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## The Public Defender Defendant: A Model Statutory Approach to Public Defender Malpractice Liability

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Richards: The Public Defender Defendant: A Model Statutory Approach to Publ

# THE PUBLIC DEFENDER DEFENDANT: A MODEL STATUTORY APPROACH TO PUBLIC DEFENDER MALPRACTICE LIABILITY

Because of the vital importance of counsel's assistance, this [Supreme] Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. *That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough . . . .* An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.<sup>1</sup>

## I. INTRODUCTION

Rick Teissier is a public defender for the Orleans Indigent Defender Program (OIDP) in New Orleans, Louisiana.<sup>2</sup> At the time of his appointment to represent Leonard Peart, Teissier was handling seventy felony cases.<sup>3</sup> Between January 1 and August 1, 1991, Teissier represented 418 defendants, and of these he entered 130 guilty pleas at arraignment.<sup>4</sup> Moreover, he had at least one serious case set for trial on every trial date during this period.<sup>5</sup> It is not extraordinary for Teissier's clients to be incarcerated for anywhere between thirty to seventy days before he can meet with them.<sup>6</sup>

OIDP operates under a public defender model.<sup>7</sup> OIDP provides no funds for expert witnesses, and OIDP's library is inadequate.<sup>8</sup> Further, OIDP only has enough funding to employ three investigators, who are responsible for assisting in more than 7000 cases per year in the ten sections of the Criminal District Court, plus cases in Juvenile Court, Traffic Court, and Magistrates'

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1. *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (emphasis added) (citations omitted).

2. *State v. Peart*, 621 So. 2d 780, 784 (La. 1993).

3. *Id.* at 784. Peart, an indigent, was charged with armed robbery, aggravated rape, aggravated burglary, attempted armed robbery, and first degree murder. *Id.*

4. *Id.*

5. *Id.* at 784. The trial court noted that a "serious case" is one involving an offense necessarily punishable by a jail term that may not be suspended. *Id.* at 784 n.3. Such offenses include first and second degree murder, aggravated rape, aggravated kidnapping, armed robbery, and possession of heroin. *Id.*

6. *Id.* at 784.

7. *State v. Peart*, 621 So. 2d 780, 784 (La. 1993).

8. *Id.*

Court.<sup>9</sup> Consequently, in a routine case, defenders like Rick Teissier receive virtually no investigative support.<sup>10</sup>

These crisis conditions at OI DP are representative of public defender systems across the country.<sup>11</sup> Due to the heavy caseloads, public defenders are often unable to provide thorough representation.<sup>12</sup> This raises the question of what remedies should be available to indigent defendants, such as those represented by OI DP, who receive inadequate representation. Perhaps the most common refuge of the indigent defendant is the post-conviction claim, either through a direct appeal or a writ of habeas corpus,<sup>13</sup> that trial counsel was ineffective in handling the case in violation of the Sixth Amendment.<sup>14</sup> When

9. *Id.*

10. *Id.* The Louisiana Supreme Court held that the indigent defense services in Section E of Orleans Criminal District Court, where Teissier was assigned to represent Peart, were so lacking that a rebuttable presumption arises that indigent defendants represented by OI DP attorneys do not receive effective assistance of counsel under the Sixth Amendment. *Id.* at 791. But, ironically, the court noted that Peart himself did receive the effective assistance of counsel guaranteed him by the Constitution. *Id.* at 785 n.4. The court noted that when defenders apply their full efforts, they generally provide effective assistance of counsel. *Id.* That Peart could receive effective assistance, while Teissier's other clients do not, reflects the fact that defenders must select certain clients whom to give more attention. *Id.* The court noted that each of Teissier's clients was entitled to the same quality of defense services received by Peart. *Id.* For a further discussion of the *Peart* case, see *infra* note 190 (discussing the judicial response to public defender workloads).

11. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, INDIGENT DEFENSE CASELOADS AND COMMON SENSE: AN UPDATE 3 (1992) [hereinafter NLADA REPORT]. According to a 1990 defender office survey, conducted by the Institute of Law and Justice for the National Institute of Justice, increasing caseloads are still a major concern of public defenders, and financial resources to effectively handle the caseloads continue to be inadequate. *Id.* For a further discussion of the caseload and funding problems facing most public defender offices, see *infra* notes 186-90 and accompanying text.

12. Patricia B. Carlson, Comment, *Liability of Government-Appointed Attorneys in State Tort Actions*, 71 J. CRIM. L. & CRIMINOLOGY 136, 144 (1980).

13. A habeas corpus proceeding is a form of collateral attack, instituted by the prisoner, to determine whether the prisoner is being unlawfully deprived of his or her liberty. BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

14. JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 4.1, at 58 (1987). The Sixth Amendment to the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

Anything that counsel did which could have conceivably affected the verdict may be raised in an ineffective assistance of counsel claim. HALL, *supra*, § 4.1, at 59. Ineffective assistance of counsel is a common claim made by and against the best attorneys, usually without success. *Id.* at 58. A criminal defense attorney should assume that a client, who is sentenced to a substantial prison term and is unable to reverse a conviction on other grounds, will bring an ineffective assistance

successful, these claims usually result in either the reversal of a conviction or the granting of a new trial.<sup>15</sup> This in turn raises the question of whether an indigent defendant represented by a public defender should be entitled to an action for *damages* against a negligent public defender.

Prior to the United States Supreme Court decision in *Ferri v. Ackerman*,<sup>16</sup> most damage suits against public defenders were brought under section 1983 of the Civil Rights Act.<sup>17</sup> Under section 1983, the indigent defendant was required to prove that the state public defender's conduct was "under color of" state law, and that the defender's conduct was so inadequate that it violated the indigent's constitutional right to counsel.<sup>18</sup> In *Ferri*, however, a unanimous Supreme Court held that federal law does not provide immunity for court-appointed counsel in *state malpractice* suits.<sup>19</sup> Significantly, the *Ferri* Court noted that when state law creates a cause of action, the state remains free to define defenses to the claim, including the defense of immunity.<sup>20</sup>

State courts are split on the issue of whether public defenders are immune

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claim. *Id.* at 58-59. For a discussion of the standard of proof for ineffective assistance of counsel, see *infra* note 131. For a discussion of the relationship between ineffective assistance of counsel and malpractice, see *infra* note 232 and accompanying text.

15. Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1203 (1988).

16. 444 U.S. 193 (1979) (holding that federal law does not provide immunity for court-appointed counsel in state malpractice suits).

17. Ronald E. Mallen, *The Court-Appointed Lawyer and Legal Malpractice—Liability or Immunity*, 14 AM. CRIM. L. REV. 59, 59 (1976). 42 U.S.C. § 1983 (1981) provides:

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

*Id.*

Among the few pre-*Ferri* malpractice cases against public defenders are *Spring v. Constantino*, 362 A.2d 871 (Conn. 1975) (holding that public defenders are not immune from malpractice liability), and *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103 (N.Y. Sup. Ct. 1978) (holding that public defenders, like judges and prosecutors, are immune from malpractice liability). See *infra* notes 97-104 and accompanying text.

18. See *supra* note 14 and accompanying text for the text of the Sixth Amendment. However, in *Polk County v. Dodson*, 454 U.S. 312 (1981), the Supreme Court foreclosed the section 1983 avenue of relief for indigent defendants. See *infra* text accompanying notes 133-37 (discussing *Polk County*).

19. *Ferri*, 444 U.S. at 205 (emphasis added). See *infra* text accompanying notes 41-71 for a general discussion of immunities and attorney malpractice.

20. *Ferri*, 444 U.S. at 198. See *infra* text accompanying notes 118-29 (discussing *Ferri*).

from liability in state malpractice suits.<sup>21</sup> State courts that have granted immunity have argued that judges and prosecutors enjoy immunity to allow them to effectively perform their function of impartially administering the law. These courts analogize that public defenders, like prosecutors and judges, perform a similar function and thus should enjoy the same immunity.<sup>22</sup> These courts have also relied on the public defender's duty to take on any client as justifying public defender malpractice immunity.<sup>23</sup> Further, it is argued that the time, money, and energy consumed in defending such malpractice suits would further deplete the already sparse resources available to defend indigent criminal defendants.<sup>24</sup>

Courts granting immunity have also cited the need for public defenders to fearlessly litigate their cases,<sup>25</sup> as well as the need to have competent counsel willing to represent indigents.<sup>26</sup> In addition, courts granting immunity have alleged that if public defenders are not granted malpractice immunity, the "floodgates" will be opened to frivolous claims by convicted indigents.<sup>27</sup> Further, it is maintained that the indigent remains free to pursue other avenues of relief, such as ineffective assistance of counsel.<sup>28</sup>

In contrast, courts that have declined to extend immunity to public defenders have held that, once appointed, the public defender functions purely

21. Some courts have refused to grant immunity. See *Spring*, 362 A.2d at 874-75 (holding that public defender is not a public official); *Donigan v. Finn*, 290 N.W.2d 80 (Mich. Ct. App. 1980) (noting a strong indication of a trend away from immunity); *Reese v. Danforth*, 406 A.2d 735 (Pa. 1979) (holding that once appointed, public defender functions purely as a private attorney).

Other courts have extended malpractice immunity to public defenders. See *Browne v. Robb*, 583 A.2d 949 (Del. 1990) (holding that public defender enjoys qualified immunity under state tort claims act), *cert. denied*, 499 U.S. 952 (1991); *Dziubak v. Mott*, 503 N.W.2d 771 (Minn. 1993) (holding that significant differences between public defender and private counsel require extension of immunity to public defender); *Scott*, 407 N.Y.S.2d at 105-06 (holding that duty of public defender, like judge and prosecutor, is to insure that impartial justice is done). See *infra* notes 97-147 and accompanying text.

22. *Dziubak*, 503 N.W.2d at 777 (citing *Brown v. Joseph*, 463 F.2d 1046, 1048-49 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973)); *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103, 105 (N.Y. Sup. Ct. 1978).

23. *Browne*, 583 A.2d at 951; *Dziubak*, 503 N.W.2d at 775; *Scott*, 407 N.Y.S.2d at 105; *Reese*, 406 A.2d at 743 (O'Brien, J., dissenting).

24. *Dziubak*, 503 N.W.2d at 776-77; *Scott*, 407 N.Y.S.2d at 105.

25. *Browne*, 583 A.2d at 951; *Dziubak*, 503 N.W.2d at 777 (citing *Brown*, 463 F.2d at 1048-49); *Reese*, 406 A.2d at 743 (O'Brien, J., dissenting).

26. *Dziubak v. Mott*, 503 N.W.2d 771, 776-77 (Minn. 1993); *Scott*, 407 N.Y.S.2d at 105; see *Ferri v. Ackerman*, 444 U.S. 193, 204-05 (1979).

27. *Dziubak*, 503 N.W.2d at 776 (citing *Minns v. Paul*, 542 F.2d 899, 902 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977)); *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103, 105 (N.Y. Sup. Ct. 1978).

28. *Dziubak*, 503 N.W.2d at 776; *Scott*, 407 N.Y.S.2d at 105. See *infra* note 131 (discussing the ineffective assistance of counsel cause of action).

as a private attorney.<sup>29</sup> While judges and prosecutors are officers of the state, whose duty is to see that impartial justice is done, public defenders, much like private attorneys, are advocates, and therefore they are no more entitled to immunity than are private attorneys.<sup>30</sup> These courts further reason that, even though public defenders are overworked and underpaid, it would be unfair to punish indigent defendants for the deficiencies in public defender offices.<sup>31</sup> Further, the threat of possible malpractice liability ensures that public defenders will vigorously pursue their cases,<sup>32</sup> and the availability of other alternatives, such as bar association discipline and claims of ineffective assistance of counsel, cannot substitute for a civil remedy.<sup>33</sup>

Though the unique characteristics of public defender offices require that public defenders be treated somewhat differently from private counsel, public defenders should be subject to malpractice liability. Section II of this Note will provide background on immunities in general, including a discussion of common law immunities and the current state of immunities law.<sup>34</sup> Also, the attorney malpractice cause of action will be discussed therein,<sup>35</sup> as well as the origin and characteristics of modern public defender systems.<sup>36</sup> Section III of this Note will trace the evolution of public defender malpractice liability, from the foundational cases *Spring v. Constantino*, *Ferri v. Ackerman*, and *Reese v. Danforth*, to the most recent treatment of the issue in *Dziubak v. Mott*.<sup>37</sup> Section IV of this Note will then evaluate and scrutinize the arguments advanced by courts granting malpractice immunity to public defenders.<sup>38</sup> Finally, in light of these criticisms, Section V of this Note will propose a model statute that will strike a balance between the unique characteristics of modern public defender offices, and the indigent defendant's right to recover damages for malpractice.<sup>39</sup> Further, this model statute will outline a standard of proof for indigent recovery and will provide for state indemnification of malpractice awards against public defenders, except where the public defender's conduct

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29. *Spring v. Constantino*, 362 A.2d 871, 874-75, 878 (Conn. 1975); *Reese v. Danforth*, 406 A.2d 735, 738-39 (Pa. 1979); see *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981).

30. *Spring*, 362 A.2d at 874-75; *Windsor v. Gibson*, 424 So. 2d 888, 889 (Fla. Dist. Ct. App. 1982); *White v. Galvin*, 524 N.E.2d 802, 803 (Ind. Ct. App. 1988); *Reese*, 406 A.2d at 738-39. See *Polk County*, 454 U.S. at 321-22; *Ferri*, 444 U.S. at 202-04.

31. *Dziubak v. Mott*, 503 N.W.2d 771, 778 (Minn. 1993) (Gardebring, J., dissenting); *Reese*, 406 A.2d at 739-40.

32. See *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

33. *Dziubak*, 503 N.W.2d at 778 (Gardebring, J., dissenting); *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993).

34. See *infra* notes 41-57 and accompanying text.

35. See *infra* notes 58-71 and accompanying text.

36. See *infra* notes 72-96 and accompanying text.

37. See *infra* notes 97-147 and accompanying text.

38. See *infra* notes 148-263 and accompanying text.

39. See *infra* notes 264-92 and accompanying text.

constitutes willful misconduct.<sup>40</sup>

## II. BACKGROUND: IMMUNITIES, ATTORNEY MALPRACTICE, AND PUBLIC DEFENDER SYSTEMS

### A. Immunities

United States courts have regularly borrowed immunities from English precedent.<sup>41</sup> Courts grant certain public officials immunity to enable them to effectively perform their duties, and only those who exercise policymaking functions are entitled to immunity.<sup>42</sup> Presently, most public officials enjoy only qualified immunity, under which government officials are immune from damages liability when performing their discretionary functions.<sup>43</sup> However, qualified immunity does not extend to public officials when their conduct violates clearly established statutory or constitutional rights.<sup>44</sup> Hence, under qualified immunity, public officials are not liable for mere mistakes in judgment, but they can be liable if they knew or should have known that their actions violated clearly established laws.<sup>45</sup> In most cases, qualified immunity is sufficient to protect both the officials who are required to exercise discretion, and the public interest in encouraging the vigorous exercise of official authority.<sup>46</sup>

However, some officials perform special functions which, because of the similarity to functions that historically would have been immune, deserve

40. See *infra* notes 276-92 and accompanying text.

41. *Tower v. Glover*, 467 U.S. 914, 921 (1984).

42. *Carlson*, *supra* note 12, at 138-39.

43. *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2613 (1993) (holding that prosecutors' actions, in determining whether footprint at scene of crime was that of defendant, were merely administrative and investigatory in nature, rather than closely associated with the judicial process, and were therefore only entitled to qualified immunity; and that prosecutors' statements to the press did not involve the initiation of a prosecution, the presentation of the state's case in court, or actions in preparation of these functions, and therefore such statements were only entitled to qualified immunity). Though *Buckley* dealt with immunities under section 1983 of the Civil Rights Act, it is instructive because section 1983 immunities are determined by immunities recognized at common law: "Congress did not intend § 1983 to abrogate immunities 'well grounded in history and reason.' Certain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Id.* at 2612-13 (citations omitted).

44. *Id.* at 2613 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)).

45. *Butz v. Economou*, 438 U.S. 478, 507 (1978). The *Butz* Court held that federal officials, though not liable for mere mistakes in judgment, may not "with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule." *Id.* See *Carlson*, *supra* note 12, at 139.

