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Prosecutorial Immunity

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PROSECUTORIAL IMMUNITY

*Erwin Chemerinsky**

Honorable George C. Pratt:

It is time to move ahead. Our next subject is prosecutorial immunity.

Professor Erwin Chemerinsky:

My task is to discuss prosecutorial immunity.¹ In order to discuss this, it has to be put in the broader context of absolute immunities.² I am going to focus my remarks on three questions discussing absolute prosecutorial immunity.³

The first question is, what are the general principles of absolute immunity that also apply to prosecutors? Second, when can prosecutors claim absolute immunity as opposed to just receiving qualified immunity? And third, from a practical perspective, how is the distinction between absolute and qualified immunity for prosecutors applied?

There are few important general principles of prosecutorial immunity that I can identify. First, it's important to remember that absolute immunity applies to the task, not to the office. Judges have absolute immunity for their judicial acts, but not for their administrative acts. Legislators have absolute immunity for legislative action, but they only have qualified immunity for their

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¹ Erwin Chemerinsky, *14th Annual Section 1983 Civil Rights Litigation*, Vol. 2, 14 PRACTICING LAW INST. 753, 765 (1998).

³ *Id.* at 761. While the Supreme Court has held that individuals performing certain functions have absolute immunity from liability under § 1983, the Court explains that "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* (quoting *Burns v. Reed*, 500 U.S. 478, 487 (1991)).

administrative acts. Prosecutors have absolute immunity for prosecutorial acts, but not for investigative, and not for administrative acts.

There are several implications from this basic statement that absolute immunity attaches to the task and not to the office. One implication is that others who perform the task can also claim the immunity. So, for example, lower courts are increasingly finding that those besides judges who are performing judicial tasks are entitled to absolute judicial immunity. For example, *O'Neill v. Mississippi Licensing Board*⁴ says that because a state licensing board for nurses is really performing an adjudicatory task, especially in considering license revocation, that board receives absolute judicial immunity.⁵ *Collyer v. Darling*,⁶ another lower court case, stated that where a personnel board is adjudicating, that board is entitled to absolute judicial immunity.⁷ The notion is that since the immunity goes to the task, it does not matter who the individual is performing it.

The same is true with regard to prosecutors. For example, there are a number of cases that say when social workers are functioning essentially as prosecutors, they are entitled to absolute prosecutorial immunity. *Ernst v. Children and Family Services*,⁸ and *Thompson v. SCAN Volunteers*,⁹ both were instances where courts said that since the social workers were functioning as prosecutors, the task was prosecutorial in nature, and they are entitled to absolute immunity. There are some cases that go the other way regarding

³ 113 F.3d 62 (5th Cir. 1997).

⁵ *Id.* at 64. This case involved a § 1983 action brought by nurses against a State Board of Nursing, its executive director, and board members for violation of Fourteenth Amendment due process rights by Board's revoking nurses' licenses to practice nursing. *Id.*

⁶ 98 F.3d 211 (6th Cir. 1996).

⁷ *Id.* at 218-19. A state employee brought claims for violation of procedural due process under 42 U.S.C. §§ 1983 and 1985(3) against various defendants, including members of the State Personnel Board of Review, in either their individual or both their official and individual capacities.

⁸ 108 F.3d 486 (3rd Cir. 1997).

⁹ 85 F.3d 1365 (8th Cir. 1996).

social workers, allowing only qualified immunity, and I have listed them as well.¹⁰

Marty Schwartz this morning pointed out to me a recent decision of the Fourth Circuit that follows this in another context. The case is *Jean v. Collins*,¹¹ where the question was the liability of police officers for not turning exculpatory material over to a defendant. The Fourth Circuit (en banc) said that police officers have absolute immunity for failure to turn exculpatory material over to a criminal defendant, because police in this capacity are performing a prosecutorial task and are therefore entitled to absolute immunity.¹²

Jean v. Collins also addressed the issue of the liability of the police for not turning exculpatory material over to the prosecutor.¹³ There, the Fourth Circuit said it was qualified immunity, and that because it was not clearly established law the police were not to be held liable.¹⁴ But I use the case as another illustration of how courts say that when somebody is performing the task, they are entitled to the immunity.

