Redressing Judicial Misbehavior: An Integrated Approach to Judicial Immunity

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Immunities generate intense public interest and controversy. Whether it is the sweeping presidential immunity that former President Trump has claimed or the qualified immunity that rogue police invoke to evade financial responsibility for their brutality, immunities stand as a highly contested aspect of the American legal system. Judicial immunity incites similar controversy. American judges possess absolute immunity from civil suits for their judicial acts, so victims are barred from seeking civil compensation, even against judges who engage in purposeful or malicious misconduct from the bench. For decades scholars have sought to curtail absolute judicial immunity, but they have overlooked a significant distinction: whereas judges have absolute immunity against civil lawsuits, they have no immunity whatsoever against criminal prosecutions. By wholly ignoring potential criminal liability for wrongful judicial acts, the scholarly critiques of absolute judicial immunity and their proposed reforms miss their mark. This Article provides a comprehensive, holistic exploration of judicial immunity in the context of all lawsuits — civil and criminal — and it proposes reforms that will advance the compelling goals the doctrine is intended to serve. While acknowledging key differences between civil and criminal law that impact the desirability of

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judicial immunity, this Article concludes that our current binary system of absolute immunity for civil suits and zero immunity for criminal prosecutions is excessively formalistic and misaligns with the important policy goals underlying the doctrine. Consequently, the Article proposes a criminal-law limitation on civil judicial immunity that will (1) more effectively advance the goals that immunity is designed to achieve; (2) harmonize criminal law and civil law immunity rules into a more coherent whole; and (3) avoid the practical difficulties that have doomed previous reform efforts. This Article's proposals will permit judicial immunity to operate in an integrated fashion with reduced costs and enhanced ability to serve the ends for which it was created.

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INTRODUCTION

According to her mother, fifteen-year-old Linda McFarlin had diminished intellectual capabilities[1] *and* was running with the wrong crowd.[2] Consequently, Linda's mother petitioned Indiana Judge Harold Stump to have her daughter surgically sterilized.[3] Judge Stump approved the petition the same day it was presented in an ex parte proceeding. Judge Stump did not conduct a hearing; he did not give notice to Linda, and he did not appoint a guardian ad litem.[4] Linda entered the hospital believing that she would undergo an appendectomy; instead, doctors performed a tubal ligation.[5] Only years later when she was married and could not become pregnant did she learn that she had been sterilized.[6]

Linda brought suit against Judge Stump, her mother, and others claiming federal constitutional violations along with state claims of assault, battery and medical malpractice.[7] But against Judge Stump she recovered nothing. The case reached the United States Supreme Court, which held Judge Stump to be immune from suit. It mattered not that Judge Stump had acted in clear violation of Indiana law[8] or that his act caused tragic and irreparable harm,[9] or even that his approval of the secret petition "precluded all resort to appellate or other judicial

[1] Her mother's petition claimed that Linda did "not have what is considered normal mental capabilities and intelligence" despite attending public school and having been passed, along with the rest of her class, each school year. Stump v. Sparkman, 435 U.S. 349, 351 n.1 (1978).

[2] Mrs. McFarlin's petition claimed that Linda had been associating with "older youth and young men" and had on several occasions stayed overnight with them. *Id.* at 351.

[3] *Id.*

[4] *Id.* at 360.

[5] *Id.* at 353.

[6] *Id.*

[7] *Id.* at 353-54.

[8] *Id.* at 359.

[9] *Id.* at 363.

remedies that would otherwise be available."[10] Because Judge Stump's grant of the petition was a judicial act not done in the clear absence of all jurisdiction, Judge Stump was immune from civil suit.[11]

The *Washington Post* excoriated the Supreme Court's decision in *Stump v. Sparkman* as a "step toward judicial omnipotence,"[12] yet the Court's holding should have come as no surprise. Derived from 17th century England, the doctrine of judicial immunity has a long historical pedigree. Historians now disagree about scope of the doctrine in previous centuries,[13] but just three years before *Stump*, the Supreme Court had broadly interpreted the doctrine to bar suits against judges for claims brought under 42 U.S.C. § 1983,[14] despite a strong textual and historical argument that § 1983 superseded judicial immunity.[15] However, even though the expansive nature and wide breadth of the *Stump* holding was doctrinally predictable, it generated a flood of scholarly and popular criticism,[16] and absolute judicial immunity continues to be reviled to this day.[17]

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[10] *Id.* at 370 (Powell, J., dissenting).

[11] *Id.* at 364.

[12] Editorial, *Judicial Omnipotence*, WASH. POST, Mar. 31, 1978, https://www.washingtonpost.com/archive/politics/1978/03/31/judicial-omnipotence/251ed69d-bb44-4bf8-bdac-d2c9852ca5f9/.

[13] *See infra* text accompanying notes 137–139.

[14] Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

[15] *See* Harper v. Merckle, 638 F.2d 848, 856 (5th Cir. 1981); *see also* Douglas K. Barth, *Immunity of Federal and State Judges from Civil Suit — Time for a Qualified Immunity?*, 27 CASE W. RSRV. L. REV. 727, 740 (1977) (maintaining that "a careful review of the legislative history of section 1983 and of contemporary case law indicates that the legislature intended to impose liability on those judges who violated section 1983").

[16] *See* Irene Merker Rosenberg, Stump v. Sparkman*: The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833, 833 (1978) (observing that "legal commentators have persistently condemned" absolute judicial immunity); Peter H. Schuck, *The Civil Liability of Judges in the United States*, 37 AM. J. COMPAR. L. 655, 665-66 (1989) ("*Stump* has evoked severe criticism from many academic commentators."); John Bennett Sinclair, *Casenotes: Torts — Judicial Immunity: A Sword for the Malicious or a Shield for the Conscientious?* Stump v. Sparkman*, 98 S. Ct. 1099 (1978)*, 8 U. BALT. L. REV. 141, 155 (1978) ("In recent years, many legal commentators have strongly criticized the doctrine of absolute judicial immunity.").

[17] *See* Note, *Judicial Immunity at the (Second) Founding: A New Perspective on § 1983*, 136 HARV. L. REV. 1456, 1456 (2023) [hereinafter *Judicial Immunity at the (Second) Founding*].

Indeed, immunities remain a hotly contested topic of intense public interest. Former President Trump's claim of sweeping presidential immunity for any crimes he may have committed has generated enormous scholarly[18] and popular commentary.[19] Likewise, the doctrine

[18] *See, e.g.*, Quinta Jurecic & Benjamin Wittes, *Two Court Rulings on Presidential Immunity Move Trump Cases Forward*, LAWFARE (Dec. 4, 2023, 5:31 PM), https://www.lawfaremedia.org/article/two-court-rulings-on-presidential-immunity-move-the-trump-cases-forward [https://perma.cc/Y5EH-5R2M] (speculating in regards to the lasting effects of judicial rulings made in two cases involving former President Trump); Walter Olson, *Trump's Immunity Claims Aren't Likely to Let Him Escape Accountability*, CATO INST. BLOG (Jan. 4, 2024, 3:52 PM), https://www.cato.org/blog/trumps-immunity-claims-arent-likely-excuse-him-accountability [https://perma.cc/N6QV-JMR8] (analyzing the potential validity of former President Trump's claim of absolute presidential immunity); Austin Sarat, *The Incredible, Inconsistent, Incoherent Legal Arguments About Presidential Immunity Made by Donald Trump's Lawyer*, VERDICT (Jan. 11, 2024), https://verdict.justia.com/2024/01/11/the-incredible-inconsistent-incoherent-legal-arguments-about-presidential-immunity-made-by-donald-trumps-lawyer [https://perma.cc/LQZ2-E6FF] (criticizing legal arguments, proposing broad presidential immunity, made by former President Trump's attorney during appellate oral argument); Debra Cassens Weiss, *Taking 'Legal Long Shot,' Trump's Lawyers Point to Impeachment Judgment Clause in Immunity Argument*, A.B.A. J. (Jan. 2, 2024, 2:16 PM), https://www.abajournal.com/news/article/taking-a-legal-long-shot-trumps-lawyers-point-to-impeachment-judgment-clause-in-immunity-argument [https://perma.cc/F97L-4Q8J] (discussing an immunity argument, to be made by former President Trump's council based on the Impeachment Judgment Clause).

[19] *See, e.g.*, Alan Feuer & Maggie Haberman, *Trump's Immunity Claim in Court*, N.Y. TIMES (Jan. 9, 2024), https://www.nytimes.com/2024/01/09/us/politics/trump-immunity-claim-in-court.html?searchResultPosition=6 (discussing the court's apparent skepticism about Trump's immunity claim); Alexandra Hutzler, *Experts Break Down What the Constitution, Framers Said About "Presidential Immunity*,*"* ABC NEWS (Apr. 24, 2024), https://abcnews.go.com/Politics/experts-break-constitution-framers-presidential-immunity/story?id=106140371 [https://perma.cc/6MR5-XS5D] (discussing expert opinions about Trump's immunity claims); Glenn Kirschner, Opinion, *The Trump Immunity Lark Is as Damaging to American Democracy as It Is Absurd*, MSNBC (Jan. 11, 2024), https://www.msnbc.com/opinion/msnbc-opinion/trump-immunity-argument-appeals-court-rcna133315 [https://perma.cc/FLA5-AWBX] (describing the way in which three appellate judges signaled "through their questions of counsel, that nothing in our Constitution, our laws or our democratic system of government places an American president above the law"); *The Supreme Court Will Decide How Quickly Donald Trump is Prosecuted*, THE ECONOMIST (Dec. 12, 2023), https://www.economist.com/united-states/2023/12/12/the-supreme-court-will-decide-how-quickly-donald-trump-is-prosecuted [https://perma.cc/MN22-HC9M] (discussing the Supreme Court's position in deciding

of qualified immunity that frequently shields police and other government officials from the pecuniary consequences of their misbehavior, has been subject to robust critique.[20] Scholars and citizens become similarly incensed when judges escape accountability for their wrongdoing.[21] Violations of judicial ethics standards have been much in the news of late,[22] but judicial misconduct can extend beyond ethics

whether former presidents are "immune from federal prosecution for crimes committed while in office").

[20] *See generally*, *e.g.*, F. Andrew Hessick & Katherine C. Richardson, *Qualified Immunity Laid Bare*, 56 WAKE FOREST L. REV. 501 (2021) (arguing that the doctrine of qualified immunity should be refined so as to weigh the rights alleged to have been violated by the government official); Taylor Kordsiemon, *Challenging the Constitutionality of Qualified Immunity*, 25 J. CONST. L. 576 (2023) (arguing that qualified immunity violates Article III of the U.S. Constitution as well as the principle of equal protection); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (arguing that the U.S. Supreme Court should overturn qualified immunity); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 1 (2017) (arguing that, contrary to prevailing rationales qualified immunity is rarely invoked to protect government officials from burdens related to discovery and trial).

[21] *See infra* notes 185–196.

[22] In 2023, Justices Clarence Thomas and Samuel Alito were the subjects of separate *ProPublica* reports which identified ethical concerns relating to the Justices' activities and associations. Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow; Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/Q6PD-CKCY]. Shortly after publication of the report on Justice Thomas, Senate Judiciary Chairman Dick Durbin (D-IL) invited Chief Justice John Roberts to testify to the committee about the Supreme Court's ethical guidelines, but Roberts declined the invitation. Abbie VanSickle, *Chief Justice Declines to Testify Before Congress Over Ethics Concerns*, N.Y. TIMES (Apr. 25, 2023), https://www.nytimes.com/2023/04/25/us/politics/justice-roberts-supreme-court-ethics.html. The following months heard calls from political figures and editorial boards for a stricter ethics code for the Court. *See, e.g.*, *America's Supreme Court Should Adopt New Ethics Standards*, THE ECONOMIST (Sept. 6, 2023), https://www.economist.com/leaders/2023/09/06/americas-supreme-court-should-adopt-new-ethics-standards; Editorial, *Who Can Rein In the Supreme Court?*, N.Y. TIMES (May 25, 2023), https://www.nytimes.com/2023/05/25/opinion/supreme-court-ethics-act.html. In November 2023, the nine justices adopted a new ethics code, although some political figures deemed it insufficient. Lawrence Hurley, *Supreme Court Adopts Code of Conduct Amid Ethics Scrutiny*, NBC NEWS (Nov. 13, 2023, 11:10 AM),

violations into the realm of intentional torts and other malicious conduct. It is for these acts that judicial immunity prevents victims from seeking compensation.

Scholars have sought to ameliorate judicial immunity's perceived unfairness by proposing various restrictions. Some scholars, for instance, recommend limits based on the judge's mindset[23] or on the nature of his wrongful act.[24] Others adopt a process-based perspective and suggest eliminating immunity when certain procedural guarantees are not in place.[25] However, what this copious scholarly commentary has overlooked is a significant distinction: whereas American law provides judges absolute immunity against civil lawsuits, it provides no immunity whatsoever against criminal prosecutions.[26] Thus, Judge Stump had complete immunity against Ms. Sparkman's civil damages claim, but he would have had no immunity had he been charged with criminal battery or some related crime for Ms. Sparkman's sterilization. Also notable is that the American treatment of judicial immunity is somewhat exceptional across the globe. For one thing, most countries do not absolutely immunize judicial acts against civil suits,[27] so Anglo-American countries stand as outliers for providing the broad immunity that *Stump* exemplified. And American law stands as an outlier to the outliers in that it diverges even from many Anglo-American countries in

https://www.nbcnews.com/politics/supreme-court/supreme-court-code-of-conduct-rcna124951.

[23] *See infra* notes 211–217.

[24] *See infra* notes 208–210.

[25] *See infra* notes 208–210.

[26] O'Shea v. Littleton, 414 U.S. 488, 503 (1974) (reporting that "the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct'"); Gravel v. United States, 408 U.S. 606, 627 (1972).

[27] *See, e.g.*, COUNCIL OF EUROPE, JUDGES: INDEPENDENCE, EFFICIENCY, AND RESPONSIBILITIES 15 para. 66 (2010) (recommending that civil liability attach only when judges exhibit malice or gross negligence); Barth, *supra* note 15, at 743-51 (discussing judicial liability in civil law countries); Gary Chan, *Judicial Immunity and Independence of Vietnamese Judges: Reflections on the Ordinance on Judges and Jurors and the Law on the Organisation of the People's Courts*, 7 AUSTL. J. ASIAN L. 143, 145 (2005) (discussing civil liability of Vietnamese judges); E. J. H. Schrage, *The Judge's Liability for Professional Mistakes*, 17 J. LEGAL HIST. 101, 115, 125-26 (1996) (discussing German and Austrian law).

bestowing or denying immunity based on whether the act in question is the subject of a civil or a criminal suit.[28]

Although a couple of scholars devote a couple of sentences to judicial liability for crimes,[29] they do so summarily and fail to consider the role that criminal law can play both in ameliorating the harshness and imbalance of the current judicial immunity doctrine and in developing a more holistic and cohesive doctrine that turns on substance rather than form. On the one hand, this inattention is not surprising. After all, most victims of judicial harms — like Linda McFarlin Sparkman — bring civil suits seeking compensatory damages. It is also commonplace for the same act — say a reckless motor vehicle accident — to be treated differently depending on whether the act is the subject of a civil suit seeking money damages or a criminal prosecution.[30] Civil suits and criminal prosecutions employ different procedures, substantive standards, and burdens of proof, and they are also viewed differently as a conceptual matter.[31] At the risk of oversimplifying, individuals bring civil tort claims to vindicate their private, largely financial interests. By contrast, the state brings criminal prosecutions to vindicate the community's interest in deterring and punishing antisocial acts.[32]

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[28] *See infra* notes 177–184.

[29] *See infra* note 220.

[30] Standards of proof relating to the act differ, for instance, as do the punitive consequences of the act.

[31] *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991) ("The Constitution, statutes, and the common law all draw fundamental distinctions between criminal proceedings, which emphasize adjudication of guilt or innocence with strict adversarial protections for the accused, and civil proceedings, which emphasize the rights and responsibilities of private parties.").

[32] Jill Wieber Lens, *Pushing for the Injury: Tort Law's Influence in Defining the Constitutional Limitations on Punitive Damage Awards*, 39 HOFSTRA L. REV. 595, 602-03 (2011) ("Criminal law focuses on public wrongs and righting the resulting public harm. . . . In contrast, tort law focuses on private wrongs done to the plaintiff and righting the resulting private harm."). However, recent scholarship has questioned the conceptual validity of the sharp distinction that was historically drawn between civil and criminal law. *See, e.g.*, Lionel M. Lavenue, *The Corporation as a Criminal Defendant and Restitution as a Criminal Remedy: Application of the Victim and Witness Protection Act by the Federal Sentencing Guidelines for Organizations*, 18 J. CORP. L. 441, 454-55 (1993) (describing civil and criminal wrongs as not intrinsically different but often as one and the same act

On the other hand, the dearth of scholarship addressing judicial immunity for criminal acts both before and especially after *Stump* is troubling and gives rise to two core difficulties. First, we cannot normatively evaluate the scope and contours of absolute judicial immunity against civil suits without taking account of judges' susceptibility to criminal prosecutions. Thus, although scholars have roundly excoriated absolute civil judicial immunity,[33] by wholly ignoring the criminal liability to which these same judges are subject, the scholars' critiques and their proposed reforms are incomplete and frequently distorted.

Second, and even more importantly, scholars have never assessed the coherence of a system that broadly immunizes judges from their obligation to compensate their victims but that provides them no protection from the potentially graver consequences of a criminal prosecution. Throughout its lengthy lifespan, the judicial immunity doctrine has been deemed to advance several important policy goals, but the most prominent is the maintenance of an independent judiciary.[34] In particular, it is believed that judges must be absolutely immunized from financial liability for their judicial acts or else their rulings will be influenced by fear of negative personal consequences. However, to the extent that maintaining an independent judiciary requires absolute immunity from civil suit, then must we not consider the threat that criminal prosecutions pose to this same judicial independence?

This Article provides a comprehensive, holistic exploration of judicial immunity in the context of all lawsuits, and it proposes reforms that will

as viewed from different standpoints); Bridgett N. Shephard, Note & Comment, *Classifying Crime Victim Restitution: The Theoretical Arguments and Practical Consequences of Labeling Restitution as Either a Criminal or Civil Law Concept*, 18 LEWIS & CLARK L. REV. 801, 802-04 (2014) (observing that the distinction between civil and criminal law has become blurred); Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 935-36 (1984) (noting that criminal law is similar to civil law in its multiple goals, including the protection of society as well as individual victims).

33 *See infra* notes 176–184.

34 Rosenberg, *supra* note 16, at 855 ("The primary purpose served by the doctrine [of judicial immunity] is the preservation of a fearless and independent judiciary whose members will be able to resolve difficult and controversial matters based on their own convictions, uninfluenced by apprehension of civil suits against them by disappointed litigants.").

advance the compelling goals the doctrine is intended to serve. Part I begins by tracing the doctrine of judicial immunity from its historical origins to its modern-day formulation. This exploration reveals that American law bestows not only on judges but also on judicial proxies exceptionally wide-ranging immunity from civil liability for acts, no matter how intentional or malicious, performed during the course of judicial duties, a concept that is also broadly defined.[35] Judges might receive kickbacks after inappropriately incarcerating children in detention facilities.[36] Court clerks might purposefully falsify key documents.[37] And partition commissioners might commit a multiplicity of illegal acts.[38] However, if any of these individuals is called upon to compensate the victims of their wrongs, they need not do so because they are immune both from defending against the suit and from paying damages.[39] At the same time, if the relevant judicial conduct can be plausibly characterized as a crime, these same judges, court clerks, and partition commissioners can be charged and convicted because the law is clear that "[j]udicial title does not render its holder immune to crime even when committed behind the shield of judicial office."[40] Different cases reach this conclusion through different reasoning,[41] but the bottom line is that judicial immunity is bipolar. Judges are entirely shielded from civil money damage suits, but they have no shielding whatsoever from criminal prosecutions.

Because absolute judicial immunity for civil suits is so controversial, Part II explores the rationales that have supported and maintained the doctrine over the centuries.[42] Why would we want to provide judges with a "free pass," as it were, against all manner of civil liability for all manner of misconduct? Courts and commentators have ready answers to that

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[35] Schuck, *supra* note 16, at 665.

[36] *See* Wallace v. Powell, Nos. 3:09-CV-286, 3:09-CV-0291, 3:09-CV-0357, 3:09-CV-0630, 2009 WL 4051974, at *1 (M.D. Pa. Nov. 20, 2009).

[37] *See* Eades v. Sterlinske, 810 F.2d 723, 726 (7th Cir. 1987).

[38] *See* Ashbrook v. Hoffman, 617 F.2d 474, 475 (7th Cir. 1980).

