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8

THE IMMUNITIES

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A lawyer for forty years, John Williams started his legal career as a lobbyist for Aetna Life & Casualty in Hartford in 1967, following several years working in staff positions in the United States Senate. His introduction to litigation came when company lawyers were asked to donate time to pro bono publico activities of the Hartford County Bar. His first criminal client was Preston ("The Real Thing") Holloway, a man sentenced to life in prison in the 1950s for "use of heroin" in the days before the Fourth Amendment prohibition on illegal searches and seizures was applied to the states. Obtaining his release from prison and a job in the Aetna cafeteria, Williams was quickly disillusioned with corporate liberalism when a Senior Vice President fired Holloway upon learning that thirty years earlier he had suffered from a venereal disease. Forced to return to a life on the streets, he was promptly arrested on other charges and returned to prison.

Leaving Aetna for more useful activity, Williams became chief criminal attorney in the Hill Neighborhood Law Office of the New Haven Legal Assistance Association in the summer of 1969. His first major case was as one of the defense attorneys in the murder prosecution of the local and national leadership of the Black Panther Party, the so-called New Haven Nine. After their acquittal in the summer of 1971, Williams joined Catherine Roraback and Michael Avery, two other Black Panther Party lawyers, in forming New Haven's first public interest law firm. That firm continues today under the name John R. Williams and Associates, LLC.

John Williams is best known as a pioneer in the field of police misconduct litigation. Since 1971, he and his firm have filed most of the police misconduct suits litigated in the federal court in Connecticut. He and his associates have argued many of the Section 1983 appeals decided by the United States Court of Appeals for the Second Circuit in the years since then, and his name and the names of his associates appear on many of the important Second Circuit decisions in this field. He writes and lectures extensively in the area.

His notable Section 1983 cases include Porter v. Nussle, 534 U.S. 516 (2002) (Prison Litigation Reform Act); Liscio v. Warren, 901 F.2d 274 (2d Cir. 1990) (medical treatment of prisoners); Cartier v. Lussier, 955 F.2d 841 (2d Cir. 1992) (misrepresentations in arrest warrant applications); Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992) (release-dismissal agreements); Dobosz v. Walsh, 892 F.2d 1135 (2d Cir.

1989) (police whistleblowers); Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988) (free speech at public meetings); Reed v. Town of Branford, 949 F. Supp. 87 (D. Conn. 1996) (age discrimination as a §1983 violation and harassment as a substantive due process violation); Gavlak v. Town of Somers, 267 F. Sup. 2d 214 (D. Conn. 2003) (rights of property owners in zoning disputes); In re Alexander V., 223 Conn. 557, 613 A.2d 780 (1992) (familial relationships as a fundamental constitutional right); Warren v. Dwyer, 906 F.2d 70 (2d Cir. 1990) (submission of qualified immunity question to jury); Gagnon v. Ball, 696 F.2d 17 (2d Cir. 1982) (police bystander liability); Pitchell v. Callan, 13 F.3d 545 (2d Cir. 1994) (color of law); Miller v. Lovett, 879 F.2d 1066 (2d Cir. 1989) (pendent jurisdiction); Dodd v. City of Norwich, 827 F.2d 1 (2d Cir. 1987) (municipal liability); Pouncey v. Ryan, 396 F. Supp. 126 (D. Conn. 1975) (Newman, J.) (collateral estoppel effect of prior conviction); O'Neill v. Krzeminski, 839 F.2d 9 (2d Cir. 1988) (standard for punitive damages); and Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991) (opportunity cost as a factor in attorney fee awards).

He also is an active criminal practitioner. His celebrated cases include the Lorne Acquin mass murder case in Prospect, Connecticut, in 1977 which remains the largest mass murder case ever prosecuted in the State of Connecticut. He represented members of the Black Panther Party in the so-called "New Haven Nine" prosecutions between 1969 and 1971, members of the Black Liberation Army, Los Macheteros, and other controversial cases. He has argued countless appeals in the Connecticut Supreme Court in both criminal law and other areas of the law. He has contributed to the expansion of rights for criminal defendants under the state constitution, going beyond the protections afforded by the federal Bill of Rights. State v. Joyce, 229 Conn. 10, 639 A.2d 1007 (1994).

He takes particular pride in his efforts to reshape and democratize the Connecticut jury system. In 1976, he was the first Connecticut lawyer to challenge in federal court the then common prosecutorial practice of using "peremptory challenges" to remove minorities from juries in criminal cases. United States v. Newman, 549 F.2d 240 (2d Cir. 1977).

