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third persons involved in the agency relationship other than article 3010, which makes mandataries liable to such persons in their individual capacities. Since it is reasonable to assume that principals are more likely to be financially responsible than their agents, the solution contemplated by this article appears untenable in a modern commercial society. In view of Louisiana's need for a doctrine analogous to the common law concept of apparent authority, it seems that the result reached in *Dixie Parking Service* was the correct one, despite the court's questionable application of codal authority. It is submitted that it would be more desirable for the courts, in applicable cases, to apply common law principles as their source for apparent authority—at least until the Louisiana Civil Code can be revised so as to embrace an equivalent concept.

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THE RIGHT OF THE INDIGENT CLIENT TO SUE HIS COURT-APPOINTED ATTORNEY FOR MALPRACTICE

The assistance of counsel has been afforded the accused in federal criminal prosecutions for several decades.[1] The Supreme Court of the United States first guaranteed the indigent's right to counsel in all state felony prosecutions (via the fourteenth amendment) in *Gideon v. Wainwright*.[2] The recent decision in *Argersinger v. Hamlin*[3] provided that in all criminal prosecutions, including misdemeanors, no incarceration could flow from a conviction of a crime unless the defendant is afforded the assistance of counsel. Attorneys will as a result defend increasing numbers of indigent clients who are a diversion from and burden to their regular practice. It is a reasonable inference from this fact that the instances of professional malpractice may increase at least proportionately to the corresponding increase in representation of indigent clients. The concern of this Note is the isolation and examination of the civil remedies available to the indigent client to redress the wrong caused by his attorney's incompetence.

We must begin, however, with the remedies for incompetent counsel within the framework of the criminal proceed-

1. Johnson v. Zerbst, 304 U.S. 458 (1937).
2. 372 U.S. 335 (1963).
3. 407 U.S. 25 (1972).

ing, as the nature of post-conviction relief in criminal proceedings provides the contrast against which the viability of the civil remedies is brought into focus. It is well-established that a defendant has grounds for post-conviction relief for incompetent counsel if the assistance of counsel is perfunctory and for the sake of form alone.[4] The test for determining the lack of effective counsel is rather vague and is most commonly enunciated as follows:

> "There can be held to be lack of effective counsel only when it appears that the assistance of counsel was so grossly inept as to shock the conscience of the court and make the proceedings a farce and mockery of justice."[5]

Moreover, "success is not the test of the effective assistance of counsel."[6]

Hence, although post-conviction relief for lack of effective counsel is possible, the standard for such relief has yet to be stated with clarity, and at best requires a heavy burden of proof by the client of his attorney's flagrant incompetence. The writer submits that what post-conviction relief is available is an inadequate remedy for redress of the harm suffered.

The traditional civil remedy for incompetent counsel is suit in tort for negligence.[7] There has been no jurisprudence in Louisiana or elsewhere barring the indigent from bringing a tort action in state court. The issue as such has been exclusively the subject-matter of federal litigation; these decisions have dismissed indigent actions brought for the malpractice of their court-appointed attorneys under the Civil Rights Act of 1871.[8] The rationale of the typical plaintiff's complaint in these actions

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4. *See* 253 F. Supp. 805 (D. Colo.), *aff'd*, 363 F.2d 879 (10th Cir. 1966); Cofield v. United States, 263 F.2d 686 (9th Cir. 1959).

5. *See* Busby v. Holman, 356 F.2d 75, 79 (5th Cir. 1966). *See also* United States v. Dilella, 354 F.2d 584 (7th Cir. 1965); Bouchard v. United States, 344 F.2d 872 (9th Cir. 1965); Lyons v. United States, 325 F.2d 370 (9th Cir. 1963); Rivera v. United States, 318 F.2d 606 (9th Cir. 1963).

6. *See* Wood v. United States, 357 F.2d 425, 427 (10th Cir. 1966). *See also* Silva v. Cox, 351 F.2d 61 (10th Cir. 1965); DeRoche v. United States, 337 F.2d 606 (9th Cir. 1964); Lucero v. United States, 335 F.2d 912 (10th Cir. 1964); Holt v. United States, 303 F.2d 791 (8th Cir. 1962); Hester v. United States, 303 F.2d 47 (10th Cir. 1962).

