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Judges: Immunities: Judicial Act and Jurisdiction Broadly Defined. (Stump v. Sparkman)

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language of *Owen* is ambiguous and will require further clarification, but as a general proposition the decision presents a three part analysis. First, it must be determined whether the federal and nonfederal claims comprise a single constitutional case. If the nonfederal claim does not arise from the "common nucleus of operative fact," then the inquiry will be at an end, since the claim is outside the constitutional limits of jurisdiction. Second, if the constitutional test is met, the relevant statute must be examined to determine whether Congress has negated the exercise of jurisdiction. Last, if a statutory negation is found, then the context in which the nonfederal claim is asserted must be examined to determine whether it should permit a circumvention of the negation. Exactly what type of context will be sufficient to permit circumvention is uncertain. Also, there may be some cases where context will be irrelevant. While leaving a number of unresolved questions as to scope and interpretation, in requiring this three part test, *Owen* may burden the courts with time consuming examinations of congressional intent and limit, to some extent, the efficiency, economy and fairness intended to be fostered by the Federal Rules of Civil Procedure.

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JUDGES — Immunities — Judicial Act and Jurisdiction Broadly Defined. Stump v. Sparkman, 98 S. Ct. 1099 (1978). Since 1871, the Supreme Court has made available a very broad privilege of immunity to judges of courts of general jurisdiction in civil actions when such actions arise out of judicial acts not done in the complete absence of jurisdiction.[1] In the recent case of *Stump v. Sparkman,*[2] the United States Supreme Court again considered the defense of judicial immunity and, for the first time, offered some definition of what constitutes a judicial act. In this author's view, in putting forward a broad definition of judicial act, and in reaffirming the use of a broad construction of jurisdiction in immunity cases, the Court

"to the arduous and ultimately wasteful task of guessing what state law is on issues upon which only the state court can authoritatively act." *Id.* at 4-5. The bill has been reintroduced in the 96th Congress. H.R. 2202, 96th Cong., 1st Sess. (1979).

1. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).
2. 98 S. Ct. 1099 (1978).

assured the maintenance of a nearly absolute immunity privilege for judges in courts of general jurisdiction when they appear to be acting in a judicial capacity.

Sparkman involved alleged violations of plaintiffs' constitutional rights,[3] which were said to have occurred during the process culminating in Linda Sparkman's involuntary sterilization. Prior to the operation, the sterilization had been approved by Harold Stump, a judge in an Indiana court of general jurisdiction, after a petition by Ms. Sparkman's mother to have her daughter sterilized was filed in his court. The petition was granted the day it was presented, in an *ex parte* proceeding without a hearing. Neither the petition nor the order were ever filed or recorded; no notice was given the daughter; nor was a guardian ad litem appointed. The operation was performed seven days later after Ms. Sparkman was told she was to have her appendix removed. Two years later, after Ms. Sparkman's marriage, when she consulted a doctor concerning her inability to conceive, she was informed that she had been sterilized.[4]

In response, Ms. Sparkman and her husband filed a federal action under 42 U.S.C. §§ 1983 and 1985[5] against Judge Stump, together with pendent state claims for assault and battery and malpractice against her mother, the mother's attorney, the doctors involved in the surgery, and the hospital where it was performed. Judge Stump's motion to dismiss based on the defense of judicial immunity was granted in the district court and the entire action was then dismissed.[6]

A three judge panel of the Seventh Circuit Court of Appeals unanimously reversed the district court, holding that the defense of judicial immunity was not available to Judge Stump,

3. The Supreme Court majority referred to the district court's summary of the constitutional claims asserted: violations of due process, equal protection, the right of privacy, the right to be free of cruel and unusual punishment and the right to procreate. *Id.* at 1103.

4. Sparkman v. McFarlin, 552 F.2d 172, 173 (7th Cir. 1977).

5. (1970). Section 1983, originally enacted as Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, reads in full:

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

6. The claims against the remaining defendants were dismissed since it was held that without Judge Stump's presence in the case, there could be no showing of the state action necessary under section 1983. Civil No. F75-129 (N.D. Ind., filed May 13, 1976).

first because he had acted extrajudicially in ordering the sterilization and second, because the act in question was performed without jurisdiction.[7] The Supreme Court, however, in a five-three decision, again reversed, holding that the judicial immunity defense did protect Judge Stump.[8] The majority and minority views in *Sparkman* represent two historical positions on the breadth of protection which should be afforded under the judicial immunity privilege, and these opinions must necessarily be examined in the light of this history.