The other implication of this to which I have already alluded to, is then prosecutors are performing non-prosecutorial tasks, they are only entitled to qualified immunity. If the immunity goes to the task and not to the office, then that explains why the prosecutor who is in a non-prosecutorial role just gets good faith immunity, where the judge in the non-judicial role gets good faith immunity, and that application carries across the board.

The second general principle that is important here, is that often the availability of absolute immunity depends on the relief sought. This is certainly true with regard to prosecutors. Prosecutors have absolute immunity as to claims for money damages, but prosecutors have no immunity as to claims for injunctive relief. Indeed *Ex*

¹⁰ See *supra* note 1 at 756 (citing *White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997)); *Defore v. Premore*, 86 F.3d 48 (2d Cir. 1996).

¹¹ 155 F.3d 701 (4th Cir. 1998), *petition for cert. filed*, 67 USLW 3409 (U.S. Dec. 16, 1998) (No. 98-980), *reh'g en banc*, 107 F.3d 1111 (4th Cir. 1997).

¹² *Jean v. Collins*, 155 F.3d 701 (4th Cir. 1998).

¹³ *Id.* at 707.

¹⁴ *Id.* at 708.

*parte Young*¹⁵ long ago held that prosecutors can be sued for injunctive relief. One of the key ways around the Eleventh Amendment is to sue the attorney general in federal court for injunctive relief. To give prosecutors absolute immunity here would create an enormous obstacle to applying federal law in the states.

Legislators, in contrast, have always been thought to have both immunity from suits from money damages and from suits for injunctive relief.¹⁶ For judges the story is even more complicated. In *Pulliam v. Allen*,¹⁷ the United States Supreme Court said that judges have absolute immunity in suits from money damages, but no immunity in suits for injunctive relief. If the judge is successfully sued for injunctive relief, the judge could be liable for attorneys fees under Section 1983. The judges did not like this very much and they tried very hard to lobby Congress for a statute to amend Section 1983 to create absolute judicial immunity to suits for injunctions as well. When the Republicans gained control of Congress, finally the judges had a receptive audience. Indeed, two years ago a statute was adopted, which is quoted within the materials,¹⁸ that now gives judges absolute immunity in suits for both injunctive relief and for money damages. There is only a very narrow exception if the judge violates prior to declaring judgment.¹⁹

The final general principal to remember is that absolute immunity is a judicial creation, not a legislative requirement. There is nothing in Section 1983 that speaks of immunities at all. All immunities whether they are absolute or qualified are a product of judicial decisions.²⁰ In discussing prosecutorial immunity, the

¹⁵ 209 U.S. 123 (1908).

¹⁶ *Clinton v. Jones*, 117 S. Ct. 1636, 1643 (1997).

¹⁷ 466 U.S. 522 (1984).

¹⁸ Federal Courts Improvement Act of 1996, Pub. L. No. 104-317 (b)-(c), 110 Stat. 3487.

¹⁹ *Id.*

²⁰ See e.g., *Briscoe v. LaHue*, 460 U.S. 325 (1983) (the Court held, "the debates of the 42nd Congress do not support petitioners' contention that Congress intended to provide a . . . damages remedy against police officers or any other witnesses."). *Id.* at 341; *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (determining that qualified, not absolute immunity existed when a prosecutor makes statements to the press which are outside the context of initiating a prosecution). *Id.* at 278; *Burns v. Reed*, 500 U.S. 478 (1991)

crucial distinction is between prosecutorial and investigative. It is important to recognize that since the Court has created this distinction, the Court, not the legislature, gets to decide its contours. Congress always has the ability to overrule the Court by amending Section 1983 as it did for absolute immunity for judges to injunctions,²¹ but otherwise the Court is creating the immunities.²²

When the Court creates absolute immunities, it says it is looking both to history and function. The Supreme Court says Section 1983 was written against the backdrop of common law immunity.²³ It looks to the nature of the immunities as they existed in common law when Section 1983 was adopted and if an official had absolute immunity pre-Section 1983 then, that official has it now.²⁴

I am skeptical about this historical analysis. For example consider judicial immunity as articulated in *Stump v. Sparkman*,²⁵ in which the Supreme Court held that judges have absolute immunity in suits for money damages.²⁶ The Supreme Court based this, in large-part, on history. Professor Randy Block wrote an article in the *Duke Law Journal*,²⁷ in which he went to a survey of every state that

