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Public Officials and Employees - Absent Allegations of Bad Faith or Corruption, Quasi-Judicial Officials Are Immune from Criminal Prosecution in Pennsylvania

Richard E. Widin

PUBLIC OFFICIALS AND EMPLOYEES—ABSENT ALLEGATIONS OF BAD FAITH OR CORRUPTION, QUASI-JUDICIAL OFFICIALS ARE IMMUNE FROM CRIMINAL PROSECUTION IN PENNSYLVANIA.

In re Petition of Dwyer (Pa. 1979)

On November 5, 1978, a fire swept through the Allen Motor Inn (Inn) in Honesdale, Pennsylvania, taking the lives of twelve persons.[1] The Coroner of Wayne County, respondent, convened an inquest into the causes of the fire.[2] The inquest revealed that following a safety inspection conducted over a year before the blaze,[3] a district supervisor of the Pennsylvania Labor Department's Bureau of Occupational and Industrial Safety (Industrial Board)[4] directed the owner of the Inn to correct numerous safety violations[5] and ordered him to close off the second and third floors of the Inn until the corrections were completed.[6] The inquest also divulged that, notwithstanding two subsequent inspections[7] which revealed only minimal compliance with the order, the Industrial Board, without holding a hearing, granted the owner three extensions of his compliance date.[8] On the basis of

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1. *In re* Petition of Dwyer, 486 Pa. 585, 588, 406 A.2d 1355, 1357 (1979). By the time this case reached the Supreme Court of Pennsylvania, an individual had been arrested and charged with arson in the fire at the Allen Motor Inn. *Id.* at 590 n.3, 406 A.2d at 1357 n.3. It was undisputed, however, that the condition of the Inn and the numerous safety code violations therein "contributed to the rapid spread of the fire and the ensuing loss of lives." *Id.* at 590, 406 A.2d at 1357.

2. *Id.* The coroner in Pennsylvania is charged with the responsibility of investigating certain deaths to determine whether such deaths resulted from criminal or criminally negligent acts. PA. STAT. ANN. tit. 16, § 1237 (Purdon 1956). He may also conduct inquests—*i.e.*, formal hearings wherein witnesses may be called and other evidence may be heard "to ascertain the cause of death." *See id.* §§ 1238, 1245-1248. Additionally, he is endowed with the authority to subpoena witnesses. *Id.* § 1245. For a discussion of the coroner's powers in Pennsylvania, *see generally* Commonwealth v. Guy, 41 D. & C.2d 151 (1966).

3. *See* 486 Pa. at 588, 406 A.2d at 1356.

4. The Industrial Board, which consists of five members, is headed by the Secretary of Labor, and includes at least one employer of labor, one wage earner, and one woman. *See* PA. STAT. ANN. tit. 71, § 155 (Purdon 1962). Its members are appointed for four-year terms by the governor. *See id.* §§ 62, 63, 67.1, 68 (Purdon 1962 & Supp. 1979). The Industrial Board's powers include holding hearings, issuing subpoenas, and administering oaths. *Id.* §§ 574, 1442 (Purdon 1962). It is also empowered to administer the Fire and Panic Act, PA. STAT. ANN. tit. 35, §§ 1221-1235 (Purdon 1977). *See* PA. STAT. ANN. tit. 71 § 574 (Purdon 1962). The Fire and Panic Act sets forth various safety standards which must be met in buildings within the purview of the Act. *See* note 5 *infra*.

5. 486 Pa. at 588 n.1, 406 A.2d at 1356 n.1. The safety violations included, among others, the absence of fire alarms, smoke detectors, emergency lighting, fire extinguishers, and a night clerk, as well as a defective boiler and the lack of adequate fire exits. *Id. See* PA. STAT. ANN. tit. 35, § 1221 (Purdon 1977) (general safety requirements); *id.* § 1223 (special safety requirements); *id.* § 1224 (rules governing ways of egress); *id.* § 1224.1 (rules concerning fire extinguishers).

6. 486 Pa. at 588, 406 A.2d at 1356. *See* PA. STAT. ANN. tit. 35, § 1230 (Purdon 1977).

7. 486 Pa. at 589, 406 A.2d at 1357. Although the reports of the later inspections were apparently sent to the Industrial Board, it is unclear whether the reports were actually in the Industrial Board's files when it granted the requests for extensions. *Id.*

8. *Id.* at 588-89, 406 A.2d at 1356-57. The owner of the Inn offered several reasons to support his requests for extensions: 1) time was needed to retain an engineering firm to formu-

these findings, the coroner's jury[9] concluded that the members of the Industrial Board had acted in a wanton, reckless, and grossly negligent manner, and recommended that the petitioners be charged with involuntary manslaughter, reckless endangerment of life, and criminal conspiracy.[10]

Alleging that they were protected from prosecution by quasi-judicial immunity,[11] petitioners requested the Pennsylvania Supreme Court to exercise extraordinary jurisdiction[12] and issue a writ of prohibition[13] to permanently enjoin the coroner's prosecution.[14] The Supreme Court of Pennsylvania granted the petition and discharged the criminal proceedings, *holding* that, absent allegations of corruption or bad faith,[15] certain officials within a state agency are immune from criminal prosecution for official agency acts allegedly performed in a wanton, reckless, and grossly negligent manner. *In re Petition of Dwyer*, 486 Pa. 585, 406 A.2d 1355 (1979).

There are two commonly recognized types of immunity in civil actions for damages: absolute and qualified.[16] The former insulates one from civil liability even for willful misconduct,[17] while the latter protects an official only if his actions are taken in good faith.[18] Members of state and national

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late how the corrective measures could be taken; 2) family illness; 3) inclement weather; and 4) the subsequent dismissal of the engineering firm originally hired. *Id.*

9. 486 Pa. at 590, 406 A.2d at 1357. Although at common law a coroner's jury could prosecute offenders without indictment by a grand jury, under current Pennsylvania law the coroner's jury only performs an advisory function, recommending actions to be taken by those charged with the administration of justice. *See* PA. STAT. ANN. tit. 16, § 1238 (Purdon 1956); Commonwealth *ex rel.* Czako v. Maroney, 412 Pa. 448, 450, 194 A.2d 867, 868 (1963).

