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The Business Judgment Rule as an Immunity Doctrine

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THE BUSINESS JUDGMENT RULE AS AN IMMUNITY DOCTRINE

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ABSTRACT

The business judgment rule is a judicially created doctrine that protects directors from personal civil liability for the decisions they make on behalf of a corporation. In today's era of corporate scandals, global financial meltdowns, and directorial malfeasance, it has become especially important in setting the bar for when directors are appropriately responsible to shareholders for their actions. Traditionally the business judgment rule has been regarded as a standard of liability, although it has never really been explored or enunciated as such. This view determines eligibility for business judgment rule protection of a directorial decision after an examination of certain preconditions. An alternate view has developed that posits the business judgment rule is actually an abstention doctrine, and should be applied automatically absent the establishment of the same preconditions as the liability standard approach, only to be used as nullifying factors, to shield directors from having to account. The difference between the two positions essentially comes down to the order of the requirements, and who has the burden of establishing the existence of the factors that would grant or deny business judgment rule protection.

This Article disagrees with both of the above approaches, and instead explores the business judgment rule as a type of immunity by comparing it to selected public and private immunities. The policy underpinnings of the business judgment rule mirror those of immunities, as does the practical impact. This means that the business judgment rule, properly construed, would require the director to establish entitlement to protection by proving that all preconditions for application of the rule are met. Much of the

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confusion between the courts and circuits could be alleviated by approaching the business judgment rule as a type of immunity, where the procedures and philosophies are much more enunciated. This helps place the business judgment rule back as a crucial part in the balancing act between directorial autonomy and accountability, which is especially timely given the current economic climate.

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INTRODUCTION

The accountability of corporate directors has been in the forefront of many minds since large-scale malfeasance hit the news with the swift and sudden bankruptcy of Enron in 2001. WorldCom and Tyco soon joined the ranks of infamy, the beginning of the recent recession saw the collapse of Lehman Bros., and corporate ethics made headlines. For example, WellPoint, Inc. made the news in 2010 when discoveries revealed that the insurer had pursued a deliberate policy of cancelling the health insurance of women who had been recently diagnosed with breast cancer.[1] The "Occupy Wall Street" (and other "Occupy" locations) movement, which gained an impressive international following in 2011, had as one objective the condemnation of corporate greed.[2] Corporate, and therefore directorial, accountability is clearly a topic of interest for more than just academics.

Directors owe fiduciary duties to the corporations and shareholders that they serve.[3] These duties include the duty of care, as well as the duty of loyalty, and there are many nuances to each.[4] The usual fiduciary relationship sees breach of these duties as sufficient grounds for liability; breach equals liability.[5] For directors, however, this is not the case. The business judgment rule (BJR) is a judicially created doctrine that protects directors from personal liability for decisions made in their capacity as a director, so long as certain disqualifying behaviors are not established.[6]

How one views the business judgment rule, as a liability rule or as an abstention doctrine, drives how the rule is interpreted and accordingly what must be considered by the courts, and when, in determining its application. The abstention approach presumes automatic application of the business judgment rule, and certain disqualifying conditions rebut this presumption.[7]

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[1] Murray Waas, *Corrected: WellPoint Routinely Targets Breast Cancer Patients*, REUTERS, (Apr. 23, 2010, 7:28 PM), http://www.reuters.com/article/2010/04/23/us-wellpoint-breastcancer-idUSTRE63M5D420100423.

[2] Michael Rectenwald, *Occupy Wall Street: Its Objects, Issues, and Political Meaning*, Citizens For Legitimate Government (Sept. 26, 2011), http://www.legitgov.org/Occupy-Wall-Street-Its-Objects-Issues-and-Political-Meaning.

[3] *Floyd v. Hefner*, No. H-03-5693, 2006 U.S. Dist. LEXIS 70922, at *21 (S.D. Tex. Sept. 29, 2006).

[4] Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1232–33 (2010).

[5] For example, an agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006). Breach of this duty creates liability.

[6] Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 90 (2004).

[7] *Id.* at 90.

It would be technically incorrect, although common, to cast these disqualifications as "preconditions" to the business judgment rule. A precondition must generally be met or exist in order for something else to be valid or apply. Under this reading of the business judgment rule, the rule applies unless certain conditions exist, which is inconsistent with viewing the business judgment rule as a precondition. Therefore, "precondition" is an inaccurate way to describe the factors that nullify the presumption of the business judgment rule application. This is a technical point, but in law, the specifics of language matter. These putative "preconditions" are more along the lines of nullifying conditions: fraud, illegality, self-dealing, absence of a decision, and the like. If one of these conditions can be established, the presumption of the business judgment rule application is nullified.[8]

Casting the business judgment rule as a liability rule generally means that an evaluation of sorts will take place before the rule is applied, with the plaintiff bearing the burden of proving that a nullifying condition exists.[9] The absence of any nullifying conditions results in the application of the business judgment rule to protect directors from personal liability. The order in which things must be proven differs depending on which way one views the business judgment rule, which primarily affects practitioners when deciding how to present cases in which the business judgment rule may be involved. Additionally, inconsistencies between courts create uncertainty, and therefore a unifying interpretation would be helpful to the judiciary as well.

While extant literature interprets the business judgment rule as both a liability standard[10] and an abstention doctrine,[11] neither one of these approaches necessarily "fits" with the reality of the business judgment rule as it has developed, and the purpose that it fulfills. Since the business judgment rule protects directors from personal liability for actions done in their occupation, there is a telling similarity to immunities, which also protect individuals from personal liability in certain situations. This Article explores the business judgment rule as a form of immunity, with the goal of determining the appropriateness of that interpretation.

In Part I, the business judgment rule, its history, and background are outlined, and the main interpretations of its role are examined. In Part II, different types of immunities are outlined, as well as the public policy underpinning them. The business judgment rule as a form of immunity is then explored to determine whether this is a more helpful way to view the rule.

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[8] *Id.* at 96 (citing Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968)).
[9] *Id.* at 94 (quoting Cede & Co. v. Technicolor, 634 A.2d 346, 361 (Del. 1993)).
[10] FDIC v. Stahl, 89 F.3d 1510, 1516 (11th Cir. 1996).
[11] Brewer v. Bristol, 577 F. Supp. 519, 524 (E.D. Tenn. 1983).

I. THE BUSINESS JUDGMENT RULE

A. History, Background, and Role

The business judgment rule has a long history in America, dating back to the nineteenth century.[12] Despite its longevity, however, the rule has been called "one of the least understood concepts in the entire corporate field,"[13] and it is still acknowledged as widely misunderstood: "Countless cases invoke it and countless scholars have analyzed it. Yet, despite all of this attention, the business judgment rule remains poorly understood."[14] In part, this can be attributed to a lack of consensus in the courts. Another contributing factor might be that corporations, and the transactions into which they enter, have become increasingly complex and continuously evolve.[15] Some have suggested that complex financial instruments issued by corporations, which are poorly understood by many, contributed to the recent financial morass.[16] In addition, the business judgment rule touches on the tension inherent in balancing "between government regulation and free markets, between public interests and private autonomy."[17] Finally, inter alia, tension also exists in balancing directors' legal authority to manage the corporation with shareholders' right to hold those directors accountable for the decisions made on behalf of the corporation.[18]

The business judgment rule ensures that decisions made by directors in good faith are protected even though, in retrospect, the decisions prove to be unsound or erroneous.[19] It provides a deference to prevent courts from

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[12] *See* Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 93 (1979) (dating the business judgment rule to at least the early 1800s).

[13] Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 454 (2005) ("Manne's statement about the rule remains as true in 2005 as when first made in 1967: the business judgment rule is 'one of the least understood concepts in the entire corporate field.'"); Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 270 (1967).

[14] Bainbridge, *supra* note 6, at 83–84.

[15] *See, e.g.*, LARRY RITTENBERG, KARLA JOHNSTONE & AUDREY A. GRAMLING, AUDITING: A BUSINESS RISK APPROACH 2 (7th ed. 2010) ("Accounting is highly complex—often, in part, because companies are entering into increasingly complex transactions and organizational structures.").

[16] *See, e.g. Financial Regulatory Reform*, N.Y. TIMES (Sept. 20, 2011), http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit_crisis/financial_regulatory_reform/index.html; *'Wall Street Got Drunk' Says Bush*, BBC NEWS (July 23, 2009, 7:28 PM), http://news.bbc.co.uk/2/hi/7522335.stm.

[17] Lael Daniel Weinberger, *The Business Judgment Rule and Sphere Sovereignty*, 27 T.M. COOLEY L. REV. 279, 281 (2010).

[18] Ann M. Scarlett, *A Better Approach for Balancing Authority and Accountability in Shareholder Derivative Litigation*, 57 U. KAN. L. REV. 39, 42 (2008).

[19] *Business Judgment Rule*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/business_judgment_rule (last visited Mar. 23, 2013).

second-guessing business decisions that were made in good faith.[20] Since most people are risk-adverse,[21] if directors had to worry about liability for every decision they made, many directors would insist on playing things completely safe.[22] This would stifle the innovation for which American corporations are known, and would ensure that profits would remain small. There is a general correlation between risk and return,[23] and directors would be too concerned about their personal liability to take risks with the corporation's business. "It is almost impossible for a court, in hindsight, to determine whether the directors of a company properly evaluated risk and thus made the 'right' business decision."[24] "To impose liability on directors for making a 'wrong' business decision would cripple their ability to earn returns for investors by taking business risks."[25] Negative externalities might decrease, but so would positive externalities. Society would not have as much technological (and therefore social) advancement, and corporations would not be such a major part of the economy. Accordingly, the business judgment rule evolved to give some comfort to directors that they were not being looked to as guarantors for all corporate actions

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[20] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (indicating that it is a presumption that in making a business decision the directors act on an informed basis in good faith and in the honest belief that the action was in the best interests of the company).

[21] *Decision-Making Under Uncertainty - Basic Concepts*, EXPERIMENTAL ECONOMICS CENTER, http://www.econport.org/econport/request?page=man_ru_basics4 (last visited Mar. 23, 2013).

[22] *See* Kevin LaCroix, *Banking Agencies Challenge California's Business Judgment Rule: Will This Expand Officer and Inside Director Liability?* (May 7, 2012, 2:00 PM), http://www.dandodiary.com/2012/04/articles/failed-banks/guest-post-banking-agencies-challenge-californias-business-judgment-rule-will-this-expand-officer-and-inside-director-liability/.

[23] This statement is not without controversy. Some studies have found that it is true that a positive relationship exists, some have found a negative relationship, and some have found none. *See* Manuel Nunez Nickel & Manuel Cano Rodriguez, *A Review of Research on the Negative Accounting Relationship Between Risk and Return: Bowman's Paradox*, 30 Omega 1, 1 (2002), *available at* http://www.sciencedirect.com/science/article/pii/S030504830100055X.

[24] *In re* Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106, 126 (Del. Ch. 2009) (citing Bainbridge, *supra* note 6, at 114–15 ("[T]here is a substantial risk that suing shareholders and reviewing judges will be unable to distinguish between competent and negligent management because bad outcomes often will be regarded, ex post, as having been foreseeable and, therefore, preventable ex ante. If liability from bad outcomes, without regard to the ex-ante quality of the decision or the decision-making process, however, managers will be discouraged from taking risks.")).

[25] *In re Citigroup*, 964 A.2d at 126.

being taken whilst at the helm.[26] It is meant to prevent armchair judging of decisions made by directors in usual circumstances, while leaving some room for liability in not-so-usual circumstances, usually ones involving a significant degree of malfeasance.[27] Many articles have been written exploring director liability, which necessarily entails balancing the authority inherent to a director's position with accountability from various sources, including shareholder derivative litigation. The business judgment rule is generally the fulcrum used to balance these competing concerns.[28]

The role of the business judgment rule has been defined as follows:

> Under Delaware law, the business judgment rule is the offspring of the fundamental principle, codified in 8 Del. C. § 141(a), that the business and affairs of a Delaware corporation are managed by or under its board of directors .... The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors.[29]

B. Balancing Authority with Accountability

American business law has long recognized an implied obligation for directors to maximize the wealth of their shareholders.[30] In order to maximize shareholder wealth and grow a corporate enterprise, directors must often make business decisions that entail an assumption of risk; very seldom does return exist without risk, and there is generally presumed to be a positive correlation between the two.[31]

> The Delaware Supreme Court made clear in *Stone* that directors of Delaware corporations have certain responsibilities to implement and monitor a system of oversight ... this obligation does not eviscerate the core protections of the business judgment rule—protections designed to allow corporate managers and directors to pursue risky transactions without the specter of being held personally liable if those decisions turn out poorly.[32]

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[26] *See* E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1424–25 (2005).

[27] *Id.* at 1422.

[28] *Id.*

[29] Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1975).

[30] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (arguing that a corporation is organized and carried on primarily for the profit of the stockholders).

[31] Nickel & Rodriguez, *supra* note 23, at 1.

[32] *In re* Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106, 125 (Del. Ch. 2009) (summarizing the holding in Stone v. Ritter, 911 A.2d 362 (Del. 2006)).

The tension between authority and accountability thus arises:

> On the one hand ... the modern public corporation simply could not exist if directors lacked authority to exercise fiat. On the other hand, possession of that power by directors enables them to divert corporate profits from shareholders to themselves. Consequently, efforts to hold the board accountable necessarily shift some of the board's decision-making authority to shareholders or judges.[33]

The business judgment rule attempts to strike a workable balance between directors' need to exercise authority in running the enterprise on one hand, while allowing some accountability on the other, in order to prevent the diversion of corporate agendas or assets to serve personal interests. Realistically, it is difficult for a plaintiff to rebut the business judgment rule, given that, prior to discovery, the information needed might not be readily available.[34]

C. Standard of Liability

A *standard of conduct* states how an actor should conduct a given activity or play a given role. A *standard of review* states the test a court should apply when it reviews an actor's conduct to determine whether to impose liability or grant injunctive relief.[35]

Courts tend to view the business judgment rule as a standard of liability because it forms the test that courts use in determining whether a director's conduct gives rise to personal liability.[36] This test requires a plaintiff to meet the burden of proof in establishing the existence of certain conditions, such as fraud, illegality, self-dealing, lack of decision by the board, or others.[37] If the plaintiff does not meet this burden, then the court will

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[33] Bainbridge, *supra* note 6, at 103–04.

