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Pulliam's Pacific Progeny: Deep Pockets in the Judges' Robes?

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Pulliam's Pacific Progeny: Deep Pockets in the Judges' Robes?

Judicial immunity is an historic doctrine that shields the judiciary with absolute immunity from civil actions for damages resulting from judicial acts performed within a judge's jurisdiction.[1] The doctrine is based upon two major policies: the preservation of an independent judiciary and the protection of appellate hierarchy.[2] The doctrine is said to be as old as the common law itself.[3]

Both federal and state decisions upholding the doctrine proceed from the assumption that judicial immunity existed at common law.[4] Modernly, judicial immunity in the United States is significantly broader than the immunity provided at common law or in other modern common law jurisdictions.[5] The American version of the doctrine provides *absolute* judicial immunity and protects malicious abuses of power as well as good-faith errors.[6]

Absolute immunity from civil liability has been applied to judicial violations of federal civil rights statutes, including 42 U.S.C. Section 1983 (Section 1983),[7] the principal statute under which most civil rights actions are brought.[8] Section 1983 was enacted to enforce the provisions of the fourteenth amendment to the United States Constitution. Section 1983 provides a private cause of action for legal, equitable,

1. *See infra* notes 63-70 and accompanying text. For extensive discussions of the historic background of judicial immunity *see* Block, *Stump v. Sparkman And the History of Judicial Immunity,* 1980 DUKE L.J. 879 (1980); R. Feinman & R. Cohen, *Suing Judges: History and Theory,* 31 S.C.L. REV. 201 (1980).
2. *See* Pulliam v. Allen, ___U.S.___, 104 S. Ct. 1970, 1983 (1984) (Powell, J., dissenting).
3. *See* Wyatt v. Arnot, 7 Cal. App. 221, 226, 94 P. 86, 89 (1907) citing Weaver v. Devendorf, 3 Denio 120 (1846).
4. *See Pulliam,* 104 S. Ct. at 1974.
5. *See infra* notes 63-90 and accompanying text.
6. *See infra* notes 63-151 and accompanying text.
7. 42 U.S.C. §1983. *See infra* notes 110-125 and accompanying text.
8. *See* WRIGHT, THE LAW OF FEDERAL COURTS, 121 (4th ed. 1983).

or administrative relief against any person who, acting under color of state law, causes a deprivation of any constitutional right.[9]

In order to encourage litigation of Section 1983 actions which ultimately benefit the public, courts have awarded attorneys' fees under statutory and equitable exceptions to the "American Rule" that each party bears its own costs in litigation.[10] In 1975, however, the United States Supreme Court held, in *Aleyska Pipeline Service Co. v. Wilderness Society*,[11] that one of these exceptions, the "private attorney general" doctrine,[12] is inapplicable in federal courts. In response, Congress enacted the Attorneys' Fees Awards Act of 1976[13] authorizing courts to award attorneys' fees to the prevailing party in actions brought to enforce certain enumerated civil rights statutes, including Section 1983. Codified at 42 U.S.C. Section 1988 (Section 1988), The Attorneys' Fees Awards Act of 1976 was enacted to further many of the same purposes as the private attorney general doctrine by encouraging public interest litigation.[14]

In California state courts, however, the private attorney general doctrine has survived the *Aleyska* decision.[15] California has codified the private attorney general doctrine at Code of Civil Procedure Section 1021.5 (Section 1021.5).[16] California courts still recognize former federal authorities in interpreting the private attorney general doctrine,[17] even though the doctrine is no longer applicable in federal courts.

The recent United States Supreme Court decision of *Pulliam v. Allen*[18] held that no judicial immunity exists as to prospective injunctive relief awarded in a Section 1983 action and that attorneys' fees may be awarded in such a case under Section 1988.[19] The Court concluded that no immunity existed at common law as to prospective injunctive relief against a judge.[20] Further, the Court found that

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9. *See infra* notes 110-125 and accompanying text.
10. *See infra* notes 110-125 and accompanying text.
11. 421 U.S. 240, 255-257 (1975). *See infra* notes 197-209 and accompanying text.
12. The "private attorney general" doctrine provides for an award of fees to successful public interest litigants. The term was first used in Associated Industries v. Ickes, 134 F.2d 694 (2d Cir. 1943). The "private attorney general" doctrine is described *infra* at notes 187-224.
13. 42 U.S.C. §1988. *See infra* notes 200-218 and accompanying text.
14. *See infra* notes 215-218 and accompanying text.
15. *See* Serrano v. Priest, 20 Cal. 3d 25, 46, 569 P.2d 1303, 1315, 141 Cal. Rptr. 315, 326 (1977).
16. CAL. CIV. PROC. CODE §1021.5.
17. *See* Westside Community for Independent Living, Inc. v. Obledo, 33 Cal. 3d 348, 352, n.5, 657 P.2d 363, 365, n.5, 188 Cal. Rptr. 873, 875 n.5 (1983).
18. Pulliam v. Allen, 104 S.Ct. 1970 (1984).
19. *Id.* at 1981-1982.
20. *Id.* at 1980.

nothing in the language of Section 1988 indicated that Congress intended to expand on the common law immunity doctrine by immunizing judges against the award of attorneys' fees under Section 1988.[21] Relying on *Pulliam*, a California court of appeal in *Lezama v. Justice Court*,[22] sanctioned the filing of an independent civil action for declaratory and injunctive relief and the attendant awards of attorneys' fees under both Section 1988 and California Code of Civil Procedure section 1021.5.[23] *Lezama* raises numerous questions regarding the scope of the judicial immunity doctrine in California after the *Pulliam* decision.

This comment will examine the doctrine of judicial immunity in relation to public interest litigation in California.[24] Initially, this comment will describe the common law roots of the doctrine of judicial immunity and assess the propriety of relying on the common law as a basis for delineating the scope and validating the utility of the doctrine in light of a continuing need to encourage public interest litigation.[25] A comparison of the equitable and statutory exceptions to the "American Rule" in federal and state courts will demonstrate that the policy considerations that compel the award of attorneys' fees against a judge under Section 1988 equally compel an award of attorneys' fees under the California private attorney general statute, Code of Civil Procedure section 1021.5.[26] Finally, this comment will suggest that limiting judicial immunity by permitting injunctive and declaratory relief against a judge is entirely consistent with the common law as received by California and poses no constitutional conflict in the application of this limited liability.[27]

The Development of Judicial Immunity in England

The doctrine of judicial *immunity*, though touted as being "as old as the law,"[28] may not be as old as doctrines of judicial *liability*. Provisions for imposing liability on judges have existed since ancient times, in different judicial contexts, and for different purposes.[29]

21. *Id.* at 1982.
22. 165 Cal. App. 3d 287, *modified, reh'g granted*, (1985).
23. *Id.* at 292-93. The decision was clear, however, that the award would run only against the court as a public entity and not against the individual judge whose egregious conduct gave rise to the action. *Id.* at 293, 297.
24. *See infra* notes 210-295 and accompanying text.
25. *See infra* notes 32-100 and accompanying text.
26. *See infra* notes 210-295 and accompanying text.
27. *See infra* notes 237-257 and accompanying text.
28. *See* Randall v. Brigham, 74 U.S. 523, 536 (1868).
29. The Hammurabi Code, for example, provided for twelve-fold damages against a judge

Judicial immunity in England evolved in response to multiple sociological and legal factors peculiar to the development of the English judicial system.[30] Absolute judicial immunity did not exist at ancient common law. The doctrine was an historical development conferring only limited immunity upon a limited group of judges.[31]

A. Early English Law

In early English law the concept of appellate review as a means of challenging the correctness of the decision of a judge was unknown.[32] In the tenth and eleventh centuries, a judgment of a common law court was challenged by an independent action brought in another court.[33] This action evolved into the "complaint of false judgment."[34] Successful challenges resulted in nullification of the earlier judgment and imposition of a fine against the erring judge that was payable to the court.[35]

In contrast to the common law courts, ecclesiastical courts provided an appellate hierarchy to which unsatisfactory decisions could be appealed.[36] This was an attractive model for the King's courts in that it provided the principal advantage of enabling a higher court, as opposed to a collateral, inferior court, to authoritatively declare legal precepts,[37] thus achieving superiority over local courts. By statute,

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whose "written verdict" was later disproved. In addition to punitive damages, the judge was permanently removed from the bench. (The Hammurabi Code and the Sinaitic Legislation, §5 at p. 26 (C. Edwards trans., 1904 & Reissue 1971)).

The Visigoths imposed liability on a judge when the judge "refuses to hear a litigant or decides fraudulently." Visigothic Code (*forum judicum*) (S.P. Scott trans., 1910 & Reprint 1982) Book II, tit. I, §XIX at p.28. Injuries resulting from judicial acts in the clear absence of jurisdiction were compensable by the judge, who was compelled to "not only make restitution; but. . . to surrender an equal amount of his own property to the party injured." *Id.*, §XVI at 24, 25. But even the Visigoths, whose concern for the preservation of judicial integrity caused them to impose the foregoing civil penalties on a judge, realized the distinction between errors of judgment and wrongful, malicious or corrupt behavior. No liability was imposed for the former. *Id.*, §XIX at 28. Restitutionary and punitive damages were assessed for the latter. *Id.*, §XXII at 28.

None of the foregoing penalties, however, are as severe as those ". . . said to have been imposed by Cambyses; who flayed a corrupt judge, and placed his skin in the judgment seat, as a suggestive warning to his successors." *Id.* at 28, 29 n.1.

30. *See infra* notes 32-62 and accompanying text.

31. *See infra* notes 45-62 and accompanying text.

32. For a review of the English common law history, *see* 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 234-40 (2d ed. 1937); 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 664-68 (2d ed. 1898); Block, *supra* note 1; Feinman & Cohen, *supra* note 1.

33. This action was termed "forsaking the doom." *See* Block, *supra* note 1, at 881.

34. *Id.*

35. The fine was termed an "amercement." *Id.* at 881 n.12 and accompanying text.

36. *Id.* at 882.

37. *Id.*

the complaint of false judgment was made a royal plea.[38] This enabled the King's courts to establish control over the local courts by placing the complaint of false judgment in the exclusive jurisdiction of the royal courts. A judgment of the King's court could not be challenged through a complaint of false judgment, however, because the King's courts were courts of record. The proceedings therein were recorded and assumed the nature of the royal prerogative — that the words of the King were indisputable.[39] The judgments of the King's courts, therefore, were final.

By the fourteenth century, courts distinguished complaints against a judge (the complaint of false judgment)[40] from complaints against a judgment, through the development of the writ of error.[41] Barred from attacking the factual findings which inhered in the sanctity of the record, a dissatisfied litigant achieved review of the judgment by attacking the legal conclusions with a writ of error.[42] No action was available, however, against a judge of record for his judicial acts.[43] The source, then, of modern judicial immunity, can be identified as early as the mid-fourteenth century.[44] Not until several centuries later and two influential opinions by Lord Coke did the relationship between the King, the King's Court, and the writ of error crystallize into a well-defined doctrine of judicial immunity.

