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Prosecutorial Immunity - The Wyoming Supreme Court's Failure to Adequately Address Relevant Public Policies Results in a Mistaken Grant of Absolute Prosecutorial Immunity - Cooney v. Park County

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CASENOTES

PROSECUTORIAL IMMUNITY—The Wyoming Supreme Court's failure to adequately address relevant public policies results in a mistaken grant of absolute prosecutorial immunity. *Cooney v. Park County*, 792 P.2d 1287 (Wyo. 1990).

Thomas Cooney was placed on five years supervised probation following a guilty plea in the District Court of Park County to a charge of writing checks on insufficient funds on January 24, 1985.[1] Supervision of Cooney's probation was assigned to Riverton probation officer Cindy Johnson.[2] In September 1985 Cooney received permission from Johnson to relocate to Bairoil, Wyoming.[3] Ms. Johnson sent Cooney's file to Rawlins, the office in charge of the Bairoil area; however, she mistakenly listed Cooney as moving to La Barge.[4] The file was forwarded to the La Barge area office in Evanston and assigned to Robert Mayor.[5] Mayor attempted to locate Cooney in La Barge from October 1985 to January 1986.[6]

Although Cooney was not contacted by probation officers after moving to Bairoil, he kept in touch with either Johnson or the Rawlins office.[7] After failing to locate Cooney, Mayor called Johnson in January 1986 and told her of Cooney's absence.[8] Unexplainedly, Johnson told Mayor that Cooney had moved to La Barge in October and she had not heard from him since.[9]

On January 24, 1986, Mayor called Park County assistant prosecutor Chris White and told White that Cooney had moved without permission and had not been in contact with probation officials since October 1985.[10] White told Mayor to prepare a petition to revoke probation.[11]

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1. Cooney v. Park County, 792 P.2d 1287, 1288 (Wyo. 1990). Thomas Russell Cooney pled guilty and was placed on probation under Wyoming Statutes section 7-13-203 (1977) (renumbered to Wyoming Statutes section 7-13-301 (1987)). The statute permits the court to defer further proceedings without entering a judgment of guilt or conviction. The court then places the defendant on probation, for not more than five years. If the defendant violates any probation provision, the court may enter the conviction and impose sentence under the guilty plea to the original charge. *Cooney*, 792 P.2d at 1306 n.7 (Urbigkit, J., dissenting).
2. *Id.* at 1288.
3. *Id.* The majority misspelled "Baroil;" the correct spelling is "Bairoil."
4. *Id.* Bairoil is in Sweetwater County, but is served by Rawlins because of its proximity. La Barge is in Uinta County.
5. *Id.*
6. *Id.* at 1288-89.
7. *Id.*
8. *Id.* at 1289.
9. *Id.*
10. *Id.*
11. *Id.* Cooney's allegations concerning the prosecutor's actions are accepted as

On January 29, 1986, Johnson realized her mistake and called Mayor, telling him that Cooney had permission to move to Bairoil and that Cooney had been in contact with her since the move.[12] Mayor relayed this information to White, who advised Mayor to continue with the petition to revoke probation.[13] After receiving the signed petition from Mayor, White presented the petition to the District Court of Park County which issued a bench warrant for Cooney's arrest on February 7, 1986.[14]

Cooney filed monthly reports with the Rawlins probation office in February and March 1986.[15] When Cooney's job ended in March, he found permanent work in Glasgow, Montana. Thereafter Cooney requested and received, from the Rawlins probation office, written permission to relocate to Glasgow, Montana.[16] In the process of this move, Cooney was arrested on March 15, 1986, under authority of the bench warrant, and taken to the Park County jail.[17] Cooney spent thirty-eight days in jail without a hearing, until the district court denied the petition to revoke, released Cooney, and restored him to probation.[18]

Cooney later filed a 42 U.S.C. section 1983[19] damages claim against White.[20] White answered with a Wyoming Rules of Civil Pro-

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true in a WYO. R. CIV. P. 12(b)(6) motion, and the dismissal is based solely upon the pleadings. *Id.* at 1290.

12. *Id.* at 1289. The Riverton officer, Johnson, received completed forms from Cooney stating that no one from Rawlins had yet contacted him in Bairoil. This information apparently alerted the Riverton officer of her recent error. *Id.* at 1306 n.7 (Urbigkit, J., dissenting).

13. *Id.* at 1289.

14. *Id.*

15. *Id.*

16. *Id.* Cooney worked as a drilling rig deck hand. *Id.* at 1306 n.7 (Urbigkit, J., dissenting).

17. *Id.* at 1289. Cooney was arrested by the Wyoming Highway Patrol in the Bairoil area and subsequently jailed 250 miles away in the Park County jail. *Id.*

18. *Id.* The allegations include a statement that the public defender requested Cooney's release pending a hearing, but that White refused to honor that request. It is unclear whether the public defender sought release from the court and White successfully contested that release or whether the defender's request was addressed directly to White, in which case it was not within White's power to grant Cooney's release. *Id.*

19. *Id.* The basis for Cooney's claim against White is a federal statute held to be within state court jurisdiction under Hagans v. Lavine, 415 U.S. 528, 535 (1974) and Martinez v. California, 444 U.S. 277, 283 (1980), and which states:

> 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.

