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In 1979, Judge White of the Seventh Judicial Circuit of the State of Illinois fired his probation officer, Cynthia Forrester, citing scheduling disputes and conflicts between Forrester and her coworker. Forrester then filed an action against Judge White in federal district court under civil rights statute 42 U.S.C. § 1983, alleging that Judge White had discharged her because of her sex. A jury found Judge White liable and awarded Forrester compensatory damages. Judge White's motion for judgment notwithstanding the verdict was denied, but his motion for a new trial was granted. On retrial, the district court granted summary judgment for Judge White, stating that he was absolutely immune from a civil damages award. Forrester appealed. In Forrester v. White, the United States Court of Appeals for the Seventh Circuit upheld the district court's ruling, holding that Judge White was immune from liability because Forrester's dismissal constituted a judicial act within the scope of the judge's authority.

This Comment examines the Seventh Circuit's decision to

2. Id. 42 U.S.C. § 1983 (1982) provides a federal right of action against state officials for violation of any person's federal constitutional or statutory rights. The statute states:
   Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
4. Forrester, 792 F.2d at 650.
5. Id. The jury awarded Forrester approximately $82,000 in compensatory damages. Id.
6. Id. at 650.
7. Id. at 658.
apply the doctrine of judicial immunity to personnel decisions. Part I discusses the history of judicial immunity, its policies and justifications, and the present state of the law concerning judicial immunity for personnel decisions at the district court level. Part II examines the Seventh Circuit's reasoning in *Forrester*. Part III then argues that the *Forrester* court misapplied the judicial immunity doctrine in this case. Finally, the Comment concludes that the holding in *Forrester* unjustifiably denies certain judicial employees the right to bring private damages actions against their employers and leaves judges without clear guidelines to govern their future employment practices.

I. THE JUDICIAL IMMUNITY DOCTRINE

The doctrine of judicial immunity had its American beginnings in the Supreme Court case of *Bradley v. Fisher*. In *Bradley*, the Court held that judges are absolutely immune from liability for acts that are judicial in nature and that fall within, or even are in excess of, their jurisdiction. Only when

9. *Bradley*, 80 U.S. (13 Wall.) 335 (1872). In this case, the attorney for John Suratt, an alleged conspirator in President Lincoln's assassination, sought damages from a judge who, the attorney alleged, had wrongfully disbarred him after a hung jury verdict. *Id.* at 344-45. The Court denied relief for the attorney, holding the judge to be immune from a civil suit resulting from a judicial act. *Id.* at 354.


10. Absolute immunity is one of two forms of official immunity that have been recognized by the Supreme Court. Absolute immunity is an affirmative defense providing complete protection from suit and has been recognized for legislators, see *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975), judges, see *Stump v. Sparkman*, 435 U.S. 349, 364 (1978), and certain executive officials, see *Butz v. Economou*, 438 U.S. 478, 514 (1978). Qualified or "good faith" immunity is a lesser form of immunity that has been recognized for public officials performing less discretionary functions. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Although officials enjoying absolute immunity are absolutely protected from suit, under the qualified immunity doctrine, officials are protected from suit only to the extent their conduct did not violate clearly established constitutional or statutory rights, of which a reasonable person would have known. *Id.* at 818. For a discussion of qualified official immunity, see Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901 (1984).


12. *Id.* at 351. Although judges remain immune from liability for dam-
a judge has acted in "clear absence of all jurisdiction" may a judge be held liable.\textsuperscript{13} Therefore, under \textit{Bradley}, the extension of judicial immunity depends on whether the dual requirements of a "judicial act" performed within a judge's "jurisdiction" are met.\textsuperscript{14}

The \textit{Bradley} Court based its rule of absolute immunity on the concern that without immunity judges would be vulnerable to vexatious suits brought by disgruntled litigants.\textsuperscript{15} The Court

\begin{quotation}
ages, they may be subject to injunctive or declaratory relief. See \textit{Pulliam}, 466 U.S. at 536-43. Judges also are not immune from criminal prosecution for civil rights violations. See, e.g., \textit{O'Shea v. Littleton}, 414 U.S. 488, 503 (1974) ("the judicially fashioned doctrine of official immunity does not reach so far as to immunize criminal conduct proscribed by an Act of Congress . . . . ") (quoting \textit{Gravel v. United States}, 408 U.S. 606, 627 (1972)).

\textsuperscript{13} \textit{Bradley}, 80 U.S. (13 Wall.) at 351. The \textit{Bradley} Court distinguished clear absence of jurisdiction from excess of jurisdiction. Clear absence meant that the court had no jurisdiction over the subject matter, whereas excess of jurisdiction referred to the manner in which subject matter jurisdiction was exercised. \textit{Id.} at 351-52. Thus, for example, a probate court of limited jurisdiction acts in clear absence of jurisdiction when it presumes to try parties for public offenses because that would be a usurpation of authority. \textit{Id.} at 352. A criminal court, however, acts only in excess of jurisdiction when it gives a more severe sentence than that authorized by law. \textit{Id.} Some commentators have argued that the jurisdiction element of judicial immunity no longer has meaning in the modern legal system of courts of general jurisdiction and should be abolished because it only creates confusion. See \textit{Block}, supra note 9, at 921.

\textsuperscript{14} \textit{Bradley}, 80 U.S. (13 Wall.) at 351.

Four years before \textit{Bradley}, in \textit{Randall v. Brigham}, 74 U.S. (7 Wall.) 523 (1868), the Supreme Court held that judges of general jurisdiction were not civilly liable for judicial acts, even when they acted outside of their jurisdiction. \textit{Id.} at 536. Justice Field qualified the opinion, however, by adding that judges may perhaps be liable "where the acts, in excess of jurisdiction, are done maliciously or corruptly." \textit{Id.} In \textit{Bradley}, however, Justice Field retracted the qualifying remarks, stating that immunity extended even to malicious or corrupt acts. \textit{Bradley}, 80 U.S. (13 Wall.) at 351.

The \textit{Bradley} rule of judicial immunity remains virtually unchanged to the present. See, e.g., \textit{Stump v. Sparkman}, 435 U.S. 349, 355-56 (1978) (citing the \textit{Bradley} holding as the principle continuing to govern the law concerning judicial immunity). The doctrine of judicial immunity from liability for damages, however, has been altered somewhat by \textit{42 U.S.C. § 1988} (1982). The Supreme Court recently held that the immunity defense does not protect a magistrate from an award of attorney's fees when prospective injunctive relief is granted for civil rights violations under \textit{§ 1988}. \textit{Pulliam}, 466 U.S. at 543-44.

\textsuperscript{15} \textit{Bradley}, 80 U.S. (13 Wall.) at 354. The Court reasoned that absolute immunity was necessary to protect judges and the public interest because every controversy produces a losing party who could easily allege that the judge had acted maliciously. \textit{Id.} at 348. Following this reasoning, the Court held that judges are immune from liability even for malicious acts, \textit{Id.} at 348-49, thus altering an earlier formulation of the doctrine of judicial immunity. See \textit{Randall}, 74 U.S. (7 Wall.) at 536, discussed supra note 14. According to commentators Jay Feinman and Roy Cohen, however, the \textit{Bradley} Court's de-
reasoned that such vulnerability would have several negative results. If judges feared reprisal for their actions, the public interests in preserving judicial independence and preventing the degradation of the judicial office would be impaired. In addition, the Court reasoned that fear of personal liability would compel judges to keep unnecessarily meticulous records at trial in case of future litigation. Finally, the Bradley Court concluded that lack of judicial immunity would also undermine the finality of decisions.