46. *Buckley*, 113 S. Ct. at 2613 (citing *Butz*, 438 U.S. at 506).

absolute protection from damages liability.<sup>47</sup> Absolute immunity at common law was confined to participants in legislative,<sup>48</sup> high level executive,<sup>49</sup> and judicial proceedings.<sup>50</sup> Absolute judicial immunity currently extends in certain situations to judges,<sup>51</sup> prosecutors,<sup>52</sup> grand jurors,<sup>53</sup> and witnesses.<sup>54</sup> Such

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47. *Buckley*, 113 S. Ct. at 2613. "The official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Id.* (quoting *Burns v. Reed*, 500 U.S. 478, 486 (1991)). In determining whether certain actions of government officials fit within a common-law tradition of absolute immunity, or only qualified immunity, the Supreme Court has applied a functional approach, which looks to "the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 113 S. Ct. at 2613 (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)); *Burns*, 500 U.S. at 486.

48. Roy R. Brandys, Note, *Constitutional Law—Section 1983 Liability—Absolute Immunity for Police Witnesses—Briscoe v. LaHue*, 19 WAKE FOREST L. REV. 1105, 1108-09 (1983). In the United States, the Speech and Debate Clause of the Constitution grants absolute immunity to both Houses of Congress with respect to any speech, debate, vote, report, or action which takes place while in session. U.S. CONST. art. I, § 6, cl. 1; see also *United States v. Brewster*, 408 U.S. 501, 512 (1972) (holding that the Speech and Debate Clause prohibits inquiry into both those things said or done in the House or Senate in the performance of official duties, and the motivation for such acts). This legislative immunity is based on the public policy that the interests of society can best be served by allowing members of the legislature to perform their duties independently and effectively without fear of civil or criminal prosecution. *Coffin v. Coffin*, 4 Mass. 1, 27 (1808).

49. Brandys, *supra* note 48, at 1109. At common law, the executive officers of both the nation and the states were granted absolute immunity for defamatory statements made while discharging their official duties. *Id.* This grant of immunity ensures policymaking officials the freedom necessary to exercise their official duties without fear of civil liability. 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 5.23, at 429 (1956). "[T]he President of the United States and the governors of the various states and territories come within the rule, as do the members of the President's cabinet and heads of agencies and comparable state officers." *Id.*

50. Brandys, *supra* note 48, at 1108-09. See *infra* notes 51-55 and accompanying text.

51. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); *Pierson v. Ray*, 386 U.S. 547 (1967). Judicial immunity has its roots in the early English common law. See *Floyd v. Barker*, 77 Eng. Rep. 1305, 1307 (K.B. 1607) ("And as a Judge shall not be drawn in question in the cases aforesaid, at the suit of the parties, no more shall he be charged in the said cases before any other Judge at the suit of the King."). In England, by 1608, it was well settled that a judge could be made to answer to no one save the king. *Id.*; see Comment, *Liability of Court-Appointed Defense Counsel for Malpractice in Federal Criminal Prosecutions*, 57 IOWA L. REV. 1420, 1422 (1972) [hereinafter *Liability of Court-Appointed Defense Counsel*]. Absolute judicial immunity secures complete and independent decision-making, and such immunity exists not for the protection or benefit of judges, but rather for the benefit of the public through the effective administration of justice. Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 469-70 (1909).

52. Brandys, *supra* note 48, at 1112; see, e.g., *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973) (extending immunity to a state's attorney), *cert. denied*, 415 U.S. 917 (1974); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (Hand, J.) (extending immunity to an attorney general), *cert. denied*, 339 U.S. 949 (1950); *Smith v. Parman*, 165 P. 663 (Kan. 1917) (extending immunity to a city attorney).

Like judicial immunity, prosecutorial immunity is as old as the English common law. See *Anfield v. Feverhill*, 80 Eng. Rep. 1113 (K.B. 1614); *Hodgson v. Scarlett*, 106 Eng. Rep. 86 (K.B. 1818). Prosecutorial immunity was first recognized in the United States in *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896) (holding that prosecutor is a judicial officer and thus is not liable in a civil



absolute judicial immunity is justified because these officials are more likely to be sued than others, and because safeguards inherent in the judicial system protect any individual interest that may be infringed upon.<sup>55</sup>

Immunity for public defenders did not exist at common law because there was no such office in existence at the time.<sup>56</sup> Courts have restricted the class of cases to which immunity applies because immunity diametrically opposes the traditional rule that "for every wrong there must be a remedy."<sup>57</sup> One such remedy is a malpractice action for damages against a negligent attorney.

### B. Attorney Malpractice

Legal malpractice originated from contract law, with the claim arising when counsel was in breach of an express or implied contract with the client.<sup>58</sup>

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action for malicious prosecution). The rationale for such immunity, as with judges, is that persons so clearly associated with the judicial process should be allowed to speak and act freely in the discharge of their official duties. *Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927); *see also* 1 HARPER & JAMES, *supra* note 49, at 305 (noting that the policy requiring immunity for a judge applies to prosecutors as well). *See Brandys, supra* note 48, at 1112.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court held that a state prosecutor was absolutely immune from a civil suit for damages under section 1983 for the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial, because the common-law rule of immunity for prosecutors was well settled, and such conduct was "intimately associated with the judicial phase of the criminal process." *Id.* at 430-31. In *Burns v. Reed*, 500 U.S. 478 (1991), the Court held that a prosecutor was absolutely immune from section 1983 liability for appearing at a probable cause hearing, but not for giving legal advice to the police. *Id.* at 490-96. The Court reasoned that participating in a probable cause hearing accorded with common-law absolute immunity for prosecutors for eliciting false or defamatory testimony from witnesses or for making false or defamatory statements during and related to judicial proceedings, and such conduct was "intimately associated with the judicial phase of the criminal process." *Id.* at 489-90, 492 (quoting *Imbler*, 424 U.S. at 430).

53. *See Imbler*, 424 U.S. at 422-23 ("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."). *See Carlson, supra* note 12, at 139.

54. *Briscoe v. LaHue*, 460 U.S. 325, 345-46 (1983) (holding that, since common law provided absolute immunity for all persons who were integral participants in the judicial process, a police witness in a criminal trial must be granted absolute immunity from civil liability).

55. *Butz v. Economou*, 438 U.S. 478, 512 (1978). The *Butz* Court explained that the insulation of judges from political influence, the importance of precedent in resolving controversies, the adversarial nature of the judicial process, and the correctibility of error on appeal are examples of checks on malicious actions by judges, while professional obligations and the nature of the adversary system serve as checks on the wrongdoing of prosecutors. *Id.* The Court further explained that jurors are carefully screened to remove all possibility of bias, and witnesses are subject to rigorous cross-examination and the penalty of perjury. *Id.*

56. *Tower v. Glover*, 467 U.S. 914, 921 (1984). For a discussion of the origin of public defender systems, *see infra* notes 72-96 and accompanying text.

57. *Brandys, supra* note 48, at 1108.

58. *Reese v. Danforth*, 406 A.2d 735, 742 (Pa. 1979) (O'Brien, J., dissenting).

Early cases often held that a negligent representation action against an attorney must "sound" in contract.<sup>59</sup> Today, legal malpractice is thought to constitute both a tort and a breach of contract, and even though legal malpractice is usually enforced by a negligence action, the attorney's liability actually rests on the attorney's employment by the client, which is contractual in nature.<sup>60</sup>

The current standard for determining attorney malpractice liability is the standard of reasonableness.<sup>61</sup> Hence, the attorney is bound to exercise the skill and knowledge possessed by a reasonable, prudent attorney under similar circumstances.<sup>62</sup> In an action against an attorney for negligence, the client has the burden of proving four elements: first, that an attorney-client relationship existed, creating a duty of care upon the attorney; second, that the attorney committed acts or omissions in breach of that duty; third, that the attorney's breach of duty was the proximate cause of the injury; and fourth, that an injury did in fact occur.<sup>63</sup> The third and fourth elements, the so-called "case within a case requirement," involve a showing that "but for" the attorney's negligence, the client would have been successful in the underlying case.<sup>64</sup>

Though malpractice claims against criminal defense attorneys were once practically unknown, criminal defense attorneys are now as likely or more likely than other attorneys to be sued for malpractice.<sup>65</sup> This is due to the nature of

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59. *Id.* at 742-43 (O'Brien, J., dissenting) (citing *Goodman & Mitchell v. Walker*, 30 Ala. 482 (1857)).

60. 7A C.J.S. *Attorney & Client* § 255 (1980). Hence, for the attorney to be held liable for malpractice, it must appear that the alleged loss arose from the attorney's neglect to discharge a duty that was fairly within the purview of the attorney's employment. *Id.*

61. RESTATEMENT (SECOND) OF TORTS § 299 (1989) ("An act may be negligent if it is done without the competence which a reasonable man in the position of the actor would recognize as necessary to prevent it from creating an unreasonable risk of harm to another.")

62. *Id.*; Mallen, *supra* note 17, at 60. An attorney is generally not liable to the client for a bad result, or even for an error in judgment, unless such result or judgment is the product of professional negligence. Mallen, *supra* note 17, at 60. In *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* authors Otto M. Kaus and Ronald E. Mallen further explain:

A lawyer is not a guarantor of a result nor does he insure the soundness of his opinions or strategies. He is not liable for every mistake he makes, nor need he be a seer who anticipates points of law in decisions not yet rendered; but he is liable for damages when he is negligent.

Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191, 1213 (1974).

63. See 7A C.J.S. *Attorney & Client* § 255 (1980).

64. HALL, *supra* note 14, § 27.4, at 722-23; see *Maryland Casualty Co. v. Price*, 231 F. 397, 401 (4th Cir. 1916).

65. HALL, *supra* note 14, § 27.1, at 718. The courts have reached different results in particular instances on whether a defense attorney's handling of a criminal case constituted actionable legal malpractice. For a discussion of particular acts or omissions of criminal defense attorneys which have been held to constitute legal malpractice, see Gregory G. Sarno, Annotation, *Legal Malpractice*

the interests that criminal defense attorneys litigate,<sup>66</sup> and the fact that clients who are convicted in criminal cases usually have nothing to lose and much to gain by suing their attorneys.<sup>67</sup> As in attorney negligence cases in general, attorneys in criminal defense negligence cases are held to a duty of reasonable care and must exercise ordinary skill, knowledge, and diligence.<sup>68</sup> However, with respect to the causation analysis, some courts have held that, in criminal defense attorney malpractice, the plaintiff must prove his or her actual innocence to recover.<sup>69</sup> Moreover, courts more frequently have held criminal defense attorneys to the standard of attorneys regularly engaged in the practice of criminal law.<sup>70</sup> Thus, a higher standard of care applies to attorneys holding themselves out as specialists.<sup>71</sup> The public defender is such a specialist.

### C. Public Defender Systems

Public defender systems have only recently developed on a large scale.<sup>72</sup>

in *Defense of Criminal Prosecution*, 4 A.L.R. 5TH 273 (1992).

66. HALL, *supra* note 14, § 27.1, at 718. Hall notes that due to the nature of the criminal justice system, criminal lawyers are more likely than non-criminal lawyers to have to exercise judgment on behalf of the client to prevail. *Id.* § 27.3, at 721.

67. *Id.* § 27.1, at 718.

68. RESTATEMENT (SECOND) OF TORTS § 299 (1989); *see supra* note 61.

69. HALL, *supra* note 14, § 27.5, at 723 (citations omitted). Kaus & Mallen ask,

What would be the result of a public opinion poll which asks this question: "Should a lawyer have to pay damages to a guilty client because he negligently fails to secure an acquittal?" Surely a very substantial percentage of those polled would say that the guilty client is not entitled to damages since—God works in mysterious ways—"justice" was done. Would the public really tolerate the thought of a prisoner, who is precisely where he ought to be, receiving substantial damages for not being on the street planning to rob another bank?

Kaus & Mallen, *supra* note 62, at 1203. Actual innocence may not necessarily guarantee success in a malpractice action. *See Olson v. North*, 276 Ill. App. 457 (1934) (holding that even though actual innocence was proven, plaintiff could not recover because negligence was not proven). For an argument against the use of the actual innocence requirement in criminal malpractice cases, *see Susan M. Treyz, Note, Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 FORDHAM L. REV. 719 (1991).

70. HALL, *supra* note 14, § 27.3, at 721 (citations omitted). For a thorough discussion of the obstacles faced by criminal malpractice plaintiffs, *see David H. Potel, Comment, Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L. J. 542 (1981).

71. RESTATEMENT (SECOND) OF TORTS § 299A (1989) ("Unless he represents that he has greater or less skill and knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.").

72. Though the first defender program in the United States was established in 1914 in Los Angeles, California, as recently as 1961 defender services existed in only three percent of the nation's counties. Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 476 (1982). For a general discussion of indigent criminal defense systems and their history, *see LEE SILVERSTEIN, DEFENSE OF THE POOR*

The prior scarcity of defender services was related to the fact that before the 1963 Supreme Court decision *Gideon v. Wainwright*,<sup>73</sup> the sixth amendment right to counsel had not been applied to the states.<sup>74</sup> Thus, because most criminal prosecutions take place at the state level, there was effectively no requirement that counsel be provided to indigent criminal defendants.<sup>75</sup>

Consequently, the demand for appointed counsel was fairly small and was usually satisfied through the case-by-case appointment of members of the local bar.<sup>76</sup> Originally, assigned counsel received no compensation for their work, but because such practice was perceived as unfair to both the attorneys and the indigent defendants,<sup>77</sup> appointed counsel later received compensation.<sup>78</sup> However, even after appointed counsel were paid, problems with the appointed counsel system persisted.<sup>79</sup> The compensation was low and thus did not assure the client adequate representation.<sup>80</sup> Moreover, the judge's power of

IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965), and REGINALD H. SMITH, JUSTICE AND THE POOR (Arno Press 1971) (1919).

73. 372 U.S. 335 (1963) (holding that the sixth amendment right to counsel is fundamental and binding on the states). See *infra* notes 85-87 and accompanying text (discussing *Gideon* and subsequent cases expanding the right to counsel).

74. While the Supreme Court in *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), held that the Sixth Amendment required that counsel be appointed for those unable to retain counsel, *Johnson* was limited to federal prosecutions because at the time the Sixth Amendment had not been applied to the states. Mounts, *supra* note 72, at 476. In fact, in *Betts v. Brady*, 316 U.S. 455, 461-62 (1942), the Court explicitly stated that the Fourteenth Amendment Due Process Clause did not incorporate the rights guaranteed by the Sixth Amendment. *Betts* was overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963). See *infra* notes 84-85 and accompanying text.

75. Mounts, *supra* note 72, at 477. Mounts notes the following: "Because the vast majority of criminal prosecutions take place in the state courts, and because the cases in which the courts found it necessary to appoint counsel were few and far between, the actual number of attorneys needed to handle these cases was relatively small." *Id.*

76. *Id.* at 478.

77. Among the problems with the unpaid appointed counsel system were that, because it is generally thought that problems in the criminal justice system should be borne by society as a whole, it was unfair to place the entire financial burden of providing counsel on the local bar. Mounts, *supra* note 72, at 479. Further, requiring appointed counsel to provide services for free, in addition to paying out-of-pocket expenses, had an adverse effect on the quality of representation. *Id.* See *infra* notes 122-24 and accompanying text (discussing the Criminal Justice Act of 1964).

Additionally, in *The Public Defender: A Necessary Factor in the Administration of Justice*, author Mayer C. Goldman argued that, just as merchants cannot be forced to donate portions of their stock to the needy, attorneys should not be required to provide services gratuitously. MAYER C. GOLDMAN, *THE PUBLIC DEFENDER: A NECESSARY FACTOR IN THE ADMINISTRATION OF JUSTICE* 18 (Arno Press 1974) (1917). Goldman also asserted that an accused should not be dependent upon the services of counsel working without compensation. *Id.* at 17-18.

