Prosecutorial Immunity: Imbler, Burns, and Now Buckley u. Fitzsimmons-The Supreme Court's Attempt to Provide Guidance in a Difficult Area

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I. INTRODUCTION

In *Buckley v. Fitzsimmons*, the Supreme Court for the third time directly addressed the issue of prosecutorial immunity. Since the Supreme Court first addressed prosecutors' immunity to civil suits brought under 42 U.S.C. § 1983 in *Imbler v. Patchman*, lower courts have struggled with its boundaries. Difficulty in this area can be attributed to the lack of guidance provided by the Court in *Imbler* and later in *Burns v. Reed*. Following *Imbler* and *Burns*, the Supreme Court in *Buckley* provided a needed standard for determining the limits of prosecutorial immunity.

Determining the proper scope of prosecutorial immunity is difficult. The dilemma exists in part because improperly prosecuted citizens warrant redress, yet society has an interest in

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1. 113 S. Ct. 2606 (1993).
5. "Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them." 424 U.S. at 431 n.33.
6. 500 U.S. 478 (1991); see infra part II.C. (explaining that aside from the Supreme Court recognizing a particular situation where absolute immunity would not be granted, *Burns* provided no more guidance than *Imbler*).
7. "Privileges and immunities against responsibility are an anathema for a democratic society and most appropriately correctable by civil damage responsibility." Cooney v. Park County, 792 P.2d 1287, 1302 (Wyo. 1990) (Urbigkit, J., dissenting), cert. granted and judgment vacated by 501 U.S. 1201 (1991); see also Susan M. Coyne, Comment, Immunizing the Investigating Prosecutor: Should the Dishonest Go Free or the Honest Defend?, 48 FORDHAM L. REV. 1110 (1980) (explaining that individuals who claim a deprivation of their rights often resort to the federal forum).
assuring that prosecutors are not diverted by civil suits from "their important duty of enforcing the criminal law."\textsuperscript{8} In an attempt to provide guidance in this area, a fractured Court in \textit{Buckley}\textsuperscript{9} provided a rational and clearly defined\textsuperscript{10} standard. The majority in \textit{Buckley} held a "prosecutor neither is, nor should consider himself to be, an advocate [and therefore absolutely immune from suit] before he has probable cause to have anyone arrested."\textsuperscript{11} Although only supported by a slight majority of the Court,\textsuperscript{12} the \textit{Buckley} probable cause standard provides a workable method for determining the boundaries of prosecutorial immunity.

This Note examines the Supreme Court's decision in \textit{Buckley}\textsuperscript{13} and the issues left unresolved by the majority's probable cause standard. Part II provides a framework for understanding the \textit{Buckley} decision by briefly explaining 42 U.S.C. § 1983 and related immunities. Additionally, Part II summarizes \textit{Imbler} and \textit{Burns}. Part III outlines the facts, analysis, and holding of \textit{Buckley}. Part IV analyzes the \textit{Buckley} standard for determining prosecutorial immunity and its underlying rationale. Part V explores issues that remain unanswered after \textit{Buckley}. This Note concludes that \textit{Buckley} provides pragmatic guidance in a difficult area and is a positive step in the evolution of prosecutorial immunity.

\textsuperscript{8} Burns, 500 U.S. at 485; see also Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950) ("Better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.").

\textsuperscript{9} The Court's 4-1-4 decision illustrates the difficulty in setting clear, workable boundaries regarding prosecutorial immunity.

\textsuperscript{10} \textit{Buckley}, 113 S. Ct. at 2622 (Kennedy, J., dissenting) (asserting the majority "superimposed" a bright-line standard onto the functional approach used in previous decisions).

\textsuperscript{11} Id. at 2616.

\textsuperscript{12} Justice Stevens delivered the opinion of the Court. Part of Justice Stevens' opinion was supported unanimously. See infra note 73 (discussing the unanimous portion of the decision). However, the part of Justice Stevens' opinion instituting the "bright line" standard, was joined only by Justices Blackmun, O'Connor, Scalia, and Thomas with Justice Scalia filing a concurring opinion. Justice Kennedy wrote the dissenting opinion opposing the probable cause standard, which was joined by Chief Justice Rehnquist and Justices White and Souter.

\textsuperscript{13} The Note is limited to the Court's "bright line" (or probable cause) standard for determining what prosecutorial functions are not absolutely immune from § 1983 civil suits. See infra part III. B.
II. HISTORY OF PROSECUTORIAL IMMUNITY

A. Section 1983 and Immunities Generally

In 1871\(^{14}\) Congress passed civil rights legislation that has become the primary "statutory vehicle used to remedy constitutional violations committed by state and local officials."\(^{15}\) The statute states in part:

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 proceeding for redress.\(^{16}\)

Section 1983 by its terms creates no immunities.\(^{17}\) It imposes liability upon "[e]very person" who, under color of state law, deprives others of their civil rights. Although § 1983 appears to create no immunities, the Supreme Court has held that § 1983 must be read in harmony with general, common-law principles of tort immunity.\(^{18}\) The Court reasoned that immunities "well-grounded in history" had not been displaced by the general language of the Civil Rights Act of 1871.\(^{19}\)

\(^{14}\) The Act passed in 1871 was modeled after section 2 of the Civil Rights Act of 1866. In part, because the constitutionality of the Civil Rights Act of 1866 was questioned, the Fourteenth Amendment was passed in 1868. Congress granted civil remedies for constitutional violations in the first section of the Civil Rights Act of 1871 to ensure the Fourteenth Amendment's "vitality." See A. Allise Burris, Note, Qualifying Immunity in Section 1983 and Bivens Actions, 71 Tex. L. Rev. 123, 131-32 (1992).


\(^{18}\) See Pierson v. Ray, 386 U.S. 547, 554 (1967) (citing common law cases addressing immunity and granting absolute immunity for judges acting within their jurisdiction); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (granting absolute immunity for state legislative committee acting within traditional legislative capacity); see also City of Newport v. Fact Concerts, 453 U.S. 247, 258 (1981) (Congress in 1871 expressed no intention to do away with immunities afforded state officials at common law). But see Burris, supra note 14, at 132 (stating the purpose of the act was "to redress wrongs by those who wore black robes during the day and white robes at night"). See generally Achtenberg, supra note 15, at 500-35 (analyzing and criticizing the Court's methods of legislative interpretation).

\(^{19}\) Tenney, 341 U.S. at 376; see also Imbler v. Patchman, 424 U.S. 409, 418
Despite the language of § 1983, the Supreme Court has recognized two general types of immunities under § 1983—absolute and qualified. In determining which immunity to grant, courts use a functional analysis. Those "functions" that were granted absolute immunity at common law are generally given the same protection today. The Court has recognized that some officials perform special functions, which because of their similarity to functions that would have been immune when Congress enacted § 1983 in 1871, deserve absolute protection. When applying the functional approach, courts must look to "the nature of the function performed, not the identity [or office] of the actor who performed it." If the

(1976) ("The decision in Tenney established that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."). But see Achtenberg, supra note 15, at 522-24; Jennifer A. Coleman, 42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983, 19 IND. L. REV. 665, 676-79 (1986) (arguing that there was no "well-grounded" common law and that modern courts should not be required to search out common-law precedents).

20. The following has been stated as to how absolute and qualified immunity relate to prosecutors:

Absolute immunity, as the name suggests, bars all suits against the prosecutor. Qualified immunity, on the other hand, is an affirmative defense and bars actions only when the prosecutor can show that his actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known" or that there were "extraordinary circumstances" which prevented him from knowing those established standards.

GERSHMAN, supra note 4, at § 13.7 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982)).


22. "Judges, witnesses, and jurors have long been afforded absolute immunity for acts performed within the scope of their official capacities." Coyne, supra note 7, at 1112.


function performed is not protected by absolute immunity, the state official is left with the defense of qualified immunity.

