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*Pierson v. Ray*⁵⁷ established absolute judicial immunity from liability for damages under section 1983. In *Pierson*, the plaintiffs had been arrested by the defendant police officers, convicted and given the maximum sentence by the defendant municipal police justice for violating a Mississippi breach of the peace statute.⁵⁸ After plaintiffs had been vindicated in a trial de novo, they sued the defendants for damages under 1983 as well as for false arrest and imprisonment at common law.

In holding that the municipal police justice was absolutely immune from liability for damages under 1983,⁵⁹ the Court compared judicial immunity at common law with legislative immunity. Following *Tenney*'s approach, the Court stated that the legislative history of section 1983 did not indicate an intention to abolish the common law immunity of judges.⁶⁰ The Court also observed that the only role the police justice played was to find plaintiffs guilty. It then went on to hold that judges should be absolutely immune from liability for damages for acts within their judicial jurisdiction in order to preserve the autonomy of judicial decision-making.⁶¹

An interpretation of section 1983 as excluding judges⁶² is more questionable than *Pierson*'s interpretation excluding state legislators. As Justice Douglas, dissenting in *Pierson*, pointed out, the legislative history of section 1983 and its criminal law counterpart, now 18 U.S.C. § 242, indicates that it is to apply to judges and that, indeed, "[i]t was recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied."⁶³ It has also been suggested that, in contrast with the history of legislative immunity set out in *Tenney*,⁶⁴ judicial immunity at common law was not so well established as the Court thought in *Pierson*.

Nevertheless, the result in *Pierson* was probably inevitable given *Tenney*'s approach to reading section 1983 against a background of common law immunity. It is worth noting in this connection that with few exceptions,⁶⁵ federal courts, especially after *Tenney*, and even before *Pierson*, began to apply the doctrine of absolute judicial immunity consistently.⁶⁶ Consequently, after *Pierson*, the question is no longer the existence of absolute judicial immunity, but rather its scope. *Pierson* indicates that the immunity only applies to acts within "judicial jurisdiction." This, however, does little to define the scope of judicial immunity. *Pierson*, a



relatively easy case which involved a judge who clearly acted in a traditional judicial capacity, held, not surprisingly, that a judge acts within his judicial jurisdiction even if he applies a statute unconstitutionally.

"Judicial Jurisdiction," Bradley v. Fisher and Stump v. Sparkman: The Scope of Judicial Immunity from Liability for Damages

While it was relatively easy in Pierson to find that the police justice acted within his "judicial jurisdiction," Pierson did not determine the scope of judicial jurisdiction. This term was coined in Bradley v. Fisher,⁶⁷ an 1871 Supreme Court decision cited with approval in Pierson, in which a criminal court judge for the District of Columbia was sued for damages by a lawyer whom he removed from practice before his court without notice and the opportunity to defend. The Court elaborately set out the general rules which define judicial jurisdiction:

[J]udges 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 in such 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.⁶⁸

In applying these principles to the facts before it, the Supreme Court in Bradley observed that while the defendant judge had the power to remove a lawyer from the bar, this should not ordinarily be done without notice and the opportunity to explain and defend. Nevertheless, even though the defendant judge erred in not giving plaintiff such notice, this constituted at most an excess of jurisdiction but "did not make the act any less a judicial



act;...[it was not] as though the court had proceeded without any jurisdiction whatever over its attoreys."⁶⁹ Thus, the defendant judge was absolutely immune from liability for damages for the allegedly wrongful disbarment.

Several matters are noteworthy. First and foremost is the distinction the Court draws between "excess of jurisdiction" and the "clear absence of all jurisdiction" over the subject matter. Second, the Court mentions subject matter jurisdiction several times, but mentions jurisdiction over the person only once. In Bradley, it appears that while the defendant judge may not have given the plaintiff notice of the disbarment, the judge retained personal jurisdiction over the plaintiff although the jury in the case in which plaintiff and defendant were involved had already been discharged.⁷⁰ However, the relevance of personal jurisdiction is nowhere made clear.

