

VOL 6 NUM 1 ART 3 | II | OMITTED JUSTIFICATIONS FOR ABSOLUTE JUDICIAL IMMUNITY

Only briefly, at the end of a dissenting opinion, was there any allusion in *Stump v. Sparkman* to a justification which had figured prominently in the history of judicial immunity. Justice Stewart noted that the petitioner's brief referred to the "aura of deism which surrounds the bench...essential to the maintenance of respect for the judicial institution."¹¹⁷ The modern opinions insist that official immunity must be justified by realistic functional analysis, not by attributes of status. The arguments based on status sound curious to the modern ear, outmoded and even embarrassing. But they are worth examining partly because they were relied on historically, partly because the functional arguments are so unconvincing, and partly because a moment's introspection reveals their importance. Courts have been surrounded with special responsibilities and with special prerogatives, and they do have special psychological significance for lawyers and citizens. Myths, superstitions and emotive symbols are commonly studied as elements of governance;¹¹⁸ the stolid efforts of courts and commentators to justify immunity doctrines only in realistic terms may be submerging the more important issues at stake.

Dignity has always been an important attribute of judicial authority. The English courts traced their ancestry to the authority of the crown itself,¹¹⁹ and courts still utilize regal symbolism. Religious allusions are not uncommon when judges and commentators discuss judicial responsibilities.¹²⁰ It is doubtful that any other officials in the United States are as accustomed as judges to the exercise of peremptory authority or to such constant shows of deference. The early American cases concerning judicial immunity overtly linked immunity to the judiciary's special need for dignity. In *Randall v. Brigham*,¹²¹ the Court described the possibility of personal liability as necessarily leading to the "degradation of the judicial authority."¹²² The *Randall* opinion quoted at length from British decisions that suggested liability would render judges "slaves... to every sheriff, juror, attorney, and plaintiff"; it asserted, "If you once break down the barrier of their dignity, and subject them to an action, you... establish its weakness in a degrading responsibility."¹²³ References to "servility" and "degradation" recur in *Randall* and also appear in the other early major judicial immunity case, *Bradley v. Fisher*.¹²⁴

It is noteworthy that both *Randall* and *Bradley* involved claims by attorneys of illegal, summary disbarment by a judge. In *Bradley*, the Court assumed that summary action was improper, but found it to be a "judicial" act because the attorney had "threatened the presiding justice... with personal chastisement."¹²⁵ The Court noted that "[a] greater indignity could hardly be offered to a judge" and that without firm reaction the judge "would soon find himself a subject of pity rather than of respect."¹²⁶ Thus in the early judicial immunity cases, the need to maintain the dignity of the court was relevant to establishing the "judicial" nature of the act, but the illegality of the judge's action was not so treated. Protection of the court's authority, more than protection of the rule of law, was seen as the defining characteristic of a "judicial" action.

One key to judicial dignity has always been impersonality. Judicial opinions, as well as academic comment on them,¹²⁷ strive to eliminate the judge's personality as a factor in the outcome. As Learned Hand observed:

[The judge's] authority...depend[s] upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if...it is to stand against the passionate resentments arising out of the interests he must frustrate. He must pose as a kind of oracle, voicing the dictates of vague divinity—a communion which reaches far beyond the memory of any now living, and has gathered up a prestige beyond that of any single man.¹²⁸

Qualified immunity would especially threaten the impersonality and, therefore, the dignity of the judge. Inquiries into what the judge knew or should have known examine the judge as a person. His knowledge and motives must be exposed. This stands in sharp contrast to the challenges to judicial authority that are now permitted. In an appeal, a lower court is alleged to have erred, but normally the error is not examined from the perspective of what the judge below should have known or whether his mistake was justifiable; rather, the issue is the law, not the judge. Similarly, a judge can be liable if he acts in the clear absence of jurisdiction or in a nonjudicial capacity.¹²⁹ In such cases, the judge is examined as a person but, by definition, only after he has been removed from the domain of judicial authority. Even arguments that the scope of judicial liability should be expanded

sometimes rely on the sleight-of-hand that makes a fallible judge not a judge. The intention to deprive a person of his civil rights is said to be "wholly incompatible with the judicial function," and a judge who has acted with this intention is described as acting not "as a judge, but as a 'minister' of his own prejudices."¹³⁰ Absolute judicial immunity, then, like many judicial practices, serves to preserve the impersonality and dignity of the judge's authority.

