


“A Sordid Case”: Stump v. Sparkman, Judicial Immunity, and the Other Side of Reproductive Rights

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Articles

“A SORDID CASE”: *STUMP V. SPARKMAN*, JUDICIAL IMMUNITY, AND THE OTHER SIDE OF REPRODUCTIVE RIGHTS

LAURA T. KESSLER*

ABSTRACT

This Article presents a new historical account of Stump v. Sparkman, one of the most controversial Supreme Court decisions in the past fifty years. Stump is the 1978 judicial immunity opinion in which the Supreme Court declared that judges are absolutely immune from liability for their official judicial acts, even if such acts are done maliciously or flawed by the commission of grave procedural errors. The context of the case was horrific. It involved the involuntary sterilization of a fifteen-year-old girl; she was sterilized pursuant to a court order that her mother had obtained from a state judge without any notice to the child, appointment of a lawyer to represent her, presentation of evidence, or opportunity to appeal. As an adult she sued the judge and lost on the basis of the judicial immunity doctrine.

The basic project of this Article is to show why this largely overlooked case is important in American constitutional law beyond the narrow issue of judicial immunity, recovering it as a canonical decision relevant to contemporary debates about constitutional reproductive rights and procedural due process. Specifically, this Article suggests that Stump emerged from an ongoing set of discussions about the nature and scope of then-nascent

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*constitutional protections for reproductive rights, as well as access to the federal courts by civil rights claimants. These issues continue to be contested today, as courts and states reign in the scope of reproductive rights, and as federal judges increasingly employ procedural rules limiting the ability of civil rights victims to pursue their claims and receive a decision on the merits in federal court. As these questions continue to filter through the courts, a close examination of the historical antecedents to these trends, as reflected in earlier Supreme Court decisions such as *Stump*, can help courts envision more just alternatives to the present course on these fundamentally important procedural and substantive questions.*

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INTRODUCTION

When I was fifteen years old, I had a real bad pain on my right side. . . .

. . . [I] was admitted into the hospital and my mother told me I was going in for an appendectomy. . . . Then the shots came. I kept hearing the nurses say, “make sure she is really out. If she finds out what’s really going on, she will run.”

This all took place in a small room. I can remember the men all in their green gowns. They laid me on the table. I was cry’ing for my mom but she wasn’t there. I saw this door that had two windows and I looked up to yell again, and when I did, a man in a green gown put a black mask on my face and told me to count backwards. Everything went black.

Linda Spitler¹

What happened next became the subject of one of the leading United States Supreme Court decisions on judicial immunity, *Stump v. Sparkman*.² Linda Spitler was sterilized pursuant to an ex parte court order that her mother had obtained a few days earlier from Judge Harold D. Stump of the DeKalb County Circuit Court in Auburn, Indiana. Years later, Linda married Leo Sparkman and learned of her condition after failing to conceive a child. She sued the judge, her mother, and the physicians involved in the sterilization in federal court for violating her civil rights and other abuses. The trial court dismissed her suit before any trial, reasoning that Judge Stump was clothed with absolute judicial immunity and that his elimination from the case removed the necessary element of state action, requiring dismissal of the private defendants as well. Sparkman took the question of the judge’s immunity all the way to the Supreme Court. Ultimately, the Court held that judges acting within their jurisdiction are absolutely immune from liability for their judicial acts, even if their exercise of authority is done maliciously or flawed by the

1. JAMIE RENAE COLEMAN & PAULA BATEMAN HEADLEY, *THE BLANKET SHE CARRIED* 1 (2003). This book is a first-person account of Linda Sparkman’s life, written with the assistance of a friend, Paula Headley. Linda Spitler married Leo Sparkman, becoming Linda Sparkman. She changed her name to Jamie Renae Coleman later in life. See Shari Rudavsky, *Looking at the History of Eugenics in Indiana*, INDIANAPOLIS STAR, Apr. 13, 2007, at 1.

2. 435 U.S. 349 (1978).

commission of grave procedural errors.³ On remand to the Seventh Circuit, the court issued a brief per curiam opinion affirming the trial court's dismissal of Sparkman's claims against the private parties as well. The apparent basis for this result, provided in four concurrences, was that Sparkman had not stated sufficient facts in her complaint describing an alleged conspiracy among the judge and the private parties to deprive her of her rights.⁴ This decision effectively terminated the entire case.

The story of *Stump v. Sparkman* is really three stories. First, and most basically, it is about the life of a family—the Spitlers. It is about a teenager in conflict with her mother about her sexuality, how her mother turned to the legal system to control her daughter, and the long-term impact of that decision on the child, Linda Spitler. At a second level, the story of *Stump* is about the history of eugenics in the United States. Through its broad interpretation of judicial immunity despite the obvious unconstitutionality of the sterilization order, the Supreme Court became complicit in this history, indeed, part of it. From this perspective, *Stump* is a story of how constitutional reproductive rights continue to be a function of race, ethnicity, and socioeconomic status in America, and how the law works to channel sex and childbearing into the marital family by punishing those who do not conform to this ideal. Finally, on a third level, the story of *Stump* is a tale of how the Supreme Court and lower federal courts have developed, interpreted, and applied procedural rules limiting the substantive reach of civil rights.

Commentators have critically addressed each of the legal stories implicated by *Stump*. For example, many scholars have written about socioeconomic inequality and reproductive rights, particularly how emphasizing the “choice” and privacy dimensions of reproductive rights has resulted in a divergent set of reproductive “rights” for privileged and poor women.⁵ Other scholars have focused on racial

3. *Id.* at 364 (1978) (disposing of all claims against Judge Stump on the basis of judicial immunity).

4. *Sparkman v. McFarlin*, 601 F.2d 261, 262–69 (7th Cir. 1979) (per curiam).

5. Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES*, 45, 52–54 (J.L. Garfield & Patricia Hennessey eds., 1984) (criticizing Roe's basis in privacy instead of equality, and claiming that this choice resulted in *Harris v. McRae's* holding that public funding for abortions is not constitutionally required); Carol Sanger, *M is for the Many Things*, 1 *S. CAL. REV. L. & WOMEN'S STUD.* 15, 46 (1992) (“How is it that maternity is a praiseworthy aspiration for some women while for others it is condemned as a sign of irresponsibility or irrationality?”); cf. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal*

inequality and reproductive rights, showing how motherhood remains a race privilege in our country.⁶ Many scholars have devoted attention to the law’s preference for the traditional nuclear family and punishment of those who do not adhere to this norm.⁷ Finally, there has been a significant critique of the increasingly “restrictive ethos” of federal civil procedure,⁸ as well as the Supreme Court’s

Protection, 44 STAN. L. REV. 261 (1992) (employing a historical analysis demonstrating that abortion regulation is an issue of sexual equality as well as privacy).

6. See SERENA MAYERI, REASONING FROM RACE 145–67, 185 (2011) (showing, through historical analysis of Supreme Court cases involving discrimination against black unwed mothers, how “the regulation of sex, sexuality, and ‘morals’ functioned to maintain white supremacy”); DOROTHY ROBERTS, KILLING THE BLACK BODY (1997) (exploring the disparagement of black motherhood through the birth control movement, fetal protection policies, welfare reform, and other legal developments); Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781 (2014) (examining the recent emergence of fetal protection laws, their disproportionate use against racial minority and socioeconomically disadvantaged women, and providing an account of their constitutional illegitimacy); Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 328 (2013) (examining the emergence and development of the reproductive justice movement, initially conceived of by feminists of color, which “takes into consideration that the right to have a child and the right to parent are as important as the right to not have children”).

7. See CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW & PUBLIC POLICY 4 (2010) (“[F]amily law can be seen as essentially a set of statements by society in favor of a particular ideal—heterosexual marriage and reproduction within the nuclear family—even though that idea now coexists with widespread different family structures.”); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (criticizing the law for privileging the bond between husband and wife, and arguing that the parent-child bond is the relationship that should be protected and subsidized by the law); Ariela R. Dubler, Essay, *Sexing Skinner: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1352 (2010) (re-reading *Skinner* as a “story of the Supreme Court attempting to create a conservative bulwark against potentially encroaching forces of sexual freedom”); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1256 (2009) (“[C]riminal law and family law have worked in tandem to produce a binary view of intimate life that categorizes intimate acts and choices as *either* legitimate marital behavior *or* illegitimate criminal behavior.”); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 200 (2007) (“Those performing carework outside legal marriage, including in ‘non-conjugal relationships characterized by care and/or interdependence,’ are stigmatized both by the current boundaries of the legal family and by proposed boundaries that would extend legal recognition to same-sex couples.”); Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 12 (2005) (“[A] central means of oppressing a disfavored group in our society is to wage war on their familyhood.”); Michael Warner, *Beyond Gay Marriage*, in LEFT LEGALISM/LEFT CRITIQUE 259, 260 (Wendy Brown & Janet Halley eds., 2002) (“Marriage sanctifies some couples at the expense of others. It is selective legitimacy.”).

8. See A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2009) (arguing that a “restrictive ethos” characterizes federal civil procedure today, with many rules being developed, interpreted, and applied in a manner that frustrates the ability of claimants to prosecute their claims and receive a decision on the merits in federal court); see also Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests*,

efforts to limit Congress's capacity to protect groups through civil rights legislation.⁹

These salient issues are all present in *Stump*, yet scholars have largely neglected this Supreme Court decision.¹⁰ When *Stump* has received attention, most scholars have addressed one or the other of these issues separately. By examining these substantive and procedural issues together in the context of one seminal case, this Article provides three important contributions. First, it revives *Stump v. Sparkman* as a canonical decision relevant to contemporary debates about constitutional reproductive rights and procedural due process. Second, it presents a unique case study demonstrating the illusory distinction between substance and procedure, a principle that legal scholars have argued for decades.¹¹ Finally, this Article provides a glimpse of what “might have been” had the Supreme Court used *Stump* as an opportunity to outline a robust conception of reproductive rights encompassing the right to procreate—what this Article calls “the other side of reproductive rights.”¹² As many scholars have argued,¹³ the Court's failure to articulate such a vision has had long-term repercussions for present-day legal understandings of the nature and scope of reproductive rights, with middle class,

Destabilizing Systems, 95 IOWA L. REV. 821 (2010) (describing the Supreme Court's choice to shift from minimal notice pleading in the federal courts to a robust gatekeeping regime and giving some reasons for thinking the Court's course on this matter may promise the worst of both worlds); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–2009 Labor and Employment Cases*, 13 EMPLOYEE RTS. & EMP. POL'Y J. 253 (2009) (discussing several decisions showcasing the “procedural extremism” of the Roberts Court that limit employees' access to the federal courts to litigate workplace disputes); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013) (criticizing the heightened commonality standard for certifying class actions imposed by the Supreme Court in *Wal-mart v. Dukes*); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010) (arguing that the motion to dismiss is the new summary judgment motion after *Twombly* and *Iqbal*).

9. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).

10. See *infra* Part II.

11. See, e.g., Robert M. Cover & Owen M. Fiss, *The Independence of Procedure?*, in THE STRUCTURE OF PROCEDURE 47–104 (Robert M. Cover & Owen M. Fiss eds., 1979); Martha Minow, *Politics and Procedure*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1998).

12. Others have framed this more broadly as simply “Reproductive Justice.” See MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE (2014); Luna & Luker, *supra* note 6.

13. See sources cited *supra* note 5 and accompanying text.

white women remaining more protected than low income women, including women of color.

Part I of this Article discusses the immediate circumstances surrounding the case of *Stump v. Sparkman*, including a summary of the facts and procedural history, the controlling legal precedents at the time the suit was filed, the Supreme Court decision, and the outcome of the case on remand to the Seventh Circuit. Part I also examines the history of the judicial immunity doctrine invoked by the Supreme Court in *Stump*. Traditional articulations of this doctrine explain it as an essential, trans-substantive feature of our civil justice system intended to be equally relevant to many different sorts of substantive disputes for the purpose of ensuring an independent judiciary. However, an examination of the historical context in which the Supreme Court first developed the doctrine in the nineteenth century suggests a more complex pedigree, rooted in the Supreme Court's opposition to Congress's aggressive efforts to institute civil rights for former slaves following the Civil War. This new historical account reveals the substantive dimensions of the judicial immunity doctrine, particularly the expansive version embraced by the Court. Part I also discusses the Seventh Circuit's sua sponte imposition of a heightened pleading standard to assess the sufficiency of Sparkman's complaint after the Supreme Court found Judge Stump immune from suit and remanded the case for consideration of the claims against the remaining private defendants. According to this analysis, *Stump* can be understood as an antecedent to current efforts by federal judges, and ultimately the Supreme Court, to limit access to the federal courts through a heightened pleading regime and other procedural measures.¹⁴

Part II summarizes the scholarly reaction to the decision. Scholars are not bystanders; their analyses and critiques become part of the “story” of Supreme Court cases, shaping how we understand them and the historical record. I argue that legal scholars, perhaps influenced by the Court's narrow focus on the immunity issue, have neglected the decision's broader implications for several intersecting civil rights movements, including disability rights, women's rights, reproductive rights, and patients' rights.

14. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (replacing notice pleading announced in *Conley v. Gibson*, 355 U.S. 41, 47 (1957), with a more demanding “plausibility” pleading standard); see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (replacing the minimal commonality requirement to certify a class action under Rule 23 of the Federal Rules of Civil Procedure with a heightened commonality standard).

Part III provides a new historical account of *Stump v. Sparkman* by placing the decision within its broader social, historical, and legal contexts. Specifically, Part III discusses some of the legal, political, and policy developments that were occurring at the time of the decision, particularly the federal government's involvement in the systemic coercive sterilization of hundreds of thousands of poor women in the United States through its anti-poverty and population control efforts. More broadly, Part III places the case within the longer history of eugenics and sterilization abuse in the United States. Contrary to popular conceptions, eugenics began in the United States long before it was practiced in Nazi Germany and continued for many years after eugenic sterilizations of institutionalized persons fell out of favor.

Part IV explores how certain aspects of eugenic thinking, if not formal eugenic ideology, continue to influence contemporary law and public policy. Among other legal developments, this Part examines the prosecution of drug addicted mothers; probation conditions limiting the reproductive freedom of sex offenders and "deadbeat dads" delinquent on their child support obligations; welfare reforms intended to influence welfare recipients' reproductive choices; reproductive technologies enabling parents to select offspring with certain genetic characteristics; state marriage bans justified on grounds that same-sex couples are not able or fit to bear and raise children; and sterilization abuse in prisons. Although many of these examples do not conform with classic understandings of eugenics, because they do not involve direct state-sponsored coercion, Part IV shows that they do share many continuities with our eugenic past.

Ultimately, this reexamination of *Stump v. Sparkman* demonstrates how the shadow of eugenics in America extended well into the late twentieth century and arguably continues today. More generally, this Article highlights the divergent content of reproductive rights for different groups in our society. Specifically, in the very same period when middle class women were winning victories in the Supreme Court for the rights of contraception use and abortion, the Supreme Court turned a blind eye to poor women struggling to resist coercive sterilizations. Finally, this Article links *Stump* with a larger, ongoing project of federal judges implementing a procedural gatekeeping regime that frustrates the ability of civil rights victims to pursue their claims and receive a decision on the merits in federal court. The Article's larger aim is to help students and academics better appreciate the historical context of this case and the role it

might productively play in current debates about discrimination, reproductive freedom, and procedural justice.

I. SUMMARY OF THE CASE

A. *Facts*

On July 9, 1971, Ora Spitler McFarlin of Auburn, Indiana, through her attorney Warren G. Sunday, presented a petition to Judge Harold D. Stump of the DeKalb County Circuit Court asking to have her fifteen-year-old daughter, Linda Spitler, surgically sterilized.¹⁵ The petition, entitled “Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement,”¹⁶ alleged that the daughter was “somewhat retarded although she is attending or has attended the public schools . . . and has been passed along with other children in her age level”¹⁷ The petition also stated that Linda was associating with “older youth or young men and . . . [had] stayed overnight with said youth or men” and that it would be in the daughter’s best interest to undergo a tubal ligation “to prevent unfortunate circumstances.”¹⁸

These facts, alleged in the sterilization petition and reprinted in an extensive footnote in the Supreme Court opinion, do not begin to tell the full story. Linda Spitler lived with her mother, two sisters, brother, and a series of step-fathers¹⁹ in a small rust belt town in Northern Indiana.²⁰ Linda’s mother worked two jobs and was absent most of the time.²¹ The unfortunate circumstances of Spitler’s childhood included poverty, sexual and physical abuse, indifference, and neglect.²² Beaten by an older sister, alcoholic brother, and step-father,²³ and sent away at times to live with a second older sister²⁴ and foster parents,²⁵ Spitler says she “was never wanted or loved,”²⁶ and

15. *Stump v. Sparkman*, 435 U.S. 349, 351 (1978).

16. *Id.* at n.1.

17. *Id.*

18. *Id.*

19. See COLEMAN & HEADLEY, *supra* note 1, at 3, 9–10, 18–19.

20. The “Rust Belt” refers to “the northeastern and midwestern states of the United States in which heavy industry has declined.” See *rust belt*, AMERICAN HERITAGE DICTIONARY (3d ed. 1992).

21. See COLEMAN & HEADLEY, *supra* note 1, at 5, 24.

22. *Id.* at 11, 20–23, 35, 38–39.

23. *Id.* at 5, 9, 28.

24. *Id.* at 15, 17–18.

25. *Id.* at 27–29.

that her mother was “very strict”²⁷ with her as a teenager and rarely permitted her to leave the house.²⁸ When Spitler sought more independence—for example, an opportunity to go to the movies or socialize with young men—her sister and mother accused her of being a “whore” and “letting . . . dirty old men climb on me.”²⁹

The extent of Spitler’s sexual activities as a teenager is unclear. However, certain family circumstances likely influenced her mother’s decision to seek a court order authorizing the sterilization of her fifteen-year-old daughter. Ora McFarlin had married her first husband, Pete Spitler, at age seventeen³⁰ and had four children by her mid-twenties.³¹ In addition, Linda Spitler’s older sister, Kathy, became pregnant as a senior in high school,³² when Linda Spitler would have been about fifteen or sixteen years old. This was approximately the same period when Ora McFarlin sought to sterilize Linda.

The sterilization petition was an unusual legal document.³³ It had no case caption naming the parties to the case or the court. The caption merely read “State of Indiana County of DeKalb.”³⁴ Although the document was titled a “Petition,”³⁵ it did not in fact contain a petition or a motion asking for the court to take any action. Rather, it

26. *Id.* at 34.

27. *Id.* at 31, 36–37.

28. *Id.* at 35.

29. *Id.* at 20, 31, 35.

30. Ora McFarlin was born in 1919 to William Wappes and Freda Preston, and she married Pete Spitler, Linda’s father, in 1937. See *Obituaries—McD*, NOBLE COUNTY INDIANA LIBRARY, WHAN COLLECTION, <http://gen.nobleco.lib.in.us/Obituaries/McD.htm> (last visited Nov. 9, 2014). She married David McFarlin in 1971. *Id.* McFarlin’s obituary lists her occupation as “dietary aide.” *Id.* Ora McFarlin’s mother died in childbirth when Ora was four years old. See *Death Records in Simon Journal 1900–1943*, NOBLE RECORDS FROM THE WHAN COLLECTION, <http://gen.nobleco.lib.in.us/Births/DeathsSimon.htm> (last visited Nov. 9, 2014) (stating Freda Wappes (Preston) died in 1923 “from childbirth”).

31. Specifically, a search of birth and death records shows Ora McFarlin had two sons and four daughters: Bruce (born 1940), Joe (born 1942), Carol (born 1943), Beverly (born 1944), Kathy (born 1954) and Linda (born 1955). These birth dates were compiled by researching the public records for each child listed in Ora McFarlin’s obituary, *supra* note 30.

32. See COLEMAN & HEADLEY, *supra* note 1, at 19.

33. This discussion of the sterilization petition builds on a similar analysis by remedies scholar Doug Laycock. See Douglas Laycock, *Civil Rights and Civil Liberties*, 54 CHI.-KENT L. REV. 390, 392–93 (1977).

34. The full text of the petition and Judge Stump’s order are reproduced in the first footnote of the Supreme Court’s opinion. See *Stump v. Sparkman*, 435 U.S. 349, 351 n.1 (1978).

35. *Id.*

was written as an affidavit in which Ora McFarlin attested to her daughter’s mental defects and promiscuity and McFarlin’s inability to control her, and it stated that it would be in the child’s best interest to be sterilized.³⁶ Oddly, McFarlin’s sworn statement included an indemnification clause, whereby, “in consideration of the Court . . . approving the Tubal Ligation” she agreed to “indemnify and . . . hold harmless” the physician and the hospital “from and against all or any matters or causes of action that could or might arise as a result of the performing of said Tubal Ligation.”³⁷ McFarlin’s attorney affixed his signature below her signed, sworn statement as “Warren G. Sunday, Notary Public.”³⁸

A one-sentence order is typed at the end of the two-page document.³⁹ It states, “I, Harold D. Stump, . . . do hereby approve the above petition by affidavit form on behalf of Ora Spitler McFarlin . . . subject to . . . McFarlin covenanting and agreeing to indemnify . . . Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of actions arising therefrom.”⁴⁰ McFarlin’s attorney drafted the affidavit and the order;⁴¹ they appear together on his firm’s letterhead.⁴² Yet Warren Sunday did not sign the document as an attorney of record. The reason is unclear, but there are several explanations worth exploring.

Less than two years earlier, Indiana had undertaken a major overhaul of its civil court rules, conforming them with the Federal Rules of Civil Procedure.⁴³ Under the state’s new Trial Rule 11, if a client was represented by counsel, the attorney himself was required to sign and attest to the fact that he had read a pleading and believed that there is good ground to support it and that it was not interposed for delay.⁴⁴ The attorney was subject to disciplinary action for a willful violation of this rule.⁴⁵ According to the drafters of the new rule, “for

36. *Id.*

37. *Id.*

38. *Stump*, 435 U.S. at 351.

39. *Id.* at 352 n.1.

40. *Id.*

41. *Id.* at 351.

42. See Exhibit A, Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement, Jul. 9, 1971, at 1, 2, *Sparkman v. McFarlin*, No. F-75-129 (N.D. Ind. Dec. 5, 1975). The National Archives in Chicago furnished a copy of this document.

43. IND. R. CIV. P. v-vi (1969) (Indiana Supreme Court order adopting rules effective January 1, 1970).

44. See IND. R. TRIAL P. 11(A) (West 1971).

45. *Id.*

the most part, [it] preserves prior Indiana practice” and “[t]he only change is that the new rule also requires the address and telephone number [of the signatory] to be stated.”⁴⁶ It is doubtful, therefore, that Warren Sunday’s failure to sign the petition as an attorney of record was due to confusion about the new rule.

Perhaps it was the parties’ intention that Ora McFarlin proceed pro se. But Warren Sunday prepared the document,⁴⁷ and it is typed on his firm’s letterhead, which suggest this was not a pro se matter.

Maybe there was an emergency, real or perceived, preventing Sunday from investigating the alleged facts.⁴⁸ Certainly, the risk of a teen pregnancy would likely have been viewed a matter of great urgency in a small Midwestern town in 1971. In addition, although not established in any trial record,⁴⁹ and accounts conflict, some sources suggest that Linda Spitler had appendicitis.⁵⁰ Assuming this is true, a desire to perform the sterilization concurrent with an appendectomy may have been viewed as an emergency by the parties. However, the prevailing rule at that time would have required, in that case, the petition to state “specific facts show[ing] . . . that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition” and that “efforts have been made to give notice” or “the reasons . . .

46. IND. SUP. CT., STATE OF IND. CIVIL CODE STUDY COMM’N, INDIANA RULES OF CIVIL PROCEDURE PROPOSED FINAL DRAFT 45–46 (1968) [hereinafter 1968 IND. RULES STUDY COMM’N].

47. *Stump v. Sparkman*, 435 U.S. 349, 351 (1978).

48. Chief Justice Burger raised this possibility during oral arguments, likening the sterilization petition to an ex parte injunction or temporary restraining order. See Oral Argument at 34:12, *Stump v. Sparkman*, 435 U.S. 349 (1978) (No. 76-1750), available at http://www.oyez.org/cases/1970-1979/1977/1977_76_1750. Such actions were one of a handful submitted on “verified pleadings” in Indiana, that is, by affidavit of the client. See 1968 IND. RULES STUDY COMM’N, *supra* note 46, at 46 (listing actions requiring verified pleadings).

49. There was no trial or a record of any legal proceeding, see discussion, *infra* notes 54–57, and *Sparkman*’s subsequent civil rights suit was dismissed before trial. See *infra* Part II.E.

50. Compare Oral Argument, *supra* note 48, at 42:20 (“I think that Linda, the facts would show, was in the hospital a few weeks earlier supposedly for the purpose of having her appendix removed and then was discharged.”) (oral argument of Richard H. Finley, *Sparkman*’s lawyer in the Supreme Court); COLEMAN & HEADLEY, *supra* note 1, at 1; Morton Mintz, *Court Hears Case of Girl Sterilized Without Her Consent*, WASH. POST, Jan. 11, 1978, at A10 (“To induce Linda to submit to surgery, McFarlin told her she would enter the hospital for an appendectomy to correct the appendicitis that Dr. Hines recently had been treating. Actually, the physician performed both an appendectomy and the tubal ligation.”), with *Stump*, 435 U.S. at 353 (stating that *Sparkman* “was told that she was to have her appendix removed. The following day a tubal ligation was performed upon her. She was released several days later, unaware of the true nature of her surgery”).

that notice should not be required.”⁵¹ The petition did not contain any of this information.

Finally, evaluating the petition in the best possible light, perhaps, as suggested by remedies scholar Douglas Laycock, Sunday viewed this as a declaratory judgment action.⁵² But, as Laycock observes, the indemnity provision suggests that the parties had some doubt about the legality of the operation, even with a court’s approval.⁵³ In sum, features of the document suggest the parties’ intended to keep it secret and potentially had doubts about both the factual allegations contained in it and the legality of the operation.

Despite these red flags, Judge Stump signed the requested order the same day that he received the petition.⁵⁴ Linda Spitler did not receive even rudimentary procedural due process, despite the extreme and permanent deprivation at stake. She received no notice of the proceeding. There was no hearing.⁵⁵ She did not have a guardian ad litem appointed to represent her. The court received no evidence beyond Ora McFarlin’s verified pleading. Judge Stump did not cite any legal authority for his decision and, apparently, did not

51. IND. R. TRIAL P. 65(B) (West 1971).

52. Laycock, *supra* note 33, at 393. Another possibility, not explored by Laycock, is that Warren Sunday meant to treat the petition as an “agreed case,” a form of action whereby the parties to a controversy who agree upon the facts in the case bring an action before a court by affidavit and without process. See IND. CODE ANN. § 2-1704 (LexisNexis 1971); see also ABRAHAM CARUTHERS & ANDREW BENNETT MARTIN, HISTORY OF A LAWSUIT 468–69 (1919); John D. Welman, *Demurrer to Parts of Complaint*, 7 IND. L.J. 165, 177 (1931) (“The parties may submit an agreed statement of facts, in good faith, signed by the parties, and ask that their rights be determined. Thereupon the court may render judgment. This statement, the submission, and judgment of the court is the entire record.”). If that was the intention, the glaring flaw was the absence of Linda Spitler as a party to the agreement.

53. Laycock, *supra* note 33, at 393. Indeed, Richard H. Finley, the lawyer who argued Sparkman’s appeal in the Supreme Court, when asked why the parties came to the court at all, responded, “I believe . . . I think the doctor wanted the protection of an instrument signed by the Judge They wanted a piece of paper with the Judge’s name on it” See Oral Argument, *supra* note 48, at 42:06.

54. *Stump*, 435 U.S. at 352.

