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Immunizing the Investigating Prosecutor: Should the Dishonest Go Free or the Honest Defend?

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NOTES

IMMUNIZING THE INVESTIGATING PROSECUTOR: SHOULD THE DISHONEST GO FREE OR THE HONEST DEFEND?

INTRODUCTION

The position of prosecutors in the judiciary and the breadth of prosecutorial authority[1] simultaneously create a great potential for abuse of their tremendous power.[2] Individuals who claim a deprivation of their rights by malintentioned prosecutors often resort to the federal forum for redress.[3] The Civil Rights Act section 1983 creates a federal damage remedy for persons alleging violations of their constitutional rights by those acting under color of state law.[4] Similarly, the Supreme Court has held that the Constitution creates an implied cause of action against federal agents who violate the Constitution during the exercise of their duties.[5]

State and federal prosecutors, however, have generally been held to be

1. H. Kerper, Introduction to the Criminal Justice System 431 (2d ed. 1979); Jackson, *The Federal Prosecutor,* 31 J. Crim. L. 3, 3 (1940); Reiben, *Abuse of Power,* 11 Trial Law. Q. 99, 108 (1976). *See generally* The Prosecutor (W. McDonald ed. 1979) (collection of essays on the variety of prosecutorial functions).

2. *Developments in the Law—Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1202-04 (1977) [hereinafter cited as *Developments*]; Note, *Liability of Judicial Officers Under Section 1983,* 79 Yale L.J. 322, 329 n.45 (1969) [hereinafter cited as *Judicial Officers*].

3. The jurisdictional counterparts to the Civil Rights Act, 42 U.S.C. § 1983 (1976), are 28 U.S.C. §§ 1343(3), 1343(4). Prior to 1980, plaintiffs asserting that the nationwide service of process clause gave district courts the inherent authority to exert personal jurisdiction over officials often attempted to use the broad venue provision of 28 U.S.C. § 1391(e) in federal remedy actions. In Stafford v. Briggs, 100 S. Ct. 774 (1980), however, the Supreme Court ruled that § 1391(e) is limited to mandamus actions brought against federal officials. In so doing, the Supreme Court limited the plaintiff's choice of forum and the potential deterrence of official abuse otherwise effected by the statute. *See* Note, Driver v. Helms *and the Long-Arm, Strong-Arm Effects of 28 U.S.C. § 1391(e),* 48 Fordham L. Rev. 83 (1979).

4. 42 U.S.C. § 1983 (1976) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. In Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the Supreme Court held that a federal official could be sued directly under the fourth amendment to the Constitution. On remand, analogizing to common law and § 1983 cases, the Second Circuit held the government agents to be amenable to suit, but entitled to a good faith/probable cause defense. 456 F.2d 1339, 1341 (2d Cir. 1972). For purposes of immunity, no distinction is drawn between § 1983 actions and direct suits brought under the Constitution against federal officials. Butz v. Economou, 438 U.S. 478, 504 (1978); Brawer v. Horowitz, 535 F.2d 830, 834 (3d Cir. 1976); Apton v. Wilson, 506 F.2d 83, 90-93 (D.C. Cir. 1974); Bethea v. Reid, 445 F.2d 1163, 1166 (3d Cir. 1971), *cert. denied,* 404 U.S. 1061 (1972). Furthermore, the sole Supreme Court decision to apply prosecutorial immunity to § 1983 actions, Imbler v. Pachtman, 424 U.S. 409 (1976), has been explicitly relied on by the lower courts to determine when absolute immunity protects federal prosecutors. *See, e.g.,* Forsyth v. Kleindienst, 599 F.2d 1203, 1212-15 (3d Cir. 1979); Briggs v. Goodwin, 569 F.2d 10, 17-23 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978).

absolutely immune from such suits.[6] Under the doctrine of absolute immunity the suit is defeated at the outset, regardless of the alleged egregiousness of the prosecutor's conduct.[7] Recently, in *Imbler v. Pachtman*,[8] applying common law immunity to section 1983 suits, the Supreme Court held the state prosecutor to be absolutely immune for his decisions to initiate criminal proceedings and his handling of cases.[9] Although the Court did not directly address the issue, it did recognize lower federal court decisions that had denied such immunity to prosecutors engaged in investigative or administrative activities.[10] When the prosecutor's alleged conduct falls into one of these categories, it is deemed beyond the scope of his quasi-judicial authority and he is then entitled only to the qualified immunity afforded other government officials.[11] Qualified immunity places the burden on the official to defend his actions. To avoid liability, therefore, the prosecutor must establish his good faith and the reasonableness of his behavior in light of the circumstances.[12] Lower court decisions have continued to distinguish the quasi-judicial and investigative functions of the prosecutor, but extend immunity to those investigations he undertakes in relation to a specific prosecution.[13]

This Note first examines the policy justifications underlying the grant of absolute immunity at common law and the Supreme Court's application of those considerations to federal suits. Second, it analyzes the various approaches used to delineate the scope of absolute prosecutorial immunity, and argues that the current applications are impractical and fail to implement properly the intended purposes of immunity. Finally, the Note balances the considerations that militate against expanding the immunity beyond common

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6. *See, e.g.*, Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975); United States *ex rel.* Rauch v. Deutsch, 456 F.2d 1301 (3d Cir. 1972); Ney v. California, 439 F.2d 1285 (9th Cir. 1971); Carmack v. Gibson, 363 F.2d 862 (5th Cir. 1966); Scolnick v. Lefkowitz, 329 F.2d 716 (2d Cir.), *cert. denied*, 379 U.S. 825 (1964); Kostal v. Stoner, 292 F.2d 492 (10th Cir. 1961).

7. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976); Restatement (Second) of Torts § 895D, at 412-14 (1979); W. Prosser, Handbook of the Law of Torts 970 (4th ed. 1971).

8. 424 U.S. 409 (1976).

9. *Id.* at 431. Absolute immunity does not generally bar federal injunctive relief. Mitchum v. Foster, 407 U.S. 225, 242-43 (1972); *see* Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975); Krahm v. Graham, 461 F.2d 703 (9th Cir. 1972). When an injunction is sought against a prosecutor during the course of a state trial, however, principles of equity and federalism will prevent it from being issued "in the absence of a showing of irreparable injury which is 'both great and immediate.' " O'Shea v. Littleton, 414 U.S. 488, 499 (1974) (quoting Younger v. Harris, 401 U.S. 37, 54 (1971)); *see* Guerro v. Mulhearn, 498 F.2d 1249, 1253-55 (1st Cir. 1974).

10. 424 U.S. at 430-31.

11. Jacobson v. Rose, 592 F.2d 515 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979); Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); Wilhelm v. Turner, 431 F.2d 177 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); Peterson v. Stanczak, 48 F.R.D. 426 (N.D. Ill. 1969).

12. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

13. *See, e.g.*, Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979); Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978); Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977).

law limitations with the potential benefits to the judicial process by expanding its scope.

I. ABSOLUTE PROSECUTORIAL IMMUNITY

A. *Common Law Origins*

Judges,[14] witnesses,[15] and jurors[16] have long been afforded absolute immunity for acts performed within the scope of their official capacities.[17] This protection was originally justified by the need to protect the exercise of their judgment free from the threat of vexatious suits by dissatisfied litigants.[18] Prosecutorial immunity was created by analogizing the prosecutor's discretionary authority to that of a judge and characterizing the prosecutor as a quasi-judicial officer.[19]

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14. Alzua v. Johnson, 231 U.S. 106 (1913); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). English law had long recognized the doctrine of judicial immunity because of the need to preserve both judicial discretion and the King's records. *See, e.g.*, Floyd v. Barker, 77 Eng. Rep. 1305 (K.B. 1607). *See generally* Note, *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 Duke L.J. 95, 112-14 [hereinafter cited as *Quasi-Judicial Immunity*]. United States courts recognized this doctrine as early as 1810. *See* Yates v. Lansing, 5 Johns. 282, 296, 298 (N.Y. Sup. Ct. 1810), *aff'd*, 9 Johns. 395 (N.Y. 1811). *See also* Early v. Fitzpatrick, 161 Ala. 171, 172-73, 49 So. 686, 686 (1909); Sweeney v. Young, 82 N.H. 159, 160-61, 131 A. 155, 157-58 (1925). The rationales for affording judges absolute immunity include: (1) conservation of judicial time spent in private litigation; (2) preservation of judicial discretion; (3) fear that qualified people will be deterred from office; (4) insuring an independent judiciary; (5) need for finality in litigation; (6) unfairness of vesting one with authority and then subjecting his judgment to review by others. Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 271-72 (1937). *See also* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 223-24 (1963). For a general discussion of the history of judicial immunity, see 47 Miss. L.J. 812 (1976).

15. Sacks v. Stecker, 60 F.2d 73, 75 (2d Cir. 1932); Johnson v. Dover, 201 Ark. 175, 176, 143 S.W.2d 1112, 1113 (1940); Laing v. Mitten, 185 Mass. 233, 235, 70 N.E. 128, 129 (1904); Johnston v. Schlarb, 7 Wash. 2d 528, 535, 110 P.2d 190, 194-95 (1941). The doctrine was applied to witnesses to encourage full disclosure of all possibly relevant information. Sacks v. Stecker, 60 F.2d at 75; Weil v. Lynds, 105 Kan. 440, 442, 185 P. 51, 52 (1919); Hoar v. Wood, 44 Mass. 193, 194, 197 (1841).

16. Turpen v. Booth, 56 Cal. 65, 69 (1880); Sidener v. Russell, 34 Ill. App. 446, 447 (1890); Hunter v. Mathis, 40 Ind. 356, 358 (1872).

17. The Supreme Court recognized the doctrine of judicial immunity in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). The Court held that a judge is not amenable to civil suit unless he acts with a complete absence of jurisdiction over the subject matter. The immunity protects the judge regardless of the extent of the alleged error or the severity of the injury inflicted on the complainant, and even if malicious or corrupt behavior is alleged. *Id.* at 347, 351.

18. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 351 (1871) (judges); Sacks v. Stecker, 60 F.2d 73, 75 (2d Cir. 1932) (witnesses); Sidener v. Russell, 34 Ill. App. 446, 447 (1890) (jurors); Scott v. Stansfield, L R. 3 Ex. 220, 223 (1868). The doctrine could not be applied if the challenged activity was merely ministerial. Turpen v. Booth, 56 Cal. 65, 69 (1880). *See generally* 2 F. Harper & F. James, The Law of Torts § 29.10, at 1638-39 (1956).

19. *See, e.g.*, Pearson v. Reed, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935); Smith v. Parman, 101 Kan. 115, 116, 165 P. 663, 663 (1917); Kittler v. Kelsch, 56 N.D. 227, 234, 216 N.W. 898, 900 (1927); Creelman v. Svenning, 67 Wash. 2d 882, 884, 410 P.2d 606, 607 (1966). *But see* Orso v. City of Honolulu, 56 Hawaii 241, 248, 534 P.2d 489, 493 (1975).

Absolute immunity from malicious prosecution suits[20] ensures that the prosecutor is not required to defend groundless charges that could potentially be brought by every acquitted defendant.[21] Because the threat of retaliatory suits might influence the prosecutor's decisions, the grant of absolute immunity protects his impartial judgment.[22] To safeguard judicial freedom of expression, the prosecutor has also been protected from suits alleging defamatory words in the pleadings and affidavits or in open court proceedings.[23] Although the immunity is purportedly limited to communications relevant to trial proceedings,[24] only words totally unrelated and unnecessary[25] to the proceedings are actionable.[26] The public interest in encouraging the presentation of all relevant evidence of criminal activity to the trier of fact[27] requires

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20. *See, e.g.*, Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927); White v. Brinkman, 23 Cal. App. 2d 307, 73 P.2d 254 (1937); Pearson v. Reed, 6 Cal. App. 2d 277, 44 P.2d 592 (1935); Kittler v. Kelsch, 56 N.D. 227, 216 N.W. 898 (1927); Watts v. Gerking, 111 Or. 654, 228 P. 135 (1924); Creelman v. Svenning, 67 Wash. 2d 882, 410 P.2d 606 (1966). Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896), is usually cited as the first case to grant absolute prosecutorial immunity in a malicious prosecution suit. *But see* Cashen v. Spann, 66 N.J. 541, 334 A.2d 8 (1975) (court declined to immunize the prosecutor from charges of an illegal search). Because a search can more appropriately be categorized as investigatory than prosecutorial, *Cashen* neither contradicts *Imbler* nor the weight of federal case law. The language in early malicious prosecution cases often indicates acceptance of a very broad immunity. *See, e.g.*, Pearson v. Reed, 6 Cal. App. 2d 277, 44 P.2d 592 (1935); Watts v. Gerking, 111 Or. 654, 228 P. 135 (1924). In fact, government officials were generally amenable to suits for false arrest. *See, e.g.*, Schneider v. Shepherd, 192 Mich. 82, 158 N.W. 182 (1916) (prosecuting attorney); Shaw v. Moon, 117 Or. 558, 245 P. 318 (1926) (justice of the peace).

21. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); Yaselli v. Goff, 12 F.2d 396, 399 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

22. *See, e.g.*, Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); Sacks v. Stecker, 60 F.2d 73, 75 (2d Cir. 1932); Pearson v. Reed, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935); Copeland v. Donovan, 124 Misc. 553, 554, 208 N.Y.S. 765, 767 (Erie County Ct. 1925); *cf.* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871) (judicial immunity). In *Gregoire*, the Second Circuit determined that only a person with extraordinary resolve or complete irresponsibility could withstand the inclination to consider the potential liability resulting from every judicially related decision if he was amenable to civil suits. 177 F.2d at 581.

23. 1 F. Harper & F. James, *supra* note 18, at 427 (1956); *see* W. Prosser, *supra* note 7, § 114, at 777-78. Privately retained counsel, as well as government prosecutors, are completely immune from defamation actions at common law. *See, e.g.*, Latimer v. Oyler, 108 Kan. 476, 196 P. 610 (1921); Willner v. Hermelin, 73 N.Y.S.2d 412 (Sup. Ct. 1947), *aff'd mem.*, 273 A.D. 816, 76 N.Y.S.2d 846 (2d Dep't 1948); McKinney v. Cooper, 163 Or. 512, 98 P.2d 711 (1940); Irwin v. Ashurst, 158 Or. 61, 74 P.2d 1127 (1938).

24. *See, e.g.*, Kennedy v. Cannon, 229 Md. 92, 98-100, 182 A.2d 54, 58-59 (1962); Ramstead v. Morgan, 219 Or. 383, 388, 347 P.2d 594, 596 (1959); Massey v. Jones, 182 Va. 200, 204, 28 S.E.2d 623, 626-27 (1944).

25. Martirano v. Frost, 25 N.Y.2d 505, 508, 255 N.E.2d 693, 694, 307 N.Y.S.2d 425, 427 (1969) (assertion must be so completely irrelevant that its only possible purpose is to defame the person about whom it is said).

26. Seltzer v. Fields, 20 A.D.2d 60, 62-63, 244 N.Y.S.2d 792, 795-96 (1st Dep't 1963), *aff'd*, 14 N.Y.2d 624, 198 N.E.2d 368, 249 N.Y.S.2d 174 (1964); Johnston v. Schlarb, 7 Wash. 2d 528, 536, 110 P.2d 190, 195 (1941).

27. Hoar v. Wood, 44 Mass. 193, 194 (1841); Youmans v. Smith, 153 N.Y. 214, 218-21, 476 N.E. 265, 266-67 (1897); *see* Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J.,

that the prosecutor be given wide latitude in exercising his trial-related discretion,[28] even though the individual's interest in protecting his reputation may thereby be forfeited.[29]

Absolute immunity shields the prosecutor's motives from review in a civil damage action regardless of the maliciousness of his conduct.[30] Consequently, although it encourages the exercise of unbiased decisionmaking, absolute immunity simultaneously shields prosecutors who have misused their authority. The victim may therefore endure injury without the right of redress.[31] Furthermore, by cloaking the prosecutor with absolute rather than qualified immunity, the courts have eliminated a potential deterrent of intentionally abusive conduct.[32] In balancing "the evils inevitable in either alternative, [however, it was] thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[33] In theory, at least, the prosecutor would not be unpunished because he is always subject to criminal sanctions.[34]

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concurring) (emphasizing that in defamation cases encouragement of disclosure is the "single justification" for immunity). *See generally* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463 (1909). Abuse of this privilege is tempered by the judge's constant scrutiny of all participants in the trial and by the criminal sanctions for perjury. 1 F. Harper & F. James, *supra* note 18, § 5.22, at 424.

28. Sacks v. Stecker, 60 F.2d 73, 75 (2d Cir. 1932) (absolute immunity granted to protect the honest advocate although defamatory words should be actionable); Maulsby v. Reifsnider, 69 Md. 143, 151, 14 A. 505, 505 (1888) (It is "absolutely essential to the administration of justice that he should be allowed the widest latitude in commenting on the character, the conduct, and motives of parties and witnesses and other persons directly or remotely connected with the subject-matter in litigation").

29. Maulsby v. Reifsnider, 69 Md. 143, 151, 14 A. 505, 506 (1888); Hoar v. Wood, 44 Mass. 193, 194 (1841). *See generally* Veeder, *supra* note 27.

30. Yaselli v. Goff, 12 F.2d 396, 406 (2d Cir. 1926); Maulsby v. Reifsnider, 69 Md. 143, 151, 14 A. 505, 506 (1888); *cf.* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871) (judges).

31. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *see* Keefe, *Personal Tort Liability of Administrative Officials*, 12 Fordham L. Rev. 130, 130-31 (1943). For example, the prosecutor who purposefully commences an action to harass his victim can cause much inconvenience and force him to bear the needless financial burden of defending a groundless charge without having to make reparations. *Judicial Officers*, *supra* note 2, at 329 n.45. In Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), the result of the alleged misconduct was far more serious. Arrested as an enemy alien, the German complainant was incarcerated for almost five years despite the Enemy Alien Hearing Board's determination that he was a Frenchman. *Id.* at 579.

32. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); 2 F. Harper & F. James, *supra* note 18, at 1641-42.

33. 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). It has been argued that the fear of groundless suits unduly biasing official discretion is unrealistic because today it is more usual for the state treasury to pay a judgment against the prosecutor or to indemnify him if he pays in the first instance. Jaffe, *supra* note 14, at 231.

34. At common law, courts often reasoned that punishment of government officials was properly left to the public, or their representatives, rather than to private individuals. *See, e.g.*, Pugach v. Klein, 193 F. Supp. 630, 635 (S.D.N.Y. 1961); Smith v. Parman, 101 Kan. 115, 116-17, 165 P. 663, 663-64 (1917); Watts v. Gerking, 111 Or. 654, 670, 228 P. 135, 141 (1924).

B. *Section 1983 and* Imbler v. Pachtman

Relying on the broad remedial purpose of the Civil Rights Acts,[35] and the silence of section 1983 on the applicability of the common law immunities,[36] several early courts literally construed section 1983 to authorize suit against every person who infringed another's constitutional rights while acting under color of state law.[37] The Supreme Court, however, focused on common law considerations and the ambiguity of the legislative history and incorporated the traditional immunities of legislators,[38] judges,[39] and police officers[40] into section 1983.

Nevertheless, not all officials have been accorded the same immunity to which they were entitled at common law. In *Scheuer v. Rhodes*,[41] the Court held that executive officials, who were absolutely immune at common law,[42]

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35. *See* Monroe v. Pape, 365 U.S. 167, 173-74 (1961); Cong. Globe, 42nd Cong., 1st Sess. app. 68 (1871) (remarks of Rep. Shellabarger). 42 U.S.C. § 1983 (1976), derived from the Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (1871), was enacted in response to the lawlessness that existed in the south after the Civil War, and because "through tacit complicity and deliberate inactivity, state and local officials were fostering [Klan] vigilante terrorism against politically active blacks and Union sympathizers." *Developments, supra* note 2, at 1153 (footnote omitted). Although § 1 was created to remedy the plight of southern blacks, its supporters intended that it be available to all persons deprived of their constitutional rights by those endowed with state authority. Cong. Globe, 42nd Cong., 1st Sess. app. 68 (1871) (remarks of Rep. Shellabarger); *see* Monell v. Department of Social Servs., 436 U.S. 658, 683 (1978). The § 1983 claimant need not first resort to an available state remedy; the federally-created right is supplemental to state law. Monroe v. Pape, 365 U.S. at 183; *see* Cong. Globe, 42nd Cong., 1st Sess. 334-35, app. 216 (1871) (remarks of Rep. Hoar and Sen. Thurman).

36. *See* note 4 *supra*.

37. *See* Picking v. Pennsylvania R.R., 151 F.2d 240, 250 (3d Cir. 1945) ("the conclusion is irresistible that Congress by enacting the Civil Rights Acts sub judice intended to abrogate the privilege to the extent indicated by that act and in fact did so"), *overruled*, Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); *accord*, McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949); Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946). *See also* Littleton v. Berbling, 468 F.2d 389, 409 (7th Cir. 1972) (noting the ambiguous legislative history).

38. Tenney v. Brandhove, 341 U.S. 367 (1951). Legislative immunity is rooted in English law, *see id.* at 372-76, and is well established in the United States. *Id.*; Kilbourn v. Thompson, 103 U.S. 168, 201-05 (1880); Tanner v. Gault, 20 Ohio App. 243, 245-46, 153 N.E. 124, 125, (1925). It is generally agreed that the 42nd Congress did not intend to overturn legislative immunity. *See Developments, supra* note 2, at 1200. *But see* Tenney v. Brandhove, 341 U.S. 367, 381-83 (1951) (Douglas, J., dissenting).

39. Pierson v. Ray, 386 U.S. 547 (1967). Commentators have argued that Congress never intended that judges be immune from suit. *See Developments, supra* note 2, at 1201-02 (statements of several Congressmen that judicial officers could incur liability were never corrected); Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285, 1296 (1953) (same) [hereinafter cited as *Proper Scope*]. Continuing judicial immunity under § 1983 has been justified by the theory that the universal acceptance of the doctrine at common law requires specific Congressional reversal. It has been argued, however, that judicial immunity was not, in fact, firmly entrenched in the common law. *Judicial Officers, supra* note 2, at 325-27.

40. Pierson v. Ray, 386 U.S. 547 (1967) (good faith and probable cause defense).

41. 416 U.S. 232 (1974).

42. *See* Barr v. Matteo, 360 U.S. 564 (1959) (acting director of the Office of Rent Stabilization

are only entitled to a qualified immunity based on "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with a good-faith belief" that their behavior complied with constitutional constraints.[43] After *Scheuer*, prosecutors, who are also characterized as executive officers,[44] can only be granted absolute immunity on the basis of their judicial functions.[45]

The Supreme Court directly addressed the issue of prosecutorial immunity under section 1983 in *Imbler v. Pachtman*,[46] in which the plaintiff alleged that the California deputy district attorney had willfully or negligently suppressed evidence favorable to the defense and had allowed an eyewitness, whom he knew or should have known was committing perjury, to testify.[47]

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alleged to have released libelous press statement); Spalding v. Vilas, 161 U.S. 483 (1896) (Postmaster General charged with breach of contract).

43. 416 U.S. at 247-48. In Barr v. Matteo, 360 U.S. 564 (1959), the Court reasoned that, if the government official was entitled only to a qualified immunity, suits brought would consume time and energy otherwise devoted to public service and the threat of these suits would inhibit effective policy administration. *Id.* at 571. The Court, therefore, held that government officials are absolutely immune. *Id.* at 574. Although *Scheuer* held that executive officials sued under § 1983 have only qualified immunity, the decision was based on the same policy considerations as *Barr*. 416 U.S. at 239-40, 246-47. Recently, in Butz v. Economou, 438 U.S. 478 (1978), the Court held that federal executives charged with unconstitutional conduct are entitled only to the *Scheuer* qualified immunity. *Id.* at 507.

44. *See, e.g.*, Pearson v. Reed, 6 Cal. App. 2d 277, 44 P.2d 592 (1935) (granting absolute immunity based on both the quasi-judicial and executive status of the prosecutor); ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function § 1.1 (a), (b), at 25 (1971) [hereinafter cited as ABA Standards].

45. *See, e.g.*, Walker v. Cahalan, 542 F.2d 681, 685 (6th Cir. 1976) (prosecutor's letter to newspaper deemed executive activity although not quasi-judicial), *cert. denied*, 430 U.S. 966 (1977); Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970) (lawyer giving advice unrelated to pending litigation not quasi-judicial).

46. 424 U.S. 409 (1976). In 1927, the Court had summarily affirmed the Second Circuit's determination that a special assistant to the United States Attorney General was absolutely immune from a malicious prosecution action. Yaselli v. Goff, 275 U.S. 503 (1927), *aff'g per curiam* 12 F.2d 396 (2d Cir. 1926). *Yaselli* was decided when federal executive officials were generally immune from suit. *See, e.g.*, Spalding v. Vilas, 161 U.S. 483 (1896); Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845); Mellon v. Brewer, 18 F.2d 168 (D.C. Cir. 1927). For this reason and because of subsequent limitations on the immunity in § 1983 suits, *see* Scheuer v. Rhodes, 416 U.S. 232 (1974), one commentator has noted that it was not strong precedent for absolute prosecutorial immunity. *Quasi-Judicial Immunity, supra* note 14, at 106-07.