B. Lord Coke's Influence

The doctrine of judicial immunity initially evolved as a limited immunity for a limited group of judges.[45] In two watershed cases, Lord Coke established the immunity of courts of record from other rival courts. The first of these cases, *Floyd v. Barker*,[46] defined the policy bases that continue to be stated as supporting the doctrine of judicial immunity: (1) decisional finality,[47] (2) judicial independence from rival courts,[48] and (3) public confidence in the judicial system.[49] The ma-

38. Statute of Marlborough, 1267, 52 Hen. 3, c. 19. *See* Pollack & Maitland, *supra* note 32 at 666.
39. *See* Block, *supra* note 1, at 883.
40. *See* Feinman & Cohen, *supra* note 1, at 205.
41. *See* Block, *supra* note 1, at 884.
42. *Id.*
43. *Id.*
44. *Id.*
45. *See* Feinman & Cohen, *supra* note 1, at 206.
46. 77 Eng. Rep. 1305 (Star Chamber 1608).
47. "[I]f the judicial matters of record should be drawn into question . . . there will never be an end of causes: but controversies will be infinite." *Id.* at 1306.
48. "[T]he Judges . . . ought not to be drawn into question . . . except it be before the King himself." *Id.* at 1307.
49. *Id.*

jor significance of *Floyd v. Barker*, however, was in the limitation of the immunity to judicial acts. Only acts of discretion as empowered by law were considered to be judicial acts.[50] Extra-judicial acts were afforded no such immunity.[51]

The judicial act limitation of *Floyd* was followed by the jurisdictional limitation on immunity established by Lord Coke in *The Case of the Marshalsea*.[52] This case established that a judge would be liable for acts performed in the clear absence of jurisdiction, since these acts were presumably not on the record.[53] Conversely, a judge would not be liable for wrongful acts in the abuse of jurisdiction, as such acts were a matter of record.[54] The immunity limited to judicial acts became defined further by distinguishing a select group of judges to whom the immunity would be available.

C. Superior and Inferior Courts Distinguished

The judicial act and jurisdictional limitations on judicial immunity were followed by a limitation based on the distinction between superior courts and inferior courts.[55] Subsequent cases developed a distinction between judges of superior courts and judges of inferior courts. Superior courts, "stand[ing] next to the King",[56] had full immunity, unlike inferior courts which were subject to control of the King through prerogative writ.[57] This distinction was based on a jurisdictional limitation.[58] Superior courts had unlimited jurisdiction; inferior courts had limited jurisdiction. Therefore the immunity was limited to the extent of jurisdiction.[59] The limited immunity for a limited group of judges soon led to the differentiation of good faith judicial errors from malicious abuses of judicial power.

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50. *Id.* at 1306.
51. The judicial act is one of discretion, while the ministerial act is one that the law requires without discretion, and includes such acts as compliance with a writ from a higher court. *See* Block, *supra* note 1, at 887 n.42 and accompanying text.
52. 77 Eng. Rep. 1027 (C.P. 1610).
53. *Id.* at 1038.
54. *See* Feinman & Cohen, *supra* note 1, at 209.
55. *See e.g.* Miller v. Seare, 96 Eng. Rep. 673, 674-75 (1977); Taafe v. Downs, 13 Eng. Rep. 15 (CP Ireland 1813).
56. Taafe v. Downs, 13 Eng. Rep. 15 at 18.
57. *See* Pulliam v. Allen, 104 S. Ct. 1970, 1976; Feinman & Cohen, *supra* note 1, at 216.
58. *See* 6 W. HOLDSWORTH, *supra* note 32, at 238-39.
59. One commentator suggests that the jurisdictional limitation distinguishing superior and inferior courts is no longer useful because many of the functions of the inferior courts eventually shifted to statutorily created administrative agencies. This shift effected a limiting of

D. Malicious Acts and Good Faith Acts Distinguished

By the end of the eighteenth century cases limited immunity to errors of judgment and imposed liability for malicious or corrupt acts.[60] The limitation was based partly on jurisdictional grounds. Malicious acts were characterized as acts in the absence of jurisdiction and subjected the actor to liability.[61]

On several occasions[62] Parliament enacted legislation regulating procedures for bringing actions against judges. These enactments were consistent with the developing case law. By the mid-nineteenth century, the common law in England recognized a doctrine of limited judicial immunity. Immunity was not available when a judge acted in the absence of jurisdiction or when the act, though within jurisdiction, was of a malicious or corrupt nature.

Judicial Immunity in the United States

Reliance upon the historical dimensions of judicial immunity is the most consistent reason cited for rote adherence to the doctrine.[63] Historically, common law immunity was only a limited immunity. The historical dimensions, however, as a result of misapplication and misinterpretation, became the basis for a vastly broader doctrine of immunity than had ever existed before.[64]

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liability and an expansion of immunity in the inferior courts. The distinction between inferior and superior courts, however misapplied or inconsistently interpreted, would provide the basis for judicial immunity in the United States. *See* Block, *supra* note 1, at 896. Misinterpretation of the distinction between superior and inferior courts may have been unavoidable. Commentators agree that judicial interpretation of the distinction is unclear. *See* Block, *supra* note 1, at 893-94, notes 77-80 and authorities cited therein; Feinman & Cohen, *supra* note 1, at 217. The distinction between inferior and superior courts was applied in the seminal opinion of the U.S. Supreme Court regarding judicial immunity, Randall v. Brigham, 74 U.S. 523 (1868). *See infra* notes 65-72 and accompanying text.

60. *See* Drewe v. Coulton, 102 Eng. Rep. 217 (1787). For a discussion of actions alleging malice against a judicial officer see Rubenstein, *Liability in Tort of Judicial Officers,* 15 U. Toronto L.J. 317, 326-30 (1964).

61. *See* Feinman & Cohen, *supra* note 1, at 218.

62. Justices Protection Act 1609, 7 Jac. 1, ch. 5; Justices Protection Act 1751, 24 Geo. 2, ch. 44; Justices Protection Act 1803, 43 Geo. 3, ch. 141; Justices Protection Act 1848, 11 & 12 Vict., ch. 44.

63. *See, e.g.* the discussion of Randall v. Brigham, 74 U.S. at 523, ("This doctrine is as old as the law."); Bradley v. Fisher, 80 U.S. at 335, ("It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."); Prosser, *Handbook of the Law of Torts,* 987, 4th ed. (1971), ("[J]udges *always* have been accorded complete immunity for their judicial acts. . .even when their conduct is corrupt or malicious and intended to do injury." (emphasis added)).

64. *See* Block, *supra* note 1 at 897-900; Feinman & Cohen, *supra* note 1 at 223-43.

Randall v. Brigham[65] was the first United States Supreme Court decision[66] to apply the doctrine of judicial immunity to a defendant judge.[67] In *Randall*, a disbarred attorney sought damages from the state court judge who ordered his disbarment. In applying the doctrine to preclude recovery, Justice Field followed English common law precedent in all respects,[68] noting that the doctrine is "as old as the law."[69] The decision recognized the judicial act distinction.[70] The Court held that ordering the disbarment of an attorney was a judicial act, an exercise of judicial discretion unlike ministerial functions, the wrongful exercise of which might impose liability. The jurisdictional limitation and the distinction between inferior and superior courts was also followed.[71] Justice Field qualified the immunity, even as to *superior* court judges, noting that "malicious" acts or acts clearly in the excess of jurisdiction would not be immunized.[72]

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65. 74 U.S. (7 Wall.) 523 (1868).

66. State court decisions prior to *Randall* were neither consistent nor uniform and represented the judicial struggle to adapt common law principles of judicial immunity to the new Republic. *See* Block, *supra* note 1 at 897-900; Feinman & Cohen, *supra* note 1 at 223-43.

67. Prior to *Randall*, however, the doctrine of judicial immunity as applied to other public officers performing judicial functions had been discussed by the United States Supreme Court. These early Supreme Court cases illustrate the judicial perception of the scope of the doctrine of judicial immunity. As early as 1806, in Wise v. Withers, 7 U.S. 330 (1806), Chief Justice Marshall discussed the doctrine of judicial immunity. In *Wise*, a justice of the peace brought an action against a judicial officer of a court-martial tribunal. The plaintiff alleged that the tribunal was without jurisdiction over him because a justice of the peace was exempt from military service. The United States Supreme Court agreed with the plaintiff. After deciding that a justice of the peace was exempt, and concluding that the court martial was without jurisdiction, Chief Justice Marshall wrote, "The Court and the officer are all trespassers" and held that an action in trespass would lie against the defendant judicial officer. *Id.* at 337. In Kendall v. Stokes, 44 U.S. 87 (1845), an action brought against the Postmaster General, the doctrine was held to preclude liability based primarily upon the distinction between judicial and ministerial acts. Immunity from prosecution for malicious or corrupt acts was not discussed, as the parties apparently conceded that the acts were *bona fide. Id.* at 91. The dissent of Justice McLean set forth the three grounds on which a public officer may be held responsible to an injured party:

> 1. Where he refuses to do a ministerial act, over which he can exercise no discretion.
> 2. Where he does an act which is clearly not within his jurisdiction. 3. Where he acts willfully, maliciously and unjustly, in a case within his jurisdiction.

Id. at 794-95 (McLean, J. dissenting). Notwithstanding the fact that the issue was moot because of the stipulation that the actions were *bona fide*, Justice McClean reiterated that "the law is clear where the facts are established." *Id.* at 797. Liability for actions on the third ground, above, for "malicious" acts would "seem to result." *Id. Kendall* is of value in demonstrating the judicial perception that the doctrine of judicial immunity was not absolute, and that the common law limitations of the doctrine to good-faith acts continued to survive.

68. *See* Block, *supra* note 1, at 901.

69. Randall, 74 U.S. at 536.

70. *Id.*

71. *Id.*

72. *Id.*

Three years after *Randall*, the Supreme Court again addressed the issue of judicial immunity. In *Bradley v. Fisher*,[73] Justice Field withdrew his qualifying remarks in *Randall* and made clear for the first time in the United States that judicial immunity was absolute.[74] *Bradley* is the seminal American case extending *absolute* immunity to the judiciary.[75] Under *Bradley*, judges of superior courts of general jurisdiction are not civilly liable for any judicial acts, even if done maliciously or corruptly.[76]

Bradley expanded the scope of the immunity by precluding liability for malicious acts.[77] This had the effect of obscuring the distinction between superior and inferior courts.[78] This aspect of the opinion is not clear, partly because examples cited by Field as "courts of general jurisdiction"[79] were actually courts of limited jurisdiction.[80] Although some state courts continued to distinguish superior and inferior courts,[81] Field's opinion is considered to have supported the eventual demise of this distinction.[82] *Bradley* emphasized, however, the distinction between the judicial and ministerial act, a distinction that would become more important in later decisions.

Bradley was based on policy as well as precedent. Justice Field enumerated three major policies underlying judicial immunity. Judicial independence, or the need to protect judges from coercion that would affect their freedom to act upon their own convictions was the foremost consideration.[83] Second, the burden of litigating a personal action

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73. 80 U.S. (13 Wall.) 335 (1871).

74. *See Id.* at 351.

75. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967). "Few doctrines were more solidly established at common law . . . as this Court recognized when it adopted the doctrine in *Bradley*." *Id.* at 553-54.

76. Bradley v. Fisher, 80 U.S. at 351.

77. *See* Feinman & Cohen, *supra* note 1, at 245; P. Roth & K. Hagan, *The Judicial Immunity Doctrine Today: Between the Bench and a Hard Place. Origins and Development of the Doctrine*, 1 Juvenile & Family Court Journal at 4 (1984).

78. *See* Feinman & Cohen, *supra* note 1, at 246.

79. Bradley v. Fisher, 80 U.S. at 351. "[T]he qualifying words used [in *Randall* to limit liability to malicious and corrupt acts] were not necessary to a correct statement of the law. . . judges of courts of superior or *general* jurisdiction are not liable. . . .even when such acts are . . . alleged to have been done maliciously or corruptly." *Id.* (emphasis added).

80. Justice Field cited as examples, "a probate court" and "a judge of a criminal court" both of which were courts of *limited* jurisdiction. *Id.* at 352. *See also* Feinman & Cohen, *supra* note 1, at 246.

81. *See* Feinman & Cohen, *supra* note 1, at 249-50.

82. The distinction was lost by 1900. *See* Feinman & Cohen, *supra* note 1, at 251-252, Roth & Hagan, *supra* note 77 at 4; Note, *Judicial Immunity — State Judicial Officials Are Not Immune From Prospective Relief in an Antion Brought Under 42 U.S.C. §1983 or From Paying Attorneys' Fees to Prevailing Parties Pursuant to 42 U.S.C. §1988.* 14 BALT. L. R. 346, 349 (1985).

