Section 1983 and the Limits of Prosecutorial Immunity

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SECTION 1983 AND THE LIMITS OF PROSECUTORIAL IMMUNITY

Hampton v. Hanrahan
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Section 1 of the Civil Rights Act of 1871, presently codified at 42 U.S.C. § 1983, permits any individual to bring a civil action for damages against any person who, acting under color of state law, deprived the individual of rights secured by the United States Constitution and laws. The language of the statute appears to apply without exception to all persons acting under color of state law, regardless of their official position. In 1951, however, the United States Supreme Court, in Tenney v. Brandhove, concluded that Congress had not intended that section 1983 should abrogate official immunities "well grounded in history and reason."

In Tenney, the Supreme Court found an absolute immunity from section 1983 damages liability for state legislators acting in a traditional legislative capacity. The Supreme Court later held judges to be absolutely immune from section 1983 damages liability for acts performed within their judicial jurisdiction. In Imbler v. Pachtman, the Supreme

   Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, 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.

2. Section 1983 also provides for equitable relief. See S. Nahmod, Civil Rights & Civil Liberties Litigation ch. 5 (1979) [hereinafter cited as Nahmod].

3. The United States Supreme Court has held that the "under color" of state law requirement contained in section 1983 is the same as the state action required under the fourteenth amendment. United States v. Price, 383 U.S. 787, 794 n.7 (1966).


5. Id. at 376.

6. Id. at 379. Absolute immunity also has been extended to regional legislators. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).


7. Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967). The Supreme Court in Sparkman reiterated the distinction between acts in excess of jurisdiction and the clear absence of all jurisdiction. Only in the clear absence of all jurisdiction, the Court held, will a judge lose his absolute immunity. For a general discussion of judicial immunity, see Rosenberg, Stump v. Sparkman: The Doctrine of Judicial Impunity, 64 Va. L. Rev. 833 (1978); Note,
Court extended absolute immunity to prosecuting attorneys but expressly limited the immunity to a prosecutor's actions in connection with his advocacy function. Imbler did not define the precise limits of the advocacy function, and left open the issue of whether absolute immunity attached to a prosecutor's other functions. Hampton v. Hanrahan presented the United States Court of Appeals for the Seventh Circuit with an opportunity to delineate the outer limits of a prosecuting attorney's absolute immunity from liability for damages under section 1983. The Seventh Circuit dealt with a complex factual situation in Hampton. The litigation which led to the Seventh Circuit's decision was protracted, often sensational, and legally significant in several respects.

This comment will address only the issue in Hampton of the extension of immunity to prosecutors and federal officials in section 1983 suits for damages. First, the comment will examine the development of section 1983 immunities and the difficulties that the multiple roles of a prosecuting attorney present in determining the parameters of prosecutorial immunity. Next, the relevant factual and legal background of Hampton will be examined. This comment will then assess the Seventh Circuit's immunity analysis in Hampton and show that the court correctly refused to extend absolute immunity to federal law enforcement officials, and to a state prosecutor's "publicity campaigns"
and participation in planning police raids. Finally, this comment will demonstrate that the Seventh Circuit's extension of immunity to the prosecuting attorney's actions in connection with the Chicago Police Department's internal investigation was incorrect.

SECTION 1983 AND IMMUNITY

Historical Background

Many of the "persons" who are potential defendants in section 1983 actions were immune from suit for their official activities at common law. Despite the absolute language of section 1983, the United States Supreme Court has extended this traditional immunity to section 1983 suits for damages, holding many officials either absolutely or qualifiedly immune.

Legislative immunity was firmly entrenched at common law and legislators were the first officials to be granted absolute immunity from section 1983 damages liability, in Tenney v. Brandhove. Sixteen years later, in Pierson v. Ray, the Supreme Court extended absolute immu-

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16. 600 F.2d at 631-33.
18. See, e.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (regional legislators held to have absolute immunity from section 1983 actions for damages); Procnur v. Navarette, 434 U.S. 555 (1978) (state prison officials held to have qualified immunity in section 1983 actions for damages); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecuting attorney held to have absolute immunity from section 1983 actions for damages in initiating a prosecution and presenting the State's case); Wood v. Strickland, 420 U.S. 308 (1975) (school officials and school board held to have qualified immunity in section 1983 actions for damages); Scheuer v. Rhodes, 416 U.S. 232 (1974) (governor and executive officials of a state held to have qualified immunity in section 1983 claims for damages); Pierson v. Ray, 386 U.S. 547 (1967) (state judges held to have absolute immunity from section 1983 actions for damages; local police officers held to have qualified immunity in section 1983 actions for damages); Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators held to have absolute immunity from section 1983 actions for damages). For an explanation of the difference between absolute and qualified immunity, see text accompanying notes 40-42 infra.
20. 341 U.S. 367 (1951). Brandhove charged that the contempt proceedings instituted against him by the California Senate after he refused to testify before the Tenney committee were an attempt to prevent his exercise of his first amendment rights. The Supreme Court held that section 1983 created no liability for conduct by legislators in an area where they had traditional power to act.
21. 386 U.S. 547 (1967). Plaintiffs in Pierson were a group of white and black clergymen who
nity from section 1983 damages liability to state judges. Both the Tenney and Pierson opinions relied heavily on the historical immunity of legislators and judges.\textsuperscript{22}

The immunity of federal officials from suit is based on a separate line of cases. In Spalding v. Vilas,\textsuperscript{23} the United States Postmaster General was sued for circulating a notice which allegedly injured the plaintiff's reputation. The Supreme Court held that even a malicious motive would not render the Postmaster General liable in damages for injury caused by an official act that otherwise was within the scope of his authority.\textsuperscript{24} Barr v. Matteo,\textsuperscript{25} involving a suit against the director of a government agency for malicious defamation, reaffirmed this holding as to federal officials. In Butz v. Economou,\textsuperscript{26} however, the Supreme Court held that the immunity established in Spalding and Barr did not protect a federal official acting in an executive capacity who violated a statutory or constitutional limitation on his authority.\textsuperscript{27} The Court reasoned that in suits for alleged violations of constitutional rights there was no basis for extending greater immunity from liability to federal officials than was extended to their state counterparts in section 1983 cases.\textsuperscript{28} State executive officers had been held to have only a qualified good faith immunity in Scheuer v. Rhodes.\textsuperscript{29} The Court extended the Scheuer standard to school administrators in Wood v. Strickland,\textsuperscript{30} and to prison officials in Procunier v. Navarette.\textsuperscript{31} The Butz Court applied this same qualified, good faith immunity to federal officials performing comparable functions.\textsuperscript{32} Federal officials performing adjudicatory

