University of Baltimore Law Review

Volume 8
Issue 1 *Fall 1978*

Article 8

1978

Casenotes: Torts — Judicial Immunity: A Sword for the Malicious or a Shield for the Conscientious? Stump v. Sparkman, 98 S. Ct. 1099 (1978)

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TORTS — JUDICIAL IMMUNITY: A SWORD FOR THE MALICIOUS OR A SHIELD FOR THE CONSCIENTIOUS? *STUMP v. SPARKMAN,* 98 S. Ct. 1099 (1978).

I. INTRODUCTION

In *Stump v. Sparkman,*[1] the United States Supreme Court held that a state judge, who had approved an ex parte petition of a mother seeking to have her daughter sterilized, was immune from damages liability when sued by the daughter under 42 U.S.C. § 1983.[2] In reaffirming the century-old doctrine of judicial immunity pronounced in *Bradley v. Fisher,*[3] the Supreme Court held that a judge [4] remains absolutely immune from civil liability for his judicial acts.[5] The Court noted that judicial immunity attaches even when a judge's actions are taken in error, done maliciously, in excess of his authority,[6] or are "flawed by the commission of grave procedural errors."[7]

The Court declared that the only exceptions to judicial immunity are when a judge's actions are nonjudicial in character[8] or when a judge acts in the clear absence of all jurisdiction.[9] Finding Judge Stump's act to be a judicial one, and also finding that he had jurisdiction to consider and approve the sterilization petition, the Court held his actions to be immune from suit.[10] While acknowledging the "tragic consequences"[11] of the judge's actions, the Court reasoned that the need for judges to decide controversial cases

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1. 98 S. Ct. 1099 (1978).
2. 42 U.S.C. § 1983 (1970). Section 1983 provides:
   > Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
3. 80 U.S. (13 Wall.) 335 (1872). *See* text accompanying notes 43-48 *infra.*
4. Subsequent to *Stump,* the Supreme Court extended absolute judicial immunity to federal hearing examiners and administrative law judges in Butz v. Economou, 98 S. Ct. 2894 (1978).
5. Under some circumstances, a judge may be subject to criminal liability for his actions. O'Shea v. Littleton, 414 U.S. 488, 503 (1974) (dictum); *Ex parte* Virginia, 100 U.S. 339 (1880); Braatelien v. United States, 147 F.2d 888 (8th Cir. 1945). The courts have split on the question of whether judicial immunity bars suits against judges for injunctive or equitable, as opposed to monetary, relief. *Compare* Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975) *with* Mirin v. Justices of Supreme Court of Nevada, 415 F. Supp. 1178 (D. Nev. 1976). *See also* Annot., 64 A.L.R.3d 1251 (1975).
6. 98 S. Ct. at 1105.
7. *Id.* at 1106.
8. *Id. Accord,* Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970) ("A judge does not cease to be a judge when he undertakes to chair a PTA meeting, but, of course, he does not bring judicial immunity to that forum, either.").
9. 98 S. Ct. at 1105.
10. *Id.* at 1108-09.
11. *See id.* at 1108.

without fear of suit by disgruntled litigants mandated the retention of absolute judicial immunity.[12]

On July 9, 1971, Ora Spitler McFarlin, the mother of Linda Spitler, presented a petition to Judge Harold Stump of the Circuit Court of DeKalb County, Indiana.[13] The petition was entitled "Petition To Have Tubal Ligation Performed On Minor And Indemnity Agreement."[14] It contained an affidavit by Mrs. McFarlin stating that Linda was fifteen years-old and was "somewhat retarded," although she was attending public school and had been promoted each year to the next grade with her class. Mrs. McFarlin also alleged that Linda had spent the night on several occasions with older youths and young men. Unable to maintain "continuous observation" over her daughter's activities, Mrs. McFarlin asserted that it would be in Linda's best interests to be sterilized in order to "prevent unfortunate circumstances" from occurring.

Judge Stump approved the sterilization petition that same day in an ex parte proceeding. No notice was given to Linda either prior to or after the proceeding. No guardian *ad litem* was appointed to represent her interests. No hearing was held. The petition was not given a docket number nor was it or Judge Stump's subsequent approval ever filed in the DeKalb County Circuit Court,[15] thereby precluding the possibility of appeal.

On July 15, 1971, Linda Spitler was taken to the DeKalb Memorial Hospital. She was not informed of the true purpose for her entry; rather, she was told that the purpose of the hospital stay was to have her appendix removed. A successful tubal ligation was subsequently performed on Linda, thereby sterilizing her. She left the hospital without discovering the subterfuge.[16]

In 1973, Linda married Leo Sparkman. Two years later, after being unable to become pregnant, Linda learned from the doctor who performed the tubal ligation that she had been sterilized during the 1971 operation.[17] The Sparkmans filed suit in the United States District Court for the Northern District of Indiana against Judge Stump, Mrs. McFarlin, the attorney who prepared the sterilization petition, the doctors involved in the sterilization operation, and the DeKalb Memorial Hospital.[18] The Sparkmans sought damages under

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12. *Id.* Judicial immunity has even been extended to West Publishing Company for publishing an allegedly defamatory, judicial opinion. Lowenschuss v. West Publishing Co., 542 F.2d 180 (3d Cir. 1976), *noted in* 55 TEXAS L. REV. 1103 (1977); *see also* Annot., 42 A.L.R.2d 825 (1955).
13. 98 S. Ct. at 1101.
14. *Id.* at 1102 n.1. The entire petition is set out in the Appendix.
15. Sparkman v. McFarlin, 552 F.2d 172, 173 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 98 S. Ct. 1099 (1978).
16. 98 S. Ct. at 1103.
17. 552 F.2d at 173.
18. 98 S. Ct. at 1103.

42 U.S.C. § 1983[19] and 42 U.S.C. § 1985(3)[20] for the alleged deprivations of Linda's constitutional rights.[21]

The district court granted the defendants' motions to dismiss the federal claims.[22] In so doing, the court first determined that a showing of state action was required to support the Sparkmans' constitutional claims and that the only state action[23] present was the approval of the sterilization petition by Judge Stump. The court declared that the judge was entitled to absolute judicial immunity, reasoning that Judge Stump had jurisdiction to consider and approve the petition.[24] The district court then dismissed the federal claims against all the defendants since Judge Stump, the only state actor, was immune from suit.[25]

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19. 42 U.S.C. § 1983 (1970). *See* note 2 *supra.*
20. 42 U.S.C. § 1985(3) (1970). Section 1985(3) provides, in pertinent part:
> If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws and in any case of conspiracy set forth in this section, if one or more persons engaged therein do . . . any act in furtherance of the object of such conspiracy, whereby another is injured . . . or deprived of . . . any right or privilege of a citizen of the United States, the party so injured or deprived may have a cause of action for damages against the conspirators.

