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STUMP V. SPARKMAN AND THE HISTORY OF JUDICIAL IMMUNITY

J. RANDOLPH BLOCK*

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

* Assistant Professor, DePaul University College of Law. A.B. 1974, Princeton University; J.D. 1977, University of Chicago; member of the Illinois Bar. James Lindgren, William Marshall, and Douglas Laycock provided helpful comments on intermediate drafts. My fellow students in Prof. Laycock's seminar on governmental immunities stimulated my thinking with their vigorous and enthusiastic criticism; I am especially grateful to Joel Eisen-Stein for his ideas on official immunity.

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 L.J. 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 Nonstatutory 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).

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

4. *See, e.g.*, Falk, *The Mandarins: Judges Seek Shield from Public*, Wall St. J., 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.

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.

I. THE HISTORY OF THE DOCTRINE OF JUDICIAL IMMUNITY

A. *The English Origins of the Doctrine: Judicial Immunity and the Development of Appellate Procedures.*

Disappointed suitors will exert pressure upon any legal system to provide relief for the mistakes of its judges. The relief provided, however, will not necessarily take the form of appellate proceedings as we know them today. In early English law, the now familiar proceedings in error by appeal from one court to a higher court were completely unknown. A litigant challenged the correctness of a decision by an accusation against those who decided the case; for instance, a complaint against the verdict of a jury took the form of a charge of perjury under the procedure of attaint.[11] Under Anglo-Saxon law of the tenth and eleventh centuries, a judgment (doom) could be impeached by charging the official proposing the judgment (the doomsman) with falsehood. This proceeding, known as "forsaking the doom," developed into the complaint of "false judgment," whereby a dissatisfied litigant obtained a writ commanding the challenged court to cause a record of its proceedings to be made and brought before the court of the litigant's superior lord. The complainant could accept the court's record and thus confine the issues to errors of law. But this record could be challenged by anyone willing to engage in physical combat with the champions of the challenged court. If the challenge succeeded, the lower court's judgment was annulled and the court was amerced.[12]

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9. See notes 197-233 *infra* and accompanying text.

10. *See, e.g.*, Feinman & Cohen 204; Nagel, *supra* note 4, 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).

11. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 214, 337-42 (3d ed. 1922); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 665 (2d ed. 1898).

12. An "amercement" was a pecuniary penalty, the amount of which was imposed at the discretion of the king's court. These penalties were payable to the assessing court, not to the complaining litigant. Amercements were small and frequent. "Most men in England must have expected to be amerced at least once a year." 2 F. POLLOCK & F. MAITLAND, *supra* note 11, at 513. For these reasons, liability for amercement is not comparable to liability for damages.

The author is unaware of any example of assessment of damages against a court of any kind for a judicial act performed within jurisdiction. Coke does not mention damages in his discussion of the Statute of Marlborough, 1267, 52 Hen. 3, c. 19, which made false judgment a royal plea.

These challenges to the record were costly and lengthy. Moreover, the fact that the challenged court—rather than the successful party to the original action—had to defend against the action of false judgment meant that such actions could be, and often were, brought to intimidate a judge.[13] Gradually, false judgment proceedings were transformed: combat was avoided (usually by agreement of the parties), and both parties were heard on review,[14] but the burdensome attacks on the record were still possible.

Other features of the system of correcting errors by false judgment were also unsatisfactory to the central government. False judgments in the local courts were redressed in the court of the lord immediately superior to the original court, and the appeal proceeded upwards through the ranks of the feudal courts.[15] This meant that the king's courts received no amercements from lower courts and could redress errors only after long delays, if at all. That the system of false judgment did not permit an authoritative declaration of law by the central government also became apparent when compared with the ecclesiastical courts:

> In the twelfth century, under the influence of the canon law, Englishmen became familiar with appeals (*appellationes*) of a quite other kind [than criminal appeals of felony]; they appealed from the archdeacon to the bishop, from the bishop to the archbishop, from the archbishop to the pope. The graduated hierarchy of ecclesiastical courts became an attractive model. The king's court profited by this new idea; the king's court ought to stand to the local courts in somewhat the same relation as that in which the Roman curia stands to the courts of the bishops.[16]

The attractiveness of the ecclesiastical model lay in its hierarchical structure. Both a hierarchical system of review and a horizontal one (in which rehearing is by another inferior court) offer correction of errors, but proceedings in a hierarchical system enable the higher court to authoritatively ascertain and declare legal precepts.[17] For the judges of the king's courts to stand in such a hierarchical relation to the local courts, they needed to monopolize the existing means of correcting errors, the complaint of false judgment. By statute, therefore, false judg-

13. *See* Statutes of Westminster I, 1275, 3 Edw. 1, c. 28; R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 31 (1941); Riddell, *Erring Judges of the Thirteenth Century*, 24 MICH. L. REV. 329 (1926).

14. 2 F. POLLOCK & F. MAITLAND, *supra* note 11, at 667.

15. *See* 2 E. COKE, INSTITUTES OF THE LAWES OF ENGLAND 138 (1642).

16. 2 F. POLLOCK & F. MAITLAND, *supra* note 11, at 664 (footnotes omitted).

17. R. POUND, *supra* note 13, at 3.

ment was made a royal plea, which could be heard only in the king's courts.[18]

A judgment of a king's court could not be challenged through a complaint of false judgment, however, because of the doctrine of the sanctity of records. From a very early time, the proceedings of the king's court had been written in Latin on rolls of parchment.[19] This process of recording, coupled with royal prerogative, led to the view that the king's record of factual findings concerning what took place before him, whether maintained on parchment or stated *viva voce*, was superior to every other record. This very useful doctrine of the finality of the record was first applied in the court in which the king sat in person, and remained with the king's courts as they expanded their functions.[20] The doctrine of the sanctity of records of courts of record, which originated by virtue of royal prerogative, thus survived because it eliminated time-consuming attacks on the findings of fact in the record.[21]

Nonetheless, the need for correction of the royal courts' errors of law remained; indeed, it increased as the local courts dwindled and were replaced by the royal justices of the peace and assizes. Inevitably a method for correcting the errors of the royal courts developed in response. Because a complainant could not challenge the truth of the king's courts' findings of fact,

> the only manner in which such a complaint could be distinctly formulated was [for a complainant] to look at the formal record of the case, and indicate clearly some error or errors [of law] appearing thereon. It followed therefore that a complainant could only succeed if he could point out an error on the record. . . . The first step was the removal of the record into the higher court. Then came the assignment of errors by the plaintiff in error, the summoning of the defendant in error by writ of Scire Facias to hear the errors assigned, and the joinder of issue on the question whether the errors so assigned were really errors.[22]

Thus the writ of error came into being.

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18. "None from henceforth, except our Lord the King, shall hold in his Court any Plea of false Judgement, given in the Court of his Tenants; for such Plea specially belongeth to the Crown and Dignity of our Lord the King." Statute of Marlborough, 1267, 52 Hen. 3, c. 19.

19. *See* 1 F. POLLOCK & F. MAITLAND, *supra* note 11, at 169.

20. 2 F. POLLOCK & F. MAITLAND, *supra* note 11, at 666. Courts that kept such formal Latin records became known as "courts of record." "Coke deduced from certain vague dicta in the Year Books as to the powers of courts of record the new rule that it was only a court of record which could fine and imprison." 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 159 (1927). Although Coke's view had little or no effect at the time, it has since been accepted. *See* 10 HALSBURY'S LAWS OF ENGLAND *Courts* ¶ 709 (4th ed. 1975).

21. *See* Feinman & Cohen 205-06.

22. 1 W. HOLDSWORTH, *supra* note 11, at 214. Prior to the development of the writ of error, redress, when given, was at the instance of the central court and the king. Justices of assize and justices in eyre were summoned before the central court for the correction of errors.

In the development of the writ of error lay the seeds of the doctrine of judicial immunity. Although the benefits of finality that the doctrine of the sanctity of records brought about appeared most clearly in the context of proceedings in error, the scope of the doctrine was not confined to that context. The factual findings of a court of record could not be traversed by anyone in any proceeding, whether the proceeding was appellate in nature or a collateral attack.

> In the case of courts of record . . . it was held, certainly as early as Edward III.'s reign [1326-1377], that a litigant could not go behind the record, in order to make a judge civilly or criminally liable for an abuse of his jurisdiction. This is shown by a case reported in one of the books of Assizes, which runs as follows: "J de R was arraigned for that, whereas he was a justice to hear and terminate felonies and trespasses, and whereas certain persons were indicted for trespass, he made entry in his record that they were indicted for felony. And judgment was demanded for him [for all that he did] from the time that he was justice by commission, and that which he [the accuser] presents will be to undo his record, which cannot be by law, if to such a presentment the law puts him to answer. And it was the opinion of the justices that the presentment was bad." The only recourse open to the suitor in such a case was to attack the [legal conclusions in the] record by writ of error, founded either on the record or on a bill of exceptions to a ruling of the judge.[23]

Other cases from the *Year Books* show that it was soon accepted that no action would lie against a judge of record for that which he did as judge.[24] The cases reveal that judicial immunity was an integral part of the development of a hierarchical appellate system in England. The doctrine of the sanctity of records had provided the legal system with a necessary, though limited, finality by eliminating attacks on the record. It enabled, in Coke's phrase, an "end of causes."[25] Under the old procedure of false judgment, that end came only after long delays, if at all. The monopolization of procedures in error by the king's courts was intended in part to remedy this situation; it was also intended to give the royal courts the last word in legal controversies, thus adding another dimension to the concept of finality: authoritativeness.

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23. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 235-36 (2d ed. 1937) (the second and third bracketed interpolations are Holdsworth's). Note that the holding of the case is limited to criminal actions in which the accusation would traverse the record of the defendant judge. The holding would not apply to extrajudicial criminal actions.

It is noteworthy that a statute gave an action against a judge who refused to record a bill of exceptions. Statutes of Westminster II, 1285, 13 Edw. 1, c. 31.

24. These cases are reported in law French. For discussions in English of the cases, see Floyd v. Barker, 77 Eng. Rep. 1305 (Star Chamber 1607). *See also* Yates v. Lansing, 9 Johns. 395, 408-09 (N.Y. 1811).

25. See text accompanying notes 32-39 *infra*.

In sum, as the hierarchical appellate system developed, the king's courts found that attacks on the record of the royal courts were unnecessary and intolerably wasteful. The doctrine of the sanctity of records thus came to be established and lent a degree of finality to judgments. The system of appeal which these steps created had to monopolize the correction of errors in order to be authoritative;[26] collateral attacks framed as actions against judges were therefore eliminated by the development of the doctrine of judicial immunity. Judicial immunity followed naturally from the doctrine of the sanctity of records[27] but was ultimately accepted because it strengthened the appellate system by cutting off collateral attacks on judgments.[28]

B. *The Development of the Doctrine of Judicial Immunity.*

1. *The Restriction of Immunity to Judicial Acts.* (a) *Lord Coke*: Floyd v. Barker.[29] The failure of the common law courts to administer effectively the criminal law led to the subsequent growth of the courts of the Privy Council and the Star Chamber. The success of those courts attracted more business. As part of the rivalry that thus developed, the common law courts' supporters, especially Lord Coke, tended to magnify various consequences of the common law courts' status as courts of record.[30] In *Floyd v. Barker*[31] Coke established the immunity

26. The usual procedure for the correction of justices' errors was to bring a writ of error in the King's Bench. In the case quoted in the text accompanying note 23 *supra*, the criminal action against the justice was brought before justices of assizes. The cases from the *Year Books* (see note 24 *supra*) were actions brought in the Court of Common Pleas.

It could be argued that the doctrine of judicial immunity did not make the monopolization of proceedings in error by the king's courts complete, since it applied only to courts of record. The point is insignificant. There is no example of an action for damages against a judge of a court not of record from Bracton's time to the nineteenth century, when it was held that such an action would not lie. *See, e.g.*, Haggard v. Pelicier Frères, [1892] A.C. 61 (P.C.); Calder v. Halket, 13 Eng. Rep. 12 (P.C. 1839-40). Moreover, false judgment was much less significant after the time of Edward I. Local courts, especially courts baron, were on the decline by the fourteenth century. Justices of the peace, who were judges of courts of record, took their places. 1 W. HOLDSWORTH, *supra* note 11, at 201.

