Remedying Ineffective Representation by Public Defenders--An Administrative Alternative to Traditional Civil Actions

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The sixth amendment grants to the accused in criminal prosecutions "the right . . . to have the Assistance of Counsel for his defence." The Supreme Court has interpreted this amendment to guarantee free counsel to indigent defendants and to necessarily require effective representation, as well as representation per se. In Gideon v. Wainwright, the Court held that by incorporation through the fourteenth amendment, the right to counsel applies to state felony prosecutions. And, in Argersinger v. Hamlin, the Court extended the right to all prosecutions for offenses punishable by imprisonment.

In order to provide free and effective counsel for indigent defendants, the states and their political subdivisions have used either court-appointed private attorneys or permanent staffs of publicly employed attorneys known as public defenders. The latter method is generally thought to provide less expensive yet superior representation and is by far the more common.

1. U.S. Const. amend. VI.
8. See Dahlin, Toward a Theory of the Public Defender's Place in the Legal System, 19 S.D.L. Rev. 87, 88 (1974). The importance of the public defender is further demonstrated by the fact that most criminal defendants cannot afford private counsel. A study of the New Jersey public defender system, for example, found that in its first year of operation the system served approximately 75 percent of all indicted persons in the state. Note, supra note 7, at 158. See also Benner, Tokenism and the American Indigent: Some Perspectives on Defense
Regardless of their relative merits, however, public defender systems often provide a regrettably poor variety of the "Assistance" constitutionally guaranteed to their clients. Yet at present, though an indigent defendant who receives ineffective representation may regain his liberty by petitioning for a writ of habeas corpus, there are, as this Note will demonstrate, no adequate means for monetarily compensating him for the injury he has suffered or for deterring future ineffective representation. The Note therefore poses two goals: prevention of, and appropriate compensation to indigents for injury caused by, ineffective assistance of counsel. It will evaluate the present possibilities for judicial attainment of these goals and then propose legislative reforms.

I. HABEAS CORPUS RELIEF

Theoretically, a defendant claiming denial of his constitutional right to effective counsel can seek relief during the ordinary course of trial and appeal. In practice, a defendant who has been incompetently represented may lose this chance due to that very incompetence. Once finally imprisoned, however, the defendant can obtain judicial review of his claim via petition for writ of habeas corpus. The court can grant the writ if it finds that the petitioner did not receive effective counsel.

The Supreme Court has never enunciated a definition of effective counsel. The majority rule among the lower courts is that the performance of the attorney must be so woefully inadequate as to shock the conscience of the court and make the pro-


ceeding a farce and a mockery of justice. This test has drawn severe criticism from many commentators, however, and several courts have rejected it for the standard of reasonable care employed in legal malpractice suits. The issue for those courts is whether the indigent defendant was represented as well as a paying client would have been by an ordinarily prudent lawyer skilled in criminal law. This more liberal standard of care is qualified, however, by the harmless error rule, which requires that the writ be denied if the court finds beyond a reasonable doubt that regardless of the ineffectiveness of counsel, the defendant would have been convicted.

It is clear that the habeas corpus action, notwithstanding its potentially great importance to an imprisoned defendant, is an

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Use of the harmless error rule derives from Chapman v. California, 386 U.S. 18 (1967), where the Court held that the trial court's comments to the jury on the defendant's failure to take the stand were, beyond a reasonable doubt, harmless error. A footnote in the Chapman opinion, id. at 23 n.8, indicated that errors infringing upon certain fundamental rights of the accused could never be harmless, regardless of the facts, and cited Gideon v. Wainwright, 372 U.S. 335 (1963). But the court in McQueen v. Swenson, supra, attempted to explain away this dictum by pointing to an "obvious difference between the total absence of counsel in Gideon and the ineffective assistance of counsel." Id. at 218.

Arguments against application of the harmless error rule in the habeas situation center on the rationale that its use requires an independent determination of guilt or innocence by the court reviewing the habeas petition. See generally Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn. L. REV. 519, 540-42 (1969).

The harmless error rule greatly reduces the potential difference between the "reasonableness" and "mockery of justice" standards, for the latter in effect incorporates a requirement that the error in question be harmful. Thus it is unlikely that the "reasonableness" standard will appreciably increase the number of writs granted.
inadequate means of attaining the goals stated above. It neither deters future incompetence nor compensates a defendant who has undergone unnecessary judicial proceedings and incarceration as a result of his attorney's incompetence.

II. PRESENT POSSIBILITIES FOR PREVENTION OF AND COMPENSATION FOR INEFFECTIVE REPRESENTATION

A. NEGLIGENCE ACTIONS AGAINST THE INDIVIDUAL DEFENDER

A malpractice suit is the traditional civil remedy for ineffective representation by counsel. Prosecution of such a suit requires proof of a duty running from the attorney to his client, a breach of that duty, and a resulting injury to the client.

The impediments to a malpractice action against a public defender are numerous, however, and of the few such actions that have been brought, none has succeeded.

The primary barriers to successful malpractice actions in general are their high cost and the reluctance of professionals to testify as experts against their fellows. In the case of legal

16. Habeas proceedings could conceivably deter ineffective representation by threatening harm to the culpable attorney's reputation. Judges, however, rarely publicize the names of the attorneys implicated in the proceedings. See Bines, supra note 13, at 969.

