July 2015

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Recommended Citation
Shapiro, Stephen J. (1984) "The Propriety of Prospective Relief and Attorney's Fees Awards Against State-Court Judges in Federal Civil Rights Actions," Akron Law Review: Vol. 17 : Iss. 1 , Article 3. Available at: https://ideaexchange.uakron.edu/akronlawreview/vol17/iss1/3

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THE PROPRIETY OF PROSPECTIVE RELIEF AND ATTORNEY’S FEES AWARDS AGAINST STATE-COURT JUDGES IN FEDERAL CIVIL RIGHTS ACTIONS

by

STEPHEN J. SHAPIRO*

I. INTRODUCTION

DURING THE PAST thirty years, the United States Supreme Court has refined a system of immunities for governmental officials when those officials are sued under 42 U.S.C. §1983 for violation of constitutional rights. The kind of immunity granted varies with the kind of governmental function exercised by the official when committing the alleged constitutional violation. Persons exercising legislative functions are absolutely immune from suit either for damages or for prospective (declaratory or injunctive) relief. Those exercising prosecutorial functions are absolutely immune from damages but may be sued for prospective relief. Those exercising executive functions are granted

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1This statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person with 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.

42 U.S.C. §1983 (Supp. III 1979). Theoretically the same system of immunities is available when suit is brought under the other remaining post-civil war Civil Rights Statutes, codified at 42 U.S.C. §§1981, 1982, 1985 and 1986, and all of the arguments made in this article would be applicable to all such suits. As a practical matter, however, the vast majority of civil rights suits brought against state and local governmental officials are brought pursuant to 42 U.S.C. §1983.

2Although the great majority of §1983 suits are brought to redress violations of federal constitutional rights, that statute also encompasses claims based on purely statutory violations of federal law. Maine v. Thiboutout, 448 U.S. 1 (1980).

3Butz v. Economou, 438 U.S. 478 (1978). The Court in Butz reasoned that an official’s immunity should be determined not by his official title or position, but by the functions and responsibilities which he exercises. “Judges have absolute immunity not because of their particular location within the Government but because of their individual nature of their responsibilities . . . . The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location.” Id. at 511-12. In that case absolute judicial immunity from damages was granted to an independent department hearing examiner, rather than the good-faith immunity normally afforded executive officials. Scheur v. Rhodes, 416 U.S. 232 (1974).


5Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731-34 (1980).


7Consumers Union, 446 U.S. at 736-7 (1980) (citing Gerstein v. Pugh, 420 U.S. 103 (1975) and Ex parte Young, 209 U.S. 123 (1908)).
only a conditional, good-faith immunity from damage awards and also may be sued for prospective relief. While it is settled that those persons exercising judicial functions are entitled to absolute immunity from damage actions, the one piece still missing from this jigsaw puzzle of immunities is whether they may be sued for prospective relief. The Supreme Court has not yet decided whether judges acting in their judicial capacity may be sued for declaratory or injunctive relief.

At least seven circuits have held that judicial immunity does not bar such relief in appropriate circumstances. Injunctive suits against judges should not be allowed merely to overturn incorrect rulings on constitutional issues. Neither should they be allowed as a normal method of challenging the constitutionality of a statute, when the judge's only involvement is to adjudicate a controversy arising under the statute. Such suits are necessary, however, and should be allowed to restrain a judge from carrying out an unconstitutional course of conduct from the bench, such as sentencing defendants to jail in lieu of bail for a non-incarcerable offense. In the case of *Allen v. Burke*, a district court

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In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), the Court specifically stated that it had not decided the issue. However, we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question whether judicial immunity bars declaratory or injunctive relief; we have not addressed the question. *Id.* at 735. The Court noted that a state judge had been among the defendants in *Mitchum v. Foster*, 407 U.S. 225 (1972), where the Court held that § 1983 overcame the barrier to enjoining state-court proceedings erected by 28 U.S.C. § 2283. The Court also affirmed a judgment against both state-court judges and a state prosecutor enjoining enforcement of state statutes in *Gerstein v. Pugh*, 420 U.S. 103 (1975). In neither case, however, did the Court specifically address the question of judicial immunity to declaratory and injunctive relief. *Consumers Union*, 446 U.S. at 735, n.14 (1980). The Court also noted two cases, *Boyle v. Landry*, 401 U.S. 77 (1971) and *O'Shea v. Littleton*, 414 U.S. 488 (1974), in which the Court reversed injunctions against defendants who included state-court judges on other grounds, without mentioning the issue of judicial immunity. *Consumers Union*, 446 U.S. at 735, n.14 (1980).