55. Sparkman asserted in her memoir that Judge Stump approved the petition “while standing on a street corner, talking it over” with her mother. See COLEMAN & HEADLEY, *supra* note 1, at xi. Along the same lines, Marjorie Lindblom, a partner at Kirkland & Ellis, who as a young associate argued Sparkman’s appellate case pro bono on remand before the Seventh Circuit United States Court of Appeals, said “I recall Finley [Sparkman’s lawyer] telling me that the Judge had been presented with the petition in a diner.” Laura Kessler Telephone Interview with Marjorie Press Lindblom, Partner, Kirkland & Ellis L.L.P. (Aug. 23, 2012). None of these accounts is included in the Supreme Court opinion, but Justice Stewart’s dissent suggests the basic scenario, noting that Judge Stump “acted with informality” and “may not have been in his judge’s robes, or in the courtroom itself.” *Stump*, 435 U.S. at 368 (Stewart, J., dissenting) (internal quotation marks omitted).

even docket the case.⁵⁶ As one newspaper reported, “The paper never was filed in court. Judge Stump approved the sterilization without disclosing his actions to anyone.”⁵⁷ Six days later, Linda entered DeKalb Memorial Hospital.⁵⁸ She was told that she was to have her appendix removed.⁵⁹ The next day a tubal ligation was performed on her by Dr. John H. Hines, assisted by another doctor and an anesthesiologist.⁶⁰

Two years later, Linda Spitler married Leo Sparkman.⁶¹ Failing to become pregnant, she discovered that she had been sterilized.⁶² Linda Sparkman then brought Section 1983 and Section 1985 federal civil rights claims for damages against Judge Stump; Linda’s mother, Ora McFarlin; McFarlin’s attorney, Warren Sunday; the doctors who performed the operation; and the hospital.⁶³ The main theory for holding the private defendants liable under the Civil Rights Act was that they had conspired with Judge Stump to bring about the unconstitutional acts.⁶⁴ Linda Sparkman also joined supplemental (then called “pendent”)⁶⁵ state law claims against the physicians for assault and battery and medical malpractice.⁶⁶ Leo Sparkman asserted a pendent claim for loss of potential fatherhood.⁶⁷ The case was filed in federal court in Indiana.⁶⁸

56. Irene Merker Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833, 834 (1978).

57. See John Rutherford, *Secret Court Order*, INDIANAPOLIS NEWS, Jan. 18, 1978.

58. *Stump*, 435 U.S. at 353.

59. *Id.*

60. *Sparkman v. McFarlin*, 552 F.2d 172, 173 (7th Cir. 1977), *rev’d sub nom.* *Stump v. Sparkman*, 435 U.S. 349 (1978).

61. *Id.*

62. *Id.*

63. *Stump*, 435 U.S. at 353. Section 1983 provides remedies for violations of federal civil rights including declaratory relief and, in some cases, injunctive relief. 42 U.S.C. § 1983 (2012). Section 1985 provides similar remedies for conspiracy to violate federal civil rights. 42 U.S.C. § 1985 (2012).

64. *Stump*, 435 U.S. at 354.

65. Pendent jurisdiction provided the authority of a federal court to hear a substantially related state law claim against a party already facing a federal claim, thereby encouraging efficiency by only having one trial at the federal level rather than one trial in federal court and another in state court. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966). The holding in *Gibbs* was essentially codified by Congress along with ancillary jurisdiction in 28 U.S.C. § 1367 (2012), its supplemental jurisdiction statute.

66. *McFarlin*, 552 F.2d at 173.

67. *Id.* at 173–74.

68. *Stump*, 435 U.S. at 353.

B. The Legal Landscape

Sparkman was fighting an uphill battle with her lawsuit against Judge Stump. At the time, precedent had established near-total judicial immunity as a settled feature of American law. Indeed, the history of the judicial immunity doctrine in America suggests that the expansive form it took here may have been developed to protect judges from civil rights claims like Sparkman’s, despite Congress’s wishes to the contrary.

The judicial immunity doctrine as we know it has its principal beginnings in the Supreme Court’s 1871 decision, *Bradley v. Fisher*.⁶⁹ Bradley was the defense counsel for John Surratt, one of the accused co-conspirators in Abraham Lincoln’s assassination.⁷⁰ Judge Fisher had disbarred Bradley from practicing before the Supreme Court of the District of Columbia for allegedly insulting and threatening to assault him during Surratt’s trial.⁷¹ The Supreme Court of the United States, on a writ of mandamus, held that Judge Fisher, a judge in the criminal court, acted in excess of his jurisdiction to disbar Bradley from the Supreme Court of the District of Columbia and ordered his reinstatement.⁷² Subsequently, Bradley brought an action for money damages against Judge Fisher.⁷³

The Supreme Court of the United States denied Bradley’s claim for damages, announcing a sweeping rule of absolute immunity for judges in their official capacity.⁷⁴ Distinguishing judicial acts “in excess of jurisdiction” from judicial acts taken “with clear absence of all jurisdiction,”⁷⁵ Justice Field writing for the Court, held that “judges . . . are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.”⁷⁶ That is, judges are immune from all civil liability for any judicial act, unless there is “a

69. 80 U.S. (13 Wall.) 335 (1871). A previous decision, three years earlier, suggested an exception from immunity for judicial acts done in excess of jurisdiction and maliciously and corruptly, but this exception was eliminated in *Bradley*. See *Randall v. Brigham*, 74 U.S. (Wall.) 523, 537 (1868).

70. ANDREW JAMPOLER, *THE LAST LINCOLN CONSPIRATOR: JOHN SURRETT’S FLIGHT FROM THE GALLOWS* (2009).

71. *Bradley*, 80 U.S. (13 Wall.) at 337.

72. 74 U.S. (7 Wall) 364 (1869).

73. *Id.* at 336–37.

74. *Id.* at 356–57.

75. *Id.* at 351.

76. *Id.*

clear absence of *all* jurisdiction over the subject matter.”⁷⁷ Justice Field justified this broad rule on three grounds: its alleged long-standing existence in Anglo-American common law,⁷⁸ its necessity in protecting judicial independence,⁷⁹ and the existence of alternative means, such as appeal and impeachment, as adequate for redressing litigant grievances.⁸⁰

Justice Field’s reasoning is compelling on its face, but his opinion is notably silent about the decision’s potential impact on a matter of great political importance at the time. In 1871, the same year that the judicial immunity doctrine was fashioned by the Supreme Court in the broadest possible terms, Congress passed the Civil Rights Act of 1871, also known as the Ku Klux Klan Act,⁸¹ intended to make state officials, including state judges, liable for civil rights violations. The 1871 law imposed civil liability on any person who, under color of state law, caused anyone to be deprived of his civil rights.⁸² Congress passed this law to target the rampant racially motivated violence being committed by groups like the Klan in former slaveholding states.⁸³ The line between private acts of violence and state-sponsored violence was blurry. For example, public officials were often backed in elections by white supremacist groups like the Klan.⁸⁴ Moreover, state officials and local judges were typically complicit, tolerating and condoning racial violence.⁸⁵ Congress passed the Ku Klux Klan Act of 1871 in recognition of the fact that the Thirteenth Amendment, ratified in 1865;⁸⁶ the Fourteenth Amendment, ratified in 1868;⁸⁷ and early civil rights statutes passed by Congress pursuant to the Thirteenth and Fourteenth Amendments, were not adequate to

77. *Id.* (emphasis added).

78. *Id.* at 347.

79. *Id.* at 347–48.

80. *Id.* at 350, 354.

81. Ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (2012)).

82. *Id.*

83. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 454–55 (1984); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1334 (1952); James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 387 & 387 n.4. (2014).

84. See LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, & THE DEATH OF RECONSTRUCTION 58 (2008) (“Across the South, the Ku Klux Klan and related organizations emerged as armed wings of white political movements.”).

85. See *Owens v. Okure*, 488 U.S. 235, 249 n.11 (1989) (discussing history).

86. U.S. CONST. amend. XIII.

87. U.S. CONST. amend. XIV.

protect the freedom of blacks.⁸⁸ The Civil Rights Act of 1871 responded directly to the problem of state and local law enforcement complicity with private perpetrators of violence.⁸⁹

The sweeping judicial immunity doctrine announced by the Court in 1871 undercut Congress’s efforts to provide a civil rights remedy for freed blacks against racist state officials and judges.⁹⁰ It had no constitutional or statutory basis.⁹¹ Notwithstanding Justice Field’s assertions, the decision was a sharp departure from the broad common law rule of general judicial liability recognized by the majority of the states at the time,⁹² as well as its English common law antecedents.⁹³ Moreover, the Court’s holding in *Bradley* is consistent

88. See Gressman, *supra* note 83, at 1324–34; see also Rebecca Hall & Angela P. Harris, *Hidden Histories, Racialized Gender, and the Legacy of Reconstruction: The Story of United States v. Cruikshank*, in *WOMEN AND THE LAW STORIES* 29–37 (Elizabeth M. Schneider & Stephanie M. Wildman, eds. 2011).

89. Gressman, *supra* note 83, at 1334. According to Gressman, the 1871 Act went beyond outlawing conspiracy in the narrow sense of concerted joint action or even the requirement that the public and private parties reach an unstated understanding to deprive a citizen of her civil rights: “[T]he person whose civil rights were injured was given a civil cause of action against the officer *who should have but did not* protect him” *Id.* (emphasis added); cf. Pope, *supra* note 83, at 417 (reviewing legislative history and concluding that Congress, in passing the Ku Klux Klan Act of 1871, was of the opinion that it “could reach private action if, in its view, state enforcement had failed”). This position was not uniformly embraced by scholars or courts, however. For a concise summary of the varying positions on just how much state action, if any, was contemplated by the 1871 Act, see Stephanie M. Wildman, *42 U.S.C. § 1985 (3)—A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved*, 17 *SAN DIEGO L. REV.* 317, 325–26 (1980).

90. It is not clear whether this was the Court’s intention, but historians note that Justice Field, as a Democrat, opposed Reconstruction and “had almost no interest” in blacks’ rights. See FONER, *supra* note 83, at 530; see, e.g., also *Ex Parte Virginia*, 100 U.S. 339, 368 (1879) (Field, J., dissenting) (discussing Congress’s lack of authority to pass a law that resulted in the conviction of a Virginia judge for excluding African Americans from jury service solely on account of their race and suggesting a parade of horrors might result from the law, including the requirement that African Americans serve as judges).

91. K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 *HOW. L.J.* 95, 105 (1995).

92. Robert Craig Waters, *Judicial Immunity vs. Due Process: When Should a Judge Be Subject to Suit?*, 7 *CATO J.* 461, 466 (1987) (“[F]rom 1869 to 1872 the Supreme Court extended a sweeping form of immunity to state-court judges that a majority of the states themselves would not have recognized under their own law.”); Note, *Liability of Judicial Officers Under Section 1983*, 79 *YALE L.J.* 322, 326–27 (1969) (review finding that, in the year 1871, only thirteen states recognized the rule of absolute judicial immunity, six states denied immunity for malicious acts, and eighteen states never conclusively ruled on the issue of immunity).

93. Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 *S.C. L. REV.* 201, 254 (1980) (“English law does not provide support for a broad rule of immunity except as it has been misread and misapplied by successive generations of American judges.”); *id.* at 255 (“A very few of the highest courts were regarded as superior courts and presumed to have jurisdiction in all cases for reasons that are historical and not

with other Supreme Court decisions in this period reaffirming a narrow vision of federal power to protect blacks from state and local violence.⁹⁴ Thus, although not explicit in the *Bradley* decision, its coincidental timing with the passage of the Civil Rights Act of 1871, break with prior precedent, and fit within a line of cases evincing Supreme Court hostility to Reconstruction suggest that the judicial immunity doctrine has a complex,⁹⁵ if not suspect, pedigree related to substantive objections to federal civil rights law, rather than simply the value of “judicial independence” invoked by the Court.⁹⁶

compelling at present. For judges of other courts, including most of the courts in England, the rule was only limited immunity; extrajudicial acts and acts within jurisdiction but motivated by malice were actionable.”); Judge Phillip J. Roth & Kelly Hagan, *The Judicial Immunity Doctrine Today: Between the Bench and a Hard Place*, 35 JUV. & FAM. CT. J. 3, 6 (1984) (“[A]rguments based on the long and unquestioned tenure of judicial immunity are spurious. Not only do such arguments avoid the crucial inquiry into policy, but the facts of the matter are that judicial immunity occupies no such hallowed position in English or American common law. Liability, not immunity, has been the longer standing rule, with absolute immunity coming as a relatively late development.”).

94. *See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3, 25–26 (1883) (declaring the Civil Rights Act of 1875 unconstitutional, because Congress lacked the authority under the Fourteenth Amendment to outlaw race discrimination by private individuals and organizations; the Fourteenth Amendment protects only against state action); *Virginia v. Rives*, 100 U.S. 313, 322–23 (1879) (upholding the conviction of two black men by an all-white jury, even though whites were rarely apprehended, tried, or convicted of crimes against blacks by state officials or judges); *United States v. Cruikshank*, 92 U.S. 542, 559 (1875) (annulling the convictions of three men involved in the massacre of 100–300 African Americans in Colfax, Louisiana, including about 50 being held as prisoners, because, *inter alia*, there was not sufficient state action shown even though Louisiana had done nothing to redress these brutal murders); *The Slaughter-House Cases*, 83 U.S. 36, 78–92 (1872) (holding that the Privileges and Immunities Clause of the Fourteenth Amendment concerned only a scattered collection of miscellaneous federal rights related to national citizenship, and not individuals’ human rights generally). For a history of *Cruikshank*, one of these decisions, and the other Supreme Court decisions “terminating” Reconstruction during this era, see Pope, *supra* note 83, at 385, 405–27 (2014).

95. Other explanations for the sweeping form of judicial immunity announced in *Bradley*, beyond the imperative of judicial independence, include: (1) the desire to develop a uniform rule of judicial immunity for all courts, *see* Roth & Hagan, *supra* note 93, at 3–4; Feinman & Cohen, *supra* note 93, at 246, 265; (2) the declining need and desirability of judicial liability as the legal profession and state judicial systems became more professionalized, *see* Feinman & Cohen, *supra* note 93, at 243; (3) “[T]he necessities of judicial administration . . . as the judicial system became larger and more complex. The threat of disruption from private suits against judges was a significant danger at a time when the system was barely able to function even without such interference,” *id.*; and (4) the Supreme Court’s general “conservative outlook,” including its desire to preserve the existing economic and social order and lack of concern for protecting individuals from the abuses of the powerful. *Id.* at 248–49.

96. After *Bradley*, in the name judicial independence and federalism, racist violence, with complicity of state officials and judges, continued unabated in the South. *See* LAWRENCE FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 190 (1993) (“The ‘golden age’ of the lynch mob was in the years after 1880. Any threat to the ideology of

Although the opinion of the Supreme Court gradually changed from non-interventionist and pro-states’ rights to one more concerned with the enforcement of the Bill of Rights and the preservation of civil rights beginning with the New Deal,⁹⁷ it has held fast to the judicial immunity doctrine. In 1967, the Supreme Court finally decided the question implicit in *Bradley*. It held in *Pierson v. Ray* that Congress had not intended to eliminate judicial immunity for state judges when it passed the Civil Rights Act of 1871.⁹⁸ *Pierson* involved a group of black and white “Freedom Rider”⁹⁹ ministers who had engaged in a civil rights protest by attempting to use the “white-only” waiting room in a segregated bus station in Jackson,

white supremacy made a black man a candidate for lynching.”); *cf. In re Wall*, 13 F. 814 (S.D. Fla. 1882). *In re Wall* involved a Florida lawyer who did:

with an unlawful, tumult[u]ous, and riotous gathering, he advising and encouraging thereto, take from the jail of this county and hang a man, to the court known only as John. . . . The offense . . . came to the personal knowledge of the court. As the judge was leaving the court-house for dinner, a prisoner was brought into the yard in custody of officers. Upon his return in the afternoon the dead body of the same person hung in a tree directly in front of the court-house door. No legal execution had taken place. The evidence shows that a person, whose name has not appeared, was taken from the jail, and, in the immediate vicinity of the court-house, hung to the limb of a tree

Id. at 815. The lawyer was disbarred for his role in the lynching, but no apparent action was taken against the judge. *Id.* at 820. The Supreme Court upheld the attorney’s disbarment, but Justice Field dissented, arguing that the lawyer who led a lynch mob should retain his license on the grounds of procedural improprieties. *See Ex parte Wall*, 107 U.S. 265, 290, 318 (1883) (Field, J., dissenting). The lynched man, Charles Owens, had allegedly attempted to rape a young woman of a prominent family. “Although Charles Owens was white, the fact that approximately forty per cent of Tampa’s population was black may have figured in the desire of whites to deal summarily with a man accused of attempted rape.” Robert P. Ingalls, *General Joseph B. Wall and Lynch Law in Tampa*, 63 FLA. HIST. Q. 51, 51, 62 n.54 (1984).

97. *See, e.g.*, *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (declaring state laws establishing separate public schools for black and white students unconstitutional); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 642 (1950) (striking down state law requiring segregated graduate and professional education); *Sweatt v. Painter*, 339 U.S. 629, 636 (1950) (holding that segregated state law schools violate the Equal Protection Clause); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that courts cannot enforce racial covenants on real estate); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (holding that segregated accommodations on interstate buses are unconstitutional).

98. 386 U.S. 547, 553–55 (1967) (applying judicial immunity to 42 U.S.C. § 1983 claims). For a history of the circuit split leading up to *Pierson*, see J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 901–07.

99. *Pierson*, 386 U.S. at 553 n.8 (referring to the ministers as Freedom Riders). Freedom Riders were civil rights activists organized by the Congress for Racial Equality (CORE) who rode interstate buses into segregated Southern states with the purpose of desegregating public transportation in the South. *See* RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* (2006).

Mississippi.¹⁰⁰ They were arrested and convicted by a “municipal police justice.”¹⁰¹ After the defendants successfully challenged their convictions, the ministers sued the arresting police officers along with the judge under Section 1983 of the Civil Rights Act,¹⁰² the successor to the 1871 Ku Klux Klan Act, alleging a conspiracy to deprive them of their civil rights. Applying *Bradley v. Fisher*, the Court held that Congress did not intend to eliminate judicial immunity when it passed the Ku Klux Klan Act, and that the judge was immune from suit.¹⁰³ Chief Justice Warren explained for the majority, “The legislative record [of the Civil Rights Act of 1871] gives no clear indication that Congress meant to abolish wholesale all common-law immunities.”¹⁰⁴ Although Justice Douglas severely criticized the majority’s decision for misreading the legislative history of the Act,¹⁰⁵ as have contemporary scholars,¹⁰⁶ the lower federal courts consistently

100. *Pierson*, 386 U.S. at 548–49.

101. *Id.* at 549.

102. 42 U.S.C. § 1983 (2012).

103. *Pierson*, 386 U.S. at 553–55.

104. *Id.* at 554.

105. *Id.* at 558–59 (Douglas, J., dissenting). Specifically, Justice Douglas stated:

[E]very member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable. Many members of Congress objected to the statute because it imposed liability on members of the judiciary

Yet despite the repeated fears of its opponents, and the explicit recognition that the section would subject judges to suit, the section remained as it was proposed: it applied to “any person.” There was no exception for members of the judiciary. In light of the sharply contested nature of the issue of judicial immunity it would be reasonable to assume that the judiciary would have been expressly exempted from the wide sweep of the section, if Congress had intended such a result.

The section’s purpose was to provide redress for the deprivation of civil rights. It was recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied. The parade of cases coming to this Court shows that a similar condition now obtains in some of the States. Some state courts have been instruments of suppression of civil rights. The methods may have changed; the means may have become more subtle; but the wrong to be remedied still exists.

Id. at 561–563 (citations omitted).

106. See WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 957–58 (2007) (presenting detailed legislative background of the Civil Rights Act of 1871 demonstrating that no one in Congress disputed the analogy between the 1871 Act and a similar 1866 Act holding judges criminally liable; the sponsor of the 1871 Act never disputed opponents’ allegations that the law would make judges civilly liable; supporters of the 1871 Act explicitly referenced state courts as the intended target of the law; and that the 1871 bill was passed overwhelmingly).

applied the judicial immunity doctrine after *Pierson*. These were the controlling precedents when Linda Sparkman filed her lawsuit against Judge Stump and the other defendants in 1978.

C. The District Court Case and Appeal to the Seventh Circuit

The trial judge in *Stump*, Jesse Eschbach, had previously ruled rather consistently for plaintiffs in welfare,¹⁰⁷ labor,¹⁰⁸ and civil rights cases.¹⁰⁹ However, given the legal landscape, perhaps it is not surprising that Judge Eschbach dismissed Sparkman’s federal civil rights claims as to all parties on the ground that Judge Stump, the only state official named as a defendant, was absolutely immune from suit.¹¹⁰ Consequently, no state action could be shown, which was necessary to the federal claims.¹¹¹ Judge Eschbach also dismissed the pendent state-law tort claims, given the failure of the federal claims before trial.¹¹²

107. *See, e.g.*, *Green v. Stanton*, 364 F. Supp. 123, 128 (1973) (holding state policy denying welfare benefits to pregnant women for their “unborn children” until the actual birth of the child violates federal Social Security Act), *rev’d in part*, 499 F.2d 155 (7th Cir. 1974), *vacated*, *Stanton v. Green*, 421 U.S. 983 (1975); *Grubb v. Sterrett*, 315 F. Supp. 990, 995 (1970) (holding that a state welfare regulation denying welfare benefits to a child with a stepparent present in the home violates federal welfare law); *Broddie v. Gardner*, 258 F. Supp. 753, 757–58 (N.D. Ind. 1966) (holding that a child adopted by a parent after his parent became disabled and eligible for benefits is entitled to child’s benefits under the Social Security Act).

108. *See, e.g.*, *Local 186, Intern. Pulp, Sulfite and Paper Mill Workers v. Minnesota Mining & Mfg. Co.*, 304 F. Supp. 1284, 1295 (1969) (denying summary judgment in action by union against employer on behalf of employees who had been discriminated against on the basis of sex); *Dick v. Sinclair Glass Co.*, 283 F. Supp. 505, 513–14 (N.D. Ind. 1967) (granting temporary injunction prohibiting employer from violating National Labor Relations Act).

109. *See, e.g.*, *Affeldt v. Whitcomb*, 319 F. Supp. 69, 79 (1970) (holding that a durational residency requirement for voting infringed the right to vote and to equal protection).

110. *Stump v. Sparkman*, 435 U.S. 349, 354 (1978).

111. The “derivative” immunity rule followed by the majority of circuits at the time required the dismissal of any claims against a private party alleged to have conspired with an immune state official, no matter how strong the allegations of the conspiracy or severe the violation of constitutional rights. *See* Martha O. Shoemaker, Note, *Stump v. Sparkman: The Scope of Judicial and Derivative Immunities Under 42 U.S.C. § 1983*, 6 WOMEN’S RTS. L. REP. 107, 111 n.21, 115–17 (1980).

112. *See* *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (“Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well.”).

Sparkman appealed to the Seventh Circuit, which unanimously reversed on the immunity question.¹¹³ Although the court acknowledged *Bradley* and *Pierson* as relevant authority,¹¹⁴ it found the facts of Sparkman's case to lie outside the boundaries of the judicial immunity doctrine as defined by those precedents. "Judicial immunity," the court said, "is available . . . only where the judge has jurisdiction."¹¹⁵ Judge Stump's action did not meet this requirement, according to the court. Indiana statutes in existence at the time permitted sterilizations, but only of institutionalized persons and only if certain procedures were followed.¹¹⁶ These procedures included the right to notice, the opportunity to defend, and the right to appeal.¹¹⁷ According to the Seventh Circuit, this statutory scheme "negat[ed]" subject matter jurisdiction,¹¹⁸ there was simply no statutory authority for Judge Stump's actions.¹¹⁹ Nor did the common law, according to the court, provide any jurisdictional basis for Judge Stump's order.¹²⁰ In sum, the Seventh Circuit found no express basis in statutory or common law for a court to order the sterilization of a minor child simply upon a parent's petition.¹²¹ To give judges immunity in such cases, Judge Swygert wrote, "would be sanctioning tyranny from the bench."¹²²

D. The Supreme Court Proceedings and Decision

Judge Stump and his co-defendants appealed to the Supreme Court. The law clerk assigned to review Stump's petition for certiorari recommended against hearing the case, because he thought there would be "institutional costs."¹²³ As he explained:

This is a sordid case. If this Court grants review the case will attract even wider attention and publicity than it has already

113. *Sparkman v. McFarlin*, 552 F.2d 172, 176 (7th Cir. 1977), *rev'd sub nom.* *Stump v. Sparkman*, 435 U.S. 349 (1978).

114. *Id.* at 174.

115. *Id.*

116. *Id.* at 174-75, 175 n.3 (citing IND. CODE §§ 16-13-13-1 to 6 (1971)).

117. *Id.* at 175.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 174-75.

122. *Id.* at 176.

123. Prelim. Mem. from Monte Stewart, law clerk, to Chief Justice Warren Burger 5 (Aug. 17, 1977) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 76-1750 *Stump v. Sparkman*).

received—all for the wrong reasons. And regardless of how the Court rules on the narrow legal issue raised (judicial immunity), its decision, because of the underlying fact pattern, will be very susceptible to popular misunderstanding These costs would seem to outweigh any benefits to be derived from plenary review of a CA opinion so fact-specific that its precedential value, its potential for mischief, is de minimis.¹²⁴

Justice Powell’s clerk agreed, noting that “the public would misunderstand whatever ruling came out of this case.”¹²⁵ Moreover, because Judge Stump had not yet been tried on the merits, there was some sentiment among the justices that certiorari should be denied.¹²⁶ If Judge Stump prevailed at trial, the Court could avoid wading into this controversial case. Yet, some of the justices disagreed with the Seventh Circuit’s interpretation and application of the judicial immunity doctrine. For example, Justice Powell wrote in his notes of the conference discussing the certiorari petition that the Seventh Circuit had “settled law of immunity for that circuit,” and “this decision severely undercuts *Pierson v. Ray*.”¹²⁷ Perhaps given these conflicting considerations, five justices initially voted to reverse summarily without issuing an opinion.¹²⁸ However, Justice Brennan, who initially voted not to hear the case for lack of a trial on the merits, switched his vote to grant certiorari and hear oral argument,

124. *Id.*

125. Handwritten note from Nancy Bregstein, law clerk, to Lewis S. Powell, Jr. (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 76-1750 Stump v. Sparkman). However, Powell’s clerk was less adamant than Justice Burger’s about denying certiorari, for two reasons. First, she noted that “if the issue is certworthy, public reaction . . . would not be a valid reason for denying cert.” *Id.* Second, she argued, the fact that Judge Stump had not yet been tried should not figure into the Justice’s decision about whether to hear the case. *Id.*

126. For example, Justice Powell scribbled on the vote sheet indicating his vote to deny certiorari, “Case has not been tried on the merits.” Conference Notes of J. Lewis F. Powell, Jr. (Sept. 27, 1977) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 76-1750 Stump v. Sparkman) [hereinafter Powell Conference Notes]. Similarly, Justice Blackmun wrote at the end of the preliminary certiorari memo circulated among the justices, “The judge will be free to plead and prove some qualified immunity or defense at trial. Deny.” Handwritten note by Harry A. Blackmun (Aug. 23, 1977) (on file with the Library of Congress in Harry A. Blackmun Papers, box 269, folder 4).

127. Powell Conference Notes, *supra* note 126.

128. *Id.*

and Justice Marshall followed.¹²⁹ This switch apparently produced the requisite four votes necessary to grant certiorari and hear oral argument, as required by Supreme Court rules.

At oral argument,¹³⁰ Justice Stewart's questions suggested he was skeptical that Judge Stump had subject matter jurisdiction to hear the sterilization petition. He asked:

What if Mrs. McFarlin had presented a piece of paper to your client, the Judge, and said my daughter is incompetent, she is a kleptomaniac, she has done a lot of shoplifting and I want your approval to have her right hand chopped off and the Judge had signed the approval and that surgery had been performed

. . . .

. . . [L]et us assume . . . that the Court had ordered that operation on that representation by the parent. Would you be making the same argument?¹³¹

Similarly, Justice Marshall asked, "What statute do you have in Indiana that authorized the parent to sterilize the child without the child's permission? . . . [W]ill you give me the case that the Judge cited? He didn't cite a piece of law about anything."¹³²

Some of the Justices' questions also suggested skepticism about whether Judge Stump's order was a judicial act deserving of immunity. For example, one justice asked whether there was any record in the courthouse that the sterilization petition was ever filed in court.¹³³ The attorney for Judge Stump conceded that there was

129. *Id.* ("The vote that should have prevailed was 5 to Rev. summarily, 2 to grant . . . and hear oral argument, and 2 to deny. But then Brennan outmaneuvered us by switching to a grant and TM [Thurgood Marshall] followed.")

130. The description of the oral arguments in the Supreme Court is based on a transcription of the recording by the author of this article. The recording may be accessed online at [Oyez.org](http://www.oyez.org), a project of the Chicago-Kent College of Law providing audio recordings of United States Supreme Court decisions dating back to 1955. See *Oyez*, CHICAGO-KENT COLLEGE OF LAW, <http://www.oyez.org/about>. This discussion uses the author's determinations as to who is speaking, verified by independent research, throughout.

131. Oral Argument, *supra* note 48, at 6:44. After some back and forth, the attorney for Judge Stump replied, "In answer to your question your honor, that would be an inappropriate action on the part of the Judge. . . . Certainly cutting off her hand is not going to improve her physically." *Id.* at 8:11-28. Justice Stewart rejoined, "Well do you think this improved this child physically, this operation?" *Id.* at 8:32. For verification that Justice Stewart is the speaker, see Mintz, *supra* note 50, at A10 (reporting on this exchange); see also Oral Argument, *supra* note 48, at 9:28 (referring to Justice Stewart's question).