17. Professor Bines has suggested a unitary proceeding for considering both the habeas petition and the alleged negligence of the attorney. See id. at 974-79. If the outcome of the habeas petition depended on a finding of ineffectiveness based on a negligence standard, there would be no need for a second suit. See notes 26-29 infra and accompanying text. If workable, this approach would enhance both the likelihood of compensation for the ineffectively represented defendant and the deterrent effect of habeas proceedings. It is not presently feasible, however, for most courts still use the "mockery of justice" standard for habeas corpus review. See note 12 supra and accompanying text.

18. See W. Prosser, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971) (elements of cause of action in negligence); id. § 32, at 161 (standard of conduct for attorneys). Most courts have held public defenders or court-appointed counsel to the standard of skill that is imposed on privately retained attorneys. See, e.g., United States v. Marshall, 488 F.2d 1189, 1193 (9th Cir. 1973) (court-appointed counsel); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (public defender). But see People v. Morris, 3 Ill. 2d 537, 121 N.E.2d 810, 819 (1954) (holding a public defender to a higher standard of skill).

malpractice, there is perhaps also a professional fear of proliferating malpractice suits. Where the potential plaintiff in a legal malpractice action is indigent, the cost problem is of course particularly severe. He cannot, by definition, pay an attorney's hourly fee, and a contingent-fee arrangement is likely to be precluded by the small probability of success and by the difficulty of predicting whether, in the event of success, the damages awarded for the plaintiff's unnecessary subjection to judicial proceedings and incarceration would be substantial.

In addition to these practical obstacles, several legal problems lessen the likelihood of successful prosecution of a malpractice claim against a public defender. One is the doctrine of discretionary immunity. Based on the rationale that the imposition upon public officials of unlimited liability for their official actions would "contribute not to principled and fearless decision-making but to intimidation" detrimental to the public interest and deter capable persons from seeking office, the doctrine grants the official a "qualified immunity" from liability for discretionary actions taken in good faith.

The courts have split as to whether the doctrine applies to public defenders. The better view is that it does not. Unlike prosecutors, judges, and many other public officials, the de-

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20. See note 30 infra.
23. See, e.g., Wood v. Strickland, 420 U.S. 308 (1975) (holding that school officials are entitled to "a qualified good faith immunity" from liability for damages under the Civil Rights Act, 42 U.S.C. § 1983 (1970), unless they "knew," "reasonably should have known," or intended that their actions would violate the constitutional rights of the affected students); Scheuer v. Rhodes, 416 U.S. 232 (1974) (holding that "[t]he immunity of officers of the executive branch of a state government for their acts is not absolute but qualified . . . depending upon the scope of discretion and responsibilities of the particular office and the circumstances existing at the time of the challenged action").
25. The Supreme Court has held that a state judge enjoys immunity
fender does not exercise his discretion for public ends, except insofar as it is in the public interest to provide counsel for his client; and the client's interests are better protected, as the existence and scope of the traditional malpractice action demonstrate, if his attorney is liable for negligence than if he is not. Moreover, inasmuch as lawyers in general are subject to liability for negligence and are accustomed to obtaining insurance against that eventuality, it can hardly be argued that a grant of immunity from such liability is required in order to avoid deterring capable persons from becoming public defenders.

Two additional impediments to a successful malpractice action against a public defender may derive from a previous habeas corpus proceeding. One is the possible collateral estoppel effect of a determination in the earlier proceeding that the indigent was represented with reasonable care. Although the public defender is not a party to the habeas proceeding, and would thus be deprived of due process if held bound by a result adverse to him, jurisdictions that have abandoned the mutuality requirement of collateral estoppel might reasonably conclude for acts done in the performance of his judicial functions, Pierson v. Ray, 386 U.S. 547 (1967), and the lower federal courts have appropriately extended this rule to prosecutors, e.g., Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966) (county prosecutor), and to an Assistant United States Attorney General, Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971), cert. denied, 404 U.S. 1081 (1972).

Some courts that have granted immunity to public defenders have done so on the theory, only vaguely articulated, that it would be inappropriate to apply different rules to prosecutors and defenders. E.g., Brown v. Joseph, 463 F.2d 1046, 1048-49 (3d Cir. 1972), cert. denied, 412 U.S. 950 (1973). But see notes 49-51 infra and accompanying text.


27. Professor Bines suggests either legislation or use of the declaratory judgment to make the public defender a party to habeas proceedings, thus making the findings there binding on later civil or disciplinary proceedings. Bines, supra note 13, at 976-77.

28. The doctrine of mutuality requires that the party invoking the benefit of a prior judgment have been a party or privy to the prior proceeding. This requirement avoids allowing a party to take advantage of a prior proceeding favorable to him, but escape, on due process grounds, the effect of a disadvantageous prior proceeding. See 1B J. Moore, Federal Practice § 0.412[1] (2d ed. 1974).

Those courts that have departed to some extent from the mutuality doctrine have most often done so by allowing the defensive use of a prior judgment against a plaintiff who was a party to the prior suit. See generally Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281 (1957). The rationale is that
that the indigent had his day in court in that proceeding and therefore is precluded from retrying the issue of ineffectiveness.\footnote{29}

Regardless of its possible collateral estoppel effect, a prior habeas corpus proceeding could also affect the damages element of the malpractice action. Only where the habeas court ordered a retrial that resulted in acquittal of the indigent defendant would the defendant be clearly entitled to damages.\footnote{30} Where the habeas court found that the errors committed by the indigent’s lawyer were harmless,\footnote{31} the indigent defendant would apparently be precluded from proving damages, for the court hearing the malpractice claim could award damages only if it independently reconsidered and denied the indigent defendant’s guilt.\footnote{32} Similarly, conviction on retrial would apparently preclude proof of damages.\footnote{33} Thus, regardless of his actual guilt or innocence, the indigent defendant may be prevented by a prior habeas proceeding from obtaining damages in a malpractice suit.