In addition to policy considerations, the Bradley Court relied on precedent to justify its grant of immunity. See 80 U.S. (13 Wall.) at 347. Justice Field, writing for the majority in Bradley, wrote that the doctrine of judicial immunity “has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.” Id. In their article on the development of judicial immunity, however, Feinman and Cohen wrote that this statement by Justice Field was made “with only the usual degree of exaggeration.” Feinman & Cohen, supra note 9, at 247. The two authors contend that judicial immunity in England was at most a limited exception to the general rule of liability and that American courts have misinterpreted English law. Id. at 205-20. Contra Block, supra note 9, at 880 (disagreeing with Feinman and Cohen and contending that limited judicial liability, rather than general liability, was the rule in England).

17. Id. at 347.
18. Id. at 349. Discussing the independent decisionmaking rationale behind judicial immunity, the Supreme Court more recently explained:

Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption.

Dennis v. Sparks, 449 U.S. 24, 31 (1980).

20. Id. The Bradley Court foresaw an endless line of actions, with each new judge considering the matter becoming a potential defendant. Id.

Commentators have suggested policies underlying judicial immunity in addition to those cited in Bradley. See, e.g., Jennings, Tort Liability of Administrative Officers, 21 MINN. L. REV. 263, 271-72 (1937) (suggesting nine reasons behind absolute judicial immunity: (1) the public’s saving from a drain on judicial time by private lawsuits; (2) the judge’s freedom to make determinations without undue influence of the threat of personal liability; (3) the fear that qualified persons will not seek judgeships; (4) the importance of judicial independence in the federal and state constitutional systems; (5) the need for finality in decisions; (6) the availability of correction on appeal and opportunities
The Bradley Court also was influenced by the belief that private actions were not necessary to deter lawless conduct by judges.\textsuperscript{21} The Court stated that a private right of action against judges is unnecessary because individuals may resort to other legal remedies, such as correction on appeal, to redress judicial wrongs.\textsuperscript{22} Moreover, the Court noted that judges who perform their functions maliciously or corruptly may be subject to proceedings such as impeachment.\textsuperscript{23}

The Supreme Court recently reaffirmed its position on judicial immunity in \textit{Butz v. Economou}.\textsuperscript{24} In \textit{Butz}, the Court identified the safeguards justifying judicial immunity as including the legal remedy of correction on appeal, the insulation of judges from political influences, the role of precedent in deciding cases, and the nature of the adversarial process.\textsuperscript{25} The Court in \textit{Butz} reasoned that because these safeguards serve to deter judges from acting unconstitutionally, private actions are not necessary to control judicial conduct.\textsuperscript{26}

The Supreme Court also has determined that the doctrine of judicial immunity is not limited by the Civil Rights Act of 1871 which makes liable "every person" who under color of state law deprives another person of a civil right.\textsuperscript{27} Notwithstanding the broad language of the statute, the Supreme Court for change of venue; (7) the absence of a judge's duty to the individual litigant and the threat of criminal liability or impeachment; (8) the possibility that judges would not be unfriendly toward their own immunity; and (9) the feeling that judges, whose opinions are required and given deference, should not be punished due to another judge's opinion).

\textsuperscript{21.} \textit{Bradley}, 80 U.S. (13 Wall.) at 354.

\textsuperscript{22.} \textit{Id.}

\textsuperscript{23.} \textit{Id.}

\textsuperscript{24.} 438 U.S. 478 (1978).

\textsuperscript{25.} \textit{Id.} at 512.

\textsuperscript{26.} \textit{Id.} As explained by the Court in \textit{Butz}:

\textit{[T]he safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. . . . Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.}

\textit{Id.} (footnote omitted).

held in Pierson v. Ray\textsuperscript{28} that section 1983 does not abrogate the judge-made defense of judicial immunity. Describing the judicial immunity doctrine as a "settled principle of law,"\textsuperscript{29} the Court reasoned that Congress would have specifically abolished the defense if such a result had been intended by the adoption of the Act.\textsuperscript{30} Absent a legislative record clearly indicating such an intent,\textsuperscript{31} the Court ruled that the common-law immunities still applied.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{28} 386 U.S. 547 (1967). In Pierson, the plaintiffs, clergymembers, were arrested for breaching the peace in a segregated bus terminal during a "prayer pilgrimage" for racial integration. \textit{Id.} at 549, 552. The plaintiffs were convicted under a Mississippi statute later held unconstitutional as applied to similar facts by the Supreme Court. \textit{Id.} at 550. The clergymembers brought suit under 42 U.S.C. § 1983 against the arresting officers and the convicting judge, alleging deprivation of their civil rights. \textit{Id.} at 548, 550. After examining the legislative record of § 1983 the Court held that the common-law doctrines of good faith immunity for police officers and absolute immunity for judges were not abolished by § 1983 and that the convicting judge was, therefore, immune from liability. \textit{See id.} at 554-55.
\item \textsuperscript{29} \textit{Id.} at 554. Some commentators contend that the doctrine of judicial immunity was not universally accepted in 1871 when the Civil Rights Act was passed. \textit{E.g.,} Feinman & Cohen, \textit{supra} note 9, at 237 (contending that both English and American courts "held many, if not most, judicial officers liable for their wrongful acts much, if not most, of the time"); \textit{Note, Liability of Judicial Officers Under Section 1983, 79 Yale L.J. 322, 326-27 (1960)} (stating that by 1871, only 13 states had adopted the absolute immunity rule, six states had held judges liable if they acted maliciously, nine states had faced the issue but failed to rule clearly, and nine apparently had not faced the issue). \textit{Contra Block, supra note 9, at 899-900} (arguing that judicial immunity was the general rule in the United States when the Civil Rights Act was passed).
\item \textsuperscript{30} \textit{Pierson,} 386 U.S. at 554-55. Justice Douglas, dissenting in Pierson, disagreed. He concluded that "[i]n 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." \textit{Id.} at 563 (Douglas, J., dissenting).
\item \textsuperscript{31} According to Justice Douglas, congressional intent to abolish judicial immunity was indeed clear in the legislative record because "every 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." \textit{Id.} at 561. Some commentators have agreed with Justice Douglas. \textit{See Note, Stump v. Sparkman: The Scope of Judicial and Derivative Immunities under 42 U.S.C. § 1983, 6 Women's Rts. L. Rep. 107, 114 (1979-1980)} (arguing that congressional debate and the history of the period support the proposition that the Civil Rights Acts were intended as exceptions to the doctrine of judicial immunity); \textit{Note, supra note 29, at 327-28} (arguing that legislative history indicates that Congress intended § 1983 to include judges).
\item \textsuperscript{32} \textit{Pierson,} 386 U.S. at 554-55 ("We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities.").
\end{itemize}
The leading modern case on judicial immunity is Stump v. Sparkman. In Stump, the plaintiff sued a state judge under 42 U.S.C. § 1983 for approving her sterilization based solely upon her mother’s petition. In a much-criticized decision, the Supreme Court employed the two-part Bradley test to determine that judicial immunity shielded the judge from liability. The Court held that judicial immunity applied as long as the judge did not act “in clear absence of all jurisdiction” and

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34. Stump, 435 U.S. at 351. The plaintiff’s mother had stated in her petition that her 15-year-old daughter was “somewhat retarded” and had on several occasions stayed overnight with young men. Id. She claimed that because of such behavior and her daughter’s limited mental capacity, a tubal ligation would be in the girl’s best interests. Id. The judge approved the petition in an ex parte proceeding without a hearing and without appointing a guardian to act on the girl’s behalf. Id. at 349. The girl underwent the operation, having been told that she was to have an appendectomy. Id. at 353. Two years later, after her marriage, she learned the truth and brought suit. Id.

