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In the United States today, judges of general jurisdiction are, for the most part, immune from suit for their judicial acts. The term "judicial act" is broad enough to encompass any action of a judge except for certain behavior not normally expected of a judge or not colorably within the judge's jurisdiction. Judges of limited jurisdiction share this immunity, although for some of them the immunity is more closely associated with jurisdictional limits and in some states malice will remove their immunity even for jurisdictionally proper acts. The authoritative contemporary statement of the law of judicial immunity is, of course, *Stump v. Sparkman*.[319] We have described how the law arrived at this state and we have expressed our belief in the limited utility of the historical evidence for current decision-making. In light of this dissatisfaction, we review the reform proposals that have been made by others and engage in a policy analysis of the judicial liability problem, articulating and balancing the public and private interests implicated. In this balancing, we demonstrate that the current law in general, and *Stump* in particular, incorrectly evaluate the policy concerns, but we also argue that none of the proposed solutions is entirely satisfactory. To justify this position, we return to the historical materials and present a modest jurisprudential discussion of the judicial liability issue as an illustration of a greater problem. We conclude with a suggestion of our own that we find to be not entirely convincing but satisfying nevertheless.

A. Stump v. Sparkman

In *Stump*, the Supreme Court applied what it considered to be the well-established rule of judicial immunity to protect Judge Stump from liability to suit.[320] The Court, in an opinion by Justice White, used a two-pronged test, requiring that a judge perform a judicial act that is within his subject-matter jurisdiction to be immune. Justice Stewart dissented in an opinion joined by Justices Marshall and *Powell*, on the ground that Judge Stump's granting plaintiffs mother's petition for sterilization of plaintiff was not a judicial act.[321] Justice Powell also dissented separately, emphasizing that the lack of opportunity for appellate review of Judge Stump's order was an important factor in rendering it nonjudicial.[322]

The judicial act concept, derived from the jurisdictional limitation on immunity, has been central to judicial immunity since the beginning of limited immunity in English law.[323] In *Stump*, the Court based its discussion of the nature of a judicial act upon recent federal court decisions, which were among the first systematic judicial examinations of the concept,[324] in an attempt to clarify*the nature of a judicial act and the relationship between judicial act and jurisdiction.[325]

Justice White relied principally on the definition of judicial act articulated in *McAlester v. Brown*.[326] The Fifth Circuit in McAlester stated a four-part test for determining whether an act is judicial,[327] but Justice White condensed the four parts into two:

> 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.[328]

On the first point, Justice White held that entertaining and acting on petitions, including petitions concerning the affairs of minors, is a function normally performed by a judge.[329] He rejected Justice Stewart's contention that since Indiana judges do not normally act on parents' petitions for approval of surgical treatment of their children or on petitions for sterilization, Judge Stump's act was not judicial, because the function of entertaining and deciding the petition is normally judicial even if the particular petition is atypical. On the second point, Justice White noted that only because *Stump* was a judge did McFarlin (plaintiff's mother), on the advice of counsel, bring her petition before him, and these expectations therefore support the construction of the act as judicial.[330] Justice Stewart in response argued that neither McFarlin's misperception of Judge Stump's power nor *Stump*'s representation of his judicial position by approving the petition could confer immunity.[331]

The dissenting justices disagreed with the majority not only on the application of the judicial act test in *Stump*, but also in the delineation of that test. Justices Stewart and *Powell* argued that to determine what is a judicial act requires resort to the policies underlying the rule of immunity.[332] The basic policy articulated in *Pierson v. Ray*[333] was the protection of the judge's principled decisionmaking,[334] but in *Stump* there was no principled decision-making to protect, no litigants, no case or controversy, no weighing of the merits,[335] and, as Justice Powell emphasized, no appellate remedy to vindicate the rights of an injured party and to render a civil action against the judge unnecessary to redress a wrong done.[336]

The second prerequisite of judicial immunity in the majority's test is jurisdiction over the subject matter of the judge's actions. Justice White equated subject-matter jurisdiction with anything short of clear absence of jurisdiction in Justice Field's dichotomy between excess of jurisdiction and absence of jurisdiction.[337] Because of the sweeping statutory grant of jurisdiction to Indiana circuit court judges and the lack of a specific statutory or common-law denial of jurisdiction in such cases,[338] Justice White held that Judge Stump had subject-matter jurisdiction over McFarlin's petition. For courts of general jurisdiction, everything that is not expressly forbidden apparently is permitted. Further, jurisdiction and the exercise of jurisdiction are separate ideas, and therefore once it was determined that jurisdiction in this general class of cases has not been specifically denied to him, Judge Stump's "failure to comply with elementary principles of procedural due process"[339] was as irrelevant here as it was in the determination of whether his act was judicial.

Substantively, Justice White's opinion in *Stump* is illustrative of recent trends in the decisions of the Supreme Court.[340] First, the extent of potential federal interference with state judicial actions was reduced by the expansion of the immunity from section 1983 actions first granted in *Pierson*. The reduction is consistent with other decisions that generally limit federal control of state court activities, particularly through the limitation of section 1983 and federal-court jurisdiction over state court proceedings.[341] Second, the decision advanced managerial concerns by eliminating private actions against judges as potentially intrusive and disruptive of the judicial process. Other decisions advanced the same concerns in aid of the efficient administration of justice, with emphasis on "efficient," with some decrease in the protection of individual rights taken to be an acceptable cost.[342]

In process terms as well, the decision is consistent with other developments. First, Professor Tribe's description of certain leading opinions as containing "lapses of logic, disregard or distortion of relevant precedent, and other indications that the decisions are impelled by considerations that never quite surface in the opinions"[343] could accurately be applied to the opinion in *Stump*. Second, the majority opinion as a whole employs a formalistic approach with only the pretense of weighing competing values, a style of reasoning that has become increasingly familiar in the Court.[344]

Neither *Bradley* nor other precedents controlled the decision in *Stump*, yet the Court responded to the case as if the result were so obvious that little discussion was necessary. The majority, unlike the dissenting minority, did not feel the need to consider how the result would effectuate the policies behind judicial immunity; ukase was substituted for analysis.

