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A BLACK ROBE IS NOT A BIG TENT: THE IMPROPER EXPANSION OF ABSOLUTE JUDICIAL IMMUNITY TO NON-JUDGES IN CIVIL-RIGHTS CASES

*Margaret Z. Johns**

IN civil-rights cases, absolute judicial immunity has been extended to many defendants who are not judges, including psychologists, social workers, mediators, receivers, probation officers, and licensing and parole-board members. This expansion of the immunity defense seriously undermines civil-rights enforcement, denies victims a remedy, and hinders the development of constitutional standards. It departs from the Supreme Court's decisions circumscribing the scope of absolute judicial immunity and cannot be justified by either historical understandings or policy arguments. Yet, surprisingly, this unwarranted expansion of absolute immunity has been ignored by the Supreme Court and has escaped scholarly criticism.

This Article examines the extension of absolute judicial immunity to two categories of non-judges: (a) court adjuncts and appointees within the judicial system who are not decision-makers; and (b) decision-makers outside of the judicial system where procedural safeguards are lacking. It explains that these decisions fail to satisfy the Supreme Court's requirements for establishing the entitlement to judicial immunity. It then proposes that this unjustified expansion of judicial immunity should be corrected by the adoption of a qualified-immunity regime that protects honest officials from excessive litigation, while allowing the vigorous enforcement of civil-rights remedies.

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I. INTRODUCTION

To insure fearless and independent decision-making, the United States Supreme Court grants judges absolute immunity from civil-rights lawsuits by disgruntled litigants, trusting that procedural safeguards, including adversary proceedings and appellate review, will prevent and correct most constitutional violations.¹ In scores of cases, however, lower courts have extended this absolute immunity to an increasing number of non-judges, including psychologists, social workers, mediators, receivers, probation officers, and licensing and parole-board members. Under this extension of immunity, these officials escape liability even when they have maliciously violated constitutional protections. For example, in a child-custody case, a social worker who falsified the results of a plaintiff's

1. *Butz v. Economou*, 438 U.S. 478, 511-12 (1978); *Stump v. Sparkman*, 435 U.S. 349, 363-64 (1978); *Pierson v. Ray*, 386 U.S. 547, 554 (1967); see *infra* Part II.B.

evaluation and omitted positive information from the report was granted absolute immunity.² A court-appointed commissioner charged with selling property following a divorce received absolute immunity even when defectively advertising the sale, illegally participating in the sale, and lying to the court.³ A court-appointed receiver who was investigating a judgment debtor's assets received absolute judicial immunity after breaking into the debtor's girlfriend's storage locker and seizing \$5600 in cash, an oil painting and family jewelry.⁴ Other courts have refused to adopt this expansive application of absolute judicial immunity, which has created circuit splits.⁵ Surprisingly, this unwarranted expansion of the defense and the resulting conflicts have not been addressed by the Supreme Court and have rarely been considered in the scholarly literature.

This article argues that this expansion of absolute judicial immunity is wrong for three reasons. First, it misinterprets Supreme Court decisions that limit the application of the doctrine to the core judicial decision-making function.⁶ Second, it ignores the historical common-law application of the doctrine, which is the sole basis for extending judicial immunity to civil-rights cases.⁷ Third, it frustrates the enforcement of civil-rights laws by denying victims a remedy, failing to deter future constitutional violations, and hindering the development of constitutional standards.⁸

Instead of this misguided expansion of judicial immunity, this article proposes that the doctrine be confined to the judicial decision-making function where sufficient procedural safeguards offset the risk of constitutional violations. Absolute immunity should not be extended to officials who are not performing this core judicial function or who are not constrained by procedural safeguards comparable to those inherent in the judicial process. Rather, these officials should be afforded qualified immunity that shields them from liability so long as they do not violate clearly established laws that a reasonable officer would have known.⁹ This potent defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."¹⁰ The historical common-law immunity doctrine supports this application of qualified immunity. Moreover, it strikes the proper balance between shielding government officials from excessive exposure to civil litigation while

2. *Hughes v. Long*, 242 F.3d 121, 125-28 (3d Cir. 2001).

3. *Ashbrook v. Hoffman*, 617 F.2d 474, 476-77 (7th Cir. 1980).

4. *Davis v. Bayless*, 70 F.3d 367, 371-74 (5th Cir. 1995).

5. For example, circuits are split on the proper immunity to apply to child-protective workers, to parole-board members performing certain duties, to medical peer-review committee members, to medical-board members, and to land-use officials. See *infra* Part III.

6. See *infra* Part III.A.

7. See *infra* Part II.B.

8. See *infra* Part III.B.

9. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

10. *Burns v. Reed*, 500 U.S. 478, 494-95 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

protecting the constitutional rights of victims injured by clearly unconstitutional misconduct.

As background for understanding the current immunity doctrine and its proper scope, Part II briefly describes development of civil-rights liability under § 1983 and the Court's application of common-law judicial immunity to shield judges from civil-rights liability. Part III describes the improper expansion of judicial immunity to two categories of non-judges: (a) court adjuncts and appointees within the judicial system; and (b) decision-makers outside of the judicial system where procedural safeguards are lacking. Part IV argues that this unjustified expansion of judicial immunity should be corrected by the adoption of a qualified-immunity regime which protects honest officials from excessive litigation, while allowing the vigorous enforcement of civil rights remedies.

II. ABSOLUTE JUDICIAL IMMUNITY IN CIVIL-RIGHTS CASES

This Part reviews the doctrine of absolute judicial immunity as applied by the United States Supreme Court in civil-rights actions. Part I.A briefly outlines the development of civil-rights liability under § 1983. Part I.B describes the Court's application of absolute judicial immunity in § 1983 cases.

A. CIVIL-RIGHTS ENFORCEMENT UNDER § 1983

Until the Civil War, the constitutional protections of the Bill of Rights applied only to the federal government and not to the States.¹¹ Congress enacted the Thirteenth Amendment at the close of the Civil War to outlaw slavery and transform the Emancipation Proclamation into a constitutional right.¹² But, despite the Thirteenth Amendment, a reign of violence took hold in the South.¹³ In response, Congress adopted the first Reconstruction civil-rights statute in 1866.¹⁴ Doubting its constitutional authority to pass this statute,¹⁵ Congress proposed the Fourteenth Amendment in 1866, which forbids States from denying citizens due process and the equal protection of the law.¹⁶ In 1871, buttressed by the constitutional authority of the Fourteenth Amendment, Congress essentially re-adopted the 1866 civil-rights statute that is codified today at 42 U.S.C. § 1983.¹⁷ These events transformed the national government. As

11. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247-54 (1833).

12. U.S. CONST. amend. XIII.

13. See *Monroe v. Pape*, 365 U.S. 167, 174-79 (1961).

14. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away*, 60 N.Y.U. L. Rev. 1, 4-5 (1985).

15. *Id.* at 6-8.

16. U.S. CONST. amend. XIV; see ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 13 (2d ed. 2002); Blackmun, *supra* note 14, at 4-5.

17. 42 U.S.C. § 1983 was originally enacted as section 1 of the Ku Klux Klan Act of 1871, 17 Stat. 13, which was essentially a re-enactment of the 1866 civil-rights statute. See *Monroe*, 365 U.S. at 171, 185; see also SHELDON H. NAHMUD, *CIVIL RIGHTS & CIVIL LIB-*

Professor Tribe has explained, taken collectively, the Reconstruction Amendments, the Civil Rights Acts, and these new jurisdictional statutes, all emerging from the cauldron of the War Between the States, marked a revolutionary shift in the relationship among individuals, the States, and the Federal Government.¹⁸

Section 1983 provides in pertinent part:

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.¹⁹

Though a revolutionary shift, § 1983 was essentially dormant for nearly 100 years.²⁰ But in 1964, in *Monroe v. Pape*, the Court held that § 1983 applied despite the availability of a state remedy where police officers abused their official authority and violated Mr. Monroe's civil rights.²¹ Since *Monroe*, § 1983 has been the most important remedy for civil-rights violations by state and local officials.²² Furthermore, despite the absence of statutory authority, a decade later, the Court adopted a companion remedy for redressing violations by federal officials in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.²³ While the frequent use of these civil-rights remedies has not been without controversy,²⁴ it seems highly unlikely that the Court will return to an interpre-

ERTIES LITIGATION: THE LAW OF SECTION 1983 § 1.03 (2d ed. 1986) (explaining that § 1983 was patterned after the 1866 Civil Rights Act).

18. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 7-1 (3d ed. 2000).

19. 42 U.S.C. § 1983 (2000).

20. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968); see also HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *CIVIL RIGHTS LAW AND PRACTICE* ch. 2 (2001); Blackmun, *supra* note 14, at 19-20.

21. *Monroe v. Pape*, 365 U.S.165, 180, 191-92 (1961). In *Monroe*, thirteen Chicago police officers broke into the Monroe home without a warrant, roused the family, forced the husband and wife to stand naked while they ransacked the home, and detained Mr. Monroe at the police station for ten hours on "open charges" without allowing him to make a phone call or appear before a magistrate judge. *Id.*

22. 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, 497 (1992).

23. 403 U.S. 388, 397 (1971). In *Bivens*, acting without a warrant or probable cause, narcotics agents arrested plaintiff using excessive force in front of his wife and children, searched the family home, threatened to arrest the entire family, and strip-searched and booked him. *Id.* at 389. For purposes of the immunity defenses, the Court treats § 1983 and *Bivens* actions the same. See *Malley v. Briggs*, 475 U.S. 335, 340 n.2 (1986); *Butz v. Economou*, 438 U.S. 478, 504 (1978).

24. See Blackmun, *supra* note 14, at 5 (arguing that §1983 was an important vehicle for maintaining a federal forum for the protection of federal rights); John Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89-90 (1999) (arguing that courts interpret constitutional rights narrowly in order to reduce government exposure to money damages); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345-46, 348 (2000) (arguing that constitutional torts have a limited deterrent effect and are not economically justified); James K. Park, *Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 396,

tation that significantly diminishes their role in civil-rights enforcement given their lengthy and well-established jurisprudence.

B. ABSOLUTE JUDICIAL IMMUNITY IN 1983 ACTIONS

As § 1983 and *Bivens* actions came into frequent use, the Court considered whether common-law immunity defenses would be available to officials sued for civil-rights violations.²⁵ Nothing in the language of § 1983 suggests that Congress intended to extend official immunity defenses to defendants in civil-rights actions. And the legislative history does not demonstrate that Congress intended to preserve immunities.²⁶ Indeed, since the entire goal of the statute was to impose liability on state officials who violated constitutional rights, it seems doubtful that Congress intended to insulate officials who violate civil rights by granting them immunity.²⁷

However, according to the Court, the 1871 Congress presumably acted against the backdrop of the established common-law immunities.²⁸ In the Court's view, if Congress had intended to effect such a momentous change in the law as eliminating common law-immunities, that would be clear from the legislative history.²⁹ Since the legislative record fails to support this intent, the Court inferred from the congressional silence that Congress intended to retain the common-law immunities.³⁰ For this reason, the starting point for analyzing immunity defenses under § 1983 is the relevant common law in 1871 when § 1983 was adopted.³¹

In addressing immunity issues, the Court has balanced the benefits of civil liability—compensating victims and encouraging lawful conduct—

452-53 (2003) (arguing that monetary remedies for constitutional torts not only serve the goals of compensation and deterrence, but also provide individual remedies that help spur the development of constitutional rights, norms that regulate government action, and structural solutions to systemic problems).

25. See generally *Imbler v. Pachtman*, 424 U.S. 409, 410, 420 (1976) (applying absolute immunity in a civil-rights case against a prosecutor); *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (applying qualified immunity in a civil-rights case against an executive officer); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (applying absolute immunity in a civil-rights case against a judge).

26. Achtenberg, *supra* note 22, at 502-11; see *Pierson*, 386 U.S. at 559-60 (Douglas, J., dissenting); *Tenney v. Brandhove*, 341 U.S. 367, 382-83 (1951) (Douglas, J., dissenting); Note, *Liability of Judicial Officers Under § 1983*, 79 YALE L.J. 322, 325-28 (1969).

27. Achtenberg, *supra* note 22, at 502; see *Pierson*, 386 U.S. at 559-60 (Douglas, J., dissenting); *Tenney*, 341 U.S. at 382-83 (Douglas, J., dissenting); Note, *Liability of Judicial Officers Under § 1983*, *supra* note 26, at 325-28.

28. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-69 (1993); *Burns v. Reed*, 500 U.S. 478, 484-85 (1991); see *Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *Tenney*, 341 U.S. at 376.

29. *Buckley*, 509 U.S. at 268-69; *Burns*, 500 U.S. at 484-85; *Stump*, 435 U.S. at 356; *Tenney*, 341 U.S. at 376.

30. *Buckley*, 509 U.S. at 268-69; *Burns*, 500 U.S. at 484-85; *Stump*, 435 U.S. at 356; *Tenney*, 341 U.S. at 376. With respect to judicial immunity, it is not at all clear that the common law granted judges absolute immunity in 1871. See *infra* note 43. Nor is it clear that Congress intended to insulate judges from civil-rights liability. Indeed, to the extent that there is legislative history on the point, it suggests that Congress intended to impose liability on judges under the Civil Rights Act of 1866. *Id.*

31. *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997); see *Buckley*, 509 U.S. at 268; *Burns*, 500 U.S. at 484-85; *Imbler v. Pachtman*, 424 U.S. 409, 417-18 (1976).

against its undesirable consequences—intimidating decision-makers and undermining their independence.³² As the Court has explained,

[a]ware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court.³³

For this reason, the Court has been “quite sparing” in recognizing claims to absolute immunity.³⁴ Moreover, since the justification for continuing the immunity doctrines in civil-rights cases is the presumed intent of Congress in 1871, expansion of absolute immunity beyond its 1871 scope is unsupported.³⁵

While the Court grants absolute immunity sparingly, it has held that some officers perform special functions requiring a full exemption from liability.³⁶ In evaluating claims for absolute immunity, the Court presumes that “qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties”³⁷ and requires the proponent of the claim to “bear the burden of establishing the justification for such immunity.”³⁸ To determine whether that burden has been met, the Court undertakes “‘a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.’”³⁹ According to the Court, absolute immunity is “strong medicine” that is justified only when the threat to effective performance of office is “very great.”⁴⁰

The Court found that this “strong medicine” was justified to protect judges from civil liability.⁴¹ In the Court’s view, “[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction.”⁴² The doctrine reflects the need for an independent judiciary

32. *Forrester v. White*, 484 U.S. 219, 223 (1987).

33. *Id.* at 223-24.

34. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 n.4 (1993) (quoting *Burns v. Reed*, 500 U.S. 478, 486-87 (1991)); *Forrester*, 484 U.S. at 224.

35. See *Burns*, 500 U.S. at 497-98 (Scalia, J., concurring in part and dissenting in part); see also *Buckley*, 509 U.S. at 279-80 (Scalia, J., concurring).

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

37. *Antoine*, 508 U.S. at 432 n.4 (quoting *Burns*, 500 U.S. at 486-487).

38. *Id.* at 432.

39. *Id.* (quoting *Butz*, 438 U.S. at 508).

40. *Forrester v. White*, 484 U.S. 219, 230 (quoting *Sup. Ct. of Va. v. Consumers Union*, 792 F.2d 647, 660 (1986) (Posner, J., dissenting)).

41. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

42. *Id.* at 553-54. This conclusion is debated in the scholarly literature. Douglas K. Barth, *Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?*, 27 CASE W. RES. L. REV. 727, 732-33 n.29 (1977) (explaining that inferior court judges were liable for malicious acts during the nineteenth century); accord Note, *Liability of Judicial Officers Under § 1983*, *supra* note 26, at 325 n.25. Moreover, even assuming absolute judicial immunity had been solidly established in the English common law, it is not clear that it was adopted in the United States following independence. According to one scholar,

By 1871, thirteen states had adopted the absolute immunity rule; six states had ruled that judges were liable if they acted maliciously; in nine states courts had faced the issue but had not ruled clearly one way or the other; and nine states had apparently not yet faced the issue.

Id. at 326-27; see also Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 201, 237 (1980). This analysis has been criticized by Professor J. Randolph Block, who argues that the states had uniformly adopted judicial immunity for both superior and inferior judges when they performed judicial acts, but that inferior judges were liable if they acted with malice in performing administrative duties. In his view, the language in cases suggesting that absolute immunity did not apply to judicial acts of inferior-court judges was merely dicta. J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L. J. 879, 887-91, 899 (1980).

In terms of federal law, there was only one Supreme Court decision on the issue as of 1871 when § 1983 was adopted. *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868). In *Randall*, the Court stated that judges of general or superior courts "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly." *Id.* at 536. In other words, if a conscientious congressman undertook to research the federal law on judicial immunity on the eve of passage of § 1983, he would have found that qualified immunity applied. Note, *Liability of Judicial Officers Under § 1983*, *supra* note 26, at 326. Indeed, the first Supreme Court decision adopting absolute judicial immunity was decided the year after § 1983 was adopted. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872).

Moreover, the legislative history of § 1983 suggests that Congress intended to impose liability on judges for civil rights violations. *Pierson*, 386 U.S. at 562-63 (Douglas, J., dissenting.); Dan B. Kates, Jr., *Immunity of State Judges under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U. L. REV. 615, 620 n.19 (1970), quoted in Mark D. Thompson, Note, *Judges—Judicial Malpractice? Judicial Immunity, Injunctive Relief, and Attorney's Fees under the Civil Rights Statutes*, 14 MEM. ST. U. L. REV. 588, 591 n.24 (1984); see CONG. GLOBE, 42d Cong., 1st Sess. 365-66 (1871), quoted in Thompson, *supra*, at 591 n.24; Barth, *supra*, at 738. Congressman Lewis of Kentucky thought that under [§ 1983] "the judge of a state court, though acting under oath of office, is made liable to a suit in Federal court and subject to damages for his decision against a suitor." Congressman Thurmond of South Carolina pointed out that under the 1866 act

there have been two or three instances already under the civil rights bill of State judges being taken into the United States district court, sometimes upon indictment for the offense . . . of honestly and conscientiously deciding the law to be as they understood it to be . . . Is [section 1] intended to perpetuate that? Is it intended to enlarge it? Is it intended to extend it so that no longer a judge sitting on the bench to decide causes can decide them free from any fear except that of impeachment, which never lies in the absence of corrupt motive? Is that to be extended so that every judge of a State may be liable to be dragged before some Federal judge to vindicate his opinion and to be mulct [penalized] in damages if that Federal judge shall think the opinion was erroneous? That is the language of this bill.

CONG. GLOBE, 42d Cong., 1st Sess. App. 217 (1871), quoted in *Pierson*, 386 U.S. at 562 (Douglas, J., dissenting) and Thompson, *supra*, at 592 n.24. As Justice Douglas explained, "The position that Congress did not intend to change the common-law rule of judicial immunity ignores the fact that every member of congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable." *Pierson*, 386 U.S. at 561. "In light of the sharply contested nature of the issue of judicial immunity it would be reasonable to assume that the judiciary would have been expressly exempted from the wide sweep of the section, if Congress had intended such a result." *Id.* at 563. Indeed, no one supporting § 1983 contradicted the view of its opponents that judges would be held liable. Kates, *supra*, at 620 n.19, quoted in Thompson, *supra*, at 592 n.24.