132. *Id.* at 12:00.

133. *Id.* at 14:34.

not, but asserted that this was “not an unusual occurrence,”¹³⁴ and, in any case, “It was certainly a judicial act. It was presented to the Judge, as a judge, signed by him as a judge.”¹³⁵

Other questions from the justices signaled concern about the lack of due process, including the absence of a guardian ad litem to represent Linda Spitler¹³⁶ and the absence of an evidentiary record,¹³⁷ principled judicial inquiry of the child’s best interests,¹³⁸ or opportunity for her to appeal.¹³⁹ Chief Justice Burger, in contrast, seemed less troubled by the apparent lack of due process. He likened the proceeding to a petition for a temporary restraining order, noting that a temporary restraining order could be granted “on the same kind of representations and petition as was presented here, could it not?”¹⁴⁰ Even Justice Marshall, long recognized for his strong support for constitutional protection of individual rights, evinced some sympathy for Judge Stump. “There are many experienced judges who have made mistakes,” asserted Justice Marshall.¹⁴¹

After oral argument, according to Justice Blackmun’s conference notes, Justice White indicated that he thought Judge Stump’s order

134. *Id.* at 14:53 (referencing petitions for approval of minors’ estates that are not generally docketed).

135. *Id.* at 16:29. Along the same lines, Justice Powell suggested that if a parent has the unequivocal right to consent to surgery of a minor child, as the attorney for Judge Stump asserted at oral argument, then Judge Stump’s approval of the sterilization was not necessary under Indiana law. *Id.* at 27:47. “Doesn’t that leave the court in the position of performing only a ministerial act? . . . What judgment does he make?” asked Justice Powell. *Id.* at 28:22. His notes from oral argument echo this assessment. See Powell Conference Notes, *supra* note 126 (“There was no judicial decision. . . . Judge’s consent was not required under statute. It was an unnecessary act.”).

136. Oral Argument, *supra* note 48, at 37:05, 63:20, 65:06; see also Powell Conference Notes, *supra* note 126 (indicating that Justice Stevens, during oral argument, had asked whether “this would have been a different case” if Judge Stump had appointed a guardian ad litem”).

137. Oral argument, *supra* note 48, at 28:46–29:52.

138. *Id.* at 28:50.

139. *Id.* at 16:37.

140. *Id.* at 43:04–44:00. Some of the justices also asked questions suggesting that the plaintiff did not have sufficient evidence to support her conspiracy claim, presaging the Seventh Circuit Court of Appeals disposition of the case on remand. See *infra* Part II.E. For example, Justice Marshall said, “I am not too sure that you have any right to charge him [Judge Stump] with conspiracy at all. You don’t know whether he saw anybody To have a conspiracy you’ve got to have people.” See Oral Argument, *supra* note 48, at 53:58. The attorney for Linda Sparkman responded, “I think we could show if there were a trial that there was a conspiracy.” *Id.* at 54:20.

141. *Id.* at 68:28.

was “too informal a way to pass muster,”¹⁴² but he was nevertheless inclined to accept the trial judge’s dismissal of Sparkman’s claim against Judge Stump and said he might dissent if the Court decided to affirm the Seventh Circuit.¹⁴³ Still, he and three other Justices all agreed this was a hard case.¹⁴⁴ Justice Stevens floated the idea of certifying the question of Judge Stump’s jurisdiction to the Indiana Supreme Court.¹⁴⁵ Chief Justice Burger thought that Judge Stump made a “clear error,” but indicated that “if judicial immunity doctrine means anything, it must apply here.”¹⁴⁶ Ultimately, the Supreme Court reversed the Seventh Circuit in a 5–3 decision.¹⁴⁷ Justice White wrote the majority opinion, joined by Chief Justice Burger and Justices Blackmun, Rehnquist, and Stevens.¹⁴⁸

In reversing, the Supreme Court articulated the by now well-established two-prong test. To be protected by immunity, a judge must have subject matter jurisdiction over the question and perform an official judicial act.¹⁴⁹ As to the first prong, Justice White’s majority opinion disagreed with the determination by the Seventh Circuit that there was a “clear absence of all jurisdiction” for Judge Stump to consider Ora McFarlin’s petition.¹⁵⁰ According to Justice White, Indiana law gave state circuit courts “original exclusive jurisdiction in all cases at law and in equity” unless specifically prohibited by statute or case law.¹⁵¹ The absence of specific authority in Indiana law to decide a petition for sterilization under these circumstances was insignificant; the critical factor was that no law expressly prohibited Judge Stump from entertaining the petition. According to the majority, as a judge sitting in a court of general jurisdiction, Judge

142. Conference Notes of Harry S. Blackmun (Jan. 13, 1978) (on file with the Library of Congress in Harry A. Blackmun Papers, box 269, folder 4) [hereinafter Blackmun Conference Notes].

143. *Id.*

144. Blackmun Conference Notes, *supra* note 142 (indicating that Chief Justice Burger and Justices Stewart, and Stevens all felt this was a “hard case”); Powell Conference Notes, *supra* note 126 (indicating that Justice White felt this was a “tough case”).

145. Powell Conference Notes, *supra* note 126.

146. *Id.*

147. *Stump v. Sparkman*, 435 U.S. 349, 364 (1978). Justice Brennan had voted to join the dissent in conference, *see* Powell Conference Notes, *supra* note 126, but did not take part in the opinion. *Stump*, 435 U.S. at 364. According to news reports, he did not participate because he was ill when the case was considered. *See* Morton Mintz, *High Court Rules Judge Isn’t Liable*, WASH. POST, Mar. 29, 1978, at A1.

148. *Stump*, 435 U.S. at 350–51.

149. *Id.* at 356–57, 360.

150. *Id.* at 357.

151. *Id.* (internal quotation marks omitted) (citing IND. CODE § 33-4-4-3 (1975)).

Stump had jurisdiction over any action before him absent a specific statutory or common law prohibition.¹⁵²

The Supreme Court also found that Judge Stump’s order was a judicial act, the second requirement for judicial immunity.¹⁵³ A judicial act, according to the Court, exists where the judge’s act is one “normally performed by a judge” and where the parties “dealt with the judge in his judicial capacity.”¹⁵⁴ In the majority’s view, approving petitions with respect to minors was a “function normally performed by a judge . . . in his judicial capacity.”¹⁵⁵ Addressing the Seventh Circuit’s assertion that even if Judge Stump had jurisdiction, he was deprived of immunity because of his failure to observe elementary principles of procedural due process, Justice White countered: “A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors.”¹⁵⁶

The majority’s decision vividly illustrates the view that the procedural rule (or in this case, a quasi-procedural rule, judicial immunity) should not bend in the face of substantive claims. By refusing to let Sparkman raise any substantive objections to the sterilization order, the Supreme Court in *Stump* upheld the judicial immunity doctrine in the face of compelling substantive injustice. By endorsing this doctrine in this context, the Court explicitly identified the value of an independent judiciary over substantive justice.

To be sure, the value of judicial independence is a foundational element of our judicial system. As explained by Justice White:

Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of “the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in

152. *Id.* at 358–59

153. *Id.* at 362–64.

154. *Id.* at 362.

155. *Id.*

156. *Id.* at 359. In contrast, remedies scholar Douglas Laycock argues that the “grave procedural errors” referenced by Justice White represent the gravamen of Spittle’s legal action. See Laycock, *supra* note 33. According to Laycock, as a judge sitting in a court of general jurisdiction, Judge Stump did have the power to hear the sterilization petition, however wrongly decided, *id.* at 395–397. However, the lack of effort to serve Linda Spittle deprived the court of personal jurisdiction over her and thus deprived Judge Stump of immunity from suit. *Id.* at 393–94, 400. By resolving the immunity issue without discussing personal jurisdiction, according to Laycock, the Court modified the traditional test for judicial immunity, which Laycock asserts requires both subject matter jurisdiction and personal jurisdiction. *Id.* at 392, 393–95, 404–06.

him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself.”¹⁵⁷

In the normal course, a party who believes he has been wronged by a judge acting in her official capacity may ask the judge to reconsider; appeal to a higher court; or, if the party suspects judicial wrongdoing, file a complaint with the bar association.¹⁵⁸ However, a party cannot generally sue the judge for monetary damages.¹⁵⁹ A judge should not have to answer to a lawsuit whenever she issues a ruling that makes a litigant unhappy. Such threats of personal liability would have a chilling effect on judicial independence by discouraging judges from exercising judicial discretion and judgment.¹⁶⁰

Despite the fundamental importance of an independent judiciary, the Court’s reasoning is unsatisfactory. The judicial immunity doctrine cannot be separated from the larger framework of our judicial system, prescribing that there must be an adversarial process, predicated on a fair chance for competing sides to be heard by an unbiased decision maker. The majority’s strict interpretation of the judicial immunity doctrine preserved one aspect of this system—the unbiased decisionmaker—but it ignored the fact that the proceeding granting the sterilization order lacked every other feature of procedural justice. There was no notice, no personal jurisdiction, no opportunity to present or test evidence, and no opportunity to appeal. This Kafkaesque character of the case distinguished it from earlier Supreme Court decisions emphasizing the availability of

157. *Stump*, 435 U.S. at 363 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871)).

158. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 525–28 (4th ed. 2010).

159. *Id.*

160. See *Bradley*, 80 U.S. (13 Wall.) at 348; *Pierson v. Ray*, 386 U.S. 547, 564 (1967) (Douglas, J., dissenting). Other justifications for the doctrine of judicial immunity include:

[P]rotecting judges from liability for honest mistakes; . . . relieving judges of the time and expense of defending suits; . . . removing an impediment to responsible men entering the judiciary; . . . necessity of finality; . . . appellate review is satisfactory remedy; . . . the judge’s duty is to the public and not to the individual [litigant before him]; . . . judicial self-protection; . . . [and] separation of powers.

Id. at 564 n.4. The Supreme Court has given so much weight to these considerations that judicial immunity extends beyond good faith errors and protects corrupt or malicious decisions. See *Bradley*, 80 U.S. (13 Wall.) at 347–49. Reversal of erroneous decisions and, in egregious cases, removal of malfasant judges are the accepted remedies for judicial error or misbehavior. LAYCOCK, *supra* note 158, at 525–28.

alternative remedies to the aggrieved litigant¹⁶¹ and could easily have provided the basis for a narrow exception without disrupting the basic doctrine of judicial immunity.¹⁶² Moreover, the question of subject matter jurisdiction was close,¹⁶³ as many of the Justices themselves noted, this was a “hard case.”¹⁶⁴ There were compelling constitutional values sounding in privacy, equality, due process, and reproductive rights that called for the abrogation of immunity in this case.

Finally, as discussed in Part I.B., the sweeping form of absolute judicial immunity forged by the Supreme Court in *Bradley* was itself a questionable rule, borne of an anti-Reconstruction Supreme Court willing to allow private racial violence and tyranny—committed in complicity with state officials, including judges—to continue

161. See *Pierson*, 386 U.S. at 554 (“His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.”); *Bradley*, 80 U.S. (13 Wall.) at 354 (“Against the consequences of [judges’] erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort.”).

162. Other proposals, which are beyond the scope of this Article, are to qualify judges’ immunity for criminal, malicious, corrupt, or negligent acts. See, e.g., Feinman, *supra* note 93, at 291 (proposing a flexible standard accounting for whether the judge acted “according to normal procedural standards in good faith”); Pillai, *supra* note 91, at 144–45 (1995) (proposing compensation where a state or federal judicial commission investigates a complaint and finds it merits formal sanctions); Roth & Hagan, *supra* note 93, at 12–13 (discussing alternatives, from absolute immunity to a negligence standard, and proposing a system of judicial liability supplemented with insurance protection); Brittney Kern, Comment, *Giving New Meaning to “Justice For All”: Crafting an Exception to Absolute Judicial Immunity*, 2014 MICH. ST. L. REV. 149, 176–80 (proposing an exception for acts that violate the Model Code of Judicial Conduct and are undertaken with malice); Timothy M. Stengel, Comment, *Absolute Judicial Immunity Makes Absolutely No Sense: An Argument for an Exception for Judicial Immunity*, 84 TEMP. L. REV. 1071, 1105–07 (2012) (proposing an exception where criminal charges are filed related to the conduct and the act is judicial).

163. The general jurisdiction statute gave Judge Stump “original exclusive jurisdiction in all cases at law and in equity whatsoever . . . and jurisdiction in “all other causes, matters, and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer,” *Stump*, 435 U.S. at 357 & 357 n.8, and another statute provided that a parent may consent to medical or hospital care or treatment of her child, including surgery. *Id.* at 358. However, there was no specific statutory or common law basis under which Judge Stump could order the sterilization of a child simply upon the petition of a parent. See *Sparkman v. McFarlin*, 552 F.2d 172, 174 (7th Cir. 1977), *rev’d sub nom.* *Stump v. Sparkman*, 435 U.S. 349 (1978). Moreover, concluding that general jurisdiction cloaks a judge with blanket immunity stretches the judicial immunity doctrine beyond recognition. Given such a reading, it would be impossible for a judge sitting in a court of general jurisdiction to ever act in excess of authority, so long as she is performing a judicial act. See Laycock, *supra* note 33, at 405 (“The result is an immunity with no meaningful limits—perhaps no limits at all for judges of courts of general jurisdiction.”); Stengel, *supra* note 162, at 1077 (“[I]t appears that a judge serving on a court of general jurisdiction has virtually no limit to her immunity . . .”).

164. See *supra* note 144 and accompanying text.

unabated after the Civil War. The Supreme Court subsequently embraced an ahistorical conception of doctrine in the post-1960s civil rights era, with similar consequences. Ultimately, none of this moved the Court majority in *Stump*.¹⁶⁵ Linda Sparkman lost her liberty despite an unjust order, unjust process, and unjust interpretation of federal law and common law precedent.

Justice Stewart wrote a stinging dissent, joined by Justices Powell and Marshall. Agreeing that judges of general jurisdiction enjoy absolute immunity for their judicial acts,¹⁶⁶ he wrote, "I think what Judge Stump did . . . was beyond the pale of anything that could sensibly be called a judicial act."¹⁶⁷ For Justice Stewart, the meaning of a "judicial act" must be informed by the immunity doctrine's underlying purpose of protecting judges' "principled decision-making."¹⁶⁸ "[P]rincipled decision-making," according to Stewart, involves the presence of litigants, weighing the merits, and an opportunity to appeal.¹⁶⁹ Lacking all these features, the proceeding in *Stump* did not merit the protection of the immunity doctrine, and a civil action against the judge should be permitted to redress the wrong done.¹⁷⁰ Stating that it was "factually untrue" that authorizing a sterilization pursuant to a parent's request was an act "normally performed by a judge,"¹⁷¹ Stewart wrote, "[T]here is no reason to believe that such an act has ever been performed by *any* other Indiana judge, either before or since."¹⁷²

According to news reports, on March 28, 1978, when the Supreme Court issued its ruling, "The intensity of feelings evoked

165. However, there is some indication that Justice Stevens felt that *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871) and *Pierson v. Ray*, 386 U.S. 547 (1967) should be revisited. Justice Blackmun's conference notes record Stevens as saying, "*Pierson* was bad. And wrong on the merits." Blackmun Conference Notes, *supra* note 142.

166. *Stump*, 435 U.S. at 364–65 (Stewart, J., dissenting) (citing *Pierson*, 386 U.S. at 554).

167. *Id.* at 365.

168. *Id.* at 368–69.

169. *Id.* The lack of an appeal remedy was particularly important to Justice Powell, who dissented separately to emphasize this issue. According to Justice Powell, courts historically justified immunity on the ground that judicial errors may be corrected on appeal. *Id.* at 370 (Powell, J., dissenting). This interpretation is backed by prominent remedies scholars. See LAYCOCK, *supra* note 158, at 526 ("Indeed, judicial immunity and the right of appeal arose at the same time. The writ of error, under which a higher court reviews the record for errors of law, replaced the writs of false judgment and attain. The writ of false judgment was a suit against the judge; attain was a similar procedure against jurors."); Laycock, *supra* note 33, at 401–03.

170. *Stump*, 435 U.S. at 368–69 (Stewart, J., dissenting).

171. *Id.* at 365.

172. *Id.* at 367.

among the justices became obvious in the hushed chamber of the court”¹⁷³ After Justice White briefly summarized the fifteen-page majority opinion, Justice Stewart read aloud most of his five-page dissent from the bench, an infrequent occurrence for dissenters.¹⁷⁴ Chief Justice Burger, who voted with the majority, was sitting at Stewart’s right as Justice Stewart “spoke in a strong, controlled voice.”¹⁷⁵ “As one cutting phrase tumbled on another, Burger’s face reddened. Other justices also appeared to be uncomfortable. The tension struck observers as almost palpable.”¹⁷⁶

Left undecided by the Supreme Court was the question of whether Linda Sparkman’s federal civil rights claims against the private parties—her mother, the physicians, and the hospital—must be dismissed once Judge Stump, the only state official named as a defendant, was found to be immune from suit.¹⁷⁷ The Court remanded this issue to the Seventh Circuit.¹⁷⁸

E. Remand to the Seventh Circuit Court of Appeals

The question before the Seventh Circuit on remand was whether Judge Stump’s immunity would remove the necessary state action from the alleged conspiracy to sterilize Linda Sparkman and result in the automatic dismissal of the federal civil rights claims against the private defendants.¹⁷⁹ At the time, the circuits were split on this question. The majority of the federal appellate circuits adopted a *per se* dismissal rule in this situation, also known as the “derivative immunity” doctrine. According to this approach, “Private persons cannot be held liable for conspiracy to violate a person’s constitutional rights if the other conspirators are state officials who are themselves immune to liability under the facts alleged.”¹⁸⁰ In other words, a public official’s immunity also shields his private co-

173. Mintz, *supra* note 147.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Stump*, 435 U.S. at 364 n.13.

178. *Id.* at 364.

179. *Sparkman v. McFarlin*, 601 F.2d 261, 262 (7th Cir. 1979) (*per curiam*). To bring the private defendants within the ambit of § 1983 of the Civil Rights Act, the Sparkmans were required to prove that the private defendants had conspired with a state official to deprive them of a right secured by federal law or the Constitution. *Id.* at 263–64. (Sprecher, J., concurring) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). Without Judge Stump, the crucial requirement of state action would be missing, and the Sparkmans’ civil rights claims would fail.

180. *Sykes v. California*, 497 F.2d 197, 202 (9th Cir. 1974).

conspirators from liability for civil rights violations. In contrast, a minority of circuits at the time rejected the derivative immunity rule.¹⁸¹

The Seventh Circuit avoided taking sides on the question. Sitting en banc,¹⁸² it issued a brief per curiam opinion affirming the district court's dismissal of Sparkman's claims.¹⁸³ However, the five judges in the majority supplied the apparent basis for this result in a series of concurring opinions. These concurring judges agreed that, to make out a claim of conspiracy between a state judge and a private person under the Civil Rights Act, the plaintiff must set forth detailed facts in the complaint demonstrating an agreement between the state judge and the private party to deprive the plaintiff of her constitutional rights.¹⁸⁴ In other words, in the majority's view, for Linda Sparkman to maintain her civil rights action in federal court against her mother who executed the sterilization petition, the attorney who drafted it, the physicians who performed the sterilization, and the hospital—and specifically to have the opportunity to move on to the discovery phase of litigation—she would have to allege additional facts showing an agreement between each of the private parties and Judge Stump to deprive her of her constitutional rights.

This new more stringent pleading requirement was at odds with the simple notice pleading standard announced by the Supreme Court in *Conley v. Gibson*,¹⁸⁵ controlling at this time. Under *Conley*, courts were prohibited from dismissing a claim unless it was clear that there was “no set of facts” that the plaintiff could prove to establish the claim.¹⁸⁶ An underlying purpose of this framework was to give litigants a chance to support and present their claims after a full opportunity to engage in discovery. In this view, embodied in the Federal Rules, closing the courthouse door on Sparkman at this early stage of the litigation would not be consistent with notions of

181. See Shoemaker, *supra* note 111, at 124–25.

182. Normally, an appellate panel consists of three judges, and a full en banc hearing is held before a majority of the circuit judges who are in regular active service and who are not disqualified. See Fed. R. App. P. 35(a). On remand, eight judges heard oral argument on the derivative immunity question in this case. See *Sparkman*, 601 F.2d at 261 (listing Chief Judge Fairchild and Circuit Judges Bauer, Sprecher, Swygert, Cummings, Pell, Tone, and Wood as the assigned judges).

183. *Id.* at 262.

184. *Id.* at 262 (Fairchild, C.J., concurring); *id.* at 263 (Pell, J. and Bauer, J., concurring); *id.* at 265–68 (Sprecher, J., concurring); *id.* at 269 (Tone, J., concurring).

185. 355 U.S. 41 (1957).

186. *Id.* at 45–46.

procedural fairness undergirding our modern civil justice system.¹⁸⁷ Moreover, according to Marjorie Press Lindblom, who, as a young associate at Kirkland and Ellis in Chicago, argued Sparkman’s appeal pro bono on remand before the entire Seventh Circuit, this reasoning was “totally out of the blue.”¹⁸⁸ The issue had not been briefed or argued.

Nevertheless, as civil procedure scholars have documented, many lower federal courts had begun to embrace heightened pleading rules for civil rights claims beginning in the 1960s and 1970s.¹⁸⁹ The trend was fueled by concerns over burgeoning dockets, a perception that civil rights claims are more likely to be frivolous, and the alleged proliferation of civil rights litigation.¹⁹⁰ “The end result compelled civil rights plaintiffs to plead facts, often relating to the state of mind of the defendant, without the benefit of discovery.”¹⁹¹ The majority of the Seventh Circuit panel’s invocation of a heightened pleading standard on remand was consistent with this emerging trend in the lower federal courts at this time to carefully scrutinize civil rights claims. Over time, this trend extended beyond the civil rights context to a variety of situations. As civil procedure scholar Benjamin Spencer explains:

Though the Supreme Court had indicated that Rule 8 [of the Federal Rules of Civil Procedure] required only simple notice pleading with no need for factual detail, lower federal courts developed and imposed their own more stringent pleading standards for certain claims that required increased levels of factual detail before such claims would be permitted to proceed to discovery.¹⁹²

One might concede that Sparkman’s claim was the type requiring increased factual detail. Although Judge Stump had at this point

187. See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 23 (2009).

188. Laura Kessler Telephone Interview with Marjorie Press Lindblom, *supra* note 55.

189. See Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY. L. REV. 935, 991 (1990); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 567–68 (2002); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOWARD L.J. 99, 112–13 (2008); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back*, 49 MO. L. REV. 677, 693 (1984).

190. See Fairman, *supra* note 189, at 567, 575–76; Spencer, *supra* note 189, at 113.

191. See Fairman, *supra* note 189, at 552.

192. Spencer, *supra* note 187, at 3–4 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); see *id.* at 14 (“[T]he type of factual detail needed” to sufficiently support a claim “varies depending on the legal and factual context in which a claim is situated.”).

been eliminated as a defendant, the issue of judicial independence was still lurking in the case. If the action were to go forward against the private defendants, Judge Stump, even as a non-party, could be subject to discovery as to an alleged agreement to deprive Linda Sparkman of her constitutional rights, including the requirement that he respond to document requests and depositions.¹⁹³ He might also be called as a witness at trial.¹⁹⁴ The heightened pleading standard announced by the majority thus provided some measure of protection to judges from being entangled as potential witnesses in satellite

193. Fed. R. Civ. P. 30(a)(1) (“A party may, by oral questions, depose any person”); Fed. R. Civ. P. 31(a)(1) (“A party may, by written questions, depose any person”); Fed. R. Civ. P. 34(c) (“[A] nonparty may be compelled to produce documents and tangible things or to permit an inspection.”).

194. Fed. R. Civ. P. 45 (c)(1) (providing for subpoenas by the district courts for attendance at a hearing or a trial). Although Rules 26(b) and (c) of the Federal Rules of Civil Procedure may well have protected Judge Stump from such discovery on the basis of lack of relevance, annoyance, embarrassment, oppression, or undue burden or expense had the action gone forward, precedent suggests that Judge Stump would not have been protected by any blanket privilege. Although some jurisdictions have since recognized a “judicial deliberations” privilege protecting judges from discovery requests relating to their decision-making processes or communications relating to their holdings, these jurisdictions remain in the minority and there was no jurisdiction that had adopted such a privilege when *Stump v. Sparkman* was decided. Cf. *Matter of Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1518–22 (11th Cir. 1986) (holding that the deliberations and private communications of judges and judicial officers were entitled to a qualified privilege against discovery requests mirroring executive privilege, but explicitly noting that they could find no prior cases recognizing this privilege and relying on dicta); see also *Thomas v. Page*, 837 N.E.2d 483 (Ill. App. 2 Dist. 2005); *In re Enforcement of a Subpoena*, 927 N.E.2d 1022 (2012). Nor do the Federal Judicial Center’s *Benchbook* for federal judges or Code of Judicial Conduct reference any privilege protecting judicial deliberations or prohibit judges from testifying as fact witness. See FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES (6th ed. 2013), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/\\$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf); JUDICIAL CONFERENCE, CODE OF CONDUCT FOR UNITED STATES JUDGES (Mar. 20, 2014), available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx>. The ABA’s *Model Code of Judicial Conduct* is also silent. See ABA, MODEL CODE OF JUDICIAL CONDUCT (2011 ed.), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html; cf. *United States v. Nixon*, 418 U.S. 683 (1974) (even the executive privilege, which is constitutional, is qualified and may be overcome by a sufficient showing that the information is essential to the justice of the case). The Supreme Court confirmed these conclusions two years after it decided *Stump v. Sparkman* in *Dennis v. Sparks*, 449 U.S. 24, 31 (1980) (“[J]udicial immunity was not designed to insulate the judiciary from all aspects of public accountability. . . . Neither are we aware of any rule generally exempting a judge from the normal obligation to respond as a witness when he has information material to a criminal or civil proceeding.”).

litigation related to the act of discharging their authorized duties. This was no small concern. As Chief Judge Fairchild asserted, “In most judicial decisions the judge ‘agrees’ with one or more parties and their counsel. Thus it is easy for a state court loser to fulfill, superficially, the agreement element of conspiracy.”¹⁹⁵

The majority’s approach also had another benefit. By falling back on the heightened pleading rule, the court avoided announcing a *per se* rule of no liability as to private persons who act in concert with immune state officials to deprive citizens of their civil rights. There was a circuit split as to this question,¹⁹⁶ and it seems that at least some judges in the Seventh Circuit were concerned about the broad reach of derivative immunity.¹⁹⁷ In an opinion just a few years prior, Judge Pell found “somewhat disturbing the lack of any rationale for a rule which would appear to carry over governmental immunity to private individuals.”¹⁹⁸ The heightened pleading doctrine invoked in the judges’ concurrences thus enabled them to avoid confronting the derivative immunity issue, which apparently failed to win a majority in either direction.¹⁹⁹ From this perspective, rather than a giant leap backward for civil rights claimants, the heightened pleading requirement that apparently justified the court’s *per curiam* dismissal of Sparkman’s claims may be understood as a proverbial “glass half-full” for civil rights law.

However, even accepting *arguendo* that the heightened pleading standard represented a reasonable compromise in this context given

195. *Sparkman v. McFarlin*, 601 F.2d 261, 262 (1979). Thus, according to Judge Fairchild:

I would build into any principle for the recognition of a § 1983 claim based on a private person’s conspiracy with a state judge, a requirement of pleading and proof not only that the private party used the state court proceedings to produce a constitutional wrong, but that there was agreement between the party and judge beyond ordinary request and persuasion by the prevailing party, and that the state court judge invidiously used his office to deprive the § 1983 plaintiff of a federally protected right.

Id. (Fairchild, C.J., concurring).

196. *See Shoemaker*, *supra* note 111, at 111 n.21, 115–17.

197. *See Grow v. Fisher*, 523 F.2d 875, 878 (7th Cir. 1975).

