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Casenotes: Judicial Immunity — State Judicial Officials Are Not Immune from Prospective Relief in an Action Brought under 42 U.S.C. § 1983 or from Paying Attorney's Fees to Prevailing Parties Pursuant to 42 U.S.C. § 1988. Pulliam v. Allen, 104 S. Ct. 1970 (1984)

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JUDICIAL IMMUNITY — STATE JUDICIAL OFFICIALS ARE NOT IMMUNE FROM PROSPECTIVE RELIEF IN AN ACTION BROUGHT UNDER 42 U.S.C. § 1983 OR FROM PAYING ATTORNEY'S FEES TO PREVAILING PARTIES PURSUANT TO 42 U.S.C. § 1988. *Pulliam v. Allen*, 104 S. Ct. 1970 (1984).

Two Virginia residents were arrested for misdemeanors for which the maximum penalty in each case was a monetary fine.[1] A county magistrate committed both men to jail because each failed to meet the bail she had imposed.[2] The two residents brought an action under 42 U.S.C. § 1983[3] to enjoin the allegedly unconstitutional practice of incarcerating persons awaiting trial for non-incarcerable offenses.[4] The United States District Court for the Eastern District of Virginia declared the practice unconstitutional, granted the injunction against the magistrate, and awarded the residents costs and attorney's fees pursuant to 42 U.S.C. § 1988.[5] The United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling, rejecting the magistrate's argument that principles of judicial immunity barred an award of attorney's fees against her.[6] On certiorari, the Supreme Court affirmed, holding that because judicial immunity did not bar the injunctive relief sought, the attorney's fees award was proper.[7]

Judicial immunity is a common law doctrine that evolved from twelfth century English appellate proceedings.[8] Initially, unsatisfied litigants could "appeal" a lower court's decision by bringing a personal ac-

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1. Richmond Allen was arrested for breach of the peace in violation of VA. CODE § 18.2-416 (1982) (maximum penalty is a $500 fine). Jesse Nicholson was arrested for being drunk in public in violation of VA. CODE § 18.2-388 (1982) (maximum penalty is a $100 fine). *See* Allen v. Burke, No. 81-0040A, slip op. (E.D. Va. June 4, 1981) *reprinted in* Joint Appendix accompanying Petition For Writ of Certiorari, Pulliam v. Allen, 104 S. Ct. 1970 (1984), *aff'd*, 690 F.2d 376 (4th Cir. 1982), *aff'd sub nom.* Pulliam v. Allen, 104 S. Ct. 1970 (1984).
2. Allen v. Burke, No. 81-0040A, slip op. (E.D. Va. June 4, 1981), *aff'd*, 690 F.2d 376 (4th Cir. 1982), *aff'd sub nom.* Pulliam v. Allen, 104 S. Ct. 1970 (1984).
3. 42 U.S.C. § 1983 (1982) provides:
   > Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
4. In the five months preceding the residents' suit, the magistrate had committed at least 34 persons charged with non-incarcerable offenses to jail for failure to post bond. Allen v. Burke, No. 81-0040A, slip op. at 26 (E.D. Va. June 4, 1981), *aff'd*, 690 F.2d 376 (4th Cir. 1982), *aff'd sub nom.* Pulliam v. Allen, 104 S. Ct. 1970 (1984).
5. *Id.* at 19-20. For the relevant text of 42 U.S.C. § 1988 (1982), see *infra* note 52.
6. Allen v. Burke, 690 F.2d 376 (4th Cir. 1982), *aff'd sub nom.* Pulliam v. Allen, 104 S. Ct. 1970 (1984).
7. Pulliam v. Allen, 104 S. Ct. 1970, 1971-72 (1984).
8. 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 664-68 (2d ed. 1968). For a survey of English common law origins of judicial immunity, see 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 234-40 (2d ed. 1937); Block, *Stump*

tion against its members for false judgment.[9] Judges appointed by the monarch, however, could not be accused of false judgment, rather they could only be directed to provide a record of their actions to the appellate court.[10] This record was incontestable and provided immunity for the judge, as agent of the monarch, for any act that appeared in the record.[11] Any act done outside the proper jurisdiction of the court would not appear in the record and was therefore not privileged as a judicial act.[12]

In the seventeenth century, to quell competition by rival courts, Lord Coke and the members of the King's Bench expanded the doctrine of immunity.[13] The justification for this expansion was that the common law courts of record derived their authority from the King[14] and therefore should not be subject to collateral interference from courts such as the Admiralty court, the Chancery acting as an equity court, and the Star Chamber.[15] Coke's broad application of the technical distinction between courts of record and courts not of record resulted in a broader privilege for members of superior common law courts. Judges of superior common law courts were afforded absolute and universal immunity for any judicial act whether done within or without the court's jurisdiction, while inferior common law court justices were immune only for judicial acts done within their limited jurisdiction.[16] Although this different treatment of superior and inferior court justices eventually subsided, the underlying policy for judicial immunity remained constant: to ensure that each judge "may be free in thought and independent in judgment."[17]

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v. Sparkman and the History of Judicial Immunity, 1980 DUKE L.J. 879; Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REV. 20 (1980).

