**University of Minnesota Law School**
**Scholarship Repository**

Minnesota Law Review

1992

# An Act-Based Analysis of Immunity and Its Application to Unconstitutional Acts of Court Clerks

Claire E. Harkrider

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

Harkrider, Claire E., "An Act-Based Analysis of Immunity and Its Application to Unconstitutional Acts of Court Clerks" (1992). *Minnesota Law Review*. 1044.
https://scholarship.law.umn.edu/mlr/1044

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

# Note

## An Act-Based Analysis of Immunity and Its Application to Unconstitutional Acts of Court Clerks

*Claire E. Harkrider*

Errors by court clerks can create serious consequences. For example, a state district court granted Thad Lowe's petition for release from jail,[1] but Lowe spent three additional weeks in jail because the court clerk intentionally failed to notify him of the order,[2] thereby violating Lowe's constitutional right to liberty. In another case, a court clerk refused to send Frank Marcedes a transcript of the criminal proceedings against him.[3] As a result, the court clerk violated Marcedes's constitutional right of access to the courts. In spite of the consequences of court clerk errors such as these, some courts would prohibit Lowe and Marcedes from recovering damages by granting the clerks immunity from civil liability.[4]

Court clerks play an important role in the judicial process.[5] Under the law, court clerks are considered records custodians.[6] They enter judgments, notify parties of the entry of judgments, administer oaths, receive and keep money, control and disburse funds, and file pre-trial and post-trial motions and pleadings.[7]

Because the Supreme Court has made judges,[8] witnesses,[9]

1. Lowe v. Letsinger, 772 F.2d 308, 310 (7th Cir. 1985).
2. *Id.*
3. Marcedes v. Barrett, 453 F.2d 391, 392 (3d Cir. 1971).
4. *See infra* notes 93-96 and accompanying text.
5. A court clerk, also known as a prothonotary, is a public official whose appointment is governed by constitutional and statutory provisions. For an overview of court clerks and their office, appointment, eligibility requirements, qualifications, term of office including tenure and removal, compensation, powers, duties, and liabilities, see 15A AM. JUR. 2D *Clerks of Court* §§ 1-38 (1976).
6. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 2-201(a)(1) (1989).
7. *See infra* note 70 and accompanying text (listing some court clerk duties).
8. Pierson v. Ray, 386 U.S. 547, 553-54 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

jurors,[10] grand jurors,[11] and prosecutors[12] absolutely immune from liability, frustrated criminal defendants and civil litigants have looked for constitutional violations[13] by court clerks to vindicate their rights and seek damages.[14] In 1991 alone, nine cases addressing court clerk immunity reached the federal appellate level.[15] The Supreme Court has not considered court

---

9. Briscoe v. LaHue, 460 U.S. 325, 345-46 (1983).

10. Yaselli v. Goff, 12 F.2d 396, 403 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

11. Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976).

12. *Id.* at 423.

13. Plaintiffs also sue court clerks for damages arising out of negligence and defamation claims. *See, e.g.*, 15A AM. JUR. 2D *Clerks of Court* § 28 (1976); *Liabilities for Negligence or Misconduct*, 1981-1986 NINTH DECENTENNIAL DIGEST § 72, at 222-23. This Note, however, limits its discussion to constitutional violations.

14. The court in Dellenbach v. Letsinger, 889 F.2d 755, 763 (7th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990), stated that a danger exists that "disappointed litigants, blocked by the doctrine of absolute immunity from suing the judge directly, will vent their wrath on clerks, court reporters, and other judicial adjuncts." *Id.* (quoting Scruggs v. Moellering, 870 F.2d 376, 377 (7th Cir. 1989), *cert. denied*, 493 U.S. 956 (1989)).

15. The Ninth Circuit alone heard six of the nine cases regarding court clerk immunity. *See* Franzen v. Wright, No. 91-15181, 1991 U.S. App. LEXIS 26618, at *1 (9th Cir. Nov. 4, 1991), *cert. denied*, 112 S. Ct. 1493 (1992); Fixel v. United States, No. 90-15739, 1991 U.S. App. LEXIS 18366, at *2 (9th Cir. Aug. 5, 1991); Sands v. Arizona Supreme Court, No. 90-15897, 1991 U.S. App. LEXIS 18046, at *2 (9th Cir. July 31, 1991); Balawajder v. Williams, No. 90-15167, 1991 U.S. App. LEXIS 18066, at *1 (9th Cir. July 29, 1991); Robinson v. Cawthorne, No. 90-4013, 1991 U.S. App. LEXIS 10336, at *2 (6th Cir. May 4, 1991); Addleman v. Merritt, No. 90-35474, 1991 U.S. App. LEXIS 4844, at *4 (9th Cir. March 20, 1991); Kukes v. Vandervoort, No. 89-16280, 1991 U.S. App. LEXIS 3469, at *2 (9th Cir. Feb. 28, 1991), *cert. denied*, 111 S. Ct. 2267 (1991); McKinney v. Oklahoma, 925 F.2d 363, 365 (10th Cir. 1991); X. v. Casey, No. 90-667, 1991 U.S. App. LEXIS 1488, at *5 (4th Cir. Feb. 4, 1991).

Since 1967, 37 cases on court clerk immunity, including those decided in 1991, have reached the various courts of appeals. *See* Ching v. Moffard, No. 89-16331, 1990 U.S. App. LEXIS 18872 (9th Cir. Oct. 26, 1990); Badea v. Bowman, No. 89-16060, 1990 U.S. App. LEXIS 18769 (9th Cir. Oct. 25, 1990); Ferdik v. Allen, No. 90-15382, 1990 U.S. App. LEXIS 18823 (9th Cir. Oct. 25, 1990); Page v. Albertson, No. 89-2256, 1990 U.S. App. LEXIS 16045 (6th Cir. Sept. 10, 1990), *cert. denied*, 111 S. Ct. 564 (1990); Mwonyonyi v. Gieszl, No. 89-5495, 1990 U.S. App. LEXIS 2048 (6th Cir. Feb. 9, 1990); Foster v. Walsh, 864 F.2d 416 (6th Cir. 1988); Rogers v. Bruntrager, 841 F.2d 853 (8th Cir. 1988); Eades v. Sterlinske, 810 F.2d 723 (7th Cir. 1987), *cert. denied*, 484 U.S. 847 (1987); Lowe v. Letsinger, 772 F.2d 308 (7th Cir. 1985); McCaw v. Winter, 745 F.2d 533 (8th Cir. 1984); Green v. Mario, 722 F.2d 1013 (2d Cir. 1983); LeGrand v. Evan, 702 F.2d 415 (2d Cir. 1983); Tarter v. Hury, 646 F.2d 1010 (5th Cir. 1981); Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981); Slotnick v. Garfinkle, 632 F.2d 163 (1st Cir. 1980); Williams v. Wood, 612 F.2d 982 (5th Cir. 1980); Morrison v. Jones, 607 F.2d 1269 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980); Shipp v. Todd, 568 F.2d 133 (9th Cir. 1978); McLallen v. Henderson, 492 F.2d 1298 (8th Cir.

clerk immunity.

This Note considers whether and to what extent court clerks should be entitled to immunity from civil liability for damages arising from unconstitutional acts. Part I sets forth the legal principles and policies underlying immunity, demonstrates the interaction between immunity and constitutional claims, and discusses the role of court clerks in the judicial process. Part II reviews the circuit courts of appeals' divergent conclusions regarding court clerk immunity. Drawing from Supreme Court precedent on immunity for public officials, Part III argues that immunity should depend on the nature of the contested act of the court clerk. Court clerks should not be granted immunity for their ministerial acts. Rather, immunity from civil liability is appropriate only when the clerk performs a discretionary act or when the clerk acts pursuant to a judge's order.

## I. IMMUNITY

### A. LEGAL PRINCIPLES AND POLICY JUSTIFICATIONS UNDERLYING IMMUNITY

#### 1. Legal Principles Governing Immunity

Immunity[16] is an affirmative defense[17] that protects an individual from liability for alleged wrongful conduct. In general, immunity attaches to the particular act performed by the official, not to the official's title.[18]

---

1974); Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973); McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972); Marcedes v. Barrett, 453 F.2d 391 (3d Cir. 1971); Davis v. McAteer, 431 F.2d 81 (8th Cir. 1970); Lockhart v. Hoenstine, 411 F.2d 455 (3d Cir.), *cert. denied*, 396 U.S. 941 (1969); Dieu v. Norton, 411 F.2d 761 (7th Cir. 1969); Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969); Brown v. Dunne, 409 F.2d 341 (7th Cir. 1969); Henig v. Odorioso, 385 F.2d 491 (3d Cir. 1967), *cert. denied*, 390 U.S. 1016 (1968).

16. *Black's Law Dictionary* defines immunity to be "[e]xemption . . . from . . . performing duties which the law generally requires other citizens to perform." BLACK'S LAW DICTIONARY 751 (6th ed. 1990).

