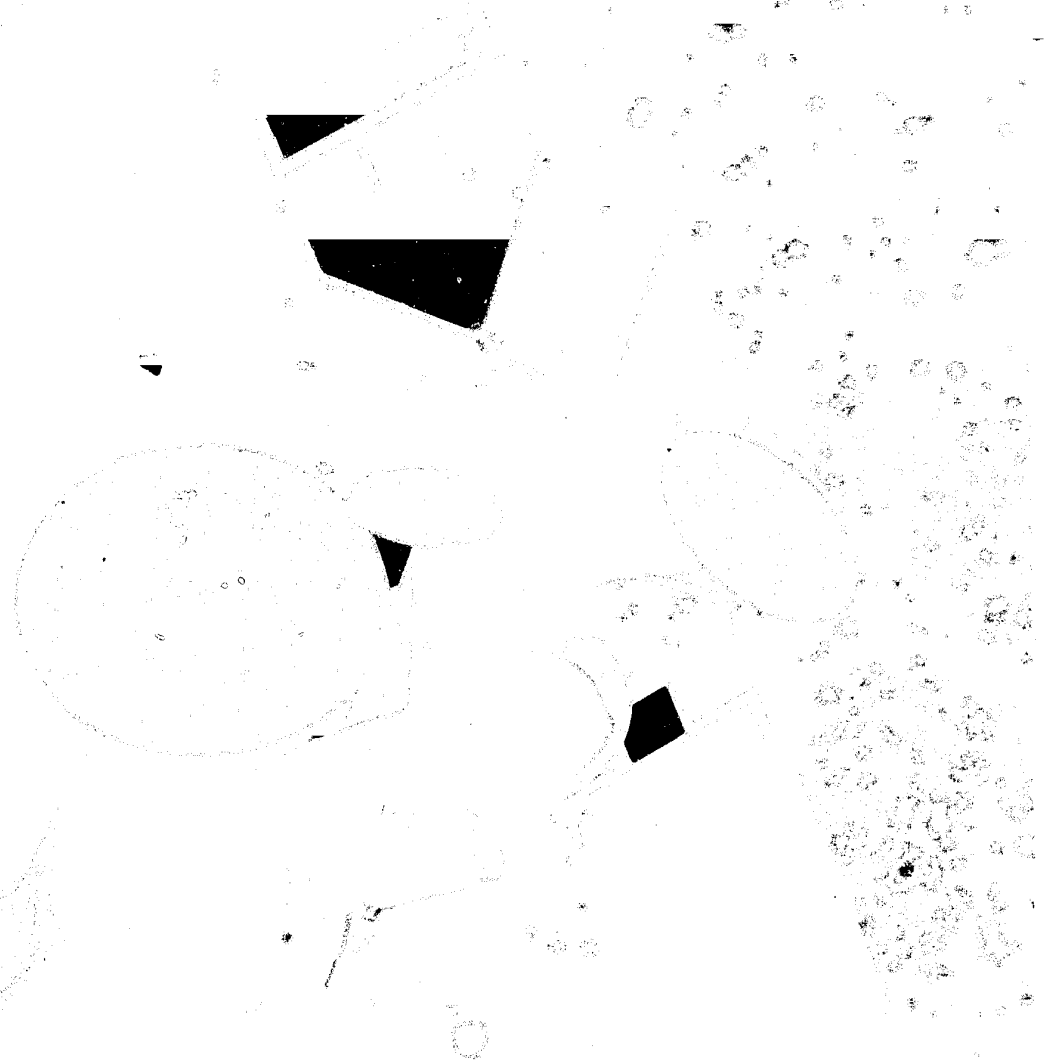


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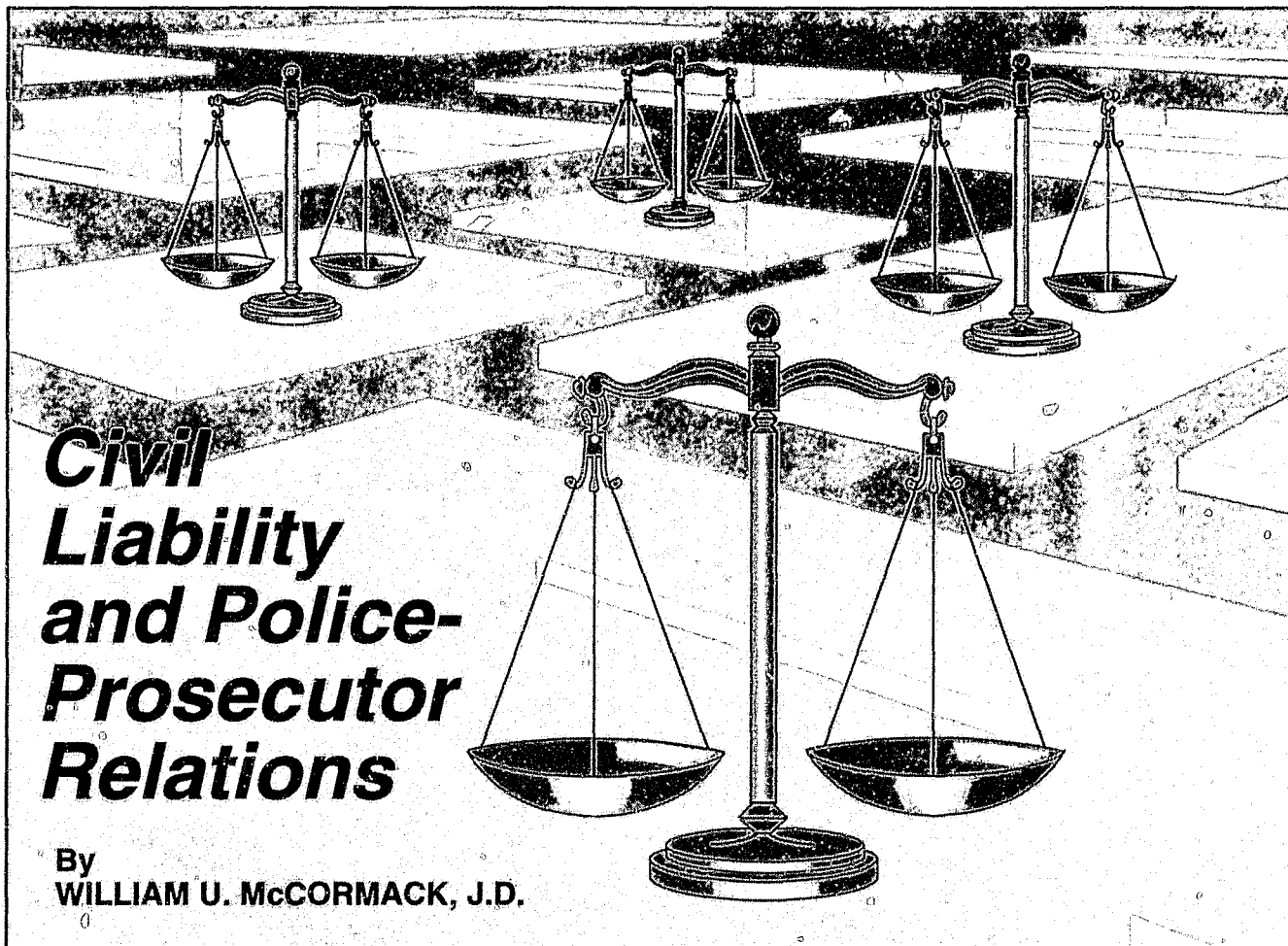
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Civil Liability and Police- Prosecutor Relations

By
WILLIAM U. McCORMACK, J.D.

Effective law enforcement in any jurisdiction depends, in large part, on good relationships and cooperation between law enforcement officers and their prosecutors. Essential to well-functioning police-prosecutor relationships are open communication and the early participation of a prosecutor in many criminal cases. However, unnecessary civil liability concerns on the part of the prosecutor can inhibit the extent of this vital cooperation.