83. *See* Bradley v. Fisher, 80 U.S. at 347.

against a judge would destroy the usefulness of the judge and, according to Justice Field, would degrade the judicial office.[84] Third, judicial liability would destroy the finality of the judicial decision. An individual would simply need to allege malice and corruption in order to maintain an action against a judge.[85]

Justice Davis dissented from the *Bradley* majority on the principal ground that, when a judge has acted maliciously and corruptly, he should be subject to the same suit as a private person.[86] This dissent, however, was but a vanishing area of solid ground rapidly being overtaken by the tidal wave of absolute judicial immunity. *Bradley* became the leading authority on judicial immunity in the United States.[87]

The holding in *Bradley* was not supported by precedent. No broad degree of immunity existed at common law,[88] despite Justice Field's note that the doctrine is "as old as the law."[89] The general rule of judicial immunity prior to *Bradley* exempted malicious and corrupt acts from the scope of the immunity.[90] Furthermore, *Bradley* failed to establish how the judicial immunity, developing as a *limited* immunity, was inadequate to protect the policies supporting the doctrine. The expansion to absolute judicial immunity simply was not satisfactorily justified.

State court decisions prior to *Bradley*, were not uniform in defining the extent of judicial immunity.[91] The judge-made expansion of the common law doctrine was followed without analysis or dissent by state and federal court judges who uniformly embraced the *Bradley* doctrine. The development of the doctrine of judicial immunity in California illustrates both the uniformity that *Bradley* achieved, and the conspicuous lack of analysis with which state court judges accepted the new *absolute* immunity.

Judicial Immunity in California

Prior to *Bradley*, there was a paucity of case law dealing with judicial

84. *Id.* at 349.

85. *Id.*

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

87. *See, e.g.*, Yaselli v. Goff, 12 F.2d 396 (1926), *aff'd. (per curiam)* on the authority of Bradley v. Fisher, 275 U.S. 503 (1927) ("The case of *Bradley v. Fisher* [Citations] is a leading case in the courts of this country as to the immunity of judges. . . .").

88. *See supra* notes 60-62 and accompanying text.

89. *See* Randall v. Brigham, 74 U.S. at 356.

90. *Supra* notes 63-72 and accompanying text. *But see* Block, *supra* note 1, at 901 ("In all respects Field's statements of the rules and doctrine of judicial immunity followed the mainstream of precedent.").

91. For a thorough review of state court decisions by 1871; see Note: *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 335 nn. 29, 30, 31 (1969).

immunity in California. The few decided cases, however, demonstrate that California courts at least implicitly followed the rule of qualified immunity, imposing liability for malicious acts.[92] *Turpen v. Booth*,[93] was the first post-*Bradley* decision of the California Supreme Court dealing with judicial immunity and is frequently cited as the seminal case in California.[94] *Turpen*, however, dealt not with the liability of a judge, but that of a grand juror, holding that a grand juror was absolutely immune from civil damages no matter how erroneous or malicious his actions.[95] In addition to relying on *Bradley, Turpen* relied on the familiar range of inconsistent English and American cases.[96] *Turpen* failed to define and clarify the extent of the immunity recognized in California.

Continued reliance on historical precedent with only minimum analysis marked the first decision of the California Supreme Court[97] holding that a *judge* was absolutely immune from prosecution for judicial action. *Pickett v. Wallace*[98] was an action brought against the justices of the California Supreme Court seeking damages for a contempt judgment and punishment that had been rendered by the court, allegedly in the absence of jurisdiction and in a malicious manner. The court focused on jurisdiction, finding that when the court had jurisdiction to adjudge contempt, the justices of the court were

92. The seminal case of Downer v. Lent, 6 Cal. 94 (1854) involved the liability of a quasi-judicial officer, a Pilot Commissioner. The *Downer* court, primarily relying upon perceptions of the historical dimensions of the doctrine, held that immunity from civil liability was "beyond controversy", even for quasi-judicial officers. *Id.* at 95. The case dealt principally with errors of judgment within jurisdiction, not malicious or corrupt acts and thus cited precedent that is consistent only with the proposition that good faith errors are not actionable. For example, the case cites Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845), which at least impliedly imposed liability for malicious and corrupt acts. But *Downer* also cites a New York case of the same year as *Kendall*, Wilson v. Mayor of New York, 1 Denio 595, 43 Am. Dec. 719 (1845), that, although of obviously less precedential value than the *Kendall* decision, extended judicial immunity to any judicial act "no matter how gross or corrupt." Wilson v. Mayor of New York, 1 Denio 595 (1845). That *some* immunity existed may have been "beyond controversy." The scope and extent of that immunity, however, was far from clear in the early California cases.

93. 56 Cal. 65 (1880).

94. *See, e.g.*, Oppenheimer v. Ashburn, 173 Cal. App. 2d 624, 629, 343 P.2d 931, 933 ("The clear line of California decisions begins with the early case of *Turpen v. Booth*.").

95. 56 Cal. at 69.

96. *See id.* at 68, 69.

97. Pickett v. Wallace, 57 Cal. 555 (1881). Although *Pickett* may be said to be the first California Supreme Court decision on judicial immunity applied in favor of a judge, a better description might be "the first *published* decision." In an unreported decision in 1859, Den v. Fernald, 1 C.U. 70 (1859), the California Supreme Court applied the doctrine to immunize a judge from liability. The court evoked the historical aspects of the doctrine but, citing no supporting authority whatever, ruled that a judge could not be responsible for any error committed within the scope of his jurisdiction. *Id.*

98. 57 Cal. 555 (1881).

absolutely immune from liability, even if their acts had been malicious.[99]

By 1907, any doubt as to the extent of the immunity afforded by the "California doctrine"[100] was removed. In *Wyatt v. Arnot*,[101] the California Court of Appeal chose not to follow those states that distinguished good faith errors and malicious acts:

> The California doctrine is founded upon a deeply rooted principle of the common law and in none of the cases in which the rule is attempted to be modified or extended is there to be discovered any sound reason why the rule as it is followed in this state should be varied from.[102]

In reaching this conclusion, *Wyatt* regarded the *Turpen* review of the "leading cases" as "particularly valuable."[103] The review in *Turpen*, however, was no more valuable than that of the *Bradley* court in terms of analysis. This reliance on a "deeply rooted principle of the common law,"[104] then, was as analytically defective as the misinterpretation and misapplication of the common law by the *Bradley* court.[105]

Though the "root" of absolute judicial immunity could accurately have been described as deep, the depth of the doctrinal entrenchment was more a function of rapid and hearty growth rather than the sustained allegiance to the common law tradition to which chief proponents of the doctrine continued to allude.[106] The common law recognized distinctions between the jurisdictional limits of varied courts for reasons that may have been appropriate only in their historical context[107] and recognized the most egregious conduct of a judge as being essentially an excess of jurisdiction and hence actionable.[108] The American deviation from these common law concepts resulted in the adoption of an overbroad scope of judicial immunity. The excessive scope of judicial immunity became increasingly problematic with the enactment of the Civil Rights Acts.[109]

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99. *Id.* at 557.
100. *See infra*, note 102 and accompanying text.
101. 7 Cal. App. 221, 94 P. 86 (1907).
102. *Id.* at 227.
103. *Id.* at 225.
104. *Id.* at 227.
105. *See supra* notes 88-90 and accompanying text.
106. *See supra* note 63 and accompanying text.
107. *See supra* notes 33-62 and accompanying text.
108. *See supra* note 60-62 and accompanying text.
109. *See* Maher, *Federally-Defined Judicial Immunity: Some Quixotic Reflections on an Unwarranted Imposition*, 88 DICK. L. REV. 326, 336 (1984).

THE CIVIL RIGHTS ACTS

At approximately the same time *Bradley v. Fisher* was decided, the efforts of the reconstruction era Congress to protect fundamental civil rights became manifest in constitutional amendments and congressional enactments.[110] In 1865, Congress passed the Civil Rights Act of 1866,[111] granting citizenship to all persons born in the United States without regard to color. Civil rights advocates, in an effort to protect the rights recognized therein from subsequent congressional diminution, sought to make provisions of the Act permanent by constitutional amendment.[112] The fourteenth amendment was meant to incorporate provisions of the 1866 Act.[113] One year later, the fifteenth amendment[114] was ratified adding the right to vote to those rights protected by the Constitution.[115] To enforce the provisions of the fourteenth and fifteenth amendments, Congress enacted the Enforcement Act of May 31, 1870,[116] providing, *inter alia*, for criminal penalties for violations of the 1866 Act.

As a result of continuing violations of the civil rights of blacks in the South by the Ku Klux Klan, Congress passed the Ku Klux Klan Act[117] "to enforce the provisions of the fourteenth amendment . . . and for other purposes."[118] Section 1 of the Ku Klux Klan Act was subsequently codified at 42 U.S.C. section 1983, the statute under

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110. Prior to Reconstruction, constitutional protection of individual rights was available only against infringement by the federal government. Individual acts or actions by state or local governments depriving citizens of fundamental rights were not protected by the first ten amendments. *See* Barron v. Baltimore, 32 U.S. (1 Pet.) 243 (1833). This limitation reflected the Framers' fears of a powerful federal government and their belief that the states were the better guardians of individual rights. After the Civil War, however, congressional enactments reflected a view of the federal government as the protector of individual civil rights. The thirteenth amendment, for example, in addition to abolishing slavery, empowered Congress to enact appropriate enforcement legislation. *See* U.S. CONST. amend. XII, §1; U.S. CONST. amend. XIII, §2. For a discussion of the genesis of Section 1983, *see* R. Freilich & R. Carlisle, *Comment: Municipal Liability Under the Ku Klux Klan Act of 1871—An Historical Perspective*, in Section 1983 Sword And Shield, A.B.A. Sec. of Urban, State and Local Government Law 24, (R. Freilich & R. Carlisle, eds. 1983).

111. 14 Stat. 27 (1865).

112. *See* R. Freilich & R. Carlisle, *supra* note 111 at 25.

113. U.S. CONST. amend. XIV. The fourteenth amendment reads in part: "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. . . ."

114. U.S. CONST. amend. XV.

115. U.S. CONST. amend. XV, §1.

116. 16 Stat. 140 (1870), amended 16 Stat. 433.

117. 17 Stat. 13 (1871).

