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Does Judicial Immunity Serve the Common Good?

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Chapter One – Introduction

In a society that elevates the Common Good, perhaps no greater group of people can have an impact on that Common Good than that of its judges. Ultimately, they make the decisions that affect all of society. Their decisions ripple out from their courtrooms and have an impact on future litigation and fundamentally the course of society for decades and sometimes centuries to come. In effect, their decisions don't just interpret law, they become law. The purpose of this research paper is to examine a small part of the wide spectrum that constitutes the legal system in the United States as it pertains to its judges, in particular the policy of judicial immunity. Does judicial immunity serve the Common Good?

To be effective it is imperative to understand the two parts of the research question. To accomplish that, judicial immunity and the Common Good must be defined. The Common Good is (or should be) self-evident; however, a brief description and definition is a prerequisite for this analysis. Immunity is different, it is shrouded in antiquity and its definition is much less obvious. Furthermore, immunity, as it exists in the United States runs deep and has a curious origin and murky history. We will examine that origin and the history leading up to the current policy of present day judicial immunity. This paper will focus on judicial immunity as a policy of the US judicial system which may prioritize its practioneers above the law, and in turn attempt to reconcile it with the Common Good.

Research Methodology Used

When thinking of research, most individuals conjure pictures of lab rats and test tubes. Other types of research abound and their methods are quite varied. When considering this research question, it became evident that many possible choices and modes of analysis were available as analytic tools. As in any endeavor however: the right tool for that endeavor

generally renders the best results. One of the chief concerns in this research effort was/is to attempt to remove any preconceived bias from the analysis itself. The chosen research model then had to reflect this need. Of secondary importance was a desire to not presume a problem inherent in the policy that needed correction; rather the analysis was/is intended as a pure critique of the policy without a preconceived diagnosis of malfunction. Again, the chosen research model and method would need to observe this qualifier. To take an informal look at judicial immunity it was determined that a qualitative research model as opposed to a quantitative model would best serve this study. While a quantitative model could have been conducted by asking the opinions of others through survey and opinion polls, it was felt that this would not look at judicial immunity from a policy rubric but rather from a social popularity perspective. With this then in mind our research model would need to be qualitative. Of final importance in our selection of a research model was a desire to interpret the policy under question.

In the end, interpretive policy analysis was chosen as the best research method fit for the given research question. Policy analysis is interpretive and qualitative in nature, and when conducted without a presumption of underlying problems fits the description of the research method desired for this project.

This paper then is a policy analysis, with that in mind, to do justice to the subject matter and arrive at a meaningful answer to the research question, applying the correct style of analysis is of chief concern.

Definitions

Before moving forward in this policy analysis, the two key concepts contained within the research question must be defined. One is the Common Good and the other concept is judicial immunity.

The Common Good is different to different people. Encyclopedia Britannica offers an insight into what the Common Good may be when it states: "the idea of the common good has pointed toward the possibility that certain goods, such as security and justice, can be achieved only through citizenship, collective action, and active participation in the public realm of politics and public service." This would suggest that the Common Good is not just a citizen's right to goods but rather something that one participates in, something that leads to a better life and existence for all.

The following quote is an outstanding summation of what the Common Good is:

> What exactly is "the common good", and why has it come to have such a critical place in current discussions of problems in our society? The common good is a notion that originated over two thousand years ago in the writings of Plato, Aristotle, and Cicero. More recently, the contemporary ethicist, John Rawls, defined the common good as "certain general conditions that are...equally to everyone's advantage". The Catholic religious tradition, which has a long history of struggling to define and promote the common good, defines it as "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment." The common good, then, consists primarily of having the social systems, institutions, and environments on which we all depend work in a manner that benefits all people. Examples of particular common goods or parts of the common good include an accessible and affordable public health care system, and effective system of public safety

> and security, peace among the nations of the world, a just legal and political system, and unpolluted natural environment, and a flourishing economic system. Because such systems, institutions, and environments have such a powerful impact on the well-being of members of a society, it is no surprise that virtually every social problem in one way or another is linked to how well these systems and institutions are functioning. (Velasquez, Andre, Shanks, S.J., Meyer, 1992).

The Common Good then is dependent on the system that serves the Commons. The Commons can only be served well if that system runs well. As the previous quote suggests the system is comprised of many parts. It further suggests that only when these parts work well together does the Common Good prevail.

The second concept, judicial immunity is, the "absolute immunity from civil liability that is granted to judges and other court officers (prosecutors and grand juries) and quasi-judicial officials for tortious acts or omissions done within the scope of their jurisdiction or authority" (Findlaw, 2017). The remainder of this work will develop and detail the policy and practice of judicial immunity and in the final analysis attempt to determine if in fact judicial immunity as a policy serves the Common Good.

Organization of the Paper

Looking forward then, Chapter Two will examine the various research models and methods used in policy analysis and justify the model chosen. The chosen policy model for this research paper is one that hails from a social science approach and does not presuppose a problem in the examined policy. This policy analysis model, known as the Popple & Leighninger model, offers various avenues of potential focus but with no predetermined or preset format. Essentially, only the categories pertinent to the subject are analyzed and evaluated.

Chapter Three will examine current and past literature in a review format. Many of the documents that will be cited and shared will be of a legal nature and taken from court proceedings and final judgments. Other documents and quotes will come from peer reviewed journals and articles to allow a deeper, well-reasoned and informed approach to this policy analysis.

Chapter Four will comprise the actual policy analysis utilizing the tools provided by Popple & Leighninger. Chapter Four will develop the necessary understanding of the subject to form a final conclusion and answer our research question.

The final chapter, Chapter Five, will offer conclusions based on the study. In this chapter, I will share thoughts on my journey to understanding judicial immunity. I will offer possible remedies if they are called for and suggest areas for future research and analysis.

Chapter Two – Policy Analysis Explained

To answer the question: "Does Judicial Immunity Serve the Common Good?" a research method must be found and utilized. As was stated in Chapter One after investigating many types of research methods, it was felt that the research method known as Policy Analysis might offer the best opportunity to objectively understand the matter of Judicial Immunity. To briefly recap, it was felt that a qualitative research design was more desirable than a quantitative, or mixed approach design. In the end, the choice for a policy analysis approach was indicated as best practice and the decision was made to incorporate this design.

Approaches to Policy Analysis

In a policy analysis paper, several different approaches may be employed. The purpose of this chapter is to examine some of the more popular forms of policy analysis and determine the appropriate format for this study into a sub-section of absolute immunity; specifically, judicial immunity.

From the study of policy analysis and its various formats, it appears that many policy analysis formats are suggestive of a preconceived problem in the policy prior to investigation. It has been the intent of this research project design to shy away from any presuppositions of judicial immunity as a policy or to enter into any bias in regards to the policy's efficacy and/or legal standing. It is also the intent of this research to, in fact, remove as much bias as possible so as to approach the subject from a purely investigative standpoint.

Policy analysis models can be broken down into many categories. Utilizing a review of policy analysis methodology, and using the search parameters "Policy Analysis" rendered several categories as pertinent to our research model. Remaining true to the design of this research, the various methods were evaluated as to whether the model preconceived a problem

with the policy in question OR whether it did not. There were other potential analysis classification/divisions that could have been employed for the project; for example, whether a framework analysis might have suited the subject matter or whether a focus on political processes might render the best results. Ultimately, these other formats were rejected (as they did not fit the criteria listed for our research model in Chapter One) in lieu of the two proposed categories for analysis. For our purposes then, we will break the models down into two categories. In category One, the model presumes that there is a preconceived problem associated with the policy. In category Two there is no such presumption.

The first category of policy analysis approaches are those that enter the analysis under the assumption that a pre-existing problem is inherent in the policy to be examined. The first such model is known as the Analysis-centric model. The Analysis-centric model presupposes a problem in the policy and attempts analysis at the micro scale (Wikipedia). Its focus is on technical processes (such as classification and filing systems or workload and output designs) and seeks remediation of the problem through technical means. It is also concerned with economic approaches to the aforementioned technical solution.

A second approach to policy analysis is called the Framework approach. Policies are viewed as frameworks or guidelines (Wikipedia). In the Framework approach, a potential problem is identified to be a social problem having effects on all members of the commons. In the Framework model, once a problem has been identified, a process is initiated to find, study and repair the broken procedure (frame). The process begins by identifying and defining a social problem. Phase Two reviews the policy objectives and their intended target. Phase Three evaluates the effects of the current policy and future implications if left both unchecked and if modified. Finally, Phase Four consists of recommendations on potential policy reform and/or

replacement of the entire policy if deemed necessary. This model assumes a problem in the policy prior to investigation.

The third approach in this category is the Policy Process. In this process, a decision matrix called the Policy Cycle is utilized. Basically, "the process/cycle" assumes there is a problem in the policy. The solution is then found by breaking down the problem into an action-step loop starting from the problem, progressing to a query of the different political tools available for finding and implementing the solution to the identified policy problem. At this a juncture in the process, a potential solution/s is/are chosen from the list of tools determined appropriate to fulfill the task, and then implemented. The new process is monitored and if another problem is detected in the new process, the loop begins anew. Many different filters can be utilized during the investigative process under this type of policy analysis including: policy outcomes, economic effectiveness, political advantage and/or any potential repercussions both positive and negative. The Policy Process method is best utilized when scrutinizing stakeholders, especially elected and unelected officials.

A fourth approach of is known as the Meta-Policy method. The Meta-Policy approach is a systems approach, it assumes a problem in the structure of the policy. Its emphasis and priority is on the context (social and political) in which the policy exists and what factors in these dimensions influence it. The Meta-Policy approach takes a macro-scale level look at the factors associated with the politics, economics and social dimensions of the policy in question. Its method defines the problem and the criteria used to evaluate it. It then identifies policy changes or alternatives to the policy as are needed and implicated through the evaluation phase of its method and approach (Wikipedia, 2017, Policy Analysis).

Having explored the policy analysis models that presume a problem with the policy prior to investigation we will turn our attention to those models that assume no prejudgment as to the policies in question, but rather explore the subject matter with an open mind and eye. As was stated in the first chapter, it is the intent of this paper and its researcher to remove any preconceived ideology that might interfere with or skew the final conclusions in regards to the subject matter. Presumption of a problem prior to analysis then is antithetical to the goals of this policy analysis. With that in mind, it is understood that the choice of policy analysis model for our research project will come from these last three models.

The first of these approaches is called the "6 Dimension" approach. In the "6 Dimension" analysis, the "dimensions" are broken down into two equal categories of three dimensions, with each dimension having a rubric for evaluation purposes. One category is associated with the policy's effects, the other category is associated with the policy's implementation process. Under the Effects rubric the three dimensions of effectiveness, unintended effects**,** and the concept of equity (fairness across diverse groups) of the policy under deliberation, are taken into consideration. In contrast, the Implementation rubric examines the three dimensions of cost, feasibility**,** and the acceptability of the policy in question. These two categories, effects and implementation, are interrelated and are melded into a final "6 Dimensions" analysis for which recommendations for policy reform are made. Under this approach any problems are discovered in the analysis process itself and not presumed prior to the analysis process. Because analysis of cost is a major determinant in this design and cost is hard if not impossible to quantify in the analysis of judicial immunity, this method was not chosen.

The Five "**E**" approach (Wikipedia, 2017, Policy Analysis) is the second model under consideration, in this category, in regards to this policy study and its subject matter. The Five "**E**'s" are each areas of policy consideration. They are composed of the study of a policy's: **E**ffectiveness, **E**fficiency, **E**thical Considerations, **E**valuations of Alternatives and **E**stablishment of recommendations. While the Five "**E**" approach would be a useful model in our analysis, there is one that would provide a better fit for the established subject matter. In light of the next model, the Popple & Leighninger method, The Five "**E**" model was not chosen simply because it was felt not to be as exhaustive in its analysis.

For this study, it is felt the Popple & Leighninger approach (Wikipedia, 2017, Policy Analysis) will best fit the intended design and best answer the study's research question. It was/is felt that a hybrid approach to this study is indicated and desirable. The design of the Popple & Leighninger approach affords such a luxury and is of such design that one can choose from various potential parameters for analysis. The Popple & Leighninger model is a framework model similar to the Framework model that was reviewed earlier, but however without a presumption of complications already inherent in the system. The framework of the Popple & Leighninger model is comprised of the following seven elements:

- Overview of the policy under analysis.
- Historical Analysis.
- Social Analysis.
- Economic Analysis.
- Political Analysis.
- Policy/Program Evaluation.
- Current Proposals for Policy Reform.

It was felt that the design of the Popple & Leighninger policy analysis model, and the ability to choose from its various elements the appropriate levels of analysis for the subject, made it the ideal model for this research paper. As was mentioned earlier, potentially the most important factor in the choice of the Popple & Leighninger model for this research effort, is/was that the model in no way presumes a problem inherent in the system prior to analysis.

Of the Popple & Leighninger model's seven elements; the economic element of the analysis may be the hardest factor to determine, due to the unavailability of such information regarding the subject matter. To date, I have been unable to find a source of information that would reveal the economic costs associated with the judicial system and the further costs associated with the final decisions and trial outcomes of its case load both past and present; especially those decisions that may have had a negative economic effect on the litigants and more importantly future negative economic implications, from the decision, for others in the commons.

Chapter Three – Literature Review

To set the stage properly a brief history of the principle of immunity itself is paramount to any further analysis. That history will be woven into the tapestry of our literature review. Immunity takes many forms in the United States, and as has been previously stated, this research will zero in and focus solely on the principle and policy of judicial immunity.

Methodology

While conducting this literature review the following methodology was utilized to gather, categorize, define**,** and convey the ideas and concepts garnered during the review process. Having been trained in the social sciences, specifically Political Science, the following research methodology was employed. Literature was found through the Winona State University Library J-Stor portal and online access. J-Stor is an online database containing peer reviewed articles and books with a social science focus. These articles and books are downloadable for extended access and use. Utilizing the search parameters of "Judicial Immunity" all of the material gathered for this policy analysis was located and accessed in this manner. Once the relevant literature had been located it was parsed to determine applicability and relevance to the research question. Once the articles had been selected for inclusion in the study, they were downloaded into a hard copy format and read in far greater detail so applicable thoughts and concepts could be highlighted for future use. Once the readings had been undertaken and concepts highlighted, they were then arranged to allow for a concise and meaningful flow of information and dialogue in reference to our subject matter.

While the use of many, as well as lengthy, block quotes are generally discouraged in a literature review and research design, it was felt for this analysis given the depth of emotionality that can be evoked by the policy under consideration, that these quotes were pertinent and

necessary to convey the importance of the policy under analysis without distorting the essence of the quote through the medium of paraphrase.

Immunity Defined

The principle of immunity comes to us from across the sea, in particular from English Law of antiquity. Originally known as the "King's X", the concept behind the principle is that "the king makes the laws; therefore, the king is exempt from the laws." Kings were believed to be of divine origin and birthright; therefore, they existed above the law. They enjoyed a "do as I say, not as I do' lifestyle and due to their status were exempt from the mandates that they passed down to the masses. Edwin Dunahoe (1973) in his article: "Governmental Immunity: The End of 'King's X'" informs us of the origin of this doctrine. He writes:

> The theory of governmental immunity rests upon an idea which has little justification in modern law. It began in England as a personal attribute of the King and later, through a somewhat uncertain process, was extended to the state. Its application in the United States is basically unsound, since 'the keystone of American political thought has been responsible government' and the idea that the government is above the people is inconsistent with this premise. Any assertion of governmental immunity is subject to at least one overriding objection, it is basically unfair. If the theory of responsible government is accepted as proper, then any negligence should create liability for which the government should respond. To hold otherwise puts the state above the law and answerable to no one. (Dunahoe, 1973, p.72)

Dunahoe makes a salient point regarding his view that the keystone of American political thought has been the ideal of a responsible government with the added caveat that the government is not superior to its people. It would appear that Dunahoe is not an advocate of the

immunity principle, yet in his next sentence he entertains and defends the opposite view. Dunahoe states:

> It appears that while a *total* removal of the defense of governmental immunity might be theoretically ideal, practically it is not feasible, largely because of the extent to which the public depends on governmental services…If the state were faced with a possibility of liability, the solution would be to cease performance of the service. As a policy matter, we cannot afford to discourage the performance of governmental services; thus, it seems necessary to excuse negligence in certain situations. The question remains, which immunity rule would provide the most satisfactory result? (Dunahoe, 1973, p. 76)

Dunahoe points towards a possible remedy of the policy for its critics. His query of which immunity rule would best serve all parties, including the common good, suggests that more than one solution exists, perhaps a "qualified" immunity policy might in fact be best practice. For qualified immunity to exist however, the immune individual and circumstance/s must meet certain "qualifications". Examples of these types of qualifications would include "a reasonable person" standard, or "acting within the scope of one's jurisdiction."

Dunahoe makes another crucial point; what would prevent an official, agent or agency from diminishing or ceasing services altogether if they believed they would be facing liability for performing those services? We have seen services withheld for political reasons in the past, especially during government shutdowns, so this is a viable scenario. Playing devil's advocate however, and providing a counter to Dunahoe's point, in my view, legislative or executive mandate could intervene and force the services if needed. This then counters the argument that officials could not be compelled to return to providing services even without liability protection.