(holding that the state prosecutor's appearance at a probable cause hearing was protected by absolute immunity). *Id.* at 492. The Court in *Burns*, however, did not extend absolute immunity "to the prosecutorial function of giving legal advice to the police." *Id.* at 496; *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding prosecutor is immune from a civil suit for damages under §1983 when initiating a prosecution and presenting the state's case.) *Id.* at 431; *Kalina v. Fletcher*, 118 S. Ct. 502 (1997) (affirming its prior holdings that have recognized that "the prosecutor is fully protected by absolute immunity when performing the traditional functions of advocate."). *Id.* at 510; *Stump v. Sparkman*, 43 U.S. 349 (1978) (holding that judge's erroneous approval of a petition for sterilization still rendered him absolutely immune from damages). *Id.* at 364.

²¹ See *supra* note 17 and accompanying text.

²² See *supra* note 19 and accompanying text.

²³ *Briscoe*, 460 U.S. at 331. "The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law." *Id.*

²⁴ *Id.* at 334.

²⁵ 435 U.S. 349 (1978).

²⁶ *Id.* at 364.

²⁷ J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L. J. 879, 899 (November 1980).

existed in 1871, and which ones did and did not have absolute immunity for judges. He found only 13 of 37 states had absolute judicial immunity in 1871, yet the Supreme Court cites to those 13, ignoring the fact that the majority of states rejected absolute immunity.

I think the functional analysis is more important to the Court. The Court says that for those officers who are likely to be subjected to repeated suits, there is a need for protection. For those officers where the suits are likely to chill the excess of discretion, there is a necessity for protection, and that is why the Court has said the President has absolute immunity in carrying out the tasks of the office. The Supreme Court said police officers testifying as witnesses have absolute immunity. In *Brisco v. Lahue*,²⁸ the Court enumerated the same factors which lead it to that conclusion. The same factors support its conclusion with regard to prosecutors.

The reason I am emphasizing this is that there are likely to be many other officers who want to claim prosecutorial immunity. I mentioned social workers; I think the arguments there, in part, will be about history, but even more, they are about function. Is this a kind of function that warrants absolute immunity; is it a prosecutorial task or an investigative task, or an administrative one?

With those general principles in mind, I want to go to the second of the three questions I said at the beginning, which is, when are prosecutors entitled to absolute as opposed to qualified immunity? The only way that I can answer this question is to tell you that there have been four Supreme Court cases. All four cases say prosecutors have absolute immunity for prosecutorial acts, but only qualified immunity for investigative and administrative ones, and if you litigate in this area you simply need to rely on these four cases for guidance.

Let me go through them one at a time. The first is *Imbler v. Pachtman*.²⁹ *Imbler* involved a prosecutor who knowingly used perjured testimony. As a result of the perjured testimony, an innocent individual was convicted and served nine years in prison. Only after the true culprit was found did the individual learn that

²⁸ 460 U.S. 325 (1983).

²⁹ 424 U.S. 409 (1976).

his conviction was obtained because of the use of perjured testimony. A suit was brought against the prosecutor.

The United States Supreme Court for the first time articulated this distinction between absolute immunity for prosecutorial acts and qualified immunity for investigative or administrative acts. The Supreme Court said using testimony at trial is quintessentially a prosecutorial action so the prosecutor had absolute immunity to a suit for money damages.³⁰ The Court said that there may be other actions against the prosecutor, perhaps a criminal prosecution,³¹ bar disciplinary action, an administrative action within the office, but no civil suit for money damages could be brought, even though an innocent person spent nine years in prison.³²

The next time that the Supreme Court turned to this distinction was in *Burns v. Reed*,³³ a case of particularly colorful facts. It starts with a tragedy. A woman awoke to discover that both of her children had been shot; thankfully both recovered. The police focused on the idea that the mother shot her own children. They gave the mother a lie detector test and she passed. They gave the mother a voice stress test and she passed. The police saw some writing in lipstick on the mirror. Someone had written: "I have taken from you what you love the most." Thereafter, the police had the handwriting analyzed; it turned out that the writing in the mirror was made by a lefthanded person and Kathy Burns, the mother, was a righthanded person. She was completely exonerated of any wrongdoing. Still, the police had no suspect. Then a police officer developed a theory, maybe Kathy Burns had a multiple

³⁰ *Id.* at 428 (holding that "only . . . in initiating a prosecution and in presenting the state's case, the prosecutor is immune from a civil action for damages under § 1983."). *Id.*

³¹ *Id.* at 429 (stating, "[t]his court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also placed beyond the reach of the criminal law."). *Id.*

³² *Id.* at 415. Imbler was released in 1970 after having been convicted in 1961 and sentenced to death. *Id.* at 412. In 1964, Imbler was successful in having the death sentence overturned on other grounds not pertinent to this case. *Id.* at 414.