I. THE HISTORICAL CONTEXT

The first United States Supreme Court case regarding judicial immunity was *Randall v. Brigham*,[9] decided in 1868. In the majority opinion in that case, Justice Field recognized the qualified immunity available to judges under English common law.[10] Under this doctrine, no judge was immune from prosecution for malicious or corrupt judicial acts; further, inferior court judges were subject to prosecution for acts in excess of their jurisdiction.

However, in 1871, with the case of *Bradley v. Fisher*,[11] the Supreme Court, in another opinion written by Justice Field, abandoned the qualified immunity doctrine in favor of a doctrine of absolute judicial immunity: "[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

7. 552 F.2d 172 (7th Cir. 1977).

8. 98 S. Ct. 1099 (1978).

9. 74 U.S. (7 Wall.) 523 (1868). The Justices' Protection Act of 1848, 11 & 12 Vict., c. 44, § 1, provided that an inferior court justice, acting within his jurisdiction, could be sued for conduct proven to be malicious and without reasonable and probable cause. Motivation was irrelevant as to such justice acting in excess of his jurisdiction. A superior court judge, acting even in excess of his jurisdiction, would be immune.

10. Mr. Justice Field expanded the concept of immunity for malicious judicial acts by applying it to all judges, not solely to inferior court judges as had been the limit imposed by the English courts.

> [I]t is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly.

74 U.S. (7 Wall.) at 535-36.

11. 80 U.S. (13 Wall.) 335 (1871).

corruptly."[12] After *Bradley,* judges were provided a defense in all actions brought by persons alleging malicious judicial conduct.

While *Bradley* was being argued, Congress enacted the Civil Rights Act of 1871[13] which created a federal remedy for civil rights violations perpetrated under color of state law. The Act imposed liability upon "every person" who, under color of state law, deprived another of his or her civil rights; it appeared to provide statutory authority for relief from judicial abuse. There is no convincing proof that Congress intended that immunity would be available to any state or territorial officials in actions under the Act, and it is more likely that the Forty-Second Congress intended to do away with whatever common-law immunities existed.[14]

Nevertheless, over the next hundred years, there was never a consistent recognition that the judicial immunity defense had been abrogated in section 1983 actions. The dominant line of cases found judges immune from suit on the basis of *Bradley,* even in civil rights cases.[15] However, the exceptions to judicial immunity enunciated in *Bradley* were recognized in section 1983 actions also: (1) instances in which judges acted in clear absence of jurisdiction[16] and (2) instances where judges engaged in nonjudicial activities.[17] But a maverick line of cases held that judicial immunity was simply not a valid defense to

12. *Id.* at 351. Justice Field justifies the shift away from liability depending on the motive of the judge by noting that "[t]he allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." *Id.* at 354.

13. Ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1970)).

14. *See* Cong. Globe, 42nd Cong., 1st Sess. 17, 365-66, 385 (1871); Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J., 322, 325 (1969).

15. Berg v. Cwiklinski, 416 F.2d 929 (7th Cir. 1969); Franklin v. Meredith, 386 F.2d 958 (10th Cir. 1967); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965); Harvey v. Sadler, 331 F.2d 387 (9th Cir. 1964); Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964); Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955); Francis v. Crafts, 203 F.2d 809 (1st Cir. 1953); Stambler v. Dillon, 302 F. Supp. 1250 (S.D.N.Y. 1969); Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss. 1969); Pritt v. Johnson, 264 F. Supp. 167 (M.D. Pa. 1967); Haigh v. Snidow, 231 F. Supp. 324 (S.D. Cal. 1964); Griffin v. Connally, 127 F. Supp. 203 (S.D. Tex. 1955); Ginsburg v. Stern, 125 F. Supp. 596 (W.D. Pa. 1954); Morgan v. Sylvester, 125 F. Supp. 380 (S.D.N.Y. 1954); Souther v. Reid, 101 F. Supp. 806 (E.D. Va. 1951).

16. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970); Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932).

17. Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963).

suit brought under section 1983.[18] Finally, in 1967, in *Pierson v. Ray*,[19] the Supreme Court resolved the uncertainty regarding the applicability of the judicial immunity defense in actions under section 1983. There, Chief Justice Warren ruled that a state judge who had convicted civil rights demonstrators of disorderly conduct was immune from liability, noting that he had played no role in the arrest and conviction other than to adjudge petitioners guilty when their cases came before his court.[20] The eight member majority reaffirmed the applicability of the judicial immunity defense under the Civil Rights Act:

> We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove*, . . . that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.[21]

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18. *See* McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949); Picking v. Pennsylvania R.R. Co., 151 F.2d 240 (3rd Cir. 1945). In *Picking*, the Third Circuit held that judicial immunity was not a valid defense to a suit brought under section 1983. The court reasoned that judicial immunity was a common-law rule which Congress was empowered to change. "We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that act and in fact did so." *Id.* at 250.

