

VOL 31 ISS 2 ART 4 | 0 | INTRODUCTION

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The issue of judicial liability in civil actions¹ for various types of wrongdoing has attracted recent interest as a result of the 1978 United States Supreme Court decision, *Stump v. Sparkman*.² In *Stump*, the Court held that an Indiana circuit judge who ordered the sterilization of a minor solely on the ex parte petition of her mother, without notice, hearing, or opportunity to appeal, was immune from civil suit brought by the daughter. The decision has been followed in a large number of cases,³ but commentators unanimously have condemned the decision and have suggested reform of the rules of judicial liability and judicial immunity.⁴ We agree that *Stump* was wrongly decided and that reform is needed, but we do so for different reasons and with different results.

The most frequent justification offered for judicial immunity is its alleged long-standing existence in Anglo-American common law.⁵ A principal authority for this proposition is the century-old precedent of *Bradley v. Fisher*,⁶ in which Justice Stephen Field stated that immunity "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."⁷ Thus, we first examine the history of judicial liability to determine if this reverence for the past is warranted. We conclude that statements such as that in *Bradley* are inadequate history at two levels, reflecting judicial misunderstanding of both what the law was and how and why it developed. Actually, English law began with a position of general judicial liability and developed only limited exceptions on grounds that are irrelevant to a discussion of judicial liability today. When the English law was received in the United States, this limited immunity was expanded significantly, notably by James Kent, to limit liability, and throughout the nineteenth century a mixed pattern of judicial liability and immunity existed in America. In *Bradley*, Justice Field provided a confused reformulation of the law, which led to a further limitation of liability. At no point, however, were the advantages and disadvantages of judicial immunity fully examined.

Because the case for immunity is inconclusive and unpersuasive on historical grounds, we also examine the issue on policy grounds; our analysis proceeds from a thorough review of the case law and literature. We conclude that immunity is indefensible on policy



grounds as well, but that conclusion does not convince us that any of the suggested reforms should be adopted. Instead, we draw on contemporary jurisprudential thinking to argue that no convincing policy resolution is possible. At that point, we express our, own belief on the desirable response of courts to judicial liability cases, in the context of a broader conception of the past, present, and future legal order.⁸

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Footnotes

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¹. Explanation of the terminology of judicial liability and judicial immunity is required at the outset to minimize confusion. The customary but not exclusive usage of the terms "liability," and, more commonly "immunity," concerns the possibility of being subjected to a damage action. See, e.g., Stump v. Sparkman, 435 U.S. 349, 355-56 (1978) (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871)). Of course, immunity from suit is a fiction since a rule of law cannot prevent a plaintiff from filing suit but can only provide a reduced probability of success on the merits. The issue here is the scope of the rule of liability. In tort law, an immunity is a status that renders a person not liable when another person, not possessing the status, would be liable. Basically, an immunity is a defense that permits disposition of a suit at an early stage of the proceeding. For example, under a rule of sovereign immunity, a tort action against a state may be dismissed without any further examination of the facts. This is not the case with judicial "immunity" under any version of the concept, because judicial immunity requires that the act complained of be related to the judge's official duties, although the precise relation required is variously defined by different courts. Thus, a tort claim against a judge cannot be dismissed solely on those facts; it must be determined that the judge's action was sufficiently related to his judicial duties to invoke the "immunity" rule. This further determination is guided by the liability standard. The judge may be viewed as having an immunity for acts that are within the liability standard (that is, for all "judicial acts"), but the scope of the inquiry necessary to determine whether the act complained of was "judicial" is so extensive that the term "immunity" seems misplaced. One could just as easily say that automobile drivers have an immunity for their actions when they exercise reasonable care; again, the use of the term is not helpful. Nevertheless, because of the common use of the term "judicial immunity" in both the case law and the literature, we refer to both "immunity" and "liability" throughout.



². 435 U.S. 349 (1978).

