Circuit considered the state action question in depth, comparing a public defender to a court-appointed attorney serving without pay, and finding it "difficult to perceive 'color of law' in the activities in the first category, and deny its existence in the latter." The court, however, inexplicably did not decide the color of law issue; instead, it concluded that even if public defenders were to be considered to be acting under color of state law, public defenders nonetheless enjoyed an immunity

20 In 1961, before Gideon v. Wainright, 372 U.S. 335 (1963), defender systems were operating in only three percent of the nation's counties, serving approximately 25% of the country's population. By 1973, defender systems served 64% of the population, in a little over one-fourth of the counties. Moreover, in many states, defender systems are now organized at the state level rather than by counties. L. Benner & B. Neary, The Other Face of Justice 13 (1973).
21 L. Silverstein, supra note 19, at 39. In 1973, while more than half of the existing defender offices were public agencies of state or county government, almost a third were private organizations such as Legal Aid Societies or defender associations, and most of the remaining indigent defense services were provided by part-time individual defenders, who also had their own law practice. L. Benner & B. Neary, supra note 20, at 14-15.
22 "[W]hether an indigent is represented by an individual or by an institution, he is entitled to the same level of competency as that generally afforded at the bar to fee-paying clients." Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970). For a discussion of minimum standards which have been applied in determining whether the assistance of counsel was "effective," see Bine, Remediag Ineffective Representation in Criminal Cases: Departtures from Habeas Corpus, 59 Va. L. Rev. 927,927-39 (1973).
23 463 F.2d 1046 (3d Cir. 1972), cert. denied, 412 U.S. 950 (1973). Two earlier federal decisions held court-appointed attorneys immune from personal liability, but the context in each was a federal criminal case, and the immunity found was that of a federal public official. Jones v. Warlick, No. 2006 (W.D.N.C. Aug. 24, 1965), aff'd, 364 F.2d 828 (4th Cir. 1966) ("Defendant was acting as an officer of a federal court when he (at the request of the court) represented Jones on the criminal charges which had been brought against him."); accord, Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971). These decisions are criticized in Comment, Liability of Court-Appointed Defense Counsel for Malpractice in Federal Criminal Prosecutions, 57 Iowa L. Rev. 1420 (1972).
24 463 F.2d at 1048.
25 The Brown court's discussion of the state law issue comprises such a large proportion of the opinion that the case is occasionally cited as holding that a public defender does not act under state law. See, e.g., United States ex rel. Simmons v. Zibilich, 542 F.2d 259 (5th Cir. 1976).
for acts done in the performance of a "judicial function," the same immunity that judges and state prosecutors have. The case was cited, followed, and the same analysis employed in most of the succeeding Courts of Appeals cases.26 Most circuits refused to affirm district court reasoning that the defender's actions in representing his client were not under color of state law, the courts holding instead that the state action issue need not be resolved since in any case public defenders had absolute immunity.

The obvious criticism of such cases is that the courts were putting the cart before the horse. Federal court jurisdiction under section 1983 clearly requires that "state action" be found prior to addressing the merits, and where state action is lacking the complaint must be dismissed for a lack of subject matter jurisdiction.27 As the Seventh Circuit finally pointed out in Robinson v. Bergstrom,28 it is "elementary that jurisdiction is a threshold issue. . . . [T]he state action question, a requirement for subject matter jurisdiction, must be weighed prior to a consideration of immunity."29

Not all courts avoided the state action question in the manner of Brown, however. Many district courts30 and the Tenth Circuit31 did reach the state action issue, and all concluded that a public defender does not act under color of state law when representing an indigent. The federal courts have articulated, in various guises, two rationales for reaching such a conclusion. The first, relied upon by the Tenth Circuit in Espinoza v. Rogers,32 is that since the state statutes creating a means of funding public defenders offices do not attempt to control or influence the professional judgment of the defenders, it can not be said that the actions of the defender constitute state action.33

The second rationale, and the one adopted most frequently by the courts,34 is that the relationship between a public defender and an indigent is essentially a professional one, a "personal relationship of trust and confidence governed by the canons of professional ethics."35 The "public" nature of the relationship is seen merely as something incidental to the professional relationship of attorney and client. This view is identical to the view adopted

26 In chronological order, the immunity cases following the Brown logic are: John v. Hurt, 489 F.2d 786 (7th Cir. 1973); Morrow v. Igleburger, 87 F.R.D. 675 (S.D. Ohio 1974); Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975); Minns v. Paul, 542 F.2d 899 (4th Cir. 1976), cert. denied, 429 U.S. 1102 (1977); Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977).
27 Cannon v. Univ. of Chicago, 559 F.2d 1063 (7th Cir. 1977); Braden v. Univ. of Pittsburgh, 552 F.2d 148 (9th Cir. 1977).
28 579 F.2d 401 (7th Cir. 1978).
29 Id. at 404.
31 Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972).
32 Id.
33 See also Berryman v. Shuster, 405 F. Supp. 813 (W.D. Okla. 1975); United States ex rel. Wood v. Blacker, 335 F. Supp. 43 (D.N.J. 1971); The Wood court also maintained that the power exercised by a defender in the course of his duties is not state action for § 1983 purposes because that power results from his license to practice law rather than his employment by the state.
by the majority of federal courts in disposing of section 1983 actions against court-appointed attorneys:

The lack of state action for volunteer court-appointed counsel follows from the nature of the attorney-client relationship underlying disputes such as the instant one. The court-appointed attorney, like any retained counsel, serves his client. He represents the client, not the state. The ancillary facts that the court has a hand in providing counsel, and that the attorney selection board . . . obtains its authority from statute, do not alter the attorney-client relationship. That relationship is our concern here. Accordingly, . . . the situation presents no state action.\(^{36}\)

Precisely because the nature of the attorney-client relationship remains the same whether the attorney comes to his position as a court-appointed counsel or as the result of his employment in the public defenders office, federal courts have been understandably reluctant to make distinctions that would permit finding no color of state law in the first case, as the courts have uniformly held, but would require a finding of state action in the latter.

In \textit{Robinson v. Bergstrom},\(^{37}\) the Seventh Circuit became the first federal court to both address the state action question and conclude that public defenders do act under color of state law for purposes of section 1983. The court began its analysis by discounting the precedent of the Tenth Circuit's decision in \textit{Espinoza}, noting that \textit{Espinoza} relied on several cases that involved private volunteer counsel, rather than public defenders.\(^{38}\) The court then evaluated the weight to be accorded the fact that the state has no right to direct the manner in which the public defender represents his client. In \textit{Espinoza}, this factor had been the significant consideration in finding no state action. In \textit{Robinson}, after an examination of the recent section 1983 precedents, the Seventh Circuit concluded that "the status of the individual actor is irrelevant if the institution on whose behalf he acted is found, upon examination of all the relevant factors, to be an instrumentality of a state or local government."\(^{39}\) The court determined that the County Public Defender Office is plainly an instrumentality of the state, and that, therefore, the public defender is acting under color of state law.

