Published by the
Institute of Government,
The University
of North Carolina
at Chapel Hill

No. 94/01
January 1994
©1994

Administration of Justice Memorandum

Judges, Prosecutors,
Appellate and
Public Defenders,
Police Attorneys,
and Subscribers

Immunity of Prosecutors, Judges, and Public Defenders Sued under Section 1983

Robert L. Farb and Ruth T. Dowling

The primary vehicle for lawsuits brought against prosecutors, judges, and public defenders for alleged misconduct in the performance of their duties is Section 1983 of Title 42 of the United States Code. Section 1983 creates a cause of action against any person who, acting under color of state law, abridges rights created by the United States Constitution or federal law.[1] A public official who violates a person's rights may be enjoined from continuing certain unlawful practices and may be required to pay compensatory (monetary) damages to the victim.[2]

The initial question in a Section 1983 lawsuit is whether the public official[3] acted "under color of law." Absent some action under color of law, a public official may not be held liable under Section 1983. As defined through a series of United States Supreme Court decisions, the "under color of law" standard encompasses all behavior by public officials, including unauthorized illegal acts[4] that are "clothed with the authority of state law."[5] Those within this broad framework have included a private physician who provided medical services to prison inmates under a state contract[6] and an administrator of a state mental health facility.[7] In certain circumstances, even off-duty law-enforcement personnel may act under color of state law.[8]

There is one group of state officials, however, who are shielded in most instances from lawsuits under Section 1983: public defenders. The United States Supreme Court in *Polk County v. Dodson* ruled that a public defender, who serves a client in an inherently adversary relationship with the government, does not act under color of state law when "performing a lawyer's traditional functions as counsel to a [criminal] defendant."[9] The Court acknowledged, however, that a public defender sometimes is a state actor outside the adversarial courtroom setting: for example, when hiring and firing employees.[10]

Even though judges, prosecutors, and sometimes public defenders act under color of law, they are not automatically subject to liability under Section 1983. The United States Supreme Court has ruled that the United States Congress did not intend to abrogate certain immunities developed at common law when it enacted Section 1983, because those immunities ensure independent decision making by public officials. Essentially, some tasks are so vital to the public interest that they must be carried out without fear of lawsuits. Courts, therefore, grant absolute immunity from suits for monetary damages to public officials performing judicial and prosecutorial tasks. (Neither prosecutors nor judges have immunity from declaratory or injunctive relief—see the discussion of this issue under Judicial Immunity later in this memorandum.)[11]

Judges and prosecutors are not always immune from Section 1983 lawsuits, however. In deciding immunity questions, courts focus on the *function* or *task* performed by a public official, not the *title* an official holds. For example, a judge performing a nonjudicial act will not be given absolute immunity. If absolute immunity is not provided, however, the public official may still be protected by qualified

Ruth T. Dowling is a third-year student at Duke University Law School.

immunity, which shields conduct that does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[12]

Courts have had difficulty in determining which tasks should be categorized as judicial or prosecutorial and thus qualify for absolute, as opposed to qualified, immunity. This memorandum discusses the case law on immunities applicable to prosecutors, judges, and public defenders, and attempts to classify the level of protection for each group depending on the function performed.

I. Prosecutorial Immunity

A. United States Supreme Court Cases

In the 1976 case *Imbler v. Pachtman*, the United States Supreme Court recognized that prosecutors had absolute immunity from Section 1983 lawsuits under certain circumstances.[13] The Court ruled that a prosecutor, alleged to have knowingly used perjured testimony and to have willfully suppressed exculpatory evidence during trial,[14] was absolutely immune from a Section 1983 lawsuit for money damages. The Court first compared the case to a malicious prosecution lawsuit under common law (initiating a prosecution without probable cause), from which prosecutors were absolutely immune, and reasoned that allowing such suits under Section 1983 would inhibit—to the detriment of the public good—a prosecutor's ability to exercise independent judgment.[15] The Court also was persuaded that other checks on prosecutorial misconduct, including criminal prosecution and professional discipline, were sufficient deterrents.[16]

After examining comparable common-law immunities, the Court established what has since become known as the "function test." That test draws a distinction between (1) prosecutorial functions and (2) investigative or administrative functions. In *Imbler*, the Court stated that absolute immunity applied to prosecutorial conduct "intimately associated with the judicial phase of the criminal process."[17] The Court left undecided whether any other actions would warrant absolute immunity. Little guidance was provided in drawing the line between prosecutorial and investigative or administrative functions, except that the Court cited some examples of prosecutorial acts entitled to absolute immunity: decisions involving who and when to prosecute, which witnesses to call, and whether to present a case to a grand jury.

In 1985, the Court ruled in *Mitchell v. Forsyth* that former Attorney General John Mitchell was entitled only to qualified immunity for his authorization of a warrantless wiretap.[18] The Court found that such conduct—which Mitchell asserted was a "national security function" of his office—was not a prosecutorial function and therefore was not protected by absolute immunity. Again, however, the Court's analysis provided little assistance to lower courts that were struggling to classify conduct by prosecutors as prosecutorial, investigative, or administrative.

