DePaul Law Review

Volume 27
Issue 4 *Summer 1978: Symposium - Employment Rights of the Handicapped*

Article 13

A Judge Can Do No Wrong: Immunity Is Extended for Lack of Specific Jurisdiction - Stump v. Sparkman

Stephen Craig Voris

A JUDGE CAN DO NO WRONG: IMMUNITY IS EXTENDED FOR LACK OF SPECIFIC JURISDICTION—*STUMP V. SPARKMAN*

> *[T]he King himself is* de jure *to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his Judges,. . . and forasmuch as this concerns the honour and conscience of the King, there is great reason that the King himself shall take account of it, and no other.*[1]

Traditionally, the doctrine of judicial immunity has precluded individuals from maintaining civil actions against judges for injuries resulting from a judicial proceeding. This tenet is thought to be in the best interest of society, in that it allows a judicial officer "to be free to act upon his own convictions without apprehension of personal consequences to himself."[2] In reversing the Seventh Circuit Court of Appeals, however, in *Stump v. Sparkman*,[3] the Supreme Court dangerously expanded the scope of this doctrine.[4] Specifically, the Court found that a state judge's jurisdiction and ensuing immunity shielded his approval of a mother's petition to sterilize her daughter. As a result, the Court established that a judge is protected from personal liability unless consideration of the subject matter which caused the injury was precisely foreclosed by law.

Problems immediately arise from this rationale. The most obvious being that the Court is deferring to the state legislatures the duty of amending their jurisdictional grant to their courts, a slow and often

---

1. Floyd & Barker, 12 Co. Rep. 23, 25, 77 Eng. Rep. 1305, 1307 (1608).

2. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872).

3. 98 S.Ct. 1099 (1978). One of the earliest American cases to consider judicial immunity was Yates v. Lansing, 5 Johns. 282 (N.Y. 1810). In *Yates*, Chief Justice Kent found that a judge of the New York Court of Chancery had jurisdiction to order a prisoner recommitted despite another court's earlier grant of habeas corpus. The Chief Justice's rationale in holding the judge free from the prisoner's liability action derived from an extended list of English cases which had advocated the need for immunity in order to insure an uneffected and competent judiciary. *Id.* at 289-98.

4. Few commentators have supported the need for a judicial immunity doctrine. *See generally* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1936); Thompson, *Judicial Immunity and the Protection of Justices*, 21 MOD. L. REV. 517 (1958). More recently, however, allegations of the doctrine's harshness have been advanced. *See* Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615 (1970); Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941, 958 (1977). Note, *Immunity of Federal and State Judges from Civil Suit–Time for a Qualified Immunity?* 27 CASE W.L.REV. 717 (1977) [hereinafter cited as *Qualified Immunity*]; Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969) [hereinafter cited as *Liability of Judicial Officers*].

fruitless process, so as to make judicial approval of matters which deprive citizens of fundamental interests unlawful. Since the immunity doctrine was judicially created, the Court itself should have taken the initiative to limit the protection given to those judges who violate an individual's basic rights.

After examining the evolution of the doctrine, this Note will challenge the present Court's application of judicial immunity. Secondly, a more rational immunity standard will be advanced—one in which society's interest in an efficient judiciary can be maintained while awarding damages when fact situations similar to *Stump* arise.

FACTS AND BACKGROUND

On July 9, 1971, Mrs. Ora Spitler McFarlin, the mother of plaintiff Linda Kay Spitler Sparkman, presented through counsel, a "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement"[5] to Judge Harold D. Stump of the Circuit Court of DeKalb

---

Actions for damages have been brought against judges based on a common law tort theory of trespass against the person, including claims of: libel and slander: O'Bryan v. Chandler, 496 F.2d 403 (10th Cir. 1974), *cert. denied*, 419 U.S. 986 (1974) (federal judge immune from liability for libelous statements and press releases); Roberson v. Harris, 393 F.2d 123 (8th Cir. 1968) (state court judge immune for publication of libelous court opinion); Garfield v. Palmieri, 297 F.2d 526 (2d Cir. 1961), *cert. denied*, 369 U.S. 871 (1962) (judge held immune for publication of court opinion); malicious prosecution: O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S.926 (1966) (judge immune for giving false testimony to grand jury regarding plaintiff's activities); Branstead v. Schmidt, 324 F. Supp. 1232 (W.D. Wis. 1971) (judge immune from action alleging prejudice in criminal sentencing); false imprisonment: Potter v. LaMunyon, 389 F.2d 874 (10th Cir. 1968) (judge held immune for ordering woman restricted from visiting children).

Actions also have been based on deprivations of civil rights. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967). Judicial immunity has been unavailable, however, in those actions against judges which seek injunctive relief. *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972); Jacobson v. Schaeffer, 441 F.2d 127, 130 (7th Cir. 1971).

Judicial immunity has also been extended to protect quasi-judicial officers, including court clerks and prosecuting attorneys. *See, e.g.*, Smith v. Rosenbaum, 460 F.2d 1019 (3d Cir. 1972) (clerk with ministerial duties held to be part of judicial process and thus immune); Yaselli v. Goff, 12 F.2d 396 (2nd Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927) (special assistant to attorney general immune from liability). *But see* McCray v. Maryland, 456 F.2d 1 (4th Cir. 1971) (court clerk held not entitled to absolute immunity for negligence in duties).

5. 98 S. Ct. at 1102. The petition was prepared by Mrs. McFarlin's attorney, Warren G. Sunday, later named a defendant in this case.

A tubal ligation, or sterilization, is a surgical operation in which the fallopian tubes are bound or severed so as to prevent reproduction. The operation is known in medical terms as a salpingectomy. *See* 2 J.E. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE 117 (1962). The operations are usually irreversible. *See* Oster, Sterilized Daughter Seeks Justice, Chi. Sun Times, October 30, 1977 at 8, col. 3 (statements made by defendant physician). These operations have been referred to as a form of genocide. *See* R. SLOVENKO, SEXUAL BEHAVIOR AND THE LAW 100-11 (1965).

County, Indiana.[6] In the petition, Mrs. McFarlin stated that her fifteen year old daughter was "somewhat retarded," although she had attended public schools and progressed normally "along with other children in her age level."[7] The mother also asserted that Linda had left home on "several occasions" without permission, and had stayed overnight with older youths or men. In view of this behavior, Mrs. McFarlin believed sterilization was necessary to "prevent unfortunate circumstances."

Before signing the petition Judge Stump made no effort to appoint a guardian *ad litem* to represent the plaintiff's interests,[8] nor did he give her an opportunity to appear in court for a hearing on the matter.[9] In fact, the child was never given notice,[10] and neither the

---

6. The circuit courts of Indiana are courts of superior and general jurisdiction in both law and equity cases. *See* Barkley v. Trapp, 87 Ind. 25 (1882). Judge Stump has been sitting on the DeKalb County Circuit Court since 1959.

7. *See* note 5 *supra*.