were arrested when attempting to use a segregated bus terminal waiting room in Mississippi in 1961. The clergymen were convicted by a municipal police justice; on appeal to the county court, the charges were dropped. The clergymen then sued under section 1983 the police judge and the officers who arrested them. The Supreme Court held that a judge was not liable under section 1983 even for an unconstitutional conviction.\textsuperscript{22} See id. at 553-55; 341 U.S. at 372-76.
24. \textit{Id.} at 498.
26. 438 U.S. 478 (1978). The plaintiff in \textit{Butz} sued the Secretary of Agriculture and other federal officials, alleging that by instituting unauthorized proceedings to suspend the registration of his commodity futures commission company the department had violated his constitutional rights. The Supreme Court held that federal officials were not absolutely immune from liability for a willful or knowing violation of plaintiff's constitutional rights.\textsuperscript{27} \textit{Id.} at 495. The plaintiffs in \textit{Barr} alleged defamation, whereas in \textit{Butz} the plaintiff alleged constitutional deprivations. The Court viewed the distinction as crucial.
28. \textit{Id.} at 500. The Court excluded “exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.” \textit{Id.} at 507.
32. 438 U.S. at 508.
functions or functions analogous to those of a state prosecutor in initiating and presenting a case, on the other hand, were held to be entitled to absolute immunity because their state counterparts were immune.33

The most frequently noted reason for extending immunity from section 1983 damage suits is that the immunity is necessary to protect the official’s decision making process.34 Yet to extend absolute immunity to all state officials would negate the very remedy which Congress sought to create through section 1983.35 Thus, the Supreme Court has extended absolute immunity only upon a convincing showing that the immunity serves an important public interest.36 While the early immunity cases gave great weight to the official’s immunity at common law, the analysis in later cases concentrated on the effect that threat of suit would have on the official’s performance of his or her duties.37 In at least one situation, that of high ranking government executives, the Supreme Court refused to extend absolute immunity in section 1983 cases,38 even though such immunity existed at common law.39

The procedural difference between absolute and qualified immunity is significant. Absolute immunity defeats a suit at the outset if the official’s actions were within the scope of his authority.40 The official’s intent and the legality of his acts are irrelevant.41 An official who has only a qualified immunity, however, must establish at trial that he acted with a good faith belief in the constitutionality or legality of his action and that the belief was reasonable under the circumstances.42

33. Id. at 513.
34. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 435 (1976). The Court in Scheuer reasoned that the immunity of government officers rested on two mutually dependent rationales: the injustice, particularly in the absence of bad faith, of subjecting an officer to liability where his position requires him to exercise discretion; and the danger that the threat of liability would deter the officer’s willingness to exercise his office with the decisiveness and judgment required by the public good. 416 U.S. at 240.
Prosecutorial Immunity

Historically, the exercise of quasi-judicial discretion by an official was one of the major criteria courts used in determining whether the official should be immune from suit. In *Gregoire v. Biddle*, the United States Court of Appeals for the Second Circuit summed up the reasoning behind this immunity: "[I]t has been thought in the end 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."

In *Yaselli v. Goff*, an early federal case which refers to "quasi-judicial" immunity, the Second Circuit examined the history of immunity in Anglo-American law and concluded that a Special Assistant to the Attorney General of the United States was immune from civil suit for malicious prosecution, regardless of the existence of malice on his part, or of the fact that the initial case against the plaintiff had resulted in a jury verdict of not guilty. Most appellate courts adopted this position.

The United States Supreme Court addressed the section 1983 immunity of the prosecutor in *Imbler v. Pachtman*. The Court held that a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution was absolutely immune from suit under section 1983 for alleged deprivations of constitutional rights. Imbler sued the state prosecutor who had successfully prosecuted him for murder, alleging that the prosecutor knowingly used perjured testimony and suppressed material evidence.

43. Spalding v. Vilas, 161 U.S. 483, 498 (1896); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), aff'd per curiam, 275 U.S. 503 (1927).
44. 177 F.2d 579 (2d Cir. 1949).
45. Id. at 581.
46. 12 F.2d 396 (2d Cir. 1926), aff'd per curiam, 275 U.S. 503 (1927).
47. 12 F.2d at 399-405. The court stated that a United States Attorney exercises important judicial functions and performs much the same role as a grand jury in deciding whether a particular prosecution should be instituted or followed up. If a prosecuting attorney knows that he may have to defend an action for malicious prosecution in case of a failure to convict, his decision may be influenced by that consideration. Id. at 404.
48. Id. at 406.
49. Id. at 398.
52. Id. at 430-31.
53. Imbler had been freed by a federal district court after filing a habeas corpus petition. Id. at 415-16.
54. Id. at 415.
The Supreme Court noted in *Imbler* that the historical immunity of a prosecutor is based on the same policies that underlie the traditional immunities of judges and grand jurors acting within the scope of their duties.\(^5\) The Court concluded that these public policy considerations warranted absolute immunity for prosecutors under section 1983 as well.\(^6\) These considerations include concern that harassment by unfounded litigation would deflect the prosecutor's energies from his duties and the possibility that threat of suit would influence the prosecutor to shade his decisions rather than exercise independent judgment.\(^5\) The holding in *Imbler* was expressly limited to situations in which the alleged misconduct of the prosecutor occurred as part of the initiation of a prosecution or the presentation of the State's case.\(^5\) The Court did not decide whether those aspects of a prosecutor's responsibilities which cast him in the role of administrator or investigator, rather than advocate, require immunity.\(^5\)

Justice White concurred in the *Imbler* holding that a prosecutor is absolutely immune from suit for damages under section 1983 for knowing use of perjured testimony in the presentation of the government's case.\(^6\) He disapproved, however, of the majority decision in *Imbler* to extend to the prosecutor a broader immunity from section 1983 damage suits than the common law immunity from malicious prosecution and defamation suits.\(^6\) Justice White disagreed with the majority opinion

\(^5\) *Id.* at 422-23. The Court pointed out that some courts have remarked on the fact that judges, grand jurors, and prosecutors all exercise discretionary judgment on the basis of evidence presented to them. *Id.* at 423 n.20.

\(^6\) *Id.* at 424.

\(^5\) *Id.* at 423. As Justice White pointed out in his concurring opinion in *Imbler*, no one will sue a prosecutor for an erroneous decision not to bring charges. If suits for malicious prosecution were permitted, the prosecutors' inclination would always be to not bring charges. *Id.* at 438 (White, J., concurring).

The Court listed additional reasons for applying the common law immunity to section 1983 suits: 1) the danger that suits which survived a pleadings challenge would pose to an honest prosecutor; 2) the danger of virtual retrial of criminal offenses in the section 1983 suit; 3) the adverse effect on the criminal justice system that limiting the prosecutor's discretion in conducting the trial and presenting the evidence could have; and, 4) the availability of other remedies to discipline prosecutors who abuse their discretion. *Id.* at 424-27.

\(^5\) *Id.* at 431.

