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Kalina v. Fletcher: Another Qualification of Imbler's Prosecutorial Immunity Doctrine

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KALINA v. FLETCHER: ANOTHER QUALIFICATION OF *IMBLER'S* PROSECUTORIAL IMMUNITY DOCTRINE

Kalina v. Fletcher, 118 S. Ct. 502 (1997).

I. INTRODUCTION

In *Kalina v. Fletcher*,[1] the Supreme Court addressed whether the doctrine of absolute prosecutorial immunity protects a prosecutor from liability for attesting to false facts in an affidavit supporting the issuance of an arrest warrant.[2] A unanimous Court held that a prosecutor is not protected by absolute immunity for her action in executing the affidavit.[3] While absolute immunity protects a prosecutor for activities in initiating and prosecuting a case or by otherwise performing acts "intimately associated with the judicial phase of the criminal process,"[4] the Court concluded in *Kalina* that "[t]estifying about facts is the function of the witness, not of the lawyer."[5] The Court found that the prosecutor in *Kalina* functioned as a complaining witness.[6] Since a complaining witness was accorded only qualified immunity at common law[7] and no policy concerns justified extending absolute immunity to a prosecutor for such an action,[8] the Court declined to accord absolute immunity to the prosecutor in *Kalina* for attesting to facts.[9]

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[1] 118 S. Ct. 502 (1997).
[2] *Id.* at 505.
[3] *Id.* at 510.
[4] Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976).
[5] *Kalina*, 118 S. Ct. at 510.
[6] *See id.*
[7] *See id.* at 508 n.14.
[8] *See id.* at 510.
[9] *See id.*

This Note first argues that *Kalina* descends directly from *Imbler v. Pachtman*, and does not follow *Imbler*'s intervening progeny. This Note further argues that for policy reasons besides those articulated by the Court in *Kalina*, denying the protection of absolute immunity to the prosecutor in *Kalina* is justified. To hold otherwise would cause substantial harm to the judicial process and the administration of justice.

Finally, this Note discusses whether lower courts have applied *Kalina* correctly in light of *Imbler*. Lower courts have been able to apply *Kalina* with ease, but the application of *Kalina* in some contexts triggers policy considerations absent in *Kalina* but nevertheless worthy of weight due to *Imbler*. In some cases, the denial of absolute immunity to a prosecutor has accorded with the policies recognized by the Court; in others, courts have extended *Kalina* too far.

II. BACKGROUND

A. SECTION 1983 AND *BIVENS* CLAIMS AGAINST PROSECUTORS

Section 1983 of the Civil Rights Act provides a remedy to persons who are deprived of their constitutional rights by a state actor.[10] One who wishes to sue that state actor in his or her individual capacity typically files a § 1983 claim.[11]

Section 1983 was originally codified as part of the Civil Rights Act of 1871.[12] Following the Civil War, fundamental

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[10] 42 U.S.C. § 1983 (1994). Section 1983 reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[11] *See* Megan M. Rose, *The Endurance of Prosecutorial Immunity—How the Federal Courts Vitiated* Buckley v. Fitzsimmons, 37 B.C. L. REV. 1019, 1021 (1996).

[12] *See* James P. Kenner, Note, *Prosecutorial Immunity: Removal of the Shield Destroys the Effectiveness of the Sword*, 33 WASHBURN L.J. 402, 409 (1994). Passed as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, the Civil Rights Act of 1871 was dubbed the Ku Klux Klan Act. *Id.* at 408 n.59.

changes occurred in the area of individual civil rights.[13] Because of the breakdown in the protection of civil rights in the South after the Civil War,[14] the Reconstruction Congress enacted legislation to protect individuals from oppression by state officials.[15] For example, although the Thirteenth Amendment ended slavery,[16] many southern state legislatures enacted laws, known as the Black Codes, which preserved the subordination of African-Americans' rights.[17] Congress countered the Black Codes by ratifying and submitting to the states the Fourteenth[18] and Fifteenth Amendments,[19] and to enforce them, Congress enacted the Civil Rights Act of 1871.[20]

The right to redress a violation of a constitutional right by a federal actor is not derived from statute, but rather was established by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*[21] A *Bivens* claim is legally analogous to a § 1983 claim and is available against a federal prosecutor. The law applicable to a *Bivens* claim against a federal official mirrors that applicable to a § 1983 claim for individual immunity purposes, and § 1983 and *Bivens* immunity cases are interchangeable.[22]

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[13] *See* Kenner, *supra* note 12, at 408 (citing Jamie K. Lansford, *Municipal Liability Under the Ku Klux Klan Act of 1871—An Historical Perspective, in* SECTION 1983 SWORD AND SHIELD 23, 24 (Robert H. Freilich & Richard G. Carlisle eds., 1983)).

[14] *See* Michael Wells, *Punitive Damages for Constitutional Torts,* 56 LA. L. REV. 841, 851 (1996).

[15] *See* Kenner, *supra* note 12, at 408 (citing Lansford, *supra* note 13, at 24).

[16] U.S. CONST. amend. XIII, § 1 ("[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

[17] *See* Kenner, *supra* note 12, at 408 n.55 (citing Lansford, *supra* note 13, at 24).

[18] U.S. CONST. amend. XIV, § 1 (prohibiting states from "deny[ing] to any person within its jurisdiction the equal protection of the laws.").

[19] U.S. CONST. amend. XV, § 1 (prohibiting states from denying or abridging a citizen's right to vote based on "race, color, or previous condition of servitude.").

[20] *See* Kenner, *supra* note 12, at 409.

[21] 403 U.S. 388, 397 (1971).

[22] *See* Butz v. Economou, 438 U.S. 478, 504 (1978). While individual immunities to § 1983 and *Bivens* suits are the same, differences exist between the suits. Stephen R. McAllister & Peyton H. Robinson, *The Potential Civil Liability of Law Enforcement Officers and Agencies,* 67 J. KAN. B. ASS'N 14, 31 (Sept. 1998). For example, in a *Bivens* suit, the plaintiff may not seek liability against the defendant-official's employer. *See* FDIC v. Meyer, 510 U.S. 471 (1994). Furthermore, successful plaintiffs in *Bivens* actions cannot recover attorney's fees as their counterparts in § 1983 suits may under § 1988. *See, e.g.,* Saxner v. Benson, 727 F.2d 669, 673 (7th Cir. 1984), *aff'd on other grounds,* 474 U.S. 193 (1985).

A § 1983 or *Bivens* suit permits a plaintiff to sue directly the state or federal official who allegedly violated her rights.[23] For purposes of § 1983, a state actor includes persons who derive their authority from a state law or custom.[24] A prosecutor is a state actor.[25] Thus, when acting "under color of state authority," a prosecutor is subject to suit for violating rights secured to a plaintiff either by the United States Constitution or by a federal statute.[26] The elements of a § 1983 claim include "(1) a violation of a constitutional or federal statutory right; (2) proximately caused; (3) by a 'person;' (4) who acted 'under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia. . . .'"[27] The plaintiff may seek compensatory and punitive damages against the official in her individual capacity.[28] For the plaintiff to recover damages in any § 1983 action that would in effect cause the plaintiff's prior conviction or sentence to become invalid, the plaintiff must prove that the prior conviction or sentence has been officially reversed on direct appeal, eliminated by executive order, declared invalid by a state tribunal, or been the subject of a federal court's issuance of a writ of habeas corpus.[29] Thus, until a court or executive order officially invalidates a disputed conviction or sentence, it cannot form the basis for a § 1983 claim.[30]

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[23] *See* Rose, *supra* note 11, at 1022. *See, e.g.*, Moore v. Valder, 65 F.3d 189, 191 (D.C. Cir. 1995).

[24] *See supra* note 10 for the text of § 1983.

[25] *See* Imbler v. Pachtman, 424 U.S. 409, 420-29 (1976); Georgia v. McCollum, 505 U.S. 42, 50-53 (1992).

[26] Monroe v. Pape, 365 U.S. 167, 172 (1961).

[27] Rose, *supra* note 11, at 1023 n.34 (quoting Martin A. Schwartz & John E. Kirklin, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 1.4 (2d ed. 1991)). Depending on the claim, the plaintiff may have to prove elements in addition to those of a § 1983 claim. *Id.* For example, in a suit against a prosecutor for misconduct relating to a wrongful conviction, a plaintiff must establish that the prior criminal proceeding ended in favor of the former defendant. Heck v. Humphrey, 512 U.S. 477, 486-87 (1994); Rose, *supra* note 12, at 1022-23.

[28] *See* Rose, *supra* note 11, at 1022.

[29] *See Heck*, 512 U.S. at 486-87.

[30] *See id.*

B. IMMUNITY TO SECTION 1983 LIABILITY

On its face, § 1983 makes no exception to liability for any state official.[31] Furthermore, the legislative history reveals Congress did not consider creating any exceptions to the liability.[32] However, in *Tenney v. Brandhove*,[33] the Supreme Court interpreted the absence of an exemption to mean that Congress accepted the immunities generally recognized at the time of § 1983's passage in 1871.[34] *Tenney* involved the immunity available to state legislators charged with violating what is presently § 1983.[35] The Court acknowledged that the Constitution explicitly conferred immunity on federal legislators,[36] and that both the English and American common law granted legislative immunity to legislators to prevent nuisance suits from infringing upon legislative decision-making.[37] The Court concluded that if Congress had wished to abolish immunities "well grounded in his-

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[31] *See supra* note 10 for the text of the statute.