10. 486 Pa. at 590, 406 A.2d at 1357. *See* 18 PA. CONS. STAT. ANN. § 2504 (Purdon 1978) (involuntary manslaughter); *id.* § 3303 (reckless endangerment of life); *id.* § 903 (criminal conspiracy).

11. *Id.* For a discussion of quasi-judicial immunity, *see* notes 37-51 and accompanying text *infra*.

12. 486 Pa. at 590, 406 A.2d at 1357. "[T]he Supreme Court may, on its own motion or upon petition of any party, in any matter . . . involving an issue of immediate public importance, assume plenary jurisdiction . . . and enter a final order or otherwise cause right and justice to be done." 42 PA. CONS. STAT. ANN. § 726 (Purdon 1979).

13. *See* 42 PA. CONS. STAT. ANN. § 721 (Purdon 1979) (supreme court has original but not exclusive jurisdiction over writs of prohibition). For a discussion of this extraordinary writ, *see generally In re* Reyes, 476 Pa. 59, 63-70, 381 A.2d 865, 867-71 (1977); Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 102, 61 A.2d 426, 430 (1948).

14. 486 Pa. at 590, 406 A.2d at 1357.

15. Although the court in *Dwyer* failed to define bad faith, it had been defined in an earlier Pennsylvania Supreme Court case as being motivated by "fraud, dishonesty, or corruption." McNair's Petition, 324 Pa. 48, 63, 187 A. 498, 505 (1936). For a discussion of *McNair*, *see* notes 35-36 and accompanying text *infra*.

16. *See* W. PROSSER, LAW OF TORTS § 132, at 987-89 (4th ed. 1971).

17. *See id.* It appears that absolute immunity would confer immunity from civil liability even "for knowing and malicious unconstitutional acts," unless committed in the clear absence of all jurisdiction. *See* Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237, 237 (1978). *See also* Alzua v. Johnson, 231 U.S. 106, 111 (1913) (immunity applies even where bad faith exists); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-52, 355 (1871) (judge's motive irrelevant so long as not acting in clear absence of all jurisdiction).

18. *See* W. PROSSER, *supra* note 16, § 132, at 987-89.

legislatures,[19] as well as the judiciary,[20] have long enjoyed *absolute* immunity from civil suits arising out of their official conduct.[21] Lesser public officials performing discretionary functions, however, are most often clothed with only *qualified* immunity.[22]

The absolute civil immunity enjoyed by the judiciary has been entrenched in Anglo-American law since at least 1607.[23] The leading United States Supreme Court decision recognizing such immunity was *Bradley v. Fisher*,[24] where the Court held that a federal judge enjoyed absolute immunity from civil liability unless he acted beyond his jurisdiction.[25] While many reasons have been offered in support of such immunity,[26] the primary justification has been the desire to protect a judge's ability to act without

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19. *See* U.S. CONST. art. I, § 6 (federal legislators absolutely immune from civil or criminal liabilities for words spoken in legislative proceedings); Tenney v. Brandhove, 341 U.S. 379, 397 (1951) (state legislators absolutely immune from civil and criminal liability arising from statements in legislative hearings). Absolute immunity from civil liability also extends to high executive officials. *See* Spalding v. Vilas, 161 U.S. 483, 498 (1896) (postmaster general as head of executive department is absolutely immune from civil liability when acting within his authority); Matson v. Margiotti, 371 Pa. 188, 196, 88 A.2d 892, 896 (1952) (legislators, judges, and high executive officials, such as postmaster general, entitled to absolute immunity from civil suit). *See also* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 274 & nn. 43 & 44 (1937); Note, *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 DUKE L.J. 95, 100 n.22 (1976).

20. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-52 (1871) (absolute immunity granted to judges unless clearly acting without jurisdiction).

21. *See* notes 19 & 20 *supra*.

22. *See* Butz v. Economou, 438 U.S. 478, 505-07 (1978) (federal executive officials only qualifiedly immune unless absolute immunity is necessary for the conduct of official activity); Ammlung v. City of Chester, 224 Pa. Super. Ct. 47, 53-55, 302 A.2d 491, 496-97 (1973) (police officers are lesser public officials entitled to only qualified immunity). It has been stated that "the determination of whether a particular public officer is protected by absolute [or qualified] privilege should depend upon the nature of his duties, the importance of his office, and particularly whether or not he has policy-making function." Montgomery v. City of Philadelphia, 392 Pa. 178, 186, 140 A.2d 100, 105 (1958) (citations omitted) (Deputy Commissioner of Public Property and the city architect held absolutely immune from liability in defamation action). *See also* notes 37-51 and accompanying text *infra*.

23. *See* Floyd v. Barker, 77 Eng. Rep. 1305 (K.B. 1607). For a discussion of the historical foundation of judicial immunity, *see* Note, *supra* note 19, at 112-15.

24. 80 U.S. (13 Wall.) 335 (1871).

25. *Id.* at 351-53. *Cf.* Randall v. Brigham, 74 U.S. (7 Wall.) 523, 563 (1868) (judge absolutely immune from all acts within his jurisdiction and qualifiedly immune for acts in excess of his jurisdiction).