*Morrison v. Ayoob*, 627 F.2d 669, 672-3 (3d Cir. 1980) *cert.* denied, 449 U.S. 1102 (1981); *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979); *Harris v. Harvey*, 605 F.2d 330, 335, n.7 (7th Cir. 1979) *cert.* denied, 445 U.S. 938 (1980); *Dahl v. Dahl*, 578 F.2d 674, 676 (7th Cir. 1978); *Kelsey v. Fitzgerald*, 574 F.2d 443, 444 (8th Cir. 1978); *Shipp v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978); *Briggs v. Goodwin*, 569 F.2d 10, 15, n.4 (D.C. Cir. 1977); *Williams v. Williams*, 532 F.2d 120, 121-22 (8th Cir. 1976); *Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975), *rev'd on other grounds sub nom.*, 454 U.S. 83 (1981); *Hansen v. Ahlgrimm*, 520 F.2d 768, 769 (7th Cir. 1975); *Fowler v. Alexander*, 478 F.2d 694, 696 (4th Cir. 1973); *Jacobson v. Schaeffer*, 441 F.2d 127, 130 (7th Cir. 1971). *See also*, WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir. 1981), in which the Sixth Circuit recently granted injunctive relief against a judge without explicitly discussing the issue of judicial immunity. In some of the cases listed above, relief was properly denied on grounds other than judicial immunity. This paper is not arguing that declaratory or injunctive relief should normally or often be granted against judges, only in those cases where other avenues of relief are inadequate. *See infra* text accompanying notes 13-15 and *infra* 70-80.


in the Eastern District of Virginia, in line with Fourth Circuit precedent,\textsuperscript{16} enjoined a state magistrate from just such a practice.

Whether injunctive or declaratory relief may be obtained against a judge is important in another context: whether attorney’s fees may be awarded to the plaintiff who successfully attains such relief. The district court awarded attorney’s fees against the defendant magistrate in \textit{Allen v. Burke},\textsuperscript{17} and this award was affirmed by the Fourth Circuit.\textsuperscript{18} Relying on \textit{Supreme Court of Virginia v. Consumers Union}\textsuperscript{19} and the legislative history of the Civil Rights Attorney’s Fees Awards Act of 1976,\textsuperscript{20} the court held that attorney’s fees may be recovered against a judicial officer when prospective relief is properly awarded, even though a damage award would be barred by judicial immunity.\textsuperscript{21}

The Supreme Court has granted certiorari to determine whether judicial immunity bars the award of attorney’s fees pursuant to 42 U.S.C. § 1988 against a member of the judiciary acting in his judicial capacity.\textsuperscript{22} In order to decide the attorney’s fees issue, the Court will probably have to address the underlying question of prospective relief. If persons acting in a judicial capacity are absolutely immune from suit, as are legislators, then the Court will not allow the award of attorney’s fees. It has previously determined that Congress did not intend an award of attorney’s fees to be based on acts for which defendants enjoy absolute immunity from suit.\textsuperscript{23} On the other hand, if the Court finds that injunctive relief was appropriate, as this article argues that it should,\textsuperscript{24} then it should also allow the fee award to stand. Prior cases indicate that Congress intended to allow attorney’s fees awards when prospective relief had been awarded against a defendant, even if that defendant was immune from a damage award.\textsuperscript{25}

\textsuperscript{17}No. 81-0040A (E.D. Va. June 4, 1981).
\textsuperscript{18}690 F.2d 376 (4th Cir. 1982).
\textsuperscript{19}446 U.S. 719 (1980).
In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. 200d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.
\textsuperscript{21}Allen v. Burke, 690 F.2d at 379.
\textsuperscript{22}\textit{Pulliam}, 103 S. Ct. 1873 (1983).
\textsuperscript{23}\textit{Consumers Union}, 446 U.S. at 738-39 (1980).
\textsuperscript{24}See infra text accompanying notes 68-101.
II. Judicial Immunity from Damage Liability

The seminal opinion concerning judicial immunity in the United States came in the nineteenth century case of Bradley v. Fisher. Plaintiff, an attorney, sought damages from Judge Fisher, a judge of the criminal court of the District of Columbia, for wrongfully disbarring him from that court. The Supreme Court held that judges of courts of general jurisdiction are absolutely immune from liability for damages for their judicial acts. Such immunity remained intact even if the act was done maliciously or corruptly and even if the act was in excess of the court’s jurisdiction.

The Court based its holding on the supposedly “settled doctrine of the English courts for many centuries” and also on the importance of an independent and courageous judiciary.

For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.

Although the immunity doctrine established in Bradley v. Fisher has been somewhat refined by several more recent Supreme Court decisions, the basic holding and rationale of the case have remained virtually intact. In Pierson v. Ray the Court held that absolute judicial immunity remained a valid defense to a damage action brought pursuant to 42 U.S.C. § 1983. Relying on the reasoning of Tenney v. Brandhove, which held that legislative immunity survived the enactment of the post-civil war civil rights statutes, the Court held

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2680 U.S. (13 Wall.) 335 (1872).

27The Supreme Court in an earlier opinion held that Judge Fisher did not have jurisdiction to disbar Bradley, and ordered Bradley’s reinstatement. Ex parte Bradley, 74 U.S. (7 Wall.) 364 (1869).

28Bradley v. Fisher, 80 U.S. (13 Wall.) at 347-49. The Court reasoned: “Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.” Id. at 348.

29The main distinction between absolute and qualified immunity has been that the former protects actions taken regardless of their motives, while the latter protects only actions taken in good faith.

