CRIMINAL MALPRACTICE: THRESHOLD BARRIERS TO RECOVERY AGAINST NEGLIGENT CRIMINAL COUNSEL

In the past decade the number of malpractice suits brought against attorneys by their former clients increased dramatically.[1] Most of these cases were civil malpractice actions, involving claims that arose out of an attorney's handling of a civil matter.[2] Some suits, however, were actions for criminal malpractice—legal malpractice in the course of representing a criminal defendant.[3] Although criminal malpractice suits are relatively uncommon, they are becoming increasingly attractive to convicted criminal defendants.[4]

Civil and criminal malpractice actions involve many of the same issues, and courts generally treat them in a similar manner. The basic

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1. *See* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 6 (1977).

2. State malpractice claims may sound in tort or contract, and the analysis is similar in either situation. *See* R. MALLEN & V. LEVIT, *supra* note 1, § 71. Several convicted criminal defendants also have brought actions against their attorneys under 42 U.S.C. § 1983 (1976). *See, e.g.*, Smith v. Clapp, 436 F.2d 590 (3d Cir. 1970). These actions are outside the scope of this comment, which deals only with malpractice actions based on state law.

3. Kaus & Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 U.C.L.A. L. REV. 1191, 1191 n.2 (1974).

4. Two-thirds of the reported cases have been decided since 1970. *See* Ferri v. Ackerman, 444 U.S. 193 (1979); Jackson v. Salon, 614 F.2d 15 (1st Cir. 1980); Myers v. Butler, 556 F.2d 398 (8th Cir.), *cert. denied*, 434 U.S. 956 (1977); Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973); Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971); Hunt v. Bittman, 482 F. Supp. 1017 (D.D.C. 1980); Tasby v. Peek, 396 F. Supp. 952 (W.D. Ark. 1975); Sanchez v. Murphy, 385 F. Supp. 1362 (D. Nev. 1974); Malloy v. Sullivan, 387 So. 2d 169 (Ala. 1980); Bradshaw v. Pardee, Civ. No. 15444 (Cal. Ct. App. Mar. 13, 1978); Martin v. Hall, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971); Spring v. Constantino, 168 Conn. 563, 362 A.2d 871 (1975); Henzel v. Fink, 340 So. 2d 1926 (Fla. Dist. Ct. App. 1976); Hughes v. Malone, 146 Ga. App. 341, 247 S.E.2d 107 (1978); Talley v. Yonan, 72 Ill. App. 3d 851, 391 N.E.2d 79 (1979); Ochoa v. Maloney, 69 Ill. App. 3d 689, 387 N.E.2d 852 (1979); Geddie v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 718 (La. Ct. App.), *writ denied*, 356 So. 2d 1011 (La. 1978); Jepson v. Stubbs, 555 S.W.2d 307 (Mo. 1977) (en banc); Vavolizza v. Krieger, 33 N.Y.2d 351, 308 N.E.2d 439, 352 N.Y.S.2d 919 (1974); Weaver v. Carson, 62 Ohio App. 2d 99, 404 N.E.2d 1344 (1979); Gaito v. Matson, 228 Pa. Super. Ct. 288, 323 A.2d 753, *cert. denied*, 419 U.S. 1092 (1974); Garcia v. Ray, 556 S.W.2d 870 (Tex. Civ. App. 1977).

The earlier criminal malpractice cases are: Underwood v. Woods, 406 F.2d 910 (8th Cir. 1969); Lamore v. Laughlin, 159 F.2d 463 (D.C. Cir. 1947); Vance v. Robinson, 292 F. Supp. 786 (W.D.N.C. 1968); Olson v. North, 276 Ill. App. 457 (1934); Miller v. Ginsberg, 134 Minn. 397, 159 N.W. 950 (1916); Cleveland v. Cromwell, 128 A.D. 237, 112 N.Y.S. 643 (1908); Cleveland v. Cromwell, 110 A.D. 82, 96 N.Y.S. 475 (1905); Malone v. Sherman, 49 N.Y. Super. 530 (1883); Heathman v. Hatch, 13 Utah 2d 266, 372 P.2d 990 (1962).

elements of both actions are identical.[5] Criminal malpractice cases, however, present unique threshold issues. If the plaintiff does not prevail on these threshold issues, a court may bar his claim without hearing the merits of his case.

After reviewing the basic elements of legal malpractice actions, this comment examines four threshold obstacles the criminal malpractice plaintiff may have to overcome. First, a requirement of innocence:[6] a court may hold that a plaintiff who cannot demonstrate his actual innocence of the underlying criminal charges cannot recover for the malpractice of his defense attorney. Second, a unique application of the doctrine of collateral estoppel:[7] a client[8] who raised and lost a claim of ineffective assistance of counsel in the underlying criminal case may be estopped from attacking the performance of the attorney in a subsequent criminal malpractice action. Third, the potential immunity of a court-appointed attorney:[9] courts occasionally hold that a court-appointed defense counsel or a public defender is immune from malpractice liability. Finally, a trial lawyer, whether civil or criminal, may be granted immunity from malpractice liability for any errors of judgment he makes in the conduct of litigation.[10] After examining each of these potential bars, this comment concludes that a plaintiff seeking to recover for the malpractice of his criminal defense attorney should have to overcome no greater initial burden than his civil malpractice counterpart.

I. THE BASICS OF LEGAL MALPRACTICE

Most legal malpractice actions, whether civil or criminal, involve professional negligence rather than intentional harm or fraud. In order to recover the plaintiff must establish four basic elements.[11] The first

5. *Compare* Bradshaw v. Pardee, Civ. No. 15444, slip op. at 3 (Cal. Ct. App. Mar. 13, 1978) *with* Budd v. Nixen, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971). See notes 11-23 *infra* and accompanying text.

6. See notes 24-48 *infra* and accompanying text.

7. See notes 49-74 *infra* and accompanying text.

8. Denoting a particular party is invariably confusing because criminal malpractice involves two distinct actions: the actual malpractice suit and the underlying criminal trial. In this comment the term "client" will be used to refer to the plaintiff in the malpractice suit who was the defendant in the underlying criminal action. Similarly, the "attorney" represented the client in the criminal trial and is the defendant in the criminal malpractice suit.

9. See notes 75-102 *infra* and accompanying text.

10. See notes 103-16 *infra* and accompanying text.

11. Kasten, *Attorney Malpractice in Illinois: An Early Chapter in a Book Destined for Great Length*, 13 J. MAR. L. REV. 309, 311 (1980). *Compare* Budd v. Nixen, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971) ("(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the

element, the attorney's duty to his client, flows from the attorney-client relationship,[12] and normally poses no problem to the malpractice plaintiff. A defense attorney has the same duty to his client whether he is appointed or retained.[13]

The malpractice plaintiff next must demonstrate that the attorney breached a duty to his client by failing to exercise the proper degree of care.[14] The standard of care for legal malpractice is relatively uniform throughout the United States; courts require the exercise of that degree of skill and knowledge normally possessed either by other attorneys in the community[15] or by members of the profession generally.[16] No separate standard of care has been established for criminal malpractice cases.[17]

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resulting injury; and (4) actual loss or damage resulting from the professional's negligence") *with* Herston v. Whitesell, 348 So. 2d 1054, 1057 (Ala. 1977) ("[A] duty, a breach of the duty, that the breach was the proximate cause of the injury, and damages") *and* Hansen v. Wightman, 14 Wash. App. 78, 88, 538 P.2d 1238, 1246 (1975) ("[T]he existence of an attorney-client relationship, the existence of a duty on the part of the lawyer, failure to perform the duty, and the negligence of the lawyer must have been a proximate cause of damage to the client").

12. D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 2:1 (1980). The attorney-client relationship usually results from the employment of the attorney by the client, *see, e.g.*, Ventura County Humane Soc'y v. Holloway, 40 Cal. App. 3d 897, 903, 115 Cal. Rptr. 464, 468 (1974), but it can arise in other ways as well, *see, e.g.*, Tormo v. Yormark, 398 F. Supp. 1159, 1169 (D.N.J. 1975) (attorney's promise to "see what could be done" concerning a legal matter is sufficient to establish the relationship even without formal employment).

13. *See* Ferri v. Ackerman, 444 U.S. 193, 200 n.17 (1979); Sanchez v. Murphy, 385 F. Supp. 1362, 1364 (D. Nev. 1974); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION § 3.9 (1971). Similarly, the attorney's duty arises regardless of whether he has been paid a fee. Grudberg v. Midvale Realty Co., 119 Misc. 558, 559-60, 196 N.Y.S. 760, 761 (App. Term 1922); *see* Kasten, *supra* note 11, at 311. *But see* Cleveland v. Cromwell, 128 A.D. 237, 112 N.Y.S. 643 (1908) (that the attorney was a friend of the plaintiff, was never paid for his services, and even contributed his own money to the settlement of plaintiff's case was given weight in the decision not to hold the attorney liable).