While it is not my intent to criticize the adoption of absolute judicial immunity for state and federal judges, others have argued that absolute immunity should be replaced by qualified immunity and modified in some other respects. See generally Barth, *supra*, at 729; Kates, *supra*, at 615; Joseph Katten, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941 (1977); Michael Robert King, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*,

and finality in judicial proceedings.⁴³ Based on this historical doctrine, the Court imposes two requirements for the immunity to attach: (1) the challenged conduct must be a “judicial act”; and (2) it must not have been performed in the “complete absence of all authority.”⁴⁴

These two requirements have been expansively interpreted. Specifically, a “judicial act” is one that is a function normally performed by a judge and within the expectations of the parties.⁴⁵ Under the interpretation announced in *Stump v. Sparkman*, a judge performed a judicial act in ordering the sterilization of a young girl on the *ex parte* application of her mother.⁴⁶ In the Court’s view, entering a court order on the request of a party qualifies as a judicial act since entering orders is a normal judicial function and the mother expected the judge to enter it.⁴⁷

But not everything a judge does in the course of employment is a judicial act. The Court has stressed that the purpose of judicial immunity is to protect the adjudicative function from exposure to harassing litigation by disappointed litigants who are protected by the alternative remedy of appellate review.⁴⁸ Where the adjudicative function is not at issue, judicial immunity does not apply.⁴⁹ For example, personnel actions taken by a judge are characterized as administrative functions, and therefore outside the protection of judicial immunity.⁵⁰ For this reason, where a judge dismissed a probation officer and discriminated against her on the basis of sex, the Court held that his conduct was not protected by absolute immunity.⁵¹ Likewise, when judges promulgate rules for professional conduct, they are not protected by judicial immunity because that function is administrative, not adjudicative.⁵²

For the second requirement, complete absence of jurisdiction, the Court has held that acting in *excess* of jurisdiction is not sufficient to defeat absolute immunity.⁵³ As the Court explained, if a criminal court

20 ARIZ. L. REV. 421 (1978); K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95 (1995) (proposing personal liability for judges); Irene Merker Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833 (1978) (arguing that correctability on appeal should be required for absolute immunity to apply); Frank Way, *A Call for Limits to Judicial Immunity: Must Judges Be King in their Courts?*, 64 JUDICATURE 390 (1981).

43. Joseph Romagnoli, *What Constitutes a Judicial Act for Purposes of Judicial Immunity*, 53 FORDHAM L. REV. 1503, 1503 (1985).

44. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

45. *Id.* at 362; Romagnoli, *supra* note 43, at 1503.

46. *Stump*, 435 U.S. at 360-63. The girl was told that she was having an appendectomy and found out the truth only after she was married and unable to conceive children. *Id.* at 353. Justices Stewart and Powell dissented on the grounds that the *ex parte* procedure denied the plaintiff all of the procedural protections associated with the formal judicial process. *Id.* at 364-70 (Stewart, J. & Powell, J., dissenting).

47. *Id.* at 362.

48. *Forrester v. White*, 484 U.S. 219, 226-27 (1988).

49. *See id.* at 227-28.

50. *Id.* at 229-30.

51. *Id.*

52. *See Sup. Ct. of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980).

53. *Stump*, 435 U.S. at 356-57.

judge convicted a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.⁵⁴ On the other hand, if a probate judge with jurisdiction limited to wills and estates were to try a criminal case, she would be acting in the clear absence of jurisdiction and would not be entitled to absolute immunity.⁵⁵ But in cases where the judge has a broad grant of general jurisdiction to hear "all cases at law and in equity whatsoever" the jurisdiction requirement is satisfied despite the absence of a specific common law or statutory basis for the exercise of jurisdiction.⁵⁶ Thus, in *Stump*, the judge of a court of general jurisdiction did not act in complete absence of all authority although no specific provision authorized the sterilization order.⁵⁷

Under its functional approach to the immunity doctrines, the Court has extended the protection of judicial immunity to government officials who perform the function of a judge when the proceedings provide comparable procedural safeguards.⁵⁸ Specifically, in *Butz v. Economou*, the Court held that federal administrative-law judges were entitled to judicial immunity.⁵⁹ The Court concluded that federal agency proceedings were functionally the same as judicial proceedings, and therefore administrative-law judges should have their independence protected by absolute immunity.⁶⁰ This expansion of judicial immunity was justified because agency proceedings provide "many of the same safeguards as are available in the judicial process."⁶¹ These included: adversary proceedings; a trier of fact insulated from political pressure; the right to present evidence; a transcript of proceedings; a statement of findings and conclusions on all issues of fact, law, or discretion; and the right to agency or judicial review.⁶² As the Court explained, "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."⁶³ The Court doubted that this extension of immunity would undermine civil-rights protections since "most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side-effects inevitably associated with exposing judges to personal liability."⁶⁴

The Court, however, has refused to extend judicial immunity to officers within the judicial system who do not perform judicial functions or conduct proceedings outside of the judicial system that lack comparable procedural safeguards. For example, in *Antoine v. Byers & Anderson, Inc.*,

54. *Id.* at 357 n.7 (citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 352 (1872)).

55. *Id.*

56. *See id.* at 357-59.

57. *Id.* at 359-60.

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

59. *Id.* at 513-14.

60. *Id.*

61. *Id.* at 513.

62. *Id.* at 516.

63. *Id.* at 514.

64. *Forrester v. White*, 484 U.S. 219, 227 (1988).

the Court refused to extend absolute judicial immunity to court reporters.⁶⁵ While the Court recognized the importance and difficulty of the court reporter's job, it stressed that "the 'touchstone' for the [judicial immunity] doctrine's applicability has been 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.'"⁶⁶ As the Court explained, court reporters perform an administrative function and "do not exercise the kind of judgment that is protected by the doctrine of judicial immunity."⁶⁷ In rejecting the claim of absolute immunity, the Court reaffirmed its consistent view that absolute immunity is to be sparingly granted, that qualified immunity is presumed to provide sufficient protection from excessive litigation, and that the person seeking absolute immunity bears the burden of showing that it is justified.⁶⁸

Similarly, in *Cleavinger v. Saxner*,⁶⁹ the Court rejected the argument that absolute judicial immunity protected members of a prison's discipline committee.⁷⁰ The Court acknowledged that the members exercised some functions analogous to the judicial function in conducting hearings, receiving evidence, and determining guilt or innocence.⁷¹ But it found that the absence of safeguards comparable to those of the judicial process foreclosed the application of absolute judicial immunity.⁷² Specifically, the members were not independent, professional hearing officers like administrative-law judges, but were "prison officials . . . temporarily diverted from their usual duties."⁷³ Although minimal safeguards were provided,⁷⁴ the Court found that the process contained few of the safeguards provided in the Administrative Procedure Act under consideration in *Butz*.⁷⁵ Moreover, the Court stressed the potency of the qualified-immunity defense, which merely requires the official to comply with clearly established constitutional law to avoid civil liability.⁷⁶

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. They have also disre-

65. 508 U.S. 429, 438 (1993).

66. *Id.* at 435-36.

67. *Id.* at 436-37.

68. *Id.* at 432 n.4.

69. 474 U.S. 193 (1985).

70. *Id.* at 206. Justice Rehnquist, joined by Chief Justice Burger and Justice White, dissented. In their view, the realities of the prison environment justified the extension of absolute immunity to members of the discipline committee. *Id.* at 208-12.

71. *Id.* at 203.

72. *Id.* at 206.

73. *Id.* at 203-04.

74. *Id.* at 206 ([Safeguards included] "the qualifications for committee service; prior notice to the inmate; representation by a staff member; the right to present certain evidence at the hearing; the right to be present; the requirement for a detailed record; the availability of administrative review at three levels (demonstrated by the relief obtained on review by these respondents at the first two levels); and the availability of ultimate review in federal court under 28 U.S.C. § 2241.").

75. *Id.*

76. *Id.* at 207.

garded the *Stump* requirement that judicial immunity be limited to judicial acts in the performance of the judicial function.⁷⁷ They have disregarded the *Antoine* rule that judicial immunity should not be extended to participants in the judicial system who fail to meet the touchstone requirement of resolving disputes between parties or authoritatively adjudicating private rights.⁷⁸ And, they have ignored the *Cleavinger* rule against extending judicial immunity to decision-makers outside of the judicial system where the proceedings lack safeguards comparable to those of the judicial process.⁷⁹

III. THE IMPROPER EXPANSION OF ABSOLUTE JUDICIAL IMMUNITY IN CIVIL-RIGHTS CASES

This Part will discuss the wrongful expansion of absolute judicial immunity in two categories of cases: (1) civil-rights actions against court adjuncts and appointees within the judicial system; and (2) civil-rights actions against decision-makers in non-judicial proceedings lacking the safeguards of the judicial process. In both, the lower courts have failed to follow the Supreme Court's decisions limiting the application of the doctrine to the historical boundaries of absolute judicial immunity in 1871, the sole basis for its application in § 1983 actions.

A. THE IMPROPER EXPANSION OF JUDICIAL IMMUNITY TO COURT APPOINTEES AND ADJUNCTS

A number of lower courts have granted absolute judicial immunity to

77. See *infra* Part III.A. For example, some lower courts have extended judicial immunity to psychiatrists for providing medical opinions. See, e.g., *Miller v. Gammie*, 335 F.3d 889, 898 (9th Cir. 2003) (considering whether a therapist in a child-custody proceeding should enjoy absolute immunity); *Hughes v. Long*, 242 F.3d 121, 125-27 (3d Cir. 2001) (considering whether unlicensed psychologist evaluating foster children should receive absolute immunity); *Hunter v. Clark*, No. 04-CV-0920SC, 2005 WL 1130488, at *2 (W.D.N.Y. May 5, 2005) (dismissing § 1983 claim against court-appointed psychiatrist who determined that plaintiff was not competent to stand trial).

78. See *infra* Part III.A. For example, some lower courts have extended judicial immunity to social workers and probation officers. *Brown v. Newberger*, 291 F.3d 89, 94 (1st Cir. 2002) (evaluating the immunity of social workers and concluding "that the information gathering, reporting, and recommending tasks of both are similar in nature and purpose to those of a guardian ad litem and qualify to confer absolute quasi-judicial immunity"); *Hughes v. Long*, 242 F.3d 121, 126-28 (3d Cir. 2001) (holding that social workers enjoyed absolute judicial immunity for custody evaluations); *Wilson v. Rackmill*, 878 F.2d 772, 775-76 (3d Cir. 1989) ("Probation and parole officers are entitled to absolute immunity when they are engaged in adjudicatory duties.").

79. See *infra* Part III.B. For example, some lower courts have extended judicial immunity to parole boards. *Johnson v. R.I. Parole Bd. Members*, 815 F.2d 5, 8 (1st Cir. 1987) ("We join those circuit courts which have addressed this issue and conclude that the defendant parole board members are entitled to absolute immunity from liability for damages in a § 1983 action for actions taken within the proper scope of their official duties."); *Robinson v. Fahey*, 366 F. Supp. 2d 368, 371 (E.D. Va. 2005) ("All of the defendants are members of the Virginia Board of Parole who are being sued on account of decisions they made in determining whether Robinson should be granted parole. Consequently, they are entitled to absolute immunity . . .").

court adjuncts and appointees, including medical experts,⁸⁰ child-protective workers,⁸¹ receivers,⁸² mediators,⁸³ and parole and probation officers.⁸⁴ As the following discussion shows, these defendants fail to qualify for absolute immunity because they cannot establish the required 1871 counterpart, they do not perform judicial acts in the discharge of the judicial function, and they are not constrained by procedural safeguards required to offset the danger of unchecked constitutional violations.

1. Mental-Health Experts

Courts have frequently been required to determine which immunity defense applies to court-appointed medical experts in child abuse and custody proceedings⁸⁵ and criminal prosecutions where competency is at issue.⁸⁶ Of the circuit courts to have addressed the issue in published de-

80. *See infra* Part III.A.1.

81. *See infra* Part III.A.2.

82. *See infra* Part III.A.3.

83. *See infra* Part III.A.4.

84. *See infra* Part III.A.5.

85. *See e.g.*, *Miller v. Gammie*, 335 F.3d 889, 898-900 (9th Cir. 2003) (reh'g en banc) (considering whether a therapist in a child-custody proceeding should enjoy absolute immunity); *Hughes v. Long*, 242 F.3d 121, 125-27 (3d Cir. 2001) (considering whether an unlicensed psychologist evaluating foster children should receive absolute immunity).

86. *See e.g.*, *Hunter v. Clark*, No. 04-CV-0920SC, 2005 WL 1130488, at *2 (W.D.N.Y. May 5, 2005) (dismissing a § 1983 claim against court-appointed psychiatrists who determined that the plaintiff was not competent to stand trial); 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 (2004); *see also Morstad v. Dep't of Corr.*, 147 F.3d 741, 744 (8th Cir. 1998) (holding that a psychologist who evaluated a convicted sex offender in connection with parole revocation proceeding was entitled to absolute immunity).

cisions, the Third,⁸⁷ Seventh,⁸⁸ Eighth,⁸⁹ and Tenth Circuits⁹⁰ grant these experts absolute judicial immunity. While the Ninth Circuit previously extended absolute immunity to court-appointed psychiatrists,⁹¹ a recent decision suggests that medical experts do not normally perform judicial or prosecutorial functions that enjoyed absolute immunity at common

87. *Hughes*, 242 F.3d at 126-28 (applying absolute judicial immunity to a court-appointed child custody evaluator and unlicensed psychologist appointed by the evaluator on the grounds that they functioned as arms of the court); *D.T.B. v. Farmer*, 114 F. App'x 446, 447 (3d Cir. 2004) (holding that a court-appointed psychologist was entitled to absolute immunity under *Hughes v. Long*); *McArdle v. Tronetti*, 961 F.2d 1083, 1085 (3d Cir. 1992) (holding that a prison doctor who conducted a psychiatric exam on an inmate at the court's request enjoyed absolute judicial immunity); see also *Williams v. Consovoy*, 333 F. Supp. 2d 297, 302 (D.N.J. 2004) (finding that a private psychologist conducting a psychological assessment at the behest of Parole Board (a "quasi-judicial body itself immune from § 1983 actions") was entitled to absolute judicial immunity); *Pierson v. Members of Delaware County*, No. 99-3435, 2000 WL 486608, at *4 (E.D. Pa. April 25, 2000) ("Dr. Wiesner made his [competency] evaluation at the request of the court, and his report was furnished to the court. Dr. Wiesner was thus functioning as an arm of the court, and as an integral part of the judicial process he is protected by the same judicial immunity that protects the judge who requested the evaluation."); *P.T., A.T. & H.T. v. Richard Hall Cmty. Mental Health Care Ctr.*, 364 N.J. Super. 460, 462 (N.J. Super. Ct. App. Div. 2003) (affirming a lower-court decision applying absolute judicial immunity to a court-appointed psychologist).

88. *Duzynski v. Nosal*, 324 F.2d 924, 929 (7th Cir. 1963) (holding that a mental-health evaluator was entitled to judicial immunity).

89. *Morstad v. Dep't of Corr. and Rehab.*, 147 F.3d 741, 744 (8th Cir. 1998) ("Because the court directed [the psychologist] to evaluate [appellant] and to testify at [appellant's] probation revocation hearing, we conclude that [the psychologist] was performing functions essential to the judicial process . . . [and was] entitled to absolute immunity."); *Moses v. Parwatikar, M.D.*, 813 F.2d 891, 892 (8th Cir. 1987), *disapproved on other grounds*, *Burns v. Reed*, 500 U.S. 478, 496 (1991) (holding that absolute immunity protected a court-appointed psychiatrist who conducted a competency examination for both his "quasi-judicial function" and his function as a witness); *Myers v. Morris*, 810 F.2d 1437, 1466-67 (8th Cir. 1987) ("[n]onjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process have absolute immunity for damage claims arising from their performance of the delegated functions.").

90. *Turney v. O'Toole*, 898 F.2d 1470, 1474 (10th Cir. 1990) (holding that a psychologist was entitled to absolute immunity for performing a quasi-judicial role); *Martinez v. Roth*, No. 94-2206, 1995 WL 261127, at *3 (10th Cir. Apr. 26, 1995) (holding that a court-appointed psychologist assisting the court in determining the best interest of the child was entitled to absolute quasi-judicial immunity because his service was "integral to the judicial process").

91. *Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970).

law.⁹² The Sixth Circuit applies absolute witness immunity.⁹³ Research has disclosed no published decisions of the First, Second, Fourth, Fifth, Tenth, and District of Columbia Circuits; however, unpublished decisions, district-court decisions, and state-court decisions in those circuits generally apply absolute immunity.⁹⁴ In my view, medical experts appointed to assist the courts, where medical evaluations are required, should *never*

92. See *Miller v. Gammie*, 335 F.3d 889, 898-900 (9th Cir. 2003) (reh'g en banc). In *Miller*, the court considered whether absolute immunity applied when a social worker and therapist placed a 12-year-old boy who was a known sexual predator in a foster home with two small children without disclosing his dangerous tendencies. *Id.* at 893. In the initial decision, the court followed its prior decisions granting blanket absolute immunity to the defendants. *Id.* at 894. On rehearing, the en banc panel concluded that its prior circuit authority conflicted with the functional approach adopted by the Supreme Court in *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993) and *Kalina v. Fletcher*, 522 U.S. 118 (1997). *Id.* at 896-98. It remanded the case for the district court to determine the functions that the defendants performed since those functions were unclear from the pleadings. *Id.* at 898. It indicated that if the therapist provided only treatment and diagnosis “[s]he apparently is not alleged to have performed any quasi-judicial or prosecutorial function that enjoyed absolute immunity at common law, unless discovery discloses that she performed other functions more directly related to the prosecution of the dependency proceedings.” *Id.* at 898-99.

93. *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) (holding that a court-appointed psychiatrist and psychologist were entitled to absolute immunity as witnesses because they provided information to the court which is the function of a witness). In my opinion, the court is correct in concluding that the proper functional analogy is to that of a witness; but the court erred in extending witness immunity outside of the judicial phase of the proceeding.

94. *First Circuit*: *Watterson v. Page*, 987 F.2d 1, 7 (1st Cir. 1993) (affirming the lower court’s dismissal of a claim against a court-appointed psychologist on other grounds, recognizing the difficulty of the absolute-immunity question, and indicating that qualified immunity is presumed to apply except for testimony in the judicial phase of the proceeding where absolute witness immunity applies); *Lalonde v. Eissner*, 405 Mass. 207, 211-13 (1989) (extending absolute quasi-judicial immunity to a court-appointed psychiatrist in a negligence action brought under Massachusetts law but citing federal immunity decisions). *Second Circuit*: *Kalman v. Carre*, 352 F. Supp. 2d 205, 207-10 (D. Conn. 2005) (applying absolute judicial immunity in action under the Americans with Disabilities Act against a court-appointed psychiatrist by applying the holdings in civil-rights cases under section 1983); *Hunter v. Clark*, No. 04-CV-0920SC, 2005 WL 1130488, at *2 (W.D.N.Y. May 5, 2005) (dismissing a § 1983 claim against court-appointed psychiatrists who determined that the plaintiff was not competent to stand trial). *Fourth Circuit*: *Williams v. Rappoport*, 699 F. Supp. 501, 507 (D. Md. 1988) (“[Mental health experts] exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties.”). *Fifth Circuit*: *Todd v. Angeloz*, 844 So. 2d 316, 321 (La. Ct. App. 2003) (finding a court-appointed expert entitled to absolute judicial immunity for conduct in divorce proceedings (citing *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987) (granting therapist absolute immunity in a federal civil rights action))); *Delcourt v. Silverman*, 919 S.W.2d 777, 781-83 (Tex. 1996) (holding under Texas law court-appointed psychologists are entitled to absolute immunity, citing numerous federal civil rights cases); *S.T.J. v. P.M.*, 556 So. 2d 244, 248 (La. Ct. App. 1990) (applying absolute judicial immunity in state-law claim based on court-appointed expert’s conduct in custody dispute and citing numerous federal authorities). *Eleventh Circuit*: *Dolin v. West*, 22 F. Supp. 2d 1343, 1349 (M.D. Fla. 1998) (“Absolute immunity protects witnesses, court-appointed psychologists, and guardians ad litem who are sued in their individual capacities under section 1983” (citing *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984))). *District of Columbia Circuit*: *Schinner v. Strathmann*, 711 F. Supp. 1143, 1143-44 (D.D.C. 1989) (granting court-appointed psychiatrist judicial immunity because “defendant was acting in a judicial capacity when he interviewed the plaintiff to assist a judge in evaluating a plaintiff’s competency.”).

receive absolute judicial immunity because there is no 1871 counterpart, they do not perform the required decision-making function, and when conducting investigations and examinations, they are not subject to the procedural safeguards of the judicial process.