Most state officials are entitled to qualified immunity.26 The Supreme Court has stated, "Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions."27 The Court has held that qualified immunity protects state officials while they perform discretionary functions if their conduct does not violate established statutory or constitutional rights that a "reasonable person"28 would have known.29 In more recent cases, the Supreme Court has stated, "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."30 The current standard for qualified immunity is much more protective and functional than the standard existing when the Supreme Court first addressed prosecutorial immunity.31

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28. The "reasonable person" standard was set forth in Harlow v. Fitzgerald, 457 U.S. 800, 801 (1982). Harlow eliminated the subjective prong of prior qualified immunity analysis. Id. at 815-18. Before Harlow, courts were required to determine if the state official acted with the intent either to deprive the plaintiff of some constitutional right or to cause some other injury. See Wood v. Strickland, 420 U.S. 308, 322 (1975), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982).

29. Harlow, 457 U.S. at 818; see also Rudovsky, supra note 27, at 35.


31. In 1976, when the Court decided Imbler v. Patchman, qualified immunity was based on a subjective standard. Officials were immune unless they acted with malicious intent to injure the plaintiff or acted with knowledge or reason to know that their actions violated constitutional rights. See supra note 28.
B. Imbler v. Patchman

The Supreme Court first addressed the immunity of state prosecutors from § 1983 violations in *Imbler v. Patchman*. Patchman, a California state prosecutor, was charged by Imbler with using false testimony and suppressing material evidence at Imbler’s trial. Imbler sought damages under 42 U.S.C. § 1983 for loss of liberty allegedly caused by the unlawful prosecution. The Court in *Imbler* granted the prosecutor absolute immunity from liability for his actions in initiating a prosecution and in presenting the state’s case.

The Court in *Imbler* appeared to rely on a “well settled” common-law rule of immunity and on general policy argu-

32. 424 U.S. 409, 420 (1976) (“This case marks our first opportunity to address the § 1983 liability of a state prosecuting officer.”).

33. Interestingly, it had been Patchman who had brought these matters to light. After Imbler’s conviction, Patchman wrote to the Governor of California describing the evidence that he and an investigator had discovered after trial. Patchman stated that he wrote from a belief that “a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented.” *Id.* at 413. It seems Patchman was an honorable prosecuting attorney; otherwise, he never would have brought forth potentially damaging material. In fact, Imbler’s counsel in his brief for Imbler’s state habeas corpus petition described Patchman’s post-trial detective work as “in the highest tradition of law enforcement and justice.” *Id.* at 420.

It is worth noting that the Supreme Court’s first ruling on prosecutorial immunity as it relates to § 1983 damage claims was based on these facts. Not surprisingly, the apparently “honorable” actions of the prosecutor in *Imbler* established absolute immunity—despite an insecure historical basis in the common law for absolute prosecutorial immunity. *See infra* note 36 and accompanying text (commenting on the lack of common law precedent for absolute prosecutorial immunity).

34. *Imbler*, 424 U.S. at 416.

35. *Id.* at 431 (“We hold only that in initiating a prosecution and in presenting the State’s case, the prosecutor is immune from a civil suit for damages under § 1983.”).

36. The Court’s statement that “[t]he common-law rule of immunity is thus well settled,” *Imbler*, 424 U.S. at 424, is questionable. *See* Coleman, *supra* note 19 (arguing that the common law in general was not well established). Additionally, a nineteenth century treatise on malicious prosecution, Martin L. Newell, *Malicious Prosecution, False Imprisonment and the Abuse of Legal Process* (1892), contains an extensive discussion of the immunity of judges, which makes it clear that they are immune even if they act maliciously, *id.* at 125, but it states that quasi-judicial officers, such as prosecutors, are not entitled to such immunity if they do not act honestly. Newell concluded that a quasi-judicial officer could not be liable “for the honest exercise of his judgment, however erroneous or misguided that judgment may be,” but there was no provision for absolute immunity for a quasi-judicial officer who performed his duties dishonestly or maliciously. *Id.* at 166.

The treatise provided that prosecutors were liable if there were malice and absence of probable cause, with no distinction made between public and private
ments. The common-law origin of absolute immunity for prosecutors is questionable, but only after purporting to find a common-law basis did the Court examine the policy arguments for providing the same immunity in § 1983 suits. The first policy argument was that without absolute protection the threat of § 1983 suits would undermine prosecutors' performance. Second, the Court worried about honest prosecutors being subject to suit. The Court was also concerned about the consequences of granting only qualified immunity to prosecutors. When Imbler was decided, qualified immunity had a subjective element. The Court questioned whether qualified immunity at the time of Imbler would provide the necessary protection to ensure that there was not an adverse effect on the criminal justice system. Finally, the Court con-

prosecutors; the section on defendants contained no exemption for public prosecutors, id. at 367-68; and the defendant's status as a public prosecutor was not listed as a defense, id. at 430-49. The first American case to address prosecutorial immunity, and the case the Supreme Court relied on in Imbler, 424 U.S. at 421, was Griffith v. Slinkard, 146 Ind. 117 (1896). Griffith was a case decided well after the enactment of § 1983. In Griffith, the Indiana court held the prosecutor was entitled to absolute immunity based on state constitutional grounds—not common law. The fact the Indiana court relied only on the state constitutional argument for granting immunity supports the position that there was no common law rule of immunity for prosecutors in 1871. See Filosa, supra note 4, at 979-81 (explaining that the Court's historical derivation of prosecutorial immunity was based on its own decisions and ignored the common-law origin of immunity); Comment, Liability of Judicial Officers Under Section 1983, 79 YALE L.J. 322, 337 (1969) ("There is no adequate rationale . . . for altogether exempting judicial officers from liability under section 1983.").

37. See supra note 36; see also Burns v. Reed, 500 U.S. 478, 496-501 (1991) (Scalia, J., concurring in part and dissenting in part) (discussing the historical roots of prosecutorial immunity).

38. See supra notes 22-23 and accompanying text; Burns, 500 U.S. at 498 (stating "the presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language of the statute"); see also Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2616-17 (1993); Antoine v. Byers & Anderson, Inc., 113 S. Ct. 2167, 2170-71 (1993) (illustrating that in § 1983 immunity analysis the Court must first find a common law precedent).

39. "[T]he prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." Imbler, 424 U.S. at 424.

40. Id. at 425.

41. Id. at 426.

42. See supra note 31 and accompanying text.

43. "The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify . . . . If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence." Imbler, 424 U.S. at 426.
cluded that the public had criminal and professional sanctions to control prosecutorial misconduct.44 Based on policy and the Court's common-law analysis, absolute immunity was extended to prosecutors when their functions were "intimately associated with the judicial phase of the criminal process."45

Before Imbler, lower courts had generally held that prosecutors were absolutely immune from suit when their activities were within the scope of "prosecutorial duties."46 Imbler affirmed the functional approach47 employed by the majority of circuits, rather than a "status" or "position" approach.48 In affirming the functional approach, the Imbler decision left unanswered questions regarding investigative and administrative functions. The Supreme Court specifically noted that administrative or investigative activities of a prosecutor might not be protected.49 The Court stated it had no occasion to decide whether investigative or administrative acts by a prosecutor should be absolutely protected.50 The Court noted:

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. At some point, and with respect to some decisions, the prosecutor no doubt functions as an ad-

44. Id. at 429. But see infra note 100 and accompanying text (explaining that criminal and professional sanctions are not effective methods to control prosecutorial misconduct).
45. Imbler, 424 U.S. at 430.
46. Id. at 420 & n.16 (discussing previous holdings and citing circuit court decisions).
48. A status or positional approach would have provided immunity to prosecutors solely because they are prosecutors. See Hurlburt v. Graham, 323 F.2d 723, 725 (6th Cir. 1963) (the prosecutor was not liable in a civil suit based on the principle of "judicial immunity" without examining the actual function performed).
49. "The purpose of the Court of Appeal's focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases... which hold that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's." Imbler, 424 U.S. at 430.
50. Id. at 430-31.
ministrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.51

As it pertains to prosecutorial immunity, the Supreme Court in Imbler acknowledged the difficulty in applying the functional approach in investigative and administrative contexts, but provided little guidance.52

C. Burns v. Reed

Fifteen years after Imbler, the Court in Burns v. Reed53 again addressed the issue of absolute prosecutorial immunity. The case focused on (1) prosecutorial immunity for giving legal advice to police officers about the legality of their investigative conduct and (2) prosecutorial immunity in probable cause hearings.54 Applying the functional analysis set forth in Imbler, the Court in Burns held that a prosecutor is absolutely immune from civil liability while participating in a probable cause hearing, but not when giving legal advice to the police. The decision in Burns made clear that absolute immunity should not be granted for all prosecutorial functions.