9. 2 F. POLLACK & F. MAITLAND, *supra* note 8, at 666-68.
10. *Id.* at 668.
11. *See* 1 HALSBURY'S LAWS OF ENGLAND ¶ 206 (Lord Hailsham 4th ed. 1973) ("the record of a court of record cannot, if subsisting and valid upon its face, be traversed in any action against the judge of that court"). A court of record is one "where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question." 5 W. HOLDSWORTH, *supra* note 8, at 157 n.1 (3d ed. 1945) (quoting 3 W. BLACKSTONE, COMMENTARIES 24).
12. 1 HALSBURY'S LAWS OF ENGLAND, *supra* note 11, ¶ 212; *see also* Feinman & Cohen, *supra* note 8, at 206.
13. 5 W. HOLDSWORTH, *supra* note 8 at 157-60; Feinman & Cohen, *supra* note 8, at 207-10.
14. *See* Floyd and Barker, 77 Eng. Rep. 1305, 1307 (1607) (common law courts of record are answerable only to the monarch); *see also supra* note 11 and accompanying text.
15. Floyd and Barker, 77 Eng. Rep. 1305, 1307 (1607).
16. Miller v. Searle, [1777] 2 Wm.Bl. 1141, 1145, *quoted in* Sirros v. Moore, [1975] 1 Q.B. 118, 135. For a thorough discussion of the development of the doctrine of judicial immunity since Lord Coke, see Sirros v. Moore, [1975] 1 Q.B. at 132-50; Feinman & Cohen, *supra* note 8, at 210-21.
17. Sirros v. Moore, [1975] 1 Q.B. at 132 (quoting Garnett v. Ferrand, [1827] B. & C. 611, 625). This policy states:

    This freedom from action and question at the suit of an individual is given

When the issue of judicial immunity first arose in American courts, the judiciary looked to English law for guidance. In *Yates v. Lansing*,[18] a state chancellor who had been sued for wrongly convicting and incarcerating the plaintiff claimed that his judicial office barred the action. Noting that the challenged act was one within the chancellor's proper jurisdiction and agreeing with the policy supporting the doctrine of judicial immunity, the New York Supreme Court held that the action against the chancellor was barred.[19] Other courts concurred with this opinion and began to apply a doctrine of judicial immunity in varying degrees and with different refinements.[20] A clear statement of an American rule of judicial immunity, however, did not emerge until the Supreme Court considered the issue.

In *Randall v. Brigham*[21] and *Bradley v. Fisher*,[22] the Supreme Court first discussed judicial immunity which, according to the Court, "ha[d] been the settled doctrine of the English courts for many centuries, and ha[d] never been denied, that we are aware of, in the courts of this country."[23] Overlooking the inconsistent application of the doctrine in both American and English courts,[24] Justice Field, in *Bradley*, enunciated the "settled" American rule of judicial immunity. Similar to the English dichotomy between superior and inferior courts,[25] members of American courts of general jurisdiction received a broader privilege than those of courts of limited jurisdiction. While a judge of the former class was immune for any act[26] in a matter over which he had, or believed he had, subject matter jurisdiction,[27] the jurisdiction of the latter class was more

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> by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.

Id.

18. 5 Johns. 282 (N.Y. Sup. Ct. 1810), *aff'd*, 9 Johns. 395 (N.Y. 1811).
19. *Id.* at 290-96; *see* Feinman & Cohen, *supra* note 8, at 227.
20. *Compare* Howe v. Mason, 14 Iowa 510 (1863) (immunity restricted to judicial acts in good faith) *and* Ely v. Thompson, 10 Ky. (3 A.K. Marsh.) 70 (1820) (liability for acting under unconstitutional statute), *with* Lancaster v. Lane, 19 Ill. 242 (1857) (no liability for wrongful fine of parties provided jurisdiction was proper) *and* Young v. Herbert, 11 S.C.L. (Nott & McC.) 172 (1819) (immunity for magistrate who committed party to jail rather than imposing bail).
21. 74 U.S. (7 Wall.) 523 (1863).
22. 80 U.S. (13 Wall.) 335 (1872).
23. *Id.* at 347. *But see* Sirros v. Moore, [1975] 1 Q.B. 118, 146-49 (Lord Justice Ormond discussing the varying application of judicial privilege in England between the seventeenth and nineteenth centuries); Feinman & Cohen, *supra* note 8, at 205.
24. *See supra* note 20 (American courts) and Sirros v. Moore, [1975] 1 Q.B. 118, 146-49 (discussing inconsistent application in English courts).
25. *See supra* note 16 and accompanying text.
26. Members of a court of general jurisdiction were also immune for any act allegedly done with partiality, or done maliciously or corruptly. Bradley v. Fisher, 80 U.S. (13 Wall.) at 348.
27. *Id.* at 352. Justice Field noted that, in a court of general jurisdiction, the question of jurisdiction is as vital as the issues relating to the causes of action, and therefore a judge's good faith decision to accept jurisdiction should also be protected. If, how-

clearly defined, and thus its members were not protected for any act done without proper jurisdiction.[28] As in England, however, the dichotomy of the *Bradley* immunity doctrine gradually dissipated and by the turn of the century the tendency was toward equal treatment of all judicial officials.[29]