42 U.S.C. § 1983 (1988).

20. *Cooney*, 792 P.2d at 1288. Other parties to the action were Thomas Cooney's wife, Lora John Cooney, as co-plaintiff and the State of Wyoming, the Wyoming Department of Probation and Parole, and Robert Mayor as co-defendants. Suit was brought against the co-defendants under the Wyoming Governmental Claims Act. WYO. STAT. §§ 1-39-101 to -108 (1988). Claims against these co-defendants were dis-

cedure 12(b)(6) motion to dismiss under which, even if the allegations are accepted as being true, the plaintiff still fails to state a claim upon which relief can be granted.[21] White's motion was made on the theory that absolute prosecutorial immunity precluded civil action against him.[22] The district court granted the motion, and the Wyoming Supreme Court affirmed on appeal.[23]

The Wyoming Supreme Court applied judicially created prosecutorial immunity to preclude an injured party from exercising a statutorily guaranteed right to seek damages for deprivation of civil rights.[24] This casenote examines the Wyoming Supreme Court's interpretation of the United States Supreme Court's "functional analysis" of prosecutorial activities, and disagrees with the *Cooney* decision permitting absolute immunity, as opposed to qualified immunity, as a complete defense to civil suits arising from activities not within the required discretionary duties of prosecutor.[25]

BACKGROUND

The evolution of immunity from civil suit began with the common law application of immunity to judges.[26] The United States Supreme Court examined the principle of absolute judicial immunity in *Bradley v. Fisher*, in 1871.[27] The *Bradley* Court agreed with the rationale supporting the English common law which granted absolute

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missed by the district court based on a finding that there was no waiver of immunity under the Claims Act, and the district court was affirmed on appeal. *Id.* This casenote does not deal with the Claims Act.

21. *Cooney*, 792 P.2d at 1288. WYO. R. CIV. P. 12(b)(6) differs from WYO. R. CIV. P. 56 (summary judgment) in that the former is a motion based solely on the pleadings and may only occur prior to trial. The latter motion may be heard at any time and may or may not be based upon supplementary affidavits.

22. *Cooney*, 792 P.2d at 1288.

23. *Id.*

24. *Id.*

25. Immunity denotes existence of a special privilege. In litigation the grant of immunity relieves defendants of some degree of obligation to offer evidence in defense of charges. This privilege signifies that the defendant has acted to further such an important social interest that he is entitled to protection even at the expense of damage to the plaintiff. Absolute immunity differs from qualified immunity. A grant of absolute immunity defeats a suit, on a 12(b)(6) motion, at the outset without any showing of evidence beyond the pleadings. A grant of qualified immunity requires a showing of a reasonable belief and good faith, forming the basis for the defendant's actions, as conditions of a summary judgment in the defendant's favor. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 16, at 109 (5th ed. 1984); *see also* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). For a well written comment on good faith, see Comment, *The Defense of "Good Faith" Under Section 1983*, 1971 WASH. U.L.Q. 666.

26. For a detailed discussion of the English evolution of judicial immunity, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

27. 80 U.S. (13 Wall.) 335 (1871). *Bradley* was the trial of the doctor who rendered medical assistance to John Wilkes Booth after the assassination of President Lincoln. The trial judge disbarred the doctor's lawyer under disputed circumstances, and the lawyer filed a civil action against the judge. *Id.* at 337.

immunity to judges acting within their jurisdictions.[28] The Court concurred that the proper administration of justice called for judicial officers to be free of concern over personal consequences as a matter of public policy.[29] The Court reasoned that without absolute immunity a judge would continually be subjected to suits brought by losing parties, requiring the judge to go before a second judge to show support for his actions. If the aggrieved party should lose again, the second judge could similarly be sued and forced to offer proof supporting his decision.[30] Thus, the creation of absolute immunity in American jurisprudence was born of English common law and based upon public policy concerns.[31]

Twenty-five years later, the Indiana Supreme Court extended absolute immunity to a prosecutor.[32] The state prosecutor presented evidence to a grand jury concerning an arson investigation and gave the names of John Mullins and George Griffith, thought to be criminally involved.[33] The grand jury found no evidence linking Griffith to the charges, and requested that the prosecutor exclude Griffith's name from the indictment.[34] The prosecutor, however, listed both parties, and as a result Griffith was subjected to the rigors of defending the criminal charge.[35] In appellate review of Griffith's civil suit for damages, the court affirmed the lower court's dismissal of the case.[36] The court reasoned that the position of state prosecutor is a judicial position similar to a judge, created by the constitution of the state and entrusted with the administration of justice, and therefore should be similarly immune from suit.[37] The extension of absolute immunity is based upon the similarity of discretionary duties between the judge and prosecutor.[38] The court held that whenever duties of a judicial nature, requiring the exercise of discretionary judgment, are imposed upon a public officer, he is exempt from all civil liability in performance of those duties, regardless of the motives and manner in which the duties are performed.[39]