78. Mounts, *supra* note 72, at 479.

79. *Id.*

80. *Id.*; see *Wallace v. Kern*, 392 F. Supp. 834, 841 (E.D.N.Y.), *rev'd on other grounds*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 420 U.S. 947 (1975).

appointment became a source of patronage.<sup>81</sup> Further, attorneys most willing to take criminal appointments were attorneys who were just beginning their practice, and "professional" appointed counsel who, to maximize their profits, would accept large numbers of cases and dispose of them as quickly as possible.<sup>82</sup> Not surprisingly, both of these groups usually provided inadequate representation.<sup>83</sup>

However, in *Gideon v. Wainwright*,<sup>84</sup> the United States Supreme Court held that the sixth amendment right to counsel was fundamental and thus binding on the states.<sup>85</sup> The effect of *Gideon* and subsequent cases<sup>86</sup> was to expand the right to counsel, both at trial and at other stages of the proceedings.<sup>87</sup> This led to an increased demand for criminal defense attorneys.<sup>88</sup> Many jurisdictions responded to this increased demand by establishing public defender offices.<sup>89</sup> In contrast to the assigned counsel system, a defender system provides indigent defense services by salaried lawyers who devote all of their practice to indigent criminal defense.<sup>90</sup>

Because most public defender programs are organized at the county level,

81. Mounts, *supra* note 72, at 479-80; see David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 10 (1973) ("To the extent the quality of justice depends on an incestuous relationship between judges and attorneys, the adversary quality of the system is corrupted.")

82. Mounts, *supra* note 72, at 479. Bazelon notes that though the high-volume "regulars" were relatively few, they were assigned a percentage of cases far out of proportion to their numbers. Bazelon, *supra* note 81, at 10.

83. Mounts, *supra* note 72, at 479. The assigned counsel system is still used in many jurisdictions, though it is generally confined to rural areas. *Id.* at 478 n.22.

84. 372 U.S. 335 (1963).

85. *Id.* at 344-45 (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

86. See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (holding that an accused is entitled to have counsel provided in certain parole and probation revocation hearings); *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (holding that an accused has a right to have counsel present at a preliminary hearing); *United States v. Wade*, 388 U.S. 218, 226-27 (1967) (holding that an accused has a right to have counsel present at a pre-trial line-up); *Massiah v. United States*, 377 U.S. 201, 204-05 (1964) (holding that an accused has a right to be aided by counsel when subjected to police interrogation); *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (holding that counsel must be appointed for the first level of appeal).

87. Mounts, *supra* note 72, at 478.

88. *Id.* ("[T]he combined effect, in terms of legal personnel required to fulfill the promise made in these decisions, is enormous. This increase in the demand for criminal defense attorneys has had substantial impact on the systems used to provide defense services.")

89. *Id.* at 481. In 1961, two years before *Gideon*, defender systems existed in a mere three percent of the nation's counties, and those defender systems served approximately one-quarter of the population. In contrast, by 1973, defender systems existed in 28 percent of the nation's counties and served nearly two-thirds of the population. *Id.* at 481 n.40.

90. *Id.* at 478 n.22. For a comparison of assigned counsel and defender systems, see SILVERSTEIN, *supra* note 72, at 15-74.

defender programs are generally considered part of the county government.<sup>91</sup> Thus the defender program must apply to the county each year for its budget.<sup>92</sup> However, because virtually all of the defenders' clients are charged with often heinous crimes, the tasks of public defenders are notoriously unpopular.<sup>93</sup> Consequently, local politicians, in tune with the sentiments of their constituents, often have little to gain by giving public defender offices large budgetary appropriations.<sup>94</sup> As a result, most modern public defender offices are severely under-funded.<sup>95</sup> Limited budgets, in turn, lead to staff shortages, which have ultimately resulted in excessive caseloads in public defender offices across the country.<sup>96</sup> The under-funding and excessive caseloads characteristic of most modern public defender offices are critical factors in determining whether public defenders should be subject to malpractice liability. The next section discusses the treatment, by both state courts and the United States Supreme Court, of public defenders regarding malpractice liability.

### III. EVOLUTION OF PUBLIC DEFENDER MALPRACTICE LIABILITY

The first state court decision to address the issue of public defender malpractice liability was the 1975 Connecticut Supreme Court decision in *Spring v. Constantino*.<sup>97</sup> In a carefully reasoned opinion,<sup>98</sup> the court held that none of the immunities advanced by the state extended to public defenders.<sup>99</sup> The court rejected the argument that a public defender is appointed by the judiciary to a judicial office and, like a prosecutor, performs an integral part of the

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91. MOUNTS, *supra* note 72, at 482.

92. *Id.*

93. *Id.* at 481-82. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations.")

94. MOUNTS, *supra* note 72, at 482.

95. *Id.* at 482-83; see NLADA REPORT, *supra* note 11. For a further discussion of the under-funding of public defender offices, see *infra* text accompanying note 190.

96. MOUNTS, *supra* note 72, at 483; see NLADA REPORT, *supra* note 11. For a further discussion of the excessive caseloads in public defender offices, see *infra* notes 186-89 and accompanying text.

97. 362 A.2d 871 (Conn. 1975). In *Spring*, the plaintiff client alleged that her public defender negligently disclosed to the court the defender's belief that the client was insane. *Id.* at 873. The attorney general, on behalf of the defender, alleged immunity from suit. *Id.* The trial court sustained the plea and dismissed the plaintiff's case. *Id.*

98. MALLIN, *supra* note 17, at 65.

99. *Spring*, 362 A.2d at 879. The state advanced three grounds for the public defender's immunity: judicial immunity, common law sovereign immunity, and statutory immunity of state employees. *Id.* at 873.

judicial process.<sup>100</sup> Rather, the court found that while a prosecutor represents the state and is under a duty to see that impartial justice is done, a public defender, upon assignment, represents his or her client.<sup>101</sup> The court emphasized that the public defender's role is that of an advocate, whose role does not differ from that of a privately retained attorney.<sup>102</sup> The court reasoned that an attorney's allegiance is to the client, not to the entity that happens to be paying the defender's salary.<sup>103</sup> The court concluded that the public defender's independence and freedom from state entanglement is a constitutional underpinning of Connecticut's public defender system.<sup>104</sup>

The next significant case dealing with public defender malpractice immunity was *Reese v. Danforth*.<sup>105</sup> Like the Connecticut Supreme Court in *Spring*, the Pennsylvania Supreme Court in *Reese* held that the public defender was not a

100. *Id.* at 874. The court reasoned that this argument swept too broadly and encompassed any privately retained attorney who represents a criminal defendant. *Id.* The court further reasoned that all attorneys who undertake criminal cases perform an integral part of the judicial process, namely the defense of the accused and protection of the innocent. *Id.*

101. *Id.* at 874-75. The court also rejected the defender's sovereign immunity argument on this basis, reasoning that the conduct of a public defender is not a sovereign or governmental act. *Id.* at 875.

102. *Spring v. Constantino*, 362 A.2d 871, 874-75 (Conn. 1975).

103. *Id.* at 878. In rejecting the defender's claim of statutory immunity as a state employee, the court reasoned that although the defender's employment and source of compensation differs from that of privately retained counsel, the status of a public defender, once the attorney-client relationship attaches, is that of an independent contractor. *Id.* at 877-78. *See infra* note 160.

104. *Id.* at 878; *see infra* text accompanying notes 167-70 (arguing that the public defender's independence is mandated by *Gideon v. Wainwright*, 372 U.S. 335 (1963)). The court also noted that the public defender's principled and fearless defense of the client would not be deterred by the possibility of malpractice liability. *Id.* at 874-75.

The next court to address the issue of public defender malpractice immunity, the New York Supreme Court, reached a different result than the *Spring* court. In *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103 (N.Y. Sup. Ct. 1978), the court held that public defenders are immune from malpractice liability for discretionary acts or decisions made in pursuit of their official duties. *Id.* at 106. The court reasoned that the public defender, like the judge and prosecutor, is a public official who receives compensation from the county and whose responsibility is to insure that justice is achieved in the context of our adversary system. *Id.* at 105. The court relied on the public defender's lack of choice in handling frivolous matters, as well as the public defender's large caseloads. *Id.* The court speculated that the possibility of frivolous claims may make it difficult to recruit capable public defenders. *Id.* Finally, the court maintained that indigent defendants remain free to pursue other post-conviction relief, while careless public defenders may face bar association discipline. *Id.* Much of the *Scott* court's reasoning is echoed in *Dziubak v. Mott*, 503 N.W.2d 771 (Minn. 1993). *See infra* notes 139-47 and accompanying text (discussing *Dziubak*).

105. 406 A.2d 735 (Pa. 1979). In *Reese*, the plaintiff client alleged that he was involuntarily confined as a result of his public defender's negligent representation. *Id.* at 737. The trial court found that the public defender was a public official and thus was entitled to immunity from liability for negligent conduct. *Id.* The trial court's decision was affirmed by the Pennsylvania Superior Court. *Id.*

public official entitled to immunity.<sup>106</sup> Rather, the duty of zealous representation of a client's interests attaches to the public defender just as it does to private counsel, and the performance of this duty by a public defender is similar to the performance of that duty by private counsel.<sup>107</sup> Echoing the *Spring* court, the *Reese* court reasoned that once a public defender is appointed to a case, the defender's public function ceases and, thereafter, the defender's professional relationship with the client takes on all the obligations and protections present in a private attorney-client relationship, except that the public pays the defender's fee.<sup>108</sup>

The court also rejected the public policy arguments that public defender malpractice liability would hinder both the recruitment of public defenders and the unfettered exercise of discretion.<sup>109</sup> The court opined:

Whether a particular individual claiming official status is accorded immunity depends upon "the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions." [*Immunity*] does not turn on the putative effect of the imposition of the financial burdens attendant to tort liability.<sup>110</sup>

Finally, the court reasoned that, because granting immunity would in effect deny indigents tort relief that would be available to paying clients, immunity would raise troublesome equal protection problems.<sup>111</sup>

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106. *Id.* at 740. The court began its analysis by noting that under Pennsylvania law, public officials are entitled to "some" form of immunity, while mere public employees having no policy-making functions are entitled to no immunity. *Id.* at 737. Hence, the critical issue to the court was whether a public defender is a public official entitled to some sort of immunity, or a mere public employee to whom no immunity flows. *Id.*

107. *Id.* at 738. See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) (requiring that an attorney zealously represent his or her client within the bounds of the law); see *supra* note 93. Like the *Spring* court, the *Reese* court compared the relationship between the county and the public defender to that between an independent contractor and the party contracting for his or her services. *Reese*, 406 A.2d at 738. The court reasoned that the county has no control over the manner of representation given to indigent defendants. *Id.* The court further reasoned that the nature of the defender's work involves the attorney-client relationship, which precludes outside interference or direction by the county. *Id.* See *infra* note 160.

108. *Id.* at 739.

109. *Id.* at 739-40; see *supra* note 104 (discussing the reasoning of the New York Supreme Court in *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103 (N.Y. Sup. Ct. 1978)).

110. *Reese v. Danforth*, 406 A.2d 735, 739-740 (Pa. 1979) (emphasis added) (citation omitted).

111. *Id.* at 740 (citing *Liability of Court Appointed Defense Counsel*, *supra* note 51, at 1425-27). The court reasoned that a finding of immunity would be tantamount to distinguishing between groups of plaintiffs based on their economic status. *Id.* See also *id.* at 741 (Roberts, J., concurring) ("Immunity would only permit less zealous representation and deny to those who cannot afford private counsel an equal remedy for their injuries.")



In an oft-cited dissent,<sup>112</sup> Justice O'Brien argued that immunity would not pose equal protection problems because "the Equal Protection Clause does not require absolute equality or precisely equal advantages."<sup>113</sup> Justice O'Brien also argued that the attorney malpractice cause of action originated from contract law, and a public defender, unlike a private attorney, is not free to contract with clients.<sup>114</sup> This unique relationship between the public defender and client justifies treating public defenders differently from privately retained counsel.<sup>115</sup> However, noting that a grant of immunity must rest on weightier policy considerations,<sup>116</sup> Justice O'Brien maintained that immunity is required by the need to both recruit public defenders and encourage their full exercise of unfettered discretion.<sup>117</sup>

In 1979, the United States Supreme Court finally addressed the issue of public defender immunity.<sup>118</sup> In *Ferri v. Ackerman*,<sup>119</sup> a unanimous Supreme Court held that federal law does not grant immunity from a state

112. See *Browne v. Robb*, 583 A.2d 949, 951 (Del. 1990), cert. denied, 499 U.S. 952 (1991).

113. *Reese*, 406 A.2d at 742 (O'Brien, J., dissenting) (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973)). However, Justice O'Brien conceded that "if public defenders are immune from civil liability, a cause of action available to persons sufficiently affluent to secure private representation will be foreclosed to persons not so happily circumstanced." *Id.* at 742 (O'Brien, J., dissenting).

114. *Id.* at 742-43 (O'Brien, J., dissenting). Justice O'Brien found the evolution of English thought on this issue persuasive. *Id.* at 744 (O'Brien, J., dissenting). See *infra* notes 174-78 and accompanying text.

115. *Reese v. Danforth*, 406 A.2d 735, 742 (Pa. 1979) (O'Brien, J., dissenting).

116. See *infra* note 177 and accompanying text.

117. *Reese*, 406 A.2d at 744 (O'Brien, J., dissenting) (citing *Minns v. Paul*, 542 F.2d 899, 901 (4th Cir.), cert. denied, 429 U.S. 1102 (1976)). The *Minns* court explained:

Basically there are two [policy reasons justifying a rule of absolute immunity]: (a) the need to recruit and hold able lawyers to represent indigents both full and part-time public defenders, as well as private practitioners appointed by courts to represent individual defendants or litigants, and (b) the need to encourage counsel in the full exercise of professionalism, i.e., the unfettered discretion, in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced.

*Minns*, 542 F.2d at 901.

118. *Ferri v. Ackerman*, 444 U.S. 193 (1979).

119. 444 U.S. 193 (1979). In *Ferri*, after being convicted in federal court, the plaintiff sued his court-appointed attorney in Pennsylvania state court, alleging that the attorney was negligent in numerous instances, including failure to raise the statute of limitations defense. *Id.* at 194-96. The Court of Common Pleas dismissed the complaint on the ground that the court-appointed counsel should be immune from civil liability. *Id.* at 196. The Pennsylvania Supreme Court affirmed the order of dismissal. *Id.* at 196-97; see *Ferri v. Ackerman*, 394 A.2d 553 (Pa. 1978).

malpractice action to an attorney appointed by a federal court.<sup>120</sup> Though declining to express an opinion on immunity under state law,<sup>121</sup> the Court reasoned that the only applicable statute, the Criminal Justice Act of 1964,<sup>122</sup> attempted to minimize the differences between retained and appointed counsel.<sup>123</sup> This indicated that Congress intended that court-appointed counsel should be subject to the same liabilities as privately retained attorneys.<sup>124</sup> The Court also reasoned that even though federal funds provided the source of the attorney's compensation, that is an inadequate basis for inferring that Congress intended to grant the attorney immunity from malpractice liability.<sup>125</sup>

The Court then compared court-appointed attorneys to other state-appointed judicial officers, such as judges, prosecutors, and grand jurors. The Court found that prosecutors, judges, and grand jurors represent the interests of society as a whole, and because their conduct may affect a wide variety of people, immunity for them is justified, even in the absence of a statutory grant.<sup>126</sup> In contrast, the duties of court-appointed counsel parallel those of privately retained counsel.<sup>127</sup> The court-appointed counsel's principal duty is to serve the interests of the client, and an indispensable element of such counsel's effective

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120. *Ferri*, 444 U.S. at 205 (Stevens, J.). For a thorough critique of the *Ferri* decision, see *Lack of Immunity of Court-Appointed Defense Attorneys in Criminal Cases*, 24 TRIAL LAW. GUIDE 141 (1980).

121. *Ferri*, 444 U.S. at 197-98. The Court explained:

We are not concerned with the elements of a state cause of action for malpractice. . . . Nor are we concerned with the question whether Pennsylvania may conclude as a matter of state law that [the attorney] is absolutely immune. For when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law.

*Id.* (citing U.S. CONST. art. VI, cl. 2).

122. 18 U.S.C. § 3006A (1976).

123. *Ferri*, 444 U.S. at 199. In response to evidence that unpaid appointed counsel were sometimes less diligent than retained counsel, Congress enacted the Criminal Justice Act to provide compensation for attorneys appointed to represent indigent defendants in federal criminal trials. *Id.* As noted by the Sixth Circuit Court of Appeals, "It seems obvious that the Congressional purpose in adopting [the Criminal Justice Act] was to seek to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants in the defense of criminal cases." *United States v. Tate*, 419 F.2d 131, 132 (6th Cir. 1969).

