University of Arkansas at Little Rock Law Review

Volume 8 | Issue 1 Article 3

1985

Courts—Judicial Immunity—Prospective Relief and Attorney's Fees Allowed

Robert S. Irving

Follow this and additional works at: https://lawrepository.ualr.edu/lawreview

 Part of the Civil Rights and Discrimination Commons, and the Courts Commons

Recommended Citation

Robert S. Irving, *Courts—Judicial Immunity—Prospective Relief and Attorney's Fees Allowed*, 8 U. ARK. LITTLE ROCK L. REV. 31 (1985).
Available at: https://lawrepository.ualr.edu/lawreview/vol8/iss1/3

This Note is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

NOTES

COURTS—JUDICIAL IMMUNITY—PROSPECTIVE RELIEF AND ATTORNEY'S FEES ALLOWED: *Pulliam v. Allen*, 104 S. Ct. 1970 (1984).

On January 10, 1980, the police arrested Richmond Allen in Culpepper Co., Virginia for using abusive language. The offense was a misdemeanor for which there was no jail sentence; the maximum penalty was a $500.00 fine.[1] Magistrate Pulliam set bail at $250.00 and when Allen was unable to meet it, she committed him to jail until his trial fourteen days later.

Subsequent to his release and payment of the fine, Allen brought a section 1983 action against Magistrate Pulliam and Judge Burke, before who he had been tried, seeking declaratory and injunctive relief. The United States District Court for the Eastern District of Virginia found the practice of incarcerating persons for non-incarcerable offenses to be a violation of due process and equal protection and prospectively enjoined Magistrate Pulliam.[2] Pursuant to section 1988, Allen was granted his request of $7,038 in attorney's fees and the award was upheld by the Fourth Circuit Court of Appeals.[3] The Supreme Court granted certiorari[4] and held that judicial immunity does not bar prospective injunctive relief under section 1983 of the Civil Rights Act of 1871[5] or bar the award of attorney's fees under the Civil Rights Attorney's Fees Award Act of 1976.[6] *Pulliam v. Allen*, 104 S. Ct. 1970 (1984).[7]

---

1. VA. CODE § 18.2-416 (1982).
2. Allen v. Burke, No. 81 Civ. 0040A (E.D. Va. June 4, 1981). The district court dismissed Judge Burke as his involvement was insignificant.
3. Allen v. Burke, 690 F.2d 376 (4th Cir. 1982).
4. 461 U.S. 904 (1983).
5. 42 U.S.C. § 1983 (Supp. V 1979) (current version at 42 U.S.C. § 1983 (1982)). [hereinafter cited as section 1983].
6. 42 U.S.C. § 1988 (Supp. V 1976) (current version at 42 U.S.C. § 1988 (1982)). [hereinafter cited as section 1988].
7. Justice Blackmun wrote the majority opinion. Justice Powell wrote the dissenting opinion

Judicial immunity began in England as a relatively narrow exception to judicial liability.[8] Before the fourteenth century, false judgments, malicious judgments, or judgments that went beyond the scope of the judge's authority resulted in personal liability.[9] By the fourteenth century a distinction emerged between the courts of record and those not of record.[10] The former derived their authority from the King. The record was analogous to the King's word, and the judge, as the source of the record, could not be held liable for actions within his jurisdictional powers.[11] Courts not of record, which were more numerous and in closest contact with the people, had no such protection.[12]

By the early seventeenth century a struggle for jurisdiction developed between the King's courts, the ecclesiastical and seignorial courts, and other courts of limited jurisdiction.[13] The existence of judicial immunity for judges of courts of record or law courts gave them distinct advantages over their rivals. In the leading case of *Floyd v. Barker*,[14] Lord Coke held that a judge brought before the Star Chamber on a charge of conspiracy had absolute immunity. In so holding, he drew not only from the potency of the record but also from two important policy considerations. First, without immunity "there never will be an end of causes: but controversies will be infinite . . . ."[15] Second, immunity was necessary to maintain respect for the judiciary and the King.[16] In *Hamond v. Howell*,[17] a third policy justification emerged. The court held that it was inappropriate to sanction a judge for making an incorrect decision in matters properly before him.[18] The court reasoned that the harm of mistaken actions was readily remediable.[19]

Gradually, the distinction between courts of record and courts not of record faded, and judicial immunity was viewed as arising more

---

and was joined by Chief Justice Burger, Justice Rehnquist and Justice O'Connor.

8. *See* Feinman and Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REV. 201 (1980); Rubinstein, *Liability in Tort of Judicial Officers*, 15 U. TORONTO L.J. 317 (1964); and Thompson, *Judicial Immunity and the Protection of Justices*, 21 MOD. L. REV. 517 (1958).

9. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 213-15 (7th ed. 1956).

10. *Id.*

11. Feinman and Cohen, *supra* note 8, at 206.

12. 6 W. HOLDSWORTH, *supra* note 9, at 235-36.

13. 5 W. HOLDSWORTH, *supra* note 9, at 300-301, 429-432.