[32] *See* Briscoe v. LaHue, 460 U.S. 325, 330 (1983); Imbler v. Pachtman, 424 U.S. 409, 417-29 (1976); Ron S. Chun, *Avoiding a Jurassic Dinosaur Run Amok: Circumventing Eleventh Amendment Sovereign Immunity to Remedy Violation of the Automatic Stay*, 98 COM. L.J. 179, 203 (1993); Wells, *supra* note 14, at 851 ("[i]mmunity has no more foundation in the text [of § 1983] than in the legislative history . . . ."); Christina B. Sailer, Note, *Qualified Immunity for Child Abuse Investigators: Balancing the Concerns of Protecting our Children from Abuse and the Integrity of the Family*, 29 J. FAM. L. 659, 664 (1991); Jennifer S. Zybtowski, Note, *The Case Against Section 1983 Immunity For Witnesses Who Conspire With a State Official to Present Perjured Testimony*, 93 MICH. L. REV. 2192, 2211 (1995).

[33] 341 U.S. 367 (1951). *Tenney* addressed the issue of immunity to § 1983 liability for the first time. *Id.*

[34] *Id.* at 376.

[35] *See id.* at 369. In *Tenney*, the Supreme Court considered the immunity under 8 U.S.C. § 43, the predecessor to the current 42 U.S.C. § 1983. *Id.* Section 43 provided:

> 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.

8 U.S.C. § 43 (current version at 42 U.S.C. § 1983 (1994)).

[36] *See* U.S. CONST. art I, § 6; *Tenney*, 341 U.S. at 372.

[37] *See Tenney*, 341 U.S. at 377.

tory and reason," such as the legislative immunity, it would have expressly stated such an intent when it enacted § 1983.[38]

Tenney's "history and reason" standard established "a two-prong test to determine whether Congress intended to extend immunity to a particular defendant under § 1983."[39] Hereafter, courts used this two-prong test to analyze § 1983 immunity defenses.[40] The "historical" criterion focused on "whether Congress was aware of the immunity claimed when it enacted § 1983, [yet] chose not to expressly abrogate [it]."[41] The "reason" component focused on the public policy supporting the extension of the immunity in the particular case.[42]

In both § 1983 and *Bivens* claims, immunity is an affirmative defense available to the defendant.[43] A defendant may claim either absolute or qualified immunity.[44] Absolute immunity provides an affirmative defense to state officials whose special functions or status require complete protection from civil suit.[45] Absolute immunity can immediately defeat a civil suit as long as the official's alleged acts are within the scope of the applicable immunity, even where the offending official knew that her conduct was unlawful, malicious, or otherwise without justification.[46] The Supreme Court only accords absolute immunity where specially justified by public policy considerations.[47]

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[38] *Id.* at 376.

[39] Kenner, *supra* note 12, at 410; *see Tenney*, 341 U.S. at 367.

[40] *See* Kenner, *supra* note 12, at 410; *see also* Imbler v. Pachtman, 424 U.S. 409 (1976); Burns v. Reed, 500 U.S. 478 (1991); Butz v. Economou, 438 U.S. 478 (1978); Pierson v. Ray, 386 U.S. 547 (1967).

[41] *Tenney*, 341 U.S. at 376; Kenner, *supra* note 12, at 410. *See also* Burns v. Reed, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in part and dissenting in part) ("Where we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983.").

[42] *Tenney*, 341 U.S. at 376. *See also Imbler*, 424 U.S. at 424 (noting that after meeting the "history" criterion, the Court must then "determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983.").

[43] *See* Burns v. Reed, 500 U.S. 478, 486 (1991).

[44] *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[45] *See id.*

[46] *See* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976).

[47] *See Burns*, 500 U.S. at 487; *see also Harlow*, 457 U.S. at 808.

Conversely, establishing qualified immunity does not automatically defeat the suit against the public official; rather, it sets the standard against which the defendant-official's conduct will be examined.[48] Qualified immunity protects the state actor from liability as long as she does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[49] In the context of § 1983 or *Bivens* claims, qualified immunity is presumed to provide adequate protection for official acts.[50] It reflects a "reasonable balance between the need to protect individual rights and the public interest in promoting the vigorous exercise of official authority."[51]

The qualified immunity standard presents a threshold question to the trial court: whether the currently applicable law was clearly established at the time of the alleged constitutional deprivation.[52] If the law was clearly established at the time of the violation, the qualified immunity defense will ordinarily fail, since a public official is expected to know the law governing his office.[53] By contrast, an absolute immunity defense does not require this initial determination. Thus, "the procedural advantage of absolute immunity, the avoidance of civil suit significantly earlier in the legal process, makes it a much more attractive and coveted defense than qualified immunity. . . ."[54]

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[48] *See Harlow*, 457 U.S. at 818-19. *See Imbler*, 424 U.S. at 419 n.13.

[49] *Harlow*, 457 U.S. at 818. Before *Harlow*, courts applied a subjective standard, described as good faith and probable cause. *See id.*; Pierson v. Ray, 386 U.S. 547 (1967). *Harlow* overruled the prior caselaw to require the courts to apply an objective standard. *See Harlow*, 457 U.S. at 815-16.

[50] *See Burns*, 500 U.S. at 486-87. *See also Harlow*, 457 U.S. at 807.

[51] Rose, *supra* note 11, at 1024 (quoting *Harlow*, 457 U.S. at 807 (quoting *Butz*, 438 U.S. at 506 (internal quotation marks omitted))).

[52] *See id.*; *Harlow*, 457 U.S. at 818.

[53] *See Harlow*, 457 U.S. at 818-19. The Court acknowledged that the qualified immunity defense could succeed where extraordinary circumstances prevented an official from obtaining actual knowledge, or reason to know, of the relevant legal standard. *Id.* at 819.

[54] Rose, *supra* note 11, at 1025.

C. DEVELOPMENT OF THE PROSECUTORIAL IMMUNITY DOCTRINE

The United States Supreme Court has specifically addressed the issue of prosecutorial immunity to § 1983 suits four times.[55]

1. Imbler v. Pachtman

Relying primarily on public policy, the Court in *Imbler v. Pachtman*[56] held that a prosecutor is absolutely immune from civil suit for activities in initiating and prosecuting a case or by otherwise performing acts "intimately associated with the judicial phase of the criminal process."[57]

After admitting to his involvement in a robbery, Paul Imbler was charged with the murder of a victim who was killed during prior robbery.[58] Despite Imbler's alibi for the first robbery, police believed that Imbler had committed it as well.[59] Imbler was convicted of first-degree murder and sentenced to death.[60] Released after nine years of incarceration due to the discovery of new evidence, Imbler sued Pachtman, the prosecuting attorney, and various other police officers under § 1983, alleging a conspiracy to violate his civil rights.[61]

The district court found that Pachtman was immune from civil suit for the alleged acts.[62] The court granted his motion to dismiss because his actions fell into the category of "acts done as

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[55] *See* Kalina v. Fletcher, 118 S. Ct. 502, 505 (1997); Buckley v. Fitzsimmons, 509 U.S. 259, 261 (1993); *Burns*, 500 U.S. at 481; Imbler v. Pachtman, 424 U.S. 409, 410 (1976).

[56] 424 U.S. 409 (1976).

[57] *Id.* at 430-31.

[58] *See id.* at 411.

[59] *Id.*

[60] *See id.* at 412.

[61] *See id.* at 415-16. Specifically, Imbler claimed that Pachtman "with intent, and on other occasions with negligence" allowed a supposed eyewitness to testify falsely, and that Pachtman was chargeable for the fingerprint expert's suppression of evidence. *Id.* at 416. Evidence had emerged that suggested that Pachtman may have known about some of the inaccuracies that led to Imbler's wrongful incarceration before Imbler's initial trial. *Id.* Imbler claimed that Pachtman had known of a lie detector test that "cleared" Imbler, and that Pachtman had used at trial a police artist's sketch of the market owner's killer from the first robbery-murder that had been allegedly altered to resemble Imbler. *See id.*

[62] *Id.* at 416.

part of [a prosecutor's] traditional official functions."[63] The Ninth Circuit affirmed, finding that the alleged acts were prosecutorial activities integral to the judicial process, and therefore, that Pachtman was protected from Imbler's suit by absolute immunity.[64]

The Supreme Court granted certiorari to address for the first time whether a state prosecutor, acting within the scope of his duties in initiating and prosecuting a case, could be sued under § 1983.[65] The *Imbler* Court focused the inquiry on the "immunity historically accorded [to the prosecutor] at common law and the interests behind it."[66] The Court also stated several policy justifications for absolute rather than qualified prosecutorial immunity. First, frivolous suits by defendants would divert prosecutors' attention from enforcing criminal law.[67] Second, such suits would prove an evidentiary challenge to prosecutors since they would have to prove they acted in good faith usually years after a criminal trial.[68] Third, the threat of liability would discourage prosecutors from bringing suit in cases where they thought acquittal was a significant possibility; whereas the proper course of action would be to let a jury decide the defendant's guilt or innocence.[69] Finally, reviewing judges might refrain from reversing convictions for fear of triggering a suit against the prosecutor.[70] Although the Court did not indicate what level of immunity applied to prosecutors engaged in non-advocatory work, the Court acknowledged that some pretrial work was an implicit part of advocacy.[71] Nevertheless, the Court admitted that "[d]rawing a proper line between these functions may present difficult questions" in the future.[72]

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[63] *See id.*

[64] *See id.*

[65] *See id.* at 410.