14. An attorney is not liable for being in error about a question of law on which well-informed lawyers may reasonably disagree. *See, e.g.*, Kirsch v. Duryea, 21 Cal. 3d 303, 308, 578 P.2d 935, 938-39, 146 Cal. Rptr. 218, 222 (1978).

15. *See* Bradshaw v. Pardee, Civ. No. 15444, slip op. at 3 (Cal. Ct. App. Mar. 13, 1978); Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 786, 269 So. 2d 239, 244 (1972); Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 395-96, 438 P.2d 865, 867 (1968). *See also* Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408, 415-21 (1977).

16. *See* Kirsch v. Duryea, 21 Cal. 3d 303, 308, 578 P.2d 935, 938, 146 Cal. Rptr. 218, 221-22 (1978); Hughes v. Malone, 146 Ga. App. 341, 344, 247 S.E.2d 107, 110-11 (1978); Olson v. North, 276 Ill. App. 457, 473 (1934).

Most jurisdictions require expert testimony to establish the proper standard of care. *See, e.g.*, Lipscomb v. Krause, 87 Cal. App. 3d 970, 975, 151 Cal. Rptr. 465, 468 (1978); Brown v. Gatlin, 19 Ill. App. 3d 1018, 1020, 313 N.E.2d 180, 182 (1974). Expert testimony is not required when the attorney's negligence is obvious. Watkins v. Sheppard, 278 So. 2d 890, 892 (Fla. Dist. Ct. App. 1973); Hill v. Okay Construction Co., 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977).

17. D. MEISELMAN, *supra* note 12, § 16:1. If the attorney holds himself out to be especially qualified in an area of law, he may be held to a higher standard of care. Wright v. Williams, 47

The malpractice plaintiff also must prove that the breach of duty proximately caused his damages. To prove proximate cause he must establish the merits of his position in the underlying case,[18] and demonstrate that with adequate counsel he would have received a more favorable verdict. Proximate cause is often difficult to prove.[19]

Damages, the final element of the tort, are evaluated differently for civil and criminal malpractice claims. The principles concerning civil malpractice damages are settled: a client who has suffered a money judgment as a result of his attorney's negligence is entitled to full compensation;[20] a client who was unsuccessful as the plaintiff in the underlying suit is entitled to the amount he would have recovered but for the attorney's negligence.[21] When a criminal defendant is convicted as a result of his attorney's negligence, the damage determination is more difficult. The criminal trial judge often has discretion to determine the severity of the client's original sentence. The parole board determines if the malpractice plaintiff deserves early release. The conviction itself may make future employment difficult to obtain and mandate heavier penalties for future crimes. Determining potential damages thus involves evaluating multifarious considerations. Few courts have attempted such a calculation,[22] and useful principles have yet to evolve.[23]

All legal malpractice plaintiffs must establish the four essential elements of the action. Many courts require a plaintiff to litigate addi-

Cal. App. 3d 802, 810, 121 Cal. Rptr. 194, 199 (1975). *See also* RESTATEMENT (SECOND) OF TORTS § 299A, Comment d (1965).

18. The malpractice plaintiff therefore must prove a "suit within a suit." Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 769 (1959); Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 692 (1977). *See, e.g.*, Schneider v. Richardson, 411 A.2d 656, 658 (Me. 1979); Harding v. Bell, 265 Or. 202, 205, 508 P.2d 216, 217 (1973). Proving proximate causation also necessarily entails proving but for causation.

19. In some cases, however, an attorney's negligence may have so obviously resulted in a disposition unfavorable to the plaintiff that detailed proof of proximate cause is unnecessary. *See, e.g.*, Geddie v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 718 (La. Ct. App.), *writ denied*, 356 So. 2d 1011 (La. 1978) (the maximum penalty for the crime was two years, and the attorney neglected to object to the imposition of a four year sentence).

20. *See, e.g.*, Better Homes, Inc. v. Rodgers, 195 F. Supp. 93, 97 (N.D.W. Va. 1961); Pete v. Henderson, 124 Cal. App. 2d 487, 489-90, 269 P.2d 78, 79 (1954).

21. *See, e.g.*, Williams v. Bashman, 457 F. Supp. 322, 326 (E.D. Pa. 1978); Freeman v. Rubin, 318 So. 2d 540, 543 (Fla. Dist. Ct. App. 1975).

22. Courts have awarded damages in only two reported cases. *See* Geddie v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 718 (La. Ct. App.), *writ denied*, 356 So. 2d 1011 (La. 1978); Miller v. Ginsberg, 134 Minn. 397, 159 N.W. 950 (1916). In Olson v. North, 276 Ill. App. 457 (1934), a jury awarded $29,500 to the plaintiff in a criminal malpractice suit. This sum was reduced to $7,500 by the trial court. The case was reversed on appeal. The appellate court noted that the magnitude of the damages awarded showed passion and prejudice on the part of the jury.

23. A full discussion of damages is beyond the scope of this comment. One recent commentator provides a fitting summary of the issue: from the perspective of both judge and jury, it promises to be a nightmare. Kaus & Mallen, *supra* note 3, at 1220.

tional threshold issues. Civil malpractice claims are relatively common, and the questions a client can expect to litigate are well established. Criminal malpractice suits are rare, however, and the courts have not agreed on appropriate threshold issues for such actions.

II. THE REQUIREMENT OF INNOCENCE

Several courts have indicated that a criminal defendant who is actually guilty[24] of the crime for which he was convicted cannot recover in a malpractice action for his attorney's negligent failure to use a technical defense to win his release.[25]

The client must prove his actual innocence of the underlying charge or his claim will be barred. No comparable burden exists in civil malpractice suits,[26] and no reason justifies imposing this burden on criminal malpractice plaintiffs.

In *Bradshaw v. Pardee*[27] the defendant in a criminal proceeding had confessed his guilt to law enforcement officials and pleaded guilty on advice of counsel. He then brought a criminal malpractice suit, charging that his sentence was the proximate result of his attorney's negligent advice. He alleged that if his attorney had properly performed his legal duties, the criminal charges would have been reduced or dismissed or, alternatively, his sentence would have been less severe. The California Court of Appeals held that the client could not maintain the action, reasoning that if a criminal defendant was actually guilty of the crime for which he was convicted, his prison sentence was proximately caused by his guilt and not by the alleged negligence of his

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24. The criminal law is designed to punish legal guilt. Actual guilt is a term of art:

> First, its antonym, "innocence," merely means innocence of the crime of which the client has been convicted. Thus, in the context of a claim that the lawyer's negligence caused the client to be convicted of murder, guilt of manslaughter is the equivalent of innocence.
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> Second, "actual guilt" does not mean actual guilt. No system of procedure and proof can infallibly determine the client's guilt or innocence. By "actual guilt" we merely mean guilt provable at the malpractice trial—a civil proceeding—with the aid of all then available evidence admissible in such a trial.

Kaus & Mallen, *supra* note 3, at 1200 n.25; *cf.* Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970) (defining a colorable showing of innocence in the context of collateral attack on a criminal conviction).

25. *See, e.g.*, Walker v. Kruse, 484 F.2d 802, 804 (7th Cir. 1973); Bradshaw v. Pardee, Civ. No. 15444, slip op. at 4-5 (Cal. Ct. App. Mar. 13, 1978); Garcia v. Ray, 556 S.W.2d 870, 872 (Tex. Ct. App. 1977). *See also* Hughes v. Malone, 146 Ga. App. 341, 347, 247 S.E.2d 107, 112 (1978).

26. *See* Kaus & Mallen, *supra* note 3, at 1203:

> In the context of civil malpractice, when a [defendant's] lawyer is sued for permitting an action on a debt to go by default, the client need only show that he would have prevailed had the case been defended on the merits. We do not ask him to prove in addition that he did not actually owe the debt.

27. Civ. No. 15444 (Cal. Ct. App. Mar. 13, 1978).

attorney.[28]

Had the *Bradshaw* court used the terms guilt or innocence in their legal sense, its holding would have been entirely correct. A client who is legally guilty cannot satisfy his burden of proximate cause (his "suit within a suit" requirement); he cannot show that, but for the negligence of his attorney, the result in the criminal case would have differed.[29] The court, however, imposed a requirement of actual innocence. It relied on two facts in reaching its decision: the confession and the guilty plea.[30] Neither demonstrates legal guilt. A confession does not preempt a legal defense, for a layman may not know what defenses are provided by the law. One of the functions of the attorney is to present legal defenses not apparent to the layman. Certainly the guilty plea does not prove legal guilt; the essence of the client's claim is that he was negligently advised to plead guilty when he was in fact legally innocent.[31] *Bradshaw*, however, holds that an actually guilty client cannot establish proximate causation.