30The Court distinguished between acts done “in excess of jurisdiction” which were covered by the immunity, and acts done in “the clear absence of all jurisdiction over the subject matter” which were not. Id. at 351.

31Bradley, 80 US. (13 Wall.) at 347.

32386 U.S. 547 (1967).

33See supra note 1 for the text of this statute.
that it would not presume that Congress intended to abrogate the common law doctrine of judicial immunity absent a “clear indication” to do so.\textsuperscript{35} Despite references to judicial liability in the Congressional debates pointed out by Justice Douglas in dissent,\textsuperscript{36} the Court found no such intention to abolish judicial immunity.

The third major Supreme Court case dealing with judicial immunity is \textit{Stump v. Sparkman}.\textsuperscript{37} The Court held Judge Stump immune from damages for ordering the sterilization of a fifteen year old girl without a hearing, based on the \textit{ex parte} application of her mother. The Court held that neither the absence of authority to enter the sterilization order nor the failure to afford the plaintiff due process destroyed the judge’s immunity. That immunity attaches to any “judicial act”\textsuperscript{38} unless there is a “clear absence of all jurisdiction.”\textsuperscript{39} Since granting petitions affecting the affairs of minors was a judicial act not clearly outside his jurisdiction, Judge Stump was held to be immune from damages.\textsuperscript{40}

All of the major Supreme Court rulings dealing with immunity for judicial functions have dealt with the issue in the context of liability from damages. As noted by the Court in \textit{Supreme Court of Virginia v. Consumers Union},\textsuperscript{41} “we have not addressed the question” of whether “judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts.”\textsuperscript{42} The Court has, however, answered this question for those exercising legislative and prosecutorial functions. Although prosecutors and legislators are both, like judges, absolutely immune from damage liability,\textsuperscript{43} they are treated differently as regards injunctive and declaratory relief. Prosecutors are subject to such relief\textsuperscript{44} while legislators are absolutely immune from all such suits.\textsuperscript{45}

It is instructive, therefore, in determining how the Court should rule on this question as applied to judges, to examine the Court’s decisions regarding legislative and prosecutorial immunity. Such an examination shows that it would be more reasonable for the Court to treat judges like prosecutors than like legislators, and allow prospective relief under appropriate circumstances.

\textsuperscript{35}\textit{Pierson}, 386 U.S. at 554. The Court also somewhat extended the immunity doctrine, which as stated in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872), applied in its broadest form only to courts of “superior or general” jurisdiction. \textit{Id.} at 347. The judge in \textit{Pierson} was a municipal police justice, a judicial officer of an “inferior” court of limited jurisdiction. No distinction was made on this basis, however.

\textsuperscript{36}\textit{Pierson}, 341 U.S. at 559-63 (Douglas, J., dissenting).

\textsuperscript{43}\textit{id.} at 360.

\textsuperscript{49}\textit{Id.} at 357 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872)).

\textsuperscript{47}\textit{Id.} at 362-3.


\textsuperscript{41}\textit{Consumers Union}, 446 U.S. at 736-37.

\textsuperscript{45}\textit{Id.} at 733.
III. PROSECUTORIAL AND LEGISLATIVE IMMUNITY

The Supreme Court addressed the issue of prosecutorial immunity from section 1983 damage actions in the case of *Imbler v. Pachtman*.

Although most other executive officials receive only qualified immunity, the Court held that state prosecutors were absolutely immune from damages for actions taken in their prosecutorial capacities. The Court explicitly based its decision on a direct analogy between prosecutors and judges: "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunity of judges and grand jurors acting within the scope of their duties."

Like a judge, a prosecutor must exercise his duties "with courage and independence," free of the fear of personal consequences to himself.

If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. *Bradley v. Fisher*, 13 Wall., at 348; *Pierson v. Ray*, 386 U.S., at 554. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

The Court completed the analogy by referring to prosecutorial immunity as "quasi-judicial."

The law as to the amenability of state prosecutors to suits for declaratory and injunctive relief has developed very differently, indeed. Not only are prosecutors not immune from such suits, they are the usual and accepted defendants in suits challenging the constitutionality of state law. "[T]hey are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law."
This doctrine dates back to the 1908 case, Ex Parte Young. In Young, the Supreme Court upheld, against an eleventh amendment challenge, a federal court injunction restraining the Attorney General of Minnesota from enforcing an unconstitutional state statute. The reasoning used by the Supreme Court to circumvent the eleventh amendment has been criticized as illogical and pure fiction. Yet those same critics have considered the result of the case (that those responsible for enforcing unconstitutional state laws may be subject to injunctive relief in a federal court) absolutely necessary to the functioning of our federal system. Otherwise it would not always be possible to force the states and their officers to comply with the mandates of the United States Constitution.

Legislative immunity has derived from a different source than judicial and prosecutorial immunity. While the latter immunities have developed through the common law, legislative immunity was statutorily based in England and constitutionally based in the United States. In deciding that legislative immunity protected a state senator from a federal civil rights action for damages, the Supreme Court cited both to the speech and debate clause of the Federal Constitution and to similar provisions in the constitutions of forty-one states. Although the Court in Tenney v. Brandhove recognized that as a state senator the defendant was not actually protected by the speech and debate clause, the opinion depended heavily on it. The speech and debate clause gives very broad protection to members of Congress. Not only has it been held to prohibit declaratory and injunctive relief, but unlike judicial and prosecutorial immunity it protects members of Congress from criminal prosecution for covered legislative acts.