19. 386 U.S. 547 (1967).

20. Petitioners had attempted to suggest a "conspiracy" between the presiding judge and the police officers. The proof of such conspiracy never went beyond the suggestion that inferences could be drawn from the judge's judicial decisions. *Id.* at 553 n.8.

21. *Id.* at 554-55 (footnote omitted). The Supreme Court also discussed justifications for judicial immunity. They reasoned that a judge's independent decisionmaking would be compromised by the prospect of a lawsuit after every decision. Moreover, a judge should not have to risk the depletion of his personal resources in the defense of vexatious or harassing suits, even if he could easily prevail. *See* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1936), who lists nine identifiable reasons for the immunity rule; these include the benefits of 1) saving judges' time; 2) preventing influence on decisions through fear of subsequent suit; 3) removing discouragement to judicial service; 4) assuring separation of powers; 5) safeguarding the finality of decisions; 6) utilizing alternate avenues of redress for erroneous decisions; 7) refraining from unfairly penalizing honest error; 8) recognizing that judges' duties are directed to the public rather than to individuals; and 9) noting the fact of judicial self-protection. *See also* Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615 (1970).

Despite vigorous dissent concerning the legislative intent[22] and history[23] of the Act, the majority gave a broad construction to judicial immunity even in section 1983 cases. This same broad construction is reflected in the majority opinion of *Stump v. Sparkman*.

II. THE OPINIONS

The majority opinion in *Sparkman*, written by Justice White representing a five member majority,[24] cites *Pierson* to support the determination that the doctrine of judicial immunity is applicable in suits under 42 U.S.C. § 1983.[25] Justice White discussed that point no further, and directed the greater part of his opinion to a consideration of the only recognized exceptions to the doctrine of judicial immunity: (1) acts that cannot be characterized as judicial acts[26] and (2) acts done in the clear absence of all jurisdiction.[27]

A. "Judicial Act"

The first exception to absolute judicial immunity arises when the act in question cannot be classified as "judicial." Early British judges could be held liable for acts ministerial in nature, but not for acts discretionary in nature.[28] Similarly, that distinction is often employed today in determining what

22. In Pierson v. Ray, Justice Douglas, dissenting, stated that he did not think "that all judges, under all circumstances, no matter how outrageous their conduct are immune from suit under 17 Stat. 13, 42 U.S.C. § 1983. . . . To most, 'every person' would mean *every person*, not every person *except* judges." 386 U.S. at 558-59 (emphasis in original).

23. Section 1 of the Civil Rights Act of 1871 was designed to supplement an 1866 statute that clearly included judges. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (current version at 18 U.S.C. § 242 (1970)). This statute provided a criminal remedy for the same deprivations for which section 1 provided a civil remedy.

24. Chief Justice Burger and Justices Blackmun, Rehnquist and Stevens joined in the opinion. Justice Stewart filed a dissenting opinion, in which Justices Marshall and Powell joined. Justice Powell filed a dissenting opinion. Justice Brennan took no part in the consideration or decision of the case.

25. 98 S. Ct. at 1104.

26. *See* Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970); Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963); Penn v. Eubanks, 360 F. Supp. 699 (N.D. Ala. 1973).

27. *See, e.g.*, Schwartz v. Weinstein, 333 F. Supp. 1031 (E.D. Mo. 1971), *aff'd*, 459 F.2d 882 (8th Cir. 1972); Joyce v. Hickey, 337 Mass. 118, 147 N.E.2d 187 (1958); Utley v. City of Independence, 240 Or. 384, 402 P.2d 91 (1965).

28. *See, e.g.*, Prickett v. Gratiex, 115 Eng. Rep. 1158 (K.B. 1846); Davis v. Capper, 109 Eng. Rep. 362 (K.B. 1829); 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 239 n.4 (1924).

acts of public officials are immune from liability.[29] *Sparkman* reiterates another well-established rule that "judicial" acts render a judge immune from liability,[30] while "nonjudicial" acts do not.[31] The majority describes two tests to determine whether an act of a judge is a "judicial" one: (1) the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and (2) the expectation of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity.[32]

The *Sparkman* majority found that "both factors indicate that Judge Stump's approval of the sterilization petition was a judicial act."[33] As to the nature of the act, White wrote: "State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors, as for example, a petition to settle a minor's claim."[34] As to the expectation of the parties, he says: "We may infer from the record that it was only because Judge Stump served in that position [county circuit judge] that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval."[35]

Justice Stewart, writing for the dissenting justices, not only faults White's definition of judicial act but also his application of the majority test: "I think that the first of these grounds [function normally performed by a judge] is factually untrue and that the second [dealing with judge in judicial capacity] is legally unsound."[36] Stewart notes that the act in question, the approval of a parent's decision regarding medical treat-

29. Cords v. Anderson, 80 Wis. 2d 525, 259 N.W.2d 672 (1977). This recent Wisconsin decision reaffirmed the Wisconsin position that a public official may be held liable for negligent performance of purely ministerial duties.