While § 1983 requires a showing of state action, § 1985(3) reaches purely private conspiracies. Griffin v. Breckenridge, 403 U.S. 88 (1971).
21. The Sparkmans alleged, *inter alia,* that the defendants violated Linda's fourteenth amendment due process rights as well as her right to privacy and to procreate. 98 S. Ct. at 1103 n.2. *See also* Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975) (claim that defendants deprived plaintiff of her ability to bear children by performing sterilization alleged the denial of a civil right under § 1983). The Sparkmans also alleged pendent state claims for assault and battery, medical malpractice, and for Leo Sparkman's loss of potential fatherhood. 98 S. Ct. at 1103.
22. 98 S. Ct. at 1103. The district court's opinion was unreported. Sparkman v. McFarlin, Civil No. F75-129 (N.D. Ind. May 13, 1976).
23. *Cf.* Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978) (private hospital held to be a state actor in a § 1983 suit by a deaf mute mother who was involuntarily sterilized in the hospital); Walker v. Pierce, 560 F.2d 609 (4th Cir. 1977), *cert. denied,* 98 S. Ct. 1266 (1978) (physician who required indigent patients who were having a third child to voluntarily submit to sterilization following delivery of the child or seek another physician held not to be a state actor in a § 1983 suit by a former patient who submitted to sterilization); Harley v. Oliver, 539 F.2d 1143 (8th Cir. 1976) (actions of attorney in performance of his duties as counsel representing divorced father of child upon whom mother wanted surgery performed without use of blood transfusions were not performed under color of state law; attorney held not liable under § 1983). *See also* Note, *Judicial Review of Private Hospital Activities,* 75 MICH. L. REV. 445, 450-64 (1976).
24. 552 F.2d at 174.
25. The district court also dismissed the pendent state claims for lack of subject matter jurisdiction. The Supreme Court noted in a footnote that the issue was not before the Court of whether the district court should have dismissed the federal claims against the other defendants upon a finding that the only state actor, the judge, was immune. 98 S. Ct. at 1109 n.9. The Court cited two cases which discussed the same issue and reached contrary results. *Compare* Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976) *with* Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970). When dealing with judicial immunity, federal courts have held that a private person alleged to have conspired with a

The United States Court of Appeals for the Seventh Circuit reversed.[26] It found that Judge Stump did not have subject matter jurisdiction over the sterilization petition as it determined that neither statutory nor common law granted him such jurisdiction.[27] It maintained that "[t]here are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take."[28] The court of appeals also charged Judge Stump with a "failure to comply with elementary principles of procedural due process."[29] The court concluded, for these two reasons, that Judge Stump was not entitled to judicial immunity in approving the sterilization petition and therefore was subject to suit under section 1983.

The United States Supreme Court granted certiorari[30] and reversed the judgment of the Seventh Circuit Court of Appeals in a five-to-three decision.[31]

II. HISTORY OF JUDICIAL IMMUNITY

Stump v. Sparkman[32] is only the fourth case in which the Supreme Court has dealt with the question of judicial immunity from civil suits[33] and the first Supreme Court case in over a hundred years which has dealt solely with judicial immunity.[34] The doctrine of

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judge who is entitled to immunity cannot be held liable under § 1983 or § 1985(3). *E.g.*, Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975); Shakespeare v. Wilson, 40 F.R.D. 500 (S.D. Cal. 1966).

26. Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 98 S. Ct. 1099 (1978).
27. 552 F.2d at 174-76.
28. *Id.* at 176.
29. *Id.*
30. 434 U.S. 815 (1977).
31. Stump v. Sparkman, 98 S. Ct. 1099 (1978). In the majority were the Chief Justice and Justices White (author of the opinion), Rehnquist, Blackmun and Stevens. Justice Stewart authored a dissent in which Justices Marshall and Powell joined. Justice Powell wrote a separate dissent. Justice Brennan did not participate in the consideration or decision of the case. The apparent swing vote of this case was that of Justice Stevens. Had he voted with the dissenters, the vote would have been a four-to-four tie which would have resulted in an affirmance of the Seventh Circuit's decision. In light of some of Justice Stevens's sensitive and pragmatic opinions which have shown great concern for the rights of criminal defendants, *e.g.*, Brewer v. Williams, 430 U.S. 387, 414-15 (1977) (Stevens, J., concurring); Lakeside v. Oregon, 98 S. Ct. 1041, 1096-99 (1978) (Stevens, J., dissenting), his position and silence on this case is puzzling. It merits noting that prior to Justice Stevens's appointment to the Supreme Court in 1975, he served on the Seventh Circuit Court of Appeals, the very court whose decision in this case he joined in reversing.
32. 98 S. Ct. 1099 (1978).
33. The other three cases were Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Pierson v. Ray, 386 U.S. 547 (1967). A fifth case involving judicial immunity, Butz v. Economou, 98 S. Ct. 2894 (1978), was decided two months after the *Stump* decision. *See* note 4 *supra.*
34. Pierson v. Ray, 386 U.S. 547 (1967) dealt mainly with the question of liability of police officers under § 1983. The Court's discussion of judicial immunity was only little more than a page in length. *Id.* at 553-55.

judicial immunity in this country has its origins in England[35] and has been rooted completely in common law.[36] Under the English rule, judges of superior courts have been held absolutely immune from liability for their judicial acts while magistrates and justices of the peace have been held liable for judicial acts taken maliciously.[37] Prior to the first Supreme Court case on the subject, state courts in the United States were less than uniform in their treatment of judicial immunity. Some courts adopted the absolute immunity rule while others granted judges only a qualified immunity from suit.[38]

In 1868, the Supreme Court addressed the question of judicial immunity for the first time in *Randall v. Brigham.*[39] The Court held that judges of general jurisdiction were not liable in civil actions for their judicial acts "unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly."[40] The Court relied on English and American precedent, reasoning:

> This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of the judicial authority and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or property. . . .
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> This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it

35. Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322, 325 (1969). The first recorded case on judicial immunity seems to be Floyd & Barker, 77 Eng. Rep. 1305 (Star Chamber 1608). For a discussion of the status of judicial immunity in England today, *see generally* Brazier, *Judicial Immunity and the Independence of the Judiciary,* 1976 PUBLIC LAW 397; Thompson, *Judicial Immunity And The Protection of Justices,* 21 MODERN L. REV. 517 (1958). The doctrine of judicial immunity in England developed as a corollary to the theory: "The King can do no wrong."; that judges, as the King's personal representatives, should answer to him alone. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1868).

36. This has prompted one legal commentator to remark that "judges, as the ones administering tort liability, have at least had no reason for being unfriendly toward their own immunity." Jennings, *Tort Liability of Administrative Officers,* 21 MINN. L. REV. 263, 272 (1937). For other policy reasons for Judicial immunity, see *id.* at 271-72. Judicial immunity is not constitutionally mandated. *See* note 141 *infra.*

37. Note, *Immunity Of Federal And State Judges From Civil Suit — Time For A Qualified Immunity?,* 27 CASE W. RES. L. REV. 727, 732 n.28 (1977); Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322, 325 (1969).

38. By 1871, thirteen states had adopted the absolute immunity rule; six states had ruled that judges were liable if they acted maliciously; in nine states, courts had faced the issue but had not ruled clearly one way or the other, and nine states had apparently not yet faced the issue.
Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322, 326-27 (1969) (footnotes omitted).

39. 74 U.S. (7 Wall.) 523 (1868). *Randall* involved a civil suit for wrongful removal by an attorney against a state judge who disbarred him after the attorney was found guilty of malpractice and misconduct.

40. *Id.* at 536. Judges of courts of limited jurisdiction were held to be entitled to the same immunity only when they acted within their jurisdiction. *Id.* at 535-36.

