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Since Imbler, it is clear that prosecutorial immunity from liability for damages attaches to those acts of the prosecutor in his role as advocate.¹⁴⁸ Not so clear, however, is where the prosecutor's role as advocate ends and his other roles begin. This was a recurring issue in the circuits before Imbler and remains so because Imbler expressly left open the question of the scope of prosecutorial immunity in non-advocacy situations.

For example, the prosecutor as investigator has been the subject of considerable litigation. In Robichaud v. Ronan,¹⁴⁹ a much quoted pre-Imbler decision which involved a prosecutor accused of various attempts to intimidate the plaintiff while in custody to confess to a murder she didn't commit, despite the lack of probable cause to hold her, the Ninth Circuit held that the investigative activities of a prosecutor are protected only by a qualified immunity.¹⁵⁰ The Seventh Circuit, in another pre-Imbler case, Hampton v. City of Chicago,¹⁵¹ explicitly used the Robichaud approach to reject the prosecutors' claim of absolute immunity. In Hampton, plaintiffs' complaint could have been read as alleging that the prosecutors and others had conspired to plan and execute a raid in order to kill certain members of the Black Panther party. The court read the complaint more narrowly as alleging the planning and execution of the raid in order simply to obtain evidence. Still, the court rejected the contention that "evidence gathering is so closely related to the presentation of evidence at trial that it should also be clothed with immunity."¹⁵²

A recent post-Imbler district court decision followed Robichaud and Hampton in holding that absolute immunity was not available to a prosecutor who allegedly forced the plaintiff to become a police agent and informant through threats and coercion.¹⁵³ The court simply characterized this activity as "of a police/investigative nature,"¹⁵⁴ However, Imbler casts some doubt upon the propriety of a "bright line" test which simply asks whether the activity is of the kind in which police engage.¹⁵⁵

In addition to the investigatory role of prosecutors, courts have distinguished the advocacy role from still other prosecutorial activities.¹⁵⁶ The District of Columbia Circuit held, albeit in a non-1983 case, that the U.S. Attorney General's role in directing law enforcement activity was not absolutely protected from liability for damages for alleged Fourth and Fifth Amendment violations.¹⁵⁷ The prosecutor's role as advocate has also been distinguished from situations in which a corporation counsel



allegedly failed to issue an advisory opinion which would have permitted plaintiff to speak at a public gathering.¹⁵⁸ A similar conclusion was reached when a prosecutor sent a critical letter to a legislative investigating committee, with copies to the press, about the plaintiff against whom a murder charge had been dismissed and no judicial proceedings were pending or contemplated.¹⁵⁹ It was stated in these post-*Imbler* cases that there was no judicial or quasi-judicial significance to the defendants' conduct. A pre-*Imbler* Ninth Circuit case reached a similar conclusion about an allegedly wrongful advisory opinion given by a city attorney which resulted in plaintiff's discharge from his job.¹⁶⁰ The court refused to extend absolute immunity "to a lawyer in a public law office giving legal advice to a public entity in respect of matters that are not the subject of pending litigation. The purpose of according judicial immunity is to protect the integrity of the judicial process... not to shield lawyers... when the alleged invasion did not occur during the performance of acts that are an integral part of the judicial process."¹⁶¹

The Third Circuit recently noted what it called the "thorny issue" of prosecutorial immunity in connection with still another prosecutorial role: the defendant's firing of plaintiff, his first assistant, for publicly contradicting him about his role concerning a concluded criminal case.¹⁶² The defendant argued "that prosecutorial immunity should be held to cloak administrative actions such as the discharge involved here. The hiring and firing of the subordinates through whom he acts... is the District Attorney's ultimate discretionary act in his service to the public..."¹⁶³ But the court avoided being "pricked", and ruled against plaintiff on the merits. It would appear, though, that the defendant's act was clearly administrative and not taken in his role as advocate. Just as a legislator's discharge of an employee was held not protected by a legislator's absolute immunity, because it was not a legislative act,¹⁶⁴ so too in all likelihood would this defendant's conduct be unprotected by a prosecutor's absolute immunity because it was not an advocate's act.

Situations may arise in which the prosecutor is found to have acted not as a prosecutor, but rather as an individual. A 1977 Third Circuit decision indicated that a special prosecutor without authority to act as prosecutor in the plaintiff's case would not be absolutely immune from liability for damages arising from a claim that he had conspired with others to bring false criminal charges against the plaintiff'.¹⁶⁵ In another Third Circuit decision that same year, the plaintiff, a former congressman, sued



a United States Attorney for allegedly attempting to destroy him politically by deliberate leaks to the press of false information in connection with grand jury proceedings.¹⁶⁶ In holding that the defendant was protected only by a qualified immunity, the court left open the scope of prosecutorial immunity in a non-advocate context. Instead, the court found that the allegations of deliberate leaks not only went beyond the advocate's role but also exceeded that of the prosecutor as investigator and administrator.¹⁶⁷ The court failed to mention the prosecutor's role as a public official who is accountable to the public at large.