Throughout the entire decade of the 1970s and into the 1980s, in a series of state and federal court cases, he fought many court battles to change the method by which Connecticut juries were selected, a complex legacy of the colonial era which produced juries that were disproportionately white, male, middle-aged and suburban. Finally, in 1986, in the companion cases of Alston v. Manson and Haskins v. Manson, 791 F.2d 255 (2d Cir. 1986), he persuaded the United States Court of Appeals to strike down the Connecticut system.

In the cases of State v. Anthony, 172 Conn. 172, 374 A.2d 156 (1976); and State v. Roberson, 173 Conn. 102, 376 A.2d 1087 (1977); he persuaded the Connecticut Supreme Court to prohibit trial court judges from limiting the time lawyers could question prospective jurors during the jury selection process, thereby reducing the danger of biased jurors infecting trials with racial and other prejudices.

One of his most celebrated cases was the New Haven Wiretap Litigation class action in the federal court in Connecticut running from 1977 to 1984, in which he represented more than 1,000 people from all walks of life and strata of society who had been victimized by an unlawful wiretap operation conducted jointly by local police and FBI agents for more than a decade. This litigation resulted in a settlement of over \$1 million, led to significant reforms in the area of personal privacy, and generated a voluminous history of illegal police surveillance of the Black Panther Party which is now archived at Yale's Beineke Library.

He has worked extensively, and sometimes successfully, in cases involving the "false confession syndrome," in which innocent people have confessed to crimes they did not commit. E.g., Miller v. Angliker, 848 F.2d 1312 (2d Cir.), cert. denied, 488 U.S. 890 (1988); State v. LaPointe, 237 Conn. 694, 678 A.2d 942 (1996). He was the first lawyer in the United States to win an acquittal in a criminal case on the ground that the ingestion of prozac caused the criminal behavior. State v. DeAngelo, 2000 WL 973104 (Conn. Super. 2000).

In the civil arena, his cases have significantly expanded the rights of plaintiffs in such fields as the intentional infliction of emotional distress and vexatious litigation [DeLaurentis v. City of New Haven, 220 Conn. 225, 597 A.2d 807 (1991)]; the rights of divorced persons to sue their former spouses for marital torts [Delahunty v. Massachusetts Mutual Life Ins. Co., et al., 236 Conn. 582, 674 A.2d 1290 (1996)]; the right of parents to sue public school systems for educational inadequacies [Bell v. Board of Education, 55 Conn. App. 400, 739 A.2d 321 (1999)]; the rights of gays to equal treatment in child-visitation cases [Zavatsky v. Anderson, 130 F. Supp. 2d 349 (D. Conn. 2001)]; the rights of mentally disabled individuals to be free from coerced psychiatric intervention and police harassment [Hoyer v. DiCocco, 457 F. Supp. 2d 110 (D. Conn. 2006), rev'd ___ F.Appx. ___ (2nd Cir. 2007)]; and the appellate rights of parties in workers compensation cases [Cantoni v. Xerox Corp., 251 Conn. 153, 740 A.2d 796 (1999)]. Other notable appellate cases include Davis v. Margolis, 215 Conn. 408, 576 A.2d 489 (1990) (qualifications for expert witnesses in legal malpractice cases); DeLeo v. Nusbaum, 263 Conn. 588 (2003), which established the "continuous representation rule" for statute of limitations purposes in legal malpractice cases; and Drumm v. Brown, 245 Conn. 657, 716 A.2d 50 (1998), limiting the "exhaustion of tribal remedies" bar to suits against Indian tribes and their leaders.

In recent years, he has devoted considerable energy to protecting the rights of high school girls, who have been the victims of sexual assault or harassment, to fair

treatment by school officials. He has had a lot of success in pursuing litigation for these young women in the federal courts pursuant to Title IX of the Civil Rights Act. His victories have included Doe ex rel. A.N. v. East Haven Board of Education, 430 F. Supp. 2d 54 (D. Conn.), *affirmed* 200 Fed. Appx. 46 (2nd Cir. 2006); Doe ex rel. Doe v. Derby Board of Education, 451 F. Supp. 2d 438 (D. Conn. 2006); and Riccio v. New Haven Board of Education, 467 F. Supp. 2d 219 (D. Conn. 2006).

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Justice for victims, while an important goal of any society that believes in the rule of law, is not always the objective in first position. Sometimes, bad conduct has to be endured in the service of larger goals like protecting the independence of certain officeholders. Or so we think. This paper will consider two such immunities, those of judges and prosecutors, which often arise in the context of police misconduct litigation.