B. Reform Proposals

Those who have proposed reform of the law of judicial liability sometimes have done so with specificity, but more often their proposals have included only basic principles, leaving details and application to be worked practically. In this section, we discuss three alternative liability rules; our concern is also with the essentials of the proposals.

1. The Good-Faith Approach.

In the leading contemporary English judicial liability case, *Sirros v. Moore*,[345] the Court of Appeal reversed the prior English position distinguishing superior and inferior judges and established an immunity for good faith judicial acts. Lord Denning, M.R., and Lord Justice Ormrod stated a simple version of the test, and Lord Justice Buckley stated a more complicated one that is more consistent with prior law; all three justices largely rejected the earlier basis for immunity and liability in favor of a new standard.

All three opinions examined the history of judicial liability and, of course, noted the different treatment accorded superior judges and inferior judges. Lord Denning[346] and Justice Ormrod[347] rejected the modern validity of the distinction; Justice Buckley stated that the same liability principle should be applicable to both, but that its application may vary in different situations because of jurisdictional variations.[348] Lord Denning's statement was forthright:

> If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. ... So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction - in fact or in law - but so long as he honestly believes it to be within his jurisdiction, he should not be liable.... He is not to be plagued with allegations of malice or ill will or bias or anything of the kind.[349]

Although this statement includes reference to jurisdiction, clearly the motive of the judge, the attempt to honestly fulfill judicial responsibilities, is both the reason and the standard for immunity. This standard is different from the basic immunity rule of *Stump* in the attention given by the standard to the subjective circumstances of the judge's act.

2. The Malice Approach.

An approach similar to the good-faith fest is a rule of general immunity except for acts committed with malice. We treat this separately from the good-faith approach because it has been one of the reforms most frequently suggested in the literature.[350]

This standard would render a judge immune from liability except for acts committed with malice. For this purpose, malice is defined to include not only a conscious purpose to injure, but also reckless disregard for proper action, reflecting the definition advanced in *New York Times v. Sullivan*.[351] The emphasis on the bad faith of the judge is the converse of the good-faith approach, but the two standards are essentially harmonious. The purpose of the malice standard is to protect good-faith decision-making by, sanctioning only behavior outside the requirements of the judicial office because of ill-will or of gross neglect. The *New York Times* malice test may be somewhat broader than the malice standard used at common law, although some states used a doctrine of constructive malice for extremely injudicious behavior that may amount to the same thing.[352]

3. The Judicial-Process Approach.

Justices Stewart and *Powell*, in their dissents in *Stump*,[353] presented a critique of Justice White's opinion that contained an alternative rule of judicial immunity. That rule takes the nature of the act that is the subject of the litigation and its appealability as the factors that set the limits of judicial immunity. Together, these two factors emphasize the importance of observing accepted judicial procedures as the basis of immunity.

The essence of the judicial process approach is that a judge will be immune from suit for any action taken consistent with the procedural standards normally expected of judges.[354] The first procedural requisite is jurisdiction. Justices Stewart and *Powell* did not explore this concept in detail, but it is apparent that their view is not a technical one. Instead, jurisdiction is satisfied if the act taken can be said to be one "normally performed by a judge." The words are Justice White's,[355] but Justice Stewart's interpretation of them is different from Justice White's. For Justice Stewart, the phrase embodies an imprecise notion that the act is within a range of authority considered appropriate for a judge by traditional practice and general agreement.[356]

To develop the other standards expected of judges, Justice Stewart considered "the factors that support immunity from liability for the performance of [a judicial] act.[357] Relying on the summary of those factors in *Pierson v. Ray*,[358] he enumerated the presence of litigants in an actual case, principled decision-making by the judge, and the possibility of appellate review. Judges are immunized to ensure their ability to engage in independent decision-making and, in an adversary system, those features are essential to that function.[359] Justice Powell emphasized the last factor in his separate dissent, stating that a foundation of the judicial immunity doctrine as expressed in *Bradley* and other cases is that the vindication of private rights in a civil action is unnecessary because of other avenues available to vindicate those rights.[360]

The judicial-process approach differs from the good-faith and malice approaches in its emphasis on objective characteristics of the judge's action and it differs from the rule in *Stump* in its emphasis on more precise procedural protections as the test for judicial immunity. Those emphases make it an attractive alternative to the other doctrines. To explain our preference for it, we now turn to the policy analysis of the judicial liability issue.

C. The Policy Pictures

The choice among the present immunity doctrine and any of the three alternatives should be made by weighing the relative advantages and disadvantages of each. In this section, we begin the policy analysis of the judicial liability problem by presenting the relevant policy concerns. At the risk of repeating ourselves, we first emphasize two arguments for a rule of judicial immunity that probably would be generally regarded as spurious. The first such argument is historical precedent. As has been previously stated, until modern times, judicial immunity was a limited doctrine. In any case, the past does not strike us as a very persuasive point of argument in this case. A rule of judicial immunity does not appear to be so central to our system of justice that its alteration would be a most significant step, nor is it the type of legal rule concerning which significant public or private expectations have arisen; therefore, changing the rule would not disappoint extant expectations. Judges, those most affected, probably have a general idea of their immunity from suit[361] and alteration of the rule would disappoint their expectations to some extent, but the effects of anything short of wholesale revision would not inevitably be disastrous.

The second such argument is the necessity of extending judicial immunity to resolve the inconsistent treatment of different judges. Throughout most of history, superior court judges had a broader immunity than inferior court judges, but by the early twentieth century, that inconsistency was removed and all judges were treated similarly. As was much debated at the time, the inconsistency may have been indefensible, but that does not explain, as a matter of logic or policy, why the immunity of superior judges was extended to inferior judges and not the liability of inferior judges extended to superior judges. Only on historical grounds can we begin to understand why the general rule today is immunity, not liability, and those grounds are not persuasive in the final analysis.

