Buckley v. Fitzsimmons: The Beginning of the End for Absolute Prosecutorial Immunity

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I. INTRODUCTION

On March 4, 1988, Stephen Buckley commenced a civil action seeking damages under Title 42, section 1983 of the United States Code from the State’s Attorney for DuPage County, Illinois, J. Michael Fitzsimmons and other governmental officials, for allegedly fabricating evidence during the preliminary investigation of a crime in which Buckley had been implicated.

1. 42 U.S.C. § 1983 provides that:
   Every person who, under color of any ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2609 (1993). In his complaint, Buckley listed seventeen defendants. Id. Fitzsimmons, the State Attorney for DuPage County, Illinois at the time of Buckley’s indictment, was the lead defendant. Id. The other defendants included the DuPage County Sheriff, members of the Sheriff’s police department, several prosecutors of the State Attorney’s office, two experts who analyzed evidence used against Buckley, the estate of another expert who analyzed evidence, and DuPage County itself. Id.

3. Buckley v. Fitzsimmons, 919 F.2d 1230, 1235-36 (7th Cir. 1990). In addition to seeking damages for the falsification of evidence claim, Buckley also contended that Fitzsimmons violated his liberty rights by making false statements at a press conference where it was announced that an indictment had been returned against Buckley. Id. at 1236. Buckley’s complaint stated that everyone who participated in his prosecution was conspiring to execute him even though they all knew he was innocent. Id. Buckley believed that


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The action arose out of Buckley's arrest and subsequent prosecution for the murder of eleven year old Jeanine Nicario.\footnote{Buckley, 919 F.2d at 1234.} On February 25, 1983, Jeanine was kidnapped from her home in Naperville, Illinois, when someone kicked in the front door and carried her away in a blanket.\footnote{Buckley, 919 F.2d at 1234.} The kidnapper drove Jeanine into the country where he raped and sodomized her.\footnote{Buckley, 919 F.2d at 1234.} The assailant beat her to death and threw her body in the mud near a country path.\footnote{Buckley, 919 F.2d at 1234.} Jeanine's body was found two days later, and an intensive investigation commenced under the direction and responsibility of the Illinois Sheriff’s Department and the Illinois State Attorney’s Office.\footnote{Buckley, 919 F.2d at 1234.}

During the investigation, the authorities focused their attention on what they considered to be a key piece of evidence: a bootprint the killer left on the door of the Nicaricos' home when he kicked in the door.\footnote{Buckley, 919 F.2d at 1234.} At approximately the same time in the investigation, a man named Alex Hernandez told Sheriff’s detectives that Buckley had been present during a post-murder conversation in which Buckley discussed the murder of Nicario.\footnote{Buckley, 919 F.2d at 1234.}

Fitzsimmons wanted to strengthen his popularity for an upcoming election by quickly solving the Nicario murder. \textit{Id.} Buckley also maintained that the press conference violated his rights because the community turned against him, and his chances of obtaining bail or receiving a fair trial were diminished. \textit{Id.} However, this comment will limit its focus to the falsification of evidence claim and subsequent decisions because the Supreme Court unanimously decided that Fitzsimmons was not entitled to absolute immunity for those statements he made at the press conference. \textit{Buckley}, 113 S. Ct. at 2617-18.

\begin{itemize}
\item 4. \textit{Id.} at 2609.
\item 5. \textit{Buckley}, 919 F.2d at 1234.
\item 6. \textit{Id.} The actual account of the crime is that after the kidnapper unsuccessfully attempted to penetrate Jeanine's vagina, he raped her in the anus. \textit{Id.}
\item 7. \textit{Id.} Jeanine's skull was caved in by five blows from either a tire iron or a baseball bat. \textit{Id.}
\item 8. \textit{Buckley}, 919 F.2d at 1234.
\item 9. \textit{Id.}
\item 10. \textit{Id.} Hernandez was believed to be a mentally disturbed petty thief who was subsequently arrested and convicted of Jeanine’s murder along with Buckley and another man named Rolando Cruz. \textit{Id.} Hernandez and Cruz had both admitted to taking part in Jeanine’s abduction but neither confessed to the rape or murder, and both stated that Buckley drove the car. \textit{Id.} All three men were arrested and put on trial. \textit{Buckley}, 919 F.2d at 1235. A jury convicted Hernandez and Cruz of murder, among other charges, and they were sentenced to death. \textit{Id.} In 1988, the Supreme Court of Illinois reversed the convictions of Cruz and Hernandez, but in reversing the convictions, the court did not forbid a retrial, concluding that the evidence was sufficient enough for a jury to find guilt. \textit{Id.} As a result, Cruz and Hernandez were retried and Cruz was again found guilty and sentenced to death. \textit{Id.} The jury could not reach a verdict regarding Hernandez’s guilt or innocence, and his case was declared a mistrial. \textit{Id.} However, it was announced that the prosecuting attorney would take
\end{itemize}
On the basis of the information supplied by Hernandez, detectives tracked down Buckley and questioned him about the murder. When detectives specifically asked Buckley if he owned any boots, he admitted to having boots with soles similar to the print that was left on the door. Buckley's boots were examined by three separate experts who gave three varying opinions. Confronted with these three differing opinions, prosecutors asked Louise Robbins, an anthropology professor at the University of North Carolina at Greensboro, to analyze the boots and the bootprint. Robbins affirmatively concluded that Buckley's boots made the marks on the Nicarico's door. Additional pieces of evidence linking Buckley to the crime were two eyewitnesses; one placed Buckley at the scene of the abduction and another placed him at the scene of the murder.

Prosecutors convened a special grand jury for the sole purpose of investigating the murder. Ten months later, Fitzsimmons announced Buckley's indictment at a news conference with the basis for the indictment being Louise Robbins' testimony. Buckley was eventually arrested, and

Hernandez to a third trial. Buckley, 919 F.2d at 1235.

11. Id. at 1234. Buckley steadfastly maintained his innocence as to any involvement in the murder throughout the entire proceedings. Id.

12. Id.

13. Id. The boots were first examined by John Goracyzk who was the head of the identification section in the DuPage County crime laboratory. Buckley, 919 F.2d at 1234. He concluded that although the soles of the boots and the bootprint were the same, Buckley's boots did not match the bootprint because the heels were a "little" different. Id. The boots were next analyzed by Edward German, a forensic scientist in the Illinois Crime laboratory. Id. He determined that Buckley's boots "could have at best" made the bootprint. Id. Prosecutors then asked Robert Olsen of the Kansas Bureau of Identification to examine the boots, and he concluded that Buckley's boot "probably" matched the marks on the door. Id.

