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THE OFFICER HAS NO ROBES: A FORMALIST SOLUTION TO THE EXPANSION OF QUASI-JUDICIAL IMMUNITY

ABSTRACT

In 1871, Congress passed the Civil Rights Act. Section 1 is now more commonly known as 42 U.S.C. § 1983, the primary vehicle for constitutional tort litigation. Commonly interpreted against a background of tort principles, federal courts have imported—contrary to the plain language of the law—several immunities. This Comment focuses on one immunity in particular: absolute judicial immunity.

Despite the “judicial” qualifier, absolute judicial immunity has been extended to a great deal of parties who are not judges. Commentators have decried this expansion and criticized lower federal courts for subverting civil-rights enforcement, exacerbating a pronounced rights-remedy gap, and departing from Supreme Court decisions that putatively cabin absolute judicial immunity. This Comment focuses on that last critique in particular.

Although language in Supreme Court opinions certainly supports restricting absolute judicial immunity, this Comment proposes that the Supreme Court’s muddled methodology in this area supports the expansion of absolute judicial immunity. Fidelity to Supreme Court precedent will further expand absolute judicial immunity. This Comment proposes one solution to further the values commentators believe are disserved by the outgrowth of absolute judicial immunity: a formalist regime that clothes only judges with absolute immunity and the rest with qualified immunity.

INTRODUCTION

Absolute judicial immunity has been a feature of the common law since at least 1871 in the United States.¹ The justifications originally offered by the Supreme Court in *Bradley v. Fisher* continue to ring true today—to the Supreme Court, at the least. Absolute judicial immunity offers a judge independence and freedom to make decisions without fear of retribution.² Immunity properly allows for error correction to be channeled to either the political or appellate processes as opposed to being fought through new, potentially vexatious litigation.³ Recognizing the strength of absolute immunity, the Court has attempted to restrain judicial immunity by crafting a part-historical,⁴ part-functional,⁵ part-policy based⁶ approach when determining whether to extend immunity to non-judicial officers.

Despite the Supreme Court's assertion that it has historically been "quite sparing"⁷ in recognizing absolute immunity claims, commentators have observed an "expansion" of judicial immunity beyond what the Supreme Court has commanded.⁸ As noted by Professor Margaret Johns, the immunity has moved beyond the judicial robe and now clothes medical-experts,⁹ child-

¹ *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).

² *Id.* at 347–49; *see also* *Stump v. Sparkman*, 435 U.S. 349, 363–64 (1978).

³ *Bradley*, 80 U.S. (13 Wall.) at 350; *see* *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

⁴ *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 339–40 (1986) ("Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts.").

⁵ *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 434, 437 (1993) (citing *Burns v. Reed*, 500 U.S. 478, 499–500 (1991) (Scalia, J., concurring in judgment in part and dissenting in part)).

⁶ *Butz v. Economou*, 438 U.S. 478, 514 (1978) (examining procedural safeguards and concluding that the risk of an unconstitutional act is outweighed by the need for an independent decision-maker).

⁷ *Forrester v. White*, 484 U.S. 219, 224 (1988).

⁸ *See generally* Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 SMU L. REV. 265 (2006); David M. Coriell, Note, *The Transferred Immunity Trap: Misapplication of Section 1983 Immunities*, 100 CORNELL L. REV. 985 (2015).

⁹ *D.T.B. v. Farmer*, 114 F. App'x 446, 447 (3d Cir. 2004); *Morstad v. Dep't of Corr. and Rehab.*, 147 F.3d 741, 742 (8th Cir. 1998); *McArdle v. Tronetti*, 961 F.2d 1083, 1083–84 (3d Cir. 1992). The Third Circuit has been particularly active in crafting judicial immunity for mental-health professionals. *See* Tammy Lander, Note, *Do Court-Appointed Mental Health Professionals Get a Free Ride in the Third Circuit? An Examination of the Latest Extensions of Judicial Immunity*, 22 QUINNIPIAC L. REV. 895, 909 (2004). According to Lander, this has created somewhat of a circuit split. *Id.* at 910–14. Professor Johns has noted the circuits are split as well on whether to apply the immunity to child-protective workers, certain parole-board members, land-use officials, and to medical-board or medical peer-review committees. *See* Johns, *supra* note 8, at 267 n.5.

protective workers,¹⁰ arbitrators,¹¹ receivers,¹² and prison-hearing officers,¹³ to name a few.¹⁴ These decisions have been criticized for exacerbating a rights-remedy gap, undermining civil-rights enforcement, and—most relevant to this Comment—“misinterpret[ing] Supreme Court decisions that limit the application of the doctrine.”¹⁵

This Comment argues that lower federal courts have not misinterpreted Supreme Court decisions in this field. Supreme Court precedent, rather, is in accord with the extension of absolute judicial immunity. To reverse the expansion and bolster civil-rights protections, this Comment proposes one solution: a formalist approach to judicial immunity.

This Comment proceeds in three Parts. Part I deals with common law, § 1983, and judicial immunity. It presents and explains the creation of judicial immunity and its framework. Further, Part I introduces quasi-judicial immunity, the label attached to absolute judicial immunity given to a non-judge, and presents the analytical model used by the Supreme Court to determine whether absolute immunity is appropriate.¹⁶

Part II concerns the extension of absolute immunity and is composed of two sections. First, it examines the operation of absolute immunity in a variety of cases. Second, it deals with the concerns articulated by various observers and reconciles the examined cases with Supreme Court language.

Part III presents the argument for formalism. The argument proceeds in two sections. First, it outlines the rationale behind a formalist application of judicial immunity and advocates that qualified immunity cover the denuded public

¹⁰ *Brown v. Newberger*, 291 F.3d 89, 94 (1st Cir. 2002); *Hughes v. Long*, 242 F.3d 121, 127 (3d Cir. 2001); *Fleming v. Asbill*, 42 F.3d 886, 889 (4th Cir. 1994) (holding that a guardian *ad litem* enjoys absolute immunity).

¹¹ For a comprehensive overview of quasi-judicial immunity in the arbitration context, see Robert M. Carroll, *Quasi-Judicial Immunity: The Arbitrator's Shield or Sword?*, 1991 J. DISP. RESOL. 137.

¹² For an example, see *Davis v. Bayless*, 70 F.3d 367, 373–74 (5th Cir. 1995).

¹³ *Scotto v. Almenas*, 143 F.3d 105, 112–13 (2d Cir. 1998) (state parole officer); *Jones v. Moore*, 986 F.2d 251, 253 (8th Cir. 1993) (per curiam) (parole board member); *Shelly v. Johnson*, 849 F.2d 228, 230 (6th Cir. 1988) (per curiam); *Johnson v. R.I. Parole Bd. Members*, 815 F.2d 5, 8 (1st Cir. 1987) (per curiam) (parole board members).

¹⁴ For an overview of the listed categories (and more), see Johns, *supra* note 8, at 276–314.

¹⁵ *Id.* at 267.

¹⁶ As this section does not break new ground, readers who are familiar with the subject may find it useful to proceed to Part II or III.

officials.¹⁷ Second, it examines how formalism would operate in § 1983 litigation and applies the approach to demonstrate its benefits.

I. THE COMMON LAW BACKGROUND, § 1983, AND JUDICIAL IMMUNITY

This Part addresses the common law background, § 1983, and the creation and framework for judicial immunity, both absolute and quasi. First, this Part details the origin of § 1983 as well as how the Supreme Court has interpreted the statute in light of the common law. Second, this Part introduces the creation and importation of absolute judicial immunity into § 1983. Third, this Part discusses the quasi-judicial immunity framework.

A. *The Common Law Background and § 1983*

Congress originally articulated 42 U.S.C. § 1983 as § 1 of the Ku Klux Act in 1871, during the Reconstruction Era.¹⁸ The Supreme Court has inferred three purposes from the 42nd Congress's passage of the Act: (1) to "override certain kinds of state laws," (2) to provide "a remedy where state law [fails]," and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."¹⁹ Practically, § 1983 provides a "tort-like remedy"²⁰ for persons whose federally protected rights are deprived by state officials under the "color of [law]."²¹ To constrain the broad, forceful language

¹⁷ Although a formalist approach has not been advocated for by scholars in this field, commentators have proposed for qualified immunity to replace quasi-judicial immunity. *See, e.g.*, Johns, *supra* note 8, at 314.

¹⁸ *Monroe v. Pape*, 365 U.S. 167, 171 (1961). The Act was officially titled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." 17 Stat. 13 (1871). It is commonly referred to as both the "Civil Rights Act of 1871" and the "Ku Klux Act." *See Monroe*, 365 U.S. at 171 ("[Section 1983] came onto the books as § 1 of the Ku Klux Act."); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 51 (1989) (referring to the "Civil Rights Act of 1871 ('§ 1983')"). *Monroe* refers to 42 U.S.C. § 1983 as § 1979, *Monroe*, 365 U.S. at 171, but this was later recodified as § 1983, *see* 42 U.S.C. § 1983, and will be referred to as § 1983 in this Comment.

¹⁹ *Monroe*, 365 U.S. at 173–74.

²⁰ Beermann, *supra* note 18, at 51; *see also* Rehberg v. Paulk, 132 S. Ct. 1497, 1504–05 (2012) ("The new federal claim created by § 1983 differs in important ways from those pre-existing torts. It is broader in that it reaches . . . violations that do not correspond to any previously known tort. But it is narrower in that it applies only to tortfeasors who act under color of state law." (citations omitted)).

²¹ While § 1983 expressly deals with deprivation arising under the color of state law, the Supreme Court has read § 1983 to encompass actions against federal officials. *See* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971). Section 1983 actions can also be maintained against municipalities and local governmental agencies. *See* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). The logic that extends § 1983 actions to federal *agents* does not similarly extend § 1983 actions to federal *agencies*. *FDIC v. Meyer*, 510 U.S. 471, 486 (1994).

of § 1983,²² the Supreme Court tasked the federal judiciary to read § 1983 “against the background of tort liability” that was in place in 1871.²³

The Supreme Court has relied heavily on the common law, as it existed in 1871,²⁴ to import absolute immunities²⁵ into § 1983, although none are expressly stated. The Court has defended its historical approach to the immunity question as partly functional.²⁶ The Court has explicitly noted that the extension of

²² The statute currently states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2012).

²³ *Monroe*, 365 U.S. at 187; *see Buckley v. Fitzsimmons*, 509 U.S. 259, 268–69 (1993) (“[S]ome officials perform ‘special functions’ which, because of their similarity to functions that would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability.”); *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967) (“Few doctrines were more solidly established at common law than the immunity of judges . . .”).

²⁴ *Pierson*, 386 U.S. at 553–54 (“Few doctrines were more solidly established at common law than the immunity of judges . . .”).

²⁵ Absolute immunity must be contrasted with qualified immunity. Absolute immunity applies irrespective of motive, and attaches to *tasks*, not offices. Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 *TOURO L. REV.* 473, 475 (2008). Thus, a judicial officer receives immunity for judicial actions but not for administrative or criminal actions. *Id.*; *see also Gregory v. Thompson*, 500 F.2d 59, 64 (9th Cir. 1974) (holding that a judge’s physical assault was not a judicial act, so judicial immunity was unavailable). Qualified immunity attaches to public officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). The framework requires an objective inquiry into whether a reasonable defendant would have understood that his conduct violated the plaintiff’s constitutional rights. *Id.* at 818. The plaintiff must make out a violation of a constitutional right and the right must be clearly established at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Both immunities work to protect the defendant from suit itself, not just from liability. *Id.* at 231 (qualified immunity); *Pierson*, 386 U.S. at 554 (judicial immunity).

²⁶ *Harlow*, 457 U.S. at 810–11 (“[I]n general our cases have followed a ‘functional’ approach to immunity law. We have recognized that the judicial . . . functions require absolute immunity.”); *accord Heck v. Humphrey*, 512 U.S. 477, 492 (1994) (Souter, J., concurring) (explaining that “[while] common-law tort rules . . . [or] principles . . . widely understood at the time § 1983 was enacted [by] the 42nd Congress” are applied, the Court will refuse to “displace statutory analysis [and decline] to import even well-settled common law rules ‘if [the statute’s] history or purpose counsel against [application]’” (emphasis added)). Noted Constitutional scholar Erwin Chemerinsky has observed the same, explaining that the Supreme Court takes both a “historical and functional” approach to absolute immunity questions. *See Chemerinsky, supra* note 25, at 473. Professor Jeffries refers to the focus on the nature of the Act as “essentialist” or “definitional,” instead of functional. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 *VA. L. REV.* 207, 217 (2013). Under his view, a “functional” analysis would tie the scope of the immunity to its rationale. *Id.* Thus, the term “essentialist,” is designed “to signal the lack of concern with [the] rationale [supporting the immunity].” *Id.*

immunity must not be an exercise in the craft of judicial policymaking,²⁷ but an exercise in statutory interpretation in light of the 42nd Congress's "likely intent" in constructing § 1983.²⁸ Thus, the Court has described its analytical approach not as one that merely copies and pastes 1871 tort law into modern law,²⁹ but instead as one that adapts the varied principles supporting 1871 immunities and applies them to burgeoning contexts.³⁰

B. The Creation of and Framework for Judicial Immunity

Judicial immunity, as it is understood today, received its first extended treatment in *Bradley v. Fisher* in 1871.³¹ But the Supreme Court did not affirmatively recognize judicial immunity in the § 1983 context until *Pierson v. Ray* in 1967.³² Although affirmatively recognized, the Supreme Court did not articulate a framework for determining judicial immunity until *Stump v. Sparkman* in 1978.³³ This section will examine each decision in turn.