The United States Supreme Court first addressed federal prosecutorial immunity in *Yaselli v. Goff*, in 1927.[40] In *Yaselli*, an at-

28. *Id.* at 347.
29. *Id.*
30. *Id.* at 348-49.
31. *Id.* at 347. American judicial absolute immunity was limited to judges acting within the subject matter jurisdiction of their court. *Id.* at 354.
32. Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896).
33. *Id.* at 1001. Mullins and Griffith were charged with arson and intent to defraud an insurance company after Mullins' barn was destroyed by fire. The prosecutor sought charges of arson and complicity against Griffith. *Id.*
34. *Id.*
35. *Id.* An indictment containing both names was submitted to the grand jury foreman, who signed the bill without reading it. *Id.*
36. *Id.* at 1002.
37. *Id.*
38. *Id.*
39. *Id.*
40. Yaselli v. Goff, 12 F.2d 396 (2d Cir.), *aff'd per curiam*, 275 U.S. 503 (1927).

torney secured appointment as Assistant Attorney General of the United States, for the purpose of maliciously prosecuting the plaintiff.[41] In the plaintiff's suit for damages, the district court reviewed the policies supporting immunity grants to judges and found that the same policy considerations called for an extension of absolute immunity to prosecutors.[42] The district court held that a prosecutor is immune from civil action because persons in official positions closely related to judicial offices should have the freedom to discharge duties imposed upon them by law, without fear of personal liability.[43] The United States Supreme Court affirmed on authority of *Bradley*.[44]

State prosecutors were granted absolute immunity from suit in section 1983 actions, in certain circumstances, as a result of the United States Supreme Court holding in *Imbler v. Pachtman*.[45] The Court examined the history of the absolute immunity afforded judges and qualified immunity (requiring a showing of good faith or probable cause) commonly granted to other public officials.[46] The Court referred to numerous lower court decisions granting absolute immunity to state prosecutors for actions taken while in performance of their official duties, and found that a state common law immunity for prosecutors existed.[47] The Court stated that the grant of absolute immunity was dependent upon a finding that the prosecutorial activities were "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with force."[48] The Court reasoned that subjecting a prosecutor to the threat of civil liability for malicious prosecution whenever a criminal charge fails to win a conviction or is overturned

41. *Id.* at 406. The district court considered separately the issue whether immunity would attach when the prosecutor attained his office for the specific purpose of maliciously prosecuting the plaintiff. The court held that once the appointment was made, immunity would attach regardless of the impetus for the appointment. *Id.* at 407.

42. *Id.* at 402, 404 (citing 2 T. COOLEY, COOLEY ON TORTS 756, 795 (3d ed. 1906)).

43. *Id.* at 406.

44. Yaselli v. Goff, 275 U.S. 503 (1927) (per curiam).

45. 424 U.S. 409 (1976). A state prosecutor knowingly used false testimony and suppressed material evidence favorable to the criminal defendant in obtaining an illegal conviction. *Id.* at 411-13.

46. *Id.* at 418-19.

47. *Id.* at 427. The *Imbler* Court stated common law concerns supporting absolute immunity to be: (1) The threat of liability arising on a failure to convict would influence a prosecutor's conduct toward fewer prosecutions. *Id.* at 423-24. (2) The potential for a large expenditure of time, away from serving the criminal justice system, defending suits brought by defendants whose prosecutions are defeated or whose convictions are overturned. *Id.* at 425. (3) The greater difficulty the prosecutor would face in meeting the standards of qualified immunity than other executive or administrative officials. *Id.* at 425-26. (4) The possibility that a prosecutor would withhold post-conviction evidence that may overturn the verdict and therefore subject the prosecutor to liability. *Id.* at 427. (5) The knowledge that a prosecutor may be subjected to a liability suit if a conviction is overturned may influence a judge toward fewer justifiable reversals. *Id.* at 428.

48. *Id.* at 430.

would be counter to public policy principles.[49] The Court concluded that the possibility of such litigation would deter the diligent performance of official duties and adversely influence the prosecutor's decision-making functions.[50]

While the Court's holding was limited to the grant of absolute immunity for activities involving the initiation and presentation of the state's case, the reasoning developed a "functional analysis" that has been adopted by the lower courts in attempting to define the scope of absolute immunity.[51] The analysis calls for an examination of the functional nature of the challenged prosecutorial activities and requires an intimacy of the activities with the criminal process, where absolute immunity would be fully supported by public policies.[52]

The Wyoming Supreme Court adopted the *Imbler* "functional analysis" in *Blake v. Rupe*.[53] A juror filed a damages suit against Blake, a county prosecuting attorney who charged the juror with perjury without fully investigating the allegations.[54] The juror had not responded to inquiries concerning felony convictions during jury selection because he had been granted full pardon.[55] The juror alleged tortious conduct during the prosecutor's investigation of the allegations, a prosecutorial function not considered in *Imbler*.[56] However, the court emphasized footnote language from *Imbler* suggesting that certain preparatory activities for initiation of criminal proceedings are functions of a state's advocate that require exercise of discretion similar to that of a judge and deserving of absolute immunity.[57]

The court concluded that absolute immunity does not adhere to the office of prosecutor, but that the functional relationship of the activity to the preparation for a criminal prosecution would determine whether absolute immunity attached.[58] The court concluded that investigative activities necessary to determine whether to pursue a criminal prosecution were within the absolute immunity umbrella, even if performed negligently or with improper motives, and absolute immunity from civil suit was proper.[59]

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49. *Id.* at 424.

