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# The Transferred Immunity Trap: Misapplication of Section 1983 Immunities

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## NOTE

# THE TRANSFERRED IMMUNITY TRAP: MISAPPLICATION OF SECTION 1983 IMMUNITIES

*David M. Coriell*†

INTRODUCTION .....	985
I. THE SECTION 1983 IMMUNITIES FRAMEWORK.....	988
A. Categories of Absolute Immunity in the Section 1983 Context .....	989
1. <i>Legislative Immunity</i> .....	990
2. <i>Judicial Immunity</i> .....	991
3. <i>Quasi-Judicial Immunity</i> .....	993
B. The Functional Approach .....	997
C. Limits on Absolute Immunity in Section 1983 Suits .....	998
II. MISAPPLICATIONS OF SECTION 1983 ABSOLUTE IMMUNITY IN THE LOWER COURTS .....	1000
A. Application in the Lower Courts .....	1001
B. The Fallacy of Transferred Immunity .....	1006
III. THE REASON FOR LOWER COURTS' MISAPPLICATION OF SECTION 1983 IMMUNITIES .....	1011
CONCLUSION .....	1013

### INTRODUCTION

Congress enacted section 1983 in the aftermath of the Civil War to provide a cause of action for individuals deprived of their constitutional rights by officials acting under the color of state law.<sup>1</sup> This

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<sup>1</sup> See MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 1–2 (2d ed. 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sec19832.pdf/\\$file/sec19832.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sec19832.pdf/$file/sec19832.pdf). The predecessor of section 1983 was enacted as section 1 of the “Ku Klux Klan Act.” *Id.* at 1. The statute “grew out of a message sent to Congress by President Grant on March 23, 1871,” in which President Grant alluded to the “condition of affairs now exist[ing] in some States of the Union rendering life and property insecure.” *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Concerned with abuses of Civil Rights by officials acting under the color of state law, President Grant urged “such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.” *Id.* at 173.

landmark Civil Rights statute is intended to hold public officials accountable through civil liability for wrongs committed in their official capacities.<sup>2</sup> Indeed, its very purpose is to strike at prejudiced, intolerant, or neglectful public officials.<sup>3</sup> It might seem odd, then, that although the literal language of section 1983 does not mention any immunities for public officials, the Supreme Court has implicitly read into the statute the very immunities that protected these officials from civil liability at common law.<sup>4</sup>

This Note does not intend to debate the merits of more than sixty years of firmly established jurisprudence regarding the implicit immunities in section 1983.<sup>5</sup> It does, however, argue that lower courts have misinterpreted a key element of the Supreme Court's section 1983 immunity framework and helped set the stage for unwarranted expansions of absolute immunity to officials who did not have (or would not have had) absolute immunity at common law.

Some lower courts subscribe to a theory that immunity can transfer from an official entitled to absolute immunity to auxiliary officials who assist the immune official in the performance of the immune official's functions, even when the auxiliary official is performing a different function than the immune official.<sup>6</sup> By conceptualizing the auxiliary official as an arm of the immune official, these courts hold that it is sufficient that the auxiliary official's function is integrally related to the judicial process for that auxiliary official to receive absolute immunity.<sup>7</sup>

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<sup>2</sup> See Sheldon Nahmod, *Section 1983 Is Born: The Interlocking Supreme Court Stories of Tenney and Monroe*, 17 LEWIS & CLARK L. REV. 1019, 1020 (2013). In its current form, section 1983 reads:

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 . . . .

42 U.S.C. § 1983 (2013).

<sup>3</sup> *Monroe*, 365 U.S. at 180 ("It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.").

<sup>4</sup> Margaret Z. Johns, *A Black Robe is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil Rights Cases*, 59 S.M.U. L. REV. 265, 270 (2006) ("[S]ince 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.").

<sup>5</sup> See discussion *infra* Part I.

<sup>6</sup> See discussion *infra* Part II.A.

<sup>7</sup> See, e.g., *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994) (noting that immunity extends to individuals performing functions closely related to the judicial process).

The notion that immunity can transfer from one official to another official performing a different function, however, is an analytic mistake that misconstrues the Supreme Court's "functional approach"<sup>8</sup> to section 1983 immunities. A theory of transferred immunity disregards the need to root any extension of absolute immunity in the common law as it existed in 1871, when section 1983 was first enacted.<sup>9</sup> Instead, by subscribing to a theory that immunity can transfer from an immune official to an auxiliary official performing a different function, courts are making impermissible policy decisions about the importance of protecting certain officials.<sup>10</sup>

As a result, courts that engage in transferred-immunity-reasoning risk extending absolute immunity in section 1983 cases to new officials and new functions that were never intended to be free from section 1983 liability. More importantly, by expanding the scope of immune functions, courts potentially deprive section 1983 litigants of an important civil remedy for injuries suffered as a result of official misconduct.

While some scholars have critiqued the expansion of absolute immunity in the context of section 1983,<sup>11</sup> this Note does not intend to merely recap those critiques. Rather, its purpose is to identify the analytical error that many courts make when applying the Supreme Court's section 1983 immunity framework. Part I examines and de-

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<sup>8</sup> See *id.* ("Under [the functional approach], a court looks to the nature of the function performed, not the identity of the actor who performed it." (internal quotation marks omitted)).

<sup>9</sup> See, e.g., *Heck v. Humphrey*, 512 U.S. 477, 492 (1994) (Souter, J., concurring) ("Common-law tort rules can provide a 'starting point for the inquiry under § 1983 . . .'" (quoting *Carey v. Phipus*, 435 U.S. 247, 258 (1978))); see also *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("[I]mmunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in freewheeling policy choice[s]." (second alteration in original) (internal quotation marks omitted)).

<sup>10</sup> It is important to look to the 1871 common law in understanding whether immunities apply in the context of section 1983 because the Court adopted immunities in section 1983 by means of statutory interpretation. Thus, the Court's fundamental rationale for implying immunities in section 1983 is that the 42d Congress would not have eliminated well-established immunities without explicitly doing so. See, e.g., *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967) ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. . . . The immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (noting that Congress would not have eliminated legislative immunity without doing so explicitly).

<sup>11</sup> Some scholars have noted and criticized the expansions of absolute immunity from section 1983 liability in the lower courts. See, e.g., *Johns*, *supra* note 4, at 276 ("[T]he lower courts have failed to follow the Supreme Court's decisions limiting the application of the [absolute judicial immunity] doctrine to the historical boundaries of absolute judicial immunity in 1871, the sole basis for its application in § 1983 actions."). These critics, however, have not addressed how or why the lower courts have come to mistakenly apply section 1983 immunities.

scribes the Supreme Court's section 1983 immunity framework. Part II identifies the misapplication of absolute immunity in section 1983 cases in a number of circuit court decisions that subscribe to a theory of transferred immunity. Part III briefly addresses the reason why some courts have mistakenly applied the Supreme Court's section 1983 immunity framework.

## I

### THE SECTION 1983 IMMUNITIES FRAMEWORK

When the 42d Congress passed the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, it created a new federal tort to "provide[ ] a damages remedy against state and local government officials and local governments for violations of constitutional rights."<sup>12</sup> Section 1983's cause of action is at the same time both broader than torts recognized at common law, in that it makes government officials liable for violations of constitutional rights, and narrower, in that it applies only to government officials acting under the color of law.<sup>13</sup>

Despite the fact that section 1983's literal language does not mention any immunities,<sup>14</sup> the Supreme Court has instructed that the 42d Congress drafted section 1983 against the backdrop of the common law as it stood in 1871.<sup>15</sup> This common law backdrop includes certain firmly established immunities for government officials,<sup>16</sup> which "were so fundamental and widely understood at the time § 1983 was enacted that the 42d Congress could not be presumed to have abrogated them silently."<sup>17</sup> Two levels of immunity are available to public officials: qualified and absolute. Qualified immunity protects public officials when the official reasonably believes his actions are legal.<sup>18</sup> The reasonableness of the official's actions is judged objectively.<sup>19</sup> The corollary to this principle is that "[a]n official who violated clearly established federal law did not act in an objectively reasonable manner" and thus, faces liability.<sup>20</sup> In contrast, absolute immunity "applies

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<sup>12</sup> Nahmod, *supra* note 2, at 1020.

<sup>13</sup> See *Rehberg v. Paulk*, 132 S. Ct. 1497, 1504–05 (2012).

<sup>14</sup> See 42 U.S.C. § 1983 (2013).

<sup>15</sup> Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 *TOURO L. REV.* 473, 474 (2008).

<sup>16</sup> See *Pierson v. Ray*, 386 U.S. 547, 553–55 (1967). The Court reasoned that certain immunities, such as judicial and legislative immunity, were so well established at common law that Congress would not have abolished those immunities in enacting section 1983 without making their intention to do so explicit. *Id.*; see also John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 *VA. L. REV.* 207, 211 (2013) ("The Court explains [judicial immunity] in the familiar terms of a historical pedigree so well established that Congress must have meant to maintain it."); Nahmod, *supra* note 2, at 1032–36.

<sup>17</sup> *Heck v. Humphrey*, 512 U.S. 477, 492 (1994) (Souter, J., concurring)

<sup>18</sup> See *Pearson v. Callahan*, 555 U.S. 223, 244 (2009).

<sup>19</sup> SCHWARTZ & URBONYA, *supra* note 1, at 143.

<sup>20</sup> *Id.*

even when the [official] is accused of acting maliciously and corruptly.”<sup>21</sup> Both types of immunity cut off the litigation before it begins.<sup>22</sup>

The Court looks at the legal landscape at the time of section 1983’s enactment to determine the intent of the 42d Congress in regard to retaining common law immunities in section 1983. In doing so, the Court engages in statutory interpretation. As a result, even if there exists a common law tradition of immunizing a function, if providing immunity to that function does not accord with the history and purpose of section 1983, then the Court will “refus[e] to allow common-law analogies to displace statutory analysis, [and] declin[e] to import even well-settled common-law rules.”<sup>23</sup>

In summary, although section 1983’s language does not reference any immunities,<sup>24</sup> the Court has interpreted the statute to include immunities that were firmly established in the common law as of 1871, so long as those immunities do not conflict with the purpose of section 1983.<sup>25</sup> Courts are not empowered to extend immunity based on their view of sound policy because doing so is inconsistent with the role of statutory interpretation in section 1983 immunities law.<sup>26</sup> Thus, when evaluating a claim of immunity in a section 1983 case, courts must look first to the immunities historically afforded to officials; if the function for which the official is claiming immunity has a historical justification, the court must then consider whether section 1983’s purpose accords with the policy for immunizing the function.<sup>27</sup>

#### A. Categories of Absolute Immunity in the Section 1983 Context

The Supreme Court has so far identified three categories of absolute immunity that were implicitly adopted into section 1983 when it was enacted in 1871<sup>28</sup>: (1) legislative immunity, (2) judicial immunity,

<sup>21</sup> *Pierson*, 386 U.S. at 554.