Verne Lawyer provides yet another and deeper analysis of the immunity principle and how it came to be ingrained in the U.S. political and legal systems. Verne Lawyer (1966) in his work titled "Birth and Death and Governmental Immunity" states:

> …why the courts so readily accepted a doctrine originally an attribute of a personal ruler is still not clear. It is difficult to understand why a theory originating in the belief of the divine right of kings should become so firmly imbedded in the law of a country which fought to free itself of this tyranny. The inviolability of the king was essential to the existence of his powers as supreme magistrate, but the location of undivided sovereignty in the United States is not possible. The executive in the United States is not historically the sovereign, and the legislature is restrained by constitutional limitations. The federal government is one of delegated powers and the states, although retaining certain powers, are not sovereign. (Lawyer, 1966, p. 532)

Essentially, Lawyer is reminding us that while our country is sovereign, its leaders are not, and therefore should not enjoy the privilege of immunity. Lawyer further contends that:

> …the difficulty of reconciling the royal prerogative with democratic government has led some of our courts to deny the applicability of the English theory of kingly immunity and to rationalize its acceptance on the ground of public policy. Just what is meant by public policy is equally confusing, but the general reasoning is that inconvenience and danger would follow any different rule. Public service would be hindered and public safety endangered if supreme authority could be subjected to suit at the instance of every citizen. (Lawyer, 1966, p. 533)

From this we are to understand that the reason immunity was promulgated in our country was/is to serve public policy, no matter how nebulous that policy was/is. In addition, the reasons given for not allowing monetary civil remedies against the government are as follows:

> …that public funds should not be dissipated to compensate for private injuries; the absence of funds for satisfaction of judgments; the government derives no profit from its activities, which are solely for the public benefit; and the government should not be subjected to the private control of tort litigation. Some of the practical reasons given are the lack of jurisdiction, as a court has no authority to render a judgment on which it has no power to issue execution, and the need to avoid embarrassing the executive. Other theories advanced are the dignity of the state; the absurdity of a wrong committed by an entire people; the idea that whatever a state does must be lawful; and the doubtful theory that an agent of the state is always outside the scope of his authority when he commits a wrongful act. (Lawyer, 1966, p. 533)

Lawyer is basically telling us that the system is designed to go unchallenged, for to challenge the system's authority would in fact diminish its authority. On the face of it, this seems a rather self-serving argument, especially for those in power.

The question remains however, is the practice even constitutional? Vicki C. Jackson (2003) answers that question in her work: "Suing the Federal Government: Sovereignty, Immunity and Judicial Independence." Ms. Jackson informs us that "although the "sovereign immunity" of the federal government is accepted today as "the law," it is nowhere explicitly set forth in the Constitution" (Jackson, 2003, p. 523).

Ms. Jackson has gone right to the heart of the legal system (the U.S. Constitution) to research the concept of immunity. The concept of immunity is found nowhere in the document.

Nowhere in our constitution is a "get out of jail free card" for any public officials, in my opinion this would have been repugnant to the framers. The concept of immunity by definition is anathema to the principles of a fair and democratic society.

At this point, the reader must be reminded that our research question is not about what constitutes a fair and democratic society, but rather what best serves the common good. The reader must also be reminded that our research is not about the principle of immunity but rather its subset of judicial immunity.

Forms of Immunity

We turn briefly to a discussion of some of the other forms of immunity and then we will proceed to the actual history and literature as it pertains to judicial immunity. When we speak of immunity it is helpful to know of which kind we speak. Basically, there are three types of immunity at play and within these types lie sub-types.

The three types of immunity in the United States consist of: sovereign immunity, governmental tort immunity, and official immunity. Sovereign immunity applies to the nation as a whole. Governmental tort immunity relieves the government from having to disperse monetary outlays for negligent acts of its agents. Under official immunity there are three additional categories; qualified, absolute, and foreign diplomatic immunity. Official immunity, in my opinion, is truly the one area that is wide open to abuse, as it relieves individual actors (select government employees) of responsibility for their negligent and/or unlawful actions.

Under qualified immunity, actors may enjoy immunity only if their actions are consistent with established law and policy. Absolute immunity relieves the actor from any responsibility of the fruit of their actions even if their actions were intentional, malicious and/or criminal.

Foreign diplomatic attachés enjoy absolute immunity, essentially their foreign status gets them a "get out of jail free" card. Their actions may result in deportation but they are shielded from any criminal and civil prosecution for any illegal actions.

Roots of Judicial Immunity

It is at this point in our literature review we will begin to delve into our core subject matter, judicial immunity. The history of judicial immunity goes far back indeed. J. Randolph Block (1980) shares some of that early history in his article titled: "Stump v. Sparkman and the History of Judicial Immunity." Block states that the principle of judicial immunity was codified in 1607 during an English trial:

> In *Floyd v. Barker,* Coke established the immunity of judges of courts of record, thus ensuring the independence of those courts from review by their newer rivals, especially the Star Chamber, which were under the control of the king. In so doing, Coke stated for the first time what are now considered the modern public policy bases of the doctrine of judicial immunity. First,
>
> > [I]f the judicial matters of record should be drawn in question . . . there never will be an end of causes: but controversies will be infinite; *et infinitum in Jure reprohatur…*
>
> Second, Coke noted that:
>
> > …insomuch as the Judges of the realm have the administration of justice, under the King, to all his subjects, they ought not to be drawn into question for any supposed corruption, which extends to the annihilating of a record, or of any judicial proceedings before them . . . except it be before the King himself; for they

> are only to make an account to God and the King, and not to answer to any suggestion in the Star-Chamber…

Third, a judge's having to answer to a collateral court such as the Star Chamber:

> …would tend to the scandal and subversion of all justice…

And fourth:

> ...those who are the most sincere, would not be free from continual calumniations…

> Coke's policy basis for judicial immunity can be summarized as follows: (1) the need for finality; …; (2) the need for protecting the independence of common law courts from rival courts controlled by the king; (3) the need for maintaining public confidence in the system of justice; and (4) a recognition that independent, conscientious judges would be most subject to prosecutions in the Star Chamber. (Block, 1980, p. 885-887)

Block has revealed the original thinking that led to the principle of judicial immunity. Possibly of greatest importance in 1607 was a concern by magistrate Coke of being overruled or held accountable to a higher court, specifically the Star Chamber of the king. Block also believed that Coke wished for decisions to be final, alluding to a concern for "unending causes" and "infinite controversies." Block also brought Lord Cokes assertion to the fore, regarding the loss of credibility of the lower court, if its decisions were subject to review and the possibility of being overturned by a higher court.

Paul T. Sorenson (1976) suggests that the doctrine of absolute judicial immunity may actually even predate Floyd v. Barker and Lord Coke. He postulates: "The doctrine of absolute judicial immunity has been established at least since 1607, and some elements of the concept were formulated two centuries prior to that date" (Sorenson, 1976, p. 112).

The roots then of judicial immunity are firmly within the realm of the English Common Law practices of the 17th century. For author D. Thompson, two considerations are of utmost importance when considering the principle of judicial immunity and common law as it applies not only to judges, who adjudicate at the local level, but also to justices who serve in the higher courts. Thompson in "Judicial Immunity and the Protection of Justices" states: "There are, then, two propositions which require careful examination: (a) that the protection in respect of acts done is identical with that for words spoken; (b) that all judicial officers acting within their jurisdiction are protected even when they act maliciously" (Thompson, 1958, 517).

Thompson would have us believe that justices should be protected for both words and deeds when acting in an official capacity. It is Thompson's further contention that immunity should be extended to justices even in light of proven maliciousness on their part. In this regard, Thompson's argument circles back to the oft heard mantra that I found repeatedly in the researched articles that "the justices would not be able to function if faced with the possibility of liability over their decisions."

John C. Hall would disagree with Thompson. Hall in his article "Constitutional Law: Civil Rights Act: Civil Liability of State Judicial Officers" states: "Against the fear that the judiciary will be less able to give considered judgements must be weighed the injury to litigants from unconstitutional judgements" (Hall, 1953, p. 52).

Judicial Immunity's Policy Progression in the U.S.

Judicial immunity then has crossed the ocean, and has been imported and incorporated into U.S. law. Many cases beginning after the Civil War began to pave the way toward a full embrace of judicial immunity.

On April 20, 1871 Congress enacted the Civil Rights Act of 1871. The Civil Rights Act of 1871, also known as the "Ku Klux Klan Act" was enacted as the curative to protect against the corruption, injustice**,** and misconduct that was rampant in the southern states, post-Civil War, especially by the Ku Klux Klan. Sub-section 1983 (42 U.S.C. § 1983), a part of the Act, would spell out the relief granted to citizens for constitutional torts. 42 U.S.C. § 1983, commonly referred to as "section 1983" provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. (Constitution Society)

What form might this declaratory relief take then in the courts opinion? John C. Jefferies, Jr. in his article “The Liability Rule for Constitutional Torts” provides an answer. Jefferies asserts:

> Yet in a broader sense, absolute judicial immunity, like absolute legislative immunity, is justified by the existence of an alternative remedy. That remedy is appeal. Appellate review does not provide any prospect of compensation – and is that way inferior to the remedial alternatives to legislative immunity – but it does offer an avenue of redress.

> And although appeal takes time and money, in most situations it provides a reasonable prospect of correction for judicial error. (Jeffries, 2013, p. 212)

Appeal may be a remedy provided to litigants; however, looking at appellate statistics, only about 21% of civil cases reaching the appellate court win the appeal process. For criminal appeal processes, only about 4% are successful (Derusha, 2013).

The Civil Rights Act of 1871 set the stage for what was to come next for the principle of judicial immunity, and while other cases had come before the court system relating to judicial immunity, it was in Bradley v. Fisher (1871), that the U.S. Supreme Court fully incorporated the common law elements of judicial immunity into U.S. Law. Sorenson stated:

> The first Supreme Court case to deal with the doctrine of judicial immunity was Randall v. Brigham, 74 U.S. 523 (1868). In that case the Court held that it was a "general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction." Some crucial elements of the common law doctrine relating to jurisdiction were not clearly accepted in Brigham*; however*, and it was not until the *Bradley* decision that it was explicit that the same common law doctrine that had been developed in England would also be the law in the United States. (Sorenson, 1976, p. 112)

Few changes occurred over the next century within the realm of judicial immunity, until 1967, when the Supreme Court heard another case regarding the subject. It was at this time that the Supreme Court in Pierson v. Ray decided that judicial officers were immune from suit under 42 U.S.C. § 1983. In this case a Mississippi justice of the peace had found four plaintiffs, all clergymen involved in Civil Rights activism, who had been attempting to integrate bus terminals, guilty of the misdemeanor of a breach of the peace. The clergymen in turn brought suit of

malicious prosecution under §1983. In their findings, the Supreme Court reasoned that the doctrine of judicial immunity was well established in common law and that the legislative history of §1983 contained no clear indication that Congress intended to disturb such judiciary immunity. The Supreme Court again sided with the defendant (the judge) and dismissed the case.

In 1969, the Yale Law Journal published an article titled "Liability of Judicial Officers under Section 1983." The article details the justification/s behind the Supreme Courts findings in Pierson:

> In turning to those policy considerations, one finds in Pierson only the following passage to justify judicial immunity:
>
> > It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.
>
> The Court did not indicate which of these reasons it was relying on, nor did it offer all the arguments for the immunity that the literature reveals. Three separable reasons, however, may be discerned from the opinion.
>
> The first of these is that a judge's decision is appealable, and, therefore, the party need not sue the judicial officer to vindicate his rights. (Yale Law Journal, 1969, p. 329)

So, the Supreme Court's first consideration is that judges should be immune from the fruits of their decisions due to the fact that their decisions are always appealable to a higher

court. This is not necessarily the case as we will find out in the next case to be considered, Stump v. Sparkman, some decisions are permanent.

The Yale Law Journal article points out that the second consideration found in Pierson "is that judicial officers would be hounded by dissatisfied litigants if they were civilly liable" (Yale Law Journal, 1969, p. 330).

The Yale Law Journal article added:

> The *Pierson* court also argued the much-supported view that judicial liability would detract from "principled and fearless decision making" and destroy the independence of judicial officers by intimidation, but any argument that the pressure of liability would encourage unprincipled read "wrong," apparently decisions must presume a general weakness in judicial fibre. (Yale Law Journal, 1969, p. 331)

In my opinion, in light of the Supreme Court's decision, the fact that a judge's decisions may be appealable holds little sway as an argument. While appeal processes can provide a remedy they are lengthy, expensive, highly uncertain and statistically have low percentage chances of winning for the litigant. I also concur with the Yale Review in that a weakness of judicial fiber would be evident in a judge who yielded to political and liability pressure in making unprincipled decisions during his tenure as justice.

Previous Supreme Court trials had also set precedent and provided rationale for judicial immunity. Recalling, Bradley v. Fisher in 1871, the Supreme Court reasoned that "judges owe duty only to the government, not to individual citizens" (Yale Law Journal, 1969, p. 332).

The Yale Law Journal article makes one last point regarding judicial immunity and the courts' credibility. The article states:

> Others have contended that respect for the judiciary would diminish and judicial dignity would suffer if judges were to be subject to liability in civil actions based on their judicial acts. Respect for the judiciary is desirable, but popular respect is hardly engendered by the knowledge that, by reason of a judge-made rule, a judicial officer may maliciously abuse his powers and leave the citizen without remedy. Respect for the judiciary is only one aspect of respect for the law, and if the two conflict, the latter should prevail. (Yale Law Journal, 1969, p. 333.)

The findings in Pierson were given wings a decade later in the landmark Supreme Court case of Stump v. Sparkman. In this case the qualification that a judge must be acting within his/her jurisdiction for immunity to exist was stretched to the limit. In "Stump v. Sparkman: The Doctrine of Judicial Impunity" Irene Merker Rosenberg informs:

> Ever since the Supreme Court's ruling in 1967 that state judges acting within their jurisdiction are absolutely immune from suit for damages under section 1983, legal commentators have persistently condemned this unqualified exemption. In *Stump v. Sparkman*, the Court gave its response to these critiques by not only reaffirming but also apparently expanding the immunity doctrine, thus facilitating the use of still another mechanism for federal courts to avoid the merits of constitutional claims.
>
> On July 9, 1971, Indiana Circuit Court Judge Harold D. Stump received Mrs. Ora Spitler McFarlin's petition to have her fifteen- year-old daughter, Linda Spitler, sterilized. The petition, prepared by the mother's attorney, alleged that Linda was "considered to be somewhat retarded" and had associated "with older youth or young men." The petition further suggested that a tubal ligation was in the child's best interest as it would prevent "unfortunate circumstances." On the same day the petition was

submitted, Judge Stump approved it without notice to the child, without a hearing or the receipt of any evidence, without appointment of either counsel or some guardian ad litem to represent the girl, without docketing the case, and indeed apparently without ever seeing Linda. One week later, believing that an appendectomy was being performed, Linda was hospitalized and sterilized. Approximately two years thereafter, she married and, after being unable to conceive, consulted a physician and ultimately learned that she was sterile. Linda and her husband, Leo Sparkman, brought a suit for damages under section 1983 against Judge Stump, Mrs. McFarlin and her attorney, the doctors, and the hospital.

The district court dismissed the suit as to all parties on the grounds that Judge Stump, the only state official named as a defendant, was absolutely immune from suit and consequently no state action could be shown. The Seventh Circuit reversed, holding that Judge Stump was not acting within his jurisdiction under Indiana law and thus was not entitled to absolute immunity. The Supreme Court in turn reversed the court of appeals and held that Judge Stump was absolutely immune from suit. In reaching this result, the Court articulated a two-prong test. To come under the umbrella of immunity, a judge must perform a judicial act and must have subject matter jurisdiction over the question. Applying this standard to Judge Stump, the Court held that a judge of a court of general jurisdiction with broad authority to hear and decide "all cases" has subject matter jurisdiction to entertain any matter unless specifically prohibited from doing so by statute or case law. The facts in *Stump* also satisfied the second element of the Court's test. Approval of the petition for sterilization constituted a "judicial act," notwithstanding the informal, ex parte nature of the proceeding, because approving

> petitions with respect to minors was a "function normally performed by a judge . . . in his judicial capacity." Thus, a judge's failure to comply with even the most rudimentary principles of due process does not divest him or her of immunity. (Rosenberg, 1978, p. 833-835)

Rosenberg clearly articulates that this may be a problem. If even the most basic of functions and responsibilities can be ignored by a judge without any possibility of censure, is there any possibility of legitimacy? In my opinion, the trade-off in this policy issue is between judicial legitimacy and judicial impunity. The argument that judges could not operate under fear of liability should be offset by the lack of legitimacy that the same policy fosters.

Judicial Immunity Applies to All Judicial Officers

Judicial Immunity by definition applies to all judicial officers, not just judges and justices. In his article titled "The Civil, Criminal and Disciplinary Liability of Judges" John O. Haley explains:

> Absolute immunity from civil liability is not limited to judges. Judicial decisions have extended it to all persons exercising judicial functions, including justices of the peace, magistrates, other lay judges, court commissioners, court-appointed mediators, law clerks, and others performing judicial or quasi-judicial acts. In *Butz v. Economu,* for example, the U.S. Supreme Court held that the immunity principle applied to the adjudicatory functions of administrative agency hearing examiners and administrative law judges, Judicial immunity has been held not to apply, however, to private persons alleged to be co-conspirators with a protected judge using the judicial process to defraud. (Haley, 2006, p. 284)

Potential Policy Remediation Strategies

Are there any remedies then to this principle and policy? For this review, we will rely on Peter H. Schuck; in the literature reviewed for this study, his was the only voice that offered alternatives to the current U.S. judicial immunity policy. In "The Civil Liability of Judges in the United States" (1989), Schuck proposes four possible opportunities for change and remediation in the principle of judicial immunity. Schuck has labeled the proposals: the tort approach, the regulatory approach, the penal approach, and the electoral approach.

Tort approach.