In support of its conclusion, the \textit{Robinson} court analogized the public


But the fact that one comes to his court-appointed role as a result of a state-mandated and county-financed system does not, in any respect whatsoever, distinguish his professional responsibility to his client from that of any attorney appointed to serve without pay, or paid by a legal aid society financed largely by private contributions. We find it difficult to perceive "color of law" in the activities in the first category, and deny its existence in the latter.

\textit{Id.} at 1048.

\(^{37}\) 579 F.2d 401 (7th Cir. 1978).

\(^{38}\) 579 F.2d 401, 405 (7th Cir. 1978). The cases that the Seventh Circuit found inapposite were Peake \textit{v. County of Philadelphia}, 280 F. Supp. 853 (E.D. Pa. 1968) and Thomas \textit{v. Howard}, 455 F.2d 228 (3d Cir. 1972). The court chose to ignore United States \textit{ex rel. Wood v. Blacker}, 335 F. Supp. 43 (D.N.J. 1971), which was also relied on in \textit{Espinoza}, and which did concern a public defender.

\(^{39}\) 579 F.2d at 407.
defender to a doctor supplied by the state to treat a prisoner awaiting trial. In Robinson v. Jordan, the Fifth Circuit had found such a doctor to be acting under color of state law, even though the state did not supervise his medical decisions, because the prisoner he treated had no option to choose another doctor during his incarceration. Similarly, the Robinson court reasoned, the indigent prisoner had no choice but to accept the public defender if he wanted to be represented by counsel.

The "right of control" argument rejected by the Robinson court is superficially convincing; a public defender is under a duty to exercise independent, professional judgment on behalf of his client, and the defender does oppose the efforts of "the state" to convict his client. However, a "right of control" test has never been the standard under section 1983 for a determination of state action. Those officials routinely found to be subject to suit under section 1983 are individuals who frequently exercise independent judgment. The most frequently relied-upon definition of the state action standard is the statement of the Supreme Court in United States v. Classic: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." This standard does not imply a need for state supervision of the power granted by state law and that requirement has not been added by judicial gloss. Following the Classic standard, the Supreme Court has held that even action exceeding the authority granted to an official by the state or that is in direct violation of state law is under color of state law. Moreover, some jurists have concluded that the purely ministerial acts of government functionaries are insufficient to establish state action. If some use of discretionary power is required, discretion would seem to be a prerequisite rather than an obstacle to finding that one acting on behalf of the state is acting under color of state law.

The Robinson opinion does not discuss as an independent factor the nature of the attorney-client relationship, the second rationale which has supported a finding of no state action in a public defender's performance of his official duties. This second rationale is based on the presumed importance of state control; once state control of its agents' actions is recognized as unnecessary

40 494 F.2d 793 (5th Cir. 1974).
41 579 F.2d at 410.
42 ABA Code of Professional Responsibility, DR 5-107(B) states: "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."
44 313 U.S. 299 (1941).
45 Id. at 326.
47 E.g., Flagg Bros, v. Brooks, 96 S. Ct. 1729, 1742-43 (1976) (Stevens, J., dissenting). As Justice Stevens pointed out, if ministerial acts are sufficient, even car sales would be invested with state action because state officials record transfers of title. Id. at 1743 n.12.
for section 1983 jurisdiction, the "attorney-client" rationale loses some significance. Moreover, since the Seventh Circuit held that action on behalf of the state suffices to establish state action, the argument based on the attorney-client relationship became irrelevant. It is true that, once the public defender is appointed, his loyalty must be to his client, the indigent defendant. The public defender represents his client, not the state. Yet this very independence is undertaken on behalf of the state.

The Constitution mandates a duty to provide counsel for those who cannot afford it. As Gideon v. Wainwright established, this duty is made obligatory upon the states by the Fourteenth Amendment. That effective assistance of counsel rests upon "a personal relationship of trust and confidence," unhampered by state control, does not blunt the fact that providing effective assistance of counsel in state courts is a state responsibility. In light of this constitutional duty, it would seem paradoxical to hold that the very attorney-client relationship characterizing effective assistance of counsel is a relationship that removes state-provided assistance of counsel from the gambit of state action for purposes of section 1983.

That no Court of Appeals before the Robinson decision could bring itself to state explicitly that the public defender does act under color of state law must be attributed, at least in part, to the uniform precedent of cases finding no state action in the representation of indigents by court-appointed attorneys. It does seem improper to treat public defenders and court-appointed attorneys differently in resolving the state action question; the appropriate resolution is to find them both acting under color of state law in the course of defending indigents. Whether the state meets its constitutional obligation to provide counsel to indigents through public defender offices or through a system of court-appointed counsel, it is still the state's obligation that is being carried out. The Robinson holding itself is based on factors that are as applicable to court-appointed attorneys as to public defenders. Court-appointed volunteer attorneys, like public defenders, act on behalf of the state in carrying out the state's obligation. Court-appointed attorneys, like public defenders, are assigned to indigent defendants, who have no option to select another attorney if they choose to be represented. The rationale of the Robinson opinion thus does support a finding of state action in the court-appointed attorney's performance of his court-assigned duties.

That court-appointed attorneys should be considered to act under color of

49 It has been pointed out that the state does in fact restrict the actions of the public defender to some degree, and it is argued that state constraints on his services may themselves be a sufficient basis for state action. Note, Minns v. Paul: Section 1983 Liability of State-Supplied Defense Attorneys, 63 VA. L. REV., 607, 616-17 (1977).


51 Ohio statutes, for example, provide for a state public defender and county or joint-county defenders, but retain the option for a county to use and pay private attorneys to represent indigents. Ohio Rev. Code Ann. §§ 120.04, .13-.15, .33 (Page 1978). Federal provision of counsel is also split between public defenders and court-appointed attorneys. For the 12 months ending June 30, 1978, 43,375 appointments of counsel were made in federal criminal cases; 51% were represented by private panel attorneys and 49% by staff attorneys in federal defender organizations. Administrative Office of the United States Courts, Annual Report of the Director 18 (1978).
state law is supported by the recent Supreme Court decision of Flagg Bros. Inc. v. Brooks.\(^{52}\) Deciding that a warehouseman’s sale of goods entrusted to him for storage, as permitted by state statute, is not action attributable to the state, the Court held that only private individuals performing functions “exclusively reserved to the state”\(^{53}\) are to be considered to act under color of state law. Such traditional governmental functions as providing elections or necessary municipal services had been held to be functions reserved to the state in earlier cases.\(^{54}\) The majority also identified education, fire and police protection, and tax collection as functions administered with a great degree of exclusivity by the state.\(^{55}\) The duty to provide counsel for indigent criminal suspects must fall into the category of functions exclusively reserved to the state; it is not only reserved to the state, it is mandatory upon the state. Where the state has authorized private individuals to fulfill this constitutional obligation, a finding of state action would seem to follow.

