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FEDERAL PRACTICE & PROCEDURE

I. TOWARD A BALANCED JUDICIAL IMMUNITY POLICY

A. INTRODUCTION

In *Rankin v. Howard*,[1] the Ninth Circuit, interpreting a recent Supreme Court decision, held that judicial power exercised in the clear absence of personal jurisdiction may give rise to the judge's personal monetary liability. The *Rankin* court made it clear that a judge who agrees upon a ruling prior to a hearing is not immune from suit.

On Christmas Day, 1976, the defendant Judge Zeller held a guardianship proceeding upon the application of Wayne Howard, an attorney for Mr. and Mrs. Rankin. The Rankins sought to have their son, the plaintiff, "deprogrammed"[2] from his reli-

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1. 633 F.2d 844 (9th Cir. 1980) (per Wright, J.; the other panel members were Ferguson, J. and Brown, D.J., sitting by designation), *cert. denied*, 101 S. Ct. 2020 (1981).

2. *Id.* "Deprogramming" is a phenomenon involving the removal of the subject, usually a cult member, from his or her supportive environment and, while thus confined or isolated from other cult members, continually lecturing and cajoling the person in an aggressive manner, all in an attempt to bring the subject back to "reality." Cult, in this context, is defined as "a minority religious group holding beliefs regarded as unorthodox or spurious." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 552 (3d ed. 1971). Typically such "therapy" occurs, after physical abduction of the cult member, in locked motel rooms, during marathon sessions by teams of lay "deprogrammers." For the views of a veteran of over 1,000 successful "deprogrammings," see T. PATRICK, LET OUR CHILDREN Go! (1976). For a comprehensive and generally favorable treatment of "deprogramming" policy issues, see Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 5-6, 88-91 (1977). Criticisms of "deprogramming" abound: *Deprogramming and Religious Liberty*, 29 CHURCH AND STATE 212 (1977); Robbins, *Even a Moonie Has Civil Rights*, THE NATION, Feb. 26, 1977, at 232.

Temporary conservatorships and guardianships commonly afford parents the means by which to commence "deprogramming." *See generally* Note, *Legal Issues in the Use of Guardianship Procedures to Remove Members of Cults*, 18 ARIZ. L. REV. 1095 (1976); Note, *Conservatorships and Religious Cults: Divining a Theory of Free Exercise*, 53 N.Y.U.L. REV. 1247 (1978). The use of temporary conservatorships for this purpose has ceased in California. Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977).

gious faith.[3] Both the plaintiff and his parents resided in Missouri.[4] Howard incorrectly stated on the guardianship application that the proposed ward resided in Kansas.[5] In the proceeding, the defendant judge issued an ex parte guardianship order.[6] Later that day, plaintiff's father flew him to Kansas, ostensibly to visit friends.[7] Howard, also a defendant, and two sheriffs met plaintiff and his father at the airport.[8] On the authority of the guardianship order, the sheriffs forcibly took plaintiff into custody and placed him on a flight to Arizona.[9] There, plaintiff was confined and subjected to "deprogramming" for nine days.[10]

Plaintiff sued the participants in the scheme, including Judge Zeller, pursuant to three sections of the 1871 Civil Rights Act,[11] and also alleged common law torts.[12] Plaintiff claimed that

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3. The plaintiff Marcus Rankin is an adult member of the Unification Church headed by Reverend Sun Myung Moon. 633 F.2d at 846. One commentator estimates the membership of the Unification Church at 300,000-750,000. Delgado, *supra* note 2, at 6. *See Life With Father Moon*, NEWSWEEK, June 14, 1976, at 60-66; *Religious Cults: Newest Magnet for Youth*, U.S. NEWS & WORLD REPORT, June 14, 1976, at 52-54; *The Darker Side of Sun Moon*, TIME, June 14, 1976, at 49.

4. 633 F.2d at 846.

5. *Id.*

6. Rankin v. Howard, 457 F. Supp. 70, 72 (D. Ariz. 1978). The order authorized: (1) appointment of plaintiff's father as temporary guardian; (2) detention and custody of the ward; (3) counseling, examination and treatment of the ward by any person; (4) assistance of any law enforcement officer in the state for the location and detention of the ward. *Id.* The defendant judge is a Kansas probate judge, vested through Kansas statutes with jurisdiction over guardianships. *Id.* at 73. He is not a lawyer. Rankin v. Howard, 633 F.2d at 846. The proceeding commenced and concluded before the ward entered the state. *Id.*

7. 633 F.2d at 846.

8. Brief for Appellant at 18-19.

9. *Id.*

10. 633 F.2d at 846. Attorney Howard, sometimes working with Pima County Assistant District Attorney Trauscht, had apparently used this technique before. *See* Brief for Appellant at 7-8. The plaintiff's confinement occurred first in a motel room, then at Attorney Howard's home, where plaintiff escaped. Brief for Appellant at 8.

11. Rankin v. Howard, 457 F. Supp. 70, 72 (D. Ariz. 1978). Because of the disposition of the statutory claims, only issues arising under 42 U.S.C. § 1983 (1976) are discussed in this case note. Section 1983 states:

> 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.

the defendant judge, prior to the proceeding, agreed to the guardianship order and knew of the fraudulent jurisdictional allegations.[13] Plaintiff claimed the order violated a variety of express jurisdictional requirements of the Kansas guardianship statutes[14] and failed to give the proposed ward notice or the opportunity to be heard, all in contravention of the United States Constitution.[15]

The district court granted summary judgment for the defendant judge on all claims.[16] The court based its decision on the doctrine of absolute judicial immunity from damages liability for judicial acts.[17] The Ninth Circuit reversed, setting forth several significant holdings.[18] First, the court stated that a prior private agreement on an application's disposition is not a "judicial act" for which damages immunity lies.[19] Second, judicial acts com-

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For a discussion of other issues, see note 16 *infra*.

12. 633 F.2d at 846. Neither the trial court opinion, Ninth Circuit opinion, nor the appellate briefs describe the alleged torts.

13. *Id.*

14. *Id.* at 847.

15. *Id.*

16. *Id.* The judge's co-defendants were granted partial summary judgment on a theory of derivative immunity. *Id.* This immunity applies to private citizens who conspire with immune state actors. The theory of derivative immunity disappeared with Dennis v. Sparks, 449 U.S. 24 (1980). Accordingly, this Note will not discuss any derivative immunity issues. Nor will plaintiff's claims under §§ 1985 and 1986 against the judge's co-defendants be analyzed because the significance and focus of *Rankin* is on judicial immunity.

17. Rankin v. Howard, 457 F. Supp. at 73. The doctrine of absolute judicial immunity may be described as the judicial officer's freedom from civil damage suits for judicial acts performed within the officer's jurisdiction, if the acts fall within the scope of the immunity. W. PROSSER, THE LAW OF TORTS 987 (4th ed. 1971). The adjective "absolute" means that the judge's motive, state of mind, or reasonableness of conduct is not relevant to the doctrine's application. *Id.* This definition embodies the discretionary/ministerial distinction governing liability for other public officials. Thus, judicial acts are seen as discretionary. *Id.* at 988. Judicial liability for ministerial functions is seen in Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970).

A qualified immunity doctrine provides a complete defense for conduct meeting a certain standard. *See* note 90 *infra*. The most common verbal formula applies immunity for such acts committed in good faith, such conduct being reasonable at the time. W. PROSSER, *supra* at 989. For histories of sovereign and judicial immunity, see Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REV. 201 (1980); Kattan, *Knocking on* Wood: *Some Thoughts on the Immunities of State Officials to Civil Rights Damages Actions*, 30 VAND. L. REV. 941 (1977); *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827 (1957).

18. 633 F.2d 844 (9th Cir. 1980).

