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Section 1983, Immunity, and the Public Defender: The Misappllication of Imbler v. Pachtman

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SECTION 1983, IMMUNITY, AND THE PUBLIC DEFENDER: THE MISAPPLICATION OF *IMBLER V. PACHTMAN*

ROBINSON V. BERGSTROM
579 F.2d 401 (7th Cir. 1978) (per curiam)

The Civil Rights Act of 1871 was designed to implement the fourteenth amendment to the United States Constitution.[1] Section 1 of the Civil Rights Act, presently codified as 42 U.S.C. § 1983,[2] permits a private individual to bring a civil action for damages[3] against any person who acts "under color of state law"[4] and deprives the private individual of a right or privilege guaranteed by the United States Constitution. Initially, section 1983 was narrowly construed by the courts to include only actions by state officials or acts authorized by state law as actions "under color of state law."[5] More recently, under color of state law has been more broadly interpreted by the courts to include actions of many private persons and institutions not readily identifiable as state entities.[6] This is most often the case where the private individual or state

1. U.S. CONST. amend. XIV provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. 42 U.S.C. § 1983 (1976) [hereinafter referred to as section 1983] states:

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

3. Section 1983 provides for relief in the form of damages for deprivation of rights guaranteed by the United States Constitution. Injunctive relief may be obtained by invoking the pertinent provision or amendment of the United States Constitution. *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

4. In claims brought under section 1983, " 'under color' of law has consistently been treated as the same thing as the state action required under the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 794 n.7 (1966).

5. *See* Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size*, 15 DUQ. L. REV. 49, 51 (1976). For the United States Supreme Court's original stance on this issue, *see* Monroe v. Pape, 365 U.S. 167, 182-87 (1961). *But see* Monell v. Department of Social Servs., 436 U.S. 658 (1978) (overrules *Monroe* as to absolute immunity of local governments in section 1983 actions).

6. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975) (staff of state mental hospital); Wood v. Strickland, 420 U.S. 308 (1975) (public school board members); Chalfant v. Wilmington Institute, 574 F.2d 739 (3d Cir. 1978) (public library board members); Potenza v. Schoessling, 541 F.2d 670 (7th Cir. 1976) (private individuals conspiring with state officials); Bonner v. Coughlin, 517 F.2d

institution is state regulated or the state has statutorily delegated its authority to the private individual or institution.[7]

The extension of section 1983 claims to ostensibly private persons and institutions which perform public functions poses a curious problem: whether a person employed by a state entity is *not* acting under color of state law because that person exercises a private function. This is the situation of the public defender, whose office is statutorily created and state funded but who maintains a private attorney-client relationship which is free from any and all state regulation.

In *Robinson v. Bergstrom*,[8] the United States Court of Appeals for the Seventh Circuit held that the public defender is a "state instrumentality"[9] who acts under color of state law.[10] But the Seventh Circuit, relying on the recent United States Supreme Court decision in *Imbler v. Pachtman*[11] which concerned state prosecutors, found the public defender to be "absolutely immune"[12] from section 1983 claims.

This comment will examine the development of section 1983 claims against the public defender, the defense of immunity often allowed by the courts to defeat such claims, and the application by some courts of the immunity defense to a section 1983 claim without first locating the requisite state action. Finally, this comment will assess the Seventh Circuit's opinion in *Robinson v. Bergstrom*.[13] It will be shown that while the Seventh Circuit correctly found the public defender to be acting under color of state law, the court incorrectly analogized *Imbler v. Pachtman*[14] and misapplied absolute immunity to the public defender.

HISTORY OF SECTION 1983 ACTIONS AGAINST PUBLIC DEFENDERS

The Public Defender and State Action

The section 1983 claim against the public defender is a relatively

1311 (7th Cir. 1975), *cert. denied*, 435 U.S. 932 (1978) (prison guard); Robinson v. Jordan, 494 F.2d 793 (5th Cir. 1974) (physician employed as county health official); Thomas v. Pate, 493 F.2d 151 (7th Cir.), *cert. denied*, 419 U.S. 879 (1974) (prison doctor); Meredith v. Allen County War Memorial Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968) (hospital commission); Fidtler v. Hendricks, 317 F. Supp. 738 (E.D. Pa. 1970) (prison superintendent).

7. *See* note 108 *infra*.

8. 579 F.2d 401 (7th Cir. 1978) (per curiam).

9. *Id.* at 408.

10. Act of July 6, 1933, L. 1933, p. 430, ILL. REV. STAT. ch. 34, §§ 5601-5608 (1977) and Act of June 21, 1929, L. 1929, p. 306, ILL. REV. STAT. ch. 34, §§ 5609 (1977), create the office of public defender, enumerate duties and provide for office quarters and compensation.

11. 424 U.S. 409 (1976).

12. 579 F.2d at 411.

13. 579 F.2d 401 (7th Cir. 1978) (per curiam).

14. 424 U.S. 409 (1976).

new phenomenon.[15] Prior to the United States Supreme Court holding in *Gideon v. Wainwright*,[16] which required appointed counsel for indigent defendants, there were very few public defenders mandated under state statute.[17] Instead, if the indigent defendant was represented at all,[18] the courts relied on the privately retained attorney or, occasionally, the court-appointed attorney, neither of whom was found by the courts to be acting under color of state law for section 1983 purposes.[19] Similarly, the private attorney who volunteered to represent an indigent client was found not to be acting under color of state law.[20]

Gideon v. Wainwright[21] established the right to counsel for indigent defendants in criminal proceedings.[22] In other cases, the United States Supreme Court recognized the indigent's right to appeal[23] and the right to adequate appellate review in criminal proceedings.[24] In *Anders v. California*,[25] the Court mandated the right to a meaningful appeal[26] for the indigent defendant and required the attorney representing the indigent to file a brief if it was at least arguable that the appeal contained merit.[27] The states created the office of public defender to meet these requirements of an indigent's right to a fair trial and appeal as mandated by the United States Supreme Court. Most states enacted statutes providing for the appointment of public defenders, office space

15. *See generally* Gozansky & Kertz, *Private Lawyers' Liability under 42 U.S.C. § 1983*, 24 EMORY L.J. 959 (1975) [hereinafter cited as Gozansky]; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1 (1974).

