NOTE

Where the Reason Stops: Babcock v. State Establishes an Unjustified Immunity for Foster-Care Placement

America's massive foster-care system has become so overburdened that it is threatening the welfare of thousands of children that it is supposed to protect. The system is in such disarray that many experts now say that in too many cases state custody is as harmful to the children as are the abusive homes from which they are taken.¹

I. INTRODUCTION

In the midst of the problems facing the nation's child protection services, the Washington Supreme Court has lowered the protection for children in foster-care by granting absolute immunity from negligence liability to the caseworkers who recommend foster-care placement.² In Babcock v. State, the court refused to distinguish the role Department of Social and Health Services (DSHS) caseworkers performed during the initiation of a dependency proceeding from the role they perform during a foster-care placement proceeding.³ Instead, the court granted blanket protection to all of the caseworker's actions—from initiating proceedings to investigating placement—under the aegis of judicial immunity.⁴

This Note will argue that the Babcock court's application of this immunity fails to serve the traditional goals of judicial immunity and undermines the factors that should protect dependent children. This argument will develop by first considering the development of judicial immunity and the signifi-

³. Babcock, 112 Wash. 2d at 104, 768 P.2d at 493.
⁴. Id.
cance of the concept of functional comparability. The Note will then begin the discussion of the Babcock case with an explanation of the nature of a dependency proceeding and the duties performed by a caseworker during initiation of a dependency proceeding and during placement in foster-care. The Note will then consider the caseworker's actions in the Babcock case and that court's application of judicial immunity. It will show that the extension of judicial immunity to investigative and ministerial duties fails to fulfill the policies behind the grant of immunity.

The Note will then show that the application of ordinary negligence principles would serve to protect the legitimate concerns raised by the court while providing protection to children who may be placed at risk by DSHS. The Note will conclude that the court should balance the need to protect caseworkers' decision-making ability with the need to protect the children in the state's care. The result of this balancing would allow the limited application of immunity to the initiation of a dependency proceeding and the application of traditional negligence analysis to foster-care placement.

II. JUDICIAL IMMUNITY

A. The Development of Judicial Immunity

The concept of judicial immunity from civil liability is deeply entrenched. It was first developed to protect judges from liability in civil actions for any judicial action taken within their jurisdiction. Courts used the doctrine to protect judicial decision-making because of the recognized need for judges to exercise discretion within their role. Judges must be able to make decisions without the threat of a civil suit. Addi-

5. See Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 Duke L. Rev. 879 (tracing judicial immunity back to Lord Coke's decision in Floyd v. Barker, 77 Eng. Rep. 1305 (Star Chamber 1607)). The Supreme Court first faced the issue of judicial immunity in Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868) in which the Court concluded that the judge was not liable for his judicial acts unless the acts were done maliciously and in excess of jurisdiction. Subsequently, the Court even removed the possibility of judicial liability for malicious acts. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).


tionally, judicial economy disfavors re-litigating a suit through an action against the judge. Because of these concerns, judges are accorded absolute immunity from civil suit for actions taken within their official capacity.

While quite broad, immunity is not unlimited in scope. It covers acts that are "judicial" and within the general scope of the court's jurisdiction, even if the acts are done in bad faith or with a corrupt or malicious motive. However, a judge may be liable for conduct not constituting a judicial act. For example, judges may be liable for acts that are ministerial in nature rather than judicial. Examples of ministerial acts include chairing meetings outside of the courtroom, forcibly removing a person from the courtroom and physically assaulting him, and participating in employment decisions. Ulti-

[A] general principle of the highest importance to the proper administration of justice [is] that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871), quoted in Stump, 435 U.S. at 363.


12. Id. at 1058-59.

13. Forrester v. White, 484 U.S. 219, 228 (1988). The distinction may be considered discretionary versus non-discretionary. "To fulfill his discretionary role, the judge must use his personal judgment in performing the act; in his ministerial role, the judge is required by law to perform certain acts in specific ways." Note, Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?, 27 CASE W. RES. L. REV. 727, 729-30 (1977). Discretionary decisions are protected by immunity. Dalehite v. United States, 346 U.S. 15 (1953). However, the basis for immunity, which is the need to preserve the independence of judicial decision-making, does not carry over to ministerial acts. For example, the method by which an investigation is conducted has more guidelines than the decision of whether to initiate it and may be seen as administrative. Administrative acts are considered non-discretionary and are not immunized. RESTATEMENT (SECOND) OF TORTS § 895(D), comment h (1979) (examples of administrative or ministerial acts include registration of voters, recording of documents, care of prisoners, driving of vehicle and collection of taxes).


15. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974).

16. Forrester, 484 U.S. 219. The Forrester Court focused on the "nature of the functions" that an official performs and whether the application of immunity would protect that function, rather than on the identity of the official. See United States v. Hays, 499 U.S. 114, 119-22 (1991). The Court rejected the argument that the judge's employment decision should be immunized.
mately, the issue of whether a judge's actions require sufficient discretion to warrant a grant of judicial immunity is one of degree.  

B. Functional Comparability

Based on the functional comparability of their roles to that of a judge, other participants in judicial proceedings have also been granted absolute immunity. Functional comparability, although not clearly defined in the cases, involves a comparison of the role performed and the judicial interests protected by immunity. The U.S. Supreme Court first articulated the functional comparability approach in Imbler v. Pachtman, in which the Court pronounced that "[i]t is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers and their immunities being termed 'quasi-judicial' as well."

In Imbler, a criminal defendant brought a civil rights action against the state prosecutor for damages resulting from an alleged unlawful prosecution. The Imbler Court held that a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal case was absolutely immune from civil liability. The Court stated that absolute immunity was appropriate for conduct "intimately associated with the judicial phase of the criminal process." The Imbler Court based the extension of judicial immunity to other participants in the judicial process, or "quasi-judicial" immunity, on the same principles that underlie the traditional grant of immunity for judges. These principles "include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possi-

simply because the employee aided the judge in the performance of adjudicative functions. Id. at 222. "Absolute immunity . . . is 'strong medicine, justified only when the danger of [officials'] being deflect[ed from the effective performance of their duties] is very great.'" Id. at 230 (quoting 792 F.2d 647, 660 (1986) (Posner, J., dissenting)).

17. RESTATEMENT (SECOND) OF TORTS § 895(D), comment h (1979).
19. Id. at 423 n.20.
20. Id. at 430. The Court reserved judgment on whether absolute immunity extended to those aspects of a prosecutor's duties which cast him in the role of an investigative officer, rather than an advocate. Id.
21. Id.
22. Id. at 422-23.
bility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."23

The Imbler Court specifically limited its holding so that the prosecutor was granted absolute immunity only for his acts in initiating and prosecuting a criminal action.24 By so limiting its holding, the Imbler Court implied that the prosecution of an action may include activities outside the courtroom for which a prosecutor might be immune. However, the Court also recognized that "[a]t some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court."25 For acts which may be ministerial in nature, and consequently not subject to judicial immunity, the Court refused to consider whether absolute immunity should be applied.26

Subsequently, the Court has clarified the application of functional comparability. In Butz v. Economou,27 a futures merchant brought an action against the Department of Agriculture and others, seeking damages on the ground that the defendant had wrongfully initiated administrative proceedings against the merchant. In reaching its decision, the Court developed a two-part test for functional comparability.28 First, the Court compared the officials' powers and duties to those performed by officials already protected by judicial immunity.29 Second, if the duties were analogous to duties already subject to immunity, the Court would then determine whether the existence of institutional safeguards were sufficient to minimize the risks of bias.30

23. Id. at 423.
24. Id. at 430.
25. Id. at 431 n.33.
26. Id.; see also discussion of ministerial acts, supra note 13.
28. Id. Arguably, the Butz decision entailed a three-part test: before determining if the function was comparable to a judicial act and if institutional controls were sufficient to minimize possible bias, the Court first determined whether absolute immunity was even necessary to protect the official from liability. Note, Quasi-Judicial Immunity of State Officials: Butz v. Economou's Distorted Legacy, 1985 U. ILL. L. REV. 401, 418. For some officials, qualified immunity was adequate protection from liability for mere mistakes and, therefore, absolute immunity was not granted. Butz, 438 U.S. at 507. Qualified immunity protects officials from civil liability unless the official violated a clearly established constitutional right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The burden is on the official claiming absolute immunity to prove that a grant of qualified immunity will provide adequate protection. Id. at 812-13.
30. Id. at 512-514.
In order to determine whether the role of a given official is functionally comparable to a role traditionally granted judicial immunity, the Butz Court looked to whether the roles being compared performed the same duties and sought the same goals.\(^{31}\) Thus, the concept of functional comparability focuses upon the character of the conduct for which the immunity is claimed.\(^{32}\) That conduct must be such an integral part of the judicial process that the integrity of the process itself requires a grant of judicial immunity.\(^{33}\)

In Butz, the Court granted absolute immunity to an administrative hearing officer’s performance of functions which were substantially similar to those for which judges traditionally received immunity.\(^{34}\) The hearing officer, like a judge, ruled on the evidence presented, regulated the course of the hearing, and made decisions or recommendations.\(^{35}\) The Court found that “[m]ore importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him . . . .”\(^{36}\) The Court additionally noted that

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31. Id.