14. Buckley, 919 F.2d at 1234. The use of Louise Robbins as an expert was considered to be controversial as she was thought to be an unreliable scientific evidence expert by other forensic scientists due to continuing accusations against her alleging that she was willing to fabricate her testimony. Buckley, 113 S. Ct. at 2610.

15. Buckley, 919 F.2d at 1234. During later testimony, Robbins stated that she could identify the wearer of a shoe with certainty even if she only had the prints made with different shoes. Id.

16. Id. Both eyewitnesses, one who was near the Nicarico's house and the other who was near the muddy path where Jeanine's body was found, stated that they were positive they saw Buckley driving a green Ford Granada leaving the neighborhood at the time of the abduction and arriving at the path near the time of the murder. Id.

17. Buckley, 113 S. Ct. at 2610-11. Buckley stated in his claim that Fitzsimmons convened this special grand jury to bolster his campaign and to specifically secure an indictment against him. Buckley, 919 F.2d at 1236.

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his bond was set at three million dollars. Buckley, unable to meet the bond, remained incarcerated for three years.

At Buckley's first trial, Louise Robbins' testimony about the bootprint evidence provided the foundation of the prosecution's case against Buckley; however, the jury was unable to reach a verdict, and the judge declared a mistrial. The State decided to retry Buckley, but before the retrial began, Louise Robbins died. As a result, the charges against Buckley were dismissed, and he was released in March of 1987 after three years of incarceration.

In 1988, Buckley filed suit under 42 U.S.C. section 1983, claiming that virtually everyone involved with the arrest, investigation, and subsequent malicious prosecution should pay damages because his constitutional right to liberty was violated by their actions. The theory of Buckley's case was that to obtain the indictment against him, the prosecutors fabricated evidence when they obtained Robbins' opinion about the bootprint evidence. Fitzsimmons moved to dismiss Buckley's action based on a claim of absolute immunity.

In addition, Buckley maintains that the announcement of his indictment by Fitzsimmons to the press violated his right to liberty because the community turned against him, thereby diminishing his chances of obtaining bail or receiving a fair trial. Immunity is defined as the "freedom or exemption from a charge, duty, obligation . . . penalty . . . as granted by law to a person or class of persons," and as "a freedom granted to a special category of persons from the normal burdens and duties arising out of a legal relationship with other persons." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1130-31 (15th ed. 1971) (emphasis added).

The importance of the immunity concept in this scenario rests on its implications at the procedural level. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). Absolute immunity defeats a suit at the outset, provided the official's actions were within the scope of the
The District Court for the Northern District of Illinois, Eastern Division, held that the prosecutors were entitled to absolute immunity with respect to the claim based on the alleged fabrication of evidence. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, holding that the prosecutors had absolute immunity. The court concluded that the fabricated evidence could have only caused injury at the judicial phase, and therefore, the prosecutors were entitled to, and protected by, absolute prosecutorial immunity. The court reasoned that conversations between the prosecutors and the bootprint evidence expert may not be the foundation of liability because the out-of-court evaluation of evidence from an expert witness causes no injury independent from that which transpires in the courtroom. Thus, "[p]rosecutors whose out-of-court acts cause injury only to the extent a case proceeds will be brought to heel adequately by the court," and the defendant who has suffered the injury must rely on the pending court to protect his interests. Buckley appealed the decision to the United States Supreme Court and the Court granted his immunity. See Wood v. Strickland, 420 U.S. 308, 320-22 (1975); Scheuer v. Rhodes, 416 U.S. 232, 238-39 (1974). However, an official with qualified immunity must depend upon the circumstances and motivations of his actions, as established at trial, to determine whether he is liable for the claims against him. Scheuer, 416 U.S. at 239. Under this form of immunity, government officials are not subject to damages liability for the performance of their duties when their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

26. Buckley, 113 S. Ct. at 2611. The district court stated that absolute immunity should be extended to the prosecutors effort to link the bootprint evidence to Buckley because that act was in the nature of evaluating evidence for the purpose of initiating a criminal proceeding. Id. The court further stated that the concept of absolute immunity covers the entire investigation of a case which includes meetings with witnesses, presentation of evidence to a grand jury, and the decision on whether or not to prosecute. Buckley, 919 F.2d at 1243.

27. Id. at 1244. However, the court of appeals reversed the district court, and ruled that the prosecutors were also entitled to the protection of absolute immunity with regard to the press statements. Id. at 1242.

28. Buckley, 113 S. Ct. at 2611.

29. Buckley, 919 F.2d at 1243-44.

30. Id. at 1242.

31. Id. at 1241. In addition to looking to the court to protect the defendant's interests, in this scenario, the defendant also has the opportunity to utilize his own expert witnesses at trial to rebut the expert testimony presented by the prosecution.
petition for certiorari, vacated the judgment, and remanded the case for further proceedings.32

On remand, the Court of Appeals for the Seventh Circuit reaffirmed its decision.33 Buckley again appealed the court’s decision, claiming that absolute prosecutorial immunity only applies to the act of initiating the prosecution and to acts that occur inside the courtroom during the presentation of the State’s case.34 The Supreme Court once again granted certiorari and reversed the court of appeals decision, holding that the prosecutors were not entitled to absolute immunity,35 thereby allowing Buckley to seek damages from the prosecutor for the alleged falsification of evidence.

This comment will focus on the potential harmful ramifications this decision will have, as well as the contradictory nature of the decision itself. Part II will discuss the doctrine of immunity, from the immunity granted to those officials from common law liability, to the immunity afforded governmental officials under 42 U.S.C. section 1983. Part III will specifically examine the historical development of prosecutorial immunity, from the common law tradition of prosecutorial immunity, to a survey of the Federal Circuit Courts of Appeals’ handling of the prosecutorial immunity issues, and finally to Supreme Court precedent dealing with the issue of prosecutorial immunity. Part IV will focus on the reasoning the Supreme Court proffered in its holding in Buckley. Part V will criticize the majority’s decision in light of previous Supreme Court decisions which clearly indicate that the prosecutors’ actions in Buckley should have been afforded the protection of absolute prosecutorial immunity. Furthermore, this part will discuss the possible effects and harmful ramifications Buckley will have on prosecutors and the public. Part VI will conclude that absolute immunity should have been afforded to the prosecutors in Buckley in light of the historical, common law, and case law support for extending absolute immunity to those acts undertaken by the prosecutors.