II. IMMUNITY

A. IMMUNITY BY ANALOGY

The plain import of the language of section 1983 allows no limit to its application; any person depriving another of constitutional rights while acting under color of state law is susceptible to suit under the statute. Although a literal reading of the statute has been urged,\(^{56}\) the Supreme Court has held that Congress intended to incorporate into section 1983 the common-law immunities that were in existence before the civil rights statute was passed.\(^{57}\) In *Imbler v. Pachtman*, the Supreme Court extended absolute immunity under section 1983 to public prosecutors, and in so doing clarified the appropriate method to determine immunity under section 1983. After reviewing earlier decisions on section 1983 immunity,\(^{59}\) the Court concluded that “each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.”\(^{60}\) In considering section 1983 immunity, the *Imbler* Court stated

\(^{52}\) 98 S. Ct. 1729 (1978).

\(^{53}\) *Id.* at 1735. (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974))(emphasis added). The dissent by Justice Stevens, joined by Justices White and Marshall, maintained that exclusivity is too stringent a test, and that the test should be whether the function is one that has been traditionally and historically associated with sovereignty. *Id.* at 1741-42. The actions of a public defender would be state action under either test.

\(^{54}\) See, *e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (state delegation of election process to political party cannot circumvent constitutional guarantees); Marsh v. Alabama, 326 U.S. 501 (1946)(corporation provision of municipal functions in a company-owned town is a public function).

\(^{55}\)*We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions [as education, fire and police protection and tax collection] and thereby avoid the strictures of the 14th Amendment.” 98 S. Ct. at 1737.


\(^{58}\) 424 U.S. 409 (1976).


\(^{60}\) 424 U.S. at 421.
that a two-tiered examination is to be employed: first, the immunity historically accorded the relevant official at common law is considered and then, once a common-law immunity is found, the court must determine whether the same considerations of public policy that underlie the common-law rule likewise support immunity under section 1983. A finding of section 1983 immunity, therefore, should presuppose a finding of common law immunity, and a continuing reason for that immunity. The Imbler opinion does not suggest that immunity under section 1983 may be found on the basis of only one of its two tests.

There is, of course, no traditional immunity for a public defender because the job is not a traditional one; government obligation to provide counsel to indigents has been acknowledged only recently. However, in one case where no common-law immunity existed because the office did not exist at common law, the Supreme Court found that immunity lies by analogy if the functions of the new office are sufficiently similar to an office that had received common-law immunity. Most of the federal courts that have declared section 1983 immunity for public defenders have cursorily analogized the function of public defender to that of a prosecutor.

Imbler granted absolute immunity from section 1983 liability to prosecutors because they exercise an adjudicative function. Prosecutors had absolute immunity at common law; the Court held that the prosecutors' adjudicative role necessitated that common-law immunity, and required immunity under section 1983. As one federal court stated before Imbler was decided:

[The prosecutor's] primary responsibility is essentially judicial — the protection of the innocent...[H]is office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench.

The prosecutor, like the judge or member of a grand jury, exercises discretionary judgment. On the basis of evidence presented to him, the prosecutor decides whether to seek an indictment, whether to prosecute, and

61 Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent felony defendant must be provided counsel); Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanor defendant must be provided counsel if jail results from the proceeding).
62 "As with executive officers faced with the instances of civil disorder, school officials, confronted with student behavior causing or threatening disruption, also have an obvious need for prompt action..." Wood v. Strickland, 420 U.S. 308, 319 (1975).
63 See cases cited supra notes 5-9. This conclusion has been strongly criticized. See Note, supra note 48, at 621-24.
64 "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties." 424 U.S. at 422-23.
65 The common-law immunity of federal prosecutors had been recognized in Yaselli v. Goff, 275 U.S. 503 (1927), aff'd mem., 12 F.2d 396 (2d Cir. 1926).
whether to accept a plea to a lesser offense. His office must be impartial and free from any influence.

A public defender, on the other hand, cannot truly be said to have an essentially judicial responsibility. Defenders are "obligated to vigorously oppose the efforts of the state to convict their clients. The fact that the defendant's attorneys may have received remuneration from the state . . . in no way alters the very nature of the [public defenders'] duty to defend their clients against the State's efforts to convict." As one commentator has said:

In the case of the prosecutor, fearlessness and impartiality are essential to the public interest. Potential liability frustrates this interest; immunity protects it. In contrast, the state-supplied attorney does not act impartially in the public interest. He makes no adjudicative judgment on the basis of the evidence before him. Instead, the state-supplied attorney must vigorously and sometimes vociferously advocate the interests of his particular client.

The public policy granting an immunity arises "not so much from a desire to protect an erring officer as . . . [from] a recognition of the need of preserving independence of action, without deterrence or intimidation by the fear of personal liability and vexatious suits." The judge, the grand jury, and the prosecutor all exercise a discretionary judgment on the basis of evidence presented to them; the complete independence of their judgment serves public policy. The appropriate common law analogue of the public defender, however, is neither judge nor public prosecutor, but rather may be the privately retained attorney who represents his client for a fee. The public defender provides the same function for his indigent clients as the private defense attorney does for his wealthier ones. Far from recognizing an attorney's need for freedom from personal liability in order to perform his duties without intimidation, public interest has required that a lawyer be accountable for his professional actions. As a result, a lawyer is forbidden by his code of professional responsibility to make any attempt to limit his liability to his client for personal malpractice. As the Supreme Court of Connecticut

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67 335 F. Supp. at 46 (emphasis in original). The Robinson court came to the same conclusion. "These kinds of decisions [made by defenders], while similar to those of a prosecutor are not of quasi-judicial nature as are those of the prosecutor." 579 F.2d at 409-10. See also Barto v. Felix, 378 A.2d 927, 930 (Pa. Super. Ct. 1977).