Schuck articulates the tort approach as follows:

> …the law should confer absolute immunity on individual officials but should provide a reformed tort remedy against the government agency that employs them, as well as a more effective arrangement for imposing administrative sanctions against official wrongdoers. The common law principle of *respondeat superior*, or enterprise liability, is of course well established in American private law. But for complex constitutional, historical and political reasons, enterprise liability has been largely rejected in American public law. At both the federal and state levels, governments continue to enjoy the protection of sovereign immunity, or its functional equivalents, to a considerable extent.
>
> The enterprise liability approach would significantly improve compensation for governmentally inflicted wrongs by providing a solvent defendant. If properly implemented, it would also refine the deterrent effects of civil liability. It would target liability not upon the individual official, who is often poorly situated to alter the conditions producing the error, but upon the organization, which is likely to be in a better position to influence individual officials' behavior in socially optimal ways. (Schuck, 1989, p. 667)

Schuck's proposal then would entail seeking relief for a constitutional tort from the judge's superior agent or agency. This is frequently seen in the business realm, where the business owner or management team is held responsible for the actions of their employees. Of note, and as Schuck points out, generally the business owner has more resources with which to compensate an injured litigant than the offending employee; so too, the judge's superior organization has deeper pockets than the judge does. Schuck also states the obvious, the judges' superior can have a greater effect in shaping and controlling the judge's future behavior than a onetime penalty in a "1983" action.

Regulatory approach.

Schuck's next approach the "regulatory approach" would remove the litigation process altogether and establish review boards. Schuck asserts:

> A very different kind of remedy would rely not on civil liability but on administrative review mechanisms that would prescribe standards for judicial conduct, educate judges to observe those standards, and enforce them against individual offenders.
>
> In 1980, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act in order to address the problem of judicial misconduct by federal judges and magistrates. Upon receipt of a written complaint, a committee of judges investigates the complaint and files a written report, containing findings and recommendations, with the judicial council for the region. The council or the Judicial Conference of the United States, to which the council may refer the matter, may impose a range of sanctions on the judge, including refusal to assign new cases to the judge but not including formal removal of the judge. Each of the councils has been considering

> adoption of model procedural rules to govern their handling of complaints. (Schuck, 1989, p. 668)

Schuck's only qualifier in his above recommendation is that this type of reviewal must be conducted properly, to date he states that the efforts have been doubtful and token at best. Schuck states that of the 1000 possible cases brought against judges before the review boards in 1986, all were dismissed. Likewise, in 1987, of the number of cases filed, only seven led to any disciplinary action. These actions were done confidentially and led to no actual public apology. In Schuck's view, this approach while viable, is also doubtful, due to "the good ole boy" mentality that exists amongst the judgeship.

Penal approach.

Schuck admittedly acknowledges that the next approach like the last approach seems to be a doubtful one. Schuck explains the penal approach and its limitations thus:

> The traditional, constitutionally-sanctioned methods for disciplining serious judicial misconduct in the United States are impeachment proceedings in Congress and criminal prosecutions. I say "serious" misconduct because under the U.S. Constitution, judges (and other federal officials) may be impeached only for treason, bribery, "or other high crimes and misdemeanors," a restriction that was intended to avoid threats to judicial independence not only from the executive and legislative branches but from other judges as well. Neither of these remedies is likely to deter judicial misconduct effectively, especially as to actions that are of public concern but do not constitute impeachable or prosecutable offenses.
>
> Impeachment is a political remedy designed to remove an official from office; it involves a formal accusation (impeachment) by the House of Representatives and a

> formal trial by the Senate. Because it is so cumbersome and protracted, it is seldom employed. In 200 years, there have been only 16 impeachments of federal officials; only 5 of these have resulted in convictions, all of them judges. The most recent of those occurred in 1986 when Judge Harry Claiborne was impeached and convicted by the Senate of falsifying tax returns (for which he had previously been criminally convicted) and for the "high misdemeanor" of bringing the federal judiciary into disrepute. Another judge, Alcee Hastings, was impeached by the House in 1988 and will face Senate trial during the summer of 1989 (as a reminder this article was written in 1989) on charges of perjury and conspiracy to solicit a bribe. Judge Hastings is the first public official ever to face a Senate impeachment trial after having been acquitted by a jury of the same charges. On May 10, 1989, the House voted to impeach still another federal judge, Walter Nixon, who is currently serving a prison sentence after having been convicted of perjury.
>
> In certain obvious respects, impeachment is a decidedly ineffective remedy for judicial misconduct. Judge Claiborne refused to resign until he had been convicted; five years elapsed between his original conviction and his removal from office. Judge Hastings still sits and apparently continues to hear cases. And Judge Nixon continues to collect his salary from prison. (Schuck, 1989, p. 670)

As stated earlier Schuck admits to the inability of this approach to bring satisfactory relief for damages done by sitting judges. Schuck in effect acknowledges this remedy only for the political and personal fallout that the stigma of the impeachment process places on the offending official. In his view, it can only be employed under extreme conditions and involves a time and resource consuming process. Due to the closeness of association between the

judgeship and the prosecutorial staff, there is doubt that a fair and unbiased process can even occur. Many prosecutors may be reluctant to bring suit against former close colleagues.

Electoral approach.

Schuck's final approach to finding a solution to the shortcomings in the judicial immunity principle, is the electoral process. The ballot box may be the solution to censuring and replacing a rogue judge. This can happen in at least 43 states, as in these states some or all of the judges are elected. When facing the uncertainty of being re-elected, a judge may be more mindful of the practice of his jurisprudence. Again; however, Schuck admits that this is a poor remedy and fraught with problems. Schuck discloses:

> The election of judges has a long and controversial history in the United States, one that is linked to our populist traditions. In my view (and that of many other observers), election is a very poor way to recruit and select judges. There is no clear consensus in the United States, however, concerning the relative merits of elective and appointive benches. Party patronage is a common route to judgeships in both elective and appointive systems, but appointive benches generally seem to enjoy higher prestige and qualifications than elected ones. But even here the criteria for evaluating these differences are controversial and there are always exceptions.
>
> What does seem clear, however, is that the electoral process is unlikely to effectively control judicial misconduct. In order to protect judicial independence, elected judges must be given relatively long terms of office. This means that the risk of electoral defeat, like that of impeachment for appointed judges appointed for life, is a weak deterrent until a new election is imminent. Indeed, to the extent that the need to face

> election causes political considerations to influence judges, certain kinds of wrongdoing may actually be encouraged. (Schuck, 1989, p. 672)

Schuck makes a valid point here as to the ineffectiveness of the electoral process in compelling correct judicial behavior. Like politicians, judges may only feel threatened at election time. Due to the long time between elections, this type of pressure may only be felt once or twice during the judge's entire tenure.

Schuck makes some salient points in the close of his article that I feel are germane to our study and I will include them here:

> …judges enjoy a political and symbolic importance in American life that is perhaps unique among western democracies. This importance helps to explain both why the civil sanctions for judicial misconduct are so weak, and why there is dissatisfaction with the traditional remedial structure as a whole. Americans value judicial independence so highly that they are willing to allow judges' victims to go uncompensated in order to avoid threatening it. But in view of the enormous power that judges wield in the United States, Americans also remain uncomfortable with judges' almost complete immunity from accountability for even extreme misbehavior. That discomfort has become so great that new judicial regulatory mechanisms have been created at both the federal and state levels.
>
> Although we may feel that we have resolved the basic tension that has led to these reforms, the truth is that we have not. Except for the penal and electoral approaches, which are of limited value, judges essentially make and administer the rules that govern themselves; the disciplining of judges is confided largely to other judges. It is notable that in the United States, at least, judges are in this respect quite privileged relative to

> other officials, enjoying an immunity from civil liability that is the envy of their counterparts in the executive (and, to a lesser degree, the legislative) branch. Yet the reasons for this difference are far from persuasive. Moreover, because the nature and extent of judicial misconduct are unknown and perhaps unknowable, no one can say how much injustice this system deters and how much it encourages. (Schuck, 1989, p. 672)

Common Good

Prior to closing this chapter, we will look one more time at the principle of the Common Good. Charles Sherover in his article "The Temporality of the Common Good: Futurity and Freedom" shares a final consideration for our analysis. Sherover explains:

> …Freedom entails power: A specific freedom is a social grant of power to do certain acts, to honor obligations, to utilize property, to press claims on the social whole or, for the magistracy, to press claims on the citizenry. Depending on position and function, it is thus the power to make decisions that will bind others. Specific freedoms are grants of power to control developments of future time. Such power must be finitized. Its excess invites corruption, as Lord Acton taught, and few among us are able to resist its seductive rationalizations. As Aristotle might have urged, its excesses become self-defeating. Specific freedoms, as powers to control futurity, need restriction to teleological adequacy. For ourselves, we need power adequate to exercise the specific freedoms we choose to utilize but it needs to be moderated by distribution among fellow-citizens. For our officials, we need power adequate to discharge their specified responsibilities but if not checked it can become tyrannous, and if not prudentially moderated it can faithfully evolve into that over-protective paternalism which

> evaporates individual accountability. The free powers of any citizen are both invigorated and finitized by his participation in a society that, by seeking freedom for all, must thereby prescribe restrictions on the powers of each. (Sherover, 1984, p. 490)

For the Common Good, Sherover tempers freedom and power by limiting both. He sees this as essential for both those who wield power and those who are subject to it. Recalling our definition of the Common Good from Chapter One, the Common Good comes with a cost, that cost is responsibility to all others who share the Commons. It follows that those who wield the most power over the Commons should also be the most transparent, the most responsible**,** and the most selfless.

Chapter Four – Policy Analysis: Popple & Leighninger Method

Utilizing the Popple & Leighninger method of policy analysis this chapter will synthesize and integrate the researched information found in the literature review. While objectivity is the goal during the analysis portion of this project, it is also recognized that subjectivity will come into play during this segment due to personal interpretation of the literature and subject matter. All attempts will be made to minimize or identify such instances of personal bias.

Following the Popple & Leighninger design protocol, beginning with this overview section, we will progress with a historical analysis of judicial immunity, examine its social impact, determine, if possible, any economic consequences associated with it, evaluate its political dimensions and significance, tender findings related to the policy, and finally offer suggestions to improve the policy's service to the common good.

Overview

Judicial Immunity is central to the fabric of our society in that the judiciary plays a central role in the lives of every citizen, every day. For most citizens, this phenomenon remains in the periphery of their daily experience unless they are called to jury duty or find themselves in front of the court. I believe, daily, all citizens in the country are subject to these decisions even if they happen in other jurisdictions or locations. The power of the Judicial Branch of the government is staggering, it is also equal to if not greater than that enjoyed by the other two branches of government, the executive and legislative.

Because Judicial Immunity is all but hidden and yet a central figure in all our daily affairs and that of the Common Good it is of great importance to understand it and evaluate it against the needs of the Common Good. The following analysis will attempt to shine a

spotlight on the subject and if indicated offer alternatives within the policy or alternatives to the policy itself.

Historical Analysis

The literature review provided some interesting insights into the history surrounding Judicial Immunity. The policy stretches back into antiquity and English Common Law. The literature review revealed that judicial review, as a policy was codified during an English trial in 1607. Some scholars however place the date as much as two centuries earlier. Regardless of the actual first date of appearance, the policy originally was an entitlement enjoyed by the King of England and his appointed emissaries. Originally termed the "Kings X", in its earliest form, the principle derived from the divine right of Kings. The King in theory was infallible and divinely inspired in his leadership and edicts. Hence the ideation of "the King makes the rules; therefore, He is immune from them." This practice then became Common Law in England. The U.S. Court system in its infancy adopted the Common Law rule of England and used it as the foundation of much of its civil decision-making process.

While the U.S. Court system embraced the principles of English Common law from its inception as an independent country, they were not totally adopted until after the Civil War. The Civil Rights Act of 1871, attempting to combat the Jim Crow laws of the South, provided the basis for the Supreme Court's decision regarding the absoluteness of Judicial Immunity. Bradley v. Fisher, in the same year, 1871, finalized the Supreme Court's decision that English Common law would in fact be the law of the United States as well.

For almost a century, there was no further debate by the Supreme Court regarding Judicial Immunity. In 1967, the Supreme Court heard another case regarding the subject. It was at this time that the Supreme Court in Pierson v. Ray decided that judicial officers were

immune from suit under 42 U.S.C. § 1983. A few years later in Stump v. Sparkman the Supreme Court concluded that a judge shall not be held liable for an action that he/she took that was in error, no matter how egregious or unappealable that action/decision might be.

From a historical perspective, as evidenced by the reviewed literature, the concept of immunity, especially absolute immunity, has been looked down upon by both lawmakers, and scholars alike, as self-serving. In conducting the literature review it was apparent that few if any authors perceive judicial immunity as a good policy. In fact, outside of the judiciary, there was not a single article that I could find under the search parameter of "Judicial Immunity" that espoused the concept as a good policy and certainly not one that serves the Common Good.

Social Analysis

When looking at Judicial Immunity through a social lens its benefits to the Common Good, or lack thereof, become more apparent. For the Judicial system to effectively fulfill its social role as the arbiter of justice and as an interpreter of law it must remain fair and impartial. In the eyes of the public, legitimacy and transparency are two highly desired traits to any official government office, be it an elected office or an appointed one. From the literature reviewed, the authors felt that the principle of Judicial Immunity was inherently unfair, lacked transparency and ultimately led to a lack of legitimacy on the part of the court. Justice implies equity under the law; whereas immunity equates to a shield and protection from justice.

Immunity for certain individuals based on the seat that they sit in, the hat that they wear, or the position or office that they hold, establishes an elite status not enjoyed by all within the Commons. Part of the definition for the Common Good is that all individuals with in the Common's must share and enjoy the same privileges that all others enjoy. The establishment of

a separate set of rules for the personal and professional conduct of one set of people, not enjoyed by another set, then negates the idea of the Common Good.

From the pro-immunity standpoint, the justification that the judiciary would not/could not serve its function without immunity in place, would argue the other side of the coin. For the Common Good to be served judges must be unfettered from fear of litigation in order to perform their assigned duties. In this regard, if immunity, in fact allows for judges to fully function in their assigned tasks, then by most standards this would qualify as serving the Common Good. Unfortunately, with the immunity policy in place, it is impossible to verify if in fact it serves its stated purpose of insulating the judges from immunity, so much so that they are able to fully perform their duties without fear of civil and monetary reprisal.

The Common Good requires a system of governance and justice that applies equally to all citizens no matter their status or station in life. The creation of a system of rule then that is without censure and oversight simply establishes an elite group of citizens who are unique, separate and discrete from the common man. This separate segment of society then fractures the Commons and provides privilege to one class of individuals not enjoyed by all in the Commons.

When considering the definition of the Common Good, it struck me that while good can be common, it might not be enjoyed by all individuals. To illustrate this point, an example that comes to mind is of World War II. On D-Day, thousands upon thousands of allied troops were killed at Normandy. For those killed or injured on that day, no one would argue that their experience was anywhere near good. Yet, the aftermath of that day, despite all the death and destruction, can only be described as serving the Common Good.

Economic Analysis

As was mentioned in a previous chapter, this particular metric may be a hard one to assess. Little to no information can be ascertained as to the actual costs of litigation in the U.S. Furthermore, it is impossible to assign a dollar value to a litigation event that fell victim to poor judicial procedural practice or poor judicial decisions. There is simply no way to track these types of economic impacts.

Given the multiplicity of courts in the U.S., state to state variation in legal codes and practice, coupled with the hidden and not so obvious costs associated with the defense process, a true economic picture of the judicial immunity's impact is simply unobtainable.

What is certain, in my opinion, is that the policy of Judicial Immunity has most definitely affected many individuals negatively in regards to its economic impact on their financial resources. How much so, and with what frequency is unknown.

Once again, viewing this rubric from a pro-immunity standpoint, and that held by the majority of the judiciary, without immunity in place, the judiciary would cease to function at its peak. This is turn could cost the government heavily in regards to its fiscal resources and not serve any value to the Common Good.

Political Analysis

Schuck from our literature review states that: "The American judiciary is a central governing institution that exercises enormous political power. Perhaps equally important, our courts function as the ultimate legitimators of the exercise of power by other public and private actors" (1989, p. 657). Schuck also shared a quote from Alexis de Tocqueville, he credits de Tocqueville with the observation "almost all political questions become judicial questions."

As I stated at the beginning of Chapter One, in a society that elevates the concepts of freedom and the furtherance of the Common Good, no group of individuals can have a greater impact on that society than that of its judges.

I completed my undergraduate studies in Political Science, with that understanding I believe I have a firm grasp on how our government operates. In my view, the political power of the judiciary is mostly without functional oversight, it is vastly misunderstood and grossly underestimated by the common man. Far too much importance is placed by the Commons on the executive and legislative branches, without a true understanding and appreciation of the political clout wielded by the court system.

Within the last several weeks of the writing of this paper, the current U.S. President penned an executive order (EO) that restricted travel from certain countries identified as having terroristic ties. Within hours the executive order was blocked by judicial decree. In this instance, politically, the judiciary trumped the executive branch. In my opinion, this was done with a political agenda in mind.

In the U.S. there are two ways in which judges make their rulings and that is dependent on which view of the U.S. Constitution they espouse. Those judges called Constitutionalists affirm the Constitution down to the letter attempting to interpret the Constitution narrowly and exactly as it is written. The second way in which judges view the Constitution is as a living and evolving document. In this interpretive process, the judges make assumptions and best guesses as to how the framers of the Constitution would define and practice the law today. Most judges fall into one or the other of these two camps. Some judges utilize both approaches depending on the issue and case at hand. Both types of judges can and do rule with political bias. With

Judicial Immunity, judges then can influence the political process and do so in a partisan fashion without fear of liability for their actions.

For some judges, the pinnacle of their career is to actually create new law. This law making is facilitated by the creation of a new legal precedent, established during a legal proceeding. Legal precedent in reality becomes new law as it sets the standard by which the law can and will be interpreted in the future. Depending on career and political aspirations sitting as a judge can be quite powerful in shaping political and social policy.

The political distribution of the members of the Supreme Court can also be extremely powerful politically. For this reason, most sitting presidents attempt to nominate judicial candidates to fill vacancies based on the judge's political philosophies, choosing those that closely align with their own political and social views. And, for this very same political reason, most minority political parties in the House and Senate attempt to block the sitting president's nomination pick, understanding the true political power of the nominee in the future.

Political power in and of itself is not a bad thing for the judiciary to have and to exercise as long as it is utilized to uplift the Common Good. All too often political power is abused to advance the goals of one party over that of the other. Utilizing judiciary powers for such goals is antithetical to the Common Good.