47. 424 U.S. at 416. Imbler was convicted of first-degree murder, primarily because of testimonial identification by an eyewitness. People v. Imbler, 57 Cal.2d 711, 714, 371 P.2d 304, 306, 21 Cal. Rptr. 568, 570-71 (1962) (en banc). The Supreme Court of California unanimously affirmed the trial verdict and death penalty. *Id.* at 718, 371 P.2d at 308, 21 Cal. Rptr. at 572. Shortly before the scheduled execution, however, Deputy District Attorney Pachtman informed the governor that he had discovered new evidence that supported Imbler's alibi and discredited the identification testimony. 424 U.S. at 412-13. Although the California Supreme Court unanimously denied Imbler's subsequent petition for a writ of habeas corpus, *In re* Imbler, 60 Cal. 2d 554, 570, 387 P.2d 6, 15, 35 Cal. Rptr. 293, 303 (1963), *cert. denied*, 379 U.S. 908 (1964), the federal district court, granted the writ relying solely on the state court records. Imbler v. Craven, 298 F. Supp. 795, 812 (C. D. Cal. 1969), *aff'd sub nom.* Imbler v. California, 424 F.2d 631 (9th Cir.), *cert. denied*, 400 U.S. 865 (1970). The court found numerous instances of misconduct, including both the subornation of perjury by Pachtman and the suppression of

Following earlier decisions that had applied tort immunities and defenses to section 1983,[48] the Court held the prosecutor to be absolutely immune from charges concerned with "initiating a prosecution and in presenting the State's case"[49]—charges analagous to common law malicious prosecution and defamation.[50] This holding was in accord with the vast majority of lower court decisions that had provided absolute immunity for these activities because of their integral relationship with the judicial system.[51]

The *Imbler* Court first considered the potential negative effect a denial of absolute immunity would have on the prosecutor's function as state advocate. The primary concerns were the same as the common law justifications for immunity—the deflection of time and energy from the prosecutor's public duties that the need to defend private lawsuits would cause and the prejudicial effect of these suits on his discretionary activities.[52] The Court also recognized two practical consequences that could result from a denial of absolute immunity. First, because of the large volume of cases he annually presents,[53] as well as his adversarial relationship with the defendant,[54] the prosecutor would have far more difficulty than other government officials in satisfying the good faith requirement of qualified immunity.[55] Concurrently, his often pressing need to make quick decisions based on insufficient information could lead to colorable claims of abuse.[56]

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evidence favorable to Imbler's defense. *Id.* at 803. When Imbler was not retried within sixty days, in accordance with the district court order, the writ of habeas corpus issued and he was finally released. 424 U.S. at 415.

48. 424 U.S. at 418 (citing Tenney v. Brandove, 341 U.S. 367 (1951)), *see* Wood v Strickland, 420 U.S. 308 (1975); Pierson v. Ray, 386 U.S. 547 (1969); notes 14-16 *supra* and accompanying text.

49. 424 U.S. at 431.

50. *See* notes 20-29 *supra* and accompanying text.

51. *See, e.g.*, Taylor v. Nichols, 558 F.2d 561 (10th Cir. 1977) (failure to initiate followed by decision to initiate); Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975) (decision to initiate); Scolnick v. Lefkowitz, 329 F.2d 716 (2d Cir.) (failure to initiate), *cert. denied*, 379 U.S. 825 (1964); Kostal v. Stoner, 292 F.2d 492 (10th Cir. 1961) (conspiracy with judge to deprive plaintiff of fair trial), *cert. denied*, 369 U.S. 868 (1962). *But see* Holton v. Boman, 493 F.2d 1176 (7th Cir. 1974) (refusal to initiate suit held actionable); Dacey v. New York County Lawyer's Ass'n, 423 F.2d 188 (2d Cir. 1969) (association treated as public prosecutor, denied absolute immunity for decision to initiate trial), *cert. denied*, 398 U.S. 929 (1970).

52. 424 U.S. at 423-26. The Court pointed out that the detrimental effects of threatened § 1983 suits and common law actions are the same. *Id.* at 427.

53. *Id.* at 426. *But see Quasi-Judicial Immunity, supra* note 14, at 97 n.11 (recognizing that the numerosity of potential claims has never been a distinguishing factor in immunity cases).

54. *Id.* at 425 "[A] defendant will often transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Id.* (citations omitted); *accord*, Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *cf.* Bradley v. Fisher, 80 U.S. 335, 347 (1871) (judge).

55. 424 U.S. at 425. The Court emphasized that it would be extremely difficult for the prosecutor to prove the technical elements of a qualified immunity to a jury. *Id.* One commentator has contended that "[t]he strongest reason for judicial immunity may lie in the uncertainties of the fact-finding process: suits might force a defendant judicial officer to attempt an explanation of his mental processes in a particular case," but specifically recognized that this argument also applies to police officers. *Judicial Officers, supra* note 2, at 333-34 (footnote omitted).

56. 424 U.S. at 425-26.

The Court then examined the direct consequences that a grant of limited immunity would have on the criminal justice system. It found the desirability of having all relevant evidence available to the jury to be of paramount importance.[57] Because amenability to suit could induce the prosecutor to withhold questionable, yet possibly valuable, evidence and to hesitate to commence an action, the criminal justice system and the public interest would suffer.[58] Various post-trial corrective mechanisms, such as appellate review and habeas corpus proceedings, could also be jeopardized.[59] The reviewing judge or tribunal might be reluctant to find a violation of the defendant's constitutional rights if a prosecutor could be held financially responsible.[60]

In determining that these considerations outweigh the injured person's right to redress under section 1983,[61] the *Imbler* Court emphasized the alternative sanctions that are provided for official misconduct[62] in criminal law[63] and in the American Bar Association (ABA) Canons.[64] It overlooked, however, the

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57. *Id.* at 426. This concern parallels the rationale underlying the decision to immunize participants in the judicial process from defamation suits. *See* note 27 *supra* and accompanying text.

58. 424 U.S. at 426 & n.24. An error in judgment might not be brought to the attention of the court. Justice White noted in his concurring opinion that "[t]here is no one to sue the prosecutor for an erroneous decision *not* to prosecute." *Id.* at 438 (White, J., concurring) (emphasis in original). The potential check on abuse effected by judicial safeguards—the overseeing judge and the deliberative jury—would be completely lacking.

59. *Id.* at 427.

60. *Id.* at 427-28. The Court noted that such a result might occur even without the reviewing judge's awareness. "This focus [on doing justice] should not be blurred by even the subconscious knowledge" of the judge. *Id.* at 427.

61. *Id.* at 427-28. Commentators agree that the prosecutor should not be held financially accountable for honest errors in judgment. *See Developments, supra* note 2, at 1204; *Judicial Officers, supra* note 2, at 322. Nevertheless, there has been considerable controversy concerning the shield of absolute immunity that is afforded the dishonest prosecutor. Many argue that a qualified immunity is necessary to deter reprehensible conduct by those most able to engage in it and that it would sufficiently protect the public's interest in an independent judiciary. *See, e.g., Developments, supra* note 2, at 1202-04; *Quasi-Judicial Immunity, supra* note 14, at 112-18; 47 Miss. L.J. 812, 820 (1976) (actual malice standard). The counter argument is that the claim in the pleadings in a civil suit could always be phrased to charge the prosecutor with malice and that it is the threat of suit itself, rather than possible liability, that would impede impartial decision-making. *See, e.g., Proper Scope, supra* note 39, at 1298; Note, *Delimiting the Scope of Prosecutorial Immunity from Section 1983 Damage Suits,* 52 N.Y.U. L. Rev. 173, 190-91 (1977) [hereinafter cited as *Delimiting the Scope*]. *See also* Imbler v. Pachtman, 424 U.S. 409, 431 n.33 (1976).

62. 424 U.S. at 428-29; *see Civil Rights Improvements Act of 1977: Hearings on S. 35 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary,* 95th Cong., 2d Sess. 39 (1978) (remarks of Assistant Attorney General Days) [hereinafter cited as *1978 Hearings*]; *Delimiting the Scope, supra* note 61, at 203.

63. The criminal counterpart of § 1983 provides that those acting under color of state law who deprive others of their constitutional rights "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." 18 U.S.C. § 242 (1976). Criminal proceedings may also be brought under state law. *See, e.g.,* Cal. Penal Code § 127 (West 1970); Mass. Ann. Laws ch. 268, §§ 1-2 (Michie/Law. Co-op 1968); Mich. Comp. Laws Ann. § 450.426 (1968).

64. ABA Code of Professional Responsibility EC 7-13, EC 7-26, DR 1-101, DR 4-101, DR

scarcity of criminal or professional disciplinary actions brought against prosecutors in the past.[65]

Because the *Imbler* Court reasoned that the challenged activities were intimately related to the trial proceeding, it did not delineate the boundaries of the immunity.[66] Thus, no guidelines were offered to separate investigative from prosecutorial functions—a distinction that has shifted within[67] and

7-107 (1976); ABA Standards, *supra* note 44, §§ 1.1(c), Commentary at 44, 3.1(b), Commentary at 78, 3.5(b), Commentary at 88, 3.11(a)&(c), Commentary at 100, 102. "[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." Imbler v. Pachtman, 424 U.S. at 429 & n.30 (footnote omitted).

65. The true value of such sanctions as punishment and deterrents of misconduct is questionable. The specific intent requirement of § 242 is difficult to prove. The result is often a choice between an acquittal, which may engender "disrespect for the criminal provisions at issue and for the rule of law generally," and the decision not to prosecute, which "allows persons to act with impunity." Comment, *Legislating Civil Rights: The Role of Sections 241 and 242 in the Revised Criminal Code*, 63 Geo. L.J. 203, 217 (1974). *But see* Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 Yale L.J. 1297, 1300 (1965) [hereinafter cited as *Discretion to Prosecute*] (even one highly publicized acquittal has a deterrent effect). In fact, only one § 242 criminal action has been instituted against a prosecutor. *See* United States v. Hunter, 214 F.2d 356 (5th Cir. 1954); *1978 Hearings*, *supra* note 62, at 66 (statement of Sen. Howard M. Metzenbaum). This may be attributed to the prosecutor's reluctance to bring suits against his peers and his discretion in deciding whether or not to initiate them. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493, 493-94 (1955); *see* United States v. Cox, 342 F.2d 167 (5th Cir.) (holding that a prosecutor has the discretionary authority to refuse to commence an action despite grand jury indictment of the accused), *cert. denied*, 381 U.S. 935 (1965). Additional factors include sympathetic juries and the difficulty of discovering evidence. *Discretion to Prosecute*, *supra*, at 1298-1300. *See generally* Shapiro, *Limitations In Prosecuting Civil Rights Violations*, 46 Cornell L.Q. 532 (1961). Furthermore, the ABA has recognized that it has been "woefully lax in enforcing its professed ethical standards." ABA Standards, *supra* note 44, at 10.

66. 424 U.S. at 430-31.

67. The Third Circuit has undergone the most noticeable changes in its approach to prosecutorial immunity. In Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945), the court held that the Civil Rights Act had eliminated judicial immunity. The court subsequently overruled *Picking*, however, and held that the prosector's office is immune under § 1983. Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); *see* note 94 *infra*. Later, the court distinguished between the various functions performed by the prosecutor and the proper degree of immunity. *See, e.g.*, Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977); Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977); Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975); *accord*, Austin v. Manlin, 433 F. Supp. 648 (E.D. Pa. 1977); Tomko v. Lees, 416 F. Supp. 1137 (W.D. Pa. 1976). The district courts utilized the functional approach to distinguish the investigatory from the adversarial activities of the prosecutor. This led to contradictory determinations. *Compare* Gockley v. Van Hoove, 409 F. Supp. 645, 650-51 (E.D. Pa. 1976) (absolutely immune for press release although the court recognized that such conduct was not exclusively adversarial) *with* Coggins v. Carpenter, 486 F. Supp. 270, 283-84 (E.D. Pa. 1979) (allowing trial judge to determine whether acting within or without scope of his jurisdiction) *and* J.D. Pflaumer, Inc. v. United States Dep't of Justice, 450 F. Supp. 1125, 1135 (E.D. Pa. 1978) (denial of immunity to prosecutor who ordered the seizure of records even though it appeared that the criminal action had already been initiated). In 1979, the Third Circuit held that when investigations are necessary to enhance the discretion of the prosecutor, they are protected activities. Forsyth v. Kleindienst, 599 F.2d 1203, 1215 (3d Cir. 1979).

among the circuit courts.[68] The Court, however, recognized the lower court decisions that used a functional approach[69] to hold that a prosecutor acting in an investigatory capacity is entitled only to the good faith and probable cause defense afforded the police officer.[70] It acknowledged that at a certain point the prosecutor's function more closely resembles that of the administrator or investigator than that of the advocate. The Court noted that "[p]reparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence,"[71] indicating that absolute immunity might also protect other activities.