[34] *In re Citigroup*, 964 A.2d at 114–15. For example, in the recent Citigroup Shareholder derivative litigation, the plaintiffs' claims composed of, "generally statements from public documents that reflect worsening conditions in the financial markets." *Id*.

[35] Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437 (1993) [hereinafter Eisenberg, *The Divergence of Standards*]. This is not unlike the law versus morality concept that many law students ponder in their first year—we do not legislate morality (for example, you have to be nice to people), but much legislation is based on morality (for example, killing someone is bad, hitting someone is bad). Aside from the easy situations, it is often hard to know where the line is or should be drawn between law and morality.

[36] *Id.* at 444–45. The business judgment rule is the test courts use in determining whether the directors' conduct gives rise to liability. MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS 544–49 (8th ed. 2000).

[37] Bainbridge, *supra* note 6, at 96.

apply the business judgment rule to protect the director from personal liability for the relevant decision. One caveat of the business judgment rule is that decisions that are grossly negligent will not be protected.[38] Therefore, the effect of the business judgment rule in this formulation is to elevate the standard of liability for a director's decision from simple negligence to an aggravated or gross level of negligence in order for liability to be found. *Cede & Co. v. Technicolor*[39] is often used as an example of the court treating the business judgment rule as a standard of liability.[40]

In *Cede*, the Delaware Supreme Court explained the function of the business judgment rule as precluding "a court from imposing itself unreasonably on the business and affairs of a corporation."[41] The Court quoted from an earlier case, stating:

> The rule operates as both a procedural guide for litigants and a substantive rule of law. As a rule of evidence, it creates a "presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith and the honest belief that the action taken was in the best interest of the company."[42]

"The presumption initially attaches to a director-approved transaction within a board's conferred or apparent authority in the absence of any evidence of 'fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment.'"[43]

Decisions made by a loyal and informed board will not create liability for a director, absent evidence that the board's action was not grounded in rational business purpose. A plaintiff wishing to challenge a board's action bears the burden of proving that the board, in making the disputed decision, breached one or more of its fiduciary duties of good faith, loyalty, or due care.[44] If a plaintiff is unable to meet this burden, the business judgment rule applies to protect the directors, effectively precluding the courts from interjecting themselves into the corporate dealings.[45] If, however, the plaintiff is successful in meeting her burden of proof, the business judgment rule does not apply and the evidentiary burden shifts to the defendant

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[38] *Id.* at 100 (quoting Brehm v. Eisner, 746 A.2d 244, 264 & n.66 (Del. 2000)).
[39] Cede & Co. v. Technicolor, 634 A.2d 346 (Del. 1993).
[40] Bainbridge, *supra* note 6, at 90–91.
[41] *Cede*, 634 A.2d at 360.
[42] *Id.* at 360 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).
[43] *Id.* at 360 (citing Grobow v. Perot, 539 A.2d 180, 187 (Del. 1988)).
[44] *Id.* at 361.
[45] *Id.*

directors to prove to the trier of fact the "entire fairness" of the transaction to the plaintiff.[46]

1. Fiduciary Duties

a. Duty of Loyalty

Since fiduciary duties matter in this formulation of the business judgment rule, a brief exploration of these duties is necessary. As stated earlier, the two broad fiduciary duties are the duty of care and the duty of loyalty.[47] The Delaware Supreme Court defined the duty of loyalty of corporate officers and directors as follows:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests .... A public policy existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to *refrain from anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it*, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest.[48]

The Court explained further that "[w]e have generally defined a director as being independent only when the director's decision is based entirely on the corporate merits of the transaction and is not influenced by personal or extraneous considerations."[49]

To establish a breach of the duty of loyalty, a shareholder plaintiff must present evidence that the director was either on both sides of the transaction or "derive[d] any personal financial benefit from the sense of self-dealing as opposed to a benefit which devolves upon the corporation or all stockholders generally."[50] The Delaware Supreme Court has cautioned, however, that "one director's colorable interest in a transaction" has never been sufficient proof to deprive an entire board of the business

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[46] *Id.*

[47] Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[48] *Cede*, 634 A.2d at 361 (emphasis added) (quoting Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)).

[49] *Id.* at 362.

[50] *Id.* at 363 (quoting Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984)).

judgment rule protection, holding that "there must be evidence of disloyalty."[51] It also noted that it had never adopted a bright-line rule for determining when the self-interest of one director is sufficient to prevent the business judgment rule from protecting board actions.[52]

In *Cede*, the Delaware Court of Chancery found that while one director's (Sullivan's) independent business judgment was compromised by a promised finder's fee,[53] the finder's fee was not a material interest affecting the overall transaction because Sullivan disclosed his interest prior to the board approving the transaction.[54] The court also found that there was a question as to another director's (Ryan's) loyalty, owing to a conflict of interest.[55] On appeal, the Delaware Supreme Court found support for the lower court's decision with respect to the situation with Sullivan in 8 Del. C. § 144(a), but remanded the issue of Ryan's loyalty for clarification of the lower court's finding that Ryan's conflict of interest did not constitute a breach of his duty of disclosure.[56] On remand, the Court of Chancery established that it had applied the materiality analysis standard of *Rosenblatt v. Getty Oil Co.*[57]

In a similar case, *Shaper v. Bryan*, plaintiff shareholders of the former Bank One Corporation (Bank One) filed suit against its board of directors, claiming that the directors had breached their fiduciary duties when negotiating and approving the corporation's merger with J.P. Morgan Chase & Co. (J.P. Morgan).[58] Plaintiffs alleged that Bank One's former CEO, James Dimon, breached his duty of loyalty by accepting less favorable merger terms in return for a promise from J.P. Morgan that he would become CEO two years post-merger.[59] The court found that the plaintiffs failed to allege sufficient facts to show that Dimon was self-interested in the merger.[60] No evidence was presented to prove that Dimon appeared on both sides of the merger between Bank One and J.P. Morgan, or that he received a personal benefit not shared by shareholders. While plaintiffs alleged that Dimon's negotiations to retain his CEO position at the newly formed company constituted self-dealing, Delaware law has routinely rejected the notion that a director's interest in maintaining his office is a debilitating factor.[61]

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[51] *Id.* at 363.
[52] *Id.* at 364.
[53] *Id.* at 357–58.
[54] *Cede*, 634 A.2d at 365.
[55] *Id.* at 358.
[56] *Id.* at 372.
[57] 493 A.2d 929, 944–45 (Del. 1985).
[58] Shaper v. Bryan, 864 N.E.2d 876, 879 (Ill. App. 2007).
[59] *Id.* at 880.
[60] *Id.* at 885.
[61] *Id.*

b. Duty of Care

Duty of care as defined by the Delaware Supreme Court is the "amount of care which ordinarily careful and prudent men would use in similar circumstances."[62] This court has further articulated the duty of care in *Smith v. Van Gorkom*, as being a director's duty to exercise an informed business judgment.[63] Where the context is a proposed merger of domestic corporations, the Court said further:

> [A] director has a duty under Del. Code Ann. tit. 8, § 251(b), along with his fellow directors, to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders. Certainly, in the merger context, a director may not abdicate that duty by leaving to the shareholders alone the decision to approve or disapprove the agreement.[64]

The Delaware Supreme Court in *Cede* applied *Van Gorkom* to find that the defendant directors, as a board, breached their duty of care by making an uninformed decision to approve the sale of the corporation to MAF pursuant to a plan of merger for twenty-three dollars per share.[65] The case was remanded for the plan of merger to be reviewed using entire fairness as the standard.[66]

In *Shaper*, the plaintiffs argued that the board breached its duty of due care by failing to inform itself of a "secret no-premium offer"[67] allegedly made to director and CEO Dimon. Plaintiffs alleged that the J.P. Morgan offer price was not based on the corporation's actual value, but rather was "simply the price of delaying his takeover as CEO of the newly formed company."[68] The court disagreed, and stated that the board's duty of care did not require a board to be "intimately familiar with every proposal and fact during the negotiating process."[69] The court found that there was ample evidence showing that the board had properly exercised its duty of care in reviewing joint proxy statements and a formal opinion from an investment banking firm that the proposed merger was fair and presented an equitable exchange ratio to Bank One stockholders.[70]

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[62] *See, e.g.*, Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963); *see also* MODEL BUS. CORP. ACT § 8.30 (2002).

[63] *Smith*, 488 A.2d at 872.

[64] *Id.* at 873.

[65] *Cede*, 634 A.2d at 367.

[66] *Id.* (applying Weinberger, 457 A.2d at 711).

[67] *Shaper*, 864 N.E.2d at 886 (referring to a *New York Times* article citing sources stating that Dimon had offered to sell Bank One to J.P. Morgan at no premium if he were made CEO immediately; JP Morgan refused and Dimon then negotiated the deal at issue).

[68] *Id.*

[69] *Id.* (citing Brehm v. Eisner, 746 A.2d 244, 259 (Del. 2000)).

[70] *Id.* at 886–87.

2. Criticism

Critics of the view that the business judgment rule is a standard of liability posit that the business judgment rule requires deference to be the presumption, mandating a judicial "hands-off" policy unless certain preconditions for review are met.[71] Noted academic Professor Stephen Bainbridge is a key critic claiming that viewing the business judgment rule as a standard of liability puts "the cart before the horse," in that the courts examine the cases for instances of misconduct and in the absence of those instances, then takes the requisite "hands-off" approach.[72] With authority resting in the directors to run the affairs of the corporation, excessive review from the courts would shift true authority from the directors to the courts.[73] Therefore, judicial review of director's decisions should be the exception rather than the norm.[74] Under this formulation of the rule at least a limited judicial review is the norm, which is viewed as undesirable and inefficient.

Omnicare, Inc. v. NCS Healthcare is also used as an example[75] of the business judgment rule formulation as a standard of liability: "The business judgment rule, as a standard of judicial review, is a common-law recognition of the statutory authority to manage a corporation that is vested in the board of directors."[76] Key themes found within case law and scholarly articles interpreting this standard of review include (1) directors acting in good faith can use the business judgment rule as a shield from personal liability,[77] and (2) the rule simply moves the liability bar from mere negligence to a lower standard such as gross negligence or recklessness.[78]

D. Abstention Doctrine

Professor Bainbridge takes an alternate view of the business judgment rule, where the courts refrain from reviewing board decisions unless certain conditions for review are met.[79] He argues that the business judgment rule is better viewed as a doctrine of abstention, although the courts rarely

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[71] *See, e.g.*, Bainbridge, *supra* note 6, at 94.
[72] *Id.*
[73] *Id.* at 103–04.
[74] *Id.* at 96.
[75] *Id.* at 90.
[76] Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 927 (Del. 2003).
[77] Franklin A. Gevurtz, Corporation Law 282–84 (2000) (discussing the analogies between director and physician liability).
[78] *Id.* (discussing the analogies between director and physician liability).
[79] Bainbridge, *supra* note 6, at 87.

use this phrase in conjunction with business judgment rule interpretation.[80] The presumption is that directors' decisions are protected by the business judgment rule, and therefore not open to judicial scrutiny, unless this presumption is rebutted.[81] Professor Bainbridge argues that "corporate decision-making efficiency can be ensured only by preventing the board's decision-making authority from being trumped by courts under the guise of judicial review."[82] The abstention approach, under which "courts in fact refrain from reviewing board decisions unless exacting preconditions for review are satisfied,"[83] reduces the risk of hindsight bias: "If a jury knows that the plaintiff was injured, the jury will be biased in favor of imposing negligence liability even if, viewed ex ante, there was a very low probability that such an injury would occur and taking precautions against such an injury was not cost effective."[84] Shareholders "prefer the risk of director error to that of judicial error."[85] "Abstention contemplates judicial reticence, but leaves open the possibility of intervention in appropriate circumstances."[86] Refusing to review directors' operational decisions is proper, absent exceptional circumstances, "because most such decisions do not pose much of a conflict between the interests of directors and shareholders."[87]

Professor Bainbridge sees the abstention doctrine as a better means by which corporate law can resolve the inherent tension between authority and accountability—and thus the business judgment rule is "better understood as a doctrine of abstention which guides courts to refrain from reviewing board decisions unless exacting preconditions for review are satisfied."[88] The business judgment rule as "an abstention doctrine ... creates a presumption against judicial review of duty of care claims."[89] Thus, when a court is presented with a claim accusing directors of breaching their duty of care, a court "will abstain from reviewing the substantive merits of the directors' conduct unless the plaintiff can rebut the business judgment rule by showing that one or more of its preconditions are lacking."[90]

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[80] *Id.*
[81] *Id.*
[82] *Id.* at 85.
[83] *Id.* at 87.
[84] *Id.* at 114 (discussing Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1523–27 (1998)).
[85] *Id.* at 122.
[86] *Id.* at 127.
[87] *Id.* at 129.
[88] *Id.* at 87.
[89] Stephen Bainbridge, *The Business Judgment Rule Is NOT a Standard of Review*, PROFESSORBAINBRIDGE.COM (Jan. 31, 2011, 6:28 PM), http://www.professorbainbridge.com/professorbainbridgecom/2011/01/this-is-the-sort-of-arrant-nonsense-about-the-business-judgment-rule-up-with-which-i-will-not-put.html.
[90] *Id.*

Professor Bainbridge believes that the question of "whether ... the board exercised reasonable care is irrelevant."[91] Professor Bainbridge advocates using the *Brehm v. Eisner* formulation of the business judgment rule, which opines that:

> Courts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context. Due care in the decision-making context is process due care only .... Thus, directors' decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all the material facts reasonably available.[92]

In order for the business judgment rule to apply all that need be shown is that the "directors employed a rational process and considered all material information available."[93] This would avoid the situation presented in *Cede* where "courts ... second-guess board decisions if it is 'reasonable' to do so."[94]

Shlensky v. Wrigley is a classic example of the abstention doctrine formulation of the business judgment rule.[95] Shlensky, a minority shareholder at the time, challenged Philip Wrigley's famous refusal to install lights in Wrigley Field so the Chicago Cubs could play home games in the evening. Shlensky felt that baseball games in the evening would encourage higher game attendance and ultimately lead to higher revenues for the corporation. The court reasoned, inter alia, that "in a purely business corporation ... the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors."[96] The court also concluded, "[t]he response which courts make to such applications is that it is not their function to resolve for corporations questions of policy and business management. The directors are chosen to pass upon such questions and their judgment unless shown to be tainted with fraud is accepted as final."[97]

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[91] *Id.*

[92] Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000).