8. In Whinnery v. Hammond Trust & Savings Bank, 80 Ind. App. 282, 140 N.E. 451 (1923), it was held that a court had the imperative duty to appoint a guardian *ad litem* in an action concerning a child's interest in an estate. It would seem only logical then that a guardian was necessary in this case. Other Courts which have dealt with the issue of sterilization have automatically appointed a guardian. *See In re* M.K.R., 515 S.W.2d 467 (1974); Kemp. v. Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

9. The rights to notice and a hearing in an action which affects one's Fourteenth Amendment rights were recently reiterated by the Supreme Court in Goss v. Lopez, 419 U.S. 565 (1975). Bd. Regents v. Roth, 403 U.S. 564 (1972) and Carey v. Piphus, 98 S. Ct. 1042 (1978). In these cases, the Court stated that the procedural due process rights under the Fourteenth Amendment will be invoked in cases where constitutional rights are violated. Procreation has been interpreted as an element of the constitutional right to privacy. *See* Skinner v. Oklahoma, 316 U.S. 535 (1951). It should be noted, however, that these procedural cases were decided after Linda Sparkman was sterilized.

10. According to Indiana rules, the circuit courts, which are courts of general and superior jurisdiction, acquire "jurisdiction over a party or person who . . . is served with summons or enters an appearance, or who is subject to the power of the court under any other law." INDIANA RULES OF TRIAL PROCEDURE, TR.4(A) (1970). Defendant Stump argues that he had jurisdiction over Linda Sparkman through IND. CODE §§ 16-8-3-1, 16-8-4-2 (1971) which allow for parents to consent to medical care for their children. Thus, Judge Stump argues jurisdiction existed when Mrs. McFarlin consented to the operation by submitting her petition to the court. *See* Petitioner's Brief for Certiorari at 8-9, Sparkman v.McFarlin, 552 F.2d 172 (7th Cir.), *cert. granted sub nom.* Stump v. Sparkman, 98 S. Ct. 51 (1977). Plaintiffs argue, however, that this method of acquiring jurisdiction is permitted only when necessary medical care is sought. *See* Respondent's Brief for Certiorari at 7. Furthermore, service upon infants is required by an Indiana law which specifically provides:

> Service upon an individual known to be an infant shall be made upon his next of friend or guardian ad litem, if service is with respect to the same action in which the infant is so represented.

IND. TR.4.2(A) (1970).

In Indiana, the due process right to notice for children was recognized at an early date. *See, e.g.*, Martin v. Starr, 7 Ind. 224 (1855) (where process was required to be served on infant-defendant in the same manner as adults). This demand for notice is also evident in applications to the court for orders. *See* IND. TR.7(B) (1970).

petition nor the approval was filed formally in the court.[11] After the judge approved the petition, the child was taken to a local hospital where she was told by doctors she was to undergo an appendectomy.[12] Not until four years later, after her marriage to Leo Sparkman, did the couple discover the true nature of Linda's operation.[13] In 1975, the Sparkmans brought civil rights and common law tort actions in federal court against Mrs. McFarlin, her attorney, the doctors, the hospital, and Judge Stump.[14]

The United States District Court for the Northern District of Indiana dismissed the plaintiffs' constitutional counts for failure to state a claim upon which relief could be granted.[15] The court stated that the only action proscribed by either the Fourteenth Amendment or the civil rights acts[16] was the "state action" involved in Judge

---

11. The Indiana rules require that pleadings and other papers be properly filed with the courts. *See* IND. TR. 5(E) (1970). In Pease v. State, 74 Ind. App. 572 (1921), a court held that courts have general jurisdiction, known as subject matter jurisdiction conferred on them by the State's constitution or statutes, but that particular jurisdiction, that over the parties, necessitates the filing of a complaint and the issuance of summons. Furthermore, in Gilmour v. State, 230 Ind. 454 (1952), *rehearing denied*, 230 Ind. 454, 461 (1952), the Indiana Supreme Court held that not only was subject matter jurisdiction required, but also jurisdiction over the particular case. This can be accomplished only by complying with IND. TR. 7(B) (1970).

12. 98 S. Ct. at 1103. This cover-up was employed because Linda recently had been treated for an attack of appendicitis by defendant Dr. Hines, *See* Sparkman v. McFarlin, Civil No. F75-129 (N.D. Ind. May 13, 1976) (order of dismissal). The actual sterilization occurred on July 16, 1971, only seven days after Judge Stump had signed the petition.

13. Some of the doctors involved in the operation admitted to performing a sterilization, while some denied it. The Sparkmans were finally informed by Dr. Hines in May of 1975 that a tubal ligation had been performed. *See* Sparkman v. McFarlin, Civil No. F75-129 (N.D. Ind. May 13, 1976) (order of dismissal).

14. The plaintiffs asserted a cause of action arising under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution. Jurisdiction was established under 28 U.S.C. §§ 1331, 1343 (1970) which permit the federal courts original jurisdiction in cases involving both federal questions and those which allege a violation of 42 U.S.C.§ 1985 (1970). The Sparkmans also attached pendent state claims of assault, battery and medical malpractice. Leo Sparkman individually asserted a pendent claim of loss of potential fatherhood. Federal courts are permitted to entertain non-federal causes of action when the division of federal and state claims would cause plaintiffs burdensome and repeated litigation. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

15. Sparkman v. McFarlin, Civil No. F75-129 (N.D. Ind. May 13, 1976) (order of dismissal). The pendent state actions against the private defendants were also dismissed for lack of subject matter jurisdiction as a result of the dismissal of the federal claims.

16. U.S. CONST. amend. XIV, Section 1, provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Acts on which plaintiffs based their action are ch. 22 § 1, 17 Stat. 13, *codified at* 42 U.S.C. § 1983 (1970) which 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

Stump's approval of the petition. Nevertheless, the court found that no federal action could lie against any of the defendants because Judge Stump, the only state agent, was absolutely immune from suit under the doctrine of judicial immunity. On appeal, the Seventh Circuit reversed,[17] concluding that Judge Stump was not acting within his jurisdiction in approving the petition because Indiana law provided no authority for court-ordered sterilizations on the petition of a parent. That court held that Judge Stump had, in fact, "acted extrajudicially"[18] and that such action prevented the application of judicial immunity as a defense. The Supreme Court, however, found this ruling incorrect, stating, in sum, that the court of appeals employed an "unduly restrictive view of the scope of Judge Stump's jurisdiction."[19] Writing for the majority in a five - three decision, Justice White found that even if approval of the petition appears to be in error, "Indiana law vested in Judge Stump the power to entertain and act upon the petition for sterilization."[20]

In separate dissents, Justices Stewart and Powell suggested that society's interest, in addition to individual interests, might be better served if the doctrine is viewed in light of a case's surrounding circumstances, rather than merely applying the two considerations of jurisdiction and judicial action as was done by the majority. Yet to fully appreciate the implications of the majority's rationale, an understanding of how the immunity doctrine developed is necessary.

---

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.

ch. 22 § 2, Stat. 13, now 42 U.S.C. § 1985 (3) (1970) provides in part:

[I]n any case of conspiracy set forth in this section, if one or more persons engaged therin do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

17. Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977).

18. *Id.* at 173. The common law rule and later cases have established that only actions taken outside a judge's jurisdiction can subject him to personal liability. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

19. 98 S. Ct. at 1106.