118. *Id.*

which most "civil rights" cases are now brought. The Ku Klux Klan Act provided for civil *and* criminal penalties for the deprivation of rights under color of law,[119] empowered the President to enforce the Act when state and local officials failed to do so,[120] and provided a private cause of action against any official who failed to provide the guaranteed protection.[121] Additional legislation followed the Ku Klux Klan Act. In 1875 Congress passed the Civil Rights Act of 1875[122] prohibiting discrimination on the ground of race or color in public places. The civil rights act permitted victims of discrimination to recover five hundred dollars for each violation and gave federal courts exclusive jurisdiction.[123]

To summarize, the civil rights acts provided, *inter alia*, a private cause of action for money damages against a person who, acting under color of state law deprives another of a federal right. Congress enacted Section 1983 to provide an independent avenue to protect federal constitutional rights, because state courts were being used to harass and injure individuals.[124] The Congressional intent to protect fundamental civil rights from abridgment by state courts continues to conflict with the common law principles of judicial immunity.[125]

A. Judicial Immunity and the Civil Rights Acts

As early as 1879, the United States Supreme Court in *Ex Parte Virginia*[126] reasoned that Congressional authority to enforce provisions of the fourteenth amendment through Section 4 of the Civil Rights Act of 1875[127] reached unconstitutional state judicial actions and held that a judge could be *criminally* liable.[128] Liability was based on the ministerial rather than judicial nature of the act complained of and the Court implied that if the judge *had* been performing a *judicial* function, he would not be protected by judicial immunity.[129]

Although the Civil Rights Acts created a civil cause of action for

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119. *Id.* at §2.
120. *Id.* at §3.
121. *Id.* at §1.
122. 18 Stat. 335 (1875).
123. *Id.*
124. *See Pulliam*, 104 S. Ct. at 1980.
125. *See infra* notes 126-151 and accompanying text.
126. 100 U.S. 339 (1879).
127. 18 Stat. 335 (1875) (currently at 18 U.S.C. §243).
128. *See Ex Parte* Virginia, 100 U.S. at 349.
129. *Id.* at 348-49. "It is idle . . . to say that the act . . . is unconstitutional because it inflicts penalties upon state judges for their judicial action. It does no such thing." *Id.*

any person who, under color of state law, causes a violation of civil rights, the issue of the *civil* liability of a judge under the Acts was not addressed by a federal court until 1945. In *Picking v. Pennsylvania Railroad*[130] the Third Circuit held that judicial immunity was no defense to a Section 1983 action brought against a judge.[131] The analysis in *Picking* of the congressional intent behind Section 1983 to reach all state officials or officers acting under color of any law, including judges, was short-lived and unpopular in the circuits.[132] Largely as a result of the United States Supreme Court holding in *Tenny v. Brandhove*,[133] that state legislators were immune from civil liability for actions within the scope of their legislative activities, federal courts deviated from the *Picking* rationale. The courts reasoned that since judicial immunity is at least as well grounded in history as legislative immunity, judicial immunity would bar similar actions against judges.[134] The Third Circuit finally overruled *Picking* in 1966.[135] The analogy to legislative immunity, however, is not entirely accurate. Legislative immunity and judicial immunity derive from separate, conceptually distinct sources in the common law.[136] Therefore, the factors that require full legislative immunity may not necessarily require judicial immunity, particularly in the context of a civil rights action.

The United States Supreme Court first addressed the issue of the civil liability of a judge under Section 1983 in 1967 in *Pierson v. Ray*.[137] *Pierson* held that, absent express congressional language abrogating the common law doctrine of judicial immunity, judicial immunity operated as a complete defense to a Section 1983 action against a judge.[138] *Pierson* relied to a large extent on the circuit court decisions that utilized *Tenney* to support absolute judicial immunity.[139]

Though *Pierson* was the first United States Supreme Court pronouncement on judicial immunity since *Bradley*, and the first decision of that Court dealing with judicial liability under Section 1983,

130. 151 F.2d 240 (3d Cir. 1945).
131. *See id.* at 250-51.
132. By 1955 the *Picking* holding had been picked apart and criticized in nearly all of the federal circuits. *See, e.g.*, Tate v. Arnold, 223 F.2d 782, 785 (8th Cir. 1955), ("But courts generally have refused to accept the holding in [*Picking*] as the correct view of the law.").
133. 341 U.S. 367 (1951).
134. *See e.g.*, Tate v. Arnold, 223 F.2d 782, 785 (8th Cir. 1955).
135. *See* Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966) *cert. denied* 386 U.S. 1021 (1967).
136. "The Privilege of legislators to be free from arrest or civil process has taproots in the Parliamentary struggles of the sixteenth and seventeenth centuries." Tenney v. Brandhove, 341 U.S. 367, 372 (1951).
137. 386 U.S. 547 (1967).
138. *Id.* at 553-55.
139. *Id.* at 559 n.9.

analysis of congressional intent and statutory interpretation of Section 1983 was conspicuously absent. As Justice Douglas pointed out in his dissent,[140] the majority simply did not address the fact that every member of Congress who spoke to the issue *assumed* that judges would be liable.[141] To some extent, *Pierson* relied on the availability of judicial review of the violative act as precluding the need for judicial liability.[142]

The ultimate synthesis of the *Bradley* and *Pierson* decisions, extending absolute judicial immunity to all judicial acts regardless of the nature or intent occurred in *Stump v. Sparkman.*[143] In *Stump*, a county judge in an *ex parte* action approved a petition presented by the mother of a minor to have a tubal ligation performed on the minor.[144] The minor was sterilized after being told that she was having an appendectomy performed. The sterilization was discovered after the minor's marriage and unsuccessful attempts to conceive. Her Section 1983 action against the judge was dismissed by the U.S. District Court.[145] The Court of Appeals for the Seventh Circuit reversed.[146] The United States Supreme Court affirmed the dismissal by the District Court and upheld absolute judicial immunity in a Section 1983 action.[147]

Stump placed no emphasis on the availability of alternative means of judicial review and "right vindication." Obviously, no meaningful judicial review of Judge Stump's action was possible. *Stump* relied on the jurisdictional test of *Bradley.*[148] The court undertook an excruciatingly painful analysis of the statutory authority under which Judge Stump's jurisdiction could be found.[149]

Stump announced a new test for distinguishing a "judicial act."[150]

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140. *Id.* at 561 (Douglas, J., dissenting).

141. *Id.* Of particular interest is the fact that the judge protected in *Pierson* was a police court justice. This extension of immunity to the inferior courts of limited jurisdiction is not wholly consistent with reliance placed by the majority on *Bradley* and the common law. *See* Roth & Hagan, *supra* note 77, at 5.

142. *See* Pierson v. Ray, 386 U.S. at 554.

143. 435 U.S. 349 (1978).

144. *Id.* at 351 n.1.

145. Sparkman v. McFarland, 552 F.2d 172, 174 (7th Cir. 1977).

146. *Id.*

147. *See* Stump v. Sparkman, 435 U.S. at 356, 357 (1978).

148. *Id.* at 356 quoting *Bradley v. Fisher* at 652.

149. Stump v. Sparkman, 435 U.S. at 358-359.

150. *See Id.* at 362. "The relevant cases demonstrate that the factors determining whether an act is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e. whether they dealt with the judge in his judicial capacity." *Id.*
Mr. Justice Stewart in dissent raised the question of whether or not an ex parte judicial action approving a petition to sterilize a minor is a "function normally performed by a judge." *Id.* at 366 (Stewart, J., dissenting).

The test functionally ignores any distinction between judicial and ministerial acts and, instead, places emphasis only on whether the act is normally performed by a judge. This emphasis ignores the essential element of discretion that is inherent in the definition of "judicial."

Stump remains the standard by which judicial immunity protecting judges from civil liability for *damages* is upheld.[151] The extent of protection by way of other remedies, such as prospective injunctive or declaratory relief, or by way of liability for attorneys' fees was yet to be settled. The American version of the common law doctrine of judicial immunity remained unassailable, from *Bradley* to *Pierson* to *Stump*, until *Pulliam v. Allen*.

B. Judicial Immunity, Civil Rights, and Attorneys' Fees

The tensions between the doctrine of judicial immunity and civil rights enforcement legislation was aggravated by subsequent, concurrent federal and state policies manifesting a desire to award attorneys' fees to successful public interest litigants. This tripartite tension between doctrine, law, and policy was the subject of *Pulliam v. Allen*.[152] In *Pulliam*, the United States Supreme Court held that judicial immunity is no bar to prospective injunctive relief in a Section 1983 action and, when such relief is granted, judges may be liable for attorneys' fees awarded pursuant to Section 1988.[153]

In *Pulliam*, a Virginia magistrate maintained a practice of imposing bail on persons arrested for non-jailable offenses and incarcerating those persons when they could not meet bail.[154] A Section 1983 action was filed in the federal court seeking declaratory and injunctive relief against this practice. The district court granted the relief and attorneys' fees were awarded.[155] The Court of Appeals affirmed.[156] The United States Supreme Court granted certiorari to determine "whether judicial immunity bars the award of attorneys' fees pursuant to 42 U.S.C. Section 1988 against a member of the judiciary acting in his judicial capacity."[157] In order to reach that question, however, the Supreme Court turned to "the more fundamental ques-

151. *See e.g., Pulliam*, 104 S. Ct. at 1983 (Powell, J., Burger, C.J., Rehnquist, J., O'Connor, J., dissenting).
152. 104 S. Ct. 1970 (1984).
153. *Id.* at 1981, 1982.
154. *Id.* at 1971.
155. *See* Pulliam v. Allen, 104 S. Ct. at 1973.
156. *See* Allen v. Burke, 690 F.2d 376 (1982).
157. *See* Pulliam v. Allen, 104 S. Ct. at 1974.

tion. . .whether a judicial officer acting in her judicial capacity should be immune from prospective injunctive relief."[158]

The analysis of the Court began with the "assumption"[159] that common law judicial immunity "should not be abrogated absent clear legislative intent to do so."[160] The Court was correct in relying on the common law but, as this comment has indicated, the accuracy with which the Court has interpreted the common law has consistently been questionable.[161] In analyzing the common law, the Court analogized to the common law "prerogative writ"[162] to find a parallel to injunctive relief. The Court noted that the King's Bench exercised collateral control over inferior rival courts.[163] Significantly, the Court also noted that writs were "particularly useful in exercising collateral control over the ecclesiastical courts, since the King's Bench exercised no direct review over those tribunals."[164] In *Stump*, in which no degree of review would have afforded relief to the aggrieved party for the wrongful sterilization, the argument that liability should be predicated, at least partially, on the availability of review was not even considered.

The Court found no inconsistency in granting judges immunity from civil liability for damages while allowing injunctive relief from judicial actions.[165] None of the arguments supporting judicial immunity from damages is applicable in a case like *Pulliam*.[166] The jurisdictional limitations on equitable actions counterbalance the risk of harrassing and vexatious litigation.[167] Extraordinary writs are still reserved for "really extra-ordinary causes."[168] Existing principles of federalism and comity restrain unnecessary federal court intrusion into state process.[169]

The relationship the Court perceived between Section 1983 and judicial immunity was that judicial immunity operates to limit relief under Section 1983, not that Section 1983 limits judicial immunity. If a limitation is imposed on the availability of relief under Section 1983, that limitation must come from Congress.[170] *Pulliam* thus

158. *Id.*
159. *Id.*
160. *Id.*
161. *See supra* notes 73-109 and accompanying text.
162. *See Pulliam*, 104 S. Ct. at 1974-78.
163. *Id.* at 1976.
164. *Id.*
165. *Id.* at 1978-79.
166. *Id.* at 1978; *see* S. Shapiro, *The Propriety of Prospective Relief and Attorneys' Fees Awards Against State Court Judges in Federal Civil Rights Actions*, 17 AKRON L.REV. 25, 36 (1983).
167. *See Pulliam*, 104 S. Ct. at 1978.
168. *See Id.* at 1979 n.17 and accompanying text.
169. *Id.* at 1980.
170. *Id.*

validated the interpretation in *Ex Parte Virginia* that Section 1983 reaches judicial actions.[171] Furthermore, the *Pulliam* Court held that there is nothing to suggest that Congress intended to expand the common law doctrine of judicial immunity to immunize judges from prospective injunctive relief.[172]

Although the Court recognized the similarity between prohibited monetary damages and attorneys' fees,[173] the Court still awarded attorneys' fees against the judge. This part of the holding was reached by noting the manifest congressional intent to award attorneys' fees even when damages would be barred by immunity.[174] Judicial immunity could be no bar to an award of attorneys' fees under Section 1988.

The perceived threat of personal liability for quasi-damages—attorneys' fees—and the "disturbing possibility that judges may be exposed to damages liability"[175] has rallied the bench to a new cry for remedial actions to repair the damage wrought by *Pulliam*.[176] The

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171. *Id.* "The interpretation in *Ex Parte Virginia* of Congress' intent . . . has not lost its force with the passage of time." *Id.*

172. *Id.*

173. *Id.* at 1981.

174. *Id.* at 1982.