50. *Id.*

51. *Id.* at 430-31; *see* McCarthy v. Mayo, 827 F.2d 1310 (9th Cir. 1987); Campbell v. Maine, 787 F.2d 776 (1st Cir. 1986); *cf.* Robinson v. Via, 821 F.2d 913 (2d Cir. 1987); Edgar v. Wagner, 101 Nev. 226, 699 P.2d 110 (1985).

52. *Imbler*, 424 U.S. at 430. *See supra* note 47.

53. 651 P.2d 1096 (Wyo. 1982).

54. *Id.* at 1098.

55. *Id.*

56. *Id.* at 1099.

57. *Id.* at 1101 (citing *Imbler*, 424 U.S. at 433 n.33).

58. *Blake*, 651 P.2d at 1102.

59. *Id.* at 1105.

PRINCIPAL CASE

In *Cooney*, the alleged civil rights violations occurred subsequent to prosecution of the criminal charge.[60] This presented the Wyoming Supreme Court with the task of applying the "functional analysis" to prosecutorial activities taking place within a different time frame than previously considered. The issue required the court to deal with the undefined limits on the scope of absolute immunity, a task made more difficult due to the limited holding in *Imbler*.[61]

The court acknowledged the lack of statutory immunity from civil suit, but stated that common law immunity was available to prosecutors in certain situations.[62] The *Cooney* court determined that the *Imbler* "functional analysis" adopted by the *Blake* court was the proper test to resolve whether the prosecutor's activities in *Cooney* fell within the ambit of absolute immunity.[63] The court stated that if the prosecutor's activities challenged in *Cooney* were administrative, rather than part of the prosecutor's role as state's advocate in a criminal proceeding, the prosecutor could be granted only qualified immunity and would be required to show probable cause for his actions.[64]

The court invoked the *Imbler* principle that the purpose of the "functional analysis" is to decide whether the activities are "intimately associated with the judicial phase of the criminal process."[65] The elements of the "functional analysis" therefore require that there be a "criminal process" involved, that the process is in the "judicial phase," and that the activities challenged are "intimately associated" with that judicial phase.[66] The court looked to the statutory definition of probation to determine that the sentencing court retained authority over the probationer in order to regulate his probation.[67] The court declared that a judge's sentencing duties were not concluded and a case was not closed until probation was revoked or completed.[68]

The court noted that a presiding judge has the option of directing the prosecuting attorney to investigate and report on factors relevant

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60. *Cooney*, 792 P.2d at 1287. Cooney had been before the court, pleaded guilty, and received five years probation. Cooney had been on probation for one year and eight days when Mayor's probation revocation petition was filed. *Id.* at 1306 n.7 (Urbigkit, J., dissenting).

61. *Id.* at 1293.

62. *Id.* at 1291; *see* Cleavinger v. Saxner, 474 U.S. 193 (1985); Imbler v. Pachtman, 424 U.S. 409 (1976); Tenney v. Brandhove, 341 U.S. 367 (1951).

63. *Cooney*, 792 P.2d at 1293.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* Wyoming Statutes section 7-13-401(a)(x) (1987) defines probation as "a sentence not involving confinement which imposes conditions and retains authority in the sentencing court to modify the conditions of the sentence or to resentence the offender if he violates the conditions."

68. *Cooney*, 792 P.2d at 1293-94 (citing Smith v. State, 598 P.2d 1389, 1391 (Wyo. 1979)).

to sentencing considerations.[69] The court further noted that if allegations of probation violations arise, either a state probation and parole officer or a county attorney should notify the court.[70] Expanding upon a prior Wyoming Supreme Court holding, the court stated that "[t]he supervision of probation, through his probation officers (and, we would add, the county attorney) is one of the most important duties performed by the trial judge."[71] The court therefore rejected Cooney's claim that his criminal proceedings had ended with the sentencing of probation and concluded that retention of jurisdiction established probation as an integral part of the judicial phase of Cooney's criminal proceeding.[72]

Next, the court stated that the duty to alert the sentencing judge to possible probation violations was a vital activity of both probation officers and prosecutors.[73] The court stated that the abundance of due process safeguards at revocation proceedings evidences their adversarial nature.[74] The court therefore rejected the argument that White's activities were not those of a state's advocate and held that the prosecutor's activities were intimately associated with the judicial phase of the criminal process.[75]

In support, the court cited federal court of appeals decisions granting absolute prosecutorial immunity despite varying degrees of wrongful and intentional acts.[76] Specifically, the court noted a Fifth Circuit case that extended absolute immunity to state parole officers.[77] Further support came from cases where state and federal probation

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69. *Id.* at 1293; *see also* WYO. STAT. § 7-13-303 (1987).

