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CRIMINAL LAW COMMENTS

LIABILITY OF GOVERNMENT-APPOINTED ATTORNEYS IN STATE TORT ACTIONS

The liability of a public defender in a state tort action for malpractice has been decided in two recent cases. In *Ferri v. Ackerman*¹ the United States Supreme Court held that federal law does not grant immunity from state malpractice actions to an attorney appointed by a federal court to represent a defendant in a criminal trial.² *Reese v. Danforth*,³ decided by the Pennsylvania Supreme Court, significantly added to the scarce case law⁴ on the issue of state immunity when it held that Pennsylvania state public defenders are not immune from

malpractice suits brought against them for their conduct in state court proceedings.⁵

As a result of these two cases, a court-appointed attorney will receive no federal immunity from state malpractice liability, regardless of whether the attorney was appointed by a federal or a state court. However, on the state level, only the courts of Pennsylvania and Connecticut have decided whether their respective state laws provide immunity to court-appointed attorneys.⁶

State legislatures, as well as Congress, may wish to provide statutory protection for court-appointed attorneys. The issue of immunity of a public defender, therefore, must be analyzed carefully to determine the advisability of providing immunity either by statute or by state court decisions.

Prior to these two cases, most suits by indigent defendants against their government-appointed attorneys were brought in federal court and stated claims based on a deprivation of the defendants' constitutional right of representation. If the attorney had been assigned by a federal court to represent the defendant in a federal criminal trial,⁷ the indigent alleged that the attorney's representation had been so inadequate that it violated his sixth amendment right to counsel.⁸ If, on the other hand,

⁵ 406 A.2d at 739 (plurality opinion).

⁶ *Spring v. Constantino*, 168 Conn. at 576, 362 A.2d at 879; *Reese v. Danforth*, 406 A.2d at 739.

⁷ Many attorneys representing indigents in federal trials are private attorneys who have been appointed by the court to represent specific clients. They receive some compensation from the federal government for the time they spend representing indigents. In 1970 Congress did permit the establishment of full time public defenders offices to supplement the individual appointments of private attorneys. For a discussion of the federal system for providing representation to indigent defendants, see *Ferri v. Ackerman*, 100 S. Ct. at 407 n.16.

⁸ The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

In *Housand v. Heiman*, 594 F.2d 923 (2d Cir. 1979), for example, the plaintiff sued the federal court-appointed attorney who had represented him in his criminal trial in federal court. Appearing pro se, the plaintiff relied upon 42 U.S.C. §1983 (1976) to get jurisdiction in the federal court. The Second Circuit, in a footnote, acknowledged that § 1983 was not really applicable in this case because § 1983 requires that the violation of the consti-

¹ 100 S. Ct. 402 (1979).

² *Id.* at 410.

³ 406 A.2d 735 (Pa. 1979) (plurality opinion).

⁴ There are only five other reported cases which mention the issue of whether states provide public defenders or court-appointed attorneys with immunity from malpractice suits. See *Housand v. Heiman*, 594 F.2d 923 (2d Cir. 1979); *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir. 1978); *Walker v. Kruse*, 484 F.2d 802 (7th Cir. 1973); *Vance v. Robinson*, 292 F. Supp. 786 (W.D.N.C. 1968); *Spring v. Constantino*, 168 Conn. 563, 362 A.2d 871 (1975). *Spring* was the only case that directly addressed the question of whether a state public defender could be immune from liability for malpractice, and the Connecticut Supreme Court refused to grant such immunity. 168 Conn. at 576, 362 A.2d at 879. Relying upon the *Spring* case, the Second Circuit in the *Housand* case said that the plaintiff, although unable to sue under 42 U.S.C. § 1983 (1976), would be able to sue his federal court-appointed attorney under Connecticut law. The court remanded the case to determine whether diversity jurisdiction existed so that the federal court could hear the state court claim. 594 F.2d at 926.

In *Walker*, a suit based on diversity jurisdiction, the Seventh Circuit dismissed the complaint alleging public defender malpractice because, among other reasons, it thought that Illinois might grant public defenders immunity from malpractice actions. 484 F.2d at 804. As support for its decision, the Seventh Circuit relied upon the fact that the Illinois Supreme Court had already affirmed the client's conviction, even though the client had argued that his conviction was due in part to his attorney's incompetence.

In *Robinson* and *Vance*, the courts simply mentioned in dicta that perhaps the plaintiffs might have causes of action against the state public defender for malpractice under the state laws. *Robinson v. Bergstrom*, 579 F.2d at 411 (possible action under Illinois law); *Vance v. Robinson*, 292 F. Supp. at 788 (possible action under North Carolina law). The courts mentioned this possibility after holding that there was certainly no cause of action under 42 U.S.C. § 1983 (1976). 579 F.2d at 411; 292 F. Supp. at 788.

the indigent had been tried in state court and had been represented by a state public defender, the indigent alleged that the public defender had violated section 1983 of the Civil Rights Acts.⁹ The indigent was required to prove that the state public defender's conduct constituted state action and that the representation was so inadequate as to deprive the indigent of his constitutional right to counsel.¹⁰

It is difficult to determine precisely why the indigents decided to allege constitutional violations instead of simple torts. Perhaps they believed that federal judges would be more sympathetic to them. At least one commentator has suggested that suits were brought under section 1983 because courts could award nominal or punitive damages under that statute while only actual damages could be recovered in a tort action.¹¹

Whatever the reasons behind the filing of the actions in federal court, to date no suit alleging violation of the constitutional right to counsel has been successful. Actions brought against attorneys appointed to represent defendants in federal court have failed for one of two reasons. In some cases the courts have held that the activities of court-appointed attorneys do not constitute federal action since the attorneys are not federal officials.¹² One court has taken the position that even if the federal action requirement is met, the attorneys are

government officials entitled to immunity from civil rights suits.¹³

For similar reasons, while increasing numbers of section 1983 actions against state public defenders are being filed,¹⁴ none have succeeded. The same two types of arguments are being advanced as in the constitutional cases. Some courts have been adamant that there is no cause of action because, contrary to the requirements of section 1983, the state public defender's conduct does not constitute state action.¹⁵ According to these courts, even though the public defender is appointed or employed by the state, he is not a state officer. As an additional rationale, some courts have held that even if public defenders act under color of state law for the purposes of section 1983 jurisdiction, public policy dictates that they be immune from section 1983 suits.¹⁶ In some of these cases, the courts found state action,¹⁷ but in others the courts found that there was no state action¹⁸ or simply

¹³ The court in *Housand* based its holding of immunity from constitutional suits on its determination that there was no federal action. The court acknowledged that another approach would be to hold that even if federal action were present, defense lawyers would be immune from § 1983 suits for policy reasons. 594 F.2d at 925.