As the Court has repeatedly admonished, absolute immunity should rarely be granted,⁹⁵ and it should be limited to functions that were afforded absolute immunity under the common law in 1871.⁹⁶ Under the Court's functional approach, "the 'touchstone' for the [judicial immunity] doctrine's applicability has been 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.'"⁹⁷ Specifically, in the first case applying judicial immunity to a § 1983 action, the Court explained:

It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.⁹⁸

To confine the judicial immunity doctrine to the protection of the judicial function, the Court requires that the challenged conduct satisfy the requirements for a "judicial act."⁹⁹ To determine whether the judge performed a judicial act, the Court considers two factors relating to "the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties; i.e., whether they dealt with the judge in his judicial capacity."¹⁰⁰ Examples of judicial acts include sitting as trial judge and sentencing defendants,¹⁰¹ entertaining and approving petitions submitted by litigants,¹⁰² disbarring an attorney as a sanction for contempt of court,¹⁰³ ordering a police officer to bring an attorney into the courtroom in connection with a pending case,¹⁰⁴ issuing a search warrant,¹⁰⁵ and entering a default judgment.¹⁰⁶

On the other hand, many functions essential to the adjudication of cases are not considered judicial acts. For example, the Supreme Court has held that jury selection, which could be performed by a private person, is not a judicial act.¹⁰⁷ And in *Forrester v. White*, the Court held that

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

96. See *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976).

97. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993).

98. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

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

100. *Id.* at 362; *Romagnoli*, *supra* note 43, at 1503.

101. See *Pierson*, 386 U.S. at 553.

102. See *Stump*, 435 U.S. at 352-53, 364.

103. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354 (1872).

104. See *Mireles v. Waco*, 502 U.S. 9, 10 (1991).

105. *Burns v. Reed*, 500 U.S. 478, 492 (1991).

106. *Simmons v. Sacramento County Super. Ct.*, 318 F.3d 1156, 1159 (9th Cir. 2003).

107. *Ex parte Virginia*, 100 U.S. 339, 348 (1880).

a judge's decision to dismiss a probation officer was not a judicial act justifying absolute immunity.¹⁰⁸ As the Court explained, in discharging the officer, the judge was acting in an administrative capacity.¹⁰⁹ "Those acts—like many others involved in supervising court employees and overseeing the efficient operation of the court—may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative."¹¹⁰

Turning to cases involving mental-health experts, the threshold judicial-act requirement cannot be met. Mental-health experts do not perform judicial acts in the discharge of the judicial function. They do not resolve disputes between parties or authoritatively adjudicate private rights—the touchstone for the judicial-immunity defense.¹¹¹ They investigate and examine medical conditions, prepare reports of their findings, and testify in court to provide expert opinions. These are not acts normally performed by a judge and within the expectations of the parties. Indeed, were a judge to conduct a medical examination to form an opinion of the case—much less testify about the facts—it would constitute judicial misconduct.¹¹² As one commentator observed, "Appellate courts frown on judicial investigations, not only because they present an appearance of partiality, but also because they may provide the judge with personal knowledge of disputed facts, which is a specific ground for judicial disqualification."¹¹³

Since medical experts do not perform judicial functions, we must consider what functions they do perform to determine which immunity defense to apply. Under the Court's functional approach, we consider the function the defendant has performed and whether there is a historical basis for applying absolute immunity when § 1983 was adopted.¹¹⁴ Here, of course, neither psychiatrists nor psychologists were in the minds of the 1871 Congress when it adopted § 1983.¹¹⁵ The closest analogy for these functions would be those of an investigator and witness. As the Court has long held, the investigative function receives qualified, not absolute, immunity.¹¹⁶ Witnesses, on the other hand, receive absolute immunity

108. 484 U.S. 219, 220-21 (1988).

109. *Id.* at 228.

110. *Id.* at 229

111. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993).

112. See Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1366-69 (2000) (explaining that independent judicial investigations violate the provision of MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990)).

113. *Id.* at 1367-68 (footnotes omitted).

114. *Malley v. Briggs*, 475 U.S. 335, 339-40 (1985) ("Our general approach to questions of immunity under § 1983 is by now well established Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts.")

115. EDWARD SHORTER, *A HISTORY OF PSYCHIATRY: FROM THE ERA OF ASYLUM TO THE AGE OF PROZAC* (1997).

116. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("[W]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither

for testimony during the judicial phase of the proceeding.¹¹⁷ But the application of absolute witness immunity does not extend to nontestimonial conduct nor to unsworn statements, not limited by the rules of evidence, and not subject to cross-examination.¹¹⁸ These limitations reflect the Court's insistence that absolute immunity can be justified only when it is accompanied by sufficient procedural safeguards.¹¹⁹

This approach was adopted in 2000 in the unreported a district court case of *Metoyer v. Connick*.¹²⁰ In *Metoyer*, the plaintiff was convicted of manslaughter, but later exonerated by newly discovered evidence.¹²¹ He then sued the doctor who provided the expert testimony on which the original conviction was based.¹²² The court held that the doctor was entitled to absolute witness immunity for his trial testimony, but not for his nontestimonial actions in gathering and interpreting evidence in the course of performing a medical examination.¹²³ The court held that this conduct was more closely analogous to that of a police officer in investigating a crime and was therefore subject to qualified immunity.¹²⁴ In my view, this analysis correctly follows the Supreme Court's functional approach to absolute immunity by distinguishing the judicial function from investigative and testimonial functions. Unfortunately, it has not been adopted by any of the circuit courts addressing the issue.

In short, medical experts are not entitled to absolute judicial immunity because they do not perform a judicial function, do not engage in judicial acts, and are not subject to the procedural safeguards of the judicial process. The functions they perform as investigators and witnesses entitle them to qualified immunity only, except for their sworn testimony in the

appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'").

117. *Briscoe v. Lahue*, 460 U.S. 325, 345-46 (1983) ("In short, the rationale of our prior absolute immunity cases governs the disposition of this case. In 1871, common-law immunity for witnesses was well settled. The principles set forth in *Pierson v. Ray* to protect judges and in *Imbler v. Pachtman* to protect prosecutors also apply to witnesses, who perform a somewhat different function in the trial process but whose participation in bringing the litigation to a just—or possibly unjust—conclusion is equally indispensable.").

118. *Kalina v. Fletcher*, 522 U.S. 118, 127-31 (1997) (refusing to apply absolute immunity where a prosecutor executed an affidavit under oath to obtain an arrest warrant); *Malley*, 475 U.S. at 340-41 (holding that a police officer who served as the complaining witness to procure an arrest warrant was not entitled to absolute witness immunity); *Brisco*, 460 U.S. at 342 ("A police officer on the witness stand performs the same function as any other witness; he is subject to compulsory process, takes an oath, responds to questions of direct examination and cross examination, and may be prosecuted subsequently for perjury.")

119. See *Cleavinger v. Saxner*, 474 U.S. 193, 207-08 (1985) (refusing to grant prison-discipline committee members absolute immunity because of the lack of procedural safeguards); *Butz v. Economou*, 438 U.S. 478, 516 (1978) (granting administrative-law judges absolute immunity because the procedural safeguards were comparable to those of the judicial process).

120. No. 99-3019, 2000 WL 863133, at *7 (E.D. La. June 26, 2000).

121. *Id.* at *1.

122. *Id.* at *2.

123. *Id.* at *6; see *Paine v. City of Lompoc*, 265 F.3d 975, 981 (9th Cir. 2001) (holding that witness immunity does not shield non-testimonial acts like fabricating evidence).

124. *Metoyer*, 2000 WL 863133, at *7.

judicial phase of the proceeding where they are entitled to absolute witness immunity.

2. Child-Protective Workers

While some circuit splits have developed on the issue, many circuits extend absolute judicial immunity to child-protective workers including guardians ad litem (GALs)¹²⁵ and social workers. For the six circuits with published decisions, the courts have unanimously held that GALs are entitled to absolute judicial immunity for activities within the scope of their appointment.¹²⁶ Specifically, the First,¹²⁷ Third,¹²⁸ Fourth,¹²⁹

125. A GAL is “appointed to represent an infant . . . [and] is regarded as an officer or agent of the court He or she is charged with the duty of protecting the rights and best interest of the infant, and, when appropriate, making recommendations to the court on the minor’s behalf.” 42 AM. JUR. 2d *Infants* § 183 (2003), quoted in Inga Larent, Note, “*This One’s for the Children: The Time Has Come to Hold GALs Responsible for Negligent Injury and Death to their Charges*,” 52 CLEV. ST. L. REV. 655, 656 n.2 (2004-05).

126. See *infra* notes 127-32.

127. *Brown v. Newberger*, 291 F.3d 89, 94 (1st Cir. 2003) (applying absolute immunity in a case involving a sexual abuse investigation and stating, “[w]e conclude that the information gathering, reporting, and recommending tasks . . . are similar in nature and purpose to those of a guardian ad litem and qualify to confer absolute quasi-judicial immunity.”); *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989) (“[Absolute] immunity applies no matter how erroneous the act may have been, how injurious its consequences, how informal the proceeding, or how malicious the motive.”); see also *Marr v. Me. Dept. of Human Services*, 215 F. Supp. 2d 261, 269 (D. Me. 2002) (extending quasi-judicial absolute immunity to GAL stating, “[The GAL’s] duties included meeting with the child, investigating, and reporting to the court the best interests of the child. In performing these duties, [the GAL] carried out a function that was integral to the judicial process.” However, “A guardian ad litem acting outside the scope of his/her authorized duties is not protected by quasi-judicial immunity for those acts.”); *Tower v. Leslie-Brown*, 167 F. Supp. 2d 399, 404 (D. Me. 2001) (granting absolute quasi-judicial immunity to a GAL who “willfully or recklessly caused harm to . . . children by failing to perform her statutory duties”); *Snyder v. Talbot*, 836 F. Supp. 19, 21 (D. Me. 1993) (applying absolute immunity to GAL); *Archambault Through Archambault v. Printzlau*, No. 87-1384-MC, 1990 WL 117906, at *1 (D. Mass. Aug. 3, 1990) (“[G]uardian ad litem is a quasi-judicial official and entitled to absolute immunity for actions within the scope of the appointment.”); *Sarkisian v. Benjamin*, 820 N.E.2d 263, 266 (Mass. App. Ct. 2005) (granting absolute immunity from claims arising from reports filed by attorney. “Because all of the child’s claims for damages arise out of duties performed by [the court-appointed attorney acting] as a guardian ad litem or in a quasi judicial capacity, we conclude that she is entitled to absolute immunity from the child’s damages claims.”); *Vondra v. Crown Pub. Co.*, No. 012199F, 2002 WL 31379948, at *5 (Mass. Super. Sept. 12, 2002) (applying absolute judicial immunity to a GAL); *Mclarnon v. Mass. Gen. Hosp.*, No. 002910C, 2001 WL 1772034, at *1 (Mass. Super. Ct. Oct. 9, 2001) (applying absolute judicial immunity to GAL).

128. *Hughes v. Long*, 242 F.3d 121, 126-28 (3d Cir. 2001) (using a “functional approach,” a court-appointed child-custody evaluator was found to have acted as “the arms of the court” similar to a court-appointed psychologist (or similar to a GAL) and, thus, entitled to judicial immunity. Furthermore, the *custody evaluator* appointed an unlicensed psychologist. The court also granted judicial immunity to both the unlicensed psychologist and the licensed psychologist overseeing her.); *Gardner by Gardner v. Parson*, 874 F.2d 131, 146 (3d Cir. 1989) (applying absolute immunity to functions of a GAL).

129. *Fleming v. Asbill*, 42 F.3d 886, 889 (4th Cir. 1994) (holding that a GAL enjoys absolute immunity); see also *Lewittes v. Lobis*, No. 04 Civ.0155 JSR AJP, 2004 WL 1854082, at *12 (S.D.N.Y. Aug. 19, 2004) (holding that a GAL receives absolute immunity); *Gutman v. Crawford*, No. 2:02CV388, 2002 WL 32589033, at *2 (E.D. Va. July 1, 2002) (holding that a GAL receives absolute immunity); *Dalenko v. Wake County Dept. of*

Sixth,¹³⁰ Seventh,¹³¹ and Ninth Circuits¹³² have all reached this conclusion. In addition, district-court decisions and state-court decisions in the Second,¹³³ Fifth,¹³⁴ Eighth,¹³⁵ Tenth,¹³⁶ Eleventh,¹³⁷ and District of Columbia¹³⁸ circuits are in accord. The circuits are split, however, on the question of the applicable immunity for social workers in a child abuse

Human Services, 578 S.W.2d 599, 604 (N.C. Ct. App. 2003); *Falk v. Sadler*, 533 S.E.2d 350, 353 (S.C. Ct. App. 2000) (holding that a GAL receives absolute judicial immunity).

130. *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) (holding that a GAL receives absolute judicial immunity).

131. *Scheib v. Grant*, 22 F.3d 149, 157 (7th Cir. 1994) (holding that a GAL receives absolute judicial immunity).

132. *Babcock v. Tyler*, 884 F.2d 497, 501-02 (9th Cir. 1989) (holding that a GAL was entitled to absolute immunity); *see also Ward v. San Diego County Dep't of Soc. Serv.*, 691 F. Supp. 238, 241 (S.D. Cal. 1988) (“[GAL] is entitled to absolute quasi-judicial immunity for her actions as guardian ad litem.”); *Widoff v. Wiens*, 45 P.3d 1232, 1235 (Ariz. Ct. App. 2002) (“[GAL is] entitled to judicial immunity.”); *West v. Osborne*, 34 P.3d 816, 821 (Wash. Ct. App. 2001) (“[GAL] was acting as an arm of the court at all times. Accordingly, she is entitled to [quasi-judicial] immunity.”).

133. *Lewittes v. Lobis*, 2004 WL 1854082, at *12 (S.D.N.Y. 2004) (holding that a GAL was entitled to “quasi-judicial immunity”); *Janicki v. Subbloie*, No. CV0102778485, 2002 WL 819100, at *3 (Conn. Super. Ct. Apr. 13, 2002); *Bluntt v. O'Connor*, 737 N.Y.S.2d 471, 478 (N.Y. App. Div. 2002) (accord); *Bradt v. White*, 740 N.Y.S.2d 777, 778-79 (N.Y. Sup. Ct. 2002) (accord).

134. *Delcourt v. Silverman*, 919 S.W. 2d 777, 781 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (“When judges delegate their authority or appoint others to perform services for the court, the judicial immunity that attaches to the judge may follow the delegation or appointment.”).

135. *Myers v. Morris*, 810 F.2d 1437, 1466-67 (8th Cir. 1987) (“Nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process have absolute immunity for damage claims arising from their performance of the delegated functions.” (court-appointed therapist)); *Kent v. Todd County*, No. Civ. 99-44 JRT RLE, 2001 WL 228433, at *7 (D. Minn. Feb. 21, 2001) (“[C]ourt-appointed GALs and custody evaluators are among those quasi-judicial officers who qualify for absolute quasi-judicial immunity.”); *Pirila v. Jantzen*, No. A03-149, 2003 WL 22136802, at *1 (Minn. Ct. App. Sept. 16, 2003) (“Because appellant has not alleged that the respondents exceeded their authority as guardians ad litem, they are entitled to absolute immunity.”); *Tindell v. Rogosheske*, 421 N.W.2d 340, 342 (Minn. Ct. App. 1988) (“Although absolute immunity may occasionally cause hardship, guardians ad litem must be protected against civil litigation challenging the performance of their duties.”); *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 385-86 (Mo. Ct. App. 1993) (holding quasi-judicial immunity extends to statutorily mandated guardians ad litem in child-custody proceedings as to conduct within scope of guardian’s duties).

136. *Short by Oosterhous v. Short*, 730 F. Supp. 1037, 1039 (D. Colo. 1990) (“[A] court appointed guardian ad litem in service of the public interest in the welfare of children is squarely within the judicial process. Acting as such, a court appointed guardian ad litem is thus entitled to absolute quasi-judicial immunity.”); *Collins ex rel. Collins v. Tabet*, 806 P.2d 40, 47 (N.M. 1991) (“[If GAL] did carry out his responsibilities as an ‘arm of the court,’ assisting the court in determining the reasonableness of the settlement reached by Perrine and the attorneys for the Hospital defendants, [GAL] is absolutely immune from liability for the negligence which the jury found.”).

137. *Dolin ex rel. N.D. v. West*, 22 F. Supp.2d 1343, 1349 (M.D. Fla. 1998) (“Absolute immunity protects witnesses, court appointed psychologists, and guardians ad litem who are sued in their individual capacities under § 1983.”).

138. *Ficken v. Golden*, No. Civ.A. 04-0350 (RMU), 2005 WL 692019, at *6 (D.D.C. Mar. 24, 2005) (“The complaint fails to set forth allegations of Abod’s actions beyond the scope of his court-appointed role. Accordingly, the court concludes that Abod functioned as an agent of the Superior Court and therefore is immune from suit.”); *Arntz v. Smith*, Nos. 94-7049, 94-7050, 1994 WL 474998, at *1 (D.C. Cir. July 1, 1994) (“[T]he court-appointed conservator . . . and guardian of Mary Arntz . . . is immune from suit for damages resulting from her quasi-judicial activities.”); *see also* George S. Mahaffey, Jr., *Role*

and a child custody cases.¹³⁹ A number of circuits have extended them absolute immunity derived from absolute judicial immunity or absolute prosecutorial immunity.¹⁴⁰ Other circuits have concluded that social workers should receive qualified immunity.¹⁴¹ As the following discussion explains, these child-protective workers cannot establish an 1871 common-law counterpart to support the application of absolute judicial immunity because they do not perform the required decision-making function. Moreover, except for in-court testimony where witness immunity applies, their activities are not governed by procedural protections comparable to those of the judicial process. For these reasons, they are not entitled to the protection of absolute judicial immunity.

a. Guardians ad Litem

Turning first to the cases involving GALs, the courts have almost achieved unanimity in concluding that GALs should enjoy absolute judicial immunity.¹⁴² The courts have reasoned that the GALs function as arms of the court in performing a function that is integral to the judicial

Duality and the Issue of Immunity for the Guardian Ad Litem in the District of Columbia, 4 J. L. & FAM. STUD. 279 (2002).

139. The area is complicated by the fact that social workers perform several distinct functions. For purposes of this article, it is not necessary to address cases where social workers perform functions wholly unconnected to a judicial proceeding. Thus, for example, this discussion will not include cases where the social workers conduct investigations and take children into custody before legal proceedings begin. *See, e.g.,* *Roe v. Tex. Dep't of Prot. and Regulatory Serv.*, 299 F.3d 395, 400 (5th Cir. 2002); *Hatch v. Dep't for Children*, 274 F.3d 12, 24 (1st Cir. 2001); *Millspaugh v. County Dep't. of Pub. Welfare of Wabash County*, 937 F.2d 1172, 1176 (7th Cir. 1991); *Whisman ex rel. Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997). Another line of cases involves social workers who are executing court orders for the removal of children. *See, e.g.,* *Vosburg v. Dep't of Soc. Services*, 884 F.2d 133, 135 (4th Cir. 1989); *LaPlaca v. Johnson*, No. 87 C 20479, 1990 WL 304323, at *12 (N.D. Ill. Nov. 21, 1990). These cases are also beyond the scope of this article.