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\footnote{29} The plaintiff has already had his day in court. Cf. Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (Super. Ct. 1934); J. Moore, supra.

\footnote{30} This seems to be the ground of decision in Lamore v. Laughlin, 159 F.2d 463 (D.C. Cir. 1947), where the court upheld a summary judgment on the ground that plaintiff’s “allegation of dereliction” was answered by the findings of fact in the habeas proceeding.

Where the prior habeas corpus proceeding employed the “mockery of justice” standard, see text accompanying notes 12-15 supra, even those courts that have abandoned the mutuality requirement ought not to give collateral estoppel effect to a determination adverse to the indigent defendant. This follows from the more stringent burden of proof embodied in that standard.

\footnote{31} In this case the damages award would be similar to awards for false imprisonment. It would represent lost time, physical discomfort, and any resulting mental or physical injury. See W. Prosser, \textit{Handbook of the Law of Torts} § 11 (4th ed. 1971). Cases in which such awards have been computed are rare, since immunity doctrines have usually barred recovery. See Comment, \textit{Compensation of Persons ERRONEOUSLY Confined by the State}, 118 U. PA. L. REV. 1091, 1098-1107. See also notes 21-25 supra and accompanying text. But see Tatum v. Morton, 386 F. Supp. 1308, 1313-14 (D.D.C. 1974) ($100 in § 1983 suit for brief incarceration following false arrest); Landman v. Royster, 354 F. Supp. 1302, 1318-19 (E.D. Va. 1973) ($15,000 recovery in § 1983 suit for pain and suffering during confinement, but recovery for six years lost wages denied as “speculative”).

\footnote{32} Although a finding of harmless error in the habeas proceeding arguably precludes a finding of injury in a subsequent malpractice suit, it ought not to do so in a subsequent action based on section 1983 or on the theory that the deprivation of the constitutional right is itself an injury. See notes 74-75 infra and accompanying text.

\footnote{33} See generally 12 Am. Jur. 2d \textit{Damages} §§ 30-44 (1965). This assumes that credit would be given for time already served.
B. NEGLIGENCE ACTION AGAINST THE PUBLIC DEFENDER OFFICE

Actions against either the defender's superior or the public defender office, in its capacity as a unit of state or local government, are possibilities in addition to suits against the individual defender. In suing the defender’s superior, a plaintiff would need to allege negligence in supervision, training, or the like.\textsuperscript{34} Again, however, such a suit has never been won. As with a negligence action against the defender himself, the cost of suing and the reluctance of many attorneys to bring suit or testify against their fellows are severe practical obstacles. In addition, several considerations suggest that the plaintiff’s case would be difficult to prove. First, it might be difficult to establish a duty to train a public defender for the special demands of the job. Although some state defender statutes could be construed to impose such a duty,\textsuperscript{35} none appears to specifically mandate a course of instruction for defenders beyond that required for all attorneys.\textsuperscript{36} Second, a plaintiff would have little chance of demonstrating negligent supervision unless a history of incompetence by the individual defender had been ignored.\textsuperscript{37} Third, it would be difficult to prove that the supervisor’s failure to train the defender was the legal cause of whatever injury allegedly befell the plaintiff.

Furthermore, it is possible that a superior would be shielded from liability by discretionary immunity. The policies underly-


\textsuperscript{35} The Minnesota Public Defender Act, for example, declares that the state public defender “shall supervise the training of all state [assistant and district] public defenders, and may establish a training course for such purpose.” \textit{Minn. Stat.} § 611.25 (1974).


\textsuperscript{37} \textit{Cf.} \textit{Moon v. Winfield}, 368 F. Supp. 843 (N.D. Ill. 1973) (police chief may be liable for negligent failure to dismiss police officer with history of poor conduct).
ing that doctrine would appear to be better served by granting immunity to the supervisor than to the individual defender. First, because the supervisor’s discretionary functions must serve the interest of the general public, and especially that of potential indigent defendants, in the effective and economical administration of the public defender office, arguably immunity is necessary to promote “fearless and principled decision-making.” Second, the imposition of liability upon the supervisor could deter capable attorneys from seeking such a position, because that liability would exceed the ordinary malpractice liability to which the attorney is accustomed.

An action against the public defender office alleging inadequate funding or staffing would face comparable difficulties. The major hurdle would lie in either the doctrine of sovereign immunity, which bars suits against the state and its agencies, or the analogous doctrine of local immunity, which bars suits against the political subdivisions of the state. Where these doctrines still exist, negligence suits against the government are barred, although several courts and legislatures have carved out an exception from immunity where it can be shown that the challenged decisions are of a nondiscretionary rather than a discretionary or policy-making nature. Because the government is constitutionally mandated to provide effective counsel to indigent defendants, its failure to do so by inadequately funding or staffing the defender office could be considered nondiscretionary, for it has no choice but to provide the requisite funds and staff. Nonetheless, in view of their many difficulties, malpractice suits against either the public defender office or its supervisors cannot now be considered viable means of attaining the desired reforms.