32. See Imbler v. Pachtman, 424 U.S. 409, 420 (1976) (citing Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974)). Courts have often termed conduct that has traditionally been treated as immune as “quasi-judicial” in order to distinguish it from investigative conduct. Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974). The proper focus, therefore, is on the character of the conduct. Id. “[W]hen the prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relationship between his acts and the judicial process—ceases to exist.” Id. (quoting Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965)). In Hampton, the Seventh Circuit Court of Appeals held that the drafting of a search warrant by the state attorneys was not sufficiently related to the judicial process to warrant a grant of absolute immunity. Id. at 609.

The Imbler Court also implicitly acknowledged that the focus upon the functional nature of the conduct allows a distinction between certain kinds of conduct. The Court distinguished the conduct for which it would grant absolute immunity, activities intimately associated with the judicial process, from the conduct that might be entitled only to a qualified immunity, activities commonly associated with investigation. Imbler, 424 U.S. at 430. The Court specifically left standing those cases holding that prosecutors were entitled to only a qualified immunity for investigative activities. Id. See also Hampton, 484 F.2d 602; Robichaud, 351 F.2d 533; Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974); cf. Madison v. Purdy, 410 F.2d 99 (5th Cir. 1969); Lewis v. Brautigan, 227 F.2d 124 (5th Cir. 1955); accord Barbera v. Smith, 836 F.2d 96 (2nd Cir. 1987); Barrett v. United States, 798 F.2d 565 (2nd Cir. 1986); Mancini v. Lester, 630 F.2d 990 (3rd Cir. 1980); Forsyth v. Kleindienst, 599 F.2d 1203 (3rd Cir. 1979).

33. Imbler, 424 U.S. at 430.

34. Butz, 438 U.S. at 511, 513.

35. Id. at 513.

36. Id.
agency hearings, like other court proceedings, are subject to the contention that malice affected the judgment. The Court then concluded that the hearing examiner, like a judge, needed protection from the fear of liability in order to exercise independent judgment on the evidence before him. Therefore, a grant of judicial immunity protected the hearing examiner's ability to make decisions on the merits, the same function for which a judge is protected.

Furthermore, the Court also granted immunity to the agency attorney for actions analogous to those of a prosecutor. The agency attorney, like a prosecutor, had to decide whether to initiate an action. Also like a prosecutor, the agency attorney needed to make that decision from the evidence rather than from fear of a retaliatory civil suit. The function the Court sought to protect, therefore, was the agency attorney's ability to initiate meritorious actions.

Thus, the Butz Court found the roles of the hearing examiner and the agency attorney sufficiently comparable to those of a judge and a prosecutor. In both situations, the participants' actions occurred in the course of an adjudicative proceeding and were analogous to the conduct traditionally subject to absolute immunity. In addition, by granting absolute immunity to the hearing officer and the agency attorney, the Butz Court sought to protect the need to make a meritorious decision. The Butz Court implied that if the only significant difference between the roles of the officials to which it granted immunity and the role of a judge is the location of the hearing, the immunity should be applied.

After examining the functional comparability of the roles of the participants, the Butz Court then inquired into the existence of institutional controls that reduce the risk of abuse of

37. Id.
38. Id.
39. See id. at 512.
40. Id. at 515 (construing Imbler v. Pachtman, 424 U.S. 409 (1976)).
41. Id.
42. Id.
43. Id.
44. Id. at 512. See also Note, supra note 28, at 419. The Butz Court did not, however, grant absolute immunity to the Secretary and the Assistant Secretary of the Department of Agriculture, who were also defendants to the suit. Butz, 438 U.S. at 507. Those officials had filed an administrative complaint against the plaintiff, seeking to revoke the plaintiff's registration as a commodities merchant. The Court held that they were only entitled to a qualified immunity for that action. Id.
power.\textsuperscript{45} The control of precedent and the appeal process check the power of judges; professional obligations and the adversary nature of a trial check the power of advocates; finally, cross-examination and the penalty of perjury check the power of witnesses at trial.\textsuperscript{46} The Court stated that because these characteristics of the judicial process enhance the reliability of information and the impartiality of the decision-making process, there is a lesser need for individual suits to act as a check on judicial action.\textsuperscript{47} Thus, when both functionally comparable duties and institutional controls are present, immunity may be properly applied to protect judicial interests.

III. \textit{STATE v. BABCOCK}

A. Introduction

In \textit{State v. Babcock},\textsuperscript{48} the Washington Supreme Court applied a broad interpretation of judicial immunity to the actions of caseworkers during foster-care placement. By broadening this interpretation, the court ignored the distinction between a caseworker's duties during the initiation of a dependency proceeding and during the investigation of foster-care placement. Before discussing the application of immunity in the \textit{Babcock} case, however, a discussion of the rudiments of dependency proceedings and foster care placement is necessary.

B. \textit{Dependency Proceedings and Foster-Care Placement}

A dependency proceeding is the process by which the state, through the DSHS, assumes a legal interest in a child when there is no parent or guardian able to care for the child.\textsuperscript{49} The establishment of a dependency creates a legal status which imposes certain rights and duties on the state

\textsuperscript{45} See Butz, 438 U.S. at 512.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} 112 Wash. 2d 83, 768 P.2d 481 (1989).
regarding the care of the child.\textsuperscript{50} If a dependency has been established and the state becomes the legal custodian of the child, the state controls the placement of the child\textsuperscript{51} and determines the steps that a parent must follow to regain custody.\textsuperscript{52}

Establishing a dependency involves three stages: initial investigation, fact-finding investigation, and disposition investigation.\textsuperscript{53} At each stage, the DSHS caseworker investigates the level of risk to the child and makes recommendations to the court. The court will then determine whether the parent or an agency such as DSHS will retain custody of the child based on those recommendations. If the court awards custody to DSHS, DSHS controls any specific foster-care placement and, in certain situations, DSHS may make a foster-care placement even before a dependency has been ordered by the court.

At the initial stage, DSHS receives a report that a child has been abused, neglected, or abandoned.\textsuperscript{54} To determine what action should be taken, an intake worker at DSHS will evaluate the risk to the child and consider whether previous reports have been made.\textsuperscript{55} Depending on the level of risk,

\textsuperscript{51} See Wash. Rev. Code §§ 13.34.130(1)(b), 74.13.031(6).
\textsuperscript{52} Wash. Rev. Code § 13.34.130(2).
\textsuperscript{53} Confusion commonly occurs over the nomenclature because the courts sometimes refer to a factfinding hearing as a dependency hearing and sometimes refer to both the factfinding hearing and the disposition hearing as a single dependency hearing. Technically, the factfinding hearing and the disposition hearing are held separately, although the disposition hearing is usually held immediately after the factfinding hearing. See generally H. Landau, M. Salus, T. Stiffman & N. Kalb, Child Protection: The Role of the Courts 19-26 (1980).
\[\text{[i]Investigate complaints of neglect, abuse, or abandonment of children, and on the basis of the findings of such investigation, offer child welfare services in relation to the problem to such parents, legal custodians, or persons serving in loco parentis, and/or bring the situation to the attention of an appropriate court, or another community agency. . . .}
\] Wash. Rev. Code § 74.13.031(3). DSHS has a duty to see to the welfare of dependent children. See In Re Feldman, 94 Wash. 2d 244, 246-47, 615 P.2d 1290, 1294 (1980).

Because of the concern about child abuse, the legislature has also mandated that any person who participated in a good faith report of alleged child abuse or testified to the alleged abuse in a judicial proceeding is immune from liability arising out of such reporting or testimony under any state law. Wash. Rev. Code § 26.44.060 (1989). DSHS receives and investigates child abuse reports through its subdivision, Child Protective Services. Wash. Admin. Code §§ 388-15-130 to -132 (1989).
DSHS may take no action and simply file the report.\textsuperscript{56}

However, if the risk to the child is sufficient, DSHS may decide to monitor the child in the parental home or to remove the child from the home and place the child in shelter care.\textsuperscript{57} Shelter care is only a temporary placement in a facility licensed by DSHS, such as a foster home, or a facility not required to be licensed, such as the home of a relative.\textsuperscript{58} The decision to place a child in shelter care may be made without a court order if the officer has reason to believe that the child is at risk of immediate harm.\textsuperscript{59} However, the officer must obtain a court order if the child is to remain in shelter care.\textsuperscript{60} If a hearing is held, the court will determine whether the child may be returned to the parental home and whether a dependency petition should be filed.\textsuperscript{61} Furthermore, whether or not the child is removed from the home, DSHS may file a dependency petition which would enable the agency to assume control of the child.\textsuperscript{62}

If the DSHS caseworker determines that a dependency should be established and files a dependency petition, the caseworker will initiate an investigation which will lead to a fact-finding hearing.\textsuperscript{63} The fact-finding hearing is a full evidentiary hearing in which the state has the burden of proving that the child meets certain statutory requirements for depen-

\textsuperscript{56} See \textit{Wash. Admin. Code} § 388-15-132(1)(b). DSHS has the authority to refuse to investigate the reported abuse or neglect. \textit{Id.}


\textsuperscript{58} \textit{Wash. Rev. Code} § 13.34.060.


\textsuperscript{60} \textit{Wash. Rev. Code} § 13.34.060. The statute provides that [n]o child may be held longer than seventy-two hours, excluding Saturdays, Sundays and holidays, after such child is taken into custody unless a court order has been entered for continued shelter care. The child and his or her parent, guardian, or custodian shall be informed that they have a right to a shelter care hearing. The court shall hold a shelter care hearing if one is requested.