17. To benefit from immunity, the defendant must plead immunity. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). Although an immunity defense is an affirmative defense, the plaintiff must anticipate the immunity defense. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); *see* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 958-59 (1990) (advocating limited discovery).

18. Thus, an official may receive absolute, qualified, or no immunity, depending on the act performed. *Compare* Stump v. Sparkman, 435 U.S. 349, 351, 364 (1978) (providing a judge with absolute immunity for ordering sterilization of a minor) *with* Forrester v. White, 484 U.S. 219, 228 (1988) (holding that a

The Supreme Court has recognized two levels of immunity[19] for public officials: absolute[20] and qualified.[21] Both levels of immunity protect only discretionary acts performed by public officials.[22] Thus, immunity will not protect public officials who perform nondiscretionary or so-called ministerial acts.[23] A public officer may also be entitled to derivative immunity. Under this doctrine, officials otherwise not immune are

---

judge was not absolutely immune from damages resulting from his discriminatory discharge of female probation officer); *see also Mitchell*, 472 U.S. at 521 (holding that even though the Attorney General would have been absolutely immune in his prosecutorial function, he was not absolutely immune in a § 1983 action when performing his national security function). *But see* Nixon v. Fitzgerald, 457 U.S. 731, 744-58 (1982) (holding that presidential immunity is awarded based on the title of the official).

19. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1981).

20. *Id.* Both statutes and state and federal constitutions also may grant immunity. *See, e.g.*, U.S. CONST. art. I, § 6 (providing that members of Congress are absolutely immune for any speech, debate, vote, representation or activity done in session); MINN. STAT. § 60A.031(9)(a) (Supp. 1991) ("No cause of action shall arise nor shall liability be imposed against the commissioner . . . for statements made or conduct performed in good faith while carrying out the provisions of this section."); Tenney v. Brandhove, 341 U.S. 367, 375 & n.5 (1951) (listing 41 states which have the equivalent of the Speech and Debate Clause in their state constitutions).

21. *Harlow*, 457 U.S. at 807. Qualified immunity is also known as good faith immunity. *Id.* at 815.

22. *Id.* at 816 ("Immunity generally is available only to officials performing discretionary functions."); Butz v. Economou, 438 U.S. 478, 506 (1978) (noting that some form of immunity is required to protect officials who are required to exercise their discretion). In *Anderson v. Creighton*, the Court explained why immunity is available to those public officials who exercise discretion:

> When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." . . . [P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.

483 U.S. 635, 638 (1987) (quoting *Harlow*, 457 U.S. at 814).

23. Ministerial acts are those which give the officer no power to judge the matter to be done. *See* Morgan v. Yuba County, 41 Cal. Rptr. 508, 511 (Dist. Ct. App. 1964) (explaining that a "discretionary act" is an act which requires "personal deliberation, decision and judgment," but a ministerial act "amounts only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own"); *see also* Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342, 346 (D.C. Cir. 1964) (holding that when a statutory command addressed to the public official is unmistakable, the official's duty to comply with the statutory command is ministerial).

granted derivative immunity for acts performed at the request of an official entitled to immunity.[24]

Absolute immunity provides complete protection from suit,[25] regardless of the intent or malice behind the allegedly wrongful act.[26] For example, a judge who erroneously convicts a defendant is immune from civil liability even if the judge convicted the defendant knowing that the defendant was innocent.

In contrast, qualified immunity protects public officials from civil liability only if the law governing the conduct is unclear, such that the official did not know that he or she was violating the individual's constitutional rights.[27] Officials are not immune if they fail to follow a clear legal standard.[28] For example, an attorney general who authorizes a warrantless wiretap would be immune from civil liability under the doctrine of qualified immunity if the Supreme Court had not yet ruled that

24. Circuit courts of appeals agree that an official performing an unconstitutional act at the request of a judge or in compliance with a court order deserves some form of immunity, but these courts disagree on whether it should be absolute or qualified. For example, the Fourth Circuit has granted absolute immunity to those officials who act pursuant to a judge's order even though those officials would have been liable had they acted on their own. *See* McCray v. Maryland, 456 F.2d 1, 4 (4th Cir. 1972). Other circuits have reached the same conclusion. *See* Rogers v. Bruntrager, 841 F.2d 853, 856 (8th Cir. 1988); Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981); Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir. 1980); Lockhart v. Hoenstine, 411 F.2d 455, 460 (3d Cir.), *cert. denied*, 396 U.S. 941 (1969). *But see* Green v. Maraio, 722 F.2d 1013, 1018 (2d Cir. 1983) (holding that clerks are immune from suit under the doctrine of qualified immunity when acting pursuant to a judicial order).

25. A court will dismiss a complaint against a public officer entitled to absolute immunity pursuant to Federal Rule of Civil Procedure 12(b)(6) or Federal Rule of Civil Procedure 56(c).

26. Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

27. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Prior to *Harlow*, officials claiming qualified immunity needed to meet objective and subjective requirements. *Id.* In *Harlow*, however, the Court rejected the subjective element of good-faith intent, finding it incompatible with the goal of ensuring that insubstantial claims do not proceed to trial. *Id.* at 815-16. The Court noted that the subjective qualified immunity standard did not protect an official from suit because the official's good faith was a question of fact which he would have to establish at trial. *Id.* at 816. By rejecting the subjective element of the qualified defense, the Court thus changed the qualified immunity standard from one which only protected an official from ultimate liability to one which protects an official from suit. *Id.* at 817-18.

28. The immunity defense ordinarily fails where the law was clearly established because reasonably competent public officials should know the law governing their own conduct. *Id.* at 818-19. Officials may, however, be able to show extraordinary circumstances to explain why they neither knew nor should have known the relevant legal standard. *Id.*

a warrantless wiretap is unconstitutional or the lower federal courts had not consistently decided the issue.[29]

2. Policy Justifications For Immunity

The immunity defense protects officials from threats of personal liability that may inhibit them from exercising independent discretion to perform their jobs properly.[30] For most public officials, qualified immunity is sufficient to protect their exercise of discretion.[31] The Supreme Court has concluded, however, that absolute immunity is necessary to protect discretionary acts performed by many participants in the judicial process.[32]

The Supreme Court cites two factors to justify absolutely immunizing participants in the judicial process. First, the Court reasons that discretionary acts performed by a judicial officer[33] are so important to society that judicial officers should be able to take action without fear of liability.[34] The Supreme Court has observed that "[i]t is a general principle of the highest importance to the proper administration of justice that a ju-

---

29. Mitchell v. Forsyth, 472 U.S. 511, 530-35 (1985).

30. The Supreme Court has stated:

> Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties . . . . When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well . . . skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct.

Forrester v. White, 484 U.S. 219, 223 (1988).

31. *See* Burns v. Reed, 111 S. Ct. 1934, 1939 (1991) ("The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties."); *Harlow*, 457 U.S. at 807 (explaining that qualified immunity represents the norm for executive officials and stating that only those officials whose special functions or constitutional status require complete protection from suit are entitled to absolute immunity).

32. *See supra* notes 8-12 and accompanying text.

33. Judicial officers include both officers appointed by the court and other citizen participants in the judicial process, such as grand jurors, petit jurors, and witnesses. *See* Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976) (defining judicial officers as those participants in the judicial process whose exercise of judgment is functionally equivalent to judges).

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

dicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."[35] The second factor justifying immunity in the judicial sphere is the Court's belief that procedural safeguards in the judicial process reduce the need for private redress of constitutional wrongs.[36] These safeguards include the importance of precedent in resolving controversies, the adversarial nature of the judicial process, and the ability to correct error on appeal.[37] Because these safeguards exert sufficient control over a judicial officer's action, the threat of civil liability is not necessary to deter wrongful behavior by judicial officers.

## B. Immunities and Constitutional Violations

### 1. The Significance of 1871

Plaintiffs may sue state public officials for constitutional violations under 42 U.S.C. § 1983, which is derived from Section 1 of the Civil Rights Act of 1871.[38] Federal public officials similarly are liable in *Bivens* actions.[39] Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by every person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[40] The statute's plain language[41] appears to create a cause of action against

---

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

36. Butz v. Economou, 438 U.S. 478, 512 (1978).

37. *Id.*

38. 42 U.S.C. § 1983 (1988); *see* Pierson v. Ray, 386 U.S. 547, 548 (1967) (describing the origins of § 1983).

39. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971), established that a plaintiff has an action under the Constitution for money damages against persons acting under color of federal authority but in violation of the Constitution.

