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Judicial Immunity: An Unqualified Sanction of Tyranny from the Bench

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JUDICIAL IMMUNITY: AN UNQUALIFIED SANCTION OF TYRANNY FROM THE BENCH?

Stump v. Sparkman, 98 S. Ct. 1099 (1978)

In a suit brought against an Indiana circuit court judge, Linda Kay Sparkman sought damages alleging that the judge deprived her of her fundamental rights. Judge Stump had approved[1] a petition[2] submitted by appellant's mother to have her then fifteen-year-old daughter sterilized. After Judge Stump signed the sterilization petition,[3] Linda went to a hospital ostensibly to have her appendix removed; in fact, a tubal ligation was performed.[4] Four years later, Linda learned of the consequences of the operation.[5] She then sought damages under 42 U.S.C. §1983[6] alleging that the actions of defendants[7] in sterilizing her or causing her to be sterilized violated her constitutional rights.[8] The dis-

1. In approving the petition Judge Stump cited no statutory or common law basis for his decision. His order read: "I, Harold D. Stump, Judge of DeKalb Circuit Court, do hereby approve the above petition by affidavit form on behalf of Ora Spitler McFarlin, to have Tubal Ligation performed upon her minor daughter, Linda Spitler, subject to said Ora Spitler McFarlin covenanting and agreeing to indemnify and keep indemnified Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of action arising therefrom." Sparkman v. McFarlin, 552 F.2d 172, 174, n.1 (7th Cir. 1977).

2. In the petition captioned, "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement," plaintiff's mother alleged that her daughter was "somewhat retarded" although the girl was in public school and was being passed along with others her age. 98 S. Ct. 1099, 1102, n.1 (1978). The petition also stated that Linda had been associating with young men, that she had stayed overnight with said young men, and that plaintiff's mother could not keep a constant watch over the girl. *Id.* The only reason cited in the petition for the tubal ligation was to "prevent unfortunate circumstances." *Id.*

3. Judge Stump issued the requested approval of the petition in an ex parte proceeding. No notice was given to Linda Sparkman, no hearing was held, and no guardian ad litem was appointed to represent Linda's interests. Further, neither the petition nor the order was ever filed in the DeKalb County Circuit Court. Sparkman v. McFarlin, 552 F.2d at 173. Because Linda was not notified nor informed of the nature of the operation that was to be performed on her, she had no opportunity to appeal from Judge Stump's decision or to contest her mother's allegations. *Id.* at 176.

4. Stump v. Sparkman, 98 S. Ct. at 1103.

5. In 1973, approximately two years after the operation, Linda Spitler married Leo Sparkman. When she was unable to have a child, Linda first learned from her doctor that she had been sterilized in 1971. Sparkman v. McFarlin, 552 F.2d at 173.

6. 42 U.S.C. §1983 (1970) reads in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priviliges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

7. Also named as defendants were Linda's mother, Ora Spitler McFarlin, the doctors who performed or assisted in the operation, the hospital where it was performed, and her mother's attorney, who had prepared the petition. The claims against these defendants were pendent state claims for assault and battery and malpractice and were attached to the claims brought in the federal district court against Judge Stump. 98 S. Ct. at 1103.

8. Plaintiff alleged that the defendants violated the following constitutional guarantees: "1. that the actions were arbitrary and thus in violation of the due process clause of the

trict court dismissed the action on the ground that Judge Stump was "clothed with absolute judicial immunity."[9] The Seventh Circuit Court of Appeals reversed, finding that because the judge had acted extrajudicially, the doctrine of judicial immunity was inapplicable.[10] On certiorari, the United States Supreme Court reversed and HELD, because Indiana law gave a circuit judge jurisdiction to consider and act upon a petition for sterilization, the judge was immune from damages liability even though approval of the petition may have been erroneous.[11]