\textsuperscript{61} \textit{Wash. Rev. Code} § 13.34.060. If the parent requests that the hearing be held, the court will hold the hearing and determine whether the child can be returned to the home or whether the child should remain in shelter care. \textit{Id.} DSHS may recommend that the shelter care be continued if DSHS files a petition alleging dependency. \textit{Id.}


dency status. If the court orders that a dependency be established, the court will then require a disposition hearing, which is usually held immediately after the fact-finding hearing.

At the disposition hearing, the court determines where the dependent child will be placed. At this hearing, DSHS must submit its disposition recommendation in the form of a social study. Because the court generally relies upon the caseworker's judgment regarding placement rather than conducting its own independent investigation, the report from DSHS has a tremendous influence over the court's placement decision.

At the disposition hearing, the court may order that the dependent child remain in the parental home or be placed outside the home. If the court determines that the child cannot remain in the parental home, the court has several placement options. Although the legislative preference is

64. See generally Wash. Rev. Code § 13.34.110 (1989). A child may be found dependent upon the care of the state if the child has been abandoned, neglected, or abused, or if the child lacks a parent or guardian able to adequately care for the child. Wash. Rev. Code § 13.34.030(2).

The need to establish a dependency must be proven by a preponderance of the evidence. Wash. Rev. Code § 13.34.130.


67. Wash. Rev. Code § 13.34.120(1). The statute states:

[...]o aid the court in its decision on disposition, a social study, consisting of a written evaluation of matters relevant to the disposition of the case, shall be made by the person or agency filing the petition. The study shall include all social records and may also include facts relating to the child's cultural heritage, and shall be made available to the court. The court shall consider the social file and social study at the disposition hearing in addition to evidence produced at the fact-finding hearing. At least ten working days prior to the disposition hearing, the department shall mail to the parent and his or her attorney a copy of the agency's social study and proposed service plan, which shall be in writing or in a form understandable to the parents or custodians.


70. Wash. Rev Code § 13.34.130(1)(b). The statute provides:

The court shall order one of the following dispositions of the case:

(a) Order a disposition other than removal of the child from his or her home, which shall provide a program designed to alleviate the immediate danger to the child, to mitigate or cure any damage the child has already suffered, and to aid the parents so that the child will not be endangered in the future. In selecting a program, the court should choose those services that
placement with a relative, the court often orders that the child be placed with DSHS, which has the authority to accept legal custody of dependent children. The transfer of legal custody charges the custodian, DSHS, with the following duties: (1) maintaining physical custody of the child; (2) protection, training, and discipline of the child; and (3) providing food, clothing, shelter, education, and routine medical care. Additionally, DSHS must provide a specific plan for the child's placement.

If DSHS must accept custody, it will usually place the child in foster-care while retaining legal custody. The two

least interfere with family autonomy, provided that the services are adequate to protect the child.

(b) Order that the child be removed from his or her home and ordered into the custody, control, and care of a relative or the department of social and health services or a licensed child placing agency for placement in a foster family home or group care facility licensed pursuant to chapter 74.15 RCW or in a home not required to be licensed pursuant to chapter 74.15 RCW. Unless there is reasonable cause to believe that the safety or welfare of the child would be jeopardized or that the efforts to reunite the parent and child will be hindered, such child will be placed with a grandparent, brother, sister, stepbrother, stepsister, uncle, aunt, or first cousin with whom the child has a relationship and is comfortable, and who is willing and available to care for the child. An order for out-of-home placement may be made only if the court finds that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home... and that:

(i) There is no parent or guardian available to care for such child;
(ii) The child is unwilling to reside in the custody of the child's parent, guardian, or legal custodian;
(iii) The parent, guardian, or legal custodian is not willing to take custody of the child; or
(iv) A manifest danger exists that the child will suffer serious abuse or neglect if the child is not removed from the home and an order under RCW 26.44.063 would not protect the child from danger...
basic principles that underlie foster-care are that the child is placed on a temporary basis with the foster family and that DSHS reserves the right to remove the child at any time from the foster home. Foster care is intended to serve as a substitute to parental care until the child can be returned to the parental home or until another permanent placement can be made. In addition to its initial duty to investigate foster homes for licensing purposes, DSHS has a continuing duty to monitor the dependent child in the foster home.

To clarify, the factfinding hearing, in which the child may be determined to be dependent, and the disposition hearing, in which the legal custody of the child is determined, are two phases of what is collectively referred to as a dependency proceeding. By contrast, the placement in foster care takes place subsequent to the dependency proceeding, after the court has ordered custody to DSHS. The issue at the fact-finding hearing is the parent's ability to care for the child. If the court finds sufficient evidence that the child is dependent, then the dependency is established at the fact-finding hearing. The initial issue at the disposition is whether the child can remain in the parental home, even if monitored. If the court orders that the child be removed from the parental home and places the child with DSHS, DSHS becomes responsible for the care, custody, and control of the child. At that point, DSHS, rather than the natural parent, has assumed care of the child as if DSHS were the parent. Because the court itself does not order specific foster-care placement in the disposition order,

79. In limited cases, foster-care placement may be made prior to the order of dependency. Wash. Rev. Code §§ 26.44.050, 13.34.060 (allowing placement of a child in emergency shelter care).
80. See Wash. Rev. Code §§ 13.34.030, -.130.
82. See Wash. Rev. Code § 13.34.130(1)(a).
83. See Wash. Rev. Code § 13.34.130(1)(b).
84. See Evangelical United Brethren Church of Adna v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965). The care, custody, and discipline of wards of the state shall approximate that which should be given by the parent. Id. at 259-60, 407 P.2d at 447. In Evangelical, a juvenile in the custody of the state burned down a church and residence. The owners sued the state for negligently supervising the juvenile whom the state knew to be a pyromaniac. The court determined that the state was like a parent to the juvenile and owed a duty to the community commensurate with the duty of a parent in similar circumstances. Id. at 260, 407 P.2d at 447-48.
DSHS then selects the foster home in which the child will be placed.85

C. Facts of Babcock v. State

In Babcock v. State,86 the Washington Supreme Court addressed the issue of dependent children who had been placed at risk in foster-care. In Babcock, the father of children who had been sexually abused by a foster parent brought suit on behalf of himself and the children against the state and the individual caseworkers for negligence, outrage, and alienation of affections.87 The trial court granted summary judgment in favor of the defendants.88 The Washington Supreme Court affirmed, holding that the individual defendants and the state were absolutely immune from negligence liability.89

Rudolph Babcock and Ann Long had two daughters, Erika and Beth; in addition, Ann had two daughters from a previous marriage, Angela and Aryn Long. On August 28, 1978, Ann Long Babcock committed suicide.90 After her death, Rudolph was apparently unable to care for the girls, and in August 1981, a Louisiana court ordered placement of the girls with Rudolph's parents, Willis and Elizabeth Babcock.91 Because the elder Babcocks lived in Richland, Washington, the court ordered the transfer of the case to Washington.92

Subsequently, on March 31, 1982, a dependency disposition hearing was held,93 in which Rudolph was represented by counsel. The juvenile court granted a continuance as to the Babcock girls, who had been removed by their father from the state, and granted a temporary order that the Long girls be placed with Lee and Janet Michael.94 Upon their return to the

86. 112 Wash. 2d 83, 768 P.2d 481 (1989).
87. Id. The claims for outrage and alienation of affections were dismissed on summary judgment with the negligence claim. Id. This Note will deal only with the issues raised by the dismissal of the negligence claim.
88. Id. at 92, 768 P.2d at 486.
89. Id. at 108, 768 P. 2d at 494.
90. Id. at 85, 768 P.2d at 483.
91. Id.
92. Id. The court ordered the transfer pursuant to the interstate compact on the placement of children. Wash. Rev. Code ch. 26.34.
93. The disposition hearing was held pursuant to Wash. Rev. Code § 13.34.110.
94. Babcock, 112 Wash. 2d at 86, 768 P.2d at 483. Janet Long was the natural aunt of the girls. It is not clear whether the children were placed with the Michaels as a
state and prior to the issuance of a court order, the Babcock girls were also placed in the Michaels' home. 95

On May 4, 1982, a second disposition hearing was held. Pursuant to Wash. Rev. Code § 13.34.120, DSHS submitted a report and recommendation for placement to the court. The report, written by DSHS caseworker Wanda Tyler, recommended that all four girls be placed in the care of the Michaels. Rudolph Babcock was present at the hearing and objected to the recommendation of DSHS on the grounds that the Michaels had interfered with his relationship with the girls, hampering reunification. 96 The court continued the proceeding until more evidence became available. 97

On August 26 and 27, 1982, a third disposition hearing was held. Mark Bronson, the DSHS caseworker who had replaced Tyler, testified that, based on the report previously prepared by Tyler, the Michaels should be made guardians of the Long girls and the Babcock girls should remain in the Michaels' home. Janet and Lee Michael also testified regarding their relationships with the girls. All of the witnesses were cross-examined by counsel for Rudolph and Rudolph testified on his own behalf. Ultimately, the juvenile court ordered that all four girls should remain with the Michaels. 98

relative placement or whether the Michaels were licensed as a foster-care placement facility. The court referred to the Michaels as foster parents but did not mention whether the Michaels were licensed. The initial DSHS caseworker, Wanda Tyler, also testified at a deposition that she evaluated the Michaels as foster parents, rather than as adoptive parents. Id. at 91, 768 P.2d at 486. In fact, only one visit was made to the Michaels' home and Tyler compiled information regarding the Michaels on an adoption application form. Id. at 110, 768 P.2d at 495 (Utter, J., dissenting). Tyler prepared the home study for the court on the basis of that one visit. Id.