14. 77 Eng. Rep. 1305 (Star Chamber 1607). In an often cited companion case the court held that a judicial act outside of the court's jurisdiction was not within the record and not protected. The Case of Marshalsea, 77 Eng. Rep. 1027 (C.P. 1610).

15. *Floyd*, 77 Eng. Rep. at 1306.

16. *Id.* at 1307.

17. 86 Eng. Rep. 1035 (C.P. 1677).

18. *Id.* at 1037.

19. *Id.* at 1036.

from the nature of the judicial office.[20] A second dichotomy gradually emerged, however, which distinguished between superior and inferior courts.[21] Which courts comprised which category was never clear.[22] Nevertheless, a judge of a superior court was not answerable when acting in a judicial capacity even if he acted maliciously or corruptly.[23] A judge of an inferior court was liable if he acted outside his jurisdictional powers,[24] and this occurred frequently.[25]

The American response to the issue of judicial immunity, while varied, was significantly influenced by the English law. It was not, however, until 1868 that the Supreme Court confronted the issue. In *Randall v. Brigham*,[26] the Court adopted the general principle that all judges were immune in civil actions "for any judicial act done within their jurisdiction."[27] Judges of superior or general authority were not liable "even when such acts are in excess of their jurisdiction, unless perhaps . . . the acts . . . are done maliciously or corruptly."[28]

Four years later, in 1872, the Supreme Court decided *Bradley v. Fisher*,[29] which was to become the leading case in establishing the boundaries between judicial liability and immunity in America. Guided primarily by the principle of judicial independence, Justice Field held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."[30] Only when acting in absence of jurisdiction should a judge be held liable for his actions.[31] Although Justice Field spoke only of judges of general jurisdiction, his decision blurred the distinction be-

---

20. Feinman and Cohen, *supra* note 8, at 211. Jurisdiction became a key determinant of liability. When a judge acted outside his authority he was not afforded protection. Guinne v. Poole, 125 Eng. Rep. 523 (1566). Lack of knowledge of jurisdictional facts would be a valid defense but ignorance of the law was not. Houlden v. Smith, 117 Eng. Rep. 323 (Q.B. 1850).

21. Feinman and Cohen, *supra* note 8, at 214.

22. *Id.* at 215-218. In Terry v. Huntington, 145 Eng. Rep. 557 (Exch. 1668) and Taaffe v. Downes, 13 Eng. Rep. 15 (C.P. Ireland 1813) superior courts were defined as the King's courts at Westminster.

23. Fray v. Blackburn, 3 B. & S. 576, 578 (1863).

24. Terry v. Huntington, 145 Eng. Rep. 557 (Exch. 1668).

25. "In many situations the law provided no other form of remedy, and the courts used this one so rigorously that Parliament had to intervene on several occasions to temper the wind to the shorn lamb." Sirros v. Moore, 118 Q.B. 149 (1975).

26. 74 U.S. (7 Wall.) 523 (1868).

27. *Id.* at 535.

28. *Id.* at 536.

29. 80 U.S. (13 Wall.) 335 (1871).

30. *Id.* at 351. Note that *Bradley* closed the "maliciously or corruptly" exception of *Randall*.

31. *Id.* at 351-52. Absence of jurisdiction is an act for which there is clearly no jurisdiction of subject matter. *Id.*

tween general and limited jurisdiction with respect to immunity.[32] In response to Justice Field's ambiguous language, the lower courts quickly expanded the logic of *Bradley* to include lower court judges as well.[33]

The early common law doctrines of judicial immunity both in England and in this country were concerned only with civil actions for damages. Injunctions against judges have no corresponding history and are largely the product of the modern courts and the recent expansion of actions brought under the Civil Rights Acts of 1871. As the Court in *Pulliam v. Allen*[34] noted, "[n]one of the seminal opinions on judicial immunity, either in England or in this country, has involved immunity from injunctive relief."[35]

Section 1983[36] provides that "[e]very person" who acts "under color of" state law to deprive another of his constitutional or federal rights shall be liable in an action at law or suit in equity. The broadly phrased language of the Act created new questions with respect to judicial immunity. First, did Congress intend to abrogate the common law immunity? Second, could judges be subjected to injunctions in equity?

The legislative history of the Civil Rights Acts of 1866 and 1871 strongly suggested that Congress intended to reach all state actors, including judges. The section of the 1871 Act that became section 1983 was introduced by Representative Shellabarger who stated that the second section of the Civil Rights Act of 1866[37] "provides a criminal proceeding in identically the same case as this one [section 1983] provides a civil remedy for."[38] President Johnson in his 1866 veto message gave as his major objection to section two of the Civil Rights Act of 1866 that it would make legislators and judges criminally liable.[39] The veto was overridden. In the debates, Senator Turnbull, the bill's sponsor, stated, "a judge, if he acts corruptly or viciously in the execution or under color of an illegal act, may be and ought to be punished."[40]

---

32. While speaking only of judges of general jurisdiction, Justice Field in his examples of jurisdiction used judges of limited, inferior jurisdiction. *Id.* at 352.

33. Feinman and Cohen, *supra* note 8, at 294-304.

34. 104 S.Ct. 1970 (1984).