The court's reasoning is flawed. A client who is actually guilty can establish proximate causation by showing that he had a legal defense that his attorney neglected to raise.[32] For example, an actually guilty client cannot be convicted once the statute of limitations has expired. In such a situation the defendant is legally innocent and it is his attorney's duty to raise that defense.[33] If the attorney does not, and the client is convicted, the attorney's negligence is the proximate cause of the conviction. In *Bradshaw* the requirement of innocence barred a potentially valid claim even though there was no proof that the client was legally guilty.

Although an actually guilty client may not be legally guilty, he may be morally culpable. The expiration of the statute of limitations makes him legally innocent, but it does not restore his virtue. Never-

28. *Id.*, slip op. at 5-7. The court indicated that the client's actual guilt undercut his ability to establish proximate cause: "Since plaintiff was indeed guilty, as he pleaded after being 'advised at length about the consequences of the guilty plea' and having 'fully understood the nature of the proceedings,' his prison sentence was caused by such guilt and not by defendant's alleged negligence." *Id.*, slip op. at 5. (footnote omitted).

29. *Id.*, slip op. at 4-5.

30. See note 18 *supra* and accompanying text.

31. Of course, that a client is legally guilty of a lesser crime does not affect the negligent nature of advice to plead guilty to a more serious offense.

32. *See* Martin v. Hall, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971); Kaus & Mallen, *supra* note 3, at 1226-31.

33. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 13, at 148 ("[counsel's] role as advocate permits and requires that he press all points legally available, even if he must subordinate his personal evaluation of the client's conduct"); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, Canon 7, n.3 (1980) (quoting ABA CANONS OF PROFESSIONAL ETHICS No. 5).

theless, a defendant who is convicted because his attorney neglected to raise a technical defense, such as the statute of limitations, should recover damages. The criminal law imposes no requirement of actual innocence; no reason exists to use actual guilt as a bar to civil recovery for professional negligence. As a tort action, criminal malpractice should focus on the activity of the alleged tortfeasor, not on the conduct of the victim.[34]

The criminal courts, though affording defendants greater procedural safeguards than civil courts,[35] do not impose a requirement of actual guilt when they identify and punish criminal behavior. Because it is impossible to ascertain moral culpability conclusively, the criminal justice system is designed to punish only legal guilt. If an actually guilty client has a viable defense to the criminal charge—for example, that the statute of limitations has expired—the law considers him innocent for reasons of public policy despite his moral culpability.[36]

Dividing criminal malpractice claims into two categories more clearly demonstrates the inappropriateness of considering actual guilt in a tort action. The first category includes those cases in which the client was legally guilty but, through the negligence of his attorney, was either sentenced more heavily than the legal maximum or was convicted of a more serious crime than was legally appropriate. In this

34. Under conventional tort theory the doctrines of contributory negligence and assumption of risk place the plaintiff's behavior at issue, but neither of these doctrines is relevant to a requirement of innocence. Being guilty of the original crime does not constitute contributory negligence to the malpractice tort. When the client robs a liquor store, he is not increasing the risk that his lawyer will be incompetent. *See generally* W. PROSSER, LAW OF TORTS, § 65 (4th ed. 1971). The contributory negligence defense may be available to the attorney, however, if the defense is premised on client conduct that took place during the course of the trial, rather than on conduct that occurred beforehand.

To apply the doctrine of assumption of the risk suggests that the client, by committting the criminal act, has recognized the risk of malpractice and has relieved the attorney, in advance, of his duty to use ordinary skill and knowledge. *See id.* § 68.

35. The Constitution guarantees criminal defendants many rights, including the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge. Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963). Comparable rights are not necessarily afforded in civil actions. *See, e.g.*, Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980). *See generally* Chambers v. Florida, 309 U.S. 227, 235-38 (1940).

36. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944). The criminal law will not penalize the client after the statute has run because the passage of time makes the evidence unreliable. Once the client proves his legal innocence in a civil proceeding by showing that the limitations period has expired, it is irrational to require him to prove his actual innocence as well; the evidence has not become more reliable by virtue of the civil forum. *But cf.* Kaufman v. United States, 394 U.S. 217, 234 (1969) (Black, J., dissenting) (probable or possible innocence should be given weight in determining whether judgment should be open to collateral attack); Friendly, *supra* note 24 (a colorable showing of innocence should be prerequisite to collateral attack on a criminal conviction).

situation the attorney's negligence caused the client to suffer an excessive penalty.[37] Actual innocence is irrelevant;[38] the client pays his debt to society in any event. He is merely asking for damages for the excess penalty.

The second category includes those cases in which the client was legally innocent of any crime,[39] but was convicted because of his attorney's failure to raise an appropriate defense. If an actually guilty client may recover damages for an excess penalty, it follows that a client may recover damages if he should never have been convicted at all. Even an actually guilty client is entitled to all appropriate defenses,[40] and is entitled to damages if his attorney neglects to present these defenses.

It may seem wrong for an actually guilty client to recover from his attorney for failure to assert a technical defense on his behalf. Some defenses, such as alibi, self-defense, and, in some cases, insanity, are related to the question of a defendant's actual criminal guilt. Other defenses reflect policies of the criminal justice system unrelated to the actual guilt of the defendant. Examples of this kind of defense include the exclusionary rule,[41] the statute of limitations,[42] and the rule against improper grand jury selection.[43] Because the policies behind these technical defenses are not directly aimed at the defendant's actual guilt, it may be argued that a criminal defendant should not recover from an attorney who negligently fails to assert such a defense.[44]

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37. The court in Geddie v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 718 (La. Ct. App.), *writ denied*, 356 So. 2d 1011 (La. 1978), coined the term "excessive incarceration" to designate the time spent in prison beyond the legal maximum. 354 So. 2d at 719.

38. *See* R. MALLEN & V. LEVIT, *supra* note 1, § 248.

39. For simplicity, the text deals with a plaintiff who claims he is legally innocent of any crime and was convicted solely due to malpractice. Alternatively, a plaintiff might admit his guilt of a lesser crime, but bring suit because the malpractice caused his conviction on a more serious charge. *See* Geddie v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 718 (La. Ct. App.), *writ denied*, 356 So. 2d 1011 (La. 1978). The rationale is the same in both cases: if the plaintiff can establish that the criminal courts would have found him legally innocent of the crime for which he was convicted, the civil courts should not demand additional proof of his innocence.

40. See text accompanying notes 46-47 *infra*.

41. The purpose of the exclusionary rule is to deter police from making unreasonable searches and seizures. *See* Terry v. Ohio, 392 U.S. 1, 12 (1968); Linkletter v. Walker, 381 U.S. 618, 629-35 (1965).

42. See note 36 *supra*.

43. Discrimination in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole . . ." Rose v. Mitchell, 443 U.S. 545, 556 (1979).

44. In Stone v. Powell, 428 U.S. 465 (1976), the Supreme Court held that a criminal defendant may not seek habeas corpus relief on the basis of a state's denial of his fourth amendment rights if he had a full and fair opportunity to assert his constitutional claim in the state court. *Id.* at 494. The Court suggested that federal habeas corpus relief may be unavailable to defendants with claims unrelated to their actual guilt. *Id.* at 489-90, 491 n.31. In Rose v. Mitchell, 443 U.S. 545 (1979), however, the Court permitted collateral review of the defendant's claim of racial discrimination in the selection of a state grand jury, despite the fact that the claim was unrelated to

The criminal law provides these technical defenses, however, for valid policy reasons.[45] Defense attorneys owe a duty to their clients to assert all reasonable defenses.[46] An attorney who fails to raise a valid technical defense is just as negligent as one who overlooks a viable truth-related defense.[47] Moreover, the policies behind technical defenses are ill served if defense attorneys can freely choose whether to raise them. The tort law of malpractice would subvert the criminal system if it shielded attorneys from liability for failing to raise a technical defense.

Even if a criminal malpractice plaintiff establishes all the elements of his claim, few juries would award substantial damages to a criminal who, they believe, received an appropriate sentence.[48] Thus, even without a judicially imposed requirement of innocence, an actually guilty client will rarely recover damages for criminal malpractice. Nevertheless, a client suing his criminal defense attorney for malpractice should be required to prove only that he was legally innocent of the charges against him, and should not have to prove his actual innocence.