In 1868, the Supreme Court in *Randall v. Brigham*[12] first recognized the doctrine of judicial immunity.[13] The Court held that judicial officers were not liable in a civil action for any judicial act done within their jurisdiction. However, the Court limited the scope of the doctrine of immunity by indicating that judges might be held liable for malicious or corrupt acts done in excess of their jurisdiction.[14]

Fourteenth Amendment; 2. that Linda was denied procedural safeguards required by the Fourteenth Amendment; 3. that the sterilization was permitted without promulgation of standards; 4. that the sterilization was an invasion of privacy; 5. that the sterilization violated Linda's right to procreate; 6. that the sterilization was cruel and unusual punishment; 7. that the use of sterilization as punishment for her alleged retardation or lack of self-discipline violated various constitutional guarantees; 8. that the defendants failed to follow certain Indiana statutes, thus derpriving Linda of due process of law; and 9. that the defendants violated the equal protection clause, because of the differential treatment accorded Linda on account of her sex, marital status, and allegedly low mental capacity." 98 S. Ct. at 1103 n.2, citing Civil No. F75-129 (N.D. Ind. May 13, 1976).

9. Finding that Judge Stump had acted within his jurisdiction, the district court held that he was immune from suit and could not be held liable under §1983. *Id.* The district court found that the only state action within the meaning of §1983 had been the approval of the petition by Judge Stump. Having dismissed the federal claim against the judge, the district court then dismissed the pendent state claims against the other defendants for want of subject matter jurisdiction. *Id.*

10. Sparkman v. McFarlin, 552 F.2d 172, 173 (7th Cir. 1977). The court stated that the general grant of jurisdiction to the circuit courts, while broad, did not cloak an Indiana circuit judge with blanket immunity. *Id.* at 174. "A claim must be characterized as a case in law or equity in order to come within the statute. In short, it must have a statutory or common law basis." *Id.* Examining Indiana statutory and common law, the court found no authority for Judge Stump's action. *Id.* Because Judge Stump's action fell without the statutory grant of jurisdiciton, he was not "clothed with absolute judicial immunity." *Id.* at 175. Moreover, even if Judge Stump had acted within his common law power, the Court stated that his action was an illegitimate exercise of that authority because of his failure to comply with principles of due process. *Id.* at 176.

11. 98 S. Ct. 1099 (1978).

12. 74 U.S. 523 (1868).

13. For the history of the doctrine of judicial immunity which developed out of the English feudal system, *see generally* Note, *Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827 (1957). *See also* Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damages Actions*, 30 VAND. L. REV. 941 (1977).

14. Randall v. Brigham, 74 U.S. at 535-36. The Court stated: "If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, . . . [judges] may be called to account by impeachment, and removed from office." *Id.* at 537. *See generally* Kattan, *supra* note 13, at 958-59.

In the leading immunity decision of *Bradley v. Fisher*,[15] the Supreme Court reexamined the *Randall* opinion and held that judges were not liable in civil actions for their judicial acts, regardless of motive.[16] Recognizing that judges need to exercise judicial discretion within their vested authority, the Court used the doctrine of immunity to encourage independent judicial thinking.[17] The *Bradley* Court, reasoning that amenability of judges to suit would inhibit the exercise of discretion in controversial cases,[18] established an absolute immunity[19] applicable even when a judge acted in excess of his jurisdiction. The Court further justified the immunity doctrine by recognizing that a judge's errors could be corrected on appeal.[20]

In 1967, the Supreme Court extended the judicial immunity doctrine to actions brought under section 1 of the Civil Rights Act of 1871, now 42 U.S.C.