Essentialness has been a second important aspect of judicial authority. From the earliest Supreme Court decisions, the judicial power has been equated with the existence of the constitutional order itself.¹³¹

Judicial authority is often described as fragile and threats to judicial authority are couched in catastrophic terms. For example, words that threaten or demean a judge—a daily fact of life for many executives and legislators—have been described as incompatible with "the judicial independence so indispensable to the administration of justice."¹³² Although the threat to authority was an isolated incident, the danger was cast in systemic terms:

[A]n enormity of the sort, practiced but on a single judge, would be an offence as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the consequences to suitors and the public would be the same....¹³³

Similarly, grand themes were elicited by the possibility that a state court might try a federal marshal for a murder allegedly committed while protecting a federal judge from assassination: "The general government must cease to exist whenever it loses the power of protecting itself...."¹³⁴ No doubt, the courts have sometimes exaggerated the danger inherent in challenges to the other branches of government. But the persistent tone of catastrophe associated with threats to judicial authority can be contrasted with detached assessments of dangers involving the authority of the executive and legislative branches. For example, with the scope of the executive power in question, the Court calmly found "the administration of justice" not to be endangered by disorders created during the Civil War¹³⁵ and the power of the general government to protect itself not to be implicated by a nation-wide steel strike during the Korean War.¹³⁶

Predictably, disaster has been found in the possibility of qualified judicial immunity. The Court has resisted qualifying judicial immunity by suggesting that it would expose judges to lawsuits from "every one who might feel himself aggrieved."¹³⁷ In contrast, despite a huge increase in the actual number of challenges to executive authority, the Court has remained detached enough to see the countervailing benefits, and has expanded the range of executives who might be subject to civil rights liability.¹³⁸ In addition, judicial immunity for knowingly unconstitutional acts continues to be linked to grave considerations such as "the proper administration of justice."¹³⁹ The judicial decision is still pictured as delicate and painful, easily undermined by the faintest trace of personal consideration.¹⁴⁰

Finality has been a third attribute of judicial authority. Since *Marbury v. Madison*,¹⁴¹ the Supreme Court has aggressively extended its role as the final arbiter of almost all constitutional questions.¹⁴² Partly because a judicial decision is the final recourse for defining the law, defiance of the judiciary has been viewed as less tolerable than defiance of other authority. For example, a statute or administrative ruling can be challenged by disobedience and the legality of the defiance can be finally determined in a court; however, if an injunction is disobeyed, the defiant party normally is subject to punishment even if he can demonstrate that the order was illegal.¹⁴³ The psychological impulse that rejects any possibility of legitimate challenge to authority that is temporally final is reflected, perhaps, also in the extraordinary powers that federal courts have employed while enforcing their decrees against unresponsive governments or populations.¹⁴⁴ The impulse is understandable. If "final" authority can be challenged, then it is not final; surely, society cannot operate on the basis of an infinite regress of challenges. Moreover, because the decisions of the courts are effectively the law no matter how patently inconsistent with the written constitution, there is a strong incentive to believe the decisions are correct.¹⁴⁵ Psychologically, judicial opinions are not final because infallible but infallible because final.¹⁴⁶

The attribute of finality has also been reflected in the judicial immunity cases. Both English and American courts have relied on the argument that "if the judicial matters of record should be drawn in question...there never will be an end of causes but controversies will be infinite."¹⁴⁷ Immunity not only cuts off challenges to judicial authority but also serves the psychological

correlates of finality. Absolute judicial immunity treats judges as if they were infallible, in the sense that their errors are treated as legally insignificant. More importantly, the urge to believe that the final authority is infallible is served by preventing inquiries into motive and knowledge. A finding that a judge was not only wrong but also venal would painfully emphasize the eventual unavailability of imperfect, even unjust authority. In this sense, the action of a court cannot be considered corrupt or foolish "without seeming to endanger the very fabric of the state."¹⁴⁸