It was not until 1991 that the Court in *Burns v. Reed* squarely confronted the distinction between the functions.[19] The Court accepted the case for review because lower courts disagreed whether a prosecutor's legal advice to law-enforcement officers about the legality of prospective investigative conduct was prosecutorial and therefore entitled to absolute immunity. The prosecutor in the case had allegedly advised police officers that they could hypnotize a woman, whom they suspected had shot her two children, to determine if she had a multiple personality disorder—even though there was no evidence that she was mentally ill or that she had committed the crime. As a result of the hypnosis "findings," the woman was arrested—based on the prosecutor's advice that probable cause existed—and spent four months in a mental institution, only to be discharged because medical experts could not find anything wrong with her.[20] The case also presented another issue: Was the prosecutor's participation in a court hearing (with a judge presiding) to obtain a search warrant a prosecutorial function that warranted absolute immunity?[21] The plaintiff had alleged that the prosecutor elicited misleading testimony from a witness during that hearing.

Burns clarified the distinction drawn in *Imbler*. It ruled that absolute immunity applies to an advocate's activities in preparing for the initiation of a prosecution or to an advocate's participation in judicial proceedings—these are prosecutorial functions. Activities unrelated to such advocacy functions, the Court reasoned, were not protected by absolute immunity at common law, are not closely related to the judicial process, and are typically performed by law-enforcement officers who receive only qualified immunity.[22] The Court could not justify providing different immunities for the same act simply because the act was performed by a government official with a different title.

In analyzing the two allegations under the function test, the *Burns* Court ruled that the prosecutor's participation in the court hearing to obtain a search warrant was entitled to absolute immunity.[23] However, giving advice to law-enforcement officers that there was probable cause to arrest was only protected by qualified immunity. The Court found that absolute immunity extended at common law to "any hearing before a tribunal which performed a judicial function," but there was no such immunity for giving advice to law-enforcement officers. A prosecutor assumes the role of a state's advocate in a court hearing when presenting evidence before a judge. However, giving advice to a law-enforcement officer during the investigation of a crime does not constitute advocacy, and it is not intimately associated with the judicial phase of the criminal process.

In 1993, the Court in *Buckley v. Fitzsimmons* again clarified the line between prosecutorial and investigative or administrative functions.[24] The plaintiff in *Buckley*, charged with a highly publicized rape and murder of an eleven-year-old girl, spent three years in prison before all charges were dropped and he was released. He alleged that the prosecutor, who was involved in a primary election at the time of his alleged misconduct, fabricated evidence during the preliminary investigation of the case and lied about the plaintiff in a press conference to convince voters that he was putting criminals behind bars.

Applying the function test to the claim that the prosecutor had manufactured false evidence, the Court denied absolute immunity. Because the prosecutor admitted that at the time of the alleged misconduct he had no probable cause to arrest the suspect, the Court concluded that he was not acting as an advocate for the state. Instead the "mission . . . was entirely investigative in character."[25] The Court added that a prosecutor is not only denied absolute immunity when there is no probable cause to arrest, but there is also no guarantee that all actions taken after probable cause exists will be afforded absolute immunity.[26]

The Court also refused to grant absolute immunity for the prosecutor's statements during his public announcement of the indictment. Employing the same historical analysis as in *Burns*, the Court found no common-law immunity for public statements. Further, the Court reasoned that a prosecutor is not functioning as an advocate for the state in a press conference and noted that other executive officials are only afforded qualified immunity when dealing with the news media. Finally, the Court noted that it did not believe that denying absolute immunity would lead to vexatious litigation hindering a prosecutor's ability to function effectively.

These four cases have articulated the current standard employed by the Court in prosecutorial immunity cases. In sum, the function test labels the particular conduct as prosecutorial, investigative, or administrative and thus determines its level of immunity. The primary issues in assessing and defining the type of conduct are as follows:

1. Was the activity accorded immunity at common law, and—if so—is absolute immunity compatible with the purpose of Section 1983?
2. Does the activity place the prosecutor in the role of an advocate for the state?
3. Is the activity "intimately associated with the judicial phase of the criminal process"?
4. Will the denial of absolute immunity lead to a risk of vexatious litigation?

B. Lower Court Rulings

While the United States Supreme Court was engaged in the slow process of developing a framework for analyzing prosecutorial immunity cases, the lower courts were flooded with claims. Therefore the bulk of the case law drawing distinctions among administrative, investigative, and prosecutorial functions comes from federal circuit courts of appeals and federal district courts.

1. When Absolute Immunity Has Been Granted

Misconduct during the decision to initiate a prosecution. Federal courts agree that the purpose of Section 1983 was not to override a prosecutor's common-law immunity to malicious prosecution suits. Hence a prosecutor is absolutely immune for initiating a criminal prosecution in bad faith and without probable cause;[27] failing to initiate a criminal prosecution based on prejudice against the victim;[28] committing misconduct during grand jury proceedings;[29] failing to charge a crime even when ordered to do so by a court;[30] committing misconduct in initiating an *in rem* civil proceeding to forfeit criminal property;[31] and denying an indicted defendant admission into a rehabilitation program in lieu of a trial.[32]