35. See, e.g., Rosenberg, Stump v. Sparkman: The Doctrine of Judicial Immunity, 64 Va. L. Rev. 833, 858 (1978) (criticizing Stump as a wrongful expansion of judicial immunity and arguing that “correctability on appeal” should be the “crucial underpinning of absolute judicial immunity”); Note, supra note 33, at 1503 (identifying both procedural and substantive problems with the Stump Court’s broad and ambiguous test for judicial acts); Note, Judicial Immunity or Imperial Judiciary?, 47 UMKC L. Rev. 81, 94 (1978) (criticizing as unjustifiable the Stump Court’s grant of immunity in the absence of the possibility of correction on appeal or of other judicial remedies).


37. Id. at 356 (quoting Bradley, 80 U.S. (13 Wall.) at 351). This requirement is apparently met in a court of general jurisdiction if there was no statute or case law prohibiting the judge’s act. See Stump, 435 U.S. at 358-59 (“But in our view, it is more significant that there was no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump.” Id. at 358.). Thus, according to the Court, unless the judge is expressly forbidden to perform a certain function, that function is within the judge’s jurisdiction. Id.

Justice Stewart vigorously dissented from the majority’s approach to the jurisdiction issue in Stump, arguing that it was based on “dangerously broad criteria.” Id. at 367 n.5 (Stewart, J., dissenting). Justice Stewart wrote that “[a] judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity.” Id. at 367. Commentators, too, have criticized the Stump approach as providing no real jurisdictional limitation on courts of general jurisdiction. In her article on judicial immunity, Professor Irene Rosenberg accused the Stump Court of unrealistically expecting Congress to foresee and legislate against all unusual functions a court may be requested to perform in order to make explicit exceptions to jurisdiction. See Rosenberg, supra note 35, at 835-37 (“The Court’s generous interpretation of subject matter jurisdiction for purposes of immu-
the act complained of was a “judicial” act.\textsuperscript{38}

The Court in \textit{Stump} for the first time articulated what constitutes a judicial act.\textsuperscript{39} Adopting a two-pronged test, the Court held that a judicial act is a “function normally performed by a judge” when acting “in his judicial capacity.”\textsuperscript{40} Thus, under the \textit{Stump} definition of judicial act, judicial immunity depends on the character of the act, not on the status of the actor as judge.\textsuperscript{41} If the act performed by the judge was nonjudicial in nature, judicial immunity does not apply.\textsuperscript{42} For example, judicial immunity does not apply to the administrative function of filing court papers,\textsuperscript{43} the executive duty of evaluating and

\textit{id.} at 837 (footnote omitted).\textsuperscript{38} \textit{Stump}, 435 U.S. at 356.
\textsuperscript{39} \textit{id.} at 360 (noting that, before \textit{Stump}, the Court had “not had occasion to consider, for purposes of the judicial immunity doctrine, the necessary attributes of a judicial act”).
\textsuperscript{40} \textit{id.} at 362 (“The relevant cases demonstrate that the factors determining whether an act by a judge is a ‘judicial’ one relate to the nature of the act itself, \textit{i.e.}, whether it is a function normally performed by a judge, and to the expectations of the parties, \textit{i.e.}, whether they dealt with the judge in his judicial capacity.”).
\textsuperscript{41} It has long been the rule that judicial immunity depends on the nature of the act, not on the status of the actor. For example, in \textit{Ex parte Virginia}, 100 U.S. 339 (1879), the Supreme Court refused to grant a county judge immunity from prosecution for racial discrimination in selecting jurors. Finding that the selection of jurors was not a judicial act, the Court stated:

\begin{quote}
Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It is often given to county commissioners, or supervisors, or assessors. \ldots{} In such cases, it surely is not a judicial act, in any such sense as it is contended for here. It is merely a ministerial act \ldots{} That the jurors are selected for a court makes no difference. So are court criers, tipstaves, sheriffs, etc. Is their election or their appointment a judicial act?
\end{quote}

\textit{id.} at 348. \textit{See also} Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982) (stating that “an executive official’s claim to absolute immunity must be justified by reference to public interest in the special functions of his office, not the fact of high station”).
\textsuperscript{42} \textit{See}, \textit{e.g.}, Forrester v. White, 792 F.2d 647, 656 (7th Cir.) (noting that “judges are protected only when they are acting as ‘judges,’ not as administrators”), \textit{cert. granted}, 107 S. Ct. 1282 (1986).
\textsuperscript{43} \textit{See} McCray v. Maryland, 456 F.2d 1, 4 (4th Cir. 1972) (holding that court clerk does not enjoy derivative judicial immunity for negligently failing to file plaintiff’s petition for post conviction relief because the act does not require judicial or quasi-judicial discretion).
appointing judicial officers,\textsuperscript{44} or the legislative function of promulgating disciplinary rules.\textsuperscript{45}

The question whether employment decisions by a judge constitute judicial acts under the \textit{Stump} test\textsuperscript{46} has led to confusion and conflict in the lower federal courts.\textsuperscript{47} Several courts

\textsuperscript{44} See Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982) (refusing to grant Judicial Selection Commission absolute immunity from suit by state judge alleging that the Commission's refusal to reappoint him constituted a deprivation of procedural due process).

\textsuperscript{45} See Supreme Court v. Consumers Union, 446 U.S. 719, 731 (1980) (holding that the Supreme Court of Virginia was not protected by judicial immunity for banning attorney advertising in violation of attorneys' first and fourteenth amendment rights; the Virginia court, however, did enjoy legislative immunity for "propounding the Code").

By the same token, judicial immunity may apply to persons other than judges when those persons perform judicial acts. See, e.g., Denman v. Leedy, 479 F.2d 1097, 1098 (6th Cir. 1973) (holding court clerk immune from liability for failure to set bail pursuant to statute authorizing the performance of this judicial function by clerks in misdemeanor cases).