27. *See* Feinman & Cohen 205-06.

28. The policy underlying judicial immunity was therefore not simply "a technical proposition concerning the nature of the record of a court of record," as Feinman and Cohen suggest. *Id.* 206. Nor is it true that "[b]oth judicial and executive immunity are common law doctrines with a similar origin in the monarchical concept of sovereign immunity." Nagel, *supra* note 4, at 249.

29. 77 Eng. Rep. 1305 (Star Chamber 1607).

30. 5 W. HOLDSWORTH, *supra* note 20, at 158-61.

31. Barker was a judge of assize who had presided over the trial of William Price for the murder of one Hugh ap William. The jury returned a verdict of guilty, and Barker gave the judgment of death, which the sheriff later carried out. One Rice ap Evan ap Floyd laid charges against Barker, the grand jury that indicted Price, the jury that convicted Price, the sheriff who executed Price, the justices of the peace who examined Price, and the witnesses against Price. The charges in the Star Chamber were for conspiracy, or false accusation. *See id.* 203-05. It was held

of judges of courts of record, thus ensuring the independence of those courts from review by their newer rivals, especially the Star Chamber, which were under the control of the king. In so doing, Coke stated for the first time what are now considered the modern public policy bases of the doctrine of judicial immunity.[32] First,

> [I]f the judicial matters of record should be drawn in question . . . there never will be an end of causes: but controversies will be infinite; *et infinitum in jure reprobatur* . . . .[33]

Second, Coke noted that

> insomuch as the Judges of the realm have the administration of justice, under the King, to all his subjects, they ought not to be drawn into question for any supposed corruption, which extends to the annihilating of a record, or of any judicial proceedings before them . . . except it be before the King himself; for they are only to make an account to God and the King, and not to answer to any suggestion in the Star-Chamber . . . .[34]

Third, a judge's having to answer to a collateral court such as the Star Chamber

> would tend to the scandal and subversion of all justice.[35]

And fourth,

> those who are the most sincere, would not be free from continual calumniations . . . .[36]

Coke's policy bases for judicial immunity can be summarized as follows: (1) the need for finality (which, as discussed earlier,[37] covers at least two policy concerns);[38] (2) the need for protecting the indepen-

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that those involved in Price's prosecution could not be charged with conspiracy. 77 Eng. Rep. at 1306.

32. 77 Eng. Rep. at 1306-07.

33. *Id.* at 1306.

34. *Id.* at 1307.

35. *Id.*

36. *Id.*

37. See text accompanying notes 24-28 *supra.*

38. Feinman and Cohen suggest that this first policy stated by Coke is a "floodgates" argument.

> One of his reasons is still today the principal policy argument advanced for judicial immunity—the potential for a multiplicity of suits, frivolous and otherwise, against judges. . . . The difficulty with this formulation is identical to the difficulty with similar arguments in later times; any rule other than an absolute rule of immunity for all judges that gives no consideration to jurisdiction or the nature of the act committed has the potential for generating suits of great, if not "infinite," numbers.

Feinman & Cohen 208. According to their interpretation, "infinite," as used by Coke in the quoted section (see the text accompanying note 33 *supra*), is synonymous with "countless." Coke's concern for "an end of causes," however, (and the common law's concern for finality) suggests that, in this instance, "infinite" actually means "endless." Coke was not making a floodgates argument but a finality argument. *See* 77 Eng. Rep. at 1306.

dence of common law courts from rival courts controlled by the king;[39] (3) the need for maintaining public confidence in the system of justice; and (4) a recognition that independent, conscientious judges would be most subject to prosecutions in the Star Chamber.

Coke also stated a limiting principle in *Floyd v. Barker*: a judge is immune "for any thing done by him *as Judge*."[40] This restriction of immunity to judicial acts, in one form or another, continues to be applied by today's courts, including the Supreme Court.[41] The statement appears to define the scope of judicial immunity as encompassing all the official acts of a judge, but the history of the judicial-act requirement after Coke's time shows that the concept was more specific and limited.

(b) *The judicial-act requirement after Lord Coke.* Until rather recently, most functions of the British government were carried out by the justices of the peace. The duties of these judicial officers have historically been classified as either judicial or ministerial. As Clerk and Lindsell's statement of the dichotomy reveals, "ministerial" is not synonymous with "administrative":[42]

> Officers of courts of justice act either judicially or ministerially. A judicial act is one which involves the exercise of a discretion, in which something has to be heard and decided. A ministerial act is one which the law points out as necessary to be done under the circumstances, without leaving any choice of alternative courses.[43]

Three hundred years earlier, Dalton had described the duties of a justice of the peace in almost identical terms:

> The Power and Authority of the Justices of Peace . . . is in some cases Ministeriall or Regular, and limited as a Minister onely; and in some other cases Judiciall or Absolute, and as a Judge.

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39. Feinman and Cohen believe that this policy argument "concerned the necessity of maintaining respect for the judiciary and the government." Feinman & Cohen 209. One should differentiate this second policy argument from the third.

The distinction between judicial responsibility for judicial acts to the king under the king's power of appointment, and possible subjection to criminal prosecution for judicial acts was clearly drawn by Coke, who relied on the case of J de R from the books of Assizes (see the text accompanying note 23 *supra*) for the assertion that "as a Judge shall not be drawn in question in the cases aforesaid, at the suit of the parties, no more shall he be charged in the said cases before any other Judge at the suit of the King." 77 Eng. Rep. at 1307.

40. 77 Eng. Rep. at 1307 (emphasis added).

41. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349, 355-56 (1978).

42. De Smith calls administrative acts "particular," in contradistinction to legislative acts, which are "general." S. DE SMITH 31. In his view, "an administrative act is the making and issue of a specific direction, or the application of a general rule to a particular case in accordance with the requirements of policy." *Id.* Ministerial acts, on the other hand, are those actions, "the discharge of which involves no element of discretion." *Id.* 30.

43. J. CLERK & W. LINDSELL, TORTS 1108 (14th ed. 1975).

> Ministeriall, when he is thereto commanded by a higher Authority:
>
> As upon { A *Supplicavit* . . . / A Writ upon the Statute of Northhampton . . .
>
> In the execution of which two writs, the Justice of Peace may proceed no further, or otherwise, than he is authorized by such Writ; and is also to returne the Writ, and to certifie his doings therein, into the Court whence the Writ came.
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> But in all other cases within their authority, the power of the Justices of Peace, seemeth to be Absolute (in some manner) so as they and every of them, may of their owne power proceed *ex officio*, and as a Judge; yet this their power is also limited, for they may neither hang a man for a trespasse, nor fine him for a felony, but must proceed in all things according as they are prescribed by the Commission, and by the said severall Statutes.[44]

This distinction was necessary to determine the appropriate means of control by the King's Bench. Mandamus issued only to compel the performance of ministerial duties, while certiorari and prohibition could issue only to control the exercise of judicial power.[45] Ministerial actions were largely beyond the effective control of the King's Bench, because such actions could not be restrained through certiorari and prohibition. In their determination to supervise the actions of public authorities, "the courts . . . chose to assume that [these new public authorities] were controllable in the same manner by means of certiorari and prohibition. Hence almost all non-ministerial functions vested in statutory bodies were treated as 'judicial' for the purpose of review by certiorari and prohibition."[46]

The same classification used in the extension of judicial review of administrative action was used also to determine whether the public authority was immune from tortious liability. As to justices of the peace, for example, Hawkins stated the rule thus:

> Justices of the peace are not punishable *civilly* for acts done by them in their judicial capacities, but if they abuse the authority with which they are entrusted, they may be punished *criminally* at the suit of the king by way of information. But in cases where they proceed ministerially rather than judicially, if they act corruptly, they are liable to an action at the suit of the party, as well as to an information at the suit of the king.[47]

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44. M. DALTON, THE COUNTREY JUSTICE 23-24 (1643).

45. *See generally* Jenks, *The Prerogative Writs in English Law*, 32 YALE L. J. 523 (1923).

46. S. DE SMITH 46.

47. 3 W. HAWKINS, PLEAS OF THE CROWN ch. 8, § 74 (7th ed. 1795) (emphasis in original). In turn, this statement was followed in Burn's manual for justices of the peace:

> In the next place; he is not punishable at the suit of the party, but only at the suit of the king, for what he doth as judge, in matters which he hath power by law to hear and

This rule extending immunity to all of a justice's discretionary acts cannot be regarded as anything but a mistake, for the administrative duties of justices of the peace were extensive and diverse; in Maitland's phrase, they were the "rulers of the county,"[48] at least by the sixteenth century. A justice's duties were all performed through the use of judicial procedures. Routine matters like bridge repairs, for example, were handled through the machinery of the quarter sessions requiring charging, presentment, indictment, and trial, under the forms and rules of the criminal law.[49] Much of the work of a justice of the peace also required some exercise of discretion. Thus, under the judicial-ministerial dichotomy, most of a justice's administrative acts were classified as judicial and therefore qualified for absolute immunity as judicial acts.[50]

Although it had early been recognized that an officer's discretion was not absolutely unlimited in matters given over to his authority,[51] the force of the distinction between judicial and ministerial actions remained. Administrative actions of justices, as long as they were discretionary, were protected within very wide limits. In time, Parliament and the courts came to realize that drawing the line of liability according to the discretion with which a judicial officer could act resulted in too much protection for the justices of the peace and the other inferior judicial officers and tribunals that executed the great bulk of the laws of Great Britain. In *Bernardiston v. Some*,[52] for example, the plaintiff argued that the sheriff of Suffolk had acted ministerially in making a double return of an election writ.[53] The court decided that the sheriff was acting as a judge in the declaring of a majority of the election, and that no action would lie against a judge for what he did judicially.[54] This decision demonstrates the basic weakness in the judicial-ministerial dichotomy: Clearly the sheriff's duties were administrative and had been circumscribed by statute; he had no discretion beyond the application of arithmetic rules. Yet under the rule of *Bernardiston*, almost any administrative action performed by an officer of justice

determine without the concurrence of any other; for regularly no man is liable to an action for what he doth as judge: but in cases wherein he proceeds ministerially, rather than judicially, if he acts corruptly, he is liable to an action at the suit of the party, as well as to an information at the suit of the king.

2 R. BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 434 (3d ed. 1756).

48. F. MAITLAND, JUSTICE AND POLICE 80 (1885).

49. *See id.* 85-88; S. & B. WEBB, THE PARISH AND THE COUNTY 281 (1963 reprint).

50. See text accompanying notes 43-44 *supra*.

51. *See* Rooke's Case, 77 Eng. Rep. 209, 210 (C.P. 1598).

52. 83 Eng. Rep. 475 (K.B. 1675).

53. The sheriff had been concerned that return of the election results as tallied would be challenged in an action for false returns. He therefore returned two separate and contradictory election results—a double return. *Id.* at 475.

54. *Id.* at 476.

(even an officer like a sheriff, whose duties are usually ministerial) could be characterized as judicial and thus be immunized. The outcry against this decision resulted in the enactment of a statute that created a cause of action against officials for making false returns willfully, or for making double returns falsely, willfully, and maliciously.[55]

Over time, as more authority was entrusted to the justices of the peace, seventeenth and eighteenth century courts also came to realize that many of a justice's administrative duties were not judicial in the accepted sense, and that the mere exercise of discretion should not automatically insulate a justice from the consequences of an arbitrary exercise of his administrative powers. Courts facing problems of the liability of justices of the peace relied less and less on the doctrine of judicial immunity and more on judicial review of administrative acts. Superior courts became more willing to deny immunity to justices of the peace who maliciously abused their powers in administrative matters. A rule developed giving justices of the peace immunity for judicial functions exercised in good faith, even when not exercised in a court of record;[56] in practice this good faith immunity encompassed many of their administrative duties.