Misconduct directly connected to a pending criminal charge. The Supreme Court in *Buckley v. Fitzsimmons* noted that, even after probable cause to arrest exists and a charge is brought against a defendant, the function test still must be used to assess conduct for immunity purposes.[33] In applying the function test, lower courts have granted absolute immunity to a variety of activities before and during trial that are related to prosecuting a particular charge. Activities accorded absolute immunity include misconduct in dismissing criminal charges in exchange for the waiver of a defendant's right to bring a civil lawsuit;[34] misconduct in advocating the amount of bail that a defendant must post;[35] misconduct in initiating contempt proceedings against a suspect;[36] misconduct during the plea-bargaining process;[37] arranging cash payments to prospective witnesses in exchange for perjured testimony;[38] threatening prospective witnesses to influence their testimony;[39] questioning witnesses to decide whether to bring a charge;[40] making improper comments or arguments to a jury;[41] improperly freezing assets of racketeering defendants;[42] and seeking a warrant for the arrest of a defendant against whom charges have been filed (but a prosecutor would have only qualified immunity for advice to officers that there was probable cause to arrest a person).[43]

The Fourth Circuit Court of Appeals ruled in 1990 that a prosecutor's participation in executing a postindictment search warrant was covered by absolute immunity.[44] Although the plaintiff argued that the search was simply "a foray seeking narcotics or other evidence of further criminal

activity," the court found no evidence to contradict the prosecutor's contention that he was legitimately searching for evidence to prosecute the specific indictment.[45] It is possible that this ruling is no longer valid after the *Buckley* ruling which stated that "when the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same."[46] However, an argument can be made that because the search occurred postindictment and was intended to gather evidence for a pending prosecution, the prosecutor was acting as "an advocate" under *Buckley*.[47]

It is unclear after *Buckley* when a prosecutor will be protected by absolute immunity after a probable cause determination. However, statements in *Buckley* would indicate a prosecutor will be protected by absolute immunity any time after a probable cause determination if the prosecutor is acting as an advocate in conducting a search—rather than an investigator—or is "preparing for trial" against a defendant.[48]

Post-trial misconduct. Many prosecutorial activities undertaken after trial are also protected by absolute immunity. Again, a court will employ the function test to determine whether these activities are "intimately associated with the judicial phase of the criminal process." Prosecutorial functions entitled to absolute immunity include misconduct in opposing a defendant's petition for a writ of habeas corpus;[49] in initiating contempt proceedings;[50] and in urging denial of parole or executive clemency.[51]

A 1992 case illustrates the fine line between absolute and qualified immunity for post-trial activities. In *Houston v. Partee*,[52] the Seventh Circuit Court of Appeals refused to give absolute immunity to prosecutors who failed to disclose evidence they discovered after trial that exculpated defendants who were imprisoned for murder convictions. The court was influenced by the fact that the prosecutors were not involved in a pending postconviction proceeding; therefore they were acting solely in an investigative capacity when they discovered and then failed to disclose the exculpatory evidence.

2. When Only Qualified Immunity Has Been Granted

If a prosecutor is denied the defense of absolute immunity, qualified immunity generally applies. (The denial of an absolute or qualified immunity defense is immediately appealable.)[53] Under the qualified immunity standard a prosecutor is immune from liability for all acts which "do not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[54] Three examples of conduct already discussed in this memorandum, which the United States Supreme Court considered administrative and therefore only entitled to qualified immunity, are (1) advice given to law-enforcement officers, (2) false statements made at a press conference, and (3) fabrication of false evidence before probable cause to arrest existed.

Lower court decisions have decided that the following activities are administrative or investigative functions: advice given to all state officers (not just law-enforcement officers);[55] preindictment participation in the preparation or execution of an arrest or search warrant;[56] interrogation of a criminal defendant or interview of a witness when the prosecutor was acting as an investigator instead of deciding whether to file charges;[57] directing the removal of abused children from their home before formal proceedings had been initiated;[58] mismanaging post-trial disposition of seized property;[59] causing the face-to-face identification of a suspect by a citizen and thus exposing the citizen to an increased risk of retaliation;[60] and ordering mistreatment of a prisoner.[61]

II. Judicial Immunity

A. United States Supreme Court Cases

The United States Supreme Court has ruled that judges (a category that includes North Carolina magistrates)[62] have absolute immunity from lawsuits for money damages for their judicial acts.[63] Even acts that are alleged to be malicious or corrupt are accorded absolute immunity because the Court believes it is "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself."[64]

The earliest United States Supreme Court judicial immunity cases did not grant absolute immunity if a judge acted in the "clear absence of all jurisdiction."[65] However, a judge acting in clear *excess* of jurisdiction would still be protected by absolute immunity. Illustrating the distinction, the Court in the 1872 landmark case, *Bradley v. Fisher*, gave the following examples:

> [I]f a probate court, invested only with jurisdiction over wills and the settlement of estates of deceased persons, should proceed to try parties for public [offenses], jurisdiction over the subject of [offenses] being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over [offenses] committed within a certain district, should hold a particular act to be a public [offense], which is not by the law made an [offense], and proceed to the arrest and trial of a party charged with such an act . . . , no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction. . . .[66]