Moreover, the two examples set forth by the Court⁷¹ are intriguing. The first concerns a probate judge who tries criminal offenses; he acts, according to Bradley, in clear absence of all jurisdiction. In its discussions, the Court may have intimated that the probate judge's state of mind is relevant to a finding of clear absence of all jurisdiction because it spoke at one point of this clear absence as "necessarily known" to the probate judge, and at another juncture similarly qualified its clear absence rule by adding "when the want of jurisdiction is known to the judge."⁷² The Court may have set out a test for judicial immunity that includes both objective and subjective elements: the judge must know of a clear absence of subject matter jurisdiction which exists in fact before he loses his immunity.

The Court's second example concerns a judge with general criminal jurisdiction who either convicts a person of an act which is not in fact criminal or gives a person an unauthorized sentence.⁷³ This judge, according to the Court, has acted only in excess of jurisdiction and does not lose his judicial immunity. The puzzling aspect is why the Court characterizes this as jurisdictional, when it appears to be an error of law going to the merits. Further, suppose it is somehow jurisdictional. If the judge knows in fact that the act is not a crime or that the sentence is unauthorized, does he then act in clear absence of jurisdiction?

Pierson retained the jurisdictional language of Bradley in holding that the police justice acted within his "judicial jurisdiction." Indeed, as mentioned, applying the Bradley approach in Pierson is rather straightforward and poses no serious problems, because the

police justice clearly had both subject matter jurisdiction and personal jurisdiction. In Bradley's terms, he acted, at most, only in excess of his jurisdiction when he convicted the plaintiffs under an unconstitutionally applied statute. Also, because the Pierson court did not even inquire whether he knowingly did so, this suggests a judge's state of mind is irrelevant when he makes a legal error. He would not lose his absolute immunity regardless of his alleged state of mind; he would still have acted only in excess of jurisdiction in Bradley's terms.⁷⁴ Such a result seems consistent with the emphasis in both Bradley and Pierson on preventing litigants from challenging a judge's motivation and on encouraging resort instead to the appellate process to correct legal errors.

In considering the implications of Bradley and Pierson, those relatively few cases in which courts have held that judges lose their absolute immunity are helpful in evaluating the proper scope of judicial immunity.⁷⁵ A Sixth Circuit decision, Lucarell v. McNair, held that a plaintiff who alleged that a juvenile court referee illegally incarcerated him in connection with traffic court proceedings stated a cause of action. The referee acted in "absence of all jurisdiction" because, according to the complaint, he lacked power to incarcerate under state law.⁷⁶ A similar and much cited Ohio district court case, Wade v. Bethesda Hospital,⁷⁷ involved a 1983 claim against a probate judge who allegedly conspired with others to sterilize the plaintiff.⁷⁸ In considering whether the defendant "acted outside the scope of his jurisdiction," the court set out the following three pronged test:

*The cases are clear that the term jurisdiction means that the judge must have both [1] jurisdiction over the person and [2] subject matter if he is to be immune from suit for an act performed in his judicial capacity... [3] A third element . . . [which] enters into the concept of jurisdiction... is the power of the Court to render the particular decision which was given... [that is] whether the defendant's action is authorized by any set of conditions or circumstances.*⁷⁹

After finding that no Ohio statute authorized a judge to order sterilization for any purpose and no judicial precedent for such an order existed absent a specific statute, the court concluded: "Because there was no set of circumstances or conditions under Ohio law which would permit defendant Gary to order plaintiff to submit to sterilization, the Court determines that defendant Gary

acted wholly without jurisdiction in this matter. Consequently, defendant Gary is not protected by the doctrine of judicial immunity."⁸⁰

These decisions seem to go beyond the Bradley-Pierson approach in treating the defendant judges as acting in clear absence of jurisdiction. First, they apparently considered their fact situations to be substantially similar to Bradley's example of a probate judge who tries criminal cases but substantially different from the other Bradley example of a criminal court judge who either convicts a person of an act which is not a crime or imposes an unauthorized sentence upon a person. Why this is so is unclear since in Lucarell the incarceration might be termed an unauthorized sentence and in Wade the sterilization might be termed an illegal order. Unlike the Bradley probate judge example, these judges had the power to do something with the plaintiffs in connection with the reasons the plaintiffs were before them at the outset.⁸¹