19. *Id.* at 847. Injunctive or other equitable relief under § 1983 is not barred by the judicial immunity doctrine. Mitchum v. Foster, 407 U.S. 225 (1972).

mitted in the clear absence of personal jurisdiction are not cloaked with immunity.[20] Third, a total absence of personal jurisdiction may be found when the absence is known to the judge or when the judge proceeds recklessly in the face of statute or case law prohibiting such action.[21] Finally, the Ninth Circuit reaffirmed the historic distinction between acts in excess of jurisdiction and acts in the absence of jurisdiction.[22] In effect, the court firmly preserved the policy basis underlying immunity for excessive acts.[23]

B. A Century-Old Bulwark Against Damages Liability

Immunity has traditionally been recognized as necessary to shield a principled and independent judiciary from intimidation and harassment.[24] Among the justifications for immunity are that it: (1) prevents influence upon decisions;[25] (2) saves judges from the burden of defending retaliatory suits;[26] (3) enhances the attractiveness of judicial service;[27] (4) promotes finality in litigation;[28] (5) preserves the appellate process and administration of justice;[29] (6) reflects a duty to society as a whole;[30] (7) conserves judicial self-protection;[31] and, (8) upholds separation of powers and federalism.[32]

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20. 633 F.2d at 848.

21. *Id.* at 849.

22. *Id.*

23. *Id.*

24. *Id.* at 847. *See also,* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871) ("[T]he principle, therefore, which exempts judges . . . from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence."). Justice Douglas enumerated nine reasons for judicial immunity in Pierson v. Ray, 386 U.S. 547, 564 n.4 (1967) (dissenting opinion). The Ninth Circuit listed six in Robichaud v. Ronan, 351 F.2d 533, 535 (9th Cir. 1965).

25. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

26. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

27. Phelps v. Sill, 1 Day 315, 329 (Conn. 1804).

28. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

29. *Id.*

30. Robichaud v. Ronan, 351 F.2d 533, 535 (9th Cir. 1965); Sweeney v. Young, 82 N.H. 159, 163, 131 A. 155, 158 (1925). The rationale for this justification flows thus: Because judges owe no duty to individual litigants and individuals must establish a duty not to commit the act, individuals can not establish judicial liability.

31. Grimm v. Board of Pardons and Paroles, 115 Ariz. 260, 264, 564 P.2d 1227, 1231 (1977); Jennings, *Tort Liability of Administrative Officers,* 21 Minn. L. Rev. 263, 272 (1937).

32. Pierson v. Ray, 386 U.S. 547, 564 n.4 (1967).

In *Bradley v. Fisher*,[33] the Supreme Court first articulated the modern standard of judicial immunity.[34] There the Court required the "clear absence of all jurisdiction" as a condition of a judge's civil liability for judicial acts.[35] This rule has remained essentially untouched until now.[36] Pursuant to this traditional theory, judges who act in excess of the court's jurisdiction, even if committed maliciously or recklessly, were immune from civil suit.[37] Three elements figured prominently in the rationale of *Bradley:* (1) judicial independence would be eroded through artful pleading of partiality, corruption, or maliciousness;[38] (2) excessive resources would be spent by requiring one judge to answer before another—perhaps one of inferior standing—at the behest of a losing party, and forcing judges to preserve every item of evidence in every case to later prove their integrity;[39] and (3) respect for the judiciary would be diminished by the absence of immunity.[40]

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33. 80 U.S. (13 Wall.) 335 (1871).

34. In *Bradley*, the plaintiff represented a man accused of slaying Abraham Lincoln; defendant was the trial judge. At the close of trial, defendant removed plaintiff's name from the role of attorneys admitted to practice in that court because plaintiff had threatened the judge with "personal chastisement." *Id.* at 344. For his part, plaintiff claimed insults directed at him from the bench provoked his response. *Id.*

Justices Davis and Clifford dissented "from the rule laid down by the majority of the court, that a judge is exempt from liability in a case like the present, where it is alleged not only that his proceeding was in excess of jurisdiction, but that he acted maliciously and corruptly. If he did so, he is . . . subject to suit the same as a private person would be under like circumstances." *Id.*

Three years before *Bradley*, Justice Field hinted that judges could be held liable for malicious acts in excess of their jurisdiction. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1868). The *Bradley* decision, also by Justice Field, dismissed this implication as dictum. 80 U.S. (13 Wall.) at 351.

The *Bradley* Court also dropped the distinction between courts of general jurisdiction and courts of inferior jurisdiction for the purposes of immunity from suit. *Id.* The courts of some American states as well as England settled absolute immunity only upon superior courts of general jurisdiction, reserving for the lower courts immunity only for acts committed in good faith—a qualified immunity. Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 325-27 (1969).

35. 80 U.S. (13 Wall.) at 351.

36. Only five reported Supreme Court cases have dealt directly with judicial immunity: Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967); Alzua v. Johnson, 231 U.S. 106 (1913); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868). Only *Stump* and *Pierson* address the conflict between § 1983 and the judicial immunity doctrine. *See* Harper v. Merckle, 638 F.2d 848, 857 n.12 (5th Cir. 1981).

37. 80 U.S. (13 Wall.) at 351.

38. *Id.* at 354.

39. *Id.* at 349. This requirement would also apply to the second judge.

40. *Id.* at 347.

Nearly coincident with the announcement of the *Bradley* doctrine, Congress enacted section 1983[41] as part of the Civil Rights Act of 1871. Congress intended this reconstruction era package of legislation as a vehicle to redress misconduct on the part of state officials and those acting under color of state law.[42] Section 1983 and the judicial immunity doctrine of *Bradley* represented antagonistic currents in the law. The former sought to create liability; the latter to deny it. This tension remained largely theoretical until resolved in *Pierson v. Ray*,[43] in which the Court held that section 1983 did not disturb the common law judicial immunity doctrine.[44]

The Supreme Court's most recent pronouncement on the subject of judicial immunity demonstrates both the longevity and vitality of the *Bradley* rule. In *Stump v. Sparkman*,[45] the Court reversed a Seventh Circuit decision by holding a state court judge immune from a section 1983 suit for his ex parte order of a minor's sterilization upon the petition of the minor's mother.[46] The holding of *Stump* is a vivid example of the minimal showing required to meet *Bradley*'s two prerequisites for immunity: a "judicial act" and the lack of a "clear absence of all jurisdiction."[47]

The *Stump* Court outlined two factors which breathe con-

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41. 42 U.S.C. § 1983 (1976).

42. Mitchum v. Foster, 407 U.S. 225, 239-40, 239-40 n.30 (1972) (state courts at the time of enactment were being used to deprive citizens of federal rights); *Ex parte* Virginia, 100 U.S. 339, 346 (1880) (purpose of § 1983 was to enforce the provisions of the fourteenth amendment against all state action—executive, legislative and judicial).

43. 386 U.S. 547 (1967). A notable exception is Picking v. Pennsylvania R.R. Co., 151 F.2d 240 (3d Cir. 1945) (Congress possesses power to wipe out common law judicial immunity, and did so by enacting § 1983), *cert. denied*, 322 U.S. 776 (1947). *Picking* was overruled by Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967).

44. 386 U.S. at 553-54.

45. 435 U.S. 349 (1978).

46. The petition alleged that the minor daughter was "somewhat retarded," had spent the night with older males and stated the mother's desire to prevent "unfortunate circumstances." *Id.* at 351-52 n.1. The daughter had regularly graduated from grade to grade in her public school. Nevertheless, the lower court approved the petition and the procedure was performed. *Id.* at 352. Two years later the minor married. Unable to conceive, the young couple visited a physician, and for the first time learned that the "appendectomy" performed after the petition was granted was, in fact, a tubal ligation. *Id.* at 353. The petitioner failed to file the petition. The petition did not appear on the docket. The minor received no notice, guardian ad litem, or hearing. *Id.* at 360.