In *Bradley*, the plaintiff was a member of the bar of the Supreme Court of the District of Columbia and the defendant was a justice of the court.³⁴ The plaintiff alleged that shortly after confronting the defendant justice for having "accosted" him in a rude manner during trial, the justice retaliated by directing an order to disbar the plaintiff and remove him from practicing in the Supreme Court of the District.³⁵ The plaintiff filed suit for damages.³⁶

²⁷ *Malley v. Briggs*, 475 U.S. 335, 342 (1986) ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress's intent by the common-law tradition.").

²⁸ *Id.*; *Burns v. Reed*, 500 U.S. 478, 493 (1991) ("[O]ur role is 'not to make a freewheeling policy choice,' but rather to discern Congress' likely intent in enacting § 1983."). *But see* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 500–01 (1992) (describing the various interpretive approaches the Court has used to answer the immunity question and how the approaches are inconsistent with the 42nd Congress's legislative will).

²⁹ *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503 (2012) ("While the Court's functional approach is tied to the common law's identification of the functions that merit the protection of absolute immunity, the Court's precedents have not mechanically duplicated the precise scope of the absolute immunity that the common law provided to protect those functions.").

³⁰ *Id.* at 1503–05 (discussing the creation of prosecutorial immunity and its reliance on post-1871 cases).

³¹ 80 U.S. (13 Wall.) 335, 347 (1871). The Court first addressed the question of judicial immunity in 1868. *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1868). The *Randall* Court, however, offered a formulation for judicial immunity that differs dramatically from the now-standard formulation given in *Bradley*. *See infra* note 43.

³² 386 U.S. 547, 554–55 (1967).

³³ 435 U.S. 349, 359–60 (1978).

³⁴ *Bradley*, 80 U.S. (13 Wall.) at 344.

³⁵ *Id.* at 344.

³⁶ *Id.* at 345.

The Court held that the defendant was not liable for damages and was absolutely immune from suit, emphasizing that the defendant functionally performed a “judicial act,” to which liability cannot attach.³⁷ The Court reasoned that a judicial act “cannot [subject the judicial officer] to responsibility for it in a civil action”;³⁸ otherwise, judicial officers would act “[with] apprehension”³⁹ and the judiciary would be “weak[ened].”⁴⁰ Perhaps cramped by institutional inertia, the Court grounded its holding primarily in the language of tradition: the issue had been settled “for many centuries” and was “deep[ly] root[ed] in the common law.”⁴¹ The Court did not revisit the logic underscoring the immunity⁴² and denied the suggestion that immunity cannot attach when a judicial officer acts maliciously or corruptly.⁴³ Judicial immunity, the Court stated, attaches irrespective of the judicial officer’s motives.⁴⁴

³⁷ *Id.* at 347.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² For a detailed explanation of the justifications for judicial immunity, see Jeffries, *supra* note 26, at 212–13. Professor Jeffries points to the availability of an alternative remedy—appeal—and the potentially destructive cost (stated explicitly in the *Bradley* opinion) of allowing an “additional remedial structure” through litigation. *Id.* at 212. Professor Block, in his seminal and oft-cited treatment of judicial immunity, noted four policy bases from the English common law. J. Randolph Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 DUKE L.J. 879, 885–87. The four policy bases are readily apparent in the *Bradley* opinion: (1) “the need for finality,” (2) protecting judicial independence, (3) “maintaining public confidence,” and (4) protecting “independent, conscientious judges” from prosecution for developing the law. *Id.*

⁴³ *Bradley*, 80 U.S. (13 Wall.) at 347 (“The purity of [the judges’] motives cannot in this way be the subject of judicial inquiry.”). *Randall* suggested such a rule. *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1868). *Bradley* overruled *Randall* in that respect, stating the *Randall* suggestion was “not . . . a correct statement of the law.” *Bradley*, 80 U.S. (13 Wall.) at 351.

⁴⁴ *Id.* at 354. This proposition, and the Court’s reliance on the common law and history, has been heavily criticized. Professor Block surveyed the state of judicial immunity in 1871 and concluded that the majority of the states did not accord absolute immunity. Block, *supra* note 42, at 899. A minority of states provided absolute immunity with six states voiding that immunity if judges acted maliciously. *Id.* (citing Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 326–27 (1969)). The critique that the Supreme Court either misunderstood or ignored history has been repeated often by scholars. See Achtenberg, *supra* note 28, at 500–01; Don Kates, Jr., *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U. L. REV. 615, 621–23 (1970); Sheldon Nahmod, *From the Courtroom to the Street: Court Orders and Section 1983*, 29 HASTINGS CONST. L.Q. 613, 617–18 (2002). Justice Douglas believed that the legislative history of the Civil Rights Act of 1871 unequivocally showed that judicial misconduct was among the chief evils § 1983 was meant to remediate. *Pierson v. Ray*, 386 U.S. 547, 563 (1967) (Douglas, J., dissenting) (“[The 42nd Congress] recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied.”). Indeed, because the literal words of § 1983 require liability to be imposed upon any state official who violates an individual’s constitutional rights, the Court’s wholesale importation of immunities is unfounded. 42 U.S.C. § 1983 (2012). However, because this topic is not the main focus of this Comment, it will not join the scholarly fray.

The *Bradley* Court did distinguish, however, between judicial actions taken in “excess of jurisdiction” versus actions taken in the “clear absence of all jurisdiction over the subject-matter.”⁴⁵ The former would be clothed with immunity, the latter would not.⁴⁶ For example, if a probate court proceeded to try a party for a criminal offense, the judicial officer would not receive absolute immunity.⁴⁷ If, however, a criminal judge held the defendant’s conduct to be illegal, even though no law criminalized the behavior, absolute immunity would attach as the judicial officer acted only in “excess of his jurisdiction.”⁴⁸

Bradley did not answer the immunity question within the § 1983 framework. The Court decided for the first time whether judicial immunity was applicable in a § 1983 suit in *Pierson v. Ray*.⁴⁹ The petitioners were African-American and white Episcopal clergymen who attempted to use segregated facilities at a bus terminal in Jackson, Mississippi.⁵⁰ The petitioners were arrested and charged with violating a Mississippi “breach the peace” law.⁵¹ A municipal justice convicted the petitioners.⁵² The conviction was appealed and overturned; shortly thereafter, the petitioners brought an action for damages under § 1983.⁵³ The Fifth Circuit held the judge was immune from liability under § 1983 for acts committed within his judicial jurisdiction.⁵⁴ The Supreme Court granted certiorari to consider whether a local judge may face liability for damages under § 1983 for an unconstitutional conviction.⁵⁵

The Court held the justice received judicial immunity.⁵⁶ The Court fell back upon the common law and *Bradley v. Fisher*, holding that § 1983 did not abolish the “settled principle of law” that immunity attaches to “judges for acts within the judicial role.”⁵⁷ Chief Justice Warren reaffirmed that immunity attaches even if the judge is malicious or corrupt because “the benefit of the public” demands

⁴⁵ *Bradley*, 80 U.S. (13 Wall.) at 351.

⁴⁶ *Id.* at 352.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 386 U.S. 547, 551 (1967).

⁵⁰ *Id.* at 549.

⁵¹ *Id.* The arrest of the clergymen occurred in 1961, four years before the statute was found to be unconstitutional as applied to similar facts. *Id.*; see *Thomas v. Mississippi*, 380 U.S. 524 (1965).

⁵² *Pierson*, 386 U.S. at 549.

⁵³ *Id.* at 550.

⁵⁴ *Id.*; *Pierson v. Ray*, 352 F.2d 213 (5th Cir. 1965).

⁵⁵ *Pierson*, 386 U.S. at 551.

⁵⁶ *Id.* at 553.

⁵⁷ *Id.* at 554.

judicial protection.⁵⁸ The principles vindicated, according to the Court, were the independence of the judiciary and the proper transference of error correction from § 1983 actions to appellate courts.⁵⁹

The *Pierson* Court's discussion of judicial immunity was rather perfunctory. Justice Douglas devoted his entire dissent to dissecting whether the 42nd Congress abrogated judicial immunity;⁶⁰ the majority, however, found "no difficulty" in concluding that the 42nd Congress did not.⁶¹ The Court did not devote full attention to judicial immunity until the infamous case of *Stump v. Sparkman*,⁶² in which the Court first supplied the analytical framework that has since plagued lower federal courts.

In *Stump*, the mother of a mentally challenged fifteen-year-old girl petitioned Judge Stump of the Circuit Court of DeKalb County, Indiana, to have a sterilization procedure performed on her daughter.⁶³ The petition alleged, without evidence, that the daughter was "somewhat retarded" and had been "associating with 'older youth or young men.'"⁶⁴ The petition concluded it was within the daughter's interests to undergo sterilization lest an "unfortunate circumstance" occur.⁶⁵ Judge Stump approved the petition ex parte: the daughter was not notified, no guardian *ad litem* was appointed, and no hearing was held.⁶⁶ Shortly after, respondent had the tubal ligation procedure performed upon her.⁶⁷ She was under the impression that her appendix was being removed.⁶⁸

Two years later, the respondent married but was unable to become pregnant; she then discovered that she had been sterilized.⁶⁹ The respondent filed suit

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 558–67 (Douglas, J., dissenting) (concluding that § 1983 did abrogate judicial immunity).

⁶¹ *Id.* at 553–55; see *supra* text accompanying notes 56–59.

⁶² 435 U.S. 349 (1978). *Stump* has been the subject of much criticism. See, e.g., Block, *supra* note 42, at 916–20; Robert F. Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237, 237–44 (1979); Sheldon H. Nahmod, *Persons Who Are Not "Persons": Absolute Individual Immunity Under Section 1983*, 28 DePaul L. Rev. 1, 19–20 (1978); Irene Merker Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833, 835–36 (1978).

⁶³ *Stump*, 435 U.S. at 351.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 360. The Seventh Circuit noted that Judge Stump had failed to take "the slightest steps to ensure that [the minor's] rights were protected." *Sparkman v. McFarlin*, 552 F.2d 172, 176 (7th Cir. 1977).

⁶⁷ *Stump*, 435 U.S. at 353.

⁶⁸ *Id.*

⁶⁹ *Id.*

against Judge Stump and others, seeking damages.⁷⁰ The district court held that Judge Stump was entitled to judicial immunity as the actions taken were within his jurisdiction, his “erroneous view of the law” aside.⁷¹ The Seventh Circuit reversed and held that Judge Stump had no jurisdiction because the relevant sterilization statutes only encompassed sterilization of “institutionalized persons” and contained no express authority otherwise.⁷² Further, the Seventh Circuit held that the immunity was “forfeited,” as the judicial act failed to comport with due process.⁷³

The Supreme Court paid sparse attention to the facts defining the “judicial act” Judge Stump had taken.⁷⁴ The Court reiterated its holding in *Bradley* and *Pierson*, stating that the correct inquiry in judicial immunity cases is whether, “at the time [the judge] took the challenged action he had jurisdiction over the subject-matter before him.”⁷⁵ In response to this inquiry, the Court noted that Indiana law granted Judge Stump “original exclusive jurisdiction in *all cases* at law and in equity whatsoever”⁷⁶ Thus, the Court held that Judge Stump had jurisdiction over the matter.⁷⁷ The Court further held that the lack of direct case law or statutory authorization to grant a sterilization did not matter; in the Court’s view, the lack of case law *prohibiting* Judge Stump from granting a sterilization was the determinative fact.⁷⁸

Justice White then addressed the Seventh Circuit’s holding that Judge Stump forfeited immunity by undertaking “an illegitimate exercise of his common law power.”⁷⁹ The Court stated that such analysis “misconceives” judicial immunity; the correct inquiry is not whether a judicial act suffered a procedural defect, but whether the act was taken (1) within the jurisdiction of the court and (2) could properly be characterized as a judicial act.⁸⁰ Having already answered the former by reference to the Indiana statute, the Court held that Judge Stump indeed performed a judicial act.⁸¹ The majority dismissed the argument that procedural

⁷⁰ *Id.*

⁷¹ *Id.* at 354–55.

⁷² *Id.* at 355, 358.

⁷³ *Id.* at 355.

⁷⁴ See Nagel, *supra* note 62, at 239.