It is not surprising, therefore, that when it came time to determine whether state officials acting in a legislative capacity were immune from prospective

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4209 U.S. 123 (1908).

5Defendants argued that the suit was in reality against the state, which is prohibited by the eleventh amendment. U.S. Const. amend. XI.

617 Ch. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 4321 at 356, 359 (1978); (hereinafter cited as Wright, Miller, and Cooper); Davis, Suing the Government by Falsely Pretending to Sue an Officer. 29 U. Chi. L. Rev. 435, 437 (1962). The Court reasoned that by enforcing the unconstitutional law, an officer is stripped of his status as a state officer and "is subject in his person to the consequences of his conduct," 209 U.S. at 160. The illogic of this fiction results from the fact that only state action is subject to the prohibitions of the fourteenth amendment. Civil Rights Cases, 109 U.S. 3 (1883). Young's action was considered private action for purposes of the eleventh amendment and state action for purposes of the fourteenth.

7"Yet in perspective, the doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and to the rule of law." Wright, Miller and Cooper, supra note 56, at 360.

8"That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place Out of Parliament" 1 Wm. & Mary, Sess. 2, c. II.

9"[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place." U.S. Const. art. I, § 6.


11341 U.S. 367 (1951).


relief the Court answered this question affirmatively.\(^6\) This time the Court’s reliance on the speech and debate clause was even more explicit. The opinion states: “we generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution.”\(^6\)

There is another difference between prosecutors and legislators which, although unstated by the Court, may have led it to grant legislative immunity from prospective relief when such immunity is not available to prosecutors. Legislative action, although very important, is not self-executing. Legislators make the rules, but others must enforce them. There is no need, therefore, for prospective relief from legislative action, since such relief can be obtained against the official responsible for enforcement. If the legislature passes an unconstitutional statute it is not necessary to obtain an injunction forcing it to repeal it. Through the fiction of *Ex parte Young*\(^6\) it is possible to have the statute declared unconstitutional by suing the enforcing officer. It was, as noted above,\(^6\) the importance of providing some procedure for forcing state compliance with the Federal Constitution which led to the tortured logic of *Young*.

Unlike officials acting in a legislative capacity, a judge exercising his judicial function can cause direct harm, which in some cases may only be preventable by prospective relief granted against him. The next section of this article will identify such situations, explain why prospective relief against a judge may be necessary in such cases, and argue that such relief would not contravene the policies behind judicial immunity.

IV. GRANTING PROSPECTIVE RELIEF AGAINST JUDGES

As noted above,\(^6\) the main policy argument supporting judicial immunity from damage suits is to allow judges to decide cases courageously, according to their best judgment, without fear of personal liability for an incorrect decision. This, of course, is the strongest policy supporting all grants of official immunity. It is clear that this policy would not be harmed by allowing injunctive or declaratory relief against a judge in his official capacity, since it would not result in any personal harm or liability to him.\(^6\)

A secondary reason advanced for immunity might have somewhat more validity as an argument for immunity from prospective relief. This is the fear that allowing such relief might result in a flood of suits by unsatisfied litigants

\(^{6*}\)"Consumers Union, 446 U.S. at 733-34 (1980).

\(^{61}\)Id. at 733.

\(^{62}\)209 U.S. 123 (1908). See supra note 56 for an explanation of the "fiction" of *Ex parte Young*.

\(^{63}\)See supra note 57, and accompanying text.

\(^{64}\)See supra text accompanying note 31.

\(^{65}\)"The grant of injunctive relief in a case like this would not have the *in terrorem* effect on state judges that the threat of a subsequent damage action would have." Law Students Civil Rights Research Coun., Inc. v. Wadmond, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (three judge court; Friendly, J., concurring).
which would divert "his energy and attention" from his judicial tasks. Failure to extend judicial immunity to declaratory and injunctive relief would not, however, result in such a flood. The overwhelming majority of such suits would be barred by other jurisdictional doctrines such as the requirement of a case or controversy, adequate legal remedies, and mootness. Using such doctrines to weed out improper suits against judges, rather than establishing a blanket immunity to suit, would have the advantage of allowing relief where necessary to protect constitutional rights. The Supreme Court noted this itself in Supreme Court of Virginia v. Consumers Union. After noting that a number of circuits had held that judicial immunity does not extend to declaratory or injunctive relief, the Court stated:

It is rare, however, that any kind of relief has been entered against judges in actions brought under § 1983 and seeking to restrain or otherwise control or affect the future performance of their adjudicative role. Such suits have been recurring dismissed for a variety of reasons other than immunity. Hence, the question of awarding attorney's fees against judges will not often arise.