26. *See, e.g.*, Grimm v. Arizona Bd. of Pardons, 115 Ariz. 260, 564 P.2d 1227 (1977); Jennings, *supra* note 19, at 271-72. In *Grimm*, the Supreme Court of Arizona enunciated ten traditionally cited policy reasons for the grant of absolute judicial immunity in its discussion of why only qualified immunity should be extended to administrative agency officials:

1. Save judicial time which would otherwise be spent defending suits.
2. Prevent undue influence from the threat of suit which could discourage fearless independent action.
3. Avoid deterring competent people from taking office.
4. Importance of an independent judiciary in the American scheme.
5. Need for absolute finality, somewhere, in the resolution of disputes.
6. Existence of adequate alternative remedies in procedural safeguards such as change of venue and appellate review.
7. Duty is owed to the public in general.
8. Possible bias of judges toward their own immunity.

fear of liability for his errors in judgment.[27] Consequently, the principle of judicial immunity from civil suit has remained unquestioned, except in the areas of civil[28] and constitutional[29] rights, where the immunity has nonetheless been upheld.[30] State courts, including the Supreme Court of Pennsylvania,[31] have followed the lead of the United States Supreme Court, finding absolute judicial immunity necessary for the proper functioning of the judiciary.[32]

The concept of judicial immunity, however, has not been widely accepted with respect to criminal liability.[33] The United States Supreme Court, for example, has stated:

> Whatever may be the case with respect to civil liability generally, or civil liability for willful corruption, we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise crim-

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9. Unfairness of requiring an opinion and the exercise of judgment to which is given special deference and then subjecting the person to personal consequences depending upon the opinion of another.

10. Historical basis, the original reason for which has been lost.

115 Ariz. at 264-65, 564 P.2d at 1231-32.

27. *See* Grimm v. Arizona Bd. of Pardons, 115 Ariz. 260, 264, 564 P.2d 1227, 1231 (1977); Nagel, *supra* note 17, at 253.

28. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967) (merely because violation was related to plaintiff's civil rights does not affect judicial immunity).

29. *See* Stump v. Sparkman, 435 U.S. 349, 353, 356, 358 (1978) (state judge no less immune simply because his procedural errors tended to deny one's fourteenth amendment rights).

30. *See generally* Nagel, *supra* note 17. The Court in Stump v. Sparkman, 435 U.S. 349 (1978), held that a state court judge was immune from civil liability for wrongfully issuing a sterilization order where no statute authorized such an order and where the proceedings violated established procedural safeguards. *Id.* at 359-60. *See* notes 20-21 and accompanying text *supra*.

31. *See* Klauder v. Cox, 295 Pa. 323, 331, 145 A. 290, 292 (1929). After a review of various authorities, the *Klauder* court affirmed a broad rule of judicial immunity, while holding that legislators were also entitled to the same absolute immunity from civil liability. *See* 295 Pa. at 331, 145 A. at 292.

32. *See, e.g.*, Grimm v. Arizona Bd. of Pardons, 115 Ariz. 260, 266, 564 P.2d 1227, 1233 (1977) (judges are absolutely immune while administrative officials are qualifiedly immune); Cashen v. Spann, 66 N.J. 541, 545-47, 334 A.2d 8, 10-11 (1975) (judges enjoy absolute immunity while prosecutors enjoy only qualified immunity).

33. Pennsylvania is one of a very few jurisdictions to ever grant immunity to judges from criminal prosecution. *See* McNair's Petition, 324 Pa. 48, 55, 187 A. 498, 501 (1936). For a discussion of *McNair*, *see* notes 35-36 and accompanying text *infra*. *See also* People v. Furguson, 20 Ill. 2d 295, 298, 170 N.E.2d 171, 173 (1960) (criminal immunity limited to judicial acts performed honestly and in good faith). Federal courts have specifically rejected the notion of judicial immunity from criminal prosecution. *See* O'Shea v. Littleton, 414 U.S. 488, 503 (1974); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir. 1974); Strawbridge v. Bednarik, 460 F. Supp. 1171, 1173 (E.D. Pa. 1978). *See also* United States v. Gillock, 587 F.2d 284, 294 (6th Cir. 1978)(Weick, C.J., dissenting). In *Gillock*, Chief Judge Weick noted that "[n]o federal official has ever been held exempt from prosecution for his commission of a federal crime." *Id.* at 298 (Weick, C.J., dissenting).

Few other jurisdictions have considered the issue; of those which have, however, most have rejected the notion of judicial immunity from criminal suits. *See, e.g.*, Frazier v. Moffatt, 108 Cal. App. 2d 379, 385, 239 P.2d 123, 127 (1951) (dictum); People v. LaCarrubba, 46 N.Y.2d 658, 663-64, 389 N.E.2d 799, 802, 416 N.Y.S.2d 203, 206-07 (1979); *cf.* Note, *supra* note 19, at 95 (contending that immunity from criminal liability undisputedly does not exist).

> inal deprivations of constitutional rights. On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress . . . ."[34]

Unlike the position taken by the federal courts, the Pennsylvania Supreme Court, in *McNair's Petition*,[35] held at an early date that a judge enjoys a qualified immunity from criminal prosecution, stating that "so long as he renders judgment in good faith, he is accountable to no one."[36]

By analogy to judicial immunity from civil actions, certain lesser public officials enjoy a similar, but usually qualified immunity from civil liability through the doctrine of quasi-judicial immunity.[37] The grant of quasi-judicial immunity, whether it be qualified or absolute, has customarily been dependent upon the nature of the functions performed by the individuals involved.[38] Under this so-called "functional test,"[39] those public officials who perform acts substantially equivalent to those performed by judges[40]

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34. O'Shea v. Littleton, 414 U.S. 488, 503 (1974) (citations ommitted) *quoting* Gravel v. United States, 408 U.S. 606, 627 (1972). In *Gravel*, a United States Senator sought to quash a subpoena which directed his aide to testify before a grand jury about the Senator's possible violation of federal law in making classified documents (the "Pentagon Papers") public. 408 U.S. at 608. Holding that no testimonial privilege existed under these facts, the Court stated that no judicially constructed privilege immunizes conduct which is criminal under federal law. *Id.* at 626-27. *But cf.* Alzua v. Johnson, 231 U.S. 106, 111 (1913) (absolute immunity for judges from civil actions applies notwithstanding a corrupt motive).