There are numerous *obiter dicta* in the case law to the effect that justices are liable for malicious actions, and these are so broad in scope that they seem to apply to both ministerial and judicial acts.[57] These dicta have led some critics of judicial immunity to argue that the English rule of immunity for judicial acts done within jurisdiction extended only to judges of superior courts; their argument for an "actual malice" standard of liability rests in part on assertions that "inferior judges were liable for malicious acts within their jurisdiction."[58] There are, however, numerous equally broad dicta to the contrary.[59] To reconcile this apparent conflict, one must turn to the decisions. An examination of the case law in Britain leads to the conclusion that inferior judicial officers were held liable for malicious acts when they were not performing judicial functions as judges of courts of record. Most often the acts

55. An Act to prevent False and Double Returns of Members to serve in Parliament, 1695-1696, 7 & 8 Will. 3, c. 7.

56. *See* Morgan v. Hughes, 100 Eng. Rep. 123 (K.B. 1788); Windham v. Clere, 78 Eng. Rep. 387 (Q.B. 1589). *See also* Thompson, *Judicial Immunity and the Protection of Justices*, 21 MOD. L. REV. 517 (1958).

57. *E.g.*, Rex v. Young & Pitts, 97 Eng. Rep. 447, 450 (K.B. 1758); Gerlington v. Pitfield, 84 Eng. Rep. 360 (K.B. 1669); Cave v. Mountain, 133 Eng. Rep. 330 (C.P. 1840).

58. Feinman & Cohen 218. *See also* Note, *Immunity of Federal and State Judges from Civil Suit*, *supra* note 2; Yale Note.

59. *E.g.*, Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774); Green and the Hundred of Buccle-churches Case, 74 Eng. Rep. 294 (C.P. 1589); Brittain v. Kinnaird, 129 Eng. Rep. 789, 792 (C.P. 1819).

for which such magistrates were held liable were clearly administrative.[60]

Seen in perspective, then, the case of justices of the peace is not an exception to or an evolution of the general rules of judicial immunity; rather it is the case of an officer subjected to more than one rule of immunity by the varied nature of his duties. Present-day judicial officers have administrative duties, although not as extensive as those of a justice of the peace in former times, and their liability should also vary in accordance with the nature of their duties.[61]

(c) *Later evolution of the judicial-act concept.* As British courts repeatedly tried to define the nature of a multitude of statutory functions (usually for the purpose of determining the proper scope of judicial review), they came to realize, late in the nineteenth century, that the judicial-ministerial dichotomy was a caricature rather than a definition of official duties; that the duties of justices of the peace did, indeed, include merely administrative functions; and that Parliament possessed the power to vest in any public authority a combination of administrative, legislative, and judicial functions.[62]

Various definitions of a judicial act were developed; often, when a definition appeared patently unsuitable in a particular context, the courts would discard it and adopt another definition, also supposedly universal in its application.[63] Such flexibility resulted in ambiguities and inconsistencies. A particular act or function might be called "judicial" for purposes of review but be called "administrative" for purposes of determining liablity.[64]

The courts eventually ceased their attempts to state a conclusive test and came to rely on a flexible approach that emphasized the differ-

60. This is also the conclusion of Professor Thompson, who examined the question at some length:

> (1) A justice of the peace acts as a court of record when exercising summary criminal jurisdiction. As a judge of such a court he is protected in respect of all acts doue within his jurisdiction, whether maliciously or otherwise.
>
> (2) In civil matters, if a justice is entrusted with the jurisdiction of a court [of] record, he will be similarly protected.
>
> (3) A justice is protected only if he acts in good faith when he discharges judicial functions other than as a court of record.

Thompson, *supra* note 56, at 533.

61. *See* Butz v. Economou, 438 U.S. 478, 511-13 (1978). For a discussion of official and derivative immunity and their varied applications, see Note, *Derivative Immunity: An Unjustified Bar to Section 1983 Actions*, 1980 DUKE L.J. 568.

62. *See* S. DE SMITH 29. *See also* Boulter v. Justices of Kent, [1897] A.C. 556; Regina v. Cornwall Quarter Sessions, [1956] 1 W.L.R. 906 (Q.B.); Newman v. Foster, 86 L.J.K.B. 360 (1916); Huish v. Justices of Liverpool, [1914] 1 K.B. 109.

63. S. DE SMITH 29.

64. *See id.* 50-51.

ent characteristics of judicial, administrative, and legislative functions.[65] Judicial functions were typically characterized by the exercise of the power to make a binding and conclusive decision, the exercise of power to hear and determine a controversy, the application of objective standards for the determination of an issue, the declaration or alteration of the rights and obligations of individuals, and certain procedural attributes.[66] Administrative functions, on the other hand, were directed more toward public affairs and service than to disputes between individuals, and legislative functions were concerned with the institution of a general rule of conduct without reference to particular cases.[67] The development and use of such guides for classification has been discussed elsewhere.[68] For the purposes of this Article, it is sufficient to note that British courts realized that not all of a judge's official acts are judicial, and that therefore not all of them should be protected by absolute judicial immunity.[69]

2. *The Jurisdictional Limit on Immunity.* The restriction of jurisdictional immunity to judicial acts, as developed by Lord Coke in *Floyd v. Barker*, was followed shortly by another major opinion, *The Marshalsea*,[70] in which Coke set forth a second limit on the doctrine. The court of the Marshalsea had tried a case in assumpsit and had found against the defendant, whose "bail," or surety, was imprisoned until the judgment was paid. The surety then brought an action against the officers responsible for his imprisonment. Coke sustained the suit, finding that the Marshalsea court lacked jurisdiction over actions in

65. Even down to the nineteenth century the administrative and judicial functions of the Justices were so intermingled that most writers give up the attempt to distinguish between them. We are told that "it is not easy to fix any rule for distinguishing, in the abstract, between what things are the subject of orders of Justices, and what of convictions by them. Before the Statute of 4 Geo. II., convictions were always recorded in Latin, whereas orders were returned in English; and we find this circumstance referred to as a criterion. . . . Perhaps the only criterion that can be furnished for distinguishing when penal proceedings are to be considered as orders, and when as convictions, is that alluded to by Lord Hardwicke in R. v. Bissex, viz. whether they be so denominated by the statute which gives the Justices jurisdiction to make them" (Burn's *Justice of the Peace*, vol. v. p. 287 of edition of 1845).

S. & B. WEBB, *supra* note 49, at 281 n.1.

66. S. DE SMITH 37-47.

67. *Id.* 31-34.

68. *See generally id.* 27-51; Gordon, *"Administrative" Tribunals and the Courts*, (pts. 1-2), 49 L.Q. REV. 94, 419 (1933).

69. Feinman and Cohen mention the limitation of judicial immunity to judicial acts but find little distinction between that limitation and the limitation imposed by the requirement that a judge act within his jurisdiction to retain immunity. *See* Feinman & Cohen 210. The two limitations are quite distinct. American courts have adopted the judicial act requirement with little understanding, consequently overlooking the administrative-ministerial distinction. A discussion of the jurisdictional limit follows in the text. See notes 70-96 *infra* and accompanying text.

70. 77 Eng. Rep. 1027 (Star Chamber 1612). *See also* Feinman & Cohen 209-10.

assumpsit, and consequently that proceedings conducted in the absence of jurisdiction were void *ab initio*. For the latter proposition, Coke relied on the fifteenth-century case *Bowser v. Collins*,[71] which stated that an action taken by a court lacking the power to take it was *coram non judice* (before a person who was not a judge). In fact, *Bowser* more likely meant that such an action would be avoidable by plea, rather than void.[72]

Despite its lack of strong precedential underpinning, *The Marshalsea* was taken not only for the proposition that lack of jurisdiction over the subject matter renders a proceeding void *ab initio*, but also for the further proposition that lack of subject matter jurisdiction makes a judge liable for the consequences of his judicial acts.[73] Even this limitation on the doctrine of immunity, however, was undercut in subsequent cases.

In *Peacock v. Bell*[74] the burden of pleading and proving that the judge of a superior court had exceeded his jurisdiction was placed on the plaintiff. In *Hamond v. Howell*[75] the court refused to apply the jurisdictional limit rule of *The Marshalsea* to a judge of a superior court acting "*quatenus* a judge."[76] In 1692 *Gwinne v. Poole*[77] established that an inferior court judge retained immunity unless he was aware of facts suggesting a lack of jurisdiction.

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71. Y.B. Mich. 22 Edw. 4, f. 30, pl. 11 (1483). *See* 77 Eng. Rep. at 1040. The opinions of Judges Pigot and Suliard are partially translated from law French in 6 W. HOLDSWORTH, *supra* note 23, at 236.

72. *See* Y.B. Mich. 22 Edw. 4, f. 30, pl. 11, at 30 (Pigot, J.); 6 W. HOLDSWORTH, *supra* note 23, at 236-37.

73. *See* Dobbs 67-68; Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 164 (1977); and cases cited in notes 75, 77, & 90 *infra*.

74. 85 Eng. Rep. 84 (K.B. 1667).

75. 86 Eng. Rep. 1035 (C.P. 1677).

76. *Id.* at 1037.

77. 125 Eng. Rep. 858 (C.P. 1692). In Judge Powell's view, his decision was not a modification of the rule of *The Marshalsea*, 77 Eng. Rep. 1027 (Star Chamber 1612). He pointed out that the court of the Marshalsea had jurisdiction only in cases in which the king's servants were parties; as all parties were enrolled, the judge of that court should have known the character of all parties, and could be culpable only from ignorance. 125 Eng. Rep. at 86. The argument is not completely convincing, because Coke appeared to be more concerned in *The Marshalsea* with jurisdiction of "the cause" than with personal jurisdiction.

The rule of *Gwinne v. Poole* combined with the rule of *Peacock v. Bell* to form a rule whose operation was described by Judge Parke in the well-known case of *Calder v. Halket*:

> It is well settled that a Judge of a Court of Record in England, with limited jurisdiction, or a Justice of the Peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction.

13 Eng. Rep. 12, 36 (P.C. 1839-40).

These cases developed a distinction between judges of inferior and superior courts, although the distinction would not be fully stated for another century.[78] Scholars have found it difficult to justify the rule of *The Marshalsea*[79] and almost impossible to reconcile the distinction that subsequently developed between the complete immunity for judicial acts that was enjoyed by judges of superior courts with the immunity limited to acts within jurisdiction that was allowed judges of inferior courts.[80]

An understanding of what "jurisdiction" meant to courts of the seventeenth and eighteenth centuries, and how it was used by them, may be helpful. According to modern theories,[81] a court's jurisdiction—its power to decide a case—depends only upon its authority over the subject matter of the general class of controversies of which the particular dispute at hand is a member, the territorial limits on its power, and its power over the person of the defendant. These elements of a controversy are capable of initial determination by a court. If these conditions are met the court has jurisdiction, and its decision, even if erroneous, is binding unless and until an appellate court overturns its order. Under this theory the court's jurisdiction does not and cannot depend on anything the court might do in its subsequent disposition of the case. In short, "[t]he jurisdiction of a court depends upon its right to decide a case and never upon the merits of its decision."[82]

These ideas did not prevail in the seventeenth century: the courts of that era never developed a theory of jurisdiction. As an eminent British writer explained, "the problem of defining the concept of jurisdiction for the purposes of judicial review has been one of public policy rather than one of logic."[83] The kings' courts from the sixteenth cen-

78. That statement came in *Miller v. Seare*:

> But it is said, that no actions will lie against persons acting in a judicial capacity. Let us see how far this general position is warranted by law. 1st. It is agreed, that the Judges in the King's Superior Courts of justice are not liable to answer personally for their errors in judgment. And this, not so much for the sake of the Judges, as of the suitors themselves. [Citations omitted.] 2d. The like in Courts of general jurisdiction, as gaol-delivery, &c. [Citations omitted.] 3d. In Courts of special and limited jurisdiction, having power to hear and determine, a distinction must be made. While acting within the line of their authority, they are protected as to errors in judgment; otherwise they are not protected. . . . In all the cases where protection is given to the Judge giving an erroneous judgment he must be acting *as Judge*.

96 Eng. Rep. 673, 674-75 (C.P. 1777) (emphasis added).

79. *See* Dobbs 68; Note, *supra* note 73, at 164-65.

80. *See* 6 W. HOLDSWORTH, *supra* note 23, at 238-40; Feinman & Cohen 214-18; Thompson, *supra* note 56, at 520-23. Feinman and Cohen, for example, find that "[t]he law from the seventeenth century forward [is] somewhat confused . . . ." Feinman & Cohen 217.

81. *See, e.g.*, Z. CHAFEE, SOME PROBLEMS OF EQUITY chs. 8-9 (1950); A. RUBINSTEIN, JURISDICTION AND ILLEGALITY 212-14 (1965).