For example, a party attacking the constitutionality of a statute should not normally be allowed to sue a judge merely because he will adjudicate a case arising under the statute. The First Circuit has correctly pointed out:

... at least ordinarily, no 'case or controversy' exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute . . . . [O]ne seeking to enjoin the enforcement of a statute on constitutional grounds ordinarily sues the enforcement official authorized to bring suit under the statute . . . .

Similarly, a party dissatisfied with a judge's ruling on an issue of constitutional law is normally required to appeal the judge's ruling. He may not sue the judge as a substitute for appeal, which is normally an adequate legal remedy to protect his rights. Even in the small number of cases where appeal will not adequately protect a person's rights, if the judge's error was a single isolated incident, declaratory or injunctive relief may still be denied on the principle of mootness. If, as in most cases, the harm has already occurred and there is no reason to believe that the action will be repeated, then the case is moot.

On the other hand, if a judge is engaged in a continued pattern of un-

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70 Imbler, 424 U.S. at 425 (1976). Although the Court was actually discussing the reasons for prosecutorial immunity, this secondary reason for immunity is also applicable to judges.
71 446 U.S. at 735, n.13.
72 Id.
73 In Re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 21 (1st Cir. 1982).
74 Normally, the doctrine of Younger v. Harris, 401 U.S. 37 (1971), and its progeny prohibits federal courts from issuing declaratory or injunctive relief which interferes with an ongoing state-court criminal or quasi-criminal action, unless the normal appellate process would not provide an adequate remedy for constitutional violations.

Published by IdeaExchange@UAkron, 1984
constitutional action, to which appeal or suit against other defendants does not provide adequate relief, then the judge should not be immune from a declaratory or injunctive suit brought to halt such action. Although the number of such suits should be small, the necessity for them in some cases may be very great.

Take, for example, a hypothetical situation based on a slight variation of the facts in the well-known case of Stump v. Sparkman. The Supreme Court held Judge Stump immune from damages for ordering, without statutory authorization, the sterilization of a fifteen year old girl based on the ex parte application of her mother. The girl had not been afforded due process rights, including appointment of counsel and opportunity to appeal. The unfairness of that result "elicited a uniformly critical response from scholarly writers," many of whom called for reform of the immunity doctrine. The Supreme Court acknowledged the "unfairness to litigants that sometimes results" from judicial immunity but reiterated the need for a judge to act "without apprehension of personal consequences to himself." Assume for a moment that rather than being an isolated past instance Judge Stump's action had been part of an ongoing practice, and that there was evidence that he intended to continue to grant ex parte sterilization orders against unrepresented minors. If suit were brought by an organization representing the rights of minors to enjoin the judge from continuing with such practice, there would be absolutely no justification for denying relief.

35Roth and Hagan, supra note 30, at 7.
38Id. (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872)).
39It is clear that no alternative to suit against the judge could afford adequate relief. Since individual parents could present sterilization petitions, no executive department enforcement official could be enjoined from bringing the sterilization proceedings. Since the operation had been ordered ex parte with no representation or right of appeal provided for the minor, no individual appellate remedies would suffice. Although "it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion." In Re Justices of the Supreme Court of Puerto Rico, 695 F.2d, 17, 23 (1st Cir. 1982), this only speaks to the kind of prospective relief to be granted, not whether it should be granted. It may be more proper for a federal court to grant declaratory relief first, following with an injunction only if necessary.
The facts of Pulliam v. Allen, currently pending before the Supreme Court, while less horrifying than the preceeding hypothetical, fit this profile of cases in which prospective relief should be allowed against a judicial officer. Plaintiffs Allen and Nicholson were both arrested for minor misdemeanors, both non-incarcerable offenses, for which the maximum penalty was a monetary fine. After arrest the men were brought before Magistrate Pulliam, who set bond and when the men were unable to pay the bond, committed them to the County Jail where they remained until trial. Neither man was appraised of his rights or provided with legal counsel at any time preceding or during his incarceration.

After his trial on the merits, Allen filed a section 1983 suit in federal district court against Magistrate Pulliam, asking that the practice of incarcerating persons pending trial for non-incarcerable offenses be declared unconstitutional and that defendant be enjoined therefrom. The Office of Attorney General of Virginia represented the magistrate throughout the proceedings and "vigorously contested" the constitutionality of her actions.

The district court found that it was Magistrate Pulliam’s practice to require bond for non-incarcerable offenses, and that during a five-month period she had committed at least thirty-four persons who had been arrested for such offenses to jail for failure to pay bond. The district court entered summary judgment, declaring the practice a violation of due process and equal protection and enjoined further continuation of the practice.

Both because of the lack of access to legal representation and because of the comparatively brief jail confinement, the alternative remedies of appeal, mandamus, and habeas corpus were not viable options to challenge the
Neither could suit be brought against the prosecutor, since he was not the person carrying out the unconstitutional activities. If suit had not been allowed against the magistrate the plaintiffs might have been left without any remedy to halt the constitutional violation.