Although the majority explicitly declined to exclude unconstitutional suppression from the general coverage afforded the prosecutor's handling of a criminal prosecution,[72] the three concurring justices maintained that absolute immunity does not protect the suppression of exculpatory evidence.[73] In his

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68. *Compare* Heidelberg v. Hammer, 577 F.2d 429 (7th Cir. 1978) (absolute immunity from false arrest charges) *and* Martinez v. Chavez, 574 F.2d 1043 (10th Cir. 1978) (same) *and* Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977) (prosecutor immune for investigations connected to preparation and presentation of case) *with* Jacobson v. Rose, 592 F.2d 515 (9th Cir. 1978) (illegal wiretap qualifiedly immune), *cert. denied,* 99 S. Ct. 2861 (1979) *and* Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965) (no absolute immunity for false arrest and coercion of confession) *and* Peterson v. Stanczak, 48 F.R.D. 426 (N.D. Ill. 1969) (illegal search and seizure and false arrest not immune).

69. *See, e.g.,* Guerro v. Mulhearn, 498 F.2d 1249, 1256 (1st Cir. 1974); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974); Robichaud v. Ronan, 351 F.2d 533 (9th Cir 1965).

70. *See, e.g.,* Whirl v. Kern, 407 F.2d 781, 787-89 (5th Cir. 1969); Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968); Notaras v. Ramon, 383 F.2d 403, 404 (9th Cir. 1967).

71. 424 U.S. at 431 n.33.

72. *Id.* at 431 n.34. The majority gave three reasons for refusing to accept Justice White's argument. First, it found that suppression of evidence is as much a violation of an individual's rights as is subornation of perjury. *Id.* This reasoning is deficient in two respects. Allowing a prosecutor to present evidence without fear of potential suit puts the ultimate burden on the jury to determine if it is valid. Thus, more information will be released. *Id.* at 446 n.9 (White, J., concurring). A denial of immunity for suppression, however, would achieve this beneficial effect. Moreover, when individual rights are at stake, only those activities that benefit the judicial system should be protected. Second, the Court felt that the distinction was impossible to apply because a charge of perjury could easily be recast as suppression. *Id.* at 431 n.34. Justice White pointed out, however, that it is fairly easy to assert subornation of perjury, but much more difficult to allege the objective facts necessary to establish that the prosecutor unconstitutionally withheld evidence. *Id.* at 446 n.9 (White, J., concurring). Finally, the majority charged that the test of disclosure formulated was more demanding than that required by Brady v. Maryland, 373 U.S. 83 (1963). 424 U.S. at 431 n.34. Justice White expressly rejected that notion. *Id.* at 446 n.9 (White, J., concurring).

73. 424 U.S. at 433 (White, J., concurring) (Brennan, J., & Marshall, J., joining). The Justices concurred with the majority because they viewed the subornation of perjury as the crux of the alleged offense. *Id.* at 432, 445-47 (White, J., concurring). Prior to *Imbler,* a number of lower courts had denied absolute immunity to prosecutors who had suppressed evidence favorable to the defendant. *See* Hilliard v. Williams, 465 F.2d 1212, 1218 (6th Cir.) (suppression of FBI laboratory report supporting the defense), *cert. denied,* 409 U.S. 1029 (1972); Haaf v. Grams, 355 F. Supp 542, 545 (D. Minn. 1973) (withholding evidence outside jurisdiction); Peterson v. Stanczak, 48 F.R.D. 426 (N.D. Ill. 1969) (suppression within investigative role of prosecutor). *See also* Weathers v. Ebert, 505 F.2d 514, 516 (4th Cir. 1974), *cert. denied,* 424 U.S. 975 (1976).

concurring opinion, Justice White argued that trial disclosure[74]—an accepted justification for absolute immunity[75]—would only be encouraged by denying the prosecutor such immunity.[76] He reasoned that the judicial process would be improved by the limited grant of qualified immunity because the prosecutor would be inclined to present information in his possession when he is uncertain as to its materiality.[77] Finally, he noted that the opportunity for judicial scrutiny and review is entirely lacking because unconstitutionally suppressed information will rarely be discovered.[78] This underscores the need to deter such behavior by permitting federal causes of action when suppressed evidence is discovered.[79] Thus, the concurrence intimates that when the prosecutor exercises his discretion in areas devoid of judicial safeguards, permitting him to be brought to trial will provide the deterrent effect on future prosecutorial abuse that is otherwise lacking.

C. Butz v. Economou

Butz v. Economou[80] is the most recent Supreme Court decision to analyze the factors relevant to immunity determinations. Reasoning that Department

74. 424 U.S. at 443. The prosecutor has an affirmative duty to disclose material exculpatory evidence to the defense. Moore v. Illinois, 408 U.S. 150 (1972); Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). To ensure that the defendant's due process rights are not violated, this information must be disclosed when requested by the defense, Brady v. Maryland, 373 U.S. 83, 87-88 (1963), and when the omission would create "a reasonable doubt [as to the defendant's innocence] that did not otherwise exist." United States v. Agurs, 427 U.S. 97, 112 (1976).

75. Both the majority, 424 U.S. at 426 & n.23, and the concurrence, *id.* at 442-43 (White, J., concurring) recognized this.

76. *Id.* at 443 (White, J., concurring).

77. *Id.* A prosecutor intent on protecting himself from potential liability could not injure the judicial system by disclosing too much information. *Id.* The Court in United States v. Agurs, 427 U.S. 97 (1976), also recognized that the standard it had formulated would encourage the prosecutor to disclose evidence of doubtful materiality. *Id.* at 108. As Justice White emphasized in *Imbler,* 424 U.S. at 446 n.9, however, the *Agurs* Court stressed that only omissions that interfered with the defendant's right to a fair trial would be unconstitutional. 427 U.S. at 108.

78. 424 U.S. at 443-44 (White, J., concurring). The prosecutor in *Imbler* actually did come forward with evidence that had been withheld. *Id.* at 412. For this reason, the majority argued that the grant of absolute protection would encourage such behavior. *Id.* at 427 n.25; *see* 31 Vand. L. Rev. 196, 207 (1978). Justice White's standard, however, would deter such behavior in the first instance.

79. 424 U.S. at 444 (White, J., concurring). The proposed Civil Rights Improvements Act of 1977, S. 35, 95th Cong., 1st Sess., 123 Cong. Rec. S205 (daily ed. Jan. 10, 1977), included this standard in a modified form. The exceptions to prosecutorial immunity in S. 35 were much broader than those advocated by Justice White and exceeded the constitutional duty to disclose evidence enunciated by the Court. Under S. 35 a prosecutor could be brought to trial under § 1983 if he suppressed either evidence or investigative leads. In Moore v. Illinois, 408 U.S. 786, 795 (1972), the Supreme Court stated that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." The proposed bill was vigorously contested on this point. *1978 Hearings, supra* note 62, at 121-22 (statement of Louis J. Lefkowitz), 352-54 (statement of Lee C. Flake), 355-56 (testimony of D. Lowell Jensen), 362-63 (statement of Andrew L. Sonner). In 1979, S. 35 was resubmitted as S. 1983, 96th Cong., 1 Sess., 125 Cong. Rec. S15991 (daily ed. Nov. 6, 1979) excluding the provisions relating to prosecutorial immunity.

80. 438 U.S. 478 (1978).

of Agriculture officials who had conducted an administrative hearing exercised discretion similar to that of judicial officers,[81] the Court held them to be absolutely immune.[82] The Court was not required to determine whether absolute prosecutorial immunity extends beyond the bounds it had previously delineated in *Imbler*.[83] The value of *Butz*, however, lies in its clarification of the considerations upon which *Imbler* relied.

Using the adversary system as its model,[84] the *Butz* Court identified three major factors to be balanced when deciding whether an official is entitled to absolute or qualified immunity. First, the discretion of the prosecutor must be related to adjudicatory proceedings.[85] Second, the grant of absolute immunity is only warranted when it is likely that, in its absence, the prosecutor will be the target of retaliatory suits.[86] The Court found that in the context of trial proceedings, he is especially amenable to suit because angry defendants will often focus their resentment on him.[87] Finally, the *Butz* Court recognized that

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81. *Id.* at 511. The *Butz* Court would limit the definition of quasi-judicial to encompass only those judgments relating to adjudications functionally comparable to trial proceedings. *See id.* at 512-13. Because administrative hearings may differ, the "comparability" approach advanced by *Butz* would require that each case be examined individually. *E.g.*, Simons v. Bellinger, No. 77-2012, slip op. at 12 (D.C. Cir. Jan. 4, 1980); Forsyth v. Kleindienst, 599 F.2d 1203, 1212 (3d Cir. 1979); Tigue v. Swaim, 585 F.2d 909, 914 (8th Cir. 1978).

82. 438 U.S. at 512-17. In *Butz*, Department of Agriculture officials had initiated and conducted an administrative hearing to revoke or suspend the registration of a commodity futures commission merchant. *Id.* at 481-85. This was the first time the Court examined the right of executive officials to immunity when they are sued directly under the Constitution. The *Butz* decision followed the line of cases that had granted qualified immunity to state executive officials sued under § 1983, *e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974), rather than federal case law granting government officials absolute immunity. *See* Barr v. Mateo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896). The Court found no reason to differentiate between state and federal officials for the purposes of conferring immunity because both § 1983 and implied causes of action under the Constitution would become meaningless if officials were always immune when conducting themselves improperly. 438 U.S. at 500-01; *see* note 5 *supra*. The Court did not deny federal executive officials absolute immunity, however, solely on the basis of their status or title. Rather, it placed the burden on them to prove that public policy requires that they should be completely protected from suit in certain situations. 438 U.S. at 506.

83. The officials in *Butz* were charged with having maliciously initiated the hearing in response to the plaintiff's criticism of the Department. 438 U.S. at 482-83. This conduct falls squarely within the *Imbler* immunity.

84. *Id.* at 512; *accord*, Apton v. Wilson, 506 F.2d 83, 93 (D.C. Cir. 1974) ("the prosecutor's absolute protection, like that of the judge from which it is derived, is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse") (footnotes omitted).

85. 438 U.S. at 511-13.

86. *Id.* at 512. In Simons v. Bellinger, No. 77-2012 (D.C. Cir. Jan. 4, 1980), the District of Columbia Circuit adopted this as the primary requisite to grant absolute immunity. *Id.*, slip op. at 23 n.15; *see* notes 137-50 *infra* and accompanying text.

87. 438 U.S. at 512. As in *Imbler*, the Court emphasized the importance of encouraging disclosure of evidence and noted that the prosecutor's handling of evidence could easily lead to charges of misconduct. In the context of a government agency, the Court again stressed that the public interest would be defeated if relevant evidence were withheld from those making policy decisions. *Id.* at 517. At the same time, the Court specifically noted that the time and information

safeguards must be available to deter the prosecutor from misusing his authority.[88] In contrast to its decision in *Imbler,* the Court focused on the features of the judicial system that may effect this deterrence: challenges to his assertions by defense counsel through cross-examination and rebuttal; scrutiny of his decision to commence the action during the trial proceeding itself; and, the jury's decision whether to accept the credibility of any evidence presented for its deliberation.[89] This focus on the availability of checks indicates that the broad implications of the *Imbler* immunity are subject to limitation.[90] Only when there are adequate means to deter prosecutorial abuse will the importance of ensuring independence of judgment and action outweigh the risk of unconstitutional conduct.[91]

II. SCOPE OF THE IMMUNITY

The variety of activities performed by the prosecutor intensifies the difficulty in delineating the scope of prosecutorial immunity.[92] The prerequisite for immunity is that the prosecutor be acting within the scope of his authorized powers at the time of his alleged misconduct.[93] An official who

constraints under which the prosecutor acts were not a central consideration in *Imbler. Id.* at 516 n.40.

88. *Id.* at 512. The court noted that it is these safeguards that guarantee the reliability and impartiality of judicial decisionmaking. *Id.*

89. *Id.* at 516-17.

90. It has been noted that the *Imbler* Court's concern with the criminal enforcement system is a radical departure from the traditional emphasis upon the nature of the prosecutor's role in the judicial process, and that a much broader immunity can be justified on this basis. Note, *Absolute Immunity for Prosecutors; Too Broad a Protection:* Imbler v. Pachtman, 10 Sw. U. L. Rev. 305, 315 (1978); *Quasi-Judicial Immunity, supra* note 14, at 97 n.11; 47 Miss. L.J. 812, 819 (1976); *see Delimiting the Scope, supra* note 61, at 200-01 (proposing that all prosecutorial investigations be covered by absolute immunity).

91. Butz v. Economou, 438 U.S. 478, 514 (1978). Lower courts ignore this factor completely, Atkins v. Lanning, 556 F.2d 485, 488 (10th Cir. 1977), give it only cursory attention, Forsyth v. Kleindienst, 599 F.2d 1203, 1215 n.15 (3d Cir. 1979), or misinterpret its application. Briggs v. Goodwin, 569 F.2d 10, 38-39 (D.C. Cir. 1977) (Wilkey, J., dissenting), *cert. denied,* 437 U.S. 904 (1978).