35. 324 Pa. 48, 187 A. 498 (1936). In *McNair*, a magistrate sought and was granted a writ of prohibition ordering a judge, a district attorney, and a grand jury to cease an investigation into his alleged misconduct in office. *Id.* at 51-52, 187 A. at 499-500. The acts in question were the magistrate's releasing to the juvenile court without bail three offenders who had pleaded guilty to felonies. *Id.* The court reasoned that although magistrates are lesser judicial officers, their importance to the justice system is substantial and they must therefore be free to act, so long as in good faith, without accountability. *Id.* at 53-54, 187 A. at 500-01.

36. *Id.* at 54, 187 A. at 501. It should be noted that the immunity recognized by the McNair court was a qualified immunity from criminal prosecutions, and thus, it does not protect a judge who acts intentionally, maliciously, or otherwise absent good faith. *See id.*; notes 16-18 and accompanying text *supra*.

37. *See* W. PROSSER, *supra* note 16, at 988-92; Jennings, *supra* note 19, at 276-80; note 22 and accompanying text *supra*. For a complete discussion of the federal case law of quasi-judicial immunity, *see* Butz v. Economou, 438 U.S. 478, 484-512 (1978); Scheuer v. Rhodes, 416 U.S. 232, 238-49 (1974). For a discussion of Pennsylvania's doctrine of quasi-judicial immunity, *see* Reese v. Danforth, 486 Pa. 479, 482-87, 406 A.2d 735, 737-40 (1979). *See generally* Note, *supra* note 19, at 99-112.

38. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 513 (1978); Reese v. Danforth, 486 Pa. 479, 486, 406 A.2d 735, 739 (1979); Montgomery v. City of Philadelphia, 392 Pa. 178, 186, 140 A.2d 100, 105 (1958). *See also* Jennings, *supra* note 19, at 276-301; Note, *supra* note 19, at 122-23.

39. *See* Butz v. Economou, 438 U.S. 478, 513 (1978); Imbler v. Pachtman, 424 U.S. 409, 430 (1976); Scheuer v. Rhodes, 416 U.S. 232, 243 (1974). In *Scheuer*, the Court noted that "[f]inal resolution of [the] question [of whether an official is entitled to qualified or absolute immunity] must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government . . . ." *Id.*

40. This category includes those public officials who perform discretionary functions—*i.e.*, government agents who exercise independent judgment in performing official acts. *See, e.g.*, Butz. v. Economou, 438 U.S. 478, 506-07 (1978) (administrative agents who initiate administrative proceedings); Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (prosecutors who initiate and conduct criminal actions); Scheuer v. Rhodes, 416 U.S. 232, 242-48 (1974) (public officials engaged in policymaking); Jonnet v. Bodick, 431 Pa. 59, 62, 244 A.2d 751, 753 (1968) (government

are immune from civil liability for injury resulting from such acts, while those performing mere ministerial duties are not.[41] As with judicial immunity, the rationale for quasi-judicial immunity is that officials entrusted with discretionary responsibility must be free to discharge their duties without fear of legal action for possible errors in judgment.[42]

In the recent case of *Butz v. Economou*,[43] the United States Supreme Court utilized the functional test to uphold a claim of quasi-judicial immunity.[44] In granting absolute civil immunity to officials of the Department of Agriculture who allegedly violated the plaintiff's first and fifth amendment rights,[45] the *Butz* Court stated that "federal executive officials exercising discretion are entitled only to [a] qualified immunity . . . subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business."[46]

The Pennsylvania Supreme Court has also recently considered a claim for quasi-judicial immunity in *Reese v. Danforth*,[47] where the court held that public defenders were not "public officials," and thus were not immune from suits for negligent representation.[48] In reaching its decision, the court

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officials who rule on building permits); Matson v. Margiotti, 371 Pa. 188, 199-201, 88 A.2d 892, 897-98 (1952) (public officials engaged in policymaking and law enforcement).

41. *See, e.g.*, United States *ex rel.* Smith v. Heil, 308 F. Supp. 1063, 1066 (E.D. Pa. 1970) (parole board member liable for making threats); Reese v. Danforth, 486 Pa. 479, 488-89, 406 A.2d 735, 740 (1979) (public defender liable for negligent representation); DuBree v. Commonwealth, 481 Pa. 540, 544, 393 A.2d 293, 295 (1978) (mere status as public employee insufficient to warrant immunity); Meads v. Rutter, 122 Pa. Super. Ct. 64, 69, 184 A. 560, 562 (1936) (driver of state-owned snowplow held liable for negligence). *See generally* Jennings, *supra* note 19, at 279-301.

42. *See* Butz v. Economou, 438 U.S. 478, 515 (1978). *But see* Grimm v. Arizona Bd. of Pardons, 115 Ariz. 260, 266, 564 P.2d 1227, 1233 (1977) (absolute quasi-judicial immunity from civil suit outmoded and dangerous). For a discussion of *Grimm* with respect to judicial immunity, *see* note 26 *supra*. For examples of quasi-judicial officials, *see* note 40 *supra*.

43. 438 U.S. 478 (1978).

44. *Id.* at 511-18. The Court reasoned that judges are immune from civil liability due to the adjudicatory functions they perform. *Id.* at 511. Additionally, the Court maintained that prosecutors are "functionally comparable" to judges. *Id.* at 512. Thus, since it found that executive agency officials prosecute and adjudicate at administrative tribunals, the Court concluded that they "are entitled to absolute immunity from damages liability for their parts in that decision." *Id.* at 512-16.

45. *Id.* at 482-83. The Court stated: "We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Id.* at 512-13.

In reaching this conclusion, however, the Court relied heavily upon the procedural safeguards required in administrative adjudication. *Id.* at 513-14. The Court indicated that these safeguards reduce the risk of unconstitutional acts. *Id.* at 514. With respect to adjudication within an administrative agency, the Court's grant of absolute immunity appeared to be predicated on the official being subject to administrative restraints: "We therefore hold that persons subject to these [procedural] restraints and performing adjudicatory functions . . . are entitled to absolute immunity from damages liability for their judicial acts." *Id.* For the administrative procedures referred to by the Court, *see* 5 U.S.C. §§ 551-59 (1976).