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the defendant's guilt. Similarly, in Cuyler v. Sullivan, 446 U.S. 335, 342-44 (1980), the Court held that federal habeas corpus relief could be available to a state prisoner claiming that his retained counsel failed to provide him with effective assistance. Because the court of appeals award of such relief was based, in part, upon an improper weighing of the evidence of conflict-of-interest, the Supreme Court vacated the decision. Thus, the Court is responding not only to *Stone*'s guilt-related standard but to other policies as well in determining the availability of collateral review. *See The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 203-05 (1979).

The guilt-related standard is inappropriate in criminal malpractice cases. *Stone* requires deference to a state court's adjudication of a constitutional claim, but *Rose* allows collateral review when the asserted constitutional claim impinges directly on the state court's ability to determine the claim fairly. For discussion of *Rose*, see Duker, Rose v. Mitchell *and Justice Lewis Powell: The Role of Federal Courts and Federal* Habeas, 23 How. L.J. 279, 281 (1980); *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 199-209 (1979). Federal deference to the competence of state courts is not at issue in the context of criminal malpractice. Criminal malpractice is a state law claim, often brought in state court. Moreover, the outcome of a criminal malpractice action has no bearing on the finality or integrity of the prior criminal proceeding. While habeas corpus relief results in the release of a state prisoner, malpractice results only in a damages award against his defense attorney. The malpractice action is entirely separate from the underlying criminal proceeding, and therefore the policies involved are those of tort law, not of federalism or criminal procedure.

45. See notes 41-43 *supra*.

46. See note 33 *supra*.

47. *Cf.*, Christy v. Saliterman, 288 Minn. 144, 179 N.W.2d 288 (1970) (an attorney held liable in civil malpractice for neglecting to raise the technical statute of limitations defense).

48. *See* Kaus & Mallen, *supra* note 3, at 1203:

> [W]hat would be the result of . . . this question: "Should a lawyer have to pay damages to a guilty client because he negligently fails to secure an acquittal?" Surely a very substantial percentage of those polled would say that the guilty client is not entitled to damages since—God works in mysterious ways—"justice" was done. Would the public really tolerate the thought of a prisoner, who is precisely where he ought to be, receiving substantial damages for not being on the street planning to rob another bank?

III. COLLATERAL ESTOPPEL

The doctrine of collateral estoppel[49] is a potential defense to any legal malpractice action. One application of the doctrine, however, is unique to criminal malpractice suits. A client who has unsuccessfully raised the constitutional claim of ineffective assistance of counsel in the underlying criminal action[50] is estopped from relitigating identical issues in a subsequent malpractice action against his defense attorney.[51] This estoppel defense is inapplicable in civil malpractice actions; a party to a civil suit has no opportunity to challenge the competence of his attorney during the initial civil action because attorney incompetence is not a basis for appeal.

Applying this form of estoppel in a criminal malpractice action is justified only in certain circumstances. First, the issue barred from relitigation must be identical to an issue necessarily decided or actually adjudicated in the prior proceeding.[52] Second, the party against whom the defense is asserted must have had a full and fair opportunity to litigate the issues in the prior proceeding.[53] In the context of criminal malpractice actions the second requirement generally presents no prob-

49. Collateral estoppel precludes relitigation of issues actually litigated and determined in a prior suit, regardless of whether both suits involve the same cause of action. Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955). *See* Polasky, *Collateral Estoppel Effects of Prior Litigation*, 39 IOWA L. REV. 217, 222 (1954). Although the doctrine usually precludes relitigation of issues of fact, it may also bar issues of law. Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L.Q. 158, 171. *See generally* 1B MOORE'S FEDERAL PRACTICE ¶ 0.441 (2d ed. 1948 & Supp. 1980).

50. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have . . . the Assistance of Counsel for his defence." The right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955). *See generally* Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 HARV. L. REV. 752, 753-58 (1980). Any post-conviction proceeding in which the client seeks relief on the ground that his defense counsel provided inadequate representation can form the basis for estoppel in this context. *See* Vavolizza v. Krieger, 33 N.Y.2d 351, 351, 308 N.E.2d 439, 439, 352 N.Y.S.2d 919, 919 (1974).

51. *See* Walker v. Kruse, 484 F.2d 802, 803-04 (7th Cir. 1973); Vavolizza v. Krieger, 33 N.Y.2d 351, 355-56, 308 N.E.2d 439, 441-42, 352 N.Y.S.2d 919, 922-23 (1974); Garcia v. Ray, 556 S.W.2d 870, 872 (Tex. Civ. App. 1977). In *Walker* and *Garcia* the prior proceeding was a direct appeal of the client's criminal conviction. In *Vavolizza* the client had previously challenged his attorney's conduct in a collateral review proceeding.

52. Alabama Farm Bureau Mut. Cas. Ins. Co. v. Moore, 349 So. 2d 1113, 1116 (Ala. 1977); People v. Taylor, 12 Cal. 3d 686, 691, 527 P.2d 622, 625, 117 Cal. Rptr. 70, 73 (1974) (en banc); Vavolizza v. Krieger, 33 N.Y.2d 351, 356, 308 N.E.2d 439, 442, 352 N.Y.S.2d 919, 923 (1974); 1B MOORE'S FEDERAL PRACTICE ¶ 0.443[2] (2d ed. 1948 & Supp. 1980).

53. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 328 (1978); Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 329 (1971); Johnson v. United States, 576 F.2d 606, 614 (5th Cir. 1978); Borland v. Gillespie, 206 Neb. 191, 199, 292 N.W.2d 26, 31 (1980); Hicks v. De La Cruz, 52 Ohio St. 2d 71, 74, 369 N.E.2d 776, 778 (1977). An actual hearing is not required. An issue that is submitted and determined on a motion for summary judgment, for

lem. The client had his day in court when his claim of ineffective assistance of counsel was litigated in the underlying criminal action. The first requirement, however—that the issues be identical—is not so easily satisfied.

Either of two elements of an ineffective assistance claim may form the basis of a collateral action. The first is inadequate representation.[54] In both the ineffective assistance claim and the criminal malpractice suit the client must establish that counsel provided him with inadequate representation in the underlying criminal case. When the proceedings use the identical standard to determine whether the attorney fulfilled his duty, a prior determination that the attorney provided adequate representation bars the client from relitigating the issue in the malpractice action. The client is bound by the prior determination that counsel provided adequate representation,[55] and therefore cannot recover.

In some jurisdictions, however, courts apply different standards for judging the performance of counsel in malpractice actions than in ineffective assistance proceedings. The standard used in malpractice actions is relatively uniform: courts require attorneys to exercise that degree of skill and knowledge normally possessed by their colleagues.[56]

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example, will be precluded from relitigation. RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment d (Tent. Draft No. 4, 1977).

Historically, courts applied a third prerequisite: unless both parties in an action were bound by a judgment in a previous case, neither party could use the prior judgment as determinative of an issue in the second action. *See, e.g.*, Triplett v. Lowell, 297 U.S. 638, 645 (1935). This "mutuality of estoppel" is no longer a strict requirement of collateral estoppel. Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 349-50 (1971). *See generally* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968).

54. "Inadequate representation" is a generic term. In the criminal malpractice context it refers to the essential element of breach of duty. The client demonstrates inadequate representation by showing that his attorney breached his duty of care by exercising a degree of skill and knowledge less than that of other members of the profession. See notes 15-16 *supra* and accompanying text.

To establish the element of inadequate representation in an ineffective assistance of counsel proceeding, the client must demonstrate that the attorney's representation fell below the constitutionally required standard of minimum competence for defense counsel. This standard may or may not be identical to that of malpractice, because jurisdictions do not agree on the proper standard of care for ineffective assistance of counsel claims. See notes 57-84 *infra* and accompanying text.

55. A client who succeeds on his ineffective assistance claim and is subsequently released might nevertheless bring a malpractice action and assert that the delay of his release was his damage. *See* Underwood v. Woods, 406 F.2d 910, 916-17 (8th Cir. 1969). The finding that the representation was inadequate, however, will not bar the attorney from claiming that his performance was competent in a subsequent malpractice suit. The attorney is not a party to the ineffective assistance proceeding and thus litigates the issue of his professional competence for the first time in the malpractice action.