In *Stump v. Sparkman*, decided in 1978, the United States Supreme Court again discussed the distinction

between absence of jurisdiction and excess of jurisdiction.[67] In that case the Court accorded absolute immunity to a judge who ordered the sterilization of a "slightly retarded" fifteen-year-old girl on the request of her mother. The sterilized woman and her husband sued several years later when they discovered the sterilization. (At the time of the procedure, the girl was told she was having her appendix removed.) They alleged, and the Court accepted as true, that the judge had no statutory authority to issue such an order, the case itself was never given a docket number, and pleadings were not required. The plaintiffs therefore argued that the judge must have acted in the clear absence of jurisdiction. The Court disagreed. It reasoned that because the judge sat in a court of general jurisdiction, he was acting in *excess* of jurisdiction—not in the *absence* of jurisdiction.[68] Some scholars believe that the case effectively ended the "absence of jurisdiction" exception, since the Court refused to apply it when the judge acted without legal authority, while inflicting great harm, and without providing any procedural due process to the girl.[69]

Two other exceptions have been carved out of the general absolute immunity rule for judges. The first is for administrative functions: absolute immunity extends only to judicial functions.[70] Just as the function-test analysis distinguishes a prosecutor's prosecutorial functions from administrative and investigative ones, so must a judge's judicial actions be distinguished from administrative ones. The United States Supreme Court has developed a two-factor test to determine if an act is judicial or administrative. First, the Court analyzes the "nature of the act itself," that is, whether it is a function normally performed by a judge. Second, the Court considers the expectations of the parties and whether they dealt with the judge in a judicial capacity.[71] Additionally, the Court will refer to the common-law immunities granted to judges to determine if the immunities should be extended to Section 1983 lawsuits.

The Court distinguished administrative and judicial functions in *Forrester v. White*, decided in 1988.[72] The Court in *Forrester* refused to grant absolute immunity to a judge who fired a female probation officer in violation of the Fourteenth Amendment's equal protection clause. The Court reasoned that the hiring and firing of people is not a judicial function, because the judge cannot be meaningfully distinguished from any other executive branch official who is responsible for making employment decisions. Although the Court ruled that the judge in *Forrester* was not entitled to absolute immunity, it did not decide whether he could claim qualified immunity.

The Court's 1991 decision in *Mireles v. Waco* demonstrates that the line between judicial and administrative acts is not easy to draw.[73] In *Mireles*, absolute immunity was granted to a judge who allegedly ordered two police officers to seize a public defender and to use excessive force in bringing him into the judge's courtroom. The public defender was grabbed by the officers in a hallway and dragged backwards and slammed through the swinging gates of the courtroom while the officers called him "vulgar and offensive names."[74] The Court stated that the relevant inquiry was about the " 'function' of the act, not the 'act itself.' "[75] Therefore while the Court did not consider the judge's command to use excessive force a "function normally performed by a judge," it did rule that the act of directing law-enforcement officers to bring counsel into a courtroom was a judicial, not administrative act. A judge does not lose absolute immunity from Section 1983 simply because he or she acted erroneously or maliciously.

The Court in *Pulliam v. Allen* developed the second exception to the general rule of absolute immunity: judges are not entitled to absolute immunity to lawsuits for prospective relief which result in an award of attorney's fees or costs.[76] The case involved a judge's practice of requiring bond for nonjailable offenses and incarcerating those who could not make bail. The federal district court enjoined the judge from continuing this unconstitutional practice and awarded attorney's fees and costs to the plaintiffs under the Civil Rights Attorney's Fees Awards Act.[77]

Because requiring bond clearly was a judicial act, the Court focused on the issue whether common-law immunities precluded an award of fees and costs. It determined that there were no immunities at common law to injunctive or declaratory relief. In addition, the Court found that Congress intended under Section 1988 to allow the award of attorney's fees even when monetary damages would be barred by absolute immunity (based on prosecutorial or judicial acts).[78] The *Pulliam v. Allen* ruling would also apply to a prosecutor when injunctive or declaratory relief is granted against the prosecutor in a Section 1983 lawsuit.

In sum, the Court will grant judges absolute immunity from suit for monetary relief for their judicial acts unless (1) the judge was acting in "clear absence of all jurisdiction" or (2) the monetary relief consists of attorney's fees or costs awarded under Section 1988 in a lawsuit for injunctive or declaratory relief.

B. Lower Court Rulings

1. The Scope of "Judicial Acts"

As discussed previously, the United States Supreme Court has defined "judicial acts" broadly to include acts done in excess of jurisdiction, as long as the two-prong test of *Stump v. Sparkman* is met. The federal circuit courts of appeals in applying the test have granted absolute immunity in many cases. Some of the more extreme cases providing absolute immunity include a judge who allegedly singled

out a juror and upbraided him for not voting for the death penalty;[79] a judge who allegedly ordered a court reporter to alter a transcript after sentencing;[80] and a judge who allegedly ordered a party in a divorce proceeding to have a vasectomy as a condition of obtaining a favorable property settlement.[81] Even a judge's act that predetermines the outcome of a judicial proceeding is entitled to absolute immunity.[82] Of course, however, a judge would not be immune from criminal charges.