46. 438 U.S. at 507 (footnote omitted).

47. 486 Pa. 479, 406 A.2d 735 (1979).

48. *Id.* at 483-89, 406 A.2d at 737-40. In *Reese*, the court observed that while high public officials enjoy absolute immunity from civil liability and lower public officials are entitled to qualified immunity, mere public employees who have no policymaking functions, such as public

utilized a functional test, noting that public defenders are not public administrators with policymaking functions, and are not accountable to the community at large.[49] At no time, however, had the issue of quasi-judicial immunity from *criminal* prosecution arisen in Pennsylvania until *Dwyer*.[50] Several other states have considered this criminal immunity issue, and most have declined to grant such immunity.[51]

Against this background, the *Dwyer* court[52] considered whether, absent a showing of bad faith, state agency officials are quasi-judicially immune from criminal prosectuion for the consequences of official acts.[53] The court first examined the pure judicial immunity from criminal prosecution and affirmed the rule set forth in *McNair's Petition*,[54] stating that judicial officers must "be free to exercise their discretion . . . , whether correct or erroneous, . . . unburdened by the threat of criminal prosecution for serious errors of judgment."[55] Moving to the primary federal decisions concerning judicial

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defenders, are afforded no immunity. *Id.* at 482-83, 406 A.2d at 737. The court described public officials generally as those who occupy public offices, perform functions of government, and act under oath. *Id.* at 483-84, 406 A.2d at 737-38. The court further indicated that immunity will depend upon whether one is a high or a low public official, a categorization to be determined by the importance of his duties and by the nature and degree of his policymaking functions. *Id.* at 487, 406 A.2d at 739.

49. *See id.* at 487-88, 406 A.2d at 740.

50. It should be noted, however, that *judges* in Pennsylvania have been held qualifiedly immune from criminal prosecution. *See* McNair's Petition, 324 Pa. 48, 187 A. 498 (1936). For a discussion of *McNair*, *see* notes 35-36 and accompanying text *supra*.

51. *See, e.g.*, People v. Belkota, 50 A.D.2d 118, 121-22, 377 N.Y.S.2d 321, 324-25 (1975) (police officers convicted of distributing heroin in exchange for drug traffic information; court stated, "a crime is no less a crime when performed by a public officer"); People v. Mackell, 47 A.D.2d 209, 216-17, 366 N.Y.S.2d 173, 181 (1975) (assistant district attorney could be convicted of conspiracy and hindering prosecution for covering up illegal conduct of others; court stated "the crime of official misconduct may occur even where the public official's duty is couched with discretion"); State v. Lack, 118 Utah 128, 133, 221 P.2d 852, 854 (1950) (state liquor control agent convicted of embezzlement notwithstanding statute immunizing such officials from civil liability).

It is interesting to note that all of the cases specifically denying immunity from criminal prosecution involved crimes requiring intent. It is suggested that a different result may have been obtained had the crimes not required bad faith or corruption. Some states which have not directly considered the issue arguably provide public officials with immunity for civil *or* criminal liability so long as no bad faith is shown. *See, e.g.*, Foster v. Pearcy, ___ Ind. ___, 387 N.E.2d 446, 449-50 (1979), *cert. denied*, 100 S. Ct. 1646 (1980); Godwin v. East Baton Rouge Parish, 372 So. 2d 1060, 1062-65 (La. App. 1979); Gildea v. Ellershaw, 363 Mass. 800, 820-21, 298 N.E.2d 847, 858-59 (1973); Palvik v. Kinsey, 81 Wis. 2d 42, 49-51, 259 N.W.2d 709, 711-12 (1977).

52. Justice Larsen, writing for the majority, was joined by Chief Justice Eagen, and Justices O'Brien, Manderino, and Flaherty. Justice Roberts filed a separate concurring opinion, and Justice Nix dissented.

53. 486 Pa. at 587-88, 406 A.2d at 1356. In deciding to hear this case, the court exercised extraordinary jurisdiction pursuant to 42 PA. CONS. STAT. ANN. § 726 (Purdon 1979). *See* notes 12-13 and accompanying text *supra*. The court stated: "Because of the grave implications of such a prosecution and the obvious potential chilling effect such prosecutions might have on all state agency officials in the performance of their duties, this matter is one of immediate public importance." 486 Pa. at 592 n.4, 406 A.2d at 1358 n.4.

54. 486 Pa. at 590-91, 406 A.2d at 1357-58. For a discussion of *McNair*, *see* notes 35-36 and accompanying text *supra*.

55. 486 Pa. at 591, 406 A.2d at 1358, *citing* United States v. Chaplin, 54 F. Supp. 926 (S.D. Cal. 1944). For a critique of the court's reliance upon *Chaplin*, *see* note 90 and accompanying text *infra*.

immunity from civil prosecution, the court agreed with the long-standing policy espoused in *Bradley v. Fisher*[56] that it is a "principle of the highest importance . . . that a judicial officer . . . be free to act upon his own convictions, without apprehension of personal consequences to himself."[57]

Turning to the facts presented in *Dwyer*, the court found that since administrative agents perform "adjudicatory functions,"[58] they are entitled to the same or similar immunity as that afforded to judges and magistrates.[59] The majority further reasoned on the basis of *Butz v. Economou*[60] that the Board in the instant case was entitled to quasi-judicial immunity because it was given discretion to grant extensions and variances,[61] as well as to initiate enforcement proceedings,[62] issue subpoenas, and conduct hearings.[63] The court thus recognized that the members of the Industrial Board are immune from criminal prosecution in the absence of allegations of bad faith or corruption.[64]

After finding that the Board enjoyed this immunity, the court turned to the respondent's alternative argument that even if quasi-judicial[65] immunity applied to the Board, application of the immunity was inappropriate in this case because the Industrial Board's action was taken *ex parte*.[66] In rejecting this argument, the court determined that the functional nature of the Industrial Board's action, not the procedural posture in which it took place,

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56. 80 U.S. (13 Wall.) 335 (1871). For a discussion of *Bradley*, *see* notes 24 & 25 and accompanying text *supra*. In addition to *Bradley*, the court relied heavily upon Butz v. Economou, 438 U.S. 478 (1978) and Stump v. Sparkman, 435 U.S. 349 (1978). *See* 486 Pa. at 592-97, 406 A.2d at 1359-61. The court acknowledged, however, that *Bradley* dealt with civil liability, whereas the case before the court involved criminal liability. *Id.* at 591, 406 A.2d at 1358.

