Section 1983—A Change in the Meaning of "Under Color of Law": *Polk County v. Dodson*

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In the past, the United States Supreme Court has used a functional test to determine whether a private person has acted under color of law.[1] This test analyzes whether a person's actions were taken either for the state or in lieu of the state's acting itself. If the person's actions are found to be taken for or in place of the state, then that person has carried out a state function, making his actions either state action or action taken under color of state law.[2] The inquiry then, is whether the person has performed a function reasonably attributable to the state, even though acting in a private capacity.

In *Polk County v. Dodson*,[3] the United States Supreme Court, for the first time, applied a functional test to determine whether the actions of a state employee were taken "under color of state law" for the purposes of section 1983.[4] The Court held that a public defender, who is a full-time employee of the county, "does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."[5] In making this decision, the Court resolved a split among the courts of appeals on two issues: first, what constitutes action under color of law under section 1983; and second, what immunity to suit is still perceived under section 1983.[6]

This Note will discuss the new test for action taken "under color of state law" which was announced in *Dodson*. Next, this Note will analyze the effect of the *Dodson* decision on future suits in which state action is a jurisdictional prerequisite. Finally, this Note will suggest the use of immu-

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1. *See infra* notes 32-89 and accompanying text.
2. *Id.*
3. 454 U.S. 312 (1981).
4. *Id.* at 328, 335, 337 (Blackmun, J., dissenting). *See infra* note 10 for the text of 42 U.S.C. § 1983 (1976).
5. 454 U.S. at 325. The holding of no state action was limited to § 1983. *Id.* at n.19. The state action test for 18 U.S.C. § 242 (1976), the criminal counterpart of § 1983, remains the same. *Id. See infra* notes 214-28 and accompanying text.
6. *Compare* Robinson v. Bergstrom, 579 F.2d 401, 404-08 (7th Cir. 1978) (public defender acts under color of law, but is absolutely immune from § 1983 suits); Slavin v. Curry, 574 F.2d 1256, 1265, *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978) (public defenders do not act under color of state law) *and* Espinoza v. Rogers, 470 F.2d 1174, 1175 (10th Cir. 1972) (public defenders do not act under color of state law); *with* Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977) (absolute immunity) *and* Brown v. Joseph, 463 F.2d 1046, 1048 (3d Cir. 1972) (absolute immunity).

nity as a means of maintaining uniformity in the application of "under color of law" analysis.

I. THE *POLK COUNTY V. DODSON* DECISION

Polk County v. Dodson arose out of a complaint by Russell Dodson that his lawyer Martha Shepard had failed to represent him adequately in an appeal of a robbery conviction.[7] Shepard, a full-time employee of the Polk County Offender Advocate's office who was appointed to represent Dodson in his appeal, asked to withdraw on the grounds that Dodson's claims were "wholly frivolous."[8] The Iowa Supreme Court granted Shepard's motion to withdraw and dismissed Dodson's appeal.[9]

Section 1983 requires two things—first that a person be deprived of a constitutional right, and second that the action complained of be taken under color of law.[10] Dodson's claim, in a suit brought under section 1983, was that Shepard's actions, especially her motion to withdraw, had "deprived him of his right to counsel, subjected him to cruel and unusual punishment, and denied his due process of law."[11] To establish action under color of law Dodson relied on the fact that Shepard's actions were taken in the course of her fulltime employment with the county.[12]

In deciding that public defenders do not act "under color of state law" for the purposes of section 1983, the United States Supreme Court relied on two factors. First, a public defender, unlike other state employees, is not amenable to administrative direction in carrying out his or her duties when counseling clients.[13] This, the Court said, is because a public defender is held to the same ethical canons requiring independence as are privately retained attorneys.[14] Second, the state has a constitutional duty to respect the professional independence of public defenders in their handling of criminal defenses.[15] The Court stated that the constitutionally re-

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7. 454 U.S. at 314.

8. *Id.* Shepard accompanied her request with a brief outlining all points arguably supportive of Dodson's appeal, complying with rule 104(f) of the Iowa Rules of Appellate Procedure and the procedure described in Anders v. California, 386 U.S. 738 (1967). 454 U.S. at 314 n.2.

9. *Id.* at 315.

10. 42 U.S.C. § 1983 (1976) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

11. 454 U.S. at 315. Dodson also sued Polk County, the Polk County Offender Advocate, and the Polk County Board of Supervisors. *Id.* The Court denied relief against these defendants because the allegations did not state any policy which could have been a "moving force" behind the alleged denial of constitutional rights and because § 1983 claims cannot rest on the theory of *respondeat superior. Id.* at 325-26. *See* Monell v. Department of Social Servs., 436 U.S. 658, 694 (1970); Rizzo v. Goode, 423 U.S. 362, 370-77 (1976).

12. 454 U.S. at 315.

13. *Id.* at 321.

14. *Id. See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR-5-107(B) (1976).

15. 454 U.S. at 321. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963); Powell v. Alabama, 287 U.S. 45, 69 (1932).

quired "guiding hand of counsel"[16] implicitly requires that counsel be free of state control.[17]

If the public defender acted independently with no state control, the Court said, then the action did not occur under color of law.[18] In discussing the independence of public defenders despite their employment by the government, the Court relied heavily on the fact that, in a criminal trial, the public defender is the state's adversary.[19] In addition, the Court pointed to the professional ethical responsibilities of all lawyers to avoid conflicts of interest in representing clients.[20] These responsibilities to their profession, the Court said, place public defenders in a unique position among civil servants despite the source of their compensation.[21] Thus, the Court reasoned that this professionally required independence precludes public defenders, while performing the traditional functions of lawyers, from acting under color of state law.[22] This holding in *Dodson* amounts to a radical departure from previous state action analysis for section 1983.[23]

II. PREVIOUS TREATMENTS OF STATE ACTION IN SECTION 1983 SUITS

State action and action under color of law have been evolving concepts. Initially, suits under section 1983 were limited by a very narrow interpretation of the threshhold requirement of state action. In the Civil Rights Cases,[24] the United States Supreme Court said that for an action to violate a constitutional right it must be supported by state authority in the form of "laws, customs, or judicial or executive proceedings."[25] Actions taken by persons other than government officials,[26] or actions taken by government officials outside the scope of their authority were not considered actions under color of law.[27]

The limitation of section 1983 suits to actions taken by state officials within the scope of their authority was gradually removed on two fronts, and these developed into the two traditional strands of state action analysis. The first was the functional analysis which allowed for acts by private persons to meet the state action requirement if the person performed func-

16. *Gideon*, 372 U.S. at 345; *Powell*, 287 U.S. at 69.
17. 454 U.S. at 321-23.
18. *Id.* at 324-25.
19. *Id.* at 318, 320.
20. *Id.* at 318, 321-22, 327-28 (Burger, C.J., concurring). *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1976).
21. 454 U.S. at 318. *But see* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (prison doctor can be sued under § 1983); O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (psychiatrist at state mental hospital can be sued under § 1983; *infra* notes 133-72 and accompanying text.
22. 454 U.S. at 325. *Cf.* Ferri v. Ackerman, 444 U.S. 193, 204 (1979) (principal duty of appointed counsel is to client, not to public at large). The Court did not specifically define what a lawyer's traditional duties are. *See infra* notes 204-13 and accompanying text.
23. *See infra* notes 24-122 and accompanying text.
24. 109 U.S. 3 (1883) (denial of public accomodations to persons of color by private citizens is not action taken under color of law).
25. *Id.* at 17.
26. *See id.*
27. *E.g.*, Barney v. City of New York, 193 U.S. 430, 438-39 (1902) (construction of subway tunnel in violation of city authority not action taken under color of law). *See infra* notes 92-96 and accompanying text.

tions traditionally performed by the state.[28] The second strand, the state authority analysis, permitted actions of state officials outside their official duties to fulfill the state action requirement if the action was made possible by the official's authority.[29] Both strands required that the state official's actions be closely scrutinized.