16. 372 U.S. 335, 340-45 (1963).

17. While public defender offices could be funded by the state prior to *Gideon*, there was no mandatory requirement to do so.

18. *See* 372 U.S. at 338. Many indigent clients were forced to defend themselves as best they could.

19. For cases where the privately retained attorney was found not to act under color of state law, *see* Nelson v. Stratton, 469 F.2d 1155 (5th Cir. 1972), *cert. denied*, 410 U.S. 957 (1973); Skolnick v. Martin, 317 F.2d 855, 857 (7th Cir.) (per curiam), *cert. denied*, 375 U.S. 908 (1963) (plaintiff alleged mistreatment by attorney during taking of deposition in civil suit). For an analysis of this issue, *see* Gozansky, *supra* note 15.

For cases where the court-appointed attorney was found not to act under color of state law, *see* O'Brien v. Colbath, 465 F.2d 358, 359 (5th Cir. 1972) (per curiam); Mulligan v. Schlachter, 389 F.2d 231, 233 (6th Cir. 1968) (per curiam); Hill v. Lewis, 361 F. Supp. 813, 818 (E.D. Ark. 1973); Vance v. Robinson, 292 F. Supp. 786, 788 (W.D.N.C. 1968).

20. *See* Thomas v. Howard, 455 F.2d 228, 229 (3d Cir. 1972) (per curiam).

21. 372 U.S. 335 (1963).

22. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), extended the right of counsel to all prosecutions of offenses punishable by imprisonment.

23. Douglas v. California, 372 U.S 353 (1963).

24. Griffin v. Illinois, 351 U.S. 12 (1956). The Court in *Griffin* held that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money. . . ." *Id.* at 19.

25. 386 U.S. 738 (1967).

26. *Id.* at 742.

27. *Id.* at 744.

and compensation.[28]

Although the public defender became state sanctioned, the courts did not readily find that the public defender acted under color of state law when representing the indigent client.[29] Various courts held that the public defender did not act under color of state law by virtue of the private nature of the attorney-client relationship and therefore dismissed the claim.[30] One court even found the public defender to be an independent contractor.[31]

Nor did the fact that the public defender received state funds create state action according to some courts. In *Peake v. County of Philadelphia*,[32] a section 1983 claim by an indigent client against the Voluntary Defenders Association (VDA), a public defender group, was struck down. Although the VDA was partially funded by the state, the court found that the VDA did not possess any power derived from the state statute and thus did not act under color of state law.[33] The public defender's office was funded by the state in *Espinoza v. Rogers*,[34] yet the court found that the state statutes "in no way attempt to control or otherwise influence the professional judgment of a lawyer employed as a public defender."[35] According to the *Espinoza* court, mere employment as a public defender did not constitute acting under color of state law.[36]

Immunity as a Defense to a Section 1983 Claim

The other method utilized by the courts to defeat a section 1983 claim against a public defender was to declare the public defender immune from such a claim. Section 1983 states that *any* person who acts under color of state law to deprive an individual of constitutional rights may be liable for damages.[37] Thus, section 1983 on its face does not allow the application of immunity to defeat a claim.[38] The United

28. *See, e.g.*, CAL. GOV'T CODE §§ 27700-27712 (West 1978); PA. STAT. ANN. tit. 16, §§ 9960.1-9960.13 (Purdon 1978).

29. Ironically, the courts were expansively interpreting the section 1983 state action prerequisite in other areas. *See generally* cases cited note 6 *supra*.

30. *See* Clark v. Brandom, 415 F. Supp. 883, 884 (W.D. Mo. 1976); Berryman v. Shuster, 405 F. Supp. 1346 (W.D. Okla. 1975); United States *ex rel.* Wood v. Blacker, 335 F. Supp. 43, 44 (D.N.J. 1971).

31. Spring v. Constantino, 168 Conn. 563, 362 A.2d 871 (1975) (malpractice action against public defender).

32. 280 F. Supp. 853 (E.D. Pa. 1968) (per curiam).

33. *Id.* at 854.

34. 470 F.2d 1174 (10th Cir. 1972).

35. *Id.* at 1174-75.

36. *Id.* at 1175.

37. For the text of section 1983, *see* note 2 *supra*.

38. *See* Imbler v. Pachtman, 424 U.S. 409, 417-19 (1976).

States Supreme Court, however, in *Tenney v. Brandhove*,[39] held that immunities and defenses may be applied in certain instances to defeat a section 1983 claim.[40] Thus, the courts have applied immunity to a section 1983 claim on a case-by-case basis, eventually carving out exceptions to section 1983 liability for certain classes of state officials.[41] There are two basic types of immunity which a court may apply to a section 1983 claim. These are absolute (judicial and quasi-judicial) and qualified immunity.[42]

Judicial immunity is the absolute immunity provided to judges acting within the scope of their official duties.[43] Recently, the United States Supreme Court, in *Stump v. Sparkman*,[44] reemphasized the absolute quality of judicial immunity when the judge acts within his or her official capacity, even if the judge acts maliciously or in excess of authority.[45]

Quasi-judicial immunity, the other form of absolute immunity, has been granted by the courts to those persons found to have judicial-like duties.[46] The rationale for the extension of this immunity is that these individuals make discretionary judgments on the basis of evidence presented to them similar to those of a judge exercising judicial authority. The state prosecutor is the most recent official to arrive under the quasi-judicial umbrella. In *Imbler v. Pachtman*,[47] the United States

39. 341 U.S. 367 (1951).

40. *Id.* at 376-77. *But see* Scheuer v. Rhodes, 416 U.S. 232, 243-49 (1974) (Congress did not intend to incorporate all common law immunities into section 1983).

41. *See* Monroe v. Pape, 365 U.S. 167 (1961). *But see* Monell v. Department of Social Servs., 436 U.S. 658 (1978) (overrules *Monroe* as to absolute immunity of local governments in section 1983 actions). For an argument in favor of a strict reading of section 1983 which would allow no immunity applications, *see* Pierson v. Ray, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting); Tenney v. Brandhove, 341 U.S. 367, 382-83 (1951) (Douglas, J., dissenting).