C. Actions Against the Individual Defender Under Section 1983 of the Civil Rights Act

Another possible avenue of recovery for the indigent defendant claiming to have received ineffective counsel is a suit for

38. See notes 21-22 supra and accompanying text.
40. For a listing of the current status of state and local immunity in all 50 states, see Restatement (Second) of Torts § 895A, special note at 12-22 (Tent. Draft No. 19, 1973). In Minnesota, the supreme court has recently abolished sovereign immunity. See note 97 infra.
41. For a thorough discussion of discretionary functions and government immunity, see Note, The Discretionary Exception and Municipal Tort Liability: A Reappraisal, 52 Minn. L. Rev. 1047 (1968).
damages against the public defender under section 1983 of the Civil Rights Act. To succeed with such an action, a plaintiff must demonstrate that the defender was a state officer—a “person” who acts “under color of state law”; that the plaintiff was deprived of his constitutional right to effective counsel; and that the defender is unable to claim immunity from liability. No such action has yet succeeded.

Some courts have dismissed section 1983 actions against public defenders (and against court-appointed counsel) on the ground that section 1983 “was never intended as a vehicle for prosecuting malpractice suits.” This conclusion is not without reason. A plaintiff represented by private counsel would have no remedy under the Civil Rights Act; why should a court strain to provide the indigent defendant with an additional theory of relief? One answer might be that a malpractice action requires that the plaintiff establish injury as a part of his claim, while section 1983 has been held to empower courts to grant nominal or punitive damages even when no actual damages can be shown. Thus, if an indigent defendant could proceed under section 1983, he would need to prove only a duty on the part of the public defender and a breach thereof. Punitive dam-

42. 42 U.S.C. § 1983 (1970) provides that:
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 . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .
44. Arguments that attorneys, as “officers of the court,” act under color of state law have uniformly been rejected. See, e.g., Steward v. Meeker, 495 F.2d 669, 670 (3d Cir. 1972); Stambler v. Dillon, 302 F. Supp. 1250, 1255 (S.D.N.Y. 1969).
45. See note 18 supra.
ages, however, have generally been granted only where the violation of constitutional rights was “willful or malicious”; and nominal damages, of course, are only that.

At any rate, a majority of the courts that have considered claims under section 1983 have concluded that public defenders do not act under color of state law. Integral to this conclusion is the belief that the defender has an affirmative duty to protect his client’s interests and hence is not controlled by the state. This view rests on the premise that the public defender’s role is analogous to that of the private criminal defense attorney. Those courts that have reached a contrary result have focused on the similarities between the roles of the defender and the prosecutor. Since prosecutors have been found to act under color of state law, the same would thus apply to defenders. Ironically, a continued application of the prosecutorial analogy has led these courts to ultimately reject the plaintiff’s claim on the basis of discretionary immunity.


49. As stated by the Court of Appeals for the Tenth Circuit, the public defender’s “professional duties and responsibilities toward his clients are identical in all respects to any other . . . attorney whether privately retained or court-appointed.” Espinoza v. Rogers, 470 F.2d 1174, 1175 (10th Cir. 1972).

50. See, e.g., Hampton v. Chicago 484 F.2d 602, 607-08 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974); Robichaud v. Ronan, 351 F.2d 533, 535 (9th Cir. 1965).


52. See, e.g., John v. Hurt, 489 F.2d 786, 788 (7th Cir. 1973); Brown v. Joseph, 463 F.2d 1046, 1048-49 (3d Cir. 1972), cert. denied, 412 U.S. 950 (1973). For criticism of the prosecutorial analogy as regards immunity, see Comment, Liability of Court-Appointed Defense Counsel for Malpractice in Federal Court Prosecutions, 57 Iowa L. Rev. 1420, 1424 (1972); note 25 supra and accompanying text.

One commentator has argued that “an indigent client should have a cause of action directly from the sixth amendment, irrespective of the doctrine of immunity . . . .” Note, The Right of the Indigent Client to Sue His Court-Appointed Attorney for Malpractice, 33 La. L. Rev.
It appears, then, that an indigent defendant seeking monetary damages from a public defender has even less chance of success under section 1983 than with a malpractice action.

D. Actions Against the Public Defender Office Under Section 1983 of the Civil Rights Act

A further potential, but relatively untested, theory of relief for ineffective representation by public defenders is an action under section 1983 seeking declaratory or injunctive relief against the public defender office. This theory has been attempted only once. In Gardner v. Luckey, the Court of Appeals for the Fifth Circuit dismissed, as not presenting a case or controversy, a class action for declaratory and injunctive relief brought by three convicted indigent defendants, who claimed that their rights to effective counsel had been denied because of inadequate funding of the public defender office and the excessive caseloads of its attorneys. The court reasoned that because the plain-

740, 745 (1973). This argument, based on Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc., 403 U.S. 388 (1971), is unpersuasive. In Bivens, the Supreme Court established an analogue to 42 U.S.C. § 1983 by permitting the plaintiff to sue federal agents who had allegedly violated his fourth amendment protection against unreasonable searches and seizures. Since section 1983 already provides a remedy against state officers, such as most public defenders, there is no need to predicate jurisdiction, as in Bivens, directly on the Constitution. See, e.g., Payne v. Mertens, 343 F. Supp. 1355, 1358 (N.D. Cal. 1972); Anderson v. Reynolds, 342 F. Supp. 102, 109 (D. Utah 1972).

Moreover, even if section 1983 could be so circumvented, there is no reason to believe that a different immunity would then cloak the state officer. See, e.g., Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc., 456 F.2d 1339, 1342-48 (2d Cir. 1972), where on remand the Court of Appeals for the Second Circuit applied the qualified good faith immunity standard to the federal agents.