The Supreme Court in Burns found that there was no common law support for providing absolute immunity to a

51. Id. at 431 n.33.
52. The Court did intimate that the policy reasons set forth in Imbler could be used in applying the functional approach to prosecutors’ investigative and administrative actions. See id. at 430-31 (the Court was not considering “whether like or similar [policy] reasons require immunity for those aspects of the prosecutor’s responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate”).
54. In Burns, two Indiana police officers sought legal advice regarding the propriety of hypnotizing a murder suspect whom they thought had multiple personalities. A state prosecutor told the officers that they could proceed with the hypnosis. Based on information obtained while the suspect was under hypnosis, the prosecutor advised the officers they probably had probable cause for arrest. The prosecutor and officer then presented the information obtained through hypnosis at a probable cause hearing. Neither the officer nor the prosecutor informed the judge that the “confession” was obtained under hypnosis. Id. at 481-83.
55. The Court noted that Burns challenged only the prosecutor’s “participation in the hearing, and not his motivation in seeking the search warrant or his conduct outside the courtroom relating to the warrant.” Id. at 478. The Court determined that the prosecutor was functioning in a role similar to a witness and there existed a common-law immunity for such functions. Additionally, the court concluded that absolute immunity for a prosecutor’s actions in a probable cause hearing is justified by the policy concerns of Imbler. Id. at 489-91.
The Court held that giving advice was not so "intimately associated with the judicial phase of the criminal process that it qualifies for absolute immunity." Additionally, the Court recognized that qualified immunity had evolved since Imbler to protect "all but the plainly incompetent or those who knowingly violate the law." The Court recognized that the new qualified immunity standard was more protective and pragmatic, thus satisfying concerns that underlay the Court's recognition of absolute immunity in Imbler. In sum, the Court reasoned that it would be "incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice."

The Court in Burns highlighted a prosecutorial function for which absolute immunity would not apply, but the Court provided little guidance regarding other prosecutorial functions. The Court in Imbler had broadly suggested that a prosecutor performing investigative or administrative functions might not be absolutely immune from suit under § 1983 but gave little specific guidance regarding how such functions should be identified. In Burns, the Court analyzed the modified policy aspects of Imbler and determined that giving advice to police would not be absolutely protected. The Court did not, however, clarify the issue of how to determine when a prosecutor is functioning in an investigative or administrative role and when the prosecutor is functioning in an absolutely protected capacity. Rather, in Burns, the Supreme Court held only that giving legal advice to police officers was not an absolutely protected prosecutorial function.

56. Id. at 493 (quoting Imbler, 424 U.S. at 430).
57. Burns, 500 U.S. at 495 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1985)).
58. The standard is pragmatic because it employs an objective standard that allows for determinations without a hearing. See Malley, 475 U.S. at 341 (discussing the Harlow standard); see also Mitchell v. Forsyth, 472 U.S. 511, 524 (1985) ("Where an official could be expected to know that his conduct could violate statutory or constitutional rights, he should be made to hesitate . . . .").
59. Burns, 500 U.S. at 494 n.8.
60. Id. at 495.
62. In Imbler, the extent of the Court's guidance is found in footnote 33 and the accompanying text. See supra note 51 and accompanying text.
The majority decision in *Buckley v. Fitzsimmons* provides guidance to courts and prosecutors. The *Buckley* holding establishes a workable standard to determine when prosecutors' actions are not "intimately associated" with the judicial process and therefore not protected by absolute immunity.

III. **Buckley v. Fitzsimmons**

A. The Facts

Stephen Buckley brought suit under 42 U.S.C. § 1983 against DuPage County State's Attorney Michael Fitzsimmons and others. Buckley claimed that Fitzsimmons had fabricated evidence during the preliminary investigation of the rape and murder of an eleven-year-old child. Buckley claimed that in order to obtain an indictment in a case that had engendered extensive publicity and intense emotions in the community, Fitzsimmons, in connection with an "expert witness," Louise Robbins, had fabricated evidence related to a boot print on the door of the victim's home. Additionally, Buckley sought damages for Fitzsimmons' allegedly false statements at a press conference announcing an indictment against him. Buckley claimed that in order to gain votes twelve days before a primary election, Fitzsimmons made false statements about him in a press conference announcing his arrest.

Fitzsimmons convened a special grand jury for the sole purpose of investigating the case. After an eight-month investigation, Fitzsimmons still was unable to provide enough evidence to warrant an indictment. Although no additional evi-

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64. Louise Robbins was an anthropologist from North Carolina. Robbins allegedly was well known for her willingness to fabricate unreliable expert testimony. *Id.* at 2610.

65. The boot print apparently had been left by the killer when he kicked in the door. After three separate lab studies failed to make a reliable connection between the bootprint at the murder site and Buckley's boots, prosecutors obtained a positive identification from Louise Robbins. Robbins' opinion was obtained during the early stages of the investigation, which was conducted under the joint supervision and direction of the sheriff and prosecutors. *Id.*

66. *Id.*

67. *Id.* ("[Fitzsimmons'] misconduct created a 'highly prejudicial and inflamed atmosphere' that seriously impaired the fairness of the judicial proceedings against an innocent man and caused him to suffer a serious loss of freedom, mental anguish, and humiliation.").

68. At this time, Fitzsimmons admitted in a public statement that there was insufficient evidence to indict anyone for the rape and murder of the child. *Id.*
idence was obtained in the interim, an indictment against Buckley was issued two months later. It was at this time Fitzsimmons held the allegedly defamatory press conference twelve days before the election. Buckley was arrested and because he was not able to meet the bond set at $3 million he was held in jail until charges were eventually dropped. Buckley filed a § 1983 suit against Fitzsimmons.

Buckley's two claims against Fitzsimmons were treated differently by different courts. The district court held that Fitzsimmons was entitled to absolute immunity regarding Buckley's claim that he fabricated evidence, but not for statements made at the press conference. However, the Seventh Circuit Court of Appeals ruled that Fitzsimmons had absolute immunity to both claims, applying an "unprecedented" injury test. The Supreme Court granted Buckley's petition for certiorari, vacated the judgment, and remanded the case for further proceedings in light of the Court's intervening decision in Burns v. Reed. On remand from the Supreme Court, the court of appeals found nothing in Burns to undermine its initial holding. The Supreme Court again granted certiorari and reversed the court of appeals' decision, finding that absolute immunity should not be granted for either claim. Because the Court was unanimous in denying absolute immunity for prosecutors' comments at a press conference, the bulk of the Court's analysis dealt with the fabricated evidence claim. It

69. Robbins provided the principal evidence against Buckley at trial, but the jury was unable to reach a verdict. When Robbins died before Buckley's retrial, all charges were dropped and he was released after three years in prison. Id. at 2611.
70. Id.
71. The basis of the test was that a prosecutor was entitled to absolute immunity if the injury "flows from" the judicial process or if the injury is incomplete at the time the judicial process is initiated. Buckley v. Fitzsimmons, 919 F.2d 1230, 1241 (7th Cir. 1990), modified, 952 F.2d 965 (7th Cir.), cert. granted, 113 S. Ct. 53 (1992), rev'd, 113 S. Ct. 2606 (1993).
73. In unanimously denying absolute immunity for comments made by a prosecutor at a press conference, the Court recognized that the circuits addressing the issue, other than the Seventh Circuit, had granted qualified immunity to press statements. Buckley, 113 S. Ct. at 2618 n.9 (citing cases granting qualified immunity for press statements); see also James Lappan, The Prosecutor, The Investigator, The Administrator, 42 U.S.C. § 1983 and Burns v. Reed: The Hammer Has Dropped, 62 MISS. L.J. 169, 183 n.91 (1992) (asserting that "prosecutorial statements made to the press concerning a criminal defendant have universally been held to command only qualified immunity").
was the fabricated evidence claim that resulted in the "bright-line" probable cause standard and produced the divided court.\textsuperscript{74} The fabricated evidence claim is the focus of this Note.