These justifications for absolute judicial immunity omitted by the modern Court are, of course, a description of the classical idea of sovereignty. The long history of attempting to embody sovereignty by investing rulers with extraordinary dignity through the use of various symbols of power is well known. The pomp, ritual and religious overtones of Roman emperors and British kings find a faded reflection in some of the customs and rhetoric that surround the modern judiciary.¹⁴⁹ Theories of sovereignty were developed against the background of political disorder in sixteenth century France, and a major objective of the theorists was to justify a degree of power and loyalty thought essential to order and the rule of law.¹⁵⁰ Hobbes, for example, described the sovereign as "the soul of the commonwealth; which failing, the commonwealth is dissolved into a civil war, no one man so much as cohering to another, for want of a common dependence on a known sovereign."¹⁵¹ Anarchy is the blunt word for the more muted intimations of catastrophe that the courts so often suggest when their authority is threatened. Finally, the tautology that the final authority must be beyond challenge was the crucial argument of early theorists of sovereignty.¹⁵² The consequent paradox that the embodiment of the highest legal authority must be above the law is echoed in the freedom of modern judges from personal liability for knowingly unconstitutional acts. Modern commentators do not insist, as Blackstone did with respect to the king, that a judge is "'incapable of doing wrong...even of thinking wrong...; in him is no folly or weakness."¹⁵³ Yet a lawsuit that would make an issue of a judge's folly or weakness is nevertheless foreclosed by the doctrine of absolute judicial immunity.

No matter how psychologically compelling, the omitted justifications themselves do not necessarily support the doctrine of absolute judicial immunity. Dignity and respect can be achieved in a number of ways, and one of the most appropriate would be visibly to subordinate judges' behavior to the Constitution by



qualifying judicial immunity. Surely, dignity is not unambiguously achieved by a doctrine, like absolute immunity, apparently prompted by self-interest. The essential role of the courts in maintaining a system of law is undermined, not promoted, by putting judges above the fundamental law. Qualifying immunity would be consistent with careful attention to the law; it would help deter the occasional excess. The temporal finality of judges' decisions is a further reason for qualifying judicial immunity. Irresponsible legislative acts can often be tempered by wise executive implementation and judicial interpretation; executive excesses can often be corrected by new legislation or judicial oversight. But to the extent that judicial decisions are not subject to revision outside the judicial system, it is important that a judge have effective incentives to act responsibly. The omitted justifications are inconsistent with qualified judicial immunity only to the extent that the judiciary embodies "sovereignty" in its fullest sense: to the extent that the sovereign must be above the law.

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Footnotes

¹¹⁷. 435 U.S. 349, 369 (1978) (Stewart, J., dissenting).

¹¹⁸. See H. TUDOR, POLITICAL MYTH (1972) and materials cited therein; Casey, The Supreme Court and Myth, 8 L. & SOC'Y REV. 385 (1974) and materials cited therein.

¹¹⁹. Even in the United States, this has been relied on as a reason for immunity. See Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1869). See also materials cited in note 65 supra.

¹²⁰. For instance, Learned Hand described Justice Brandeis' "almost mystic reverence for that court whose tradition seemed to him not only to consecrate its own members, but to impress its sacred mission upon all who shared in any measure in its work." L. HAND, THE SPIRIT OF LIBERTY 168 (3d ed. 1960) [hereinafter cited as HAND]. Thurman Arnold referred

¹²¹. 74 U.S. (7 Wall.) 523 (1869).

¹²². Id. at 536.

¹²³. Id. at 537-38.

¹²⁴. 80 U.S. (13 Wall.) 335, 347-49 (1872).

¹²⁵. Id. at 356.



126. *Id.*

127. The efforts by legal scholars to deal objectively with the reasons given by courts for their decisions need no citation since the great bulk of legal literature, even critical literature, is impersonal. No doubt, this approach is constructive, and the point here is merely to note how deeply impersonality is imbedded in legal traditions and norms. The most famous illustration is probably Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

128. HAND, *supra* note 120, at 130.

129. *Stump v. Sparkman*, 435 U.S. at 355-57.

130. *Pierson v. Ray*, 386 U.S. 547, 567 n.6 (1967) (Douglas, J., dissenting).

131. If courts were required to give effect to legislation that, in their opinion, was unconstitutional, the Constitution, established "in theory," would be overthrown "in fact." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Court has even equated the judicial process with the constitutional order in a case requiring obedience to an injunction that probably violated the First Amendment: "But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967).