JUDICIAL IMMUNITY

Of the various forms of immunity given to individual actors, the most popular, curiously, is that accorded to judges. Judicial immunity is an ancient common law concept going back at least to the early seventeenth century, Floyd v. Barker, 77 Eng. Rep. 1305 (Star Chamber 1607); and recognized in the United States as “a general principle of the highest importance to the proper administration of justice” in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

The ultimate in judicial immunity may have been reached by the Supreme Court in Mireles v. Waco, 502 U.S. 9 (1991), where Howard Waco, a public defender in Los Angeles County, had failed to appear for the initial call of the morning calendar in the courtroom of Judge Mireles one morning in November of 1989. According to his complaint, the judge ordered deputies to go to the other courtroom where he was appearing and seize him “forcibly and with excessive force” and bring him “by means of unreasonable force and violence” into his courtroom. When that was accomplished, with considerable banging around and injury to the lawyer, Waco sued Mireles. The judge, of course, moved to dismiss on grounds of absolute judicial immunity. The Ninth Circuit was not amused, but the Supreme Court bought it, holding that ordering a lawyer to appear in court is a uniquely judicial function and the fact that the order may have included a directive to beat the lawyer up did not make it any less immune.

Judges still can go too far, however, even after Mireles. Judge Douglas Gonzales did so one night in Baton Rouge, Louisiana, when Thomas Malina made the mistake of sounding his horn and motioning appropriately when he felt the judge was driving too slowly in a congested area. The judge pulled him over, took relevant information, had him arrested and ordered to appear before him in court the following morning. There he issued him a summons for failing to obey the signal of an officer, which he considered himself to be. When Mr. Malina questioned the circumstances of the initial traffic stop, Judge Gonzales held him in contempt and jailed him for five hours. The Fifth Circuit, relying on Mireles, found Judge Gonzales immune for the contempt citation but not immune for the traffic stop. Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993). Compare to this the Second Circuit's holding – pre-Mireles but still (one hopes) good law – in Zarcone v. Perry, 572 F.2d 52 (2nd Cir. 1978), finding no judicial immunity for the night court judge who, dissatisfied with the quality of the coffee being served by a vendor in the court parking lot, had the miscreant hauled before him in handcuffs and summarily convicted him of contempt of court.

A judge is not a judge when she leaves her jurisdiction. Thus, issuance of an arrest warrant for crimes committed outside the judge's jurisdiction is actionable under Section 1983. “For a judge to assume authority outside the geographic bounds of his office is the kind of clear judicial usurpation which cannot be condoned by any grant of immunity. No public policy would be served by granting immunity for such arrogant excesses of authority.” Maestri v. Jutkofski, 860 F.2d 50, 53 (2nd Cir. 1988). Compare this case to Tucker v. Outwater, 118 F.3d 930 (2nd Cir. 1997), in which a judge failed to comply with certain state law procedural requirements in jailing for failure to post bond a defendant charged with a motor vehicle violation. In Tucker, the Second Circuit acknowledged that the judge may have acted unlawfully but that any absence of jurisdiction was not so obvious that she must have known about it.

The distinction drawn by the cases in this area is between those in which the judge's action “was in error, was done maliciously, or was in excess of his authority,” where there is immunity, and actions in “clear absence of all jurisdiction,” where there is no immunity. Stump v. Sparkman, 435 U.S. 349, 356-57, 360 (1978). This is somewhat reminiscent of the “shocks the conscience” test – we can't exactly draw a bright line, but we know it when we see it.

Judges typically perform functions not directly related to “the paradigmatic judicial act...the resolution of a dispute between parties who have invoked the jurisdiction of the court.” Morrison v. Lipscomb, 877

F.2d 463, 465 (6th Cir. 1989). The farther from that role the judge gets, the less likely she is to have judicial immunity. See DePiero v. City of Macedonia, 180 F.3d 770 (6th Cir. 1999); Cameron v. Seitz, 38 F.3d 264 (6th Cir. 1994) (Boggs, J.). Thus, such actions as terminating an employee are not immunized, Forrester v. White, 484 U.S. 219, 229-30 (1988); Meek v. County of Riverside, 183 F.3d 962 (9th Cir. 1999); Nunez v. Davis, 169 F.3d 1222 (9th Cir. 1999); nor is employment discrimination, Duffy v. Wolle, 123 F.3d 1026, 1034 (8th Cir. 1997); and raping employees, job applicants and litigants (literally rather than figuratively) is not immunized. Archie v. Lanier, 95 F.3d 438 (6th Cir. 1996). Helping parties in the preparation of criminal complaints which later will be adjudicated before him, however, qualifies as at most a mere figurative rape of the person later charged, and thus is immunized. Barnes v. Winchell, 105 F.3d 1111 (6th Cir. 1997). Similarly, swearing out an application for a warrant to arrest a person for committing a crime in the judge's court even if false and malicious is protected by judicial immunity. Brookings v. Clunk, 389 F.3d 614 (6th Cir. 2004). Obviously, a judge is immune to liability for issuing a search warrant without probable cause. Fernandez v. Alexander, 419 F. Supp. 2d 128 (D. Conn. 2006). But when the judge goes beyond that and issues statements to the news media denouncing the person thus prosecuted, she is not immune. Barrett v. Harrington, 130 F.3d 246, 260-61 (6th Cir. 1997).