70. *Id.* at 1294. The addition of "county attorney" is a judicial expansion of statutory language. The expansion follows the creation of judicial probation revocation in Knobel v. State, 576 P.2d 941 (Wyo. 1978) and found in subsequent cases such as Gronski v. State, 700 P.2d 777, 778 (Wyo. 1985); Minchew v. State, 685 P.2d 30, 31 (Wyo. 1984) and *Smith*, 598 P.2d at 1390. However, the prosecutor is not mentioned in Wyoming Statutes section 7-13-408(a) (1987): "If the state probation and parole officer determines that consideration should be given to retaking or reincarcerating a probationer who allegedly has violated a condition of probation, then that officer shall notify the court."

71. *Cooney*, 792 P.2d at 1294. The court was expanding upon *Smith*, 598 P.2d at 1391. *Id.*

72. *Cooney*, 792 P.2d at 1294.

73. *Id.* at 1295.

74. *Id.*

75. *Id.*

76. *Id.* at 1295-97; *see* Casey-El v. Hazel, 863 F.2d 29 (8th Cir. 1988); Marx v. Gumbinner, 855 F.2d 783 (11th Cir. 1988); Barr v. Abrams, 810 F.2d 358 (2d Cir. 1987); Joseph v. Patterson, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); Williams v. Hartje, 827 F.2d 1203 (8th Cir. 1987); Meyers v. Morris, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987); McCarthy v. Mayo, 827 F.2d 1310 (9th Cir. 1987); Campbell v. Maine, 787 F.2d 776 (1st Cir. 1986); Henderson v. Lopez, 790 F.2d 44 (7th Cir. 1986); Hamilton v. Daly, 777 F.2d 1207 (7th Cir. 1985); Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984); Lerwill v. Joslin, 712 F.2d 435 (10th Cir. 1983); Daniels v. Kieser, 586 F.2d 64 (7th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979).

77. *Cooney*, 792 P.2d at 1297 (referring to Farrish v. Mississippi State Parole Bd., 836 F.2d 969 (5th Cir. 1988)). *Contra* Ray v. Pickett, 734 F.2d 370 (8th Cir. 1984); Galvan v. Garmon, 710 F.2d 214 (5th Cir. 1983).

officers were granted absolute immunity for activities involved in preparation and submission of presentence reports.[78] The *Cooney* court listed reasons supporting absolute immunity for presentence activities and stated those reasons also supported absolute immunity grants to the preparation of petitions to revoke probation.[79] The court used the allegory of the prosecuting attorney functioning as an arm of the sentencing judge for the benefit of the court, and reasoned that the challenged activities were integral to the criminal process and deserving of absolute immunity.[80]

Justice Urbigkit, in dissent, accepted the majority's utilization of the *Imbler* "functional analysis" as being the proper test to determine whether White's actions were within the absolute immunity umbrella.[81] According to Justice Urbigkit, accepting the allegations as true requires a finding that White committed perjury and conspiracy.[82] The holding of the majority, Urbigkit stated, allows a prosecutor to commit perjury and conspiracy in the guise of performing prosecutorial functions and is therefore an unacceptable result.[83]

Justice Urbigkit, in examination of Wyoming probation statutes providing for revocation, noted that while it is not prohibited, there is no requirement that a prosecutor become involved in the revocation process, and therefore, the revocation proceeding should be characterized as neither judicial nor adversarial.[84] In addition, the dissent pointed out that Cooney's revocation concerned alleged violations of conditions, an event functionally monitored by probation officials and upon which probation officers may report directly to the court; an official duty to be performed by White was not shown to exist.[85] According to Justice Urbigkit, the petition to revoke probation was not factually shown to have been filed by the prosecutor and it was "impossible to determine whether a mailman could have equally served the same function as performed by White. . . ."[86] The dissent's argument appears to be that White may have been acting

78. *Cooney*, 792 P.2d at 1298. For cases involving federal probation officials, see Dorman v. Higgins, 821 F.2d 133 (2d Cir. 1987); Spaulding v. Nielson, 599 F.2d 728 (5th Cir. 1979). For cases involving state officials, see Turner v. Berry, 856 F.2d 1539 (D.C. Cir. 1988); Demoran v. Witt, 781 F.2d 155 (9th Cir. 1985).

79. *Cooney*, 792 P.2d at 1298. The reasons listed by the court are (1) the nature of the function performed; (2) the impossibility of guaranteeing the accuracy of the information to be reported; (3) the existence of routine adversary review and judicial scrutiny of the reports. *Id.*

80. *Id.*

81. *Id.* at 1304 (Urbigkit, J., dissenting).

82. *Id.* at 1305.

83. *Id.* at 1303.

84. *Id.* at 1307-08. The dissent noted that while Cooney's revocation was a judicial procedure, it was based upon an administrative petition to revoke and there is only a statutory implication that a county attorney represents the probation department officer when that office has the responsibility for revocation. *Id; see also Knobel*, 576 P.2d at 943.

85. *Cooney*, 792 P.2d at 1308 (Urbigkit, J., dissenting).