\(^9\) *Id.* at 430. In a footnote the Court said:

*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 administrator 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.*

*Id.* at 431 n.33.

\(^6\) *Id.* at 440 (White, J., concurring).

\(^6\) *Id.* at 441.
insofar as it implied an absolute immunity from suits for constitutional violations other than those based on the prosecutor’s decision to initiate proceedings or his actions in bringing information or argument to the court.\textsuperscript{62} He emphasized his particular disapproval of extending absolute immunity to the prosecutor in suits charging unconstitutional suppression of evidence.\textsuperscript{63} Such an extension of immunity, Justice White reasoned, would injure the judicial process and interfere with Congress’ purpose in enacting section 1983.\textsuperscript{64}

The Supreme Court’s analysis in \textit{Imbler} addressed the prosecutor’s immunity in his role as advocate.\textsuperscript{65} The Court recognized that the lines between advocacy, administration, and investigation are not always clear.\textsuperscript{66} The two-part question still unresolved after \textit{Imbler} was whether the administrative or investigative functions of the prosecutor also were entitled to immunity\textsuperscript{67} and where the line separating advocacy from investigation or administration should be drawn.\textsuperscript{68} The Seventh Circuit addressed these questions in \textit{Hampton v. Hanrahan}.\textsuperscript{69}

\textbf{HAMPTON \textit{v.} HANRAHAN}

\textit{Facts and Procedure}

On December 4, 1969, fourteen Chicago police officers detailed to the Special Prosecution Unit\textsuperscript{70} of the Cook County State’s Attorney’s Office raided an apartment occupied by nine members of the Black Panther Party. The officers were equipped with a search warrant for

\begin{itemize}
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id. The absolute immunity traditionally extended to prosecutors in defamation cases is designed to encourage them to bring information to the court which will resolve the case. “It would stand this immunity rule on its head, however, to apply it to a suit based on a claim that the prosecutor unconstitutionally withheld information from the court.” \textit{Id.} at 442-43 (emphasis in original).
\item \textsuperscript{64} Id. at 433. The majority in \textit{Imbler} reasoned that as a practical matter, distinguishing knowing use of perjured testimony from the deliberate withholding of exculpatory information would be impossible. Because of the difficulty in distinguishing the two, the majority reasoned that denying absolute immunity to suppression claims would eviscerate the absolute immunity extended to claims of using perjured testimony. \textit{Id.} at 431 n.34.
\item \textsuperscript{65} Id. at 430-31.
\item \textsuperscript{66} Id. at 431 n.33.
\item \textsuperscript{67} The courts which have considered this question appear to be answering it negatively. \textit{See, e.g.}, Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979); Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), \textit{cert. denied}, 437 U.S. 904 (1978).
\item \textsuperscript{68} \textit{See, e.g.}, Henzel v. Gerstein, 608 F.2d 654 (5th Cir. 1979); Helstocki v. Goldstein, 552 F.2d 564 (3d Cir. 1977); Hall v. Flathead County Attorney, 478 F. Supp. 644 (D. Mont. 1979). \textit{See NAHMOD, supra} note 2, at 218-26 for a thorough discussion of \textit{Imbler} and the questions still unanswered after the decision.
\item \textsuperscript{69} 600 F.2d 600 (7th Cir. 1979), \textit{cert. denied}, 48 U.S.L.W. 3780 (U.S. June 2, 1980).
\item \textsuperscript{70} Hereinafter referred to as SPU.
\end{itemize}
"sawed-off shotguns and other illegal weapons." Upon the police entry into the apartment, there was "an enormous burst of gunfire." Two of the apartment's occupants, Black Panther leaders Fred Hampton and Mark Clark, died as a result of the gunfire. Four of the remaining seven occupants were wounded.

Edward Hanrahan had been elected Cook County State's Attorney in November of 1968, the same month that a Black Panther Party chapter opened in Chicago. In the spring of 1969, Roy Mitchell, an FBI agent assigned to the Chicago office's Racial Matters Squad, contacted Richard Jalovec, an Assistant State's Attorney appointed and made chief of the SPU by Hanrahan. Mitchell informed Jalovec that the FBI had an informant, William O'Neal, within the Chicago Black Panthers. An FBI covert counterintelligence program designed to "neutralize" a variety of political organizations, including the Black Panther Party, was employing O'Neal to disrupt local Black Panther programs. During the summer and fall of 1969, tension between the Black Panthers and Chicago law enforcement agencies escalated.

About December 1, 1969, Jalovec received from Mitchell a detailed floor plan of the apartment in which Hampton and several other Black Panther members were living, together with a list of weapons allegedly present in the apartment. Daniel Groth and Jalovec met with Hanrahan on December 3, and gave him the information on the Black Panthers which they had received from the FBI. Jalovec told Hanrahan that they intended to obtain a search warrant for Hampton's

71. 600 F.2d at 605.
72. Id.
73. Id.
74. Id.
75. Id. at 608-10.
76. Id. at 609. The informant, O'Neal, was recruited by Mitchell. O'Neal joined the Chicago chapter of the Black Panther Party as soon as it opened and soon became the local chief of security for the Panthers.
77. Id. at 608. The program, called "Cointelpro" was set up in 1967, according to an FBI memorandum, to "expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalist, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder." NATIONAL LAWYERS GUILD, COUNTERINTELLIGENCE: A DOCUMENTARY LOOK AT AMERICA'S SECRET POLICE 12 (3d ed. 1980) (emphasis deleted) [hereinafter referred to as COUNTERINTELLIGENCE].
78. 600 F.2d at 608-09.
79. Id. at 610.
80. Id. at 611. This information may or may not have come only from O'Neal; testimony from plaintiffs and defendants at trial was in disagreement on this point, as on most others. Id. at 611-12.
81. Groth was one of the Chicago police officers assigned to the SPU. He was next in command after Jalovec. Id. at 610.
82. Id. at 611-12.
apartment, which Jalovec and Groth then drafted. After the warrant was issued, Jalovec approved Groth’s decision to serve the warrant at 4:00 a.m. Jalovec then met with Hanrahan and explained the final plan for the search of the apartment.83

At 4:30 a.m. on December 4, seven police officers guarded the apartment’s exterior while seven more entered from the front and rear doors.84 A factual dispute exists as to the activity inside the apartment, both during and immediately after the raid.85 It is undisputed, however, that after Hampton had been shot several times in the head and body, he was dragged dead from his bedroom; Clark also died as a result of the gunfire.86

After the raid, the police took the four wounded occupants of the apartment to a hospital and incarcerated the three other survivors in Cook County Jail.87 Later on the day of the raid, Hanrahan issued a statement to the press in which he adopted the raiders’ version of the incident, although he was aware of conflicting stories.88