Policy Evaluation

Judicial Immunity, as a U.S. policy, comes from a surprising source. Given the level of antipathy that the Framers of the U.S. Constitution had for anything related to the English Monarchy, it is curious that the Judiciary would embrace such a policy. The policy, originating in England in the early 17th century was originally intended to safeguard the divine right of

kings. By proxy, this policy was extended to the officers who served the monarchy in a judicial capacity, in theory extending the kings divine right to his agents.

This policy in time became English Common Law. Like other systems of control borrowed from our English forebears, the Common Law practice was also adopted over time in the United States. The judiciary embraced the policy of immunity early on, but the Supreme Court did not codify it into actual law until almost one hundred years after the formation of the U.S. Constitution.

Loosely interpreting the Civil Rights Act of 1871, the Supreme Court legitimized the policy in a trial in the same year. Almost a century would pass before the Supreme Court would revisit the policy, again reaffirming it. Soon after this decision, the Supreme Court in another case, would extend the immunity coverage to include acts and decisions made in error, done maliciously or committed through negligence. The only qualifier to this immunity is that the judicial officer committed the act while serving within the scope of his/her jurisdiction.

From a historical perspective, judicial immunity, given its origin has a dubious place in our free democratic republic. From a social perspective, this would be equally true.

Socially, judicial immunity bestows a special privilege upon a select group of people within the Commons. Privileges afforded to one class of people and not another, would negate or lessen the commonality shared by all; in effect, creating an elite class that enjoys social and political privilege at the expense of the rest of the Commons.

The absolutism that is a quality of the immunity imposed under judicial immunity engenders a quasi-divinity status to those who fall underneath its umbrella of protection. This quasi-divine (recall the divine right of kings) status confers an infallibility to their decision-making process. Given that judges are not divinely inspired, yet human, it follows that their

decisions may also not be of a divine nature, but rather quite human and full of hubris. Knowing this, it is questionable then that the absolutism afforded immunity would socially serve the greater Common Good, rather is seems to be a self-serving concept that fosters an elitism not enjoyed by the Commons.

Alternatively, following the pro-judicial immunity argument, immunity may serve the Commons socially in that judges are unfettered by fear of reprisal for their judicial decisions, thus rendering correct, fair, and swift justice through their legal ruling power.

Due to the lack of information readily available regarding the true economic picture created by the judicial process, it is impossible to assess just how judicial immunity may skew the numbers and in which direction. Reason would dictate, however, that the immunity afforded to judicial officers does in fact shield them from monetary loss, not so though for those litigants who lose a court case due to improper judicial practice and/or procedure. With this in mind, economically the flow must then move away from the litigants and move towards the court system.

The political clout of the judicial branch is staggering and greatly underestimated by most citizens of the Commons. The Judiciary has the final say in all matters, political, social and legal. Judicial Immunity may act as a shield of protection for those judges who aspire to a "rule of politics" as opposed to a "rule of law." The "rule of politics" adherents see the U.S. Constitution as a living and evolving document open to broad interpretation. In contrast, "rule of law" advocates believe in a strict and narrow interpretation of the Constitution. For both sides of this dichotomy, party line politics generally takes center stage and colors the decision-making process.

To appreciate the political power of the judiciary it is sufficient to know the importance that most executives (presidents) place on being able to stack the Supreme Court with politically aligned appointees. Of equal value is the knowledge that the opposing political party does all in its power to block such political nominations. Judicial Immunity may shield bad actors from politically motivated decisions that are partisan in nature, favorable to one party, but harmful to the overall Common Good.

Parroting de Tocqueville, all political questions become judicial ones. In my view, many social questions also become judicial ones. As purveyors of justice and interpreters of the law, the judiciary enjoys a unique place in the governance of our country. Not only do judges establish legal precedent and laws they also establish new social norms. As a case in point, Roe v. Wade created a legal precedent that allowed for a woman to choose legally whether to carry a pregnancy to full term or not. This legal precedent paved the way for a now socially accepted, new social norm that has become firmly embedded in the social fabric of our society, so much so, that close to 52 million abortions have been performed from 1970 until 2013 in the U.S.

Current Proposals for Policy Reform

From our literature review, Peter H. Shuck has proposed four possible remedies or reforms to the current judicial immunity policy. The first proposal was the tort approach, it consisted of filing a tort against a judges' superiors, as opposed to the judge himself. In this approach, it is felt that pressure can be brought to bear on the errant judge by his supervisor/boss. This type of scenario happens frequently in the business world, where a business owner is compelled to be legally responsible for the actions of his subordinates. In business when such an action takes place, internal discipline of the offending party is generally swift and final. So too, it is assumed would be the effect in the judicial world.

Shuck's second proposal is a regulatory approach, in which an independent panel or review board would monitor judicial actions and provide sanctions as relief for poor performance and/or behavior. This method is currently employed and has been successful to a limited degree. Where does the authority to hold these tribunals exist? From the United States Courts website comes the following information:

> The Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364 establishes a process by which any person can file a complaint alleging a federal judge has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts" or has become, by reason of a mental or physical disability, "unable to discharge all the duties" of the judicial office.
>
> The Rules for Judicial-Conduct and Judicial-Disability Proceedings, as amended on September 17, 2015, provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Judicial Conduct and Disability Act.
>
> The judicial conduct and disability review process cannot be used to challenge the correctness of a judge's decision in a case. A judicial decision that is unfavorable to a litigant does not alone establish misconduct or a disability.... (http://www.uscourts.gov)

The third possible remedy proposed by Shuck is the penal approach. In his estimation; however, this is not a good solution for a variety of reasons. The first and foremost reason is that a judge can only be tried for serious offences such as treason or bribery. Secondary to this, is that before a criminal trial can proceed against an errant judge, he/she must first be impeached and removed from office. As seen from the literature review, even these measures may prove unfruitful should a judge decide that he/she does not wish to leave office.

The fourth remedy according to Shuck is the ballot box or the electoral approach. Shuck decries this approach as being rife with problems too. Essentially, according to Shuck, due to the long periods between election cycles for elected judges, they may operate with impunity for the entire period of their tenure and only monitor and curtail their bad behavior during election cycle years. Of note too, many judges are appointed and are not subject to election cycles and the capriciousness of the voting public.

There are two other possible remedies not mentioned in the literature review that are viable possibilities for reform. One is the complete abolishment of the policy altogether. This will probably never happen as the one group that would stand to lose the most under this edict would be the judiciary itself. Self-preservation then would prevent this remedy. A second remedy not found in the reviewed literature would be downgrading the immunity from absolute to qualified. This in my estimation is perhaps the solution and the best practice in affording immunity to the judiciary, while ensuring at the same time that the judiciary does not abuse its legal authority.

Chapter 5: Reflections and Conclusions

Personally, I have had great difficulty in accepting the concept and embedded practice of judicial immunity. In my view, one only requires immunity if one has transgressed the criminal law or engaged in an act that has created a civil tort. It is inappropriate in my belief system to tender relief in the form of immunity for such transgressions.

With this understanding, I began my research with a bias, a bias however that I knew had no place in this study and project. Bearing that in mind, I took great efforts to ensure that my bias did not overdrive and steer the paper toward a predisposed supposition prior to the complete investigation of the immunity policy. Oddly, I entered this study with a total conviction that immunity in all of its forms was bad policy for the United States and the Common Good. After engaging in this project my views have relaxed somewhat. I now can allow for and see the actual need for immunity in the judicial process, but only on a qualified basis.

When engaging in the literature review, all of the articles that I identified as pertinent to the research question were in fact negative toward the practice of absolute immunity. Apparently, my biases are shared by the majority of authors identified in this subject. That said, after having read dozens of peer-reviewed articles over the years, regarding immunity policies, my belief has softened somewhat. I can now acknowledge the merits to the argument that without some form of immunity it would be deleterious to the scope and practice of most judges in performing their duties. While I can agree to some forms of immunity I remain uncertain how that immunity should apply. In many aspects, qualified immunity appears much more attractive and a sensible alternative to absolute judicial immunity.

While conducting the research, I was struck by the lack of reliable financial information regarding the true costs of litigation in the U.S. Of greater concern, is the lack of ability to monitor and track economic burdens shouldered by victims of the judicial process. Equally concerning, is the potential for the finality of the judgement, especially in a death sentence scenario or as was seen in Stump v. Sparkman, the permanent removal of the litigant's ability to procreate.

Also of high concern is that the US Supreme Court upheld the immunity policy in Stump v. Sparkman and found that a judge, while acting within his jurisdiction, may act both negligently and maliciously without fear of civil litigation or censure. This simply establishes an elite class of citizens who operate under a different standard than the rest of the Commons.

It is at this point that we must return to our research question, does judicial immunity in fact serve the Common Good? Judicial Immunity clearly negatively affects certain individuals, but individuals, while a part of the Commons are not the whole Commons. This is where my opinion changed. My first reactions were on an individual and personal level. In retrospect, and stepping back from the individual level to a Commons level view, I can concede the merits of immunity afforded to those that through no fault of their own, performing their duties with all due diligence, being faithful to judiciary principles and acting without malice should in fact be free from any liability that their judgement might create. Qualified immunity then may be the long sought for answer to the Judicial Immunity question held by the policy's critics. As long as the Court system continues to embrace the absoluteness of the Judicial Immunity policy in the U.S., other possible policies and remedies cannot be implemented, much less considered.

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Appendix A

Civil Rights Act of 1871 and Cited Legal Cases

Civil Rights Act of 1871

42 USC CHAPTER 21 - CIVIL RIGHTS

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 - CIVIL RIGHTS

Sec.
1981. Equal rights under the law.
1981a. Damages in cases of intentional discrimination in employment
1983. Civil action for deprivation of rights.
1988. Proceedings in vindication of civil rights.

Sec. 1981. Equal rights under the law

(a) Statement of equal rights
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
(b) "Make and enforce contracts" defined
For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
(c) Protection against impairment
The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Sec. 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery
(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this

section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party -

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section -

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means -

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who

may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Sec. 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as

modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

Bradley v. Fisher

BRADLEY v. FISHER.
80 U.S. 335 (13 Wall. 335, 20 L.Ed. 646)
BRADLEY v. FISHER.
Decided: Not Found

- opinion, FIELD
- dissent, DAVIS, CLIFFORD

ERROR to the Supreme Court of the District of Columbia.

This was an action brought by Joseph H. Bradley, who was, in 1867, an attorney-at-law, practicing in the Supreme Court of the District of Columbia, against George P. Fisher, who was then one of the justices of that court, to recover damages alleged to have been sustained by the plaintiff, 'by reason of the wilful, malicious, oppressive, and tyrannical acts and conduct' of the defendant, whereby the plaintiff was deprived of his right to practice as an attorney in that court. The case was thus:

On the 10th of June, 1867, the trial of John H. Suratt, for the murder of the late President Lincoln, was begun in the Criminal Court of the District and continued until the 10th of August, when the jury, failing to agree on a verdict, was discharged. The defendant was the presiding judge in the court during the progress of the trial, and until its termination, and the plaintiff was one of the attorneys who defended the prisoner. Immediately on the discharge of the jury, the court thus held by the defendant made the following order, which with its recitals was entered of record:

'On the 2d day of July last, during the progress of the trial of John H. Suratt for the murder of Abraham Lincoln, immediately after the court had taken a recess until the following morning, as the presiding justice was descending from the bench, Joseph H. Bradley, Esq., accosted him in a rude and insulting manner, charging the judge with having offered him (Mr. Bradley) a series of insults from the bench from the commencement of the trial. The judge disclaimed any intention of passing any insult whatever, and assured Mr. Bradley that he entertained for him no other feelings than those of respect. Mr. Bradley, so far from accepting this explanation or disclaimer, threatened the judge with personal chastisement. No court can administer justice or live if its judges are to be threatened with personal chastisement on all occasions whenever the irascibility of counsel may be excited by imaginary insult. The offence of Mr. Bradley is one which even his years will not palliate. It cannot be overlooked or go unpunished.
'It is, therefore, ordered that his name be stricken from the roll of attorneys practicing in this court.

'GEORGE P. FISHER,
'Justice of the Supreme Court, D. C.'

The present suit was founded upon this order, which was treated in the declaration as an order striking the name of the plaintiff from the roll of attorneys of the Supreme Court of the District, and not as an order merely striking his name from the roll of attorneys practicing in the Criminal Court of the District. The declaration had two counts, and was entitled and filed in the Supreme Court of the District.

The first count alleged that the defendant caused the order (which was set out at length) to be recorded 'on the minutes of the Criminal Court, being one of the branches of the said Supreme Court;' that the several statements, contained in the order were untrue, and were specifically denied; and that the defendant 'falsely, fraudulently, corruptly, and maliciously intended thereby to give a color of jurisdiction' for making the order that the name of the plaintiff 'be stricken from the roll of attorneys practicing in this court,' whereby the plaintiff had been injured, and claimed damages, $20,000.

The second count alleged that the defendant 'wantonly, corruptly, arbitrarily, and oppressively intending to remove the plaintiff' from his office as an attorney-at-law, 'caused to be entered on the records of the Supreme Court of the District of Columbia, Criminal Court, March Term, 1867,' the order in question, which was set forth at length, 'the same being an order removing the plaintiff from the office of an attorney-at-law in the said Supreme Court of the District of Columbia,' whereby he was greatly disturbed in the enjoyment of his office and prevented from having the use and benefit thereof, in so full and ample a manner as he otherwise might and would have had.

The declaration also averred that the order was made without notice of any kind to the plaintiff, and was summary, that there was no complaint made by him to the justice, and that he did not accost him while the court was in session, nor immediately on the court's taking a recess and as the presiding judge was descending from the bench, as was stated in the order, nor did he, the plaintiff, at the time and place mentioned in the order, address the justice at all after the court had taken the recess, until the judge had passed some time in a private room, and had left the same and gone out of the court-house; and the great body of auditors, jurors, witnesses, clerks, and officers of the court, and the jury impanelled, and the prisoner on trial had left the court-house; and so the declaration proceeded to say, 'the said judge wilfully, maliciously, corruptly, and unlawfully fabricated the said order to give color and pretence to his jurisdiction in the premises.'

By reason of which unlawful, wrongful, unjust, and oppressive acts of the defendant, the plaintiff alleged that he had been deprived of emoluments, and had lost sums of money which would otherwise have accrued to him from the enjoyment of his office and from his practice as an attorney in the courts of the county and district, &c., &c., and therefore he claimed $20,000 damages.

Pleas: 1st, the general issue, 'not guilty;' and 2d, a special plea, that before and at the time of the alleged commission, &c., the defendant was one of the justices of the Supreme Court of the District of Columbia, and, as such justice, was regularly and lawfully holding, by appointment of said Supreme Court of the District of Columbia, in general term, at the city of Washington, in said District, a court of record, to wit, the Criminal Court of said District, created by authority of the United States of America, and having general jurisdiction for the trial of crimes and offences arising within said District, and that the said supposed trespass consisted of an order and decree of said Criminal Court, made by said defendant in the lawful exercise and performance of his authority and duty, as the presiding justice of said Criminal Court, for official misconduct and misbehavior of said plaintiff (he being one of the attorneys of said Criminal Court), occurring in the presence of the said defendant as the justice of said Criminal Court holding the same as aforesaid and not otherwise; as appears from the record of said Criminal Court and the order or decree of the defendant so made as aforesaid.

Wherefore he prayed judgment, if the plaintiff ought to have or maintain his aforesaid action against him, &c.

The defendant joined issue on this plea.

On the trial the plaintiff produced the order entered by the Criminal Court, which was admitted to be in the handwriting of the defendant, and offered to read it in evidence, but upon objection of the defendant's counsel to its admissibility, it was excluded, and the plaintiff excepted. Subsequently the plaintiff read in evidence the order, as entered, from the records of the Criminal Court, and offered to show that the order was prepared, written, and published by the defendant with express malice against the plaintiff, to defame and injure him, and without the defendant having any jurisdiction to make the order; and that there was no altercation on the 2d July, 1867, between him and the judge, and that no words passed between them; and that they were not near each other when the Criminal Court took its recess, until the next day or immediately thereafter,

and as the presiding justice thereof was descending from the bench; but upon objection of the defendant's counsel the proof was excluded, and the plaintiff excepted.

The plaintiff also offered to prove that the only interview between him and the judge, which occurred on the 2d of July, 1867, after the Criminal Court had taken a recess, began after the court had adjourned, and the judge had left the court-room and the building and returned to the court-room, and in that interview he did not address the judge in a rude and insulting manner; that he did not charge him with having offered him, the plaintiff, a series of insults from the bench from the commencement of the trial; that the judge did not disclaim any intention of passing any insult whatever, nor assure the plaintiff that he entertained for him no other feelings but those of respect; that the plaintiff did not threaten the judge with personal chastisement, but to the contrary thereof, the said judge was from the opening of the interview violent, abusive, threatening, and quarrelsome; but upon objection the proof was excluded, and the plaintiff excepted.

The plaintiff thereupon asked a witness to state what passed between the plaintiff and defendant on the said 2d of July, 1867, the time when the parties met, and whether it was before the adjournment of the court on that day, or after it had adjourned, and how long after it had adjourned, and to state all he knew relating to that matter; the object of the evidence being to contradict the recitals in the order, and show that the justice had no jurisdiction in the premises, and had acted with malice and corruptly. But upon objection the evidence was excluded, and the plaintiff excepted. And the court ruled that, on the face of the record given in evidence, the defendant had jurisdiction and discretion to make the order, and he could not be held responsible in this private action for so doing, and instructed the jury that the plaintiff was not entitled to recover. The jury accordingly gave a verdict for the defendant, and judgment being entered thereon, the plaintiff brought the case to this court on a writ of error.