[66] *Id.* at 420-21. The Court noted that Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896), which became the majority rule in the states on the issue in the early 20th century, was the first case recognizing absolute immunity for prosecutors. *Id.* at 422.

[67] *See id.* at 425.

[68] *See id.*

[69] *Id.* at 426 n.24.

[70] *See id.* at 427.

[71] *See id.* at 430-31.

[72] *Id.* at 431 n.33.

2. *Burns v. Reed*

Fifteen years later, in *Burns v. Reed*,[73] the Supreme Court revisited the issue of prosecutorial immunity to address the question left open in *Imbler*: what level of immunity should be accorded to prosecutors for their non-advocatory actions?[74]

Cathy Burns' two sons were shot while sleeping at home.[75] During the probable cause hearing, at which police sought a search warrant, an officer testified that Burns had confessed to shooting her children.[76] Neither the officer nor Reed, the Chief Deputy Prosecutor, told the judge that the confession was obtained under hypnosis or that when conscious Burns had consistently denied shooting her sons.[77] The judge issued the search warrant based on the misleading presentation.[78]

The State charged Burns with attempted murder.[79] However, because the judge suppressed the statements she made under hypnosis, the prosecutor dropped all the charges against her.[80] Burns then sued Reed and others under § 1983. The district court granted Reed a directed verdict based on his assertion of absolute immunity.[81] The Seventh Circuit affirmed, declaring that "a prosecutor should be afforded absolute immunity for giving legal advice to police officers about the legality of their prospective investigative conduct."[82]

Although the Supreme Court did affirm the district court's grant of absolute immunity for Reed's testimony at the probable

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[73] 500 U.S. 478 (1991).

[74] *See id.* at 481.

[75] *See id.*

[76] *See id.* The police had consulted Reed, the prosecutor, as to whether hypnosis was an acceptable investigative technique, and Reed told the officers to proceed. *Id.* at 482. Once the officers obtained the "admission" under hypnosis, they once again consulted Reed, and Reed advised the officers that they "probably had probable cause" to arrest Burns. *Id.*

[77] *See id.* at 482-83.

[78] *See id.* at 483.

[79] *See id.* at 483. Since both boys lived, Cathy Burns was charged with attempted murder, not murder in the first degree. Burns v. Reed, 894 F.2d 949, 950-51 (7th Cir. 1990).

[80] *See Burns*, 500 U.S. at 483.

[81] *See id.*

[82] 894 F.2d at 956.

cause hearing,[83] it conferred only qualified immunity for Reed's advice to arrest Burns.[84] The Court analogized Reed's testimony at the hearing to that of a witness at trial, who enjoyed common law immunity even before the passage of § 1983.[85] However, the common law did not absolutely immunize a prosecutor's advising police to arrest a suspect.[86] The Court rested its conclusion on the lack of historical support for the action, despite the policy reasons supporting protection of the action articulated by the Seventh Circuit and the United States as amicus curiae.[87] The Court also reasoned that the major policy justification for absolute prosecutorial immunity—the risk of disruptive, harassing litigation—is absent where it is unlikely that a suspect would know of the prosecutor's advice to the police.[88] Furthermore, the Court noted that it would be unfair to accord prosecutors absolute immunity for supplying advice to police while granting only qualified immunity to police officers for accepting and acting on that advice.[89]

Writing for the concurring justices, Justice Scalia agreed that Reed deserved absolute immunity for "eliciting false statements in a judicial hearing,"[90] and qualified immunity for providing legal advice to police officers.[91] He wrote separately to acknowledge Burns' separate cause of action for malicious prosecution based on her assertion that Reed knowingly secured the search warrant without probable cause.[92]

Reviewing the common law as it existed in 1870, Scalia found three categories of immunity.[93] First, statements made during "a court proceeding were absolutely privileged against

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[83] *See Burns*, 500 U.S. at 489-92.

[84] *See id.* at 493.

[85] *See id.* at 489-90.

[86] *See id.* at 493.

[87] *See id.*

[88] *See id.* at 494.

[89] *See id.* at 495.

[90] *Id.* at 496-97 (Scalia, J., concurring in part and dissenting in part). Justices Marshall and Blackmun joined Scalia in his concurrence.

[91] *See id.* at 497 (Scalia, J., concurring in part and dissenting in part).

[92] *See id.* at 504 (Scalia, J., concurring in part and dissenting in part).

[93] *See id.* at 499-501 (Scalia, J., concurring in part and dissenting in part).

. . . defamation."[94] Second, judicial immunity, which was also absolute, was granted for all acts "relating to the exercise of judicial functions."[95] Finally, a variation of judicial immunity, "quasi-judicial immunity," was extended to government servants performing discretionary functions short of adjudication.[96] Quasi-judicial immunity was not absolute and could be overcome by proving malice.[97] Justice Scalia concluded that prosecutors fell into this third category, and thus deserved only qualified immunity for the act of providing legal advice to the police.[98]

3. Buckley v. Fitzsimmons

In *Buckley v. Fitzsimmons*,[99] the Supreme Court further clarified the scope of absolute prosecutorial immunity by holding that absolute immunity should not be accorded to a prosecutor for false statements made to the media and for allegedly fabricating evidence during the preliminary investigation of a crime.[100]

A unanimous Supreme Court held that the prosecutor's statements to the press were non-advocatory and, thus, not entitled to absolute immunity.[101] The common law did not absolutely immunize out-of-court statements to the press, but it limited immunity for defamatory statements to those made during, and relevant to, judicial proceedings.[102] Furthermore, under the functional approach established in *Imbler*, comments to

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[94] *Id.* at 501 (Scalia, J., concurring in part and dissenting in part). A Connecticut Superior Court judge, however, did recently refuse to extend absolute immunity to a state's attorney when he was accused of revealing confidential HIV-related information about an assault victim during a court session. *See* Barese v. Clark, No. CV-96-0389890, 1996 WL 663850 (Conn. Super. Ct. Nov. 6, 1996).

[95] *Burns*, 500 U.S. at 499 (Scalia, J., concurring in part and dissenting in part).

[96] *Id.* at 500 (Scalia, J., concurring in part and dissenting in part).

[97] *See id.* (Scalia, J., concurring in part and dissenting in part).

[98] *See id.* at 501 (Scalia, J., concurring in part and dissenting in part).

[99] 509 U.S. 259 (1993).

[100] *See id.* at 261.

[101] *See id.* at 277.

[102] *See id.*

the media neither fall under the prosecutor's advocatory role nor connect to the judicial process.[103]

A five-to-four majority also held that the alleged fabrication of evidence was not advocatory and, thus, not deserving of absolute immunity.[104] The Court stated that the ultimate question was whether the function in question was advocatory or non-advocatory.[105] A prosecutor cannot engage in advocatory acts, however, until probable cause is determined.[106] The Court recognized that

> [t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."[107]

A determination of probable cause, however, does not automatically entitle a prosecutor to absolute immunity from liability for all actions taken thereafter.[108] Police investigative work undertaken even after a finding of probable cause will only deserve qualified immunity.[109] Conversely, a prosecutor will have absolute immunity when acting in an advocatory capacity in preparation for the prosecution or for trial itself, including the professional evaluation of evidence collected by police officers and the preparation of that evidence for presentation at trial.[110]

The dissent argued that the prosecutor's search for the favorable expert's testimony constituted trial preparation worthy

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[103] *See id.* at 277-78.
[104] *See id.* at 272, 282.
[105] *See id.* at 272-73.
[106] *See id.* at 274.
[107] *Id.* at 273 (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).
[108] *See id.* at 273 n.5.
[109] *See id.*
[110] *See id.* at 273.

of absolute immunity.[111] The dissent attacked the probable cause line drawn by the majority on three fronts. First, probable cause would have to be an element of any future suit against a prosecutor, thereby limiting the protection accorded by *Imbler*.[112] Second, the majority's holding would encourage prosecutors to present perjured or fabricated evidence to third parties in order to secure probable cause and absolute immunity earlier.[113] Third, it creates an incentive for prosecutors to avoid pretrial investigations, for they will not receive absolute protection.[114] The dissent asserted that the majority misconceived that a prosecutor functions solely as a police officer before the determination of probable cause.[115] Justice Scalia concurred with the majority to reemphasize that the common law in 1871 controlled the level of immunity to be accorded a prosecutor.[116]

4. Malley v. Briggs

Both the Ninth Circuit and the Supreme Court relied on *Malley v. Briggs*[117] in their analysis of *Kalina v. Fletcher*.[118] In *Malley*, the Supreme Court denied absolute immunity to a police officer who caused an unconstitutional arrest by submitting to a judge a complaint and supporting affidavit that failed to establish probable cause.[119]

The policeman in *Malley* sought absolute immunity by arguing that he functioned as a complaining witness and alternatively, that he functioned similarly to a prosecutor.[120] The Supreme Court rejected both of the officer's arguments.[121] Complaining witnesses were not absolutely immune from suit at

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[111] *See id.* at 283-84 (Kennedy, J., concurring in part and dissenting in part).