This article discusses recent cases that delineate the immunities from civil lawsuits alleging constitutional violations accorded to prosecutors and law enforcement

officers. First, the article analyzes the Supreme Court's decision in *Burns v. Reed*¹ and a prosecutor's immunity for giving advice to the police. Next, it reviews the doctrine of qualified immunity from civil lawsuits applicable to law enforcement officers and prosecutors and concludes that responsible prosecutors need not fear personal liability as a result of the *Burns* decision. Finally, the article stresses that even though prosecutors may lack absolute immunity from suit, they should confidently continue to advise police, and in appropriate circumstances, to become involved in the investigative process.

Types of Immunity

In establishing the extent of personal liability for government employees who violate the U.S. Constitution, the Supreme Court has engaged in a balancing of interests. On the one hand, the Court has ruled that government employees, such as prosecutors and law enforcement officers, should be encouraged to conform their actions to the Constitution by allowing them to be personally sued for constitutional violations under 42 U.S.C. 1983² and *Bivens v. Six Unknown Federal Narcotics Agents*.³ On the other hand, the Court has recognized that government employment places a person in a special position

that invites lawsuits. This, in turn, can distract officials from their governmental duties, inhibit discretionary action, and deter able people from public service.⁴

With these competing interests in mind, the Supreme Court has developed two types of immunity—absolute immunity and qualified immunity—for law enforcement officials who are sued for alleged constitutional violations. Absolute immunity pertains to judicial⁵ and prosecutorial functions⁶; qualified immunity applies to law enforcement investigatory functions.⁷


Providing Advice to Police

In *Burns v. Reed*, the Supreme Court decided that a prosecutor giving advice to police in the course of an ongoing investigation is entitled to only qualified immunity from a lawsuit alleging a constitutional violation. While the Court thus cleared up a disputed issue concerning immunity, it also increased the concerns of prosecutors about their roles in assisting police during the investigatory phase of a case.

Burns arose out of an investigation of a shooting of two young boys in Indiana. Police focused on the boys' mother as their prime suspect. The mother, however, passed a polygraph examination and a voice stress test, submitted exculpatory handwriting samples, and repeatedly denied shooting her sons. Finally, the police decided to interview her under hypnosis, believing she may have had multiple personalities.

However, because the police did not know whether an hypnotic interview was an accepted investigative technique in Indiana, they called the chief deputy prosecutor.

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Special Agent McCormack is a legal instructor at the FBI Academy.

The deputy prosecutor told police that if the hypnotic interview was their last available avenue, they could conduct it.

The police believed the mother made incriminating remarks about the shooting during the hypnotic interview. They then met with the prosecutor to relate her statements and to ask if he thought they had probable cause to arrest her. Once the prosecutor replied that they “probably had probable cause,”⁸ police arrested the mother and later searched her house pursuant to a warrant.

After the mother spent 4 months in a psychiatric ward awaiting trial, the prosecution dropped the charges when a court suppressed her statements made during the hypnotic interview. She then sued the police and the prosecutor under 42 U.S.C. 1983 alleging various constitutional violations. The police settled the case against them for \$250,000. However, the lower courts eventually granted absolute immunity to the prosecutor, who refused to settle, for all of his activities in the case.⁹

The Supreme Court reversed, in part, the rulings of the lower courts and held that the prosecutor was entitled to only qualified immunity for providing legal advice to the police.¹⁰ At the same time, the Court reaffirmed that prosecutors are absolutely immune from lawsuits alleging constitutional violations when they conduct a prosecutorial function that is intimately associated with a judicial phase of the criminal process.¹¹

The Court ruled, therefore, that the prosecutor was entitled to absolute immunity for participating in the probable cause hearing before a magistrate, in which the police obtained the search warrant for the mother's house.¹² However, the Court determined that providing advice to police is not an activity closely associated with the judicial process, and as such, the prosecutor should only be accorded a qualified immunity. The Court noted that if prosecutors were afforded absolute immunity for giving legal advice to police, it would be ironic that police who do not ordinarily hold law

degrees would be liable for not knowing clearly established law while prosecutors would not.¹³

