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In Defense of Public Defenders: *Polk County v. Dodson*

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In Polk County v. Dodson, *the United States Supreme Court held that a public defender does not act under color of state law "when performing a lawyer's 'traditional functions' as counsel to a defendant in a criminal proceeding." The Court formulated a "functions" test to distinguish cases holding that public defenders act under color of state law when performing administrative tasks or when engaging in nontraditional or criminal acts. The author questions the Court's marked curtailment of indigents' access to federal courts when alleging ineffective representation by public defenders under 42 U.S.C. § 1983. Moreover, the author concludes that the Court created these artificial distinctions and found no state action primarily to decrease the number of civil rights actions against public defenders.*

Russell Richard Dodson was convicted of robbery in Polk County District Court, Iowa.[1] The Offender Advocate of Polk County[2] assigned a staff attorney, Martha Shepard, to represent Dodson in his appeal to the Iowa Supreme Court. After Shepard studied Dodson's file, and against her client's wishes, she moved for permission to withdraw as counsel on the ground that Dodson's appeal was "frivolous."[3] Dodson then brought a *pro se*[4] action in

1. Dodson was convicted of first degree robbery on February 1, 1979 and sentenced to 25 years in prison. Brief for Petitioners at 5, Polk County v. Dodson, 454 U.S. 312 (1981).

2. The Offender Advocate's office is under the direction of the Board of Supervisors of Polk County, Iowa. The office employs an attorney-director and nine salaried, full-time staff attorneys. County courts appoint attorneys from the Offender Advocate's office to represent indigent defendants. The county completely underwrites the operation of the office. Dodson v. Polk County, 483 F. Supp. 347, 349 n.2 (S.D. Iowa 1979), *rev'd in part*, 628 F.2d 1104 (8th Cir. 1980), *rev'd*, 454 U.S. 312 (1981).

3. Shepard moved for permission to withdraw pursuant to IOWA R. APP. P. 104(a), which provides:

> If counsel appointed to represent a convicted indigent defendant in an appeal to the Iowa Supreme Court is convinced after conscientious investigation of the trial transcript that the appeal is frivolous and that he cannot, in good conscience, proceed with the appeal, he may move the Iowa Supreme Court in writing to withdraw. The motion must be accompanied by a brief referring to anything in the record that might arguably support the appeal.

Iowa, as the United States Supreme Court noted in *Polk County*, provides for greater representation of indigents than the United States Constitution requires. 454 U.S. at 324. Iowa public defenders had their duties specified by statute: "When representing an indigent person in a criminal proceeding, the public defender shall counsel and defend him . . . at

federal district court under section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983,[5] alleging that Shepard and Polk County had deprived him of his sixth amendment right to counsel on appeal.[6] The Iowa Supreme Court granted Shepard's motion to with-

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every stage of the proceedings against him; and prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice." IOWA CODE ANN. § 336A.6 (West 1977) (repealed 1981). Although technically repealed, the Iowa public defender statutes were effectively retained in slightly amended form. *See* IOWA CODE ANN. §§ 331.775-.778 (West Supp. 1982).

A public defender is required to advise the client of the defender's decision to withdraw and inform the client of his right to proceed with the appeal. If the Iowa Supreme Court finds that the appeal is not frivolous, then it may grant counsel's decision to withdraw, but will direct the trial court to afford the indigent the assistance of appointed counsel. IOWA R. APP. P. 104(b)-(f).

The United States Supreme Court also noted that IOWA R. APP. P. 104 closely resembles the procedure it prescribed in Anders v. California, 386 U.S. 738 (1967), which held that a brief referring to anything that might arguably support the appeal must accompany a motion to withdraw. 454 U.S. at 314-15 n.2.

4. A *pro se* complaint is a pleading through which a plaintiff brings an action on his own behalf without the assistance of counsel. In Haines v. Kerner, 404 U.S. 519 (1972) (per curiam), the United States Supreme Court ruled that courts must hold *pro se* complaints to less stringent standards than complaints drafted by attorneys. Accordingly, courts may dismiss a *pro se* complaint for failure to state a claim only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 521 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

5. The Civil Rights Act, 42 U.S.C. § 1983 (Supp. IV 1980) provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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.

Federal jurisdiction for Dodson's § 1983 action was predicated on 28 U.S.C. § 1343 (Supp. IV 1980), which provides in part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
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> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . . .

6. U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Dodson's complaint also alleged that he suffered cruel and unusual punishment and was arbitrarily denied his state-created right to appeal, in violation of the due process clause of the fourteenth amendment. In addition, the complaint included pendent jurisdiction claims for malpractice and breach of an oral contract to prosecute the appeal. Dodson sought damages and release from confinement. 483 F. Supp. at 348. Besides Shepard and Polk County, Dodson also named as defendants the Polk County Offender Advocate and the Polk County Board of Supervisors. Dodson claimed that the Offender Advocate and the Board of Supervisors were liable for Shepard's actions because they supervised her handling of criminal appeals through established rules and procedures. 454 U.S. at 315.

draw and dismissed the appeal.[7]

The United States District Court for the Southern District of Iowa dismissed the claims against Shepard and the Offender Advocate, holding that neither had acted under color of state law.[8] The district court concluded that a public defender, like any privately retained or court-appointed attorney, owes undivided loyalty not to the state, but to the indigent defendant whom he represents in a criminal case.[9] The United States Court of Appeals for the Eighth Circuit reversed in part and remanded, holding that Shepard acted under color of state law because she was "selected, paid, hired, and fired by the County."[10] The Eighth Circuit agreed with the district court on the client-centered loyalties owed by both public defenders and private counsel, but regarded Shepard's public employment as dispositive.[11] The court held that, like other public servants,[12] public defenders should enjoy only "qualified immunity" from liability in section 1983 claims.[13]

The United States Supreme Court granted certiorari[14] to resolve the conflict among several circuits[15] concerning "whether a public defender acts under color of state law when providing representation to an indigent client."[16] The Court reversed the Eighth

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7. The Iowa Supreme Court granted the withdrawal motion and dismissed the appeal on November 9, 1979, four days after the United States District Court for the Southern District of Iowa dismissed Dodson's complaint. 483 F. Supp. at 348 n.1.

8. The district court also dismissed the claims against Polk County and its Board of Supervisors. 483 F. Supp. at 350. It held that the claims were based on the doctrine of respondeat superior, which is "not recognized in actions brought pursuant to 42 U.S.C. § 1983." *Id.* Having disposed of all the constitutional claims, the district court also dismissed Dodson's pendent state claims. *Id.* at 350.

9. 483 F. Supp. at 350.

10. 628 F.2d at 1106.

11. *Id.*

12. The court listed "police officers, school board members, prison officials, and state hospital superintendents." *Id.* at 1108.

13. *Id.* The Eighth Circuit affirmed the district court's decision to dismiss Dodson's request for an injunction commanding his release from the Iowa Men's Reformatory. The appellate court, however, held that the district court erred in dismissing Dodson's claim against the Offender Advocate, and that on remand Dodson should be afforded an opportunity to amend his complaint. *Id.* at 1109. For a thorough discussion of the Eighth Circuit's holding, see generally 50 U. CIN. L. REV. 212 (1981).

14. 450 U.S. 963 (1981).

15. In Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978), and Dodson v. Polk County, 628 F.2d 1104 (8th Cir. 1980), *rev'd*, 454 U.S. 312 (1981), the Seventh and Eighth Circuits held that public defenders representing indigent defendants act under color of state law. But in Slavin v. Curry, 574 F.2d 1256 (5th Cir.), *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978), and Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972), the Fifth and Tenth Circuits held otherwise.

16. 454 U.S. at 317.

Circuit and held that "a public defender does not act under color of state law when performing a lawyer's *traditional functions* as counsel to a defendant in a criminal proceeding."[17]

Polk County v. Dodson is significant for at least three reasons. First, the Supreme Court formulated a "functions" test to apply in section 1983 actions against public defenders. The Court did not rule simply *whether* a public defender acts under color of state law. Instead, it decided *when* a public defender does *not* act on behalf of the state.[18] By confining its opinion to public defenders practicing "a lawyer's traditional functions," the Court left standing cases holding that public defenders act under color of state law when performing administrative tasks[19] or when engaging in non-traditional or criminal acts.[20] Prior to *Polk County*, the Court never had held that a state employee acts under color of state law when performing certain official functions, but does not act under color of law when performing other functions.[21]

Second, for all practical purposes, the Court has blocked indigents' access to federal courts when alleging ineffective representation by public defenders under section 1983.[22] This hurdle repre-

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17. *Id.* at 325 (emphasis added). Polk County argued that public defenders must be granted absolute immunity from civil liability under 42 U.S.C. § 1983 because they "perform the critical governmental function of representing indigent defendants in state criminal trials." Brief for Petitioners at 64, *Polk County*, 454 U.S. 312 (1981).