57. 486 Pa. at 591-92, 406 A.2d at 1358, *quoting* Bradley v. Fisher, 80 U.S. (13 Wall.) at 347.

58. 486 Pa. at 592, 406 A.2d at 1358. The types of functions performed by administrative agents which, according to the majority, make them "functionally comparable" to judicial officers, include: 1) the application of law to a given fact situation; 2) the exercise of discretion in granting extensions and variances; 3) issuing subpoenas; 4) ruling on evidentiary matters; 5) regulating the course of hearings; and 6) making or recommending decisions. *Id.* at 593, 406 A.2d at 1359.

59. *Id.* at 593-97, 406 A.2d at 1359-60.

60. 438 U.S. at 515. For a discussion of *Butz*, *see* notes 43-46 and accompanying text *supra*.

61. 486 Pa. at 594, 406 A.2d at 1359. *See* PA. STAT. ANN. tit. 35, §§ 1221-1235 (Purdon 1977); 34 Pa. Code § 37.705 (1979).

62. 486 Pa. at 594, 406 A.2d at 1359. *See* 34 Pa. Code § 37.709 (1979).

63. 486 Pa. at 594, 406 A.2d at 1359. *See* PA. STAT. ANN. tit. 71, § 1442 (Purdon 1962). For the procedures required to be followed when conducting these hearings, *see generally* 34 Pa. Code § 37.707 (1979); 1 Pa. Code §§ 35.101-.251 (1979).

64. 486 Pa. at 595, 406 A.2d at 1360.

65. The *Dwyer* court referred to the agency officials in the instant case as quasi-judicial and quasi-prosecutorial officers. *Id.*

66. *Id.* The coroner argued that absent formal adjudicatory or adversary proceedings in granting the extensions and variance, the grant of immunity was inappropriate. *Id.* Apparently, he considered the Board's grant of extensions without formal hearings to be outside its jurisdiction. *See id.* Thus, according to the coroner, as in the case of absolute judicial immunity, no freedom from liability could be granted in such circumstances. *Id. See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-52 (1871).

was the most important consideration in clothing the Board with immunity.[67]

Notwithstanding his expression of shock and astonishment[68] at the Board's alleged actions, Justice Roberts, in his concurring opinion, discussed the "ever increasing importance of administrative tribunals in the resolution of disputes,"[69] and concluded that they were entitled to quasi-judicial immunity.[70] Noting the chilling effect likely to result if criminal prosecution was available to remedy administrative abuses, Justice Roberts concluded that sufficient protection from such abuse was provided by "established administrative and judicial review procedures . . . ."[71]

In a strongly worded dissent, Justice Nix criticized the majority's decision on three grounds.[72] First, he maintained that the majority had improperly accepted jurisdiction since the facts showed no immediate need[73] or extreme necessity,[74] both of which are prerequisites to the issuance of a writ of prohibition or the invocation of the court's extraordinary

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67. 486 Pa. at 596, 406 A.2d at 1361, *citing* Stump v. Sparkman, 435 U.S. 349, 362-63 (1978). The Court in *Stump* rejected the argument that a judge loses his judicial immunity if the *procedures* he follows are *ex parte* and, thus, not in compliance with the "normal attributes of a judicial proceeding." 435 U.S. at 362-64 & n.12. Instead, the Court found that the grant of immunity turned on the judicial or nonjudicial nature of the act itself. *Id.* at 363-64 & n.12.

68. 486 Pa. at 597, 406 A.2d at 1361 (Roberts, J., concurring). Justice Roberts stated: "Shocking, indeed, are the allegations of incompetency and negligence of the Industrial Board . . . and the Board's Building Advisory Committee. Astonishing are the repeated instances of flagrant abuse of discretion alleged in this record." *Id.*

69. *Id.* at 598, 406 A.2d at 1362 (Roberts, J., concurring).

70. *Id.* at 597-98, 406 A.2d at 1361-62 (Roberts, J., concurring).

71. *Id.* at 599, 406 A.2d at 1362 (Roberts, J., concurring). Justice Roberts referred to the general provisions for review of administrative agency action. *Id.* at 598 n.1, 406 A.2d at 1361-62 n.1 (Roberts, J., concurring). *See* 1 Pa. Code §§ 35.101-.251 (1979). He particularly noted those provisions of the regulations dealing with reopening matters and judicial intervention. *Id.* at 598 n.1, 406 A.2d at 1361-62 n.1.

72. 486 Pa. at 599-603, 406 A.2d at 1362-64 (Nix, J., dissenting).

73. *Id.* at 601, 406 A.2d at 1363 (Nix, J., dissenting). Justice Nix indicated that petitioners would not have experienced irreparable injury or injustice had the court refused to exercise extraordinary jurisdiction because traditional review procedures would have protected them. *Id.* For a discussion of the court's jurisdiction in the instant case, *see* notes 12-13 and accompanying text *supra*.

74. 486 Pa. at 601, 406 A.2d at 1363 (Nix, J., dissenting). Justice Nix believed that there was "no concern" that the issues presented in *Dwyer* would avoid judicial review absent the grant of extraordinary jurisdiction. *Id.* Justice Nix stated:

> It should be noted that petitioners at this point have not had a preliminary hearing, or an indictment or information issued against them. Remedies such as habeas corpus and motions to quash or dismiss were clearly available to allow this objection to be raised and considered *before the petitioners would have been exposed to trial.* Following the normal proceeding would have insured that if the question was ultimately brought to this Court for resolution, then we would have had the benefit of the thinking of the court below and the refinement of the issues that the traditional appellate process is designed to provide.