86. *Id.*

outside of any functional role as prosecutor, precluding the grant of immunity. The lack of information available to the court made it improper, according to Urbigkit, to grant a motion to dismiss for failure to state a claim.[87]

ANALYSIS

The pride of Anglo-American democratic principles has been the tenet that no man is above the law.[88] This belief supports the language of 42 U.S.C. section 1983 that "color of office" creates no civil immunity for unlawful acts. Judicial expansion of absolute immunity is creating a growing list of public officials immune from suit in section 1983 actions.[89] The holdings in *Imbler* and similar cases state that the tenet remains true, despite judicially created absolute immunity from civil liability, due to the existence of criminal and disciplinary alternatives available to punish prosecutorial abuses.[90] However, punitive and disciplinary alternative actions do not occur with the frequency of civil actions seeking damages for wrongful acts of public officials.[91] The wronged citizen has little incentive to pursue criminal and disciplinary alternatives, and in many cases, like *Cooney*, where the prosecutor has offered no defense to allegations of criminal conduct, the judiciary fails to advocate those charges and bar associations react passively to the misconduct.[92] The judiciary, above all, should be able to see that abuses of power are not adequately addressed by these alternative remedies. Until federal or state legislatures enact explicit limits upon official immunities, the judiciary must necessarily monitor and control intentional wrongdoing by prosecutors claiming immunity.

The original cloak of civil immunity was provided to ensure the independence necessary for the proper exercise of discretion required of a judge.[93] In its grant of absolute prosecutorial immunity, the *Imbler* Court declared that the immunity was necessary to the proper performance of the prosecutor's duties "essential" to the judicial system.[94] The phraseology of the *Imbler* analysis, immunizing activities

87. *Id.*

88. Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 610-11 (1989).

89. For an excellent comment on official immunity, see Comment, *Federal Officers-Scope of Immunity from Damage Actions Available to Administrative Agency Officials*, 30 RUTGERS L. REV. 209 (1976).

90. *Cooney*, 792 P.2d at 1298 n.7 (citing *Imbler*, 424 U.S. at 429).

91. *Cooney*, 792 P.2d at 1309 (Urbigkit, J., dissenting). Scholastic examinations reveal few instances of disciplinary actions, such as disbarments, reprimands, or filing of criminal charges, by either the judiciary or the professional associations. *See* B. GERSHMAN, PROSECUTORIAL MISCONDUCT § 13, at vii-ix (1989); Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1984); Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972).

92. *Cooney*, 792 P.2d at 1309.

93. *Bradley*, 80 U.S. at 347.

94. *Imbler*, 424 U.S. at 427.

that are "intimately" associated with the criminal process, likewise implies a restraining caveat that attempts to limit immunity to "essential" functions rather than optional ones.[95] The *Imbler* Court's footnote language continues the implied restraint by reference to activities "required" of the prosecutor to properly evaluate and present a criminal charge.[96]

Many courts emphasize the limitations on the scope of absolute immunity. Judge Learned Hand, sitting on the Court of Appeals for the Second Circuit, stated that the purpose of absolute immunity was to protect the function of the prosecutor as a "key" participant in the criminal process.[97] Even the Wyoming Supreme Court's language that a district attorney's acts that are "intrinsic" elements of the prosecutorial function are deserving of absolute immunity implies a limitation on absolute immunity.[98]

The *Cooney* court's application of absolute prosecutorial immunity to White's involvement in the probation revocation procedure is a dilution of the implied limitations used by past courts when granting absolute immunity.[99] White's involvement was not imposed upon him by his office.[100] The majority's language lacks any mention of imposed duties and fails to explain how White could be a key participant while performing a nonessential activity, suggesting that the *Cooney* court does not recognize any implied limitations.

The *Cooney* court has taken a long stride towards, and perhaps beyond, the implied limitation with a finding that White's actions were "intimately associated" with the criminal process. The split court in *Cooney* evinces a growing dispute over the priority of a citizen's right to redress wrongs, and the proper application of absolute immunity necessary to ensure the diligent performance of a prosecutor's official duties.[101]

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95. *Id.* at 430.

96. *Id.* at 431 n.33.

97. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

98. *Blake*, 651 P.2d at 1102.

99. *See Yaselli*, 12 F.2d at 404; *Griffith*, 146 Ind. at 122, 44 N.E. at 1002.

100. The Park County court could have ordered White to supervise Cooney's probation under Wyoming Statutes section 7-13-301 (1987); however, the record before the court contained no evidence of such an order, nor was there a showing that White signed the petition to revoke. *Cooney*, 792 P.2d at 1308 (Urbigkit, J., dissenting).