32 Buckley, 113 S. Ct. at 2612. The Supreme Court remanded the case to the court of appeals in light of their recent decision in Burns v. Reed, 111 S. Ct. 1934 (1991). Burns, discussed more in depth later in this comment, dealt with absolute prosecutorial immunity and was decided after the Seventh Circuit Court of Appeals had already rendered its decision. See infra pp. 1932-33 and note 95.

33 Buckley v. Fitzsimmons, 952 F.2d 965 (7th Cir. 1992) (per curiam). The court held that Burns did not undermine its initial decision that prosecutors are absolutely immune for “normal preparatory steps.” Id. at 966.

34 Buckley, 113 S. Ct. at 2615, 2620.

35 Id. at 2612. The Court limited its inquiry to the issue of prosecutorial immunity in regard to the bootprint evidence and the statements made to the press. See supra note 3.
II. DOCTRINE OF IMMUNITY

Courts have granted immunity from liability to certain classes of federal and state officials based on their status as government officials. This immunity is based principally on the special status of the defendant as a government entity, and is grounded in the belief that even though the defendant may have committed a wrong, there exist greater social concerns that mandate the defendant escape liability.36

When a court grants immunity to an official, it does not deny that a tort exists. It deems that the defendant may not be subjected to a suit for the alleged wrong based solely on the defendant's function as a government official.37

The courts recognize two types of immunity: absolute and qualified.38 An official who has been granted absolute immunity is not subject to a tort action provided his actions are deemed to be within the scope of his duties as a government official, even if his actions are intentional or malicious.39 However, an official with qualified immunity is immune from liability if his actions are within the scope of his authority and are performed in good faith.40

The doctrine of immunity from common law liability is well settled and firmly establishes that judicial officers acting within the scope of their duties are immune from liability.41 The grant of absolute immunity to judges,42

38. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 807-08 (1982). The Court noted that "[o]ur decisions have recognized immunity defenses of two kinds:" absolute and qualified. Id. at 807. The Court went on to state that absolute immunity applies to those officials whose status requires "complete protection from suit" and that qualified immunity is the normal standard for executive officials in general. Id.
40. Scheuer, 416 U.S. at 247-48 (however, in Harlow, the Court modifies this standard with regards to actions arising under 42 U.S.C. section 1983).
41. Imbler, 424 U.S. at 418, 424. The common law tradition of affording absolute immunity to prosecutors for acts committed within the scope of their duties was found to be preserved in claims brought under 42 U.S.C. section 1983. See Pierson v. Ray, 386 U.S. 547, 554-55 (1967).
42. Imbler, 424 U.S. at 423 n.20. The Supreme Court accepted the rule of judicial immunity in Bradley v. Fisher, 80 U.S. 335 (1871). The Court has since described the grant of judicial immunity as follows:

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley
grand jurors,\textsuperscript{43} and prosecutors,\textsuperscript{44} for acts within the scope of their official capacities has roots extending to the earliest days of the common law. Courts have recognized these types of immunities to protect the public interest by allowing those officials who were immune from liability to perform their duties without the fear of retaliatory lawsuits.\textsuperscript{45}

Under 42 U.S.C. section 1983, government officials acting under the color of state law may be held personally liable for acts that deprive any person of constitutionally protected rights.\textsuperscript{46} On its face, section 1983 grants no immunities.\textsuperscript{47} However, the United States Supreme Court has held that certain government officials performing certain functions should be afforded immunity from liability under section 1983 suits.\textsuperscript{48} The Court has further held that it is the function the government official performed, not his status, which determines whether an immunity defense is available to that official.\textsuperscript{49}

A government official may be granted the defense of absolute immunity and thereby be shielded from a section 1983 action if the official’s function passes the standard set forth by the Supreme Court.\textsuperscript{50} The Court states that “where the immunity claimed by the defendant was well established at the common law at the time § 1983 was enacted, where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity.”\textsuperscript{51} Therefore, if the official’s function satisfies that standard, it will be “incorporated” into section 1983, and the official can successfully claim the defense of absolute immunity.\textsuperscript{52} Accordingly, the Court has recognized absolute immunity

\textsuperscript{v. Fisher. This immunity applies even when the judge is accused of acting maliciously and corruptly, and it “is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interests it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.”

\textit{Pierson,} 386 U.S. at 553-54 (quoting \textit{Bradley,} 80 U.S. at 355).

\textsuperscript{43} Turpen v. Booth, 56 Cal. 65 (1880).

\textsuperscript{44} Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896).

\textsuperscript{45} \textit{Imbler,} 424 U.S. at 418 n.12.


\textsuperscript{47} \textit{Id.}


\textsuperscript{50} Owen v. City of Independence, 445 U.S. 622, 638 (1980).

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.}
from section 1983 suits for judges,\textsuperscript{53} witnesses,\textsuperscript{54} and prosecutors.\textsuperscript{55} The Court has reasoned that the same underlying justifications mandating absolute immunity from liability in common law tort suits also apply to section 1983 actions.\textsuperscript{56}

The majority of cases regarding government official's immunity from section 1983 liability have involved prosecutors and other officials with functions that the courts have designated as "quasi-judicial."\textsuperscript{57} The Court stated that it is the "functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers. . . ."\textsuperscript{58}