<sup>22</sup> *Id.*

<sup>23</sup> *Heck v. Humphrey*, 512 U.S. 477, 492 (1992) (Souter, J., concurring); *see also Burns v. Reed*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in part and dissenting in part) (“While we have not thought a common-law tradition (as of 1871) to be a *sufficient* condition for absolute immunity under § 1983, we have thought it to be a *necessary* one . . . .” (internal citation omitted)).

<sup>24</sup> *See* 42 U.S.C. § 1983 (2013).

<sup>25</sup> *See Wyatt v. Cole*, 504 U.S. 158, 163–64 (1992) (“[I]rrespective of the common law support, we will not recognize an immunity available at common law if § 1983’s history or purpose counsel against applying it in § 1983 actions.”).

<sup>26</sup> *Burns*, 500 U.S. at 493 (“[W]e look to the common law and other history for guidance because our role is not to make a freewheeling policy choice, but rather to discern Congress’[s] likely intent in enacting § 1983.”) (internal quotation marks omitted)).

<sup>27</sup> *See Rehberg v. Paulk*, 132 S. Ct. 1497, 1503–05 (2012).

<sup>28</sup> Commentators have criticized the Supreme Court’s reading of the common law of judicial and prosecutorial immunity. According to Margaret Johns, “to the extent that there is a legislative history on the point, it suggests that Congress intended to impose

and (3) quasi-judicial immunity.<sup>29</sup> Legislative immunity encompasses the function of legislative decisionmaking.<sup>30</sup> Judicial immunity encompasses the “function of resolving disputes between parties, or of authoritatively adjudicating private rights” within an official’s subject-matter jurisdiction.<sup>31</sup> And quasi-judicial immunity encompasses the functions of advocacy (e.g., prosecutorial immunity), testimony (e.g., witness immunity), and factual adjudication (e.g., juror immunity) during the judicial phase of a proceeding.<sup>32</sup>

### 1. *Legislative Immunity*

The Court first considered section 1983’s implied immunities in *Tenney v. Brandhove*.<sup>33</sup> A committee of the California Legislature summoned William Brandhove, an admitted Communist, allegedly to intimidate him from exercising his First Amendment rights.<sup>34</sup> Justice Frankfurter, writing for the *Tenney* majority, held that Brandhove failed to state a cause of action under section 1983 because the legislative committee members were protected by absolute legislative immunity for acts, such as legislative investigations, which are “an established part of representative government.”<sup>35</sup>

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liability on judges under the Civil Rights Act of 1866.” Johns, *supra* note 4, at 270 n.30 (citing Joseph Romagnoli, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 *FORDHAM L. REV.* 1503, 1503 (1985)). Similarly, critics have attacked prosecutorial immunity for not being firmly grounded in the common law as of 1871. See *Burns*, 500 U.S. at 505 (Scalia, J., concurring in part and dissenting in part) (arguing that in recognizing absolute immunity for prosecutors “[the Court] relied . . . upon a common-law tradition of prosecutorial immunity that developed much later than 1871, and was not even a logical extrapolation from then-established immunities”).

<sup>29</sup> See *infra* notes 30–32 and accompanying text.

<sup>30</sup> See *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); see also Chemerinsky, *supra* note 15, at 475.

<sup>31</sup> *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 434 n.8 (1993) (quoting *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part)).

<sup>32</sup> This Note classifies the immunity extended to witnesses, prosecutors, and jurors under the heading of quasi-judicial immunity. The term quasi-judicial, however, has been used in varied ways by different authorities. For example, a quasi-judicial official has been defined as an official who exercises adjudicatory acts outside of the courtroom similar to those exercised by a judge in court. FLOYD R. MECHEM, *A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS* 420 (Callaghan and Company 1890); see, e.g., *Butz v. Economou*, 438 U.S. 478, 512 (1978) (describing the function of an agency adjudicator as quasi-judicial). This note, however, uses quasi-judicial in the same sense that Justice Scalia used the term in *Burns* when he defined quasi-judicial as “official acts involving policy discretion but not consisting of adjudication.” 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part). It should be noted that Justice Scalia goes on to claim that at common law, quasi-judicial acts were only afforded qualified immunity. *Id.* While it is not my purpose to test the common-law history relied upon by Justice Scalia, I do challenge the idea that a prosecutor’s advocacy function received only qualified immunity. See discussion *infra* notes 73–81.

<sup>33</sup> 341 U.S. 367 (1951).

<sup>34</sup> *Nahmod*, *supra* note 2, at 1026.

<sup>35</sup> *Tenney*, 341 U.S. at 377.

Justice Frankfurter grounded his decision in the long-established common law precedent that legislators are immune when performing legislative functions.<sup>36</sup> He cited the Sixteenth Century English Parliamentary debates that culminated in the 1689 English Bill of Rights that “declared in unequivocal language: ‘That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.’”<sup>37</sup> Justice Frankfurter then traced the American adoption of legislative immunity that culminated with the inclusion of the Speech or Debate Clause in the Constitution.<sup>38</sup>

In regard to whether absolute legislative immunity accorded with the purpose of section 1983, Justice Frankfurter quoted James Wilson, a drafter of the Speech or Debate Clause:

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.<sup>39</sup>

Thus, absolute legislative immunity protects the public by affording its representatives the freedom to engage in spirited and unhesitating debates in carrying out their legislative duties without being inhibited by the potential of being targets of private litigation.

## 2. *Judicial Immunity*

Sixteen years after *Tenney*, the Supreme Court recognized an additional common law absolute immunity lurking behind the literal language of section 1983. In *Pierson v. Ray*, the Court held that judges acting within their judicial role have absolute immunity from section 1983 liability.<sup>40</sup> Judge Spencer, a municipal police justice, sentenced Civil Rights advocates to four months in prison for violating a Mississippi state law that made congregating in public spaces illegal under certain circumstances.<sup>41</sup> The convictions were overturned on appeal and the advocates brought a section 1983 suit against Judge

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<sup>36</sup> *Id.* at 372–77 (demonstrating the tradition protecting legislative immunity in England after its Civil War and preservation of that tradition “in the formation of State and National Governments” in the United States).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (“Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution.”); see also U.S. CONST. art. I, § 6, cl. 1.

<sup>39</sup> *Tenney*, 341 U.S. at 373 (quoting II THE WORKS OF JAMES WILSON 38 (Andrews ed., Callaghan and Company, 1896)).

<sup>40</sup> 386 U.S. 547, 553–54 (1967).

<sup>41</sup> *Id.* at 549.



Spencer.<sup>42</sup> The Court affirmed the lower court's dismissal of the claim against Judge Spencer on the grounds that he was protected by absolute judicial immunity for acts done while performing his judicial functions.<sup>43</sup> Chief Justice Warren wrote, "[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."<sup>44</sup>

Although some commentators dispute just how firmly judicial immunity was entrenched in the common law,<sup>45</sup> the Court's recognition of judicial immunity was rooted in English precedent dating back to the 1607 case of *Floyd & Barker*.<sup>46</sup> Lord Edward Coke reasoned that the King's judicial officers derived their immunity from the sovereign authority of the Crown.<sup>47</sup> Because the King was immune, those responsible for carrying out his will were likewise immune.<sup>48</sup> Despite its foundation in monarchy, judicial absolute immunity persisted in the common law that developed in the United States.<sup>49</sup> The King's sovereign authority was replaced by the sovereign authority of, first, state constitutions and, later, Article III.<sup>50</sup>

The *Pierson* Court also held that absolute judicial immunity accorded with the purpose of section 1983.<sup>51</sup> Absolute judicial

<sup>42</sup> *Id.* at 549–50.

<sup>43</sup> *Id.* at 553–54.

<sup>44</sup> *Id.* Chief Justice Warren noted that the Supreme Court adopted judicial immunity in 1872 in *Bradley v. Fisher*, 80 U.S. 335, 347 (1872). *Id.* at 554. *Bradley* involved a dispute that arose from the trial of John Suratt for the murder of President Lincoln. *Bradley*, 80 U.S. at 336. After a heated dispute between Judge Fisher of the Supreme Court of the District of Columbia (the criminal court in the District) and Bradley, a lawyer for Suratt, Judge Fisher barred Bradley's continued participation in the trial. *Id.* at 337. Bradley brought suit against Judge Fisher alleging that he acted maliciously to deprive Bradley of his right to practice as an attorney before the Supreme Court of the District of Columbia. *Id.* at 337–38. The Supreme Court adopted the common-law tradition that judges are immune for actions within their judicial authority regardless of their motives, noting "[t]he purity of [a judge's] motives cannot in this way be the subject of judicial inquiry." *Id.* at 347.

<sup>45</sup> See Johns, *supra* note 4, at 270 n.30 ("[I]t is not at all clear that the common law granted judges absolute immunity in 1871. . . . 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." (citing Romagnoli, *supra* note 28, at 1503)).

<sup>46</sup> 77 Eng. Rep. 1305 (1607).

<sup>47</sup> *Id.* at 1307. In *Floyd & Barker* Lord Coke reasoned that "the King himself is *de jure* to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath." *Id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *Conover v. Montemuro*, 477 F.2d 1073, 1101–02 (3d Cir. 1973).

<sup>50</sup> See *id.* at 1102 ("The King's prerogative, formerly exercised by the Chancery Court, is by virtue of article III, a part of the judicial power of the United States, and is exercised by each of the federal courts within the respective jurisdictions conferred by Congress.").