> has been maintained by a uniform course of decisions in England for centuries, and in this country ever since its settlement.[41]

The Court concluded that the proper remedy for redress of an oppressive or arbitrary act by a judge protected by immunity was impeachment from office.[42]

In 1872, the Supreme Court, in *Bradley v. Fisher,*[43] significantly enlarged the doctrine of judicial immunity, holding that judges of courts of general jurisdiction "are not liable to civil actions for their judicial acts *even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.*"[44] While reaffirming the *Randall* rationale for judicial immunity, the *Bradley* Court overruled the qualifying language of *Randall.* Justice Field, author of both opinions, explained in *Bradley*: "[T]he qualifying words used [in the *Randall* opinion] were not necessary to a correct statement of the law."[45] The reasons given by Justice Field for the exclusion of the qualifying language were the difficulty that a judge of general jurisdiction had in determining the extent of his jurisdiction[46] and the ease with which a plaintiff might allege malicious or corrupt motives on the part of a judge, thereby subjecting him to "vexatious litigation."[47]

The Court drew a distinction between a judge acting in excess of his jurisdiction and a judge acting in the clear absence of all jurisdiction.[48] A judge acting in excess of his jurisdiction retained his

41. *Id.* at 536. The Court's statement that American decisions on the question of judicial immunity were uniform would seem to be in error upon an examination of earlier American decisions. *See* note 38 *supra.*
42. 74 U.S. (7 Wall.) at 537.
43. 80 U.S. (13 Wall.) 335 (1872). Like *Randall, Bradley* involved a suit by an attorney against a judge who disbarred him. The attorney had represented John H. Suratt in his trial before the judge for the murder of President Abraham Lincoln.
44. *Id.* at 351 (emphasis added).
45. *Id.* In further ambiguous language, Justice Field wrote:
> The qualifying words [in the *Randall* opinion] were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.

Id.
46. *See id.* at 352–53.
47. *See id.* at 354. Justices Davis and Clifford dissented in *Bradley,* contending that judges who act in excess of their jurisdiction, acting maliciously and corruptly, should be subject to private suits. *Id.* at 357 (Davis and Clifford, JJ., dissenting).
48. The Court distinguished excess of jurisdiction from the clear absence of all jurisdiction over the subject matter as follows:
> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the

immunity while a judge acting in the clear absence of all jurisdiction forfeited his immunity. As a result of *Bradley,* judges were absolutely immune from civil suit except where (1) their actions were nonjudicial in character; or (2) their actions were taken in the clear absence of all jurisdiction.

While *Bradley* was being argued before the Supreme Court, Congress enacted the Civil Rights Act of 1871,[49] the forerunner of section 1983.[50] Section 1983 would seem to provide a statutory, civil cause of action for judicial wrongdoing as, in its present form, it applies to "*every* person."[51] Federal courts, however, did not have occasion to address the question of whether the doctrine of judicial immunity was overruled by this congressional mandate until 1945 in *Picking v. Pennsylvania R.R. Co.*[52] There the Third Circuit Court of Appeals reasoned that the conclusion was "irresistible"[53] that the doctrine of judicial immunity was abrogated by the Civil Rights Act and that judges were subject to suit thereunder. Though some courts initially followed *Picking,*[54] others[55] later repudiated it after the

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want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanted in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked.

Id. at 351-52.

49. Civil Rights Act of 1871, ch. 22, 17 Stat. 13.
50. 42 U.S.C. § 1983 (1970).
51. *Id.* (emphasis added). The wording of the 1871 Act, which applied to "any person," was changed for apparent aesthetic purposes by the person who prepared the Revised Statutes of 1878. Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322, 325 n.19 (1969).
52. 151 F.2d 240 (3d Cir. 1945), *cert. denied,* 332 U.S. 776 (1947).
53. 151 F.2d at 250.
54. *See, e.g.,* Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948); Alesna v. Rice, 74 F. Supp. 865 (D. Haw. 1947).
55. *See, e.g.,* Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), *cert. denied,* 386 U.S. 1021 (1967); Kenney v. Fox, 232 F.2d 288 (6th Cir.), *cert. denied sub nom.* Kenney v. Killian, 352 U.S. 855 (1956) where the courts reasoned by analogy to *Tenney* that Congress did not intend to abrogate the doctrine of judicial immunity.

Supreme Court decision in *Tenney v. Brandhove,*[56] which held that, in the absence of congressional intent to the contrary, legislators acting in their official capacities were immune from suits under the Civil Rights Act.

The Supreme Court did not confront the issue of whether state judges were liable to civil suits under section 1983 until 1967 in *Pierson v. Ray.*[57] Chief Justice Warren, speaking for the majority, held state court judges to be immune from section 1983 suits. The Court reaffirmed *Bradley* and concluded, without elaboration, that "few doctrines were more solidly established at common law than the immunity of judges from liability for damages committed within their judicial jurisdiction."[58] Moreover, the Court found that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities"[59] when it enacted the Civil Rights Act, and since the doctrine of judicial immunity was so "well established . . . Congress would have specifically so provided had it wished to abolish the doctrine."[60]

Justice Douglas vigorously dissented in *Pierson,* finding that the import of the wording of section 1983 was clear: "To most, 'every person' would mean *every person,* not every person *except* judges."[61] He also examined the legislative record of the Civil Rights Act and determined that every Congressman who spoke on the question assumed that the Act would apply to state judges.[62] Nowhere was

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56. 341 U.S. 367 (1951). Referring to the long-standing, constitutional tradition of legislative immunity, the Court declared: "We cannot believe that Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." *Id.* at 376.
57. 386 U.S. 547 (1967). *Pierson* involved a § 1983 suit by black and white clergymen who were arrested and convicted for violating a state breach of the peace statute by attempting to use a segregated, bus terminal waiting room in Jackson, Mississippi. Named as defendants were the police officers who arrested them and the police justice who convicted them.
58. *Id.* at 553-54. One legal commentator has suggested that the reason for the *Pierson* holding was the Court's desire to prevent harassment of state judges through the increasingly popular § 1983 damages suit. Kates, *Immunity Of State Judges Under The Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered,* 65 Nw. U.L. Rev. 615, 617-19 (1970).
59. 386 U.S. at 554.
60. *Id.* at 554-55. *But cf.* United States v. LePatourel, 571 F.2d 405 (8th Cir. 1978). The Eighth Circuit Court of Appeals held that a federal judge's nonjudicial conduct (driving automobile while on official business) comes within the purview of the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1976). The court reasoned "that the failure to exclude specifically the judiciary in the final version of the Act reflected a conscious congressional choice." 571 F.2d at 409.
61. 386 U.S. at 559 (Douglas, J., dissenting) (emphasis in original).
62. *Id.* at 561-62. Justice Douglas quoted from the remarks of Congressman Arthur of Kentucky who opposed the statute:

> Under the provisions of this section every judge in the State court . . . will enter upon and pursue the call of official duty with the sword of Damocles suspended over him by a silken thread, and bent upon him the

this assumption contradicted.[63] Justice Douglas also argued that absolute immunity was not needed to maintain an independent judiciary and that the fear of a flood of suits which would harass the judiciary was only conjecture.[64]

III. ANALYSIS

The Supreme Court initiated its analysis in *Stump v. Sparkman*[65] with a reaffirmance of the doctrine of judicial immunity as pronounced in *Bradley* and reinforced in *Pierson*. The Court's opinion was based on an examination of three questions: (1) whether Judge Stump had subject matter jurisdiction over the sterilization petition; (2) whether Judge Stump's failure, as the court of appeals framed it, "to comply with elementary principles of procedural due process"[66] stripped the judge of his immunity; and (3) whether Judge Stump's act constituted a judicial act. Justice Stewart focused his strongly worded dissent[67] on the third question. Justice Powell

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scowl of unbridled power, the forerunner of the impending wrath, which is gathering itself to burst upon its victim.