68 Note, supra note 48, at 622.


72 ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-102. It should be noted that this is a disciplinary rule, mandatory rather than advisory in nature, and that such rules are to be uniformly applied to all lawyers regardless of the nature of their professional activities. "The Canons of this Association govern all its members, irrespective of the nature of their practice, and the application of the Canons is not affected by statutes or regulations governing certain activities of lawyers which may prescribe less stringent standards." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 203 (1940).
has stated, in the course of denying immunity to public defenders for alleged malpractice, a public defender "is like any other attorney whose duties as an officer of the court and to an individual client and whose principled and fearless conduct of the defense are not deterred by the prospect of liability." 73

B. The Standard Policy Rationale For Immunity

Not all courts have attempted to find an analogy between the position of public defender and other positions to which immunity has been traditionally associated. In Robinson v. Bergstrom, 74 the Seventh Circuit made no attempt to analogize the functions of a public defender to a prosecutor or any other "immune" position. The court was not troubled by the lack of common-law history dictating a finding of immunity. It glossed over this problem by observing that "[a]lthough utilized as an important inquiry, the [first test of Imbler] is not set forth as a mandatory test. Indeed, the [Supreme] Court heavily stressed policy considerations underlying the common-law cases which are similarly applicable here. 75 It seems unlikely that the Supreme Court would agree to a characterization of its first Imbler test as not mandatory. Imbler, like the prior Supreme Court opinions dealing with immunity under section 1983, was predicated upon a "considered inquiry" into historical immunity as well as on the interests behind it. 76 When the Court has been confronted with a situation where an official claiming immunity under section 1983 had no traditional counterpart it has analogized modern officials to traditional counterparts or included them within the class of executive officials previously found to have immunity. 77 The ease with which the Robinson opinion dismisses the first test of Imbler disguises the result, which is a finding of section 1983 immunity completely free from any ties to traditional immunities. The result countenances a potential broad expansion of section 1983 immunity based solely upon policy considerations, a result clearly contrary to the rule laid down in Imbler. This is not to say that public defenders must be liable under section 1983 because the position did not exist at common law, but merely that the Robinson court's failure to conduct any inquiry into whether public defenders would fit into the common-law immunities is contrary to traditional interpretation of 1983 and may result in unwarranted expansions of 1983 immunity.

To find public defender immunity, the Robinson court relied on the second Imbler test, defined by the Supreme Court as whether "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." 78 The Third Circuit in Brown

74 579 F.2d 401 (7th Cir. 1978).
75 Id. at 409.
76 424 U.S. at 421.
77 E.g., Wood v. Strickland, 420 U.S. 308 (1975). However, in O'Connor v. Donaldson, 422 U.S. 563 (1975), and Procunier v. Navarette, 98 S. Ct. 855 (1978), the Supreme Court accorded qualified immunity to administrators of state mental hospitals and state prisons, classing these administrators of state institutions as state executive officials. Justice Stevens pointed out that the Court may be making qualified immunity available to all potential section 1983 defendants and urged that the contours of this affirmative defense be explained with care and precision. 98 S. Ct. at 863 (Stevens, J., dissenting).
78 424 U.S. at 424.
v. Joseph\textsuperscript{79} has provided two considerations of public policy for the absolute immunity of public defenders under section 1983, considerations upon which federal courts deciding the question of public defender immunity have continued to rely.\textsuperscript{80}

The court in \textit{Brown} first reasoned that it was necessary to encourage able people to become public defenders and that such recruiting would be difficult if defenders were subject to the potential liability of suit by unhappy defendants. The court noted:

To subject this defense counsel to liability, while cloaking with immunity his counterpart across the counsel table, the clerk of the court recording minutes, the presiding judge, and counsel of a co-defendant, privately retained or court-appointed, would be to discourage recruitment of sensitive and thoughtful members of the bar.\textsuperscript{81}

It has been pointed out that this concern for recruitment of attorneys does not require that absolute immunity under section 1983 be the remedy; qualified immunity, applying to state executives and ministerial officials, and to police officers, has not seemed to present a major obstacle to recruiting and retaining them.\textsuperscript{82} One real difference between the public defender and these officials is that the public defender has a duty to the particular clients assigned to him, and all too often the public defender's professional decisions must be based in part on the practical limitations of the justice delivery system which may necessitate choices of action that may not be in the best interest of an individual client. As the public defenders' office pointed out in \textit{Brown v. Joseph},\textsuperscript{83} both the court and the public defenders seek expeditious handling of cases as well as adequate representation of defendants in criminal proceedings. The two aims must at times be in direct conflict. The \textit{Robinson} court phrased the conflict in terms of preference rather than actual malpractice or inadequate representation: "The public defender, given the usual heavy caseload, must . . . make many strategic decisions with which the defendant may disagree."\textsuperscript{84} Nevertheless, malpractice is not an unlikely

\textsuperscript{80} See cases cited in note 26 \textit{supra}.
\textsuperscript{81} 463 F.2d at 1049. The \textit{Brown} court seemed to be especially concerned that § 1983 actions may expose the public defender to unusual liability, noting that § 1983 complaints against defenders are usually brought \textit{pro se} and, as established by Haines v. Kerner, 404 U.S. 519 (1972), such complaints are to receive special treatment, broadly construed in favor of the plaintiff. The inference was that the effect of that lenient reading should be avoided by simply disallowing the complaint on the grounds that the defendant is immune from suit. Such a conclusion misapprehends the reason for a lenient reading of \textit{pro se} complaints. It is not intended to create an advantage for \textit{pro se} plaintiffs or to increase the potential liability of defendants to such suits; rather, it is intended to compensate for the ineptitude of an untrained plaintiff who must proceed without a lawyer's knowledge of the rules of pleading. It is merely one application of the general rule that "[a]ll pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f).

Public defenders are exposed to no more liability in such suits than is a private attorney defendant in a malpractice suit. The \textit{Haines} holding would still permit dismissal of clearly frivolous \textit{pro se} claims, and a court could order complaints that are too general to be amended, perhaps even with the aid of appointed counsel, to allege the specific nature of the wrong.

\textsuperscript{82} See Note, \textit{supra} note 48, at 627.
\textsuperscript{83} 463 F.2d (1046), 1049 (3d Cir. 1972), \textit{cert. denied}, 412 U.S. 950 (1973).
\textsuperscript{84} \textit{Robinson} v. Bergstrom, 579 F.2d 401, 410 (7th Cir. 1978).
result in such a situation. One commentator recently noted the numerous pressures to compromise felt by an attorney for indigent criminal suspects: pressure from clients, superiors, opposing counsel, from agency personnel "many of whom could not do their jobs or make a living unless large numbers of cases were smoothly processed and resolved," and from judges and other deciders "who clearly recognize that they don't have the resources, time or energy to hear every case on its merits." Recruitment of public defenders would suffer if, in addition to these pressures, defenders faced the prospect of being the one person in the system to be held personally liable for results that may be attributable to the system itself. Absolute immunity, however, goes too far; it frees the public defender from liability for his own misconduct.

A second consideration offered by the Third Circuit in Brown v. Joseph and repeated in other immunity-granting opinions, including Robinson, is that exposure to suit from dissatisfied clients would have "a chilling effect upon Defense Counsel's tactics. Defense Counsel would be caught in an intrinsic conflict of protecting himself and representing his client." The courts are concerned that public defenders be free to exercise their professional judgment without weighing every decision in terms of potential liability. The trouble with this rationale for immunity is that it sweeps too broadly. The threat of suit may also have a "chilling effect" upon the practices of any privately-retained attorney, or on a doctor's choice of treatment for his patient, or on a hospital's routine tests to be ordered for all incoming patients. The resulting "intrinsic conflict" has not compelled any immunity for those lawyers, doctors or hospitals. It is surprising, therefore, that this rationale has been uniformly accepted as justifying immunity for public defenders. The argument has merit only when it is stated more precisely, to include the unique situation of the public defender: virtually unable to refuse to represent indigents needing counsel, working to process a certain number of cases, the public defender must make decisions that are never faced by a private attorney. Federal courts are assuring that a public defender does not risk personal liability for such actions as declining to press frivolous appeals, assigning a lower priority to one indigent's case than to another, or making a strategic decision with which his client disagrees. In doing so, however, they have gone beyond that which is necessary to adequately protect public defenders. Absolute immunity protects the public defender not only from suit for actions within the scope of his professional duties, it protects him from liability for actual malpractice.