¹⁴ The increase in § 1983 suits against state public defenders mirrored the general increase in § 1983 suits against state officials after *Monroe v. Pape*, 365 U.S. 167 (1961). In defining the scope of § 1983 actions in *Monroe*, the Supreme Court held that actions could be considered to have taken place under color of state law even though the state did not authorize the actions. 365 U.S. at 172. The Court further held that plaintiffs did not have to prove that defendants acted with "a specific intent to deprive a person of a federal right." *Id.* at 187 (quoting *Screws v. United States*, 325 U.S. 91, 103 (1945)). For a discussion of the general increase in § 1983 litigation that followed the *Monroe* decision, see *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1136 n.7 (1977).

¹⁵ See, e.g., *Miller v. Barilla*, 549 F.2d 648, 650 (9th Cir. 1977) (dictum); *Espinoza v. Rogers*, 470 F.2d 1174 (10th Cir. 1972) (per curiam); *Brown v. Joseph*, 463 F.2d 1046, 1047-48 (3d Cir. 1972) (dictum), *cert. denied*, 412 U.S. 950 (1973); *United States ex rel. Wood v. Blacker*, 335 F. Supp. 43, 47 (D.N.J. 1971); *Vance v. Robinson*, 292 F. Supp. 786, 788 (W.D.N.C. 1968).

¹⁶ See *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir. 1978); *Miller v. Barilla*, 549 F.2d 648 (9th Cir. 1977); *Minns v. Paul*, 542 F.2d 899 (4th Cir.), *cert. denied*, 429 U.S. 1102 (1976); *Brown v. Joseph*, 463 F.2d 1046 (3d Cir. 1972).

¹⁷ *Robinson v. Bergstrom*, 579 F.2d at 407-08.

¹⁸ In *Miller* and *Brown*, the courts said that it was unlikely that the state public defenders had acted under color of state law, but held that even if they had, they were immune from malpractice suits. 549 F.2d at 650; 463 F.2d at 1048.

tutional right occur under color of state law. Here there was no state action because the entire conduct in question took place in federal court by a federal court-appointed attorney. Instead of being a § 1983 suit, the Second Circuit said the action was actually brought under general constitutional provisions, i.e., the sixth amendment. Such a suit, said the court, required federal action just like a § 1983 suit required state action. Therefore, the court used the analysis found in § 1983 cases to determine that there was no cause of action under the United States Constitution. 594 F.2d at 924 n.1.

⁹ 42 U.S.C. § 1983 (1976) provides:

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.

¹⁰ U.S. CONST. amend. VI; see note 8 *supra*.

¹¹ Note, *Remedying Ineffective Representation by Public Defenders—An Administrative Alternative to Traditional Civil Actions*, 60 MINN. L. REV. 123 (1975).

¹² See *Housand v. Heiman*, 594 F.2d at 925 n.1; *Sullens v. Carroll*, 308 F. Supp. 311 (M.D. Fla. 1970). See note 8 *supra* for a discussion of the federal action requirement.

failed to reach that issue.¹⁹ All agreed that in order to recruit public defenders²⁰ and in order to encourage them in the full exercise of their professional judgment,²¹ public defenders must be immune from section 1983 suits.

Because the suits alleging constitutional violations have been so unsuccessful, there has been some discussion recently that unsatisfied indigent defendants should file malpractice suits in state courts against their appointed attorneys. At least three of the courts that held that section 1983 did not give unsatisfied defendants a cause of action against their government-appointed defenders suggested that they may have a common-law cause of action for malpractice against the attorney.²² These suits would not be based on violations of constitutional rights but instead would allege that the attorney had a contractual or implied duty to provide adequate assistance of counsel. By breaching that duty, he committed a tort against his client and, therefore, would be liable under state common law for any damages caused by his wrongful act.²³

If such suits were filed, the question still would arise as to whether the court-appointed attorney or public defender was immune from suit. The federal courts have held that some federal officials are not liable for injury caused by their public acts,²⁴ and

the state courts have held that certain state officials are not subject to malpractice suits.²⁵ In addition, statutes enacted at both the federal and state level confer immunity on certain individuals.²⁶

Certain public officials are granted immunity to enable them to perform their duties in the most effective manner. It is believed that public officials should represent the interests of all, not just the interests of one individual or group. Because not everyone will be satisfied with the decisions made in the public interest, public officials potentially could be the victims of frequent litigation by unhappy groups. In order to free public officials from this fear of liability and in order to save government time that would be spent defending the suits, public officials are granted immunity.²⁷

Because governments only grant immunity to enable public officials to make decisions that are in the public interest, not everyone employed by

²⁵ See, e.g., *Hyde v. Lakewood*, 2 Ohio St. 2d 155, 156, 207 N.E.2d 547, 549 (1965).

²⁶ 28 U.S.C. § 2680(a) (1976) grants immunity against "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function . . . [by] an employee of the Government."

Among the state statutes granting immunity is CAL. GOV'T CODE § 820.2 (West 1976), which states: "[A] public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion [was] abused."

²⁷ *Barr v. Matteo*, 360 U.S. 564, 571 (1959). Justice Harlan wrote in *Barr*:

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

Various states, while agreeing that officials exercising discretion on basic policy decisions are entitled to immunity, have expressed the rationale behind the immunity in different ways. For example, California justifies immunity for state officials making basic policy decisions on the grounds that if they were not immune, the courts would be "in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government." *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 445, 551 P.2d 334, 350, 131 Cal. Rptr. 14, 30 (1976) (quoting *Johnson v. State*, 69 Cal. 2d 782, 793, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968)). Pennsylvania has sovereign immunity so that public officials will not be afraid to act where their action cannot be measured by predictable standards of care. *DuBree v. Commonwealth*, 481 Pa. 540, 544, 393 A.2d 293, 295 (1978).

¹⁹ *Minns v. Paul*, 542 F.2d at 900.