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15. 80 U.S. 335 (1871). In *Bradley*, the defendant judge had ordered that plaintiff's name be stricken from the roll of attorneys practicing in the criminal court of the District of Columbia. *Id.* at 337. The plaintiff claimed that the defendant had acted maliciously and without jurisdiction. *Id.* The Court held that the defendant acted in excess of his jurisdiction by not affording plaintiff an opportunity for a hearing, but that he did have the general jurisdiction to admit or disbar attorneys to that court. *Id.* at 356-57. Therefore, he was not personally liable. *Id.*

16. In an opinion written by Mr. Justice Field, author of the *Randall* opinion, the Court held that the qualifying words "maliciously and corruptly" were not necessary to a correct statement of the law. The Court stated: "[J]udges of courts of superior or general jurisdiction . . . [were] not liable to civil actions for their judicial acts, even when such acts were alleged to have been done maliciously or corruptly." *Id.* at 351.

17. *Id.* at 347. "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful." *Id. See also* Note, *supra* note 13, at 833: "When a judge acts in good faith and with colorable jurisdiction, the availability of a defense to a subsequent action against him is easily rationalized as being essential to the proper administration of justice. A decision as to liability or jurisdiction may be influenced by considerations other than the merits of the case when made with the knowledge that, if found to be erroneous, it may expose the judge to an action for damages."

18. Pierson v. Ray, 386 U.S. 547, 554 (1967). *See* Bradley v. Fisher, 80 U.S. 335, 347 (1871). *See also* Kattan, *supra* note 13, at 958-61.

19. The term absolute immunity was used to mean that a judge's motives did not affect the application of immunity. Kattan, *supra* note 13, at 958-59. Similarly, with respect to legislators, improper motive and bad faith have no effect upon the invocation of immunity. Judge, Schirof & Bliss, *Judicial Immunity Under the Civil Rights Act: Here Come the Judge's Defenses*, 7 JOHN MAR. J. PRAC. & PROC. 213, 218 (1974). In contrast, the immunity granted to a prosecuting attorney was a narrower immunity in that his motives may affect the invocation of that immunity doctrine. *Id.* at 221. *But cf.* Rhodes v. Houston, 202 F. Supp. 624, 634 (D. Neb. 1962) (prosecuting officials were immune from suit even though it was alleged that their acts were done maliciously).

20. Pierson v. Ray, 386 U.S. 547, 554 (1967). The Court in *Pierson* stated: "His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption." *Id. See also* Kattan, *supra* note 13, at 959.

§1983.[21] In light of an earlier holding[22] that Congress did not intend to abolish other common law immunities by enacting section 1983, the Court held in *Pierson v. Ray*[23] that the judicial immunity doctrine had not been abrogated. Thus ended the period between enactment of the Civil Rights Act and the *Pierson* decision during which the Act could have been enforced against a judge.[24]

While the scope of judicial immunity was expanding, it was not limitless. The Court in *Bradley*, emphasizing the distinction[25] between acts done in ex-

21. Pierson v. Ray, 386 U.S. 547 (1967). In *Pierson*, plaintiffs and others were involved in a "prayer pilgrimage" from New Orleans to Detroit. *Id.* at 552. Plaintiffs were members of a group of white and black Episcopal clergyman who attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi. *Id.* at 549. They were arrested and brought to trial before defendant, Judge Spencer. The judge convicted plaintiffs under a Mississippi statute which made anyone who breached the peace guilty of a misdemeanor. *Id.* On appeal the case was dropped. *Id.* at 550. Subsequently, plaintiffs brought suit for damages in federal district court under section 1983 for false arrest and imprisonment. *Id.* at 548. The Supreme Court held that Judge Spencer was immune from liability for damages for his role in the convictions, finding no record that the Judge played any role in the arrest or convictions other than adjudging plaintiffs guilty. *Id.* at 553. The Court further held that the judicial immunity protecting Judge Spencer from liability was a defense even in an action under §1983. *Id.* at 554.