C. Other Policy Considerations

Although the encouragement of recruitment and free exercise of professional judgment are the two factors uniformly mentioned by courts

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57 Id. at 1049. Accord, Robinson v. Bergstrom, 579 F.2d 401, 409 (7th Cir. 1978); Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977); Mims v. Paul, 542 F.2d 899, 901 (4th Cir. 1976), cert. denied, 429 U.S. 1102 (1977); John V. Hurt, 489 F.2d 786, 788 (7th Cir. 1973); Morrow v. Igleburger, 67 F.R.D. 675, 681 (S.D. Ohio 1974).
supporting the absolute immunity of public defenders, other factors, sometimes articulated but often merely hinted at in the decisions, supplement these two considerations and also serve as underlying policy reasons for failure to allow liability.

As a preliminary matter, it is important to understand the context in which the public defenders' cases arise. The issue of whether a public defender should be personally liable for any malpractice is a difficult one for the legal profession to deal with. Aware that the public defender's clients have been charged by the state with criminal offenses, the private attorney may respond, only half-humorously, "Oh well, they're all guilty anyway," and suppress an uncomfortable awareness of the difficult circumstances in which many public defenders work.

The public defender typically has neither the staff, time, nor money available to conduct a full investigation into the facts of the case to which he has been assigned. Salaries for public defenders are typically low, and their caseloads often high. It is not surprising that most staff attorneys leave the public defender office within two or three years. Representation by attorneys who are so pressured may meet minimum constitutional requirements but it would take the determined optimism of Voltaire's Pangloss to maintain that such representation will be the equivalent of that provided by private counsel. The cases offer glimpses of the quality of representation an indigent may receive. For example, one prisoner complaint alleged that the plaintiff never saw his Legal Aid lawyer until ten minutes prior to his trial, which time was spent with the lawyer urging him to plead guilty. While such treatment of a client by retained counsel would raise a strong presumption of

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90 A standard response from practicing members of the bar in discussing the subject of adequate representation of criminal defendants with the author of this note, this widely-held attitude has also been noted by Judge Bazelon, of the U.S. Court of Appeals for the District of Columbia. Bazelon, The Defective Assistance of Counsel, 42 CIN. L. REV. 1, 26 (1973).


92 The National Defender Survey found in 1973 that even chief defenders usually made less than $16,000 per year, and that about half of the defender offices surveyed offered a starting salary for a full-time attorney of between $11,000 and $14,000. L. BENNER & B. NEARY, supra note 20, at 67. In the same year, noting that "numbers of good attorneys have withdrawn from the [court appointment] panel because of the inadequacy of the compensation," Judge Judd offered, as an example, the case of a Legal Aid attorney whose 300 hours on a case was compensated at a rate of $5.00 an hour, or a rate of compensation "substantially less than a plumber or a TV repairman would receive," Wallace v. Kern, 13 CRIM. L. REP. 2243, 2245 (E.D.N.Y.), rev'd, 481 F.2d 621 (2d Cir. 1973).

93 An annual maximum caseload of 150 felony or 400 misdemeanor cases has been suggested for full-time public defenders. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 276 (1973). Defenders themselves suggested, on the average, a maximum caseload of 100 felony defendants or about 300 misdemeanor defendants. In contrast, the practice in most defender offices is much heavier, with 45% reporting misdemeanor caseloads over 400. L. BENNER & B. NEARY, supra note 20, at 29. Felony caseloads alone may be that high in some cities. Bazelon, supra note 89 at 6.

94 Pugliano v. Staziak, 321 F. Supp. 437, 351 (W.D. Pa. 1964), aff'd per curiam, 345 F.2d 797 (3d Cir. 1965). Such limited contact is not uncommon. In a recent survey of men charged with felonies nearly 30 percent of the defendants who had public defenders reported that their attorney spent less than 10 minutes with them; 32 percent stated 10 to 29 minutes; 27 percent stated one-half hour to 3 hours; and only 14 percent stated more than 3 hours. J. CASPER, CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE 35 (1978).
malpractice, for state-provided counsel in some types of cases, it may be standard procedure.

The realities of defender office support services or caseload are not usually argued before nor discussed by the court in these cases. The plaintiff charges his own defense attorney with negligent or willful misrepresentation resulting in a denial of his sixth amendment rights. Understandably, defendant attorneys would rather raise the defense of immunity than admit to any less-than-adequate representation and attempt to excuse it by the limitations of a public defense system unable to handle the demands on it. The federal bench is not unaware of the particular constraints and high case loads that many public defenders regularly face.

Another consideration that appears to have inclined some judges to find immunity for defenders is a fear that the federal courts would be flooded with section 1983 suits that are without merit. The dissatisfied former client almost always brings these suits pro se, and from prison. As the Minns court noted, "the experience of the federal courts in federal habeas corpus and section 1983 litigation demonstrates that indigents more frequently attempt to litigate claims which are patently without merit than do non-indigent parties." Most opinions have not dismissed the section 1983 claims as frivolous, nor have they stated that such lack of merit is a reason to find judicial immunity for state-supplied attorneys but, in the context of otherwise short opinions and perfunctory rationale for finding the immunity, references to lack of intrinsic merit in the charges or wry comments about the difficulties of even making out the nature of the complaint must be seen as evidence that a presumed lack of merit influenced the final outcome. While the opinions

95 In one interesting exception, a § 1983 class action was brought, seeking injunctive relief against an over-burdened Legal Aid Society. The district court granted a preliminary injunction limiting Legal Aid attorneys to fewer than forty active felony cases at one time. The ruling was abruptly overturned by the court of appeals, which found no state action and dismissed the case for lack of jurisdiction. Wallace v. Kern, 13 Crim. L. Rep. 2243, rev'd, 481 F.2d 621 (2d Cir. 1973).

96 E.g., Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978); Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977) (a deputy public defender allegedly induced plaintiff to plead guilty in exchange for a reduced sentence, and then the plea bargain was not respected); John v. Hurt, 489 F.2d 786 (7th Cir. 1973) (the defender allegedly failed to suppress damaging evidence at trial, failed to call all of plaintiff's witnesses, and made statements to the jury prejudicial to his own client); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972) (defendants allegedly passed plaintiff's legal work off to each other until, after more than two years of inaction, the files were lost).