\textsuperscript{46} Generally, the jurisdiction requirement is not an issue in actions against judges for their employment decisions, provided the judges were authorized to make employment decisions. See, e.g., McMillan v. Svetanoff, 793 F.2d 149, 151 (7th Cir. 1986) (concluding that in court reporter's civil rights action for discharge on the basis of race and political affiliation, a "jurisdiction analysis is inappropriate because the discharge decision does not implicate the power of the court—only the authority of the judge to make such an employment decision"). Some cases involving judges' employment decisions ignore the jurisdiction issue entirely. See, e.g., Lewis v. Blackburn, 555 F. Supp. 713 (W.D.N.C. 1983) (discussing only the judicial act issue in finding that judge was not immune for violating plaintiff's first amendment rights by failing to reappoint plaintiff magistrate); Atcherson v. Siebenmann, 458 F. Supp. 526 (S.D. Iowa 1978) (analyzing only the judicial act issue in holding judge liable for violation of probation officer's first amendment rights through dismissal).

\textsuperscript{47} Courts have commented on the confusion about whether judges' employment decisions may constitute judicial acts. See Cronovich v. Dunn, 573 F. Supp. 1340, 1342 (E.D. Mich. 1983) (noting that "there is confusion over the scope of immunity granted judges in making personnel appointments"); Shore v. Howard, 414 F. Supp. 379, 386 n.3 (N.D. Tex. 1976) (stating that the issue of judges' liability for damages for personnel decisions is vague). Some of the confusion results from the ambiguity of the \textit{Stump} test for judicial acts, which has been criticized for its inherent vagueness. See, e.g., Block, \textit{supra} note 9, at 920 (arguing that the \textit{Stump} court's inadvertent redefinition of judicial act has misled courts and has resulted in disarray and dissatisfaction); Note, \textit{supra} note 33, at 1504 ("definition of a judicial act for purposes of the second prong of the \textit{Stump} test has caused confusion among the lower courts").
have held that judicial immunity does not apply to the hiring and firing of court personnel. Although these courts have reached the same result, the rationales employed often have been different. One court concluded that the appointment of magistrates and other judges was a ministerial rather than a judicial function because judicial functions are "primarily acts necessary in the hearing and decision of cases or controversies." Another court reasoned that a state judge was not entitled to immunity for his discharge of a probation officer because there was no opportunity for appellate review.

Other federal courts have been more willing to apply judicial immunity to employment decisions. In Laskowski v. Mears, a federal district court in Indiana adopted an approach to judicial immunity that examined the actual relationship between the parties and concluded that judicial immunity applies if, as a factual matter, the probation officer's relationship with the judge implicated the judge's independence. In Blackwell

48. See Blackburn, 555 F. Supp. at 723. In Blackburn, a magistrate brought suit under § 1983 alleging that the defendant-judge's refusal to reappoint her violated her first amendment right to voice complaints about an increased workload. Id. at 715. The court found that the judge's action in refusing to reappoint the magistrate was not a judicial act and, therefore, that the judge was not immune from suit. Id. at 723. Consequently, the court granted the plaintiff's request for reappointment and attorney's fees. Id. at 724.

49. See Atcherson, 458 F. Supp. at 535. Atcherson involved a probation officer suing under § 1983 on the ground that her dismissal abridged her first amendment right to free speech. Id. Although the court held that the judge was not entitled to absolute immunity because of the lack of appellate review, it also held that qualified immunity is "contingent upon a showing that the officer acted in good faith." Id. at 536.

50. 600 F. Supp. 1568 (N.D. Ind. 1985). In this case, a probation officer sued under § 1983 alleging his dismissal was based on age, handicap, and political affiliation. Id. at 1568. He sought "reinstatement, compensation for loss of employment rights and benefits, and liquidated damages for intangible injuries." Id. at 1570.

51. Id. at 1574. The Laskowski court held that the facts of each case must be assessed in light of the policy behind judicial immunity of protecting the initiative and independence of the judiciary. Id. at 1573-74 ("Unless the judge's relationship with his or her probation officer is something more unusual as a factual matter, a relationship which implicates the judge's independence, then there is no argument that the 'nature of the act' of discharge was 'a judicial act.'" Id. at 1574). Denying the defendant-judge's motion for summary judgment, the court required further inquiry into the closeness with which the probation officer and the judge worked. Id. at 1574.

In holding that the facts of each case determine whether judicial immunity applies, the court in Laskowski distinguished its decision from that in Blackwell v. Cook, 570 F. Supp. 474 (N.D. Ind. 1983). Laskowski, 600 F. Supp. at 1574. In Blackwell, the court held that statutory duties of the probation of-
v. Cook, however, another Indiana federal court held that judges cannot be civilly liable for firing “confidential employees” of the court. The Blackwell court reasoned that because such employees are “essential” to the court’s decision-making process, firing them constitutes a judicial act under the Stump analysis.

II. FORRESTER V. WHITE: DISMISSAL OF A PROBATION OFFICER AS A JUDICIAL ACT

The Seventh Circuit’s decision in Forrester v. White marked the first time a federal court of appeals found a judge absolutely immune from a charge alleging dismissal of an employee on the basis of sex discrimination. Using the two-fac-}

icer, and not the extent to which as a factual matter the employee’s relationship with the judge implicates the judge’s independent decision making, determine whether immunity applies. Blackwell, 570 F. Supp. at 477-79 (“a special, confidential relationship exists between a probation officer and a judge,” id. at 479).

52. 570 F. Supp. 474 (N.D. Ind. 1983). In Blackwell, a probation officer sued under § 1983 alleging that she was dismissed in violation of her first and fourteenth amendment rights. She claimed that the basis for her dismissal was a conversation she held in the privacy of her own home. Id. at 476 & n.1. Discussing judicial immunity if the judge fired a janitor, the court stated: “While the judge and janitor might personally enjoy a close relationship dating back to childhood, that personal relationship would be distinguishable from this occupational relationship.” Id. at 479.

53. Id. at 479. See also Pruitt v. Kimbrough, 536 F. Supp. 764, 767-78 (N.D. Ind. 1982) (stating in dicta that judges may not be held liable for firing confidential employees on political grounds and characterizing as confidential employees court secretaries, bailiffs, and probation officers).

The Blackwell court did not examine the particular relationship between the plaintiff and the judge, but instead considered the duties and responsibilities of probation officers in general. Blackwell, 570 F. Supp. at 477. To determine the nature of these duties and responsibilities, the court reviewed the Indiana statute describing the functions of a probation officer. Id. at 477-79.

54. 570 F. Supp. at at 478.

55. Id. The court therefore granted defendant’s motion for summary judgment. Id. at 482.

56. For a discussion of the development of the doctrine of judicial immunity, see supra note 14 and accompanying text.

57. See supra notes 46-55 and accompanying text.

58. 792 F.2d at 657-58. Although other circuit courts have touched on related issues, none has squarely faced the issue whether judges have absolute immunity for their personnel decisions. See, e.g., Goodwin v. Circuit Court, 729 F.2d 541, 546-47 (8th Cir. 1984) (holding that plaintiff was properly awarded damages under 42 U.S.C. § 1983 because defense of good faith immunity was unavailable to state judge who transferred a hearing officer because of her sex); Gabe v. County of Clark, 701 F.2d 102, 103-04 (9th Cir. 1983) (holding that judge’s secretary was entitled to damages for discharge without written notice and a hearing because she was given no notice of the change of
part Bradley test for judicial immunity, the Forrester court first considered whether Judge White acted within his jurisdiction in firing Forrester, and second, whether Forrester’s dismissal constituted a judicial act. After deciding both issues affirmatively, the Forrester court held that Judge White was absolutely immune from liability notwithstanding the possibility that the dismissal was discriminatory.