198. *Id.*

199. Specifically, Judges Sprecher, Swygert, Cummings, and Wood were opposed to derivative immunity in this context. *Sparkman*, 601 F.2d at 263 (Sprecher, J., concurring); *id.* at 269 (Swygert, J., Cummings, J. & Wood, J., dissenting). Chief Judge Fairchild and Judges Pell, Bauer, and Tone, in separate concurrences, were either completely silent on the issue or stated there was no need to reach it since the case could be dismissed on the basis of the insufficiency of pleadings. *Id.* at 262 (Fairchild, C.J., concurring); *id.* at 263 (Pell, J. & Bauer, J., concurring); *id.* at 268–69 (Tone, J., concurring).

the competing values at stake, and even if the heightened pleading requirement invoked by the majority was “less offensive than the absolute bar of derivative immunity,”²⁰⁰ Sparkman should have been provided an opportunity to amend her complaint to add more facts substantiating the agreement element of her claim. The more stringent pleading standard had not been in place when Sparkman originally filed her complaint,²⁰¹ and no court had ruled on the sufficiency of the pleadings before.²⁰² Under these circumstances, according to the Federal Rules of Civil Procedure²⁰³ and circuit precedent at the time,²⁰⁴ leave to amend a complaint was to be “freely given” unless it “appear[ed] to a certainty that the plaintiff would not be entitled to any relief under any state of facts which could be proved in support of his claim.”²⁰⁵

The purpose of this liberal amendment rule, along with the other procedural innovations of the Federal Rules of Civil Procedure adopted in 1938, was “to promote open access to the courts” and the “resolution of disputes on the substantive merits as opposed to procedural technicalities.”²⁰⁶ Despite this controlling liberal amendment rule, the concurring judges in the majority were silent as to whether Sparkman should have the chance to amend her complaint to meet its new, stricter pleading standard.²⁰⁷ They did not even address the standard then in effect for when amendment should

200. Craig B. Merkle, Note, *Derivative Immunity: An Unjustifiable Bar to Section 1983 Actions*, 1980 DUKE L.J. 568, 598.

201. *See Sparkman*, 601 F.2d at 281 (Swygert, J., Cummings, J. & Harlington Wood, J., dissenting).

202. Specifically, when the Seventh Circuit first received the case on appeal, it held that Judge Stump was not immune from suit, but it never questioned the sufficiency of the pleadings. *See* discussion *supra* Part I.C. Nor had the sufficiency of the pleadings been ruled on by the district court. *Sparkman*, 601 F.2d at 275. Although the private defendants had filed a motion to dismiss for failure to state a claim under Rule 12(b)(6) in the trial court, the motion was filed after the defendants’ answer to the complaint, and was therefore expressly waived by Rule 12(h)(1). *See* Answer of Defendants Warren G. Sunday, John H. Hines, John C. Harvey, M.D., Harry M. Covell, M.D., *Sparkman v. McFarlin*, No. F 75-129 (N.D. Ind. Dec. 22, 1975); *see* Answer of Ora E. McFarlin, *Sparkman v. McFarlin*, No. F 75-129 (N.D. Ind. Dec. 23, 1975); Motion to Dismiss [on behalf of all defendants], *Sparkman v. McFarlin*, No. F 75-129 (N.D. Ind. Jan. 13, 1976); Fed. R. Civ. P. 12(h).

203. Fed. R. Civ. P. (15)(a).

204. *See Sparkman*, 601 F.2d at 281 (citing, *inter alia*, *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir. 1977)).

205. *Id.* (quoting *Fuhrer v. Fuhrer*, 292 F.2d 140, 143 (7th Cir. 1961)).

206. *See* Spencer, *supra* note 8, at 353, 355–56.

207. *Sparkman*, 601 F.2d at 281.

be allowed.²⁰⁸ Sub silencio, they evaluated the original complaint under the newly announced heightened pleading standard post hoc, apparently concluding it was insufficient to state a cause of action.

Sparkman’s original complaint had asserted that “the actions of” her mother, the physicians who performed the sterilization, the hospital, and Judge Stump were taken “in concert and with the common goal and result of sterilizing” her, depriving her of privacy, due process, and equal protection, and that “the concerted action was taken against [her] because of her sex, her marital status and of her allegedly low mental ability.”²⁰⁹ Although unstated, the majority of the concurring judges apparently concluded that these factual allegations were insufficient to support the “agreement” element of her civil rights claim, which was necessary for her to show state action and keep her claims in federal court.²¹⁰

The poignant injustice of the court’s imposition of a heightened pleading standard on Linda Sparkman as a condition of pursuing her civil rights claims in federal court should not be lost in this analysis, given the bare-bones petition that led to her sterilization. Indeed, one scholar has argued that Ora McFarlin’s “bizarre petition presented nothing to decide. A document with no named parties and no prayer for relief may be so unlike any normal pleading that it does not present a ‘case,’ or even a ‘matter,’ within the jurisdictional statute.”²¹¹

208. Judge Sprecher did try to justify the court’s disposition in terms of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), a summary judgment case. *Sparkman*, 601 F.2d at 263–64. Neither ducking the issue nor mixing up dismissal and summary judgment standards is an excuse for the court’s failure to give Sparkman a chance to amend.

209. See Complaint at ¶ 30, *Sparkman v. McFarlin*, No. F 75-129 (N.D. Ind. Nov. 26, 1975), available in HAROLD D. STUMP ET AL., PETITIONERS V. LINDA KAY SPARKMAN AND LEO SPARKMAN. U.S. SUPREME COURT TRANSCRIPT OF RECORD WITH SUPPORTING PLEADINGS app. A15 (Richard H. Finley et al., eds., 1976).

210. See sources cited *supra* note 184. In essence, the majority’s rejection of Sparkman’s allegations can be understood as an exercise of disbelief, likely because the allegations were inconsistent with the Seventh Circuit judges’ expectations of how a judge normally behaves. As civil procedure scholar Benjamin Spencer asserts, such “fact skepticism” “is inappropriate; rejecting facts because they report occurrences that members of the Court would find to be out-of-step with their expectations regarding an official’s behavior is a complete violation of the assumption-of-truth rule.” See A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 192, 196 (2010). According to the “assumption-of-truth rule,” “a claimant’s factual allegations are entitled to be believed and accepted at the pleading stage . . .” *Id.* at 192. This rule has since been rejected by the Supreme Court, see *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), but it was controlling law when the Seventh Circuit considered Sparkman’s claims on remand from the Supreme Court.

211. Laycock, *supra* note 33, at 397.

Perhaps the judges believed Sparkman would not be able to state additional facts showing a conspiracy, rendering an amendment futile. Yet there are facts in the record suggesting a conspiracy. Specifically, Ora McFarlin's petition for sterilization included an indemnity clause relieving the hospital and all physicians involved of any liability for the medical procedure, and Judge Stump's order specifically incorporated this clause, stating that he approved the petition, in essence, on the condition that McFarlin indemnify the physicians.²¹² Some type of coordination or understanding among the physicians, Ora McFarlin, and Judge Stump could be inferred from this language. In any case, discovery would have provided Sparkman with an opportunity to learn of more facts surrounding her sterilization, facts she was not in a position to know given the secrecy of the entire proceeding that led to the sterilization. Despite these compelling circumstances, it seems that the specter of discovery and a potential trial on judicial corruption in small town America was simply too much for the judges to countenance. Whatever else the court's per curiam opinion was meant to express, it is clear the judges wanted, more than anything, to rid the court of this "sordid case."²¹³ With this final blow, Linda Sparkman's claims for her nonconsensual sterilization were foreclosed under federal civil rights law against all defendants.²¹⁴

II. SCHOLARLY REACTION TO *STUMP*

The Supreme Court's decision in *Stump v. Sparkman* was quickly and roundly criticized by legal scholars for its expansive interpretation and application of judicial immunity.²¹⁵ For example,

212. See *supra* notes 37–40 and accompanying text.

213. See sources cited *supra* notes 123–124 and accompanying text.

214. Although Linda and Leo Sparkman could have pursued their tort claims against the private physicians and the hospital in state court after the Seventh Circuit dismissed their federal civil rights claims, they did not pursue any further action. See COLEMAN & HEADLEY, *supra* note 1, at 82.

215. See, e.g., Block, *supra* note 98, at 881 (suggesting that the Court in *Stump* misstated, misinterpreted, and misapplied the doctrine of judicial immunity); Feinman & Cohen, *supra* note 93, at 261 (“[T]he majority opinion as a whole employs a formalistic approach with only the pretense of weighing competing values”); Rosenberg, *supra* note 56, at 838–42 (suggesting that Judge Stump was acting in the capacity of a juvenile court judge without specific statutory authority to order the sterilization of a noninstitutionalized person, thus raising doubts as to the Supreme Court's determination of jurisdiction and absolute immunity); Shoemaker, *supra* note 111, at 127 (asserting that Judge Stump's order “approved” the sterilization, but it did not order it, and therefore “[n]o jurisdiction exists for an Indiana circuit court judge to issue such advisory opinions at the request of

the decision has earned a place among the twenty-four “worst decisions of the Supreme Court”²¹⁶ according to one author, alongside infamous cases such as *Plessy v. Ferguson*²¹⁷ and *Korematsu v. United States*.²¹⁸ As this strong and succinct critique explains:

Absolute immunity for judges is a court-made principle. It is not based on the Constitution of the United States, nor on a statute passed by Congress nor by state legislation. . . . But absolute judicial immunity can make judges into tyrants who cannot be questioned, except by appeal to a higher court. Absolute immunity places judges above the law.²¹⁹

Another commentator described *Stump* “as an example of the worst sort of self-dealing by the judiciary.”²²⁰

News coverage of the decision was also bitingly critical. One political editorial cartoon depicted a Supreme Court justice nailing a sign to the bench: “A Judge Can Do No Wrong*.”²²¹ The footnote after the asterisk stated, “* This replaces constitutional protections of individual rights.”²²²

private parties”); Marianne Schwartz O’Bara, Note, *Stump v. Sparkman: Judicial Immunity or Imperial Judiciary*, 47 UMKC L. REV. 81, 90–91 (1978) (“The practical effect of the decision is that there will be no effective limits upon the application of the [judicial immunity] doctrine.”).

216. See JOEL D. JOSEPH, BLACK MONDAYS: WORST DECISIONS OF THE SUPREME COURT 23–25, 247–57 (1987).

217. 163 U.S. 537 (1896) (upholding the constitutionality of state laws requiring racial segregation in public facilities under the “separate but equal” doctrine).

218. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the constitutionality of an Executive Order ordering Japanese Americans into internment camps during World War II).

219. JOSEPH, *supra* note 216, at 255–56.

220. Block, *supra* note 98, at 880.

221. Herb Block, *A Judge Can Do No Wrong*, Mar. 30, 1978.

222. *Id.*



A 1978 Herblock Cartoon, © The Herb Block Foundation.

Another cartoon depicted a Supreme Court justice with an angel and devil beside each of his ears. The angel states, "Wise and just decisions tempered with mercy and reason, arrived at only after patient, soul-searching deliberation . . . this is what we expect, nay, *demand* of a judge, your Honor!"²²³ The judge responds, "Who is this little wimp to lecture *mē*?"²²⁴ and the devil answers, "Right, Judge!—

223. Pat Oliphant, *Who is This Little Wimp?*, WASH. STAR, Apr. 2, 1978.

224. *Id.*

You’re immune, anyway!”²²⁵ The *Washington Post* ran an editorial stating, in part, “[T]he Supreme Court this week carried the doctrine too far in the case of a young woman who was sterilized after what was, at best, a kangaroo-court proceeding.”²²⁶ One of Justice Powell’s law clerks clipped this editorial and shared it with the Justice. The clerk’s cover note stated, “I cut this out of the *Post* this morning. Your vote to deny cert looks better all the time.”²²⁷

Despite this critical response to the decision’s immunity holding, *Stump v. Sparkman* has received little attention as a case relevant to eugenics, reproductive rights, disability rights, women’s rights, race theory, or feminist theory. In legal scholarship and law school texts, cases such as *Buck v. Bell*²²⁸ and *Skinner v. Oklahoma*²²⁹ are regarded as canonical on eugenics and sterilization, and *Griswold v. Connecticut*,²³⁰ *Eisenstadt v. Baird*,²³¹ and *Roe v. Wade*²³² are generally treated as the key early cases on reproductive rights.²³³ Only a few law review articles have addressed the underlying substantive implications of *Stump*.²³⁴ It has appeared primarily in civil rights, remedies, and constitutional law

225. *Id.*

226. *Judicial Omnipotence*, WASH. POST, Mar. 31, 1978.

227. Supreme Court of the United States, Handwritten note from Robert D. Comfort to Justice Lewis F. Powell (Mar. 31, 1978) (on file with the Washington and Lee University School of Law in Lewis F. Powell Jr. Papers, 1921–1998, Ms 001, Lewis F. Powell, Jr. Archives, Washington and Lee University, Lexington, VA).

228. 274 U.S. 200, 207 (1927) (holding that a state statute permitting compulsory sterilization of the unfit, including the mentally retarded, does not violate the Due Process Clause of the Fourteenth Amendment).

229. 316 U.S. 535, 538 (1942) (holding that a state cannot impose compulsory sterilization as punishment for a crime).

230. 381 U.S. 479, 485 (1965) (holding that it is unconstitutional for a state to intrude upon a married couple’s decision to use contraceptives).

231. 405 U.S. 438, 443 (1972) (establishing the right of unmarried people to possess contraception and engage in potentially non procreative sexual intercourse).

232. 410 U.S. 113, 164 (1973) (establishing existence of due process right to abortion).

233. The definition of a canonical case is contestable, but one rough measure is the frequency of citation of a case in legal scholarship. As of February 26, 2015, *Buck*, *Skinner*, *Griswold*, *Eisenstadt*, and *Roe* were cited in 1503, 3559, 10,188, 4255, and 13,226 law reviews, respectively, in Westlaw’s “Journals and Law Reviews” (JLR) database, compared with 494 citations for *Stump v. Sparkman*. Of these 494 citations, a qualitative review suggests that the majority of *Stump* citations relate to its holding on judicial immunity rather than its significance as a reproductive rights or discrimination case.

234. See, e.g., Beverly Horsburgh, *Schrödinger’s Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 570 (1996); Sandra S. Coleman, Comment, *Involuntary Sterilization of the Mentally Retarded: Blessing or Burden?*, 25 S.D. L. REV. 55, 63–64 (1980); Gary A. Dodge, Comment, *Sterilization, Retardation, and Parental Authority*, 1978 BYU L. REV. 380, 385–86.

casebooks for the purpose of educating students about the doctrine of judicial immunity.²³⁵ However, *Stump* is an important data point in the history of eugenics in the United States for at least two reasons. First, *Stump* highlights the long arc of eugenic thinking in this country, which, contrary to many accounts, reached well into the twentieth century. Second, it highlights the continuing divergent and unequal meanings of “reproductive rights” for privileged and less privileged people in our country. The remaining sections turn to these aspects of *Stump*.

III. *STUMP*'S BROADER SOCIAL, HISTORICAL, AND LEGAL CONTEXT

A. *Eugenics in the Late Twentieth Century?*

Justice Stewart wrote in his dissent, “[T]here is no reason to believe that such an act has ever been performed by *any* other Indiana judge, either before or since.”²³⁶ In Justice Stewart’s view, Judge Stump was acting so far outside his judicial authority that holding him accountable would not threaten immunity’s larger policy goal of ensuring a completely independent judiciary. That is, requiring a “loose cannon”²³⁷ like Judge Stump to answer for his actions in a court of law would not open the floodgates.

The irony of Stewart’s dissent is that, while the *ex parte* order of Judge Stump may have represented a particularly egregious example of sterilization abuse, the basic scenario presented by Linda Sparkman’s claims was not an aberration. Beginning in the late 1960s, the medical profession and government systematically targeted poor women for “family planning” services as part of an anti-poverty and population control agenda. According to historian Michael Dorr, the post-World War II baby and economic booms had reached their

235. See, e.g., THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS 220–27 (4th ed. 1996); PAUL G. KAUPER & FRANCIS X. BEYTAGH, CONSTITUTIONAL LAW: CASES & MATERIALS 654 (5th ed. 1980); LAYCOCK, *supra* note 158, at 525–28; EDWARD D. RE ET AL., REMEDIES 219 (1992); JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 1254 (13th ed. 2009). One exception is Professor Walter Wadlington, who has included *Stump* in all of his casebooks. See WALTER WADLINGTON ET AL., CASES AND MATERIALS ON LAW AND MEDICINE 778–83 (1980) (presenting *Stump* in the context of sterilization).

236. *Stump v. Sparkman*, 435 U.S. 349, 367 (1978) (Stewart, J., dissenting).

237. *Id.* Specifically, Stewart said, “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.*

peak in the early 1960s.²³⁸ “By the late 1960s and early 1970s, people drew parallels between starvation and war in [Vietnam] and America’s crowded, dirty, and decrepit inner cities”²³⁹ “‘Illegitimate children’ born to impoverished single mothers became the new social/eugenic menace.”²⁴⁰ Historian Rebecca Kluchin adds that this was the period when “forced sterilization moved from the realm of state public health departments and eugenics boards to federal family planning.”²⁴¹

In 1965, in his State of the Union address, President Lyndon B. Johnson expressed concern about “the explosion in world population,”²⁴² and shortly thereafter, the federal government began to fund at least some family planning services under the auspices of his War on Poverty.²⁴³ The Nixon administration expanded this initiative in 1970.²⁴⁴ The Title X Family Planning Program was

238. See Gregory Michael Dorr, *Protection or Control? Women’s Health, Sterilization Abuse, and Relf v. Weinberger*, in *A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIMENT TO THE HUMAN GENOME ERA* 161, 163–64 (Paul A. Lombardo ed., 2011) (documenting growing concern for population growth in the late 1960s and early 1970s).

239. *Id.*

240. *Id.* at 166. For example, here is the perspective of the Indiana Surgeon General, as reported in a 1968 editorial:

Dr. Herschel C. Moss[] has been whacking the drums for eight years or so over what he considers General Hospital’s “arbitrary and discriminatory rules that literally force the lower income groups to have more children.” His general concern is the number of children born into this world unwanted and destined for a marginal kind of life on welfare rolls, a burden on the taxpaying public.

Fremont Power, Editorial, *Two Views Heard on Sterilization*, INDIANAPOLIS NEWS, Jan. 26, 1968. Fears of rising political power of African Americans may also have motivated these concerns. See Loretta J. Ross, *African-American Women and Abortion: A Neglected History*, 3 J. HEALTH CARE POOR & UNDERSERVED 274, 281–82 (1992) (“Perhaps in response to the militancy of the [civil rights] movement and its potential for sweeping social change, members of the white elite and middle class suggested that black population growth should be curbed. White Americans held inordinate fears that a growing welfare class of African-Americans concentrated in the inner cities would not only create rampant crime, but exacerbate the national debt, and eventually produce a political threat from majority-black voting blocs in urban areas.”).

241. Rebecca M. Kluchin, *Locating the Voices of the Sterilized*, PUB. HISTORIAN, Summer 2007 at 131, 133.

242. Lyndon B. Johnson, Annual Message to the Congress on the State of the Union, Jan. 4, 1965, available at Gerhard Peters and John T. Woolley, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=26907>.

243. See Janet L. Dolgin & Katherine R. Dieterich, *The “Other” Within: Health Care Reform, Class, and The Politics of Reproduction*, 35 SEATTLE U. L. REV. 377, 395–96 (2012) (citing LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 289 (2002)).

244. *Id.* at 396; see also Richard Nixon, Statement on Signing the Family Planning Services and Population Research Act of 1970, Dec. 26, 1970, available at Gerhard Peters

enacted as part of the Public Health Service Act²⁴⁵ and authorized federal grants to subsidize family planning services for low-income individuals.²⁴⁶ Around this same period, and apparently supported by a recommendation of the Family Law Section of the American Bar Association,²⁴⁷ states began adopting welfare rules designed to impose financial disincentives against poor women having more children.²⁴⁸ In 1970, the Supreme Court upheld such a rule in *Dandridge v. Williams*.²⁴⁹

According to historian Rickie Solinger, the federal government increased expenditures for birth control between 1967 and 1971 from \$4.5 million to \$24 million.²⁵⁰ The primary purposes for this increase were diminishing poverty and reducing welfare dependency.²⁵¹ Reproductive autonomy was low on the list of reasons for this increase.²⁵² As she explains, in 1974, “the federal Department of Health, Education, and Welfare decided . . . to develop an attractive federal funding scheme for reimbursing the states for sterilizing poor women. The funding scheme allowed for much less generous reimbursement for abortions [than for sterilization].”²⁵³ Solinger notes, “For many poor women after *Roe* . . . reproductive choice came to mean deciding between an abortion they didn’t have the money to pay for and a sterilization they also did not have the money for, but

and John T. Woolley, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=2865>.

245. Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (codified as amended at 42 U.S.C. §§ 300 to 300a-6 (2012)).

246. *Id.* (stating as the Act’s first purpose to “assist in making comprehensive voluntary family planning services readily available to all persons desiring such services” and prioritizing grants to programs “furnishing of such services to persons from low-income families”).

247. See Hon. Nanette Dembitz, *Should Public Policy Give Incentives to Welfare Mothers to Limit the Number of Their Children?*, 4 FAM. L.Q. 130, 133 (1970) (article reprinting the final revised version of the second report of the Committee on Law and Family Planning of the Section of Family Law of the ABA) (“The conclusion of this report is that . . . the use of incentives to welfare mothers to limit child-bearing should be a primary objective in devising public assistance programs.”).

248. *Id.* at 133–34.

249. See 397 U.S. 471, 487 (1970) (upholding as constitutional a Maryland law capping federal welfare benefits at \$250.00 per month regardless of a family’s size or need).

250. RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 9–10 (2001).

251. *Id.* (citing Social Security Act, ch. 531, tit. XX, § 2001, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. § 1397 (2006))).

252. *Id.*

253. *Id.* at 11.

for which the federal government would pick up the tab.”²⁵⁴ Between 1968 and 1973, sterilizations in the United States skyrocketed. Whereas 400,000 people underwent sterilization in 1968, approximately two million people (half men and half women) underwent sterilization in 1973.²⁵⁵

Of particular note, the Family Planning Division of Nixon’s Office of Economic Opportunity developed a set of guidelines to protect the medical and legal rights of the poor receiving sterilization services from programs receiving federal family planning funds.²⁵⁶ Among other features, the guidelines “specif[ied] that OEO patients must be provided adequate counseling, that they must not be coerced in any way, and that only those able to give meaningful informed consent themselves would receive voluntary sterilization operations.”²⁵⁷ The guidelines were developed in 1971 and approved in 1972,²⁵⁸ shortly after President Nixon rolled out his federal family planning program as part of the War on Poverty.²⁵⁹ However, senior agency officials would not release the guidelines despite the repeated, stated concerns of the Dr. Warren Hern, the agency official who oversaw the guidelines’ development.²⁶⁰ According to Dr. Hern, who in 1973 testified before a United States Senate subcommittee investigating sterilization abuse, “I felt that many people’s lives were at stake, and we knew that some programs were going ahead [with sterilizations] without the guidelines even though we had requested them not to.”²⁶¹ The federal government did eventually issue guidelines, but not until after thousands of men and women were sterilized without their consent with federal family planning money.²⁶²

254. *Id.*

255. *See* Dorr, *supra* note 238, at 175; *see also* RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA 194–200 (2005).

256. *Quality of Health Care—Human Experimentation, Hearing Before the S. Subcomm. on Health of the Comm. on Labor and Public Welfare*, 93d Cong. 1504, 1509 (1973) [hereinafter *1973 Human Experimentation Senate Hearings*] (statement of Warren M. Hern, M.D., M.P.H., Former Chief, Program Development and Evaluation Branch, Family Planning Division, Office of Economic Opportunity).

257. *Id.* at 1509.

258. *Id.* at 1541–42 (memorandum from Warren M. Hern, M.D., M.P.H., Chief, Program Development and Evaluation Branch, Family Planning Division, Office of Health Affairs to E. Leon Cooper, M.D., Mar. 30, 1972).

259. *See* sources *supra* notes 244–246 and accompanying text.

260. *Id.* at 1503, 1509–10 (Hern testimony). According to Dr. Hern, around the time the guidelines were to be issued, “I was told that the 200 advance copies I was holding for press release would be taken from me, counted out, and put in a safe.” *Id.* at 1510.

261. *Id.* at 1510 (Hern testimony).

262. *See* sources cited *infra* notes 281–282 and accompanying text.

Between 1974 and 1987, the ACLU Reproductive Freedom Project brought twenty-one forced sterilization lawsuits.²⁶³ In one of those cases, *Cliett v. Hospital of University of Pennsylvania*,²⁶⁴ Valerie Cliett, an African-American woman, was sterilized postpartum without her knowledge or consent in the Hospital of the University of Pennsylvania.²⁶⁵ According to her 1980 file:

Plaintiff, an indigent Black mother of three, brings this state tort action against physicians and hospitals for performing sterilization upon her immediately after childbirth without her knowledge or consent. Plaintiff underwent an operation to reverse the sterilization, but after two years of trying unsuccessfully to become pregnant, it appeared that the reversal operation had been ineffective.²⁶⁶

In another case, *Cox v. Stanton*,²⁶⁷ the plaintiff, Nial Ruth Cox, a black woman, described her situation this way:

I was living with my mother and eight sisters and brothers. My father . . . is dead. My family was on welfare, but payments had stopped for me because I was eighteen. We had no hot or cold running water, only pump water. No stove. No refrigerator, no electric lights. . . . I got pregnant when I was 17. I didn't know anything about birth control or abortion. When the welfare caseworker found out I was pregnant, she told my mother that if we wanted to keep getting welfare, I'd have to have my tubes tied—temporarily. Nobody explained anything to me before the operation. Later on, after the operation, I saw the doctor and I asked him if I could have another baby. He said that I had nothing to worry about, that, of course, I could have more kids. I know now that I was sterilized because I was from a welfare family.²⁶⁸

According to the ACLU, Nial's mother "consented" to what she was told would be a temporary tying of her daughter's fallopian tubes

263. Kluchin, *supra* note 241, at 131.

264. *Id.*

265. *Id.* at 131–32.

266. *Id.* at 132 (citing Reproductive Freedom Project, American Civil Liberties Union Foundation, "Legal Docket, June 18, 1980," American Civil Liberties Union Records, Seeley G. Mudd Manuscript Library, Princeton University, box 387, folder 14, 15).

267. 381 F. Supp. 349 (E.D.N.C. 1974), *aff'd in part and rev'd in part*, 529 F.2d 47 (4th Cir. 1975).

268. 1973 *Human Experimentation Senate Hearings*, *supra* note 256, at 1586 (ACLU Press Release and statement of Nial Ruth Cox, summarizing *Cox v. Stanton*).

“under threat of removal from the welfare rolls of her entire family.”²⁶⁹

The case that drew the most significant national attention was *Relf v. Weinberger*,²⁷⁰ filed by the Southern Poverty Law Center in 1973.²⁷¹ In *Relf*, Minnie Lee and Mary Alice Relf, ages twelve and fourteen, were sterilized without their mother’s knowledge or consent.²⁷² According to critical race scholar Dorothy Roberts, the Relf sisters “were the youngest of six children of a Black couple living in Montgomery, Alabama.”²⁷³ Their parents were extremely poor. They were “uneducated farmhands, who survived after migrating to the city on relief payments totaling \$156 a month.”²⁷⁴ According to the complaint:

On June 13, 1973, a family planning nurse . . . picked up Mrs. Relf and the younger girls and transported them to a doctor’s office. Mrs. Relf was told the girls were being taken for some shots. . . .

. . . Neither Mrs. Relf nor the girls spoke with anyone at the doctor’s office. From the doctor’s office the children and their mother were transported to the hospital where the girls were assigned a room.

. . . It was at this time that Mrs. Relf, who neither reads nor writes, put her mark on what was later learned to be an authorization for surgical sterilization. . . . Mrs. Relf was then escorted home.

. . . Minnie and Mary Alice were left by themselves in a ward. . . . So far, neither child had even seen the physician who was to perform the operation nor had either child been explained what was going to happen to her. . . .

. . . .

. . . [T]he next morning . . . both children were placed under a general anesthetic and surgically sterilized.²⁷⁵

269. *Id.* at 1585.

270. 372 F. Supp. 1196 (D.D.C. 1974), *vacated as moot*, 565 F.2d 722, 727 (D.C. Cir. 1977) (per curiam) (vacated upon HEW’s declaration to issue new regulations complying with the court’s order).

271. *Relf v. Weinberger*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/case-docket/relf-v-weinberger>.

272. See Complaint at 8–10, ¶¶ 6–11, *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974) (No. 1557-73), *available* at http://www.splcenter.org/sites/default/files/Relf_Original_Complaint.pdf.

273. ROBERTS, *supra* note 6, at 93.

274. *Id.*

275. Complaint, *supra* note 272, at 8–10, ¶¶ 6–11.

The local family planning clinic had been administering birth control injections to the sisters and their older sibling, Katie, for some time.²⁷⁶ The use of birth control injections on the Relf sisters is consistent with reports of widespread inappropriate, experimental use of such shots on poor women during this time period.²⁷⁷ According to United States Senator Edward Kennedy, who chaired a Senate committee investigating the *Relf* case and a federal bill on the protection of human subjects, “When the Federal program supporting the Family Planning Clinic [where the Relf sisters were being treated] was transferred” from one federal agency to another, “Depo-provera was properly banned for use at that clinic. That action may have led to these sterilizations.”²⁷⁸ Mrs. Relf, who was illiterate, believed that by marking an “X” on the forms she was consenting to additional birth control shots for her girls.²⁷⁹

The Southern Poverty Law Center filed a lawsuit on behalf of the Relf sisters. Katie Relf served as the lead plaintiff, having only averted sterilization the day Minnie and Mary Alice were taken to the hospital by locking herself in her room.²⁸⁰ The district court found that “[o]ver the last few years, an estimated 100,000 to 150,000 low-income persons have been sterilized annually under federally funded programs.”²⁸¹ The court also found “there is uncontroverted evidence in the record that minors and other incompetents have been sterilized with federal funds and that an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn”²⁸²

276. *Id.* at 8, ¶¶ 3–4.