47. 80 U.S. (13 Wall.) at 348, 351.

tent into the notion of a judicial act.[48] A judicial act is either "a function normally performed by a judge" (a functional perspective),[49] a situation where the parties have "dealt with the judge in his judicial capacity" (an expectational perspective),[50] or some admixture of the two.[51] The *Stump* Court found both factors in the situation before it.[52]

The remarkably informal features of the sterilization proceeding[53] as set out in Justice Stewart's dissent did not sway the majority. The functional factor of the majority's test of a judicial act existed because judges commonly "approve petitions relating to the affairs of minors, as for example, a petition to settle a minor's claim."[54] The court found the expectational aspect based on an inference "from the record that it was only because Judge Stump served in that position [county circuit court judge] that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval."[55] While the petitioner undoubtedly appeared before Judge Stump because of his office, such an application of the expectational factor is little help in distinguishing a proper judicial act from improper overreaching.[56] Clearly, *Stump* means that serious procedural due process errors offer no grounds for judicial liability.[57]

The *Stump* decision is important for its treatment of the "clear absence of all jurisdiction" prerequisite of monetary personal liability for judges. Simply stated, Judge Stump's court was not totally devoid of jurisdiction, since apparently no state statute or case law prohibited such action.[58] A general jurisdictional statute empowered the defendant judge to hear "all cases at law and in equity whatsoever" and all "causes, matters and

48. 435 U.S. at 360.
49. *Id.* at 362.
50. *Id.*
51. *Id.*
52. *Id.*
53. *See* note 46 *supra.*
54. 435 U.S. at 362.
55. *Id.*
56. Justice Stewart's pithy retort summarizes the objection: "A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity." *Id.* at 367 (footnote omitted).
57. *Id.* at 359.
58. *Id.* at 358.

proceedings."[59] By finding the judge's jurisdiction not specifically foreclosed, the Supreme Court could not find it clearly absent.[60]

The dissenters never reached the jurisdictional matter. Justice Stewart found the judge's conduct nonjudicial and remarked that the majority's holding was "based on dangerously broad criteria."[61] In a separate dissent, Justice Powell focused on the nonreviewable quality of the sterilization proceeding as a critical fact which distinguished it from the disbarment in *Bradley*.[62] He found that *Bradley*'s foundational policy—namely that private rights may be diminished in the greater public interest of an independent judiciary, and relegated to other forums for their vindication—should not apply to the sterilized minor since she lacked appellate or alternative remedies.[63]

C. Tailoring An Effective Judicial Immunity Policy

When the *Rankin* trial court granted summary judgment for the defendant judge, it "assumed that a court arguably having subject matter jurisdiction does not act in the 'clear absence of all jurisdiction.' "[64] In deciding an issue of first impression, the Ninth Circuit stated that the absence of personal jurisdiction constitutes a clear absence of jurisdiction for two reasons.[65] First, the requirements of subject matter and personal jurisdiction are conjunctional, since both are necessary for lawful adjudication.[66] Thus, the absence of either amounts to a total ab-

59. *Id.* at 357.
60. *Id.*
61. *Id.* at 367-68 n.5 (Stewart, J., dissenting).
62. *Id.* at 369.
63. *Id.* at 370.
64. 633 F.2d at 848.
65. *Id.*
66. *Id.* The Fifth Circuit has apparently adopted a contrary stance as to whether a clear absence of personal jurisdiction destroys immunity. In Harper v. Merckle, 638 F.2d 848 (5th Cir. 1981), the Fifth Circuit interpreted *Stump* as "extend[ing] the protection of judicial immunity to all 'judicial acts' unless those acts fall clearly outside the judge's subject matter jurisdiction." *Id.* at 858 (footnote omitted) (emphasis added). *See also id.* at 860 n.21 (test for judicial immunity is a "judicial act not clearly outside his subject matter jurisdiction"). A close reading of *Stump* indicates that personal jurisdiction did not appear as an issue. Thus *Stump* does not foreclose the colorable presence of personal jurisdiction as an element of judicial immunity. While the *Harper* decision did not deal directly with an issue of personal jurisdiction, the court noted "that *Stump* mandates a broad construction of the term 'jurisdiction.' " *Id.* at 858 n.16. This expansive interpretation conforms to the tone of other Fifth Circuit decisions, as set out in note 77 *infra*. If

sence of jurisdiction. More importantly, however, the Ninth Circuit stated that since "the limits of personal jurisdiction constrain judicial authority, acts taken in the absence of personal jurisdiction do not fall within the scope of legitimate decision-making that judicial immunity is designed to protect."[67] The presence of immunity is directly related to judicial authority.[68]

What *Stump* only intimated concerning proof of jurisdictional issues, the *Rankin* court expressed. The Ninth Circuit held that when the defendant judge either knew the jurisdictional pleadings to be false, or proceeded in the face of valid statutory or case law denying him jurisdiction, proof of the lack of jurisdiction is met.[69] It is fundamental that a court has jurisdiction to determine its jurisdiction,[70] but that alone does not confer immunity. For an erroneous, but well-founded, determination, no liability exists.[71]

In *Rankin*, the Ninth Circuit applied the expectational and functional factors articulated in *Stump* to conclude that predetermination of a guardianship petition is a nonjudicial act. First, the Ninth Circuit noted the proposed ward's expectation of judicial impartiality was frustrated.[72] Second, the appellate court

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this is the view of the Fifth Circuit, a conflict among the circuits awaits Supreme Court resolution. For criticism of the expansive theory of judicial immunity, see text accompanying note 77 *infra*. The impact of *Harper* on the "judicial act" analytical strand is also discussed at note 77 *infra*.

67. 633 F.2d at 849.

68. In a recent case, O'Neil v. City of Lake Oswego, 642 F.2d 367 (9th Cir. 1981), the Ninth Circuit applied the distinction between excessive jurisdiction and absence of jurisdiction for immunity purposes in an interpretation of *Rankin*. In *O'Neil*, the defendant judge apparently mistook a bench warrant for an indirect contempt of court charge and sentenced plaintiff to two days in jail. *Id.* at 368. An indirect contempt charge is one based on events outside the view of the judge entering judgment. *Id.* An affidavit making the charge and describing the events is expressly required by state law. *Id.* No such affidavit existed prior to the entry of judgment. *Id.* Plaintiff won compensatory and punitive damages against defendant under § 1983. *Id.* The Ninth Circuit reversed, holding that judicial immunity prevented suit. The defendant judge's failure to comply with the procedural requirements for an indirect contempt charge prior to sentencing, though a judicial act, reflected an act in excess, not absence, of jurisdiction. *Id.* at 369. The trial court had erroneously believed that the imperfect discharge of statutory duties conferring jurisdiction over indirect contempt hearings amounted to a clear absence of jurisdiction. *Id.*

69. 633 F.2d at 849 n.14.

70. United States v. United Mine Workers of Am., 330 U.S. 258 (1947); C. WRIGHT, LAW OF FEDERAL COURTS 57-58 (3d ed. 1976).

71. 633 F.2d at 849.

72. *Id.* at 847.

recognized that an agreement to make a particular ruling in advance is not a "function normally performed by a judge."[73] Rather, it is the opposite of that which judicial immunity seeks to protect—*i.e.*, "principled and fearless decisionmaking."[74]

The Ninth Circuit's formulation appears to have adopted Justice Stewart's definition of a judicial act.[75] Justice Stewart recommended that "the concept of what is a judicial act must take its content from a consideration of the factors that support immunity from liability for the performance of such an act."[76] Though the Ninth Circuit accomplished a verbal blending of the two views, its application of the critical factors implies the primacy of Justice Stewart's suggestion.[77] An earlier opinion by the *Rankin* court strengthened this interpretation[78] when it stated

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73. *Id.*

74. *Id.*

75. *Id.* n.8 ("[W]e do not believe that the majority meant to deny the relevance of the doctrine's purpose in determining its scope.").

76. 435 U.S. at 368.

77. 633 F.2d at 847. The Fifth Circuit has adopted a virtually limitless view of what makes a judicial act. *Harper v. Merckle*, observed:

> Thus we take as settled law the proposition that [in] the *vast* majority of section 1983 cases in which judges are named as defendants, judicial immunity will bar the action. Moreover, as our analysis . . . reveals, we can envision no situation—where a judge acts after he is approached qua judge by parties to a case—that could possibly spawn a successful section 1983 suit.

638 F.2d 848, 856 n.9 (5th Cir. 1981) (emphasis in original).

In McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972), the Fifth Circuit reflected this view of judicial immunity. Pertinent comments include the following:

> We note in concluding that the opening of any inroads weakening judicial immunity could have the gravest consequences to our system of justice. . . . To be sure, we can conjure converse chambers of horrors, but we cannot allow that to erode the necessary features of the immunity. That judicial immunity is sometimes used as an offensive dagger rather than a defensive shield must not justify derogating its inviolability. Even though there may be an occasional diabolical or venal judicial act, the independence of the judiciary must not be sacrificed one microscopic portion of a millimeter, lest the fears of section 1983 intrusions cow the judge from his duty.