[112] *See id.* at 283 (Kennedy, J., concurring in part and dissenting in part).

[113] *See id.* (Kennedy, J., concurring in part and dissenting in part).

[114] *See id.* (Kennedy, J., concurring in part and dissenting in part).

[115] *See id.* at 289 (Kennedy, J., concurring in part and dissenting in part).

[116] *See id.* at 279-80 (Scalia, J., concurring).

[117] 475 U.S. 335 (1986).

[118] Kalina v. Fletcher, 118 S. Ct. 502, 508-09 (1997); Fletcher v. Kalina, 93 F.3d 653, 655-56 (9th Cir. 1996).

[119] *See Malley*, 475 U.S. at 340-43.

[120] *See id.*

[121] *See id.*

common law.[122] Furthermore, the Court asserted that a policeman's role is not sufficiently analogous to a prosecutor's since exposing a prosecutor to liability when seeking an indictment would interfere with the exercise of the prosecutor's professional judgment.[123] Therefore, the Court denied absolute immunity to the police officer on both grounds.[124]

III. FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

As was normally done in her office, Lynne Kalina, a deputy prosecuting attorney for King County, Washington, filed three documents in the Superior Court of King County on December 14, 1992, to commence criminal proceedings against Rodney Fletcher.[125] Two of the documents were unsworn pleadings.[126] The third document was a "Certification for Determination of Probable Cause" in which Kalina attested to the truth of the facts set forth therein under penalty of perjury.[127] The judge found probable cause and issued an arrest warrant based on Kalina's assertions.[128]

A few weeks after the police arrested Fletcher, Fletcher's attorney discovered errors in the certification and informed Kalina's office.[129] First, Kalina incorrectly stated that Fletcher had no association with or permission to be at the school where his fingerprints had been found.[130] In fact, Fletcher had installed partitions there.[131] Second, Kalina stated that an electronics store employee had identified Fletcher as the person who had

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[122] *See id.* at 340-41.

[123] *See id.* at 341-43.

[124] *See id.* at 340-43.

[125] *See* Kalina v. Fletcher, 118 S. Ct. 502, 505 (1997).

[126] *See* Fletcher v. Kalina, 93 F.3d 653, 654 (9th Cir. 1996). Kalina charged Fletcher in an information with second-degree burglary for stealing computer equipment from a school and filed an application for an arrest warrant.

[127] *See Kalina*, 118 S. Ct. at 505; WASH. REV. CODE § 9A.72.085 (1988).

[128] *See Kalina*, 118 S. Ct. at 505.

[129] *See* Brief for Petitioner at 6, Kalina v. Fletcher, 118 S. Ct. 502 (1997) (No. 96-792).

[130] *See Kalina*, 118 S. Ct. at 505.

[131] *See id.*

asked about selling a stolen school computer.[132] Although two store employees had been shown photo spreads, neither employee had identified Fletcher.[133]

Following his arrest, Fletcher spent one day in jail.[134] In light of the inaccuracies that Kalina brought to the court's attention about a month later, the trial court dismissed the charges against Fletcher.[135] Fletcher sued Kalina under § 1983 for violating his Fourth and Fourteenth Amendment rights to be free from unreasonable seizures.[136]

B. PROCEDURAL HISTORY

Kalina moved for summary judgment alleging that her involvement in filing the three documents was protected by absolute prosecutorial immunity.[137] The United States District Court for the Western District of Washington denied the motion.[138] The court held that Kalina did not have absolute immunity, and that whether she was entitled to qualified immunity was a question of fact to be determined at trial.[139] Applying Supreme Court precedent,[140] the Ninth Circuit affirmed the district court on Kalina's interlocutory appeal.[141] The Ninth Circuit reasoned that because the police officer in *Malley*, who secured an arrest warrant without probable cause, was denied absolute immunity,[142] Kalina too must be denied absolute immunity because she functioned almost identically to the police officer in *Malley*.[143] To grant Kalina absolute immunity, the Ninth Circuit reasoned, would violate the Supreme Court's functional approach

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[132] *See id.*

[133] Fletcher v. Kalina, 93 F.3d 653, 654 (9th Cir. 1996).

[134] *See* Petitioner's Brief at 6 n.3, *Kalina* (No. 96-792).

[135] *See id.* at 6.

[136] *See Kalina*, 118 S. Ct. at 505.

[137] *See id.*

[138] *See id.*

[139] *See id.*

[140] *See* Buckley v. Fitzsimmons, 509 U.S. 259 (1993); Burns v. Reed, 500 U.S. 478 (1991); Malley v. Briggs, 475 U.S. 335 (1986); Imbler v. Pachtman, 424 U.S. 409 (1976).

[141] *See* 93 F.3d at 654.

[142] *See Malley*, 475 U.S. at 342.

[143] *See* 93 F.3d at 655-56.

to immunity questions.[144] Thus, the Ninth Circuit refused to grant absolute immunity to Kalina for her actions in filing the certification and remanded the case for a determination of whether Kalina violated a "clearly established right of which a reasonable person would have known."[145] The United States Supreme Court granted certiorari to determine whether the doctrine of absolute prosecutorial immunity protects a prosecutor from liability for making false statements of fact in an affidavit supporting an application for an arrest warrant.[146]

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

Writing for a unanimous Court, Justice Stevens held that a prosecutor is not protected by absolute immunity when she attests to facts in support of a finding of probable cause when seeking an arrest warrant.[147] In so holding, the Court affirmed the Ninth Circuit's ruling.[148]

The Court began by examining the source of prosecutorial immunity, noting the previous caselaw on the issue, and then reiterating the appropriate test to be applied by the Court to determine what level of immunity is proper.[149] Although § 1983 does not expressly codify immunity from the liability it creates, the Court construed the statute to confer immunities that were well settled at the time of its enactment in 1871.[150]

Turning next to the caselaw, the court summarized its jurisprudence by stating that the cases of late made it "clear that it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of primary importance" in determining what immunity to accord

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[144] *See id.* at 656.

[145] *Id.*

[146] *See* Kalina v. Fletcher, 118 S. Ct. 502, 505 (1997).

[147] *Id.* at 510.

[148] *See id.*

[149] *See id.* at 506-08.

[150] *See id.* at 506 (citing Tenney v. Brandhove, 341 U.S. 367 (1951)). *See supra* note 10 for the text of the statute.

to a prosecutor.[151] The Court acknowledged that while *Imbler v. Pachtman*[152] set out the policy considerations that justified the extension of absolute immunity to prosecutors when functioning in their traditional roles, it did not address what level of immunity would be accorded to a prosecutor functioning in a non-advocatory role.[153] *Burns v. Reed*[154] and *Buckley v. Fitzsimmons*[155] confirmed the importance to the judicial process of protecting the prosecutor when she is serving as an advocate in judicial proceedings, but also illustrated that the defense of absolute immunity is unavailable when the prosecutor is performing a different function.[156] In conformity with prior decisions, the Court then confirmed that immunity attaches to "'the nature of the function performed, not the identity of the actor who performed it.'"[157]

The Court then addressed the case relied upon by the Ninth Circuit in its decision, *Malley v. Briggs*.[158] The Court examined Kalina's action in light of *Malley*, asking specifically whether Kalina acted as a complaining witness rather than as a lawyer when she attested to the facts in the certification.[159] Although the Fourth Amendment requires a showing of probable cause when seeking an arrest warrant,[160] neither federal nor state law required the prosecutor to make the certification.[161] In fact, "tradition, as well as the ethics of [the legal] profession, instruct[ed] counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding."[162]

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[151] *Id.* at 507.

[152] 424 U.S. 409 (1976).

[153] *See Kalina*, 118 S. Ct. at 506-07.

[154] 500 U.S. 478 (1991).

[155] 509 U.S. 259 (1993).

[156] *See Kalina*, 118 S. Ct. at 507-08.

[157] *Id.* at 508 (quoting Forrester v. White, 484 U.S. 219, 229 (1988)).

[158] *See id. See also* Malley v. Briggs, 475 U.S. 335 (1986).

[159] *See Kalina*, 118 S. Ct. at 509.

[160] *See id.*; *see also* U.S. CONST. amend. IV.

[161] *See Kalina*, 118 S. Ct. at 509. Police officers normally attest to the facts in an affidavit filed in support of an application for an arrest warrant, and only two counties in Washington require a prosecutor to file a document beyond an information. *Id.* at 509 n.16.

[162] *Id.* at 509.