²⁰ *Robinson v. Bergstrom*, 579 F.2d at 408; *Miller v. Barilla*, 549 F.2d at 649; *Minns v. Paul*, 542 F.2d at 901. The rationale is that since all other court officials—the judge, the prosecutor, and the clerk of the court—are immune from suits, the public defender also must be immune in order to encourage the recruitment of sensitive and thoughtful lawyers to those positions. *Brown v. Joseph*, 463 F.2d at 1049.

²¹ If the public defenders were liable, they would not be able to exercise their discretion because they "would be constrained to weigh every decision in terms of potential liability." *Minns v. Paul*, 542 F.2d at 902. The burden of considering potential liability would be particularly great for public defenders since indigents, who do not have to pay court costs, are more likely than nonindigents to bring frivolous claims. *Robinson v. Bergstrom*, 579 F.2d at 410.

²² See *Housand v. Heiman*, 594 F.2d 923, 926 (2d Cir. 1979) (federal court-appointed attorney); *Robinson v. Bergstrom*, 579 F.2d 401, 411 (7th Cir. 1978) (state public defender); *Vance v. Robinson*, 292 F. Supp. 786, 788 (W.D.N.C. 1968) (state court-appointed attorney).

²³ See, e.g., *Vance v. Robinson*, 292 F. Supp. at 788.

²⁴ See, e.g., *Butz v. Economou*, 438 U.S. 478 (1978) (holding that administrative law judges and federal agency attorneys presenting actions were absolutely immune from civil liability); *Howard v. Lyons*, 360 U.S. 593 (1959) (captain in U.S. Navy immune); *Spalding v. Vilas*, 161 U.S. 483 (1896) (postmaster general immune).

the government is entitled to immunity. Only those who exercise policymaking functions receive this protection.²⁸ Furthermore, not even all those exercising discretion are exempted from full liability. Absolute immunity is only given to those who participate in the judicial process as judges,²⁹ prosecutors,³⁰ grand jurors,³¹ and other similar positions.³² There is total immunity for them because they are more likely to be sued than others and because there are safeguards in the judicial process itself to protect people from the errors of these officials.³³ Those government officials not performing some type of judicial function usually are given only qualified immunity from suit. Under this type of immunity, they are not liable for mere mistakes in judgment, but they can be sued if they knew or should have known that their actions violated clearly established laws.³⁴

Prior to *Ferri* and *Reese*, there was no consensus on whether government-appointed attorneys for indigents were granted any type of immunity from tort malpractice suits. One case assumed that a court-appointed attorney in a federal trial could be sued for malpractice in state court, but that assumption was not crucial to the resolution of the case.³⁵ Two other cases, in brief one-page opinions, held that there was immunity for federally appointed defense attorneys.³⁶ The only case that directly considered whether state public defenders were immune under state law held that there was no immunity.³⁷ In dicta, the Seventh Circuit rec-

ognized the possibility that Illinois might grant state court-appointed attorneys immunity,³⁸ but a later Seventh Circuit case held that Illinois would recognize malpractice actions against state public defenders.³⁹ Another federal court also stated in dicta that North Carolina might grant state public defenders immunity.⁴⁰

Ferri and *Reese* brought direction to this confusing, contradictory array of cases. In *Ferri*, the Supreme Court determined that federal law does not grant government-appointed attorneys immunity from state malpractice suits.⁴¹ *Reese* represented the first extensive state court treatment of the immunity problem, and the Pennsylvania Supreme Court came to the same conclusion as the federal court—no common-law right of immunity.⁴² Together these cases substantially bolster the view

not judicial officers. Since they perform a private function, not a public one, they do not have the type of immunity shared by judges and prosecutors and others who represent the public in court. Second, the court held that a public defender was not a public official like a legislator because the defender did not perform any government functions. Instead of protecting the public, he had to protect his "client." Finally, there was no statute granting the public defender immunity.

³⁸ *Walker v. Kruse*, 484 F.2d 802 (7th Cir. 1973). In *Walker*, the client had appealed his Illinois conviction in Illinois court, alleging among other things that his court-appointed attorney's incompetence caused his conviction. *Walker v. Pate*, 53 Ill. 2d 485, 292 N.E.2d 387 (1973). The client also brought a malpractice suit in federal court under diversity jurisdiction. *Walker v. Kruse*, 484 F.2d at 803. After the Illinois Supreme Court affirmed the conviction, the Seventh Circuit said that the Illinois courts might find that there was no cause of action for malpractice for any one of a number of reasons. One reason was that Illinois might provide immunity to court-appointed attorneys. The court said that "there are strong reasons of policy which might persuade the Illinois courts to hold that a lawyer, who has been appointed to serve without compensation in the defense of an indigent citizen accused of crime, should be immune from malpractice liability." *Id.* at 804. Requiring an attorney to defend malpractice charges would only make it difficult for the Bar to discharge its professional responsibilities. *Id.*

³⁹ *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir. 1978). In *Robinson*, the Seventh Circuit said that "the defendant would arguably have the same state action in tort for malpractice against the public defender as a former client might have against a retained attorney." *Id.* at 411.

⁴⁰ *Vance v. Robinson*, 292 F. Supp. 786 (W.D.N.C. 1968). In *Vance*, the District Court for the Western District of North Carolina said that if the state public defender "did the things alleged in the complaint he may be liable to the plaintiff for civil damages in an action at law in the courts of North Carolina." *Id.* at 788.

⁴¹ 100 S. Ct. at 410.

⁴² 406 A.2d at 740 (plurality opinion).

²⁸ See *Butz v. Economou*, 438 U.S. at 507; *Johnson v. State*, 69 Cal. 2d at 793, 447 P.2d at 360, 73 Cal. Rptr. at 248.

²⁹ *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).

³⁰ *Yaselli v. Goff*, 275 U.S. 503 (1927), *aff'd* 12 F.2d 396 (2d Cir. 1926).

³¹ See *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976) ("[t]he common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties").

³² *Economou v. Butz*, 438 U.S. at 512 (holding that administrative officials who performed functions similar to those performed by judges and prosecutors were absolutely immune from suit).

³³ *Id.* These safeguards include the adversary nature of the process, the importance of precedent in resolving controversies, and the correctability of error on appeal.

³⁴ *Id.* at 506-07.