CONG. GLOBE, 42d Cong., 1st Sess. 366 (1871). *But see* Bauers v. Heisel, 361 F.2d 581, 587-88 n.8 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967).

63. This legislative history was recounted to the Supreme Court in *Stump* in the *Amicus Curiae* Brief of the American Civil Liberties Union at 41-51, obviously to no avail. *See generally* Note, *Immunity Of Federal And State Judges From Civil Suit — Time For A Qualified Immunity?*, 27 CASE W. RES. L. REV. 727, 738-40 (1977); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 327-28 (1969). One legal commentator has argued that in view of the legislative record, "the proposition that § 1983 leaves the common law of judicial immunity intact (while the statute upon which it was consciously modeled abrogates it) approaches the incredible. If the test is one of congressional purpose (as it surely is), no absolute immunity for state judges can be read into § 1983." Kates, *Immunity Of State Judges Under The Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 NW. U.L. REV. 615, 622-23 (1970) (footnotes omitted). Moreover, at the time of the enactment of the Civil Rights Act in 1871, Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868) (holding judges liable when acting in excess of their authority and maliciously or corruptly) was still good law. To suggest, therefore, that the congressional intent was to maintain absolute judicial immunity flies in the face of the record and the time period.

64. 386 U.S. at 564-67.

65. 98 S. Ct. 1099 (1978).

66. 552 F.2d 172, 176 (7th Cir. 1977).

67. Justice Stewart took the unusual step of reading his dissent from the bench when the opinion was handed down. The following excerpt from a *Washington Post* report gives an indication that emotions ran high among the Justices over the case:

> The intensity of feelings evoked among the justices became obvious in the hushed chamber of the court after Justice Byron R. White briefly summarized the 15-page opinion he wrote for the majority.
>
> Normally, that would have ended the matter. In recent years, dissenters only infrequently have given opinions from the bench.
>
> Yesterday, however, Justice Potter Stewart read aloud most of his five-page dissent, in which he was joined by Justices Thurgood Marshall and Lewis F. Powell, Jr.
>
> Chief Justice Warren E. Burger, one of the majority, was at Stewart's right as the dissenter spoke in a strong, controlled voice. As one cutting phrase tumbled on another, Burger's face reddened. Other

directed his dissent to Linda Sparkman's preclusion from having her rights vindicated elsewhere in the legal process.

A. Subject Matter Jurisdiction

In addressing the question of Judge Stump's subject matter jurisdiction, the Court ruled that since " 'some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . .,' the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge."[68] The Court reiterated the *Bradley* principle that a judge loses his immunity only when he has acted in the clear absence of all jurisdiction.[69] Turning to the Indiana Code, the Court noted that the code gave Judge Stump, as a circuit judge, a broad jurisdictional grant over all original cases at law and equity and in "'all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.'"[70]

The Court found that neither Indiana case law nor statute provided Judge Stump with express authority to act as he did.[71] The only statutes pertaining to sterilization were those that authorized the sterilization of institutionalized persons under limited circumstances.[72] While the majority only mentioned these statutes in passing, both Justice Stewart and the court of appeals emphasized that these statutes only permitted sterilization after an administrative proceeding, which gave the alleged incompetent the right to notice of the proceeding, the opportunity to defend (including a right to a guardian *ad litem*), and the right of review in a circuit court.[73] The court of appeals reasoned that "[t]his statutory scheme clearly negates jurisdiction to consider sterilization in cases not involving institutionalized persons and in which these procedures are not followed."[74]

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justices also appeared to be uncomfortable. The tension struck observers as almost palpable.

The Washington Post, March 29, 1978, at A1, col. 1.

68. 98 S. Ct. at 1105 (quoting from Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 352 (1872)). *See generally* Rothschild, *Judicial Immunity For Acts Without Jurisdiction*, 7 FORDHAM L. REV. 62 (1938).
69. 98 S. Ct. at 1105.
70. *Id.*
71. *See id.*
72. *Id. See* IND. CODE §§ 16-13-13-1 through 16-13-13-4 (1973).
73. 98 S. Ct. at 1109-10 (Stewart, J., dissenting); 552 F.2d at 175. These statutes were repealed by the Indiana Legislature in 1974. 98 S. Ct. at 1110 n.4 (Stewart, J., dissenting).
74. 552 F.2d at 175. *See* Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971), *motion den.*, 356 F. Supp. 380 (S.D. Ohio 1973); Guardianship of Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974). *But see* Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978) (Connecticut statute providing a method for obtaining permission for sterilization of mentally retarded inmates of certain state institutions violates the equal protection clause because it denies parents of

The Supreme Court disagreed. In a curious analysis of subject matter jurisdiction, the *Stump* majority considered it "more significant"[75] that at the time of Judge Stump's action neither case nor statutory law in Indiana expressly prohibited Judge Stump from entertaining the sterilization petition. The Court also relied on another Indiana statute,[76] which gave parents the right to consent to medical treatment of their children, in concluding that Indiana law did not foreclose Judge Stump from approving the sterilization petition.[77] In keeping with its promise to broadly construe the jurisdiction of a judge when his immunity is at stake,[78] the Court employed tenuous reasoning in implying jurisdiction for Judge Stump's actions.

Speaking for the majority, Justice White addressed the court of appeals' assertion that jurisdiction for Judge Stump to approve the petition could not be found in the common law of Indiana.[79] The court of appeals relied on *A.L. v. G.R.H.*,[80] an Indiana Court of Appeals decision that affirmed a trial court's denial of a request for a declaratory judgment by a mother seeking to have her son sterilized. The Supreme Court responded: "The opinion, however, speaks only of the rights of parents to consent to the sterilization of their child and does not question the *jurisdiction* of a circuit judge who is presented with such a petition from a parent."[81] The Court ignored the court of appeals' observation that the cases cited by the *A.L.* court were cited for the proposition that a judge in the absence of express statutory authority *lacked jurisdiction* to authorize the sterilization of a minor.[82] The Supreme Court's failure to consider this point is puzzling.

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mentally retarded children not inmates a method to obtain permission to have their children sterilized); Matter of S.C.E., 378 A.2d 144, 145 (Del. Ch. 1977) ("I disagree with the reasoning of the Circuit Court [of Appeals in *Sparkman v. McFarlin*] because I believe a Legislature neither claims nor has such sophistication.").

75. 98 S. Ct. at 1105.

76. *Id. See* IND. CODE § 16-8-4-2 (1973). This statute simply states: "Any person who is the parent of a child shall be competent to give consent to and contract for medical or hospital care or treatment of such child, including surgery."

77. 98 S. Ct. at 1105-06. *See also* Harley v. Oliver, 539 F.2d 1143 (8th Cir. 1976); Staelens v. Yake, 432 F. Supp. 834 (N.D. Ill. 1977) (in both cases, judges were held immune from § 1983 suits when they consented to medical treatment of a child over the religious objections of the parent(s)); Annot., 52 A.L.R.3d 1118 (1973).