Addressing Kalina's conduct, the Court stated that everything short of executing the certification—her determination that the evidence against Fletcher was compelling enough to constitute probable cause, her decision to charge Fletcher, her drafting of the certification, her presentation of the information to the court, and even her selection of the particular facts to include in the certification—involved the exercise of professional judgment.[163] However, "that judgment could not affect the truth or falsity of the factual statements themselves. Testifying about facts is the function of the witness, not of the lawyer."[164] The Court thus found that Kalina performed an act of any competent witness, denied absolute immunity on that basis, and held that § 1983 may provide a remedy when a prosecutor functions as a complaining witness.[165]

Lastly, the Court rejected Kalina's claim that denying absolute immunity in this instance would have a "chilling effect" on prosecutors.[166] Kalina offered no evidence supporting her assertion.[167]

B. JUSTICE SCALIA'S CONCURRENCE

Although Justice Scalia joined in the opinion of the Court, he wrote separately to point out that the Court's functional approach to § 1983 immunity questions "has produced some curious inversions of the common law as it existed in 1871."[168]

Justice Scalia asserted that the thrust of the Supreme Court's recent decisions with regard to prosecutorial immunity was exactly opposite to the common law as it existed in 1871, when § 1983 was enacted.[169] The Court's recent cases instructed that prosecutors "have absolute immunity for the decision to seek an arrest warrant after filing an information, but only qualified immunity for testimony as a witness in support of the

[163] *See id.* at 509-10.

[164] *Id.* at 510.

[165] *Id.*

[166] *Id.*

[167] *See id.*

[168] *Id.* (Scalia, J., concurring). Justice Thomas joined Justice Scalia in his concurrence.

[169] *See id.* (Scalia, J., concurring).

warrant."[170] However, according to Justice Scalia, no absolute prosecutorial immunity existed in 1871.[171]

Justice Scalia outlined three types of immunities that were in existence in 1871.[172] First, the common law recognized an absolute judicial immunity which extended to all persons—judges, jurors, members of courts martial, private arbitrators, and various assessors and commissioners—who resolved disputes between other parties or "authoritatively adjudicat[ed] private rights."[173] Second, the common law protected witnesses and attorneys from prosecution for statements made during a judicial proceeding.[174] Third, a "quasi-judicial" immunity extended to officials who "made discretionary policy decisions that did not involve actual adjudications."[175] Justice Scalia likened this "quasi-judicial" immunity to the modern "qualified" immunity because it was not absolute; it could be defeated by a showing of malice and absence of probable cause.[176] Reiterating the position he took in *Burns v. Reed*,[177] Justice Scalia asserted that had prosecutors existed in their modern form in 1871, their functions would have been considered quasi-judicial, and thus, they would have been entitled only to qualified immunity.[178]

If Fletcher brought his case against Kalina in 1871, Justice Scalia asserted, the tort would be Kalina's decision to prosecute Fletcher and Kalina would be liable only if Fletcher could prove that the prosecution was malicious, lacking in probable cause, and unsuccessful.[179] Kalina's false statements as a witness in support of the warrant would not have been an independent actionable tort since such testimony was absolutely protected from

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[170] *Id.* (Scalia, J., concurring).

[171] *See id.* (Scalia, J., concurring). In fact, even the majority notes that there was no such thing as the modern public prosecutor in 1871. *See id.* at 506 n.11.

[172] *Id.* at 510-11 (Scalia, J., concurring).

[173] *Id.* (Scalia, J., concurring).

[174] *Id.* at 511 (Scalia, J., concurring).

[175] *Id.* at 510 (Scalia, J., concurring).

[176] *See id.* (Scalia, J., concurring).

[177] 500 U.S. 478 (1991). *See also supra* notes 90-98 and accompanying text for a discussion of Justice Scalia's concurrence in *Burns v. Reed*.

[178] *See Kalina*, 118 S. Ct. at 510 (Scalia, J., concurring).

[179] *See id.* at 511 (Scalia, J., concurring).

defamation suits, although it may have been evidence of malice.[180]

The current prosecutorial immunity jurisprudence would create immunities opposite those recognized in 1871.[181] Justice Scalia argued that the functional analysis used by the Court "can[not] faithfully replicate the common law."[182] He reasoned that since "complaining witnesses" are subject to suit for their involvement in initiating or procuring the prosecution, then testifying is the crucial event.[183] The distinction between "witness" and "complaining witness," namely the involvement in the initiation of the prosecution, was relatively harmless in *Malley*.[184] In *Kalina*, however, *Imbler* and *Malley* "collide to produce a rule that stands the common law on its head: Kalina is absolutely immune from any suit challenging her decision to prosecute or seek an arrest warrant, but can be sued if she changes 'functional categories' by providing personal testimony to the Court."[185]

Despite this departure from the common law, Justice Scalia urged adherence to *Imbler* and the functional approach to immunity questions since they are "so deeply embedded in our § 1983 jurisprudence" that stare decisis governs.[186]

V. ANALYSIS

A. THE STATE OF PROSECUTORIAL IMMUNITY JURISPRUDENCE

Kalina v. Fletcher[187] takes a fresh stab at defining the scope of the absolute prosecutorial immunity doctrine. *Imbler v. Pachtman*[188] laid out the Court's functional approach to prosecutorial immunity questions, and *Burns v. Reed*[189] and *Buckley v. Fitzsim-*

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[180] *See id.* (Scalia, J., concurring).
[181] *See id.* (Scalia, J., concurring).
[182] *Id.* (Scalia, J., concurring).
[183] *See id.* (Scalia, J., concurring).
[184] *See id.* at 512 (Scalia, J., concurring).
[185] *Id.* (Scalia, J., concurring).
[186] *Id.* (Scalia, J., concurring).
[187] 118 S. Ct. 502 (1997).
[188] 424 U.S. 409 (1976). *See also supra* Part II.C.1.
[189] 500 U.S. 478 (1991). *See also supra* Part II.C.2.

mons[190] applied the functional test, holding that absolute immunity extended to a prosecutor only while acting as an advocate, which the Court limited to the period following a determination of probable cause. *Kalina* does not build on *Burns* and *Buckley*. Rather, *Kalina* is better seen as a third direct qualification of the broad rule of absolute prosecutorial immunity set forth in *Imbler*.

Kalina highlights trends in the Court's analysis of absolute prosecutorial immunity cases. Where a prosecutor performs advocatory functions not intimately associated with the judicial process, the Court looks to the common law of 1871 and weighs the *Imbler* policy considerations to determine whether to extend absolute immunity to the prosecutor.[191] Where a prosecutor performs an investigative or administrative activity, the Court consults the common law but declines to weigh the *Imbler* policy considerations.[192] Where a prosecutor performs a non-advocatory, non-administrative, and non-investigatory activity, the Court again declines to consider policy when the function enjoys no common law support for absolute immunity and can be performed by other individuals.[193]

Burns identified a singular function, advising,[194] that would not be protected by absolute prosecutorial immunity.[195] *Burns* concluded that a prosecutor's provision of legal advice to the police, although advocatory, was not so "'intimately associated with the judicial phase of the criminal process'" that it deserved absolute prosecutorial immunity.[196] The Court came to that conclusion by noting the lack of historical support for immunity for the activity and the lack of other policy reasons justifying the extension of absolute immunity to that activity.[197] In reaching its

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[190] 509 U.S. 259 (1993). *See also supra* Part II.C.3.

[191] Burns v. Reed, 500 U.S. 478 (1991).

[192] Buckley v. Fitzsimmons, 509 U.S. 259 (1993).

[193] Kalina v. Fletcher, 118 S. Ct. 507 (1997).

[194] The *Burns* Court did not term the activity of providing legal advice to police as "advising," but I will hereafter refer to the activity as such.

[195] *Burns*, 500 U.S. at 493.

[196] *Id.* at 493 (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976)). *See also supra* Part II.C.2.

[197] *See id.* at 493-96.

conclusion, the Court consulted the policy considerations identified in *Imbler*.[198] Although the Court did not identify advising as investigative or administrative, *Burns* directly qualified the rule set forth in *Imbler*.

Buckley chipped away further at the administrative and investigative ambiguity left by *Imbler*. It too directly qualified *Imbler*'s rule by identifying separate functions for which a prosecutor would not be accorded absolute immunity. In *Buckley*, the prosecutor's search for a sympathetic bootprint expert was investigative, and his convening of the grand jury to consider the evidence the work produced was administrative.[199] Furthermore, the Court denied absolute immunity to the prosecutor for holding a press conference, not because the activity was administrative or investigative, however, but because "a prosecutor is in no different position than other executive officials who deal with the press."[200] The Court declined to examine public policy considerations when concluding that statements to the press deserved only qualified immunity, reasoning that when "the prosecutorial function is not within the advocate's role and there is no historical tradition of immunity on which [the Court] can draw, [the Court's] inquiry is at an end."[201] Likewise, the Court did not weigh the *Imbler* policy considerations when it could neatly characterize the prosecutor's activity as administrative or investigative.[202]

In *Kalina*, the Court examined what the prosecutor asserted was advocatory conduct—attesting to facts to support a finding of probable cause—and distinguished the preparation of the affidavit from its actual execution.[203] This distinction, while it identified another function for which absolute immunity will be denied to a prosecutor, does not help to clarify the continuing ambiguity surrounding the line between a prosecutor's advoca-

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[198] *See id.*

[199] *See* Buckley v. Fitzsimmons, 509 U.S. 259, 275-76 (1993). *See also supra* Part II.C.3.