On December 8, Hanrahan called a second press conference, reiterating the raiders’ account. At his request, the Chicago Tribune published an exclusive interview with the raiders on December 11. The interview contained photographs provided by the State’s Attorney’s Office showing holes in walls and doors of the apartment which were represented by the State’s Attorney’s Office as caused by shots from guns fired by the apartment occupants.89 On December 12, a reenactment of the raid was filmed by CBS-TV. The film was edited not by CBS but by the raiders. A set was constructed in the State’s Attorney’s Office and Hanrahan, Jalovec, and the raiders were present during at least part of the filming.90 On December 13, Hanrahan held yet another press conference, in which he again confirmed the accuracy of the of-

83. Id. at 612.
84. All were Chicago police officers detailed to the Cook County State’s Attorney’s Office. Id. at 606. See text accompanying note 70 supra.
85. The apartment’s surviving occupants depicted what occurred as a violent, unprovoked attack on the apartment, and testified at trial that the police officers did not announce their purpose when they arrived at the apartment. The apartment occupants denied that they fired on the police. The survivors further claimed that they were physically and verbally abused by the police in the apartment after the raid. The police officers testified at trial that they were fired upon from within the apartment, after having properly announced their purpose to the occupants while on the apartment porch. The disagreement between the survivors’ testimony and that of the police on the facts of the raid is almost total. 600 F.2d at 613-15.
86. Id. at 605, 615.
87. Id. at 616.
88. Id.
89. Id.
90. Id. at 616-17.
NOTES AND COMMENTS

Officers' story, despite questions from the media.91 Throughout this period, the Chicago FBI agents kept in touch with Jalovec and Groth.92

On December 12, Hanrahan asked the Chicago Police Superintendent to initiate an internal police investigation. The police officers placed in charge of the investigation were informed by their superiors that the inquiry would be limited in scope, designed to justify the raiders' use of force, and that all of the raiders' statements were to be identical.93 Groth was shown the prearranged questions and answers taken from the official police report and then was asked to give his account of the raid. Jalovec and two other Assistant State's Attorneys were then shown the questions and answers. The raiders then met with two of the Assistant State's Attorneys and were also shown the prepared material and Groth's statement. The Assistant State's Attorneys were present at the Internal Investigation Division interviews.94

In January of 1970, a Cook County grand jury returned an indictment for attempted murder and aggravated battery against the seven survivors of the raid. Hanrahan was responsible for the presentation of evidence to the grand jury.95

In March, Hanrahan learned that an independent ballistics expert had conducted extensive tests and discovered that the shells previously identified by a Chicago Police ballistics analyst as being fired from inside the apartment had actually been fired from police officers' weapons. The Chicago Crime Laboratory repeated their tests, also firing the raiders' weapons for the first time, and confirmed the independent expert's findings.97 On May 4, 1970, Hanrahan informed a federal grand jury convened to investigate possible violations of the apartment occupants' civil rights that the charges against the surviving Black Panthers would be dropped.99

The seven survivors and the mothers of Fred Hampton and Mark

91. "Id."
92. "Id. During this period, the FBI agents also requested a bonus payment for O'Neal, who had provided them with the information given to Hanrahan's office before the raid. "Id. at 617; Counterintelligence, supra note 77, at 44.
93. 600 F.2d at 617.
94. Hereinafter referred to as IID.
95. 600 F.2d at 617.
96. "Id. at 618.
97. "Id. at 619. Chicago Crime Laboratory personnel had incorrectly identified shells which actually came from police officers' guns as coming from those of the apartment occupants. None of the police officers' guns were tested by the laboratory in its initial ballistics tests. "Id. at 618.
98. "Id. at 618.
99. "Id. at 620. The indictments against the survivors were dropped by Hanrahan four days after his appearance before the federal grand jury. No indictments were returned and the federal grand jury was discharged on May 15, 1970. "Id."
Clark filed four separate civil rights actions in 1970 against a number of city and state officials, including Hanrahan, Jalovec, the police officers involved in the raid, and the police officers involved in the IIT investigation. These actions were consolidated in an amended complaint filed in the federal district court in 1972.100

The trial court dismissed the complaint against all the defendants except the fourteen police officers who actually participated in the raid. Judge Perry held that the plaintiffs had failed to state a cause of action and further held that the State's Attorneys were protected by quasi-judicial immunity.101 The United States Court of Appeals for the Seventh Circuit reversed in Hampton v. City of Chicago,102 holding that the plaintiffs' allegations respecting the planning and execution of the raid were sufficient to state a claim under sections 1983 and 1985(3).103 The Seventh Circuit further held that the alleged participation of the prosecuting attorneys in the planning and execution of the raid was not quasi-judicial conduct, and therefore was entitled to only the qualified immunity granted to police officers.104

In December of 1974, plaintiffs amended their complaint, joining

100. Plaintiffs alleged that defendants, in planning and executing the raid and conspiring to illegally arrest, falsely imprison, and maliciously prosecute the survivors, committed acts under color of state law which deprived plaintiffs of the rights guaranteed by the first, fourth, fifth, eighth, ninth, thirteenth, and fourteenth amendments, and protected by 42 U.S.C. §§ 1983, 1985(3), and 1986. Plaintiffs alleged that the defendants acted both individually and in conspiracy with each other to accomplish the deprivation.

101. Hampton v. City of Chicago, 339 F. Supp. 695 (N.D. Ill. 1972), rev'd, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974). Judge Perry held that, in their quasi-judicial character and function, Hanrahan and his assistants were entitled to the same common law immunity as that given the judiciary. Further, he stated that plaintiffs did not present sufficient allegations that the defendants engaged in investigatory conduct other than that necessary to perform their quasi-judicial function. Judge Perry held that the plaintiffs' allegations were conclusory and lacked a factual showing of malice or lack of good faith. Id. at 701.

102. 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974). The Seventh Circuit affirmed the district court's dismissal of the case against the City of Chicago, Cook County, the mayor, and the superintendent of police. 484 F.2d at 611. The Seventh Circuit limited its review to whether the plaintiffs alleged any sufficient claim for relief, and therefore did not discuss the State's Attorneys' post-raid activity. See id. at 606.

103. 42 U.S.C. § 1985(3) (1976) states, in pertinent part:
If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

104. 484 F.2d at 608-09. The court relied on the distinction made in Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965):

[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?