A. *The Functional Analysis*

There are two lines of functional state action analysis. The first is the "public function" strand which applies when the actor performs a function so public in nature that it is as if the state were acting.[30] The second is the "nexus" strand which applies when the private actor's conduct is in conjunction with public officials.[31]

The public function line of functional analysis began with *Smith v. Allwright*.[32] In *Allwright*, the United States Supreme Court held that election judges chosen by political parties were acting as agents of the state when they denied blacks the right to vote in party primaries.[33] This holding expanded state action to include persons who carried out state functions regardless of whether they were paid to do so.[34] The Court's use of the public function line of functional analysis to determine state action continued in *Marsh v. Alabama*.[35] In *Marsh*, a Jehovah's Witness was denied entrance to a "company town" and was prosecuted for trespass when she distributed literature without permission on a seemingly public sidewalk.[36] The Court held that the operation of a town was essentially a "public function"[37] and those who own the town must run it "consistently with the purposes of the Constitutional guarantees."[38] In this way, the United States Supreme Court determined that private persons can act "under color of law" if the function they perform "is essentially a public function."[39]

The second line of the functional analysis strand is the "nexus" test. The nexus strand of analysis raises private action to the level of state ac-

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28. *See infra* notes 32-89 and accompanying text.
29. *See infra* notes 90-122 and accompanying text.
30. *See infra* notes 32-39 and accompanying text.
31. *See infra* notes 40-46 and accompanying text.
32. 321 U.S. 649 (1943).
33. *See id.* at 661-62. *See also* Rece v. Elmore, 165 F.2d 387, 389 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948) (political parties that undertake functions relating to the exercise of sovereignty may not perform these functions in a manner which violates constitutional rights). These actions, however, still must be taken in conformity with state law.
34. 321 U.S. at 661-62.
35. 326 U.S. 501 (1946).
36. *Id.* at 503. The town of Chicasaw, Alabama was entirely privately owned by the Gulf Shipbuilding Corporation. All residents and businesses rented their buildings. *Id.* at 502-03.
37. *See id.* at 507.
38. *Id.* at 508. In deciding *Marsh*, the Court held that the individual first amendment rights of the inhabitants of Chicasaw occupied a preferred position to the property rights of the owners of the town. *Id.* at 509.
39. *Id.* at 506. *See, e.g.*, Evans v. Newton, 382 U.S. 296, 299 (1966) (running a public park is a traditional function of government and, therefore, state action); Terry v. Adams, 345 U.S. 461, 468-69 (1953) (pre-primary elections cannot exclude blacks). *But see* Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (running a shopping mall is not sufficiently analogous to the running of a company town to be state action).

tion if the state is involved with the private actor.[40] The idea that, given the appropriate connection with state functions, private persons will be deemed to act under color of law, was expounded by the Court in *Burton v. Wilmington Parking Authority*.[41] In *Burton*, a restaurant located in a public parking garage refused service to black patrons.[42] The restaurant leased its building from the Wilmington Parking Authority, a state agency, and revenues from the lease supported the parking garage.[43] In holding the owner's action to be state action, the Court said, "[t]he State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity."[44] Under the "nexus" strand of state action analysis,[45] it is the state's involvement rather than solely the activity of the private party that determines state action.[46]

Elements of both "nexus" and "public function" strands of the functional analysis appear in the line of cases dealing with procedural due process requirements in debtor-creditor relationships beginning with *Sniadach v. Family Finance Corp*.[47] These cases,[48] though not all suits under section 1983, required a finding of state action as a prerequisite to the Court's analysis of the particular statute's constitutionality.[49] In *Sniadach*, a Wis-

40. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 999-1028 (1980).

41. 365 U.S. 715 (1961).

42. *Id.* at 716.

43. *Id.* at 718-19. The garage would have been an unprofitable enterprise without those sections of the building which were allocated to commercial leasing. *Id.* The land and the building were publicly owned. *Id.* at 723.

44. *Id.* at 725.

45. G. GUNTHER, *supra* note 40, at 999.

46. *See* Lugar v. Edmonson Oil Co., 102 S. Ct. 2744, 2749 (1982) (private party's use of prejudgment attachment law in which sheriff serves writ is state action); *cf.* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978) (self-help under attachment law is not state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-59 (1974) (state guaranteed monopoly and heavy regulation not sufficient to make state a joint participant); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-79 (1972) (grant of liquor license doesn't make state a joint participant).

47. 395 U.S. 337, 342 (1969) (Wisconsin statute allowing prejudgment garnishment of wages without notice or hearing is unconstitutional denial of due process).

48. Lugar v. Edmonson Oil Co., 102 S. Ct. 2744 (1982) (private creditor who uses prejudgment attachment procedure in joint action with state official acts under color of state law); Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978) (private bailor of goods who uses self-help authorized by statute does not act under color of state law); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (Georgia statute allowing prejudgment ex parte garnishment doesn't satisfy procedural due process requirements of notice and hearing); Mitchell v. W.T. Grant, 416 U.S. 600 (1974) (Louisiana statute allowing for sequestration of goods had sufficient procedural safeguards to meet procedural due process requirements for prejudgment seizure); Fuentes v. Shevin, 407 U.S. 67 (1972) (ex parte seizure statutes deny due process when there is no provision for pre-seizure hearing).

49. The claims in all of these cases were that the applicable statutes allowed seizure of property without due process. In *Sniadach*, a statute providing for prejudgment wage garnishment was held unconstitutional. 395 U.S. at 342. In *Fuentes*, Pennsylvania and Florida statutes allowed prejudgment seizure of property by anyone who made ex parte application for a writ of replevin and posted a security bond. 407 U.S. at 69. The Court found this statute to be violative of the fourteenth amendment also. *Id.* at 83. In *Mitchell*, a Louisiana statute allowing prejudgment sequestration of secured property was held to provide adequate protection to the debtor. 416 U.S. at 603, 610. It required a sworn affidavit to a judge, not merely a clerk, that sequestration was necessary to prevent the debtor from disposing of the property, required the posting of a bond by the creditor, and provided for a prompt, post-seizure hearing. *Id.* at 602-03. In *North Georgia Finishing*, the Supreme Court invalidated a Georgia statute allowing prejudgment garnishment

consin statute allowed prejudgment garnishment after only an *ex parte* request to a court clerk.[50] The United States Supreme Court held this procedure to violate fundamental due process rights.[51]

The question of why due process rights inhered was never clearly delineated. It was assumed by some that the state's delegation of the power to seize property brought the actors under constitutional restraints because the seizure was a public function.[52] This theory however, was denied in *Flagg Brothers v. Brooks*.[53] *Flagg Brothers* concerned a New York statute[54] which allowed goods bailed to a warehouseman to be sold after notice to the owner.[55] The Court found no state action, nor any constitutional "taking" question, because the seizure and sale of goods was done privately, without the participation of any state officials.[56] In finding the action to be private, the *Flagg Brothers* Court distinguished between "state action" and action taken "under color of state law." To invoke section 1983, a person must be deprived of a constitutional right, and that deprivation must take place under color of state law.[57] The *Flagg Brothers* Court pointed out that most constitutional rights, such as the property rights at issue in *Flagg Brothers*, are protected only against infringement by the state.[58] Thus, to initially decide whether a constitutional violation has occurred, the action at issue must be "properly attributable to the State."[59] This "state action," then, is an integral part of the allegation that a constitutional deprivation has taken place.[60] If a court finds that a constitutional violation has occurred, it may then address whether this deprivation took place under color of state law. Thus, the Court said that it is possible to have action under color of law without state action.[61] The Court conceded that Flagg Brothers was attempting to seize and sell property pursuant to a state statute, and was therefore possibly acting under color of law.[62] The Court found it unnecessary to reach the color of law issue, however, because Flagg Brothers could not, acting in a private capacity, deprive anyone of a constitutional right. In other words, the Court

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upon an *ex parte* allegation to a court clerk by the creditor. 419 U.S. at 607. In all of these cases, a finding of state action was necessary because the statutes were deemed violative of the fourteenth amendment.

50. 395 U.S. at 338.

51. *Id.* at 342.

52. Flagg Bros. v. Brooks, 436 U.S. 149, 170-74 (1978) (Stevens, J. dissenting).

53. *Id.* Brooks was evicted from her apartment and her belongings were stored with Flagg Brothers. *Id.* at 153. When Brooks was unable to pay the storage charges, Flagg Brothers notified her that her belongings would be sold pursuant to New York Uniform Commercial Code § 7-210 (McKinney 1964). 436 U.S. at 153. She then brought suit to prevent the sale from taking place without a hearing. *Id.*

54. *See supra* note 53.

55. 436 U.S. at 151 n.1.

56. *Id.* at 156-57. The statute provided for sale by the bailor without any judicial intervention.