20. *Id.* at 1108.

THE DOCTRINE OF JUDICIAL IMMUNITY

English Development

The doctrine evolved at common law as a means of preserving a strong and independent judicial system.[21] English courts theorized that if judges were forced to defend their rulings against the adverse reactions of litigants, the public as a whole would suffer from an influenced judiciary. Sir Edward Coke first emphasized this argument in 1608 when he stated that judges were "to make an account to God and the king"[22] only. To require that judges answer to the complaints of litigants "would tend to the scandal and subversion of all justice, and those that are the most sincere would not be free from continual calumnations."[23]

While at common law there existed this strong public policy favoring immunity, there has always been an available procedure for defeating the doctrine. The most common means has been to attack the questioned judge's jurisdiction. If it is found that a judge has the prerequisite jurisdiction to rule on a particular subject matter, he will be absolutely immune from an action for damages.[24] If, on the other hand, it is found that a judge acted in absence of jurisdiction, the door to liability is open.

Although superficially easy to grasp, the concept of jurisdiction is an extremely nebulous area of the law. According to the legal historian, William Holdsworth, a distinction in the degrees of jurisdiction arose from the fight for control of the English judiciary between the common law courts of record, and those forums which did not maintain a record.[25] The courts of record were deemed courts of *superior*

---

21. *See* Taafe v. Downes, 13 Eng. Rep. 12 (1815) (cases cited for the defendant). *But cf.* Dawkins v. Lord Paulet, L.R. 5 Q.B. 94, 110 (C.J. Cockburn dissenting)(disbelief that cases allowing judicial liability will necessarily affect the judiciary). *See also* Pierson v. Ray, 386 U.S. 547, 566 (1967) (Douglas, J. dissenting).

22. Floyd & Barker, 12 Co. 23, 25, 77 Eng. Rep. 1305, 1307 (1608). In *Floyd*, an action of conspiracy was brought against Judge Barker for having given judgment upon a verdict of death for a defendant. In finding for Barker, Chief Justice Coke stated that record court judges could not be drawn in question by the Star Chamber, a non-record court where the action had been brought.

23. *Id.* One commentator has stated that continual calumnations, or vexatious suits, could be controlled by implementing a qualified immunity which would allow suit upon a showing of actual malice equivalent to the standard of proof in New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *see Liability of Judicial Officers*, *supra* note 4, at 322.

24. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872); Pierson v. Ray, 386 U.S. 547, 554 (1967).

25. As one of the leading judicial spokesmen of his time, Lord Coke led the political fight for the supremacy of the common law courts of record by stating that these courts had the exclusive jurisdictional authority to levy fines and to imprison offenders. 5 W. HOLDSWORTH, A

(general) jurisdiction because their judges had been vested by the king with the power to independently determine the limits of their own jurisdictional authority. A judge's erroneous conclusion as to his limit of authority was characterized as merely in excess of, or an abuse of jurisdiction, not an act outside his jurisdiction which could subject him to liability.[26]

In contrast, the courts of no record were regarded by the monarchy as courts of *inferior* jurisdiction because their authority had been limited expressly to encompass only particular places, people, or subject matters. Consequently, an inferior court judge's error as to his ambit of jurisdiction could result in action taken outside his authority, thus subjecting him to probable liability.

However, in alleging a judge of general jurisdiction to be personally liable, plaintiffs were required to meet an extreme burden of proof. It had to be demonstrated that the superior court judge acted without jurisdiction,[27] a difficult process at best since the reviewing courts presumed that superior court judges could only act in excess of their authority, and not outside their jurisdiction. This was believed to have been the standard of proof until *Stump*.

American Development

The United States inherited this common law immunity theory with the adoption of the English legal system. In 1868, the doctrine

---

HISTORY OF ENGLISH LAW, 159-60 (1924) [hereinafter cited as HOLDSWORTH]. Courts which did not keep records were the Star Chamber, the Council, the Chancery courts while sitting in equity, and the Admiralty courts, *id.* at 157-62. Since the new courts did not keep a record of their proceedings, they were regarded by Coke as having no authority to impose such sanctions. Later, in *Floyd & Barker*, 12 Co. 23, 77 Eng. Rep. 1305 (1608), Chief Justice Coke took the opportunity to eliminate the dispute between these two distinct legal factions and thus assure the common law courts of their status as the duly authorized English forums. In an effort to sanctify the records of the common law courts and consequently cripple the authority of the competing courts, he stated that rulings of record-court judges could not be attacked in a complaint brought before the non-record courts. This unique privilege, however, was not available to the judges of the rival courts, whose unrecorded actions would remain open to attack. Therefore, the basis of judicial immunity was merely the product of Coke's political maneuvering, making the historical basis a tenuous foundation for the inflexible privilege that currently shields our judges. 5 HOLDSWORTH at 159-60. Holdsworth claims, however, that prior to Coke's theory, judicial immunity was non-existent, since actions which questioned the rationale of a court's judgment took the form of a complaint against the judge. 6 HOLDSWORTH at 234-35. Holdsworth states that the original method for appeal of an erroneous judicial decision was to bring an action against the judge who rendered it. In the fourteenth century, however, complaints against the judgment were differentiated from charges against the judge. *See* 1 HOLDSWORTH at 214; *See also* 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 665-67 (2d ed. 1898).

26. 6 HOLDSWORTH, *supra* note 25 at 238-39.

27. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 352 (1872).

and its justifications first were examined by the Supreme Court in *Randall v. Brigham*.[28] Justice Field, speaking for the Court, qualified the doctrine in dictum by stating that judges of courts of superior jurisdiction were not liable in civil actions, "unless perhaps where the acts in excess of jurisdiction are done maliciously or corruptly."[29] By implying that bad faith actions in excess of jurisdiction could be a basis for judicial liability, *Randall* limited for the American judge the immoderate immunity which protected English superior court judges. The *Randall* theory of judicial immunity allowed courts to resolve difficult questions of a judge's jurisdictional limits by letting the courts make further inquiry into the judge's motive or intent in order to balance the good-faith of his actions against the individual's competing interests.

Four years later, however, the Supreme Court reconsidered the scope of the doctrine in *Bradley v. Fisher*.[30] In *Bradley*, an attorney brought a common law tort action against a criminal court judge for having ordered the plaintiff's name stricken from the roll of attorneys eligible to practice in court. On the plaintiff's writ of error, the Supreme Court held that Judge Fisher's jurisdictional grant encompassed the authority to ostracize Bradley from the criminal court bar. In so holding, the Court introduced a rule which basically restored absolute judicial immunity. The Court overruled, by implication, its dictum in *Randall* by declaring that judges of courts of superior or general jurisdiction would be immune even when their acts in excess of jurisdiction were malicious or corrupt.[31] Again writing for the majority, Justice Field did indicate, however, one exception to immunity. He distinguished actions which are in *excess* of jurisdiction from those actions which are taken in *clear absence* of all subject matter jurisdiction. As a model he stated that if a probate court judge, vested only with authority over wills and estates, should try a party for a public offense, it would be a usurpation of the judge's authority, thus exposing him to an action for damages.[32] But if a

28. 74 U.S. (7 Wall.) 523 (1868). In *Randall*, a superior court judge removed an attorney from the Massachusetts bar because the attorney had allegedly given deceitful advice to a client. The client's complaint to the court resulted in the attorney's removal. The attorney consequently brought an action for damages against the judge.