³³ 500 U.S. 478 (1991).

personality disorder and one of her alternative personalities was responsible for the shootings.

At that time, according to the Seventh Circuit opinion, the police officer had a friend, a grocery store clerk who had just completed a course in hypnosis. The police officer called the prosecutor, Rick Reed, and asked if he could have Kathy Burns hypnotized to see if she had multiple personality disorder. The prosecutor approved the hypnosis and Kathy Burns was hypnotized by this grocery store clerk. Apparently at one point she referred to herself with another name in the third person. Based solely on this, the prosecutor went to court the next day for an arrest warrant. The prosecutor never disclosed the hypnosis to the judge. Additionally, it was never disclosed, for example, that Kathy Burns was told under hypnosis to fully answer all questions put to her by the police. Kathy Burns spent four months in custody, temporarily lost custody of her children and lost her job. No evidence of any wrongdoing was ever found against Kathy Burns and she was released.

Kathy Burns sued the police officers and the prosecutor. The prosecutor claimed absolute immunity. This went to the United States Supreme Court.³⁴ The Supreme Court said prosecutors have absolute immunity for prosecutorial acts. Requesting an arrest warrant is a prosecutorial act so there could be no liability, but the Supreme Court said prosecutors have only qualified immunity for investigative acts.³⁵ The Supreme Court said authorizing hypnosis was investigative in nature so for that purpose he had only qualified immunity.³⁶

The third of these cases was *Buckley v. Fitzsimmons*.³⁷ Buckley involved a high profile murder case in a county outside of Chicago. Shortly before the election for district attorney, the incumbent held a press conference, and announced the arrest of the murderer in the

³⁴ *Id.* at 491 (holding that “absolute immunity . . . serves the policy of protecting the judicial process”). *Id.* at 492.

³⁵ *Id.* at 493.

³⁶ *Id.* at 496. The Court determined that the respondent had not met his burden of showing that an extension of absolute immunity to the prosecutorial function of giving legal advice to the police as to the use of hypnosis was justified. *Id.*

³⁷ 509 U.S. 259 (1993).

case and claimed that the person placed under arrest had committed these high profile crimes. After a long time in jail, it turned out that there was no evidence to link the defendant to the crime. The defendant was released and brought a civil suit against the prosecutor.

There were two grounds for the civil suit against the prosecutor. One concerned the press conference, the other concerned alleged fabrication of evidence. There was a boot print at the murder scene, and the prosecutor went to a number of experts to see if those experts would link the defendant to the boot print. One expert after another said there is no indication that this boot print came from this defendant. Finally, the prosecutor found an expert in North Carolina who said: not only can I match the shoe to the defendant, but I can tell you that only the defendant could have left this boot print. She said that she had a method where she could tell by the distribution of weight who exactly left a footprint. She said that each of us has a unique way of walking, and from looking at a footprint I can tell you that was this defendant. The prosecutor found no one else who would say this, but this was the key evidence that was used to keep the defendant in custody.

Subsequently, all charges were dismissed. Thereafter, a suit was filed against the prosecutor, not only for the press conference, but also for shopping for a new witness and fabricating evidence. The Supreme Court unanimously held that prosecutors have only qualified immunity for what they say at press conferences.³⁸ The Supreme Court said such conduct is not prosecutorial in nature, is not even investigative, at most, it is administrative or public-relations in nature.³⁹ Furthermore, the Court stated in a five to four

³⁸ *Id.* at 277.

³⁹ *Id.* at 278. The Court stated:

The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions. Statements to the press may be an integral part of the prosecutor's job but . . . a prosecutor . . . is in no different position than other executive officials who deal with the press, and . . . qualified immunity is the form for them.