Currently, the requirements for foster-care licensing are more stringent than relative placement and would have entitled the Michaels to payment for the girls' care. In either situation, DSHS would still be responsible for investigating the placement. However, in a relative placement, the relative becomes the legal custodian at the close of the disposition. Wash. Rev. Code § 13.34.130(1)(b). For purposes of analysis, however, this Note considers the Michaels as foster-parents because the rule created by the court applies equally to foster-parent relationships.

95. Babcock v. Tyler, 884 F.2d 497, 499 (9th Cir. 1989).
96. Babcock, 112 Wash. 2d at 110-11, 768 P.2d at 496 (Utter, J., dissenting). DSHS operates under a legislative mandate to reunify the family unless reunification jeopardizes the health or safety of the child. See generally Wash. Rev. Code § 13.34.020.
97. The court continued the proceeding to await the receipt of the dependency records from Louisiana. 112 Wash. 2d at 87, 768 P.2d at 484.
98. Id. at 87-88, 768 P.2d at 484-85. Again, it was unclear whether the court specifically ordered placement with the Michaels because they were relatives or whether DSHS retained legal custody but placed the girls with the Michaels as foster
The Long and the Babcock girls remained in the Michaels' home until October 1983, when it was discovered that Lee Michael had been sexually abusing all four girls, in addition to his own daughter.99 At the time the Michaels were awarded custody of the four girls, Lee Michael had a substantial criminal record, which included charges of forcible rape, attempted rape, and sexual assault.100

DSHS based its recommendation that the girls be placed with the Michaels on a single home study conducted by Tyler in November 1981. Tyler testified at her deposition that, although the Michaels were evaluated as foster parents and not adoptive parents, she used a form entitled "Adoption Application." By failing to ask the question contained in the form concerning the applicant's criminal history, Tyler failed to discover Lee Michael's criminal record.101 In addition, Tyler conducted no other investigation that would have revealed his record. At that time, DSHS did not require a check of police records.102 DSHS did admit, however, that had it discovered the criminal record, it would not have recommended placement of the girls in the Michaels' home.103

parents. The court referred to the placement with the Michaels as a "foster placement." Id. at 84, 768 P.2d at 483. Ordinarily, the foster-parents are not named in the disposition order. Cf. WASH. REV. CODE § 13.34.130(1)(b) (court orders child into custody of DSHS, who will then determine the placement).

99. 112 Wash. 2d at 90, 768 P.2d at 486. Lee Michael was subsequently convicted on three counts of statutory rape and two counts of indecent liberties. He is presently serving a 55-year sentence. Id. at 90-91, 768 P.2d at 486.

100. Id. at 91, 768 P.2d at 486.

101. Id.

102. Id. at 110, 768 P.2d at 495 (Utter, J., dissenting).

103. Babcock, 112 Wash. 2d at 110, 768 P.2d at 486.

The plaintiffs also brought suit in federal court pursuant to 42 U.S.C. § 1983 against the individual caseworkers, Tyler and Bronson. Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989). In February 1986, the defendants filed a motion in the district court to dismiss the plaintiffs' complaint on the ground of absolute immunity. The district court denied the motion. 884 F.2d at 500. Subsequently, the Ninth Circuit Court of Appeals decided two cases involving DSHS proceedings and which granted absolute immunity to the caseworkers involved. Meyers v. Contra Costa County Dep't of Social Servs., 812 F.2d 1154 (9th Cir.) cert. denied, 484 U.S. 829 (1987); Coverdell v. Dep't of Social and Health Servs., 834 F.2d 758 (9th Cir. 1987). Both of the cases involved the initiation of child dependency proceedings.

The defendants moved for summary judgment, contending that they were entitled to absolute immunity under Meyers and Coverdell. Nevertheless, on January 11, 1988, the district court denied the defendants' motion for summary judgment and refused to dismiss the case on the ground of absolute immunity. Babcock, 884 F.2d at 500. The court of appeals reversed and remanded the district court's denial and issued instructions to dismiss the suit. The court held that the caseworkers were entitled to absolute immunity. Id. at 504.
D. The Court's Analysis: Extending the Scope of Judicial Immunity

The Washington Supreme Court\(^{104}\) held that the individual DSHS caseworkers and the state were entitled to absolute immunity from liability for negligence on the ground that the acts occurred in the course of a judicial proceeding required by statute.\(^{105}\) The court first characterized the dependency hearings as "adversarial judicial proceedings"\(^{106}\) and then determined that the participants were "entitled to absolute immunity as a safeguard on the integrity of such proceedings."\(^{107}\) According to the court, the scope of this immunity extended to all participants in the judicial proceeding and included out-of-court investigations.\(^{108}\)

In reaching its decision, the court relied on the common law doctrine of judicial immunity.\(^{109}\) The cases upon which the court relied granted immunity based on the functional comparability of the role being considered to that of a judge, the role to which courts traditionally applied immunity.\(^{110}\) The Babcock court interpreted these cases as setting forth a single theory of judicial immunity: that participants in a judicial proceeding are immune from suit.\(^{111}\) The court reasoned that

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104. Justice Dore writing for the court, with Chief Justice Callow and Justice Durham concurring; Justices Dolliver and Andersen concur in the result; Justice Utter writing the dissent, with Justices Brachtenbach and Pearson concurring.


106. Babcock, 112 Wash. 2d at 95, 768 P.2d at 488.

107. Id. The court first found that the individual defendants were absolutely immune and, through an agency theory, that the state was immune to the same extent as the caseworkers. Id. at 105, 768 P.2d at 493.

108. Id.


110. Imbler, 424 U.S. at 423, n.20. See supra notes 18-47 and accompanying text.

111. Babcock, 112 Wash. 2d at 95, 768 P.2d at 488. The defendants had only contended that the cases established two separate grounds of immunity: quasi-prosecutorial immunity, in which the caseworker's role was analogous to a prosecutor, and witness immunity. Id. at 98, 768 P.2d at 489. However, the court did not distinguish between the cases. Instead the court stated that "[t]he leading cases actually set forth a single theory of immunity: that participants in adversarial judicial proceedings are immune from suit as a safeguard on the integrity of the adversarial process itself." Id. at 98, 768 P.2d at 489. See also Bruce v. Byrne-Stevens & Assocs. Eng'rs., Inc., 113 Wash. 2d 123, 776 P.2d 666 (1989). Granting absolute immunity to expert witnesses, the Bruce court reasoned as follows:

The purpose of granting immunity for participants in judicial proceedings is to preserve and enhance the judicial process . . . . The various grants of immunity for judges and witnesses, as well as for prosecutors and bailiffs, are
immunity was needed to protect the truth-seeking function of the court.112 According to the court, the threat of liability would have a chilling effect on the investigation and prosecution of cases and would restrict the free flow of information.113 Finally, the court also expressed the concern that the threat of liability might distract the prosecutor from the business of his office and that, as a matter of efficiency, to allow a civil suit might require a retrial of the criminal case.114

Although the Babcock court never expressly mentioned "functional comparability," it purported to rely upon Imbler v. Pachtman115 and Butz v. Economou116 in its analysis.117 Both Imbler and Butz limited judicial immunity to acts functionally comparable to the judicial role.118 The Babcock court, however, went beyond the holdings in Imbler and Butz by extending immunity to all participants in the proceeding, covering both their in-court and out-of-court conduct, without a strict analysis of the nexus between the act and the judicial function served.119 In an attempt to justify this approach, the Babcock court interpreted the Imbler Court's grant of immunity as based on the nature of the proceedings rather than on the nature of the individual's duties.120 In other words, the Babcock court focused on the procedural safeguards, the second part of the Butz test, rather than on the specific conduct for which the immunity was claimed. By focusing on the procedural safeguards, the court found that the judicial function of truth-seeking was adequately protected.121 Thus, the court held that immunity should be granted so that the participants in the proceeding could carry out their functions without fear

all particular applications of this central policy. They are best described as instances of a single immunity for participants in judicial proceedings.

Id. at 128, 776 P.2d at 668.
112. Babcock, 112 Wash. 2d at 98, 768 P.2d at 489.
113. Id. at 98, 768 P.2d at 489-90.
114. Id. at 98, 768 P.2d at 489.
117. Babcock, 112 Wash. 2d at 97, 768 P.2d at 489.
118. For discussion of functional comparability, see supra text accompanying notes 18-47.
119. See Babcock, 112 Wash. 2d at 104, 768 P.2d at 492 (refusing to consider a distinction between the acts involved in establishing the dependency and the acts involved in foster-care placement).
120. Id. at 99, 768 P.2d at 490.
121. Id. at 100, 768 P.2d at 490 (quoting Butz, 438 U.S. at 512).
of intimidation or harassment.  

After concluding that all participants in adversarial proceedings were entitled to absolute immunity, the court analyzed whether the dependency proceedings were adversarial in nature.  

To make such a determination, the court examined whether the parties had the opportunity to offer evidence, cross-examine witnesses, and argue to the court.  