56. See notes 15-16 *supra* and accompanying text.

The standard used to determine whether a client has received constitutionally effective assistance of counsel, however, varies from jurisdiction to jurisdiction.[57] The Supreme Court has held that the attorney's advice must be "within the range of competence demanded of attorneys in criminal cases."[58] Most courts follow this standard, or the similar test of "reasonable competency."[59] If the court determining the assistance of counsel claim uses this standard, the malpractice standard may be sufficiently analogous to provide the requisite identity of issues.[60]

Some jurisdictions[61] regard counsel to be ineffective only when the purported representation was of such a character as to turn the proceedings into "a farce and mockery of justice."[62] In jurisdictions applying the "farce and mockery" standard, the client's failure to establish ineffective assistance of counsel should not bar him from attacking the attorney's competence in a subsequent criminal malpractice suit. The two proceedings do not present identical issues because they apply different standards in determining the adequacy of counsel. A client who cannot establish a "farce" may still be capable of demonstrating that his attorney's actions lacked ordinary skill and knowledge. The requisite identity of issues therefore is not present between the constitutional

57. Maryland v. Marzullo, 435 U.S. 1011, 1011-12 (1978) (White, J., dissenting). For a listing of the standards used by the various federal courts of appeals and state courts, see Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 237-40 (1979); Note, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 CORNELL L. REV. 659, 661 nn.7-8 (1980); Note, *Criminal Procedure—Ineffective Assistance of Counsel*, 53 TEMP. L.Q. 193, 198 n.33 (1980).

58. McMann v. Richardson, 397 U.S. 759, 771 (1970).

59. *See, e.g.*, Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); United States v. Easter, 539 F.2d 663, 666 (8th Cir.), *cert. denied*, 434 U.S. 844 (1976); People v. Blalock, 197 Colo. 320, 325, 592 P.2d 406, 409 (1979); White v. State, 309 Minn. 476, 480-81, 248 N.W.2d 281, 285 (1976).

60. Some courts have forged standards for effective assistance of counsel that are virtually identical to legal malpractice standards. *See, e.g.*, United States v. Hood, 593 F.2d 293, 297 (8th Cir. 1979) ("In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances"); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) ("[T]he standard of adequacy of legal services . . . is the exercise of the customary skill and knowledge which normally prevails at the time and place").

61. *See* Wainwright v. Sykes, 433 U.S. 72, 117 n.16 (1977) (Brennan, J., dissenting); Note, 53 TEMP. L.Q., *supra* note 57, at 198 n.33.

62. *E.g.*, United States v. Bubar, 567 F.2d 192, 201-02 (2d Cir.), *cert. denied*, 435 U.S. 872 (1977); Gillihan v. Rodriguez, 551 F.2d 1182, 1187 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977); State v. Smith, 112 Ariz. 208, 209, 540 P.2d 680, 681 (1975) (en banc); State v. Miller, 173 Mont. 453, 455, 568 P.2d 130, 132 (1977).

and tort claims,[63] and rejection of the former should not bar litigation of the latter.[64]

The element of prejudice is the second issue in an ineffective assistance determination that may bar the client's subsequent malpractice action. The question of prejudice arises in an ineffective assistance proceeding only after the client has established that his attorney provided inadequate representation. The court then determines whether counsel's substandard conduct actually damaged the client's case.[65] Prejudice is analogous to the element of proximate cause in malpractice suits.[66]

The jurisdictions are split concerning whether prejudice is an essential element of a claim of ineffective assistance of counsel.[67] In ju-

63. *See* Brown v. Schiff, 614 F.2d 237 (10th Cir.), *cert. denied*, 446 U.S. 941 (1980). The plaintiffs in *Brown* sued under 42 U.S.C. § 1983 (1976), alleging that the representation by their court-appointed attorneys had violated their constitutional rights. The Court of Appeals for the Tenth Circuit, which applies the farce and mockery standard, *see* Gillihan v. Rodriguez, 551 F.2d 1182, 1187 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977), held:

> [N]one of the alleged conduct by court appointed defense counsel in these cases is so egregious as to be violative of the Sixth Amendment right to counsel. Claims of legal malpractice do not achieve constitutional status solely by virtue of a claimant's status as a defendant in a criminal proceeding. At most, appellants' allegations sound in tort and a more proper forum could be provided in state court.

614 F.2d at 239. *Cf.* Estelle v. Gamble, 429 U.S. 97, 107 (1976) (a doctor's treatment of a prisoner, while not a violation of the eighth amendment, may still give rise to a medical malpractice claim).

64. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(d) (Tent. Draft No. 4, 1977).

65. *See* Cooper v. Fitzharris, 586 F.2d 1325, 1331 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1980).

66. A criminal malpractice plaintiff must show that, but for his attorney's substandard performance, he would have won a more favorable verdict. See note 19 *supra* and accompanying text. The client's burden to prove prejudice in an ineffective assistance claim, however, is more easily satisfied. *See, e.g.*, United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1979) (en banc) (the defendant must prove a likelihood that counsel's inadequacy affected the outcome of the trial; the burden then shifts to the government to show that no prejudice resulted); Davis v. Alabama, 596 F.2d 1214, 1221 (5th Cir. 1979) (the defendant need show only that his counsel's actions were not harmless beyond a reasonable doubt), *vacated and remanded*, 446 U.S. 903 (1980); People v. Pope, 23 Cal. 3d 412, 424, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979) (en banc) (the defendant must establish that his counsel's performance resulted in the withdrawal of a potentially meritorious defense). *But see* United States v. Ritch, 583 F.2d 1179, 1183 (1st Cir.) (the defendant has the burden of establishing actual prejudice when claiming that attorney was insufficiently prepared for trial), *cert. denied*, 439 U.S. 970 (1978). Prior failure to satisfy an easier burden on an issue bars the client from subsequently relitigating the issue under a heavier burden. *See generally* 1B MOORE'S FEDERAL PRACTICE ¶ 0.418[1] (2d ed. 1948 & Supp. 1980); 64 HARV. L. REV. 1376, 1378 (1951). If the client cannot prove prejudice in the prior proceeding, he should be barred from attempting to establish proximate cause in the malpractice suit.

67. *Compare* Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), *and* Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc), *and* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968) (the defendant is not required to establish prejudice), *with* United States v. Ritch, 583 F.2d 1179, 1183 (1st Cir.), *cert. denied*, 439 U.S. 970 (1978), *and* United States *ex rel.* Johnson v. Johnson, 531 F.2d 169, 177 (3d Cir.), *cert. denied*, 425 U.S. 997 (1976), *and* People v. Pope, 23 Cal. 3d 412, 425, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979) (defendant must show that his counsel's incompetence prejudiced his case). *See generally* Note, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 CORNELL L. REV. 659 (1980).

risdictions in which a criminal defendant need not show prejudice to have his conviction reversed, the issue is never raised in the ineffective assistance proceeding and cannot bar recovery in a later malpractice action.[68] In jurisdictions in which a client must show prejudice to establish his claim of ineffective assistance, a determination that the client was not harmed by his attorney's negligence precludes relitigation of the issue of proximate cause in a subsequent malpractice action.[69]

A court may not necessarily bar a criminal malpractice action even when the essential elements of an ineffective assistance of counsel claim are identical to those of a criminal malpractice action and the client fails to establish these elements in the former proceeding. When a client bases his malpractice claim upon factual allegations that he did not raise in the ineffective assistance proceeding, the malpractice claim is not barred by the prior adjudication.[70] If, for example, the client claims he was denied effective assistance of counsel because his attorney failed to object to the admission of illegally obtained evidence and that claim is rejected, the client is not barred from bringing a subsequent malpractice action claiming that his attorney neglected to raise a valid statute of limitations defense.[71]

The malpractice court should determine whether the issue of prejudice was actually litigated in the prior proceeding. Some courts decide on a case-by-case basis whether to require the client to prove prejudice. *See, e.g.*, Thomas v. Wyrick, 535 F.2d 407, 414 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); United States *ex rel.* Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970).

68. When a showing of prejudice is not a necessary part of an ineffective assistance claim, the client litigates the issue of prejudice for the first time at the malpractice trial. Collateral estoppel on this issue is therefore inapplicable.

69. A determination at the ineffective assistance hearing that the client was not prejudiced by his counsel's inadequate representation forms a basis for collateral estoppel regardless of what standard of inadequate representation the court used. If the client cannot prove in the prior proceeding that counsel's conduct prejudiced him, he will be barred from attempting to establish the element of proximate cause in the subsequent malpractice suit.

70. *But cf.* Sanders v. United States, 373 U.S. 1 (1963) (addressing the problem of what effect denial of a prior application for federal collateral relief should have on a subsequent application for relief). The *Sanders* Court stated:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or [28 U.S.C.] § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.
>
> (1) By "ground," we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different "ground" than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations.