As the Supreme Court observed in Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976), if an official acting within the scope of his absolute immunity were sued, then the action against him would be defeated at the outset. If, however, an official were granted qualified immunity, then the trial court would have to determine whether he acted in good faith. The *Polk County* Court did not reach the immunity issue, however, because the threshold jurisdictional requirement of "under color of state law" was not met. The Court also rejected Dodson's claims against Polk County, the Offender Advocate, and the Polk County Board of Supervisors because Dodson failed to allege "any policy that arguably violated his rights under the Sixth, Eighth, or Fourteenth Amendments." 454 U.S. at 326. The Court recognized Dodson's allegation that public defenders refused to proceed with appeals they found frivolous. "But," it ruled, "a policy of withdrawal from frivolous cases would not violate the Constitution." *Id.*

18. *See* 454 U.S. at 324-25.

19. *See, e.g.*, Branti v. Finkel, 445 U.S. 507 (1980); *see also infra* notes 45-46 and accompanying text.

20. *See, e.g.*, United States v. Senak, 477 F.2d 304 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973); *see also infra* note 46.

21. 454 U.S. at 335 (Blackmun, J., dissenting).

22. Following Gideon v. Wainwright, 372 U.S. 335 (1963), which held that indigent defendants have a fundamental right to court-appointed counsel in criminal prosecutions, and Douglas v. California, 372 U.S. 353 (1963), which held that indigents have a right to court-appointed counsel on their first appeal from a criminal conviction, many jurisdictions established public defender offices. Concomitantly, federal courts have witnessed dramatic increases in the number of lawsuits alleging civil rights violations filed against public defend-

sents the Court's effort to limit the number of civil rights actions brought in federal courts.[23] Dodson was one of more than 11,000 convicts who brought a civil rights action in federal court in 1979. In *Polk County*, Justice Powell expressed the Court's concern about "[t]he recent burgeoning of post-conviction remedies [that] has undoubtedly subjected the legal system to unprecedented strains . . . ."[24]

Third, the Court apparently has decided to protect public defenders. Instead of finding public defenders to be state actors with qualified immunity, the Court has shielded public defenders from section 1983 liability altogether by barring an indigent's access to a federal remedy.

In any section 1983 action, a federal court must decide the threshold jurisdictional issue of state action before it can determine whether liability exists.[25] If the court does not find state action, it must dismiss the section 1983 complaint for lack of subject matter jurisdiction. The Seventh Circuit, in *Robinson v. Bergstrom*,[26] was the first United States Court of Appeals to hold that a public defender acts under color of state law. After deciding the threshold state action issue affirmatively, the *Robinson* court addressed the question of immunity. Some circuits previously had dismissed similar cases on grounds that a public defender does not

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ers. *See* Case Comment, *Liability of Public Defenders Under Section 1983:* Robinson v. Bergstrom, 92 HARV. L. REV. 943 (1979).

23. The Court's decision in Monroe v. Pape, 365 U.S. 167, 172 (1961), that state officials may act under color of state law even when committing acts not authorized by the state, spurred an "extraordinary increase" in the number of civil rights actions brought in federal courts. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1169-72 (1977). The Supreme Court has contracted the scope of § 1983 partly because of the "need to reduce the pressures on the already crowded dockets of the federal courts." *Id.* at 1172.

24. 454 U.S. at 324. In 1980 alone, state prisoners brought 12,397 civil rights actions against public officials, a 10.7% increase over the 11,195 filings in 1979 and a 511% increase over the 2,030 filings in 1970. *See* 1975 ADMIN. OFF. OF THE U.S. CTS. ANN. REP. 207-09; 1980 ADMIN. OFF. OF THE U.S. CTS. ANN. REP. 231-32; *see also* Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370, 1371 (1982).

25. "It is elementary that jurisdiction is a threshold issue, whether or not raised by a party, which must be satisfied prior to the merits." Robinson v. Bergstrom, 579 F.2d 401, 404 (7th Cir. 1978) (per curiam) (citing Haley v. Childers, 314 F.2d 610 (8th Cir. 1963)). The *Robinson* court also explained that "state action" and "under color of state law" are interchangeable expressions that "have been held to mean the same thing." 579 F.2d at 404 n.3. The Court has reaffirmed this principle in Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2750-53 (1982). *See* Note, Polk County v. Dodson: *Liability Under Section 1983 for a Public Defender's Failure to Provide Adequate Counsel*, 70 CAL. L. REV. 1291 (1982).