277. *See, e.g., 1973 Human Experimentation Senate Hearings*, at 1444 (“Our hearings demonstrated, to the alarm of the then FDA Commissioner Edwards, that Depo-provera was used widely in the routine practice of medicine throughout the state of Tennessee. . . . As a result of these hearings, its manufacturer, Upjohn, voluntarily ceased shipping the drug to the Arglington [S]chool [and Hospital for the Mentally Retarded] and to the State family planning units in Tennessee. Upjohn agreed that the use of the drug in Tennessee was inappropriate.”) (opening remarks of Senator Edward Kennedy).

278. *Id.* at 1445.

279. Complaint, *supra* note 272, at 8 ¶ 6, 9 ¶ 8; *see also* Dorr, *supra* note 238, at 161.

280. Complaint, *supra* note at 272 ¶ 12; *see also* *Relf v. Weinberger*, 372 F. Supp. 1196, 1200–01 (D.D.C. 1974), *vacated as moot*, 565 F.2d 722 (D.C. Cir. 1977) (*per curiam*).

281. *Relf*, 372 F. Supp. at 1199. For more on *Relf*, see Lisa Ikemoto, *Infertile by Force and Federal Complicity: The Story of Relf v. Weinberger*, in *WOMEN AND THE LAW STORIES* 179–206 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

282. *Relf*, 372 F. Supp. at 1199. The judge prohibited the use of federal dollars for sterilizations of minors and mentally incompetent persons and the practice of threatening women on welfare with the loss of their benefits if they refused to comply. *Id.* at 1204–05.

The *Relf* court’s findings are consistent with other accounts of what was occurring during this time period. According to a victim named Nial Ramirez whose testimony was read before a North Carolina eugenics victims’ compensation task force:²⁸³

At the young age of seventeen I was pregnant with my daughter Deborah living in a household with my mom and my siblings. My mother was a single mom and times were tough so we were on public assistance just trying to survive. During that time it was common for social workers to visit from time to time. Not often, just pop up on visits to evaluate the household living conditions.

.....
One particular social worker discovered I was expecting and all attention went solely on me. The visits from the social worker became very frequent and I began to feel the pressure of the social worker coercing me into something I wasn’t familiar with. I was told I [sic] that if I continued to have children the livelihood of my family would suffer greatly. I was told that if I had more children then my family would no longer receive the help of public assistance. The social worker convinced my mom to sign for me to undergo an operation that would prevent me from getting pregnant not knowing all the while I was being set up to be sterilized like I was some type [sic] animal. . . .

In 1973[,] I got married and my husband and I wanted desperately to have children. It was impossible because later I found out I was never to conceive. You see, I was told when

The district court also declared the federal regulations authorizing the use of federal family planning funds for these practices “arbitrary and unreasonable,” and ordered the Department of Health, Education, and Welfare (HEW) (now the Department of Health and Human Services) to amend its regulations. *Id.* As the litigation made its way through the courts, HEW withdrew the challenged regulations, issued interim regulations complying with the district court’s order, and represented on appeal its intention to issue final compliant regulations. *See Relf v. Weinberger*, 565 F.2d 722, 725–26 (D.C. Cir. 1977) (per curiam). The Court of Appeals held that the controversy was mooted by HEW’s actions and remanded the case back to the district court for dismissal. *Id.* at 727.

283. The North Carolina Eugenics Victims Compensation Task Force was established on March 8, 2011, by executive order of Beverly Perdue, then governor of North Carolina. GOV. BEVERLY EAVES PERDUE, EXECUTIVE ORDER NO. 83: GOVERNOR’S TASK FORCE TO DETERMINE THE METHOD OF COMPENSATION FOR VICTIMS OF NORTH CAROLINA’S EUGENICS BOARD (2011), available at <http://wayback.archive-it.org/org-67/20130104020149/http://www.governor.state.nc.us/NewsItems/ExecutiveOrderDetail.aspx?newsItemID=1732>. The purpose of the Task Force was to “[r]ecommend possible methods or forms of compensation to those persons forcibly sterilized under the North Carolina Eugenics Board program.” *Id.* For a fuller discussion of the Task Force’s process and outcome, see the discussion *infra* accompanying notes 387 to 394.

I was operated on that I could have it reversed but I was lied to and butchered. I have been traumatized from this experience.²⁸⁴

Not all coercive sterilizations occurred within the welfare context. As Mary English, another North Carolina sterilization victim, testified:

I was raised in an era in Fayetteville where I trusted my doctors completely. So, when my doctor said he had a program. I wouldn't have to worry about anything else, not to worry. He handed me a piece of paper, a hospital form. I signed it. And he said he'd let me know if he could get me into the program and that this would help me cause I wanted to go to college. I had three great kids. I wanted to raise my kids and the moment I found a wonderful young man I could come back . . . and have this surgery undone and have more kids and have this great life.

Well again. I signed it. In other words, I was sold the Cadillac with no engine. I trusted him completely.

So, couple years later, three and a half, I got engaged. Wonderful man, loved my kids, loved me. I went back to the same clinic which by the way I had still been attending and told the doctor I was ready to have the surgery undone because I was ready to get remarried. At which point, he leans over his desk and says 'what'. I said I'm ready to have the surgery undone now. I'm gonna get married. And he laughed. I don't mean he chuckled. I mean he laughed.

And he said, "I don't know what you're talking about you're sterile. You'll never have anymore [sic] children." So, I told him no, no, no. That's not the surgery I signed up for. . . . And he laughed again.

He said "look I don't know what you're talking about. You're sterile. . . . I don't care what you think I told you" and he laughed again "but you're sterile and you're not gonna have no more kids. You oft to be thankful for the three you got." . . .

.....

. . . I tried to find lawyers that would help. No one would take the case and they all had an amazing, amazing statement. Each and everyone [sic] of them. "You need to let this go and forget about it."

284. N.C. DEP'T ADMIN., GOVERNOR'S TASK FORCE TO DETERMINE THE METHOD OF COMPENSATION FOR VICTIMS OF NORTH CAROLINA'S EUGENICS BOARD 26-27 (Jun. 22, 2011) [hereinafter GOVERNOR'S TASK FORCE JUNE 22, 2011 HEARING], *available at* <http://www.doa.nc.gov/ncjsvf/documents/meetings/Minutes222011.pdf> (testimony of Deborah Chesson reading statement of her mother, Nial Ramirez).

Second lawyer: “You know you need to just put this behind you and just forget about it.” . . .

....

. . . I had an emotional breakdown. I was hospitalized. I came out, dealt with things. Going to college, kids, moving, getting another apartment, getting a house, the rain, snow, the prices at the grocery store. What I did not deal with was finding out I had been sterilized in '72.²⁸⁵

As these accounts demonstrate, in the 1960s and 1970s, eugenics migrated outside of the traditional context of eugenics boards, prisons, and mental institutions.²⁸⁶ Within the culture of aggressive federal family planning, and often with the support of federal funding, physicians became a significant part of the story, sometimes not obtaining consent, obtaining it days after a surgery, obtaining it when patients were under the influence of medications and the stress of childbirth, or obtaining consent by other deceptive means.²⁸⁷ Many victims did not understand the nature of the procedure, and physicians routinely exploited patients' lack of understanding by not explaining the permanence of tubal ligation.²⁸⁸ Historian Rebecca Kluchin explains that in this period:

Coercive surgeries, recorded as voluntary, blended into rising rates of tubal ligation [for all women] . . . [These involuntary surgeries] often went unnoticed by hospital administrators and watchdog groups. Further, at the time that this new form of coercive sterilization emerged, standards of informed consent were in the process of being developed, but had not been implemented. . . . The absence of standards of informed consent created an environment in which coercion could flourish.²⁸⁹

Thus, even as late as the 1970s, sterilizations of the poor absent informed consent or basic due process were occurring in the United States, supported by the official policy of the federal government. It is unclear whether Linda Spitler's sterilization involved Medicaid or federal family planning dollars. There is no trial record. Her family's circumstances and the timing of her sterilization, just one year after

285. *Id.* at 39–41 (testimony of Mary English).

286. *See generally* Dorr, *supra* note 238, at 163–73 (documenting eugenic sterilization practices as part of family planning and welfare).

287. *See* Kluchin, *supra* note 241, at 134–35.

288. *Id.* at 139. For example, “[A] physician from Los Angeles followed a policy of informing patients of the permanence of tubal ligation only if they asked.” *Id.*

289. *Id.* at 135. For a review of some of this history, see SOLINGER, *supra* note 250, at 9–10 and Dorr, *supra* note 238, at 166–71.

the federal government pumped millions of dollars into family planning for low-income individuals,²⁹⁰ raise this possibility. In any case, physicians during this period would not have found the sterilization of a poor, uneducated woman like Linda Spitler to be an unusual event.

More generally, this was a period of attacks on poor women's reproductive autonomy. In 1976, Congress passed the Hyde Amendment,²⁹¹ barring the use of certain federal funds, most notably Medicaid funds, to pay for abortions. In 1980, the Supreme Court upheld the Hyde Amendment,²⁹² justifying the denial of federal funds even for medically necessary abortions of poor women. As many commentators have noted, this policy effectively removed reproductive choice from indigent women.²⁹³

The Supreme Court justices must have been aware of the systemic problem of coerced sterilization when they decided *Stump v. Sparkman*. The *Relf* case had received significant coverage in national newspapers, like the *New York Times*, just a few years earlier.²⁹⁴ *Relf* was the basis for new federal laws and regulations requiring informed consent for patients and protections against coercive sterilizations of certain vulnerable populations.²⁹⁵ The Department of Health, Education, and Welfare ("HEW") promulgated the final version of these regulations in 1978, the same year that the Supreme Court decided *Stump*.²⁹⁶

Furthermore, amici for several organizations brought to the Court's attention the scope of the coercive sterilization problem. For example, a brief filed by the American Civil Liberties Union, the Indiana Civil Liberties Union, and the Mental Health Law Project stated, "Sterilization abuse has been another large and growing

290. See sources cited *supra* notes 244–246 and accompanying text.

291. Hyde Amendment, Pub. L. No. 94-439, tit. II, § 209, 90 Stat. 1434 (1976) (codified at 42 U.S.C. § 18023) (an act of Congress ending federal Medicaid funding for the abortions of poor women unless a woman's life is endangered by pregnancy or if the pregnancy is the result of rape or incest).

292. *Harris v. McRae*, 448 U.S. 297 (1980).

293. See ROBERTS, *supra* note 6, at 231–32; SOLINGER, *supra* note 250, at 14; Leslie Friedman Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 8 HASTINGS CONST. L.Q. 313, 316–17, 342 (1981).

294. See Dorr, *supra* note 238, at 183 n.1 (citing several news reports covering the lawsuit in the *New York Times* and other national newspapers).

295. See discussion *supra* note 282.

296. Provision of Sterilization in Federally Assisted Programs of the Public Health Service, 43 Fed. Reg. 52146, 52165–67 (Nov. 8, 1978) (codified at 42 C.F.R. §§ 50.201–210 (2009)).

concern of the ACLU, and ACLU attorneys, together with the Reproductive Freedom Project of the ACLU Foundation, have represented many women seeking to remedy and deter the resulting violations of substantive and procedural rights.”²⁹⁷ Another amicus brief filed by several mental health and disability rights organizations stated:

Some of the proposed *amici* organizations have devoted much time and energy to public education, drafting of legislation, and lobbying efforts aimed at securing the repeal of mandatory sterilization laws and educating physicians and other professionals as to the lack of scientific and medical justification for involuntary sterilization practices. And yet, these efforts . . . may come to naught if judges are granted the unilateral power to authorize sterilization in the absence of a statute so providing.²⁹⁸

An amicus brief filed by the National Center for Law and the Handicapped (“NCLH”) discussed, at length, abuses that had occurred as part of the sterilization movement.²⁹⁹ The NCLH brief included a section detailing the history of the eugenics movement in the United States from 1900 to the 1940s, arguing that this history “illustrates the dangers inherent in the development and authorization of involuntary sterilization.”³⁰⁰ In sum the Court was informed by amici of the larger history and continuing pattern of eugenic sterilization in the United States, yet it seems the Justices did not connect the dots so as to see what happened to Linda Sparkman as indicative of larger, systemic injustice. Referencing the NCLH brief, Justice Blackmun’s clerk wrote in a memo to Justice Blackmun,

297. See Motion of the American Civil Liberties Union et al. to File Brief Amici Curiae and Brief Amici Curiae at *ii–*iii, *Stump v. Sparkman*, 435 U.S. 349 (1978) (No. 76-1750), 1978 WL 206600 (citing as an example *Walker v. Pierce*, 560 F.2d 609 (4th Cir. 1977), a case involving the coercive sterilizations of two women by Dr. Clovis H. Pierce, a South Carolina physician, who routinely required poor women on Medicaid to submit to a sterilization upon delivery of a third child).

298. Motion for Leave to File Brief Amici Curiae and Brief for Amici Curiae American Coalition of Citizens With Disabilities; Epilepsy Foundation of America; Counsel for Handicapped People Developmental Disabilities Law Project at *xiv–*xv, *Stump v. Sparkman*, 435 U.S. 349 (1978) (No. 76-1750), 1978 WL 223472.

299. Motion for Leave to File Brief and Brief of the National Center for Law and the Handicapped, Inc. Amicus Curiae at *7–*14, *Stump v. Sparkman*, 435 U.S. 349 (1978) (No. 76-1750), 1978 WL 223474.

300. *Id.* at *7 (capitalization omitted).

“I think everything that is said in the brief is true but none of it is relevant to deciding this case.”³⁰¹

This was also a period of a rapid expansion of children’s constitutional rights, particularly with regard to procreation. In a series of decisions, the Supreme Court expressed the view that even state and parental interests must give way to mature minors’ choices regarding reproductive rights. For example, in 1976, *Planned Parenthood of Central Missouri v. Danforth*,³⁰² the Supreme Court held that a state cannot impose a parental consent requirement on minor girls seeking an abortion.³⁰³ As children’s rights scholar Anne Dailey explains, “[T]he *Danforth* Court suggested that girls who engage in sexual activity leading to pregnancy are to be treated the same as adult women for purposes of the decision whether to terminate their pregnancies. . . . [T]he privacy right recognized in *Danforth* . . . emancipate[d] minor girls from the . . . decisionmaking authority of their parents.”³⁰⁴ A year later, in *Carey v. Population Services International*,³⁰⁵ a plurality of the Court held that a state may not constitutionally prohibit the distribution or sale of contraceptives to minors.³⁰⁶ And in 1979, the Court held in *Bellotti v. Baird*³⁰⁷ that a state may not require a mature child to first notify her parents and seek consent before going to a court to obtain judicial approval for an abortion.³⁰⁸

In sum, when the Court decided *Stump*, the justices had been fully apprised of the ongoing problem of systemic eugenic sterilization in the United States. Moreover, the Court was in the midst of intense jurisprudential activity establishing minors’ reproductive rights. Given this context, the majority’s formalistic, narrow analysis, focusing on whether Judge Stump’s order was a “judicial act,” represents an example of legal abstraction at its worst.³⁰⁹

301. Mem. from Keith Ellison, law clerk, to Justice Harry A. Blackmun, at 2 (Jan. 9, 1977) (on file with the Library of Congress in Harry A. Blackmun Papers, box 269, folder 4).

302. 428 U.S. 52 (1976).

303. *Id.* at 74.

304. See Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 2132 (2011).

305. 431 U.S. 678 (1977).

306. *Id.* at 681–82.

307. 443 U.S. 622 (1979).

308. *Id.* at 651.

309. Some classic feminist and race theory critiques of abstract legal reasoning include ROBIN WEST, *CARING FOR JUSTICE* (1999); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44–51 (1991); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and*

What happened to Linda Spitler was horrendous; the Court’s mechanical application of the doctrine of judicial immunity, which prevented her from having a day in court, represents an even deeper injustice.

Perhaps the Court’s fealty to protecting judges blinded it to the underlying equities, legal context, and history of the case. Indeed, in 1991, the Court reaffirmed the view that judges are immune from suit for virtually anything they say or do from the bench.³¹⁰ With rare exceptions,³¹¹ lower federal courts continue to hold fast to the judicial immunity doctrine.³¹² However, the broader history of how “reproductive choice” in the United States separates women by race and class suggests that something more was at play in *Stump* than the apparent feudalism of federal judges. As the next section demonstrates, *Stump* fits quite comfortably into the history and trajectory of eugenics in America.

B. Stump’s Antecedents: The Long History of Eugenics in the United States

The story of *Stump* begins more than a century ago with the eugenics movement in the United States.³¹³ Eugenics started in Europe with Sir Francis Galton, who coined the term “eugenics” and defined it as “hereditarily endowed with noble qualities.”³¹⁴ Eugenics

Reparations, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Carrie Menckel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985).

310. See *Mireles v. Waco*, 502 U.S. 9, 12 (1991) (per curiam) (holding that a California judge who ordered a public defender to be dragged by a police officer from a nearby courtroom and brought before him cannot be sued for damages).

311. See, e.g., *Dawn v. Ciavarella*, No. 3:10-CV-0797, 2010 WL 3122858, at *1, *4 (M.D. Pa. Aug. 9, 2010) (order granting judicial immunity on some claims but denying dismissal of others in civil rights action against a judge who conspired with another judge and the owner of a for-profit juvenile detention center to send thousands of juveniles to the center in exchange for kickbacks from the owner); John Hurdle & Sabrina Tavernise, *Former Judge is on Trial in ‘Cash for Kids’ Scheme*, N.Y. TIMES (Feb. 8, 2011), <http://www.nytimes.com/2011/02/09/us/09judge.html?module=Search&mabReward=relbias%3As>.

312. See, e.g., *King v. McCree*, 2014 WL 3579785, at *1–3 (6th Cir. 2014) (holding that a judge who “maintained a romantic and sexual relationship with the complaining witness” in a felony child-support case, had lunch with the witness, and gave her \$6,000, was absolutely immune from a civil rights action alleging that the judge’s relationship with the witness violated the defendant father’s constitutional rights).

313. Eugenics is “[t]he study of hereditary improvement of the human race by controlled selective breeding.” AMERICAN HERITAGE DICTIONARY 632 (2000).

314. FRANCIS GALTON, F.R.S., *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 42 n.2 (BiblioBazaar 2009) (1883).

came to the United States through the work of Richard Dugdale in 1877.³¹⁵ Dugdale was not a eugenicist, but his work was later adopted by eugenicist organizations in America.³¹⁶ Charles Benedict Davenport, a Harvard trained biologist and director of Cold Spring Harbor Laboratory, and his protégé, Harry Laughlin, are widely credited as leaders of the American eugenics movement.³¹⁷ However, as historians have come to understand, many scientists, physicians, and other social authorities played a role in advancing eugenics in this country.³¹⁸ According to historian Mark Largent, “[i]t is difficult to find many early-twentieth-century American biologists who were not advocates of eugenics in some form or another.”³¹⁹ As such, historical research has led to a wider appreciation of the fact that eugenics existed in the United States long before it was practiced in Nazi Germany.³²⁰ American eugenics—now called “negative eugenics”—focused on preventing unworthy genes through race, disability, and other marriage restrictions, involuntary sterilization, and ethnically-targeted limits on immigration.³²¹ This Article focuses on eugenic sterilization, the main issue in *Stump*.

315. See Nicole Huberfeld, *Three Generations of Welfare Mothers Are Enough: A Disturbing Return to Eugenics in the Recent “Workfare” Law*, 9 UCLA WOMEN’S L.J. 97, 113 (1998).

316. *Id.*; see also EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH 19 (1995) (“Although the early work of . . . Dugdale laid a foundation on which later eugenicists built, the time was not yet quite ripe for the eugenics movement to flourish.”).

317. See MARK A. LARGENT, BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION 2 (2008); see also RAYNA RAPP, TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA 36 (1999) (“Many scientists of renown were eugenicists, and their political commitments ran the entire gamut from left to right.”).

318. LARGENT, *supra* note 317, at 2.

319. *Id.*

320. See VICTORIA F. NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS (2008); Dorr, *supra* note 238, at 171 (“[W]hen the Nazis passed their eugenics laws, thousands of Americans had already undergone eugenic sterilization.”); Paul A. Lombardo, *Introduction: Looking Back at Eugenics*, in A CENTURY OF EUGENICS IN AMERICA 1 (Paul A. Lombardo ed., 2011) [hereinafter Lombardo, *Introduction*]; Paul A. Lombardo, *Disability, Eugenics, and the Culture Wars*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 57, 74 (2008) [hereinafter Lombardo, *Disability*] (“[T]he first six presidents of the twentieth century—Theodore Roosevelt, William Howard Taft, Woodrow Wilson, Warren Harding, Calvin Coolidge and Herbert Hoover—all had taken positions supporting some kind of eugenic policy.”).

321. LARSON, *supra* note 316, at 22. In contrast, European eugenics—or “positive eugenics”—believed genius and talent were hereditary and focused on inbreeding within the upper class to protect them from those in the lower “social pecking order.” Huberfeld, *supra* note 315, at 112–13. For more detailed treatments of the various expressions of American eugenics, see for example, JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925, at 97–116 (1955); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); Paul

The first state to pass a compulsory eugenic sterilization law was Indiana,³²² where the *Stump v. Sparkman* controversy arose. The 1907 law provided compulsory sterilization for “criminals, idiots, imbeciles and rapists.”³²³ The Indiana Supreme Court overturned the law in the 1921 case of *Williams v. Smith*,³²⁴ finding it unconstitutional under the Fourteenth Amendment for lack of procedural safeguards.³²⁵ Indiana passed another compulsory sterilization law in 1927—this time with procedural safeguards including notice, hearing, and appeal rights.³²⁶ Indiana’s eugenics program included identifying the state’s “feeble-minded.”³²⁷ Most of the individuals designated were among the rural poor.³²⁸

In the same year, the United States Supreme Court upheld Virginia’s compulsory sterilization law in *Buck v. Bell*.³²⁹ According to the Court, Carrie Buck was “a feeble minded white woman who was committed to the State Colony She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child.”³³⁰ Like Linda Spitler, although

A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421 (1988); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

322. See Note, *Eugenic Sterilization in Indiana*, 38 IND. L.J. 275, 276 (1963). Sterilizations performed by Dr. Harry C. Sharp at the Indiana State Reformatory go back more than eight years before the 1907 law passed. See Julius Paul, “Three Generations of Imbeciles are Enough”: State Eugenic Sterilization Laws in American Thought and Practice 342 (1965) (unpublished manuscript), available at <http://buckvbell.com/pdf/JPaulmss.pdf>. There is dispute over how many boys at the Indiana State Reformatory received vasectomies prior to the 1907 Act; Dr. Sharp himself put the number at 456. See Harry C. Sharp, *Vasectomy as a Means of Preventing Procreation in Defectives*, 53 J. AM. MED. ASSOC. 1897, 1899 (1909), available at http://digitalarchive.gsu.edu/col_facpub/4/ (“Since October, 1899, I have been performing an operation known as vasectomy I have 456 cases that have afforded splendid opportunity for postoperative observation . . .”).

323. Act of Mar. 9, 1907, ch. 215, 1907 Ind. Acts 377–78, *invalidated by Williams v. Smith*, 131 N.E. 2 (Ind. 1921), available at <https://scholarworks.iupui.edu/bitstream/handle/1805/1053/1907%20General%20Acts-%20OCR.pdf?sequence=1>.

324. See *Williams*, 131 N.E. at 3.

325. *Id.* at 2 (“In the instant case the prisoner has no opportunity to cross-examine the experts who decide that this operation should be performed upon him. He has no chance to bring experts to show that it should not be performed; nor has he a chance to controvert the scientific question that he is of a class designated in the statute.”).

326. See Paul, *supra* note 322, at 345.

327. *Id.*

328. See Alexandra Minna Stern, “We Cannot Make a Silk Purse out of a Sow’s Ear”: *Eugenics in the Hoosier Heartland*, 103 IND. MAG. HIST. 3, 6 (2007).

329. 274 U.S. 200 (1927).

330. *Id.* at 205.

described as feeble minded, Carrie Buck had no cognitive disabilities and neither did her daughter.³³¹ Bearing an illegitimate child provided the basis for allegations against her even though her pregnancy resulted from a rape by the nephew of her foster parents.³³² The Supreme Court, in an 8–1 decision written by Justice Oliver Wendell Holmes, upheld the law’s constitutionality, noting that it was necessary to prevent “being swamped with incompetence.”³³³ Holmes, without explaining why the mentally ill and developmentally disabled were unworthy of equal protection or procedural due process, famously pronounced: “Three generations of imbeciles are enough.”³³⁴

With the Supreme Court’s imprimatur on eugenic sterilizations, the practice flourished.³³⁵ Fifteen years later the Court again considered the forced sterilization question—this time in the form of an Oklahoma statute that targeted “habitual criminals.”³³⁶ The Act exempted certain types of crime, among them embezzlement.³³⁷ The Court, without overturning *Buck v. Bell*, struck down the Act as a violation of equal protection.³³⁸ Although the Court did not overturn *Buck v. Bell*, “widespread support of eugenics came to an eventual halt, when the Nazi regime pushed the philosophy and practice of

331. See PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 103–48 (2008) (discussing the largely sham process by which Carrie Buck and her daughter, Vivian, were proven to be “feeble minded”).

332. See *id.* at 116, 139–40. There are online repositories of original documents from the *Buck* case. See, e.g., *Eugenics: Three Generations, No Imbeciles: Virginia, Eugenics & Buck v. Bell*, UNIVERSITY OF VIRGINIA CLAUDE MOORE HEALTH SCIENCES LIBRARY, <http://www.hsl.virginia.edu/historical/eugenics/> (last visited Feb. 13, 2014); Reading Room, Georgia State University College of Law, <http://readingroom.law.gsu.edu/buckvbell/>.

333. *Buck*, 274 U.S. at 207.

334. *Id.*

335. See Paul Popenoe, *The Progress of Eugenic Sterilization*, 25 J. HEREDITY 19, 20 (1934), available at <http://readingroom.law.gsu.edu/buckvbell/> 41 (noting that between 1907 and 1931, twenty-seven states passed eugenic sterilization laws).

336. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942). The Act defined a “habitual criminal” as a person who had “been convicted two or more times for crimes ‘amounting to felonies involving moral turpitude’” *Id.*

337. *Id.* at 537.

338. *Id.* at 538–39 (noting that grand larceny and embezzlement were felonies, but that the sterilization exemption for embezzlement resulted in a substantially similar crime being exempted from sterilization. One stealing twenty dollars from a stranger three times is subject to sterilization but one stealing the same amount from the till of his place of employment three times is exempt.).

eugenics over the line of what American eugenicists found acceptable.”³³⁹

However, compulsory sterilization did not disappear. Sterilizations of people with mental disabilities were permitted throughout the twentieth century. For example, Indiana’s 1927 sterilization law was amended several times and not repealed until 1974,³⁴⁰ three years after Linda Spitler’s sterilization. Indiana’s law was a “benchmark for the rest of the nation,”³⁴¹ with more than thirty states following its lead and passing compulsory sterilization laws.³⁴² State compulsory sterilization laws targeted different kinds of people. Some states identified the “crippled, blind, degenerate, and deficient,”³⁴³ while others picked “paupers and the criminalistic.”³⁴⁴ Historian Paul Lombardo explains, “[I]n all states those most likely to be sterilized were poor people living in state institutions.”³⁴⁵ Many of the people subject to these laws were considered “poor white trash” or “misfits” by social workers or doctors.³⁴⁶ The term “feeble minded” was a catchall linked as closely to poverty and perceived antisocial behavior as actual mental disability.³⁴⁷ As one commentator explains, “Often, these authorities never actually tested the victims for mental disability.”³⁴⁸

Controlling the sexuality of poor women who did not conform with white middle-class standards of womanhood is also an important theme running throughout the history of eugenics in America. For example, in North Carolina, poor working-class white women were sent to a reformatory for girls called Samarcand Manor where

339. Huberfeld, *supra* note 315, at 116.

340. See Stern, *supra* note 328, at 35.

341. See Jason S. Lantzer, *The Indiana Way of Eugenics: Sterilization Laws, 1907–74*, in *A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIMENT TO THE HUMAN GENOME ERA* 26, 31 (Paul A. Lombardo ed., 2011).