[93] *In re* Citigroup Inc. Derivative Litigation, 964 A.2d 106, 122 (Del. Ch. 2009) (citing Brehm v. Eisner, 746 A.2d 244, 259 (Del. 2000); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996)).

[94] Bainbridge, *supra* note 89, at 4.

[95] *Shlensky*, 237 N.E.2d at 781.

[96] *Id*. at 779 (quoting Toebelman v. Mo.-Kan. Pipe Line Co., 41 F. Supp. 334, 339 (D. Del. 1941)).

[97] *Shlensky*, 237 N.E.2d at 779 (quoting Davis v. Louisville Gas & Elec. Co., 142 A. 654 (Del. Ch. 1928)).

1. Critique of Abstention Doctrine Formulation of the Business Judgment Rule

Not many academics have delved into Professor Bainbridge's interpretation of the business judgment rule, but at least one takes exception to the idea of the business judgment rule as an Abstention Doctrine.[98] To fully understand this position, the Abstention Doctrine must be further explored.

a. History of Abstention Doctrine

At its root, the Abstention Doctrine addresses the balance of power between two autonomous levels of government, each with inherent powers granted or delegated to them through the federalist system.[99] Usually it is used in the context of a federal court declining to review subject matter it feels is more appropriate for state courts. The abstention doctrine was first formulated in 1941 in *Railroad Commission of Texas v. Pullman Co.*, where the Supreme Court declined to intervene in the case, stating: "federal courts ought not to enter unless no alternative to its adjudication is open."[100] This case brought together several previous cases where the Supreme Court had declined to insert itself,[101] and led to the enunciation of the new doctrine to reflect the principle of non-intervention or abstention:

> These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.[102]

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[98] Scarlett, *supra* note 18, at 69–70 (discussing Bainbridge, *supra* note 6, at 85).

[99] It has the general purpose of sorting out the relationship between state and federal court functions, and "preserve the balance between state and federal sovereignty." Mathew D. Staver, *The Abstention Doctrines: Balancing Comity with Federal Court Intervention*, 28 SETON HALL L. REV. 1102, 1102 (1998). For an interesting treatment of the Abstention Doctrine, see Tonya Kowalski, *A Tale of Two Sovereigns: Danger and Opportunity in Tribal-State Court Relations* (forthcoming) (on file with author).

[100] R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498 (1941).

[101] Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95 (1935) (refraining from enforcement of criminal statute absent exceptional circumstances); Pennsylvania v. Williams, 294 U.S. 176, 177 (1935) (refraining from action when state has detailed procedures for action); Gilchrest v. Interborough Rapid Transit Co., 279 U.S. 159, 209 (1929) (respecting authority of state court decision on arguable state law interpretation); Fenner v. Boykin, 271 U.S. 240, 240 (1926) (abstaining from action absent extraordinary circumstances).

[102] R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (citations omitted).

Soon after the decision in *Pullman*, a variation on the abstention doctrine was developed in *Burford v. Sun Oil Co.*[103] This variation, dubbed the Burford Abstention Doctrine, went further than the *Pullman* decision, as the *Burford* court envisioned a "hands-off policy" while the *Pullman* court seemed to posit the abstention more as a "postponement."[104] The *Burford* court quoted the *Pullman* court, stating that a federal court should "stay its hands" in deciding a matter of state law.[105] The Court stated that interfering with a state court decision would only lead to "[d]elay, misunderstanding of local law, and needless federal conflict with the State policy."[106] It also held that there are "circumstances in which a federal court should decline to hear at all a case of which it has jurisdiction in order to avoid needless conflict with the states ...."[107]

The doctrine further evolved and narrowed in *Colorado River Water Conservation Dist. v. United States*,[108] becoming known as the Colorado River Abstention Doctrine. In this case, the court "recognized that there are 'exceptional' circumstances in which dismissal of a federal suit due to the presence of a concurrent proceeding may be appropriate for reasons of wise judicial administration."[109] "Under the Colorado River Abstention Doctrine, a federal court may abstain from hearing a claim when there is a pending state proceeding only under 'exceptional circumstances.'"[110] Many factors are considered before dismissing a case, and abstention from the exercise of federal jurisdiction is to be the exception rather than the rule.[111]

> The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.[112]

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[103] Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943).

[104] 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4241 (3d ed. 1998).

[105] *Burford*, 319 U.S. at 334.

[106] *Id.* at 327.

[107] WRIGHT ET AL., *supra* note 104 (referring to § 4244 and its procedural consequences, § 4245).

[108] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

[109] WRIGHT ET AL., *supra* note 104 (paraphrasing Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

[110] Staver, *supra* note 99, at 1130 (paraphrasing and quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813–14 (1976)).

[111] *Colo. River Water Conservation Dist.*, 424 U.S. at 813.

[112] Staver, *supra* note 99, at 1130 (quoting *Colo. River Water Conservation Dist.*, 424 U.S. at 813–14) (citations and quotations omitted).

The Court, seeking to limit the application of the doctrine, outlined only three instances where the Abstention Doctrine would be appropriately used:

1. "[I]n cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law."[113]
2. "[W]here there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar .... In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[114]
3. "[W]here, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings ...."[115]

b. Critique

"The key underlying assumption for Professor Bainbridge's proposal is that the courts' current approach to the business judgment rule inadequately respects the value of directors' authority—meaning directors' decision-making power."[116] However, in considering whether the business judgment rule is an abstention doctrine, as proposed by Professor Bainbridge, it is impossible to overlook certain other things that do not fit with this formulation of the business judgment rule.

First of all, the Abstention Doctrine recognizes the tension inherent between two levels of government, each of which has inherent powers, granted through the creation of a federalist system, in which certain of those powers might overlap when fully exercised.[117] It is about the balance of power.[118] Under no circumstances can private corporations be viewed as having inherent grants of power that transform them into autonomous

[113] *Colo. River Water Conservation Dist*., 424 U.S. at 814 (citations omitted).
[114] *Id.* (citations omitted).
[115] *Id.* at 816 (citations omitted).
[116] Scarlett, *supra* note 18, at 67 (discussing Bainbridge, *supra* note 6, at 85).
[117] Younger v. Harris, 401 U.S. 37, 43–44 (1971).
[118] For an interesting treatment of the Abstention Doctrine in the context of tribal law, see Tonya Kowalski, *A Tale of Two Sovereigns: Danger and Opportunity in Tribal-State Court Relations* (forthcoming) (on file with author).

entities, not subject to any level of government, especially when corporations owe their very existence to legislation issued by state governments. It also cannot be said that a director, by virtue of taking control of a private corporation, can be seen to have assumed a mantle of inherent power such that she is an autonomous being free from state control. She is still just a person who has a particular job—"the tension in such cases is in the purely private relationship between directors and shareholders."[119] When considering the players in the business judgment rule, the directors of a corporation, the shareholders who were "wronged," and the courts that would determine whether directors have personal liability for their actions as directors, the directors are not even remotely analogous to a level of government that is granted a power that would make them separate but somehow equal to the state. This fact alone makes it difficult to stretch the Abstention Doctrine to the business judgment rule.

Second, application of the Abstention Doctrine does not mean that the subject matter before the court is permanently protected from the review of any court. The doctrine presumes that a court is in fact going to be reviewing the case—the only thing in issue is which court, not whether a court has the ability to hear the subject matter at all. In fact, that is the whole point behind the Abstention Doctrine—the federal courts stepping out of the way so the state courts can handle the matter. Professor Bainbridge's business judgment rule formulation would see the entire subject matter of a director's liability removed from the court's review, except in exceptional circumstances,[120] which is a very different matter from determining which court has jurisdiction. In one important way, he is correct—if the business judgment rule applies, whether as a presumption or after an evaluation, the effect is that the courts abstain from evaluating a director's decision on the merits. But just because the effect is a small "a" abstention, this doesn't mean that it is appropriate for the capital "A" Abstention Doctrine, considering the capital "A" Abstention Doctrine is already in existence with a very different and well-defined meaning.

Finally, the Abstention Doctrine is to be applied with a light touch, and with judicious restraint. To view the business judgment rule as an Abstention Doctrine would again strain interpretation of the Abstention Doctrine immensely, since no matter what formulation you interpret it under, the business judgment rule is the dominant position. The Supreme Court has made it very clear that the Abstention Doctrine is not the dominant application,

[119] Scarlett, *supra* note 18, at 77.
[120] Bainbridge, *supra* note 6, at 87–88.

but is rather an exception to the usual way of things.[121] This would pervert the Abstention Doctrine as developed by the Supreme Court into something quite unrecognizable.

Another criticism of Professor Bainbridge's approach to the business judgment rule is that it has no practical impact. In the context of derivative litigation, Ann Scarlett states, "the proposed abstention approach will not significantly alter shareholder derivative lawsuits, because it operates essentially the same in the context of litigation as the current formulation of the business judgment rule and otherwise is too limited to be useful as a replacement for the current formulation."[122] She also noted that, "courts are unlikely to adopt the proposed Abstention Doctrine approach to the business judgment rule, because it does not fit within the Abstention Doctrines commonly recognized by courts and abstention otherwise does not present a desirable approach."[123]

In outlining why the two approaches are similar, Scarlett states "both the current approach and the proposed abstention approach establish a presumption of non-review, and courts will not review the challenged conduct unless the plaintiff can rebut that presumption."[124] This means that the methods for rebutting the presumption of the business judgment rule are similar because, "both approaches limit courts to reviewing the decision-making process and not the merits of the decision."[125] "Furthermore, both approaches operate the same after the court determines whether the presumption of the business judgment rule has been rebutted ... the current approach ... protects the directors from liability and the case ends ... similarly ... under the proposed abstention approach ... the court abstains from further review."[126]

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[121] Bainbridge, *supra* note 6, at 128 ("If the business judgment rule is framed as an Abstention Doctrine, however, judicial review is more likely to be the exception rather than the rule.")); Scarlett, *supra* note 18, at 79 (comparing *Colo. River Water Conservation Dist*., 424 U.S. at 813 ("Abstention from the exercise of federal jurisdiction is the exception, not the rule.");. Scarlett states that, "the Supreme Court has made it clear that abstention is the 'extraordinary' exception and not the rule. Professor Bainbridge ... reverses that principle ... abstention would be the rule and judicial review would be the extraordinary exception." *Id.*

[122] Scarlett, *supra* note 18, at 70.

[123] *Id.*

[124] *Id.* at 70–71.

[125] *Id.* at 72 & n.191 (discussing Bainbridge, *supra* note 6, at 128 ("[S]tating that under his abstention approach: '[t]he court begins with a presumption against review. It then reviews the facts to determine not the quality of the decision, but rather whether the decision-making process was tainted by self-dealing and the like.'")).

[126] Scarlett, *supra* note 18, at 72 (comparing Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989) and Bainbridge, *supra* note 6, at 87).

If the plaintiff successfully rebuts the presumption of the application of the business judgment rule, "under either ... approach, the case proceeds."[127] As such, the abstention approach is

> too limited to be useful as a replacement for the current formulation ... [b]ecause [it] would not prohibit court review in cases alleging fraud or breaches of the duties of loyalty or good faith, it is designed to apply only to a small category of business judgment rule cases—those alleging a breach of the fiduciary duty of care.[128]

II. IMMUNITIES FOR COMPARISON

The effect of an immunity is to insulate the recipient of the immunity from civil liability for actions undertaken by individuals acting in a specific capacity.[129] Similarly, the effect of the business judgment rule is to insulate the recipient from civil liability for actions undertaken by individual directors acting in a capacity related to their job as directors. This similarity provides a starting point for an inquiry into the nature and extent of certain immunities to better compare immunities with the business judgment rule.

A. Selected Public Actor Immunities

1. Judicial Immunity

Judicial immunity is a form of legal immunity, and has been in place for centuries to protect judges from personal lawsuits brought by disgruntled and angry litigants.[130] Although not without controversy,[131] this protection continues to be upheld by the modern judiciary.[132] *Stump v. Sparkman*[133] is

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[127] Scarlett, *supra* note 18, at 72.

[128] *Id.* at 73.

[129] This sometimes extends to criminal prosecution, such as in the case of diplomatic immunity, but this aspect of immunity will not be explored in this Article.

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

[131] *See generally* Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 389 (1970); Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 867 (1970). *See, e.g.*, Don B. Kates, Jr., *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615, 621 (1970); Douglas K. Barth, Note, *Immunity of Federal and State Judges from Civil Suit-Time for a Qualified Immunity?*, 27 CASE W. RES. L. REV. 727, 728 (1977).