The Fifth Circuit Court of Appeals denied absolute immunity to a judge who allegedly (1) stopped a motorist on a highway for traffic violations (and then let him go), (2) directed a law-enforcement officer to go to the motorist's home to summon him to court the next day, and (3) charged the motorist with several criminal violations when he appeared in court. The court ruled that none of these acts were functions normally performed by a judge.[83]

2. Judges Acting In "Clear Absence of All Jurisdiction"

The circuit courts at one time disagreed whether judges have absolute immunity when they hear a case in which they have subject matter jurisdiction—but not personal jurisdiction—over a civil party or criminal defendant. In a 1980 case that has since been overruled, the Ninth Circuit ruled that subject matter and personal jurisdiction both must exist if a judge is to be protected by absolute immunity.[84] However, the Eleventh Circuit in a 1985 case disagreed, relying on the *Bradley v. Fisher* case in which the "absence of jurisdiction" exception was framed.[85] The United States Supreme Court in *Bradley* stated that the exception is invoked when there is a "clear absence of all jurisdiction *over the subject matter*."[86] Although in quoting the *Bradley* language in *Stump v. Sparkman* the Court cut off the last four words, the Eleventh Circuit noted that several other circuit courts had since *Bradley* required only subject matter jurisdiction, and not personal jurisdiction as well.[87] The weight of authority in the circuit courts favors absolute immunity even in the absence of personal jurisdiction.[88] The United States Supreme Court would likely rule the same way.[89]

III. Public Defender Immunity

A. United States Supreme Court Cases

As previously discussed, the United States Supreme Court ruled in *Polk County v. Dodson* that the traditional adversarial functions performed by a public defender are considered private and therefore not done "under color of state law" for purposes of Section 1983.[90] The issue of immunity is moot because the public defender is not a state actor and has no potential liability. Therefore a public defender may not be sued under Section 1983 for monetary or injunctive relief when the public defender has exercised independent professional judgment in a criminal proceeding.

There are situations, however, where the public defender is not acting as an adversary to the state's interests. In those cases the public defender can qualify as a state actor and thus be subject to suit under Section 1983, unless protected by absolute or qualified immunity. In *Branti v. Finkel*, the United States Supreme Court considered a public defender a state actor when he allegedly fired two assistant public defenders for their political beliefs.[91] Immunity for the public defender was not discussed in *Branti* because the plaintiffs only asked for injunctive relief—namely, their reinstatement as public defenders. No other case has come before the Court exploring a public defender's potential immunity from suit for monetary damages when the public defender is not acting on behalf of a criminal defendant.

Even though a public defender is not considered a state actor when serving a client's needs, a public defender can be subject to suit under Section 1983 when involved in joint action with a state official. The Court in *Dennis v. Sparks* ruled that a Section 1983 action could be brought against private parties who allegedly conspired with a judge to violate the plaintiff's constitutional rights.[92] The private person who conspired with a judge in the *Dennis* case was not granted judicial immunity even though the judge was absolutely immune from suit. The Court reasoned that there was no historical evidence that judicial immunity insulated private people who corruptly conspired with a judge.[93] (The applicability of qualified immunity was not reached in that case.)

The Court in *Tower v. Glover* extended this rationale to public defenders.[94] It ruled that they are not immune for intentional misconduct committed in a conspiracy with a state actor. The plaintiff in *Tower* alleged that two public defenders who represented him in a burglary charge conspired with judges to secure his conviction. He asked for $5 million in punitive damages from each public defender. Finding no historical immunity for public defenders at common law, the Court was faced with the public policy argument that public defenders should be accorded the same immunities as judges and prosecutors. The Court, however, rejected this argument. It stated that only Congress had the power to create new immunities for Section 1983 actions.[95] Therefore the Court refused to grant absolute immunity to public defenders.

The most recent United States Supreme Court case dealing with this issue, *Wyatt v. Cole*, ruled that private people sued under Section 1983 for conspiratorial activities are not entitled to *any* immunity.[96] Although the case did not directly confront the issue of public defenders engaged in joint activities with public officials, the case law established in *Dennis* and *Tower* would indicate that public defenders also would not be protected by any kind of immunity under those circumstances.

B. Lower Court Rulings

Determining whether a particular action taken by a public defender is more in line with the reasoning of *Polk County* or with *Branti* may be difficult for lower courts. According to the *Polk County* decision, public defenders are not state actors when performing a "lawyer's traditional function." But the question remains how that classification is to be made.

A circuit court that addressed this issue chose a broad interpretation of "traditional function." In *Eling v. Jones* a group of incarcerated, indigent prisoners sued the state public defender's office for failing to furnish copies of transcripts without cost.[97] The prisoners claimed that the public defender's office was performing an "administrative function" that constituted state action. The court disagreed. It stated that the decision whether or not to order copies of a transcript for a particular defendant was an exercise of "independent professional judgment in a criminal proceeding," which brought the case "squarely within the Supreme Court's holding" in *Polk County*.[98]

IV. Immunities for State Torts

An action may be successfully brought under Section 1983 only if the United States Constitution or a federal statute has been violated.[99] If a lawsuit is not available under Section 1983, plaintiffs may sue under a state tort theory (malicious prosecution, trespass, etc.).[100] However, immunities similar to those granted to public officials under Section 1983 often will be granted by North Carolina courts for state torts.[101]

Notes

1. 42 U.S.C. § 1983 reads:

> Every person who, under color of any statute, 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 proceedings 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. Punitive damages may also be recovered from individual officials when absolute immunity is unavailable and their "conduct is motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632, 651 (1983).