Id. at 1283 (footnote omitted).

In *Harper*, the Fifth Circuit claimed that the *McAlester* decision is the source of the *Stump* factors. Harper v. Merckle, 638 F.2d at 858. A view of judicial immunity that vests upon such an intangible definition of judicial act cuts the doctrine free from its policy bases. See notes 25-32 *supra* and accompanying text for the policies behind judicial immunity.

78. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974). The *Gregory* court held the

that "[w]hat constitutes conduct falling within that range [of judicial acts] must, in large part, be determined by looking at the purpose underlying the doctrine of judicial immunity."[79]

D. Analysis

Neither controversy nor fear of reprisal should deter a court from undertaking a difficult jurisdictional question. Neither *Rankin* nor *Stump* enunciated the requisite quantum of jurisdictional certainty. The *Rankin* court, however, stood by the proposition that the bedrock basis for judicial action—a tenable claim to jurisdiction over the cause and over the parties—must be met under the state of the law as it then exists in order to preserve judicial immunity. The inadequacy of *Stump* results from the lack of direction it affords lower courts.[80] By resting the decision on a broad jurisdictional statute, the Supreme Court failed to delineate outer limits to action by a court of general jurisdiction. The *Rankin* decision took a long stride toward curing that defect.

By juxtaposing the expectational and functional factors of a judicial act against the policy need for judicial immunity, the Ninth Circuit shaped a clearer doctrine, more keenly attuned to the section 1983/*Bradley* conflict. Both parties to a court proceeding expect fair and even treatment at the hands of the judiciary. The Ninth Circuit recognized the importance of the two perspectives. In contrast, the *Stump* Court overlooked the expectations of the sterilized minor.[81] Like the grant of jurisdiction in *Stump*, the probate statutes of Kansas clearly gave the defen-

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defendant judge, who assaulted the plaintiff while ejecting him from the courtroom, was entitled to a qualified immunity. Since the judge could have directed the baliff to evict plaintiff, and the bailiff enjoyed immunity if he acted in good faith even while using excessive force, the judge could claim bailiff's immunity. *Id.* at 64.

79. *Id.* at 63.

80. *See* Rosenberg, Stump v. Sparkman: *The Doctrine of Judicial Impunity*, 64 Va. L. Rev. 833 (1978); Comment, *Judicial Immunity: An Unqualified Sanction of Tyranny from the Bench?*, 30 U. Fla. L. Rev. 810 (1978); 47 U.M.K.C.L. Rev. 81 (1978).

In the context of legislative immunity, the Supreme Court has stated that the doctrine of immunity should not be applied broadly, but should be invoked only to the extent necessary to effect its purpose: "[T]he Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens . . . ." Doe v. McMillan, 412 U.S. 306, 320 (1972).

81. 435 U.S. at 363.

dant judge in *Rankin* authority to order guardianships.[82] But the Ninth Circuit's determination that the judge exceeded his functional role is premised on less literal, more realistic, considerations. Private agreements which conclude before causes commence diminish respect for the judiciary. In recognizing this, the *Rankin* court achieved a more incisive use of the expectational and functional factors.

E. A Model Theory of Judicial Immunity

An ideal theory of judicial immunity protects judicial officers from civil reprisal for decisions made upon their well-considered convictions. Courts have constantly narrowed the scope of immunity in the legislative and executive branches to confine it within only the salutory bounds required.[83] While it is unfair to describe the doctrine of judicial immunity as a "judicial repeal of the Civil Rights Act,"[84] it is wise to recognize the virtues of accountability which that section contemplates.[85]

Arguably, those features of the judicial system that are essential to a shared concept of fairness and respectability in public opinion should be protected by a doctrine of judicial culpability. Such features might include the following: (1) notice and an opportunity to be heard for final adjudications,[86] (2) a colorable

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82. 633 F.2d at 846 n.5.

83. *Compare* Butz v. Economou, 438 U.S. 478 (1978) (executive officers performing adjudicatory functions entitled to absolute immunity for that function only, because features of the judicial process enhance reliability and impartiality—citing as safeguards, adversarial procedure, right to appeal, cross-examination and use of precedent) *with* Scheuer v. Rhodes, 416 U.S. 232 (1974) (state governor has qualified immunity) *and* Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute immunity for state prosecutor's performance of "judicial" duties, leaving unanswered the question of liability for administrative duties). *See also* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209 (1963); Note, *Federal Executive Immunity From Civil Liability in Damages: A Reevaluation of* Barr v. Matteo, 77 Colum. L. Rev. 625 (1977).

84. If the courts held that all state officials had immunity from liability under Civil Rights actions for all acts done or committed within the ostensible scope of their authority, this would practically constitute a judicial repeal of the Civil Rights Act. Repeal is the responsibility of Congress, not the courts.

Hoffman v. Halden, 268 F.2d 280, 299-300 (9th Cir. 1959).

85. For an interesting, sometimes amusing, discussion of the range and impact of judicial misconduct, see Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 Ariz. L. Rev. 549, 555-63 (1978) and citations therein.

86. Rosenberg, *supra* note 80, at 835 (*Stump* rejected procedural due process and nonreviewability as limits on the immunity doctrine. Lack of adversary hearing should

claim to personal and subject matter jurisdiction,[87] (3) a right to appeal,[88] (4) freedom from prejudgment and partiality,[89] and (5) a written record. For the denigration of these fundamental elements of the American judiciary, monetary liability may be an effective deterrent. A policy of qualified immunity for the judiciary—thereby introducing state of mind as a relevant factor—would seriously erode the benefits realized by an immunity doctrine.[90] Judicial immunity policy must seek to nurture decisions based on judicial conviction, but not to insulate lawlessness from civil redress.[91] The *Rankin* decision is just such an effort.

Tom C. Clark

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be seen as jurisdictional defect.).

87. Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 2020 (1981).

88. Stump v. Sparkman, 435 U.S. 349, 370 (1978) (Powell, J., dissenting).

89. United States v. Grinnel Corp., 384 U.S. 563, 583 (1966) (due process right to a judge who has not prejudged case); *In re* Murchison, 349 U.S. 133 (1955) (due process right to a disinterested judge). *Accord*, Tumey v. Ohio, 273 U.S. 510 (1927).

90. Among the many articles favoring a qualified immunity, the best include: Theis, *Official Immunity and the Civil Rights Act*, 38 LA. L. REV. 279 (1978); Note, *supra* note 85 (proposal modelled on Judicial Immunity Tenure Act); Note, *Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?*, 27 CASE W. RES. L. REV. 727 (1977) (mechanisms for enforcing an actual malice standard); Note, *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 DUKE L.J. 95 (1976) (all public officials exercising discretion deserve a "good faith" immunity absent evidence that it imposes an undue restraint upon performance); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969) (favoring an actual malice standard similar to New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

Justice Douglas also appeared to favor qualified immunity:

> The presence of malice and the intention to deprive a person of his civil rights is wholly incompatible with the judicial function. When a judge acts intentionally and knowingly to deprive a person of his constitutional rights he exercises no discretion or individual judgement; he acts no longer as a judge, but as a "minister" of his own prejudices.

Pierson v. Ray, 386 U.S. 547, 567 n.6 (1967) (Douglas, J., dissenting).

91. French judicial officials are liable to harmed litigants for the intentional or negligent discharge of their duties. The statutory scheme for recovery is praised by some writers for its built-in filtering of frivolous claims. See, Note, *Tort Liability: Search Warrant Quashed: Protection Order Denied: Magistrate Negligent: Consideration of Judicial Immunity: Possible Alternatives: French System: Malice and Negligence Standard: Re Yoner, 7 D.L.R. 3d 185 (B.C. Sup. Ct. 1969)*, 4 OTTOWA L. REV. 627, 630-31 (1971) (citing H. SOLUS, I DROIT JUDICIAIRE PRIVE 704-11 (1961)). The standard of care demands that "serious professional error" occur before recovery is allowed. Note, *supra* note 85, at 589.