[200] *Buckley*, 509 U.S. at 278.

[201] *Id.*

[202] *See id.* at 275-76.

[203] *See* Kalina v. Fletcher, 118 S. Ct. 502, 510 (1997).

tory and investigative or administrative functions.[204] The *Kalina* Court does not categorize Kalina's activity of attesting[205] as investigative or administrative. For this reason, *Kalina* does not follow *Buckley.* Nor does *Kalina* follow *Burns* since attesting does not build on the advising function analyzed in *Burns.* In *Kalina,* the Court cited to *Burns* and *Buckley* only to support the propositions that when a prosecutor serves as an advocate, he is protected by absolute immunity; when a prosecutor performs a different function, he is not.[206] Finally, *Kalina* does not claim to be progeny of either *Burns* or *Buckley.* Thus, *Kalina* should be analyzed as a third direct qualification of *Imbler.*

Although the Court did not explicitly identify attesting as being beyond the scope of a prosecutor's advocatory duties, it has done so implicitly. First, the Court denied absolute immunity to the prosecutor for attesting to facts as a complaining witness.[207] Applying the *Imbler* standard, the Court found that Kalina was not acting as a advocate in initiating or presenting the state's case when she attested to facts supporting probable cause, and thus was not entitled to absolute immunity.[208]

Furthermore, the Court did not recognize attesting as an administrative or investigative responsibility of the prosecutor's office; it did not constitute normal non-quasi-judicial activity[209] for which qualified immunity would be appropriate. Kalina's activity, attesting, was one that "any competent witness might have performed."[210] Furthermore, the common law did not provide historical support for extending absolute immunity for its performance. Thus, Kalina was not entitled to absolute immunity.

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[204] *See* Kenner, *supra* note 12, at 425.

[205] The *Kalina* Court did not term the activity of attesting to facts in support of probable cause as "attesting," but I will hereafter refer to the activity as such.

[206] *See Kalina,* 118 S. Ct. at 507.

[207] *See id.* at 510.

[208] *See id.* at 509.

[209] Normal non-quasi-judicial activity is conduct performed by a prosecutor that is unrelated to the judicial process. *See* Anthony J. Luppino, *Supplementing the Functional Test of Prosecutorial Immunity,* 34 STAN. L. REV. 487, 505 (1982).

[210] *Kalina,* 118 S. Ct. at 509.

Last, and most strikingly, the Court went so far as to admonish prosecutors against attesting.[211] This more than anything else reveals the Court's sentiment that attesting is beyond the scope of a prosecutor's duties. The Court did, however, extend qualified immunity to Kalina in accordance with law set forth in *Harlow v. Fitzgerald*[212] and the immunity granted to complaining witnesses at common law.[213]

This analysis helps to discern the method by which the Court resolves prosecutorial immunity cases. The Court's analysis in *Kalina* is similar to that in *Burns* in that both cases identify a new function, neither administrative nor investigative, for which absolute immunity is unavailable. However, in *Burns*, because the activity was within the role of the prosecutor as advocate, the Court then consulted the policy considerations enumerated in *Imbler* to determine whether extending the absolute immunity doctrine was justified.[214] It did not do so in *Kalina*, for it regarded attesting to be outside the scope of a prosecutor's duties. In *Buckley*, the Court also by-passed the policy analysis where it could characterize the prosecutor's activity as administrative or investigative,[215] and where the activity was outside the role of the prosecutor and had no common law foundation.[216] The analysis in *Kalina*, then, is most analogous to that conducted by the Court in *Buckley* of the prosecutor's statements at a press conference. Both attesting and giving a press conference were outside the scope of a prosecutor's duties as advocate, and neither were accorded absolute immunity at common law. Thus, in *Kalina* and in *Buckley* with regard to the giving of a press conference, the Court did not consider the *Imbler* policy factors.

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[211] *See id.* at 509 and n.17, 510.

[212] 457 U.S. 800, 816-18 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

[213] *See Kalina*, 118 S. Ct. at 508 n.14.

[214] *See* Burns v. Reed, 500 U.S. 478, 493-96 (1991). *See* Imbler v. Pachtman, 424 U.S. 409, 424-29 (1976).

[215] *See* Buckley v. Fitzsimmons, 509 U.S. 259, 275-76 (1993).

[216] *See id.* at 278.

The *Kalina* Court did, however, note a new policy consideration uniquely triggered by the scenario of the case. The Court questioned the appropriateness of prosecutorial attesting in light of the rules of professional ethics.[217]

B. *KALINA* WAS CORRECTLY DECIDED

Kalina's value springs from the clarity of the opinion and message.[218] The case instructs that when a prosecutor acts as a complaining witness, she will be granted only qualified immunity.[219] A unanimous Court proclaimed that a prosecutor's attestation to false facts will not be protected under the guise of professional judgment.[220] The Court gave deference to the exercises of professional judgment that are involved in preparing and obtaining an arrest warrant, but it appropriately protected only the means by which a court reaches the truth and renders justice.[221] The Court was clear in articulating that it will not infringe upon the prosecutor's decision whether or not to seek an arrest warrant; it just refused to protect the prosecutor from liability for attesting.[222]

Even if Kalina's actions were difficult to categorize, an examination of the policy considerations concerning the extension of immunity to prosecutors would readily reveal that a grant of absolute immunity would have been inappropriate in *Kalina*. *Imbler* provides the starting point for identifying the factors to consider.[223] Generally, *Imbler* factors balance the harm to the prosecutor's ability to exercise discretion against the harm to defendants in denying redress.[224] Subsequent cases relying on *Imbler*'s policy considerations highlighted specific factors loyal to

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[217] *See Kalina*, 118 S. Ct. at 509 & n.17 (citing WASH. R. PROF. CONDUCT 3.7 ("'A lawyer shall not act as advocate at a trial in which the lawyer . . . is likely to be a necessary witness,' unless four narrow exceptions apply"), and MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1992) (same)).

[218] *See infra* Part V.C.1.

[219] *Kalina*, 118 S. Ct. at 510.

[220] *See id.*

[221] *See id.*

[222] *See id.* at 509-10.

[223] *See* Luppino, *supra* note 212, at 511.

[224] *See* Imbler v. Pachtman, 424 U.S. 409, 425 (1976). *See also* Luppino, *supra* note 212, at 510.

the principles in *Imbler*: (1) the potential number of ensuing civil suits; (2) the associated costs of time and effort in defending the suits; (3) the reluctance of prosecutors to point out later-discovered exculpatory evidence; (4) the danger that judges will be less prone to reverse convictions if doing so might lead to a prosecutor's liability; and (5) the ability of the justice system to "check" or correct the effects of misconduct in performing the function in question.[225] *Kalina* identified another policy consideration: whether the prosecutor's activity would violate the rules of professional ethics.[226]

Although the Court did not specifically address them, many of the aforementioned policy considerations supporting the extension of absolute immunity to a prosecutor are absent in *Kalina*. First, denying absolute immunity to a prosecutor who attests to facts in order to support a finding of probable cause would not significantly harm the prosecutor's ability to exercise discretion on behalf of the state. The Court specifically acknowledged and vowed to protect the prosecutor's exercises of professional judgment involved in preparing and obtaining an arrest warrant.[227] Furthermore, the prosecutor presented no evidence that the administration of justice would be harmed if the King County practice of having the prosecutor attest to facts in support of probable cause were no longer followed.[228] A prosecutor need not fill the role of complaining witness when she does not have first hand knowledge of the facts. As such a role is not within a prosecutor's necessary functions, denying absolute immunity to a prosecutor acting as a complaining witness does not impair her ability to exercise discretion in her advocatory role.

Second, in light of the fact that there is no sound policy supporting extension of absolute immunity to prosecutors at-

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[225] *See Imbler*, 424 U.S. at 424-28. *See, e.g.*, Marrero v. City of Hialeah, 625 F.2d 499, 509 (5th Cir. 1980); Hampton v. Hanrahan, 600 F.2d 600, 633 (7th Cir. 1979); Donovan v. Reinbold, 433 F.2d 738, 743-44 (9th Cir. 1970); Redcross v. County of Rensselaer, 511 F. Supp. 364, 371 (N.D.N.Y. 1981); Wilkinson v. Ellis, 484 F. Supp. 1072, 1083-84 (E.D. Pa. 1980); Shifrin v. Wilson, 412 F. Supp. 1282, 1304 (D.D.C. 1976).

[226] *See Kalina*, 118 S. Ct. at 509.

[227] *See id.* at 509-10.