\section*{III. HISTORICAL DEVELOPMENT OF PROSECUTORIAL IMMUNITY}

The common law immunity of a prosecutor is derived from the same considerations that form the common law grant of immunity to judicial officers acting within the scope of their duties.\textsuperscript{59} One reason is a prosecutor's concern about harassment from retaliatory lawsuits that would inhibit prosecutors from utilizing their lawyering skills to fully perform their duties.\textsuperscript{60} This recognition that the common law tradition of judicial immunity is extended to prosecutors ensures that prosecutors do not have to be intimidated by the threat of civil litigation. Furthermore, it guarantees that a prosecutor can retain and exercise the "independence of judgment required by his public trust."\textsuperscript{61} In addition, judicial immunity extends to prosecutors because prosecutors, like judges, are integrally involved in the

\begin{itemize}
  \item \textsuperscript{53} \textit{Pierson}, 386 U.S. at 554. The Court determined that judicial immunity is essential to protect the judicial process and is therefore preserved under 42 U.S.C. section 1983. \textit{Id}
  \item \textsuperscript{54} \textit{Briscoe}, 460 U.S. at 325. The Court reasoned there was nothing in the legislative history of section 1983 that indicated an intention to abrogate common law witness immunity. \textit{Id}
  \item \textsuperscript{55} See \textit{Pierson}, 386 U.S. at 554-55. The Court determined the common law tradition of affording absolute immunity to prosecutors for acts committed within the scope of their duties was found to be preserved in claims brought under 42 U.S.C. section 1983. See \textit{Id}
  \item \textsuperscript{56} \textit{Imbler}, 424 U.S. at 418. The Court stated that "[section] 1983 is to be read in harmony with general principals of tort immunities and defenses rather that in derogation of them." \textit{Id}
  \item \textsuperscript{57} \textit{Id}. at 423 n.20.
  \item \textsuperscript{58} \textit{Id}.
  \item \textsuperscript{59} \textit{Id}. at 422-23.
  \item \textsuperscript{60} \textit{Imbler}, 424 U.S. at 423.
  \item \textsuperscript{61} \textit{Id}.
\end{itemize}
judicial process and also exercise discretionary judgment on the basis of evidence presented to them.\textsuperscript{62}

In light of the immunity historically granted to prosecutors at common law, as well as the policy interests supporting prosecutorial immunity, state prosecutors have been deemed to be absolutely immune from liability under 42 U.S.C. section 1983 for their conduct in commencing prosecutorial proceedings and in presenting the State’s case,\textsuperscript{63} as long as that conduct is “intimately associated with the judicial phase of the criminal process.”\textsuperscript{64}

Yet, before the Supreme Court rendered its decision in \textit{Buckley}, the question of whether absolute immunity protected certain preparatory actions undertaken by a prosecutor before an indictment had been filed had remained unanswered.\textsuperscript{65} The United States Courts of Appeal have declined to establish a “bright line” test based on the commencement of judicial proceedings, and have applied absolute immunity to several acts that prosecutors perform, including those that have occurred prior to an indictment.\textsuperscript{66}

The Court of Appeals for the Second Circuit has divided the pre-litigation actions of prosecutors into two categories.\textsuperscript{67} The first category involves those acts considered to be of a police nature and includes the supervision of and participation with law enforcement agencies in acquiring evidence that might be used during a prosecution.\textsuperscript{68} Therefore, those officials whose acts fall into this category would only be entitled to qualified immunity.\textsuperscript{69} The second category, categorized as prosecutorial in nature, involves the organization, evaluation, and supervision of evidence that will enable the prosecutor to decide whether or not to commence with judicial proceedings.\textsuperscript{70} Accordingly, these functions qualify for absolute immunity.\textsuperscript{71}

\begin{thebibliography}{99}
\item \textsuperscript{62} \textit{Id.} at n.20. The Court notes it is this functional comparison of a prosecutor’s discretionary judgment to that of judges that has resulted in prosecutors being labeled as “quasi-judicial” officers, and the immunity they are entitled to is also referred to in those terms. \textit{Id.}
\item \textsuperscript{63} \textit{Id.} at 431.
\item \textsuperscript{64} \textit{Imbler}, 424 U.S. at 430.
\item \textsuperscript{65} \textit{Id.} at 431 n.33.
\item \textsuperscript{66} See, e.g., \textit{Barbera} v. \textit{Smith}, 836 F.2d 96, 100 (2d Cir. 1987); \textit{Powers} v. \textit{Coe}, 728 F.2d 97, 104 (2d Cir. 1984).
\item \textsuperscript{67} \textit{Barbera}, 836 F.2d at 100.
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} \textit{Id.}
\end{thebibliography}
prosecutor's actions during the plea bargaining stage of a proceeding despite misrepresentations by the prosecutor of certain facts.\textsuperscript{72}

The Court of Appeals for the Eighth Circuit has held that providing advice to law enforcement officials concerning the existence of probable cause and the legality of subsequent arrests is within the protected scope of prosecutorial immunity.\textsuperscript{73} Furthermore, the Eighth Circuit has held that commencing proceedings to terminate parental rights without notice to the natural father is protected by absolute prosecutorial immunity.\textsuperscript{74} Additionally, the Court of Appeals for the Fifth Circuit has established that the act of intimidating a plaintiff by continuing prosecutorial proceedings against him unless he agreed to dismiss a damage suit he had filed against a prosecutor was a protected prosecutorial function.\textsuperscript{75}

The United States Courts of Appeal have also established that the prosecution's pre-indictment securing of evidence, whether through the interrogation of witnesses or through other means, qualifies for absolute immunity because these acts are essential to the prosecutorial functions of pre-trial preparation.\textsuperscript{76} Specifically, the Court of Appeals for the Second Circuit has held that a prosecutor is entitled to absolute immunity when the coercion of false testimony leads to an indictment.\textsuperscript{77} The court reasoned that the same injurious result from the decision to prosecute must flow from the initiation of the criminal proceedings.\textsuperscript{78} The Court of Appeals for the Fifth Circuit has stated that the interviewing of witnesses by prosecutors

\textsuperscript{72} Taylor v. Kavanaugh, 640 F.2d 450, 453 (2d Cir. 1981). In Taylor, the prosecutor lied to the defendant and to the court during the plea bargaining phase of the judicial proceedings, stating that an indictment had been returned by the grand jury when no such indictment had been handed down. \textit{Id.} at 451. The state attorney during this plea bargaining stage also reneged on a promise he had made to the defendant that he would not make a recommendation relating to the sentence to be imposed. \textit{Id.}

\textsuperscript{73} Myers v. Morris, 810 F.2d 1437, 1446 (8th Cir. 1987).

