VOLUME 1980 NUMBER 5 | 0 | INTRODUCTION

Most developed legal systems, including our own, have long reflected a belief that suits against judges by dissatisfied litigants are an unsatisfactory method of correcting judicial error. In the common law, that belief became the doctrine of judicial immunity. In recent years, traditional immunity doctrines have been criticized more and more, especially by activist sectors of the bar and academe;[1] naturally, judicial immunity has not avoided censure.[2]

In *Stump v. Sparkman*,[3] decided in 1978, the Supreme Court held that a judge is absolutely immune from suits for damages for his judicial acts, unless he acted in the clear absence of subject matter jurisdiction. No doubt the Court intended to affirm the validity of the doctrine of judicial immunity, but the most apparent effect of the *Sparkman* decision has been to reduce the stature of the doctrine and to call into question the integrity of the judiciary and of the judicial process. Writers in both the popular and the scholarly press[4] responded sharply (aroused perhaps not so much by the decision itself as by the facts of the case, which involved the involuntary sterilization of a fifteen-year old girl), attacking the decision as an example of the worst sort of self-dealing by the judiciary and arguing that judicial immunity as it now stands cannot find its justification in public policy.

In one of the more dispassionate of these articles,[5] two authors — Jay Feinman and Roy Cohen — examine the history of judicial immunity. They conclude that "English law began with a position of general judicial liability and developed only limited exceptions on grounds that are irrelevant to a discussion of judicial liability today."[6] These authors also discuss the policies underlying the judicial immunity doctrine: "We conclude that immunity is indefensible on policy grounds as well, but that conclusion does not convince us that any of the suggested reforms should be adopted. Instead, we draw on contemporary jurisprudential thinking to argue that no convincing policy resolution is possible."[7]

An examination of the history of the doctrine of judicial immunity leads to quite contrary conclusions. English law began not from a position of general judicial liability for damages but from a position of very limited liabilities that resulted in only nominal penalties.[8] Moreover, the doctrine of judicial immunity was developed primarily to eliminate collateral attacks on judgments and to confine procedures in error to the hierarchy of the king's courts; these grounds are relevant to discussions of judicial immunity today and are especially relevant to an analysis of *Sparkman*. Finally, this history does lead to a legitimate resolution of conflicting policies, and to a reform proposal that implements the policies underlying the doctrine of judicial immunity. These policies in turn show, as argued below,[9] that the error the Court committed in *Sparkman* was not the perpetuation of the doctrine of judicial immunity, as some critics have asserted,[10] but rather the misstatement, misinterpretation, and misapplication of the doctrine.

Footnotes

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

> ***S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (1959)***, hereinafter cited as S. DE SMITH;
> Dobbs, ***The Decline of Jurisdiction by Consent***, 40 N.C.L. REV. 49 (1961), hereinafter cited as Dobbs;
> Feinman & Cohen, Suing Judges: ***History and Theory***, 31 S.C.L. REV. 201 (1980), hereinafter cited as Feinman & Cohen;
> Note, ***Liability of Judicial Officers Under Section 1983*** 79 YALE LJ. 322 (1969), hereinafter cited as Yale Note.

[1]. See generally Cramton, ***Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity***; ***Subject Matter Jurisdiction, and Parties Defendant***, 68 MICH L. REV.387 (1970); Scalia, ***Sovereign Immunity and Non-Statutory Review of Federal Administrative Action: Some Conclusions From the Public-Lands Cases*** 68 MICH. L. REV. 867 (1970).

[2]. See, e.g., Kates, ***Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*** 65 Nw. U.L. REV.615 (1970); Note, ***Immunity of Federal and State Judges from Civil Suit — Time for a Qualified Immunity*** 27 CASE W. RES. L. REV. 727 (1977); Yale Note.

[3]. 435 U.S. 349 (1978).

[4]. See, e.g., Falk, ***The Mandarins: Judges Seek Shield from Public***, Wall St. J.t Apr. 28, 1978, at 16, coL 3; Laycock, ***Civil Rights and Civil Liberties***, 54 CHI.-KENT L. REV. 390 (1977); Nagel, ***Judicial Immunity and Sovereignty***, 6 HASTINGS CONST.L.Q. 237 (1978); Nahmod, ***Persons Who Are Not "Persons"; Absolute Individual Immunity Under Section 1983***, 28 DEPAUL L. REV.1 (1978); Rosenberg, ***Stump v. Sparkman: The Doctrine of Judicial Impunity***, 64 VA. L. REV. 833 (1978); Young, ***Supreme Court Report***, 64 A.B.A.J. 740 (1978); Note, Torts—***Judicial Immunity: A Sword for the Malicious or a Shield for the Conscientious***?, 8 U. BALT. L. REV. 141 (1978); 11 IND. L. REV. 489 (1978); 47 U. Mo. KAN. CITY L. REV. 81 (1978).

[5]. Feinman & Cohen.

[6]. Id. 203.

[7]. Id. 204.

[8]. See note 12 infra and accompanying text.

[9]. See notes 197-233 infra and accompanying text.

[10]. See, e.g.,Feinman & Cohen 204; Nagel, supra note4,at 238-39; Rosenberg, supra note 4, at 836; Young, supra note 4, at 740; Note, supra note 4, at 156-58; 47 U. Mo. KAN. CITY L. REV. 81, 81, 94 (1978).