78. *See* text accompanying note 68 *supra*.

79. 552 F.2d at 175.

80. 325 N.E.2d 501 (Ind. 1975), *cert. denied*, 425 U.S. 936 (1976).

81. 98 S. Ct. at 1106 (emphasis in original). In a footnote, Justice Stewart termed the majority's criteria for subject matter jurisdiction as "dangerously broad." *Id.* at 1110 n.5 (Stewart, J., dissenting).

82. 552 F.2d at 175. The *A.L.* court stated:

> We believe the common law does not invest parents with such power [to have their children sterilized] over their children even though they sincerely believe the child's adulthood would benefit therefrom. This *result* has been reached most recently in In Interest of M.K.R. (1974), 515 S.W.2d 467, and In Re Kemp's Estate (1974), 43 Cal. App. 3d 758, 118 Cal. Rptr. 64, where the courts of Missouri and California held that their

B. Effect of Procedural Flaws on Judicial Immunity

The *Stump* majority then examined the court of appeals' ruling that Judge Stump also forfeited his immunity as a result "of his failure to comply with elementary principles of procedural due process."[83] The court of appeals had severely criticized Judge Stump for failing to protect Linda Sparkman's rights. It asserted that to allow such misfeasance by a judge "would be sanctioning tyranny from the bench."[84] The Supreme Court, however, chastised the court of appeals for allegedly misconceiving the doctrine of judicial immunity, holding: "A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."[85]

In holding that Judge Stump's utter failure to safeguard Linda Sparkman's constitutional rights did not strip him of his immunity, the Court merely relied on dictum from *Bradley*.[86] The Court failed to consider the important constitutional issue of whether Linda Sparkman's fundamental right of procreation[87] was unconstitutionally abrogated by Judge Stump's actions. Lower courts which have considered the question of whether such a right can be preempted have held that the "awesome power of denying that right"[88] may not

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respective juvenile statutes making general provision for the welfare of the children *were insufficient to confer jurisdiction to authorize the sterilization* of retarded girls in the absence of specific sterilization legislation. See, also, Wade v. Bethesda (S.D. Ohio 1973), 356 F. Supp. 380; Frazier v. Levi (1969), Tex. Civ. App., 440 S.W.2d 393; Holmes v. Powers (1968), Ky., 439 S.W.2d 579.

325 N.E.2d at 502 (emphasis added). *Cf.* Briley v. California, 564 F.2d 849 (9th Cir. 1977) (holding judge who participated in a plea bargain leading to the plaintiff's castration to be immune from § 1983 suit *only* if he had specific statutory or common law authority to authorize castration in the particular situation). *But cf.* Robinson v. McCorkle, 462 F.2d 111 (3d Cir. 1972) (holding that even if plaintiff was committed under a repealed statute providing for summary commitments, such judicial miscue did not remove shield of judicial immunity).

83. 552 F.2d at 176.
84. *Id.*
85. 98 S. Ct. at 1106.
86. *See id.*
87. Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). This right extends to minors as well as to adults. *Carey, supra* at 693. *See also* Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74-75 (1976). For an enlightening history of sterilization in America, see the *Amicus Curiae* Brief in *Stump* of the National Center for Law and the Handicapped, Inc. at 7-14.
88. In Interest of M.K.R., 515 S.W.2d 467, 470-71 (Mo. 1974). *Accord,* Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969). Every state sterilization statute provides some safeguards to insure that the alleged defective's interests are protected. *See, e.g.,* North Carolina Association For Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976). *See generally* R. Burgdorf and M.P. Burgdorf, *The Wicked Witch Is Almost Dead:* Buck v. Bell *And The Sterilization Of Handicapped Persons,* 50 TEMP. L.Q. 995 (1977); Gauvey and Shuger, *The* Permissibility of Involuntary Sterilization under the Parens Patriae *and Police Power Authority of the State,* 6 MD. L. FORUM 109 (1976); MURDOCK, *Sterilization of the Retarded: A Problem or a Solution?,* 62 CALIF. L. REV. 917 (1974).

be used absent sufficient legal safeguards. The Supreme Court chose not to reach that issue in *Stump*. Instead, it shrouded Judge Stump in a sweeping cloak of judicial immunity. The Court's failure to reach this issue is disturbing. It raises the spectre of a judge acting summarily to deny persons their constitutional rights while foreclosing their ability to redress the judge's actions.[89]

C. *Judicial Act*

The Supreme Court next considered the issue of whether Judge Stump's act was a judicial act. The Court agreed with the Sparkmans' contention that judicial immunity attaches only to acts performed in a judge's judicial capacity,[90] establishing two factors to determine whether an act by a judge is a judicial one. The first factor "relate[s] to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge."[91] The second factor concerns "the expectation of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity."[92] The Court concluded that both factors supported Judge Stump's contention that his approval of the sterilization petition was a judicial act.

The Court first explained that state judges with general jurisdiction often consider petitions which concern the affairs of minors.[93] It then reasoned that Mrs. McFarlin presented the petition to Judge Stump in his capacity as a circuit court judge,[94] adding that the informality of a judicial proceeding does not prevent an act from being a judicial one.[95] This, the Court held, was sufficient to establish Judge Stump's act as a judicial act, thereby entitling him to absolute immunity.[96]

It was on this point that Justice Stewart, in his dissent, launched his attack on the majority opinion. While acknowledging the doctrine of judicial immunity, he vigorously asserted "that what

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89. Judge Stump's failure to notify Linda Sparkman prior to or after his approval of the sterilization petition, as well as his failure to appoint a guardian *ad litem* to represent her interests, obviously precluded her from safeguarding her own interests as well as from appealing the judge's decision. *See generally* Levin, *Guardian* Ad Litem *In A Family Court*, 34 MD. L. REV. 341 (1974). At the very least, Judge Stump violated Canon 3A(4) of the CODE OF JUDICIAL CONDUCT (ABA 1972), which provides: "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law."

90. 98 S. Ct. at 1106.

91. *Id.* at 1107.

92. *Id.*

93. *Id.* at 1108.

94. *Id.*

95. *See id.* at 1107. *Cf. In re* Summers, 352 U.S. 561 (1945) (lack of formality in court's consideration of a petitioner's application for admission to the state bar did not prevent proceeding from being a "judicial proceeding"). *Compare* Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) *with* McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972).

96. 98 S. Ct. at 1108.