<sup>51</sup> See *Pierson v. Ray*, 386 U.S. 547, 553–55 (1967).

immunity “is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.”<sup>52</sup> Rather than subject a judge to section 1983 liability, the judge’s “errors may be corrected on appeal.”<sup>53</sup> Thus, absolute judicial immunity does not undermine the purpose of section 1983 because absolute judicial immunity preserves an independent judiciary and potential plaintiffs have adequate access to appeal to correct erroneous decisions.<sup>54</sup>

### 3. *Quasi-Judicial Immunity*

A third category of implicit section 1983 immunity based on a common law tradition is quasi-judicial immunity. In 1772, Lord Mansfield explained an oft-cited common law rule that “neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office.”<sup>55</sup> Thus, in addition to judicial immunity, there is an established common law tradition of absolute immunity for witnesses, counsel, and members of the jury.<sup>56</sup> This category of absolute immunity however, is not a blanket common law basis for extending absolute immunity to every individual who plays some role in a judicial proceeding.<sup>57</sup> Rather, the functions protected by absolute quasi-judicial immunity for participation in the judicial process are limited to testimony, advocacy, and factual adjudication.<sup>58</sup>

Witness immunity is an example of absolute quasi-judicial immunity afforded to officials engaged in the judicial process. In *Briscoe v. LaHue*, a convicted burglar alleged that a police officer delivered perjured testimony at trial regarding the value of fingerprints found at

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<sup>52</sup> *Id.* at 554 (quoting *Scott v. Stansfield*, (1868) L.R. 3 Exch. 220 at 223).

<sup>53</sup> *Id.*

<sup>54</sup> The argument that absolute judicial immunity conforms with the purpose of section 1983 is not without criticism. In his dissent in *Pierson*, Justice Douglas noted that the predecessor of section 1983, The Ku Klux Klan Act of 1871 was drafted in the context of “[a] condition of lawlessness exist[ing] in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated.” *Id.* at 559 (Douglas, J., dissenting). Douglas pointed out that Congress “recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied.” *Id.* at 563 (Douglas, J., dissenting). From this point of view, cloaking the very officials at whom the law was aimed with absolute immunity is antithetical to the very purpose of section 1983.

<sup>55</sup> *The King v. Skinner*, (1772) 98 Eng. Rep. 529 (K.B.) 530.

<sup>56</sup> *See id.*

<sup>57</sup> *See Snyder v. Nolen*, 380 F.3d 279, 286–87 (7th Cir. 2004) (“Absolute immunity does not extend to all positions simply ‘because they are part of the judicial function.’” (quoting *Imbler v. Pachtman*, 424 U.S. 409, 435 (1976))). *But see Burns v. Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in part and dissenting in part) (arguing that no quasi-judicial act deserves absolute immunity but that quasi-judicial functions were entitled to only qualified immunity at common law).

<sup>58</sup> *See infra* notes 59–80 and accompanying text.

the crime scene.<sup>59</sup> In recognizing absolute witness immunity from section 1983 suits for police officers, the Court first noted “[t]he immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law”<sup>60</sup> and American courts generally followed the English rule.<sup>61</sup> As such, the Court concluded that “the common law’s protection for [private] witnesses is ‘a tradition so well grounded in history and reason’ that we cannot believe that Congress impinged on it ‘by covert inclusion in the general language [of section 1983].’”<sup>62</sup> In extending the common law witness immunity available to private individuals to public officials, the Court explained that no reasonable distinction exists between public and private witnesses.<sup>63</sup>

The *Briscoe* Court’s recognition of section 1983 common law witness immunity was preceded by the Court’s recognition of common law absolute immunity for public prosecutors in *Imbler v. Pachtman*.<sup>64</sup> After spending more than five years in prison for murder before being released on a habeas corpus petition, Imbler, the plaintiff, initiated a section 1983 suit against Pachtman, the prosecutor, for knowingly allowing a witness to give false testimony during Imbler’s murder trial, thus depriving Imbler of his constitutional right to a fair trial.<sup>65</sup> Justice Powell, writing for the majority, held that prosecutors are

<sup>59</sup> 460 U.S. 325, 326–27 (1983). Along with *Briscoe*’s claims against Officer LaHue, the Court also considered the claims of two convicted sexual assault offenders who brought a section 1983 suit against a police officer for depriving these individuals of their constitutionally protected right to a fair trial by giving false testimony at trial. *Id.*

<sup>60</sup> *Id.* at 330–31 (citing *Cutler v. Dixon*, (1585) 76 Eng. Rep. 886 (Q.B.); *Anfield v. Feverhill*, (1614) 80 Eng. Rep. 1113 (K.B.); *Henderson v. Broomhead*, (1859) 157 Eng. Rep. 964 (Ex.) 968).

<sup>61</sup> *Id.* (citing cases). Some American courts, however, required that defendants claiming witness immunity must show that their “allegedly defamatory statements were relevant to the judicial proceeding” in order to claim the privilege. *Id.* at 331.

<sup>62</sup> *Id.* at 334 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

<sup>63</sup> *Id.* at 335–36 (“[The police officer] may reasonably be viewed as acting like any other witness sworn to tell the truth.”). In *Rehberg v. Paulk*, the Supreme Court recently extended absolute witness immunity to public officials who testify before a grand jury. 132 S. Ct. 1497, 1500 (2012).

<sup>64</sup> 424 U.S. 409 (1976). As I will discuss below, the Court’s reasoning in *Imbler* failed to acknowledge a pre-1871 common-law tradition to support its recognition of absolute prosecutorial immunity, which has resulted in confusion among lower courts about how to apply the Court’s section 1983 immunity precedent.

<sup>65</sup> Imbler was convicted of murder and sentenced to death at trial. After the trial, however, Pachtman “wrote to the Governor of California describing evidence turned up after trial by himself and an investigator” that suggested that one of the key witnesses, Costello, “was less trustworthy than he had represented originally.” *Imbler*, 424 U.S. at 412. Based in part on Pachtman’s letter, Imbler filed a habeas corpus petition. *Id.* at 413. During the habeas hearing, Costello recanted his testimony from the trial. *Id.* Although the California Supreme Court denied Imbler’s habeas petition because it felt that Costello’s testimony was not dispositive in the jury’s verdict, several years later Imbler filed a habeas petition in federal court on the same grounds. *Id.* at 413–14. Finding eight instances of state misconduct at Imbler’s trial, six of which were related to Costello’s testimony, the

entitled to absolute immunity in section 1983 suits for their alleged misconduct during the judicial phase of a prosecution.<sup>66</sup>

Justice Powell explained that “earlier decisions on § 1983 immunities were not products of judicial fiat . . . . Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.”<sup>67</sup> Justice Powell then traced the development of prosecutorial immunity in the American common law, starting with the 1896 Indiana case of *Griffith v. Slinkard*,<sup>68</sup> and culminating with the Supreme Court’s adoption of absolute prosecutorial immunity in 1926.<sup>69</sup>

Although the *Imbler* decision did not address whether prosecutorial immunity was well established at common law when section 1983 was enacted in 1871,<sup>70</sup> the decision is not without pre-1871 common law support.<sup>71</sup> Indeed, as far back as 1606, private attorneys were afforded absolute immunity when acting as advocates for their clients in the judicial phase of a case.<sup>72</sup> According to T. Leigh Anenson:

Lawyers . . . are absolutely immune from civil liability for statements or conduct that may have injured, offended, or otherwise damaged an opposing party during the litigation process. This protection, often referred to as the “litigation privilege,” shields a litigator regardless of malice, bad faith, or ill will of any kind. It originated at the very beginning of English jurisprudence for the purpose of

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district court granted the writ. *Id.* at 414. After the Ninth Circuit affirmed the district court’s ruling, the State dropped its appeals and *Imbler* was released. *Id.* at 415.

<sup>66</sup> *Id.* at 431 (“We hold only that in initiating a prosecution and in presenting the State’s case, the prosecutor is immune from a civil suit for damages under § 1983.”).

<sup>67</sup> *Id.* at 421.

<sup>68</sup> 44 N.E. 1001 (Ind. 1896).

<sup>69</sup> *Imbler*, 424 U.S. at 421–22 (citing *Yaselli v. Goff*, 275 U.S. 503 (1927) (per curiam)).

<sup>70</sup> See *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) (“There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted. (Indeed, . . . there generally was no such thing as the modern public prosecutor.)”).

<sup>71</sup> There are, however, many who have criticized the historical underpinnings of *Imbler*. See, e.g., Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing a Compromise Approach to Claims of Prosecutorial Misconduct*, 48 GONZ. L. REV. 219, 221 (2013) (“[C]hanges in the legal landscape, as well as historical research, have cast significant doubt on the continued validity of *Imbler*’s reasoning.”). In rebuttal to such criticisms, however, it should be noted that in *Yaselli v. Goff*, 12 F.2d 396, 403 (2d Cir. 1926), *aff’d*, 275 U.S. 503 (1927) (per curiam), a decision upon which the *Imbler* Court heavily relied, the Second Circuit analogized the function of a prosecutor in initiating a prosecution to that of a grand juror. See *Butz v. Economou*, 438 U.S. 478, 509–10 (1978). And according to the Second Circuit, grand jurors were entitled to absolute immunity at common law. *Yaselli*, 12 F.2d at 403 (citing I W. HAWKINS, PLEAS OF THE CROWN 349 (6th ed. 1787)).

<sup>72</sup> T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 919 (2004) (“The first opinion dismissing a lawsuit against an attorney by applying the doctrine of absolute immunity was rendered in 1606.” (citing *Brook v. Montague*, (1606) 79 Eng. Rep. 77 (K.B.) 77)).

protecting the advocacy system and its participants, and it crossed the Atlantic Ocean to reach the shores of America after colonization.<sup>73</sup>

With an established common law tradition of protecting private counsel, the Court reasonably extended absolute immunity to public prosecutors who serve as the state's counsel for their conduct during trial, despite the fact that the role of public prosecutor was not widely established in 1871.<sup>74</sup> Just as no distinction existed between private and public officials serving as witnesses in regard to their entitlement of absolute witness immunity,<sup>75</sup> there is no reason why public officials who serve as advocates during the judicial phase of a proceeding should not be entitled to the same absolute immunity that private attorneys were afforded at common law.<sup>76</sup>

As for whether quasi-judicial immunity accords with the purpose of section 1983, the *Imbler* Court explained that prosecutors require absolute immunity protections from civil suits for the same policy reasons as judges, such as the concerns about vexatious litigation and the potential chilling effect on the prosecutor's independent and unhesitating exercise of his duties.<sup>77</sup> Additionally, potential plaintiffs are protected from prosecutorial misconduct by the availability of collateral remedies to attack the fairness of the trial.<sup>78</sup>

It is important to note, however, that although the policy considerations regarding judicial and quasi-judicial immunity are similar, the *Imbler* Court did not ground its opinion on the reasoning that a prosecutor derived immunity from the judge. Instead, the opinion looked to the common law as an independent basis to support absolute prosecutorial immunity.<sup>79</sup> That is to say, rather than conclude that the judge's immunity transferred to the prosecutor (and to a witness), prosecutors (and witnesses) are entitled to absolute immunity in their own right.<sup>80</sup>

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<sup>73</sup> *Id.* at 916 (footnote omitted) (noting the "privilege" and "immunity" are interchangeable); see also Paul T. Hayden, *Reconsidering the Litigator's Absolute Privilege to Defame*, 54 OHIO ST. L.J. 985, 1017–18 (1993) (cataloguing early American cases citing English courts for the rule that lawyers were absolutely immune from civil liability for words spoken during trial).