175. *See* Roth & Hagan, *supra* note 77 at 11.

176. *Stump* drew an overwhelming critical response, mostly from those who perceived an inherent unfairness in the decision. *See, e.g.*, I.M. Rosenberg, *Stump v. Sparkman (98 Sup.* Ct. 1099): The Doctrine of Judicial Impunity, 64 VA. L. REV. 833 (1978); Note, *Judicial Immunity Tort Liability of a State Court Judge in Granting the Sterilization of a Minor Without Due Process,* 22 HOW. L. J. 129 (1979); Note, *Torts—Judicial Immunity—Judge's Erroneous Grant of a Sterilization Petition Held Not In Clear Absence of Jurisdiction and Therefore Entitled to the Defense of Judicial Immunity,* 11 IND. L. REV. 489 (1978); Note: *Judges—Immunities—Judicial Act and Jurisdiction Broadly Defined,* 62 MARQ. L. REV. 112 (1978); Note, *Torts—Judicial Immunity: A Sword For the Malicious or a Shield For the Conscientious?,* 8 U. BALT. L. REV. 141 (1978); Note: *Judicial Immunity: An Unqualified Sanction of Tyranny From the Bench,* 30 U. FLA. L. REV. 810 (1978); Note, *Torts—Judicial Immunity—Absolute Immunity Reaffirmed in Stump v. Sparkman (98 Sup. Ct. 1099),* 27 U. KAN. L. REV. 518 (1979); Note, *Courts: Judicial Immunity—Courts of General Jurisdiction,* 18 WASHBURN L.J. 158 (1978).

The response to *Pulliam* by the judiciary, who perceived the decision, at the very least, as the first snip at the "deep root" of judicial immunity, has been no less overwhelming. *See, e.g.*, S. Plotkin & C. Mazorol, *Judicial Malpractice: Pulliam Is Not The Answer* Trial, December 1984, 24; P. Roth & K.Hagan, *supra* note 77; C. Frank, *Suing Judges, Immunity Losses Worrisome,* 71 A.B.A.J. 27 (April 1985); Allen, *Disrobing Judges,* June 1985 California Lawyer 10; C. Frank, *Judicial Jeopardy Liability Alarm in Rights Cases,* 70 A.B.A.J 29 (December 1984). *Pulliam* has even been credited with abrogating the doctrine of judicial immunity. *See* Amicus Curiae Brief of California Judges Association in Support of the Position of Defendants and Respondents, at 17, Lezama v. Justice Court, 1st Civ. No. A025829, California Court of Appeal, 1st Dist., Div. 5, filed June 17, 1985; *see, also,* Note, U. BALT. L. REV., *supra* at 358. The holding can hardly be considered an abrogation. "Abrogation" is defined as "The destruction or annulling of a former law, by an act of the legislative power, by constitutional authority, or by usage." BLACK'S LAW DICTIONARY 8 (5th ed. 1979). An abrogation presupposes that such immunity in fact existed, and *Pulliam* held that there never existed any judicial immunity from prospective injunctive relief. *See Pulliam,* 104 S. Ct. at 1981.

direct influence of *Pulliam* on possible legislative actions[177] to *create* an immunity where none previously existed by codifying an exception to Section 1988 as to judges, poses a significant threat to the developing awareness of public interest litigation. Codification of judicial immunity could threaten the continuing societal benefits derived from the vindication of civil liberties through public interest litigation.

The effect of *Pulliam* on claims brought under state statutes intended to encourage civil rights litigation is not clear. This comment will examine these effects, particularly with respect to the award of attorneys' fees in California under the California private attorney general statute, Code of Civil Procedure section 1021.5. To aid in understanding the relationship between *Pulliam* and public interest litigation in California this comment will first examine the history of 42 U.S.C. Section 1988 and the relationship of this section to the development of Section 1021.5 in California.

Attorneys' Fees Awards

That parties must bear their own attorneys' fees has been a settled rule of American law for generations.[178] This "American Rule"[179] is unique to the United States. In most countries, the prevailing party to a lawsuit is entitled to an award of fees as part of the compensatory damages. The American Rule was an accepted doctrine of American Jurisprudence as early as 1796[180] and still applies notwithstanding certain exceptions that have developed in federal and state courts.[181]

The holding in *Pulliam* that a judge may be liable for attorneys' fees under §1988 evoked considerably more concern from the bench than the holding that injunctive relief would not be barred by judicial immunity. *See* C. Frank, *Judicial Jeopardy—Liability Alarm in Rights Cases, supra* at 29. Even Magistrate Pulliam did not appeal from the award of injunctive relief against her. *See Pulliam*, 104 S. Ct. at 1981.

This judicial concern has been manifested in several ways. Legislation has been introduced that would expand judicial immunity to prohibit Section 1988 awards. *See* H.R. 877, 99th Cong. 1st Sess. (1985). Judges in many states are seeking to clarify the availability of indemnification by the states to defend any Section 1983 actions brought against judges. *See Judges Due Help in Rights Suits, A.G. Opinion Says*, L. A. Daily Journal, June 7, 1985 at 1, col. 2; Shapiro, *supra* note 166 at 36. Judicial liability insurance has been made available through the American Bar Association. The A.B.A. Conference of Chief Justices and the Judicial Immunity Committee of the A.B.A. selected the National Union Fire Insurance Co. of Pittsburgh as exclusive underwriter of a comprehensive liability policy. The selection was ratified by the A.B.A Board of Governors in March, 1984. *See* Roth & Hagan, *supra* note 77, at 13.

177. H.R. 877, 99th Cong., 1st Sess. (1985).

178. *See* Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 Univ. Pa. L. Rev. 636, 638 (1974).

179. The "American Rule" is "almost unique in the jurisprudential world". *See Id.* at 637 n.3.

180. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

181. The reasons for departing from the English tradition are not completely clear, but

A. Federal Court Exceptions

Exceptions to the American Rule have permitted fee shifting[182] in the federal courts.[183] Federal courts have permitted fee awards where authorized by statute.[184] Federal courts have also exercised their equity jurisdiction to create exceptions to the American Rule. Three major exceptions to the rule that parties must bear their own fees have evolved. First, under the "bad faith exception", fees have been traditionally awarded when a party brings an action in bad faith, or engages in bad faith during litigation.[185] Second, the "common fund theory" has permitted fee shifting to avoid unjust enrichment of a class at the expense of an individual through whose efforts a common fund was created.[186] Third, a more recent exception, the "private attorney general theory"[187] arose as a result of the civil rights movement of the 1960's.

The private attorney general theory developed from statutory fee awards but achieved principal utility in the expansion of the theory by federal courts exercising their inherent equitable powers.[188] The Civil Rights Act of 1964,[189] for example, provided for private enforcement actions and fees for prevailing parties. These statutory fee provisions were permissive rather than mandatory and federal judges had discretion whether or not to award them.[190] In *Newman v. Piggie Park Enterprises, Inc.*,[191] the United States Supreme Court stated that:

> Congress enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to

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American individualism, distrust of lawyers, or an exasperation with anything British have been suggested as the reasons behind the American Rule. Another reason may have been inflation, which rendered meaningless early fee statutes in which a specific dollar amount was specified. *See*, Comment, *supra* note 182 at 641, 642.

182. *Id.*

183. For statutory exceptions, *see generally* Aleyska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 260 n.33 and statutes cited therein (1975). For equitable exceptions *see infra* notes 185-189 and accompanying text.

184. For example, fee awards have been authorized under the Communications Act (47 U.S.C. §206) for copyright violations, under the Merchant Marine Act (46 U.S.C. §1227), under Patent Laws (35 U.S.C. §285), etc.

185. *See* Comment, *supra* note 178 at 660.

186. *Id.* at 662.

187. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam).

188. *See* Comment, *The Private Attorney General in California — An Evolution of The Species,* 18 SAN DIEGO L. REV. 843, 844 (1981).

189. 42 U.S.C. §§2000a-2000h-6.

190. *Id.* "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee. . ." *Id.*

191. 390 U.S. 400 (1968) (per curiam).

> be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.[192]

Based upon this reasoning, the Court held that fees should be granted under the private attorney general theory as a matter of course to prevailing Title II plaintiffs.[193]

Further decisions crystallized the nonstatutory private attorney general rationale that private citizens should not have to pay for the privilege of enforcing their own rights.[194] Continued expansion in the number of fee awards under the private attorney general theory succeeded *Piggie Park* and the subsequent decisions.[195] The theory burgeoned in the federal courts.[196]

This trend was reversed in 1975 in the United States Supreme Court decision of *Aleyska Pipeline Service Co. v. Wilderness Society*.[197] *Aleyska* held that the American Rule precluded the allowance of attorneys' fees in federal courts on the basis of the private attorney general theory.[198] Statutory authorization was generally required for a federal court to award attorneys' fees.[199]

In 1976, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976, codified at 42 U.S.C. Section 1988.[200] The Act was passed in response to *Aleyska*[201] and to address the congressional perception of a need to permit parties to recover what it cost them to vindicate their violated civil rights.[202] Congress recognized that "fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy".[203] Congress further found

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192. *Id.* at 402.

193. The burden shifted to the defendant who was responsible for showing that an award would be unjust. *Id.*

194. *See* Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Cornist v. Richland Parish School Board, 495 F.2d 189 (5th Cir. 1974); Morales v. Haines, 486 F.2d 880 (7th Cir. 1973); Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

195. *See* Comment, *supra* note 178 at 657.

196. *Id.*

197. 421 U.S. 240 (1975).

198. *Id.* at 269.

199. *Id.*

200. 42 U.S.C. §1988.

201. S. REP. No. 94, 94th Cong. 2d Sess. (1976) *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5909.

202. *See Id.* at 5910; A. Wolff & J. Steptoe, *Federal Legislative Outlook for New Opportunities For Fee Awards*, COURT AWARDED FEES IN "PUBLIC INTEREST LITIGATION", (Practicing Law Institute (H. Newburg, Ed.) Symposium) 1978, vol. 2 at 392.).

203. *See* S. REP, *supra* note 201 at 5911.

that fee awards were an "integral part"[204] of the remedies made available by the civil rights acts.

Section 1988 provides statutory authority for federal courts to award attorneys' fees to the prevailing party in an action brought under any of its enumerated statutes.[205] Section 1988 also applies to actions brought in state courts to enforce federal civil rights.[206] Although *Aleyska* precluded the private attorney general theory in federal courts,[207] state courts have continued to apply the theory[208] and California has codified the doctrine under Code of Civil Procedure Section 1021.5, which authorizes the award of attorneys' fees in public interest litigation.[209]

B. *Attorneys' Fees Awards in California*

California has followed the American Rule and codified the preclusion of fee shifting in Code of Civil Procedure section 1021.[210] The literal provisions of Section 1021 provide for awards of attorneys' fees only on the basis of contract or specific statutory authority. However, like the federal courts, California courts have created equitable exceptions to the American Rule,[211] among them, the private attorney general theory.

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204. *Id.* at 5913.

205. *See* 42 U.S.C. §1988.

206. *See* Maine v. Thiboutot, 448 U.S. 1, 10-11 (1980).

207. *See supra* notes 209-211 and accompanying text.

208. *See, e.g.*, Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977); *see infra* notes 212, 213 and accompanying text.

209. CAL. CIV. PROC. CODE §1021.5 provides: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entitites, this section applies to allowances against, but not in favor of, public entitites, and no claim shall be required to be filed therefor."

210. CAL. CIV. PROC. CODE §1021 provides: "Except as attorneys fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties."