The Qualified Immunity Protection

One of the reasons given in *Burns* for denying absolute immunity to prosecutors who give advice to police was the broad protection qualified immunity provides from lawsuits alleging constitutional violations. The Court noted, "As the qualified immunity defense has evolved, it provides ample support to all but the plainly incompetent or those who knowingly violate the law."¹⁴

A court uses three steps to determine qualified immunity and whether a lawsuit alleging a constitutional violation should be dismissed prior to trial. First, the court must determine whether the plaintiff even stated a constitutional violation in the complaint. Second, the court must determine whether the constitutional right allegedly violated was clearly established at the time the activity occurred. Third, the court must determine whether a reasonable law enforcement official could have believed that the actions of the prosecutor or police officer sued were lawful in light of the clearly established law and the facts known to the prosecutor or officer when the alleged unconstitutional actions occurred.

Allegations of Constitutional Violations

In recent years, the Supreme Court has viewed narrowly the types of governmental activity that gives rise to a lawsuit based on a constitutional violation. In particular, the Court has clarified that the

Due Process Clause of the 5th and 14th amendments does not supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.¹⁵ For example, a section 1983 or *Bivens* lawsuit based on an allegation that a prosecutor or a law enforcement officer committed an act amounting to common law negligence¹⁶ or defamation¹⁷ will be dismissed because such conduct does not constitute a constitutional violation.

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The Supreme Court has instructed lower courts that the first step in determining qualified immunity is to decide whether the plaintiff alleges a constitutional violation at all.¹⁸ Thus, attorneys representing law enforcement officials and prosecutors should be wary of attempts by plaintiffs to fashion common law defamation or negligence claims into an alleged constitutional violation.

Clearly Established Rights

Even if a plaintiff clears the first hurdle and alleges an injury of constitutional significance, courts must determine whether the violation was clearly established at the time the

action occurred.¹⁹ In this regard, the Supreme Court and lower courts have set down clear rules in many areas of criminal procedure and constitutionally based employment rights. Nevertheless, many areas still remain unclear because the courts have not set forth clear guidelines or rules. If a prosecutor or law enforcement official engages in investigative or managerial activity in one of these unclear areas, and a civil suit alleging a constitutional violation results, the court will dismiss the case, because the right alleged to have been violated was not clearly established.

An example is *Tarantino v. Baker*,²⁰ a case involving the concept of business curtilage decided by the U.S. Circuit Court of Appeals for the Fourth Circuit. In *Tarantino*, the plaintiff alleged that a detective for the sheriff's department illegally walked up to the defendant's business, an abandoned general store in a rural area, and peered through a crack in the wall of the store to view marijuana growing inside.

After the evidence was suppressed in the criminal case, the plaintiff brought a lawsuit under 42 U.S.C. 1983 alleging a fourth amendment violation by the detective. The fourth circuit ruled that the law concerning whether the plaintiff had a reasonable expectation of privacy in the area where the detective walked without a warrant was unclear, and thus, granted qualified immunity.

In determining whether the law allegedly violated was clearly established, courts will review both Supreme Court and lower court case law that existed at the time the alleged constitutional violation occurred.²¹ The court determining

qualified immunity essentially takes a snapshot of the law at the time the activity occurred. Only rights that were clearly established clear the second qualified immunity hurdle.²²

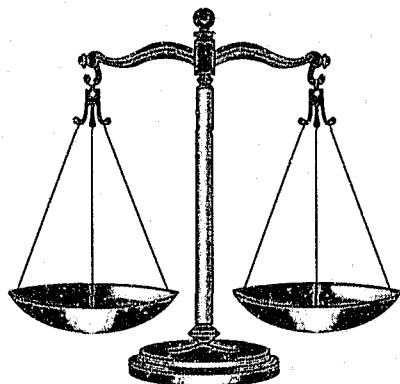
Facts Known to Officers

The third step in determining the availability of qualified immunity is for the court to review the facts known to the prosecutor or officer at the time the alleged constitutional violation occurred. The court must then decide whether a reasonable prosecutor or officer could have believed that the actions were lawful in light of clearly established law and the facts known to the officer or prosecutor.