140. *See, e.g.,* *Vosburg*, 884 F.2d at 135 (holding that social workers are entitled to absolute immunity based on their performance as the prosecutorial function); *Hughes v. Long*, 242 F.3d 121, 125 (3d Cir. 2001) (holding that social workers enjoyed absolute judicial immunity).

141. *Frazier v. Bailey*, 957 F.2d 920, 931 (1st Cir. 1992) (granting qualified immunity to social workers who conducted investigation or counseling with respect to child-abuse allegations); *Millspaugh v. County Dept. of Public Welfare of Wabash County*, 937 F.2d 1172, 1176 (7th Cir. 1991) (“Social workers must settle for qualified immunity when taking initial custody of children.”); *Spielman v. Hildebrand*, 873 F.2d 1377, 1383 (10th Cir. 1989) (“[Social workers’] nontestimonial actions . . . [are] not integral to the judicial process and therefore not entitled to absolute immunity.”).

142. *See supra* notes 127-32. Our research found one Texas appellate-court case refusing to apply absolute immunity to a GAL. *Byrd v. Woodruff*, 891 S.W.2d 689, 708 (Tex. App.—Dallas 1994, no writ) (“If we cloak the guardian ad litem with judicial immunity, the minor has no recourse for an inadequate representation of her interests. The system’s attempt to maintain the finality of judgments and protect the minor from the next friend’s adverse interests would deny the minor any protection against acts of incompetence or bad faith committed by her guardian ad litem. Consequently, we conclude that policy requires this Court to hold the guardian ad litem accountable to the minor.”). A New Mexico case held that a GAL was entitled to absolute immunity for conducting an investigation pursuant to a court order, but not for acting as the child’s advocate. *Collins v. Tabet*, 806 P.2d 40, 50 (N.M. 1991). *See* *Larent, supra* note 125.

process.¹⁴³ They often describe this as a “quasi-judicial function.”¹⁴⁴ Courts have also found that public policy supports the application of absolute immunity in order to ensure that GALs function without fear of subsequent litigation.¹⁴⁵

But in reaching this conclusion, the courts have failed to consider whether the GALs satisfy the two requirements for applying absolute judicial immunity: (1) the performance of judicial acts in the discharge of the judicial function; (2) the presence of procedural protections comparable to those of judicial proceedings. In fact, neither requirement is met. First, GALs do not perform judicial acts. GALs are not decision-makers who resolve disputes, issue orders, or enter judgments. As in the case of court-appointed medical experts, conducting an investigation and reporting the results to a court are not judicial acts.¹⁴⁶ GALs do perform a different function than medical experts when they are furthering the best interests of the child.¹⁴⁷ However, representing a party’s best interest in court is more analogous to an advocacy function than a judicial function.¹⁴⁸ It would violate the rules of judicial conduct for a judge to represent the best interests of one of the parties in court.

Second, many of the GAL’s activities are not subject to the protections of the judicial process. Again, as in the case of medical experts, GALs would enjoy absolute witness immunity to the extent they are testifying under oath in the judicial phase of the proceeding.¹⁴⁹ Nevertheless, in conducting their out-of-court investigations and preparing their reports and recommendations, they are not subject to the constraints of the judicial process and therefore are not entitled to the protection of absolute judicial immunity.

b. Social Workers

In contrast to the federal court unanimity in GAL cases, the circuits have taken different approaches to analyzing the applicable immunity for social workers in child-abuse and custody cases. A number of circuits have held that social workers perform the function of prosecutors in initi-

143. *Hughes v. Long*, 242 F.3d 121, 126-28 (3d Cir. 2001); *Gardner ex rel. Gardner v. Parson*, 874 F.2d 131, 146 (3d Cir. 1989); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984).

144. *See Brown v. Newberger*, 291 F.3d 89, 94 (1st Cir. 2003).

145. *Janicki v. Subbloie*, No. CV0102778485, 2002 WL 819100, at *3 (Conn. Super. Ct. Apr. 3, 2002).

146. *See supra* notes 111-13 and accompanying text.

147. *See Marr v. Me. Dept. of Human Serv.*, 215 F. Supp. 2d 261, 269 (D. Me. 2002); *Leary v. Leary*, 627 A.2d 30, 36-37 (Md. 1993); *Bradt v. White*, 740 N.Y.S. 2d 777, 779 (N.Y. Sup. Ct. 2002).

148. *See Collins v. Tabet*, 806 P.2d 40, 48 (N.M. 1991) (“Where the guardian ad litem is acting as an advocate for his client’s position—representing the pecuniary interest of the *child* instead of looking into the fairness of the settlement (for the child) on behalf of the *court*—the basic reason for conferring quasi-judicial immunity on the guardian does not exist. In that situation, he or she functions in the same way as does any other attorney for a client—advancing the interests of the client, not discharging (or assisting in the discharge of) the duties of the court.”).

149. *See supra* notes 117-19 and accompanying text.

ating and pursuing child-protective proceedings and therefore enjoy absolute prosecutorial immunity for those activities.¹⁵⁰ Other cases have extended absolute judicial immunity to social workers.¹⁵¹ As the following discussion shows, there is no historical basis for extending absolute judicial immunity to social workers. Under the Court's historical and functional approach to the immunity doctrine, qualified immunity is the appropriate defense except when social workers are testifying in the judicial phase of the proceedings when they enjoy absolute witness immunity.

By analogy to prosecutorial and judicial functions, the lower courts have granted social workers absolute immunity for many functions. Specifically, the Third Circuit held that where a social worker acted as an arm of the court in evaluating a child-custody case, the social worker was entitled to absolute judicial immunity.¹⁵² And where a social worker initiated child dependency proceedings, she performed a prosecutorial function and therefore enjoyed absolute prosecutorial immunity.¹⁵³ Under this

150. See e.g., *Doe v. Lebbos*, 348 F.3d 820, 825-26 (9th Cir. 2003) (holding social workers enjoyed absolute immunity for initiating and pursuing dependency proceedings); *Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) ("By analogy [to prosecutors], social workers are absolutely immune only when they are acting in their capacity as *legal advocates*—initiating court actions or testifying under oath—not when they are performing administrative, investigative, or other functions."); *Miller v. City of Philadelphia*, 174 F.3d 368, 376 n.6 (3d Cir. 1999) (holding social workers enjoyed absolute immunity when performing the prosecutorial function); *Millsbaugh v. Co. Dep't of Pub. Welfare*, 937 F.2d 1172, 1175-76 (7th Cir. 1991) (holding social workers enjoyed absolute immunity when performing prosecutorial function); *accord Vosburg v. Dep't of Soc. Servs.*, 884 F.2d 133, 135 (4th Cir. 1989).

Interestingly, the cases define the scope of the prosecutorial function differently. In *Doe*, the court included the investigation in connection with initiating a proceeding as a prosecutorial function, while *Holloway* held that investigative activities should be distinguished from the prosecutorial function. Moreover, *Vosburg* included initiating the proceeding as a prosecutorial function, but *Millsbaugh* analogized seeking an initial order to a police function. While the issue of prosecutorial immunity is beyond the scope of this article, I have previously argued that prosecutorial immunity should be entirely replaced by a qualified immunity regime. See Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 56 (2005).

151. *Brown v. Newberger*, 291 F.3d 89, 94 (1st Cir. 2002) (evaluating the immunity of social workers and concluding "that the information gathering, reporting, and recommending tasks of both are similar in nature and purpose to those of a guardian ad litem and qualify to confer absolute quasi-judicial immunity"); *Hughes v. Long*, 242 F.3d 121, 126-28 (3d Cir. 2001) (holding social workers enjoyed absolute judicial immunity for custody evaluations).

152. *Hughes*, 242 F.3d at 128; *accord Brown v. Newberger*, 291 F.3d 89, 94 (1st Cir. 2003) ("We conclude that the information gathering, reporting, and recommending tasks . . . are similar in nature and purpose to those of a guardian ad litem and qualify to confer absolute quasi-judicial immunity."); *Rippy ex rel. Rippy v. Hattaway*, 270 F.3d 416, 422 (6th Cir. 2001) (holding social workers entitled to absolute judicial immunity when failing to ensure children were appointed guardians ad litem); *Richmond v. Catholic Soc. Serv.*, No. 246833, 2004 WL 1416266, at *1 (Mich. Ct. App. June 24, 2004) ("[Absolute quasi-judicial] immunity extends to social workers in regard to activities involving the initiating and monitoring of child placement proceedings and to placement recommendations in cases where there is *close oversight of the recommendations by the court.*") (emphasis added).

153. *Miller*, 174 F.3d at 376 (holding social workers are entitled to absolute prosecutorial immunity for initiating child dependency proceedings); *accord Ernst v. Child and Youth Servs. of Chester County*, 108 F.3d 486, 493 (3d Cir. 1997); *Salyer v. Patrick*, 874 F.2d 374, 377-78 (6th Cir. 1989) (holding social workers function as quasi-prosecutors and

approach, social workers enjoy absolute immunity for many of their functions.

For example, in *Hughes v. Long*, the Third Circuit considered which immunity to apply in a bitter child-custody proceeding where the trial court ordered a clinical social worker to conduct a full custody evaluation and to report the results of psychological evaluations to the court.¹⁵⁴ The social worker interviewed the family, administered parenting tests, arranged for psychological testing, and made recommendations to the court regarding custody arrangements.¹⁵⁵ According to the complaint, the social worker falsified results of the evaluation, omitted positive information from the report, withheld data from another consulting psychologist, and lied during custody proceedings.¹⁵⁶ The trial court granted the social worker prosecutorial immunity or, alternatively, witness immunity.¹⁵⁷

The Third Circuit affirmed the judgment, but on the basis of absolute judicial immunity.¹⁵⁸ According to the court, judicial immunity, "has given functionaries in the judicial system the ability to perform their tasks and apply their discretion without the threat of retaliatory § 1983 litigation."¹⁵⁹ In reaching this conclusion, the court relied on cases extending judicial immunity to guardians ad litem as well as court-appointed doctors and psychologists who function as "arms of the court."¹⁶⁰ In the court's view, since the social worker's service was integral and essential to the judicial process, the workers acted as "arms of the court" and were entitled to judicial immunity.¹⁶¹

In my opinion, this analysis overlooks the Supreme Court's approach to the immunity doctrines. While the Supreme Court has not addressed the immunity defense available to social workers, Justice Thomas, in an opinion dissenting from the denial of a petition for certiorari, stressed the need to evaluate social worker immunity in historical context.¹⁶² The case at issue extended absolute immunity to social-workers "due to their quasi-prosecutorial function."¹⁶³ As Justice Thomas explained:

thus enjoy absolute immunity); *Milspaugh v. County Dept. of Pub. Welfare of Wabash County*, 937 F.2d 1172, 1175 (7th Cir. 1991) (holding absolute immunity applied to a social worker who initiated proceedings); *Myers v. Morris*, 810 F.2d 1437, 1452 (8th Cir. 1987) (holding social workers' initiation of proceedings was analogous to prosecutorial function); see *Johns*, *supra* note 150 (arguing that the doctrine of absolute prosecutorial immunity should be reconsidered and replaced by a qualified-immunity regime); see also *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984) (holding that initiating proceeding is not a judicial act). *But see* *Howell v. Hofbauer*, 123 F. Supp. 2d 1178, 1183 (N.D. Iowa 2000) (initiating contempt proceedings held to be judicial act).

154. *Hughes*, 242 F.3d at 123.

155. *Id.* at 126.

156. *Id.* at 123.

157. *Id.* at 124.

158. *Id.* at 126.

159. *Id.* at 125.

160. *Id.* at 126.

161. *Id.* at 126-27.

162. *Hoffman v. Harris*, No. 92-6161, 1993 WL 369140, at *2 (6th Cir. Sept. 21, 1993), *cert. denied*, 511 U.S. 1060, 1062-63 (1994) (Thomas, J., dissenting, joined by Scalia, J.).

163. *Id.*

The courts that have accorded absolute immunity to social workers appear to have overlooked the necessary historical inquiry; none has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871. If they did not, absolute immunity is unavailable to social workers under § 1983. This assumes, of course, that “social workers” (at least as we now understand the term) even existed in 1871. If that assumption is false, the argument for granting absolute immunity becomes (at least) more difficult to maintain.¹⁶⁴

Even if the historical concerns could be overcome, Justice Thomas was skeptical of the analogy to the prosecutorial function. In his view, social workers, who participate in *civil* family law proceedings, were not necessarily entitled to prosecutorial immunity since that doctrine is limited to “those functions ‘intimately associated with the judicial phase of the *criminal process*.’”¹⁶⁵ As he concluded, “We should address the important threshold question whether social workers are, under *any* circumstances, entitled to absolute immunity.”¹⁶⁶

Even assuming these concerns could be overcome, the argument that social workers are entitled to absolute *judicial* immunity must fail. Like medical experts and GALs, social workers cannot satisfy the two requirements for judicial immunity, the performance of judicial acts in the discharge of the judicial function and the presence of procedural safeguards comparable to judicial proceedings. Social workers do not perform judicial acts in the discharge of a judicial function.¹⁶⁷ For example, in *Hughes*, the case workers were not responsible for resolving disputes or adjudicating private rights, the touchstone for finding the conduct to be a judicial function.¹⁶⁸ Rather, their job included interviewing witnesses, administering parenting tests, conducting psychological examinations, and preparing expert reports.¹⁶⁹ These tasks are not judicial acts since they are not activities normally performed by a judge within the judicial function and expectation of the parties.¹⁷⁰ They are investigative functions that receive qualified, not absolute, immunity.¹⁷¹ Indeed, if a judge were to conduct such an *ex parte* investigation or proffer an expert opinion in court, those acts would constitute judicial misconduct.¹⁷² Moreover, these out-of-court activities are not subject to the procedural constraints of the judicial process. While the social worker’s sworn in-court testimony is entitled to witness immunity,¹⁷³ this immunity would not extend to non-testamentary, out-of-court misconduct, nor to unsworn statements that are not governed by the rules of evidence nor subject to cross examination.

164. *Id.* at 1062.

165. *Id.* at 1063 (quoting *Imbler v. Pachtman* 424 U.S. 409, 430 (1976) (emphasis provided by Justice Thomas)).

166. *Hoffman*, 511 U.S. 1060, 1063 (1994) (Thomas, J., dissenting).

167. *Hughes v. Long*, 242 F.3d 121, 126-28 (3d Cir. 2001); see Tammy Lander, *supra* note 86, at 919-20 (arguing that the *Hughes* decision correctly extends judicial immunity to court-appointed mental-health professionals).

168. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993).

169. *Hughes*, 242 F.3d at 126.

170. See *Stump v. Sparkman*, 435 U.S. 349, 362-63 (1978).

171. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).

172. See *supra* notes 116-18 and accompanying text. In fact, where a judge conducted a private interview with a child in a custody matter over a parent’s objection, the Wyoming Supreme Court concluded that her due-process rights were violated. *KES v. CAT*, 107 P.3d 779, 786 (Wyo. 2005). As the court explained, “When a judge interviews a child without the consent of a parent, that parent is deprived of due process inasmuch as he or she is unable to hear the evidence, and is not given a opportunity to explain or rebut statements made by the child.” *Id.* at 784. If the judge could not constitutionally perform this investigation, it defies logic to conclude that a social worker is performing a judicial act when she does so.

173. See *Watterson v. Page*, 987 F.2d 1, 7 (1st Cir. 1993) (applying witness immunity to a psychologist); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) (granting witness immunity to a psychologist and psychiatrist).

In short, child-protective workers do not qualify for absolute judicial immunity. There is no historical counterpart in the common law of 1871 to justify the expansion of judicial immunity to the child-protective function. Moreover, child-protective workers do not perform the core judicial function of resolving disputes between parties within a procedural framework comparable to that of the judicial process. For these reasons, they fail to overcome the presumption that qualified immunity applies.

3. *Receivers*

A number of lower courts have concluded that absolute judicial immunity applies to court-appointed receivers in §1983 cases.¹⁷⁴ But they have failed to analyze whether the receivers performed a judicial act subject to the protections of the judicial process. This analysis reveals that receivers do not qualify for absolute immunity. Receivers typically investigate property ownership, run businesses and agencies, and sell assets.¹⁷⁵ None of these activities are normally performed by judges within the expectations of the parties; and none are constrained by the protections of the judicial process. Some examples illustrate why judicial immunity should not be extended to court-appointed receivers.

A Fifth Circuit decision provides a striking example of the erroneous extension of judicial immunity to receivers.¹⁷⁶ In *Bayless*, a doctor found liable in a malpractice action failed to pay the judgment.¹⁷⁷ The court appointed a receiver to seize assets to satisfy the judgment.¹⁷⁸ Allegedly acting as the agent for the receiver, the attorney for the judgment-creditor searched the home of the doctor's girlfriend and her daughter, rifled through her underwear, and read her personal mail.¹⁷⁹ He left the home with several pairs of her underwear.¹⁸⁰ The receiver and attorney also searched the girlfriend's leased storage unit, seizing her family jewelry and an oil painting.¹⁸¹ The receiver and lawyer contended that the searches and seizures were authorized by the receiver's appointment to take possession of non-exempt property and by court's orders authorizing

174. *New Ala. Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1303 (9th Cir. 1989); *Moses v. Parwatarikar*, 813 F.2d 891, 893 (8th Cir. 1987); *Property Mgmt. & Inv., Inc. v. Lewis*, 752 F.2d 599, 602-03 (11th Cir. 1985); *Boullion v. McClanahan*, 639 F.2d 213 (5th Cir. 1981); *Ashbrook v. Hoffman*, 617 F.2d 474, 476 (7th Cir. 1980); *T & W Inv. Co. v. Kurtz*, 588 F.2d 801, 802 (10th Cir. 1978); *Kermit Contr. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 2-3 (1st Cir. 1976); *Bradford Audio Corp. v. Pious*, 392 F.2d 67, 72-73 (2d Cir. 1968); *see also Huszar v. Zeleny*, 269 F. Supp. 2d 98 (E.D. N.Y. 2003); *Murray v. Gilmore*, 226 F. Supp. 2d 179, 185-86 (2002); *Walker Mgmt., Inc. v. Affordable Communities of Mo.*, 912 F. Supp. 455 (E.D. Mo. 1996); *Brown v. Costello*, 905 F. Supp. 65, *aff'd*, 101 F.3d 685 (N.D.N.Y. 1995).

175. BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 739 (2d ed. 1995) (defining a receiver as "'a person appointed by a court . . . for the protection or collection of property.' Usually, the *receiver* administers the property of a bankrupt, or property that is the subject of litigation, pending the outcome of a lawsuit.").

176. *Davis v. Bayless*, 70 F.3d 367, 369 (5th Cir. 1995).

177. *Id.* at 371.

178. *Id.*

179. *Id.* at 371-72.

180. *Id.* at 372.