Addressing the first part of the two-part immunity test, the Forrester court easily determined that Judge White acted within his jurisdiction in firing Forrester. Restating the question as whether Judge White was “authorized” to dismiss Forrester, the court concluded that Forrester’s dismissal fell within Judge White’s authority because Illinois law provides that only judges may fire probation officers. The court thus concluded that the jurisdiction requirement was met.

To determine whether a judicial act was at issue, the court adopted the Stump two-pronged definition of judicial act: a

59. For a discussion of the Bradley test for judicial immunity, see supra notes 9-14 and accompanying text.
60. Forrester, 792 F.2d at 655-56.
61. Id. at 656. The Forrester court acknowledged the confused and uncertain state of the law concerning whether personnel decisions are judicial acts meritng immunity. Id. at 653-54. Such uncertainty, according to the court, was generated because actions against judges by former employees depart from the paradigm of Bradley and its progeny, in which dissatisfied litigants sue judges. Id. Immunity was nonetheless equally important, the court decided, because modern judges rely more on their staff for advice on substantive decisions than judges did in the past. The rights of litigants, therefore, may be affected by this extended “institutional personality.” Id. at 654.
62. Id. at 655. For the purpose of considering the propriety of the district court’s decision on judicial immunity, the Seventh Circuit assumed that Judge White dismissed Forrester because of her sex. Id. at 650.
63. Id. at 655-56. The court conceded that the question whether the act was within the judge’s subject matter jurisdiction made little sense in the context of a personnel decision. Id. at 655. The court stated that the jurisdiction requirement nonetheless had relevance because it was subsumed by the question of the judge’s scope of authority. Id. at 655-56.
64. Id. at 656.
65. Id.
66. Id.
67. Id.
function normally performed by a judge when acting in her judicial capacity.\textsuperscript{68} In deciding that Judge White's dismissal of Forrester was a function normally performed by a judge, the Forrester court again relied on the fact that under Illinois law only judges may dismiss probation officers.\textsuperscript{69} When he fired Forrester, Judge White thus performed a normal judicial function.\textsuperscript{70}

The Forrester court found the second prong of the Stump judicial act test more troublesome.\textsuperscript{71} Recognizing that judges often perform functions outside their judicial capacity that do not merit immunity,\textsuperscript{72} the Seventh Circuit concluded that to analyze properly whether the defendant was acting in his judicial capacity, it should focus on the principles underlying immunity.\textsuperscript{73} The court thus rephrased the question of judicial capacity in terms of whether the judge's employment decision involved the policies\textsuperscript{74} and safeguards\textsuperscript{75} that justify a grant of immunity.\textsuperscript{76}

The Forrester court considered the judicial immunity issue in a context unlike that found in either Bradley\textsuperscript{77} or Stump.\textsuperscript{78} In those cases, the Supreme Court considered the judicial im-

\textsuperscript{68}. See supra notes 39-45 and accompanying text.
\textsuperscript{69}. Forrester, 792 F.2d at 656. The Forrester court was not the first court to use the same reasoning under both the jurisdiction part of the judicial immunity test and the normally-performed-function portion of the test. The Stump Court itself, in trying to define "judicial act," confused the normally-performed-function analysis with that of jurisdiction. See Stump v. Sparkman, 435 U.S. 349, 362 n.11 (1978) (observing that the judge's act was a judicial act because it fell within the judge's jurisdictional grant). Professor Rosenberg has criticized this merging of analytical techniques and the resulting destruction of any distinction between the two separate elements of the judicial immunity test. Rosenberg contends that use of a jurisdiction test to define judicial act could immunize judges from the consequences of deviant behavior in situations in which they possess jurisdiction. See Rosenberg, supra note 35, at 844-45.
\textsuperscript{70}. Forrester, 792 F.2d at 656.
\textsuperscript{71}. See id.
\textsuperscript{72}. Id. at 655-57. The court noted, for example, that judges do not enjoy immunity for their administrative acts. Id. at 656-57 & n.10.
\textsuperscript{73}. Id. at 656-57.
\textsuperscript{74}. Id. at 658. For a discussion of the policies underlying judicial immunity, see supra notes 15-20 and accompanying text.
\textsuperscript{75}. Id. For a discussion of the safeguards justifying judicial immunity, see supra notes 21-26 and accompanying text.
\textsuperscript{76}. Id. at 657-58.
\textsuperscript{77}. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). For a discussion of Bradley, see supra notes 9-23 and accompanying text.
munity question in a trial context and was concerned with the potential for vexatious suits brought against judges by disgrun-
ted litigants. The Forrester court, however, was concerned with the possibility that a judge who has lost confidence in his probation officer may nevertheless hesitate to fire the officer for fear of civil suit. According to the court, if the probation officer is in a position to affect the judge’s discretionary judgment, the fear of a civil damages action could undermine the policy of preserving independent judicial decision making.

In Forrester, the plaintiff was responsible for providing ad-
vice and information to the judge concerning sentencing, proba-
tion, and revocation of parole and probation. On the basis of these duties, the court determined that Forrester’s relationship with the judge was both confidential and influential. Immunity should attach to a judge’s decisions concerning such confidential positions, the Forrester court concluded, to prevent the impairment of the judge’s decisionmaking ability. Forcing a judge to rely on a probation officer the judge no longer trusted would make the parties appearing before the court victims of unprincipled decision making. In light of the policy of preserving independent decision making, the court thus held that Judge White was acting within his judicial capacity when he fired Forrester.

In addition to this traditional policy concern, the court contended that immunity was necessary to protect judges from suits that might be brought by litigants who have learned of the decline of the judge’s relationship with her probation officer.

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79. See Stump, 435 U.S. at 363-64; Bradley, 80 U.S. (13 Wall.) at 349. For a discussion of the dangers of judges’ amenability to suit by dissatisfied litigants, see supra notes 16-20 and accompanying text.
80. Forrester, 792 F.2d at 658. The Forrester court stated:
  The evil to be avoided is the following: A judge loses confidence in his probation officer, but hesitates to fire him because of the threat of litigation. He then retains the officer, in which case the parties appearing before the court are the victims, because the quality of the judge’s decision-making will decline.