Id.

decision, with regard to fabricating evidence, that it is only protected by qualified immunity. When a prosecutor is alleged to fabricate evidence, the prosecutor is/ engaged in an investigative task, not a prosecutorial task.⁴⁰ Here the prosecutor went shopping for an expert witness to say what the prosecutor wanted, and that is the kind of investigative task usually performed by police officers, not prosecutors, so for this, only qualified immunity.⁴¹

I find this part of the holding troubling in trying to come up with a clear line between what is prosecutorial and what is investigative. Why does a prosecutor go to get an expert witness; to use that person at trial. Well, why then is shopping for the expert witness to be regarded as investigative rather than prosecutorial in nature?

The fourth of the cases is *Kalina v. Fletcher*.⁴² *Kalina* involved a prosecutor who sought an arrest warrant. In addition to going to the court for the arrest warrant, the prosecutor submitted a certificate, an affidavit in support of the arrest warrant, and it turns out the arrest warrant had some false information. The defendant was accused of having stolen computers from the school, and one of the allegations was that the defendant had never otherwise been in the school. The reason this was important is that the defendant's fingerprint was found on a partition in the school, so if the fingerprint was there and the defendant had never been there, that is highly implicative. However, it turned out the defendant had properly been in the school. He had been there to install partitions, so the prosecutors' lie here was quite important. Additionally, the certificate said that a clerk or salesperson in a computer store could identify the defendant as somebody coming in to price computers. This was important because the defendant was accused of stealing computers from the school, and if the defendant brought a computer into the computer store to ask what it was worth, it would be indicative of guilt. It turns out this allegation was also false.

⁴⁰ *Id.* at 276 (holding "[a] prosecutor may not shield his investigative work in the aegis of absolute immunity."). *Id.*

⁴¹ *Id.* "When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same." *Id.*

⁴² 522 U.S. 118 (1997).

The Supreme Court once more reaffirmed the distinction between absolute immunity for prosecutorial acts, and qualified immunity for investigative acts. The Supreme Court says seeking an arrest warrant is prosecutorial, that is protected by absolute immunity, but filling out and submitting the certificate or affidavit, that is investigative in nature, and therefore, that it is protected by only qualified immunity.⁴³ To me, this makes the distinction between absolute and qualified immunity for prosecutors ever more difficult. Why is seeking the arrest warrant protected by absolute immunity, but submitting the affidavit in support of that very same arrest warrant supported only by qualified immunity? It is this difficulty, distinguishing between prosecutorial and investigative tasks that takes me to the third and final question that I want to address, and that is, from a practical perspective, how do courts distinguish what is prosecutorial and what is investigative?

Hopefully, it is obvious from the cases I have reviewed that there is no litmus test. There is no easy rule that I can articulate for you as to what is prosecutorial or what is investigative, but I would suggest to you that three factors seem to explain what the Supreme Court and the lower courts have done. First, is the action by the prosecutor in court or out of court? If the action is in court, it is presumptively prosecutorial; if the action is out of the court, it is presumptively nonprosecutorial. Although it is not an absolute rule, it explains a lot. In *Imbler v. Pachtman*,⁴⁴ the prosecutor's testimony was in court. In *Burns v. Reed*,⁴⁵ going for the arrest warrant was in court, but authorized hypnosis was out of court. In, *Buckley v. Fitzsimmons*,⁴⁶ all the actions, the press conference and

⁴³ *Id.* at 510.

No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even then the person who makes the constitutionally required 'Oath or Affirmation' is a lawyer, the only function that she persons in giving sworn testimony is that of a witness.

Id.

⁴⁴ 424 U.S. 409 (1976).

⁴⁵ 500 U.S. 478 (1991). See *supra* notes 32-35 and accompanying text.

⁴⁶ 509 U.S. 259 (1993). See *supra* notes 36-40 and accompanying text.

shopping for experts, was out of the court. *Kalina v. Fletcher*⁴⁷ does not entirely fit because submitting the arrest warrant was in court, but so was the affidavit.

I consider three lower court cases with regard to prosecutorial immunity that also fit within this question. The first is *Doe v. Philips*,⁴⁸ the Second Circuit case. The prosecutor said to the defendant, "If you will swear on a bible that you didn't commit the offense, I will dismiss all of the charges against you."⁴⁹ The court said asking somebody to swear on a bible outside of court is not a prosecutorial act, prosecutors are not supposed to be administering oaths, prosecutors are not supposed to be determining whether to bring charges on this basis.⁵⁰ So the court rejected both absolute and qualified immunity. I think what is key is that it happened out of the court.⁵¹ Compare it to a couple of others cases I have listed. *Estevens v. Brook*⁵² is a civil suit against the prosecutors for using peremptory challenges in a discriminatory fashion in violation of *Batson v. Kentucky*.⁵³ Prosecutors have absolute immunity for the way they use peremptory challenges at trial. That of course is in court, which helps explain why it is protected by absolute immunity.