We must extract the better reasons advanced in support of the doctrine of judicial immunity from a variety of sources, judicial and scholarly. It is insufficient simply to refute the arguments of Justice White in *Stump* or Justice Field in *Bradley*. Instead, the entire body of law and commentary on judicial liability in England and America is our source. Our investigation leads to the development of a view of the judicial system that provides the context for policy discussion of judicial liability. Two pictures together comprise the argument for judicial immunity and against judicial liability:[362] a picture of the present judicial system operating under a rule of judicial immunity that protects all judicial acts broadly defined, and a scenario of how the judicial system would operate under a doctrine of judicial liability. Those dissatisfied with judicial immunity and favoring some form of limited liability view the situation differently. Their perception of the existing situation is less appealing than that held by those favoring immunity, and the scenario of limited immunity consequently less horrifying. We now present those conflicting views before turning to a criticism of this entire approach to the problem.[363]

1. The Case for Judicial Immunity.

Proponents of judicial immunity view the judicial system as it now operates as one in which most judges act reasonably, though not always correctly, most of the time. There are no widespread problems of judicial incompetence, vindictiveness, misfeasance, malfeasance, or nonfeasance. Judicial errors can be corrected by appellate review and the few cases of misconduct or incompetence that do occur can be effectively remedied either by public procedures such as impeachment, or, in the most extraordinary cases, by private action within one of the few exceptions to the doctrine of immunity.

Contrasted to this placid picture of a system in equilibrium is the scenario of what would occur if judges were liable to civil suit. In this view, nearly every lawsuit leaves at least one of the parties dissatisfied with the result, and the disappointed party or parties will attribute the problem not to the lack of merit in the cause but to some malfunction in the process itself, with the most visible source of this putative malfunction being the judge. The party's disappointment will cause a search for judicial wrongdoing and, in the party's frequently vengeful state, some wrongdoing will be perceived. Either error, incompetence, bias, or malice will be attributed to the judge by the party, as the situation allows and as the cause of action against the judge requires. The result of the party's perception of injury frequently will be a civil action against the judge. The number of these actions will be enormous since at least one party to nearly every legal proceeding will want to bring such an action. Further, the total will increase geometrically as the disgruntled party proceeds through the system. If an action against the first judge is unsuccessful, the failure will be attributed to a wrong committed by the second judge, against whom an action also may be brought, and so on *ad infinitum*. These suits cannot be screened out by the system, for any doctrine of immunity but the most broad will require an inquiry into particular facts before the validity of an action against a judge can be determined.

Thus, the systemic effects of a rule of liability, in this view, would be drastic. The multitude of actions brought against judges would clog the courts, impeding the flow of other judicial business. The disruption would be greater than that caused by a similarly sized body of litigation of some other kind because each case would involve two judges and not one, the presiding judge and the defendant, who would be diverted from normal judicial duties by the necessity of reconstructing the decisional processes at the time of the contested act, giving testimony, conferring with counsel, and otherwise presenting a defense. These burdens would consume scarce resources, including both judicial time and state funds, particularly if the government indemnifies the judge for damages recovered.

The effects on judges would be just as disastrous according to the proponents of this view. Judicial liability would endanger the independent, fearless, principled decision-making in which judges must engage. Judges would be less free to make decisions if they were in fear of having their motives misconstrued in subsequent actions. Weighing into each judicial decision would be not only the merits of a case, but also the probability that the losing party would bring suit and the judge's position if that contingency materialized. Judges would be motivated to practice defensive decision-making, taking extra precautions in every matter solely for the purpose of building a record to vindicate their decisions upon later scrutiny. Furthermore, these fears would extend to prospective judges and would discourage lawyers from seeking or accepting judicial appointments to avoid awkward, tiresome, and embarrassing public examination of their every act.

The final detrimental impact of a system of judicial liability would be the degradation of the judiciary in the eyes of the public. A significant aspect of the legitimacy of the judicial office and the effectiveness of the judicial system results from the esteem in which the citizenry holds the judiciary. Subjecting judges to many vexatious suits and examining their acts both in public and in the public press would certainly cause a loss of stature. This is especially true when, as a result of the vagaries of the jury system or the inevitability of occasional error, judges were forced to pay damages, a form of public penance for wrongdoing as well as compensation to an injured plaintiff.

2. The Case for Judicial Liability.

Given the current state of the law, the case for judicial liability takes the form of a critique of the present situation and a refutation of the liability scenario drawn by the advocates of continued immunity. The alternative view of the present state of affairs assumes that most judges act properly most of the time, and therefore judicial liability will not be an everyday threat. At present, however, when error or wrongdoing does occur, mechanisms other than private actions against a judge are inadequate remedies. Appellate review often comes too late to redress the wrong done a party, providing little or no compensation for the harm done, and, to the extent that liability is intended to punish the judge and to deter future wrongful conduct, appellate review is ineffective. Further, under the judicial immunity doctrine defined in *Stump*, appellate review will be completely unavailable in some cases. Public forms of sanction, such as censure or removal from office, by contrast, serve the retributive function but provide no compensation for the injured party, and these sanctions are notoriously cumbersome in application and are effective only in rare cases.

On the other hand, in the reformers' view, the world under a system of liability would not be as bad as envisioned by those favoring immunity. Litigants will be disappointed, of course, but only in a relatively few cases will that disappointment breed vindictiveness or accusations of bias, malice, or other wrongdoing against judges. Litigants are normal people, sometimes rational, sometimes not, but no more prone to unreasonable conduct than the rest of humanity. Even when a litigant's emotions are aroused and the judge becomes the target of those emotions, a civil action will not ensue as a matter of course because the economic costs of such a suit will be significant, requiring a substantial outlay of funds by the party, or, if brought under a contingent fee arrangement, of opportunity cost by counsel. At this point, the limits of the particular rule of liability adopted become crucial, determining the probability of success and the potential benefit. Frivolous actions will be rare because of these costs and because of the likely unwillingness of attorneys to participate in fruitless causes, especially those that alienate judges and colleagues at the bar. Finally, the hypothetical situation of an action being brought against a judge and then another action against the judge who tries that action, and so forth, is unlikely to occur with any frequency.[364]

Whatever costs will be incurred by the system are the necessary expenses of vindicating the party's rights and providing an effective penalty for judicial misconduct. In the process, independent decision-making will not be sacrificed entirely to judicial liability. The argument that judges will be more hesitant because of the threat of suit ignores the realities of the situation and of the judicial character. In most cases, the threat of suit would come equally from both parties and thus no particular bias should be present. Even when a particularly potent threat is present, the moral fibre of most judges will be sufficiently strong to resist the implicit pressure. Judges are subjected to many different pressures, both in particular cases and in general, and are quite able to resist those pressures as they affect specific decisions. Even to the extent that judges are unable to resist, the threat of litigation will not be the greatest influence to which they are subject. Most judges are subject to the basest of influences-election or political appointment. Compared to the weight of these processes, the hypothetical influence of civil action will be minimal. Moreover, to the extent threatened litigation induces caution in the judge, it may be beneficial. The costs of the administration of justice may increase, but the price will not be too high if it ensures a meticulous concern for the rights of parties and a check on judicial misconduct.