124. *Ferri v. Ackerman*, 444 U.S. 193, 199-200 (1979).

125. *Id.* at 201. The Court observed that countless private citizens receive federal funds of one kind or another, but Congress assuredly did not intend for all recipients of federal funds to be immune for actions taken in spending those funds. *Id.*

126. *Id.* at 202-03. The Court characterized such immunity as an incident of the particular office. *Id.*

127. *Id.* at 204. Earlier in the opinion, the Court cited Justice Burger's statement that the "defense counsel who is appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer." *Id.* at 200-01 n.17 (citing Warren E. Burger, *Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards*, 8 AM. CRIM. L.Q. 2, 6 (1969)).

performance is the ability to act independently of the government.<sup>128</sup> Further, the Court reasoned that the fear of a malpractice claim, rather than conflicting with court-appointed counsels' performance of their functions, provides the same incentive for appointed and retained counsel to perform their functions effectively.<sup>129</sup>

Prior to the seminal *Ferri* and *Reese* cases, most suits by indigent defendants against their government-appointed attorneys alleged a violation of the sixth amendment right to counsel.<sup>130</sup> Such suits were brought either as claims of ineffective assistance of counsel under the Sixth Amendment,<sup>131</sup> or as damages claims alleging a violation of section 1983 of the Civil Rights Act.<sup>132</sup> The latter avenue of relief was foreclosed to indigent criminal defendants by the Supreme Court in *Polk County v. Dodson*.<sup>133</sup> In *Polk County*, the Court held that public defenders do not act "under color of" state law when providing the traditional functions of representation to a criminal

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128. *Id.* at 204.

129. *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979). The Court noted that there was no claim that retained counsel are immune from malpractice liability by virtue of their participation in federal criminal trials. *Id.* at 204 n.21.

The Court did acknowledge that policy reasons may exist that could justify a grant of immunity. *Id.* at 204-05. The Court noted that the most persuasive reason justifying a grant of immunity is the recruitment of competent counsel to accept indigent defense work. *Id.* However, the Court noted that the attorney did not direct the Court to empirical data to support his argument that the risk of malpractice litigation either adversely affects the quality of representation, or deters members of the private bar from representing indigent defendants. *Id.* at 201 n.17. Thus, given the speculative nature of the attorney's argument, the Court refused to ascribe to Congress an intent to grant immunity, but noted that the question is best left to a legislative body acting on the basis of empirical data. *Id.* at 201 n.17, 205.

130. *Carlson*, *supra* note 12, at 136. *See supra* note 14 for the text of the Sixth Amendment.

131. *Carlson*, *supra* note 12, at 136. In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Supreme Court established a two prong requirement for reversal of a conviction or setting aside of a death sentence based on a sixth amendment claim of ineffective assistance. First, the defendant must show that counsel's performance was deficient. *Id.* at 687. Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* The Court refused to delineate specific guidelines for what constitutes ineffective assistance of counsel, save to say that the inquiry is whether counsel's assistance was reasonable under the circumstances. *Id.* at 687-88. The Court also noted that the inquiry is highly deferential. *Id.* at 689. For a discussion of the relationship between ineffective assistance of counsel and malpractice, *see infra* note 232 and accompanying text.

132. *Carlson*, *supra* note 12, at 136-37. *See supra* note 17 for the text of section 1983.

133. 454 U.S. 312 (1981). In *Polk County*, the plaintiff prisoner brought suit in federal court under 42 U.S.C. § 1983 (1981) against Polk County, its Offender Advocate, its Board of Supervisors, and an attorney in the Offender Advocate's Office. *Polk County*, 454 U.S. at 312. The plaintiff alleged that his civil rights were violated when the attorney moved to withdraw as counsel on the grounds that the plaintiff's claims were frivolous. *Id.* The district court dismissed the plaintiff's claims, holding that the attorney's actions were not "under color of" state law. *Id.* at 315; *see Dodson v. Polk County*, 483 F. Supp. 347 (S.D. Iowa 1979). However, the United States Court of Appeals for the Eighth Circuit reversed. *Polk County*, 454 U.S. at 316; *see Dodson v. Polk County*, 628 F.2d 1104 (8th Cir. 1980).

defendant.<sup>134</sup>

Though *Polk County* dealt with a public defender's liability under section 1983 of the Civil Rights Act, the Court's reasoning is nevertheless instructive with regard to public defender malpractice liability. The Court reasoned that, except for the source of payment, the relationship between the public defender and the client is identical to that existing between any other lawyer and client.<sup>135</sup> The Court emphasized the independence of the public defender, noting that implicit in the "guiding hand" of counsel guaranteed to criminal defendants under *Gideon v. Wainwright*<sup>136</sup> is the supposition that appointed counsel will be free from state control.<sup>137</sup>

Since the foundational *Spring, Reese, Ferri*, and *Polk County* cases, state

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134. *Polk County*, 454 U.S. at 321 (Powell, J.). Significantly, the *Polk County* Court, like the *Ferri* Court, noted: "[W]e intimate no views as to a public defender's liability for malpractice in an appropriate case under state tort law." *Id.* at 325 (citing *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979)). See *supra* note 121.

Prior to *Polk County*, some federal circuits held that public defenders were immune under section 1983. See *Miller v. Barilla*, 549 F.2d 648 (9th Cir. 1977); *Minns v. Paul*, 542 F.2d 899 (4th Cir.), cert. denied, 429 U.S. 1102 (1976); *John v. Hurt*, 489 F.2d 786 (7th Cir. 1973); *Brown v. Joseph*, 463 F.2d 1046 (3d Cir. 1972), cert. denied, 412 U.S. 950 (1973); *Sullens v. Carroll*, 446 F.2d 1392 (5th Cir. 1971); *Jones v. Warlick*, 364 F.2d 828 (4th Cir. 1966). However, because the *Polk County* Court held that public defenders do not act "under color of" state law, the Court did not find it necessary to reach the immunity issue. *Polk County*, 454 U.S. at 317 n.4.

135. *Polk County*, 454 U.S. at 318.

136. 372 U.S. 335 (1963). See *supra* notes 84-85 and accompanying text (discussing *Gideon*).

137. *Polk County*, 454 U.S. at 321-22 (citing *Gideon*, 372 U.S. at 345). But see Kenneth S. Schlessinger, Note, *Polk County v. Dodson: Liability Under Section 1983 for a Public Defender's Failure to Provide Adequate Counsel*, 70 CALIF. L. REV. 1291, 1301 (1982) (arguing that, because public defenders are independent advocates, they perform their duties with unlimited discretion, which leads to more deprivations of indigent defendants' constitutional rights; consequently, a section 1983 remedy is necessary to ensure that the deprivation of effective assistance of counsel does not evade judicial review).

Justice Blackmun, the sole dissenter in *Polk County*, criticized the Court's holding as unduly minimizing the influence that the government has over the public defender. *Polk County*, 454 U.S. at 331-32 (Blackmun, J., dissenting). In contrast to other courts addressing the issue, Justice Blackmun argued that, while the authority of a privately retained attorney is derived from the client's selection of the lawyer, a public defender's power is possessed by virtue of the state's selection of the attorney and the attorney's official employment. *Id.* at 329 (Blackmun, J., dissenting). "The public defender is not merely paid by the county; he is totally dependant financially on the County Board of Supervisors, which fixes the compensation for the public defender and his staff and provides the office with equipment and supplies." *Id.* at 332 (Blackmun, J., dissenting).

Three years after *Polk County*, the Supreme Court carved out an exception to the *Polk County* Court's holding that public defenders do not act "under color of" state law when performing their normal functions. In *Tower v. Glover*, 467 U.S. 914, 923 (1984), the Court held that state public defenders are not immune from liability under section 1983 for intentional misconduct, "under color of" state law, involving alleged conspiratorial action that deprives their clients of constitutional rights. *Id.*

courts have largely split on the issue of public defender malpractice immunity.<sup>138</sup> The most recent court to address the issue was the Minnesota Supreme Court, in *Dziubak v. Mott*.<sup>139</sup> In *Dziubak*, the court held that important social values require that public defenders be immune from suit for legal malpractice.<sup>140</sup> The *Dziubak* court perceived the judge, district attorney, and public defender as part of a courtroom triumvirate, with the public defender serving as an adversary to the prosecutor, "not an adversary of the system but an integral part of it."<sup>141</sup> The court also likened the public defender to a

138. See *Shaw v. State Dept. of Admin.*, 861 P.2d 566 (Alaska 1993) (allowing malpractice suit against public defender office); *Briggs v. Lawrence*, 281 Cal. Rptr. 578 (Cal. Ct. App. 1991) (holding that public defenders are liable for malpractice whether considered independent contractors or public employees, but since public defenders are public employees within the meaning of state tort claims act, client suing public defender for malpractice must sue county); *Pearson v. Sublette*, 730 P.2d 909 (Colo. Ct. App. 1986) (allowing malpractice suit against public defender); *Browne v. Robb*, 583 A.2d 949 (Del. 1990) (applying the *Reese* dissent and finding defendant court-appointed counsel immune from malpractice liability under state tort claims act), *cert. denied*, 499 U.S. 952 (1991); *Windsor v. Gibson*, 424 So. 2d 888 (Fla. Ct. App. 1982) (holding that public defender is an advocate whose role is no different than that of a private attorney); *White v. Galvin*, 524 N.E.2d 802 (Ind. Ct. App. 1988) (following *Polk County* and holding that public defender was not an employee under state tort claims act and thus county need not be given notice as required by tort claims act); *Donigan v. Finn*, 290 N.W.2d 80 (Mich. Ct. App. 1980) (citing *Ferri* as a strong indication of a trend away from immunity); *Laws v. Hager*, 693 S.W.2d 902 (Mo. Ct. App. 1985) (allowing malpractice suit against public defender); *Ramirez v. Harris*, 773 P.2d 343 (Nev. 1989) (holding that statute conferring immunity for discretionary acts includes public defender in its definition of "public officer"); *Delbridge v. Office of Pub. Defender*, 569 A.2d 854 (N.J. Super. Ct. Law Div. 1989) (holding that public defenders are immune from malpractice liability); *Herrera v. Sedillo*, 740 P.2d 1190 (N.M. Ct. App. 1987) (holding that immunity granted to attorneys appointed under the Indigent Defense Act applies also to those acting under authority of the Public Defender Act); *DeBrosse v. Jamison*, No. 91-CA-26, 1992 WL 5851 (Ohio Ct. App. Jan. 14, 1992) (allowing malpractice suit against public defender); *Veneri v. Papano*, 622 A.2d 977 (Pa. Super. Ct. 1993) (following *Reese* and finding public defender not immune from malpractice liability); *Williams v. Office of Pub. Defender*, 586 A.2d 924 (Pa. Super. Ct. 1990) (following *Reese* and finding public defender not immune).

139. 503 N.W.2d 771 (Minn. 1993). In *Dziubak*, plaintiff *Dziubak* plead guilty to one count of second-degree manslaughter. *Dziubak*'s conviction was later vacated when it was discovered that *Dziubak*'s defense expert misread a toxicology report that indicated fatal levels of anti-depressants in the decedent's blood. *Id.* at 773 n.2. *Dziubak* then sued his public defenders for malpractice. *Id.* at 773. The defenders moved for a dismissal based upon immunity from suit. *Id.* The trial court denied the motion, but held that *Dziubak* was collaterally estopped from litigating whether the public defenders negligently failed to discover the fatal levels of anti-depressants. *Id.* The Minnesota Court of Appeals affirmed. *Id.*; see *Dziubak v. Mott*, 486 N.W.2d 837 (Minn. Ct. App. 1992).

140. *Dziubak*, 503 N.W.2d at 773. The court noted that tort immunity is generally based on the idea that, though a defendant might be negligent, important social values require that the defendant remain free from liability. *Id.* at 774 (citing *W. PAGE KEETON ET. AL., PROSSER & KEETON ON THE LAW OF TORTS* § 131 (5th ed. 1984)). See *supra* notes 41-57 and accompanying text (discussing the origin and current state of immunities law).

141. *Dziubak*, 503 N.W.2d at 777 (quoting Stephen L. Millich, *Public Defender Malpractice Liability in California*, 11 WHITTIER L. REV. 535, 537-38 (1989)).

guardian ad litem, reasoning that both are appointed to protect the best interests of their clients and that both must be free to exercise independent judgment without having to weigh potential civil liability into their decisions.<sup>142</sup>

The court reasoned that while this argument also encompasses privately retained attorneys, significant differences exist between private counsel and public defenders.<sup>143</sup> The court emphasized the crisis conditions present in most public defender offices.<sup>144</sup> Public defenders generally work with excessive caseloads, and most public defender offices are grossly underfunded.<sup>145</sup> Rejecting the plaintiff's argument that state indemnity of public defenders solves the immunity issue, the court alleged that the substantial time, money, and energy consumed in defending malpractice suits would further drain public defenders' already sparse resources.<sup>146</sup> The court concluded that the extension of immunity to public defenders would ensure that the resources available to the public defender will be used for the defense of the accused, rather than diminished through the defense of malpractice suits against public defenders.<sup>147</sup>

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142. *Dziubak*, 503 N.W.2d at 775. The court explained that it recently held a guardian ad litem, who is appointed by the court to protect the best interests of a child in a proceeding involving the child, absolutely immune from negligence claims arising out of conduct within the scope of the guardian's duties. *Id.* (citing *Tindell v. Rogosheske*, 428 N.W.2d 386 (Minn. 1988)). The court noted that a guardian must be free to engage in vigorous representation of the child, and immunity is necessary to avoid harassment from disgruntled parents. *Id.*

143. *Id.*

144. *Dziubak v. Mott*, 503 N.W.2d 771, 775-76 (Minn. 1993). The court drew heavily from THE SPANGENBERG GROUP, WEIGHTED CASELOAD STUDY FOR THE STATE OF MINNESOTA BOARD OF PUBLIC DEFENSE (1991).

145. *Dziubak*, 503 N.W.2d at 775-76. The court noted that public defenders work substantially above capacity, with insufficient time to devote to their cases. *Id.* at 775. Further, the crime rate continues to increase, and the economic climate has resulted in increased claims of indigency and lower state budgets; thus public defender caseloads continue to grow. *Id.* at 776. The court concluded: "It would be an unfair burden to subject the public defender to possible malpractice for acts or omissions due to impossible caseloads and an under-funded office: something completely out of the defender's control." *Id.* See *infra* notes 186-90 and accompanying text for a further discussion of the caseload and funding problems faced by public defender offices. See *infra* notes 193-95 and accompanying text for a discussion of the causes of the caseload and funding problems.

146. *Dziubak*, 503 N.W.2d at 776-77. In rejecting the plaintiff's indemnity argument, the court also reasoned that potential civil liability, for a lack of resources not within the defender's control, would deter the recruitment and maintenance of able public defenders. *Id.*

147. *Id.* at 777. The court also noted that indigent defendants have other remedies through the appeals process and post-conviction relief. *Id.* at 776.

In a forceful dissent, Justice Gardebring argued that the majority opinion reflected a lack of confidence in public defenders, when in reality public defenders are highly experienced professionals who provide the best possible defense under the circumstances. *Id.* at 778 (Gardebring, J., dissenting). Justice Gardebring further argued that the ineffective assistance remedy cannot fully right the wrong done to someone who may have been unjustly incarcerated; rather, a civil remedy is needed. *Id.* (Gardebring, J., dissenting). In addition, Justice Gardebring argued that the absence of immunity would not result in an onslaught of malpractice suits. Public defenders do an admirable

Both the United States Supreme Court and various state courts have grappled with the issue of public defender malpractice liability. However, the courts have reached different results using a wide array of rationales. A detailed analysis of the rationales advanced both in favor of and against public defender malpractice immunity is thus necessary to understand the need for model legislation in this area.