Id. at 603-04 n.5, 406 A.2d at 1365 n.5 (Nix, J., dissenting) (emphasis in original).

Only one year prior to *Dwyer*, the Pennsylvania Supreme Court had maintained that "[p]rohibition and mandamus both require a party seeking relief to establish a violation of clear rights not remediable by ordinary processes. . . . [O]nly the most meritorious claims will require this Court to depart from its normal appellate function and consider an original proceeding." Philadelphia Newspapers, Inc. v. Jerome, 478 Pa. 484, 494-95, 387 A.2d 425, 430 (1978). It appears that the court is now retreating from its hard-line stance of a year ago.

jurisdiction.[75] Second, Justice Nix believed that the majority was "hasty" in granting an across-the-board immunity, particularly in light of the court's recent espousal of a case-by-case approach in this context.[76] Finally, since the instant case involved alleged *criminal* conduct, the dissent criticized the majority's analysis which relied upon the United States Supreme Court cases recognizing immunity from *civil* actions,[77] but which ignored those cases rejecting immunity from *criminal* liability.[78]

It is suggested that in granting the Industrial Board immunity from criminal liability for unintentional crimes, the *Dwyer* court determined that the societal interest in granting such immunity—*i.e.*, to encourage the independent and unfettered exercise of discretion by decisionmakers[79]—outweighs the public interest in denying immunity from such suits—*i.e.*, to deter reckless behavior by public officials.[80] It is further suggested that the *Dwyer* court found that this balance tipped in favor of denying immunity when the official acted corruptly or in bad faith.[81] While it is conceded that this latter determination by the court is justifiable, it is contended that the court erred in striking the former balance. It is submitted that the harm to society caused by a public official's recklessness may be far in excess of the harm caused by an official's *corrupt* acts. The corrupt acts specifically not immunized under the holding in *Dwyer*, such as bribery, conspiracy, and extortion,[82] primarily inflict only pecuniary injury; the recklessness of the type immunized in the instant case, on the other hand, helped to deprive

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75. *See* notes 12 & 13 *supra*.

76. 486 Pa. at 601-02, 406 A.2d at 1363-64 (Nix, J., dissenting), *citing* DuBree v. Commonwealth, 481 Pa. 540, 393 A.2d 293 (1978). In advocating a case-by-case analysis when dealing with the issue of official immunity in civil actions, the *DuBree* court stated:

> Several times in recent years we have declined to follow easily-applied but unjust doctrines in favor of rules which, though requiring case-by-case determinations, more often produce equitable results. . . . "The obviously wiser course is to resolve disputes on a case-by-case basis until we develop, through experiences in [an] area, a sound basis for developing overall principles." We adhere to this view today.

481 Pa. at 547, 393 A.2d at 296 (citations omitted), *quoting* Pennsylvania Labor Relations Bd. v. State College Area School Dist., 461 Pa. 494, 500, 337 A.2d 262, 265 (1975).

77. 486 Pa. at 602, 406 A.2d at 1364 (Nix, J., dissenting). The dissent took particular exception to the majority's reliance on *Butz*. *Id.* For a discussion of *Butz*, *see* text accompanying notes 43-46 *supra*.

78. 486 Pa. at 602, 406 A.2d at 1364 (Nix, J., dissenting). Justice Nix contended that the majority's analysis overlooked O'Shea v. Littleton, 414 U.S. 488 (1974); Gravel v. United States, 408 U.S. 606 (1972); and *Ex parte* Virginia, 100 U.S. 379 (1879). 486 Pa. at 602, 406 A.2d at 1364 (Nix, J., dissenting). For a discussion of *O'Shea* and *Gravel*, *see* notes 33-34 and accompanying text *supra*.

79. *See* 486 Pa. at 591, 406 A.2d at 1358.

80. *See id.* at 597, 406 A.2d at 1361. The majority stated: "This opinion in no way condones reckless and negligent conduct of public officials in the performance of their responsibilities and duties. Criminal prosecution for that type of performance cannot, however, be the remedy." *Id.* (footnote ommitted).

81. *See id.* at 597 n.6, 406 A.2d at 1361 n.6.

82. *See id.*

twelve persons of their lives.[83] Since the injury to society that can result from undeterred recklessness appears to be at least as great as that caused by official corruption, it is suggested that the court should have permitted criminal liability in the context of reckless behavior as it did for official corruption or bad faith.

Although the court found that criminal prosecution of reckless public officials was not appropriate,[84] it did state that "public officers who are derelict in their duties can be removed from office by the appointing power."[85] It is suggested that this solution does not adequately deter reckless acts by public officials, nor does it encourage decisions which promote public safety.[86] It is contended that such removal is a standardless penalty to be inflicted, not by statute, but according to the whim of those who appointed the officials, possibly with political overtones.

Not only is it suggested that the majority's decision was improper for the policy reasons just mentioned, it is further contended that the court's analysis in reaching its decision is subject to criticism. The *Dwyer* court, in considering the need for criminal immunity, recognized that a primary interest in the grant of immunity in civil actions is to protect officials from the fear of retaliatory and vexatious lawsuits.[87] Since the decision of whether to institute *criminal* litigation rests with a disinterested public official, not with an aggrieved party, it is suggested that the need to protect public officials from vexatious *criminal* charges should not have influenced the court's decision.

It is further suggested that the majority's attempt to bolster its decision to grant immunity from *criminal* prosecution with federal cases that grant immunity from *civil* liability for damages[88] is both questionable and confusing. It is submitted that the *Dwyer* court's analysis of federal law ignored recent United States Supreme Court and circuit court authority expressly rejecting judicial immunity from criminal prosecution,[89] and relied on a sig-

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83. *See* notes 1-10 and accompanying text *supra*.