⁷⁵ *Stump*, 435 U.S. at 356.

⁷⁶ *Id.* at 357 (emphasis added) (quoting IND. CODE § 33-4-4-3 (1975)).

⁷⁷ *Id.* at 358.

⁷⁸ *Id.*

⁷⁹ *Id.* at 359.

⁸⁰ *Id.* at 359–60.

⁸¹ *Id.* at 362.

formality is a relevant inquiry.⁸² Rather, it held that the only question is whether the function performed is one “normally performed by a judge, and to the expectations of the parties.”⁸³ The opinion boiled down the formula to a key, but logically circular, question: “whether [the parties] dealt with the judge in his judicial capacity.”⁸⁴ Because a state judge is often called upon to approve petitions relating to minors, and because the respondent’s mother went to the judge with such expectation, the Court concluded that Judge Stump acted within his judicial capacity.⁸⁵ Having answered the jurisdictional question and the judicial “act” question in Judge Stump’s favor, the Court held he was immune from damages.⁸⁶

After *Stump*, the current framework for judicial immunity is clear. The relevant inquiries are only whether the act was taken within the judge’s judicial capacity; if so, then immunity applies unless the action was taken in complete absence of jurisdiction.⁸⁷ The Supreme Court has made clear that the inquiry is a generalized one, not a particular one.⁸⁸ Thus, for example, if a judge orders police to seize a wayward attorney “forcibly and with excessive force,” the Court will not frame the act as whether a judge has the power to seize someone forcibly, but whether a judge may direct “court officers to a bring a person who is in the courthouse before him.”⁸⁹

⁸² *Id.* at 360 (“This Court has not had occasion to consider, for purposes of the judicial immunity doctrine, the necessary attributes of a judicial act; but it has previously rejected the argument, somewhat similar to the one raised here, that the lack of formality involved . . . prevented it from being a [judicial act].”).

⁸³ *Id.* at 362.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 364.

⁸⁷ *Mireles v. Waco*, 502 U.S. 9, 11–12 (1991) (per curiam).

⁸⁸ *Id.* at 13 (“[W]e look to the particular act’s relation to a general function normally performed by a judge . . .”).

⁸⁹ *Id.* at 10–12.

C. *Quasi-Judicial Immunity: Framework for Extension*

Quasi-judicial immunity⁹⁰ refers to the extension of absolute judicial immunity to non-judicial officers,⁹¹ for example⁹²: medical experts,⁹³ child-protective workers,⁹⁴ prison-hearing officers,⁹⁵ state-administrative tribunal officers,⁹⁶ medical licensing boards,⁹⁷ zoning-board members,⁹⁸ and arbitrators.⁹⁹

The process through which a lower federal court extends immunity requires some elaboration. Thankfully, the Supreme Court has been quite active in both extending, and refusing to extend, judicial immunity.¹⁰⁰

⁹⁰ See, e.g., *Hughes v. Long*, 242 F.3d 121, 128 (3d Cir. 2001) (“Given the [judicial] nature of their duties, the counselors were granted ‘quasi-judicial’ immunity.”).

⁹¹ For a recent student note describing quasi-judicial immunity as also encompassing witnesses, counsel, and members of the jury, see Coriell, *supra* note 8, at 990. This Comment does not consider the extension of absolute judicial immunity in those specific factual contexts.

⁹² For a comprehensive analysis of quasi-judicial immunity being applied in various contexts, including those listed, see generally Johns, *supra* note 8, at 276–314. This Comment examines some of the specific factual contexts Professor Johns surveyed, but not all are listed. Further, this Comment does not seek to reiterate the critiques proffered by Professor Johns. Instead, this Comment will defend the lower federal courts’ extension, not because they are proper, but because the Supreme Court’s muddled methodology has dictated the expanding specter of judicial immunity.

⁹³ *D.T.B. v. Farmer*, 114 F. App’x 446, 447 (3d Cir. 2004); *Morstad v. Dep’t of Corr. and Rehab.*, 147 F.3d 741, 742 (8th Cir. 1998); *McArdle v. Tronetti*, 961 F.2d 1083, 1085 (3d Cir. 1992); *Duzynski v. Nosal*, 324 F.2d 924, 928 (7th Cir. 1963).

⁹⁴ *Brown v. Newberger*, 291 F.3d 89, 94 (1st Cir. 2002); *Hughes*, 242 F.3d at 126; *Fleming v. Asbill*, 42 F.3d 886, 889 (4th Cir. 1994); *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989).

⁹⁵ *Scotto v. Almenas*, 143 F.3d 105, 113 (2d Cir. 1998) (state parole officer); *Jones v. Moore*, 986 F.2d 251, 253 (8th Cir. 1993) (per curiam) (parole board member); *Shelly v. Johnson*, 849 F.2d 228 (6th Cir. 1988) (per curiam) (hearings officer); *Johnson v. R.I. Parole Bd. Members*, 815 F.2d 5, 8 (1st Cir. 1987) (parole board members).

⁹⁶ *Dixon v. Clem*, 492 F.3d 665, 674–75 (6th Cir. 2007).

⁹⁷ *Applewhite v. Briber*, 506 F.3d 181, 182 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008); *Guttman v. Khalsa*, 446 F.3d 1027, 1032 (10th Cir. 2006); *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 924 (9th Cir. 2004); *Wang v. N.H. Bd. of Registration in Med.*, 55 F.3d 698, 699 (1st Cir. 1995). *But see* *DiBlasio v. Novello*, 344 F.3d 292, 301–02 (2d Cir. 2003).

⁹⁸ *Dotzel v. Ashbridge*, 438 F.3d 320, 322 (3d Cir. 2006); *Bass v. Attardi*, 868 F.2d 45, 50 (3d Cir. 1989) (per curiam).

⁹⁹ See *supra* note 11.

¹⁰⁰ The following cases are of particular importance: *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436–37 (1993); *Forrester v. White*, 484 U.S. 219, 220–21 (1988); *Cleavinger v. Saxner*, 474 U.S. 193, 194 (1985); *Butz v. Economou*, 438 U.S. 478, 480 (1978).

It is well established that absolute immunity is to be rarely granted¹⁰¹ and limited only to functions that have a common law analogue.¹⁰² For judicial immunity, as noted prior, the relevant inquiry is whether the actor is performing a “judicial act.”¹⁰³ *Forrester v. White*¹⁰⁴ counseled further that this inquiry protects adjudicative functions; for example, a judicial officer is not protected for personnel decisions, which are decidedly administrative in nature.¹⁰⁵

Procedural safeguards assuring independent judgments are characteristics of a judicial or adjudicative proceeding.¹⁰⁶ In *Butz v. Economou*, the plaintiff filed suit against members of the Department of Agriculture,¹⁰⁷ claiming that certain officials had instituted an investigation and an administrative proceeding in retaliation for his criticism of the agency.¹⁰⁸ The court of appeals held the agents were entitled only to qualified immunity.¹⁰⁹ The Supreme Court reversed and held that the officials were entitled to absolute immunity.¹¹⁰

The United States, on behalf of the federal officials, argued that the officials should be entitled to absolute immunity, even if the constitutional violation was “knowing and deliberate.”¹¹¹ The Supreme Court, engaging in a historical

¹⁰¹ See *Forrester*, 484 U.S. at 224. Petitioner Forrester alleged that she was demoted and discharged on account of her sex. *Id.* at 220–21. The respondent, a Circuit Judge of the Seventh Judicial Circuit of Illinois, claimed judicial immunity for his decision. *Id.* at 222. The *Forrester* Court noted first that it had historically been “quite sparing in its recognition of claims to absolute official immunity.” *Id.* at 224. The Court reasoned that the act of firing a subordinate is functionally an administrative one and, thus, judicial immunity shall not attach. *Id.* at 229. The Court did not determine whether the judge would have qualified immunity and instead left the issue to the Seventh Circuit on remand. *Id.* at 230.

¹⁰² *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). In *Imbler*, a prosecutorial immunity case, the Supreme Court analogized the principles underlying the common law immunity of prosecutors to the common law immunity protecting judges and grand juries. *Id.* at 422–23. Having established a common law rule of immunity, the Court concluded the same public policy considerations “countenance absolute immunity [for prosecutors] under § 1983.” *Id.* at 424.

¹⁰³ *Stump v. Sparkman*, 435 U.S. 349, 356 (1978).

¹⁰⁴ For a more detailed discussion of *Stump*, see *supra* note 101.

¹⁰⁵ *Forrester*, 484 U.S. at 229.

¹⁰⁶ *Butz v. Economou*, 438 U.S. 478, 512–14 (1978) (detailing various safeguards).

¹⁰⁷ Note that this is an action pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the federal common law equivalent to a § 1983 action. This is of particular importance because in deciding *Bivens* case law, the Supreme Court is not directly bound by the statutory language of § 1983 but, rather, its own judgment. Nevertheless, because the two actions are merely two sides of the federal/state coin, the Supreme Court has stated that § 1983 case law is “instructive” in determining *Bivens* actions. *Butz*, 438 U.S. at 495–96. *Bivens* case law is similarly instructive in § 1983 actions. See *Forrester*, 484 U.S. at 224–26; see also *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433 n.5 (1993).

¹⁰⁸ *Butz*, 438 U.S. at 480.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 517.

¹¹¹ *Id.* at 485.

exploration of federal immunity akin to its exploration of § 1983 immunity, rejected the proposition as “unsound.”¹¹² Nevertheless, while the Court acknowledged that the “extension of absolute immunity . . . to all federal executive officials” would have a deleterious effect on the protections granted by the Constitution,¹¹³ the Supreme Court held that the “Chief Hearing Examiner, Judicial Officer, and prosecuting attorney” were entitled to absolute immunity.¹¹⁴

The “cluster of [quasi-judicial] immunities” stem from “characteristics of the judicial process.”¹¹⁵ Specifically, the Court noted that the “safeguards built into the judicial process” reduce the need for damages actions as a check on judicial officers because the “insulation . . . from political influence, the importance of precedent . . . , the adversar[ial] nature of the process, and the correctability of error on appeal” restrain even the most wicked judges.¹¹⁶ Because the federal administrative adjudication shared several safeguards with the judicial process, the Court explained absolute immunity was appropriate—the preservation of “independent judgment” outweighed the risk of an unconstitutional act.¹¹⁷

One of the so-called *Butz* factors is “insulation from political influence”;¹¹⁸ thus, in a situation where extrajudicial pressure may influence the decisionmaking process, absolute immunity may be inappropriate.¹¹⁹ In *Cleavinger v. Saxner*, the plaintiffs were inmates in a Federal Correctional Institute in Terre Haute, Indiana.¹²⁰ Evidence was adduced that the plaintiffs encouraged a work stoppage in order to protest the death of various inmates.¹²¹ Each plaintiff was tried before an Institution Discipline Committee.¹²² Each plaintiff had a right to have a written copy of the charge; to be represented by the prison staff; to be present at the hearing, call witnesses, and submit evidence;

¹¹² *Id.*

¹¹³ *Id.* at 505.

¹¹⁴ *Id.* at 511–12.

¹¹⁵ *Id.* at 512.

¹¹⁶ *Id.* The Court has since referred to the listed safeguards as factors. See *Cleavinger v. Saxner*, 474 U.S. 193, 201–02 (1985) (“And in *Butz*, the Court mentioned the following factors . . .”).

¹¹⁷ *Butz*, 438 U.S. at 514 (“In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.”).

¹¹⁸ *Cleavinger*, 474 U.S. at 202.

¹¹⁹ *Id.* at 203–04.

¹²⁰ *Id.* at 194.

¹²¹ *Id.* at 194–95.

¹²² *Id.* at 195.

and to have a written explanation of the committee's decision.¹²³ After the proceedings, the plaintiffs were found guilty, placed in administrative detention, and forced to forfeit "good time."¹²⁴ A proper appeal was filed to the warden; the individuals were released from detention, their good time was restored, and a note was placed directing officials that the incident "not reflect unfavorably" during the parole hearing.¹²⁵ The respondents then appealed to the Regional Director of the Bureau of Prisons to have the incident expunged and the relief was granted.¹²⁶ Upon release, the plaintiffs filed suit in district court under *Bivens* and won damages; the Seventh Circuit affirmed the holding and denied the discipline committee's argument for absolute immunity.¹²⁷

Despite the existence of some judicial safeguards, the error correction on appeal, and the eventual grant of "all the administrative relief they sought," the Supreme Court declined to extend absolute immunity in *Cleavinger*.¹²⁸ The Supreme Court agreed that the committee members performed an "adjudicatory function."¹²⁹ Further still, the Court agreed that the process was adversarial in nature, that harassment and retaliation for wrongful decisions were "more than a theoretical possibility," and that the prospect of damages suits would dissuade officials from serving on the committee.¹³⁰ Nonetheless, the Court was swayed by the lack of independence on the discipline committee.¹³¹ The members of the committee were necessarily passing judgment on their fellow co-workers—a judgment subject to review by their superior, the warden.¹³² There existed an "obvious pressure" to favor the institution they belonged to, their fellow co-workers, and not the inmate.¹³³

The Court held that qualified immunity would suffice, as it more appropriately balances the "opposing considerations"; the need, on the one hand, to protect officials in their discretionary tasks and, on the other, to provide a potential remedy for deprivations of constitutional rights.¹³⁴ In so holding, the Court explicitly contrasted the officials in *Cleavinger* with the judicial officials

¹²³ *Id.*

¹²⁴ *Id.* at 197.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 198–99.