[39] This absolute immunity contrasts sharply with the more limited qualified immunity possessed by other governmental officials, such as police officers or public defenders. *See* Kisela v. Hughes, 584 U.S. 100, 104 (2018).

[40] Braatelien v. United States, 147 F.2d 888, 895 (8th Cir. 1945).

[41] *See infra* notes 161–174.

[42] *See infra* Part II.

question, as Part II shows. Next, Part II asks the same question with respect to criminal prosecutions. Courts uniformly reject judges' claims for criminal law immunity for their judicial acts, but they are less expansive in explaining why. Different courts travel slightly different paths to these rulings, but most routes pass through a summary cost-benefit analysis that begins with and presumes the benefits of absolute judicial immunity for civil suits and thereafter concludes that the incremental benefit of immunizing judges from criminal prosecutions does not exceed the costs.

Far more thorough, well-thought-out cost-benefit analyses are also on display in the scholarly treatment of civil judicial immunity. Indeed, judicial immunity's exceptionally expansive breadth seems counterintuitive if not utterly wrong-headed to many scholars, as Part III details.[43] Although this scholarly criticism takes many forms and addresses many topics, most can be summarized in one basic proposition: the justifications that support absolute judicial immunity are outweighed by the costs the doctrine imposes on individual victims and society as a whole. One key problem, however, is that these critical assessments focus entirely on civil immunity and fail to consider the possibility of criminal prosecution for wrongful judicial acts. Indeed, most critical accounts of judicial immunity highlight the doctrine's negative impact on deterrence and judicial accountability, but these are ends that criminal prosecutions can readily advance. Thus, Part III reconsiders these criticisms in light of the availability of criminal prosecutions, and it concludes that more robust use of criminal charges against judges will ameliorate many of the harms that critics have identified in the doctrine of civil judicial immunity.

Finally, Part IV provides a holistic analysis of judicial immunity across civil and criminal law contexts.[44] Part IV acknowledges key differences between civil and criminal that support immunity in the former realm but accountability in the latter. Nonetheless, it considers the current binary system of absolute immunity for civil suits and zero immunity for criminal prosecutions to be excessively formalistic and misaligned with the important policy goals the doctrine is designed to serve. Part

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[43] *See infra* Part III.

[44] *See infra* Part IV.

IV, then, proposes reforms to the civil judicial immunity doctrine that will (1) more effectively advance the goals that immunity is designed to achieve; (2) unify criminal law and civil law judicial immunity rules into a more coherent whole; and (3) avoid the practical difficulties that have proved fatal to previous reform efforts. In sum, Part IV's proposals will permit judicial immunity to operate in an integrated fashion with reduced costs and enhanced ability to serve the ends for which it was created.

I. Judicial Immunity Civil and Criminal, Then and Now

Although the precursor to the modern doctrine of judicial immunity dates to mid-fourteenth century England,[45] it was not until 1607 in *Floyd* v. *Barker* that British jurist Lord Coke clearly articulated the doctrine. There, he held that judges must not be "question[ed] for any supposed corruption . . . except before the King himself; for they are only to make an account to God and the King."[46] In the United States, the Supreme Court issued its first two major decisions on judicial immunity in *Randall v. Brigham* in 1869[47] and *Bradley v. Fisher* three years later.[48] In both cases, the Court firmly endorsed absolute judicial immunity against civil suits. *Randall* held that judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction."[49] The *Randall* holding left open the possibility that immunity would not extend to malicious judicial conduct,[50] but *Bradley* shut that door to plaintiffs as well. Observing that judicial immunity "has been the settled doctrine of the English courts for many centuries," the *Bradley* Court explained that a judge's malicious mindset cannot eliminate immunity because plaintiffs can so easily allege malicious motives; if such an allegation could defeat immunity, then judges could be subject to vexatious litigation regardless of whether or not malice

[45] Jay Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. Rev. 201, 206 (1980).

[46] Floyd v. Barker (1607) 77 Eng. Rep. 1305, 1307 (KB).

[47] Randall v. Brigham, 74 U.S. 523 (7 Wall.) (1869).

[48] Bradley v. Fisher, 80 U.S. 335 (1872).

[49] *Randall*, 74 U.S. at 535.

[50] *Id.* at 536-37.

could subsequently be proved.[51] *Bradley* also clarified the expansive jurisdictional scope of the immunity doctrine. Specifically, *Bradley* held that a judicial act taken in excess of jurisdiction retains absolute immunity.[52] Immunity will be denied only for acts taken "in the clear absence of all jurisdiction."[53]

In *Randall* and *Bradley,* the Supreme Court planted the seeds for the contemporary doctrine of judicial immunity that continues to shield judges from civil liability today. In 1967, *Pierson v. Ray*[54] relied on the history articulated in *Bradley*[55] to hold that judges are immune even from suits under 42 U.S.C. § 1983, despite the statute's seemingly clear language and legislative history to the contrary. Some years later, *Stump v. Sparkman*, mentioned in the introduction, elaborated on the scope of judicial immunity from § 1983 suits.[56] Throughout these cases and many others, courts have expansively interpreted the various components of the judicial immunity doctrine to provide the doctrine extraordinarily broad reach. For that reason, Section A briefly discusses the various elements of the doctrine by asking (1) who can obtain judicial immunity; (2) which acts are shielded by judicial immunity; and (3) what is the scope of the jurisdictional exception that could (but rarely does) limit judicial immunity? Section A shows that the judicial immunity doctrine began its American life providing its beneficiaries broad coverage, and that coverage has only increased over time. Section B then turns to the diametrically opposed vulnerability of judges whose misbehavior instead is characterized as criminal.

[51] *Bradley*, 80 U.S. at 347.

[52] *Id.* at 351.

[53] *Id.*

[54] 386 U.S. 547 (1967).

[55] *Id.* at 553-54 ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in *Bradley v. Fisher*." (citation omitted)).

[56] Stump v. Sparkman, 435 U.S. 349, 356-59 (1978).

A. *Judicial Immunity from Civil Suits: The Sky Is the Limit*

1. Who Can Obtain Judicial Immunity?

Historically, the contours of the judicial immunity doctrine varied depending on the court and the status of the judge; in particular, judges on inferior courts and courts of limited jurisdiction were provided a more restricted form of judicial immunity than superior court judges.[57] Judicial immunity in England still depends to some degree on the status of the judge,[58] but in the United States, judicial immunity now equally "protects all judges, from the lowest to the highest court."[59] Moreover, judicial immunity extends not only to actual judges but to anyone who performs duties of a judicial nature.[60] For that reason, courts have

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[57] Feinman & Cohen, *supra* note 45, at 224, 230; *id.* at 240-41 (explaining the basis for the distinctions).

[58] *Sirros v. Moore* held that the distinction between inferior and superior judges was not sustainable, but the *Sirros* judges differed regarding the precise level of immunity to which judges were entitled. Rebecca Ananian-Welsh & George Williams, *Judicial Independence from the Executive: A First-Principles Review of the Australian Cases*, 40 MONASH U. L. REV. 593, 632 (2014); *see also* SHIMON SHETREET & SOPHIE TURENNE, JUDGES ON TRIAL: THE INDEPENDENCE AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY 274-75 (2nd ed. 2013) (noting that "superior" judges must act beyond their jurisdiction and in bad faith to lose immunity whereas inferior judge need only to act beyond their jurisdiction).

[59] Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1, 5 (1990); *see also* Feinman & Cohen, *supra* note 45, at 246 (reporting that Justice Field's analysis in *Bradley v. Fisher* "began the merger of the doctrinal treatment of superior and inferior judges"). Likewise, other Anglo-American countries tend to provide the same immunity to all of their judges. *See, e.g.*, Nova Scotia Provincial Court Act, R.S.N.S. 1989, c. 238, § 4A (Can.) (granting the same immunity enjoyed by judges of the Nova Scotia Supreme Court to judges of the Nova Scotia Provincial Court); Ananian-Welsh & Williams, *supra* note 58, at 604-05 (discussing the civil immunity enjoyed by judges in New South Wales, Australia).

[60] ABIMBOLA A. OLOWOFOYEKU, SUING JUDGES: A STUDY OF JUDICIAL IMMUNITY 79 (1994). Early English cases recognized that protection should be afforded to those who perform the judicial functions of a judge; hence, they extended immunity to members of the General Council, Partridge v. General Council of Medical Education and Registration of the United Kingdom (1890) 25 QBD 90, and the Board of Guardians, Everett v. Griffiths [1921] 1 AC 631 (HL). Later cases sought to generalize the principle by providing judicial immunity to all tribunals established under the authority of Parliament or the Crown "which exercise equivalent functions by equivalent procedures and are manned by equivalent personnel as those of the recognized courts of the land." Att'y Gen. v. BBC (1979) 3 All ER 45, 53.

bestowed what has been termed "absolute quasi-judicial immunity" to administrative law judges, law clerks,[61] hearings examiners in administrative agencies,[62] and others who work under the direction of a judge.[63] Courts have even extended absolute quasi-judicial immunity to social workers,[64] psychologists,[65] receivers,[66] mediators,[67] probation officers, and parole board members.[68] Even governmental officials whose primary tasks entitle them only to qualified immunity[69] will be shielded by absolute immunity for any tasks which are considered adjudicatory. Some examples include Board of Supervisors who decide on homeowner permits,[70] mayors who issue or suspend restaurants' liquor licenses,[71] and medical licensing board members who grant or revoke medical licenses.[72] Commentators have described the expansion of the beneficiaries of judicial immunity as "dramatic,"[73] with some sharply criticizing it.[74]

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[61] *See* Oliva v. Heller, 670 F. Supp. 523 (S.D.N.Y. 1987).

[62] Butz v. Economou, 438 U.S. 478, 512-14 (1978); Robert D. Kligman, *Judicial Immunity*, 38 ADVOC. Q. 251, 261-62 (2011).

[63] KYLE SCOTT, DISMANTLING AMERICAN COMMON LAW: LIBERTY AND JUSTICE IN OUR TRANSFORMED COURTS 95 (2007).

[64] *See* Meyers v. Contra Costa Cnty. Dep't of Soc. Servs., 812 F.2d. 1154, 1157 (9th Cir. 1987).

[65] *See* Hughes v. Long, 242 F.3d 121, 126-27 (3d Cir. 2001).

[66] *See* Davis v. Bayless, 70 F.3d 367, 373 (5th Cir. 1995).

[67] *See* Wagshal v. Foster, 28 F.3d 1249, 1254 (D.C. Cir. 1994). For a more comprehensive discussion of mediator immunity, see Nat Stern & Karen Oehme, *Toward a Coherent Approach to Tort Immunity in Judicially Mandated Family Court Services*, 92 KY. L. J. 373, 390-94 (2004).

[68] *See* Rolle v. Cassidy, 64 F. App'x 322, 322-23 (2d Cir. 2003); Snell v. Tunnell, 920 F.2d 673, 687-88 (10th Cir. 1990); Freeze v. Griffith, 849 F.2d 172, 174-75 (5th Cir. 1988); Demoran v. Witt, 781 F.2d 155, 158 (9th Cir. 1985).

[69] The acts of officials entitled to qualified immunity are immunized, "only if the official has acted in 'good faith' — that is, without 'malice' or 'reckless disregard' of the plaintiff's rights." *See* Schuck, *supra* note 16, at 661.

[70] Dotzel v. Ashbridge, 438 F.3d 320, 322 (3d Cir. 2006).

[71] Killinger v. Johnson, 389 F.3d 765, 770 (7th Cir. 2004).

[72] Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 926 (9th Cir. 2004).

[73] *See* Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 TOURO L. REV. 473, 488 (2008).

[74] *See, e.g.*, David M. Coriell, Note, *The Transferred Immunity Trap: Misapplication of Section 1983 Immunities*, 100 CORNELL L. REV. 985, 986 (2015); Seena Forouzan,

2. Which Acts Are Shielded from Civil Liability Through Judicial Immunity?

Judicial immunity, even as far back as Lord Coke's seventeenth century formulation of the doctrine, protected only *judicial* acts.[75] That is, not every act performed by a judge is entitled to immunity. Historically, many functions of the British government were carried out by justices of the peace, whose work was categorized either as judicial or ministerial.[76] Whereas the ministerial acts of justices of the peace were not immunized, their judicial acts were.[77] This distinction proved unsatisfactory,[78] however, and for the next several centuries, British courts struggled to define a "judicial act" in a way that transcended the particularity of context.[79] The courts eventually adopted a flexible approach that emphasized the different characteristics of judicial, administrative, and legislative functions.[80]

In the United States, it was not until *Stump* v. *Sparkman* that the Supreme Court passed on the distinction between judicial and non-judicial acts for purposes of judicial immunity.[81] *Stump* articulated a two-factor test that considers whether the act is one "normally performed by a judge" and whether the parties "dealt with the judge in his judicial

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Comment, *The Officer Has No Robes: A Formalist Solution to the Expansion of Quasi-Judicial Immunity*, 66 EMORY L.J. 123 (2016); 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, 314 (2006).

[75] Floyd v. Barker (1607) 77 Eng. Rep. 1305, 1307 (KB) (restricting immunity to anything done by a judge "as Judge").

[76] J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 887 (1980).

[77] WILLAM HAWKINS, 3 A TREATISE OF THE PLEAS OF THE CROWN 80 (7th ed. 1795).

[78] Block notes, for instance, that the judicial-ministerial distinction served to classify many of a justice of peace's administrative duties as judicial and thereby immunize them. Block, *supra* note 76, at 889.

[79] *Id.* at 891.

[80] *Id.* at 891-92. As relevant to immunity, judicial functions were typically characterized by the "power to hear and determine a controversy, the application of objective standards for the determination of an issue, the declaration or alteration of the rights and obligations of individuals, and certain procedural attributes." *Id.* at 892.

[81] Ann Bowe, *Judges: Immunities: Judicial Act and Jurisdiction Broadly Defined.* (Stump v. Sparkman), 62 MARQ. L. REV. 112, 112 (1978).

capacity."[82] Commentators have sharply criticized the *Stump* test,[83] and a more recent synthesis of *Stump* in conjunction with lower-court cases now indicates that courts typically distinguish judicial from non-judicial acts by assessing such factors as (1) whether the act is a typical judicial function; (2) whether the events occurred in the courtroom or somewhere adjacent thereto; (3) whether the act pertained to a case pending before the judge; and (4) whether the events arose from an interaction with the judge in the judge's official capacity.[84] The cases make clear that these factors should be construed in favor of finding immunity.[85]

The primary class of acts considered non-judicial for purposes of judicial immunity are administrative acts.[86] Employment actions (such as demotions and dismissals) taken by judges are typically considered administrative,[87] as is selecting jurors for county courts.[88] Acts that are legislative or otherwise rule-making are also not judicial and therefore

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[82] Stump v. Sparkman, 435 U.S. 349, 362 (1978).

[83] *See, e.g.*, Rosenberg, *supra* note 16, at 836 (labeling *Stump* "a possible invitation to judicial lawlessness in the case of the very judges who might be deterred from misconduct if the doctrine were only slightly less than all-embracing"); Linwood I. Rogers, Casenote, Mireles v. Waco: *The Supreme Court Prescribes the Bitter Pill of Judicial Immunity and Summary Reversal,* 26 U. RICH. L. REV. 539, 549 (1992) (noting that *Stump*'s "characterization of a judicial act has been widely criticized").

[84] Shaman, *supra* note 59, at 9. For a fuller discussion of the qualities of a judicial act, see OLOWOFOYEKU, *supra* note 60, at 38-52.

[85] *See, e.g.*, Ashelman v. Pope, 793 F.2d 1072, 1076 (9th Cir. 1986) (reporting that the above described "factors are to be construed generously in favor of the judge and in light of the policies underlying judicial immunity").

[86] Shaman, *supra* note 59, at 9. In Australia, judges have immunity from suits challenging their administrative acts. *Magistrates Act 1991* (Queensl.) s 51 (Austl). However, some acts classified as administrative in Australia might be classified as judicial in the United States. Moreover, American judges who perform administrative acts, though not entitled to absolute immunity, may benefit from the qualified immunity that would be bestowed on other government officials. *See, e.g.*, Forrester v. White, 484 U.S. 219, 230 (1988); Sup. Ct. of Va. v. Consumers Union, Inc., 446 U.S. 719, 731-34 (1980); Michael Crowell, *Basics in Judicial Immunity*, *in* NORTH CAROLINA SUPERIOR JUDGES' BENCHBOOK 1, 3 (2015).

[87] *See, e.g.*, *Forrester*, 484 U.S. at 229.

[88] *See, e.g.*, *Ex parte* Virginia, 100 U.S. 339, 348 (1879). Jury selection is considered a ministerial function because it "might as well have been committed to a private person as to one holding the office of a judge." *Id.*

not immunized.[89] That said, acts that are otherwise judicial have immunity even when they are undertaken for corrupt or malicious purposes.[90] So, for instance, when a judge corruptly conspires with a litigant to rule in favor of that litigant, the judge performs a judicial act entitled to immunity.[91]

3. What Is the Scope of the Jurisdictional Exception that (Could) Limit Judicial Immunity?

Although judicial immunity is bestowed on any judicial act, broadly defined, no matter who performs it, the doctrine does contain one limited restriction. Namely, although judicial acts retain immunity even when the judge acts outside of his jurisdiction, immunity does not extend to acts that are undertaken in the "*clear* absence of jurisdiction."[92] Commentators have observed that the "clear absence of jurisdiction" exception is "a very high bar" for litigants to meet,[93] not least because in making the assessment, courts broadly construe the scope of the relevant jurisdiction.[94] The *Bradley* court provided one hypothetical example of a judicial act that would be in the clear absence of jurisdiction: a probate court judge who tried and sentenced a criminal defendant.[95] Such an extreme departure from settled principles of jurisdiction seems almost fancifully unlikely, and the wrongful acts of

[89] *See Sup. Ct. of Va.*, 446 U.S. at 731 (holding that State Supreme Court's promulgation of a State Bar Code is act of rulemaking, not adjudication).

[90] Dennis v. Sparks, 449 U.S. 24, 27 (1980); Bradley v. Fisher, 80 U.S. 335, 354 (1872); Brookings v. Clunk, 389 F.3d 614, 617 (6th Cir. 2004).

[91] *See, e.g.*, *Dennis*, 449 U.S. at 27; Ashelman v. Pope, 793 F.2d 1072, 1079 (9th Cir. 1986); Holloway v. Walker, 765 F.2d 517, 522-25 (5th Cir. 1985); Dykes v. Hosemann, 776 F.2d 942, 945-46 (11th Cir. 1985); Harper v. Merckle, 638 F.2d 848, 856 n.9 (5th Cir. 1981) (noting that even a judge who conspires with a party to violate another party's federal constitutional rights has immunity from a damage suit).

[92] Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) (emphasis added) (citing *Bradley*, 80 U.S. at 351).

[93] *Judicial Immunity at the (Second) Founding*, *supra* note 17, at 1461.

[94] Shaman, *supra* note 59, at 7.

[95] *Bradley*, 80 U.S. at 352. For a real-world example finding judicial acts to be taken in clear excess of jurisdiction, see Vickrey v. Dunivan, 279 P.2d 853, 855-56 (N.M. 1955) (involving a judge who framed an affidavit to suggest that an offense had occurred within his court's territorial jurisdiction when he knew that it had not).

real judges tend to be interpreted as not clearly in the absence of jurisdiction.[96] So, judges who, without jurisdiction, hold individuals in contempt and incarcerate them have immunity for those acts so long as the judge had subject matter jurisdiction over the case.[97] Indeed, Judge Stump's authorization of Linda Sparkman's sterilization was in clear contravention of Indiana statutes that allowed court-authorized sterilization only of institutionalized persons and, even then, only after complying with a series of procedural requirements (that Judge Stump flouted).[98] For that reason, the Seventh Circuit had found his acts to be clearly in excess of jurisdiction,[99] observing that even judges operating under a state grant of general jurisdiction "may not arbitrarily order or approve *anything* presented to him in the form of an affidavit or petition."[100] However, the Supreme Court reversed and held that for the act of a judge of general jurisdiction to be clearly in excess of that jurisdiction, the plaintiffs would have to cite a statute or case that expressly precluded the judge's jurisdiction.[101]

B. A World of Difference: Judicial Vulnerability to Criminal Prosecutions

As just discussed, judges have absolute immunity against civil suits and the money damages that could be awarded in those suits. Thanks to the judicial immunity doctrine, then, judges cannot be compelled to compensate victims of their innocent mistakes or victims of their purposely wrongful conduct. By contrast, judges possess no immunity whatsoever from criminal prosecutions.[102] In the most literal sense, it

[96] *See* Selig v. N. Whitehall Twp. Zoning Hearing Bd., 653 F. App'x 155, 158 (3d Cir. 2016) (holding that substantive resolution of judge who subsequently recuses himself is not clearly in the absence of jurisdiction). Just as the requirements of immunity are applied expansively to realize the policies supporting judicial immunity, limitations to the immunity doctrine are interpreted narrowly. Adams v. McIlhany, 764 F.2d 294, 297 n.1 (5th Cir. 1985).