26. 579 F.2d 401 (7th Cir. 1978) (per curiam).

act under color of state law.[27] Still other circuits had avoided a state action analysis, holding instead that a public defender is absolutely immune from section 1983 claims.[28]

The confusion surrounding the issue whether a public defender acts under color of state law emanates from the unique triangular relationship of the public defender, the public defender's office, and the indigent client. Confusion also abounds because this triad does not fit the traditional state action analysis of whether a private individual or institution is performing a public function.[29] In *Polk County* the issue was whether a public employee—the public defender—was performing a private function.[30]

The lower court opinions in *Polk County* reveal the most common arguments for and against the finding of state action. The district court, which held that the public defender did not act under color of state law, emphasized Dodson and Shepard's private, independent relationship.[31] In contrast, the Eighth Circuit stressed Shepard's ties to Polk County, holding that those ties formed the stronger bond.[32] The appellate court adopted the "persuasive" state action analysis of *Robinson v. Bergstrom*:[33] Because Shepard acted on behalf of a state instrumentality, her seemingly private relationship was of little importance relative to the public nature of her employment.[34] In reassessing the district court's holding

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27. *E.g.*, Skipper v. Brummer, 598 F.2d 427 (5th Cir. 1979) (per curiam); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972) (per curiam).

28. *E.g.*, Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977); Minns v. Paul, 542 F.2d 899 (4th Cir. 1976); John v. Hurt, 489 F.2d 786 (7th Cir. 1973) (per curiam); Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973); *see* 50 U. CIN. L. REV. 212, 214-15 (1981).

29. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (a sufficiently close nexus between the state and the challenged activity of a state-regulated utility subjects the utility's activity to treatment as state action); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (state leasing of public property to restaurant that excludes blacks places the state in a "position of interdependence with [the restaurant so] that it must be recognized as a joint participant in the challenged activity").

30. In *Robinson* the Seventh Circuit explained, "The difficulty with an analysis of the situation here is that we are presented with the reverse argument, that an employee of a clearly state-related instrumentality is not acting under color of state law because he exercises a private function." 579 F.2d at 405-06; *see also* Comment, *Section 1983, Immunity, and the Public Defender: The Misapplication of* Imbler v. Pachtman, 55 CHI.-KENT L. REV. 477, 478 (1979); Case Comment, *supra* note 22, at 944.

31. The district court described the ties between a public defender and his client as "a personal relationship of trust and confidence governed by the canons of professional ethics under which the attorney owes an obligation of unswerving loyalty and devotion to the interests of his client." 483 F. Supp. at 349.

32. 628 F.2d at 1106.

33. *Id.*

34. The Seventh Circuit in *Robinson* held that a public defender acts under color of

that public defenders act solely on behalf of their clients, the Eighth Circuit assumed *arguendo* that (1) Polk County has no authority to influence directly particular decisions made by its public defenders, and (2) the professional responsibility of a public defender is identical to that of any other attorney.[35] Notwithstanding the ethical significance of these two assumptions, the Eighth Circuit concluded that a public defender's day-to-day actions in and around his office influence him more than private function factors.

The Offender Advocate's office, which, in the words of the Eighth Circuit, is "merely a creature of the State of Iowa,"[36] fulfills an obligation imposed upon state and local governments by the United States Constitution.[37] The public defenders in that office are hired, paid, and fired by the county. They receive their caseload and power not because they have been selected by their clients, but because the county employs them to represent indigents who are unable to afford their own counsel.[38] Additionally, because the county could employ more or fewer public defenders, the Eighth Circuit determined that the county could increase or decrease directly the amount of time that a public defender devotes to a particular case.[39] The court concluded that these facts trivialize arguments which portray the public defender as a private

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state law because he acts on behalf of a state instrumentality. 579 F.2d at 408. The *Robinson* court held inapplicable the *Jackson* state action "nexus" test, *see* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), which requires not only state involvement in the private institution, but also a sufficiently close nexus between the state and the challenged activity. That "nexus" probably would disqualify public defenders from being state actors. Accordingly, the *Robinson* court held that the "persuasive" state action analysis is more appropriate when a public employee acts on behalf of a state instrumentality. 579 F.2d at 406.

35. *Polk County*, 628 F.2d at 1106.

36. *Id.*

37. *See supra* note 22.

38. 628 F.2d at 1106. The Offender Advocate's office of Polk County employs nine public defenders. Of those nine lawyers, seven represent criminal defendants and two represent juveniles. The office handles approximately 2,500 cases each year, divided evenly among the seven public defenders. Brief for Petitioners at 4-5, *Polk County*, 454 U.S. 312 (1981); *see also supra* notes 2-3; *infra* note 77 and accompanying text.

Judge Overton, a district court judge sitting by designation, 628 F.2d at 1105, rebutted the majority's state action analysis: "[T]here is simply no sound basis for distinguishing the public defender's role as attorney for his client from that of any other attorney because of the source of his remuneration." *Id.* at 1110 (Overton, J., dissenting).