¹²⁸ *Id.* at 197, 203.

¹²⁹ *Id.* at 203.

¹³⁰ *Id.*

¹³¹ *Id.* at 203–04.

¹³² *Id.* at 204.

¹³³ *Id.*

¹³⁴ *Id.* at 206–07.

in *Butz* and noted that both the lack of independence and lack of “procedural safeguards . . . under consideration in *Butz*” compelled qualified immunity over absolute judicial immunity.¹³⁵

Merely being a part of a judicial proceeding, even one with the full panoply of procedural safeguards, is not sufficient to qualify for absolute judicial immunity if there is no discretionary judgment involved.¹³⁶ *Antoine v. Byers & Anderson, Inc.*, involved a court reporter who lost a trial transcript and failed to produce it, resulting in a four year delay before the plaintiff’s criminal appeal was heard.¹³⁷ The plaintiff filed a *Bivens* suit against the court reporter and the company that hired her.¹³⁸ The Ninth Circuit applied absolute judicial immunity, holding that the “tasks performed by a court reporter in furtherance of her statutory duties are functionally part and parcel of the judicial process.”¹³⁹

The Supreme Court reversed the Ninth Circuit.¹⁴⁰ First, the Court noted a distinct lack of a common law analogue, stating that a “skilled, professional court reporter of today was unknown” during the development of judicial immunity.¹⁴¹ Second, the Court explained that a central component in extending judicial immunity is the existence of a “functionally comparable . . . discretionary judgment.”¹⁴² The lack of any discretionary judgment rendered absolute immunity inapplicable, despite the arguably “indispensable” nature of a court reporter.¹⁴³ While the court reporter did not receive judicial immunity, the Court did note that various circuits provide reporters a qualified immunity.¹⁴⁴

After *Antoine*,¹⁴⁵ there is an established framework for extending judicial immunity to non-judicial officers. First, a lower court is tasked with determining whether “[the] official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871.”¹⁴⁶ Second, if a counterpart is

¹³⁵ *Id.* at 206.

¹³⁶ *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993).

¹³⁷ *Id.* at 430–31.

¹³⁸ *Id.* at 431.

¹³⁹ *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1476 (9th Cir. 1991).

¹⁴⁰ *Antoine*, 508 U.S. at 438.

¹⁴¹ *Id.* at 433.

¹⁴² *Id.* at 436 (citing *Imbler v. Pachtman*, 424 U.S. 409, 423, n.20 (1976)).

¹⁴³ *Id.* at 437.

¹⁴⁴ *Id.* at 432.

¹⁴⁵ *Swift v. California*, 384 F.3d 1184, 1190 (9th Cir. 2004) (“[I]n *Antoine*, the Supreme Court worked a sea change in the way in which we are to examine absolute quasi-judicial immunity for nonjudicial officers.” (quoting *Curry v. Castillo*, 297 F.3d 940, 948 (9th Cir. 2002))).

¹⁴⁶ *Malley v. Briggs*, 475 U.S. 335, 340 (1986).

found, the court must next determine whether § 1983's history or purpose counsels against recognition of the immunity.¹⁴⁷ There must be sufficient procedural safeguards such that a damages action is, on balance, an unwise check on constitutional conduct when compared to the normal appellate process.¹⁴⁸ Further, the function performed must involve discretionary judgment, otherwise, the function is more akin to an administrative or ministerial activity that receives only qualified immunity.¹⁴⁹ The immunity must be limited, under *Stump*, to judicial acts.¹⁵⁰ A central inquiry for applicability is whether the function of the official is to “resolv[e] disputes between parties, or [to] authoritatively adjudicat[e] private rights.”¹⁵¹

II. THE EXTENSION OF ABSOLUTE IMMUNITY

Professor Margaret Johns has noted that several circuits have extended judicial immunity to mental-health experts in family law proceedings and criminal prosecutions.¹⁵² Johns argues that medical experts appointed to assist the courts should never receive judicial immunity: not only is there no 1871 common law analogue, but the experts neither perform a “decision-making function” nor are “subject to the procedural safeguards of the judicial process.”¹⁵³ This is true. But while this statement aptly criticizes the lower federal court’s *application* of judicial immunity, it implicitly preserves the correctness of the functional approach of judicial immunity itself. Worse still, while the Supreme Court has counseled that absolute immunity must be granted “sparing[ly],”¹⁵⁴ the analytic model does not easily provide support to that contention. Thus, the scholarly critique’s focus is misplaced.¹⁵⁵

¹⁴⁷ *Id.*

¹⁴⁸ *See Butz v. Economou*, 438 U.S. 478, 514 (1978).

¹⁴⁹ *Antoine*, 508 U.S. at 436–37.

¹⁵⁰ *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

¹⁵¹ *Antoine*, 508 U.S. at 434 n.8 (citing *Burns v. Reed*, 500 U.S. 478, 499–500 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part)).

¹⁵² Johns, *supra* note 8, at 277–79.

¹⁵³ *Id.* at 279–80.

¹⁵⁴ *Burns*, 500 U.S. at 487.

¹⁵⁵ *See* Johns, *supra* note 8, at 275 (“Unfortunately, as the following discussion will show, the lower courts have frequently disregarded the Supreme Court’s limitations on the doctrine of absolute judicial immunity in several ways.”); Coriell, *supra* note 8, at 1000 (“While the Supreme Court has been ‘quite sparing’ in extending absolute immunity, lower courts have regularly extended absolute immunity beyond the categories recognized by the Supreme Court.” (footnote omitted)).

While the historical and functional approach is intended to constrain lower courts,¹⁵⁶ the Supreme Court also allows “special functions” and policy considerations¹⁵⁷ to influence whether extension of immunity is appropriate.¹⁵⁸ As the following cases show, it is no surprise that lower federal courts have taken strands of historical, functional, and policy-based models in weaving an immunity that blankets more officials than the Supreme Court would prefer.¹⁵⁹

This Part proceeds in two sections. First, this Part examines the extension of absolute judicial immunity in practice. This includes a survey of “typical” quasi-judicial immunity cases and an examination of the language and reasoning employed. Second, this Part reconciles the surveyed cases with Supreme Court doctrine to demonstrate that the expansion of judicial immunity is not an aberrant practice, but an expected consequence of a mercurial methodology.

A. *The Extension of Absolute Judicial Immunity in Practice*

1. *The Third Circuit Approach*

In *Hughes v Long*,¹⁶⁰ the Court of Appeals for the Third Circuit extended absolute judicial immunity to a licensed clinical social worker and a licensed clinical psychologist on the theory that both were “arms of the court” that performed “functions integral to the judicial process.”¹⁶¹ The *Hughes* court noted that the analytical model required¹⁶² a historical approach followed by an inquiry into § 1983’s purpose.¹⁶³ The majority did not, however, engage in even

¹⁵⁶ *Burns*, 500 U.S. at 493 (“[W]e look to the common law and other history for guidance because our role is ‘not to make a free-wheeling policy choice,’ but rather to discern Congress’ likely intent in enacting § 1983.” (quoting *Malley v. Briggs* 475 U.S. 335, 342 (1986))).

¹⁵⁷ *Butz v. Economou*, 438 U.S. 478, 508 (1978).

¹⁵⁸ *Forrester v. White*, 484 U.S. 219, 224 (1988).

¹⁵⁹ Consider, for example, the Second Circuit’s language in a pair of cases known as *Gross I*, *Gross v. Rell*, 585 F.3d 72 (2d Cir. 2009), and *Gross II*, *Gross v. Rell*, 695 F.3d 211 (2d Cir. 2012). In *Gross I*, the Second Circuit referred to quasi-judicial immunity as a “simpl[e] appl[ication]” of the *Cleavinger* factors. *Gross I*, 585 F.3d at 81. In *Gross II*, the Second Circuit doubled-down and reiterated that quasi-judicial immunity is—as the Supreme Court has advised—determined with “reference to the six factors described in *Cleavinger*.” *Gross II*, 695 F.3d at 213. This approach eschews historical considerations and is both a correct application of Supreme Court precedent—chiefly *Butz*, 438 U.S. at 512 (laying out the six factors for quasi-judicial immunity), and *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985) (restating the *Butz* factors)—and an arguable misapplication of the historical approach in *Antoine*. See *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433 (1993).

¹⁶⁰ 242 F.3d 121 (3d Cir. 2001).

¹⁶¹ *Id.* at 127.

¹⁶² *Id.* at 125 (“[A] court *must* first determine whether [an official had immunity at common law]” (emphasis added)).

¹⁶³ *Id.*

a scintilla of historical analysis. Instead, the Third Circuit squarely approached the issue under the “functional approach” to see if there were any “special functions” or liability issues that counseled in favor of extending immunity.¹⁶⁴ Specifically, the court noted that the “neutral fact-finding and advis[ory]” functions the officials performed were “intimately related and essential to the judicial process” because it aided the court in making a discretionary judgment.¹⁶⁵

Hughes is emblematic of the reasoning employed by lower federal courts in this field.¹⁶⁶ Although the Court did not engage in any historical analysis, lower courts are concerned with other articulated *Butz* factors¹⁶⁷: the need to assure that the individual officer can perform her discretionary duty without fear of liability¹⁶⁸ and the presence of safeguards and lack of outside influence.¹⁶⁹ These concerns, taken seriously, stretch judicial immunity beyond its historical confines.

2. *The Ninth Circuit: An Ahistorical Approach*

The Ninth Circuit has explicitly depended on the *Butz* factors—as opposed to a more constrained historical analysis—in deciding quasi-judicial immunity questions.¹⁷⁰ In *Meyers v. Contra Costa County Department of Social Services*,

¹⁶⁴ *Id.* (first citing *Butz*, 438 U.S. at 506; then citing *Forrester v. White*, 484 U.S. 219, 224 (1988)).

¹⁶⁵ *Id.* at 127.

¹⁶⁶ *Morstad v. Dep’t of Corr. and Rehab.*, 147 F.3d 741, 744 (8th Cir. 1998) (holding that quasi-judicial immunity extended to court appointed psychologist because the function performed was “essential to the judicial process”); *Turney v. O’Toole*, 898 F.2d 1470, 1474 (10th Cir. 1990) (granting the superintendent of a hospital and psychologist quasi-judicial immunity when performing actions pursuant to a judicial order); *Moses v. Parwatikar*, 813 F.2d 891, 892 (8th Cir. 1987) (holding that a psychiatrist appointed by the court was entitled to judicial immunity for performing “functions essential to the judicial process”); *Williams v. City of New York*, No. 03 Civ. 5342RWS, 2005 WL 901405, at *8 (S.D.N.Y. Apr. 19, 2005) (holding that a social worker received judicial immunity when performing “functions that were integral to the judicial process”); *see also* *Lander*, *supra* note 9, at 904–14 (contrasting the Third Circuit’s approach to mental-health expert immunity with other courts of appeals).

¹⁶⁷ The Court listed six factors: (1) “the need to assure that the individual can perform his functions without harassment or intimidation;” (2) “the presence of safeguards that reduce the need for private damages actions as a means of controlling the unconstitutional conduct;” (3) “insulation from political influence;” (4) “the importance of precedent;” (5) “the adversary nature of the process;” and (6) “the correctability of error on appeal.” *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985) (citing *Butz*, 438 U.S. at 512).

¹⁶⁸ *Turney*, 898 F.2d at 1474.

¹⁶⁹ *Hughes*, 242 F.3d at 126–27 (“[Defendants] were not acting under any time constraints and were not forced to make ‘snap judgments’ . . . Rather, [defendants] took six months to complete their evaluations and did so in a deliberate, methodical, and thorough fashion.”).

¹⁷⁰ *See, e.g., Meyers v. Contra Costa Cty. Dep’t of Soc. Servs.*, 812 F.2d 1154, 1157–58 (9th Cir. 1987) (citing *Butz*, 438 U.S. at 512).

the Ninth Circuit was tasked with determining whether a social worker and employees of California's Family Conciliation Court and Department of Social Services were entitled to immunities.¹⁷¹ The court granted the social worker, Haaland, absolute prosecutorial immunity for testimony given during the custody hearing,¹⁷² but did not extend either prosecutorial immunity or quasi-judicial immunity for Haaland's allegedly ordering the plaintiff father to stay away from his home.¹⁷³ The majority engaged in both a functional and a policy-based analysis on the latter point.¹⁷⁴ Specifically, the Ninth Circuit panel held that the conduct did not "contribut[e] to an informed judgment by an impartial decisionmaker" and was undertaken in the "absence of such 'safeguards built into the judicial process.'"¹⁷⁵ For the *Meyers* court and the Supreme Court in *Butz*, the "balance" strikes in favor of absolute immunity when the characteristics that breed the "cluster of immunities"¹⁷⁶ are present, not historical, considerations.

