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A. The Judicial-Act Requirement.

The preceding discussion demonstrates that the brief legacy of *Sparkman* has been disarray and dissatisfaction. Courts applying *Sparkman* have been misled by that decision's inadvertent redefinition of the concept of a judicial act. Justice White's statement that the Supreme Court had not previously had occasion to consider the necessary attributes of a judicial act in the context of judicial immunity is simply wrong. Judging from the opinion, White was not aware of the discussion in *Ex parte Virginia* when he set down his test for a judicial act;[234] judging from the test itself, White was unaware of the need to distinguish judicial acts from administrative or legislative acts in the context of judicial immunity. Rather, the opinion asks "whether [an act] is a function normally performed by a judge," i.e., whether it is an official act, and "whether [the parties] dealt with the judge in his judicial capacity"—which means in his official capacity, according to the authority the Court cited.[235] The opinion does not clarify why an act that is by nature judicial might be made non-judicial by the expectations of the parties.[236] A better analysis of the facts of *Sparkman* and the doctrine of judicial immunity calls for a return to the traditional approach to the judicial-act requirement.[237]

B. The Jurisdictional Limit.

The historical discussion above[238] suggests that the jurisdictional limit on immunity—whatever is left of it—is ripe for elimination. For centuries the jurisdictional limit has not been applied to judges of superior courts. The distinction between superior courts and inferior courts regarding judicial immunity has fallen into desuetude in those American jurisdictions that have not expressly abolished it,[239] and for good reason. As applied to inferior courts, the jurisdictional limit on immunity was a consequence of the ossified system of review by prerogative writ, and provided a needed remedy for damages from official action when many of the functions of government were performed by justices of the peace using judicial forms and procedures. The jurisdictional limit once served a purpose when it was apphed to administrative functions, but that purpose is not served by applying the jurisdictional limit to judicial functions in a modem legal system. It is an anachronism that fosters nothing but confusion, and it should be eliminated.[240]

C. The Malice Standard.

Almost without exception, critics of the doctrine of judicial immunity have agreed on one point: It is one thing, they say, to protect a judge from his honest mistakes, but it is something quite different for the judicial system to protect judges who purposely use their authority to inflict harm or deprive others of their rights. For this reason, some have called for judicial liability under an "actual malice" standard:

"Applied to a judicial officer, this would mean that an action would [result in liability] if it was done with actual knowledge that it was incorrect or with reckless disregard of whether it was incorrect or not."[241] Proponents argue that adopting this standard would deter judicial acts "motivated by prejudice, bias, anger, or ill-will, or the result of inattention, neglect of duty, or incompetence."[242] In addition, of course, any diminution of judicial immunity would increase the compensation for those wronged by judicial malefaction.

The chief drawback to this proposal is that most aggrieved litigants would readily allege that a judge's conduct had been malicious, or had met any other requisite standard, and the truth of such allegations could not be determined without a trial; the damage to the policies supporting immunity would be inflicted by the fact of a trial, no matter what the verdict.[243] The most effective argument against the malice standard, however, is that the premises underlying it are mistaken. Judicial immunity exists not to protect judges but to protect litigants.

This freedom from action and question at the suit of an individual is given by law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer judgment ought to be.[244]

On the basis of "modern social theory, including modem legal theory,"[245] Feinman and Cohen conclude that this policy argument cannot be resolved in any objectively satisfying manner:

Values are subjective because they are solely a matter of individual choice and they are arbitrary because once the choice is made little is left to be said. Values are not subject to rational debate or discussion and one person can rarely persuade another of the rightness of certain values because of the irreconcilable antinomy of reason and value. . . . [T]he resolution of the policy formula requires a weighing of the costs of a liability mle against the benefits. Weighing implies a scale, an objective measure, but the choice among competing values is itself reflective of more basic values and is therefore subjective and arbitrary.... Each decisionmaker values compensating injured parties, sanctioning wrongdoers, and maintaining the efficiency of the legal system, but when those common values conflict, as in the judicial liability context, no independent means of resolving the conflict is available.[246]

This sort of conclusion is more an indictment of relativism than of legal reasoning. When one evaluates value choices in a legal context, one is not trying to prove the validity or truth of a scale of values, but only the consistency of that value choice with other value choices made, accepted, and legitimated by society. The inconsistency of according absolute immunity for the protection of judicial independence, but only qualified immunity for the protection of the independence of most other government officials, is what one finds disturbing about the doctrine of judicial immunity—not the subjectivity of value judgments, as Feinman and Cohen suggest.

D. An Alternate Proposal.

The salient feature of *Sparkman* is that the defendant judge's actions deprived Linda Kay *Sparkman* of the opportunity to seek appellate relief from his judgment. According to the view of judicial immunity stated by both the majority and the dissenters in *Sparkman*, the only significance of appeal in the context of judicial immunity is that its availability mitigates some of the harsher consequences of the doctrine. If that were indeed the only significance of appeal, then its unavailability in any particular case would be nothing more than an unfortunate circumstance, affecting the general cost-benefit calculus by which the utility of the doctrine of judicial immunity is evaluated, but not bearing on the validity of the application of the doctrine in that particular case.