Since its pronouncements in *Bradley*, the Supreme Court has decided an issue of judicial immunity on only three occasions. Each of these cases concerned a suit for damages against a judicial official.[30] In *Pierson v. Ray*,[31] the Court held judicial immunity to be an absolute defense to an action for damages brought under 42 U.S.C. § 1983.[32] Notwithstanding a strong dissent by Justice Douglas arguing that § 1983 contained no exception for judges,[33] the *Pierson* Court stated it would not presume that Congress intended to abrogate the common law doctrine of judicial immunity unless it "specifically so provided."[34] In *Stump v. Sparkman*,[35] the Court's attention focused on determining when an act

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ever, it is clear to the judge that the court has no jurisdiction, acts in excess of jurisdiction are not excusable and are not exempt from liability. *Id.* at 351-52.

28. *Id.* at 351.
29. *See, e.g.*, Thompson v. Jackson, 93 Iowa 376, 61 N.W. 1004 (1895) (immunity extended to justice of the peace who entered a good faith judgment that was void for want of jurisdiction); Brooks v. Mangan, 86 Mich. 576, 49 N.W. 633 (1891) (justices of the peace are generally men of little legal education and therefore deserve at least equal protection from liability afforded educated members of courts of general jurisdiction); Austin v. Vrooman, 128 N.Y. 229, 28 N.E. 477 (1891) (similar extention of privilege to a magistrate); Waugh v. Dibbens, 61 Okl. 221, 160 P. 589 (1916) (judges of inferior courts are to be accorded the same privilege as judges of superior courts). *See generally* Feinman & Cohen, *supra* note 8, at 249-53.
30. Pulliam v. Allen, 104 S. Ct. 1970 (1984), is the first case before the Supreme Court that concerns a suit for prospective relief against a judge acting in a judicial capacity. *Id.* at 1974. All of the prior Supreme Court cases in this area involved suits for damages against judges, Butz v. Economou, 438 U.S. 478 (1978); Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868), or for prospective relief against a judge acting in a legislative capacity, Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980).
31. 386 U.S. 547 (1967).
32. In *Pierson*, a group of white and black clergymen attempted to use a segregated bus terminal waiting room in Jackson, Mississippi. They were arrested and charged with conduct breaching the peace in violation of a Mississippi statute later determined to be unconstitutional. The clergymen waived a jury trial and were then convicted by a municipal police justice. The clergymen then brought an action against the police justice for damages under 42 U.S.C. § 1983 claiming that their convictions were in violation of their civil rights. Finding that the police justice did nothing "other than to adjudge petitioners guilty when their case came before his court," 386 U.S. at 553, the Supreme Court held that the doctrine of judicial immunity was an absolute defense. For an evaluation of *Pierson*, see Kates, *Immunity of State Judges Under the Federal Civil Rights Act*: Pierson v. Ray *Reconsidered*, 65 NW. U.L. REV. 615 (1970).
33. 386 U.S. at 559 (Douglas, J., dissenting).
34. *Id.* at 554-55.
35. 435 U.S. 349 (1978). In *Stump* a judge, acting on the *ex parte* application of a young girl's mother, ordered the sterilization of the daughter without affording the daughter notice, a hearing, or an opportunity to appeal. The daughter sued the

by a judge constitutes a judicial act. It concluded that a judicial act is any act that is judicial in character[36] and that, if not in clear absence of all jurisdiction,[37] would be absolutely privileged by the doctrine of judicial immunity.[38] Finally, in *Butz v. Economou*[39] the Court extended the doctrine of absolute immunity to protect federal hearing examiners and administrative law judges from damages suits.[40] To insulate judicial officials from personal liability in damages suits, the Supreme Court had eliminated the *Bradley* distinction between courts of general and limited jurisdiction.

Prior to *Pulliam v. Allen*,[41] the Supreme Court had not had occasion to determine whether the doctrine of judicial immunity would bar prospective relief sought under the civil rights statutes.[42] Although several cases had been filed against state judges seeking such relief under 42 U.S.C. § 1983, the Court was able to reach a decision in each case without reaching the issue of judicial immunity.[43] The seven United States courts of appeals that have considered this issue, however, are in agreement that judicial immunity does not bar prospective relief against judicial officers.[44] One of the most thorough opinions supporting this

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judge for damages under 42 U.S.C. § 1983. *Id.* at 351-55. For an analysis of *Stump*, see Note, *Torts — Judicial Immunity: A Sword For The Malicious Or A Shield For The Conscientious?* Stump v. Sparkman, *98 S. Ct. 1099 (1978)*, 8 U. BALT. L. REV. 141 (1978).