30. 98 S. Ct. at 1106. *See generally* Wiggins v. Hess, 531 F.2d 920 (8th Cir. 1976) (judge who sentenced a misdemeanant to prison when the offense carried no prison sentence held immune from suit); Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1971), *cert. denied*, 409 U.S. 1042 (1972) (judge who committed an individual to a state hospital under a previously repealed statute held immune from suit).

31. 98 S. Ct. at 1106. *See generally* Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) (justice of the peace who bodily assaulted a person in his courtroom held not immune); Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972) (juvenile court referee without power to incarcerate who ordered incarceration of juvenile held not immune); Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963) (judge who after disqualifying himself from a case interfered with the proceedings and filed a false affidavit therein held not immune).

32. 98 S.Ct. at 1107.

33. *Id.* (footnote omitted).

34. *Id.* at 1108.

35. *Id.*

36. *Id.* at 1109.

ment for a minor, is not a function normally performed by a judge. "Indeed, there is no reason to believe that such an act has ever been performed by *any* other Indiana judge, either before or since."[37]

Stewart also questions the second part of the test: "But false illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act;"[38] neither, in the minority view, does a judicial act result from the simple affixation of the title "judge" under a signature: "[T]he conduct of a judge surely does not become a judicial act merely on his own say-so. A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."[39]

For the minority, in order for an act to be judicial at least some of the attributes of a judicial proceeding must be present. Justice Stewart suggests that there must be a case or controversy, there must be litigants, there must be some avenue of appeal and there must be at least "the pretext of principled decisionmaking."[40] For Justice Powell, writing in a separate dissent, it is the absence of appellate or political remedies which clearly marks this act as nonjudicial, since it is the presence of such alternative relief which provides the basis of judicial immunity in the first place.[41]

While, unlike the minority, the majority does not specifically describe what they perceive to be the attributes of a judicial act, they do cite previous cases which have held that lack of formal proceedings[42] and separation from court facilities[43] do not automatically preclude a judicial act. In contrast, acts done by a judge acting in another official capacity[44] or characterized by outrageous behavior[45] have been held to be beyond the pale of judicial behavior.

In sum, the Supreme Court in *Sparkman* has offered a two pronged test to determine whether the act of a judge is a

37. *Id.* at 1110 (emphasis in original).
38. *Id.*
39. *Id.* (footnote omitted).
40. *Id.* at 1111.
41. *Id.* at 1111-12.
42. *In re* Summers, 325 U.S. 561 (1945).
43. McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972).
44. Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970); Penn v. Eubanks, 360 F. Supp. 699 (N.D. Ala. 1973).
45. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963).

"judicial" one, and while it has not offered clear guides to use of the test, it is clear that broad and generous analysis will be used to determine if a judge's act is "judicial" to the point where it merits absolute immunity.

B. *"Clear Absence of All Jurisdiction"*

Definition of judicial act was the primary area of disagreement between the majority and minority in *Sparkman* and formed the basis of discussion in the preceding section of this note. Since the Supreme Court minority did not reach the jurisdictional issue,[46] and since complete lack of jurisdiction was the primary basis of decision in the court of appeals, it is the contrast between the definition of jurisdiction espoused by the Seventh Circuit and the definition put forward by the *Sparkman* majority which forms the organizational basis of this section.

Justice White relies on *Bradley* to establish the general rule of construction regarding jurisdiction in immunity cases: "[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."[47] This sets the issue, the definition of a line between acts done in excess of jurisdiction and acts done in the complete absence of jurisdiction.

The Seventh Circuit had held that for jurisdiction to be present when a judge operates under a state grant of general jurisdiction[48] there must be a statutory or common-law basis for the exercise of judicial power:

> Although this grant of judicial power is broad, we cannot accept the assertion that it cloaks an Indiana circuit judge

46. 98 S. Ct. at 1110 n.5.

47. 80 U.S. (13 Wall.) at 351.

48. IND. CODE § 33-4-4-3 (1976) provides:

Jurisdiction

Sec. 3. Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.