22. In Tenney v. Brandhove, 341 U.S. 367 (1951), the Court held that legislators were immune from liability for acts done or words spoken in a legislative proceeding. However, immunity applied only to acts done in the sphere of legitimate legislative activity. *Id.* at 376-77. The Court said they would not hesitate to sustain the rights of private individuals if they found that Congress had acted outside its legislative role. *Id.* at 377. Legislative immunity was founded upon the speech and debate clause, U.S. CONST. art. I §6, cl. 1, which made speech and debate in the legislative department privileged. Since legislative immunity was a well established doctrine, the Court held that Congress had not abolished that immunity by enacting §1983. *Id.*

23. 386 U.S. 547, 554-55 (1967). *See generally* Judge, Schirof & Bliss, *supra* note 19, at 218. *See also* Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L. J. 322 (1969).

24. *See, e.g., Ex parte* Virginia, 100 U.S. 339 (1879), in which the Court held that a judge of a county circuit court in Virginia could be held liable under Section 1 of the Civil Rights Act of 1871 for the violation of the constitutional rights of blacks. The judge had been indicted in a federal district court for exclusion of and failure to select blacks as grand jurors. The Court held that the judge had acted outside of his authority and that therefore he could be punished for his disobedience under the Civil Rights Act. *Id.* at 348-49.

25. The distinction between excess and clear absence of jurisdiction depends upon the definition of jurisdiction. "Jurisdiction, for . . . [immunity] purpose[s], has been defined as the authority to act officially in the matter then in hand . . . or as the power to hear and determine a cause." McGlasker v. Calton, 397 F. Supp. 525, 530 (M.D. Ala. 1975). In Bradley v. Fisher, 80 U.S. 335 (1871) and Randall v. Brigham, 74 U.S. 523 (1868), the defendant judges were exercising their authority to admit, disbar, or discipline the members of the bar practicing in their courts. The Supreme Court held that the judges clearly had authority to act even though the course of action they chose was in excess of their jurisdiction. *See generally* McGlasker v. Calton, 397 F. Supp. 525 (M.D. Ala. 1975) (judge sentencing plaintiff to a term longer than provided by statute for contempt of court acted in excess of jurisdiction); MacKay v. Nesbett, 285 F. Supp. 498 (D. Alas. 1968) (in suit brought against the Supreme Court of Alaska, discipline of bar members found within that court's jurisdiction so that the Alaska court had authority to suspend plaintiff for one year). *But cf.* Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957) (liberalizing the rule to the extent that it is "absence of any color" of jurisdiction which pierces immunity).

cess of jurisdiction and those done in "clear absence of all jurisdiction,"[26] limited immunity to acts done in excess of jurisdiction. Additionally, immunity from liability applied only to judicial acts.[27]

In cases dealing with sterilization, the weight of authority was that judges had no jurisdiction to order or approve sterilization absent a specific statutory grant of authority.[28] Accordingly, a district court held in *Wade v. Bethesda Hospital*[29] that a judge acted in clear absence of jurisdiction by ordering plaintiff's sterilization. In the context of sterilization, which deprived the plaintiff of the fundamental right to procreate,[30] authority for the judge's action could not be inferred from a grant of general jurisdiction.[31] Therefore, his act done

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26. 80 U.S. at 351. The Court stated: "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend." *Id.*

27. Bradley v. Fisher, 80 U.S. 335, 338 (1871). "Whether the act done by . . . [a judge] was judicial or not . . . [was] to be determined by its character, and not by the character of [the] agent." *Ex parte* Virginia, 100 U.S. at 348.

28. In the most recent decision concerning the authority of courts to approve or order the sterilization of a child, the Supreme Court of Missouri held that jurisdiction to exercise the awesome power of denying to a human being the fundamental right to bear or beget a child may be conferred only by specific statutory authority. *Ex rel.* M.K.R., 515 S.W.2d 467, 471 (Mo. 1974). *See* Frazier v. Levi, 440 S.W.2d 393 (Eex. Ct. App. 1969); Holmes v. Powers, 439 S.W.2d 579 (Ky. 1968).