<sup>74</sup> *Imbler*, 424 U.S. at 431; see also *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503–04 (2012) (discussing the historical development of the role of the public prosecutor).

<sup>75</sup> See *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983).

<sup>76</sup> See *Rehberg*, 132 S. Ct. at 1504.

<sup>77</sup> See 424 U.S. at 422–23 (“[I]f the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.”).

<sup>78</sup> See *id.* at 422–27.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

## B. The Functional Approach

The Court has noted that “‘the precise contours of official immunity’ need not mirror the immunity at common law.”<sup>81</sup> Where the common law as of 1871 may not have explicitly considered whether a twenty-first century function deserved immunity, modern courts may extend absolute immunity to a “new” function by drawing an analogy to similar functions to which 1871 common law afforded absolute immunity.<sup>82</sup> The Court, however, still “look[s] to the common law and other history for guidance because [its] role is not to make a free-wheeling policy choice, but rather to discern Congress’[s] likely intent in enacting § 1983.”<sup>83</sup> Thus, when an official claims absolute immunity for performing a function that did not yet exist in 1871, courts must identify an analogous function that was entitled to absolute immunity at common law.<sup>84</sup>

To evaluate whether a claim of immunity is implicit in section 1983, courts employ a “functional approach.”<sup>85</sup> This functional approach recognizes that immunity does not specifically cover the individual, but rather the immunity insulates her act from liability.<sup>86</sup> Thus, a judge receives absolute judicial immunity for her judicial determinations made within the scope of her jurisdiction.<sup>87</sup> However, a judge is not absolutely immune when making administrative or executive decisions in the management of her chambers.<sup>88</sup> For example, in *Forrester v. White*, the Court rejected a judge’s claim that he was protected by absolute judicial immunity when making personnel decisions.<sup>89</sup> In distinguishing between a judge’s administrative and judicial functions, the Court recognized “an intelligible distinction between judicial acts and the administrative, legislative, or executive

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<sup>81</sup> *Burns v. Reed*, 500 U.S. 478, 493 (1991) (quoting *Anderson v. Creighton*, 483 U.S. 635, 645 (1987)).

<sup>82</sup> See, e.g., *Rehberg*, 132 S. Ct. at 1505 (extending immunity to public officials testifying before a grand jury); *Butz v. Economou*, 438 U.S. 478, 514 (1978) (affording immunity to agency adjudicators); *Imbler*, 424 U.S. at 431 (granting immunity to public prosecutors).

<sup>83</sup> *Burns*, 500 U.S. at 493 (internal quotation marks omitted).

<sup>84</sup> See *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) (“[O]ur original decisions recognizing defenses and immunities to suits brought under 42 U.S.C. § 1983 rely on analogous limitations existing in the common law when § 1983 was enacted.”); see also *Rehberg*, 132 S. Ct. at 1502 (“Recognizing that ‘Congress intended [§ 1983] to be construed in the light of common-law principles,’ the Court has looked to the common law for guidance in determining the scope of the immunities available in a § 1983 action.” (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997))).

<sup>85</sup> See *Rehberg*, 132 S. Ct. at 1503.

<sup>86</sup> *Chemerinsky*, *supra* note 15, at 475 (“[A]bsolute immunity goes to the task, not to the office.”); see also *Forrester v. White*, 484 U.S. 219, 227 (1988) (“[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.”).

<sup>87</sup> *MECHEM*, *supra* note 32, at 400.

<sup>88</sup> See *Forrester*, 484 U.S. at 229–30.

<sup>89</sup> See *id.*

functions that judges may on occasion be assigned by law to perform.<sup>90</sup> A personnel decision is not adjudicative in nature and an injured party lacks the “ordinary mechanisms of review” to correct a judge’s mistakes.<sup>91</sup> Therefore, administrative functions are not absolutely immune, even when performed by a judge.<sup>92</sup>

The functional approach not only limits absolute immunity for officers generally entitled to immunity when performing acts that are not covered by immunity, but it also works to confer immunity to officials *not* generally entitled to immunity when performing a function that *was* historically deserving of immunity.<sup>93</sup> For example, in *Butz v. Economou* the Court extended absolute immunity to Department of Agriculture officials involved in a licensing revocation proceeding on the ground that these officials were performing judicial functions deserving of judicial immunity.<sup>94</sup> Comparing the actions of agency adjudicators to those of judges, the *Butz* Court found that “adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages.”<sup>95</sup> In particular, “the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct.”<sup>96</sup>

### C. Limits on Absolute Immunity in Section 1983 Suits

The Supreme Court, however, has not been persuaded by arguments that an official deserves absolute immunity from section 1983 liability merely because the official performs a function integral to the judicial process without also demonstrating a common law analogy.<sup>97</sup> In *Antoine*, the Court resolved a circuit split over whether to extend absolute immunity to court reporters.<sup>98</sup> The plaintiff, Antoine, was convicted of bank robbery after a two-day trial and promptly appealed.<sup>99</sup> The court reporter, Ruggenberg, however, was unable to produce a transcript for the appeal because she had lost her trial

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<sup>90</sup> *Id.* at 227.

<sup>91</sup> *See id.* at 223, 227.

<sup>92</sup> *Id.* at 227–30.

<sup>93</sup> *See* Chemerinsky, *supra* note 15, at 475 (“[P]rosecutors have absolute immunity, but only for prosecutorial actions; judges have absolute immunity for their judicial acts, but not for administrative acts; legislators have absolute immunity for their legislative functions, but not for administrative tasks.”).

<sup>94</sup> *See* 438 U.S. 478, 512–13 (1978).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 512.

<sup>97</sup> *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435 (1993).

<sup>98</sup> *Id.* at 432.

<sup>99</sup> *Id.* at 430.

notes.<sup>100</sup> Eventually a transcript was produced with help from another court reporter, but as a result of Ruggenberg's mistake, Antoine's appeal was not heard for four years.<sup>101</sup> Antoine sued Ruggenberg and her employer, Byers & Anderson, Inc., under section 1983.<sup>102</sup>

The Ninth Circuit Court of Appeals, in extending absolute judicial immunity to the function of court reporting, reasoned "the tasks performed by a court reporter in furtherance of her statutory duties are functionally part and parcel of the judicial process."<sup>103</sup> In reversing the Court of Appeals, the Supreme Court reasserted that in order to determine whether a function is entitled to "a full exemption from liability, we have undertaken a considered inquiry into the immunity *historically accorded* the relevant official at common law and the interests behind it."<sup>104</sup> It then noted that modern court reporters were "unknown during the centuries when the common-law doctrine of judicial immunity developed," and, thus, "not among the class of persons protected by judicial immunity in the 19th century."<sup>105</sup>

However, the fact that an official was not among the class of protected officials at common law as of 1871 does not necessarily require the court to reject the claim of absolute immunity.<sup>106</sup> If the official can demonstrate that her function is analogous to a function that was absolutely immune at common law, then a court can extend absolute immunity.<sup>107</sup> The *Antoine* Court, however, rejected the court reporter's argument that her professional function was analogous to "common-law judges who made handwritten notes during trials."<sup>108</sup> According to the Court, the duties of a court reporter are not discretionary, but rather ministerial.<sup>109</sup> As the Court previously held in *Forrester v. White*, "judges are not entitled to absolute immunity when acting in their administrative capacity."<sup>110</sup> Thus, even if a court reporter's duties were analogous to judicial note taking, the fact that the court reporter exercised no discretion in performing the function precluded an extension of judicial immunity because a judge would

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 430–31. Antoine's conviction was ultimately upheld. *Id.*

<sup>102</sup> *Id.* at 431.

<sup>103</sup> *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1476 (9th Cir. 1991), *rev'd*, 508 U.S. 429 (1993).

<sup>104</sup> *Antoine*, 508 U.S. at 432 (internal quotation marks omitted) (emphasis added).

<sup>105</sup> *Id.* at 433.

<sup>106</sup> *See Butz v. Economou*, 438 U.S. 478, 512–13 (1978).

<sup>107</sup> *See id.*

<sup>108</sup> *Antoine*, 508 U.S. at 434 ("Faced with the absence of a common-law tradition involving court reporters themselves, respondents urge us to treat as their historical counterparts common-law judges who made handwritten notes during trials. We find the analogy unpersuasive.")

<sup>109</sup> *Id.* at 436.

<sup>110</sup> *Id.* at 435 (citing *Forrester v. White*, 484 U.S. 219, 229 (1988)).



not have been absolutely immune for performing such a nondiscretionary function.<sup>111</sup>

The Court then rejected the court reporter's argument that the "functional approach to immunity requires that absolute immunity be extended to court reporters because they are 'part of the judicial function.'"<sup>112</sup> The Court thus rejected the theory that the judge's immunity could transfer to the court reporter based on the fact that the court reporter aided the judge.<sup>113</sup> Rather, Justice Stevens asserted, "the 'touchstone' for the doctrine's applicability has been 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.'"<sup>114</sup> Thus, the functional approach, according to the *Antoine* Court, does not extend immunity to a function merely because that function may be "extremely important," "indispensable to the appellate process," or "essential to the very functioning of the courts."<sup>115</sup> Instead, the functional approach only extends judicial immunity to officials who "exercise the kind of judgment that is protected by the [common law] doctrine of judicial immunity."<sup>116</sup> The type of judgment protected by judicial immunity is the discretion involved in "resolving disputes between parties, or of authoritatively adjudicating private rights."<sup>117</sup>

## II

### MISAPPLICATIONS OF SECTION 1983 ABSOLUTE IMMUNITY IN THE LOWER COURTS

While the Supreme Court has been "quite sparing" in extending absolute immunity,<sup>118</sup> lower courts have regularly extended absolute immunity beyond the categories recognized by the Supreme Court.<sup>119</sup> In so doing, these courts have often employed a flawed analysis that absolute immunity can transfer from an official who is entitled to immunity to auxiliary officials who assist the immune official in the performance of immune functions, even when the auxiliary official is

<sup>111</sup> *Id.* at 437.

