Liberty Tree

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Judging their own cause

Part VI

Self-serving doctrine in search of historical justification

A while back,[1] we began to explore a judge-made "law," the doctrine of "absolute immunity," which judges have devised in order to keep their entire profession from being sued for damages they cause by violating the rights of litigants in criminal or civil cases. This doctrine is certainly one of the main contributors to the corruption of American courts. Without honest, accountable judges, no justice can be had.

The doctrine of absolute judicial immunity as held by the Supreme Court, began with two cases authored by Stephen Field, *Randall v. Brigham*, 74 U.S. 523 (1868), and *Bradley v. Fisher*, 80 U.S. 335 (1872). Field declared judges are absolutely immune from suit, because "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.*, at 347. And, as hardly needs to be said, the "personal consequences" to himself are more important to a judge than the personal consequences he imposes on others by violating their due process, or their right not to be compelled to be witnesses against themselves, or to be free from search or seizure absent probable cause, or to be free from unusual punishments — you get the idea. But you get no remedy, if you are violated by a judge. And that's just the way that judges want it — they can harm you in violation of their oath to the Constitution, without being accountable at all.

Henry VII in the Star Chamber. The Star Chamber was an English court of law that sat at the royal Palace of Westminster from 1487 until 1641. It was established by Henry VII in part so that laws would be enforced against people who were so powerful that the ordinary courts would never convict them of their crimes. Inevitably, perhaps, proceedings evolved from fairly just to secretive and corrupt under James I and Charles I, under whom sessions were held in secret, with no appeal. The court became a political weapon to be used against the monarchs' enemies. It was so abusive that Parliament abolished it in 1641.

Today, the declaration by judges of the Supreme Court and the State courts that judges are absolutely immune from suit for violating constitutionally guaranteed rights has extended Star Chamber-like abuse into every courtroom of this country. Because the Supreme Court has also declared prosecutors to be absolutely immune from suit as well, court proceedings are now used as political weapons. In September of 2022, Attorney General Letitia James of New York filed a $250M lawsuit against President Trump for "fraud" in business dealings, with no complaining witness!! Yet the courts of New York refuse to throw out the case, and are proceeding to trial, in an obvious political attack against Trump's 2024 presidential campaign. If AG James was at all concerned that she could be sued for proceeding unlawfully, such a case might never even be filed in the first instance.

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1. See the November 2019 through March 2020 issues of the *Liberty Tree* for Parts I through V of "Judging their own cause."

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Teflon judges, destroyed people

In 2020, news association Reuters reported on the problem of judicial unaccountability. "The Teflon Robe" investigation identified and reviewed 1,509 cases from 2008 through 2019 in which judges resigned, retired or were *publicly* disciplined following accusations of misconduct, and another 3,613 cases from 2008 through 2018 in which the details of judicial offenses and even identities were kept *hidden* from the public. These were all situations in which complaints were made regarding the judges to a State's judicial accountability commission, and the commission investigated and recommended discipline, including suspension from the bench.

Reporters estimated that at least 5,206 people identified were directly affected by judges' misconduct, ranging from people illegally jailed to people subject to racist, sexist, and other abusive comments from judges which tainted their cases. But this only scratches the surface. There are many ways in which judges can violate the rights of civil litigants or criminal defendants while acting "judicially," from abusive rulings on evidence and discovery, through improper voir dire of the jury, denying instructions so the jury applies incorrect legal standards, to violating sentencing guidelines and ordering punishments unauthorized by law — the list goes on and on. Very rarely, in fact, are complaints made to judicial disability commissions, since, as Reuters noted, the States "afford judges accused of misconduct a *gentle* kind of justice." In other words, judges are investigated in secrecy, and not even slapped on the wrist. But the people they destroy? They remain destroyed, with no remedy, despite the promises of the State constitutions to deliver remedy for injuries.[2]

Victim Marquita Johnson.

As Sue Bell Cobb, former chief justice of the Alabama Supreme Court stated, "[The judicial inquiry commission]'s a ridiculous system that protects judges and makes it easy for them to intimidate anyone with a legitimate complaint."[3] Yes, Ms. Cobb, but would you support trial judges being *sued for damages* when they have violated the litigants they are supposed to serve? Likely not.

Municipal Judge Lester Hayes.