None of the traditional arguments supporting judicial immunity are applicable to a case such as Pulliam v. Allen. The defendant magistrate will not compromise her decisions because of the possibility of personal consequences to her. The only possible consequence to her was in the form of an order requiring her to bring her official conduct in line with the Constitution. Neither would allowing such suits result in a flood of litigation which would require judges to divert significant time and energy from their judicial tasks. First, the number of such suits which will be allowed will not be very great. Second, the burden placed on the defendant judge will not be very great. Legal representation will almost invariably, as was the case in Pulliam, be provided by the state attorney general. In most cases, the only burden placed on the judge will be to forward the complaint to the attorney general. This is really no greater than the burden imposed by the filing of a writ of mandamus against a judge, and may in fact be less than if the judge’s action had been appealed, which might require the writing of an opinion.

Such cases will often, as was Pulliam, be decided by motion for summary judgment, based on affidavits and stipulations of fact. Even if a judge’s testimony is occasionally required, however, this should not be a ground for

Although it is theoretically possible for an unrepresented indigent defendant to make use of such remedies, it is highly unlikely. The practice of incarcerating persons without benefit of counsel either before or after trial will usually greatly enhance the possibility that the case will fall into the class of cases where prospective relief against a judge is necessary and appropriate. See Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981) (suit to enjoin practice of sentencing convicted indigents to jail for summary offenses without affording right to counsel). Even if plaintiffs had the means to attempt to use these remedies, it is unlikely that they could have been successful during their brief periods of detention. The Supreme Court has recognized that brief pretrial detentions are fairly incapable of timely appellate review. "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted." Gerstein v. Pugh, 420 U.S. 103, 110, n.11 (1975). For further discussion of the unsuitability of mandamus as an alternative, see infra note 96.

Her legal representation was provided by the Office of Attorney General of Virginia. Any award of attorney’s fees would not be paid by her personally, but by the state of Virginia. See infra text accompanying note 115.

The great majority of suits against judges will be dismissed early on for a variety of reasons other than judicial immunity. See supra text accompanying notes 70-74.

If, however, the case proceeded to discovery and trial, some testimony might be required from the defendant judge. This should not be grounds for dismissing suit. See infra the discussion of Dennis v. Sparks, 449 U.S. 24 (1980), at text accompanying notes 97-102.

Judges have traditionally been named as defendants when litigants seek writs of mandamus or prohibition. In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 23 (1982); 52 AM. JUR. 2D Mandamus § 301 (1970). The existence of a possible mandamus remedy should not, however, be used as an argument for denying relief under § 1983. Many states severely limit the situations in which the writ can be used, i.e., where the question is one of jurisdiction only. Also, relief can be provided only to the individual litigant, with nothing to guarantee that the unconstitutional action will not be repeated. Additionally, litigants with a federal constitutional claim should not be forced to litigate it in state court.
disallowing suit. In *Dennis v. Sparks,* the Supreme Court allowed a damage action to proceed against persons who had allegedly conspired with a judge, despite a claim of derivative immunity. Defendants argued that allowing suit would "seriously erode" the judge's immunity because "testifying takes time and energy that otherwise might be devoted to judicial duties." The Court specifically distinguished the case of legislators who were not required "to respond to questions about their legislative acts," since legislative immunity, unlike judicial immunity, was based on the broader speech and debate clause.

Although the Court recognized that in suits such as *Dennis v. Sparks* "the judge's integrity and that of the judicial process may be at stake," the Court refused to hold it barred by judicial immunity.

Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption. In terms of undermining a judge's independence and his judicial performance, the concern that his conduct will be examined in a collateral proceeding against those with whom he allegedly conspired, a proceeding in which he cannot be held liable for damages and which he need not defend, is not of the same order of magnitude as the prospects of being a defendant in a damages action from complaint to verdict with the attendant possibility of being held liable for damages if the factfinder mistakenly upholds the charge of malice or of a corrupt conspiracy with others. These concerns are not unsubstantial, either for the judge or for the public, but we agree with the Court of Appeals that the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.

Although *Dennis* is distinguishable from *Pulliam* in that the judge was dropped as an actual defendant in *Dennis,* the Court's view of judicial immunity is very important. The negative effect on the judiciary was clearly more harmful in *Dennis.* The Court was willing to allow the action to proceed, however, since it was necessary to provide a remedy and the judge would not be subject to damages. Disallowing suit in *Pulliam* after allowing it in *Dennis* would be putting form over substance.

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91 Id. at 30.
91 Id.
90 Id.
100 U.S. CONST. art. I. § 6.
101 *Dennis*, 449 U.S. at 31.
102 Id. at 31-32.
If the Supreme Court, in deciding *Pulliam v. Allen*, determines that prospective relief may be awarded against a judicial officer, it will then face the question of whether attorney's fees may be awarded to the prevailing plaintiff.\(^{103}\) If the Court determines that judges, like legislators, enjoy absolute immunity from suit for their judicial acts, it will almost certainly reverse the award of attorney's fees. In *Supreme Court of Virginia v. Consumers Union*\(^{104}\) the Court determined that in enacting the Civil Rights Attorney's Fees Awards Act of 1976,\(^{105}\) Congress did not intend to allow fee awards to be entered against officials who enjoyed absolute immunity from suit.