57. *Id.* at 156.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* The Court stated that the under color of law test of *Adickes v. S.H. Kress & Co.*, which required action "with the knowledge of and pursuant to" a state statute, was satisfied in *Flagg Brothers*. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 162 n.23 (1970).

found no state action.[63] The Court distinguished the previous *Sniadach* line[64] of cases by pointing out that in those cases a state official acted in concert with the private actor to effect the seizure of the property.[65] The seizure and sale contemplated in *Flagg Brothers* was private and analogous to common law self-help remedies.[66] It was recourse to the power of the state by taking joint action with a state official which had previously made the constitutional protections inhere.[67]

The line of analysis announced in *Flagg Brothers* was continued in *Lugar v. Edmonson Oil Co.*[68] In *Lugar*, a creditor brought suit for a debt and sought prejudgment attachment.[69] Virginia's procedure required only an allegation, in an *ex parte* petition, that the creditor, Edmonson Oil, believed that the debtor might dispose of his property to defeat his creditors.[70] In response to that petition, a clerk of the state court issued a writ of attachment which was served by a county sheriff.[71] Lugar's property was sequestered, though left in his possession.[72] This attachment was later dismissed because the state court found that Edmondson had failed to establish the required statutory grounds.[73] Subsequently, Lugar brought a section 1983 action alleging that Edmondson had acted jointly with the state to deprive him of his property without the requisite procedural due process.[74]

The *Lugar* Court held that the participation of state officers was sufficient state action to require due process.[75] In deciding this, the Court further discussed the *Flagg Brothers* distinction between state action and action taken under color of state law.[76] The Court pointed out that in *Flagg Brothers*, because there was no state action, the issue of whether there was action under color of state law was never decided.[77] Though *Flagg Brothers* had called the two questions "separate areas of inquiry,"[78] the Court cautioned that this did not mean that the same conduct could not satisfy both tests.[79] "As we see it," the Court said, "the two concepts cannot be so easily disentangled. Whether they are identical or not, the

63. 436 U.S. at 156-57.
64. *See supra* notes 47-49.
65. 436 U.S. at 157, 160 n.10.
66. *Id.* at 162 n.12.
67. *Id.* at 161 n.10. The Court rejected the contention that by passing the statute New York had delegated a traditional state function to those who acted under it, making their actions state actions. *Id.* at 157-58.
68. 102 S. Ct. 2744 (1982).
69. *Id.* at 2747.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 2748. The principal debt collection action was found in favor of Edmonson and some of Lugar's property was sold to satisfy the debt. *Id.* at n.3.
74. *Id.* at 2748.
75. *Id.* The *Lugar* Court distinguished this from *Flagg Brothers*. In *Flagg Brothers*, the bailor acted on his own with no judicial intervention to sell property already in his possession. *Id.* at 2748 n.6. *See* 436 U.S. at 157.
76. 102 S. Ct. at 2749-50.
77. *Id.* at 2750-51.
78. 436 U.S. at 155-56.
79. 102 S. Ct. at 2751.

state action and the under color of state law requirement are obviously related. Indeed, until recently this Court did not distinguish between the two requirements at all."[80] The United States Supreme Court had formerly either stated or assumed that the fourteenth amendment requirement of state action and the requirement of section 1983 that action be taken under color of law were the same.[81]

Even in cases where the Court distinguished between state action and action under color of law, the same conduct has satisfied both requirements. In *Adickes v. S.H. Kress & Co.*,[82] the case relied upon in *Flagg Brothers* to differentiate the two concepts,[83] the Court held that the private actor's joint participation with a state official satisfied both requirements.[84] The involvement of the state official provided the necessary state action for a constitutional violation, and the private party's joint action with this official brought his action under color of law for purposes of section 1983.[85] While the application of these distinctions to any particular case must remain, in the words of the Court, a "necessarily fact-bound inquiry,"[86] the Court upheld its comment in *Flagg Brothers* that "[o]f course, where the defendant is a public official, the two elements of a section 1983 action merge."[87]

Thus, both the "public function" and the "nexus" strands of the functional analysis require that a court carefully analyze the facts of a given case in determining whether the action is attributable to the state. It is only by "sifting the facts and weighing the circumstances" of the individual private conduct that a court can determine whether there is state action

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80. *Id.* at 2749.

81. *See, e.g.*, United States v. Price, 383 U.S. 787, 794 n.7 (1966) where the court said:

> "Under color" of law means the same thing of § 242 that it does in the civil counterpart to § 242, 42 U.S.C. § 1983 (1964 ed.). In cases under § 1983, "under color" of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment. . . . Recent decisions of this Court which have given form to the "state action" doctrine make it clear that the indictments in this case allege conduct on the part of the "private" defendant which constitutes "state action," and hence action "under color" of law within § 242. In Burton v. Wilmington Parking Authority, we held that there is "state action" whenever the "State has so far insinuated itself into a position of interdependence [with the otherwise 'private' person whose conduct is said to violate the Fourteenth Amendment] . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."

Id. (citations omitted).

Both Smith v. Allwright, 321 U.S. 649 (1944), and Terry v. Adams, 345 U.S. 461 (1953), were suits under what is now § 1983. In these cases the Court looked for state action in the activities of all-white political parties which ran elections. Finding "state action within the meaning of the Fifteenth Amendment," *Smith*, 321 U.S. at 664, there was no further inquiry into whether there was also action taken under color of state law. Further, in United States v. Classic, 313 U.S. 299, 326 (1941), a prosecution under 18 U.S.C. § 242, the court based its finding of action taken under color of state law on a case, *Ex parte* Virginia, 100 U.S. 339, 346-47 (1879), which purported only to define state action for the purposes of the fourteenth amendment.

82. 398 U.S. 144 (1970) (police officer acted in concert with store owner to prevent racial integration of lunch counter).

83. 436 U.S. at 155-56.

84. 398 U.S. at 152.

85. *Id.*

86. *Lugar*, 102 S. Ct. 2744, 2755.

87. 436 U.S. at 157 n.5. *Cf. Lugar*, 102 S. Ct. at 2754.

or action taken under color of law.[88] This type of analysis, however, has never, before *Dodson*, been used to determine whether a public servant was acting under color of state law.[89]

The two lines of functional analysis are used to place private actions within the scope of the fourteenth amendment and section 1983. In addition, another strand of state action analysis has been used to make the public official who acts outside of his designated authority similarly liable. This is the state authority analysis.

B. *State Authority Analysis*

Originally, public employees acting outside the scope of their authority were not considered liable under section 1983. In the Civil Rights Cases,[90] the Court stated, in dictum, that for an action to be raised to the level of a violation of a constitutional right it must be supported by state authority in the shape of either "laws, customs, or judicial or executive proceedings."[91] This requirement for the presence of state action was further delimited in *Barney v. City of New York*.[92] In *Barney*, the plaintiff sought to enjoin the construction of a railway tunnel under his property without compensation.[93] The tunnel was not built in accordance with the routes adopted by the city, and in fact, violated state law.[94] The Court, therefore found that this violation by city officials was outside of the city's authority and therefore not state action.[95] The United States Supreme Court, in effect, stated that the violation of the law by the city authorities placed them outside the realm of their governmental authority and they were thereby reduced to the status of private citizens whose disputes were subject only to the jurisdiction of the state courts.[96] This decision denied that a defendant could be acting "under color of state law" when that defendant's actions themselves violated the laws of the state.

The *Barney* decision remained the rule until *United States v. Classic*.[97] *Classic* was a criminal prosecution brought under 18 U.S.C. section 242, the criminal counterpart of section 1983.[98] In *Classic*, election judges in Louisiana conspired to eliminate black votes in contravention of state

88. *Burton*, 365 U.S. at 722.
89. *Dodson*, 454 U.S. at 328 (Blackmun, J., dissenting).
90. 109 U.S. 3 (1883). *See supra* notes 24-26 and accompanying text.
91. 109 U.S. at 17.
92. 193 U.S. 430 (1902).
93. *Id.* at 437.
94. *Id.*
95. *Id.* at 437-38.
96. *Id.* at 438-39.
97. 313 U.S. 299 (1941).
98. *Id.* at 307. 18 U.S.C. § 242 (1976) states:

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

law.[99] In holding the judges liable under 18 U.S.C. section 242, the Court ruled that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[100]

It was not until *Monroe v. Pape*,[101] however, that the definition of state action put forth in *Classic* was applied to suits under section 1983.[102] In *Monroe*, the Court held that Congress intended the phrase "under color of" law in section 1983 to encompass the abuse of authority by state officials.[103] Citing the post-Civil War abuses of black citizens by the authorities in the south,[104] the Court held that "it is beyond doubt that [under color of law] should be accorded the same construction in both" 18 U.S.C. section 242 and 42 U.S.C. section 1983.[105]

After the *Monroe* Court held that actions taken by public officials constituted state action even when taken outside the scope of their authority,[106] the courts treated the issue rather summarily. A finding of public employment has been considered dispositive. For example, in *Paul v. Davis*,[107] in which police officers were the state officials charged, the question of state action was relegated to a footnote where the Court said "[i]t is not disputed that petitioners' actions were part of their official conduct and that this element of a section 1983 suit is satisfied here.[108] Similarly, in *Ingraham v. Wright*,[109] school officials were sued under section 1983 for allegedly excessive punishment of children without due process and in violation of the eighth amendment.[110] The Court must have found state ac-

99. 313 U.S. at 325, 326.