36. 435 U.S. at 362. The Court set out two factors for determining whether an act is a "judicial" one: whether the act is one normally performed by a judge, and whether the parties dealt with the judge in his judicial capacity. *Id.*

37. *Id.* at 356-57.

38. Strictly applying the rule of Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872), the *Stump* Court clearly indicated that immunity attaches even when a judge's actions are taken in error, done maliciously, in excess of his authority, 435 U.S. at 356, or are "flawed by the commission of grave procedural errors." *Id.* at 359.

39. 438 U.S. 478 (1978).

40. The *Butz* Court stated that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Id.* at 512-13.

41. 104 S. Ct. 1970 (1984).

42. *Id.* at 1974; *see also* Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 735 n.13 (1980).

43. *E.g.*, Gerstein v. Pugh, 420 U.S. 103 (1975) (injunctive relief against judicial officers not appealed); O'Shea v. Littleton, 414 U.S. 488 (1974) (district court lacked article III jurisdiction); Boyle v. Landry, 401 U.S. 77 (1971) (same).

44. *In re* Justices of Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982); WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir. 1981); Heimbach v. Village of Lyons, 597 F.2d 344 (2d Cir. 1979); Slavin v. Curry, 574 F.2d 1256, *vacated as moot*, 583 F.2d 779 (5th Cir. 1978); Shipp v. Todd, 568 F.2d 133 (9th Cir. 1978); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975), *rev'd on other grounds sub nom.* Leeke v. Timmerman, 454 U.S. 83 (1981); Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), *cert. denied*, 414 U.S. 1143, *rev'd on other grounds sub nom.* O'Shea v. Littleton, 414 U.S. 488, *vacated sub nom.* Spomer v. Littleton, 414 U.S. 514 (1974); *cf.* R.W.T. v. Dalton, 712 F.2d 1225, 1232 n.9 (8th Cir.) (Eighth Circuit has expressly declined to decide this issue), *cert. denied*, 104 S. Ct. 527 (1983).

The district courts that have decided this issue are divided. *Compare, e.g.*, Baier

conclusion is the Seventh Circuit case of *Littleton v. Berbling*.[45] *Littleton* concerned a suit under the civil rights statutes against several county judges for engaging in a pattern and practice of racial discrimination. Reasoning that the narrow holding in *Pierson v. Ray*[46] only preserved judicial immunity in damages actions arising after the enactment of the civil rights statutes,[47] the *Littleton* court concluded that *Pierson* "does not, of course, mean that [state judges] may not be enjoined from pursuing a course of unlawful conduct."[48]

Most of the circuit courts of appeals[49] have in effect aligned themselves with Justice Douglas's dissenting view in *Pierson*. Douglas maintained that the effect of 42 U.S.C. § 1983 was to abrogate the immunity of all persons acting under color of state law, including judges, regardless of whether the relief sought was damages or injunction.[50] Still, the circuits were bound by the Supreme Court's holding in *Pierson* that, like legislative immunity, judicial immunity from damages had survived the enactment of the civil rights statutes.[51] Thus, the circuits interpreted § 1983 as abrogating judicial immunity from all actions except those for damages.

In 1976, Congress enacted the Civil Rights Attorney's Fees Award Act (Act), which permits the award of costs and attorney's fees to prevailing plaintiffs in civil rights suits.[52] Most courts have construed the Act as abrogating the strict rule of judicial immunity from damages suits

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v. Parker, 523 F. Supp. 288, 292-93 (M.D. La. 1981) (immunity) *and* Coleman v. Court of Appeals, 550 F. Supp. 681, 683-84 (W.D. Okla. 1980) (same), *with* Ashenhurst v. Carey, 351 F. Supp. 708, 712 n.3 (N.D. Ill., 1972) (no immunity) *and* Koen v. Long, 302 F. Supp. 1383, 1389 (E.D. Mo., 1969) (same), *aff'd*, 428 F.2d 876 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