³. E.g., *McClain v. Brown*, 587 F.2d 389 (8th Cir. 1978); *Schuman v. California*, 584 F.2d 868 (9th Cir. 1978); *Slavin v. Curry*, 574 F.2d 1256 (5th Cir. 1978); *Kelsey v. Fitzgerald*, 574 F.2d 443 (8th Cir. 1978); *Strawbridge v. Bednarik*, 460 F. Supp. 1171 (E.D. Pa. 1978); *Holland v. Rubin*, 460 F. Supp. 1056 (E.D.N.Y. 1978); *Adkins v. Adkins*, 459 F. Supp. 406 (S.D. W.Va. 1978); *Prochaska v. Fediaczko*, 458 F.Supp. 778 (W.D. Pa. 1978); *Atcherson v. Siebenmann*, 458 F. Supp. 526 (S.D. Iowa 1978); *Rankin v. Howard*, 457 F. Supp. 70 (D. Ariz. 1978); *Chalk v. Elliott*, 449 F. Supp. 65 (N.D. Tex. 1978).

On remand of *Stump* the Seventh Circuit held that because Judge Stump was immune and no other state action was shown, the conspiracy claim against the private defendants (Mrs. McFarlin, her attorney, the doctors who performed the sterilization, and the hospital) could not be brought on constitutional or other federal grounds. *Sparkman v. McFarlin*, 601 F.2d 261 (7th Cir. 1979).

The importance of the issue of judicial liability also is shown by the large number of suits against judges. In Pennsylvania, for example, about 150 suits were filed in 1978. Philadelphia Bulletin, Aug. 13, 1979, at 3, col. 3.

⁴. See Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237 (1978); Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Immunity*, 64 VA. L. Rv. 833 (1978); Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 Amz. L. Rv. 549 (1978) [hereinafter cited as *A Proposal for Limited Liability*]; Note, *A Judge Can Do No Wrong: Immunity is Extended for Lack of Specific Jurisdiction- Stump v. Sparkman*, 27 DEPAUL L. Rv. 1219 (1978); 22 How. L.J. 129 (1979); 27 KANS. L. REV. 518 (1979). Articles prior to *Stump* include Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U.L. REV. 615 (1970); Note, *Immunity of Federal and State Judges from Civil Suit - Time for a Qualified Immunity?*, 27 CASE W.L. Rv. 727 (1977) [hereinafter cited as *Immunity of Judges*]; Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969) [hereinafter cited as *Liability of Judicial Officers*].

⁵. E.g., W. PROSSER, HANDBOOK OF THE LAW OF TORTS 987 (4th ed. 1971) ("judges always have been accorded complete immunity for their judicial acts within the jurisdiction of courts).

⁶. 80 U.S. (13 Wall.) 335 (1872).

⁷. Id. at 347.

⁸. We are concerned exclusively with judicial immunity, not the immunity of other public officials, although that topic also has received considerable attention in the recent case law. *Butz v. Economou*, 438 U.S. 478 (1978) (except in extraordinary circumstances, federal executive officials entitled only to limited, good-faith immunity); *Procunier v. Navarette*, 434 U.S. 555 (1978) (state prison officials immune when unestablished constitutional right and only negligent conduct involved). See Nagel, *supra* note 4; see generally K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTEENTH 573-98 (1972); K. DAVIS, 3 ADMINISTRATIVE LAW TREATISE 506-44 (1958); W. PROSSER, *supra* note 5, at 987-92; Buxbaum, *Liability of Federal Officials in*

Damage for Acts Unconstitutional or in Excess of Their Authority: Expanding the Concept of the Rule of Law, 8 CAP. U.L. REv. 465 (1979); Jennings, ***Tort Liability of Administrative Officers***, 21 MINN. L. Rev. 263 (1937).

Although they are not the primary focus of our research, we can report some impressions on the relation between the immunity of judges and the immunity of other officials. First, as our devotion to the history of judicial immunity should make obvious, the particular history of each type of immunity requires investigation. The literature of judicial immunity includes scant reference to parallel immunities of other officials, suggesting that they developed independently of each other. Second, that investigation may lead to the discovery of links between the development of the various immunities. For example, in our discussion of the immunity of the colonial and early federal magistracy, we note that magistrates performed administrative as well as judicial functions; thus two bodies of law were developing with respect to different functions of one group of officers. Third, because the administrative and judicial systems are so dissimilar, the policy determination of an appropriate rule of immunity must include different factors. The nature of the policy analysis described in Part IV of this article is applicable to both, and we suggest that the policy factors are as indeterminate and value-laden for nonjudicial as for judicial immunity. See generally Symposium - Civil Liability of Government Officials, 42 LAW & CONTEMPT. PROB. 1 (1978).