#### IV. A CRITICAL ANALYSIS OF THE PUBLIC DEFENDER IMMUNITY RATIONALES

Public defenders should not be immune from malpractice liability. A public defender's duties and obligations are akin to those of a private attorney, who is of course subject to malpractice liability.<sup>148</sup> Moreover, the public defender's inability to choose clients exists independently of the duty to act with reasonable care, and ethical considerations impose limits on the permissible advocacy of all attorneys.<sup>149</sup> Also, it is unfair to make indigent defendants pay for the problems of public defenders' under-funding and excessive caseloads.<sup>150</sup> A rule of malpractice liability would deter neither fearless advocacy nor public defender recruitment.<sup>151</sup> In addition, due to the difficult burden of proof in a malpractice action, and the resulting necessity of counsel in such suits, malpractice liability would not cause the floodgates to be opened to frivolous suits by indigents.<sup>152</sup> Further, the availability of other alternatives, such as ineffective assistance of counsel, cannot substitute for a civil remedy where the indigent is wrongly convicted and incarcerated.<sup>153</sup> Moreover, granting malpractice immunity to public defenders would violate the Equal Protection Clause by unfairly distinguishing between groups of plaintiffs based solely upon their economic status.<sup>154</sup>

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job under the circumstances, and indigent defendants, due to their indigence, will find it difficult to retain counsel to represent them in a malpractice suit. *Id.* (Gardebring, J., dissenting).

Finally, Justice Gardebring reasoned that immunity is not necessary to recruit public defenders. There is no shortage of private attorneys willing to represent indigent defendants, and indemnity likely to be provided by the state for malpractice awards both removes the possibility of deterrence and ensures that public defenders will vigorously pursue their cases. *Id.* (Gardebring, J., dissenting). "By this opinion the majority denies to poor criminal defendants a civil remedy for the failure of their counsel to provide them an adequate defense," Justice Gardebring concluded. "This action creates de facto just the kind of two-tier criminal justice system the Supreme Court hoped to obliterate in its landmark decision, [*Gideon v. Wainwright*, 372 U.S. 335 (1963)]." *Id.* (Gardebring, J., dissenting).

148. See *infra* section IV.A, notes 156-70 and accompanying text.

149. See *infra* section IV.B, notes 171-82 and accompanying text.

150. See *infra* section IV.C, notes 183-98 and accompanying text.

151. See *infra* sections IV.D and IV.E, notes 199-215 and accompanying text.

152. See *infra* section IV.F, notes 216-27 and accompanying text.

153. See *infra* section IV.G, notes 228-37 and accompanying text.

154. See *infra* section IV.H, notes 238-63 and accompanying text.

Despite the soundness of these arguments favoring public defender malpractice liability, some courts have nevertheless extended malpractice immunity to public defenders. The following analysis will document and criticize the reasons why courts have granted malpractice immunity to public defenders, and the analysis will conclude that public defenders should indeed be subject to malpractice liability. However, due to the unique characteristics of public defender offices, a balance should be struck between these unique characteristics and the indigent defendant's right to recover damages for malpractice.<sup>155</sup>

#### A. *The Public Defender As an Independent Advocate*

A public office is the right, authority, and duty, conferred by law, by which an individual is invested with some portion of the sovereign functions of the government, to be exercised for the benefit of the public.<sup>156</sup> Courts extending immunity to public defenders have theorized that public defenders, like prosecutors and other judicial officers, are employed and paid by the state, and they perform the function of impartially administering criminal justice.<sup>157</sup> These courts conclude that there is no valid reason for extending immunity to prosecutors and judges while withholding it from state-subsidized defenders.<sup>158</sup>

However, several arguments militate against this view. First, the United States Supreme Court, in both *Ferri* and *Polk County*, has stated that the role of the public defender parallels that of a private attorney, rather than that of a prosecutor or a judge.<sup>159</sup> The *Polk County* Court held that the public defender's appointment entails functions, duties, and responsibilities that in no

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155. See *infra* section V, notes 264-92 and accompanying text.

156. *State ex. rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761, 764 (Mo. Ct. App. 1981). See 67 C.J.S. *Officers* § 8 (1978); 63A AM. JUR. 2D *Public Officers and Employees* § 12 (1984). In general, official or unofficial character is determined by the nature of the duty, function or service to be performed, and the power granted or wielded. 67 C.J.S. *Officers* § 8 (1978). There are numerous criteria used in determining whether a person is an officer, among them official designation, source of compensation, mode of selection, and the taking of an oath or bond. *Id.* No single criteria is conclusive, and it is not necessary that all of the criteria be present for a person to be considered an officer. *Id.*

157. *Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993); *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103, 105 (N.Y. Sup. Ct. 1978).

158. *Dziubak*, 503 N.W.2d at 775; *Reese v. Danforth*, 406 A.2d 735, 745 (Pa. 1979) (O'Brien, J., dissenting) (citing *Brown v. Joseph*, 463 F.2d 1046, 1048 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973)).

159. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).



way depend on state authority.<sup>160</sup> Except for the source of compensation, the public defender's relationship with the client is identical to the relationship between any other attorney and client.<sup>161</sup> Moreover, the *Ferri* Court noted that compensation of court-appointed defenders with public funds does not establish legislative intent that they be afforded immunity.<sup>162</sup>

The Supreme Court's view is echoed in the Rules of Professional Conduct, which do not distinguish between public defenders and privately retained counsel.<sup>163</sup> The American Bar Association's *Standards for Criminal Justice*<sup>164</sup> state that once an attorney undertakes to represent an accused, the attorney's duties and obligations are the same whether the attorney is retained

160. *Polk County*, 454 U.S. at 318. See also *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir. 1991) (Posner, J.), where the Seventh Circuit Court of Appeals reasoned:

The government hires [the public defender] . . . because the Sixth Amendment has been held to require it to furnish counsel to indigent criminal defendants. One way to discharge this constitutional duty is to hire public defenders; another is to reimburse appointed counsel. *In neither case is the government meaningfully an employer responsible for the care with which the lawyer does his work.* In relation to the federal government a federal defender is functionally an independent contractor rather than an employee, and a principal is not liable for the torts of his independent contractors.

*Id.* (emphasis added) (citations omitted). See also *Spring v. Constantino*, 362 A.2d 871, 877-78 (Conn. 1975) (reasoning that once appointed, a public defender's status is that of an independent contractor); *Reese v. Danforth*, 406 A.2d 735, 738 (Pa. 1979) (same).

161. *Polk County*, 454 U.S. at 318. See also Klein, *supra* note 15, at 1187 ("[T]here are no 'allowances' made for the defender serving in a legal aid or defender program.").

*But see* *Briggs v. Lawrence*, 281 Cal. Rptr. 578 (Cal. Ct. App. 1991), where the California Court of Appeals held that salaried, full-time public defenders are public employees within the meaning of California's Tort Claims Act, therefore the plaintiff client was required to sue the county employing the defenders. *Id.* at 586. The court reasoned that while public defenders must exclusively serve the interests of their clients, this is what the defenders were employed to do, thus the county should be able to discipline defenders who do not meet these standards. *Id.* at 585. In this respect, the court reasoned, the county does exercise control over public defenders. *Id.* The court further reasoned that the county can and should exercise a degree of control to assure that its public defenders are providing competent representation. *Id.*

162. *Ferri*, 444 U.S. at 201 ("Countless private citizens are the recipients of federal funds of one kind or another, but Congress surely did not intend that all such recipients would be immune for actions taken in the course of expending those funds."). See also *Liability of Court-Appointed Defense Counsel*, *supra* note 51, at 1425 ("The mere fact that the court-appointed attorney is technically a state official or employee, since he is paid by the state, is insufficient to justify granting him immunity in the absence of any governmental interest which would be furthered by such protection.").

163. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1981) ("[T]he Disciplinary rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities."); see Klein, *supra* note 15, at 1187.

164. ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.9 (2d ed. 1980), cited in *Polk County v. Dodson*, 454 U.S. 312, 318 (1981).

or serving in a defender program.<sup>165</sup> The *Polk County* Court noted that the ABA view of a public defender's duties and responsibilities has been almost universally accepted by courts that have considered the issue.<sup>166</sup>

Further, this freedom of public defenders from state control—as opposed to, say, prosecutors—is part of the constitutional right to effective assistance of counsel guaranteed under *Gideon v. Wainwright*.<sup>167</sup> Implicit in the “guiding hand” of counsel constitutionally guaranteed to criminal defendants under *Gideon* is the assumption that counsel will be free from state control.<sup>168</sup> In *Ex Parte Hough*,<sup>169</sup> the California Supreme Court persuasively explained:

The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so his client would not be afforded the full right ‘to have the Assistance of Counsel for his defense’ which the Constitutions, both state and federal, give to one accused of crime.<sup>170</sup>

These arguments support the view that the duties, the obligations, and the role of the public defender closely parallel those of privately retained attorneys. Consequently, public defenders, like private attorneys, should be subject to malpractice liability.

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165. ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.9 (2d ed. 1980), cited in *Polk County*, 454 U.S. at 318 (“Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.”). See *supra* note 127 (discussing Justice Burger’s view of public defenders’ duties and obligations).

166. *Polk County*, 454 U.S. at 318 n.6. See also *Sanchez v. Murphy*, 385 F. Supp. 1362, 1364 (D. Nev. 1974) (holding that public defenders’ duties are identical to those of other attorneys); *Espinoza v. Rogers*, 470 F.2d 1174, 1175 (10th Cir. 1972) (same); *Brown v. Joseph*, 463 F.2d 1046, 1048 (3d Cir. 1972) (holding that public defender is essentially a state-paid private counsel), *cert. denied*, 412 U.S. 950 (1973); *Chaleff v. Superior Court*, 138 Cal. Rptr. 735, 737 (Cal. Ct. App. 1977) (holding that public defenders are subject to the Rules of Professional Conduct no less than other members of the bar).

167. 372 U.S. 335 (1963). See *supra* notes 84-87 and accompanying text (discussing the right to counsel under *Gideon*).

168. *Polk County*, 454 U.S. at 321-22 (citing *Gideon*, 372 U.S. at 345). See also *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) (“Indeed, an indispensable element of the effective performance of [the defender’s] responsibilities is the ability to act independently of the government and to oppose it in adversary litigation.”); *Spring v. Constantino*, 362 A.2d 871, 878 (Conn. 1975) (noting that the public defender’s freedom from state control is a constitutional underpinning of the state’s public defender system).

169. 150 P.2d 448 (Cal. 1944).

170. *Id.* at 452 (citing U.S. CONST. amend. VI, CAL. CONST. art. 1, § 8). See *supra* note 14 for the text of the Sixth Amendment.

*B. The Public Defender's Duty to Take on Any Client Does Not Justify Malpractice Immunity*

In addition to arguing that the public defender is a public officer, courts granting immunity have asserted that attorney malpractice was traditionally treated as a breach of contract between the attorney and client.<sup>171</sup> However, a public defender is not free to contract with clients, but is obligated to represent whomever is assigned to the defender, regardless of the defender's current workload or a case's level of difficulty.<sup>172</sup> In contrast, privately retained counsel may confer with potential clients and determine whether to accept a case based on the case's merits, the attorney's current workload, and potential profits.<sup>173</sup> Because public defenders are not free to contract with their clients, the argument follows, public defenders should be immune from malpractice liability.

This argument is an insufficient basis for granting immunity for two reasons. First, in his dissenting opinion in *Reese*, Justice O'Brien found the evolution of English thought on the inability-to-contract issue to be persuasive.<sup>174</sup> Justice O'Brien noted that the immunity of barristers in the English system was generally thought to be based on the barristers' inability to contract with their clients.<sup>175</sup> That rationale was abandoned in *Rondel v. Worsley*,<sup>176</sup> on the ground that a professional's duty to act with reasonable care exists independently of contractual duties; however, barristers' immunity was retained based on public policy considerations.<sup>177</sup> Thus, Justice O'Brien concluded that, while the inability of public defenders to contract with clients may justify treating public defenders differently from privately retained

171. See *supra* text accompanying notes 58-60 (discussing the origin of attorney malpractice).

172. *Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993); *Reese v. Danforth*, 406 A.2d 735, 743 (Pa. 1979) (O'Brien, J., dissenting). See also *Moore v. McComsey*, 459 A.2d 841, 844 (Pa. Super. Ct. 1983) (holding that no contractual relationship existed between client and public defender because public defender was court-appointed).

173. *Dziubak*, 503 N.W.2d at 775.

174. *Reese*, 406 A.2d at 744 (O'Brien, J., dissenting).

175. *Id.* at 743 (O'Brien, J., dissenting). In *Tower v. Glover*, 467 U.S. 914, 921 (1984), the Supreme Court noted that the public defender has a reasonably close "cousin" in the English barrister.

176. 1 App. Cas. 191 (1969). The issue in *Rondel* was whether an action lay against a barrister for professional negligence with respect to work done as an advocate. *Id.* at 193.

177. *Reese v. Danforth*, 406 A.2d 735, 743 (Pa. 1979) (O'Brien, J., dissenting); *Rondel*, 1 App. Cas. at 203 ("[T]he only rational basis for exempting barristers was thought to be the inability to contract. But this was and is erroneous. . . . A professional man's duty to take care is a duty irrespective of contract. . . . The sole ground that is now given for immunity is public policy."). The *Rondel* court based barrister immunity on the need for barristers to fearlessly litigate their cases, and the avoidance of retrying criminal cases under a civil standard of proof. *Rondel*, 1 App. Cas. at 249, 253.

attorneys, the inability to contract is an insufficient basis for granting immunity.<sup>178</sup>

Second, the inability-to-contract rationale for immunity assumes that, while private attorneys can determine whether to accept a case based on the case's merit, public defenders are obligated to pursue any claim, no matter how frivolous.<sup>179</sup> In contrast, as stated by the *Polk County* Court, while a defense attorney has a duty to advance all colorable claims and defenses,<sup>180</sup> ethical considerations limit the permissible advocacy of *all* attorneys.<sup>181</sup> All attorneys, whether retained or appointed, have a duty to avoid clogging the courts with frivolous matters.<sup>182</sup> Therefore, the inability to contract with clients, while possibly justifying treating public defenders differently from privately retained counsel, should not be a basis on which to cloak public defenders with malpractice immunity.

### *C. The Public Defender's Excessive Caseloads and Under-Funding Does Not Justify Malpractice Immunity*

Courts granting malpractice immunity to public defenders also claim that such immunity is justified because public defender offices are burdened with excessive caseloads and severely limited budgets.<sup>183</sup> As a result, public

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178. *Reese*, 406 A.2d at 744 (O'Brien, J., dissenting).

179. *See Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993).

180. *See supra* note 93 (providing duty of attorneys under MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) to zealously represent clients within the law's boundaries).

181. *Polk County v. Dodson*, 454 U.S. 312, 323, 323 n.14 (citing ABA STANDARDS FOR CRIMINAL JUSTICE, Commentary to 4-3.9 (2d ed. 1980)), which provides:

No lawyer, whether assigned by the court, part of a legal aid or defender staff, or privately retained or paid, has any duty to take any steps or present dilatory or frivolous motions or any actions that are unfounded according to the lawyer's informed professional judgment. On the contrary, to do so is unprofessional conduct.

ABA STANDARDS FOR CRIMINAL JUSTICE, Commentary to 4-3.9 (2d ed. 1980).

182. *Polk County*, 454 U.S. at 323 ("It is the obligation of any lawyer—whether privately retained or appointed—not to clog the courts with frivolous motions or appeals."). *See* FED. R. CIV. P. 11, which provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record. . . . The signature of an attorney . . . constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

*Id.*

183. *Dziubak*, 503 N.W.2d at 776; *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103, 105 (N.Y. Sup. Ct. 1978); *see* NLADA REPORT, *supra* note 11.

defenders typically work under time and resource constraints.<sup>184</sup> The argument is that the time and money that would be consumed in defending malpractice suits against public defenders would detract from the already meager resources available to defend indigents.<sup>185</sup>

Initially, this argument is appealing, as large caseloads and small budgets continue to be among the biggest problems faced by our nation's public defender offices.<sup>186</sup> In a 1990 survey of public defender offices,<sup>187</sup> more than seventy-five percent of the respondents reported an increase in the number of plea bargains per attorney as the caseloads have risen, and half of the respondents felt increased pressure to settle cases due to the increasing caseloads.<sup>188</sup> Moreover, of the respondents, sixty-five percent reported that the heavy caseloads make staff recruitment difficult, and seventy-six percent reported that burnout due to heavy caseloads makes staff retention difficult.<sup>189</sup> However, the survey confirmed that indigent defense funding has not kept up with the increasing caseloads, as over seventy percent of the respondents felt that their offices were inadequately funded, and ninety-four percent noted that

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184. *Dziubak v. Mott*, 503 N.W.2d 771, 776 (Minn. 1993); *Scott*, 407 N.Y.S.2d at 105.