There is no . . . indication in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity. \[T\]here is no indication that Congress intended to permit an award of attorney's fees to be premised on acts that themselves would be insulated from even prospective relief.\(^{106}\)

If, on the other hand, the Court determines that judicial immunity does not bar declaratory and injunctive relief, *Consumers Union* just as clearly indicates that an award of attorney's fees would also be proper. The Court held that the defendant judges, who were absolutely immune from damages for their enforcement or prosecutorial functions,\(^{107}\) could nonetheless be subject in that capacity to an attorney's fee award based on properly awarded prospective relief.

\(^{103}\) Actually, the defendant appealed only the award of attorney's fees, and not the granting of the underlying prospective relief. The Fourth Circuit correctly realized, however, that the two issues are inextricably intertwined, and discussed the propriety of the injunctive relief before affirming the fee award. *Allen v. Burke*, 690 F.2d at 378. Both parties have briefed the prospective relief issue before the Supreme Court. Brief of Petitioner, at 10-18; Brief of Respondent at 7-11. Given its holding in *Supreme Court of Virginia v. Consumers Union*, it would seem impossible for the Court to affirm the fee award without first holding that judges do not enjoy absolute immunity from prospective relief. \textit{See infra} note 106. The Court could conceivably avoid the issue of prospective relief by holding that judicial immunity bars a fee award whether or not prospective relief is appropriate. Such a holding, however, would seem inconsistent with *Consumers Union*. \textit{See infra} text accompanying notes 107-110. What the Court clearly should not do is first determine that attorney's fees are not appropriate, and then reach that desired result by deciding that prospective relief is barred. The issue of prospective relief is important enough to be decided on its own merits. \textit{See supra} text accompanying notes 75-93.

\(^{104}\) 446 U.S. 719 (1980).


\(^{106}\) 446 U.S. at 738-39. This holding seems consistent with the language of the Act which requires that a plaintiff be a "prevailing party" in order to recover a fee award. It is hard to see how a plaintiff can be a prevailing party as to a defendant who is absolutely immune from all suits, and must therefore be dismissed as a party.

\(^{107}\) The Court spoke of the "enforcement functions" of the Virginia Supreme Court, rather than using the more common term "prosecutorial function." It is clear in context, however, that the Court was writing about "prosecutorial immunity" since the references were to *Imbler v. Pachtman*, 424 U.S. 409 (1976), *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *Ex parte Young*, 209 U.S. 123 (1908). The decision to initiate a criminal prosecution on behalf of the state is a "prosecutorial" function; the decision to initiate a quasi-criminal action (i.e., disbarment proceeding) is an "enforcement" function. Both are entitled to absolute immunity from damages, but not from injunctive relief. *Consumers Union*, 446 U.S. at 736-37.
"The House Committee Report on the Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards, H.R. Rep. No. 94-1558, p. 9 (1976), . . . ."\(^{108}\)

The actual facts to which that holding applied involved an attorney's fee award against an official acting in a prosecutorial function. There is no reason, however, why that holding should not apply any time an official is immune from damages awards but subject to prospective relief.

First of all, the language used by the Supreme Court is general, and not specifically limited to prosecutorial immunity. The language of the House Report on which the Supreme Court based its holding also refers to immunity from damages generally and not merely prosecutorial immunity.\(^{109}\) In fact, the House Report specifically referred to \textit{Pierson v. Ray}, a case involving judicial immunity from damages.\(^{110}\)

Also, as noted above, both the historical background of and policy reasons behind judicial and prosecutorial immunities are similar.\(^{111}\) This paper has argued that they should therefore be treated similarly as regards amenability to declaratory and injunctive relief. If the Court accepts this argument and holds that judges, like prosecutors, are not immune from prospective relief, it should also hold that judges, like prosecutors, are not immune from attorney's fees awards.

An attorney's fee award will not interfere with the basic purpose of both prosecutorial and judicial immunity, freeing the official to act without fear of personal consequences to himself. The Senate Report indicates that such fee awards will not be paid by the official personally but "like other items of costs"\(^{112}\) will be born by the governmental agency or government for whom

\(^{108}\)The Court was obviously referring to the following language in the House Report:

Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.\(^{17}\) Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

H.R. REP. No. 1558, 94th Cong., 2d. Sess. 9 (1976). Footnote 17 in the report included a citation to Pierson v. Ray, 386 U.S. 547 (1967), which held that judges were absolutely immune from damages for their judicial acts.


\(^{110}\)Id. at n.17. The citation to Pierson v. Ray is not an unequivocal reference to judicial immunity, since the case also involved the qualified immunity from damages available to police officers. \textit{Pierson}, 386 U.S. at 557.

\(^{111}\)See supra text accompanying notes 46-52.

the official works. In *Hutto v. Finney* the Supreme Court recognized that in a suit for prospective relief against state prison officials acting in their official capacities, attorney's fees would be paid not by the officials themselves, but from the state treasury. The possibility of an award of attorneys' fees, therefore, should not result in any fear of personal consequences to the judge which would compromise his independent decisionmaking.