\textsuperscript{74} Martin v. Aubuchon, 623 F.2d 1282, 1285 (8th Cir. 1980). In Martin, a man who had been arrested for the murder of his wife sought damages from a variety of governmental officials, including the District Attorney, claiming that he had not been given adequate notice of the termination proceedings and accordingly, had been deprived of due process. \textit{Id.} The court stated that the claim against the District Attorney was barred by absolute immunity because the acts complained of occurred as part of the initiation and prosecution of the State's case. \textit{Id.}

\textsuperscript{75} McGruder v. Necaise, 733 F.2d 1146, 1148 (5th Cir. 1984).

\textsuperscript{76} Myers, 810 F.2d at 1446; Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979), \textit{cert. denied}, 453 U.S. 913 (1981).


\textsuperscript{78} \textit{Id.}
before presenting their testimony to a grand jury, is also protected by absolute immunity.\textsuperscript{79}

In addition, the Court of Appeals for the Ninth Circuit has similarly established that the act of conferring with a potential witness for the determination of whether or not to file charges is entitled to absolute immunity.\textsuperscript{80} Finally, the Court of Appeals for the Tenth Circuit has determined that certain case preparation that is deemed "investigative" can be regarded as a necessary part of the prosecutorial function and thus qualifies for absolute immunity protection.\textsuperscript{81}

Supreme Court precedent has firmly established that the principles for determining whether certain actions of government officials are entitled to immunity have their basis in historical practice, and have resulted in a functional approach test being applied to determine whether or not immunity should be afforded to those actions.\textsuperscript{82} The Court has stated that the "immunity analysis rests on functional categories, not on the status of the defendant."\textsuperscript{83} The various functions that the prosecutor must perform in his role as advocate for the State are the essence of the functional approach.\textsuperscript{84} Yet, prior to the \textit{Buckley} decision, the Supreme Court has only

\textsuperscript{79} Cook v. Houston Post, 616 F.2d 791, 793 (5th Cir. 1980).
\textsuperscript{80} Demery v. Kupperman, 735 F.2d 1139, 1144 (9th Cir. 1984), \textit{cert. denied}, 469 U.S. 1127 (1985). The court reasoned that the act of conferring with witnesses for this purpose is necessary for the preparation for trial. \textit{Id}.
\textsuperscript{81} Atkins v. Lanning, 556 F.2d 485, 488 (10th Cir. 1977).
\textsuperscript{83} \textit{Briscoe}, 460 U.S. at 342.
\textsuperscript{84} Note, \textit{Delimiting the Scope of Prosecutorial Immunity From Section 1983 Damage Suits}, 52 N.Y.U. L. Rev. 173, 187 (1977). The note goes on to state that a prosecutor's duties can be divided into seven general categories: 1) Quasi-judicial or prosecutorial duties, considered to be the most important duties, include decisions on whether or not to prosecute; 2) Executive or administrative duties that consist mostly of office duties; 3) Investigatory duties, similar to those undertaken by the police, may include the gathering of evidence and being involved in the investigation of criminal activities; 4) Ministerial duties include those matters in which a prosecutor cannot exercise his own discretionary judgment, such as complying with court orders; 5) Advisory acts include the giving of advice to other governmental officials and providing legal opinions; 6) Official public duties can comprise a vast scope of activities that can range from attending public activities, making speeches, and testifying at public hearings; and 7) Individual acts include job-related activities, like campaigning, as well as those acts that are strictly personal in nature. \textit{Id} at 187-88. The functional approach only extends absolute prosecutorial immunity to those acts falling under the quasi-judicial category. \textit{Id} at 188.
had two opportunities to utilize the functional approach test to specifically address the liability of prosecutors in a suit for damages under 42 U.S.C. section 1983.\footnote{85} 

In \textit{Imbler v. Pachtman},\footnote{86} the Supreme Court first established that a prosecutor is absolutely immune from a civil suit for damages under 42 U.S.C. section 1983 for alleged deprivation of an accused's constitutional rights.\footnote{87} In \textit{Imbler}, the Court held that a state prosecuting attorney is absolutely immune from liability in "initiating a prosecution and in presenting the State's case."\footnote{88} The Court focused upon the functional nature of a prosecutor's activities rather than his status as a prosecutor, and stated that those activities which are "intimately associated with the judicial phase of the criminal process" are the type of functions that absolute immunity should apply to with full force.\footnote{89} The Court reasoned that although this immunity would leave the "genuinely wronged" criminal
defendant without any type of civil action against the prosecutor whose
improper actions deprived him of his liberty, the alternative of only
affording a prosecutor the protection of qualified immunity would "prevent
the vigorous and fearless performance of the prosecutor's duty that is
essential to the proper functioning of the criminal justice system." 90

The Court, however, did not attempt to draw a line between those
functions that a prosecutor undertakes in his preparation for the initiation of
the criminal process and for trial and those functions that require a
prosecutor to act as an administrator rather than as an officer of the court. 91
The Court recognized that the duties of the prosecutor in his role as
advocate for the State "involve actions preliminary to the initiation of a
prosecution and actions apart from the courtroom." 92 As a result, the Court
left the door open for further debate as to what prosecutorial acts would fall
under the broad categorization of allowing absolute prosecutorial immunity
for "initiating [and pursuing] a [criminal] prosecution" 93 and "presenting
the State's case." 94

In 1991, the Court revisited the issue of prosecutorial immunity in
Burns v. Reed. 95 The Burns Court applied the "functional" test analysis of

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90. Id. at 427-28.
91. Imbler, 424 U.S. at 431 n.33.
92. Id. The court noted that preparation for both the initiation of the criminal process
and for a trial may require the obtaining, reviewing, and evaluating of evidence. Id.
93. Id. at 431.
94. Id.
95. 111 S. Ct. 1934 (1991). In Burns, petitioner Cathy Burns had called the police to
report that an assailant had entered her house, knocked her unconscious, and shot and
wounded her two sons. Id. at 1937. Burns eventually became the prime suspect, even
though she passed a lie-detector test and repeatedly denied any involvement in the attack.
Id. It was then suspected that Burns had multiple personalities, one of whom had perpetrated
the attack on her sons. Id.

The police sought the advice of state prosecutor Reed to see if it would be a
permissible investigative technique to hypnotize Burns to determine if she did suffer from
multiple personalities, and if so, to elicit if one of the personalities was the assailant. Id.
While Burns was hypnotized, she referred both to herself and to the assailant as "Katie." Burns,
111 S. Ct. at 1937. The police regarded this as support for their multiple personality
theory, and once again sought the advice of the state prosecutor for a probable cause
determination, who told them that they "probably had probable cause" to arrest her. Id. On
the basis of this assurance, Burns was arrested. Id.