181. *Id.*

the searches.¹⁸² These women were not parties in the receivership proceeding and received no notice that an order allowing the search of their property had been issued.¹⁸³

The court held that the receiver, but not the attorney, was entitled to absolute immunity derived from the appointing court's judicial immunity.¹⁸⁴ The court found that since the court appointing the receiver and authorizing the search did not act in the "clear absence of all jurisdiction," absolute judicial immunity applied.¹⁸⁵ Because of this, the receiver who was acting under the court's authority was entitled to derivative immunity.¹⁸⁶ But it denied this derivative immunity to the creditor's attorney who acted as a private party seeking to satisfy her client's judgment.¹⁸⁷

In extending immunity to the receiver, the court disregarded the functional approach to judicial immunity that requires a judicial act subject to procedural protections. Rather, the court held that so long as the judge who appointed the receiver enjoyed judicial immunity, the receiver did as well.¹⁸⁸ But this conclusion ignores the distinct functions they performed. Certainly searching private premises and confiscating personal property are not acts normally performed by a judge, nor are such acts within the expectation of the parties. The conduct does not involve the resolution of disputes and the procedural safeguards of the courtroom are not present at the plaintiff's storage locker and private home, where there is no judge, no counsel, no record, and no appellate review.

Another example highlighting the over-expansive application of absolute judicial immunity to receivers is *Murray v. Gilmore*.¹⁸⁹ In response to a lawsuit seeking improvements in public housing, the court appointed a receiver to reorganize and restructure the public housing agency.¹⁹⁰ The receiver's duties included establishing and implementing personnel policies.¹⁹¹ Plaintiff Murray, an employee of the agency, brought suit alleging civil-rights violations after being terminated by the receiver.¹⁹² The district court held that the receiver was absolutely immune in the civil-rights action because he enjoyed absolute immunity as a judicial officer since he acted under the authority of the court order in implement-

182. *Id.* at 372, 374-75.

183. *Id.* at 372.

184. *Id.* at 373-75.

185. *Id.* at 374.

186. *Id.* at 373-74.

187. *Id.* at 374-75.

188. Actually, the court seems somewhat confused about the doctrine of absolute judicial immunity in stating that receivers "share the appointing judge's *absolute immunity* provided that the challenged actions are taken in *good faith* and within the scope of the authority granted to the receiver." *Id.* at 373 (emphasis added). Absolute immunity is a complete defense that precludes liability for actions taken in bad faith.

189. 231 F. Supp. 2d 82 (D.D.C. 2002).

190. *Id.* at 84.

191. *Id.* at 84-85.

192. *Id.* at 86-87.

ing personnel policies.¹⁹³

However, the court's analysis is erroneous because it fails to confine absolute judicial immunity to the judicial function of resolving disputes between parties. Running a housing authority—whether pursuant to a court order or not—is simply not something a judge normally does within the expectations of the parties. Indeed, even when a judge fires an employee, it is not a judicial act, but rather an administrative act protected by qualified immunity, not absolute judicial immunity.¹⁹⁴ In other words, the *Murray* court expanded judicial immunity to protect the receiver for an administrative act for which the judge himself would not have enjoyed absolute judicial immunity.

Rather than extending absolute judicial immunity to court-appointed receivers, the courts should follow the Supreme Court's admonition that judicial immunity be limited to the core decision-making function.¹⁹⁵ Other functions, albeit essential to the administration of justice, enjoy only qualified immunity.¹⁹⁶ Perhaps the most apt example of this limiting principle is *Ex parte Virginia*.¹⁹⁷ In *Ex parte Virginia*, the Court considered whether a state-court judge enjoyed judicial immunity from criminal liability for racial discrimination in jury selection in violation of a civil-rights act passed shortly after the Civil War along with § 1983.¹⁹⁸ The judge claimed that jury selection was a judicial act and therefore he was immune from liability.¹⁹⁹ Certainly, jury selection is integral to the judicial process and essential to the administration of justice. But the Court rejected this argument finding that jury selection was not a judicial act.²⁰⁰ As the Court explained, jury selection could be performed by a private person as well as a judge.²⁰¹ The Court drew the analogy to "a sheriff holding an execution, in determining upon what piece of property he will make a levy."²⁰² This analogy is a close fit to the function of a court-appointed receiver, charged with locating, managing, and selling assets. These are administrative, not judicial functions, and therefore should enjoy only qualified immunity.

4. Mediators

The District of Columbia Circuit extended absolute judicial immunity to mediators and case evaluators when their services are performed in a

193. *Id.* at 88-89.

194. *Forrester v. White*, 484 U.S. 219, 220-21 (1988); *see also* *MEEK v. County of Riverside*, 183 F.3d 962 (9th Cir. 1999) (holding that judicial immunity does not apply to the firing of subordinate judicial personnel).

195. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-37 (1993) (holding the touchstone of the judicial function is adjudicating private rights).

196. *Forrester*, 484 U.S. at 229 (explaining that even essential administrative acts do not enjoy absolute judicial immunity).

197. 100 U.S. 339 (1880).

198. *Id.* at 348.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

court-sponsored program.²⁰³ The Ninth Circuit reached the same conclusion for court-appointed, child-custody mediators.²⁰⁴ Surprisingly, this is one of the few extensions of judicial immunity to have received significant scholarly comment.²⁰⁵ While some commentators favor absolute immunity for mediators and others favor liability, the arguments are extensively developed and need not be repeated here. Rather than reweighing the pros and cons of mediator immunity, my point is simply that mediators fail to meet the established requirements of the Court's functional approach to judicial immunity in section 1983 actions.

To meet the burden of showing entitlement to absolute judicial immunity, the defendant must establish that she performs judicial acts in the discharge of the judicial function with adequate procedural safeguards.²⁰⁶ The functions performed by mediators do not satisfy either requirement. Mediation is the voluntary resolution of the dispute between parties with the assistance of a mediator; which has no power to resolve the dispute. As Professor Hughes explained, mediators do not perform the judicial function because: "The mediator, in contrast to the arbitrator of judge, has *no* power to impose an outcome on disputing parties."²⁰⁷ In other words, mediators do not perform the critical judicial function of "resolving disputes between parties, or of authoritatively adjudicating private rights."²⁰⁸

Moreover, since mediation is intentionally less formal and more flexible than the judicial process, it does not provide comparable procedural protections. Specifically, in the typical mediation, the rules of evidence do not apply, cross examination is not available, no formal record of the

203. *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (extending absolute quasi-judicial immunity to mediators).

204. *Meyers v. Contra Costa County Dep't of Soc. Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987).

205. Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731, 732-33 (1984); Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47, 52-53 (1986); Brian Dorini, *Institutionalizing ADR: Wagshal v. Foster and Mediator Immunity*, 1 HARV. NEG. L. REV. 185, 186-87 (1996); Caroline Turner English, *Stretching the Doctrine of Absolute Quasi-Judicial Immunity: Wagshal v. Foster*, 63 GEO. WASH. L. REV. 759 (1995); Amanda K. Esquible, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 RUTGERS L. J. 131, 148 (1999); Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107, 125-26 (2004); Cassandra E., Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629, 648-49 (1997); Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 200 (2003); Joseph B. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85, 86 (1986); Kevin C. Gray, Comment, *Torts—Wagshal v. Foster: Mediators, Case Evaluators, and Other Neutrals—Should They Be Absolutely Immune?*, 26 U. MEM. L. REV. 1229, 1249-50 (1996).

206. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-436 (1993) (describing the touchstone of the judicial function as adjudicating private rights); *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (refusing to extend absolute judicial immunity to a proceeding that lacked procedural safeguards).

207. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 123 (3d ed. 1999).

208. *Antoine*, 508 U.S. at 435-36.

proceedings is maintained, and appellate review is not available.²⁰⁹ Indeed, the proceeding is confidential.²¹⁰ In contrast to judicial proceedings that are open to public scrutiny and appellate review, mediation is a secret process lacking formal procedural safeguards.²¹¹

In short, mediators are not entitled to common-law absolute judicial immunity because they do not perform judicial functions and because the mediation process lacks the procedural protections of the judicial process, including appellate review. While, as some commentators have argued that policy reasons may support the adoption of mediator immunity, application of judicial immunity to mediators was not present in the 1871 common law as required for immunity in § 1983 actions.²¹²

5. *Parole and Probation Officers*

The Supreme Court has left open the question of which immunity defense applies to parole and probations officers.²¹³ In addressing this issue, the lower courts have properly adopted a functional approach and apply qualified immunity when the officer is performing law-enforcement functions.²¹⁴ Unfortunately, some circuits have applied absolute immunity to parole and probation officers when they investigate and prepare presentencing reports.²¹⁵ As the following discussion will show, this extension of absolute judicial immunity is improper because the investigation and preparation of presentence reports are not judicial acts accompanied by procedural protections comparable to those of the judicial process. Moreover, there is no historical common-law counterpart to support this expansion of absolute judicial immunity.

Following the Supreme Court's functional approach to the immunity defenses, the lower courts have properly held that many functions performed by parole and probation officers are most analogous to police

209. See generally R. LAWRENCE DESSEM, *PRETRIAL LITIGATION IN A NUTSHELL* 356-57 (3d ed. 2001) (explaining the informality and flexibility of the mediation process); ROGER S. HAYDOCK ET AL., *LAWYERING—PRACTICE AND PLANNING* 197-205 (1996) (describing the mediation process).

210. See, e.g., CAL. EVID. CODE § 1119 (West 2005); Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 94 (1999) (explaining the importance of confidentiality in mediation proceedings).

211. HAYDOCK, *supra* note 209, at 192 ("The process and results of mediation are more private and much less public than other forums, and parties who want matters to remain confidential may prefer to mediate.").

212. See *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 free-wheeling policy choice . . .").

213. *Martinez v. California*, 444 U.S. 277, 285 n.11 (1980) ("We reserve the question of what immunity, if any, a state parole officer has in a § 1983 action where a constitutional violation is made out by the allegations.").

214. *Scotto v. Almenas*, 143 F.3d 105, 111 (2d Cir. 1998); *Jones v. Moore* 986 F.2d 251, 253 (8th Cir. 1993); *Johnson v. Rhode Island*, 815 F.2d 5, 8 (1st Cir. 1987); *Harper v. Jeffries*, 808 F.2d 281, 284 (3d Cir. 1986); *Galvan v. Garmon*, 710 F.2d 214, 215 (5th Cir. 1983); *Wolfel v. Sanborn*, 691 F.2d 270, 272 (6th Cir. 1982).

215. See *infra* notes 250-59.

functions and are thus entitled to qualified immunity.²¹⁶ For example, a recent Ninth Circuit case, *Swift v. California*,²¹⁷ carefully examined the precise tasks the officers performed in determining whether absolute or qualified immunity applied. Specifically, the plaintiff's section 1983 action was based on: (1) the defendants' investigation of parole violation; (2) the defendants' taking the parolee into custody and booking him into a local jail; and (3) the defendants' recommendation that parole revocation proceedings be initiated.²¹⁸ The court concluded that these functions were most analogous to the law-enforcement functions of a police officer investigating a crime, executing an arrest, and seeking an arrest warrant.²¹⁹ The court distinguished cases where an official had the discretion to actually initiate a proceedings, which is a prosecutorial function entitled to absolute prosecutorial immunity.²²⁰ But where the officer merely recommends the initiation of proceedings to another official with the discretionary authority to actually initiate the proceedings, only qualified immunity applies.²²¹

However, while many of the decisions involving probation and parole officers properly apply qualified immunity because the officers perform law-enforcement functions,²²² another line of cases extends absolute judicial immunity to officers for investigations and reports submitted in court in connection with sentencing. The following discussion will briefly outline the presentence procedure and then address the erroneous application of judicial immunity in these cases.

While there is some variation depending on the jurisdiction, many states permit a presentence report to be submitted to the sentencing judge and in some cases it is mandatory.²²³ For example, under Federal Rule of Criminal Procedure 32(c)(1), "A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority . . . and the court explains this finding on the record."²²⁴ The presentence report typically presents a thorough history of the defendant including his criminal record, financial condition, and relevant circumstances affecting his behavior, as well as, an assessment of the financial, social, psychologi-

216. *Scotto*, 143 F.3d at 111; *Jones*, 986 F.2d at 253; *Johnson*, 815 F.2d at 8; *Harper*, 808 F.2d at 284; *Galvan*, 710 F.2d at 215; *Wolfel*, 691 F.2d at 272.

217. 384 F.3d 1184 (9th Cir. 2004).

218. *Id.* at 1191-92.

219. *Id.*

220. *Id.* at 1192-93; see *Johns*, *supra* note 150, at 154 (arguing that the doctrine of absolute prosecutorial immunity should be reconsidered and replaced by a qualified immunity regime).

221. *Swift*, 384 F.3d at 1191 (citing with approval *Scotto v. Almenas*, 143 F.3d 105 (2d Cir. 1998)).

222. *Id.* at 1191 n.4 and cases cited therein.

223. CHARLES E. TORCIA, *WHARTON'S CRIMINAL PROCEDURE* 480 nn.62-65 (13th ed. 1992).

224. FED. R. CRIM. P. 32(c)(1).

cal, and mental impact of the crime on the victim.²²⁵ The probation officer gathers this information from interviews with the defendant, the defendant's criminal record, and from the defendant's family members, employers, and victim.²²⁶

Under longstanding Supreme Court precedent, the rules of evidence do not apply to the presentence report, and a wide range of information may be considered.²²⁷ Specifically, 18 U.S.C.A § 3661 provides:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United State may receive and consider for the purposed of imposing an appropriate sentence.²²⁸

Thus, neither the hearsay rule²²⁹ nor the exclusionary rule²³⁰ apply in this process. Indeed, many courts fail to screen the material for reliability and simply presume hearsay to be reliable, requiring the defendant to prove otherwise.²³¹ State provisions are similar.²³² Moreover, the defendant is not entitled to cross examine the persons who made the statements in the presentence report.²³³ While most states and the federal rules now require the disclosure of the report to the defendant and entitle the defendant to object to unreliable information, in some jurisdictions disclosure is left to the court's discretion.²³⁴ And while the defendant is not guaranteed the right to introduce evidence to rebut the presentence report, the federal rules permit the courts to allow such evidence in their discretion.²³⁵ In other words, the reports are essentially double hearsay—the probation officer's out-of-court summary of a third-party's out-of-court statement. The third party is neither under oath nor subject to cross-examination when the interview is conducted; and the probation officer is neither under oath nor subject to cross examination when she prepares the report. In short, the presentence report is a collection of unsworn,

225. TORCIA, *supra* note 223, at 481-82 (quoting FED. R. CRIM. P. 32(c)(2)(A), (D)).

226. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 1116 (2d ed. 1992).

227. *Williams v. New York*, 337 U.S. 241, 246 (1949); LAFAVE, *supra* note 226, at 750-57, 769.

228. 18 U.S.C.A. § 3662 (2005).

229. LAFAVE & ISRAEL, *supra* note 226, at 114.

230. *Id.* at 115.

231. Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1884 (1992).

232. LAFAVE & ISRAEL, *supra* note 226, at 114; see FED. R. EVID. 1101(d) (providing that the rules of evidence do not apply in sentencing).

233. *Williams v. New York*, 337 U.S. 241, 250-51 (1949); LAFAVE, *supra* note 226, at 114.

234. LAFAVE & ISRAEL, *supra* note 226 at 791-92; see FED. R. CRIM. P. 32(e), (f). Under the federal rule, the court may not disclose certain items of sensitive information, but must summarize it and give the defendant an opportunity to object. FED. R. CRIM. P. 32(d)(3) and (i).

235. FED. R. CRIM. P. 32(i). The Court has held that in capital cases due process requires the defendant to have an opportunity to challenge the accuracy or materiality of information relied on by the judge. *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

out-of-court, hearsay statements to a probation officer, not subject to the rules of evidence and not subject to cross examination or even rebuttal.

Not surprisingly, presentence reports are often inaccurate.²³⁶ They omit information, contain wrong information, and are biased.²³⁷ There are several reasons for this. First, the investigation does not begin until after guilt has been established, and that may be long after the crime was committed such that evidence has become stale and witnesses have vanished.²³⁸ In addition, the probation officer is required not just to report, but also to interpret the facts that can lead to “a pro-state slant, a phenomenon that has been reported often.”²³⁹ Moreover, in response to the pressure of a large caseload, the officer may rely heavily on the prosecutor’s file.²⁴⁰ As one commentator noted, “It is an unavoidable observation that the evaluative sections of the [presentence reports] frequently appear for all the world as if they had been lifted from a prosecuting attorney’s sentencing argument.”²⁴¹

Because the probation officer functions as an investigator in preparing the report and providing it to the court, the strongest analogy for immunity purposes would be to a police officer who conducts an investigation and prepares a report. As previously explained for medical experts and child-protective workers, qualified immunity applies to this function.²⁴² While the officer would be entitled to absolute witness immunity for testimony under oath in the judicial phase of the proceeding,²⁴³ unsworn hearsay statements by third parties that are collected in the report do not enjoy witness immunity.

This analysis was correctly followed in a recent Fourth Circuit case where the court rejected a police officer’s claim that he was entitled to immunity for fabricating evidence in a police report that ultimately led to the wrongful conviction of an innocent man for rape and murder.²⁴⁴ After the defendant was exonerated by DNA evidence, he sued the police officer for violating his civil rights.²⁴⁵ The court rejected the claim that absolute immunity attached, distinguishing testimony at trial that enjoyed witness immunity from the out-of-court preparation of the false report.²⁴⁶ The court held that qualified immunity was the appropriate defense for this conduct,²⁴⁷ but that it failed because falsifying evidence violated

236. Peter B. Pope, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 *YALE L. J.* 1258, 1274-78 (1986).

237. *Id.* at 1275-76.

238. *Id.* at 1276.

239. *Id.*

240. *Id.* at 1277.

241. *Id.* at 1276 n.89.

242. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); see *supra* notes 116-45 and accompanying text.

243. *Briscoe v. Lahue*, 460 U.S. 325, 345-46 (1983) (recognizing that witnesses enjoy absolute immunity for testimony in the judicial phase of the proceedings).

244. *Washington v. Wilmore*, 407 F.3d 274, 283-84 (4th Cir. 2005).

245. *Id.* at 275, 277-78.

246. *Id.* at 282-83.

247. *Id.* at 281.

clearly established law of which a reasonable officer would have known.²⁴⁸ Thus, the plaintiff's case was allowed to proceed to trial.²⁴⁹

This same analysis should be applied where a probation officer conducts an investigation and prepares a false report. As the Supreme Court has repeatedly admonished, where defendants perform the same function, they should receive the same immunity.²⁵⁰ For example, in *Buckley v. Fitzsimmons*, the Court held that where the prosecutor performs the function of an investigator, she enjoys qualified immunity like a police officer, not absolute immunity as a prosecutor.²⁵¹ As Justice Kennedy has explained, one of the Court's "unquestioned goals of . . . § 1983 jurisprudence [is] ensuring parity in treatment among state actors engaged in identical functions."²⁵² Thus, to achieve parity in treatment, probation officers who conduct investigations and prepare reports in connection with a criminal proceeding should receive the same protection that a police officer receives for performing these functions—qualified immunity.

Yet, several circuit courts have applied absolute "quasi-judicial" immunity since the activity of preparing a presentence report is "intimately associated with the judicial phase of the criminal process."²⁵³ Specifically, the Second,²⁵⁴ Fifth,²⁵⁵ Ninth,²⁵⁶ Tenth,²⁵⁷ Eleventh,²⁵⁸ and D.C. Circuits²⁵⁹ have granted officers absolute judicial immunity. A district court in the First Circuit reached the same conclusion.²⁶⁰ But, as explained above, this conclusion cannot be justified under a functional analysis. Conducting investigations and preparing investigation reports are not judicial acts subject to the protections of the judicial process; they are

248. *Id.* at 281-84.

249. *Id.* at 284.

250. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

251. *Id.* ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 608 (7th Cir. 1973)).

252. *Id.* at 288 (Kennedy, J., concurring in part and dissenting in part).

253. *Spaulding v. Nielsen*, 599 F.2d 728, 729 (5th Cir. 1979) (quoting *Imbler v. Pachtman* 424 U.S. 409, 430 (1976)).