The earlier discussion of the origins of judicial immunity shows, however, that appeal has a much greater significance in the context of judicial immunity.[247] Judicial immunity developed to protect the appellate system from collateral attacks on judgments, thus channeling actions upward through the appellate hierarchy for the correction of error. The availability of appellate correction of error is, therefore, absolutely central to the logic of judicial immunity. For this reason, judicial immunity should not be available when, as in *Sparkman*, the actions complained of prevented the complainant from seeking normal appellate correction of error.

The limiting principle proposed here is hardly radical. At its most fundamental level, it is nothing more than an application of the maxim cessante ratione legis cessat ipsa lex (where the reason for the rule stops, there stops the rule).[248] Its application would leave the vast majority of precedents undisturbed[249] and would deny immunity only in cases like *Sparkman*, in which the judge's actions denied the plaintiff access to the appellate system. The standard would be a return to sound precedent and would result very neatly in the establishment of limits on judicial immunity that are determined by the policy basis of the doctrine.[250]

Footnotes

234. See text accompanying notes 202-06 supra.

235. 435 U.S. at 362.

236. The hypothetical case of a non-judicial act being characterized as judicial as a result of the expectations of the parties should convince the reader that the *Sparkman* judicial-act rule, see text accompanying note 206 supra, is conjunctive rather than disjunctive. See also Feinman & Cohen 257-58.

237. See text accompanying notes 62-69 supra.

238. See notes 70-96 supra and accompanying text.

239. The following cases abolished any such distinction between inferior and superior courts: *Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980); *McDaniel v. Harrell*, 81 Fla. 66, 86 So. 631 (1921); *Calhoun v. Little*, 106 Ga. 336, 32 S.E. 86 (1898); *Thompson v. Jackson*, 93 Iowa 376, 61 N.W. 1004 (1895); *Shaw v. Moon*, 117 Or. 558, 245 P, 318 (1926); *Kalb v. Luce*, 234 Wis. 509, 291 N.W. 841 (1940).

In 1975 Her Majesty's Court of Appeal abolished the distinction between superior and inferior courts regarding the jurisdictional limit on judicial immunity. *Sirros v. Moore*, [1975] 1 Q.B. 118 (C.A.). See also Feinman & Cohen 261-62 (discussing Sirros).

240. The jurisdictional limit on immunity has had a less than glorious history in its application to what are regarded as judicial acts. See the discussion of *The Marshalsea*, notes 70-80 supra and accompanying text.922 DUKE LAW JOURNAL [Vol. 1980:879

241. Yale Note 322 n.3.

242. Feinman & Cohen 271.

243. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). One critic of the *Sparkman* decision noted that

> [w]hile it may initially appear unjust to protect the corrupt actions of judges, the difficulty in distinguishing between frivolous and legitimate claims would be significant. Although it has been argued that frivolous suits could be disposed of through summary judgment procedures under Rule 56 of the Federal Rules of Civil Procedure, there are two problems with this proposed solution. Subjecting a judge's record of evidence, authorities and arguments to discovery prior to summary judgment would create problems. In addition, summary judgment is particularly inappropriate when intent is relevant, credibility is an issue or when relevant information is peculiarly within the knowledge of the moving party. Thus, suits charging a judge with malice or corruption could not be easily disposed of under summary judgment procedures. The Court's reluctance to adopt a standard of actual malice in imposing judicial liability is, therefore, understandable.

47 U. Mo. KAN. CITY L. REV. 81, 93 (1978). See also Brazier, ***Judicial Immunity and the Independence of the Judiciary***, 1976 PUB. L. 397.Vol. 1980:879] JUDICIAL IMMUNITY 923

244. *Garnett v. Ferrand*, 108 Eng. Rep. 576, 581 (K.B. 1827).

245. Feinman & Cohen 278.

246. Id. 278-79.924 DUKE LAW JOURNAL [Vol. 1980:879

247. See text accompanying notes 11-28 supra.

248. See *Funk v. United States*, 290 U.S. 371 (1933); K. LLEWELLYN, BRAMBLE BUSH 157-58 (6th ed. 1977); Kocourek & Koven, Renovation of the Common Law Though Stare Decisis, 29 III. L. REV. 971 (1935).

249. The question arises whether judicial immunity should be denied when the actions complained of constitute breaches of a judge's obligation to follow decisions of courts superior to his own. *Pierson v. Ray*, 386 U.S. 547 (1967); *Ross v. Rittenhouse*, 2 Dali. 160 (Pa. 1792); and, arguably, *Consumers Union of the United States v. ABA*, 470 F.Supp. 1055 (E.D. Va. 1979), rev'd sub nom. *Supreme Ct. of Va. v. Consumers Union*, 100 S. Ct. 1967 (1980), fall into this category. Judicial immunity did not develop to enforce the authority of the decisions of reviewing courts, but rather developed to channel procedures in error upwards through the appellate hierarchy by barring certain collateral attacks.

250. The legitimacy of such a limit on judicial immunity is established not by a welfare analysis or a balancing of interests, such as that which disturbs Feinman and Cohen, see text accompanying note 246 supra, but by its derivation from the same policies which led to the development of judicial immunity. Vol. 1980:879] JUDICIAL IMMUNITY 925