Id. at 536.
four federal defendants connected with the Chicago FBI office, including Mitchell and O’Neal. \(^{105}\) Trial began in January of 1976 and lasted approximately eighteen months. At the conclusion of the plaintiffs’ evidence, Judge Perry granted the defendants’ motion for a directed verdict for all except the seven police officers directly participating in the shooting. \(^{106}\) The case against the seven remaining defendants was submitted at its conclusion to a jury, which deadlocked. Judge Perry then directed verdicts in favor of the remaining defendants. \(^{107}\)

**Reasoning of the Court**

On appeal, the Seventh Circuit reversed on most of the counts, holding that the lower court erred in directing verdicts for the defendants. \(^{108}\) The Seventh Circuit held that the plaintiffs had presented sufficient evidence to support their claims of individual liability and conspiracy under sections 1983, 1985(3), and 1986. \(^{109}\) The court found that the plaintiffs had established causes of action for the defendants’ pre-raid and post-raid conduct, as well as for the deprivation of rights which occurred during the raid. \(^{110}\) The Seventh Circuit then addressed the absolute immunity claimed by the state and federal officials for their actions in connection with the raid. \(^{111}\)

The Seventh Circuit stated that requests from public officials for immunity for their official wrongdoing must be treated with circumspection. \(^{112}\) The court reasoned that the claims of Hanrahan and his

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105. 600 F.2d at 606.
106. *Id.* The federal district court ruled that the plaintiffs had not established a prima facie case of conspiracy or joint venture.
107. *Id.*
108. *Id.* at 608. The court held that a motion for a directed verdict must be denied if the evidence shows that reasonable persons might draw differing conclusions therefrom, which was the case in *Hampton.*
109. *Id.* at 620-26. The court held that the state officials supplied the requisite color of state law, thus making the entire alleged conspiracy actionable under section 1983, including the part played by the federal defendants. *Id.* at 623. See note 1 supra.
110. 600 F.2d at 625-26. Plaintiffs contended that the failure of Hanrahan and Jalovec to properly supervise the SPU officers created another cause of action under 1983. The Seventh Circuit agreed, holding that the plaintiffs’ allegation of intentional or reckless disregard for their rights in the failure to supervise comprised a cause of action. *Id.* at 626 & n.25.
111. *Id.* at 631.
112. *Id.* The court stated:
three assistants to absolute immunity under *Imbler* were misplaced. *Imbler*, according to the Seventh Circuit, held only that a prosecutor has absolute immunity in initiating a prosecution and presenting the State's case. The *Hampton* court noted that the Supreme Court in *Imbler* left standing several federal appellate court decisions which focused on the nature of the prosecutor's complained of activity rather than his status. These decisions held that certain actions by state prosecutors are entitled only to qualified immunity, indicating that when a prosecutor is performing investigative rather than advocacy functions, he is not entitled to absolute immunity.

The Seventh Circuit reiterated its ruling in *Hampton v. City of Chicago* that prosecutors have no greater claim to complete immunity for their alleged participation in the planning and execution of a raid of this sort than do the police officers acting under their direction. The Seventh Circuit held that neither *Imbler v. Pachtman*, decided after *Hampton v. City of Chicago*, nor the evidence produced at trial led to a different decision. The court concluded that defendants' pre-raid activity was not within the meaning of advocacy as used in *Imbler*.

The defendants' claims to immunity for their post-raid conduct presented a more complicated question. The Seventh Circuit found that Hanrahan's decision to file charges, his presentation of evidence to the grand jury, and his decision to drop the charges were all part of his duties in initiating and presenting the State's case, and clearly were absolutely immune under *Imbler*. The defendants' post-raid publicity activity, however, which may have encouraged both pre-trial prejudice to the plaintiffs and the alleged coverup, was held not protected by ab-

We should be hesitant to expand the scope of official activity which, from the perspective of a victim seeking civil redress, stands beyond the constraints of the Constitution. For us to hold that all of the actions of the defendants in this case should be immune from liability as a matter of law would require us to expand radically the parameters which the Supreme Court has set for the doctrine of official immunity. This we are unwilling to do.

*Id.*

113. *Id.* at 631. The Seventh Circuit also cited Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), holding that the prosecutors' immunity was limited to advocacy functions.
114. 600 F.2d at 631.
115. Guerro v. Mulhearn, 498 F.2d 1249, 1256 (1st Cir. 1974); Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973), *cert. denied*; 415 U.S. 917 (1974); Robichaud v. Ronan, 351 F.2d 533, 536-37 (9th Cir. 1965).
117. 600 F.2d at 632.
119. 600 F.2d at 632.
120. *Id.* The court held that any Assistant State's Attorneys who aided Hanrahan in these phases of his post-raid activity were also absolutely immune from civil liability for their conduct.
solute immunity.\textsuperscript{121}

The \textit{Hampton} court concluded that nothing in \textit{Butz v. Economou}\textsuperscript{122} or \textit{Imbler} suggested that a state prosecutor's publicity activity should be absolutely immune from civil liability. The Seventh Circuit noted that the Supreme Court in \textit{Butz} justified its extension of absolute immunity to "quasi-judicial" actions of administrative prosecutors partly because of the scrutiny which a prosecutor's discretionary decisions receive in the adjudicatory process.\textsuperscript{123} This scrutiny was absent in the publicity context of \textit{Hampton}.\textsuperscript{124} The Seventh Circuit likewise read \textit{Imbler} as not protecting a prosecutor's "publicity campaigns."\textsuperscript{125} The court reasoned that allowing only a qualified immunity for a prosecutor's public relations activities would undermine neither the prosecutor's judgment in bringing and conducting suits nor the functioning of the criminal justice system as a whole.\textsuperscript{126} Accordingly, only a qualified immunity applied to Hanrahan's post-raid press conferences and to the participation of Hanrahan and Jalovec in the Chicago Tribune interview and the CBS-TV reenactment.\textsuperscript{127}

In \textit{Hampton v. City of Chicago}, the Seventh Circuit had held that the Assistant State's Attorneys were entitled to only qualified immunity from liability for their participation in the Chicago Police Department IID investigation.\textsuperscript{128} After \textit{Imbler}, however, the Seventh Circuit had found absolute immunity in \textit{Heidelberg v. Hammer}\textsuperscript{129} for prosecutors who allegedly cooperated with local police in falsifying a line-up report and destroying police tapes of incoming phone calls in connection with a murder trial. The court found that the conduct of the Assistant State's Attorneys in \textit{Hampton} during the IID investigation was essentially indistinguishable from that held to be absolutely immune in \textit{Heidelberg}.\textsuperscript{130} The Seventh Circuit accordingly held the Assistant State's Attorneys to be absolutely immune from liability for their actions in connection with the IID investigation.\textsuperscript{131}

\textsuperscript{121} \textit{Id.}
\textsuperscript{122} 438 U.S. 478 (1978). The Seventh Circuit relied on the \textit{Butz} holding that an official whose public relations activity allegedly violated specific statutory and constitutional guarantees is not covered by the absolute immunity extended in \textit{Barr v. Matteo}, 360 U.S. 564 (1959).
\textsuperscript{124} 600 F.2d at 633.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.} at 609. The court said that, in substance, the plaintiffs were alleging the deliberate preparation of perjured testimony. \textit{Id.} at 609 n.9.
\textsuperscript{129} 577 F.2d 429, 432 (7th Cir. 1978).
\textsuperscript{130} 600 F.2d at 633.
\textsuperscript{131} \textit{Id.}
The federal defendants in *Hampton* also claimed immunity for their actions.\(^\text{132}\) Section 1983 requires that the complained of action be performed under color of *state* law.\(^\text{133}\) Therefore, federal officials are not amenable to suit under section 1983 unless they conspire with a person who provides the requisite color of state law.\(^\text{134}\) Once plaintiffs show a conspiracy,\(^\text{135}\) the court must face the question of the federal defendants’ immunity.

