XVI. Torts

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In *Foster v. Pearcy*,[1] the Indiana Supreme Court created an absolute privilege reaching the defamatory statements of a local deputy prosecutor made to a reporter shortly after indictment of the eventual plaintiff. The indictment proved defective and a subsequent attempt to indict the plaintiff failed. The defamatory remarks alleged various details of the plaintiff's heroin operations indicating, *inter alia*, his gross income and his membership in a nationwide drug ring. In a civil suit for defamation filed against the deputy prosecutor and the county prosecutor, the trial court granted a motion to dismiss for failure to state a cause of action.[2] On appeal, the First District of the Indiana Court of Appeals reversed the trial court in a unaminous decision.[3] On transfer, the judgment of the trial court was unanimously reinstated, the supreme court having concluded that "since it is a prosecutor's duty to inform the public as to his investigative, administrative and prosecutorial activities, the prosecutor must be afforded an absolute immunity in carrying out those duties."[4]

Prosecutors have long enjoyed several immunities in conjunction with their function in the judicial process. Most significant among these is the immunity from suit for malicious prosecution, which originated in the United States with an Indiana case, *Griffith v. Slinkard*.[5] In *Imbler v. Pachtman*,[6] the United States Supreme Court

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[1]387 N.E.2d 446 (Ind. 1979).

[2]*Id.* at 447. Actually, the only issue on appeal was the dismissal of the cause of action against the county prosecutor. The opinion throughout treats the county prosecutor and deputy alike, except insofar as the deputy has not been delegated, presumably by the county prosecutor, the authority to give information to the public. *See id.* at 449.

[3]Foster v. Pearcy, 376 N.E.2d 1205, 1211 (Ind. Ct. App. 1978).

[4]387 N.E.2d at 449. The use of the plural here suggests that the immunity granted in this case extends to all duties of the prosecutor; the choice seems deliberate. Although the sentence might be read as implying that other duties are immunized because the prosecutor has a duty to inform the public, a better understanding would be that, given the immunization of the public information function, *a fortiori*, more important functions such as investigation and administration are immunized. Much of what is said in this review of the case relates equally well to all extrajudicial duties of the office. The specific focus of this article is, however, the decision in *Foster v. Pearcy*, and not the question of prosecutorial immunity in general.

[5]146 Ind. 117, 44 N.E. 1001 (1896).

[6]424 U.S. 409 (1976).

extended common law prosecutorial immunity to actions arising under section 1983 of the United States Code[7] in cases involving the initiation of a prosecution or presentation of a case. Chief Justice Givan, writing for the Indiana Supreme Court in *Foster*, purported to extend the reasoning of *Griffith* and *Imbler* to protect a prosecutor acting in fulfillment of his "duty to inform the public regarding cases which are pending his office"[8] from a suit in defamation.

Viewed as a mere defamation case, the result in *Foster* is extraordinary. In this area of the common law, absolute privilege is held by all participants in a judicial proceeding, including attorneys for both sides, witnesses, jurors and judge.[9] In the case of attorneys, the *Restatement* formulation of this rule is an extremely broad one, reaching "communications preliminary to a proposed judicial proceeding . . . if . . . [the defamatory statement] has some relation to the proceeding."[10] Nonetheless, *Johnston v. Cartwright*[11] appears to be the only case in which that privilege was found to embrace attorney remarks to a reporter. That case involved a defendant-attorney's statement that his client's defamatory remarks "came to us on pretty good authority."[12] This presumed defamation, however, was issued at a time when the client's original statements had already received wide publicity and had been publicly met by an accusation of falsity and libel and a challenge to prove. Then-Circuit Judge Blackmun found that "[a]ll signs pointed to incipient litigation and *to the necessity for protective action.*"[13] This indication that the court believed that a "trial by press" was already well underway suggests that its decision to recognize an attorney's absolute privilege in the case should be taken as a product of those rather special circumstances. For it is precisely the fear of trial by press that lies at the root of a widely accepted rule limiting the attorney's absolute privilege to statements made in the course of his functions within the judicial process, the rule to which the Indiana Supreme Court has now fashioned a second exception.

The late Dean Prosser stated the rule flatly: "It is clear, however, that statements given to the newspapers concerning the case are no part of the judicial proceeding, and are not absolutely privileged."[14] The leading case of *Kennedy v. Cannon*[15] is illustrative of

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[7]42 U.S.C. § 1983 (1976).

[8]387 N.E.2d at 448.

[9]*See generally* L. ELDRIDGE, THE LAW OF DEFAMATION 340-74 (1978).

[10]RESTATEMENT (SECOND) OF TORTS § 586 (1977).

[11]355 F.2d 32 (8th Cir. 1966).

[12]*Id.* at 34.

[13]*Id.* at 37 (emphasis added).

[14]W. PROSSER, LAW OF TORTS § 114, at 781 (4th ed. 1971).

[15]229 Md. 92, 182 A.2d 54 (1962).

both the stringency with which the rule is applied and the reasons therefor. In that case, the defendant-attorney Kennedy was representing a black man arrested for the rape of the white plaintiff. All relevant events occurred in Salisbury, Maryland. Kennedy learned that the local newspaper was about to publish a story which stated that the accused had signed a statement admitting intercourse. Recalling that twenty-five years earlier a similar situation in Salisbury had resulted in a lynching, Kennedy told the reporter working on the story of his client's claim that the woman had consented. The court denied Kennedy's alternative claims for absolute or *qualified* privilege, saying in part:

> The solicitude of . . . [the attorney] for his client is understandable, and the initial act of the State's Attorney in releasing his statement to the press must be disapproved. Nevertheless . . . [his] legal duty in no way justified the publication of his defamatory reply statement. To hold otherwise would open the door to the universally condemned "trial by press," a procedure forbidden to counsel and subversive of the fair and orderly conduct of judicial proceedings.[16]

The judicial proceedings privilege in defamation thus limited by *Kennedy* is itself founded on the idea of protecting the judicial process, reflecting the belief that the full disclosure of any and all pertinent evidence within the judicial process will aid the search for truth. As Justice White put the matter in his concurring opinion in *Imbler*:

> The reasons for this rule are substantial. It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be "given every encouragement to make a full disclosure of all pertinent information within their knowledge." . . . For a lawyer, it means that he must be permitted to call witnesses without fear of being sued if the witness is disbelieved and it is alleged that the lawyer knew or should have known that the witness' [sic] testimony was false. . . . [I]f the risk of having to defend a civil damage suit is added to . . . criminal laws against . . . subornation of perjury, the risk of self-censorship becomes too great.[17]

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[16] *Id.* at 101, 182 A.2d at 59.