Neither should the possibility of a large award being paid by the state exert any improper pressure on the judge's judicial activities. A judge need not fear that any unconstitutional judicial action on his part will result in significant fee award liability by the state. Such unconstitutional action might result in a suit for prospective relief being filed. Even if the act was in fact unconstitutional, that alone would not result in more than a *de minimus* fee award. That is because since only prospective relief may be sought, the fee award would not be based on the judge's past conduct. Rather it would accrue only if and to the extent that the state, on behalf of the judge, decided to litigate whether

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113 In such cases [in which the defendants are State or local bodies or State or local officials] it is intended that the attorney's fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party).

*Id.*


115 *Id.* at 700. The Court in *Hutto* held that the eleventh amendment did not bar the payment of an attorney's fee award from the state treasury. The Court gave two alternative rationales for its holding. First, Congress has the Constitutional power to override eleventh amendment sovereign immunity when enforcing the fourteenth amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The Court found that in passing the Civil Rights Attorney's Fees Awards Act, Congress intended to override the eleventh amendment and make the states liable for fee awards. *Hutto*, 437 U.S. at 693-94. Alternatively, the Court held that attorney's fees should not be treated as damages, but as items of costs which are not subject to eleventh amendment immunity to begin with. *Id.* 695. Both of these rationales lend strong support for the position that attorney's fees may be awarded against a judicial officer.

116 In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court held that a municipality could not hide behind the unconstitutional immunity of its executive officials. The Court's reasoning, however, still makes sense when applied in the context of judicial immunity.

At the heart of this justification for a qualified immunity for the individual official is the concern that the threat of personal monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy. The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed. First as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties.... More important, though, is the realization that consideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'etre*." *Id.* at 655-56 (quoting Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1224 (1977)).

117 If the filing of the complaint itself led to the cessation of the unconstitutional conduct, plaintiff would be considered a "prevailing party" and would be entitled to fees. *Morrison v. Ayoob*, 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). Plaintiff's attorneys would receive compensation only for the time spent on preparing the complaint, which would not normally be a large amount.
the judge could constitutionally continue the challenged practice. This decision is not judicial in nature and will normally be made not by the judge alone, but in consultation with the attorney general.

The Supreme Court has held that Congress has the power to restrict immunities granted to governmental entities and their officials. In the case of *Hutto v. Finney*, the Court held that in passing the Civil Rights Attorney's Fees Act Congress had intended to override the eleventh amendment and subject state treasuries to the payment of fee awards. Since judicial immunity is based on the common law rather than the Constitution, this holding is strong support for allowing fee awards against judges. This is especially true since the payment of such awards will come from the same source as in *Hutto*, the state treasury itself.

The Court in *Hutto* relied first on the text of the Act itself. "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; indeed the Act primarily applies to laws passed specifically to restrain state action." The legislative history also supports an abrogation of judicial immunity, just as it did an abrogation of sovereign immunity in *Hutto*. As noted above, the House Report evidences an intent to override the immunities of government officials, while the Senate Report indicates that fee awards are to be paid by the governmental bodies. This is exactly the result reached in *Hutto*. It is also what led the Court to conclude in *Consumers Union* that absolute prosecutorial immunity from damages is not a bar to an attorney's fee award in conjunction with prospective relief granted against an official in his enforcement capacity. It should lead to the same result for officials acting in their judicial capacity.

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118For example, in *Pulliam* the attorney's fee award of $7500, while not huge, was due mostly to the fact that the constitutionally challenged practice was "vigorously contested" by the Attorney General in spite of "anemic" support in the case law. *Pulliam v. Allen*, Joint App. at 26 and 41.
121Id. at 693-694. See *supra* note 115 for a discussion of the rationale used by the Court.
123See *supra* text accompanying note 113.
124*Hutto*, 437 U.S. at 694.
125H.R. REP. No. 1558, 94th Cong., 2d Sess. 9 (1976). See *supra* note 108, for the relevant text.
126S. REP. No. 1101, 94th Cong., 2d Sess. 5 (1976). See *supra* note 113 for the relevant text.
127See *supra* text accompanying notes 107-110. Additional support in the legislative history comes from the defeat of an amendment by Senator Allen which would have prohibited making a fee award against "any state or local public official." *CONG. REC.* 32, 298 and 32, 388-89 (1976).
VI. CONCLUSION

State officials, when exercising judicial functions, are absolutely immune from suits for damages brought under 42 U.S.C. § 1983. Such officials should not be absolutely immune from civil rights actions seeking declaratory or injunctive relief against them in their judicial capacity. Judicial immunity should not bar such relief when necessary in appropriate circumstances. Otherwise, there may be situations in which citizens will be powerless to prevent continuing constitutional violations committed in the name of the state.

If prospective relief is properly granted against an official acting in a judicial capacity, neither should judicial immunity bar an award of attorney's fees to the prevailing party. In passing the Civil Rights Attorney's Fees Awards Act of 1976, Congress intended a fee award to accompany prospective relief, even as against an official who enjoys absolute immunity from damages. Allowing a fee award against a judge in such a case would not interfere with the purposes of judicial immunity.