³⁵ *Housand v. Heiman*, 594 F.2d 923 (2d Cir. 1979).

³⁶ *Sullens v. Carroll*, 446 F.2d 1392 (5th Cir. 1971); *Jones v. Warlick*, 364 F.2d 828 (4th Cir. 1966).

³⁷ *Spring v. Constantino*, 168 Conn. 563, 362 A.2d 871 (1975). The court in *Spring* considered three arguments supporting immunity for state public defenders and rejected all of them. First, it held that public defenders are

that government-appointed attorneys have neither state nor federal immunity from state malpractice suits.⁴³

FERRI AND THE IMMUNITY QUESTION UNDER FEDERAL LAW

In *Ferri*, an indigent defendant after being convicted in federal court sued his court-appointed attorney in Pennsylvania state court. He alleged that his attorney had committed malpractice in numerous instances, including the attorney's failure to raise a statute of limitation defense that would have barred prosecution on several of the counts for which the client received substantial sentences.⁴⁴ The Pennsylvania Supreme Court affirmed the lower court decisions that the court-appointed attorney was immune from suit.⁴⁵ Because the attorney had been appointed by a federal court, the Pennsylvania court looked to federal law⁴⁶ and concluded that federal law granted the attorney immunity from state malpractice suits.⁴⁷

The United States Supreme Court unanimously reversed the *Ferri* decision. It held that federal law did not grant an attorney appointed by a federal court immunity from a state malpractice suit.⁴⁸ The Court began its reasoning by assuming that the attorney would not be immune under state law.⁴⁹ Therefore, the only issue was whether federal law would grant the attorney immunity and thus supersede the state finding of liability.⁵⁰

The Court acknowledged that there were federal interests in this case that could have required a federal rule of immunity if such a finding were in

accord with the statutory or court-developed law of immunity.⁵¹ The attorney had been appointed and compensated pursuant to a federal statute, and he had participated in a federal proceeding.

However, the Court found no statutory basis for a grant of immunity to federally appointed attorneys.⁵² The only arguably relevant statute, the Criminal Justice Act of 1964,⁵³ attempted to minimize the difference between privately retained and court-appointed counsel by compensating appointed attorneys. The implication from the purpose of the law was that appointed attorneys should be subject to the same liability that retained lawyers face.⁵⁴

The Court went on to recognize that some federal officers have been granted immunity in the absence of any statute.⁵⁵ It reasoned that the duties of federally appointed attorneys, however, were significantly different from the duties of those officials who had been granted immunity at common law, such as judges and prosecutors. Such officials were required to represent the interests of society as a whole. The immunity granted to them was designed as a protection from disgruntled groups whose desires were not always identical to those of the public. In contrast, an appointed attorney's only duty was to the defendant he was appointed to represent. He had no conflicting responsibility to the public and could avoid malpractice suits by fulfilling his duty to the defendant.⁵⁶

The Court did acknowledge that there might be policy reasons to grant appointed counsel immunity. For example, immunity might be needed to recruit attorneys. Nevertheless, the Court held that the legislature must be the one to determine whether to grant immunity because of policy concerns.⁵⁷ The Court, however, refused to indicate whether Congress would have the power to grant appointed attorneys immunity from state law tort liability.⁵⁸

⁴³ One indication that state courts are likely to follow the holdings in *Ferri* and *Reese* is the fact that the *Reese* case relied heavily on the discussion of immunity in *Spring*, the only prior case dealing with the issue of public defender immunity under the common law. *Reese v. Danforth*, 406 A.2d at 739.

⁴⁴ *Ferri v. Ackerman*, 483 Pa. 90, 92, 394 A.2d 553, 554 (1978).

⁴⁵ *Id.* at 99, 394 A.2d at 558.

⁴⁶ *Id.* at 93, 394 A.2d at 555.

⁴⁷ *Id.* at 99, 394 A.2d at 558.

⁴⁸ 100 S. Ct. at 410.

⁴⁹ *Id.* at 406. On remand, the Pennsylvania Supreme Court held that state law did not grant immunity to the court-appointed attorney. *Ferri v. Ackerman*, 411 A.2d 213, 214 (Pa. 1980).

⁵⁰ A federal grant of immunity is binding on the state courts under the supremacy clause, U.S. CONST. art. VI, cl. 2, which states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

⁵¹ 100 S. Ct. at 406.

⁵² *Id.*

⁵³ 18 U.S.C. § 3006A(d)(2) (1976).

⁵⁴ 100 S. Ct. at 407.

⁵⁵ *Id.* at 408.

⁵⁶ *Id.* at 409.

⁵⁷ *Id.* at 410.

⁵⁸ *Id.* Although the Court did not specify why Congress might not be able to grant appointed attorneys immunity, others have said that the Constitution would not allow immunity for two reasons. First, grants of immunity would violate the equal protection clause because indigents who received inadequate legal assistance would be denied the remedy of a malpractice suit available to those able to retain private counsel. Second, unless clients could sue their appointed attorneys, the appointed attorneys

REESE AND THE IMMUNITY QUESTION UNDER
PENNSYLVANIA LAW

Even though it is not as far reaching as *Ferri*, the decision of the Pennsylvania Supreme Court in *Reese* is noteworthy since it is one of only two cases that has considered whether state law grants state public defenders immunity. Although the court in *Reese* agreed with the earlier Connecticut Supreme Court decision in *Spring v. Constantino*⁵⁹ opposing immunity, *Reese* contained a more thorough discussion of the policy reasons favoring immunity, largely because it was decided by a divided court and contained a number of opinions, each developing a different aspect of the immunity problem.