35. *Id.* at 1978.

36. Ch. 22 § 1, 17 Stat. 13 (1871) [Codified as amended at 42 U.S.C. § 1983 (1982)].

37. 14 Stat. 27 (1866). Now 18 U.S.C. § 242 (1982).

38. CONG. GLOBE, 42nd Cong., 1st Sess. 68 (App.) (1871). Also, Monroe v. Pape, 365 U.S. 167 (1961), held that "under color of law" should be accorded the same construction in both § 1983 and § 242.

39. CONG. GLOBE, 39th Cong., 1st Sess. 1680 (1866).

40. *Id.* at 1758. Similar statements were made by other congressmen: "Any judge . . . who is called upon to decide whether the State law is in force because this law is unconstitutional, shall

The debates surrounding the Ku Klux Klan Act of 1871,[41] which gave rise to section 1983,[42] indicated that Congress felt just as strongly about judicial liability as it had with the Civil Rights Act of 1866.[43] The Supreme Court, too, in a recent review of the legislative history of section 1983 stated: "This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights . . . and it believed that these failings extended to the state courts."[44]

The early case of *Ex parte Virginia*[45] dealt with judicial immunity and suggested that the Civil Rights Acts had indeed abolished the common law immunities. In that case, a judge was indicted under the predecessor of 18 U.S.C. section 243 for excluding qualified blacks from jury lists. The Court held that the judge was acting in a ministerial capacity and could claim no judicial immunity. The Court alternatively found that even if his actions had been judicial, he would have been liable for acts "not left within the limits of his discretion."[46]

In the years that followed, however, the Civil Rights Acts were not given the full effect of their broad language.[47] This resulted primarily from the narrow reading given the statutory phrase "under color of" law. In the early cases, "under color of" law was construed to mean that only official conduct sanctioned by state law was actionable. If the official acts were unauthorized by state law, a section 1983 remedy was not available.[48]

---

hold it to be in force notwithstanding this law, is to be punished." *Id.* at 1778 (remarks of Senator Johnson). "[I]t is better to invade the judicial power of the States than to permit it to invade, strike down, and destroy the civil rights of citizens." *Id.* at 1837 (remark of Representative Lawrence).

41. Ch. 22 § 1, 17 Stat. 13 (1871) [now codified as 42 US.C. § 1983 (1982)].

42. 42 U.S.C. § 1983 derives from § 1 of the Ku Klux Klan Act of 1871; 42 U.S.C. § 1985(3).

43. CONG. GLOBE, 42nd Cong., 1st Sess. 394 (1871) (remarks of Representative Rainey); *Id.* at 429 (remarks of Representative Beatty); *Id.* at 153 (App.) (remarks of Representative Garfield); *Id.* at 277 (App.) (remarks of Representative Porter); *Id.* at 654 (remarks of Senator Osborne); *Id.* at 505 (remarks of Senator Pratt).

44. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

45. 100 U.S. 339 (1879).

46. *Id.* at 348.

47. Between 1871 and 1920 only 21 cases were brought under section 1983. Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951); *see also* Comment, *Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right*, 43 U. PITT. L. REV. 1035, 1039 (1982); Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285 (1953).

48. Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927); *see* Comment, *Federalism, Section 1983, supra* note 47, at 1039 n.18; *Developments in the Law—Section*

Beginning in the 1940's, "under color of" law was reinterpreted in two Supreme Court cases. In *United States v. Classic*[49] and *Screws v. United States*,[50] the Court held that official acts in violation of state law would be "under color of" law for the purposes of sections 241 and 242.[51] The close historical parallels between these criminal sections and section 1983 set the stage for the breadth ultimately given section 1983 as a means of enforcing federal rights against unlawful state action. Thus, in *Monroe v. Pape*,[52] a 1961 case, the *Classic* and *Screws* definition of "under color of" law was accorded to section 1983. Justice Douglas concluded that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[53]

Despite the *Classic* and *Screws* holdings, the majority of the circuits held that the common law immunity of judges was undiminished by the Civil Rights Act.[54] These holdings were fostered in part by the Supreme Court's 1951 decision of *Tenney v. Brandhove*.[55] This case, while addressing the immunity of state legislators, narrowed the broad scope of the 1871 Act and made the courts less hesitant to find judicial immunity.[56] Prior to *Tenney* a few courts did hold that judges could be liable under the 1871 Act as invigorated by *Classic* and *Screws*.[57] The Third Circuit Court of Appeals in *Picking v. Pennsylvania R.R. Co.*,[58] interpreted the intent of Congress as including members of the state judiciary acting in an official capacity and held a judge liable for dam-

---

1983 and Federalism, 90 HARV. L. REV. 1133, 1159-1161 (1977) which suggest that the restrictive interpretation given "under color of" law was based on early courts' assumption that a violation of state law could not be state action under the fourteenth amendment, *citing* The Civil Rights Cases, 109 U.S. 3 (1883) and Barney v. City of New York, 193 U.S. 430 (1904).

49. 313 U.S. 299 (1941). "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.* at 326.