Id.
81. Id. at 657-58.
82. Id. at 657.
83. Id.
84. Id. at 657-58.
85. Id. at 658.
86. Id. Essentially, the Forrester court held that if the plaintiff’s perform-
ance of her job responsibilities influenced the decisions that traditionally are considered judicial acts, the dismissal of the plaintiff was itself a judicial act. See id. at 657-58.
87. Id. at 658. The court did not explain, however, why immunity would
Otherwise, the judge could be charged with impropriety and lose the respect necessary to effectively perform her duties.\textsuperscript{88} The \textit{Forrester} court also noted that safeguards such as impeachment, censure, equitable and declaratory relief, and market forces reduce the need for a private damages action.\textsuperscript{89} Finally, the court asserted broadly that without immunity for employment decisions, judges would be forced to employ wasteful and meticulous self-protective devices.\textsuperscript{90}

Although presented with the opportunity, the Seventh Circuit in \textit{Forrester} refused to establish a general rule concerning judges' liability for personnel decisions.\textsuperscript{91} Instead, the court stated narrowly that judicial immunity depends upon the nature of the particular relationship between the judge and staff member\textsuperscript{92} and whether granting judicial immunity would advance the policies underlying the doctrine.\textsuperscript{93} Under this rule, judicial immunity would not apply where the interaction between the judge and employee does not implicate the judge's decision making.\textsuperscript{94} The court thus declined to express an opinion on the personnel decisions Judge White made involving other members of his staff, or on employment decisions concerning probation officers in different court systems.\textsuperscript{95}

\footnotesize{not attach when a litigant brought suit against a judge upon discovering the deterioration of the judge's professional relationship with her probation officer.}

\textsuperscript{88} Id.

\textsuperscript{89} Id.

\textsuperscript{90} Id.

\textsuperscript{91} Id. at 657. \textit{Compare Forrester}, 792 F.2d at 657 (refusing to set a general rule concerning judges' liability for firing employees "because the interaction between the judge and the members of his staff does not always appropriately implicate the decisions of the judge \textit{qua} judge") with \textit{Lewis v. Blackburn}, 555 F. Supp. 713, 723 (W.D.N. C. 1983) (holding that the immunity defense is never available for judges' personnel appointments because such decisions are ministerial duties (discussed supra note 48 and accompanying text)) and \textit{Blackwell v. Cook}, 570 F. Supp. 474, 477-79 (N.D. Ind. 1983) (holding that judges are immune from civil damage actions by fired probation officers (discussed supra notes 52-55 and accompanying text)).

\textsuperscript{92} Forrester, 792 F.2d at 657. The court observed that because each judge may interact differently with staff members and each system may allocate responsibility to employees differently, it was impossible to establish a general rule. \textit{Id}.

\textsuperscript{93} Id. at 657-58.

\textsuperscript{94} See id. at 658.

\textsuperscript{95} See id. The court emphasized the factual nature of the inquiry by writing: "We have, as we must, addressed only the facts of the case before us." \textit{Id}.}
III. THE MISAPPLICATION OF THE JUDICIAL IMMUNITY DOCTRINE IN FORRESTER

The Forrester court asserted that policy considerations should be the touchstone for analyzing judicial conduct under the Stump judicial act test. In examining the policies behind judicial immunity, however, the court developed a new line of reasoning that altered the traditional emphasis in judicial immunity cases and too quickly dismissed factors that have previously played an important role in deciding this issue.

Courts considering the issue of judicial immunity have accepted the proposition that, without immunity, judges, by the nature of their role in dispute resolution, would be particularly vulnerable to lawsuits by dissatisfied litigants. Losing parties, dissatisfied with their result, would attempt to continue their case by suing the judges involved for alleged civil rights violations. This type of litigation would result not only in costs to the defendant judges, but would also increase the expense of litigation generally, divert judges’ energy from judicial issues, and deter acceptance of judicial office.

In Forrester, however, there was no showing that judges are more likely to be sued by employees than are other public employers who are not entitled to immunity for alleged employment discrimination. It follows, then, that the social costs of denying judges immunity for their discriminatory acts do not exceed the costs incurred in holding other public employers liable for such conduct. Nonetheless, the Forrester

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96. For a discussion of the Stump test, see supra notes 39-45 and accompanying text.
97. Judge Posner, dissenting in Forrester, noted that a judge for the Seventh Circuit Court of Appeals votes in more than 200 cases each year. Forrester, 792 F.2d at 661 (Posner, J., dissenting). A significant fraction of the losers of those cases, claimed Judge Posner, would sue the judges as a means of collaterally attacking adverse decisions. Id. Because most such suits would be frivolous and wasteful, Judge Posner agreed that judicial immunity is justified when litigants sue judges. Id.
98. The Court in Butz v. Economou, 438 U.S. 478 (1978), explained: As the Bradley court suggested ... controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. . . . Absolute immunity is thus necessary to assure that judges . . . can perform their . . . functions without harassment or intimidation. Id. at 512.
100. See Forrester, 792 F.2d at 662 (Posner, J., dissenting) (noting that a “judge is no more likely to be sued for employment discrimination than any other employer, public or private”).
court denied judicial employees a right of action against their employers.

The Forrester court justified its decision to grant judicial immunity by asserting the policy of promoting independent judicial decision making.101 As noted above,102 however, the Forrester court departed from the traditional reasoning that judges must be granted absolute immunity because, without immunity, the threat of personal liability for judicial decisions could result in inconsistent and unprincipled decision making.103 Instead, the Forrester court was concerned that the decisionmaking process would be distorted if judges retained incompetent employees out of a fear of civil litigation because they would then be relying on advice they considered to be untrustworthy in disposing of cases.104

The Forrester court’s reasoning, however, strains the judicial immunity analysis employed by courts since Bradley and establishes an entirely new rationale for the immunity defense. The approach adopted by the Forrester court, that the threat of liability for employment discrimination hampers a judge’s ability to maintain a competent and trustworthy staff, not only misconstrues the policy of preserving principled and

101. Id. at 657-58.
102. See supra notes 77-81 and accompanying text.
103. See Forrester, 792 F.2d at 654.

Although the reasoning that the goal of principled decision making justifies immunity has been widely accepted, see, e.g., Forrester, 792 F.2d at 661-62 (Posner, J., dissenting) (judicial immunity is justified when the threat of massive litigation would be likely to distort a judge’s official behavior and result in serious detriment to the public), it is not without its critics. Justice Douglas, dissenting in Pierson v. Ray, 386 U.S. 547, 565-66 (1967), argued that judicial immunity is not necessary to preserve an independent judiciary. He quoted Chief Justice Cockburn who, dissenting in an English judicial immunity case, wrote:

“I cannot believe that judges . . . would fail to discharge their duty faithfully and fearlessly according to their oaths and consciences . . . from any fear of exposing themselves to actions at law. I am persuaded that the number of such actions would be infinitely small and would be easily disposed of. While, on the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice as that, on sound principles, the authors of such wrong ought to be responsible to the parties wronged.”

Id. (Douglas, J., dissenting) (quoting Dawkins v. Lord Paulet, 5 L.J.Q.B. 94, 110 (1859) (Cockburn, C.J., dissenting)). See also Note, supra note 29, at 331 (“Any argument that the pressure of liability would encourage unprincipled—read ‘wrong’ apparently—decisions must presume a general weakness in judicial fiber. It does not logically follow that principle automatically flees from a fear of law-suits [sic].”).