45. 468 F.2d 389 (7th Cir. 1972), *cert. denied*, 414 U.S. 1143, *rev'd on other grounds sub nom.* O'Shea v. Littleton, 414 U.S. 488, *vacated sub nom.* Spomer v. Littleton, 414 U.S. 514 (1974).
46. 386 U.S. 547 (1967).
47. Noting the Supreme Court's rejection of Justice Douglas's dissenting view in *Pierson*, the *Littleton* court pointed out that "[t]he *[Pierson]* Court did not consider the issue of immunity from injunctive or other equitable relief." Littleton v. Berbling, 468 F.2d at 406.
48. *Id.* at 407 (quoting United States v. McLeod, 385 F.2d 734, 738 n.3 (5th Cir. 1967)).
49. *See supra* note 44 and accompanying text.
50. Pierson v. Ray, 386 U.S. at 559 (Douglas, J., dissenting). Examining the precise wording of 42 U.S.C. § 1983, quoted *supra* at note 3, Justice Douglas stated: "To most, 'every person' would mean *every person*, not every person *except* judges . . . . The congressional purpose seems to me to be clear." 386 U.S. at 559 (Douglas, J., dissenting) (emphasis in the original).
51. The *Pierson* Court followed its reasoning in Tenney v. Brandhove, 341 U.S. 367 (1951) (legislative record of § 1983 provides no clear indication that Congress intended to abolish legislative privilege), and concluded that Congress would have been more specific had it intended to abolish the common law doctrine of judicial immunity. *Pierson*, 386 U.S. at 554-55.
52. 42 U.S.C. § 1988 (1982). This section provides, in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*

to the extent that the Act permits the award of attorney's fees, and have accordingly upheld attorney's fees awards to plaintiffs who have been granted prospective relief against state judges.[53] The Supreme Court in dictum has implicitly followed this interpretation, noting in *Supreme Court of Virginia v. Consumers Union of the United States*[54] that "Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards."[55] The *Consumers Union* Court, however, was able to avoid the issue of judicial immunity once more, because the defendants in that case were sued in their legislative rather than judicial capacity.[56]

In *Pulliam v. Allen*,[57] the Supreme Court finally decided whether judicial immunity bars prospective relief against state judicial officials. Even though the magistrate in *Pulliam* had raised only the issue of the attorney's fees award on appeal,[58] the Court, in a five to four decision, stated that its earlier ruling in *Consumers Union* required it first to determine whether principles of immunity barred the underlying relief sought.[59] Finding no bar to the injunctive relief granted against the magistrate, the Court, following its interpretation of 42 U.S.C. § 1988 in *Consumers Union*,[60] affirmed the award of the attorney's fees.[61]

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53. *See, e.g.*, Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980); Morrison v. Ayoob, 627 F.2d 669, 672-73 (3d Cir. 1980). The *Morrison* court examined the legislative history of § 1988 in light of the Supreme Court's decision in Pierson v. Ray, 386 U.S. 547, 554-55 (1967). Noting that the House Report contained a footnote citing *Pierson*, *see infra* note 86, the Third Circuit concluded that it was a "sufficient indication that Congress has exercised the choice left to it by *Pierson* by enacting § 1988." 627 F.2d at 673.
54. 446 U.S. 719 (1980).
55. *Id.* at 738-39.
56. In *Consumers Union*, the promoters of a legal services dictionary sought to enjoin the Supreme Court of Virginia and its chief justice from enforcing a provision of the Virginia Code of Professional Responsibility that had been ruled unconstitutional. The district court granted the injunction on the ground that the Virginia court, in its legislative capacity, should have modified the Code, and awarded attorney's fees to the prevailing plaintiff. Consumers Union of United States v. American Bar Ass'n, 470 F. Supp. 1055, 1063 (E.D. Va. 1979), *vacated sub nom.* Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980). The Supreme Court vacated the fee award on the ground that legislative immunity barred the injunction and the fee award was therefore improper. 446 U.S. at 738-39. For a discussion of *Consumers Union*, see Note, *Official Immunity in Federal Court*: Supreme Court of Virginia v. Consumers Union of the United States, Inc., 67 CORNELL L. REV. 188 (1981).
57. 104 S. Ct. 1970 (1984).
58. The magistrate did not appeal the injunctive relief granted by the district court, nor the award of court costs. The appeal raised only the issue of judicial immunity from the award of attorney's fees and, in the alternative, that the fee award was excessive. Allen v. Burke, 690 F.2d 376 (4th Cir. 1982), *aff'd sub nom.* Pulliam v. Allen, 104 S. Ct. 1970 (1984).
59. *Pulliam*, 104 S. Ct. at 1973-74.
60. In *Consumers Union*, noting the legislative history of 42 U.S.C. § 1988, the Court stated:

    The House Committee Report on the Act indicates that Congress intended

To support its approval of the prospective relief, the Court embarked on an analysis of the sources of the immunity doctrine, relying primarily on analogous English common law principles[62] and American case law.[63] Drawing on conclusions from an admittedly different English court system,[64] the Court stated that "there was no inconsistency between a principle of immunity that protected judicial authority from a 'wide, wasting and harassing persecution' . . . and the availability of collateral injunctive relief in exceptional cases."[65] In addition to this conclusion, the Court relied on two other factors in finding that judicial immunity did not bar injunctive relief against the magistrate. First, it found no English or American case holding judges immune from prospective relief.[66] Second, it noted that seven circuit courts of appeals had affirmatively held immunity not to bar injunctive relief.[67]