3. Private individuals can also be sued under Section 1983 if they are collaborating with public officials. However, private individuals are not protected by any of the governmental immunities provided to public officials. Wyatt v. Cole, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992). See discussion of this subject later in this memorandum.

4. Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

5. United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368, 1383 (1941).

6. West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

7. O'Connor v. Donaldson, 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975).

8. *See* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 5.5 (2d ed. 1991).

9. 454 U.S. 312, 325, 102 S. Ct. 445, 453, 70 L. Ed. 2d 509, 521 (1981). Note, however, that public defenders are state actors under the Fourteenth Amendment's equal protection clause when they exercise peremptory challenges. *See* Georgia v. McCollum, 505 U.S. ___, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

10. Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).

11. As will be discussed later, attorney's fees and costs may be awarded when a court grants injunctive relief.

12. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982).

13. 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

14. However, prosecutors do not have absolute immunity if they willfully suppress exculpatory evidence that they discover after conviction if they are not then participating in postconviction proceedings. Houston v. Partee, 978 F.2d 362 (7th Cir.), *cert. denied*, 113 S. Ct. 1647, 123 L. Ed. 2d 269 (1992).

15. *Imbler* at 423, 96 S. Ct. at 991, 47 L. Ed. 2d at 139.

16. *Id.* at 429, 96 S. Ct. at 994, 47 L. Ed. 2d at 142–43.

17. *Id.* at 430, 96 S. Ct. at 995, 47 L. Ed. 2d at 143.

18. 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

19. 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991).

20. *Id.* at 1937, 114 L. Ed. 2d at 556.

21. The Court carefully noted that the plaintiff was not challenging the prosecutor's motivation in seeking the search warrant or his conduct outside the courtroom involving the warrant. Therefore the Court did not decide whether absolute or qualified immunity would apply to those activities.

22. *Burns*, 111 S. Ct. at 1944, 114 L. Ed. 2d at 564.

23. A prosecutor is also absolutely immune when appearing before a judicial official to present evidence in support of an application for an arrest warrant, insofar as the prosecutor acts as the state's advocate in presenting evidence and arguing the law. However, a prosecutor has only qualified immunity for preparing an affidavit for an arrest warrant or presenting the affidavit as true to a judicial official. Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993).

24. 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993).

25. *Id.* at 2616, 125 L. Ed. 2d at 227.

26. *Id.* n.5.

27. Day v. Morgenthau, 909 F.2d 75 (2d Cir. 1990); Williams v. Hartje, 827 F.2d 1203 (8th Cir. 1987) (participating in coroner's inquest); Joseph v. Patterson, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023, 107 S. Ct. 1910, 95 L. Ed. 2d

516 (1987) (obtaining issuance of criminal complaints and arrest warrants); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Kulwicki v. Dawson, 969 F.2d 1454 (3d Cir. 1992).

28. Woolfolk v. Thomas, 725 F. Supp. 1281 (N.D.N.Y. 1989) (court also rules that decision not to investigate is the same as the decision not to prosecute, providing the prosecutor with absolute immunity); Dohaish v. Tooley, 670 F.2d 934 (10th Cir.), *cert. denied*, 459 U.S. 826, 103 S. Ct. 60, 74 L. Ed. 2d 63 (1982). *See also* Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993) (failure to institute charge).

29. Fields v. Soloff, 920 F.2d 1114 (2d Cir. 1990); Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989) (instituting grand jury proceedings without investigation and without good faith belief that any wrongdoing occurred); Baez v. Hennessey, 853 F.2d 73 (2d Cir.), *cert. denied*, 488 U.S. 1014, 109 S. Ct. 805, 102 L. Ed. 2d 796 (1988) (signing erroneous indictment that grand jury did not return); Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100, 104 S. Ct. 1593, 80 L. Ed. 2d 125 (1984).

30. Webster v. Gibson, 913 F.2d 510 (8th Cir. 1990).

31. Schrob v. Catterson, 948 F.2d 1402 (3d. Cir. 1991).

32. Davis v. Grusemeyer, 996 F.2d 617 (3d Cir. 1993).

33. 113 S. Ct. 2606, 2616 n.5, 125 L. Ed. 2d 209, 227 (1993).

34. Schloss v. Bouse, 876 F.2d 287 (2d Cir. 1989); Hammond v. Bales, 843 F.2d 1320 (10th Cir. 1988); Haynesworth v. Miller, 820 F.2d 1245 (D.C. Cir. 1987).

35. Myers v. Morris, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987).

36. Barr v. Abrams, 810 F.2d 358 (2d Cir. 1987).

37. Myers v. Morris, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987); Taylor v. Kavanaugh, 640 F.2d 450 (2d Cir. 1981) (lying to a defendant during plea negotiations); Tarter v. Hury, 646 F.2d 1010 (5th Cir. 1981) (coercing a guilty plea); McGruder v. Necaise, 733 F.2d 1146 (5th Cir. 1984) (offering to drop charges if civil suit dropped).