40. Section 1983 provides in full:

> 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

41. The legislative history of § 1983 supports "the expansive sweep of the statutory language." Owen v. City of Independence, 445 U.S. 622, 635-36

*every* person who has violated the "Constitution and laws," regardless of whether the person was entitled to any common law immunities. The Supreme Court concluded, however, that in enacting § 1983, Congress did not abrogate immunities which were "firmly rooted" in the common law because it did not expressly state any intent to do so.[42]

This view led the Supreme Court to develop the following three-stage inquiry to determine what level of immunity,[43] if any, state and federal[44] public officials may use as a defense to a § 1983 action. First, the Court considers the level of common law immunity that was available to the official in a tort action in 1871[45] and whether the immunity was "firmly rooted."[46] Second, the Court, because it is unwilling to assume that Con-

(1980). The opponents of § 1983 noted its lack of limitations during congressional debates before enactment. *Id.* at 636 n.17.

42. Malley v. Briggs, 475 U.S. 335, 343 (1985) ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition . . . ."); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981) ("It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. . . . [The 42d Congress] likely intended these common-law principles to obtain, absent specific provisions to the contrary.").

43. "Level" refers to absolute versus qualified immunity.

44. Federal public officials are entitled to immunity for their unconstitutional acts to the same extent as state officials performing the same job. Butz v. Economou, 438 U.S. 478, 500-01 (1978); Antoine v. Byers & Anderson, Inc., 950 F.2d 1471, 1473 (9th Cir. 1991), *petition for cert. filed*, (U.S. Mar. 11, 1992) (No. 91-7604).

45. Burns v. Reed, 111 S. Ct. 1934, 1941 (1991); *Malley*, 475 U.S. at 339-40 (citing Tower v. Glover, 467 U.S. 914, 920 (1984)); Smith v. Wade, 461 U.S. 30, 34 (1983). In *Burns*, the court held that a state prosecutor was absolutely immune from liability for damages under § 1983 for participating in a probable cause hearing, 111 S. Ct. at 1942, but was not absolutely immune for giving legal advice to the police. *Id.* at 1944-45. The Supreme Court based its holding on the existence of common law immunity both before and after 1871 which immunized prosecutors from liability for making false or defamatory statements in judicial proceedings and for eliciting false and defamatory testimony from witnesses. *Id.* at 1941. Similarly, the Court concluded that the prosecutor was not immune for advising the police because "neither respondent nor the court below has identified any historical or common-law support for extending absolute immunity to such actions by prosecutors." *Id.* at 1942.

46. In *Owen v. City of Independence*, the Court said:

> [N]otwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so *firmly rooted* in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine."

445 U.S. 622, 637 (1980) (emphasis added) (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)).

gress intended to "freeze into permanent law whatever principles were current in 1871," determines whether "the prevailing view on some point of general tort law ha[s] changed substantially in the intervening century."[47] Third, the Court considers whether the original policy justifications supporting the availability or non-availability of immunity at common law furthers the purposes of § 1983.[48]

Scholars[49] and jurists[50] have attacked this inquiry into the common law of 1871 as too rigid, especially when the common law rule prior to 1871 is not clear. As an alternative, Justice

47. *Wade*, 461 U.S. at 34 n.2. As a result, the Supreme Court will cite cases both before and after 1871 to support the existence or non-existence of a historical tradition of common law immunity. *See id.* at 45 & n.12, 48 & n.13; Wood v. Strickland, 420 U.S. 308, 318 (1974) (citing cases from 1854 to 1925 to support the existence of a common-law tradition of qualified immunity for school board members).

48. *Malley*, 475 U.S. at 340; *see* Briscoe v. LaHue, 460 U.S. 325, 342-44 (1983); Imbler v. Pachtman, 424 U.S. 409, 424 (1976).

49. Professor Erwin Chemerinsky offers two criticisms of an historically-based approach to immunity under § 1983. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 403-04 (1989). First, an historical approach assumes that common law clearly stated the type of immunity available to public officials. *Id.* at 403. This is not always the case because the degree of immunity that courts afforded to public officials varied among states. *Id.* at 404. Thus, majority and dissenting opinions of immunity decisions will cite conflicting cases, noting the existence or non-existence of immunity to support their positions. *Id.* Second, Chemerinsky questions the relevance of common law principles to modern views of tort law, the Constitution, and individual rights. *Id.*

50. Justice O'Connor has stated:

> This approach [of looking to the common law at 1871] makes sense when there was a generally prevailing rule of common law, for then it is reasonable to assume that Congressmen were familiar with that rule and imagined that it would cover the cause of action that they were creating. But when a significant split in authority existed, it strains credulity to argue that Congress simply assumed that one view rather than the other would govern. Particularly in a case like this one, in which those interpreting the common law of 1871 must resort to dictionaries in an attempt to translate the language of the late 19th century into terms that judges of the late 20th century can understand . . . [W]e cannot safely infer anything about congressional intent from the divided contemporaneous judicial opinions.

*Wade*, 461 U.S. at 93 (O'Connor, J., dissenting) (citations omitted). In *Wade*, the Court, looking to Congress's presumed intent in enacting § 1983, held that a jury may be permitted to assess punitive damages in a § 1983 action when the defendant's conduct involves reckless or callous indifference because the common law, both in 1871 and now, allows recovery of punitive damages in tort cases not only for actual malicious intent but also for reckless indifference to the rights of others. *Id.* at 46-48. Justice Rehnquist dissented, asserting that the Court should look only to 1871 law and that a jury may assess punitive damages in a § 1983 action only when there was bad faith or improper motive on the part of the defendant because that was the standard required for punitive damages in common law before 1871. *Id.* at 65-66, 84.

O'Connor has suggested that the Court focus on the policies underlying § 1983 to determine which common law rule best accords with those policies.[51] Justice O'Connor identifies compensation of victims of constitutional violations and deterrence of further violations as the overriding policies of § 1983.[52] She stated, however, that the goal of deterrence must be balanced against the potential chill on public officials in the performance of their duties.[53] Recently, the Court has indicated that it may not use the 1871 test to determine the scope of qualified immunity.[54]

2. History of Immunity

a. *Discretionary Acts*

Prior to 1871, the common law provided that most public officials were entitled to qualified immunity for their discretionary acts.[55] The following public officials, however, were entitled to absolute immunity if they performed discretionary acts in the judicial process: judges,[56] witnesses,[57] jurors and grand jurors.[58] These common law rules remain the prevailing view

51. *Wade*, 461 U.S. at 93 (1983) (O'Connor, J., dissenting).

52. *Id.*

53. *Id.*

54. Justice Scalia's opinion for the Court in Anderson v. Creighton, 483 U.S. 635 (1987), suggests that the Supreme Court will not apply the 1871 test to determine the scope of qualified immunity. *Anderson*, 483 U.S. at 644-45. Justice Scalia stated that, although it is true that the Court determines the scope of immunity in light of common law tradition, "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Id.* at 645.

55. *See* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 411-13 (1880); *see also* Burns v. Reed, 111 S. Ct. 1934, 1947 (1991) (Scalia, J., concurring in part and dissenting in part) (arguing that government servants who performed official acts involving policy discretion had qualified immunity in pre-1871 common law). In *Burns*, Justice Scalia cites a pre-1871 case, Billings v. Lafferty, 31 Ill. 318, 322 (1863), which held that a court clerk was entitled to qualified immunity, to support the notion that government servants who exercise policy discretion were awarded qualified immunity before 1871. *Id.* However, most court clerk duties do not allow for discretion because they are ministerial. In addition, the majority of pre-1871 courts provided no immunity for the acts of court clerks. *See infra* notes 60-64, 131-40 and accompanying text. Thus, Justice Scalia mischaracterized the duties of court clerks as discretionary and chose one of the few cases which granted court clerks qualified immunity for their acts.

56. Floyd v. Barker, 77 Eng. Rep. 1305 (1608), *cited in* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

57. King v. Skinner, 98 Eng. Rep. 529 (K.B. 1772), *cited in* Briscoe v. LaHue, 460 U.S. 325, 334 (1983).

58. *Id.*; *see* Yaselli v. Goff, 12 F.2d 396, 403 (2d Cir. 1926) (noting the exist-

today.[59]

b. *Ministerial Acts*

Prior to the passage of the Civil Rights Act in 1871, the general common law provided that a public officer was not entitled to immunity for ministerial acts.[60] The few courts that granted immunity to public officials for ministerial acts did so by extending qualified immunity.[61] Under the general rule, however, a public officer was liable[62] for omission, neglect, or malfeasance[63] in the performance of ministerial acts,[64] and most courts provided court clerks with no immunity for these acts.[65] After 1871, courts continued to apply this general rule.[66]

---

ence of common-law precedent extending absolute immunity to grand and petit jurors), *aff'd per curiam*, 275 U.S. 503 (1927); *see also* Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976) (citing Turpen v. Booth, 56 Cal. 65 (1880); Hunter v. Mathis, 40 Ind. 356 (1872)).

59. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Butz v. Economou, 438 U.S. 478, 505 (1978).

60. Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 95 (1836) ("It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress.... Where a ministerial officer acts in good faith for an injury done, he is not liable to exemplary damages; but he can claim no further exemption, where his acts are clearly against law."); *see* Jones v. Commonwealth, 64 Ky. (1 Bush) 34, 38-42 (1866); Briggs v. Wardwell, 10 Mass. 356, 358 (1813).

61. *See, e.g.*, Billings v. Lafferty, 31 Ill. 318, 322 (1863); Commonwealth v. Thompson, 65 Ky. (2 Bush) 559, 560 (1866).

62. When the injured party was contributorily negligent, however, the public officer was not liable. *See* Parks v. Davis, 26 Iowa 20, 22 (1864).

63. Malfeasance has been defined as "a wrongful act which the actor has no legal right to do; [or] as any wrongful conduct which affects, interrupts or interferes with the performance of official duty; [or] as an act for which there is no authority or warrant of law; [or] as an act which a person ought not to do at all; ... [or] as the unjust performance of some act which the party performing it has no right, or has contracted not, to do." Daugherty v. Ellis, 97 S.E.2d 33, 42 (W. Va. 1956) (citations omitted).

64. McNutt *ex rel.* Moore v. Livingston, 15 Miss. (7 S. & M.) 641, 649-50 (1846) (holding that a court clerk performed a ministerial act and thus was not entitled to immunity); *see also* State *ex rel.* McIntyre v. Merritt, 65 N.C. 558, 560 (1871) (holding court clerks liable for failure to perform official duty provided by law).

65. *See infra* notes 132-40 (listing cases).

66. *See, e.g.*, Martin v. Bogard, 2 S.W.2d 700, 702 (Ark. 1928); Riverside Transfer Co. v. Service Drayage Co., 135 So. 79, 80 (La. Ct. App. 1931); Whelan v. Reynolds, 112 N.W. 223, 224 (Minn. 1907). For a more complete listing of cases, see *infra* notes 144-52. Several courts, however, have held that clerks are qualifiedly immune and therefore liable for bad faith actions or malicious disregard of duties. *See, e.g.*, Hoyer v. Graham, 129 N.W. 317, 318 (Iowa 1911); Brown v. Brown, 64 S.W.2d 59, 61 (Tenn. Ct. App. 1933).

Gradually, however, some courts began to depart from the common law rule and grant absolute immunity to officers who performed ministerial acts.[67] However, because immunity is meant to protect officials who exercise discretion and because, by definition, a ministerial act prohibits discretion, policy considerations support withholding immunity for ministerial acts.

### C. ROLE OF COURT CLERKS IN THE JUDICIAL PROCESS

The majority of court clerks' duties are ministerial.[68] A ministerial act is one which does not require the exercise of judgment and discretion in its performance.[69] Although their duties vary by jurisdiction, court clerks generally file or record judgments, payments of fines, orders, and pleadings; issue executions of judgments; and approve appeal bonds. Statutes require that court clerks perform these acts.[70]

A court clerk also may perform discretionary acts when mandated by a constitutional or legislative provision. For example, a statute may empower a court clerk to issue criminal warrants. To issue a warrant, a court clerk must exercise dis-

---

67. Although there is no clear turning point when courts began to award absolute immunity to court clerks for ministerial acts, one of the early cases was Allen v. Biggs, 62 F. Supp. 229 (E.D. Pa. 1945). In *Biggs*, the plaintiff sued both the judge and the court clerk, alleging that he was deprived of his liberty because the clerk delayed filing a writ of certiorari. *Id.* at 230. Concluding that the judge was entitled to absolute immunity, and without discussing the immunity of the clerk specifically, the court dismissed the action against both the clerk and the judge. *Id.* at 230-31.

Courts continue to split on whether court clerks should be absolutely immune for ministerial acts. *Compare* Dalton v. Hysell, 381 N.E.2d 955, 956 (Ohio Ct. App. 1978) (holding that a court clerk is liable for negligently failing to note the payment of a fine when the failure resulted in plaintiff's arrest) *and* Connell v. Tooele City, 572 P.2d 697, 699 (Utah 1977) (indicating that a court clerk is liable for negligent bookkeeping which resulted in plaintiff's arrest because improper docketing was a ministerial act) *with* Zimmerman v. Spears, 428 F. Supp. 759, 762 (W.D. Tex.) (holding that a court clerk is entitled to absolute immunity when performing her duties), *aff'd*, 565 F.2d 310 (5th Cir. 1977) *and* Davis v. Quarter Sessions Court, 361 F. Supp. 720, 722 (E.D. Pa. 1973) (holding that court clerks are absolutely immune for failing to forward transcript).

68. Midwestern Devs., Inc. v. City of Tulsa, 319 F.2d 53, 53 (10th Cir. 1963) (holding that a clerk is a ministerial officer); State *ex rel.* Wanamaker v. Miller, 128 N.E.2d 108, 109 (Ohio 1955) (same).

69. *See supra* note 23 and accompanying text.

70. *See, e.g.*, BANKR. R. 5005, 5006 (describing clerk's duty to accept filed papers and to issue certified copy of record); IND. R. PROC. 72 (listing duties of trial courts and clerks); MD. CTS. & JUD. PROC. CODE ANN. § 2-201 (1989) (setting forth general duties of court clerks); WIS. STAT. ANN. §§ 59.3, 59.395 (West 1988 & Supp. 1991) (clerk of court's duties).

cretion to determine whether probable cause exists.[71]

## II. AVAILABILITY OF IMMUNITY TO COURT CLERKS FOR CONSTITUTIONAL VIOLATIONS

Courts have not yet determined the appropriate level of court clerk immunity. The Supreme Court has not considered the issue, and the circuit courts are split.[72] The Ninth Circuit has concluded that court clerks are absolutely immune for ministerial acts,[73] but other circuits have suggested that court clerks may receive qualified immunity for ministerial acts.[74] The opinions of the Fourth, Seventh, and Ninth Circuits represent the three approaches that courts use in determining court clerk immunity.

### A. FOURTH CIRCUIT

In *McCray v. Maryland*,[75] the Fourth Circuit held that a state court clerk was not entitled to absolute immunity for his ministerial act in a § 1983 action.[76] The plaintiff, a state prisoner, alleged that the clerk barred his access to the courts by negligently filing the prisoner's petition for state post-conviction relief.[77]

The *McCray* court used a two-part analysis to determine whether the court clerk was entitled to absolute immunity.[78] First, the court considered whether the policies behind absolute immunity warranted granting it to court clerks performing ministerial acts.[79] The court reasoned that absolute immunity ensures that the threat of liability will not affect a public offi-

71. *See, e.g.*, Scott v. Dixon, 720 F.2d 1542, 1547 (11th Cir. 1983) (holding that a court clerk was entitled to absolute immunity because he performed a discretionary function normally handled by a judge), *cert. denied*, 469 U.S. 832 (1984); City of Louisville v. Bergel, 610 S.W.2d 292, 293 (Ky. 1980) (holding that the issuance of a warrant for arrest by the clerk is a judicial act requiring discretion, thereby making the court clerk immune).

72. *See* Forte v. Sullivan, 935 F.2d 1, 3-4 (1st Cir. 1991) (noting the split among the circuit courts of appeal on the application of immunity to court personnel).

73. *See infra* notes 93-99 and accompanying text (discussing the Ninth Circuit's test for immunity as applied to court clerks).

74. *See infra* notes 75-89, 100-23 and accompanying text (discussing the Fourth and Seventh Circuits' positions, respectively, on qualified immunity for court clerks).

75. 456 F.2d 1 (4th Cir. 1972).

76. *Id.* at 6.

77. *Id.* at 2.

78. *Id.*

79. *Id.* at 3.

cial's ability to make decisions.[80] Thus, the court concluded that it should grant the court clerk absolute immunity only if the job requires discretion.[81] Because a Maryland statute required the clerk to file petitions,[82] the court determined that the clerk's duty to file papers was mandatory and not discretionary.[83] Because the clerk lacked discretion, the threat of liability would not inhibit the clerk from performing his duties.[84] Thus, the policies underlying absolute immunity would not have been furthered in *McCray*.[85]

Second, the court focused on the fact that the plaintiff brought his suit pursuant to § 1983 of the Civil Rights Act. Because § 1983 makes "every person" who deprives another of her constitutional rights under color of state law liable for damages, the court ruled that only those immunities which existed at common law could aid officials sued pursuant to § 1983.[86] The court concluded that because a state officer generally was not immune for failure to perform a required ministerial act under common law,[87] the court clerk likewise was not immune.[88] The court remanded the question of whether the court clerk was entitled to qualified immunity.[89]

80. *Id.* For example, granting judges absolute immunity fulfills the purpose underlying absolute immunity because it allows judges to exercise their discretion freely without the fear of liability for their actions. *Id.*

81. *Id.* at 4 (explaining that other participants in the judicial process are entitled to absolute immunity when they perform discretionary duties similar to those exercised by judges).

82. *Id.* at 2.