254. *Rolle v. Cassidy*, 64 F. App'x 322 (2d Cir. 2003); *Dorman v. Higgins*, 821 F.2d 133, 137 (2d Cir. 1987).

255. *Freeze v. Griffith*, 849 F.2d 172, 175 (5th Cir. 1988); *Spaulding*, 599 F.2d at 729.

256. *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir. 1984); *Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970); *Desilva v. Baker*, 96 P.3d 1084, 1089 (Ariz. 2004) (citing federal cases in applying absolute judicial immunity to probation officers who filed a false presentence report in a § 1983 action brought in state court).

257. *Snell v. Tunnell*, 920 F.2d 673, 687-88 (10th Cir. 1990); *Tripati v. U.S. Immigration and Naturalization Service*, 784 F.2d 345, 347-48 (10th Cir. 1986), *cert. denied*, 484 U.S. 1028 (1988) (applying absolute immunity to pretrial services report); *Hummell v. McCotter*, 28 F. Supp. 2d 1322, 1330 (D. Utah 1998) (holding absolute immunity applied to preparation of presentence report).

258. *Hughes v. Chesser*, 731 F.2d 1489, 1490 (11th Cir. 1984).

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

260. *Namey v. Reilly*, 926 F. Supp. 5, 9-10 (D. Mass. 1996) (holding that federal probation officer enjoyed absolute immunity for preparing sentencing materials since this was "closely associated with the discretionary function of the decision-maker").

investigative acts that enjoy only qualified immunity.²⁶¹ Moreover, extension of absolute immunity cannot be justified by history because the very first paid probation officer in the United States was retained in 1878, seven years after the adoption of § 1983.²⁶²

B. THE IMPROPER EXPANSION OF JUDICIAL IMMUNITY TO
DECISION-MAKERS IN NON-JUDICIAL PROCEEDINGS
LACKING PROCEDURAL SAFEGUARDS

In another line of cases, since the early twentieth century, the lower courts have frequently extended absolute immunity to defendants who perform a function that is analogous to that of judges because they act as decision-makers functioning outside of the judicial process.²⁶³ In my view, this expansion is unwarranted for two main reasons. First, this 20th century expansion of immunity ignores the requirement that the absolute immunity defense should be confined to its 1871 scope in § 1983 cases. Second, in many cases, these decisions ignore the Supreme Court's ruling in *Cleavinger v. Saxner* that the application of absolute judicial immunity is limited to proceedings where the safeguards are comparable to those of the judicial process.²⁶⁴ This section will discuss this expansion of judicial immunity outside of the judicial process in cases involving: (1) parole-board members; (2) licensing-board members; and (3) land-use officials.

Before turning to the lower-court cases erroneously extending judicial immunity outside of the judicial process, the Supreme Court's decisions governing this issue will be briefly reviewed. The requirement of limiting absolute judicial immunity to its 1871 boundaries has been explained above and need not be repeated here.²⁶⁵ However, a more detailed review of the Court's decisions on procedural protections is necessary to explain why these additional expansions of judicial immunity depart from the Court's precedents.

Essentially, where proceedings have protections comparable to those of the judicial process, absolute immunity applies to decision-makers per-

261. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273-74 (1993).

262. R. HENNINGSEN, *PROBATION AND PAROLE* 14 (1981), *quoted in* Pope, *supra* note 236, at 1276 n.88.

263. *Sellars v. Procnier*, 641 F.2d 1295, 1299 n.6 (9th Cir. 1981) ("The concept of absolute immunity for non-court personnel exercising certain adjudicatory functions did not arise, however, until the early twentieth century." (citing R. J. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 314 (1959) "Certain bodies who clearly do not fit within the tradition judicial hierarchy have by analogy been given this [judicial] immunity. They are usually statutorily created bodies with procedure comparable to courts, exercising adjudicatory functions. So bankruptcy commissions, military tribunals, ecclesiastical courts, lunacy hearings and many other boards of inquiry and commissions have been equated to courts, for purposes of granting immunity."); Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); Edward G. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Wayne McCormack & Laird C. Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 RUTGERS-CAM. L.J. 65 (1976); John J. Grant, Note, 24 WAYNE L. REV. 1513 (1978).

264. 474 U.S. 193, 201-02 (1985).

265. See *supra* notes 28-31 and accompanying text.

forming judicial acts;²⁶⁶ but where those safeguards are lacking, qualified immunity applies.²⁶⁷ Specifically, in *Butz v. Economou*, the Court held that administrative-law judges were entitled to absolute judicial immunity because they performed the judicial function and the procedures of the Administrative Procedure Act, which were functions comparable to those of the judicial process.²⁶⁸ The Supreme Court detailed the kinds of protections that justify absolute immunity, including: adversary proceedings;²⁶⁹ a trier of fact insulated from political pressure;²⁷⁰ the right to present evidence;²⁷¹ a transcript of proceedings;²⁷² and a statement of findings and conclusions on all issues of fact, law or discretion.²⁷³

At the other end of the spectrum are proceedings lacking sufficient safeguards to justify the application of absolute immunity. For example, in *Cleavinger v. Saxner*, the Court rejected the argument that judicial immunity protected members of a federal prison's discipline committee.²⁷⁴ The committee heard cases in which inmates were charged with rules infractions.²⁷⁵ The inmates had the right to have a written copy of the charge, have a member of the prison staff represent him, be present at the hearing, call witnesses, submit documentary evidence, and receive a written explanation of the committee's decision.²⁷⁶ Following the committee decision, the inmates could appeal the decision to the warden of the institution and to the Regional Director of the Bureau of Prisons.²⁷⁷

In rejecting the extension of judicial immunity, the Court acknowledged that the committee members performed an adjudicatory function by determining the inmate's guilt or innocence, hearing testimony, receiving documentary evidence, weighing credibility, and rendering a decision.²⁷⁸ It also recognized that members could be subject to harassment and intimidation by disappointed inmates.²⁷⁹ But the Court ultimately rejected the extension of judicial immunity because the safeguards available in a judicial proceeding were lacking in the prison's disciplinary process.²⁸⁰ Specifically, the members who were prison officials "temporarily diverted from their usual duties"²⁸¹ and were not independent like fed-

266. See *Butz v. Economou*, 438 U.S. 478, 512-14 (1978).

267. *Cleavinger v. Saxner*, 474 U.S. 193, 203-04, 206 (1985).

268. *Butz*, 438 U.S. at 512-14.

269. *Id.* at 513.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. 474 U.S. 193, 207-08 (1985). Justice Rehnquist, joined by Chief Justice Burger and Justice White, dissented. In his view, the realities of the prison environment justified the extension of absolute immunity to members of the Discipline Committee.

275. *Id.* at 194.

276. *Id.* at 195.

277. *Id.* at 197.

278. *Id.* at 203.

279. *Id.*

280. *Id.* at 203-04.

281. *Id.* at 204.

eral or state judges and professional hearing officers.²⁸² They were the direct subordinates of the warden, who reviewed their decisions, and were sitting in judgment on a dispute between an inmate and a fellow co-worker.²⁸³

Moreover, the Court listed the procedural deficiencies:

The prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of proof. No verbatim transcript was afforded. Information presented often was hearsay or self-serving. The committee members were not truly independent. In sum, the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.²⁸⁴

Within this framework, in determining whether to extend absolute judicial immunity outside of the judicial process, the courts should carefully evaluate whether the procedural protections at issue are comparable to those of the judicial process, as in *Butz*, or to the prison disciplinary process, as in *Cleavinger*. But this approach is itself problematic since there is no clear rule about which procedures are required and which procedures are merely optional. Since there is no established standard, each procedural scheme must be separately evaluated, complicating the litigation and creating uncertainty. Further, as the following discussion shows, at times the lower courts have skipped this inquiry altogether and extended absolute judicial immunity despite the lack of sufficient procedural protections. This discussion addresses the unwarranted expansion of absolute immunity to: (1) parole-board members; (2) licensing-board members; and (3) land-use officials.

1. Parole-Board Members

The Supreme Court has expressly left open the question of whether absolute immunity extends to parole-board members.²⁸⁵ The circuits have unanimously concluded that it does, at least with respect to the per-

282. *Id.* at 203.

283. *Id.* at 204.

284. *Id.* at 206.

285. *Id.* at 204 (distinguishing members of a prison disciplinary committee, who received only qualified immunity, from parole-board members).

formance of adjudicatory duties.²⁸⁶ The First,²⁸⁷ Second,²⁸⁸ Third,²⁸⁹

286. They have split on the question whether absolute immunity also extends to executive or administrative functions. *See, e.g.*, *Wilson v. Rackmill*, 878 F.2d 772, 775 (3d Cir. 1989); *Harper v. Jeffries*, 808 F.2d 281, 284 (3d Cir. 1986); *Thompson v. Burke*, 556 F.2d 231, 237-40 (3d Cir. 1977); *Friedland v. Fauver*, 6 F. Supp. 2d 292, 304 (D.N.J. 1998); *Hayes v. Muller*, No. 9603420, 1996 U.S. Dist. LEXIS 14987, at *11 (E.D. Pa. Oct. 7, 1996).

287. *Johnson v. R.I. Parole Bd. Members*, 815 F.2d 5, 8 (1st Cir. 1987) (“[w]e join those circuit courts which have addressed this issue and conclude that the defendant parole board members are entitled to absolute immunity from liability for damages in a § 1983 action for actions taken within the proper scope of their official duties.”); *Nicolas v. Rhode Island*, 160 F. Supp. 2d 229, 232 (D.R.I. 2001) (extending absolute immunity to a parole-board member).

288. *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999) (“What is more, parole board officials, like judges, may find themselves spending an inordinate amount of time and expense defending against baseless suits brought by disappointed parolees, thereby distracting parole board officials from their crucial duties in administering the state’s penal system. For these reasons, we join our sister circuits and hold directly that parole-board officials, like judges, are entitled to absolute immunity from suit for damages when they serve a quasi-adjudicative function in deciding whether to grant, deny or revoke parole.”); *Scotto v. Almenas*, 143 F.3d 105, 111 (2d Cir. 1998) (recognizing in dicta that parole board officials are absolutely immune from liability for damages when he decides to grant, deny, or revoke parole, because this task is functionally comparable to that of a judge).

289. *Thompson v. Burke*, 556 F.2d 231, 236-40 (3d Cir. 1976) (“No doubt can be entertained that probation officers and Pennsylvania Parole Board members are entitled to quasi-judicial immunity when engaged in adjudicatory duties. This has been repeatedly held by courts of appeal and district courts, though not by the Supreme Court, insofar as we are aware”); *Nellom v. Luber*, No. 02-2190, 2004 U.S. Dist. LEXIS 7103, at *21 (E.D. Pa. 2004) (“Plaintiff’s challenge of the Parole Board Defendants’ decisions denying his re-parole in May 2000, June 2001, and June 2002, and his challenge of their stated reasons for denying re-parole in June 2002, are attacks on adjudicatory decisions As such, the Parole Board Defendants’ decisions denying re-parole, and their reasons supporting those decisions, are protected by absolute immunity, since these actions represent adjudicatory functions.”).

Fourth,²⁹⁰ Fifth,²⁹¹ Sixth,²⁹² Seventh,²⁹³ Eighth,²⁹⁴ Ninth,²⁹⁵ Tenth,²⁹⁶

290. *Pope v. Chew*, 521 F.2d 400, 405-06 (4th Cir. 1975) (“Parole board members have been held to perform a quasi-judicial function in considering applications for parole and thus to be immune from damages § 1983 actions.”); *Robinson v. Fahey*, 366 F. Supp. 2d 368, 371 (E.D. Va. 2005) (“All of the defendants are members of the Virginia Board of Parole who are being sued on account of decisions they made in determining whether Robinson should be granted parole. Consequently, they are entitled to absolute immunity . . .”).

291. *Hulsey v. Owens*, 63 F.3d 354, 356 (5th Cir. 1995) (“[W]e have repeatedly held that parole board members are absolutely immune when performing their adjudicative functions, distinguishing such decision-making activities from administrative functions for which parole board members are entitled to only qualified immunity.”); *Walter v. Torres*, 917 F.2d 1379, 1385 (5th Cir. 1990) (holding that parole-board members had absolute immunity for parole determinations); *Johnson v. Kegans*, 870 F.2d 992, 995-96 (5th Cir. 1989) (discussing the history of absolute immunity for parole board members, equating their function to that of judges and labeling the parole board’s function “quasi-judicial”); *Farrish v. Miss. State Parole Bd.*, 836 F.2d 969, 973-74 (5th Cir. 1988) (holding that parole officers acting in an adjudicative capacity are entitled to absolute immunity from § 1983 damage claims); *Serio v. Members of La. State Bd. of Pardons*, 821 F.2d 1112, 1114 (5th Cir. 1987) (holding members of parole board absolutely immune for the denial of plaintiff’s parole); *Cruz v. Skelton*, 502 F.2d 1101, 1101-02 (5th Cir. 1974) (finding that parole board members are absolutely immune from suits for money damages for refusing to grant parole).

292. *Horton v. Martin*, No. 04-1142, 2005 U.S. App. LEXIS 10855, at *4 (6th Cir. June 7, 2005) (“Parole board members are absolutely immune from liability for their conduct in individual parole decisions when they are exercising their decision making powers.”); *Coleman v. Martin*, 363 F. Supp. 2d 894, 903 (E.D. Mich. 2005) (holding parole board members enjoy absolute immunity when performing adjudicatory functions); *Bricker v. Mich. Parole Bd.*, 405 F. Supp. 1340, 1345 (E.D. Mich. 1975) (concluding that “the decision to impose certain conditions of parole fell within the quasi-judicial functions vested in the Parole Board members by Michigan law” and therefore entitled the officials to immunity from suit under § 1983).

293. *Wilson v. Kelkhoff*, 86 F.3d 1438, 1445 (7th Cir. 1996) (“The actions of the prisoner board members in this case fall squarely within the class of conduct for which absolute immunity is provided. The decision to revoke Wilson’s supervised release, albeit on grounds that Wilson argues were not valid, is a prototypical quasi-judicial act deserving of absolute immunity.”); *Walrath v. United States*, 35 F.3d 277, 283 (7th Cir. 1994) (holding that scheduling of parole revocation hearings was comparable to the function of a judge setting a trial date and thus entitled the officer to absolute immunity); *Trotter v. Klincar*, 748 F.2d 1177, 1182 (7th Cir. 1984) (applying absolute immunity to the parole revocation and decision process); *United States ex rel. Powell v. Irving*, 684 F.2d 494, 496-97 (7th Cir. 1982) (holding absolute immunity was necessary to protect parole-board members from excessive litigation).

294. *Anton v. Getty*, 78 F.3d 393, 396 (8th Cir. 1996); *Patterson v. Von Riesen*, 999 F.2d 1235, 1239 (8th Cir. 1993) (holding absolute immunity applies to decisions by parole board to deny parole); *Nelson v. Balazic*, 802 F.2d 1077, 1078 (8th Cir. 1986) (holding that parole board members are absolutely immune from suit when considering and deciding parole questions); *Gale v. Moore*, 763 F.2d 341, 344 (8th Cir. 1985) (granting immunity to parole officials performing official duties); *Evans v. Dillahunt*, 711 F.2d 828, 831 (8th Cir. 1983) (holding absolute immunity applies to decisions to grant, deny or revoke parole).

295. *Bermudez v. Duenas*, 936 F.2d 1064, 1066 (9th Cir. 1991) (holding that parole board members enjoy absolute immunity for decision to grant or deny parole); *Anderson v. Boyd*, 714 F.2d 906, 908-09 (9th Cir. 1983); *Sellars v. Procnunier*, 641 F.2d 1295, 1303 (9th Cir. 1981) (“[p]arole board officials perform functionally comparable tasks to judges when they decide to grant, deny, or revoke parole. The daily task of both judges and parole board officials is the adjudication of specific cases or controversies. Their duty is often the same: to render impartial decisions in cases and controversies that excite strong feelings because the litigant’s liberty is at stake. They face the same risk of constant unfounded suits by those disappointed by the parole board’s decisions.”).

296. *Giese v. Scafe*, 133 F. App’x 567, 569 (10th Cir. 2005) (granting members of parole board absolute immunity for delaying plaintiff’s release for fifteen months by imposing

and Eleventh²⁹⁷ Circuits have granted absolute immunity to parole officials for all actions related to the processing of alleged parole violations. District-court decisions in the District of Columbia Circuit also apply absolute immunity to parole-board members.²⁹⁸ In my view, the extension of judicial immunity to parole proceedings is erroneous for two reasons. First, it violates the common-law understanding in 1871 that parole decisions were protected by qualified, not absolute immunity. Second, it ignores the lack of procedural safeguards in the parole process.

From a historical perspective, absolute immunity did not apply to parole decisions in 1871 when § 1983 was adopted since parole boards did not exist in 1871.²⁹⁹ Ohio was the first state to adopt a statewide system of parole through an administrative agency in 1884.³⁰⁰ Before 1884, elected officials made parole determinations.³⁰¹ California, one of the first states to adopt a parole agency, did so primarily to relieve governors of part of the burden of exercising clemency to reduce excessive and disparate sentences.³⁰² In 1871, these elected officials enjoyed qualified immunity.³⁰³ As the Ninth Circuit explained, since the Supreme Court has held that the 1871 Congress intended to preserve the established common-law immunities, “[a]s successors to state governors in making parole decisions, state parole board members should enjoy at least the same immunity enjoyed by governors and other state executives under the common law.”³⁰⁴ But the decision to grant immunity beyond that enjoyed in 1871 defies the Supreme Court’s admonition that absolute immunity under § 1983 is limited to those functions that enjoyed absolute immunity in 1871.³⁰⁵

Second, parole-board members should not enjoy absolute immunity because parole proceedings fail to meet the *Butz* requirement, which limits the application of absolute judicial immunity to proceedings with procedural safeguards comparable to those of the judicial process.³⁰⁶ The

conditions that could not be satisfied); *Russ v. Uppah*, 972 F.2d 300, 303 (10th Cir. 1992); *Knoll v. Webster*, 838 F.2d 450, 450 (10th Cir. 1988) (applying absolute judicial immunity to parole-board members).

297. *Sultenfuss v. Snow*, 894 F.2d 1277, 1278-79 (11th Cir. 1990) (holding parole-board members enjoyed absolute quasi-judicial immunity for decisions to grant or deny parole).

298. *Pate v. U.S.*, 277 F. Supp. 2d 1, 11 (D.D.C. 2003) (holding [Parole board official was] “entitled to absolute immunity for her alleged failure to timely schedule [parolee’s] parole revocation hearing.”).

299. *Sellars v. Proconier*, 641 F.2d 1295, 1299 n.6 (9th Cir. 1981).

300. *Id.*

301. *Id.*

302. Sheldon L. Messinger et al., *The Foundations of Parole in California*, 19 L. & Soc’y REV. 69 (1985).

303. *Sellars*, 641 F.2d at 1302. Common-law qualified immunity existed where an official acted in good faith and without malice. See *Scheuer v. Rhodes*, 416 U.S. 232, 245-47 (1974). Qualified immunity is now determined by an objective standard. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

304. *Sellars*, 641 F.2d at 1302.

305. See, e.g., *Burns v. Reed*, 500 U.S. 478, 493-94 (1991) (stating that courts must look to the functions that enjoyed absolute immunity under nineteenth-century American common law); see also *supra* note 31 and cases cited therein.