50. 325 U.S. 91 (1945). "Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Id.* at 111.

51. 18 U.S.C. §§ 241, 242 (1976) (current version at 18 U.S.C. §§ 241, 242 (1982)).

52. 365 U.S. 167 (1961).

53. *Id.* at 183.

54. *E.g.*, Johnson v. MacCoy, 278 F.2d 37 (9th Cir. 1960); Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955); Francis v. Crafts, 203 F.2d 809 (1st Cir. 1953), *cert. denied*, 346 U.S. 835 (1953); Morgan v. Sylvester, 125 F. Supp. 380 (S.D. N.Y. 1954), *aff'd*, 220 F.2d 758 (2d Cir. 1955), *cert. denied*, 350 U.S. 867 (1955); Souther v. Reid, 101 F. Supp. 806 (E.D. Va. 1951).

55. 341 U.S. 367 (1951).

56. *See* Comment, *Immunity of Public Officials from Liability Under the Federal Civil Rights Acts*, 18 ARK. L. REV. 81, 85-86 (1964).

57. Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950); McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949); Burt v. City of N.Y., 156 F.2d 791 (2d Cir. 1946).

58. 151 F.2d 240 (3d Cir. 1945).

ages. "R.S. section 1979 applies to 'every person'. We can imagine no broader definition."[59]

The Supreme Court finally faced the issue of judicial immunity under section 1983 in *Pierson v. Ray*.[60] After reviewing the legislative history of section 1983, the Court denied liability. The Court concluded that since the common law doctrine of immunity was well established, "we presume that Congress would have specifically so provided had it wished to abolish the doctrine."[61] The Court also relied on its decision in *Tenney*,[62] which held that legislative immunity was not abolished by section 1983. By analogy, section 1983 did not abolish judicial immunity either. Thus, the Court reaffirmed *Bradley v. Fisher*[63] and reiterated the concerns of replacing principled and fearless decision-making with judicial intimidation.[64] Moreover, the Court felt that judicial errors were correctable by appeal.[65]

While *Pierson* clearly established judicial immunity as a defense to actions brought under section 1983, the scope of that immunity was not tested until the 1978 case of *Stump v. Sparkman*.[66] In *Stump*, the judge granted a mother's petition to have her fifteen year old, slightly retarded daughter sterilized. The daughter did not learn of the nature of the operation until much later when she was married and discovered she could not have children. At that time she brought an action for damages under section 1983 against Judge Stump.

The Supreme Court, freed by *Pierson* from the constraints of the legislative debates, could rely almost entirely on the language of *Bradley v. Fisher*.[67] The Court held that a judge will not be liable because his action was in error, malicious, or in excess of his authority. He will be liable only if he has acted in the absence of all jurisdiction, and by state statute the circuit court had original and exclusive jurisdiction in all cases of law and equity.[68] Moreover, with this broad jurisdiction a judge was immune even if his judicial acts were "flawed by the commission of grave procedural errors."[69] Judicial acts are to be tested by

59. *Id.* at 250. In Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1960), *cert. denied*, 386 U.S. 1021 (1967), *Picking* was overruled, relying in part on the holding in *Tenney*.
60. 386 U.S. 547 (1967).
61. *Id.* at 554-55.
62. 341 U.S. 367 (1951).
63. 80 U.S. (13 Wall.) 335 (1871).
64. *Pierson*, 386 U.S. at 554.
65. *Id.*
66. 435 U.S. 349 (1978).
67. 80 U.S. (13 Wall.) 335 (1871).
68. 435 U.S. at 356-57.
69. *Id.* at 359.

whether the act is normally preformed by a judge and whether the parties dealt with the judge in his official capacity.[70]

The second major unanswered question raised with the passage of section 1983, the possibility of injunctive relief against prospective judicial acts, has had a much different history than that of the award of damages. It was not until 1965 that a federal court addressed the issue. In *United States v. Clark*,[71] the United States District Court for the Southern District of Alabama held that "[the] doctrine of judicial immunity applies only when those officials are faced with civil suits for damages . . . . The doctrine has no application where, as here, the relief sought is preventive."[72] The court reasoned that injunctive relief would not interfere with judicial discretion since it "will only prevent the doing of what there is no right to do."[73] The court, however, sensitive to the principle of comity existing between federal and state courts and recognizing that relief could be attained by enjoining other parties, declined to grant the injunction against the circuit judge.[74] In 1967, the Fifth Circuit Court of Appeals similarly found a distinction between immunity from damages and that of injunctive relief.[75]

Since these decisions, the majority of the circuit courts have now held that judicial immunity is no bar to injunctive relief.[76] The Eighth and Third Circuit Courts of Appeal, however, have expressly declined to decide the issue.[77]

Another important aspect in the issue of judicial immunity is the abstention doctrine, as articulated in *Younger v. Harris*.[78] This doctrine states a policy of non-interference with pending state criminal proceedings absent special circumstances (bad faith, harassment or a patently invalid state statute). The doctrine is based on the idea of respect for state functions, comity and the belief "that the National Government will fare best if the States and their institutions are left free to perform

---

70. *Id.* at 362.