29. 337 F. Supp. 671 (1971), *aff'd on rehearing*, 356 F. Supp. 380 (S.D. Ohio 1973). The facts in *Wade* are similar to those in the instant case. In *Wade*, the county child welfare board petitioned in Ohio probate court to order the sterilization of a "feeble minded" person. *Id.* at 673. Defendant Judge Gary ordered plaintiff's sterilization. *Id.* Defendant Gary relied on a general statutory grant of jurisdiction similar to that granted Judge Stump which stated: "The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute." *Id.* When plaintiff sough damages under §1983, the district court held that Judge Gary had no immunity and was liable for his action in ordering the sterilization. *Id.* at 674. The court stated that in the absence of a specific statutory grant of sterilization power, Judge Gary did not have jurisdiction; thus, the grant of general jurisdiction did not authorize Judge Gary's action. *Id.* The court held that because defendant Gary acted wholly without jurisdiction, he was not protected by the doctrine of judicial immunity. *Id.*

30. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court held that a state statute which provided for the sterilization of habitual criminals was unconstitutional. In so doing the Court held that the right to procreate was a fundamental right: "Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541. The Court warned that the power to sterilize, if exercised, could have subtle, far-reaching and devasting effects. *Id.* Furthermore, the Court noted that an individual who was sterilized by operation of law would have been deprived forever of a basic liberty. *Id.* For a history of eugenics and sterilization statutes in the United States and the rise and fall of the eugenics movement, *see generally* Burgdorf, *The Wicked Witch is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 TEMP. L. Q. 995, 1006-08 (1977).

31. 337 F. Supp. at 673-74.

in the absence rather than in mere excess of jurisdiction deprived him of immunity.

Assuming that a judge had jurisdiction, he could still be liable for his challenged act if it were non-judicial. Although the Supreme Court has not defined a judicial act for immunity purposes, the lower courts have maintained that not every act by a judge is a judicial act.[32] In *Gregory v. Thompson*,[33] the Ninth Circuit Court of Appeals found that a court must look beyond the status of a party seeking immunity to consider the nature of the conduct for which immunity was sought.[34] Further justifying its grant of immunity, the court stated that a judicial act, within the meaning of the doctrine, may normally be corrected on appeal.[35] Therefore, according to the court, judges were subject to liability for acts which could not properly be characterized as judicial.

In the instant case, the Supreme Court reaffirmed the principle that a judicial officer should be free to act upon his own convictions without apprehension of personal liability.[36] The Court noted, however, that the doctrine of immunity protected a judge from civil liability only when he was performing a judicial act within his jurisdiction. To determine whether Judge Stump was immune to suit, the Court examined the judge's order in light of his authority to act.[37]

As an Indiana circuit court judge, Judge Stump was vested by statute with general jurisdiction over all cases and other causes where exclusive jurisdiction was not conferred by law upon some other court.[38] The Court construed this provision as a broad jurisdictional grant which could include the authority to approve a petition for tubal ligation.[39] Absent a specific statute or common law doctrine denying a court of general jurisdiction the authority to entertain a

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32. "However, not every action by a judge is in exercise of his judicial function. For example, it is not a judicial function for a judge to commit an intentional tort even though the tort occurs in the courthouse." Yates v. Hoffman, 209 F. Supp. 757, 759 (N.D. Ill. 1962) (because it was not a judicial function for a magistrate to direct a police officer to arrest and take into custody a person not named in a warrant, the magistrate was not immune from suit). *See* Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970) (judge acting as presiding officer of a legislative and administrative body had not performed a judicial act when he ordered that a member of that body be forcibly removed from the meeting and jailed). Also, see note 27 *supra*.

33. 500 F.2d 59 (9th Cir. 1974).