This concern with the varied roles of the prosecutor is unique. Unlike legislators and judges whose exposure to potential liability will generally arise in connection with either legislating or judging, the prosecutor not only prosecutes, but investigates, administers, executes and the like. His exposure to potential liability will arise in varied situations which seem to admit of no straightforward immunity approach which is relatively easy to apply.¹⁶⁸ Therefore, to the extent that Imbler's rationale is tied to the prosecutor's broadly construed role as advocate and is based on a concern with independent decision making, retrying criminal offenses and the adverse impact on the criminal justice system, distinctions will inevitably have to be drawn between this role and all the others. If, however, the policy underlying Imbler's rationale is based more on protecting honest prosecutors and avoiding the diversion of a prosecutor's attention, then so long as the prosecutor is acting within a traditional prosecutorial role,¹⁶⁹ he will be accorded an absolute immunity. It is a fair prediction that at least the prosecutorial role of investigator will be accorded absolute immunity and assimilated into the advocate's role, in part because of the difficulty in drawing a satisfactory line between the prosecutor as advocate and as investigator where there are pending or contemplated criminal matters. The Supreme Court may eventually hold that if absolute immunity for prosecutors is to be effective, a prosecutor should not have to guess whether what he is doing is advocative or investigative.¹⁷⁰

Regardless of where the Imbler absolute immunity line is drawn, it is clear that one of the major purposes of absolute immunity is to avoid implicating the merits of the allegations of unlawful conduct against a prosecutor. Thus, the reasoning in pre-Imbler cases about prosecutorial conduct which is "clearly beyond the proper exercise of his authority and exceed[ing] any possible construction of the power granted to this office"¹⁷¹ is no longer to be followed. It



improperly focuses on the unauthorized or ultra vires nature of the conduct and not on the role of the prosecutor. Such reasoning led to a result in a 1974 Seventh Circuit decision which is also now clearly incorrect after Imbler.¹⁷² There, the refusal of a prosecutor to assist the plaintiff in regaining his property by prosecuting those unlawfully possessing it was characterized as outside the scope of the prosecutor's duties and illegal and hence protected by qualified immunity only.

Consequently, it is surprising that the Ninth Circuit recently used this very approach in a post-Imbler case. Briley v. State of California¹⁷³ was a 1983 action for damages brought against a trial judge, prosecuting attorneys and others for alleged violations of the plaintiff's constitutional rights. The plaintiff had been charged with child molestation but was offered the opportunity to plead guilty to a lesser offense provided he consent to castration. The plaintiff consented to this surgery even though the plea bargain was never recorded and a court order was never entered approving it. As to the immunity issue, the plaintiff argued that there was no legal authority whatever for district attorneys to require castration and therefore absolute immunity was inappropriate. Agreeing with this approach to prosecutorial immunity, the Ninth Circuit remanded to determine whether the state trial judge "would have arguably had some common-law or statutory basis for ordering Briley to submit to castration had he been convicted for the child molestation charge. If such authority is found and, thus, judicial immunity attaches, the district attorneys ... would be immune from \$1983 liability for misrepresentations "¹⁷⁴ The court cited the Seventh Circuit opinion in Stump v. Sparkman (prior to reversal by the Supreme Court)¹⁷⁵ and the district court decision in Wade v. Bethesda Hospital¹⁷⁶ as "persuasive authority that a court, at least when ordering the extreme remedy of sterilization, must have specific legislative or common-law authority for doing so,"¹⁷⁷ and then made the district attorneys' immunity dependent on the judge's.

After Imbler, however, and even without the Court's decision in Stump, it is clear that district attorneys should be immune when they act as advocates in connection with a specific criminal case. To make their immunity dependent solely upon the judge's not only misdirects the inquiry but also, to the extent it focuses on statutory or common law authority, necessarily implicates the merits. Yet Imbler was designed to preclude just such an inquiry where a prosecutor acts as an advocate. Furthermore, the Court's decision in Stump now makes abundantly clear that the "legislative



or common law authority" approach to judicial immunity is wrong. Consequently, Briley's approach is similarly incorrect.