104. See Forrester, 792 F.2d at 658.
independent decision making but also departs from the functional approach toward judicial immunity clearly required by the *Stump* test.\(^{105}\)

Under *Stump*, judges are immune only for their judicial acts.\(^{106}\) The *Forrester* court, however, in holding the dismissal of a probation officer to be a judicial act, failed to explain why such an act functionally merits immunity. There is no showing in *Forrester* that judges, in performing such a function, differ from other similarly situated employers. Certainly, prosecutors, public defenders, and private attorneys play as important a role in the outcome of cases as do probation officers. Yet the employers of such persons are not granted absolute immunity in suits alleging employment discrimination. In addition, the reasoning of *Forrester* is not logically limited to judicial employment decisions. The rationale of ensuring competent personnel extends to every government official who relies on subordinates in performing discretionary functions.\(^{107}\) Thus, Judge White was granted immunity because of his status as judge, not because, functionally, his role as employer, as opposed to the roles of other employers, required the sacrifice of individuals’ rights of action for the public good.\(^{108}\)

In addition to misapplying the functional policy test for judicial immunity, the *Forrester* court also overemphasized the role that procedural safeguards would play in deterring judicial

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\(^{105}\) For a discussion of the *Stump* principle that immunity is dependent on the nature of the act, not the status of the actor, see *supra* notes 39-45 and accompanying text.

\(^{106}\) See *supra* notes 41-45.

\(^{107}\) See *Forrester*, 792 F.2d at 659 (Posner, J., dissenting).

\(^{108}\) The *Forrester* court’s reliance on the policy of avoiding judicial dependence on wasteful devices to protect against later suit also supports the reading that the court did not follow a functional approach to judicial immunity. See *id.* at 658. The policy of avoiding judicial reliance on wasteful self-protective devices was one of the *Bradley* Court’s considerations. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 (1872). In *Bradley*, the Court stated the policy in terms of meticulous recordkeeping. The policy of avoiding meticulous recordkeeping developed as a practical response to the possibility of judges being harassed by suits by former litigants. *Forrester*, 792 F.2d at 652 (citing *Bradley*, 80 U.S. (13 Wall.) at 347-54). Certainly a judge hearing hundreds of cases a year might be driven to wasteful recordkeeping if she feared that any one of those cases could result in personal liability. A judge merely maintaining a staff, however, would be no more likely than any other public employer to keep records so meticulous as to seriously interfere with public duties. In light of the failure in *Forrester* to show that judges are particularly vulnerable to suit for employment decisions, the court’s reliance on the recordkeeping policy was misplaced.
misconduct involving employment decisions. The safeguards cited by the court simply are inadequate to prevent impermissibly employment discrimination. The threat of judicial impeachment or censure is too remote to be seriously viewed as a deterrent to such discriminatory conduct. Assuming that the victims of employment discrimination could muster enough strength and support to even raise the issue, the impeachment and censure of judges are extreme measures that rarely are carried out. The court's claim that market forces could effectively deter discrimination in judicial employment is also difficult to understand in light of the fact that those forces have been inadequate in deterring discrimination in other areas of public employment. In addition, equitable relief would operate as a deterrent to such discriminatory conduct only when the plaintiff's complaint could be satisfied with backpay and reinstatement to the court in which she had suffered the discrimination.

Besides relying on these ineffective safeguards to find Judge White immune, the Forrester court also ignored the fact that other safeguards traditionally considered important to a judicial immunity analysis were lacking in this case. As explained in Butz v. Economou, a judge's insulation from political influences, the importance of precedent in resolving conflicts, and the adversary nature of the judicial process reduce the need for private actions to deter unconstitutional conduct. In Forrester, however, the court failed to recognize that even judges insulated from political influences are free to discriminate on such impermissible bases as race or sex, and that precedent does not operate as a safeguard against employ-

109. See supra text accompanying note 89.
110. See Rosenberg, supra note 35, at 857 (arguing that the threat of criminal or disciplinary proceedings against judges is too remote to deter lawless judges because district attorneys would be unwilling to prosecute judges for nonmonetary misconduct and judicial qualifications commissions are less than zealous in prosecuting malfeasant); Note, Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability, 20 Ark. L. Rev. 549, 564-65 & nn.13-14 (1978) (providing statistics on the infrequency of impeachment proceedings initiated against judges and citing a study which revealed that before 1960 only 50 impeachment proceedings were brought in the United States and only 19 judges were removed).
111. The enactment of title VII of the Civil Rights Act, which provides a cause of action against public employers for some types of discrimination, evidences the ineffectiveness of market forces as a deterrent to employment discrimination. See 42 U.S.C. § 2000e-2(a) (1982).
113. For a discussion of Butz, see supra notes 24-26 and accompanying text.
ment discrimination because judges cannot cite authority for firing an employee in the same way they can cite cases supporting their rulings in court. Moreover, no adversarial process is involved in a dismissal and, therefore, there is no assurance that all facts are disclosed and that the employee's interests are vigorously promoted. Thus, unlike the situation involved in the adjudication of disputes, in the employment context there is no significant systemic check on judicial misconduct.

Additionally, there is no opportunity for a victim of employment discrimination to seek a remedy for a judicial wrong except by commencing a civil suit. Since Bradley, courts have justified the denial of private damages actions when parties had the opportunity to seek correction of a judicial wrong through appeal. Although the Stump decision departed from precedent by granting immunity even though the plaintiff had no opportunity for appeal, that decision was made in the face of

114. Victims of employment discrimination by judges may seek a remedy only by bringing suit. They may, as did Forrester, bring an action against the judge under § 1983 for violation of a constitutional right. The judge might, however, be found immune from liability. The victims may also bring an action against the employing agency under title VII of the Civil Rights Act of 1964, which provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, sex, religion, or national origin.


The possibility of relief under title VII, however, does not justify granting absolute judicial immunity for employment decisions. Relief under title VII is limited to the equitable relief of backpay and reinstatement. Forrester, 792 F.2d at 662 (Posner, J., dissenting). It does not provide for common-law damages. Id. More important, however, title VII is available only for certain constitutional violations. It does not cover, for example, employment discrimination in violation of first amendment rights. A party whose first amendment rights have been violated is therefore limited to action against the judge. If the judge is immune from liability, that party has no remedy available. That Congress has provided a remedy for some forms of employment discrimination does not justify making judges immune from liability for all forms.

115. See, e.g., Butz, 438 U.S. at 512 (citing "the correctability of error on appeal" as one of the checks on malicious action by judges); Pierson v. Ray, 386 U.S. 547, 554 (1967) ("[A judge's] 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 v. Fisher, 80 U.S. (13 Wall.) 335, 345 (1872) (private parties must resort to the numerous remedies the law has provided to protect themselves against the consequences of improper judicial action); Atcherson v. Siebenmann, 458 F. Supp. 526, 535 (S.D. Iowa 1978) (absolute immunity extends only to judicial actions, and the availability of appellate review is a relevant factor in determining whether an act is judicial).
vehement dissent and has sparked strong criticism by commentators. The Forrester court would have done well to return to the traditional, and less-criticized, analysis that required an opportunity for appellate review before granting absolute immunity.

Nonetheless, even if the policies and safeguards discussed by the Forrester court justified the grant of immunity, the court’s requirement of a factual inquiry into the judge-employee relationship undermines the court’s intentions in granting immunity. Summary disposition of actions against judges is necessary to prevent vexatious suits and to further the policies of immunity. Summary judgment, however, is appropriate only when there is no issue of material fact and the moving party is entitled to judgment as a matter of law.