29. *Id.* at 536.

30. 80 U.S. (13 Wall.) 335 (1872). The plaintiff in *Bradley* represented John Suratt, who had been accused of murdering Abraham Lincoln. After trial on July 2, 1867, the plaintiff allegedly confronted Judge Fisher as he was leaving the bench and made derogatory remarks about the Judge's handling of the case. Consequently, the Judge ordered Bradley dismissed from the court's bar.

31. *Id.* at 351.

32. *Id.* at 352.

judge of a criminal court vested with general criminal jurisdiction should hold a particular act to be an offense, when in fact it is not, and consequently convict a party for such act, or should sentence a defendant to a greater punishment than is authorized by law, no personal liability would exist. Such action would only be in excess of jurisdiction.[33]

Dissenters in *Bradley*, however, believed that the appropriate rule to have been applied was the qualified immunity standard established in *Randall*.[34] Nevertheless, the *Bradley* holding reinstated what is considered absolute immunity for superior court judges. The majority removed virtually the only mode of checking a judge's action other than through appeal.[35] In protecting malicious and corrupt judicial conduct, and holding liable only those acts which are clearly outside of jurisdiction, the *Bradley* Court let suits against judges turn on subtle questions of jurisdictional interpretation. This standard makes it extremely difficult for plaintiffs to obtain relief, especially in cases such as *Stump*,[36] where the jurisdiction of the defendant judge de-

33. *Id.*

34. *Id.* at 357 (Davis, J. dissenting).

35. The check on judicial action should be readily available to injured plaintiffs, not a barrier which is based on keeping the bench desirable to qualified attorneys. *See* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271 (1936). The justifications which Professor Jennings advanced in behalf of judicial immunity remain assumptions which apparently the judiciary would rather not test. These justifications include: (1) suits against judges would delay court proceedings; (2) prevention of possible influence on judicial determinations; (3) capable men would be deterred from judicial service; (4) separation of powers between federal and state governments; (5) a need for finality in litigation; (6) appeal of decisions as an adequate remedy; (7) judges owe duty to public, not to individuals; (8) judges' need to protect themselves; (9) unfair to have one decide the law and then penalize him for his opinion.

36. An alternative to suing judges in tort, and the theory on which the plaintiffs in *Stump* rely, exists under 42 U.S.C. § 1983 (enacted in the Civil Rights Act of 1871). *See* note 16 *supra*. This section permits actions at law or suits in equity to be brought in the federal forum against *every* person who, while acting under government authority, deprives individuals of their constitutional rights. Notwithstanding the section's broad language, the Supreme Court's most recent comment on judicial liability in Pierson v. Ray, 386 U.S. 547 (1967) implied that the *Bradley* requirement of absence of jurisdiction was still a necessary prerequisite to proving judicial liability even under Section 1983.

The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were intended to vest private individuals with federally protected rights. U.S. CONST. amend. XIII provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

The Fourteenth Amendment is cited in note 16 *supra*. U.S. CONST. amend. XV provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

These amendments, collectively known as the Reconstruction Amendments, were designed to protect individuals from both private and state injury. *See generally* Note, *Developments in the Law-Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977) [hereinafter cited as *Develop-*

ments]. In furtherance of these amendments, Congress passed a series of supporting civil rights acts which permitted federal courts to award damages to plaintiffs who were denied their new constitutional guarantees, including: Act of April 9, 1866, ch. 31, 14 Stat. 27 (outlawing Southern Black Codes); Act of May 31, 1870, ch. 14, 16 Stat. 140 (protecting voting rights); Act of Feb. 28, 1871, ch. 99, 16 Stat. 443 (protecting voting rights); Act of April 20, 1871, ch. 22, 17 Stat. 13 (suppressing the Ku Klux Klan); Act of March 1, 1875, ch. 114, 18 Stat. 335 (prohibiting racial discrimination in public accommodations). *See Developments, supra*. As a result of these acts, the lower federal courts emerged above the state courts as the primary enforcers of constitutional rights. At the time the Supreme Court was hearing *Bradley*, Congress was deliberating the passage of the Civil Rights Act of 1871. Because this Act's broad language made every person liable for violating an individual's civil rights, legislators necessarily were confronted by the question of whether judges also would be liable. Congressional debate shows, however, that the Act was specifically directed against the inaction of southern courts and judges in easing racial strife. *See* CONG. GLOBE, 42d Cong., 1st Sess. App. 172 (1871). Senator Pool stated that, "[no Klan member ever] has feared any punishment for a crime committed in pursuance of the order of the Klan. . ."; Senator Osborn stated that "[t]he State courts, mainly under influence of the [Klan] oath, are utterly powerless." *Id.* at 653. These comments show the legislature's concern for the freed slaves who were repeated victims of prejudice in the courts. The 1871 Act is often referred to as the "Ku Klux Klan Act."

Representative Shellabarger, who drafted the Act, foresaw it as the civil model of the Act of 1866, ch. 114, 16 Stat. 140 (1870) *codified* at 18 U.S.C. § 242 (1970), which had established criminal penalties for all persons who violated an individual's rights. *See* CONG. GLOBE, 42d Cong., 1st Sess. (1871). Statements made in the 1866 debate strongly suggest that the doctrine of absolute judicial immunity was abandoned because it "places officials above the law," and was the "very doctrine out of which the rebellion was hatched." CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866) (remarks of Sen. Trumbull). The statements were made by Senator Trumbull in the fight to overcome the judicial immunity doctrine which President Johnson supported. Legislators were cognizant of the deprivation suffered by the freed slaves in courts of law, and therefore enacted the bill as enforcement of the "Reconstruction Amendment" rights. Furthermore, Representive Lawrence stated:

> I answer it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded. . . . And if an officer shall intentionally deprive a citizen of a right, knowing him to be entitled to it, then he is guilty of a willful wrong which deserves punishment.

Id. at 1837.

Although President Johnson vetoed the Act, pointing out to Congress problems involved in subjecting a judge to criminal penalties, the veto was overridden and the Act approved. Therefore, with judges exposed to the disgrace of criminal penalties, it should be presumed that the civil liability called for in the Act of 1871 also was intended to include judges. Indeed, proponents of the 1871 Act argued in debate that the courts often were under the control of "those who are wholly inimical to the impartial administration of law and equity." CONG. GLOBE, 42d Cong., 1st Sess. 394 (1871) (remarks of Rep. Rainey). Furthermore, it was believed that the civil remedy provided by the Act was needed because of prejudicial judges and juries. *Id.* at 429.