Thus, Lucarell and Wade appear in fact to be cases where the judges acted in "excess of jurisdiction" and not in "clear absence" of it. The errors made by these judges as to their powers in the particular cases before them should not be treated as acts in clear absence of jurisdiction. As Bradley itself recognized, "some of the most difficult and embarrassing questions" for a judge involve his jurisdiction and powers.⁸² This was also acknowledged in a Second Circuit decision predating Lucarell and Wade which involved a claim based upon plaintiff's conviction for assault by a justice of the peace who did not have subject matter jurisdiction over this offense.⁸³ In holding that absolute immunity attached, the court stated that absolute immunity is lost only in those exceptional circumstances when it is perfectly clear that a judge acts in the absence of jurisdiction.⁸⁴

That a judge with general subject matter jurisdiction loses his absolute immunity if he errs grossly and issues an unauthorized order-the proposition for which Lucarell and Wade stand-was thus questionable even before the Supreme Court's 1978 decision in Stump v. Sparkman.⁸⁵ After Stump, which reversed a Seventh Circuit decision holding that a judge had lost his absolute immunity, it is clearly untenable. Stump concerned the issue, similar to that in Wade, of the judicial immunity of a judge who ordered the sterilization of a fifteen year old girl upon her mother's petition.⁸⁶ The facts in Stump apparently shocked the Seventh Circuit which noted that the order was issued in an ex parte proceeding. Further, no guardian ad litem was appointed to

represent the child's interests and no hearing was held. She never received notice of the petition and neither the petition nor the order was ever filed in the circuit court.⁸⁷

Applying the Bradley-Pierson test, the Seventh Circuit reversed the district court and found that the defendant had acted in clear absence of subject matter jurisdiction, even though the Circuit Court of DeKalb County was by statute a court having original and exclusive jurisdiction in all cases at law and in equity.⁸⁸ In order for the judge's act to come within the statute, the court said, it must have either a statutory or common law basis.⁸⁹ After examining Indiana law, the court found no such basis. Further, it rejected the defendant's argument that he was exercising his power to fashion new common law.⁹⁰ First, judges "may not use the power to create new decisional law to order extreme and irreversible remedies such as sterilization in situations where the legislative branch of government has indicated that they are inappropriate .. .[Otherwise] we would be sanctioning tyranny from the bench."⁹¹ Alternatively, the court stated that the defendant's exercise of his common law power was illegitimate "because of his failure to comply with elementary principles of procedural due process."⁹²

The Supreme Court reversed. As it had in Pierson, the Court cited Bradley for its approach distinguishing between excess of jurisdiction and the clear absence of all jurisdiction. It then noted the difficult nature of jurisdictional questions and concluded: "We cannot agree that there was a 'clear absence of all jurisdiction' in the DeKalb County Circuit Court to consider the petition presented. ...⁹³ In reaching this conclusion, the Court mentioned the broad jurisdictional grant and, turning the Seventh Circuit's argument around, observed 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."⁹⁴ The Court, citing Bradley again, also rejected the Seventh Circuit's due process argument as "misconceiv[ing] 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."⁹⁵ In short, the Court broadly construed the scope of the judge's jurisdiction because "the issue is the immunity of the judge."

The Court then considered and rejected the argument that the judge was nevertheless not entitled to immunity because his approval of the petition was not a "judicial act" as a result of the

informality of the judge's approval of the petition.⁹⁶ Noting that this was the first time such an issue was ever before it in connection with immunity, the Court agreed that judicial immunity would only attach to a judicial act. Relying on one of its decisions in a different context⁹⁷ and on several circuit court decisions,⁹⁸ the Court stated:

[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 usually performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.⁹⁹

The Court applied these factors to the facts before it and concluded that despite the informality of the proceedings and their ex parte nature, the approval of the petition was a judicial act and hence protected.