42. For general background on judicial and quasi-judicial immunity, *see* Fullwood, *Immunity Under 42 U.S.C. Section 1983*, 7 N.C. CENT. L.J. 39 (1975); McCormack & Kilpatrick, *Immunities of State Officials Under Section 1983*, 8 RUT.-CAM. L.J. 65 (1976); Note, *Liability of Public Officers to Suit Under the Civil Rights Acts*, 46 COLUM. L. REV. 614 (1946); Note, *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 DUKE L.J. 95. *See* notes 50-54 *infra* and accompanying text for general background on qualified immunity.

43. By definition, judicial immunity applies only to a section 1983 claim against a judge. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). Judicial immunity is preserved in the case of a section 1983 claim. *See* Pierson v. Ray, 386 U.S. 547 (1967).

44. 435 U.S. 349 (1978). In *Stump*, the United States Supreme Court upheld a state court judge's approval of a mother's petition to have her " 'somewhat retarded' " fifteen-year-old daughter sterilized without informing the daughter. *Id.* at 351. The Court found that although the judge may have acted maliciously and in excess of his authority, the judge will be protected by absolute immunity unless he has acted in clear absence of all jurisdiction. *Id.* at 362-64.

45. *Id.* at 356.

46. *See* Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503, 506 (1927) (United States Attorney General); Rhodes v. Meyer, 225 F. Supp. 80 (D. Neb. 1963), *cert. denied*, 379 U.S. 915 (1964) (state attorney general); Turpen v. Booth, 56 Cal. 65, 69 (1880) (grand jurors); Hunter v. Mathis, 40 Ind. 356, 358 (1872) (grand jurors).

47. 424 U.S. 409 (1976). For an analysis of the *Imbler* opinion, *see* Note, *Prosecutor Not*

Supreme Court compared the role of a state prosecutor to that of a judge and found that the state prosecutor, by virtue of the ability to determine who should be brought to trial and when, performed a judicial-like function.[48] Thus, the Court reasoned that the state prosecutor must be absolutely immune from any section 1983 claim so that he or she may proceed with the "vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[49]

The other basic type of immunity granted by the courts in a section 1983 claim is qualified immunity. It is granted to those officials of the state who possess non-judicial authority but who must be protected in certain instances from claims which unnecessarily interfere with their duties.[50] The United States Supreme Court has granted qualified immunity to policemen,[51] public school board members,[52] and state executive officers.[53] Qualified immunity is narrower in scope than the immunity enjoyed by holders of absolute immunity because it is granted to these officials only when they carry out their duties in good faith,[54] whereas there is no good faith requirement under the doctrine of absolute immunity.

The distinction between absolute immunity and qualified immunity should not be overlooked. Not only will absolute immunity protect the official in apparently every aspect of his or her official duties,[55] it will defeat any claim against the official at the outset of the proceedings.[56] Once absolute immunity is granted, the suit is dismissed, no

Amenable to Civil Rights Suit, 62 A.B.A.J. 642 (1976); Note, 60 MARQ. L. REV. 152 (1976); Comment, 16 WASHBURN L.J. 217 (1976). Prior to *Imbler*, the state prosecutor was ordinarily granted qualified immunity. *See* Arensman v. Brown, 430 F.2d 190 (7th Cir. 1970).

48. 424 U.S. at 430.

49. *Id.* at 427-28. Justices White, Brennan and Marshall, concurring in *Imbler*, would grant only qualified immunity to a state prosecutor who is faced with a claim based on "unconstitutional suppression of evidence" because to do otherwise would "*injure* the judicial process and interfere with Congress' purpose in enacting section 1983." *Id.* at 433 (White, J., concurring).

50. For background information on this area of immunity, *see* Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941 (1977); Note, 20 VILL. L. REV. 1057 (1975); Note, 21 WAYNE L. REV. 1103 (1975).

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

52. Wood v. Strickland, 420 U.S. 308 (1975).

53. Scheuer v. Rhodes, 416 U.S. 232 (1974). *See also* Procunier v. Navarette, 434 U.S. 555 (1978) (qualified immunity granted to prison official).

54. Correspondingly, any activity which is outside official duty will not be protected by qualified immunity in a section 1983 claim. For general background on the good faith requirement in qualified immunity, *see* Note, *Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?*, 27 CASE W. RES. L. REV. 727 (1977); Note, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 TEMPLE L.Q. 938 (1976).

55. Stump v. Sparkman, 435 U.S. 349 (1978).

56. *See* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976).

matter how egregious the behavior of the official.[57] Qualified immunity, on the other hand, may be applied only after the case has been presented on its merits and the official has been found to have carried out his or her duties in good faith.[58]

Public Defenders and the Immunity Defense in a Section 1983 Action: Approaches Taken by the United States Courts of Appeals

Two circuits, relying on *Imbler v. Pachtman*,[59] have granted absolute immunity to the public defender.[60] However, in so doing, these courts have failed initially to establish the requisite state action upon which a section 1983 claim is, in part, based.

The Ninth Circuit relied on *Imbler* in deciding *Miller v. Barilla*.[61] In *Miller*, the public defender was charged with depriving the indigent client of the sixth amendment right to trial[62] for having breached a plea bargain.[63] The court held that the public defender, like the state prosecutor in *Imbler*, was absolutely immune from section 1983 claims for acts within the "judicial" function of a public defender.[64] The state action question of whether the public defender had acted under color of state law was left unsettled, although the Ninth Circuit suggested that state action appeared to be tenuous.[65]

57. *See* Stump v. Sparkman, 435 U.S. 349, 356 (1978).