39. 628 F.2d at 1106. The Eighth Circuit relied on the Seventh Circuit's analysis in *Robinson v. Bergstrom* in making this determination. *Id.; see supra* note 34 and accompanying text. As the *Robinson* court noted, "The public defender, given the usual heavy caseload, must . . . make many strategic decisions with which the defendant may disagree." 579 F.2d at 410; *see also* Case Comment, *supra* note 22, at 947.

attorney first and a state actor last.[40]

The Supreme Court has decided numerous section 1983 actions involving various state employees. Circuit courts confronted with public defender liability under section 1983 have looked to those state action cases for guidance. The Supreme Court has extended absolute immunity to judges,[41] prosecutors,[42] and legislators,[43] while it has granted qualified immunity to prison, hospital, school, and political officials,[44] never once intimating that these officials did not act under color of state law. Indeed, according to Justice Blackmun, the Court in *Branti v. Finkel*,[45] a 1980 decision, "did not pause to question" whether a public defender acted under color of state law—it assumed that he did.[46] In *Branti* two assistant public defenders, both Republicans, sought to enjoin the pubic defender, a Democrat, from discharging them solely because of their political affiliations. The Court decided the merits of the case, sidestepping any state action analysis.

Less than two years after *Branti*, the Supreme Court in *Polk County v. Dodson* not only paused to consider whether a public defender acts under color of state law, but also dismissed the indigent client's section 1983 action for lack of subject matter jurisdiction.[47] The Court held that Shepard did not act under color of state law in seeking permission to withdraw from representing an indigent because she was "exercising her independent professional judgment in a criminal proceeding."[48] Emphasizing the traditional adversarial role of a public defender, the Court stated that it was "peculiarly difficult to detect any color of state law"[49] when a pub-

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40. 628 F.2d at 1106.

41. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967).

42. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976).

43. *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367 (1951).

44. *See, e.g.*, Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (state hospital superintendents); Wood v. Strickland, 420 U.S. 308 (1975) (school board members); Scheuer v. Rhodes, 416 U.S. 232 (1974) (governors and other state officials).

45. 445 U.S. 507 (1980).

46. *Polk County*, 454 U.S. at 335 (Blackmun, J., dissenting). In his dissent in *Polk County*, *id.* at 337-38 n.7, Justice Blackmun also discussed United States v. Senak, 477 F.2d 304 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973). In *Senak* the Seventh Circuit held that a public defender is amenable to suit under 18 U.S.C. § 242 (1976)—the criminal counterpart of 42 U.S.C. § 1983—when he extorts fees from indigent clients and their friends and relatives under color of law. But the majority in *Polk County* declared that its holding does not "disturb" cases brought pursuant to 18 U.S.C. § 242. 454 U.S. at 325 n.19.

47. 454 U.S. at 325.

48. *Id.* at 324.

49. *Id.* at 320.

lic defender (1) enters pleas of "not guilty," (2) moves to suppress the state's evidence, (3) cross-examines the state's witnesses, and (4) makes closing arguments—all on the defendant's behalf.[50]

In an effort to evade the confines of precedent, the Supreme Court fashioned "nontraditional" roles for a public defender. The Court insisted, for example, that the public defender acts under color of state law when he makes hiring and firing decisions in his office.[51] Moreover, the Court suggested, "It may be . . . that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions."[52] The Supreme Court preserved its decision in *Branti v. Finkel* by formulating a "functions" test[53] of traditional and nontraditional activities. The Supreme Court's new test focuses on the public defender's individual tasks rather than on the overall role the public defender plays in the judicial system. Following *Polk County*, federal courts will have to apply this functional test in determining whether they have subject matter jurisdiction over public defenders in section 1983 actions.[54]

The Court tailored the facts of *Polk County* to fit its definition of "under color of law." An individual, the Court declared,

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50. *Id.*

51. *Id.* at 325.

52. *Id.*

53. For all intents and purposes, the *Polk County* Court adopted the "functions" test proposed by the National Legal Aid and Defender Association ("NLADA") and the National Association of Criminal Defense Lawyers ("NACDL") in their amici brief:

> Amici urge this court . . . to adopt a functional test, under which the actions, or functions, of the public defender, rather than the role or position occupied, would determine whether the jurisdiction of the court can be invoked because the wrongdoing occurred "under color of state law." If the actions are taken pursuant to representation of an individual client, that lawyer should stand in no different position before the law than the court-appointed or privately retained attorney. No state action has occurred. However, if the actions of the attorney are taken pursuant to policies or practices of the office itself, or a governmental administrative or funding source, action under color of state law has occurred.

Brief for Amici Curiae at 5, *Polk County*, 454 U.S. 312 (1981). Interestingly, neither petitioners nor the respondent suggested this test in their respective briefs.