Justices Stewart, Marshall and Powell vigorously dissented, arguing that what the judge did "was beyond the pale of anything that could sensibly be called a judicial act."¹⁰⁰ They criticized the majority's factors and instead contended that the meaning of a "judicial act" derives from those considerations set out in *Pierson* which support absolute immunity in the first place.¹⁰¹ Justice Powell added what he considered to be central: the defendant's "preclusion of any possibility for the vindication of [plaintiff's] rights elsewhere in the judicial system."¹⁰² He emphasized that the major reason for absolute immunity is the existence of "alternative forums and methods for vindicating [private] rights," and that absent such forums, "the underlying assumption of the *Bradley* doctrine is inoperative."¹⁰³

Stump indicates clearly that the *Lucarell* and *Wade* cases were incorrectly decided. In both cases there was general subject matter jurisdiction and the defendant's acts were judicial in nature under the *Stump* majority's reasoning. However, in continuing to use the "jurisdiction" approach of *Bradley* and *Pierson*, the Court did little to clarify the factors which distinguish between "excess of jurisdiction" and "clear absence of all jurisdiction" and the confusing relation between those factors and the merits. In any event, since the Court addressed the judicial act question in *Stump*, the inquiry into judicial immunity is now roughly parallel to the inquiry into legislative immunity. After ascertaining that the defendant's status is that of a legislator or a judge, an inquiry must be then made into whether the defendant legislator's



act was performed in a traditional legislative field or the defendant judge's act was within his jurisdiction. If so, the next question requires characterization of the act performed in order to decide whether it was a legislative act or a judicial act. Thus, despite the "jurisdiction" jargon of the judicial immunity cases, in reality the same general kinds of questions are being asked for both legislative and judicial immunity.

However, what is especially disturbing about Stump is the Court's failure¹⁰⁴ to answer Justice Powell's point about the unavailability of an alternative forum to plaintiff because of the judge's conduct. Where there is a physical assault by a judge upon a person, an act which the Court agreed is not a judicial act, there is no alternative forum available to the injured person to stop the judge; the damage has already been done. Thus, it makes sense to hold that judicial immunity is not applicable. In Stump, the sterilization of plaintiff' was the equivalent of a physical assault as to which there was also no recourse. In both cases the only remedy was retrospective. For this reason, both acts were similarly not functions "normally performed by a judge," contrary to the majority's characterization of the judge's approval of the petition.

In this light, Stump's message is clear: it will be a rare case indeed in which a judge will lose his absolute immunity. The Court may be saying about judges what it said long ago about the immunity under federal law of the Postmaster General:

*As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision.*¹⁰⁵

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Footnotes

⁵⁷. 386 U.S. 547 (1967).

⁵⁸. This statute was held unconstitutional by the Supreme Court as applied to similar facts several years later. Thomas v. Mississippi, 380 U.S. 524 (1965).



⁵⁹. 386 U.S. 547, 553 (1967).

⁶⁰. The Court noted:

The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities The immunity of judges for acts within the judicial role is [as] equally well established [as absolute legislative immunity], and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

Id. at 554.

⁶¹. The Court reasoned that judges are absolutely immune from liability for damages for acts committed within their judicial jurisdiction ... even when the judge is accused of acting maliciously and corruptly 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.

Id. (emphasis added).

⁶². There is no serious question as to Congress' power to impose criminal sanctions upon state judges for constitutional violations. *Ex parte Virginia*, 100 U.S. 339 (1879). The same is true for civil liability. In *Pierson*, of course, the question was one of congressional intent, not power.

⁶³. 386 U.S. at 563. He argues in effect for a qualified immunity for judges. See also Kates, *Immunity of State Judges Under the Federal Civil Rights Act: Pierson v. Ray* Reconsidered, 65 Nw. U. L. REv. 615 (1970).

⁶⁴. 341 U.S. 367, 372-375. See Comment, Liability of Judicial Officers Under Section 1983, 79 YALE L.J. 322 (1969), in which the author states that "judicial immunity was not a universal doctrine." Id. at 325. Under common law, although superior judges were "absolutely immune ...justices of the peace .. .were liable to civil suit if they acted maliciously." Id. See also Note, Developments in the Law-Section 1983 and Federalism, 90 HARV. L. REV. 1133 (1977).

⁶⁵. One early exception was *Picking v. Pennsylvania R.R. Co.*, 151 F.2d 240 (3d Cir. 1945), overruled *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966), cert denied, 386 U.S. 1021 (1967). 1978]

⁶⁶. So noted in *Pierson*. 386 U.S. at 555 n.9.