Judge Stump did on July 9, 1971, was beyond the pale of anything that could sensibly be called a judicial act."[97] Justice Stewart contended that the majority's labelling of Judge Stump's act as a function normally performed by a judge was "factually untrue."[98] In equally strong language, Justice Stewart termed the majority's conclusion that Judge Stump's act was performed in his judicial capacity as "legally unsound."[99]

Justice Stewart aptly noted that while parents are generally authorized to consent to medical treatment of their children, they need not normally seek the prior approval of a judge.[100] Asserting there was nothing to indicate that any Indiana judge had ever performed such an act, Justice Stewart urged that the judge's act was not one normally performed by a judge.[101]

Addressing the majority's assertion that Judge Stump acted in his judicial capacity in approving the sterilization petition, Justice Stewart convincingly refuted the majority's strained reasoning. He argued that while Mrs. McFarlin presented her petition to Judge Stump because he was a judge, "false illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act."[102] Furthermore, even if Judge Stump told Mrs. McFarlin he was acting in his judicial capacity, this would make no difference:

> [T]he conduct of a judge surely does not become a judicial act merely on his own say-so. A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity.[103]

Finally, Justice Stewart expressed dissatisfaction with the majority's definition of a judicial act. He maintained "that the concept of what is a judicial act must take its content from a consideration of the factors that support immunity from liability for the performance of such an act."[104] Adopting the reasons cited in

97. *Id.* at 1109 (Stewart, J., dissenting). In its *Amicus Curiae* Brief at 4-5, the National Center for Law and the Handicapped, Inc. likened the immunity sought to be extended to Judge Stump to that given judges in Nazi Germany who by judicial fiat extended their power to order persons sterilized.
98. 98 S. Ct. at 1109.
99. *Id.*
100. *Id.*
101. *Id.* at 1110.
102. *Id.* Justice Stewart continued: "In short, a judge's approval of a mother's petition to lock her daughter in the attic would hardly be a judicial act simply because the mother had submitted her petition to the judge in his official capacity." *Id.*
103. *Id.* (footnote omitted). *Accord,* Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978). In *Zarcone,* the court of appeals upheld a $60,000 punitive damages award in a § 1983 suit by a coffee vendor against a judge who, displeased with the cup of coffee he received, ordered the vendor handcuffed and brought to his chambers where the judge conducted a "pseudo-official inquisition" and threatened the vendor.
104. 98 S. Ct. at 1111.

Pierson v. Ray[105] for the retention of absolute judicial immunity, Justice Stewart pointed out that errors in a normal case could be corrected on appeal, but that here there was no "case," no litigants, nor any manner in which to appeal Judge Stump's actions.[106] It was the absence of these characteristics of a normal judicial proceeding, as well as a lack of "even the pretext of principled decision-making,"[107] which convinced Justice Stewart to conclude that Judge Stump's act was not a judicial one.

In a separate dissent, Justice Powell emphasized Linda Sparkman's preclusion from other means to protect her rights, due to the clandestine actions of Judge Stump and his co-defendants. He contended that the rationale behind judicial immunity was that private suits against the judiciary could be safely prohibited for the sake of an independent judiciary as there existed alternative methods for redress, such as appeal.[108] Finding this rationale absent in the instant case, as Judge Stump's act foreclosed any appeal or other remedy, Justice Powell reasoned that the judicial immunity doctrine was "inoperative."[109] He agreed with Justice Stewart that Judge Stump's act was nonjudicial and that Judge Stump was not entitled to immunity from suit under section 1983.[110]

IV. CRITICISM OF ABSOLUTE JUDICIAL IMMUNITY

In recent years, many legal commentators have strongly criticized the doctrine of absolute judicial immunity.[111] As noted earlier, the Supreme Court's assertion of absolute judicial immunity as being firmly established in early American common law and not legislatively overruled by section 1983 is open to attack.[112] There is

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105. 386 U.S. 547, 554 (1967).

> [I]t is . . . for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. . . . It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

106. 98 S. Ct. at 1111.
107. *Id.*
108. 98 S. Ct. at 1111 (Powell, J., dissenting).
109. *Id.* at 1112. *See* the *Amicus Curiae* Brief of the National Center for Law and the Handicapped, Inc. at 38-42.
110. 98 S. Ct. at 1112.
111. *E.g.*, Kates, *Immunity Of State Judges Under The Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 Nw. U.L. REV. 615 (1970); Note, *Immunity Of Federal And State Judges From Civil Suit — Time For A Qualified Immunity?*, 27 CASE W. RES. L. REV. 727 (1977); Comment, *Charity Begins At Home: Judicial Immunity In Iowa*, 58 IOWA L. REV. 197 (1972); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969).
112. *See* text accompanying notes 38, 61-63 *supra.*

also a frequent lack of consistency in decisions[113] and a dearth of in-depth analysis by the judiciary when faced with a case involving their own immunity as opposed to cases concerning immunity for other public servants.[114] The reluctance of judges to closely scrutinize the actions of their brethren might be best explained by the old adage: "There, but for the grace of God, go I."

Upon close examination, even the strongest rationales for the retention of absolute judicial immunity lack firm support. One of these rationales for the doctrine is that a judge's decision is appealable or correctable by other judicial means; that litigants should be required to follow the appellate process for redress.[115] Justices Stewart and Powell effectively demonstrated the fallacy of this rationale in a case such as *Stump v. Sparkman*[116] in which no appeal could be taken or where no other judicial remedy was available. Moreover, while a judge's decision may be overturned on appeal, the reversal does nothing to compensate a litigant who has suffered financial, emotional, and other harm as a result of the judge's malfeasance.[117] Impeachment of a judge or disciplinary proceedings against him are not only cumbersome and seldom-used devices, but are "directed only toward the correction of future

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113. Justice White, author of the *Stump* opinion, demonstrated this inconsistency in Butz v. Economou, 98 S. Ct. 2894 (1978). In *Butz* he gave the following reasons for absolute judicial immunity:

> At the same time, the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, *the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal* are just a few of the many checks on malicious actions by judges.

Id. at 2914 (emphasis added). The latter three safeguards were conspiciously absent in *Stump,* nor did Justice White use this rationale in *Stump.*

Maryland case law on judicial immunity is a good example of the frequent failure of state courts to clearly analyze the doctrine of judicial immunity and to reconcile a present decision with previous cases. *Compare* Bevard v. Hoffman, 18 Md. 479, 484 (1862) *and* Hiss v. State, 24 Md. 556, 560-62 (1866) *and* Knell v. Briscoe, 49 Md. 414, 416-17 (1878) *with* State v. Carrick, 70 Md. 586, 588, 17 A. 559, 559 (1889) *and* Roth v. Shupp, 94 Md. 55, 59-60, 50 A. 430, 431-32 (1901) *and* Eliason v. Funk, 233 Md. 351, 356, 196 A.2d 887, 889-90 (1964) (dictum). *See also* 61 Md. Att'y Gen. Op. 63 (1976) (judicial immunity does not shield District Court Commissioner from liability for injuries sustained by members of the public while in the Commissioner's home on official business).

114. *See* Note, *Immunity Of Federal And State Judges From Civil Suit — Time For A Qualified Immunity?,* 27 CASE W. RES. L. REV. 727, 753 n.158 (1977). The only legislative analysis by the Supreme Court of the applicability of § 1983 to suits against judges consisted of one brief paragraph. *See* Pierson v. Ray, 386 U.S. 547, 554-55 (1967).

115. Butz v. Economou, 98 S. Ct. 2894, 2914 (1978). *See* Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1872).

116. 98 S. Ct. 1099 (1978).

117. Kates, *Immunity Of State Judges Under The Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered,* 65 NW. U.L. REV. 615, 638-39 (1970).

irresponsible action";[118] they do not compensate the victim for the deprivation of his constitutional rights.