The Court next discussed the concerns for judicial independence that may arise from subjecting judges to prospective relief. It did not perceive the first concern — that judges would constantly have to defend themselves against suits by disgruntled litigants — to pose a real threat to judicial independence.[68] Citing earlier decisions in *Beacon Theatres, Inc. v. Westover*[69] and *Ex parte Fahey*,[70] the Court calculated that prospective relief against state judges, either by direct or collateral action, could only arise in rare and limited situations.[71] The only other concern — the independence of state officials from federal interference resulting from the issuance of an injunction under 42 U.S.C. § 1983[72] — was summarily dismissed as being a "matter of comity and federalism, independent of

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to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards, H.R. Rep. No. 94-1558, p.9 (1976), but there is no indication that Congress intended to permit an award of attorney's fees to be premised on acts that themselves would be insulated from even prospective relief.

446 U.S. at 738-39. For the relevant part of H.R. Rep. No. 94-1558, p.9, see *infra* note 86.

61. *Pulliam*, 104 S. Ct. at 1982.
62. *Id.* at 1974-78.
63. *Id.* at 1974 n.6.
64. The Court stated: "The relationship between the King's Bench and its collateral and inferior courts is not precisely paralleled in our system by the relationship between the state and federal courts." *Id.* at 1978.
65. *Id.* (quoting Taaffe v. Downes, 13 Eng. Rep. 15, 18 (Ir. 1813)).
66. *Id.*
67. *Id*; *see supra* note 44 and accompanying text.
68. *Id.* at 1978-79.
69. 359 U.S. 500 (1959) (need to show an inadequate remedy at law and a serious risk of irreparable harm in order to obtain equitable relief).
70. 332 U.S. 258 (1947) (mandamus, prohibition, and injunction against a judge should be reserved for extraordinary cases because they have the unfortunate consequence of making the judge a litigant).
71. *Pulliam*, 104 S. Ct. at 1978-79.
72. 42 U.S.C. § 1983 creates a cause of action for damages, suit in equity, or other proper proceeding for redress. For the text of § 1983, see *supra* note 3.

principles of judicial immunity."[73] The Court therefore concluded that the arguments supporting judicial immunity from suits for damages were not applicable to suits seeking prospective relief.

Finally, the Court looked to the statute upon which the cause of action was based. Citing its earlier interpretations in *Ex parte Virginia*[74] and *Mitchum v. Foster*,[75] the Court stated that "Congress intended § 1983 to be an independent protection for federal rights" and that there is "nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review."[76] Thus, having found no valid reason to disallow the injunctive relief awarded against the magistrate, the Court affirmed the award of the attorney's fees.

The dissent, led by Justice Powell, focused primarily on the propriety of assessing any fee award against a judge. Apparently ignoring the Court's earlier interpretation of 42 U.S.C. § 1988 in *Consumers Union*,[77] the dissent argued that by accepting a distinction between "attorney's fees" and "damages" the majority "subordinates realities to labels."[78]

Briefly departing from this line of argument, the dissent raised two other points of contention. It first cited the common law qualification that immunity only bars suits against judges acting within the scope of their jurisdiction, and noted that there was no allegation by the plaintiffs in *Pulliam* that the magistrate was acting without jurisdiction.[79] Alternatively, the dissent claimed that even if collateral relief were granted against a judicial officer, considerations of judicial independence would require that costs be awarded "only against the party at interest and not against the judge."[80] To permit the award of attorney's fees against judges would not only ignore this latter consideration, but also would further threaten judicial independence by encouraging "harassing litiga-

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73. *Pulliam*, 104 S. Ct. at 1979-80.
74. 100 U.S. 339 (1879) (because a state acts only through its legislative, executive, or judicial authorities, the federal civil rights act provides a cause of action against state judicial officials).
75. 407 U.S. 225 (1972) (42 U.S.C. § 1983 is necessary to prevent injury to individuals by state courts that sought to abrogate federally protected rights or were powerless to stop their deprivation).
76. *Pulliam*, 104 S. Ct. at 1981.
77. Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 738-39 (1980).
78. *Pulliam*, 104 S. Ct. at 1982 (Powell, J., dissenting); *see also* Smith v. Smith, 396 F. Supp. 367, 369-70 (D. Or. 1973) (same policies that underlie judicial immunity from damages suits prohibit the award of attorney's fees), *aff'd mem.*, 579 F.2d 1376 (9th Cir. 1975).
79. *Pulliam*, 104 S. Ct. at 1985 (Powell, J., dissenting).
80. *Id.* at 1986 (Powell, J., dissenting). The dissent cited two United States Court of Appeals decisions in support of this proposition. *Id.* at 1986-87 (Powell, J., dissenting). In both of those cases, however, the respondents in the mandamus actions were federal, not state, judges. *See* Cotler v. Inter-County Orthopedic Ass'n, 530 F.2d 536 (3d Cir. 1976); *In re* Haight & Freese Co., 164 F. 688 (1st Cir. 1908). *But cf.* 42 U.S.C. § 1988 (1982) (§ 1988 allows fee awards to prevailing plaintiffs in, *inter alia*, actions brought under 42 U.S.C. § 1983, which concerns *state* officials).

tion" and increasing "its potential for intimidation" of judges.[81]

The Supreme Court's decision in *Pulliam v. Allen*[82] is significant in several respects. It permitted the Court to state clearly what it could only intimate in *Consumers Union*:[83] judicial immunity is not a bar to prospective relief against a judicial officer acting in his judicial capacity. Further, it enabled the Court to construe 42 U.S.C. § 1988 as permitting attorney's fees awards against defendants who would otherwise be immune from damages awards.[84] Notwithstanding the result, however, the reasoning of the Court leaves several questions unanswered.