[17] 424 U.S. at 439-40 (quoting in part 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.22, at 424 (1956).

And if trial by press is subversive of that same process, it can hardly be contended that the privilege thus accorded can sensibly be extended to cover remarks made to the press. Such an extension would cut the ground from under itself; the reasoning of such an extension could only be called reasoning in a very vicious circle.

Although the *Foster* case arose under the law of defamation, the Indiana Supreme Court paid scant attention to defamation law and its lessons in Chief Justice Givan's opinion, which makes no mention of "trial-by-press," *Kennedy*, or even Dean Prosser.[18] Instead, *Foster* claimed to rely on an extension of the reasoning of the *Griffith* and *Imbler* cases to reach the extrajudicial prosecutorial duty of informing the public, and *a fortiori*, more significant investigative and administrative duties.[19] Even a casual reading of those two cases would, however, warrant great caution in attempting such an extension. *Griffith*, which provided immunity for prosecutors from malicious prosecution, rested heavily on the judicial nature of that prosecutorial function. At the crucial point in its analysis the Court quoted from a section on the privilege of judges in judicial proceedings from a treatise on the law of defamation,[20] thus suggesting that any privilege was necessary to and limited by the exigencies of the judicial process. Likewise, although the opinion of Justice Powell in *Imbler* declined to consider whether the immunity from suit under section 1983 granted in that case might extend to prosecutorial administrative or investigative responsibilities,[21] it was noted both that the basis of prosecutorial immunity lay on the same foundation as that of judges and grand jurors[22] and that the questioned activities of the defendant in *Imbler* were "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force."[23] When read, not casually, but in the total context of *Imbler*, these statements do considerably more than suggest the need for caution in applying the result, supplying a limitation which has been acknowledged by other courts considering proposed extensions of prosecutorial immunity.[24]

Prior to the decision in *Imbler*, prosecutors had consistently lost attempts to have their immunity from suit under section 1983 ex-

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[18]The opinion of the court of appeals referred to both the case and the dean. 376 N.E.2d at 1208. The opinion of Judge Robertson did not, however, mention trial by press or attempt to examine the policy reasons involved in the case.

[19]*See* note 4 *supra.*

[20]146 Ind. at 121-22, 44 N.E. at 1002 (citing J. TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL § 227, at 395-96 (3d ed. 1877)).

[21]424 U.S. 430-31.

[22]*Id.* at 422-23.

[23]*Id.* at 430.

[24]*See* notes 27-44 *infra* and accompanying text.

tended to activities beyond the initiation or presentation of a case, with at least four of the United States Circuit Courts of Appeal holding squarely against such extensions.[25] In post-*Imbler* section 1983 litigation, they seem to have fared no better[26] with the rather revealing exception of the decision in *Forsyth v. Kleindeinst*,[27] a case which arose from the decision of former United States Attorney General John Mitchell to authorize warrantless electronic surveillance.

In that case, decided several months after *Foster*, the Third Circuit Court of Appeals recognized that the securing of additional information may be necessary upon occasion for an informed decision to prosecute. The court indicated its belief that the right to make an unfettered decision to prosecute must, therefore, include a limited right to gather facts necessary to form that decision.[28] At the same time, the court recognized the evident potential for expansion of this exception to include all of a prosecutor's investigative activity. It therefore carefully confined the extension of *Imbler* protection to an act designed to secure information necessary to a decision to initiate prosecution, clearly indicating that "when the decision arises in the context of a purely investigative or administrative function, the decision will not be protected by absolute immunity."[29] Although the court was fully aware that the value of an absolute immunity is to avoid the chilling effect of later second-guessing by factfinders in the courts,[30] the court remanded the case for development of facts from which Mitchell's role, quasi-judicial or investigative/administra-

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[25]Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974); Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965).

[26]*See* Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977); Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976).

[27]599 F.2d 1203 (3rd Cir. 1979).

[28]*Id.* at 1215.

[29]*Id.*

[30]One important difference between absolute and qualified immunity is that the existence of absolute immunity will lead to disposition of the case without, in most instances, trial on issues of fact such as "good faith" or "reckless disregard of truth or falsity." The beneficiary of an absolute immunity will rarely be sued; if he is, the case can usually be disposed of on the pleadings. By remanding *Forsyth*, the Third Circuit placed the defendant, Mitchell, at risk of finding in fact that he was engaged in purely investigative activity. The danger of "dilution" of the immunity arises because future prosecutors who need information to make the decision on initiation of a prosecution might so fear the inconvenience of facing trial on an ambiguous issue of fact that they will skew their decisions toward the side of personal safety. Still, even an absolute immunity like that of Barr v. Mateo, 360 U.S. 564 (1959), must occasionally present questions of fact; no immunity will cover all possible activities of its beneficiary. In other words, even absolute immunities are susceptible to abuse. *See generally* L. ELDRIDGE, *supra* note 9, at 414-16.

tive, could be determined.[31] That it was content to do so, although explicitly recognizing that such an action "might dilute" the absolute immunity thus extended,[32] serves to demonstrate the court's determination that *Imbler* be limited to quasi-judicial activities.