83. *Id.* at 4.

84. *Id.* Additionally, a Maryland statute provided for a penalty of $200 against any court clerk who "neglectfully or willfully" failed to perform such ministerial duties as making "proper entries of all proceedings in the court of which he is a clerk." MD. ANN. CODE art. 17, § 32 (1957) (repealed 1973). The court implied that the threat of liability would not inhibit the court clerk's proper performance of his duties, given that the clerk would already be penalized for failing to do so. *McCray*, 456 F.2d at 4.

85. *McCray*, 456 F.2d at 4.

86. *Id.* at 3 (stating that courts must look at common law in 1871 to avoid a " 'judicial repeal' of the congressional purpose to make liable 'every person' who under color of state law abridges a citizen's rights" (quoting Hoffman v. Halden, 268 F.2d 280, 300 (9th Cir. 1959))).

87. *Id.* at 4. The court did not define what it meant by "common law," but the earliest case cited to support the lack of immunity was from 1899. *Id.* at 4 n.8.

88. *Id.* at 4. The *McCray* court also remanded the case to the district court to determine whether the court clerk had acted pursuant to a judicial or court order, noting that such an action would give the clerk qualified immunity. *Id.* at 5.

89. *Id.* at 6. At the time of the *McCray* decision, the test for whether an official was entitled to qualified immunity was whether the official acted in

B. NINTH CIRCUIT

In *Mullis v. United States Bankruptcy Court*,[90] the Ninth Circuit rejected the *McCray* court's reasoning and held that a court clerk was absolutely immune for a ministerial act. In *Mullis*, the plaintiff brought a *Bivens* action[91] against several federal bankruptcy court clerks, alleging that the clerks had erroneously filed an incomplete bankruptcy petition under Chapter 7 and later refused to accept an amended petition.[92] The Ninth Circuit held that court clerks are entitled to absolute immunity[93] in civil rights actions when they perform acts that are an integral part of the judicial process[94] and the acts were not

---

good faith. Since the *McCray* decision, however, the Supreme Court has changed the standard for qualified immunity. *See supra* note 27 and accompanying text (discussing the Supreme Court's changes to the qualified immunity standard). The present inquiry for qualified immunity focuses on whether the law was unclear, not on whether the public official took the action in good faith.

90. 828 F.2d 1385 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988).

91. *See supra* note 39 and accompanying text (explaining civil rights actions against federal officials).

92. *Mullis*, 828 F.2d at 1390. Bankruptcy Rule 5005(a) provides that filing bankruptcy papers is a statutory duty for court clerks.

93. *Mullis*, 828 F.2d at 1390. The Ninth Circuit's recent decision in Antoine v. Byers & Anderson, Inc., 950 F.2d 1471 (9th Cir. 1991), *petition for cert. filed*, (U.S. Mar. 11, 1992) (No. 91-7604), further develops the Ninth Circuit's analysis regarding the availability of absolute immunity for acts which are an integral part of the judicial process. In *Antoine*, the Ninth Circuit held that a court reporter was absolutely immune for failing to produce a criminal trial transcript because her acts were part of an adjudicatory function. *Id.* at 1476. The court noted that absolute immunity is limited to actions that are either "judicial or adjudicative." *Id.* at 1475 (citing Forrester v. White, 484 U.S. 219, 229 (1987)). The Ninth Circuit explicitly rejected the Eighth Circuit's decision in McLallen v. Henderson, 492 F.2d 1298 (8th Cir. 1974), which held that court reporters were not entitled to absolute immunity because the reporters' duties were ministerial, not discretionary. *See Mullis*, 828 F.2d at 1476 n.4.

The Ninth Circuit thus interpreted *Forrester* to confer absolute immunity from damages for all acts carried out as a part of the judicial function, no matter how mechanical or routine the acts are. The Ninth Circuit's interpretation of *Forrester* is too broad and thus incorrect. Although the *Forrester* Court excluded administrative acts such as employment decisions from the protection of absolute immunity, the Court did not indicate that it was expanding absolute immunity to include those ministerial acts traditionally exempt from absolute immunity. *See supra* notes 60-66 and accompanying text (discussing traditional exemptions for ministerial acts).

94. *Mullis*, 828 F.2d at 1390; *see also* Sharma v. Stevas, 790 F.2d 1486, 1486 (9th Cir. 1986) (holding that a clerk of the United States Supreme Court was absolutely immune because his activities were an integral part of the judicial process). Other circuits have also adopted the "integral part of the judicial process" test. *See* Mwonyonyi v. Gieszl, No. 89-5495, 1990 U.S. App. LEXIS 2048, at *5 (6th Cir. Feb. 9, 1990); Foster v. Walsh, 864 F.2d 416, 417 (6th Cir.

performed in the clear absence of all jurisdiction.[95] The court's analysis implies that the discretionary nature of the act does not affect the status of immunity.[96]

Although it did not define the characteristics of those tasks which are "an integral part of the judicial process," the court held that the commencement of an action was such an act.[97] Under the second half of its test, the court concluded that the clerks did not act in the clear absence of all jurisdiction because the acts were within the general subject matter jurisdiction of bankruptcy clerks.[98] Thus, the court affirmed the district court's decision to dismiss the complaint on the grounds that court clerks had absolute immunity.[99]

### C. SEVENTH CIRCUIT

Like the Fourth Circuit, the Seventh Circuit has held that court clerks are not entitled to absolute immunity for ministerial acts. Unlike the Fourth Circuit, however, the Seventh Circuit appears to have defined a ministerial act as an act of omission rather than an act of commission.[100] The Seventh Circuit does not consider whether the act itself is discretionary.[101]

---

1988) (per curiam); Tripati v. United States Immigration & Naturalization Serv., 784 F.2d 345, 348 (10th Cir. 1986), *cert. denied*, 484 U.S. 1028 (1988); Hughes v. Chesser, 731 F.2d 1489, 1490 (11th Cir. 1984); Spaulding v. Nielsen, 599 F.2d 728, 729 (5th Cir. 1979) (per curiam). *But see* Page v. Albertson, No. 89-2256, 1990 U.S. App. LEXIS 16045, at *2-3 (6th Cir. Sept. 10, 1990) (holding that the court clerks' alleged failure to file or assign plaintiff's motion promptly might be characterized as administrative and thus may not be entitled to absolute immunity).

95. *Mullis*, 828 F.2d at 1390. The Supreme Court has made a distinction between acts which are performed in clear absence of jurisdiction and those performed in excess of jurisdiction. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 352 (1872).

96. *Mullis*, 828 F.2d at 1390; *see also* Foster v. Walsh, 864 F.2d 416, 417-18 (6th Cir. 1988) (holding that a court clerk was entitled to absolute immunity from damages in a § 1983 suit for issuing a warrant because the act was a truly judicial act, regardless of whether discretion was involved).

97. *Mullis*, 828 F.2d at 1390. The Second Circuit has stated that tasks "integrally related to the judicial process" share the following characteristics: "the need for absolute immunity in order to permit the effective performance of the function and the existence of safeguards against improper performance." Dorman v. Higgins, 821 F.2d 133, 136 (2d Cir. 1987).

98. *Mullis*, 828 F.2d at 1390.

99. *Id.*

100. *See infra* notes 163-64 and accompanying text (discussing the Seventh Circuit's omission/commission distinction).

101. *See infra* note 163 (noting that the Seventh Circuit, in *Lowe* and *Eades*, held that clerks are not immune for failure to perform nondiscretionary acts).

The Seventh Circuit's decisions in *Lowe v. Letsinger*[102] and *Eades v. Sterlinske*[103] best illustrate the court's analysis. In *Lowe*, the plaintiff brought a § 1983 action against a court clerk for an act of omission, alleging that the clerk intentionally withheld notice of an order vacating the plaintiff's conviction,[104] causing the plaintiff to spend three additional weeks in jail.[105] The Seventh Circuit held that the court clerk was not entitled to absolute immunity but suggested that the clerk may be entitled to qualified immunity.[106] The court explained that court clerks are absolutely immune when they perform discretionary acts similar to those performed by judges, such as setting bail.[107] Therefore, the court held that the clerk was not entitled to absolute immunity for his act of omission because the clerk's duty to send notice after entry of judgment was a ministerial task.[108] The court stated that the clerk may nevertheless be entitled to qualified immunity if he could show that the law governing his conduct was unclear or if extraordinary circumstances excused his wrongful conduct.[109] Because it was "elementary" that a prisoner should be notified when a judgment is entered on a post-conviction petition, the court thought it unlikely that the clerk would be immune under the first

102. 772 F.2d 308 (7th Cir. 1985).

103. 810 F.2d 723 (7th Cir.), *cert. denied*, 484 U.S. 847 (1987).

104. *Lowe*, 772 F.2d at 310.

105. *Id.* at 312-13.