306. See *supra* notes 266-73 and accompanying text.

arguments against the application of absolute immunity to parole-board members were thoughtfully presented in a 1988 student note, *A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions* by Julio A. Thompson.³⁰⁷ As Mr. Thompson points out, there is no uniform parole system in this country.³⁰⁸ But one consistent hallmark of parole boards is the members' susceptibility to political pressure.³⁰⁹ Members are typically appointed by governors, subject to legislative approval.³¹⁰ In some states, the governor has authority to overrule any parole-board decision to grant parole.³¹¹ Thus, the decision-maker's insulation from the political process, relied on in *Butz* to support the application of judicial immunity,³¹² is entirely absent in the parole context.

Parole hearings are markedly different from judicial proceedings in other respects as well. In contrast to criminal-court proceedings, parole hearings are characterized by informality and brevity.³¹³ The rules of evidence do not apply and a wide range of materials may be considered by individual boards.³¹⁴ In Michigan, for example, the Parole Board adopts the presentence report as true despite its hearsay character.³¹⁵ Inmates are often not present, and when they are, their participation is limited.³¹⁶ Only a few jurisdictions permit counsel to accompany the inmate.³¹⁷ While some systems require a written record of the reasons for the parole board's decision, judicial review is limited.³¹⁸ In short, the procedural protections supporting the extension of absolute immunity in *Butz*—the right to present evidence,³¹⁹ the application of the rules of evidence,³²⁰ a transcript of proceedings,³²¹ a statement findings and conclusions on all

307. Julio A. Thompson, *A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions*, 87 MICH. L. REV. 241 (1988).

308. *Id.* at 249.

309. *Id.* at 252, 257.

310. *Id.* at 252-53, 257.

311. *See, e.g.*, CAL. CONST. art. V, § 8 (granting the governor the power to review parole decisions).

312. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

313. Thompson, *supra* note 307, at 250-51; *see e.g.*, *Christopher v. U.S. Bd. of Parole*, 589 F.2d 924, 932 (7th Cir. 1978) (“[W]e hold that [parolee] Christopher, by not being entitled to call adverse witnesses and to cross-examine them, was not denied due process on the facts of this particular case.”).

314. Thompson, *supra* note 307, at 250-51; *see e.g.*, *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998) (holding that the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' U.S. Constitution Fourth Amendment rights).

315. Stuart G. Friedman, *Feature: Prisoners and Corrections: The Michigan Parole Board: A Smoldering Volcano*, 77 MICH. BAR J. 184, 187 (1998).

316. Thompson, *supra* note 307, at 251.

317. *Id.* at 251.

318. *Id.* at 251-52.

319. *Butz v. Economou*, 438 U.S. 478, 512-14 (1978).

320. *See Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (criticizing the admission of hearsay and self-serving evidence in pleadings).

321. *Butz*, 438 U.S. at 512-14.

issues of fact, law or discretion,³²² the right to agency or judicial review,³²³ and adherence to precedent³²⁴—are all absent in the typical parole hearing.

An example illustrates the point. In California, over 24,000 prisoners have been given indeterminate sentences—for example ten or fifteen years to life.³²⁵ After serving the fixed portion of these sentences, these prisoners were supposed to be able to establish that they had been rehabilitated and then be returned to society.³²⁶ The rules provide that these prisoners have the right to notice of the hearing at least one month in advance; the right to review nonconfidential documents and to file a response; the right to be present, to speak, to ask and answer questions; the right to be represented by an attorney; the right to receive a copy of the decision; and the right to a copy of the transcript of the hearing.³²⁷

But the hearing procedures are dramatically different from a court proceeding. Specifically, the victim must be notified of the hearing and has the right to appear along with two family members or representatives to “express their views.”³²⁸ They can also present written, audiotaped or videotaped statements.³²⁹ A representative of the district attorney’s office from the county of conviction must be invited to attend and participate in the hearing.³³⁰ According to established procedure, “[t]he victim, the victim’s representative, or the prosecutor representing the views of the victim and the victim’s family has the right to speak last.”³³¹

Other information—not necessarily satisfying the rules of evidence—may also be presented, including sections of the trial transcript, police reports, photographs, and autopsy protocols.³³² After preliminary matters, the presiding commissioner recites the facts of the commitment offense taken from the appellate decision if one is available, or the probation report if one is not.³³³ This information is placed on the official record.³³⁴ The panel also considers prior convictions and “reliably documented criminal behavior that did not result in a conviction.”³³⁵ The panel then considers the prisoner’s social history including family background, family relationships, education, military service, drug or alcohol use, and psychological issues.³³⁶ The next stage of the hearing focuses on the prisoner’s institutional behavior including disciplinary history, educa-

322. *Id.*

323. *Id.*

324. *Id.*

325. Michael Goldberg, *The Longest Wait*, S.F. CHRON., July 1, 2005, at B8.

326. *Id.*

327. CALIFORNIA CRIMINAL LAW 1449 (CEB 2005).

328. *Id.* at 1450.

329. *Id.*

330. *Id.* at 1454.

331. *Id.* at 1450.

332. *Id.* at 1454.

333. *Id.* at 1456.

334. *Id.*

335. *Id.* at 1457.

336. *Id.* at 1457.

tion and training, self help, and psychological reports.³³⁷ Finally, the panel considers letters solicited from interested parties including the trial judge, defense counsel, the prosecuting attorney, and the investigating law-enforcement agency.³³⁸ Under California rules, the right to submit opinions is granted to “any person interested in the grant or denial of parole.”³³⁹

The panel then determines whether the prisoner is suitable for parole.³⁴⁰ In making this determination, the Board of Prison Terms has almost unlimited discretion, subject to very limited administrative and judicial review.³⁴¹ The Board has been sparing in exercising its power to release inmates with indeterminate sentences.³⁴² For example, in 2004 the Board held 2,713 suitability hearings, but rejected parole for 2,613 and recommended release for only 199.³⁴³

When the commitment offense is murder, the governor may reverse or modify any parole decision within thirty days after it becomes final.³⁴⁴ In most cases, California governors have been unwilling to adopt the Board’s recommendations for inmate release. Since 1991, the Board of Prison Terms has recommended the release of 838 inmates, but California governors have released only 219.³⁴⁵ In his five years as governor, Gray Davis released only six of the 368 prisoners recommended by the Board.³⁴⁶ As he once remarked, “the only way a convicted murderer would leave prison would be in a pine box.”³⁴⁷

In short, as the California example illustrates, parole hearings consider all kinds of information that is not subject to the rules of evidence, not submitted under penalty of perjury, and not subject to cross-examination. The right to appeal is extremely limited. Rather than operating independently of the political process, the parole process is highly politicized. For murder convictions, the governor has the absolute right to veto any board determination. In other words, these proceedings lack most of the characteristics of the administrative process in *Butz* that justified the application of absolute judicial immunity.

2. *Licensing-Board Members*

The lack of adequate procedural safeguards is also an issue in cases involving licensing-board members. A number of circuits have granted absolute judicial immunity to licensing-board members on the grounds that they act as decision-makers for the state and are subject to procedu-

337. *Id.* at 1457-58.

338. *Id.* at 1460.

339. *Id.* at 1460.

340. *Id.* at 1460-61.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 1463.

345. Goldberg, *supra* note 325, at B8.

346. *Id.*

347. *Id.*

ral safeguards.³⁴⁸ But in some cases, the board proceedings lack the safeguards required by *Butz* and clearly fall on the *Cleavenger* end of the procedural spectrum.

For example, in *Dunham v. Wadley*, the Eighth Circuit concluded that members of the Arkansas Veterinary Medical Examining Board were entitled to absolute judicial immunity in a § 1983 action brought by a person who was denied the right to practice veterinary medicine by the board.³⁴⁹ Under Arkansas law, graduates of foreign veterinary schools are entitled to practice under the supervision of licensed veterinarians, for which the plaintiff qualified.³⁵⁰ The board received information that the plaintiff was practicing at two clinics without a licensed veterinarian on the site.³⁵¹ The board “discussed Dr. Dunham’s situation during two scheduled meetings, maintained detailed minutes of each meeting, and considered investigative reports that were prepared in her case.”³⁵² Following the meetings, the board sent Dr. Dunham and her two employers “cease and desist” letters notifying them of their conclusion that Dr. Dunham was practicing veterinary medicine without a proper license.³⁵³ The letters ordered the employers to cease their employment of the plaintiff and threatened criminal prosecution and adverse administrative action for noncompliance.³⁵⁴ The board’s letter invited the plaintiff to call the board if she had any questions.³⁵⁵ As a result of these letters, the em-

348. *Beck v. Tex. State Bd. of Dental Exam’rs*, 204 F.3d 629, 636 (5th Cir. 2000) (holding dental examiners were entitled to absolute immunity where they performed a judicial function, were insulated from the political process, provided notice of the charges, permitted the dentist to present evidence, allowed the dentist to be represented by counsel, and provided for appellate review); *Mishler v. Clift*, 191 F.3d 998, 1007 (9th Cir. 1999) (holding members of medical board were entitled to judicial immunity for their quasi-judicial acts since the proceedings had sufficient procedural protections); *Romano v. Bible*, 169 F.3d 1182, 1187-88 (9th Cir. 1999) (holding members of racing commission enjoyed absolute immunity for disciplinary matters); *see also O’Neal v. Miss. Bd. of Nursing*, 113 F.3d 62, 66-67 (5th Cir. 1997) (holding that nursing regulatory board performed quasi-judicial function and provided sufficient procedural protections to justify absolute immunity); *Watts v. Burkhart*, 978 F.2d 269, 274 (6th Cir. 1992) (holding members of state medical-licensing board were entitled to absolute immunity in connection with decisions to suspend or revoke a medical license, finding the procedural protections sufficient); *Yoonessi v. Albany Med. Ctr.*, 352 F. Supp. 2d 1096, 1100 (C.D. Cal. 2005) (holding members of California Medical Board enjoyed absolute immunity); *VanHorn v. Neb. State Racing Comm’n*, 304 F. Supp. 2d 1151, 1160 (D. Neb. 2004) (finding sufficient procedural safeguards in a disciplinary proceedings against a veterinarian where the commission maintained an official record, followed the rules of evidence, administered oaths, issued subpoenas, permitted cross examination, permitted the plaintiff to present rebuttal evidence, provided written decision with findings of fact and conclusions of law, and provided for appeal to state court); *Mason v. Arizona*, 260 F. Supp. 2d 807, 821 (D. Ariz. 2003) (holding members of chiropractic licensing board enjoyed absolute immunity because the proceedings provided adequate safeguards). *But see Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315, 1319 (10th Cir. 2002) (refusing to extend absolute judicial immunity to a hospital’s peer review committee because the process lacked sufficient procedural protections).

349. *Dunham v. Wadley*, 195 F.3d 1007 (8th Cir. 1999).

350. *Id.* at 1008.

351. *Id.* at 1009.

352. *Id.* at 1010.

353. *Id.* at 1011.

354. *Id.*

355. *Id.* at 1009.

ployers terminated her employment at the clinics.³⁵⁶ The plaintiff then brought a § 1983 action claiming the board's conduct violated her due-process rights.

The Eighth Circuit concluded that the board members were entitled to absolute immunity. In the court's view, the board members performed functions similar to those of the judicial process.³⁵⁷ Moreover, it concluded that sufficient safeguards existed in the regulatory process to control unconstitutional conduct.³⁵⁸ To support this conclusion, the court pointed out that the board consisted of five members appointed by the governor to staggered five-year terms, four of whom were licensed veterinarians and the fifth, a lay member.³⁵⁹ The statute creating the board empowered it to conduct investigations, hold hearings, administer oaths, receive evidence, issue subpoenas, make factual and legal determinations, and enter orders consistent with those findings.³⁶⁰ The court also noted that the plaintiff was subpoenaed to a hearing at which her second employer agreed to terminate her employment.³⁶¹

The court, however, did not compare the procedural protections at issue to those evaluated by the Supreme Court in *Butz* and *Cleavinger*. Indeed, the case seems to allow a level of safeguards below those provided in *Cleavinger*. As far as the decision reports, unlike the procedural safeguards in *Butz*, the plaintiff received no notice of the charges against her prior to the adverse action, had no right to attend the "meetings," had no right to representation, had no right to discovery, had no right to present evidence, had no right to call witnesses, had no right to cross-examine witnesses, had no right to the application of the rules of evidence or adherence to precedent, had no transcript of the proceedings, had no statement of findings and conclusions of fact and law, and had no right to appellate review. In short, it appears that the procedural protections were minimal in comparison to those of the administrative proceedings in *Butz*, which closely paralleled the judicial process.

In addition to improperly extending absolute judicial immunity to non-judicial proceedings, this line of cases illustrates the confusion that arises from the lack of clear standards for evaluating the sufficiency of procedural safeguards. In these cases, each regulatory scheme has its own combination of protections. For this reason, each scheme must be carefully evaluated to determine whether it offers sufficient protections to justify absolute immunity. This case-by-case approach is perhaps consistent with the Supreme Court's decisions in *Butz* and *Cleavinger*. But it reveals the inherent difficulty in the Court's approach because of the infinitely variable procedures. For example, one scheme may provide notice and the opportunity to present evidence, but it may not adhere to the rules of

356. *Id.*

357. *Id.* at 1011.

358. *Id.*

359. *Id.* at 1010.

360. *Id.*

361. *Id.* at 1011.

evidence or follow precedent. Another scheme may follow stricter rules of evidence, but it may be subject to increased political pressures. How are the lower courts to determine which combination of features justifies absolute immunity and which do not?

Lacking clear standards, the lower courts are left to make ad hoc decisions based on the individual characteristics of the specific proceedings. But this approach leads to unpredictability and confusion, generating litigation over the question whether absolute or qualified immunity should apply. This unnecessary litigation defeats the purpose of the immunity doctrines, which are designed to facilitate the early resolution of civil-rights litigation so that defendants are spared not just the burden of liability, but also the burden of litigation.³⁶²

The decisions considering medical-disciplinary systems illustrate this problem. Because every system must be individually evaluated, immunity issues are repeatedly litigated with unpredictable results. For example, some peer-review systems are found to have sufficient procedural safeguards to justify the application of judicial immunity,³⁶³ while others have not.³⁶⁴ Similarly, some medical-board procedures have been found to support the application of judicial immunity,³⁶⁵ while others have been found insufficient.³⁶⁶ In other words, the *Butz/Cleavenger* analysis frustrates the goal of facilitating the early resolution of the immunity defense by prolonging litigation over which immunity to apply. As will be explained in Part IV, a significant advantage of applying qualified immunity is the simplification of civil-rights litigation to ensure that honest officials receive the early resolution they deserve.³⁶⁷

3. *Land-Use Officials*

In cases involving the appropriate immunity defense for land-use officials, the circuits conflict as illustrated by cases in the Ninth and Third

362. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) ("Moreover, because 'the entitlement is an immunity from suit rather than a mere defense to liability' . . . we repeatedly have stressed the importance of resolving immunity questions at the earliest possible state in litigation." (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

363. *Ostrzenski v. Seigel*, 177 F.3d 245, 251 (4th Cir. 1999) (finding the peer review system supported the application of absolute immunity); *accord Kwoun v. S.E. Mo. Prof. Standards Rev. Org.*, 811 F.2d 401, 409 (8th Cir. 1987).

364. *Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315, 1317-20 (10th Cir. 2002) (holding peer review system failed to provide sufficient procedural safeguards to support the application of absolute immunity); *Braswell v. Haywood Reg'l Med. Ctr.*, 352 F. Supp. 2d 639, 649-50 (W.D.N.C. 2005) (finding that the hospital's peer-review board lacked the characteristics of a judicial body required to apply absolute immunity).

365. *Mishler v. Clift*, 191 F.3d 998, 1007 (9th Cir. 1999) (holding medical-board members entitled to absolute immunity because the board procedures provided sufficient safeguards); *accord Wang v. N.H. Bd. of Registration in Med.*, 55 F.3d 698, 701 (1st Cir. 1995); *Watts v. Burkhart*, 987 F.2d 269, 278 (6th Cir. 1992); *Bettencourt v. Bd. of Registration in Med.*, 904 F.2d 772, 784 (1st Cir. 1990); *Horwitz v. State Bd. of Med. Exam'rs*, 822 F.2d 1508, 1514 (10th Cir. 1987).

366. *DiBlasio v. Novello*, 344 F.3d 292, 301-02 (2d Cir. 2003) (holding medical-board procedures lacked sufficient safeguards to support absolute immunity).

367. See *infra* Part IV.B.

Circuits.³⁶⁸ In the Ninth Circuit, the decisions apply the *Butz/Cleavinger* analysis to determine whether the proceedings provide sufficient procedural safeguards to justify the application of absolute immunity.³⁶⁹ While in my view the Ninth Circuit properly attempts to apply the Supreme Court's precedent, these cases illustrate the unpredictability of this approach. In the Third Circuit, on the other hand, absolute immunity has been consistently extended to zoning-board members without any analysis of whether the proceedings are comparable to the judicial process as required by the *Butz/Cleavinger* approach.³⁷⁰ While this approach leads to predictable results, it seems to squarely contradict the Supreme Court's requirements. The following discussion compares these conflicting approaches.

Following the guidance of the Supreme Court decisions in *Butz* and *Cleavinger*, the Ninth Circuit has extended absolute judicial immunity to land-use officials when the proceedings are found to be comparable to those of the judicial process. So, for example, the court applied absolute immunity where the proceedings were adversarial, the decision-makers were insulated from the political process, and the procedural rules were similar to judicial proceedings.³⁷¹ But it refused to extend absolute immunity where board members were elected and therefore subject to political pressures.³⁷² The district courts within the circuit have, of course, attempted to follow the same analytical approach.³⁷³ The problem (as explained above with respect to the licensing cases) is that there is no clear standard to determine which combination of features is sufficient to justify the application of absolute immunity. In short, the Ninth Circuit cases apply the required legal analysis, which leads to unpredictable results.

368. A related issue is the proper characterization of land-use decisions. See Marguerite N. Pryzblyski, Note, *Characterization of Land Use Decisions: A Zone of Uncertainty*, 37 VILL. L. REV. 663, 684-707 (1992). This issue arises when the courts must determine whether a land-use official is performing a legislative function or executive function. For example, where a land-use agency is formulating a plan, it may be characterized as a legislative function. But where it is enforcing a restriction, it may be characterized as a judicial function. For purposes of this article, only decisions treated as judicial in nature will be addressed.

369. *Buckles v. King County*, 191 F.3d 1127, 1131, 1134-35 (9th Cir. 1999) (evaluating land-use decisions under the *Butz/Cleavinger* analysis).

370. *Associates in Obstetrics & Gynecology v. Upper Merion Twp.*, 270 F. Supp. 2d 633, 661-64 (E.D. Pa. 2003) (holding zoning-board members entitled to absolute judicial immunity without performing the *Butz/Cleavinger* analysis); *accord* *Ryan v. Lower Merion Twp.*, 205 F. Supp. 2d 434, 438-39 (E.D. Pa. 2002); *Zapach v. Dismuke*, 134 F. Supp. 2d 682, 697 (E.D. Pa. 2001).

371. *Buckles*, 191 F.3d at 1131, 1134-35.

372. *Zamsky v. Hansell*, 933 F.2d 677, 679 (9th Cir. 1991).

373. *Guru Nanak Sikh Soc'y of Yuba City v. City of Sutter*, 326 F. Supp. 2d 1128, 1135-36 (E.D. Cal. 2003) (finding that members of the board did not have the required separation from the political process because permit application reviews were simply one of the functions they performed as elected officials); *Hale O Kaula Church v. Maui Planning Com'n*, 299 F. Supp. 2d 1056, 1065 (D. Haw. 2002) (finding proceedings were comparable to those of the judicial process and thus supported absolute immunity).