The employees, Allison and Crossley, were both granted quasi-judicial immunity.¹⁷⁷ The pair was accused of conspiring to refuse visitation rights to the plaintiff and of biasing foster parents.¹⁷⁸ The Court determined that the officers performed their duties pursuant to a court order and statute.¹⁷⁹ Although the defendants were accused of violating the court order, the *Meyers* court held that only an action "completely outside the scope of [Allison and Crossley's] jurisdiction" would strip them of their immunity.¹⁸⁰ Judicial immunity applied because the defendants did not exceed that scope.¹⁸¹

¹⁷¹ Specifically, the court was weighing prosecutorial immunity, quasi-judicial immunity, and qualified immunity. *Id.* at 1155. While prosecutorial immunity may be a species of quasi-judicial immunity, *Burns v. Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) ("Quasi-judicial immunity . . . that is, official acts involving policy discretion but not consisting of adjudication."), it is often given the separate, distinct label of "prosecutorial immunity."

¹⁷² *Meyers*, 812 F.2d at 1155–56.

¹⁷³ *Id.* at 1157.

¹⁷⁴ *Id.* at 1157–58 ("Haaland's ordering of *Meyers* away . . . [is not] quasi-judicial . . . Furthermore, the policy considerations that support quasi-judicial immunity do not apply to Haaland's action.").

¹⁷⁵ *Id.* at 1157–58 (citing *Butz*, 438 U.S. at 512).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1159.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* This analysis is functionally identical to the *Bradley* Court holding that only an action in "clear absence of all jurisdiction over the subject-matter" would leave the officer bereft of immunity. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351–52 (1871).

¹⁸¹ *Meyers*, 812 F.2d at 1159.

3. *The Derivative or Arm of the Court Approach*

The Ninth Circuit's ahistorical, policy/functional-based approach has been replicated in a myriad of contexts by other circuits. For example, receivers¹⁸² often receive absolute judicial immunity.¹⁸³ *Davis v. Bayless*¹⁸⁴ offers a prototypical example of the language and reasoning employed by lower federal courts in receivership judicial-immunity cases.

As long as the judge appointing the receiver is afforded judicial immunity, the receiver will derivatively acquire judicial immunity as well, if acting within the scope of her authority.¹⁸⁵ In *Bayless*, the debtor doctor failed to pay a malpractice judgment and a receivership was appointed to seize assets to satisfy the judgment.¹⁸⁶ At the time, the doctor lived with his girlfriend, Lana Davis, and her daughter; an attorney, acting on behalf of the judgment creditor, appeared at the Davis home to search for assets.¹⁸⁷ The attorney perused Davis's underwear drawer, read private mail, and refused to leave.¹⁸⁸ Shortly thereafter, the receiver received a court order to search storage units associated with Davis and her family.¹⁸⁹ The receiver searched the storage unit and seized \$5600 cash, family jewelry, and an oil painting.¹⁹⁰ Davis was never notified of the search.¹⁹¹ Davis filed suit and alleged that the receiver and attorney violated her constitutional rights.¹⁹² The defendants argued they were entitled to absolute judicial immunity.¹⁹³

¹⁸² A receiver is a disinterested person, typically appointed by a court, for the protection or collection of property that is the subject of competing claims—commonly because the property belongs to a bankrupt person or is the subject of litigation. *Receiver*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁸³ *Roland v. Phillips*, 19 F.3d 552, 557 (11th Cir. 1994); *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1303–04 (9th Cir. 1989); *T & W Inv. Co. v. Kurtz*, 588 F.2d 801, 803 (10th Cir. 1978); *Kermit Constr. Corp. v. Banco Credito y Ahorro Poceno*, 547 F.2d 1, 3 (1st Cir. 1976). *But see* *Teton Millwork Sales v. Schlossberg*, 311 F. App'x 145, 150–52 (10th Cir. 2009) (holding that receiver exceeded scope of order and thus could not receive quasi-judicial immunity).

¹⁸⁴ 70 F.3d 367 (5th Cir. 1995). This case was chosen partly due to its memorable facts and partly because Professor Johns uses the case in her article. *See* Johns, *supra* note 8, at 290–91. Because this Comment addresses Johns's concerns and arguments, it will wrestle with what Johns has observed to be a “striking example of the erroneous extension of judicial immunity to receivers.” *Id.* at 290.

¹⁸⁵ *Bayless*, 70 F.3d at 373.

¹⁸⁶ *Id.* at 371.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 371–72. The attorney did eventually leave, albeit with several pairs of the girlfriend's underwear.

Id.

¹⁸⁹ *Id.* at 372.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

The attorney did not receive absolute judicial immunity, partly for prudential reasons¹⁹⁴ and partly because she was a private party.¹⁹⁵ The receiver did receive absolute immunity.¹⁹⁶ The court first noted that a receiver would receive immunity “derivative of the appointing judge’s judicial immunity.”¹⁹⁷ Because a state judge authorized the receivers’ actions and because the state judge did not act “in the clear absence of all jurisdiction” by issuing a general order, the receiver was entitled to receive derivative immunity.¹⁹⁸ This entitlement would fail if the receiver acted beyond the scope of the court order.¹⁹⁹ Without much analysis, the Fifth Circuit concluded that the receiver did not act beyond the scope of the order and thus received judicial immunity.²⁰⁰ Although Davis had her property searched and seized, she was left without notice and without remedy.

Bayless did not purport to examine the historical purpose of the receiver, nor did it expressly consider the function a receiver serves. Indeed, only three facts were ostensibly of any importance: (1) the receiver acted as an “arm of the court,” (2) the judge was generally allowed to issue such orders, and (3) the receiver stayed within the scope of the order.²⁰¹ Although unstated, these facts touch upon the policy/functional approach endorsed by the Supreme Court. By framing a receiver as an “arm of the court,” *Bayless* implicitly suggested that the receiver performed a role part and parcel with core judicial functions.²⁰² Because the immunity is derivative, factors that counsel in favor of immunity for judges similarly counsel immunity for the derivative officer.²⁰³ A Kekuléan²⁰⁴ knot of

¹⁹⁴ *Id.* at 374–75 (“The Supreme Court has said that absolute immunity should be extended no further than its justification warrants.”).

¹⁹⁵ *Id.* at 374.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 373. This is concerning. Because a judge will often receive judicial immunity—as long as the judge acts within her jurisdiction, immunity is virtually guaranteed—logically, a receiver will almost always be eligible for absolute immunity.

¹⁹⁸ *Id.* at 374.

¹⁹⁹ *See id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 373–74.

²⁰² *See id.* at 374 (citing *Boullion v. McClanahan*, 639 F.2d 213, 214 (5th Cir. 1981)).

²⁰³ *See, e.g., Engebretson v. Mahoney*, 724 F.3d 1034, 1039–40 (9th Cir. 2013) (elaborating policy considerations supporting derivative immunity).

²⁰⁴ Kekuléan is a classic Wallace-ism, stemming from the literary genius of David Foster Wallace, the renowned author of *Infinite Jest*. DAVID FOSTER WALLACE, *INFINITE JEST* 5 (Little, Brown & Co. 1996) (“I stare carefully into the Kekuléan knot of the middle Dean’s necktie.”). Kekuléan most likely refers to organic chemist August Kekulé’s discovery of benzene’s annular molecular structure. Kekulé has stated that he discovered the ring shape of the benzene molecule after dreaming about a snake eating its own tail. JOHN READ, FROM ALCHEMY

logic, this approach to derivative immunity poses no outer limits on who can be cloaked by quasi-judicial immunity.

A final case, *Martin v. Hendren*, illustrates the extreme lengths to which the functional and policy-based approach can be taken. During a traffic charge hearing, the mother of the defendant, Paula Martin, approached the bench without permission.²⁰⁵ After refusing to return to her seat, the judge ordered defendant Officer Hendren to remove her.²⁰⁶ During the struggle, Martin was struck in the face by Hendren, flipped face down onto the floor, handcuffed, pulled to her feet by her hair and handcuffs, and ultimately led out of the court.²⁰⁷ She allegedly suffered a shoulder injury.²⁰⁸ She filed a § 1983 suit for damages, and the officer claimed absolute quasi-judicial immunity.²⁰⁹

The court held that absolute judicial immunity applied as the defendant derived his immunity from the presiding judge's immunity.²¹⁰ The *Hendren* court cited favorably the Supreme Court opinion in *Mireles v. Waco*,²¹¹ specifically its emphasis on the nature of the function performed and the policy reasons behind judicial immunity.²¹² Although the Seventh²¹³ and Tenth Circuit²¹⁴ have dealt with the *Hendren* fact pattern differently, *Hendren* remains good law in the Eighth Circuit. This circuit split underscores the confusion and lack of uniformity that pervades the courts of appeals.

B. Reconciling the Cases with Supreme Court Doctrine

Although Professor Johns points out that the workers in *Hughes* likely should not have received quasi-judicial immunity, it is less clear whether the precedent has been misapplied.²¹⁵ Professor Johns argues that mental-health experts neither perform judicial acts nor “resolve disputes between parties.”²¹⁶ She also

TO CHEMISTRY 179–80 (Dover 1995). This self-devouring, self-ratifying, ouroboros logic is typical of the derivative immunity approach.

²⁰⁵ *Martin v. Hendren*, 127 F.3d 720, 721 (8th Cir. 1997).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* The judge acquired immunity because he issued a valid order, within his judicial capacity, and within his jurisdiction. *Id.*

²¹¹ 502 U.S. 9 (1991) (per curiam).

²¹² *Hendren*, 127 F.3d at 721–22.

²¹³ *Richman v. Sheahan*, 270 F.3d 430, 439 (7th Cir. 2001).

²¹⁴ *Martin v. Bd. of Cty. Comm'rs*, 909 F.2d 402, 405 (10th Cir. 1990).

²¹⁵ See Johns, *supra* note 8, at 279–82.

²¹⁶ *Id.* at 281.

notes that there is no historical analogue to the function mental-health experts perform or a historical basis for extending immunity.²¹⁷ But neither *Cleavinger* nor *Antoine* refused to extend judicial immunity solely based on the historical approach or the judicial act inquiry. Rather, *Cleavinger* focused on the lack of certain *Butz* factors,²¹⁸ and *Antoine* keyed in on the lack of discretionary judgment in addition to the weak historical basis.²¹⁹ Thus, the key consideration that drives *Butz*, *Cleavinger*, and *Antoine* is not history or function, but policy. If policy is key, then *Hughes* and similar decisions are much more palatable. Indeed, it is a “freewheeling”²²⁰ choice that the Supreme Court has—likely to its chagrin—mandated.

The policy considerations in *Butz* and its progeny necessitate *Hughes*. Unlike *Antoine*, the medical experts in *Hughes* exercised discretionary judgment in compiling reports and in making recommendations to the court.²²¹ Unlike *Cleavinger*, there is no significant “obvious pressure”²²² to favor a specific party; indeed, the experts were chosen by the court and not by either party.²²³ Like in *Butz*, the *Hughes* proceeding contained the full panoply of procedural safeguards, including the right to appeal an adverse decision.²²⁴ While the particular functions the *Hughes* experts performed did not contain any specific safeguards, the report was used in a safeguarded judicial proceeding.²²⁵ Further, the experts deliberated over a six-month period and not in a “snap [fashion],”²²⁶ similar to the judicial officers exercising reasoned judgment in *Butz*.²²⁷

²¹⁷ *Id.*

²¹⁸ *Cleavinger v. Saxner*, 474 U.S. 193, 203–04 (1985); *see supra* text accompanying notes 118–35.

²¹⁹ *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433, 436–37 (1993); *see supra* text accompanying notes 136–44.

²²⁰ *Burns v. Reed*, 500 U.S. 478, 493 (1991) (“[W]e look to the common law and other history for guidance because our role is ‘not to make a freewheeling policy choice,’ but rather to discern Congress’ likely intent in enacting § 1983.” (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986))).

²²¹ The *Hughes* court described the function of the mental-health experts as “neutral fact-finding and advis[ory].” *Hughes v. Long*, 242 F.3d 121, 127 (3d Cir. 2001). While “neutral fact-finding” implies something less than discretionary judgment, this is not quite the “verbatim” recording of the *Antoine* court reporter. *Antoine*, 508 U.S. at 436. In any event, the “advisory” role played by mental-health experts lends further force to moving the *Hughes* experts closer to an official displaying discretionary judgment and farther from the rote activity of a court reporter.

²²² *Cleavinger*, 474 U.S. at 204.