Id. at 15-16 (footnote omitted). *See also* 1B MOORE'S FEDERAL PRACTICE ¶ 0.443[2] (2d ed. 1948 & Supp. 1980).

71. Whether the factual allegations that underlie a malpractice suit are identical to those pleaded in the ineffective assistance proceeding may be unclear. *See* Vavolizza v. Krieger, 39 A.D.2d 446, 336 N.Y.S.2d 748 (1972), *aff'd*, 33 N.Y.2d 351, 308 N.E.2d 439, 352 N.Y.S.2d 919 (1974).

Before barring a criminal malpractice claim on the basis of collateral estoppel, a court should carefully determine what issues were adjudicated in the prior litigation. If it is not clear that the same issues were presented, the plaintiff should be provided the opportunity to prove his case.[72] Even if the malpractice court finds that a substantially identical issue was considered in the prior proceeding, collateral estoppel should not automatically be applied.[73] No danger of burdening the attorney with the necessity of relitigating an issue arises because of this judicial approach.[74] The attorney was not a party to the prior proceeding, so he will have to defend himself only once. The rationale underlying the estoppel doctrine thus is not particularly compelling in the criminal malpractice context, and a court that has any doubts about the identity of issues or the fairness of the prior proceeding should not hesitate to allow the client a hearing.

IV. IMMUNITY FOR COURT-APPOINTED COUNSEL

A client who was represented in the underlying criminal action by court-appointed counsel may face a third threshold barrier to recovery for malpractice. Several federal courts[75] have held that a public defender[76] or court-appointed attorney[77] enjoys immunity from suit, in-

72. "In short we should not evoke collateral estoppel when so many doubts exist as to whether what happened earlier should operate now as a bar to plaintiff's claim. The facts relied on to establish estoppel should be established far more clearly and convincingly than they are here." Vavolizza v. Krieger, 39 A.D.2d 446, 450, 336 N.Y.S.2d 748, 752-53 (1972) (Markewich, J., dissenting), *aff'd*, 33 N.Y.2d 351, 308 N.E.2d 439, 352 N.Y.S.2d 919 (1974).

73. The doctrine is merely a matter of judicial policy, to which courts make exceptions in the interest of justice. *See* RESTATEMENT (SECOND) OF JUDGMENTS, Introductory Notes § 68-68.1 (Tent. Draft No. 1, 1973); Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 54-55 (1964).

74. The doctrine of collateral estoppel is based on the twin policies of conserving judicial resources and protecting litigants from the burden of relitigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). Because the policy of protecting litigants from the burden of relitigation is absent in criminal malpractice cases, courts should be slower to apply the doctrine in this context.

75. Because state malpractice actions have been rare until recently, most claims against appointed counsel have arisen under 42 U.S.C. § 1983 (1976). Some of these decisions held that a court-appointed attorney enjoys judicial immunity from suit, and dismissed the claim. *E.g.*, Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). A case involving this issue is currently before the Supreme Court. *See* Dodson v. Polk County, 628 F.2d 1104 (8th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3635 (U.S. Mar. 3, 1981) (No. 80-824). Other courts have reasoned that appointed counsel do not act under color of state law. *E.g.*, Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972).

76. Robinson v. Bergstrom, 579 F.2d 401, 411 (7th Cir. 1978); Miller v. Barilla, 549 F.2d 648, 649-50 (9th Cir. 1977); Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

77. Minns v. Paul, 542 F.2d 899 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977); *see* Walker v. Kruse, 484 F.2d 802, 804-05 (7th Cir. 1973).

cluding immunity from criminal malpractice claims.[78] In *Ferri v. Ackerman*,[79] however, the Supreme Court unanimously held that federal law does not protect court-appointed counsel from state criminal malpractice claims. Two recent state court decisions found that no such immunity derives from state law.[80]

Ferri was indicted by a federal grand jury on a conspiracy charge. The district court appointed Ackerman as Ferri's counsel pursuant to the Criminal Justice Act of 1964.[81] After being convicted of conspiracy, Ferri sued Ackerman for malpractice. The state trial court dismissed the complaint, and the Pennsylvania Supreme Court affirmed.[82] The state supreme court considered itself bound by federal law and held that federal principles of immunity were properly extended to court-appointed counsel.[83]

The Supreme Court reversed. It concluded that federal law did not immunize court-appointed attorneys from civil liability for malpractice. The Court recognized that a state may provide such immunity as a matter of state law, but that a state was under no federal compulsion to do so.[84] The *Ferri* Court rejected the argument that by providing compensation to court-appointed attorneys through the Criminal Justice Act of 1964, Congress intended to immunize such counsel from civil liability. Nothing in the language of the statute, nor in its legislative history, suggested such an intent.[85]

The Court then considered whether, apart from the statute, the federal doctrines of official or judicial immunity extend to counsel appointed to represent an indigent criminal defendant in federal court. It found that court-appointed attorneys did not warrant such immunity.

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78. In Sullens v. Carroll, 308 F. Supp. 311 (M.D. Fla. 1970), *aff'd*, 446 F.2d 1392 (5th Cir. 1971), the plaintiff brought a malpractice action against his court-appointed attorney in federal court under 42 U.S.C. § 1983 (1976). The district court dismissed on the ground that an attorney appointed by a federal court does not act under color of state law. The plaintiff then brought his claim as a diversity suit for criminal malpractice. The Court of Appeals for the Fifth Circuit held the court-appointed attorney to be immune from malpractice liability. *See* Sullens v. Carroll, 446 F.2d 1392, 1392-93 (5th Cir. 1971).

79. 444 U.S. 193 (1979).

80. Spring v. Constantino, 168 Conn. 563, 362 A.2d 871 (1975); Reese v. Danforth, 486 Pa. 479, 406 A.2d 735 (1979). *Spring* involved a criminal malpractice claim against a public defender. *Reese* was a negligence action against a public defender who had represented the plaintiff in involuntary commitment proceedings. In each case the court arrived at the same conclusion: once the attorney is assigned to a client, his function does not differ from that of a private attorney. 168 Conn. at 567, 362 A.2d at 875; 486 Pa. at 486, 406 A.2d at 739.

81. 18 U.S.C. § 3006A (Supp. II 1978).

82. Ferri v. Ackerman, 483 Pa. 90, 394 A.2d 553 (1978), *rev'd*, 444 U.S. 193 (1979).

83. 483 Pa. at 99, 394 A.2d at 558.

84. 444 U.S. at 198.

85. *Id.* at 199.

The court reasoned that judges and prosecutors enjoyed such immunity because "[a]s public servants, they represent the interest of society as a whole."[86] The conduct of their official duties affects many individuals, each of whom may be a source of future controversy. The law confers immunity on these officials to provide them with the maximum ability to "deal fearlessly and impartially with the public."[87] In contrast, a court-appointed lawyer, like a privately retained attorney, represents only his client. His conduct does not directly affect the public at large, and immunity should not extend to him.[88]

Proponents of immunity for appointed counsel advance several policy arguments in support of their position.[89] First, they cite "the need to encourage counsel in the full exercise of professionalism."[90] Appointed attorneys need to have the discretion "to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions [in the course of litigation] . . . ."[91] This argument presents valid concerns that could be resolved by a grant of immunity. The problem of professional discretion is faced by all attorneys, however, not merely by appointed counsel. Retained and court-appointed attorneys perform identical duties. Each requires freedom to exercise professional discretion, and appointed counsel merit no special treatment.

A second argument in favor of immunity, based on the public's interest in avoiding repetitive litigation,[92] exhibits a similar weakness. To establish a malpractice claim a client must prove that, but for the attorney's negligence, he would have been acquitted, convicted of a lesser crime, or given a less severe penalty. A client can make this showing of proof only when a criminal case that has been settled is

86. *Id.* at 202-03.

87. *Id.* at 203.

88. *Id.* at 204. *See generally* Imbler v. Pachtman, 424 U.S. 409, 420-29 (1975); Note, *Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 833-38 (1957); 30 U. FLA. L. REV. 810 (1978).

89. *See* Reese v. Danforth, 486 Pa. 479, 495, 406 A.2d 735, 743 (1979) (Manderino, J., dissenting); Rondel v. Worsley, [1969] 1 A.C. 191 (H.L.); Mallen, *The Court-Appointed Lawyer and Legal Malpractice—Liability or Immunity?*, in PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION 36 (1979).