The reluctance of the Third Circuit to extend *Imbler* beyond those cases having a close relationship to the judicial aspects of the prosecutorial function was underscored by its treatment of two of its own prior cases. One of these involved alleged prosecutorial conduct all but indistinguishable from that now immunized in Indiana by *Foster*. In *Helstoski v. Goldstein*,[33] then-former Congressman Helstoski brought an action against a United States Attorney for, *inter alia*, deliberate leaks to the press of false information. The district court had dismissed the action on the basis of *Imbler*. The Third Circuit reinstated the suit, noting that even if *Imbler*-immunity extended to the administrative and investigative functions, deliberate leaks to the press of false information were outside the scope of immunity.[34] The *Forsyth* court relied on *Helstoski* as the authority for its holding that "where the activities of the Attorney General depart from those which cast him in his quasi-judicial role, the protection of absolute immunity will not be available."[35]

If the *Forsyth* court's treatment of *Helstoski* shows its outright rejection of an extension of immunity to cases with a close family resemblance to *Foster*, similar treatment of another case serves to demonstrate just how extreme is the overextension of *Imbler* by the Indiana court. The defendant Mitchell confronted the court with its own earlier rejection of an advocatory/investigative distinction in *Cambist Films, Inc. v. Duggan*,[36] a case in which a prosecutor had been held immune for the presumably investigative activity of illegally seizing an allegedly obscene film.[37] *Cambist*, by no coincidence, happens to have been the leading, and perhaps the only, pre-*Imbler* case extending absolute immunity beyond a prosecutor's advocatory function. The *Forsyth* court first correctly distinguished *Cambist* as a common law case and then, having thus limited its direct precedential value, proceeded to attack in explicit terms its own reasoning in the earlier case,[38] thereby depriving *Cambist* of analogical persuasiveness as well. An actual overruling of *Cambist* would, of course, have been impossible. Nevertheless, the holding in *Forsyth*

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[31]599 F.2d at 1217.
[32]*Id.* at 1215.
[33]552 F.2d 564 (3rd Cir. 1977).
[34]*Id.* at 566.
[35]599 F.2d at 1215.
[36]475 F.2d 887 (3rd Cir. 1973).
[37]*Id.* at 889.
[38]599 F.2d at 1214 n.14.

does indeed advance *Imbler*-immunity by a single, somewhat small and admittedly "diluted" step, and the fact that in so doing the leading pre-*Imbler* exponents of prosecutorial immunity all but overruled their own leading case shows a plain reversal of direction. The cause of prosecutorial immunity was thus firmly advanced an inch, toward a frontier which had somehow moved closer by a mile. As will be seen, that retrenchment was not accomplished despite *Imbler* but in large part because of it.

The third was not the only circuit to have frowned upon extensions of prosecutorial immunity in the post-*Imbler* era. In a remarkable case, the District of Columbia Circuit withheld *Imbler*-immunity, as well as witness immunity, from a United States Department of Justice Special Attorney for his false statements in an open court proceeding, preliminary to a grand jury investigation, in answer to a judge's question while under oath.[39] If prosecutorial falsehood in court and under oath does not qualify for *Imbler*-immunity, it is extremely difficult to believe that prosecutorial defamation to the press could. Even so, a case in the Sixth Circuit court presented just that situation. In *Walker v. Cahalan*,[40] the plaintiff, after eighteen years of seeking post-conviction relief, had succeeded in obtaining a new trial for murder, resulting eventually, in entry of an order of *nolle prosequi*. A year later a state legislator introduced a private bill to reimburse the plaintiff for time spent in jail owing to false testimony and mistaken identity. The defendant prosecutor wrote a letter to a legislative committee, with copies to the press, flatly stating the guilt of the plaintiff, and the justness of the original conviction. The plaintiff sued for defamation, conceding his public figure status on appeal. Despite the insistence by the prosecutor on *Imbler* protection, the court ruled that the qualified immunity afforded by the "actual malice" standard of *New York Times v. Sullivan*[41] was quite enough for the defendant and remanded for trial on the malice issue.[42] After citing *Imbler* for the proposition that acts within the scope of quasi-judicial prosecutorial duties are immune,[43] the court, again citing *Imbler*, rejected extension of the proposition to non-quasi-judicial activities even though they may be within the scope of prosecutorial authority.[44]

The great weight of authority has, it appears, not thought the reasoning of *Imbler* to extend beyond the quasi-judicial functions of the prosecutor. Two United States Circuit Courts of Appeals have

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[39]Briggs v. Goodwin, 569 F.2d 10, 29 (D.C. Cir. 1977).
[40]542 F.2d 681 (6th Cir. 1976).
[41]376 U.S. 254 (1964), *cited in* 542 F.2d at 684.
[42]542 F.2d at 685.
[43]*Id.* at 684.
[44]*Id.* at 685.

found the reasoning therein to weigh against extension to investigative or administrative functions. One of these, along with a third circuit court, has specifically withheld *Imbler*-immunity from the even less quasi-judicial function of public information. If these precedents from federal courts might have been helpful to resolution of the controversy between Foster and his defamer, however, relevant authority was also close at hand. For it will have by now occurred to those familiar with the trial by press problem that the accused was doubly-wronged—by defamation and by the potential prejudice of his right to a fair trial. Of this latter concern, the law of Indiana has much to say.

Disclosures to the press of this type are regulated by the Indiana Code of Professional Responsibility.[45] By adopting the Code,[46] the Indiana Supreme Court might be thought to have given approval to the balance therein struck between the value of a public informed of prosecutorial activities and the rights of subjects of the criminal process to have their causes heard in the courts and not on the pages of newspapers and the screens of television sets.[47] The prosecutor's comments about Foster[48] appear to have run well afoul of the strictures of DR 7-107.[49] In any case, the court seemed to have con-

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[45]1978 IND. CT. R. 335. The Code contains conduct-regulative Disciplinary Rules [hereinafter referred to as DRs], which establish the minimum professional standards below which no attorney may fall.

[46]The Indiana Supreme Court approved the Code on March 8, 1971. *Id.*

[47]*See* DR 7-107, *quoted in* note 49 *infra.*

[48]The deputy prosecutor's comment several days after the indictment that police authorities "knew the whereabouts of huge profits plaintiff was estimated to have made during a two (2) year stint as boss of a narcotics operation," 376 N.E.2d 1206, would presumably violate DR 7-107(B)(6), forbidding any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case. It seems unlikely that this material was included in the indictment or quoted from a public record of some other sort, and thereby protected under DR 7-107(C)(9).