100 See, e.g., Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976), cert. denied, 429 U.S. 1102 (1977) ("The resentiment of unsuccessful litigants may easily blossom into § 1983 litigation, and defense of even frivolous § 1983 suits would consume the energy of state-subsidized attorneys which should be devoted to representing the interests of other indigent clients. The instant case is a classic example."); Walker v. Kruse, 484 F.2d 802, 803-04 (7th Cir. 1973) (noting that the State Supreme Court had found a "clear want of merit" in the malpractice contention).

101 E.g., United States ex rel. Simmons v. Zibilich, 542 F.2d 259 (5th Cir. 1976) ("the Complaint poses the difficulty of knowing precisely (or even imprecisely) on what theories Simmons founds his case and of determining what relief he seeks.")
do not state that such lack of merit is itself a sufficient reason to find judicial immunity for public defenders, some have explicitly included the waste of effort expended in defending against frivolous suits as one of the public policy reasons supporting immunity.\textsuperscript{102}

In fact, many of the reported cases do lack merit; the complaints are often conclusory statements of "conspiracy" supported by no factual allegations. The plaintiff may sue everyone involved in his case, from judge and defense attorney, through the arresting officer, down to the victim.\textsuperscript{103} One such case involved thirty-seven defendants, including the court reporter and the state governor.\textsuperscript{104} While the problem of meritless suits may be a real one, it is improper support for a policy of judicial immunity. The appropriate response to a frivolous suit is to dismiss it for failure to state a cause of action, not to find the defendants immune from all suit.

In addition to awareness of the practical limitations of defender-provided counsel and of the number of meritless prisoner complaints, federal courts have evidenced concern about federalism. Federal courts are generally reluctant to sit in review of the conduct of state courts, as they must do in section 1983 actions against court-appointed counsel. In Morgan v. Sylvester,\textsuperscript{105} the problem was stated emphatically:

This action is a clear attempt, despite plaintiff's assertion to the contrary, to obtain a review and a retrial of the State Court proceedings. The fact that a defeated litigant is prepared to charge a "conspiracy" recklessly or otherwise and recite in haec verba the language of the Civil Rights Act does not give a right of review in the Federal Courts. To uphold the claim here advanced upon such conclusory allegations would open the door wide to every aggrieved litigant in a state court proceeding, and set the federal courts up as an arbiter of the correctness of every state decision. This case demonstrates forcibly the wisdom of the public policy which grants immunity to judicial and other officials for acts performed in the discharge of their duties.\textsuperscript{106}

The Morgan court thus sees the immunity of judicial officers as an appropriate way to block both an improper state-federal court relationship and an increase in federal case load.

It has also been claimed that the substantial expansion of federal jurisdiction resulting from broad construction of section 1983 has weakened the structure of our dual state-federal judicial system.\textsuperscript{107} Even if a federal

\textsuperscript{102} Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978); Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976), cert. denied, 429 U.S. 1102 (1977).

\textsuperscript{103} E.g., Barnes v. Dorsey, 354 F. Supp. 179 (E.D. Mo. 1973), aff'd, 480 F.2d 1057 (8th Cir. 1973). Section 1983 suits against the defense attorney, the prosecutor and the judge are common; see, e.g., Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977); Waits v. McCowan, 516 F.2d 203 (3d Cir. 1975); Jones v. Warlick 364 F.2d 828 (4th Cir. 1966).

\textsuperscript{104} Morrow v. Ingleburger, 67 F.R.D. 675 (S.D. Ohio 1974).


\textsuperscript{106} Id. at 387 (citation omitted).

judge does not fear the theoretically resulting "de facto national court
system," he must daily be aware of the substantial increase in federal
caseload attributable to section 1983 actions. Civil rights petitions filed by
state prisoners in federal courts have increased by 379.3 percent just since
1970. In 1978 federal and state prisoner petitions represented 15.8 percent of
the civil cases coming before a district court judge and about half of these
were civil rights cases.

III. Qualified Immunity

The federal courts have focused on the dual public-private nature of the
public defender, on his similarity to the prosecutor or to the private attorney.
It might be better to begin with the public defender’s actual position as an
employee of the state. In Scheuer v. Rhodes, an opinion intended to guide
the federal courts in reconciling an injured plaintiff’s right to compensation
with the need to protect the decisionmaking processes of the executive
branch, officers of the executive branch of the state governments were held
to have a qualified immunity. Two mutually dependent rationales were found
to support this immunity:

(1) the injustice, particularly in the absence of bad faith, of
subjecting to liability an officer who is required, by the legal
obligations of his position, to exercise discretion; (2) the danger that
the threat of such liability would deter his willingness to execute his
office with the decisiveness and the judgment required by the public
good.

The opinion also recognized that executive branch officers must act swiftly
and on the basis of imperfect information. Based upon these considerations
a qualified immunity was deemed sufficient protection for executive
officers.

The Robinson opinion summarily distinguished public defenders from
other state officials on the basis of his dual public-private responsibilities.
This is not the relevant distinction. The distinction to be examined is whether
the public defender’s role in the judicial process requires an exemption from
the general rule for executive officials. In Butz v. Economou, determining
whether federal officials and agency hearing officers have immunity for
instituting administrative proceedings the Supreme Court acknowledged that

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108 Id. at 578.
111 "[O]ur decision in Scheuer was intended to guide the federal courts in resolving this tension in
112 416 U.S. at 240.
113 Id. at 247.
114 Robinson v. Bergstrom, 579 F.2d 401, 410 (7th Cir. 1978).
the special functions of some executive officials require a full exemption from liability, and analyzed the need for immunities in the judicial process.

The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process. . . . [C]ontroversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.\footnote{116}

This appears to suggest that absolute immunity is required for advocates; in fact it does not. The summation groups together two types of immunities. Judges and prosecutors have absolute immunity; witnesses and opposing counsel have only an absolute privilege, or immunity to say what they wish in the course of judicial proceedings without fear of suit for defamation. Absolute immunity for courtroom statements should have no bearing upon the determination of immunity for a defender whose questionable actions or omissions often are far-removed from the courtroom.

As the Court pointed out in Butz, safeguards are built into the judicial process that tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct.\footnote{117} It is clear that these safeguards are inadequate to promote active and effective assistance of counsel. Advocates are said to be restrained by their professional obligations and by the knowledge that their assertions will be contested by their adversaries in open court. This may check an overly vigorous representation of a client; it has little effect on lack of representation, an evil for which malpractice actions have traditionally been the remedy. The Butz opinion thus provides no basis for finding that the judicial responsibilities of the public defender require a greater immunity than other executive officers.