58. It is important to note that an individual normally protected by quasi-judicial immunity may receive only qualified immunity if the act alleged is considered to be outside the individual's quasi-judicial function. *See* Hilliard v. Williams, 465 F.2d 1212, 1217 (6th Cir.), *cert. denied*, 409 U.S. 1029 (1972); Brown v. Dunne, 409 F.2d 341, 343-44 (7th Cir. 1969). For example, state prosecutors who defame a defendant in public, Martin v. Merola, 532 F.2d 191, 195 (2d Cir. 1976) (per curiam); enter a conspiracy, Holton v. Boman, 493 F.2d 1176, 1178 (7th Cir. 1974); engage in a raid for the purpose of committing murder, Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); or, induce sheriffs to coerce a confession from a suspect, Robichaud v. Ronan, 351 F.2d 533, 537-38 (9th Cir. 1965) and Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955) may find these acts to be outside the "absolute" quasi-judicial immunity afforded to them under *Imbler*.

59. 424 U.S. 409 (1976).

60. *See* Miller v. Barilla, 549 F.2d 648, 649 (9th Cir. 1977) and Minns v. Paul, 542 F.2d 899, 901 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977). For a discussion in favor of the grant of absolute immunity to the public defender, *see* Nakles, *Criminal Defense Lawyers: The Case for Absolute Immunity From Civil Liability*, 81 DICK. L. REV. 229 (1976).

61. 549 F.2d 648, 649 (9th Cir. 1977).

62. U.S. CONST. amend. VI states:

> 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 accusations; 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.

63. The indigent client in *Miller* alleged that the public defender made false representations that the plea bargain would be honored, thereby inducing the indigent to accept the plea bargain which was not respected. 549 F.2d at 648.

64. *Id.* at 649.

65. *Id.* at 650.

State action was also left undecided by the Fourth Circuit in *Minns v. Paul*,[66] where a public defender had allegedly violated the indigent client's fourteenth amendment rights by failing to respond to the indigent's request for aid in preparing a writ of habeas corpus.[67] The Fourth Circuit relied on the *Imbler* analogy and held that the public defender was absolutely immune from a section 1983 claim.[68] The *Minns* court identified two policy reasons in support of the absolute immunity grant to the public defender. These were the need to recruit able attorneys as public defenders and the desire to encourage the public defender to use "unfettered discretion . . . to assign priorities between indigent litigants, and to make strategic decisions."[69]

The Fourth Circuit, in *Minns*, introduced another consideration in favor of a grant of absolute immunity to the public defender—the possibility of "frivolous" section 1983 claims.[70] According to the court, "indigents more frequently attempt to litigate [section 1983] claims which are patently without merit than do non-indigent parties."[71] In fact, the court found the *Minns* case to be a "classic example"[72] of such a frivolous section 1983 claim since Minns' only complaint was that the legal services which he sought were not forthcoming within the thirty-seven days which elapsed between the request for aid in preparing the writ of habeas corpus and the filing of the section1983 complaint.[73]

Two circuits, prior to the decision in *Imbler v. Pachtman*,[74] had determined that qualified immunity affords adequate protection to a public defender in a section 1983 claim. Again, however, these courts

66. 542 F.2d 899 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977). For an analysis of the implications of *Minns, see* Note, 26 CATH. U.L. REV. 620 (1977); Note, 5 FORDHAM URB. L.J. 390 (1977); Note, 63 VA. L. REV. 607 (1977); Comment, 1977 WASH. U. L. Q. 155.

67. For the text of the fourteenth amendment, *see* note 1 *supra*. For a discussion of the use of the writ of habeas corpus, *see* Stone v. Powell, 428 U.S. 465, 474-82 (1976). The court in *Minns* stated the facts surrounding the alleged deprivation of a constitutional right as follows:

> Between the 8th and 14th of January, 1975, Minns telephoned Paul to request legal assistance in preparing a petition for habeas corpus; during that conversation, Minns was assured that Paul would be back in contact with him within a week. On January 18, 1975, the plaintiff sent a formal written request for legal assistance to the defendant. At Minns' insistence, on February 5, 1975, the Assistant Superintendent of the Correctional Unit telephoned Paul to discover the reasons why the defendant had not acted upon the plaintiff's requests for legal assistance. On February 6, 1975, Minns sent a second letter to the defendant, once again requesting legal assistance. Paul has never responded in any way to these requests.

542 F.2d at 900.

68. The *Minns* court stated: "Because we agree [that the public defender is immune] . . . we do not reach the question of whether Minns acted under color of state law." *Id.*

69. *Id.* at 901.

70. *Id.* at 902.

71. *Id.*

72. *Id.*

73. *Id.*

74. 424 U.S. 409 (1976).

had determined that the public defender has qualified immunity without establishing the requisite state action necessary for a valid section 1983 claim.

In *Brown v. Joseph*,[75] an indigent client at arraignment refused the services of his court-appointed public defender. At trial for robbery, the public defender represented the indigent who pleaded guilty and was sentenced.[76] The indigent subsequently brought a section 1983 action against the public defender for allegedly violating his constitutional right to trial.[77] The Third Circuit, in *Brown*, found the public defender to have a qualified immunity similar to state prosecutors.[78] The state action question was left undecided.[79]

Prior to *Robinson v. Bergstrom*,[80] the sole case in the Seventh Circuit concerning a section 1983 claim against a public defender was *John v. Hurt*.[81] In *John*, an indigent state prisoner filed a *pro se* complaint alleging that the public defender who represented him at trial had deprived him of his sixth amendment rights.[82] On appeal, the Seventh Circuit did not specifically rule on the state action question. Rather, the court determined that even were the public defender deemed to be acting under color of state law, the public defender, as a matter of law, was immune from liability for damages.[83]

The Seventh Circuit in *John* found the public defender to have a qualified immunity similar to that of state prosecutors.[84] Again, public policy considerations of recruitment and performance were cited for extending immunity to the public defender. But the court, in *John*, found that a grant of qualified rather than absolute immunity was sufficient to "encourage . . . free exercise of discretion in the performance

75. 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

76. *Id.* at 1046. Apparently, the indigent, although represented at trial by the public defender, did not wish to be so represented nor, in retrospect, to plead guilty.

77. *Id.*

78. *Id.* at 1048-49. Although the court in *Brown* does not identify the immunity as qualified, the immunity granted was the same immunity given state prosecutors at that time—qualified immunity.

79. The court stated that "we do not deem it necessary to decide the question (citation omitted) because in the view we take, even assuming the color of law requirement to have been met, we hold that a County Public Defender, created under the Pennsylvania statute, enjoys immunity from liability." *Id.* at 1048.