38. Stokes v. City of Chicago, 660 F. Supp. 1459 (N.D. Ill. 1987).

39. Williams v. Hartje, 827 F.2d 1203 (8th Cir. 1987); Lee v. Willins, 617 F.2d 320 (2d Cir.), *cert. denied*, 449 U.S. 861, 101 S. Ct. 165, 66 L. Ed. 2d 78 (1980).

40. Myers v. Morris, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987); Hunt v. Jaglowski, 926 F.2d 689 (7th Cir. 1991).

41. Mills v. Criminal District Court #3, 837 F.2d 677 (5th Cir. 1988).

42. Ehrlich v. Guiliani, 910 F.2d 1220 (4th Cir. 1990). *See also* Schrob v. Catterson, 948 F.2d 1402 (3d Cir. 1991).

43. Lerwill v. Joslin, 712 F.2d 435 (10th Cir. 1983); Barr v. Abrams, 810 F.2d 358 (2d Cir. 1987); Joseph v. Patterson, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023, 107 S. Ct. 1910, 95 L. Ed. 2d 516 (1987); Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993). Unlike in court systems in other states, North Carolina prosecutors do not file charges and then seek an arrest warrant against a defendant (other than when a case begins with an indictment and a judicial official issues an order for arrest). If a North Carolina prosecutor advises a law-enforcement officer that there is sufficient evidence to charge and to arrest a person, that advice is entitled only to qualified immunity under *Burns v. Reed*, discussed in the preceding text.

44. Pachaly v. City of Lynchburg, 897 F.2d 723 (4th Cir. 1990).

45. *Id.* at 727.

46. Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2617, 125 L. Ed. 2d 209, 227 (1993).

47. *Id.* at 2616, 125 L. Ed. 2d at 227.

48. *Id.*

49. Summers v. Sjagren, 667 F. Supp. 1432 (D. Utah 1987); Bertucci v. Brown, 663 F. Supp. 447 (E.D.N.Y. 1987).

50. Tanner v. Heise, 879 F.2d 572 (9th Cir. 1989).

51. Johnson v. Kegans, 870 F.2d 992 (5th Cir.), *cert. denied*, 492 U.S. 921, 109 S. Ct. 3250, 106 L. Ed. 2d 596 (1989); Lucien v. Preiner, 967 F.2d 1166 (7th Cir), *cert. denied*, 113 S. Ct. 267, 121 L. Ed. 2d 196 (1992) (absolute immunity for statements made in an executive clemency proceeding).

52. 978 F.2d 362 (7th Cir.), *cert. denied*, 113 S. Ct. 1647, 123 L. Ed. 2d 269 (1992).

53. Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

54. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982).

55. Hughes v. Tarrant County Texas, 948 F.2d 918 (5th Cir. 1991).

56. Preparing arrest and search warrants: McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982); Keeble v. Cisneros, 664 F. Supp. 1076 (S.D. Tex. 1987); Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993). Executing search warrants: Joseph v. Patterson, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023, 107 S. Ct. 1910, 95 L. Ed. 2d 516 (1987); McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982). Directing officer to make an arrest: Day v. Morgenthau, 909 F.2d 75 (2d Cir. 1990).

57. Joseph v. Patterson, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023, 107 S. Ct. 1910, 95 L. Ed. 2d 516 (1987); Kulwicki v. Dawson, 969 F.2d 1454 (3d Cir. 1992).

58. Robson v. Via, 821 F.2d 913 (2d Cir. 1987); Myers v. Morris, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828, 108 S. Ct. 597, 98 L. Ed. 2d 58 (1987).

59. Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985), *cert. denied*, 474 U.S. 101, 106 S. Ct. 882, 88 L. Ed. 2d 917 (1986); Schrob v. Catterson, 948 F.2d 1402 (3d Cir. 1991); Coleman v. Turpen, 697 F.2d 1341 (10th Cir. 1982) (illegal sale of seized property).

60. Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993).

61. Price v. Moody, 677 F.2d 676 (8th Cir. 1982).

62. Lower courts have uniformly ruled that these immunities also apply to magistrates. *See, e.g.*, King v. Myers, 973 F.2d 354 (4th Cir. 1992).

63. Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

64. *Id.* at 355, 98 S. Ct. at 1104, 55 L. Ed. 2d at 338 [quoting Bradley v. Fisher, 80 U.S. 335, 347, 20 L. Ed. 646, 649 (1872)].

65. Bradley v. Fisher, 80 U.S. 335, 351, 20 L. Ed. 646, 651 (1872).

66. *Id.* at 352, 20 L. Ed at 651.

67. 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

68. *Id.* at 357, 98 S. Ct. at 1105, 55 L. Ed. 2d at 339.

69. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 409 (1989); Irene M. Rosenberg, Stump v. Sparkman: *The Doctrine of Judicial Immunity*, 64 VA. L. REV. 833, 836 (1978) (*Stump* is a possible invitation to judicial lawlessness).

70. Judges are given absolute immunity for legislative or prosecutorial acts because, as this memorandum has noted, those

acts are granted absolute immunity no matter who performs them. *See* Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980) (granting absolute immunity to Virginia Supreme Court for acts taken in its legislative capacity in promulgating the Virginia Code of Professional Responsibility, but denying absolute immunity in enforcing the code).