34. In *Gregory*, the defendant judge physically assaulted a non-lawyer who had refused to leave when the judge ordered him to leave the courtroom. The court stated: "The decision to personally evict someone from a courtroom by the use of physical force . . . [was] simply not an act of a judicial nature. . . ." *Id.* at 64. Therefore, the court concluded that the defendant was not entitled to automatic immunity. *Id.*

35. *Id. See* Pierson v. Ray, 386 U.S. 547, 554 (1967).

36. 98 S. Ct. 1099, 1104 (1978).

37. *Id.* at 1105.

38. *Id.* IND. CODE §33-4-4-3 (1971) (amended 1975) provided in part: "Jurisdiction — Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever . . . . It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships . . . . [I]t shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

39. 98 S. Ct. at 1105.

petition like that presented to Judge Stump, the Court found that the judge had jurisdiction over the subject matter.[40] Thus, because neither statute[41] nor common law[42] prohibited a circuit judge from authorizing a minor's sterilization, the Court held that Judge Stump had acted within his jurisdiction.[43]

Although the Court found that Judge Stump had acted within his jurisdiction, it recognized that he would not be entitled to judicial immunity if approval of the petition were not a judicial act.[44] In considering for the first time for immunity purposes the necessary attributes of a judicial act, the Court discussed several controlling factors. The Court noted that the informality[45] with which Judge Stump proceeded could not render his act non-judicial.[46] Rather, the critical determinative factors were the nature of the act[47] and the expectations of the parties.[48] In the instant case the Court concluded that Judge Stump performed a judicial act when he signed the sterilization petition, because signing petitions was a normal judicial function[49] and because appellant's mother believed that he was acting in his official capacity.[50]

The Court emphasized the purpose and necessity of judicial immunity in protecting judges from vexatious litigation.[51] Thus, despite the tragic consequences of his act and the fact that approval of the petition may have been in

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40. Mr. Justice White wrote for the majority: "But in our view, it is more significant that there was no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump." *Id.*

41. The Court held that the Indiana statutes (IND. CODE §§16-13-13-1 through 16-13-13-4 (1971) (amended 1973) providing for the sterilization of certain institutionalized persons did not warrant the inference that all other judicial authority to approve sterilization was prohibited. The Court found no statute specifically prohibiting courts of general jurisdiction from approving petitions for tubal ligation. *Id.*

42. *But cf.* cases cited in note 28 *supra* and in note 62 *infra.*

43. 98 S. Ct. at 1106.

44. "It is only for acts performed in his 'judicial' capacity that a judge is absolutely immune." *Id.*

45. See note 3 *supra.*

46. The Court cited two earlier decisions for the proposition that failure to comply with procedural requirements (such as entry of a petition on the docket or the ordering of a contempt citation outside of the courtroom) could not render a judge's action non-judicial. 98 S. Ct. at 1107, citing *In re* Summers, 325 U.S. 561 (1945); McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972).

47. Whether an act was judicial was determined by: "whether it . . . [was] a function normally performed by a judge." 98 S. Ct. at 1107.

48. The Court stated the test of the second factor as: "whether . . . [the parties] dealt with the judge in his official capacity." *Id.*

49. "State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors, as for example, a petition to settle a minor's claim." *Id.* at 1108.

50. "We may infer from the record that it was only because Judge Stump served in that position that . . . [appellant's mother], on advice of counsel, submitted the petition to him for his approval." *Id.*

51. *Id.* "Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of the proper administration of justice . . . [for it allows] a judicial officer, in exercising the authority vested in him to be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.*

error, Judge Stump was held immune from liability for damages because his act was judicial and within his jurisdiction.[52]

Justice Stewart, in a dissenting opinion in which Justice Marshall and Justice Powell joined, stated that "what Judge Stump did . . . was beyond the pale of anything that could sensibly be called a judicial act."[53] Justice Stewart rejected the majority's enunciated determinants of judicial action, deeming that such a test would render meaningless the inherent limitations on immunity.[54] He stated that the test of whether an act is judicial should instead be based on the factors supporting immunity from liability,[55] including the judge's duty to decide all cases within his jurisdiction, the possibility of an appeal to correct his errors, and protection of the judge from suit by unsatisfied litigants.[56] Finding in the instant situation no case, no possibility of appeal,[57] and no litigants, Justice Stewart concluded that Judge Stump's approval of the petition was not a judicial act.[58]