The court noted that the report by DSHS must be admissible under the rules of evidence, that the parents of dependent children have access to the caseworker’s report and recommendation, and that counsel for Rudolph Babcock cross-examined Bron-  

122. Id. Additionally, the Babcock court referred to the immunity of witnesses in Briscoe v. LaHue, 460 U.S. 325 (1983). See Babcock, 112 Wash. 2d at 100, 768 P.2d at 491. In Briscoe, convicted state defendants brought a civil rights action against police officers because of the alleged perjured testimony of the officers at the defendants' criminal trial. Briscoe, 460 U.S. at 327. The police officers in Briscoe were held absolutely immune for their testimony as witnesses in the course of a judicial proceeding. However, the police officers were not entitled to absolute immunity in the performance of their duties simply because they might testify later in a judicial proceeding. The immunity was limited to freedom from civil liability for the consequences of what the officers said in court. See id. at 342.  

The Babcock court ignored this distinction and stressed the concern that witnesses would be intimidated by the fear of liability, which would impair the truth-seeking function. Babcock, 112 Wash. 2d at 100-101, 768 P.2d at 672. The court recently reiterated its adherence to the principle of absolute immunity for witnesses in Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc., 113 Wash. 2d 123, 776 P.2d 666 (1989). In Bruce, the court extended absolute immunity to expert witnesses for acts in preparation of litigation. Id. at 136, 776 P.2d at 672. The court allowed the immunity to protect both the witness' testimony and the basis of that testimony, such as reports prepared for use in court even though the preparation may be negligent. Id. at 135, 776 P.2d at 672.  


124. Id. at 101-102, 768 P.2d at 491.  

125. Id. at 101, 768 P.2d at 491. The court cited to WASH. REV. CODE. § 13.34.110, which reads in part "[n]o social file or social study may be considered by the court in connection with the fact-finding or prior to factual determination, except as otherwise admissible under the rules of evidence." However, this portion of the statute applies only to the fact-finding portion of a dependency hearing. It does not refer to the disposition phase of a dependency hearing, which may immediately follow the fact-finding portion of a dependency hearing. WASH. JUV. CT. R. 3.8(a). The rules of evidence do not apply to a disposition hearing. For disposition hearings, or the disposition phase of a dependency hearing, WASH. JUV. CT. R. 3.8(c) states:

Evidence. The court shall consider the social file, social study, and other appropriate pre-disposition studies, in addition to information produced at the fact-finding and disposition hearings. Any party shall have the right to be heard at the disposition hearing. Any social file, social study, or pre-disposition study shall be made available for inspection by a party or his or her lawyer for a reasonable time prior to the disposition hearing.

See also O'NEILL, supra note 85, A-30, -31.  

126. Babcock, 112 Wash. 2d at 101, 768 P.2d at 491 (parent has access to report and recommendation pursuant to WASH. REV. CODE § 13.34.110).
son, the witness who presented the report to the court.\textsuperscript{127} Because all parties had the opportunity to offer evidence, cross-examine witnesses, and argue to the court, the court concluded that the proceeding was fully adversarial.\textsuperscript{128} As a result, the court concluded that the caseworkers were entitled to absolute immunity.\textsuperscript{129}

The court reiterated four policy reasons why absolute immunity should be granted to caseworkers in the context of dependency actions. First, the threat of civil suits would inhibit caseworkers from initiating dependency actions.\textsuperscript{130} Second, caseworkers should be protected as witnesses; otherwise, they might withhold information critical to a proper resolution of the case.\textsuperscript{131} Third, the adversarial nature of the proceeding, including cross-examination and argument, is an adequate check on the fairness and thoroughness of DSHS procedures.\textsuperscript{132} Finally, civil suits are redundant and expensive, and the court should favor absolute immunity to protect the finality of decisions and judicial efficiency.\textsuperscript{133}

After determining that caseworkers were entitled to absolute immunity for their participation in judicial proceedings, the court extended the scope of the immunity to include the caseworkers' actions outside the courtroom.\textsuperscript{134} The court found the threat of liability equally damaging to the adversarial process whether liability is imposed for preparing the report and recommendation or whether it is imposed for testifying in court.\textsuperscript{135} The court reasoned that the imposition of liability for either task would limit the supply of information to the court.\textsuperscript{136} Thus, the proceeding's objective of determining the best interests of the children prohibited the juvenile court from acting until fully appraised of all necessary information.\textsuperscript{137}

In order to protect the flow of information, the \textit{Babcock} court expressly refused to distinguish between the

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\textsuperscript{127} \textit{Id.} at 101, 768 P.2d at 491. \\
\textsuperscript{128} \textit{Id.} at 102, 768 P.2d at 491. \\
\textsuperscript{129} \textit{Id.} \\
\textsuperscript{130} \textit{Id.} \\
\textsuperscript{131} \textit{Id.} at 102, 768 P.2d at 491-92. \\
\textsuperscript{132} \textit{Id.} at 102, 768 P.2d at 492. \\
\textsuperscript{133} \textit{Id.} at 103, 768 P.2d at 492. \\
\textsuperscript{134} \textit{Id.} \\
\textsuperscript{135} \textit{Id.} \\
\textsuperscript{136} \textit{Id.} at 104, 768 P.2d at 492. \\
\textsuperscript{137} \textit{Id.} at 103, 768 P.2d at 492.
\end{flushleft}
caseworker’s actions in establishing a dependency and his or her actions in placing the child in foster-care.\textsuperscript{138} Because the caseworkers in the suit had not actually removed the children from the parental home,\textsuperscript{139} the court stated that removal was not at issue.\textsuperscript{140} Consequently, the court did not limit the immunity to the removal.\textsuperscript{141} Instead, the court focused on the caseworker’s role in the adversarial proceeding, rather than the particular actions to which immunity would apply. Ignoring the distinction that other courts have made between the particular duties involved in dependency proceedings and foster-care placement proceedings,\textsuperscript{142} the Babcock court concluded that the caseworker’s full range of duties fall within the scope of immunity.\textsuperscript{143}

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138. Id. at 104, 768 P.2d at 492.
139. Id. at 85, 768 P.2d at 483 (Louisiana caseworkers had removed the children from the family home).
140. Id. at 104, 768 P.2d at 492.
141. Id. at 104, 768 P.2d at 492-93. The court stated that there is no basis for distinguishing between the removal and the placement of the child. Both decisions are in the hands of the court, first in the factfinding hearing and then in the hearing on disposition. As to both removal and placement, [DSHS] functions in the same advisory role, preparing a single report containing a single recommended plan of action. The need for immunity based on the integrity of the adversarial proceeding is the same in regard to both removal and placement.

Id.

142. See, e.g., Koepf v. County of York, 198 Neb. 67, 251 N.W.2d 866 (1977) (judge who ordered placement in foster-care and prosecutor were both immune from liability for child’s death at hands of foster-parent, but welfare department charged with custody of the child for placement in foster-care could be liable); compare Deshaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 109 (1989) (state may owe constitutional duty of protection to children in its custody, although such a duty is not owed to children in parental home).

143. Babcock v. State, 112 Wash. 2d at 104, 768 P.2d at 492-93. Similarly, the federal court considered the integral nature of the caseworker’s actions in the disposition to the whole dependency proceeding. See Babcock v. Tyler, 884 F.2d 497, 503 (9th Cir. 1989). The test the federal court applied was whether the action for which the immunity was claimed was so integral to the judicial process that to deny immunity would not serve the public interest in having participants in judicial proceedings perform their function without fear of having to defend their actions in a civil lawsuit. Id. at 502.

Applying this test, the federal court first noted that it had extended absolute prosecutorial immunity to caseworkers who initiated and pursued dependency proceedings, Babcock, 884 F.2d at 502 (citing Meyers v. Contra Costa County Dep’t of Social Servs., 812 F.2d 1154 (9th Cir.), cert. denied, 484 U.S. 829 (1987)), and who sought and obtained a court order for the seizure and placement of a newborn child. Id. at 502 (citing Coverdell v. Dep’t of Social and Health Servs., 834 F.2d 758, 764 (9th Cir. 1987) (the caseworker who executed the court order for seizure and placement was also entitled to quasi-judicial immunity). In Babcock v. Tyler, the federal court then extended the scope of immunity to include post-adjudication activities in addition to
E. The Court Overextended the Application of Judicial Immunity

The Washington Supreme Court interpreted *Imbler* and its progeny to extend the scope of judicial immunity not only to participants' conduct within the courtroom but also to their actions occurring outside the courtroom. This interpretation, however, overextended the United States Supreme Court's holding in *Imbler*. The Babcock court asserted that *Imbler* "bases prosecutorial immunity on the nature of the criminal proceeding; *not* on the nature of the prosecutor's duties."¹⁴⁴ However, a closer reading of *Imbler* reveals that the *Imbler* Court based immunity for prosecutors on the "functional comparability" of decisions of prosecutors to the decisions of judges.¹⁴⁵ Contrary to the Babcock court's interpretation, the *Imbler* Court did not grant blanket immunity to individuals simply because they were participants in a judicial proceeding. Only some actions were protected. For example, the *Imbler* Court did not extend absolute immunity to those aspects of the prosecutor's duties that were administrative or investigative.¹⁴⁶ The prosecutor received absolute immunity only for those actions "intimately associated with the judicial phase of the criminal process."¹⁴⁷ However, a prosecutor will not receive absolute immunity when acting outside the scope of litigation-

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¹⁴⁴ Id. at 106, 768 P.2d at 493. See also *Barrett v. United States*, 798 F.2d 565, 571-72 (2nd Cir. 1986) (prosecutorial protection encompasses "all of their activities that can be fairly characterized as closely associated with the conduct of litigation or potential litigation ....").
related duties.\textsuperscript{148}

\textbf{F. The Application of the Functional Comparability Test to Foster-Care Placement}

Instead of over-extending the application of judicial immunity under \textit{Imbler}, the \textit{Babcock} court should have adhered to the functional comparability test developed by the United States Supreme Court in \textit{Butz}. Under this test, the caseworker's actions in investigating the foster-care placement would not be granted absolute immunity because the actions do not meet the requirements of analogous duties and institutional controls. In \textit{Butz}, the court first looked for duties analogous to those performed by officials already protected by absolute immunity.\textsuperscript{149} By examining the differences between the caseworker's duties during the establishment of the dependency and during the foster-care placement, the \textit{Babcock} court could have distinguished the actions that were comparable to the immunized actions of a prosecutor from the actions that are not traditionally protected by immunity.