²²³ *Hughes*, 242 F.3d at 123. There is not an institutional pressure similar to the one that existed in *Cleavinger*. The experts in *Hughes* were passing judgment neither on fellow co-workers nor on individuals subordinate to them in the institutional structure. Both issues were present in *Cleavinger*. 474 U.S. at 203–04.

²²⁴ *Hughes*, 242 F.3d at 123. In fact, *Hughes* did appeal the order of the Superior Court of Pennsylvania, only to withdraw the appeal. *Id.*

²²⁵ *See id.* at 127.

²²⁶ *Id.*

²²⁷ *Butz v. Economou*, 438 U.S. 478, 514 (1978).

Thus, although the extension of quasi-judicial immunity to mental-health experts may not be in the “sparing” spirit the Supreme Court has repeatedly asked for,²²⁸ it does fit well within established Supreme Court precedent. Indeed, by focusing largely on policy considerations in both extending and refusing to extend judicial immunity, the Supreme Court has affirmatively created the “freewheeling” policy-making it purports to condemn.²²⁹

The “derivative” and “arm of the court” case lines, of which *Bayless* and *Hendren* are stark examples, present a more troublesome fit within Supreme Court doctrine.²³⁰ On the one hand, the analytical model does not pretend to take into account historical considerations, a necessary (but not sufficient) condition for immunity.²³¹ However, the derivative analysis does dovetail nicely with a functional or policy-based inquiry.

The immunity is derived from the judge and, as the cases illustrate, the first inquiry is whether the judge would receive immunity.²³² This requires an inquiry into whether the judge undertook judicial action that was within the court’s jurisdiction.²³³ There is an implicit assumption that the judge’s orders satisfy the procedural question and the execution of the order is necessarily a judicial function.²³⁴ Thus, to the extent that the Supreme Court disfavors derivative

²²⁸ *Burns v. Reed*, 500 U.S. 478, 487 (1991).

²²⁹ *Id.* at 493 (“[W]e look to the common law and other history for guidance because our role is ‘not to make a freewheeling policy choice,’ but rather to discern Congress’ likely intent in enacting § 1983.” (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986))).

²³⁰ *Martin v. Hendren*, 127 F.3d 720, 721 (8th Cir. 1997); *Davis v. Bayless*, 70 F.3d 367, 374 (5th Cir. 1995). Professor Jeffries has argued that *Bayless* is more readily understood if the scope of quasi-judicial immunity was “purely definitional—that is, whether the defendant’s actions were in some sense ‘judicial’ . . . as the receiver acted with judicial authorization.” Jeffries, *supra* note 26, at 219–20. If quasi-judicial immunity is not justified by a definitional model but instead by Jeffries’s “functional” model, then *Bayless* is wrong. *Id.* Because the *Bayless* plaintiff was unable to pursue a judicial remedy, as there was no decision to appeal, then quasi-judicial immunity should be unavailable. *Id.* at 220. With respect to Jeffries’s first observation, this Comment argues that the receiver’s actions were not judicial. A receiver is not a judge and the receiver did not resolve a dispute between parties nor authoritatively adjudicate private rights. To extend quasi-judicial immunity due to a judge’s “authoriz[ation]” of an action is to design a boundless immunity—follow the thread long enough and nearly all actions are “authorized” by a judge. With respect to Jeffries’s second observation, the mere availability of appeal would similarly fabricate an immunity of limitless application. If the receiver’s report was a part of a proceeding that could be appealed, then under Jeffries’s phrasing, quasi-judicial immunity would be appropriate. Instead, the relevant—and proper—consideration should be whether the officer is the equivalent of a judge, not whether the litigant could effectively appeal an adverse result. For further commentary, see *infra* Part III.

²³¹ *Burns*, 500 U.S. at 497 (Scalia, J., concurring in part and dissenting in part).

²³² *Hendren*, 127 F.3d at 721; *Bayless*, 70 F.3d at 373.

²³³ See *Bayless*, 70 F.3d at 373 (“[T]he proper inquiry is . . . whether the challenged actions were obviously taken outside the scope of the judge’s power.” (citing *Stump v. Sparkman*, 435 U.S. 349, 357 (1978))).

²³⁴ See *Hendren*, 127 F.3d at 721 (“[J]udicial] orders unquestionably [relate] to the judicial function.”).

analysis, the frailty of the derivative model is not readily found when compared to the *Cleavinger* and *Butz* approach.

The circuits take various approaches to judicial immunity questions. A social worker in the Third Circuit will almost certainly receive judicial immunity, while a social worker in the First, Second, or Seventh Circuit may receive only qualified immunity.²³⁵ A probation or parole officer preparing a report will almost certainly receive absolute judicial immunity in the Second,²³⁶ Fifth,²³⁷ Ninth,²³⁸ Tenth,²³⁹ Eleventh,²⁴⁰ and D.C. Circuits.²⁴¹ A recent Sixth Circuit²⁴² (unpublished) opinion suggests a probation or parole officer preparing a report will only have qualified immunity; similar holdings have been found in the Fifth,²⁴³ Eighth,²⁴⁴ and Ninth²⁴⁵ Circuits, suggesting possible intra-circuit splits as well as an inter-circuit split. This haphazard application of immunity disadvantages both plaintiffs and defendants. Federal rights and defenses should not depend on the legal jurisdiction in which one works or lives. A uniform approach is necessary.

²³⁵ Compare *Hughes v. Long*, 242 F.3d 121, 131 (3d Cir. 2001), with *Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 98–99 (2d Cir. 1999), and *Frazier v. Bailey*, 957 F.2d 920, 933 (1st Cir. 1992), and *Millsbaugh v. Cty. Dep't of Pub.*, 937 F.2d 1172, 1177 (7th Cir. 1991).

²³⁶ *Peay v. Ajello*, 470 F.3d 65, 70 (2d Cir. 2006); *Dorman v. Higgins*, 821 F.2d 133, 138 (2d Cir. 1987).

²³⁷ *Freeze v. Griffith*, 849 F.2d 172, 175 (5th Cir. 1988).

²³⁸ See *Desilva v. Baker*, 96 P.3d 1084, 1089 (Ariz. Ct. App. 2004) (citing federal cases applying absolute judicial immunity to probation officers who filed a false presentence report in a § 1983 action brought in state court).

²³⁹ *Tripati v. U.S. Immigration and Naturalization Serv.*, 784 F.2d 345, 348 (10th Cir. 1986) (applying absolute immunity to pretrial bond report and presentence report); *Hummel v. McCotter*, 28 F. Supp. 2d 1322, 1330 (D. Utah 1998) (holding absolute immunity applied to the preparation of a presentence report).

²⁴⁰ *Hughes v. Chesser*, 731 F.2d 1489, 1490 (11th Cir. 1984); see also *Holmes v. Crosby*, 418 F.3d 1256, 1258 (11th Cir. 2005) (citing *Chesser* favorably).

²⁴¹ *Turner v. Barry*, 856 F.2d 1539, 1541 (D.C. Cir. 1988).

²⁴² *Draine v. Leavy*, 504 F. App'x 494, 496 (6th Cir. 2012) (per curiam) (holding that an officer who prepares a parole violation report is entitled only to qualified immunity). But see *Loggins v. Franklin Cty.*, Ohio, 218 F. App'x 466, 476 (6th Cir. 2007) (holding that a probation officer's advice to the sentencing court entitles the officer to quasi-judicial immunity); *Horton v. Martin*, 137 F. App'x 773, 775 (6th Cir. 2005) (finding that absolute immunity applies to parole board members as well as “those who make recommendations concerning parole” in relation to parole hearings); *Balas v. Leishman–Donaldson*, No. 91-4073, 1992 WL 217735, at *5 (6th Cir. Sept. 9, 1992) (per curiam) (applying absolute immunity to a parole officer).

²⁴³ *Galvan v. Garmon*, 710 F.2d 214, 214 (5th Cir. 1983) (per curiam).

²⁴⁴ *Ray v. Pickett*, 734 F.2d 370, 374–75 (8th Cir. 1984).

²⁴⁵ *Swift v. California*, 384 F.3d 1184, 1193 (9th Cir. 2004) (holding that a parole officer preparing a report is not entitled to absolute immunity).

III. QUALIFIED IMMUNITY AND REFINING A MUDDLED METHODOLOGY

Having identified the problem, this Part proposes a potential solution. To ameliorate the haphazard application of immunity, this Comment suggests formalism as an antidote: judicial immunity for judges, qualified immunity for the rest. This Part has two sections. First, this Part lays out the case for formalism by juxtaposing the negatives of the current regime with the positives of a formalist approach. Second, this Part establishes that the Supreme Court is the best body to curb the expansion of quasi-judicial immunity and applies a formalist approach.

A. *Judicial Immunity for Judges, Qualified Immunity for the Rest*

An overly expansive absolute immunity regime disserves the public. Civil-rights laws are undermined as victims are denied a remedy, deterrence is weakened, and constitutional boundaries lay undefined.²⁴⁶ Such costs would be justified if there were a significant benefit. But, as it stands, the extension of absolute immunity serves none but the particularly malicious. This problem is magnified by the fact that the prototypical honest, fair-dealing public officer receives the considerably powerful qualified immunity defense.²⁴⁷

The policies of § 1983 are disserved as well by the extension of absolute immunity. The primary purpose of § 1983 is to “give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.”²⁴⁸ Absolute immunity denies that remedy.²⁴⁹ As Professor Johns aptly writes, absolute immunity fails to give “concrete meaning to abstract constitutional language.”²⁵⁰ The limits of a government official’s actions are often defined and established in constitutional tort litigation;²⁵¹ thus, to the extent that absolute immunity restricts the “capacity of constitutional doctrine to

²⁴⁶ See Johns, *supra* note 8, at 314.

²⁴⁷ In recent years, the Supreme Court has described the protection of qualified immunity as extending to “all but the plainly incompetent or those who knowingly violate the law.” *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

²⁴⁸ *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

²⁴⁹ See *Imbler v. Pachtman*, 424 U.S. 409, 434 (1976) (White, J., concurring).

²⁵⁰ See Johns, *supra* note 8, at 315.

²⁵¹ James K. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 393, 446 (2003) (“[M]ost of the rights regulating a government official’s discretion to inflict injury upon individuals have been established in constitutional tort actions.”).

adapt,”²⁵² this Comment argues that it is a step too far in favor of protecting the independence of judicial officers.

Reducing the absolute immunity regime, and turning instead to qualified immunity “has constitutional benefits.”²⁵³ As Professor Jeffries has argued, a limitation on money damages can “foster[] the development of constitutional law.”²⁵⁴ Qualified immunity, for example, shields government officials from liability when they violate a constitutional right that has not been clearly established.²⁵⁵ This shield makes it less costly for a court to declare a new right—to “innovat[e],” in Jeffries’s terms²⁵⁶—because, while the defendant in the present case is not liable, future officials are on notice and future victims can point to clearly delineated constitutional boundaries.²⁵⁷ An expansive absolute immunity regime, however, does not have the attendant constitutional benefits. Rather than providing for the lively development of constitutional doctrine, absolute immunity stultifies growth and renders constitutional doctrine vulnerable to ossification. This problem of underdeveloped or static law is particularly concerning where, as noted prior, the question of judicial immunity or qualified immunity is circuit-dependent.²⁵⁸ The Constitution is the supreme law of *all* the land and its growth (or stagnation) should not be a mere matter of geography.

²⁵² John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 97 (1999) (“My endorsement of constitutional change does not reflect a taste for it. . . . But it reflects a conviction that the capacity of constitutional doctrine to adapt to evolving economic, political, and social conditions is a great strength.”).

²⁵³ *Id.* at 90. As then-Judge Sotomayor stated in *Wilkinson*:

By taking this opportunity to address constitutionality in advance of immunity, we have begun the difficult process of identifying particular conduct falling inside and outside of acceptable constitutional parameters. In this way, and at the Supreme Court’s urging, we hope to “promote[] clarity in the legal standards for official conduct.” Indeed, from this day forward, these and other case workers should understand that the decision to substantiate an allegation of child abuse on the basis of an investigation similar to but even slightly more flawed than this one will generate a real risk of legal sanction.

Wilkinson ex rel. Wilkinson v. Russell, 182 F.3d 89, 107 (2d Cir. 1999) (citation omitted).

²⁵⁴ Jeffries, *supra* note 252, at 90. This limitation on damages is often referred to as a “right-remedy” gap. *Id.* at 87.

²⁵⁵ *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

²⁵⁶ Jeffries, *supra* note 252, at 90.

²⁵⁷ *See id.* at 90, 108–09.

²⁵⁸ *See supra* text accompanying notes 235–45; *see also* Johns, *supra* note 8, at 267 n.5; Lander, *supra* note 9, at 911–14.