101. For a partial review of scholastic writings generally disapproving of the modern trend of judicially applied immunity, see Beerman, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U.L. REV. 277 (1988); Blackmum, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985); Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977); Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987); Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Actions*, 38 EMORY L.J. 369 (1989); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Jaron, *The Threat of Personal Liability*

The nature of probation revocation should be determined by reference to the character of its procedure rather than the character of the parties involved.[102] According to Wyoming probation statutes, although prosecutorial action is not prohibited, the disposition of Cooney's revocation could have been accomplished without judicial participation and would have been dismissed in an administrative hearing, based on the facts before the court in *Cooney*.[103] Prior to 1978, Wyoming probation revocation was statutory and required an administrative hearing.[104] In 1978, the Wyoming Supreme Court judicially created a nonstatutory probation revocation procedure that bypasses the normal administrative hearing.[105] The judicial revocation only supplements the statutory procedure; it does not replace it.[106] If the legislature has seen fit to provide greater protection of a probationer's conditional freedom, then the action of the judiciary in abridging that protection by eliminating the administrative hearing seems contrary to public policy.

Before 1978, court involvement was predicated upon the findings of an administrative hearing.[107] The statutory revocation implies the involvement of a prosecutor, but does not make it a requirement.[108] Either statutory or judicial probation revocation can be accomplished with or without prosecutorial activity, and therefore White's actions should not be simply labeled "intrinsic" or "intimate" with the probation revocation because White chose to present Mayor's revocation petition to the court.[109]

White's election to bypass the administrative hearing should not

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Under the Federal Civil Rights Act: Does it Interfere with the Performance of State and Local Government?, 13 URB. 1 (1981); Schwartz & Mahshigian, *In the 1990's the Government Must be a Reasonable Person in its Workplaces: The Discretionary Function Immunity Shield Must be Trimmed*, 46 WASH. & LEE L. REV. 359 (1989); Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499 (1985); Comment, *Oregon's Discretionary Interpretation of Discretionary Immunity*, 22 WILLAMETTE L. REV. 147 (1986).

102. *See Ex parte* Virginia, 100 U.S. 339, 348 (1879); *see also Blake*, 651 P.2d at 1102.

103. WYO. STAT. § 7-13-408 (1987).

104. *Cooney*, 792 P.2d at 1308 (Urbigkit, J., dissenting).

105. Knobel v. State, 576 P.2d 941 (Wyo. 1978).

106. *Id.* at 943. The *Knobel* court stated that the statutory revocation requirements only apply "to cases wherein the probation or parole agent seeks to have the probationary retaken or reincarcerated for violation of the terms of his probation or conditional release, and has no application unless such proceedings are instituted by that department." Taken literally, this statement would appear to require statutory proceedings in *Cooney*, in light of the allegations that probation officer Mayor prepared the revocation petition based upon condition violations. *Id.*

107. *Cooney*, 792 P.2d at 1308 (Urbigkit, J., dissenting).

108. WYO. STAT. § 7-13-408 (1987).

109. *Cooney*, 792 P.2d at 1308 (Urbigkit, J., dissenting). The initiation of revocation was based upon a failure to report and an unauthorized move, and was presented in an administrative department petition to revoke; these circumstances have previously been handled entirely by the statutory revocation procedure, evidencing the less than "intrinsic" nature of the prosecutor's role in Cooney's revocation. *Id.*

transform an administrative procedure into a judicial one.[110] The record before the *Cooney* court contained no evidence that White was under a judicial duty to supervise Cooney's probation.[111] Although such supervision could be exercised by a prosecutor, Cooney's probation supervision was performed by state probation and parole officers.[112] Cooney's revocation was premised upon a violation of probationary procedures and conditions, a subject normally dealt with administratively by probation officials, rather than additional violations of Wyoming law that would call for a prosecutor's involvement.[113]

It has been recognized that the doctrine of absolute immunity applies to those legal officials whose duties are deemed "integral" to the operation of the judiciary, and those duties are limited to regular and normal advocacy functions.[114] The record before the *Cooney* court provided no official papers prepared by White; the accepted allegations state only that White requested the use of knowingly false statements and presented Mayor's petition to the court.[115] The accepted allegations that Mayor requested advice from White as a prosecutor indicate that White used his office as a means to secure the false petition and subsequently have Cooney jailed for thirty-eight days.[116] There was nothing in the record to suggest White's judicial participation was official action, let alone a duty "imposed" upon him by his office.[117]

It can be argued that the general advisory function performed by White is being protected to ensure the diligent and fearless pursuit of justice. However, after Cooney pleaded guilty to the State's charge, the essential and traditional function of the prosecution in presenting the State's case was finished.[118] Cooney was under close administrative supervision by probation department officials who were fully entitled to procure a probation revocation without a prosecutor's assistance.[119] Each of the above arguments drives White's actions further and further from the essential or regular duties of State's advocate. As the gap widens, the grant of absolute immunity should require a more detailed examination into whether supporting public policies apply.

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110. *See* Robinson v. Via, 821 F.2d 913, 918 (2d Cir. 1987).
111. *Cooney*, 792 P.2d at 1288. The allegations accepted as fact by the majority point out that Cooney was under supervision of the Wyoming Department of Probation and Parole; no mention is made of White's judicial obligation concerning the monitoring of Cooney's probation. *Id.*
112. *Id.*
113. *Id.* at 1289.
114. *See* Murphy v. Morris, 849 F.2d 1101, 1105 (8th Cir. 1988).
115. *Cooney*, 792 P.2d at 1289.
116. *Id.*
117. *Id.* The most one can glean from the allegations is that Mayor sought advice from White and that White, as prosecutor, advised Mayor to prepare a revocation petition using false statements. *Id.*
118. *Id.* at 1288.
119. *See* WYO. STAT. § 7-13-408 (1987).