71. 249 F. Supp. 720 (S.D. Ala. 1965).

72. *Id.* at 727.

73. *Id.* at 728.

74. *Id.* at 729.

75. U.S. v. McLeod, 385 F.2d 734, 738 n.3 (5th Cir. 1967).

76. *See, e.g., In re* Justices of Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982); Richardson v. Koshiba, 693 F.2d 911 (9th Cir. 1982); WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir. 1981); Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980); Heimbach v. Village of Lyons, 597 F.2d 344 (2d Cir. 1979); Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978).

77. R.W.T. v. Dalton, 712 F.2d 1225 (8th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983); Conover v. Montemuro, 477 F.2d 1073 (3d Cir. 1973) (on reh'g *en banc*).

78. 401 U.S. 37 (1971).

their separate functions in their separate ways."[79] The holding in *Younger* is important to the issue of judicial immunity in two ways. First, Justice Stewart in his concurring opinion was careful to note that the reluctance of the federal courts to intervene in on-going state criminal proceedings does not foreclose the possibility of injunctive or declaratory relief from future state criminal proceedings.[80] Second, the courts have repeatedly cited the doctrine's notions of comity and federalism as a way of providing limits on the use of the federal powers of equity to enjoin state court judges.

Limits on injunctions under section 1983 are important in the balance of the various policy factors for and against judicial liability. Within the circuit courts of appeal a number of limits have emerged.

In *Conover v. Montemuro*,[81] the Third Circuit Court of Appeals discussed two uses of comity to limit the number of section 1983 cases asking for injunctive relief. First, the court employed the *Younger* doctrine of non-intervention in state criminal proceedings; second, the court turned to the *Pullman*[82] abstention doctrine which requires a federal court to refrain from intervening in a state court proceeding concerning an unresolved question of state law. On the basis of comity, as embodied in *Younger* and *Pullman*, the court found it unnecessary to decide whether an injunction should be issued against a state judge.[83]

In *In re Justices of Supreme Court of Puerto Rico*,[84] the First Circuit Court of Appeals admitted that judges were not immune from injunctions but found that ordinarily there is no "case or controversy" between a judge who adjudicates claims under a statute and a litigant who attacks the statute's constitutionality.[85] The court did not rest its decision on this constitutional basis, however, but rather used the idea of comity and proper party analysis.[86] Under proper party analysis, judges are not ordinarily considered as proper party defendants to a section 1983 action. The judge has no stake in upholding the statute and relief can normally be obtained by enjoining other non-judicial parties. "[Section] 1983 does not provide relief against judges acting purely in their adjudicative capacity, any more than . . . [a] state's

79. *Id.* at 44.
80. *Id.* at 55.
81. 477 F.2d 1073 (3d Cir. 1973).
82. Railroad Commissioner of Texas v. Pullman Co., 312 U.S. 496 (1941).
83. 477 F.2d at 1093-94.
84. 695 F.2d 17 (1st Cir. 1982).
85. *Id.* at 21.
86. *Id.* at 22.

libel law imposes liability on a postal carrier."[87]

The Eighth Circuit Court of Appeals in *R.W.T. v. Dalton*[88] also refrained from finding a case or controversy in a suit for declaratory and injunctive relief against several judges.[89] The court elaborated on the proper party analysis of *Justices*. While expressly not deciding the reach of judicial immunity, the court found on the basis of proper party analysis and comity that the judges in the case before it should not be parties to the lawsuit.[90] Central to the holding was the availability of complete relief by enjoining other non-judicial parties. Thus, for the Eighth Circuit Court of Appeals, the use of injunctive relief against a state judge is only a last resort. It made no difference to the court whether the attack was on the justices' practice (as in *Pulliam v. Allen*[91]) or on the constitutionality of the statute (as in *Justices*[92]).

The Supreme Court has established additional limits to injunctive relief against a defendant judge. *O'Shea v. Littleton*[93] overturned an injunction granted by the Seventh Circuit Court of Appeals[94] for failure to meet the case or controversy requirement of article III of the Constitution. The Court noted that injunctive relief would conflict with recognized principles of equitable restraint and could not be granted even if a case or controversy existed. The injunction would be a continuing federal intrusion into state criminal proceedings.[95] Further, the Court found that respondents had failed to meet the equitable requirements of establishing the likelihood of irreparable injury and the inadequacy of remedies at law.[96]

In *Supreme Court of Virginia v. Consumers Union of the United States Inc.*,[97] Consumers Union brought a 1983 action against the Virginia Supreme Court seeking a declaration that the court had violated its constitutional rights to gather and publish information on attorneys practicing in the county. It also sought a permanent injunction against the enforcement of that portion of the Code of Professional Responsibility limiting attorney advertising. The Court declined to decide

87. *Id.*
88. 712 F.2d 1225 (8th Cir. 1983).
89. *Id.* at 1232 n. 10.
90. *Id.* at 1232.
91. 104 S.Ct. 1970 (1984).
92. 712 F.2d at 1233.
93. 414 U.S. 488 (1974).
94. Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), *cert. denied*, 414 U.S. 1143 (1974).
95. 414 U.S. at 499 (citing Younger v. Harris, 401 U.S. 37 (1971)).
96. 414 U.S. at 502.
97. 446 U.S. 719 (1980).