Had the material been available in the September 6th indictment, it would not have been newsworthy when given to the press on the 11th. The court's approach to the problem made any such considerations unnecessary on its part. Had the prosecutor confined his comments to a fair account of the indictment, not only would he be protected from disciplinary activity, but the court could have decided the case on the less far-reaching ground of record libel. This privilege for fair reports of matters of public record, even when made with knowledge of their falsity, is virtually absolute, in the sense that it may be disposed of on summary judgment. *See* L. ELDRIDGE, *supra* note 9, at 418-38; RESTATEMENT (SECOND) OF TORTS § 611 (1977). *But see* Henderson v. Evansville Press, Inc., 127 Ind. App. 592, 142 N.E.2d 920 (1957).

[49]The text of DR 7-107 is reproduced below. It should be noted that DRs 7-107(A)(4), (A)(5), (C)(2), & (C)(3) deal with various public requests for assistance and with public warnings of danger. There are obvious risks that the innocent will be defamed by prosecutorial comment permissible under these sections. Such conduct, it is submitted, falls within the investigative and administrative functions of the prosecutor's office and is not a simple exercise of the obligation of the prosecutor to keep the public informed as to the activities of his office. This survey takes no position with

respect to the conduct of these particular functions; it may well be that the case for *Imbler*-immunity covering these particular functions is stronger than that for pure public information. Three points, however, should be noted. First, there is no reason to believe that the conduct of the defendant in *Foster* was in furtherance of these functions. Next, the court made no attempt to separate various aspects of prosecutorial public information and therefore must be taken as content to have the immunity extended to all such reports. Finally, police officers often have the functions of warning the public or seeking help from the public in an investigation. As many of the courts denying *Imbler*-immunity to prosecutors for their investigative activity have pointed out, it would be inconsistent to extend an absolute immunity to prosecutors serving a function for which police have only been extended a qualified immunity.

DR 7-107 Trial Publicity provides:

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
  (1) Information contained in a public record.
  (2) That the investigation is in progress.
  (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
  (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
  (5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
  (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
  (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
  (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
  (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
  (5) The identity, testimony, or credibility of a prospective witness.
  (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:
  (1) The name, age, residence, occupation, and family status of the accused.
  (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
  (3) A request for assistance in obtaining evidence.
  (4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
(6) The identity of investigating and arresting officers or agencies and the length of the investigation.
(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
(8) The nature, substance, or text of the charge.
(9) Quotations from or references to public records of the court in the case.
(10) The scheduling or result of any step in the judicial proceedings.
(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness, or prospective witness.
(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness, or prospective witness.
(3) Physical evidence or the performance or results of any examina-

templated that immunizable statements in at least some instances might have that aspect, for it offered that the accused might look upon DR 7-107 as a substitute for the remedy denied him by the opinion.[50] The offering of absolute immunity, therefore, leads to this uncanny result: the plaintiff in defamation will be unable to recover for maliciously false statements which, *even if they had been uttered in perfect truth*, would have rendered their speaker subject to professional sanction.

Even so, immunities by their nature engender similar, if less aggravated, results. In *Imbler* itself, for example, the prosecutor involved was relieved of a civil suit brought by the supposed victim of his allegedly purposeful use of false testimony;[51] at the same time, he remained subject to the sanction of professional discipline, *inter alia*.[52] It will be beneficial to here consider the precise reasoning process dictating this result.

Justice Powell, writing for the five-man *Imbler* majority, made a variety of arguments on varying levels of both abstraction and general applicability. The Indiana Supreme Court opinion under discussion, for example, adopted from *Imbler* the idea that "'[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.'"[53] This was but one of several statements of a like degree of abstraction and generality by the Supreme Court; for example, the statement by the Court that, "if the prosecutor could be made to answer in court each time . . . his energy and attention would be diverted from the pressing duty of enforcing the criminal law."[54] Statements such as these, however, although no doubt relevant to determining an occasion appropriate for the granting of an absolute immunity, can hardly be said to be

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tions or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

[50]387 N.E.2d at 449.

[51]424 U.S. at 413.

[52]*Id.* at 429. The Court also pointed to the availability of 18 U.S.C. § 242 (1976), the criminal analogue to 42 U.S.C. § 1983 (1976), as a device to protect the accused from wilful misconduct.

[53]387 N.E.2d at 449 (quoting 424 U.S. at 424-25).

[54]424 U.S. at 425.

dispositive of the matter, for they prove entirely too much; a single such principle could be taken as justifying an absolute immunity from all sorts of suits against all sorts of officials acting in the course of all sorts of duties. Justice Powell's lofty generalities, therefore, must be, and, except by the Indiana Supreme Court have been, read in conjunction with the more specific rationale developed in *Imbler*.

Two arguments of a more specific nature were considered in *Imbler*. One of these was a familiar immunity analysis and will be discussed below. The other was an unusual argument which apparently never had before appeared in the literature or cases concerning prosecutorial immunity and for which the court gave no citation. This argument was that various remedies available to the criminal accused, particularly post-conviction remedies, might be subject to decisional skewing by a judiciary mindful of the possibility that their decision in favor of the accused could result in the prosecutor being called upon to answer a civil suit.[55] Such a concern seems exaggerated, if only because the results of the remedial action within the criminal justice system would not be res judicata in a civil suit against a prosecutor.[56] Moreover, in cases such as *Foster*, criminal justice remedies would focus on the question of wrongful disclosures by the prosecutor, rather than the entirely separate questions of falsity, malice, and defamatory character which would characterize the defamation action, which could be brought no matter what the outcome of the post conviction action.[57]

This rather curious and apparently unprecedented rationale for *Imbler* was rejected by a strong concurring opinion in that case,[58] and has since gone unrecognized in the post-*Imbler* cases, including *Foster*. In addition, a later Supreme Court opinion extending *Imbler*-like protection to administrative hearing officers and agency attorneys in the context of adjudicative hearings in which their respective roles are judicial and prosecutorial, omitted this specific argument, along with some of Justice Powell's grander generalities from its account of the reasoning of *Imbler*.[59]

Finally, there is a major additional flaw in the "skewing of remedial action" argument. Like the more general arguments from the *Imbler* case, it also proves entirely too much. The argument that the judiciary will hesitate to overturn primary official action for fear of triggering retaliatory remedial action is applicable to all govern-

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[55]*Id.* at 427-28.