106. *Id.* at 313. The Seventh Circuit's analysis in Thompson v. Duke, 882 F.2d 1180 (7th Cir. 1988), and its interpretation of Forrester v. White, 484 U.S. 219 (1988), however, suggest that the Seventh Circuit might analyze the immunity of a court clerk differently if it were now faced with the question of whether a court clerk is absolutely immune. The *Thompson* court held that, regardless of how ministerial a task was, those individuals who perform tasks in the judicial system are entitled to absolute immunity. *See Thompson*, 882 F.2d at 1184. Accordingly, the court held that state officials responsible for a delay in scheduling were absolutely immune because the scheduling of a hearing is part of an adjudicatory or judicial function. *Id.* at 1185.

However, the *Forrester* Court did not provide a general definition of the class of acts entitled to immunity, nor did it state that all individuals who perform acts which are part of an adjudicatory function are entitled to absolute immunity. Instead, the Court relied on a functional analysis to determine those officials entitled to absolute immunity. 484 U.S. at 227. The *Thompson* court, however, did not perform the functional analysis. *See* 882 F.2d at 1189.

107. *Lowe*, 772 F.2d at 313. For cases in other circuits which hold that a court clerk is absolutely immune when performing discretionary acts of a judicial nature, see Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983), *cert. denied*, 469 U.S. 832 (1984); Denman v. Leedy, 479 F.2d 1097, 1098 (6th Cir. 1978).

108. *Lowe*, 772 F.2d at 313-14 (citing McCray v. Maryland, 456 F.2d 1, 5 (4th Cir. 1972)).

109. *Id.*

prong.[110] However, it remanded the case for further consideration of whether there were extraordinary circumstances which excused his conduct.[111]

The Seventh Circuit rejected the argument that the court clerk was entitled to derivative absolute immunity because he acted at the request of the judge.[112] The court reasoned that immunity should not protect a clerk from liability if the clerk knowingly engaged in unconstitutional conduct, even if the action was taken pursuant to the judge's direction.[113]

In *Eades v. Sterlinske*,[114] the Seventh Circuit defined discretion broadly. In *Eades*, the plaintiff, a criminal defendant, brought a § 1983 action[115] against a court clerk and the state court judge, alleging that they had falsely represented that an instruction and special-verdict conference had been held.[116] The court concluded that the clerk's act of commission of entering a false item on the docket sheet was a discretionary act[117] because the act had an "integral relationship with the judicial process."[118] Thus, the clerk was entitled to absolute

---

110. *Id.* at 314.

111. *Id.*

112. *Id.* *But see* Heldstab v. Liska, No. 89-3323, 1990 U.S. App. LEXIS 15203, at *3-4 (7th Cir. Aug. 20, 1990) (holding that court clerks are absolutely immune when acting pursuant to a judge's instruction because it would be unfair to spare the judges who give orders while punishing the officers who obey them).

113. *Lowe*, 772 F.2d at 314.

114. 810 F.2d 723 (7th Cir.), *cert. denied*, 484 U.S. 847 (1987).

115. The plaintiff alleged a deprivation of her Sixth and Fourteenth Amendment rights. *Id.* at 725.

116. *Id.* at 724. Specifically, the plaintiff alleged that the judge dictated a false certificate indicating that the conference had been held and told the court clerk to alter the docket sheet record to indicate that he had filed the certificate. *Id.* at 724-25.

117. *Id.* at 726.

118. *Id.* The Seventh Circuit's conclusion that the court clerk was absolutely immune because the clerk exercised discretion and thus performed an act which had an "integral relationship to the judicial process" is reminiscent of the Ninth Circuit's analysis. *See supra* note 93 and accompanying text (discussing the Ninth Circuit standard). However, while the Ninth Circuit concludes that filing petition papers is a task which is an "integral part of the judicial process," the Seventh Circuit suggests that only those acts which are discretionary are an "integral part" of the judicial process and should be afforded absolute immunity. *Eades*, 810 F.2d at 726. Under its test of tasks which are an "integral part of the judicial process," the Seventh Circuit probably would conclude that the court clerk in *Mullis* did not perform a task integral to the judicial process when filing papers because filing papers does not require discretion. Thus, the Seventh Circuit probably would disagree with the Ninth Circuit and conclude that the Ninth Circuit erred in according absolute immunity to the court clerk in *Mullis*.

immunity.[119]

The court briefly distinguished its earlier decision in *Lowe*.[120] It explained that in *Lowe* the court clerk's duty to send a notice after entry of judgment was a ministerial act because a statute required the clerk to perform the act.[121] For this reason, the clerk was not entitled to absolute immunity for his failure to perform his duty. In contrast, the *Eades* court concluded that because the clerk breached his statutory duty when he entered the false item on the docket sheet, he exercised discretion.[122] Because the clerk exercised discretion, the *Eades* court held that the clerk was entitled to absolute immunity.[123]

## III. AN ACT-BASED ANALYSIS OF COURT CLERK IMMUNITY

Despite their disparate analyses,[124] none of the circuits precludes a grant of immunity to court clerks for ministerial

---

119. *Eades*, 810 F.2d at 726.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* Rather than distorting the law to find that the court clerk performed a discretionary task, the *Eades* court could have decided the case based on derivative immunity and concluded that the court clerk was absolutely immune on those grounds. *See supra* note 24 and accompanying text.
124. The circuit courts' attempts to deal with the question of court clerk immunity have resulted in mass confusion. Consider, for example, how the Fourth, Seventh, and Ninth Circuits would treat a court clerk's deliberate falsification of a docket entry. Although both the Fourth and Seventh Circuits would grant absolute immunity to a court clerk who performed discretionary tasks, they would disagree about whether the deliberate falsification of a docket entry is a discretionary task. Focusing on whether performance of the act requires discretion, the Fourth Circuit would conclude that the court clerk was not absolutely immune because keeping an accurate docket is mandated by statute and is thus ministerial. *See supra* notes 78-88 and accompanying text. In contrast, the Seventh Circuit would conclude that the court clerk was absolutely immune because the clerk's decision to falsify the docket entry was an act of commission, and acts of commission are discretionary under the Seventh Circuit's analysis. *See supra* text accompanying notes 117-18, 122-23.

Like the Seventh Circuit, the Ninth Circuit also would find the court clerk absolutely immune, but for different reasons. The Ninth Circuit would grant absolute immunity to the court clerk regardless of whether the falsification of a docket entry was a discretionary task as long as docket entry was within the scope of the clerk's employment. *See supra* notes 93-96 and accompanying text. At the very least, the Fourth, Seventh, and Ninth Circuits all would conclude that even if the court clerk were not entitled to absolute immunity for falsifying the docket entry, the court clerk may be qualifiedly immune from liability. *See supra* notes 89, 96, 109-11 and accompanying text.

acts.[125] Supreme Court decisions on immunity suggest, however, that courts should deny any immunity to court clerks for ministerial acts which result in constitutional violations. Additionally, immunizing court clerks for ministerial acts conflicts with the policy considerations underlying immunity. Only when court clerks perform discretionary acts or acts pursuant to a judge's order does Supreme Court precedent and policy support awarding court clerks immunity.

### A. SUPREME COURT PRECEDENT AND IMMUNITY FOR UNCONSTITUTIONAL MINISTERIAL ACTS

The Supreme Court has stated that courts must look to whether immunity was available and firmly rooted in common law prior to 1871 to determine the extent to which state and federal officials are immune from civil liability for constitutional violations.[126] The Supreme Court has applied this test to judges, prosecutors, jurors, and grand jurors.[127] Court clerks are a part of the same judicial process. Because no reason exists for treating clerks differently than other judicial officers, this framework should govern court clerk immunity. Nevertheless, the circuit courts' analyses fail to apply this test. Only the Fourth Circuit has looked to the existence of common law immunity[128] in determining whether immunity is currently available as a defense to unconstitutional ministerial acts.[129]

---

125. The Ninth Circuit grants absolute immunity to court clerks for ministerial acts. *See supra* notes 93-96 and accompanying text. Through a broad definition of discretionary acts, the Seventh Circuit grants absolute immunity to court clerks for ministerial acts which are acts of commission. *See supra* notes 114-23 and accompanying text. The Seventh Circuit suggests that there may be circumstances where a court clerk would be qualifiedly immune for acts of omission. *See supra* notes 109-11 and accompanying text. The Fourth Circuit also left open the possibility that court clerks may be qualifiedly immune for their acts. *See* McCray v. Maryland, 456 F.2d 1, 4 (4th Cir. 1972).

126. *See supra* notes 45-46 and accompanying text.

127. *See supra* notes 8-12 and accompanying text.

128. *See supra* notes 86-87 and accompanying text.

129. Even so, the Fourth Circuit was imprecise in its application of Supreme Court precedent concerning the types of immunities which survive the "every" person language of § 1983. The court stated that the immunities which have been read into § 1983 derive from those existing at common law. *McCray*, 456 F.2d at 4. The court then concluded that court clerks were not absolutely immune because court clerks were not absolutely immune in 1899. *Id.* at 4 n.8.