Nor, by this view, will a degradation of the judiciary in the eyes of the public necessarily flow from a rule of liability. Recovery of damages from judicial tortfeasors may be degrading to them, but only if an association is made between them and all judges will the esteem of the entire judiciary be lowered. If only a few such cases arise, the association will not be strong and the degradation may be no greater than that arising from public awareness of unpunished judicial wrongdoing. Indeed, the legal process may be dignified by the public's knowledge that the judicial system can punish its own misfits and correct its own errors.

D. The Policy Core

The policies and interests raised by the alternative views are numerous and overlapping. As presented in judicial opinions and scholarly commentaries, the issues are complicated and almost unmanageable. The policy debate, however, may be reduced to disagreement on a few basic points, a policy core common to every examination of this problem, which can be the vehicle for deciding between the various alternatives.

There are three elements in the policy core of the judicial liability problem: first, the magnitude of the harm done to victims of judicial wrongdoing; second, the costs of enforcing a liability rule; and third, the impact of the liability rule on the execution of the function of the judicial process.[365] Each of these three elements entails some of the basic issues in the judicial liability debate, and together they provide the core on which the policy debate will be settled, if settlement is possible. The weight of the first factor, the magnitude of the harm done to parties by judges, depends on the seriousness of the problem, that is, the number of instances of judicial misconduct and the amount of injury caused in those instances, and the effectiveness of other forms of review, such as appeal and removal from office, in preventing and redressing harm and punishing judicial wrongdoing. The second factor, the costs of enforcing a particular liability rule, comprises the number of private actions brought and their effects, the degree of distortion of the decision-making process caused by the threat of liability, and the difficulty of the factfinding process imposed by the liability rule. The third factor, the impact of the liability rule on the judicial process, concerns the products of the process, public and private dispute resolution, and justice.[366]

Thus, the tests for any rule of judicial liability, present or proposed, are whether it increases or decreases the harm done to persons by judicial misbehavior, the cost of reducing that harm, and the quantum of justice produced by the judicial process. Generally, decreasing the first two elements and increasing the third would be socially useful; increasing the first two and decreasing the third would be harmful. Any variation from those two possibilities necessitates evaluation of the relative costs and benefits of each of the factors.[367] In that case, the elements of the policy core are the focus for disagreement between supporters of immunity and proponents of a more expanded liability. The conflicts are conflicts of factual prediction and of value. We now discuss the rule in *Stump* and the reform proposals in an attempt to resolve these conflicts.

E. The Policy Analysis

The choice on policy grounds among reform proposals, or between any reform and the *status quo*, is made by measuring each liability standard against the core policies. Presumably, the result should be a conclusion, satisfactory to those who hold the two differing views of the legal system previously described, concerning the liability standard that best balances the core policies and achieves the most socially advantageous, that is, the most just, result. Practically, however, that is not the result. Although we can suggest the direction of influence on the first two elements for each of the alternative liability rules, the degree of change is not subject to empirical verification. The third element creates even greater difficulty because it is value-based and therefore incapable of rational determination.

1. Magnitude of Harm.

The first issue in the policy core is the extent to which reform of the rule in *Stump* would decrease the harm done to parties by judicial misconduct. Here, the two camps disagree on the starting point, namely how much harm is done to parties under the current rule. That disagreement, of course, influences their beliefs concerning the extent to which any improvement is necessary or possible, but both sides do agree on the direction of change under each of the reform proposals. Both perceive that a wider liability rule would induce more caution in judges and consequently prevent some misbehavior that otherwise would occur. Indeed, one of the principal arguments against liability is that it would create excessive caution and thus interfere with independent decision-making.

The deterrent effect of a liability rule will vary with the type of behavior addressed. No rule of liability can deter irrational conduct, but most acts complained of seem to be not wholly irrational, but either motivated by prejudice, bias, anger, or ill will, or the result of inattention, neglect of duty, or incompetence.

The fear of liability may influence the judge to exercise restraint with the first group and spur a judge to take more care in the second, thus having a positive effect in both cases.

The good-faith approach and the malice approach are similar in conception, though different in focus, and will have similar effects on judicial wrongdoing. They will have some deterrent effect on judges who otherwise would act maliciously. Focusing on the judge's state of mind as manifested by his behavior, these approaches will require some subterfuge by judges who attempt to deliberately violate the rights of parties if liability is to be avoided; in some cases, subterfuge is not likely because of the lack of a proper judicial temperament, the source of the problem in the first place, and there will be an imposition of liability that remedies the particular harm and has some deterrent effect on judicial behavior in general. A major deterrent effect would be provided by the *New York Times* variation on actual malice or an equivalent objective or procedural formulation of good faith. A standard that provides immunity only if certain safeguards are met will channel potentially aberrant behavior into desired forms and a "reckless disregard" test will influence some judges to take sufficient precautions to avoid running afoul of the test. This presumably will improve the quality of decision-making and reduce the incidence of abuse.

The judicial-process approach contains procedural and substantive safeguards, with each having differing impacts on the prevention of improper judicial acts. If the procedural lesson is learned, instances of harm due to neglect will decrease significantly. Channelling judicial activity into accepted paths provides both a lower likelihood of wrongful injuries to parties and a greater opportunity to correct the wrongs. This approach is especially useful in preventing what may be the worst situation, when, as in *Stump*, the judge's act has irreversible consequences yet-is hidden from review. The effect of the substantive aspect of the judicial-process approach is less certain. The notion of liability for a function "not normally performed by a judge" or lacking "principled decision-making" is a more general threat. Because it is more general, it may influence a broader range of situations, but because it is less specific, its impact may be less keen. Much would depend on the content given to the terms in practice, demonstrating the willingness of judges to impose liability on each other.