To understand one point of the case the better, it may be mentioned that in Ex parte Bradley,–this court granted a peremptory mandamus to the Supreme Court of the District to restore Mr. Bradley to his office of attorney and counsellor in that court, from which in consequence of the matter with Judge Fisher in the Criminal Court, he had been removed; this court, that is to say the Supreme Court of the United States, holding that the Criminal Court of the District was, at the time the order in question was made, a different and separate court from the Supreme Court of the District of Columbia, as organized by the act of March 3d, 1863.

It may also be stated that on the 21st of June, 1870, after the decision just mentioned, Congress passed an act entitled, 'An act relating to the Supreme Court of the District of Columbia,'–which declared 'that the several general terms and special terms of the circuit courts, district courts, and criminal courts authorized by the act approved March 3d, 1863, entitled 'An act to reorganize the courts in the District of Columbia, and for other purposes,' which have been or may be held, shall be, and are declared to be severally, terms of the Supreme Court of the District of Columbia; and the judgments, decrees, sentences, orders, proceedings, and acts of said general terms, special terms, circuit courts, district courts, and criminal courts heretofore or hereafter rendered, made, or had, shall be deemed judgments, decrees, sentences, orders, proceedings, and acts of said Supreme Court.

It may be well also, as counsel in argument refer to it, to state that an act of Congress of March 2d, 1831, enacted:

'That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice; the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.'

Messrs. J. M. Harris and R. T. Merrick, for the plaintiff in error:

By the act of Congress of June, 1870, the judgments, decrees, and orders of the Criminal Court of the District are to be deemed the judgments, decrees, and orders of the Supreme Court. All the effects, therefore, of the decision by this court of the case Ex parte Bradley, and argument that the order of the Criminal Court is not an order removing or disbarring the plaintiff from the Supreme Court, fall to the ground, in virtue of this act, and irrespectively of other reasons which might be adduced.

The judge relies in effect upon the order of court made by him. The plaintiff in reply alleges that the judge has himself fabricated the statement of facts set forth in that order—made it falsely and fraudulently—and by such fabrication, and by a false and fraudulent statement that certain things which never took place at all, did take place, corruptly sought to give himself jurisdiction in the case where he has acted. Now, the evidence which the plaintiff offered and which the court refused, tended directly to prove that the whole statement ordered by the judge to be put on record, was false and fabricated; and that it was made but to give color to a usurped jurisdiction; in other words, that the statement was fraudulently made. Certainly, the plaintiff had a right to show such facts; for the judge had no power or jurisdiction to make the order complained of, if the matters recited never occurred. Under such circumstances, a judge, knowing the facts, is liable, even though he did not act corruptly; and a fortiori is liable in a case where he did so act.

The courts of the District are, of course, courts of the United States; and whether the proceeding for which this action is brought, be regarded as a punishment for contempt, or as a punishment for alleged misbehavior in office—a matter which the form of the order leaves quite uncertain—it was in the face of the statute of March 2d, 1831. This is undoubtedly so if it was for contempt; and even if it was for misbehavior in office the statute would still seem to apply; for it prohibits a summary proceeding except in the cases which the act specifies; cases which all look to misconduct that interferes with the administration of justice. But for a man who may have been once admitted to the bar, to threaten out of court, with assault, another man who happens to be a judge, and so occasionally in court, is neither misbehavior in office nor a contempt of court.

But if the offence for which Mr. Bradley was disbarred was misbehavior in office, and if that be not within the statute of March 2d, 1831, still, undoubtedly, he should have had notice and an opportunity of defending himself. Admit that the court may proceed summarily, still summary jurisdiction is not arbitrary power; and a summons and opportunity of being heard is a

fundamental principle of all justice. The principle has been declared by this court in Ex parte Garland, to be specifically applicable to the case of disbarring an attorney; and so, declared for obvious reasons. Without then having summoned Mr. Bradley, and having given to him an opportunity to be heard, the court had no jurisdiction of Mr. Bradley's person or of any case relating to him. It is not enough that it have jurisdiction over the subject-matter of the complainant generally; it must have jurisdiction over the particular case, and if it have not, the judgment is void ab initio. The whole subject is set forth in Smith's Leading Cases, where the authorities are collected and the principle deduced, that when the record shows that the court has proceeded without notice to the party condemned, the judgment will be void, and may be disregarded in any collateral proceeding.

Mr. A. G. Riddle and W. A. Cook, contra.

Mr. Justice FIELD delivered the opinion of the court.

In 1867, the plaintiff was a member of the bar of the Supreme Court of the District of Columbia, and the defendant was one of the justices of that court. In June, of that year, the trial of one John H. Suratt, for the murder of Abraham Lincoln, was commenced in the Criminal Court of the District, and was continued until the tenth of the following August, when the jury were discharged in consequence of their inability to agree upon a verdict. The defendant held that court, presiding at the trial of Suratt from its commencement to its close, and the plaintiff was one of the attorneys who defended the prisoner. Immediately upon the discharge of the jury, the court, thus held by the defendant, directed an order to be entered on its records striking the name of the plaintiff from the roll of attorneys practicing in that court. The order was accompanied by a recital that on the second of July preceding, during the progress of the trial of Suratt, immediately after the court had taken a recess for the day, as the presiding judge was descending from the bench, he had been accosted in a rude and insulting manner by the plaintiff, charging him with having offered the plaintiff a series of insults from the bench from the commencement of the trial; that the judge had then disclaimed any intention of passing any insult whatever, and had assured the plaintiff that he entertained for him no other feelings than those of respect, but that the plaintiff, so far from accepting this explanation, or disclaimer, had threatened the judge with personal chastisement.

The plaintiff appears to have regarded this order of the Criminal Court as an order disbarring him from the Supreme Court of the District; and the whole theory of the present action proceeds upon that hypothesis. The declaration in one count describes the Criminal Court as one of the branches of the Supreme Court, and in the other count represents the order of the Criminal Court as an order removing the plaintiff from the office of an attorney-at-law in the Supreme Court of the District. And it is for the supposed removal from that court, and the assumed damages consequent thereon, that the action is brought.

Yet the Criminal Court of the District was at that time a separate and independent court, and as distinct from the Supreme Court of the District as the Circuit Court is distinct from the Supreme Court of the United States. Its distinct and independent character was urged by the plaintiff, and successfully urged, in this court, as ground for relief against the subsequent action of the Supreme Court of the District, based upon what had occurred in the Criminal Court. And because of its distinct and independent character, this court held that the Supreme Court of the District possessed no power to punish the plaintiff on account of contemptuous conduct and language

before the Criminal Court, or in the presence of its judge. By this decision, which was rendered at the December Term of 1868,[9] the groundwork of the present action of the plaintiff is removed. The law which he successfully invoked, and which protected him when he complained of the action of the Supreme Court of the District, must now equally avail for the protection of the defendant, when it is attempted to give to the Criminal Court a position and power which were then denied. The order of the Criminal Court, as it was then constituted, was not an order of the Supreme Court of the District, nor of one of the branches of that court. It did not, for we know that in law it could not, remove the plaintiff from the office of an attorney of that court, nor affect his right to practice therein.

This point is distinctly raised by the special plea of the defendant, in which he sets up that at the time the order complained of was made, he was regularly and lawfully holding the Criminal Court of the District, a court of record, having general jurisdiction for the trial of crimes and offences arising within the District, and that the order complained of was an order of the Criminal Court, made by him in the lawful exercise and performance of his authority and duty as its presiding justice, for official misconduct of the plaintiff, as one of its attorneys, in his presence; and upon this plea the plaintiff joined issue.

The court below, therefore, did not err in excluding the order of removal as evidence in the cause, for the obvious reason that it did not establish, nor tend to establish, the removal of the plaintiff by any order of the defendant, or of the court held by him, from the bar of the Supreme Court of the District. And the refusal of the court below to admit evidence contradicting the recitals in that order, could not be the ground of any just exception, when the order itself was not pertinent to any issue presented. Nor is this conclusion affected by the act of Congress passed in June, 1870, nearly three years after the order of removal was made, and nearly two years after the present action was commenced, changing the independent character of the Criminal Court and declaring that its judgments, decrees, and orders should be deemed the judgments, decrees, and orders of the Supreme Court of the District. If the order of removal acquired from this legislation a wider scope and operation than it possessed when made, the defendant is not responsible for it. The original act was not altered. It was still an order disbarring the plaintiff only from the Criminal Court, and any other consequences are attributable to the action of Congress, and not to any action of the defendant.

But this is not all. The plea, as will be seen from our statement of it, not only sets up that the order of which the plaintiff complains, was an order of the Criminal Court, but that it was made by the defendant in the lawful exercise and performance of his authority and duty as its presiding justice. In other words, it sets up that the order for the entry of which the suit is brought, was a judicial act, done by the defendants as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. 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 everyone 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. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. 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. It has, as Chancellor Kent observes, 'a deep root in the common law.'

Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of Floyd and Barker, reported by Coke, in 1608, where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it would 'tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations.'

The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he

did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

Some just observations on this head by the late Chief Justice Shaw, will be found in Pratt v. Gardner,-and the point here was adjudged in the recent case of Fray v. Blackburn, by the Queen's Bench of England. One of the judges of that bench was sued for a judicial act, and on demurrer one of the objections taken to the declaration was, that it was bad in not alleging malice. Judgment on the demurrer having passed for the defendant, the plaintiff applied for leave to amend his declaration by introducing an allegation of malice and corruption; but Mr. Justice Compton replied: 'It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore, the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent them being harassed by vexatious actions;'—and the leave was refused.

In this country, the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. In some States they may be thus suspended or removed without impeachment, by a vote of the two houses of the legislature.

In the case of Randall v. Brigham, decided by this court, at the December Term of 1868, we had occasion to consider at some length the liability of judicial officers to answer in a civil action for their judicial acts. In that case the plaintiff had been removed by the defendant, who was one of the justices of the Superior Court of Massachusetts, from the bar of that State, and the action was brought for such removal, which was alleged in the declaration to have been made without lawful authority, and wantonly, arbitrarily, and oppressively. In considering the questions presented the court observed that it was a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction; that with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction; that if this were the case with respect to them, no such limitation existed with respect to judges of superior or general authority; that they were not liable in civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, 'unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly.' The qualifying words were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.

In the present case, we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not

necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons.

The distinction here made between acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists, was taken by the Court of King's Bench, in Ackerley v. Parkinson. In that case an action was brought against the vicar-general of the Bishop of Chester and his surrogate, who held the consistorial and episcopal court of the bishop, for excommunicating the plaintiff with the greater excommunication for contumacy, in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin, the citation issued to him being void, and having been so adjudged. The question presented was, whether under these circumstances the action would lie. The citation being void, the plaintiff had not been legally brought before the court, and the subsequent proceedings were set aside, on appeal, on that ground. Lord Ellenborough observed that it was his opinion that the action was not maintainable if the ecclesiastical court had a general jurisdiction over the subject-matter, although the citation was a nullity, and said, that 'no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, inverso ordine.' Mr. Justice Blanc said there was 'a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;' and held that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should

by reason of the error be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction.

The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.

If, now, we apply the principle thus stated, the question presented in this case is one of easy solution. The Criminal Court of the District, as a court of general criminal jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practicing attorney. This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession. And, except where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as it is when the proceeding is taken to reach his real or personal property. And even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, the attorney should ordinarily be heard before the order of removal is made, for those matters may not be inconsistent with the absence of improper motives on his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper reparation and apology. Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should therefore never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired.

But on the other hand the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous

demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. 'In matters collateral to official duty,' said Chief Justice Gibson in the case of Austin and others, 'the judge is on a level with the members of the bar as he is with his fellow-citizens, his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is nevertheless evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court. Such would be the consequences of beating or insulting a judge in the street for a judgment in court. No one would pretend that an attempt to control the deliberation of the bench, by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice. And an enormity of the sort, practiced but on a single judge, would be an offence as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the consequences to suitors and the public would be the same; and whatever may be thought in such a case of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll.'

The order of removal complained of in this case, recites that the plaintiff threatened the presiding justice of the Criminal Court, as he was descending from the bench, with personal chastisement for alleged conduct of the judge during the progress of a criminal trial then pending.

The matters thus recited are stated as the grounds for the exercise of the power possessed by the court to strike the name of the plaintiff from the roll of attorneys practicing therein. It is not necessary for us to determine in this case whether under any circumstances the verity of this record can be impeached. It is sufficient to observe that it cannot be impeached in this action or in any civil action against the defendant. And if the matters recited are taken as true there was ample ground for the action of the court. A greater indignity could hardly be offered to a judge than to threaten him with personal chastisement for his conduct on the trial of a cause. A judge who should pass over in silence an offence of such gravity would soon find himself a subject of pity rather than of respect.

The Criminal Court of the District erred in not citing the plaintiff, before making the order striking his name from the roll of its attorneys, to show cause why such order should not be made for the offensive language and conduct stated, and affording him opportunity for explanation, or defense, or apology. But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.

We find no error in the rulings of the court below, and its judgment must, therefore, be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Mr. Justice DAVIS, with whom concurred Mr. Justice CLIFFORD, dissenting.

I agree that judicial officers are exempt from responsibility in a civil action for all their judicial acts in respect to matters of controversy within their jurisdiction. I agree, further, that judges of superior or general authority are equally exempt from liability, even when they have exceeded their jurisdiction, unless the acts complained of were done maliciously or corruptly. But I dissent from the rule laid down by the majority of the court, that a judge is exempt from liability in a case like the present, where it is alleged not only that his proceeding was in excess of jurisdiction, but that he acted maliciously and corruptly. If he did so, he is, in my opinion, subject to suit the same as a private person would be under like circumstances.

I also dissent from the opinion of the majority of the court for the reason that it discusses the merits of the controversy, which, in the state of the record, I do not consider open for examination.

Pierson v. Ray

Pierson v. Ray
386 U.S. 547 (1967)
U.S. Supreme Court
Pierson v. Ray, 386 U.S. 547 (1967)
Pierson v. Ray
No. 79
Argued January 11, 1967
Decided April 11, 1967*
386 U.S. 547
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners,** members of a group of white and Negro clergymen on a "prayer pilgrimage" to promote racial integration, attempted to use a segregated interstate bus terminal waiting room in Jackson, Mississippi, in 1961. They were arrested by respondent policemen and charged with conduct breaching the peace in violation of § 2087.5 of the Mississippi Code, which this Court, in 1965, held unconstitutional in *Thomas v. Mississippi,* 380 U. S. 524, as applied to similar facts. Petitioners waived a jury trial, and were convicted by respondent municipal police justice. On appeal, one petitioner was accorded a trial *de novo* and, following a directed verdict in his favor, the cases against the other petitioners were dropped. Petitioners then brought this action in the District Court for damages (1) under 42 U.S.C. § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights, and (2) at common law for false arrest and imprisonment. The evidence showed that the ministers expected to be arrested on entering a segregated area. Though the witnesses agreed that petitioners entered the waiting room peacefully, petitioners testified that there was no crowd at the terminal, whereas the police testified that a threatening crowd followed petitioners. The jury found for respondents. On appeal, the Court of Appeals held that (1) respondent police justice had immunity for his judicial acts under both § 1983 and the state common law and (2) the policemen had immunity under the state common law of false arrest if they had probable cause to believe § 2087.5 valid, since they were not required to predict what laws are constitutional, but that, by virtue of *Monroe v. Pape,* 365 U.

S. 167, they had no such immunity under § 1983 where the state statute was subsequently declared invalid. The court remanded the case against the officers for a new trial under § 1983 because of prejudicial cross-examination of petitioners, but ruled that they could not recover if it were shown at the new trial that they had gone to Mississippi in anticipation that they would be illegally arrested.

Held:

1. The settled common law principle that a judge is immune from liability for damages for his judicial acts was not abolished by § 1983. *Cf. Tenney v. Brandhove,* 341 U. S. 367. Pp. 386 U. S. 553-555,
2. The defense of good faith and probable cause which is available to police officers in a common law action for false arrest and imprisonment is also available in an action under § 1983. *Monroe v. Pape, supra,* distinguished. Pp. 386 U. S. 555-557.
3. Though the officers were not required to predict this Court's ruling in *Thomas v. Mississippi, supra,* that § 2087.5 was unconstitutional as applied, and the defense of good faith and probable cause is available in an action under § 1983, it does not follow that the count based thereon should be dismissed, since the evidence was conflicting as to whether the police had acted in good faith and with probable cause in arresting the petitioners. Pp. 386 U. S. 557-558.
4. Petitioners did not consent to their arrest by deliberately exercising their right to use the waiting room in a peaceful manner with the expectation that they would be illegally arrested. P. 386 U. S. 558. 352 F. & 213, affirmed in part, reversed in part, and remanded.

MR. CHIEF JUSTICE WARREN delivered the opinion of Court.

These cases present issues involving the liability of local police officers and judges under § 1 of the Civil Rights Act of 1871, 17 Stat. 13, now 42 U.S.C. § 1983. [Footnote 1] Petitioners in No. 79 were members of a group of 15 white and Negro Episcopal clergymen who attempted to use segregated facilities at an interstate bus terminal in Jackson Mississippi, in 1961. They were arrested by respondents Ray, Griffith, and Nichols, policemen of the City of Jackson, and charged with violating § 2087.5 of the Mississippi Code, which makes guilty of a misdemeanor anyone who congregates with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refuses to move on when ordered to do so by a police officer. [Footnote 2] Petitioners [Footnote 3] waived a jury trial and were convicted of the offense by respondent Spencer, a municipal police justice. They were each given the maximum sentence of four months in jail and a fine of $200. On appeal, petitioner Jones was accorded a trial *de novo* in the County Court, and, after the city produced its evidence, the court granted his motion for a directed verdict. The cases against the other petitioners were then dropped.