54. Justice Blackmun in his dissent attacked the majority's "unconvincing" functional test. He also attacked the Court's use of Imbler v. Pachtman, 424 U.S. 409 (1976), as support for its state action "functions" test:

> [T]he Court held in *Imbler* that the prosecutor enjoys absolute immunity for actions taken in his role as an advocate. The Court refused to decide, however, whether the same policies require immunity for prosecutors acting in their administrative or investigative roles. Not only did the *Imbler* Court therefore fail to endorse the functional test adopted here, but it pointed to the difficulties it foresaw in implementing such a test.

454 U.S. at 335 (Blackmun, J., dissenting).

acts under color of state law when he exercises "power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' "[55] The Court reasoned that although the Offender Advocate selected Shepard to appeal Dodson's conviction, the assignment "entailed functions and obligations in no way dependent on state authority."[56] The Court presumed—notwithstanding the source of Shepard's salary—that the relationship between Shepard and Dodson paralleled that of any other attorney and client: "From the moment of her appointment, Shepard became Dodson's lawyer, and Dodson became Shepard's client."[57] Shepard performed a "private function" by acting with individual loyalty to her client. "[S]tate office and authority are not needed" to perform a function that is "traditionally filled by [privately] retained counsel."[58]

Justice Blackmun, the sole dissenter, relied on the same definition of "under color of state law" to reach the opposite conclusion.[59] He argued that a public defender's power to defend is "possessed by virtue of the State's selection of the attorney and his official employment."[60] Accordingly, Justice Blackmun insisted that the Court failed to realize that Shepard had the authority to defend Dodson and to withdraw from his appeal *solely* because the Offender Advocate assigned her to that case.[61]

Dodson had relied in part on *O'Connor v. Donaldson*[62] and *Estelle v. Gamble*[63] to show that Shepard acted under color of state law. *O'Connor* involved a state mental hospital superintendent; *Estelle* involved a state prison medical director. In *O'Connor* and *Estelle*, the Supreme Court did not question whether those state officials acted under color of state law while allegedly violating the claimants' constitutional rights—it held that the officials were state actors and therefore, liable under section 1983.[64] Dodson compared public defenders to state physicians: In each situation,

55. 454 U.S. at 317-18 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
56. *Id.* at 318.
57. *Id.*
58. *Id.* at 319. "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." *Id.* at 318 (quoting STANDARDS FOR CRIMINAL JUSTICE § 4-3.9 (2d ed. 1980)).
59. 454 U.S. at 329 (Blackmun, J., dissenting).
60. *Id.*
61. *Id.*
62. 422 U.S. 563 (1975).
63. 429 U.S. 97 (1976).
64. 454 U.S. at 319-20.

the state employed, paid, and assigned a public official to render services in a private fashion and to maintain a confidential relationship with either a patient or an inmate who had no say in who would treat or defend him.

The *Polk County* Court was able to distinguish *O'Connor* and *Estelle* only by formulating a "functions" test.[65] The Court declared that O'Connor, a psychiatrist and hospital superintendent, was sued "in his capacity as a state custodian and administrator,"[66] not in his role as a treating physician. The *Polk County* Court viewed the physician's functions in *Estelle* "[s]imilarly."[67]

Justice Blackmun attacked the Court's attempts to avoid precedent by superimposing its new test on prior decisions, thereby artificially distinguishing the physician cases from *Polk County*.[68] Gamble was an inmate who sued Gray, his assigned physician, for inadequate medical treatment.[69] Justice Blackmun argued that if the Court had formulated its "functions" test at the time it decided *Estelle v. Gamble*, then it would have dismissed Gamble's suit for lack of state action:

> Gray was sued because he allegedly had given the plaintiff substandard medical care—the doctor's duty to the public and his custodial and supervisory functions were not at issue. If the Court had determined that Gray acted under color of state law only in his capacity as a custodian and administrator, it would have dismissed the claims against him for want of subject-matter jurisdiction, rather than on the merits.[70]

Justice Blackmun concluded that *Polk County* and *Estelle* are

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65. *See supra* notes 51-54 and accompanying text.

66. 454 U.S. at 320.

67. *Id.*

68. *Id.* at 330 (Blackmun, J., dissenting). In O'Connor v. Donaldson, 422 U.S. 563 (1975), a patient sued under § 1983, alleging that Dr. O'Connor intentionally had deprived him of his liberty. The hospital staff had the power to release a patient who was not dangerous to himself or to others, even if the patient had been lawfully committed and remained mentally ill. As Justice Blackmun noted, the evidence in *O'Connor* demonstrated clearly that Donaldson was hospitalized for reasons other than dangerousness. 454 U.S. at 331 n.2 (Blackmun, J., dissenting). Dr. O'Connor nevertheless refused to release Donaldson. *See O'Connor*, 422 U.S. at 565-68.