For a time, even judges who had absolute immunity could be sued for prospective injunctive relief. Pulliam v. Allen, 466 U.S. 522 (1984). Pulliam, however, was overruled by the Federal Courts Improvement Act of 1996, which provided that injunctions could not be issued against judicial officers based upon actions or inaction in a judicial capacity unless a declaratory judgment had been violated or such relief was unavailable.

Decisions like Mireles tempt every defendant to argue that, while he may not be wearing a robe, he still is at least a "quasi-judge" and entitled to the same license. *E.g.*, Wang v. New Hampshire Board of Registration in Medicine, 55 F.3d 698 (1st Cir. 1995) (individual members of board and board's attorney entitled to either judicial or prosecutorial immunity even for malicious and corrupt acts); Montero v. Travis, 171 F.3d 757 (2nd Cir. 1999) (parole board commissioner who presided over parole revocation hearing entitled to quasi-judicial immunity); Scotto v. Almenas, 143 F.3d 105 (2nd Cir. 1998) (parole officers who threatened to initiate parole revocation proceedings and signed arrest warrant were entitled to quasi-judicial immunity, but parole officer who recommended issuance of warrant was not); Hili v. Sciarrotta, 140 F.3d 210 (2nd Cir. 1998) (New York state

probation officers entitled to quasi-judicial immunity); Rodriguez v. Weprin, 116 F.3d 62 (2nd Cir. 1997) (court clerk who allegedly delayed plaintiff's appeal was performing a judicial function and thus was immune); Young v. Selsky, 41 F.3d 47 (2nd Cir. 1994) (director of Office of Special Housing and Inmate Disciplinary Programs for N. Y. Dept. of Correctional Services denied right to claim quasi-judicial immunity); Tulloch v. Coughlin, 50 F.3d 114 (2nd Cir. 1995) (prison disciplinary officer – same result); Dorman v. Higgins, 821 F.2d 133, 136-39 (2nd Cir. 1987) (federal probation officer entitled to quasi-judicial immunity for actions in moving for probation revocation); Hughes v. Long, 242 F.3d 121 (3rd Cir. 2001) (court-appointed custody evaluator in family court proceedings has quasi-judicial immunity); Clay v. Allen, 242 F.3d 679 (5th Cir. 2001) (court clerk has quasi-judicial immunity for setting excessive bail bond); Turner v. Houma Municipal Fire and Police Civil Service Board, 229 F.3d 478 (5th Cir. 2000) (municipal fire and police civil service board members not entitled to immunity); Davis v. Bayless, 70 F.3d 367 (5th Cir. 1995) (court-appointed receiver granted judicial immunity from suit after he conducted a search of plaintiff's premises for assets); O'Neal v. Mississippi Board of Nursing, 113 F.3d 62 (5th Cir. 1997) (state nursing board members who conduct adjudicatory license revocation hearings are immune); Collyer v. Darling, 98 F.3d 211 (6th Cir. 1996) (state personnel board members are absolutely immune for their adjudicative acts); Richman v. Sheahan, 270 F.3d 430 (7th Cir. 2001) (sheriff's deputies ordered by the court to restrain a person not entitled to quasi-judicial immunity for restraining him to the point of death); Crenshaw v. Baynerd, 180 F.3d 866 (7th Cir. 1999) (members of Indiana Civil Rights Commission entitled to quasi-judicial immunity for actions dismissing a complaint); Wilson v. Kelkhoff, 86 F.3d 1438 (7th Cir. 1996) (prison review board members who revoked plaintiff's supervised release got quasi-judicial immunity, but correction department employee was not); Martin v. Hendren, 127 F.3d 720 (8th Cir. 1997) (police officer carrying out judge's order to handcuff plaintiff and remove her from courtroom was immune); Anton v. Getty, 78 F.3d 393 (8th Cir. 1996) (parole commissioner, hearing examiner and officers charged with illegally delaying parole release were entitled to quasi-judicial immunity, but parole case manager and supervisors were not); Robinson v. Freeze, 15 F.3d 107 (8th Cir. 1994) (bailiff claimed he was acting under judge's orders - remanded for further evidence on the point); Mishler v. Cliff, 191 F.3d 998 (9th Cir. 1999) (Board of Medical Examiners entitled to quasi-judicial immunity for actions respecting physician's license); Roland v. Phillips, 19 F.3d 552 (11th Cir. 1994) (sheriff and deputies allowed to claim quasi-