80. 579 F.2d 401 (7th Cir. 1978) (per curiam).

81. 489 F.2d 786 (7th Cir. 1973).

82. *Id.* at 787. *See* note 62 *supra* for the text of the sixth amendment. The *pro se* complaint in *John* was drafted by the indigent client and made vague allegations that the public defender had been incompetent by failing "to move to suppress damaging evidence . . . [and] call all witnesses in plaintiff's behalf." 489 F.2d at 787.

83. *Id.* at 788.

84. *Id. John* was decided before the United States Supreme Court decision in *Imbler* granted absolute immunity to state prosecutors. 424 U.S. at 427-28.

of professional obligations, as well as aid in the recruitment of able men and women for public defender positions."[85] Five years after *John*, the issue of immunity for public defenders was once again before the Seventh Circuit.

ROBINSON V. BERGSTROM

Facts of the Case

In *Robinson v. Bergstrom*,[86] Earl Robinson, an indigent, was represented in a trial for murder by John C. Bergstrom, a part-time assistant public defender for Champaign County, Illinois. In his capacity as assistant public defender, Bergstrom was compensated by the state. In a jury trial on September 27, 1968, Robinson was convicted. Shortly thereafter, Bergstrom was reappointed in his capacity as public defender to represent Robinson on appeal. Bergstrom did not prosecute Robinson's appeal[87] and resigned his position as public defender in 1973. Robinson's appeal was filed in May 1974 by the Illinois State Appellate Defender's Office[88] and was subsequently denied.

Because the delay between Robinson's conviction and the filing of the appeal was approximately five and one half years, Robinson maintained that he was denied access to various prison programs and prevented from filing a federal habeas corpus petition because all state remedies had not been exhausted.[89] In reply, Bergstrom testified that an error in judgment regarding his caseload was the primary reason for the delay.[90]

In 1973, Robinson filed a section 1983 claim against Bergstrom.[91] Robinson alleged that Bergstrom had acted under color of state law, thereby depriving Robinson of his rights under the sixth and fourteenth amendments to the United States Constitution.[92] The district court found no state action on the part of Bergstrom and dismissed the complaint.[93] On appeal, the Seventh Circuit found that it was at least argu-

85. 489 F.2d at 788.

86. 579 F.2d 401 (7th Cir. 1978) (per curiam).

87. *Id.* at 402. Bergstrom did file notice of appeal. The only other actions taken by Bergstrom were two apparent visits to Robinson in prison in 1972. *Id.*

88. *See* The State Appellate Defender Act, P.A. 77-2633, ILL. REV. STAT. ch. 38, §§ 208-1-208-11 (1977).

89. 579 F.2d at 403. For a discussion of the use of a writ of habeas corpus, *see* Stone v. Powell, 428 U.S. 465, 474-82 (1976).

90. 579 F.2d at 402. Bergstrom testified that his caseload was approximately six hundred to nine hundred cases per year. *Id.*

91. *Id.* at 403.

92. *Id.* For the pertinent provisions of the texts of the fourteenth and sixth amendments to the United States Constitution, *see* notes 1 and 62 *supra*.

93. 579 F.2d at 403.

able that a public defender, acting within his capacity as a public servant, falls within the meaning of "under color of state law."[94] Accordingly, the Seventh Circuit vacated and remanded.[95] On remand, the district court held that Bergstrom had not acted under color of state law when he represented Robinson as a public defender.[96] Robinson again appealed to the Seventh Circuit.

Reasoning of the Court

In its second review of the *Robinson* case, the Seventh Circuit held that the traditional procedure of granting either absolute or qualified immunity to the public defender prior to the determination of the state action question was incorrect.[97] The court rejected the procedure established in *Miller v. Barilla*,[98] *Minns v. Paul*,[99] and *Brown v. Joseph*[100] and found that its own handling of *John v. Hurt*[101] was incorrect.[102] Thus, the Seventh Circuit held that the requisite state action of a section 1983 claim was an "essential jurisdictional predicate."[103] The court viewed immunity, on the other hand, as an affirmative defense to be raised only after subject matter jurisdiction has been established.[104] In sum, the Seventh Circuit found it necessary to settle the state action question to determine jurisdiction before considering a grant of immunity.[105]

Following this approach, the court determined that the state action question in *Robinson* was whether the public defender, as a state em-

94. The Seventh Circuit cited its opinion in John v. Hurt, 489 F.2d 786 (7th Cir. 1973). 579 F.2d at 403.

95. Robinson v. Bergstrom, No. 73-1401 (7th Cir. March 12, 1974) (unpublished order vacating and remanding cause for hearing).

96. Robinson v. Bergstrom, No. CV 73-85-E (May 15, 1974) (unpublished opinion).

97. *See* note 105 *infra*.

98. 549 F.2d 648 (9th Cir. 1977).

99. 542 F.2d 899 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977).

100. 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

101. 489 F.2d 786 (7th Cir. 1973).

102. 579 F.2d at 403-04.

103. *Id.* at 404.

104. *Id.* The court cited Stump v. Sparkman, 435 U.S. 349 (1978) and Larsen v. Gibson, 267 F.2d 386 (9th Cir.), *cert. denied*, 361 U.S. 848 (1959) for this proposition although neither of these cases mentions the prior establishment of state action as an "essential jurisdictional predicate."