211. The "common fund theory" exception in California is based on the same principle of avoiding unjust enrichment as the exception in the federal courts. *See* Neal v. County of Stanislaus, 141 Cal. App. 3d 534, 190 Cal. Rptr. 324 (1983). The "substantial benefit theory" exception derives from the common fund theory but does not require the creation of a common fund out of which the award is based. The benefit, however, must be substantial and must derive directly from the decision of the court and not from subsequent legislation resulting therefrom. For a discussion of the California history of the substantial benefit theory, see Serrano v. Priest, 20 Cal. 3d 25 at 38-42, 569 P.2d 1303, 1309-1312, 141 Cal. Rptr 315, 320-24 (1977). Federal and California law are nearly identical as to the substantial benefit exception.

The private attorney general theory in California survived the *Aleyska* decision in *Serrano v. Priest.*[212] The California Supreme Court in *Serrano* held that because California courts are courts of *general* jurisdiction, unlike federal courts of *limited* jurisdiction, the *Aleyska* rationale was not binding on California.[213] Thus, the private attorney general theory remained viable in California. Nearly coincidental with the *Serrano* decision, California codified and expanded the private attorney general theory by enacting Code of Civil Procedure section 1021.5.[214]

C. The Private Attorney General Statute, California Code of Civil Procedure section 1021.5

The private attorney general statute, California Code of Civil Procedure section 1021.5, was enacted to encourage suits that enforce a strong public policy and that confer a benefit on a broad class of people.[215] Section 1021.5 awards include three major elements. First, the litigation must result in "the enforcement of an important right affecting the public interest."[216] That "important right" may be either constitutional or statutory. Second, the litigation must confer a significant benefit, either pecuniary or nonpecuniary, upon the general public or a large class of persons.[217] Third, the necessity and financial burden of private enforcement must be such that the award is appropriate.[218]

The federal roots of the private attorney general doctrine have been noted by the California Supreme Court.[219] California courts often follow federal precedent in interpreting the doctrine.[220] California courts have awarded fees under both Section 1021.5 and Section 1988.[221]

See, e.g., Lewis v. Anderson, 692 F.2d 1267 (9th Cir. 1982).

The "bad faith exception" available in the federal courts is not consistently available in California. The appellate courts are split on the issue. *See* R. PEARL, CALIFORNIA ATTORNEYS' FEES AWARD PRACTICE, California Continuing Education of the Bar, §3.17 (Supplement 1/84 at 30).

212. 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977).

213. *Id.*

214. *See* Comment, *supra* note 188 at 845.

215. *See id.* at 846; Woodland Hills Residents Association v. City Council of Los Angeles, 23 Cal. 3d 917, 154 Cal. Rptr. 503, 593 P.2d 200 (1979).

216. *Id.*

217. *Id.*

218. *Id.*

219. *See, e.g.*, Serrano v. Unruh, 32 Cal. 3d 621, 634, 652 P.2d 985, 993, 186 Cal. Rptr. 754, 762 (1982) ("Framing the private-attorney-general theory in California, both this court and the legislature relied on federal precedent.") *Id.*

220. *See* Westside Community For Independent Living, Inc. v. Obledo, 33 Cal. 3d 348, 657 P.2d 365, 188 Cal. Rptr. 873.

221. *See* Schmid v. Lovette, 154 Cal. App. 3d 466, 201 Cal. Rptr. 424 (1984).

Section 1988 and Section 1021.5 share a common development. They both represent legislative reponse to the judicial development of the private attorney general exception to the "American Rule" precluding fee shifting.[222] The common development and the identical societal interests served by both Section 1988 and Section 1021.5[223] require that the same principles be applied with respect to the extent of the remedies provided. The rationale of *Pulliam*, with respect to both the availability of injunctive relief and the award of attorneys' fees against a judge, is completely harmonious with application of Section 1021.5. A California court, however, has been reluctant to apply the principles enunciated in *Pulliam* in any broader context than the narrowest Section 1988 situation.[224]

POST-*PULLIAM* JUDICIAL IMMUNITY AND PUBLIC INTEREST LITIGATION IN CALIFORNIA

In February, 1985, the First District Court of Appeal decided the first California case discussing the possibility of a *Pulliam* approach to Section 1021.5. In *Lezama v. Justice Court*,[225] the plaintiff and other members of the United Farmworkers Union had been charged in San Benito County Justice Court with various misdemeanor charges arising from a labor dispute. Justice Court Judge Bernard McCullough appointed defense counsel on the basis of indigency. Judge McCullough subsequently assessed legal fees against the "indigents" without any hearing to determine the defendants' ability to pay. California Penal Code Section 987.8 expressly requires a hearing and notice of hearing in addition to providing for other procedural and evidentiary rights.[226]

After conclusion of the criminal proceedings, the plaintiffs filed a Section 1983 action against the Justice Court alleging civil rights

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222. *See, e.g.*, Comment, *supra* note 188 at 847 ("This holding [in Woodland Hills Residents Assn. v. City Council, 23 Cal. 3d 917, 593 P.2d 200, 154 Cal. Rptr. 503 (1979)] is based on the the legislature's reliance on these federal cases in drafting section 1021.5").

223. *Compare*, Newman v. Piggie Park, 390 U.S. 400, 402 (1968) (per curiam) ("Congress enacted [§1988]. . . .not simply to penalize. . . .but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.") *with*, Woodland Hills Residents Assn. v. City Council, 23 Cal. 3d 917, 933, 154 Cal. Rptr. 503, 511, 593 P.2d 200, 208 (1979) ("[T]he fundamental objective of the private attorney general doctrine of attorney fees is to 'encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees. . . . to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens'. . . .[citations].").

224. *See* Lezama v. Justice Court, 165 Cal. App. 3d 287, *modified, reh'g. granted* (1985).

225. *Id.*

226. *Id.* at 290, 291.

violations and violations of California Penal Code section 987.8.[227] Plaintiffs sought a writ of mandate ordering the Justice Court to set aside the order of legal fees.[228] Plaintiffs also sought declaratory relief as to the section 987.8 and Section 1983 violations, and an injunction against further violations.[229] Finally, plaintiffs sought an award of fees under both the federal statute, Section 1988, and the California statute, Section 1021.5.[230]

The trial court ordered the Justice Court to set aside the order requiring plaintiffs to pay legal fees but refused to grant the attorneys' fees under either Section 1988 or Section 1021.5, or to grant the underlying declaratory or injunctive relief upon which the attorneys' fees might be based. The trial court based the refusal to grant injunctive relief and attorneys' fees on the grounds that the trial court lacked the authority to grant such relief against another court.[231] Plaintiffs appealed.

Seemingly in reliance on *Pulliam*, the court of appeals permitted the award of attorneys' fees against the judge under Section 1021.5 and remanded to the trial court to determine whether a Section 1988 award would be appropriate.[232] The award of attorneys' fees against the judge, rather than the court, was significant. Prior interpretations of judicial immunity had permitted awards only against the court as a public entity.[233]

The original opinion was modified on March 19, 1985,[234] in response to pressure exerted by judges.[235] The modification made clear that, although injunctive relief would clear the hurdle of judicial immunity, no award of attorneys' fees would be available against individual judges performing their judicial functions, but only against the *court*

227. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *See* Lezama v. Justice Court, No. A025829, February 26, 1985, 85 D.A.R. 734, for text of the original, unmodified opinion.
233. *See* Rhyne v. Municipal Court, 113 Cal. App. 3d 807, 825, 170 Cal. Rptr. 312, 324 (1980). Judicial "public entities" as opposed to *judges* have been included in the enumeration of groups of defendants against whom a Section 1021.5 award may be recovered. "If judicial public entities are to be excluded from these broad statutory definitions, the legislative purpose will be frustrated in some most substantial manner." *Id.*
234. *See* 85 D.A.R. 940 for text of the Modification Order.
235. *See* The Daily Recorder, Friday, May 24, 1985, at 3. ("Leo Weisman, clerk of the appeal court's division five, said recently that after the justices ruled in *Lezama*, they received a letter from James Wright, presiding judge of Santa Clara County Superior Court, [the *Lezama* action was based in San Benito County] requesting a rehearing on the case. The appeal court agreed on March 22 to grant a rehearing. It also allowed the judges [California Judges Association] to file an amicus brief.") *Id.*

as a public entity.[236] Three days after the modification, the Presiding Judge of the First District, on his own motion, granted a rehearing.

The *Lezama* opinion has raised major issues concerning the scope of judicial immunity in California with respect to public interest litigation and attorneys' fees awards. In the following sections, this comment will address those issues. The issues concern the applicability of judicial immunity as a defense to (1) injunctive relief and declaratory relief in California; (2) awards of attorneys' fees under Section 1021.5; and (3) an award of damages in a civil action. In each of the above situations, the rationale of *Pulliam* will be found to be applicable. In the first two cases, injunctive relief and awards under Section 1021.5, *Pulliam* counsels the denial of judicial immunity as a defense. In the third case, an action for damages, *Pulliam* provides an opportunity for reassessment of the extent of judicial immunity as to damages.

A. Judicial Liability for Injunctive Relief in California

Although the powers and scope of the federal courts differ from state courts, the reasoning of *Pulliam* is persuasive in arguing that judicial immunity does not bar injunctive relief against a judge. *Pulliam* was not a product of any special circumstances peculiar to federal civil rights laws. Rather, *Pulliam* relied almost entirely on the *absence* of any common law judicial immunity as to injunctive relief.[237] *Pulliam* refused to impute to Congress any intent to limit the extent of injunctive relief.[238]

Common law reliance is appropriate, then, in analogizing to California law. Injunctive relief is *discretionary* under California Code of Civil Procedure Section 526.[239] Section 526 codifies the common law provisions for injunctive relief as an equitable remedy.[240] Since the common law never had a provision for judicial immunity against injunctive relief,[241] no evidence is needed of express legislative intent to abrogate a doctrine that never existed.[242] Furthermore, prospective

236. *See* Lezama v. Justice Court, 185 Cal. App. 3d *modified, re'hg. granted,* at 293.
237. *See Pulliam,* 104 S. Ct. at 1980. "There is little support in the common law for a rule of judicial immunity that prevents injunctive relief against a judge." *Id.*
238. *See id.* at 1980, citing Pierson v. Ray, 386 U.S. 547 (1967) for the proposition that in the absence of any "affirmative congressional intent to insulate judges from the reach of the remedy Congress provided" the Court would not impute such intent.
239. CAL. CIV. PROC. CODE §526.
240. *See* City of Pasadena v. Superior Court, 157 Cal. 781 (1910).
241. *See Pulliam* 104 S. Ct. at 1978-80.
242. *See infra* note 176 and accompanying text.

injunctive relief awarded against a judge is arguably no more disturbing to the principles of judicial independence and finality of decision than direct review on appeal.

Declaratory relief is also discretionary in California and made available under California Code of Civil Procedure Section 1060.[243] Provisions for declaratory relief are a relatively recent enactment in Californa[244] and thus lack the "deep common law roots" upon which to conclude that California has no common law history of judicial immunity as to declaratory relief.[245] Nonetheless, as a general proposition, declaratory relief is generally less drastic than injunctive relief[246] and no persuasive reasons exist to immunize a judge from declaratory relief. In any event, regardless of the propriety of declaratory relief against a judge as a general proposition, after *Pulliam* a state court judge has no judicial immunity from declaratory relief in a Section 1983 action. State courts have concurrent jurisdiction with federal courts to decide Section 1983 cases.[247] To allow the defense of judicial immunity in a Section 1983 action brought in a superior *state* court against a state court judge, but to deny, on the basis of *Pulliam*, the immunity defense in a similar action brought in a *federal* court, would encourage forum shopping and violate settled principles of federalism.[248]

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243. CAL. CIV. PROC. CODE §1060.

244. CAL. CIV. PROC. CODE §1060 was enacted in 1921.

245. *See Pulliam* 104 S. Ct. at 1978-1980.

246. *See* Steffel v. Thompson, 415 U.S. 452, 466-468 (1974). "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction. . .[t]he express purpose of the Federal Declaratory Judgement Act was to provide a milder alternative to the injunction remedy." *Id., quoting from* Perez v. Ledesma, 401 U.S. 82, 111-12 (1981).