⁶⁷. 80 U.S. 335 (1871). *Bradley* is, of course, not a 1983 case.

⁶⁸. id. at 351-352 (emphasis added). The Court continued, illustrating the dichotomy between acts in excess of jurisdiction and acts performed in the absence of all jurisdiction: 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.

Id. at 352 (emphasis added).

⁶⁹. Id. at 357.

⁷⁰. Id. at 356-57.

⁷¹. Id. at 352.

⁷². id.

⁷³. Id.

⁷⁴. The Mississippi statute involved in *Pierson* was, it is true, held unconstitutional as applied to similar facts only after the police justice convicted the plaintiffs. See note 58 supra. However, the Supreme Court, in *Boynnton v. Virginia*, 364 U.S. 454 (1960), had previously held a similar statute unconstitutional as applied to virtually identical facts. *Boynnton* was apparently brought to the timely attention of the police justice. See Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U.L. REV. 615, 617 (1970).

⁷⁵. Also illustrative of the proper scope of judicial immunity are those circuit court cases which, following the *Bradley-Pierson* jurisdictional approach, have held absolute judicial immunity applicable to section 1983 allegations. See, e.g., *Humble v. Foreman*, 563 F.2d 780, 781 (5th Cir. 1977) (per curiam) (judge conspired with prosecutor and defense counsel during plea bargaining to deny plaintiff effective assistance of counsel); *Conner v. Pickett*, 552 F.2d 585, 586 (5th Cir. 1977) (per curiam) (judge violated plaintiff's civil rights by convicting him for possession of narcotics paraphernalia); *Dean v. Shirer*, 547 F.2d 227, 230 (4th Cir. 1976) (judge, following a trial and the plaintiff's disparaging comments about him to a crowd outside the courtroom, had plaintiff, an attorney, brought back into the courtroom, threatened him with bodily harm and jail, and forced him to retract his earlier comments; judge still retained subject matter jurisdiction over the case and his acts were judicial acts because they were part of his exercise of the contempt power); *Keeton v. Guedry*, 544 F.2d 199, 200 (5th Cir. 1976) (per curiam) (judge issued a warrant for the arrest of plaintiff for stopping payment on a check after discovering defects in a purchased truck, an act which was not a criminal offense; court emphasized that judge "clearly believed that criminal conduct possibly had occurred."); *Harley v. Oliver*, 539 F.2d 1143, 1145 (8th Cir. 1976)



(probate judge, who had statutory jurisdiction over guardianships, caused emotional distress when he improperly denied plaintiff custody of her minor son); Grundstrom v. Darnell, 531 F.2d 272, 273 (5th Cir. 1976) (per curiam) (justice of the peace, who has subject matter jurisdiction and is to be treated like any other judge, improperly denied bail to plaintiff); Wiggins v. Hess, 531 F.2d 920, 921 (8th Cir. 1976) (per curiam) (judge from one county who specially presided over plaintiff's criminal trial in another county improperly issued an order for his arrest and commitment under the seal of the first county and also improperly imprisoned him for a crime which carried no prison sentence); Waits v. McGowan, 516 F.2d 203, 205 (3d Cir. 1975) (judge improperly withheld information regarding plaintiff's illegal extradition from Canada, thereby resulting in plaintiff's imprisonment); Duba v. McIntyre, 501 F.2d 590, 591 (8th Cir. 1974) (justice of the peace ordered the attachment and sale of plaintiff's entire stock of hogs on the pretext of satisfying a \$55 misdemeanor fine; conceding that justice of the peace acted in excess of jurisdiction, the court held that his acts were within the general power of judges to issue executions to recover fines imposed for violations of municipal ordinances); Barnes v. Dorsey, 480 F.2d 1057, 1060 (8th Cir. 1973) (judge who presided at a burglary trial conspired with others in order to suppress certain exonerating information in a police report); Mississippi ex rel Giles v. Thomas, 464 F.2d 156, 158-59 (5th Cir. 1972) (justice of the peace wrongfully entered a default order evicting plaintiff because the summons contained an erroneous return date); Robinson v. McCorkle, 462 F.2d 111, 113 (3d Cir. 1972) (judge ordered the plaintiff committed under a repealed statute "such judicial miscue does not remove the shield of immunity."); Jacobson v. Schaefer, 441 F.2d 127, 130 (7th Cir. 1971) (judge improperly attached certain conditions to plaintiff's bail; although judge did not in fact have authority to do what he did-court emphasized that he had general jurisdiction over the subject matter); Berg v. Cwiklinski, 416 F.2d 929, 931 (7th Cir. 1969) (judge improperly imprisoned a traffic court defendant for contempt for refusing to answer a prosecutor's questions on the ground of self-incrimination).