Applying the \textit{Butz} analysis of analogous duties, the initiation of a dependency proceeding could be analogized to the initiation of a criminal charge. Like a prosecutor assessing whether a crime has been committed and whether the elements of the crime can be proven, the caseworker must assess whether the child is at risk of harm and whether the caseworker will have sufficient proof to establish the dependency. Initially, the caseworker has a duty to investigate the parental home.\textsuperscript{150} This investigation may culminate in a dependency proceeding during which the court determines whether there are grounds for DSHS to assume the parental duties. This often results in the removal of the child from the parental home. However, like a prosecutor who may decide to plea bargain or dismiss a case, the caseworker may decide to reach another resolution. The caseworker may decide not to file a dependency petition but to continue working with the

\textsuperscript{148} Barbera v. Smith, 836 F.2d 96, 100 (2nd Cir. 1987); accord \textit{Imbler}, 424 U.S. at 430. Thus, a prosecutor might not be protected from liability when the prosecutor authorizes the use of wiretaps, Powers v. Coe, 728 F.2d 97, 103 (2nd Cir. 1984), or assists in the execution of a search and seizure, Robison v. Via, 821 F.2d 913, 918-19 (2nd Cir. 1987).

\textsuperscript{149} See Note, \textit{supra} note 28, at 402.

family. The caseworker may even decide that the risk is insufficient to investigate or that the risk has diminished and close the case.

During the establishment of the dependency, like the criminal context, investigation and efficient resolution should be encouraged. Even if no grounds for a conviction or dependency are discovered during the investigation, it is better to allow investigations that might apprehend criminals or protect children rather than to inhibit such investigation. The caseworker should have absolute immunity for the initiation of dependencies because of the similarities in the caseworker's duties to those of the prosecutor which are are protected under Imbler.

By contrast, when the caseworker makes a foster-care placement, the caseworker has moved away from the quasi-judicial function of initiating and proving a dependency. Instead, the caseworker performs the ministerial act of investigating and supervising the placement of the child who, theoretically, has been removed from the risk of harm. Once the court has ordered the dependent child into the custody of DSHS at the disposition hearing, the court is not required to order specific foster-care placement. That decision remains with the custodial agency, DSHS. DSHS has the duty to investigate potential foster homes and to monitor foster-care placements. The caseworker must evaluate the needs of the dependent child and determine which foster-care placement best meets those needs.

While these duties differ from those of a prosecutor, the roles of each subsequent to the judicial proceeding are analogous when considered in light of the characteristics traditionally supporting a grant of judicial immunity. Thus, once the proceeding has been completed, neither the prosecutor nor the caseworker occupies a role or engages in conduct to which courts have traditionally extended immunity. After the conviction and sentencing, the prosecutor is no longer involved in

the criminal case. Instead, the state assumes custody of convicted defendants sentenced to incarceration. Once the state assumes custody, the state has a duty to assume responsibility for the prisoner's welfare and safety.\footnote{DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200 (1989); see also Youngberg v. Romero, 457 U.S. 307, 324 (1982) (state owes "unquestioned duty" to provide for safety of inmates in state mental institution); see generally Mushlin, Unsafe Havens: The Case for Constitutional Protection of Foster Children From Abuse and Neglect, 23 Harv. C.R.-C.L. L. Rev. 199 (1988) (examining the constitutional right to safety in state custody).} At this point, the judicial phase is over and judicial immunity does not apply.

Similarly, the Babcock court should have distinguished the caseworker's duties in establishing a dependency from those in making a foster-care placement in order to determine which duties were analogous to those for which a prosecutor receives absolute immunity. By doing so, the court could have limited the application of immunity to the acts involved in the establishment of the dependency, acts integrally associated with the judicial process. However, once the dependency is established, the caseworker's actions cease to be analogous to those for which a prosecutor receives immunity because the judicial phase has ceased. At this point, the judicial truth-seeking function is no longer present.

The truth-seeking function of the court is not at risk if liability can attach to foster-care placement. At the dependency proceeding, a caseworker may testify as to whether the natural parents are able to care for the child. Caseworkers are granted absolute immunity during this proceeding because, absent such immunity, caseworkers might withhold potentially damaging information about the parents for fear of a retaliatory suit.

At the disposition hearing, the caseworker's testimony concerns whether the child should remain in the parental home.\footnote{The main issue at the disposition hearing is whether the dependent child should remain in the parental home. In-home placement is favored even when a dependency has been established. Wash. Rev. Code § 13.34.130(1)(a) (1989).} If the court orders the child removed from the home and grants custody to DSHS, the issue of the specific foster-care placement will not arise. The natural parent may contest the removal from the home but usually does not contest the specific foster-care placement.\footnote{See Babcock v. State, 112 Wash. 2d 83, 768 P.2d 481 (1989). At each of the disposition hearings, Rudolph Babcock sought to establish his ability to care for his children. He was repeatedly denied custody because he had not established a permanent home. In Babcock, the background of the foster parents was not the central issue at the} Consequently, information
regarding the specific foster-care placement is irrelevant and the truth-seeking function of the court is not at risk if the caseworker is liable for that placement. Therefore, because of the lack of analogous duties and the absence of the judicial truth-seeking function, the application of judicial immunity would fail the first part of the functional comparability test applied in Butz. In addition to the lack of analogous duties, the institutional controls emphasized in Butz, chiefly cross-examination, offers of evidence, and the penalty of perjury, are not sufficiently present during foster-care placement. Because the issue at the disposition hearing is not the specific foster-care placement, the foster parents usually do not testify; consequently, they are not subject to cross-examination or penalty of perjury.\textsuperscript{162}

Once the court enters the disposition order granting temporary custody to DSHS, the judicial proceeding is over. DSHS makes a specific foster-care placement after the judicial proceeding has ended.\textsuperscript{163} At the time the court orders the disposition, it will not decide the specific foster-home in which the children will be placed. Instead, the court relies on the caseworker to investigate the foster home to determine if the placement is appropriate.\textsuperscript{164} As a result, the court will not question the caseworker's investigation of the foster-care

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\textsuperscript{162} In Babcock, because the foster-care placement was challenged, some of the institutional controls were present. However, while a caseworker did testify as a witness at the trial, the caseworker who made the report on which the testimony was based was not subject to cross-examination and penalty of perjury. \textit{Id.} at 97, 768 P.2d at 489.

\textsuperscript{163} If the child was taken into shelter care prior to the dependency, then the child may be placed in shelter care before the judicial proceeding. See WASH. REV. CODE §§ 26.44.050, 13.34.060. Thus, the child can be at risk even before the issue of foster-care placement arises. See Babcock, 112 Wash. 2d at 110-11, 768 P.2d at 496 (Utter, J., dissenting) (the children were in the Michaels' home before the court ordered placement).

\textsuperscript{164} The court will continue to review whether the dependency should be continued every six months. WASH. REV. CODE § 13.34.130(4). At the review hearings, the court considers whether the parent and DSHS have completed the reunification plan ordered by the court at the disposition. WASH. REV. CODE § 13.34.130(4).
placement during the disposition. In Babcock, the court was mistaken in its belief that both the establishment of the dependency and the foster-care placement are in the hands of the court. Because of this mistake, the court also failed to recognize that the safeguards present in a judicial proceeding will not protect against dangers that are not at issue.

More importantly, the caseworker making the investigation has the best access to information concerning foster-care placement. As in Babcock, the natural parent is often at odds with the foster parent and lacks access to information about the foster home. The natural parent, as well as the dependent child, relies on the caseworker to fully investigate the home. If the caseworker negligently fails to discover a harmful situation, the institutional controls of cross-examination and threat of perjury will not expose information of which the caseworker is simply unaware.

Moreover, the Babcock court ignored the issue that, in many cases, institutional controls are lacking because there is no party available to challenge the removal from the parental home. For example, when the child is abandoned or voluntarily relinquished, there will be no challenge to the disposition and no inquiry into the foster-care placement. As a result, extending judicial immunity to the post-disposition actions of the caseworker will not be safeguarded by the institutional controls of a judicial proceeding.

Because of the lack of analogous duties and institutional controls, the caseworker's actions during foster-care placement fail both parts of the functional comparability test outlined in Butz. Accordingly, the Babcock court, by relying on well-reasoned decisions from other jurisdictions, should have refused to extend the application of judicial immunity to foster-care placement.