[56]*Id.* at 436 n.3 (White, J., concurring). *But see* Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973).

[57]*But see* 478 F.2d 520.

[58]424 U.S. at 436 n.3 (White, J., concurring opinion).

[59]Butz v. Economou, 98 S. Ct. 2894, 2913 (1978).

mental officials in respect of all their decisions. Such arguments therefore have usually been thought to justify at best only a qualified immunity for governmental officials.[60] Nonetheless, there are appropriate situations for absolute immunity which have a quite familiar nature.

The proponent of an immunity relies on a special configuration of important interests, difficult judgments, and skewing dangers which are characteristic of his situation. He points first to some important public interest affected by his decision. He will then, if he can, demonstrate the importance of his decisionmaking processes by showing that incorrect decisions will prejudice the achievement of the interest; usually he will show that an interest will go completely unserved without a certain decision on his part, for example, that without his decision to prosecute, a criminal will not be brought to justice. Then, he shows that the judgments required are difficult to make. The most crucial step in the analysis lies in the proponent's demonstration that mere misjudgments are, by nature, easily confused with outright wrongful conduct, as when prosecution and malicious prosecution are difficult to distinguish. Thus, a mere error by the decisionmaker easily leads to false but colorable claims against him. The possibility of having to fight this kind of claim, riddled with ambiguities, and not claims in general, is crucial; this sort of claim presents sharp dangers to the performance of his duty, to wit, that he may skew those important judgments to the side of his personal safety rather than giving the public the independent decision these important questions require.[61]

The importance of the type of question presented and the thinness of the line between proper independent judgment and wrongful conduct are the most crucial elements of the case for an absolute immunity. The need for independent judgment should not be made into a general excuse for the violation of rights. Only where independence of judgment is particularly important and especially at risk should an absolute immunity be granted. Qualified immunities tested by "good faith" exist in abundance to protect the public interest in cases in which the boundary between the required and the forbidden is troublesome. Absolute immunity should be reserved for cases presenting unusually difficult determinations. In *Imbler*, the immunity was extended to such prosecutorial determinations as the truthfulness of witnesses and the question of whether a given piece of evidence was subject to surrender to defense counsel.[62] In *For-*

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[60]424 U.S. at 436-37 (White, J., concurring opinion).

[61]This is essentially the analysis of Justice Powell in *Imbler*. *See id.* at 422-28 (majority opinion).

[62]*Id.* at 413.

syth v. Kleindeinst,[63] the one court, which extended *Imbler* to any extrajudicial function, protected a determination of the constitutionality of an evidence gathering technique. Both of these cases dealt, then, with prosecutorial decisions that were heavily clouded with extremely difficult questions of law. The special difficulty of making such determinations presents the greatest risks of skewing of decision, and, when coupled with the importance of unskewed decision, calls for the elevation of an immunity from qualified to absolute.

The call for an immunity may thus be loud or soft, depending upon the precise configuration of the above-discussed elements inhering in the situation presented.[64] Regardless of the volume of the call from the proponents side, however, the interests of the would-be plaintiff should not simply be ignored. Those interests will weigh themselves, with varying strength, against the grant of immunity. Some of this weight, in turn, may be relieved by substitute protec-

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[63]599 F.2d 1203 (3d Cir. 1979). *See* text accompanying notes 27-38 *supra*.

[64]Consider the following somewhat fanciful case. While the jury is deliberating in a criminal case, the prosecutor sneaks into the jury room and proceeds to re-present his case, this time without the disadvantages concerning admissibility of evidence and the like which normally provide protection for the accused. Notwithstanding statements in *Imbler* that the immunity extends to conduct and presentation of a case, protection is doubtful; a court presented with a 42 U.S.C. § 1983 (1976) suit would no doubt conclude that such acts did not constitute steps in the protection area of advocacy. Indeed, he would almost certainly be denied a "good faith" defense allowed by a qualified immunity. But why should this be so?

The reasoning which would justify the total deprivation of immunity begins with the clarity of the rule which forbids entry into the jury room. Because the rule is clear, there is no danger that permitted duties will be infringed by the skewing of decisions to avoid later second-guessing of ambiguous conduct. The prosecutor simply cannot be allowed to claim that a legitimate function might be jeopardized for fear of an inadvertent violation of a clear rule. Added to this principal reason is the fact that the public interest in no way hinges on his decision to undertake such action, as a procedure for presentation of his case already exists in the normal courtroom processes.

The example, fanciful as it is, bears a family resemblance to *Foster*, in which the prosecutorial conduct consisted of extrajudicial, and maliciously false comments banned by rules regulating the conduct of the criminal process for precisely the reason that such conduct may influence jurors, albeit only potential jurors at the time of the conduct. A more apt analogy to the conduct of the *Foster* prosecutor would be to the behavior of counsel who in conducting his case before the jury attempted to introduce irrelevant, but knowingly false testimony. Even before the "wrong" of admitting irrelevant but prejudicial testimony was "doubled" by being done with knowing falsity, the prosecutor would normally be prevented from engaging in the conduct at all. The need to protect the accused from knowing and irrelevant falsity would ordinarily not arise because the accused would already have received the benefits of judicial guarantees of trial on the merits of the case alone. Analogously, the prosecutor should likewise be barred from speaking in excess of what DR 7-107 permits even when such comments are not aggravated by knowing falsity. Within the courtroom, the accused has the protection of relevancy, or at least rebuttal, vastly more protection than was accorded the plaintiff in *Foster*. *See* text accompanying notes 65-75 *infra*.

tion of the plaintiff's interests through disciplinary rules, criminal actions, or the like.