[97] *Adams*, 764 F.2d at 297.

[98] *See* Bowe, *supra* note 81, at 121.

[99] *See* Sparkman v. McFarlin, 552 F.2d 172, 176 (7th Cir. 1977), *rev'd sub nom;* Stump v. Sparkman, 435 U.S. 349 (1978).

[100] *McFarlin*, 552 F.2d at 174 (emphasis added).

[101] *See Stump*, 435 U.S. at 358. *See also* Rosenberg, *supra* note 16, at 836 (observing that *Stump* provides "no limitation with respect to tribunals of general jurisdiction").

[102] Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

goes without saying that judges are "subject to the criminal law, like all other members of the community,"[103] so judges have no immunity for criminal behavior that stems from non-judicial acts.[104] Thus, judges who possess illegal firearms,[105] drive drunk,[106] or commit murder[107] can be criminally prosecuted for those acts, just like anyone else.[108] But judges

[103] B.V. Harris, *Remedies and Accountability for Unlawful Judicial Action in New Zealand: Could the Law be Tidier*, 2008 N.Z. L. REV. 483, 490 (2008).

[104] Shaman, *supra* note 59, at 18. As Olowofoyeku puts it, "[A] judge who commits theft, assault, or murder . . . would not be able to claim judicial immunity, since these would have nothing to do with his office as a judge." OLOWOFOYEKU, *supra* note 60, at 77.

[105] Brendan Kirby, *Ex-judge from Clarke County, Ala., Gets 18 months for Firearms Violations*, AL.COM (Mar. 6, 2009, 2:27 PM), https://www.al.com/live/2009/03/stuart_dubose_sentenced_on.html [https://perma.cc/CG77-RUKQ].

[106] *See, e.g.*, Order, *In re* Cir. Judge Joseph P. Hettel, Ill. Cts. Comm'n No. 14-CC-1 (Dec. 22, 2014), https://jib.illinois.gov/content/dam/soi/en/web/jib/documents/orders-from-courts-commission/hettel.pdf [https://perma.cc/HZ5R-X9BB]; Order, *In re* Associate Judge Albert L. Purham, Jr., Ill. Cts. Comm'n No. 09-CC-2 (Sept. 14, 2010), https://jib.illinois.gov/content/dam/soi/en/web/jib/documents/orders-from-courts-commission/purham.pdf [https://perma.cc/VK8G-3246]; Stipulation, Agreement and Order of Reprimand, *In re* Dingledy, Wash. Comm'n on Jud. Conduct No. 8710-F-176 (Dec. 8, 2017), https://www.cjc.state.wa.us/materials/activity/public_actions/2017/8710FinalStip.pdf [https://perma.cc/A5PM-TCCJ]; Stipulation, Agreement and Order of Censure, *In re* Hitchcock, Wash. Comm'n on Jud. Conduct No. 7377-F-160 (Oct. 3, 2014), https://www.cjc.state.wa.us/materials/activity/public_actions/2014/7377_Hitchcock_Stip.pdf [https://perma.cc/KNE8-5KNK]; Stipulation, Agreement and Order of Reprimand, *In re* Lyman, Wash. Comm'n on Jud. Conduct No. 6527-F-152 (July 8, 2011), https://www.cjc.state.wa.us/materials/activity/public_actions/2011/6527%20Lyman%20Stip%20Final.pdf [https://perma.cc/4WQL-5TSP]; Lisa Demer, *Judge Sentenced to 5 Days in Jail for Drunken Driving*, ANCHORAGE DAILY NEWS (Oct. 27, 2009), https://www.adn.com/alaska-news/article/judge-sentenced-5-days-jail-drunken-driving/2009/10/27/#:~:text=An%20Anchorage%20Superior%20Court%20judge,and%20three%20years%20of%20probation [https://perma.cc/KEW2-R7GK]; Cory McCoy, *Exclusive: Tri-Cities Judge Will Avoid Jail Time After 2nd DUI. But it Comes with a Price,* TRI-CITY HERALD (Feb. 28, 2023, 6:00 PM) https://www.tri-cityherald.com/news/local/crime/article272629373.html.

[107] *See* Hayden Sparks, *On This Day 10 Years Ago, a Disgraced East Texas Judge Began His Killing Spree*, THE TEXAN (Jan. 31, 2023), https://thetexan.news/issues/criminal-justice/on-this-day-10-years-ago-a-disgraced-east-texas-judge-began-his-killing-spree/article_0ed30ba7-a09d-5903-82b1-ddb25aca6392.html [https://perma.cc/Z3TA-292V].

[108] *See* OLOWOFOYEKU, *supra* note 60, at 77 ("A judge who commits theft, assault, or murder . . . would not be able to, claim judicial immunity, since these would have nothing to do with his office as a judge.").

also have no immunity from criminal prosecution for acts that would be deemed "judicial" if a litigant brought a civil suit, seeking money damages for them.[109] For that reason, judges indicted on charges of corruption,[110] fraud,[111] soliciting bribes,[112] tax evasion,[113] and other criminal charges for their judicial acts[114] have been unable to assert immunity against those charges. Likewise, judges have no immunity

[109] *See* Wallace v. Powell, Nos. 3:09-CV-286, 3:09-CV-0291, 3:09-CV-0357, 3:09-CV-0630, 2009 WL 4051974, at *6 (M.D. Pa. 2009) (involving judges who had immunity from civil suit but no immunity from criminal indictments); Shaman, *supra* note 59, at 20.

[110] Braatelien v. United States, 147 F.2d 888, 895 (8th Cir. 1945); McFarland v. State, 109 N.W.2d 397, 403 (Neb. 1961); LOUISIANA LEGISLATIVE AUDITOR, CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS INVESTIGATIVE AUDIT 4-10 (2012) (finding that judges wrongfully appropriated insurance funds to themselves).

[111] *See, e.g.*, United States v. Isaacs, 493 F.2d. 1124, 1144 (7th Cir. 1974) (convicting judge of mail fraud and other fraud related crimes); Press Release, Off. of Pub. Aff. Dep't of Just., Former Arkansas State Judge Sentenced to Prison for Dismissing Cases in Exchange for Personal Benefits and Tampering With a Witness (Feb. 21, 2018), https://www.justice.gov/opa/pr/former-arkansas-state-judge-sentenced-prison-dismissing-cases-exchange-personal-benefits-and [https://perma.cc/V5YZ-MVUW] (discussing an Arkansas state judge who "was sentenced to five years in prison for perpetrating a seven-year-long fraud and bribery scheme in which he dismissed pending cases in exchange for personal benefits").

[112] *See, e.g.*, United States v. Claiborne, 727 F.2d 842, 848 (9th Cir. 1984) (discussing indictment accepting charging judge with accepting a $55,000 bribe in return for promising to secure the reversal of a defendant's criminal tax evasion conviction by bribing one or more judges on the Ninth Circuit Court of Appeals); United States v. Hastings, 681 F.2d 706, 709 (11th Cir. 1982) (discussing indictment charging a judge with soliciting and accepting a bribe from an undercover agent who was posing as a criminal defendant in a case before the judge).

[113] *See Isaacs*, 493 F.2d at 1144.

[114] *See, e.g.*, United States v. Anderson, 798 F.2d 919, 921 (7th Cir. 1986) (involving judge convicted for perjury); Harbison v. U.S. Senate Comm. on Foreign Rels., 839 F. Supp. 2d 99, 102 (D.D.C. 2012) (alleging that judge committed war crimes); Associated Press, *Ex-Judge Jailed for Trading Sex for Ruling*, N.Y. TIMES, Apr. 20, 1994, at B11; Opinion, *What Voters Didn't Know About Judge Cynthia Brim,* CHI. TRIB., https://www.chicagotribune.com/2013/02/05/what-voters-didnt-know-about-judge-cynthia-brim/ (last updated Nov. 3, 2021, 9:34 PM) [https://perma.cc/BQ5K-59QK] (describing a judge who was criminally prosecuted for battery of a deputy).

from criminal prosecutions for violations of 18 U.S.C. § 242,[115] which is the criminal law analogue to 42 U.S.C. § 1983.[116]

As Section A explored, courts have decided numerous cases featuring the civil judicial immunity doctrine. Moreover, as Part III will detail, commentators have dissected, synthesized and, most notably, critiqued this body of case law.[117] But the application of the judicial immunity doctrine (or its lack of application, to be more exact) to criminal prosecutions has generated virtually no attention. Three factors help to explain this scholarly and popular neglect. First, the doctrine of judicial immunity as applied to criminal prosecutions is clear and straightforward. Whereas judges asserting civil judicial immunity must satisfy a number of sometimes-ambiguous elements,[118] no such contestable legal analyses are required in the criminal context. That is, it is uncontroverted that the doctrine of judicial immunity does not shield judges from criminal liability for their judicial acts.[119] Second, the no-immunity-for-criminal-prosecutions doctrine is not only clear and straightforward, but also uncontroversial. As Part III will explicate, absolute judicial immunity against civil suits has been widely criticized for undermining fundamental legal tenets, including the maxim that every wrong deserves a remedy. By contrast, a doctrine that permits the prosecution of judges for their judicial crimes seems both equitable and consistent with core rule-of-law principles. Thus, it is unsurprising that the doctrine has sparked little resistance.

[115] United States v. Lanier, 520 U.S. 259, 270-72 (1977); United States v. Cochran, 682 F. App'x 828, 838 n.12 (11th Cir. 2017).

[116] 18 U.S.C. § 242 criminalizes willfully and under color of law depriving a person of rights protected by the United States Constitution or laws.

[117] *See infra* text accompanying notes 185–219.

[118] *See* Forrester v. White, 484 U.S. 219, 227 (1988). At a minimum, a court assessing a judicial immunity claim brought in a civil suit must ascertain if the challenged act was judicial and if the judge acted in the clear absence of jurisdiction.

[119] Shaman, *supra* note 59, at 18-20; Samuel P. Stafford, *An Overview of Judicial Immunity: Including Legal Representation of Judges*, STATE CT. J. 1, 4 (1977) ("It is axiomatic that common law judicial immunity has never been extended to shield a judge from criminal liability."); *see also* Dennis v. Sparks, 449 U.S. 24, 31 (1980); Imbler v. Pachtman, 424 U.S. 409, 429 (1976); O'Shea v. Littleton, 414 U.S. 488, 503 (1974). That said, somewhat tangentially, some cases have held that the misfeasance of a judge, when acting in his official capacity, does not constitute a criminal offense. Commonwealth v. Tartar, 239 S.W.2d 265, 266 (Ky. 1951).

A final reason that criminal judicial immunity has received virtually no attention is that judges rarely face criminal charges for their misconduct. Why judges are prosecuted so infrequently is itself uncertain, as will be discussed in Part IV. But in 1978, Rosenberg commented on the rarity of judicial prosecutions,[120] and nearly fifty years later, Reuters conducted a multi-year, in-depth study of judicial misconduct, which revealed that prosecutions of judges are still exceptional.[121]

Although these factors help to explain why scholars and commentators have ignored judicial immunity for crimes, that inattention is nonetheless problematic. For one thing, as Part III.A will describe, absolute judicial immunity for civil liability has been subject to numerous, stinging critiques. However, because these critiques fail to consider the possibility of criminal prosecutions for judges, they frequently miss their mark. As Part III.B will later explore, criminal law has the potential to remedy many of the flaws that scholars have identified with respect to the civil judicial immunity doctrine. But before turning to that analysis, Part II will consider why Anglo-American judges were provided absolute immunity for civil damage suits in the first place and why they were not for criminal prosecutions.

II. WHY ABSOLUTE JUDICIAL IMMUNITY AND WHY NOT?

Immunizing judges from the financial consequences of their intentional wrongdoing is counter-intuitive, so we might well ask why Anglo-American countries bestow on judges such broad immunity, even against willfully malicious or corrupt acts. Section A explores the justifications typically advanced to support absolute judicial immunity from civil suits. Next, Section B considers the same question with respect to criminal prosecutions. That is, Section B asks: if judicial

[120] Rosenberg observed in particular that the "possibility that a district attorney will prosecute a judge for misconduct other than crass, monetary schemes is remote." Rosenberg, *supra* note 16, at 856; *see also* Schuck, *supra* note 16, at 671.

[121] Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS (June 30, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-judges-misconduct/ [https://perma.cc/A4LM-M9J5] [hereinafter Berens & Shiffman, *Thousands of U.S. Judges*].

immunity against civil suits is so valuable, why are courts so steadfastly unwilling to extend it to criminal prosecutions?

A. *Judicial Misbehavior Without Consequences: Justifying Immunity for Civil Claims*

Western legal systems, including that of the United States, generally adhere to the ancient maxim *ubi jus ibi remedium* (where there is a wrong, there is a remedy).[122] Immunities, of course, preclude remedies for wrongs. Thus, they are exceptional and must be justified by important policy goals,[123] goals that should be all the more compelling when they are invoked to justify the exceptionally expansive absolute immunity bestowed on American judges. Not surprisingly, then, the judges who crafted the Anglo-American judicial immunity doctrine had justifications at the ready. Indeed, some of the most common policy rationales invoked to support judicial immunity today date all the way back to Lord Coke's seventeenth century articulation of the immunity doctrine in *Floyd v. Barker*. There, Lord Coke invoked the need for finality,[124] the need to maintain the dignity and authority of the courts,[125] and the need to protect judges from harassing lawsuits.[126]

Coke and subsequent commentators claimed that judicial immunity advances the principle of finality because holding judges personally liable for their judicial acts could lead to endless litigation.[127] Specifically, if litigants were permitted to bring suits against judges,

[122] *See, e.g.*, N. Pac. R. Co. v. Hussey, 61 F. 231, 236 (9th Cir. 1894) (invoking *ubi jus ibi remedium* as justification for enjoining the defendant from cutting down timber on land owned by the plaintiff).

[123] *See, e.g.*, Mason v. Melendez, 525 F. Supp. 270, 275 (W.D. Wis. 1981) ("Immunity from damages . . . represents a sharp departure from the principle that persons are responsible for the harm they inflict upon one another, and that the victims may seek compensation from the perpetrators.").

[124] As Lord Coke put it, if a judge's determination of a case "should be drawn into question . . . there will never be an end of causes, but controversies will be infinite." Floyd v. Barker (1607) 77 Eng. Rep. 1305, 1306 (KB).

[125] *Id.* at 1307 (maintaining that suits against judges are a scandal to the King and to the judiciary as a whole).

[126] *Id.* (arguing that judges must be immune from suit, or else they will suffer "continual calumniations").

[127] *Id.*

then a disappointed party could bring a second suit to contest the actions of the initial judge who ruled against him in the first suit. If the litigant's second suit (against the first judge) failed, the litigant could subsequently bring a third suit against the second judge who ruled against his challenge to the first judge.[128] And so on. Next, judicial immunity has been said to preserve the authority and respect of judges because subjecting them to lawsuits that scrutinize their potential mistakes would result in "a loss of stature" for the judiciary.[129] Finally, Coke seemed to view protecting judges from a plethora of harassing lawsuits as a good in itself,[130] but later commentators additionally considered this protection to serve consequentialist ends. Specifically, society benefits when competent, capable individuals pursue judicial office, but they are less likely to do so if obtaining a judgeship means subjecting themselves to potential litigation every time a party is dissatisfied with one of their rulings.[131]

Early American cases repeated these rationales[132] and added two more, one which later was largely discredited but the other which has become ascendant. The discredited rationale is that of historical

[128] Barth, *supra* note 15, at 741; Feinman & Cohen, *supra* note 45, at 266-67.

[129] Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1869); Feinman & Cohen, *supra* note 45, at 267-68; Harris, *supra* note 103, at 487; *see* Barth, *supra* note 15, at 742; Bruce Feldthusen, *Judicial Immunity: In Search of an Appropriate Limiting Formula*, 29 U.N.B. L.J. 73, 79 (1980).

[130] *See* Floyd v. Barker (1607) 77 Eng. Rep. 1305, 1306 (KB).

[131] OLOWOFOYEKU, *supra* note 60, at 189; Feinman & Cohen, *supra* note 45, at 267; Brittney Kern, *Giving New Meaning to "Justice for All": Crafting an Exception to Absolute Judicial Immunity*, 2014 MICH. ST. L. REV. 149, 182.

[132] *See* Bradley v. Fisher, 80 U.S. 335, 349 (1871) ("If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party — and that judge perhaps one of an inferior jurisdiction — that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party."); *Randall*, 74 U.S. at 536 (noting that eliminating judicial immunity "would lead to the degradation of the judicial authority"); *see also* Don B. Kates, Jr., *Immunity of State Judges Under the Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 NW. U. L. REV. 615, 619-20, 630 (1970) (discussing the meritless and harassing lawsuits brought against judges).

precedent. The early American cases that initially developed the judicial immunity doctrine for this country based their holdings in part on the doctrine's perceived historical pedigree.[133] In 1869, the Supreme Court found judicial immunity to be "as old as the law,"[134] and, three years later, the Court described judicial immunity as "the settled doctrine of the English courts for many centuries."[135] Nearly one hundred years later, when deciding its most important modern case on judicial immunity, the Supreme Court again appealed to historical precedent.[136] However, contemporary historians maintain that the cited English precedents were "misread and misapplied by successive generations of American judges."[137] Recent American courts have relied on American, not British, historical precedents, but they may have misunderstood these also. Although these courts considered judicial immunity to be universal and well-settled in nineteenth century America, many historians now contest this claim,[138] contending that nineteenth century American courts held "many, if not most judicial officers liable for their wrongful acts much, if not most, of the time."[139]

If judicial immunity had only history, finality, and respect in its corner, it may not have persisted, and in so robust a form, for several hundred years. As Part III will detail, these rationales do not provide particularly weighty justifications for a doctrine that diverges so sharply both from settled legal principles and moral intuitions. But another far more compelling rationale emerged in support of judicial immunity: the need to maintain an independent judiciary.[140] The judicial independence

[133] Feinman & Cohen, *supra* note 45, at 254 ("The most important reason usually offered for a rule of judicial immunity is the weight of the past.").

[134] *Randall*, 74 U.S. at 536.

[135] *Bradley*, 80 U.S. at 347.

[136] *See* Stump v. Sparkman, 435 U.S. 349, 355 (1978).

[137] Feinman & Cohen, *supra* note 45, at 254; *see also* Barth, *supra* note 15, at 737; *Judicial Immunity at the (Second) Founding*, *supra* note 17, at 1464.

[138] *See* Barth, *supra* note 15, at 737-38. At least one historian sides with the courts in maintaining that the doctrine of judicial immunity was "universally accepted in the state courts of the United States." Block, *supra* note 76, at 899-900.

[139] Feinman & Cohen, *supra* note 45, at 237; *see also* Barth, *supra* note 15, at 731; *Judicial Immunity at the (Second) Founding*, *supra* note 17, at 1474.

[140] OLOWOFOYEKU, *supra* note 60, at 193; *see also Stump*, 435 U.S. at 354-56; *Bradley*, 80 U.S. at 347; Harris, *supra* note 103, at 487; Kligman, *supra* note 62, at 251; J.M. Law, *A Tale*

rationale maintains that judges who are not protected from lawsuits will take account of the threat of subsequent litigation against them when deciding cases.[141] Fear of these lawsuits will cause judges — consciously or unconsciously — to favor litigants who seem particularly able and willing to sue if unhappy with the judge's ruling.[142] Thus, it has been said that the primary reason to immunize judicial acts is to preserve "a fearless and independent judiciary whose members will be able to resolve difficult and controversial matters based on their own convictions, uninfluenced by apprehension of civil suits against them by disappointed litigants."[143] Frequently repeated to this day, this rationale was articulated as early as 1871 when Justice Field proclaimed:

> [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer. . . shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.[144]

Contemporary U.S. Supreme Court cases continue to highlight the relationship between judicial immunity and judicial independence,[145] as

of Two Immunities: Judicial and Prosecutorial Immunities in Canada, 28 ALTA. L. REV. 468, 480, 484 (1990); Robert F. Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237, 256 (1978); Rosenberg, *supra* note 16, at 855 ("The primary purpose served by [judicial immunity] is the preservation of a fearless and independent judiciary whose members will be able to resolve difficult and controversial matters based on their own convictions, uninfluenced by apprehension of civil suits against them by disappointed litigants.").

[141] Feinman & Cohen, *supra* note 45, at 267; Barth, *supra* note 15, at 742-43; Craig Burgess, *Judicial Immunity—Right or Wrong?,* 31 ALT L.J. 39, 39 (2006).

[142] Harris, *supra* note 103, at 487.