2. Costs of Enforcing Sanctions.

The second element of the policy core is the cost of a rule of liability. The key here is the ease with which the proof process can implement the liability standard. The scope of the liability standard will determine the likelihood of success of a suit and the ease of disposition of unwarranted suits, which will be the principal determinants of the number of suits brought and the systemic costs of those suits. A secondary cost is the loss of judicial independence from an expanded rule of liability.

The rule in *Stump*, if construed as broadly as apparently intended by the majority, minimizes the costs to the system by allowing an early disposition of most suits. Despite the indeterminacy of the terms of the rule, the thrust of the rule is to make success unlikely in any suit against a judge. The greatest fear of advocates of such a broad rule of immunity is that anything less will open the floodgates to a stream of frivolous litigation that will not be possible to check.

As a general principle, the wider and the more uncertain a liability standard is, the greater the costs of avoiding spurious or unmeritorious claims. Anything less than a nearly complete rule of immunity, as in *Stump*, carries the potential for litigation that will proceed through the system and require elaborate factfinding and judicial participation before decision. Thus, the costs of the good-faith and malice tests will be great. The attempt to prove actual malice is a quagmire that inevitably will involve expenditure of enormous judicial resources, and even the type of second order inquiry into the judge's ability to explain a departure from normal processes, as required by the *New York Times* standard, seldom will be capable of decision prior to proof. The costs of either test will therefore be great.

Stump is useful as an example. One of the striking features of both reported decisions in *Stump* is that Judge Stump himself remains an unknown quantity. The record tells us nothing about him beyond the formal characteristics of his position and the action he took. Imagine *Stump* litigated under a good-faith or malice standard. The necessary inquiry would include evidence taken in discovery and at trial on his assumption of jurisdiction, his failure to give notice to Linda or appoint a guardian pendente lite, his failure to enter the case in the court record, and so forth. It is hard to imagine how the case could have been concluded without a full trial.

The judicial-process approach, strictly construed, because it has the most narrow and most concrete liability standard, will be a more effective check on vexatious but unmeritorious litigation. The factual claims of plaintiffs may be speculative, but seldom will they be knowingly untrue; even false claims of a failure to adhere to procedural safeguards can be disposed of at an early stage of litigation with little factfinding by any of a number of pretrial motions. The cost of a limited exception to the immunity principle for cases such as *Stump* would therefore not be great. The costs increase with any extension of liability beyond mere failure to provide procedural due process. Even Justice Stewart's extension to "functions not normally performed by a judge" and "lack of principled decision-making" makes much more difficult the distinction of spurious claims from meritorious ones because of legal and factual intricacies.

The second cost of a rule of liability is the loss of judicial independence from fear of civil suit and civil liability. Here, the direction of variation with particular liability standards is clear. The disagreement of proponents and opponents of liability on this point is evident from the presentation of the policy pictures; the cost, however great or small, again will increase directly with the exposure to liability and inversely with the certainty of the liability test.

3. Effect on Justice.

The third element of the policy core is the effect of the liability standard on the quantum of justice in society. This has been characterized as "the insurmountable barrier to a satisfactory analysis of the problem because of the impossibility of achieving agreement on the definition of justice and the costs that should be incurred to attain it.[368] We adopt that characterization; the intractable nature of this element is symptomatic of a fundamental contradiction in the legal process and, in turn, the existence of that contradiction helps explain the decisional patterns demonstrated in earlier judicial liability cases. From this point forward then, we build our argument to its resolution, concluding the policy analysis of the judicial liability problem and discussing policy argumentation in the legal system generally and then re-examining the way judges have responded to the judicial liability problem. Finally, the results of that examination will be linked to broader thoughts on the legal system.

A useful way of illustrating the 'dilemma arising from the third element of the policy core is by presenting individual cases and analyzing them under that element. We choose four recent cases, the facts somewhat simplified and stylized, which are largely representative of the range of judicial liability cases. The cases are: *Gregory v. Thompson*,[369] in which a judge physically assaulted a visitor to his courtroom by forcibly removing him; *Zarcone v. Perry*,[370] in which a judge who had been served "putrid" coffee by a vendor ordered the vendor seized and brought before him in handcuffs to be harangued by the judge; *Stump v. Sparkman*,[371] in which a judge, acting on a mother's petition, ordered the sterilization of a minor without notice, hearing, or opportunity to appeal; and *Sirros v. Moore*,[372] in which a judge ordered the arrest and detention of an alien, an act that would have been lawful if he had asserted jurisdiction over the underlying matter regarding which the alien first came before him, but which was unlawful because he stated that he lacked jurisdiction over that matter.

Consider first how these cases would be decided under each of the possible liability rules. Implicit in each decision is a policy judgment that justice is increased by immunization or the imposition of liability considering the harm done to the parties and the cost of imposing liability under each rule. On those grounds, Gregory and *Sirros* are the cases that demarcate the range of agreement of those who have previously addressed the issue. The tests of the majority in *Stump* and the judicial-process, good faith, and malice approaches would render liable the defendant in Gregory, but not the judge in *Sirros*. Gregory fails under each test because assault is not a judicial act under any accepted construction and also fails under the good-faith and malice tests because of the judge's state of mind. *Sirros*, on the other hand, is a case in which immunity would apply because it was a judicial act within the general jurisdiction of the court under the *Stump* test, because the act was one normally performed by a judge and was discharged in accordance with accepted procedures under the judicial process test, and because the state of mind of the judge was acceptable under the good-faith and malice approaches.

Disputes over the third element of the policy core arise in those cases within the range set by Gregory and *Sirros*. *Zarcone* at first might seem like a clear case of liability under the judicial-process, good-faith, and malice approaches; more interesting, however, is the treatment of *Zarcone* under the rule in *Stump*. If we alter the facts in *Zarcone* to make Judge Perry a judge of general jurisdiction with a grant of jurisdiction equivalent to that of Judge Stump,[373] his action in summoning and abusing *Zarcone* was arguably within his jurisdiction and was a function normally performed by a judge-punishment of a contempt. Although the incident did not arise out of a pending case and was never entered on the docket, those factors are not determinative since they were not present in *Stump*. Thus, Judge Perry, who was removed from the bench for his conduct,[374] might not be liable to a civil action for the same conduct.