The public defender does act under "serious constraints of time and even information" which may lead to "decisions that could engender colorable claims of constitutional deprivation,"\footnote{118} factors that appear to have been significant in the Imbler extension of immunity to the prosecutor. The Butz opinion, however, clarified the weight to be accorded these facts: "That prosecutors act under 'serious constraints of time and even information' was not central to our decision in \textit{Imbler}, for the same might be said of a wide variety of state and federal officials who enjoy only qualified immunity."\footnote{119}

Neither the public defender's role in the judicial process nor the constraints under which he works call for more than a qualified immunity; in general, federal courts have provided absolute immunity rather than qualified immunities.

\begin{footnotes}
\item[116] Id. at 2913-14.
\item[117] The Butz opinion lists such elements as the insulation of the judge from political influence, the importance of precedent, and the availability of appeal as checks on malicious action by judges and the rigors of cross-examination and the penalty of perjury as checks on a witness' malice. 98 S. Ct. at 2914.
\item[119] 98 S. Ct. 2994, 2916 (1978).
\end{footnotes}

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immunity\textsuperscript{120} on grounds other than the concern for constraints of "time and information" placed upon public defenders.

Absolute immunity protects any action within the scope of the immunity; the official's motivation is not at issue. Qualified immunity is a defense based on good faith and probable cause. "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."\textsuperscript{121} An absolute immunity defeats a suit at its outset; a qualified immunity is a defense to be established by the evidence at trial.\textsuperscript{122}

Relying on \textit{Imbler}’s extension of absolute immunity to prosecutors, \textit{Miller v. Barilla}\textsuperscript{123} and \textit{Minns v. Paul}\textsuperscript{124} rejected qualified immunity for the public defender on the sole grounds that qualified immunity would require the case to go to trial on the merits. Foremost in this reasoning was a concern about the "already burdened legal services resource"\textsuperscript{125} and the potentially great number of frivolous suits.\textsuperscript{126} The \textit{Imbler} grant of immunity to prosecutors, however, was based on the common-law rule and on considerations of public policy underlying it, which, in addition to such concerns, included the fact that even honest prosecutors would face serious danger of liability under a qualified immunity, given the discretionary nature of his duty to prosecute and the difficulty of evaluating the propriety of his actions.\textsuperscript{127} Moreover, the Supreme Court acknowledged that absolute immunity leaves a genuinely wronged complainant without civil redress, but found that evil outweighed by the public need for "the vigorous and fearless performance of the prosecutor’s duty that is essential to the proper functioning of the criminal justice system."\textsuperscript{128}

The duties of a public defender provide a very different context for the discussion of immunity. The public defender has no traditional absolute immunity at common law. Moreover, the diligent defender would face little liability under a qualified immunity; that he acted in good faith, in accordance with state statutes, and with reasonable belief in the validity of his actions would be a complete defense. Reference to the procedures established by the public defender’s office or the standards of the National Legal Aid and

\textsuperscript{120}The Seventh Circuit accorded qualified immunity to public defenders in \textit{John v. Hurt}, 489 F.2d 786 (7th Cir. 1973), likening him to the prosecutor, but has since extended absolute immunity in \textit{Robinson v. Bergstrom}, 579 F.2d 401 (7th Cir. 1978).


\textsuperscript{123}Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977).


\textsuperscript{125}549 F.2d 899, 900 (4th Cir. 1977).

\textsuperscript{126}"[D]efense of even frivolous § 1983 suits would consume the energy of state-subsidized attorneys which should be devoted to representing the interests of other indigent clients." Minns v. Paul, 542 F.2d at 902.

\textsuperscript{127}"It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials." 424 U.S. at 425.

\textsuperscript{128}Id. at 427-28.
Defender Association\textsuperscript{129} would simplify evaluation of the propriety of his actions.

The most serious objection to absolute immunity for public defenders is that no countervailing public policy outweighs the evil of depriving a genuinely wronged complainant of his civil remedy. Society's interest in vigorous prosecution of criminals is furthered by extending absolute immunity to the prosecutor; society's interest in assuring a constitutionally required effective counsel for indigents is hampered, not promoted, by holding the defender immune from liability for his malpractice. The public interest that has been offered as the reason to dispose of these cases without trial on the merits is an interest in the efficient functioning of the criminal justice system. That a burdened public defender's office may be forced to provide a defense for a number of section 1983 suits against its own attorneys is a legitimate concern but society's need to have its state-subsidized attorneys defending indigents rather than defending themselves does not over-balance society's need to have state-supplied attorneys defending those indigents well. An indigent, deprived of his sixth amendment right to an adequate counsel, should have effective redress for damages suffered because of his deprivation of freedom. Denial of that redress in order to maintain the smooth operation of a criminal defense system may excuse malpractice in order to permit further malpractice.

One of the reasons that the federal courts have not hesitated to find absolute immunity for public defenders under section 1983 is their insistence that other remedies are available to an indigent victim of malpractice by a public defender.\textsuperscript{130} The suggested alternatives are not adequate. A prisoner who is unable to exhaust state remedies because his public defender will not file his appeal is not helped by the fact that a petition for habeas corpus is available if he ever can exhaust those remedies. A prisoner raising the issue of ineffective assistance of counsel in a motion for new trial or on appeal faces an uphill battle; he may have to establish that his defense was a mere sham or made a mockery out of the trial in order to prevail.\textsuperscript{131} Neither of these remedies is appropriate when public defender malpractice has resulted in a short sentence or a heavy fine, either of which could have serious personal

\textsuperscript{129} Such standards, as approved by the National Legal Aid and Defender Association Assembly of Delegates on October 16, 1976, are currently being studied by the NLADA Defender Committee in light of the National Study Commission on Defense Services guidelines. They are printed in 34 NLADA BRIEFCASE 83 (1977).


\textsuperscript{131} The standard of attorney effectiveness has been so low that the plaintiff, at least in some circuits, must allege failures that turn a state trial into a "sham or mockery" or at least "blotted out the essence of a substantial defense." See, e.g., United States ex rel. Little v. Twomey, 477 F.2d 767, 773 (7th Cir. 1973); Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970). Other courts have used standards of "reasonably competent assistance of an attorney acting as . . . diligent conscientious advocate," U.S. v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973), or "customary skill," Moore v. U.S. 432 F.2d 730, 736 (3d Cir. 1970). See generally Bazelon, The Defective Assistance of Counsel, 42 Cin. L. Rev. 1 (1973); Finer, Ineffective Assistance of Counsel, 58 CORNELL L. REV. 1077 (1973).
consequences for the defendant. Finally, neither remedy will financially recompense the injured party for his damages.

As a final alternative, it has been suggested that the wronged defendant would have a state action in tort for malpractice against the public defender. The federal courts all have limited their actual holding very narrowly to an immunity from liability under section 1983 only; therefore, finding no immunity under state law would be consistent with their holdings although it would not be consistent with their discussion of public policies calling for immunity.