Although the legislative intent of Section 1983 to include judges is evident, few actions based on the statute were brought against judges. Doubt regarding Section 1983's applicability forced litigants to sue judges on a tort theory, as was done in Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932). In *Manning*, the Sixth Circuit Court of Appeals found that a Kentucky state court judge had acted in clear absence of his jurisdiction when he ordered a court spectator imprisoned for refusing to answer his questions. In honoring the jurisdictional rationale of Kentucky's highest state court, the Sixth Circuit agreed that the judge was not performing a judicial function in asking questions of a person not involved at the trial at bar. The judge was deemed to have assumed the role of grand jury and therefore was acting without jurisdiction.

rives from a statutory grant giving his court the jurisdiction "to hear all cases . . . whatsoever."[37]

ANALYSIS OF THE SUPREME COURT DECISION

The Court's analysis in *Stump* was founded upon two major inquiries. First, the Court examined Indiana's jurisdictional grant to the circuit court in order to determine whether Judge Stump's consideration of the petition was within the lawful scope of his court's jurisdiction. Secondly, the Court examined and responded to plain-

---

In 1945, however, a federal appeals court specifically found judicial immunity invalid as a defense to an action brought under Section 1983. In Picking v. Pennsylvania R.R. Co., 151 F.2d 240 (3d Cir. 1945), *cert. denied* 332 U.S. 776 (1947), a judge was named as a defendant for denying a hearing for plaintiffs after their arrest in violation of the Due Process Clause of the Fourteenth Amendment. The Third Circuit dealt with the immunity issue of reasoning that "the privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. . .by enacting the Civil Rights Act. . .and in fact did so." 151 F.2d at 250. Other federal courts, however, did not immediately concur in this rationale. In fact, in 1966 the Third Circuit was persuaded to overrule *Picking* in Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), following the Supreme Court's holding in favor of legislative immunity in Tenney v. Brandhove, 341 U.S. 367 (1951).

Finally, the Supreme Court specifically rejected the Section 1983 theory of judicial liability in Pierson v. Ray, 386 U.S. 547 (1967). A group of black and white clergymen were arrested and convicted of violating a breach of the peace statute after attempting to use a "whites only" section in a Mississippi bus terminal. After being acquitted of the criminal charges, the group brought an action for damages under Section 1983 against the arresting officers and police judge. On review, the Supreme Court discounted the belief that Section 1983 was intended to include judges, and held that the common law doctrine of judicial immunity had not been abolished by the civil rights acts.

The majority drew its rationale from Tenney v. Brandhove, 341 U.S. 367 (1951). In that case the Court had established immunity for the official acts of state legislators by holding that Congress could not have intended to impinge on a tradition of legislative privilege that was so well grounded in history. Applying this simple logic to *Pierson*, Chief Justice Warren stated that, "Congress would have specifically so provided had it wished to abolish the doctrine [of judicial immunity]." 386 U.S. at 555.

The sole dissent in *Pierson* was filed by Justice Douglas, who, instead of relying on common law traditions, articulated the Congressional approach to the issue. Referring to the legislative debate on Section 1983, he stated, "To most, 'every person' would mean every person, not every person except judges." *Id.* at 559. He believed that a view which assumes that Congress did not intend to change the common law is obviously contrary to the legislature's intent. Douglas argued that the Court's consideration of judicial immunity should be based solely on a statutory interpretation, which is not restricted to the common law view. Furthermore, he stated that Congress enacts statutes to "remedy the inadequacies of the pre-existing law, including common law." *Id.* at 561. Douglas concluded that the majority had ignored the clear language of the statute and the policy reasons behind it, and that doing so constituted not only an erroneous interpretation but also a legislative act by the Court.

The *Pierson* decision does not abrogate the *Bradley* immunity holding. Instead, it extends it because plaintiffs who bring a civil rights action against a judge under Section 1983 still must show as in *Bradley* that the judge has acted in absence of subject-matter jurisdiction.

37. IND. CODE § 33-4-4-3 (1975).

tiffs' argument that Judge Stump's consideration did not constitute a protected "judicial act." The Court's rationale, however, signals that in the future, defendant judges should be found by trial courts to be within their jurisdiction unless they were foreclosed from considering a subject matter by law. Furthermore, after *Stump*, this standard will be required despite the most severe deprivations of individual rights.

Rather, the Court should have followed the reasoning of the Seventh Circuit.[38] In that court's unanimous decision, Judge Luther Swygert adopted the reasoning of various state courts,[39] all of which had found judges lacking the jurisdiction necessary to order sterilization absent specific statutory authority. Following this analysis, the Supreme Court should have then balanced the severity of the plaintiffs' injury against society's interest in similar judicial behavior.

Jurisdiction

Initially, the Supreme Court's analysis of jurisdiction relied solely on *Bradley v. Fisher*.[40] *Bradley* established two critieria for presiding judges to consider when in judgment of their brethren. First, that it is of the highest importance to the proper administration of justice that a judicial officer be free.[41] Secondly, Justice Field's

---

38. Stump v. Sparkman, 552 F.2d 172 (7th Cir. 1977).

39. *See* Frazier v. Levi, 440 S.W.2d 393 (Tex. Ct. Civ. App. 1969). In *Frazier*, a guardian's application to a probate court for a sterilization was held to be outside the court's jurisdiction. Moreover, the court stated that the application was based on social and economic grounds, not on medical necessity. *Id.* at 393. *See* Holmes v. Powers, 439 S.W.2d 579 (Ky. Ct. App. 1968). In *Holmes*, a county health officer sought a sterilization for a 34 year-old woman who had already given birth to two illegitimate retarded children. The appellate court affirmed the lower court's holding that no legal authority to grant such relief exists. The appellate court implied that legal committees, and not the courts, should oversee such matters.

It was argued before the Seventh Circuit and the Supreme Court that Judge Stump had jurisdiction according to A.L. v. G.R.H., 325 N.E.2d 50 (Ind. App. Ct. 1975). In *A.L.*, a mother sought a declaration of her right to have her son sterilized under the common law rules of parent-child relation. The Indiana appellate court held that common law does not invest such power in parents. In *Stump*, at the Seventh Circuit level, plaintiffs contended that because the appellate court heard the case and did not touch upon the issue of whether courts were the proper forum for considering sterilizations, it was to be implied that the courts had such jurisdiction. The Seventh Circuit, however, found that no such inference could be drawn from *A.L.* "Aside from the fact that *A.L.* was decided after Judge Stump acted, it undercuts rather than supports his position." 552 F.2d at 175. Furthermore, the action in *A.L.* was a full adversary proceeding as opposed to the facts in the present case where neither notice nor a hearing were given, thereby raising the presumption that Judge Stump knew he did not have the jurisdiction. The Supreme Court did not, however, accept this argument. 98 S. Ct. at 1106.

40. 80 U.S. (13 Wall.) 335 (1872).

41. 80 U.S. (13 Wall.) at 347.

model of jurisdiction is to be considered the only standard by which a court can pass on a judge's limits.

Total reliance on *Bradley*, however, is unwarranted for several reasons. First, it is inconsistent with the qualified immunity the Supreme Court recently has allowed other governmental officials. For example, in *Wood v. Strickland*,[42] the Court found that school officials were to be given only a qualified immunity, if in expelling students, they "knew or reasonably should have known that the action [they] took within [their] sphere of official responsibility would violate the constitutional rights of the student affected. . . ."[43] Essentially, the test was whether the officials acted in good faith. Furthermore, in *Scheuer v. Rhodes*,[44] the Court held that the Governor of Ohio and other state officials were not absolutely immune from liability, but were entitled immunity qualified by the circumstances and by whether they acted in good faith.