[132] *See* Mireles v. Waco, 502 U.S. 9, 9 (1991).

the hallmark case used to illustrate the broad protective spectrum provided by judicial immunity in the context of rather appalling facts.[134] In *Stump*, a mother petitioned an Indiana state judge to grant her request to have her fifteen-year-old daughter surgically sterilized.[135] The filed petition was heard ex parte, without any evidence, and the petition was granted the same day it was filed.[136] There was no notice to the girl, no appointment of a guardian ad litem, and no hearing in which the girl could participate.[137] The order lacked statutory authority for the action, and was never filed with the clerk of the circuit court.[138] After Judge Stump approved the mother's request, the young girl was told by her mother that she was to have her appendix removed, and the next day a tubal ligation was performed that rendered the girl sterile.[139] Later, the girl married, and after seeking medical help to explain why she had failed to become pregnant, she discovered that she could never have children.[140] After uncovering the full truth of the events behind her sterilization, she sued the judge, among others, under 42 U.S.C. § 1983.[141] The case ended up at the Supreme Court, which determined:

> [T]he scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."[142]

The disturbing facts and eventual decision by the judge in *Stump v. Sparkman* illustrate the broad protection from personal liability afforded judges under the judicial immunity doctrine, including actions brought under § 1983.

a. A Brief Historical Background

Under the common law of England:

> Sir Edward Coke, the ardent advocate of absolute immunity for royal or superior court judges in England sought to ground the doctrine on the

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[133] Stump v. Sparkman, 435 U.S. 349 (1978).
[134] *See generally* 2 SHELDON NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 7:14 (2009).
[135] *Stump*, 435 U.S. at 351.
[136] *Id.* at 349.
[137] *Id.*
[138] *Id.* at 360.
[139] *Id.* at 353.
[140] *Id.* at 349.
[141] *Stump*, 435 U.S. at 349.
[142] *Id.* at 356–57.

> rationale that the administration of justice "concerns the honour and conscience of the King" and that the judges who represent the King "are only to make an account to God and the King."[143]

Historically, judicial immunity was a corollary to that theory. Since the King could do no wrong, the judges, his delegates for dispensing justice, "ought not to be drawn into question for any supposed corruption (for this tends) to the slander of the justice of the King." Because the judges were the personal delegates of the King, they should be answerable to him alone.[144]

Although founded more in public policy than in deference to the King, courts in the United States have adopted and refined the doctrine of judicial immunity.[145]

U.S. circuit courts have recognized that Anglo-American common law provides judicial immunity, a "sweeping form of immunity" for acts performed by judges that relate to the "judicial process."[146] The U.S. Supreme Court has stated judicial immunity is one of the "few doctrines" that has been "solidly established at common law"[147] from the beginning of the judicial system in the United States.[148]

The immunities examined in this Article rest on the interpretation of 42 U.S.C. § 1983, which provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory *or the District of Columbia*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

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[143] K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOWARD. L.J. 95, 104 (1995) (quoting Floyd v. Barker, 77 Eng. Rep. 1305, 1307 (K.B. 1607)).

[144] Pierson v. Ray, 386 U.S. 547, 565, at n.5 (1967) (Douglas, J., dissenting) (citation omitted). Justice Douglas disagreed with this argument in his dissent.

[145] *Pierson*, 386 U.S. at 548; *Stump*, 435 U.S. at 356.

[146] *In re* Castillo, 297 F.3d 940, 947 (9th Cir. 2002) (quoting Forrester v. White, 484 U.S. 219, 225, (1988)).

[147] "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, 13 Wall. 335 (1872)." *Pierson*, 386 U.S. at 553–54 (Warren, J.); *see also* Hale v. Lefkow, 239 F. Supp. 2d 842, 844 (C.D. Ill. 2003); Mercer v. HCA Health Services of Tennessee, Inc., 87 S.W.3d 500, 503–04 (Tenn. Ct. App. 2002), *appeal denied* (Sept. 16, 2002).

[148] According to Jan Pillai, the Court has misinterpreted the common law understanding, citing that "in 1871 only thirteen states recognized the rule of absolute judicial immunity, six states denied immunity for malicious acts, and eighteen states never conclusively ruled on the issue of immunity." Pillai, *supra* note 143, at 105. For a similar argument, see Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 SMU L. REV. 265, 270 (2006) [hereinafter Johns, *A Black Robe*].

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. *For the purpose of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia*.[149]

A full treatment of § 1983 is beyond the scope of this Article, but a brief overview is needed to give context for further analysis of the implications of judicial and prosecutorial immunity. A series of legislative and judicial decisions after the Civil War empowered and emboldened judicial immunity as we understand it today. At the close of the Civil War, Congress enacted the Thirteenth Amendment to outlaw slavery.[150]

> [D]espite the Thirteenth Amendment, a reign of violence took hold in the South. In response, Congress adopted the first Reconstruction civil-rights statute in 1866. Doubting its constitutional authority to pass this statute, Congress proposed the Fourteenth Amendment in 1866, which forbids States from denying citizens due process and the equal protection of the law. In 1871, buttressed by the constitutional authority of the Fourteenth Amendment, Congress essentially re-adopted the 1866 civil-rights statute that is codified today at 42 U.S.C. § 1983.[151]

Section 1983 was not employed often during its first fifty years,[152] but gradually gained importance as a tool. By 1964, evidenced by the *Monroe v. Pape* decision, § 1983 had become an important remedy for civil rights violations by state and local officials.[153] Like Stump, most plaintiffs who allege civil rights violations seek a remedy against a judge through a § 1983 action.

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[149] 42 U.S.C. § 1983 (2006) (emphasis added). "The portion in italics was added by an amendment in 1979, Pub. L. No. 96-170, and the portion underlined was added by an amendment in 1996, Pub. L. No. 104-317, § 309(c) ... to provide judges some protection from injunctive relief after the decision in *Pulliam v. Allen*." Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 Tex. J. C.L. & C.R. 29, 30–31 n.1 (2010).

[150] U.S. CONST. amend. XIII.

[151] Johns, *A Black Robe*, *supra* note 148, at 268.

[152] "Despite its seemingly broad language, § 1983 was relatively inactive during its first fifty years, with only twenty-one reported cases decided under the section between 1871 and 1920." Bodensteiner, *supra* note 149, at 31. "Though a revolutionary shift, § 1983 was essentially dormant for nearly 100 years." Johns, *A Black Robe*, *supra* note 148, at 269. "[Section] 1983 was largely ineffectual for almost one hundred years." Malia N. Brink, *A Pendulum Swung too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 3 (2009).

[153] Johns, *A Black Robe*, *supra* note 148, at 269.

Some scholars argue that § 1983 has no language in it to suggest that Congress intended official immunity defenses for defendants in civil rights actions, nor did Congress intend to preserve any type of immunity.[154] However, the Court does not agree with this position as it has interpreted the 1871 Congressional legislation to preserve and retain the common law immunities.[155]

b. Public Policy Underpinnings of Judicial Immunity

Public policy anchors the doctrine of judicial immunity in modern jurisprudence.

> Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption.[156]

Other courts have expanded on the policy underpinnings behind judicial immunity, stating that "[j]udicial immunity exists not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the people, in whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[157]

It is a judge's duty to decide all cases within the judge's jurisdiction that are brought before the tribunal,[158] which includes "controversial cases that arouse the most intense feelings in the litigants."[159] A judge should be able to act and not have to fear that an unsatisfied litigant may hound the judge with burdensome litigation, charging malice or corruption with every decision he may find disagreeable.[160] Allowing litigants to pursue judges would impose an onerous burden on judges, and it would contribute to rulings influenced by intimidation rather than rulings based on principled and fearless decision-making.[161] A judge's errors may, and should, be corrected

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[154] *Id.* at 270; David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 502–11 (1992); Bodensteiner, *supra* note 149, at 76.

[155] Buckley v. Fitzsimmons, 509 U.S. 259, 268–69 (1993); Burns v. Reed, 500 U.S. 478, 484–85 (1991). *See Stump*, 435 U.S. at 356; Tenney v. Brandhove, 341 U.S. 367, 367; *see also* Johns, *A Black Robe*, *supra* note 148, at 270.

[156] Dennis v. Sparks, 449 U.S. 24, 31 (1980).

[157] Long v. Cross Reporting Service, Inc., 103 S.W.3d 249, 253 (Mo. Ct. App. W.D. 2003), *reh'g denied* (Apr. 1, 2003), *transfer denied* (May 27, 2003), *cert. denied*, 124 S. Ct. 471 (U.S. 2003).

[158] Pierson v. Ray, 386 U.S. 547, 554 (1967).

[159] *Id.*

[160] *Id.*

[161] *Id.*

on appeal, rather than by action for damages.[162] The rationale for judicial immunity rests on the public policies of "protecting the finality of judgments, discouraging inappropriate collateral attacks, and preserving judicial independence by insulating judges from lawsuits by unsatisfied litigants."[163] These grounds have established the unique and special legal immunities—even absolute immunities—afforded to the judiciary, and only the judiciary.

In the 1990s, public sentiment turned against government officials who enjoyed certain immunities not available to the general public.[164] For decades, Congress had "exempted itself from significant laws relating to the environment, labor protection, and civil rights with which the citizens, under the threat of severe penalty, were obligated to comply."[165] President Clinton even noted that "most Americans are actually surprised when they learn that some of our most basic laws don't apply to Congress and their staffs."[166] The Congressional Accountability Act of 1995[167] was enacted to address this, and was intended for all levels of government officials, low and high ranking, to be subject to the same laws that apply to the general public at large.[168] Despite this, several categories of officials in the judicial branch and in its proximity continue to operate outside of these laws.[169] Based on the Court's claim of judicial immunity, judges still enjoy the same exemptions as they have enjoyed for decades, founding judicial exemption from the Congressional Accountability Act of 1995 on both the common law tradition of judicial immunity and on public policy.[170]

c. Determining What Is Judicial in Nature

The doctrine of judicial immunity generally applies to both federal[171] and state[172] judges. Judicial immunity does not automatically attach to all

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[162] *Id.*

[163] 48A C.J.S. *Judges* § 207 (2012); *see also* Forrester v. White, 484 U.S. 219, 226 (1988).

[164] Pillai, *supra* note 143, at 96.

[165] *Id.*

[166] *Id.* (quoting Remarks of the President on signing the Congressional Accountability Act of 1995, 31 Weekly Comp. Pres. Doc. 91 (1995)).

[167] Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (to be codified at 2 U.S.C. § 1301).

[168] Pillai, *supra* note 143, at 96.

[169] *Id.*

[170] *Id.*

[171] Turner v. American Bar Ass'n, 407 F. Supp. 451, 481 (N.D. Tex. 1975), *aff'd*, 539 F.2d 715 (7th Cir. 1976).

[172] Stepanek v. Delta Cnty., 940 P.2d 364, 368 (Colo. 1997); *see also* 48A C.J.S. *Judges* § 209 (2012).

conduct of a judge, however, even if the conduct is proper for him to perform, but only to *adjudicative* conduct. Not all acts by one bearing the title *judge* are judicial.[173] The Supreme Court's approach to judicial immunity law determines entitlement to immunity by the functions being protected, rather than by the person to whom the title "judge" is attached.[174] This functional approach distinguishes between adjudicatory acts and administrative or executive functions.[175] For example, a judge is not protected by absolute immunity while performing administrative functions such as hiring and firing. In *Forrester v. White*, a judge dismissed a probation officer on the basis of sex, violating the Equal Protection Clause of the Fourteenth Amendment.[176] The Court held that the judge could not claim absolute immunity from a damages suit under § 1983 for his decision to demote and dismiss the probation officer.[177]

A judge is not protected by absolute immunity when he or she is engaged in conduct that is not within her judicial role.[178] For example, a judge is not protected if threatening physical assault[179] or carrying out an assault and battering a person.[180] Moreover, a judge is afforded no protection if he acts without jurisdiction.[181] Perhaps the most bizarre example to illustrate this is found in *Zarcone v. Perry*, where the judge ordered his bailiff to bring before him, in handcuffs, a coffee vendor whose coffee he disliked.[182] The judge described the taste of the coffee as "putrid" and threatened the vendor in his chambers for twenty minutes.[183] When sued

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[173] Mylett v. Mullican, 992 F.2d 1347, 1352 (5th Cir. 1993).

[174] Mireles v. Waco, 502 U.S. 9, 12–13 (1991); Forrester v. White, 484 U.S. 219, 224–25 (1988); Killinger v. Johnson, 389 F.3d 765, 770 (7th Cir. 2004); Brown v. Griesenauer, 970 F.2d 431, 434 (8th Cir. 1992); Mumford v. Zieba, 788 F. Supp. 987, 990 (N.D. Ohio 1992), *rev'd on other grounds*, 4 F.3d 429 (6th Cir. 1993); Johnson v. Foti, 583 So. 2d 1210, 1212 (La. Ct. App. 4th Cir. 1991).

[175] 46 AM. JUR. 2D *Judges* § 68 (2006).

[176] *Forrester*, 484 U.S. at 219.

[177] *Id.*

[178] MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 3:2, at 3–7 (3d ed. 1996).

[179] Ammons v. Baldwin, 705 F.2d 1445, 1448 (5th Cir. 1983).

[180] *See, e.g.*, Archie v. Lanier, 95 F.3d 438, 441 (6th Cir. 1996) (holding that "stalking and sexually assaulting a person, no matter the circumstances, do not constitute 'judicial acts'"); Gregory v. Thompson, 500 F.2d 59, 64 (9th Cir. 1974) (holding that a judge has no immunity for the use of physical force to personally remove an individual from the courtroom); *see also* Dean v. Byerley, 354 F.3d 540, 556 (6th Cir. 2004) (holding that the Regulation Counsel for the State Bar of Michigan was not performing adjudicative function when he threatened picketer with arrest and the prospect of never practicing law in state).

[181] MICHAEL AVERY ET AL., *supra* note 178, at 3–5.