342. See Elof Axel Carlson, *The Hoosier Connection: Compulsory Sterilization as Moral Hygiene*, in *A CENTURY OF EUGENICS IN AMERICA* 11, 21 (Paul A. Lombardo ed., 2011).

343. Lombardo, *Disability*, *supra* note 320, at 64 (citing Washington and North Dakota laws).

344. *Id.* (citing South Dakota law).

345. *Id.*

346. Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era In United States History*, 72 *GEO. WASH. L. REV.* 862, 867 (2004).

347. *Id.*; see generally JAMES W. TRENT, JR., *INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES* (1994) (documenting changing conceptions of the “feebleminded” over the past 150 years).

348. See Silver, *supra* note 346, at 867.

sterilization and other physical abuses occurred.³⁴⁹ They were institutionalized for “noncriminal status offenses like ‘running around,’ ‘incurability,’ being ‘in danger of prostitution’ or ‘beyond parental control,’ and in one case, as an incest victim whose father’s conviction as the perpetrator left her without a legal guardian.”³⁵⁰ Samarcaud was not unusual. “By 1924, there were fifty-seven publicly funded institutions for delinquent girls, with only two states failing to provide at least one reformatory.”³⁵¹ Historian Susan Cahn notes that the specter of untamed sexuality of unmarried lower-class white women who fled rural areas in the 1920s for economic opportunities in cities threatened patriarchal norms of domesticity and motherhood as well as “racialized distinctions between white virtue and black vice.”³⁵² Much attention has been given to sterilization laws aimed at mentally disabled people. However, as this example demonstrates, historians of eugenics have long emphasized that eugenics took on a variety of meanings, contexts, and forms.³⁵³

During the New Deal and through the 1950s, sterilization was used as a solution to welfare dependency and social disorder.³⁵⁴ It was also connected with child welfare policy. For example, in Minnesota, the eugenic sterilization law was part of the “Children’s Code,” which “included a civil commitment law that empowered county probate judges to commit neglected, dependent, and delinquent children . . . to state guardianship without the approval of parent or kin,” often for life.³⁵⁵ In the 1950s, southern lawmakers proposed laws that would require sterilization of women giving birth to illegitimate children and made having more than one illegitimate child a crime, among other measures aimed at regulating “immoral” sex and childbirth in the African-American community.³⁵⁶

349. See Susan Cahn, *Spirited Youth or Fiends Incarnate: The Samarcaud Arson Case and Female Adolescence in the American South*, 9 J. WOMEN’S HIST. 152, *passim* (1998).

350. *Id.* at 172.

351. *Id.* at 156.

352. *Id.* at 154.

353. See Lombardo, *Introduction*, *supra* note 320, at 1.

354. *Id.* at 4.

355. Molly Ladd-Taylor, *Eugenics and Social Welfare in New Deal Minnesota*, in A CENTURY OF EUGENICS IN AMERICA 117, 119 (Paul A. Lombardo ed., 2011).

356. See ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS 77–82 (2009); see also Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL’Y & L. 347, 353, 351–353 (2012) (discussing southern lawmakers “manipulative attempts to maintain racial apartheid” in the aftermath of *Brown* through the “construct of illegitimacy”).

Scholars have documented the strategic shift that eugenics took in this period. Eugenicians were being criticized for their focus on heredity as the primary justification for eugenics policies; thus, historians have shown how the movement shifted to environmental and social justifications.³⁵⁷ Beginning in the nineteenth century, and continuing largely unabated until the middle of the twentieth century, the eugenics movement emphasized the centrality of motherhood—particularly white, middle class motherhood—to the future of the country.³⁵⁸ Given this view, significant attention was given to ensuring that only “fit” women became mothers.³⁵⁹ This was achieved through a combination of abortion and contraception restrictions aimed at ensuring that middle class women produced large families³⁶⁰ and marriage and family counseling urging women to make good marriage choices and fulfill their procreative potential in helping to build a better race.³⁶¹

As discussed in Part III.A, in the 1960s and early 1970s, eugenics took the form of federal welfare and family planning policy: poor, minority women were often targeted for sterilization.³⁶² These different examples demonstrate the shifting justifications for eugenics, which have variously included racism; concerns about hereditary degeneracy; controlling women’s sexuality; channeling sex and reproduction into the marital family and maintaining the gendered marital family more generally; social and economic efficiency; population control; and theological determinism.³⁶³

In the 1970s, several developments contributed to the demise of at least the most overt, coercive forms of eugenics. In 1972, it was revealed that the United States Public Health Service had conducted unethical and harmful syphilis experiments on poor rural blacks in Macon County, Alabama, for over forty years.³⁶⁴ The result was public

357. WENDY KLINE, *BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM* 4, 124–57 (2001).

358. *Id.*

359. *Id.*

360. *Cf.* Siegel, *supra* note 5, at 280–304 (arguing that the nineteenth century campaign against abortion was rooted in judgments about women’s proper roles, their duty to bear and raise children, and their central role in the production of citizens).

361. *See* KLINE, *supra* note 357, at 124–57.

362. *See supra* Part III.A.

363. *See* discussion *supra* notes 313–355 and accompanying text; *see also* Lombardo, *Introduction*, *supra* note 320, at 7.

364. *See* Jean Heller, *Human Guinea Pigs: Syphilis Patients Died Untreated*, *THE EVENING STAR & THE WASH. DAILY NEWS*, July 25, 1972, at A1; Jean Heller, *Syphilis Victims in U.S. Study Went Untreated for 40 Years*, *N.Y. TIMES*, July 26, 1972, at A1.

outray and federal laws and regulations requiring the protection of participants in clinical studies involving human subjects.³⁶⁵ Additionally, lawsuits and state laws began to establish the rights of persons in state mental institutions,³⁶⁶ and there was a movement to treat mentally disabled and mentally ill persons in the community.³⁶⁷ A series of Supreme Court cases established a constitutional right to privacy, which included a right to bodily integrity, to choose whether to use contraceptives, and abortion.³⁶⁸ In 1978, in response to *Relf v. Weinberger*, the federal government finally issued regulations prohibiting the use of federal family planning funds to sterilize persons under the age of twenty-one, mentally incompetent persons of any age, and institutionalized persons of any age.³⁶⁹ It also promulgated similar restrictions for Medicaid, under which the majority of publicly-funded sterilizations were now performed.³⁷⁰

Historian Gregory Dorr suggests that these seemingly unrelated rights claims by individuals involved in the welfare, civil rights, women's health, and patients' rights movements all converged in a way that fundamentally undermined eugenic ideology in the United

365. Specifically, studies involving human subjects now require informed consent, communication of diagnosis, and accurate reporting of test results. In addition, biomedical and behavioral research involving human subjects must be approved, monitored, and reviewed by institutional review boards ("IRBs"), independent ethics committees ("IECs"), or ethical review boards ("ERBs"). These changes were required, in large part, by the National Research Service Award Act of 1974, Pub. L. No. 93-348, § 211, 88 Stat. 342, 351-52 (repealed 1978). For a general discussion of the legislative and administrative reaction to the syphilis experiments, see Michael J. Malinowski, *Choosing the Genetic Makeup of Children: Our Eugenics Past-Present, and Future?*, 36 CONN. L. REV. 125, 165-70 (2003).

366. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *N.Y. State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973).

367. See generally BOB SMUCKER, PROMISE, PROGRESS, AND PAIN: A CASE STUDY OF AMERICA'S COMMUNITY MENTAL HEALTH MOVEMENT FROM 1960 TO 1980 (2007), available at http://mentalhealthhistory.org/Promise_Progress_Pain.pdf (providing a detailed history of the community mental health movement).

368. See *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

369. Provision of Sterilization in Federally Assisted Programs of the Public Health Service, 43 Fed. Reg. 52146, 52165-67 (Nov. 8, 1978) (codified at 42 C.F.R. §§ 50.201-50.210 (2009)).

370. See Federal Financial Participation in State Claims for Sterilizations, 43 Fed. Reg. 52171 (Nov. 8, 1978) (codified at 42 C.F.R. §§ 441.250-441.259 (2009)). The rules included a complex procedure to ensure women's informed consent, a thirty-day waiting period between consent and the procedure, a prohibition on sterilization for anyone who is younger than twenty-one or mentally incompetent, the provision of translators when necessary, and a prohibition on signing consent forms while a patient is undergoing labor, childbirth, or abortion. *Id.* at 52171-72.

States.³⁷¹ As he explains, “[T]he central issue was whether the victims—the Relf girls, the syphilitic men, and institutionalized mental patients—had given their informed consent.”³⁷² These developments, according to Dorr, “implicitly undermined the durable Progressive Era notion that, in the public interest, the state can reliably substitute its judgment for individual decision making.”³⁷³ In response, many states moved to repeal what they now saw as antiquated and biased sterilization laws, however sporadically applied. Indiana’s Governor Otis Bowen signed that state’s repeal into law in 1974.³⁷⁴ Although not entirely clear when the last involuntary sterilization of a competent adult occurred in the United States,³⁷⁵ there are currently at least fifteen states that still authorize sterilization for persons with mental disabilities by statute³⁷⁶ and at least nine that authorize it by judicial decree.³⁷⁷ These laws all require

371. See Dorr, *supra* note 238, at 176.

372. *Id.*

373. *Id.*

374. Act of Feb. 13, 1974, No. 60, § 1, 1974 Ind. Laws 2d Reg. Sess. 262; see also Lantzer, *supra* note 341, at 36–37. In 2013, the West Virginia House of Delegates voted unanimously to repeal its eugenic sterilization law, but a companion bill died in the Senate. See H.B. 2463, 2013 Leg., Reg. Sess. (W. Va. 2013), S.B. 193, 2013 Leg., Reg. Sess. (W. Va. 2013).

375. Some sources place it in Oregon in 1981. See, e.g., Sangeeta Chattoo & Karl Atkin, ‘Race’, *Ethnicity and Social Policy: Theoretical Concepts and the Limitations of Current Approaches to Welfare*, in UNDERSTANDING ‘RACE’ AND ETHNICITY: THEORY, HISTORY, POLICY, PRACTICE 25 (Gary Craig et al. eds., 2012).

376. See ARK. CODE ANN. §§ 20-49-201 to -207 (LexisNexis 2014); COLO. REV. STAT. §§ 27-10.5-128 to -132 (West 2012); CONN. GEN. STAT. §§ 45a-691 to -700 (Thomson Reuters 2014); DEL. CODE ANN. tit. 16, §§ 5701–5716 (Michie 2003); GA. CODE ANN. §§ 31-20-1 to -6 (LexisNexis 2012); HAW. REV. STAT. §§ 560:5-601 to -612 (Michie 2010); IDAHO CODE §§ 39-3901 to -3910 (Michie 2011); ME. REV. STAT. ANN. tit. 34-B, §§ 7001–7016 (West 2010); MICH. COMP. LAWS § 330.1629 (West 1999); N.J. STAT. ANN. § 30:6D-5 (West 2009); OHIO REV. CODE ANN. § 5123.86 (LexisNexis 2009); OR. REV. STAT. §§ 436.205 to 436.335 (2013); UTAH CODE ANN. §§ 62A-6-101 to -116 (LexisNexis 2011); VT. STAT. ANN. tit. 18, §§ 8705–8716 (LexisNexis 2012); VA. CODE ANN. §§ 54.1-2974 to -2980 (LexisNexis 2013).

377. See *C.D.M. v. Alaska*, 627 P.2d 607, 612 (Alaska 1981) (reasoning that authorizing sterilization of incompetent persons is part of a court’s “inherent parens patriae authority”); *Mildred G. v. Valerie N.*, 707 P.2d 760, 771–72 (Cal. 1985) (reasoning that statute which completely prohibited sterilization of incompetent persons violated the liberty and privacy rights protected by the federal and state constitutions); *A.W. v. T.M.W.*, 637 P.2d 366, 374–75 (Colo. 1981) (reasoning that power to authorize sterilizations flows from courts’ broad authority to “protect the person or property of an incompetent” and a person’s “constitutional right not to have the option of sterilization completely foreclosed”); *P.S. v. W.S.*, 452 N.E.2d 969, 971–72, 976–77 (Ind. 1983) (reasoning that courts have power to authorize sterilization of incompetent persons when in their best interests, on facts where autistic minor female had fascination with blood and would pick at her skin to discover the source of the blood and her parents and doctors feared she would harm herself in this way during menstruation); *In re Guardianship of Matejski*, 419

that certain protections are in place, including in most cases the right to notice and counsel, an opportunity for the person to be heard as to the need for sterilization, and the right to cross-examine witnesses.³⁷⁸ Further, a petition to sterilize an individual must be proved by clear and convincing evidence;³⁷⁹ courts have found the less exacting preponderance standard to be unconstitutional given the seriousness of the interests at stake.³⁸⁰

According to historians, all told, more than 63,000 people were forcibly sterilized under eugenics-inspired official state programs in the U.S. between 1907 and 1980.³⁸¹ Moreover, “[t]he actual number is most certainly higher—perhaps much higher—as some physicians sterilized without oversight, but because of limited documentation, the total number cannot realistically be estimated.”³⁸² Notwithstanding the isolated success of litigants like the *Relf* sisters, victims have generally found it difficult to obtain relief through the courts for the constitutional wrongs suffered. Statutes of limitations and lack of standing often prevent legal redress.³⁸³ Tracking down victims and their families is a formidable task. Many victims are dead, elderly, or unknown.³⁸⁴ Accessing medical information is a challenge because of rules protecting patient confidentiality.³⁸⁵

N.W.2d 576, 580 (Iowa 1988) (quoting IOWA CODE § 145.2 (1977)) (reasoning that repeal of law mandating sterilization of persons who are “mentally ill or retarded, syphilitic, habitual criminals, moral degenerates, or sexual perverts and who are a menace to society” did not evince legislative intent to strip courts of authority to authorize sterilizations of incompetent persons); *In re Moe*, 432 N.E.2d 712, 718 (Mass. 1982) (reasoning that courts’ power to authorize sterilizations derives from their “powers of equity over incompetents and their guardians”); *In re Terwilliger*, 450 A.2d 1376, 1380–82 (Pa. Super. Ct. 1982) (reasoning that courts’ power to authorize sterilizations of incompetent persons derives from the State’s *parens patriae* authority); *In re Guardianship of Hayes*, 608 P.2d 635, 638–39 (Wash. 1980) (reasoning that the lack of a statute granting courts power to authorize sterilization of incompetent persons does not entail that courts lack such power); *Eberhardy v. Conway*, 307 N.W.2d 881, 885–86 (Wis. 1981) (reasoning that courts’ authority to entertain and approve petitions for sterilizations of incompetent persons derives from the state constitution’s broad grant of general jurisdiction).

378. See 53 AM. JUR. 2D, *Mentally Impaired Persons* § 119 (2006).

379. *Id.*

380. *Id.*

381. LARGENT, *supra* note 317, at 1, 7, 8, 83, 138; LOMBARDO, *supra* note 331, at 294 app. c (Laws and Sterilizations by State).

382. LARGENT, *supra* note 317, at 138. Moreover, this figure does not include those sterilized outside of institutions.

383. See Silver, *supra* note 346, at 886.

384. See *id.* at 889.

385. See *id.* at 888. For this reason, one scholar has proposed that states should “make a narrow exception to their patient confidentiality rules.” *Id.* at 890.

However, a handful of states have apologized for these unjust laws once used against the disabled, poor, and minorities,³⁸⁶ and two states, North Carolina and Virginia, have passed laws compensating victims. For example, in 2011, the Governor of North Carolina appointed a task force to determine the method of compensation for victims of North Carolina’s eugenics board.³⁸⁷ The task force convened for three meetings in 2011 and 2012, at which victims and their families addressed the task force and told their stories. The task force issued a final report in January 2012, wherein it recommended lump sum payments of \$50,000 to each of the estimated 1500 to 2000 living victims of the North Carolina eugenics board to come forward and be verified; mental health services for living victims that would supplement gaps in health insurance and pay for services for victims without any insurance; and funding for a traveling North Carolina eugenics exhibit, a permanent exhibit memorializing the victims, and an oral history project recounting the full story of eugenics in North Carolina.³⁸⁸ Although the state House of Representatives passed bills implementing the key recommendations of the task force in May 2012,³⁸⁹ the effort ultimately died when it was not included in the state Senate’s budget.³⁹⁰ According to news reports, fiscal concerns drove the Senate’s decision.³⁹¹ Other senators raised the concern “that paying victims of what had been a legal program could lead to paying descendants of slaves or American Indians.”³⁹² “If we do something like this, you open up the door to other things the state did in its history,” remarked Republican Senator Chris Carney, “[a]nd some, I’m sure you’d agree, are worse than this.”³⁹³ After several years of

386. See LOMBARDO, *supra* note 331, at 258–66.

387. See 25 N.C. Reg. 2197–99 (Apr. 1, 2011), available at <http://www.ncoah.com/rules/register/Volume25Issue19April2011.pdf>.

388. See GOVERNOR’S TASK FORCE TO DETERMINE THE METHOD OF COMPENSATION FOR VICTIMS OF NORTH CAROLINA’S EUGENICS BOARD, N.C. DEP’T ADMIN., FINAL REPORT TO THE GOVERNOR OF THE STATE OF NORTH CAROLINA 2 (2012), available at <http://www.sterilizationvictims.nc.gov/documents/FinalReport-GovernorsEugenicsCompensationTaskForce.pdf>.

389. See H.B. 947, 2011 Gen. Assemb., Reg. Sess. (N.C. 2012); H.B. 73, 2011 Gen. Assemb., Reg. Sess. (N.C. 2012).

390. See Kim Severson, *Payments for Victims of Eugenics are Shelved*, N.Y. TIMES, June 21, 2012, at A14.

391. It was reported that “[i]f all of the 1,350 to 1,800 living victims came forward, the state could have been liable for about \$90 million.” *Id.* However, “the actual cost was expected to be much less. Only 146 living victims have been verified, and an additional 200 requests were pending. The House bill included \$11 million for the program.” *Id.*

392. *Id.*

393. *Id.*

advocacy, however, North Carolina finally approved a plan to compensate victims in 2014.³⁹⁴ Virginia, the home of Carrie Buck, is set to become the second state to compensate victims.³⁹⁵ Virginia's law will provide \$25,000 for each living victim of its eugenic sterilization law.³⁹⁶

Still, recognition that so many people were systematically wronged has been slow. As of 2015, just six of the thirty-two states with official sterilization programs have apologized to their victims,³⁹⁷ and only two states have decided to compensate the victims. Moreover, other than *Relf* and other cases spearheaded by civil rights organizations discussed in Part III.A., there has never been systematic

394. The North Carolina legislature introduced house and senate bills providing for compensation for eugenics victims in the 2013 session. See Eugenics Compensation Program, H.B. 7, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013); Eugenics Compensation Program, S.B. 464, 2013 Leg., Reg. Sess. (N.C. 2013). In May of 2014, the two bills were combined and reconciled and put into an appropriations bill, which was signed by the governor in August 2014. Appropriations Act of 2014, N.C. Sess. Law 2014-100, on Aug. 7, 2014, codified at N.C. GEN STAT. § 143B-426.51, available at http://www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_143B/GS_143B-426.51.pdf.

Under the final compensation scheme signed by the governor, North Carolina set aside \$10 million to be divided equally among victims of the state's eugenics board program. See N.C. GEN STAT. § 143B-426.51 (a). Victims had until June 30, 2014, to submit a claim. See N.C. GEN STAT. § 143B-426.52 (a). Ultimately, 786 claims were received by the deadline, and approximately 213 individuals qualified for compensation. See Press Release, N.C. Dep't Admin., Approximately 213 Qualify Under Eugenics Compensation Program, Initial Determinations Continue (Oct. 1, 2014), <http://www.doa.nc.gov/media/releases/showrelease.asp?id=0001-01OCT14>. The successful claimants were awarded \$20,000 in the first of two installments from the fund. John Raily, *Checks Arrive Loaded with Meaning*, WINSTON-SALEM J., Nov. 2, 2014, at A33. The total amount of compensation each victim receives, however, will depend on the number of people whose claims are approved by the commission, accounting for final appeals. That could approach \$50,000, according to a spokesman for the agency administering the compensation program. *Id.* The sterilization task force's recommendations relating to mental health services for victims, public education, and an oral history project preserving the experiences of victims for researchers and future generations were not included in the final law. See *supra* note 388 and accompanying text.

395. Bill Sizemore, *Virginia to Compensate Victims of Forced Sterilizations*, ASSOCIATED PRESS, Feb. 26, 2015 (reporting that the Virginia General Assembly budgeted \$400,000 to compensate victims at the rate of \$25,000 each). For the original proposed bill, see Virginia Justice for Victims of Sterilization Act, HB 1504, 2015 Va. Gen. Assemb., Reg. Sess. (Va. 2015).

396. *Id.*; Jenna Portnoy, *Lawmakers Agree to Pay Those Sterilized by the State*, WASH. POST., Mar. 1, 2015. For a summary of the events leading to this development, see LOMBARDO, *supra* note 323, at 258–63.

397. See LOMBARDO, *supra* note 331, at 258–66 (discussing apologies by California, Indiana, North Carolina, Oregon, South Carolina, and Virginia); *id.* at 294 app. c (Laws and Sterilizations by State) (listing 32 states with sterilization programs).

compensation for low-income women who were sterilized pursuant to the federal government’s family planning program in the 1970s. For example, such victims were, by definition, left out of the North Carolina compensation plan,³⁹⁸ even though some of the victims who testified before the Eugenics Victims Compensation Task Force were sterilized in this context.³⁹⁹ Newspapers ran editorials decrying the exclusion of these victims in North Carolina,⁴⁰⁰ “the majority of them African-American women,”⁴⁰¹ and civil rights groups have pressed lawmakers to amend the law,⁴⁰² but news reports suggest that “support for closing the loophole ‘ranges from zero to tepid.’”⁴⁰³ Virginia’s law, if signed by the Governor, also would compensate only victims sterilized under that state’s eugenics law while living in state institutions.⁴⁰⁴ Still, these developments represent breakthroughs and create hope that they will build awareness so that a larger, inclusive movement will develop some day across the United States to recognize the harms of coercive sterilizations and compensate all victims.⁴⁰⁵

C. Good Intentions, Victims’ Agency, and Other Caveats

By highlighting the history of eugenics and involuntary sterilization in the United States, I do not suggest that all sterilizations during the periods discussed were involuntary, unwanted, unnecessary, or unconstitutional. Moreover, although very few clear legal and ethical directives apply to every case, there are some

398. See Jim Morrill, *N.C. Eugenics Victims Shut Out of Settlement by Law’s Wording*, CHARLOTTE OBSERVER, Dec. 6, 2014.

399. See *supra* notes 284–285 and accompanying text (testimony of Nial Ramirez and Mary English).

400. Editorial, *Law Needs Fixing*, NEWS & RECORD, Dec. 11, 2014; Editorial, *What All NC Sterilization Victims Deserve*, NEWS & OBSERVER, Oct. 13, 2014.

401. Elizabeth Haddix, Op-Ed., *United in Justice for NC Eugenics Victims*, NEWS & OBSERVER, Oct. 22, 2014 (op-ed by a lawyer with the University of North Carolina Center for Civil Rights).

402. *Id.*

403. See Jim Morrill, *Victim Advocates Want to Close Eugenics Loophole*, CHARLOTTE OBSERVER, Jan. 20, 2015 (quoting Democratic Senator Jeff Jackson).

404. See Virginia Justice for Victims of Sterilization Act, *supra* note 395 (defining those eligible as “certain individuals who were involuntarily sterilized under the authority of the Virginia Eugenic Sterilization Act of 1924, ‘An ACT to provide for the sexual sterilization of inmates of State institutions in certain cases’”).

405. For evidence of this, however tentative, see Mark Bold, Op-Ed, *Our Debt on Sterilization: An Apology is Not Enough for the 20,000 victims of the State’s Eugenics Law*, L.A. TIMES, Mar. 6, 2015 (arguing that California’s 2003 official apology is not enough and urging compensation for the state’s sterilization victims).

contexts that may make a parent or guardian of a person with a severe disability conclude that it would be in the best interest of a child or ward to protect them from sexual activity or parenthood.⁴⁰⁶ In some instances, sterilization might enable developmentally disabled people to live richer, sexually active lives.⁴⁰⁷ And there are cases, for example, of women with such serious handicaps that having a menstrual period presents a monthly trauma.⁴⁰⁸

Nor do I intend to portray minorities merely as targets of eugenic control and repression. The family planning clinic nurses who took the Relf sisters to the hospital were African American,⁴⁰⁹ as was about half of the clinic staff.⁴¹⁰ Some of them told a reporter that “they know of people—poor people—who have been sterilized or have received other birth control aid from the clinic who ‘thank God’ for it.”⁴¹¹ Indeed, according to some historians, a certain type of positive eugenics held a strong appeal for various segments of the African-American community.⁴¹² And African-American women broadly supported the family planning movement; despite their valid

406. For a detailed discussion of such a case, see Paul A. Lombardo, *The Ethics of Controlling Reproduction in a Population with Mental Disabilities*, in PEDIATRIC BIOETHICS 173, 180–81 (Geoffrey Miller ed., 2010) (discussing *In re Estate of C.W.*, 433 Pa. Super. Ct. 167 (1994), a case where a mother sought a tubal ligation of her daughter who had significant mental and physical disabilities because of the mother’s “desire to increase the range of experience available to C.W., specifically the wish to allow her to live in a sheltered living facility rather than the more socially restricted environment of her mother’s home.”).

407. *Id.*

408. *See, e.g.*, *Ruby v. Massey*, 452 F. Supp. 361 (D. Conn. 1978). Note that long-acting birth control like Norplant might well moot (or at least soften) these difficulties. One major problem with surgical sterilization is its permanence.

409. *See Dorr, supra* note 238, at 177.

410. *Id.*

411. *See Bruce Nichols, Staff of Clinic Stunned by Suit*, MONTGOMERY ADVERTISER, June 28, 1973, at 2.

412. *See Gregory M. Dorr & Angela Logan, “Quality, Not Mere Quantity, Counts”: Black Eugenics and the NAACP Baby Contests*, in A CENTURY OF EUGENICS IN AMERICA 68–92 (Paul A. Lombardo ed., 2011). According to Dorr and Logan, certain leading African-American intellectuals and organizations, such as W.E.B. Du Bois, Thomas Wyatt Turner, Marcus Garvey, Elijah Muhammad, and the NAACP, “believed in eugenics’ central dogma that (a) human beings could be sorted into the relatively ‘fit’ and ‘unfit’ and (b) society as a whole could be improved by ensuring the propagation of the fit and reducing procreation of the unfit.” *Id.* at 69. Although these ideas represented an effort to lift up the African-American race and “fight against the fruits of white eugenics: segregation, anti-miscegenation law, and lynching,” *id.* at 70, historians also associate black eugenic ideas with an “obvious class bias” against poor African Americans, *id.* at 87, that lined up with whites’ view of their “feebleminded” (that is, poor, uneducated, unemployed) as immoral and eugenically “unfit.” Dorr, *supra* note 238, at 178.

concerns about racism, “they still perceived the free services to be in their own best interests.”⁴¹³

Moreover, one of the Relf sisters was physically and mentally disabled,⁴¹⁴ suggesting that her mother may have thought at least some measure to prevent pregnancy was a good idea. It is also possible that Linda Spitler’s mother had her daughter’s best interests in mind when she sought the order authorizing sterilization, especially if she thought the procedure was reversible.⁴¹⁵ According to one authoritative source, “Women were rarely provided complete information about the procedure or given information about alternative methods of birth control. Many did not understand that the procedure was permanent and the use of confusing terminology such as ‘tied tubes’ misleadingly implied its reversibility.”⁴¹⁶ The stories of those sterilized or whose children were sterilized certainly support this account.

Nor have the legal protections for patients attributable to the political fallout of cases like *Relf* been welcomed by all physicians or patients. Some physicians have criticized strict rules governing sterilization as an overcorrection, because they allegedly interfere with a physician’s clinical judgment and the ability of competent women to choose sterilization.⁴¹⁷ Moreover, competent women have sued to

413. Ross, *supra* note 240, at 282.

414. See Dorr, *supra* note 238, at 178.

415. See David Kurtz, *Linda and Leo Sparkman Are an Unlikely Test Case for the Courts*, HERALD TELEPHONE (Bloomington, Ind.), Nov. 21, 1977, at 10 (reporting that when Linda Spitler confronted her mother about the sterilization, Ora McFarlin told her daughter that her tubes had been tied but they would “come untied on their own accord”); see also Complaint at ¶ 18, *Sparkman v. McFarlin*, No. F 75-129 (N.D. Ind. Nov. 26, 1975), available in STUMP, *supra* note 209 (alleging that Spitler’s mother told her that “her tubes would come untied on their own accord”); COLEMAN & HEADLEY, *supra* note 1, at v (recounting same story). Assuming this account is true, it is unclear whether McFarlin was being duplicitous or really believed this.