Having been vindicated in the County Court, petitioners brought this action for damages in the United States District Court for the Southern District of Mississippi, Jackson Division, alleging that respondents had violated § 1983, *supra,* and that respondents were liable at common law for false arrest and imprisonment. A jury returned verdicts for respondents on both counts. On appeal, the Court of Appeals for the Fifth Circuit held that respondent Spencer was immune from liability under both § 1983 and the common law of Mississippi for acts committed within his judicial jurisdiction. 352 F.2d 213. As to the police officers, the court noted that § 2087.5 of the

Mississippi Code was held unconstitutional as applied to similar facts in *Thomas v. Mississippi*, 380 U. S. 524(1965). [Footnote 4] Although *Thomas* was decided years after the arrest involved in this trial, the court held that the policemen would be liable in a suit under § 1983 for an unconstitutional arrest even if they acted in good faith and with probable cause in making an arrest under a state statute not yet held invalid. The court believed that this stern result was required by Monroe v. Pape, 365 U. S. 167 (1961). Under the count based on the common law of Mississippi, however, it held that the policemen would not be liable if they had probable cause to believe that the statute had been violated, because Mississippi law does not require police officers to predict at their peril which state laws are constitutional and which are not. Apparently dismissing the common law claim, [Footnote 5] the Court of Appeals reversed and remanded for a new trial on the § 1983 claim against the police officers because defense counsel had been allowed to cross-examine the ministers on various irrelevant and prejudicial matters, particularly including an alleged convergence of their views on racial justice with those of the Communist Party. At the new trial, however, the court held that the ministers could not recover if it were proved that they went to Mississippi anticipating that they would be illegally arrested, because such action would constitute consent to the arrest under the principle of *volenti non fit injuria,* he who consents to a wrong cannot be injured.

We granted certiorari in No. 79 to consider whether a local judge is liable for damages under § 1983 for an unconstitutional conviction and whether the ministers should be denied recovery against the police officers if they acted with the anticipation that they would be illegally arrested. We also granted the police officers' petition in No. 94 to determine if the Court of Appeals correctly held that they could not assert the defense of good faith and probable cause to an action under § 1983 for unconstitutional arrest. [Footnote 6]

The evidence at the federal trial showed that petitioners and other Negro and white Episcopal clergymen undertook a "prayer pilgrimage" in 1961 from New Orleans to Detroit. The purpose of the pilgrimage was to visit church institutions and other places in the North and South to promote racial equality and integration, and, finally, to report to a church convention in Detroit. Letters from the leader of the group to its members indicate that the clergymen intended from the beginning to go to Jackson and attempt to use segregated facilities at the bus terminal there, and that they fully expected to be arrested for doing so. The group made plans based on the assumption that they would be arrested if they attempted peacefully to exercise their right as interstate travelers to use the waiting rooms and other facilities at the bus terminal, and the letters discussed arrangements for bail and other matters relevant to arrests.

The ministers stayed one night in Jackson, and went to the bus terminal the next morning to depart for Chattanooga, Tennessee. They entered the waiting room, disobeying a sign at the entrance that announced "White Waiting Room Only -- By Order of the Police Department." They then turned to enter the small terminal restaurant, but were stopped by two Jackson police officers, respondents Griffith and Nichols, who had been awaiting their arrival and who ordered them to "move on." The ministers replied that they wanted to eat, and refused to move on. Respondent Ray, then a police captain and now the deputy chief of police, arrived a few minutes later. The ministers were placed under arrest and taken to the jail.

All witnesses, including the police officers, agreed that the ministers entered the waiting room peacefully and engaged in no boisterous or objectionable conduct while in the "White Only" area. There was conflicting testimony on the number of bystander's present and their behavior. Petitioners testified that there was no crowd at the station, that no one followed them into the waiting room, and that no one uttered threatening words or made threatening gestures. The police testified that some 25 to 30 persons followed the ministers into the terminal, that persons in the crowd were in a very dissatisfied and ugly mood, and that they were mumbling and making unspecified threatening gestures. The police did not describe any specific threatening incidents, and testified that they took no action against any persons in the crowd who were threatening violence because they "had determined that the ministers was the cause of the violence if any might occur," [Footnote 7] although the ministers were concededly orderly and polite and the police did not claim that it was beyond their power to control the allegedly disorderly crowd. The arrests and convictions were followed by this lawsuit.

We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court. [Footnote 8] Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in Bradley v. Fisher, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

(*Scott v. Stansfield,* L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher, supra,* 80 U. S. 349, note, at 80 U. S. 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but to intimidation.

We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities. Accordingly, this Court held in *Tenney v. Brandhove,* 341 U. S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine. [Footnote 9]

The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is, rather, that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. Under the prevailing view in this country, a peace officer who arrests someone with probable cause is not liable for false arrest simply because the

innocence of the suspect is later proved. Restatement, Second, Torts § 121 (1965); 1 Harper & James, The Law of Torts § 3.18, at 277-278 (1956); *Ward v. Fidelity & Deposit Co. of Maryland,*179 F.2d 327 (C.A. 8th Cir.1950). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does. Although the matter is not entirely free from doubt, [Footnote 10] the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid, but that was later held unconstitutional, on its face or as applied.

The Court of Appeals held that the officers had such a limited privilege under the common law of Mississippi, [Footnote 11] and indicated that it would have recognized a similar privilege under § 1983 except that it felt compelled to hold otherwise by our decision in Monroe v. Pape, 365 U.S. 167 (1961). *Monroe v. Pape* presented no question of immunity, however, and none was decided. The complaint in that case alleged that 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further allege[d] that Mr. Monroe was then taken to the police station and detained on 'open' charges for 10 hours while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges' being preferred against him."

365 U.S. at 365 U. S. 169. The police officers did not choose to go to trial and defend the case on the hope that they could convince a jury that they believed in good faith that it was their duty to assault Monroe and his family in this manner. Instead, they sought dismissal of the complaint, contending principally that their activities were so plainly illegal under state law that they did not act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory," as required by § 1983. In rejecting this argument, we in no way intimated that the defense of good faith and probable cause was foreclosed by the statute. We also held that the complaint should not be dismissed for failure to state that the officers had "a specific intent to deprive a person of a federal right," but this holding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers. As we went on to say in the same paragraph, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 365 U. S. 187. Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.

We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common law action for false arrest and imprisonment, is also available to them in the action under § 1983. This holding does not, however, mean that the count based thereon should be dismissed. The Court of Appeals ordered dismissal of the common law count on the theory that the police officers were not required to predict our decision in *Thomas v. Mississippi*, 380 U. S. 524. We agree that a police officer is not charged with predicting the future course of constitutional law. But the petitioners in this case did not simply argue that they were arrested under a statute later held unconstitutional. They claimed and attempted to prove that the police officers arrested them solely for attempting to use the "White Only" waiting room, that no crowd was present, and that no one threatened violence or seemed about to cause a

disturbance. The officers did not defend on the theory that they believed in good faith that it was constitutional to arrest the ministers solely for using the waiting room. Rather, they claimed and attempted to prove that they did not arrest the ministers for the purpose of preserving the custom of segregation in Mississippi, but solely for the purpose of preventing violence. They testified, in contradiction to the ministers, that a crowd gathered and that imminent violence was likely. If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was, in fact, unconstitutional. The jury did resolve the factual issues in favor of the officers but, for reasons previously stated, its verdict was influenced by irrelevant and prejudicial evidence. Accordingly, the case must be remanded to the trial court for a new trial.

It is necessary to decide what importance should be given at the new trial to the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested. We do not agree with the Court of Appeals that they somehow consented to the arrest because of their anticipation that they would be illegally arrested, even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations. The case contains no proof or allegation that they in any way tricked or goaded the officers into arresting them. The petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner, does not disqualify them from seeking damages under § 1983. [Footnote 12]

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

* Together with No. 94, *Ray et al. v. Pierson et al.*, also on certiorari to the same court.

** *See* n 3, *infra.*

[Footnote 1]

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

[Footnote 2]

"1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may he occasioned thereby: "
"(1) crowds or congregates with others in . . . any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, . . . or any other place of business engaged in selling or serving members

of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, . . . shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars ($100.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment. . . ."

[Footnote 3]

The ministers involved in No. 79 will be designated as "petitioners" throughout this opinion, although they are the respondents in No. 94.

[Footnote 4]

In *Thomas,* various "Freedom Riders" were arrested and convicted under circumstances substantially similar to the facts of these cases. The police testified that they ordered the "Freedom Riders" to leave because they feared that onlookers might breach the peace. We reversed without argument or opinion, citing *Boynton v. Virginia,* 364 U. S. 454 (1960). *Boynton* held that racial discrimination in a bus terminal restaurant utilized as an integral part of the transportation of interstate passengers violates § 216(d) of the Interstate Commerce Act. State enforcement of such discrimination is barred by the Supremacy Clause.

[Footnote 5]

Respondents read the court's opinion as remanding for a new trial on this claim. The court stated, however, that the officers "are immune from liability for false imprisonment at common law, but not from liability for violations of the Federal statutes on civil rights. It therefore follows that there should be a new trial of the civil rights claim against the appellee police officers so that there may be a determination of the fact issue as to whether the appellants invited or consented to the arrest and imprisonment." 352 F.2d at 221.

[Footnote 6]

Respondents did not challenge in their petition in No. 94 the holding of the Court of Appeals that a new trial is necessary because of the prejudicial cross-examination. Belatedly, they devoted a section of their brief to the contention that the cross-examination was proper. This argument is no more meritorious than it is timely. The views of the Communist Party on racial equality were not an issue in these cases.

[Footnote 7]

Transcript of Record, at 347. (Testimony of Officer Griffith.)

[Footnote 8]

Petitioners attempted to suggest a "conspiracy" between Judge Spencer and the police officers by questioning him about his reasons for finding petitioners guilty in these cases and by showing that he had found other "Freedom Riders" guilty under similar circumstances in previous cases. The proof of conspiracy never went beyond this suggestion that inferences could be drawn from Judge Spencer's judicial decisions. *See* Transcript of Record at 35-371.

[Footnote 9]

Since our decision in *Tenney v. Brandhove, supra,* the courts of appeals have consistently held that judicial immunity is a defense to an action under § 1983. *See Bauers v. Heisel,* 361 F.2d 581 (C.A.3d Cir.1966), and cases cited therein.

[Footnote 10]

See Caveat, Restatement, Second, Torts § 121, at 207-208 (1965); *Miller v. Stinnett,* 257 F.2d 910 (C.A. 10th Cir.1958).

[Footnote 11]

See Golden v. Thompson, 194 Miss. 241, 11 So.2d 906 (1943).

[Footnote 12]

The petition for certiorari in No. 79 also presented the question whether the Court of Appeals correctly dismissed the count based on the common law of Mississippi. We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case. The state common law claim in this case is merely cumulative, and petitioners' right to recover for an invasion of their civil rights, subject to the defense of good faith and probable cause, is adequately secured by § 1983.

MR. JUSTICE DOUGLAS, dissenting.

I do not think that all judges, under all circumstances, no matter how outrageous their conduct, are immune from suit under 17 Stat. 13, 42 U.S.C. § 1983. The Court's ruling is not justified by the admitted need for a vigorous and independent judiciary, is not commanded by the common law doctrine of judicial immunity, and does not follow inexorably from our prior decisions.

The statute, which came on the books as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, provides that "every person" who, under color of state law or custom, "subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

To most, "every person" would mean every person, not every person except judges. Despite the plain import of those words, the Court decided in *Tenney v. Brandhove,* 341 U. S. 367, that state legislators are immune from suit as long as the deprivation of civil rights which they caused a person occurred while the legislators "were acting in a field where legislators traditionally have power to act." *Id.* at 341 U. S. 379. I dissented from the creation of that judicial exception, as I do from the creation of the present one.

The congressional purpose seems to me to be clear. A condition of lawlessness existed in certain of the States under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated. And its members were not unaware that certain members of the judiciary were implicated in the state of affairs which the statute was intended to rectify. It was often noted that "[i]mmunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." Cong.Globe, 42d Cong., 1st Sess., 374. Mr. Rainey of South Carolina noted that "[T]he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity."*Id.* at 394.

Congressman Beatty of Ohio claimed that it was the duty of Congress to listen to the appeals of those who, "by reason of popular sentiment or secret organizations or prejudiced juries or bribed judges, [cannot] obtain the rights and privileges due an American citizen. . . ." *Id.* at 429.

The members supporting the proposed measure were apprehensive that there had been a complete breakdown in the administration of justice in certain States, and that laws nondiscriminatory on their face were being applied in a discriminatory manner, that the newly won civil rights of the Negro were being ignored, and that the Constitution was being defied. It was against this background that the section was passed, and it is against this background that it should be interpreted.

It is said that, at the time of the statute's enactment, the doctrine of judicial immunity was well settled, and that Congress cannot be presumed to have intended to abrogate the doctrine, since it did not clearly evince such a purpose. This view is beset by many difficulties. It assumes that Congress could and should specify in advance all the possible circumstances to which a remedial statute might apply and state which cases are within the scope of a statute.

"Underlying [this] view is an atomistic conception of intention, coupled with what may be called a pointer theory of meaning. This view conceives the mind to be directed toward individual things, rather than toward general ideas, toward distinct situations of fact, rather than toward some significance in human affairs that these situations may share. If this view were taken seriously, then we would have to regard the intention of the draftsman of a statute directed against 'dangerous weapons' as being directed toward an endless series of individual objects: revolvers, automatic pistols, daggers, Bowie knives, etc. If a court applies the statute to a weapon its draftsman had not thought of, then it would be 'legislating,' not 'interpreting,' as even more obviously it would be if it were to apply the statute to a weapon not yet invented when the statute was passed."

Fuller, The Morality of Law 84 (1964).

Congress, of course, acts in the context of existing common law rules, and, in construing a statute, a court considers the "common law before the making of the Act." *Heydon's Case,* 3 Co.Rep. 7a, 76 Eng.Rep. 637 (Ex. 1584). But Congress enacts a statute to remedy the inadequacies of the preexisting law, including the common law.

[Footnote 2/1]

It cannot be presumed that the common law is the perfection of reason, is superior to statutory law (Sedgwick, Construction of Statutes 270 (1st ed. 1857); Pound, Common Law and Legislation, 21 Harv.L.Rev. 383, 404-406 (1908)), and that the legislature always changes law for the worse. Nor should the canon of construction "statutes in derogation of the common law are to be strictly construed" be applied so as to weaken a remedial statute whose purpose is to remedy the defects of the preexisting law.

The position that Congress did not intend to change the common law rule of judicial immunity ignores the fact that every member of Congress who spoke to the issue assumed that the words of the statute meant what they said, and that judges would be liable. Many members of Congress objected to the statute because it imposed liability on members of the judiciary. Mr. Arthur of Kentucky opposed the measure because:

"Hitherto . . . no judge or court has been held liable, civilly or criminally, for judicial acts . . .. Under the provisions of [section 1], every judge in the State court . . . will enter upon and pursue the call of official duty with the sword of Damocles suspended over him . . .."
Cong.Globe, 42d Cong., 1st Sess., 365-366.

And Senator Thurman noted that:

"There have been two or three instances already under the civil rights bill of State judges being taken into the United States district court, sometimes upon indictment for the offense . . . of honestly and conscientiously deciding the law to be as they understood it to be. . .."

"Is [section 1] intended to perpetuate that? Is it intended to enlarge it? Is it intended to extend it so that no longer a judge sitting on the bench to decide causes can decide them free from any fear except that of impeachment, which never lies in the absence of corrupt motive? Is that to be extended so that every judge of a State may be liable to be dragged before some Federal judge to vindicate his opinion and to be mulcted in damages if that Federal judge shall think the opinion was erroneous? That is the language of this bill." Cong.Globe, 42d Cong., 1st Sess., Appendix 217.

Mr. Lewis of Kentucky expressed the fear that:

"By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor. . .." Cong.Globe, 42d Cong., 1st Sess., 385.

Yet, despite the repeated fears of its opponents and the explicit recognition that the section would subject judges to suit, the section remained as it was proposed: it applied to "any person."

[Footnote 2/2]

There was no exception for members of the judiciary. In light of the sharply contested nature of the issue of judicial immunity, it would be reasonable to assume that the judiciary would have been expressly exempted from the wide sweep of the section if Congress had intended such a result.

The section's purpose was to provide redress for the deprivation of civil rights. It was recognized that certain members of the judiciary were instruments of oppression, and were partially responsible for the wrongs to be remedied. The parade of cases coming to this Court shows that a similar condition now obtains in some of the States. Some state courts have been instruments of suppression of civil rights. The methods may have changed; the means may have become more subtle; but the wrong to be remedied still exists.

Today's decision is not dictated by our prior decisions. In *Ex parte Virginia*, 100 U. S. 339, the Court held that a judge who excluded Negroes from juries could be held liable under the Act of March 1, 1875 (18 Stat. 335), one of the Civil Rights Acts. The Court assumed that the judge was merely performing a ministerial function. But it went on to state that the judge would be liable under the statute even if his actions were judicial.

[Footnote 2/3]

It is one thing to say that the common law doctrine of judicial immunity is a defense to a common law cause of action. But it is quite another to say that the common law immunity rule is a defense to liability which Congress has imposed upon "any officer or other person," as in *Ex parte Virginia,* or upon "every person," as in these cases.

The immunity which the Court today grants the judiciary is not necessary to preserve an independent judiciary. If the threat of civil action lies in the background of litigation, so the argument goes, judges will be reluctant to exercise the discretion and judgment inherent in their position and vital to the effective operation of the judiciary. We should, of course, not protect a member of the judiciary "who is, in fact, guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good." *Gregoire v. Biddle,* 177 F.2d 579, 581. To deny recovery to a person injured by the ruling of a judge acting for personal gain or out of personal motives would be "monstrous." *Ibid.* But it is argued that absolute immunity is necessary to prevent the chilling effects of a judicial inquiry, or the threat of such inquiry, into whether, in fact, a judge has been unfaithful to his oath of office. Thus, it is necessary to protect the guilty as well as the innocent.