It should be noted, finally, that this discussion of Imbler and its reception in the circuits is limited to prosecutorial immunity for liability for damages. For reasons similar to those discussed earlier in connection with injunctive relief against legislators and judges,¹⁷⁸ it is likely that injunctive relief is also available even after Imbler against prosecutors in appropriate situations.¹⁷⁹ A post-Imbler Third Circuit decision broadly stating the contrary in connection with the plaintiff's request for injunctive relief' against a prosecutor appears incorrect.¹⁸⁰ Because there the plaintiff sought to have his conviction set aside, the case is better treated more narrowly as one in which the prosecutor did not have authority to grant the requested relief.

The Immunity of Public Defenders

The circuits discussing the immunity of public defenders have generally concluded that they, like prosecutors, are protected by absolute immunity in their role as advocates. A significant pre-Imbler decision of the Third Circuit, Brown v. Joseph,¹⁸¹ which involved an allegedly improperly induced guilty plea, justified this result on the ground that assuming prosecutors and public defenders act in analogous although opposite roles, the policies sought to be achieved by prosecutorial immunity apply to public defender immunity as well.¹⁸²

In two post-Imbler cases involving claims that public defenders had breached a plea bargain and had failed to respond to requests for help in connection with the preparation of a habeas corpus petition, the Fourth and Ninth Circuits¹⁸³ followed Brown and the clear implication of the Court's language in Imbler regarding the need for broad trial discretion for "both the prosecution and the defense."¹⁸⁴ They accordingly held that public defenders are protected by absolute immunity. The Seventh Circuit's contrary result in a pre-Imbler case¹⁸⁵ was always suspect, because it both relied on a qualified immunity rule for prosecutors¹⁸⁶ and misread the Third Circuit's decision in Brown.¹⁸⁷ It has now been expressly repudiated by the Seventh Circuit.¹⁸⁸ The trend therefore is to apply absolute immunity to both prosecutors and public defenders. It is worth noting, however, that the previously discussed line drawing problems relating to different prosecutorial roles will similarly arise in connection with public defenders.



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Footnotes

¹⁴⁸. See, e.g., *Ledwith v. Douglas*, 568 F.2d 117, 119 (8th Cir. 1978) (immunity protects a prosecutor acting in a civil enforcement proceeding to enjoin deceptive trade practices and obtain restitution for defrauded consumers. Although *Imbler* dealt with criminal proceedings, the civil enforcement proceeding in *Ledwith* is functionally comparable to a criminal proceeding. As such, the result in *Ledwith* is sound); *Perez v. Borchers*, 567 F.2d 285, 287 (5th Cir. 1978) (per curiam) and *Jennings v. Schuman*, 567 F.2d 1213, 1221 (3d Cir. 1977) (immunity protects the prosecutor who allegedly conspired to bring false criminal charges against the plaintiff); *Hilliard v. Williams*, 540 F.2d 220, 221 (6th Cir. 1976) (per curiam) (immunity protects a prosecutor who allegedly withheld evidence favorable to plaintiff and instructed a witness to testify evasively, if not falsely); *Bruce v. Wade*, 537 F.2d 850, 852 (5th Cir. 1976) (immunity protects a prosecutor who allegedly improperly had the plaintiff indicted and, at the trial, suborned perjury and filed false affidavits); *Flood v. Harrington*, 532 F.2d 1248, 1251 (9th Cir. 1976) (immunity protects government attorneys involved in litigation in connection with the collection of income taxes. Although Flood was not a 1983 case, *Imbler's* reasoning was found applicable).

¹⁴⁹. 351 F.2d 533 (9th Cir. 1965).

¹⁵⁰. The court reasoned as follows:

We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity- integral relationship between his acts and the judicial process-ceases to exist. If he 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.

Id. at 536-37. Robichaud relied on the earlier similar case of *Lewis v. Brantigan*, 227 F.2d 124 (5th Cir. 1955), in which the defendant prosecutor allegedly attempted to coerce a guilty plea from a criminal charge. The Fifth Circuit held that prosecutorial immunity does not extend to such investigative activity.

¹⁵¹. 484 F.2d 602 (7th Cir. 1973).

¹⁵². Id. at 609.

¹⁵³. *Tomko v. Lees*, 416 F. Supp. 1137 (W.D. Pa. 1976).

¹⁵⁴. Id. at 1139.

¹⁵⁵. In a possibly significant footnote, the Supreme Court observed:

We recognize 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...



Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing and evaluating of evidence... Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them. 424 U.S. 409, 431 n.33 (emphasis added). This language strongly suggests that the Court realizes both that prosecutorial functions may overlap and that the scope of the prosecutor's role as advocate is quite broad. If it is taken literally, then the prosecutorial activities in Robichaud and Hampton may be outside the scope of 1983 liability for damages.