90. Minns v. Paul, 542 F.2d 899, 901 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977).

91. *Id. Accord*, Reese v. Danforth, 486 Pa. 479, 485-86, 406 A.2d 735, 739 (1979). Lord Pearce best expressed this view in Rondel v. Worsley, [1969] 1 A.C. 191 (H.L.), when he wrote:

> It is impossible to expect an advocate to prune his case of irrelevancies against his client's wishes if he faces an action for negligence when he does so. Prudence will always be prompting him to ask every question and call every piece of evidence that his client wishes, in order to avoid the risk of getting involved [in a malpractice action].

Id. at 273.

92. Reese v. Danforth, 486 Pa. 479, 495, 406 A.2d 735, 743 (1979) (Manderino, J., dissenting); Kaus & Mallen, *supra* note 2, at 1192 n.5. *See* Rondel v. Worsley, [1969] 1 A.C. 191, 230 (H.L.).

retried in a civil court. The argument contends that judicial finality would be undermined by this practice.[93] This argument, like the first, fails to explain why appointed counsel should be granted unique protection. Any malpractice action based upon underlying litigation involves to some extent the retrial of a closed case. Under this rationale, both retained criminal defense counsel and attorneys who litigate civil cases also should be immunized.[94]

Several significant distinctions, however, exist between appointed attorneys and privately retained counsel. First, an appointed attorney cannot choose his clients; he cannot "assay the likelihood that the frustrations of a client's case may lead to recriminations and, ultimately, litigation . . . ."[95] Nor does the client have the opportunity to select an attorney with whom he feels comfortable. Consequently, the attorney-client relationship may commence in an atmosphere of suspicion and hostility and, if the client is convicted, end in bitterness.[96] Furthermore, because he does not pay for the lawyer's services, an indigent is more likely to urge his counsel to press frivolous appeals and raise meritless defenses.[97] If the attorney refuses to comply, the client may believe he is entitled to damages for malpractice.[98] Finally, many courts cite the need to recruit able lawyers to represent indigent defendants.[99]

Appointed attorneys may be particularly vulnerable to malpractice actions, but all attorneys are vulnerable in some degree to such suits.

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93. Rondel v. Worsley, [1969] 1 A.C. 191, 230 (H.L.).

94. Some authorities advocate immunity for all trial lawyers for their errors of judgment in the conduct of litigation. See notes 104-06 *infra* and accompanying text.

95. Reese v. Danforth, 486 Pa. 479, 494, 406 A.2d 735, 743 (1979) (Manderino, J., dissenting).

96. *See* Ferri v. Ackerman, 444 U.S. 193, 200 n.17 (1979).

97. *See* Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). The *Brown* court noted that complaints under section 1983 are usually pro se, 42 U.S.C. § 1983 (1976). An indigent plaintiff pays nothing to file a section 1983 claim; thus an indigent receiving a court-appointed attorney would be more likely to bring such a claim than would the client of a privately retained attorney, who would pay to press his section 1983 suit. The *Brown* court used this logic to grant immunity to a court-appointed attorney. 463 F.2d at 1049. Because the attorney in *Ferri* was appointed by a federal court, the decision does not necessarily preclude an attorney appointed by a state court and sued under 42 U.S.C. § 1983 (1976) from claiming immunity. The Supreme Court has recently granted certiorari to decide whether state court-appointed attorneys are amenable to suit under section 1983. *See* Dodson v. Polk County, 628 F.2d 1104 (8th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3635 (U.S. Mar. 3, 1981) (No. 80-824).

98. An attorney may always request the court's permission to withdraw from the case. The procedure may be time consuming, *see* Anders v. California, 386 U.S. 738, 744 (1967), and if the court denies permission the attorney-client relationship will almost certainly have deteriorated. Certainly, the attorney may decide to take the extra appeal or make the extra argument rather than to go through an unsuccessful withdrawal procedure.

99. *See, e.g.*, Minns v. Paul, 542 F.2d 899, 901 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977); Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972); Reese v. Danforth, 486 Pa. 479, 486, 406 A.2d 735, 739 (1979).

Retained lawyers may handle cases that carry equal or greater risks of client dissatisfaction. A convicted defendant facing a long prison term may feel bitter regardless of whether his attorney was retained or appointed. Attorneys who litigate civil matters also are vulnerable, and if the stakes are high enough, the losing party may try to recover his loss in a malpractice suit. Most attorneys are not immune from suit; they protect themselves by more conventional methods, such as malpractice insurance. The appointed attorney can protect himself in the same way.[100]

A court discriminates against indigent clients when it permits retained but not appointed attorneys to be held liable for their negligence.[101] Poor clients become doubly disadvantaged: they may neither choose their lawyer nor recover damages if the appointed attorney is negligent. Far from improving the quality of indigent representation, immunity for appointed counsel will reduce the quality of representation available to the poor. Paid less than private attorneys and insulated from malpractice liability, court-appointed counsel will almost certainly render less effective representation.

Finally, even if the proponents of immunity are correct, the question is better suited to legislative than judicial determination.[102] A state legislature may decide that public policy demands such immunity for appointed counsel, and confer it by statute. In the absence of legislative action, however, the judiciary should not extend immunity to court-appointed attorneys.

V. IMMUNITY FOR ERRORS OF JUDGMENT IN THE CONDUCT OF LITIGATION

A court may grant an attorney immunity from liability for any errors made in the conduct of civil or criminal litigation.[103] This immunity is grounded in two independent theories. First, trial attorneys

100. R. MALLEN & V. LEVIT, *supra* note 1, § 175; Mallen, *supra* note 89, at 43.

101. Ferri v. Ackerman, 483 Pa. 90, 100-01, 394 A.2d 553, 559 (1978) (Roberts, J., dissenting), *rev'd*, 444 U.S. 193 (1979).

102. Ferri v. Ackerman, 444 U.S. 193, 205 (1979).

103. *See* Woodruff v. Tomlin, 423 F. Supp. 1284, 1288 (W.D. Tenn. 1976), *rev'd*, 593 F.2d 33 (6th Cir. 1979), *aff'd in part, rev'd in part on rehearing en banc*, 616 F.2d 924 (6th Cir.), *cert. denied*, 101 S. Ct. 246 (1980); Stricklan v. Koella, 546 S.W.2d 810, 814 (Tenn. Ct. App. 1976). *See generally* Beckham, *Trial Lawyer's Liability for Judgmental Decisions*, in PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION 157 (1979); Haskell, *The Trial Lawyer's Immunity from Liability for Errors of Judgment*, in PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION 141 (1979); Thomason, *A Plea for Absolute Immunity for Errors in Trial Judgment*, 14 WILLAMETTE L.J. 369 (1978).

should not be liable for mere errors of judgment.[104] Decisions of trial tactics are within an attorney's professional discretion and errors of judgment should not result in liability. This argument, however, does not justify absolute immunity for a negligent trial attorney.[105]

The second argument for trial-attorney immunity is that regardless of the existence of negligence, a malpractice plaintiff rarely can establish conclusively the element of proximate cause.[106] Causation is obvious when an attorney negligently omits a defense which, had it been asserted, would have resulted in a favorable judgment in the initial proceeding as a matter of law.[107] Causation is not obvious, however, when the malpractice plaintiff alleges that the omitted defense would have prevailed, not as a matter of law, but because it would have persuaded the jury to reach a more favorable result.[108] The causation burden is difficult to carry in this instance because the malpractice plaintiff never can establish conclusively what the jury in the underlying case would have decided. The uncertainty of this causal connection is the major premise supporting immunity for errors of judgment in the conduct of litigation: "Only by pure guesswork can the verdict of a jury be examined and a so-called cause for that verdict be determined. No man shall suffer a judgment against him based on guess."[109] Many courts allow such speculation in malpractice suits.[110] The causation argument supporting immunity, however, is sensible; there is valid concern that the "suit within a suit" provides too tenuous a causal link to establish

104. Dorf v. Relles, 355 F.2d 488, 492 (7th Cir. 1966); Woodruff v. Tomlin, 423 F. Supp. 1284, 1288 (W.D. Tenn. 1976), *rev'd*, 593 F.2d 33 (6th Cir. 1979), *aff'd in part, rev'd in part on rehearing en banc*, 616 F.2d 924 (6th Cir.), *cert denied*, 101 S. Ct. 246 (1980); Baker v. Beal, 225 N.W.2d 106, 112 (Iowa 1975). *See* R. MALLEN & V. LEVIT, *supra* note 1, § 111.

105. Siegel v. Kranis, 29 A.D.2d 477, 479, 288 N.Y.S.2d 831, 834 (1968); R. MALLEN & V. LEVIT, *supra* note 1, § 111; Beckham, *supra* note 103, at 160.