In his dissent in Stump, Justice Powell argued that the judicial immunity defense should not be allowed where a judge has cut off all avenues of appeal. Stump v. Sparkman, 435 U.S. 349, 369-70 (1978) (Powell, J., dissenting). He contended that Bradley sacrificed private rights to the public good on the assumption that alternative forums existed for the vindication of those rights. Id. Therefore, when the possibility of vindication of a plaintiff’s rights has been absolutely precluded, the judge should not be immune from liability. Id. Justice Stewart likewise dissented in Stump because none of the normal attributes of a judicial proceeding, including the possibility of appeal, were present in the case. Id. at 368-69 (Stewart, J., dissenting).

See Feinman & Cohen, supra note 9, at 280 (stating that Stump should have been decided the other way in view of the high value of human dignity and the redress of wrongful injury); Rosenberg, supra note 35, at 858 (concluding that, although judges’ desire for an overbroad umbrella of judicial immunity is understandable, it is outrageous to “stretch that umbrella so that it also covers Daumier caricatures in judicial robes on their way to a masquerade ball”).

One commentator who espouses a more limited immunity for judges has criticized the use of appellate review as a justification for absolute immunity. The commentator argues that appellate review is a weak deterrent of unconstitutional conduct and is an inadequate remedy both because of its costliness and because it cannot give compensation. It can only result in a reversal or new trial. See Note, supra note 110, at 565-66.

See, e.g., Pierson, 386 U.S. at 554 (using traditional analysis to determine that judge enjoys absolute immunity from liability for alleged § 1983 violations).

For a discussion of the Forrester court’s emphasis on the factual nature of the judge-employee relationship, see supra notes 91-94 and accompanying text.

See Fed. R. Civ. P. 56 which reads in part:

The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Id.
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the Forrester analysis, therefore, it would be inappropriate to grant summary judgment if the plaintiff-employee has pleaded that as a factual matter her relationship with the judge did not implicate the judge’s discretionary decision making and if the plaintiff-employee is able to create a genuine issue of fact concerning her ability to influence the judge’s rulings. Although the Forrester decision upheld summary judgment against the plaintiff, future plaintiffs now know the issue they need to create to survive summary judgment motions. Thus, if courts adopt this factual approach, judges may still be burdened with defending themselves at trial and the resulting harm to the public will be no less present.

The factual inquiry advocated in Forrester also fails to provide specific guidelines for judges to follow in hiring and firing their employees. Under Forrester, whether immunity will be granted will vary from court to court and from employee to employee due to differences in factual situations. The liability question could become especially muddled if, as the Forrester court suggested, modern judicial staffmembers play a larger role in substantive decision making. If liability depends on a staffmember’s remoteness from the judicial decisionmaking process, differing degrees of remoteness could lead to confusing results. Because no clear rule exists to guide them, judges making personnel decisions are unlikely to rely on the possibility that they may possess absolute immunity. If immunity

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121. The only firm guideline suggested by the court is that immunity will not attach to a decision to not hire a janitor because “[a] janitor is not required to provide a judge with advice and information concerning pending cases.” Forrester, 792 F.2d at 656.

122. See id. at 654.

The threat that the Forrester holding will muddle the question of liability is borne out by a recent decision of the Montana Supreme Court. Citing Forrester, the Montana Court held a judge immune from an unfair termination action brought by his secretary. Mead v. McKittrick, 727 P.2d 517, 519 (Mont. 1986). The court concluded that because judicial efficiency depends in part upon a professional and confidential judge-secretary relationship, the act of firing a secretary is a judicial act. Id. Thus, even though a secretary plays no role in influencing judicial decisionmaking, in Montana the secretary may not bring a wrongful discharge suit against the employer-judge. It is therefore open to question what other judicial employees not involved in decisionmaking will receive similar treatment under interpretations of Forrester.

123. Dissenting in Forrester, Judge Posner wrote: The absolute immunity for a judge’s legal rulings is about as definite a rule as we have in our legal system, and the absolute immunity that the court creates today is about as indefinite, which robs the principle of its value to the judges and to the public. Absolute immunity provides real security only if the scope of the immunity is well defined.
has but little effect on a judge's personnel decisions, it is of value only to an errant judge, not to the public.

Finally, the court's decision in *Forrester* engenders inconsistency between judicial immunity for hiring decisions and for firing decisions. Logically, there is no reason why judges should enjoy immunity for a discriminatory firing if they are not immune from making hiring decisions on the same basis. It would be impossible, however, to undertake a factual inquiry into the judge-employee relationship if the judge had not yet hired the employee or established any type of relationship. Yet, under *Forrester*, if the judge cannot prove that the plaintiff implicated judicial decision making, judicial immunity will not apply. To avoid this inconsistency, the *Forrester* court should have laid down a general no-immunity rule for judges' employment decisions.

**CONCLUSION**

Courts have traditionally granted judicial immunity for

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Under the court's approach the process of definition will be protracted and may never yield a clear rule on which employees or job applicants may sue which judges and which may not, and for what.

We shall still have to buy liability insurance.

*Forrester*, 792 F.2d at 664 (Posner, J., dissenting).

124. *Id.* at 659 (Posner, J., dissenting) (“It would be a curious notion that a judge must hire probation officers without regard to their race or sex but is free to fire them on the basis of their race or sex.”).

125. One alternative to absolute judicial immunity for certain employment decisions would have been to grant judges qualified immunity which protects judges who show that their discriminatory act was unintentional and was done in good faith. *Cf.* Rodriguez v. Board of Educ., 620 F.2d 362, 366-67 (2d Cir. 1980) (holding that good faith is a defense for school officials against liability for damages in an action for deliberate sex discrimination under § 1983). Good faith immunity, however, requires that the defendant's conduct not violate clearly established constitutional or statutory rights, of which a reasonable person should have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This good faith defense in employment cases, therefore, would assume that judges can reasonably be unaware that sex discrimination in employment is unconstitutional. As explained by the Ninth Circuit, such an assumption should not be tolerated: “[T]he constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it.” *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir.) (citing *Cooper v. Aaron*, 358 U.S. 1 (1958)), and holding that there is no good faith immunity for city officials who delay granting of liquor license on grounds of national origin), *cert. denied*, 449 U.S. 875 (1980). *See also* Goodwin v. Circuit Court, 729 F.2d 541, 545-46 (8th Cir. 1984) (holding that defense of good faith immunity is unavailable to circuit court judge who demoted hearing officer on the basis of her sex). Qualified immunity, therefore, should have no place in § 1983 actions against judges for impermissible discrimination in employment.
acts relevant to the adjudication of cases. The Forrester court, however, granted judicial immunity for a discriminatory personnel decision made by a judge. In so doing, the court misconstrued the policy considerations underlying judicial immunity and ignored the fact that the safeguards traditionally relied on by courts to protect individuals from judicial misconduct are ineffective in the context of personnel decisions. A product of the court’s fact-oriented approach, the holding in Forrester not only prevents certain judicial employees from seeking damages for discrimination, it also leaves judges without clear guidelines as to which employees are involved in the grant of immunity. Courts, therefore, should deny immunity for judges’ personnel decisions and thereby strike a more equitable balance between public and individual needs.

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