<sup>112</sup> *Id.* at 435 (quoting *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1476 (9th Cir. 1991), *rev'd*, 508 U.S. 429 (1993)) (internal citation omitted).

<sup>113</sup> *See id.*

<sup>114</sup> *Id.* at 435-36 (citing *Burns v. Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in part and dissenting in part)).

<sup>115</sup> *See id.*, 508 U.S. at 436-37 (citations omitted).

<sup>116</sup> *Id.* at 437.

<sup>117</sup> *See Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part).

<sup>118</sup> *Id.* at 487 (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)).

<sup>119</sup> *See Johns*, *supra* note 4, at 276, 280-83, 286-90, 301-10 (criticizing the extension of absolute immunity to court appointees and adjuncts, such as mental-health experts and social-service workers, and to decisionmakers in nonjudicial proceedings that lack procedural safeguards, such as parole-board members and licensing-board members).

performing a different function altogether.<sup>120</sup> These courts disregard the need to look to the common law to determine if a function performed by the official was or would have been deserving of immunity in 1871.<sup>121</sup> Instead, these courts extend absolute immunity by employing a transferred immunity approach when the auxiliary official is performing a function that is important to the functioning to the judicial system.<sup>122</sup> Lower courts that employ this reasoning engage in the freewheeling policy determinations that the Supreme Court has explicitly instructed courts not to make in the section 1983 context.<sup>123</sup>

#### A. Application in the Lower Courts

The root of many decisions extending absolute immunity on a transferred basis to officials who perform functions important to the judicial system is exemplified by opinions like the Seventh Circuit's decision in *Scruggs v. Moellering*.<sup>124</sup> In *Scruggs*, an inmate brought a section 1983 suit against a judge and a court reporter for allegedly falsifying his trial transcript.<sup>125</sup> In extending absolute judicial immunity to the court reporter, Judge Posner declared that "[a]uxiliary judicial personnel who perform functions at once integral to the judicial process and nonmechanical are entitled to absolute immunity from damages liability for acts performed in the discharge of those functions, just as judges are."<sup>126</sup>

Although the holding in *Scruggs* that court reporters are entitled to absolute immunity was later rejected in *Antoine*,<sup>127</sup> the Seventh Circuit continued to apply the basic reasoning that auxiliary officers could derive absolute immunity from a judge for acts that assist the judge in the performance of her duties.<sup>128</sup> In *Trent v. Gordon*, a plaintiff brought a section 1983 suit against a juvenile court clerk for

<sup>120</sup> See discussion *infra* Part II.B.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> 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 freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition.").

<sup>124</sup> 870 F.2d 376 (7th Cir. 1989).

<sup>125</sup> *Id.* at 377.

<sup>126</sup> *Id.* Judge Posner emphasized that a court reporter's function "is not a mechanical process." *Id.* The Supreme Court, however, rejected the notion that court reporting is a discretionary act when it rejected the claim that court reporters are entitled to absolute immunity. See *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993) ("[C]ourt reporters are required by statute to 'recor[d] verbatim' court proceedings in their entirety. They are afforded no discretion in the carrying out of this duty; they are to record, as accurately as possible, what transpires in court." (alteration in original) (citation omitted)); see also *supra* notes 98–117 and accompanying text.

<sup>127</sup> 508 U.S. at 435–37 (rejecting the premise that a judge's immunity could transfer to a court reporter simply because the court reporter aided the judge).

<sup>128</sup> See *infra* notes 129–30 and accompanying text.

allegedly conspiring to delay the filing of the plaintiff's custody petition until after the court granted the state temporary custody of the plaintiff's grandchild.<sup>129</sup> In upholding summary judgment in favor of the court clerk on grounds of absolute judicial immunity, the Seventh Circuit explained, "[a]lthough the act of filing a petition might be characterized as more administrative than judicial in character, [the court clerk] is nonetheless entitled to absolute judicial immunity because she acted under the explicit direction of the judge."<sup>130</sup>

Other circuits have also subscribed to the reasoning that absolute immunity can transfer from one official to another, even where the subordinate official performs a different function than the immune official does.<sup>131</sup> Recently the Tenth Circuit extended absolute immunity to a special master in a state custody proceeding.<sup>132</sup> The plaintiff, Morkel, brought a section 1983 claim against the special master, Dredge, for allegedly engaging in *ex parte* contacts, issuing orders outside her jurisdiction, and preventing Morkel from seeing her child.<sup>133</sup> Specifically, the court held that the special master's function of "alter[ing] the parent-time schedule" was immune because the judge assigned the function to Dredge.<sup>134</sup> There was no discussion about whether the function of setting a parent-time schedule was a judicial act or if it was analogous to a function historically afforded absolute immunity.<sup>135</sup> Rather, the court reasoned, "non-judicial officers may be afforded the same absolute immunity enjoyed by judges when a claim is based on duties performed in furtherance of the judicial process."<sup>136</sup>

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<sup>129</sup> No. 99-3928, 2000 U.S. App. LEXIS 11092, at \*1-3 (7th Cir. May 11, 2000).

<sup>130</sup> *Id.* at \*6 (citing *Kincaid v. Vail*, 969 F.2d 594, 601 (7th Cir. 1992)); *see also* *Richman v. Sheahan*, 270 F.3d 430, 435 (7th Cir. 2001) ("The absolute immunity afforded to judges has been *extended* to apply to . . . '[n]on-judicial officials whose official duties have an integral relationship with the judicial process.'" (alteration in original) (emphasis added) (quoting *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238 (7th Cir. 1986))). Professor Nahmod has used the term "Nuremberg defense" to refer to the defense advanced by officials acting at the direction of judicial officers, even where the judicial officer's directive is presumptively invalid. *See* Sheldon Nahmod, *From the Courtroom to the Street: Court Orders and Section 1983*, 29 HASTINGS CONST. L.Q. 613, 616, 633 (2002). The term alludes to the war-crimes defense made post-WWII by some Nazi officers that they were merely acting at the direction of superior officers and did not deserve punishment. *See id.* at 634 n.98.

<sup>131</sup> *See infra* notes 132-141 and accompanying text.

<sup>132</sup> *See* *Morkel v. Davis*, 513 F. App'x 724, 729 (10th Cir. 2013).

<sup>133</sup> *Id.* at 726.

<sup>134</sup> *Id.* at 729.

<sup>135</sup> *See id.* (simply considering that the judge in the state custody proceeding appointed Dredge as the special master).

<sup>136</sup> *Id.* (citing *Whitesel v. Sengenberger*, 222 F.3d 861, 867 (10th Cir. 2000)). Employing the same reasoning, the Tenth Circuit has also extended absolute immunity to court clerks for failure to notice an individual, leading to a default judgment against that individual, *see* *Schrader v. New Mexico*, 361 F. App'x 971, 974 (10th Cir. 2010), and to a bail bond commissioner for failing to process a bail application in a timely manner, resulting in an

This transferred immunity approach has also been particularly prevalent in the extension of absolute immunity to officials executing court orders. While the Supreme Court has yet to consider whether the execution of a court order is a function deserving of absolute immunity in the context of section 1983 litigation,<sup>137</sup> circuit courts have consistently held that an official executing a court order is entitled to absolute immunity from section 1983 liability.<sup>138</sup> For example, in *J.P. Silvertown Industries L.P. v. Sohm*, the Sixth Circuit extended absolute immunity to officials who executed a foreclosure sale.<sup>139</sup> The court noted that “[t]he execution of a foreclosure sale is . . . not an action ‘normally performed by a judge,’ or analogous ‘to a general function normally performed by a judge.’”<sup>140</sup> Nonetheless, the court afforded the officials absolute immunity by reasoning “absolute quasi-judicial immunity is unlike absolute judicial immunity in that it does not derive from the discretionary nature of an official’s actions. Rather, it derives from the official’s *lack of discretion*.”<sup>141</sup>

Not only has the Supreme Court not endorsed the idea that quasi-judicial immunity derives from a lack of discretion, but the Sixth Circuit also did not point to any common law support for its position, nor did it make an analogy to the recognized quasi-judicial functions of advocacy, testimony, or factual adjudication.<sup>142</sup> Rather, the Sixth Circuit explained “absolute judicial immunity has been extended to non-judicial officers who perform . . . tasks so integral or intertwined with the judicial process that *these persons are considered an arm of the judicial officer who is immune*.”<sup>143</sup>

Other circuits have also extended absolute immunity on the basis of transferred immunity to the “quasi-judicial” act of executing a court

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individual spending an extra night in jail, *see* *Hinton v. Franck*, No. 00-1142, 2000 U.S. App. LEXIS 33121, at \*6–7 (10th Cir. Dec. 18, 2000).

<sup>137</sup> *See* *Engebretson v. Mahoney*, 724 F.3d 1034, 1038 (9th Cir. 2013) (“The Supreme Court also has not decided whether prison officials are entitled to absolute immunity from § 1983 liability for enforcing facially valid court orders.”).

<sup>138</sup> *See id.* at 1039 (noting that “the courts of appeals that have addressed whether prison officials are absolutely immune from § 1983 liability for enforcing facially valid court orders have uniformly concluded that they are” and citing cases that have so concluded).

<sup>139</sup> 243 Fed. Appx. 82, 89 (6th Cir. 2007).

<sup>140</sup> *Id.* (quoting *Brookings v. Clunk*, 389 F.3d 614, 617 (6th Cir. 2004)).

<sup>141</sup> *Id.* (citing *Whitesel*, 222 F.3d at 869).

<sup>142</sup> *See id.* ([B]ecause . . . [the official] was simply following an order of the court, he is entitled to absolute quasi-judicial immunity.”).