The principal duty of a prosecutor, is, of course, to advance the pleas of the state in criminal cases.[65] In addition, the relevant Indiana law provides for an investigative function[66] and an assortment of administrative duties.[67] Nowhere has the legislature provided for a public information as such. The court did not cite any authorities from which the importance of the public information function might be determined, save a bare reference to DR 7-107 in another context.[68] Inspection of that rule suggests that the public information function is of limited importance. In a case under investigation, for example, the prosecutor's realm of disclosure for public information is limited to matters in the public record, the fact that an investigation is in progress, a description of the offense, and the scope of the investigation.[69] Legislative silence and supreme court promulgation of the Disciplinary Rules combine to indicate that the public information function of prosecutors is to be of no more than secondary importance.

Most of the information which a prosecutor might care to give out in performance of this function, and possibly in violation of the Disciplinary Rules, is readily available to the press in any case.[70] The press is protected by a generous privilege in reporting matters of public record,[71] including the indictment in the case or matters of public interest.[72] The voracious appetite of the press for details of crime and its suspected perpetrators can be more than adequately satisfied by public records; by interviews with witnesses, victims, and members of the victim's family; and by other sources. Law enforcement officials such as the police, not bound by the Code of Professional Responsibility, can be relied upon to speak quite freely even though they lack the protection of absolute immunity. Finally, the prosecutor himself may bring relevant information forth with absolute immunity in the indictment,[73] or at trial, or following

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[65]IND. CODE § 33-14-1-4 (1976 & Supp. 1979).

[66]*Id.* § 33-14-1-3 (1976).

[67]*Id.* §§ 33-14-2-1, -5-1, -6-1.

[68]*See* 387 N.E.2d at 449.

[69]DR 7-107(B), *supra* note 49. Additional disclosures are permitted for the purposes of seeking information from the public and warning the public about dangers. *Id.*

[70]*See generally* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Approved Draft, 1966) [hereinafter cited as ABA PROJECT].

[71]L. ELDRIDGE, *supra* note 9, at 419-38.

[72]*See, e.g.*, Patten v. Smith, 360 N.E.2d 233, 236-37 (Ind. Ct. App. 1977).

[73]The prosecutor would be protected by the judicial proceedings privilege, which is discussed at text accompanying notes 9-18 *supra*. Statements made would, of course, be subject to rebuttal or other testing by the defamed party. *See* text accompanying notes 17 & 84.

disposition of the case.[74]

The public information function, then, at least in the form of prosecutorial comment on a matter concerning an accused under indictment and pending trial as presented in *Foster*, serves an interest of little importance which is likely to be well served in other ways. Moreover, the presence of the crucial feature which calls for immunity, that of significant skewing dangers, may also be doubted. When compared to the difficulties of determining the truthfulness of a witness or the constitutionality of the seizure of an item of evidence, a determination of conduct as allowed or forbidden by DR 7-107 appears elementary. The Rule, when matched against the criteria for a prosecutor's turnover of evidence to defense counsel or the mysteries of the fourth amendment,[75] seems positively black-letter in nature, as clear at least as legal propositions are ever likely to be.[76]

These aspects of DR 7-107 should come as no surprise. The evident purpose of that rule was to protect the right of the accused to a fair trial by keeping that trial in the courtroom and out of the press.[77] It would not be unfair to say that the Rule was carefully designed with the skewing of decisions in mind; indeed, it was designed to give maximum encouragement to the skewing of judgments in the direction of nondisclosure. The Indiana court's projection of a fear that skewing will lead to insufficient disclosure for the public interest is precisely in opposition to the purpose and the strictures of the Rule.

The call for an absolute immunity for prosecutorial public information concerning cases within the prosecutor's office is therefore considerably less loud than the call in *Imbler*, generated by highly significant public interests in the conduct of trials by prosecutors, performable only by them, coupled with the particularly high risks of skewing difficult judgments. If, however, there is little call for an absolute immunity, and much in the Indiana Supreme Court's own disciplinary rules calls against it, there is in the *Foster* situation very little by way of substitute protection to shoulder the weight of

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[74]The provisions of DR 7-107 apply only at the times indicated therein. One might ask, however, what would justify prosecutorial comment on those who have already either been duly convicted or have come through the criminal justice process successfully.

[75]U.S. CONST. amend. IV.

[76]DR 7-107 has been successfully challenged, in part on the ground of vagueness, as applied to defense attorneys, and the great bulk of the Rule survived the charge. *See, e.g.*, Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975). The court cast doubt on the applicability of its determination to government attorneys. *See id.* at 253.

[77]ABA PROJECT, *supra* note 70, at 51, 80-82.

the twin interests of the accused in a fair trial and in an unimpaired reputation.

Unlike the plaintiff in *Imbler*, who had available not only provisions of the Code of Professional Responsibility, but the criminal provisions of federal civil rights law as well,[78] complainants of prosecutorial defamation may never have been tried, indicted, or even so much as arrested, and would consequently be unlikely candidates for any form of federal civil rights protection, civil or criminal.[79] Nor could they any longer avail themselves of an Indiana criminal defamation statute.[80] Thus, this group of potential victims of prosecutorial defamation would be left with nothing but the disciplinary rule to protect them.[81] Because such victims are entitled to such protection as DR 7-107 affords them for even entirely truthful comments by the prosecutor,[82] leaving them with only that Rule as a protection for the malicious falsehoods of a prosecutor is to leave them with exactly no additional protection from the malicious falsehoods themselves.[83] The accused thus gets but a single protection though sustaining a double wrong.

For those among the defamed who are brought to trial, the potential harm which DR 7-107 is designed to prevent, an unfair trial, is heaped upon the harm from defamation. At this point, federal criminal civil rights law protection might be available. It is, however, in the case which reaches trial that the *Imbler* opinion, its general remarks to one side, is most pertinent, and where its specific rationale for quasi-judicial absolute prosecutorial immunity weighs most heavily. The weight, however, is decisively against ex-

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[78]424 U.S. at 429.

[79]Simple defamation is an insufficient basis for relief under 42 U.S.C. § 1983 (1976). Paul v. Davis, 424 U.S. 693 (1976).