In *Reese*, an indigent sued a county public defender and members of his staff who had represented the indigent in proceedings brought against him pursuant to the Mental Health and Mental Retardation Act of 1966.⁶⁰ Alleging that his seven-day confinement in a psychiatric hospital was caused by the attorneys' negligence, he sought damages. The trial court granted the defendants' motion to dismiss, holding that a public defender is immune from malpractice suits. The appellate court affirmed without opinion.⁶¹

A divided Pennsylvania Supreme Court held that state public defenders are liable for malpractice.⁶² Justice Nix, in his plurality opinion, began

by announcing that the case was governed by Pennsylvania state law on official immunity.⁶³ The cases on the federal common law of immunity⁶⁴ and the cases that dealt with the state-action requirement for purposes of section 1983 were not controlling because *Reese* involved neither a federal defender nor a federal claim.⁶⁵

According to Justice Nix, the determination of a state public defender's immunity under Pennsylvania law depended on whether he was a public official, in which case he would get some measure of immunity, or whether he was only a public employee and thus entitled to no immunity.⁶⁶ Justice Nix based his decision that the public defender was an employee rather than an official on the fact that a public defender does not exercise the sovereign function of policymaking.⁶⁷ In contrast to a

Justice O'Brien dissented, saying that public policy mandates that public defenders receive immunity. *Id.* at 746 (O'Brien, J., dissenting). Chief Justice Eagen joined in Justice O'Brien's dissent with the exception of Justice O'Brien's statement that Pennsylvania determines immunity solely on the basis of whether the grant of immunity in a particular case meets the reasons behind immunity. Chief Justice Eagen believed that immunity should be granted on a "classification" basis. *Id.* at 746 (Eagen, C.J., dissenting).

⁵⁹ 406 A.2d at 737.

⁶⁰ The Pennsylvania Supreme Court had decided one case on the issue of whether federal law grants federally appointed attorneys immunity about eleven months before it decided *Reese*. See *Ferri v. Ackerman*, 483 Pa. 90, 394 A.2d 553 (1978), *rev'd*, 100 S. Ct. 402 (1979). It is interesting to note that in *Ferri* the court held that a federal court-appointed attorney was immune from a state malpractice suit on the basis of the federal common law of immunity, while in *Reese* the court held that a state public defender was not immune from a state malpractice suit. Justice Nix authored the opinion in both cases. In *Ferri v. Ackerman*, 483 Pa. at 100-01, 394 A.2d at 558-59, Justices Roberts and Larsen dissented, using the same reasons they later relied on for their concurrence in *Reese*. See note 70 *infra*.

⁶¹ 406 A.2d at 737.

⁶² *Id.* at 737. Justice Nix acknowledged that in the previous year the court had changed the doctrine of official immunity in its decision in *DuBree v. Commonwealth*, 481 Pa. 540, 393 A.2d 293 (1978). However, in a footnote, Justice Nix simply stated that *DuBree* contracted the scope of official immunity so it was necessary to determine first whether state public defenders could even meet the broader guidelines for immunity found in the older cases. 406 A.2d at 737 n.7.

⁶³ 406 A.2d at 738. In determining that a public defender was not a public official, Justice Nix relied upon a previous Pennsylvania Supreme Court case in which the court held that a county solicitor was not a public official. *Commonwealth ex rel. Foreman v. Hampson*, 393 Pa. 467, 143 A.2d 369 (1958). However, in *Foreman* the court was not determining whether the solicitor was a

would not provide their clients with effective counsel. Thus the government would have breached its sixth amendment duty to provide indigents with assistance of counsel at criminal trials. See Comment, *Liability of Court-Appointed Defense Counsel for Malpractice in Federal Criminal Prosecutions*, 57 IOWA L. REV. 1420, 1428-29 (1972).

⁵⁹ 168 Conn. 563, 362 A.2d 871 (1975), discussed in note 37 *supra*.

⁶⁰ 406 A.2d at 736-37.

⁶¹ 241 Pa. Super. Ct. 604, 360 A.2d 629 (1976), *rev'd*, 406 A.2d 735 (Pa. 1979) (plurality opinion).

⁶² *Reese v. Danforth*, 406 A.2d at 740. Justice Nix took the approach that public defenders are not public officials and that public policy dictates that they be made liable for their negligence. *Id.* Justice Manderino, in a concurring opinion, agreed with Justice Nix's opinion except that Manderino wished to stress that a public defender represents the sovereign in the same way that a district attorney does and that neither party in a criminal proceeding should put the sovereign's interest in conviction ahead of fairness to the defendant. *Id.* at 741 (Manderino, J., concurring). In a second concurring opinion, Justice Roberts, writing for himself and for Justice Larsen, stressed that public defenders exercise no more discretion than do private attorneys. He pointed out that granting immunity to public defenders would only cause the poor to receive legal services inferior to those received by paying defendants. *Id.* at 741 (Roberts, J., concurring).

district attorney who represents the interests of the county, a public defender does not represent the public but instead represents his appointed "client."⁶⁸

In his opinion, Justice Nix rejected the defenders' arguments that immunity is needed to recruit good lawyers and to encourage the public defenders to use their discretion to perform their functions responsibly.⁶⁹ He argued that the Pennsylvania court does not determine whether a person has sovereign immunity by examining the effect that tort liability will have on the office. Instead, the court determines which people have immunity by looking at the functions they perform. Only officials who perform policymaking functions have immunity and since public defenders have no policymaking function, Justice Nix concluded that they are not entitled to immunity.⁷⁰

public official for purposes of granting him immunity. Instead, the issue in that case was whether the solicitor as a public official had to be appointed from among the residents in the county. The court did not want to require solicitors to be residents because the particular county involved in the case had only 5,000 residents and three practicing attorneys residing there, one of whom was already the district attorney. If the county government could choose from among only those three lawyers, it would not have had much of a selection. Therefore, the court held that the county solicitor was simply a professional employee, not a public official. Obviously, different criteria would be relevant to the question of sovereign immunity than were involved in a determination of residency requirements.

⁶⁸ 406 A.2d at 738. The Pennsylvania Supreme Court in *Lennox v. Clark*, 372 Pa. 355, 372, 93 A.2d 834, 842 (1953), had held that district attorneys are public officials.

This was the only point of disagreement between Justices Nix and Manderino. Justice Manderino agreed with the holding in *Reese* that public defenders are not public officials who are entitled to sovereign immunity. However, he took pains to stress that neither the district attorney nor the public defender should allow their actions to be controlled by outside forces and both had a responsibility to see that no criminal defendant was convicted unjustly. His concurrence probably was intended to rebut any suggestion that district attorneys were controlled by the state and wanted to try to convict innocent people. 406 A.2d at 741 (Manderino, J., concurring).

⁶⁹ 406 A.2d at 740.

