Justice Rehnquist's fears are unfounded. Indeed, doctors and nurses, for example, are probably a "distinct" group in the community, and a prima facie fair cross section violation caused by their exemption probably would not be difficult to prove. Justice Rehnquist's analysis also ignores the state's opportunity to justify aberrations from a fair cross section by showing a significant state interest served by the exemption in question.[51]

As the Court's dictum implies,[52] such a showing in the case of most "reasonable exemptions" should not be difficult.[53] Although most occupational and age exemptions could result in prima facie fair cross section violations,[54] the Court probably will find these exemptions to "manifestly and primarily" advance significant state interests.

TORTS—JUDICIAL IMMUNITY—STATE COURT JUDGE HAS ABSOLUTE IMMUNITY IN § 1983 ACTION. *Stump v. Sparkman*, 435 U.S. 349 (1978). Respondent's mother filed a petition to have respondent (then a fifteen-year-old girl) sterilized, alleging that respondent was "somewhat retarded" and had begun to associate with, and on several occasions had stayed out overnight with, "older youth or young men."[1] Peti-

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their statutes to avoid losing their convictions. *Id.* Missouri and Tennessee, TENN. CODE ANN. § 22.108 (1975), neglected to change the women's exemption provisions in their statutes. Thus, only the Missouri Legislature should be blamed for putting "the destiny of Missouri in the hands of the nation's highest court instead of the elected officials." St. Louis Post-Dispatch, Jan. 31, 1979, § C, at 2, col. 4 (reprinted from the Kansas City Star).

51. *See* notes 25-31 *supra* and accompanying text.

52. 99 S. Ct. at 671.

53. Justice Rehnquist's analysis reveals his belief that at least one common exemption does serve significant state interests:

> Doctors and nurses, though virtually irreplacable in smaller communities, may ultimately be held by the Court to bring their own "flavor" or "indescribable something" to a jury venire. [*See* note 32 *supra*]. If so, they could then be exempted from jury service only on a case-by-case basis, and would join others with skills much less in demand whiling away their time in jury rooms of countless courthouses.

Id. at 675 (Rehnquist, J., dissenting).

54. For example, it would seem likely that most doctors and people over sixty-five exercise their rights not to serve. Assuming that they do, their representation on jury venires, pools, and wheels is probably grossly disproportionate to their size in the community.

1. Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement (Ind., DeKalb Cir. Ct., filed July 9, 1971), *reprinted in* Stump v. Sparkman, 435 U.S. 349, 351 n.1 (1978).

tioner, an Indiana state court judge,[2] approved the petition the same day and a local physician performed the sterilization the next week. Respondent was not present at the judicial proceedings and believed that the surgery performed was an appendectomy. When she later learned that she had been sterilized, respondent brought this action under section 1983 of the Civil Rights Act.[3] The district court dismissed the claim on the ground that the doctrine of absolute judicial immunity barred the suit against the judge, the only state agent.[4] The Seventh Circuit Court of Appeals reversed,[5] holding that because the judge acted without subject-matter jurisdiction, he was not entitled to judicial immunity in the subsequent damages suit.[6] The Supreme Court reversed and *held:* A judge of a court of general jurisdiction who approves a petition for sterilization is absolutely immune from personal liability under section 1983 if there is no statutory or case law specifically denying jurisdiction over sterilization orders.[7]

The common law doctrine of judicial immunity provides that judicial officers[8] are not civilly liable in damages[9] for their judicial acts

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2. The jurisdictional statute reads in part: "Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever . . . and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer." IND. CODE § 33-4-4-3 (1976).

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

42 U.S.C. § 1983 (1976).

4. Sparkman v. McFarlin, No. 75-129 (N.D. Ind. May 13, 1976).

5. 552 F.2d 172 (1977).

6. The court of appeals reasoned that in the absence of statutory authority the judge did not have jurisdiction to order sterilization. It also found that he had waived immunity by his "failure to comply with elementary principles of procedural due process." *Id.* at 176.

7. Stump v. Sparkman, 435 U.S. 349 (1978).

8. Judicial immunity applies to other officers of the court who are not judges. *E.g.*, Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) (justice of the peace); Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970) (court-appointed psychiatrist); Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955) (justice of the peace). Absolute immunity also applies to prosecutors, Imbler v. Pachtman, 424 U.S. 409 (1976), and to legislators, Tenney v. Brandhove, 341 U.S. 367 (1951). Administrative officials are usually entitled to only qualified immunity, which exempts them from liability if their acts were done in good faith and with the reasonable belief that the acts were justified. *E.g.*, Procunier v. Navarette, 434 U.S. 555 (1978) (prison administrators); O'Connor v. Donaldson, 422 U.S. 563 (1975) (administrator of state mental hospital); Wood v. Strickland, 420 U.S. 308 (1975) (school officials); Scheuer v. Rhodes, 416 U.S. 232 (1974) (governor, state national guard officers, and president of state university); Pierson v. Ray, 386 U.S. 547 (1967) (police officers). Administrative