In both cases the Court looked extensively to common law tradition and public policy as was done in *Bradley*. What is difficult to reconcile, however, is why the Governor of Ohio, considering the circumstances surrounding the Kent State University riots, is allowed only a qualified immunity for ordering troops to shoot at students, while an Indiana county court judge is bestowed with absolute immunity for ordering a young woman sterilized. The public policy consideration, that of protecting the official, indeed was more pressing in *Scheuer*, where there was an "obvious need for prompt action, and decisions. . . made in reliance on factual information supplied by others."[45] In comparison, Mrs. McFarlin's petition was not pressing. Nor can it be said that Judge Stump would have been justified in relying only on the information supplied to him by Mrs. McFarlin's attorney, since a hearing was in order where the child would have been present or represented by counsel.

Nevertheless, the Supreme Court began its analysis of jurisdiction as the Seventh Circuit had, by examining Indiana's statutory grant to the circuit court, a law which gives Judge Stump "original exclusive jurisdiction in all cases at law and equity whatsoever. . . ."[46] The

---

42. 420 U.S. 308 (1975).
43. *Id.* at 322.
44. 416 U.S. 232 (1974).
45. *Id.* at 246.
46. IND. CODE § 33-4-4-3 (1975) provides:
Jurisdiction. Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon

statute also provides circuit court judges with jurisdiction over "all other causes, matters and proceedings where exclusive juridiction thereof is not conferred by law upon some other court, board or officer."[47] In light of this grant, the Supreme Court concluded simply that Judge Stump had the requisite authority to consider the sterilization petition, even if, as the district court had found, Judge Stump's "approval" in retrospect appears to have been premised on an erroneous view of the law.[48] The Court, however, entirely ignored addressing what this "erroneous view of the law" was, and instead, found that under the Indiana jurisdictional statute, the *Bradley* mandate of an absence of all jurisdiction was not clearly evident.

At the appellate level, the Seventh Circuit had found this broad statutory grant could not cloak an Indiana judge with blanket immunity. Stating that a claim must have a statutory or common law basis[50] to justify immunity, the Seventh Circuit found that the sole Indiana sterilization statute authorized only the governing boards of institutional hospitals to approve these operations.[51] Consequently, the court of appeals reasoned that the final portion of Indiana's juris-

---

justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters, and proceedings where exclusive jurisdiction thereof is not conferred by law *upon some other* court, board or officer. (emphasis added).

47. *Id.*

48. Sparkman v. McFarlin, Civil No. F 75-129 (N.D. Ind. May 13, 1976) (order of dismissal).

49. 98 S. Ct. at 1105.

50. 552 F.2d at 174.

51. IND. CODE § 16-13-13-1 (Repealed by Acts 1974 P.L. 60 § 1). The Sterilization of Patients Act of 1927 originally provided:

> Authorization. Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of insane, feeble-minded or epileptic persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician and surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness: Provided. That such superintendent shall have first complied with the requirements of this act. . . .

Sections 16-13-13-2 to 16-13-13-6 of the statute provide the due process procedures to be followed in a sterilization matter, including an appeal to the circuit courts of the state for stay of proceedings.

dictional statute — "where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer,"[52] was in effect. Since another board had jurisdiction over the subject matter, Judge Stump was deemed to lack the proper authority.

In its own analysis, the Supreme Court acknowledged the excessive breadth of the State's jurisdictional statute, and its failure to itemize what subject matters were included. Yet the Court ignored the careful restrictions of the sterilization statute, finding instead it "more significant that there was no Indiana law in 1971 prohibiting a circuit court,. . . from considering a petition of the type presented to Judge Stump."[53]

The Court reasoned that even if the sterilization statute precludes original judicial approval, parents have the underlying authority, according to a general medical statute, to "consent to and contract for medical or hospital care or treatment of [the minor] including surgery."[54] Reliance on this statute, however, is entirely mistaken. For then, as Justice Stewart was told by petitioner's counsel during oral arguments, Judge Stump would have had jurisdiction to order the child's hands amputated had Mrs. McFarlin pleaded her daughter was inflicted with kleptomania.[55] Indiana's general medical care statute was not intended to authorize parents' requests for unnecessary surgery. Rather, this statute was presumably intended to establish limitations on hospital and physician liability involving the care of minors.[56]

The court's reliance on *Bradley* is unwarranted for further reasons. Justice Field's model of jurisdictional limitation does not deal with superior court judges and, therefore, should not be totally controlling. His example of a clear absence of jurisdiction depicted a probate court judge, a court statutorily limited in its jurisdiction, hearing a criminal matter.[57] The absence of authority is clear for there have been cases where a limited court judge has been found liable for ordering sterilization.[58] What is equally apparent in *Brad-*

52. *See* note 45 *supra*.

53. 98 S. Ct. at 1105.

54. IND. CODE § 16-8-4-2 (1973).

55. This question was asked of Judge Stump's counsel during oral argument. Stump v. Sparkman (No. 76-1750) (argued Jan. 10, 1978).

56. *See, e.g.*, ILL. REV. STAT. ch. 91 § 18.2 (1975) which is worded similar to the Indiana law. The Illinois statute has been interpreted as requiring consent by a parent as a protective measure against third-party liability.

57. 80 U.S. (13 Wall.) at 352.

58. *See* Wade v. Bethesda Hosp. 337 F. Supp. 671, *rehearing* 356 F. Supp. 380 (S.D. Ohio 1971, 1973). In *Wade*, an action was brought under Section 1983 against an Ohio probate judge who had ordered the sterilization of a 17 year-old girl. An order was rendered denying the

ley, however, is that Justice Field did not indicate how to determine when a superior court judge acts in clear absence of jurisdiction. Since, as Justice White indicated, Indiana's general jurisdictional grant to the circuit court is not itemized,[59] there is no exact way of telling, as in Justice Field's example, when an Indiana superior court judge has acted beyond his authority.

Consequently, the correct analysis called for the Court to examine the subject matter considered by Judge Stump and determine whether, on its face, it was an appropriate subject for judicial approval.[60] The Court, however, took no initiative to explore the subject matter and instead relied on the Indiana legislature's lack of specificity in the jurisdictional statute. As a result, the Court did not have to discuss the trauma surrounding involuntary sterilization nor the public's scant interest in a protected judiciary in circumstances such as these.

---

defendant's motion for summary judgment. The judge had claimed immunity on the grounds that his action came within his jurisdictional grant.

This particular judge had also ordered the sterilization of a young girl in *In re* Simpson, 180 N.E.2d 206 (Ohio Prob. 1962). At that time, the judge based his action on an Ohio statute which provided that when mental institutions were overcrowded, a probate judge could take such action as he deemed necessary for the health and welfare of the feeble-minded. In *Wade*, the judge based his action on OHIO REV. CODE ANN. § 2101.24 which provides:

> The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute.