The Seventh Circuit dismissed the federal defendants’ reliance on *Barr v. Matteo*\(^\text{136}\) for their claim to absolute immunity. The court reiterated the Supreme Court’s statement in *Butz v. Economou*\(^\text{137}\) that *Barr* does not afford protection to a federal official who has exceeded an express statutory or constitutional limitation on his authority.\(^\text{138}\) Because plaintiffs had presented evidence to support their allegations that the federal defendants violated both constitutional and statutory limitations on their authority, the absolute immunity granted to federal officials in *Barr* did not apply in this case.\(^\text{139}\) The Seventh Circuit noted that *Butz* held that federal officials should receive no more protection from liability for violating an individual’s civil rights than do their state counterparts.\(^\text{140}\) The federal defendants in this case were operating as law enforcement officials investigating potential wrongdoing. The Seventh Circuit noted that *Pierson v. Ray*\(^\text{141}\) established the rule that such activity by state law enforcement officials warrants only qualified immunity. Therefore, the court held that the federal officials in this case were entitled to only qualified immunity.\(^\text{142}\)

The test of qualified immunity on remand, the court said, should be that used in *Procunier v. Navarette*.\(^\text{143}\) If the constitutional right which the defendants allegedly violated was clearly established at the time of the conduct, and if the defendants knew or should have known

\(^\text{132}\) *Id.* at 631.

\(^\text{133}\) *See* Adickes v. Kress, 398 U.S. 144, 150 (1970). *See also* notes 1 and 109 supra.


\(^\text{135}\) *See* note 109 supra.

\(^\text{136}\) 360 U.S. 564 (1959). The Supreme Court held in *Barr* that a federal official who, even maliciously, issues a false and damaging publication, is absolutely immune from liability for libel if the issuance of the publication is within the parameters of his official duties.


\(^\text{138}\) 600 F.2d at 634.

\(^\text{139}\) *Id.*

\(^\text{140}\) *Id.* In *Butz*, the Supreme Court held that, in the absence of congressional direction to the contrary, there was no basis for differentiating between the immunities accorded state and federal officials when sued for the same constitutional violation. *See* text accompanying notes 26-28 supra.

\(^\text{141}\) 386 U.S. 547 (1967).

\(^\text{142}\) 600 F.2d at 634.

\(^\text{143}\) 434 U.S. 555, 562 (1978).
of the right, or knew or should have known that their conduct violated
the constitutional norm, the doctrine of qualified immunity would not
thwart the recovery of damages.144 The United States Supreme Court
in Procunier stated that qualified immunity is not available where the
defendant official has acted with malicious intent to deprive the plain-
tiff of a constitutional right or cause him other injury.145 A determina-
tion of whether the defendants' actions are immune under this test, the
court held, must await retrial.

In a concurring opinion, Chief Judge Fairchild, without explana-
tion, advocated limiting the holding that a prosecutor is not entitled to
absolute immunity while performing “investigative” functions to the
functions of the prosecutor defendants described in Hampton.146

Reasoning of the Dissent

In a separate opinion, Judge Pell147 concurred with the majority
that the directed verdict as to the officers who actually did the shooting
in the raid was improper because of the issue of the possible use of
excessive force.148 Judge Pell dissented, however, as to the reversal of
the trial court's directed verdicts in favor of the remaining defendants.
While Judge Pell admitted that Imbler left open the question of abso-
olute immunity for the administrative and investigative roles of the pros-
ecutor, he reasoned that the Seventh Circuit should extend absolute
immunity to cover the State's Attorneys' conduct in Hampton.149

Judge Pell argued that the prosecuting attorneys' involvement in
public statements and media publicity was of a less egregious nature
than other conduct that has been found to be absolutely immune where
prosecutors were engaged directly in the prosecutorial process. The
conduct here, the dissent reasoned, was so intimately related to the
prosecutorial process that absolute immunity should protect it.150

144. 600 F.2d at 634-35.
145. Id.
146. Id at 649 (Fairchild, J., concurring).
147. In October of 1979, it was revealed that Judge Pell had been an FBI special agent from
1942 to 1945 and a member of an FBI alumni group until 1977. Chicago Sun-Times, October 19,
1979, at 40. This information, while not part of Judge Pell's official biography issued by the clerk
of the court, had been made public previously in Who's Who in America. Plaintiffs moved that
Judge Pell be recused from all further proceedings and that his dissent be stricken. Chicago Law-
yer, November 1979, at 18. The Chicago Lawyer reported that it is standard practice in the Sev-
enth Circuit for recusal motions to be submitted to the judge being challenged. Judge Pell denied
the motion on November 15, 1979. Respondents Brief in Opposition to Defendants' Petitions for
Writs of Certiorari at 25.
148. 600 F.2d at 661 (Pell, J., dissenting in part, concurring in part).
149. Id. at 661-62.
150. Id. at 662.
Judge Pell characterized Hanrahan's media activity as a "counter-attack" to the adverse publicity his office was receiving, done for the purpose of avoiding the adverse effect on the criminal justice system about which the Supreme Court was concerned in *Imbler*.  

**ANALYSIS**

Prior to *Imbler*, several circuit courts of appeals had attempted to delineate the prosecutor's immunity by focusing on whether or not the challenged activity was illegal and therefore outside the scope of the official's jurisdiction. This approach clearly was unworkable after *Imbler* because the immunity granted in *Imbler* makes no distinction between legal and illegal acts. After *Imbler*, a court must focus on the function the prosecutor performs in order to delineate the extent of the immunity. To the extent that the function is quasi-judicial—that of an advocate initiating a prosecution or presenting the State's case—the prosecutor is absolutely immune from damages liability under section 1983.

The basis for the Supreme Court decision in *Imbler* was an overriding concern for the proper functioning of the criminal justice system. The Court reasoned that the public trust of the prosecutor's office would suffer if he were potentially liable in damages for his decisions. This, in turn, would adversely affect the system's goal of accurately determining guilt or innocence. Because the prosecutor's advocacy functions are an integral part of the judicial process, the Court found that they require absolute immunity.