⁷⁰ *Id.* In their concurrence, Justices Roberts and Larsen specifically refuted the idea that public defenders need to be immune so that they will perform their jobs professionally. The justices argued that public defenders are just like private attorneys and need no more freedom or encouragement to exercise their professional judgment than private attorneys. Since private attorneys can exercise their judgment in spite of their liability for any

Justice Nix also reasoned that granting public defenders immunity would cause equal protection problems because a paying client could get relief from his attorney's malpractice in situations where an indigent could not.⁷¹ Therefore, even if public defenders did perform policymaking functions and thus were entitled to immunity under state law, Justice Nix thought the equal protection clause prevented the states from granting them immunity.⁷²

The two dissenting justices did not discuss whether public defenders were considered public officials or public employees.⁷³ One of the dissenters noted that during the previous term the court had held that sovereign immunity did not depend solely upon whether someone was classified as a public official, but instead was determined on the basis of a case-by-case analysis of whether the grant of immunity would further the policies behind protection of officials from liability.⁷⁴ Under the current law, said the dissenters, a public servant is entitled to immunity only when his duties are such that they require an exercise of discretion that would be hampered if he were subject to liability. Therefore, it does not matter how a public defender is classified; what is important is whether granting the public defender immunity would advance the policies that immunity is supposed to further.⁷⁵

Both dissenters agreed that public policy did require immunity,⁷⁶ relying on the same policy reasons expressed in the federal cases that had held that public defenders are immune from section 1983 actions.⁷⁷ These reasons are the need to recruit and to retain lawyers as public defenders and the necessity

"to encourage counsel in the full exercise of professionalism, i.e., the unfettered discretion, in the light

negligence, public defenders also should be able to perform responsibly without immunity. *Id.* at 741 (Roberts, J., concurring).

⁷¹ 406 A.2d at 740.

⁷² *Id.*

⁷³ *Id.* at 741 (O'Brien, J., dissenting).

⁷⁴ *DuBree v. Commonwealth*, 481 Pa. 540, 393 A.2d 293 (1978).

⁷⁵ 406 A.2d at 741 (O'Brien, J., dissenting).

⁷⁶ *Id.* at 746.

⁷⁷ Justice O'Brien cited *Minns v. Paul*, 542 F.2d 899, 900-01 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977), *John v. Hurt*, 489 F.2d 786, 788 (7th Cir. 1973), and *Brown v. Joseph*, 463 F.2d 1046, 1049 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973), as cases using these policy reasons to support their decisions to give public defenders some type of immunity from § 1983 suits. 406 A.2d at 745 (O'Brien, J., dissenting).

of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced."⁷⁸

The dissent also took the position that immunity did not present any equal protection problems.⁷⁹ They pointed out that the Supreme Court had held that not all people must have exactly equal advantages.⁸⁰ As long as the grant of immunity furthers a legitimate state interest, which it does by advancing the previously discussed policies,⁸¹ it does not violate the equal protection clause.⁸²

Nor did the dissent agree that the grant of immunity would violate the state's obligation to provide counsel for indigents. They took the position that the state had fulfilled that duty simply by establishing public defenders' offices and that disciplinary proceedings could be used to ensure that the counsel was effective.⁸³

ANALYSIS OF IMMUNITY UNDER THE COMMON LAW

Despite the vigorous dissent in *Reese*, both *Ferri* and *Reese* correctly applied the traditional views concerning official immunity in reaching their conclusions that the government-appointed attorneys in those cases were not entitled to immunity. As discussed above,⁸⁴ immunity traditionally has been granted to protect the proper functioning of government. Officials in policymaking positions have been granted immunity because they must consider the welfare of all citizens, not just the interests of the most litigious group. Neither federally appointed attorneys nor state public defenders, however, have policymaking roles. Their job is not to determine what is in the best interest of the public as a whole. Instead, they must be advocates only for their assigned defendants. Unlike other public servants, they do not have to juggle interests; they only have to pursue the interests of their clients,

and therefore, pursuant to prior cases, they are not entitled to immunity.

However, although *Ferri* and *Reese* are consistent with the other cases on immunity for public officials, they are inconsistent with some, though not all, of the cases dealing with government-appointed attorneys' liability for constitutional violations. There is no conflict between the finding in *Ferri* and *Reese* that government-appointed attorneys are not public officials and the holdings in some cases⁸⁵ that the government action required to show a constitutional or section 1983 cause of action is lacking. Furthermore, even the holding that government attorneys do act under color of law could be reconciled with the finding that the government attorneys are not government officials entitled to immunity since not all people acting under color of law are entitled to immunity.⁸⁶

An inconsistency arises, however, with the finding by at least two courts⁸⁷ that the government attorneys acted under color of law, but that as government officials they are immune from suit. To reconcile *Ferri* and *Reese* with these cases would require a decision that there are different standards for immunity from section 1983 and constitutional suits than there are for immunity from common law tort suits. Since there do not appear to be any cases that have drawn this distinction, it is at least arguable that *Ferri* overruled the two cases that found immunity from actions based on section 1983 or the Constitution.

RECOMMENDATIONS FOR STATUTORY GRANTS OF IMMUNITY

The *Ferri* case itself recognized that there may be valid policy reasons why legislatures should break with precedent and grant immunity to appointed counsel.⁸⁸ There are, in addition, several reasons that were not mentioned in *Ferri* why legislatures should immunize public defenders.⁸⁹

⁷⁸ *Minns v. Paul*, 542 F.2d at 901, quoted in *Reese v. Danforth*, 406 A.2d at 744 (O'Brien, J., dissenting).

⁷⁹ 406 A.2d at 742 (O'Brien, J., dissenting).

⁸⁰ *Id.* at 742 (citing *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973)).

⁸¹ 406 A.2d at 742 (O'Brien, J., dissenting). According to the dissent, another compelling reason to treat public defenders differently than private counsel is that unlike private counsel, they are not free to refuse to contract with their clients. *Id.* See the discussion of this problem at note 100 *infra*.

⁸² 406 A.2d at 746 (O'Brien, J., dissenting).

⁸³ *Id.* at 746.

⁸⁴ *Id.* at —, 406 A.2d at 746.

⁸⁵ See notes 27-34 & accompanying text *supra*.

⁸⁵ See note 18 & accompanying text *supra*.

⁸⁶ See note 28 & accompanying text *supra*.

⁸⁷ *Robinson v. Bergstrom*, 579 F.2d 401; *Minns v. Paul*, 542 F.2d 899.