[228] *See id.* at 510.

testing to facts supporting probable cause when they do not have first hand knowledge, denying redress to defendants would be particularly severe. Were any person other than the prosecutor acting as the complaining witness, the defendant would be able to seek relief. In *Kalina*, the Supreme Court specifically stated that such status-based grants of immunity are inappropriate.[229]

Third, the potential for suits against a prosecutor for attesting to facts might be equal to or even greater than the number of suits brought against the original witness. Room for error exists in the communication of the facts from the original witness to the prosecutor. Real world experience instructs that greater accuracy resides in the person closest along the chain of communication to the events in dispute. Where a prosecutor attests to facts communicated to her by another person, she is more likely to mischaracterize or misrepresent them than she would be if she witnessed the events herself, thus making it more probable that a defendant's constitutional rights would be impacted and that a defendant would bring suit. The facts of *Kalina* nicely support this point.[230]

Finally, the justice system provides a method to correct the prosecutor's conduct in *Kalina*. It may require the person with first hand knowledge, normally the police officer, to attest to the facts. Although more troublesome in some situations to the prosecutor to require the police officer, or whomever supplied the prosecutor with the facts, to attest to those facts supporting probable cause, policy justifications weigh in favor of doing so. The integrity of the criminal justice system would be strengthened by such a rule. Our justice system places a premium on truthful witness testimony. To encourage Kalina's conduct by guarding it with absolute immunity contradicts the system's principles. Striving to help to guarantee the truthfulness of wit-

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[229] *See id.* at 507-08.

[230] The Certification for Determination of Probable Cause to which Kalina attested summarized the evidence against Fletcher generated by the police investigation. *See* Brief for Petitioner at 5, Kalina v. Fletcher, 118 S. Ct. 502 (1997) (No. 96-792). Kalina did not collect the evidence herself; she merely relied upon the police report to draft the Certification. *See id.* at 7. Kalina could have miscommunicated the police findings in the Certification.

ness statements should forever be the Court's objective. As Justice White noted in his concurrence in *Imbler*, absolute prosecutorial immunity is "also based on the policy of protecting the judicial process. . . . It is precisely the function of a judicial proceeding to determine where the truth lies."[231]

For reasons besides those articulated by courts, it is sound policy to hold prosecutors to the qualified immunity standard for attesting to facts to support the issuance of an arrest warrant, because to hold otherwise would cause substantial harm to the judicial process and the administration of justice. Arrest warrants arising from false facts given by a prosecutor would leave innocent citizens without any legal remedy. Furthermore, a potential for abuse exists with such a rule; without the possibility of liability, a prosecutor could obtain arrest warrants with abandon. Fourth Amendment warrant procedures are a protection that can only be enforced by the courts,[232] a fact that reinforces the Court's need to protect the integrity of the system in such a way.

Lastly, the Court's rule in *Kalina* creates the incentive for prosecutors to investigate the facts reported to them by the police. Although the Court cautioned prosecutors against attesting to facts to support probable cause, it did not prohibit such activity.[233] Should prosecutors, like those in King County, Washington, continue to attest to facts, they open themselves up to possible liability. Knowing this, they will more thoroughly inquire into the facts reported by the police and be more cautious about executing such supporting documents. While *Kalina* will affect how prosecutors do their jobs, it will do so in a positive way.

C. THE WAKE OF *KALINA*

Lower courts have applied *Kalina* with ease.[234] They are, however, still testing the limit of its holding.[235] As a guiding

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[231] Imbler v. Pachtman, 424 U.S. 409, 439 (1976) (White, J., concurring).

[232] *See* Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967).

[233] *See Kalina*, 118 S. Ct. at 509-10.

[234] *See, e.g.*, Aponte Matos v. Toledo Davila, 135 F.3d 182, 187 (1st Cir. 1998) (relying, in part, on *Kalina* to accord qualified immunity to a police officer who filed an affidavit containing allegedly false facts in support of a search warrant);

principle, the Supreme Court's decisions have frequently held that a state official's absolute immunity should extend only to acts in performance of particular functions of his office.[236] But the Court also has refused to draw functional lines finer than "history and reason" would support.[237] In *Kalina*, the Court drew a line between prosecutorial advocacy and participation. The boundaries of that line remain unclear, however, and the lower courts, zealously following the Court's sentiment that qualified immunity provides adequate protection to most functions, have at times denied absolute immunity based on *Kalina* in sometimes unfounded circumstances.[238] Thus, while *Kalina* is a sound opinion with a rule easy for lower courts to apply, overextension of its rule has already occurred.

1. Roberts v. Kling

In *Roberts v. Kling*,[239] the Tenth Circuit addressed a case with facts similar to *Kalina*. The court appropriately relied upon *Kalina* in reaching its conclusion, and the case exemplifies the easy application of the *Kalina* rule.[240] In *Roberts*, a former criminal

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Sheehan v. Colangelo, 27 F. Supp.2d 344 (D. Conn. 1998); Orobono v. Koch, 30 F. Supp.2d 840, 842 (E.D. Pa. 1998); Richards v. City of New York, No. 97 Civ. 7990(MBM), 1998 WL 567842, at *2 (S.D.N.Y. Sept. 3, 1998); Haywood v. Nye, 999 F. Supp. 1451, 1458 (D. Utah 1998); Brathwaite v. Bunitsky, No. Civ. A. 97-194-SLR, 1998 WL 299357, at *5 and n.9 (D. Del. May 21, 1998).

[235] *See, e.g.*, Jean v. Collins, 155 F.3d 701, 705 (4th Cir. 1998) (relying on *Kalina* in finding absolute immunity for police officers when they perform prosecutorial functions); Larsen v. Senate of the Commonwealth of Pa., 152 F.3d 240, 249 (3rd Cir. 1998) (citing to *Kalina* to support the application of the functional test to legislative immunity questions); Friedland v. Fauver, 6 F. Supp. 2d 292, 303-04 (D.N.J. 1998) (discussing the applicability of prosecutorial immunity doctrine to parole officers).

[236] *See* Butz v. Economou, 438 U.S. 478, 508-17 (1978); *cf. Imbler*, 424 U.S. at 430-31.

[237] Nixon v. Fitzgerald, 457 U.S. 731, 755-56 (1982). *See, e.g.*, Stump v. Sparkman, 435 U.S. 349, 363 & n.12 (1978) (applying judicial privilege even to acts occurring outside "the normal attributes of a judicial proceeding"); Barr v. Matteo, 360 U.S. 564, 575 (1959) (asserting that the fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable."); Spalding v. Vilas, 161 U.S. 483, 498 (1896) (extending privilege to all matters "committed by law to [an official's] control or supervision").

[238] *See, e.g.*, Lucas v. Parish of Jefferson, 999 F. Supp. 839 (E.D. La. 1998); Newton v. Etoch 965 S.W.2d 96 (Ark. 1998).

[239] 144 F.3d 710 (10th Cir. 1998).

[240] *See id.* at 711.

suspect sued Kling, an investigator for the district attorney's office, alleging that Kling "knowingly and willfully executed a criminal complaint, based on false and misleading factual allegations."[241] The complaint resulted in the issuance of a warrant for Roberts' arrest.[242]

Reviewing the case in light of *Kalina*, the Tenth Circuit distinguished the investigator's action of preparing the criminal complaint and that of executing the complaint under penalty of perjury.[243] Relying on *Kalina*, the court held that the investigator was entitled to absolute immunity for his actions in preparing a criminal complaint against Roberts and in seeking a warrant for her arrest, but deserved only qualified immunity for his conduct in executing the criminal complaint.[244] *Roberts* exemplifies the clarity of the *Kalina* decision. The court applied *Kalina* with ease, and did so properly.[245]

2. *Lucas v. Parish of Jefferson*

The District Court for the Eastern District of Louisiana cited *Kalina* in *Lucas v. Parish of Jefferson*[246] in support of its holding that where a prosecutor files a Rule to Revoke Probation, the prosecutor acts merely as a probation or police officer and, accordingly, is entitled only to qualified immunity.[247]

The court relied on *Kalina* for its straightforward application of the functional test, and for the proposition that when a prosecutor elects to function in another capacity, the prosecu-

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[241] *Id.* at 710.

[242] *See id.* Roberts had been accused of failing to return her children to the custody of their father in violation of a court order. *See id.* at 711. Roberts asserted that the complaint misrepresented where she was at the time of the abduction and lacked information about a parenting plan between her and the children's father which would support her contention that she was not in violation. *See id.* at 712.

[243] *See id.* at 711.

[244] *See id.* (citing Kalina v. Fletcher, 118 S. Ct. 502, 509 (1997)).

[245] *Roberts* can be distinguished from *Kalina* in that the defendant was an investigator for the district attorney's office, not a prosecutor, and that the document to which he swore was a criminal complaint, not a certification of the facts supporting the issuance of an arrest warrant. Nevertheless, the state actor in *Roberts* and the document to which he swore were functionally analogous to those in *Kalina* and support a holding resting on *Kalina*.

[246] 999 F. Supp. 839, 844 (E.D. La. 1998).

[247] *See id.* at 847.

tor is entitled to the level of immunity accorded to that capacity.[248] The *Lucas* court argued that while a prosecutor's initial decision to prosecute an individual is seemingly analogous to the decision to revoke probation, it is not so under further scrutiny.[249] The district court noted that qualified immunity was the norm and that only in "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business" will such immunity be afforded.[250]

In Louisiana, the probation officer, not the prosecutor, is responsible for supervising probation and reporting violations to the court.[251] The court further noted that Louisiana statutory law does not even mention the prosecutor when discussing the procedure for summoning an individual for a violation of probation; it assumes that the probation officer will commence such action.[252] A probation officer who moves to revoke probation is protected only by qualified immunity.[253]

In light of *Kalina* and other jurisprudence, the *Lucas* court held that the prosecutor performed the function of a probation officer when he filed a Rule to Revoke Probation.[254] Additionally, by filing the Revocation, the prosecutor represented to the court that probable cause existed to summon the probationer for possible violations, a function analogous to a police officer's seeking an arrest warrant.[255] Accordingly, the prosecutor was only entitled to qualified immunity, the same immunity accorded to a probation or police officer.[256]

The *Lucas* court has helped to define the line between prosecutorial acts that are advocatory and those that are merely participatory. Like the *Kalina* court, the *Lucas* court grappled

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[248] *See id.* at 844.