<sup>143</sup> *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994) (emphasis added) (internal citations omitted); *see also* *Grant, Konvalinka & Harrison, PC v. Banks*, 716 F.3d 404, 412 (6th Cir. 2013) (“Extension of such immunity to officials performing quasi-judicial duties has been recognized for ‘those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune.’” (quoting *Bush*, 38 F.3d at 847)).

order.<sup>144</sup> Most recently, in *Engbretson v. Mahoney*, the Ninth Circuit reasoned that extending absolute immunity to executive officers executing a court order “is consistent with the Supreme Court’s recent case law, because it is beyond dispute that prison officials enforcing court orders are performing functions necessary to the judicial process.”<sup>145</sup>

Outside of the context of executing court orders, many courts have found that court clerks share the judge’s absolute immunity.<sup>146</sup> The D.C. Circuit adopted absolute immunity for court clerks on the ground that absolute judicial “immunity applies to all acts of auxiliary court personnel that are basic and integral parts of the judicial function, unless those acts are done in the clear absence of all jurisdiction.”<sup>147</sup> Moreover, the D.C. Circuit explicitly rejected the idea that a function must be discretionary to be judicial in nature.<sup>148</sup>

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<sup>144</sup> For instance, in *Valdez v. Denver* the Tenth Circuit held that a sheriff and a prison warden were entitled to absolute “quasi-judicial” immunity for incarcerating a prisoner pursuant to a facially valid court order. See 878 F.2d 1285, 1289–90 (10th Cir. 1989). The court “[r]ecogniz[ed] that the power to execute judicial decrees is no less an important and integral part of the judicial process than the roles of those officials previously afforded absolute immunity.” *Id.* at 1287–88. More recently, the Tenth Circuit extended absolute immunity to two sheriff’s deputies who executed disputed court orders by reasoning that “just as judges acting in their judicial capacity are absolutely immune from liability under section 1983, officials charged with the duty of executing a facially valid court order enjoy absolute immunity from liability for damages in a suit challenging conduct prescribed by that order.” *Moss v. Kopp*, 559 F.3d 1155, 1163 (10th Cir. 2009) (quoting *Turney v. O’Toole*, 898 F.2d 1470, 1472 (10th Cir. 1990)). The First Circuit has noted that “a receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge’s absolute immunity. To deny him this immunity would seriously encroach on the judicial immunity already recognized by the Supreme Court.” *Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976). Similarly, the Ninth Circuit has said “[t]he rationale for immunizing persons who execute court orders is apparent. Such persons are themselves integral parts of the judicial process.” *Coverdell v. Dep’t of Soc. & Health Servs.*, 834 F.2d 758, 765 (9th Cir. 1987) (internal quotation marks omitted). The Eleventh Circuit, likewise, noted that “receivers . . . enjoy judicial immunity for acts within the scope of their authority.” *Prop. Mgmt. & Invs., Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir. 1985). The Third Circuit has also subscribed to the rationale that “where the defendant is directly involved in the judicial process . . . he may be covered by the immunity afforded the judge because he is performing a ministerial function at the direction of the judge.” *Waits v. McGowan*, 516 F.2d 203, 206 (3d Cir. 1975).

<sup>145</sup> 724 F.3d 1034, 1040 (9th Cir. 2013) (internal quotation marks omitted).

<sup>146</sup> See U.S. DEP’T OF JUSTICE, CIVIL DIV., TORTS BRANCH REPRESENTATION MONOGRAPH III: IMMUNITY OF FEDERAL EMPLOYEES IN PERSONAL DAMAGES ACTIONS 5–6 (1985) (noting the general consensus that “judicial immunity also may have a derivative application. There is general agreement that clerks of a court are absolutely immune when they perform a ministerial function at the direction of a judge.”).

<sup>147</sup> *Sindram v. Suda*, 986 F.2d 1459, 1461 (D.C. Cir. 1993) (internal quotation marks omitted); see also *Jackson v. Houck*, 181 F. App’x 372, 373 (4th Cir. 2006) (per curiam) (“[L]aw clerks . . . are also entitled to absolute judicial immunity when assisting the judge in carrying out the former’s judicial functions.” (internal quotation marks omitted)).

<sup>148</sup> See *Sindram*, 986 F.2d at 1461 (“[W]e agree with the Sixth Circuit that “[w]hether an act is judicial in character does not depend on whether it is discretionary.” (alteration in original) (quoting *Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988))). But see *Antoine v.*

The Second Circuit extended absolute judicial immunity to court clerks who allegedly wrongfully refused a plaintiff's document request and failed to properly manage the court calendar.<sup>149</sup> In *Rodriguez v. Weprin* the Second Circuit determined that if the clerks' functions deserved absolute judicial immunity, it was irrelevant whether the functions were discretionary or ministerial.<sup>150</sup> Judicial immunity, according to the Second Circuit, "extends to law clerks where they are assisting judges performing judicial functions."<sup>151</sup>

Likewise, the Tenth Circuit extended absolute judicial immunity from section 1983 liability to a court clerk for refusing to file a plaintiff's complaint.<sup>152</sup> The court cited its reasoning from an earlier non-section 1983 case,<sup>153</sup> which explained: "In the context of judicial immunity from claims for damages, when a court clerk assists a court or a judge in the discharge of judicial functions, the clerk is considered the functional equivalent of the judge and enjoys *derivative immunity*."<sup>154</sup>

In addition to absolute judicial immunity, courts have found that other types of immunity are transferable to auxiliary officers. In a section 1983 suit, the Third Circuit extended absolute prosecutorial immunity to a nonattorney prosecutor's office employee.<sup>155</sup> The plaintiff alleged that the employee conspired to withhold exculpatory evidence by mailing a discovery packet to the plaintiff's attorney without including the exculpatory evidence.<sup>156</sup> In extending absolute

Byers & Anderson, Inc., 508 U.S. 429, 436 (1993) ("When judicial immunity is extended to officials other than judges, it is because their judgments are 'functionally comparable' to those of judges—that is, because they, too, 'exercise a discretionary judgment' as a part of their function." (quoting *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976))).

<sup>149</sup> *Rodriguez v. Weprin*, 116 F.3d 62, 66 (2d Cir. 1997).

<sup>150</sup> *See id.* at 67 ("[E]ven if viewed as performing an administrative task, the court clerks are entitled to immunity for harms allegedly related to the delay in scheduling appellant's appeal.").

<sup>151</sup> *Id.* In a non-section 1983 case, the Ninth Circuit relied on *Rodriguez* to extend absolute immunity to a bankruptcy trustee for miscalendaring and failing to give notice to the plaintiff in a bankruptcy proceeding. *In re Castillo*, 297 F.3d 940, 952 (9th Cir. 2002). The Ninth Circuit noted that it had "extended absolute quasi-judicial immunity in post-*Antoine* decisions to court clerks and other non-judicial officers for purely administrative acts." *Id.* The court explained, "[t]he judge's clerk was also immune from suit because . . . '[t]he concern for the integrity of the judicial process that underlies the absolute immunity of judges is reflected in the extension of absolute immunity to certain others who perform functions closely associated with the judicial process.'" *Id.* (quoting *Moore v. Brewster*, 96 F.3d 1240, 1244 (9th Cir. 1996)).

<sup>152</sup> *Spalsbury v. Sisson*, 250 F. App'x 238, 248 (10th Cir. 2007). The plaintiff attempted to file a complaint against his ex-wife for alleged false imprisonment during a custody argument. *Id.* at 242.

<sup>153</sup> *Id.* at 248.

<sup>154</sup> *Trackwell v. United States*, 472 F.3d 1242, 1247 (10th Cir. 2007) (emphasis added).

<sup>155</sup> *See Moore v. Middlesex Cnty. Prosecutors Office*, 503 F. App'x 108, 109 (3d Cir. 2012) (per curiam).

<sup>156</sup> *Id.*

immunity, the court explained that “[t]he employee of an attorney, including the employee or agent of a prosecutor, is also granted absolute immunity from § 1983 suits where the function of the employee and the judicial process are closely allied.”<sup>157</sup> In fact, the Third Circuit noted it had previously held “that absolute immunity extends to employees of prosecutors who perform investigative work in furtherance of a criminal prosecution,”<sup>158</sup> despite the fact that the Supreme Court has held that prosecutors, themselves, are not immune for their investigatory functions.<sup>159</sup>

### B. The Fallacy of Transferred Immunity

The lower courts’ extension of absolute judicial immunity on the basis of transferred immunity to functions that merely “‘have an integral relationship with the judicial process’”<sup>160</sup> misconstrues the Supreme Court’s functional approach to section 1983 immunities. In its most recent application of the functional approach, the Supreme Court explained that it “consult[s] the common law to identify those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed . . . .”<sup>161</sup> Modern courts cannot extend absolute immunity to functions not protected at common law by “simply mak[ing] [their] own judgment about the need for immunity.”<sup>162</sup> This is because courts “do not have a license to establish immunities from § 1983 actions in the interests of what [courts] judge to be sound public policy.”<sup>163</sup> Because courts engage in statutory interpretation when implying section 1983 immunities, to base immunities on policy rather than history essentially rewrites the statute.<sup>164</sup>

Supreme Court precedent does not support the extension of absolute immunity to auxiliary officials on the grounds that their

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (citing *Davis v. Grusemeyer*, 996 F.2d 617, 631–32 (3d Cir. 1993)).

<sup>159</sup> See *Burns v. Reed*, 500 U.S. 478, 493 (1991) (“We do not believe, however, that [a prosecutor] advising the police in the investigative phase of a criminal case . . . qualifies for absolute immunity.”); Erwin Chemerinsky, *Prosecutorial Immunity*, 15 *TOURO L. REV.* 1643, 1644 (1999) (“Prosecutors have absolute immunity for prosecutorial acts, but not for investigative, and not for administrative acts.”).

<sup>160</sup> *Richman v. Sheahan*, 270 F.3d 430, 435 (7th Cir. 2001) (citing *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238 (7th Cir. 1986)); see also *Sindram v. Suda*, 986 F.2d 1459, 1461 (D.C. Cir. 1993) (“[I]mmunity applies to all acts of auxiliary court personnel that are basic and integral parts of the judicial function.” (internal quotation marks omitted)).

<sup>161</sup> *Rehberg v. Paulk*, 132 S.Ct. 1497, 1503 (2012).

<sup>162</sup> *Id.* at 1502.

<sup>163</sup> *Burns v. Reed*, 500 U.S. 478, 493–94 (1991) (quoting *Tower v. Glover*, 467 U.S. 914, 922–23 (1984)).