In analyzing the authority vested in a court of general jurisdiction, the Court did not consider the weight of lower court decisional law. With only one exception,[59] the earlier lower court decisions had held that a specific statute was needed to confer jurisdiction over sterilization matters.[60] The Supreme Court looked only at Indiana common law and concluded that there was no specific limitation upon a court of general jurisdiction precluding Judge Stump's consideration of a sterilization petition.[61] In light of the common law of other states,[62] the Court could have inferred that a judge vested with general jurisdiction could not approve a person's sterilization without a specific

52. *Id.* at 1108-09.

53. *Id.* (Stewart, J., dissenting, joined by Marshall and Powell, J.J.).

54. *Id.*

55. *Id.* at 1111.

56. *Id.*, citing Pierson v. Ray, 383 U.S. 547, 554 (1967).

57. Mr. Justice Powell wrote a separate dissent emphasizing that the central feature of the case was that appellant was precluded from vindicating her rights elsewhere in the judicial system. 98 S. Ct. at 1111 (Powell, J., dissenting).

58. *Id.*

59. The court in *In re* Simpson, 180 N.E.2d 206 (Ohio Prob. 1962) held that an Ohio probate judge had the authority to order the sterilization of a young woman. However, the district court in Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971) held that the same judge had acted without jurisdiction and could be held civilly liable for the damages that resulted from his sterilization order. That he had previously ordered a person sterilized without liability was not controlling. *Id.* at 674.

60. See note 28 *supra* and accompanying text. *See also* Burgdorf, *supra* note 30, at 1023: "The overwhelming trend in judicial precedent has been to preclude parents, guardians, and courts from giving consent for the sterilization of mentally incompetent adults and from compelling the sterilization of minors in the absence of a state sterilization law."

61. 98 S. Ct. at 1105-06.

62. In A.L. v. G.R.H., 325 N.E.2d 501 (Ind. App. 1975), *cert. denied*, 425 U.S. 936 (1976), the Indiana court of appeals held that a parent did not have the common law right to consent to the sterilization of his minor child. While the intervening decision in that case was not controlling in the instant case, it should be noted that the Indiana court cited as controlling precedent the very cases which the Supreme Court did not recognize as part of the common law of that state. For the cases cited by the Indiana court, see note 28 *supra*. *See also* Kemp v. Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

statutory grant of authority.[63] The majority of the Court, however, disregarded the weight of the common law proscription of authority,[64] and refused to require such a specific grant of power.

In examining the statutory law of Indiana, the Court found that the statute providing that parents of a minor have the authority to consent to the medical or surgical care of their child[65] supported jurisdiction over the sterilization petition. Yet that statute implied that a parent could consent only to necessary medical treatment of his child.[66] Because the sterilization of appellant was not necessary,[67] it should not have come within the ambit of the Indiana statute.[68] Thus, no statutory law supported the Court's conclusion that a court of general jurisdiction had authority over the sterilization petition.

The Court then analyzed the factors determining whether a judge's act is a judicial one for immunity purposes. Focusing first on the nature of the act of signing the petition, the Court failed to consider the petition's substance and effect.[69] Stating that judges with general jurisdiction have the authority to approve petitions relating to the affairs of minors, the Court implied that a petition which would deprive a minor of a fundamental right[70] was no different from a petition to settle a minor's claim. That the two types of petitions should not be equated is apparent. Deprivation of fundamental human rights is not a "function normally performed by judges"[71] even though accomplished through the mechanics of signing a petition. The Court's second determinant of the judicial nature of a judge's act was whether the parties believed that they dealt with the judge in his judicial capacity. But, as the dissenters pointed out: "False illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act."[72] Only rarely would parties seeking judicial action expect a judge not to be acting in his official

63. *See* Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971). *See generally* Burgdorf, *supra* note 30, at 1022-23.