416. Historical & Multicultural Encyclopedia of Women’s Reproductive Rights in the United States 196 (Judith A. Baer ed., 2002).

417. See David Mannweiler, *Kindly Doctor is Frustrated*, INDIANAPOLIS NEWS, Sept. 26, 1979. Specifically, Mannweiler reports:

Before the hospitals changed their rules, doctors often performed simple hysterectomies on mentally retarded patients who could not take care of themselves hygienically during menstrual periods The hysterectomy allowed them to be sexually active without having children.

A spinoff problem is government intervention in the Medicaid program which [as one physician explained] “makes it so hard for women to get sterilized.

Medicaid now has a woman wait at least three [sic] days to get her tubes tied. . . . I’ve had women who have said, ‘I’ve got four children, no husband and

establish the right to require public hospitals to sterilize them. For example, in 1973, Robbie Mae Hathaway won a suit against a Massachusetts public hospital for denying her elective sterilization surgery.⁴¹⁸ She had asked to receive contraceptive sterilization from the hospital as a means of permanent birth control after having eight children.⁴¹⁹ However, the hospital had a ban on surgical sterilizations and denied her surgery.⁴²⁰ The court found the hospital had violated the equal protection clause of the Fourteenth Amendment and granted the surgery.⁴²¹ Other cases presented similar facts during this period.⁴²² Sterilization can be a desired procedure, and all sterilizations are not undertaken with eugenic intentions.

Finally, there is the risk that this Article's focus on "other side of reproductive rights" may come back to haunt feminists in the abortion and other contexts.⁴²³ Indeed, the pretense of protecting the reproductive autonomy of minority women is being used in an effort to subvert reproductive choice.⁴²⁴ For example, a billboard in New York City paid for by Life Always, an anti-abortion group, read "The most dangerous place for an African-American is in the womb."⁴²⁵ Today, as women are fighting for free birth control,⁴²⁶ poor

I don't want more children.' They ask me to tie their tubes and I say 'Okay, you got it,' but I don't bill Medicaid for the operation."

Id. (although this quote states that the waiting period was three days, the federal regulations, *supra* note 369, mandated a thirty-day waiting period); *see also* Cindy Loose, *Birth Control and Bureaucracy: Poor Women Seeking Sterilization Face a Snarl of Red Tape*, WASH. POST, Feb. 19, 1998, at A1.

418. *Hathaway v. Worchester City Hospital*, 475 F.2d. 701 (1st Cir. 1973).

419. *Id.* at 703.

420. *Id.*

421. *Id.* at 706. This suit was spearheaded by a coalition forged among the American Civil Liberties Union, Zero Population Growth, and the Association for Voluntary Sterilization. *See Kluchin, supra* note 241, at 134.

422. *See, e.g., McCabe v. Nassau Co. Medical Ctr.*, 453 F.2d 698 (2d Cir. 1971) (public medical center refused to perform a desired tubal ligation because, according to its rules, the plaintiff had to have five children before she could be sterilized).

423. *Cf. Jeannie Suk, The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1197 (2010) (arguing that legal feminists' arguments in the domestic violence context have come back to haunt them in the abortion context, in the form of the discourse of regret fueled by "feminist discourse of trauma around women's bodies and sexuality").

424. *See Mary Ziegler, Roe's Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 YALE J.L. & FEMINISM 1, 40–45 (2013) (describing examples of abortion opponents' invocation of the close relationship between the abortion-rights and population-control movements of the past as evidence that contemporary providers and activists harbor racist intentions).

425. *See Jordana Ossad, Controversial Billboard Focuses on African-American Abortions*, CNN (Feb. 23, 2011), <http://www.cnn.com/2011/US/02/23/new.york.billboard>. In response

women are often invoked as a reason why it is important to provide such care.⁴²⁷

Yet, acknowledging the good intentions of some of the story’s villains, the agency of victims, and the complexity of the issue more generally should not diminish this ugly, century-long chapter in American history during which the mentally disabled, lower-class people, and racial and ethnic minorities were subject to eugenically motivated and often coercive sterilization. *Stump* is an important part of this history. It bridges two chapters of eugenics in America—the eugenic sterilization of institutionalized persons by eugenics boards in the first half of the twentieth century and the systematic sterilization of poor, mostly minority women swept in the tide of federal “family planning” initiatives in the second half of the twentieth century. Linda Spitler, a poor, working-class teenager from a small town in Indiana, stood at the crossroads of these two eugenic periods.

to the billboard, a Life Always board member told reporters, “[I]t’s hard to celebrate Black History Month’ with abortion ‘hanging over our community.’” *Id.*; cf. Kessler, *supra* note 7, at 16–18.

While I am not seeking to diminish the real harms that cries of “black genocide” can inflict on abortion rights, the proper response to these difficulties, in my view, is to articulate the intersection of gender and race oppression into one’s scholarly analysis, rather than refrain from highlighting this history at all. See Wendy Brown & Janet Halley, *Introduction*, in *LEFT LEGALISM/LEFT CRITIQUE* 36 (Wendy Brown & Janet Halley eds., 2002) (calling on progressive scholars to “open the door of political and legal thought as if the wolves were not there); cf. Kessler, *supra* note 7, at 16–18 (explaining how black feminists’, in the face of “both racist, antinatalist policies of the white majority and sexist, pronatalist ideology within the black nationalist movement,” articulated a distinct black feminist perspective by simultaneously asserting the right of black women to “control their fertility and to control their vision and practice of motherhood”); Ross, *supra* note 240, at 283 (“Th[e] combined support for birth control and abortion and opposition to sterilization, a view unique to African-American women at the time, did much to inform both the feminist and the civil rights movement in later decades.”). New and important histories disentangling the abortion-rights, population control, and eugenics movements also go a long way toward that effort. See Ziegler, *supra* note 424, at 48–49 (“While some population activists did have ties to the eugenic legal reform movement, many population controllers had different aims, priorities, and arguments than did eugenic reformers. And while some abortion-rights activists used population-based claims or joined the population movement, the movements for abortion and population control differed considerably from one another.”).

426. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (holding that a closely-held for-profit is exempt on religious grounds from a federal regulation requiring it to cover certain contraceptives for its female employees in its employer-sponsored insurance plan under the federal Religious Freedom Restoration Act).

427. For example, a fundraising appeal by Planned Parenthood in response to Texas’ recent efforts to shut down abortion clinics states, “Women are being forced to travel hundreds of miles to get the care they need—and if they can’t afford to make that trip, safe and legal abortion is quite simply out of reach.” E-mail from Cecile Richards, Planned Parenthood, President, to Laura Kessler (Oct. 6, 2014) (on file with author).

Reported by a mother who opted to place her allegedly disobedient daughter in the hands of the law; sexually abused yet accused of promiscuity like Carrie Buck; and handled by legal and medical establishments accustomed to paternalistically controlling poor women's sexuality, Linda Spitler's story was not an aberration, as Justice Stewart's dissent suggested. It closely resembled other victims' stories and fit comfortably within larger patterns of twentieth century eugenic sterilizations in the United States.

Taking an even longer view, one can see *Stump* as part of a history of Supreme Court participation in institutionalized violence against minorities' bodies. The echoes of Lynch-law in *Stump v. Sparkman* are haunting. As Barbara Holden-Smith and others have detailed,⁴²⁸ part of what was so heinous about lynching was the participation of state officials, including police and judges, either by standing back and not restraining mobs or by actively participating.⁴²⁹ Lynching became the law of the land through this participation and the Court's protection of it.⁴³⁰ Similarly, in *Stump* we see how at least one judge made the mutilation of poor and minority women the law of the land. The Supreme Court, through its decision, protected judges' ability to do so, much in the same way that the Supreme Court protected participation in lynchings with its narrow interpretation of the Ku Klux Klan Act of 1871.⁴³¹ Although Judge Stump was participating in an individualized form of gender violence through his sterilization order, the Supreme Court, by making a space for this kind of injustice—a sterilization decision absent any notice, law, evidence, representation, or ability to appeal—elevated Judge Stump's error to a form of institutionalized gender injustice, creating a kind of zone of exception around women's bodies, a place where the law does not apply and anything might be done.⁴³²

428. See Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. FEMINISM 31, 40 (1996); see also Hall & Harris, *supra* note 88, at 34, 46; Pope, *supra* note 83, at 430.

429. See Holden-Smith, *supra* note 428, at 40 ("Local sheriffs harbored indifference, or outright hostility, toward their duties to prevent mobs from killing blacks and to apprehend lynchers. . . . [T]hey were often themselves alleged to be active participants in mob violence."); see also discussion *supra* note 96.

430. See *supra* Part I.B.

431. *Id.*

432. Cf. GIORGIO AGAMBEN, *STATE OF EXCEPTION* 3, 14–15 (2005) (describing the indefinite suspension of law in contexts such as Nazi Germany, detention camps such as Guantanamo Bay and immigration detention centers as "state[s] of exception"). That the Court achieved this result *sub silencio* does not change the conclusion. "[T]he state of exception is neither external nor internal to the juridical order;" it is created by the

IV. *STUMP*'S CONTINUING LEGACY: EUGENIC THINKING IN
CONTEMPORARY LAW AND POLICY

Although the most troubling and coercive forms of eugenics are no longer prevalent in the United States, some of the attitudes motivating the early eugenicists continue to influence contemporary law and public policy today. For example, beginning in the 1980s, state prosecutors began targeting women who used drugs during pregnancy and delivered drug-exposed babies.⁴³³ Poor, drug-addicted mothers in need of medical treatment and other services are charged with a variety of crimes, including criminal neglect, delivery of drugs to a minor, and involuntary manslaughter.⁴³⁴ Only the South Carolina Supreme Court has upheld such a conviction.⁴³⁵ However, states use other coercive and punitive measures against mothers who use drugs during pregnancy. Several states' child welfare rules include prenatal substance abuse as a basis for terminating parental rights.⁴³⁶ Some states authorize civil commitment of pregnant women

absence of law or “a zone of indifference.” *Id.* at 23, 51; *see also* Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1049 (1992) (“Legal rules permit and sometimes mandate the *terrorization* of the female body. This occurs by a combination of provisions that inadequately protect women against physical abuse and that encourage women to seek refuge against insecurity.”).

433. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1428–32 (1991).

434. *See* Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 508–09 (1992); Roberts, *supra* note 433, at 1420–21; Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 505 (1990); *see also* LYNN M. PALTROW, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW (1992), available at <http://advocatesforpregnantwomen.org/file/1992%20State-by-State%20Case%20Summary.pdf>.

435. *See* *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997). For a fuller discussion of this case, *see* Ariela R. Dubler, Case Note, *Monitoring Motherhood*, 106 YALE L.J. 935 (1996).

436. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-201 (2010); ARK. CODE ANN. §§ 12-18-103(14)(B), 12-18-402 (2009); COLO. REV. STAT. § 19-1-103(1)(a) (2011); D.C. CODE § 16-2301(9) (2012); FLA. STAT. § 39.01(30) (2011); 325 ILL. COMP. STAT. 5/3 (2011); IND. CODE. §§ 31-34-1-10 to -11 (2008); IOWA CODE § 232.68 (2011); MD. CODE ANN., CTS. & JUD. PROC. § 3-818 (West 2012); MINN. STAT. § 626.556(2)(f) (2010); NEV. REV. STAT. § 432B.330 (2011); N.D. CENT. CODE § 27-20-02(8) (2006); S.C. CODE ANN. § 63-7-1660(F)(1) (2010); S.D. CODIFIED LAWS § 26-8A-2(9) (2012); TEX. FAM. CODE ANN. § 261.001 (West 2008); VA. CODE ANN. § 63.2-1509(B) (2007); WIS. STAT. ANN. § 48.02(1) (West 2011); *see also* GUTTMACHER INST., STATE POLICIES IN BRIEF: SUBSTANCE ABUSE DURING PREGNANCY 1 (2015), available at http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf (reporting that “18 states consider substance abuse during pregnancy to be child abuse under civil child-welfare statutes”).

who use drugs or alcohol.⁴³⁷ A number of states require health care professionals to report or test for prenatal drug exposure, which can be used in a child-welfare proceeding.⁴³⁸ According to one study, there have been 413 cases from 1973 to 2005 “in which a woman’s pregnancy was a necessary factor leading to attempted and actual deprivations of a woman’s physical liberty” through arrest, detentions, and forced interventions.⁴³⁹ Scholars have highlighted the differential enforcement of these laws against lower income women and racial minorities.⁴⁴⁰

437. See, e.g., MINN. STAT. § 253B.02 (2010); S.D. CODIFIED LAWS § 34-20A-70 (2012); WIS. STAT. ANN. § 48.193 (West 2011); see also GUTTMACHER INST., *supra* note 436 at 1 (reporting that three states consider substance abuse during pregnancy grounds for civil commitment).

438. ARIZ. REV. STAT. ANN. § 13-3620 (2010); ARK. CODE ANN. §§ 12-18-103(14)(B), 12-18-402 (2009); COLO. REV. STAT. §§ 19-1-103(1)(a), -3-304 (2011); FLA. STAT. §§ 39.01(32), 39.201 (2011); 325 ILL. COMP. STAT. 5/3 to 5/4 (2011); IND. CODE §§ 31-33-5-2, 31-34-1-10 to -11 (2008); IOWA CODE §§ 232.68 to .69 (2011); ME. REV. STAT. TIT. 22, § 4011-B (2011); MD. CODE ANN., CTS. & JUD. PROC. § 3-818 (WEST 2012); MD. CODE ANN., FAM. LAW §§ 5-704 to -705 (2006); MASS. GEN. LAWS CH. 119, § 51A (2010); MINN. STAT. § 626.556 (2010); NEV. REV. STAT. § 432B.220 (2010); N.D. CENT. CODE §§ 27-20-02(8), 50-25.1-03, -03.1 (2007); OKLA. STAT. TIT. 10A, § 1-2-101 (2011); S.C. CODE ANN. §§ 63-7-310, 63-7-1660(F)(1) (2010); S.D. CODIFIED LAWS §§ 26-8A-2(9), -3 (2012); TEX. FAM. CODE ANN. § 261.001, .101-102 (WEST 2008); VA. CODE ANN. § 63.2-1509 (2007); WIS. STAT. ANN. §§ 48.02(1), 48.981 (2011); see also GUTTMACHER INST., *supra* note 436, at 1 (reporting that “15 states require health care professionals to report suspected prenatal drug abuse, and 4 states require them to test for prenatal drug exposure if they suspect abuse”).

439. See Lynne M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POLITICS, POL’Y & L. 299, 299 (2013).

440. See Roberts, *supra* note 433, at 1421 (arguing that prosecuting poor black women for drug use during pregnancy reflects authorities’ racist attitudes); Ira J. Chasnoff et al., *The Presence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1202 (1990) (study finding that black women were reported at approximately 10 times the rate for white women, and poor women were more likely than others to be reported); Michele Bratcher Goodwin, *Precarious Moorings: Tying Fetal Drug Law Policy to Social Profiling*, 42 RUTGERS L.J. 659, 677 (2011) (explaining that “enactors and interpreters of [fetal drug laws] . . . exclusively focus on . . . socio-economic and racial profiling”); Paltrow & Flavin, *supra* note 439, at 310 tbl.1, 311 (showing that of 413 state criminal or civil actions taken against women for endangering their fetuses between 1973 and 2005, seventy-one percent were economically disadvantaged and fifty-nine percent were women of color); see also Gina Kolota, *Bias Seen Against Pregnant Addicts*, N.Y. TIMES (Jul. 20, 1990), <http://www.nytimes.com/1990/07/20/us/bias-seen-against-pregnant-addicts.html> (“Most women prosecuted for using illegal drugs while pregnant have been poor members of racial minorities, experts say, even though drug use in pregnancy is equally prevalent in white middle-class women.”).

In the 1990s, many states, with federal government blessing,⁴⁴¹ began placing conditions on eligibility for welfare benefits that significantly impinged on poor women’s reproductive decision-making. For example, many states adopted “family caps,”⁴⁴² policies denying welfare-assisted families further financial assistance after the birth of additional children.⁴⁴³ About half the states have implemented a family cap or similar child exclusion policy.⁴⁴⁴ Most states have exceptions softening the harshest applications and consequences of their family caps.⁴⁴⁵ However, legal challenges to

441. Under the current 1996 federal welfare law block grant, Temporary Assistance for Needy Families (TANF), states have discretion to implement a family cap. JODIE LEVIN-EPSTEIN, CTR. FOR LAW & SOC. POL’Y, *LIFTING THE LID OFF THE FAMILY CAP: STATES REVISIT PROBLEMATIC POLICY FOR WELFARE MOTHERS* 2–3 (2003), *available at* <http://www.clasp.org/admin/site/publications/files/0166.pdf>. Prior to TANF, under the federal Aid to Families with Dependent Children, states had to obtain waivers before imposing family caps. *Id.*

442. Historically, the birth of additional children would result in a modest increase in welfare benefits. *Id.* at 1–2. Family caps eliminate such increases, an attempt to influence the reproductive behavior of poor women. *Id.*

443. See Laura T. Kessler, *PPI, Patriarchy, and the Schizophrenic View of Women: A Feminist Analysis of Welfare Reform in Maryland*, 6 MD. J. CONTEMP. LEGAL ISSUES 317, 336–38 (1995); Jennifer S. Madden, *Recent Development, Family Caps Threaten Women and Their Children*, 10 BERKELEY WOMEN’S L.J. 171, 172–74 (1995).

444. See ARIZ. REV. STAT. ANN. § 46-292 (2011); CAL. WELF. & INST. CODE § 11450.04(a) (West 2001); CONN. GEN. STAT. ANN. § 17b-112(d)(2) (West 2006); FLA. STAT. ANN. § 414.115(4)-(5) (West 2009); GA. CODE ANN. § 49-4-186 (West 2009); IND. CODE ANN. § 12-14-2-5.3(b) (LexisNexis 2006); MINN. STAT. ANN. § 256J.24 Subdiv. 6(a) (West 2007); MISS. CODE ANN. § 43-17-5(1) (West 2008); N.J. STAT. ANN. § 44:10-61 (West 1993); N.D. CENT. CODE ANN. § 50-09-29(1)(w) (West 2007); S.C. CODE ANN. § 43-5-1175 (1995); TENN. CODE ANN. § 71-3-104(h)(4)(i) (West 2005); VA. CODE ANN. § 63.2-604 (2007); ARK. ADMIN. CODE 208.00.1-2361 (West 2009); 16 DEL. ADMIN. CODE 51000-3008.2 (West 2011); 106 MASS. CODE REGS. 203.300(B)(1) (West 2011); N.C. DEP’T HEALTH & HUMAN SERVS. DIV. OF SOC. SERVS., NORTH CAROLINA’S TEMPORARY ASSISTANCE FOR NEEDY FAMILIES STATE PLAN: THE FIRST WORK PROGRAM 27 (2013), *available at* <http://www.ncdhhs.gov/dss/dcdl/economicfamilyservices/EFS-WF-06-2013a.pdf>; *cf.* IDAHO ADMIN. CODE r. 16.03.08.248, 16.03.08.251 (West 2011) (providing a flat maximum benefit regardless of family size); WIS. DEP’T OF CHILDREN & FAMILIES, WISCONSIN WORKS (W-2) MANUAL § 10.1 (2012), *available at* [http://dcf.wisconsin.gov/w2/manual/default.htm#11/11.6.1_intentional_program_violation_\(ipv\).htm](http://dcf.wisconsin.gov/w2/manual/default.htm#11/11.6.1_intentional_program_violation_(ipv).htm) (providing a flat maximum benefit regardless of family size); *see generally* DAVID KASSABIAN ET AL., *URBAN INST., WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2010* (2011), *available at* <http://www.urban.org/UploadedPDF/412381-Welfare-Rules-Databook.pdf>; Martha F. Davis, *The Child Exclusion in a Global Context*, 60 CASE W. RES. L. REV. 1183 (2010); *Family Cap Policies*, NAT’L CONF. ST. LEGISLATURES (July 2009), <http://www.ncsl.org/issues-research/human-services/welfare-reform-family-cap-policies.aspx>.

445. For example, most states with family caps exempt children born as a result of rape, sexual assault, or incest. *See, e.g.*, GA. CODE ANN. § 49-4-186 (West 2009); MINN. STAT. ANN. § 256J.24 Subdiv. 6(b)(3) (West 2007); N.J. STAT. ANN. § 44:10-61 (West 1993); MASS. CODE

family caps typically fail.⁴⁴⁶ For example, challenges to family caps under the unconstitutional conditions doctrine have been unsuccessful.⁴⁴⁷ This doctrine forbids the government from requiring a person to surrender a constitutional right as a condition of receiving a public benefit.⁴⁴⁸ Generally, courts considering these challenges have held that the government can place a condition on a benefit so long as the condition is a refusal to subsidize the constitutional right.⁴⁴⁹ This approach has allowed government to influence welfare recipients' constitutionally-protected reproductive choices through family caps so long as its efforts can plausibly be described as inaction. Furthermore, the entire project of "welfare reform," with its workfare requirements, child support enforcement, family caps, responsible fatherhood programming, abstinence education, and marriage promotion dimensions may be viewed as a eugenic-like project that suspends democratic norms and the law in important ways.

Judges have also urged vasectomies and "no-procreation" orders on men (and occasionally women) who have borne many children out of wedlock and have required contraception as a condition of probation in certain criminal cases. For example, in 2001, the

REGS. 203.300(C)(3) (West, Westlaw current through January 6, 2012, Register #1199). California excludes children who were "conceived as a result of contraceptive failure if the parent was using an intrauterine device, a Norplant, or the sterilization of either parent." See CAL. WELF. & INST. CODE § 11450.04(b) (2001). South Carolina provides benefits to children subject to the cap in the form of vouchers. See S.C. CODE ANN. § 43-5-1175 (1995). Idaho does not apply its flat benefit, which works like a family cap, to families with at least some earned income. See IDAHO ADMIN. CODE r. 16.03.08.248, 16.03.08.251 (West 2011). For a comprehensive discussion of exceptions, see Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 166-167 (2006).

446. See Davis, *supra* note 444, at 1186-87; Christopher Dinkel, Note, *Welfare Family Caps and the Zero-Grant Situation*, 96 CORNELL L. REV. 365, 383-88 (2011) (discussing failed legal challenges in state and federal courts); Smith, *supra* note 445, at 180-86.

447. See Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 497-511 (1995); Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155, 162-65 (1996); Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 934-43 (1995).

448. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

449. See, e.g., C.K. v. Shalala, 883 F. Supp. 991, 1014-15 (D.N.J. 1995), *aff'd sub nom.* C.K. v. N.J. Dep't of Health & Human Servs., 92 F.3d 171, 194-95 (3d Cir. 1996); N.B. v. Sybinski, 724 N.E.2d 1103, 1112-13 (Ind. Ct. App. 2000); Sojourner A. v. N.J. Dep't of Human Servs., 828 A.2d 306, 331-37 (N.J. 2003); see also Dandridge v. Williams, 397 U.S. 471, 483-87 (1970) (holding that a state-imposed cap on welfare benefits did not violate the Equal Protection Clause).

Wisconsin Supreme Court upheld such a restriction in *State v. Oakley*.⁴⁵⁰ In that case, a trial judge sentenced David Oakley to probation for intentional failure to pay child support, on the condition that “Oakley cannot have any more children unless he demonstrates that he had [sic] the ability to support them and that he is supporting the children he already had.”⁴⁵¹ Laurence Tribe, a leading constitutional scholar, petitioned the United States Supreme Court on the Oakley’s behalf,⁴⁵² but certiorari was denied in 2002.⁴⁵³ The Court’s refusal to hear the issue left the door open for other family court judges to follow. In 2004, a New York family court ordered an allegedly drug-addicted homeless couple to stop having children after their fourth child was removed from their care.⁴⁵⁴ Although the parents in this case and others have successfully challenged “no procreation” orders on constitutional and other grounds,⁴⁵⁵ “these conditions are rarely challenged in appellate

450. 629 N.W.2d 200, 214 (Wis. 2001).

451. *Id.* at 203. The justices of the Wisconsin Supreme Court divided on gender lines; four men upheld the ruling and three women dissented. *Id.* at 223. Justice Ann Walsh Bradley noted the untenable position that the ruling creates for any unlucky woman impregnated by Mr. Oakley: “have an abortion or be responsible for Oakley going to prison for eight years.” *Id.* at 219. Justice Diane Sykes objected to what she saw as “a compulsory, state-sponsored, court-enforced financial test for future parenthood.” *Id.* at 221.

452. *See* Petition for Writ of Certiorari, *Oakley v. Wisconsin*, No. 01-1573, 2001 WL 34116641 (U.S. Apr. 19, 2001).

453. *Oakley v. Wisconsin*, 537 U.S. 813 (2002).

454. *In re Bobbijeane P.*, No. 03626-03, 2004 WL 834480, at *1 (N.Y. Fam. Ct. Mar. 31, 2004). The court’s order stated:

[I]t is the intention of the court that the mother be required to not get pregnant until all of her children are being raised by a natural parent, or are no longer being cared for at the expense of the public. It is similarly the intention of the court that the father be required to not father another child until all his children are being raised by a natural parent, or are no longer being cared for at the expense of the public. It is further the intention of the court that neither parent shall conceive another child until found capable of having custody of all their current children. In other words, the respondents shall be required to act like responsible parents and for the duration of the order, to have no more children unless they can parent them themselves.

Id. at *3.

455. *See In re Bobbijeane P.*, 46 A.D.3d 12, 13–14 (N.Y. App. Div. 2007) (holding that family court lacked authority to impose a “no pregnancy” condition because it did not address the goals of remedying the acts found to have caused mother’s neglect of her child or relate to the well-being of the removed child within the meaning of the family court rules); *see also* Trammell v. State, 751 N.E.2d 283, 290–91 (Ind. Ct. App. 2001) (order of a mentally retarded woman convicted of child neglect not to become pregnant for the eight years of her suspended sentence violated her constitutional right to privacy for procreative decisions); *State v. Talty*, 814 N.E.2d 1201 (Ohio 2004) (overturning a condition that the

courts,⁴⁵⁶ therefore “trial judges will often have the final say as to whether these probation conditions are appropriate.”⁴⁵⁷

News reports and legal scholarship suggest that family court judges continue to issue such orders.⁴⁵⁸ For example, one Kentucky family court judge reportedly gives repeat offenders who are in contempt of court for failing to pay child support the option of having a vasectomy rather than going to jail for thirty days.⁴⁵⁹ The judge encourages the procedure in cases of “fathers who owe more than \$10,000 in child support and have children with more than three women.”⁴⁶⁰ The latter criterion, in particular, suggests that moral judgments about the circumstances of unwed parenthood motivate this judge’s decision to impose sterilization conditions on those before him. In a 2013 Wisconsin case, the judge announced from the bench, “It’s too bad the court doesn’t have the authority to sterilize.”⁴⁶¹ And, in Virginia, one of two states that recently approved compensation for individuals sterilized by its eugenic boards of years past, a state judge approved a plea deal in which a man received twenty months in prison, five years of probation, and a vasectomy for child endangerment and hit and run driving on a suspended license.⁴⁶² The prosecutor’s motivation in offering the vasectomy

defendant make “reasonable efforts” to avoid conception while on probation for criminal nonpayment of child support, on the ground that the sentence was unconstitutionally overbroad, because it did not include a method for lifting the ban if the defendant caught up with his payments).

456. Joanna Nairn, *Is There A Right To Have Children? Substantive Due Process and Probation Conditions That Restrict Reproductive Rights*, 6 STAN. J. CIV. RTS. CIV. LIBERTIES 1, 9 (2010).

457. *Id.*

458. See Nairn, *supra* note 456, at 6–10; Bruce Vielmetti, *No-Procreation Order Only Latest Solution to Child Support*, MILWAUKEE WIS. J. SENTINEL, Jan. 17, 2013, <http://www.jsonline.com/news/wisconsin/judge-orders-deadbeat-dad-not-to-father-children-b68e4a8-187381811.html> (“For the second time in as many months, a Wisconsin judge has ordered a man not to father any more children until he pays past-due child support.”).

459. Dee McAree, *Deadbeat Dads Face Ban on Procreation*, NAT’L L.J., May 31, 2004.

460. *Id.* For a detailed account of this judge’s methods, see Andrea W. Fancher, Note, *Thinking Outside the Box—A Constitutional Analysis of the Option to Choose Between Jail and Procreation*, 19 QUINNIPIAC PROB. L.J. 328, 329–30 (2006).