The "functional analysis" should not be conducted mechanically. The narrow holding in *Imbler* resulted in the creation and acceptance of a broad "functional analysis" that requires an inquiry into the common law immunity afforded prosecutors and the public policies supporting the immunity, as applied to a particular function.[120] The supporting background of absolute immunity suggests three main concerns that call for the application of absolute immunity to certain prosecutorial functions.[121] First, the proper administration of justice requires that the officer be free from fear of personal liability for acts requiring the exercise of discretion.[122] Second, the time spent in defending damage suits would prevent the prosecutor's performance of other duties necessary to the justice system.[123] Third, the impossibility of a prosecutor to produce verifiable proof when much of his information is based upon conflicting information and the veracity of witnesses.[124] A full consideration of these policies should determine the application of common law absolute immunity to prosecutors when considering the *Imbler* "functional analysis."[125]

In *Cooney*, the majority appears to have mechanically applied the *Imbler* functional language, relying too heavily on other court holdings as precedence in defining the scope of prosecutorial immunity available in Wyoming.[126] The public policies mentioned above are valid reasons for granting absolute immunity to most functions within the scope of prosecutorial duties, but prosecutors are not afforded absolute immunity merely because their functions are within the scope of official duties.[127] Prosecutors are granted absolute immunity when the loss of protection would result in a derogation of the prosecutor's ability to perform the protected function.[128] The *Cooney* court failed to adequately address this consideration in light of the facts surrounding White's actions.

Administrative acts are often based on documented information and are commonly given qualified immunity due to a lesser degree of required discretion and the reduced difficulty in meeting the standard of qualified immunity.[129] The *Cooney* probation revocation was based on an administrative petition which, in turn, was based on information that should have been documented and easily produced.[130] A prosecutor with knowledge of this documented proof would have no

120. *Imbler*, 424 U.S. at 421.
121. *Cooney*, 792 P.2d at 1290 n.3. The majority lists six policies supporting absolute immunity. These can be condensed due to a degree of overlap. *Id.*
122. *Imbler*, 424 U.S. at 423-24.
123. *Id.* at 425.
124. *Id.* at 425-26.
125. *Id.* at 421.
126. *Cooney*, 792 P.2d at 1295.
127. *Imbler*, 424 U.S. at 430-31; *Cooney*, 792 P.2d at 1292.
128. *Imbler*, 424 U.S. at 424.
129. Economou v. United States Dep't of Agric., 535 F.2d 688, 696 n.8, *vacated on other grounds sub nom.* Butz v. Economou, 438 U.S. 478 (1976).
130. *Cooney*, 792 P.2d at 1289.

reason to fear a liability suit even if granted only a qualified immunity.[131] Under a qualified immunity White would have been granted summary judgment with a minimal showing of probable cause, resulting in a *de minimis* effect upon the performance of normal and necessary prosecutorial functions. Balanced against the need to protect the citizen from prosecutorial abuses of power, the policy concerns underlying absolute immunity lose much of their support in *Cooney*.

It is unlikely that the grant of qualified immunity to certain prosecutorial activities would chill the performance of essential duties if the grant were restricted to judicial revocation proceedings based on administrative petitions. Prosecution of criminal charges, as well as necessary pre-trial activities, would remain fully within the absolute immunity umbrella. Thus limited, the grant of qualified immunity imposes no civil liability upon honest prosecutors and provides a partial replacement of the legislative protections lost in judicially created revocation. More importantly, a genuinely wronged citizen can seek redress and provide a more certain restraint on isolated power abuses by prosecutors.

CONCLUSION

The real problem with undefined absolute immunity limitations is that public policy concerns calling for able and active criminal prosecutions are in constant conflict with public policies calling for compensation of intentionally wronged persons and controlling abuses of governmental power. The absence of explicit legislative action places the burden upon the courts to strike an effective balance. The modern trend of mechanically extending absolute immunity by reference to the duties of prosecutors, "integral to the judicial phase of criminal process," based upon the narrow *Imbler* holding and its broad analysis criteria, does a disservice to the very public absolute immunity is supposed to benefit. The *Cooney* decision exposes the failure of a perfunctory analysis to provide for reasonable limits on the scope of absolute immunity. The result in *Cooney* under qualified immunity may not have changed, but a simple showing, by White, of good faith or simple error, could have told the Wyoming public, and prosecutors, that the integrity of the judicial system would be balanced with concerns for the protection of civil rights. By exercising its judicial discretion and granting qualified immunity, the court could have either summarily exonerated White or provided redress to Cooney. All the public is left with after *Cooney* is a broadening distrust of the judiciary due to its unwillingness to provide a check on prosecutorial powers.

LOREN JOSEPH RICHARDS

131. Qualified immunity requires only a showing of good faith or probable cause, such as supplementary affidavits or documents, summary judgment then being proper even if the action performed was in error. *See supra* note 25.