53. As with negligence actions against the public defender office, see notes 39-41 supra and accompanying text, damage suits brought against the office under section 1983 are likely to be barred by the doctrines of sovereign and local immunity. See Edelman v. Jordan, 415 U.S. 651 (1974). Equitable relief, however, even if it necessitates the spending of large amounts of money, is not barred by those doctrines. Id. at 667-68.

54. 500 F.2d 712 (5th Cir. 1974).

55. The plaintiffs alleged that because of the inadequate funding and excessive caseloads the public defenders had failed “to consult with those whom they were appointed to represent, to advise each indigent of his legal rights, to provide adequate investigation of the availability of factual and legal defenses, and to assign a specific attorney to defend the indigent.” Id. at 713.

The problem of inadequate funding has been described by several commentators. A survey done by Silverstein indicated that 22 of 46 defenders and 31 of 75 judges interviewed found funding to be inade-
tiff's future need for services of the public defender office was speculative, they lacked the present injury necessary for relief. The court added that even had the case or controversy requirement been met, it would have denied relief in order to avoid "exactly the sort of intrusive and unworkable supervision of state judicial processes condemned [by the Supreme Court]," and that the doctrine of *Younger v. Harris,* which prevents federal courts from enjoining state criminal prosecutions, might also have independently barred relief.

It is possible that both the holding and the two dicta of this case can be successfully challenged or avoided. The case or controversy problem would be avoided by a suit brought while the indigent defendants were still being represented by the allegedly ineffective counsel. The first dictum, that judicial supervision of public defender offices would be unworkable, was questionable when uttered and has been rendered more so by a recent dictum

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56. 1 L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 43 (1965). For other examples of insufficient funding and its potential effects on representation, see Benner, supra note 8, at 679-80; Kittel, Defense of the Poor: A Study in Public Parsimony and Private Poverty, 45 IND. L.J. 90, 92-93 (1969); Note, supra note 7, at 158-59.

Excessive caseloads are also often cited. A study of the Denver Public Defender Office found that individual defenders completed, on average, more than 25 aggravated robbery and 80 driving-under-the-influence cases per month. This resulted in work weeks in excess of 60 hours and inevitable lapses in the quality of representation. See Note, The Right to Effective Counsel: A Case Study of the Denver Public Defender, 50 DENVER L.J. 45, 61-64 (1973).

57. 500 F.2d at 714-15. The court relied on *O'Shea v. Littleton,* 414 U.S. 488 (1974), also a suit for injunctive relief under section 1983; there, the Supreme Court held that absent an allegation of continuing injury, no case or controversy was presented by allegations that a magistrate and a judge had denied plaintiffs' constitutional rights.


59. A problem not mentioned by the *Gardner* court is that the controversy could be considered mooted if the indigent defendant was convicted and thus ceased to be represented by his public defender before the section 1983 action was decided. In recognition of this type of problem, however, the Supreme Court has held that mootness will not be held to preclude suit where the conduct complained of is likely to be often repeated, yet likely to evade full judicial review. *Roe v. Wade,* 410 U.S. 113, 125 (1973) ("pregnancy provides a classic justification for ... nonmootness"). Moreover, since suits for injunctive relief under section 1983 will be usually brought as class actions, any mootness problem can probably be avoided. *Sosna v. Iowa,* 419 U.S. 393, 399-402 (1975); *Wallace v. McDonald,* 369 F. Supp. 130, 168 (E.D.N.Y. 1973).

60. The court based this dictum, as it did its holding, on *O'Shea v. Littleton,* 414 U.S. 488 (1974). The intrusive effect of an injunction
of the Supreme Court in a case comparable to Gardner.\textsuperscript{61} And the second dictum ignores an exception to the Younger doctrine that allows federal intervention if the alleged constitutional threat cannot be eliminated by the defense of a single state prosecution.\textsuperscript{62} That exception seems certainly applicable to the broad threat presented by the inadequate funding of a public defender office.

Thus, it appears that a successful suit under section 1983 to compel the public defender office to provide effective representation has not been precluded. At present, however, the various unanswered questions surrounding such an action render it a dubious vehicle for reform of public defender systems. Moreover, even if successful, the action would only ensure adequate funds and staff for the defender office; it would not otherwise deter ineffective representation, nor would it compensate the inadequately represented client.

requiring that a public defender office be adequately funded and staffed would seem to be much less than that "condemned" in O'Shea, however. The O'Shea action was aimed at redressing the allegedly prejudicial courtroom practices of a magistrate and a judge; thus the enforcement of an injunction would have required at least periodic monitoring of the defendants. 414 U.S. at 500. In comparison, an injunction forcing a public defenders office to meet easily quantifiable prerequisites to effective representation would seem well within a court's proper role.

\textsuperscript{61} In Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), vacated, 95 S. Ct. 2486 (1975), a former patient in a state mental hospital sought damages under section 1983 on the ground that persons involuntarily committed to such hospitals in civil proceedings have a constitutional right to receive treatment or be released. The circuit court (a different panel than the one that decided Gardner) and the Supreme Court both indicated in dictum that promulgation of standards defining constitutionally adequate treatment is within judicial competence. 493 F.2d at 25-26; 95 S. Ct. at 2493 n.10.