[182] Zarcone v. Perry, 572 F.2d 52, 53 (2d Cir. 1978).

[183] *Id.*

by the street coffee vendor, the judge was not entitled to immunity, and the coffee vendor recovered substantial damages.[184]

Finally, the doctrine does not protect judges from gross criminal acts—even if technically performed within the jurisdiction of the judge.[185] The widely publicized "Kids-for-Cash" scandal[186] involved two former Pennsylvania judges and tested the boundaries of the doctrine of judicial immunity.[187] Eventually the judges pled guilty to, inter alia, honest services fraud and tax evasion[188] in connection with their scheme of sending numerous juveniles to detention centers in exchange for more than $2.8 million in kickbacks.[189] The judges' plea bargains were rejected and replaced with harsher sentences and longer prison times.[190]

2. Prosecutorial Immunity

The vast majority of prosecutors are ethical lawyers engaged in necessary public service, and they maintain a crucial role in the criminal justice system. Prosecutors are often accused of misconduct when upset and dissatisfied litigants feel that a prosecutor has overreached his role as an officer of the court and public servant. In order to enable a prosecutor to carry out the duties of her position in the most effective and efficient manner possible, yet deter and punish genuine misconduct, a system of absolute and qualified immunities has developed.

a. Public Policy Underpinnings of Prosecutorial Immunity

The immunities protecting prosecutors are a fundamental element in the criminal justice system. There are five general policy arguments in support of prosecutorial immunities.

First, the threat of a lawsuit would undermine the effective execution of a prosecutor's responsibilities. Presumably, a prosecutor would be more

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[184] *Id*.

[185] *E.g.*, Neal v. Director, 400 F. Supp. 2d 134, 143 (D.D.C. 2005); Braatelien v. United States, 147 F.2d 888, 895 (8th Cir. 1945).

[186] Clark v. Conahan, 737 F. Supp. 2d 239, 256–57 (M.D. Pa. 2010).

[187] Ashby Jones, *New Lawsuits Try to Pierce Shield of Judicial Immunity*. WALL ST. J., Nov. 12, 2009, at A21, *available at* http://online.wsj.com/article/SB125798232401944303.html.

[188] *Pa. Judge Gets 28 Years in "Kids for Cash" Case*, CBSNEWS.COM (August 11, 2011, 4:36 PM), http://www.cbsnews.com/stories/2011/08/11/national/main20091371.shtml.

[189] Michael R. Sisak and Patrick Sweet, *'Boss' Conahan Sentenced to 17½ Years*, THE CITIZEN'S VOICE (Sept. 21, 2011), http://citizensvoice.com/boss-conahan-sentenced-to-17-years-1.1207996 (last visited Mar. 23, 2013).

[190] *Id.* Ciavarella was eventually sentenced to twenty-eight years in prison, and Conahan was sentenced to seventeen and one-half years in federal prison. *Id*.

cautious in bringing criminal charges and less zealous at trial if the threat of a civil rights suit hung over his head. Second, criminal defendants might be tempted to bring such suits for purposes of retaliation. Such suits would sap a prosecutor's energy and "his attention would be diverted from the pressing duty of enforcing the criminal law." Third, even the most honest prosecutor would become entangled in these suits, requiring "a virtual retrial of the criminal offense in a new forum." Such burdens would be "unique and intolerable." Fourth, post-conviction remedies such as appeals and habeas corpus proceedings are more appropriate remedies because they focus on the overall fairness of the trial and not solely upon the prosecutor's alleged misconduct. Finally, criminal and other punitive remedies already exist against a prosecutor who violates the law and, as a result, "immunity of prosecutors from liability in suits under [§] 1983 does not leave the public powerless to deter misconduct or to punish that which occurs."[191]

Prosecutorial immunity, like judicial immunity, is rooted in both the common law and public policy.[192] Two types of immunity have emerged and apply to prosecutors in litigation under a § 1983 action: absolute immunity and qualified immunity. A functional test, which was introduced by the Supreme Court in *Imbler v. Pachtman* and further developed in *Buckley v. Fitzsimmons*,[193] is employed to determine which immunity applies, and it is largely dependent on the function the prosecutor was performing at the time of the misconduct.[194] *Imbler v. Pachtman*,[195] a widely cited and influential case, decided the question of immunity for prosecutors under § 1983. *Imbler* "created a broad rule of absolute immunity" for prosecutors[196] to shield them from civil liability and enable them to perform their duties as ministers of justice.[197] According to the Court, absolute immunity should be

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[191] BENNET L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 14:14, at 14–33 (2d ed. 1999).

[192] Imbler v. Pachtman, 424 U.S. 409, 420–28 (1976). Some academics argue that the Court's understanding of prosecutorial immunity being rooted in the common law is in error, stating that the first case affording prosecutors absolute immunity was not decided until 1896. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 55 (2005).

[193] Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993). The Court reiterated that prosecutors should receive absolute immunity for acts done in preparation for or during a judicial proceeding. *Id.* at 260. The Court, distinguishing these adversarial acts from those that were investigative or administrative, held that prosecutors should receive only qualified immunity for investigative or administrative functions. *Id.*

[194] Kalina v. Fletcher, 522 U.S. 118, 127–29 (1997); *Buckley*, 509 U.S. at 268–69; Burns v. Reed, 500 U.S. 478, 486 (1991).

[195] *Imbler*, 424 U.S. 409.

[196] Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3455 (1999).

[197] *Imbler*, 424 U.S. at 425.

granted to a prosecutor for activities "intimately associated with the judicial phase of the criminal process."[198] The Court avoided detailed language about what exactly the "judicial phase" is, but did state that at the very least, it would include any action the prosecutor might undertake in his role as advocate for the state.[199]

After *Imbler*, the Court addressed the nuances of prosecutorial immunity in *Burns v. Reed*,[200] where it emphasized that, in determining immunity, the focus should be on the nature of the act, rather than the job title of the actor.[201] It also held that a probable cause hearing was "intimately associated with the judicial phase of the criminal process" and a prosecutor is protected by immunity for any conduct within that process of obtaining a search warrant.[202] The Court also recognized that giving advice to the police is an investigative function and is therefore only eligible for qualified immunity.[203]

b. Absolute Immunity for a Prosecutor

The Supreme Court, not the legislature, has extended the principles of absolute immunity beyond application to judges. In certain circumstances, the Court has recognized that legislators,[204] the President,[205] and prosecutors[206] can also claim absolute immunity.

Absolute immunity will generally apply when prosecutors act as advocates. This includes conduct geared toward the initiation of a prosecution or in preparation for a judicial proceeding, "including prosecutorial conduct before grand juries, statements made during trial, examination of witnesses,

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[198] *Id.* at 430.

[199] *Id.* at 430–31.

[200] Burns v. Reed, 500 U.S. 478 (1991). The Court opined that "qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties" and that the Court had been "quite sparing" in its recognition of absolute immunity. *Id.* at 486–87. The Court reasoned that its role was "not to make a freewheeling policy choice, but rather to discern Congress'[s] likely intent in enacting § 1983." *Id.* at 494.

[201] *Id.* at 495–96.

[202] *Id.* at 479.

[203] *Id.* at 493.

[204] *See* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 405 (1979) (regarding regional legislators); Gravel v. United States, 408 U.S. 606, 616 (1972) (regarding federal legislators); Tenney v. Brandhove, 341 U.S. 367, 372–75 (1951) (regarding state legislators).

[205] *See* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

[206] Yaselli v. Goff, 12 F.2d 396, 404 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927); *see also* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 204 (3d ed. 1997).

and presentation of evidence in support of a search warrant during a probable cause hearing."[207] "Under absolute immunity, prosecutors are immunized even when the plaintiff establishes that the prosecutor acted intentionally, in bad faith, and with malice."[208] A prosecutor's absolute immunity "will not be defeated because of action that was in error, done maliciously, or in excess of authority."[209] An official who seeks the protection of absolute immunity bears the burden of demonstrating that absolute immunity is justified for the function in question.[210] Prosecutors have been protected by absolute immunity in cases[211] dealing with behaviors including inducing perjury,[212] failing to disclose exculpatory evidence,[213] fabricating evidence and presenting false testimony,[214] improperly influencing witnesses,[215] initiating a prosecution without probable cause,[216] and breaching plea agreements.[217]

c. Qualified Immunity for a Prosecutor

Qualified immunity applies when prosecutors act as investigators or administrators, and courts use a functional test to determine if the acts of the prosecutor were investigative or administrative in nature.[218] Therefore, immunity from liability applies only after an evaluation is made that a certain objective standard is met: "Under qualified immunity, prosecutors are immunized unless the misconduct violated clearly established law of which a

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[207] 27 C.J.S. *District and Prosecuting Attorneys* § 59 (2012); *see also* Rehberg v. Paulk, 598 F.3d 1268, 1276 (11th Cir. 2010), *aff'd*, 132 S. Ct. 1497 (2012).

[208] Johns, *supra* note 192, at 54.

[209] GERSHMAN, *supra* note 191, at 14–33.

[210] BENNET L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 14:14 (2d ed. 2012).

[211] For a more exhaustive and thorough list of cases receiving prosecutorial immunity, see generally Williams, *supra* note 196.

[212] Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976).

[213] Carter v. Burch, 34 F. 3d 257, 262–63 (4th Cir. 1994).

[214] *See, e.g.*, Moore v. Valder, 65 F.3d 189, 194 (D.C. Cir. 1995) (concluding that absolute immunity insulated the prosecutor for allegedly manipulating and concealing evidence before the grand jury); Pinaud v. Cnty. of Suffolk, 52 F.3d 1139, 1149 (2d Cir. 1995) (holding that a prosecutor was entitled to absolute immunity for misstatements); Fields v. Soloff, 920 F.2d 1114, 1120 (2d Cir. 1990) (finding that a prosecutor was protected by absolute immunity in the grand jury context). The Supreme Court has made clear, however, that fabrication of evidence must occur after the existence of probable cause, that is, after the prosecutor has made a decision to indict, for it to be considered an advocacy function and thus covered by absolute immunity. *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993).

[215] Stokes v. City of Chicago, 660 F. Supp. 1459, 1461 (N.D. Ill. 1987).

[216] Manetta v. Macomb Cnty. Enforcement Team, 141 F.3d 270, 274 (6th Cir. 1998).

[217] *Pinaud*, 52 F.3d at 1149.

[218] Johns, *supra* note 192, at 54.

reasonable prosecutor would have known."[219] The theory behind qualified immunity for a prosecutor attempts to balance providing a remedy for egregious misconduct on one hand and protecting the honest prosecutor from liability on the other.[220] Alleged prosecutorial misconduct that has received qualified immunity[221] include cases with a prosecutor who swore to false facts in an affidavit,[222] giving legal advice to the police during a criminal investigation,[223] providing incorrect information in a search warrant,[224] and failure to warn witnesses who were in danger by testifying at trial.[225]

3. Legislative Immunity

The doctrine of legislative immunity provides absolute immunity to legislators at the federal, state, regional, and municipal levels when discharging their public duties in their legislative role. This policy is based on pre-colonial English common law.

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger .... Legislators are immune from deterrents to the uninhibited discharge of their legislative duties, not for their private indulgence but for the public good.[226]

This notion of the freedom of speech and action in the legislative setting was so fundamental that it was incorporated into the Articles of Confederation,

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[219] *Id.*

[220] *Id.*

[221] For a more exhaustive and thorough list of cases receiving prosecutorial immunity, see generally Williams, *supra* note 196.

[222] Hart v. O'Brien, 127 F.3d 424, 449 (5th Cir. 1997).

[223] Harris v. Bornhorst, 513 F.3d 503, 510 (6th Cir. 2008), *cert. denied*, 554 U.S. 903 (2008); Prince v. Hicks, 198 F.3d 607, 611–12 (6th Cir. 1999); Burns v. Reed, 500 U.S. 478, 496 (1991). A prosecutor is not entitled to any immunity based on giving advice to police about the existence of probable cause to make an arrest if the prosecutor could not have reasonably believed the arrest was supported by probable cause. *Harris*, 513 F.3d at 516. Investigators employed by a prosecutor's office and working under the prosecutor's direction ordinarily possess qualified immunity. Joseph v. Patterson, 795 F.2d 549, 560 (6th Cir. 1986), *abrogated on other grounds by* Kalina v. Fletcher, 522 U.S. 118 (1997). *But see* Collins v. King Cnty., 742 P.2d 185, 189 (1987), *overruled on other grounds by* Lutheran Day Care v. Snohomish Cnty., 829 P.2d 746 (1992) (nonattorney in Victim Assistance Unit of prosecutor's office entitled to absolute immunity for giving erroneous advice to person who called for help).

[224] *Hart*, 127 F.3d at 439–40.

[225] Piechowicz v. United States, 685 F. Supp. 486, 489 (D. Md. 1988).

[226] Tenney v. Brandhove, 341 U.S. 367, 372 (1951), *reh'g denied*, 342 U.S. 843 (1951).

the U.S. Constitution, and various state constitutions as well.[227] The founders viewed the immunity as essential in enabling a public official to discharge his duties with "firmness and success" by conferring upon him the "fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence."[228]

In *Tenney v. Brandhove*, the Court protected investigations conducted by the Senate Fact-Finding Committee on Un-American Activities, finding them, however distasteful, legitimate legislative activity.[229] This is true despite the violations of due process committed by the committee, as well as the chilling effect that their activities had on free speech.[230] As such, the committee members' actions in conducting the investigations were entitled to immunity.[231] In its decision, the Court said:

> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.[232]

The justification for legislative immunity at the federal level is equally applicable to state and regional legislators.[233] For example, members of the Tahoe Regional Planning Agency, a bi-state agency created by California and Nevada, were held to be immune from federal suit, as they had been acting in a legislative capacity.[234] In its opinion, the Court said: "[T]o the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability."[235] This immunity also applies to municipal legislators, as demonstrated in *Bogan v. Scott-Harris*, where the Court stated: "Absolute immunity for local legislators under § 1983 finds support not only in history, but also in reason....