185. *Dziubak*, 503 N.W.2d at 776. See *supra* notes 143-47 and accompanying text (discussing *Dziubak*). It has further been argued that because of their large caseloads, public defenders do not have sufficient time to devote to their cases and therefore are particularly vulnerable to malpractice suits. Carlson, *supra* note 12, at 144. See *infra* notes 216-27 and accompanying text (discussing and criticizing the argument that malpractice liability will lead to an onslaught of frivolous suits by indigent defendants).

186. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) established maximum caseload limitations for public defender offices. The Commission was appointed by the administrator of the Law Enforcement Assistance Administration, and the Commission was composed of elected officials, law enforcement officers, and defenders. NLADA REPORT, *supra* note 11, at 6. The NAC standards are the most widely visible benchmark in the effort to describe maximum case limits for a defender staff attorney. *Id.*

In 1988, the Caseload Subcommittee of the NLADA's Defender Committee surveyed a selected group of public defender offices to see what the actual caseloads were in comparison to the NAC standards. *Id.* at 25. While the NAC standard for felonies per attorney per year was 150, the survey's respondents reported that the average actual number of felonies handled by individual attorneys per year was 191. *Id.* While the NAC standard for misdemeanors per attorney per year was 400, the average number of misdemeanors actually handled by individual attorneys per year was 613. *Id.* at 25-26. The survey further found that while the NAC standard for juvenile cases was 200, respondents reported that the average actual number of juvenile cases handled annually by individual defenders was 417. *Id.* at 26. While the NAC standard for appeals was 25, respondents reported that the average number of appeals actually handled annually by individual attorneys was 43. *Id.*

187. The survey was conducted by the Institute for Law and Justice for the National Institute of Justice. The Institute for Law and Justice received responses from 194 defender programs across the country. *Id.* at 3.

188. *Id.* at 4.

189. *Id.*

their budgets were less than prosecutors' budgets for handling indigent cases.<sup>190</sup>

One cannot deny the existence of these serious problems, and it may be unfair to subject public defenders to liability for acts stemming from conditions that are outside the defender's control.<sup>191</sup> However, it would be even more unfair for the indigent client to suffer from misrepresentation because of an under-funded public defender office, as the crisis conditions in most public defender offices are out of the indigent's control as well.<sup>192</sup> Rather, the problems of under-funding and excessive caseloads should be borne by society as a whole, because public defender office deficiencies are caused by larger social problems, such as increased crime,<sup>193</sup> an economic climate which has lead to increased claims of indigency and lower state budgets,<sup>194</sup> and a

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190. *Id.* These crisis conditions which characterize most public defender offices have caused courts to intervene. Most recently, in *State v. Peart*, 621 So. 2d 780 (La. 1993), the Louisiana Supreme Court held that the indigent defense services in Section E of Orleans Criminal District Court were so inadequate that a rebuttable presumption arises that indigents in Section E are receiving counsel insufficient to meet constitutionally required standards. *Id.* at 791. The court reasoned that, as the trial court stated, "[n]ot even a lawyer with an S on his chest could effectively handle [Section E's dockets]." *Id.* at 789. See *supra* text accompanying notes 2-10.

191. See *Dziubak v. Mott*, 503 N.W.2d 771, 776 (Minn. 1993).

192. *Id.* at 778 (Gardebring, J., dissenting).

193. Between 1986 and 1991, crime rates increased 23 percent for murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault; while rates increased six percent for burglary, larceny-theft, motor-vehicle theft, and arson. AMERICAN BAR ASSOCIATION, THE STATE OF CRIMINAL JUSTICE: AN ANNUAL REPORT 2 (1993). Between 1986 and 1991, arrests increased 14 percent. *Id.* at 3. Moreover, record numbers of people are coming under correctional supervision. *Id.* at 5. Between 1986 and 1990, the number of probationers, parolees, prisoners, and jail inmates grew by nearly 50 percent. *Id.* While federal, state, and local government spending for all civil and criminal justice activities increased 63 percent (\$29 billion) between 1985 and 1990, most courts are not keeping pace with the increasing number of criminal cases. *Id.* at 13, 15. Fewer states in 1990 than in 1986 disposed of more cases than they filed. *Id.* at 13.

Further, in the 1990 survey of defender offices conducted by the Institute for Law and Justice for the National Institute of Justice, public defenders were asked to identify factors contributing to the increased caseloads. NLADA REPORT, *supra* note 11, at 4. Among the responses were the following:

- 88% of the respondents felt that increased caseloads were caused by an increased number of drug cases;
- 82% felt that another cause was that prosecutors often overcharge defendants;
- 82% noted that increased sentencing for certain crimes was a problem;
- 79% reported that the number of attorneys was inadequate for the caseload;
- 78% pointed to a lack of resources;
- 77% said that the number of defenders has not kept pace with the caseloads.

*Id.*

194. *Dziubak*, 503 N.W.2d at 778 (Gardebring, J., dissenting).

negative stigma associated with public defenders' tasks.<sup>195</sup> Thus, courts should not condone the under-funding of public defender offices by reducing public defenders' obligations to indigent defendants.<sup>196</sup>

Moreover, whether an individual claiming official status is granted immunity depends upon the nature of the individual's duties, the importance of the office, and whether the individual has policymaking functions.<sup>197</sup> As one court has stated, "[Immunity] does not turn on the putative effect of the imposition of the financial burdens attendant to tort liability."<sup>198</sup> Therefore, the excessive caseloads and chronic under-funding of public defender offices, though they may justify different treatment for public defenders, cannot justify a rule of public defender malpractice immunity.

#### D. *The Promotion of Unfettered Discretion and Fearless Litigation Does Not Justify Malpractice Immunity*

In addition to the unique characteristics of public defender offices as a justification for immunity, courts granting immunity have relied on the traditional justification that immunity is necessary to promote fearless litigation and the exercise of unfettered discretion.<sup>199</sup> This unfettered exercise of discretion is encouraged by freeing public officials from the fear of potential liability.<sup>200</sup> Immunity thus promotes the broader public interest of the effective

195. Public defender offices, as part of the local county government, must apply to the local government each year for their budgets. Mounts, *supra* note 72, at 482. Because virtually all of the public defender's clients are charged with serious crimes, the tasks of public defenders are unpopular; thus, local politicians have little to gain by giving public defender offices large budgets. *Id.* at 481-82. Consequently, most public defender offices are severely under-funded. *Id.* at 482-83. The limited budgets lead to staff shortages, which ultimately result in excessive caseloads. *Id.* See *supra* text accompanying notes 91-96.

196. *Dziubak v. Mott*, 503 N.W.2d 771, 778 (Minn. 1993) (Gardebring, J., dissenting).

197. *Reese v. Danforth*, 406 A.2d 735, 739 (Pa. 1979); 67 C.J.S. *Officers* § 8 (1978); see *supra* note 156.

198. *Reese*, 406 A.2d at 739-740 (emphasis added).

199. In *Barr v. Matteo*, 360 U.S. 564, 571 (1959), the second Justice Harlan wrote the following:

The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

*Id.*

200. *Carlson*, *supra* note 12, at 138. *Carlson* argues:

Many indigent defendants, particularly repeat offenders, think they are as competent as attorneys. Therefore, they are likely to tell their attorneys how to conduct the cases. If the public defenders are afraid of malpractice suits, they may follow the defendants'

administration of laws.

However, this justification for immunity for governmental officials should not be applied to public defenders for three reasons. First, public defenders are not governmental officials but, rather, are more similar in their duties and obligations to privately retained attorneys.<sup>201</sup> Second, indemnity, which states are likely to provide for malpractice awards, both removes the possibility of deterring recruitment of public defenders,<sup>202</sup> and assures that public defenders will vigorously pursue their cases.<sup>203</sup> Third, as the *Ferri* Court reasoned, the threat of possible malpractice liability, rather than *inhibiting* fearless decision-making, would actually have the opposite effect of providing public defenders, like private attorneys, with an *incentive* to perform their functions competently.<sup>204</sup> A public defender's awareness that negligent acts may lead to civil liability will keep the defender "on his or her toes."<sup>205</sup> Therefore, the traditional justification that immunity is necessary to promote fearless litigation should not be applied to public defenders.

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advice in order to placate them. At best this means the public defender may be filing many worthless motions and pursuing frivolous defenses; at worst it means the attorney is conducting the cases in a manner detrimental to his clients.

*Id.* at 144.

201. The United States Supreme Court has held that public defenders' duties and obligations parallel those of privately retained attorneys, who are of course subject to malpractice liability. See *Polk County v. Dodson*, 454 U.S. 312, 318 (1981); *Ferri v. Ackerman*, 444 U.S. 193, 201 (1979). The Rules of Professional Conduct echo the Supreme Court view. See ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.9 (2d ed. 1980). Further, the public defender's freedom from state control is part of the right to counsel constitutionally guaranteed under *Gideon v. Wainwright*, 372 U.S. 335 (1963). See *Polk County*, 454 U.S. at 321-22 (citing *Gideon*, 372 U.S. at 345); *Ex Parte Hough*, 150 P.2d 448, 452 (Cal. 1948) (citing U.S. CONST. amend. VI, CAL. CONST. art. 1, § 8). See *supra* section IV.A, notes 156-70 and accompanying text.

202. See *infra* section IV.E, notes 206-15 and accompanying text.

203. *Dziubak v. Mott*, 503 N.W.2d 771, 778 (Minn. 1993) (Gardebring, J., dissenting). See, e.g., 55 ILL. COMP. STAT. ANN. § 5/5-1003 (West 1993), which provides the following:

§ 5-1003. Indemnity of public defender or assistant public defender. If any injury to the person or property of another is caused by a public defender or any assistant public defender, while the public defender or assistant public defender is engaged in the performance of his duties as such, the county shall indemnify the public defender or assistant public defender, as the case may be, for any judgment recovered against him as the result of that injury, except where the injury results from the willful misconduct of the public defender or assistant public defender, as the case may be . . . .

55 ILL. COMP. STAT. ANN. § 5/5-1003 (West 1993).

204. *Ferri*, 444 U.S. at 204.

205. See *Kaus & Mallen*, *supra* note 62, at 1196 ("It seems anomalous to suggest that the effectiveness of counsel on behalf of a criminal defendant may be weakened by the lawyer's awareness that incompetence in the criminal defense may lead to civil liability for its consequences; on the contrary, it should keep him on his toes.").



*E. The Need to Recruit Competent Public Defenders Does Not Justify Malpractice Immunity*

In addition to deterring fearless and independent decision-making, it is argued that public defender malpractice immunity is necessary to ensure that competent counsel remain willing to serve as public defenders.<sup>206</sup> The argument is that public defender malpractice liability would be caused largely by a lack of resources, which is outside the defender's control.<sup>207</sup> Consequently, civil liability may deter the recruitment and maintenance of public defenders.<sup>208</sup>

While the *Ferri* Court dismissed as largely speculative the argument that malpractice liability will affect public defender recruitment,<sup>209</sup> empirical data suggests that heavy caseloads do affect public defender recruitment.<sup>210</sup> However, the argument that malpractice liability will deter public defender recruitment is unrealistic in light of the ever-increasing number of attorneys in the United States, which is approaching epic proportions.<sup>211</sup> Further, this

206. The *Ferri* Court called this reason "the most persuasive reason for creating such an immunity." *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

207. *Dziubak*, 503 N.W.2d at 776-77.

208. *Dziubak v. Mott*, 503 N.W.2d 771, 776-77 (Minn. 1993).

209. *Ferri*, 444 U.S. at 201 n.17. The Court concluded:

But respondent has not directed our attention to any empirical data—in judicial decisions, legislative hearings, or scholarly studies—to support his conclusions that the risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants or adversely affects the quality of representation.

*Id.*

210. In the 1990 National Law Institute survey of public defender offices, 65 percent of the respondents reported that heavy caseloads made staff recruitment difficult, and 76 percent reported that burnout from heavy caseloads was a major reason for staff retention problems. NLADA REPORT, *supra* note 11, at 4. See *supra* text accompanying note 189.

211. The following table shows the growth in the legal profession on a national scale from 1960 to 1985:

<u>Year</u>	<u>Number of Lawyers</u>	<u>Ratio of Lawyers to Population</u>
1960	286,000	1/632
1970	355,000	1/572
1980	542,000	1/418
1985	655,000	1/360

NEW ENGLAND BOARD OF HIGHER EDUCATION, LAW AND THE INFORMATION SOCIETY: OBSERVATIONS, THOUGHTS AND CONCLUSIONS ABOUT LEGAL EDUCATION, LAW PRACTICE AND THE NEW ENGLAND ECONOMY 18 (1989). Since 1940, the number of lawyers per 100,000 population has more than doubled. *The Lawsuit Industry—Number of Lawyers and Legal Activity Has Increased Since the 1940's*, FORBES, Sept. 14, 1992, at 304(1) [hereinafter *The Lawsuit Industry*]. Over the past thirty years, the United States' lawyer population has multiplied by an annual rate of 3.64 percent. Daniel Seligman, *Ask Mr. Statistics—Increase in the Number of Lawyers*, FORTUNE, June 15, 1992, at 159. Presently, about 700,000 lawyers maintain active practices in the United States, and America has more practicing lawyers than any other country in the world, both in total and in

deterrence argument ignores the intangible and often idealistic reasons why many attorneys choose to serve as public defenders. One author noted:<sup>212</sup>

When public defenders tell their stories about what led them to their jobs, their voices take on the tones of evangelists.

"All of us do this for reasons that don't boil down to what we make," [public defender Carol] Burney said. "The compensation is just not monetary. It's not tangible. It's the feeling you get at the end of the day. Sometimes nobody appreciates it . . . not even your client."<sup>213</sup>

In addition, lawyers in general are subject to liability for negligence, and they obtain insurance against that possibility.<sup>214</sup> Therefore, it cannot plausibly be maintained that immunity is necessary to avoid deterring attorneys from becoming public defenders.<sup>215</sup> The argument that public defender malpractice liability will deter the recruitment of public defenders, while supported by some data, is impractical and unrealistic, and as such cannot justify a rule of public

per capita. *The Lawsuit Industry*, *supra*, at 304(1). Overcapacity has indeed become a serious problem in the legal profession. In *"It's Not a Wonderful Situation,"* author James Lyons describes [a] former associate lawyer . . . who was laid off at . . . [a] major Manhattan firm took a job selling shirts and ties at a men's clothing store. A real estate specialist who earned \$113,000 in his last year of practice, he once bought \$500 suits from the company for which he now works.

James Lyons, *"It's Not a Wonderful Situation,"* FORBES, Feb. 4, 1991, at 90(3).

The overcrowding of the legal profession could ideally be utilized to solve the problem of public defenders' excessive caseloads. If public defender offices were more adequately funded, public defender offices could be more fully staffed, and the caseloads could be better distributed so as to provide thorough defense services to all indigent defendants. Such a proposal, however, is beyond the scope of this note.

212. DeNeen L. Brown, *For Fairfax Public Defenders, a Tough Job—and a Mission*, WASH. POST, April 9, 1990, (Metro), at B1.

213. Brown, *supra* note 212, at B1. Brown further describes:

[Public defender] James Slaughter . . . has a resume that might open doors at most prestigious law firms. Slaughter graduated from Yale University and Columbia University's law school. . . .

The offers from the law firms were open. He could have stepped into a job and made \$50,000 his first year. . . . But he turned it down to make \$23,000 as a Fairfax public defender.

"I took the job because America's reliance on jailing people is a national tragedy," Slaughter said. . . . "I want to spend a few of the early years of my career trying to protect due process for those accused of crimes in an era so hostile to criminal suspects . . . ."

*Id.*

214. Note, *Remedying Ineffective Representation by Public Defenders—An Administrative Alternative to Traditional Civil Actions*, 60 MINN. L. REV. 123, 128 (1975) [hereinafter *Ineffective Representation*].