"even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly,"[10] unless the acts are done in the "clear absence of all jurisdiction."[11] Immunity extends only to "judicial" acts, and not to those that, although performed by a judge, are essentially ministerial or administrative.[12] The major justification for the doctrine is the need for independent judicial decisionmaking, unhampered by fear of retaliatory suit for unpopular decisions.[13] Other justifications include the availability of other remedies for persons wronged,[14] the need for finality in judicial decisions,[15] and the need for respect of the judiciary.[16]

In *Pierson v. Ray*[17] the Supreme Court determined that Congress did not intend section 1983 to change the doctrine of absolute immunity for actions within a judge's "judicial jurisdiction."[18] *Sparkman* reexam-

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officials who perform functions analogous to those of judges, prosecutors, and legislators, however, are accorded absolute immunity. *E.g.*, Butz v. Economou, 98 S. Ct. 2894 (1978) (federal hearing examiner, agency officials who institute adjudicatory proceedings, and agency attorneys who present agency's evidence at hearing); Silver v. Dickson, 403 F.2d 642 (9th Cir. 1968) (state parole board members).

9. Judicial immunity does not apply to suits for injunctive or declaratory relief. United States v. McLeod, 385 F.2d 734 (5th Cir. 1974); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977); Shore v. Howard, 414 F. Supp. 379 (N.D. Tex. 1976); Doe v. County of Lake, 399 F. Supp. 553 (N.D. Ind. 1975); Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969). *Contra*, Mirin v. Justices of the Supreme Court of Nev., 415 F. Supp. 1178 (D. Nev. 1976).

10. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871).

11. *Id.*

12. *See Ex parte* Virginia, 100 U.S. 339, 348 (1879) (judge who made jury selection was not entitled to immunity). Judges performing administrative and ministerial acts have qualified immunity. Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970) (judge sitting as presiding officer of county fiscal court, an administrative body); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977) (family court judge's appointment of board of managers for juvenile detention center); Doe v. County of Lake, 399 F. Supp. 553 (N.D. Ind. 1975) (judges control administration of juvenile court and juvenile detention home); Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969) (informing indigent criminal defendant of right to court-appointed counsel and appointing such counsel).

13. *See* Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871); Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1868); Gregory v. Thompson, 500 F.2d 59, 63 (9th Cir. 1974); McAlester v. Brown, 469 F.2d 1280, 1283 (5th Cir. 1972).

14. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 350, 354 (1871); Gregory v. Thompson, 500 F.2d 59, 64 (9th Cir. 1974); McAlester v. Brown, 469 F.2d 1280, 1283 (5th Cir. 1972).

15. *See* Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1868).

16. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 348 (1871); Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536, 537 (1868).

17. 386 U.S. 547 (1967).

18. *Id.* at 554. The Court reasoned that judicial immunity was so well established at common law that Congress would have specifically provided for judicial liability had that been its intent. *Id.* This was the same reasoning used to find legislative immunity in Tenney v. Brandhove, 341 U.S. 367 (1951).

ines this concept of "judicial jurisdiction," applying a two-part analysis to decide whether absolute immunity is inappropriate to the case.[19]

The first part of the Court's analysis determined that the petitioner did not act in the "clear absence of all jurisdiction" in considering the petition for sterilization.[20] Indiana has statutory procedures for sterilization of institutionalized persons;[21] no statutory or case law prohibits assertion of jurisdiction over sterilization of noninstitutionalized persons.[22] The only relevant case held that a parent did not have the common-law right to authorize sterilization of her minor child.[23] The Court interpreted this case to mean that the state court did have jurisdiction and that the judge should have denied the petition on the merits.[24]

The second part of the Court's analysis addressed the necessary attributes of a "judicial act."[25] First, the Court decided that the informality of the proceedings[26] did not deprive the act of its judicial character.[27] The Court said that whether an act is "judicial" relates to the "nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and the expectations of the parties, *i.e.*, whether

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Considerable evidence exists, however, to show that most members of Congress believed judges would be liable under § 1983, and that immunity was much more widely accepted for legislators than it was for judges at the time the act was passed. *See generally* Pierson v. Ray, 386 U.S. at 558-63 (1967) (Douglas, J., dissenting); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615, 620-22 (1970); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1200-02 (1977); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J 322, 327-28 (1969).

19. 435 U.S. 349, 362-64.

20. *Id.* at 357-60.

21. IND. CODE §§ 16-13-13-1 to 16-13-13-4 (1976).

22. 435 U.S. at 358.

23. A.L. v. G.R.H., 325 N.E.2d 501 (Ind. App. 1975), *cert. denied*, 425 U.S. 936 (1976).

24. 435 U.S. at 358-59. The Court correctly pointed out that A.L. v. G.R.H., 325 N.E.2d 501 (Ind. App. 1975), *cert. denied*, 425 U.S. 936 (1976), did not question the jurisdiction of the court to approve the sterilization. 435 U S. at 358-59.

Other courts that have considered the issue of jurisdiction to approve or order sterilization have found no jurisdiction where there is no specific statutory grant. *See* Kemp v. Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); Holmes v. Powers, 439 S.W.2d 579 (Ky. App. 1969); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974); Frazier v Levi, 440 S.W.2d 393 (Tex. App. 1969). *Contra, In re* Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (1976). The only federal court to consider the question also found no jurisdiction. *See* Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971).