7. Thompson v. Lobdell, 7 Rob. 369 (La. 1844); Breedlove v. Turner, 9 Mart.(O.S.) 353 (La. 1820).

8. 42 U.S.C. § 1983 (1970).

has been that the defendant attorney, acting under color of state law as court-appointed counsel, deprived the indigent plaintiff of his civil rights through his incompetence in handling the plaintiff's case. Most federal courts have dismissed these complaints upon the grounds that court-appointed attorneys, although officers of the court, do not act under color of state law.[9] The Sixth Circuit Court of Appeals adopted this statutory interpretation in *Mulligan v. Schlachter*;[10] the other courts of appeal have differed in their dispensation of actions brought under the Civil Rights Act. The Third Circuit has consistently said that such a claim "amounts to no more than a tort claim for malpractice and as such is not cognizable under the Civil Rights Act."[11] The Fourth and Fifth Circuits have predicated their affirmation of the district court's dismissal upon the doctrine of executive immunity.[12] This doctrine is based upon the principle that potential tort liability of government officials would unduly interfere with the operation of government functions.[13] The application of executive immunity to court-appointed attorneys is of fairly recent origin. In *Sullens v. Carroll*,[14] the district court dismissed the plaintiff's action brought under the Civil Rights Act upon the grounds that the court-appointed attorney's alleged malpractice was not an act done under color of state law. Plaintiff refiled, basing jurisdiction upon diversity of citizenship. In affirming the lower court's dismissal of the second suit, the court held that "court-appointed counsel . . . in federal criminal cases are immune from suit the same as federal officers."[15] The court relied upon *Jones v. Warlick*,[16] a 1966 Fourth Circuit decision, as authority for the proposition

9. Woods v. Virginia, 320 F. Supp. 1227 (W.D. Va. 1971); Vance v. Robinson, 292 F. Supp. 786 (W.D.N.C. 1968); Reinke v. Richardson, 279 F. Supp. 155 (E.D. Wis. 1968); Jackson v. Hader, 271 F. Supp. 990 (W.D. Mo. 1967); Pritt v. Johnson, 264 F. Supp. 167 (M.D. Penn. 1967); Pugliano v. Staziak, 231 F. Supp. 347 (W.D. Penn. 1964). All of these actions arose out of state prosecutions.

10. 389 F.2d 231 (6th Cir. 1968).

11. Fletcher v. Hook, 446 F.2d 14, 16 (3d Cir. 1971). *See also* Smith v. Clapp, 436 F.2d 590 (3d Cir. 1970), though the basis of this holding is unclear, as there are many torts cognizable under the Civil Rights Act, and the court offers no criteria for distinguishing professional malpractice from those that do create a federal cause of action.

12. Sullens v. Carroll, 308 F. Supp. 311 (M.D. Fla. 1970), *aff'd*, 446 F.2d 1392 (5th Cir. 1971); Jones v. Warlick, 364 F.2d 828 (4th Cir. 1966).

13. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

14. 308 F. Supp. 311 (M.D. Fla. 1970), *aff'd*, 446 F.2d 1392 (5th Cir. 1971).

15. 446 F.2d at 1392.

16. 364 F.2d 828 (4th Cir. 1966).

that court-appointed attorneys (in federal cases) are immune from suit for conduct within the scope of their official duties.

The import of these decisions is that a near absolute bar has been erected against indigent suits of this nature in federal courts. Not only is the alleged incompetence of the attorney outside the scope of the Civil Rights Act as consistently interpreted by the courts, but at least two courts of appeal have held that court-appointed attorneys are absolutely immune from tort liability for their official acts as a matter of law, regardless of jurisdictional questions. An analysis of the viability of that doctrine of immunity is critical to the purposes of this Note.

In *Jones v. Warlick*,[17] the earliest decision on point, the indigent plaintiff sued the federal district judge, an FBI agent, and his court-appointed attorney for conspiring to deprive him of his right to a fair trial. The district court found the defendant attorney immune, as well as the judge and the FBI agent. The Fourth Circuit based its affirmation of the lower court's dismissal upon the Supreme Court decision in *Barr v. Matteo*.[18] *Barr*, which remains the leading case with regard to executive immunity, held the head of an executive agency in the federal government immune from civil suit for libel for statements made within the scope of his official duties. The principles enunciated in *Barr* have rational application to the FBI agent; moreover the Federal judge is certainly immune by virtue of the long-standing doctrine of judicial immunity.[19] But it is unclear how this doctrine of immunity can be consistently applied to court-appointed attorneys in light of the purposes of the doctrine as defined by the jurisprudence. The doctrine evolved from the cognition that the public interest often demands official action that might result in tortious liability; hence the doctrine rescues officials of government from this dilemma—the public interest on the one hand and their private interest in avoiding lawsuits on the other. It is unclear how this conflict of interests evolves within the attorney-client relationship. The public interest in due process and the attorney's interest in avoiding a malpractice suit are both fulfilled by the competent