82. Brougham v. Oceanic Steam Navigation Co., 205 F. 857, 860 (2d Cir. 1913).

83. S. DE SMITH 68.

tury through the eighteenth century used prohibition and mandamus against the ecclesiastical courts to require them to apply common law and statutory rules of procedure and decision.[84] The fiction that these writs were used to confine those courts to their proper jurisdiction was maintained by a requirement that an applicant for a writ of prohibition allege that the king's interest was threatened.[85]

In controlling the proceedings of justices of the peace and other administrative tribunals, the practice of the King's Bench was even less confined. Style's *Practical Register* stated that "[the King's Bench] hath authority to Quash Orders of Sessions, Presentments, Endictments &c made in inferior Courts, or before Justices of the Peace, or other Commissioners, if there be cause, that is, if they be defective in matter or form . . . ."[86] This use of an expansive sense of "jurisdiction" was made necessary by the shortcomings of the writ of error. Not all the decisions of justices of the peace could be appealed by writ of error, but only those "formal" or "plenary" decisions resulting in a traditional, extensive record that could be examined in King's Bench.[87] Statutes had increased the use of summary proceedings by both justices of the peace and the newer administrative tribunals; the records of these proceedings gave few details except the fact of the order.[88] "[T]he significant fact is that it was held, or rather taken for granted, that error lay neither to justices out of sessions, nor to all the new statutory tribunals, such as the Commissioners of Sewers and Excise which came to life in the sixteenth century."[89] The King's Bench could, however, effectively review administrative decisions by the use of a prerogative writ if it confined its review to jurisdictional defects. The eventual result was almost inevitable, given the constraints of the writ system: "The plain fact is that the High Court wanted to exercise as much control over these administrative bodies as possible, and has greatly extended the concept of jurisdiction for this purpose."[90]

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84. *See* Dobbs 60-61.

85. E. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 120-31 (1963); Gordon, *The Observance of Law as a Condition of Jurisdiction*, 47 L.Q. REV. 386, 393 (1931); Jenks, *supra* note 45, at 528.

86. W. STYLE, REGESTUM PRACTICALE, OR, THE PRACTICAL REGISTER 455-56 (3d ed. 1694).

87. A. RUBINSTEIN, *supra* note 81, at 63.

88. *See* J. GRIFFITH & H. STREET, PRINCIPLES OF ADMINISTRATIVE LAW 220 (3d ed. 1963).

89. A. RUBINSTEIN, *supra* note 81, at 63. *See also* E. HENDERSON, *supra* note 85, at 85-110.

90. J. GRIFFITH & H. STREET, *supra* note 88, at 220. In a suit against certain judges of excise, for example, a previous factual determination by the judges as to whether certain wines were "low wines" or "strong wines" was held to be erroneous and outside the judges' jurisdiction. Terry v. Huntington, 145 Eng. Rep. 557 (Ex. 1668). Compare Holmes's well-known "glanders" opinion in Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891). See also the companion case to *Terry*: Papillon v. Buckner, 145 Eng. Rep. 556 (Ex. 1668).

While this expansion of review authority over the jurisdictional errors of administrative tribunals was taking place, a tremendous growth in statutory law was underway. Much of this law created additional local administrative bodies and expanded the duties of the justices of the peace.[91] The increasingly pervasive effects on a local society of these agents of the central government predictably put greater pressure on the legal system to provide a tort remedy for those damaged by administrative actions. Judicial immunity barred direct suit against a justice of the peace for administrative actions—unless a higher court found that the justice had acted without jurisdiction. The jurisdictional limit on judicial immunity was therefore retained because its application to inferior judicial officers provided a tort remedy for administrative wrongdoing.[92]

With respect to judges of superior courts there was no comparable need for a jurisdictional limit on immunity, because these courts played little part in the administration of local government. In any case, a jurisdictional limit on the immunity of superior court judges would have had little practical effect, because courts of general jurisdiction were, naturally enough, not subject to similar statutory jurisdictional requirements.[93]

Not until the twentieth century did common law courts develop an adequate method of reviewing administrative action;[94] until that time, administrative action within a court's jurisdiction was regarded as unreviewable by writ of error absent specific legislative provision for review.[95] The recent development of judicial review of administrative action has now removed the need for the judicial control of administrative action by expansive use of the prerogative writs and of jurisdictional fictions.[96] Similarly, the shift of administrative authority from justices of the peace to statutory agencies during the nineteenth and twentieth centuries has removed the barriers of res judicata and judicial immunity from the path of those seeking redress for damage from administrative action. As a result of these developments, the jurisdictional limit on judicial immunity no longer serves the purpose it served for so many centuries; there is no longer any reason to distinguish between the immunity of superior and inferior court judges.

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91. S. & B. WEBB, *supra* note 49, at 387-424, 585-602.

92. *See* 6 W. HOLDSWORTH, *supra* note 23, at 238.

93. *See id.* (quoting Peacock v. Bell, 85 Eng. Rep. 84, 87-88 (K.B. 1667)).

94. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 152-92 (1965).

95. *See generally* J. GRIFFITH & H. STREET, *supra* note 88, at 219-20, 237.

96. *See, e.g.*, 5 U.S.C. §§ 702-703 (1976). The implications of *The Marshalsea*, however, still affect the concept of jurisdiction. *See* RESTATEMENT OF JUDGMENTS § 10 (1942); D. LOUISELL & G. HAZARD, CASES ON PLEADING AND PROCEDURE 487-91 (3d ed. 1973).

C. *The Doctrine of Judicial Immunity in America.*

1. *Judicial Immunity Before the Civil Rights Acts.* The first major reported American case involving judicial immunity was the Connecticut Supreme Court's 1804 decision in *Phelps v. Sill*.[97] Feinman and Cohen note that *Phelps* is "frequently . . . regarded as the first American judicial liability case . . . ."[98] In fact, at least three cases preceded it. The Pennsylvania Supreme Court in 1792 decided *Ross v. Rittenhouse*,[99] a case involving events that occurred just before the ratification of the Constitution. Congress had passed a law encouraging the states to set up state courts of admiralty, but directing that appeals from the judgments of these courts be taken in the Court of Appeals of the United States. Justice Shippen summarized both the facts and the court's reasoning:

> What is the case before us? A judge of an inferior [state] Court of Admiralty condemns a prize, declares who are the captors, and orders a distribution accordingly. On appeal to the Superior Court of Admiralty [a court of appeals of the United States], that Court reverses his judgment, and directs a different distribution. The Judge below refuses to obey the sentence, and persists in distributing the proceeds of the prize agreeably to his own decree. A suit is brought here, to compel the Judge to perform the decree of the Superior Court. . . . Can ours be a proper Court to decide between the sentences of two contending Courts of Admiralty, or to enforce the

97. 1 Day 315 (Conn. 1804).

98. Feinman & Cohen 226. Interestingly, the rule stated by the Connecticut court in *Phelps* is absolute, but the rule of immunity that Judge Phelps's attoruey suggested was one of qualified immunity:

> 3. Phelps acted as a judge. As a judge he acted, in appointing Stanley; as a judge he delivered to him the property; and throughout, he is treated as a judge. If so, no action can be sustained against him, unless he acted *maliciously and corruptly*. But, there is no intention to injure stated in this declaration. . . . Nothing, from which malice can be inferred, is stated.
>
> An action will not lie against a judge, for an erroneous judgment. Though he mistook, it is sufficient for him, that he acted *judicially*.
>
> . . . .
>
> In all cases of this kind, where suits have been brought against officers, it seems to have been agreed, that it was necessary to state malice.

1 Day at 318-19 (citations omitted) (emphasis in original).

In Note, *Immunity of Federal and State Judges from Civil Suit*, *supra* note 2, at 731 n.20, the author argues that the Connecticut court's statement that "no impurity of motive is imputed to him, and none is to be inferred," 1 Day at 320, indicates that "proof of bad faith or malicious intent might have led to a different result." A careful reading of *Phelps v. Sill* shows that the court was concerned with the sufficiency of the plaintiff's pleadings and the classification of the judge's duties. Connsel for the plaintiff had argued that some of the judge's duties were ministerial, 1 Day at 322; counsel for the defendant had argued the contrary, *id.* at 318-19, but maintained that, in any case, malice was not alleged, *id.* at 319. The statement the author quoted may therefore be seen as disposing of the case on the gronnds of insufficient pleadings, avoiding the question whether the judge's actious were indeed ministerial.

99. 2 Dall. 160 (Pa. 1792).

> sentence of either? It is in vain to say, the times were such, that the Supreme Court could not, or would not, proceed to extremities with the Judge of the inferior Court. We are not authorised to aid a defective, or unwilling jurisdiction, by assuming an extraordinary power, unknown to the law . . . . In whatever light I view this question, I am satisfied, that the Court of Common Pleas were incompetent to carry into effect the decree of the reversal of the superior Court of Appeals, and that an action for money, had and received against the Judge who distributed the money according to his own decree, could not be sustained in a Court of law.[100]

All the justices who authored opinions in *Ross v. Rittenhouse* agreed that the Court of Common Pleas, as a common-law court, had no jurisdiction to carry out a judgment of a court of appeals acting in admiralty, "and also," added Chief Justice McKean, "that an action will not lie against a Judge for what he does as such."[101] Obviously the court's decision did not rest on the doctrine of judicial immunity alone, but *Ross v. Rittenhouse* is a clear example of application of the doctrine in preventing improper collateral attack on a judgment.

Two South Carolina cases were also decided before *Phelps v. Sill.* In *Lining v. Bentham*[102] the plaintiff sued a justice of the peace in an action on the case for imprisoning him for contempt. Counsel for the defendant justice urged the distinctions between a justice's ministerial and judicial acts, and his liability for actions taken in those capacities. The court held "that a justice of the peace is not answerable in an action for what he does by virtue of his judicial power."[103] The next case, *Brodie v. Rutledge*,[104] was an attempted suit for libel against the recently deceased Justice Rutledge. The report of the case is brief, but it shows clearly that South Carolina adopted the English rule of complete immunity from defamation accorded all judges for any words spoken from the bench: "[N]o suit will lie against a judge for any opinion delivered by him in his judicial capacity, either supreme or subordinate."[105] The English rule of immunity for defamation was broader than the general rules of judicial immunity;[106] the court's decision is thus not a rejection of the English distinction between the immunity accorded judges of superior courts and that granted judges of inferior courts.

The Supreme Court did not face the issue of judicial immunity

100. *Id.* at 166 (opinion of Shippen, J.).
101. *Id.* at 164 (opinion of McKean, C.J.).
102. 2 S.C.L. (2 Bay) 1 (1796). Justice Bay's reports were published in 1811.
103. *Id.* at 7.
104. 2 S.C.L. (2 Bay) 69 (1796).
105. *Id.* at 70.
106. *See* Thompson, *supra* note 56, at 518-20.

until 1868.[107] In the meantime, the doctrine of judicial immunity had often been affirmed in state court decisions that are of little interest today. Nevertheless, a brief summary of these decisions is necessary because knowledge of the status of the doctrine in the common law of the nineteenth century aids in understanding the context in which Congress enacted the 1871 Civil Rights Act.[108] Some authors have underestimated that status. Feinman and Cohen assert that "American courts . . . held many, if not most, judicial officers liable for their wrongful acts much, if not most, of the time."[109] They are joined in this evaluation of nineteenth century law by a student author who states that the doctrine of judicial immunity was not uniformly accepted in state courts. This writer offers as evidence the results of a survey of decisions in those courts before the passage of the Civil Rights Act of 1871: "By 1871, thirteen states had adopted the absolute immunity rule [and] six states had ruled that judges were liable if they acted maliciously . . . ."[110] With these assertions one can compare the judgment of Chief Justice Cooley of the Michigan Supreme Court, an observer more familiar with the courts of the day: "There are *dicta* in some cases that a justice is civilly responsible when he acts maliciously or corruptly, but they are not well founded, and the express decisions are against them . . . ."[111]

One can reach a proper interpretation only by examining the cases themselves. The cases cited by the authors noted above deal with justices of the peace (or other quasi-judicial officers) who, as previously discussed,[112] were liable under the traditional rule of qualified immunity for some abuses of their administrative authority. These cases are fully consistent with the traditional rules of judicial immunity; none of them resulted in a judicial officer's being held liable for a judicial act done within his jurisdiction.[113] The very cases cited by these authors

107. Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868), discussed in text accompanying notes 114-17 *infra*.

108. Ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1976)).

109. Feinman & Cohen 237.

110. Yale Note 326-27. *See also* Note, *Immunity of Federal and State Judges from Civil Suit*, *supra* note 2, at 731.

111. T. COOLEY, A TREATISE ON THE LAW OF TORTS 478-79 n.2 (2d ed. 1888).

112. See text accompanying notes 42-61 *supra*.

113. *See* State *ex rel.* Robinson v. Littlefield, 4 Blackf. 129 (Ind. 1835) (a justice of the peace was not liable on his statuory bond); State *ex rel.* Conley v. Flinn, 3 Blackf. 72 (Ind. 1832) (a justice of the peace was liable on statutory bond for issuing an execution on the same day he issued a summons); Wasson v. Mitchell, 18 Iowa 153 (1864) (the county board of supervisors was not liable for an honest mistake); Howe v. Mason, 14 Iowa 510 (1863) (a justice of the peace was not liable for erroneously approving a replevin bond); Revill v. Pettit, 60 Ky. (3 Met.) 314 (1860) (a justice of the peace was not liable for acts within his jurisdiction); Friend v. Hamill, 34 Md. 298 (1870) (Republican judges of an election were liable for refusing to allow the plaintiff, a Demo-

for the contrary point strongly suggest that the doctrine of judicial immunity and the rules of that doctrine that had been developed in England were indeed universally accepted in the state courts of the United States.

In 1868 the Supreme Court of the United States decided the case of *Randall v. Brigham*,[114] an action for damages against a Massachusetts judge who had disbarred the plaintiff. The Court, by Justice Field, concluded that judges of general jurisdiction were not liable to civil suit for their judicial acts, even when they acted outside their jurisdiction, "unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly."[115] One author has used this phrase of tentative qualification to attack the continued validity of the doctrine of judicial immunity;[116] in light of the historical development of the rules of judicial immunity as applied to justices of the peace and other inferior officers of justice, however, these words of qualification are not surprising.[117] In fact, such a qualification would have to appear in any statement of a rule of immunity that attempted to cover all the functions of both judges and justices of the peace, and would enable the Court to account for the state court dicta discussed above without undertaking a thorough re-examination of those cases.

Three years after *Randall*, in *Bradley v. Fisher*,[118] Justice Field withdrew his qualifying remarks and explained:

> The qualifying words were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.
>
> In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemp-

crat, to vote); State *ex rel.* Tavel v. Jervey, 36 S.C.L. (4 Strob.) 304 (1850) (a tax collector was not liable for costs for issuing tax execution when the writ of prohibition was later granted); Macon v. Cook, 11 S.C.L. (2 Nott & McC.) 600 (1819) (officers of a court martial were not liable for an action of trespass); Young v. Herbert, 11 S.C.L. (2 Nott. & McC.) 473 (1819) (a magistrate was not liable for an erroneous denial of libel); Reid v. Hood, 11 S.C.L. (2 Nott. & McC.) 471 (1819) (a justice of the peace was not liable for error; an interesting discussion of the judicial-ministrial dichotomy); Cope v. Ramsey, 49 Tenn. (2 Heisk.) 197 (1870) (justices of a county court were not liable for an error); Hoggatt v. Bigley, 25 Tenn. (6 Hum.) 236 (1845) (a justice of the peace, a constable, and a juror were not liable for errors in judgment).

114. 74 U.S. (7 Wall.) 523 (1868).

115. *Id.* at 536.

116. Yale Note 325-26.

117. See text accompanying notes 42-61 *supra*.

118. 80 U.S. (13 Wall.) 335 (1871).

> tion is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction 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.[119]

In *Randall* Justice Field had restated the doctrine of judicial immunity as it had been expounded by English and American judges from Coke to Kent. In *Bradley* Field went beyond a bare statement of the doctrine itself to state two policy bases for judicial immunity: protection of judicial independence and the need for finality. The latter was a catch-all term for the ends accomplished by a hierarchical appellate system for the correction of error, as discussed above.[120] In all respects, Field's statement of the rules and doctrine of judicial immunity followed the mainstream of precedent.[121]

2. *Judicial Immunity and the Civil Rights Acts. Bradley v. Fisher* was decided in 1872. In that year one could say, as Field did, that judicial immunity was "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."[122] But the era of *Bradley v. Fisher* was also the era of Reconstruction; the work of the Reconstruction Congresses radically transformed the relationship of the federal government to the governments of the several states. This work played a major part in the creation of the present controversy over judicial immunity.

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119. *Id.* at 351.

120. See text accompanying notes 15-22 *supra.*

121. Significantly, Justice Field maintained the common law distinction between acts in excess of jurisdiction, for which judges could not be held liable, and acts done in "the clear absence of all jurisdiction over the subject-matter." 80 U.S. (13 Wall.) at 351. His example of absence of jurisdiction—a probate judge trying a criminal case—also indicates that in the context of judicial immunity he thought of "jurisdiction" as subject-matter jurisdiction. *Id.* at 352. An additional meaning of jurisdiction—the power to order a particular remedy—was not at issue in the case. The closing words of the opinion make it clear that the Court had considered and rejected the plaintiff's claim that Judge Fisher had lacked personal jurisdiction over the plaintiff. *Id.* at 357.

Feinman and Cohen state that Field's opinion changed the law of judicial immunity in that "the distinction between excess of jurisdiction and absence of jurisdiction solidified the notion of judicial act that always had been the boundary of the immunity of superior judges." Feinman & Cohen 246. This is the first mention in their article of the "judicial act" concept, a major part of the judicial immunity doctrine. They fail, however, to distinguish between the judicial-act requirement and the jurisdictioual limit ou immunity. See notes 118-20 *supra* and accompanying text. Feinman and Coheu also claim that "Field suggested . . . a judicial act would require adherence to certain fundamental notions of judicial process." Feinman & Cohen 246. In point of fact, Field made no such suggestion. Indeed, Field wrote that Judge Fisher's failure to afford the plaintiff an opportunity to show cause why the order of disbarmeut should not be made, though a violation of due process, "did not make the act any less a judicial act." 80 U.S. (13 Wall.) at 357.

122. 80 U.S. (13 Wall.) at 347.

During Reconstruction, Congress enacted several statutes, later called the Civil Rights Acts, under the enforcement powers granted to it by the Civil Rights Amendments. One of these acts was the Act of March 1, 1875,[123] which provided that

> no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.[124]

A Virginia county court judge was arrested and held in custody under an indictment which alleged that he did "exclude and fail to select as grand and petit jurors certain citizens . . . of African race and black color . . . ."[125] In *Ex parte Virginia*[126] the Supreme Court denied the judge's petition for habeas corpus, rejecting the argument that the doctrine of judicial immunity prohibited the indictment.[127]

Under Virginia law all male citizens between the ages of twenty-one and sixty who were eligible to vote and hold office were subject to jury duty. If the preparation of a jury list involved no more than the listing of those eligible to serve, *Ex parte Virginia* would have been an easy case. Virginia's law, however, required the judge of each county court to prepare a list of from one hundred to three hundred eligible inhabitants of the county " 'as he shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception.' "[128] The statute required the county court judge to exercise considerable discretion; under the judicial-ministerial classification, therefore, this function would be regarded as judicial.

The Court found, however, that the duty of making up jury lists was a ministerial duty rather than a judicial one, and that therefore the doctrine of judicial immunity did not apply. The Court recognized, at least tacitly, the inadequacy of the judicial-ministerial dichotomy:

> 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. . . . That the jurors are selected by

123. Ch. 114, § 4, 18 Stat. 335 (1875).
124. *Id.*, 18 Stat. 336-37 (current version at 18 U.S.C. § 243 (1976)).
125. *Ex Parte* Virginia, 100 U.S. 339, 340 (1880).
126. 100 U.S. 339 (1880).
127. *Id.* at 348.
128. *Id.* at 349 (Field, J., dissenting).

> a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?[129]

The Court did not really address the soundness of the judicial-ministerial distinction (as Justice Field intimated in dissent).[130] Nonetheless, the Court's reasoning was effective, for it enabled the majority to avoid a conflict between two principles of constitutional stature—equal protection and judicial independence. Because the act for which the judge was prosecuted was not judicial, prosecution could not threaten judicial independence. Indeed, the Court concluded by disavowing the idea that the 1875 Act infringed on judicial immunity: "It is idle . . . to say that the act of Congress is unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing."[131]

The possibility that other civil rights statutes might reach a state judge's judicial acts was not raised for many years. In 1944, when a California judge was indicted under the criminal provisions of the Enforcement Act of 1870,[132] the district court remarked: "It is worthy of note that in nearly three-quarters of a century no similar action has been passed upon by a court of record."[133] That 1944 case, *United States v. Chaplin*,[134] presented the issue absent in *Ex parte Virginia*: whether a state judge could be prosecuted in a federal proceeding for his judicial acts. The indictments left no doubt that the defendant, Judge Griffin of the city court of Beverly Hills, had acted in his judicial capacity and within his jurisdiction. For guidance in his deliberations, Judge O'Connor of the district court turned to the "long line of [judicial immunity] decisions over a period of years which marks the span of our national existence . . . ."[135] After reviewing British and American cases, Judge O'Connor explained what he thought would result from permitting federal prosecutions of judicial acts under the civil rights statutes:

> A decision in favor of the Government in the instant criminal actions would place the official action of every justice of the peace, municipal or city court judges, Superior Court judges, Appellate Court judges and Supreme Court judges in our country at the mercy of a United States Attorney. Every sentence imposed on a defendant would be subject to review by the representative of the Department of Justice, and if, in the judgment of the Attorney General of the

129. *Id.* at 348.
130. *Id.* at 359-60 (Field, J., dissenting).
131. *Id.* at 348-49.
132. Ch. 116, 16 Stat. 144 (codified at 18 U.S.C. § 52 (1970)).
133. United States v. Chaplin, 54 F. Supp. 926, 928 (S.D. Cal. 1944).
134. 54 F. Supp. 926 (S.D. Cal. 1944).
135. *Id.* at 928.

> United States or the United States Attorney for the District, the decision deprived the defendant of his civil rights, the judge could be indicted, tried, and if convicted, punished. Every defendant sentenced to the county jail or the penitentiary is deprived of his civil rights, and in many instances the civil rights are not revived upon release. The same reasoning would apply to our Federal Courts. To sustain the Government's contention would be to destroy the independence of the judiciary and mark the beginning of the end of an independent and fearless judiciary.[136]

Ex parte Virginia and *Chaplin* were concerned with immunity from criminal prosecution under the Civil Rights Acts for judicial acts. Those statutes also gave civil causes of action for civil rights deprivations; these, like their criminal provisions, fell into desuetude after Reconstruction. Although the Ku Klux Klan Act of 1871[137] imposed civil liability on any person who under color of state law caused anyone to be deprived of his civil rights, no federal district court addressed the question of tort liabilty of judges under the Act's provisions until 1945. In that year the Court of Appeals for the Third Circuit held in *Picking v. Pennsylvania Railroad*[138] that judicial immunity was not available in actions against judges under what is now section 1983.[139]

The plaintiffs in *Picking* claimed that they were arrested illegally in Pennsylvania under a bench warrant "unlawfully issued on a falsified and substituted pleading"[140] by a New York judge. The arrest had been for "placing an advertisement upon a flag of the United States on their car . . . ."[141] The plaintiffs' suit was dismissed at the district court level for failure to state a cause of action against the twenty-four named defendants, who included the Pennsylvania Railroad, which had transported the plaintiffs back to New York as part of their extradition, and the New York judge.[142]

The Third Circuit reversed; its decision was prompted by the Supreme Court's then recent holding in *Screws v. United States*[143] that a state official acts "under color" of state law when he acts with official power, even though the action itself violates state law. According to the court in *Picking*, the Supreme Court's interpretation of "under color of law" in *Screws* meant that

136. *Id.* at 934.
137. Ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1976)).
138. 151 F.2d 240 (3d Cir. 1945).
139. 42 U.S.C. § 1983 (1976).
140. 151 F.2d at 245.
141. *Id.*
142. *Id.* at 245-46.
143. 325 U.S. 91 (1945).