B. The Supreme Court's Analysis and Holding in Buckley

In deciding \textit{Buckley}, the Supreme Court followed established precedent. The Court first followed the traditional steps for a § 1983 immunity analysis, concluding that prosecutors' actions are protected when they are closely associated with the judicial process.\textsuperscript{75} The Court then, emphasizing dicta in \textit{Imbler},\textsuperscript{76} reiterated that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur during the prosecutor's role as an advocate for the state, are entitled to absolute immunity.\textsuperscript{77} The majority, however, found that in trying to determine whether Buckley had made the boot print, Fitzsimmons was acting not as an advocate, but rather as an investigator searching for clues and corroboration that might give probable cause for arrest.\textsuperscript{78}

The majority in \textit{Buckley} determined that Fitzsimmons' actions were not intimately associated with the judicial process and were therefore only protected by qualified immunity. The majority reasoned that such activities, if performed by police officers and detectives, would only be entitled to qualified immunity; therefore, the same immunity should apply to prosecutors performing the same actions.\textsuperscript{79} Additionally, the majority stated that convening a grand jury to consider whether evidence collected is sufficient to support an indictment does not

\textsuperscript{74} See \textit{supra} notes 12-13 and accompanying text.

\textsuperscript{75} The Court determined that certain immunities were so well established when § 1983 was enacted that Courts should presume Congress would have specifically so provided had it wished to abolish them. \textit{Buckley}, 113 S. Ct. at 2613. The court reiterated that most public officials are entitled only to qualified immunity. However, sometimes their actions fit within a common-law tradition of absolute immunity. Whether they do is determined by the nature of the function performed, not the identity of the actor who performed it. \textit{Id.} For a prosecutor, absolute immunity is available for conduct that is "intimately associated with the judicial phase of the criminal process." \textit{Id.} at 2614.

\textsuperscript{76} \textit{Id.} at 2614 (citing \textit{Imbler} v. Patchman, 424 U.S. 409, 430-31 n.33 (1976)).

\textsuperscript{77} \textit{Id.} at 2615 ("We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.").

\textsuperscript{78} \textit{Id.} at 2616.

\textsuperscript{79} See \textit{infra} part IV.C.
retroactively transform the efforts made to collect the evidence from administrative to prosecutorial actions.\textsuperscript{80} The Court concluded that "a prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."\textsuperscript{81} The Court thus drew a line between prosecutorial actions before and after probable cause exists, with a presumption of qualified immunity before and absolute immunity after there is probable cause.

\section*{IV. Analysis of the Majority Opinion in \textit{Buckley}}

The entire Court\textsuperscript{82} recognized the need to provide a standard for distinguishing between "advocacy" and "investigation," and the majority opinion did so. The majority opinion provides guidance to courts and prosecutors and is rational. The \textit{Buckley} probable cause standard is appropriate because: (1) it does not undermine the protection found necessary in \textit{Imbler}; (2) the conflicting duties of a prosecutor support the determination that a prosecutor is not an "advocate" until there is probable cause; (3) the probable cause standard promotes the equal treatment of prosecutors and police officers; and (4) the standard is workable. The preceding statements supporting the \textit{Buckley} probable cause standard will be individually examined. In analyzing aspects of the probable cause standard, arguments presented by the dissent will also be addressed.

\subsection*{A. The Probable Cause Standard Does Not Undermine Protection Found Necessary in \textit{Imbler}}

The probable cause standard fills gaps left by the Court in \textit{Imbler}. The Court in \textit{Imbler} never decided whether investigative or administrative functions of a prosecutor should be absolutely protected.\textsuperscript{83} Although the Court in \textit{Burns} determined that absolute immunity should not be granted for certain prosecutorial acts (i.e., giving advice to police officers), it provided no

\begin{thebibliography}{83}
\bibitem{fn80} "A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retroactively described as 'preparation' for a possible trial . . . ." \textit{Buckley}, 113 S. Ct. at 2617.
\bibitem{fn81} \textit{Id.} at 2616.
\bibitem{fn82} "In recognizing a distinction between advocacy and investigation . . . I understand the necessity for a workable standard in this area." \textit{Id.} at 2625 (Kennedy, J., dissenting in part and concurring in part).
\bibitem{fn83} See supra notes 50-52 and accompanying text.
\end{thebibliography}
general guidance as to which functions are investigative and which are administrative. The probable cause standard in *Buckley* provides a method for determining which acts are protected without undermining protection found necessary in *Imbler*. The *Buckley* probable cause standard does not undermine necessary prosecutorial protection because the qualified immunity standard has changed. The Court in *Burns* recognized that the qualified immunity standard was more protective and less burdensome to implement than it had been. Under the *Harlow* approach to granting qualified immunity, frivolous suits can be dismissed on a motion for summary judgment. Additionally, under the *Malley* standard all but the plainly incompetent are protected. Because the qualified immunity standard now provides more protection than at the time *Imbler* was decided, many of the Court's concerns expressed in the *Imbler* opinion no longer apply.

The dissent argues that a prosecutor who is sued for malicious prosecution is no longer protected. The dissent claims that whether absolute immunity exists will be based on the plaintiff's manipulation of the complaint. The dissent's argument is that a § 1983 plaintiff will merely assert that the prosecutor violated his rights before a finding of probable cause. By

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84. See supra note 60 and accompanying text.
85. See supra notes 39-45 and accompanying text (explaining the policy arguments the Court addressed in *Imbler*).
86. "But the qualified immunity standard is today more protective of officials than it was at the time that *Imbler* was decided." *Burns* v. Reed, 500 U.S. 478, 494 (1991).
89. Judge McKay of the Tenth Circuit noted the following:
Since *Imbler*, the Court has expanded the protection of qualified immunity by eliminating its benevolent intent requirement. . . . Thus, § 1983 defendants who have qualified immunity are now less likely to be liable, and, if not liable, are less likely to have to go to trial since the objective qualified immunity standard lends itself to resolution on the pleadings. This decreases the disruption to state criminal law enforcement that would result from granting a prosecutor only qualified immunity. The Supreme Court has not yet suggested, however, that this dramatic change in *Imbler*’s frame of reference affects *Imbler*’s reach.
90. "This formulation of absolute prosecutorial immunity would convert what is now a substantial degree of protection for prosecutors into little more than a pleading rule." *Buckley*, 113 S. Ct. at 2621 (Kennedy, J., dissenting).
asserting that the misconduct occurred before probable cause existed, the prosecutor would not be entitled to absolute immunity.

Although future plaintiffs may assert "pre-probable cause" violations in their complaints, the Buckley probable cause standard remains appropriate. The function test, which the dissent clearly supports, requires that prosecutors not acting in a capacity "intimately associated with the judicial phase of the criminal process" should not be entitled to absolute immunity for their actions. Thus, a suit for malicious prosecution is absolutely protected if the contested actions of the prosecutor occur after a prosecutor has assumed a capacity "intimately associated" with the judicial phase of the proceedings. If prosecutorial misconduct occurs before probable cause exists, the prosecutor is not "intimately associated" with the judicial phase of the criminal proceedings and is not protected by an absolute immunity. The majority decision in Buckley rightly held that until probable cause exists, a prosecutor is not an advocate, and therefore is not intimately functioning within the judicial phase of the criminal process.

91. Id. at 2620 (Kennedy, J., dissenting) ("The Court is correct to observe, the rules determining whether particular actions of government officials are entitled to immunity have their origin in historical practice and have resulted in a functional approach.").

92. Imbler, 424 U.S. at 430.

93. The following hypothetical illustrates why the probable cause standard is not an avenue for "manipulating pleadings," but rather is a means for defining the functional test. In the proposed hypothetical, one group of prosecutors is involved in investigating a crime. Later, another group of prosecutors prosecute the case. In these circumstances, under the function test set forth in Imbler, the prosecuting attorneys would be absolutely immune from civil suit. These prosecutors would be absolutely protected from a claim of malicious prosecution, because they were clearly functioning in the "judicial phase of the criminal process." However, the investigating prosecutors were not performing functions "intimately associated with the judicial process." Under the function analysis, the functions they were performing are only protected by qualified immunity. Conceptually, the legal ramifications of one group of prosecutors performing both functions should be the same. Prosecutors should be absolutely protected when prosecuting a case but not when investigating a case before a finding of probable cause.