[249] *See id.* at 845.

[250] *Id.* (quoting Butz v. Economou, 438 U.S. 478, 508 (1978) (internal quotation marks omitted)).

[251] *See id.* (citing LA. CODE CRIM. P. art. 893 (1997)).

[252] *See id.* at 846.

[253] *See id.* (citing Ray v. Pickett, 734 F.2d 370, 370 (8th Cir. 1984); Galvan v. Garmon, 710 F.2d 214 (5th Cir. 1983)).

[254] *See id.* at 847.

[255] *See id.*

[256] *See id.*

with a prosecutorial activity that could not easily be characterized as advocatory, administrative, or investigative.[257] However, arguably an advocatory function, revoking the probation was conduct that could be viewed as "intimately associated with the judicial phase of the criminal process"[258] and a function that was within the prosecutor's duty to determine whether a person should be charged. In *Lucas*, the filing of the revocation by the prosecutor could be seen as a charge: the prosecutor evaluated the evidence, determined that the probationers had violated the law, and because of the violators' status as probationers, initiated appropriate proceedings against them by filing the Revocation. However, because a probation officer normally performed the same action, the court placed great weight on the incongruity of according a prosecutor absolute immunity for an activity for which another received only qualified immunity.[259] Notably the *Lucas* court offered only that one policy reason to support its judgment.

In *Kalina*, by contrast, the prosecutor was denied absolute immunity not only because another individual normally performed the activity and it lacked common law support, but also because the holding comported with an overwhelming number of policy reasons.[260] *Imbler* still provides the guidelines for deciding when absolute immunity is appropriate.[261] The decision to grant absolute immunity entails a balancing of the strain on the prosecutor's ability to function against the public's need for recourse. The only policy reason behind the *Lucas* decision was that a probation officer receives only qualified immunity for the same activity. The decision does comport with the Supreme Court's sentiment that the "absolute immunity that protects the prosecutor's role as an advocate is not grounded in any special 'esteem for those who perform these functions, and not from a

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[257] *See id.* at 845-47.

[258] Imbler v. Pachtman, 424 U.S. 409, 430 (1997).

[259] *See* Lucas v. Parish of Jefferson, 999 F. Supp. 839, 847 (E.D. La. 1998).

[260] *See supra* Part V.B.

[261] *See supra* Part II.C.1; Imbler v. Pachtman, 424 U.S. 409, 424-29 (1976).

desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself.'"[262]

However, denying absolute immunity to a prosecutor for filing a Revocation of Probation does impair the judicial process. The activity is sufficiently analogous to a prosecutor's role as an advocate in initiating and prosecuting a case. This being the case, all the policy considerations articulated in *Imbler* should apply. Accordingly, *Lucas* has extended the reasoning of *Kalina* to an inappropriate extent.

3. Newton v. Etoch

In *Newton v. Etoch*,[263] the Supreme Court of Arkansas relied, in part, on *Kalina* in holding that a prosecutor who knowingly directed the preparation of a materially false affidavit supporting the issuance of an arrest warrant was not entitled to absolute immunity because the alleged conduct fell "outside of traditional prosecutorial functions . . . ."[264]

The prosecutor, Carruth, asserted generally that he was not subject to suit due to absolute prosecutorial immunity.[265] Following a lengthy discussion of the development of prosecutorial immunity jurisprudence, the Arkansas Supreme Court first likened the prosecutor's knowing direction and supervision of false testimony for an arrest warrant affidavit to allegations that a prosecutor fabricated evidence during the preliminary investigation of a crime, the scenario at issue in *Buckley v. Fitzsimmons*.[266] The *Buckley* Court held such conduct to be investigative, as opposed to advocatory, and accorded the prosecutor in that case qualified immunity for that conduct.[267] The Arkansas Supreme Court further analogized the prosecutor's actions to those of the prosecution in *Kalina*.[268] "[T]he [United States Supreme] Court recently held that a prosecutor does not receive

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[262] Kalina v. Fletcher, 118 S. Ct. 502, 508 (1997) (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)).

[263] 965 S.W.2d 96 (Ark. 1998).

[264] *Id.* at 103.

[265] *See id.* at 98.

[266] *See id.* at 103. *See also* Buckley v. Fitzsimmons, 509 U.S. 259, 261 (1993).

[267] *See Buckley*, 509 U.S. at 279.

[268] *See Newton*, 965 S.W.2d at 103.

absolute immunity for swearing to false information in an affidavit for an arrest warrant in *Kalina v. Fletcher*. . . . It logically follows that knowingly directing the preparation of a materially false affidavit would not pass muster."[269]

On its face, the holding seems unwarranted under *Kalina*, for *Kalina* merely addressed a prosecutor's actual attestation to the facts. Here, the prosecutor did not sign his name to the affidavit; he did not personally vouch for the truth of the statements under penalty of perjury. In *Kalina*, the Supreme Court expressly stated that a prosecutor's involvement in the drafting of such an affidavit and in deciding which facts to include in the document were protected by absolute immunity.[270] Therefore, *Kalina* seemingly does not apply.

Even if the plaintiff alleged that the prosecutor directed the drafting of the affidavit knowing it to be false, he should still be entitled to absolute immunity. The reasons articulated in *Imbler* provide the guidelines for deciding when absolute immunity is appropriate.[271] The decision to grant absolute immunity entails a balancing of the strain on the prosecutor's ability to function against the public's need for recourse. Although subversion of justice should be avoided, the costs of exposing a prosecutor to liability in this case would be too high. A challenge to the prosecutor's level of knowledge every time an arrest warrant is issued would greatly jeopardize the prosecutor's ability effectively to represent the state. A suit against him would direct his attention away from his duties, and potential liability would infringe upon the "vigorous exercise of his official authority."[272] More importantly, in the scenario presented in *Newton*, the defendant would not be denied recourse if the prosecutor were granted absolute immunity for knowingly directing a false affidavit. The defendant could recover from the signer of the affidavit, the po-

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[269] *Id.*

[270] *See* Kalina v. Fletcher, 118 S. Ct. 502, 509-10 (1997). "[E]xcept for [the prosecutor's] act in personally attesting to the truth of the averments in the certification, it seems equally clear that the preparation and filing of the [certification] was part of the advocate's function" and were, therefore, activities protected by absolute immunity. *Id.* at 509.

[271] *See supra* Part II.C.1; Imbler v. Pachtman, 424 U.S. 409, 424-29 (1976).

[272] Butz v. Economou, 438 U.S. 478, 506 (1978).

lice officer, provided he could prove that the signer violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[273] Although a potential for abuse exists, the strain on the prosecutor's office would be great, and the harm to the public's ability to seek recourse would be minimal. Therefore, a prosecutor's knowing direction of a false affidavit should be protected by absolute immunity where a defendant would be able to recover damages from another source. Thus, *Newton*'s holding is not warranted by *Kalina.*

VI. CONCLUSION

In a unanimous opinion, the *Kalina* Court correctly concluded that the doctrine of absolute prosecutorial immunity should not protect a prosecutor when she attests to facts in an affidavit supporting the issuance of an arrest warrant.[274] In so holding, *Kalina* identified attesting as another activity for which a prosecutor will not be accorded absolute immunity, and therefore, directly qualified the broad rule of absolute prosecutorial immunity announced in *Imbler v. Pachtman.*[275]

Kalina is valuable to prosecutorial immunity jurisprudence for several reasons. The case articulated a new policy consideration: whether the prosecutor's activity violates a rule of professional ethics. The holding is easy to apply, and the decision was necessary and proper in order to prevent substantial harm to the judicial process and the administration of justice.

The addition of *Kalina* to prosecutorial immunity jurisprudence allows for the identification of trends in the Supreme Court's analysis of these cases.[276] In some cases, the Court declines to consider policy arguments for extending absolute immunity to a prosecutor for certain activities. However, guiding principles in the Court's analysis remain whether the common law recognized absolute immunity for the activity; whether the

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[273] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The defendant in *Newton* sued both the police officer and the prosecutor. *Newton*, 965 S.W.2d at 97-98.

[274] Kalina v. Fletcher, 118 S. Ct. 502, 510 (1997).

[275] 424 U.S. 409 (1976).

[276] *See supra* Part V.A.

activity is advocatory; and whether the policy arguments articulated in *Imbler* weigh in favor of granting absolute immunity. While *Imbler*'s progeny have qualified its rule, *Imbler* still provides the standard against which prosecutorial immunity cases are judged, and courts are advised to consider *Imbler* as well as *Kalina* in considering whether a prosecutor is entitled to absolute immunity.

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