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[227] *Id.* at 372–73.
[228] *Id.* at 373.
[229] *Id.* at 369, 377.
[230] *Id.* at 371.
[231] *Id.* at 377.
[232] *Tenney*, 341 U.S. at 377.
[233] Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 (1979).
[234] *Id.* at 391, 405.
[235] *Id.* at 406.

The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators."[236]

Legislative immunity is therefore broadly applied to all levels of government, and the delegates necessary for these levels to function, based on a functional analysis of the role being played during the alleged wrong.

4. Qualified Immunity and Quasi-Judicial Immunity

A wide array of public officials and other court-appointed individuals participate in carrying out judicial functions, and accordingly these individuals are entitled to assert absolute quasi-judicial immunity.[237] These include administrative judges,[238] officials who enforce court orders,[239] law clerks,[240] court clerks,[241] court appointed evaluators, parole and probation officers, special masters, arbitrators and mediators, hearing officers, and even a presiding official in an alternative dispute resolution proceeding.[242] This is consistent with the functional approach generally governing common-law immunities.[243] Public policy requires that the law should afford quasi-judicial immunity to officials who enforce judicial orders, because while they are not judicial officers, they act "under the command of a court decree or explicit instructions from a judge."[244]

Many government officials "performing acts within the course of their official duties have immunity but that immunity is qualified in several ways."[245] Much of the law of qualified immunity derives from *Scheuer v. Rhodes*.[246] In *Scheuer*, the plaintiffs' estates brought a § 1983 suit against

> the Governor of Ohio, the Adjutant General of the Ohio National Guard and various guardsmen, and the President of Kent State University for the deaths resulting from control of a demonstration at Kent State. The Court found that a qualified immunity would be sufficient to protect the officials in their discretionary activities.[247]

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[236] Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998). The Court cites *Tenney*, 341 U.S. 367, stating that Congress did not intend for § 1983 to "impinge on a tradition so well grounded in history and reason." *Id.*

[237] SCHWARTZ & KIRKLIN, *supra* note 206, at 204.

[238] Butz v. Economou, 438 U.S. 478, 479 (1978).

[239] SCHWARTZ & KIRKLIN, *supra* note 206, at 225.

[240] Oliva v. Heller, 839 F.2d 37, 40 (2d Cir. 1988).

[241] Kinkaid v. Vail, 969 F.2d 594, 601 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1002 (1993).

[242] Wagshal v. Foster, 28 F.3d 1249, 1254 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995).

[243] SCHWARTZ & KIRKLIN, *supra* note 206, at 204.

[244] Henriksen v. Bentley, 644 F.2d 852, 855 (10th Cir. 1981).

[245] CHARLES H. KOCH JR., 3 ADMINISTRATIVE LAW & PRACTICE § 8:41, at 249 (3d ed. 2010).

[246] Scheuer v. Rhodes, 416 U.S. 232 (1974).

[247] KOCH, *supra* note 245, at 249.

One is entitled to qualified immunity when there is "the existence of reasonable grounds for the belief formed at the time [of the action] and in light of all the circumstances, coupled with good-faith belief ...."[248] In *Butz v. Economou*,[249] the leading case on administrative immunity, the Court held that in a suit for damages arising from unconstitutional action, federal executive officials were entitled to only qualified "good faith" immunity.[250] Furthermore, the doctrine has expanded in recent decades to include "many defendants who are not judges, including psychologists, social workers, mediators, receivers, probation officers, and licensing and parole-board members.... Under this extension of immunity, these officials escape liability even when they have maliciously violated constitutional protections."[251] For example, a social worker working on a child custody case was granted immunity even after she had omitted positive information and falsified the results of a plaintiff's evaluation.[252] However, not all courts have accepted expansive applications of immunity, and the circuits are split as to the boundaries of liability for non-judges acting in a quasi-judicial role.[253]

The courts are generally in agreement with regard to qualified immunity for federal and state law enforcement and investigative officers:

> Under all circumstances, federal and state law enforcement and investigative officers are entitled to only qualified immunity. Both *Pierson v. Ray* and *Bivens* confirmed that the courts would not go beyond the qualified immunity available to police at common law. The courts acknowledged that police work involves a great deal of discretion especially in determining whether and how to arrest someone. Limited immunity, the courts held, would be sufficient to allow the officers to continue to exercise that discretion but would act as a safeguard to prevent overzealousness.
> ....
> [A]s expressed by the Court in *Bivens*, qualified immunity requires that the officer must have acted in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest or search in the way the arrest was made and the search was conducted. The Supreme Court in *Pierson* similarly stated the test for immunity.[254]

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[248] *Scheuer*, 416 U.S. at 247–48; *see also* KOCH, *supra* note 245, at 249–50.

[249] KOCH, *supra* note 245, at 249–50 ("In *Butz*, the petitioner alleged that Department of Agriculture employees unsuccessfully had tried to revoke or suspend the registration of his commodity futures commission company. The petitioner claimed that the Department instituted the proceedings solely in retaliation for his criticism of commodity operations and that not only had the Department's conduct of the hearings deprived him of due process, but the entire affair had violated his First Amendment rights.").

[250] *Id.*

[251] Johns, *A Black Robe*, *supra* note 148, at 266–67.

[252] Hughes v. Long, 242 F.3d 121, 125–28 (3d Cir. 2001).

[253] Johns, *A Black Robe*, *supra* note 148, at 266–67.

[254] KOCH, *supra* note 245, at 250 (footnotes omitted).

Individuals are not the only ones to enjoy immunity. Certain organizations, which are considered legal persons, also enjoy immunity. For example, self-regulatory organizations enjoy a form of immunity:

> Since the passage of the Securities Exchange Act of 1934 (the Exchange Act), self-regulatory organizations (SROs), like Nasdaq, have enjoyed absolute immunity for acts carried out under the quasi-governmental powers of the Exchange Act. Courts have generally held that SROs will receive protection from the Exchange Act so long as their "alleged misconduct falls within the scope of [their] quasi-governmental powers." But recently, there has been a trend by SROs to become for-profit entities. Since 2000, [and as of 2008] seven of the ten largest U.S. stock exchanges have filed initial public offerings with the SEC and relinquished their nonprofit status. As a consequence of such filings, SROs, like Nasdaq, have been struggling to maintain their identities as quasi-governmental entities. Thus, the issue becomes whether an SRO's actions in furthering profit-making activity fall within its quasi-governmental powers under the Exchange Act.[255]

The first time a plaintiff pierced the veil of immunity of a stock exchange was in the Eleventh Circuit's decision in *Weissman v. NASD, Inc.*[256]

> To be sure, self-regulatory organizations do not enjoy complete immunity from suits. Only when an SRO is "acting under the aegis of the Exchange Act's delegated authority" does it enjoy that privilege. Absolute immunity is not appropriate unless the relevant conduct constitutes a delegated quasi-governmental prosecutorial, regulatory or disciplinary function.[257]

The court held for the first time that an SRO was not entitled to absolute immunity.[258] This decision, although not yet followed in other circuits, moved away from the long-standing and liberal application of absolute immunity for SROs and established a new test to determine whether an SRO is entitled to such immunity.[259] Time will tell if other circuits follow suit or not, but "it is clear for the time being, given the court's emphasis on private versus regulatory actions, that piercing the veil of absolute immunity favors plaintiffs like Steve Weissman when SROs perform any function outside their quasi-governmental role."[260]

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[255] Craig J. Springer, *Weissman v. NASD: Piercing the Veil of Absolute Immunity of an SRO Under the Securities Exchange Act of 1934*, 33 DEL. J. CORP. L. 451, 451–53 (2008).

[256] *Id.*

[257] Weissman v. Nat'l Ass'n of Sec. Dealers, Inc., 468 F.3d 1306, 1311 (11th Cir. 2006), *reh'g en banc in part*, 500 F.3d 1293 (11th Cir. 2007).

[258] Springer, *supra* note 255, at 451–53.

[259] *Id.*

[260] *Id*.

B. Selected Private Actor Immunities

Immunity from suit also exists for certain private individuals acting in a non-state type role, in some situations.[261] Less attention in the immunity field is paid to these private actor immunities, which generally exist when actors engage in a certain role or activity unrelated to their occupations, and provide powerful protections to protect the exercise of discretion. While the theme of public service performed through specified occupations underpins the public role immunities, private actor immunities are more centered on roles or situations that an individual might find themselves to be in, some of which might be highly unusual or non-recurring.

1. Good Samaritan Immunity

So-called "Good Samaritan" statutes grant immunity from civil liability for negligent acts or omissions committed by certain individuals who have voluntarily provided emergency care to injured parties.[262] The statutory terms and classes of protected individuals vary by jurisdiction,[263] but generally, courts limit Good Samaritan protection to individuals without a pre-existing duty to render assistance.[264] Some jurisdictions extend immunity to anyone administering emergency care, while others limit protection to certain medical personnel.[265] First responders, such as law enforcement and firefighters, are typically covered by other statutes that specifically apply to them. Similarly, Good Samaritan protection extends only to physicians who treat patients while not on call, or who are not required to respond as part of their hospital function.[266] Good Samaritans must provide at least a minimal standard of care, although the extent of minimum care also varies by jurisdiction. In some jurisdictions, Good Samaritans statutes expressly apply to assistance provided in an "ordinary prudent manner."[267] Still another jurisdiction grants immunity to Good Samaritans who provided emergency care in "good faith;"[268] while yet another jurisdiction grants immunity to all care except care constituting "gross negligence."[269]

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[261] Richardson v. McKnight, 521 U.S. 399, 407 (1997).

[262] Danny R. Veilleux, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R. 4TH 294, 294 (2012).

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

Typically, Good Samaritan statutes require that the care rendered be "emergency care," and at least one jurisdiction construes "emergency" narrowly.[270] In *Muller v. McMillian Warner Ins. Co.*, the court determined that the initial evaluation and immediate assistance provided by the parents of a minor all-terrain vehicle (ATV) driver to his injured passenger upon their arrival at the parent's home following an ATV accident did constitute "emergency care."[271] However, the court held that the care the parents provided some six or more hours later, prior to calling 911, did not constitute "emergency care," and as such, the parents were not entitled to Good Samaritan immunity.[272] The court found that the parents had cared for the individual longer than necessary to transfer her to professional medical care.[273] Other jurisdictions have held that physicians who provide medical treatment that is not immediately necessary do not provide "emergency care" within the meaning of Good Samaritan statutes.[274] For instance, in *Gragg v. Neurological Associates*, the court held that the treatment of a fractured and dislocated ankle bone caused by a motorcycle accident did not constitute emergency treatment.[275] Similarly, in *Lewis v. Soriano*, the court held that although the patient needed treatment without undue delay, there were orthopedic surgeons available within thirty miles, and so the treatment could have been delayed for the short time necessary to transport the patient to qualified specialists.[276] Finally, many jurisdictions hold that Good Samaritan immunity does not extend to individuals who created the emergency necessitating the treatment.[277] In *Markman v. Kotler*, the court held that the defendant doctor would not be held to the lesser standard of care for Good Samaritans if he had created the emergency.[278] The court also held that the jury could find for the plaintiff if the doctor's conduct had decreased the decedent's chances of survival.[279] The State of Utah's Good Samaritan statute codifies this point of law.[280] In its holding granting immunity to National Park Service employees, the court in *Flynn v. United States* emphasized that the employees did not cause an

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[270] Mueller v. McMillian Warner Ins. Co., 714 N.W.2d 183, 186 (Wisc. 2006).
[271] *Id.*
[272] *Id.*
[273] Mia I. Frieder, *Can You Lift the Good Samaritan Shield*, 46 TRIAL 48, 49 (2010).
[274] Gragg v. Neurological Assocs., 263 S.E.2d 496, 498 (Ga. Ct. App. 1979).
[275] *Id.*
[276] Lewis v. Soriano, 374 So.2d 829, 831 (Miss. 1979).
[277] Veilleux, *supra* note 262, at 294.
[278] Markham v. Kotler, 52 A.D.2d 579, 579 (N.Y.S.2d 1976).
[279] *Id*. at 580.
[280] Flynn v. United States, 681 F. Supp. 1500, 1506–07 (D. Utah 1988), *aff'd in part*, *vacated in part*, 902 F.2d 1524 (10th Cir. 1990).

accident resulting in injuries to a pedestrian, who herself had been rendering assistance to an earlier accident victim.[281]

a. Policy

The primary purpose of these statutes is to encourage prompt emergency care by granting immunity from civil damages and removing the fear of liability,[282] and courts enforce the statute to advance public policy. The administering of emergency medical care is done in a stressful situation immediately following the injury, often by people who are not specifically trained to handle medical emergencies, and public policy seeks to encourage assistance from bystanders by freeing them from worry about liability for their reasonable actions. This promotes the use of discretion in responding to a medical emergency, since a Good Samaritan will not be held liable as long as he provided care that met an objective standard of reasonableness or good faith.

2. Parental Immunity

The doctrine of parental immunity bars a child from bringing an action for damages against her parents, insulating parents from most personal injury actions brought by minor children.[283] Subject to certain limitations and exceptions, parents are generally immune from suits brought by minor children for acts of ordinary negligence that involve the reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child.[284] This immunity is an American invention, which was unknown in British or American common law prior to the nineteenth century.[285] Parental immunity does not apply to cases implicating gross negligence or willful misconduct. Specifically, courts have held that parental immunity does not apply to parents who commit intentional torts against their children.[286]

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[281] *Id.* at 1510.

[282] Veilleux, *supra* note 262, at 294.