94. It is significant that the focus is on whether probable cause existed as opposed to a formal finding of probable cause. See infra notes 145-47 and accompanying text (discussing why the Buckley probable cause standard is best interpreted as not requiring a formal determination of probable cause). Despite the dissent's concerns, it is clear that if probable cause existed a plaintiff cannot "manipulate" the complaint to show otherwise and, thus, the prosecutor is presumably protected by absolute immunity. See infra note 158 (discussing the presumption of absolute immunity after probable cause exists).

95. See infra part IV.B. (explaining prosecutors' multiple duties and why
B. The Conflicting Duties of a Prosecutor Support the Determination That a Prosecutor Is Not an "Advocate" Until There Is Probable Cause

A prosecutor's duty is to "do justice," not merely to convict.\textsuperscript{96} Although prosecutors have the duty to "do justice," they must also serve as aggressive advocates.\textsuperscript{97} To the detriment of criminal defendants and society, prosecutors often\textsuperscript{98} pursue their role as "aggressive advocates" beyond proper bounds, ignoring their duty to do justice.\textsuperscript{99} Some method to curb prosecutorial misconduct is needed aside from criminal and professional sanctions.\textsuperscript{100} A court ruling defining and limiting a

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before probable cause exists a prosecutor's duty does not weigh in favor of aggressively representing the public as the state's advocate).

96. The Supreme Court has stated:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.


97. "To the extent that the adversary system works according to theory, government lawyers promote justice by playing the same role at trial as private advocates... At one level, the prosecutor thus helps achieve the appropriate systemic results—does adversarial justice—simply by performing as an aggressive advocate.


99. Zacharias provides reasons for such results. "For elected prosecutors, publicity about trial successes is essential to campaigns. For subordinate prosecutors in larger offices, promotion and internal evaluation depends largely on the ability to produce convictions." Zacharias, supra note 97, at 58 n.63.

100. Justice Urbigkit explains why criminal and professional sanctions are in-
prosecutor's absolutely protected role as an advocate makes prosecutors more apt to "do justice." The Buckley probable cause standard so defines and regulates a prosecutor's adversarial role.

Before probable cause exists, a prosecutor should not be considered an "advocate" in the absolutely protected sense. She has not assumed an adversarial role toward the defendant. A prosecutor, unlike most advocates, is not retained to represent one party. Prosecutors represent many groups and the emphasis of a prosecutor's duty in representing the groups varies. Prosecutors represent the police, the victim, the defendant, those who care about the victim and defendant, and citizens as a whole. The dissenting justices' concern in Buckley that a prosecutor not protected by absolute immunity will not have "full fidelity" to the prosecutorial role, is misplaced. Contrary to what the dissenting justices imply in their opinion, prosecutors must be concerned about more than faithfully pursuing a conviction.

Justice Kennedy's statement in the dissent, "I do not understand the art of advocacy to have an inherent temporal

adequate; he contends:

[Alternative remedies providing responsibility to the immunized public official for his bad conduct in order to avoid the chilling result of monetary responsibility would substitute either criminal prosecution or professional sanction as the punishment . . . .] In the justice delivery system, these alternatives are seldom if ever actually applied. It is an unacceptable fraud on the public since prosecutors seldom prosecute prosecutors and bar associations infrequently take punitive action to correct prosecutorial suborned perjury.


101. Two terms are used to refer to prosecutorial functions protected by absolute immunity. Functions "intimately associated with the judicial phase of the criminal process" and functions performed by prosecutors in their role as an "advocate." Imbler, 424 U.S. at 430-31. These terms are interrelated and both represent circumstances when a prosecutor will be absolutely immune from civil suit.


103. "The prospect of liability may 'induce[e] [a prosecutor] to act with an excess of caution or otherwise to skew [his] decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide [his] conduct.'" Buckley, 113 S. Ct. at 2622 (Kennedy, J., dissenting) (quoting Forrester v. White, 484 U.S. 219, 223 (1988)).

104. See infra notes 116-120 and accompanying text (describing the undesirable results and circumstances that society and prosecutors must face when prosecutorial "fidelity" is interpreted as solely obtaining convictions).
limitation,"105 is incompatible with a prosecutor's role before probable cause exists. Before probable cause to arrest, a prosecutor is not an advocate in the judicial sense. Before probable cause, a prosecutor's duty weighs more heavily in favor of protecting the rights of society and of those who might be arrested. Once there is probable cause to arrest someone, the balance shifts, and the prosecutor assumes a more aggressive, adversarial role.106 Once probable cause exists, prosecutorial duties weigh in favor of aggressively representing the community's interest in a just conviction.107

The probable cause standard recognizes the different duties of prosecutors. By holding that a prosecutor is not absolutely protected from civil suit before probable cause exists, the majority in Buckley implicitly recognizes the varied groups prosecutors represent and the need to balance the prosecutor's duty in representing them. By balancing the prosecutor's duties to potential defendants before a probable cause determination, and her duty to the community to provide a just conviction after probable cause exists, the majority's probable cause standard benefits society.

C. Before Probable Cause For Arrest a Prosecutor Is Functioning as a Police Officer

A goal of § 1983 immunity jurisprudence is to ensure equal treatment among state actors engaged in identical functions.108 Generally, police officers do investigative work. Before probable cause exists, a prosecutor's functions are similar to those of police officers. Because both function in similar roles, both should be granted the same degree of immunity.109

105. Buckley, 113 S. Ct. at 2624.
106. Even grand jury proceedings, which are usually used to determine if probable cause exists, are nonadversarial in nature. See David M. Nissman & Ed Hagen, The Prosecution Function 18 (1982); cf. Burns v. Reed, 500 U.S. 478, 489 (1991) (concluding that a prosecutor's participation in a probable cause hearing is absolutely protected not because a prosecutor is acting as an advocate, but because his role is similar to a witness's role, which was protected at common law).
107. Cf. Zacharias, supra note 97, at 56-60 (explaining how prosecutors fit into the adversarial system).
109. Both should be entitled to qualified immunity. In Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965) the Ninth Circuit in a pre-Imbler decision stated,
The majority in *Buckley* stated: "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'"\(^{10}\) The *Buckley* holding is fair in that it treats police and prosecutors functioning in the same role equally.

The dissenting justices argue that the functions of police officers and prosecutors before a finding of probable cause are not the same. The dissent asserts that a prosecutor can be examining the evidence for trial purposes while a police officer examines the evidence to decide whether it provides a basis for arresting a suspect.\(^{11}\) The difficulty with the dissent's assertion is in deciding whether the prosecutor in a particular instance was examining the evidence for trial purposes or to establish probable cause. If the prosecutor was investigating evidence to find probable cause, she was functioning similarly to a police investigator. If she was examining evidence "to determine whether it will be persuasive at trial and of assistance to the trier of fact,"\(^{12}\) then she was engaged in a prosecutorial function. The problem is making this determination.\(^{13}\) Deciding what the prosecutor was really thinking would require a subjective analysis, which, due to its difficulty in implementing,\(^{14}\) should be avoided.\(^{15}\)

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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; *see also* Higgs v. District Court, 713 P.2d 840, 853-57 (Colo. 1985) (prosecutors' drafting of documents and affidavits used to secure warrants for nontestimonial evidence and photo identification procedures more closely resembled police conduct than advocacy).


11. *Id.* at 2624 (Kennedy, J., dissenting) ("Two actors can take part in similar inquiries while doing so for different reasons and to advance different functions.").

12. *Id.*

13. Conceivably, the dissent would conclude that a prosecutor only investigates a crime and examines evidence "to determine whether it will be persuasive at trial." *Id.* Such a conclusion is unsupported by reality. Any prosecutor investigating a crime and examining evidence realizes that no matter how "persuasive" a finding may be, it is of little value unless there is somebody to accuse and try.