132. *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 356.

133. *Id.*

134. *In re Neagle*, 135 U.S. 1, 61 (1890) (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 363 (1816)).

135. *Ex Parte Mulligan*, 71 U.S. (4 Wall.) 2 (1867).

136. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

137. *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 347 (emphasis added). See also cases cited in note 90 *supra*.

138. See cases cited in note 3 *supra*. See also *Butz v. Economou*, 98 S.Ct. at 2910-12 (threat of numerous lawsuits against executives is dismissed on the grounds that "insubstantial lawsuits can be quickly terminated by federal courts").

139. *Stump v. Sparkman*, 435 U.S. at 363 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871)).-

140. *Id.* See also note 87 *supra*.

141. 5 U.S. (1 Cranch) 137 (1803).

142. See, e.g., cases cited in note 1 *supra*; *United States v. Nixon*, 418 U.S. 683 (1974); *Powell v. McCormack*, 395 U.S. 486 (1969).



^{143.} This is true even if the defiance precedes a successful appeal, *Worden v. Searls*, 121 U.S. 14 (1887), and even if the injunction was issued pursuant to an unconstitutional statute, *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947); *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922). As to whether defiance is punishable if the issuing court lacked subject matter jurisdiction, compare *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) and *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967) (both suggesting that subject matter jurisdiction might be a prerequisite) with *Dobbs, The Validation of Void Judgments: The Bootstrap Principle*, 53 VA. L. REV. 1003, 1020 (1967) (suggesting that there was no subject matter jurisdiction, in the normal sense, in *United Mine Workers*). As to instances where defiance might not be punishable, see *Walker v. City of Birmingham*, 388 U.S. at 315-19.

^{144.} For descriptions of such powers, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661 n.2 (1978); Comment, *Community Resistance to School Desegregation: Enjoining the Undefinable Class*, 44 U. CHI. L. REV. 111 (1976).

^{145.} Many scholars come only reluctantly to the conclusion that the Court has acted unconstitutionally, or strive to justify other ways of describing departures from the written document. See L. LUSKY, *BY WHAT RIGHT?* (1975); Compare Ely, *The Wages of Crying Wolf. 4 Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973) and Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) with R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

^{146.} The reference, of course, is to Justice Jackson's famous line in *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring opinion). Cf. L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

^{147.} *Floyd v. Barker*, 77 Eng. Rep. 1305, 1306 (1608); see *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 (1871).

^{148.} ARNOLD, *supra* note 11, at 129.

^{149.} See generally *I THE GREAT POLITICAL THEORIES FROM PLATO AND ARISTOTLE TO LOCKE AND MONTESQUIEU* 117, 270 (M. Curtis ed. 1961). Hobbes argued: "And as the power, so also the honour of the sovereign, ought to be greater, than that of any, or all the subjects. For in the sovereignty is the fountain of honour. The dignities of lord, earl, duke, and prince are his creatures. As in the presence of the master, the servants are equal, and without any honour at all; so are the subjects, in the presence of the sovereign." *Id.* at 311.

^{150.} *Id.* at 269.

^{151.} *Id.* at 315.

^{152.} Bodin argued: "[I]t is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes law.... No one who is subject... to the law... can do this. That is why it is laid down in the civil law that the prince is above the law.... If the prince is not bound by the laws of his predecessors, still less can he be bound by his own laws.

One may be subject to laws made by another, but it is impossible to bind oneself in any matter which is the subject of one's own free exercise of will...." Id. at 274. See also id. at 272-81. Hobbes, too, argued that the final source of law could not be subject to law: "[The sovereign's] power cannot, without his consent, be transferred to another: he cannot forfeit it: he cannot be accused by any of his subjects, of injury: he cannot be punished by them: he is...judge of doctrines: he is sole legislator and supreme judge of controversies.... The sovereign of a commonwealth, be it an assembly, or one man, is not subject to the civil laws. For having power to make, and repeal laws, he may when he pleaseth, free himself from that subjection.... " Id. at 312-13.

¹⁵³ H. LASKI, FOUNDATIONS OF SOVEREIGNTY 103 (1931).