461. See Vielmetti, *supra* note 458.

462. See Amanda Marcotte, *Vasectomies Should Not be Used as Punishment*, SLATE MAGAZINE (June 20, 2014), http://www.slate.com/blogs/xx_factor/2014/06/18/jesse_lee_herald_agrees_to_a_vasectomy_as_part_of_his_plea_deal_bad_idea.html; see also Justin Jouvenal, *In Unusual Plea Deal, Virginia Man Agrees to a Vasectomy*, WASH. POST, June 29, 2014, http://www.washingtonpost.com/local/crime/in-unusual-plea-deal-virginia-man-agrees-to-a-vasectomy/2014/06/29/7835371c-fe3e-11e3-932c-0a55b81f48ce_story.html (providing additional details of the case).

option “was primarily due to the fact that he had seven or eight children, all by different women, and we felt it might be in the commonwealth’s interest for that to be part of the plea agreement”⁴⁶³

Along the same lines, some states have considered adding castration provisions to their penal codes for certain serious sex offenses. Such proposed laws either require castration, typically for repeat offenders, or authorize “voluntary” castration as a condition of early release. For example, in 2007, Virginia Governor Timothy Kaine vetoed a law encouraging state agencies to consider allowing early release for sexually violent predators who agreed to castration.⁴⁶⁴ Almost twenty states have considered adding castration provisions to their penal codes.⁴⁶⁵ Most of these legislative proposals have failed. Still, seven states have statutes authorizing chemical or surgical castration of sex offenders.⁴⁶⁶ Most of the proposed laws and enacted

463. *Id.*

464. *See* S.B. 1203, 2007 Gen. Assemb., Reg. Sess. (Va. 2007). Senator Emmett W. Hanger, the bill’s sponsor, unsuccessfully reintroduced it in 2011. *See* S.B. 1470, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).

465. *See, e.g.*, H.B. 14, 2014 Gen. Assemb., Reg. Sess. (Ala. 2014) (providing that any person over the age of 21 years who is convicted of certain sex offenses against a child 12 years of age or younger would be surgically castrated before his or her release from correctional custody); S.F. 64, 85th Gen. Assemb., Reg. Sess. (Iowa 2013) (“A person who has been convicted of a serious sex offense shall, in addition to any other punishment provided by law, be required to undergo medroxyprogesterone acetate treatment [chemical castration] as part of any conditions of release imposed by the court or the board of parole”); S.B. 3386, 234th Leg., Reg. Sess. (N.Y. 2011) (authorizing chemical castration of violent felony sex offenders); S.B. 144, 34th Leg., Reg. Sess. (La. 2008) (authorize the chemical castration for persons convicted of certain sex offenses and requiring chemical castration for persons convicted of more than one sex offense); H.B. 1349, 186th Gen. Assemb., Reg. Sess. (Mass. 2007) (providing for voluntary chemical castration for sex offenders); S.B. 1235, 190th Gen. Assemb., Reg. Sess. (Pa. 2007) (authorizing or in some cases requiring chemical castration for certain sex offenses); H.F. 1131, 84th Leg., Reg. Sess. (Minn. 2005) (authorizing punishment by surgical or chemical castration and allowing chemical castration as a condition of a suspended sentence); S.B. 1585, 50th Leg. Sess., (Okla. 2005) (providing for surgical or chemical castration as a condition of deferred or suspended sentence or parole for certain convicted sex offenders); Kenneth Fromson, Note, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH. J. HUM. RTS. 311, 314–15 (1994) (identifying castration bills proposed in California, Florida, Hawaii, Montana, New Mexico, Oregon, Texas, Washington, and Wisconsin).

466. *See* CAL. PENAL CODE § 645 (West 2002); FLA. STAT. § 794.0235 (2007); IOWA CODE § 903b.10 (2013); LA. REV. STAT. ANN. § 15:538 (2012); MONT. CODE ANN. § 45-5-512 (2007); TEX. GOV’T CODE ANN. § 501.061 (West 2007); WIS. STAT. § 304.06 (2014). Although Georgia and Oregon once allowed chemical castration, these laws have since been repealed. *See* GA. CODE ANN. § 42-9-44.2 (2011); OR. REV. STAT. §§ 144.625–29 (2011).

statutes provide for temporary chemical castration,⁴⁶⁷ rather than surgical castration. Unlike surgical castration, chemical castration is reversible and is more likely to be viewed by courts as a treatment, avoiding potential constitutional challenges. Scholars have argued that surgical castration is unconstitutional under the Eighth and Fourteenth Amendments to the Constitution,⁴⁶⁸ and international human rights bodies have also denounced surgical castration of sex offenders.⁴⁶⁹

Writers have also raised concerns about even chemical castration, especially when considered in the historical context of racialized eugenic actions by American states and private actors, as well as the documented history of castrations of allegedly oversexed, predatory African-American men as part of white supremacist lynchings during slavery and after the Civil War.⁴⁷⁰

On the medical front, prenatal tests like amniocentesis and ultrasounds, as well as new reproductive technologies, enable parents to select offspring with certain genetic characteristics.⁴⁷¹ Similarly,

467. Chemical “castration” involves weekly chemical injections of medroxyprogesterone acetate, otherwise known as “Depo-Provera.” It inhibits testosterone production and consequently sex drive. See Frederico D. Garcia & Florence Thibaut, *Current Concepts in the Pharmacotherapy of Paraphilias*, 71 *DRUGS* 771, 780 (2011).

468. See Zachary Edmonds Oswald, “Off With His ___”: *Analyzing the Sex Disparity In Chemical Castration Sentences*, 19 *MICH. J. GENDER & L.* 471, 492–96 (2013) (Fourteenth Amendment); Catherine Rylyk, *Lest We Regress to the Dark Ages: Holding Voluntary Surgical Castration Cruel and Unusual, Even for Child Molesters*, 6 *WM. & MARY BILL RTS. J.* 1305, 1317–26 (2008) (Eighth Amendment); cf. *State v. Brown*, 326 S.E.2d 410, 412 (S.C. 1985) (holding that surgical castration is “a form of mutilation” prohibited by the state’s constitutional prohibition on cruel and unusual punishment).

469. For example, in 2009, the Council of Europe’s anti-torture committee called surgical castration “invasive, irreversible and mutilating” and demanded the Czech Republic “bring to an immediate end the application of surgical castration in the context of treatment of sex-offenders.” See Eur. Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”), Council of Europe, Report to the Czech Government on the Visit to the Czech Republic Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 March to 2 April 2008 16, 20 (Feb. 5, 2009), available at <http://www.cpt.coe.int/documents/cze/2009-08-inf-eng.pdf>.

470. See Hall & Harris, *supra* note 88, at 42 (“White terrorist violence, and later lynching, frequently involved horrific acts of sexual torture, often witnessed by appreciative crowds.”); Marques P. Richeson, *Sex, Drugs, and . . . Race-to-Castrate: A Black Box Warning of Chemical Castration’s Potential Racial Side Effects*, 25 *HARV. BLACKLETTER L.J.* 95 (2009); see also Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 *MICH. L. REV.* 675, 753–54 (2002).

471. DIANE B. PAUL, *CONTROLLING HUMAN HEREDITY: 1865 TO THE PRESENT* 3 (1995); RAPP, *supra* note 317, at 37–38, 55 (1999); JOAN ROTHSCHILD, *THE DREAM OF THE PERFECT CHILD* at 79–82 (2005); Cynthia R. Daniels & Janet Golden, *Procreative Compounds: Popular Eugenics, Artificial Insemination and the Rise of the American Sperm Banking Industry*, 38 *J. SOC.*

consumers of sperm can review catalogs and websites listing the race, ethnicity, height, weight, hair color, hair texture, skin tone, facial structure, IQ, hobbies, talents, education, and interests of men whose sperm is for sale.⁴⁷² To be sure, amniocentesis, in vitro fertilization, and related prenatal testing technologies can be seen as promoting individual reproductive choice. One cannot deny that screening promotes the reproduction of healthy offspring. Prenatal testing and other reproductive technologies also involve private decisions by individuals within the context of the patient-physician relationship or the free-market. There are no central powers limiting who may or may not reproduce in these contexts.

At the same time, as anthropologist Rayna Rapp explains, these technologies do encourage individuals “to judge the quality of their own fetuses, making concrete and embodied decisions about the standards for entry into the human community.”⁴⁷³ Rapp and other scholars have written about the subtle coercion parents feel to join the testing track only to learn that they cannot get off it.⁴⁷⁴ Everyone expecting a child is now routinely offered an early ultrasound—“baby’s first picture”—and before they know it, they may find themselves faced with a decision they planned to avoid. Today’s new maternal blood tests that detect fetal problems will likely only exacerbate such pressures.⁴⁷⁵

HIST. 5, 7, 11–14 (2004); Daniel F. Goodkind, *Should Prenatal Sex Selection Be Restricted? Ethical Questions and Their Implications for Research and Policy*, 53 POPULATION STUD. 49, 49 (1999); F. Allan Hanson, *Donor Insemination: Eugenic and Feminist Implications*, 15 MED. ANTHROPOLOGY Q. 287, 288–89 (2001); David S. King, *Preimplantation Genetic Diagnosis and the “New” Eugenics*, 25 J. MED. ETHICS 176, 176 (1999); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 345 (1978); Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Genetic Dystopia?* 34 SIGNS 783, 784, 786–91 (2009); cf. Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913, 913–27 (1994) (discussing the adoption market for babies).

472. See Daniels & Golden, *supra* note 471, at 5, 7.

473. See RAPP, *supra* note 317, at 3. According to Rapp:

[W]hen ‘everything’ from well-characterized single-chromosome conditions like Down syndrome to polygenic syndromes like manic depression or alcoholism to alleged syndromes like a propensity for antisocial behavior or obesity can be popularly attributed to genetics and prenatally diagnosed, we may be soon standing on a ‘slippery slope’ of a ‘eugenic boutique’.

Id.

474. *Id.* at 94–100, 165–90; Barbara Katz Rothman, *The Book of Life: A Personal and Ethical Guide to Race, Normality and the Human Gene Study* (2001); Barbara Katz Rothman, *The Tentative Pregnancy: How Amniocentesis Changes the Experience of Motherhood* (1993).

475. See Pam Belluck, *Test Is Improved Predictor of Fetal Disorders*, N.Y. TIMES (Feb. 26, 2014), <http://well.blogs.nytimes.com/2014/02/26/new-dna-test-better-at-predicting-some->

Although these dynamics occur within the confines of private doctor-patient relationships, often these situations present troubling parallels with earlier eugenic practices, particularly the softer, positive eugenics that developed after the 1930s aimed at influencing adults' procreative decisions so as to "build a better race."⁴⁷⁶ Furthermore, recent scholarship concerning the impact of genomic research cautions us not to expect modern eugenics to assume the forms it took earlier in the century.⁴⁷⁷ Rather, current permutations of eugenics "will be rooted more thoroughly in the free-market economy of contemporary capitalism, rather than legislation aimed directly at controlling reproduction."⁴⁷⁸ Finally, although most medical professionals may not acknowledge or even know about the continuities, the contemporary field of genetic counseling has antecedents in turn-of-the-century eugenic ideologies⁴⁷⁹ and the field of eugenically-motivated marriage and family counseling in the early twentieth century.⁴⁸⁰

In sum, although eugenics is formally a movement of the past, eugenic thinking is still with us. Moreover, the general assault on the reproductive autonomy of poor people and minorities, especially

disorders-in-babies-study-finds/?_r=0 ("A test that analyzes fetal DNA found in a pregnant woman's blood proved much more accurate in screening for Down syndrome and another chromosomal disorder than the now-standard blood test, a new study has found.").

476. See *supra* text accompanying notes 357–361.

477. RAPP, *supra* note 317, at 37 (1999).

478. *Id.*

479. For example, the condition we call Down syndrome was initially labeled "mongolism." *Id.* John Langdon Down, the British doctor who fully described the syndrome in 1866, viewed it as "lower-stage of human life characteristic of forms of lower races." STEPHEN JAY GOULD, THE PANDA'S THUMB: MORE REFLECTIONS IN NATURAL HISTORY 164–65 (1980). While such explicit eugenic thinking is no longer used, even today, "Down syndrome babies are often considered 'wrong babies' marked almost from the moment of birth by medical scrutiny as incurably damaged." See RAPP, *supra* note 317, at 266–67 (recounting stories of mothers advised by physicians to put their Downs syndrome babies up for adoption hours after giving birth or subject to callous remarks by medical professionals such as "[t]he only blessing is that they don't tend to live very long.").

480. As Rapp explains, "the more blatant forms" of eugenic ideology were gradually dispersed into other areas such as sociobiology and evolutionary psychology," and "as genetics developed as a science . . . eugenics was replaced by an applied individual and familial counseling model." *Id.* at 55; see also DANIEL J. KEVLES, IN THE NAME OF EUGENICS 253 (1985) ("In its efforts to encourage the use of genetics for medical purposes and improve the biological quality of human populations, reform eugenics had helped lead to the opening of facilities devoted explicitly to genetic advisory services."); KLINE, *supra* note 357, at 4, 123–26 (describing the strategic shift by eugenicists in the 1930s toward marriage and family counseling to counteract declining birthrates and expand the white middle class).

women, continues to the present day. One recent study found that African-American women and women with no insurance or public insurance are about fifty percent more likely to have undergone tubal sterilization compared with white women and women with private insurance.⁴⁸¹ The most recent assault on poor women’s reproductive autonomy appears in the dramatic increase in abortion restrictions that disproportionately impact lower-income women.⁴⁸²

481. Sonya Borrero et. al., *Race, Insurance Status, and Tubal Sterilization*, 109 OBSTETRICS & GYNECOLOGY 94, 97 (2007) (finding in study of women ages 15 to 44 that 21.3% of African-American women were sterilized compared to 15% of white women, and 21% of women who had no insurance or public insurance were sterilized compared to 14% of women who had private insurance).

482. For example, many states ban late-term abortions, which are more likely to be sought by poor women who delay because they cannot afford an abortion. See GUTTMACHER INST., STATE POLICIES IN BRIEF: STATE POLICIES ON LATER ABORTIONS (2013), available at http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf (summarizing state laws on late-term abortions); Rachel K. Jones & Lawrence B. Finer, *Who Has Second-Trimester Abortions in the United States?*, 85 CONTRACEPTION 544, 546 (2012) (finding that “[s]econd trimester abortions [are] inversely associated with education and poverty status”). The Supreme Court upheld late-term abortion bans in *Gonzales v. Carhart*, 550 U.S. 124 (2007).

Furthermore, several states have adopted relatively new types of abortion restrictions that disproportionately impact lower-income women. In 2011, seven states (Arizona, Kansas, Nebraska, North Dakota, Oklahoma, South Dakota and Tennessee)—all largely rural states with large, scarcely populated areas—prohibited “telemedicine” for medication abortion, requiring instead that the physician prescribing the medication be in the same room as the patient. See Rachel Benson Gold & Elizabeth Nash, *Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks*, GUTTMACHER POL’Y REV., Winter 2012, at 14, 16, available at <http://www.guttmacher.org/pubs/gpr/15/1/gpr150114.html>.

Other restrictions that disproportionately burden low-income women include requiring an ultrasound prior to having an abortion, even without medical reason to do so; laws restricting insurance coverage for abortion; and expanded counseling requirements and waiting periods. *Id.*; see also, e.g., North Carolina Gen. Stat. Ann. § 90-21.85 (law requiring physicians to perform an ultrasound prior to an abortion, which was held unconstitutional as a violation of physicians’ First Amendment Rights in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014)). Finally, state and federal lawmakers have aimed to completely shut down women’s health programs such as Planned Parenthood by withdrawing all public financing, see Mary Ziegler, *Sexing Harris: The Law and Politics of the Movement to Defund Planned Parenthood*, 60 BUFF. L. REV. 701 & n.1 (2012); Pam Belluck & Emily Ramshaw, *Women in Texas Losing Options for Health Care*, N.Y. TIMES, Mar. 7, 2012, at A1, and by requiring abortion clinics to meet the same building, equipment and staffing standards as hospital-style surgical centers. See, e.g., H.B. 2, 83rd Leg., Tex. Sess. Law Serv., ch. 1 §§ 1–12 4795–802 (Tx. 2013) (codified at Tex. Health & Safety Code Ann. §§ 171.0031, 171.041–.048, 171.061–.064, & amending §§ 245.010–.011; Tex. Occ. Code Ann. amending §§ 164.052 & 164.055). Enforcement of the Texas law has been enjoined, in part, for now. See *Whole Women’s Health v. Lakey*, (W.D. Tex. Aug. 29, 2014), 2014 WL 4346480; Adam Liptak, *Clinics to Open as Justices Halt Abortion Law*, N.Y. TIMES, Oct. 15, 2014 (“The Supreme Court’s order—five sentences long and with no explanation of the justices’ reasoning—represents an interim step in a legal fight that is far from over.”).

More generally, if we adopt an expansive view of eugenics as a broad, loosely-related set of ideas used opportunistically to attack poor people, minorities, the disabled, unwed mothers, and the social welfare state—as some leading historians on eugenics have argued⁴⁸³—then perhaps the “history” of eugenics in America has not ended. Increasingly aggressive immigration laws⁴⁸⁴ can be fairly understood as “eugenic” under this definition,⁴⁸⁵ as can mandatory federal sentencing guidelines⁴⁸⁶ that disproportionately impact African Americans and other minorities⁴⁸⁷ and state marriage and adoption bans that have been routinely justified on grounds that same-sex couples are not fit to bear and raise children.⁴⁸⁸

483. See, e.g., ALEXANDRA MINNA STERN, *EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA* (2006). Seeking to “push the bounds” of what has been considered eugenics, *id.* at 18, this book covers areas as diverse as medicine, immigration, sterilization, and environmentalism.

484. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012) (upholding in relevant part a state law that allows police to investigate the immigration status of an individual stopped, detained, or arrested if there is reasonable suspicion that individual is in the country illegally); see also 8 U.S.C.A. § 1152(a)(2) (2012) (establishing a limit on the number of visas that can be issued to natives of any one foreign country).

485. See STERN, *supra* note 483, at 57–81 (discussing links between the establishment of U.S. Border Patrol, public health measures, and eugenic immigration policies).

486. See U.S. SENTENCING GUIDELINES MANUAL (2009), available at http://www.ussc.gov/Guidelines/2009_guidelines/Manual/GL2009.pdf. As the son of a North Carolina eugenics program victim explains, “[W]e have an obligation to challenge these systems. . . . [T]wo million people we have incarcerated in prison today. A young man nineteen years old, first time convicted, nonviolent offense, you give him fifteen to twenty years in prison. Now look at what happens, now he can no longer be a father, his mother loses a child, we have to reevaluate these things today man. We have to look at these things differently.” See GOVERNOR’S TASK FORCE JUNE 22, 2011 HEARING, *supra* note 284, at 12 (testimony of Mr. Tony Riddick).

487. According to the US Bureau of Justice Statistics, blacks accounted for 43.2% of the total prison and jail population in 2009. See HEATHER C. WEST, *BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 19 tbl.16* (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>. Hispanics were 20.6% of the total jail and prison population in 2009. *Id.* Blacks were incarcerated at a rate more than six times higher than whites, and Hispanics at a rate 2.46 times higher than whites. *Id.* at 21 tbl.18. Although there is significant variation among states in the incarceration rate of blacks and Hispanics, the proportion of blacks and Hispanics in prison exceeded the proportion of whites in every state of the country in 2005. See MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY* 5, 6 tbl.2, 7, 12 (2007), available at http://www.sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf.

488. For example, in the litigation defending Utah’s ban on same-sex marriage in the Tenth Circuit United States Court of Appeals, the Attorney General justified its ban on the “serious risk to children raised by same-sex parents,” suggesting that same-sex parents are more likely than heterosexual parents to “subordinate their own interests to the needs of their children.” Brief of Appellants Gary R. Herbert and Sean D. Reyes at 42, 66, Kitchen

Finally, although it is not clear how widespread the phenomenon, nonconsensual sterilizations continue to occur in the United States in certain contexts, such as prisons. For example, a series of news stories by the Center for Investigative Reporting (“CIR”) revealed that women in two California prisons had been sterilized after being coerced or misled by their doctors.⁴⁸⁹ From 2006 to 2010, 148 women received tubal ligations in violation of state regulations requiring approval from a review committee of medical professionals.⁴⁹⁰ For example, Kimberly Jeffrey, one woman interviewed as part of the CIR investigation, “was pressured by a doctor while sedated and strapped to a surgical table for a C-section in 2010,”⁴⁹¹ during her imprisonment at a California prison for a parole violation.⁴⁹² Jeffrey “was horrified,” and she resisted.⁴⁹³ “Being treated like I was less than human produced in me a despair.”⁴⁹⁴ Other women reported being repeatedly pressured to agree to a tubal ligation once the prison physician found out they had other children.⁴⁹⁵ The physician who performed most of the sterilizations defended his actions, telling the CIR that the money the state spent on sterilizations was minimal “compared to what you save in welfare paying for these unwanted children—as they procreated more,”⁴⁹⁶ but the investigative report ultimately led to a new law in California making the practice of sterilizing incarcerated people for the purpose of birth control illegal.⁴⁹⁷

v. Herbert, No. 13-4178 (10th Cir. Feb. 3, 2014), *available at* <http://www.nclrights.org/wp-content/uploads/2014/02/2014.02.03-Appellants-Opening-Brief1.pdf>. Conservative states such as Arkansas, Florida, Mississippi, and Utah have defended laws disallowing LGBT people from fostering or adopting children on similar grounds, arguing that families headed by gay parents produce children who are more likely to be violent, sexually promiscuous, or gay. *See generally* Kari E. Hong, *Parens Patri[Archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1 (2003).

489. *See* Corey G. Johnson, *Female Inmates Sterilized in California Prisons Without Approval*, CTR. FOR INVESTIGATIVE REPORTING (Jul. 7, 2013), <http://cironline.org/reports/female-inmates-sterilized-california-prisons-without-approval-4917>.

490. *Id.*; *see also* CAL. CODE REGS. tit. 15, § 3350.1 (b)(4) & (d) (2006).

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.*

497. *See* S.B. 1135, 2013-2014 Reg. Sess. (Ca. 2014) (enacted), codified at CAL. PENAL CODE § 3440 et seq. (West 2014). Under the new law, sterilization is only permitted if the procedure is required “for the immediate preservation of the individual’s life in an emergency medical situation” or, under certain limited conditions, including consent, “medically necessary . . . to treat a diagnosed condition.” *Id.*

V. CONCLUSION

The legacy of eugenics in the United States continued well into the twentieth century, yet it was hidden by the Supreme Court decision in *Stump v. Sparkman*. The Court achieved this erasure by employing two of the most forceful legal mechanisms of denial: immunity and jurisdiction. Moreover, Justice Stewart's dissent did as much to obscure the ongoing reality of sterilization abuse in America as the majority's opinion. Stewart's main justification was that holding Judge Stump accountable for his actions would not disrupt 100 years of legal doctrine on judicial immunity, because Judge Stump's order was an isolated incident.⁴⁹⁸ The irony of this reasoning is that the Supreme Court's decision was issued just a few years after the *Relf* decision ignited a national scandal on sterilization abuse of poor women;⁴⁹⁹ in the same year that HEW issued regulations requiring a mandatory thirty-day waiting period for federally-funded sterilizations, among other protections;⁵⁰⁰ during a period of rapid expansion of minors' reproductive rights by the Supreme Court;⁵⁰¹ and just two years after Congress waged a major attack on poor women's reproductive autonomy by enacting the Hyde Amendment.⁵⁰² That all of this was occurring right around the time of the Court's decision makes its silence on the reproductive rights issue all the more deafening. Furthermore, as this Article demonstrates, eugenics never really disappeared after the Supreme Court decided *Stump*; arguably it persists in different forms today. *Stump* is thus not even the last gasp of the unbecoming history of eugenics in America. It is the middle of a continuing story.

As this article has demonstrated, *Stump* also fits within a long line of federal cases developing, interpreting, and applying procedural rules in a manner frustrating civil rights claimants' ability to prosecute their claims in federal court. Indeed, the historical record suggests that the judicial immunity doctrine, relied upon by the Supreme Court in *Stump*, has its genesis, at least in part, in an earlier Supreme Court's opposition to the Reconstruction Congress's efforts to remedy the incidents of slavery by enacting a comprehensive civil rights regime. The heightened pleading standard announced by the

498. See *Stump v. Sparkman*, 435 U.S. 349, 367 (1978) (Stewart, J., dissenting).

499. *Supra* notes 270–282, 294–298 and accompanying text.

500. *Supra* notes 364–370 and accompanying text.

501. *Supra* notes 302–308 and accompanying text.

502. *Supra* notes 291–293 and accompanying text.

Seventh Circuit on remand is a later chapter in this same story, when federal judges, beginning in the 1960s, invoked heightened pleading standards in civil rights and other disfavored public law actions. In this sense, *Stump* is not simply about the trans-substantive value of judicial independence, although this concern certainly contributed to the Supreme Court and Seventh Circuit decisions. It is also a story of a political struggle, begun after the Civil War and continuing to present day, over our society’s commitment to ameliorating civil rights violations.

Perhaps it is not a surprise that then-Chief Justice Burger, who voted with the *Stump* majority, advocated curtailing the federal jurisdiction of the federal courts.⁵⁰³ According to federal courts and constitutional law scholar Judith Resnik, in several major addresses to the American Bar Association and American Law Institute, Burger expressed his opinion against enlarging federal jurisdiction.⁵⁰⁴ For example, in a 1970 speech to the American Bar Association, he said, “[T]he federal court system is for a limited purpose People speak glibly of putting all the problems of pollution, of crowded cities, of consumer class actions and others in the federal courts.”⁵⁰⁵ As Resnik observes, Chief Justice Burger was opposed to liberal standing doctrine,⁵⁰⁶ too “expansive” interpretations of federal statutes,⁵⁰⁷ too many prisoner petitions,⁵⁰⁸ and too narrow understandings of the immunity of government officials.⁵⁰⁹ The monstrosity of *Stump* becomes comprehensible, if not forgivable, in light of this vision of limiting the role of federal courts in protecting individual rights.

503. See Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1608 (2006).

504. *Id.*

505. Warren E. Burger, Chief Justice of the United States, *Remarks on the State of the Judiciary, Before the American Bar Association (Aug. 10, 1970)*, in STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 17 (Shelley L. Dowling ed., 2000).

506. See Resnik & Dilg, *supra* note 503, at 1609 (citing Warren E. Burger, *Address to the American Law Institute*, 57 A.L.I. PROC. 29, 33–34 (1980)).

507. *Id.*

508. *Id.* (citing Warren E. Burger, Chief Justice of the United States, *Remarks to the Am. Bar Ass’n: Report on the Federal Judicial Branch (Aug. 6, 1973)*, in STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 12–13 (Shelley L. Dowling ed., 2000)). Specifically, Chief Justice Burger suggested that prisoners’ claims be resolved by informal grievance procedures or administrative hearings and that magistrates or special masters hear habeas cases. *Id.*

509. *Id.* (citing Warren E. Burger, *Address to the American Law Institute*, 57 A.L.I. PROC. 29, 32–33 (1980)). Chief Justice Burger attributed the “litigation explosion” in part to “a narrowing of the scope of immunity of government officials.”

In the end, *Stump* presented a conflict between fundamental principles of constitutional law: privacy, equal protection and due process, on the one hand, and judicial independence on the other. The majority of the Court sided with the latter. This alternative reading of *Stump v. Sparkman* is intended to give voice to the principles so well hidden by that unfortunate choice, and to help courts envision alternative routes to the present course on these fundamentally important substantive and procedural questions.

EPILOGUE

Shortly after the Supreme Court issued its opinion in *Stump v. Sparkman*, Judge Stump was re-elected to another six-year term.⁵¹⁰ Two years later, the Supreme Court unanimously held that a private defendant who conspires with an immune state judge acts under “color of state law” for the purposes of civil rights law and is not derivatively protected by that judge’s absolute immunity.⁵¹¹ In the following decades, the Supreme Court twice rejected the practice of requiring a heightened pleading standard for civil rights claims.⁵¹² Although Sparkman’s legal strategy in federal court was vindicated by these later decisions, and Linda Sparkman (now Jamie Coleman) was honored at a 2007 state ceremony commemorating Indiana’s eugenic past,⁵¹³ she has never been compensated for her own extralegal sterilization.

510. See Warren Weaver, Jr., *High Court Rules Judge Immune to Lawsuit in Girl’s Sterilization*, N.Y. TIMES, March 29, 1978, at A18.

511. See *Dennis v. Sparks*, 449 U.S. 24, 29 (1980). According to the Court, “[T]he potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.” *Id.* at 31–32.

512. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). However, the practice continued to flourish in many circuits, see *Spencer*, *supra* note 187, at 19–24, and ultimately took hold when the Supreme Court reversed course in the late 2000s in two decisions signaling that a heightened pleading rule may apply in to all cases in federal court. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

513. See *Rudavski*, *supra* note 1.