Another major argument for the retention of absolute judicial immunity is the need for judges to act decisively without fear of suit by disgruntled litigants.[119] Advocates of absolute judicial immunity contend that the doctrine is essential to maintain the independence of the judiciary and to prevent judges from being intimidated by the threat of civil suits. Yet, as one commentator put it, such arguments "presume a general weakness in judicial fibre. It does not follow that principle automatically flees from a fear of law-suits."[120] Federal and state officials are only accorded a qualified immunity from suit.[121] Numerous other professionals such as physicians, attorneys and police officers also exercise a great deal of discretion with the threat of lawsuits everpresent.[122] Nevertheless, all of these persons manage to effectively carry out their responsibilities. In short, it is inconsonant that the judiciary should hold other professionals and public officials to negligence and good faith standards of liability while holding itself absolutely immune. A cynic might be tempted to agree with a British commentator who remarked about the sensitivity of British judges to criticism: "Her Majesty's judges, it would appear, are hothouse plants. Exposed to the frost of public disapproval, they may wither and die."[123] No one would disagree with the need for an independent judiciary, but as Justice Stewart argued in *Stump,* in the case of "such lawless conduct as took place here . . . if intimidation would serve to deter its recurrence, that would surely be in the public interest."[124]

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118. Note, *Immunity Of Federal And State Judges From Civil Suit — Time For A Qualified Immunity?,* 27 CASE W. RES. L. REV. 727, 728 (1977). *See generally id.* at n.7; Berger, *Impeachment of Judges and "Good Behavior" Tenure,* 79 YALE L.J. 1475 (1970); Comment, *Judicial Discipline, Removal, And Retirement,* 1976 WISC. L. REV. 563; 84 HARV. L. REV. 1002 (1974).
119. *See* Stump v. Sparkman, 98 S. Ct. 1099, 1108 (1978); Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872).
120. Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322, 331 (1969).
121. Butz v. Economou, 98 S. Ct. 2894 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974). *But see* Granger v. Marek, 47 U.S.L.W. 2152 (6th Cir. September 12, 1978) (holding that *Butz v. Economou* applies only to constitutional deprivations and not to common law torts).
122. *See* Brazier, *Judicial Immunity and the Independence of the Judiciary,* 1976 PUBLIC LAW 397, 408-09; Comment, *Charity Begins At Home: Judicial Immunity In Iowa,* 58 IOWA L. REV. 197, 202 (1972).
123. Brazier, *Judicial Immunity and the Independence of the Judiciary,* 1976 PUBLIC LAW 397, 397. In Butz v. Economou, 98 S. Ct. 2894, 2922 n.* (1978) (Rehnquist J., dissenting), Justice Rehnquist criticized the majority for granting federal officials only a qualified immunity from suit while retaining absolute immunity for the judiciary, citing *Stump.* He argued that while the majority was mindful of the pressures on judges, it had forgotten that similar pressures are placed on many nonjudicial public officials. "[T]he cynical among us might not unreasonably feel that this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as 'lesser breeds without the law.' " *Id.*
124. 98 S. Ct. at 1111 (Stewart, J., dissenting) (footnote omitted).

Frivolous or petty suits against judges can be easily disposed of by summary judgment[125] or judgment on the pleadings.[126] A requirement that a plaintiff first pursue the appellate process, where appeal is possible, and be successful in winning a reversal of the original decision would help to eliminate many frivolous suits.[127] Despite the fact that such suits would cause some judges inconvenience, to allow considerations of convenience to determine immunity is untenable.[128]

V. PROPOSALS FOR A QUALIFIED JUDICIAL IMMUNITY

In the search for a qualified judicial immunity, commentators have focused on two standards of liability — negligence and actual malice. One commentator advocating a negligence standard suggested that liability be based only on "an error so serious that a judge normally careful of his duties would not have made or an error that could only have resulted from a very serious neglect of duty."[129] A negligence standard of judicial liability has been criticized on two specific grounds. First, it is argued that it is too difficult to determine a standard of conduct for judges, and that trials would be bogged down in matters of proof.[130] The short answer is that juries must regularly determine whether other professionals have met their standard of professional conduct in complex areas such as the medical and legal fields. Why should a jury be any less qualified to determine judicial malpractice than any other form of professional wrongdoing? As one commentator noted, the "expert witness"[131] in each case will be sitting on the bench who can set a standard of professional conduct based on his own judicial experience. The

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125. FED. R. CIV. P. 56.

126. FED. R. CIV. P. 12(c). *Cf.* Butz v. Economou, 98 S. Ct. 2894, 2911 (1978) (holding that federal officials are only entitled to a qualified immunity from § 1983 suits) where Justice White explained:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, . . . damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

127. *See* Kates, *Immunity Of State Judges Under The Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered,* 65 NW. U.L. REV. 615, 634-35 (1970).

128. *See* Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322, 331 (1969).

129. 4 OTTAWA L. REV. 627, 634 (1971).

130. Note, *Immunity Of Federal And State Judges From Civil Suit — Time For A Qualified Immunity?,* 27 CASE W. RES. L. REV. 727, 767 (1977); Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322, 335 (1969).

131. 4 OTTAWA L. REV. 627, 634 (1971). In the case of a nonjury trial, a fellow judge should not experience great difficulty in following the testimony.

stronger argument against a negligence standard is that judges would be subject to more frivolous suits as the burden of proof is lower and summary judgment is more difficult to obtain in negligence cases.[132]

An actual malice standard would eliminate the borderline and frivolous suits while redressing the blatantly erroneous actions of a judge in such cases as *Stump v. Sparkman*.[133] As "[a]pplied to a judicial officer, this would mean that an action would be malicious if it was done with actual knowledge that it was incorrect or with reckless disregard of whether it was correct or not."[134] The focus of the trial would not be on whether a judge erred in his rulings, but whether the judge maliciously deprived a litigant of his rights.[135] The plaintiff would bear a heavy burden of proof, and the actual malice standard would not punish those judges who make good faith or honest errors of judgment.[136] Such a standard would serve to compensate those who have been the clear object of judicial abuse while protecting the judiciary from petty suits.

Applying the actual malice standard to *Stump*, it is clear that Judge Stump acted with reckless disregard in approving the sterilization petition. First, there was no common law or statutory authority in Indiana or anywhere else in the country that sanctioned a judge approving the sterilization of a minor simply on the basis of an ex parte petition.[137] Second, Judge Stump's failure to set a hearing on the matter and appoint a guardian *ad litem* to represent Linda Sparkman demonstrated the judge's utter lack of interest in determining whether he had such authority. The third and most damning aspect of Judge Stump's actions, however, was his failure to ascertain the truth of Mrs. McFarlin's allegations before authorizing such drastic and irreversible surgery. In sum, Judge

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132. *See* note 130 *supra*.
133. 98 S. Ct. 1099 (1978).
134. Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 322 n.3 (1969). This commentator, the first to suggest an actual malice standard for judicial wrongdoing, derived the standard analogously from the actual malice standard adopted by the Supreme Court in New York Times v. Sullivan, 376 U.S. 254 (1964). The Court held that a public official could recover damages in a defamation suit against a newspaper only if he showed the newspaper to have printed the allegedly defamatory material "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. *See also* Kates, *Immunity Of State Judges Under The Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 NW. U.L. REV. 615, 624 (1970); Note, *Immunity Of Federal And State Judges From Civil Suit — Time For A Qualified Immunity?*, 27 CASE W. RES. L. REV. 727, 767 (1977).
135. Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 336-37 (1969).
136. "[T]he malice standard places no strain on the independence of the conscientious judge who decides close cases against the party arguing a deprivation of constitutional rights. The only pressure involved is exerted against the free rein to prejudice and abuse of judicial power." *Id.*
137. *See* note 88 *supra*.