Just one injured person, of the five thousand uncovered by Reuters, demonstrates the damage that unaccountable judges can do. Marquita Johnson, a mother of three girls in Alabama, was locked up by Judge Les Hayes for 496 days for failing to pay several thousand dollars in traffic fines and court fees — a sentence that exceeds that for negligent homicide! While she was stuck in jail for ten months, strangers abused her young daughters. As it turned out, Hayes was implementing a type of debtors' prison in Alabama, which is against the law. Ultimately, he was suspended for a mere 11 months from the bench for targeting many poor Blacks and jailing them to provide free labor for the city of Montgomery.[4] But how did his short suspension from the bench repair the damage to his victims? It didn't, of course. If an ordinary citizen were to imprison someone who owed them a debt, and force them to work, they would be criminally charged, and made to pay restitution. But when a judge does the same thing in violation of the law and his jurisdiction, there is no remedy.

Has it always been so?

In *Bradley v. Fisher*, the seminal Supreme Court case which declared "superior" judges to be immune from suit, Stephen Field made a bold claim:

> The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, "a deep root in the common law."[5]

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2. See *Liberty Tree*, December 2019, for a list of the State's constitutions which promise remedy for all injuries.
3. https://www.reuters.com/investigates/special-report/usa-judges-misconduct/
4. The police also stacked charges as part of this scheme, it appears.
5. 80 U.S. at 347, citing *Yates v. Lansing*, 5 Johnson 282, 291 (N.Y. Sup. Ct. 1810).

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Laying aside for the moment the fact that the U.S. Constitution established a new alliance of States wherein each judge of every State takes an oath to adhere to said Constitution, and not to a king, we see that Field actually made three claims to justify his ruling that judges are exempt from suit: (1) everyone else does it, (2) it's the traditional way of doing it, and (3) no one has ever yet said it was wrong!

Let's examine these three assertions in detail to see if any are true.

"Well-ordered" means what, exactly?

First, at the time *Bradley* was decided in 1871, did all countries having "well-ordered" systems of justice exempt judges from liability in civil actions for any judicial acts done by them? To start, the English court decisions upon which Field relied were rendered in a time in which England itself had many courts with different, and often overlapping jurisdictions. Just at the time *Bradley* was decided, the English court system was undergoing a great deal of revision by Parliament due to its judgment that the courts were not in fact "well-ordered," resulting in the Judicature Acts of 1873 and 1875.

Moreover, we can observe that if we were to go back in time and confront Field by citing a country where judges *could* be held liable through civil action for the damage they caused while on the bench, Field would simply respond that said country doesn't have a "well-ordered" system of justice. In other words, his justification depended upon his own *unstated* definition of a "well-ordered" system of justice. Thus, for Field, if a judicial system allowed litigants to hold judges individually accountable, it must *ipso facto* be disordered.

Thus Field's pronouncement is mere sophistry, barren of any actual citation to any real countries. And it is false. The Roman law, which influenced the legal systems of many countries of Europe, allowed for judges to be sued. The Roman Emperor Justinian, in the 6th century A.D., stated that "[A judge who] is regarded as having erred in some way, even without intent ... is regarded as liable quasi-delictually and will incur the penalty of the amount that appears right to the conscience of the person dealing with the matter."[6] "Quasi-delictually" refers to an act where a person, without malice, but by fault, negligence or carelessness which is not legally excusable, causes another person to be injured.

European courts in a number of jurisdictions allowed dissatisfied litigants to sue judges, and judges could also be prosecuted. In Italy, judges could be held personally liable for misconduct in office, beginning at least in the 13th and 14th centuries.[7] In Germany, beginning in the 16th century, adoption of Roman law principles allowed for judges to be personally liable to litigants for decrees that were "void" or "not conforming to law," later restricted to cases of fraud, corruption, or partiality.[8] From the late middle ages to at least mid-20th century, injured litigants could hold judges personally liable where there was fraud, extortion or "heavy professional fault," as ultimately established by French law.[9]

Even in 2002, the Council of Europe reported that the Czech Republic and Italy still allowed judges to be sued by the government after a litigant established that they had a right to be compensated by the government. Damages could arise from a judge's illegal decision (Czech Republic) or "gross negligence" (Italy).[10] These are the remnants of former systems in which judges could be directly sued.

As to the first claim of Field in *Bradley*, that every well-ordered system of justice exempted

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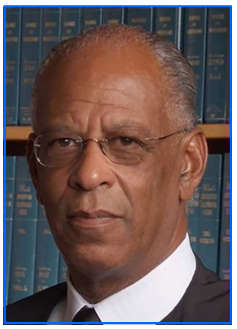
6. A. Olowofoyueku, *Suing Judges: A Study of Judicial Immunity*, p. 6 (1993).
7. John P. Dawson, *Oracles of the Law*, p. 134-5. (1968).
8. *Id.*, p. 215.
9. *Id.*, p. 419.
10. See *Manual on Independence, Impartiality, and Integrity of Justice*, compiled by CEELI Institute of Prague, p. 337 (June 2015).