[143] Rosenberg, *supra* note 16, at 855.

[144] Bradley v. Fisher, 80 U.S. 335, 347 (1872); *see also* Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1869) (proclaiming judicial immunity to be "essential to the impartial administration of justice").

[145] *See, e.g.*, Forrester v. White, 484 U.S. 219, 226 (1988); Stump v. Sparkman, 435 U.S. 349, 355 (1978); *Bradley*, 80 U.S. at 347.

do many lower court opinions.[146] Indeed, when extending absolute judicial immunity to prevent § 1983 claims against judges despite seemingly clear text and legislative history to the contrary,[147] the Supreme Court in *Pierson* v. *Ray* asserted that judicial 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."[148] Further, judicial independence is invoked to support judicial immunity not only for American judges but also for judiciaries throughout the world.[149] The United Nations General Assembly's Basic Principles on the Independence of the Judiciary includes a provision recommending that judges have personal immunity for civil suits seeking damages for improper acts in the performance of their judicial duties.[150]

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[146] *See, e.g.*, Smith v. Stark, 777 F. Supp. 2d 795, 799 (D. Del. 2011); Montana v. Connor, 817 F. Supp. 2d 440, 450 (D.N.J. 2011); Wallace v. Powell, Nos. 3:09-CV-286, 3:09-CV-0291, 3:09-CV-0357, 3:09-CV-0630, 2009 WL 4051974, at *4 (M.D. Pa. 2009); Doe v. Lake Cnty., 399 F. Supp. 553, 555 (N.D. Ind. 1975).

[147] *See* sources cited *supra* note 15. 42 U.S.C. § 1983 provides "Every person who, under color of any statute . . . subjects any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities . . . shall be liable to the party injured . . . except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." It includes no exception for judges or other governmental actors.

[148] Pierson v. Ray, 386 U.S. 547, 554 (1967) (quoting Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868)). For a contemporary articulation of this argument, see COUNCIL OF EUROPE, *supra* note 27, at 5-6 (underlining that "the independence of the judiciary . . . is not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the judicial system").

[149] *See e.g.*, IAN BINNIE, JUDICIAL INDEPENDENCE IN CANADA 27 ("A further bulwark of judicial independence is that judges enjoy immunity from civil liability for actions taken in the performance of their judicial duties."); U.N. Office of Drug and Crime, *Expert Group Meeting on the Role of Judicial Immunities in Safeguarding Judicial Integrity* (Aug. 26–27, 2019); Ananian-Welsh & Williams, *supra* note 58, at 630 ("Judicial immunity from suit is a crucial facet of personal independence.").

[150] *Basic Principles on the Independence of the Judiciary*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary (last visited Oct. 22, 2024) (endorsed by the U.N. General Assembly in 1985); *see also Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*, 1 ASIA-PAC. J. ON HUM. RTS. & L. 158, 162 ¶ 32 (2000).

B. Judicial Misbehavior and Criminal Prosecutions: Why Don't We Cut Judges Any Slack?

As Section A indicates, courts and commentators — over literal centuries — have advanced numerous rationales justifying absolute judicial immunity for civil suits. This Section considers the justifications that have been advanced for the courts' diametrically opposed conclusions regarding judicial immunity for criminal prosecutions. Because scholars have ignored this question, this Section will explore the justifications appearing in judicial decisions that reject claims of judicial immunity for criminal prosecutions.

As noted above, criminal prosecutions of judges are relatively rare. Cases considering judicial immunity for criminal prosecutions are even rarer, probably because the no-immunity doctrine is so clear and well-established that indicted judges recognize the futility of raising the issue. For these reasons, the vast majority of reported criminal cases involving judges do not feature a claim or decision on immunity.[151] The

[151] *See, e.g.*, United States v. Lanier, 520 U.S. 259 (1997); United States v. Ciavarella, 765 F. App'x 855 (3d Cir. 2019); United States v. Cochran, 682 F. App'x 828 (11th Cir. 2017); United States v. Baumgartner, 581 F. App'x 522 (6th Cir. 2014); United States v. Barraza, 655 F.3d 375 (5th Cir. 2011); United States v. Anderson, 798 F. 2d 919 (7th Cir. 1986); Fernandez v. State, 479 S.W.3d 835 (Tex. Crim. App. 2016); Williams v. State, No. 05–12–00909–CR, 2013 WL 3947188, *1-6 (Tex. Ct. App. 2013); Press Release, U.S. Att'y's Off. for the S. Dist. of Tex., Former JP and Bail Bondsman Sentenced On Federal Extortion Charges (Aug. 28, 2015), https://www.justice.gov/usao-sdtx/pr/former-jp-and-bail-bondsman-sentenced-federal-extortion-charges [https://perma.cc/9E74-53YT]; Press Release, F.B.I., Waller County Justice of the Peace Indicted for Bribery (July 7, 2009), https://archives.fbi.gov/archives/houston/press-releases/2009/ho070709a.htm; Associated Press, *Former Texas Judge Gets Probation*, *$25,000 Fine in Billing Scam*, ARK. DEMOCRAT GAZETTE (June 17, 2105, 2:16 PM), https://www.arkansasonline.com/news/2015/jun/17/former-texas-judge-gets-probation-25000-fine-billi/ [https://perma.cc/WZ5G-HND7]; *Atascosa Co. Judge Arrested for Official Oppression Charges*, KENS 5, (Nov. 13, 2013, 6:30 PM), https://www.kens5.com/article/news/local/atascosa-co-judge-arrested-for-official-oppression-charges/273-306164848 [https://perma.cc/QA43-ESQG]; Jeff Bobo, *Former Hawkins Judge James Taylor Gets 3-Year Prison Term; Must Serve 11 Months*, TIMESNEWS (Sept. 20, 2012), https://www.timesnews.net/news/local-news/former-hawkins-judge-james-taylor-gets-3-year-prison-term-must-serve-11-months/article_5e6e3a6f-2669-5fc5-9690-60f7d61f16c7.html [https://perma.cc/D45V-3MH7]; Zeke MacCormack, *Former Hill County Judge Admits Theft*, MY SAN ANTONIO (Apr. 26, 2010), https://www.mysanantonio.com/news/local_news/article/Former-Hill-Country-judge-admits-theft-788605.php; *Quintero Resigns Effective Monday*, WTAW (June 19, 2009),

cases in which the issue does receive attention can be divided between those where the court's treatment is dicta and those where the issue is actually decided. The former cases tend simply to articulate the rule — that judges have no immunity from criminal prosecution — without providing any justification therefore.[152] For instance, in *O'Shea v. Littleton*,[153] the Supreme Court summarily observed that "the judicially fashioned doctrine of official immunity does not reach so far as to immunize criminal conduct proscribed by an Act of Congress. . . ."[154] Two years later, in *Imbler v. Pachtman*, the Court similarly and summarily noted that it had never "suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law." The court went on to say that "[e]ven judges, cloaked with absolute civil immunity for centuries" are susceptible to criminal punishment.[155] Finally, in *Dennis* v. *Sparks,*[156] the Court observed that although judicial immunity shielded judges from civil liability, it "was not designed to insulate the judiciary from all aspects of public accountability."[157] For that reason, whereas judges are absolutely immune from § 1983 suits which claim civil damages for constitutional violations, "they are subject to criminal prosecutions as are other citizens" for criminal constitutional violations under § 242.[158]

As for the few cases where judges actually asserted a claim of immunity against a criminal prosecution, one might expect the courts

https://wtaw.com/quintero-resigns-effective-monday/ [https://perma.cc/U2L4-R5PF]; Brian Rogers, *Convicted Harris Judge Resigns from Bench*, HOUSTON CHRON. (Dec. 29, 2009), https://www.chron.com/news/houston-texas/article/convicted-harris-judge-resigns-from-bench-1617217.php.

[152] *See, e.g.*, Daul v. Meckus, 897 F. Supp. 606, 610-11 (D.C. Cir. 1995) ("[A] judge may be criminally liable for willful deprivations of constitutional rights pursuant to 18 U.S.C. § 242, but the same judge is absolutely immune from suit for civil liability for the same alleged unconstitutional deprivation.").

[153] O'Shea v. Littleton, 414 U.S. 488 (1974).

[154] *Id.* at 503; *see also* Gravel v. United States, 408 U.S. 606, 627 (1972) ("[W]e cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an act of Congress . . . .").

[155] Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

[156] Dennis v. Sparks, 449 U.S. 24 (1980).

[157] *Id.* at 31.

[158] *Id.*

to resolve the issue on the basis of rationales similar to those appearing in cases involving civil law immunity, but this has not proven the case. To be sure, some rationales — such as the need for finality — might be salient in the civil-law but not the criminal-law context, so its absence from criminal-law immunity decisions is understandable. However, the primary purpose of civil judicial immunity is to preserve judicial independence, and this value is threatened when a judge faces any sort of suit. Indeed, one might hypothesize that the risk of a criminal prosecution would impair judicial independence even more substantially. After all, criminal sanctions are typically experienced as more severe than monetary damages.[159] Further, criminal prosecutions have the potential to exert an even greater influence on judges because they are brought by a co-equal branch of the government. That is, it is problematic enough if judges are motivated to rule in favor of one-off private litigants as a means of preventing subsequent civil litigation. It would be far worse if judges (consciously or unconsciously) sought to curry favor with the executive, in general, or with prosecutors, in particular, due to fear of criminal prosecution.[160]

Despite these similarities, courts appeal to somewhat different rationales when concluding that judges have no criminal law immunity. Surprisingly, a few cases suggest that criminal acts do not meet the "judicial act" element required to obtain immunity.[161] To be fair, the earliest case to invoke this rationale seemed to limit it to the particular facts and the crime at issue in the case. Specifically, in *Braatelein v. United States*, the judge had been convicted of various fraud, conspiracy, and corruption crimes.[162] The court rejected Braatelein's claim for immunity, holding that a judge "may be held criminally responsible when he acts fraudulently or corruptly."[163] Amongst other rationales,

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[159] *See* Blanton v. N. Las Vegas, 489 U.S. 538, 542 (1989) (observing that "[p]enalties such as . . . a fine may engender 'a significant infringement of personal freedom' but they cannot approximate in severity the loss of liberty that a prison term entails").

[160] *See Amicus Curiae Brief on the Immunity of Judges for the Constitutional Court of Moldova*, VENICE COMM'N ¶ 25 (Mar. 11, 2013), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)008-e.

[161] *See* McFarland v. State, 109 N.W.2d 397, 403 (Neb. 1961).

[162] Braatelien v. United States, 147 F.2d 888, 895 (8th Cir. 1945).

[163] *Id.*

however, the court observed that the particular crimes that Braatelein had committed were "distinct from his judicial acts." The court noted that the conspiracy count in particular "might have been consummated without the performance of a single judicial act" because the conspiracy was complete as soon as the unlawful agreement was made and one of the co-conspirators committed any overt act;[164] that is, before Braatelein himself had acted. Other courts, however, invoked this rationale more generally and expansively. For instance, in *U.S. v. Isaacs*, the Seventh Circuit observed that "[c]riminal conduct is not part of the necessary functions performed by public officials,"[165] and the Ninth Circuit noted that "taking a bribe" is no part of the judicial function.[166]

Rejecting criminal law immunity on the grounds that a crime is not a "judicial act" seems both formalistic and inconsistent with the doctrine of absolute judicial immunity for civil suits.[167] After all, the same act — for instance, taking a bribe — can be characterized as a civil or a criminal harm, but it is well-established that a judge's bribe *is* a judicial act for purposes of the absolute judicial immunity doctrine for civil liability.[168] So, charging the relevant act as a crime should not change the nature of the act for doctrinal purposes.

Fortunately, only a few courts implied that criminal judicial acts somehow ceased to be judicial acts. Moreover, even when that rationale has appeared, it has typically been paired with the primary rationale that courts invoke when rejecting immunity for judicial crimes: namely, a summary cost-benefit analysis that is deemed to weigh against immunity for crimes. For instance, the Eleventh Circuit in *U.S. v. Hastings* acknowledged that immunity for civil suits promoted judicial independence but concluded that

> [T]he miniscule increment in judicial independence that might be derived from [immunizing judges from criminal suits] would be outweighed by the tremendous harm that the rule would

[164] *Id.*

[165] United States v. Isaacs, 493 F.2d. 1124, 1144 (7th Cir. 1974).

[166] United States v. Claiborne, 727 F.2d 842, 848 (9th Cir. 1984).

[167] *See* Shaman, *supra* note 59, at 20.

[168] *See* Wallace v. Powell, Nos. 3:09-CV-286, 3:09-CV-0291, 3:09-CV-0357, 3:09-CV-0630, 2009 WL 4051974, at *9 (M.D. Pa. Nov. 20, 2009).

> cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law."[169]

The Ninth Circuit in *U.S.* v. *Claiborne* agreed, finding it "unlikely that judicial independence would be measurably diminished by subjecting judges to the processes of criminal laws."[170] Finally, in rejecting the defendant's claim that impeachment constituted the only constitutionally approved method for removing federal judges from office,[171] the Seventh Circuit highlighted the political nature of impeachment proceedings and maintained that "the independence of the judiciary is better served when criminal charges against its members are tried in a court rather than in Congress."[172] The Seventh Circuit went on to conclude that punishing criminal conduct will not interfere with the legitimate operations of the judiciary.[173] Indeed, even courts addressing judicial immunity for criminal prosecutions as dicta sometimes summarily weigh up the costs and benefits to conclude that the law need not immunize judges from criminal prosecutions.[174]

As this brief description reveals, the few cases that consider whether judges can be criminally prosecuted for their judicial acts have two things in common. First, they all categorically and unequivocally reject judicial immunity for crimes. Second, they support this conclusion with minimal reasoning.[175] In particular, except to state the relevant rules, these cases fail entirely to address the dramatic divergence between the

[169] United States v. Hastings, 681 F.2d 706, 711 (11th Cir. 1982).

[170] *Claiborne*, 727 F.2d at 848.

[171] United States v. Isaacs, 493 F.2d. 1124, 1140-41 (7th Cir. 1974).

[172] *Id.* at 1144. The court reasoned that "with a court trial, a judge [is] assured of the protections given to all those charged with criminal conduct. The issues are heard in a calm and reasoned manner and are subject to the rules of evidence, the presumption of innocence, and other safeguards." *Id.*

[173] *Id.*

[174] United States v. Craig, 528 F.2d 773, 782-83 (7th Cir. 1976) (Tone, J., concurring) ("Immunity from civil but not criminal liability has been regarded as sufficient to achieve the purpose of the doctrine of official immunity, which is to promote independence and fearless discharge of duty on the part of the protected officials.").

[175] The lengthier discussions in some cases address the relationship between the federal government's power to prosecute judges and its power to impeach them. *See Claiborne*, 727 F.2d at 845-49. Some judges maintained that the government's impeachment power rendered the government powerless to prosecute. *Id.* at 846.

law's treatment of civil lawsuits — for which judges have complete immunity, broadly interpreted — and criminal prosecutions, to which judges are completely vulnerable.

The courts' treatment of judicial immunity gives rise to two problems. First, courts rejecting judicial immunity for criminal prosecutions presume the beneficial consequences of the pre-existing doctrine of absolute judicial immunity for civil suits. That is, these courts treat absolute judicial immunity for civil suits both as a doctrinal *fait accompli* and as incontrovertibly achieving certain benefits. They then conclude that immunizing criminal prosecutions would not significantly increase those benefits but would significantly increase costs. However, as Part III will detail, scholars and commentators have vigorously contested the empirical consequences of absolute judicial immunity doctrine. Hence, it was arguably presumptuous for courts to take for granted both the current contours of the doctrine and its allegedly beneficial impacts.

Second, both the courts that crafted the judicial immunity doctrine for civil suits and the courts that rejected judicial immunity for criminal prosecutions based their conclusions on summary cost-benefit analyses. Courts fashioning and maintaining judicial immunity for civil suits do so because they deem the benefits (primarily in judicial independence) to exceed the costs (in judicial accountability and victim loss). By contrast, courts rejecting judicial immunity for criminal prosecutions conclude that the costs (also in judicial accountability but also in the principle of equality before the law) exceed the benefits. These assessments may well be sound, but the courts have not supported them with reasoned analyses, and they have been rejected by virtually every other country on the planet. Certainly, the cost-benefit analysis that underlays absolute judicial immunity for civil suits has not been accepted in most of the rest of the world, where judges obtain, at best, qualified immunity.[176] Moreover, even many common-law countries

[176] *See, e.g.*, CONSTITUTION OF ROMANIA, art. 52 (1991, rev. 2003); COUNCIL OF EUROPE, *supra* note 27, at 15 para. 66 ("The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, *except in cases of malice and gross negligence*." (emphasis added)); Schrage, *supra* note 27, at 117 (Italy); *id.* at 125 (Austria); *Report on the Independence of the Judicial System Part I: The Independence of Judges*, VENICE COMM'N ¶ 60 (Mar. 16, 2010), https://rm.coe.int/1680700a63 (arguing in favor of a limited functional immunity of judges "[providing] protection from civil suits for actions done in good

that, like the United States, absolutely immunize judges against civil suits diverge from the United States when it comes to criminal prosecutions. Specifically, these countries also immunize their judges against criminal prosecutions, finding that the policies that support civil judicial immunity likewise justify criminal judicial immunity.

Notably, *Floyd v. Baker*, the seminal British case that first articulated the judicial immunity doctrine did so in the context of a *criminal* prosecution for conspiracy.[177] Nearly 400 years later, Olowofoyeku observed that "[w]ith respect to criminal proceedings against judges, the general principle in English law is, again, one of immunity."[178] New Zealand law is the same,[179] and Australian courts immunize judges from criminal prosecutions on both statutory[180] and common-law grounds.[181] In *Yeldham v. Rajski*, for instance, the New South Wales Court of Appeals held a judge to be immune from criminal contempt charges. Indeed, whereas American courts have concluded that extending judicial

faith in the course of their functions"); *Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan*, VENICE COMM'N ¶ 24 (Dec. 16, 2008), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)039-e ("It is reasonable to grant immunity from civil suit to a judge acting in good faith in the performance of his or her duty. But, it should not be extended to a corrupt or fraudulent act carried out by a judge." (emphasis omitted)).

[177] Floyd v. Barker (1607) 77 Eng. Rep. 1305, 1306 (KB). There, the court stated, "the Judge . . . being Judge by commission and of record, and sworn to do justice, cannot be charged for conspiracy for that which he did openly in Court as Judge or justice of the peace." *Id.*; *see also* Miller v. Seare (1773) 96 Eng. Rep. 673, 674 (KB); Yeldham v. Rajski [1989] 18 NSWLR 48 (Austl.) (Hope, AJA) (explaining *Floyd* as holding that a "judge was not liable to be prosecuted for the crime of conspiracy for what he did openly as a judge").

[178] OLOWOFOYEKU, *supra* note 60, at 74.

[179] *See* Harris, *supra* note 103, at 490 (reporting that "if the alleged criminal action taken by the judge is within his or her jurisdiction, that jurisdiction may prevent what would otherwise be regarded as criminal action being held to be such by the courts").

[180] *Fingleton v The Queen* [2005] HCA 34 (Austl.). The immunity statute in *Fingleton* provided that "[e]xcept as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by the judicial officer in the exercise of the officer's judicial functions." Criminal Code of Queensland, § 30. As a result of the "except" clause appearing at the start of § 30 as well as § 120 of the Criminal Code of Queensland, judges can be exposed to criminal punishment for various forms of corruption.

[181] *Rajski*, 18 NSWLR at 59-60.

immunity to criminal suits would not advance judicial independence sufficient to justify its costs, Australian courts reached the exact opposite conclusion.[182] The High Court of Australia in *Fingleton v. The Queen* determined that "the public policy which supports immunity from civil liability even in respect of conduct alleged to be malicious and lacking in good faith extends to immunity from criminal responsibility."[183] In *Yeldham,* Judge Hope expanded this view, stating:

> The basis of the immunity of judges from civil proceedings in respect of their judicial acts . . . is that the immunity is essential to the independence of judges. . . . [T]his policy is as equally applicable to criminal proceedings for the acts of judges, in the exercise of their judicial functions, as it is in respect of civil proceedings.[184]

That these foreign cases consider the same factors yet reach diametrically different conclusions regarding the desirability of judicial immunity for crimes does not mean that they are right and American courts wrong. But it does suggest that the summary cost-benefit analysis that American courts invoke to reject that judicial immunity is contestable and needs additional interrogation and defense. Indeed, because neither foreign courts nor American courts make any real effort to thoroughly analyze the relevant competing interests or to justify their conclusions, Part IV will take up that task. But before that, Part III explores the cost-benefit analyses that appear in the scholarship critiquing the doctrine of absolute judicial immunity for civil suits. More importantly, Part IV shows how the possibility of criminal prosecution substantially alters those analyses.