17. *Id.*
18. 360 U.S. 564 (1959).
19. Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fischer, 80 U.S. (13 Wall.) 335 (1871).

legal representation of the indigent by the attorney. Because the public interest which dictated his appointment does not require that the attorney act contrary to the interests of his client, the traditional justification for the doctrine of immunity is absent in its application to the attorney-client relationship. Rather than immunity, the potential tortious liability of the court-appointed attorney would serve to encourage that competent representation by him, a constitutional as well as a social imperative.

Furthermore, the previous jurisprudence notwithstanding, a recent Supreme Court decision has provided a sound constitutional basis for suit by the indigent against his court-appointed attorney. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[20] the plaintiff brought a civil suit against six federal agents for violation of his fourth amendment rights by a warrantless entry and search of his apartment without probable cause. The district court dismissed the suit upon the ground that 1) it failed to state a federal cause of action and 2) the agents were immune by virtue of executive immunity. The Supreme Court reversed, holding that the plaintiff had a federal cause of action directly under the fourth amendment for which damages are recoverable:

> "Finally we cannot accept respondent's formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the eyes of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress through a particular remedial mechanism normally available in the federal courts. . . . Having concluded that petitioner's complaint states a federal cause of action under the Fourth Amendment, . . . we hold that petitioner is entitled to

20. 403 U.S. 388 (1971).

recover money damages for any injury he has suffered as a result of the agent's violation of the amendment."[21]

Justice Harlan's concurring opinion elaborated upon the court's holding: "I am of the opinion that federal courts do have the power to award damages for violations of 'constitutionally protected interests.' "[22]

The Court did not pass upon the question of immunity in reaching its decision. The Constitution being the fundamental law of the land, it is a reasonable interpretation of the court's omission that the doctrine of executive immunity will not protect those who violate constitutional imperatives. *Bivens* may thus be distinguished from *Barr*, *i.e.*, in *Barr* the cause of action was not predicated upon the violation of a constitutionally protected interest.

Reasoning by analogy from *Bivens*, an indigent client should have a cause of action directly from the sixth amendment, irrespective of the doctrine of immunity as applied in *Jones* and *Sullens*. The jurisprudence concerning the right to counsel[23] quite clearly confers to that right the status of a constitutionally protected interest, *i.e.*, the assistance of counsel is so fundamental to the purposes of justice that no individual should be deprived of it solely because of his economic circumstances. Hence its violation in federal criminal cases should create for the indigent client a federal civil action, basing jurisdiction upon 28 U.S.C. § 1331(a).[24]

Assuming, however, the indigent is allowed his day in court, the question remains as to the burden of proof he must sustain in order that damages may be recovered. Due to the novelty of this question, the rather heavy burden of proof required in criminal proceedings is at present the only constitutional test for deprivation of the right to counsel. The criminal test should be inapplicable to the civil action contemplated here; whereas society's interest in order and public safety as prosecuted in the

21. *Id.* at 397.
22. *Id.* at 399.
23. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).
24. "The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of 10,000 dollars, exclusive of interest or costs, and arises under the Constitution, laws, or treaties of the United States."

criminal proceeding may justify the heavy burden of proof following conviction, this interest is absent in civil litigation between private individuals. It is suggested that the indigent plaintiff should instead be required to sustain the traditional burden of proof for a civil action for negligence.

The final consideration with regard to the indigent's civil remedy for his attorney's malpractice is a matter of the ethical considerations which serve to characterize the practice of law as a profession rather than a business. Canon Six of the Code of Professional Responsibility provides "a lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." The doctrine of immunity violates the spirit if not the letter of this canon. The principle of the personal responsibility of the attorney to his client is a cornerstone of the legal profession, and it would be ignoble to compromise this principle with regard to indigents.

As noted before, there is no jurisprudence in Louisiana or other jurisdictions barring the indigent from suing his court-appointed attorney for malpractice. For the same reasons that recommend the rejection of the doctrine of immunity in the federal courts, it is submitted that such a development in state courts might compromise the basic principles by which we conceive of our profession and our system of justice itself.

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