Although cases after 1871 may be relevant in determining whether the prevailing view of immunities for ministerial acts has substantially changed since 1871, the Fourth Circuit also should have determined whether the absolute immunity of court clerks was firmly rooted at common law at the time

Court clerks should not be entitled to absolute or qualified immunity for ministerial acts because court clerk immunity for ministerial acts was not firmly rooted in common law at the time Congress passed the Civil Rights Act in 1871, nor has the prevailing view of immunity for ministerial acts changed substantially since 1871.[130] Court clerks were sued repeatedly in the years prior to 1871, and most courts held that court clerks were not entitled to absolute immunity.[131] Courts reasoned that "every public officer ought to know his duty, and exercise it with fidelity, or he will become responsible to the party grieved."[132] Thus, prior to 1871, plaintiffs recovered damages against court clerks for failure to perform the following ministerial acts: issue an execution,[133] docket cases in correct order,[134] enter judgments correctly,[135] issue a citation in a timely manner,[136] search records properly,[137] approve bonds with sufficient sureties,[138] issue a writ of error secured by the proper sureties,[139] and avoid unreasonable delays in delivering a transcript.[140]

The fact that only a few courts before 1871 held that court clerks were entitled to qualified immunity for ministerial acts indicates that it was not firmly rooted at common law before

---

Congress passed the Civil Rights Act in 1871. The common law status of court clerk immunity was, in fact, the same before 1871 as after, and, therefore, the Fourth Circuit reached the correct result. *See supra* note 66 and accompanying text.

130. The existence of immunity for court clerks prior to 1871 must be assessed in terms of their immunity in the tort context. Constitutional actions were not available prior to 1871 when the Civil Rights Act was passed. *See* Section 1 of the Civil Rights Act of 1871, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1988)) (creating liability for constitutional violations by "every person" acting under color of state law).

131. *See supra* notes 60-61, 64 (citing cases holding that court clerks were not entitled to any immunity or, at the most, qualified immunity); *see also infra* notes 132-40 (citing cases in which court clerks were assessed damages).

132. Work v. Hoofnagle, 1 Yeates 506, 508 (Pa. 1795).

133. *See, e.g.*, State *ex rel.* Mahoney v. Ritter, 20 Ind. 406, 408 (1863) (per curiam); Briggs v. Wardwell, 10 Mass. 356, 358 (1813); State *ex rel.* McIntyre v. Merritt, 65 N.C. 558, 560 (1871); Gooch v. Gregory, 65 N.C. 142, 144 (1871).

134. *See, e.g.*, Brown v. Lester, 12 Miss. (13 S. & M.) 392, 395 (1850).

135. *See, e.g.*, Day v. Graham, 6 Ill. (1 Gilm.) 435, 442 (1844); Planters' Bank v. Conger, 20 Miss. (12 S. & M.) 527, 531 (1849); Coyne v. Souther, 61 Pa. 455, 458 (1869).

136. *See, e.g.*, Anderson v. Jouhett, 14 La. Ann. 614, 615 (1859).

137. *See, e.g.*, Ziegler v. Commonwealth, 12 Pa. 227, 228 (1849).

138. *See, e.g.*, Ward v. Buell, 18 Ind. 104, 106 (1862); Pass v. Dibrell, 16 Tenn. (8 Yer.) 470, 473 (1835).

139. *See, e.g.*, McNutt v. Livingston, 15 Miss. (7 S. & M.) 641, 649-50 (1846).

140. *See* Bates v. Foree, 67 Ky. (4 Bush) 430, 432 (1868).

1871.[141] Further, the prevailing view of court clerk liability has not changed substantially since Congress enacted the Civil Rights Act. Although some courts have departed from the general common law view and granted court clerks absolute immunity for ministerial acts, absolute immunity for ministerial acts has by no means become the prevailing view.[142] Many courts continue to hold court clerks liable for many ministerial acts for which they were liable before 1871.[143] For example, since 1871, court clerks have been held liable for their failure to record judgments accurately,[144] to furnish information regarding judgments,[145] to enter orders promptly,[146] to index a notice of lis pendens properly,[147] to issue process correctly,[148] to forward transcripts in a timely fashion,[149] to distribute funds promptly,[150] to notify parties of the grant of a final order,[151] and to file or record documents correctly.[152]

The non-existence of a "firmly rooted" absolute or qualified common law immunity for court clerks, both before 1871 and after 1871, indicates that courts should neither grant absolute immunity to court clerks for ministerial acts nor remand for an inquiry into whether the court clerk is entitled to qualified immunity due to an unclear law. Based on this initial inquiry, the circuits should not have concluded that an immunity defense is available to court clerks.

Some may argue that the existence of a few courts which granted qualified immunity to court clerks for their ministerial acts, both before and after 1871, and the recent decisions granting court clerks absolute immunity for ministerial acts, suggest

---

141. *See supra* note 61 and accompanying text (citing cases).

142. *See supra* notes 66-67 and accompanying text.

143. *See supra* note 67.

144. *See, e.g.*, Landreneau v. Ceasar, 153 So. 2d 145, 152-53 (La. Ct. App. 1963); Whelan v. Reynolds, 112 N.W. 223, 229 (Minn. 1907); Cole v. Vincent, 242 N.Y.S. 644, 650 (App. Div. 1930); Connell v. Tooele City, 572 P.2d 697, 699 (Utah 1977).

145. *See, e.g.*, Selover v. Sheardown, 76 N.W. 50, 51 (Minn. 1898).

146. *See, e.g.*, Charco, Inc. v. Cohn, 411 P.2d 264, 266 (Or. 1966).

147. *See, e.g.*, Hartwell v. Riley, 62 N.Y.S. 317, 320 (App. Div. 1900).

148. *See, e.g.*, Baltimore & O.R.R. v. Weedon, 78 F. 584, 590 (6th Cir. 1897).

149. *See* Rheuark v. Shaw, 547 F.2d 1257, 1259 (5th Cir. 1977) (permitting an action to be maintained against a court clerk for failure to forward a transcript).

150. *See, e.g.*, Martin v. Bogard, 2 S.W.2d 700, 703 (Ark. 1928).

151. *See, e.g.*, Spector v. Hallan, 17 N.Y.S.2d 163, 165 (City Ct.), *aff'd*, 19 N.Y.S.2d 439 (Sup. Ct. 1940).

152. Cain v. Gray, 142 S.W. 715, 718 (Ky. 1912); Progressive Bank & Trust Co. v. Dieco Specialty, Inc., 378 So. 2d 139, 141 (La. Ct. App. 1979); Riverside Transfer Co. v. Service Drayage Co., 135 So. 79, 80 (La. Ct. App. 1931).

that there is no clear common law rule regarding court clerk immunity.[153] Additionally, the Supreme Court appears to be moving away from the application of the 1871 test to qualified immunity.[154] Justice O'Connor has suggested that an inquiry into the existence of common law immunities both before and after 1871 is futile, especially when there was no prevailing rule at common law.[155] In place of the 1871 test, Justice O'Connor has urged courts to turn to the policies underlying § 1983. In doing so, courts can determine which rule best furthers § 1983's purposes of providing compensation to victims of constitutional violations while deterring further violations.[156]

The principal policies underlying § 1983 are compensation of victims for constitutional violations and deterrence of further violations.[157] The goal of deterrence must be balanced by the potential chill such deterrence will have on public officials in the performance of their duties.[158] Holding court clerks liable for constitutional violations allows victims to seek compensation for injuries caused by clerks and deters clerks from further misconduct. The existence of liability as a deterrent would not chill a court clerk's performance of her ministerial acts because such acts do not allow for discretion. Liability for ministerial acts thus furthers the policies underlying § 1983. Moreover, the general policy justifications for awarding immunity do not exist.

### B. Policy Considerations Justifying Immunity Do Not Exist

In addition to failing to meet the policy objectives of § 1983, providing immunity to court clerks who perform ministerial acts violates policy concerns underlying immunity. Courts principally grant immunity to ensure that public officials may exercise discretion free from the fear of harassment or intimidation that is created by the threat of liability.[159] Accordingly, the Supreme Court has granted immunity to those public officials who exercise discretion.[160] Ministerial acts, which *must* be per-

153. *See supra* notes 62-67 and accompanying text.
154. *See supra* note 54.
155. *See* Smith v. Wade, 461 U.S. 30, 92-93 (1983) (O'Connor, J., dissenting).
156. *See supra* text accompanying notes 52-53.
157. *Wade*, 461 U.S. at 92-93 (O'Connor, J., dissenting).
158. *Id.*
159. *See supra* notes 30-35 and accompanying text.
160. *See supra* note 22 and accompanying text.

formed and allow for no discretion,[161] constitute the majority of court clerk duties.[162] Because court clerks do not exercise discretion when performing ministerial acts, immunity serves no purpose. In fact, subjecting court clerks to liability, rather than protecting them with immunity, will encourage the proper performance of their duty.