Based on the very cases upon which it relies for the application of immunity, the Babcock court could have made a distinction between the caseworker's actions during the establishment of a dependency and the caseworker's actions during the foster-care placement. The cases upon which the

However, the caseworker continues to monitor the foster-care placement. WASH. REV. CODE § 74.13.031(5).

166. Id. at 86, 768 P.2d at 484. In Babcock, the natural father only contended that the foster parents interfered with his relationship with his daughters, thereby making family reunification impossible. Id.
court relied to state that caseworkers have been granted immunity in the past are distinguishable on one basic fact: they all involved a suit against a caseworker for initiating a dependency investigation or proceeding.\textsuperscript{167} None of these cases involved an injury to the child while in foster-care placement.

Other jurisdictions, recognizing the differences between the initiation of dependency proceedings and foster-case placement, have treated the two proceedings differently. When confronted with an injury to a child in foster care, other courts have found that the state has a duty to children in its care and, consequently, may be liable for its negligence in placing and supervising them.\textsuperscript{168} For example, in \textit{Koepf v. County of}


In \textit{Babcock}, the children had already been declared dependent by the Louisiana courts. The plaintiffs did not challenge that proceeding. Specifically, they charged negligence once the girls were already in the care and custody of the state. The situation was clearly distinguishable from the cases on which the plurality relied.

\textsuperscript{168} See Elton v. County of Orange, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970) (investigation and supervision of foster-care placement by the welfare department was a ministerial duty, which the court specifically distinguished from initiating a dependency, and the department could be liable for negligence for breach of that duty); Koepf v. County of York, 198 Neb. 67, 251 N.W.2d 866 (1977) (decisions of welfare department in connection with foster care placement were ministerial and immunity would not protect department from liability for negligent placement); Bartels v. County of Westchester, 76 A.D.2d 517, 429 N.Y.S.2d 906 (1980) (county could be liable for injuries sustained by child at the hands of foster parent and county's duty to supervise the care and welfare of the child could not be delegated to the foster parent); National Bank of South Dakota v. Leir, 325 N.W.2d 845 (S.D. 1982) (failure of social workers to adequately investigate and supervise foster-care placement was breach of ministerial duty and the social workers were not immune from suit); Little v. State Div. of Family Servs., 667 P.2d 49 (Utah 1983) (failure of family services to properly evaluate foster home, its failure to supervise the child's placement, and its failure to protect the child from harm were breaches of ministerial duties and were actionable negligence).

The dissent in \textit{Babcock} cites to these cases. \textit{Babcock}, 112 Wash. 2d at 112, 768 P.2d at 496 (Utter, J., dissenting). However, the plurality dismisses these cases as irrelevant because it refuses to distinguish between initiation and placement, \textit{Id.} at 104, 768 P.2d at 492.

Recently, the Supreme Court indicated that foster-care placement should be distinguished from initiating dependency proceedings. In Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), the Court held that the caseworkers did not owe a constitutional duty to protect children by investigating child abuse
York, the Nebraska Supreme Court held that a prosecutor was entitled to absolute immunity under *Imbler* for initiating a dependency action. However, the *Koepf* court held that once the child was in the state's custody, the welfare department had a duty to act with reasonable care and could be held liable for breach of that duty.

In *Koepf*, a mother brought an action for the wrongful death of her minor child against the county, which managed the child welfare department. The county had obtained a court order declaring the child dependent and placing the child in the custody of the welfare department. The county then placed the child in a foster home. One month after the placement, the child died of severe physical injuries inflicted by his foster mother. The child's natural mother then sued the judge and the prosecutor alleging that they were negligent in removing the child from her custody. She also sued the county welfare department, alleging that it had been negligent in the selection of the foster parent.

reports. However, the Court indicated that it might find that the caseworkers had a constitutional duty to protect children that had been placed by the state in foster care:

[h]ad the State by affirmative exercise of its power removed [the child] from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration and institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held, by analogy [to cases involving incarceration or institutionalization], that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents.


170. *Id.* at 72-74, 251 N.W.2d at 870-71.
171. *Id.* at 69, 251 N.W.2d at 868.
172. *Id.* at 65, 251 N.W.2d at 868. The mother also sued the sheriff for negligently removing the child from the parental home. *Id.* The court found that the sheriff was immune from liability because he was an officer acting pursuant to a facially valid order. *Id.*
173. *Id.* at 69, 251 N.W.2d at 869. Specifically, the plaintiff alleged that the department was negligent because it had (1) not required that the foster-parent be examined by a physician prior to placement, (2) not inquired into the foster-parent's attitude regarding corporal punishment prior to placement, and (3) had placed the child in the foster-home even though the department had received complaints about the foster-parent. *Id.*
The Nebraska court held that the judge was immune because his actions occurred within his judicial capacity.\textsuperscript{174} The court also granted the prosecutor "quasi-judicial" immunity, reasoning that the prosecutor's acts, which occurred within the general scope of his official capacity, must be performed without fear of civil liability.\textsuperscript{175}

On the other hand, the court refused to grant immunity to the welfare department for the claim that it had negligently placed the child in foster care. The court stated that the "placement in foster homes of defenseless children, and the supervision of their health and care, once committed to the custody of the welfare department must be accomplished with reasonable care commensurate with the circumstances."\textsuperscript{176} While the court ultimately found for the defendant on the issue of negligence, the court refused to protect the welfare department under a strained immunity theory.\textsuperscript{177} Instead, the court distinguished the supervision of foster-care placement as a ministerial act and determined that the welfare department owed a duty of reasonable care to the children in its custody.\textsuperscript{178}

Similarly, in \textit{Meyers v. Contra Costa County Department of Social Services.},\textsuperscript{179} the Ninth Circuit Court of Appeals distinguished the acts for which a caseworker was entitled to judicial immunity from the acts for which the caseworker was not entitled to absolute immunity. The court determined that the caseworker was entitled to absolute immunity, which the court referred to as "prosecutorial immunity," for his role in the initiation of dependency proceedings.\textsuperscript{180} The court determined that the nature of the caseworker's action and the need for caseworkers to perform without the fear of liability justified the application of immunity to the caseworker's actions during

\begin{itemize}
  \item 174. \textit{Id.} at 70, 251 N.W.2d at 869.
  \item 175. \textit{Id.} at 70-71, 251 N.W.2d at 869-70 (citing Imbler v. Pachtman, 424 U.S. 409 (1976)).
  \item 176. \textit{Id.} at 73-74, 251 N.W.2d at 871. The Nebraska court also cited Elton v. County of Orange, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970), in which the California court noted that the decisions regarding placement, maintenance, care, or supervision of a dependent child could give rise to a cause of action for negligence.
  \item 177. \textit{Koepf}, 198 Neb. 67, 73-74, 251 N.W.2d 866, 870-71.
  \item 178. \textit{Id.} at 73-74, 251 N.W.2d at 871.
  \item 179. 812 F.2d 1154 (9th Cir.), \textit{cert. denied}, 484 U.S. 829 (1987). In this case, the children were never actually removed from the home, but rather the caseworker ordered one parent to stay away from the home and initiated dependency proceedings, which were later dismissed. \textit{Id.} at 1156.
  \item 180. \textit{Id.} at 1156.
\end{itemize}
the initiation of the dependency proceeding.\textsuperscript{181} However, the court did not presume that all of the caseworker's actions fell within the immunity. Specifically, the court found that the caseworker's order that one parent stay away from the home pending a judicial hearing could "be characterized neither as advocatory or (sic) quasi-judicial."\textsuperscript{182} The court also found that the policy considerations supporting quasi-judicial immunity did not apply to the caseworker's action outside of the initiation of a dependency.\textsuperscript{183} Because the caseworker's order that the parent stay away from the home was outside of a judicial proceeding, therefore, it was not subject the institutional controls built into the judicial process. Consequently, the court refused to extend the doctrine of judicial immunity to those acts.\textsuperscript{184}

Blinded by its concerns about caseworkers' liability, the Babcock court missed the clear distinction between dependency proceedings and foster-care placements. DSHS, through its caseworkers, has a duty to investigate foster homes adequately.\textsuperscript{185} That duty should not be nullified by the application of immunity because of the caseworker's involvement in judicial proceedings to establish a dependency. Once a duty has been imposed, the court can, and should, consider the volume of the DSHS caseload in its determination of whether reasonable care was taken. Also, the court would have to consider whether the negligence proximately caused the injury. However, the issue should not be silenced on a contrivance of immunity. If the Washington Supreme Court closely follows the functional comparability test, examining both analogous duties and institutional controls, it will be able to limit the application of immunity to the initiation of dependency proceedings, and, thus, the state will be required to act cautiously once it has assumed custody of a child.

\textsuperscript{181} Id. at 1157.

\textsuperscript{182} Id.

\textsuperscript{183} Id. "Nevertheless, the balance might not be struck in favor of absolute immunity were it not for the presence of safeguards built into the judicial process that tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." Id. at 1158 (quoting Sellars v. Procunier, 641 F.2d 1295, 1300 (9th Cir.), cert. denied, 454 U.S. 1102 (1981)).

\textsuperscript{184} Id. at 1157. The court was willing, however, to grant the caseworker qualified immunity because the acts occurred during the attempt to protect and promote the welfare of a child by preventing a problem which might result in abuse or neglect. Id. at 1158.