92. *See, e.g.,* Jacobson v. Rose, 592 F.2d 515, 524 (9th Cir. 1978) (defining implementation of wiretap as administrative), *cert. denied,* 442 U.S. 930 (1979); Taylor v. Nichols, 558 F.2d 561, 566 (10th Cir. 1977) (decision to prosecute within prosecutorial function); Sprague v. Fitzpatrick, 546 F.2d 560, 564 (3d Cir. 1976) (hiring and firing policies within administrative function), *cert. denied,* 431 U.S. 937 (1977); Palermo v. Warden, 545 F.2d 286, 297 (2d Cir. 1976) (plea-bargaining within prosecutorial function), *cert. dismissed,* 431 U.S. 911 (1977); Hampton v. City of Chicago, 484 F.2d 602, 608-09 (7th Cir. 1973) (evidence gathering within police function), *cert. denied,* 415 U.S. 917 (1974); 12 Ga. L. Rev. 372, 379 (1978); 31 Vand. L. Rev. 196, 198 (1978). Seven categories of prosecutorial conduct have been identified: quasi-judicial, administrative, ministerial, investigatory, civil/advisory, public official, and individual. *Delimiting the Scope, supra* note 61, at 187-88.

93. *See, e.g.,* Stump v. Sparkman, 435 U.S. 349, 356 (1978) (judge); Scheuer v. Rhodes, 416 U.S. 232, 250 (1974) (executive official); Tenney v. Brandhove, 341 U.S. 367, 376-79 (1951) (legislators). The classic example of an official exceeding these bounds is the probate court judge who chooses to preside at criminal proceedings. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-52 (1871). Analogously, a state district attorney attempting to prosecute a citizen for a federal offense would also be liable for his misconduct. Clark v. Zimmerman, 394 F. Supp. 1166, 1176 (M.D. Pa. 1975).

merely exceeds his granted authority, however, will not be affected by this limitation.[94] Moreover, a prosecutor will be immune from suit[95] even when

94. In Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871), the Supreme Court noted that "the manner and extent in which the [judge's] jurisdiction shall be exercised" is precisely the judicial discretion the immunity was created to protect. *Id.* at 352. Judicial immunity has traditionally been broad. *See* Sparks v. Duval County Ranch Co., 604 F.2d 976, 980 (5th Cir. 1979). In Stump v. Sparkman, 435 U.S. 349 (1978), for example, the Court found that a judge's ex parte order allowing a minor to be sterilized without her consent was within his jurisdiction. *Id.* at 362-63. Judges have, however, been found amenable to suit in certain circumstances. *See, e.g.*, Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972) (judge assaulted and incarcerated minor during traffic violation proceedings); Spires v. Bottorf, 317 F.2d 273 (7th Cir. 1963) (judge interfered with coram nobis proceeding after disqualifying himself), *cert. denied*, 379 U.S. 938 (1964).

The authority of the prosecutor is generally governed by statute. *E.g.*, Cal. Gov't Code §§ 26500-528 (1980) (District Attorney); *id.* § 12510 (Attorney General); N.Y. County Law § 700(1) (McKinney 1972) (District Attorney); N.Y. Exec. Law § 63 (9)-(11) (McKinney 1972) (Attorney General); *see* Jennings v. Shuman, 567 F.2d 1213, 1220-21 (3d Cir. 1977); Dacey v. New York County Lawyers' Ass'n, 423 F.2d 188, 189-90 & n.3 (2d Cir. 1969), *cert. denied*, 398 U.S. 929 (1970). Even though investigatory activities are not usually included in statutory grants of authority, they are deemed within the proper scope of the prosecutor's jurisdiction. *See* Wilhelm v. Turner, 298 F. Supp. 1335, 1338 (S.D. Iowa 1969), *aff'd*, 431 F.2d 177 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); Meloling, *Prosecutorial Investigations*, in Pretrial Problems of the Prosecutor 3-6 (J. Douglass ed. 1977). Despite the diversity of prosecutorial functions, some courts reason that immunity attaches to the office of the prosecutor rather than the activities he performs, and thus appear to impose no other limitations upon the immunity. *See, e.g.*, Cambist Films, Inc. v. Duggan, 475 F.2d 887, 889 (3d Cir. 1973) (seizure of allegedly obscene films); Bauers v. Heisel, 361 F.2d 581, 591 (3d Cir. 1966) (juvenile tried in criminal court), *cert. denied*, 386 U.S. 1021 (1967); Gockley v. VanHoove, 409 F. Supp 645, 650 (E.D. Pa. 1976) (releasing information to the press). Before the Supreme Court held that executive officials are entitled only to qualified immunity in Scheuer v. Rhodes, 416 U.S. 232 (1974), courts sometimes conferred absolute immunity on prosecutors because of their positions as executive officials. *See, e.g.*, United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965). The distinction between acting beyond the scope of official authority and merely in excess of that authority has been criticized as meaningless and difficult to apply. *E.g.*, Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1343 (2d Cir. 1972); *see* National Sur. Co. v. Miller, 155 Miss. 115, 127, 124 So. 251, 254 (1929) ("We cannot grasp the conception that nonexistence can be less than nonexistence, or that there can be different kinds of nonexistence, or that that which is absent can be more absent."); McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 Rut.-Cam. L.J. 65, 72-73 (1976); Note, *Briggs v. Goodwin: The Constriction of Prosecutorial Immunity*, 15 Hous. L. Rev. 760, 763 (1978) [hereinafter cited as *Constriction*]; *But see* 2 F. Harper & F. James, *supra* note 18, § 29.10, at 1643. Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967), emphasized the fine distinction between these two concepts. In *Bauers*, the prosecutor tried an escaped juvenile offender in criminal court although the New Jersey legislature had removed this duty from his authority. *Id.* at 583-84. Nevertheless, the court held that because the prosecutor had fulfilled his foremost responsibility—vindicating wrongs against society—he had not exceeded the bounds of his jurisdiction. *Id.* at 591.

95. *See, e.g.*, Briggs v. Goodwin, 569 F.2d 10, 15 (D C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978); *cf.* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (common law malicious prosecution action), *cert. denied*, 339 U.S. 949 (1950); Cooper v. O'Connor, 99 F.2d 135, 140-41 (D.C. Cir.) (same), *cert. denied*, 305 U.S. 643 (1938). If absolute immunity did not extend to any charges of illegal behavior, even honest prosecutors would be subject to examination at trial. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

he exercises that authority illegally.[96]

Not every prosecutorial act that is within his authority, however, is protected by absolute immunity. Most courts refine the basic jurisdiction limitation by focusing on the challenged activity and granting absolute immunity only when it is an integral part of the judicial process.[97] Those activities that are directly connected with the system, such as presenting evidence in court, will usually be deemed quasi-judicial and therefore completely protected.[98] Other functions, such as conducting wide-ranging investigations[99] and issuing press releases,[100] will generally be covered only with the

96. Some early decisions had interpreted this limitation to restrict absolute immunity to acts within the prosecutor's lawful authority. The implicit rationale was that the prosecutor who breaks the law, and thus violates the public trust, is always without authority, and the grant of absolute immunity can never be justified. *See, e.g.*, Holton v. Boman, 493 F.2d 1176, 1179 (7th Cir. 1974); Hilliard v. Williams, 465 F.2d 1212, 1217-18 (6th Cir.), *cert. denied*, 409 U.S. 1029 (1972); Madison v. Purdy, 410 F.2d 99, 102 (5th Cir. 1969); Lewis v. Brautigam, 227 F.2d 124, 128-29 (5th Cir. 1955); Palermo v. Rockefeller, 323 F. Supp. 478, 482 (S.D N.Y. 1971); *cf.* Helstoski v. Goldstein, 552 F.2d 564, 566 (3d Cir. 1977) (ambiguous post-*Imbler* case holding that libelous press releases were not in "proper performance" of prosecutor's functions); Norton v. McShane, 332 F.2d 855, 866 (5th Cir. 1964) (Gewin, J., dissenting) (unlawful conduct can never be within the scope of an official's authority), *cert. denied*, 380 U.S. 981 (1965). In Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955), for example, the Fifth Circuit found that the Florida state prosecutor had conspired to coerce a guilty plea from a murder suspect. The court held that the prosecutor was entitled to only a qualified immunity because his behavior was illegal, although his actions would have been within his authority if properly executed. *Id.* at 128-29. The court noted that police officers could be held liable for performing identical acts. *Id.* This language was relied on by the court in Robichaud v. Ronan, 351 F.2d 533, 537 (9th Cir. 1965), to represent the functional approach. *See* notes 114-16 *infra* and accompanying text. The court would have reached the same result, therefore, had it analyzed the coercion of a guilty plea within the *Robichaud* investigatory/advocacy context. *See, e.g.*, Peterson v. Stanczak, 48 F.R.D. 426, 430-32 (N.D. Ill. 1969).

97. *See, e.g.*, Heidelberg v. Hammer, 577 F.2d 429, 432 (7th Cir. 1978) (alteration of police tapes); Martinez v. Chavez, 574 F.2d 1043, 1044 (10th Cir. 1978) (arrest based on alleged unfounded escape charge); Fine v. City of N.Y., 529 F.2d 70, 73-74 (2d Cir. 1975) (presenting evidence to grand juries); Front Runner Messenger Serv., Inc. v. Ghini, 468 F. Supp. 305, 309 (N.D. Ill. 1979) (using false testimony to obtain arrest warrant).

98. *See* Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); Ellison v. Stephens, 581 F.2d 584, 585 (6th Cir. 1978) (assertion of sovereign immunity defense); Fanale v. Sheehy, 385 F.2d 866 (2d Cir. 1967) (initiation of suit and presentation of prosecution). *But see* Holton v. Boman, 493 F.2d 1176, 1179 (7th Cir. 1974) (requiring prosecutor to plead with respect to his decision not to initiate a criminal case).

99. *See, e.g.*, Guerro v. Mulhearn, 498 F.2d 1249, 1256 (1st Cir. 1974) (police related activities); Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973) (illegal search), *cert. denied*, 415 U.S. 917 (1974); Wilhelm v. Turner, 431 F.2d 177, 180 (8th Cir. 1970) (illegal seizure), *cert. denied*, 401 U.S. 947 (1971); Williams v. Wright, 432 F. Supp. 732, 740 (D. Or. 1976) (coerced confession); Ames v. Vavreck, 356 F. Supp. 931, 937 (D. Minn. 1973) (search and seizure).

100. Hampton v. Hanrahan, 600 F.2d 600, 633 (7th Cir. 1979) (public relations), *appeal docketed*, 48 U.S.L.W. 3415 (U.S. Jan. 1, 1980) (No. 79-912); Sprague v. Fitzpatrick, 546 F.2d 560, 564 (3d Cir. 1976) (hiring and firing policies); Walker v. Cahalan, 542 F.2d 681, 685 (6th Cir. 1976) (press releases), *cert. denied*, 430 U.S. 966 (1977); Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970) (giving advice to administrative agency). *But see* Gockley v. VanHoove, 409 F. Supp. 645, 651 (E.D. Pa. 1976) (finding press releases to be one of the normal functions of prosecutor's office and therefore protected).

limited protection of qualified immunity. This distinction recognizes the societal interest in allowing individuals redress when their constitutional rights have been violated and concurrently in protecting the independent discretion of the prosecutor.[101] Only when an activity is deemed quasi-judicial will the scales tip in favor of immunizing the prosecutor from suit.[102] The cases, however, are inconsistent in their treatment of investigations undertaken in connection with a contemplated or commenced criminal proceeding. Although some courts have denied immunity to these investigating prosecutors,[103] others include certain investigatory operations in immunity coverage,[104] thereby extending its scope far beyond common law bounds.[105]

A. *The Functional Approach*

Courts using the functional approach hold that the prosecutor is amenable to suit when he engages in essentially police related activities.[106] They reason that because the law enforcement officer is allowed only a qualified immunity for his conduct,[107] it would be illogical and unjust to afford a complete defense to the prosecutor who undertakes similar tasks or orders their performance.[108] On this basis, prosecutors have been denied immunity for

101. *See* Imbler v. Pachtman, 424 U.S. 409, 437, 442, (1976) (White, J., concurring); *cf.* Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1346 (2d Cir. 1972) (distinguishing between ministerial and discretionary activities); *Developments, supra* note 2, at 835.

102. *See, e.g.*, Briggs v. Goodwin, 569 F.2d 10, 33 (D.C. Cir. 1977) (Wilkey, J., dissenting), *cert. denied*, 437 U.S. 904 (1978). *See generally* J.D. Pflaumer, Inc. v. United States Dep't of Justice, 450 F. Supp. 1125, 1134 (E.D. Pa. 1978).

103. *See, e.g.*, Robichaud v. Ronan, 351 F.2d 533, 536-37 (9th Cir. 1965); Lewis v. Brautigam, 227 F.2d 124, 128-29 (5th Cir. 1955); J.D. Pflaumer, Inc. v. United States Dep't of Justice, 450 F. Supp. 1125, 1133-34 (E.D. Pa. 1978).