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[182] *See* Robyn Carroll, *Mediator Immunity in Australia,* 23 SYDNEY L. REV. 185, 195 (2001) (reporting that "[j]udicial immunity rests on public policy and applies equally to a judge's conduct during criminal and civil trials").

[183] *Fingleton*, HCA at 40.

[184] *Rajski*, 18 NSWLR at 69.

III. SCHOLARLY CRITIQUES OF ABSOLUTE JUDICIAL IMMUNITY: INCOMPLETE COST-BENEFIT ANALYSES

As noted, absolute judicial immunity for civil suits has spawned dozens of scholarly critiques, which Section A will briefly summarize. These critiques ignore the possibility of criminal accountability for judicial misconduct, however, so Section B explores the ways in which that accountability might alter — and complicate — these scholarly critiques.

A. The Many Critiques of Judicial Immunity

Courts that address absolute judicial immunity for civil suits commonly begin by referencing the long history and well-established nature of the doctrine.[185] From the judiciary's perspective, therefore, absolute judicial immunity could barely be less controversial. However, the pages of academic books and law review journals tell a different story. There, the doctrine is reviled.[186] Particularly after *Pierson v. Roy* held absolute judicial immunity also to bar § 1983 claims, and *Stump v. Sparkman* broadly interpreted the doctrine to shield exceptionally egregious and harmful judicial acts,[187] commentators have pulled no punches in their critiques. Some scholars have attacked the mistaken historical analyses that underlay some judicial reasoning,[188] but most

[185] *See* Forrester v. White, 484 U.S. 219, 225-26 (1988); Pulliam v. Allen, 466 U.S. 522, 530 (1984); Harper v. Merckle, 638 F.2d 848, 857 (5th Cir. 1981).

[186] For a sampling of critical sources, see SCOTT, *supra* note 63, at 94-95; Barth, *supra* note 15, at 758; Block, *supra* note 76, at 920-24 (describing critiques); Feinman & Cohen, *supra* note 45, at 261-264 (describing critiques); Kates, *supra* note 132, at 624; Kern, *supra* note 131, at 176; Nagel, *supra* note 140, at 237-38; K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95, 98-99 (1995); Rogers, *supra* note 83 at 560; Sinclair, *supra* note 16, at 155-58 (describing critiques); Robert Craig Waters, *Judicial Immunity vs. Due Process: When Should a Judge be Subject to Suit?*, 7 CATO J. 461, 471 (1987).

[187] *See* Nagel, *supra* note 140, at 239 (describing *Stump* v. *Sparkman* as featuring "an extreme factual situation").

[188] *See supra* text accompany notes 128–130. Even if nineteenth century American courts misunderstood the doctrine's history to be more stable and universal than it was, that mistake does not necessarily call into question the doctrine's desirability. Indeed, Feinman & Cohen authored perhaps the most detailed and comprehensive critique of

have called into question the doctrine's ability to advance its ostensible goals.

A few critiques of absolute judicial immunity challenge the justifications that traditionally have been invoked to support the doctrine, maintaining that these justifications are founded on implausible assumptions. Take, for instance, Lord Coke's claim that judicial immunity advances finality and protects judges from harassment.[189] Critics point out that judicial immunity is necessary to advance these ends only if we can reasonably assume that losing parties will frequently bring meritless suits against the judges in their cases.[190] However, because litigation is costly, it is unlikely that litigants will launch ad infinitum legal challenges against every judge who ever ruled against them.[191] Others acknowledge that civil suits against judges may reduce the public's respect for the individual judge who has been challenged,[192] but they maintain that "respect for the judiciary as an institution is more seriously undermined by not requiring the judge to account for his malicious acts."[193] Finally, critics of judicial immunity agree with supporters that capable individuals might be deterred from seeking judicial office if judges were provided no immunity whatsoever.[194] But that does not make *absolute* immunity necessary to attract and retain competent judicial candidates; after all, strong candidates seek other governmental positions although they are

the nineteenth century courts' historical claims, but they themselves were not willing to advocate for any particular reform proposal. Feinman & Cohen, *supra* note 45, at 204, 280.

[189] *See* Floyd v. Barker (1607) 77 Eng. Rep. 1305, 1307 (KB).

[190] *See* Barth, *supra* note 15, at 742-43; *see also* Kates, *supra* note 132, at 637.

[191] *See* Barth, *supra* note 15, at 741. Some commentators also suggest that any challenges that are obviously meritless are apt to be summarily dismissed. *Id.* at 742-43. Others, however, contest this claim. *See* Stern & Oehme, *supra* note 67, at 415.

[192] *Cf.* Nagel, *supra* note 140, at 260 (maintaining that arguments justifying judicial immunity on the basis of respect and status "sound curious to the modern ear, outmoded and even embarrassing").

[193] Barth, *supra* note 15, at 742; *see also* Gabrielle Appleby & Suzanne Le Mire, *Judicial Conduct: Crafting a System That Enhances Institutional Integrity*, 38 MELBOURNE U. L. REV. 1, 3 (2014) ("While problematic judicial conduct is rare, failing to acknowledge and address it can damage the integrity of the courts . . . ."); Sinclair, *supra* note 16, at 161. For a more nuanced discussed of the dignity rationale, see Nagel, *supra* note 140, at 260-62.

[194] *See* OLOWOFOYEKU, *supra* note 60, at 190.

provided only qualified, and not absolute, immunity.[195] Indeed, one commentator asserted that individuals who would decline a judicial post unless afforded the sweeping judicial immunity that American law currently provides "are the very persons who, quite frankly, should not sit on the bench."[196]

It may be, as these critics claim, that absolute judicial immunity is not necessary to advance finality or maintain the quality of the judiciary; however, the primary justification for judicial immunity is that it preserves judicial independence, and this empirical claim is not so easy to dismiss. One need look only so far as to countries that lack an independent judiciary[197] to recognize that judges can be intimidated in a variety of ways, including by the threat of a lawsuit.[198] For that reason, most critics acknowledge that judicial immunity advances worthy goals,[199] but they maintain that — in its current expansive form — the doctrine's costs dramatically exceed its benefits.[200] Critical scholars highlight two costs in particular. First, *ubi jus ibi remedium* (where there is a right, there is a remedy) is a foundational principle of American law[201] and of just legal systems everywhere,[202] yet it is a principle that

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[195] *Id.*

[196] Rosenberg, *supra* note 16, at 856.

[197] Sally Aldrich, *WJP Asia Pacific Forum Participants Highlight Strategies for Strengthening Judicial Independence*, WORLD JUST. PROJECT (Feb. 9, 2023), https://worldjusticeproject.org/news/wjp-asia-pacific-forum-participants-highlight-strategies-strengthening-judicial-independence [https://perma.cc/EA2H-W4VJ].

[198] Schrage, *supra* note 27, at 126-27.

[199] *See, e.g.*, Rogers, *supra* note 83, at 544 (describing Justice O'Connor's arguments for judicial immunity as "cogent[]").

[200] Nagel, *supra* note 140, at 244 (arguing that the "weighty policies asserted by the Court in support of absolute judicial immunity do not justify the result"); Rosenberg, *supra* note 16, at 853 (asserting that because the costs of judicial immunity are so high, one would assume that its policy justifications "would be so compelling as to outweigh the competing considerations," but they are not); *see* Kates, *supra* note 132, at 637 (arguing that "absolute immunity, which eliminates meritorious as well as frivolous suits, can be justified only by the necessity of avoiding an evil of momentous proportions").

[201] *See* Marbury v. Madison, 5 U.S. 137, 163 (1803); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 15 (Lonang Institute 2003) (1768).

[202] Lehtimaki v. Cooper [2020] UKSC 33 [144].

judicial immunity contravenes.[203] Thanks to judicial immunity, victims of judicial wrongs, including victims of grievous wrongs such as Linda Sparkman, suffer severe harms but are left without a remedy.[204] Second, judicial immunity prevents judges from facing accountability for their wrongful acts.[205] They thus escape deserved punishment, and the law does not serve to deter them, or other judges, from engaging in future misconduct.[206]

To better align judicial immunity's costs and benefits, different scholars propose different reforms. Some critics, for instance, take aim at the ever-increasing cast of characters who perform acts deemed sufficiently "judicial" to generate immunity, and they advocate restricting immunity to a narrower range of persons.[207] Other reformers adopt a process-based perspective and recommend excluding immunity when the judge's acts prevent the complainant from seeking appellate correction of error[208] or limiting immunity to instances where the judge's actions are consistent with the procedural standards typically expected of judges.[209] Indeed, one such commentator very specifically contends that judicial acts should be immune from civil suits only when the judge afforded the victim (1) notice; (2) a chance to be heard; and (3) a method of appeal.[210]

The majority of critical scholars, however, recommend more sweeping reforms and in particular advocate bestowing on judicial acts only qualified, not absolute immunity.[211] These scholars, therefore,

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[203] *See* Donald L. Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 452 (2011).

[204] Barth, *supra* note 15, at 742-43.

[205] *See Judicial Immunity at the (Second) Founding*, *supra* note 17, at 1475.

[206] *See id.*

[207] Coriell, *supra* note 74, at 986-87; Forouzan, *supra* note 74, at 123 (proposing a formalist approach whereby only the actions of actual judges benefit from absolute immunity whereas the acts of quasi-judicial officials garner only qualified immunity); Johns, *supra* note 74, at 299.

[208] *See* Block, *supra* note 76, at 924; Rosenberg, *supra* note 16, at 855-56 (arguing against immunity for judges who act in ways that shield them from appellate review).

[209] Feinman & Cohen, *supra* note 45, at 263-64; Schuck, *supra* note 16, at 666.

[210] *See* Waters, *supra* note 186, at 471.

[211] Barth, *supra* note 15, at 751-57; Kates, *supra* note 132, at 624; Nagel, *supra* note 140, at 252; Shaman, *supra* note 59, at 28; Sinclair, *supra* note 186, at 158-61.

would deny immunity for acts committed with malice.[212] "Malice" itself is understood differently by different commentators; most would deny immunity only when judges acted with the knowledge that their acts were illegal or with conscious disregard for their illegality,[213] though some would more broadly define malicious acts to include those committed with gross negligence.[214] Regardless of the precise contours of the proposed malice exception, these critics generally contend that the benefits of judicial immunity do not justify the costs incurred in shielding malicious acts. As noted, absolute judicial immunity generates one primary and uncontroversial benefit and two costs. The benefit is judicial independence, and the two costs are that victims receive no remedy and judges face no accountability. Those advocating qualified immunity for judicial acts maintain that both costs are higher and the benefit lower when the challenged judicial act is malicious. As for costs, the victims of malicious acts typically will have greater need for a remedy than the victims of non-malicious harms.[215] And judges who commit malicious acts have a greater need for punishment and deterrence than judges whose acts are unintentionally wrongful.[216] Finally, the overall threat to judicial independence is reduced when the

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[212] Harris, *supra* note 103, at 514-15; Kates, *supra* note 132, at 624; Law, *supra* note 140, at 482. As Olowofoyeku puts it, "[a] malice-based liability is many commentators' favourite means of setting the limits." OLOWOFOYEKU, *supra* note 60, at 205; *see also* Block, *supra* note 76, at 922 ("Almost without exception, critics of the doctrine of judicial immunity have agreed on one point: It is one thing, they say, to protect a judge from his honest mistakes, but it is something quite different for the judicial system to protect judges who purposely use their authority to inflict harm or deprive others of their rights.").

[213] *See* Block, *supra* note 76, at 922.

[214] Harris, *supra* note 103, at 514.

[215] *Id.* at 515; *see also* Barth, supra note 15, at 743; John Murphy, *Rethinking Tortious Immunity for Judicial Acts*, 33 LEGAL STUD. 455, 470 (2013) ("[I]n cases involving malicious judicial acts . . . full reparation is likely to require a retributive element . . . [in] the form of aggravated or exemplary damages in tandem with the imposition of *personal responsibility* on the part of the judge.").

[216] Barth, *supra* note 15, at 767 n.239 (observing that "the danger that official power will be abused is greatest where its motives are proper"); Feinman & Cohen, *supra* note 45, at 271-72 (maintaining that a rule of liability would "influence the judge" acting on ill-will "to exercise restraint . . . ."); *see* Harris, *supra* note 103, at 515.

exception to immunity applies only to judges who act in a malicious or bad-faith manner.[217]

As this summary description should convey, different proposals strike different balances, but all seek to limit immunity in one way or another and all are premised on the one core insight articulated above: that the costs of absolute judicial immunity exceed its benefits.[218] But these cost-benefit analyses fail to take account of two compelling empirical facts. First, as will be addressed in Section B, these critiques, recommendations, and proposals almost uniformly fail to consider the way in which the availability of criminal prosecutions might alter the relevant costs and benefits.[219] Thus, Section B explores the ways in which criminal law enforcement might reform the reform proposals. Second, as will be discussed in Part IV, many of these proposals fail to consider the likely — and highly problematic — practical consequences of their implementation. Together, Section B and Part IV show that criminal law has the potential to beneficially alter both the scholarly proposals seeking to reform judicial immunity and, more importantly, the immunity doctrine itself.

B. Prosecuting Judges: The Impact of Criminal Law on the Scholarly Critiques of Absolute Judicial Immunity

Section A reports that scholars critical of absolute judicial immunity for civil lawsuits frequently maintain that immunity comes at too high a

[217] *See* Harris, *supra* note 103, at 515; *see also* Murphy, *supra* 215, at 464-65 ("[A]lthough the independence of the judiciary is an important and relevant consideration, it is neither an absolute end in itself, nor a self-evident and unqualified good. Still less is it anything approaching a basis for cloaking in immunity judicial acts which are 'actuated by envy, hatred and malice.'").

[218] Nagel, *supra* note 140, at 238 (arguing that the "weighty policies asserted by the Court in support of absolute judicial immunity do not justify the result"); Rosenberg, *supra* note 16, at 853 (asserting that because the costs of judicial immunity are so high, one would assume that its policy justifications "would be so compelling as to outweigh the competing considerations," but they are not); *see* Kates, *supra* note 132, at 637 (arguing that "absolute immunity, which eliminates meritorious as well as frivolous suits, can be justified only by the necessity of avoiding an evil of momentous proportions").

[219] Rogers, *supra* note 83, at 547; *see* Rosenberg, *supra* note 16, at 855-57; Shaman, *supra* note 59, at 28; Schuck, *supra* note 16, at 671.

cost. But critics fail to consider the role that criminal prosecutions might play in altering the relevant cost-benefit analyses. To be sure, a few scholars make passing reference to the possibility of criminal prosecutions, but most ignore it entirely, and the few who mention it summarily dismiss its relevance.[220] In my view, this is a mistake because criminal prosecutions have the potential to reduce both of the core costs of judicial immunity. First, critics routinely complain that judicial immunity inappropriately shields misbehaving judges from deserved punishment and eliminates any deterrent that might dissuade prospective judicial wrong doers.[221] Criminal prosecutions, however, can help to fill that gap. Indeed, criminal penalties are generally considered more severe and thereby to impose more substantial accountability than civil law damages.[222] Thus, to the extent that judges should be punished or need to be deterred from committing serious misconduct, criminal law can deliver those forms of accountability.

Second, judicial immunity prevents deserving victims from obtaining civil money damages for the harms they have suffered, but criminal prosecutions can also reduce this cost. For one thing, civil money damages function both to compensate and to punish.[223] Because many

[220] Rosenberg and Rogers each devote essentially one sentence to the possibility of criminal prosecutions. *See* Rosenberg, *supra* note 16, at 856 ("That these judges will be deterred by proceedings against them in criminal courts . . . is no answer [because t]he possibility that a district attorney will prosecute a judge for misconduct other than crass, monetary schemes is remote . . . ."); Rogers, *supra* note 83, at 547 ("[R]esort to other mechanisms, such as sanctioning by judicial conduct boards, prosecution for criminal misconduct, and impeachment, does not adequately justify judicial immunity [because] these alternate remedies . . . punish judicial misconduct [but] they do not compensate the victims of misconduct."). Schuck and Merryman each devote one short paragraph, Schuck, *supra* note 16, at 671; John Henry Merryman, *Judicial Responsibility in the United States*, 41 RABEL J. COMPAR. & INT'L PRIVATE L. 332, 354-55 (1977), and Shaman's (along with Merryman's) treatment of both civil and criminal liability for judicial misconduct is entirely descriptive, not normative. *See generally* Shaman, *supra* note 59.

[221] *See supra* text at note 205.

[222] *See* Blanton v. N. Las Vegas, 489 U.S. 538, 542 (1989) (observing that "[p]enalties such as . . . a fine may engender 'a significant infringement of personal freedom,' but they cannot approximate in severity of the loss of liberty that a prison term entails" (citations omitted)).

[223] For the respective general purposes of both compensatory and punitive damages, see RESTATEMENT (SECOND) OF TORTS §§ 903, 908 (AM. L. INST. 1979).

plaintiffs do not claim large pecuniary losses as a result of the alleged judicial misconduct[224] and rather seek damages for the dignitary harms they have suffered,[225] we might assume that these plaintiffs view civil damages primarily as serving punitive and not compensatory goals. For these plaintiffs, then, criminal sanctions can function as a viable substitute for a civil damage award.

However, criminal law can play an important compensatory role even for plaintiffs who primarily desire and deserve damages for ascertainable financial losses. Indeed, several decades ago, state and federal legislators began adapting criminal law processes and penalties to better meet victims' compensatory needs, recognizing that victims often faced substantial obstacles to recovering damages through civil tort processes.[226] Consequently, every state along with the federal government now authorizes (and sometimes requires) courts to impose restitution awards against criminal defendants in favor of their victims.[227] Not surprisingly, then, this compensatory mechanism has

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[224] Sometimes the alleged losses are difficult to determine because the court summarily dismisses the plaintiff's complaint due to judicial immunity. *See, e.g.*, Day v. Florida, 563 F. App'x 878 (3d Cir. 2014); Brooks v. Love, 527 F. Supp. 3d 113 (D. Mass. 2021); Smith v. Stark, 777 F. Supp. 2d 795 (D. Del. 2011).

[225] *See, e.g.*, Kelsey v. Clark, 2023 WL 1980307 (2d Cir. 2023); Lund v. Cowan, 5 F.4th 964 (9th Cir. 2021); Simmons v. Conger, 86 F.3d 1080 (11th Cir. 1996); Henry v. City of Mount Dora, No. 5D21-1387, 2022 Fla. App. LEXIS 9021 (Fla. Dist. Ct. App. 2022); Hise v. Bordeaux, 364 Ga. App. 138 (2022); Chasan v. Platt, 244 A.3d 73 (Pa. Commw. Ct. 2020).

[226] *See* Lavenue, *supra* note 32, at 453.

[227] For state law, see *id.* at 457 ("As a result, every state currently provides either common law or statutory authority to impose some form of restitution against a criminal defendant."); Shephard, *supra* note 32, at 807 ("Every state has statutes allowing courts to order restitution for a victim."). As a matter of federal law, the Mandatory Victims Restitution Act ("MVRA") requires defendants convicted of a large range of offense to provide restitution to their victims. The MVRA supersedes an earlier federal restitution statute enacted in 1982 — the Victims and Witness Protection Act. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248. The primary difference between the two laws is that the VWPA instructed judges to consider a defendant's ability to pay when determining restitution orders whereas the MVRA requires an award of restitution for certain offenses and is calculated on the basis of the victim's loss, without consideration of the defendant's ability to pay. *See* United States v. Randle, 324 F.3d 550, 555 n.2 (7th Cir. 2003).

already been employed against convicted judges who have been ordered to pay restitution to their victims.[228]

Concededly, not every crime can give rise to a restitution order, as restitution is best suited for crimes that inflict quantifiable harms on discrete, identifiable victims.[229] Although some judges commit crimes that victimize identifiable persons who suffer quantifiable losses,[230] other judges commit crimes such as mail fraud,[231] wire fraud,[232] or tax

[228] *See, e.g.*, United States v. Ciavarella, 716 F.3d 705, 713 (3d Cir. 2013); Public Warning at 2, *In re* Hon. Woodrow "Woody" Densen, Tex. Comm'n on Jud. Conduct, No. 09-0948-RT (Oct. 14, 2010); Press Release, U.S. Att'y's Off. for the S. Dist. of W. Va., Former Justice of West Virginia Supreme Court of Appeals Sentenced for Fraud (Feb. 13, 2019), https://www.justice.gov/usao-sdwv/pr/former-justice-west-virginia-supreme-court-appeals-sentenced-fraud#:~:text=Former%20Justice%20of%20West%20Virginia%20Supreme%20Court%20of%20Appeals%20Sentenced%20for%20Fraud,-Wednesday%2C%20February%2013&text=CHARLESTON%2C%20W.Va.,States%20District%20Judge%20John%20T. [https://perma.cc/D7U6-JDGW] (describing West Virginia judge convicted for mail and wire fraud, sentenced to jail and ordered to pay restitution); Press Release, U.S. Att'y's Off. for the S. Dist. of W. Va., Former WV Supreme Court of Appeals Justice Menis Ketchum II Sentenced for Fraud (Mar. 6, 2019), https://www.justice.gov/usao-sdwv/pr/former-wv-supreme-court-appeals-justice-menis-ketchum-ii-sentenced-fraud [https://perma.cc/6AYD-Q33F] [hereinafter Menis Ketchum II Sentenced for Fraud]; Roger Estlack, *McCoy Resigns as Judge*, CLARENDON ENTER. (Feb. 28, 2008), https://www.clarendonlive.com/2008/02/mccoy-resigns-as-judge/ [https://perma.cc/CGX5-M4T4] (discussing a case where a judge charged with theft and abuse of official capacity signed a non-prosecution agreement in exchange for resigning his office and paying restitution). Even judges who are not convicted or censured can be ordered to pay restitution. *See* John Simerman, *Orleans Judge Ordered to Repay $10,000 in Insurance Reimbursements but Cleared of Ethical Misconduct*, THE ADVOCATE (Jan. 23, 2017), https://www.nola.com/news/courts/orleans-judge-ordered-to-repay-10-000-in-insurance-reimbursements-but-cleared-of-ethical-misconduct/article_4723a10f-56e2-5767-93ff-b9771e9a1a92.html [https://perma.cc/PM7W-YAN7].