II. *DAVIS v. UNITED STATES:* ACCRUAL OF A CLAIM UNDER THE FEDERAL TORT CLAIMS ACT

A. INTRODUCTION

In *Davis v. United States*,[1] the Ninth Circuit held that once a plaintiff learns of the facts of both his injury and its likely cause, the two-year statute of limitations under the Federal Tort Claims Act (the Act) begins to run. The decision has the unfortunate effect of forcing plaintiffs to sue before legal causation can be shown and may result in the forfeiture of some meritorious claims.

In March 1963, an immunization clinic administered Sabin Type III oral polio vaccine to plaintiff as part of a government-initiated, mass immunization program to control poliomeylitis.[2] Thirty days after vaccination, plaintiff became paralyzed from the waist down.[3] He sued Wyeth Laboratories, the manufacturer of the vaccine, in 1964.[4] During this litigation, it was revealed that the Division of Biological Standards (DBS) had tested the lot from which plaintiff's vaccine was taken and found it within acceptable limits.[5] This litigation culminated in an appeal and the remand of the case for retrial on a strict liability theory.[6]

The plaintiff alleged that, in 1973, he learned of another DBS test of the vaccine,[7] the results of which fell outside the

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1. 642 F.2d 328 (9th Cir. 1981) (per Merrill, J.; the other panel members were Tang, J., dissenting, and Schroeder, J.), *cert. denied*, 50 U.S.L.W. 3589 (U.S. Jan. 26, 1982).

2. *Id.* at 329. The immunization program stemmed from the Vaccination Assistance Act of 1962 (current version at 42 U.S.C. § 247b (1976)).

3. 642 F.2d at 329.

4. *Id.* Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968).

5. 642 F.2d at 329-30. In *Davis v. Wyeth Laboratories, Inc.*, defendant Wyeth Laboratories deposed Dr. Ruth Kirschstein, chief of the pathology section of the laboratory of Viral Immunology, DBS, and subpoenaed her to bring all records of DBS relating to lot no. 03503 of the Sabin Type III oral polio vaccine. DBS had subjected each lot of vaccine to various tests. Dr. Kirschstein produced records of only a single neurovirulence test. *Id.* at 329.

The test involved giving the vaccine to monkeys and then examining their brains for lesions. If the number of lesions fell within DBS standards, the lot was acceptable. The test on lot no. 03503 indicated that only two of the thirty monkeys developed lesions and the lot was classified as acceptable. *Id.* at 329 n.2, 330 n.3.

6. 399 F.2d at 131.

7. 642 F.2d at 330. The plaintiff alleged that he learned of another test conducted on lot no. 03503 from an attorney representing a plaintiff in another suit, Griffin v. United States, 351 F. Supp. 10 (E.D. Pa. 1972), *modified*, 500 F.2d 1059 (3d Cir. 1974).

acceptable range.[8] Because Congress charged DBS[9] with testing and licensing the manufacturer of the vaccine,[10] plaintiff also sued the government under the Act.[11]

The district court granted summary judgment for the government and held that the Act's two-year statute of limitations barred recovery.[12] On appeal, plaintiff contended that his cause of action did not accrue until 1973, when he learned of facts indicating the government's responsibility for his paralysis. He contended, in the alternative, that the government's fraudulent concealment of the results of the second test tolled the statute.[13]

B. Background of the "Discovery Rule"

The general rule of tort law is that a claim accrues for statute of limitations purposes at the time of the plaintiff's injury.[14]

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8. 642 F.2d at 330. This test revealed that one of the monkeys developed lesions that were unacceptable under DBS standards. *Id.* n.5.

9. DBS was part of the National Institute of Health, United States Department of Health, Education, and Welfare. It was transferred to the Food and Drug Administration and renamed the Bureau of Biologics in 1972. 37 Fed. Reg. 12,865 (1972). Current authorization at 21 C.F.R. § 5.68 (1980) provides:

> The Director and Deputy Director of the Bureau of Biologics . . . are authorized to issue licenses under section 351 of the Public Health Service Act (42 U.S.C. § 262) for propagation or manufacture and preparation of biological products as specified in the act, and to revoke such licenses at the manufacturer's request.

10. 42 C.F.R. § 73.110 (1971) (current version at 21 C.F.R. § 630 (1980)) prescribes standards for testing viral vaccines such as poliomeylitis, rubella, smallpox, and measles.

11. 28 U.S.C. § 2674 (1976) provides in pertinent part: "The United States shall be liable . . . , in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Congress enacted the Act to eliminate the burden of providing relief through private bills to victims of government negligence and to create a remedy that would achieve a more equitable result in tort actions against the United States. *See* S. Rep. No. 1400, 79th Cong., 2d Sess. 2, 7 (1946).

12. The Act specifically provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1976).

13. 642 F.2d at 330.

14. In the usual case, the fact of injury provides a plaintiff with adequate notice of the cause of the injury and of the possibility that a legal wrong has occurred. *See* Re-

Because the general rule was recognized as being unjust and unnecessarily harsh,[15] it has been modified in medical malpractice claims to delay accrual of the claim until the plaintiff, through due diligence, discovers the injury.[16]

Lower courts have further extended this discovery rule to forestall accrual until the plaintiff discovers, or, in the exercise of reasonable diligence, should discover, both the injury and its cause.[17] In *United States v. Kubrick*,[18] the Supreme Court adopted this extension of the discovery rule.[19] The Court found

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STATEMENT (SECOND) OF TORTS § 899 comment c at 441 (1977).

15. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971). *See also* Gottlieb & Young, *Medical Malpractice and Limitations Under the Federal Tort Claims Act*, 13 DEF. L.J. 257 (1964); Sacks, *Statutes of Limitations and Undiscovered Malpractice*, 16 CLEV.-MAR. L. REV. 65 (1967).

16. In Urie v. Thompson, 337 U.S. 163 (1949), the Court held that a claim under the Federal Employers' Liability Act did not accure until a plaintiff's injury manifested itself. The court stated that the plaintiff was not barred by the statute of limitations because:

> It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs [by silocosis]; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.
>
> . . . .
>
> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance.

Id. at 169-70.

In Quinton v. United States, 304 F.2d 234 (5th Cir. 1962), the Fifth Circuit applied *Urie* to medical malpractice claims under the Act, stating, "[w]e can see no sound reason for permitting the Government to escape liability here simply because its alleged negligence was such as to remain undiscovered and, practically speaking, undiscoverable, for many years thereafter." *Id.* at 241.

17. This rule was followed in the Ninth Circuit and other circuits. Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977); Bridgford v. United States, 550 F.2d 978 (4th Cir. 1977); Reilly v. United States, 513 F.2d 147 (8th Cir. 1975); Jordan v. United States, 503 F.2d 620 (6th Cir. 1974); Toal v. United States, 438 F.2d 222 (2d Cir. 1971); Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962), *overruled on other grounds*, Ramirez v. United States, 567 F.2d 854, 857 (9th Cir. 1977).

18. 444 U.S. 111 (1979).

19. In *Kubrick*, the plaintiff was treated with neomycin at a Veteran's Administration (VA) hospital for an infection of the right femur. Irrigation of the infected area with neomycin led to a ringing sensation and loss of hearing six weeks later. An ear specialist, who had secured Kubrick's records from the VA, advised him that the hearing loss might be due to the neomycin treatment. The plaintiff did not file claim against the government until later when another physician advised him that the neomycin had caused the injury. The Court held that accrual occurred when the plaintiff was informed of the pos-

that once a plaintiff learns of his injury and its cause, he is no longer at the mercy of a defendant who has knowledge of these critical facts.[20] The Court, however, reversed an additional extension of the rule by the court of appeals, and held that accrual cannot be deferred until a plaintiff learns of a defendant's negligence or legal fault.[21]

C. Court's Analysis

Majority Opinion

In *Davis,* the Ninth Circuit affirmed a summary judgment and held that the Act's two-year statute of limitations barred the action.[22] The panel noted that the *Kubrick* Court refused to defer accrual until plaintiff discovered that defendant was legally at fault.[23] The court stated that, "[w]ith knowledge of the fact of injury and its cause, the malpractice plaintiff is on the same footing as any negligence plaintiff" and that the burden is on the plaintiff to ascertain the existence and source of fault within the statutory period.[24] Consequently, the *Davis* court decided that the question of plaintiff's diligence or lack of diligence in proving fault was irrelevant,[25] because the statute would begin to run in either event. The court stated that *Kubrick* had made clear that once a plaintiff knows of his injury and its cause, the decision to sue must be made within the statutory period.[26] The *Davis* court found that in April 1963, plaintiff knew of his injury and that the vaccine was the likely cause; or

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sibility that the neomycin caused his injury, not when he learned that the doctor who had caused his injury was legally responsible. *Id.* at 113-23.