When absolute immunity is applied, the court dismisses the action without considering the underlying merits.²⁵⁹ Although qualified immunity analysis no longer requires a court to determine whether the Constitution was violated,²⁶⁰ an enterprising judge may still consider the underlying merits and promote the development of constitutional law. If a judge is uncomfortable deciding the constitutional question—perhaps out of a concern that otherwise innocent court officials would be liable for merely carrying out the orders of the judicial officer—then the judge could hold that the officer did not violate clearly established law. Ultimately, qualified immunity serves as an appropriate vehicle to balance competing values: remedying constitutional wrongs while protecting the discretion of public officials.²⁶¹

A formalist approach that this Comment proposes—judicial immunity for judges, qualified immunity for the rest—has several beneficial effects: (1) it keeps easy cases easy, (2) it reverses the erosion of basic constitutional guarantees,²⁶² (3) it promotes constitutional innovation,²⁶³ and (4) it accommodates the competing values of private protection and public discretion.²⁶⁴ The preceding paragraphs have already touched on the latter three benefits. As for the first listed benefit, a case application will suffice.

In *Martin v. Hendren*,²⁶⁵ the Eighth Circuit granted absolute immunity to a court police officer, reasoning that carrying out a judge’s orders is “unquestionably” part and parcel with the judicial function.²⁶⁶ *Richman v. Sheahan*²⁶⁷ and *Martin v. Board of County Commissioners*²⁶⁸—Seventh Circuit and Tenth Circuit cases, respectively—answered the same question differently. In all three cases, police officers acted pursuant to a judicial order and physically accosted the plaintiffs, allegedly using excessive force.²⁶⁹ Although *Richman*

²⁵⁹ See, e.g., *Martin v. Hendren*, 127 F.3d 720, 722 (8th Cir. 1997) (finding that quasi-judicial immunity applied, granting summary judgment for the defendant and stating that the court “need not speculate about hypothetical situations testing the limits of our holding”).

²⁶⁰ See *Pearson*, 555 U.S. at 236.

²⁶¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

²⁶² See *supra* Part II; see also *Butz v. Economou*, 438 U.S. 478, 505 (1978) (“The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees.”).

²⁶³ See *supra* text accompanying notes 250–61.

²⁶⁴ See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

²⁶⁵ *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997); see *supra* text accompanying notes 205–14.

²⁶⁶ *Hendren*, 127 F.3d at 721.

²⁶⁷ 270 F.3d 430 (7th Cir. 2001).

²⁶⁸ 909 F.2d 402 (10th Cir. 1990) [hereinafter *Martin*] (per curiam).

²⁶⁹ *Richman*, 270 F.3d at 433–34; *Hendren*, 127 F.3d at 721; *Martin*, 909 F.2d at 403–04. In *Richman*, fourteen police officers restrained a disruptive witness, forced him to the floor, and sat on him; while he was

and *Martin* apply qualified immunity, both panels focused on whether the function performed was ultimately executive or judicial.²⁷⁰ While this led to this Comment's preferred result, such reasoning in closer cases—such as *Hendren*—will lead to the opposite result.

This Comment argues that it is not enough to merely distinguish the function performed as “judicial” or “executive.” A functional approach does not constrain a court from making “freewheeling” policy decisions;²⁷¹ it does not induce a court to remain “cautious in extending [immunities].”²⁷² The *Richman* court expressed concern that that expansion of immunity could create unjust results with respect to plaintiffs harmed by the “unlawful conduct [of] those who enforce [judicial orders].”²⁷³ But taking that concern seriously, it makes little sense to distinguish between whether harm flows from the order *itself* or from the *execution* of the order. In both cases, the officer was engaging in unlawful conduct, with the only difference stemming from the initiator of the unlawful action—a judge in the former instance, an officer in the latter.

A formalist approach would simplify the matter. Where the suit is aimed at the judicial officer, absolute immunity is appropriate.²⁷⁴ If the suit, however, is aimed not at the judicial officer, but at the executors of the order, then qualified immunity should apply. Thus, unlike with absolute immunity, which protects even the “knowingly unlawful or plainly incompetent,”²⁷⁵ a plaintiff could

restrained, he stopped breathing and, ultimately, died. *Richman*, 270 F.3d at 433–34. *Hendren* was described in greater detail earlier. *See supra* text accompanying notes 205–14. *Martin* involved officers executing an arrest warrant. *Martin*, 909 F.2d at 403. The plaintiff had been discharged from a hospital prior to her arrest with instructions to exit in a wheelchair and return to bed. *Id.* at 404. Instead, she was forced to walk to a police van, ride to jail, and sit in the van for some time without medical attention, thereby aggravating her existing injuries. *Id.*

²⁷⁰ *Richman*, 270 F.3d at 438; *Martin*, 909 F.2d at 405. The *Martin* court did not refer specifically to the “executive” function, but did speak to the manner in which the orders were carried out, language reflective of whether the executive or judicial function was implicated. *Id.* at 405 (“We conclude that absolute immunity does not protect defendants from damage claims directed . . . to the manner of [an order’s] execution.”); *see also Richman*, 270 F.3d at 438 (“[C]onduct—the manner in which [officers] enforced the judge’s order—implicates an executive, not judicial, function.”).

²⁷¹ *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

²⁷² *Forrester v. White*, 484 U.S. 219, 226 (1988).

²⁷³ *Richman*, 270 F.3d at 438–39.

²⁷⁴ *See Mireles v. Waco*, 502 U.S. 9, 11 (1991) (per curiam). *Mireles* involved facts similar to *Richman*, *Hendren*, and *Martin*. *Id.* at 10 (reciting the facts of *Mireles*). The only difference is that the plaintiff sued the judge and the police officers executing the order. *Id.*

²⁷⁵ *Richman*, 270 F.3d at 438. Knowingly unlawful or plainly incompetent certainly, one would think, describes the actions of the officers in *Richman*, *Hendren*, and *Martin*.

recover if the relevant law was clearly established and the defendant had violated it.²⁷⁶

Formalism would not only tidy the law, but would also make it uniform for both potential plaintiffs and defendants across the land. A social worker in the Third Circuit would receive qualified immunity, as her colleagues currently do in the First, Second, and Seventh Circuits.²⁷⁷ A probation or parole officer preparing a report would receive qualified immunity, resolving the possible intra-circuit split in the Fifth and Sixth Circuits and a larger inter-circuit split.²⁷⁸ The jurisprudence would rid itself of terminological niceties like “derivative immunity” and “arm of the court”;²⁷⁹ a court could retire the *Butz* factors and the vestigial “cluster of immunities.”²⁸⁰

B. Applying Formalism

This next section applies formalism to illustrate its benefits in § 1983 litigation. First, it deals with stare decisis in the § 1983 context and explains why the Supreme Court is obligated to reverse the expansion of quasi-judicial immunity. Second, this Part examines the derivative and arm of the court case lines, elaborates how the current functional approach has led to that outgrowth, and then applies a formalist approach.

I. Stare Decisis in the § 1983 Context

Stare decisis promotes predictability, evenhandedly and consistently developing legal principles, and adds actual and perceived integrity to the judicial process.²⁸¹ Yet, in the judicial immunity context, continued commitment to Supreme Court precedent has led to the opposite result: an unpredictable expansion of judicial immunity,²⁸² a complete lack of consistent development of legal principles,²⁸³ and a reduction in the perceived integrity of the judicial

²⁷⁶ *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (articulating the qualified immunity standard). This approach brings quasi-judicial immunity in-line with its historical roots. *See Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) (noting that, historically, quasi-judicial immunity was closer to “what we now call ‘qualified,’ rather than absolute, immunity”).

²⁷⁷ *See supra* note 235.

²⁷⁸ *See supra* notes 236–45.

²⁷⁹ *See supra* text accompanying notes 184–204.

²⁸⁰ *See supra* text accompanying notes 115–17; *see also supra* note 167.

²⁸¹ *Pearson*, 555 U.S. at 233 (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

²⁸² *See supra* text accompanying notes 235–45.

²⁸³ *See supra* Part II.

process.²⁸⁴ To reverse this trend, this Part argues that the Supreme Court should reexamine its judicial immunity jurisprudence and apply a formalist approach.

Although not an “inexorable command,”²⁸⁵ the considerations undergirding *stare decisis* are particularly applicable in the statutory context.²⁸⁶ But in the context of § 1983²⁸⁷ and other civil-rights statutes, the Court has shown considerable adaptability in reconsidering precedent.²⁸⁸ This adaptability reflects an appreciation of the constitutional dimension that § 1983 occupies and the fundamental importance of reinterpreting the statute in light of constitutional developments.²⁸⁹ Two developments in particular require the Court to reexamine the contours of judicial immunity: (1) the considerable strength of qualified immunity today compared to when *Stump* was decided, and (2) the emerging inter- and intra-circuit splits.

²⁸⁴ For example, both legal scholars and news commentators have panned the Supreme Court’s decision in *Stump*. See, e.g., JOEL D. JOSEPH, BLACK MONDAYS: WORST DECISIONS OF THE SUPREME COURT, 254–57 (1987); Block, *supra* note 42, at 916–20; Marianne Schwartz O’Bara, Note, *Stump v. Sparkman: Judicial Immunity or Imperial Judiciary*, 47 UMKC L. REV. 81, 90–91 (1978). Professor Block has criticized *Stump* as “the worst sort of self-dealing by the judiciary.” Block, *supra* note 42, at 880. The *Washington Post* ran an editorial criticizing the decision as a “deeply disturbing step toward judicial omnipotence.” Editorial, *Judicial Omnipotence*, WASH. POST (Mar. 31, 1978), <https://www.washingtonpost.com/archive/politics/1978/03/31/judicial-omnipotence/251ed69d-bb44-4bf8-bdac-d2c9852ca5f9/>. Justice Rehnquist has noted the partiality of judicial immunity as well. *Butz v. Economou*, 438 U.S. 478, 528 n.* (1978).

²⁸⁵ *Pearson*, 555 U.S. at 233 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

²⁸⁶ *Id.*

²⁸⁷ Justice Frankfurter, dissenting in *Monroe*, was particularly adamant that the Court had an obligation to construe § 1983 properly and that it could not shirk its duty with reference to *stare decisis*. He said:

And with regard to the Civil Rights Act there are reasons of particular urgency which authorize the Court—indeed, which make it the Court’s responsibility—to reappraise in the hitherto skimpily considered context of [§ 1983’s history] what was decided [previously]. This is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision. Nor is it merely a mine-run statutory question involving a narrow compass of individual rights and duties. The issue in the present case concerns directly a basic problem of American federalism In this aspect, it has significance approximating constitutional dimension. Necessarily, the construction of the Civil Rights Acts raises issues fundamental to our institutions. This imposes on this Court a corresponding obligation to exercise its power within the fair limits of its judicial discretion.

Monroe v. Pape, 365 U.S. 167, 221–22 (1961) (Frankfurter, J., dissenting) (citations omitted).

²⁸⁸ Compare *Monroe*, 365 U.S. at 191 (finding that the word “person” in § 1983 does not apply to municipalities), with *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–92 (1978) (reversing *Monroe* and concluding that the word “person” in § 1983 does include municipalities).

²⁸⁹ See *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 672–73 (1987) (Scalia, J., dissenting) (arguing that the doctrine of *stare decisis* applied less rigorously to civil rights cases); *Monroe*, 365 U.S. at 221–22 (Frankfurter, J., dissenting); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1369–78 (1988) (describing exceptions to statutory *stare decisis*). Moreover, the Court itself has stated in the context of judge made rules, such as judicial immunity, that “change should come from [the] Court,” as such rules implicate the internal workings of the Judicial Branch. *Pearson*, 555 U.S. at 233–34.

First, because qualified immunity was significantly less powerful when *Stump* was decided,²⁹⁰ the Court should revisit its judicial immunity jurisprudence.²⁹¹ In *Harlow*, the Court removed the “subjective aspect” of qualified immunity: the “permissible intentions” or malice formulation.²⁹² This change was made because, in the Court’s language, it was finally “clear that substantial costs attend the litigation of the subjective good faith of government officials.”²⁹³ No longer a purely subjective standard, the now familiar objective standard protects all but the knowingly malicious or plainly incompetent.²⁹⁴ Further, the doctrine does not require a judge to decide whether a constitutional violation occurred, allowing judges to dismiss cases based on clearly established law.²⁹⁵

Second, the emerging circuit split²⁹⁶ constitutes an important issue for the Supreme Court, warranting review of its judicial immunity precedent.²⁹⁷ Uniformity in the federal law is an important goal—so much so, that federal courts are indeed constitutionally tasked to ensure uniformity within the federal

²⁹⁰ *Stump* was decided in 1978, while *Harlow* was decided in 1982. The qualified immunity standard in 1978 was:

[Qualified] immunity would be unavailable . . . if the official “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [individual] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [person].”

Procunier v. Navarette, 434 U.S. 555, 562 (1978) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

²⁹¹ In quasi-judicial cases since *Harlow*, the Court has held that judicial immunity should not apply, while referencing the qualified immunity. See *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993) (“Some Circuits have held that court reporters are protected only by qualified immunity.”); *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (“Qualified immunity, however, is available to these committee members.”). In a pre-*Harlow* case, the Court held that officials involved in administrative adjudication were clothed with absolute immunity. *Butz v. Economou*, 438 U.S. 478, 514 (1978). For a fuller discussion of all three cited cases, see *supra* text accompanying notes 106–44.