\textsuperscript{185} WASH. REV. CODE § 74.15.010 (1989).
G. Legitimate Concerns Can Still Be Protected By the Application Of Traditional Negligence Analysis

The Washington Supreme Court should consider an approach that distinguishes acts involved in establishing a dependency from acts involved in foster-care placement. Initiation of dependencies should be facilitated so that children are protected from risks to their safety and welfare; immunity from civil liability for initiating dependencies encourages the caseworker to begin investigations of the risks. However, once the dependency is established, immunity for failure to investigate the out-of-home placement does not facilitate the policy of protecting the safety and welfare of children. Instead, it removes an incentive to discover risks. Civil liability will deter forms of negligence by encouraging due care and caution. As one commentator has noted, "[i]mmunity breeds negligence; liability breeds caution."  

The Babcock Court listed four policy reasons for granting absolute immunity that would be served by removing the fear of civil liability. The policies include: (1) the prevention of inhibition of initiating dependencies; (2) the prevention of the possibility that caseworkers might withhold information; (3) the existence of adequate safeguards provided by adversary proceedings; and (4) the judicial interests served by preserving the finality of judgments. However, these policies would be better served by the application of traditional negligence analysis.

First, the Babcock court was concerned that the threat of civil liability might inhibit caseworkers from initiating dependency proceedings, thus leaving child abuse undeterred. That policy would, however, still be protected under a proper

186. Note, Governmental Immunity for the Child Care Social Worker: Has Michigan Gone Too Far for Too Little?, 5 COOLEY L. REV. 763, (1988). "Perhaps the best argument in favor of limited immunity for social workers is the deterrent effect of liability." Id. at 780. The most effective deterrent is civil liability and the most effective deterrent should be applied when foster-care workers place dependent children at risk. However, because the spectre of liability may have too chilling an effect on caseworker actions and employment, accountability still may be achieved short of denying the injured child compensation. The state could indemnify its employees, leaving them free to act but encouraging the state to train and supervise its employees in order to avoid potential liability. Id. at 788-81.


189. Id.

190. Id. at 102, 768 P.2d at 491.
application of *Imbler* and its progeny. Like the prosecutor in *Imbler*, the caseworker's actions in initiating and pursuing dependency proceedings would still be protected. Thus, those actions would not be deterred by the threat of civil liability. However, absolute immunity has not been granted when the prosecutor performs investigative, ministerial, or administrative functions.  

Similarly, the caseworker should not be entitled to absolute immunity when investigative, ministerial, or administrative functions are performed. The actions during foster-care placement are ministerial and thus are not entitled to absolute immunity. Such ministerial actions must be performed with reasonable care to adequately protect children under the state's care. Therefore, once the dependency has been established, the state should be liable for negligence in the care of a dependent child. The court could still grant a limited immunity to caseworkers for the initiation of dependencies; however, when foster care is involved, the court should apply a negligence analysis.

Second, the *Babcock* court expressed concern that if not protected as witnesses, caseworkers might withhold critical information or distort their testimony. Yet, in *Babcock*, the problem was not that the caseworker withheld information, it was that the caseworker never discovered information critical to a proper resolution. Immunity would not promote the discovery and disclosure of full information. On the other hand, the threat of liability leads to more careful procedures in placing dependent children because it creates an incentive to discover information. Futhermore, under a standard of reasonable care, liability would only attach to mistakes that could be prevented. Thus, civil liability for negligence, unlike immunity, would provide an incentive to a caseworker to gather information necessary to make a proper foster care placement.

Third, the *Babcock* court maintained that the adversarial nature of the proceeding would provide an adequate check on

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191. See Barbera v. Smith, 836 F.2d 96 (2nd Cir. 1987).
193. See id. at 102-03, 768 P.2d at 491-92. The *Babcock* court expressed concern that the fear of liability might even cause the caseworker's written report to be distorted. See id. See also *Briscoe v. LaHue*, 460 U.S. 325, 332 (1983).
194. If the caseworker fails to discover information, the court's approach in *Babcock* would protect that failure as if the caseworker were withholding it.
the thoroughness of the proceeding. The court believed that cross-examination and argument would adequately protect against negligence. In Babcock, both of these techniques failed. The court failed to consider that the specific foster-care placement usually occurs after the dependency proceeding. It is not an issue during the adversarial proceeding. Additionally, in many cases, dependency proceedings are uncontested because the natural parents have relinquished or abandoned the child, in which case there will be no cross-examination or argument. Furthermore, the caseworker has the best access to information and is in the best position to make decisions based on that information, whether or not the natural parent is present to contest the proceeding. If the caseworker lacks correct information, it is unlikely to be discovered during the judicial proceeding. Therefore, the adversarial techniques designed to elicit the truth will not be sufficient to safeguard foster-care placement. Trial techniques will not uncover negligence occurring during foster-care placement because such negligence is likely to occur after the judicial proceeding.

Finally, the court declared that civil suits are redundant and expensive and that the court should favor finality of judgments. However, the Babcock court itself noted that the plaintiffs were not re-litigating the facts at issue during the dependency proceeding when the Babcock court determined that the plaintiffs' claims were not barred by res judicata. The plaintiffs' injuries were caused by the placement in foster care, not by the initiation of the dependency proceeding. The injury that occurs when a child is placed in danger by negligent foster-care placement is also distinct from an injury that occurs because the caseworker failed to remove a child from the parental home. Immunizing the state from liability for the damages it causes by a negligent placement will leave the

195. Babcock, 112 Wash. 2d at 102, 768 P.2d at 492.
196. Id. at 102-103, 768 P.2d at 491-92.
197. Id. at 103, 768 P.2d at 492.
198. Id. at 92-93, 768 P.2d at 486-87.
199. See id. at 94, 768 P.2d at 487.

The only issues actually determined by the juvenile court at any of the many hearings held in the Long/Babcock cases were those set forth in RCW 13.34.130, which governs the disposition of children found to be dependent and in need of care. None of those issues is identical to the issues raised by the plaintiffs' claims for negligence, alienation or outrage.

Id.

200. See generally DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201, n.9 (1989).
children without a remedy for the resulting harm. Consequently, a negligence suit for damages resulting from foster-care placement would not be superfluous and would be a just remedy for the injury caused.  

Admittedly, there is the problem that potential individual liability for caseworkers may dissuade anyone from entering the profession. Likewise, it is likely that the individual caseworker will be judgement proof, leaving the injured child with no real remedy. A better solution would be to require the state to indemnify its caseworker-employees for their negligent acts. Holding the state responsible for the negligent conduct of its employees would focus the deterrent effect of liability on the administrative structure. The state would then have an incentive to improve its selection, training, and supervision of caseworkers. The imposition of liability will stretch the already strained resources of DSHS and, perhaps, divert funds from the initiation of dependencies. However, the imposition of liability would decrease the abuse of foster children, who are particularly vulnerable to the risk of maltreatment, and would increase the skills of caseworkers.

201. Similarly, the federal court granted absolute immunity to assuage the fear of liability which the federal court believed would compromise the caseworker's judgment and deprive the juvenile court of information necessary to make its decision. Babcock v. Tyler, 884 F.2d 497, 503 (9th Cir. 1989). The federal court applied the test of whether immunity would protect the public interest in having judicial participants perform their functions without fear of having to defend their actions in a civil lawsuit. Id. at 502. Fear of liability is not a proper standard for the test. When a wrongful action rises to the level of negligence, it should cause a concern for liability. The federal court's test would immunize negligence because a party might be liable; liability is attached because negligence occurs; thus, if negligence occurs, the party is immune. The federal court has devised a circular process whereby actions which rise to the level of a suit for negligence are protected because negligence can result in a lawsuit.

The federal court sought to apply immunity based on the goals that could be furthered by protecting judicial participants. The federal court attempted to protect caseworkers who initiate proceedings from suits by angry parents and to protect statements made in court. Those goals are admirable. But the federal court's protective test extended too far. The federal court failed to distinguish between information that comes out during the judicial proceeding and information that the caseworker should gather outside the courtroom, which the juvenile court relies upon in making its decision. Actions that occur outside the courtroom should not be immunized on the basis that the actor will later appear in court.


203. Id. at 697.

204. Id.; see also supra note 186.

205. Mushlin, supra note 159, at 204.
IV. CONCLUSION

The Babcock court erred when it failed to distinguish between the actions involved in the initiation of dependency proceedings and the actions involved in investigating foster-care placement. A careful reading of the cases on which judicial immunity is based demonstrate that the court overextended the scope of judicial immunity. Judicial immunity should be limited by an analysis of functional comparability that includes a focus on the conduct for which immunity is claimed in order to preserve the policies that the doctrine was intended to protect.

Moreover, the Babcock court could have protected its legitimate concerns by an application of traditional negligence theory to foster-care placement. For the acts involved in establishing the dependency, no liability should attach because otherwise the initiation of dependencies may be chilled by the spectre of financially devastating litigation. However, once the child has been ordered into the legal custody of DSHS, DSHS should not be immunized from liability. Liability for the foster-care placement will not chill investigations of child abuse, but it will encourage reasonable care in the investigations of foster-care homes.

The limiting principle proposed here is hardly radical. At its most fundamental, it is nothing more than an application of the maxim: where the reason stops, there stops the rule.\textsuperscript{206} The policies for granting absolute immunity to judicial acts are not fulfilled by the extension of immunity to ministerial acts performed outside the court. The Washington Supreme Court should recognize the distinction and protect children that the state takes into its care.

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