judicial immunity for following judge's orders); Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994) (mediator allowed to claim quasi-judicial immunity); Sanchez v. Doyle, 254 F. Supp. 2d 266 (D. Conn. 2003) (Arterton, J.) (police officer entitled to quasi-judicial immunity for setting excessive bail bond); DeRosa v. Bell, 24 F. Supp. 2d 252 (D. Conn. 1998) (Arterton, J.) (public health officials who summarily suspended plaintiff's day care license not entitled to quasi-judicial immunity); Poe v. Massey, 3 F. Supp. 2d 176 (D. Conn. 1998) (Chatigny, J.) (probation officer who prepared a presentencing report for the court receives quasi-judicial immunity); Gyadu v. Workers Compensation Commission, 930 F. Supp. 738 (D. Conn. 1996) (workers' compensation review board protected by quasi-judicial immunity).

In one interesting Second Circuit case, a prosecutor sued for making a telephone call to the police to instruct them to hold an unarraigned arrestee on an unreasonably high bail bond was denied prosecutorial immunity for his alleged actions, since that is not a proper activity for a prosecutor, but granted quasi-judicial immunity for the same thing. Root v. Liston, 444 F.3d 127 (2nd Cir. 2006).

PROSECUTORIAL IMMUNITY

If quasi-judicial immunity is unavailable, the next rung down the immunity ladder is to call yourself a quasi-prosecutor and seek immunity under Imbler v. Pachtman, 424 U.S. 409 (1976), or Burns v. Reed, 500 U.S. 478 (1991). Such defendants generally look to Butz v. Economou, 438 U.S. 478 (1978), which allowed quasi-prosecutorial immunity for an administrative functionary. Nevertheless, such attempts often fail as they did in Dobosz v. Walsh, 892 F.2d 1135 (2nd Cir. 1989), where a police chief claimed he was really a prosecutor when he persecuted a police officer for having cooperated with an FBI investigation of organized crime and civil rights violations inside the Bridgeport Police Department. One case where it did work was Spear v. Town of West Hartford, 954 F.2d 63 (2nd Cir. 1992), where the court held that a municipal attorney had absolute quasi-prosecutorial immunity for his decisions in causing the municipality to bring suit against a group of anti-abortion activists. Another successful effort was one made by a district attorney's investigator who was sued for Franks v. Delaware violations in preparation of an arrest warrant application. Roberts v. Kling, 104 F.3d 316 (10th Cir. 1997).

An area in which the issue of quasi-prosecutorial immunity is getting a great deal of attention has to do with social workers in child protection

agencies who handle family or juvenile court matters in which parents face loss of the custody of their minor children. The Third, Fourth, Seventh and Ninth Circuits have granted such immunity in at least some cases. See Ernst v. Child and Youth Services of Chester County, 108 F.3d 486 (3rd Cir. 1997); Vosburg v. Department of Social Service, 884 F.2d 133 (4th Cir. 1989); Millspaugh v. County Department of Public Welfare, 937 F.2d 1172 (7th Cir. 1991) (limited to social worker's in-court testimony); Myers v. Contra Costa County Department of Social Service, 812 F.2d 1154 (9th Cir.) *cert. denied*, 484 U.S. 829 (1987). The D.C. Circuit has granted it to non-prosecutor attorneys working for the government who initiate such proceedings. Gray v. Poole, 243 F.3d 572 (D.C. Cir. 2001). The Eighth and Tenth Circuits and the District of Connecticut, however, have rejected such immunity claims. Whisman v. Rinehart, 119 F.3d 1303, 1308-09 (8th Cir. 1997); Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990); Williams v. Hauser, 948 F. Supp. 164 (D. Conn. 1996). See the dissent of Justices Thomas and Scalia in Hoffman v. Harris, 511 U.S. 1060 (1994). In the Sixth Circuit, the issue is to be decided on a case-by-case basis much the way courts do it when dealing with real prosecutors. "The analytical key to prosecutorial immunity...is advocacy – whether the actions in question are those of an advocate....[S]ocial workers are absolutely immune only when they are acting in their capacity as legal advocates – initiating court actions or testifying under oath – not when they are performing administrative, investigative, or other functions." Holloway v. Brush, 220 F.3d 767, 775 (6th Cir. 2000) (Boggs, J.). In another Sixth Circuit case, Vakilian v. Shaw, 335 F.3d 509 (6th Cir. 2003), the court denied quasi-prosecutorial immunity to a prosecutor's investigator alleged to have testified falsely to the factual basis for a criminal complaint before a judicial officer.