We have an intuitive reaction that this argument is unsound, and that Judge Perry should be liable. Of course, intuitive reactions are not to be trusted as predictive devices'; we would have had the same reaction to *Stump*. But we suspect that others would share our reaction, including the defenders, and perhaps even the authors, of the rule in *Stump*. The point of the present discussion is to explore that reaction. A decision for liability in *Zarcone*, taking *Stump* as the controlling authority, certainly need not be justified solely on intuitive grounds. Lawyerly distinctions could be made in delineating the ambit of either "jurisdiction" or "judicial act." The reality of the distinction would not be based on those grounds, but rather on the reaction that Judge Stump's conduct was sufficiently judicial that he ought to be protected, while Judge Perry's conduct was so unjudicial that he ought to be liable.

The point may be made more clearly this way. What we are discussing is a tort action. We use Prosser's statement of the general nature of torts as a starting point:

> [L]iability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interest of others.... The tort-feasor usually is held liable because he has acted with an unreasonable intention, or because he has departed from a reasonable standard of care.[375]

The intuitive judgment suggested above is that Judge Perry's conduct was socially unreasonable, but that judgment is not necessarily arrived at by a careful weighing of the nature of the judicial process and the immunity of judges derived from that process. For Justice White in *Stump*, a judge's action is unreasonable only when the judge departs from a standard of care defined by jurisdiction, most broadly construed, and the concept of functions normally performed by a judge, equally broadly construed. In our altered version of *Zarcone*, then, liability will attach only if the act is not within Judge Perry's jurisdiction. Because of the vagueness of Justice White's application of the jurisdictional standard, that determination can be made in only two ways: either Judge Perry is immune because "all cases in law and equity" means all cases, no matter how irregular or implausible, or he is liable because he failed to adhere to the standard of care and exceeded our conception of acceptable conduct, for reasons that cannot be precisely identified or supported and that certainly do not follow by entailment from either the jurisdictional statute or the statement of the rule of immunity.

To complete the scheme, each of the three alternative liability standards has a different definition of reasonableness and, consequently, of the justice of sanctioning conduct defined as unreasonable. The good-faith approach ostensibly relies on the judge's intention, a reasonable intention being a bona fide effort to act judicially, that is, independently, carefully, and without bias, but if its authors were required to further articulate the test they might also draw on the malice approach, which is concerned not only with the intention of the judge, but also with his adherence to a substantive and procedural standard of care defined in *New York Times* as something short of reckless disregard. The procedural aspect of the judicial process approach defines the standard of care as requiring adherence to traditional procedural safeguards, but the substantive aspect of that approach relies on the same kind of vague determination of appropriateness as the *Stump* test.

Considering *Stump* in this context, Judge Stump acted sufficiently within his authority and the ambit of normal judicial action to bring him within the *Stump* immunity rule. Under the judicial-process approach, however, Judge Stump's action was unreasonable because of the irregularity of proceeding and the impossibility of appeal. On the third policy ground, justice, how is a choice to be made between these two views of *Stump*? The answer is more than unknown, it is imponderable. Much recent literature has argued that a basic tenet of modern social theory, including modern legal theory, is that values are subjective and arbitrary.[376] Values are subjective because they are solely a matter of individual choice and they are arbitrary because once the choice is made little is left to be said. Values are not subject to rational debate or discussion and one person can rarely persuade another of the rightness of certain values because of the irreconcilable antinomy of reason and value. Accepting this antinomy, the impossibility of an unequivocal response to the question posed becomes clear. The choice between a doctrine that embodies a goal of maximum judicial autonomy and one that expresses the value of conformity to established procedures is subjective and therefore indeterminate.

We can further complicate the matter by considering *Stump* under the good-faith and malice approaches. Both tests require some inquiry into the judge's motivation, but the case as reported, being unconcerned with that issue, provides insufficient facts for making that inquiry now. Assuming the facts were available, we would ask several questions including whether Judge Stump thought he could exercise his powers as he did, whether he made any inquiry into the applicable law, and whether he was motivated by any prejudices. These are factual matters on which we presumably could arrive at a generally acceptable conclusion. If good faith was lacking, or reckless disregard was evident, then these two tests would impose liability. The decision to do so involves value choices at two levels: first, that liability would be just as a general matter and, second, that liability would be just given the costs imposed on the legal system. Even if a value could be placed on the third element of the policy core, the resolution of the policy formula requires a weighing of the costs of a liability rule against the benefits. Weighing implies a scale, an objective measure, but the choice among competing values is itself reflective of more basic values and is therefore subjective and arbitrary. The experiences of those involved in the resolution of this issue are sufficiently related that their values, though subjective, may be commonly held. Each decisionmaker values compensating injured parties, sanctioning wrongdoers, and maintaining the efficiency of the legal system, but when those common values conflict, as in the judicial liability context, no independent means of resolving the conflict is available.[377] Accordingly, Justice White's resolution of the conflict in *Stump* is valid on its own terms as are the resolutions achieved by the judicial-process, good-faith and malice approaches.

Values are subjective and arbitrary, but because values are products of experience, common experiences often will produce common values.[378] We can all therefore agree that the value of judicial independence is not much involved in Gregory, but it certainly is in *Sirros*. In the intermediate cases, we are torn between conflicting values. Even though our argument to this point suggests that we are unwilling to assert that our conclusions are definitive, we argue that *Stump* was wrongly decided. Anyone who examines the cases is likely to agree on Gregory and *Sirros*, and it is our opinion that most of the legal community and society at large would agree on *Stump* as well. In *Stump*, we can assign approximate weights to each element of the policy core and most observers would agree that the small added cost of the second element is outweighed by the advantages of liability in the first and third elements. It is our belief that the decision in *Stump* should be rejected as too protective of judicial prerogative because it violates a basic tenet of the legal process - the right of review - when there would be little cost to the legal system from imposing liability.