100. *Id.* This holding was reaffirmed by the Court in Screws v. United States, 325 U.S. 91 (1944) (sheriff beat to death a black man in his custody).

101. 321 U.S. 167 (1961). In *Monroe*, thirteen Chicago police officers allegedly broke into Monroe's home early in the morning, roused the Monroes from their beds and forced them to stand naked in the living room. *Id.* at 203 (Frankfurter, J., dissenting). The officers also woke the six children and herded them into the living room. *Id.* They struck Mr. Monroe several times with a flashlight calling him "nigger" and "black boy," pushed Mrs. Monroe, and hit and kicked several of the children pushing them to the floor. *Id.* They ransacked the house, dumping drawers, emptying closets, and ripping mattress covers. *Id.* They then took Mr. Monroe to the police station, held him on "open" charges, interrogated him and put him in lineups, all without permitting him to call his family or an attorney. *Id.* They did not bring him before a magistrate although several were readily available. *Id.* Monroe subsequently was released and no charges were filed against him. *Id.*

102. *Id.* at 172, 183-85.

103. *Id.*

104. *Id.* at 172-82.

105. *Id.* at 185. Polk County v. Dodson, 454 U.S. 312 (1981), appears to contradict this portion of the holding in *Monroe* insofar as public defenders can be held liable under 18 U.S.C. § 242 but not under 42 U.S.C. § 1983. *Id.* at 325 n.19. *See* United States v. Senak, 477 F.2d 304, 308 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973). *See infra* notes 214-27 and accompanying text.

106. *Monroe* also expanded § 1983 on two other fronts. The Court specifically stated that state remedies need not be exhausted before filing suit in federal court, 321 U.S. at 183, and the Court also refused to require the same level of intent which it required under 18 U.S.C. § 242. *Id.* at 187. Section 1983, it said, "should be read against a background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.*

107. 424 U.S. 693 (1976). Police officers listed the plaintiff as a "known shoplifter" in a circular distributed to area merchants. *Id.* at 695. Plaintiff had never been convicted of shoplifting and claimed that his reputation had been damaged. *Id.* at 694-95.

108. *Id.* at 697 n.2.

109. 430 U.S. 651 (1977).

110. *Id.* at 653.

tion because the case was decided on the merits. Apparently the Court considered state action to be too obvious to mention.

Another case in which action under color of law was given short shrift was *Parrat v. Taylor*.[111] In that case a prison inmate in a trustee position lost another prisoner's hobby materials.[112] The Court found that this inmate's actions were taken under color of law[113] even though he was not a regular state employee.[114] The case most directly on point, however, in holding public employment to be dispositive on finding state action is *United States v. Senak*,[115] which was upheld without explanation by the *Dodson* Court.[116] In *Senak*, the Seventh Circuit Court of Appeals held that a public defender acted under color of law for the purpose of 18 U.S.C. section 242, the criminal counterpart of section 1983, when he exacted additional money from indigent clients under a threat of inadequate representation.[117] The court stated that *Senak*'s position as public defender gave him the opportunity to make the illegal demands and clothed him with the authority of the state in so doing.[118] The *Senak* court relied on *United States v. Classic*[119] in finding action under color of state law,[120] just as the Court did in *Monroe v. Pape*.[121] The United States Supreme Court, until *Dodson*, had held consistently that the under color of law requirements for section 1983 and for 18 U.S.C. section 242 were the same for the purposes of a public official acting outside the scope of employment.[122]

III. THE *POLK COUNTY V. DODSON* ANALYSIS

In holding that public defenders do not act under color of law when performing a lawyer's traditional functions in a criminal defense,[123] the Court in *Dodson* set out a two-pronged test. First, there must be a showing that the employee is bound by professional ethics to act independently.[124]

111. 451 U.S. 527 (1981) (negligent property loss by prison trustee not deprivation without due process).

112. *Id.* at 530.

113. *Id.* at 535. The Court said, "[I]t can no longer be questioned that the alleged conduct by petitioners in this case satisfies the 'under color of state law requirement.'" *Id.*

114. *Id.* at 530.

115. 477 F.2d 304 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973).

116. 454 U.S. 312, 325 n.19 (1981).

117. 477 F.2d at 308. The holding in *Senak* stated that Senak deprived his client of property without due process, a fourteenth amendment violation, which, under *Flagg Brothers* and *Lugar* would require both state action and action under color of law to be actionable under 18 U.S.C. § 242. *Id.* at 307. The concurrence felt the deprivation to be that of sixth amendment right to counsel, *id.* at 309 (Fairchild, J., concurring), which might not, under the *Flagg Brothers/Lugar* analysis require state action but which would still require action under color of state law to come under § 242. The state action question was never raised, however, because Senak was a public employee. *Id.* at 307.

118. *Id.*

119. 313 U.S. 299 (1941). *See supra* notes 97-100 and accompanying text.

120. 477 F.2d at 307.

121. 365 U.S. 167, 184-85 (1961). *See supra* notes 101-06 and accompanying text.

122. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 n.7 (1970); United States v. Price, 383 U.S. 787, 794 n.7 (1966); Monroe v. Pape, 365 U.S. 167, 185 (1961). *See infra* notes 214-27 and accompanying text.

123. 454 U.S. 312, 325 (1981).

124. *Id.* at 321.

Second, the state must have a reciprocal constitutional mandate to respect this independence.[125] The public defender is bound by ethical canons which require him or her to act independently on behalf of a client regardless of the source of compensation.[126] This, the Court said, makes a public defender "not amenable to administrative direction in the same sense as other employees of the State."[127] This absence of administrative direction fulfills the first prong of the under color of law test in *Dodson*. The second, "and equally important" prong of the *Dodson* analysis, is fulfilled by the fact that the state itself has a constitutional obligation to respect a public defender's professional independence.[128] For the state to fulfill its constitutional obligation to provide counsel to indigent criminal defendants, the Court in *Dodson* held that the state must provide an "effective and independent advocate."[129] If the public defender is an advocate for the criminal defendant, he or she must necessarily act as an adversary to the state in conducting the defense.[130] It was this adversary position of the public defender in which the Court "[found] it peculiarly difficult to detect any color of state law."[131] That these two prongs are met only when the public defender performs the "traditional" legal duties and not all possible job aspects is shown in the Court's distinguishing cases which the Court said involved administrative rather than professional responsibility.[132]

A. Estelle v. Gamble *and* O'Connor v. Donaldson

In deciding that the professional independence of a public defender removed his or her actions from under color of law, the *Dodson* Court distinguished two cases in which doctors employed by the state were held amenable to suit under section 1983:[133] *Estelle v. Gamble*[134] and *O'Connor v. Donaldson*.[135] The Court, while implying that a physician's relationship with a patient is analogous to that between an attorney and client, said the two cases were distinguishable because both physicians were also sued in an administrative capacity.[136] An administrator, unlike a physician whose sole concern is treating a patient, owes a duty of loyalty, according to the

125. *Id.* at 321-22.

126. *Id.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1976) has been adopted verbatim by the Iowa Supreme Court and is mandatory in character, leaving an attorney who violates it subject to disciplinary action. 454 U.S. at 321 n.11.

127. *Id.* at 321.

128. *Id.* at 321-22. Gideon v. Wainwright, 372 U.S. 335 (1963), established the state's duty to provide counsel for indigent criminal defendants. *See id.* at 345. The *Dodson* Court said that freedom from state intervention is implicit in this mandate. 454 U.S. at 322.

129. *Id.*

130. *Id.* at 320. This is not completely correct. The public defender acts as adversary to the prosecution. The state also acts as judge, another role in which independence is required. This independence is protected by absolute immunity. *See infra* notes 238-39 and accompanying text.

131. *Id.*

132. These prongs would not be met, for example, when a public defender was also responsible for hiring and firing decisions. *See infra* note 138.

133. *Id.* at 319-20.

134. 429 U.S. 97 (1976).

135. 422 U.S. 563 (1975).

136. 454 U.S. at 320. The Court never defines "administrative" duties but suggests that they might include hiring and firing, and have the quality of requiring "divided loyalty." *Id.*

Court, to both the patient and the state.[137] This divided loyalty, then, would make the physician amenable to suit under section 1983.[138] While this distinction may seem logical, it presents a misinterpretation of the distinguished cases.