The narrow issue before the Court in *Pulliam* was whether private citizens should be forced to bear the cost of rectifying civil rights violations against them by state judges.[85] Rather than decide this issue by construing the legislative history behind § 1988,[86] both the majority and the dissent opted for a debate on the propriety of subjecting judicial officers to prospective relief — an issue that the magistrate had not raised on appeal.[87] Furthermore, in deciding this issue the Court failed entirely to apply the two prong test for immunity from damages enumerated in

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81. *Pulliam*, 104 S. Ct. at 1988 (Powell, J., dissenting).
82. 104 S. Ct. 1970 (1984).
83. Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 738-39 (1980).
84. *See supra* note 60 and accompanying text.
85. *See* Petition for Writ of Certiorari at 3, Pulliam v. Allen, 104 S. Ct. 1970 (1984) (stating reason for granting the writ: "Immunity of a judicial officer from the payment of any attorney's fee award under 42 U.S.C. § 1988 is an important question of federal law which has not been settled by this Court.").
86. The legislative history of § 1988 includes inconsistent statements regarding its intent and purposes. *Compare* Senator Edward Kennedy's statement:

> The bill now before us, Mr. President, does not create any new legal remedies, nor does it expand our civil rights laws into new areas which Congress has not previously considered. It merely lends substance to the private enforcement of rights already authorized under existing civil rights laws.
>
> Furthermore, the bill will not create any new burdens for the courts. Rather, it is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the [Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)] decision.

122 Cong. Rec. 31,472 (1976), *with* the purpose of the Act according to the House Committee Report:

> Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

H.R. Rep. No. 94-1558, p.9 (1976) (footnote 17 contains a citation to Pierson v. Ray, 386 U.S. 547 (1967)).
87. *See supra* note 58.

Stump v. Sparkman.[88] An application of the factors considered in *Stump* would have brought the *Pulliam* reasoning into line with the Court's reasoning in previous immunity cases. It would have indicated that the magistrate's acts were of a discretionary judicial nature, requiring the *Pulliam* Court to hold the suit for injunctive relief against her barred.[89] The Court avoided application of this reasoning by noting that immunity from prospective relief was not actually an issue.[90] Nevertheless, in view of the holding in *Consumers Union* that attorney's fees may be awarded only if the underlying suit is not barred,[91] the *Pulliam* Court's validation of the fees award counsels the conclusion that the Court approves prospective relief against judges.

The *Pulliam* Court was able to avoid the issue of immunity from prospective relief because the case essentially turned on an interpretation of § 1988. The Court should therefore have examined more closely the magistrate's argument that *Pierson v. Ray*[92] requires § 1988 to be interpreted as prohibiting attorney's fees awards against state judges.[93] Had it done so, the Court might have reasoned that *Pierson*'s prohibition of suits for damages was not inconsistent with the underlying intent of § 1988. The plaintiffs in *Pierson* were the quintessential "unsatisfied litigants" from whom the doctrine of immunity sought to protect judges.[94] In *Pulliam*, however, the plaintiffs were citizens seeking to enjoin future civil rights violations by a magistrate.[95] The Court in *Pulliam* was thus presented with an excellent opportunity to explain how Congress's intent to permit attorney's fees awards against state judges was not inconsistent with *Pierson*'s prohibition against suits for damages; in effect, that judges are only liable for costs when prospective relief is sought to cure judicial *conduct*, but not *decisions* that restrict a person's civil rights.[96]