[Footnote 2/4]

The doctrine of separation of powers is, of course, applicable only to the relations of coordinate branches of the same government, not to the relations between the branches of the Federal

Government and those of the States. *See Baker v. Carr*, 369 U. S. 186, 369 U. S. 210. Any argument that Congress could not impose liability on state judges for the deprivation of civil rights would thus have to be based upon the claim that doing so would violate the theory of division of powers between the Federal and State Governments. This claim has been foreclosed by the cases recognizing "that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State. . .." *Monroe v. Pape*, 365 U. S. 167, 365 U. S. 171-172. In terms of the power of Congress, I can see no difference between imposing liability on a state police officer (*Monroe v. Pape*, *supra*) and on a state judge. The question presented is not of constitutional dimension; it is solely a question of statutory interpretation.

The argument that the actions of public officials must not be subjected to judicial scrutiny because to do so would have an inhibiting effect on their work is but a more sophisticated manner of saying "The King can do no wrong."

[Footnote 2/5]

Chief Justice Cockburn long ago disposed of the argument that liability would deter judges:
"I cannot believe that judges . . . would fail to discharge their duty faithfully and fearlessly according to their oaths and consciences . . . from any fear of exposing themselves to actions at law. I am persuaded that the number of such actions would be infinitely small, and would be easily disposed of. While, on the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice as that, on sound principles, the authors of such wrong ought to be responsible to the parties wronged."
Dawkins v. Lord Paulet, L.R. 5 Q.B. 94, 110

(C.J. Cockburn, dissenting).

This is not to say that a judge who makes an honest mistake should be subjected to civil liability. It is necessary to exempt judges from liability for the consequences of their honest mistakes. The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks. It would be unfair to require a judge to exercise his independent judgment and then to punish him for having exercised it in a manner which, in retrospect, was erroneous. Imposing liability for mistaken, though honest judicial acts, would curb the independent mind and spirit needed to perform judicial functions. Thus, a judge who sustains a conviction on what he forthrightly considers adequate evidence should not be subjected to liability when an appellate court decides that the evidence was not adequate. Nor should a judge who allows a conviction under what is later held an unconstitutional statute.

But that is far different from saying that a judge shall be immune from the consequences of any of his judicial actions, and that he shall not be liable for the knowing and intentional deprivation of a person's civil rights. What about the judge who conspires with local law enforcement officers to "railroad" a dissenter? What about the judge who knowingly turns a trial into a "kangaroo" court? Or one who intentionally flouts the Constitution in order to obtain a conviction? Congress,

I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far outweighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights.

[Footnote 2/6]

The plight of the oppressed is indeed serious. Under *City of Greenwood v. Peacock*, 384 U. S. 808, the defendant cannot remove to a federal court to prevent a state court from depriving him of his civil rights. And under the rule announced today, the person cannot recover damages for the deprivation.

[Footnote 3/1]

"Remedial statutes are to be liberally construed." *See generally* Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand.L.Rev. 395 (1950); Llewellyn, The Common Law Tradition, Appendix C (1960).

[Footnote 3/2]
As altered by the reviser who prepared the Revised Statutes of 1878, and as printed in 42 U.S.C. § 1983, the statute refers to "every person," rather than to "any person."

[Footnote 3/3]

The opinion in *Ex parte Virginia, supra,* did not mention Bradley v. Fisher, 13 Wall. 335, which held that a judge could not be held liable for causing the name of an attorney to be struck from the court rolls. But in *Bradley*, the action was not brought under any of the Civil Rights Acts.

[Footnote 3/4]

Other justifications for the doctrine of absolute immunity have been advanced: (1) preventing threat of suit from influencing decision; (2) protecting judges from liability for honest mistakes; (3) relieving judges of the time and expense of defending suits; (4) removing an impediment to responsible men entering the judiciary; (5) necessity of finality; (6) appellate review is satisfactory remedy; (7) the judge's duty is to the public and not to the individual; (8) judicial self-protection; (9) separation of powers. *See generally* Jennings, Tort Liability of Administrative Officers, 21 Minn.L.Rev. 263, 271-272 (1937).

[Footnote 3/5]

Historically, judicial immunity was a corollary to that theory. Since the King could do no wrong, the judges, his delegates for dispensing justice, "ought not to be drawn into question for any supposed corruption [for this tends] to the slander of the justice of the King." *Floyd & Barker*, 12 Co.Rep. 23, 25, 77 Eng.Rep. 1305, 1307 (Star Chamber 1607). Because the judges were the personal delegates of the King, they should be answerable to him alone. Randall v. Brigham, 7 Wall. 523, 74 U. S. 539.

[Footnote 3/6]

A judge is liable for injury caused by a ministerial act; to have immunity, the judge must be performing a judicial function. *See, e.g.*, 100 U. S. 100 U. S. 339; 2 Harper & James, The Law of Torts, 1642-1643 (1956). The presence of malice and the intention to deprive a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a judge, but as a "minister" of his own prejudices.

Stump v. Sparkman

Stump v. Sparkman
435 U.S. 349 (1978)
U.S. Supreme Court
Stump v. Sparkman, 435 U.S. 349 (1978)
Stump v. Sparkman
No. 76-1750
Argued January 10, 1978
Decided March 28, 1978
435 U.S. 349

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

A mother filed a petition in affidavit form in an Indiana Circuit Court, a court of general jurisdiction under an Indiana statute, for authority to have her "somewhat retarded" 15-year-old daughter (a respondent here) sterilized, and petitioner Circuit Judge approved the petition the same day in an *ex parte* proceeding without a hearing and without notice to the daughter or appointment of a guardian *ad litem.* The operation was performed shortly thereafter, the daughter having been told that she was to have her appendix removed. About two years later, she was married, and her inability to become pregnant led her to discover that she had been sterilized. As a result, she and her husband (also a respondent here) filed suit in Federal District Court pursuant to 42 U.S.C. § 1983 against her mother, the mother's attorney, the Circuit Judge, the doctors who performed or assisted in the sterilization, and the hospital where it was performed, seeking damages for the alleged violation of her constitutional rights. Holding that the constitutional claims required a showing of state action and that the only state action alleged was the Circuit Judge's approval of the sterilization petition, the District Court held that no federal action would lie against any of the defendants because the Circuit Judge, the only state agent, was absolutely immune from suit under the doctrine of judicial immunity. The Court of Appeals reversed, holding that the "crucial issue" was whether the Circuit Judge acted within his jurisdiction, that he had not, that, accordingly, he was not immune from damages liability, and that, in any event, he had forfeited his immunity "because of his failure to comply with elementary principles of procedural due process."

Held: The Indiana law vested in the Circuit Judge the power to entertain and act upon the petition for sterilization, and he is, therefore, immune from damages liability even if his approval of the petition was in error. Pp. 435 U. S. 355-364.

(a) A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority, but, rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction," Bradley v. Fisher, 13 Wall. 335, 80 U. S. 351. Pp. 435 U. S. 355-357.

(b) Here, there was not "clear absence of all jurisdiction" in the Circuit Court to consider the sterilization petition. That court had jurisdiction under the Indiana statute granting it broad general jurisdiction, it appearing that neither by statute nor by case law had such jurisdiction been circumscribed to foreclose consideration of the petition. Pp. 435 U. S. 357-358.

(c) Because the Circuit Court is a court of general jurisdiction, neither the procedural errors the Circuit Judge may have committed nor the lack of a specific statute authorizing his approval of the petition in question rendered him liable in damages for the consequences of his actions. Pp. 435 U. S. 358-360.

(d) The factors determining whether an act by a judge is "judicial" relate to the nature of the act itself (whether it is a function normally performed by a judge) and the expectation of the parties (whether they dealt with the judge in his judicial capacity), and here, both of these elements indicate that the Circuit Judge's approval of the sterilization petition was a judicial act, even though he may have proceeded with informality. Pp. 435 U. S. 360-363.

(e) Disagreement with the action taken by a judge does not justify depriving him of his immunity, and, thus, the fact that, in this case, tragic consequences ensued from the judge's action does not deprive him of his immunity; moreover, the fact that the issue before the judge is a controversial one, as here, is all the more reason that he should be able to act without fear of suit. Pp. 435 U. S. 363-364.

552 F.2d 172, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C.J., and BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which MARSHALL and POWELL, JJ., joined, *post,* p. 435 U. S. 364. POWELL, J., filed a dissenting opinion, *post,* p. 435 U. S. 369. BRENNAN, J., took no part in the consideration or decision of the case.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case requires us to consider the scope of a judge's immunity from damages liability when sued under 42 U.S.C. § 1983.

I

The relevant facts underlying respondents' suit are not in dispute. On July 9, 171, Ora Spitler McFarlin, the mother of respondent Linda Kay Spitler Sparkman, presented to Judge Harold D.

Stump of the Circuit Court of DeKalb County, Ind., a document captioned "Petition To Have Tubal Ligation Performed On Minor and Indemnity Agreement." The document had been drafted by her attorney, a petitioner here. In this petition, Mrs. McFarlin stated under oath that her daughter was 15 years of age and was "somewhat retarded," although she attended public school and had been promoted each year with her class. The petition further stated that Linda had been associating with "older youth or young men" and had stayed out overnight with them on several occasions. As a result of this behavior and Linda's mental capabilities, it was stated that it would be in the daughter's best interest if she underwent a tubal ligation in order "to prevent unfortunate circumstances. . . ." In the same document, Mrs. McFarlin also undertook to indemnify and hold harmless Dr. John Hines, who was to perform the operation, and the DeKalb Memorial Hospital, where the operation was to take place, against all causes of action that might arise as a result of the performance of the tubal ligation.

[Footnote 1]
The petition was approved by Judge Stump on the same day. He affixed his signature as "Judge, DeKalb Circuit Court," to the statement that he did "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."

On July 15, 1971, Linda Spitler entered the DeKalb Memorial Hospital, having been told that she was to have her appendix removed. The following day, a tubal ligation was performed upon her. She was released several days later, unaware of the true nature of her surgery.

Approximately two years after the operation, Linda Spitler was married to respondent Leo Sparkman. Her inability to become pregnant led her to discover that she had been sterilized during the 1971 operation. As a result of this revelation, the Sparkmans filed suit in the United States District Court for the Northern District of Indiana against Mrs. McFarlin, her attorney, Judge Stump, the doctors who had performed and assisted in the tubal ligation, and the DeKalb Memorial Hospital. Respondents sought damages for the alleged violation of Linda Sparkman's constitutional rights;

[Footnote 2]

also asserted were pendent state claims for assault and battery, medical malpractice, and loss of potential fatherhood.

Ruling upon the defendants' various motions to dismiss the complaint, the District Court concluded that each of the constitutional claims asserted by respondents required a showing of state action, and that the only state action alleged in the complaint was the approval by Judge Stump, acting as Circuit Court Judge, of the petition presented to him by Mrs. McFarlin. The Sparkmans sought to hold the private defendants liable on a theory that they had conspired with Judge Stump to bring about the allegedly unconstitutional acts. The District Court, however, held that no federal action would lie against any of the defendants because Judge Stump, the only state agent, was absolutely immune from suit under the doctrine of judicial immunity. The court stated

that "whether or not Judge Stump's 'approval' of the petition may, in retrospect, appear to have been premised on an erroneous view of the law, Judge Stump surely had jurisdiction to consider the petition and to act thereon." *Sparkman v. McFarlin,* Civ. No. F 75-129 (ND Ind., May 13, 1976). Accordingly, under Bradley v. Fisher, 13 Wall. 335,80 U. S. 351 (1872), Judge Stump was entitled to judicial immunity.

[Footnote 3]

On appeal, the Court of Appeals for the Seventh Circuit reversed the judgment of the District Court, [Footnote 4] holding that the "crucial issue" was "whether Judge Stump acted within his jurisdiction" and concluding that he had not. 52 F.2d at 174. He was accordingly not immune from damages liability under the controlling authorities. The Court of Appeals also held that the judge had forfeited his immunity "because of his failure to comply with elementary principles of procedural due process." *Id.* at 176.

We granted certiorari, 434 U.S. 815 (1977), to consider the correctness of this ruling. We reverse. II.

The governing principle of law is well established, and is not questioned by the parties. As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher, supra* at 80 U. S. 347.

[Footnote 5]

For that reason, the Court held that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly. "13 Wall. at 80 U. S. 351.

[Footnote 6]

Later, we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle. *Pierson v. Ray,* 386 U. S. 547 (1967).

The Court of Appeals correctly recognized that the necessary inquiry in determining whether a defendant judge is immune from suit is whether, at the time he took the challenged action, he had jurisdiction over the subject matter before him. Because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . .," *Bradley, supra,* at 80 U. S. 352, the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."

[Footnote 7]

We cannot agree that there was a "clear absence of all jurisdiction" in the DeKalb County Circuit Court to consider the petition presented by Mrs. McFarlin. As an Indiana Circuit Court Judge, Judge Stump had "original exclusive jurisdiction in all cases at law and in equity whatsoever . . . ," jurisdiction over the settlement of estates and over guardianships, appellate jurisdiction as conferred by law, and jurisdiction over "all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer." Ind.Code § 33 l l 3 (1975).

[Footnote 8]

This is indeed a broad jurisdictional grant; yet the Court of Appeals concluded that Judge Stump did not have jurisdiction over the petition authorizing Linda Sparkman's sterilization. In so doing, the Court of Appeals noted that the Indiana statutes provided for the sterilization of institutionalized persons under certain circumstances, *see* Ind.Code §§ 16-13-13-1 through 16-13-13-4 (1973), but otherwise contained no express authority for judicial approval of tubal ligations. It is true that the statutory grant of general jurisdiction to the Indiana circuit courts does not itemize types of cases those courts may hear, and hence does not expressly mention sterilization petitions presented by the parents of a minor. 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. The statutory authority for the sterilization of institutionalized persons in the custody of the State does not warrant the inference that a court of general jurisdiction has no power to act on a petition for sterilization of a minor in the custody of her parents, particularly where the parents have authority under the Indiana statutes to "consent to and contract for medical or hospital care or treatment of [the minor] including surgery." Ind.Code § 16-8-4-2 (1973). The District Court concluded that Judge Stump had jurisdiction under § 33-4-4-3 to entertain and act upon Mrs. McFarlin's petition. We agree with the District Court, it appearing that neither by statute nor by case law has 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. The Court of Appeals also concluded that support for Judge Stump's actions could not be found in the common law of Indiana, relying in particular on the Indiana Court of Appeals' intervening decision in *A.L. v. G.R.H.*, 163 Ind.App. 636, 325 N.E.2d 501 (1975). In that case, the Indiana court held that a parent does not have a common law right to have a minor child sterilized, even though the parent might "sincerely believe the child's adulthood would benefit therefrom." *Id.* at 638, 325 N.E.2d at 502. The opinion, however, speaks only of the rights of the parents to consent to the sterilization of their child, and does not question the *jurisdiction* of a circuit judge who is presented with such a petition from a parent. Although, under that case, a circuit judge would err as a matter of law if he were to approve a parent's petition seeking the sterilization of a child, the opinion in *A.L. v. G.R.H.* does not indicate that a circuit judge is without jurisdiction to entertain the petition. Indeed, the clear implication of the opinion is that, when presented with such a petition, the circuit judge should deny it on its merits, rather than dismiss it for lack of jurisdiction.

Perhaps realizing the broad scope of Judge Stump's jurisdiction, the Court of Appeals stated that, even if the action taken by him was not foreclosed under the Indiana statutory scheme, it would

still be "an illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process." 552 F.2d at 176. This misconceives the doctrine of judicial immunity. A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. The Court made this point clear in *Bradley,* 13 Wall. at 80 U. S. 357, where it stated:

"[T]his erroneous manner in which [the court's] jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever. . .."

We conclude that the Court of Appeals, employing an unduly restrictive view of the scope of Judge Stump's jurisdiction, erred in holding that he was not entitled to judicial immunity. Because the court over which Judge Stump presides is one of general jurisdiction, neither the procedural errors he may have committed nor the lack of a specific statute authorizing his approval of the petition in question rendered him liable in damages for the consequences of his actions.

The respondents argue that, even if Judge Sump had jurisdiction to consider the petition presented to him by Mrs. McFarlin, he is still not entitled to judicial immunity, because his approval of the petition did not constitute a "judicial" act. It is only for acts performed in his "judicial" capacity that a judge is absolutely immune, they say. We do not disagree with this statement of the law, but we cannot characterize the approval of the petition as a nonjudicial act.

Respondents themselves stated in their pleadings before the District Court that Judge Stump was "clothed with the authority of the state" at the time that he approved the petition, and that "he was acting as a county circuit court judge." Plaintiffs' Reply Brief to Memorandum Filed on Behalf of Harold D. Stump in Support of his Motion to Dismiss in Civ. No. F 75-129, p. 6. They nevertheless now argue that Judge Stump's approval of the petition was not a judicial act, because the petition was not given a docket number, was not placed on file with the clerk's office, and was approved in an *ex parte* proceeding without notice to the minor, without a hearing, and without the appointment of a guardian *ad litem.*

This Court has not had occasion to consider, for purposes of the judicial immunity doctrine, the necessary attributes of a judicial act; but it has previously rejected the argument, somewhat similar to the one raised here, that the lack of formality involved in the Illinois Supreme Court's consideration of a petitioner's application for admission to the state bar prevented it from being a "judicial proceeding" and from presenting a case or controversy that could be reviewed by this Court. *In re Summers,* 325 U. S. 561 (1945). Of particular significance to the present case, the Court in *Summers* noted the following:

"The record does not show that any process issued or that any appearance was made. . .. While no entry was placed by the Clerk in the file, on a docket, or in a judgment roll, the Court took cognizance of the petition and passed an order which is validated by the signature of the presiding officer." *Id.* at 325 U. S. 567. Because the Illinois court took cognizance of the petition for admission and acted upon it, the Court held that a case or controversy was presented. Similarly, the Court of Appeals for the Fifth Circuit has held that a state district judge was entitled to judicial

immunity, even though, "at the time of the altercation [giving rise to the suit], Judge Brown was not in his judge's robes, he was not in the courtroom itself, and he may well have violated state and/or federal procedural requirements regarding contempt citations." *McAlester v. Brown,* 469 F.2d 1280, 1282 (1972).