Estelle v. Gamble[139] was a suit under section 1983 filed by an inmate in a state prison.[140] The plaintiff alleged that he had been deprived of proper medical care[141] and was therefore subjected to cruel and unusual punishment in violation of the eighth amendment.[142] The Court ruled that a deliberate indifference to a prisoner's medical needs would violate the eighth amendment.[143] It then proceeded to decide the case on the merits with no discussion of whether or not the doctor was acting under color of law.[144] Contrary to the Court's claim in *Dodson* that the physician was acting under color of law because he was an administrator,[145] the judgment was reversed as to the doctor specifically because he was not an administrator.[146] The complaint against the doctor was based "solely on the lack of diagnosis and inadequate treatment,"[147] "a classic example of a matter for medical judgment."[148] The Court enumerated the history of Gamble's medical treatments[149] and, citing the fact that he had received extensive medical care and that the facts showed no intentional indifference on the doctor's part to his needs,[150] held that no violation of the

137. *Id.*

138. *Id.* Consistent with this statement is the Court's finding in Branti v. Finkel, 445 U.S. 507 (1980), that public defenders are liable under § 1983 when hiring and firing for the state. *Id.* at 508 n.1. In addition, the Court in *Dodson* suggested that other functions of a public defender might be under color of law, such as administrative or investigative activities. 454 U.S. at 325.

139. 429 U.S. 97 (1976).

140. *Id.* at 98.

141. *Id.* The prisoner, Gamble, was injured when a bale of cotton fell on him while he was working. *Id.* at 99. He was treated on 17 different occasions over a three-month period. *Id.* at 107. When he complained of continued pain and refused to work, he was placed in solitary confinement where he remained when suit was filed. *Id.* at 114 n.8. (Stevens, J., dissenting). At times during his treatment prison officials refused to follow the doctor's order to move him to a lower bunk, *id.* at 99, and lost his prescriptions for several days, leaving them unfilled. *Id.* at 100. Gamble also claimed that several necessary medical tests were not performed. *Id.* at 107.

142. *Id.* at 101. The Court recognized the government's obligation to provide adequate medical care for prisoners. *Id.* at 103.

143. *Id.* at 106. This implies an intent requirement. Because § 1983 itself has no intent requirement, Monroe v. Pape, 365 U.S. 167, 187 (1961), this intent standard must be tied to the violation of the eighth amendment cruel and unusual punishment clause. This is in keeping with Louisiana *ex rel.* Francis v. Reswelber, 329 U.S. 459 (1947), where the Court held that an "unforeseeable accident," *id.* at 464, or an "innocent misadventure," *id.* at 470 (Frankfurter, J., concurring), was insufficient to show an eighth amendment violation. *Id.* at 464. The dissent also recognized this intent requirement: "Of course, not every instance of improper health care violates the Eighth Amendment. Like the rest of us, prisoners must take the risk that a competent, diligent physician will make an error. Such an error may give rise to a tort claim but not necessarily to a constitutional claim." *Id.* at 116 n.13 (Stevens, J., dissenting).

144. 429 U.S. at 106-08.

145. 454 U.S. at 320.

146. 429 U.S. at 108. The case was remanded as to the Director of the Department of Corrections and the warden of the prison to consider whether a cause of action had been stated against them. *Id.*

147. *Id.* at 107.

148. *Id.*

149. *Id.* *See supra* note 141.

150. 429 U.S. at 108 n.16.

eighth amendment had been alleged against the doctor.[151] The Court said, "[a] medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court under the Texas Tort Claims Act."[152] The Court remanded the case to the court of appeals as to the prison administrators, who were also sued.[153] It is clear, therefore, that the Court was treating the physician's relationship to the plaintiff as separate and distinct from that of the other defendants.

While *O'Connor v. Donaldson*[154] does not present quite so clear a dichotomy as does *Estelle*, the challenged decision was also a medical one.[155] In *O'Connor*, a mental patient, Kenneth Donaldson, had been involuntarily committed to a state mental hospital for fifteen years.[156] During that time Donaldson received no treatment[157] and the director of the hospital denied repeated requests by both Donaldson and others that he be released.[158] During most of this period, Dr. J. B. O'Connor was the hospital director.[159] Shortly after Dr. O'Connor retired, the staff of the hospital petitioned to have Donaldson restored to legal competency and released, which he was.[160] Upon his release, Donaldson sued O'Connor under section 1983 alleging that he had been denied his liberty without due process.[161] It was conceded by all concerned that Donaldson was not a danger either to himself or to others at any time.[162] While the Court in *Dodson* correctly pointed out that an administrator had a duty to protect the public,[163] this was not an issue in Donaldson's case because he was never dangerous.[164] The decision which kept Donaldson institutionalized was one by O'Connor that Donaldson could not make a successful adjustment to the outside.[165] The Court held that the state could not constitutionally confine without treatment a person who is no danger to himself or others.[166] The Court said, "there is . . . no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live

151. *Id.* at 108.
152. *Id.* at 107.
153. *Id.* at 108.
154. 422 U.S. 563 (1975).
155. *Id.* at 567 n.3, 568. O'Connor admitted that he had the power to release Donaldson. *Id.* at 567 n.3. He stated that it was his duty to determine whether the patient was in a condition to be released. *Id.*
156. *Id.* at 564.
157. *Id.* at 569. O'Connor described Donaldson's treatment as "milieu therapy." This was apparently just a euphemism for enforced custodial care, however. *See id.*
158. *Id.* at 568-69. O'Connor refused to release Donaldson either to a halfway house or to a competent friend. O'Connor said Donaldson could be released only to his parents, though Donaldson was 55 and O'Connor knew that his parents were too elderly to care for him. This rule was of O'Connor's own making. *Id.*
159. *Id.* at 564.
160. *Id.* at 567 n.3.
161. *Id.* at 565.
162. *Id.* at 568.
163. 454 U.S. at 320.
164. 422 U.S. at 568.
165. *Id.* Donaldson supported himself for 15 years prior to his commitment, and obtained a responsible job in hotel administration immediately upon his release. *Id.*
166. *Id.* at 573-76.

safely in freedom."[167] The Court specifically found that O'Connor was "an agent of the State,"[168] and because it decided the case on the merits, presumably the Court also found action under color of law. While the Court in *Dodson* did not define exactly what constitutes an administrative capacity, Dr. O'Connor was dealing with a harmless patient concerning whom he owed no duty to public safety. The decision not to release Donaldson was closer to an evaluation of his medical condition than it was to a hiring or firing decision.[169]

Estelle and *O'Connor* represent instances in which professionals who practiced under a code of ethics requiring independent professional decisions were held amenable to suit under section 1983. They were answerable to such suits despite the fact that both prongs of the *Dodson* analysis were satisfied.[170] The physicians themselves had a responsibility to act in the best interest of their patients. This satisfies the first prong. The eighth amendment in *Estelle*[171] and the fourteenth amendment in *O'Connor*[172] required the state to respect this autonomy. This satisfies the second prong. The fact that the Court in *Dodson* felt it necessary to distinguish these cases based on purported administrative responsibilities implies that the *Dodson* analysis is applicable not only to attorneys employed by the state, but to other professionals as well, so long as both the state and individual involved have a responsibility to uphold this professional independence.[173]

B. *Under Color of State Law*

In addition to misreading *Estelle* and *O'Connor*, the *Dodson* Court

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167. *Id.* at 575.

168. *Id.* at 576.

169. *See Dodson*, 454 U.S. at 325; Branti v. Finkel, 445 U.S. 507, 508 n.2 (1980). *See supra* note 138. On remand, the fifth circuit held that the jury instructions regarding immunity were inadequate in light of Wood v. Strickland, 420 U.S. 308 (1975). Donaldson v. O'Connor, 519 F.2d 59, 60 (1975). *See infra* notes 256-62 and accompanying text.

170. *See supra* text accompanying notes 124-32.

171. 429 U.S. at 104-05.

172. 422 U.S. at 573-76.

173. It could be argued that the relationship of a doctor to his or her state employer differs from that of a public defender. When a state sets up medical facilities, whether in a prison or a public hospital, the state's mission is to treat patients and the doctor carries out that mission. When the state sets up a public defender's office, the state's mission is to make counsel available, but not to actually defend. It can be said, therefore, that while administrators who appoint attorneys to defend indigents are carrying out the state's mission, the attorneys themselves are not. This reading would narrow the under color of law exception to the sole situation of a public defender. There is some support for this reading in the Court's statement that:

> Because of their custodial and supervisory functions, the state-employed doctors in *O'Connor* and *Estelle* faced their employer in a very different posture than does a public defender. *Institutional physicians assume an obligation to the mission that the State, through the institution, attemptes to achieve.* With the public defender it is different. As argued in the dissenting opinion in the Court of Appeals, it is the function of the public defender to enter "not guilty" pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants. All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities.