> if the plaintiffs . . . were deprived of a federal right by state officials or officers acting 'under color of any law'—or as may be stated more aptly in the instant case 'under color of any statute . . . of any State'—these officials must respond in damages to the plaintiffs as prescribed by [section 1983].[144]

The *Picking* court noted with regret the precarious position judges would occupy under such a rule, but concluded that in light of *Screws*, nothing could be done to mitigate their situation:

> [W]e are compelled to the conclusion that Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law. A field was created upon which a state officer could not tread without being guilty of trespass and liable in damages. The concept is clear enough but the boundaries of the forbidden territory are ill-defined. Mr. Justice Douglas stated the danger vividly when he said in the Screws decision: "The treacherous ground on which state officials—police, prosecutors, legislators, and judges—would walk is indicated by the character and closeness of decisions of this court interpreting the due process clause of the Fourteenth Amendment. . . . Those who enforced local law today might not know for many months (and meanwhile could not find out) whether what they did deprived some one of due process of law. The enforcement of a criminal statute so construed would indeed cast law enforcement agencies loose at their own risk on a vast uncharted sea."[145]

The *Picking* court thus relied upon Justice Douglas's opinion in *Screws* to reach a result that was unacceptable to Douglas himself. Douglas had been dealing with the argument that the criminal provisions of the Enforcement Act of 1870 were void for vagueness as to the necessary standard of intent. Douglas had concluded that the Act required specific intent, noting that if "the customary standard of guilt for statutory crimes" of general intent were to apply, a local law enforcement officer "commits a Federal offense . . . if he does an act which some court later holds deprives a person of due process of law. And he is a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee."[146] If the Court of Appeals for the Third Circuit had interpreted section 1983 in strict accordance with the *Screws* decision, it would therefore have concluded that section 1983 required specific intent for liability in damages. It did not do so.

Despite *Picking*'s faults, the Court of Appeals for the Second Circuit followed its example in *Burt v. City of New York*.[147] In *Bottone v.*

144. 151 F.2d at 249.

145. *Id.* (quoting Screws v. United States, 325 U.S. 91, 97-98 (1945) (plurality opinion)).

146. 325 U.S. at 97.

147. 156 F.2d 791 (2d Cir. 1946). In a very brief opinion, Judge Learned Hand wrote:

Lindsley[148] the Court of Appeals for the Tenth Circuit refused to follow *Picking*, holding that "to make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law."[149] The Court of Appeals for the Sixth Circuit, in *McShane v. Moldovan*,[150] distinguished *Bottone* on its facts and followed *Picking*.

Several years after *Picking* the Supreme Court, in *Tenney v. Brandhove*,[151] addressed the problem of whether the Civil Rights Act of 1871 (section 1983) subjected state legislators to civil liability for actions within the sphere of legislative activity. After taking note of the history of legislative immunity and the "general language of the 1871 statute," the Court remarked, "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."[152] Following *Tenney*, federal courts found by analogy a similar immunity for judges. Almost without exception, these courts rejected *Picking*, reasoning, as did one court of appeals, that "the doctrine of judicial immunity is at least as well grounded in history and reason as is the rule of legislative immunity . . . ."[153] For more than a decade, the Court of Appeals for the Third Circuit stood alone in following *Picking*;[154] in fact, one district court within the Third Circuit announced that in light of *Tenney*, it no longer regarded *Picking* as binding precedent even within that circuit.[155] In 1966 the Court of Appeals for the Third Circuit finally abandoned *Picking*.[156]

> [I]n Picking v. Pennsylvania R. Co. . . . it was held that the "Civil Rights Act" actually tolled the privilege of a judge. The only protection at present is in the difficulty of proving such cases which is great; but, so far as we can see, any public officer of a state, or of the United States, will have to defend any action brought in a district court under [the Civil Rights Act] in which the plaintiff, however irresponsible, is willing to make the necessary allegations.

Id. at 793.

148. 170 F.2d 705 (10th Cir. 1948).

149. *Id.* at 707.

150. 172 F.2d 1016 (6th Cir. 1949).

151. 341 U.S. 367 (1951).

152. *Id.* at 376.

153. Tate v. Arnold, 223 F.2d 782, 785 (8th Cir. 1955). *See also* Cawley v. Warren, 216 F.2d 74 (7th Cir. 1954); Morgan v. Sylvester, 125 F. Supp. 380 (S.D.N.Y. 1954), *aff'd per curiam*, 220 F.2d 758 (2d Cir. 1955); Souther v. Reid, 101 F. Supp. 806 (E.D. Va. 1951).

154. *See* Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950).

155. United States *ex rel.* Peters v. Carson, 126 F. Supp. 137, 142 (W.D. Pa. 1954); Ginsburg v. Stern, 125 F. Supp. 596, 602 (W.D. Pa. 1954), *aff'd per curiam*, 225 F.2d 245 (3d Cir. 1955).

156. Bauers v. Heisel, 361 F.2d 581, 584 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967).

For several years the Supreme Court declined opportunities to address the question of judicial immunity from civil suit under section 1983, denying review of decisions by courts of appeals upholding judicial immunity in such actions.[157] Then in 1967 the Court heard *Pierson v. Ray*.[158]

The plaintiffs in *Pierson* were "freedom rider" ministers arrested and charged with breach of the peace for attempting to use segregated facilities in a Mississippi bus station. The ministers were brought before a municipal police justice, who convicted them and imposed the maximum sentence, despite a Supreme Court decision supporting the ministers' acts that was brought to his attention. On appeal, the ministers were granted a trial *de novo* in the county court, where they were victorious. The ministers then brought an unsuccessful action for damages under section 1983 against the arresting officers and the police justice who had convicted them. The Court of Appeals for the Fifth Circuit affirmed the immunity of the defendant justice, but held that the police officers would be liable in a section 1983 suit for an unconstitutional arrest.[159] Both the ministers and the police officers sought, and were granted, certiorari.[160]

Chief Justice Warren, in his opinion for eight members of the Court, disposed of the challenge to judicial immunity with facility and brevity. His opinion devoted one paragraph to the history of the doctrine at common law,[161] and then turned to the effect of the enactment of section 1 of the Civil Rights Act of 1871 (section 1983):

> 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. Accordingly, this Court held in *Tenney v. Brandhove* . . . that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.[162]

The Court was assisted in its determination by the fact, which Warren noted, that "[s]ince [the] decision in *Tenney* . . . the courts of appeals

157. Kenney v. Fox, 232 F.2d 288 (6th Cir.), *cert. denied*, 352 U.S. 855 (1956); Francis v. Crofts, 203 F.2d 809 (1st Cir.), *cert. denied*, 346 U.S. 835 (1953).

158. 386 U.S. 547 (1967).

159. Pierson v. Ray, 352 F.2d 213, 221 (5th Cir. 1965), *aff'd in part and rev'd in part*, 386 U.S. 547 (1967).

160. 384 U.S. 938 (1966).

161. 386 U.S. at 553-54.

162. *Id.* at 554-55.

have consistently held that judicial immunity is a defense to an action under § 1983."[163]

Justice Douglas, in dissent, severely criticized Chief Justice Warren's reading of the legislative history of section 1983. Douglas noted that the members of the Forty-second Congress "were not unaware that certain members of the judiciary were implicated in the state of affairs which the statute was intended to rectify."[164] He quoted two members of the Republican majority, Ramey of South Carolina and Beatty of Ohio, who, during debates on the 1871 Civil Rights Act, criticized the actions of judges in the Reconstruction South. These congressmen, according to Douglas, had described what Congress believed to be the conditions in the South and the relevant actions of government officials. "It was against this background," he wrote, "that the section was passed, and it was against this background that it should be interpreted."[165]

Douglas did not challenge the majority's statement that the legislative history of the 1871 Act did not indicate that Congress intended to abolish all defenses of immunity to the Act. Instead, he noted that three members of Congress spoke directly to the issue of judicial immunity during the debates on the statute, and that all three "assumed that . . . judges would be liable"[166] under section 1983, and hence opposed its passage. Douglas 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."[167] Nonetheless, he recognized the need for a restrictive interpretation of section 1983:

> It is necessary to exempt judges from liability for the consequences of their honest mistakes. . . . But that is far different from saying that a judge shall be immune from the consequences of any of his judicial actions, and that he shall not be liable for the knowing and intentional deprivation of a person's civil rights.[168]

Douglas is not alone in criticizing the majority's reading of the legisla-

163. *Id.* at 555 n.9.

164. *Id.* at 559 (Douglas, J., dissenting).

165. *Id.* at 559-60 (Douglas, J., dissenting).

166. *Id.* at 561 (Douglas, J., dissenting).

167. *Id.* at 563 (Douglas, J., dissenting).

168. *Id.* at 566 (Douglas, J., dissenting). In Screws v. United States, 325 U.S. 91 (1945), Justice Douglas had interpreted the analogous criminal statute to require intentional deprivation of civil rights in order to save that statute from unconstitutional vagueness under the fifth amendment. That test, however, does not apply necessarily to statutes creating civil liability, and Douglas did not refer to his *Screws* opinion for support in his dissents in *Pierson v. Ray* or *Tenney v. Brandhove.*

tive history of section 1983. Several authors[169] have attacked the Court's interpretation as unsound or unjustified. The legislative history of section 1983, however, leads one to view the Court's efforts more favorably. There was more to the Ku Klux Klan Act of 1871 than its first section (which is now section 1983). Other sections of the Act imposed civil and criminal penalties for conspiracies to deprive persons of their civil rights,[170] disqualified former Confederate soldiers from serving as jurors in federal courts,[171] and gave the President the power to suspend the writ of habeas corpus and to use armed forces to suppress insurrection.[172] Most of the debate on the Act concerned these provisions; section 1 drew little comment.[173] As for Douglas's citation of the objections of those opponents of the 1871 Act who feared that its first section would abolish judicial immunity, another critic of the *Pierson* decision has written that

> [n]o proponent of § 1983, which was, after all, but a very minor and uncontroversial section of the entire Ku Klux Klan Act, appears to have either confirmed or contradicted [these apprehensions]. Following traditional canons of statutory interpretation, the majority felt free to disregard as hyperbolic, the comments of opposing legislators.[174]

The issue of abrogation of judicial immunity was therefore not at all "sharply contested," as Justice Douglas claimed.

As with many enactments, the proponents of the Act apparently had no concern whatsoever about judicial immunity and certainly did not propose its abolition. In such situations, the Court can look to maxims of construction and considerations of public policy, as it did in *Pierson*.[175] The Court quite properly concluded that it should not attri-

169. See the sources cited in notes 2 & 4 *supra*.

170. Ch. 22, § 2, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1985 (1976)).

171. Ch. 22, § 5, 17 Stat. 13 (1871).

172. *Id.* § 4 (effective until 1874).

173. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (remarks of Rep. Lowe) (discussing section 1). Indeed, the Republicans whom Douglas quoted, who asserted the evils of judicial administration in the southern states, were debating the merits of the *second* section of the Act, the section dealing with conspiracy, not the civil provisions of section 1.

174. Kates, *supra* note 2, at 620 n.19.

175. Yet one cannot but note the superficial incongruence of *Pierson* with the Court's decision in *Screws* a few years earlier. The statute construed in *Pierson* was modeled on the 1866 and 1871 acts that were the subject of *Screws*, *compare* 42 U.S.C. § 1983 (1976) *with* 18 U.S.C. § 242 (1976); yet *Pierson* held judges exempt from the operation of section 1983, though the rule of *Screws* would impose criminal liability for intentional deprivations of federal rights. By comparison, the qualified "good faith" immunity granted to police officers in *Pierson* accords with the *Screws* rule. That point, coupled with the fact that the actual defendants in *Screws* were police officers, reduces the contrast between the two holdings to some extent. The best explanation of the difference in construction is that of legislative history: the record of section 1983 was devoid of any basis for an intent standard, while that of section 242 was replete with such evidence, *see* Kates, *supra* note 2,

bute to Congress an intention to abolish a long-standing doctrine with a strong basis in public policy, unless Congress clearly states such a purpose.

3. *Judicial Immunity Today*—Stump v. Sparkman. The leading recent case on judges' immunity from civil liability is *Stump v. Sparkman*.[176] Feinman and Cohen express dissatisfaction with the outcome of the case and with its analysis of policy, but they are unable to resolve its problems to their own satisfaction.[177] Nevertheless, a satisfactory resolution of those problems on fairly simple policy grounds is indeed possible. An initial review of the facts of the case will help both to show the difficulties with judicial immunity that the court of appeals and the Supreme Court encountered, and to highlight the usefulness of the doctrine's history in arriving at a suitable contemporary policy.