A good illustration of this third step is *Hunter v. Bryant*,²³ in which the Supreme Court granted qualified immunity to law enforcement officers making a warrantless arrest. In *Hunter*, Secret Service agents were advised that the plaintiff had given a photocopied, handwritten rambling letter to personnel at the University of Southern California. The letter referred to an undisclosed person as "Mr. Image," who was described as "Communist white men within the National Council of Churches," and stated that "Mr. Image" was planning to assassinate President Reagan on an upcoming trip to West Germany.

The Secret Service agents went to the plaintiff's home and found the original of the letter, but the plaintiff refused to identify "Mr. Image." The agents then decided to make a warrantless arrest of the plaintiff for threatening the President.

After the criminal case was dropped, the plaintiff sued the agents under *Bivens*, alleging a con-



stitutional violation. The U.S. Circuit Court of Appeals for the Ninth Circuit denied qualified immunity to the agents, but the Supreme Court reversed.

The Supreme Court held that the agents were entitled to qualified immunity, even if their decision to arrest the plaintiff was mistaken. The Court stated that qualified immunity includes a determination whether a reasonable officer could have believed the activity to be lawful in light of clearly established law and the information the officers possessed.²⁴

The Court concluded the ninth circuit's denial of qualified immunity was wrong because it would routinely place the question of immunity in the hands of the jury and that immunity should be decided by a court long before trial.²⁵ The Supreme Court held that the qualified immunity determination in this case should be based on whether a reasonable officer could have believed that probable cause existed and that the agents' decision to arrest the plaintiff was reasonable even if mistaken.²⁶

In most civil suits, it is recommended that the prosecutor or officer sued attach affidavits or other statements to their motions asserting qualified immunity. Such information provides the court with

the facts known to the government official, which can establish a basis for the court to rule on this third step in the qualified immunity determination.

Effectiveness of Qualified Immunity in Preventing Liability

The three steps in a qualified immunity determination provide extremely wide protection from civil suits alleging constitutional violations. As stated by one court:

"The grant of qualified immunity to government officials ensures that these officials can perform their duties free from the specter of endless and debilitating lawsuits...Without such immunity, the operations of the government would be immobilized. [P]ermitting damage suits can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."²⁷

Qualified immunity thus serves an important function in discouraging an unrealistic and unnecessary fear of lawsuits. As such, it should also serve to prevent police and prosecutors from becoming intent on escaping liability to the cumulative detriment of those duties which communities depend on them to perform.²⁸

Immunity and Police-Prosecutor Relations

Even though the Supreme Court opened the door to increased civil liability exposure by denying prosecutors absolute immunity when they give advice to police, the

protection provided by qualified immunity is broad. Thus, prosecutors should not be reluctant to provide responsible assistance to police because of a fear of personal liability for constitutional violations.

However, the Supreme Court in *Burns* cautioned that a prosecutor's assistance to police might result in personal liability if it is clearly irresponsible and uninformed. As the Court noted: "[W]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate."²⁹

Conclusion

In light of *Burns*, police-prosecutor relations need not be substantially affected by the threat of liability when prosecutors advise the police or even participate in an interview or other investigative activity. Although absolute immunity from suit will generally not be available, the prosecutor is entitled to qualified immunity.

Courts determine qualified immunity, like absolute immunity, at the outset of the litigation and allow an immediate appeal of an erroneous decision by the trial court. When deciding a qualified immunity issue, courts use a three-step analysis: 1) Whether a constitutional violation has been alleged; 2) whether the alleged violation was clearly established at the time the action occurred; and 3) whether a reasonable government official could have believed the activity lawful in light of the facts known to the official.