215. *Id.*

defender malpractice immunity.

*F. The Possibility of Opening the Floodgates to Frivolous Claims Does Not Justify Malpractice Immunity*

In addition to the chilling effect on both public defender advocacy and recruitment, courts have argued that allowing malpractice suits against public defenders will open the floodgates to frivolous suits by indigent defendants.<sup>216</sup> The argument is that, due to their heavy caseloads, public defenders have neither the time to give their clients individualized attention, nor the opportunity to carefully research the law.<sup>217</sup> Consequently, public defenders are particularly vulnerable to malpractice litigation.<sup>218</sup> Additionally, it is maintained that because indigents can avoid the costs of litigation by bringing their actions pro se, they are more likely to bring frivolous suits than those retaining counsel.<sup>219</sup>

However, this fear, that public defender malpractice liability will open the floodgates to frivolous suits, is unlikely to materialize for two reasons. First, the burden of proof in a malpractice action is on the plaintiff, and it is a difficult burden to meet, particularly in a criminal context.<sup>220</sup> Criminal defense attorneys, like all attorneys, are held to a duty of reasonable care and must exercise ordinary skill, knowledge, and diligence.<sup>221</sup> Moreover, with respect to the causation analysis, some courts have held that, in criminal defense malpractice, the plaintiff must prove actual innocence to prevail.<sup>222</sup> Thus, most public defenders would probably not be sued for malpractice by their indigent clients as long as they conduct themselves in the vicinity of the required standard of professional care.<sup>223</sup>

216. *Dziubak v. Mott*, 503 N.W.2d 771, 776 (Minn. 1993) (quoting *Minns v. Paul*, 542 F.2d 899, 902 (4th Cir.), *cert. denied*, 429 U.S. 1102 (1976) (“[T]he client has no economic incentive for eschewing frivolous claims. The experience of the federal courts in federal habeas corpus and § 1983 litigation demonstrates that indigents more frequently attempt to litigate claims which are patently without merit than do non-indigent parties.”)); *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103, 105 (N.Y. Sup. Ct. 1978) (“Because [the public defender’s] services are ‘free’ indigent defendants will often pursue claims or motions which have little if any chance of success.”).

217. *Carlson*, *supra* note 12, at 144.

218. *Klein*, *supra* note 15, at 1177. Further, public defenders may be more vulnerable to professional discipline than other counsel because public defenders represent individuals whose liberty is at stake. *Id.* As stated by the Seventh Circuit Court of Appeals, “The criminal defense bar has a special responsibility to its clients and to this court.” *United States v. Gerrity*, 804 F.2d 1330, 1331 (7th Cir. 1986); *see Klein*, *supra* note 15, at 1177.

219. *Carlson*, *supra* note 12, at 144; *see Minns*, 542 F.2d at 902.

220. *See supra* notes 61-71 and accompanying text.

221. RESTATEMENT (SECOND) OF TORTS § 299 (1989); *see supra* note 61.

222. *HALL*, *supra* note 14, § 27.5, at 722-23. *See supra* note 69 and accompanying text (discussing the relevance of innocence to criminal defense malpractice).

223. *Liability of Court-Appointed Defense Counsel*, *supra* note 51, at 1426.

Secondly, because of the heavy burden of proof, the indigent must obtain counsel to have any chance of success in a malpractice action.<sup>224</sup> Due to the indigent's lack of money, the indigent would likely only be able to obtain an attorney on a contingent fee basis.<sup>225</sup> Consequently, a suit would doubtfully be brought unless it was justified and had merit.<sup>226</sup> Thus, "[w]ithout resources, and quite possibly in confinement, the unhappy client is not likely to have an easy time mounting a civil action against [the client's] court-appointed attorney."<sup>227</sup> Because the fear that malpractice liability would open the floodgates to frivolous claims is unlikely to materialize, the fear cannot justify a rule of malpractice immunity.

### G. *The Availability of Other Remedies Does Not Justify Malpractice Immunity*

Courts granting immunity also argue that if public defenders are granted malpractice immunity, indigents would not be left without a remedy.<sup>228</sup> The immunity doctrine is justified in part by safeguards inherent in the judicial system that protect any individual interest that may be infringed upon.<sup>229</sup> Indigents remain free to appeal their convictions, and the incompetent public defender may be disciplined by the government and bar association.<sup>230</sup>

In addition, it is argued that indigent defendants who receive deficient legal services can, via appealing their convictions or filing habeas corpus actions, allege ineffective assistance of counsel in violation of the Sixth Amendment.<sup>231</sup> The legal standards for ineffective assistance of counsel in a criminal proceeding

224. *Id.* at 1426 n.44. See generally Martin T. Fletcher, Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771 (1968) (discussing the difficulty and complexity involved in establishing malpractice).

225. See Note, *Contingent Fee Contracts: Validity, Control, and Enforceability*, 47 IOWA L. REV. 942, 943 (1962) ("The most frequently espoused justification for [the contingent fee contract] is that it provides legal assistance for the destitute claimant who has a meritorious cause of action but no means of obtaining competent counsel.").

226. *Liability of Court-Appointed Defense Counsel*, *supra* note 51, at 1426. See *supra* note 225.

227. Mallen, *supra* note 17, at 68-69.

228. *Dziubak v. Mou*, 503 N.W.2d 771, 776 (Minn. 1993); *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103, 105 (N.Y. Sup. Ct. 1978).

229. *Butz v. Economou*, 438 U.S. 478, 512 (1978). See *supra* note 55.

230. *Dziubak*, 503 N.W.2d at 776; *Carlson*, *supra* note 12, at 146. For a thorough discussion of bar association and other types of discipline applicable to public defenders, see Klein, *supra* note 15. However, it is critical to note that the victim of the alleged misconduct is not a party to disciplinary proceedings against the attorney. *Id.* at 1176 (citing *Binns v. Board of Bar Overseers*, 343 N.E.2d 868 (Mass. 1976)).

231. *Carlson*, *supra* note 12, at 146. See *supra* note 14 for the text of the Sixth Amendment. See *supra* note 131 for a discussion of the standard for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

and for legal malpractice are equivalent, and any conduct that constitutes ineffective assistance could form the basis for a legal malpractice action, as negligence underlies both claims.<sup>232</sup> Due to the availability of these alternatives, the argument follows, a malpractice action for damages is unnecessary.

These alternatives available to indigent defendants cannot substitute for a malpractice action against a negligent public defender. None of the alternatives result in a civil remedy, which is necessary where the indigent is wrongly convicted of a crime. If a person is convicted of a crime as a result of inadequate representation, justice is generally satisfied by the granting of a new trial.<sup>233</sup> But where, due to deficient representation, an *innocent* person is *wrongly* convicted of a crime and then wrongly incarcerated, justice requires that the person be compensated for the resulting injury.<sup>234</sup>

Further, the claim of ineffective assistance of counsel should not substitute for a claim of malpractice against a public defender for two reasons. First, a

232. HALL, *supra* note 14, § 27.9, at 727. See also Klein, *supra* note 15, at 1201 (“[A] court determination ordering a reversal on ineffectiveness grounds is some reflection that the trial attorney had failed to use the skill, diligence, and degree of care that would have been exercised by a reasonably competent attorney in similar circumstances.”).

A claim of ineffective assistance of counsel was held not to preclude a claim of legal malpractice in *Ei Bon Ee Baya Ghananee v. Black*, 504 A.2d 281 (Pa. Super. Ct. 1986) (appointed counsel), and *Quick v. Swem*, 568 A.2d 223 (Pa. Super. Ct. 1989) (public defender). Moreover, ineffective assistance was held not to be a pre-requisite to recovering for legal malpractice in *Glenn v. Aiken*, 569 N.E.2d 783 (Mass. 1991), and *Krahn v. Kinney*, 538 N.E.2d 1058 (Ohio 1989). Success on an ineffective assistance claim was held not to guarantee success on a malpractice claim in *Mylar v. Wilkinson*, 435 So. 2d 1237 (Ala. 1983). But defeat on a claim of ineffective assistance was held to preclude, in whole or in part, a subsequent malpractice action in *Schiff v. Williams*, No. 267512, 1991 WL 29349 (Conn. Super. Ct. Feb. 7, 1991), and *Hockett v. Breunig*, 526 N.E.2d 995 (Ind. Ct. App. 1988). See Sarno, *supra* note 65, §§ 3, 5.

233. *Bailey v. Tucker*, 621 A.2d 108, 113 (Pa. 1993).

234. *Id.* (emphasis added). The *Bailey* court explained:

If a person is found guilty of a crime, and that person is indeed innocent of any degree of that crime, and it is established that the wrongful conviction was proximately caused by counsel's gross dereliction in his duty to represent the defendant, only then will the defendant be able to collect monetary damages. If a person is convicted of a crime because of the inadequacy of counsel's representation, justice is satisfied by the grant of a new trial. However, if an *innocent person* is wrongfully convicted due to the attorney's dereliction, justice requires that he be compensated for the wrong which has occurred.

*Id.* See also *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“[I]t is far worse to convict an innocent man than to let a guilty man go free.”).

Of course, a claim against a public defender alleging violation of section 1983 of the Civil Rights Act was foreclosed by the Supreme Court in *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (holding that public defenders do not act “under color of” state law when performing the traditional functions of counsel to a criminal defendant). See *supra* notes 133-37 and accompanying text (discussing *Polk County*).

claim of ineffective assistance speaks to the relationship between the defendant and the state, not between the defendant and the attorney, therefore the attorney should not be allowed to use the constitutional safeguard of effective assistance as a liability shield.<sup>235</sup> Second, an ineffective assistance claim results in the reversal of a conviction or the granting of a new trial, but does not address the suffering and time spent as a result of an unwarranted conviction.<sup>236</sup> Thus, a claim of ineffective assistance of counsel, like the other alternatives available to indigents, is an insufficient remedy where the indigent is wrongly convicted and incarcerated; as a result, a malpractice action becomes the necessary means of ensuring an indigent's constitutional right to effective assistance of counsel.<sup>237</sup> For these reasons, the alternative remedies and causes of action available to an indigent defendant cannot substitute for a malpractice action for damages against a negligent public defender.

#### H. Public Defender Malpractice Immunity Violates the Equal Protection Clause

Finally, public defender malpractice liability is necessary to avoid violating the Equal Protection Clause.<sup>238</sup> Writing for the Supreme Court in *Griffin v. Illinois*,<sup>239</sup> Justice Black proclaimed: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>240</sup> Justice Black's statement has particular resonance here, for extending malpractice immunity to public defenders would violate the Equal Protection Clause by distinguishing among groups of plaintiffs based solely upon their economic

235. *Bailey*, 621 A.2d at 113-14.

236. *Id.* at 114; *see supra* text accompanying note 15. *See also Dziubak*, 503 N.W.2d at 777 (Gardebring, J., dissenting):

If the public defender fails in the task of representation, he or she may be subject to an unfavorable performance appraisal; but the client may be unfairly convicted of a crime and sentenced to prison. The presence of remedies to overturn the conviction due to ineffectiveness of counsel cannot fully 'right the wrong' done to someone who may have spent extended periods of time incarcerated unjustly. I believe that a civil remedy is needed.

*Id.* Thus, such a damage remedy may be likened to damages for false imprisonment, which represent lost time, physical discomfort, and any mental or physical injury. *See Ineffective Representation, supra* note 214, at 129 n.30.

237. *Liability of Court-Appointed Defense Counsel, supra* note 51, at 1429. *See supra* notes 233-34 and accompanying text.

238. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

239. 351 U.S. 12 (1956).

240. *Id.* at 19, *cited in Donigan v. Finn*, 290 N.W.2d 80, 81 (Mich. Ct. App. 1980) (holding that attorneys appointed for indigent defendants are not immune from malpractice liability).

status.<sup>241</sup>

It is true that the Equal Protection Clause does not impose an affirmative duty on the government to remove economic handicaps.<sup>242</sup> Nor does the clause require absolute equality or precisely equal advantages.<sup>243</sup> The Supreme Court has held that wealth, standing alone, is not a suspect class under the Equal Protection Clause.<sup>244</sup> Thus, courts will usually uphold legislative actions burdening poor people as a class under the Equal Protection or Due Process Clauses, where the government's actions are rationally related to a legitimate governmental interest.<sup>245</sup>

However, the Supreme Court has stated that lines drawn on the basis of wealth or economic status are traditionally disfavored.<sup>246</sup> Moreover, courts will actively review classifications that burden the exercise of fundamental rights, even when such classifications are based on wealth.<sup>247</sup> Courts have a separate basis for actively reviewing limitations of fundamental interests, because fundamental interests are considered to be of such value as to merit special protection against arbitrary limitations.<sup>248</sup> The sixth amendment right

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241. Klein, *supra* note 15, at 1200. See also *Reese v. Danforth*, 406 A.2d 735 (Pa. 1979):

Appellee's contention is tantamount to a suggestion that we distinguish between groups of plaintiffs based on economic status, thus, denying an indigent the tort relief which would be available to the paying client in a similar fact situation. Such a distinction would raise troublesome equal protection questions were we to adopt it.

*Id.* at 740. "Immunity would only permit less zealous representation and deny to those who cannot afford private counsel an equal remedy for their injuries." *Id.* at 741 (Roberts, J., concurring).

242. *Id.* at 742 (O'Brien, J., dissenting) (citing *Douglas v. California*, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting) ("The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.")).

243. *Reese*, 406 A.2d at 742 (O'Brien, J., dissenting) (citing *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973)).

244. *Rodriguez*, 411 U.S. at 29 ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . .").

245. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.25, at 753 (4th ed. 1991).

246. *Harper v. Virginia Bd. of Elec.*, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.").

247. NOWAK & ROTUNDA, *supra* note 245, § 14.25, at 753. The Supreme Court has held that the government cannot restrict, based on individual wealth, the ability to engage in fundamental rights. See *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971) (holding that state's court fees and costs for suing for divorce violated indigents' due process rights, as indigents were excluded from the forum empowered to resolve their disputes); *Harper*, 383 U.S. at 666 (invalidating state poll tax which was a pre-requisite to voting); *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (holding that state must appoint counsel for an indigent in the first appeal from conviction).

248. NOWAK & ROTUNDA, *supra* note 245, § 14.25, at 755 ("The state may be free to allocate economic benefits on any economic policy it chooses but the fact that these rights are of fundamental constitutional magnitude means that they cannot be given only to those who can afford to pay for

to counsel is such a fundamental right.<sup>249</sup> Where an indigent is wrongly convicted of a crime, a civil action for malpractice is the only just remedy that ensures the indigent's right to effective assistance of counsel.<sup>250</sup> A grant of malpractice immunity would thus impinge on the indigent's ability to enforce his or her sixth amendment right to counsel; therefore, a grant of immunity must be supported by a compelling governmental interest.<sup>251</sup>

The preceding analysis shows that the rationales advanced in favor of public defender malpractice immunity are unsound.<sup>252</sup> Accordingly, a compelling governmental interest cannot be advanced to justify a rule of public defender malpractice immunity. Even under a lower level of scrutiny, there is no legitimate reason to justify a rule of immunity. A public defender's duties and obligations parallel those of privately retained counsel who, of course, are subject to malpractice liability.<sup>253</sup> The policy reasons advanced in favor of immunity—the public defender's inability to choose clients,<sup>254</sup> the public defender's excessive caseloads and under-funding,<sup>255</sup> the deterrence of both fearless advocacy<sup>256</sup> and recruitment of public defenders,<sup>257</sup> and the possibility of frivolous suits<sup>258</sup>—are unpersuasive. Moreover, the availability of other alternatives, such as ineffective assistance of counsel, cannot substitute for a civil remedy where the indigent has been wrongly convicted.<sup>259</sup>

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them.”).

249. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

250. This is because indigents' available alternatives, such as claims of ineffective assistance of counsel, do not address the time and suffering spent under the burden of an unwarranted conviction. See *Dziubak v. Mott*, 503 N.W.2d 771, 778 (Minn. 1993) (Gardebring, J., dissenting); *Bailey v. Tucker*, 621 A.2d 108, 113-14 (Pa. 1993). Hence, if an innocent person is wrongly convicted of a crime and then wrongly incarcerated due to negligent representation, justice requires that the person be compensated for the wrong that has occurred. *Bailey*, 621 A.2d at 113. See *supra* notes 233-34, 236-37 and accompanying text.

251. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (holding that, due to the fundamental right of all citizens to travel, statutes denying welfare to residents not residing in their jurisdictions for a minimum of one year are unconstitutional) (“Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.”).

252. See *supra* section IV.A-G, notes 156-237 and accompanying text.

253. See *supra* section IV.A, notes 156-70 and accompanying text.

254. See *supra* section IV.B, notes 171-82 and accompanying text.

255. See *supra* section IV.C, notes 183-98 and accompanying text.

256. See *supra* section IV.D, notes 199-205 and accompanying text.

257. See *supra* section IV.E, notes 206-15 and accompanying text.

258. See *supra* section IV.F, notes 216-27 and accompanying text.

259. See *supra* section IV.G, notes 228-37 and accompanying text.



Rather, under a rule of public defender malpractice immunity, some people would be allowed to sue negligent attorneys while others would not.<sup>260</sup> The sole difference between the two groups of people is their economic status.<sup>261</sup> Not only would indigent defendants be unable to choose their own counsel, but indigents would also be unable to obtain damages if the public defender negligently represented them.<sup>262</sup> Public defender malpractice immunity would create "just the kind of two-tier criminal justice system that the Supreme Court hoped to obliterate in its landmark decision, [*Gideon v. Wainwright*]."<sup>263</sup>

#### V. A MODEL STATUTORY APPROACH TO PUBLIC DEFENDER MALPRACTICE LIABILITY

The issue of public defender malpractice liability is most appropriately addressed by legislation, at either the state or federal level. Most of the arguments advanced either for or against public defender malpractice immunity are based on public policy, and the process of delicately weighing important policy considerations should not be undertaken by judges. Rather, legislatures should make such determinations on the basis of empirical data.<sup>264</sup> For the reasons set forth in Section IV of this Note, public defenders should be subject to malpractice liability.<sup>265</sup> However, the public defender is in several respects distinct from privately retained counsel,<sup>266</sup> and thus should be treated accordingly. The following model statute provides indigent defendants with a remedy for their public defenders' negligence, while recognizing that public defenders should be treated somewhat differently from private counsel.

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260. See *Liability of Court-Appointed Defense Counsel*, *supra* note 51, at 1427.

261. *Id.* at 1427-28; Mallen, *supra* note 17, at 69; Klein, *supra* note 15, at 1200.

262. Klein, *supra* note 15, at 1200-01. While criminal defendants with funds have the right to employ counsel of their own choosing, see *Powell v. Alabama*, 287 U.S. 45, 53 (1932), the Supreme Court has held that indigent criminal defendants have no such right. *Morris v. Slappy*, 461 U.S. 1, 11-14 (1983); see Klein, *supra* note 15, at 1200-01.

263. *Dziubak v. Mott*, 503 N.W.2d 771, 778 (Minn. 1993) (Gardebring, J., dissenting).

264. *Ferri v. Ackerman*, 444 U.S. 193, 205 (1979). See also Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 837 (1994) ("The legislature 'is a political engine, and the supreme instrument for the making and expression of public policy.'") (citations omitted).

265. See *supra* notes 148-263 and accompanying text.

266. See *supra* notes 171-82 and accompanying text (discussing public defender's inability to contract with clients) and notes 183-98 and accompanying text (discussing public defender caseloads and under-funding).

*Liability of Public Defenders for Malpractice*

§ 1. Liability. Public defenders shall be held personally liable for acts or omissions constituting the tort of malpractice, and may not avail themselves of the defense of immunity.

*Comment:* This provision recognizes that public defenders should not be immune from malpractice liability. Public defenders' unique characteristics, such as their inability to choose clients and their excessive caseloads and underfunding, while justifying somewhat different treatment for public defenders,<sup>267</sup> cannot justify a rule of malpractice immunity. An attorney's duty to act with reasonable care exists independently from contractual duties, and ethical considerations limit all permissible advocacy.<sup>268</sup> Moreover, it would be unfair to punish the indigent defendant for the inadequacies in public defender offices, which are caused by larger problems out of both the defender's and the indigent defendant's control.<sup>269</sup> Further, immunity turns not on the effect of imposing liability, but rather on the office and duties involved.<sup>270</sup> As stated by the United States Supreme Court, public defenders' duties and obligations closely parallel those of privately retained counsel; therefore public defenders, like private attorneys, should be subject to malpractice liability.<sup>271</sup>

The policy arguments advanced in favor of immunity are unpersuasive. The threat of malpractice liability, rather than inhibiting fearless decision-making and independent advocacy, will provide public defenders with an incentive to perform their duties effectively.<sup>272</sup> Due to the ever-increasing number of attorneys in the United States, and given the idealistic reasons why many attorneys choose to become public defenders, public defender recruitment will not be adversely affected by a rule of malpractice liability.<sup>273</sup> Further, due to the difficult standard of proof in criminal malpractice cases, and the resulting need for counsel in such cases, malpractice liability will not lead to an onslaught of frivolous malpractice suits against public defenders.<sup>274</sup> Malpractice liability is also necessary to avoid violating the Equal Protection Clause by distinguishing between groups of plaintiffs based solely upon their economic status.<sup>275</sup>

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267. See *infra* text accompanying notes 276-84.

268. See *supra* section IV.B, notes 171-82 and accompanying text.

269. See *supra* section IV.C, notes 183-98 and accompanying text.

270. See *supra* text accompanying notes 197-98.

271. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979). See *supra* section IV.A, notes 156-70 and accompanying text.

272. See *supra* section IV.D, notes 199-205 and accompanying text.

273. See *supra* section IV.E, notes 206-15 and accompanying text.

274. See *supra* section IV.F, notes 216-27 and accompanying text.

275. See *supra* section IV.H, notes 238-63 and accompanying text.

§ 2. Burden of Proof. To recover damages for malpractice against a public defender, the plaintiff must, except as provided in Section 2(C) and Section 3, allege and prove by clear and convincing evidence:

- A. that the public defender was appointed by the State to represent the plaintiff in a criminal proceeding;
- B. that the public defender committed acts or omissions in representing the plaintiff that fell below the standard of representation of a reasonable public defender under similar circumstances;
- C. that the public defender's conduct proximately caused the plaintiff to be incarcerated; that is, but for the public defender's conduct, the plaintiff would not have been found guilty beyond a reasonable doubt of the crime charged or a lesser included offense;<sup>276</sup> and
- D. that the plaintiff suffered actual damages as defined in Section 4.

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276. In *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993), which dealt with malpractice against criminal defense attorneys in general, the Pennsylvania Supreme Court required that the plaintiff prove as part of the proximate cause element that, but for the attorney's conduct, the plaintiff would have obtained acquittal or dismissal of the charges. *Id.* at 115.

An example of the use of the reasonable doubt standard in a civil action for damages can be found in a recent Senate bill, which proposed a civil cause of action for sexual assault victims against producers, distributors, and sellers of obscene materials. The bill provided the following:

Sec. 4. Cause of Action.

(a) Cause of Action.—A victim of a sex offense . . . may bring a civil action in a United States district court or a State court against a producer, distributor, exhibitor, renter or seller of obscene material or child pornography . . . to recover damages suffered as a result of a sex offense.

(c) Elements of the Cause of Action—To recover in a civil action brought under subsection (a), the plaintiff must prove by a preponderance of evidence (except as provided in paragraphs (1)(B) . . . ) that—

(1) the victim was a victim of a sex offense for which—

(A) the sex offender was convicted; or

(B) if the sex offender was not convicted and is deceased, the plaintiff establishes beyond a reasonable doubt in the civil action that the sexual offense was committed by the sex offender against the victim;

(2) exposure of the offender to obscene material or child pornography was a substantial cause of the offense;

(3) the defendant is—

(A)(i) a producer or distributor of obscene material . . .

or

(ii) an exhibitor, renter, or seller of obscene material . . .

S. 1521, 102d Cong., 2d Sess. § 4 (a), (c) (1992) (emphasis added).

*Comment:* This portion of the statute, recognizing that public defenders should be treated somewhat differently than privately retained counsel, imposes a difficult standard of proof on potential plaintiffs. Though bound by ethical considerations,<sup>277</sup> public defenders, unlike private attorneys, may not decide whether to accept a case based on the defender's current workload.<sup>278</sup> In addition, due to factors outside the control of both the indigent client and the defender, public defenders are overworked, and public defender offices are under-funded.<sup>279</sup> Thus, while the unique characteristics of public defenders do not justify a rule of malpractice immunity,<sup>280</sup> they nevertheless require that public defenders be treated somewhat uniquely for purposes of malpractice liability.

Hence, under this statute, the plaintiff has a particularly difficult burden of proof. Subject to an exception, the plaintiff must prove the elements of malpractice by clear and convincing evidence.<sup>281</sup> In addition, due to the nature of the public defender's duties, the public defender is held to the higher standard of a criminal law specialist. Thus, the plaintiff must show that the acts in question fell below the standard of a reasonable public defender in similar circumstances.

The proximate cause element requires the plaintiff to prove that he or she is innocent not only of the crime charged, but also of any lesser included offenses—thus, that the plaintiff was wrongly convicted and incarcerated due to the public defender's negligence. This element is based on the fact that a civil remedy is necessary only where the indigent defendant is wrongly convicted of a crime. If an innocent person is wrongly convicted and incarcerated due to negligent representation, justice requires that the person be compensated for the resulting injury.<sup>282</sup> Because the standard of proof in a criminal case is proof beyond a reasonable doubt,<sup>283</sup> here the plaintiff must show that he or she

277. See *supra* notes 179-82 and accompanying text.

278. See *supra* text accompanying note 173.

279. See *supra* notes 186-90 and accompanying text.

280. See *supra* note 171-98 and accompanying text.

281. Clear and convincing proof is that which results in reasonable certainty of the truth of the ultimate fact in controversy. BLACK'S LAW DICTIONARY 251 (6th ed. 1990) (citations omitted). It is a level of proof which requires more than a preponderance of the evidence, but less than proof beyond a reasonable doubt. *Id.* Clear and convincing proof will be shown where the truth of the facts asserted is highly probable. *Id.*

282. *Bailey v. Tucker*, 621 A.2d 108, 113 (Pa. 1993). See *supra* notes 233-34 and accompanying text. Alternatives such as ineffective assistance of counsel are insufficient in such situations, because a successful ineffective assistance claim results in the reversal of a conviction or the granting of a new trial, but does not address the suffering and time spent as a result of an unwarranted conviction. *Bailey*, 621 A.2d at 114. See *supra* text accompanying notes 15, 236-37.

283. *In re Winship*, 397 U.S. 358 (1970).

would not have been found guilty beyond a reasonable doubt.<sup>284</sup>

§ 3. Effect of Showing of Ineffective Assistance of Counsel.

The plaintiff's showing that the public defender's assistance was ineffective in violation of the Sixth Amendment, which showing results in the grant of a new trial, shall create a rebuttable presumption as to Sections 2(A) and 2(B) of this statute. A finding of ineffective assistance of counsel which results in either the reversal of the plaintiff's conviction, or the grant of a new trial resulting in the acquittal of the plaintiff of the crime charged and any lesser included offense, shall create a rebuttable presumption as to Sections 2(A), 2(B), and 2(C) of this statute.

*Comment:* This portion of the statute recognizes that the causes of action of malpractice and ineffective assistance of counsel are equivalent.<sup>285</sup> Any conduct that constitutes ineffective assistance of counsel could form the basis of a malpractice action, as a failure to act with reasonable care underlies both claims. Hence, a showing of ineffective assistance should be recognized as a strong indication that the public defender's acts constituted actionable malpractice.

Where the ineffective assistance claim results in the grant of a new trial, it indicates that the public defender's conduct was not reasonable under the circumstances.<sup>286</sup> Thus, the effect of the statute here is to ease the plaintiff's burden in the malpractice action on the issues of the defender's duty of care and violation of that duty. However, in such a situation, the plaintiff must still affirmatively show that, but for the defender's negligence, the plaintiff would not have been found guilty beyond a reasonable doubt, as required in Section 2(C).

However, if the finding of ineffective assistance results in either the reversal of a conviction, or the granting of a new trial which results in an acquittal of all charges, this indicates not only the unreasonableness of the defender's conduct, but that the plaintiff's guilt has not been proven beyond a reasonable doubt. Hence, the effect of the statute here is to relieve the plaintiff of his or her burden of proof on the Section 2(C) innocence element. This is

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284. See *supra* note 276. This statutory provision should be distinguished from a malicious prosecution cause of action. The gist of that action is that the plaintiff has been wrongfully made the subject of legal process by the defendant, for the sole purpose of vexing or injuring the plaintiff. 54 C.J.S. *Malicious Prosecution* § 5 (1987) (emphasis added).

285. See *supra* note 232 and accompanying text.

286. See *supra* note 131 for a discussion of the standard for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

achieved by creating a rebuttable presumption in the malpractice action on the issues of the defender's duty, violation, and proximate cause.

§ 4. Damages.

- (a) Damages shall reflect lost time, lost wages, physical, and/or mental injury suffered by the plaintiff as a result of being unjustly incarcerated.
- (b) If a public defender is found liable for malpractice under Section 2 of this statute, the state shall indemnify the public defender for the judgment, except where the plaintiff's injury results from the willful misconduct of the public defender.<sup>287</sup>

*Comment:* (a) The damage provision again recognizes that the civil remedy of malpractice is necessary where the plaintiff has been unjustly convicted and incarcerated.<sup>288</sup> In the absence of damages relating to a wrongful conviction and incarceration, the ineffective assistance remedy is sufficient. However, where an innocent person is wrongly convicted and incarcerated due to the public defender's negligence, the ineffective assistance cause of action is insufficient. Rather, justice requires that the person be compensated for lost time, lost wages, and physical or mental injuries. Therefore, this portion of the statute provides for damages similar to false imprisonment damages.<sup>289</sup>

(b) The rule of public defender malpractice liability set forth in Sections 1 and 2 of this statute is in part a reflection that the inadequacies characteristic of most public defender offices should not be borne by indigent defendants, as excessive caseloads and under-funding are not within the indigents' control.<sup>290</sup> This provision, modelled after Illinois' public defender indemnity statute,<sup>291</sup> recognizes that these inadequacies should not be borne by the individual defenders either. Under-funding and excessive caseloads are caused by larger

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287. It is true that most public defenders' malpractice liability insurance is paid for by the state. However, that is not the dispositive issue here. Rather, the issue is whether liability should be attributed to the state, in which case the damages come out of the state treasury, or whether liability should be attributed to the individual defender, in which case the damages come out of the defender's liability insurance, which may in fact be paid for by the state. The former proposition is the thesis of this note and the rationale underlying this statutory provision. The issue of liability insurance per se is beyond the scope of this note.

288. See *supra* notes 233-34, 236-37 and accompanying text.

289. See *Ineffective Representation*, *supra* note 214, at 129 n.30.

290. See *supra* notes 192-96 and accompanying text.

291. 55 ILL. COMP. STAT. ANN. § 5/5-1003 (West 1993). See *supra* note 203 for the text of the Illinois public defender indemnity statute.

social problems.<sup>292</sup> This indemnity provision is a reflection that these problems should be borne not by the indigent client, nor by the individual defender, but by society as a whole. However, if the individual defender's conduct is found to be willful, the injustice done to the indigent defendant is no longer caused by the larger societal problems, but rather is the fault of the individual defender. Accordingly, where the defender's misconduct is willful, the state should not be required to indemnify the public defender for resulting damages.

## VI. CONCLUSION

While it cannot be denied that the inadequacies present in most public defender offices are at crisis proportions, the immunity question turns not on the effect of imposing liability, but rather on the office and duties involved. In this respect, public defenders are essentially state-paid private attorneys and, like private attorneys, they should be subject to malpractice liability. However, unlike private attorneys, public defenders are unable to choose their clients. Public defenders are also plagued by unmanageable caseloads and grossly limited budgets, both of which are caused by larger societal ills outside the control of both the public defenders and the indigent clients. The model statute proposed in this Note effectively strikes a balance between the indigent defendant's right to recover damages for malpractice, and the unique characteristics of modern public defender offices.

David J. Richards

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292. See *supra* notes 193-95 and accompanying text.