59. 98 S. Ct. at 1105.

60. The Supreme Court has come to regard procreation as a fundamental right through a series of cases. *See* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). These cases arose out of arguments for rights of personal privacy. While there may be no right of privacy found in the Constitution, the Court has recognized the creation of "zones of privacy" which arise from specific guarantees, thereby limiting government interference. In *Roe*, the Court limited these protected zones to include only those rights of personal privacy which Justice Cardozo defined in Palko v. Connecticut, 302 U.S. 319 (1937) as "fundamental" or "implicit in the concept of ordered liberty." In *Palko*, the Fifth Amendment, which precludes double jeopardy in criminal proceedings, was incorporated through the Fourteenth Amendment to apply to state proceedings. Justice Cardozo held the guarantees of the Fifth Amendment to be so fundamental to an ordered scheme of liberty that its application to the states was imperative. In relation to *Sparkman*, certain privacy rights, particularly procreation, are also regarded as fundamental to an ordered society. Consequently, the interest in a sterilization must outweigh the interference it inflicts on the ordered scheme of liberty.

In Skinner v. Oklahoma, 316 U.S. 535 (1951), a state sterilization statute was held unconstitutional on equal protection grounds. In the process, Justice Douglas stated that procreation was "fundamental to the very existence and survival of the race." *Id.* at 541. Consequently, a violation of the right to bear children is permissible only when a compelling state interest in the prevention exists. Certainly, neither the social nor the economic interests held by Linda's mother or the state of Indiana were sufficiently compelling to warrant Judge Stump's order. Because the right to bear children is a fundamental right, the Supreme Court should have found that this case to be a valid Section 1983 action.

A striking contrast to the Supreme Court's lack of subject matter analysis is to be found in *In re Application of A.D.*[61] A New York court was requested by a mother to authorize the sterilization of her sixteen year-old mentally retarded daughter. Unlike *Stump*, the petition in this case was accompanied by a physician's letter which alleged that despite the girl's age, her mental retardation caused her to function below a five year-old level. Furthermore, a report filed by the guardian *ad litem*, appointed to protect the girl's interests, suggested that the girl would be unable to care for a child in the event she were to become pregnant. Despite these reports, the court denied the petition because it found that "in the absence of specific statutory authority, the courts lack jurisdiction to make this fundamental change."[62] The Supreme Court should have adopted this rationale in *Stump* and made it their duty to define the limits of jurisdiction for the Indiana circuit courts when considering a sterilization issue.

Judicial Acts

The second major inquiry involved in the Supreme Court's rationale centered on the characterization of Judge Stump's acts. Although *Bradley* speaks primarily of a jurisdictional analysis, a tangential argument for defeating immunity is available. Plaintiffs must prove that a judge's actions were not "judicial acts" and thus again were outside his jurisdiction.

The Sparkmans made this secondary argument by contending that Judge Stump's lack of formality in considering the petition made his acts less than judicial.[63] Specifically, they claimed that because the petition was not given a docket number, was not placed on file with the clerk's office, and was approved in an *ex parte* proceeding without notice to the minor, without a hearing, and without the appointment of a guardian *ad litem*, the Judge's acts lacked judicial authority.[64]

The Court dismissed this argument by purporting to apply the rationale of two cases.[65] In stating that it "has not had occasion to

61. 394 N.Y.S. 2d 139 (1977).

62. *Id.* at 140.

63. Brief for Respondent at 21-23, Stump v. Sparkman, 98 S.Ct. 1099 (1978).

64. *Id.* at 20.

65. 98 S.Ct. at 1107. The second case which the Court discussed was McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972). In *McAlester*, a judge was found immune for ordering the parents of an imprisoned youngster arrested when they came to the judge's chambers seeking permission to give their son fresh clothes. This case will not be considered in this Note because it stands for the proposition that the judge had authority to order the imprisonment when he was approached in his official capacity. Respondents concede that Judge Stump was approached in his official capacity. They contend rather that the manner in which he handled the petition was nonjudicial. Brief of Respondents, at 20-23, Stump v. Sparkman, 98 S. Ct. 1099 (1978).

consider, for purposes of the judicial immunity doctrine, the necessary attributes of a judicial act,"[66] the Court did find, however, the rationale of *In re Summers*[67] to be controlling. In *Summers* it was claimed that a lack of formality prevented the consideration of a petitioner's application to the Illinois Bar from being a judicial proceeding. Specifically, the Character and Fitness Committee had found an applicant unacceptable because of his position as a conscientious objector. The Illinois Supreme Court sustained the Committee's finding. Subsequently, the applicant petitioned the United States Supreme Court for review of the Illinois Supreme Court's denial, which petitioner alleged was in violation of the Fourteenth Amendment. In response to petitioner's allegations, the Illinois Supreme Court contended that no case or controversy had been presented which the United States Supreme Court could review. The grounds for this contention was that the state court's review was not a formal judicial proceeding. The United States Supreme Court found, however, the state court's argument erroneous because the Illinous court had ruled on the merits of the Committee's applicant report, thus making the Illinois court's action a judicial proceeding.

This case is clearly distinguishable from *Stump*. Plaintiffs in *Stump* did not contend that there had been no case or controversy presented to the judge as was done in *Summers*. This claim had been alleged in *Summers* so as to prevent review. Respondents in *Stump* contended that the more applicable case which dealt with judicial acts was *Ex parte Virginia*.[68] In *Virginia*, a county court judge was indicted and

---

66. 98 S. Ct. at 1106-07.

67. 325 U.S. 561 (1945).

68. 100 U.S. 339 (1879). Although this case did not involve a civil action against a judge, the Supreme Court did describe a judge's actions as being protected only when they are discretionary or decision-making actions, not ministerial or administrative actions. This fact is, however, that no action taken by a judge is totally free from the decision-making process. The petitioner, Judge Coles, insisted that his selection of jurors was an official judicial act and thus privileged. The Supreme Court, however, stated that selecting jurors was "surely not a judicial act." *Id.* at 348. *Cf.* Shore v. Howard, 414 F. Supp. 379 (N.D. Tex. 1976) (holding that a judicial officer is not immune from civil action for acts which may be characterized as ministerial); Penn v. Eubanks, 360 F. Supp. 699 (M.D. Ala. 1973) (judge on state jury board may be subject to liability for administrative acts taken in that capacity). *But see* Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970) (judge presiding over "Fiscal Court" possibly immune).