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88. 435 U.S. 349, 362 (1978); *see supra* note 36.
89. In determining what constitutes a judicial act, the *Stump* Court relied on McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972), a case analogous to *Pulliam*. In *McAlester*, the father of a criminal defendant was confined for a day when he inadvertently annoyed a judge in chambers. Although the confinement was ordered with neither due process nor with any of the procedural requirements of contempt proceedings, the Fifth Circuit concluded that the judge had acted "in his judicial jurisdiction." 469 F.2d at 1282.
90. *Pulliam*, 104 S. Ct. at 1981; *see also supra* note 58.
91. Supreme Court of Virginia v. Consumers Union of United States, 446 U.S. 719, 739 (1980).
92. 386 U.S. 547 (1967).
93. *See* Brief of Amici Curiae, State of Minnesota *et al.*, at 8-9, Pulliam v. Allen, 104 S. Ct. 1970 (1984).
94. The record in *Pierson* indicated no unconstitutional acts or practices by the police justice sued by convicted litigants. 386 U.S. at 553; *see also supra* note 32.
95. Plaintiffs Allen and Nicholson brought suit to enjoin the magistrate's practice of incarcerating persons arrested for non-jailable offenses. *See supra* note 4 and accompanying text. They had only appeared before the magistrate at the bail hearing, not as defendants in a trial on the merits. *Compare Pierson*, 386 U.S. 347 (1967) *with Pulliam*, 104 S. Ct. 1970 (1984).
96. This distinction is examined in Littleton v. Berbling, 468 F.2d 389, 404-10 (7th Cir. 1972), *cert. denied*, 414 U.S. 1143, *rev'd on other grounds sub nom.* O'Shea v. Lit-

The Court also failed to point out that the original concerns for judicial immunity — that judges should be at liberty to exercise their functions with independence and without fear of consequences[97] — have been substantially vitiated because the burdens of litigation and accountability for monetary awards have been largely shifted to state governments through indemnification statutes.[98] Any arguments that the prospect of large fee awards against the public funds would have an intimidating effect on conscientious jurists[99] could have been countered with the overriding policy consideration that "the potential harm to the public from denying immunity . . . is outweighed by the benefits of providing a remedy."[100]

The availability of attorney's fees awards in light of *Pulliam v. Allen*[101] is likely to result in a multiplicity of suits against state judges, an anomolous result that the doctrine of judicial immunity was adopted to prevent.[102] Yet, because the *Pulliam* Court's conclusion that judges are

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tleton, 414 U.S. 488, *vacated sub nom.* Spomer v. Littleton, 414 U.S. 514 (1974). *Ex parte* Virginia, 100 U.S. 339 (1879) is also relevant. A Virginia county court judge was indicted for excluding black citizens' names from grand and petit jury lists. Confronted with the defense of judicial immunity, the Supreme Court considered whether the selection of jurors was a judicial or ministerial act:

> Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge.

Id. at 348. The Court concluded that the challenged act was ministerial rather than discretionary, and therefore held the judge answerable for the indictment. *Cf.* Stump v. Sparkman, 435 U.S. 349, 359 (1978) (a judicial act is one that is judicial in character).

97. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 350 n.20 (1872) (quoting Scott v. Stansfield, 3 L.R.-Ex., 220, 223 (1868)); *see also supra* note 17 and accompanying text.

98. *E.g.*, CAL. GOV'T CODE § 825 (West 1980); COLO. REV. STAT. § 24-10-110 (1982) (except for wanton or willful acts); DEL. CODE. ANN. tit. 10, § 4002 (Supp. 1982); MD. STATE GOV'T CODE ANN. § 12-404 (1984) (except for acts done with malice or gross negligence). *But see* MICH. COMP. LAWS ANN. § 691.1408 (West 1968 & Supp. 1984) (no indemnification provision); UTAH CODE ANN. §§ 63-48-1 to -7 (2d Repl. Vol. 1978) (repealed 1983).

Federal court fees awards, which would in most cases be paid from state coffers, are not violative of the eleventh amendment. Hutto v. Finney, 437 U.S. 678, 693-98 (1978). *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Congress has plenary power to set aside state's immunity to enforce the fourteenth amendment). *See generally* Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 HARV. L. REV. 682, 695 (1976).

99. Brief of *Amici Curiae*, *supra* note 93, at 5-8; *see also* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (threat of suit "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties"), *cert. denied*, 339 U.S. 949 (1950).

100. Dennis v. Sparks, 449 U.S. 24, 32 (1980).

101. 104 S. Ct. 1970 (1984).

102. *See* Ito, *A National Survey Shows Wide Variations in Actions Against Court Employees*, STATE CT. J., Summer 1982, at 9, 14 (over 600 actions were initiated against judges or court personnel in 1981).

not immune from prospective relief was not properly before the Court,[103] the Court effectively has reserved the right in future cases to reverse an order of prospective relief against a state judge. Further, by failing adequately to discuss the Civil Rights Attorney's Fees Award Act in light of *Pierson v. Ray*,[104] *Pulliam* leaves unresolved whether Congress's apparent abrogation of judicial immunity for attorney's fees was intended to stand beside or in lieu of the Supreme Court's holding of absolute immunity from damages suits.[105]

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103. Because the issue of immunity from prospective relief was not raised on appeal, *see supra* note 58, the Court expressly refrained from ruling whether the injunction order by the lower court was an appropriate remedy on the facts of this case. *Pulliam*, 104 S. Ct. at 1981; *see also supra* text accompanying note 90.
104. 386 U.S. 547 (1967); *see supra* note 86 and accompanying text.
105. *Pierson*, 386 U.S. at 554.