When I teach this material, I often raise the question for my students, should a prosecutor's conduct of grand jury proceedings be regarded as prosecutorial or investigative? Often a grand jury is purely investigative. Think of the Whitewater grand jury Kenneth Starr presided over, that seems entirely an investigative grand jury.

⁴⁷ 522 U.S. 118 (1997). See *supra* notes 41-42 and accompanying text.

⁴⁸ 81 F.3d 1204, 1211 (2d Cir. 1996) (affirming no absolute immunity for the prosecutor's conduct "because his demand that Doe swear her innocence on a bible in church was manifestly beyond his authority.").

⁴⁹ *Id.* at 1207.

⁵⁰ *Id.* at 1210-11.

⁵¹ *Id.* at 1211 (stating "[t]he proceeding took place in a church.").

⁵² 106 F.3d 674, 677 (5th Cir. 1997) (holding that because the [prosecutor's] "use of peremptory strikes in a racially discriminatory manner was part of her presentation of the state's case, she is entitled to absolute immunity from personal liability.").

⁵³ 476 U.S. 79, 97 (1986) (stating the Equal Protection Clause "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.").

Other times, when the product is an indictment, then it is prosecutorial. Should the distinction be drawn based on the prosecutors goal with regard to the grand jury? *Smith v. Gribertz*⁵⁴ is a very broad opinion saying that grand juries should be prosecutorial in nature, and when prosecutors are conducting grand jury proceedings they are safeguarded by absolute immunity.⁵⁵ That is one of the factors I think courts look to.

A second factor is, who usually performs the task. If it is a task that is usually performed by the prosecutor, then I think there is a presumption that it is prosecutorial, but if it is a task usually performed by other government officials, then the presumption is that it is nonprosecutorial. I think this explains *Kalina v. Fletcher*.⁵⁶ Usually, it is not prosecutors who submit affidavits or certificates in support of arrest warrants. Usually, police fill out the affidavits. What the Supreme Court was saying in *Kalina*, is when the prosecutor takes over the task generally performed by the police, the prosecutor gets only qualified immunity. In contrast, if it is a task usually performed by the prosecutor, then that explains the situations where the prosecutor gets absolute immunity.

And the third question I think courts often look to is how discretionary is the act for the prosecutor? How much is it a matter of choice for the prosecutor to do it? The less discretion the prosecutor has, the more it is ministerial, the greater presumption is protected by absolute immunity, but the more discretion the prosecutor has, I think the more there is a presumption it is qualified immunity. I think this explains some of the cases. In the context of *Burns v. Reed*,⁵⁷ the prosecutor received qualified immunity on the issue of whether or not to authorize hypnosis. In the context of *Buckley v. Fitzsimmons*,⁵⁸ holding a press conference

⁵⁴ 887 F. Supp. 583, 588 (S.D.N.Y. 1995). The court was unwilling to issue a temporary restraining order, a preliminary injunction, and a permanent injunction "in a pending state court proceeding on the basis of plaintiff's conclusory contention [that the District Attorney is acting without hope of a valid conviction]. *Id.* at 589.

⁵⁵ *Id.*

⁵⁶ 522 U.S. 118 (1997). *See supra* notes 41-42 and accompanying text.

⁵⁷ 500 U.S. 478 (1991). *See supra* notes 32-35 and accompanying text.

⁵⁸ 509 U.S. 259 (1993). *See supra* notes 36-40 and accompanying text.

was purely discretionary. In *Fitzsimmons*,⁵⁹ shopping for the expert witness was discretionary, so I think courts are influenced by how much the choice by the prosecutor was voluntary. Whenever you have multiple factors like this, the courts have a tremendous amount of discretion, and there is inherently going to be this gray area between what is prosecutorial and what is investigative, but this is the most guidance that the Court has given.

⁵⁹ See *supra* notes 36–40 and accompanying text.