whether judicial immunity would bar prospective relief for judges acting in their judicial role. The Court instead employed a functional analysis to find that the court has three roles: judicial, legislative, and enforcement. The Virginia Supreme Court, the Court determined, was acting in a legislative capacity in its enactment of the state bar's disciplinary rules.[98] As such it was absolutely immune from both damages and injunctive relief.[99] The court and the chief justice when acting in an enforcement capacity, however, were "proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were."[100]

Consumers Union introduces yet another major element into the issue of judicial immunity: the awarding of attorney's fees to successful litigants seeking injunctive relief under section 1983. In 1976, Congress passed the Civil Rights Attorney's Fees Award Act [Section 1988].[101] The Act provides that in any action under section 1983 and other civil rights acts, the court, in its discretion, may award reasonable attorney's fees to the prevailing party.[102] Prevailing party was defined to include one who has vindicated rights without necessarily attaining relief.[103] The Act resulted from the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*.[104] In *Alyeska*, the Court halted an expanding trend to award attorney's fees when the plaintiff prevailed in the unique role as a private attorney general. Such a trend was based largely on lower courts' reading of *Newman v. Piggie Park*,[105] which held that if the plaintiff did prevail, that person did so "not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."[106] The Court in *Alyeska* curtailed the trend by limiting the fee award to situations specifically authorized by Congress. Congress responded to this limitation with section 1988.

In *Consumers' Union*,[106A] the Court held that attorney's fees would not be awarded where prospective relief was barred by judicial

98. *Id.* at 731.

99. *Id.* at 731-32 (citing Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-03 (1975) and Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).

100. *Id.* at 736.

101. 42 U.S.C. § 1988 (Supp. V 1979).

102. *Id.*

103. S. REP. NO. 94-1011, 94th Cong., 2d Sess. 5 (1976) *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912.

104. 421 U.S. 240 (1975).

105. 390 U.S. 400 (1968).

106. *Id.* at 402.

106A. 466 U.S. 719 (1980).

immunity.[107] On remand, however, the United States District Court for the Eastern District of Virginia reinstated the award of attorney's fees against the Virginia Supreme Court.[108] This was based on the Supreme Court's dicta in *Consumer's Union* that a fee award resting on the Virginia Supreme Court's enforcement role would not be improper.[109]

In *Pulliam v. Allen*,[110] the Supreme Court for the first time squarely faced the issue of prospective relief against a judge under section 1983. Before addressing the issue of the award of attorney's fees under section 1988, the court focused on the more fundamental issue of judicial immunity.

While conceding that "[a]t the common law itself, there was no such thing as an injunction against a judge,"[111] the Court endeavored to find a common law parallel to the section 1983 injunction in the use of the King's prerogative writs. Among the writs available to the King's Bench in its exercise of collateral control over "inferior and rival courts," the most relevant for the Court were the writs of prohibition and mandamus.[112] The former was issued to prevent a judge from exceeding his jurisdiction; the latter required him to exercise his jurisdiction. For the majority, the use of such writs suggested that judicial control was not incompatible with the concomitant rise of judicial immunity.[113] Important for the majority, too, was that the use of such writs was not limited to situations "where no alternative avenue of review was available."[114] Thus, the majority seemed to want to structure a system of judicial immunity that would be parallel to that of England. The persuasiveness of such a parallel depends, of course, on the degree of "kinship" perceived between the English writs and the section 1983 injunction. The dissent argued that such a relationship is not a close one: "The prerogative writs . . . are simply not analogous to suits for injunctive relief . . . ."[115] Such writs control only the proper exercise of jurisdiction and not acts within a judge's jurisdiction protected by judicial immunity. Magistrate Pulliam was within her jurisdiction and injunctive relief was "based solely on an erroneous construction

107. 446 U.S. at 738-39.

108. 505 F. Supp. 822 (E.D. Va. 1981), *aff'd*, 688 F.2d 218 (4th Cir. 1982), *cert. denied*, 462 U.S. 1137 (1983).

109. 446 U.S. at 738.

110. 104 S. Ct. 1970 (1984).

111. *Id.* at 1974.

112. *Id.* at 1976.

113. *Id.* at 1978.