> with blanket immunity. He may not arbitrarily order or approve anything presented to him in the form of an affidavit or petition. A claim must be characterized as a case in law or equity in order to come within the statute. In short, it must have a statutory or common law basis.[49]

Indiana statutes allow court authorized sterilization only when the person to be sterilized is institutionalized, and even that power is strictly limited by numerous procedural requirements.[50] Thus, the court of appeals had held that the statutory scheme in Indiana negates jurisdiction in cases not involving institutionalized persons.[51] The Seventh Circuit seems to have followed the rule that a court of general jurisdiction, while engaged in the exercise of a special statutory power, becomes a court of limited jurisdiction with powers restricted to the authority given by statute.[52]

The Supreme Court majority, on the other hand, uses an inverse reasoning process. Because "the scope of the judge's jurisdiction must be construed broadly where the issue is . . . immunity,"[53] the Supreme Court defines the plaintiff's burden of proof not as the necessity of proving absence of a statutory or common-law basis for the exercise of jurisdiction, but rather as the necessity of citing a statute or case law prohibiting the exercise of jurisdiction: "We agree with the District Court, it appearing that neither by statute or case law has the broad jurisdiction granted to the circuit courts of Indiana been circumscribed to foreclose consideration of a petition for authorization of a minor's sterilization."[54] This conclusion follows from the rule that a court has the power and duty to determine whether it has jurisdiction of a matter presented to it.[55]

The Indiana statute governing sterilization is in keeping

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49. 552 F.2d at 174.

50. The subjects of such actions were guaranteed the right to notice, the opportunity to defend and the right of appeal. IND. CODE §§ 16-13-13-1 through 16-13-13-6 (1971) (repealed 1974).

51. 552 F.2d at 175.

52. State v. Taylor, 323 S.W.2d 534, 537 (Mo. Ct. App. 1959). This case involved the deprivation of parental custody and was used by the court in *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974), where the court developed an analogy between the termination of parental custody and the termination of the right to bear children.

53. 98 S.Ct. at 1105.

54. *Id.* at 1105-06.

55. Carmichael v. Iowa State Highway Comm'n, 156 N.W.2d 332 (Iowa 1968); Niles v. Marine Colloids, Inc., 249 A.2d 277 (Me. 1969); Appeal of Matheisel, 107 N.H. 479, 224 A.2d 832 (1966).

with those of the majority of jurisdictions which impose rigid statutory restrictions on the power to authorize any sterilization procedure[56] in evidence of the sensitivity of the area. In this author's view, limitations on judicial entry into such sensitive areas must be controlled in some manner, either by legislative enactment or by a more narrow definition of jurisdiction in immunity cases.[57] Since the Supreme Court has chosen to sanction a broad grant of power to courts of general jurisdiction entering into sensitive areas even when they do so by assumption of jurisdiction, *Sparkman* clearly demonstrates the necessity of specific legislative enactment as a prerequisite to limitations on judicial action in these fields.

III. CONCLUSION

It is evident from *Sparkman* that the two exceptions to judicial immunity do not have clearly enunciated standards. The court of appeals argued vigorously that the act of authorizing a sterilization procedure was in clear absence of all jurisdiction; the same act was held by the Supreme Court majority to have been performed as an exercise of jurisdiction. Three Supreme Court justices said the respondent's actions were not "judicial," but five had no doubt that it was a judicial act.

In recent decisions, the Supreme Court has qualified the common-law immunities provided other government officials when suit is brought against them under section 1983. Federal officials were immune from suit[58] until the Supreme Court recently modified that rule in *Butz v. Economou.*[59] The prior absolute immunity afforded state officials[60] was also qualified in *Scheuer v. Rhodes.*[61] Longstanding law holding municipalities immune[62] was overturned when the Court recently held that local governments were intended to be included among the

56. *See, e.g.,* Wade v. Bethesda Hosp., 356 F. Supp. 380 (S.D. Ohio 1973); Kemp v. Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); Holmes v. Powers, 439 S.W.2d 579 (Ky. App. 1968); Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925).

57. There is little doubt that more interpersonal privacy issues will face judicial review in the future. Abortion, test-tube procreation and cloning are obvious examples.

58. Barr v. Mateo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896).

59. 46 U.S.L.W. 4952 (1978). The Court held that federal executive officials are entitled only to qualified immunity, and that there is no substantial basis for holding that executive officers may with impunity discharge their duties in a way that is known to them to violate the Constitution.

60. Spalding v. Vilas, 161 U.S. 483 (1896).

61. 416 U.S. 232 (1974).

62. Monroe v. Pape, 365 U.S. 167 (1961).