247. *See* Maine v. Thiboutot, 448 U.S. 1, 3, n. 1 (1980); Serrano v. Unruh, 32 Cal. 3d 621, 638 n. 27, 652 P.2d 985, 996 n. 27, 186 Cal. Rptr. 754, n. 27. (1982); Green v. Zank, 158 Cal. App. 3d 497, 502, 204 Cal. Rptr. 770, 773 (1984).

248. One principal concern of federal courts is the proliferation of Section 1983 actions in already-crowded federal courts. The limitation of public interest litigation to only those actions that can be framed within the parameters of a federal statutory cause of action, i.e. Section 1983, would only aggravate the problem. State courts serve a parallel role in the protection of fundamental rights and state courts should be the forum in which many of the civil rights cases are litigated. A recent federal court case, Newman v. Village of Hinsdale, 592 F. Supp. 1307 (N.D. Ill., E.D. 1984), illustrates the problem. In *Newman* a pedestrian brought an action against the Village of Hinsdale and a village policeman alleging a fourth amendment violation. The plaintiff alleged that, because there was snow on the sidewalk, he decided to walk in the street. The policeman defendant told the plaintiff to walk on the sidewalk but the plaintiff disobeyed. The plaintiff was issued a traffic ticket for violation of the Illinois Vehicle Code. After two weeks of griping to the chief of police, the plaintiff appeared at traffic court and the ticket was dismissed. Plaintiff subsequently filed a two-count complaint in federal court based on Section 1983, alleging that the policeman violated his fourth amendment rights by stopping him to issue the traffic ticket.

The plaintiff described his case as one which "shocks the conscience [and] is fundamentally

The primary policy supporting absolute judicial immunity from damages is the necessity of permitting a judge to exercise his judgment without fear of personal liability.[249] This policy is not threatened by the award of injunctive or declaratory relief against a judge.[250] Another policy argument, the need for decisional finality, is similarly unendangered by the grant of declaratory or injunctive relief. The

offensive to civilized society." Nevertheless, District Judge Kocoras, in an opinion highly critical of what Judge Kocoras perceives as civil rights cases "endeavor[ing] to transform even the most petty complaints against local governments into federal cases of constitutional dimension," granted defendants' motion to dismiss on the ground that the policeman had probable cause to stop plaintiff. District Judge Kocoras utilized the decision as an opportunity to comment on the fact that "federal courts in recent years have been snowed under with section 1983 suits. In a distressingly great number of these cases, constitutional law has been trivialized, and federal courts often have been converted into small-claims tribunals," *Id.*, citing Parratt v. Taylor, 451 U.S. 527, 554, n.131. Judge Kocoras further noted that "many of these so-called civil rights actions have proven to have nothing whatever to do with civil rights as that term is normally understood." *Id.* The rush to litigate Section 1983 actions, according to Judge Kocoras, was further aggravated by the congressional authority to award attorneys fees under Section 1988 to prevailing Section 1983 litigants. "When every misstep by the government, no matter how slight, is seized upon as creating a cause of action entitling its holder to a chance at receiving a cash jackpot from a federal jury, plus an award of attorney's fees as an automatic bonus, important values are lost and the Constitution comes to be looked upon as sort of lottery ticket." *Id.* at 1308.

The point to be made is that an "extraordinary increase" in federal court Section 1983 litigation has occurred. *Id.* at 1308, n.1. *See also Pulliam*, 104 S. Ct. 1970, 1988 (Powell, J. dissenting). The increase will only continue if public interest litigation barred by state court judicial immunity can be brought in a federal court.

249. Judge Friendly has described this fear of personal liability as the "*in terrorem*" effect. In Law Students Civil Rights Research Coun. Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969) he wrote, "The grant of injunctive relief in a case like this would not have the *in terrorem* effect on state judges that the threat of a subsequent damage action would have. . ." *Id.*

For a case in which a judge was literally placed *in terrorem* by the effect of his own practices, see Doe v. McFaul, 599 F. Supp. 1421 (E.D. Ohio 1984). In *McFaul*, Judge Leodis Harris of the Cuyahoga County Juvenile Court watched a television movie entitled "Scared Straight." He then made arrangements for his juvenile offenders to "spend time" at the county jail. Judge Harris instituted this novel procedure without the benefit of any legal authority or professional consultation. Initially, his practice was to send juveniles to the adult jail for "a few hours" but eventually he began incarcerating them for "days." As many as 250 juveniles as young as 13 years old went through the "Scared Straight Program." At least one was raped and many were threatened and assaulted. Judge Harris, apparently "scared straight", discontinued the program. Two of the juveniles brought an action alleging deprivations of constitutional and statutory rights. Although Judge Harris was not named as a defendant, judicial immunity was held to bar any recovery by the plaintiffs against a superior court judge who failed to overrule the orders of Judge Harris. Furthermore, even though the court noted, in dicta, that if Judge Harris had been named as a defendant, the plaintiffs' ("defendants" below) lacked standing because Judge Harris had discontinued his violative practices. This lack of standing would have precluded a *Pulliam* award of declaratory or injunctive relief. *Id.* at 1434 n.6. At the very least, *McFaul* supports the argument that jurisdictional limitations to injunctive relief constrain any "floodgates" argument that opponents of *Pulliam* might suggest. *McFaul* also tends to refute the belief expressed in *Pulliam* that the times have changed since the enactment of the Civil Rights Acts, and that state courts no longer serve to harrass individuals. *See Pulliam*, 104 S. Ct. at 1981.

250. *See, e.g., Pulliam*, 104 S. Ct. at 1981 n.22 ("[T]here is no merit to the dissenters' insistence that the scope of the injunctive order entered here illustrates the threat to judicial independence inherent in allowing injunctive relief against judges.").

existence of jurisdictional prerequisites to the grant of equitable remedies insures that injunctive or declaratory relief do not become means to avoid direct review. *Pulliam* noted:

> For the most part, injunctive relief against a judge raises concerns different from those addressed by the protection of judges from damages awards. The limitations already imposed by the requirements for obtaining equitable relief against any defendant — a showing of an inadequate remedy at law and of a serious risk of irreparable harm . . . severely curtail the risk that judges will be harrassed.[251]

Pulliam then compared the limitations of a mandamus proceeding which has "the unfortunate consequence of making the judge a litigant"[252] noting that such actions should be reserved for "really extraordinary causes."[253]

Pulliam does not limit the injunctive relief analysis to federal civil rights actions. On the contrary, the holding of *Pulliam* states that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity."[254] In reaching this holding, *Pulliam* distinguished a Section 1983 action only for the purposes of resolving "the other concern raised by collateral injunctive relief against a judge,"[255] a concern as to the proper relationship between federal and state judges. *Pulliam* noted that the concern is "not one primarily of judicial independence, properly addressed by a doctrine of judicial immunity"[256] but, rather "a matter of comity and federalism, independent of principles of judicial immunity."[257] The availability of injunctive and declaratory relief against a judge in federal civil rights actions to enforce federal constitutional and statutory rights is persuasive as to the availability of such relief in a state court action brought to enforce state statutory and constitutional rights. *Pulliam* is similarly persuasive in resolving the more difficult issue of whether judicial immunity operates as a defense to awards of attorneys' fees under Section 1021.5.

B. Judicial Liability for Attorneys' Fees Awards in California

Lezama apparently concluded that judicial immunity bars the award

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251. *Pulliam*, 104 S. Ct. at 1978, 1979.
252. *Id.* at 1979 (quoting from *Ex Parte* Fahey, 322 U.S. 258, 260 (1967)).
253. *Id.*
254. *Id.* at 1981.
255. *Id.* at 1979.
256. *Id.*
257. *Id.*

of attorneys' fees against a judge.[258] However, the *Pulliam* analysis of the relation between judicial immunity and Section 1988 is applicable in reaching the more appropriate conclusion: judicial immunity is no bar to attorneys' fees awarded under Section 1021.5. In *Pulliam*, no underlying immunity was found for the relief sought under any one of the statutes enumerated in Section 1988.[259] Thus, attorneys' fees could be awarded. Furthermore, the *Pulliam* court held that even if the defendant were immune from damages liability, Section 1988 would impose liability for attorneys' fees.[260] The *Pulliam* court reached this holding by analyzing the legislative intent behind Section 1988.[261]

The legislative history of California Code of Civil Procedure Section 1021.5 is not as well documented as that of Section 1988 with respect to whether the California legislature considered the effect of judicial immunity on the awards of attorneys' fees under Section 1021.5. Subsequent decisions,[262] though, have interpreted the statute and the relation between the California statute and Section 1988. The development of Section 1021.5 so closely parallels the development of Section 1988[263] that, even absent any express indication that the California legislature intended to impinge or expand on any common law doctrine of judicial immunity, implicit in the enactment of Section 1021.5 and subsequent judicial interpretations is a parallelism in the spirit, intent and policies surrounding the recognition of fee shifting as an important impetus to public interest litigation. The spirit and purpose of Section 1021.5 would be frustrated if a litigant were unable to vindicate abridged statutory and constitutional rights solely because of an inability to afford the fees of the attorney.[264]

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258. *See supra* notes 232-236 and accompanying text.

259. *See supra* notes 159-174 and accompanying text.

260. *See supra* note 174 and accompanying text.

261. *See supra* note 174 and accompanying text.

262. *See e.g.*, Woodland Hills Residents Assn. v. City Council of Los Angeles, 23 Cal. 3d 917, 934, 154 Cal. Rptr. 503, 593 P. 2d 200 (1979) ("It is clear from both the statutory framework and language that in drafting Section 1021.5 the Legislature relied heavily on the pre-*Aleyska* federal private attorney general authorities. . . indeed, we do not doubt that in significant measure the legislation was an explicit reaction to the United States Supreme Court's *Aleyska* decision."); *see infra* notes 257, 258 and accompanying text.

263. *See* Serrano v. Unruh, 32 Cal. 3d 621, 632, n.14, 652 P.2d 985, n.14, 186 Cal. Rptr. 754, n. 14 (1982):

> The [federal statute] most frequently compared with section 1021.5 is 42 United States Code Section 1988. . .Section 1021.5 has also been described as a legislative response to *Aleyska*. (*See, e.g., Woodland Hills II, supra*, 23 Cal. 3d 917, 934; Common Cause v. Stirling (1981) 119 Cal. App. 3d. 658, 662-663 174 Cal. Rptr 2001, citing *Review of Selected 1977 California Legislation* (1978) 9 PAC. L. J. 281, 365-367; County of Inyo v. City of Los Angeles, *supra* 78 Cal. App. 3d 82, 89, n. 2.).

See supra note 220 and accompanying text.

264. The spirit and purpose of §1021.5 is to encourage public interest litigation. *See, e.g.*,

The plain language of Section 1021.5 provides that ". . . this section applies to allowances against, but not in favor of, public entities. . ."[265] and courts have held that award of fees can run against a municipal court as a public entity.[266] Personal liability of a judge is effectively indistinguishable from the liability of the court, when the state provides for indemnification and defense of any claim brought against the judge for attorneys' fees. The California Attorney General has filed an opinion concluding that the state has a duty to defend and indemnify a state court judge in any action for attorneys' fees arising under a civil rights violation.[267] The opinion was requested on behalf of retired judges who had expressed concern over their personal liability after *Pulliam*.[268]

Although the Attorney General's Opinion in a narrow sense concluded "that a retired judge sitting by assignment is entitled to indemnification under California Government Code Sections 825-825.6 for plaintiff's attorney's fees and costs awarded in an action under the federal Civil Rights Act.",[269] the opinion was not limited to either retired judges or federal civil rights actions. The opinion was based on the fact that, under California Government Code sections 995-996.6,[270] public entities must provide for the defense of public employees sued on account of an act or omission in the scope of employment. California has included judges and judicial officers within the definition of public employees.[271] Thus judges come within the scope of the indemnity provisions of Government Code sections 995-996.6.[272] In order to respond to the narrow issue raised in the request for the opinion, that is, whether a *retired* judge is entitled to indemnity,[273] the opinion necessarily had to conclude that an *employed* judge was entitled to the indemnity.