A further indication that judicial supervision of the sort requested in Gardner may be attainable is Wallace v. McDonald, 369 F. Supp. 180 (E.D.N.Y. 1973). In that case indigent defendants detained by the state sought an injunction under section 1983 to prevent state judges from assigning to legal aid attorneys more cases than they could effectively handle. In denying a motion to dismiss the complaint, the court noted that it had the power to deal with day-to-day operations of state agencies to the extent necessary to remedy violations of the Civil Rights Act. Id. at 187. Similar examples of the use of injunctive relief are found in cases holding that jail conditions must meet judicially defined standards in order to avoid violating the constitutional rights of inmates. See, e.g., Rhem v. Malcolm, 507 F.2d 333, 340 (2d Cir. 1974), and cases cited therein.

E. Inherent Power of the Court

An alternative to a section 1983 action for an injunction to compel the expenditure of funds necessary to operate an effective public defender service may lie in the inherent power of the court. In the leading case, Knox County Council v. State ex rel. McCormick,63 the defendant County Council had refused to grant fees to the court-appointed defenders. After noting that the indigent defendants had a constitutional right to representation, the court observed that it possessed the inherent power to require any act reasonably necessary for the administration of justice.64 Proper administration of justice required that counsel be awarded compensation. Therefore, the court, exercising its inherent power, ordered the award out of the county treasury.65

More recently, the judges of the Court of Common Pleas of Philadelphia brought a mandamus action to compel the mayor and city council to appropriate funds for the operation of their court. The Supreme Court of Pennsylvania, in Commonwealth ex rel. Carroll v. Tate,66 concluded that “the Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice.”67 The court held that its power could be exercised without regard to city economic and budgetary factors.

These applications of the inherent power concept offer a potential means of ensuring the adequate funding and staffing of public defender offices. Surely the funds and personnel required to provide constitutionally adequate representation can be considered “reasonably necessary” for the proper administration of justice.68 Nonetheless, no suit has advanced such a theory. Moreover, of course, adequately funded and staffed public defender offices would be no guarantee of effective representation for indigent defendants.

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63. 217 Ind. 493, 29 N.E.2d 405 (1940).
64. Id. at 511, 29 N.E.2d at 413.
65. Id. at 515-16, 29 N.E.2d at 414. For a review of comparable cases, see Annot., 21 A.L.R.3d 819 (1968).
67. Id. at 52, 274 A.2d at 197 (emphasis in original).
68. The advisability of using the inherent power concept has been sharply criticized on the ground that it constitutes a dangerous infringement on the legislative sphere. See Comment, State Court Assertion of Power to Determine and Demand Its Own Budget, 120 U. Pa. L. Rev. 1187 (1972). For a more favorable view, see Note, Inherent Power and Administrative Court Reform, 58 Marq. L. Rev. 133 (1975).
III. ADMINISTRATIVE ALTERNATIVES

It is apparent that the goals of deterring ineffective representation by public defenders and compensating indigent defendants for injury caused by such representation are not likely to be accomplished by the civil actions presently available to indigents. The proposal advanced here is the creation of state administrative agencies vested with jurisdiction to adjudicate claims of ineffective assistance of counsel and with supervisory powers to implement training programs and promote the coordination and efficiency of public defender offices. These reforms must be coupled with an increase in the funding of public defender offices sufficient to attract high caliber attorneys and eliminate excessive caseloads.

A. ADMINISTRATIVE JURISDICTION OVER CLAIMS OF INEFFECTIVE REPRESENTATION OF COUNSEL

An administrative scheme for adjudicating claims of ineffective assistance of counsel must be designed to eliminate the major problems presently encountered by indigents bringing such claims. An appropriate model for structural reform is available in certain Western European systems of judicial administration. Under those systems, the judge conducts the trial. The role of witnesses is to serve the court in ascertaining the facts rather than to serve one of the parties in establishing its version of the facts. Testimony is given informally, with a minimum of interruption and little use of evidentiary rules. Expert witnesses are neutral parties called by the court.

This structure seems well suited to the problem at hand. The burden of initiating the proceeding would remain on the indigent. Thereafter, however, he would merely be required to present his evidence in an informal fashion, normally without the aid of counsel. The tribunal would play the active role, attempting to establish the facts through examination of both the indigent defendant and his allegedly ineffective public defender. Composed primarily or solely of lawyers, the tribunal would rarely need expert witnesses, for its own expertise would permit it to evaluate the validity of the plaintiff's claims. The rules

of evidence could be substantially abandoned, as is often the case in administrative proceedings.\textsuperscript{70} After considering all the available evidence, the tribunal could determine whether the acts complained of constituted professional negligence,\textsuperscript{71} whether the indigent was injured,\textsuperscript{72} and what would be the appropriate monetary award.\textsuperscript{76}

The grant of a monetary award should not depend on a demonstration of a causal relation between the inadequate representation and the conviction of the indigent defendant; it should only require a finding that the indigent was not represented with reasonable care. Elimination of any requirement of proof that the inadequate representation caused conventional injury to the indigent defendant is important for two reasons. First, it seems essential that the constitutional right to counsel not vary with guilt or innocence. The right attaches before any determination of guilt or innocence,\textsuperscript{74} when the presumption of innocence is still in effect. Thus, whatever its precise dimensions, the entitlement embodied in the right should not be subject to after-the-fact modification by a habeas corpus court. On this rationale, moreover, deprivation of the right—whether harmful or harmless—is an injury for which compensation is appropriate.\textsuperscript{75}


\textsuperscript{71} The negligence standard is preferable to the “shock the conscience” standard still used by a majority of courts to evaluate petitions for writs of habeas corpus based on claims of ineffective representation by counsel. See note 12 supra and accompanying text. On the other hand, it might even be argued that “fault” is irrelevant in this context—that regardless of fault, a person who is denied effective representation has been deprived of a constitutional right and is entitled therefore to compensation. See notes 74–76 infra and accompanying text.