[Footnote 9]

Among the factors relied upon by the Court of Appeals in deciding that the judge was acting within his judicial capacity was the fact that "the confrontation arose directly and immediately out of a visit to the judge in his official capacity." *Ibid.*

[Footnote 10]

The relevant cases demonstrate that the factors determining whether an act by a judge 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. Here, both factors indicate that Judge Stump's approval of the sterilization petition was a judicial act.

[Footnote 11]

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. Furthermore, as even respondents have admitted, at the time he approved the petition presented to him by Mrs. McFarlin, Judge Stump was "acting as a county circuit court judge." *See supra* at 435 U. S. 360. We may infer from the record that it was only because Judge Stump served in that position that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval. Because Judge Stump performed the type of act normally performed only by judges, and because he did so in his capacity as a Circuit Court Judge, we find no merit to respondents' argument that the informality with which he proceeded rendered his action nonjudicial and deprived him of his absolute immunity.

[Footnote 12]

Both the Court of Appeals and the respondents seem to suggest that, because of the tragic consequences of Judge Stump's actions, he should not be immune. For example, the Court of Appeals noted that "[t]here are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take," 552 F.2d at 176, and respondents argue that Judge Stump's action was "so unfair" and "so totally devoid of judicial concern for the interests and wellbeing of the young girl involved" as to disqualify it as a judicial act. Brief for Respondents 18. Disagreement with the action taken by the judge, however, does not justify depriving that judge of his immunity. 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."

Bradley v. Fisher, 13 Wall. at 80 U. S. 347. The fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit. As the Court pointed out in *Bradley:*

"Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility." *Id.* at 80 U. S. 348.

The Indiana law vested in Judge Stump the power to entertain and act upon the petition for sterilization. He is, therefore, under the controlling cases, immune from damages liability even if his approval of the petition was in error. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

[Footnote 1]

The full text of the petition presented to Judge Stump read as follows:

"STATE OF INDIANA"
"COUNTY OF DEKALB)"

"*PETITION TO HAVE TUBAL LIGATION PERFORMED ON"*
"*MINOR AND INDEMNITY AGREEMENT"*

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

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

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

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

"/s/ ORA SPITLER McFARLIN"
"Ora Spitler McFarlin"
rj:
Petitioner
lj:

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

"/s/ WARREN G. SUNDAY"
"Warren G. Sunday"

rj:
Notary Public

lj:

"My commission expires January 4, 1975"

"----------"

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

"/s/ HAROLD D. STUMP"

rj: *Judge, DeKalb Circuit Court*
lj: "Dated July 9, 1971"

[Footnote 2]

The District Court gave the following summary of the constitutional claims asserted by the Sparkmans:

"Whether laid under section 1331 or 1343(3) and whether asserted directly or via section 1983 and 1985, plaintiffs' grounds for recovery are asserted to rest on the violation of constitutional rights. Plaintiffs urge that defendants violated the following constitutional guarantees:"
"1. that the actions were arbitrary, and thus in violation of the due process clause of the Fourteenth Amendment;"
"2. that Linda was denied procedural safeguards required by the Fourteenth Amendment;"
"3. that the sterilization was permitted without the 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 depriving Linda of due process of law; and"
"9. that 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."
Sparkman v. McFarlin, Civ. No. F 75-129 (ND Ind., May 13, 1976).

[Footnote 3]

The District Court granted the defendants' motion to dismiss the federal claims for that reason, and dismissed the remaining pendent state claims for lack of subject matter jurisdiction.

[Footnote 4]

Sparkman v. McFarlin, 552 F.2d 172 (CA7 1977).

[Footnote 5]

Even earlier, in Randall v. Brigham, 7 Wall. 523 (1869), the Court stated that judges are not responsible "to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly."
Id. at 74 U. S. 537. In *Bradley,* the Court reconsidered that earlier statement and concluded that "the qualifying words used were not necessary to a correct statement of the law. . .." 13 Wall. at 80 U. S. 351.

[Footnote 6]

In holding that a judge was immune for his judicial acts, even when such acts were performed in excess of his jurisdiction, the Court in *Bradley* 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 clearly 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.* at 80 U. S. 351-352.

[Footnote 7]

In *Bradley,* the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction, and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction, and would be immune. *Id.* at 80 U. S. 352.

[Footnote 8]

Indiana Code § 33-4-4-3 (1975) states as follows:

"Jurisdiction. -- Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

[Footnote 9]

In *McAlester,* the plaintiffs alleged that they had gone to the courthouse where their son was to be tried by the defendant in order to give the son a fresh set of clothes. When they went into the defendant judge's office, he allegedly ordered them out and had a deputy arrest one of them and place him in jail for the rest of the day. Several months later, the judge issued an order holding the plaintiff in contempt of court *nunc pro tunc.*

[Footnote 10]

Other Courts of Appeals, presented with different fact situations, have concluded that the challenged actions of defendant judges were not performed as part of the judicial function. and that the judges were thus not entitled to rely upon the doctrine of judicial immunity. The Court of Appeals for the Ninth Circuit, for example, has held that a justice of the peace who was accused of forcibly removing a man from his courtroom and physically assaulting him was not absolutely immune. *Gregory v. Thompson,* 500 F.2d 59 (1974). While the court recognized that a judge has the duty to maintain order in his courtroom, it concluded that the actual eviction of someone from

the courtroom by use of physical force, a task normally performed by a sheriff or bailiff, was "simply not an act of a judicial nature." *Id.* at 64. And the Court of Appeals for the Sixth Circuit held in *Lynch v. Johnson,* 420 F.2d 818 (1970), that the county judge sued in that case was not entitled to judicial immunity because his service on a board with only legislative and administrative powers did not constitute a judicial act.

[Footnote 11]

MR. JUSTICE STEWART, in dissent, complains that this statement is inaccurate because it nowhere appears that judges are normally asked to approve parents' decisions either with respect to surgical treatment in general or with respect to sterilizations in particular. Of course, the opinion makes neither assertion. Rather, it is said that Judge Stump was performing a "function" normally performed by judges, and that he was taking "the type of action" judges normally perform. The dissent makes no effort to demonstrate that Judge Stump was without jurisdiction to entertain and act upon the specific petition presented to him. Nor does it dispute that judges normally entertain petitions with respect to the affairs of minors. Even if it is assumed that. in a lifetime of judging, a judge has acted on only one petition of a particular kind, this would not indicate that his function in entertaining and acting on it is not the kind of function that a judge normally performs. If this is the case, it is also untenable to claim that in entertaining the petition and exercising the jurisdiction with which the statutes invested him, Judge Stump was nevertheless not performing a judicial act or was engaging in the kind of conduct not expected of a judge under the Indiana statutes governing the jurisdiction of its courts.

[Footnote 12]

MR. JUSTICE STEWART's dissent, *post* at 435 U. S. 369, suggests that Judge Stump's approval of Mrs. McFarlin's petition was not a judicial act, because of the absence of what it considers the "normal attributes of a judicial proceeding." These attributes are said to include a "case," with litigants and the opportunity to appeal, in which there is "principled decision-making." But, under Indiana law, Judge Stump had jurisdiction to act as he did; the proceeding instituted by the petition placed before him was sufficiently a "case" under Indiana law to warrant the exercise of his jurisdiction, whether or not he then proceeded to act erroneously. That there were not two contending litigants did not make Judge Stump's act any less judicial. Courts and judges often act *ex parte.* They issue search warrants in this manner, for example, often without any "case" having been instituted, without any "case" ever being instituted, and without the issuance of the warrant being subject to appeal. Yet it would not destroy a judge's immunity if it is alleged and offer of proof is made that, in issuing a warrant, he acted erroneously and without principle.

[Footnote 13]

The issue is not presented, and we do not decide, whether the District Court correctly concluded that the federal claims against the other defendants were required to be dismissed if Judge Stump, the only state agent, was found to be absolutely immune. *Compare Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno,* 547 F.2d 1 (CA1 1976), *with Guedry v. Ford,* 431 F.2d 660 (CA5 1970).

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL and MR. JUSTICE POWELL join, dissenting.

It is established federal law that judges of general jurisdiction are absolutely immune from monetary liability "for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." Bradley v. Fisher, 13 Wall. 335, 80 U. S. 351. It is also established that this immunity is in no way diminished in a proceeding under 42 U.S.C. § 1983. *Pierson v. Ray*, 386 U. S. 547. But the scope of judicial immunity is limited to liability for "judicial acts," and I think that what Judge Stump did on July 9, 1971, was beyond the pale of anything that could sensibly be called a judicial act.

Neither in *Bradley v. Fisher* nor in *Pierson v. Ray* was there any claim that the conduct in question was not a judicial act, and the Court thus had no occasion in either case to discuss the meaning of that term.

[Footnote 2/1]

Yet the proposition that judicial immunity extends only to liability for "judicial acts" was emphasized no less than seven times in Mr. Justice Field's opinion for the Court in the *Bradley* case.

[Footnote 2/2]

Cf. Imbler v. Pachtman, 424 U. S. 409, 424 U. S. 430. And if the limitations inherent in that concept have any realistic meaning at all, then I cannot believe that the action of Judge Stump in approving Mrs. McFarlin's petition is protected by judicial immunity.

The Court finds two reasons for holding that Judge Stump's approval of the sterilization petition was a judicial act. First, the Court says, it was "a function normally performed by a judge." Second, the Court says, the act was performed in Judge Stump's "judicial capacity." With all respect, I think that the first of these grounds is factually untrue, and that the second is legally unsound.

When the Court says that what Judge Stump did was an act "normally performed by a judge," it is not clear to me whether the Court means that a judge "normally" is asked to approve a mother's decision to have her child given surgical treatment generally, or that a judge "normally" is asked to approve a mother's wish to have her daughter sterilized. But whichever way the Court's statement is to be taken, it is factually inaccurate. In Indiana, as elsewhere in our country, a parent is authorized to arrange for and consent to medical and surgical treatment of his minor child. Ind.Code § 16-8-4-2 (1973). And when a parent decides to call a physician to care for his sick child or arranges to have a surgeon remove his child's tonsils, he does not, "normally" or otherwise, need to seek the approval of a judge.

[Footnote 2/3]

On the other hand, Indiana did, in 1971, have statutory procedures for the sterilization of certain people who were institutionalized. But these statutes provided for administrative proceedings before a board established by the superintendent of each public hospital. Only if, after notice and an evidentiary hearing, an order of sterilization was entered in these proceedings could there be review in a circuit court. *See* Ind.Code §§ 16-13-13-1 through 16-13-13-4 (1974).

[Footnote 2/4]

In sum, what Judge Stump did on July 9, 1971, was in no way an act "normally performed by a judge." Indeed, there is no reason to believe that such an act has ever been performed by *any* other Indiana judge, either before or since.

When the Court says that Judge Stump was acting in "his judicial capacity" in approving Mrs. McFarlin's petition, it is not clear to me whether the Court means that Mrs. McFarlin submitted the petition to him only because he was a judge, or that, in approving it, he *said* that he was acting as a judge. But however, the Court's test is to be understood, it is, I think, demonstrably unsound. It can safely be assumed that the Court is correct in concluding that Mrs. McFarlin came to Judge Stump with her petition because he was a County Circuit Court Judge. But false illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act. In short, a judge's approval of a mother's petition to lock her daughter in the attic would hardly be a judicial act simply because the mother had submitted her petition to the judge in his official capacity.
If, on the other hand, the Court's test depends upon the fact that Judge Stump *said* he was acting in his judicial capacity, it is equally invalid. It is true that Judge Stump affixed his signature to the approval of the petition as "Judge, De Kalb Circuit Court." But the conduct of a judge surely does not become a judicial act merely on his own say-so. A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity.

[Footnote 2/5]

If the standard adopted by the Court is invalid, then what is the proper measure of a judicial act? Contrary to implications in the Court's opinion, my conclusion that what Judge Stump did was not a judicial act is not based upon the fact that he acted with informality, or that he may not have been "in his judge's robes," or "in the courtroom itself." *Ante* at 435 U. S. 361. And I do not reach this conclusion simply "because the petition was not given a docket number, was not placed on file with the clerk's office, and was approved in an *ex parte* proceeding without notice to the minor, without a hearing, and without the appointment of a guardian *ad litem.*" *Ante* at 435 U. S. 360.

It seems to me, rather, that the concept of what is a judicial act must take its content from a consideration of the factors that support immunity from liability for the performance of such an act. Those factors were accurately summarized by the Court in *Pierson v. Ray,* 386 U.S. at 386 U. S. 554:

"[I]t 'is . . . for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' . . . It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial

cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but to intimidation."

Not one of the considerations thus summarized in the *Pierson* opinion was present here. There was no "case," controversial or otherwise. There were no litigants. There was and could be no appeal. And there was not even the pretext of principled decision-making. The total absence of any of these normal attributes of a judicial proceeding convinces me that the conduct complained of in this case was not a judicial act.

The petitioners' brief speaks of "an aura of deism which surrounds the bench . . . essential to the maintenance of respect for the judicial institution." Though the rhetoric may be overblown, I do not quarrel with it. But if aura there be, it is hardly protected by exonerating from liability such lawless conduct as took place here. And if intimidation would serve to deter its recurrence, that would surely be in the public interest.

[Footnote 3/1]

In the *Bradley* case, the plaintiff was a lawyer who had been disbarred; in the *Pierson* case, the plaintiffs had been found guilty after a criminal trial.

[Footnote 3/2]

See 13 Wall. at 80 U. S. 347, 80 U. S. 348, 80 U. S. 349, 80 U. S. 351, 80 U. S. 354, 80 U. S. 357

[Footnote 3/3]

This general authority of a parent was held by an Indiana Court of Appeals in 1975 not to include the power to authorize the sterilization of his minor child. *A.L. v. G.R.H.,* 163 Ind.App. 636, 325 N.E.2d 501.

Contrary to the Court's conclusion, *ante* at 435 U. S. 359, that case does not in the least demonstrate that an Indiana judge is or ever was empowered to act on the merits of a petition like Mrs. McFarlin's. The parent in that case did not petition for judicial approval of her decision, but rather "filed a complaint for declaratory judgment seeking declaration of her right under the common law attributes of the parent-child relationship to have her son . . . sterilized." 163 Ind.App. at 636-637, 325 N.E.2d at 501. The Indiana Court of Appeals' decision simply established a limitation on the parent's common law rights. It neither sanctioned nor contemplated any procedure for judicial "approval" of the parent's decision.

Indeed, the procedure followed in that case offers an instructive contrast to the judicial conduct at issue here:

"At the outset, we thank counsel for their excellent efforts in representing a seriously concerned parent and in providing the guardian *ad litem* defense of the child's interest. *Id.* at 638, 325 N.E.2d at 502"

[Footnote 3/4]

These statutes were repealed in 1974.

[Footnote 3/5]

Believing that the conduct of Judge Stump on July 9, 1971, was not a judicial act, I do not need to inquire whether he was acting in "the clear absence of all jurisdiction over the subject matter." *Bradley v. Fisher,* 13 Wall. at 80 U. S. 351. "Jurisdiction" is a coat of many colors. I note only that the Court's finding that Judge Stump had jurisdiction to entertain Mrs. McFarlin's petition seems to me to be based upon dangerously broad criteria. Those criteria are simply that an Indiana statute conferred "jurisdiction of all . . . causes, matters and proceedings," and that there was not in 1971 any Indiana law specifically prohibiting what Judge Stump did.

[Footnote 3/6]

The only question before us in this case is the scope of judicial immunity. How the absence of a "judicial act" might affect the issue of whether Judge Stump was acting "under color of" state law within the meaning of 42 U.S.C. § 1983, or the issue of whether his act was that of the State within the meaning of the Fourteenth Amendment need not, therefore, be pursued here.

MR. JUSTICE POWELL, dissenting.

While I join the opinion of MR. JUSTICE STEWART, I wish to emphasize what I take to be the central feature of this case -- Judge Stump's preclusion of any possibility for the vindication of respondents' rights elsewhere in the judicial system.

Bradley v. Fisher, 13 Wall. 335 (1872), which established the absolute judicial immunity at issue in this case, recognized that the immunity was designed to further the public interest in an independent judiciary, sometimes at the expense of legitimate individual grievances. *Id.* at 80 U. S. 349; *accord, Pierson v. Ray,* 386 U. S. 547, 386 U. S. 554 (1967). The *Bradley* Court accepted those costs to aggrieved individuals because the judicial system itself provided other means for protecting individual rights:

"Against the consequences of [judges'] erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort." 13 Wall. at 80 U. S. 354. Underlying the *Bradley* immunity, then, is the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights. [Footnote 3/1]
But where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption of the *Bradley* doctrine is

inoperative. *See Pierson v. Ray, supra* at 386 U. S. 554. [Footnote 3/2] In this case, as MR. JUSTICE STEWART points out, *ante* at 435 U. S. 369, Judge Stump's unjudicial conduct insured that "[t]here was and could be no appeal." The complete absence of normal judicial process foreclosed resort to any of the "numerous remedies" that "the law has provided for private parties." *Bradley, supra* at 80 U. S. 354.

In sum, I agree with MR. JUSTICE STEWART that petitioner judge's actions were not "judicial," and that he is entitled to no judicial immunity from suit under 42 U.S.C. § 1983.

[Footnote 4/1]

See Handler & Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials, 74 Harv.L.Rev. 44, 53-55 (1960); Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv.L.Rev. 209, 233-235 (1963); Note, Federal Executive Immunity From Civil Liability in Damages: A Reevaluation of *Barr v. Mateo*, 77 Colum.L.Rev. 625, 647 (1977).

[Footnote 4/2]
In both *Bradley* and *Pierson*, any errors committed by the judges involved were open to correction on appeal.