(a) *The facts*. In 1971, when Linda Kay Sparkman was fifteen years old, her mother, Ora Spitler McFarlin, sought a court order authorizing Linda's sterilization. Mrs. McFarlin's attorney drafted a document captioned "Petition To Have Tubal Ligation Performed on Minor and Indemnity Agreement," and presented it to Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana.

The petition was an unusual document.[178] It included Mrs. McFarlin's affidavit that her daughter Linda was a minor and "somewhat retarded" although she attended public school and had "been passed along with other children in her age level."[179] The petition also stated that Linda had spent nights with men; and that since Mrs. McFarlin could not maintain a watch over her daughter, it would be in Linda's best interests if she underwent a tubal ligation "to prevent unfortunate circumstances."[180] The petition contained Mrs. McFarlin's unilateral "agreement" to indemnify and hold harmless the physician who was to perform the tubal ligation and the hospital where the operation was to take place.

At the bottom of the second page of the petition a typewritten par-

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at 621-24—and the language of section 242 was changed in 1909 to confine liability to those who had acted "willfully." Screws v. United States, 325 U.S. 91, 104 (1945). Given the differences in the history of the two statutes, the Court's somewhat different treatment of the statutes is appropriate. Certainly its interpretation of section 1983 is at least as defensible as the specific intent interpretation Justice Douglas offered.

176. 435 U.S. 349 (1978).

177. Feinman & Cohen 280.

178. The petition is reproduced in full in the Supreme Court opinion, 435 U.S. at 351-53 n.1.

179. *Id.* at 352.

180. *Id.* at 353.

agraph stated that Judge Stump approved the petition.[181] The legal effect of this paragraph is unclear; one author has suggested that the petition and order of approval may have had no legal effect whatsoever, since the petition did not ask for any affirmative relief.[182] The existence of the threshold question of judicial immunity made it unnecessary for any of the reviewing courts to address the shortcomings of the document. Whatever the legal impact of his approval, Judge Stump signed the petition the day it was presented, as respondent Sparkman described in her brief to the Supreme Court,

> in an ex parte manner in an undisclosed location . . . . There was no appointment of a guardian *ad litem* to represent Linda's interests. The petition was not filed with the DeKalb Circuit Court. No notice was given to Linda or anyone on her behalf of the petition, which was approved without any hearing.[183]

Eight days later the sterilization was performed. Linda had been told that she was being hospitalized for an appendectomy; several days later she was released, still unaware that she had been sterilized. Two years later she married, and two years after her marriage she learned for the first time that she had been sterilized. Linda and her husband then brought suit, under the federal civil rights statutes,[184] against her mother, the attorney who prepared the petition, Judge Stump, the doctors who performed the operation, and the hospital where the operation took place, attaching pendent state claims for assault and battery, medical malpractice, and loss of potential parenthood. The United States District Court for the Northern District of Indiana granted the defendants' motion to dismiss the federal claims, holding that only the actions of Judge Stump constituted the state action necessary to state a claim under sections 1983 and 1985(3), and that Judge Stump was absolutely immune from suit under the doctrine of judicial immunity.[185]

(b) *The Seventh Circuit decision.* On appeal the Court of Appeals for the Seventh Circuit unanimously reversed the judgment of the district court.[186] Neither the parties nor the court of appeals questioned the validity of the doctrine of judicial immunity. Nor was it contended that *Pierson v. Ray*[187] had been erroneously decided. The court began

181. *Id.*

182. Laycock, *supra* note 4, at 393.

183. Brief for Respondents at 3, Stump v. Sparkman, 435 U.S. 349 (1978).

184. 42 U.S.C. §§ 1983, 1985(c) (1976).

185. Sparkman v. McFarlin, No. F 75-129 (N.D. Ind. May 13, 1976), *rev'd*, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978).

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

187. 386 U.S. 547 (1967). See text accompanying notes 158-75 *supra.*

by citing *Bradley v. Fisher*[188] for the traditional formula restricting judicial immunity to judicial acts performed within a judge's jurisdiction, or at least not performed in the clear absence of all jurisdiction. To the court "the crucial issue . . . upon which immunity turns, is whether Judge Stump acted within his jurisdiction when he approved the petition to have Linda Sparkman sterilized."[189] Logically, the first question under *Bradley* would have been whether Judge Stump's act was judicial, but the court overlooked that part of the test.

The court then stated that for questions of judicial immunity, "jurisdiction" refers to jurisdiction over the subject matter of the case, citing *Bradley* for support.[190] This line of attack committed the court to demonstrating that the subject matter of Mrs. McFarlin's petition was clearly outside the broad statutory grant of jurisdiction to Indiana circuit courts:

> Jurisdiction.—Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever . . . and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.[191]

To evade the broad sweep of this statute, the court ignored the second part of the statutory grant ("all other causes") in formulating its test for subject matter jurisdiction: "A claim must be characterized as a case in law or equity in order to come within the statute."[192] The court then shifted to an examination of Judge Stump's power to order sterilization, a different matter entirely.[193]

The court first considered the possible statutory bases for the power to order sterilization, and found none. Indeed, the court said that "[t]he statutory scheme in existence at the time in fact negated his

188. 80 U.S. (13 Wall.) 335 (1871).

189. 552 F.2d at 174.

190. *Id. See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). Professor Laycock has argued that the rule of immunity stated in *Bradley* is ambiguous in its references to jurisdiction, and may refer to personal jurisdiction as well as to subject matter jurisdiction. Laycock, *supra* note 4, at 404-05. The better view is that the jurisdictional limit on immunity as used in that case refers to subject matter jurisdiction, for the reasons discussed earlier. See notes 114-21 *supra* and accompanying text. *See also* Dobbs.

For a vigorous attack on the notion of jurisdiction over the person as notice of hearing, see Gordon, *The Observance of Law as a Condition of Jurisdiction II*, 47 L.Q. REV. 557 (1931).

191. IND. CODE § 33-4-4-3 (1975).

192. 552 F.2d at 174.

193. *Id.* For a discussion of the notion of jurisdiction as power to order a particular remedy, see E. HENDERSON, *supra* note 85, at 117-21; Gordon, *Excess of Jurisdiction in Sentencing or Awarding Relief*, 55 L.Q. REV. 521 (1939). Lord Justice Ormrod takes issue with the notion in his opinion in Sirros v. Moore, [1975] 1 Q.B. 118, 150 (C.A.). *See also* Z. CHAFEE, *supra* note 81, ch. 9.

right to assert any jurisdiction over the petition."[194] The court reasoned that the very existence of statutes authorizing the sterilization of institutionalized persons under certain circumstances and after specified procedures "clearly negates jurisdiction to consider sterilization in cases not involving institutionalized persons and in which these procedures are not followed."[195] These words show that the court of appeals confused the existence of jurisdiction over the subject of a petition for an order of sterilization with the correctness of a court's decision to grant the relief sought.

The court of appeals then found that Judge Stump had failed to comply with due process requirements, and that this failure took his actions outside the statutory grant of jurisdiction over "cases at law or in equity."[196] The notion that due process errors strip a court of its jurisdiction—and hence strip the judge of that court of his immunity—is uniquely at variance with both theory and precedent. That interpretation of the concept of jurisdiction would render the doctrine of immunity a nullity; the jurisdictional limit would swallow the rule.

Because the Court of Appeals for the Seventh Circuit did not face a challenge to the continued validity of the doctrine of judicial immunity or even to the validity of the *Bradley v. Fisher* formula, that court never discussed how the public policy considerations underlying the doctrine of judicial immunity related to the facts and issues of *Sparkman*, or how well the *Bradley* formula served these policies. The Supreme Court unfortunately repeated that mistake on review.

(c) *The Supreme Court opinion.* Writing for the majority of the Supreme Court, Justice White framed the issue by stating: "This case requires us to consider the scope of a judge's immunity from damages liability when sued under 42 U.S.C. § 1983."[197] The Court evidently thought that *Sparkman* required consideration neither of the purposes of judicial immunity nor of how those purposes might relate to the immunity's scope, undoubtedly because the parties did not challenge the validity of the doctrine.

Like the court of appeals, the Supreme Court began by citing the judicial immunity formula stated in *Bradley v. Fisher*. The Court also agreed that, under the *Bradley* formula, "the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the sub-

194. 552 F.2d at 175.
195. *Id.*
196. *Id.* at 176.
197. 435 U.S. 349, 351 (1978).

ject matter before him."[198] Forgotten for the moment was the restriction of immunity to "judicial acts" that was part of the *Bradley* formula. The Court rejected the lower court's reasoning that the Indiana statutory framework for the sterilization of institutionalized persons deprived Judge Stump of jurisdiction over the subject matter of petitions requesting authorization of sterilization. Justice White noted the breadth of the Indiana statutory grant of jurisdiction and pointed out the fault in the court of appeals' logic: "The statutory authority for the sterilization of institutionalized persons in the custody of the State does not warrant the inference that a court of general jurisdiction has no power to act on a petition for sterilization of a minor in the custody of her parents . . . ."[199] Nor would the Court accept the conclusion that the grave procedural defects committed by Judge Stump in handling Mrs. McFarlin's petition resulted in "an illegitimate exercise of his common law power" that "does not fall within the categories of cases at law and equity."[200] This argument, the Court recognized, confused the existence of authority with its proper exercise.[201]

Justice White next turned his attention to the argument that the same procedural defects took Judge Stump's actions outside the scope of "judicial acts." White claimed the Court had not previously "had occasion to consider, for purposes of the judicial immunity doctrine, the necessary attributes of a judicial act,"[202] ignoring the discussion in *Ex parte Virginia*[203] about whether the selection of jurors was a judicial or ministerial function. Nor did he mention the long line of cases in which a multitude of English and American courts had, during the last four centuries, distinguished judicial acts from administrative and legislative functions.[204] After discussing two cases,[205] neither of which involved the problem of distinguishing a judge's judicial functions from his other official duties, Justice White created a new rule for defining judicial acts:

> 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, *i.e.*, whether it is a function normally performed by a judge,

198. *Id.* at 356.
199. *Id.* at 358.
200. 552 F.2d at 176.
201. 435 U.S. at 359.
202. *Id.* at 360.
203. 100 U.S. 339 (1879). See text accompanying notes 125-31 *supra*.
204. See notes 52-55, 62-69, 125-31 *supra* and accompanying text.
205. *In re* Summers, 325 U.S. 561 (1945) (the Illinois Supreme Court's rejection of a petition for admission to the state bar constitutes a "case or controversy"); McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972) (acts in a judge's chambers can be judicial).

> and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity.[206]

Certainly a new rule was not necessary merely to avoid the respondents' argument that Judge Stump's actions were not judicial because of their procedural irregularity. That argument confuses "judicial" with "judicious"; almost any definition of "judicial act" would have sufficed to refute it. If the Court was uncomfortable with any particular definition, it could have merely pointed out the essence of respondents' mistake.

The dissenters attacked the majority's "judicial act" rule most vigorously. They contended that Judge Stump's actions were not judicial and hence that judicial immunity did not protect those actions. Justice Stewart argued that the term "judicial act" must be defined by the policies supporting judicial immunity:

> It seems to me, rather, that the concept of what is a judicial act must take its content from a consideration of the factors that support immunity from liability for the performance of such an act. Those factors were accurately summarized by the Court in *Pierson v. Ray* . . . :
>
> > [I]t "is . . . for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences . . . ." It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. 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. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.
>
> Not one of the considerations thus summarized in the *Pierson* opinion was present here. There was no "case," controversial or otherwise. There were no litigants. There was and could be no appeal. And there was not even the pretext of principled decision making. The total absence of *any* of these normal attributes of a judicial proceeding convinces me that the conduct complained of in this case was not a judicial act.[207]

Stewart's dissent in *Sparkman* is noteworthy for suggesting, for the first time, that the limits of judicial immunity should be defined by the policies giving rise to the doctrine. Yet he, like the majority, confined himself to the elements of the familiar rule of *Bradley v. Fisher*. Instead of directly defining the scope of judicial immunity by looking to its policy basis, Stewart would use that policy basis to define "judicial acts." Because the term "judicial act" has importance outside the con-

206. 435 U.S. at 362.