Thus, Justice Powell's emphasis on the importance of appealability is persuasive to us. The majority's conclusion, whatever the strengths or weaknesses of the process that produced it, is simply undesirable. In this assertion we do not mean to propose a universal theory of judging that requires adherence to widely held values. We do not conclude that *Stump* was wrong because it was out of step with generally held beliefs or that the proper pattern for a court is to express values and then measure the response to determine if the values are widely held.[379] We simply state that the alternative result would have been preferable, in our opinion. That opinion is shaped by our view that human dignity and the redress of wrongful injury, especially in so serious a case, are of higher value than what we perceive to be marginal costs to the legal system of contrary decisions in cases such as *Stump*.

4. Summary.

To summarize, what we have attempted to do is to resolve a typical doctrinal question by using a standard policy analysis. Having identified the interests implicated, however, we find that conflicts among them could not be resolved. The magnitude of the harm caused by judicial wrongdoing is a matter of fact on which there is no agreement. The systemic costs of any liability standard are also factual issues, but are not subject to prediction with any degree of certainty. Finally, the moral desirability of any liability rule is not capable of rational resolution. Individually, therefore, the elements of the policy core defy resolution of the judicial liability problem. Any attempt at balancing the various elements is similarly fruitless. On the particular facts in *Stump*, however, a resolution of sorts is possible, and that resolution suggests a partial solution to the larger problem as well. Application of the procedural aspect of the judicialprocess approach to the judicial immunity question would be consonant with commonly held beliefs about the rights of parties and the limits of judges' power without imposing on the judicial system any great burden of excessive litigation or complicated factfinding. Accordingly, a partial answer to the judicial liability problem would be to hold liable judges who depart from traditional procedural protections-notice, opportunity to be heard, and, particularly, the right of review.

Adoption of this position would eliminate some of the injustice of the *Stump* doctrine, but this position addresses only a limited number of the common types of judicial wrongdoing. In our judgment, a more comprehensive solution requires taking the problem to a more fundamental level.

Footnotes

319. 435 U.S. 349 (1978).

320. Id. at 359.

321. Id. at 364.

322. Id. at 369.

323. See notes 16-19 and accompanying text supra.

324. *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974); *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972). See also *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970).

[325] Caution is necessary in projecting the current definition backward, for the notion of a judicial act developed in contemporary federal cases is much broader than the definition implicit in the use of the term in the nineteenth century and earlier. See notes 169-78 and accompanying text supra.

[326] 469 F.2d 1280 (5th Cir. 1972). Interestingly, Justice White cited in a footnote, but did not discuss, *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974). 435 U.S. at 361 n.10. In Gregory, the Ninth Circuit referred to the policies behind judicial immunity in formulating its judicial act test, 500 F.2d at 63-65, much as Justices Stewart and *Powell* did in dissent in *Stump*, 435 U.S. at 368-70. Like the justices, the Ninth Circuit found the possibility of appeal to be an important component of a judicial act. 500 F.2d at 64.

[327] The McAlester court's factors were "(1) the precise act complained of... is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity." 469 F.2d at 1282. Justice White's restatement of this test uses the first factor and merges the second and fourth. Application of the third factor in *Stump* would have been fatal to the claim of immunity because there was no case pending before Judge Stump.

[328] 435 U.S. at 362.

[329] Id. One difficulty with this formulation is the expansion of immunity that results from considering as determinative the general category in which the judge's act falls rather than the particular action taken. On Justice White's rationale, if McFarlin had petitioned ex parte for the mercy killing of her daughter, Judge Stump's approval of that petition also would have been a judicial act. Id. at 365-67 (Stewart, J., dissenting). See notes 369-72 and accompanying text infra.

[330] Id. at 362.

[331] Id. at 367 ("A judge is not free, like a loose cannon, to inflict damage whenever he announces that he is acting in a judicial capacity.").

[332] Id. at 368-70.

[333] 386 U.S. 547 (1967).

[334] Id. at 554.

[335] See 435 U.S. at 368-69.

[336] Id. at 369-70. The existence of an alternative remedy was a factor behind judicial immunity at common law. See, e.g., *Gault v. Wallis*, 53 Ga. 675, 677 (1875); *Pratt v. Gardner*, 56 Mass. 63, 70 (1849); Evans v. Foster, 1 N.H. 374, 377-78 (1819); *Cope v. Ramsey*, 49 Tenn. 197, 200 (1870). See also text accompanying notes 262-63 supra.

[337] 435 U.S. at 356-60.

[338] Indiana grants circuit court judges "original exclusive jurisdiction in all cases at law and in equity whatsoever." IND. COD § 33-4-4-3 (1976). Nonetheless, at least three reasons have been

offered why Judge Stump's action was in absence of jurisdiction even given this broad jurisdictional grant. First, one commentator has suggested that Judge Stump, pursuant to Indiana statutes, was acting as a juvenile court judge, a judge of limited, not general, jurisdiction and his failure to observe proper procedures divested him of jurisdiction. Rosenberg, supra note 4, at 836-42. Second, the Seventh Circuit found that Judge Stump's jurisdiction was ousted by a statute authorizing sterilization of institutionalized persons under certain circumstances. *Sparkman v. McFarlin*, 552 F.2d 172, 174-75 (7th Cir. 1977). Third, the Seventh Circuit also found no statutory or common-law basis for the action that would bring it within the general grant of jurisdiction of all cases "at law and in equity." Id. The last argument applies more to situations outside this particular case and points out the fallacy of the *Stump* majority's jurisdictional standard. To be within even the most general grant of jurisdiction, an action must be one with legal precedent. The example of euthanasia is the extreme case that demonstrates the principle. The granting of a petition for euthanasia surely would have been in absence of jurisdiction, especially given the lack of observance of proper procedure, even though the statutory jurisdictional grant and subject-matter jurisdiction would have been the same as in the actual case.

339. This characterization was given to *Stump*'s action by the Seventh Circuit. *Sparkman v. McFarlin*, 552 F.2d 172, 176 (7th Cir. 1977) (cited at 435 U.S. at 359).