[229] Randy E. Barnett, *Restitution: A New Paradigm for Criminal Justice*, 87 ETHICS 279, 287-88 (1977).

[230] Michael Berens & John Shiffman, *With "Judges Judging Judges," Rogues on the Bench Have Little to Fear*, REUTERS (July 9, 2020, 10:00 AM), https://www.reuters.com/investigates/special-report/usa-judges-deals/ ("Over a dozen years, Reuters found at least 5,206 people who were directly affected by a judge's misconduct.").

[231] *See, e.g.*, *Ciavarella*, 765 F. App'x at 856 (recounting judge's conviction for mail fraud, racketeering, money laundering, tax fraud, and conspiracy to defraud the United States).

[232] Press Release, U.S. Att'y's Off. for the S. Dist. of W. Va., Former WV Supreme Court of Appeals Justice Menis Ketchum II Pleads Guilty to Wire Fraud (Aug. 23, 2018)

evasion,[233] which are less amenable to restitution orders. Even with respect to these crimes, however, criminal law can function to compensate victims. Regardless of the kinds of crimes they commit, convicted judges are almost always ordered to pay fines in addition to incurring other criminal penalties.[234] These fines help to fund a second

https://www.justice.gov/usao-sdwv/pr/former-wv-supreme-court-appeals-justice-menis-ketchum-ii-pleads-guilty-wire-fraud [https://perma.cc/SKC9-DUJ8].

[233] *See, e.g.*, United States v. Claiborne, 765 F.2d 784, 788 (9th Cir. 1985) (U.S. district court judge was convicted for tax fraud); Seth S. King, *Otto Kerner Goes to Jail Today, His Once-Shining Career at End,* N.Y. TIMES, July 29, 1974, at 47, https://www.nytimes.com/1974/07/29/archives/otto-kerner-goes-to-jail-today-his-onceshining-career-at-end-income.html (U.S. district court judge and former governor of Illinois convicted for accepting bribes and income tax evasion).

[234] *Claiborne*, 765 F.2d at 788; Medrano v. State, 421 S.W.3d 869, 873 (Tex. Ct. App. 2014); Public Warning, *supra* note 228, at 2; Public Reprimand at 2, *In re* Honorable Amado J. Abascal III, Tex. Comm'n on Jud. Conduct, Nos. 05-0406-DI, 05-0475-DI, 06-0471-DI, 06-0520-DI, 07-0614-DI, & 07-0701-DI (Dec. 18, 2008); Stipulation, Agreement and Order of Reprimand at 2, *In re* Hon. Terry M. Tanner, Wash. Comm'n on Judicial Conduct, No. 8889-F-180 (Dec. 7, 2018); Stipulation, Agreement and Order of Reprimand at 2, *In re* Hon. Mary E. Dingledy, Wash. Comm'n on Jud. Conduct, No. 8710-F-176 (Dec. 8, 2017); Stipulation, Agreement and Order of Censure at 2, *In re* Hon. Kathleen E. Hitchcock, Wash. Comm'n on Jud. Conduct, No. 7377-F-160 (Oct. 3, 2014); Stipulation, Agreement and Order of Reprimand at 2, *In re* Hecht, Wash. Comm'n on Jud. Conduct, No. 5863-F-142 (May 14, 2010); W. VA. JUD. INVESTIGATION COMM'N, ANNUAL REPORT — 2018, at 15 (2019), https://www.courtswv.gov/sites/default/pubfilesmnt/2023-07/2018.pdf [https://perma.cc/97VL-DCDR] (discussing the judicial investigation and public censure of the Honorable Darris J. Summers); W. VA. JUD. INVESTIGATION COMM'N, ANNUAL REPORT — 2017, at 16 (2018), http://www.courtswv.gov/legal-community/JICAnnualReports/2017.pdf [https://perma.cc/5K5M-G2KZ] (discussing the judicial investigation and temporary suspension of judge-elect Stephen O. Callaghan); Press Release, U.S. Att'y's Off. S.D. Tex., Former JP and Bail Bondsman Sentenced on Federal Extortion Charges (Aug. 28, 2015); Menis Ketchum II Sentenced for Fraud, *supra* note 228 (reporting on the $20,000 fine levied on the judge); *Court Oks Sanctions Against Kanawha Magistrate*, CHARLESTON GAZETTE-MAIL (June 10, 2014), https://www.wvgazettemail.com/news/legal_affairs/court-oks-sanctions-against-kanawha-magistrate/article_56f0fdcc-4d91-5116-8d52-74483f134f2a.html [https://perma.cc/A6TT-XYQU]; Demer, *supra* note 106; King, *supra* note 233; MacCormack, *supra* note 151; Eileen Pace, *Former Guadalupe County Judge Pleads Guilty In Marijuana Case*, TEX. PUB. RADIO (Feb. 18, 2013, 2:42 PM), https://www.tpr.org/government-public-policy/2013-02-18/former-guadalupe-county-judge-pleads-guilty-in-marijuana-case [https://perma.cc/TKV2-8EUF]; Richard Stewart, *Brazoria Judge Accused of Groping Resigns in Plea,* HOUS. CHRON. (Aug. 30, 2008), https://www.chron.com/news/houston-texas/article/Brazoria-judge-accused-of-groping-resigns-in-plea-1772717.php.

vehicle through which victims of judges may receive compensation: namely, victims' compensation funds.[235] Currently, each of the fifty states has a victims' compensation fund,[236] and the federal government administers its own compensation scheme[237] while also helping to fund state compensation schemes.[238] Both federal and state funding for victims' compensation programs generally comes from the proceeds of criminal fines and fees, not from taxpayers.[239] Thus, victims' compensation funds constitute another criminal justice mechanism through which a victim of a judge's misconduct can be recompensed. Admittedly, victims compensated through these funds are not paid directly by the specific judges who harmed them, but they do receive compensation for their losses, and the fines levied on convicted judges impose additional accountability while helping to fund those compensation initiatives.

The foregoing suggests that absolute judicial immunity for civil suits may not impose costs as high as critics have claimed because criminal prosecutions are available to ameliorate those costs. But at the same time that criminal prosecutions can reduce the costs of judicial

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[235] Victims' compensation funds emerged during the 1980s, when criminal restitution and other victims' rights initiatives were also being launched. Dori A. Wind, *Texas' BIG Secret: The Crime Victims' Compensation Fund*, 64 TEX. BAR J. 363, 364-65 (2001).

[236] Valena E. Beety, *Legal Support for Victim Compensation Funds for Police Violence Victims*, 21 NEV. L.J. 953, 965 (2021); Karin D. Martin & Matthew Z. Fowle, *Restitution Without Restoration? Exploring the Gap Between the Perception and Implementation of Restitution*, 63 SOCIO. PERSP. 1015, 1023 (2020); Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth — The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL'Y 223, 230 (2011).

[237] 34 U.S.C. §§ 20101–20111; *see also Crime Victims Fund*, OFF. FOR VICTIMS OF CRIME, https://ovc.ojp.gov/about/crime-victims-fund (last visited Aug. 30, 2024) [https://perma.cc/XU6K-MR28].

[238] Beety, *supra* note 236, at 965; *Victims of Crime Act (VOCA) Assistance Fund*, OR. DEP'T OF JUST., https://www.doj.state.or.us/crime-victims/grant-funds-programs/victims-of-crime-act-voca-assistance-fund/ (last visited Aug. 30, 2024) [https://perma.cc/XJ3Q-FJE5] ("The money for these grants comes from the Crime Victims Fund, a special fund into which fines, penalty assessments, bond forfeitures collected from convicted federal offenders and certain other collections are deposited. Taxpayers do not fund VOCA grants.").

[239] DOUGLAS N. EVANS, COMPENSATING VICTIMS OF CRIMES 2, 4 (2014) (general mechanism for state victim compensation funds); *see* 34 U.S.C. § 20101 (statutory funding mechanism for federal Crime Victims Fund).

immunity for civil suits, we must consider whether they might also — counterproductively — reduce the core benefit garnered by judicial immunity: judicial independence. Judicial immunity is said to enhance judicial independence by providing judges the freedom to rule as they see fit without fear of triggering subsequent costly litigation brought by disgruntled litigants. But judicial independence might also be impaired if judges fear meritless criminal prosecution as a result of their judicial acts.

A more detailed discussion of this point appears in Part IV, but suffice it to contend somewhat summarily here that judges' decisions are not likely to be influenced by fear of criminal prosecutions.[240] Civil litigation is said to threaten judicial independence because civil suits can be brought by any disgruntled litigant and can center on even the most trivial or meritless claims. Trivial or meritless claims are not likely to result in significant damage awards, but the cost of defending against even frivolous claims can be significant, both financially and reputationally. Thus, fear of such claims may in fact influence judicial behavior. By contrast, criminal prosecutions can be expected to center on only the more serious forms of judicial misconduct, and the prosecutions can be initiated only by professional prosecutors. Certainly, malicious prosecutions can occur,[241] but the very fact that prosecutions can be brought only at the instigation of an elected or appointed governmental official, pursuant to defined legal standards and constrained by procedural guarantees, provides assurance that judges are not apt to be subjected to widespread, baseless indictments. Thus, the only judges whose behavior is apt to be influenced by the threat of criminal prosecutors are those judges who engage in behavior that could plausibly be characterized as criminal. And judges whose judicial behavior can plausibly be characterized as criminal are not the

[240] One federal appellate court made exactly that finding. *See* United States v. Claiborne, 727 F.2d 842, 848 (9th Cir. 1984) (concluding it "unlikely that judicial independence would be measurably diminished by subjecting judges to the processes of criminal laws").

[241] *See* Parker Yesko, *Why Don't Prosecutors Get Disciplined?*, AM. PUB. MEDIA REPORTS (Sept. 18, 2018), https://www.apmreports.org/story/2018/09/18/why-dont-prosecutors-get-disciplined [https://perma.cc/6FK5-QAPV]. *See generally* McDonough v. Smith, 588 U.S. 109 (2019) (describing elements of the tort of malicious prosecution).

judges whose independence we should be most concerned with securing.

This Part, then, suggests that a judge's vulnerability to criminal prosecution positively alters the cost-benefit analysis that commentators invoke when excoriating the absolute judicial immunity doctrine for civil suits. However, these beneficial adjustments can be effectuated only if two conditions are met: first, the relevant judicial wrongdoing must be characterizable as a crime; and second, prosecutors must be willing to charge judges for those crimes. As for the first condition, plenty of wrongful judicial acts that impose pecuniary harms are not criminal.[242] However, scholars critical of absolute judicial immunity are concerned with the worst of the judicial misconduct,[243] much of which could be characterized as criminal, if prosecutors were so inclined. Judge Stump, for instance, could have been charged as an accomplice to criminal battery for his blatantly illegal sterilization order.[244] Likewise, in *Mirales* v. *Waco*, Justice Stevens observed that Judge Mirales had ordered a battery,[245] which clearly could have been

[242] *See, e.g.*, Smith v. Dobin, 852 F. App'x 49 (3d Cir. 2021) (where plaintiff's suit against bankruptcy judge and others alleging participation in a bid-rigging scheme was dismissed for judicial immunity); Brady v. Ostrager, 834 F. App'x 616 (2d Cir. 2020) (describing a case where a plaintiff sued a judge and other defendants under New York state RICO law); Dominic v. Goldman, 560 F. Supp. 3d 579 (D.N.H. 2021) (executor of estate suing judge and others for alleged deprivation of rights related to the handling of the estate); Ellis v. Flannery, 2021 IL App (1st) 201096 (Ill. App. Ct. 2021) (describing case where plaintiff sued judge for failing to grant her a fee waiver, which suit was dismissed for judicial immunity).

[243] *See, e.g.*, Block, *supra* note 76, at 910-11; Kern, *supra* note 131, at 176 (arguing that judicial immunity should be tailored to protect judges who can prove that they aren't acting from malice and that they aren't committing sanctionable conduct); *Judicial Immunity at the (Second) Founding*, *supra* note 17, at 1463 ("What if a judge ordered the excessive imprisonment of a mother, leading to her children ending up in foster care and being abused? Or abusively charged a party with contempt while there was no transcript of the proceedings? Or ordered the permanent sterilization of a party? Or operated, in effect, a debtors' prison?").

[244] Indeed, Ms. Sparkman brought a state civil claim against Judge Stump for assault and battery, Stump v. Sparkman, 435 U.S. 349, 353-54 (1978), which was blocked by Stump's immunity, but the assault and battery could also have been charged as crimes.

[245] Mireles v. Waco, 502 U.S. 9, 14 (1991) (Stevens, J., dissenting). Perhaps even more egregiously, Arizona Justice of the Peace Thompson threw a witness to the floor and repeatedly pummeled him before two deputy sheriffs ended the altercation. Judge

charged as a crime. And plenty of Supreme Court and lower court civil cases involve judges accused of conspiracy,[246] bribery, and fraud,[247] which can be characterized as civil and criminal wrongs. Indeed, in a number of cases, judges who were convicted of crimes for their judicial activities are contemporaneously immunized from civil proceedings on the same facts.[248] Said differently, no one is up in arms about immunizing innocent judicial mistakes, so the scholars who excoriate the high costs of absolute judicial immunity highlight the cases that involve the most serious judicial wrongdoing, and much of this wrongdoing is criminally indictable.

But that leads us to the second necessary condition: just because serious judicial misconduct *could* be characterized as criminal does not necessarily mean that it *will* be. After all, judicial oversight boards often receive hundreds of complaints per year,[249] and most do not result in

Thompson claimed judicial immunity when the witness brought a civil suit for assault and battery, see Gregory v. Thompson, 500 F.2d 59, 61 (9th Cir. 1974), but these acts unquestionably could have been charged as crimes.

[246] *See* Rankin v. Howard, 633 F.2d 844, 846 (9th Cir. 1980); *see also* Joseph Cranney, *South Carolina: The State Where Judges Rule Themselves in Secret*, PROPUBLICA (Apr. 25, 2019, 12:00 AM), https://www.propublica.org/article/what-happens-when-judges-police-themselves-in-secret-not-much [https://perma.cc/X7YF-SDR4] (describing case against a judge accused of conspiring to award a family friend excessive fees).

[247] Dennis v. Sparks, 449 U.S. 24, 27 (1980); Eades v. Sterlinske, 810 F.2d 723, 724-25 (7th Cir. 1987); *cf.* Gage v. Provenzano, 571 F. App'x 111 (3d Cir. 2014) (accusing judge of violating various federal criminal statutes including RICO).

[248] For instance, as a primary actor in the "kids for cash" scandal, Federal Judge Mark Ciavarella, was convicted of racketeering, money-laundering, mail fraud, tax fraud, and conspiracy to defraud the United States, United States v. Ciavarella, 765 F. App'x 855, 856 (3d Cir. 2019), but he was held to have immunity against the civil claims brought on these facts. Wallace v. Powell, Nos. 3:09-CV-286, 3:09-CV-0291, 3:09-CV-0357, 3:09-CV-0630, 2009 WL 4051974, at *44 (M.D. Pa. 2009); *see also* Kern, *supra* note 131, at 151. Similarly, Georgia Judge Bryant Cochran was convicted of federal crimes after he sexually propositioned a litigant in his courtroom and conspired to have illegal drugs planted on her. United States v. Cochran, 682 F. App'x 828, 831 (11th Cir. 2017). However, the litigants' civil suit against Judge Cochran alleging the same facts was dismissed due to judicial immunity. *See* Garmley v. Cochran, No. 4:13-CV-0084-HLM, 2014 WL 12634301, at *20 (N.D. Ga. Sept. 4, 2014).

[249] Emily Hoerner & Zoë Rosenbaum, *In Illinois, Punishment is Slow and Lenient for Errant Judges*, INJUSTICE WATCH (Dec. 4, 2015), https://www.injusticewatch.org/projects/2015/illinois-court-commission-judge-punishment/ [https://perma.cc/DNJ3-SJFT].

disciplinary action,[250] let alone prosecutions. Moreover, there have been occasional reports of judges who have escaped prosecution despite engaging in high-profile criminal misconduct.[251] Although these data points may give rise to legitimate concerns, they do not suggest that judges routinely escape prosecution for criminal behavior. Yes, judicial review boards dismiss plenty of complaints from disaffected litigants, but few complaints allege (let alone substantiate) anything approaching criminal behavior,[252] so this fact tells us nothing about the way that criminal judicial conduct is treated. Further, a failure to prosecute can often be explained by legitimate evidentiary obstacles, rather than misplaced leniency for judicial defendants.[253] Certainly, prosecutors have discretion not to prosecute all manner of crimes,[254] so it may be that judges who commit less serious misconduct, even though technically criminal, will not be indicted. However, it is impossible to normatively assess the rarity of criminal prosecutions without comparing it to the actual incidence of criminal behavior among the judiciary, which is unknown. In sum, criminal prosecutions of judges are rare, but that rarity may appropriately reflect the rarity of criminal misconduct amongst judges. Indeed, at least one foreign commentator — Olowofoyeku — considers American prosecutors to zealously pursue American judges who commit crimes, at least compared to prosecutors from other countries. Olowofoyeku compares the essentially "unheard

[250] Berens & Shiffman, *Thousands of U.S. Judges*, *supra* note 121.

[251] Michael Berens & John Shiffman, *The Long Quest to Stop a "Sugar Daddy" Judge from Preying on Women*, REUTERS (July 14, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-judges-commissions/ [hereinafter Berens & Shiffman, *The Long Quest*].

[252] The Reuters report on judicial misconduct created a database containing information on every state's judicial misconduct complaints. The vast majority of these complaints alleged obviously non-criminal misconduct such as delayed rulings, discourteous treatment of litigants and minor campaign violations. Berens & Shiffman, *Thousands of U.S. Judges*, *supra* note 121 (containing searchable database of publicly disciplined judicial misconduct from 2008 through 2019).

[253] Berens & Shiffman, *The Long Quest*, *supra* note 251 (highlighting the difficulty of bringing successful prosecutions when "[a judge's] victims are people who typically make for poor witnesses — in this case, petty criminals and drug addicts.").

[254] *See, e.g.*, United States v. Woody, 2 F.2d 262, 262 (D. Mont. 1924) (noting that "the district attorney has absolute control over criminal prosecutions, and can dismiss or refuse to prosecute, any of them at his discretion").

of" criminal convictions of English judges, with the criminal convictions of American judges, which she described as "abound[ing]."[255]

In conclusion, the doctrine of judicial immunity eliminates civil law as a means of sanctioning and recompensing judicial misconduct, but it retains criminal law to pursue those same ends. Scholars have bemoaned the loss of civil tort remedies for victims of judicial misconduct, but they have overlooked the accountability opportunities provided by criminal law. For this reason, existing scholarly critiques are frequently incomplete and inadequately supported.