1. Definition of Discretion for Purposes of Immunity

In defining discretion, courts should look to the policies underlying immunity. Those policies mandate that courts focus on the *nature* of the act the court clerk should have performed, such as whether the clerk entered documents properly into the docket, rather than the *way* the clerk performed the act.

In *Eades*, the Seventh Circuit ignored these policies by apparently defining a discretionary act as an act of commission.[163] The court reasoned that if a court clerk performs an act of commission, the clerk exercises discretion even though the act otherwise appears to be ministerial. Under the Seventh Circuit's definition, ministerial acts, such as entering true information on a docket, become discretionary if the court clerk chooses to falsify the entries. The Seventh Circuit would find that such acts are discretionary because the court clerks had to choose to breach their ministerial duties.[164]

By granting absolute immunity to clerks who engage in acts of commission, the Seventh Circuit promotes the very behavior absolute immunity was intended to stop. Rather than encouraging the official to perform her duties by protecting her

---

161. *See supra* notes 23, 30-35 and accompanying text.

162. *See supra* note 68 and accompanying text.

163. Eades v. Sterlinske, 810 F.2d 723, 726 (7th Cir.), *cert. denied*, 484 U.S. 847 (1987). The *Eades* court held that a court clerk *was* entitled to absolute immunity when he intentionally falsified the entry on a docket. *Eades*, 810 F.2d at 726. In contrast, the Seventh Circuit in *Lowe v. Letsinger* held that a court clerk was *not* entitled to absolute immunity when he intentionally failed to notify a prisoner of an order releasing him from jail. 772 F.2d 308, 313 (7th Cir. 1985). Both the duty to keep an accurate docket and the duty to notify a prisoner of his release are ministerial because they are statutory duties. The only way to distinguish the Seventh Circuit's apparently conflicting decisions is to note that the court clerk's failure to notify a prisoner of an order releasing him from jail was an act of omission, whereas the court clerk's false entry in the docket was an act of commission.

164. *Eades*, 810 F.2d at 726 ("Here, defendants . . . prepared and filed a false certificate summarizing an instruction conference that allegedly was never held, and altered the docket to reflect that falsity. In so doing, defendants . . . breached their duties, and in that process exercised discretion.").

from the threat of liability, the court encourages the breach of statutory duties by providing immunity for acts of commission.

Additionally, the policies behind immunity do not justify remanding the question of whether a court clerk is entitled to qualified immunity for a ministerial act. Qualified immunity protects those officials who are required to exercise discretion when the law is unclear.[165] Court clerks do not fall within the group of public officials that qualified immunity is designed to protect because the law setting forth a ministerial act is rarely unclear.

Court clerks may argue that if they are not immune, they will become a "lightning rod" for litigation because they will be the only members of the court who are not immune.[166] This danger is exaggerated. The potential causes of action against clerks are more limited than those against judges and other judicial officers because court clerk duties are well-defined and do not require discretion. Further, this "lightning rod" concern is not enough to override the Supreme Court's interpretation of § 1983, nor does it make up for the fact that the policy considerations justifying the award of immunity to other participants in the judicial process do not exist for court clerks performing ministerial acts.

2. Lack of Procedural Safeguards

In addition, procedural safeguards will not protect the public from unconstitutional conduct by court clerks in the same way the safeguards protect the public from conduct by judicial officers. The safeguards advanced by the Supreme Court revolve around the adversarial process, precedent, and the availability of appeal—none of which protect litigants from a clerk's failure to perform ministerial tasks.[167] For example, in *Mullis*, in which the court clerk allegedly filed a bankruptcy petition incorrectly and refused to accept an amended petition,[168] the court did not consider the importance of precedent, the nature of the adversarial process, and the opportunity to correct error

165. *See supra* notes 27-29 and accompanying text.

166. *See supra* notes 8-14 and accompanying text; *see also* Ashbrook v. Hoffman, 617 F.2d 474, 476 (7th Cir. 1980) ("[A] nonjudicial officer who is delegated judicial duties in aid of the court should not be a 'lightning rod for harassing litigation' aimed at the court." (quoting Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1, 3 (1st Cir. 1976))).

167. *See supra* notes 36-37 and accompanying text.

168. Mullis v. United States Bankruptcy Court, 828 F.2d 1385, 1390 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988).

on appeal. As the court noted in *Mullis*, court clerks are responsible for accepting legal documents which initiate lawsuits.[169] The above safeguards apply only after a lawsuit has been initiated. They provide no recourse against a clerk whose negligence blocked a lawsuit. Similarly, despite the adversarial process, precedent, and the availability of appeal, the prisoner in *Lowe* lost his freedom for three weeks because of the clerk's failure to notify him of his release.[170]

### C. NARROW AREA IN WHICH COURT CLERKS ARE ABSOLUTELY IMMUNE

#### 1. Discretionary Acts

The Fourth, Seventh and Ninth Circuits considered only whether court clerks were immune for ministerial acts. Statutes occasionally will permit court clerks to perform discretionary acts. For example, when a statute authorizes a court clerk to issue warrants, the court clerk must exercise discretion to determine whether probable cause exists.[171] Under Supreme Court precedent, immunity is available for unconstitutional discretionary acts if immunity was "firmly rooted" and available to defend against discretionary acts prior to 1871.[172] Absolute immunity was firmly rooted in common law before 1871 for discretionary acts performed by participants in the judicial process,[173] and this absolute immunity attaches to the act and not to the title of the official.[174] Court clerks, therefore, also should be entitled to absolute immunity when performing discretionary acts.

#### 2. Acts Pursuant to a Judge's Order

In addition to those duties delineated by statute, court clerks also carry out judges' orders.[175] Court clerks are not en-

169. *Id.*
170. Lowe v. Letsinger, 772 F.2d 308, 310 (7th Cir. 1985).
171. *See, e.g.*, Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983) (holding that a court clerk is entitled to absolute immunity for issuing a warrant without probable cause because he performed a function normally handled by a judge—a function which required discretion), *cert. denied*, 469 U.S. 832 (1984).
172. *See supra* notes 45-46 and accompanying text.
173. *See supra* notes 55-58 and accompanying text.
174. *See supra* note 18 and accompanying text.
175. State *ex rel.* Wanamaker v. Miller, 128 N.E.2d 108, 109 (Ohio 1955) (noting that "the court has the power to order him either to file or to refuse to file any matter presented to him"). In the performance of his duties as a ministerial officer of the court, the clerk is subject to the control of the court and must obey the court's order. State *ex rel.* Tolls v. Tolls, 85 P.2d 366, 373-74 (Or.

titled to any immunity of their own to protect them from liability when ministerial acts result in constitutional violations. It is unfair, however, to hold a court clerk liable for acting pursuant to a judge's order when the judge would be absolutely immune for issuing the order.[176] It is similarly unfair to require a court clerk to defend an action which the clerk is powerless to control.[177] Further, a court's failure to grant immunity to court clerks acting pursuant to a judge's order would create tension between judges and those officials responsible for enforcing their orders.[178] If court officials were not immune, they would face the choice of disregarding the judge's orders, thereby risking discharge or criminal contempt, or of fulfilling their duty at the risk of being sued.[179]

Thus, court clerks should be entitled to absolute immunity when they act pursuant to a judge's order. This absolute immunity should derive from the judge's immunity; whether absolute immunity is available to court clerks who acted pursuant to a judge's order depends on whether the judge would be immune for his conduct in a § 1983 action.[180] Because immunity for judges was firmly rooted before 1871,[181] court clerks may borrow this absolute immunity when acting pursuant to a judge's order.

## CONCLUSION

The immunity of court clerks lies in the hands of judges who work under the same courthouse roof as do the clerks. To date, judges have insulated themselves and the other people with whom they work—witnesses, prosecutors, jurors, and grand jurors—from liability.

Although court clerks play an important role in the judicial process, these clerks should not be entitled to immunity for ministerial acts but should be immune only when they perform

1938), *overruled on other grounds*, Burnett v. Hatch, 266 P.2d 414, 419 (Or. 1954) (en banc). Failure to do so may result in contempt proceedings. *Id.*; *see also supra* note 24 (noting the different level of immunities afforded court clerks acting pursuant to a judge's order).

176. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 553-55 (1967).

177. Valdez v. City & County of Denver, 878 F.2d 1285, 1289 (10th Cir. 1989).

178. *Id.*

179. *Id.*

180. *See supra* note 24 and accompanying text.

181. *See* Floyd v. Barker, 77 Eng. Rep. 1305 (1608), *cited in* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

a judicial function or an act pursuant to a judge's order. The judicial system needs to be accountable for the actions of its participants. A judicial process totally insulated from judicial scrutiny ceases to promote, and even impedes, justice.