25. 435 U.S. at 360.

26. The petition was not given a docket number or placed on file with the clerk's office, but was approved in an ex parte hearing without notice to the minor or appointment of a guardian ad litem. *Id.* at 360.

27. *Id.* at 362. The Court relied on *In re* Summers, 325 U.S. 561 (1945).

they dealt with the judge in his official capacity."[28] The Court found that the approval of the petition met this test because judges normally consider petitions relating to the affairs of minors and because it was presented to the judge in his official capacity.[29]

Although some lower courts have discussed the expectations of the parties,[30] they have held the dispositive factor to be the character of the act itself.[31] For example, judges who perform administrative acts do so in their official capacity, and parties deal with them in that capacity. Yet these acts do not entitle judges to absolute immunity.[32] An expectation that an act will be "judicial" cannot clothe that act in the protection of judicial immunity.[33] The Court, however, did not indicate an intent to expand judicial immunity;[34] therefore it apparently did not create a new test, but merely applied the old character-of-the-act test.[35]

The Court stressed that the "tragic consequences" of the judge's act should not influence the question of immunity.[36] "[T]he fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit."[37] That this case involved a controversial issue and that the consequences of the judge's act were particularly tragic are perhaps the only remarkable aspects of the case. The Court elaborated no new law, but simply reaffirmed its unwilling-

28. 435 U.S. at 362.

29. *Id.* at 362-63.

30. *See* Gregory v. Thompson, 500 F.2d 59, 64 (9th Cir. 1974); McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972).

31. *E.g.*, Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) (physically removing a person from the courtroom is not a judicial act); McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972) (issuing contempt citation is a judicial act); Harris v. Harvey, 436 F. Supp. 143 (E.D. Wis. 1977) (giving information to media concerning secret criminal proceedings over which judge was presiding is not a judicial act).

32. *See* note 12 *supra.*

33. "[A] judge's approval of a mother's petition to lock her daughter in the attic would hardly be a judicial act simply because the mother had submitted her petition to the judge in his official capacity." 435 U.S. at 367 (Stewart, J., dissenting).

34. The Court agreed with the proposition that a judge is absolutely immune only for acts performed in his "judicial" capacity. 435 U.S. at 359-60. The court did not cite or discuss *Ex parte* Virginia, 100 U.S. 339 (1879), which originally laid out the judicial-ministerial distinction for immunity cases. It cannot be assumed that the Court intended to overrule this landmark case sub silentio.

35. *Ex parte* Virginia, 100 U.S. 339, 348 (1879) ("Whether the act done by [the judge] was judicial or not is to be determined by its character, and not by the character of the agent.").

36. 435 U.S. at 363.

37. *Id.* at 364.

ness to erode the doctrine of absolute judicial immunity, even in a case in which the action was clearly inexcusable and unfounded. This reaffirmation of the doctrine leads to two conclusions. First, it lends new impetus to the calls for extending only qualified immunity to judges in section 1983 cases[38] and to the suggestions that governmental units should be held liable for the constitutional violations of their employees.[39] Second, the decision precludes the possibility that the Court will apply qualified immunity to the judiciary.[40] Congressional action to apply qualified immunity to judges or to hold governmental units liable, or both,[41] is necessary to make section 1983 a viable remedy for persons injured by a judge's actions.

TORTS—COMMON LAW LIABILITY—SOCIAL HOST MAY BE LIABLE TO THIRD PARTIES. *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). An automobile passenger brought an action for damages against the owner and the manager of an apartment complex who allegedly furnished intoxicating liquors to the driver of the automobile in which plaintiff was riding. He claimed that the driver's resulting intoxication caused the car's collision with a roadway abutment and his consequent injuries. Plaintiff further alleged that defendants knew or should have known that their guest was becoming excessively intoxicated and intended to operate a motor vehicle follow-

38. *See generally* Kates, *supra* note 18; *Developments in the Law, supra* note 18, at 1202-04; Note, *Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?*, 27 CASE W. RES. L. REV. 727 (1977); Note, *supra* note 18.

39. *See generally* Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977). Holding the governmental unit liable for the judge's unconstitutional action would provide a remedy for the injured plaintiff, would allocate the cost to the general public, which benefits from the judge's employment, and, to the extent that state judges are a part of the political process, would deter unconstitutional actions.

40. *Id. See* Butz v. Economou, 98 S. Ct. 2894, 2916 (1978) (Rehnquist, J., dissenting). In discussing the disparate treatment of judges and prosecutors, who receive absolute immunity, and other state officials, who receive only qualified immunity, Justice Rehnquist observed: "But the cynical among us might not unreasonably feel that this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as 'lesser breeds without the law.'" *Id.* at 2922 n*.

41. The fine line between promoting independent decisionmaking and deterring malicious or unconstitutional action may best be drawn by providing for liability of the governmental unit, but allowing the good faith and reasonable belief defense of qualified immunity.