Yet any grant of absolute immunity from liability frustrates the purpose of section 1983 by limiting the state action it can reach. Congress intended section 1983 as a remedial statute designed to combat

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151. *Id.*
153. *See* 424 U.S. at 430-31. Thus, after *Imbler*, a prosecutor has been held to be absolutely immune when he allegedly conspired to bring false criminal charges, Perez v. Borchers, 567 F.2d 285 (5th Cir. 1978) (per curiam); or when he allegedly instructed a witness to testify falsely, Hilliard v. Williams, 540 F.2d 220 (6th Cir. 1976) (per curiam); or when he allegedly conspired with police to falsify a line-up report, Heidelberg v. Hammer, 577 F.2d 429 (7th Cir. 1978). *See also* Jennings v. Shuman, 567 F.2d 1213, 1221-22 (3d Cir. 1977).
155. *Id.* at 427-28.
156. *Id.* at 424.
157. *Id.* at 426.
158. *Id.* at 430.
deprivations of civil rights.\textsuperscript{159} Thus, the apparent intent of Congress, expressed through the absolute "every person" language of section 1983,\textsuperscript{160} must be balanced against the need for official performance uninfluenced by threat of vexatious litigation. In any immunity analysis, the court must balance the deprivation to the individual who is denied a remedy against the interest of governmental efficiency. Depending upon whether one views the least possible interference with the intent of section 1983 or the least possible interference with the legislative and judicial systems as more desirable, the result of the balance will change. Too great a concern with efficiency will lead to limitations on liability which will leave unprotected the interests which Congress intended the Civil Rights Act of 1871 to safeguard.

Courts must consider the danger of destroying the effectiveness of section 1983 as a remedial statute while applying \textit{Imbler}. Interpreting the prosecutorial function too broadly would destroy section 1983 as a check on unscrupulous prosecutors.\textsuperscript{161} \textit{Imbler} should be read narrowly to avoid this result.\textsuperscript{162}

Historically, the Seventh Circuit has been reluctant to expand the scope of absolute immunity from section 1983 liability as applied to judges and prosecutors.\textsuperscript{163} Continuing this policy, the Seventh Circuit in \textit{Hampton} properly delineated the prosecutor's advocacy function narrowly, with one exception. The court also correctly refused to extend absolute immunity from liability to federal officials when comparable state officials merited only qualified immunity from liability.

\textbf{Federal Defendants}

The federal defendants in \textit{Hampton}, three FBI agents and their paid informant O'Neal, sought absolute immunity for their actions. They characterized their participation in the events leading to \textit{Hampton} as that of "law enforcement officials investigating potential wrong-


\textsuperscript{160} \textit{See} note 1 \textit{supra}.

\textsuperscript{161} The other procedures commonly noted as checks on unscrupulous prosecutors, such as post-trial review and discipline by the bar, may be of limited utility to an individual wronged by a prosecutor with broad immunity.

\textsuperscript{162} The Supreme Court has stated that immunity should be granted only where it is essential for the conduct of the public business. \textit{Butz v. Economou}, 438 U.S. 478, 507 (1978). In \textit{Ferri v. Ackerman}, 100 S. Ct. 402 (1979), the Supreme Court held that federal law does not mandate absolute immunity for court-appointed counsel in a malpractice suit brought by his former client.

The plaintiffs charged the federal defendants with violating both constitutional and statutory limitations on their authority. \(^{165}\)

Given the Supreme Court's holding in *Pierson v. Ray*\(^ {166}\) granting only qualified immunity to police defendants in a section 1983 suit, and the holding in *Butz v. Economou*\(^ {167}\) mandating the same degree of immunity for federal defendants as that granted their state counterparts in section 1983 suits, the Seventh Circuit's extension of only qualified immunity to the federal defendants in *Hampton* was correct. Law enforcement officers were never granted absolute immunity at common law. They perform none of the legislative, judicial, or quasi-judicial functions which merit absolute immunity. To grant only qualified immunity to the local law enforcement officials involved in the raid while granting absolute immunity to the federal law enforcement officials would make no sense and would create the very inequity the Supreme Court attempted to avoid in *Butz*.

**State Defendants**

The activities for which the state defendants sought immunity were more varied than those of the federal defendants. The Seventh Circuit in *Hampton* applied the functional approach to a wide variety of prosecutorial activities. The State's Attorney's Office sought immunity for four separate activities: 1) the filing of charges against the survivors of the raid, presentation of evidence to a grand jury, and the eventual dropping of charges; 2) the presentation of the State's Attorney's version of the events after the fact to the media; 3) the planning, execution, and supervision of the raid against the Black Panther Party; and, 4) the actions of the Assistant State's Attorneys involved with the IID investigation.

The Seventh Circuit correctly applied *Imbler* in finding absolute immunity for the State's Attorney's actions in charging the Black Panthers, presenting evidence to the grand jury, and dropping the charges. These activities are quintessential quasi-judicial functions which fit snugly into *Imbler*'s definition of absolutely immune conduct. To open the prosecutor's decision to bring or drop charges to civil liability, no matter what the prosecutor's motive, would indeed jeopardize the functioning of the criminal justice system. The purpose of absolute immunity is as much to protect the immune official from the complica-

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\(^{164}\) 600 F.2d at 634.

\(^{165}\) Id.

\(^{166}\) 386 U.S. 547, 555-57 (1967).

tions of a trial arising from his actions as it is to protect him from the outcome of the trial. If every person charged by a prosecuting attorney was able to sue for malicious prosecution, the system would soon grind to a halt.

While the Supreme Court in *Imbler* noted that the prosecutor in his role as advocate frequently acts outside the courtroom as well as in it, the Court acknowledged that at some point the prosecutor functions as an administrator rather than as an officer of the court. The Seventh Circuit correctly held the State's Attorney's media activities to be such a nonadvocacy function, protected only by qualified immunity.

The State's Attorney's presentation to the public of his office's role and point of view in a controversial event is an administrative function. There is no direct connection between a State's Attorney's press conferences called to defend the police activities of his subordinates and his role as an advocate. In defending the propriety of his office's actions and the veracity of the SPU personnel in the media, Hanrahan was engaged in public relations. Department heads and press secretaries perform such a function daily. To attempt to claim any relationship between these activities and the preparation, initiation, or prosecution of a trial would make a mockery of the rationale enunciated in *Imbler* for extending absolute immunity.

In his *Hampton* dissent, Judge Pell argued that the media activity of the State's Attorney should be absolutely immune because it was a “counter-attack” designed to avoid an adverse effect on the functioning of the criminal justice system. But the Supreme Court in *Imbler* made it clear that the adverse effect they were attempting to avoid through immunity was the crippling of the prosecutor through unfounded litigation or fear of potential liability for decisions to prosecute, not an adverse effect caused by bad publicity.