<sup>164</sup> *Id.* at 493–94.

functions aid an official who is entitled to absolute immunity.<sup>165</sup> Indeed, as far back as 1821, the Supreme Court recognized that while legislators and judges were immune for their official conduct, their immunity did not transfer to other officers.<sup>166</sup>

In the context of legislative immunity, it is well established that while a legislator has immunity for acts performed within his legislative function, those called upon to carry out the acts do not share his immunity.<sup>167</sup> As Professor Woolhandler points out, “[legislative] immunity covers the legislator in ordering, but not executing.”<sup>168</sup> In *Kilbourn v. Thompson*, the Supreme Court held that although members of the House of Representatives were entitled to legislative immunity for ordering the arrest and imprisonment of an individual who refused to appear before a House committee, the sergeant-at-arms, who was tasked with carrying out the order, was not absolutely immune from liability.<sup>169</sup> In justifying its decision, the Court referred to an earlier case, *Kielley v. Carson & Others*, which held that “the order of the assembly, finding the plaintiff guilty of a contempt, was no defence to the action for imprisonment.”<sup>170</sup>

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<sup>165</sup> See, e.g., *Anderson v. Dunn*, 19 U.S. 204, 233–34 (1821) (“In reply to the suggestion that, on this same foundation of necessity, might be raised a superstructure of implied powers in the executive, and every other department, and even ministerial officer of the government, it would be sufficient to observe, that neither analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body.”).

<sup>166</sup> See *id.*

<sup>167</sup> See *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (“This Court has held, however, that [legislative immunity] is less absolute . . . when applied to officers or employees of a legislative body, rather than to legislators themselves.”).

<sup>168</sup> Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 403 (1987); see also *id.* at 404–05 (“The legislator is thus privileged to inflict harms by speech, and to direct a limited set of trespasses, but not physically to commit any . . .”).

<sup>169</sup> 103 U.S. 168, 203–05 (1881) (citing *Kielley v. Carson and others* (1842), 13 Eng. Rep. 225 (P.C.) appeal taken from Nfld. L.R.).

<sup>170</sup> *Id.* at 199. In *Gravel v. United States*, the Supreme Court held that legislative aides were entitled to absolute legislative immunity when they perform legislative functions. 408 U.S. 606, 616–17 (1972). This extension of absolute legislative immunity is consistent with the functional approach in that the function, not the official, is protected by immunity. See *id.* at 613–22; see also Chemerinsky, *supra* note 15, at 475 (“[A]bsolute immunity goes to the task, not to the office”). In *Gravel*, the Court noted that there are times when legislative aides are required to stand in for the legislator. *Gravel*, 408 U.S. at 616–17. Specifically, the Court held that a Senator’s aides were absolutely immune for their role in convening a hearing on the classified Pentagon Papers because this function is protected by the Speech and Debate Clause. *Id.* at 626–27. *Gravel* is consistent with the argument that immunity cannot transfer to a different function, but rather, immunity only covers functions that previously were entitled to immunity. See *id.* Moreover, the argument that immunity does not transfer between individuals themselves is supported in the context of Presidential Immunity. In the companion cases of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court granted absolute immunity to the President for decisions made while in office, but only qualified immunity for presidential aides. See, e.g., *Nixon*, 457 U.S. at 756 (holding that the President “is entitled to absolute immunity from damages liability predicated on his official acts” and that immunity is “a



Similarly, in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, the Virginia Supreme Court was responsible for promulgating, enforcing, and adjudicating the state's Bar Code.<sup>171</sup> When the Consumers Union brought a section 1983 suit against the Virginia Supreme Court and the Virginia Bar Association for "unconstitutionally restrict[ing] the right . . . to receive and gather nonfee information and information concerning initial consultation fees,"<sup>172</sup> the Virginia Supreme Court asserted absolute judicial and absolute legislative immunity.<sup>173</sup> The Court held that the act of *promulgating* the Bar Code was a legislative function deserving of absolute legislative immunity,<sup>174</sup> but the Virginia Supreme Court was not immune for *enforcing* it.<sup>175</sup> Thus, while the Virginia Supreme Court was absolutely immune for promulgating rules, that immunity did not transfer to the justices in their role as enforcement officials.<sup>176</sup>

It is not only in the context of legislative immunity that the Court has rejected the theory of transferred immunity. Indeed, the *Antoine* Court rejected such a theory when it denied absolute judicial immunity to a court reporter, despite the importance and indispensability of court reporting to the judicial process.<sup>177</sup> As the Court explained, "[n]or is it sufficient that the task of a court reporter is extremely important or . . . indispensable to the appellate process" in determining whether to extend absolute immunity to a nonjudicial officer aiding the judge in her judicial function.<sup>178</sup> Rather, "[w]hen judicial immunity is extended to officials other than judges, it is because their judgments are functionally comparable to those of judges."<sup>179</sup>

In *Dennis v. Sparks*, the Court considered whether a section 1983 suit could be maintained against private individuals for allegedly conspiring with a judge to obtain an injunction, even though the judge had been relieved of liability on the basis of absolute judicial

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functionally mandated incident of the President's unique office"); *Harlow*, 457 U.S. at 808-09 (recognizing "the importance to the President of loyal and efficient subordinates" but finding "these factors, alone, to be insufficient to justify absolute immunity").

<sup>171</sup> 446 U.S. 719, 721-22 (1980).

<sup>172</sup> *Id.* at 727.

<sup>173</sup> *Id.* at 728.

<sup>174</sup> *Id.* at 734 ("[T]he Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity.").

<sup>175</sup> *Id.* at 736 ("[W]e believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities.").

<sup>176</sup> *See id.* at 734, 736.

<sup>177</sup> *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436-37 (1993); *see also supra* note 116 and accompanying text.

<sup>178</sup> *Id.* at 436-37 (internal quotation marks omitted).

<sup>179</sup> *Id.* at 436 (internal quotation marks omitted).

immunity.<sup>180</sup> The alleged conspirator, a private individual, “insist[ed] that unless he [was] held to have an immunity derived from that of the judge, the [judge’s] official immunity [would] be seriously eroded.”<sup>181</sup> In rejecting this argument, the Court first noted that “[t]he immunities of state officials that we have recognized for the purposes of § 1983 are the equivalents of those that were recognized at common law.”<sup>182</sup> Because conspiring with a judge is not a judicial act deserving of absolute judicial immunity, the conspirator’s alleged conduct was not functionally comparable to a judicial act.<sup>183</sup> Mindful that trying the case against the alleged conspirator could expose the judge’s conduct to scrutiny and could require him to testify at trial, the Court still was not persuaded of the need to transfer the judge’s absolute immunity from civil liability to the alleged conspirator.<sup>184</sup> The Court reasoned, “the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.”<sup>185</sup>

Just as a private individual conspiring with a judge to use the judicial process to deprive another person of his constitutional or statutory rights does not receive the judge’s judicial immunity, public officials, such as court clerks, who deprive a person of his constitutional or statutory rights should not receive the judge’s immunity without a showing that the auxiliary official’s function itself deserves absolute immunity. Unfortunately, in contrast to cases like *Antoine* and *Dennis v. Sparks*, lower courts have granted immunity without this showing when they cloak judicial assistants with the judge’s immunity, even when those auxiliary officials perform nonimmune functions. Instead, courts simply transfer the judge’s immunity to the auxiliary official.

Without a common law basis to support a theory that immunity can transfer between individuals, courts are required to inquire whether a common law basis exists for insulating with absolute immunity those functions performed by auxiliary officials.<sup>186</sup> Despite this, lower courts have held that executive officials are entitled to absolute

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<sup>180</sup> See 449 U.S. 24, 25–26 (1980).

<sup>181</sup> *Id.* at 29.

<sup>182</sup> *Id.* (citing *Owen v. City of Independence*, 445 U.S. 622, 637–38 (1980); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976); *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

<sup>183</sup> *Id.* at 31.

<sup>184</sup> *Id.* at 30–32.

<sup>185</sup> *Id.* at 31–32.

<sup>186</sup> See *Burns v. Reed*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in part and dissenting in part) (“While we have not thought a common-law tradition (as of 1871) to be a *sufficient* condition for absolute immunity under § 1983, we have thought it to be a *necessary* one . . . .” (internal citation omitted)).

immunity for executing court orders;<sup>187</sup> a special master is entitled to absolute immunity for setting custody schedules;<sup>188</sup> and court clerks are entitled to absolute immunity for delaying or refusing to file a complaint or petition,<sup>189</sup> managing court calendars,<sup>190</sup> and deciding whether to issue documents to litigants,<sup>191</sup> merely because these officials assist the judge in the performance of judicial duties.<sup>192</sup> These acts, however, are not incident to “resolving disputes between parties, or . . . authoritatively adjudicating private rights,”<sup>193</sup> which constitutes “the kind of judgment that is protected by the doctrine of judicial immunity.”<sup>194</sup> Nor are these acts the type of quasi-judicial functions that are entitled to absolute immunity (i.e., testimony, advocacy, and factual adjudication).<sup>195</sup>

This is not to suggest that no common law tradition of absolute immunity exists for any of these functions.<sup>196</sup> However, courts that simply transfer immunity to auxiliary officials who aid immune offi-

<sup>187</sup> See, e.g., *Engebretson v. Mahoney*, 724 F.3d 1034, 1042 (9th Cir. 2013) (“Prison officials who simply enforce facially valid court orders are performing functions necessary to the judicial process.” (internal quotation marks omitted)).

<sup>188</sup> See, e.g., *Morkel v. Davis*, 513 F. App’x 724, 729 (10th Cir. 2013) (“[N]on-judicial officers [i.e., special masters] may be afforded the same absolute immunity enjoyed by judges when a claim is based on duties performed in furtherance of the judicial process.”).

<sup>189</sup> See, e.g., *Spalsbury v. Sisson*, 250 F. App’x 238, 248 (10th Cir. 2007) (“[T]his immunity also extends to . . . the court clerk, [who] is accused of no more than assisting . . . in the discharge of . . . judicial functions.”); *Trent v. Gordon*, No. 99-3928, 2000 U.S. App. LEXIS 11092, at \*5 (7th Cir. May 11, 2000) (“Although the act of filing a petition might be characterized as more administrative than judicial in character, [a court clerk] is nonetheless entitled to absolute judicial immunity because [the action was] under the explicit direction of the judge.”); *Kincaid v. Vail*, 969 F.2d 594, 601 (7th Cir. 1992) (“The clerk of court and deputy clerks are the officials through whom such filing is done. Consequently, the clerks qualify for quasi-judicial immunity . . .”). The Seventh Circuit has more recently held that the refusal of a court clerk to file a complaint is not a function that enjoys absolute judicial immunity when the refusal was not made at the direction of the judge. See *Snyder v. Nolen*, 380 F.3d 279, 287–89 (7th Cir. 2004).