In the few state actions against public defenders that have been reported, the public defender has been held to be protected by no special immunity; if so, a state remedy is available. Malpractice actions against public defenders are increasing, however, and it is difficult to imagine that the outcome of future cases will not be influenced by the reasoning of the federal courts on the subject. The policies of encouraging public defender recruitment and free exercise of discretion are not altered by the fact that suit is brought in another forum. Because federal courts have held that these policies require absolute immunity, state courts may well be inclined to reach the same conclusion and, thus, deprive the indigent malpractice victim of any remedy.

It appears, however, that the public policy reflected in the need to

132 E.g., Robinson v. Bergstrom, 579 F.2d 401, 411 (1978). The Robinson court also disposed of the argument that immunity discriminates in favor of those defendants who are able to afford retained counsel in a criminal case by noting that a private attorney would not be liable to a section 1983 claim. 579 F.2d at 411. This makes sense only if the court assumed that both public defender and private attorney would be liable in a civil malpractice action, and that therefore neither should be liable in a section 1983 action. If the public defender is immune under state law as well as under § 1983, the discrimination between indigent defendants and those able to afford counsel is obvious.

133 The Minns v. Paul opinion, for example, refers only to "immunity from suit for damages under § 1983." 542 F.2d at 901. The Brown court holds specifically that "a county Public Defender, whose office is created under the state statute, enjoys immunity from liability under the Civil Rights Act." 463 F.2d at 1046. The language of the Miller opinion approves the public policy reasons justifying broad absolute immunity for the public defender but the holding itself is narrow: "It is sufficient to hold, as we do, that 'plea bargaining' is an integral part of the judicial process as to which the public defender enjoys absolute immunity under § 1983 and the facts assumed here." 549 F.2d at 649. The Robinson court also concluded a general discussion of the justification for, and the effects of, a broad immunity with a limited holding: "Policy considerations . . . support a holding that a public defender should be absolutely immune from liability for suits brought under section 1983 of the Civil Rights Act for acts done in the performance of his quasi-judicial function as a public defender." 579 F.2d at 411.


135 "[A] significant increase in the number of malpractice claims filed against defenders has been reported by the agency handling NLADA's group professional liability insurance policy for public defenders." Isalsky & O'Keefe, Defender's Liability for Malpractice: A Case of Future Shock?, 32 NLADA BRIEFCASE 103, 105 (1977).

136 See, e.g., Ferri v. Ackerman, 394 A.2d 553 (Pa. Sup. Ct. 1978), cert. granted, 47 U.S.L.W. 3541 (1979) which relies on Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971), Jones v. Warlick, 364 F.2d 828 (4th Cir. 1966), and Butz v. Economou, 98 S. Ct. 2894 (1978) to find a federally-appointed criminal defense attorney absolutely immune from liability. Supreme Court resolution of the question of a court-appointed attorney's liability in this case should also resolve the issue for public defenders.
encourage recruitment and the free exercise of professional judgment in the
public defender's office would not be hindered by a requirement that
defenders act in good faith and on reasonable grounds. Both of those
problems are fully met by attributing qualified immunity to the public
defender. The problem of burdening an already over-extended public
defender with the job of presenting a defense to frivolous claims would
remain, but there is wide divergence of opinion about the extent of this
problem with qualified immunity. In the Butz opinion, for example, five
members of the Supreme Court agreed that "insubstantial lawsuits can be
quickly terminated by federal courts alert to the possibilities of artful
pleading"; four dissented, with the observation that this expectation "shows
more optimism than prescience."

Given the nature of the public defender's job, frivolous lawsuits could
readily be dismissed or terminated on a motion for summary judgment based
on the defense of qualified immunity. A court reviewing the pleadings will not
have to determine the state of the official's mind in order to evaluate the merit
of the case. In Wood v. Strickland, the Supreme Court provided the test for
liability despite the protection of a qualified immunity; a school official
would not be immune from liability for damages "if he knew or reasonably
should have known that the action he took within his sphere of official
responsibility would violate the constitutional rights of the student affected, or
if he took the action with the malicious intention to cause a deprivation of
constitutional rights or other injury to the student." The second branch of
the Wood standard will rarely be at issue because malicious intent will not
subject a public officer to liability for performing authorized duties for which
he would not otherwise be subject to liability. The question before a court
will always be whether the alleged malpractice amounts to a deprivation of a
constitutional right; the public defender's professional responsibility
presumes the knowledge called for by the first branch of the Wood test. The
scope of a public defender's immunity can be defined by the constitutional
mandate that an indigent be provided effective assistance of counsel. Such a
standard is relatively objective. It would, for example, permit a cause of
action against a public defender who did not raise an available defense of the
statute of limitations that was available to his client, or who took no action
and eventually lost the indigent's file. In a situation like that in Minns,
in which the defender merely did not agree to meet with the prisoner within a
relatively short period of time, the case should be dismissed on the pleadings.
The case of Bergstrom, who did not file an appeal for five and one-half years
would also go to trial on the merits, unless, in a properly supported motion for

138 Id. at 2921 (Rehnquist, J., dissenting).
139 420 U.S. 308 (1975).
140 Id. at 323.
141 See, e.g., Spalding v. Vilas, 161 U.S. 483, 498 (1896) (postmaster authorized to post notices,
possible malicious motive for doing so is therefore irrelevant) approved and followed in Butz v.
142 See, e.g., Ferri v. Ackerman, 394 A.2d 553 (Pa. Sup. Ct. 1978), cert. granted, 47 U.S.L.W.
3541 (1979).
143 See, e.g., Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972).
summary judgment, Bergstrom could establish that the desired appeal was itself unequivocably frivolous.

IV. CONCLUSION

While the Seventh Circuit is the first to find that a public defender acts under color of state law for purposes of section 1983, its approach to that issue is logical and its conclusion is correct. Given the identity of function of the public defender and private attorney appointed by the court to represent an indigent, the latter should also be found to be acting under color of state law.

Although there is no common-law tradition of defender immunity, and the reasons for judicial immunity do not apply to public defenders, federal courts of appeals continue to extend an absolute immunity to public defenders. The responsibilities of the public defender, however, are not analogous to the responsibilities of the prosecutor, to whom the Supreme Court has extended an absolute immunity. Two public policy reasons are usually provided to uphold public defender immunity: encouragement of public defender recruitment and the encouragement of free discretion within the public defender's office. If the public defender enjoyed a qualified immunity from personal liability for acts performed in the scope of his official duties, both of these policy considerations would be protected. The difficulty of effective representation of indigent criminal defendants, the lack of merit in individual cases, and concerns about comity and federal court caseload have also inclined courts to find immunity for public defenders, but none of these factors justifies a sweeping grant of absolute immunity. The public defender has no need for an absolute freedom to violate his clients' constitutional right to effective assistance of counsel with impunity. He does need to be able to perform his duties without fear of future frivolous, but time-consuming, lawsuits. Qualified immunity provides all the protection a public defender requires.

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