64. The Court stated: "that neither by statute [nor] case law [had] the broad jurisdiction granted to the circuit courts of Indiana been circumscribed to foreclose consideration of a petition for authorization of a minor's sterilization." 98 S. Ct. at 1105-06.

65. IND. CODE §16-8-4-2 (1971) (amended 1973).

66. In A.L. v. G.R.H., 325 N.E.2d, 501, 502 (Ind. Ct. App. 1975), the Indiana court of appeals held that sterilization did not involve any life saving necessities. Because it was not a necessary medical treatment, the court held that the parents of a minor did not have the authority to consent on behalf of the minor to her sterilization. *Id.*

67. The only reason for the sterilization given by appellant's mother was to avoid unfortunate circumstances. See note 2 *supra*. No medical reason for sterilization was given nor was any reason given for not employing a less drastic means of birth control.

68. *See* A.L. v. G.R.H., 325 N.E.2d, 501, 502 (Ind. Ct. App. 1975).

69. The significance of the substance of the petition was made clear when the question was posed: "Can a judge cut off arms and legs merely because the power to do so [was] not specifically denied him by the statute granting his jurisdiction?" Brief for Respondents at 6, Stump v. Sparkman, 98 S. Ct. 1099 (1978).

70. See note 30 *supra*.

71. 98 S. Ct. at 1107.

72. *Id.* at 1110. *See Ex parte* Virginia, 100 U.S. 339, 348 (1879) (whether an act done by a judge was judicial is to be determined by the character of the act, not by the office held by the actor).

capacity. Clearly, the factors established by the Court for determining the judicial nature of an act are not viable.

The Court's analysis of the purpose of judicial immunity focused solely on the need to protect judges from vexatious or malicious law suits, without considering the extent to which an individual's rights were circumscribed or whether an appeal was effectively foreclosed. If the Court had instead balanced individual constitutional rights against the inimical effects of judicial liability,[73] the result need not have been in favor of judicial immunity. Extension of liability to outrageous judicial behavior would not open the floodgates to vexatious litigation and would not unduly interfere with judicial independence. Only judges who act with disregard for the constitutional rights of individuals would have to fear civil liability.[74]

The instant decision creates an unqualified judicial immunity. The Court's broad test for determining the judicial nature of an act rendered meaningless that qualification to the general rule of immunity. As a result, judges are isolated by an unqualified protection from accountability for their injudicious actions.[75] Vindication of the deprivation of individual rights has been subordinated to the Court's interest in insulating judges from civil liability. Consequently, the independence of the judiciary has been strengthened at the expense of the rights of individuals.

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73. *See* Kattan, *supra* note 13, at 957: "The constitutional rights of individuals necessarily are balanced, as with all section 1983 immunities, against the deterrent effect of damage liability upon the effective performance of official functions." *See generally* Note, *supra* note 13, at 833-38.

74. One author described the Court of Appeals decision in Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977) as the paradigm of judicial liability. Kattan, *supra* note 13, at 960-63. Furthermore, the dissenters concluded that if intimidation would serve to deter the recurrence of such action by a judge, "that would be in the public interest." 98 S. Ct. at 1111. *See generally* Amicus Curiae Brief of the Nat'l Center for Law and the Handicapped at 42, Stump v. Sparkman, 98 S. Ct. 1099 (1978).

75. *See generally* Note, *supra* note 13, at 827-38. For an example of a legislator's liability for violating an individual's constitutional rights, *see* Davis v. Passman, 544 F.2d 865 (5th Cir. 1977) (a congressman was not entitled to immunity in a suit by a former member of his staff alleging sex discrimination).

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