84. *See* 486 Pa. at 597, 406 A.2d at 1361; note 80 *supra*.

85. 486 Pa. at 597 n.6, 406 A.2d at 1361 n.6.

86. For a discussion of the theory of deterrence, *see generally* Chambliss, *The Deterrent Influence of Punishment*, 12 CRIME & DELINQUENCY 70 (1966); Erickson, *Deterrence and Deviance: The Example of Cannabis Prohibition*, 67 J. CRIM. L. & CRIMINOLOGY 222 (1976).

87. *See* 486 Pa. at 595, 406 A.2d at 1360, *citing* Butz v. Economou, 438 U.S. at 508-12.

88. The majority relied upon the following cases: Butz v. Economou, 438 U.S. 478 (1978); Stump v. Sparkman, 435 U.S. 349 (1978); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). For the dissent's criticism of the court's reliance upon these cases, *see* notes 77-78 and accompanying text *supra*.

89. *See* O'Shea v. Littleton, 414 U.S. 488, 503 (1974); Gravel v. United States, 408 U.S. 606, 627 (1972); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir. 1974); notes 33-34 and accompanying text *supra*.

nificantly older district court case[90] which, it is suggested, is entirely without vitality in light of this more recent higher court authority.[91]

Moreover, it is suggested that Justice Nix's dissent correctly interpreted a recent Pennsylvania Supreme Court case, *DuBree v. Commonwealth*,[92] in concluding that a case-by-case analysis is required in determining the extent of the immunity to be granted to a particular public official.[93] Reversing a lower court's grant of civil immunity to officials of the Pennsylvania Department of Transportation, the *DuBree* court stated: "Several times in recent years we have declined to follow easily-applied but unjust doctrines in favor of rules which, though requiring case-by-case determinations, more often produce equitable results."[94] It is suggested that the *Dwyer* court provided that a blanket immunity from criminal prosecution exists where the official, and the acts he performs, are "quasi-judicial" in nature, so long as there are no allegations of bad faith or corruption.[95] Although the court mentions some clearly quasi-judicial functions—*e.g.*, granting extensions and variances[96]—it provides little guidance to indicate the extent to which other public officials performing different types of discretionary functions will fall within the holding of *Dwyer*.[97] Thus, it is submitted that in addition to placing the vitality of the holding of *DuBree* in question, the court has created a situation where the outcome of future cases will depend upon whether one can convince a court that he is a "quasi-judicial" official performing "quasi-judicial" functions.

Finally, it is submitted that the *Dwyer* court's finding that the immunity enjoyed by the Board was not lost simply because the Board committed procedural errors[98] is not entirely supportable. In reaching its decision, the

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90. *See* 486 Pa. at 591, 406 A.2d at 1358, *citing* United States v. Chaplin, 54 F. Supp. 926 (S.D. Cal. 1944). It is submitted that the *Chaplin* case, which held that a judge was immune from criminal prosecution for violating, *inter alia*, a federal conspiracy statute, is no longer good law in light of the recent higher federal court cases. *See* notes 33-34 and accompanying text *supra*; note 91 *infra*.

91. *See* notes 33-34 and accompanying text *supra*. It should be noted that the statutory violation upon which the United States Supreme Court refused to grant immunity in O'Shea v. Littleton, 414 U.S. 488, 503 (1974), was identical to that upon which the district court granted immunity 30 years earlier in United States v. Chaplin, 54 F. Supp. 926 (S.D. Cal. 1944).

92. 481 Pa. 540, 393 A.2d 293 (1978).

93. *See* 486 Pa. at 601-02, 406 A.2d at 1363-64 (Nix, J., dissenting), *citing* DuBree v. Commonwealth, 481 Pa. 540, 546, 393 A.2d 293, 296 (1978).

94. 481 Pa. at 547, 393 A.2d at 296. *See* note 74 *supra*.

95. *See* 486 Pa. at 597 n.6, 406 A.2d at 1360, 1361 n.6.

96. *Id.* at 597, 406 A.2d at 1360.

97. For the *Dwyer* court's rationale in finding the Industrial Board to be a quasi-judicial agency, *see* notes 58-64 and accompanying text *supra*.

98. *See* 486 Pa. at 596, 406 A.2d at 1360-61.

Dwyer court relied upon the federal case of *Stump v. Sparkman*.[99] It should be noted, however, that the *Stump* case dealt with judicial immunity, not quasi-judicial immunity,[100] and that the leading United States Supreme Court case dealing with quasi-judicial immunity placed great emphasis upon the existence of procedural safeguards.[101]

In considering the impact of *Dwyer*, it should be noted that the court's holding is clearly limited to crimes for which the existence of mens rea is not required.[102] Indeed, the court specifically predicated immunity from criminal prosecution on the absence of bad faith or corruption, noting that "official behavior involving crimes of corruption such as bribery, extortion, . . . conspiracy to commit crimes, etc., are not protected by judicial or quasi-judicial immunity."[103]

In conclusion, it is submitted that the *Dwyer* court's grant of immunity from criminal prosecution for recklessness,[104] coupled with the preexisting immunity from civil liability,[105] effectively removes all legal responsibility from an agency official for his reckless actions. Thus, to the extent that possible criminal sanctions would promote a practice and policy of "better safe than sorry," a valuable deterrent has been lost.

Richard E. Widin

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99. *See id., citing* Stump v. Sparkman, 435 U.S. 349, 356-57, 362-63 (1978).
100. *See* Stump v. Sparkman, 435 U.S. 349, 362-63 (1978).
101. *See* Butz v. Economou, 438 U.S. at 512-16; note 45 *supra*.
102. *See* 486 Pa. at 597 n.6, 406 A.2d at 1361 n.6.
103. *Id.*
104. *See* notes 15 & 58-64 and accompanying text *supra*.
105. *See* notes 43-49 and accompanying text *supra*.