[283] 67A C.J.S. *Parent and Child* § 317 (2012) (citing Doe v. Shults Lewis Child and Family Services, Inc., 718 N.E.2d 738 (Ind. 1999)).

[284] *Id.*

[285] Gibson v. Gibson, 479 P.2d 648, 649 (Cal. 1971).

[286] *See, e.g.*, Barnes v. Barnes, 603 N.E.2d 1337, 1342 (Ind. 1992) (holding that parental immunity does not apply in suits brought by one family member against another family member for intentional or willful conduct); Doe v. Holt, 418 S.E.2d 511, 512–13 (N.C. 1992) (parental immunity did not attach to suit brought by children against their father for damages resulting from his rapes and sexual molestation of them).

One of the earliest cases of the parental immunity doctrine involved a minor child appealing a judgment by the trial court that dismissed her claim for damages stemming from cruel and inhumane treatment at the hands of her stepmother with her father's consent.[287] Citing the common law right of a father to have "control and custody" of his child, the Tennessee Supreme Court affirmed the trial court's holding.[288] In *Hogan v. Hogan*, a child sued her mother for damages she incurred in an automobile accident in which the mother was driving.[289] The court dismissed the case because the mother had been driving the vehicle for a family purpose and was, therefore, immune from suit.[290] The Georgia Court of Appeals ruled similarly in *Blake v. Blake*.[291] There, the parents of two minor children were divorced and the children were injured in an automobile accident while with their father.[292] The court held that parental immunity applied because the father had been transporting his children from school, which constituted a family purpose.[293]

a. Policy

The parental immunity doctrine exists to preserve the integrity and unity of the family, to avoid unnecessary injection of the state into the day-to-day exercise of parental discretion, and is limited to negligence in conduct that relates to parental discretion in the discipline, supervision, and care of children.[294] The rationale behind the parental immunity doctrine is that the right of the parent to use discretion in the discharge of these parental duties could be "seriously impaired" if the parents could be held liable for ordinary negligence that occurs while discharging those parental duties.[295] The value of preserving and promoting the free exercise of parental discretion outweighs the social costs imposed by the exercise of that discretion.

3. Stand Your Ground Immunity

A more controversial private immunity exists, created by "Stand Your Ground" laws in various states in the United States. This immunity has

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[287] McKelvey v. McKelvey, 77 S.W. 664, 664 (Tenn. 1903), *overruled by* Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1994).
[288] *Id.*
[289] Hogan v. Hogan, 435 N.E.2d 770, 770 (Ill. App. Ct. 1982).
[290] *Id.* at 772.
[291] Blake v. Blake, 235 Ga. App. 38, 508 S.E.2d 443, 444 (1998).
[292] *Id.* at 444.
[293] *Id.*
[294] 67A C.J.S. *Parent and Child* § 317 (2012).
[295] McGee v. McGee, 936 S.W.2d 360, 367 (Tex. App. 1996).

received a great deal of attention with the ongoing Trayvon Martin case currently unfolding in Florida.[296] Because the nuances of this immunity are state-specific, this Article will examine one state, Florida, as an example for illustrative purposes.

The "Stand Your Ground" law in Florida is actually three separate statutes[297] that work together to allow an individual to use deadly force in self-defense, thus excusing the person from the common law duty to retreat. This common law duty had required a person to use every reasonable means to avoid danger, including retreat, prior to using deadly force.[298] The "Stand Your Ground" law is an expansion of the common law "Castle Doctrine," which allows a person to use deadly force without a duty to retreat if the person was attacked in her home or workplace and reasonably believed that deadly force was necessary to prevent imminent death to herself or another, great bodily harm, or the commission of a forcible felony.[299]

The Florida "Stand Your Ground" law reformulates the definition of self-defense and

> permits a person to use force, including deadly force, without fear of criminal prosecution or civil action for damages, against a person who unlawfully and forcibly enters the person's dwelling, residence, or occupied vehicle [and] abrogates the common law duty to retreat when attacked before using force, including deadly force in self-defense or defense of others.[300]

Together, these laws "protect the defender from civil and criminal prosecution for unlawful use of force or deadly force in self-defense."[301] The immunity does not generally apply to a person who provokes the attack.[302] The two exceptions to this are (1) where there is no means of escape other

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[296] Dan Berry, *Race, Tragedy and Outrage Collide After a Shot in Florida*, N.Y. TIMES, Sept. 29, 2012, http://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html?ref=trayvonmartin. George Zimmerman, the man who shot Trayvon Martin, has claimed immunity under Florida's "Stand Your Ground" law. This incident has brought the Florida law into the national media's attention. *Id.*

[297] FLA. STAT. ANN. § 776.012 (2012); FLA. STAT. ANN. § 776.013(2012); FLA. STAT. ANN. § 776.032 (2012).

[298] Daniel Michael, Comment, *Recent Development: Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 200 (2006) (citing State v. James, 867 So. 2d 414 (Fla. Dist. Ct. App. 2003).

[299] *Florida Legislation—The Controversy over Florida's New "Stand Your Ground" Law—Fla. Stat. § 776.013 (2005)*, 33 FLA. ST. U. L. REV. 351, 354 (2005) [hereinafter *Florida Legislation*].

[300] *Id.* at 353–54 (citing Fla. S. Judiciary Comm., CS for SB 436 (2005) Staff Analysis 7 (Feb. 25, 2005)).

[301] *Id.* at 355 (citing Judiciary Comm. SB 436 (2005) Staff Analysis 7 at 5).

[302] FLA. STAT. ANN. § 776.041(2) (2012).

than the use of deadly force or (2) if the provoking person withdraws from physical contact or unequivocally indicates his desire to withdraw from the confrontation and the alleged victim continues or resumes the use of force.[303] The Florida "Stand Your Ground" law specifically requires that the person invoking the defense "not [be] engaged in an unlawful activity."[304] The question of self-defense is ordinarily one for the jury.[305]

Once the presumption of "reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another" has been established, section 776.032 provides that the person who has used deadly force "is immune from criminal prosecution and civil action for the use of such force."[306] Although law enforcement is statutorily permitted to investigate the use of force, they may not arrest the person for using said force unless there is probable cause that the force used was unlawful.[307]

This immunity, then, is granted whenever two conditions are met.[308] The first condition is that the defender used deadly force against a person who was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, occupied vehicle, or any other place that the defender had the right to be.[309] The second condition is that the defender "had reason to believe that an unlawful and forcible entry or unlawful or forcible *act* was occurring or had occurred."[310] This second condition nullifies the common law presumption that the use of force *after* the danger had passed was presumptively retaliatory, and thus not considered self-defense.[311] Therefore, with the inclusion of this second condition, the Florida legislature expanded its consideration of what constitutes self-defense for the purposes of a statutory grant of immunity.

a. Policy

Florida's "Stand Your Ground" law advances the state's public policy protecting law-abiding citizens and gives them the right to "protect themselves,

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[303] *Id.*

[304] FLA. STAT. ANN. § 776.013(3) (2012); *see also* Dorsey v. State, 74 So.3d 521, 527 (Fla. Dist. Ct. App. 2011), *reh'g denied*, (Dec. 13, 2011) (holding that possession of a firearm by a convicted felon qualifies as an unlawful activity within the "Stand Your Ground" law).

[305] Payton v. State, 200 So.2d 255, 256 (Fla. Dist. Ct. App. 1967); *see also* Liotta v. State, 939 So.2d 333, 334 (Fla. Dist. Ct. App. 2006). Darling v. State, 81 So.3d 574, 578–79 (Fla. Dist. Ct. App. 2012).

[306] Rory Bahadur, *Treyvon Martin and Comments on the Florida Self Defense Law*, Arizona State Law Journal, Apr. 12, 2012, http://asulawjournal.lawnews-asu.org/?p=415.

[307] *Id.*

[308] *Id.*

[309] *Id.*

[310] FLA. STAT. ANN. § 776.013 (2012) (emphasis added).

[311] *Id.*

their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others."[312] It reflects the social value that people should expect to be safe in places where they have the right to be, and they should not be required to "needlessly retreat in the face of intrusion or attack."[313] This allows a person to be held to a reasonableness standard when gauging the threat level facing her, rather than requiring a reasonableness standard to determine the appropriateness of the behavior or reaction made by the person when using her discretion.[314] In other words, the reasonableness standard gauges the existence of the threat, not the reaction thereto. A person is entitled to use her discretion to react to a threat, and will not be penalized for the outcome as long as the perception of the existence of the threat was reasonable.

III. BUSINESS JUDGMENT RULE AS A FORM OF IMMUNITY?

A. Philosophy

The main policy underpinnings of all the forms of immunity, absolute or qualified, public or private, examined in this Article can be summarized as follows:

- To encourage the recipient of the immunity to have the liberty to exercise independent judgment, especially on things that may be controversial or risky, in a situation or situations that require the exercise of discretion for important decisions to be made. This will allow the effective execution of the recipient's duties, roles, or rights, and avoid making the recipient unduly cautious or less zealous in carrying them out. Put another way, it is given in situations where people need to make decisions that involve interpretation, in order to encourage people to make the best decision they can, rather than forcing them to make the obviously safe decision.[315]
- To give the recipient comfort that persons who are unhappy with his or her decisions, whether these decisions were right or wrong in hindsight, cannot retaliate or provide a nuisance

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[312] Michelle Jaffee, *Up in Arms over Florida's New "Stand Your Ground" Law*, 30 NOVA L. REV. 155, 175 (2005).

[313] *Id.*

[314] *Id.*

[315] *See* Lori A. McMillan, *Honest Services Update: Directors' Liability Concerns After Skilling and Black*, 18 TEX. WESLEYAN L. REV. 149, 180 (2011).

that might distract from the exercise of the recipient's duties, roles, or rights. This would impose too high of a burden on the recipient. This means that the recipient is allowed to make certain mistakes in making these decisions and is not expected to become the guarantor for perfection in executing his or her role.[316]

- Remedies are available for errors made by many of the recipients of immunity. For example, appeals are available to correct errors in judgment by a judge or prosecutor, which focus on overall fairness rather than on any one individual. Legislators can be removed from office by being voted out in the next election by the will of the people (the primary stakeholders) and legislation can be amended or repealed. Usually there are safeguards in the relevant system to ensure that a mistake by one person need not have a permanent impact. In addition, there are other sanctions available against recipients who commit wrongs in carrying out their jobs or roles if the behavior is egregious—criminal and other statutes provide penalties for many misbehaviors committed by individuals abusing their position or role, such as parents abusing their children, or a Good Samaritan who goes overboard and decides to perform a tracheotomy with a pen tube and paper clip when the patient only skinned her knee. These additional penalties are especially important in the context of absolute immunities, where a functional analysis rather than an objective standard results in the application of the immunity protection.[317]

The policy reasons underpinning the business judgment rule can be summarized as such:

- To allow directors the liberty to exercise their independent judgment and authority by making decisions that they think are appropriate, especially on things that may be controversial or risky. This will allow the effective execution of the recipient's duties, and will avoid making the recipient unduly cautious or less zealous in carrying them out. It is absolutely necessary that directors exercise their judgment to benefit the corporation and its shareholders from a practical standpoint, as well as being required from a legal one.[318]

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[316] *Id*. at 179–80.
[317] *Id.* at 155.
[318] *Id.* at 178–79.

- To give directors comfort that persons who are unhappy with their decisions, whether these decisions were right or wrong in hindsight, cannot retaliate or provide a nuisance that might distract from the directors' duties. This would impose too high of a burden on the directors.[319]
- Remedies are available for errors made by individual directors in other ways. First of all, there are usually many directors on a board of directors, so one director generally should not be able to highjack or otherwise harm the corporation. In addition, shareholders who are unhappy with the decisions made by a director, or team of directors, have the ability to vote them out of office annually. They can replace those directors with ones who will take a different approach to decisions that might be more in accordance with shareholders' wishes or philosophies. There are other sanctions against directors who commit wrongs in carrying out their jobs if the behavior is egregious—criminal and other statutes provide penalties for much misbehavior committed by individuals abusing their position.[320]

As demonstrated above, the policy reasons underpinning the business judgment rule mirror the policy reasons underpinning the different types of immunities examined in this Article. The recipients of the protections afforded by both are people who are, through employment or otherwise, in positions that require the exercise of discretion in order for their role to be carried out effectively. The more discretion that is required to be exercised in a position or role, the more protection that needs to be afforded to the individual in the position. This is not because of the individuals themselves per se, but rather because the integrity of the job or position, as well as its social role, must be maintained. Each type of recipient has a socially important role that is bigger than the individual, or at least a role that is an essential component of a system that has social benefit. This ranges from the justice system, in public immunities, to the family unit, to the integrity of the individual person, which is highly valued in American society in private immunities. The protection afforded to both recipients of immunity and directors is based on the idea that it is the positions that are socially

[319] *Id.* at 180–81.

[320] For example, fraud is a criminal offense. As another example, fiduciaries who are engaged in certain behaviors may be prosecuted under Honest Services Fraud. *See* McMillan, *supra* note 315, at 159–60 (discussing the current law on honest services fraud as it impacts on director liability).

valuable, rather than the individuals who occupy those positions. As such, the more important the role played is to society, and the more important the ability to make controversial decisions within this role, the stronger the immunity granted to those who occupy it.

While the importance of the roles, both public and private, of those protected by immunities might be evident, as they tend to be part of the larger system of justice and society, it may be argued that the same is true of the role played by directors. Corporations have become essential actors in the modern economy, and the legal fiction of personhood for these corporations requires that others think on behalf of the corporations. If directors, the brain trust tasked with thinking for a corporation, are fearful of personal liability for the decisions they make on behalf of the corporation, the corporation, and by extension the U.S. economy, will suffer as a result. The policy comparison demonstrates identical goals between immunities and the business judgment rule, and as such, the practicality of viewing the business judgment rule as an immunity can further illustrate the point.