During a subsequent probable cause hearing, one of the officers testified, in response
to prosecutor's Reed's questions, that Burns had confessed to the attack; however, neither the
officer, nor Reed, informed the judge that the confession was obtained while Burns was under
hypnosis. Id. Burns was ultimately charged with attempted murder, but she successfully
moved to suppress the statements elicited while she was under hypnosis, and the charges were
Imbler to further define the scope of absolute prosecutorial immunity. The Court held that a state prosecuting attorney is absolutely immune from liability for damages for his appearance as an advocate for the State during a probable cause hearing, where the prosecutor examined a witness and successfully supported the search warrant application.

The Court found support for this grant of absolute immunity both in the common law and in the policy concerns stated in Imbler. The Court reasoned that the prosecutor’s appearance before the judge and the presentation of evidence in support of an application for a search warrant “clearly involves the prosecutor’s role as advocate for the State.”

However, the Court also held that absolute immunity from liability for damages under 42 U.S.C. section 1983 did not apply to the prosecutor’s act of giving legal advice to the police. The Court noted that there was no historical or common law support for extending absolute immunity to such actions. The Court explained the risk of vexatious litigation was not present for this act because a defendant is not likely to be aware of the prosecutor’s role in giving advice as compared to a prosecutor’s role in initiating and conducting a prosecution. "Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation." Therefore, only those actions that are related to the prosecutor’s role in the judicial process justify the protection of absolute prosecutorial immunity.

dropped. Id. Burns then filed suit under 42 U.S.C. section 1983 seeking compensatory damages for the alleged violations of her Constitutional rights. Burns, 111 S. Ct. at 1937.

The district court granted Reed a directed verdict, and the court of appeals affirmed, holding that prosecutor Reed was absolutely immune from liability for giving legal advice to the police and for his conduct at the probable cause hearing. Id. at 1937-38.

96. Buckley, 113 S. Ct. at 2614.
97. Burns, 111 S. Ct. at 1940.
98. Id. at 1941. The Court noted that the “duties of the prosecutor in his functional role as advocate for the State involve actions preliminary to the initiation of a prosecution.” Id. (quoting Imbler, 424 U.S. 431 n.33 (1976)).
100. Id. at 1944-45. Prosecutor Reed advised the police that they could question Burns while under hypnosis to try to assess whether she possessed multiple personalities and to determine if one of those personalities was the assailant. Id. at 1937.
101. Id. at 1942.
102. Id. at 1943.
103. Burns, 111 S. Ct. at 1943.
104. Id.
IV. THE BUCKLEY DECISION

In 1993, the Supreme Court had the opportunity to define and further specify what prosecutorial actions are protected under the umbrella of absolute immunity. In *Buckley v. Fitzsimmons*, the Court, in a five to four decision, narrowly held that prosecutors may be sued for damages under 42 U.S.C. section 1983 for their participation in the investigative stage of a criminal case. Justice John Paul Stevens, writing for the majority, stated that the prosecutors' actions in trying to determine whether the bootprint had been made by the petitioner's foot was investigative in character and therefore was not protected by absolute immunity. The Court noted that their decision in *Burns* clarified the principle that "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." However, the Court also reiterated the well established principle that those prosecutorial acts which are in preparation for trial or for the commencement of judicial proceedings and occur in the prosecutor's role as advocate for the State are entitled to absolute immunity. The Court further noted that those acts which are entitled to the protection of absolute immunity must include "the professional evaluation of the evidence assembled by the police" and any other preparations undertaken for presentation at trial or before a grand jury. Yet, instead of recognizing that the evaluation of the bootprint evidence fell under the protection of absolute immunity, the Court chose to compare the actions of the prosecutor to that of a detective searching for clues and corroboration that might give him probable cause to recommend an arrest. The Court, by classifying the prosecutor's actions of having the bootprint evidence examined by an expert witness as that of a detective "searching for clues," had no choice but

105. 113 S. Ct. 2606 (1993).
106. *Buckley*, 113 S. Ct. at 2617.
107. Id. at 2616-17.
108. Id. at 2615.
109. Id.
110. Id. (emphasis added). It is important to note that it was the police, not the prosecutors, who acquired the bootprint evidence. *Buckley*, 919 F.2d at 1234. Accordingly, the opinion rendered by Louise Robbins should have been regarded as evaluative, not investigative, because the steps undertaken by the prosecutors in eliciting the testimony of the forensic experts, and specifically Louise Robbins, was to evaluate and determine if Buckley had made the bootprint. See discussion *infra* pp. 1936-38.
111. *Buckley*, 113 S. Ct. at 2616.
to determine that the prosecutors were only entitled to qualified immunity.\textsuperscript{112} It was this classification where the Court made its error.

The \textit{Buckley} Court also drew the distinction between evaluating evidence and interviewing witnesses in preparation for trial, which are advocacy functions, and participating in an investigation for evidence that could provide probable cause for an arrest, which is an investigative function.\textsuperscript{113} The Court, in utilizing this distinction, determined that the alleged manufacture of evidence was part investigatory in nature because the prosecutors' actions involving the bootprint evidence occurred before the prosecutors claimed to have probable cause to arrest Buckley or to initiate judicial proceedings against him.\textsuperscript{114} The Court went on to state that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."\textsuperscript{115}

However, the Court quickly retreated from what appeared to be a "bright line" test of distinguishing activities before and after the probable cause determination. The Court noted that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards."\textsuperscript{116}

V. CRITICAL ANALYSIS OF THE BUCKLEY DECISION

As previously indicated, Supreme Court precedent has created a standard that allows prosecutors to remain absolutely immune from a suit seeking damages under 42 U.S.C. section 1983 for actions a prosecutor undertakes in initiating a prosecution and in presenting the State's case at trial.\textsuperscript{117} The Court has also acknowledged that because the "duties of the prosecutor in his role as advocate for the State involve actions \textit{preliminary} to the initiation of a prosecution" and involve actions that take place outside

\begin{itemize}
  \item \textsuperscript{112} Id. Since a detective or a law enforcement agent would only be entitled to qualified immunity, a prosecutor whose actions are comparable to those that a detective would perform should only be afforded the same type of immunity because the focus is on the functional nature of the actions, not on the status of the defendant. \textit{Id.}
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{Buckley}, 113 S. Ct. at 2616.
  \item \textsuperscript{116} \textit{Id.} at n.5.
  \item \textsuperscript{117} \textit{Burns}, 111 S. Ct. at 1934; \textit{Imbler}, 424 U.S. at 409. \textit{See} discussion \textit{supra} p. 1930-33.
\end{itemize}
of the courtroom, the protection of absolute immunity should also apply to those actions.118