An example of the immunity given those officials who use discretion in their duties is found in Barr v. Mateo, 360 U.S. 564 (1959). In *Barr*, officials of the Office of Rent Stabilization brought a libel action against the office's acting director. The director had issued a press release which condemned the officers' performance of their duties, and further announced his intention to fire them. In examining the policy-making or discretionary function of a government official, Justice Harlan stated that the absolute privilege of immunity for officials who perform these functions is needed for the protection of the public interest. This interest includes freedom from vindictive or ill-founded suits.

later held in custody for excluding blacks from jury service in violation of the Civil Rights Act of March 1, 1875.[69] In the judge's petition for a writ of habeas corpus, he argued that Congress could not have intended to punish a state court judge through the Fourteenth Amendment for his official acts. In disposing of this argument and thereby denying the petition, the Court found that the selection of jurors was not a judicial act, but rather a ministerial role which might well have been committed to a private person. In Indiana, approval of sterilization petitions was specifically granted to the administrative boards of hospitals, not judges.[70]

In *Stump*, the Court regarded *Summers* as establishing the factors to determine whether an act by a judge is a judicial action or a non-judicial one. If the act is a function normally performed by a judge and to the expectation of the parties, or if the parties dealt with the judge in his official capacity,[71] the judge's actions will be deemed judicial and consequently immune. However, these factors are inapplicable in *Stump*. It is obvious that Mrs. McFarlin approached Judge Stump in his official capacity for approval of the petition. As Justice Stewart indignantly stated, however, "false illusions as to a

---

Justice Harlan drew his reasoning from Judge Learned Hand's opinion in Gregorie v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). In *Gregorie*, a plaintiff brought false imprisonment and civil rights claims against a district attorney and an immigration officer, who had ordered the plaintiff detained as an enemy alien. Judge Hand stated that the officers possessed absolute immunity based on the public good, although he conceded that officials might act dishonestly on occasion. 177 F.2d at 581.

One of the earliest Supreme Court cases to discuss the "discretionary function" was Spalding v. Vilas, 161 U.S. 483 (1896). There, the action was directed against a postmaster general for having distributed false information about the plaintiff. The Court stated at that time that, "it would seriously cripple the proper and effective administration of public affairs. . .[of] the government, if he were subjected to any such restraint." 161 U.S. at 498.

Recent cases, however, indicate a move toward making various governmental officials increasingly liable for their actions. The standard of immunity being applied requires a careful inquiry into the nature of the alleged wrongful acts and scope of the accused official's duties. *See* Doe v. McMillan, 412 U.S. 305 (1973) (action against House Committee and its employees for disseminating libelous information). Although this new immunity test has affected only executive and administrative officers, the trend indicates the Supreme Court's willingness to examine the discretionary roles of some officials. Obviously judges and legislators are not the only officials who perform discretionary functions, yet their immunity has remained excessive. Such unequal protection for officials could affect the delicate balance in the separation of powers between branches. A detailed survey of the doctrine's status prior to *Bradley*, however, discloses that several states believed that a qualified immunity was the proper standard to apply to judicial actions. *See Liability of Judicial Officers*, *supra* note 4, at 327 n.30, 31. Non-judicial action may not be simply classified as action taken outside of jurisdiction.

69. Ch. 14 § 4, 18 Stat. 335, *codified at* 18 U.S.C. § 243 (1948). This statute prohibits the states from preventing individuals from serving on juries because of racial standards.

70. *See* notes 51 & 52 and accompanying text *supra*.

71. 98 S. Ct. at 1107. In making this statement, Justice White footnotes the Court's dispute with Justice Stewart. Justice White believes what Judge Stump performed was a normal func-

judge's power can hardly convert a judge's response to those illusions into judicial acts."[72] As to the first assumption, parents normally do not petition courts for approval of medical care for their children. Only under unusual circumstances are the courts turned to, and surely it was not common for Judge Stump to encounter petitions for sterilization.

THE TRIPARTITE IMMUNITY TEST

Judicial efficiency and integrity represent society's goals in immunizing judges from liability for their actions. But as are most of society's goals, they must be balanced against competing interests. In his dissenting opinion,[73] Justice Stewart's analysis of judicial acts implies that the interest in an independent judiciary should be viewed in light of a particular case's surrounding circumstances.[74] In a separate dissent, Justice Powell took this analysis one step further.[75] He believed the central feature of *Stump* was the preclusion of any possible vindication of Linda Sparkman's rights elsewhere in the judicial system.[76] Furthermore, Justice Powell found that both the *Bradley* and *Pierson* Courts recognized that society's interest in an independent judiciary was maintained at the expense of individual rights. Consequently, he believed that underlying the notion that private rights may be sacrificed for the achievement of a greater public good through immunity, is the existence of alternative means for vindicating those rights.[77] Judge Stump acted in a manner that prohibited access to all other judicial remedies, namely appeal. Therefore, Justice Powell found the *Bradley* doctrine inoperative in this case.

In light of Justice Powell's dissent, a new determinative factor for judicial immunity cases should be implemented. Aside from analyzing the jurisdiction of the judge in question and the character of his acts, a case's surrounding circumstances should also be analyzed. Of primary importance is whether the right to appeal or alternative remedial measures were prohibited. If it cannot be clearly determined that a judge was within his jurisdiction or that his acts were non-judicial, but it does appear that an appeal was disallowed or not made possible before injury, immunity should be withheld.

---

tion. Giving approvals is a normal function for Indiana superior court judges. There is no denying, however, that judges do not normally approve sterilization petitions brought by parents.

72. 98 S. Ct. at 1110.

73. 98 S. Ct. at 1109.

74. *Id.* at 1109-11.

75. *Id.* at 1111.

76. *Id.*

77. *Id.* Justice Powell's reasoning for checking judicial actions is the most logical. His formula honors both the need for immunity and the need for a check of the power in the hands of

Society's interest in a tripartite immunity test is obvious. Although the nation needs an efficient judiciary, it also needs to protect the individual rights upon which the nation was founded. When an individual is deprived of those rights by the judiciary, and the opportunity to correct that deprivation through the system is denied, the judiciary must account for its mistake to society. Furthermore, a tripartite test should pose no threat to judges when considering critical matters such as temporary restraining orders or injunctions, situations in which a judge's order is complied with often before an appeal can be made. The test should only be applied in cases where judges have violated a citizen's fundamental rights. Not only must a judge's preclusion of appeal be considered, but also the original *Bradley* analysis of whether the judge had jurisdiction to act must be made. In temporary restraining orders and injunctions, the issue of jurisdiction is resolved usually when the motion is considered. The two remaining legs of the tripartite test should be applied only in cases where it does not clearly appear that a judge acted without jurisdiction.

CONCLUSION

In *Stump*, the Supreme Court gave immunity to a superior court judge for not having known the limits of his authority, but who was approached, nevertheless, in his official capacity. This particular deference to state authority is a dangerous precedent. State legislatures grant jurisdiction to superior courts in sweeping statutes. *Stump* has taught us that deprivation of fundamental rights may easily result from such broad grants. Consequently, unless the subject matters of jurisdiction are itemized for superior courts as they are for inferior courts, state judges will not have to answer in federal court to civil rights actions. The Supreme Court should have been prepared to force Judge Stump to answer for his actions. Unfortunately, the Court failed the public, believing in the long run the common good of society is better served if judges are firmly established above the law. No court, however, should be empowered to place restrictions on the right to bear children. Such limitations should be carefully delineated by the legislature and not the judiciary.[78] The Supreme Court should have honored this separation of power and accordingly found that Judge Stump acted outside his jurisdiction.

Stephen Craig Voris

a few. The tripartite immunity test for judges sets Justice Powell's reasoning into a workable standard for future courts to apply.

78. *See In re* Application of A.D., 394 N.Y.S.2d 139, 140 (1977).