IV. THE JUDICIAL IMMUNITY DOCTRINE IN CIVIL AND CRIMINAL PROCEEDINGS: NORMATIVE CONCLUSIONS

Part III indicated that scholars should take account of criminal prosecutions when critiquing absolute judicial immunity for civil suits. This Part advances a similar recommendation for courts. As noted in Part II, the cases addressing judicial immunity for civil suits and criminal prosecutions diverge in their holdings as well as in the reasoning that ostensibly supports those holdings. Specifically, American courts rejecting judicial immunity for crimes typically assume both the existence and desirability of absolute judicial immunity for civil suits.[256] They then summarily conclude that extending that immunity to criminal prosecutions would not generate sufficient benefits to justify the costs.[257] The courts' reasoning is questionable, for the reasons discussed in Part II, but that does not mean that their conclusion is flawed. For that reason, Section A undertakes the more careful, thorough analysis currently lacking in judicial opinions. Specifically, it considers whether the sharp dichotomy in immunity rules between civil and criminal proceedings can be justified. Certainly, civil suits and criminal prosecutions differ in significant ways, and immunity in each context generates different costs and benefits. Indeed, to state my conclusions up front, I believe that immunity to criminal prosecutions generates more costs and fewer benefits than immunity to civil suits.

[255] OLOWOFOYEKU, *supra* note 60, at 77.

[256] *See* Dennis v. Sparks, 449 U.S. 24, 31 (1980); *see also* United States v. Isaacs, 493 F.2d. 1124, 1144 (7th Cir. 1974).

[257] *See, e.g.*, United States v. Hastings, 681 F.2d 706, 711 (1982).

So, in rejecting judicial immunity for crimes, American courts had a point. However, Section B concludes that the differential costs and benefits between civil and criminal law do not justify our current binary system through which judges possess absolute immunity against civil suits but no immunity whatsoever against criminal prosecutions. For that reason, Section B approaches the question holistically and develops an integrated doctrine that reduces the formalism of the current binary approach and more effectively advances the goals that judicial immunity is intended to serve.

A. Criminal Versus Civil Immunity: Can the Doctrinal Dichotomy Be Justified?

Although courts rejecting claims for criminal law immunity have provided little reasoned analysis to support their holdings, a careful examination shows that criminal prosecutions and civil suits differ in key ways and that these differences go a long way toward justifying the current doctrinal dichotomy. As I will explain in more detail below, civil suits present a greater threat to judges than criminal prosecutions both because judges are far more likely to be the target of a meritless civil suit than a meritless criminal prosecution and because the risk of a judgment against the judge is higher for a civil suit. Thus, because civil suits present a greater threat, immunity from these suits provides greater benefits, including to the value of judicial independence.

Two differences explain why judges are far more likely to face a meritless civil suit than a meritless criminal prosecution: the difference in litigants who launch the respective suits and the difference in the severity of the wrongdoing that makes up each claim. Turning to the first difference, judges are far more likely to disappoint private litigants — both for appropriate and inappropriate reasons — simply because they rule in so many of their cases. The average state court judge hears many hundreds, if not thousands, of cases per year,[258] each of which

[258] Although many states do not appear to keep detailed statistics on the number of cases its judges hear every year, some examples may be illustrative. California — the nation's most populous state, had 2,227 filings per "judicial position" during the 2021 Fiscal Year. JUD. COUNCIL OF CAL., 2022 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2011–12 THROUGH 2020–21, at 78 (2022). Wyoming, the nation's least populated state, had 24 District (trial) Judges during Fiscal Year 2022; there were 13,809 total cases

feature at least two (and sometimes many more) private litigants. Absent immunity, any one of these litigants could sue the judge for civil money damages. Indeed, in spite of the long-standing, well-established, iron-clad rule absolutely immunizing judges from civil money damage awards, aggrieved litigants continue to bring civil lawsuits against judges.[259] Concededly, the average judge also presides over a large number of criminal cases in which local prosecutors are parties. But assuming a minimally competent judge, we should expect that large numbers of private litigants — each of whom have only one case before the judge — present a far greater likelihood of disgruntlement and subsequent litigation than a dramatically smaller number of prosecutors, each of whom litigates large numbers of criminal cases before the judge.

It is not only that judicial rulings will disappoint a larger number of private litigants but, more importantly, that disappointed private litigants are far more likely to bring a civil suit against a judge than a prosecutor is to launch a criminal prosecution. Certainly, the expense of litigation deters many disaffected litigants from filing suit, but lawyers' fees constitute the bulk of litigation expense, and a large proportion of private litigants who do sue their judges do so pro se.[260]

in District Court during FY2022 for an average of 575 (rounded) cases per judge. JUD. BRANCH OF THE STATE WYO., DISTRICT COURT ANNUAL STATISTICAL REPORT: FISCAL YEAR 2022, at 9 (2022); *About the District Courts*, JUD. BRANCH OF THE STATE WYO., https://www.courts.state.wy.us/district-courts/about-the-district-courts/ (last visited Aug. 30, 2024) [https://perma.cc/9JNG-KXUQ]. By contrast, the average federal district judges closes approximately 250 case per year. *Some Judges Handle Inordinate Caseloads*, TRAC REPS. (Mar. 14, 2018), https://trac.syr.edu/tracreports/judge/501/#:~:text=Civil%20Workloads%20Can%20Vary%20Because%20of%20Special%20Assignments&text=In%20contrast%2C%20the%20typical%20active,and%20had%20268%20pending%20cases [https://perma.cc/8Q5K-74ZU].

[259] *See, e.g.*, cases cited *supra* note 245.

[260] *See, e.g.*, Smith v. Dobin, 852 F. App'x 49 (3d Cir. 2021) (describing a pro se suit against a judge and others relating to a previous bankruptcy case); Brady v. Ostrager, 834 F. App'x 616 (2d Cir. 2020) (describing pro se RICO suit against judge and others); Williams v. Sontchi, 840 F. App'x 669 (3d Cir. 2020) (describing pro se suit against judge and others relating to previous bankruptcy case); Martinez v. Eagle Disposal, 783 F. App'x 206 (3d Cir. 2019) (describing a pro se suit against a judge and others based on an employment dispute); Fake v. City of Phila., 704 F. App'x 214 (3d Cir. 2017) (describing a pro se suit against multiple judges and others based on a previous divorce case); Fake v. Pennsylvania, 758 F. App'x 307 (3d Cir. 2018) (describing a follow-up pro se suit to

previously cited case); Selig v. N. Whitehall Twp. Zoning Hearing Bd., 653 F. App'x 155 (3d Cir. 2016) (describing pro se suit against judge and others, alleging a due process violation); Day v. Florida, 563 F. App'x 878 (3d Cir. 2014) (describing a pro se suit against judge, his staff, and others because of a traffic citation); Gage v. Provenzano, 571 F. App'x 111 (3d Cir. 2014) (describing a pro se suit against a judge and others based on a previous foreclosure and eviction case); Poku v. Himelman, 448 F. App'x 217 (3d Cir. 2011) (describing a pro se suit against police officers and state judges); Stumpf v. Maywalt, 605 F. Supp. 3d 511 (W.D.N.Y. 2022) (describing a pro se suit against judge and others relating to a custody case); Verogna v. Johnstone, 583 F. Supp. 3d 331 (D.N.H. 2022) (describing a pro se suit against a judge and others because the judge had dismissed a previous suit); Brooks v. Love, 527 F. Supp. 3d 113 (D. Mass. 2021) (describing a pro se suit against judge and others relating to a custody case); Cox v. Civ. Courthouse State Judges & Staff, 544 F. Supp. 3d 1180 (D.N.M. 2021) (describing a pro se suit by inmate against judges and others relating to previous criminal prosecutions); Dominic v. Goldman, 560 F. Supp. 3d 579 (D.N.H. 2021) (describing a pro se suit against a judge and others relating to an estate dispute); Hueter v. Kruse, 576 F. Supp. 3d 743 (D. Haw. 2021) (describing pro se suit by citizens of American Samoa against the Chief Justice of the High Court of American Samoa and others); Humphrey v. Pa. Ct. of Common Pleas, 462 F. Supp. 3d 532 (E.D. Pa. 2020) (describing a pro se suit against a judge and others related to child custody); Warren v. Lehigh Cnty. Ct. of Common Pleas, 351 F. Supp. 3d 835 (E.D. Pa. 2019) (describing a pro se suit brought by an inmate against a judge and others); Harbison v. U.S. Senate Comm. on Foreign Rels., 839 F. Supp. 2d 99 (D.D.C. 2012) (describing pro se suit against judges and others relating to previous divorce case); Smith v. Meyers, 843 F. Supp. 2d 499 (D. Del. 2012) (describing a pro se suit against judges alleging fraud and violations of the Thirteenth and Fourteenth Amendments); Goodson v. Maggi, 797 F. Supp. 2d 604 (W.D. Pa. 2011) (describing a pro se suit against a judge relating to a previous termination of parental rights case); Smith v. Stark, 777 F. Supp. 2d 795 (D. Del. 2011) (describing pro se suit against judges related to a real estate dispute); Acres v. Marston, 72 Cal. App. 5th 417 (Cal. Ct. App. 2021) (describing a pro se suit against an Indian tribal court judge and others alleging a wrongful filing of a lawsuit and other misdeeds); Bozek v. Bank of Am., 191 N.E.3d 709 (Ill. App. Ct. 2021) (describing a pro se suit against a judge and others relating to underlying foreclosure and eviction cases); Ellis v. Flannery, 189 N.E.3d 978 (Ill. App. Ct. 2021) (describing a pro se suit against a judge for failing to grant the plaintiff a fee waiver); Herigodt v. Town of Golden Meadow, 321 So. 3d 1004 (La. Ct. App. 2021) (describing pro se suit against a municipality relating to a traffic citation); Levier v. Trahan, 309 So. 3d 779 (La. Ct. App. 2020) (describing pro se suit against judge relating to previous criminal conviction); Chasan v. Platt, 244 A.3d 73 (Pa. Commw. Ct. 2020) (describing pro se suit against judge for defamation).

The prevalence of pro se suits against judges may reflect litigants' inability or unwillingness to spend additional money on lawyers. But it also may stem from the fact that absolute judicial immunity is so well-established that any reputable lawyer would strongly advise a disappointed litigant against filing suit, understanding that the suit will be promptly dismissed. Interestingly and possibly relatedly, "[l]awyers almost never file

Thus, if suits against judges were not blocked by judicial immunity, disgruntled litigants proceeding pro se would incur essentially no costs and face essentially no obstacles in seeking money damages from the judges who ruled in their cases. By contrast, a prosecutor seeking to criminally indict a judge faces costs and obstacles galore. Prosecutors are government officials whose work is subject to various strictures. At the very least, when bringing an indictment, prosecutors are bound to comply with the relevant procedural and evidentiary standards.[261] Prosecutors are also accountable in some fashion to the local community. Some prosecutors are elected whereas others are appointed,[262] but all prosecutors are accountable for their actions both to their superiors and to the public at large.

Finally, absent immunity, judges not only would face more civil lawsuits than criminal prosecutions, but they would also face more meritless (probably even frivolous) civil lawsuits. Because judges are absolutely immune, the civil lawsuits brought against them are invariably dismissed on immunity grounds. For that reason, the factual bases of these suits are not well-developed in the litigation, and it is often difficult to assess whether these suits allege facts that, if proven, would justify a damage award.[263] But even the summary facts contained

[ethics] complaints against judges; theirs make up roughly 1% of the hundreds that roll in each year." Cranney, *supra* note 246.

[261] *See* FED. R. CRIM. P. 7(c)(1) ("The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government."). For an example of a similar state provision, see, for example, VA. CODE ANN. § 19.2-17 (West 2023). For an academic discussion of the general rules binding prosecutors, see *Prosecutorial Discretion*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 269, 274 (2017). For the America Bar Association's professional practical guidance for prosecutors, see ABA, CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, 3-4.6(a) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunction FourthEdition/ ("A prosecutor should not seek an indictment unless the prosecutor reasonably believes the charges are supported by probable cause and that there will be admissible evidence sufficient to support the charges beyond reasonable doubt at trial.").

[262] *See* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1550-51 (2020).

[263] *See, e.g.*, *Smith v. Dobin*, 852 F. App'x 49; Kelsey v. Clark, No. 22-22, 2023 WL 1980307 (2d Cir. 2023); *Brady*, 834 F. App'x 616; Malhan v. Katz, 830 F. App'x 369 (3d Cir.

in some opinions make clear that they would not.[264] Also telling is that many litigants not only sue the judge who presided over their litigation, but include as co-defendants a passel of other governmental officials, and indeed seem to serve process on anyone who had anything whatsoever to do with their initial lawsuit.[265] This let's-sue-everyone

2020); *Fake v. Pennsylvania*, 758 F. App'x 307; *Day*, 563 F. App'x 878; Williams v. Sepe, 487 F.2d 913, 914 (5th Cir. 1973); *Brooks*, 527 F. Supp. 3d 113.

[264] *See, e.g.*, Lund v. Cowan, 5 F.4th 964 (9th Cir. 2021) (describing suit against judge for appointing a guardian ad litem to a person the judge believed to have Down Syndrome); *Martinez*, 783 F. App'x 206 (describing a suit against a judge and others related to an employment dispute); Tarapchak v. Lackawanna Cnty., 173 F. Supp. 3d 57 (M.D. Pa. 2016) (describing suit against judge and others for revoking the plaintiff's bail in a criminal case); Montana v. Connor, 817 F. Supp. 2d 440 (D.N.J. 2011) (describing suit against judge by family crisis counselor because the judge had banned the counselor from his courtroom); *Maggi*, 797 F. Supp. 2d 604 (describing a suit against a judge who terminated the plaintiff's parental rights); Hise v. Bordeaux, 364 Ga. App. 138 (Ga. Ct. App. 2022) (description of suit against a probate judge for denying the plaintiff a firearm carry license); Stalnacker v. Dolan, 631 S.W.3d 658 (Mo. Ct. App. 2021) (describing suit against judge for revoking the plaintiff's probation); *Bozek v. Bank of Am.*, 191 N.E.3d 709 (description of suit by mortgagor against judge and mortgagees because of foreclosure and eviction case).

[265] *See, e.g.*, *Martinez*, 783 F. App'x 206 (suit against federal judge, the United States, the FBI, and multiple former and prospective employers of the plaintiff); *Fake v. City of Phila.*, 704 F. App'x 214 (suit claiming against forty-four defendants); *Selig*, 653 F. App'x 155 (suit against judge and zoning board); Dykes v. Hosemann, 743 F.2d 1488 (11th Cir. 1984) (suit against five defendants); Hamilton v. Jasperson, 602 F. Supp. 3d 1347 (D. Nev. 2022) (suit against justice of the peace and county); Ortiz v. Foxx, 596 F. Supp. 3d 1100, 1109 (N.D. Ill. 2022) (describing a separate case where the Supreme Court did not allow a class action suit against a class that "would have eventually included 'certification of a class including all Texas state-court judges and clerks and defendants'"); *Verogna*, 583 F. Supp. 3d 33 (suit against judges and attorneys for social media site); *Dominic*, 560 F. Supp. 3d 579 (suit against probate judge, clerk of court, attorneys for estate, and special administrator for estate); *Hueter*, 576 F. Supp. 3d 743 (suit against United States Secretary of the Interior, the Chief Justice of the High Court of American Samoa, and an attorney); *Cox*, 544 F. Supp. 3d 1180 (suit against judges, judicial staff, correctional workers, public defenders, and others); *Tarapchak*, 173 F. Supp. 3d 57 (suit against judges, county, director of county's house arrest program, and others); *Harbison*, 839 F. Supp. 2d 99 (suit against multiple state and federal government employees, government agencies, judges, and others); Ingram v. Twp. of Deptford, 858 F. Supp. 2d 386 (D.N.J. 2012) (suit against township, police department, and police officer); Doe v. Lake Cnty., 399 F. Supp. 553 (N.D. Ind. 1975) (suit against judges, county, and others); *Acres*, 72 Cal. App. 5th 417 (suit against tribal casino officials, casino attorneys, tribal court judge, tribal court clerk, and others); Henry v. City of Mount Dora, No. 5D21-1387, 2022 Fla.

approach provides further evidence that civil litigation against judges commonly manifests the disaffection and disgruntlement of losing a lawsuit rather than provable judicial wrongdoing.

To be sure, it is not only private litigants who are capable of launching meritless litigation against judges; malicious prosecutors could also indict judges on spurious grounds. But apparently, they rarely do. As we know, judges are not immune from criminal prosecutions, so prosecutors inclined to launch malicious prosecutions have always been able to do so. Yet, there have been no allegations of such prosecutorial misconduct. Instead, if prosecutors face any accusations concerning their treatment of judges, it is that they under- not over-prosecute.[266] Moreover, the factors just canvassed explain why malicious prosecutions of judges are so uncommon. As noted, pro se litigants are not governed by ethics codes or other specialized procedural strictures, so they have little to lose by bringing a meritless case. By contrast, prosecutors who bring groundless indictments violate core norms (as well as laws)[267] and thereby subject themselves to serious consequences including removal and disbarment.[268] Given the risks to prosecutors,

App. LEXIS 9021 (Fla. Dist. Ct. App. 2022) (suit against state court judges, probation officer, Florida Bar officials, and member of Bar grievance committee).

[266] *See* Berens & Shiffman, *The Long Quest*, *supra* note 251.

[267] *See* MODEL CODE OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 1983) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact . . . that is not frivolous."); MODEL CODE OF PRO. CONDUCT r. 3.8 (AM. BAR. ASS'N 1983) ("The prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . ."). *See generally* Thompson v. Clark, 596 U.S. 36 (2022) (holding that a prosecutor is civilly liable under 42 U.S.C.S. § 1983 for malicious prosecution when the prosecutor (i) initiates a proceeding without probable cause (ii) with malicious motive and (iii) the prosecution ended without a conviction); Hartman v. Moore, 547 U.S. 250, 265 (2006) (showing an absence of probable cause behind criminal charges can substantiate a claim that the prosecutor was unconstitutionally influenced by an intent of retaliation or other officials bent on retaliation).

[268] *See, e.g.*, Kalina v. Fletcher, 522 U.S. 118 (1997) (holding the prosecutor liable for creating false statements of fact to determine probable cause in filing criminal charges); State v. Cannady, 78 N.C. 539, 541 (1878) ("The acquittal of the defendant is substantially the conviction of the prosecutor, where the prosecution is frivolous or malicious.") (ordering the prosecutor to pay costs of the proceeding and remain in custody until costs were paid after finding the prosecution was without cause, frivolous and malicious); *In re* Leonhardt, 930 P.2d 844 (Or. 1997) (disbarring state prosecutor for

one has to believe that malicious prosecutions — of anyone — are a rarity. Further, to the extent that prosecutors do bring malicious, or even just meritless prosecutions, data on wrongful convictions suggests their consequences are far more likely to befall people of color and those of lower socio-economic status.[269] There is, thus, little basis for assuming that prosecutors would frequently set spiteful sights even on fellow lawyers, let alone on lawyers who have attained the exalted status of judge. Consequently, it is reasonable to assume that in virtually every case in which prosecutors criminally charge judges, they ground those charges on firm factual and evidentiary bases.

The second reason that judges are far more likely to face meritless civil lawsuits than criminal prosecutions is that a far broader range of harms are compensable as civil wrongs than are punishable as crimes. Said differently, crimes (which are viewed as wrongs against both society and individual victims) are a subset of the wrongs compensable as torts (which are viewed solely as wrongs against individual victims).[270] Thus, all things being equal, civil proceedings that permit claims for a wider range of harms are likely to be more plentiful than criminal proceedings which must center on a narrower (and typically more severe) set of harms.

A final reason that civil suits constitute a greater threat to judges than criminal prosecutions is that civil suits present a greater likelihood of

pursuing a criminal indictment without probable cause, falsifying public records, and lying about the altercations).

[269] *See* MAURICE POSSLEY, KEN OTTERBOURG, KLARA STEPHENS & JESSICA WEINSTOCK PAREDES, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES iii (Samuel R. Gross & Barbara O'Brien eds., 2022) (finding that "innocent Black Americans are seven times more likely than white Americans to be falsely convicted of serious crimes," such as murder, sexual assault and drug crimes); *see also* Ellen Yaroshefsky & Laura Schaefer, *Defense Lawyering and Wrongful Convictions*, *in* EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD (Allison D. Redlich, James R. Acker, Robert J. Norris & Catherine L. Bonventre eds., 2014) 123, 129 (finding 70% of those wrongfully convicted and exonerated by DNA evidence in August 2013 were represented by public defenders in their original criminal proceedings).

[270] *See* Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit The Crime?*, 60 ALB. L. REV. 579, 582 (1997) ("Torts are viewed as private wrongs, and . . . society allows tortfeasors to expiate their wrongs by compensating the victims of their actions. Crimes, on the other hand, are acts which involve moral culpability or special harm to the whole community.").

bad outcomes to judges. For one thing, it is much easier for a plaintiff to win a civil money damage award than for a prosecutor to secure a conviction on the same facts. The standard of proof that prosecutors must meet — beyond a reasonable doubt — is much higher than the preponderance of the evidence standard that civil plaintiffs must meet.[271] Similarly, all state and federal courts require a unanimous jury verdict to convict a defendant of a crime, as the Supreme Court has deemed anything less to violate the defendant's Sixth and Fourteenth Amendment rights.[272]By contrast, many states permit non-unanimous jury verdicts in civil cases.[273] Finally, criminal defendants possess a host of due process rights that impede prosecutors' efforts to prove their cases.[274] Just a couple of examples include the criminal defendant's right

[271] *In re* Winship, 397 U.S. 358, 371-72 (1970) (holding the preponderance of evidence standard only requires the trier of fact to find the facts more probable than not, while beyond a reasonable doubt is the more "stringent standard" required for criminal prosecutions).