<sup>190</sup> See, e.g., *Rodriguez v. Weprin*, 116 F.3d 62, 66 (2d Cir. 1997) (“A court’s inherent power to control its docket is part of its function . . . for which the judges and their supporting staff are afforded absolute immunity.”).

<sup>191</sup> See, e.g., *id.*

<sup>192</sup> See, e.g., *Spalsbury*, 250 F. App’x at 248 (holding that derivative immunity applies when the official’s function directly assists the judge in the performance of judicial duties).

<sup>193</sup> *Burns v. Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in part and dissenting in part).

<sup>194</sup> *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 437 (1993).

<sup>195</sup> See discussion *supra* Part I.A.3. Similarly, lower courts have held that an employee in a prosecutor’s office is entitled to absolute prosecutorial immunity for conspiring to withhold evidence during the judicial phase of the proceeding, regardless of whether such conduct is an advocacy function. See *Moore v. Middlesex Cnty. Prosecutors Office*, 503 F. App’x 108, 109 (3d Cir. 2012) (per curiam); see also *supra* notes 155–59 and accompanying text.

<sup>196</sup> Indeed, there is some support that the execution of a court order deserves of its own category of absolute immunity. For instance, in *Erskine v. Hohnbach*, the Supreme Court held that a ministerial officer could not be liable for enforcing a tax assessment. 81 U.S. 613, 616 (1871). The Court noted:

cial fail to properly analyze whether the function performed by the auxiliary officials is, itself, deserving of absolute immunity.<sup>197</sup> It may well be the case that there is a common law tradition of insulating judges for calendaring hearings or deciding whether and when a complaint should be filed. But it also may be the case that such functions are administrative in nature and a judge would not have been absolutely immune for performing such functions at common law.<sup>198</sup> By failing to engage in a common law analysis, courts that adhere to the transferred immunity theory not only misconstrue the functional approach but also risk undermining section 1983 by unnecessarily limiting the ability of aggrieved plaintiffs to recover civil damages for violations of their constitutional rights.<sup>199</sup>

### III

#### THE REASON FOR LOWER COURTS' MISAPPLICATION OF SECTION 1983 IMMUNITIES

The error that many lower courts make may be attributed to the fact that the Supreme Court's own reasoning in regard to section 1983 immunities has not always been entirely clear.<sup>200</sup> Professor Achtenberg has argued that the Court has employed five distinct approaches to the section 1983 immunity doctrine.<sup>201</sup> According to Achtenberg, "[d]espite the issue's importance, and despite more than two dozen decisions, the Supreme Court has been unable to create a

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Whatever may have been the conflict at one time . . . as to the extent of protection afforded to ministerial officers acting in obedience to process . . . it is well settled now, that if the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face . . . then, . . . the order or process will give full and entire protection to the ministerial officer in its regular enforcement . . . .

*Id.* If absolute immunity for officials executing court orders was well established in 1871 (*Erskine* was decided in December 1871), then courts applying absolute immunity from section 1983 liability to such officials should ground their decisions in this common-law history and justify that the purpose behind the common-law rule accords with the purpose of section 1983. See *Heck v. Humphrey*, 512 U.S. 477, 492 (1994) (Souter, J., concurring). Rather than classify the immunity of officials executing court orders as a species of judicial or quasi-judicial immunity, courts should employ the functional analysis and recognize that the execution of a court order is independently immune.

<sup>197</sup> In so doing, lower courts ignore the Supreme Court's functional approach. See, e.g., *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994).

<sup>198</sup> See *Heck*, 512 U.S. at 492 (Souter, J., concurring).

<sup>199</sup> See, e.g., *Johns*, *supra* note 4, at 267.

<sup>200</sup> See *Jeffries, Jr.*, *supra* note 16, at 208 ("[T]he fact remains that constitutional tort doctrine is incoherent. It is so shot through with inconsistency and contradiction as to obscure almost beyond recognition the underlying stratum of good sense.").

<sup>201</sup> David Achtenberg, *Legal Theory: Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. REV. 497, 499 (1992).

stable body of immunity law.”<sup>202</sup> More recently, after the Court issued its *Rehberg v. Paulk* opinion, one commenter noted Justice Alito’s candidness “about the Court’s sometimes seemingly inconsistent approach to absolute immunity.”<sup>203</sup>

Indeed, the discussions in both *Imbler v. Pachtman* and *Briscoe v. LaHue* seem to offer some support for the theory that immunity can transfer from the immune official to another official assisting the immune official in the performance of her duties.<sup>204</sup> In *Imbler*, Justice Powell wrote, “courts sometimes have described the prosecutor’s immunity as a form of ‘quasi-judicial immunity’ and referred to it as derivative of the immunity of judges.”<sup>205</sup> Although Justice Powell’s decision goes on to support prosecutorial immunity on common law grounds,<sup>206</sup> the suggestion that prosecutorial immunity was a type of derivative judicial immunity has led lower courts to extend absolute immunity to nonjudicial officers merely because those officials play a role in the judicial process, regardless of whether the function performed by the official is analogous to a function that was entitled to absolute immunity at common law.<sup>207</sup>

The error that courts seem to make when construing *Imbler* is mistaking the policy rationale underlying prosecutorial immunity for the reason for recognizing prosecutorial immunity in the context of section 1983. Assisting a judge in making an accurate judicial determination is policy that supports prosecutorial immunity, but ultimately prosecutors enjoy absolute immunity from section 1983 liability for their decisions during the judicial phase of a case because in 1871 an established common law tradition of insulating advocates participating in the judicial phase of a trial existed.<sup>208</sup>

Likewise, in *Briscoe* the Supreme Court asserted, “the common law provided absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of

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<sup>202</sup> *Id.* at 498. Achtenberg is not alone in his criticism. A decade earlier, Theodore Eisenberg noted “[s]erious problems still exist . . . both with the Court’s individual immunity decisions in the aggregate and with particular decisions.” Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 488 (1982).

<sup>203</sup> Timothy Coates, *Opinion Analysis: Absolute Immunity for Grand Jury Witnesses*, SCOTUSBLOG (Apr. 4, 2012, 11:41 AM), <http://www.scotusblog.com/2012/04/opinion-analysis-absolute-immunity-for-grand-jury-witnesses/>.

<sup>204</sup> See discussion *supra* notes 59–69.

<sup>205</sup> *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976).

<sup>206</sup> Albeit without pointing to any pre-1871 case law recognizing attorneys’ absolute immunity from civil liability for their conduct during the judicial phase of a proceeding. See *id.* But see discussion *supra* at notes 69–73 (noting that at least as early as 1606, attorneys were afforded absolute immunity when acting as advocates for their clients in the judicial phase of a case).

<sup>207</sup> See discussion *supra* notes 139–45.

<sup>208</sup> See discussion *supra* notes 66–74.

the judicial process.”<sup>209</sup> This broad assertion of the common law basis for absolute judicial immunity has also served as the basis for the extension of absolute immunity in many cases.<sup>210</sup> However, not only did the *Briscoe* Court ultimately engage in an in-depth discussion of the common law witness immunity to support its decision,<sup>211</sup> but additionally, the Court’s decision in *Antoine* later clarified that an individual is not entitled to absolute immunity from section 1983 liability merely because he is integral to the judicial process.<sup>212</sup>

#### CONCLUSION

By asserting that absolute immunity transfers from a judge to an official who is instrumental in some aspect of the judicial process—such as a court clerk managing a court calendar, an executive official executing a court order, or an employee in a prosecutor’s office deciding to share evidence—courts fail to engage in the common law inquiry the Supreme Court’s section 1983 immunity framework demands.<sup>213</sup> In effect, courts are making “freewheeling policy”<sup>214</sup> determinations about whether to afford absolute immunity to officials and functions. In so doing, lower courts misapply the Supreme Court’s section 1983 immunity framework. Moreover, decisions that subscribe to a theory of transferred immunity risk rewriting section 1983 by importing new categories of absolute immunity that the 42d Congress would not have intended.<sup>215</sup> Finally, broadening the field of immunities deprives potential plaintiffs of a potent civil remedy for the deprivation of constitutional rights.<sup>216</sup>

Lower courts should pay close attention to the Supreme Court’s framework, particularly to the need to support extensions of absolute immunity with common law analogies.<sup>217</sup> The reason for doing so goes beyond a formalist desire to properly interpret the statutory intent of the 42d Congress. Constraining the expansion of absolute immunities recognized in section 1983 will contribute to the underlying purpose of this important Civil Rights statute: to prevent deprivations

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<sup>209</sup> *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983).

<sup>210</sup> *See, e.g., Valdez v. Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989).

<sup>211</sup> *See Briscoe*, 460 U.S. at 330–31.

<sup>212</sup> *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435–37 (1993); *see also Snyder v. Nolen*, 380 F.3d 279, 286–87 (7th Cir. 2004) (“Absolute immunity does not extend to all positions simply ‘because they are part of the judicial function.’” (quoting *Antoine*, 508 U.S. at 435)).

<sup>213</sup> *See, e.g., Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994); *see also supra* Part II.B.

<sup>214</sup> *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

<sup>215</sup> *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 492 (1994) (Souter, J., concurring).

<sup>216</sup> *See Johns, supra* note 4, at 267.

<sup>217</sup> *See, e.g., Rehberg v. Paulk*, 132 S. Ct. 1497, 1505 (2012).

of constitutional liberties by government officials acting under the color of state law.<sup>218</sup>

By understanding the flaw that many courts make when applying absolute immunity in the context of section 1983, future courts will be better positioned to make analytically correct decisions. When courts understand that they must support their decisions to extend absolute immunity by analogizing to functions that were entitled to absolute immunity at common law in 1871, reviewing courts can test the efficacy and accuracy of the common law analogy. For example, absolute immunity for executing court orders may have been sufficiently prevalent at common law in 1871 to support the implicit adoption of absolute immunity for the execution of court orders in section 1983.<sup>219</sup> However, courts need to test this history, rather than simply assert that the immunity of the judge transfer to the executive official called upon to execute the judicial will.

If, however, courts continue to analyze cases on the basis of transferred immunity, they will incorrectly continue to expand the category of functions that are absolutely immune from section 1983 liability. Erroneous decisions will continue to serve as precedent on which section 1983 continues to be slowly eroded by an ever-creeping regime of implicit immunities.

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<sup>218</sup> See *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

<sup>219</sup> See discussion *supra* note 137.