114. *Id.*

115. *Id.* at 1985 (Powell, J., dissenting).

and application of law."[116] The dissent also points out that in this country such writs are used sparingly and only "where the court has a clear duty to act."[117] Further, the award of costs in an action for mandamus or prohibition is made "only against the party at interest and not against the judge."[118]

Turning from English common law to the legislative history of section 1983, the majority confronted *Pierson v. Ray*[119] in which the court based its holding on the premise that the common law doctrine of judicial immunity would be preserved without clear congressional intent to abrogate it. The majority seemed not to distinguish *Pierson* so much as simply to point out that if one overlooks the premise on which *Pierson* is based, the intent of Congress to include judges within the sweep of the Civil Rights Acts was pretty clear after all.[119A] The majority also noted that no court in subsequent case law has had a rule of absolute judicial immunity from prospective relief.[119B]

In a relatively brief consideration of policy issues the majority recognized that injunctive relief raises concerns different from those addressed by the protection of judges from damage awards.[120] The normal requirements of equity—the showing of an inadequate remedy at law and irreparable harm—will limit the use of prospective relief and "curtail the risk that judges will be harassed and their independence compromised . . . ."[121] The majority also pointed to possible case or controversy considerations under article III of the Constitution which may also serve to limit the number of successful suits. Curiously, the majority cited *In re Justices of Supreme Court of Puerto Rico*,[122] a decision based on proper party analysis and explicitly not based on article III grounds.[123] Finally, the majority reaffirmed the restraints of

---

116. *Id.*

117. *Id.* at 1986.

118. *Id.*

119. 386 U.S. 547 (1967).

119A. 104 S. Ct. at 1980.

119B. *Id.* at 1978.

120. *Id.*

121. 104 S. Ct. at 1978-79. As the dissent in *Pulliam* points out, however, adequate remedies were available to the respondents under Virginia laws (writ of habeas corpus and the appeal of unreasonable bail) and there was no showing of irreparable harm. 104 S. Ct. at 1987 and n.13. (Powell, J., dissenting). To this the majority responds that given the shortness of the jail sentences it may not have been possible to use these remedies. More importantly the majority points out that Pulliam did not appeal the injunctive relief. "There has been no showing because respondents never have been called on to make such a showing." 104 S. Ct. at 1981, n.22.

122. 695 F.2d 17 (1st Cir. 1982).

123. *Justices* was decided on the basis of a proper party analysis and while the court suggested that there was no case or controversy it expressly avoided this constitutional basis for its

comity and federalism[124] in the enjoining of judicial officers.[125] For the dissent, the possibility of contempt for a violation of the injunction was as likely to interfere with "unbiased judicial decisionmaking as much as the threat of liability for damages.[126]

Lastly, the majority returned to the initial question of section 1988 and the award of attorney's fees. While conceding that attorney's fees may indeed be equivalent to money damages, "Congress has made . . . clear in [section] 1988 its intent that attorney's fees be available in any action to enforce a provision of [section] 1983."[127] The dissent did not argue the applicability of section 1988 but simply chastized the majority for ignoring the dissent's perception of reality. For the dissenters it was all too clear that the combination of the availability of prospective relief and the award of attorney's fees together are a serious threat of harassing litigation and an erosion of judicial independence.[128]

Since the time of Lord Coke the various policy concerns surrounding the question of judicial liability have been of primary importance. In this context it is difficult to understand the majority's extensive attempt to couch the issue in historical terms. The question of whether or not, on the basis of English history, section 1983 injunctive relief can coexist with judicial immunity from damages, does not seem to focus on the primary issue. The real issue is whether, in a balance of the various policies, the granting of injunctive relief and claims for damages emerge differently enough to allow one and not the other.

The policy concerns of judicial immunity or liability consist of three core elements.[129] First, there is the *magnitude* of the harm. This embraces the frequency of misconduct, the quantum of injury, and the effectiveness of redress. The second element is the *cost* of liability including the frequency of actions and their effect, and the degree of interference with judicial decision making and fact finding. The third is the *impact* of the liability on the judicial process. This admittedly vague element has been termed "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

---

holding.

124. Younger v. Harris, 401 U.S. 37 (1971); Mitchum v. Foster, 407 U.S. 225 (1972).

125. 104 S. Ct. at 1979-80.

126. *Id.* at 1988 (Powell, J., dissenting).

127. *Id.* at 1981-82.

128. *Id.* at 1988-89.

129. Feinman and Cohen, *Suing Judges: History and Theory*, 31 S. C. L. REV. 201, 274 (1980); *see also* Baxter, *Enterprise Liability, Public and Private*, 42 LAW & CONTEMP. PROBS. 45 (1978).

incurred to attain it.[130]

The *Pulliam* Court in its abbreviated policy analysis addressed the costs of judicial liability to injunctive relief. The Court found, in contrast to suits for damages, that suits for prospective relief present cost-limiting considerations that would minimize the threat to judicial independence. These operate either to reduce the frequency with which such suits are filed or their likelihood of success.

One such consideration is that suits for injunctive relief will be possible only where there is a continuing judicial practice or the constitutionality of a state statute is challenged.[131] Clearly, this factual setting will occur less frequently than isolated instances of judicial misconduct which historically led to suits for damages. In the balance, the cost of injunctive relief will be less than potential damage claims as measured by the number of suits filed. The repeatable nature of the impermissible acts also increases the magnitude of the harm. With respect to the third element, the achieved cessation of continuing impermissable practices arguably increases the quantum of justice delivered to society.