So far as prosecutors themselves are concerned, sometimes they are immune and sometimes they are not. Typically, the line is drawn at the entrance to the courtroom, more or less, so that traditional litigative activities are protected but those involving office administration, investigation or press relations tend to be held not immune. See Schrob v. Catterson, 948 F.2d 1402 (3rd Cir. 1991); Liffiton v. Keuker, 850 F.2d 73, 76 (2nd Cir. 1988) (a prosecutor who obtained and employed illegal wiretaps, conducted an unauthorized investigation and issued an improper subpoena was not immune); Milstein v. Cooley, 257 F.3d 1004 (9th Cir. 2001) (prosecutors immune for securing indictment and arrest warrant but not for acquiring known false statements, filing crime report against witness, and investigative activities); Spurlock v. Thompson, 330 F.3d 791 (6th Cir. 2003) (prosecutor was immune for knowingly presenting perjured

testimony at trial but not from threatening the witness after the trial had been completed). Prosecutorial immunity was denied in a case involving the sale of seized horses. DiCesare v. Stuart, 12 F.3d 973 (10th Cir. 1993). Immunity also was denied to an assistant district attorney for his decision to have a robbery victim make face-to-face identifications of the perpetrators while failing to provide the victim with police protection, resulting in death. The prosecutor got off on other grounds, however. Ying Jing Gan v. City of New York, 996 F.2d 522 (2nd Cir. 1993). In Dory v. Ryan, 25 F.3d 81 (2nd Cir. 1994), the court held that a prosecutor enjoyed full immunity for allegedly suborning perjury in one of his criminal trials; but that he was not entitled to any immunity at all for conspiring with one or more non-prosecutors to present the same or similar perjury. In Kalina v. Fletcher, 522 U.S. 118 (1997), immunity was denied to a prosecutor who had prepared a materially false certificate of probable cause in support of a search warrant. A prosecutor was granted absolute immunity for his decision to file a criminal complaint and seek an arrest warrant, and for his presentation of those materials to a judicial officer; but was denied absolute immunity (he got off on qualified immunity grounds) for his role in the preliminary investigation and his order that the plaintiffs be held on extortion charges. Manetta v. Macomb County Enforcement Team, 141 F.3d 270 (6th Cir. 1998). A prosecutor was granted immunity for using peremptory jury challenges in a racially discriminatory manner. Esteves v. Brock, 106 F.3d 674 (5th Cir. 1997). A county attorney was granted immunity for ex parte communications with a judge and for attempting to influence the testimony of witnesses at a related hearing, but was denied immunity for events which transpired when he was meeting with a witness because that fell within the investigatory aspect of his job rather than the advocacy aspect. Storck v. Suffolk County Dept. of Social Services, 62 F. Supp. 2d 927 (E.D.N.Y. 1999) (Wexler, J.) A prosecutor is entitled to immunity for knowingly presenting false testimony at a hearing, because that is in his role as an advocate; but he is denied immunity for coercing that testimony in the first place, because that is in his role as an investigator. Zahrey v. Coffey, 221 F.3d 342, 346-47 (2nd Cir. 2000) (*dicta*). Prosecutors are not immune from suit for deliberate indifference in failing to train, supervise and educate the police officers who routinely testified as witnesses in criminal cases handled by their office if that deliberate indifference proximately caused perjury that led to the plaintiff's wrongful imprisonment. That would be so because such conduct would have fallen within the administrative or investigative aspects of the prosecutor's job rather than the advocacy aspect. Carter v. City of Philadelphia, 181 F.3d 339 (3rd Cir. 1999). Failing to investigate

properly, and advising the police that probable cause already existed so they need investigate no further, were investigative functions and administrative functions, respectively, and therefore not immune. Prince v. Hicks, 198 F.3d 607 (6th Cir. 1999). A prosecutor's action in refusing to release evidence while an appeal is pending are an aspect of her role as an advocate and therefore immune. Parkinson v. Cozzolino, 238 F.3d 145 (2nd Cir. 2001).

In Buckley v. Fitzsimmons, 509 U.S. 259 (1993), the Supreme Court further refined the modifications of Imbler v. Pachtman, *supra*, which it had made in Burns v. Reed, *supra*. According to the allegations of the Section 1983 complaint, State's Attorney Fitzsimmons made up his mind that Buckley had murdered an 11-year-old child. Determined to nail him for the crime, Fitzsimmons shopped around until he found a witness (the legendary and unlamented Louise Robbins, Ph.D.) willing to swear that a footprint found at the scene of the crime was Buckley's. Knowing that this evidence was bogus – Robbins was notorious for testifying all over North America that she could identify not only the unique shoe which left footprints but the precise person who was wearing the shoe at the time – Fitzsimmons nevertheless presented it to a grand jury and eventually, many months later, obtained an indictment which he announced at a press conference in which he falsely accused Buckley of the crime. Among Buckley's claims against the prosecutor were (1) that he had knowingly manufactured the Robbins testimony and (2) that he had falsely accused Buckley at the press conference. Fitzsimmons persuaded a divided Seventh Circuit that both these things were protected by Imbler immunity. When Burns modified the rule by making it clear that prosecutors who advise the police during investigations are not immune for those actions, the Seventh Circuit on remand stuck to its guns. The Supreme Court, however, held that absolute prosecutorial immunity was not available for either activity. On remand, however, the Seventh Circuit held that mere preparation of perjured testimony is not a constitutional tort until that testimony is presented in court, which this testimony was not. Likewise, the mere holding of a press conference does not give rise to a Section 1983 cause of action. Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir.1994), *cert. denied*, 513 U.S. 1085 (1995).