20. *Id.* at 122. The *Kubrick* Court refers to a plaintiff being in "possession of the critical facts that he has been hurt and who has inflicted the injury." *Id.* Although this would appear to imply discovery of a person at fault, it is apparent from the *Kubrick* decision that the Court means only discovery of the cause of injury.

21. *Id.* at 121-22. The lower court had reasoned that if a claim does not accrue until a plaintiff is aware of his injury and its cause, neither should it accrue until he knows or should suspect that the doctor who caused his injury was medically negligent. Thus, the court extended accrual until discovery that an injury was negligently inflicted. 581 F.2d 1092, 1097 (3d Cir. 1978).

The Supreme Court stated in reversing: "[w]e are unconvinced that for statute of limitations purposes, a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment." 444 U.S. at 122.

22. 642 F.2d at 330, 332.

23. *Id.* at 331.

24. *Id.*

25. *Id.*

26. *Id.*

that, at the latest, he knew this when he sued Wyeth Laboratories in 1964.[27] The court, therefore, concluded that the claim accrued at the time of injury.[28]

The court also found that the government's concealment of the results of the second test was not fraudulent and did not toll the statute.[29] It held that the two-year statute had run, and that, although the government's failure to report a link between the vaccine and subsequent cases of polio might have been negligent, the failure was insufficient to constitute fradulent concealment,[30] and affirmed the defendant's summary judgment.[31]

The Dissent

Judge Tang dissented and indicated that the record failed to support the majority's assumption that the plaintiff was aware of his injury and its cause in April 1963.[32] He focused on the *Kubrick* Court's statement that the statute of limitations begins to run only when the plaintiff is in "possession of the critical facts that he has been hurt and *who has inflicted the injury.*"[33] Judge Tang examined the record to determine when plaintiff knew the facts of his injury and its cause.[34] The dissent found that plaintiff was hospitalized until October 1963, and that it was unclear when plaintiff recovered sufficiently to be aware of anything, although the record indicated that he had wondered in the summer of 1963 whether the vaccine had induced his paralysis.[35] The record showed that, at the earliest, plaintiff searched for the cause of his injury in October 1963. The dissent concluded that, from the record available, the question of when the plaintiff had determined the cause of his injury should be a factual determination for the jury.[36]

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27. *Id.* n.9.
28. *Id.* at 331.
29. *Id.* at 332.
30. *Id.* at 331-32.
31. *Id.* at 332.
32. *Id.*
33. *Id.* (emphasis supplied) (quoting United States v. Kubrick, 444 U.S. at 122).
34. 642 F.2d at 332.
35. *Id.*
36. *Id.* at 333. The dissent thoroughly examined the record that was available, citing the Clerk's Transcript and letters that the plaintiff had written to various agencies and doctors inquiring about the causal link between the vaccine and his paralysis. *Id.* at 332-33.

D. CRITIQUE

Although the majority correctly analyzed *Kubrick* regarding a plaintiff's discovery of legal fault, the court failed to apply *Kubrick*'s ruling that the statute of limitations begins to run only when the plaintiff possesses the critical facts of his injury and its cause. As pointed out in the dissent, the majority assumed, without examining the record, that the plaintiff was aware of his injury and its cause.

The majority thus misapplied *Kubrick* by (1) not addressing the issue of when the plaintiff possessed the critical facts, and (2) not examining the record. Although the *Kubrick* Court decided not to extend the discovery rule to defer actual accrual until discovery of legal fault, it did affirm an extension of the rule to defer accrual until a plaintiff was in possession of the critical facts.[37]

Other circuits have followed *Kubrick* in accrual questions.[38] Unlike the majority in *Davis*, these circuits have based their opinions upon an analysis of the record to determine when plaintiff came into possession of the critical facts.

One recent Seventh Circuit decision, *Stoleson v. United States*,[39] provides a sharp contrast to *Davis* in its application of *Kubrick*. In *Stoleson*, plaintiff sued under the Act and alleged heart problems resulting from employment in an ammunition plant where she was exposed to nitroglycerin.[40] She suffered a

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37. 444 U.S. at 122.

38. Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980); Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980); Waits v. United States, 611 F.2d 550 (5th Cir. 1980).

In *Wollman*, plaintiff sued defendant for injuries sustained in an automobile accident. Because defendant was a federal employee, the case was removed to federal district court where it was dismissed because the statute of limitations had run. The Eighth Circuit held that plaintiff was barred becaused the claim accrued at the time of the accident when he was aware that the defendant was a federal employee and could not be deferred until he discovered the legal significance of this fact.

In *Waits*, plaintiff sued the VA for negligence which he alleged resulted in the amputation of his leg. The government contended he was barred by the statute of limitations but the Fifth Circuit held that the plaintiff's failure to discover the specific acts of negligence that caused the amputation rested with the VA because it delayed in producing the records of the plaintiff's treatment. Thus, plaintiff was not barred.

39. 629 F.2d 1265 (7th Cir. 1980).

40. *Id.* at 1266-67. The plaintiff had worked at the Badger Army Ammunition Plant (BAAP). "During the relevant period the Olin Corporation operated BAAP pursuant to a cost plus fixed fee contract. The district court found that the Government had pervasive

heart attack in 1968 and suspected a link with the nitroglycerin, but was informed by physicians that the exposure was not the cause of her heart trouble.[41] In April 1971, a second, more authoritative opinion related her heart problems to nitroglycerin exposure.[42] The district court dismissed the suit, brought in 1972, as barred by the two-year statute of limitations.[43] The Seventh Circuit held that, under the Act, the statute began to run, not when the plaintiff first suffered severe anginal attack or when she suspected that nitroglycerin was the culprit, as the lower court had held,[44] but only when the second physician informed her of the cause and effect relationship between nitroglycerin exposure and the heart problem.[45]

To reach its decision, the Seventh Circuit relied on *Kubrick*, reasoning that "[u]nderlying *Kubrick* is the recognition that a plaintiff armed with knowledge of his injury and its cause is no longer at the mercy of a defendant's specialized knowledge. A plaintiff in that position need only inquire of other professionals, including lawyers, whether he has been legally wronged."[46] The *Stoleson* court examined the record and found that a layperson's subjective belief is insufficient knowledge of causation to trigger the statute of limitations.[47] The court stated that the plaintiff would have been advised that she had no cause of action against the government had she sought legal advice after first suspecting nitroglycerin had caused her heart problems.[48] Accordingly, the plaintiff's suspicion did not ripen into knowledge of the missing critical fact of causation until after she consulted a physician.[49]

Like the plaintiff in *Stoleson*, Davis at first merely suspected the polio vaccine caused his paralysis. This, according to *Stoleson*, was a layperson's subjective belief. Davis was also informed that no casual connection could be proved between the

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influence and authority over Olin and that the Government therefore shared with Olin whatever duties Olin owed to its employees." *Id.* at 1266 n.1.

41. *Id.* at 1267.
42. *Id.*
43. *Id.*
44. *Id.* at 1270.
45. *Id.* at 1270-71.
46. *Id.* at 1269-70.
47. *Id.* at 1270.
48. *Id.*
49. *Id.*

vaccine and his paralysis.[50] But the *Davis* court never examined the record to determine when the plaintiff's suspicion ripened into knowledge of causation. It also never addressed the issue of the second vaccine test or the possibility that it might have been a missing, critical fact in plaintiff's knowledge of the cause of injury.