What will it take to pierce Judicial Immunity?



Attorney Caree Harper (below) defended an old woman beaten by the California Highway Patrol and won a $1.5M settlement for her. On March 2, 2015, at a status conference, U.S. District Court Judge Otis Wright II (above) demanded Harper answer questions about the amount of her fee. Harper claimed attorney-client privilege and refused to answer. Wright caused her to be physically seized and detained. During this procedure, Harper said, Wright stood, pointed, clapped, and laughed at her. In a later court-room appearance, he explained he intended to make 'an example' out of Harper, and that nothing could be done to him because he has a lifetime appointment on the bench. When Harper sued for damages, she lost on judicial immunity grounds. **"It is unfortunate that maybe someone will have to die to pierce 'judicial immunity' when it is so clearly being used as a weapon not a shield,"** she said.

http://www.metnews.com/articles/2021/JudicialImmunity_082321.htm

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judges from civil action, no conclusive evidence exists that this was true. So 'everyone else exempts judges' was simply untrue. Field was not concerned with the truth, though, because after all, when have federal judges in America ever been impeached for lying in their opinions?

Settled English doctrine for many centuries?

Second, at the time *Bradley* was decided, the decision Field primarily relied upon for the pronouncement that the English courts forbade the suing of judges was *Floyd v. Barker*, which had been decided in 1607, about two and a half centuries earlier, not "many" centuries before. Moreover, it was a decision of the court of the Star Chamber, which had become so notorious for oppression that Parliament abolished it in 1641, just 33 years after the case that allegedly settled the matter of the civil liability of judges "of superior or general authority."

As legal researchers and commentators have pointed out repeatedly, however, English law began with a position of general judicial *liability*, not immunity. "[N]o simple rule of immunity ever existed, and ... application to American law of those instances in which immunity was granted has been inappropriate," researchers Feinman and Cohen wrote in 1980.[11] In the medieval period, no appeal system like we have today existed; the only review of a judicial decision came from a complaint filed against a judge personally, requesting a remedy. It was not until the 1300s that the concept of filing a complaint against a judgment, rather than the judge, began. A complaint against a judgment, however, had to be based upon the formal record of the case, and point out the errors on the record.[12]

> **"In sum, the English law provides little support for a rule of absolute judicial immunity."**
>
> — Feinman and Cohen,
> *Suing Judges: History and Theory*

The importance and status of a "court of record" in England originated from the royal assertion that the King's word on events that took place in his presence was indisputable. This privilege was extended from the King to his judges and their records, and judicial immunity was built on this basis. Since the record of the court was incontrovertible, no party could allege that the record was false, so the judge could not be subjected to criminal or civil liability for anything in the record.[13] Thus, Lord Coke, in *Floyd v. Barker*,[14] drew on this development of the record as a basis for immunity, and declared that judges of the courts of record were immune from direct suits and criminal charges. The record could not be impugned, said Coke: "And records are of so high a nature, that for their sublimity they import verity in themselves, and none shall be received to aver anything against the record itself."[15]

To add to the absurdity, the "courts of record" were only those common law courts which kept formal *Latin* records enrolled on parchment. Other courts, which kept records in English, such as the Council, the Star Chamber, and the Chancery acting as a court of equity, were not courts of record.[16] Thus, when Coke pronounced that judges of common law courts were immune for actions taken within their jurisdiction, he was favoring the law judges over rival courts which had overlapping jurisdiction. Judges of courts which were not "of record" could still be brought to court for their misconduct.

Thus, Field's second claim, that judicial immunity has been the settled doctrine of the English courts for many centuries also fails. It glosses over many contradictions in the history of English law, and does not take into account the "court of record" basis for the alleged immunity of judges.

In the next installment of this series, we will examine Field's claim that judicial exemption of liability was the established rule in States of the union at the time of his decision in *Bradley*.

11. See J. Feinman and R. Cohen, Suing Judges: History and Theory, 31 South Carolina Law Review 2, 205 (1980).
12. 1 W. Holdsworth, *A History of English Law*, 213-215 (3d. Ed. 1945).
13. Feinman and Cohen, 205-206 .
14. 77 Eng. Rep. 1305 (Star Chamber 1607).
15. *Id.*, at 1306.
16. 5 W. Holdsworth, *supra*, 159.