105. What the Seventh Circuit in *Robinson* meant by the "incorrect" application of absolute immunity before determining the requisite state action is unclear. The process used by the courts in *Miller, Minns* and *Brown* may be incorrect analytically, but it is not incorrect procedurally. Courts may wish to pass over the difficult constitutional state action question and simply apply absolute immunity. Such a procedure might be improper where the court could not have found state action because jurisdiction would be lacking, *see* Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977), but the Seventh Circuit in *John* presumed state action on the part of the public defender, 489 F.2d at 788. In using either process, the result is the same: absolute immunity for the public defender.

ployee who maintains a private attorney-client relationship, acts under color of state law.[106] The court concluded that only if the private function of representing the indigent overrides the public defender's state employment may the public defender be found not to act under color of state law for section 1983 purposes.[107] For the purpose of analysis, the court found it necessary to cursorily review "state action" as applied to a state employee who maintains a private function as a part of the state employment.[108]

The Seventh Circuit found the state action "nexus test" enunciated by the United States Supreme Court in *Jackson v. Metropolitan Edison Co.*[109] to be improper in the context of the public defender.[110] The *Jackson* test is "whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself."[111] The *Robinson* court rejected this test as applied to the public defender since there would not be the required close nexus between the state and the public defender's action in representing the indigent client.[112]

The court then turned to another state action test based on *Burton v. Wilmington Parking Authority.*[113] In *Burton*, the United States Supreme Court held that when the state leases its property to a private individual, state action may be found on the part of that individual.[114] The holding in *Burton* was narrow and confined to the facts of the case.[115] However, *Burton* has been interpreted to find state action where there is explicit statutory authorization that a private entity act as an agent of the state[116] and where the private entity is statutorily a state instrumentality and a state related institution.[117] Thus, the con-

106. 579 F.2d at 405.

107. *Id.*

108. *Id. See generally* Black, *Foreword: State Action, Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Note, *State Action in the Seventh Circuit*, 59 MARQ. L. REV. 809 (1976).

109. 419 U.S. 345 (1974).

110. 579 F.2d at 406.

111. 419 U.S. at 351.

112. The court stated:

> The 'nexus' test requires not only proof of significant state regulation but also that there be a sufficiently close nexus between the challenged action and the state. If this test is applied in the public defender context it is possible, because of the latter requirement, that a public defender could be held not to be acting under color of state law.

579 F.2d at 406.

113. 365 U.S. 715 (1961).

114. *Id.* at 726.

115. *Id.*

116. *See* Hollenbaugh v. Carnegie Free Library, 545 F.2d 382 (3d Cir. 1976) (explicit statutory authorization that library act as agent for the state).

117. *See* Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977) (en banc) (university statutorily a state-related institution).

cept set forth in *Burton* has been judicially expanded into a *Burton* "test" for state action.

This *Burton* "test" for state action has been utilized recently by the Third Circuit, in *Chalfant v. Wilmington Institute*,[118] where the court held that the uncompensated, "private citizen"[119] board members of a public library were acting under color of state law because the library was substantially funded by the state.[120] The court concluded that to find state action, the status of the individual actor is irrelevant as long as the institution on whose behalf the actor serves is found to be an instrumentality of a state or local government.[121] In *Chalfant*, the public library was created and funded by state statute and located on city-owned property. The Seventh Circuit, in *Robinson*, adopted the Third Circuit's approach to the state action question. The court determined the public defender's private attorney-client relationship to be irrelevant since the public defender office was statutorily created and publicly compensated and the public defender acted on behalf of a state instrumentality.[122]

Having established that Bergstrom had acted under color of state law when he failed to prosecute Robinson's appeal, the Seventh Circuit proceeded to the immunity issue. The court began by noting that its decision in *John v. Hurt*[123] granted qualified immunity to the public defender.[124] However, the court found that since its opinion, in *John*, had analogized public defender immunity to that of state prosecutors, the intervening United States Supreme Court decision in *Imbler v. Pachtman*[125] was controlling.[126]

In its *Imbler* analysis, the United States Supreme Court utilized a two step inquiry to determine whether to apply absolute immunity to a section 1983 claim. The first inquiry considered the type of immunity

118. 574 F.2d 739, 745 (3d Cir. 1978) (en banc).

119. *Id.* at 741.

120. The public library, in *Chalfant*, received ninety percent of its funding from the state. *Id.* at 745.

121. *Id.*

122. The Seventh Circuit, in *Robinson*, found the public defender to be:

> as much, if not more, of an instrumentality of the state as the library in *Chalfant* . . . In view of the office's inextricable relation to the state, no proof that the challenged acts are related to the state is necessary. The fact that the Public Defender is a state instrumentality is sufficient to show state action.

579 F.2d at 407-08.

123. 489 F.2d 786 (7th Cir. 1973).

124. 579 F.2d at 403.

125. 424 U.S. 409 (1976).

126. The Seventh Circuit recognized that the Fourth and Ninth Circuits had already applied *Imbler* to the public defender in Minns v. Paul, 542 F.2d 899 (4th Cir. 1976) and Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977). 579 F.2d at 408.

historically accorded to the official.[127] The Seventh Circuit, however, was unable to make such an inquiry in *Robinson* with regard to the public defender because the position was "a creature of recent origin, the outgrowth . . . of . . . *Gideon v. Wainwright*."[128] The court then turned to what it considered to be the "more heavily stressed"[129] inquiry in *Imbler* which dealt with the public policy considerations of the recruitment and performance of the state prosecutor. Here, the Seventh Circuit found that since its own public policy reasoning, in *John v. Hurt*,[130] was based on the type of immunity granted state prosecutors, *Imbler*'s public policy considerations favored extending absolute immunity to public defenders.[131] The court, in *Robinson*, also was concerned with the possibility of frivolous section 1983 claims, as in *Minns v. Paul*,[132] which might hinder the public defender in carrying out his or her duties. Thus, the court extended absolute immunity to the public defender in a section 1983 action.[133]

The Seventh Circuit acknowledged that the grant of absolute immunity might create less incentive for the public defender to provide the most effective defense for the indigent client.[134] But the court noted that such behavior would be deterred by professional sanctions[135] and the possibility of charges brought against the public defender based on 18 U.S.C. § 242,[136] the criminal counterpart to section 1983. Finally, realizing that its decision in *Robinson* would preclude successful section 1983 actions against public defenders, the court listed a number of alternatives available to the indigent client absent a viable section 1983 claim. These alternatives were a tort action based on attorney malpractice, criminal charges under section 242, the filing of a writ of habeas

127. In *Imbler*, the United States Supreme Court found a well-settled rule of immunity for state prosecutors extending back to 1896. 424 U.S. at 420-21. *See* Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896).

128. 579 F.2d at 409.

129. *Id.*

130. 489 F.2d 786 (7th Cir. 1973). *See* text accompanying notes 84-85 *supra*.