104. *See, e.g.*, Simons v. Bellinger, No. 77-2012, slip op. at 25 (D.C. Cir. Jan. 4, 1980) (investigation protected by absolute immunity when related to decision to initiate particular case); Forsyth v. Kleindienst, 599 F.2d 1203, 1215 (3d Cir. 1979) (investigatory activity subsumed within the immunity if necessary to prosecutor's decision to initiate suit). It has been noted, however, that "[m]ost lower court cases present a subtle and confused blend of these approaches." McCormack & Kirkpatrick, *supra* note 94, at 91. It is necessarily arbitrary to determine when law enforcement activities assume a judicial character. Briggs v. Goodwin, 569 F.2d 10, 21 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

105. *See* pt. I(A) *supra*.

106. Robichaud v. Ronan, 351 F.2d 533, 536 (9th Cir. 1965); *see* Guerro v. Mulhearn, 498 F.2d 1249, 1256 (1st Cir. 1974); Clark v. Lutcher, 436 F. Supp. 1266, 1272-73 (M.D. Pa. 1977).

107. Pierson v. Ray, 386 U.S. 547, 555-59 (1967); Whirl v. Kern, 407 F.2d 781, 787-89 (1969); Joseph v. Rowlen, 402 F.2d 367, 370 (1968); *see* Waits v. McGowan, 516 F.2d 203, 207 (3d Cir. 1975) (investigator employed by office of defense attorney immune for his evidence gathering activities).

108. Guerro v. Mulhearn, 498 F.2d 1249, 1256 (1st Cir. 1974); Hampton v. City of Chicago, 484 F.2d 602, 608-09 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *see* Clark v. Lutcher, 77 F.R.D. 415, 419 (M.D. Pa. 1977). The justification for according the prosecutor greater protection than the police officer is that the prosecutor formulates strategy while the police officer merely effectuates those decisions. McCormack & Kirkpatrick, *supra* note 94, at 66-67. When there is only a small degree of judgment required, or if the central importance of the act is only tangentially affected by that discretion, the act is deemed ministerial. Restatement (Second) of Torts § 895D, Comment h (1979). The distinction has always been problematic, however, because often the lowest ranked officials must choose between a variety of alternatives. Ham v.

charges of illegal wiretaps,[109] violent coercion of a guilty plea[110] and false arrest.[111]

In *Robichaud v. Ronan*,[112] for example, the plaintiff alleged that the prosecutor and deputy sheriff attempted to coerce the confession of a seventeen year old female murder suspect by confining her in a "drunk tank" for twenty-five days without a preliminary hearing, forcing her to confront the confessed murderer, and taking her to the scene of the crime without benefit of counsel.[113] The court held that when the prosecutor surrenders his role as a court officer by committing acts that are not quasi-judicial in nature, he is no longer entitled to absolute immunity.[114]

The logical result of such reasoning is that the prosecutor's role as advocate never encompasses the investigative function. Even when his investigation focuses on one particular suspect who he is preparing to indict or prosecute, the prosecutor is characterized as a policeman, rather than as a prosecutor.[115] There are several deficiencies in this approach. The prosecutor may legitimately decide that he needs more information to arrive at a decision to bring suit or to support his presentation of the case.[116] It is incorrect, therefore, to conclude that the prosecutor abandons his adversarial role whenever he participates in activities that other law enforcement officers also, and perhaps more usually, perform. Furthermore, because this distinction depends on the

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Los Angeles County, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920) (en banc); *see Constriction, supra* note 94, at 762-63; Freed, *Executive Official Immunity for Constitutional Violation: An Analysis and a Critique*, 72 Nw. U.L. Rev. 526, 532 n.28 (1977).

109. Guerro v. Mulhearn, 498 F.2d 1249, 1256 (1st Cir. 1974).

110. Robichaud v. Ronan, 351 F.2d 533, 536-37 (9th Cir. 1965).

111. Williams v. Wright, 432 F. Supp. 732, 740-41 (D. Or. 1976).

112. 351 F.2d 533 (9th Cir. 1965).

113. *Id.* at 534-35.

114. *Id.* at 537. The court was concerned that § 1983 should not be overridden unless it was absolutely necessary to do so. "[I]f immunities are broadly granted to state officers without consideration of the nature of their alleged misdeeds and the reason for the immunity, the statute becomes subject to circumvention, if not emasculation." *Id.* at 536; *accord, Proper Scope, supra* note 39, at 1298. "If [the prosecutor] acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." 351 F.2d at 536-37 (citations omitted); *see* Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); Balistrieri v. Warren, 314 F. Supp. 824 (W.D. Wis. 1970). In *Hampton*, the court held that the state prosecutor's planning of a raid upon Black Panther members would not be cloaked with absolute prosecutorial immunity regardless of whether it was characterized as an intentional execution or as obtaining of evidence relating to criminal activity. 484 F.2d at 608.

115. *See* Robichaud v. Ronan, 351 F.2d 533, 535-37 (9th Cir. 1965); Williams v. Wright, 432 F. Supp. 732, 740 (D. Or. 1976); *cf.* Wilhelm v. Turner, 431 F.2d 177, 180-83 (8th Cir. 1970) (mentioning distinction, but holding prosecutor immune because he satisfied good faith requirement of qualified immunity), *cert. denied*, 401 U.S. 947 (1971).

116. "A prosecutor, as the chief law enforcement official of his jurisdiction, ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but he has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies." ABA Standards, *supra* note 44, § 3.1(a), at 76; *see* Pretrial Problems of the Prosecutor 7 (J. Douglass ed. 1977).

characterization of a particular activity, there is no identifiable standard on which to base the grant of immunity. It has been argued, for example, that the conduct the *Robichaud* court classified as investigative was "nothing more than a grossly distorted version of plea bargaining," an activity typically conducted by the prosecutor.[117]

B. *Particularized Investigations*

Recent decisions recognize that when the judicial process has already been set in motion—for example, when a suspect has been identified or when the grand jury has convened—certain investigative functions performed by the prosecutor are within his role as advocate.[118] Although some courts also approve of the investigatory/advocacy dichotomy,[119] they base their determinations on whether the prosecutorial investigations are wide-ranging or focused on a particular suspect.[120] The courts reason that gathering evidence for use in a particular criminal suit will facilitate the prosecutor's initial decision whether to prosecute and his trial presentation.[121] Because this quasi-judicial activity enhances the prosecutor's exercise of discretion, it is viewed as beneficial to the functioning of the criminal justice system.[122]

Limiting the immunity to situations in which the prosecutor has focused on a particular case, however, does not provide clear guidelines for demarcating the bounds of absolute immunity. Even when an investigation eventually centers on a specific individual, it is often unclear whether it was commenced

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117. *Delimiting the Scope, supra* note 61, at 198. The courts have generally not followed such an interpretation. *See, e.g.*, Dodd v. Spokane County, 393 F.2d 330, 335 (9th Cir. 1968); Peterson v. Stanczak, 48 F.R.D. 426, 430-32 (N.D. Ill. 1969).

118. *See, e.g.*, Halperin v. Kissinger, 606 F.2d 1192, 1208 & n.110 (D.C. Cir. 1979), *appeal docketed*, 48 U.S.L.W. 3467 (U.S. Jan. 22, 1980) (No. 79-880); Forsyth v. Kleindienst, 599 F.2d 1203, 1215 (3d Cir. 1979); Briggs v. Goodwin, 569 F.2d 10, 20-21 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978); Daniels v. Kieser, 586 F.2d 64, 68-69 (7th Cir. 1978), *cert. denied*, 99 S. Ct 2050 (1979); Atkins v. Lanning, 556 F.2d 485, 488 (10th Cir. 1977).

119. *E.g.*, Forsyth v. Kleindienst, 599 F.2d 1203, 1214-15 (3d Cir. 1979); Daniels v. Kieser, 586 F.2d 64, 68-69 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 2050 (1979); Atkins v. Lanning, 556 F.2d 485, 488 (10th Cir. 1977); *accord*, Apton v. Wilson, 506 F.2d 83, 91, 93-94 (D.C. Cir. 1974).

120. Briggs v. Goodwin, 569 F.2d 10, 20 (D.C. Cir. 1977) (referring to *Imbler*), *cert. denied*, 437 U.S. 904 (1978). The dissent in *Briggs* argues, however, that although examining a witness before a grand jury would be "intimately associated with the judicial phase of the criminal process . . . [w]hen the prosecutor goes out to the residence of a potential witness and interrogates him there, *then* he is functioning in . . . the role of an investigator." *Id.* at 45 (Wilkey, J., dissenting) (emphasis in original).

121. *See, e.g.*, Simons v. Bellinger, No. 77-2012, slip op. at 22-23 (D.C. Cir. Jan. 4, 1980) (investigation integral to the sensitive decision of whether to prosecute); Wilkinson v. Ellis, No. 77-869 (E.D. Pa. Jan. 21, 1980) (some investigations so closely tied to advocacy that to deny protection would dilute prosecutorial immunity).

122. Forsyth v. Kleindienst, 599 F.2d 1203, 1217 (3d Cir. 1979); Daniels v. Kieser, 586 F.2d 64, 68 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 2050 (1979); Shifrin v. Wilson, 412 F. Supp. 1282, 1303 (D.D.C. 1976); *cf.* Waits v. McGowan, 516 F.2d 203, 207 (3d Cir. 1975) (investigator employed by defense counsel absolutely immune for getting information to aid in defense of accused). *But see* J.D. Pflaumer, Inc. v. United States Dep't of Justice, 450 F. Supp. 1125, 1134-35 (E.D. Pa. 1978) (prosecutor only qualifiedly immune for illegal seizure of records in connection with grand jury indictment).

solely on suspicion or because a prosecution was contemplated at its inception. Moreover, the distinction drawn between focused and wide-ranging investigations can lead to anomalous results.

In *Briggs v. Goodwin,*[123] for example, the District of Columbia Circuit held that a prosecutor who had falsely testified at a motion hearing that there were no government informants among the witnesses subpoenaed for grand jury investigation, was not absolutely immune.[124] Because the court found that the perjured response occurred before any witnesses were targeted for indictment and the testimony was solely in furtherance of a broad investigation, the court classified the prosecutor as an investigator.[125] Although six members of the group under investigation were indicted on the same day that the prosecutor committed his offense,[126] the *Briggs* court concluded that the grand jury was engaged in what was "fundamentally a fact-finding mission."[127]

The anomaly is that the very same act of the prosecutor would have been deemed within his role as advocate[128] had the witnesses previously been identified as suspects. In dividing the investigative function of the grand jury into two distinct stages—broad-scale and particularized—the court draws a tenuous line between protected and unprotected behavior based solely on the timing of the challenged activity.[129] The court appears to select an arbitrary point at which the prosecutor's act is too far removed from the judicial process to warrant immunity.[130] Integral to the judicial system is the dual function of the grand jury—to hear evidence and then to indict.[131] These

123. 569 F.2d 10 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978)

124. *Id.* at 13-16. The *Briggs* decision was the first time that a prosecutor had been granted only a limited immunity for his conduct within a courtroom. *Constriction, supra* note 94, at 767.

125. 569 F.2d at 21, 22, 24-25.

126. *Id.* at 31 n.11. The court determined that the function of the grand jury was investigative because many more members of the group were subpoenaed as witnesses than were ever indicted; indictments were returned without the testimony of any of these witnesses; and, the plaintiff was indicted three months after the investigation began. *Id.* at 24.

127. *Id.* at 23.

128. *See* Comment, Briggs v. Goodwin: *Calling for a Reappraisal of Prosecutorial Immunity from Constitutional Torts,* 19 Wm. & Mary L. Rev. 375, 390 (1977); 31 Vand. L. Rev. 196, 206 (1978). The court's analysis appears to be shaded by its knowledge that the prosecutor did, in fact, commit perjury. It has been argued that, by denying absolute immunity for the suppression of evidence necessary to the grand jury proceeding, the *Briggs* court actually adopted Justice White's concurrence in *Imbler,* despite the majority's disclaimer of this reasoning. *See Constriction, supra* note 94, at 769.

129. The court expressly declined to base its decision on the fact that the grand jury had already convened, stating that timing was not the determinative factor. 569 F.2d at 23. Nevertheless, if the court had found that the prosecutor had targeted the witness for indictment, he would have been immune from charges of perjury. *See Constriction, supra* note 94, at 768 & n.77.