\textsuperscript{72} See notes 74–76 infra and accompanying text.

\textsuperscript{73} In awarding damages, the administrative tribunal hearing a legal malpractice claim would be performing a function similar to that of a state torts claim board. For example, in Minnesota the State Claims Commission has jurisdiction to hear, \textit{inter alia}, “claims and demands against the state or any of its agencies, which the state in its sovereign capacity should in equity and good conscience discharge and pay.” Minn. Stat. § 3.735(1) (1974). The proposed tribunals would also function like typical state torts claims board in that the latter conduct their hearings informally, without the common-law rules of evidence, and often without aid of counsel. See, e.g., id. § 3.76.

\textsuperscript{74} See, e.g., United States v. Wade, 388 U.S. 218 (1967).

\textsuperscript{75} This notion is supported by the language of section 1983, see note 42 supra, and by the cases that have construed that statute to allow the award of nominal damages without regard to conventional injury. See note 46 supra. Theoretical consistency appears to require that an indigent defendant found innocent by a jury be able to appear
Second, to require causation of injury would largely defeat the
goal of deterrence by allowing either operation of the harmless
error rule or conviction of the defendant upon retrial to preclude
the imposition of liability upon the public defender, his superiors,
or the public defender office.76

While a finding of negligent representation could serve as a
basis for agency disciplinary action against the defender, the
monetary award might be drawn from a fund provided by the
state government.77 Such a funding scheme would constitute a

before the tribunal and raise a claim of ineffective representation. It
is unlikely, however, that a tribunal would allow more than a minimum
award. See note 79 infra. Furthermore, a legislature might not em-
power the tribunal to award any compensation in such a case, not-
withstanding the theoretical inconsistency.

76. See text accompanying notes 30-33 supra. It should be noted
that disciplinary actions are occasionally brought against attorneys
found to have ineffectively represented their clients. See, e.g., United
States v. Smith, 436 F.2d 1130 (9th Cir. 1970) (fine); In re Smith, 386
Ill. 11, 5 N.E.2d 227 (1936) (censure); In re McDermid, 96 N.J. 17, 114 A.
144 (1921) (disbarment). The infrequency of such proceedings no
doubt renders their deterrence value virtually nil.

77. An obvious alternative to establishing a special state fund
would be to require the individual public defender to appear before the
tribunal as a defendant. However, while the ready availability of an
effective action directly against the public defender would perhaps
better deter poor representation, creation of such an action would be
beset with difficulties. Even if the tribunal were able to award damages
against the public defender, he would probably be entitled to a de novo
jury trial under most state constitutions. See, e.g., Landgraf v. Ells-
worth, 267 Minn. 323, 126 N.W.2d 766 (1964) (Minnesota constitution
"preserves unimpaired the right of jury trial as it existed by the laws of
the territory at the time our state constitution was adopted, and such
right is neither extended nor limited." See generally Note, The Right to
new trial would give rise to the practical difficulties which inheres in con-
ventional malpractice suits—the need for the indigent defendant to
obtain legal assistance to bring the suit and expert witnesses to prove
his case. Although these difficulties might be alleviated by a statutory
requirement that the administrative tribunal assist the indigent defend-
ant at trial, see Documentary Supplement, Medical-Legal Screening
Panels as an Alternative Approach to Medical Malpractice Claims, 13
Wm. & Mary L. Rev. 695, 719 (1972), it would be incongruous to estab-
lish an expert tribunal whose judgments could be reversed by a jury.

Furthermore, an action seeking relief from a public defender would
lack several advantages inherent in an action seeking relief from a
special state fund. The latter method not only ensures that some award
will be available—that is, that the defendant is not judgment proof—but it
also affords relief to the indigent defendant whose ineffective
representation was arguably caused by circumstances beyond the control
of an individual defender, such as inadequate staffing or funding.

Finally, it is unlikely that an action directly against the public
defender would actually be a greater deterrent. In anticipation of
waiver of immunity by the state. Awards granted could be limited to a maximum amount, however, as is commonly done by states that provide statutory exceptions to their sovereign immunity. Conversely, a minimum statutory award could also be required, as is already done in several other contexts. The purpose of a minimum award would be to provide a necessary incentive to indigents who feel that they have received poor representation to bring their claims to the attention of the tribunal. The minimum should be low enough, however, to discourage frivolous claims. The maximum award should be high enough to allow for substantial compensation in appropriate cases.

Possible liability, defenders undoubtedly would purchase insurance to protect themselves. Deterrence through disciplinary sanctions such as suspensions, loss of tenure (where tenure exists, see note 87 infra), or dismissal would be equally available whether the action were brought directly against the defender or the state. But c.f. Sharood v. Hatfield, 236 Minn. 416, 210 N.W.2d 725 (1973) (holding that the power to regulate the practice of law rests solely with the judiciary). Of course, the statutory framework could provide that an award to the indigent vests in the state a right of subrogation. Neither the decision of the tribunal nor the fact that an award has been granted or denied should be admissible in evidence in any action brought against the public defender, however, including an action by the state on its subrogation claim. Compare Minnesota Crime Victims Reparations Act, Minn. Stat. §§ 299B.10, .14 (1974).

Regardless of the system selected, questions would arise as to the finality of the administrative determination and as to whether use of the tribunal by the indigent claimant would constitute an election of remedies, barring other civil actions. These questions require additional consideration and are beyond the scope of this Note.