Accordingly, state prosecutors' attempts to link the bootprint evidence to Buckley should be described as actions undertaken in preparation for trial. In Buckley, Justice Anthony Kennedy's dissent emphasizes that "the decision to use a witness" during any phase of the prosecution, "must be insulated from liability."119 He further explained that this decision should not be hampered by the damaging effects of a potential lawsuit.120

Justice Kennedy notes how the bootprint evidence was a critical part of the prosecution's case and that the consultations with the various experts are "best viewed as a step to ensure the bootprint's admission into evidence and to bolster its probative value in the eyes of the jury."121 Therefore, the prosecutors' actions in obtaining, reviewing, and ultimately utilizing the expert witness testimony should have been regarded as a function of the prosecutor in his duties as an advocate for the State.122

The majority's categorization of the prosecution's attempt to link the bootprint evidence to Buckley through the use of an expert witness as investigative in nature is incorrect when a careful look at the chronological order of events is taken. According to the allegations, Buckley was first implicated in the crime by Alex Hernandez.123 This initial connection to the crime was independent of the bootprint evidence.124 Therefore, it could be argued that the purpose of the development of the bootprint evidence was to corroborate the information supplied by Hernandez.125 The focus then becomes whether the prosecutors' attempt to obtain evidence linking Buckley to the bootprint was to acquire evidence or to evaluate the quality of the evidence already obtained. The bootprint evidence and the implication by Hernandez were both acquired before the State Attorney's office consulted with Louise Robbins to try to identify the evidence

118. Imbler, 424 U.S. at 431 n.33 (emphasis added).
119. Buckley, 113 S. Ct. at 2621 (Kennedy, J., dissenting).
120. Id. at 2621-22.
121. Id. at 2621.
122. Id. Justice Kennedy reiterates this point by quoting Imbler. He writes, "actions in 'obtaining, reviewing, and evaluating' witness testimony . . . are a classic function of the prosecutor." Id. (citations omitted).
123. Buckley, 919 F.2d at 1234.
124. Id. Hernandez stated that he, along with Buckley, was present at a conversation where the murder of Jeanine Nicarico was discussed. Id. There was never any mention of the bootprint evidence. See id.
125. This point is all the more realistic when it is noted that Hernandez was known to be mentally disturbed and to have a criminal history of committing petty crimes. Id.
positively. As a result, this attempt to identify the bootprint evidence should have been classified as evaluative in nature and afforded the full protection of absolute immunity.

The majority opinion is additionally flawed due to the fact that the analysis proffered by the Court in its decision has the potential for diluting the standard set forth in *Imbler* and *Burns* into nothing more than a mere pleading rule. If preparatory actions, like the ones undertaken by the prosecutors in *Buckley*, are unprotected by absolute immunity, any criminal defendant can institute civil proceedings against the prosecutor by simply reframing a claim to attack the preparatory actions instead of those prosecutorial actions that are protected by absolute immunity. Allowing the protection of absolute immunity to be avoided simply through a pleading mechanism circumvents the protection that the Court found necessary to establish in *Imbler* and *Burns*.

This reasoning stems from the fact that almost every action which takes place inside the courtroom requires timely and intensive preparatory measures that have taken place outside of the courtroom. These out-of-court measures include "substantial and necessary out-of-court conduct by the prosecutor in evaluating the evidence and preparing for its introduction [at trial]." Justice Kennedy referred to this reasoning as even more fundamental than that stated by the Court for rejecting Buckley's argument that *Imbler* only applies to in-court conduct and to the commencement of a prosecution.

In addition, the Supreme Court has looked to historical and common law support as one of the factors needed for extending the protection of absolute immunity to certain prosecutorial actions. The common law

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126. *Buckley*, 919 F.2d at 1234.
127. This theory was not proffered by Justice Kennedy in his dissent, but it is indicative of his attempt to show that consultations with expert witnesses at every stage of a judicial proceeding should be viewed as evaluative in nature and ultimately as preparation for trial. See *Buckley*, 113 S. Ct. at 2620-25 (Kennedy, J., dissenting).
129. *ld.* at 2621; *Imbler*, 424 U.S. at 431 n.34.
130. *Buckley*, 113 S. Ct. at 2621.
131. *ld.*
132. *ld.* The majority rejected Buckley's claim that the protection of absolute immunity for a prosecutor's conduct in initiating a prosecution and in presenting the State's case "only extend[s] to the act of initiation itself and to conduct occurring in the courtroom." *ld.* at 2615.
133. *Burns*, 111 S. Ct. at 1941-42. In *Burns*, the Court refused to grant absolute immunity to a prosecutor's act of giving advice to the police because neither the prosecutor
immunized a prosecutor, like other lawyers, from civil liability for eliciting false or defamatory testimony from witnesses.\textsuperscript{134} Therefore, in light of this common law support, the prosecutors in \textit{Buckley}, by eliciting the testimony from Louise Robbins, even if it was false, should have been afforded absolute immunity for their alleged acts of falsifying evidence through the use of false witness testimony.\textsuperscript{135}

Furthermore, the Court, in concluding that the actions of the prosecutors in regard to the bootprint evidence were not protected by absolute immunity, has superimposed "a bright-line standard onto the functional approach that has guided" the Court's previous decisions.\textsuperscript{136} \textit{Imbler} created the well established principle that prosecutors were not subject to suit for malicious prosecution.\textsuperscript{137} Yet, the Court has created the apparent notion that a claim for malicious prosecution is no longer subject to immediate dismissal on the grounds of absolute immunity where a civil plaintiff is "clever enough to include [in the claim for damages] some actions taken by the prosecutor prior to the initiation of prosecution."\textsuperscript{138} As a result, this "classic case" scenario that has consistently been afforded the protection of absolute immunity may now fall on the unprotected side of the Court's "new dividing line."\textsuperscript{139}

The Court, in its decision, also criticized the Seventh Circuit Court of Appeals' holding that when "courts can curtail the costs of prosecutorial blunders . . . by cutting short the prosecution or mitigating its effects,"\textsuperscript{140} "damages remedies are unnecessary."\textsuperscript{141} Therefore, "if the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect nor the lower court identified any common law or historical support for extending absolute immunity to such actions. \textit{Id.} at 1942.