130. The court recognized that distinguishing between the investigative and advocacy functions of the prosecutor was likely to "involve an element of arbitrariness." 569 F.2d at 21. It justified its decision, however, on the ground that the prosecutor's response had no relation to the decision to initiate or conduct a prosecution. *Id.*

131. *See* United States v. Calandra, 414 U.S. 338, 343 (1974) ("The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement."); Branzburg v. Hayes, 408 U.S. 665, 700 (1972) ("the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen.").

functions cannot be artificially subdivided.[132]

Furthermore, the *Briggs* decision appears to be improper in light of the considerations applied in *Imbler* and *Butz* in which the Court emphasized that the prosecutor advocating in court is subject to judicial sanctions.[133] Although the prosecutor responded to a judge's question in open court, the *Briggs* court denied him absolute immunity because no safeguards had been imposed.[134] The court's analysis should have focused, however, on whether there were available safeguards rather than whether each restraining influence had actually been implemented.[135] In addition, the prosecutor's response brought more information into the grand jury proceeding. The traditional concern with encouraging disclosure, emphasized in *Imbler,* would mandate the application of absolute immunity.[136]

In *Simons v. Bellinger,*[137] the District of Columbia Circuit attempted to clarify its approach to delimiting prosecutorial immunity.[138] Relying on *Butz,* the court characterized a court-appointed committee that was authorized to investigate and prosecute individuals practicing law without a license, as equivalent to a judicial officer.[139] Holding the committee immune, the court distinguished the *Briggs* decision because it found that the committee was contemplating the commencement of a suit against these particular plaintiffs

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132. Briggs v. Goodwin, 569 F.2d 10, 42 (D.C. Cir. 1977) (Wilkey, J., dissenting), *cert. denied,* 437 U.S. 904 (1978); *see* National Ass'n of Attorneys General, Statewide Grand Juries 1 (1977) [hereinafter cited as Statewide Grand Juries]; National Lawyers Guild, Representation of Witnesses Before Federal Grand Juries § 9.1, at 167 (rev. ed. 1979) [hereinafter cited as Federal Grand Juries].

133. Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976); *see* notes 88-91 *supra* and accompanying text; Butz v. Economou, 438 U.S. 478, 512 (1978).

134. 569 F.2d at 24-25. The court justified its decision by noting that the available judicial and extrajudicial safeguards on abuse had not been implemented. *Id.* at 24-25. The hearing had been conducted without a jury or cross-examination. Furthermore, even after the prosecutor's perjury was discovered neither criminal penalties nor ABA penalties had been imposed. *Id.* at 23-24.

135. *See* Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976). The *Briggs* court relied on an earlier decision, Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974), that had denied absolute immunity because of the absence of arrest safeguards. In that case, the usual procedures were completely suspended and no checks on abuse were available. *Id.* at 93-94.

136. The court reasoned, however, that answering a single question about an investigation did not render the prosecutor's conduct adversarial. 569 F.2d at 22. Although the court stated that the federal courts have substituted the functional analysis for the ministerial/discretionary approach, the court noted that the limited response of the prosecutor would properly have been classified as ministerial. *Id.* at 16 n.7. The dissent argued that the prosecutor has assumed the role of witness and should be immune from suit. *Id.* at 46-57 (Wilkey, J., dissenting). Federal courts have generally extended common law witness immunity to federal damage causes of action. *E.g.,* Burke v. Miller, 580 F.2d 108, 109 (4th Cir. 1978); Brawer v. Horowitz, 535 F.2d 830, 836-37 (3d Cir. 1976).

137. No. 77-2012 (D.C. Cir. Jan. 4, 1980).

138. *Id.,* slip op. at 2-6.

139. *See id.,* slip op. at 9-12. The court reasoned that the committee was similar to a prosecutor because it initiated and conducted trials and negotiated settlements. It also recognized that a proper inquiry should consider the nature of the challenged activity. *Id.,* slip op. at 12; *accord,* Corsican Prods. v. Pitchess, 338 F.2d 441, 443-44 (9th Cir. 1964).

at the time they conducted the investigation.[140] The investigation is particularized when a suspect and a particular wrong are identified; at this point, the court considers the information sought to be connected with the decision to prosecute.[141] In addition, the prosecutor becomes a potential target for harassing lawsuits.[142] The *Simons* court also found procedural safeguards available to check prosecutorial abuse: committee proceedings are characteristically adversarial, overseen by a judge, and subject to review.[143] The court, however, justified the grant of immunity on the basis of courtroom restraints even though the alleged harassment actually occurred outside the courtroom.[144] This consideration would seem to be irrelevant to the court's decision to grant absolute immunity because there were no safeguards present when the committee allegedly engaged in an investigation to harass the lawyers.[145]

Therefore, although the *Simons* court purported to balance the *Butz* factors, it actually considered only the particularity of the investigation.[146] Despite the factual inconsistencies regarding the committee's intention to prosecute,[147] the court assumed that the identification of a suspect marks the initiation of the action. Furthermore, granting the investigating prosecutor immunity is not justified by arguing that a particular suspect is as likely to retaliate against the prosecutor as is the defendant against the advocate. The threat of groundless suits is particularly great in trial proceedings not only because the acquitted defendant will want to retaliate against the prosecutor, but also because the prosecutor will have a difficult time proving that his decisions were made in good faith.[148] The prosecutor's need to rely on evidence presented to him by

140. No. 77-2012, slip op. at 21-25.

141. *Id.*, slip op. at 22-23.

142. *Id.*, slip op. at 17-18. The court noted that because the Committee prosecutes lawyers, it is even more susceptible to harassment than prosecutors or judges. *Id.*, slip op. at 17; *accord*, Mayes v. Honn, 542 F.2d 822, 824 (10th Cir. 1976) (State Board of Examiners); Campbell v. Washington State Bar Ass'n, 263 F. Supp. 991, 992 (W.D. Wash. 1967) (State Bar Association).

143. No. 77-2012, slip op. at 18-19.

144. *Id.* at 24 n.55 (Wilkey, J., dissenting) ("However, these safeguards only protect against unconstitutional action in the initiation and conduct of lawsuits; *they do not protect against excesses in the investigative or administrative efforts of the Committee.*") (emphasis in original).

145. In this sense, the *Simons* court does not follow the approach set forth in *Butz*. The Supreme Court specifically examined the safeguards available at the time of the misconduct charged to the administrative officers. Butz v. Economou, 438 U.S. 478, 515-17 (1978). It emphasized that the doctrine of immunity derives from the characteristics of the judicial process including checks on prosecutorial misconduct. *See id.* at 512. Thus, the *Simons* conclusion that safeguards are only secondary to the "maturity" of the investigation is based on a misinterpretation of *Butz*.

146. *See* No. 77-2012, slip op. at 19 n.11, 23 n.15.

147. Although the majority bases its decision on the prima facie case established by the committee—the lawyers had a local office and were not licensed to practice in local courts—the dissent argued that, in fact, the violation was not so evident. *Id.* at 14-22. Furthermore, the dissent noted that the Committee was conducting inquiries into practices of numerous other lawyers, and noted that this could have been a "fishing expedition" into criminal activity comparable to that found in *Briggs*. *Id.* at 21-22. It argued that a court should consider the availability of safeguards in the particular setting, *id.* at 23-24 n.55, whether a criminal suit had actually been initiated, *id.* at 18-20, as well as the particularity. *Id.* at 20.

148. *See* note 55 *supra* and accompanying text.

others increases this difficulty because he must make judgments even when he doubts the reliability of the information in his possession.[149] These considerations are not applicable when the prosecutor independently obtains evidence outside the setting of the courtroom.[150] Finally, because the court does not consider whether safeguards exist at the time of the alleged offense, its approach could result in an improper extension of the immunity into areas far removed from the boundaries suggested in *Imbler*.

In an attempt to limit the expansion of absolute immunity, the Third Circuit recently held in *Forsyth v. Kleindienst*,[151] that when a prosecutor gathers evidence, he is absolutely immune only if the activity is "necessary" in deciding whether to commence a criminal action.[152] The Third Circuit addressed this issue in the context of whether two former Attorney Generals were amenable to a suit alleging illegal wiretaps.[153] Acknowledging that the implementation of wiretaps is essentially investigative, the court reasoned that in certain circumstances the prosecutor must be afforded the same latitude to gather information that he has in deciding to initiate the case. The denial of absolute immunity could inhibit the prosecutor's investigation and thus lead to needless actions.[154] The court suggested that a "limited factual inquiry" might be necessary to determine the nature of the prosecutor's investigation.[155] The resulting dilution of immunity, the court reasoned, is necessary to balance the protection due the prosecutor, whose conduct is essential to his judicial function, and the individual, who alleges a violation of his constitutional rights.[156]

The Third Circuit, however, failed to indicate when investigative activities will be "necessary," other than stating that in certain circumstances investigations will be deemed protected activities.[157] Therefore, the proposed hearing could necessitate an examination of the prosecutor's intent and the objective necessity for the information—standards similar to the good faith

149. *See* notes 27, 56 *supra* and accompanying text.

150. *See* J.D. Pflaumer, Inc. v. United States Dep't of Justice, 450 F. Supp. 1125, 1134 (E.D. Pa. 1978) (arguing that the threat of suit is less likely to affect police-related activities adversely than it is to affect activities that occur in the courtroom).

151. 599 F.2d 1203 (3d Cir. 1979).

152. *Id.* at 1215.

153. 599 F.2d at 1205-06.

154. *Id.* at 1215; *accord* Wilkinson v. Ellis, No. 77-869, (E.D. Pa. Jan. 21, 1980) (a denial of absolute immunity for certain investigatory work would dilute the immunity afforded for decision to initiate).

155. 599 F.2d at 1215. *Forsyth* was not the first decision to emphasize the necessity of a hearing. *See* Slavin v. Curry, 574 F.2d 1256, 1262 (5th Cir. 1978) (reasoning that because the extent of immunity depends on the position of defendant, hearing usually necessary to determine that position); *cf.* Briggs v. Goodwin, 569 F.2d 10, 22 n.10 (D.C. Cir. 1977) (immunity must be determined independently on facts of each case), *cert. denied*, 437 U.S. 904 (1978). Such a hearing could effectively destroy the immunity. *See* Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973) ("An essential purpose of the doctrine is to give the officer freedom to exercise his discretion and to perform his official duties without fear that his conduct will be called into question at an evidentiary hearing or subject him to personal liability."), *cert. denied*, 415 U.S. 917 (1974); *Delimiting the Scope*, *supra* note 61, at 190-91.

156. 599 F.2d at 1215.

157. *Id.*

and probable cause requirements of qualified immunity.[158] Furthermore, the prosecutor could be forced to participate in numerous hearings because it could always be alleged that an investigation was unnecessary.[159] The inquiry could potentially be employed far more often and in greater depth than the *Forsyth* court anticipated.

III. A RECOMMENDED APPROACH: *Butz v. Economou*

The traditional approach used to delineate prosecutorial immunity balances the public's interest in an independent judiciary with the individual's right to redress for an infringement of constitutional rights.[160] The individual's right to redress should only be sacrificed to satisfy broader public purposes.[161] It benefits the public to hold government officials accountable for their wrongdoing: accordingly, even when a prosecutor functions as an advocate, it is in the public interest to deny him absolute immunity in certain circumstances.[162] In these instances, federal damage remedies that compensate an individual and deter future prosecutorial misconduct would be appropriate.

The approach is best implemented by considering the three factors identified by the Supreme Court in *Butz v. Economou*.[163] As a threshold matter, the challenged activity must be quasi-judicial in nature.[164] This requirement, similar to the jurisdictional limitation on immunity,[165] is intended to remove from consideration activities that have little or no relation to the enhancement

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158. *See Delimiting the Scope, supra* note 61, at 200 (arguing that such a hearing would examine the prosecutor's motives rather than his conduct and because intent could not be determined on the pleadings the purpose of absolute immunity would be undermined)

159. This has been an important consideration in the decision not to grant only qualified immunity to prosecutors. Imbler v. Pachtman, 424 U.S. 409, 426-27 (1976); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); Cooper v O'Connor, 99 F.2d 135, 140-41 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938).

160. *See* pt. I *supra*.

161. Because of the unique importance of constitutional rights, United States v. Lee, 106 U.S. 196, 220-21 (1882); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163-66 (1803), it has been recognized that absolute prosecutorial immunity—which precludes a remedy to victims of the prosecutor's wrongful conduct—must be extended no further than is absolutely necessary Forsyth v. Kleindienst, 599 F.2d 1203, 1215 (3d Cir. 1979); Briggs v. Goodwin, 569 F.2d 12, 28 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978); *accord*, Butz v. Economou, 438 U S 478, 505-06 (1978) (a grant of absolute immunity to federal executive officials would erode the protection of constitutional guarantees); Scheuer v. Rhodes, 416 U.S. 232, 248-49 (1974) (same for executive state officers).

162. Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring); *see Developments, supra* note 2, at 1204 (law enforcement system best served if prosecutors always denied absolute immunity); *Judicial Officers, supra* note 2, at 329-36 (same); 47 Miss. L.J. 812, 820 (1976) (same) On a variety of occasions the Court has opted for protection of individual liberty at the expense of judicial accuracy. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (evidence seized by state officials in violation of the Fourth Amendment inadmissible at trial); Weeks v. United States, 232 U S 383 (1914) (exclusionary rule applied to federal agents). *See also* Brewer v. Williams, 430 U.S. 387 (1977) (right to counsel); Miranda v. Arizona, 384 U.S. 436 (1966) (privilege against compulsory self-incrimination).

163. 438 U.S. 478 (1978).

164. *See id.* at 511-12.