In his brief, Dodson pointed out that the "existence of the doctor-patient relationship [in *O'Connor*] did not negate the fact that the actions of the Defendant doctor were under color of law." In analogizing the doctor-patient relationship to the public defender-client situation, Dodson argued, "Quite simply, the existence of a professional relationship does not determine whether state action or action under color of law is present." Brief for Respondent at 14, *Polk County*, 454 U.S. 312 (1981).

69. 429 U.S. 97 (1976).

70. 454 U.S. at 331 (Blackmun, J., dissenting) (footnote omitted).

indistinguishable. First, he rebutted the majority's holding that a public defender does not act under color of state law because he acts independently and privately with his client. Justice Blackmun argued instead that a state-employed physician owes the same professional and ethical obligations to his patients that a public defender owes to his clients: "The *Gamble* Court did not find that color of state law evaporated in the face of a professional's independent ethical obligations. I cannot see why this case is different."[71] Second, Justice Blackmun claimed that the physician and the public defender were state actors because they fulfilled state functions—Gray carried out the state's obligation to administer medical care to prison inmates; Shepard fulfilled the state's constitutionally mandated obligation to defend indigents.[72]

More generally, Justice Blackmun disagreed with the majority's conclusion that a public defender's employment relationship with the state, though "relevant," is "insufficient to establish that a public defender acts under color of state law within the meaning of § 1983."[73] Justice Blackmun also argued that the *Polk County* Court "ignore[d] both precedent and reality"[74] when it found that a public defender, unlike other state employees, is not a "servant of an administrative superior" because he must heed the canons of professional responsibility, which direct that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."[75]

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71. *Id.*

72. *Id.*

73. *Id.* at 321. Justice Blackmun added:

> Only last Term, in *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court noted that defendant-prison officials unquestionably satisfied the under color of state law requirement because they "were, after all, state employees in positions of considerable authority." *Id.*, at 535-536. Thus began, and ended, the Court's discussion of the color of law question in that case.

Id. at 328-29 (Blackmun, J., dissenting).

74. *Id.* at 330 (Blackmun, J., dissenting).

75. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1977), *quoted in Polk County*, 454 U.S. at 321.

In a concurring opinion, Chief Justice Burger emphasized that "governmental participation is very limited" in providing counsel for an indigent:

> [T]he government undertakes only to provide a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial. . . . The obligations owed by the attorney to the client are defined by the professional codes, not by the governmental entity from which the defense advocate's compensation is derived.

454 U.S. at 327 (Burger, C.J., concurring); *see* 65 MARQ. L. REV. 709, 715-16 (1982).

Because "a state official acts under color of law [even] when the State does not authorize, or . . . know of, his conduct," Justice Blackmun insisted it was irrelevant whether Polk County instructed its public defender to seek withdrawal from Dodson's case.[76] Similarly, he added, had the majority examined more diligently Iowa's public defender statutes,[77] it might not have been

76. 454 U.S. at 330 (Blackmun, J., dissenting).

77. IOWA CODE ANN. §§ 336A.1-.11 (West 1977), *repealed by* Home Rule for Counties Act, ch. 117, § 1244, 1981 Iowa Acts 305, 458. The amended public defender statutes, contained in IOWA CODE ANN. §§ 331.775-.777 (West Supp. 1982), provide in part:

§ 331.775. Definitions

. . . .

4. "Indigent person" means a person who is unable to retain legal counsel without prejudicing the person's financial ability to provide economic necessities for the person or person's dependent family.

§ 331.776. Office of public defender

1. The board, by resolution, may establish or abolish the office of public defender. . . .

2. The public defender shall be an attorney admitted to the practice of law before the Iowa supreme court. When a vacancy exists in the office of public defender, the district court judges of the judicial district containing the county in which the public defender is to serve, sitting en banc, shall nominate two attorneys qualified to serve as public defenders and certify their names to the board of each county in which the public defender is to serve. Within thirty days after the certification, the supervisors shall appoint one of the nominees by majority vote of each board.

. . . .

4. The board shall determine the compensation of the public defender.

5. The board shall provide office space, furniture, equipment, and supplies for the use of the public defender suitable for the business of the office . . . .

6. The board may require a public defender or assistant public defender to devote full time to the discharge of the duties of office and not engage in the private practice of law. . . .

. . . .

§ 331.777. Powers and duties of a public defender

The public defender:

1. Shall represent without fee each indigent person who is under arrest or charged with a crime if the indigent person requests it or the court orders it. The public defender shall counsel and defend a client at every stage of the criminal proceedings and prosecute before or after conviction any appeals or other remedies which the public defender considers to be in the interest of justice.

. . . .