¹⁵⁶. A commentator categorized the various roles as follows: executive, ministerial, investigatory, civil/advisory, public official and individual. Note, *Delimiting the Scope of Prosecutorial Immunity from Section 1983 Damage Suits*, 52 N.Y.U.L. REV. 173, 187-188 (1977).

¹⁵⁷. *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974).

¹⁵⁸. *Shifrin v. Wilson*, 412 F. Supp. 1282 (D. D.C. 1976).

¹⁵⁹. *Cahalan v. Walker*, 542 F.2d 681 (6th Cir. 1976), cert. denied, 430 U.S. 966 (1977).

¹⁶⁰. *Donovan v. Reinhold*, 433 F.2d 738 (9th Cir. 1970).

¹⁶¹. *Id.* at 743.

¹⁶². *Sprague v. Fitzpatrick*, 546 F.2d 560, 564 (3d Cir. 1976).

¹⁶³. *Id.* at 564.

¹⁶⁴. *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977). See notes 29-32 and accompanying text *supra*.

¹⁶⁵. *Jennings v. Shuman*, 567 F.2d 1213 (3d Cir. 1977).

¹⁶⁶. *Helstoski v. Goldstein*, 552 F.2d 564 (3d Cir. 1977) (per curiam) (United States Attorney).

¹⁶⁷. *Id.* at 566.

¹⁶⁸. If, for example, a "jurisdiction" approach were taken, comparable to that for judges, then absolute immunity would extend to all the traditional prosecutorial roles. Whatever difficulties the "jurisdiction" approach presents, and there are many, see notes 57-134 and accompanying text *supra*, it seems somewhat easier to apply in many situations than an approach to prosecutorial immunity which focuses on a particular role.

¹⁶⁹. This includes the role of an administrator or investigator acting within his "jurisdiction," by analogy to the judiciary.

¹⁷⁰. Compare *Stump v. Sparkman*, 435 U.S. 349 (1978), in which the Court indicated that a judge's jurisdictional errors are to be treated the same as other legal errors for purposes of absolute judicial immunity.

¹⁷¹. *Martin v. Merola*, 532 F.2d 191, 195 (2d Cir. 1976) (Lumbard, J., concurring) (per curiam).

¹⁷². *Holton v. Boman*, 493 F.2d 1176 (7th Cir. 1974).



¹⁷³. 564 F.2d 849 (9th Cir. 1977).

¹⁷⁴. *Id.* at 858.

¹⁷⁵. *Sparkman v. McFarlin*, 552 F.2d 172 (7th Cir. 1977), rev'd sub. norn. *Stump v. Sparkman*, 435 U.S. 349 (1978).

¹⁷⁶. 337 F. Supp. 671 (S.D. Ohio 1971).

¹⁷⁷. 564 F.2d at 854.

¹⁷⁸. See notes 52-56, 124-133 and accompanying text *supra*.

¹⁷⁹. The Supreme Court has, however, expressed reservations about injunctions which appear either to interfere unnecessarily with a prosecutor's discretion, *O'Shea v. Littleton*, 414 U.S. 488 (1974), or to impinge upon comity concerns. See generally note 132 *supra*.

¹⁸⁰. *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976).

¹⁸¹. 463 F.2d 1046 (3d Cir. 1972), cert. denied, 412 U.S. 950 (1973).

¹⁸². The court stated:

We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized defenders... [This reflects] a public policy encouraging free exercise of professional discretion in the discharge of pre-trial, trial and post-trial obligations... There are other considerations of public policy. First, there is the desirability of encouraging able men and women to assume Public Defender roles.... Moreover • .. if a civil rights suit... is a constant threat to the Attorney involved, then there would be a chilling effect upon Defense Counsel's tactics. Defense Counsel would be caught in an intrinsic conflict of protecting himself and representing his client.

Id. at 1048-49.

¹⁸³. *Miller v. Barilla*, 549 F.2d 648 (9th Cir. 1977); *Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976).

¹⁸⁴. 424 U.S. at 426. The Fourth and Ninth Circuits mentioned additional concerns with frivolous claims by inmates, the use of defender time to defend against such claims when other inmates need help, and the effect of 1983 litigation on the limited resources of public defender agencies.

¹⁸⁵. *John v. Hurt*, 489 F.2d 786 (7th Cir. 1973) (per curiam).

¹⁸⁶. *Id.* at 788.

¹⁸⁷. *Id.*

¹⁸⁸. *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir. 1978) (per curiam). This decision also exhaustively discussed a troublesome state action issue and concluded that state action was present. See generally A GUIDE TO SECTION 1983 chapter 2.