Although lawyers and judges should report instances of incompetent representation to bar associations for disciplinary action, see ABA Code of Professional Responsibility DR 6-101 (1974), it is obvious that this will be done in only the most egregious cases.
B. FINANCING AND ADMINISTRATION OF PUBLIC DEFENDER SYSTEMS

Establishing administrative review mechanisms designed to compensate the ineffectively defended indigent and to discipline his attorney will not alone greatly improve the quality of public defender representation. An essential element of any reform directed to that end is adequate financing for the public defender office.

The low starting salaries presently offered to prospective defenders fail to attract enough experienced and talented attorneys, and the narrow range of salaries tends to cause a high office turnover rate. Common sense and equity dictate that public defender salaries should be at least equal to those of prosecutors, but in many states they are not. Sufficient funding would also decrease the enormous caseloads presently imposed on many defenders. Few lawyers can be effective without adequate time to prepare a case.

Moreover, intensive training programs and continuing legal education courses should be required of all public defenders. Numerous authorities have suggested that such training programs should be required for all trial lawyers, both civil and criminal. Given the high value placed on personal liberty by a free society, nowhere is this need for specialized training more

81. See note 55 supra with respect to the problems created by inadequate funding of public defender offices.


84. See note 55 supra.

necessary than in the defense of the criminally accused. Few defenders are presently required to participate in such programs.

C. ADAPTABILITY OF PRESENT PUBLIC DEFENDER SYSTEMS TO PROPOSED REFORMS

The suggested reforms should be administered by a single body responsible both for improving the quality of representation by public defenders and for hearing client grievances. It may be helpful to focus on how these reforms could be implemented under an existing state defender system.

The office of state public defender in Minnesota is a legislatively created government agency, with one appointed chief public defender, who has a conditional power to employ as many assistant defenders as he deems necessary. Assistant state public defenders are all unclassified employees, having no tenure and receiving a maximum annual salary of $12,500. Above

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87. See Benner, supra note 83, at 681.
the public defender office is the Minnesota State Judicial Council, a body composed primarily of judges and lawyers\textsuperscript{92} charged with studying "the organization, rules and methods of procedure and practice of the judicial system of the state, and . . . all matters relating to the administration of said system."\textsuperscript{93} In addition, the Council is responsible for appointing the chief public defender, fixing his salary within a given range,\textsuperscript{94} and approving all of his appointments.\textsuperscript{95} Statutory bodies with general supervisory powers similar to those of the Council exist in a number of other states\textsuperscript{96} and are in an excellent position to administer the reforms suggested.

A state judicial council, together with the state bar association, could, under a general legislative mandate, establish the precise procedures for hearing indigents' claims of ineffective representation and appoint lawyers within the state to sit on the administrative tribunals.\textsuperscript{97} Such tribunals, after hearing a claim, could report their findings to the council for appropriate disciplinary action. An appropriation could be made to the council budget to satisfy any claim determined by the tribunal to be owed by the state to the indigent defendant.

Because it is possible that judges who hear criminal cases may develop prejudices for and against particular defenders, both the tribunals and the state judicial council (to the extent that it is responsible for disciplining public defenders) would ideally be composed of persons other than such judges.\textsuperscript{98} Private crim-

\textsuperscript{92} Id. § 483.01 et seq.
\textsuperscript{93} Id. § 483.01.
\textsuperscript{94} Id. §§ 15A.083(3), 611.23.
\textsuperscript{95} Id. § 611.24.
\textsuperscript{97} In Minnesota, recovery for damages caused by a state public defender office presently could be sought before the State Tort Claims Commission. \textit{MINN. STAT.} § 3.735(1) (1974). Moreover, the Minnesota supreme court has recently abolished sovereign immunity in the state, although delaying the effect of its decision until August 1, 1976, in order to give the state time to develop procedures to implement the ruling. \textit{Nieting v. Blondell,} \textit{___ N.W.2d} \textit{___} (Minn. 1975). In any event, it is desirable that legally expert administrative tribunals of the sort proposed here be established to hear claims against public defenders.

\textsuperscript{98} The Model Public Defender Act explicitly bars judges, prosecuting attorneys, and public defenders from membership on the State Defender Commission. \textit{MODEL PUBLIC DEFENDER ACT} § 10 Alternative B (b) (1) (1974).
inal defense attorneys are in a uniquely advantageous position to evaluate the indigent defendant's claim of ineffective representation and would probably be the most appropriate candidates for those bodies.

Adoption of the other reforms suggested is a relatively simple matter. Present salary levels can be increased and qualifications for prospective defenders raised, and, given adequate funding, the state judicial council or its equivalent could establish the training procedures necessary to ensure that all attorneys in the public defender office are capable of providing effective representation.

IV. CONCLUSION

The only methods currently available by which indigent criminal defendants claiming ineffective legal representation can seek monetary relief are malpractice or section 1983 actions. Such claims present numerous difficulties, ranging from the high costs of litigation to the various immunity doctrines. Although class actions seeking injunctive relief under section 1983 or claims invoking the inherent power of the court potentially offer prospective relief against the institutional problems of the defender office, these theories do not provide compensatory relief and are likely to be used sparingly because of considerations of federal-state comity and judicial discretion.

These roadblocks to judicial relief indicate that any improvements in the functioning of defender systems must come from the political process. Legislative creation of an independent administrative body with power to implement improvements in the structure and operation of the defender office, hear complaints of ineffective representation, award compensatory damages to injured defendants, and discipline irresponsible defenders seems a pragmatic approach for overcoming the present inadequacies of the system.