A prosecutor is absolutely immune from accusations that he fabricated evidence used at trial, withheld exculpatory evidence, suborned perjury and attempted to intimidate the plaintiff into accepting a guilty plea. Peay v. Ajello, 470 F.3d 65 (2nd Cir. 2006). The fact that a prosecutor is alleged to have acted from improper personal motives, rather than in the exercise of

her office, is irrelevant to the question whether absolute prosecutorial immunity attaches. Only when the prosecutor acts in the clear absence of all prosecutorial jurisdiction is her immunity lost. Shmueli v. City of New York, 424 F.3d 231 (2nd Cir. 2005).

In Kalina v. Fletcher, 522 U.S. 118 (1997), the Supreme Court adhered to its distinction between traditional prosecutorial functions and other functions in affording absolute immunity for the preparation and filing of charging documents like an information and a motion for an arrest warrant, but denied immunity for executing a certification for determination of probable cause, which could have been done by anybody. Similarly, the Third Circuit held in Kulwicki v. Dawson, 969 F.2d 1454 (3rd Cir. 1992), that actions of a prosecutor in the course of interviewing witnesses prior to the return of an indictment were not protected by absolute prosecutorial immunity. There, a prosecutor interviewing a witness encouraged the witness to accuse his political rival, Attorney Kulwicki, of involvement in a baby-selling operation. The lawyer was arrested, etc., although eventually acquitted. Politics is rough stuff in Crawford County, PA.

Giving legal advice to the police generally is not covered by prosecutorial immunity. Mendenhall v. Goldsmith, 59 F.3d 685 (7th Cir. 1995). Thus, when a prosecutor participated in a police investigation of child abuse allegations, and advised the police that there was probable cause to arrest the plaintiff, he was not immune; but he was immune from his decisions to initiate the prosecution and to withhold Brady material; and whether or not he was immune for his actions in conducting videotaped interviews was held too close to call without further evidence. Hill v. City of New York, 45 F.3d 653 (2nd Cir. 1995).

A prosecutor thus was not immune for arranging for police to conduct two searches of the law office of the defense attorney in a case he was prosecuting, although the special master who supervised the search under state law got the benefit of quasi-judicial immunity for his role. Gabbert v. Conn., 131 F.3d 793 (9th Cir. 1997). A prosecutor received absolute immunity for his actions in conducting civil forfeiture proceedings in court, but none for his subsequent conduct with respect to the management and retention of property after the forfeiture trial, including his delay in returning property ordered restored to the owner. Reitz v. County of Bucks, 125 F.3d 139 (3rd Cir. 1997).

A prosecutor's misconduct in initiating prosecution, conducting plea negotiations, manipulating bail and influencing sentencing all were immunized; but his actions after the dismissal of all criminal charges in arranging to keep the plaintiff unlawfully in state custody for an additional

three weeks were administrative in nature and not immune. Pinaud v. County of Suffolk, 52 F.3d 1139 (2nd Cir. 1995). A prosecutor was granted absolute immunity for suborning perjury before a grand jury and maliciously indicting and prosecuting the plaintiff's lawyer in order to prevent him from continuing to represent the plaintiff. These are traditional prosecutorial activities. Lyles v. Sparks, 79 F.3d 372 (4th Cir. 1996). However, a prosecutor was not entitled to immunity for intimidating and coercing witnesses and disclosing grand jury testimony to unauthorized persons. Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995). And a prosecutor who demanded that the plaintiff swear to her innocence on a bible in a church as a condition of dropping charges that she had sexually abused her son was not entitled to immunity, since, as the court held, no government official has authority to require a religious act and no official has absolute immunity when he acts in the clear absence of all jurisdiction. Doe v. Phillips, 81 F.3d 1204 (2nd Cir. 1996).