[80]The new Penal Code has no provision for criminal defamation. There is, however, a provision for criminal mischief. *See* IND. CODE. § 35-43-1-2 (Supp. 1979). Application of so vague a statute to speech conduct would seem unlikely to withstand constitutional challenge, but even if that were not so, it seems unlikely that a county prosecutor would pursue even a predecessor of the opposite political party for acts committed in the name of public relations.

[81]Or nothing at all if Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), could be extended to prosecutors. As members of the government not speaking about government, but about an individual criminal accused, prosecutors present a much weaker claim for first amendment protection than do defense attorneys. *Compare* Garrison v. State of Louisiana, 379 U.S. 64 (1964), *and* Hutchinson v. Proxmire, 99 S. Ct. 2675, 2686-87 (1979), *with* 522 F.2d at 253 (dicta).

[82]Presumably, a mere mention of an individual in conjunction with an investigation, where forbidden by DR-7-107(B), would be an unreasonable invasion of privacy, even if nondefamatory.

[83]Were the civil action in *Foster* allowed, the plaintiff might have had compensable claims in both defamation and privacy. He might also have been able to receive punitive damages.

tension to any prosecutorial public relations activity, defamatory or otherwise.

The major "prosecutor-specific" rationale offered by Justice Powell in support of the *Imbler* decision came in the following words:

> Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify . . . . If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.[84]

The Court also stated in a footnote to its opinion that "[i]n the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement."[85]

Although Justice Powell's more general arguments might have applicability in the extension of *Imbler* to an assortment of other cases, the foregoing specific argument makes quite clear that the principal reason for *this* holding in *this* case is to prevent such skewing of prosecutorial decision which might prove harmful to the judicial process, specifically to the interest in the unhampered presentation of cases, and not to prevent harm to vaguely articulated general interests of the public in an unhampered prosecutor. In an earlier passage, Powell had characterized the immunity of prosecutors as being based on the same considerations which underlie the grant of immunities to judges and grand jurors.[86] In a later passage, he noted that the activities in question were intimately associated with the judicial phase of the criminal process "and thus were functions to which the reasons for absolute immunity apply with full force,"[87] thereby indicating that his own armamentarium of abstractions about uninhibited prosecutorial conduct was to be read in context with the specific quasi-judicial situation before him.

The nature of the quasi-judicial situation which was the gravamen of the *Imbler*-immunity was further clarified in *Butz v. Economou*,[88] which extended such protection to federal agency hearing examiners and attorneys engaged in the hearing and presenting

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[84]424 U.S. at 426 (citation omitted).

[85]*Id.* at n.23.

[86]*Id.* at 422-23.

[87]*Id.* at 430.

[88]98 S. Ct. 2894 (1978).

of evidence. Circumscribing the extension carefully in terms of the rationale, the Court stated:

> The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. . . . Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.
>
> At the time same time, the safeguards built into the judicial process tend to reduce the need for private damage actions . . . . *Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court.* Jurors are carefully screened to remove all possibility of bias. Witnesses are . . . subject to the rigors of cross-examination and the penalty of perjury. . . . [T]hese features tend to enhance the reliability of information and the impartiality of the decisionmaking process . . . .
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> . . . .
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> Evidence which is false or unpersuasive should be rejected upon analysis by an impartial trier of fact.[89]

Imbler-immunity is justified because it operates when appropriately applied in aid of these processes of fair trial, processes which themselves contain protections for the accused more valuable and effective than the whole array of common-law causes of action, disciplinary rules, and federal civil rights remedies. Yet, it is these most valuable of protections which even truthful and nondefamatory utterances in violation of DR 7-107 tend to subvert. Whatever "extensions" of *Imbler* to prosecutorial administrative and investigative activities might be justified, their number does not, for it cannot include efforts to immunize prosecutors from extra-judicial conduct which endangers that which *Imbler* itself was calculated to protect. The purposes of *Imbler*, DR 7-107, and the common law rule of *Kennedy*, denying an attorney's right to take his quasi-judicial privilege to the pressroom, are in this respect identical, for each is intended to enhance the likelihood of impartial trial *in the courtroom*, where the rights or liabilities of the accused are best and most fairly determined.

Foster, then, can in no sense be read to extend quasi-judicial immunity. The case, however, might be seen as extending absolute immunity from suit in defamation to prosecutors as executive officers

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[89] *Id.* at 2913-16 (emphasis added).

on the theory of *Barr v. Mateo*,[90] which has generally been construed as creating a complete immunity from common law damage actions for any federal executive official.[91] That line of authority has been sharply denounced by several commentators, including Dean Prosser,[92] and has been adopted as a matter of state law, in not more than two, and perhaps only one, of the states.[93] The Indiana court was apparently aware of the doctrine and aware that most states granted absolute privilege only to high-ranking executive officers, because it made passing mention of the incongruity of a pair of examples from the *Restatement (Second) of Torts*, the one noting the absolute immunity of attorneys general, the other postulating the qualified immunity of prosecutors.[94] The court, however, said nothing further to suggest any support for a broad doctrine. In addition, the doctrine has no other history in Indiana, and there is authority to the contrary.[95] Even if this or another state were to adopt that doctrine as generally applicable, an exception for comment by a prosecuting attorney about cases pending in his office would seem wise. The thought that under the *Barr* doctrine even less deserving claims of immunity, if any there be, would also be protected by a blanket absolute immunity, suggests that Dean Prosser, as usual, knew whereof he spoke.

Although the court let pass the opportunity to ground its opinion on the doctrine of *Barr v. Mateo*, it furnished an alternative theory of the case, stating: "[W]e also *note* that the duty to inform the public can be characterized as a discretionary function"[96] and thus protected by the Indiana Tort Claims Act.[97] The court, offering in addition to some Powell-like abstractions only that rather cryptic comment, did not explain how a prosecutor could have discretion to issue statements not specially authorized by the legislation, but for-

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[90]360 U.S. 564 (1959).

[91]*See* L. ELDRIDGE, *supra* note 9, at 399.