In contrast to the Ninth Circuit decisions, district court decisions from the Third Circuit have consistently held that zoning officials are entitled to absolute judicial immunity.³⁷⁴ But the decisions fail to analyze the sufficiency of the procedural safeguards as required by the *Butz/Cleavinger* approach.³⁷⁵ Instead, they all cite earlier Seventh Circuit³⁷⁶ and Pennsylvania Superior Court³⁷⁷ decisions to support their conclusion. However, the reliance on these decisions is misplaced. The Seventh Circuit case, *Omnipoint Corp. v. Zoning Hearing Board*, was not a § 1983 case and did not address the question of immunity.³⁷⁸ The state case, *Urbano v. Meneses*, was a § 1983 case that addressed the immunity issue. But it was decided in 1981, before the 1985 *Cleavinger* decision refused to extend judicial immunity to proceedings lacking the procedural hallmarks of the judicial process.³⁷⁹ Since the recent cases ignore the required *Butz/Cleavinger* analysis, they are wrongly decided. In other words, these cases provide predictable results but apply an erroneous legal analysis.

While the Third Circuit cases fail to apply the required analysis, they highlight the need to consider the political context of land-use decisions. For example, in the *Zapach* case, the plaintiff sought a special exception from zoning for a mobile-home park.³⁸⁰ At the public hearing on the matter, 200 people showed up and twenty-five registered to testify, mostly against the exception.³⁸¹ In *Associates in Obstetrics*, the issue was the closing of an abortion clinic in violation of the plaintiff's rights to due process and equal protection.³⁸² Obviously, both cases were politically charged. Yet in neither case did the court consider whether the decision-makers enjoyed the insulation from the political process required by *Butz* and *Cleavinger* to support the application of judicial immunity.³⁸³

Unfortunately, when the courts struggle to follow the Supreme Court's guidance, the results can be somewhat unpredictable when the procedural protections fall somewhere between *Butz* and *Cleavinger*.³⁸⁴ For ex-

374. *Associates in Obstetrics & Gynecology*, 270 F. Supp. 2d at 661-62 (E.D. Pa. 2003) (holding zoning-board members entitled to absolute judicial immunity); accord *Ryan*, 205 F. Supp. 2d at 438-39; *Zapach*, 134 F. Supp. 2d at 696.

375. Both *Zapach*, 134 F. Supp. 2d at 697 n.14, and *Ryan*, 205 F. Supp. 2d at 439, outlined the procedures involved. But neither cited *Butz* nor *Cleavinger* nor performed the analysis of procedures required by these decisions.

376. See *Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 409 (3d Cir. 1999).

377. See *Urbano v. Meneses*, 431 A.2d 308 (Pa. Super. Ct. 1981).

378. *Omnipoint*, 181 F.3d at 403. *Omnipoint* involved the denial of a special exception to a wireless telephone service provider. *Id.* The plaintiff sued to obtain the exception and succeeded. *Id.* But it was not a money damages action against the board members. Therefore, it did not raise the question of the applicable immunity defense.

379. *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985).

380. *Zapach*, 134 F. Supp. 2d at 685.

381. *Id.*

382. *Associates in Obstetrics & Gynecology*, 270 F. Supp. 2d at 655-60.

383. *Butz v. Economou*, 438 U.S. 478, 513 (1978); *Cleavinger*, 474 U.S. at 203.

384. See *Thomas v. City of Dallas*, 175 F.3d 358, 362-63 (5th Cir. 1999) (finding the volunteer board enforcing urban-rehabilitation standards was entitled to absolute judicial immunity for ordering the demolition of plaintiffs' house because there were sufficient procedural safeguards including: adversarial proceedings, a right to receive notice, the right to present and cross examine witnesses, the requirement that witnesses testify under oath,

ample, a recent Florida case extended absolute judicial immunity to a local planning board where the landowners claimed their constitutional rights were violated by the arbitrary application of building regulations.³⁸⁵ The court held that sufficient protections were provided since the members were not elected, the parties were permitted to present evidence and cross examine witnesses, were entitled to be informed of the decision, and had the right to appeal. But this process also had many of the deficiencies: apparently there was no right to be represented by counsel, no right to compel the attendance of witnesses, no right to discovery, no requirement that testimony be given under oath, no application of the rules of evidence, no verbatim transcript of the proceedings, no written decision with findings of fact and conclusions of law, and no requirement of adherence to precedent. In short, as far as the decision reports, the procedural protections fell below the standards of the judicial process that justified the application of absolute immunity in *Butz*.³⁸⁶

Moreover, as with the licensing-board cases, the process afforded in the various land use schemes varies greatly. Since each case requires a discrete analysis, and since the courts lack a clear standard to apply, litigation is generated over the question whether the particular combination of procedural safeguards is sufficient to justify absolute immunity for each local, regional, state, and interstate agency. Again, the litigation would be streamlined by the uniform application of the qualified immunity defense.³⁸⁷

As the preceding discussion explains, the lower courts have wrongly expanded judicial immunity in two directions: (1) to adjuncts and appointees within the judicial system who do not perform the judicial function; and (2) to decision-makers outside of the judicial system where procedural safeguards are lacking. These decisions depart from the Supreme Court's directive that absolute judicial immunity be sparingly applied to cases within the historical scope of the immunity defense in 1871 where the official performs a judicial act in the discharge of the judicial function, and where procedural safeguards are comparable to those of the judicial process. Specifically, the court adjuncts and appointees discussed in Part III.A do not perform functions that enjoyed absolute judicial immunity in 1871. Indeed, many of these functions did not even exist at the time.

and the right to appeal to state district courts.) The court in *Thomas* also concluded that the board members were insulated from the political process because they were appointed by members of the city council, not elected. The court acknowledged that the board was not bound by precedent but was required to follow specific standards. But the court did not address other procedural safeguards, including the right to representation, the right to discovery, the application of the rules of evidence, a transcript or record of the proceedings, or the right to a written decision. Moreover, one might be skeptical about the political insulation of a board of volunteers appointed for two-year terms by members of the city council.

385. *Berkos v. Village of Wellington*, No. 02-81102-CV, 2003 WL 21383886 (S.D. Fla. 2003); see *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (holding that arbitrary application of local land-use rules supported a constitutional claim).

386. See *supra* notes 268-73 and accompanying text.

387. See *infra* Part IV.B.

There were no psychiatrists, psychologists, GALs, social workers, or parole and probation officers. These officials cannot meet the burden of proving that their function is that of a judge who resolves disputes between parties because that is not their job. Instead, they function primarily to perform investigations and provide information to the courts. These functions are investigative and testimonial, not adjudicative. Further, the decision-makers outside of the judicial system discussed in Part III.B also fail to meet the burden of showing that they are entitled to absolute judicial immunity. A key requirement of the historical absolute immunity doctrine is the presence of political insulation and procedural safeguards to offset the risk of governmental abuse. Where those protections are lacking, absolute immunity should not apply.

IV. THE UNWARRANTED EXTENSION OF ABSOLUTE JUDICIAL IMMUNITY SHOULD BE CORRECTED BY THE UNIFORM APPLICATION OF QUALIFIED IMMUNITY

As the preceding discussion has shown, the lower courts have expanded absolute judicial immunity to cases where it should not apply either because the official was not performing a judicial act in the discharge of a judicial function or because the proceedings lacked sufficient procedural safeguards. As the following discussion shows, qualified immunity should be applied in all these cases for two reasons. First, qualified immunity furthers public policy by striking the proper balance between the vigorous enforcement of civil-rights legislation and the protection of government officials from harassing litigation. And second, the consistent application of qualified immunity will reverse the undue complexity in the law and ensure that defendants enjoy an efficient defense at the earliest stage of the litigation.

A. QUALIFIED IMMUNITY FURTHERS PUBLIC POLICY BY STRIKING THE PROPER BALANCE BETWEEN PROTECTING CIVIL RIGHTS AND SHIELDING PUBLIC OFFICIALS FROM EXCESSIVE LITIGATION

The over-extension of absolute judicial immunity violates public policy in two respects. First, it frustrates the purposes of civil-rights laws by denying victims a remedy, failing to deter unconstitutional conduct, and stymieing the development of constitutional standards. Second, this sacrifice of civil-rights enforcement is not necessary to protect the honest public servant from litigation because the qualified-immunity defense has evolved to provide protection to all but the most willful or incompetent wrongdoer.

The unjustified expansion of absolute judicial immunity frustrates the policies of § 1983. 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."³⁸⁸ Absolute immunity defeats that purpose by denying victims "the very remedy which it appears Congress sought to create."³⁸⁹ The Court has recognized that absolute immunity leaves victims uncompensated and justice unfulfilled. In addition to compensating victims, § 1983 liability deters government misconduct. According to Justice White, "It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which § 1983 was enacted."³⁹⁰ This deterrent effect is frustrated by absolute immunity.

Beyond providing a remedy and deterring misconduct, civil-rights litigation gives concrete meaning to abstract constitutional language.³⁹¹ Since 1961 when *Monroe v. Pape*³⁹² was announced, § 1983 litigation has been largely responsible for the evolution of constitutional rights.³⁹³ Through this litigation, courts define the rights that protect people from government misconduct and regulate the discretion of officials to inflict injury.³⁹⁴ As Dean John C. Jeffries explains, "the capacity of constitutional doctrine to adapt to evolving economic, political, and social conditions is a great strength."³⁹⁵ As he observed, "most of the rights regulating a government official's discretion to inflict injury upon individuals have been established in constitutional tort actions."³⁹⁶

Absolute immunity stifles the development of constitutional law. When absolute immunity applies in civil rights actions, courts dismiss the action at the beginning of litigation without addressing the merits of the

388. *Monroe v. Pape*, 365 U.S. 165, 172 (1961). The compensation justification for constitutional tort actions has been criticized on the ground that it leads courts to narrowly interpret constitutional rights in order to prevent financial burdens on the government. Jeffries, *supra* note 24, at 89-90. But Dean Jeffries recognizes that when qualified immunity applies, this risk is minimized. Indeed, in his view, qualified immunity promotes the development of constitutional law. *Id.* at 108-09.

389. *Imbler v. Pachtman*, 424 U.S. 478, 434 (1978) (White, J., concurring).

390. *Id.* at 442 (White, J., concurring); *see also* *Owen v. City of Independence*, 445 U.S. 622, 656 (1980). The deterrent effect of monetary awards has been challenged by Professor Daryl J. Levinson. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). In his view, the deterrent effect of actions for money damages is limited because governments do not respond to monetary liability in the same way that private actors do. *Id.* at 356-57. While private actors seek to maximize financial gain and will therefore adjust their behavior in response to financial costs, government institutions respond to political costs and benefits. *Id.* at 359. Since the political effects of constitutional tort actions are unpredictable, their deterrent effects are uncertain. *Id.* at 379-380. *But see* Myriam E. Gilles, *In Defense of Making the Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (arguing that constitutional tort actions are an effective deterrent to government misconduct).

391. *See Imbler*, 424 U.S. at 420.

392. 365 U.S. 167 (1961).

393. *Id.* at 223 n.32.

394. Park, *supra* note 24, at 422-24.

395. *Id.* at 403-04.

396. *Id.* at 446.

constitutional claim.³⁹⁷ In this way, absolute immunity freezes the law in a state of perpetual uncertainty. Qualified immunity, on the other hand, requires courts to decide the substantive law at issue and develop constitutional standards.³⁹⁸ Indeed, the threshold question in the qualified-immunity analysis is whether the defendant's alleged misconducts violated the Constitution.³⁹⁹ This analysis insures the development of constitutional doctrine and the evolution of constitutional norms for official conduct.⁴⁰⁰

Second, the frustration of civil-rights enforcement is not necessary to protect honest officials from harassing litigation. Today, qualified immunity provides defendants with a potent and efficient defense to baseless litigation. While the common-law qualified-immunity defense in 1871 was based on good faith and reasonableness,⁴⁰¹ the Court has transformed the doctrine into an objective standard that can be established at the earliest stage of the litigation, thus relieving the defendant not only from the burden of liability but also from the burden of litigation.⁴⁰² In *Harlow v. Fitzgerald*, the Court "completely reformulated qualified immunity," replacing the subjective standard with an objective standard based on clearly established law.⁴⁰³ The Court candidly explained that the subjective standard was incompatible with the need to eliminate the burdens of discovery and litigation.⁴⁰⁴ Under the *Harlow* standard, an officer is liable only when he or she violates "clearly established statutory or constitutional rights of which a reasonable person would have known."⁴⁰⁵ If courts announce a new constitutional rule, they will impose liability only for future violations, which officers can avoid by complying with the newly established law. This approach, according to Dean Jeffries, allows innovations in the evolution of constitutional law without "fear of sub-

397. See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978). The plaintiff had been sterilized pursuant to a court order sought by her mother. *Id.* at 351-53. She was told she was having her appendix removed. *Id.* at 353. After she married and was unable to become pregnant, she discovered the truth. *Id.* She sued the judge who had granted the order on the grounds that his issuance of the order violated her constitutional rights. *Id.* The Supreme Court affirmed the lower court finding of absolute immunity without considering the merits of the plaintiff's constitutional claim. *Id.* at 355-64; see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 279 (1993). In *Buckley*, the plaintiff alleged a violation of due process when the prosecutor had fabricated evidence in order to convict the plaintiff. *Id.* at 262-63. The Court addressed the immunity defenses without resolving whether the misconduct violated the Due Process Clause. *Id.* at 267-79.

398. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); see also *Park*, *supra* note 24 (explaining how constitutional standards are developed through civil-rights litigation).

399. *City of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5 (1998); see also *Hope v. Pelzer*, 536 U.S. 730, 736 (2002).

400. *Lewis*, 523 U.S. at 841-42 n.5 (1998); *Wilkinson v. Russell*, 182 F.3d 89, 106-07 (2d Cir. 1999).

401. *Wood v. Strickland*, 420 U.S. 308, 315-18 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 245 (1974); see also *Hope v. Pelzer*, 536 U.S. 730, 736 (2002).

402. *Harlow*, 457 U.S. at 814-18.

403. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

404. *Harlow*, 457 U.S. at 815-16.

405. *Id.* at 818.

jecting the government to excessive costs.”⁴⁰⁶

The application of qualified-immunity to most government officials reflects the Court’s view that a balance should be struck between vindicating the rights of citizens and protecting officials exercising their discretion.⁴⁰⁷ The Court has found that “[i]n most cases, qualified immunity is sufficient to ‘protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’”⁴⁰⁸ As Justice White observed, the current qualified immunity defense “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”⁴⁰⁹ For this reason, the defendant bears the burden of overcoming the Court’s presumption that qualified immunity applies.⁴¹⁰

Along with the adoption of an objective standard for qualified immunity, the Court has developed procedural safeguards to insure that the defense can be resolved at the earliest stages of litigation. The reformulation of the qualified-immunity defense from a subjective standard to an objective standard was designed to avoid disruption of the government and permit the resolution of weak claims on summary judgment.⁴¹¹ When the defendant raises the qualified-immunity defense by a motion to dismiss or motion for summary judgment, discovery on other issues is stayed.⁴¹² If the trial court rejects the immunity defense, the defendant is entitled to an immediate interlocutory appeal.⁴¹³ Thus, qualified immunity affords defendants an effective means of avoiding unnecessary litigation so that the extraordinary protection of absolute immunity is no longer necessary.

In addition to the protection of qualified immunity, defendants can also rely on the courts’ effective procedural tools to control burdensome litigation. As the Court explained in denying President Clinton’s claim for immunity for conduct before taking office, most frivolous lawsuits are disposed of at the pleading or summary-judgment stage with little or no involvement by the actual defendant.⁴¹⁴ Moreover, courts can sanction offending litigants.⁴¹⁵ These tools—in addition to the other safeguards of the qualified immunity defense—are available to protect public officials from harassing litigation.

406. Jeffries, *supra* note 24, at 89-90.

407. *Harlow*, 457 U.S. at 807.

408. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)).

409. *Burns v. Reed*, 500 U.S. 478, 494-95 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

410. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993).

411. *Burns*, 500 U.S. at 495 n.8.

412. *Harlow*, 457 U.S. at 818.

413. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985).

414. *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

415. *Id.* at 708-09.

B. QUALIFIED IMMUNITY SIMPLIFIES AN UNJUSTIFIABLY COMPLEX
BODY OF LAW AND THEREBY PROMOTES PREDICTABILITY
AND EFFICIENCY IN CIVIL-RIGHTS LITIGATION

The over-extension of absolute immunity has introduced complexity, conflicts, and confusion in the law. Specifically, the circuits are split on many questions regarding the application of this defense, including whether it applies to child-protective workers⁴¹⁶ and to what extent it applies to parole-board members.⁴¹⁷ Under the current law, it is exceedingly difficult to predict whether a given regulatory scheme for professional discipline⁴¹⁸ or land use will support the application of the defense.⁴¹⁹ The resulting uncertainty promotes and prolongs litigation. As one scholar explained, "Lawsuits are fought if both sides think they have a shot at winning. The more stable and certain the law, the less the chance that both sides will think they can win."⁴²⁰ Simply put, complexity has costs.⁴²¹

While complexity always has costs, sometimes the benefits justify the burden. For example, we could certainly have a simpler body of law governing the death penalty, but we are willing to sacrifice efficiency to prevent the wrongful execution of an innocent person. In other words, sometimes complexity is desirable. The complexity and unpredictability created by the unwarranted expansion of absolute judicial immunity doctrine might be acceptable if the doctrine were supported by precedent or public policy. But, as the foregoing discussion has shown, the expansion of absolute judicial immunity has substantial costs without discernable benefits. The injection of uncertainty as to the applicable immunity unnecessarily prolongs litigation and burdens both the litigants and the courts. Conversely, the uniform application of qualified immunity would streamline the proceedings. Qualified immunity properly balances the need to protect government functions against the need to protect individual civil rights. It provides an affirmative defense that can be efficiently resolved in the initial stages of the proceeding to eliminate not just the burden of liability but also the burden of litigation.⁴²²

416. See *supra* Part III.A.2.

417. See *supra* Part III.B.1.

418. See *supra* Part III.B.2.

419. See *supra* Part III.B.3.

420. Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 690 (1990), quoted in J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L. J. 433, 448 (1994).

421. See Peter H. Schuck, *Legal Complexity: Some Causes, Consequences and Cures*, 42 DUKE L. J. 1 (1992).

422. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) ("Moreover, because 'the entitlement is an immunity from suit rather than a mere defense to liability' . . . we repeatedly have stressed the importance of resolving immunity questions at the earliest possible state in litigation." (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

V. CONCLUSION

The lower courts' expansion of judicial immunity cannot be supported by the historic common law, Supreme Court precedent, or public policy. By extending judicial immunity to functions that did not enjoy absolute immunity under the common law in 1871, the courts have strayed from the guiding principle that the common law of 1871 is the only justification for granting immunity in § 1983 actions.⁴²³ By extending judicial immunity to officials who do not perform judicial acts in the discharge of the judicial function, the lower courts have departed from the teachings of *Stump v. Sparkman*.⁴²⁴ And by applying judicial immunity in cases lacking rigorous procedural safeguards, the lower courts have departed from the standards established in *Butz v. Economou*⁴²⁵ and *Cleavinger v. Saxner*.⁴²⁶

This over-expansion of judicial immunity violates public policy by denying compensation to victims of unconstitutional misconduct, by not holding officials accountable for their misconduct, by failing to deter future misconduct, and by frustrating the development of constitutional standards. It introduces unnecessary conflicts and complexity into the law that defeat the purpose of the immunity defense. In addition to greatly simplifying this area of the law, adoption of a qualified-immunity regime would provide the intended remedy to victims while providing an efficient and effective defense to all but the most willful and incompetent defendants.

423. *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Burns v. Reed*, 500 U.S. 478, 484 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 417-18 (1976).

424. 435 U.S. 349 (1978).

425. 438 U.S. 478 (1978).

426. 474 U.S. 193 (1985).