B. Practicality—The Business Judgment Rule as an Immunity

1. Procedural Example of an Immunity

To see how immunity is established from a procedural standpoint, it is helpful to illustrate the process by which it is given, and how it applies in practice. As such, the immunity from the Florida "Stand Your Ground" law is briefly explored here.

The Florida "Stand Your Ground" law was intended to establish a true immunity and not merely an affirmative defense.[321] In *Peterson v. State*, the court stated, "a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches."[322] When properly raised, the "statutory immunity claim is resolved by the circuit court after a pretrial evidentiary hearing."[323] The defendant bears the burden to prove entitlement to the immunity by a preponderance of the evidence.[324] At this stage, the trial court must weigh and decide factual disputes as to the defendant's use of force to determine whether to dismiss the case based on the immunity.[325] Florida Rule of Criminal Procedure 3.190 sets

[321] Peterson v. State, 983 So.2d 27, 29 (Fla. Dist. Ct. App. 2008).
[322] *Id.* at 29.
[323] Hair v. State, 17 So.3d 804, 805 (Fla. Dist. Ct. App. 2009).
[324] *Peterson*, 983 So.2d at 29.
[325] *Id.*

out procedures for the filing and consideration of a motion to dismiss in a criminal proceeding.[326] The relevant provisions of the rule state:

> (b) Motion to Dismiss; Grounds. All defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information, whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense.
> (c) Time for Moving to Dismiss. Unless the court grants further time, the defendant shall move to dismiss the indictment or information either before or at arraignment. The court in its discretion may permit the defendant to plead and thereafter to file a motion to dismiss at a time to be set by the court. Except for objections based on fundamental grounds, every ground for a motion to dismiss that is not presented by a motion to dismiss within the time hereinabove provided shall be considered waived.[327]

Accordingly, the immunity is typically decided through a motion to dismiss, at an early stage of the litigation process. This makes sense, as the true value of an immunity is not only in preventing judgment or liability from attaching to a defendant, but also in keeping the defendant's legal bills and troubles to a minimum by abbreviating the ordeal.

To see how an immunity operates in a civil context, the Good Samaritan immunity gives a good example. Immunity under Good Samaritan statutes is an affirmative defense. Generally, a defendant moves for summary judgment based upon the state's Good Samaritan statute. In Georgia, on such a motion for summary judgment, the burden is on the movant to show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.[328] Georgia code states as follows:

> *For claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
> *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
> *Motion and proceedings thereon.* The motion shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to

[326] *Id.*
[327] FLA. R. CRIM. P. 3.190 (2012).
[328] GA. CODE ANN. § 9-11-56 (2012).

> interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this Code section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damage.[329]

The essence of the motion for summary judgment is that there is no genuine issue of material fact to be resolved by the trier of the fact, and that movant is entitled to judgment on the law applicable to the established facts.[330] Georgia Code. section 9-11-56 is similar to Fed. R. Civ. P. 56, and on review it is proper for the appellate court to consider federal rulings.[331]

After viewing these two examples, it is apparent that the person claiming the protection of the immunity must establish her entitlement thereto, whether through a motion for summary judgment or a motion to dismiss. There is no complete presumption that the office of the person, in the case of an absolute immunity, or the actions of the person, in the case of a qualified immunity, automatically establish entitlement to the immunity; instead, an evaluation of the role the defendant was acting in at the time of the injury must be done to establish absolute immunity, or a good faith or reasonableness evaluation must be done to establish the application of the qualified immunity. The important point here is that the defendant must establish that he or she is entitled to immunity.

2. Business Judgment Rule in Practice as an Immunity

The effect of the business judgment rule is to insulate directors from liability for their business-related decisions. It provides immunity to directors acting in the role of "director." As long as the conditions for the application of the business judgment rule are met, the courts will not assess the quality of the decision. This has a direct parallel to immunity. When someone attempts to hold an individual, who may qualify for the protection of a type of immunity, liable for an action, the court determines if the immunity applies, with the burden of proof on the person asserting immunity to prove that it is justified for the function or act in question. In the case of a judicial immunity, that means determining whether the action complained of falls within a judge's adjudicative conduct. In prosecutorial immunity, it must be demonstrated that the prosecutor was acting as an

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[329] *Id.*

[330] McCarty v. National Life & Accident Ins. Co., 129 S.E.2d 408, 410 (Ga. Ct. App. 1962).

[331] Federal Ins. Co. v. Oakwood Steel Co., 191 S.E.2d 298, 299 (Ga. Ct. App. 1972).

advocate for absolute immunity, or as an investigator or administrator for qualified immunity. This functional analysis must be made prior to granting immunity, and is analogous to the procedural evaluation that is done in the standard of liability interpretation of the business judgment rule. The main focus of this procedural analysis differs, however, in that one does not focus on the role being played by the director during the alleged harm, or even a specific objective, good faith test. Rather, the focus is on a procedural checklist of disqualifiers. However, it might be helpful to delve into this analysis deeper.

The disqualifying behaviors are ones that tend to demonstrate violations of the duty of loyalty, which cannot be said to be part of the director's role: fraud, illegality, self-dealing, no decision made, failure to inform oneself appropriately, and the like. These are generally rent-seeking behaviors that typically are done to enhance the director as an individual, rather than fulfill an element of the director's directorial duties. There are two possible interpretations to be made here, with one being stronger than the other.

The first interpretation, which is the weaker of the two, is to interpret the assessment of these factors as a form of functional analysis generally done for absolute immunities. If one of the disqualifying conditions for the business judgment rule—fraud, illegality, self-dealing, no decision, and so on—is present, then the effect is to deem the director as having done the allegedly wrongful actions as an individual, and not while functioning as a director—the opposite of a safe harbor. Determining the functions of a director by negative rather than positive definition may appear to be a backwards approach; despite this awkwardness, the behaviors and parameters of the role are still defined as such. This recognizes that not all actions done by one with the title "director" are directorial in nature. The usual immunities requiring a functional analysis to determine eligibility for the immunity (judge, prosecutor) have absolute immunity protections. For various reasons, however, absolute immunity is not appropriate for a director.

First of all, directors have entered into a private agreement to serve in a directorial capacity, and they should be accountable to a select class of people, namely the shareholders of the corporation who elected them to their position. The importance of the role of the corporation in society should not obviate the fact that some accountability needs to exist for actions done by directors acting as directors. This is especially true since most of the literature addressing the business judgment rule discusses the rule as attempting to reach a balance between director authority and accountability to shareholders; if directors were to receive the benefit of an absolute immunity, where anything done in their role as a director was immune from civil liability, then accountability is not possible. Absolute

immunity may apply to malicious acts, as outlined by the U.S. Supreme Court,[332] but since the persons harmed in the business judgment rule context (the shareholders) have a direct relationship to the director, it is not appropriate for a director to hide behind "social importance" when this type of harm is done in the context of a private relationship. The balancing act that underpins the business judgment rule would be completely forfeit, as there would be no accountability whatsoever, and this does not make sense.

Secondly, the strength of the immunities granted correlate to the social role and the importance of unfettered discretion. While directors are undeniably important indirect actors in the economy, it strains credulity to assert that their importance to American society rivals that of a judge, upon whom the entire success of the nation's legal system hinges. The very nature of the director role, rooted in private contract but with social impact, makes it more appropriate to interpret the business judgment rule as akin to the qualified immunities afforded others who have socially valuable roles but who must be kept in check to prevent abuses, such as police officers.

The other, stronger interpretation is to regard the preconditions for application of the business judgment rule as being the elements of the objective standard required for application of a qualified immunity. The preconditions for application of the business judgment rule—good faith, no self-dealing, no illegality, and so on—all represent reasonableness, or indicate the good faith that is the standard for application of qualified immunities. In qualified immunities, the actor is accorded immunity after an evaluation is made that his actions were either reasonable given the expectations of his position, or were done in good faith, depending on the exact immunity in question. This inquiry does not address whether the action was right or wrong, just whether it was in the realm of expectation for someone in the position given the situation in which the person was. Good faith and reasonableness do not provide absolute protection to a director, but when the preconditions for application of the business judgment rule are examined, and with these being taken as fulfilling the objective standard and good faith requirement, it makes it easy for a director to know the expectations that are on him.

3. Procedure

Like any other defendant in civil litigation with a defense that may result in the dismissal of the case, a defendant's entitlement to a case-ending defense is evaluated by the court prior to said dismissal. The integrity of our tort

[332] Stump v. Sparkman, 435 U.S. 349, 356–57 (1978).

system depends on it. While plaintiffs carry the burden of proof in establishing their claim, defendants should carry the burden of denying the plaintiffs their day in court. This is one area in which immunities can help inform the judicial treatment of the business judgment rule, to bring about consistency in how courts evaluate a defendant's claim to the protection of the business judgment rule. Consistency is an issue, given that different judges have taken different approaches to establishing the order of things considered.

If the business judgment rule is a form of immunity, then the "standard of liability" formulation to ordering matters makes the most sense, even if the underlying effect has not been well enunciated. This procedure still needs to be plainly set forth, however. The procedural evaluation that happens under this formulation is akin to the evaluation that needs to be done prior to establishing that a particular immunity protects a defendant from liability. This is true whether the defendant would enjoy absolute immunity, or a lesser qualified immunity. If this is the proper procedure to be followed for determining if a judge, who has a socially invaluable role, is protected from personal liability, then it does not make sense to assert lesser procedure to insulate a director from liability, as proposed by the "abstention" approach. If a functional analysis, rather than "no analysis unless a reason is presented" approach, has not deterred quality candidates from sitting on the bench, it seems unlikely that a procedural evaluation would do so for quality prospective directors. The same can be said about a possible chilling effect on decision-making. It is likely that directors just want to have a clear understanding of what the expectations of their role are, where the line in the sand is drawn, and the procedure for dealing with potential problems that might arise. This approach does not attack director authority in any meaningful way. While authority is necessary to any position, it is tempered by accountability and review: very few jobs enjoy unfettered discretion with no review for misconduct, and it must be remembered that a directorship is a job. As such, a procedural evaluation to ensure that a director did in fact act within his directorial role or function, or acted reasonably, does not erode his true authority—that would only happen if the substance of the decisions made were reviewed. Some case law touches on this, as the court in *Cede* states, the business judgment rule protects directors who act within their actual or apparent authority in the absence of fraud, bad faith, or self-dealing.[333] This could be read as viewing the nullifying factors as part of a short-form analysis, as authority generally defines the boundaries of one's position and the behaviors that might be considered reasonable. Whether according a person absolute or

[333] *Cede*, 634 A.2d at 360.

qualified immunity, the starting point is to ensure that the person was acting in a role attached to the immunity, before assessing anything else.

The difference in approaches between "standard of liability" and "abstention" might best be viewed by using an example from the immunity arena. Individuals asserting an entitlement to an immunity must establish that entitlement. Therefore, if a plaintiff sues a judge, the judge must demonstrate that she is entitled to immunity because the alleged misconduct was done while she was acting in her judicial function. If she succeeds, the suit is dismissed; if she fails, the suit proceeds and the plaintiff must meet the burden of proof to establish the alleged wrong. If the "abstention doctrine" formulation were applied in the case of immunities, the plaintiff would have to prove that the judge was not acting in her judicial function (that is, was not entitled to the immunity) before the suit could proceed. This might not seem like too big of a burden, but burdens are assigned in the justice system for a reason, and it is also inefficient. This is an example of information asymmetry, where the judge can easily demonstrate something that will take the plaintiff more time and effort to do so. Although the common law is not completely efficient, this should be a consideration. Moreover, it makes sense that anyone asking for special treatment should have to establish entitlement thereto. A bedrock principle of our legal system is that people who have been wronged must have their "day in court" to be heard. If we are going to deny this right to shareholders, it stands to reason that the person trying to deny them this fundamental catharsis must demonstrate a compelling reason to do so. Equity demands this. Demonstrating the "abstention doctrine" formulation in the context of judicial immunity shows that it is not the best way to approach director immunity. To be sure, authority does require judicial respect for the substance of directorial decisions. This, however, has nothing to do with substance; it is a procedural evaluation that addresses functions, nothing more. Authority is preserved, and the integrity of the tort system is also maintained. The two considerations need not be mutually exclusive; they demonstrate the balancing of authority and accountability at the heart of the business judgment rule.

The integrity of directorial authority is still maintained if the business judgment rule is interpreted as an immunity. Disgruntled shareholders cannot bring suit more easily, nor is a director quantifiably more vulnerable. There are many hurdles that a shareholder has to clear in order to sue a director personally, not the least of which is the burden of proof, and in many situations, directors will be indemnified by private contract, statute, or director's insurance. Having the director prove, rather than the shareholder disprove, that the business judgment rule applies to prevent liability

for decision made by the director is simply a part of the balancing act between authority and accountability.

CONCLUSION

"When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck."[334] The business judgment rule "walks" like an immunity, "swims" like an immunity, and "quacks" like an immunity. It has the same policy underpinnings as an immunity, the same procedure as an immunity (at least in some courts), and has the same effect as an immunity. This is an example of strong inductive reasoning, and supports the argument that the business judgment rule is a form of immunity.

If the courts viewed the business judgment rule as an immunity, this could drastically reduce the confusion surrounding its interpretation, promote uniformity amongst the circuits and levels, and simplify the jobs of countless litigators. Understanding that the business judgment rule is an immunity should help clarify the procedures needed to qualify for the protections, as well as the reasons for these procedures. As such, it is time to recognize the business judgment rule as a member of the family of immunities, and invite it to take its rightful role within that family.

[334] Popularly attributed to the American poet James Whitcomb Riley, although some claim this phrase was coined by Emil Mazey, Secretary-Treasurer of the United Auto Workers in a 1946 speech. Emil Mazey, Secretary-Treasurer of the United Auto Workers, Remark at Labor Meeting (1946).