3. Shall make an annual report to the judges of the district court sitting in any county in which the public defender serves, the attorney general, and the board of any county in which the public defender serves. The report shall include all cases handled by the public defender during the preceding year.

4. May appoint the number of assistant public defenders, clerks, investigators, stenographers, and other employees as approved by the board. An assistant public defender must be an attorney licensed to practice before the Iowa su-

blind to the state's influence over its public defenders.[78] As Justice Blackmun noted, the county effectively influences how much time a public defender can devote to a client, and how many clients each public defender can represent, by (1) prescribing what "indigency" means, (2) regulating how many public defenders, assistant public defenders, and staff members can be employed, and (3) allocating funds to the office.[79] "The public defender's discretion in handling individual cases—and therefore his ability to provide effective assistance to his clients—is circumscribed to an extent not experienced by privately retained attorneys."[80]

What propelled the Burger Court's opinion in *Polk County v. Dodson* (but expressly surfaced only once) was the Court's intent to deter the filing of civil rights actions.[81] The Court made that intent clear by opting for administrative convenience instead of protecting indigents' substantive rights. To propose, as the Court has, that application of the "functions" test will increase protection for public defenders, reduce the number of section 1983 actions, and still protect state prisoners' access to a federal forum, is to invite even more civil rights litigation. Justice Blackmun warned that the "functions" test will fail to preserve precious court time because the Court's functional test will necessitate "lengthy and involved hearings on the merits to determine whether the court has subject-matter jurisdiction."[82] Additionally, Justice Blackmun

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preme court. The appointments shall be made in the manner prescribed by the board which shall determine the compensation of the appointees.

See also supra note 3.

78. 454 U.S. at 332-33 (Blackmun, J., dissenting).

79. *Id.; see also* Brief for Respondent at 10-11, *Polk County*, 454 U.S. 312 (1981).

80. 454 U.S. at 332 (Blackmun, J., dissenting). Because the public defender must file annual reports with, inter alia, the county board of supervisors, Justice Blackmun suggested that "the public defender will be wary of antagonizing the officials to whom he must report, and to whom he owes his appointment and the very existence of the office." *Id.* at 332-33.

81. *See supra* note 24 and accompanying text.

82. 454 U.S. at 337 (Blackmun, J., dissenting). The Court did not list the "lawyer's traditional functions as counsel to a defendant." Instead, according to Justice Blackmun, it implied that so long as the public defender exercises his "independent professional judgment," he will not be a state actor. *Id.* at 334. The Court ignored, however, the possibility that extrinsic factors may impede a public defender from exercising "independent" professional judgement. In their brief, for example, amici curiae NLADA and NACDL concluded that when a public defender's decisions about how to allocate his time and resources are "affected by office policies, statutory limitations or funding levels, the attorney's choice has clearly been made while cloaked in the mantle of state authority, and the client should have a [federal] remedy." Brief for Amici Curiae at 13, *Polk County*, 454 U.S. 312 (1981). That conclusion muddles or destroys the amici's own "functions" test. It is extremely difficult to imagine a situation in which a public defender makes a decision that is not "affected by office policies, statutory limitations or funding levels."

feared that if the federal courts systematically dismiss all section 1983 claims against public defenders, then "the most egregious behavior by a public defender, even if unquestionably the result of pressures by the State, will not be cognizable under § 1983."[83] Indeed, if Justice Blackmun's fears prove correct, the Court will have failed not only to promote its express purpose—to protect public defenders from section 1983 actions—but it will also have failed to effectuate its underlying motive of lessening the burden of civil rights actions in federal courts.

The *Polk County* Court denied a state prisoner a federal forum to allege violations of his constitutional right to effective assistance of counsel. Instead of creating artificial distinctions to avoid finding state action, the Court should have extended to the public defender qualified immunity from section 1983 liability.[84] By conferring qualified immunity, the Supreme Court would have protected the public defender directly from suits filed by dissatisfied clients, while leaving indigent defendants a tenable federal action[85] against state-employed public defenders who represented them in bad faith. At the same time, public defenders who acted in good faith would have few qualms about such a ruling, knowing that meritless claims would be dismissed promptly.

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83. 454 U.S. at 337 (Blackmun, J., dissenting).

84. *See* Dodson v. Polk County, 628 F.2d 1104, 1106-09 (8th Cir. 1980), *rev'd*, 454 U.S. 312 (1981).

85. Dodson's alternative remedies are inadequate. Dodson may not bring a habeas corpus action until he exhausts his state remedies. He would have a difficult time succeeding in a state malpractice suit against a state-employed public defender, and he cannot initiate a criminal action against the public defender under 18 U.S.C. § 242. *See* Case Comment, *supra* note 22, at 950-51; *see also supra* note 46.