[272] Ramos v. Louisiana, 590 U.S. 83, 83 (2020) (holding the Sixth Amendment right to jury trial, as adopted by states in the Fourteenth Amendment, requires a unanimous jury verdict to convict a defendant of a crime); *see also* OR. REV. STAT. § 136.450(1) (2021) ("A jury in a criminal action may render a verdict of guilty only by unanimous agreement.") (amended from supermajority requirement in 2021); Watkins v. Ackley, 523 P.3d 86, 89 (Or. 2022) (prohibiting non-unanimous criminal convictions in Oregon state court and recognizing a right of action to those convicted by a non-unanimous jury, even before the Ramos ruling in 2020); *U.S. Supreme Court Mandates Juror Unanimity in State Criminal Trials*, ABA (July 23, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/supreme-court-mandates-unanimity-in-state-criminal-trials/ (noting Oregon was the only state that did not have an unanimous jury verdict rule at the time of the *Ramos* decision). Oregon, as the last straggler of the *Ramos* decision, completes the nationwide requirement of unanimous jury verdicts to convict a defendant in a criminal proceeding.

[273] *See, e.g.*, Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 203 (2006) (detailing the many states that permit non-unanimous jury verdicts for civil cases).

[274] *See* Nancy Amoury Combs, Comment, *Understanding Kaye Scholer: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer*, 82 CALIF. L. REV. 663, 693 (1994) ("Although the government's goal of punishing those who fail to conform their behavior to the substantive criminal law is undoubtedly legitimate and desirable, criminal adjudication is nonetheless characterized by constitutional guarantees and structural features that are designed to frustrate the efficient attainment of that goal.").

against self-incrimination,[275] which has no civil law analogue,[276] and the far greater discovery obligations placed on civil defendants than on their criminal counterparts.[277]

Admittedly, although judges are more likely to face bad outcomes when sued civilly, the severity of these bad outcomes is lower. Specifically, the worst outcome for a judge in a civil suit is an order to pay substantial money damages, whereas conviction of a crime could result in jail time. Although this punishment differential does present a countervailing factor, I do not believe it substantial enough to undermine the overall conclusion that civil suits present a greater threat to judges — and thereby to judicial independence — than criminal prosecutions. For that reason, immunity from civil suits provides society greater benefits.

Finally, immunity from civil suits not only provides society greater benefits than immunity from criminal prosecutions, but it does so at a reduced cost. Recent scholarship rejects the sharp distinctions that had been thought to exist between criminal law and civil law.[278] However, for our more straightforward purposes, it remains fair to say civil tort suits exist primarily to recompense individual victims who have suffered harm whereas criminal prosecutions not only vindicate the rights of individual victims but also society as a whole. Indeed, a wrongful act is denominated a "crime" in addition to a tort primarily because society has determined the act to be so wrongful that the state needs to impose

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[275] U.S. CONST. amend. V.

[276] *See* FED. R. CIV. P. 45(a)(1)(A)(iii) (stating that subpoenas can and must "command each person to whom it is directed to . . . testify"); *see also* Chavez v. Martinez, 538 U.S. 760, 768, 771-72 (2003) (upholding that a witness *can* be compelled to give incriminating testimony as long as the information derived from the testimony cannot be used against them in a pending or future criminal case); Ullman v. United States, 350 U.S. 422, 430 (1956) (testimony may be compelled even if it leads to "loss of job" and "general public opprobrium," as long as there is immunity from criminal prosecution).

[277] *See* Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962) ("While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. . . . Separate policies and objectives support these different rules.").

[278] *See* sources cited *supra* note 31.

its own punishment to vindicate society's interest.[279] Consequently, immunity from criminal prosecution imposes costs not just on the individual victim of the judge's wrongful act but also on the larger community.

B. Toward an Integrated Approach to Judicial Immunity

Section A showed that the distinction American law draws between civil law and criminal law judicial immunity can be explained and justified by real differences in the costs and benefits that immunity generates in those differing contexts. Specifically, judicial immunity imposes greater costs and produces fewer benefits when it shields judges from criminal liability. This does not mean that the Anglo-American jurisdictions that provide their judges absolute immunity against all suits — civil and criminal — necessarily have gotten it wrong. Even though criminal law immunity does not deliver the same "bang for the buck" as civil law immunity, policymakers could reasonably conclude that it delivers enough "bang," or they could value uniformity in immunity rules over more carefully calibrated distinctions. What Section A's analysis does mean, however, is that American law's denial of judicial immunity for criminal prosecutions is also defensible.

Although Section A's analysis militates against extending absolute judicial immunity to criminal prosecutions, most American scholarship seeks to reform — and specifically to limit — judicial immunity for civil suits. Some scholars would do so by imposing procedural limits[280] whereas others would reduce the classes of persons who can claim immunity.[281] However, the majority of scholars propose limiting the doctrine on the basis of the judge's mindset.[282] Although different commentators advance slightly different standards, the general thrust of their proposals is to limit judicial immunity to judicial acts taken in

[279] As Henry Hart famously put it, crimes are those acts which "incur a formal and solemn pronouncement of the moral condemnation of the community." Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 405 (1958).

[280] *See* sources cited *supra* notes 208–210.

[281] *See* sources cited *supra* note 207.

[282] *See* Harris, *supra* note 103, at 514 ("The suggestion most often made is that judicial immunity should be qualified so as not to extend to unlawful judicial action where malice, bad faith, gross negligence, or recklessness are proved by the plaintiff.").

good faith.[283] Said conversely, these scholars would deny judicial immunity when the acts in question were "malicious," which they typically define as "done with actual knowledge that [the act] was incorrect or with reckless disregard of whether it was incorrect or not."[284] In criminal law terms, we might describe this standard as denying immunity to judges who act with a culpable mens rea.

These scholarly proposals wholly ignore the dichotomy that stands at the center of this Article — between civil law and criminal law immunity rules. Yet the distinction these scholars do draw aligns meaningfully with that dichotomy, and it shows how criminal law can enable us to develop a justifiable — yet workable — standard for civil law judicial immunity. First, let us consider the alignment. Scholarly proposals to withhold judicial immunity for malicious acts recognize that the costs and benefits generated by judicial immunity vary according to the nature of the act that is to be immunized. In particular, they recognize

[283] *See, e.g.*, Feinman & Cohen, *supra* note 45, at 261-62 (describing scholarly proposals based on the UK case *Sirros v. Moore* which established immunity only for judicial acts taken in good faith).

[284] Block, *supra* note 76, at 922 (alteration in original); *see also* OLOWOFOYEKU, *supra* note 60, at 205; Barth, *supra* note 15, at 767, 767 n.237 (advocating adoption of a malice standard similar to *New York Times Co. v. Sullivan*, which held that "liability will result when the act is done with 'knowledge that it was false or with reckless disregard of whether it was false or not'" (citing New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)); Law, *supra* note 140, at 482; Nagel, *supra* note 140, at 259 (advocating judicial liability for "unreasonable or knowing violations of constitutional rights"); Sinclair, *supra* note 186, at 158-59; Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 322 (1969).

Some commentators would hold judges to a negligence standard, John E. Johnson, *Comments*, 4 OTTAWA L. REV. 627, 634 (1971), though most reject it as difficult to administer, Barth, *supra* note 15, at 767, and imposing too onerous a burden on judges, Barth, *supra* note 15, at 767; Harris, *supra* note 103, at 515; Sinclair, *supra* note 186, at 159. Other commentators would impose requirements additional to the judge meeting the malice standard, particularly in specific contexts. *See* Kates, *supra* note 132, at 624 (proposing judicial liability under § 1983 when "(1) [the judge] has knowingly erred as to law or fact, or both, or erred with reckless disregard of making the proper decision, and (2) if this was done for the purpose of harming the victim or discriminating against the victim or his class or of depriving him of constitutional rights"); Kern, *supra* note 131, at 152 (proposing to disqualify "a judge from being protected by absolute judicial immunity if the judicial conduct is sanctionable under the state or federal version of the Model Code of Judicial Conduct and if the judge acted with malice").

that immunizing judicial acts born from a judge's intentional or reckless misconduct generates greater costs and fewer benefits than immunizing judicial acts born from a judge's innocent or negligent mistakes.[285] As Section A just showed, the sharp dichotomy between civil law and criminal law immunity rules encapsulates that same conclusion. Specifically, it showed that immunizing criminal acts generates greater costs and fewer benefits than immunizing civil acts. A number of factors support this analysis, but perhaps the core insight is the inverse relationship between the wrongfulness of the act and the benefits gained from immunizing that act. Meanwhile, the convergence between the reformers' proposals and the criminal-civil law dichotomy is unsurprising because most of the malicious acts for which reformers would deny immunity also could be charged as crimes.

Although proposals to deny immunity for malicious judicial acts are theoretically compelling for the reasons just mentioned as well as additional reasons appearing in the scholarship itself, these proposals have never seriously been considered by policy makers largely because they would confront serious practical difficulties. Crafting a malice standard with sufficient precision stands as one such difficulty.[286] But a far more significant challenge relates to the practical effect of exempting malicious acts from immunity.[287] It has been pointed out, for instance, that if the law denies immunity to malicious acts, then aggrieved litigants would immediately allege that the judge's conduct had been "malicious," and the truth of those allegations would need to be litigated at trial.[288] Judges would thus be forced to incur the costs of retaining legal counsel and the stress of litigation.[289] This crucial difficulty was recognized as early as 1872 by the Supreme Court in *Bradley v. Fisher*.[290] More recently, Schuck pointed to the experience

[285] Barth, *supra* note 15, at 741-42 n.88.

[286] *See* Harris, *supra* note 103, at 515. *But see* Sinclair, *supra* note 186, at 158 (rejecting this claim).

[287] *Cf.* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 89 (1983) ("To officials at risk of being sued, the difference between absolute and qualified immunity is crucial.").

[288] *See* Block, *supra* note 76, at 922.

[289] *See* Frank Q. Nebeker, *The Judge Needs a Lawyer*, 29 CATH. U. L. REV. 751, 752, 758-61 (1980).

[290] Bradley v. Fisher, 80 U.S. 335, 354 (1872).

with the malice standard in qualified immunity cases to observe that "plaintiffs can easily allege the requisite malice or reckless disregard of their rights to survive a motion to dismiss. Thus, liability claims, however groundless, will have to proceed to trial on that issue, thereby defeating a central purpose of the immunity doctrine."[291] And the problem extends beyond proposals to deny immunity for malicious acts. Proposals to reform the immunity doctrine's judicial act element[292] or its jurisdictional limitation[293] give rise to similar concerns. As Feinman and Cohen point out: "Anything less than a nearly complete rule of immunity . . . carries the potential for litigation that will proceed through the system and require elaborate factfinding and judicial participation before decision."[294]

But that is where criminal law can provide both principled and practical solutions. Instead of eliminating civil-law immunity for malicious judicial acts, I propose eliminating civil law immunity for judicial acts that stand as crimes. Doing so will (1) more effectively advance the goals that immunity is designed to serve; (2) unify criminal law and civil law judicial immunity rules into a more coherent whole; and (3) avoid the practical difficulties that previous reform proposals would produce. This final benefit will require a further tweak, which will be discussed below.

First, however, we need only briefly review why denying civil law immunity for judicial acts that are crimes better advances the policies underlying judicial immunity because the general thrust of this point has been addressed previously. Specifically, immunity rules are costly in that they prevent victims from pursuing legitimate claims and receiving deserved compensation. They must, therefore, be justified by important societal benefits. The costs of immunity and the benefits that it can be expected to produce, however, vary according to the wrongfulness of the

[291] Schuck, *supra* note 16, at 666-67; *see also* Harris, *supra* note 103, at 515-16.

[292] *See* Rosenberg, *supra* note 16, at 848 (recommending a "narrow definition" for the judicial act requirement).

[293] *See, e.g.*, Monica V. Pennisi, Note, Simmons v. Conger: *The Illusive Nature of Judicial Accountability*, 7 WIDENER J. PUB. L. 177, 213-18 (1997) (arguing that "[i]f ill will or malfeasance in the decision-making is evident, the judicial officer has acted wrongly and in excess of his jurisdiction and should be liable for the consequences of those actions").

[294] Feinman & Cohen, *supra* note 45, at 273.

act to be immunized. Immunizing acts that are so wrongful that society has deemed them crimes is particularly costly and not apt to provide benefits sufficient to outweigh those costs. Absolute judicial immunity is inefficient in that it over-immunizes in general, and it immunizes in circumstances where the costs exceed the benefits in particular. Thus, eliminating civil law immunity for judicial acts that are crimes better advances the goals driving the immunity doctrine.

Eliminating judicial immunity for acts that are crimes would also help to unify and provide greater coherence to what now stand as two discrete, entirely independent judicial immunity doctrines. Because these doctrines are wholly separate, the same judicial act is treated in a diametrically opposite way depending on whether the act is the subject of a civil suit (in which case the act is fully immunized) or a criminal prosecution (in which case the act receives no immunity whatsoever). On its face, this differing treatment is problematic. If immunity for an act is not appropriate when the act forms the basis of a criminal prosecution, then why should the same act be immunized so as to prevent victims from receiving compensation? To be sure, it is neither new nor controversial that one and the same act is characterizable either as a civil wrong or as a crime and that such characterization subjects the act to vastly different treatment.[295] But the goals ostensibly advanced by immunity rules do not vary in accordance with this characterization. That is, if society would garner a net gain from immunizing an act, then that act should be immunized regardless of whether it forms the target of a civil suit or a criminal prosecution. Another way of conceptualizing the issue is this: American law is clear that crimes do not benefit from judicial immunity. That conclusion should hold regardless of the forum in which the crime is adjudicated. At present, judges have no immunity for crimes when those crimes are adjudicated and punished through criminal prosecutions, but they do have immunity when those crimes[296] are adjudicated through civil suits. However, the immunity of a criminal act should transcend these differences and remain constant across fora. Denying judicial immunity for crimes regardless of the forum, then, will

[295] At a minimum, criminal prosecutions feature different procedures, different evidentiary rules, and of course different outcomes for a losing defendant. *See* Cheh, *supra* note 31, at 1325.

[296] Labeled as torts.

usefully integrate the two judicial immunity doctrines by marginally extending the no-immunity-for-crimes rule to civil suits and by marginally restricting absolute judicial immunity to exempt suits that target judicial crimes.

Finally, we must consider the practical effects of my proposal since such effects have derailed other principled reform efforts. Proposals to deny judicial immunity for malicious acts, for instance, foundered on the realization that the reform would spawn an army of plaintiffs claiming malicious judicial acts, and insisting on trials to prove their claims. Denying judicial immunity for crimes, without additional safeguards, would likely produce a similar result. That is, if immunity were denied when plaintiffs were able to allege judicial acts that, if proven, would constitute a crime, then plaintiffs would likely allege that the judge in question had engaged in criminal acts. These judges would then need to retain counsel and proceed to trial (or at least engage in substantial discovery) in order to disprove the allegations of criminality.

Consequently, if an immunity exception for crimes is to avoid these fatal difficulties, the exception must be defined to contain some initial and objective confirmation that the immunity exception should in fact apply. One possibility would be to except from immunity only acts for which the judge was already criminally convicted. Such a rule would be an improvement over current doctrine, which has permitted judges to be convicted of crimes but precluded the judges' victims from recovering compensation for those same acts or crimes. However, conditioning the immunity exception on an actual criminal conviction seems both unnecessary and overly protective. Indeed, because criminal prosecutions must meet a higher standard of proof and overcome defendant-friendly due process protections, judges could be acquitted in their criminal trials although the crimes could be easily proven in less procedurally demanding civil trials.

In sum, denying immunity for any acts that can be alleged to be criminal is insufficiently protective of judges, yet granting immunity except for acts that form the basis of a previous criminal conviction is overly protective of judges. The Goldilocks solution, therefore, is to grant immunity except for acts that become the subject of a criminal indictment. Before bringing an indictment, prosecutors must gather evidence and conduct good-faith investigations. If those investigations

convince prosecutors to bring an indictment, then the allegations of judicial criminality are sufficiently plausible that immunity should be denied even if the judge is thereafter acquitted of the criminal charges. The indictment thereby provides a much-needed objective basis for civil-law claims of criminality without imposing an unduly high standard.

Conclusion

Whether it is the sweeping presidential immunity that former President Trump has claimed or the qualified immunity that often prevents the victims of police brutality from receiving compensation, immunities stand as a hotly contested feature of the American legal system. Judicial immunity — which was developed by judges to protect judges[297] — is no exception. Indeed, although judicial immunity has generated controversy throughout its lengthy lifespan, its unpopularity is particularly striking now because public confidence in the judiciary has hit an all-time low.[298] Perhaps due to swirling ethics controversies[299] and the increasing politicization of the judiciary,[300] America has lost faith in its judges. And the valuable gift of absolute immunity that judges have bestowed on themselves does not help to restore the judiciary's reputation.

Absolute judicial immunity, therefore, presents an easy target for academic critique, and scholars have spared no vitriol in seeking its reform. However, their reform proposals, though plausible on their face, are flawed both conceptually and practically. Their conceptual flaw stems from their overly narrow focus on civil suits. Specifically, while

[297] *See* Nagel, *supra* note 140, at 237 (highlighting "the spectacle of the judiciary exposing virtually all other government officials to the threat of personal liability while carefully maintaining immunity for judges"); *Judicial Immunity at the* (*Second*) *Founding*, *supra* note 17, at 1476.

[298] Carol Funk, *Public Confidence and the Courts: Pillars of the Rule of Law*, ABA (Feb. 17, 2023), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2023/winter/public-confidence-and-the-courts/.

[299] *See supra* text accompanying note 22.

[300] Andrew Breiner, *How Did the Courts Become So Politicized?*, LIBR. OF CONG. BLOGS (Sept. 21, 2021), https://blogs.loc.gov/kluge/2021/09/how-did-the-courts-become-so-politicized/ [https://perma.cc/NT5B-3XNQ].

crafting their own far-reaching civil immunity, American judges left themselves vulnerable to criminal prosecution for their illegal judicial acts. Although this criminal vulnerability should significantly impact our normative understanding of absolute judicial immunity for civil suits, scholars have largely ignored it. This Article helps to remedy that oversight by highlighting the role that criminal law can play in advancing judicial accountability and victim recompense following judicial wrongdoing.

That said, it is the scholarly proposals' far more impactful practical flaws that have rendered the proposals confined to the pages of law review articles instead of spurring judicial or legislative reforms. Like it or not, judicial immunity helps to safeguard an important value: judicial independence. So, any viable reform must take pains not to undermine that value. On their face, scholarly proposals easily meet that standard. No one, to my knowledge, suggests eliminating judicial immunity entirely; rather, reformers seek to limit it in ways that will reduce societal costs while preserving judicial independence. Although these proposals strike defensible — even compelling — balances on paper, in the real world, the balances would play out to the untenable detriment of judicial independence. Specifically, under these proposals, judges who were sued would be forced to retain counsel and proceed either to trial or through substantial discovery. Thus, although immunity ostensibly remains, its ability to advance the goals for which it was created would be sharply reduced.

Again, however, criminal law provides a way forward. Rather than limiting judicial immunity in ways that would undermine core values, this Article proposes harmonizing the treatment of those judicial acts that are both torts and crimes. Whereas current law denies judges immunity for criminal prosecutions while simultaneously immunizing the very same acts against civil damage suits, this Article recommends eliminating judicial immunity across the board for acts that constitute crimes. Doing so would cure the conceptual flaw of earlier proposals, and requiring that the targeted acts be the subject of a criminal indictment will cure the practical flaw.

Immunities have been used the world over to advance important societal ends. In other parts of the globe, even the most brutal killers have been granted immunity to induce them to lay down their arms and

cease their attacks.[301] The benefits of American judicial immunity are less immediate and less certain, but they exist and are significant. Because immunities contravene cherished notions of fairness, they are likely to prove controversial no matter how carefully we calibrate their costs and benefits. But harmonizing the judicial immunity doctrine across civil and criminal realms takes us a long way towards theoretical coherence and achieving realistic real-world aims.

[301] *See, e.g.*, Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, annex, Art. IX(3), U.N. Doc. S/1999/777 (July 12, 1999) (granting immunity to rebel groups for their acts during the Sierra Leone Civil War).