131. 579 F.2d at 410.

132. 542 F.2d 899 (4th Cir. 1976).

133. 579 F.2d at 410.

134. *Id.* at 411.

135. *Id.* at 410. *See* ABA CANONS OF PROFESSIONAL RESPONSIBILITY No. 7.

136. 18 U.S.C. § 242 (1976) [hereinafter referred to as section 242] is the criminal counterpart to section 1983. Section 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties on account of such an inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisonment not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

corpus in federal court and raising the issue of ineffective counsel in a motion for a new trial or on appeal.[137]

Analysis of the Seventh Circuit Opinion

The Seventh Circuit properly rearranged the traditional judicial inquiry into a section 1983 claim against a public defender. Following the procedure established in *Robinson v. Bergstrom*,[138] the courts should first determine that they have jurisdiction over the case before they consider whether to apply immunity to a section 1983 claim. Otherwise, immunity is apt to be erroneously applied in a situation where the defendant who is not acting under color of state law could not be held liable in the first place.[139] Thus, the Seventh Circuit correctly confronted the state action question before addressing the immunity issue.

Traditionally, the courts have not found state action on the part of the public defender.[140] The Seventh Circuit, in *Robinson*, however, was correct to emphasize the public defender's state employment and thus apply two major state action tests. The state action test set forth in *Jackson v. Metropolitan Edison Co.*[141] was not helpful because there would never be the required close nexus between the state and the public defender's acts in representing the indigent client.[142] In fact, the application of the *Jackson* test would have required focusing exclusively on the private nature of the attorney-client relationship where it might have been concluded that the public defender had no ties to the state and thus was completely outside the scope of state action. Therefore, the court in *Robinson* correctly applied the state action test based on *Burton v. Wilmington Parking Authority*[143] to find that the individual need only be a state instrumentality to satisfy the necessary state action for section 1983 purposes. The fact that the official conduct of the public defender is not absolutely controlled by the state should not preclude a finding of state action. Thus, the court correctly concluded that the public defender acts under color of state law for section 1983 purposes when representing the indigent client.

Unfortunately, the court's application of absolute immunity to the

137. 579 F.2d at 410-11.
138. 579 F.2d 401 (7th Cir. 1978) (per curiam).
139. *See* note 105 *supra*.
140. *See* notes 29-36 *supra* and accompanying text.
141. 419 U.S. 345 (1974).
142. *See* notes 109-12 *supra* and accompanying text for explanation of the *Jackson* state action test as applied in *Robinson*.
143. 365 U.S. 715 (1961). *See* notes 113-22 *supra* and accompanying text for explanation of the *Burton* state action test as applied in *Robinson*.

public defender is not as well-reasoned as is its discussion of state action. In *John v. Hurt*,[144] the Seventh Circuit granted the public defender the more limited qualified immunity. The court abandoned this conservatism, in *Robinson*, to follow the Fourth and Ninth Circuits[145] in deciding that since the United States Supreme Court has given absolute immunity to the state prosecutor, the public defender should receive it as well.

The analogy between the state prosecutor and the public defender is a tenuous one. Because the state prosecutor has the ability to partially control so-called questions of guilt and innocence[146] by deciding whom to indict, prosecute, and bring to trial, the state prosecutor does perform some quasi-judicial functions. Consequently, the state prosecutor is accorded quasi-judicial immunity. The public defender, on the other hand, performs none of these quasi-judicial functions. Of course, the public defender exercises some discretion in regard to trial strategy, witnesses, and the like. However, these duties are comparable to those of the private attorney and are not akin to the quasi-judicial function of the state prosecutor.

Indeed, the office of public defender was created solely to provide representation for indigent clients who would otherwise be without counsel. Thus, the loyalty, duty, and energy of the public defender should go towards the defense of the indigent client. With the grant of quasi-judicial immunity, the public defender becomes an absolutely immune arm of the state acting in concert with the judge and prosecutor rather than an attorney representing a client. The grant of qualified immunity, on the other hand, would protect amply the public defender's official conduct of representing the indigent client when performed in good faith but, at the same time, retain for that client a section 1983 action should the elements for such a claim be present.[147]

The Seventh Circuit noted the public policy considerations of recruitment and performance set forth in *Imbler* and *John* in support of the extension of absolute immunity to the public defender.[148] While these public policy considerations are generally sound, they are not applicable to the facts in *Robinson*. In *Robinson*, Bergstrom failed for five and one half years to process Robinson's appeal. Bergstrom's behavior is not the sort of professional decision-making which the grant of abso-

144. 489 F.2d 786 (7th Cir. 1973).
145. Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977) and Minns v. Paul, 542 F.2d 899 (4th Cir. 1976).
146. Imbler v. Pachtman, 424 U.S. 409, 426 (1976).
147. *See* notes 50-54 *supra* and accompanying text.
148. *See* 489 F.2d at 788.

lute immunity is intended to protect. There is no public policy to encourage public defenders to accept indigent clients whom the public defender either cannot or will not responsibly represent.[149]

The facts, in *Robinson*, also refute the "frivolous" section 1983 claim argument used to support the grant of absolute immunity.[150] Certainly, in recent years there has been an increase in section 1983 claims against public defenders[151] and several of these claims have been deemed to be frivolous by the courts.[152] Yet, the grant of absolute immunity effectively closes off potentially valid section 1983 claims. This grant of absolute immunity to the public defender for fear of frivolous claims by indigent clients is inconsistent with the underlying purpose of section 1983 to make liable every person who under color of state law deprives another of constitutional rights.[153] Although a grant of qualified immunity would place a burden on the public defender to defend against a section 1983 claim, on balance this alternative is preferable to the blanket grant of absolute immunity. The burden should be on the states to insure that their mandated public defender offices are fully staffed to meet the demands of indigent client representation rather than on the client whose status as an indigent forces him or her to rely on the state-created public defender.

The court, in *Robinson*, suggested several possible alternatives[154] for the indigent client other than a section 1983 claim.[155] The suggestions were a tort action based on attorney malpractice, a section 242 charge, a writ of habeas corpus, and raising the issue of ineffective counsel in a motion for a new trial or on appeal. These suggested alternatives simply are not that feasible for an indigent client.