While the prosecuting attorney's orchestration of press conferences in a context such as *Hampton* clearly is not entitled to absolute immunity, the pre-raid activities of the State's Attorney's Office present a

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169. 424 U.S. at 431 n.33. For example, the State's Attorney certainly is not performing an advocacy function when hiring or disciplining personnel.
170. See, e.g., Helstoski v. Goldstein, 552 F.2d 564, 565-66 (3d Cir. 1977) (holding that deliberate leaks by a prosecutor of false information about plaintiff to the press would not be protected under *Imbler*).
171. In his concurring opinion in *Imbler*, Justice White points out the danger inherent in extending absolute immunity too liberally to state officials. See notes 60-64 and accompanying text supra.
172. 600 F.2d at 662.
more difficult question. Arguably, some evidence gathering and investigative functions of the State’s Attorney are quasi-judicial because they are inextricably connected with the initiation and presentation of the State’s case. \(^{173}\) Yet at some point a prosecutor’s activity is so far removed from his advocacy function that it is much closer to police work, which is protected only by qualified immunity. \(^{174}\) This was the case in \textit{Hampton}.

The State’s Attorney’s Office in \textit{Hampton} was working with the FBI in conducting a long-term, far-reaching investigation into the activities of a political group, as opposed to investigating a specific crime. It is well-established that the law enforcement officials involved in such a raid are entitled only to qualified immunity. \(^{175}\) Not only would it be unjust to extend absolute immunity to the planners while extending only qualified immunity to the local police who followed their orders, it would undermine the public policy behind limiting the extension of absolute immunity. The criminal justice system might well function more efficiently from an administrative point of view if \textit{carte blanche} were given to State’s Attorneys and police in investigating possible “subversive” or criminal activity, but this does not appear to be what the framers of the Constitution or the Supreme Court in \textit{Imbler} had in mind. To extend absolute immunity in this situation would give the prosecutor immunity for conduct which would not be immune if done by other law enforcement officials. Because a court could hardly hold a subordinate liable under section 1983 for actions ordered by an immune superior, the potential for abuse in such a situation would be substantial. The Seventh Circuit correctly refused to extend absolute immunity to the State’s Attorneys for their pre-raid activities.

The Seventh Circuit in \textit{Hampton} found the Assistant State’s Attorneys absolutely immune from liability for their conduct during the IID investigation. This extension of absolute immunity was unwarranted

\(^{173}\) In \textit{Imbler v. Pachtman}, 424 U.S. 409, 431 n.33 (1976), the Supreme Court noted that performance of a prosecutor’s advocacy function may require “the obtaining, reviewing, and evaluating of evidence.” This language has reinforced speculation that the investigatory role of the prosecutor may eventually be accorded absolute immunity because of the difficulty in drawing a satisfactory line between the investigative and advocate roles. \textit{See NAHMOD, supra} note 2, at 224-25.


under *Imbler*. In substance, the plaintiffs alleged that the Assistant State's Attorneys deliberately prepared perjured testimony.  

This conduct would be immune under *Imbler* if performed in connection with initiating a prosecution or presenting the State's case.  

But, in *Hampton*, the Assistant State's Attorneys allegedly prepared perjured testimony in connection with a Chicago Police Department internal investigation. The investigation was undertaken to determine whether any disciplinary action was warranted against the fourteen police officers who had taken part in the raid on Hampton's apartment.  

The Chicago police officers were to present this testimony to the Chicago Police Department investigators, not under oath in a courtroom at a trial.

The Seventh Circuit correctly found the conduct which the Assistant State's Attorneys engaged in concerning the IID investigation to be essentially indistinguishable from that engaged in by the prosecutor in *Heidelberg v. Hammer*.  

The context in which the conduct was performed, however, is distinguishable. The prosecutor in *Heidelberg* was engaged in initiating and presenting the State's case in connection with a murder trial. The Assistant State's Attorneys in *Hampton* allegedly were aiding and encouraging the police in lying to their superiors, not a trial judge. Even if a police department finding that disciplinary action against the officers was warranted would later have discredited the police officers' testimony at the Black Panthers' criminal trial, the alleged conduct is one step further away from being an integral part of the judicial process than was the conduct in *Heidelberg*. To extend absolute immunity to the conduct of the Assistant State's Attorneys in connection with the IID investigation does not aid the functioning of the criminal justice system in accurately determining guilt or innocence; it merely opens another avenue for abuse. Under this extension of immunity, a prosecutor could arrange perjury in a trial to which he had no connection as an advocate merely to insure that a potential witness in a trial he was prosecuting later would have an unblemished record.

The Seventh Circuit did not explain its reasons for holding the Assistant State's Attorneys' conduct in connection with the IID investi-

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178. 600 F.2d at 618.
179. 577 F.2d 429 (7th Cir. 1978). See text accompanying notes 129-31 supra.
180. At this time, the surviving occupants of the apartment were still under indictment. 600 F.2d at 616-20.
gation to be absolutely immune other than noting the resemblance of the conduct to that which was held to be immune in Heidelberg. The danger of this holding is its ease of extension. It focuses on the act allegedly done rather than on either the function the prosecutor was performing at the time or the policy behind extending immunity in Imbler. Under this approach, any act done by a prosecutor would be absolutely immune, regardless of circumstances, if a similar act had ever previously been found to be immune.

The Seventh Circuit's extension of absolute immunity from liability in this situation broadened the limits of the prosecutor's advocacy function beyond the requirements of Imbler, and was not necessary to protect the prosecutor's discretion in initiating and presenting the State's case at trial.\(^\text{181}\)

**Conclusion**

Section 1983 assures a remedy to individuals whose constitutional or statutory rights are abused by persons acting under color of state law. The United States Supreme Court has carved out limited exceptions to this liability, granting absolute immunity to state officials in some circumstances.

The Seventh Circuit in *Hampton v. Hanrahan* was faced with claims of wholesale absolute immunity by a variety of state and federal officials. The court exhibited a laudable concern with balancing the policies involved in the grant of absolute immunity to prosecutors and the policies behind section 1983. The court's attempt to delineate the advocacy function of the prosecutor was correct, as was its holding that federal law enforcement officials were entitled only to a qualified immunity.

For the most part, the Seventh Circuit in *Hampton* set valid limits on absolute prosecutorial immunity, which should help circumscribe illegitimate behavior by prosecutors in the future. The court erred, however, in extending absolute immunity to the Assistant State's Attorneys' alleged actions in connection with the IID investigation. The Seventh Circuit's focus on the act involved rather than on function or policy was incorrect. Future decisions on prosecutorial immunity

\(^{181}\) In *Wood v. Strickland*, 420 U.S. 308, 320 (1975), the Supreme Court discussed the need to balance the increased discretion of the official receiving absolute immunity against the absence of a remedy for persons subject to intentional or otherwise inexcusable deprivations. This balance, applied to the IID situation, would mandate an extension of only qualified immunity.
should focus carefully on function and policy rather than make a superficial comparison of activities.

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