\textsuperscript{134} See, \textit{e.g.}, \textit{Burns}, 111 S. Ct. at 1941; \textit{Yaselli v. Goff}, 12 F.2d 396, 401-02 (2d Cir. 1926); \textit{Youmans v. Smith}, 47 N.E. 265 (N.Y. 1897); \textit{Griffith}, 44 N.E. at 1002.

\textsuperscript{135} \textit{Buckley} claimed that the prosecutors specifically chose Robbins because they knew she would testify, even if it meant testifying falsely, that Buckley made the bootprint on Nicarico's door. \textit{Buckley}, 113 S. Ct. at 2615.

\textsuperscript{136} \textit{Id.} at 2622. (Kennedy, J., dissenting). Justice Kennedy explains that the Court, in it's majority opinion, has created a true anomaly by stating that a prosecutor should not consider himself to be an advocate before he has probable cause to have anyone arrested. \textit{Id.}

\textsuperscript{137} \textit{Id.} at 2623.

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} \textit{Buckley}, 113 S. Ct. at 2623 (Kennedy, J., dissenting).

\textsuperscript{140} \textit{Buckley}, 919 F.2d at 1241.

\textsuperscript{141} \textit{Id.} at 1240.
his interests."' Thus, "prosecutors whose out-of-court acts cause injury only to the extent a case proceeds" are entitled to absolute immunity.\textsuperscript{143} The Supreme Court called this theory "unprecedented" and contrary to the Court's approach of focusing on the conduct for which immunity is extended.\textsuperscript{144} However, this "source of the injury" theory is consistent with, and supported by, Supreme Court precedent.\textsuperscript{145} This precedent was established to ensure that the full spectrum of prosecutorial actions that are intertwined and closely associated with the judicial phase of the criminal process are afforded the protection of absolute immunity.\textsuperscript{146}

Finally, the decision was flawed because of the damaging effects and harmful ramifications the \textit{Buckley} decision will have on a prosecutor's ability to fully perform his duties. Prosecutorial immunity was created to ensure that prosecutors "will be guided solely by their sense of public responsibility" rather than by a sense of fear of civil liability.\textsuperscript{147} However, the Court's decision in \textit{Buckley} will have a chilling effect on those prosecutors who may have been otherwise willing to be somehow engaged in the full investigation of those cases that they will ultimately present at trial. A prosecutor's concern about the potential liability arising from pretrial consultations with witnesses could hamper his judgment as to whether certain witnesses should be used.\textsuperscript{148} This fear of liability during the initial phase of a prosecutor's work "could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability."\textsuperscript{149}

As a result, this lingering threat of liability may cause a prosecutor to act with an undue sense of caution that will impede upon his independent
judgment. The ability of an attorney to vigorously and fearlessly perform his duties utilizing his own judgment is imperative to a state prosecutor, whose position requires that he serve the public’s interest in the most competent way possible. This ability of a prosecutor to perform his or her duties fully and without reservation is “essential to the proper functioning of the criminal justice system.”

VI. CONCLUSION

The notion and belief that “no bad deed should go unpunished” is one that has entrenched itself into societies throughout history. Yet, prosecutors have been afforded immunity protection in certain situations. Even if they do something wrong, the law has stated that they shall go unpunished. In performing their duties as public servants and in performing their duties as advocates for the State, prosecutors have been afforded the protection of absolute immunity for those functions in initiating and pursuing a criminal prosecution. However, since the dividing line between a prosecutor’s acts in preparing for those functions, some of which would be absolutely immune, and his administrative or investigative acts, which would not, has yet to be clearly defined, the question of what acts are protected by absolute immunity is yet to be completely answered.

Nonetheless, the historical and common law tradition of prosecutorial immunity, combined with state, federal, and Supreme Court precedent, have established a standard by which the determination of what acts are to be afforded the protection of absolute immunity is to be decided. Accordingly, the standard that has been established is that those acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or in preparing for trial and that occur in the course of his role as a public servant as advocate for the State are entitled to the protection of absolute immunity. The attorneys in Buckley were functioning as prosecutors in eliciting the testimony from Louise Robbins. They were preparing for the initiation of criminal proceedings against Buckley. Even if the testimony they received from Louise Robbins was false and maliciously utilized, the prosecutors’

150. Id.
151. Imbler, 424 U.S. at 427.
152. Id. at 427-28.
153. Id. at 421.
154. Id. at 431 n.33.
acts still should have been afforded absolute immunity because those acts were prosecutorial functions.

Although such immunity leaves the genuinely wronged criminal defendant without any civil redress against the prosecutor or prosecutors who intentionally and maliciously deprived him of his liberty, the alternative of qualifying a prosecutor's immunity would harm the public with which he has a duty to serve.\textsuperscript{155} "It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system . . . ."\textsuperscript{156}

As a result of the Court's determination that the apparent preparatory steps undertaken by the prosecution were not protected by absolute immunity and because of the rationalization that they were more investigative in nature, a chilling effect on prosecutors will no doubt arise in their willingness to fully involve themselves in a case. As Judge Learned Hand emphatically stated in his frequently quoted passage regarding prosecutorial immunity:

As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave undressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.\textsuperscript{157}

\textsuperscript{155} The immunity of a prosecutor from liability for damages in civil suits under 42 U.S.C. section 1983 does not leave the public without a course of criminal redress to assure the public that this type of immunity does not place certain governmental officials above the law. Title 18, section 242 of the United States Code is the criminal equivalent of 42 U.S.C. section 1983 and provides:

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


In addition, a prosecutor is also subject to disciplinary actions imposed by his peers. \textit{See} \textbf{Model Rules of Professional Conduct Rule 3.8 (1989)}.

\textsuperscript{156} \textit{Imbler}, 424 U.S. at 427-28.

The Supreme Court in *Buckley* should have realized that they have now subjected those prosecutors who are faithfully performing their prosecutorial functions to this constant fear of retaliation.

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