When qualified immunity is quickly and forcefully pursued by counsel representing a prosecutor or officer, it will dispose of all lawsuits

alleging constitutional violations early in the litigation, even before discovery, except where there is a clear violation of constitutional law. Although not as complete as absolute immunity, qualified immunity does provide broad protection so that prosecutors can confidently fulfill their important function of advising police and maintaining open lines of communication without a crippling fear of personal liability. ♦

Endnotes

- ¹ 111 S.Ct. 1934 (1991).
- ² See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961).
- ³ 403 U.S. 388 (1971).
- ⁴ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).
- ⁵ *Mireles v. Waco*, 112 S.Ct. 786 (1991) (Judge given absolute immunity when conducting a judicial function, even in the face of an allegation that the judge ordered police to forcibly and with excessive force seize and bring a public defender to his courtroom for a judicial hearing).
- ⁶ *Imbler v. Pachtman*, 424 U.S. 409 (1976). In *Briscoe v. Lahue*, 460 U.S. 325 (1983), police were accorded absolute immunity for testimony in a criminal trial.
- ⁷ *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Malley v. Briggs*, 475 U.S. 335 (1986). For an excellent discussion of *Anderson v. Creighton* and *Malley v. Briggs*, see Schofield, "Personnel Liability, The Qualified Immunity Defense," FBI Law Enforcement Bulletin, vol. 59, No. 3, March 1990.
- ⁸ *Burns*, 111 S.Ct. at 1937.
- ⁹ *Burns v. Reed*, 894 F.2d 949, 952 (7th Cir. 1990).
- ¹⁰ *Burns*, 111 S.Ct. at 1944-1945.
- ¹¹ *Id.* at 1942.
- ¹² *Id.* Lower courts have seemingly differed in determining the line between judicial-type activity by a prosecutor and investigative-type activity. Compare *Joseph v. Patterson*, 759 F.2d 549 (6th Cir. 1986) (Interrogation and the preparation of an application for a search warrant by a prosecutor fell within a "gray area" and a factual inquiry was necessary to determine whether the activity was conducted in furtherance of the decision to prosecute, in which case absolute immunity was appropriate)

and *Pachaly v. City of Lynchburg*, 897 F.2d 723 (4th Cir. 1990) (Prosecutor's participation in a post-indictment search fell within the bounds of the prosecutor's public duty to prepare a complete prosecution. Thus, absolute immunity was granted to the prosecutor.)

- ¹³ *Id.* at 1944.
- ¹⁴ *Id.* at 1944 (quoting *Malley v. Briggs*, 475 U.S. at 341).
- ¹⁵ *Collins v. City of Harker Heights, Tex.*, 112 S.Ct. 1061 (1992) (A city could not be held liable under the Due Process Clause for allegedly failing to warn and train its employees concerning the dangers of working in sewers.)
- ¹⁶ *Daniels v. Williams*, 474 U.S. 327 (1986) (A prison official negligently leaving a pillow case on a set of stairs in a prison did not give rise to due process violation).
- ¹⁷ *Stegert v. Gilley*, 111 S.Ct. 1789 (1991) (Former Government employee's claim that he was deprived of his liberty interests without due process when his former supervisor provided adverse information to another employer did not state a constitutional violation because the employee voluntarily resigned from his former employment).
- ¹⁸ *Id.* at 1793.
- ¹⁹ See *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).
- ²⁰ 825 F.2d 772 (4th Cir. 1987).
- ²¹ *Anderson v. Creighton*, 483 U.S. at 640.
- ²² See, e.g., *Borucki v. Ryan*, 827 F.2d 836 (1st Cir. 1987) (District attorney's dissemination to press of information from a suspect's psychiatric report did not violate clearly established right of privacy as of day of press conference).
- ²³ 112 S.Ct. 534 (1991).
- ²⁴ *Id.* at 536.
- ²⁵ *Id.* at 537.
- ²⁶ *Id.* at 537.
- ²⁷ *Torchinsky v. Siwinski*, 942 F.2d 257, 260-261 (4th Cir. 1991).
- ²⁸ *Gooden v. Howard County, MD*, 954 F.2d 960, 967 (4th Cir. 1992).
- ²⁹ *Burns*, 111 S.Ct. at 1944 (quoting *Harlow*, 457 U.S. at 819).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.