The thorough analysis of an accrual question by *Stoleson* applies the *Kubrick* holding more aptly than does the majority opinion in *Davis*. Even though the *Kubrick* Court did not allow the plaintiff's claim to accrue once he learned that neomycin treatment had caused his hearing loss, it did examine the record thoroughly to determine when plaintiff learned of the cause of his injury.[51]

E. Conclusion

The *Kubrick* Court's decision not to extend the discovery rule to include discovery of legal wrong has been viewed as a cutback of the liberal construction of the discovery rule.[52] This cutback has been made more harsh by the Ninth Circuit in *Davis*. The failure to apply *Kubrick* to the facts of plaintiff's claim has resulted in a ruling that the claim accrued at the time of injury and was barred by the statute of limitations, even though the question of causation was still in doubt. The *Kubrick* Court stated that a strict construction of the statute would have a justified effect in malpractice cases because a plaintiff who learns of his injury and its cause need only seek competent advice on whether to sue.[53] Unfortunately, the *Davis* interpretation of *Kubrick* has an unjust effect. A plaintiff will be required to bring suit before causation in order to avoid the risk of having his suit barred. As stated in *Stoleson*, a plaintiff who seeks legal advice on the mere suspicion of the cause of injury, will be informed that he has no cause of action.[54] As a result of *Davis*, a plaintiff will be caught in the position of risking suit before he is sure of causation, and therefore not having a cause of action, or of seek-

50. 642 F.2d at 332.
51. 444 U.S. at 118-24.
52. 14 Suffolk U.L. Rev. 1428, 1439 (1980).
53. 444 U.S. at 123.
54. 629 F.2d at 1270.

ing to find the cause and risk being barred from bringing suit.[55]

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III. OTHER DEVELOPMENTS IN FEDERAL PRACTICE & PROCEDURE

In other cases last term, the Ninth Circuit interpreted the Magistrates Act to allow a trial before a Magistrate, took an expansive view of the principal of finality, adopted a new rule on the timeliness of certain civil appeals, and allowed the district court a measure of concurrent jurisdiction.

A. MAGISTRATE'S PRE-AMENDMENT AUTHORITY TO CONDUCT A TRIAL ON THE MERITS

In *Coolidge v. Schooner California*,[1] the Ninth Circuit held that the 1976 version of the Magistrates Act,[2] authorized a magistrate, with the consent of the parties, to conduct a trial on the merits—provided the parties are given an opportunity to submit objections to the district judge for a de novo review.[3]

In *Coolidge*, a trial was held before a magistrate with the consent of the parties. Soon after, the magistrate issued his opinion, setting forth findings of fact and conclusions of law. The plaintiff then submitted objections to the findings but was informed by the Clerk of the District Court that because the

55. For a general discussion of the problems associated with mass immunization programs and liability for injuries, see Franklin & Mais, *Tort Law and Mass Immunization Programs: Lessons from the Polio and Flu Episodes*, 65 CALIF. L. REV. 754 (1977).

1. 637 F.2d 1321 (9th Cir. 1981) (per Kilkenny, J.; the other panel members were Hug, J. and Van Dusen, D.J., sitting by designation).

2. The Magistrates Act states: "A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and Laws of the United States." 28 U.S.C. § 636(b)(3) (1976).

3. 637 F.2d at 1326. In a footnote, the panel appears to have adopted the view that only those portions of the magistrate's opinion to which objections are raised require a de novo review. *Id.* n.5. *See* Calderon v. Waco Lighthouse for the Blind, 630 F.2d 352, 355-56 (5th Cir. 1980).

Section 636 was amended in 1979, establishing procedures for a magistrate to "conduct any or all proceedings in a . . . civil matter and order the entry of judgment. . . ." Act of Oct. 10, 1979, Pub. L. No. 96-82, § 2, 93 Stat. 643 (codified at 28 U.S.C. § 636(c)(1) (Supp. III 1979)).

parties had consented to a trial by the magistrate, they had no right to submit objections to the findings.[4] The district judge, apparently without any review of the proceedings, issued his judgment "[b]ased on the Court's findings of fact and conclusions of law."[5]

Under section 636(b)(1)(B) of the Magistrates Act, "[a] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of facts and recommendations for the disposition by the judge of the court. . . ."[6] The 1976 version of the Act required the magistrate to mail copies of his or her proposed findings to all parties. Furthermore,

> [w]ithin ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations. . . .
>
> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . .[7]

Although the present version of the Magistrates Act clearly gives magistrates jurisdiction to decide civil cases with the consent of the parties,[8] the Ninth Circuit panel noted that courts disagreed as to the extent of permissible magistrate jurisdiction prior to the 1979 amendment.[9]

In *Muhich v. Allen*,[10] the Seventh Circuit used a two-step approach to review the Magistrates Act. First, the court determined that section 636 of the Act, along with local rules of court, authorized magistrates to conduct civil trials with the consent of the parties. Second, the court found any constitutional or statutory objections to granting magistrates this power cured by the de novo review of a district court judge.[11] In *Muhich*, the review was proper where it covered "proceedings held before the magis-

4. 637 F.2d at 1323.
5. *Id.*
6. 28 U.S.C. § 636(b)(1)(B) (1976).
7. *Id.*
8. For text of the present version, see note 3 *supra*.
9. *See generally* 637 F.2d at 1324 n.3 and cases cited therein.
10. 603 F.2d 1247 (7th Cir. 1979).
11. *Id.* at 1250-51.

trates . . . and the objections, if any, of the parties filed thereto . . . ."[12]

The Ninth Circuit also relied on the Fifth Circuit decision in *Calderon v. Waco Lighthouse for the Blind*.[13] In *Calderon*, the Fifth Circuit found that "consensual references to a magistrate for trial on the merits were permitted" under section 636(b)(3) of the Act.[14] The Fifth Circuit also required the district court to conduct a de novo determination of any portions of the magistrate's findings to which objections are raised.[15]

The Ninth Circuit held that under section 636(b)(3) a magistrate has authority to conduct a civil trial with the consent of the parties, thereby adopting the view of the Fifth and Seventh Circuits. The court also concluded that because the Magistrate Act was to aid the district court in making decisions, "the parties must be given an opportunity to submit objections to the district judge and the judge must make a de novo review."[16] Applying this conclusion to the facts at hand, the court remanded the case for a de novo review of the magistrate's opinion and the plaintiff's objections.[17]

While the court's decision in *Coolidge* is a well-reasoned interpretation of the intent of section 636 of the Magistrate Act, its value is limited to those cases which must interpret the Act prior to the 1979 amendment. In 1979, Congress added subsection (c) which clearly vests magistrates with the power to conduct civil trials and enter judgments with the consent of the parties.[18]

B. Appealability of a Non-Final Order

In *Anderson v. Allstate Insurance Co.*,[19] the Ninth Circuit held that even though an appeal is taken from a district court

12. *Id.* at 1252.
13. 630 F.2d 352 (5th Cir. 1980).
14. *Id.* at 355.
15. *Id.* at 356.
16. 637 F.2d at 1325-26.
17. *Id.* at 1327.
18. 28 U.S.C. § 636(c)(1) (Supp. III 1979).
19. 630 F.2d 677 (1980) (per Wallace, J.; the other panel members were Alarcon, J. and Tuttle, J., sitting by designation).

order which is not final pursuant to section 1291 of Title 28,[20] and no interlocutory certificate is acquired under the Federal Rules of Civil Procedure,[21] the appellate court could treat the orders appealed from as final orders when all the remaining claims were disposed of subsequently.

The plaintiffs, a chiropracter and one of his employees, sued several insurance companies and Does 1 through 50[22] in state court for violating plaintiff's first amendment rights, malicious prosecution, abuse of process, and unlawful interference with business relationships.[23] Fifteen months later, in January 1978, the plaintiffs filed a first amended complaint adding three new defendants, but retaining the original Does 1 through 50.[24]

On April 11, 1979, the defendants' petition for removal to federal district court was granted.[25] On May 17, 1979, the three new defendants moved to dismiss on the ground that the statute of limitations had run, since they were added as new defendants and not Does.[26] On June 5, the district court judge dismissed the action with prejudice with respect to the three defendants added

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20. 28 U.S.C. § 1291 (1976) states: "The court of appeals shall have jurisdiction of appeals from all final decisions of the districts of the United States . . . ."

21. When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

FED. R. CIV. P. 54(b).

22. The California Code of Civil Procedure allows the use of fictitiously named defendants for the purpose of protecting the statute of limitations as to those parties. CAL. CIV. PROC. CODE § 474 (West 1979).