454 U.S. at 320 (emphasis added).

However, the Court says this in the context of administrative positions and never reaches the question of whether this same logic applies to physicians who are not administrators.

relied on inappropriate cases to define action taken under color of law. In holding that the public defender in *Dodson* did not act under color of law, the Court relied on the under color of law definition found in *United States v. Classic*,[174] which was affirmed in *Screws v. United States*[175] and *Monroe v. Pape*.[176] The *Dodson* Court stated that "a person acts under color of state law *only* when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' "[177] These cases deal with public employees who, acting outside the scope of their authority, committed acts which violated the civil rights of the plaintiffs.[178] The test of ostensible state authority came about because, prior to *Classic*, action by public officials taken outside the scope of their authority was not considered to be actionable under section 1983.[179] There was no question in these cases whether actions by officials within their designated authority was action under color of law.

This abuse of authority is clearly distinguishable from *Dodson*. The public defender in *Dodson* was assigned by her superiors to represent Dodson in his appeal.[180] Her request to withdraw was made in accordance with state procedures and was in keeping with the mandates of applicable case law.[181] There was no illegality in her actions, and her actions were within the scope of her duties.[182] No charge was made by anyone that her actions violated any legal procedure or job description. Thus, the threshold question in *Classic, Screws* and *Monroe*, whether the illegal action was vested with state authority, was not even reached in *Dodson*.

These *Classic, Screws* and *Monroe* precedents do militate against the Court's finding of no action under color of law, however. The Court's holding that a public defender cannot act under color of law because his or her action is not subject to administrative direction[183] contradicts previous holdings that state officials act under color of law when the state does not

174. 313 U.S. 299, 326 (1941), *quoted in Dodson*, 454 U.S. at 317-18. *Classic* was a case brought under 18 U.S.C. § 242 (1976).

175. 325 U.S. 91, 109-13 (1945).

176. 365 U.S. 167, 184 (1961).

177. 454 U.S. at 317-18 (citing United States v. Classic, 313 U.S. 299, 326 (1941)) (emphasis added). The Court in *Classic* said: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. at 326. This "clothed with the authority of state law" test is required only when the official acts outside his authority. Surely the *Dodson* Court could not have meant that action under color of law takes place only in instances of abuse.

178. *See supra* notes 97-105 and accompanying text.

179. *See supra* notes 91-96 and accompanying text.

180. 454 U.S. at 314. *See id.* at 332-33 (Blackmun, J., dissenting). The Court, in saying that administrative actions of attorneys may be taken under color of law, *id.* at 325, implies that Shepard's appointment was action taken under color of law.

181. *See supra* notes 8-9 and accompanying text.

182. 454 U.S. at 323.

183. The reliance by the Court on professional independence unduly deemphasizes the amount of influence the state has on a public defender. The Offender Advocates' office in this case was totally financially dependent upon the County Board of Supervisors. *Id.* at 332 (Blackmun, J., dissenting). The Board fixes salaries, staff size, office equipment and supplies, and effectively dictates the public defender's case load size. *Id.* This effectively determines the amount of time a public defender spends on a particular case, a factor over which a private attorney has personal control. In addition, in *Dodson*, a public defender was required to file annual reports detailing all cases handled that year. *Id.* This implies some supervisory control.

authorize or know of the public defender's action,[184] and even when the state strictly forbids it.[185] Therefore, the fact that the public defender withdrew from Dodson's case due to her own professional judgment, rather than administrative direction, is irrelevant to whether she acted under color of law.[186] It follows that the Court's reliance on the state authority strand[187] of state action analysis found in *Classic, Screws* and *Monroe* is misplaced.

While employment by the state was previously sufficient to show action under color of law,[188] the Court in *Dodson* refers to public employment as a mere "relevant factor,"[189] and goes on to state that the duties themselves remove the activities from under color of law.[190] In *Dodson*, it was the public defender's function and not her authority which was being questioned. While function has never previously been considered important in determining action under color of law for state employees, if the Court is going to analyze the public defender's function it should use the cases which previously defined the functional tests.[191] Instead the Court has used the state authority strand of state action analysis which has previously been used only to bring malfeasance in office under color of law.[192]

There are two functional tests.[193] The public defender's essentially secular function of representing a criminal defendant is clearly insufficient to meet the *Marsh v. Alabama*[194] test for performing a public function.[195] Despite the fact that the state is required to supply public defenders in criminal trials, the public defenders themselves do not assume so public a role as to put them in the shoes of the state. While the public function strand of state action analysis does not appear to apply to the actions of a public defender, the second, or nexus, line does.

The test for determining whether there is a sufficient "nexus" between private and state actors to make the private actions attributable to the state is set out in *Burton v. Wilmington Parking Authority*.[196] In *Burton*, the Court found the actions of the restaurant owner to have been taken under color of law for three reasons. The restaurant was an integral and indispensible part of the state's plan in constructing the parking garage,[197] the relationship was symbiotic, that is, both parties benefitted,[198] and the state

184. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); Screws v. United States, 325 U.S. 91, 108-13 (1945).

185. Monroe v. Pape, 365 U.S. 167, 182-87 (1961) (fact that actions violated state law doesn't remove act from under color of law).

186. 454 U.S. at 330 (Blackmun, J., dissenting).

187. *See supra* notes 91-105 and accompanying text.

188. *Dodson*, 454 U.S. at 328-29 (Blackmun, J., dissenting). *See supra* notes 106-22 and accompanying text.

189. 454 U.S. at 321.

190. *Id.* at 325.

191. *See supra* notes 30-89 and accompanying text.

192. *See supra* notes 90-122 and accompanying text.

193. *See supra* notes 30-89 and accompanying text.

194. 326 U.S. 501 (1946). *See supra* notes 23-26 and accompanying text.

195. *See supra* notes 40-89 and accompanying text.

196. 365 U.S. 715 (1961). *See supra* notes 41-44 and accompanying text.

197. 365 U.S. at 723-24. *See supra* notes 40-46 and accompanying text.

198. 365 U.S. at 724. The rent from the restaurant helped support the garage. *Id.* at 723.

had placed its power and prestige behind the restaurant owner.[199] The office of the public defender clearly fulfills these criteria. It is an integral and indispensible part of the state's plan for fulfilling its constitutional obligation to provide representation to indigent criminal defendants, an obligation surely as serious as that of providing parking facilities. The relationship between the public defender and the state is symbiotic: while the state is able to fulfill its constitutional obligations, the lawyers involved are gainfully employed. And if the state has lent its power and prestige to a restaurant operator by allowing the restaurant to operate in a public building which displays the state flag,[200] then it has surely done so by providing a county department in county offices staffed with county employees. The state has, indeed, "so far insinuated itself into a position of interdependence with [the attorney] that it must be recognized as a joint participant in the challenged activity."[201] Indeed, even when both state and attorney are bound by obligations which must allow the attorney the exercise of discretion, the state necessarily controls funding, staffing, and thereby caseload. This should have called into play the "necessarily fact bound inquiry"[202] about which the Court said "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the state in [the attorney's] conduct be attributed its true significance."[203]

An additional troubling aspect of the *Dodson* Court's use of a functional test in determining whether public defenders act under color of law is that the Court holds for the first time that a public employee may be acting under color of law when performing some official functions and not others.[204] The Court limited its ruling that the public defender was not liable to suit under section 1983 to cases where a public defender performs "a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."[205] Administrative functions are exempted from this holding, although the function of hiring and firing of employees is specifically mentioned.[206] Presumably, nontraditional actions taken by counsel are exempted as well.[207] While the Court did not define what an attorney's traditional functions consisted of for the purposes of this test, it gave as examples of these functions the entering of "not guilty" pleas, making motions to suppress evidence, objecting to evidence at trial, cross-examining witnesses, and making closing arguments.[208] The Court cited approvingly the dissent from the court of appeals' decision which referred to the com-

199. *Id.* at 725. The building was public and flew the state flag. *Id.* at 720.

200. *Id.*

201. *Id.* at 725.

202. *Lugar*, 102 S. Ct. 2744, 2755 (1982).

203. *Burton*, 365 U.S. at 722.

204. 454 U.S. at 325, 335 (Blackmun, J., dissenting).

205. *Id.* at 325.