The basic requirements for injunctive relief—irreparable harm and the inadequacy of a remedy at law—will also limit the number of successful lawsuits. These prerequisites of equity also insure that the magnitude of the harm must be substantial.[132] As noted by the *Pulliam* Court, where a federal court seeks to enjoin a pending state court proceeding, "even irreparable injury is insufficient unless it is 'both great and immediate.' "[133]

Article III concerns and proper party analysis coupled with the traditional restraints of comity and federalism also provide formidable limits on the use of prospective relief against judicial officers.[134] Their primary effect is to decrease cost by reducing the number of lawsuits filed. On the facts of *Pulliam*, however, neither these limits nor the limits imposed by the requirements of equity were adequate. Enjoining Magistrate Pulliam was the only way to insure relief to the parties.

---

130. Baxter, *supra* note 129, at 46.

131. This fundamental consideration is not specifically addressed in *Pulliam* but stems from the recognition of injunctive relief as raising different concerns from those of damage awards.

132. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-507 (1959).

133. 104 S. Ct. at 179 n.17 (quoting Younger v. Harris, 401 U.S. 37, 46 (1971)).

134. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488 (1974) (article III and comity); R.W.T. v. Dalton, 712 F.2d 1225 (8th Cir. 1983) (proper party); In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982) (proper party); Conover v. Montemuro, 427 F.2d 1073 (3rd Cir. 1973) (comity and federalism); United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965) (injunction not necessary against judge—essentially a proper party case without calling it such).

Factual patterns requiring injunctions against judges are not common,[135] and as noted in *Justices* "it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion."[136]

If the exposure of judges to injunctive relief was the only issue it seems doubtful that the core elements would balance in favor of immunity. There would, of course, be costs associated with the defense of such suits and the prospect of contempt might to some degree impair independent decision making. Yet the legal limitations to such actions coupled with the financial costs incurred by the parties seeking relief would keep such suits few in number. Successful actions would typically be those in which the magnitude of the harm was great and where there would be significant impact on the quantum of justice to society to prompt the seeking of injunctive relief.

Without question the passage of the Civil Rights Attorney's Fees Award Act (section 1988) shifts the balance of the core policy elements. First, section 1988 will increase the incentive to sue for injunctive relief under section 1983.[137] While the number of such suits may increase, section 1988 provides no monetary gain for the party and with its requirement that the party prevail does not guarantee an award of fees. Thus, the magnitude of the harm and chance of success must still be sufficient to induce the claimant to bear the non-monetary costs of such suits and to entice the attorney to undertake the cause. Second, the award of attorney's fees has been viewed as the functional equivalent of damage awards and as carrying the same chilling effect on judicial independence. The majority of the *Pulliam* Court acknowl-

---

135. A review of the recent circuit court of appeals' decisions reveals fact patterns in which the judge could have been excluded as a party defendant. Heimbach v. Village of Lyons, 597 F.2d 344 (2d Cir. 1979) is illustrative. There, a section 1983 civil rights action was brought against the village, the village justice of the peace and village officials alleging that they had illegally attempted to evict low income people from their houses. It appears an injunction against the police officers and those officials enforcing the codes could have afforded complete relief. Other decisions within the circuits, however, would have necessitated enjoining a judge. *Cf.* WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir. 1981) (injunction against state court enforcement of prior court suppression order).

136. 695 F.2d at 23.

137. As noted by the dissent in *Pulliam*, civil rights suits filed by state prisoners against state officials increased 115.6% over the number of such suits filed in 1977 before the award of fees became available. 104 S. Ct. 1988, n.16 (citing the *Annual Report of the Director of the Administrative Office of the United States Courts* 100-103 (1982)). While such a statistic is of interest it does not establish a clear cause and effect relationship. Civil rights actions have been growing in number steadily for the past two decades. The datum also does not reveal the number of these actions which involved judges.

edges this.[138] However, the award of attorney's fees is arguably not precisely the same as a damage award. It does not carry the same sense of wrongdoing, and by the extent to which the case is pursued, the size of the fee is controllable by the judge defendant.

At this juncture the enhancement of costs as measured by increased litigation brought about by section 1988 is speculative. To the majority in *Pulliam* these as yet uncertain costs were not outweighed by the likely magnitude of the harms to be corrected and the availability of legal devices to filter out all but the most meritorious actions.

> If the Court were to employ principles of judicial immunity to enhance further the limitations already imposed by principles of comity and federalism on the availability of injunctive relief against a state judge, it would foreclose relief in situations where, in the opinion of a federal judge, that relief is constitutionally required and necessary to prevent irreparable harm.[139]

Pulliam v. Allen leaves us in a wait and see position. If indeed the prophecy of the dissent, a dramatic rise in injunctive relief sought against judges, is realized, Congress has an easy remedy by limiting the scope of section 1988 to exclude fees in suits brought against judges. Unlike the seeking of damages by a single disgruntled litigant, the stakes are higher with the seeking of injunctive relief which arrests continuing impermissible practices. Thus, at present, the balancing of the various core elements should, as the *Pulliam* court has done, be allowed to proceed so that any curtailment of section 1988 is based on fact, not speculation.

Robert S. Irving

138. 104 S. Ct. at 1981.
139. 104 S. Ct. at 1980.