14. The present case illustrates the difficulty in applying a subjective,
Aside from the pragmatic reasons, there are policy reasons why prosecutors should not be considered absolutely protected advocates during a pre-indictment investigation. A potential defendant does not want a prosecutor to evaluate the evidence as a judicial advocate for the state. A prosecutor who examines evidence with a focus on a possible trial or suspect may find evidence with considerable "jury appeal." This can lead to the problem of wanting to use evidence to convict solely because there exists evidence to convict. Unfortunately, if such evidence exists, it might be tempting for a prosecutor to act improperly to indict someone, whether that "someone" should be indicted or not. Such a problem is an undesirable result that society faces when prosecutors focus solely on their duty to pursue convictions.

By recognizing that prosecutors should receive the same degree of immunity as police officers, the probable cause standard: (1) promotes fairness among public officers, (2) avoids a difficult-to-implement, subjective analysis, and (3) benefits "prosecutor's thoughts" test. If the test were applied to the examination of the boot print, a trial court would be forced to determine whether the prosecutor examined the boot print to determine whether it would be persuasive at trial or whether the prosecutor's examination was meant to establish probable cause. To make such a determination, the court would have to determine the prosecutor's thoughts at the time of the examination. This determination would be difficult, if not impossible, and completely subjective.


116. The dissent argues it will discourage early participation of prosecutors. To the extent that discouraging early participation is harmful, see infra notes 117-120 and accompanying text (explaining why it might not be harmful), the question should be asked to what degree will early participation be discouraged. It may only discourage improper early participation. See Malley v. Briggs, 475 U.S. 335, 341 (1986) (stating that qualified immunity protects all except the incompetent or those acting maliciously). Additionally, police do not enjoy absolute protection for their actions, yet they perform necessary investigative functions. The same should be true for prosecutors.

117. "Potential defendant" as used in this Note refers to anyone who could be linked to the crime whether remotely connected to the actual wrongdoing or not.

118. See supra note 99 and accompanying text (stating the factors that could motivate a prosecutor to seek convictions).


120. The Buckley decision can help curb this overly aggressive conduct. No longer will a prosecutor's investigative actions be above civil reproach. The prosecutor will be held to the same standard as the other state officers with whom she is working.
society by curbing the temptation to "create a defendant" solely because there is evidence to sustain a conviction.

D. The Probable Cause Standard Is Rational and Functional

The probable cause standard is rational and functional for three reasons. First, the probable cause standard recognizes the rights of the wrongfully injured and yet sufficiently protects prosecutors. Second, prosecutors can function without being hesitant about aggressively prosecuting. Third, the standard is based on an objective and distinguishable determination.

1. Rights of the wrongfully injured are balanced against protecting prosecutors from civil suit

Great injury can occur when an individual is criminally prosecuted.121 Because no criminal justice system is perfect, mistakes will occur and innocent citizens will occasionally be prosecuted and convicted.122 Failure to compensate these persons, especially those who are convicted and later exonerated, may seem abhorrently unjust. Although terribly unfair, injury without compensation is generally accepted as a "necessary evil" of the United States criminal justice system.123 However,

121. Justice White previously stated, "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." United States v. Marion, 404 U.S. 307, 320 (1971).

122. "A wrongful conviction results when, for a variety of reasons ranging from perjured testimony to negligent investigation, an individual who is factually innocent of a criminal charge is found guilty in a court of law and ordered incarcerated in a penal institution." James Cleary, When the Prisoner Is Innocent, 14 HUM. RTS. 42, 44 (1987); see, e.g., Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 STAN. L. REV. 21 (1987) (cataloging the cases of 350 persons nationwide who since 1900 were convicted of "potentially capital" offenses but later found to be innocent because no crime occurred or the defendant was legally and physically uninvolved in the crime); Marty I. Rosenbaum, Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988, 18 N.Y.U. REV. L. & SOC. CHANGE 807 (1991-92) (documenting "mistakes" in the New York criminal justice system related to capital crimes).

123. Professor James Cleary states that approximately ten states provide some compensation through statutes for wrongfully convicted citizens. However, Cleary points out that "several prerequisites are normally necessary," such as receiving a full pardon by the chief executive of that jurisdiction. Additionally, Cleary documents some of the monetary limitations the state statutes impose. In sum, few states provide legislation to compensate the wrongfully convicted, and those states that do allow compensation have legislation imposing very restrictive caps on the amount to be granted. See Cleary supra note 122, at 44-45.
when the injury arising from an arrest and prosecution is caused maliciously, not by mistake, just restitution should ensue.

In a perfect system, when one is maliciously injured within the criminal justice system, injuries would be compensated. Unfortunately, the current judicial system could not accommodate the voluminous litigation and enormous costs that would ensue if all state actors in the criminal justice system were subject to civil action. Although arguably unjust, basic eco-

124. See, e.g., Gershman supra note 98, at 451-53 (documenting case by case the conviction and punishment of innocent persons based on prosecutorial misconduct).

125. It is easy to agree that no personal liability should lie for innocent errors in judgment, nor is there any indication in the cases that judges [or prosecuting attorneys] ever have been subject to liability for this type of injury. By definition, the world over, judges [or prosecuting attorneys], acting within their jurisdiction, are allowed an honest mistake. But the explanation of immunity for corrupt acts is a distinct and different matter, hanging by an ancient thread that is as out of place in the cloth of modern democracy as the theory of sovereign immunity of government has recently been discovered to be.


126. Perhaps the only meaningful substitute for compensation would be the application of Hammurabi's Code, 1792 to 1750 B.C. where [the prosecuting attorneys] would spend [the same amount of time as the injured citizen] in . . . jail as prisoners without access to a court and while their families, if any, wait without funds or home for some other bureaucratic majordomo to end the incarceration.


127. The criminal justice system is, as with all human institutions, fallible. To turn a deaf ear to claims of wrongfully convicted persons would be a classic example of hypocrisy and indifference. . . . It would seem incumbent though in a democratic society to more fully address and make available appropriate compensation for wrongful convictions.

Cleary, supra note 122, at 45; see also Cooney v. White, 845 P.2d 353, 366 (Wyo. 1992) (stating "[d]amages paid for damages done is singularly more satisfying to the party injured"), cert. denied, 114 S. Ct. 60 (1993).

128. As the number of claims against government officials increased during the 1960's and 1970's, concern mounted among both judges and commentators that the rising volume of litigation would outstrip the courts' management capabilities and would hamper effective government. The United States Supreme Court in a series of decisions in the 1970's and early 1980's designed limits on civil rights actions in response to these concerns.


In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), Justice Black in his dissenting opinion stated,
nomic principles provide strong support for § 1983 immunities. Additionally, it is argued that some state actors need absolute immunity to properly perform their traditional judicial functions. Although acting in a quasi-judicial role, prosecutors have been protected in a manner similar to judges. The Buckley probable cause standard supports a balance between injured citizens’ rights and the need to protect prosecutors from civil suit and the criminal justice system from presently insurmountable financial realities.

Although the Supreme Court began the process in Burns, the Buckley decision clearly held that wrongfully injured criminal defendants are not always prohibited from receiving restitution from a prosecuting attorney. Although it is a small step towards fully compensating wrongly prosecuted citizens, the Buckley decision does help level the balance between protecting prosecutors and compensating victims.

The Buckley probable cause standard allows some avenue of relief for wrongfully prosecuted citizens yet maintains sufficient protection for prosecutors. Prosecutors are still cloaked

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My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances . . . .

[However, we sit at the top of a judicial system accused by some of nearing the point of collapse.

Id. at 428-29. Judicial resources have not increased since 1971; rather, they are stretched even tighter now. See Malcom M. Lucas, Is Inadequate Funding Threatening Our System of Justice?, 74 JUDICATURE 292 (1990-91).

129. See Lucas, supra note 128, at 292 (describing the adverse effects of limited resources on the judicial system). But see Christina Whitman, Constitutional Torts, 79 MICH. L. REV. 5, 28 (1980) (stating “caseload considerations are necessarily secondary to the vindication of those [constitutional] rights”).