23. 630 F.2d at 679. Plaintiffs had advised their patients to seek legal counsel before settling claims with the defendant insurance companies. Plaintiffs alleged that the defendants therefore "made false and fraudulent representations to patients and prospective patients about the quality of [plaintiff's] practice, told patients and prospective patients that [defendants] would not pay for [plaintiff's] services; and threatened to terminate patient's policies . . . ." *Id.* at 684.

24. *Id.* at 679.

25. On April 24, the plaintiffs moved to dismiss their federal cause of action. Because this was almost two weeks after the case had been removed to federal court and the state court lacked jurisdiction to dismiss the federal claim, the district court retained its jurisdiction to hear the case. *Id.* at 680.

26. The statute of limitations for malicious prosecution and abuse of process is one year. CAL. CIV. PROC. CODE § 340(30) (West 1979). Tortious interference with business relations has a two-year statute. *Id.* § 339(1).

in the amended complaint.[27]

The plaintiffs then attempted to serve these same three defendants as Does. The defendants moved to strike the amended complaint and for sanctions against plaintiff's counsel for abuse of process.[28] The district court granted these motions. The plaintiff appealed all three district court rulings. Subsequent to filing the appeal, the district court dismissed the federal cause of action as to the remaining defendants and remanded the state claims to the California courts.[29]

The Ninth Circuit, in granting itself jurisdiction to hear the appeal, based its decision on policy grounds stating: "There is no danger of piecemeal appeal confronting us if we find jurisdiction here, for nothing else remains in the federal courts."[30] Using finality as a basis, the court extended the holdings of several cases from other circuits. These cases had allowed appellate review of orders which only partially adjudicated the issues when the remaining claims were disposed of subsequently.[31] The panel noted that the Supreme Court has mandated that "practical, not technical, considerations are to govern the application of principles of finality."[32] Finally, the court examined two previous Ninth Circuit decisions that had granted appeals from non-final orders of dismissal when the district court had subsequently entered judgment based on those orders.[33]

C. A "Workable Rule" for Determining Who is an Officer of the United States

In *Wallace v. Chappell*,[34] the Ninth Circuit held that whenever an action arises from government activities, the sixty day period for the filing of an appeal under Federal Rule of Appel-

27. 630 F.2d at 680.

28. *Id.*

29. *Id.*

30. *Id.* at 681.

31. Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973); Frankfort Oil Co. v. Snarkard, 279 F.2d 436 (10th Cir.), *cert. denied*, 364 U.S. 920 (1960).

32. 630 F.2d at 680 (quoting Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973)). *See* Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

33. 630 F.2d at 681 (explaining Ruby v. Secretary of Navy, 365 F.2d 385 (9th Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1011 (1967); Firchau v. Diamond Nat'l Corp., 345 F.2d 269 (9th Cir. 1965)).

34. 637 F.2d 1345 (9th Cir. 1981) (per curiam; Poole, J., dissenting).

late Procedure 4(a)[35] will apply if the defendants were acting under either color of office,[36] color of law or unlawful authority,[37] or any party in the case was represented by a government attorney.[38]

The *Wallace* plaintiffs, United States Naval personnel, brought suit against their superior officers for alleged racial discrimination.[39] The plaintiffs sued the defendants as individual officers, apparently to avoid the defenses available to military officers acting in the line of duty.[40] The district court dismissed the action and the plaintiffs filed their notice of appeal thirty-five days after the district court entered final judgment.[41] Rule 4(a)(1) requires that in such cases an appeal must be filed within thirty days, but that if the United States, an officer or agency thereof is involved, notice of appeal may be filed within sixty days. The issue on appeal was whether the notice of appeal was timely under Rule 4(a).

The former rule in the Ninth Circuit had been that to prevent inconsistent positions, "a plaintiff who contended (in order to avoid a defense of immunity) that the government agent was acting as a private citizen, could not, upon appeal, contend that the defendant was a government officer on government business

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35. FED. R. APP. P. 4(a)(1) requires a notice of appeal to be filed with the district court within 30 days of the entry of judgment. This requirement is extended to 60 days when "the United States or an officer or agency thereof is a party." *Id.*

36. "An act under color of office is an act of an officer who claims authority to do the act by reason of his office when the office does not confer on him any such authority." 637 F.2d at 1348 n.6 (quoting BLACK'S LAW DICTIONARY 241 (5th ed. 1979)). "For an act of a government officer to be under color of office, the act must have some rational connection with his official position." 637 F.2d at 1348 n.6 (quoting Arthur v. Fry, 300 F. Supp. 620, 622 (E.D. Tenn. 1969)).

37. Color of law is "the appearance or semblance, without the substance of legal rights . . . ." 637 F.2d at 1348 n.7 (quoting BLACK'S LAW DICTIONARY (5th ed. 1979)). The court also noted that color of law exists when acts by private individuals become " 'so closely intertwined' with the government, that private action becomes 'state action'." 637 F.2d at 1348 n.7 (quoting Smith v. Young Men's Christian Ass'n, 462 F.2d 643, 647 (5th Cir. 1972)).

38. 637 F.2d at 1346.

39. Plaintiffs based their claim on two statutes. One, § 1985, prohibits conspiracies to interfere with civil rights and conspiracies to prevent an officer of the United States from performing his or her duties. 42 U.S.C. § 1985 (1976). The other, § 1341, vests original jurisdiction in the district court for violations of § 1985 or for other relief under an Act of Congress for the protection of civil rights. 28 U.S.C. § 1341 (1976).

40. 637 F.2d at 1346.

41. *Id.*

in order to avail himself of the 60-day rule."[42]

The *Wallace* panel found the former rule created confusion in that the time for appeal depended on the wording of the pleadings.[43] In addition, the court adjudged the defendants to have acted inconsistently by arguing their official status in district court and their individual status for the purpose of applying Rule 4(a).[44]

The defendants argued that *Hare v. Hurwitz*[45] required the court to examine the purpose of Rule 4(a), which was to allow cases against government agencies or officers to be routed to the officials responsible for deciding whether to appeal.[46] Applying *Hare* to the present case, the plaintiffs would not be entitled to sixty days under Rule 4(a). The court preferred a liberal reading of Rule 4(a) to eliminate uncertainty. However, because Congress intended the words "officers of the United States to be read in context with their activities, authority, and duties,"[47] a different approach was necessary.

In formulating its new rule, the Ninth Circuit concluded that "[a] workable rule would be one that looks to who represents the parties and the relationship of the parties to each other and to the government during the course of the conduct that gave rise to the action."[48] Looking at the defendants' relationship to the government, the *Wallace* panel denied the defendants' motion to dismiss and remanded the case for oral argument on the merits.

In a lengthy dissent, Judge Poole argued that it was both unfair to allow the plaintiff to adopt inconsistent positions and

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42. *Id.* at 1347 (citing Michaels v. Chappell, 279 F.2d 600, 602 (9th Cir. 1960), *cert. denied*, 366 U.S. 940 (1961)).

43. 637 F.2d at 1347.

44. *Id.* n.2.

45. 248 F.2d 458 (2d Cir. 1957).

46. 637 F.2d at 1347.

47. *Id.*

48. *Id.* at 1348. The court noted that the Department of Justice must conduct litigation involving officers or agencies of the United States. 28 U.S.C. § 516 (1976). In addition, a federal employee sued as an individual can request representation by the Department of Justice if it appears that the employee's activities were within the scope of employment. *Id.* § 50.15(a).

unnecessary to overule *Michaels v. Chappell.*[49] The proper procedure, according to the dissent, would have been for the Ninth Circuit to dismiss the appeal and remand the action for a determination under Federal Rule of Civil Procedure 60(b)[50] of whether to extend the time for appeal.[51]

49. 279 F.2d 600 (9th Cir. 1960), *cert. denied*, 366 U.S. 940 (1961). In *Michaels*, the Ninth Circuit enunciated the former rule. For a discussion of this rule, see text accompanying note 42 *supra*.

50. Rule 60(b) allows the district court to extend the time for filing notice of appeal if excusable neglect or good cause is shown. FED. R. CIV. P. 60(b).

51. 637 F.2d at 1349.