A tort claim based on attorney malpractice[156] against the public

149. Although the public defender has an assigned caseload, the public defender may withdraw from an indigent client's case. *See* Anders v. California, 386 U.S. 738 (1967).

150. *See* notes 70-73 and 132 *supra* and accompanying text.

151. *See, e.g.*, Minns v. Paul, 542 F.2d 899 (4th Cir. 1976). The number of section 1983 claims as a whole has increased dramatically in recent years. *See generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1135 (1977).

152. *See* Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977) and Minns v. Paul, 542 F.2d 899 (4th Cir. 1976). *See generally* Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size*, 15 DUQ. L. REV. 49 (1976).

153. *See* note 2 *supra* for the text of section 1983.

154. *See generally* Faretta v. California, 422 U.S. 806 (1975) (*pro se* complaint). For background on alternate remedies available against a public defender, *see* Note, 60 MINN. L. REV. 123 (1973); Note, 30 OKLA. L. REV. 457 (1977).

155. 579 F.2d at 410.

156. For background on a tort claim based on attorney malpractice in the section 1983 context, *see* Mallen, *The Court Appointed Lawyer and Legal Malpractice—Liability or Immunity*, 14 AM. CRIM. L. REV. 59 (1976); Comment, 57 IOWA L. REV. 1420 (1975). For a discussion as to whether tort concepts as a whole should be applied to section 1983 claims, *see* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974).

defender is generally of little use to the indigent who could not financially afford to retain private counsel in the first place. There is, however, the possibility of such an action being brought on a contingent fee basis.[157] Whether a public defender can be held liable in a tort action based on attorney malpractice depends upon the type of tort immunity, if any, granted to the public defender under state law.[158] In Illinois, where Robinson would presumably bring suit against Bergstrom, a public defender would apparently be immune from such a tort claim for the same reasons that a public defender is immune from a section 1983 suit.[159]

A criminal charge against the public defender based on section 242,[160] the criminal counterpart to section 1983, is also of little value to most indigent clients because of three prerequisites to the charge. The section 242 charge must be founded on the public defender's willful intent to deprive the indigent of constitutional rights[161] based on the indigent's alienage, race or color[162] and brought by a federal grand jury or attorney general.[163] Obviously, these provisions severely limit the applicability of section 242.[164] In fact, the Seventh Circuit, in *Robinson*, noted that Robinson could not bring a section 242 charge against Bergstrom.[165]

A writ of habeas corpus may not be filed in federal court until all state remedies are exhausted.[166] As seen in *Robinson*, a writ of habeas corpus is not an effective alternative where the public defender representing the indigent client does not exhaust all state remedies. Thus, an indigent client desiring to file a writ of habeas corpus because of misrepresentation or deprivation of a constitutional right by the public defender may be denied the writ because that same public defender has failed to exhaust all of the indigent's state remedies.

157. *See* Fletcher v. Hook, 446 F.2d 14 (3d Cir. 1971); Ehn v. Price, 372 F. Supp. 151 (N.D. Ill. 1974).

158. Therefore, to determine the public defender's liability under an attorney malpractice action, the state law with regard to the potential immunity of the public defender must be determined.

159. *See* Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973) (dicta) (applying Illinois law).

160. *See* note 136 *supra* for the text of section 242.

161. *See* Screws v. United States, 325 U.S. 91 (1945); United States v. Senak, 477 F.2d 304 (7th Cir. 1973).

162. *See* United States v. Classic, 313 U.S. 299 (1941).

163. *See* Kennedy v. Anderson, 373 F. Supp. 1345 (E.D. Okla. 1974).

164. However, section 242 charges have been brought against the public defender. *See* United States v. Senak, 477 F.2d 304 (7th Cir. 1973) (section 242 charges upheld against public defender charged with exacting fees from indigent client by threatening inadequate legal representation).

165. 579 F.2d at 411. The Seventh Circuit mentions only the "intentional" aspect of a section 242 charge without, apparently, realizing that there are two additional requirements for such a charge.

166. *See* Stone v. Powell, 428 U.S. 465, 474 (1976).

Raising the issue of attorney misrepresentation in a motion for a new trial or on appeal may eventually secure a new trial or appeal for the indigent client, but these two alternatives certainly do not attempt to compensate the indigent client for a deprivation of a constitutional right at the hands of an incompetent public defender.[167] In the *Robinson* case itself, Robinson was forced to wait five and one half years for his appeal because the public defender failed to process the appeal.[168]

Thus, the alternatives to a section 1983 claim suggested by the Seventh Circuit are not particularly feasible for the indigent client. The grant of absolute immunity to the public defender, which precludes a viable section 1983 claim, leaves the indigent client with few alternatives. The grant of qualified immunity, on the other hand, would protect the public defender's official acts performed in good faith yet allow the indigent client a claim under section 1983 should the elements for such a claim be present. Otherwise, those individuals in Robinson's position who are forced to wait five and one half years between conviction and appeal will be without remedy.

CONCLUSION

Section 1983 was enacted by Congress to ensure that no one who acts under color of state law can deprive an individual of constitutional rights or privileges. While the courts have allowed the defense of immunity to be used at times to defeat such claims, the fundamental reasons for section 1983 remain and should not be undermined by the wholesale application of absolute immunity.

The Seventh Circuit, in *Robinson v. Bergstrom*, presented a well-reasoned discussion in favor of finding state action on the part of the public defender. In so doing, the court held out hope to the indigent client who is otherwise without a viable remedy against the public defender. Unfortunately, the Seventh Circuit's grant of absolute immunity to the public defender is misapplied, making the court's persuasive state action decision only an empty gesture to the indigent client. A grant of qualified immunity by the Seventh Circuit would have pro-

167. *See generally* Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 LOY. CHI. L.J. 527 (1975); Margolin & Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards*, 24 HASTINGS L.J. 647 (1973).

168. For a discussion as to damages the indigent might receive in a section 1983 action, *see* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

tected amply those public defenders who perform their duties in good faith, as well as preserve an effective remedy against those who do not.

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