A prosecutor's orchestration of a sting operation, and his subsequent statements to the press about the resulting arrest, were not covered by prosecutorial immunity although they did receive the benefit of qualified immunity on the particular facts of the case. Smith v. Garretto, 147 F.3d 91 (2nd Cir. 1998). Signing an affidavit for an arrest warrant knowing that there was no probable cause for issuance of the warrant is outside the scope of prosecutorial immunity. Morley v. Walker, 175 F.3d 756 (9th Cir. 1999); Jones v. Cannon, 174 F.3d 1271, 1281-82 (11th Cir. 1999). However, when the prosecutor instructed somebody else to prepare the affidavit, and it was not alleged that he was personally vouching for the truth of the contents of the affidavit, he was held to be acting only as an advocate and thus did receive the benefit of prosecutorial immunity. Sheehan v. Colangelo, 27 F. Supp. 2d 344 (D. Conn. 1998).

In Suffolk County, New York, Democratic officials sued the Republican District Attorney alleging that he had engaged in a series of politically-motivated prosecutions of Democrats, without probable cause and motivated by purely political considerations. In a decision that probably comforts our current Attorney General, the Second Circuit held that a political motivation for a groundless prosecution does not remove the prosecutor's absolute immunity. "Certainly, racially invidious or partisan prosecutions, pursued without probable cause, are reprehensible, but such motives do not necessarily remove conduct from the protection of absolute immunity." Bernard v. County of Suffolk, 356 F.3d 495, 504 (2nd Cir. 2004).

The Eighth Circuit has held that a prosecutor is absolutely immune for his role in putting together a cooperation agreement with a drug defendant recruited to investigate a lawyer and for his decision to reward that defendant with a dismissal of his charges in exchange for the lawyer's scalp; he was not immune, however, for any legal advice he may have given that informer. Anderson v. Larson, 327 F.3d 762 (8th Cir. 2003). In the District of Connecticut, however, a prosecutor is absolutely immune for giving advice to a Bail Commissioner relevant to setting an excessive bail bond. Sanchez v. Doyle, 254 F. Supp. 2d 266 (D. Conn. 2003) (Arterton, J.)

In the Ninth Circuit, a prosecutor is not absolutely immune for violating his constitutional duty under Giglio v. United States, 405 U.S. 150 (1972), to establish procedures for assuring that exculpatory information will be made available to all prosecutors involved so there will be no danger of inadvertent failure to disclose it in a timely manner to defense counsel. Such activity is an administrative, rather than a prosecutorial, function. Goldstein v. Long Beach, 481 F.3d 1170 (9th Cir. 2007). Also in the Ninth Circuit, prosecutors are not immune from demanding that a particular officer be barred from participating in an investigation or from telephoning prospective employers of that officer to sabotage his job prospects; but they are immune for refusing to prosecute any cases in which that officer is involved. Botello v. Gammick, 413 F.3d 971 (9th Cir. 2005). Prosecutors are entitled to absolute immunity for investigative work performed after probable cause has been established or a prosecution initiated, but not for investigative work done before that time. Genzler v. Longanbach, 410 F.3d 630 (9th Cir. 2005). A prosecutor would be entitled to absolute immunity for bringing a bail revocation motion but not for swearing out an affidavit in support of that motion. Cruz v. Kauai County, 279 F.3d 1064 (9th Cir. 2002).

In the Eleventh Circuit, prosecutors are absolutely immune for knowingly presenting perjured testimony and for framing innocent defendants. Rowe v. City of Fort Lauderdale, 279 F.3d 1271 (11th Cir. 2002).

Even if a prosecutor is immune to a damages action, she may not necessarily ignore her constitutional obligations. "A prosecutor may not simply raise the shield of official immunity and continue to act in an unconstitutional manner without fear of judicial orders to the contrary....A plaintiff may therefore seek injunctive relief to guard against continuing (or future) governmental misconduct." Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 267 (10th Cir. 1994), quoting Supreme Court of

Virginia v. Consumers Union of America, Inc., 466 U.S. 719, 737 (1980) (“If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed....”).

There has never been a time in our history when there was a greater need to limit the extent of prosecutorial immunity and afford greater opportunities to the victims of overly-zealous prosecutors to obtain civil redress. The increasing reluctance of the judiciary to impose meaningful sanctions upon prosecutorial abuse, coupled as it has been with the belief of the Justice Department and other prosecutors that government lawyers are not bound by the ethical considerations that apply to mere lawyers, see, *e.g.*, United States ex rel. O’Keefe v. McDonnell Douglass Corp., 132 F.3d 1252 (8th Cir. 1998); In the Matter of Howes, 940 P.2d 159 (N.M. 1997); leaves the civil sanctions of section 1983 litigation as virtually the only potentially viable means of reining in prosecutors who have forgotten – if they ever heard about – the Supreme Court’s admonition in Berger v. United States, 295 U.S. 78, 88 (1935), that a prosecutor “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....He may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” See Burns, Dennis and Garcia-Bokor, Curbing Prosecutorial Excess: A Job for the Courts and Congress, THE CHAMPION, July, 1998, p. 12.