165. *See* note 93 *supra* and accompanying text.

of judicial decisionmaking.[166] Because it is often difficult to identify how closely related prosecutorial activity is to the judicial process,[167] and because the performance of almost any activity requires some discretion,[168] this requirement should be broadly construed.

Arising from the specific context in which the challenged activity is performed, the next two factors actually define when the application of absolute immunity is justified. First, if the prosecutor is susceptible to suit because of the nature and setting of his discretionary activities, the grant of absolute immunity may be essential to ensure that he is not deterred from using his best judgment. The prosecutor must also be subject to restrictive influences that check abuse before it deprives an individual of his constitutional rights.[169] The checks must be adequate to ensure that the risk of unconstitutional behavior does not outweigh the importance of protecting the independent judgment of the prosecutor.[170] When there are no safeguards comparable to those found at trial, federal causes of action are necessary to lessen the risk that he will misuse the broad range of his authority.[171] In most cases, the presence or absence of checks on abuse will be the crucial factor in determining the level of immunity to be accorded the prosecutor.

A. *Judicial Functions*

The *Imbler* Court established that the prosecutor who initiates and presents criminal cases meets all three requirements. Therefore, to grant him absolute immunity benefits the justice system. The decision also indicated that absolute immunity is not restricted to the prosecutor's courtroom conduct.[172] Although his decision to commence an action is not made within the confines of a court, that decision will be reviewed during the proceeding.[173] In addition, at the indictment stage, the grand jury provides protection to the individual who could become the victim of a malintentioned prosecutor.[174]

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166. When the activity is only tangentially related to the judicial process, as in the preparation or forwarding of the court record and other administrative functions, absolute immunity should not attach. *See* note 100 *supra*.

167. *See* notes 123-36 *supra* and accompanying text.

168. *See* note 108 *supra*.

169. *See* Butz v. Economou, 438 U.S. 478, 512 (1978); Apton v. Wilson, 506 F.2d 83, 93-94 (D.C. Cir. 1974); *Quasi-Judicial Immunity, supra* note 14, at 114; *cf.* Hampton v. Hanrahan, 600 F.2d 600, 632-33 (7th Cir. 1979) (press releases and conferences qualifiedly immune because not subject to judicial scrutiny), *appeal docketed,* 48 U.S.L.W. 3414 (U.S. Jan. 1, 1980) (No. 79-912).

170. *See* Butz v. Economou, 438 U.S. 478, 514 (1978).

171. Trial safeguards differ from other deterrent mechanisms, such as private causes of action, that are remedial. If there are checks present at the point of potential misconduct, it is less imperative that other devices be employed to ensure that the Constitution is not violated. *See id.* at 512.

172. Imbler v. Pachtman, 424 U.S. 409, 431 n.33 (1976).

173. *Id.* at 427; *cf.* Butz v. Economou, 438 U.S. 478, 515-16 ("administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself").

174. *See, e.g.,* United States v. Calandra, 414 U.S. 338, 343 (1974); Branzburg v. Hayes, 408 U.S. 665, 700 (1972); Wood v. Georgia, 370 U.S. 375, 390 (1962). The grand jury "has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution." *Id.*

Although the grand jury is a means to curb prosecutorial abuse, the prosecutor may abuse its proper function just as he may use the criminal trial for his own purposes.[175] At the same time, a witness who feels he has been improperly subpoenaed or mistreated may seek retribution against the prosecutor.[176] Despite the nonadversarial nature of the grand jury, the prosecutor is still dependent on evidence that may be contradictory and that may lead to colorable claims of abuse. Furthermore, the necessity to encourage the disclosure of evidence to grand juries is as significant as that respecting trial proceedings.[177] In fact, because the public interest requires that the grand jury be afforded wide latitude in its investigative and deliberative functions, only minimal evidentiary restrictions apply during the grand jury proceeding.[178]

Although neither judge nor opposing counsel is present during the proceeding,[179] judicial safeguards are available to lessen the prosecutor's opportunity to misuse his authority. The grand jury is subject to the direct control of the trial court in the jurisdiction in which it sits.[180] In addition, the members of the grand jury evaluate the credibility of the evidence presented by the prosecutor and operate as a check on prosecutorial abuse.[181] Charges of abuse

175. *See generally* Federal Grand Juries, *supra* note 132, §§ 9.1-9.7 (1979). A proper function of the grand jury is to decide whether there is probable cause to indict. United States v. Calandra, 414 U.S. 338, 343 (1974); Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972). Another function is to issue a written report on the basis of evidence presented by the prosecutor Federal Grand Juries, *supra* note 132, § 9.1, at 168-69. Prosecutors have also utilized the proceeding for a variety of improper purposes. *See, e.g.*, United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976) (gathering evidence for the criminal trial of an individual not a witness), *cert. denied*, 430 U.S. 969 (1977); *In re* September 1971 Grand Jury, 454 F.2d 580, 584-85 (7th Cir. 1971) (securing intelligence information), *rev'd on other grounds sub nom.* United States v. Mara, 410 U.S. 19 (1973); United States v. Remington, 191 F.2d 246, 251 (2d Cir. 1951) (harassing witnesses), *cert. denied*, 343 U.S. 907 (1952).

176. *Cf.* Daniels v. Kieser, 586 F.2d 64 (7th Cir. 1978) (prosecutor absolutely immune from charges of malicious prosecution brought by trial witnesses), *cert. denied*, 99 S. Ct. 2050 (1979); Beaver v. Carey, 426 F. Supp. 301 (N.D. Ill. 1977) (public defenders absolutely immune for charges that witnesses' constitutional rights were violated).

177. *See* Wood v. Georgia, 370 U.S. 375, 392 (1962) (public interest served by thorough investigation); United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970) ("[a] grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way. . . .").

178. United States v. Calandra, 414 U.S. 338, 343-46 (1974); Costello v. United States, 350 U.S. 359, 364 (1956); Blair v. United States, 250 U.S. 273, 282 (1919). *See generally* Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590 (1961); Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 Minn. L. Rev. 586 (1953).

179. United States v. Calandra, 414 U.S. 338, 343 (1974).

180. *See, e.g.*, United States v. Dionisio, 410 U.S. 1, 12 (1973); Branzburg v. Hayes, 408 U.S. 665, 688 (1972). For example, prosecutorial misconduct may lead to pretrial motions to dismiss indictments. Fed. R. Crim. P. 12(b); N.Y. Crim. Proc. Law § 210.20(1)(c) (McKinney 1971).

181. Statewide Grand Juries, *supra* note 132, at 7 ("[A]lthough the independence of the grand jury has been questioned, . . . the prosecutor must interrogate witnesses in front of . . . ordinary citizens, a circumstance which in itself provides some measure of check against abuse of prosecutorial powers."); *see, e.g.*, United States v. Mandujano, 425 U.S. 564, 579-80 (1976); *In re* Grobin, 352 U.S. 330, 347 (1957) (Black, J., dissenting). For a general discussion of grand jury

may be brought to the court's attention and the abuse may be checked before it results in constitutional deprivation. Thus, because the proceeding itself protects individuals from malicious prosecutions, yet simultaneously minimizes prosecutorial abuse, the balance requires that the prosecutor be absolutely protected.

B. *Evidence*

When the prosecutor functions outside the trial or grand jury setting, however, the public's interest in protecting personal liberty will usually predominate. According the prosecutor the freedom to gather evidence may appear to aid the judicial process: investigations often lead to evidence relevant to the prosecutor's decision to initiate a case[182] and may ultimately provide more information for the jury to consider in its deliberations.[183] When these investigations are conducted, however, there are no safeguards analogous to those found in the courtroom.[184] Thus, at the precise point when an unconstitutional act—a coerced confession or an illegal search—may occur, the prosecutor is free from judicial supervision. State and federal law enforcement officers who regularly engage in such activities have been granted only a good faith/probable cause defense.[185] Early decisions justified this distinction by characterizing the police function as ministerial rather than discretionary.[186] The more realistic approach focuses on the context, and therefore potential for abuse, in which the officer performs an activity.[187] Thus, in *Bivens v. Six Unknown Named Agents,*[188] the Second Circuit noted that the fiction that the police officer's duties are not discretionary is maintained because the beneficial deterrence provided by a possible suit outweighs the possible detrimental effect on vigorous performance of their jobs.[189] The same reasoning should apply to the investigating prosecutor regardless of whether a particular suspect has been targeted for a criminal action. Admittedly, denial of absolute immunity may cause some disruption of the law

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safeguards, see Note, *The Presence of Counsel in the Grand Jury Room,* 47 Fordham L. Rev. 1138 (1979).

182. *E.g.,* Forsyth v. Kleindienst, 599 F.2d 1203, 1215 (3d Cir. 1979); Atkins v. Lanning, 556 F.2d 485, 488 (10th Cir. 1977).

183. *E.g.,* Daniels v. Kieser, 586 F.2d 64, 69 (7th Cir. 1978), *cert. denied,* 99 S. Ct. 2050 (1979).

184. *See* Apton v. Wilson, 506 F.2d 83, 93-94 (D.C. Cir. 1974); J.D. Pflaumer, Inc. v. United States Dep't of Justice, 450 F. Supp. 1125, 1134 (E.D. Pa. 1978).

185. *See, e.g.,* Pierson v. Ray, 386 U.S. 547, 557 (1967) (police officer); Forsyth v. Kleindienst, 599 F.2d 1203, 1211 (3d Cir. 1979) (federal agents); Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1346 (2d Cir. 1972) (same); Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968) (city police officer), *aff'd,* 425 F.2d 1010 (7th Cir. 1970); Cohen v. Norris, 300 F.2d 24, 33-34 (9th Cir. 1962) (same). *See generally* Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights,* 59 Minn. L. Rev. 991 (1975).

186. Carter v. Carlson, 447 F.2d 358, 362-63 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

187. *See, e.g.,* Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1346 (2d Cir. 1962); *cf.* Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962) (government officials).

188. 456 F.2d 1339 (2d Cir. 1972).

189. *Id.* at 1346; *accord, Developments, supra* note 2, at 835-36.

enforcement system, but granting him complete protection would enormously expand the potential for abuse.[190] Because this is compounded by the absence of judicial surveillance, the balance must be struck in favor of providing a wronged individual his day in court and achieving the deterrence thereby effected on future abuse. In these instances, "the judicial process would be protected—and indeed its integrity enhanced—by denial of immunity to prosecutors who engage in unconstitutional conduct."[191]

Finally, other prosecutorial activities may fall within the prosecutor's role as advocate and yet not be entitled to immunity coverage. For example, although the suppression of exculpatory evidence is properly not characterized as investigative, neither is it a quasi-judicial activity that must be protected.[192] The nondisclosure of information may aid the prosecutor in his role as advocate. As a quasi-judicial officer of the court, however, the prosecutor's primary responsibility is to aid the court in its determination of whether an accused is guilty or innocent—not to obtain a conviction.[193] The grant of absolute immunity to a prosecutor accused of withholding evidence favorable to the defendant does not encourage conduct beneficial to the judicial process.[194] Furthermore, the decision to suppress material evidence is totally isolated from judicial surveillance.[195] In the absence of alternative safeguards the balance of these factors mandates a denial of absolute immunity because holding the suppressing prosecutor accountable would potentially deter occasions of such misconduct.

CONCLUSION

Absolute prosecutorial immunity serves to protect the independence of the judicial system. At the same time, it eliminates a significant deterrent of misconduct—potential civil liability for infringement of individual rights. Absolute immunity is justified only when safeguards exist to protect against such abuse. As the duties of the prosecutor expand beyond the courtroom setting, the requisite judicial restraints disappear. Under these circumstances, a federal damage remedy is necessary to replace the lacking judicial scrutiny.

Susan M. Coyne

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190. Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring); *Quasi-Judicial Immunity, supra* note 14, at 109, 115 ("granting an absolute immunity to prosecutors for acts normally within the sphere of police function might encourage an unhealthy assumption of new roles by zealous district attorneys").

191. Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring).

192. *Id.* at 442-44 (White, J., concurring); Hilliard v. Williams, 465 F.2d 1212, 1218 (6th Cir.) (deliberate suppression of laboratory report favorable to defendant not covered by absolute immunity), *cert. denied*, 409 U.S. 1029 (1972); Haaf v. Grams, 355 F. Supp 542, 545 (D Minn. 1973); Peterson v. Stanczak, 48 F.R.D. 426, 431-32 (N.D. Ill. 1969). *See also* Weathers v. Ebert, 505 F.2d 514, 516 (4th Cir. 1974), *cert. denied*, 424 U.S. 975 (1976).

193. ABA Standards, *supra* note 44, § 1.1(a)-(c), at 25, comment § 1.1, at 44 (1971). *See also* G. Felkanes, The Criminal Justice System: Its Functions and Personnel 153-54 (1970)

194. Imbler v. Pachtman, 424 U.S. 409, 443 (1976); *see* notes 74-77 *supra* and accompanying text.

195. Imbler v. Pachtman, 424 U.S. 409, 443-44 (1976).