71. Stump v. Sparkman, 435 U.S. 349, 362, 98 S. Ct. 1099, 1107, 55 L. Ed. 2d 331, 342 (1978).

72. 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

73. 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991).

74. *Id.* at 287, 116 L. Ed. 2d at 13.

75. *Id.* at 288, 116 L. Ed. 2d at 15.

76. 466 U.S. 522, 104 S. Ct. 1979, 80 L. Ed. 2d 565 (1984).

77. This act is codified at 42 U.S.C. § 1988.

78. However, the Court ruled in Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980) that attorney's fees may not be awarded in any action barred by absolute legislative immunity.

79. Emory v. Peeler, 756 F.2d 1547 (11th Cir. 1985).

80. Green v. Maraio, 722 F.2d 1013 (2d Cir. 1983).

81. Scott v. Hayes, 719 F.2d 1562 (11th Cir. 1983).

82. Sparks v. Duvall County Ranch Co. Inc., 604 F.2d 976 (5th Cir. 1979) (en banc), *aff'd sub nom.* Dennis v. Sparks, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980) (the Supreme Court did not review the Seventh Circuit's ruling on absolute immunity); Dykes v. Housman, 776 F.2d 942 (11th Cir. 1985) (en banc); Harper v. Merkle, 638 F.2d 848 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S. Ct. 93, 70 L. Ed. 2d 85 (1981); John v. Barron, 897 F.2d 1387 (7th Cir. 1990); Martinez v. Winner, 771 F.2d 424 (10th Cir. 1985); Ashelman v. Pope, 793 F.2d 1072 (9th Cir. 1986) (en banc), *reversing* Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939, 101 S. Ct. 2020, 68 L. Ed. 2d 326 (1981).

83. Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993).

84. Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939, 101 S. Ct. 2020, 68 L. Ed. 2d 326 (1981). *Rankin* was overruled in Ashelman v. Pope, 793 F.2d 1072 (9th Cir. 1986) (en banc). *See also* New Alaska Development Corp. v. Guetschow, 869 F.2d 1298 (9th Cir. 1989).

85. Dykes v. Housman, 776 F.2d 942 (11th Cir. 1985).

86. Bradley v. Fisher, 80 U.S. 335, 351, 20 L. Ed. 646, 651 (1872) (emphasis added).

87. *See* King v. Love, 766 F.2d 962, 965 (6th Cir. 1985) ("A judge acts in the clear absence of all jurisdiction if the matter upon which he acts is clearly outside of the subject matter jurisdiction of the court over which he presides"); Holloway v. Walker, 765 F.2d 517, 523 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S. Ct. 605, 88 L. Ed. 2d 583 (1985) ("Where a judge does not clearly lack all subject matter jurisdiction, he does not clearly lack *all* jurisdiction") (emphasis in original); Green v. Maraio, 722 F.2d 1013 (2d Cir. 1983) (no personal jurisdiction, but subject matter jurisdiction sufficient for absolute immunity).

88. The Fourth Circuit is in accord with the other circuits. King v. Myers, 973 F.2d 354 (4th Cir. 1992).

89. The court in Stump v. Sparkman, 435 U.S. 349, 363, 98 S. Ct. 1099, 1108, 55 L. Ed. 2d 331, 343 (1978), also advocated a broad construction of the scope of a judge's jurisdiction.

90. 454 U.S. 312, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981).

91. 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).

92. 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).

93. *Id.* at 29, 101 S. Ct. at 187, 66 L. Ed. 2d at 190.

94. 467 U.S. 914, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984).

95. *Id.* at 923, 104 S. Ct. at 2826, 81 L. Ed. 2d. at 766.

96. 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992).

97. 797 F.2d 697 (8th Cir.), *cert. denied*, 480 U.S. 917, 107 S. Ct. 1371, 94 L. Ed. 2d 687 (1986).

98. *Id.* at 699.

99. Clark v. Link, 855 F.2d 156 (4th Cir. 1988); Kulwicki v. Dawson, 969 F.2d 1454 (3d Cir. 1992) (defamation not recognized under Section 1983 because injury to reputation is not a federal constitutional violation).

100. Plaintiffs who sue under Section 1983 often allege state tort claims so that all issues may be decided in one lawsuit.

101. *See, e.g.*, State *ex rel.* Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184, 188 (1978) (claims of malicious prosecution and trespass under state law were dismissed because prosecutor had absolute immunity); White v. Williams, 111 N.C. App. 879, 433 S.E.2d 808 (1993) (prosecutors were entitled to absolute immunity for actions taken in their official capacities).

North Carolina courts have not decided whether public defenders have immunity from malpractice lawsuits. Other state courts are divided. *Compare* Dziubak v. Mott, 503 N.W.2d 771 (Minn. 1993) (public defenders have immunity) *with* Spring v. Constantino, 362 A.2d 871 (Conn. 1975) (public defenders do not have immunity); Reese v. Danforth, 406 A.2d 735 (Pa. 1979) (similar ruling).

The Institute of Government of The University of North Carolina at Chapel Hill has printed a total of 957 copies of this public document at a cost of $372.18, or $0.39 per copy. These figures include only the direct costs of reproduction. They do not include preparation, handling, or distribution costs.

Printed on recycled paper.