106. *See* Woodruff v. Tomlin, 423 F. Supp. 1284, 1288 (W.D. Tenn. 1976), *rev'd*, 593 F.2d 33 (6th Cir. 1979), *aff'd in part, rev'd in part on rehearing en banc*, 616 F.2d 924 (6th Cir.), *cert denied*, 101 S. Ct. 246 (1980); Stricklan v. Koella, 546 S.W.2d 810, 813 (Tenn. Ct. App. 1976); Haskell, *supra* note 103, at 141-42; Thomason, *supra* note 103, at 383.

107. *See* Better Homes, Inc. v. Rodgers, 195 F. Supp. 93, 97 (N.D.W. Va. 1961). For example, there is no difficulty in establishing causation if the defense attorney neglects to raise a valid statute of limitations defense.

108. Negligence is assumed for the purposes of the present discussion. Naturally, the decision not to assert a defense, which might have led to a more favorable result, would not be a basis for malpractice if the attorney exercised ordinary skill and knowledge in making his decision. See note 104 *supra* and accompanying text.

109. Stricklan v. Koella, 546 S.W.2d 810, 813 (Tenn. Ct. App. 1976).

110. *See, e.g.*, Williams v. Bashman, 457 F. Supp. 322 (E.D. Pa. 1978); Freeman v. Rubin, 318 So. 2d 540 (Fla. Dist. Ct. App. 1975).

the liability of even a clearly negligent attorney. But there is no reason to believe that the idea will gain widespread acceptance.[111]

The causation argument for immunity developed in the context of civil malpractice. Although no court has barred a criminal malpractice claim on this basis, the causation defense can be readily asserted because many malpractice claims challenge the attorney's conduct at trial. The peculiar nature of criminal malpractice actions, however, may lend credibility to the finding of proximate cause. This extra credibility may make the difference between immunity for negligence in the conduct of civil litigation and liability for negligent criminal defense.

When a client brings a civil malpractice suit alleging that competent trial strategy by his attorney would have resulted in a more favorable judgment, he alleges that a competent attorney would have presented his case differently. For example, if the client was a defendant in the underlying civil suit, he may contend that his attorney neglected to raise a defense that any competent attorney would have asserted. The client then presents that defense, and the jury in the malpractice action decides whether he has proved that the omission of that defense constitutes negligence. If the client demonstrates negligence, he must still show that, but for the omission, the jury in the underlying case would have returned a more favorable verdict. The problem with the causation inquiry is that the malpractice jury must guess what the jury in the underlying case would have decided.[112] Most jurisdictions permit this speculation in a civil malpractice case on the theory that the negligently omitted defense, when presented to the malpractice jury, will lead those jurors to the same conclusion that the jury in the underlying case would have reached.[113] Thus, if after hearing the omitted

111. As of January 1, 1981, only Tennessee recognized this form of immunity. Several commentators, however, have discussed this argument. See commentators cited in note 103 *supra*.

112. See note 109 *supra* and accompanying text.

113. Stricklan v. Koella, 546 S.W.2d 810, 813 (Tenn. Ct. App. 1976). Some courts hold that the malpractice jury should not guess what the prior jury would have done, but instead should try the matter *de novo*. *E.g.*, Fuschetti v. Bierman, 128 N.J. Super. 290, 297, 319 A.2d 781, 785 (1974); *see* Note, *The Use of Expert Testimony in Actions Against Litigation Attorneys*, 14 WILLAMETTE L.J. 425, 436-37 (1978). In these jurisdictions the underlying case is retried for the malpractice jury. If the jury finds for the criminal defendant, it is presumed that the underlying jury would have reached the same conclusion, and the client has demonstrated causation. A trial *de novo* is a more sensible procedure than asking one jury to guess how another jury would react.

If a jurisdiction allows a criminal malpractice case to be tried under this method, the malpractice plaintiff's burden of proof would be different. The criminal malpractice action is a civil suit, but to prove that his attorney's negligence caused his criminal conviction, he would only have to demonstrate a reasonable doubt of his guilt. The law would presume that, all juries being equal, if the malpractice jury found a reasonable doubt of the client's guilt, then the underlying criminal jury would have reacted identically, and acquitted the client. Civil and criminal forums are inherently different, however, and these differences may undermine the validity of this presumption. See note 35 *supra*.

defense the malpractice jury is persuaded by a preponderance of the evidence that the client should have received a more favorable verdict, it can conclude that the jury in the underlying case also would have found for the client.

Jurisdictions that do not find this causal link too speculative should allow a criminal malpractice plaintiff to demonstrate causation in a similar manner: if the malpractice jury, having heard the client present an allegedly proper criminal case, has a reasonable doubt of his guilt, the law should assume that the jury in the criminal trial also would have found reasonable doubt and acquitted.[114] In jurisdictions unwilling to make this assumption, a criminal malpractice plaintiff should be permitted to attempt to establish a more conclusive causal link. If the client, by presenting the defense omitted at the criminal trial, can prove to the malpractice jury by a preponderance of the evidence that he is innocent of the criminal charges,[115] a presumption that the criminal jury would have found at least a reasonable doubt of the client's guilt should exist. The causal connection therefore would be established.

Using this presumption the element of proximate cause can be established more definitely in criminal malpractice cases than in civil malpractice cases. In civil cases there is no margin of error; one jury must be exactly like another. In criminal malpractice a margin of error is provided; if one jury finds that a preponderance of the evidence indicates innocence, another jury, even if it does not have identical reactions, will in all likelihood find reasonable doubt of guilt.[116]

Courts should allow criminal malpractice plaintiffs to demonstrate causation by satisfying the same burden of proof as in the underlying criminal case. If this theory of causation seems speculative, a court should not overreact by providing absolute immunity. Rather, it should accept the more conclusive causal link provided by the margin-of-error proposal. This system is imperfect; because the causation burden in the malpractice case is higher than in the underlying criminal case, many clients who would have been acquitted with adequate representation will be unable to recover for the negligence of their attor-

114. See note 113 *supra*.

115. To simplify matters, this discussion concerns a criminal malpractice plaintiff who alleges that a competent defense would have resulted in a complete acquittal. The rationale is equally applicable to situations in which the client would have been found guilty on a lesser charge.

116. Other solutions to the causation problem have been suggested for civil malpractice. *See* Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 672-81 (1979); Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 701-06 (1977).

neys. Nevertheless, the margin-of-error proposal is fairer to the client than a system of absolute immunity.

VI. CONCLUSION

A criminal malpractice plaintiff, like other tort victims, may attempt to prove his case unless a substantial public policy reason justifies a threshold barrier to recovery. A criminal malpractice plaintiff should not face harsher threshold requirements than his civil counterpart. A man who is wrongfully imprisoned is no less deserving of restitution than a man who has wrongly suffered a money judgment. A concept such as the requirement of innocence suggests that the court is focusing not on the alleged injury, but on whether the victim deserves protection. Tort law is not concerned with the conduct of the victim in that sense because the morality of the plaintiff is not an element of the cause of action.

No reason exists to preclude a potentially valid criminal malpractice claim as a threshold matter. Considering the rarity of such suits, the extra expenditure of judicial resources will not unduly burden the courts. Collateral estoppel and the different types of immunity are valid concepts if exercised prudently, but neither is universally appropriate. Collateral estoppel should be applied to criminal malpractice claims only after the particular facts of each case have been examined. The concept of immunity should not bar otherwise valid claims unless the equities are overwhelming. The rule of law is that liability follows the tort, and immunity is only the exception.[117] Such exceptions to criminal malpractice recovery are unjustified.

David H. Potel

117. Reese v. Danforth, 486 Pa. 479, 487, 406 A.2d 735, 739 (1979).

EDITOR'S NOTE

In *North Haven Board of Education v. Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *cert. granted sub nom. North Haven Board of Education v. Bell*, 101 S. Ct. 1345 (1981), the Court of Appeals for the Second Circuit upheld the validity of Department of Health, Education, and Welfare regulations prescribing certain employment practices of educational institutions receiving federal financial assistance. Decisions from the Courts of Appeals for the First, Fifth, Sixth, Eighth, and Ninth Circuits support a contrary position: that the HEW regulations, promulgated under the authority of Title IX of the Education Amendments of 1972, exceed the scope of that statute.

The authors of the following two notes argue opposing sides of this issue. The first author, relying primarily on an interpretation of the legislative history of Title IX, contends that the HEW regulations are invalid. The second author, agreeing with the *North Haven* court and relying in part on statements made by the bill's sponsor in the Senate and in part on the remedial purposes behind Title IX, argues that the regulations are within the authority of the HEW under the statute. These notes illustrate that, pending Supreme Court resolution, this issue is far from settled.