130. "Judges, witnesses, and jurors have long been afforded absolute immunity for acts performed within the scope of their official capacities. This protection was originally justified by the need to protect the exercise of their judgment free from the threat of vexatious suits by dissatisfied litigants." Coyne, supra note 7, at 1112.


132. See Coyne, supra note 7, at 1112-13. But see Burns 500 U.S. at 500 (1991) (Scalia, J., concurring in part and dissenting in part) (stating that quasi-judicial officers were entitled only to qualified immunity at common law).

133. See supra note 61 and accompanying text (explaining that the Supreme Court in Burns recognized an incident where a prosecutor was not absolutely protected from suit).
with absolute immunity for actions performed in their adversarial role. The Buckley probable cause standard provides a means for determining when the adversarial role begins. Additionally, functions performed in a nonadversarial role are still protected by qualified immunity.

2. Prosecutors can function without being hesitant about aggressively performing their duties

A prosecutor does not need absolute immunity for all actions to assure an aggressive prosecution. In discussing the "need" to absolutely protect prosecutors so they will "not shirk from fearless advocacy," Justice Urbigkit of the Wyoming Supreme Court concluded,

This supposition of provided right to be irresponsible in order to do the job for which the office is held demeans the officeholder and insults the lawyer who holds it. . . . If a level of economic responsibility is required for the conduct of the practicing lawyer and the committed physician, one then wonders why not for the public official of either or both professions. Each time that kind of comment is written into opinion, the inquiry is academically raised whether the writer would perform his responsibilities only if also free from responsiveness for violations of the constitutional rights of another person with wilfulness or malice.

Although the Buckley probable cause standard does not wholly require prosecutors to be economically responsible, it is a step

134. Undoubtedly, there will be circumstances after probable cause exists where a prosecutor's functions are nonadversarial and not intimately associated with the judicial phase of the criminal proceedings. In these circumstances, based on the function performed, a prosecutor should not be absolutely protected. However, after probable cause exists a presumption should exist that the prosecutor's activities are adversarial in nature and closely linked to the judicial phase of the criminal proceedings. See infra note 161 (providing an example after probable cause exists where a prosecutor's functions are nonadversarial).

135. See supra notes 30-31 and accompanying text (explaining the increased protection that qualified immunity now provides).


137. Cooney, 792 P.2d at 1350 (Urbigkit, J., dissenting).
in recognizing that prosecutors can perform their duties without absolute protection.

The *Buckley* probable cause standard does not go so far as to completely remove absolute immunity in all situations. The *Buckley* decision only replaces absolute immunity with qualified immunity in those cases where a prosecutor acted improperly before a finding of probable cause. After a finding of probable cause, a prosecutor's role as the state advocate generally provides her with absolute immunity. 138

The *Buckley* probable cause standard protects the investigative operation and the adversarial operation of a state prosecution with a standard necessary to assure that both function efficiently. 139 Historically, police have performed investigative functions while protected from civil suit by qualified immunity. If qualified immunity provides sufficient protection for the investigative functions of police officers, qualified immunity also is sufficient protection for prosecutors before a finding of probable cause. Before a finding of probable cause, the prosecutor is not functioning in an adversarial role because there is no one a prosecutor could rightfully prosecute. 140 Rather, a prosecutor is functioning in a role similar to that of a police officer. 141 Prosecutors can aggressively function in their investigative role under qualified immunity just as police officers. Investigations by prosecutors can be pursued with the qualified protection afforded police while a prosecutor's adversarial role connected to the judicial proceedings will be absolutely protected.

3. *The Buckley probable cause standard is functional because it is based on an objective determination*

An important element of the *Buckley* probable cause standard is that the line between qualified protection and absolute protection is objectively determinable. The key question is whether probable cause existed at the time of the prosecutor's alleged misconduct. If probable cause existed, the prosecutor is

138. See infra note 158 and accompanying text (explaining that a presumption of absolute immunity arises after probable cause exists).

139. Cooney, 792 P.2d at 1302 ("The proper office of immunity should be constrained to protect governmental operation.").

140. See supra part IV.B. (explaining the need to balance a prosecutor's multiple duties).

141. See supra part IV.C.
presumed to be acting in an adversarial role.142 Once a prosecutor assumes an adversarial role, she should be entitled to absolute immunity.143 Significantly, in *Anderson v. Creighton*,144 the Supreme Court reasoned that a determination of probable cause was an "objective, albeit fact specific, question."145 The decision in *Anderson* facilitates the *Buckley* probable cause standard.

A court can objectively determine whether probable cause existed at the time of the alleged prosecutorial wrongdoing. It should be noted that the *Buckley* dissent's concern about premature indictments and arrests146 is somewhat misplaced. The majority opinion neither states nor implies that a third party determination of probable cause is necessary to provide absolute protection to prosecutors. Conversely, the majority opinion states, "the prosecutors do not contend that they had probable cause."147 Contrary to the dissent's claim, this statement indicates that a formal determination of probable cause is not necessary. If probable cause existed at the time of the prosecutorial wrongdoing, despite whether there was a formal indictment or arrest, the prosecutor would be acting in an adversarial role.148 As stated previously, the adversarial role of a prosecutor is the central element in the grant of absolute immunity.149

The *Buckley* probable cause standard is preferable to the dissent's self-defined "drawing of difficult and subtle distinctions" test.150 The dissent's proposed standard would entail determining what the prosecutor was thinking during her in-

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142. See infra note 158 and accompanying text.
143. See *Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir.) ("Although identifying those acts entitled to absolute immunity is not always easy, the determinative factor is 'advocacy' because that is the prosecutor's main function and the one most akin to his quasi-judicial role."). cert. denied, 474 U.S. 967 (1985).
145. Id. at 641.
147. Id. at 2616.
148. To the extent prosecutors want to be sure that probable cause exists, they will initiate formal proceedings. This could support the dissent's concern about premature pretrial indictments and arrests. However, the majority opinion should not be read as requiring such a determination. See id. (implying that, whether or not a formal determination is rendered, if probable cause exists, a prosecutor's actions are linked to the judicial phase of the criminal proceeding and are therefore protected).
149. See supra note 143 and accompanying text.
150. *Buckley*, 113 S. Ct. at 2625 (Kennedy, J., dissenting).
vestigation. In each case, the dissent would have courts determining whether prosecutorial actions were investigative or done in preparation for trial. This determination would be based on the state of mind of the prosecutor. Under this standard, no precedent would be possible. In one instance, examining evidence could be investigative, but in another case examining evidence could be "preparation for a possible trial."

In conclusion, the Buckley probable cause standard, with its objective reasoning and set guidelines, should be preferred not only by the courts but also by prosecutors. As Justice Scalia stated in a previous opinion, "an immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." Prosecutors no longer have to guess as to what is protected conduct. The Supreme Court in Burns determined that prosecutors are not always absolutely protected from suit. However, the Court's decision in Burns provided no clear guidance for prosecutors. The Court's holding in Buckley now provides a standard to determine when prosecutorial activity is not absolutely protected.

V. ISSUES LEFT UNADDRESSSED IN BUCKLEY

Two critical questions remain unanswered after Buckley. First, the Buckley decision provides no guidance for determining what investigative and administrative functions should be absolutely protected after probable cause is established. Second, although it is clear that a prosecutor is not always absolutely immune from civil suit, it is unclear whether a § 1983 plaintiff has established a cause of action when the plaintiff pleads that prosecutorial misconduct occurred before a finding of probable cause. This part will analyze both issues and suggest possible answers.

151. Id. at 2621.
152. See Buckley, 113 S. Ct. at 2625 (Kennedy, J., dissenting) (explaining that the courts are capable of determining the "difficult and subtle distinctions" between nonadversarial acts and preparation for trial).
153. Id. at 2624.
A. The Buckley Court Provided No Guidance for Determining What Investigative and Administrative Functions Should Be Protected After a Finding of Probable Cause

The question of what would be considered investigative or nonadversarial conduct once a prosecution is begun remains unanswered. Both the dissent

and majority opinions state that even after a finding of probable cause, a prosecutor can perform functions that would be investigative or administrative and thus not absolutely protected. Although Buckley provides no direct guidance in determining whether absolute or qualified immunity applies to prosecutorial functions after probable cause exists, prosecutors are now in a better position to argue that absolute immunity should apply after a finding of probable cause. The Buckley holding could be interpreted as supporting a presumption of absolute immunity after probable cause exists.