206. *Id.*

207. Action under color of law could also include any actions taken by an attorney which a plaintiff could prove were taken according to administrative direction, such as an instance where the state violated its obligation to respect the autonomy of the attorney. *Cf.* Rizzo v. Goode, 423 U.S. 362, 370-77 (1976) (general allegation of administrative negligence insufficient under § 1983).

208. 454 U.S. at 320.

plaint against the public defender as one of "ordinary malpractice."[209] Because the Court specifically held that these actions were not taken under color of law,[210] it would appear that malpractice could come within the definition of a lawyer's traditional function.[211] The only activity which the Court implied was not "traditional" was the extortion of payment from indigent clients and their friends and families.[212] Extortion was held to be action taken under color of law for the purposes of prosecution under 18 U.S.C. section 242.[213]

Most of the confusion stemming from the Court's attempt to delineate a lawyer's traditional functions comes from the fact that the Court implied that there are now different under color of law requirements for section 1983 and 18 U.S.C. section 242.

C. *18 U.S.C. Section 242 and 42 U.S.C. Section 1983: Different Standards for Under Color of Law*

In holding that public defenders do not act under color of law for purposes of section 1983, but do for purposes of 18 U.S.C. section 242,[214] the Court in *Dodson* departed from the well-established principle that the under color of law requirement for the two statutes is the same. In *Monroe v. Pape*, a suit under section 1983, the Court adopted the definition of under color of law previously set forth in *United States v. Classic* and reaffirmed in *Screws v. United States*.[215] Both *Classic* and *Screws* were decided under 18 U.S.C. section 242.[216] The *Monroe* Court reviewed the legislative history of both bills,[217] and decided that, as to under color of law, "it is beyond doubt that this phrase should be accorded the same construction in both statutes."[218]

The United States Supreme Court has often used cases decided under section 1983 and 18 U.S.C. section 242 interchangeably as precedent. In *United States v. Price*,[219] a criminal prosecution under 18 U.S.C. section

209. *Id.* at 316-17 (citing Dodson v. Polk County, 628 F.2d 1104 (8th Cir. 1980)).

210. *Id.* at 325.

211. The American Bar Association would seem to disagree with this proposition, however. The same ethical code which requires professional independence also requires competence. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1976).

212. 454 U.S. at 325 n.19, where the Court said: "We do not disturb the theory of cases, brought under 18 U.S.C. § 242, in which public defenders have been prosecuted for extorting payment from clients, friends or relatives 'under color of . . . law . . .' See, e.g. United States v. Senak . . . ."

213. United States v. Senak, 477 F.2d 304, 307 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973). *But see infra* note 214.

214. 454 U.S. at 325 n.19. The *Senak* court found that Senak's position was the determinative factor. The court said, "Senak's official position enabled him to perpetrate a scheme of obtaining money to which he was not entitled. His being county public defender . . . gave him the opportunity to make the demands and clothed him with the authority of the state in so doing." 477 F.2d at 308. These demands, the court said, were made "ostensibly by virtue of his appointment 'backed by the power of the state'." *Id.* The *Senak* court was considering not what the public defender did, but the context in which he did it.

215. *Monroe*, 365 U.S. at 183-84. *See supra* notes 91-105 and accompanying text.

216. *Classic*, 313 U.S. 299, 326 (1941); *Screws*, 325 U.S. 91, 108-13 (1945). *See supra* note 150.

217. 365 U.S. 167, 172-85 (1961).

218. *Id.* at 185.

219. 383 U.S. 787 (1966). The Deputy Sheriff released three civil rights workers from jail and transported them to a place where co-conspirators waited to kill them. *Id.* at 790.

242, the Court relied on both *Screws* and *Burton v. Wilmington Parking Authority*, a section 1983 case, in finding that the defendants' actions satisfied the under color of law requirement.[220] In *Price*, the Court specifically stated that " '[u]nder color' of law means the same thing in section 242 that it does in the civil counterpart of section 242, 42 U.S.C. section 1983."[221] Another section 1983 decision, *Adickes v. S.H. Kress & Co.*,[222] specifically relied on *Price* with the Court clearly pointing to the uniform interpretation of the two statutes.[223] The Court said, "[a]lthough Price concerned a criminal prosecution involving 18 U.S.C. section 242, we have previously held that 'under color of law' means the same thing for section 1983."[224]

The effect of *Dodson* on this previously undisturbed line of precedent is unclear. The major distinction between the two statutes for purposes of liability appears to be the requirement of intent. In *Monroe*, the Court discussed this distinction.[225] The requirement of willful action in section 242 has been read to mean "a specific intent to deprive a person of a federal right."[226] Because section 1983 does not contain the word "willfully," and provides for civil rather than criminal penalties, the *Monroe* Court said that it "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[227] The effect of *Dodson*, then, is that a public defender is not liable under the federal civil rights statutes unless he or she acts with specific intent. The Court could have afforded this same protection to public defenders by the much simpler act of granting some form of immunity.[228] In addition, the adoption of a good faith immunity defense would not deprive the victims of the public defender's misconduct of the more meaningful personal remedy of damages.

The *Dodson* Court expressed concern that the imposition of liability on public defenders for the performance of their traditional functions would act as a disincentive to the states to provide post conviction assistance to indigents.[229] Fear of liability, however, does not necessitate the redefinition of the concept of under color of law. A grant of immunity could have been structured to protect public defenders without redefining the meaning of section 1983.

IV. IMMUNITY TO SUIT UNDER SECTION 1983

Section 1983 itself makes no mention of immunity. The United States Supreme Court, however, has held that many traditional common law im-

220. *Id.* at 793-94, 794 n.7.
221. *Id.* at 794 n.7.
222. 398 U.S. 144 (1970). Store employee and policeman conspired to deny service to and cause the arrest of a woman attempting to integrate a lunch counter. *Id.* at 148.
223. *Id.* at 152.
224. *Id.* at 152 n.7.
225. 365 U.S. 167, 187 (1961).
226. *Screws*, 325 U.S. at 103.
227. *Monroe*, 365 U.S. at 187. The Court has recently held that negligence is sufficient to state a cause of action under § 1983. *See* Parratt v. Taylor, 451 U.S. 527 (1981).
228. *See infra* notes 230-79 and accompanying text.
229. 454 U.S. at 324 n.17.

munities to suit have been preserved in the context of section 1983. In examining the legislative history of the bill, the Court, in *Tenney v. Brandhove*,[230] said, "[w]e cannot believe that Congress . . . would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."[231] The question then became who holds these immunities, and what is their extent.

Immunity, the Court has said, is grounded in two principles.[232] It is unjust, particularly absent bad faith, to "subjec[t] to liability an officer who is required, by the legal obligations of his position, to exercise discretion."[233] Mutually dependent upon this first proposition is the danger that the threat of liability will "deter his willingness to execute his office with the decisiveness and the judgement required by the public good."[234] Therefore, the main factors considered by the Court in determining the immunity to be granted have been, first, the amount of discretion that a particular office required be exercised, and, second, the extent to which the exercise of this discretion would be hampered by section 1983 liability.[235] By measuring the responsibilities of different government officials against these two factors, the United States Supreme Court has determined the appropriate extent of immunity to be applied in a particular case. Two types of immunity have been granted: absolute immunity and good faith immunity.

Absolute immunity has been granted to only a limited class of officials. In *Tenney v. Brandhove*,[236] legislators acting within the sphere of legislative activity were held to be absolutely immune from suit under section 1983 in light of a long hard-won common law tradition of legislative freedom.[237] Similarly, in *Pierson v. Ray*,[238] the equally august tradition of absolute judicial immunity was held to have also survived.[239] The single more recent addition to this group came with the grant of absolute immunity to prosecutors.