[92]*See* authorities cited in L. ELDRIDGE, *supra* note 9, at 402 n.83, including this from Dean Prosser:

> [T]he effect of the federal rule is to leave the plaintiff without any remedy for major and outrageous abuses of official power. Since the days of John Wilkes, the whole English and American tradition has been against such a result, and recent political abuses have not been so lacking as to make the position at all attractive.

RESTATEMENT (SECOND) OF TORTS § 591, Note to the Institute, at 107 (Tent. Draft No. 12, 1966).

[93]L. ELDRIDGE, *supra* note 9, at 413-14.

[94]387 N.E.2d at 449 (citing RESTATEMENT (SECOND) OF TORTS § 591, Comment f, Illustrations 3-4 (1956)).

[95]Henry v. Moberly, 6 Ind. App. 490, 33 N.E. 981 (1893).

[96]387 N.E.2d at 449 (emphasis added).

[97]*Id.* (citing IND. CODE § 34-4-16.5-3(6) (1976)).

bidden by the court's own disciplinary rules, and which also violate a private duty owed to the accused to refrain from defaming him. The general immunity doctrines concerning governmental entities and, derivately, employees are a nightmare of similarly cryptic comment from the Supreme Court[98] codified by equally cryptic legislation.[99] In these conditions, classifying the prosecutorial public information function as discretionary, without further comment, is unhelpful.

In *Board of Commissioners v. Briggs*,[100] Judge Lowdermilk made a "Sherlockian" effort to unravel these mysteries. His solution, as applied to *Foster v. Pearcy*, would appear to allow only a qualified immunity, tested by a good faith test, to a prosecutor who exceeded the scope of his authority to give public information by passing the boundaries drawn by DR 7-107.[101] Absent good faith, the prosecutor would become subject to the law of defamation, which would presumably afford the *additional* constitutional privilege of comment on a matter of public interest absent a showing of actual malice as to the truth of the utterances. Alternatively, the *Briggs* analysis might yield the existence of a discretionary authority to make the decision to comment, but the execution of that decision would become ministerial and thus not immune from torts committed in such execution.[102] This second approach would leave the prosecutor with only the constitutional defamation privilege.

As Dean Prosser pointed out, the ministerial-discretionary distinction is "finespun and more or less unworkable,"[103] the distinction "being at most one of degree."[104] Because Indiana is at least temporarily stuck with that distinction, wisdom would counsel that the determination of such questions of degree be made in conjunction with some sort of functional analysis of situations calling for immunity similar in nature to that suggested earlier in this discussion. Further work in this area is obviously needed.

The Supreme Court's choice of the term, to "note" rather than to "hold," in stating that the duty to inform the public was discretionary, coupled with its statement basing the decision "primarily" on traditional, personal immunity of the prosecutor at common law, may be seen as a deliberate weakening of the authority of the sovereign immunity portion of its opinion. The most likely explanation of why a court would be willing to so diminish a part of its opinion which would normally qualify as an alternate holding, is that the

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[98]*See, e.g.*, Campbell v. State, 259 Ind. 55, 62-63, 284 N.E.2d 733, 736-37 (1972).

[99]*See* IND. CODE § 34-4-16.5-3(6) (1976).

[100]337 N.E.2d 852 (Ind. Ct. App. 1976).

[101]*See id.* at 855.

[102]*See id.* at 857.

[103]W. PROSSER, *supra* note 14, at 989.

[104]*Id.* at 990.

court is uncertain of itself in this area and prefers to bind both the lower courts and, to a lesser degree, itself only loosely or not at all pending further judicial or academic development of sounder theories of Indiana governmental immunity than have heretofore appeared.[105] The wait may be a long one.

Pending the development of a comprehensive analysis of the sovereign immunity doctrines in this state, the best answer that can be given to the *Foster* question would be the denial of absolute immunity, either leaving the prosecutor but a qualified immunity on facts appearing therein, or the double-qualified immunity of a good faith belief that the making of such remarks was within the duty-limits set by DR 7-107 and an ordinary constitutional privilege of comment on public issues. The "double-immunity" would permit a defendant prosecutor to admit that comment was improper but assert a good faith belief in the truth of his remarks, or even admit his knowing falsity with respect to the truth of the remarks while maintaining an honest belief that the occasion would have been a privileged one. With this double protection, an honest prosecutor would have little to fear when facing the question of permissible disclosure under the black-letter terms of DR 7-107. Greater protection than this is unnecessary.

The decision in *Foster v. Pearcy* was an extension of prosecutorial immunity in service to a relatively unimportant public interest already adequately served in other ways and by other sources. It gave unnecessary protection to honest prosecutors, while shielding those who act with malice. It was illogical and not only contrary to, but subversive of, the great weight of authority, the authorities on which the opinion itself drew, and the supreme court's own disciplinary rules. When it is recalled that the defendant-attorney in *Kennedy v. Cannon*, who sought no more than to protect his black

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[105]There is a less likely explanation. By introducing an alternate theory and then weakening it, the court makes clear that the alternate theory is definitely not an adequate explanation of the case. This explanation could be said to significantly strengthen the holding of *quasi-judicial* immunity by making later judges unable to distinguish *Foster* on the ground that it was a case in which two grounds of immunity combined to produce the result. This might be important to the future expansion of quasi-judicial immunity of prosecutors, but *Foster* itself expands that immunity so far the maneuver of weakening an alternate theory would have been otiose. By clearly grounding *Foster* in quasi-judicial immunity, however, the court also gives significant strength to *judicial* immunity itself. Indeed, if a prosecutor has a mere quasi-judicial immunity to comment on cases pending in his office, *a fortiori*, a chief justice of a supreme court would have an absolute immunity to comment on virtually any matter of legal significance in the state; for example, the teaching methods of a law professor who has written a severely critical article. A later court might fail to realize the true meaning of *Foster*, however, if it thought that the decision could be explained as simply an example of ordinary statutory immunity.

client in a rape case from lynching in a sleepy Southern town, was accorded neither absolute nor qualified immunity for fear that he would conduct a trial-by-press, one can only suspect that the reason for the decision in *Foster* was no more than that a prosecutor is a prosecutor. So, too, a judge is a judge,[106] and a king, a king.

[106] *See* note 105 *supra.*