207. *Id.* at 368-69 (Stewart, J., dissenting) (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

text of judicial immunity, however, it should not be defined by policies limited to that context. Surely whether an act is judicial depends on the character of the act. Stewart's suggestion demonstrates how limiting the Court's focus to a particular formula of the rules of judicial immunity restricts its analysis and directs it away from the important issue of the proper scope of the doctrine itself.

Justice Powell's dissenting opinion also concentrated on the "judicial act" element of the *Bradley* formula. The "central feature" in *Sparkman*, he wrote, was Judge Stump's "preclusion of any possibility for the vindication of respondents' rights elsewhere in the judicial system."[208] Powell noted that the *Bradley* Court accepted the injustices the doctrine of judicial immunity sometimes imposes because those injustices are usually mitigated by the availability of appeal.

> But where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption of the *Bradley* doctrine is inoperative. . . .
>
> In sum, I agree with Mr. Justice Stewart that petitioner judge's actions were not "judicial," and that he is entitled to no judicial immunity from suit under 42 U.S.C. § 1983.[209]

Again, the result Powell argues for would be correct, but would be achieved by the indirect route of defining the concept of "judicial act" by a policy that should limit the operation of judicial immunity directly.

The many criticisms of the *Sparkman* opinion as being hypocritical self-dealing by the judiciary show that observers expected the Court to explain why this particular judge's actions deserved protection. The majority did not provide an acceptable explanation largely because the parties in *Sparkman* did not challenge the doctrine of judicial immunity, and the Court thus did not examine it. Nevertheless, the validity of the doctrine was implicitly challenged by the facts of *Sparkman*, and the Court's failure to recognize and respond to the challenge detracted greatly from its decision.

(d) Sparkman*'s progeny*. Courts facing judicial immunity questions after *Sparkman* have focused on the "judicial act" rule stated in that case. Some courts have had little difficulty determining if the acts complained of in a given case were judicial.[210] For example, in a well-publicized recent case, *Harris v. Harvey*,[211] the acts complained of were

208. *Id.* at 369 (Powell, J., dissenting).
209. *Id.* at 370 (Powell, J., dissenting).
210. *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978).
211. 605 F.2d 330 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980).

clearly extra-judicial libels: almost any rule, even that stated in *Sparkman*, would have sufficed to distinguish such unofficial from judicial acts. This case concerned a section 1983 action by a black police officer against a state court judge who publicly called the plaintiff "a fixer, a briber, and a sycophant,"[212] and called for his dismissal from the police force. The judge also made repeated racial remarks about the plaintiff. The Court of Appeals for the Seventh Circuit denied the judge's defense of judicial immunity on the grounds that "Judge Harvey's attacks on plaintiff were not part of his duties . . . ."[213]

Rheuark v. Shaw,[214] however, presented an instance of a suit against a judge for an official, but not judicial, act. Several convicts sought damages and injunctive relief under section 1983 for long delays in the transcription of their trial court proceedings for use on appeal. The trial judge who presided over the trials of all the plaintiffs, and his court reporter—among others—were defendants in all the actions. The defendant judge asserted judicial immunity as a defense. The plaintiffs claimed to be damaged by the judge's appointment of the defendant court reporter, by the judge's failure to insure that the reporter prepared the plaintiffs' statements of facts in a timely manner, and by the judge's failure to appoint additional court reporters. In short, they complained that the judge had neglected his administrative duties. Responding to these complaints, the district court applied the *Sparkman* test: "When judicial immunity for an act is asserted, the court must determine whether that act is a function normally performed by a judge [and] whether the parties dealt with the judge in his judicial capacity . . . ."[215] Naturally, the court found the acts complained of to be judicial in nature; judges normally appoint and supervise court reporters, and the parties certainly had dealt with the defendant judge in his judicial capacity.

One cannot imagine a clearer demonstration of the flaws in the *Sparkman* rule.[216] The actions complained of bore none of the hallmarks of the judicial function discussed previously: no controversy

212. 605 F.2d at 335.

213. *Id.* at 337.

214. 477 F. Supp. 897 (N.D. Tex. 1979).

215. *Id.* at 919 (citing Stump v. Sparkman, 435 U.S. at 362-63).

216. The circumstances of *Rheuark v. Shaw* make it somewhat surprising that the district court did not note the administrative nature of the defendant judge's actions. County Judge Whittington was also a defendant in the case. As presiding officer of the Dallas County Commissioners Court, he was sued for limiting the amount of money spent by district judges for court reporters, and for his efforts to discourage the appointment of additional court reporters. The district court recognized that the functions of the Commissioners Court included "the legislative and administrative duties of managing . . . the county budget and approving expenditures of county funds . . . ," and that "Judge Whittington's violations of plaintiffs' constitutional rights were actions

was determined, no hearing was held, no binding determination was made, no objective standards were applied, no rights were declared. Clearly, the acts of the defendant trial judge were administrative, dealing only with the public service of the defendant court reporter.[217] As such, the judge should not have been entitled to the absolute immunity that protects judicial acts, but only to the limited, good-faith protection appropriate for administrative actions.[218]

Rheuark v. Shaw highlighted the uselessness of the *Sparkman* "judicial act" test for distinguishing a judge's judicial functions from his administrative duties—a problem not present in *Sparkman*. *Consumers Union of the United States, Inc. v. ABA*[219] shows that the *Sparkman* test fares no better at drawing a line between judicial and legislative functions. In that case, two consumer groups sought declaratory and injunctive relief against the enforcement of Virginia state bar disciplinary prohibitions on lawyer advertising, and sought reimbursement for costs and attorneys' fees incurred in the prosecution of their action against the Virginia State Bar, the Supreme Court of Virginia, the Chief Justice of that court, and two officers of the state bar.[220] A three-judge district court held that the individual defendants were protected by judicial immunity from personal liability for attorneys' fees:

> The record reflects that defendant Supreme Court of Virginia has the jurisdiction to adopt, modify, or refuse to modify the Virginia Code of Professional Responsibility. . . . Chief Justice l'Anson's actions, as a member of the Supreme Court of Virginia, relating to the Court's failure to amend or repeal DR2-102(A)(6), were clearly judicial acts within the Court's jurisdiction; Chief Justice l'Anson therefore in the instant case enjoys absolute immunity from individual liability for attorneys fees.[221]

Nonetheless, the court went on to hold that judicial immunity did not protect the defendants in their *official* capacities from liability for attorneys' fees under the Civil Rights Attorneys' Fee Awards Act of 1976:

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which were taken as part of his legislative and administrative duties in governing Dallas County, and were not judicial acts." 477 F. Supp. at 921.

See also Slavin v. Curry, 574 F.2d 1256 (5th Cir.), *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978), *overruled on other grounds*, 604 F.2d 976 (5th Cir. 1979) (overruled insofar as it extended a derivative immunity to private persons who conspire with judges), in which the court applied the *Sparkman* rule with similar results, although with less discussion.

217. *Cf. Ex parte* Virginia, 100 U.S. 339 (1879) (judicial immunity does not extend to the preparation of jury lists). See text accompanying notes 125-29 *supra*.

218. See text accompanying notes 56-61 *supra*.

219. 470 F. Supp. 1055 (E.D. Va. 1979), *rev'd sub nom.* Supreme Ct. of Va. v. Consumers Union, 100 S. Ct. 1967 (1980).

220. The ABA had been dismissed as a party defendant with the consent of the parties. 470 F. Supp. at 1057 n.1.

221. *Id.* at 1059.

"Both the extensive legislative history of 42 U.S.C. § 1988, as well as the numerous court opinions interpreting the statute clearly indicate that all branches and agencies of state governments may be liable for attorneys fees in 42 U.S.C. § 1983 actions."[222]

District Judge Warriner, in dissent, found it unnecessary to address the majority's conclusion that section 1988 was intended to abrogate judicial immunity from awards of attorneys' fees. He thought the actions complained of were legislative, not judicial:

> This Court has previously indicated that the Supreme Court of Virginia acts in a legislative capacity in adopting disciplinary rules. . . . This view is readily supported by analysis. Disciplinary rules are rules of general application and are statutory in character. They act not on parties litigant but on all those who practice law in Virginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. It is evident that, in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature.[223]

Judge Warriner went on to argue that section 1988 was not intended to abrogate legislative immunity. Because the only acts of the Virginia Supreme Court complained of were, in his view, legislative, the Virginia Supreme Court retained its immunity. Only the Virginia State Bar had acted to enforce the ban on attorney advertising; hence, by Warriner's reasoning, only the Virginia State Bar might properly be sued for attorneys' fees.[224]

Judge Warriner's analysis of the nature of a judicial act would not be remarkable were it not for the confusion created by *Sparkman*. In his own words the analysis was

> nothing more than a common sense approach to the question of official immunity. These immunities are the creatures of public policy, and depend necessarily upon the function being performed by the official when he does the acts for which he is called upon to answer. The title of the office in no way determines the scope and character of the privilege enjoyed by the incumbent. Thus, the fact that the Supreme Court of Virginia is comprised entirely of judges does not determine the scope and character of the privilege enjoyed by the Supreme Court when it enacts disciplinary rules. If the function is legislative, then the applicable privilege is the legislative privilege.[225]

The Supreme Court subscribed to Judge Warriner's reasoning in

222. *Id.* at 1060.

223. *Id.* at 1064 (citations omitted).

224. Under 42 U.S.C. § 1988 (1976), award of attorneys' fees is discretionary. In light of efforts by the Virginia State Bar and its officers to amend DR2-102(A)(6), the majority ruled that "special circumstances would make unjust any award of attorneys fees against defendant State Bar or against [its officers] in their official capacities as State Bar officers." 470 F. Supp. at 1062.

225. 470 F. Supp. at 1064-65.

overturning the three-judge panel's disposition of the case.[226] The Court, in a unanimous decision written by Justice White, held that the Virginia Supreme Court's actions were legislative, not judicial.[227] Accordingly, the actions were protected by legislative immunity.[228] Similarly, the Court held that this legislative immunity barred the assessment of section 1988 attorneys' fees against the Virginia Supreme Court.[229]

The Court affirmed the validity of the doctrine of judicial immunity, but conspicuously omitted any discussion of the *Sparkman* judicial-act test: "Adhering to the doctrine of *Bradley v. Fisher* . . . , we have held that judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities."[230] The opinion also acknowledged the split among the various circuits as to whether judicial immunity bars injunctive or declaratory relief.[231] Justice White sidestepped that problem: "We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Supreme Court and its Chief Justice properly were held liable on their *enforcement* capacities."[232] The district court, however, had held the Virginia court liable in its judicial capacity, not for any enforcement actions.[233]

II. PROPOSALS FOR REFORM

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

226. 100 S. Ct. 1967, 1974-75 (1980).
227. *Id.*
228. *Id.* at 1975.
229. *Id.* at 1977.
230. *Id.* at 1976.
231. *Id.* & n.13.
232. *See id.* at 1976 (emphasis added).
233. *See* 470 F. Supp. at 1060-61.
234. See text accompanying notes 202-06 *supra.*

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 applied to administrative functions, but that purpose is not served by applying the jurisdictional limit to judicial functions in a modern legal system. It is an anachronism that fosters nothing but confusion, and it should be eliminated.[240]

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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.

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

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.

> 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 modern 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 rule 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

244. Garnett v. Ferrand, 108 Eng. Rep. 576, 581 (K.B. 1827).
245. Feinman & Cohen 278.
246. *Id.* 278-79.

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]

III. CONCLUSION

The rising popularity of section 1983 suits is likely to cause increasing numbers of judges to seek the protection of judicial immunity. If recent lower court decisions are any indication of what the future holds, most of the problems of judicial immunity will result from mistakes the Supreme Court made in *Stump v. Sparkman*. At the very

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 ILL. 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 Dall. 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.

least, the Court should clarify the term "judicial act." Moreover, the Court should recognize that a reasonable definition of that concept, and the development of means of judicial review of administrative action other than by prerogative writ, have obviated any need for the jurisdictional limit on immunity. Finally, the Court should recognize that the most important policy that judicial immunity serves is the protection of the appellate system from improper collateral attacks on judgments and, therefore, that invoking judicial immunity to protect acts that prevent access to appellate review must not be permitted.