²⁹² *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

²⁹³ *Id.* at 816.

²⁹⁴ *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

²⁹⁵ *Pearson v. Callahan*, 555 U.S. 223, 234 (2009).

²⁹⁶ See *supra* text accompanying notes 235–45; see also *Johns*, *supra* note 8, at 267 n.5; *Lander*, *supra* note 9, at 910–14.

²⁹⁷ See SUP. CT. R. 10(a).

law.²⁹⁸ Uniformity creates “equal protection of the laws,”²⁹⁹ reifying familiar abstract constitutional ideals. Because the Supreme Court has sowed the seeds of confusion that currently plague the federal system,³⁰⁰ it is the Court’s duty to rectify its judicial immunity jurisprudence: the antidote, as this Comment argues, is a formalist approach.

This section has argued why the Supreme Court should reexamine its judicial immunity jurisprudence and apply a formalist approach. Importantly, a formalist approach does *not* create absolute liability for public officials. Cognizant of the compelling arguments for both parties in § 1983 litigation, this Comment merely proposes that qualified immunity—designed to accommodate both parties’ concerns—be the norm for non-judicial officers.³⁰¹ A brief example of what the Court could change will be illustrative—the next section will apply a formalist approach.

2. *Donning the Robe or Removing the Shield: Formalism Applied*

Although federal courts vary in their approaches to judicial immunity, the derivative and arm of the court approach is consistent amongst the circuits.³⁰² For example, in *Bush v. Rauch*, the Sixth Circuit held that a Probate Court

²⁹⁸ See *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) (“Our principal responsibility under current practice, however, and a primary basis for the Constitution’s allowing us to be accorded jurisdiction to review state-court decisions, see Art. III, §2, cls. 1 and 2, is to ensure the integrity and uniformity of federal law.”); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) (“[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding . . . all cases in which they are involved.”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (arguing that if there was not a uniform interpretation of federal law, “[t]he public mischiefs that would attend such a state of things would be truly deplorable”). Commentators are in accord with the preceding judicial pronouncements. See, e.g., Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1812 n.451 (1991) (explaining that circuit splits jeopardize the integrity of the federal judicial system because “uniformity is a prominent aspiration”); Sandra Day O’Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1984) (“[A] single sovereign’s laws should be applied equally to all . . .”); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1096–97 (1987) (explaining that, due to practical restraints, the Supreme Court can only afford to rectify “systematic variation in the application of national law. In general, [it is] more aggravating if citizens of Maine and Florida are threatened with having to live under different understandings of the same federal statute . . .”).

²⁹⁹ U.S. CONST. amend. XIV, § 1.

³⁰⁰ See *supra* Part II.

³⁰¹ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”).

³⁰² See *supra* text accompanying notes 183–214; see also Coriell, *supra* note 8, at 1000–06.

Administrator was entitled to quasi-judicial immunity for his decision to place a juvenile in a non-secure detention home.³⁰³ After concluding that the administrator did not act in a judicial capacity, the majority reasoned that he was an “arm of the court” performing actions “basic and integral [to] the judicial function.”³⁰⁴ Thus, he was entitled to quasi-judicial immunity.³⁰⁵

The “functions integral to the judicial process” approach is emblematic of derivative and arm of the court case lines.³⁰⁶ The Court could eliminate these case lines by incorporating a formalist approach to judicial immunity. Instead of determining whether a function is judicial—whether an individual “exercise[s] a discretionary judgment” as a part of his or her function³⁰⁷—the Court could instead use the “expectation” approach in *Stump*³⁰⁸ or require that the discretion relate to *judicial* judgment.³⁰⁹

Under this formalist approach, the defendant-administrator in *Rauch* would not receive quasi-judicial immunity. The administrator neither engaged in the authoritative adjudication of private rights, nor did he resolve a dispute between

³⁰³ *Bush v. Rauch*, 38 F.3d 842, 847–48 (6th Cir. 1994). The Administrator, Rauch, had concluded that the juvenile was non-violent and could be placed in the non-secure detention home owned by the plaintiffs. *Id.* at 845. After placement, the juvenile physically assaulted and injured the plaintiff-owner of the home. *Id.* A subsequent investigation revealed that the juvenile had a history of violent behavior and that the Administrator had been negligent in his investigation. *Id.* The plaintiffs then sued under § 1983. *Id.*

³⁰⁴ *Id.* at 847.

³⁰⁵ *Id.*

³⁰⁶ See *supra* text accompanying notes 183–214.

³⁰⁷ *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976)).

³⁰⁸ *Stump v. Sparkman*, 435 U.S. 349, 362 (1978) (“[A]n act by a judge is a ‘judicial’ one . . . [if the function performed is] to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.”). This approach is only partly formalistic because it could also be used to apply judicial immunity—if appropriate—to certain parole boards, mediators, or arbitrators. The key inquiry is not whether the individual is a judge, but whether she is expected to “resolv[e] disputes between parties, or [authoritatively adjudicate] private rights.” *Antoine*, 508 U.S. at 435–36 (quoting *Burns v. Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in judgment in part and dissenting in part)). This approach would maintain the core of judicial immunity, while jettisoning its outer-boundaries (such as the protection of any action essential to the judicial process) to the realm of qualified immunity. See *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) (“[Judicial] immunity was absolute [in 1871], but it extended only to individuals who were charged with . . . authoritatively adjudicating private rights. When public officials made discretionary policy decisions that did not involve actual adjudication, they were protected by . . . what we now call ‘qualified’ . . . immunity.”).

³⁰⁹ In this sense, the “discretion” would be to decide in favor of one party or another. This is both formalistic and functional. The officer would be adjudicating private rights and her discretion would be in respect to her final decision. This is materially different from how lower courts use the “discretion” language today. See, e.g., *Hughes v. Long*, 242 F.3d 121, 127 (3d Cir. 2001) (holding that a mental-health professional receives absolute immunity for aiding the court in performance of its discretionary duties). The *Hughes* approach is one discretionary step too far.

parties; thus, judicial immunity would be inappropriate under a formalist approach.³¹⁰ The absence of judicial immunity in this case, however, would not result in liability; qualified immunity would, instead, provide the proper protection.³¹¹ This change is not superficial. The Sixth Circuit would consider the underlying constitutional question³¹²—thereby developing and furthering constitutional standards—while properly accommodating plaintiffs’ and defendants’ interests.³¹³ This framework starkly contrasts the normal, quasi-judicial case in which a court does not consider the constitutional question and instead considers only the pressing interests of the relevant public official.³¹⁴

Although a formalist approach would not result in liability under the facts of *Rauch*, a formalist approach would allow for liability—assuming qualified immunity is breached—in cases where a constitutional violation is committed by an arm of the court. Consider, for example, the case of *Martin v. Hendren*, discussed prior.³¹⁵ In *Hendren*, the defendant officer removed the plaintiff from the courtroom by striking her in the face, flipping her onto the floor, handcuffing her, and pulling her to her feet by the hair and handcuffs.³¹⁶ The officer received derivative quasi-judicial immunity for having performed actions “unquestionably related to the judicial function.”³¹⁷

A formalist regime would not extend quasi-judicial immunity so far. The Eighth Circuit’s recitation of the facts shows that the police officer neither decided a dispute between parties nor authoritatively adjudicated private rights.³¹⁸ Thus, the police officer would only receive qualified immunity. Reading the facts in the light most favorable to the plaintiff,³¹⁹ the officer’s force would not be objectively reasonable and, thus, the conduct would be a violation

³¹⁰ See *Bush*, 38 F.3d at 847 (“The district court found that . . . [the defendant] was not acting in a judicial capacity . . .”).

³¹¹ *Id.* at 848 (explaining that, even in the absence of absolute immunity, the defendant would receive qualified immunity).

³¹² The Sixth Circuit did, in fact, consider the constitutional question in this case. *Id.*

³¹³ See *supra* note 301.

³¹⁴ See *Valdez v. City & Cty. of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989) (“[A]bsolute immunity always comes at a price. The individual wrongly deprived . . . will be unable to pursue a remedy But the public interest . . . far outweighs the benefit to be gained by providing the defendants . . . with only limited immunity.”).

³¹⁵ See *supra* text accompanying notes 205–12, 265–69.

³¹⁶ *Martin v. Hendren*, 127 F.3d 720, 721 (8th Cir. 1997).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

of clearly established law.³²⁰ At the least, the Eighth Circuit would be able to determine the contours of excessive force and provide notice to public officials.³²¹

CONCLUSION

In 1978, the *Washington Post* referred to the decision in *Stump v. Sparkman* as a “step toward judicial omnipotence.”³²² Since that time, lower federal courts have crafted a shield of omnipotence that reaches far beyond judicial officers. Scholars have framed this tale as lower federal courts run amok, a failure to apply precedent.³²³ This Comment proposes that the truth is not so simple. In large part, this is also a story about the faithful application of a muddled methodology and the creation of a freewheeling, policy-driven tribunal. This expansion has harmed both plaintiffs and defendants and has resulted in federal rights and defenses being dependent on geography.

To rectify the over-expansion of judicial immunity, this Comment proposes a clear solution: judicial immunity for judges and judicial officers, qualified immunity for the rest. The implications of the proposal are far-reaching. First, such an approach would advance the normative ideal of uniformity and equal protection under the law.³²⁴ Second, the proposal properly balances the public’s interest in zealous officials with the public’s interest in accountability. A formalist regime advances the policy undergirding absolute immunity—which supports zealous officials³²⁵—while qualified immunity allows for greater accountability and constitutional innovation.³²⁶ Third, a formalist approach eliminates the derivative and arm of the court case lines³²⁷ and, thus, fits within the Supreme Court’s “sparing” approach to quasi-judicial immunity.³²⁸

³²⁰ See generally *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012). *Montoya* involved a set of facts similar to *Hendren*. The Eighth Circuit held it was both a violation of the Constitution and of clearly established law to “throw to the ground a nonviolent, suspected misdemeanant who was not threatening anyone, was not actively resisting arrest, and was not attempting to flee.” *Id.* at 873.

³²¹ See *supra* text accompanying notes 252–61.

³²² Editorial, *Judicial Omnipotence*, WASH. POST (Mar. 31, 1978), <https://www.washingtonpost.com/archive/politics/1978/03/31/judicial-omnipotence/251ed69d-bb44-4bf8-bdac-d2c9852ca5f9/>.

³²³ See *Johns*, *supra* note 8, at 267; *Coriell*, *supra* note 8, at 986–87.

³²⁴ See *supra* text accompanying notes 296–300.

³²⁵ See *Butz v. Economou*, 438 U.S. 478, 512 (1978) (“Absolute immunity is thus necessary to assure that [officials] can perform their respective functions without harassment or intimidation.”).

³²⁶ See *supra* text accompanying notes 251–61.

³²⁷ See *supra* notes 183–214 and accompanying text.

³²⁸ *Forrester v. White*, 484 U.S. 219, 224 (1988).

Although formalism contrasts with the Supreme Court’s “functional” approach, the Court’s language is used to expand judicial immunity, not cabin it.³²⁹ The expansion of quasi-judicial immunity suggests it is time to reconsider the wisdom of the Supreme Court’s methodology. Having sowed the seeds of confusion, the onus falls upon the Supreme Court³³⁰ to earnestly inquire into the propriety of its judicial immunity jurisprudence and consider a formalist regime. Without such an examination, the lower courts will remain split on factual contexts,³³¹ the policies of civil-rights litigation will continue to be disserved,³³² and courts will remain free to haphazardly apply judicial immunity.

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³²⁹ *Engebretson v. Mahoney*, 724 F.3d 1034, 1038 (9th Cir. 2013) (“More directly relevant here, the Court has extended absolute immunity in § 1983 cases where doing so would ‘free the *judicial process*’” (quoting *Burns v. Reed*, 500 U.S. 478, 494 (1991))); *id.* at 1039 (“An official must be ‘performing a duty functionally comparable to one for which officials were rendered immune at common law’” (quoting *Miller v. Gammie*, 335 F.3d 889, 897 (9th Cir. 2003))).

³³⁰ Although this Comment is directed at what the Supreme Court should do, Congress remains free to weigh in. There is precedent for this. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847 (codified as amended at 42 U.S.C. § 1983 (2012)). This amendment further protected judicial officers, amending 42 U.S.C. § 1983 to bar injunctive relief against judicial officers unless “a declaratory decree was violated or declaratory relief was unavailable.” 42 U.S.C. § 1983 (2012).

³³¹ See *supra* text accompanying notes 235–45; see also Johns, *supra* note 8, at 267 n.5; Lander, *supra* note 9, at 910–14.

³³² See *supra* Part III.A and text accompanying notes 247–61.

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