Woodland Hills Residents Assn. v. City Council of Los Angeles, 23 Cal. 3d 917, 933, 154 Cal. Rptr. 503, 511, 593 P.2d 200, 208 (1979) ("The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.").

265. CAL. CIV. PROC. CODE §1021.5.

266. *See* Rhyne v. Municipal Court, 113 Cal. App. 3d. 807; Lezama v. Justice Court, 113 Cal. App. 3d 287.

267. 68 Ops. Cal. Att'y. Gen. 127 (1985).

268. *See Judges Due Help in Rights Suits, A.G. Opinion Says*, L.A. Daily Journal, June 7, 1985 at 1, col. 2.

269. 68 Ops. Cal. Att'y. Gen. 127, 130 (1985).

270. *See id.* at 128.

271. *See id.*

272. *See id.*

273. *See id.*

Similarly, the fact that the opinion addresses indemnity for liability under federal civil rights actions[274] should not be construed as limiting the indemnity to such actions. Such a limitation would have validity only to the extent of any distinctions between federal civil rights actions and state civil rights actions that underlie the availability of attorneys' fees awards under either Section 1988 or Section 1021.5. Federal civil rights actions were enacted to provide a private cause of action to secure fundamental civil liberties.[275] Section 1988 was enacted to provide an impetus to litigate those actions for the public benefit.[276] Similarly, Section 1021.5 provides impetus to litigate similar actions that confer public benefit.[277] In narrowing the indemnity to federal civil rights actions, the Attorney General's Opinion was simply responding to the narrow question raised by the request for the opinion.[278]

Indemnity should vitiate judicial concern that personal liability for attorneys' fees interferes with judicial independence. When the state or county assumes the duty of defending judges for wrongful judicial acts the concern focuses not as much on the effect of personal liability on a freely made decision, but rather on the effects of society subsidizing judicial misconduct. Indemnity provisions may have the effect of providing greater state supervision over judicial conduct in state courts through existing channels. Supervision of the judiciary is an established practice that occurs through judicial performance panels.[279] The recognition of judicial liability for attorneys' fees would heighten the existing supervisory functions and provide greater assurances that judges exercise their judicial offices with propriety.

Some states have chosen not to defend judges in actions arising out of judicial misconduct[280] but, in those states, as well as in Califor-

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274. *See id.*

275. *See supra* notes 110-125 and accompanying text.

276. *See supra* notes 197-209 and accompanying text.

277. *See supra* notes 210-224 and accompanying text.

278. *See* 68 Ops. Cal. Att'y. Gen. 127 (1985).

279. *See, e.g,* Wenger v. Commission on Judicial Performance, 29 Cal. 3d 615, 630 P.2d 954, 175 Cal. Rptr. 420 (1981) ("The aim of [the Judicial Performance] commission proceedings is . . . to protect the judicial system and the public which it serves.").

280. *See Judges Due Help in Rights Suits, A.G. Opinion Says* L.A. Daily Journal, *supra* note 268:

> [Nevada's] Senate Finance Committee rejected a request by the Nevada District Judges Association to appropriate $41,300 to provide up to $2 Million in insurance coverage for each of the state's 108 judges. Sen. Joe Neal of Las Vegas, added, "I don't think it should be the committee's duty to ensure mediocrity in the judiciary. Judges should render decisions based on what the law states. If they go beyond the law, they should accept the consequences like everyone else."

Id. at 19.

nia, the availability of relatively low cost judicial liability insurance[281] provides the same protection. The threat of personal liability interfering with judicial independence is extinguished when personal liability is vitiated through indemnification. The actual potential liability for attorneys' fees is only as large as the premiums for liability insurance. Furthermore, the coercive effects perceived by the imposition of liability for attorneys' fees is arguably no more coercive than liability imposed on other professionals which generally has resulted in improved, cautious, and defensive professional practice.[282] In those states that refuse to acknowledge a duty to indemnify judges, or where the judge is not as clearly a "public employee",[283] liability insurance vitiates personal liability for judicial malpractice in much the same way as personal liability is vitiated by other professional malpractice insurance.

The award of attorneys' fees is not vulnerable to any constitutional attack. Although cases interpreting Article III, Section 3 of the California Constitution[284] have "prohibited the imposition of penalties on the exercise of judicial judgment",[285] such arguments have no force in the context of attorneys' fees awards under Section 1021.5. Fee shifting in public interest litigation is simply not a penalty.[286] The policy stated in *Piggie Park* and cited with approval in numerous California cases is to encourage public interest litigation, not to penalize unsuccessful litigants.[287]

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281. "Federal Judges pay $100 a year and state judicial officers — who receive more coverage — pay $425 a year." Allen, *supra* note 176; *See* Roth & Hagan, *supra* note 77 at 13.

282. A research report prepared by The Rand Corporation for the California Postsecondary Education Commission dealt with "the effects of professional liability insurance increases on the behavior of physicians and the health delivery system in California". The report concluded that "[o]ur analysis suggests that major increases in malpractice insurance rates have. . .(14) Encouraged additional procedures. . . and 'defensive' medical practice. . . (15) Potentially improved the quality of care. . . Increased caution and 'defensive' practices may in some instances help to improve the quality of care." Lipson, *Medical Malpractice: The Response of Physicians to Premium Increases in California*, iii, 96, 97 (Prepared for the California Post-Secondary Education Commission, November 1976).

The report noted that the malpractice issue has provoked "considerable controversy and much rhetoric" about the effects of increasing liability insurance premiums. *Id.* at 97.

283. *See supra* notes 270-72 and accompanying text.

284. CAL. CONST. art. III, §3. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." *Id.*

285. Oppenheimer v. Ashburn, 173 Cal. App. 2d. 624, 627, 343 P.2d 931 (1959).

286. *See* Wilderness Soc'y. v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974); Newman v. Piggie Park Enterprises, 390 U.S. 400, *supra* notes 94-195 and accompanying text.

287. *See, e.g.*, Filipino Accountants' Association, Inc., v. State Board of Accountancy, 155 Cal. App. 3d 1023, 1030, 204 Cal. Rptr. 913, 916 (1984); Schmid v. Lovette, 154 Cal. App. 3d 466, 476, 201 Cal. Rptr. 424, 429 (1984); Woodland Hills Residents' Assn. v. City Council, 23 Cal. 3d 917, 593 P.2d 200, 154 Cal. Rptr. 503 (1979); Marini v. Municipal Court, 99 Cal. App. 3d 829, 160 Cal. Rptr. 465 (1979).

C. Judicial Liability for Damages in California

The *Lezama* decision did not address judicial immunity with regard to damages. The holding in *Stump*, affording absolute immunity even for malicious and corrupt judicial acts[288] remains good law.[289] The argument can be made, however, that some of the same reasons that counsel the application of *Pulliam* to California law[290] with respect to attorneys' fees awards, may justify a *qualified immunity* protecting only good-faith errors of judgment and judicial discretion. This treatment of judicial immunity may be more consistent with the common law doctrine and no less damaging to judicial independence. *Pulliam* noted that the availability of other relief militated favorably toward judicial immunity.[291] Certainly when there are exceptional cases in which neither direct judicial review nor extraordinary writ would be of value to the litigant, the societal benefits flowing from partial judicial liability would exceed the risk of decreased judicial independence. The important policies recognizing the need to provide a private cause of action to protect civil rights have survived since the passage of the first federal acts. In *Pulliam* the Court noted that:

> Much has changed since the Civil Rights Acts were passed. It no longer is proper to assume that a state court will not act to prevent a federal constitutional deprivation or that a state judge will be implicated in that deprivation.[292]

Despite this claim, state courts continue to harass individuals. Cases continue to be brought in which the conduct of the judge is beyond the pale and violations of fundamental rights are still committed by members of the judiciary.[293] Although the United States Supreme Court held that compensation through *tort* recovery from a judge is barred by judicial immunity,[294] the need to compensate the injured parties and the desire to encourage public interest litigation should not be thwarted by eviscerating *statutory* remedies provided by the civil rights

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288. *See* Stump v. Sparkman, 435 U.S. 349, *supra* notes 143-151 and accompanying text.

289. *See, e.g.*, Greene v. Zank, 158 Cal. App. 3d 497, 508, 204 Cal. Rptr. 770, 777 (1984) ("Thus it is well settled that judges and those performing 'judge-like' functions are absolutely immune from section 1983 damage liability for acts performed in their judicial capacities.").

290. *See supra* notes 237-87 and accompanying text.

291. *See Pulliam*, 104 S. Ct. at 1979.

292. *Id.* at 1981.

293. *See* discussion of Stump v. Sparkman, 435 U.S. 349, *supra* notes 143-51 and accompanying text. For a review of civil rights actions brought against judges whose conduct ranges from the ridiculous to the absurd, see Way, *A Call For Limits To Judicial Immunity: Must Judges Be Kings in Their Courts? 64* JUDICATURE 396-399 (1981).

294. *See* Stump v. Sparkman, 435 U.S. 349, 356-57.

acts and the private attorney general theories. A qualified immunity protecting only good faith errors of judgment clearly within jurisdiction would be more consistent with the principles of public interest litigation.[295]

CONCLUSION

This comment has examined the doctrine of judicial immunity in relation to public interest litigation in California. By examining the historical roots of the doctrine, this comment has illustrated that generations of cases relying upon the historic dimension of the doctrine have failed to recognize the context in which the doctrine developed. As a result, inconsistencies and inequities were manifest in the rote adherence to the doctrine. This comment has explored a perceived diminution in the scope of judicial immunity as a result of the holding in *Pulliam. Pulliam* held that the doctrine does not bar awards of attorneys' fees in civil rights actions under Section 1988. By examining the development of the Attorneys' Fees Award Act and the equitable exceptions to the "American Rule" precluding fee shifting, this comment has suggested the implications of *Pulliam* for California public interest litigation.

This comment has concluded that judicial immunity is no bar to injunctive or declaratory relief against a California judge and, that when such relief is awarded, a judge may be liable for an award of attorneys' fees under California Code of Civil Procedure Section 1021.5. Such relief and fee awards do not threaten the policies underlying judicial immunity. Any perceived coercive effect attributed to judicial liability is futher diminished by the availability of judicial liability insurance at comparatively low rates.

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295. *See* Roth & Hagan, *supra* note 77 at 12. Roth & Hagan present the arguments for and against judicial immunity. In presenting the arguments supporting a qualified immunity they write:

> The courts' role in dispensing justice, for civil litigants as well as the criminally accused, continues to increase alarmingly, and we can only expect to see more instances of individual injustice committed under the protection of judicial immunity. It is, therefore, reasonable to expect that pressure for reform will be tarnished further. This is not the climate of public or political opinion in which to make a case for judicial immunity or reasonably limited qualifications to it. Better to reform in advance of one's critics and take the high ground provided by public support. ". . . [T]here is the argument from the sense of injustice. No one would deny the grossness of facts presented in cases like *Stump*, or that many meritorious claims against judicial misconduct are sacrificed to the benefits of the system against the costs to individual litigants? [sic]." *Id.*

Judicial liability for attorneys' fees does not diminish absolute immunity from damages liability. This comment has taken the position that concerns about the erosion of absolute judicial immunity are unfounded, and has suggested that a qualified immunity as to damages liability for civil rights actions may be more consistent with the purposes and policies of both the civil rights acts and the doctrine of judicial immunity.

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