⁸⁸ 100 S. Ct. at 410. The Court in *Ferri* said that the respondent had failed to present any empirical data to support the policy reasons he advanced in favor of immunity, *id.* at 407 n.17, and took the position that the legislature was better able to evaluate any empirical evidence that would be available. *Id.* at 410.

⁸⁹ As discussed in the text accompanying notes 28-34 *supra*, there are two types of immunity, absolute and qualified. Because absolute immunity would eliminate all suits against government-appointed attorneys, it would achieve the policy reasons favoring immunity more

The reason found most persuasive by the Court in *Ferri* was the need to recruit appointed counsel.⁹⁰ As the Court noted, appointed counsel receive significantly lower income than retained counsel, and the burden of defending unfounded malpractice claims for appointed counsel is substantial.⁹¹ However, the government could solve this barrier to recruitment without a grant of immunity simply by promising to defend any malpractice suits against appointed counsel and to pay any judgments that result from the suits.

The second problem of unfounded malpractice claims, however, is impossible to solve without immunity because the sheer number of tort suits likely to be filed will deter attorneys from accepting positions as appointed counsel. Legal malpractice suits in general are increasing in number.⁹² Additionally, it has been observed that indigents are more likely to bring frivolous suits than those retaining counsel.⁹³ One reason for this is that indigents have no economic brake on their desire to sue.⁹⁴ They can avoid all costs of suit by bringing their actions pro se and in forma pauperis and thereby avoid paying either attorney's fees or court costs. Another factor contributing to the increase in malpractice suits by indigents is that public defenders do not have the time to give their clients extensive individualized attention. One of the major causes of medical and legal malpractice suits is the client's feeling that the professional lacks a personal relationship with his client.⁹⁵ Public defenders, with their large caseloads, do not have time to develop these personal relationships with the defendants they are appointed to represent.⁹⁶ Therefore, they are likely to get a greater number of malpractice suits filed against them. Thus, to recruit competent attorneys, the appointed attorneys must be immune from the large number of tort suits they potentially could face.

Not only will immunity help in recruiting com-

petent attorneys, it will enable the appointed attorneys to do a better job. By freeing the appointed attorneys from having to defend malpractice suits, immunity will allow the attorneys to spend all of their time defending indigents. Other classes of officials have been granted immunity because it was recognized that they could do a better job if they devoted their time to government service, rather than to the defense of malpractice suits.⁹⁷ Since public defenders are already overworked,⁹⁸ they certainly could do a better job if they did not have their own malpractice suits added to their already heavy caseloads.

In addition to giving the public defenders more time to devote to the defendants they are appointed to represent, immunity will enable them to use their best judgment on cases.⁹⁹ Private attorneys are able to remain in control of cases because they can terminate the relationship with the client if the client and the attorney disagree over the appropriate litigation strategy. Public defenders, on the other hand, are required to represent all of the defendants to whom they are assigned. Even if the defendants will not listen to the attorneys, the public defenders must continue to represent them.¹⁰⁰ Many indigent defendants, particularly repeat offenders, think they are as competent as attorneys.¹⁰¹ Therefore, they are likely to tell their attorneys how to conduct the cases. If the public defenders are afraid of malpractice suits, they may follow the defendants' advice in order to placate them. At best this means the public defender may be filing many worthless motions and pursuing frivolous defenses; at worst it means the attorney is conducting the cases in a manner detrimental to his clients.¹⁰²

Without immunity, attorneys will be hampered

⁹⁷ See, e.g., *Barr v. Matteo*, 360 U.S. at 571, in which the Court granted some federal officials immunity so that the defense of malpractice suits would not "consume time and energies which would otherwise be devoted to governmental service."

⁹⁸ *Robinson v. Bergstrom*, 579 F.2d at 410.

⁹⁹ Canon 6 of the ABA Code of Professional Responsibility creates a duty for a lawyer to use his best judgment by stating: "A Lawyer should represent a client competently." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6.

¹⁰⁰ The court acknowledged in *Robinson v. Bergstrom*: "The public defender has virtually no control over which clients he will accept or reject." 579 F.2d at 410. An attorney may not refuse appointment in federal court without good cause. Comment, *supra* note 58, at 1427.

¹⁰¹ See Nakles, *Criminal Defense Lawyer: The Case for Absolute Immunity from Civil Liability*, 81 DICKINSON L. REV. 229, 234 (1977).

¹⁰² *Id.*

closely than would qualified immunity. Even qualified immunity, though, would accomplish these policies, at least in part, by quickly eliminating the many cases in which the public defender did not knowingly violate his client's rights, but instead merely made a mistake in judgment.

⁹⁰ 100 S. Ct. at 409.

⁹¹ *Id.*

⁹² Mallen, *The Court Appointed Lawyer and Legal Malpractice—Liability or Immunity*, 14 AM. CRIM. L. REV. 59, 68 (1976).

⁹³ *Minns v. Paul*, 542 F.2d at 901-02.

⁹⁴ *Id.*

⁹⁵ Mallen, *supra* note 92, at 60.

⁹⁶ See *Robinson v. Bergstrom*, 579 F.2d at 410.

when they try to decide how to appeal convictions. Public defenders sometimes appeal on the basis that the defendant had ineffective assistance of counsel at trial.¹⁰³ If public defenders know they will be liable for malpractice, they are less likely to make this argument. It is true that at least one court has held that if an attorney argues ineffective assistance of counsel on appeal, that argument will not be taken as an admission, and the appeal cannot be used as evidence against the attorney in a malpractice suit.¹⁰⁴ Most government-appointed attorneys, however, would probably not want to give their clients the idea for a malpractice suit.¹⁰⁵

Thus, immunity would provide indigents with more effective counsel in three ways. First it would help recruit competent attorneys. Second, it would give the attorney more time to devote to his client. Third, it would allow the attorney to exercise his professional judgment on defense strategies, particularly on appeal arguments.

CONSTITUTIONALITY OF STATUTORY IMMUNITY

Although the Court in *Ferri* refused to decide whether the legislature has the power to grant government-appointed attorneys immunity,¹⁰⁶ it does not appear that the United States Constitution bars legislatures from breaking with precedent and immunizing government-appointed attorneys from tort actions in order to gain the policy advantages mentioned above. Many legislatures have already granted immunity to individuals in certain circumstances and thereby abolished the common-law tort actions formerly available against them.¹⁰⁷ When these statutes have been challenged, the Court consistently has upheld their constitutionality.¹⁰⁸

¹⁰³ See *Cross v. United States*, 392 F.2d 360 (8th Cir. 1968); *Johnson v. United States*, 328 F.2d 605 (5th Cir. 1964); *People v. Lang*, 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974).