Pursuant to the majority's analysis, a prosecutor is an advocate for the state after probable cause exists and therefore functions in an absolutely protected quasi-judicial role. However, just as a judge is not protected for functions not related to her judicial role, neither should a prosecutor be protected for acts after probable cause exists that are not related to the prosecutor's adversarial or quasi-judicial role. Although neither opinion in Buckley gives direct guidance with respect to prosecutorial immunity after a finding of probable cause, the majority provided guidance to the extent the demarcation line was clear and rational.

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155. Buckley, 113 S. Ct. at 2616 n.5.
156. Id. at 2625 (Kennedy, J., dissenting).
157. Id. at 2615.
158. This presumption would be based on the shift in the prosecutor's duties towards more strongly representing the state's interest in prosecuting. See supra part IV.B. (explaining a prosecutor's multiple duties).
159. See supra note 143 and accompanying text.
160. See Forrester v. White, 484 U.S. 219, 229 (1988) (holding that judges are not entitled to absolute immunity when acting in their administrative capacity).
161. An example of a non-advocatory act after probable cause exists would be the deliberate destruction or suppression of exculpatory evidence. See Houston v. Partee, 978 F.2d 362 (7th Cir. 1992), cert. denied, 113 S. Ct. 1647 (1993); Henderson v. Fisher, 631 F.2d 1115 (5th Cir. 1880).
B. Has a § 1983 Plaintiff Stated a Cause of Action When Prosecutorial Misconduct Occurs Before a Finding of Probable Cause?

After Buckley, a major question remains as to whether a § 1983 claim exists for improper prosecutorial conduct performed before probable cause exists. Justice Scalia in his concurring opinion emphasized the difference between the question of prosecutorial immunity and whether a claim is cognizable under § 1983. He stated:

[Many claims directed at prosecutors, of the sort that are based on acts not plainly covered by the conventional malicious-prosecution and defamation privileges, are probably not actionable under § 1983 . . . I think petitioner's false-evidence claims in the present case illustrate this point. Insofar as they are based on respondents' supposed knowing use of fabricated evidence before the grand jury and at trial, . . . the traditional defamation immunity provides complete protection from suit under § 1983. If "reframe[d] . . . to attack the preparation" of that evidence, the claims are unlikely to be cognizable under § 1983, since . . . no authority [exists] for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution.]

The majority opinion also recognized the need to separate the issues of prosecutorial immunity and stating a cause of action. Whether a claim has been stated is a vital question. Contrary to Justice Scalia's position, it seems unlikely that the four justices in the majority would find no cause of action. If they were to find no cause of action, then the decision in Buckley would be hollow. The decision would be of little significance because an injured plaintiff's claim would be dismissed for failure to state a claim as opposed to dismissed because of absolute prosecutorial immunity from civil suit. It is more conceivable that Justices Stevens, Blackmun, O'Connor, and Thomas would follow the line of cases relating to Jam-


163. "In general, the dissent's distress over the denial of absolute immunity for prosecutors who fabricate evidence regarding unsolved crimes . . . seems to conflate the question whether a § 1983 plaintiff has stated a cause of action with the question whether the defendant is entitled to absolute immunity for his actions." Buckley, 113 S. Ct. at 2616 n.5.

164. Note that Justice Scalia and the dissenting justices presumably would not
age actions against state officers who "maliciously tender[] false information to the prosecutor."165

Just as other state officers, prosecutors who maliciously tender or produce false information should be subject to damage actions. Prosecutors acting in a role comparable to other state investigators should be granted the same degree of immunity. The prosecutor's role as an investigative officer should not be repudiated, despite the fact that the prosecutor later functions in a quasi-judicial role.166 As previously noted, this concept becomes clearer if one examines the functions being performed as if they were performed by two prosecutors. The first prosecutor fabricates evidence during the pre-indictment period and conveys the false evidence to another prosecutor detached from the wrongdoing. When analyzing whether a cause of action under § 1983 exists, the function the first prosecutor performed should be treated similarly to a police investigator's actions. Whether this analysis would be applied

find a cause of action under § 1983. If the issue had been squarely addressed at the time Buckley was decided, the court would have likely ruled at least five to four that there was no cause of action stated in the complaint. However, the addition of Justice Ginsberg in lieu of Justice White (who was one of the dissenting Justices) now makes it more plausible that a cause of action would be found.

165. See Wheeler v. Cosden Oil and Chemical Co., 734 F.2d 254, 260 & n.14 (5th Cir. 1984) (explaining that circuits are divided on the issue of whether a cause of action is stated against police officers who give false information to prosecutors).

An additional case of great significance was recently decided in January 1994. In Albright v. Oliver, 114 S. Ct. 807 (1994), the Supreme Court held that there is no substantive due process right under the Fourteenth Amendment to be free from criminal prosecution when there is no probable cause. Id. at 813. The Court held that a citizen's right to be free from prosecution without probable cause must be judged under the Fourth Amendment. The Court stated that "[w]e have in the past noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." Id. at 813 (citing Gerstein v. Pugh, 420 U.S. 103, 114 (1975)). Although "express[ing] no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he [did] not present[] that question in his petition for certiori," id., the decision in Albright, nonetheless, should be interpreted as lending support to the viability of a claim against a prosecutor before a finding of probable cause. Therefore, under Buckley and Albright, a prosecutor acting wrongfully and maliciously in a nonadversarial role (i.e., before a finding of probable cause) could be subject to suit if her actions led to a wrongful seizure under the Fourth Amendment.

166. When functioning as a prosecutor the defendant would be protected by the traditional defamation immunity. Buckley, 113 S. Ct. at 2620. (Scalia, J., concurring).

167. See supra note 93 (illustrating the function test as applied to investigating and prosecuting a case).
by the Court, however, is an open question that the majority deliberately left undecided.\textsuperscript{168}

\textit{Buckley} requires courts to focus on whether a claim has been stated as opposed to whether a prosecutor is absolutely immune from civil redress. The focus on whether a claim is stated is desirable. In a democratic society, it is preferable to focus on whether a redressable injury has occurred as compared to whether a government official should be granted immunity for improper conduct. As Judge Urbigkit noted:

Immunity for responsibility for public officials is not mandated by the constitution nor even statute, but rather a public policy where the public to be protected is the miscreant public official at the loss and damage of the injured innocent citizen. Society cannot be sustained in a democratic system if arbitrary, malicious and perjurious conduct is not considered to be both reprehensible and punishable.\textsuperscript{169}

The Court's decision in \textit{Buckley v. Fitzsimmons} is a laudable effort to provide guidance in a difficult area of the law and an important step in balancing the rights of injured citizens and the duties of prosecutors.

\textbf{VI. CONCLUSION}

\textit{Imbler}, \textit{Burns}, and \textit{Buckley} illustrate the evolution of prosecutorial immunity. In first addressing the issue of prosecutorial immunity, the Supreme Court in \textit{Imbler} held that prosecutors were generally entitled to absolute immunity. However, in applying a "function performed" as opposed to a "position/status" analysis, the Supreme Court left open the possibility that certain functions performed by prosecutors would not be absolutely protected. Fifteen years after \textit{Imbler}, the Supreme Court in \textit{Burns} readdressed prosecutorial immunity and held the specific prosecutorial function of giving advice to police officers was not absolutely protected. However, the Court in \textit{Burns} did little to provide any standard to direct future cases. In \textit{Buckley v. Fitzsimmons}, the Supreme Court established a rational and operational standard. By determining that prosecutors are not absolutely protected for functions performed before probable cause exists, the Supreme Court recognized

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\item \textsuperscript{168} See supra note 164.
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rights of injured citizens while balancing the need to protect prosecutors' adversarial functions. In conclusion, the *Buckley* probable cause standard provides needed guidance in a controversial area of law and was a necessary step in the evolution of prosecutorial immunity.

*Jeffery J. McKenna*