Stump acted with reckless disregard as to the correctness of his actions.

It should now be apparent that the doctrine of judicial immunity is firmly entrenched in American jurisprudence. Even Justice Stewart in his strong dissent in *Stump* agreed with the doctrine of judicial immunity as pronounced in *Bradley v. Fisher,*[138] and also concurred with Judge Stump's assertion that "an aura of deism surrounds the bench [which is] essential to the maintenance of respect for the judicial institution."[139] Any change in the doctrine of judicial immunity will certainly not come from the judiciary in the foreseeable future. Such reform must be forthcoming from state legislatures and the Congress. On the federal level, section 1983 and the Federal Tort Claims Act[140] could be amended to specifically permit actions against state and federal judges.[141]

There is also the question of who will pay the damages award in a judicial malpractice case. Unless the state has waived its tort immunity, a plaintiff would be barred by the eleventh amendment[142] from imposing liability on the state.[143] A plaintiff would then have to seek to impose personal liability on the offending judge. Should the state elect to pay such damages, the state would also be more interested in selecting and disciplining judges whose actions would

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138. 80 U.S. (13 Wall.) 335 (1872). *See* text accompanying notes 43-48 *supra.*

139. 98 S. Ct. at 1111 (Stewart, J., dissenting). Justice Stewart commented: "Though the rhetoric may be overblown, I do not quarrel with it." *Id.*

140. 28 U.S.C. §§ 1346, 2671-2680 (1976).

141. *But cf.* Bauers v. Heisel, 361 F.2d 581, 588-89 (3d Cir. 1966), *cert. denied,* 386 U.S. 1021 (1967). The *Bauers* court contended that legislative abrogation of the doctrine of judicial immunity would violate the guarantee clause (article 4, § 4) of the federal constitution, which guarantees a republican form of government, by destroying the independence of the judiciary. The court conceded, however, that Congress probably had the authority to abrogate judicial immunity since enforcement of the clause was the province of Congress as it involved a *nonjusticiable "political question." Id.* at 589.

For a good discussion of potential causes of action for judicial wrongdoing, see Note, *Immunity Of Federal And State Judges From Civil Suit — Time For A Qualified Immunity?,* 27 CASE W. RES. L. REV. 727, 758-66 (1977).

142. U.S. CONST. amend. XI. The eleventh amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

143. *See* Edelman v. Jordan, 415 U.S. 651 (1974). *See generally* Field, *The Eleventh Amendment And Other Sovereign Immunity Doctrines: Congressional Imposition Of Suit Upon The States,* 126 U. PA. L. REV. 1203 (1978); Field, *The Eleventh Amendment And Other Sovereign Immunity Doctrines: Part One,* 126 U. PA. L. REV. 515 (1978). *See also* Hans v. Louisiana, 134 U.S. 1 (1890).

While the eleventh amendment does not apply to suits against the federal government (for example, suits involving the actions of federal judges), the doctrine of sovereign immunity barred suits against the federal government until the partial abrogation of the government's tort immunity in the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1976). The judicial decisions of federal judges, however, are not within the scope of the Act. Foster v. McBride, 521 F.2d 1304 (9th Cir. 1975); Cromelin v. United States, 177 F.2d 275 (5th Cir. 1949), *cert. denied,* 339 U.S. 944 (1950). *But cf.* United States v. LePatourel, 571 F.2d 405 (8th Cir. 1978) (*see* note 60 *supra*).

subject it to financial liability. Should the state elect not to waive its immunity, judges would be more circumspect about disregarding the rights of litigants.

VI. CONCLUSION

The Supreme Court's expansive interpretation of the doctrine of judicial immunity in *Stump v. Sparkman*[144] means that any person who wishes to challenge the immunity of a judge will have to storm an almost impregnable citadel. To paraphrase Justice Stewart, the Court has licensed judges to inflict indiscriminate damage like loose cannons[145] without fear of personal liability. The Court has made a policy decision to allow the injuries which some persons will inevitably incur at the hands of some unscrupulous judges to go unremedied in order to allow all judges to make hard decisions free from personal considerations.[146] It is respectfully submitted, however, that the Supreme Court's sweeping interpretation of the breadth of judicial immunity serves more to further the doctrine as a sword for the malicious than as a shield for the conscientious.

John Bennett Sinclair

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144. 98 S. Ct. 1099 (1978).
145. *See id.* at 1110 (Stewart, J., dissenting).
146. *Accord,* United States v. Chaplin, 54 F. Supp. 926, 934 (S.D. Cal. 1944) ("The house should not be burned to destroy the mouse.").

APPENDIX

STATE OF INDIANA }
COUNTY OF DEKALB } SS:

PETITION TO HAVE TUBAL LIGATION PERFORMED ON MINOR AND INDEMNITY AGREEMENT

Ora Spitler McFarlin, being duly sworn upon her oath states that she is the natural mother of and has custody of her daughter, Linda Spitler, age fifteen (15) being born January 24, 1956 and said daughter resides with her at 108 Iwo Street, Auburn, DeKalb County, Indiana.

Affiant states that her daughter's mentality is such that she is considered to be somewhat retarded although she is attending or has

attended the public schools in DeKalb Central School System and has been passed along with other children in her age level even though she does not have what is considered normal mental capabilities and intelligence. Further, that said affiant has had problems in the home of said child as a result of said daughter leaving the home on several occasions to associate with older youth or young men and as a matter of fact having stayed overnight with said youth or men and about which incidents said affiant did not become aware until after such incidents occurred. As a result of this behavior and the mental capabilities of said daughter, affiant believes that it is to the best interest of said child that a Tubal Ligation be performed on said minor daughter to prevent unfortunate circumstances to occur and since it is impossible for the affiant as mother of said minor child to maintain and control a continuous observation of the activities of said daughter each and every day.

Said affiant does hereby in consideration of the Court of the DeKalb Circuit Court approving the Tubal Ligation being performed upon her minor daughter does hereby covenant and agree to indemnify and keep indemnified and hold Dr. John Hines, Auburn, Indiana, who said affiant is requesting perform said operation and the DeKalb Memorial Hospital, Auburn, Indiana, whereas said operation will be performed, harmless from and against all or any matters or causes of action that could or might arise as a result of the performing of said Tubal Ligation.

IN WITNESS WHEREOF, said affiant, Ora Spitler McFarlin, has hereunto subscribed her name this 9th day of July, 1971.

/s/ ORA SPITLER MCFARLIN
Ora Spitler McFarlin
Petitioner

Subscribed and sworn to before me this 9th day of July, 1971.

/s/ WARREN G. SUNDAY
Warren G. Sunday
Notary Public

My commission expires January 4, 1975.

I, Harold D. Stump, Judge of the DeKalb Circuit Court, do hereby approve the above Petition by affidavit form on behalf of Ora Spitler McFarlin, to have Tubal Ligation performed upon her minor daughter, Linda Spitler, subject to said Ora Spitler McFarlin covenanting and agreeing to indemnify and keep indemnified Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of action arising therefrom.

/s/ HAROLD D. STUMP
Judge, DeKalb Circuit Court

Dated July 9, 1971