¹⁰⁴ *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), *overruled on other grounds sub nom. In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

¹⁰⁵ *Mallen*, *supra* note 92, at 67-68.

¹⁰⁶ 100 S. Ct. at 410.

¹⁰⁷ See, e.g., ILL. REV. STAT. ch. 111, § 4404 (1973) (a "good samaritan" statute granting medical personnel immunity from tort actions based on any voluntary, emergency medical assistance they provide); MICH. STAT. ANN. § 9.2101 (1949) (granting drivers immunity from tort actions brought by guests riding in their cars).

¹⁰⁸ *Martinez v. California*, 100 S. Ct. 553, 558 (1980) (holding that a California statute granting absolute immunity to public employees who make parole release determinations did not violate the fourteenth amend-

If the legislatures were to abolish the common-law tort actions against government-appointed attorneys, such laws immunizing attorneys who represent indigents would not create equal protection problems.¹⁰⁹ The Court has not mandated that indigents receive exactly the same treatment in the criminal appellate process that nonindigents can obtain.¹¹⁰ Equal protection only requires that statutes discriminating against indigents be "free of unreasoned distinctions."¹¹¹ Because immunity statutes for appointed attorneys are necessary to recruit competent counsel for indigents and to ensure that the counsel can perform their functions most effectively, the immunity statutes do not set up unreasoned distinctions.

The real constitutional question presented by the possibility of a legislative grant of immunity to public defenders is whether the immunity would breach the government's duty under *Gideon v. Wainwright*¹¹² and *Douglas v. California*¹¹³ to provide effective legal counsel to indigents. Some of the commentators and cases have argued that without this right to sue, indigents would get inadequate legal

ment); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 n.32 (1978) (upholding the Price-Anderson Act which put a \$560 million limitation on liability for nuclear accidents resulting from the operation of federally licensed private nuclear power plants); *Silver v. Silver*, 280 U.S. 117 (1929) (upholding automobile guest statutes which state that negligent drivers are immune from suit by guests riding in their cars); *Providence & N.Y. S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883) (limitation of vessel owner's liability is constitutional).

¹⁰⁹ It is interesting that the majority in *Reese* denied immunity in part because they thought a grant of immunity would create equal protection problems. Yet a year earlier, the same court in the *Ferri* case did not even mention the equal protection clause when it held that federal law granted federal court-appointed attorneys immunity from state malpractice suits. 483 Pa. 90, 394 A.2d 553. Two justices dissented from the decision in *Ferri*, however, because they perceived equal protection problems. *Id.* at 100, 394 A.2d at 559 (Roberts, J., joined by Larsen, J., dissenting). These same justices concurred in *Reese* on the ground that immunity grants were improper as a violation of equal protection. 406 A.2d at 741 (Roberts, J., joined by Larsen, J., concurring).

¹¹⁰ For example, in *Ross v. Moffitt*, 417 U.S. 600 (1974), the Court held that states did not have to provide indigent defendants with counsel when taking discretionary appeals to the highest state court or when petitioning for certiorari in the United States Supreme Court.

¹¹¹ *Id.* at 612 (quoting *Rinaldi v. Yaeger*, 384 U.S. 305, 310 (1966)).

¹¹² 373 U.S. 335 (1963) (indigent has a constitutional right to an attorney during his criminal trial).

¹¹³ 372 U.S. 353 (1963) (indigent has a constitutional right to an attorney during his first appeal).

advice and thus would be denied their sixth amendment right to counsel.¹¹⁴

There is no evidence, though, that a client's right to a malpractice action guarantees him better service from a professional. The number of medical malpractice actions have increased substantially recently, yet there is no evidence that medical care has been improved because of these suits.¹¹⁵ Legal malpractice actions are also unlikely to produce better legal care.

In fact, immunity laws actually would improve the effectiveness of counsel for indigents.¹¹⁶ By aiding in recruitment, the statutes would upgrade the quantity and quality of court-appointed counsel. In addition, counsel would have time to devote to their clients and would be able to make the best decisions for their clients.

Moreover, there are other ways to ensure that indigents receive effective counsel apart from malpractice actions. Defendants who are the victims of poor legal advice can file habeas corpus actions or appeal on the grounds of inadequate assistance of counsel.¹¹⁷ In addition, the incompetent public

defender can be disciplined in several ways. The government can fire him and thus guarantee that he does not injure other indigent defendants. In addition, the supreme courts of the various states can disbar the defender or otherwise impose sanctions on him if he does not represent his client competently.¹¹⁸

CONCLUSION

While not liable for malpractice based on constitutional or section 1983 claims, government-appointed attorneys after *Ferri* and *Reese* could be liable under state tort actions for malpractice. The Court in *Ferri* has said that federal law does not give federally appointed attorneys immunity from state malpractice suits. With *Reese*, there have now been two major decisions holding that state public defenders, and, by implication, federally appointed attorneys, are not granted immunity by the states from state malpractice actions.

Although these decisions correctly follow the precedents on immunity, the outcome can and should be changed by appropriate legislative action. Granting government-appointed attorneys immunity would help recruit competent counsel and would give them more time to devote to their cases. Counsel also would be able to exercise professional judgment on all matters of the defense, including whether to appeal on the basis of inadequate counsel at trial. Moreover, all this can be done without creating equal protection problems or leading to ineffective assistance of counsel.

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¹¹⁴ See, e.g., *Reese v. Danforth*, 406 A.2d at 741 (Roberts, J., concurring); Comment, *supra* note 58, at 1429.

¹¹⁵ See O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 517-19 (1976). O'Connell notes: "Even Guido Calabresi, perhaps the leading advocate of imaginative use of the tort and insurance system to achieve deterrence, recently concluded that there is no basis for believing that the present tort liability system promotes quality medical care." *Id.* at 519.

¹¹⁶ See text accompanying notes 90-105 *supra*.

¹¹⁷ See *Robinson v. Bergstrom*, 579 F.2d at 410; *Minns v. Paul*, 542 F.2d at 902; *Brown v. Joseph*, 463 F.2d at 1049.

¹¹⁸ ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7.