In *Imbler v. Pachtman*[240] the United States Supreme Court held that "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution [was not] amenable to suit under 42 U.S.C. section 1983 . . . for alleged deprivation of the defendant's constitutional rights."[241] Citing the public need for stricter law enforcement,[242] and the fact that criminal trials can pose substantial

230. 341 U.S. 367 (1951).
231. *Id.* at 376.
232. *See* Scheuer v. Rhodes, 416 U.S. 232, 239-40 (1974).
233. *Id.* at 240.
234. *Id.*
235. *See* Procunier v. Navarette, 434 U.S. 555, 561-62 (1978); Imbler v. Pachtman, 424 U.S. 409, 419 (1976); O'Connor v. Donaldson, 422 U.S. 563, 577 (1975); Wood v. Strickland, 420 U.S. 308, 318 (1975); Scheuer v. Rhodes, 416 U.S. 232, 240, 247 (1974).
236. 341 U.S. 367 (1951).
237. *Id.* at 376.
238. 386 U.S. 547 (1967).
239. *Id.* at 554.
240. 424 U.S. 409 (1976).
241. *Id.* at 410.
242. *Id.* at 424.

possibilities for liability even to the honest prosecutor because so many decisions must be based on judgment,[243] the Court said that a prosecutor called upon to defend his actions under a qualified immunity would face an "intolerable burde[n]."[244] In addition, the Court said, "[t]he affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system."[245] Without wide discretion in the conduct of the trial, the Court added, the goal of accurately determining guilt or innocence would be hampered.[246] Thus, the unfairness of holding a prosecutor liable for delicate decisions he or she is required to make, and the need for very wide latitude in the exercise of discretion require a prosecutor's immunity to be absolute.[247]

In contrast to the narrow application of absolute immunity, a qualified, good faith immunity from suit under section 1983 has been granted to a wide range of public officials. In *Pierson v. Ray*,[248] the Court held that a policeman was entitled to good faith immunity.[249] Thus, when acting in good faith and upon probable cause, he or she cannot be held liable for damages for an arrest under a statute later found to be unconstitutional.[250] The meaning of good faith in the context of a grant of immunity was discussed in *Scheuer v. Rhodes*.[251] "[T]he scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action"[252] are basic to determining the level of immunity to which an official is entitled.[253] In *Scheuer*, the Court ruled that holding a state's chief executive to be entirely immune from suit under section 1983 would vitiate the purpose of the federal remedy.[254] However, because the choices he faces are "far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad."[255] Breadth of discretion was also a consideration in *Wood v. Strickland*.[256] There the United States Supreme Court noted that school board members acted at times as both legislators and adjudicators within the context of the school's disciplinary process.[257] Their necessary reliance on information provided by others, and the need in many cases for prompt action, required that they not be subject to personal liability every time their actions were found subsequently to have violated a student's rights.[258] The Court set out a test containing both subjective and objective

243. *Id.* at 425.
244. *Id.* at 425-26.
245. *Id.* at 426.
246. *Id.*
247. *See supra* notes 232-35 and accompanying text.
248. 386 U.S. 547 (1967).
249. *Id.* at 555.
250. *Id.*
251. *See* 416 U.S. 232, 246-47 (1974).
252. *Id.* at 247.
253. *Id.* at 246-47.
254. *Id.* at 243.
255. *Id.* at 247.
256. 420 U.S. 308 (1975).
257. *Id.* at 319.
258. *See id.*

elements.[259] A school board member is personally liable for section 1983 damages only if he or she knew or should have known that the action taken would violate the constitutional rights of the affected student or if the action causing the deprivation was taken with malicious intent.[260] The Court was quick to point out, moreover, that the school board was not " 'charged with predicting the future course of constitutional law.' "[261] School board members will be charged with knowledge only of "settled, indisputable law."[262] The test, thus, sets the parameters of reasonable discretion and grants immunity within those parameters.

In finding a qualified immunity applicable to prison officials, the Court in *Procunier v. Navarette*,[263] applied the test of *Wood v. Strickland*.[264] In a dispute over a prisoner's mailing privileges,[265] the Court found that because a prisoner's first amendment rights were not yet clearly established at the time the interference with the prisoner's mail took place,[266] and because there was no malicious intent involved,[267] the prison officials were entitled to judgment as a matter of law for following the later discredited prison rules concerning prisoners' mail.[268] This same test for qualified immunity was also applied to the hospital superintendent who refused to release a nondangerous inmate in *O'Connor v. Donaldson*,[269] the very case which the Court distinguished in *Dodson*.[270] As to the type of immunity that should be granted to public defenders for actions within the course of their duties, the *Imbler* Court said, "[a]ttaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence."[271] Yet prosecutors must also make difficult decisions involving whether to prosecute, and have a duty to protect the public.[272] These are areas in which a defense attorney is not required to act. The responsibility for these types of decisions puts a prosecutor in a position where, as the Court said in *Imbler*, he or she "would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials."[273] The *Wood v. Strickland* qualified immunity test[274] appears to be more appropriate, then, for public defenders. A public defender who knew or should have known that his or her action would deprive a client of a constitutional right, or who acted with malice,

259. *See id.* at 321-22.
260. *Id.*
261. *Id.* (citing Pierson v. Ray, 386 U.S. 547, 557 (1967)).
262. 420 U.S. at 321.
263. 434 U.S. 555 (1978).
264. 420 U.S. 308 (1975).
265. 434 U.S. 555 (1978).
266. *Id.* at 565.
267. *Id.* at 566.
268. *Id.* at 563.
269. *See* 422 U.S. 563, 577 (1975).
270. *See supra* notes 133-72 and accompanying text.
271. 424 U.S. 409, 426 (1976).
272. *Id.* at 425-26.
273. *Id.* at 425.
274. 420 U.S. at 321-22.

could still be held liable under section 1983.[275] On the other hand, one who acts in good faith, relying on settled principles of law, would not be required to answer complaints of disgruntled clients with personal liability. In *Dodson*, the public defender's reliance on rule 104(f) of the Iowa Rules of Appellate Procedure detailing the procedure for withdrawal from arguably frivolous appeals,[276] coupled with the fact that Dodson had no constitutional right to prosecute a frivolous appeal, would, absent proof of bad faith, produce the same result for the public defender as the Court's holding of no action under color of law. This would be completely in keeping with the reliance of prison officials on a later-invalidated rule in *Procunier v. Navarette*,[277] and with the similar reliance allowed police officers in *Pierson v. Ray*.[278] This grant of immunity, however, would not prevent persons wronged by the malicious abuse of position which occurred in *Senak*[279] from recovering damages from the perpetrator.

V. CONCLUSION

In *Polk County v. Dodson*, the United States Supreme Court applied a functional test to the actions of a state employee to determine whether she acted under color of law for the purposes of section 1983. Thus, for the first time, a condition in addition to that of public employment was required for a state employee to be held to be acting under color of law. The Court used a two-pronged test. First, if a public employee is required by professional ethical standards to act independently regardless of the source of his or her income, and second, if the state has a concomitant constitutional responsibility to respect and support this independence, then the state employee's actions are removed from under color of law. In holding that a public defender does not act under color of law when performing a lawyer's traditional functions in defense of a client, the Court has departed from established precedent and presented problems in three areas.

In holding that a public employee acting within the scope of his or her duties can be acting outside the section 1983 under color of law requirement, the Court holds that there can be state action without action under color of law. This is a radical departure from previous section 1983 cases. For the most part, the Court has held that state action for purposes of the fourteenth amendment and action under color of law for section 1983 purposes were one and the same. In the few cases where they were distinguished, moreover, the same conduct satisfied both requirements. *Dodson* has disturbed this long series of precedents.

Second, the Court stated that the under color of law test in *Dodson* for section 1983 did not disturb the line of cases exemplified by *United States v. Senak* which held that a public defender does act under color of law for the purposes of 18 U.S.C. section 242. Prior to *Dodson*, the Court has

275. *Id.*
276. 454 U.S. 312, 314 n.2 (1981).
277. *See* 434 U.S. at 563. *See also supra* notes 263-68 and accompanying text.
278. *See* 386 U.S. at 555. *See also supra* notes 248-50 and accompanying text.
279. *See supra* notes 116-122, note 214 and accompanying text.

stated on numerous occasions that the under color of law requirement for the two statutes was identical. While the Court made this statement without explanation, the only difference between the statutes is the requirement for 18 U.S.C. section 242 of intent. It is not clear why intent would change an independent action into one taken under color of law.

The third problem area in *Dodson* occurs in that part of the holding which states that it is only a lawyer's traditional duties which fall outside the under color of law requirement. The Court, however, gives no clear definition of what a lawyer's traditional duties are. There will surely be litigation in the future to determine this definition.

While both the effect and intent of the *Dodson* decision is to protect public defenders from section 1983 liability which is not applicable to private practitioners, this could have been accomplished through a grant of qualified immunity. Qualified immunity as exemplified by *Wood v. Strickland* has been granted to a wide variety of public officials who find it necessary to exercise discretion within the parameters of their positions. This grant of immunity could have eliminated the complicating under color of law holding in *Dodson*, as well as the discrepancy that now exists between sections 1983 and 242. In addition, instead of litigating the ephemeral question of an attorney's traditional duties, both plaintiffs and defendants could confine their efforts to the fairly well laid out area of good faith immunity. The Court in *Dodson* took a much more complicated and circuitous route than necessary to reach its goal of protecting public defenders. The ramifications of this route could be quite confused.