⁷⁶. 453 F.2d 836 (6th Cir. 1972).

⁷⁷. The court emphasized that it relied solely on the complaint and thus it did not have to reach the issue of the scope of the defendant's contempt power. The court also did not discuss the assault contention in connection with immunity. But see Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974), cited with apparent approval Stump v. Sparkman, 435 U.S. 349, 361 n.10 (1978), in which the court characterized such an act as not of a judicial nature and denied absolute immunity to the defendant. The court said:

The decision to personally evict someone from a court room by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached [W]hen a judge exercises physical force in a courtroom, his decision is not amenable to appellate correction. 500 F.2d at 64.

⁷⁸. 337 F. Supp. 671 (S.D. Ohio 1971), reconsideration of motion to dismiss denied, 356 F. Supp. 380 (S.D. Ohio 1973).

⁷⁹. *Id.* at 673.



⁸⁰. *Id.* at 674.

⁸¹. In Lucarell, the defendant could have fined the plaintiff; in Wade, there was a statute giving the defendant general subject matter jurisdiction over mentally retarded persons.

⁸². Bradley v. Fisher, 80 U.S. 335, 352 (1851).

⁸³. Fanale v. Sheehy, 385 F.2d 866 (2nd Cir. 1967).

⁸⁴. The court stated explicitly that "[w]here jurisdiction depends on the resolution of factual issues or involves debatable questions of law, judges do not lose their immunity... [E]xceptions must be confined to situations in which it is perfectly clear that the court acted wholly without jurisdiction." *Id.* at 868.

⁸⁵. Stump v. Sparkman, 435 U.S. 349 (1978), reversing Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977).

⁸⁶. Plaintiff was not told the true reason for her hospitalization. Instead, a pretext was used. 435 U.S. at 353.

⁸⁷. 552 F.2d at 173.

⁸⁸. *Id.*

⁸⁹. *Id.* at 174.

⁹⁰. *Id.* at 175-76.

⁹¹. *Id.* at 176.

⁹². *Id.*

⁹³. Stump v. Sparkman, 435 U.S. 349, 357.

⁹⁴. *Id.* at 358.

⁹⁵. *Id.* at 359.

⁹⁶. The Court noted that "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." *Id.* at 360.

⁹⁷. In re Summers, 325 U.S. 561 (1945), in which the Court held that the lack of formality involved in a state court's consideration of an application for admission to the bar did not prevent it from constituting a case or controversy reviewable by the Court.

⁹⁸. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) (judge's physical assault upon plaintiff was held not to be a judicial act); McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972) (judge was entitled to judicial immunity even though he had plaintiffs arrested, in the apparent exercise of his contempt power, when he was not in his robes, not in the courtroom, and in apparent violation of procedural requirements for contempt citations); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970) (judge

serving on a board with only legislative and administrative powers was not acting in a judicial capacity).

⁹⁹. *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

¹⁰⁰. *Id.* at 365.

¹⁰¹. The dissenters stated:

[T]here 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 a principled decisionmaking. [There was a] total absence of any of these normal attributes of a judicial proceeding... [thus] the conduct complained of... was not a judicial act. *Id.* at 368-69.

¹⁰². *Id.* at 369.

¹⁰³. *Id.* at 370.

¹⁰⁴. The Court mentions the issuance of search warrants as an example of an ex parte proceeding without recourse to appeal. *Id.* at 363 n.12. However, while the issuance cannot be undone by appeal, its adverse effect, if any, can be by a motion to suppress. This sharply distinguishes search warrants from the ex parte approval of the sterilization petition in *Stump*.

¹⁰⁵. *Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (emphasis added).