340. A useful sampling of the literature concerning this trend includes L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978); Ely, Foreword: On Discovering Fundamental Values, 92 HARV. L. REV. 5 (1978); Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 HARV. L. REV. 293 (1976); Tushnet, "*... And Only Wealth Will Buy You Justice*"--Some Notes on the Supreme Court, 1972 Term, 1974 Wis. L. REV.177.

341. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976); L. TRIE, supra note 340, at 144-56; Developments in the Law - Section 1983 and Federalism,90 HARV. L. REV. 1135 (1977). The Court has been more solicitous of judicial than administrative independence. Compare *Imbler*, supra, with *Monell v. New York City Dep't of Social Servs*., 436 U.S. 658 (1978). See also *Chapman v. Houston Welfare Rights Organization*, 99 S.Ct. 1905 (1979). But see *Jackson v. Virginia*, 99 S.Ct. 2781 (1979).

342. See, e.g., *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 99 S.Ct. 2100 (1979); *Stone v. Powell*, 428 U.S. 465 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976); *United States v. Calandra*, 414 U.S. 338 (1974). See generally Chase, ***The Burger Court, The Individual, and the Criminal Process: Directions and Misdirections***, 52 N.Y.U.L. Ray. 518, 589-92 (1977).

343. L. TREE, supra note 340, at 1130.

344. See sources cited note 340 supra.

345. [19751 1 Q.B. 118 (C.A.). In *Sirros*, a crown court judge was defendant in a damage action of assault and false imprisonment for allegedly wrongfully ordering the seizure and detention of an alien under order of deportation. Although the judge's order was invalid, he was held not to be liable to suit because his action was committed in good faith.

[346.] Id. at 136.

[347.] Id. at 149.

[348.] Id at 139.

[349.] Id. at 136. Justice Buckley's modification of this standard would remove the immunity when the judge acts in good faith but lacks jurisdiction because of negligence concerning the jurisdictional facts or because of a mistake of law.

[350.] See Kates, supra note 4, at 623-24; ***Immunity of Judges***, supra note 4, at 767; ***Liability of Judicial Officers***, supra note 4, at 335-37.

[351.] 376 U.S. 254 (1964). See sources cited note 350 supra.

[352.] See notes 194-95 and accompanying text supra.

[353.] 435 U.S. at 364-70.

[354.] What is left undeveloped in the opinions of Justices Stewart and *Powell* is the rule of liability to be applied when the court determines the absence of the factors that would cause immunity to attach. In *Stump*, the normal liability rules of 42 U.S.C. § 1983 (1976) presumably would apply. In cases brought in state courts as common-law damage actions, general tort principles would apply and therefore either intent, recklessness, or probably even negligence would render the judge liable to damages. To some extent, therefore, the judicial-process approach is different from the good-faith and malice approaches because, strictly speaking, it contains only a rule of immunity and not rules of liability as well. See note 1 and accompanying text supra.

[355.] 435 U.S. at 362.

[356.] Id. at 365-67. In *Stump*, for example, Justice White considered Judge Stump's action "normal" as a decision on a petition, and particularly on a petition regarding a minor not specifically excluded by the Indiana general grant of jurisdiction. Justice Stewart was more concerned with the specific action, an order for sterilization. Because he regarded that action so exceptional that it was outside the scope of accepted conduct, he would have denied immunity.

[357.] Id. at 365-69.

[358.] 386 U.S. 547, 554 (;967).

[359.] 435 U.S. at 368-69. In *Stump*, since no parties were adverse, no issue was in dispute, the judge did not present "even the pretext of principled decision-making," and his decision negated the possibility of appeal, that decision was not a judicial act and therefore provided no immunity.

[360.] Id. at 369-70. In *Stump*, the judge's action foreclosed any other method of review. Thus, the basic assumption of immunity was undercut.

[361]. This general expectation without reference to a particular knowledge of the law supports the idea presented earlier that the law embodies an existing reality. See notes 206-08 and accompanying text supra.

[362.] Of course, "liability" and "immunity" are used here not as absolutes, but as degrees of liability. See note 1 supra.

[363.] As our presentation in this section is synthetic we do not cite to authority at each point. The elements of the pictures that comprise the case for judicial immunity are drawn primarily from the judicial opinions cited throughout as favoring immunity of one sort or another. Other statements of the policy favoring immunity are included in the contemporary scholarly literature, which is also the principal source for the arguments against judicial immunity. See note 4 supra. The pictures presented are somewhat exaggerated but fairly present the ideal types from which the arguments proceed.

[364.] Unlikely, however, is not the same as impossible. For an account of just such a case, see Foster v. Bork, 425 F. Supp. 1318 (D.D.C. 1977).

[365]. The statement of the core elements is adapted from Baxter, *Enterprise Liability, Public and Private*, 42 LAW &CONTEMP. PROBS. 45 (1978). The issue of Law and Contemporary Problems in which the Baxter article appears is devoted to the topic of official immunity.

[366.] Dispute resolution is involved in this issue only to the extent that the costs on the system make the dispute resolution process less effective; the central part of the third factor is the justice done by the execution of a liability rule.

[367.] Baxter, supra note 365, at 45-46.

[368.] Id. at 46.

[369.] 500 F.2d 59 (9th Cir. 1974).

[370.] 572 F.2d 52 (2d Cir. 1977).

[371.] 435 U.S. 349 (1978).

[372.] [19751 1 Q.B. 118 (C.A.).

[373.] Judge Perry was a county district court judge sitting in traffic court. 581 F.2d at 1040.

[374.] *In re Perry*, 53 A.D.2d 882, 385 N.Y.S.2d 589, appeal dismissed,40 N.Y.2d 1079, 360 N.E.2d 964, 392 N.Y.S.2d 1029 (1976).

[375.] W. Prossm, supra note 5, at 6.

[376.] See R. UNGER, supra note 208, at 67-81, 119-21; Form and Substance, supra note 208, at 1767-71; Legal Formality, supra note 208, at 363.

[377.] Cf. R. UNGER, supra note 208, at 100-03.

[378.] Cf. E. CAHN, THE SENSE OF INJUSTICE 22-27 (Midland Book ed. 1974).

[379.] But cf. G. WHITE, supra note 308, at 158-61.